

INTRODUCING A NEW MEASUREMENT OF  
STATE PUNITIVENESS  
AND TESTING IT ACROSS THE UNITED STATES

By

Besiki Kutateladze

A dissertation submitted to the Graduate Faculty in Criminal Justice in partial fulfillment of the  
requirement for the degree of Doctor of Philosophy, The City University of New York

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Date

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Candace McCoy  
*Professor, Chair of Examining Committee*

---

Date

---

Karen J. Terry  
*Associate Professor and Executive Officer  
Doctoral Program in Criminal Justice*

---

Diana R. Gordon  
*Professor Emerita and Senior Research Scholar*

---

James P. Lynch  
*Distinguished Professor and Presidential Scholar*

---

Evan J. Mandery  
*Associate Professor*

Supervisory Committee

## Abstract

INTRODUCING A NEW MEASUREMENT OF  
STATE PUNITIVENESS AND TESTING IT ACROSS  
THE UNITED STATESBy  
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This work explores variations in punitiveness among American states. For the purposes of this work, *state punitiveness* refers to criminal justice policies that target suspects, defendants, convicts, inmates, and releasees. These policies inflict pain and suffering upon these people, cause them shame and discomfort, adversely affect their financial and political status, and take away their freedom and sometimes their lives. Based on the examination of 44 variables across 50 states and the four regions, into which these states were grouped, Florida emerged as the most punitive, and Maine as the least punitive. The study also suggests that the American South is highly punitive, the West and the Midwest moderately punitive, and the Northeast relatively non-punitive. The success of this method in measuring state punitiveness suggests that the instrument may be useful for both within-nation and between-nation comparisons.

## Acknowledgement

I can think of dozens of people who have inspired this work and are responsible for its completion. Unfortunately, I will not be able to acknowledge all of them here and, therefore, I apologize to everyone who believes that her or his name should have been mentioned.

I want to start by acknowledging Candace McCoy's contributions. Professor McCoy and I met in her 2005 doctoral *Policy Analysis* class. Although at first it seemed that we had almost nothing in common—me from Georgia (country) and her from Ohio; me, philosophically and politically leaning left and her, espousing more conservative thinking—my affection for her personality and intelligence soon became overwhelming. Professor McCoy possesses inexhaustible liveliness that allows her to remain stimulating and helpful inside and outside the classroom. Although in the fall of 2005 she was going through personal turmoil associated with her husband, James Fyfe's, illness and death, this did not prevent her from creating an environment in which learning and thinking were omnipresent. Professor McCoy is also distinguished by the sharpness of her mind. Her comments in class and later with this dissertation showed me her experience with both legal and empirical research, as well as her superb analytical skills. I was honored to have her as my dissertation advisor.

Three other members of the dissertation committee—Diana Gordon, James Lynch and Evan Mandery—also shaped this study. Together they created a team that any doctoral student can only dream of.

Professor Gordon was particularly helpful with the political and legal aspects of punitiveness. She had conducted comparable research nearly two decades ago and was well equipped to offer advice throughout this study. During the fall of 2007, when Professor McCoy was a visiting scholar at the University of Edinburgh, Professor Gordon served as my supervisor.

Professor Lynch is a nationally and internationally known analyst of criminal justice data. He was uniquely qualified to advise me on the quantitative aspects of the study (e.g., how to operationalize key variables and estimate missing data). In addition to helping with this study, Professor Lynch also taught me much about multivariate statistics and the publication process that should benefit my academic career for years to come.

Professor Mandery has been molding my analytical and writing skills for much longer than anyone else. I first took his *Criminal Justice* class in 2003, as a Master's student at John Jay College. Since then, I have been enrolled in his doctoral seminars and served as a teaching assistant for two years in his *Philosophy* and *Law and Evidence* classes in the Honor's program. To say the least, Professor Mandery is impressive for his challenging style of teaching and advising. Regardless whether he agreed or disagreed with me, he always acted as an opponent, thus forcing me to never stop reasoning. Professor Mandery was also priceless in terms of his suggestions about writing. I must give him much credit for teaching me how to express myself in English.

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I also would like to thank Todd Clear, Joshua Freilich, James Levine, Karen Terry and Jeremy Travis for their dedication and commitment to the Criminal Justice Doctoral Program. Within several years, they managed to transform a relatively unknown program into one of the most competitive ones nationwide. By hiring leading scholars, emphasizing publications and conference presentations, providing funding for doctoral students, and raising the admission and graduation standards, they have enabled the program to produce future scholars who will redefine the scope and direction of criminal justice research and policy making.

During my stay at John Jay College, I have received help from the Center of English Language support. Among several instructors I worked with, I want to stress the contributions of Judith Wink. Professor Wink often edited my writing and taught me about idiomatic expressions, clarity of writing, and prepositions and articles, all of which I found especially challenging as a non-native speaker of English. She sat with me patiently, sometimes for hours, explaining the complicated aspects of the English language by showing the rationale and history behind them. No doubt Judith Wink is as responsible for my appreciation of English as my dissertation committee members.

In addition to these individuals, with whom I communicated on a regular basis, there were also those who influenced my research agenda and perhaps my future career without personal acquaintanceship. James Whitman is the first who comes to mind. His work, *Harsh Justice*, inspired

my master's thesis and this dissertation. And while I never stop criticizing him in this study, I must acknowledge the brilliance of his various views and his remarkable knowledge of historical aspects of punishment on both sides of the Atlantic.

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I was raised in a family seriously hit by the post-Soviet economic and political crises, the impact of which was especially grave considering the high standard of living the family enjoyed for decades before the 1990s. During my teenage years, my parents had to sell most of what we owned to feed and educate me and two of my siblings. Yet we would have suffered more if we had had financial prosperity without the bright prospects that only education can provide. As my grandmother used to say every time I needed money for school or private tutors, "Sell the house and sleep under the oak tree but do not stop investing in the children's education because no house will compensate for their ignorance." She appreciated education more than anyone I have ever known and I am grateful to her for that.

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## INTRODUCTION

In the last three decades, according to recent legal, criminological, and journalistic literature, the United States criminal justice system has become the most punitive in the West. The most popular grounds for this conclusion are the steep rise in imprisonment and the use of the death penalty. In fact, the U.S. imprisons convicts at a higher rate than any other nation in the world, having surpassed even Russia, and it is almost alone among Western democracies in its use of execution.

But does this give us enough grounds to characterize the U.S. as the most punitive nation in the West? How do we really know which western country/state/region is the most punitive? And what would be the most effective methodology to validate or reject the claim of punitiveness? The present study suggests the ways of answering these questions. It does so by identifying some definitional problems of “punitiveness”, offering a theoretical discussion for a better understanding of this construct, and providing a multidimensional measurement of state punitiveness that incorporates forty-four criteria.

After reconceptualizing and reoperationalizing the construct, the study will test the proposed instrument across fifty U.S. jurisdictions. This is not merely to show which American state or region is more or less punitive but to challenge the widespread practice of ignoring a remarkable variation among the U.S. jurisdictions and uncritically using the darkest sides of America’s criminal justice when conducting cross-national comparisons of state punitiveness.

## LITERATURE REVIEW

“Punitiveness”, from the term “punitive”, means serving for, concerned with, or inflicting punishment (etymology: French *punitif*, from Medieval Latin *punitivus*, from Latin *punitus*, past participle of *punier*). Although relatively new, this concept is widely used in the social sciences to describe the state’s incarceration policies (Doob & Sprott, 2006; Doob & Webster, 2006; Frost, 2005; Neapolitan, 2001; Pratt, 2000; Pratt, Brown, Brown, Hallsworth & Morrison, 2005; Yates & Fording, 2005), but also to explain public attitudes toward punishment (Applegate, Cullen, Link, Richards & Lanza-Kaduce, 1996; Borg, 1997; Brown, 2006; Cook, 1995; Maruna, Matravers, & King, 2004; Payne, Gainey, Triplett, & Danner, 2004; Shadd, Matravers, & King, 2004; Tyler & Boeckmann, 1997). Nevertheless, the construct is poorly defined and inconsistently operationalized. As Matthews (2005) writes, “Although the term ‘punitiveness’ is widely used in the literature, there is little attempt to define or deconstruct it. The consequence is that punitiveness remains a ‘thin’ and undertheorized concept” (p. 178). Continuing this view, Brown (2006) stresses that it is not clear whether punitivity should be viewed as a personality trait, a worldview or as a set of more narrowly defined beliefs related to crime and its control. The question of an agreeable definition of punitiveness becomes even more problematic if we take into consideration that some authors assessing punitiveness have chosen alternative terms to denote the same construct. For example, Kury and Ferdinand (1999), when comparing East and West Germans in terms of their support for harshening criminal sanctions, coined the term “punitivity”. Others (e.g., Tonry, 2001, 2004; Whitman, 2003) have used the term “penal harshness” in their portrayal of American criminal justice policies as excessively severe in comparison with those of other western nations.

Compounding the problem of terminology is the lack of a consistent definition of punitiveness. A review of empirical and theoretical articles in the areas of criminology, criminal law, psychology and other related fields does not reveal any extensive definition of punitiveness; nor is there any usage of punitiveness to suggest the true multidimensionality of the concept. Instead, in many versions of the punitiveness thesis, researchers mostly refer to relatively high American imprisonment rates (Neapolitan, 2001; Tonry, 2001, 2004; Whitman, 2003), the death penalty (Borg, 1997; Cook, 1995; Kury & Ferdinand, 1999), mandatory sentencing and public shaming sanctions (Tyler & Boeckmann, 1997; Whitman, 2003), an excessive use of punishment in deviation from the principle of proportionality (Matthews, 2005), a shift from the social to the penal treatment of poverty (Wacquant, 2001), the relation between punitiveness and opposition to gender inequality, non-marital sexuality, euthanasia and legal abortion (Cook, 1995), the extent of procedural safeguards for criminal defendants (Kurki, 2001; Tyler & Boeckmann, 1997), the length of prison sentences (Doleschal, 1977; Lynch, 1993; Tonry, 2004), prison conditions (Neapolitan, 2001), the probability of imprisonment of an arrested person (Frost, 2005; Lynch, 1988), and use of felony-murder doctrine (Fletcher, 1980-81). Most research, however, has focused only on the aspect of high incarceration rates (see e.g., Yates and Fording, 2005). As Neapolitan (2001) writes, “Imprisonment rates are generally regarded as the best measure of the punitiveness of nations” (p. 693).

After incarceration rates, among the most often used single measures of state punitiveness are capital punishment and the risk of imprisonment. For example, when comparing public attitudes toward punishment among several American states, Borg (1997) operationalized punitiveness as “the degree of punishment judged appropriate for individuals

convicted of murder and is indicated by the respondents' viewpoint on capital punishment" (p. 32). On the basis of only one dimension—support for or opposition to the death penalty—the researcher concludes that "...certain southerners do appear significantly more punitive compared to both their fellow southerners and non-southerners" (p. 41). Another one-dimensional measure was proposed by Langworthy and Whitehead (1986), who tested punitiveness by asking respondents whether "the purpose of prison was to punish criminals or to teach them to be useful, law-abiding citizens" (p. 580).

Although most measurements of punitiveness, whether on the individual, public, or state level,<sup>1</sup> appear simplistic, there are several multidimensional measurements of state punitiveness the discussion of which cannot be omitted. For example, Michael Tonry (2001) used the following six criteria when portraying the United States as the most punitive nation in the West: (a) incarceration rates; (b) the death penalty; (c) the mandatory minimum sentences; (d) three-strikes laws; (e) the life-without-possibility-of-parole sentence; and (f) the average severity of sentences. But none of these criteria was explored thoroughly enough to have allowed the reader to validate Tonry's claims.

Another scholar, James Whitman (2003), offered a number of theoretical-historical explanations for increased American harshness in comparison with France and Germany. By doing so, he developed the instrument of penal harshness. Although Whitman (2003) uses the words "harshness" and "mildness" instead of "state punitiveness", one can argue that they denote high and low levels of the latter construct. The criteria were separated into three groups. The first group consists of five measures of *harshness in criminalization*: (a) harshness in

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<sup>1</sup> Considering the confusion that has long been associated with this concept of punitiveness, this research proposes using the terms: (1) "state punitiveness" when discussing sentencing laws and other criminal justice system policies; (2) "public punitiveness" when focusing on society's harshness towards offenders; (3) "individual punitiveness" when addressing one's punitive attitudes; and finally (4) "punitiveness" only when referring to all of the above combined.

criminalizing conduct; (b) harshness in subjecting numerous classes of persons to potential criminal liability; (c) harshness in grading conducts as punishable under criminal law while they could have been regulated under administrative law; (d) harshness in inflexible doctrine of criminal liability; and finally (e) harshness in enforcement.

The second group contains the following three measures of *harshness in punishment*: (a) harshness in the law of punishment (e.g., by providing relatively longer prison sentences); (b) harshness in the application of punishment (e.g., by maintaining tough prison conditions or especially painful forms of execution); and (c) harshness in the inflexibility of punishment that does not fully consider individual characteristics of an offender. The final group includes two *forms of mildness*: (a) mildness of respectful treatment (e.g., by calling a prisoner “sir” or “madam”); and (b) mildness of pardons.

As thoughtful and enlightening as these two approaches may be, they exclude many aspects of penal harshness that could have shown the relative mildness of the United States and harshness of European nations. There was probably nothing wrong or biased about most statements and assumptions that these two scholars have made. No one can doubt that the U.S. has the highest incarceration rates in the world or that it is unique among Western countries due to its reliance on the death penalty. Bias could have been introduced, however, when selecting the criteria of punitiveness. For example, a discussion on prison conditions and procedural criminal law rules could have tipped the scale on the other side. By exploring these and many other criteria, the proposed study will address this problem by developing a truly multifaceted measure. This does not mean that the new instrument would exhaust all the possible criteria of state punitiveness. It will, however, emphasize other aspects of harshness that have never been discussed in this context.

The work that can be called the present study's only true prototype is Diana Gordon's (1989) "The Topography of Criminal Justice: A Factor Analysis of the 'Get-Tough' Policy Trends". Gordon attempted to explore the dramatic shift toward penal harshness in the 1970s and early 1980 by developing a 32-variable measure of state punitiveness and testing it across fifty American jurisdictions. These variables and factors in which they load will be described in the special section in the end of the study that will link Gordon's finding with the findings of the present work.

Unlike previous works on state punitiveness (e.g., Tonry, 2001, 2004; Whitman, 2003, 2007), the present study will not explore the reasons for one jurisdiction or society being more punitive and the other less punitive. What makes the United States more punitive in comparison with other western nations, or what makes one U.S. region more punitive than others are those *why* questions that can be asked only after we establish that the punitiveness gap between them in fact exists. Until we can accurately measure *how* and therefore *to what degree* one jurisdiction is more punitive, asking *why* seems premature. Therefore, this methodological work proposes a new multifaceted measure of state punitiveness that will put things in order by first establishing which state is more/less punitive and then opening the door for asking and answering the *why* questions. The instrument can be applied to both between-nation and within-nation comparisons.

Moreover, while this dissertation does not test any theory, it offers an original contribution to our knowledge of state punitiveness as it advances comparative methodology and thus allows theory testing in ways that were not possible before.

## DEFINING RESEARCH QUESTION AND KEY CONCEPTS

This research was sparked by many ambitious questions: What makes people and societies harsh? Why do penal practices change over time and place? Does religiosity or conservatism make some more supportive of harsh sentences than others? Is harshness learned? Do people become so accustomed to severe punishments that every subsequent generation requires even harsher sentences to be deterred from committing crimes? Can this theory be tested on the basis of a comparison of the United States with other nations? The more puzzling these questions seemed, the more exhilarating they felt. There is no easy way of addressing them because every attempt to do so introduces new questions instead of answering old ones. In fact, to know what forces shape punitive attitudes and policies, one first needs to establish that one society or political state is in fact more punitive than the other. In other words, how do we really know which country/state/region is more or less punitive? And what would be the most effective methodology to validate or reject the assumption of punitiveness? This research will attempt to answer these questions (which are conceptually the same questions) by establishing a multi-dimensional instrument of state punitiveness. Before doing so, however, it proposes a theoretical framework of punitiveness and defines the concept that should help the reader to better understand the research question.

### *Theoretical Framework of Punitiveness*

Understanding punitiveness ought to begin by differentiating between state, public, and individual punitiveness. While state punitiveness is (or at least should be) a product of thoughtful decisionmaking in legislative, executive or juridical offices and can be expressed in penal policies ranging from depriving a criminal defendant of her right to be treated with

respect to executing her, public and individual punitiveness is “more a symptom of free-floating anxieties and insecurities resulting from social change than a rational response to the crime problem” (Maruna et al., 2004, p. 277). Bluntly put, the former is more rational (even if it is sometimes provoked by the public’s irrational urges) and durable, while the latter two are more emotional and ephemeral because emotions change more quickly than policies do and should. Therefore, it is recommended to use the terms: (1) “state punitiveness” when discussing sentencing laws and other criminal justice policies; (2) “public punitiveness” when focusing on society’s harshness towards offenders; (3) “individual punitiveness” when addressing one’s punitive attitudes; and finally (4) “punitiveness” only when referring to all of the above combined. This would alleviate the confusion that has long been associated with this concept and would facilitate dialogue and research on punitiveness.

Furthermore, both existing and potential theories/research on punitiveness may be divided into four levels: macro, micro, micro-in-macro and hybrid. A macro-level theory/research would attempt to explain a group’s penal austerity (e.g., a political state, a society, a cultural or religious group), incorporating the understanding of penal harshness within that society, as well as comparisons across societies in terms of their attitudes toward punishment and sentencing laws. The International Crime Victimization Survey<sup>2</sup> (ICVS, 1989-2000) is probably one of the best sources for developing macro-level theories/research on societal attitudes toward punishment. One of the major findings of this study—that countries with the high level of imprisonment have higher number of respondents who recommend imprisonment to its alternatives—is a macro level conclusion. Neapolitan’s (2001) study exploring national-level differences with respect to imprisonment rates, prison conditions and

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<sup>2</sup> The International Crime Victim Survey is a program of standardized surveys investigating experience of crime in different countries on the basis of the data collected in 1989, 1992, 1996, and 2000.

the death penalty is an example of a macro-level research. And finally, the most vivid demonstration of a macro-level theory on punitiveness would be the civilization theory of Norbet Elias, according to which national variations in punitiveness are reflective of a society's civilization process (Elias, 2000).

On the other hand, a micro-level theory/research of punitiveness attempts to explain individuals' attitudes on punishment. Differences across sex, race, age, religion (within a society such as the U.S. and not between/among societies and countries) and other demographic characteristics can create a basis for micro-level research.<sup>3</sup> As examples of such research can serve Applegate, Cullen and Fisher's (2002) study, which examines the gender gap in terms of public views toward crime and correctional policies; Cook's (1995) doctoral dissertation that establishes the link between a literal interpretation of the Bible and punitiveness; and Kury and Ferdinand's (1999) research that reveals how regional differences, age and sex relate to individuals' attitudes toward punishment.

A third possibility, a micro-in-macro theory/research on punitiveness, would explore the degrees to which individuals are representative of a larger unit (e.g., social community, region, society, continent). That is, it would focus on understanding if and to what extent an individual's or group's attitudes differ from those of the political state and/or wider society. For example, a study attempting to find out whether African-Americans' views toward sentencing policies reflect the majority view of most Americans or the views of African

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<sup>3</sup> This view might not be shared among criminologists who typically understand differences between race, class, age and sex as domains of a macro rather than individual-level theory (See for example, Messner & Rosenfeld, 1997, pp. 39-42.) In criminology, a micro-level theory explains why certain individuals act differently from others. I believe that such interpretation of micro-level theories is limited because the task of understanding only one person's behavior without applying findings to a larger population seems quixotic. The social science are not normally concerned with one individual; they study individual behavior to understand why certain groups (e.g., victimized, Hispanic, adolescents) are different from others, which should be called a micro level theory. A study on why someone who had been sexually abused as a child became abusive herself can explain an abnormal sexual behavior of a certain group of people (sexually abused as children), which appears the only reason for studying an individual.

descendants living in Europe and elsewhere, can be classified as a micro-in-macro-level research because it examines how a relatively large unit relates to one of its components.

When theorizing about various units of analysis of the punitiveness thesis, one needs to bear in mind that the line that separates micro-, macro-, and micro-in-macro level theories/research can be very fine and, sometimes, impossible to draw. A single research can be classified as either micro or macro research or both at the same time. For example, if a study includes observations of what incarcerated females in one U.S. correctional institution think about punishment, we would call this a micro-level research. But if the same study compares the U.S. prison inmates with those incarcerated in Germany or Russia, then we will have the fourth type of research which we can call hybrid. Also, a study investigating harshness of, for example, the three strikes law within a state can be classified as a micro-level research. Once a researcher starts comparing this state with other U.S. states or countries in terms of various penal practices of dealing with recidivists, micro-level-research shifts its unit of analysis to a hybrid level because, in addition to understanding how one particular policy works within a state, it also involves state-to-state and cross-national comparisons.

Applying this theoretical division to the present research, one can characterize it as a macro-level research on state punitiveness because it attempts to explain how different nations/states/regions vary in their punitiveness levels.

*“State Punitiveness” Defined for the Purpose of This Dissertation*

The focus of this dissertation is neither public nor individual punitiveness. It is not concerned with how certain groups view criminal punishment or with understanding of athletic, religious<sup>4</sup> or parental punitive practices. This is a comparative study of state punitiveness only.

*State punitiveness*, for the purpose of this research, is a combination of an official political state’s ideologies, policies and programs of dealing with “objects” of the criminal justice system. This pool of “objects” is very wide and will include those suspected of the commission of a crime, then charged or discharged, convicted or acquitted, incarcerated or punished in any other way, released from custody after finishing sentence or released on parole, and so on. This study attempts to understand the state practices from the moment of identifying a suspect to the point of this person’s death and even afterwards. This is because once a person is an “object” of the criminal justice system, she never really stops being one, i.e., an individual detected by the police radar will by no means enjoy her rights and freedoms to the extent that non-offenders or non-detected offenders do. Even after releasing from custody, the state can limit a releasee’s freedoms through, for example, disenfranchisement and civil commitment laws. Moreover, the state’s punitive practices may continue even after the death of a suspect/defendant/offender (whether the death was a result of suicide, sickness or execution) in failing to investigate the reasons for one’s death or even in disregarding a deceased person’s faith and burial preferences when dealing with her corpse.

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<sup>4</sup> Although religion has always played and, in some ways, continues playing an important role in shaping punitive policies in the West and elsewhere, this dissertation will investigate only those religiously-driven philosophies and practices that have been adopted by secular states in their treatment of offenders.

It is known that the state's punitive actions adversely affect not only arrestees and convicts but also their spouses, partners, children, parents, friends, and the larger community.<sup>5</sup> However, relevant though it is, the discussion of the financial and psychological impact of arrests and convictions on families will be omitted in this dissertation due to its inexhaustibility, unavailability of comprehensive state-by-state data, and perhaps secondariness. The main concern here is how governments treat offenders *per se* (and again, this term is used loosely to include everyone from the moment of being suspected onwards). Moreover, the proposed comparative analysis is only concerned with current state punitiveness, and thus it will omit discussions on punitive policies from even the 1970s or 1980s.<sup>6</sup>

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<sup>5</sup> Two leading prison researchers, Michael Tonry and Joan Petersilia, identified and then grouped collateral effects of imprisonment into six categories: 1) on ex-offenders' subsequent income, employment, voting rights, families relations; 2) on prisoners' later physical and mental health; 3) on offenders' partners and their children; 4) on prisoners' later crime involvement; 5) on the larger community; and 6) on offenders' adaptation to incarceration. For more, see Tonry & Petersilia, 1999, pp. 1-16. One may also wish to read Todd Clear's (2007) eye-opening work on the impact of incarceration on individuals, intimate relationships, social relationships, institutions and democracy.

<sup>6</sup> Except in a few analyses, including comparisons of average time in prison and life imprisonment, where the research will have to focus on old convictions to find out how many years offenders actually spent in prison.

## METHODOLOGY

This work introduces a 44-item measure of state punitiveness, which hopefully is sensitive enough to capture both known and previously unexamined dimensions of state punitiveness for which data are currently available. These dimensions, referred to as criteria or variables, are shown on Table 1.

Table 1: The List of Criteria of State Punitiveness

#	Criteria (Variables)
1.	Life without the Possibility of Parole
2.	Life with the Possibility of Parole
3.	Prison Sentence for 20 Years to Life
4.	Death Penalty Application
5.	Frequency of Executions
6.	Death Row Population
7.	Sex Offender Registries
8.	The Application of Disenfranchisement Laws
9.	The Size of Disenfranchised Populations
10.	Three-Strikes Laws' Application and Sentence
11.	Number of Strikes Prisoners
12.	Stock Incarceration
13.	Flow Incarceration
14.	Prison Admission Trends
15.	Prison Release Trends
16.	Ratio Between Imprisonment and Probation
17.	Average Time Served for All Offenses
18.	Average Time Served for Murder and Voluntary/Non-negligent Manslaughter
19.	Average Time Served for Vehicular and Non-vehicular Manslaughter
20.	Average Time Served for Forcible Rape
21.	Average Time Served for Armed Robbery
22.	Average Time Served for Burglary
23.	Average Time Served for Auto Theft
24.	Average Time Served for Possession and Use of Marijuana
25.	Average Total Maximum Term in Months Imposed in State Courts
26.	Average Prison Term Expected to Be Served for All Offenses
27.	Statutory Rape and Age of Consent
28.	Arrests for Prostitution and Commercialized Vice
29.	Arrests for Drug Abuse
30.	Arrests for Gambling
31.	Arrests for Drunkenness
32.	Prison Overcrowding

- 33 Operating Cost per Inmate
  - 34 Food Service Cost per Inmate
  - 35 Medical Care Cost per Inmate
  - 36 Inmate Deaths
  - 37 Inmate-on-inmate and Staff-on-inmate Sexual Violence
  - 38 Lawsuits Filed Against Agencies or Staff
  - 39 Age for Juvenile Court Jurisdiction
  - 40 Juvenile Transfer Laws
  - 41 Juvenile Inmates in Adult Prisons
  - 42 Juvenile Incarceration Rate
  - 43 Juveniles Serving Life without Parole
  - 44 Overcrowding in Juvenile Facilities
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The data for these variables came from official and unofficial sources, mainly primary, that include Bureau of Justice Statistics, Uniform Crime Reporting Program, Office of Juvenile Justice and Delinquency Prevention, National Corrections Reporting Program, National Judicial Reporting Program, Corrections Yearbook, Death Penalty Information Center, Human Rights Watch, Amnesty International, states' penal codes, monographs, journal articles and popular press (see references underneath each table). An attempt was made to compile the most recent data and check their reliability with secondary sources. Whenever data were missing, the numbers for the preceding years were used. If the numbers were still unobtainable, they were estimated, and if the estimation was impossible, the cells were left blank. If a variable had more than 3 empty cells, it was deleted from the analysis despite having theoretical significance.

Additionally, while greatly overlapping variables were avoided to prevent the overstatement of the importance of the phenomenon to be explored (Gordon, 1989), an effort was made to include in the analysis as many variables as possible. The greater the number of variables, the smaller the adverse affects of missing values and/or imperfect operationalizations (admittedly, not all variables to be discussed will be measured in the best possibly manner),

and the more facets of state punitiveness are encompassed. For example, although variables 4 (*Death penalty application*), 5 (*Frequency of executions*), and 6 (*Death row population*) may appear repetitive, they are not unduly overlapping as they reveal different aspects of the death penalty in America by providing normative and empirical analyses of this important feature of state punitiveness.

The 44 variables will have five categories that will be obtained either through quintiles, with 10 states per quintile (when numerical data and a theoretical basis permit), or five levels, with an odd number of states (wherever quintiles are not possible or appropriate).<sup>7</sup> Consistent with this five-pronged categorization, each variable will generate five *criterion punitiveness scores* (CPSs) ranging from 0 to 4. One *criterion punitiveness score* (CPS) will be prescribed for every state. These scores will be interpreted in the following manner:

- 0 - *Minimal punitiveness or non-punitiveness;*
- 1 - *Low or less than moderate punitiveness;*
- 2 - *Moderate punitiveness;*
- 3 - *High or more than moderate punitiveness;* and
- 4 - *Extreme punitiveness.*

The rationale of assigning one of these five scores per jurisdiction is offered within the discussion of each variable in Parts One to Five.

By averaging CPSs for each state, *overall punitiveness scores* (OPSs) will be generated. Thus, OPSs are the mean scores of 44 CPSs. The means were preferred over the sums because the former is less susceptible to influence of missing values than the latter. After arranging

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<sup>7</sup> The rationale for this approach is given under the discussion of individual variables. For example, when analyzing *Death penalty application* or *Juvenile transfer laws*, it is no longer possible to create quintiles, as the bases for these variables are normative as opposed to numerical.

states in an ascending order corresponding with their OPSs, two forms of analyses will be conducted.

First, the OPSs will be broken down into quintiles, with higher scores denoting an increase in the level of state punitiveness. The method will permit identifying 10 minimally punitive states, 10 lowly punitive states, 10 moderately punitive states, 10 highly punitive states, and 10 extremely punitive states. Using this hierarchy, not only will each state's level of punitiveness will be gauged, but the four U.S. regions—the Midwest, the Northeast, the South and the West—will be compared as well. The regions with the greatest number of states in more rather than less punitive quintiles will be characterized as the most punitive.

Second, the distribution of the OPSs will be divided by the median, placing 25 states below and 25 states above the middle point. This division will be used towards explaining regional variations in state punitiveness. The regions that are well represented in the lower half of the distribution will be described as *less punitive*, and the regions that have a greater number of states in the upper half as *more punitive*.

Assigning numbers has various functions, but the primary one is to accomplish harmonization of the findings through the quantification of often qualitative data. In addition to serving an important demonstrative purpose, the proposed quantification will allow subsequent research not only to distinguish apparently punitive jurisdictions from nonpunitive ones, but also to identify the degrees of state punitiveness among those jurisdictions that are considered highly or minimally punitive.

## PART ONE

### Political and Symbolic Punishment

Every punishment is both political and symbolic. There are at least two factors that make punishment political. First, it is a government's reaction to what a convicted offender did, expressed through the political institutions of criminal justice. Second, penal practices often, especially around elections, become a vital part of a country's political life. Furthermore, as well-expressed by Kant in his often-cited desert island example<sup>8</sup>, punishment is symbolic due to its expressive nature of condemnation.<sup>9</sup> By punishing, not only does the state send a message of disapproval of certain acts (a penal code would be sufficient for this goal), but it also announces intolerance for disobedience. Yet one should not naively believe that punishment aims merely at those who went too far by contemplating or committing crimes; its targeted audience is much broader. Among other things, punishment allows the official state to publicly declare its authoritative presence to all—offending and law-abiding citizens, but also the international community.

The politico-symbolic nature of punishment makes it a vital part of political ideology.<sup>10</sup> Politicians' views on security, crime control and punishment are usually

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<sup>8</sup> Kant argued that even if the entire society is about to desert an island, it must first execute the last murderer left in prison. Otherwise, all society members will be culpable for the unpunished murder.

<sup>9</sup> Feinberg (1994) uses this characteristic when distinguishing punishment from other kinds of penalties. He writes: "Both penalties and punishments are authoritative deprivations for failures; but apart from those common features, penalties have miscellaneous character, whereas punishments have an important additional characteristic in common ... [which is] a certain expressive function: punishment is conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and indignation, on the part either of the punishing authority himself or of those 'in whose name' the punishment is inflicted" (p. 74).

<sup>10</sup> "Political ideology" is a theoretical construct that becomes meaningful only when given an operational definition (Medoff, 1997). For the purposes of this study, "political ideology" can be defined as a political state's set of principles and beliefs that create foundation for implementing policies that impact its society (e.g., by taking away certain freedoms or preventing crime). Political ideology is also a political state's weapon used to persuade its citizens of the validity of decisions it is willing to make (e.g., convincing the public that spending money on hiring police officers and installing surveillance cameras are necessary steps in increasing public security). These views are not identical but compatible with the definition of this construct by other social scientists who often describe "political ideology" as: a platform or set of positions on issues that individuals adopt in seeking political

meticulously weighed to resemble the electorate's sentiments. The convergence of these two views, politicians' and the majority of voters', often determines the outcome of elections. Therefore, it should come as no surprise that some have even won and lost elections for holding too strict or too lenient views (not necessarily in this order).<sup>11</sup> According to one theory, America's harsh penal policies can be explained by the fact that "criminal legislation is made through democratic politics, and politicians routinely run on tough-on-crime platform" (Whitman, 2007, p. 257). While it would be logical to assume that states' political ideologies are shaped by public views, this is not always the case. Even under democratic regimes, political ideology does not necessarily reflect citizens' belief systems and the state does not automatically express its citizens' commonsense judgments (see Finkel, Burke, & Chavez, 2000). These are two additional reasons why state and societal punitiveness cannot be studied as a single phenomenon, the argument that I have raised earlier.

While every punishment has at least these two characteristics, politicality and symbolism, some punishments have them more than others. Under the title of *Political and Symbolic Punishment*, this study will focus on only those forms of punishment that seem to have these characteristics to an especially large extent. They are: life imprisonment, the death penalty, mandatory sex offender registries, disenfranchisement, and three-strikes laws. In

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office (Downs, 1957); a philosophy about the goals of public policy and the means by which these policies are implemented (Bluhm, 1974); a configuration of ideas and attitudes in which the elements are bound together by some constraint (Converse, 1964); a set of core beliefs that organize perceptions of political issues and that underlie individual preferences (Jackson & Kingdon, 1992); a statement about how governments can best serve their proponents' conceptions of the public interest (Kalt & Zupan, 1984); and the aggregation of the ideological preferences of a state's voting population on a wide variety of issues, including political, social, foreign and economic (Medoff, 1997).

<sup>11</sup> Samuel Walker (2001) well describes one such case when writing about the 1988 presidential campaign. George H. W. Bush used Willie Horton's case of raping a woman during a weekend furlough as a means to deride his opponent, Michael Dukakis, who was the governor of Massachusetts when the furlough program was in operation. Being a liberal Democrat was portrayed during this campaign as equivalent to being soft on crime, which was perhaps one of the reasons for the victory of the Republican candidate (see p. 210).

addition to addressing measurement issues, the sections that follow will offer the rationale of characterizing these punitive acts of a state as overtly political and symbolic.

### **Life Imprisonment** (Variables 1-3)

Life imprisonment is among the most expressive forms of punishments. Depending on one's penal philosophy and perception, a life sentence can contain several often conflicting meanings. For some, it may show a political state's belief in the impossibility of an offender's pro-social change. Accordingly, they would view the sentence as a powerful indicator of a state's failure or unwillingness to rehabilitate its offenders. Others may believe that the state should not even bother asking whether a person sentenced to life imprisonment is treatable or not. For them, an offender is used as a means of achieving the prevention of crimes because the severity of life imprisonment is expected to produce high levels of general deterrence. Furthermore, a third group may observe a retributive sentiment behind life sentences. Some in this group may believe that certain criminals do not deserve a second chance while others might view retributivism as more respectful towards an offender by treating her as an end in herself and not as a means to an end. No doubt this is not an exhaustive list of either punishment justifications or their perceptions. Yet the goal here is not to determine whether any particular punishment rationale produces more or less punitiveness, but to point out that although people support punishment for different reasons, they all do indeed agree (except perhaps some anarchists) that punishment should be an appropriate state response to criminality. Therefore, measuring punishment in the aggregate is an acceptable way to track public and state perceptions about appropriate state response to crime. Besides, whether a life sentence was justified on utilitarian, retributive, or any other ground has only indirect relevance

for the present analysis. First, laws of all U.S. states have a mixture of punishment justifications and each life sentence may be imposed for multiple reasons. Second, the question on which punishment justification served as the basis for imposing life sentences ought to be omitted due to its insusceptibility to empirical testing.

Life imprisonment has been commonly used in comparative research on state punitiveness (Gordon, 1989; Tonry, 2001; Whitman, 2003). This is understandable because punitiveness is synonymous with penal harshness, and life imprisonment is the harshest punishment used in the U.S. and worldwide<sup>12</sup> other than the death penalty. The sentence may even be viewed as more punitive than the death penalty because it involves prolonged pain and suffering as opposed to an instantaneous death.

Although every U.S. state uses life imprisonment, significant variations among the states are observable. These variations gauge the relative punitiveness of each state. First, however, the concept of life imprisonment must be specified. Does imprisonment for life in fact mean incarceration for one's natural life, or something less? Here, both normative and empirical analyses can be useful.

A review of sentencing laws should signal some differences in the timelines of eligibility for parole. For example, a provision may require that a prisoner sentenced to life serve on average ten, twenty-five, or even forty years before her eligibility for parole. Moreover, a normative analysis should show for which crimes life sentences are imposed and

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<sup>12</sup> Unlike the U.S., where life imprisonment often means exactly that, other Western nations (with only rare exceptions; e.g., in the Netherlands, parole is almost never granted to life prisoners) allow release after certain amount of years of imprisonment (Belgium in 30 years; Canada in 25 years; Denmark in 12 years; Germany in 15 years; Greece in 16 years; Italy in 10 years; Spain in 30 years; and most post-Soviet countries in 20-30 years). Even in the U.K., which has practices similar to the U.S.'s criminal justice practices, fifty-three people sentenced to life imprisonment have been released after serving less than six years. See Daily News, June 14, 2006. Available at [http://www.dailymail.co.uk/pages/live/articles/news/news.html?in\\_article\\_id=390532&in\\_page\\_id=1770&ct=5](http://www.dailymail.co.uk/pages/live/articles/news/news.html?in_article_id=390532&in_page_id=1770&ct=5) (Retrieved on October 26, 2007).

which types of offenders in terms of their age and mental health are eligible for life sentences. For example, while most American jurisdictions permit life sentences for capital homicide and felony murder, some states impose such sentences for robbery, burglary or drug selling as well (Fagan, 2007, p. 736). Additionally, not every state authorizes natural life sentences for juveniles (see discussion in Part Five). At the same time, a normative analysis may create a distorted picture of penal practices, as there is often a wide gap between what the laws say and what is actually implemented.

As an alternative or supplement to legal research, one could focus on parole practices and obtain data on the average time individuals have spent in prison after being sentenced to life (whether they have been released or are still imprisoned). Unfortunately, there are at least two problems associated with this method. First, it does not apply to life without the possibility of parole, and, second, data on how much time individuals sentenced to life have actually served will take us to sentences that have been imposed decades ago, while the goal in this study is to evaluate contemporary state punitiveness. Although it is possible to estimate how much time recently imprisoned individuals might spend behind bars, such estimations are more reliable for short sentences<sup>13</sup> and much more problematic for decades-long sentences because changes in imprisonment policies might produce shorter or longer sentences twenty years in the future than had been planned at the time of the sentence.

To avoid this complication, the present study will compare states in terms of number of people currently serving: (a) life without the possibility of parole; (b) life with the possibility of parole; and (c) prison sentences of 20 years to life.<sup>14</sup> The data for this three-pronged model came from *The 2002 Corrections Yearbook* (Camp, 2003). This source was chosen because, at

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<sup>13</sup> Because they assume that existing early release practices will remain in force for at least several years.

<sup>14</sup> In addition, states will be compared in terms of number of juveniles serving life sentences. This variable will be discussed in the section on *Juvenile Justice*.

the time of this research, 2002 is the latest year for which state-by-state-level data on life imprisonment were available. With respect to the states for which the numbers for 2002 were missing, the data for 2001 or 2000 were used to fill up empty cells (see Tables 1, 3 & 6). Subsequently, these data were adjusted<sup>15</sup> for number of arrests for violent offenses as opposed to a state's population or number of crimes. While it might be acceptable to use per capita rates when contrasting states across their numbers of life prisoners, the same method is inadequate for substantiating a claim of state punitiveness because the frequency of life imprisonment does not depend on a state's population size. As a government's reaction to especially grave crimes, the imposition of life sentences varies directly in accordance with arrests for murder, voluntary manslaughter and perhaps several other violent offenses.

Moreover, this study does not adjust life sentences for number of crimes because not all of the offenses result in arrest, while arrests for violent crimes typically lead to conviction. Also, life prisoners may have committed more than one offense and any adjustment for a number of crimes may require considering such variations as well. Controlling for a number of arrests for murder and voluntary manslaughter solves this problem because one arrest is associated with one conviction. Although the same person may be arrested more than once, this is unlikely to happen to those who have been arrested for serious offenses that typically result in long-term incarceration. (This logic will be used across life imprisonment and the death penalty variables.)

Before controlling for a number of arrests, however, one needs to ascertain the years in which the prisoners serving life sentences in 2002 might have been arrested. This may require obtaining the state-by-state arrest data not only for last twenty years, but also for the

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<sup>15</sup> For the purposes of this study, "adjusting for" and "controlling for" will be used interchangeably. They both refer to using ratios or rates instead of hard numbers.

1970s or even 1960s, which is not possible because such data are not readily available (e.g., the FBI website does not post them). Therefore, this study adjusts life sentences for a number of arrests for 1995-2002.

After obtaining the widely available arrest data from the Uniform Crime Reports, average numbers of annual arrests were calculated for each state. For the first two variables concerning life sentences—*Life without the possibility of parole* and *Life with the possibility of parole*—arrests for only murder and non-voluntary manslaughter were used because a life sentence is a reasonable possible response to an intentional killing (see Table 5). For indeterminate life sentences grouped in the variable *Prison sentences from 20 years to life*, arrest categories include not only murder but also forcible rape, robbery and aggravated assault because all of these offenses can potentially result in more than a two-decade long imprisonment (see Table 9). Although both discretionary and mandatory life sentences can be imposed even for non-violent offenses, especially under two- or three-strikes laws, the present analysis will not adjust for their arrests because not every state has a strikes legislation, and, even in those states that have adopted such legislation, the imposition of life sentences for non-violent crimes is not a common practice (see discussion on three-strikes laws, variable 10).

When calculating criterion punitiveness scores for the first two variables, a ratio between the number of life prisoners and the number of average annual arrests for murder and non-negligent manslaughter was obtained for each state. These ratios were then transformed into the quintiles; states with higher ratio values were assigned high criterion punitiveness score (see Tables 3 & 5). For *Prison sentences from 20 years to life*, a similar method was used, the only difference being that instead of obtaining a ratio for each state, an imprisonment

rate per 100 arrests for violent offenses (Table 9) was used simply to omit decimal points (see Table 8).

### Variable 1: Life without the Possibility of Parole

Table 2: Punitiveness Scores for Life without the Possibility of Parole

State Name	Lifers 2002 <sup>a</sup>	Average # Murders <sup>b</sup>	Ratio <sup>c</sup>	Pun. Score	State Name	Lifers 2002 <sup>a</sup>	Average # Murders <sup>b</sup>	Ratio <sup>c</sup>	Pun. Score
Alabama	1,289	355	3.6	3	Montana	27	9	3.0	3
Alaska	27	26	1.0	1	Nebraska	180	42	4.3	3
Arizona	113	250	0.5	1	Nevada	366	123	3.0	3
Arkansas	429	156	2.8	3	New Hampshire	53	5	10.6	4
California	2,621	2,064	1.3	2	New Jersey	7	291	0.0	0
Colorado	283	119	2.4	2	New Mexico	0	64	0.0	0
Connecticut	189	108	1.8	2	New York	90	500	0.2	0
Delaware	231	14	16.5	4	North Carolina	366	723	0.5	1
Florida	5,118	794	6.4	4	North Dakota	6	5	1.2	2
Georgia	261	313	0.8	1	Ohio	84	244	0.3	0
Hawaii	24	44	0.5	1	Oklahoma	419	196	2.1	2
Idaho	71	24	3.0	3	Oregon	85	102	0.8	1
Illinois	1,107	628	1.8	2	Pennsylvania	3,765	418	9.0	4
Indiana	52	209	0.2	0	Rhode Island	22	22	1.0	1
Iowa	531	32	16.6	4	South Carolina	416	194	2.1	2
Kansas	0	19	0.0	0	South Dakota	146	8	18.3	4
Kentucky	22	59	0.4	1	Tennessee	187	237	0.8	1
Louisiana	3,584	378	9.5	4	Texas	0	959	0.0	0
Maine	40	9	4.4	3	Utah	14	41	0.3	0
Maryland	199	381	0.5	1	Vermont	6	5	1.2	2
Massachusetts	750	83	9.0	4	Virginia	396	307	1.3	2
Michigan	2,600	857	3.0	3	Washington	427	132	3.2	3
Minnesota	21	125	0.2	0	West Virginia	218	42	5.2	3
Mississippi	769	127	6.1	4	Wisconsin	81	383	0.2	0
Missouri	808	340	2.4	2	Wyoming	157	11	14.3	4

<sup>a</sup> “Lifers” refer to inmates serving life sentences without the possibility of being put on parole. Source: Camp (2003), see table “Inmates with sentences of 20 years or more or life on January 1, 2002”, p. 40. For several states, numbers were taken from 2001 because the 2002 data either do not differentiate between life sentences with and without parole (Hawaii, Michigan, and Virginia) or do not contain numbers for all states (New Mexico). Source: Camp & Camp (2002), see table “Inmates with sentences of 20 years or more or life on January 1, 2001”, p. 67. For New Mexico, data refer to 2000 because no data for 2002 are available and 2001 data combines both categories of life inmates. Source: Camp & Camp (2000), see table “Inmates with sentences of 20 years or more or life on January 1, 2000”, p. 53. As for Texas, data for 1999-2002 indicates that there were no inmates serving life without the possibility of parole. This is because until June 2005, Texas only had the death penalty and life with the possibility of parole after 40 years for capital crimes. Also, Kansas and New Mexico had no inmates serving life without the possibility of parole.

<sup>b</sup> Average annual number of arrests for murder and non-negligent manslaughter was calculated using the data on persons arrested in 1995-2006. See Table 6 for details.

<sup>c</sup> Ratio between the total number of inmates serving life without the possibility of parole and average annual number of arrests for murder.

Table 3: Distribution of Quintiles for Life without the Possibility of Parole

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by ratio)
1st	Minimum	0	Kansas, New Jersey, New Mexico, Texas, Indiana, Minnesota, New York, Wisconsin, Ohio and Utah
2nd	Low	1	Kentucky, Arizona, Hawaii, Maryland, North Carolina, Georgia, Oregon, Tennessee, Alaska and Rhode Island
3rd	Moderate	2	North Dakota, Vermont, California, Virginia, Connecticut, Illinois, Oklahoma, South Carolina, Colorado and Mississippi
4th	High	3	Arkansas, Idaho, Michigan, Montana, Nevada, Washington, Alabama, Nebraska, Maine and West Virginia
5th	Extreme	4	Florida, Massachusetts, Pennsylvania, Louisiana, New Hampshire, Wyoming, Delaware, Iowa and South Dakota

## Variable 2: Life with the Possibility of Parole

Table 4: Punitiveness Scores for Life with the Possibility of Parole

State Name	Lifers 2002 <sup>a</sup>	Average # Murders <sup>b</sup>	Ratio <sup>c</sup>	Pun. Score	State Name	Lifers 2002 <sup>a</sup>	Average # Murders <sup>b</sup>	Ratio <sup>c</sup>	Pun. Score
Alabama	3,354	355	9.4	3	Montana	35	9	3.9	1
Alaska	209	26	8.0	3	Nebraska	75	42	1.8	0
Arizona	993	250	4.0	1	Nevada	1,357	123	11.0	4
Arkansas	707	156	4.5	2	New Hampshire	93	5	18.6	4
California	23,020	2,064	11.2	4	New Jersey	1,105	291	3.8	1
Colorado	699	119	5.9	2	New Mexico	480	64	7.5	3
Connecticut	228	108	2.1	1	New York	12,611	500	25.2	4
Delaware	222	14	15.9	4	North Carolina	2,889	723	4.0	2
Florida	3,013	794	3.8	1	North Dakota	25	5	5.0	2
Georgia	6,046	313	19.3	4	Ohio	4,538	244	18.6	4
Hawaii	215	44	4.9	2	Oklahoma	1,365	196	7.0	3
Idaho	314	24	13.1	4	Oregon	463	102	4.5	2
Illinois	130	628	0.2	0	Pennsylvania	0	418	0.0	0
Indiana	195	209	0.9	0	Rhode Island	159	22	7.2	3
Iowa	0	32	0.0	0	South Carolina	1,515	194	7.8	3
Kansas	771	19	40.6	4	South Dakota	0	8	0.0	0
Kentucky	704	59	11.9	4	Tennessee	1,567	237	6.6	2
Louisiana	0	378	0.0	0	Texas	7,661	959	8.0	3
Maine	15	9	1.7	0	Utah	59	41	1.4	0
Maryland	1,898	381	5.0	2	Vermont	5	5	1.0	0
Massachusetts	856	83	10.3	3	Virginia	1,502	307	6.1	2
Michigan	1,711	857	2.0	1	Washington	413	132	3.1	1
Minnesota	324	125	2.6	1	West Virginia	288	42	6.9	3
Mississippi	922	127	7.3	3	Wisconsin	898	383	2.3	1
Missouri	1,445	340	4.3	2	Wyoming	29	11	2.6	1

<sup>a</sup> “Lifers” here refer to inmates serving life sentences with the possibility of being put on parole. Source: Source: Camp (2003), see table “Inmates with sentences of 20 years or more or life on January 1, 2002”, p. 40. For several states, numbers were taken from 2001 because the 2002 data either do not differentiate between life sentences with and without parole (Hawaii, Michigan, and Virginia) or do not contain numbers for all states (New Mexico). Source: Camp & Camp (2002), see table “Inmates with sentences of 20 years or more or life on January 1, 2001”, p. 67. Note: In Iowa, Louisiana, Pennsylvania, and South Dakota all life sentences were imposed without the possibility of parole.

<sup>b</sup> Average annual number of arrests for murder and non-negligent manslaughter was calculated using the data on persons arrested in 1995-2006. See Table 6 for details.

<sup>c</sup> Ratio between the total number of inmates serving life with the possibility of parole and average annual number of arrests for murder.

Table 5: Distribution of Quintiles for Life with the Possibility of Parole

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by ratio)
1st	Minimum	0	Iowa, Louisiana, Pennsylvania, South Dakota, Illinois, Indiana, Vermont, Utah, Maine and Nebraska
2nd	Low	1	Michigan, Connecticut, Wisconsin, Minnesota, Wyoming, Washington, Florida, New Jersey, Montana and Arizona
3rd	Moderate	2	North Carolina, Mississippi, Arkansas, Oregon, Hawaii, Maryland, North Dakota, Colorado, Virginia and Tennessee
4th	High	3	West Virginia, Oklahoma, Rhode Island, Mississippi, New Mexico, South Carolina, Alaska, Texas, Alabama and Massachusetts
5th	Extreme	4	Nevada, California, Kentucky, Idaho, Delaware, New Hampshire, Ohio, Georgia, New York and Kansas

Table 6: Average Annual Arrests for Murder and Non-Negligent Manslaughter (Supplement to Tables 2 and 4)

State Name	Number of Arrests for Murder and Non-negligent Manslaughter (1995 to 2002)								Average Annual Arrests
	1995	1996	1997	1998	1999	2000	2001	2002	
Alabama	426	402	466	-	265	317	306	300	355
Alaska	26	28	20	-	36	21	26	27	26
Arizona	297	253	227	-	243	214	244	271	250
Arkansas	255	227	204	-	171	161	29	48	156
California	2,796	2,429	2,197	-	1,770	1,635	1,756	1,865	2,064
Colorado	148	113	108	-	99	110	133	120	119
Connecticut	170	115	143	-	90	69	119	52	108
Delaware	1	19	9	-	23	27	7	12	14
Florida	1,114	-	-	-	741	679	707	730	794
Georgia	433	246	298	-	122	358	240	493	313
Hawaii	76	51	42	-	44	40	28	26	44
Idaho	35	29	25	-	14	15	18	33	24
Illinois	-	767	754	-	637	531	558	520	628
Indiana	191	123	179	-	244	240	236	250	209
Iowa	36	27	25	-	24	39	25	47	32
Kansas	-	-	-	-	-	-	-	19	19
Kentucky	129	64	94	-	29	7	40	51	59
Louisiana	501	418	631	-	248	286	276	288	378
Maine	13	15	12	-	-	4	3	5	9
Maryland	691	625	498	-	73	377	315	85	381
Massachusetts	128	93	78	-	69	60	73	79	83
Michigan	1,410	1,220	1,242	-	1,275	138	109	607	857
Minnesota	219	145	74	-	142	149	71	73	125
Mississippi	114	84	171	-	135	147	101	135	127
Missouri	500	338	311	-	251	239	345	393	340
Montana	-	-	6	-	17	7	7	10	9
Nebraska	55	15	42	-	46	48	45	42	42
Nevada	161	174	68	-	123	111	139	85	123
New Hampshire	-	12	-	-	2	4	2	5	5
New Jersey	380	349	334	-	240	231	248	253	291
New Mexico	42	72	55	-	68	82	50	81	64
New York	1,345	1,136	252	-	165	221	172	208	500
North Carolina	733	697	762	-	669	621	957	622	723
North Dakota	9	6	2	-	5	1	3	6	5
Ohio	350	329	285	-	185	193	167	200	244
Oklahoma	236	216	213	-	-	182	158	173	196
Oregon	67	147	109	-	103	102	111	77	102
Pennsylvania	312	511	161	-	477	465	507	492	418
Rhode Island	23	13	22	-	30	17	25	27	22
South Carolina	324	324	326	-	55	72	86	171	194
South Dakota	7	9	8	-	8	10	6	6	8
Tennessee	216	206	274	-	326	159	191	284	237
Texas	1,413	1,157	1,006	-	773	774	792	801	959
Utah	37	66	38	-	26	31	41	48	41
Vermont	2	-	-	-	7	6	2	9	5
Virginia	396	417	424	-	228	238	225	222	307
Washington	159	157	130	-	120	138	117	102	132
West Virginia	87	55	50	-	41	19	16	25	42
Wisconsin	424	477	368	-	-	-	293	351	383
Wyoming	14	8	21	-	9	11	8	8	11

Source: FBI *Uniform Crime Reports*—"Crime in the United States", 1995 through 2002. See "Persons Arrested". Available at <http://www.fbi.gov/ucr/ucr.htm> (Retrieved on October 11, 2007).

Note: State-level data before 1995 or for 1998 are not available via FBI web-site

### Variable 3: Prison Sentence for 20 Years to Life

Table 7: Punitiveness Scores for Prison Sentence for 20 Years to Life

State Name	Lifers 2002 <sup>a</sup>	Crimes '95-'02 <sup>b</sup>	Impris. Rate <sup>c</sup>	Pun. Score	State Name	Lifers 2002 <sup>a</sup>	Crimes '95-'02 <sup>b</sup>	Impris. Rate <sup>c</sup>	Pun. Score
Alabama	7,264	11,888	61.1	3	Montana	846	597	141.7	4
Alaska	409	1,306	31.3	2	Nebraska	619	1,325	46.7	2
Arizona	2,096	8,717	24.0	1	Nevada	389	3,121	12.5	0
Arkansas	2,470	4,713	52.4	3	New Hampshire	287	428	67.1	3
California	6,598	138,778	4.8	0	New Jersey	3,236	17,447	18.5	1
Colorado	2,545	5,361	47.5	2	New Mexico	185	2,422	7.6	0
Connecticut	1,232	6,165	20.0	1	New York	6,608	25,519	25.9	1
Delaware	306	1,613	19.0	1	North Carolina	3,263	24,607	13.3	0
Florida	9,237	55,921	16.5	0	North Dakota	89	174	51.1	3
Georgia	6,357	10,690	59.5	3	Ohio	10,257	12,044	85.2	4
Hawaii	582	1,320	44.1	2	Oklahoma	5,772	6,276	92.0	4
Idaho	308	1,343	22.9	1	Oregon	1,167	3,538	33.0	2
Illinois	9,632	11,013	87.5	4	Pennsylvania	1,431	18,482	7.7	0
Indiana	6,548	9,418	69.5	3	Rhode Island	265	1,676	15.8	0
Iowa	1,643	3,733	44.0	2	South Carolina	3,998	7,324	54.6	3
Kansas	2,285	1,251	182.7	4	South Dakota	315	546	57.7	3
Kentucky	3,104	3,501	88.7	4	Tennessee	4,668	8,501	54.9	3
Louisiana	4,436	11,277	39.3	2	Texas	42,734	32,612	131.0	4
Maine	85	796	10.6	0	Utah	1,292	1,812	71.3	4
Maryland	5,034	10,008	50.3	3	Vermont	64	262	24.4	1
Massachusetts	1,191	13,860	8.6	0	Virginia	8,254	8,548	96.6	4
Michigan	4,726	16,665	28.4	1	Washington	1,611	7,095	22.7	1
Minnesota	535	5,156	10.4	0	West Virginia	422	1,283	32.9	2
Mississippi	2,468	2,035	121.3	4	Wisconsin	4,041	8,064	50.1	2
Missouri	3,217	10,758	29.9	1	Wyoming	171	565	30.3	2

<sup>a</sup> "Lifers" here refer to inmates serving 20 years or more. Source: Camp (2003), see table "Inmates with sentences of 20 years or more or life on January 1, 2002", p. 40. For Maine, number was taken from 1999 because no newer data are available. Source: Camp & Camp & Camp (1999), see table "Inmates with sentences of 20 years or more or life on January 1, 1999", p. 54. For New Mexico and Virginia, numbers refer to 2001 because no later data are available. Source: Camp & Camp & Camp (2002), see table "Inmates with sentences of 20 years or more or life on January 1, 2001", p. 67. For the same reason, number of inmates for West Virginia were taken from 2000. Source: Camp & Camp & Camp (2000), see table "Inmates with sentences of 20 years or more or life on January 1, 2000", p. 53.

<sup>b</sup> Average annual number of arrests for violent offenses was calculated using the data on persons arrested in 1995-2002. See Table 9 for details.

<sup>c</sup> Imprisonment rates per 100 violent crime.

Table 8: Distribution of Quintiles for Prison Sentence for 20 Years to Life

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by imprisonment rates)
1st	Minimum	0	California, New Mexico, Pennsylvania, Massachusetts, Minnesota, Maine, Nevada, North Carolina, Rhode Island and Florida
2nd	Low	1	New Jersey, Delaware, Connecticut, Washington, Idaho, Arizona, Vermont, New York, Michigan and Missouri
3rd	Moderate	2	Wyoming, Alaska, West Virginia, Oregon, Louisiana, Iowa, Hawaii, Nebraska, Colorado and Wisconsin
4th	High	3	Maryland, North Dakota, Arkansas, South Carolina, Tennessee, South Dakota, Georgia, Alabama, New Hampshire and Indiana
5th	Extreme	4	Utah, Ohio, Illinois, Kentucky, Oklahoma, Virginia, Mississippi, Texas, Montana and Kansas

Table 9: Average Annual Arrests for Violent Offenses (Supplement to Table 7)

State Name	Number of Arrests for Violent Offences (1995 to 2002)								Average Annual Arrests
	1995	1996	1997	1998	1999	2000	2001	2002	
Alabama	11,152	37,032	10,095	-	6,684	5,851	5,673	6,730	11,888
Alaska	1,399	1,520	1,034	-	1,447	1,204	1,267	1,272	1,306
Arizona	9,524	9,025	8,630	-	7,813	8,187	8,797	9,040	8,717
Arkansas	5,431	5,279	5,939	-	5,458	4,959	3,024	2,903	4,713
California	150,152	146,092	150,518	-	133,086	129,441	133,207	128,951	138,778
Colorado	5,611	5,211	4,921	-	5,166	5,171	5,604	5,842	5,361
Connecticut	8,477	6,365	7,453	-	6,173	4,527	6,407	3,753	6,165
Delaware	118	1,789	1,540	-	2,896	2,304	1,415	1,228	1,613
Florida	58,408	-	-	-	-	53,963	57,682	53,630	55,921
Georgia	16,391	9,816	11,277	-	4,241	11,423	10,432	11,249	10,690
Hawaii	1,493	1,488	1,533	-	1,116	1,279	1,186	1,148	1,320
Idaho	1,605	1,372	1,304	-	1,152	1,368	1,239	1,362	1,343
Illinois	-	12,685	11,244	-	11,345	10,317	10,604	9,885	11,013
Indiana	8,108	8,283	8,543	-	9,257	10,106	10,902	10,730	9,418
Iowa	3,844	3,120	3,785	-	4,213	4,145	2,823	4,198	3,733
Kansas	-	-	-	-	-	-	-	1,251	1,251
Kentucky	7,849	4,192	3,591	-	2,490	379	2,805	3,202	3,501
Louisiana	11,482	9,962	14,674	-	11,607	10,282	10,772	10,157	11,277
Maine	603	895	761	-	-	887	841	787	796
Maryland	13,974	12,711	13,631	-	4,813	10,159	9,273	5,497	10,008
Massachusetts	15,872	14,224	15,468	-	13,659	13,559	12,891	11,348	13,860
Michigan	22,379	20,573	19,411	-	17,180	9,265	9,744	18,103	16,665
Minnesota	7,044	6,395	4,099	-	5,641	6,460	2,757	3,697	5,156
Mississippi	1,576	1,393	2,317	-	2,087	2,552	1,905	2,414	2,035
Missouri	11,285	9,877	10,138	-	8,261	7,684	12,947	15,112	10,758
Montana	-	-	202	-	605	691	707	782	597
Nebraska	1,548	800	1,487	-	1,394	1,448	1,265	1,333	1,325
Nevada	3,350	3,608	1,692	-	3,175	3,181	4,077	2,761	3,121
New Hampshire	-	539	-	-	278	415	392	518	428
New Jersey	20,886	20,032	19,134	-	15,913	15,497	15,399	15,268	17,447
New Mexico	1,327	2,181	2,848	-	2,521	2,793	2,267	3,014	2,422
New York	66,793	54,426	14,459	-	10,255	11,502	10,006	11,190	25,519
North Carolina	25,905	26,880	28,215	-	24,074	20,609	24,834	21,729	24,607
North Dakota	214	154	199	-	167	149	175	161	174
Ohio	10,654	17,420	15,143	-	10,690	10,349	10,515	9,534	12,044
Oklahoma	7,161	6,525	6,079	-	-	5,985	5,808	6,098	6,276
Oregon	3,454	4,304	3,825	-	3,381	3,304	3,702	2,795	3,538
Pennsylvania	9,191	19,744	8,050	-	22,365	23,496	23,260	23,269	18,482
Rhode Island	2,428	2,409	2,270	-	1,201	1,048	1,115	1,259	1,676
South Carolina	10,270	11,917	12,834	-	2,999	3,030	3,604	6,613	7,324
South Dakota	704	686	495	-	518	570	356	494	546
Tennessee	6,528	8,090	8,574	-	7,186	8,161	9,698	11,267	8,501
Texas	37,780	33,827	34,137	-	29,013	30,624	31,061	31,844	32,612
Utah	2,240	2,244	1,832	-	1,697	1,528	1,374	1,768	1,812
Vermont	123	-	-	-	288	284	280	334	262
Virginia	11,628	11,417	11,290	-	7,354	6,246	5,628	6,276	8,548
Washington	7,526	6,559	6,654	-	7,144	7,192	7,454	7,133	7,095
West Virginia	1,434	1,391	1,364	-	1,645	1,304	996	848	1,283
Wisconsin	9,480	9,335	8,001	-	-	-	3,283	10,219	8,064
Wyoming	493	411	662	-	504	643	620	619	565

Source: FBI *Uniform Crime Reports*—"Crime in the United States", 1995 through 2002. See "Persons Arrested". Available at <http://www.fbi.gov/ucr/ucr.htm> (Retrieved on October 11, 2007).

Note: State-level data before 1995 or for 1998 are not available via FBI web-site

### Death Penalty (Variables 4-6)

Capital punishment is an inescapable subject in any assessment of state punitiveness. This position is consistent with the traditional interpretation of support for the death penalty as an indicator of punitiveness (see Borg, 1997; Gordon, 1989; Kury & Ferdinand, 1999; Tonry, 2001, 2004; Tyler & Boeckmann, 1997; Whitman, 2003). As Kury and Ferdinand (1999) write, “The level of punitivity is often, especially in the United States, measured by assessing the death penalty” (p. 374). However, while countries and states (within these countries) have conventionally been classified as either retentionists or abolitionists, this study makes a claim against such a dichotomization and offers a multi-level measure of the death penalty that is presented as three distinct variables. This is to identify those jurisdictions that fall somewhere between those states that fully abolished the death penalty and execute offenders indiscriminately.

The first variable focuses on the application of the death penalty statutes. It differentiates among jurisdictions that: (a) fully abolished this practice, (b) maintain it on the books without imposing it, (c) impose it without carrying it out, and (d) carry it out. Furthermore, the last category is divided into states in which: (d<sub>1</sub>) defendants are sentenced to death for murders that they intentionally committed, and (d<sub>2</sub>) the felony murder rule applies,<sup>16</sup>

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<sup>16</sup> The felony-murder rule is the best representative of all forms of strict liability. It does not require the proof of *mens rea*, meaning that the law holds criminally responsible even those who did not even have a criminally negligent state of mind (i.e., the lowest level of culpability) during their actions.

The felony-murder rule views harm as basis for punishment, which makes it inconsistent with a basic principle of just punishment. Addressing the question of proportional punishment, George P. Fletcher wrote: “When felony-murder rule converts an accidental death into first-degree murder, the punishment is rendered disproportionate to the wrong for which the offender is personally responsible” (1980-1981, p. 428). To be more specific, the felony-murder doctrine is inconsistent with the principle of proportionate punishment because it takes harm as the only justification for harsh punishment and leads to almost analogous sentencing and perhaps capital punishment whether or not a felon kills intentionally, recklessly, negligently, or even non-negligently (strict liability). In doing so, the felony-murder doctrine ignores the idea that harm should play only a secondary role in tailoring charges and sentences because the punishment must primarily reflect an actor’s *mens rea*. This is probably the main reason for the American Law Institute’s opposition to this rule (Sec. 2.02 of the MPC reads: “...a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently... with

meaning that certain felons are charged with murders that led to their executions without proving their *mens rea* in relation to a victim's death.<sup>17</sup>

Although this five-fold categorization will not answer the question on exactly how much less or more punitive the states assigned to these five levels are, it does arrange the jurisdictions in the rank order from the least to the most punitive (see Table 9). Undoubtedly, a state that imposes the death penalty in felony-murder cases is harsher than a state that limits it to punishing those who have committed an intentional homicide. Also, a state that executes its criminals is more punitive than a state that, despite sentencing felons to the death penalty, does not carry the sentence out. Furthermore, a state that imposes death sentences exhibits a more punitive nature than its counterpart that merely maintains the sentence *de jure*. While this distinction may seem merely symbolic, it is not. Being placed on death row must be much more detrimental for a convict and her family than being sentenced to life imprisonment, because a government can always remove a moratorium on executions. Finally, states that fully abolished capital punishment are the least punitive of all, at least across this death penalty criterion.

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respect to each material element of the offense.”). But this is also why England abolished it (English Homicide Act of 1957, ch.11, §1), as well as all forms of constructive and fictitious malice (Fletcher, 1980-1981, p. 415).

The aforesaid should not be construed as an argument against punishing felons. The point I am stressing is quite straightforward: felons should not be punished for murder without proving their *mens rea* with respect to killing, and when they are, a nation allowing such practices exhibits excessive punitiveness. In most, if not all, Continental European jurisdictions, robbery or rape that resulted in a victim's death would be classified as a robbery or rape rather than first-degree murder. As the classification varies, so does the punishment for offenders. The problem with the felony-murder doctrine is that it sweeps too wide. Yes, it does put behind bars many dangerous criminals (which is achievable without this rule as well), but it also carries a substantial risk of making numerous false positive predictions. Not only does this approach appear unjustly punitive, it is also unreasonably expensive because it results in incarceration of non-dangerous felons as well.

<sup>17</sup> Although there are many kinds of strict liability laws, the uniqueness of the felony-murder rule is that it “converts an accidental death into first-degree murder” (Fletcher, 1980-1981, p. 428). In *People v. Stamp*, the California Appellate Court stated: “The [felony-murder] doctrine is not limited to those deaths which are foreseeable. Rather a felon is held strictly liable for all killings committed by him or his accomplices in the course of the felony.” In fact, while some states restrict the application of their felony-murder rules only to felonies that are “forcible” or “clearly dangerous to human life”, “others recognize any felony as sufficient to classify a related killing as murder” (Fletcher, 1980-1981, p. 418).

Such a methodological complication appears necessary in order to detect differences not only between retentionist versus abolitionist states but also among jurisdictions belonging to each of these two groups and falling between them. The analysis of the death penalty in the U.S. showed that a gap between the complete absence of capital punishment and the presence of the harshest form of the death penalty laws is filled by statutes and practices that form the continuum between these two extreme ends. An examination of such midway statutes/practices exposes the variation among states that is crucial for the present study. This methodological complication is also justified from a practical standpoint. A comparison of states across the death penalty criterion is perhaps the least challenging comparative analysis to be developed on either a national or international level. First, there is only one western country—the United States<sup>18</sup>—that still puts to death convicted criminals (although the country is not homogeneous in this sense). Second, the death penalty is among the best-researched subjects for which information is widely available, especially when researching the death penalty in America.

In addition to differentiating states across the death penalty application, two related variables will compare them in terms of the frequency of executions (variable 5) and the number of death row inmates (variable 6). The data on executions came from the eleven latest *Capital Punishment* reports of the Bureau of Justice Statistics (see Table 11). Because the focus of this research is contemporary penal practices rather than historical developments, the variations that existed among the states before 1996 were disregarded. Also, despite the initial intention to examine the data pertaining to only the last few years, the decision to extend the time period over a decade was made after observing a significant fluctuation in executions in several death penalty states. For example, Arizona executed 7 inmates in 1999 but has not carried out a single death sentence since 2001; Missouri put to death 9 inmates in 1999, but no

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<sup>18</sup> Belarus is the only other nation that still uses the death penalty.

one in 2004 and 2006; Ohio had no executions in 1996-1998 and 2000, but executed 7 inmates in 2004, and 5 in 2006; Texas carried out only 3 death sentences in 1996 but 37 in 1997, and 40 in 2000; and finally, Virginia executed 14 prisoners in 1999, but none in 2005. Had this study compared states only by executions that took place in 2006, than Tennessee (with 1 execution in 2006, but only 2 executions in 1996-2006) would have been identified as more punitive than Georgia (with no executions in 2006, but 19 executions in 1996-2006), which is obviously not accurate.

The data on states' death row populations were taken from the Death Penalty Information Center.<sup>19</sup> They were last updated on January 1, 2007 (see Table 13).

Both execution and death row variables were adjusted for the average number of annual arrests (1995-2006) for murder and non-negligent manslaughter (see Table 15). As was discussed with respect to the life imprisonment variables, arrests for intentional homicides were chosen because death sentences in the U.S., at least since the 1977 decision in *Coker*,<sup>20</sup> have been imposed almost exclusively for murder.<sup>21</sup> Even though a number of states adopted death penalty statutes for non-murder offenses,<sup>22</sup> “[s]uch statutes are of questionable constitutionality because the Supreme Court has struck down the death penalty for non-murder

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<sup>19</sup> The Death Penalty Information Center (DPIC) was created in 1990 as a non-profit organization serving the media, as well as researchers and students interested in various aspects of the death penalty in the U.S. and worldwide. The Center can be found online at <http://www.deathpenaltyinfo.org/>

<sup>20</sup> In *Coker v. Georgia*, 433 U.S. 584 (1977), the Supreme Court ruled that the death penalty for rape of an adult woman was “grossly disproportionate” and “excessive”, and thus incompatible with the Eighth Amendment of the U.S. Constitution.

<sup>21</sup> There is only one person, Patrick Kennedy, on death row in Louisiana for a non-murder case. According to the Death Penalty Information Center, all executions have been carried out exclusively for murder since the death penalty was re-instated in 1976. Available at <http://www.deathpenaltyinfo.org/article.php?&did=2347> (Retrieved on October 27, 2007).

<sup>22</sup> Texas, Oklahoma, South Carolina, Georgia, Montana, Louisiana and Florida for child rape (Death Penalty Information Center); Arkansas, California, Colorado, Georgia, Illinois, Louisiana, Mississippi, Missouri and Washington for treason; Colorado, Idaho, Illinois, Missouri and Montana for aggravated kidnapping; Florida and Missouri for drug trafficking; Georgia and Mississippi for aircraft hijacking; Missouri for placing a bomb near a bus terminal; New Mexico for espionage; and Montana for aggravated assault by incarcerated, persistent felons or murderers. See Rayburn, 2004, p. 1139.

crimes”<sup>23</sup> (Kirchmeirer, 2006, p. 16). This does not mean, however, that in the near future there will be no significant variations across death penalty states with regards to the imposition of capital punishment for non-murder offenses. Despite a global trend toward abolition of the death penalty, the last-decade expansions of the death penalty statutes in the U.S. “ensure that [at least] child rape will eventually be punished by death in an increasing number of states” (Rayburn, 2004, p. 1141). This prediction becomes especially believable given the following three factors. First, the public “seems to overwhelmingly favor the use of the death penalty for sex crimes against children” (Rayburn, 2004, p. 1138). Second, the holding in *Coker* only applies to the rape of adult women, thus leaving the question of the constitutionality of capital punishment in child molestation cases unanswered. Third, the Supreme Court has already stated that the death penalty should reflect the “conscience of the community”.<sup>24</sup> If this prediction turns out to be accurate, then future instruments of state punitiveness will also need to adjust for a number of sex offenses involving a minor, or even compare states with respect to the application of the death penalty in non-murder cases. At this point, neither of the two seems necessary.

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<sup>23</sup> In *Coker v. Georgia*, 433 U.S. 584, 600 (1977), the Court held that the death penalty was excessive and grossly disproportionate for the crime of rape of an adult women. A similar decision was reached in *Enmund v. Florida*, 458 U.S. 782, 797 (1982) with respect to armed robbery.

<sup>24</sup> See *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

### Variable 4: Death Penalty Application

Table 10: Distribution of Quintiles for the Death Penalty Application

Description	Levels of Punitiveness	Pun. Score	<i>f</i>	State Name
Complete abolition of death penalty	None or Minimum	0	13	Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, New Jersey, Rhode Island, Vermont, West Virginia and Wisconsin
Death penalty on books without imposition	Low	1	1	New Hampshire
Death penalty imposed but not carried out	Moderate	2	5	Idaho, Kansas, New York, South Dakota and Wyoming
Executions carried out but defendants cannot get death penalty for a felony murder	High	3	11	Alabama, Kentucky, Louisiana, Maryland, Missouri, Ohio, Oregon, Pennsylvania, Utah, Virginia and Washington
Executions carried out and defendants can get death penalty for a felony murder	Extreme	4	20	Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee and Texas

<sup>a</sup> Source: the Death Penalty Information Center. Available at <http://www.deathpenaltyinfo.org/getexecdata.php> (Retrieved on October 26, 2007). For New Jersey see Peters (2007).

**Variable 5: Frequency of Executions**

Table 11: Punitiveness Scores Based on the Frequency of Executions (per 1,000 arrests for murder)

State Name	Number of Executions, 1996 - 2006 <sup>a, b</sup>											Total '96-'06	Average Annual Arrests	Exec. Rate	Pun. Score
	'96	'97	'98	'99	'00	'01	'02	'03	'04	'05	'06				
Alabama	1	3	1	4	4	0	2	3	2	4	1	25	337	74.2	4
Alaska <sup>c</sup>	-	-	-	-	-	-	-	-	-	-	-	0	27	0.0	0
Arizona	2	2	4	7	3	0	0	0	0	0	0	18	250	72.0	3
Arkansas	1	4	1	4	2	1	0	1	1	1	0	16	129	124.0	4
California	2	0	1	2	1	1	1	0	0	2	1	10	2,009	5.0	2
Colorado	0	1	0	0	0	0	0	0	0	0	0	1	116	8.6	2
Connecticut	0	0	0	0	0	0	0	0	0	1	0	1	100	10.0	2
Delaware	3	0	0	2	1	2	0	0	0	1	0	9	14	642.9	4
Florida	2	1	4	1	6	1	3	3	2	1	4	28	761	36.8	3
Georgia	2	0	1	0	0	4	4	3	2	3	0	19	303	62.7	3
Hawaii <sup>d</sup>	-	-	-	-	-	-	-	-	-	-	-	0	39	0.0	0
Idaho	0	0	0	0	0	0	0	0	0	0	0	0	24	0.0	0
Illinois	1	2	1	1	0	0	0	0	0	0	0	5	504	9.9	2
Indiana	1	1	1	1	0	2	0	2	0	5	1	14	210	66.7	3
Iowa <sup>d</sup>	-	-	-	-	-	-	-	-	-	-	-	0	31	0.0	0
Kansas	0	0	0	0	0	0	0	0	0	0	0	0	26	0.0	0
Kentucky	0	1	0	1	0	0	0	0	0	0	0	2	74	27.0	3
Louisiana	1	1	0	1	1	0	1	0	0	0	0	5	342	14.6	2
Maine <sup>d</sup>	-	-	-	-	-	-	-	-	-	-	-	0	6	0.0	0
Maryland	0	1	1	0	0	0	0	0	1	1	0	4	358	11.2	2
Massachusetts <sup>d</sup>	-	-	-	-	-	-	-	-	-	-	-	0	71	0.0	0
Michigan <sup>d</sup>	-	-	-	-	-	-	-	-	-	-	-	0	661	0.0	0
Minnesota <sup>d</sup>	-	-	-	-	-	-	-	-	-	-	-	0	106	0.0	0
Mississippi	0	0	0	0	0	0	2	0	0	1	1	4	134	29.9	3
Missouri	6	6	3	9	5	7	6	2	0	5	0	49	332	147.6	4
Montana	0	0	1	0	0	0	0	0	0	0	1	2	10	200.0	4
Nebraska	1	1	0	0	0	0	0	0	0	0	0	2	42	47.6	3
Nevada	1	0	1	1	0	1	0	0	2	0	1	7	125	56.0	3
New Hampshire	0	0	0	0	0	0	0	0	0	0	0	0	6	0.0	0
New Jersey	0	0	0	0	0	0	0	0	0	0	0	0	290	0.0	0
New Mexico	0	0	0	0	0	1	0	0	0	0	0	1	70	14.3	2
New York	0	0	0	0	0	0	0	0	0	0	0	0	421	0.0	0
North Carolina	0	0	3	4	1	5	2	7	4	5	4	35	680	51.5	3
North Dakota <sup>d</sup>	-	-	-	-	-	-	-	-	-	-	-	0	5	0.0	0
Ohio	0	0	0	1	0	1	3	3	7	4	5	24	221	108.6	4
Oklahoma	2	1	4	6	11	18	7	14	6	4	4	77	183	420.8	4
Oregon	1	1	0	0	0	0	0	0	0	0	0	2	106	18.9	2
Pennsylvania	0	0	0	1	0	0	0	0	0	0	0	1	450	2.2	1
Rhode Island <sup>d</sup>	-	-	-	-	-	-	-	-	-	-	-	0	19	0.0	0
South Carolina	6	2	7	4	1	0	3	0	4	3	1	31	179	173.2	4
South Dakota	0	0	0	0	0	0	0	0	0	0	0	0	7	0.0	0
Tennessee	0	0	0	0	1	0	0	0	0	0	1	2	265	7.5	2
Texas	3	37	20	35	40	17	33	24	23	19	24	275	913	301.2	4
Utah	1	0	0	1	0	0	0	0	0	0	0	2	41	48.8	3
Vermont <sup>d</sup>	-	-	-	-	-	-	-	-	-	-	-	0	6	0.0	0
Virginia	8	9	13	14	8	2	4	2	5	0	4	69	287	240.4	4
Washington	0	0	1	0	0	1	0	0	0	0	0	2	131	15.3	2
West Virginia <sup>d</sup>	-	-	-	-	-	-	-	-	-	-	-	0	37	0.0	0
Wisconsin <sup>d</sup>	-	-	-	-	-	-	-	-	-	-	-	0	310	0.0	0
Wyoming	0	0	0	0	0	0	0	0	0	0	0	0	11	0.0	0

<sup>a</sup> Source: Bonczar & Snell (2002, 2003, 2004, 2005) and Snell (1996, 1997, 1998, 1999, 2000, 2001). See “Highlights; Status of the death penalty.”

<sup>b</sup> For 2006 data on executions, see the Death Penalty Information Center. Available at <http://www.deathpenaltyinfo.org/getexecdata.php> (Retrieved on August 21, 2007).

<sup>c</sup> Average annual number of arrests for murder and non-negligent manslaughter was calculated using the data on persons arrested in 1995-2006. See Supplementary Table # for more details.

<sup>d</sup> Jurisdictions without a death penalty

Table 12: Distribution of Quintiles Based on the Frequency of Executions

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by D.P. rates)
1st	Minimum	0	Alaska, Hawaii, Idaho, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, Wisconsin and Wyoming (Total: 19 states with no executions)
2nd	Low	1	Pennsylvania
3rd	Moderate	2	California, Tennessee, Colorado, Illinois, Connecticut, Maryland, New Mexico, Louisiana, Washington and Oregon
4th	High	3	Kentucky, Mississippi, Florida, Nebraska, Utah, North Carolina, Nevada, Georgia, Indiana and Arizona
5th	Extreme	4	Alabama, Ohio, Arkansas, Missouri, South Carolina, Montana, Virginia, Texas, Oklahoma and Delaware

## Variable 6: Death Row Population

Table 13: Punitiveness Scores Based on Death Row Population (per 1,000 arrests for murder)

State Name	Death Row Inmates <sup>a</sup>	Average Annual Arrests <sup>b</sup>	Death Row Rate <sup>c</sup>	Pun. Score	State Name	Death Row Inmates <sup>a</sup>	Average Annual Arrests <sup>b</sup>	Death Row Rate <sup>c</sup>	Pun. Score
Alabama	195	337	578.6	4	Montana	2	10	200.0	2
Alaska	0	27	0.0	0	Nebraska	9	42	214.3	2
Arizona	124	250	496.0	4	Nevada	80	125	640.0	4
Arkansas	37	129	286.8	3	New Hampshire	0	6	0.0	0
California	660	2,009	328.5	3	New Jersey <sup>d</sup>	0	290	0.0	0
Colorado	2	116	17.2	1	New Mexico	2	70	28.6	1
Connecticut	8	100	80.0	2	New York	1	421	2.4	1
Delaware	18	14	1,285.7	4	North Carolina	185	680	272.1	2
Florida	397	761	521.7	4	North Dakota	0	5	0.0	0
Georgia	107	303	353.1	3	Ohio	191	221	864.3	4
Hawaii	0	39	0.0	0	Oklahoma	88	183	480.9	3
Idaho	20	24	833.3	4	Oregon	33	106	311.3	3
Illinois	11	504	21.8	1	Pennsylvania	226	450	502.2	4
Indiana	23	210	109.5	2	Rhode Island	0	19	0.0	0
Iowa	0	31	0.0	0	South Carolina	67	179	374.3	3
Kansas	9	26	346.2	3	South Dakota	4	7	571.4	4
Kentucky	41	74	554.1	4	Tennessee	107	265	403.8	3
Louisiana	88	342	257.3	2	Texas	393	913	430.4	3
Maine	0	6	0.0	0	Utah	9	41	219.5	2
Maryland	8	358	22.3	1	Vermont	0	6	0.0	0
Massachusetts	0	71	0.0	0	Virginia	20	287	69.7	2
Michigan	0	661	0.0	0	Washington	9	131	68.7	1
Minnesota	0	106	0.0	0	West Virginia	0	37	0.0	0
Mississippi	66	134	492.5	3	Wisconsin	0	310	0.0	0
Missouri	51	332	153.6	2	Wyoming	2	11	181.8	2

<sup>a</sup> Number of death row inmates per state as of January 1, 2007. Source: the Death Penalty Information Center. Available at <http://www.deathpenaltyinfo.org/state/> (Retrieved on October 12, 2007).

<sup>b</sup> Average annual number of arrests for murder and non-negligent manslaughter was calculated using the data on persons arrested in 1995-2006. See Table 15 for details.

<sup>c</sup> Death row population per 1,000 murder arrest. Here, ratios were replaced rates to omit a large number of decimal places.

<sup>d</sup> In December of 2007, Governor Jon S. Corzine signed into a law a measure repealing New Jersey's death penalty (Peters, 2007), thus automatically eliminating the state's death row. As of January 2007, New Jersey's death row housed 11 inmates.

Table 14: Distribution of Quintiles for Death Row Population

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by death row inmates' rates)
1st	Minimum	0	Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, North Dakota, Rhode Island, Vermont, West Virginia and Wisconsin (Total: 14 states with no death row inmates)
2nd	Low	1	New York, Colorado, Illinois, Maryland, New Mexico and Washington
3rd	Moderate	2	Virginia, Connecticut, Indiana, Missouri, Wyoming, Montana, Nebraska, Utah, Louisiana and North Carolina
4th	High	3	Arkansas, Oregon, California, Kansas, Georgia, South Carolina, Tennessee, Texas, Oklahoma and Mississippi
5th	Extreme	4	Arizona, Pennsylvania, Florida, Kentucky, South Dakota, Alabama, Nevada, Idaho, Ohio and Delaware

Table 15: Average Annual Arrests for Murder and Non-Negligent Manslaughter  
(Supplement to Table 13)

State Name	Number of Arrests for Murder and Non-negligent Manslaughter (1995 to 2006)											Average Annual Arrests
	1995	1996	1997	1999	2000	2001	2002	2003	2004	2005	2006	
Alabama	426	402	466	265	317	306	300	311	280	284	347	337
Alaska	26	28	20	36	21	26	27	22	31	28	36	27
Arizona	297	253	227	243	214	244	271	210	252	244	294	250
Arkansas	255	227	204	171	161	29	48	29	33	131	130	129
California	2,796	2,429	2,197	1,770	1,635	1,756	1,865	1,835	1,894	1,953	1,965	2,009
Colorado	148	113	108	99	110	133	120	94	145	95	112	116
Connecticut	170	115	143	90	69	119	52	57	88	104	93	100
Delaware	1	19	9	23	27	7	12	15	10	16	19	14
Florida	1,114	-	-	741	679	707	730	701	693	728	755	761
Georgia	433	246	298	122	358	240	493	417	248	229	252	303
Hawaii	76	51	42	44	40	28	26	26	40	29	28	39
Idaho	35	29	25	14	15	18	33	24	24	20	27	24
Illinois	-	767	754	637	531	558	520	472	433	44	320	504
Indiana	191	123	179	244	240	236	250	204	232	248	161	210
Iowa	36	27	25	24	39	25	47	31	40	17	26	31
Kansas	-	-	-	-	-	-	19	21	35	10	47	26
Kentucky	129	64	94	29	7	40	51	35	55	269	41	74
Louisiana	501	418	631	248	286	276	288	265	303	256	292	342
Maine	13	15	12	-	4	3	5	5	8	0	0	6
Maryland	691	625	498	73	377	315	85	324	295	333	317	358
Massachusetts	128	93	78	69	60	73	79	34	54	37	74	71
Michigan	1,410	1,220	1,242	1,275	138	109	607	468	364	229	209	661
Minnesota	219	145	74	142	149	71	73	71	38	89	90	106
Mississippi	114	84	171	135	147	101	135	131	156	140	155	134
Missouri	500	338	311	251	239	345	393	305	321	294	351	332
Montana	-	-	6	17	7	7	10	10	-	11	-	10
Nebraska	55	15	42	46	48	45	42	55	36	39	44	42
Nevada	161	174	68	123	111	139	85	5	143	205	159	125
New Hampshire	-	12	-	2	4	2	5	5	6	6	8	6
New Jersey	380	349	334	240	231	248	253	293	270	278	312	290
New Mexico	42	72	55	68	82	50	81	69	92	95	67	70
New York	1,345	1,136	252	165	221	172	208	226	263	350	298	421
North Carolina	733	697	762	669	621	957	622	591	536	666	629	680
North Dakota	9	6	2	5	1	3	6	3	7	4	4	5
Ohio	350	329	285	185	193	167	200	114	212	227	164	221
Oklahoma	236	216	213	-	182	158	173	159	173	167	154	183
Oregon	67	147	109	103	102	111	77	95	125	130	101	106
Pennsylvania	312	511	161	477	465	507	492	504	536	510	476	450
Rhode Island	23	13	22	30	17	25	27	14	19	9	13	19
South Carolina	324	324	326	55	72	86	171	8	39	287	282	179
South Dakota	7	9	8	8	10	6	6	8	6	5	1	7
Tennessee	216	206	274	326	159	191	284	302	290	338	326	265
Texas	1,413	1,157	1,006	773	774	792	801	811	834	906	777	913
Utah	37	66	38	26	31	41	48	48	45	45	28	41
Vermont	2	-	-	7	6	2	9	7	7	11	6	6
Virginia	396	417	424	228	238	225	222	190	280	312	228	287
Washington	159	157	130	120	138	117	102	96	123	152	148	131
West Virginia	87	55	50	41	19	16	25	20	25	54	18	37
Wisconsin	424	477	368	-	-	293	351	85	538	76	182	310
Wyoming	14	8	21	9	11	8	8	11	14	14	4	11

Source: FBI *Uniform Crime Reports*—"Crime in the United States", 1995 through 2006, see "Persons Arrested". Available at <http://www.fbi.gov/ucr/ucr.htm> (Retrieved on October 11, 2007).

Note: State-level data for arrests for murder and non-negligent Manslaughter before 1995 or for 1998 are not available via FBI web-site.

### **Sex Offender Registries (Variable 7)**

Among the crimes of high political visibility, the rape of a minor is perhaps the most striking, as even a single case of child molestation can trigger heated public and political debates and achieve remarkable changes in criminal justice policies. Among a few examples of such developments are Megan's Laws, the efforts to apply the death penalty for child rape (see discussion on the death penalty), and the proposals for the chemical castration of repeat sex offenders.<sup>25</sup> This study focused only on the first development, Megan's Law, because while the propositions of the death penalty for child rape and chemical castration are not widespread, Megan's Law has already had a broad punitive impact across the United States.

Megan's Law is the commonly used term for the sex offender registration law, mandating convicted sex-offenders to provide the police with their names, addresses, and photographs. Subsequently, such information is displayed on publicly accessible websites, local newspapers and pamphlets.<sup>26</sup> The law took its name from Megan Kanka, a seven-year-old victim of a brutal 1994 rape and murder. This tragic event immediately gave rise to a public outcry and became the basis for enacting "one of the toughest sex offender registration acts into law" (Hindman, 1997, p. 201). This New Jersey initiative was soon embraced by the rest of the states and the District of Columbia all of which have passed analogous sex offender registration laws and community notification statutes.

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<sup>25</sup> As of 2005, chemical castration has been allowed only by the laws of California and Florida (Flack, 2005, see p. 183). The provisions were passed in 1996 and 1997, respectively. The rationale of these provisions has been "to exert control over the mind of the offender by drastically reducing the brain's exposure to testosterone, a [male] hormone which is considered crucial to the 'regulation of sexuality, aggression, cognition, emotion and personality' in men and is 'the major activator element of sexual desire, fantasies and behavior' " (Stinneford, 2006, p. 567).

<sup>26</sup> States differ in terms of allowing the sex-offenders to mail this information or submit it in person. The frequency of re-registration depends on the perceived dangerousness of the registrants and typically ranges from every three month to a year. States are also divided on the length of time of registration, which can last as long as a decade or even a lifetime. For more on registration requirements see Carpenter, 2006, pp. 333-334.

The quick spread of the registration laws across the U.S. is not attributable to sheer emotionalism alone. Although popular justice motifs should not be overlooked, these laws have been designed to serve an important pragmatic goal of public safety with the major emphasis on the protection of children from sexual predators. This purpose, assuming that it was the primary force driving the registration laws, offers a good example of how a utilitarian rationale can contribute to harshening state penal policies. Today, probably no one would doubt that the registration laws are harsh; the public is divided on the question of whether these laws are unduly and impermissibly punitive. While the proponents of these statutes are willing to tolerate a number of false positive predictions for the sake of the common good, their opponents challenge these laws for being all-encompassing and labeling not only convicted sex offenders but their families as well. For example, when addressing the punitive nature of these laws, Catherine Carpenter (2006) writes that as the modern day scarlet letter, “these laws also serve to name, brand, and stigmatize those convicted of sexual offenses, a stigma that attaches and follows the offender for years...” (p. 298).

Despite the fact that all fifty states currently have sex offender registration laws that are quite similar,<sup>27</sup> jurisdictions still differ in terms of the number of sex offenders in the publically viewable official state registries. This study uses these numbers to operationalize the variable of *Sex offender registries*. This approach is justified on both theoretical and practical bases. In theory, having a publicly viewable profile provides a broad exposure of an individual, thus presumably resulting in severe embarrassment, stigma, and total loss of privacy. Practically speaking, it was unavoidable to use the data on the registrants whose profiles are

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<sup>27</sup> This view was expressed in *State v. Bollig*, 605 N.W.2d 199, 204 (Wis. 2000).

publicly viewable because these are the only forms of data of registered sex offenders available for all states.

Before assigning the criterion punitiveness scores per state, the numbers of registrants as of 2007 were adjusted for average annual number of arrests for all sex offenses, with the exception of prostitution. This is because the size of states' sex offender registries depends on a number of arrests for sex-related crimes. The arrest data were taken from the Uniform Crime Reports, and they cover the six years proceeding 2007 (see Table 18).

After computing the ratios between a number of registrants and a number of arrests for sex offenses (except prostitution), states were grouped into the quintiles with the higher values indicating an increase in state punitiveness (see Table 16).

## Variable 7: Use of Sex Offender Registries

Table 16: Punitiveness Scores Based on the Use of Sex Offender Registries

State Name	Sex Offenders <sup>a</sup>	Average Annual Arrests <sup>b</sup>	Ratio	Pun. Score	State Name	Sex Offenders <sup>a</sup>	Average Annual Arrests <sup>b</sup>	Ratio	Pun. Score
Alabama	6,362	46.1	138.0	3	Montana	4,009	45.0	89.1	2
Alaska	4,239	15.3	277.1	4	Nebraska	1,124	50.8	22.1	0
Arizona	3,003	125.4	23.9	0	Nevada	2,289	802.0	2.9	0
Arkansas	2,953	19.6	150.7	3	New Hampshire	1,470	16.7	88.0	2
California	61,646	1305.4	47.2	1	New Jersey	2,399	146.8	16.3	0
Colorado	5,768	84.8	68.0	2	New Mexico	1,960	10.7	183.2	4
Connecticut	4,638	35.3	131.4	3	New York	13,258	374.2	35.4	1
Delaware	2,034	112.6	18.1	0	North Carolina	13,232	112.3	117.8	2
Florida	45,510	321.8	141.4	3	North Dakota	311	6.5	47.8	1
Georgia	12,329	269.3	45.8	1	Ohio	16,286	74.6	218.3	4
Hawaii	1,723	25.4	67.8	1	Oklahoma	5,435	61.4	88.5	2
Idaho	3,012	27.2	110.7	2	Oregon	765	94.1	8.1	0
Illinois	22,211	78.7	282.2	4	Pennsylvania	9,404	220.9	42.6	1
Indiana	11,246	88.6	126.9	3	Rhode Island	150	8.6	17.4	0
Iowa	6,033	23.3	258.9	4	South Carolina	9,395	59.1	159.0	3
Kansas	4,602	174.9	26.3	0	South Dakota	2,398	2.2	1090.0	4
Kentucky	5,243	9.2	569.9	4	Tennessee	10,960	64.1	171.0	3
Louisiana	7,585	67.4	112.5	2	Texas	51,240	363.3	141.0	3
Maine	2,787	23.2	120.1	3	Utah	5,512	68.6	80.3	2
Maryland	4,755	110.8	42.9	1	Vermont	343	68.6	5.0	0
Massachusetts	1,636	46.1	35.5	1	Virginia	15,183	81.8	185.6	4
Michigan	20,127	100.3	200.7	4	Washington	4,562	118.9	38.4	1
Minnesota	130	790.6	0.2	0	West Virginia	2,595	11.1	233.8	4
Mississippi	4,564	36.0	126.8	3	Wisconsin	17,688	259.4	68.2	2
Missouri	6,946	248.4	28.0	1	Wyoming	1,169	13.1	89.2	2

<sup>a</sup> Number of offenders that are publicly viewable in the official state registries as of October 12, 2007. Available through Family Watchdog at <http://www.familywatchdog.us/OffenderCountByState.asp> (Retrieved on October 12, 2007) Additional source: *Sourcebook of Criminal Justice Statistics 2003*, Table 6.63. "Offenders in State sex offender registries by state, 1998 and 2001", p. 524. Also: BJS: *Summary of State Sex Offender Registries, 2001*. Appendix table 2: "Number of Offenders in State SOR's, 1998 and 2001", p. 5. (March 2002, NCJ 192265)

<sup>b</sup> Average annual number of arrests for sex offenses (except prostitution) was calculated using the data on persons arrested in 2001- 2006. See Table 18 for details.

Table 17: Distribution of Quintiles for Use of Sex Offender Registries

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by ratio)
1st	Minimum	0	Minnesota, Nevada, Vermont, Oregon, New Jersey, Rhode Island, Delaware, Nebraska, Arizona and Kansas
2nd	Low	1	Missouri, New York, Massachusetts, Washington, Pennsylvania, Maryland, Georgia, California, North Dakota and Hawaii
3rd	Moderate	2	Colorado, Wisconsin, Utah, New Hampshire, Oklahoma, Montana, Wyoming, Idaho, Louisiana and North Carolina
4th	High	3	Maine, Mississippi, Indiana, Connecticut, Alabama, Texas, Florida, Arkansas, South Carolina and Tennessee
5th	Extreme	4	New Mexico, Virginia, Michigan, Ohio, West Virginia, Iowa, Alaska, Illinois, Kentucky and South Dakota

Table 18: Average Annual Arrests for Sex Offenses, except Prostitution (Supplement to Table 16)

State Name	Number of Arrests for Forcible Rape and Other Sex Offenses (2001 - 2006)												Average Annual Arrests
	2001		2002		2003		2004		2005		2006		
	Rape	Other	Rape	Other	Rape	Other	Rape	Other	Rape	Other	Rape	Other	
Alabama	323	349	370	395	386	433	457	396	359	455	320	553	46.1
Alaska	82	209	78	193	103	239	82	208	67	213	60	183	15.3
Arizona	250	1,751	191	1,844	223	1,785	222	1,880	215	1,740	208	1,505	125.4
Arkansas	123	472	93	380	105	326	112	209	251	306	240	235	19.6
California	2,722	15,629	2,541	15,944	2,434	15,544	2,099	14,493	2,095	15,378	2,119	15,665	1305.4
Colorado	410	1,329	436	1,415	411	1,111	434	1,272	456	1,154	484	1,018	84.8
Connecticut	291	54	221	531	164	409	239	615	262	710	234	423	35.3
Delaware	(144)	-	117	32	117	76	101	54	140	180	132	177	112.6
Florida	2,353	4,158	2,218	4,070	2,251	4,137	2,157	4,015	2,058	3,979	1,960	3,861	321.8
Georgia	387	2,836	377	3,066	425	3,727	286	3,231	244	3,292	255	3,231	269.3
Hawaii	125	432	122	409	127	382	73	276	85	203	89	305	25.4
Idaho	107	359	107	382	110	360	106	335	68	207	127	326	27.2
Illinois	703	2,134	630	2,108	603	2,118	561	2,144	543	1,552	14	944	78.7
Indiana	215	1,232	222	1,299	209	1,317	219	1,479	256	1,548	153	1,063	88.6
Iowa	93	279	112	340	126	269	123	266	99	322	107	280	23.3
Kansas	-	-	98	228	86	176	149	306	82	164	175	285	174.9
Kentucky	69	219	99	267	86	261	143	306	299	2,684	64	110	9.2
Louisiana	426	1,178	512	1,342	444	1,283	453	1,245	274	852	306	809	67.4
Maine	118	319	126	252	94	250	104	298	106	263	81	278	23.2
Maryland	404	1,271	263	856	431	1,295	466	1,339	415	1,280	400	1,330	110.8
Massachusetts	487	559	384	531	291	420	214	376	253	369	303	553	46.1
Michigan	696	1,209	1,008	1,717	1,006	1,376	872	1,379	785	1,293	747	1,203	100.3
Minnesota	444	732	614	1,081	567	946	557	953	699	1,313	-	(1,375)	790.6
Mississippi	155	257	238	395	186	282	212	345	209	331	203	432	36.0
Missouri	533	2,690	582	2,923	596	3,226	532	2,825	397	2,530	737	2,981	248.4
Montana	21	55	33	56	26	62	-	-	33	74	-	-	45.0
Nebraska	145	639	149	588	140	583	196	608	155	585	145	609	50.8
Nevada	258	1,505	172	1,281	-	-	203	1,553	197	1,336	207	1,308	802.0
New Hampshire	54	113	64	137	41	131	72	159	56	209	67	200	16.7
New Jersey	570	1,802	640	1,887	519	1,844	483	1,838	485	1,886	428	1,761	146.8
New Mexico	74	64	130	70	85	96	137	144	114	113	99	128	10.7
New York	408	3,569	587	3,961	709	4,336	739	4,402	748	4,530	730	4,490	374.2
North Carolina	746	2,151	685	1,829	726	1,631	655	1,030	720	1,632	702	1,347	112.3
North Dakota	27	69	32	77	35	84	34	91	32	68	39	78	6.5
Ohio	647	1,616	687	1,411	451	1,223	669	1,339	623	1,123	476	895	74.6
Oklahoma	367	943	426	858	365	786	343	819	329	700	261	737	61.4
Oregon	292	1,391	220	1,114	261	1,224	294	1,216	291	1,278	263	1,129	94.1
Pennsylvania	1,317	3,105	1,362	3,219	1,244	3,069	1,267	3,130	1,199	2,881	1,072	2,651	220.9
Rhode Island	110	138	123	113	134	129	94	110	59	136	48	103	8.6
South Carolina	139	249	317	510	18	43	66	145	533	809	390	709	59.1
South Dakota	50	134	82	214	59	183	57	117	46	73	25	26	2.2
Tennessee	237	495	332	643	294	659	296	623	352	657	345	769	64.1
Texas	2,174	4,481	2,310	4,500	2,189	4,425	2,177	5,004	2,183	4,616	2,131	4,359	363.3
Utah	169	625	163	789	158	726	128	844	200	892	163	823	68.6
Vermont	43	16	62	27	48	28	75	51	58	62	65	823	68.6
Virginia	372	975	405	1,012	305	790	330	942	303	957	323	981	81.8
Washington	700	1,414	837	1,466	795	1,198	756	1,261	801	1,254	783	1,427	118.9
West Virginia	26	103	37	84	20	87	17	88	55	181	35	133	11.1
Wisconsin	282	988	708	3,919	491	2,782	607	2,865	467	2,524	732	3,113	259.4
Wyoming	41	153	58	138	28	112	29	126	35	152	25	157	13.1

Source: FBI *Uniform Crime Reports*—"Crime in the United States", 2001 through 2006, see "Persons Arrested". Available at <http://www.fbi.gov/ucr/ucr.htm> (Retrieved on October 13, 2007).

Note: Number in parenthesis was excluded from the calculation of average annual arrest.

### **Disenfranchisement Laws (Variables 8-9)**

The deprivation of political rights, such as voting rights,<sup>28</sup> is another strong indicator of state punitiveness. But disenfranchisement means much more than just taking one's voting rights away. Depending on the jurisdiction, certain laws may impose restrictions on ex-felons when they seek public or other governmental employment, a broad variety of other jobs and occupational licenses (e.g. accountant, architect, barber, insurance agent, dentist, engineer, nurse, psychologist and teacher). Furthermore, disenfranchisement may mean losing the right to make contracts, or to sue or be sued. But even more, conviction for certain offenses may lead to ineligibility for student loans, public housing, cash assistance or food stamps. In her opposition to these laws, Leena Kurki (2001) writes:

When offenders have served their criminal sentences, they have fulfilled their responsibilities toward society and should not face other formal sanctions. It is also unheard of that they would be denied social welfare, housing, educational benefits, or other public services that are regularly available to other citizens (p. 359).

Whether these rights are taken away through criminal or civil remedies, they are indicative of state punitiveness because, by disenfranchising a certain group of people, the government announces that it has no interest in treating its offenders and disregards the basic principle of law that criminal penalties should be the only consequence of a conviction. These policies appear especially severe in view of the absence of credible evidence that disenfranchisement laws further criminal justice (Crutchfield, 2007). Needless to say, a state with strict disenfranchisement laws should be considered more punitive than a jurisdiction that is more concerned with the rehabilitation of its offenders by encouraging them to exercise certain rights instead of taking these rights away from them. And it should not matter here whether convicts are eager to exercise their political rights or not. To show the signs of

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<sup>28</sup> The western world has been using this legal policy since ancient Greece and Rome (Crutchfield, 2007).

punitiveness, it is sufficient that a government deprives a part of the citizenry of the option of participating in democratic processes. As discussed earlier, this study measures state punitiveness from the perspective of a government, not from that of the recipients of penal harshness.

The present study examines two variables—*The application of disenfranchisement laws* and *The size of disenfranchised populations*—neither of which, unfortunately, makes use of the differences that exist among U.S. states vis-à-vis the various forms of disenfranchisement. Admittedly, an effective comparison of disenfranchisement practices must explore at least several rights that are temporarily or permanently taken away from felons. This, however, is not currently possible because of the unavailability of such data for most states. This reality leaves us with no option but to measure “disenfranchisement” very narrowly, limiting its scope to the state’s practice of depriving certain felons (those who currently serve sentences) and ex-felons (those who have completed serving all forms of formal sentences) of their voting rights. Despite such limited operationalization, “[t]his usage is predominant in the contemporary scholarly and journalistic literature” (Manza & Uggen, 2006, p. vii).

An operational definition of “disenfranchisement” follows the logic used with the death penalty variables, thus permitting the differentiation among the states on the bases of (a) the application of disenfranchisement laws, and (b) the size of disenfranchised populations. This brings us to the following two variables.

The data for the first variable—*The application of disenfranchisement laws*—came from the Sentencing Project.<sup>29</sup> This variable distinguishes among the states in which: (a) all

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<sup>29</sup> The Sentencing Project is a research and advocacy group founded in 1986. The organization provides a wide variety of data available at <http://www.sentencingproject.org/Default.aspx>.

convicts are allowed to vote; (b) prisoners<sup>30</sup> are barred from voting, while both probationers and parolees maintain their voting rights; (c) neither prisoners nor probationers and/or parolees are permitted to vote; (d) felons lose their voting rights up to five years following release from all forms of custody; and (e) voting rights are taken away permanently. This five-fold classification determines the punitiveness scores of states on the basis of the harshness of their disenfranchisement laws. Obviously, the states in the latter categories have been assigned higher punitiveness scores than the states in which conviction is not used as a mechanism of disenfranchisement (see Table 20).

The second variable—*The size of disenfranchised populations*—will utilize the data collected for Jeff Manza and Christopher Uggen’s (2006) study, which offers the most in-depth analysis of felony disenfranchisement laws in the U.S. These researchers estimated the numbers based on exiting cohort from correctional supervision after controlling for reincarceration and mortality rates as well as the practices of the restoration of the rights for and disenfranchisement of certain ex-offenders (see pp. 75-76).<sup>31</sup> The disenfranchised population includes prisoners, parolees, felons placed on probation, jail inmates, and estimated ex-felons as of 2004. Although Manza and Uggen adjusted for states’ populations that reached voting age (as they tried to show what proportion of a voting population is banned from voting), the present study controls for the number of state prisoners in the same year using the data from the Bureau of Justice Statistics. For the purposes of assessing state punitiveness, the numbers

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<sup>30</sup> The term “prisoners” should be understood broadly as, in 2005, Colorado, Illinois, Michigan, South Carolina and Maryland disenfranchised even misdemeanants. Also, it is not clear whether this group is denied their voting rights in Indiana, Kentucky and Mississippi due to the conflict between the statutes and the opinions of state legal officials. This means that at least five states bar not only prisoners but also jail inmates from voting. For more on the disenfranchisement of misdemeanants, see the report prepared for the Sentencing Project by Alec Ewald (2005, p. 6).

<sup>31</sup> The authors write for example that since 1960s, voting rights have been restored to over 160,000 disenfranchised felons in Florida. Besides the state does not impose felony adjudication for certain probationers who successfully completed their sentences (Manza & Uggen, 2006, see p. 76).

of disenfranchised populations were adjusted for the prison populations because felon disenfranchisement policy is not a government's reaction to a state population but to the crime for which an offender has been arrested and convicted. States with higher numerators and lower denominators are judged as more punitive than those with the reversed values (see Tables 21 & 22).

## Variable 8: The Application of Disenfranchisement Laws

Table 19: Punitiveness Scores Based on the Application of Disenfranchisement Laws

State Name	Pun. Score	State Name	Pun. Score	State Name	Pun. Score
Alabama	4	Louisiana	2	Ohio	1
Alaska	2	Maine	0	Oklahoma	2
Arizona	4	Maryland	2	Oregon	1
Arkansas	2	Massachusetts	1	Pennsylvania	1
California	2	Michigan	1	Rhode Island	1
Colorado	2	Minnesota	2	South Carolina	2
Connecticut	2	Mississippi	4	South Dakota	1
Delaware	3	Missouri	2	Tennessee	4
Florida	4	Montana	1	Texas	2
Georgia	2	Nebraska	3	Utah	1
Hawaii	1	Nevada	4	Vermont	0
Idaho	2	New Hampshire	1	Virginia	2
Illinois	1	New Jersey	2	Washington	2
Indiana	1	New Mexico	2	West Virginia	2
Iowa	2	New York	2	Wisconsin	2
Kansas	2	North Carolina	2	Wyoming	3
Kentucky	2	North Dakota	1		

Source: The Sentencing Project, (2007). *Felony Disenfranchisement Laws in the United States*.

[http://www.sentencingproject.org/Admin/Documents/publications/fd\\_bs\\_fdlawsinus.pdf](http://www.sentencingproject.org/Admin/Documents/publications/fd_bs_fdlawsinus.pdf) (Retrieved on August 2, 2007)

Table 20: Distribution of Punitiveness Scores for the Application of Disenfranchisement Laws

Description	Levels of Punitiveness	Pun. Score	<i>f</i>	State Name
Convicts are allowed to vote	Minimum	0	2	Maine and Vermont
No voting rights for prisoners while both probationers and parolees can vote	Low	1	14	Hawaii, Illinois, Indiana, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota and Utah
No voting rights for prisoners, plus probationers and/or parolees	Moderate	2	25	Alaska, Arkansas, California, Colorado, Connecticut, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Missouri, New Jersey, New Mexico, New York, North Carolina, Oklahoma, South Carolina, Texas, Virginia, Washington, West Virginia and Wisconsin
No voting rights up to five years following release from all forms of custody	High	3	3	Delaware, Nebraska and Wyoming
No voting rights for lifetime	Extreme	4	6	Alabama, Arizona, Florida, Mississippi, Nevada and Tennessee

## Variable 9: The Size of Disenfranchised Populations

Table 21: Punitiveness Scores Based on the Size of Disenfranchised Populations

State Name	Prisoners	Parolees	Felony Probation	Jail Inmates	Estimated Ex-felons	Total <sup>a</sup>	State Prisoners <sup>b</sup>	Ratio <sup>c</sup>	Pun. Score
Alabama	30,628	9,098	30,387	1,418	178,516	250,046	26,521	9.43	4
Alaska	4,658	927	5,083	463	-	11,132	4,515	2.47	2
Arizona	33,103	9,291	55,259	1,315	77,136	176,103	31,631	5.57	3
Arkansas	13,699	15,461	28,532	-	-	57,691	13,477	4.28	3
California	167,612	107,580	-	7,932	-	283,124	166,053	1.71	1
Colorado	20,537	6,920	-	1,180	-	28,636	19,756	1.45	1
Connecticut	19,012	3,090	-	752	-	22,854	20,018	1.14	1
Delaware	6,808	508	10,818	516	28,028	46,677	6,973	6.69	4
Florida	84,210	4,694	127,794	5,565	957,423	1,179,687	84,733	13.92	4
Georgia	46,972	23,530	209,442	3,664	-	283,607	48,625	5.83	3
Hawaii	6,265	-	-	264	-	6,530	5,946	1.10	1
Idaho	6,034	2,767	8,265	350	-	17,416	6,312	2.76	2
Illinois	44,156	-	-	1,669	-	45,825	44,379	1.03	0
Indiana	24,615	-	-	1,630	-	26,245	23,760	1.10	1
Iowa	8,700	3,446	10,632	330	98,311	121,418	8,611	14.10	4
Kansas	9,333	4,146	13,907	477	-	27,863	9,152	3.04	2
Kentucky	17,470	9,609	29,311	1,183	128,775	186,348	17,763	10.49	4
Louisiana	36,047	25,065	34,366	2,712	-	98,190	36,745	2.67	2
Maine	-	-	-	-	-	0.00	2,014	0.00	0
Maryland	23,434	14,223	20,482	1,111	52,272	111,521	23,727	4.70	3
Massachusetts	10,140	-	-	-	-	10,140	10,365	0.98	0
Michigan	48,173	-	-	1,615	-	49,788	48,591	1.02	0
Minnesota	8,675	3,614	25,768	727	-	38,784	8,613	4.50	3
Mississippi	23,669	1,816	21,967	1,153	97,550	146,155	20,429	7.15	4
Missouri	30,515	17,123	45,305	810	-	93,752	30,775	3.05	2
Montana	3,942	-	-	203	-	4,145	3,800	1.09	1
Nebraska	4,024	736	5,385	239	51,612	61,996	4,042	15.34	4
Nevada	10,606	4,287	6,987	547	21,166	43,594	10,971	3.97	3
New Hampshire	2,417	-	-	170	-	2,587	2,441	1.06	0
New Jersey	26,619	13,950	85,186	1,423	-	127,178	28,107	4.52	3
New Mexico	6,466	2,953	8,002	658	-	18,080	6,341	2.85	2
New York	63,372	55,741	-	2,904	-	122,018	64,596	1.89	1
North Carolina	34,298	216	37,136	1,463	-	73,113	34,917	2.09	2
North Dakota	1,380	-	-	86	-	1,466	1,266	1.16	1
Ohio	43,927	-	-	1,560	-	45,487	44,770	1.02	0
Oklahoma	22,844	4,047	21,962	688	-	49,541	24,767	2.00	1
Oregon	13,376	-	-	852	-	14,228	13,219	1.08	1
Pennsylvania	41,626	-	-	-	-	41,626	40,890	1.02	0
Rhode Island	3,534	400	16,622	237	-	20,793	3,701	5.62	3
South Carolina	23,719	2,953	20,904	946	-	48,523	24,173	2.01	2
South Dakota	3,138	-	-	133	-	3,271	3,101	1.05	0
Tennessee	25,835	7,983	32,288	2,254	25,899	94,258	25,834	3.65	3
Texas	171,918	101,453	243,413	6,103	-	522,887	169,110	3.09	3
Utah	5,970	-	-	-	-	5,970	5,802	1.03	0
Vermont	-	-	-	-	-	0.00	2,033	0.00	0
Virginia	35,172	5,158	37,463	2,153	297,901	377,847	35,472	10.65	4
Washington	16,229	116	120,014	1,173	29,785	167,316	16,559	10.10	4
West Virginia	4,982	1,308	4,159	352	-	10,800	4,980	2.17	2
Wisconsin	23,134	12,911	24,873	1,423	-	62,342	22,905	2.72	2
Wyoming	2,018	586	3,171	118	14,304	20,198	1,923	10.50	4

<sup>a</sup> The total number of estimated disenfranchised population and its subgroups were taken from Manza & Uggen (2006). Table A 3.3, "Estimates of disenfranchised felons by state on December 31, 2004", pp. 248-250.

<sup>b</sup> Total number of state prisoner in June, 2004. Source: Harrison & Beck (2004), see table 2: "Prisoners under the jurisdictions of State and Federal correctional authorities", p. 3.

<sup>c</sup> Ratio between the total number of estimated disenfranchised population in 2004 and the total number of state prisoners in 2004.

Table 22: Distribution of Quintiles for the Size of Disenfranchised Populations

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by ratio)
1st	Minimum	0	Maine, Vermont, Massachusetts, Michigan, Ohio, Pennsylvania, Illinois, Utah, South Dakota and New Hampshire
2nd	Low	1	Oregon, Montana, Hawaii, Indiana, Connecticut, North Dakota, Colorado, California, New York and Oklahoma
3rd	Moderate	2	South Carolina, North Carolina, West Virginia, Alaska, Louisiana, Wisconsin, Idaho, New Mexico, Kansas and Missouri
4th	High	3	Texas, Tennessee, Nevada, Arkansas, Minnesota, New Jersey, Maryland, Arizona, Rhode Island and Georgia
5th	Extreme	4	Delaware, Mississippi, Alabama, Washington, Kentucky, Wyoming, Virginia, Florida, Iowa and Nebraska

### Three-Strikes Laws<sup>32</sup> (Variables 10-11)

When comparing German and French punishments with their American counterparts, a prominent legal scholar and historian, James Whitman (2003), asserted that the proportionality principle is “generally absent from American sentencing practices, and long has been” (p. 57). The plethora of mandatory sentencing laws of the U.S. in general and the popularity of three-strikes laws in particular serve as the main grounds for this powerful assertion. Whitman’s argument is well supported by the rich literature on mandatory sentencing that consistently signals the disproportional nature of three-strikes laws. For example, Zimring, Hawkins and Kamin (2001) call third-strike penalties imposed in California not only non-proportional but “indeed antiproportional ... because the seriousness of the particular crime has no bearing on the severity of the sentence”<sup>33</sup> (p. 121). Proportionality, however, is a matter of opinion, and not all opinions sway penal policies. In view of public support for three-strikes laws<sup>34</sup> and the Supreme Court’s ruling about the constitutionality of such laws<sup>35</sup>, legal and social scholarship that criticizes these policies does not have a great chance of being heard.<sup>36</sup> The strikes legislations remain popular despite their limited deterrent effect. For example, using a multiple time series design and UCR data from 188 cities with population of over 100, 000, Kovandzic, Sloan and Vieraitis (2004) found that cities in three strikes states witnessed no significant

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<sup>32</sup> “Three strikes” here should not be understood literally because, as we will soon see, a number of states require significant sentence enhancement after second, third and fourth strikes.

<sup>33</sup> The researchers found that the Three-Strikes law permits punishing a rapist with two prior strikes four times more harshly in comparison with a first-time rapist, while a conviction for second-degree burglary escalates penalty twenty-five times. Furthermore, less serious crimes generate even more dramatic increase in punishment. See pp. 117-121.

<sup>34</sup> In Washington and California whose voters passed the law by wide margins (Austin, Clark, Hardyman, & Henry, 1999).

<sup>35</sup> See *Ewing v. California*, 538 U.S. 11 (2003) and *Lockyer v. Andrade*, 538 U.S. 63 (2003).

<sup>36</sup> Samuel Walker (2001) writes that three-strikes law has been consistently condemned by criminologists and other sentencing experts (p. 140). Walker, Samuel (2001), *Sense and nonsense about crime and drugs: A policy guide*. Belmont, CA: Wadsworth. Fifth Edition.

reduction in crime rate. This finding is consistent with previous research (Zimring, Hawkins, & Kamin, 2001; Marvel & Moody, 2001).

Punishing repeat and violent offenders more severely than first time and non-violent ones is neither new nor an American invention. Violent recidivists have been systematically locked up for decades and occasionally executed worldwide. Therefore, it is no surprise that various provisions enhancing the penalties for such criminals were in place across the United States, including those 24 states that in the mid-nineties adopted three-strikes laws. This might explain why many scholars view these laws as merely symbolic, causing “much ado about nothing and ... having virtually no impact on current sentencing policies” (Austin, Clark, Hardyman, & Henry, 1999, p. 142).

While this might be the case in some states, the reality is much more complicated. No doubt three-strikes laws exemplify the full extent to which a penal policy can be both political and symbolic; this is precisely the reason for placing this discussion in the section on *Political and Symbolic Punishment*. At the same time, it would be a mistake to disregard the practical impact that these laws have had on the growing prison populations in at least some of the jurisdictions that enacted the law. For example, Ehlers, Schiraldi and Ziedenberg (2004) found that “an increasingly larger percentage of California’s prison population is now made up of offenders sentenced under the Three-Strikes law. At the end of 1994, 3.5% of California’s prison population was made up of second and third strikers. By June 2003, more than one out of every four California prisoners (27.7%) were second or third strikers” (p.6). Although the California experience cannot be generalized across other strikes states, it is equally true that statements about the mere symbolism of three-strikes laws in fact undermine the impact of such laws. This view is consistent with the dominant perception of excessive harshness of these

laws that Samuel Walker (2001) calls “a crude, meat-ax policy that sweeps up many non-dangerous criminals” (p. 142). Moreover, Austin and Irwin (2001) themselves reported that, although all of the 24 three-strikes states had already had provisions enhancing penalties for repeat felons, either the definition of such an offender was expanded (Louisiana, Maryland, North Dakota, South Carolina, Tennessee and Vermont), parole eligibility was annulled (Virginia), or both (California).<sup>37</sup>

A national interest in strikes laws was awakened in 1993, when the state of Washington passed the first “Three strikes and you’re out” statute, borrowing its name from baseball jargon (Zimring et al., 2001). The initiative was hurriedly embraced by Californians who passed similar legislation a year later and by 22 other states<sup>38</sup> that adopted their own versions of strikes statutes by 1996 (Kovandzic, Sloan, & Vieraitis, 2004). Despite being referred to as strikes laws, states’ strikes legislations are quite different (Walker, 2001). The statutes vary in (a) what constitutes a strikeable offense, (b) how many strikes are needed to “be out”, and (c) the lengths of imprisonment imposed (Clark, Austin, & Henry, 1997; Austin & Irwin, 2001).

One of the latest nationwide analyses of three-strikes laws was conducted by James Austin and John Irwin (2001), who found that in addition to violent crimes (murder, rape, robbery, and assault), a number of states extended their statutory horizons to include in their list of “strikeable” felonies non-violent offenses as well (drug-related crimes in Indiana, Louisiana, California; escape in Florida; burglary and weapon possession in California; embezzlement and bribery in South Carolina; and treason in Washington). The number of

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<sup>37</sup> In addition to a brief discussion, the authors provide the table that compares the new strikes statutes with preexisting sentencing provisions (see pp. 191-195).

<sup>38</sup> Arkansas in 1995, Colorado in 1994, Connecticut in 1994, Florida in 1995, Georgia in 1994, Indiana in 1994, Kansas in 1994, Louisiana in 1994, Maryland in 1994, Montana in 1995, Nevada in 1995, New Jersey in 1995, New Mexico in 1994, North Carolina in 1994, North Dakota in 1995, Pennsylvania in 1995, South Carolina in 1995, Tennessee in 1994, Utah in 1995, Vermont in 1995, Virginia in 1994, and Wisconsin in 1994.

strikes needed to “be out” is not constant either. Nine states<sup>39</sup> (Arkansas, California, Georgia, Kansas, Montana, North Dakota, Pennsylvania, South Carolina, and Tennessee) increase sentences for the second strike and require either double prison sentences (California and Kansas), sentence enhancement up to 10 years (Pennsylvania) and 40 years (Arkansas), or mandatory life imprisonment with no parole eligibility (Georgia, Montana and South Carolina). Moreover, four states do not have third-strike provision and limit their strikes legislations to only the second strike (North Dakota and South Carolina), only the fourth strike (Maryland), or both (Georgia). Finally, states are not in agreement in their definitions of “being out”. Twelve states<sup>40</sup> (Georgia, Indiana, Louisiana, Maryland, Montana, New Jersey, North Carolina, South Carolina, Tennessee, Virginia, Washington and Wisconsin) require life-without-possibility-of-parole sentences and three states (California, New Mexico and Colorado) permit the possibility of parole after decades of incarceration (25 years, 30 years, and 40 years, respectively). Furthermore, four states (Arkansas, Connecticut, Kansas and Nevada) leave sentence enhancements to the discretion of a judge, and five states (Florida<sup>41</sup>, North Dakota,

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<sup>39</sup> Unfortunately, the main text (p. 186) and its endnote (p. 215) do not correspond with the table (pp. 187-190) as the latter includes North Dakota in the list of states that adopted two-strikes provisions thus revealing the existence of nine rather than eight states with such laws. The present analysis will be using the table as a primary source of data because it is consistent with the table used in the Clark, Austin & Henry’s 1997 report prepared for the National Institute of Justice. See Exhibit 9. “Variation in state strikes laws”, pp. 7-9.

<sup>40</sup> The authors are inconsistent when listing the states in which strikes laws result in mandatory life imprisonment. In the main text (p.191), they identify only eleven such states that excludes Maryland. In the endnote 12 (p. 215), however, they list twelve states that require mandatory life imprisonment without the possibility of parole that includes the state. This technical mistake resulted in misleading citations by other authors (see e.g., Kovandzic, Sloan and Vieraitis, 2004, pp. 209-210). To omit this problem, the present study relies only on information provided in table 9-1 (pp. 187-190) that, consistent with the footnote, shows that Maryland in fact requires mandatory life in prison without parole eligibility for the fourth strike. Thus, the correct number is twelve and not eleven.

<sup>41</sup> According to Florida’s “Three-Strike Violent Felony Offender Act” (Amendments in force since July 1, 1999), any defendant who commits treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; arson; kidnapping; aggravated assault with a deadly weapon; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a distractive device or bomb; armed robbery; burglary of an occupied structure or dwelling; or any felony violations of s. 790.07, s. 800.04, s. 827.03, or s. 827.071 within three years of being released from a state correctional facility ... must be sentenced as follows: (a) for a felony punishable by life, by a term of imprisonment for life; (b) for a felony of the first degree, by a term of imprisonment of 30 years; (c) for a felony of the second degree, by a term of imprisonment of 15 years; and (d)

Pennsylvania, Utah and Vermont) provide for a range of sentences for violent recidivists that includes life imprisonment.

These significant variations have been used to construct the first of the two strikes' variables. I gave it the broad title *–Three-strikes laws' application and sentence –* to justify its much-inclusive nature. The variable synthesizes three elements: (a) a list of “strikeable” offenses; (b) the number of strikes needed to trigger strikes laws; and (c) the extent to which the enhancement of penalties is authorized by these laws. These are the same elements discussed by Clark et al. (1997) as well as Austin and Irwin (2001), who simply chose different parlance—(a) strike zone defined; (b) strikes needed to be “out”; and (c) meaning of “out” (see Table 27)—when examining state-by-state variations in strikes laws. Their data and findings have been used as the source for this variable.<sup>42</sup>

First, the three-strikes states have been compared on the basis of targeted offenses/offenders. The strikes jurisdictions have been separated into two groups – one, consisting of the states that authorize a sentence enhancement exclusively for strikes involving violent felonies and sex offenses against children, and another, including those states that apply strikes laws not only to violent offenses but to non-violent felonies as well (see Table 27, See column: “Strikes Zone Defined”). Because three-strikes laws targeting only repeat violent offenders are less punitive than those casting a much wider net (often including drug-related crimes or even any felony), the latter states have been assigned a higher point (element score = 2) than the former states (element score = 1). Finally, states that have not adopted strikes

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for a felony of the third degree, by a term of imprisonment of 5 years (see Subsect. 9 of Sec. 775.082 of the Act). The act is available at [http://election.dos.state.fl.us/pdf/99laws/ch\\_99-188.pdf](http://election.dos.state.fl.us/pdf/99laws/ch_99-188.pdf) (Retrieved on November 6, 2007).

<sup>42</sup> Despite the fact that Clark et al.'s (1997) and Austin and Irwin's (2001) data were collected before 2001, they represent the newest and most in-depth published study of three-strikes laws that are still widely cited in the literature. Because sentencing policies, including strikes legislations, must have changed for last six years, the fresher data collection and the state-by-state analysis of these laws seem timely. Unfortunately, however, this was not possible for this study since a nation-wide data collection requires significant resources unavailable at the time of the research.

legislations at all have been grouped in the least punitive category (element score = 0). Table 23 lists these three groups with appropriate descriptions, element scores (ranging from 0 to 1), and the frequency and names of states that fall into each of the three categories.

Second, the provisions authorizing mandatory sentence enhancement for different numbers of strikes were compared (see Table 24), and states that authorize the application of the mandatory sentences for the second strike have been characterized as more punitive (element score = 2) than those mandating longer prison terms for only third, third and fourth, or fourth strikes. As with the previous element, non-strikes states have been grouped in the least punitive category (element score = 1).

Third, the type of life sentence required by states' strikes laws allowed distinguishing between those jurisdictions that permit and those that do not permit parole. The possibility of parole may be purely symbolic in some states that require serving decades-long prison sentences before one becomes eligible for an early release (e.g., Arkansas and Colorado). Even in these instances, however, states allowing parole are less punitive because they reward felons with a chance, no matter how slight, of not dying behind bars. But what makes the states authorizing life-without-possibility-of-parole more punitive for the purposes of this study is not the perceptions of a felon, but the intention of the government to keep certain criminals incarcerated for life. Following this logic, the states that permit parole have been identified as less punitive (element score = 1) than those that mandate life in prison without parole (element score = 2). Table 25 provides the lists of states that fall in these two categories, plus states without strikes statutes (element score = 0).

These three elements of strikes statutes have been combined by adding the element scores and then subtracting two points from the sum. This method produced punitiveness

scores ranging from 0 to 4, thus generating the composite scale that is compatible with the rest of the variables due to its five-pronged nature, with every additional point indicating an increase in state punitiveness.

The second variable—*The number of strikes prisoners*—compares the states across the actual number of prisoners who were incarcerated under these laws in 2004 (the latest year for which state-by-state data have been collected). These numbers were adjusted for the total number of state prisoners for the same year. States without strikes prisoners were given zero punitiveness score denoting the absence of punitiveness. States with high strikes imprisonment rate (per 1,000 prisoners) were identified as more punitive than states with lower comparable rates (see Table 28).

### Variable 10: Three-Strikes Laws' Application and Sentence

Table 23: Element 1 - Strike Zone

Description	Elem. Score	$f$	State Name
No strikes laws adopted	0	26	Majority of states
Violent felonies only including sex offenses against minors	1	15	Arkansas, Colorado, Connecticut, Maryland, Montana, Nevada, New Jersey, New Mexico, North Carolina, Pennsylvania, Tennessee, Vermont, Virginia, Washington and Wisconsin
Violent plus non-violent felonies	2	9	California, Florida, Georgia, Indiana, Kansas, Louisiana, North Dakota, South Carolina and Utah

Table 24: Element 2 - Number of Strikes Needed

Description	Elem. Score	$f$	State Name
No strikes laws adopted	0	26	Majority of states
Three and/or four strikes without two-strikes	1	15	Colorado, Connecticut, Florida, Indiana, Louisiana, Maryland, Nevada, New Jersey, New Mexico, North Carolina, Utah, Vermont, Virginia, Washington and Wisconsin
Second-strike sentence enhancements	2	9	Arkansas, California, Georgia, Kansas, Montana, North Dakota, Pennsylvania, South Carolina, and Tennessee

Table 25: Element 3 - Life Sentences Requirement

Description	Elem. Score	<i>f</i>	State Name
No strikes laws adopted	0	26	Majority of states
Sentence enhancement up to life with parole eligibility	1	11	Arkansas, California, Colorado, Connecticut, Florida, Kansas, New Mexico, North Dakota, Pennsylvania, Utah and Vermont
Mandatory life imprisonment without parole eligibility	2	13	Georgia, Indiana, Louisiana, Maryland, Montana, Nevada, New Jersey, North Carolina, South Carolina, Tennessee, Virginia, Washington and Wisconsin

Table 26: Combined Punitiveness Score for Three-Strikes Laws' Application and Sentence

State Name	Element Scores			Total	Pun. Score <sup>a</sup>	State Name	Element Scores			Total	Pun. Score <sup>a</sup>
	<i>1</i>	<i>2</i>	<i>3</i>				<i>1</i>	<i>2</i>	<i>3</i>		
Arkansas	1	2	1	4	2	New Jersey	1	1	2	4	2
California	2	2	1	5	3	New Mexico	1	1	1	3	1
Colorado	1	1	1	3	1	North Carolina	1	1	2	4	2
Connecticut	1	1	1	3	1	North Dakota	2	2	1	5	3
Florida	2	1	1	4	2	Pennsylvania	1	2	1	4	2
Georgia	2	2	2	6	4	South Carolina	2	2	2	6	4
Indiana	2	1	2	5	3	Tennessee	1	2	2	5	3
Kansas	2	2	1	5	3	Utah	2	1	1	4	2
Louisiana	2	1	2	5	3	Vermont	1	1	1	3	1
Maryland	1	1	2	4	2	Virginia	1	1	2	4	2
Montana	1	2	2	5	3	Washington	1	1	2	4	2
Nevada	1	1	2	4	2	Wisconsin	1	1	2	4	2

<sup>a</sup> Punitiveness score was calculated by adding the three elements' scores and then subtracting two points from the sum.

Table 27: Variations in Three-Strikes Laws

State Name	Strike Zone Defined	Strikes Needed To Be "Out"	Meaning Of "Out"
Arkansas	Murder, kidnapping, robbery, rape, terrorist act	Two	Minimum of 40 years in prison with no parole eligibility
	First-degree battery, firing gun from vehicle, use of prohibited weapon, conspiracy to commit murder, kidnapping, robbery, rape, first degree battery, first degree sexual abuse	Three	Range of no parole sentences, depending on the offense
California	Any felony if one prior felony conviction from list of strikeable offenses that include murder, rape, robbery, attempted murder, any felony resulting in bodily harm, drug sales to minors, any felony with deadly weapon, others.	Two	Mandatory sentence of twice the term for the offense involved
	Any felony of two prior felony convictions from the same list of strikeable offenses	Three	Mandatory indeterminate life sentence, with no parole for 25 years
Colorado	Any Class 1 or 2 felony or any Class 3 felony that is violent	Three	Mandatory life in prison with no parole eligibility for 40 years
Connecticut	Murder, attempted murder, assault with intent to kill, manslaughter, arson, kidnapping, aggravated sexual assault, robbery, first-degree assault	Three	Up to life in prison
Florida	Treason, murder, manslaughter, sexual battery, carjacking, home-invasion robbery, robbery, arson, kidnapping, aggr. assault with a deadly weapon, aggr. battery; aggr. stalking, aircraft piracy, armed robbery, others	Three	For a felony punishable by life - life in prison; for a first-degree felony - 30 years; for a second-degree felony - 15 years; and for a third-degree felony - 5 years
Georgia	Murder, armed robbery, kidnapping, rape, aggravated child molestation, aggravated sodomy, aggravated sexual battery	Two	Mandatory life with no parole eligibility
	Any felony	Four	Mandatory maximum sentence for the charge
Indiana	Murder, rape, sexual battery with weapon, child molestation, arson, robbery, burglary with weapon or resulting in serious injury, drug dealing	Three	Mandatory life without the possibility of parole
Kansas	Any felony against a person	Two	Court may double term specified in sentencing guidelines
		Three	Court may triple term specified in sentencing guidelines
Louisiana	Murder, attempted murder, manslaughter, rape, armed robbery, kidnapping, any drug offense punishable by more than 5 years, any felony punishable by more than 12 years	Three	Mandatory life in prison with no parole eligibility
	Any four felony convictions if at least one was on the list above	Four	Mandatory life in prison with no parole eligibility
Maryland	Murder, rape, robbery, first- or second-degree sexual offense, arson, burglary, kidnapping, carjacking, manslaughter, use of firearms in felony, assault with intent to murder, rape, rob, or commit sexual offense	Four, with separate prison terms for first three strikes	Mandatory life in prison with no parole eligibility
Montana	Deliberate homicide, aggravated kidnapping, sexual intercourse with consent, ritual abuse of a minor	Two	Mandatory life in prison with no parole eligibility
Nevada	Mitigated deliberate homicide, aggravated assault, kidnapping, robbery	Three	Mandatory life in prison with no parole eligibility
	Murder, robbery, kidnapping, battery, abuse of child, arson, home invasion	Three	Life without parole, life with parole possible after 10 years, or 15 years with parole possible after 10 years
New Jersey	Murder, robbery, carjacking	Three	Mandatory life in prison with no parole eligibility

*Cont.*

State Name	Strike Zone Defined	Strikes Needed To Be "Out"	Meaning Of "Out"
New Mexico	Murder, shooting at or from vehicle and causing harm, kidnapping, criminal sexual penetration, armed robbery resulting in harm	Three	Mandatory life in prison with parole eligibility after 30 years
North Carolina	47 violent felonies; separate indictment is required with finding that offender is "violent habitual offender"	Three	Mandatory life in prison with no parole eligibility
North Dakota	Any Class A, B, or C felony	Two	If second strike is for Class A felony, court may impose extended sentence of up to life, if Class B felony, up to 20 years, if Class C felony, up to 10 years
Pennsylvania	Murder, voluntary manslaughter, rape, involuntary deviate sexual intercourse, arson, kidnapping, robbery, aggravated assault	Two	Enhancing sentence up to 10 years
	Same offenses	Three	Enhancing sentence of up to 25 years
South Carolina	Murder, voluntary manslaughter, homicide by child abuse, rape, kidnapping, armed robbery, drug trafficking, embezzlement, bribery, certain accessory and attempt offenses	Two	Mandatory life in prison with no parole eligibility
Tennessee	Murder, especially aggravated kidnapping, especially aggravated robbery, aggravated rape, rape of a child, aggravated arson	Two, if prison term is served for first strike	Mandatory life in prison with no parole eligibility
	Same as above, plus rape, aggravated sexual battery, aggravated robbery, especially aggravated burglary, especially aggravated child abuse, aggravated sexual exploitation of child	Three, if separate prison terms served for first two strikes	Mandatory life in prison with no parole eligibility
Utah	Any first- or second-degree felony	Three	Court may sentence from 5 up to life
Vermont	Murder, manslaughter, arson, causing death, assault and robbery with weapon or causing bodily injury, aggravated assault, kidnapping, maiming, aggravated sexual assault, aggravated domestic assault, lewd conduct with child	Three	Court may sentence up to life in prison
Virginia	Murder, kidnapping, robbery, carjacking, sexual assault, conspiracy to commit any of above	Three	Mandatory life in prison with no parole eligibility
Washington	Murder, assault, child molestation, kidnapping, rape, robbery.	Three	Mandatory life in prison with no parole eligibility
Wisconsin	Murder, manslaughter, vehicular homicide, aggravated battery, abuse of child, robbery, sexual assault, taking hostages, kidnapping, arson, burglary	Three	Mandatory life in prison with no parole eligibility

Source: Austin and Irwin (2001). See Table 9-1. "Variations in state strike laws", pp. 187-190. Earlier version of the table can be found in Clark, Austin & Henry's (1997) report for the National Institute of Justice. See Exhibit 9. "Variation in state strikes laws", pp. 7-9. Note: Changes have been made to sentences for Florida following "Three-Strike Violent Felony Offender Act" as amended in 1999.

## Variable 11: Number of Strikes Prisoners

Table 28: Punitiveness Scores Based on the Number of Strikes Prisoners

State Name	3-Strike Prisoners <sup>a</sup>	State Prisoners <sup>b</sup>	Rate <sup>c</sup>	Pun. Score	State Name	3-Strike Prisoners <sup>a</sup>	State Prisoners <sup>b</sup>	Rate <sup>c</sup>	Pun. Score
Alabama	0	26,521	0.00	0	Montana	0	3,800	0.00	0
Alaska	0	4,515	0.00	0	Nebraska	0	4,042	0.00	0
Arizona	0	31,631	0.00	0	Nevada	304	10,971	27.71	4
Arkansas	5	13,477	0.37	3	New Hampshire	0	2,441	0.00	0
California	42,322	166,053	254.87	4	New Jersey	10	28,107	0.36	3
Colorado	4	19,756	0.20	3	New Mexico	0	6,341	0.00	0
Connecticut	1	20,018	0.05	3	New York	0	64,596	0.00	0
Delaware	0	6,973	0.00	0	North Carolina	22	34,917	0.63	3
Florida	1,628	84,733	19.21	4	North Dakota	10	1,266	7.90	4
Georgia	7,631	48,625	156.94	4	Ohio	0	44,770	0.00	0
Hawaii	0	5,946	0.00	0	Oklahoma	0	24,767	0.00	0
Idaho	0	6,312	0.00	0	Oregon	0	13,219	0.00	0
Illinois	0	44,379	0.00	0	Pennsylvania	50	40,890	1.22	3
Indiana	38	23,760	1.60	4	Rhode Island	0	3,701	0.00	0
Iowa	0	8,611	0.00	0	South Carolina	14	24,173	0.58	3
Kansas	0	9,152	0.00	0	South Dakota	0	3,101	0.00	0
Kentucky	0	17,763	0.00	0	Tennessee	14	25,834	0.54	3
Louisiana	0	36,745	0.00	0	Texas	0	169,110	0.00	0
Maine	0	2,014	0.00	0	Utah	0	5,802	0.00	0
Maryland	300	23,727	12.64	4	Vermont	16	2,033	7.87	4
Massachusetts	0	10,365	0.00	0	Virginia	328	35,472	9.25	4
Michigan	0	48,591	0.00	0	Washington	209	16,559	12.62	4
Minnesota	0	8,613	0.00	0	West Virginia	0	4,980	0.00	0
Mississippi	0	20,429	0.00	0	Wisconsin	9	22,905	0.39	3
Missouri	0	30,775	0.00	0	Wyoming	0	1,923	0.00	0

<sup>a</sup> The numbers are based on most recent data available by 2004. Source: Vincent, Colburn and Lotke (2004), see Appendix A, Table 1. p. 14. Note: *Louisiana*: the Department of Corrections was unable to disaggregate the number of people sentenced under 1995 Three-Strikes amendments to the existing Habitual Offender Law (s. 529.1) from the number of people sentenced under pre-existing provisions. *Utah*: the Sentencing Commission reported that the data were not available because state prisoners are classified under the offense of the underlying conviction, rather than the habitual offender sentencing enhancement. Because no other data are available to provide numbers for these states and due to the impossibility of a reliable estimation, these two states have been treated as jurisdictions without strikes inmates. For *Maryland* and *Pennsylvania*, figures were approximated. Also, although *Kansas* was indicated as a Two- and Three-Strikes state in Cark, Austin and Henry's 1997 assessment, Vincent, Colburn and Lotke (2004) report that the review of the relevant legislation in collaboration with the information provided by the Kansas Sentencing Commission on September 2004 led to the conclusion that the state did not have a strikes law. Therefore, Kansas will also be treated as a state without strikes prisoners.

<sup>b</sup> Total number of state prisoner in June, 2004. Source: Harrison & Beck (2004), see table 2: "Prisoners under the jurisdictions of State and Federal correctional authorities", p. 3.

<sup>c</sup> Rate per 1,000 state prisoner.

### **Summary: Political and Symbolic Punishment**

Part One of the study combined a discussion of various punitive measures that, in addition to having practical impacts on convicted offenders and their families, stand out in the states' arsenals of punishments due to their overtly political and symbolic nature. They were assessed with 11 variables, each of which produced a criterion punitiveness score ranging from zero to four, with higher scores indicating the increased punitiveness of a state on the basis of that particular variable. To synthesize the results, an average punitiveness score was computed for each state by adding criterion punitiveness scores and then dividing the sum by 11 (for the number of variables). This method permitted arranging jurisdictions in rank order from the least punitive to the most punitive (see Table 29).

The analysis of the eleven variables revealed that jurisdictions in the South are highly punitive and those in the Northeast minimally punitive. Nine out of the ten most punitive states are southern (Florida, Mississippi, Georgia, Arkansas, Tennessee, Alabama, Virginia, South Carolina and Kentucky (arranged from highest to lowest pun. scores)) and seven out of the thirteen least punitive states are north-eastern (Maine, Rhode Island, Massachusetts, New York, Vermont, New Hampshire, and New Jersey (arranged from lowest to highest pun. scores)). Florida shares its most punitive position with Nevada, which is the only non-southern state among the ten most punitive states. On the other hand, two Midwestern states, Minnesota and Michigan, are among the least punitive jurisdictions. In fact, Minnesota was identified as the least punitive state in America, alongside Maine and followed by Hawaii.

These findings are compatible with those by Gordon (1989), who suggested that southern states were especially likely to be found tough across the symbolic punishment

variables, which in her analysis included the death penalty and prison sentences of more than 29 years (see pp. 193-4).

In this context, it is important to remember that having identical average punitiveness scores does not necessarily make states similarly punitive. For example, adding the eleven criterion punitiveness scores produced the same sum ( $\Sigma = 14$ , Pun. Score = 1.27) for Alaska, North Dakota, New Jersey, and West Virginia, but while the latter three have been given high criterion punitiveness scores across three-strikes variables, the scores were reversed for the variable concerning sex offender registries.

Despite the fact that jurisdictions in the South have been identified as more punitive in comparison with those in other regions of the country and especially in the Northeast, it is yet to be determined whether this holds true when a greater number of variables are put to the test. The chapters that follow provide the analyses of 33 new variables that are grouped into four categories: incarceration, punishment for moral offenses, conditions of confinement, and juvenile justice. The full summary of the state punitiveness of American jurisdictions will conclude this study.

Table 29: Combining the Punitiveness Scores of the Variables of Political and Symbolic Punishment

State Name <sup>a</sup>	Variables 1-11											Sum Pun. Scores $\Sigma X$	Mean Pun. Scores $\frac{\Sigma X}{11}$
	Life Without Possibility of Parole	Life With Possibility of Parole	Prison Sentences 20 Years to Life	Death Penalty Application	Frequency of Executions	Death Row Population	Sex Offender Registries	Application of Disenfranchisement	Disenfranchised Populations	Three-Strikes Laws' Application & Sent.	Number of Strikers Prisoners		
Maine	3	0	0	0	0	0	3	0	0	0	0	6	0.55
Minnesota	0	1	0	0	0	0	0	2	3	0	0	6	0.55
Hawaii	1	2	2	0	0	0	1	1	1	0	0	8	0.73
Rhode Island	1	3	0	0	0	0	0	1	3	0	0	8	0.73
Massachusetts	4	3	0	0	0	0	1	1	0	0	0	9	0.82
Michigan	3	1	1	0	0	0	4	1	0	0	0	10	0.91
New York	0	4	0	2	0	1	1	2	1	0	0	11	1.00
Vermont	2	0	4	0	0	0	0	0	0	1	4	11	1.00
New Hampshire	4	4	0	1	0	0	2	1	0	0	0	12	1.09
Alaska	1	3	2	0	0	0	4	2	2	0	0	14	1.27
North Dakota	2	2	0	0	0	0	1	1	1	3	4	14	1.27
New Jersey	0	1	3	0	0	0	0	2	3	2	3	14	1.27
Wisconsin	0	1	2	0	0	0	2	2	2	2	3	14	1.27
West Virginia	3	3	1	0	0	0	4	2	2	0	0	15	1.36
Iowa	4	0	2	0	0	0	4	2	4	0	0	16	1.45
Oregon	1	2	4	3	2	3	0	1	1	0	0	17	1.55
Utah	0	0	4	3	3	2	2	1	0	2	0	17	1.55
Illinois	2	0	4	4	2	1	4	1	0	0	0	18	1.64
South Dakota	4	0	3	2	0	4	4	1	0	0	0	18	1.64
Missouri	2	2	1	3	4	2	1	2	2	0	0	19	1.73
Idaho	3	4	1	2	0	4	2	2	2	0	0	20	1.82
Kansas	0	4	4	2	0	3	0	2	2	3	0	20	1.82
New Mexico	0	3	1	4	2	1	4	2	2	1	0	20	1.82
Wyoming	4	1	2	2	0	2	2	3	4	0	0	20	1.82
Arizona	1	1	1	4	3	4	0	4	3	0	0	21	1.91
Pennsylvania	4	0	2	3	1	4	1	1	0	2	3	21	1.91
Colorado	2	2	2	4	2	1	2	2	1	1	3	22	2.00
Connecticut	2	1	1	4	2	2	3	2	1	1	3	22	2.00
Louisiana	4	0	2	3	2	2	2	2	2	3	0	22	2.00
Nebraska	3	0	4	4	3	2	0	3	4	0	0	23	2.09
Ohio	0	4	3	3	4	4	4	1	0	0	0	23	2.09
Indiana	0	0	3	4	3	2	3	1	1	3	4	24	2.18
Maryland	1	2	3	3	2	1	1	2	3	2	4	24	2.18
Montana	3	1	3	4	4	2	2	1	1	3	0	24	2.18
North Carolina	1	2	1	4	3	2	2	2	2	2	3	24	2.18
Oklahoma	2	3	4	4	4	3	2	2	1	0	0	25	2.27
Texas	0	3	3	4	4	3	3	2	3	0	0	25	2.27
California	2	4	0	4	2	3	1	2	1	3	4	26	2.36
Washington	3	1	4	3	2	1	1	2	4	2	4	27	2.45
Delaware	4	4	1	4	4	4	0	3	4	0	0	28	2.55
Kentucky	1	4	4	3	3	4	4	2	4	0	0	29	2.64
South Carolina	2	3	0	4	4	3	3	2	2	4	3	30	2.73
Virginia	2	2	1	3	4	2	4	2	4	2	4	30	2.73
Alabama	3	3	3	3	4	4	3	4	4	0	0	31	2.82
Tennessee	1	2	3	4	2	3	3	4	3	3	3	31	2.82
Arkansas	3	2	3	4	4	3	3	2	3	2	3	32	2.91
Georgia	1	4	3	4	3	3	1	2	3	4	4	32	2.91
Mississippi	4	3	4	4	3	3	3	4	4	0	0	32	2.91
Florida	4	1	0	4	3	4	3	4	4	2	4	33	3.00
Nevada	3	4	2	4	3	4	0	4	3	2	4	33	3.00

<sup>a</sup> States are arranged from the least punitive to the most punitive.

Note: Shaded areas separate the 10 least punitive and the 10 most punitive states from the rest.

## **PART TWO**

### **Incarceration**

Incarceration has traditionally been used not merely as the appropriate criterion of state punitiveness (Austin & Irwin, 2001; Gordon, 1989; Lynch, 1988, 1993; Neapolitan, 2001; Tonry, 2001, 2004; Whitman, 2003; Yates & Fording, 2005) but perhaps “the best measure of [it]” (Neapolitan, 2001, p. 693). This is understandable, as imprisonment has a long history, has been employed in most cultures, and has affected a much greater number of people than any other punishment. Moreover, nations’ sentencing policies can be quickly described by a simple juxtaposition of incarceration rates, thus making imprisonment a very useful tool for comparative analysis across time and place.

In this part of the study, I examine several approaches to using the data about imprisonment for the propose of assessing state punitiveness of American jurisdictions. Although a study of the severity of carceral policies can and should utilize many other incarceration variables, the present research contains the discussion and empirical analyses of only those variables that appear to expose state punitiveness the most effectively and reliably.

These variables have been grouped into two categories; the first includes five variables that measure incarceration rates while the second category contains variables on the average prison sentences imposed in state courts and the average prison terms actually served for six specific offenses as well as for all crimes combined. In order to justify the inclusion of a large number of variables on average prison sentences, an argument is made about the superiority of the latter over other ways of measuring state punitiveness.

### **Incarceration Rates** (Variables 12-16)

This section provides the methodological discussion and data analyses for five variables: (a) stock incarceration; (b) flow incarceration; (c) prison admission trends; (d) prison release trends; and (e) the ratio between imprisonment and probation.

A *Stock* (or *static*) *incarceration*—i.e., how many prison and jail inmates are there on a given day per 100,000 population? —is the most common way of estimating and comparing incarcerated populations.<sup>43</sup> This study adopts this approach with only one change: instead of adjusting for a country's population, it controls for number of arrests. This decision was dictated by the purpose of this research. While it might be acceptable to use incarceration rates per capita when comparing countries or regions in terms of their correctional population size, the same method is inadequate for substantiating a claim of state punitiveness. As discussed in previous sections, imprisonment is a state's reaction to a crime committed beforehand, and although "no credible criminologist supports the notion that the imprisonment binge has or will in future impact crime rates" (Austin & Irwin, 2001, p. xiv), it is possible that crime rates seriously impact incarceration rates (Lynch, 1988). There would be no prisons if there were no crimes. Moreover, punishment is not a reaction to every crime, but only to those for which arrests have been made. Therefore, using official police data (e.g., *the Uniform Crime Reporting (UCR) Program*) instead of victims' surveys seems a reasonable decision. Victimization surveys are very useful source of crime data, especially when it comes to underreported crimes of sexual nature. Yet unless a crime is reported to the police and unless an offender is apprehended, there will be no official punishment and thus no means of assessing state punitiveness. Any comparative study of punitiveness can only rely on officially recorded offenses that resulted in some form of reaction by the criminal justice agencies.

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<sup>43</sup> See e.g., *European Sourcebook of Crime and Criminal Justice Statistics – 2006*.

Following this logic, I first obtained the list of inmates in custody of state prisons and jails as of June 30, 2006 using the Bureau of Justice Statistics' latest data (Sabol, Minton, & Harrison, 2007), and then adjusted these data for the number of average arrests for all crimes for the ten years preceding 2006 (see Variables 12: Tables 30-32).

The next variable is *Flow incarceration*, which is the number of convicts who have been incarcerated during a particular unit of time, usually a year. In other words, this variable assesses a state's propensity toward imprisonment following an arrest. While this analysis benefited enormously from the previous comparative research on incarceration (e.g., Frost, 2005; Lynch, 1988, 1993, 1995), it does not fully follow the suggestions offered by other researchers. Here, I will only discuss a couple of methodological proposals that seem especially relevant to the analysis of flow incarceration.

A literature review quickly led to James Lynch's (1988) advice to estimate the levels of state punitiveness as "the ratio of persons admitted to prison for a particular offense in a given year to the number of persons arrested for that offense in the same year" (p. 79). Although one aspect of this advice—obtaining the ratio between persons admitted to prisons and persons arrested—was adopted in the present analysis, the second aspect—obtaining such ratios for specific offenses—was not followed. There are two reasons for this decision. First, while it is easy to obtain the data for all U.S. jurisdictions about arrests for specific offenses (the UCR provides such data on-line), the same is hardly possible regarding the data on prison admissions. The *National Judicial Reporting Program* (2002) is perhaps the only source that offers nationwide data on the sentences that convicted felons receive in state courts. The source, however, only includes a sample of about 10% of all U.S. counties and, by chance, fully excludes the counties of Nevada, South Dakota and Wyoming. Therefore, calculating the

ratio between all arrests and the small number of convictions that resulted in imprisonment would in fact result in misleading estimates. Second, because violent crimes such as homicide, rape, armed robbery and aggravated assault would most certainly lead to prison sentences in all U.S. states, one cannot expect the variability necessary for the present analysis.

The problem of measuring punitiveness was also addressed by Natasha Frost (2005), who proposed to estimate the risk of imprisonment (and subsequently, the punitiveness of a state) in terms of the likelihood of imprisonment following a felony arrest. Despite my disagreement with prioritizing the propensity of incarceration over other criteria of penal harshness to be discussed, the likelihood of imprisonment is a valid indicator of state punitiveness as it reveals, assuming that a government has successfully managed to prove its criminal allegations, how much prison sanctions are preferred over fines, probation or other non-carceral remedies. The Frost “propensity” thesis is not fully accepted here because, for the purposes of assessing state punitiveness, it seems important to consider all arrests and all convictions, as non-felony arrests and convictions can often signal the harshness of a penal policy much more loudly than those for felonies.

Thus, the present study measures *flow incarceration* on the basis of the 2005 data that cover all prison admissions (Sabol, Minton, & Harrison, 2007), after adjusting them for the average annual number of arrests for all offenses that were made in the same as well as the previous year (UCR). Considering that there is on average a seven-month interval<sup>44</sup> between an arrest and adjudication, it seems more reasonable to adjust for mean arrests for both years instead of only for 2005.

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<sup>44</sup> Based on the data from the *National Judicial Reporting Program* (2002), the average time between an arrest and the imposition of the sentence is 217 days.

In addition to the stock and flow incarceration variables, the study also assesses the dynamics of incarceration using the variables of *prison admission trends* and *prison release trends*. The two BJS Bulletins were used as the source of data (Harrison & Beck, 2005; Sabol, Minton, & Harrison, 2007). The variables examined the percent change in prison admissions and releases between 2000 and 2005.

For *prison admission trends*, the increase in the percent change was construed as indicative of higher punitiveness. Prison admissions, however, can vary depending on the fluctuations in crime, especially those crimes that resulted in arrests. Therefore, the five-year trends in prison admissions were juxtaposed with the six-year trends for arrests (1999-2005) to cover the period during which individuals admitted to state correctional facilities could have been arrested. This juxtaposition revealed a significant variation across jurisdictions and led to the five-fold hierarchy that produced the punitiveness scores (0 to 4) compatible with those of other variables.

States that decreased prison admissions despite the increase in their numbers of arrests were considered minimally punitive (Pun. Score = 0). There were three such states: Maryland, New York and Wisconsin. States that decreased prison admissions as well as arrests were viewed as less than moderately punitive (Low Punitiveness; Pun. Score = 1 points). Delaware, Kansas, Louisiana and Maine were identified as such. Holding both prison admissions and arrests constant (less than 1% change) made California alone qualified for the third category (Moderate Punitiveness; Pun. Score = 2). Jurisdictions that increased their reliance on incarceration and also increased the number of arrests were named highly punitive (Pun. Score = 3). Twenty-seven states fell in this category. Finally, states that increased prison admissions

while experiencing a decrease in arrests were characterized as extremely punitive (Pun. Score = 3). Fifteen states met this criterion (see Tables 35-36).

*Prison release trends* was measured more quantitatively by simply assigning states to five punitiveness levels, depending on the extent to which they increased or decreased prison releases. The stronger the percent increase, the less punitive the state (see Tables 37-38). Overall, Southern states showed the highest increase in prison releases between 2000 and 2005 (20.5%) and Northeastern states revealed the greatest decrease of the comparable numbers (-4.9%). While high prison release rates may simply mean a high inmate turnover (the more people leave prisons, the more people enter them), it is not always the case. For example, Massachusetts reduced prison releases by 25% but increased admissions by almost 26%; New Jersey lowered prison releases by 11.5% while raising prison admissions by 4.4% (see Sabol, Minton, & Harrison, 2007, Appendix table 3 on p. 15).

Finally, the incarceration rate was measured as *The ratio between imprisonment and probation* for 2005. Before computing the ratio, however, both the imprisonment and probation numbers were adjusted for the total number of arrests in 2004 (arrests include all instances in which individuals were arrested, cited, or summoned). Because the numerator was imprisonment, states with high values were assigned high punitiveness scores (see Tables 39-40). Although there was no perfect correlation between punitiveness scores and regions, on the whole, Midwestern and Southern jurisdictions have been characterized as the most punitive.

## Variable 12: Stock Incarceration

Table 30: Stock Incarceration per 1,000 arrests (propensity of imprisonment after arrest)

State Name	Prisoners <sup>a</sup>	Average Annual Arrests <sup>b</sup>	Incarc. Rate <sup>c</sup>	Pun. Score	State Name	Prisoners <sup>a</sup>	Average Annual Arrests <sup>b</sup>	Incarc. Rate <sup>c</sup>	Pun. Score.
Alabama	27,888	193,148	144.39	3	Montana	3,623	17,390	208.34	4
Alaska	5,063	33,213	152.44	3	Nebraska	4,507	88,019	51.20	0
Arizona	34,864	291,769	119.49	2	Nevada	12,468	127,204	98.02	1
Arkansas	13,570	162,369	83.58	1	New Hampshire	2,625	34,744	75.55	0
California	175,115	1,487,063	117.76	2	New Jersey	28,436	413,674	68.74	0
Colorado	22,145	214,022	103.47	2	New Mexico	6,803	73,358	92.74	1
Connecticut	20,054	136,359	147.07	3	New York	63,295	427,918	147.91	3
Delaware	7,252	28,121	257.89	4	North Carolina	37,201	461,077	80.68	1
Florida	91,001	929,948	97.86	1	North Dakota	1,401	25,326	55.32	0
Georgia	51,549	223,044	231.12	4	Ohio	47,494	289,162	164.25	3
Hawaii	6,227	55,993	111.21	2	Oklahoma	23,935	157,487	151.98	3
Idaho	6,976	69,908	99.79	1	Oregon	13,645	136,720	99.80	2
Illinois	45,440	235,054	193.32	4	Pennsylvania	43,087	349,220	123.38	2
Indiana	25,460	191,208	133.15	3	Rhode Island	3,914	39,633	98.76	1
Iowa	8,659	101,465	85.34	1	South Carolina	23,633	122,756	192.52	4
Kansas	8,936	59,234	150.86	3	South Dakota	3,527	29,079	121.29	2
Kentucky	20,005	72,028	277.74	4	Tennessee	26,119	202,562	128.94	2
Louisiana	36,571	210,666	173.60	4	Texas	172,889	1,040,862	166.10	4
Maine	2,046	52,089	39.28	0	Utah	6,225	104,156	59.77	0
Maryland	23,084	261,624	88.23	1	Vermont	2,139	11,645	183.68	4
Massachusetts	11,109	128,300	86.59	1	Virginia	36,074	319,636	112.86	2
Michigan	50,701	348,194	145.61	3	Washington	16,633	220,151	75.55	0
Minnesota	9,776	193,611	50.49	0	West Virginia	5,408	40,377	133.94	3
Mississippi	21,085	92,492	227.97	4	Wisconsin	23,030	339,379	67.86	0
Missouri	30,657	271,085	113.09	2	Wyoming	2,094	32,888	63.67	0

<sup>a</sup> "Prisoners" refers to a number of inmates in custody of state prisons and jails, June 30, 2006. Source: Sabol, Minton, & Harrison (2007). Appendix table 2. "Prisoners under the jurisdiction of State and Federal correctional authorities, June 30, 2005, December 31, 2005, and June 30, 2006", p. 14.

<sup>b</sup> "Arrest" includes a total number of arrests for all crimes and ages, 1995-1997, 1999-2005. See Table 32.

<sup>c</sup> "Rate" was calculated by dividing a number of inmates in 2006 by an average annual arrests and multiplying by 1,000.

Table 31: Distribution of Quintiles for Stock Incarceration

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by rate)
1st	Minimum	0	Maine, Minnesota, Nebraska, North Dakota, Utah, Wyoming, Wisconsin, New Jersey, New Hampshire and Washington
2nd	Low	1	North Carolina, Arkansas, Iowa, Massachusetts, Maryland, New Mexico, Florida, Nevada, Rhode Island and Idaho
3rd	Moderate	2	Oregon, Colorado, Hawaii, Virginia, Missouri, California, Arizona, South Dakota, Pennsylvania and Tennessee
4th	High	3	Indiana, West Virginia, Alabama, Michigan, Connecticut, New York, Kansas, Oklahoma, Alaska and Ohio
5th	Extreme	4	Texas, Louisiana, Vermont, South Carolina, Illinois, Montana, Mississippi, Georgia, Delaware and Kentucky

Table 32: Average Annual Arrests for All Crimes (Supplement to Table 30)

State Name	Number of Arrests for All Crimes (1995-1997 and 1999-2005)										Average Annual Arrests
	1995	1996	1997	1999	2000	2001	2002	2003	2004	2005	
Alabama	202,946	215,361	223,057	176,153	150,614	171,771	195,820	208,757	208,312	178,684	193,148
Alaska	33,220	34,180	19,779	36,234	34,970	32,171	31,730	35,754	36,864	37,227	33,213
Arizona	292,752	299,937	275,565	272,281	271,233	284,696	298,631	305,252	315,007	302,339	291,769
Arkansas	195,353	198,776	191,805	214,854	195,044	159,036	107,467	120,392	98,086	142,878	162,369
California	1,578,277	1,573,555	1,594,841	1,494,099	1,423,463	1,415,129	1,412,566	1,457,151	1,414,732	1,506,819	1,487,063
Colorado	167,842	217,716	181,404	220,383	225,547	229,927	222,108	195,911	229,977	249,404	214,022
Connecticut	186,902	154,446	181,010	153,212	118,669	143,400	99,005	87,176	116,805	122,966	136,359
Delaware	2,730	26,667	23,688	38,212	33,324	28,082	25,217	34,912	31,048	37,332	28,121
Florida	766,240	-	-	897,589	881,709	922,333	912,998	974,805	1,028,856	1,055,052	929,948
Georgia	281,428	250,064	187,809	157,361	224,180	209,334	232,233	265,932	205,472	216,627	223,044
Hawaii	69,959	65,258	70,000	51,874	54,795	50,305	45,929	58,719	49,456	43,632	55,993
Idaho	77,839	78,229	73,120	63,073	74,555	69,747	72,595	73,523	72,204	44,193	69,908
Illinois	-	301,870	291,338	248,861	253,967	224,709	199,430	197,983	200,447	196,878	235,054
Indiana	159,954	162,253	164,871	188,426	189,316	196,928	196,964	208,042	215,441	229,883	191,208
Iowa	95,070	89,972	98,412	102,278	104,884	68,487	112,438	116,510	110,513	116,089	101,465
Kansas	-	-	-	-	-	-	54,136	54,354	80,262	48,182	59,234
Kentucky	99,981	56,688	50,844	45,302	14,187	52,420	61,176	60,090	69,483	210,113	72,028
Louisiana	194,629	177,083	273,715	225,942	182,120	220,687	216,444	219,924	232,704	163,410	210,666
Maine	33,356	54,319	53,028	-	55,985	56,636	54,880	55,320	55,345	49,931	52,089
Maryland	281,807	242,128	306,522	173,127	256,039	258,797	161,317	324,414	309,630	302,456	261,624
Massachusetts	158,142	155,962	158,347	127,383	123,379	132,869	114,657	98,390	101,430	112,437	128,300
Michigan	384,263	378,119	366,523	339,994	308,491	304,577	371,037	353,346	331,479	344,114	348,194
Minnesota	228,556	221,193	211,496	231,986	252,857	134,531	164,144	155,088	132,255	204,004	193,611
Mississippi	53,172	51,625	80,698	98,684	113,675	94,467	116,670	100,844	113,350	101,737	92,492
Missouri	263,054	272,068	284,954	247,319	224,483	286,856	304,921	324,705	273,415	229,077	271,085
Montana	-	-	10,515	13,769	12,821	19,058	21,579	18,855	-	25,130	17,390
Nebraska	81,118	59,007	96,236	95,330	95,416	84,706	93,355	86,544	93,098	95,377	88,019
Nevada	117,434	123,823	56,094	138,029	146,760	148,679	115,128	-	148,909	149,978	127,204
New Hampshire	-	34,735	-	22,389	30,679	29,200	34,348	36,477	43,769	46,351	34,744
New Jersey	400,392	396,784	414,998	378,090	375,012	684,204	368,619	363,297	379,625	375,719	413,674
New Mexico	44,049	87,259	86,050	67,632	73,718	57,947	76,539	64,435	92,672	83,276	73,358
New York	1,091,274	824,639	360,463	268,170	272,801	248,316	264,833	297,442	315,889	335,353	427,918
North Carolina	482,641	505,310	520,165	463,626	419,587	499,642	447,259	432,569	393,819	446,154	461,077
North Dakota	23,841	21,205	28,996	24,061	25,659	25,438	25,221	25,585	26,010	27,248	25,326
Ohio	307,506	377,034	361,976	289,536	279,715	268,148	247,868	236,081	271,838	251,917	289,162
Oklahoma	153,252	153,537	158,837	-	164,613	154,382	161,363	166,495	158,957	145,946	157,487
Oregon	117,987	159,691	150,369	136,451	137,390	140,987	111,337	115,141	155,202	142,649	136,720
Pennsylvania	70,336	346,773	202,715	375,205	372,674	403,367	421,600	421,100	441,127	437,305	349,220
Rhode Island	41,753	41,058	41,223	40,149	33,115	36,528	42,140	43,914	43,576	32,875	39,633
South Carolina	202,475	215,578	218,788	70,602	71,119	63,001	120,025	17,583	26,540	221,852	122,756
South Dakota	33,285	32,960	25,249	32,997	36,251	25,859	28,112	35,298	24,475	16,299	29,079
Tennessee	122,929	160,461	165,603	169,144	169,446	211,434	234,995	253,709	269,127	268,770	202,562
Texas	1,071,300	1,020,750	1,084,247	984,426	1,041,179	1,013,175	1,036,323	982,963	1,116,524	1,057,731	1,040,862
Utah	110,736	120,600	102,541	93,725	92,080	94,473	121,200	98,509	90,811	116,880	104,156
Vermont	3,990	-	-	14,223	13,102	12,043	13,757	10,951	12,074	13,021	11,645
Virginia	385,760	375,677	408,428	271,518	252,412	223,118	521,047	213,059	267,765	277,579	319,636
Washington	189,965	208,713	228,503	218,541	220,790	222,585	237,512	216,720	216,541	241,635	220,151
West Virginia	64,744	70,538	63,439	32,279	25,363	18,632	25,781	19,879	30,257	52,854	40,377
Wisconsin	431,689	459,506	361,333	-	-	99,269	409,682	294,493	383,306	275,752	339,379
Wyoming	30,108	20,107	35,030	34,271	34,099	35,200	34,060	32,907	35,849	37,252	32,888

Source: FBI *Uniform Crime Reporting (UCR) Program*—"Crime in the United States", 1995 through 2005, see "Persons Arrested". Available at <http://www.fbi.gov/ucr/ucr.htm> (Retrieved on November 25, 2007).

Note: State-level data before 1995 or for 1998 are not available via FBI web-site

### Variable 13: Flow Incarceration

Table 33: Flow Incarceration per 1,000 arrests (propensity of imprisonment following an arrest)

State Name	Prisoners <sup>a</sup>	Average Annual Arrests <sup>b</sup>	Incarc. Rate <sup>c</sup>	Pun. Score	State Name	Prisoners <sup>a</sup>	Average Annual Arrests <sup>b</sup>	Incarc. Rate <sup>c</sup>	Pun. Score
Alabama	9,723	193,498	50.25	2	Montana	2,390	25,130	95.11	4
Alaska	2,868	37,046	77.42	4	Nebraska	2,264	94,238	24.02	0
Arizona	12,440	308,673	40.30	1	Nevada	5,648	149,444	37.79	1
Arkansas	8,053	120,482	66.84	3	New Hampshire	1,271	45,060	28.21	0
California	129,559	1,460,776	88.69	4	New Jersey	14,251	377,672	37.73	1
Colorado	9,899	239,691	41.30	1	New Mexico	4,264	87,974	48.47	2
Connecticut	6,513	119,886	54.33	2	New York	24,199	325,621	74.32	3
Delaware	1,422	34,190	41.59	1	North Carolina	10,454	419,987	24.89	0
Florida	46,531	1,041,954	44.66	2	North Dakota	1,088	26,629	40.86	1
Georgia	19,228	211,050	91.11	4	Ohio	29,121	261,878	111.20	4
Hawaii	1,662	46,544	35.71	1	Oklahoma	8,756	152,452	57.43	2
Idaho	4,075	58,199	70.02	3	Oregon	6,436	148,926	43.22	2
Illinois	39,887	198,663	200.78	4	Pennsylvania	16,222	439,216	36.93	1
Indiana	16,957	222,662	76.16	3	Rhode Island	911	38,226	23.83	0
Iowa	6,397	113,301	56.46	2	South Carolina	9,446	124,196	76.06	3
Kansas	4,892	64,222	76.17	3	South Dakota	2,664	20,387	130.67	4
Kentucky	13,324	139,798	95.31	4	Tennessee	14,251	268,949	52.99	2
Louisiana	14,801	198,057	74.73	3	Texas	71,889	1,087,128	66.13	3
Maine	521	52,638	9.90	0	Utah	3,600	103,846	34.67	0
Maryland	10,113	306,043	33.04	0	Vermont	2,257	12,548	179.87	4
Massachusetts	2,592	106,934	24.24	0	Virginia	11,989	272,672	43.97	2
Michigan	13,145	337,797	38.91	1	Washington	12,683	229,088	55.36	2
Minnesota	7,112	168,130	42.30	1	West Virginia	2,600	41,556	62.57	3
Mississippi	8,923	107,544	82.97	4	Wisconsin	7,774	329,529	23.59	0
Missouri	19,109	251,246	76.06	3	Wyoming	772	36,551	21.12	0

<sup>a</sup>“Prisoners” refers to a number of sentenced prisoners admitted in 2005. Source: Sabol, Minton, & Harrison (2007).

Appendix table 3. “Number of sentenced prisoners admitted and released from State and Federal correctional authorities, by region and jurisdiction, 2000, 2004, and 2005”, p. 15.

<sup>b</sup>“Average Annual Arrests” is for 2004 and 2005. Source: FBI: *Crime in the United States, 2004, and 2005*. table 69: “Arrests by State.”. See Table 32, columns for 2004 and 2005.

<sup>c</sup>“Rate” was calculated by dividing a number of admitted inmates in 2004 by a number of arrests in 2004 and multiplying by 1,000

Table 34: Distribution of Quintiles for Flow Incarceration

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by rate)
1st	Minimum	0	Maine, Wyoming, Wisconsin, Rhode Island, Nebraska, Massachusetts, North Carolina, New Hampshire, Maryland and Utah
2nd	Low	1	Hawaii, Pennsylvania, New Jersey, Nevada, Michigan, Arizona, North Dakota, Colorado, Delaware and Minnesota
3rd	Moderate	2	Oregon, Virginia, Florida, New Mexico, Alabama, Tennessee, Connecticut, Washington, Iowa and Oklahoma
4th	High	3	West Virginia, Texas, Arkansas, Idaho, New York, Louisiana, Missouri, South Carolina, Indiana and Kansas
5th	Extreme	4	Alaska, Mississippi, California, Georgia, Montana, Kentucky, Ohio, South Dakota, Vermont and Illinois

## Variable 14: Prison Admission Trends

Table 35: Prison Admissions (2000-2005) and Persons Arrested (1999-2005)

State Name	Prison Admissions <sup>a</sup>			Persons Arrested for All Crimes <sup>b</sup>			Pun. Score
	2005	2000	% Change 2000-2005	2005	1999	% Change 1999-2005	
Alabama	9,723	6,296	54.4	178,684	176,153	1.44	3
Alaska	2,868	2,427	18.2	37,227	36,234	2.74	3
Arizona	12,440	9,560	30.1	302,339	272,281	11.04	3
Arkansas	8,053	6,941	16.00	142,878	214,854	-33.50	4
California	129,559	129,640	-0.1	1,506,819	1,494,099	0.85	2
Colorado	9,899	7,036	40.7	249,404	220,383	13.17	3
Connecticut	6,513	6,185	5.3	122,966	153,212	-19.74	4
Delaware	1,422	2,709	-47.5	37,332	38,212	-2.30	1
Florida	46,531	35,683	30.4	1,055,052	897,589	17.54	3
Georgia	19,228	17,373	10.7	216,627	157,361	37.66	3
Hawaii	1,662	1,594	4.3	43,632	51,874	-15.89	4
Idaho	4,075	3,386	20.3	44,193	63,073	-29.93	4
Illinois	39,887	29,344	35.9	196,878	248,861	-20.89	4
Indiana	16,957	11,876	42.8	229,883	188,426	22.00	3
Iowa	6,397	4,656	37.4	116,089	102,278	13.50	3
Kansas <sup>c</sup>	4,892	5,002	-2.2	48,182	54,136	-11.00	1
Kentucky	13,324	8,116	64.2	210,113	45,302	363.81	3
Louisiana	14,801	15,735	-5.9	163,410	225,942	-27.68	1
Maine <sup>c</sup>	521	751	-30.6	49,931	55,985	-10.81	1
Maryland	10,113	10,327	-2.1	302,456	173,127	74.70	0
Massachusetts	2,597	2,062	25.9	112,437	127,383	-11.73	4
Michigan	13,145	12,169	8.0	344,114	339,994	1.21	3
Minnesota	7,112	4,406	61.4	204,004	231,986	-12.06	4
Mississippi	8,923	5,796	54.0	101,737	98,684	3.09	3
Missouri	19,110	14,454	32.2	229,077	247,319	-7.38	4
Montana	2,390	1,202	98.8	25,130	13,769	82.51	3
Nebraska	2,264	1,688	34.1	95,377	95,330	0.05	3
Nevada	5,648	4,929	14.6	149,978	138,029	8.66	3
New Hampshire	1,271	1,051	20.9	46,351	22,389	107.03	3
New Jersey	14,251	13,653	4.4	375,719	378,090	-0.63	4
New Mexico	4,264	3,161	34.9	83,276	67,632	23.13	3
New York	24,199	27,601	-12.3	335,353	268,170	25.05	0
North Carolina	10,454	9,848	6.2	446,154	463,626	-3.77	4
North Dakota	1,088	605	79.8	27,248	24,061	13.25	3
Ohio	29,121	23,780	22.5	251,917	289,536	-12.99	4
Oklahoma <sup>c</sup>	8,756	7,426	17.9	145,946	164,613	-11.34	4
Oregon	6,436	4,059	58.6	142,649	136,451	4.54	3
Pennsylvania	16,222	11,777	37.7	437,305	375,205	16.55	3
Rhode Island <sup>d</sup>	3,881	3,701	4.9	32,875	40,149	-18.12	4
South Carolina	9,446	8,460	11.7	221,852	70,602	214.23	3
South Dakota	2,664	1,400	90.3	16,299	32,997	-50.60	4
Tennessee	14,251	13,675	4.2	268,770	169,144	58.90	3
Texas	71,889	58,197	23.5	1,057,731	984,426	7.45	3
Utah	3,600	3,270	10.1	116,880	93,725	24.71	3
Vermont <sup>d</sup>	1,987	984	101.9	13,021	14,223	-8.45	4
Virginia	11,989	9,791	22.42	277,579	271,518	2.23	3
Washington	12,683	7,094	78.8	241,635	218,541	10.57	3
West Virginia	2,600	1,577	64.9	52,854	32,279	63.74	3
Wisconsin <sup>c</sup>	7,774	8,396	-7.4	275,752	99,269	177.78	0
Wyoming	772	638	21.0	37,252	34,271	8.70	3

<sup>a</sup> Source: Sabol, Minton, & Harrison (2007). Appendix table 3. "Number of sentenced prisoners admitted and released from State and Federal correctional authorities, by region and jurisdiction, 2000, 2004, and 2005", p. 15.

<sup>b</sup> Source: FBI *Uniform Crime Reporting (UCR) Program*—"Crime in the United States", See Table 32 of this study.

<sup>c</sup> “Person arrested 1999” refers to later years: Kansas (2002), Maine (2000), Oklahoma (2000) and Wisconsin (2001). Therefore, the percent change in persons arrested covers the period between these years and 2005.

<sup>d</sup> For Rhode Island and Vermont changes in prison admissions refer to the period between 2000 and 2003. Source: Harrison & Beck (2005). Table 7. “Number of sentenced prisoners admitted and released from State and Federal jurisdiction, by region and jurisdiction, 2000, and 2002-2003”, p. 6.

Table 36: Distribution of Quintiles for Prison Admissions

Description	Levels of Punitiveness	Pun. Score	<i>f</i>	State Name
Decreased admissions while increasing arrests	Minimum	0	3	Maryland, New York and Wisconsin
Decreased admissions while decreased arrests	Low	1	4	Delaware, Kansas, Louisiana and Maine
Held both admissions and arrests constant (< %1 change)	Moderate	2	1	California
Increased admissions while increasing arrests	High	3	27	Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Indiana, Iowa, Kentucky, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia and Wyoming
Increased admissions while decreasing arrests	Extreme	4	15	Arkansas, Connecticut, Hawaii, Idaho, Illinois, Massachusetts, Minnesota, Missouri, New Jersey, North Carolina, Ohio, Oklahoma, Rhode Island, South Dakota and Vermont

## Variable 15: Prison Release Trends

Table 37: Prison Releases (2000-2005)

State Name	Releases <sup>a</sup>			Pun. Score	State Name	Releases <sup>a</sup>			Pun. Score
	2005	2000	%Change			2005	2000	%Change	
Alabama	10,405	7,136	45.8	1	Montana	2,042	1,031	98.1	0
Alaska	2,699	2,599	3.8	3	Nebraska	1,966	1,503	30.8	1
Arizona	11,865	9,100	30.4	2	Nevada	4,804	4,374	9.8	3
Arkansas	9,037	6,308	43.3	1	New Hampshire	1,179	1,044	12.9	2
California	121,523	129,621	-6.2	4	New Jersey	13,590	15,362	-11.5	4
Colorado	8,658	5,881	47.2	1	New Mexico	4,060	3,383	20.0	2
Connecticut	6,349	5,918	7.3	3	New York	25,198	28,828	-12.6	4
Delaware	1,555	2,260	-31.2	4	North Carolina	9,683	9,687	0.0	4
Florida	42,017	33,994	23.6	2	North Dakota	998	598	66.9	0
Georgia	16,974	14,797	14.7	2	Ohio	27,947	24,793	12.7	3
Hawaii	1,409	1,379	2.2	4	Oklahoma	8,338	6,628	25.8	2
Idaho	3,541	2,697	31.3	1	Oregon	6,177	3,371	83.2	0
Illinois	38,964	28,876	34.9	1	Pennsylvania	15,069	11,759	28.1	2
Indiana	16,432	11,053	48.7	1	Rhode Island <sup>b</sup>	3,684	3,223	14.3	2
Iowa	5,795	4,379	32.3	1	South Carolina	9,642	8,676	11.1	3
Kansas	4,768	5,231	-8.9	4	South Dakota	2,640	1,327	98.9	0
Kentucky	12,316	7,733	59.3	0	Tennessee	14,410	13,893	3.7	3
Louisiana	14,880	14,536	2.4	3	Texas	70,793	59,776	18.4	2
Maine	573	677	-15.4	4	Utah	3,242	2,897	11.9	3
Maryland	10,618	10,004	6.1	3	Vermont <sup>b</sup>	1,985	946	109.8	0
Massachusetts	2,166	2,889	-25.0	4	Virginia	12,104	9,148	32.3	1
Michigan	12,397	10,874	14.0	2	Washington	11,872	6,764	75.5	0
Minnesota	7,115	4,244	67.6	0	West Virginia	2,137	1,261	69.5	0
Mississippi	9,101	4,940	84.2	0	Wisconsin	8,824	8,158	8.2	3
Missouri	18,881	13,346	41.5	1	Wyoming	697	697	0.0	4

<sup>a</sup> Source: Sabol, Minton, & Harrison (2007). Appendix table 3. "Number of sentenced prisoners admitted and released from State and Federal correctional authorities, by region and jurisdiction, 2000, 2004, and 2005", p. 15.

<sup>b</sup> For Rhode Island and Vermont changes refer to the period between 2000 and 2003. Source: Harrison & Beck (2005). Table 7. "Number of sentenced prisoners admitted and released from State and Federal jurisdiction, by region and jurisdiction, 2000, and 2002-2003", p. 6.

Table 38: Distribution of Quintiles for Prison Releases

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by percent decrease)
1st	Minimum	0	Vermont, South Dakota, Montana, Mississippi, Oregon, Washington, West Virginia, Minnesota, North Dakota and Kentucky
2nd	Low	1	Indiana, Colorado, Alabama, Arkansas, Missouri, Illinois, Virginia, Iowa, Idaho and Nebraska
3rd	Moderate	2	Arizona, Pennsylvania, Oklahoma, Florida, New Mexico, Texas, Georgia, Rhode Island, Michigan and New Hampshire
4th	High	3	Ohio, Utah, South Carolina, Nevada, Wisconsin, Connecticut, Maryland, Alaska, Tennessee and Louisiana
5th	Extreme	4	Hawaii, Wyoming, North Carolina, Kansas, New Jersey, New York, Maine, Massachusetts and Delaware

## Variable 16: Ratio between Imprisonment and Probation

Table 39: Ratio between Imprisonment and Probation (2005)

State Name	# of Inmate <sup>a</sup>	# of Arrest <sup>b</sup>	Inc. Rate <sup>c</sup>	# of Probation <sup>d</sup>	# of Arrest <sup>b</sup>	Prob. Rate <sup>f</sup>	Ratio Inc/Prob <sup>g</sup>	Pun. Score
Alabama	27,740	208,312	133.17	36,799	208,312	176.65	0.754	4
Alaska	4,630	36,864	125.60	5,547	36,864	150.47	0.835	4
Arizona	32,664	315,007	103.69	70,532	315,007	223.91	0.463	3
Arkansas	13,469	98,086	137.32	28,771	98,086	293.32	0.468	3
California	166,532	1,414,732	117.71	384,852	1,414,732	272.03	0.433	2
Colorado	20,841	229,977	90.62	57,779	229,977	251.24	0.361	2
Connecticut	19,744	116,805	169.03	54,067	116,805	462.88	0.365	2
Delaware	7,180	31,048	231.25	18,725	31,048	603.10	0.383	2
Florida	87,545	1,028,856	85.09	278,606	1,028,856	270.79	0.314	1
Georgia	47,682	205,472	232.06	423,547	205,472	2061.34	0.113	0
Hawaii	6,071	49,456	122.76	16,113	49,456	325.80	0.377	2
Idaho	6,136	72,204	84.98	44,579	72,204	617.40	0.138	0
Illinois	44,669	200,447	222.85	143,871	200,447	717.75	0.310	1
Indiana	24,244	215,441	112.53	121,675	215,441	564.77	0.199	0
Iowa	8,578	110,513	77.62	22,408	110,513	202.76	0.383	2
Kansas	9,042	80,262	112.66	14,439	80,262	179.90	0.626	4
Kentucky	18,897	69,483	271.97	32,619	69,483	469.45	0.579	3
Louisiana	37,254	232,704	160.09	38,231	232,704	164.29	0.974	4
Maine	2,084	55,345	37.65	8,907	55,345	160.94	0.234	1
Maryland	23,276	309,630	75.17	76,676	309,630	247.64	0.304	1
Massachusetts	10,495	101,430	103.47	163,719	101,430	1614.11	0.064	0
Michigan	49,014	331,479	147.86	176,630	331,479	532.85	0.277	1
Minnesota	9,187	132,255	69.46	113,121	132,255	855.32	0.081	0
Mississippi	20,856	113,350	184.00	20,375	113,350	179.75	1.024	4
Missouri	31,066	273,415	113.62	54,848	273,415	200.60	0.566	3
Montana <sup>h</sup>	3,369	25,130	134.06	7,634	25,130	303.78	0.441	2
Nebraska	4,284	93,098	46.02	17,994	93,098	193.28	0.238	1
Nevada	11,565	148,909	77.66	12,645	148,909	84.92	0.915	4
New Hampshire	2,561	43,769	58.51	4,285	43,769	97.90	0.598	3
New Jersey	28,124	379,625	74.08	143,315	379,625	377.52	0.196	0
New Mexico	6,595	92,672	71.16	17,725	92,672	191.27	0.372	2
New York	62,963	315,889	199.32	124,853	315,889	395.24	0.504	3
North Carolina	36,399	393,819	92.43	111,537	393,819	283.22	0.326	1
North Dakota	1,338	26,010	51.44	3,749	26,010	144.14	0.357	1
Ohio	44,976	271,838	165.45	230,758	271,838	848.88	0.195	0
Oklahoma	23,702	158,957	149.11	28,404	158,957	178.69	0.834	4
Oregon	13,317	155,202	85.80	43,324	155,202	279.15	0.307	1
Pennsylvania	41,540	441,127	94.17	167,366	441,127	379.41	0.248	1
Rhode Island	3,639	43,576	83.51	26,085	43,576	598.61	0.140	0
South Carolina	23,896	26,540	900.38	38,941	26,540	1467.26	0.614	3
South Dakota	3,344	24,475	136.63	5,372	24,475	219.49	0.622	4
Tennessee	26,208	269,127	97.38	47,099	269,127	175.01	0.556	3
Texas	171,338	1,116,524	153.46	428,836	1,116,524	384.08	0.400	2
Utah	6,013	90,811	66.21	10,267	90,811	113.06	0.586	3
Vermont	1,975	12,074	163.57	9,731	12,074	805.95	0.203	0
Virginia	35,667	267,765	133.20	43,470	267,765	162.34	0.820	4
Washington	16,688	216,541	77.07	111,193	216,541	513.50	0.150	0
West Virginia	5,252	30,257	173.58	6,977	30,257	230.59	0.753	4
Wisconsin	22,664	302,927	74.82	53,865	302,927	177.82	0.421	2
Wyoming	2,026	35,849	56.51	4,418	35,849	123.24	0.459	3

<sup>a</sup> “# of Inmate” refers to a total number of prison and jail inmates in 2005. Source: Harrison & Beck (2006). See table 2: “Prisoners under jurisdiction of State and Federal correctional authorities, June 30, 2004, to June 30, 2005”. p. 3. Column: “Total 06/30/05”.

<sup>b</sup> “# of Arrest” refers to a total number of arrests per state for all ages and all offenses excluding traffic arrests in 2004. Source: FBI *Uniform Crime Reporting (UCR) Program*—“Crime in the United States”, See Table 32 of this study.

<sup>c</sup> Incarceration rate per 1,000 arrest in 2004.

<sup>d</sup> “# of Probation” refers to adults of probation in 2005. Source: Glaze & Bonczar (2006). See Table 2. “Adults on probation, 2005”, p.4. See column: “Probation Population, 1/1/2005”.

<sup>f</sup> Probation rate per 1,000 arrest in 2004.

<sup>g</sup> Ratio was calculated by dividing incarceration rate by probation rate and then multiplying it by 1,000 to omit decimals.

<sup>h</sup> For Montana, arrest data was not available for 2004. Therefore, the data from 2005 was used. Source: FBI *Uniform Crime Reporting (UCR) Program*—“Crime in the United States”.

Table 40: Distribution of Quintiles for the Ratio Between Imprisonment and Probation

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by percent decrease)
1st	Minimum	0	Massachusetts, Minnesota, Georgia, Idaho, Rhode Island, Washington, Ohio, New Jersey, Indiana and Vermont
2nd	Low	1	Maine, Nebraska, Pennsylvania, Michigan, Maryland, Oregon, Illinois, Florida, North Carolina and North Dakota
3rd	Moderate	2	Colorado, Connecticut, New Mexico, Hawaii, Iowa, Delaware, Texas, Wisconsin, California and Montana
4th	High	3	Wyoming, Arizona, Arkansas, New York, Tennessee, Missouri, Kentucky, Utah, New Hampshire and South Carolina
5th	Extreme	4	South Dakota, Kansas, West Virginia, Alabama, Virginia, Oklahoma, Alaska, Nevada, Louisiana and Mississippi

### **Average Prison Sentences** (Variables 17-26)

There is nothing new in saying that penal harshness and state punitiveness are relative concepts that gain their meaning only if subjected to comparative scrutiny. Comparison is a useful tool in every field, and, obviously, penology is not an exception. How can we say without a comparison that, for instance, ten years of imprisonment or a \$100 fine is a harsh or lenient penalty for a specific crime? When applying individual judgment, we usually juxtapose a particular situation with how other criminals have already been punished for the same crime and how other crimes are punishable in general. The comparison can be used to assess the proportionality of punishment to the crime committed; i.e., if a more severe crime results in one penalty, then a less severe offense should be punished less harshly. This is known as the ordinal proportionality principle, according to which punishment is based on a ranking of crimes. However, the comparative method of measuring state punitiveness proposed by this paper has to do with the comparison of punishments for the same or similar offenses rather than the proportionality principle. But before focusing on the methodological challenges of comparing average prison sanctions imposed on offenders, I would like to make a case for the superiority of this criterion over previously discussed ones (and perhaps ones that follow) to justify the use of nine similar variables. I believe that punitiveness points for these variables will not unduly skew the distributions of final punitiveness scores.

Among various methods of measuring state punitiveness, the most valid is not a comparison of incarceration rates, i.e., how many convicted individuals serve their prison sentences in various jurisdictions. This is due to the fact that there are many other variables, such as a society's crime rates and its ethnic, racial and socio-economic diversity, which can affect incarceration rates and cannot easily be controlled for. Despite the fact that incarceration

rates have much to say about criminal justice policies, any argument that one country or state is more punitive solely because it keeps more people in prisons seems a simplistic method of measuring state punitiveness.

Neither is the propensity of incarceration following an arrest the best method of assessing state punitiveness. If one even manages to obtain the data about the number of arrests and the frequency of imprisonment among arrested individuals for jurisdictions of comparison, which we did, the analysis will not reveal how much time convicts spend in prison. The propensity-of-incarceration analysis is limited because it does not differentiate, for example, between one-year and life sentences.

Another way of determining which jurisdiction is more punitive is by selecting several cases of different crimes in one jurisdiction, matching them with crimes committed in another jurisdiction across offense characteristics, offenders' previous records, and other mitigating and aggravating circumstances, and then observing sentencing outcomes in both places. For example, a researcher can use a pair matching of specific personal (murder, rape or aggravated assault) and property (robbery, fraud or theft) offenses committed and successfully prosecuted in both states. Here, one needs to carefully investigate not only the sentence *per se* but the entire criminal proceeding that has led to it, including the arrest, plea bargaining, pre-trial detention, bail, time elapsed between the arrest and sentencing, the defendant's age and financial status, the effectiveness of prosecutors' and defense attorneys' work and any other factor that has an impact on the sentence. Such analysis can offers a powerful indication of how punishment is fixed in various jurisdictions and which factors contribute to its length.

A case-to-case comparison is problematic as well. Assuming that an ambitious researcher finds two fully comparable offenses (e.g. premeditated killing with economic

motives of a 47 year-old pregnant woman by her 25 year-old husband who had no previous criminal record) in both nations/states and compares their outcomes in terms of the harshness of the sanctions imposed by national courts, she will most likely reach nongeneralizable conclusions. One, five, or even ten matched cases are never representative of the punishments applied in various jurisdictions. In order to draw meaningful conclusions, one should obtain a probability sample of cases, which, considering the limitations of criminal justice data, is not easy or may not even be possible. Thus, as exploratory as they might be, the conclusions of such analyses will be limited due to a small sample size of cases. (It will be virtually impossible to study hundreds of cases in this manner).

Also, while the death penalty and life imprisonment might be powerful indicators of state punitiveness, they are by no means the best ones because these sentences affect a relatively small portion of convicted offenders.

The best indicator of state punitiveness is how much time an average prisoner spends in prison for a specific crime. Although this analysis does not allow us to control for many mitigating and aggravating circumstances<sup>45</sup> pertaining to each crime, it provides a good understanding of the length of prison sanctions. As Lynch (1988) argues, “It is useful to know that it is the length of the sentence imposed and not the use of incarceration that distinguishes one country from another” (p. 183).

This study uses the latest data collected through *The National Judicial* (2002) and *Corrections Reporting Programs* (1998-2003) of the Bureau of Justice Statistics. These data are available from the Inter-University Consortium for Political and Social Research in both

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<sup>45</sup> Prior criminal record is typically an important determinant of the length of a sentence because recidivists are punished more harshly than first time offenders in all jurisdictions. Thus, when a researcher takes an average of prison terms for all crimes or a specific group of crimes (e.g., homicide, sex offenses, and property offenses), she is not able to control for differences in the offenders’ prior record as well as other circumstances that could have affected the severity of punishment.

SPSS and SAS formats. The *National Judicial Reporting Program (NJRP)* dataset contains 455,690 cases randomly selected from state courts in 300 U.S. counties and covers variables of demographics, arrests, convictions and sentencing. The *National Corrections Reporting Program (NCRP)* compiles data annually on all persons admitted to prisons (Part 1), released from prisons (Part 2), or released from parole (Part 3). Although these programs provide the most in-depth data on sentencing and corrections at the national level, they are by no means perfect. For the purposes of this study, the most serious limitation is the absence of figures for several states. Because the *NJRP* collects the data from a sample of counties, by chance, it excluded counties in Nevada, South Dakota, and Wyoming. And even though the *NCRP* is a nation-wide information source, it does not include the data for nine states. To correct the problem of missing data, either an alternative source of data was used or the missing values were estimated (see notes after each table).

A comparison of average prison sentences began with obtaining average incarceration terms served for all offenses by all inmates released in 1998-2003 (variable 17). Wherever the states had no values or contained only a few cases, *the 2002 Corrections Yearbook* was used to fill up empty cells. Although aggregate average prison sentences may not be the best indicator of state punitiveness, these sentences were crucial in estimating prison terms actually served for six categories of offenses: (a) voluntary/non-negligent manslaughter; (b) vehicular and non-vehicular manslaughter; (c) forcible rape; (d) armed robbery; (e) burglary; (f) auto theft; and (g) the possession and use of marijuana (Variables 18-24). While I initially considered using other sources, including the *NJRP 2002*, to estimate missing values, neither correlations nor regression analyses produced a model that would have better predicted missing criterion punitiveness scores for states without values (see discussion on  $r^2$  after each table). Because

strong correlations ( $r = .528$  to  $r = .924$ ,  $p < .001$  for all) were observed between average prison sentences for all offenses (variable 17) and for those of specific crimes (variables 18-24), I filled empty cells for variables 18-24 with the criterion punitiveness scores from variable 17.

The choice of offenses was dictated by two considerations. First, an attempt was made to include not only the serious offenses of murder and armed robbery, but also the non-violent crimes of auto theft and marijuana possession as well. One could argue here that, although a long-running punitiveness debate has been primarily focused on serious crimes and the harshest forms of punishment (e.g., the death penalty and life imprisonment), how a government punishes petty offenses can reveal penal harshness equally well. Sentences for larceny and drug possession may unveil more variations across penal practices of jurisdictions of interest than those for murder, aggravated assault or armed robbery.

Second, it seemed useful to provide a wide range of offenses that would be as specific as possible without having too many empty cells. On the one hand, the more specific are the offenses, the more adequate is a comparison as it allows the juxtaposition of prison terms actually served for identical or similar crimes. On the other hand, however, creating very specific multiple categories exacerbates the problem of missing data. Although the *NCRP* provides a great deal of detailed information about crimes, breaking down the categories of crimes made the data unusable due to either having no values for a great number of states or containing very few cases. I tried to resolve this problem by combining the data for six years (1998-2003) instead of analyzing the numbers for only 2003. Yet, even though this method produced much greater samples, it did not permit a narrower categorization of crime groups.

It may seem that identifying the offenses of comparison and standardizing data are the only complicated parts of a comparative study of average prison terms, but they are not. In most cases, inmates are incarcerated for multiple offenses and/or several counts of the same offense. Although the *NCRP* provides information regarding the number of offenses and counts for which an offender is serving or has served a prison sentence, it is virtually impossible to know what proportion of a sentence was served for each offense or count. Therefore, I first considered a comparison of average prison terms while matching cases across the three most serious offenses/counts. The limitation of this method is that the more offenses/counts I included in the analysis, the fewer cases I got, and, when jurisdictions were relatively small, I end up with a great number of empty cells. Besides, this approach requires distinguishing between concurrent and consecutive sentences, which will be difficult given that the same jurisdiction may utilize both sentencing practices. Perhaps it is not an ideal solution to this problem, but, considering our data limitations, the only way of solving this problem was to undertake a comparison of average prison sentences actually served on current admissions for only the most serious offenses.

In addition to the comparison of actual prison sentences, the study examines the *average total maximum term in months imposed for all offenses in state courts in 2002 and average prison term expected to be served for all offenses*. Because the *NCRP* only reveals how much prison time was served by those released from 1998 to 2003, it focuses on sentences that had been imposed much earlier (prisoners served on average 27 months for all crimes). To provide a more updated picture on more current sentencing practices, I used the percent of the sentences imposed by sentencing judges that was served by inmates released in 2003 (in some cases, earlier) and applied this information to predict the amount of time inmates sentenced in

2002 will serve in state prisons. This prediction is based on an assumption that policies of reduction in time by provisions such as good time, meritorious time, and earned work credit that existed before 2003 will be used with those sentenced in 2002 (see Tables 57-60).

### Variable 17: Average Time Served for All Offenses

Table 41: Average Time Served in Months on Current Admissions for all Offenses by Inmates Released in 1998-2003

State Name	Time Served in Months on Current Admissions and Number of Cases (1998-2003)												Average Time Served	Pun. Score
	1998		1999		2000		2001		2002		2003			
	Time	N	Time	N	Time	N	Time	N	Time	N	Time	N		
Alabama	24.88	8,037	23.21	8,090	23.57	8,491	24.32	9,412	22.90	8,978	67.61	11,564	31.08	3
Alaska	1.07	1,296	4.31	2,076	3.54	1,490	6.00	1	1.39	13,06	2.20	16,129	3.09	0
Arizona <sup>a</sup>	53.64	5	22.80	1	74.99	8	23.23	6	62.27	8	35.40	4	35.00	3
Arkansas	17.52	6,451	16.28	6,840	17.56	7,796	16.84	7,992	15.69	8,256	21.45	4	17.56	0
California	11.06	131,031	11.31	130,908	25.30	230	30.93	239	30.48	181	24.09	147	22.20	2
Colorado	22.85	5,709	22.55	5,375	23.31	5,906	25.05	6,658	24.76	6,608	25.04	7,148	23.93	2
Connecticut <sup>a</sup>	60.00	1	-	-	24.40	3	16.43	3	17.70	1	-	-	19.50	1
Delaware <sup>a</sup>	-	-	-	-	27.70	1	147.90	1	70.50	2	8.85	2	8.9	0
Florida	37.54	22,646	37.45	23,888	34.55	26,021	34.24	26,921	34.82	26.79	33.94	28,201	35.42	4
Georgia	18.47	14,421	26.98	11,976	27.37	11,079	29.48	11,624	31.33	12,675	32.07	13,849	27.62	3
Hawaii	15.05	2,479	16.80	2,452	22.14	1,059	22.75	1,505	22.42	1,651	21.66	1,423	20.14	1
Idaho <sup>a</sup>	-	-	28.15	2	36.20	1	9.70	2	25.82	5	21.20	7	30.10	3
Illinois	17.42	24,192	16.73	25,917	16.31	28,714	14.46	36,097	14.36	36,018	13.35	35,308	15.44	0
Indiana <sup>a</sup>	-	-	-	-	-	-	-	-	13.50	1	-	-	25.80	2
Iowa	24.92	4,693	26.27	5,559	25.63	4,903	25.93	6,057	15.58	5,298	16.12	5,398	22.41	2
Kansas	20.33	3	173.17	3	113.80	7	40.95	6	51.02	8	56.88	8	76.03	4
Kentucky	19.15	7,573	20.14	7,853	20.59	7,917	21.27	8,390	20.41	9,854	18.31	10,692	19.98	1
Louisiana	19.79	14,026	20.35	15,184	20.78	15,318	28.90	1	-	-	17.80	1	21.96	2
Maine	35.23	666	38.26	694	44.65	747	40.79	798	46.08	853	32.55	2	39.59	4
Maryland	23.23	15,542	24.65	15,081	27.08	14,725	28.51	14,062	29.39	13,956	32.86	14,452	27.62	3
Massachusetts <sup>a</sup>	38.01	7	38.93	6	41.36	7	47.70	3	79.75	2	50.32	5	40.80	4
Michigan	28.28	12,825	30.82	11,999	32.04	11,693	33.68	12,534	35.12	12,972	37.18	13,902	32.85	3
Minnesota	14.42	3,773	13.71	3,964	14.09	3,895	14.46	3,902	14.82	4,542	14.73	4,550	14.37	0
Mississippi	21.47	5,330	21.64	5,146	23.53	5,855	23.90	6,596	22.47	6,795	155.61	7,541	44.77	4
Missouri	16.21	12,928	15.82	13,686	15.17	14,760	17.10	15,699	16.87	17,511	16.58	19,126	16.29	0
Montana <sup>a</sup>	34.40	1	38.25	2	51.09	7	8.90	2	12.52	6	57.38	4	40.00	4
Nebraska	19.42	1,502	20.36	1,610	27.41	1,673	25.42	1,936	25.98	2,009	25.36	2,146	23.99	2
Nevada	26.40	4,338	26.50	4,690	25.70	4,342	26.96	4,423	26.91	5,028	27.52	5,057	26.67	3
New Hampshire	21.55	943	22.74	952	22.70	1,002	22.92	989	22.64	977	23.02	1,128	22.60	2
New Jersey	18.08	14,252	20.28	14,859	22.20	15,591	22.58	16,197	22.38	14,906	21.55	14,454	21.18	1
New Mexico	48.52	9	17.75	2	40.17	3	41.02	8	25.80	7	40.25	4	35.59	4
New York	22.68	27,302	22.65	27,240	24.85	29,220	26.68	28,458	26.79	27,133	28.06	27,738	25.29	2
North Carolina	18.45	24,040	18.26	23,927	17.49	22,395	17.44	21,249	16.09	21,461	16.63	21,748	17.39	0
North Dakota	14.73	644	12.80	668	14.35	611	15.12	714	22.80	1	39.00	5	19.80	1
Ohio	37.31	11,429	49.50	9,813	55.61	8,409	57.28	7,107	19.71	37,420	-	-	43.88	4
Oklahoma	23.90	9,065	25.21	8,196	38.95	6,405	35.87	8,581	33.53	8,127	34.28	8,136	31.96	3
Oregon	17.25	4,146	23.10	3,228	24.16	3,401	26.43	3,641	26.73	4,104	28.30	4,247	24.33	2
Pennsylvania	59.44	8,861	62.95	10,340	60.91	10,553	58.49	10,377	58.30	10,614	58.60	12,457	59.78	4
Rhode Island <sup>a</sup>	-	-	-	-	-	-	-	-	72.30	1	-	-	9.90	0
South Carolina	20.60	11,370	20.19	10,968	22.32	11,487	19.88	11,598	19.06	12,044	18.60	13,508	20.11	1
South Dakota	18.48	1,189	19.24	1,351	16.76	1,531	18.95	1,493	18.43	1,806	16.25	2,036	18.02	1
Tennessee	12.79	14,124	16.84	12,652	18.40	13,465	17.26	12,660	17.69	12,784	22.91	13,120	17.65	0
Texas	43.53	35,903	40.63	24,484	37.38	10	56.66	40,842	58.17	16,394	45.78	51,474	47.03	4
Utah	19.67	2,220	28.90	2	18.38	2,865	18.98	3,115	21.67	2,821	20.73	3,041	21.39	1
Vermont	21.93	3	11.75	2	12.20	1	9.00	1	17.40	1	18.80	2	15.18	0
Virginia	23.08	10,273	25.55	10,131	27.30	9,880	28.35	10,591	27.62	10,836	27.93	11,752	26.64	3
Washington	20.44	6,082	20.26	6,344	21.74	6,785	21.56	7,083	20.67	7,692	15.70	12,243	20.06	1
West Virginia	19.76	953	19.53	1,234	18.39	1,055	23.57	946	20.98	1,349	22.46	1,529	20.78	1
Wisconsin	18.15	6,553	17.70	7,002	22.15	8,273	24.21	7,861	25.44	8,366	27.30	8,558	22.49	2
Wyoming <sup>a</sup>	30.90	2	-	-	125.70	1	-	-	65.30	1	-	-	29.60	3

<sup>a</sup> Because *NCRP 98-03* contained only few cases for these states, data on average time served for them came from *The 2002 Corrections Yearbook; Adult Corrections*, p. 39, "Average length of stay in months for inmates released in 2001". See column "Overall". Although New Mexico (N = 33) and Vermont (N = 9) included only a small number of cases, *NCRP 98-03* data were maintained because *The 2002 Corrections Yearbook* did not report the numbers for these two states.

Source: BJS: *National Corrections Reporting Program, 1998-2003 (NCRP 98-03)*. Prison Release Data, Dataset 2.

Table 42: Calculating Punitiveness Scores for Average Time Served for All Offenses

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by prison term)
1st	Minimum	0	Alaska, Delaware, Rhode Island, Minnesota, Vermont, Illinois, Missouri, North Carolina, Arkansas and Tennessee
2nd	Low	1	South Dakota, Connecticut, North Dakota, Kentucky, Washington, South Carolina, Hawaii, West Virginia, New Jersey and Utah
3rd	Moderate	2	Louisiana, California, Iowa, Wisconsin, New Hampshire, Colorado, Nebraska, Oregon, New York and Indiana
4th	High	3	Virginia, Nevada, Georgia, Maryland, Wyoming, Idaho, Alabama, Oklahoma, Michigan and Arizona
5th	Extreme	4	Florida, New Mexico, Maine, Montana, Massachusetts, Ohio, Mississippi, Texas, Pennsylvania and Kansas



<sup>a</sup> Because there were no data for these states, the average time served for all offenses was used to estimate punitiveness scores for them. The Pearson's Correlation coefficient showed a moderately strong, statistically significant correlation between *the Average Time Served in Months on Current Admissions for all Offenses by Inmates Released in 1998-2003* ( $M = 26.67$ ,  $SD = 12.72$ ,  $N = 50$ ) and the present variable ( $M = 90.79$ ,  $SD = 28.26$ ,  $N = 40$ ),  $r = .603$ ,  $p < .001$ , allowing us to conclude that 36% ( $r^2 = .364$ ) of the variance in this variables can be predicted from its relationship with *the Average Time Served for all Offenses*. Therefore, the punitiveness scores assigned to the states across *the Average Time Served for all Offenses* (variable 17) were used fill the empty cells.

Source: BJS: *National Corrections Reporting Program, 1998-2003*. Prison Release Data, Dataset 2.

Table 44: Calculating Punitiveness Scores for Average Time Served for Murder and Voluntary/ Nonnegligent Manslaughter

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by prison term)
1st	Minimum	0	Alaska, New Mexico, California, Utah, Minnesota, Arkansas, West Virginia and North Dakota
2nd	Low	1	Louisiana, Tennessee, South Dakota, Wisconsin, Nevada, Missouri, South Carolina and Oklahoma
3rd	Moderate	2	Illinois, New Jersey, Kentucky, New York, Texas, Iowa, Colorado and New Hampshire
4th	High	3	Hawaii, Georgia, North Carolina, Oregon, Michigan, Florida, Virginia and Alabama
5th	Extreme	4	Maryland, Ohio, Pennsylvania, Mississippi, Washington, Kansas, Nebraska and Maine

### Variable 19: Average Time Served for Vehicular and Nonvehicular Manslaughter

Table 45: Average Time Served in Months on Current Admissions for Vehicular and Nonvehicular Manslaughter as the Most Serious Offense by Inmates Released in 1998-2003

State Name	Time Served in Months on Current Admissions and Number of Cases (1998-2003)												Average Time Served	Pun. Score
	1998		1999		2000		2001		2002		2003			
	Time	N	Time	N	Time	N	Time	N	Time	N	Time	N		
Alabama	38.82	110	37.15	85	37.36	96	42.77	103	43.29	109	72.88	126	45.38	2
Alaska	2.92	4	9.09	13	22.00	6	-	-	1.24	8	12.45	4	9.54	0
Arizona <sup>a</sup>	-	-	-	-	62.30	1	-	-	-	-	-	-	-	3
Arkansas	38.55	41	29.88	118	26.42	154	24.56	162	26.53	125	-	-	29.19	0
California	16.45	518	18.98	508	29.16	7	40.94	9	29.35	9	45.00	5	29.98	1
Colorado	40.40	66	33.13	50	37.49	53	38.20	81	47.85	64	43.23	64	40.05	1
Connecticut <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	1
Delaware <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	0
Florida	53.21	317	59.95	377	58.88	351	60.46	287	62.19	308	66.59	287	60.21	3
Georgia	38.49	74	39.72	109	41.55	67	48.08	68	49.88	91	56.72	77	45.74	2
Hawaii	27.92	11	43.47	22	86.22	14	45.06	21	37.64	15	51.29	15	48.60	3
Idaho <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	3
Illinois	23.85	90	19.43	92	23.73	79	21.06	21	17.49	52	20.32	48	20.98	0
Indiana <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	2
Iowa	27.80	28	44.75	38	53.32	26	54.03	28	36.25	15	28.57	27	40.79	2
Kansas <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	4
Kentucky	35.90	78	28.41	102	31.37	103	32.83	77	33.08	104	37.22	104	33.14	1
Louisiana	39.56	301	46.71	314	44.00	283	-	-	-	-	-	-	43.42	2
Maine	70.27	7	61.00	21	50.11	13	57.82	15	74.25	19	-	-	62.69	4
Maryland	52.33	99	54.94	96	48.03	89	57.77	83	67.97	89	88.68	94	61.62	4
Massachusetts <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	4
Michigan	58.58	141	59.84	118	67.84	86	57.48	84	71.56	78	75.64	73	65.16	4
Minnesota	28.32	43	29.03	46	23.67	27	25.72	32	25.69	52	25.02	33	26.24	0
Mississippi	50.77	139	56.94	121	54.53	132	64.28	134	57.71	81	112.99	78	66.20	4
Missouri	22.16	70	24.43	68	24.25	82	26.17	90	31.92	73	31.32	86	26.71	0
Montana <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	4
Nebraska	46.70	17	59.07	16	51.34	18	62.06	24	55.63	24	57.00	29	55.30	3
Nevada	30.44	16	25.13	13	85.40	1	18.52	4	15.11	7	24.76	10	33.23	1
New Hampshire	36.93	3	55.90	4	33.43	9	38.46	7	65.72	11	40.19	8	45.11	2
New Jersey	32.09	51	30.36	48	39.80	57	39.93	55	42.42	30	57.22	44	40.30	2
New Mexico <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	4
New York	41.59	148	41.45	153	46.40	153	41.98	152	50.92	160	51.98	166	45.72	2
North Carolina	27.34	235	29.04	228	30.13	198	34.33	159	35.96	110	35.94	114	32.12	1
North Dakota	25.51	9	22.89	8	14.47	3	61.00	3	-	-	23.80	1	29.53	0
Ohio	68.28	76	84.19	113	94.00	140	98.29	135	74.12	249	-	-	83.78	4
Oklahoma	33.84	29	28.67	9	58.08	27	90.38	26	66.82	25	68.08	17	57.65	3
Oregon	56.63	51	56.28	53	50.45	51	53.43	47	60.49	49	53.87	56	55.19	3
Pennsylvania	64.10	141	65.71	177	63.30	172	59.20	172	59.11	122	55.46	193	61.15	4
Rhode Island <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	0
South Carolina	65.75	160	59.41	148	77.60	172	78.24	159	79.45	188	74.27	180	72.45	4
South Dakota	49.54	7	67.35	12	42.60	12	40.07	13	61.32	17	49.24	18	51.69	3
Tennessee	8.88	46	19.42	29	17.55	25	30.95	40	28.07	33	32.26	47	22.86	0
Texas	52.74	162	63.06	239	-	-	91.53	325	103.32	297	81.10	325	78.35	4
Utah	74.36	8	-	-	59.61	20	55.42	25	62.23	26	37.35	25	57.79	3
Vermont <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	0
Virginia	33.25	84	35.94	65	36.97	79	34.96	69	39.12	79	38.22	76	36.41	1
Washington	27.06	79	27.06	68	29.07	65	26.73	62	29.95	75	37.86	67	29.62	0
West Virginia	32.20	2	46.50	5	12.62	6	35.12	4	35.50	7	40.49	12	33.74	1
Wisconsin	37.04	25	42.02	18	44.84	20	50.92	23	45.77	29	43.54	44	44.02	2
Wyoming <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	3

<sup>a</sup> Because there were no data for these states, the average time served for all offenses was used to estimate punitiveness scores for them. The Pearson's Correlation coefficient showed a strong, statistically significant correlation between *the Average Time Served in Months on Current Admissions for all Offenses by Inmates Released in 1998-2003* ( $M = 26.67$ ,  $SD = 12.72$ ,  $N = 50$ ) and this variable ( $M = 45.31$ ,  $SD = 16.90$ ,  $N = 38$ ),  $r = .751$ ,  $p < .001$ . This means that 56% ( $r^2 = .564$ ) of the variance of the variable can be predicted from its

relationship with *the Average Time Served in Months on Current Admissions for all Offenses by Inmates Released in 1998-2003*.

Source: BJS: *National Corrections Reporting Program, 1998-2003*. Prison Release Data, Dataset 2.

Table 46: Calculating Punitiveness Scores for Average Time Served for Vehicular and Nonvehicular Manslaughter

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by prison term)
1st	Minimum	0	Alaska, Illinois, Tennessee, Minnesota, Missouri, Arkansas, North Dakota and Washington
2nd	Low	1	California, North Carolina, Kentucky, Nevada, West Virginia, Virginia and Colorado
3rd	Moderate	2	New Jersey, Iowa, Louisiana, Wisconsin, New Hampshire, Alabama, New York and Georgia
4th	High	3	Hawaii, South Dakota, Oregon, Nebraska, Oklahoma, Utah and Florida
5th	Extreme	4	Pennsylvania, Maryland, Maine, Michigan, Mississippi, South Carolina, Texas and Ohio



<sup>a</sup> Because there were no data for these states, the average time served for all offenses was used to estimate punitiveness scores for them. The Pearson's Correlation coefficient showed a moderately strong, statistically significant correlation between *the Average Time Served in Months on Current Admissions for all Offenses by Inmates Released in 1998-2003* ( $M = 26.67$ ,  $SD = 12.72$ ,  $N = 50$ ) and this variable ( $M = 75.11$ ,  $SD = 31.60$ ,  $N = 34$ ),  $r = .528$ ,  $p < .001$ . This means that 28% ( $r^2 = .279$ ) of the variance of the variable can be predicted from its relationship with *the Average Time Served in Months on Current Admissions for all Offenses by Inmates Released in 1998-2003*.

Source: BJS: *National Corrections Reporting Program, 1998-2003*. Prison Release Data, Dataset 2.

Table 48: Calculating Punitiveness Scores for Average Time Served for Forcible Rape

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by prison term)
1st	Minimum	0	Alaska, California, Minnesota, Wisconsin, Colorado, Nebraska and Oklahoma
2nd	Low	1	New York, Utah, Washington, Michigan, Alabama, Hawaii and Kentucky
3rd	Moderate	2	New Hampshire, Missouri, Oregon, Louisiana, Virginia, Florida and Tennessee
4th	High	3	South Dakota, North Carolina, Georgia, Arkansas, Ohio, Mississippi and South Carolina
5th	Extreme	4	Maryland, New Jersey, Texas, Pennsylvania, Illinois and Maine



<sup>a</sup> Because there were no data for these states, the average time served for all offenses was used to estimate punitiveness scores for them. The Pearson's Correlation coefficient showed a moderately strong, statistically significant correlation between *the Average Time Served in Months on Current Admissions for all Offenses by Inmates Released in 1998-2003* ( $M = 26.67, SD = 12.72, N = 50$ ) and this variable ( $M = 46.43, SD = 17.50, N = 39$ ),  $r = .678, p < .001$ . This means that 46% ( $r^2 = .460$ ) of the variance of the variable can be predicted from its relationship with *the Average Time Served in Months on Current Admissions for all Offenses by Inmates Released in 1998-2003*.

Source: BJS: *National Corrections Reporting Program, 1998-2003*. Prison Release Data, Dataset 2.

Table 50: Calculating Punitiveness Scores for Average Time Served for Armed Robbery

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by prison term)
1st	Minimum	0	Alaska, Minnesota, California, Utah, Illinois, Tennessee, New Jersey and Washington
2nd	Low	1	Kentucky, New York, North Dakota, Arkansas, New Hampshire, West Virginia, Louisiana and North Carolina
3rd	Moderate	2	Wisconsin, Nevada, Oregon, Nebraska, Missouri, Colorado, Mississippi and South Dakota
4th	High	3	Maine, Michigan, South Carolina, Hawaii, Iowa, Oklahoma, Alabama and Virginia
5th	Extreme	4	Florida, Ohio, Massachusetts, Georgia, Maryland, Texas and Pennsylvania



<sup>a</sup> Because there were no data for these states, the average time served for all offenses was used to estimate punitiveness scores for them. The Pearson's Correlation coefficient showed a moderately strong, statistically significant correlation between *the Average Time Served in Months on Current Admissions for all Offenses by Inmates Released in 1998-2003* ( $M = 26.67, SD = 12.72, N = 50$ ) and this variable ( $M = 27.36, SD = 12.00, N = 40$ ),  $r = .924, p < .001$ . This means that 85% ( $r^2 = .854$ ) of the variance of the variable can be predicted from its relationship with *the Average Time Served in Months on Current Admissions for all Offenses by Inmates Released in 1998-2003*.

Source: BJS: *National Corrections Reporting Program, 1998-2003*. Prison Release Data, Dataset 2.

Table 52: Calculating Punitiveness Scores for Average Time Served for Burglary

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by prison term)
1st	Minimum	0	Alaska, Minnesota, Tennessee, Missouri, Arkansas, North Dakota, New Jersey and Illinois
2nd	Low	1	West Virginia, North Carolina, Utah, Louisiana, Oregon, Washington, New York and California
3rd	Moderate	2	Kentucky, Iowa, South Dakota, Hawaii, New Hampshire, Nevada, Georgia and South Carolina
4th	High	3	Michigan, Nebraska, Wisconsin, Colorado, New Mexico, Maryland, Oklahoma and Mississippi
5th	Extreme	4	Virginia, Florida, Montana, Alabama, Maine, Ohio, Texas and Pennsylvania



<sup>a</sup> Because there were no data for these states, the average time served for all offenses was used to estimate punitiveness scores for them. The Pearson's Correlation coefficient showed a moderately strong, statistically significant correlation between *the Average Time Served in Months on Current Admissions for all Offenses by Inmates Released in 1998-2003* ( $M = 26.67, SD = 12.72, N = 50$ ) and this variable ( $M = 20.34, SD = 17.00, N = 33$ ),  $r = .840, p < .001$ . This means that 85% ( $r^2 = .854$ ) of the variance of the variable can be predicted from its relationship with *the Average Time Served in Months on Current Admissions for all Offenses by Inmates Released in 1998-2003*.

Source: BJS: *National Corrections Reporting Program, 1998-2003*. Prison Release Data, Dataset 2.

Table 54: Calculating Punitiveness Scores for Average Time Served for Average Time Served in Months on Current Admissions for Auto Theft

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by prison term)
1st	Minimum	0	Alaska, Kentucky, Louisiana, Minnesota, New Jersey, Oregon and North Carolina
2nd	Low	1	Washington, Tennessee, California, West Virginia, South Carolina, New York and Missouri
3rd	Moderate	2	Utah, Alabama, Illinois, Hawaii, Nevada and Maryland
4th	High	3	Wisconsin, Florida, Colorado, Idaho, Michigan and Virginia
5th	Extreme	4	Mississippi, Oklahoma, New Hampshire, Ohio, Texas and Pennsylvania

## Variable 24: Average Time Served for Possession and Use of Marijuana

Table 55: Average Time Served in Months on Current Admissions for Possession and Use of Marijuana by Inmates Released in 1998-2003

State Name	Time Served in Months on Current Admissions and Number of Cases (1998-2003)												Average Time Served	Pun. Score
	1998		1999		2000		2001		2002		2003			
	Time	N	Time	N	Time	N	Time	N	Time	N	Time	N		
Alabama	13.42	302	12.53	339	14.31	407	16.69	427	14.95	383	34.68	430	17.76	1
Alaska <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	0
Arizona <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	3
Arkansas <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	0
California	7.57	163	8.71	145	-	-	-	-	-	-	-	-	8.14	2
Colorado	12.40	24	14.36	33	11.70	24	13.38	35	11.20	42	14.65	27	12.95	2
Connecticut <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	1
Delaware <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	0
Florida	20.42	29	14.45	24	15.65	37	11.59	54	14.30	47	13.35	52	14.96	1
Georgia	8.90	279	12.32	161	13.94	169	13.07	189	14.04	171	14.96	1,557	12.87	2
Hawaii <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	1
Idaho <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	3
Illinois	7.94	167	6.07	188	6.29	201	6.16	234	7.95	141	7.17	86	6.93	2
Indiana <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	2
Iowa	18.22	119	19.10	124	17.31	105	15.08	130	9.90	106	9.95	111	14.93	2
Kansas <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	4
Kentucky <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	1
Louisiana	39.97	3	40.70	2	13.80	3	-	-	-	-	-	-	31.49	0
Maine <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	4
Maryland	2.17	133	3.19	104	1.84	160	2.22	174	2.70	127	3.64	75	2.63	4
Massachusetts <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	4
Michigan <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	3
Minnesota	7.96	26	5.66	27	5.64	34	8.58	27	6.75	31	6.47	27	6.84	2
Mississippi	12.14	142	18.07	117	14.33	138	12.98	200	14.89	223	225.03	238	49.57	0
Missouri <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	0
Montana <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	4
Nebraska	10.23	15	11.83	9	20.32	6	10.57	16	18.85	26	12.07	25	13.98	2
Nevada	-	-	-	-	27.27	4	-	-	17.63	3	-	-	-	3
New Hampshire	-	-	-	-	-	-	-	-	12.00	2	-	-	-	2
New Jersey <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	1
New Mexico <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	4
New York	14.00	48	17.29	45	13.04	57	14.00	50	18.68	50	15.68	51	15.45	1
North Carolina <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	0
North Dakota	11.05	2	-	-	-	-	-	-	-	-	-	-	-	1
Ohio <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	4
Oklahoma	-	-	-	-	-	-	40.80	1	9.12	5	13.56	14	21.16	0
Oregon <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	2
Pennsylvania	-	-	-	-	14.00	1	-	-	36.00	2	4.60	1	-	4
Rhode Island <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	0
South Carolina	8.41	47	7.25	48	9.50	66	4.43	59	4.35	60	3.62	80	6.26	4
South Dakota	9.87	12	8.56	23	8.76	31	11.36	32	10.99	32	14.10	40	10.61	2
Tennessee	.50	2	4.90	3	3.60	1	5.62	4	5.67	3	18.90	1	6.53	4
Texas	27.47	982	28.05	751	-	-	29.78	913	29.96	804	23.79	1,128	27.81	0
Utah	-	-	-	-	-	-	-	-	10.50	1	11.70	1	-	1
Vermont <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	0
Virginia	14.32	96	13.46	85	15.24	72	15.51	84	14.42	81	16.84	113	14.97	1
Washington <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	1
West Virginia	6.10	1	5.60	1	-	-	-	-	7.20	1	7.10	1	-	1
Wisconsin <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	2
Wyoming <sup>a</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-	3

<sup>a</sup> Because there were no data for these states, the average time served for all offenses was used to estimate punitiveness scores for them. The Pearson's Correlation coefficient showed a moderately strong, statistically

significant correlation between *the Average Time Served in Months on Current Admissions for all Offenses by Inmates Released in 1998-2003* ( $M = 26.67$ ,  $SD = 12.72$ ,  $N = 50$ ) and this variable ( $M = 15.57$ ,  $SD = 11.00$ ,  $N = 19$ ),  $r = .709$ ,  $p = .001$ . This means that 50% ( $r^2 = .503$ ) of the variance of the variable can be predicted from its relationship with *the Average Time Served in Months on Current Admissions for all Offenses by Inmates Released in 1998-2003*.

Source: BJS: *National Corrections Reporting Program, 1998-2003*. Prison Release Data, Dataset 2.

Table 56: Calculating Punitiveness Scores for Average Time Served for Possession and Use of Marijuana

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by prison term)
1st	Minimum	0	Mississippi, Louisiana, Texas and Oklahoma
2nd	Low	1	Alabama, New York, Virginia and Florida
3rd	Moderate	2	Iowa, Nebraska, Colorado and Georgia
4th	High	3	South Dakota, California, Illinois and Minnesota
5th	Extreme	4	Tennessee, South Carolina and Maryland

### Variable 25: Average Total Maximum Prison Term Imposed in State Courts

Table 57: Average Total Maximum Prison Term in Months Imposed for all Offenses in State Courts in 2002

State Name	Mean Sentence	Pun. Score	State Name	Mean Sentence	Pun. Score	State Name	Mean Sentence	Pun. Score
Alabama	78.68	4	Louisiana	54.05	3	Ohio	22.30	0
Alaska	22.70	0	Maine	25.22	0	Oklahoma	54.36	3
Arizona	27.61	1	Maryland	53.38	3	Oregon	9.07	0
Arkansas	63.01	4	Massachusetts	46.45	2	Pennsylvania	46.34	2
California	20.39	0	Michigan	163.56	4	Rhode Island	22.81	0
Colorado	38.33	2	Minnesota	50.45	3	South Carolina	51.49	3
Connecticut	32.67	1	Mississippi	69.58	4	South Dakota <sup>a</sup>	36.00	1
Delaware	32.76	1	Missouri	63.62	4	Tennessee	48.95	2
Florida	25.99	1	Montana	54.00	3	Texas	30.18	1
Georgia	37.36	2	Nebraska	30.15	1	Utah	45.79	2
Hawaii	52.73	3	Nevada <sup>a</sup>	40.80	2	Vermont	67.53	4
Idaho	22.29	0	New Hampshire	73.58	4	Virginia	21.95	0
Illinois	25.35	1	New Jersey	44.14	2	Washington	13.61	0
Indiana	43.64	2	New Mexico	27.06	1	West Virginia	53.67	3
Iowa	75.76	4	New York	52.48	3	Wisconsin	33.47	1
Kansas	50.57	3	North Carolina	24.60	0	Wyoming <sup>a</sup>	68.40	4
Kentucky	55.44	4	North Dakota	36.47	2			

<sup>a</sup> Data for Nevada, South Dakota and Wyoming refer to prison terms prescribed by sentencing judges in respective states in 2001. Source: *The 2002 Corrections Yearbook; Adult Corrections*, "Average length of sentence in years on January 1, 2002", p. 38.

Source: BJS: *National Judicial Reporting Program, 2002*.

Note: Data excludes life sentences

Table 58: Calculating Punitiveness Scores for Average Total Maximum Prison Term Imposed

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by the total maximum sentence lengths)
1st	Minimum	0	Oregon, Washington, California, Virginia, Idaho, Ohio, Alaska, Rhode Island, North Carolina and Maine
2nd	Low	1	Illinois, Florida, New Mexico, Arizona, Nebraska, Texas, Connecticut, Delaware, Wisconsin and South Dakota
3rd	Moderate	2	North Dakota, Georgia, Colorado, Nevada, Indiana, New Jersey, Utah, Pennsylvania, Massachusetts and Tennessee
4th	High	3	Minnesota, Kansas, South Carolina, New York, Hawaii, Maryland, West Virginia, Montana, Louisiana and Oklahoma
5th	Extreme	4	Kentucky, Arkansas, Missouri, Vermont, Wyoming, Mississippi, New Hampshire, Iowa, Alabama and Michigan

## Variable 26: Average Prison Terms Expected to Be Served

Table 59: Average Prison Terms Expected to Be Served for All Offenses by Inmates Sentenced to Incarceration in 2002 (assuming that early-release policies used by 2003 will remain in force)

State Name	Sentence <sup>a</sup>	Per-cent <sup>b</sup>	Exp. Time <sup>c</sup>	Pun. Score	State Name	Sentence <sup>a</sup>	Per-cent <sup>b</sup>	Exp. Time <sup>c</sup>	Pun. Score
Alabama	78.68	52.53	41.33	4	Montana	54.00	26.25	14.18	1
Alaska	22.70	67.00	15.21	1	Nebraska	30.15	45.49	13.72	0
Arizona	27.61	74.00	20.43	2	Nevada	40.80	51.84	21.15	2
Arkansas	63.01	41.00	25.83	3	New Hampshire	73.58	51.57	37.95	4
California	20.39	55.52	11.32	0	New Jersey	44.14	50.92	22.48	2
Colorado	38.33	75.52	28.95	3	New Mexico	27.06	57.00	15.45	1
Connecticut	32.67	68.00	22.22	2	New York	52.48	56.43	29.61	4
Delaware	32.76	16.60	5.44	0	North Carolina	24.60	75.60	18.60	1
Florida	25.99	83.09	21.60	2	North Dakota	36.47	8.00	2.92	0
Georgia	37.36	73.18	27.34	3	Ohio	22.30	33.00	7.36	0
Hawaii	52.73	52.93	27.91	3	Oklahoma	54.36	50.01	27.19	3
Idaho	22.29	29.00	6.46	0	Oregon	9.07	82.81	7.51	0
Illinois	25.35	37.10	9.40	0	Pennsylvania	46.34	6.50	3.01	0
Indiana	43.64	48.00	20.95	2	Rhode Island	22.81	66.00	15.05	1
Iowa	75.76	25.77	19.52	1	South Carolina	51.49	49.70	25.59	3
Kansas	50.57	38.90	19.67	2	South Dakota	36.00	52.31	18.83	1
Kentucky	55.44	44.30	24.56	3	Tennessee	48.95	40.86	20.00	2
Louisiana	54.05	51.00	27.57	3	Texas	30.18	111.86	33.76	4
Maine	25.22	100.00	25.22	3	Utah	45.79	43.00	19.69	2
Maryland	53.38	66.68	35.59	4	Vermont	67.53	87.00	58.75	4
Massachusetts	46.45	63.32	29.41	3	Virginia	21.95	78.17	17.16	1
Michigan	163.56	36.56	59.80	4	Washington	13.61	67.93	9.25	0
Minnesota	50.45	65.88	33.24	4	West Virginia	53.67	28.77	15.44	1
Mississippi	69.58	51.34	35.72	4	Wisconsin	33.47	53.00	17.74	1
Missouri	63.62	33.47	21.29	2	Wyoming	68.40	44.00	30.10	4

<sup>a</sup> Average total maximum sentence lengths (in months) imposed in state courts in 2002. Source: BJS: *National Corrections Reporting Program, 2003*, Prison Release Data, Dataset 2. Data for Nevada, South Dakota and Wyoming refer to prison terms prescribed by sentencing judges in respective states in 2001. Source: *The 2002 Corrections Yearbook; Adult Corrections*, "Average length of sentence in years on January 1, 2002", p. 38.

<sup>b</sup> Total time served as a percent of maximum sentence by state inmates released in 2003. Source: BJS: *National Judicial Reporting Program, 2002*. Data on percent of sentence served for Alaska, Arizona, Connecticut, Indiana, Louisiana, New Mexico, Ohio, Rhode Island, Utah, Vermont and Wyoming refer to 1997. Source: Ditton & Wilson (1999). See Table 8, "Part 1 violent offenders released from State prison, 1993, 1995, and 1997" on p. 9.

<sup>c</sup> Expected actual prison term was calculated by predicting how much time state inmates sentenced in 2002 would or will spend in prison using the early release data (the total time served as a percent of maximum sentence by state inmates released in 2003).

Table 60: Calculating Punitiveness Scores for Average Prison Terms Expected to Be Served

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by prison term)
1st	Minimum	0	North Dakota, Pennsylvania, Delaware, Idaho, Ohio, Oregon, Washington, Illinois, California and Nebraska
2nd	Low	1	Montana, Rhode Island, Alaska, West Virginia, New Mexico, Virginia, Wisconsin, North Carolina, South Dakota and Iowa
3rd	Moderate	2	Kansas, Utah, Tennessee, Arizona, Indiana, Nevada, Missouri, Florida, Connecticut and New Jersey
4th	High	3	Kentucky, Maine, South Carolina, Arkansas, Oklahoma, Georgia, Louisiana, Hawaii, Colorado and Massachusetts
5th	Extreme	4	New York, Wyoming, Minnesota, Texas, Maryland, Mississippi, New Hampshire, Alabama, Vermont and Michigan

### Summary: Incarceration

Part Two of the study assessed state punitiveness on the bases of 14 incarceration variables. The quintile system was used to assign criterion punitiveness scores, ranging from zero (minimal punitiveness) to four (extreme punitiveness). These scores then have been combined by computing average punitiveness score for each state. The distribution of the scores is shown in Table 61.

The striking difference between the variables of *Political and Symbolic Punishment* and these 14 variables is that the latter group did not reveal regional variations of punitiveness. Instead, the jurisdictions from all four regions were represented at all five levels fairly similarly. Among least punitive ten states, there were three Northeastern states (Rhode Island, Vermont and New Jersey), two Midwestern states (Minnesota and North Dakota), two Southern states (North Carolina and Arkansas) and three Western states (Alaska, Utah and Washington). The same situation was observed among the most punitive states, as there were three Northeastern states (Maine, Massachusetts and Pennsylvania), two Midwestern states (Kansas and Ohio), two Southern states (Mississippi and Texas) and three Western states (New Mexico, Montana and Wyoming) among the ten most punitive jurisdictions. Thus, one cannot really talk about regional differences when it comes to the incarceration rates and the average prison sentences imposed as well as actually served.

When discussing these findings, we cannot disregard the limitations of the data from which they have been obtained. Because the average actual prison sentences have been estimated for a significant number of states (these numbers vary from variable to variable) that do not participate in *the National Corrections Reporting Programs*, the real numbers can be relatively different from what have been reported in the respective tables. Unfortunately,

because there are no alternative national-level data on actually served prison sentences for specific offenses, the validation of the estimates was not possible. Despite this limitation, however, leaving the empty cells unfilled was not an option either. While the criterion punitiveness scores have been averaged rather than summed when computing overall punitiveness scores, leaving empty cells would have unduly increased the impact of incarceration variables (12-16) on the distribution of the final scores and thus have distorted the picture even more.

As important as incarceration variables might be for the purposes of assessing state punitiveness, they are still only one slide of the panorama. Therefore, in order to complete the picture, this study offers the analyses of 20 additional variables that are grouped in *Punishing "Immorality"*, *Conditions of Confinement*, and *Juvenile Justice*. Then, the discussion of overall punitiveness scores will follow.

Table 61: Combining the Punitiveness Scores of the Variables of Incarceration

State Name <sup>a</sup>	Variables 12-26															Sum Pun. Scores $\Sigma X$	Mean Pun. Scores $\frac{\Sigma X}{15}$
	Stock Incarceration	Flow Incarceration	Prison Adm. Trends	Prison Release Trends	Imprisonment v. Probation	Average Time: All Offenses	Average Time: Murder	Average Time: Manslaughter	Average Time: Forcible Rape	Average Time: Armed Robbery	Average Time: Burglary	Average Time: Auto Theft	Average Time: Use of Marijuana	Average Time Imposed	Average Time to Be Served		
Rhode Island	1	0	4	2	0	0	0	0	0	0	0	0	0	0	0	7	0.47
Minnesota	0	1	4	0	0	0	0	0	0	0	0	0	0	2	3	10	0.67
North Dakota	0	1	3	0	1	1	0	0	1	0	0	0	1	1	2	12	0.80
Delaware	4	1	1	4	2	0	0	0	0	0	0	0	0	0	1	13	0.87
Washington	0	2	3	0	0	1	4	0	1	0	1	1	1	1	0	15	1.00
Vermont	4	4	4	0	0	0	0	0	0	0	0	0	0	0	4	16	1.07
Alaska	3	4	3	3	4	0	0	0	0	0	0	0	0	0	0	17	1.13
North Carolina	1	0	4	4	1	0	3	1	3	1	1	1	0	0	0	20	1.33
Arkansas	1	3	4	1	3	0	0	0	3	1	0	0	0	4	4	20	1.33
Utah	0	0	3	3	3	1	0	3	1	0	1	1	2	1	2	21	1.40
New Jersey	0	1	4	4	0	1	2	2	4	0	0	0	0	1	2	21	1.40
California	2	4	2	4	2	2	0	1	0	0	1	1	1	2	0	22	1.47
Missouri	2	3	4	1	3	0	1	0	2	2	0	0	1	0	4	23	1.53
Tennessee	2	2	3	3	3	0	1	0	2	0	0	0	1	4	2	23	1.53
Wisconsin	0	0	0	3	2	2	1	2	0	2	3	3	3	2	1	24	1.60
Oregon	2	2	3	0	1	2	3	3	2	2	1	1	0	2	0	24	1.60
West Virginia	3	3	3	0	4	1	0	1	1	1	1	1	1	1	3	24	1.60
Connecticut	3	2	4	3	2	1	1	1	1	1	1	1	1	1	1	24	1.60
Illinois	4	4	4	1	1	0	2	0	4	0	0	0	2	2	1	25	1.67
Nebraska	0	0	3	1	1	2	4	3	0	2	3	3	2	2	1	27	1.80
Louisiana	4	3	1	3	4	2	1	2	2	1	1	1	0	0	3	28	1.87
New York	3	3	0	4	3	2	2	2	1	1	1	1	1	1	3	28	1.87
Colorado	2	1	3	1	2	2	2	1	0	2	3	3	3	2	2	29	1.93
Kentucky	4	4	3	0	3	1	2	1	1	1	2	2	0	1	4	29	1.93
Indiana	3	3	3	1	0	2	2	2	2	2	2	2	2	2	2	30	2.00
New Hampshire	0	0	3	2	3	2	2	2	2	1	2	2	4	2	4	31	2.07
Iowa	1	2	3	1	2	2	2	2	2	3	2	2	2	2	4	32	2.13
South Dakota	2	4	4	0	4	1	1	3	3	2	2	2	1	2	1	32	2.13
Nevada	1	1	3	3	4	3	1	1	3	2	2	2	2	3	2	33	2.20
Hawaii	2	1	4	4	2	1	3	3	1	3	2	2	2	1	3	34	2.27
Idaho	1	3	4	1	0	3	3	3	3	3	3	3	3	3	0	36	2.40
Virginia	2	2	3	1	4	3	3	1	2	3	4	4	3	1	0	36	2.40
Florida	1	2	3	2	1	4	3	3	2	4	4	4	3	1	1	38	2.53
Oklahoma	3	2	4	2	4	3	1	3	0	3	3	3	4	0	3	38	2.53
Arizona	2	1	3	2	3	3	3	3	3	3	3	3	3	3	1	39	2.60
Georgia	4	4	3	2	0	3	3	2	3	4	2	2	3	2	2	39	2.60
Maryland	1	0	0	3	1	3	4	4	4	4	3	3	2	4	3	39	2.60
Alabama	3	2	3	1	4	3	3	2	1	3	4	4	2	1	4	40	2.67
Michigan	3	1	3	2	1	3	3	4	1	3	3	3	3	3	4	40	2.67
South Carolina	4	3	3	3	3	1	1	4	3	3	2	2	1	4	3	40	2.67
New Mexico	1	2	3	2	2	4	0	4	4	4	3	3	4	4	1	41	2.73
Maine	0	0	1	4	1	4	4	4	4	3	4	4	4	4	0	41	2.73
Wyoming	0	0	3	4	3	3	3	3	3	3	3	3	3	3	4	41	2.73
Texas	4	3	3	2	2	4	2	4	4	4	4	4	4	0	1	45	3.00
Mississippi	4	4	3	0	4	4	4	4	3	2	3	3	4	0	4	46	3.07
Pennsylvania	2	1	3	2	1	4	4	4	4	4	4	4	4	4	2	47	3.13
Massachusetts	1	0	4	4	0	4	4	4	4	4	4	4	4	4	2	47	3.13
Ohio	3	4	4	3	0	4	4	4	3	4	4	4	4	4	0	49	3.27
Montana	4	4	3	0	2	4	4	4	4	4	4	4	4	4	3	52	3.47
Kansas	3	3	1	4	4	4	4	4	4	4	4	4	4	4	3	54	3.60

<sup>a</sup> States are arranged from the least punitive to the most punitive.

Note: Shaded areas separate the 10 least punitive and the 10 most punitive states from the rest.

### PART THREE

#### Punishing “Immorality”

In America a glance at the penal statutes of the various states of the Union reveals something quite astonishing. ... [T]here seems to be no sexual practice, except “normal” relations between husband and wife and solitary acts of masturbation, which is not forbidden by the law of some state.

H. L. A. Hart, 1963, p. 26.

This Hartian impression may be outdated and not fully applicable to contemporary American criminal law statutes since some acts that used to be punishable up to the early 1960s have been removed outside the scope of criminal law. For example, in June 2003, sodomy laws were declared unconstitutional by the U.S. Supreme Court in *Lawrence et al. v. Texas*. But even if the prohibitionist sentiment has somewhat been weakened in the U.S. government, there still remains a significant number of so-called victimless and moral offenses that are dealt with via criminal law. The list of such offenses is long, and, according to Professor McWilliams<sup>46</sup> (2005), it includes underage sex, prostitution, deviant sex, drug offenses, underage drinking, alcoholism, public drunkenness, gambling and suicide.

Having clearly defined moral boundaries is perfectly acceptable and even necessary. Moral views allow us to find our identities and develop a sense of belonging to a particular culture that shapes our sense of right and wrong. While some might enjoy being constant outsiders, most of us prefer immersing ourselves into something larger than our own physical dimensions, such as family, neighborhood subculture, or society. Problems arise only when individuals try to impose their own beliefs on others and/or are incapable of accepting life choices they would never dare to make for themselves.<sup>47</sup> This problem becomes even more

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<sup>46</sup> Most of Peter McWilliams work is available at <http://www.mcwilliams.com/>. The website was last updated in 2005.

<sup>47</sup> Famous Italian movie director, Vittorio De Sica, once said that moral indignation is in most cases 2% moral, 48% indignation, and 50% envy. The quote was used by Peter McWilliams (1998) in *Ain't Nobody's Business If You Do*. Available at <http://www.mcwilliams.com/books/books/aint/104.htm>

severe as governments embrace one group's moral values and use criminal law to eliminate those of the other.

While the tendency towards the criminalization of “immoral” acts is noticeable across the U.S., states are by no means homogeneous. Therefore, this part of the research will use the variations that exist among them in their treatment of moral offenses to add new dimensions of punitiveness to the proposed measurement of state punitiveness. A discussion of moral offenses will be limited to the variables of *Statutory rape and age of consent*, *Arrests for prostitution and commercialized vice*, *Arrests for drug abuse*, *Arrests for gambling*, and *Arrests for public drunkenness*.<sup>48</sup>

I called them the variables of “immorality” because their criminalization is justified or derived from the moral inappropriateness of the behaviors they are based upon. I used the quotation marks because of my opposition to calling them immoral acts. No doubt that each of these behaviors—underage sex, prostitution, gambling, drug abuse and public drunkenness—can sometimes be deviant and understandably unacceptable from a societal standpoint. In fact, none of them is something we really need to embrace and encourage. But there are many other acts that, while being morally impermissible, are not criminalized. For example, consensual sex between two adults is also deviant if it happens outside marriage. An orgy among adults is also something that we do not hold a very positive view of. Moreover, many adults date and even get married mainly or exclusively for financial incentives. While in a relationship, they

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<sup>48</sup> I also considered using Euthanasia as one of the variables of Punishing “Morality”. However, given that there is only one U.S. state, Oregon, that legalized physician-assisted suicide, this variable would not benefit the instrument of state punitiveness because it will not reveal any variability among states; adding a constant to 49 states is hardly meaningful. At the same time, this variable might gauge states' penal harshness in the future, once more states approve this practice. For example, according to CitizenLink.com, California and Vermont are also in a race to legalize assisted suicide (Source: <http://www.citizenlink.org/CLtopstories/A000004106.cfm>).

provide sexual services in exchange for diamond earrings, a brand new Porsche, or an island in the Caribbean; yet we do not call this prostitution and criminalize it.

There are many arguments, much more sophisticated ones, raised by philosophers and social scientists about this subject. And while it is not the scope of this paper to discuss them, I will list some arguments by Peter McWilliams (1998) in defense of the decriminalization of moral offenses. According to Professor McWilliams, laws against consensual activities are not a great idea because they (a) are unconstitutional, (b) violate the separation of church and state, thus threatening the freedom of and from religion, (c) are opposed to the principles of private property, free enterprise, capitalism, and the open market, (d) are very expensive, and finally (e) destroy people's lives.

### **Statutory Rape and Age of Consent (Variable 27)**

Originated in thirteen-century England (Olszewski, 2005-6), "statutory rape" is a name for nonforcible sexual intimacy with minors under certain age (Christopher & Christopher, 2007), criminalized by all U.S. jurisdictions (Phipps, 2002-3). This act would not be illegal if not for the young age of one of the participants.<sup>49</sup> The discussion of statutory rape is offered under the title of *Punishing "Immorality"* because, among other things, these laws attempt to enforce morality (Olszewski, 2005-6) by allowing a government to make moral choices for its young citizens. In a sense, statutory rape laws are paternalistic for doing what parents do: to protect from physical and emotional harm but also guard against sexual promiscuity. Although teenage sexuality must be regulated by parental and other social norms, or even administrative

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<sup>49</sup> Black's Law Dictionary (2004) defines statutory rape as "[u]nlawful sexual intercourse with a person under the age of consent (as defined by statute), regardless of whether it is against that person's will". (p. 1288)

rules, they should be left outside the regulatory function of criminal law.<sup>50</sup> This is especially so since the criminal justice system has already failed to prevent adolescent sexuality. At least every second teenager under 18 years reports experiencing some form of sexual behavior (Oberman, 2000) despite a government's tendency to call it deviant.<sup>51</sup> Nationwide, 46.8% of high school students admitted to having had at least one sexual intercourse during their life, 14.3% had had sexual intercourse with at least four persons, and 6.2% had had sexual intercourse for the first time before even turning 13 years old (Department of Health and Human Services, Centers for Disease Control and Prevention, 2006). One can only assume that sexual activity not amounting to intercourse must be even a more frequent occurrence.

The question at which age sexual activity, including intercourse, is deemed legal is rather complicated despite the major misperception that there is only one fixed age per jurisdiction. Even a simple online search using the key words of "statutory rape" and "age of consent" in a search engine yields dozens of sites, many of which contain tables with a single age for each state. Again, the reality is quite different. First, "there is a great disparity of legislative thought as to the appropriate age of consent" (Carpenter, 2006, p. 311), i.e., the age that the legislator arbitrarily believes individuals are capable of understanding the nature and consequences (bodily injury or pregnancy) of their sexual activity before initiating or agreeing upon having sex. Second, most states' laws also provide the varying minimum age provisions that specify the age at which an adolescent may engage in sexual activity with an adult not too

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<sup>50</sup> Similar view was expressed by Olszewski (2005-6) who wrote that while "[a]dolescent abstinence may be ideal, ... it is not best accomplished by criminalization and most certainly not by treating a consensual peer relationship as equivalent to a stereotypical case of child molestation" (p. 719).

<sup>51</sup> This is what Professor Dalamter writes about statutory rape laws:

"Years ago, there was this notion that children were sexually innocent and we needed to maintain that innocence by protecting them from sexual influences. But society has changed dramatically. Teens are surrounded by sexuality. In a way, social conditions have *de facto*, sexualized teens. .... Laws tend to lag behind social change." See Melby (2006, p. 6).

much older than him/her<sup>52</sup> without the latter risking criminal responsibility. Third, statutes also specify the minimum age at which an adult might be charged with the rape of a minor. Fourth, some jurisdictions allow mistake-as-to-age defense when a victim is a certain age while others disallow it. Finally, statutes sometimes fix different ages depending on the sex and/or sexual orientation of a victim, stereotypically presuming a heterosexual female the most vulnerable of all, and thus worthy of greater protection than their homosexual or male counterparts.<sup>53</sup>

A full exploratory analysis of statutory rape laws exceeds the scope of this research. Therefore, this study will focus only on those aspects of state legislation that are especially tightly connected with sentencing outcomes and expose the variability among states that is necessary for the proposed instrument of state punitiveness. But before introducing specific numbers and creating hierarchies of punitiveness based on them, I have to persuade the reader that (a) the variable of *Statutory rape and age of consent* is relevant to the instrument of state punitiveness, and (b) states that set the age of consent high, have no minimum age provisions and age differential requirements, and disallow mistake-of-age defense are more punitive than states on the other side of the divide.

The proposed variable is relevant to the instrument of state punitiveness because rape statutes, in general, and statutory rape laws, in particular, are highly punitive.<sup>54</sup> One can characterize them as such not only because they often lead to long-term imprisonment

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<sup>52</sup>States are very diverse in this sense as well. While a 4-year age gap is common, some states permit only a 2-year age difference (Alabama, Connecticut, Louisiana (if victim is less than 17), Minnesota (if victim is less than 16), Mississippi (if victim is less than 16), and Washington (if victim is less than 12)) and others go as far as a 10-year gap (Utah). Source: Glosser, Gardiner & Fishman (2004), see table 1: "State Age Requirements."

<sup>53</sup>Although most states' rape laws were originally gender-specific ("statutory rape was established to charge males for intercourse with underage females" (Carpenter, 2006, p. 313)), last decade showed tendency of state laws to adopt more gender neutral language in their rape laws. This approach has been welcome by legal scholars. For example, Phipps (2002-3) argues against gender stereotyping because not only do sex-based protections ignore male victims despite an overwhelming evidence about the prevalence of sexual abuse of boys but also because of the message it sends about girls being "inherently weak and not capable of making important decisions" (p. 425).

<sup>54</sup>They are a good example of how progressive movements, in this case feminism, can contribute to the punitivization of a nation's criminal justice system.

(Christopher & Christopher, 2007; Melby, 2006), but also have a highly stigmatizing effect on convicted individuals, as well as their families. And while these laws may target older dangerous sexual predators,<sup>55</sup> they often trap harmless kids.<sup>56</sup>

This situation is exacerbated further if we consider that most statutory provisions do not require any proof that a defendant knew or could have reasonably known that his/her sex partner was under legal age. Instead they view the proof of sexual intercourse and the victim's age as a sufficient basis for conviction (Oberman, 2000). In other words, having sex with a minor under the age of consent in most cases qualifies as a strict liability offense known as statutory rape. The following example shows the potentially dangerous nature of such statutes.

Suppose Karl, a college senior, met 16-year-old Clara, who proposed that they engage in oral sex. When Karl asked Clara about her age, she replied that she was already nineteen. Then Karl asked for verification, and Clara produced her student ID and a driver's license that confirmed her age. Moreover, assume that Clara looks at least 19 and she herself mistakenly believes that she is 19 (she was adopted). Even more, Karl has asked Clara's parents her age and they have confirmed her being 19. The strict liability requirement inserted in statutory rape laws would still hold Karl liable for raping Clara.<sup>57</sup>

As extreme as this hypothetical might be, I hope it will allow me to clearly demonstrate the arguments that will subsequently shape the variable of *Statutory rape and age of consent*.

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<sup>55</sup>This argument has been repeatedly raised by judges. See, e.g., *State v. Blake*, 777 A.2d 709, 712 (Conn. App. 2001); *State v. Anthony*, 528 S.E.2<sup>nd</sup> 321, 324 (N.C. 2000); and *State v. Martinez*, 14 P.3d 114, 118 (Utah Ct. App. 2000).

<sup>56</sup>When discussing a problematic nature of statutory rape laws, legal and social researchers also argue that these laws are anachronistic (Carpenter, 2006), selective (Oberman, 2000; Melby, 2006), rarely applied (Law, 1999-2000) unrealistic and imprudent (Olszewski, 2006).

<sup>57</sup> Punishing Karl is a redundantly punitive act because he is not a dangerous criminal. His punishment is also unfair because millions of those who do not exercise the same forbearance and caution, but luckily end up having sex with an adult, are not punished. No other utilitarian or retributive justification of punishment would support Karl's punishment since he has done everything to prevent breaking the rules of law or morality. Unfortunately, individuals like Karl are routinely prosecuted in American criminal justice system.

First, a state that legislated a lower age of consent is less punitive than a state that fixed a higher age. Had Karl and Clara had sex in a state where the age of consent is 16 or lower (instead of 17), Karl would not have risked anything but perhaps having to marry Clara or pay for an abortion. But because in our hypothetical state, the age of consent was 17, Karl would be punished.

Second, a state that does not criminalize all forms of sexual contacts with minors is more lenient than one that does. Had Karl and Clara had oral sex (i.e., the act that does not amount to penetration) in a state with a minimum age provision that, while criminalizing all sexual acts involving a minor under 14 years of age, permits oral sexual acts with a minor between 14 and 18 years of age, Karl would not have done anything illegal. Yet his state's rape law has only one fixed age of consent, 18, below which all sexual activities are criminalized. Consequently, Karl would be punished.

Third, a state that has no age gap provisions (i.e., does not exempt from criminal liability those individuals who are around the same age as their sex partners) is more punitive than the state that does not criminalize consensual sexual activity between/among adolescents of a comparable age. Had the jurisdiction in which Karl and Clara reside had at least a two-year age-gap provision (i.e., because the age of consent was seventeen, it would not have been illegal for an 18-year-old to have sex with a 16-year-old), Karl would not have been punished.

Fourth, a state that has adopted a statutory rape law (strict liability) should be considered more punitive than a state that allows mistake of age as a defense. Had Karl and Clara lived in a jurisdiction with an "affirmative defense" clause, then Karl could have pleaded not guilty and used all the evidence (Clara's student ID, her driver's license, and her parents'

testimony) in his defense. But, unfortunately, Karl lives in a “wrong” state and, therefore, he would be facing a harsh penalty.

While the punitive nature of statutory laws can be operationalized on the bases of a great number of factors, this study limits its scope to the following four most important elements: (a) the age of consent; (b) the minimum age of a victim; (c) the age gap between the parties; and (d) mistake-of-age defense. The data for these elements came from various sources but primarily from the Lewin Group report prepared for the U.S. Department of Health and Human Services (Glosser, Gardiner & Fishman, 2004) that offers easy-to-use yet detailed information on American statutory rape laws.<sup>58</sup> Data for the mistake-of-age defense came from the online source, *Age of Consent*, the accuracy of which was confirmed against several other sources, including my own analysis of fifty states’ statutory rape statutes (excerpts are provided in Appendix Table 1).

The quantification of the variable began with a comparison of the states in terms of the age of consent. Only three groups were possible because states set the age of consent at 16 years (33 states and District of Columbia), 17 years (6 states) and 18 years (11 states). Consistent with the argument I made earlier, the first group of states was classified as the least punitive (element score = 0), the second group as moderately punitive (element score = 1) and the last group as the most punitive (element score = 2). Table 62 lists the states that fall into one of the three categories alongside their elements scores and frequencies.

Additionally, state’s statutes were contrasted on the grounds of victims’ minimum ages ranging between 10 and 16 years of age. In jurisdictions with minimum age provisions, under

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<sup>58</sup> Phipps (2002-3) legal analysis also provides the table containing the age of consent for each state. His findings (p. 441), however, are noticeably inconsistent with those of Glosser et al. (2004). Phipps reported five states with the age of consent being 15 instead of 16 or 18 years (Kansas, Maryland, North Dakota, Oklahoma and Oregon). Because the findings by Glosser et al. were comparable with my own findings (see appendix table 1), Phipps table was disregarded.

certain conditions (typically when the act does not involve penetration), sexual contact with minors is not criminalized.<sup>59</sup> This element split states into two groups: those that have minimum age provisions (element score = 0) and those that do not (element score = 1). There were 14 states that had identical age of consent and minimum age (California - 18; Georgia - 16; Idaho - 18; Illinois - 17; Kansas - 16; Kentucky - 16; Massachusetts - 16; Michigan - 16; Montana - 16; Nebraska - 16; Nevada - 16; New Hampshire - 16; New York - 17; Vermont - 16; and Wisconsin - 18). They were placed with states that do not have minimum age provisions because they fail to distinguish between the age of consent, below which certain sexual activities are not criminalized, and the minimum age, below which any sexual activity with a minor is punishable (see Table 63).

Thirdly, I used the presence or absence of age-gap requirements between the perpetrator and underage partner to group jurisdictions in non-punitive (i.e., states that have such requirements; element score = 0) and punitive (i.e., states that do not have them; element score = 1) categories. States were almost evenly split in half (see Table 64).

Finally, jurisdictions have been separated into two groups on the basis of whether or not they allow the mistake-of-age defense (element scores = 0 and 1, respectively) (see table 63).

These four elements were subsequently synthesized by adding the element scores and then subtracting a constant (in this case 1) from their sum. Without affecting the relationship among cases, this simple computation resulted in criterion punitiveness scores ranging from 0 to 4, compatible with other variables.<sup>60</sup> Two states (Maine and Pennsylvania) with a negative

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<sup>59</sup> The minimum age provision differs from the age of consent significantly because when acquiring the former, the minor is still considered legally incompetent to consent to sexual intercourse. Below this minimum age any sexual activity under any circumstances results in criminal responsibility of the major.

<sup>60</sup> Similar method was used when computing punitiveness scores for the variable 10, *Three-Strikes Laws' Application and Sentence*.

value (-1; i.e., had zero across all four elements) were placed in the category of non-punitive states with a punitiveness score of zero (see Table 66).

### Variable 27: Statutory Rape and Age of Consent

Table 62: Element 1 - Age of Consent

Age of Consent	Elem. Score	<i>f</i>	State Name
16 years	0	33	Alabama, Alaska, Arkansas, Connecticut, Georgia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, Washington, West Virginia and Wyoming (plus District of Columbia)
17 years	1	6	Colorado, Illinois, Louisiana, Missouri, New York and Texas
18 years	2	11	Arizona, California, Delaware, Florida, Idaho, North Dakota, Oregon, Tennessee, Utah, Virginia and Wisconsin

Note: Age of consent is the age at which a person is considered competent to legally consent to sexual intercourse under any circumstances but before which can consent to sexual intercourse if certain criteria are met (see table below).

Table 63: Element 2 - Minimum Age of a Victim (when it is lower than the Age of Consent)

Minimum Age	Elem. Score	<i>f</i>	State Name
yes	0	24	Alabama (12), Arizona (15), Delaware (16), Florida (16), Hawaii (14), Indiana (14), Iowa (14), Louisiana (13), Maine (14), Missouri (14), New Jersey (13), New Mexico (13), North Dakota (15), Ohio (13), Oklahoma (14), Oregon (15), Pennsylvania (13), Rhode Island (14), South Carolina (14), South Dakota (10), Tennessee (13), Texas (14), Utah (16) and Virginia (15)
no	1	16	Alaska, Arkansas, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, Vermont, Washington, West Virginia, Wisconsin and Wyoming (plus District of Columbia)

Note: Minimum age of a victim is the age below which an individual cannot consent to sexual intercourse under any circumstances. Parentheses contain actual minimum age of a victim. Fifteen states that have minimum age provisions (California, Georgia, Idaho, Illinois, Kansas, Kentucky, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Hampshire, New York, Vermont and Wisconsin) were included with states that do not have such provisions because their minimum age is the same as their age of consent.

Table 64: Element 3 - Age Difference

Age Difference	Elem. Score	<i>f</i>	State Name
yes	0	26	Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Hawaii, Iowa, Louisiana, Maine, Maryland, Minnesota, Mississippi, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, and Wyoming (plus District of Columbia)
no	1	24	California, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, North Dakota, Ohio, Oklahoma, Rhode Island, Vermont, Virginia and Wisconsin

Note: Age difference is the maximum difference in age between the victim and defendant if the victim is above minimum age and below the age of consent.

Table 65: Element 4 – Mistake of Age Defense

Age of Consent	Elem. Score	<i>f</i>	State Name
yes	0	13	Alaska, Arizona, Arkansas, Indiana, Kentucky, Maine, Missouri, Montana, New York, Pennsylvania, Washington, West Virginia and Wyoming
no	1	37	Alabama, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia and Wisconsin (plus District of Columbia)

Table 66: Combined Punitiveness Score for Statutory Rape

State Name	Element Scores				Total	Pun. Score <sup>a</sup>	State Name	Element Scores				Total	Pun. Score <sup>a</sup>
	1	2	3	4				1	2	3	4		
Alabama	0	0	0	1	1	0	Montana	0	1	1	0	2	1
Alaska	0	1	0	0	1	0	Nebraska	0	1	1	1	3	2
Arizona	2	0	0	0	2	1	Nevada	0	1	1	1	3	2
Arkansas	0	1	0	0	1	0	New Hampshire	0	1	1	1	3	2
California	2	1	1	1	5	4	New Jersey	0	0	0	1	1	0
Colorado	1	1	0	1	3	2	New Mexico	0	0	0	1	1	0
Connecticut	0	1	0	1	2	1	New York	1	1	1	0	3	2
Delaware	2	0	1	1	4	3	North Carolina	0	1	0	1	2	1
Florida	2	0	1	1	4	3	North Dakota	2	0	1	1	4	3
Georgia	0	1	1	1	3	2	Ohio	0	0	1	1	2	1
Hawaii	0	0	0	1	1	0	Oklahoma	0	0	1	1	2	1
Idaho	2	1	1	1	5	4	Oregon	2	0	0	1	3	2
Illinois	1	1	1	1	4	3	Pennsylvania	0	0	0	0	0	(-1)0
Indiana	0	0	1	0	1	0	Rhode Island	0	0	1	1	2	1
Iowa	0	0	0	1	1	0	South Carolina	0	0	0	1	1	0
Kansas	0	1	1	1	3	2	South Dakota	0	0	0	1	1	0
Kentucky	0	1	1	0	2	1	Tennessee	2	0	0	1	3	2
Louisiana	1	0	0	1	2	1	Texas	1	0	0	1	2	1
Maine	0	0	0	0	0	(-1)0	Utah	2	0	0	1	3	2
Maryland	0	1	0	1	2	1	Vermont	0	1	1	1	3	2
Massachusetts	0	1	1	1	3	2	Virginia	2	0	1	1	4	3
Michigan	0	1	1	1	3	2	Washington	0	1	0	0	1	0
Minnesota	0	1	0	1	2	1	West Virginia	0	1	0	0	1	0
Mississippi	0	1	0	1	2	1	Wisconsin	2	1	1	1	5	4
Missouri	1	0	1	0	2	1	Wyoming	0	1	0	0	1	0

<sup>a</sup> Punitiveness score was calculated by adding the three elements' scores and then subtracting 1 point from the sum. Two states (Maine and Pennsylvania) with negative scores were assigned zero and put in a category of the least punitive.

### **Moral Offense: Arrests for Prostitution and Commercialized Vice (Variable 28)**

A debate about criminalization, decriminalization, or legalization<sup>61</sup> of prostitution has been persistent throughout the 20<sup>th</sup> century. Yet there is little consensus among nations as to how to deal with this world's one of the oldest professions. While most western countries<sup>62</sup> and a substantial number of non-western nations have legalized prostitution<sup>63</sup>, there still remain many countries that criminalize it.<sup>64</sup> The United States belongs to the latter group of nations as it prohibits all form of sex work in all but its two jurisdictions, Nevada and Rhode Island (Franklin, 2007).

Nevada permits brothel prostitution throughout its seven counties (Churchill, Esmeralda, Lander, Lyon, Mineral, Nye, and Storey) and in the unincorporated areas of six counties (Elko, Eureka, Humboldt, Pershing, Washoe, and White Pine) while fully prohibiting the sex trade in its four largest counties (Carson City, Clark, Douglas, and Lincoln) (Bingham, 1998, Coty & Haltiwanger, 2004). This variation is attributable to the fact that counties are given complete control in deciding whether to legalize prostitution and how to regulate it

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<sup>61</sup> It is important to distinguish between decriminalization and legalization because while the former “takes a much more hands-off approach, by accepting all forms of an activity, which was previously illegal, as now legitimate” (Coty & Haltiwanger, 2004, p. 229), the latter implies certain regulations such as registration, licensing, health checks, safety training, and time and place limitations.

<sup>62</sup> According to James Whitman (2003):

Certainly, governments throughout Europe have engaged, since the late 1960s, in large-scale decriminalization of moral offenses. Various kinds of sex and intoxication offenses that would once have carried a prison term have been stricken entirely from the books. Prostitution makes for a particularly striking contrast with the United States. American prostitutes, and their clients, have been the subject of a growing crackdown in many parts of the United States... and police departments have expanded considerable manpower on suppressing prostitution. In northern Europe, by contrast, prostitution has been legalized everywhere... (p. 80).

<sup>63</sup> For example, Canada, Denmark, France, Germany, Greece, the Netherlands, New Zealand, Portugal, Spain, Sweden, Switzerland, Turkey, parts of Austria and Australia (Kohn, 2006), Argentina, Belgium, Brazil, Costa Rica, England, Estonia, Ethiopia, Guatemala, Iceland, Israel, Italy, Kyrgyzstan, Latvia, Mexico, Norway, Peru, Senegal, Singapore, made prostitution legal (Prostitution ProCon.com).

<sup>64</sup> For example, China, Cuba, Egypt, India, Iran, Japan, Kenya, Liberia, the Philippines, Romania, Rwanda, Saudi Arabia, South Africa, South Korea, Taiwan, Thailand, Uganda, and the United Arab Emirates prohibit sex work under any circumstance (Prostitution ProCon.com).

(Bingham, 1998). Such decisions are generally made by local governments (e.g., ordinances) or through public referenda (Franklin, 2007).

Rhode Island also permits the sex trade, as long as it occurs indoors. However, unlike Nevada, the state has no regulations or any formal approval of sex work by its government (Franklin, 2007).

The discussion on prostitution is offered under *Punishing “Immorality”* because “[t]he most likely explanation for the current prohibition of prostitution is the conservative moral approach, which creates the basis for most of the laws still on the books today” (Coty & Haltiwanger, 2004, p. 229). Nicole Bingham (1998) writes that “[p]rostitution in the United States is usually associated with vice, sin, and loose sexual morals. People labeled as prostitutes are stigmatized and often looked down upon by communities (p. 69). Such positions clearly prevail in legal, philosophical, and social science literature.<sup>65</sup>

While the basis for the criminalization of prostitution is a negative public view of sex workers, who are often blamed for spreading of diseases, drug use, and other related misdeeds (Coty & Haltiwanger, 2004), not all arguments against decriminalization are entirely moralistic. In fact, the feminist literature offers a great range of important philosophical views on the matter. The feminist group opposing the decriminalization of prostitution is often

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<sup>65</sup> For example, Sylvia Law (1999-2000) writes that:

The core moral argument for the criminal prohibition of prostitution rests on a vision of women, their sexuality, and the role of marriage. ... Even though the conservative vision of family valued has been largely rejected in relation to birth control, abortion, premarital sex, and homosexuality, criminal prohibitions against commercial sex, and vigorous efforts to enforce them, have persisted to the end of the twentieth century. (pp. 542, 545).

Alexandra Bongard Stremler (1994-6) also argue that “[s]ocial morality, rather than concern for women’s safety, has deemed prostitution illegal” (p. 192). Coty Miller and Nuria Haltiwanger (2004) confirm this view by stating that “the element of morality is infused within the statutes [governing the sex trade]” (p. 236). Daniel Franklin (2007) also believes that people oppose decriminalization because it would “contribute to the spread of disease, or decay the moral fabric of society” (p. 368).

referred to as the prostitution-as-exploitation movement.<sup>66</sup> This group “reject[s] the idea that women would freely and independently choose sex work” (Coty & Haltiwanger, 2004, p. 232) and therefore “challenges the claim that prostitution is a valid employment opportunity for women” (Bingham, 1998, p. 77). Furthermore, this movement also “equates sex work with slavery, a sale of so much of one’s self that it denies humanness to and strips dignity from the seller, affronting the fundamental goals of the human rights system” (Hernandez-Truyol & Larsen, 2006, p. 405).

As sensible as the prostitution-as-exploitation theory might be, it fails to acknowledge the obvious: criminalization often results in punishing those who may not have chosen to become a sex worker, a view fundamental to this theory. Therefore, by supporting criminalization, the prostitution-as-exploitation movement hurts those whom it claims to protect. Assuming that at least some prostitutes are forced into prostitution by social conditions, this law is especially punitive. This explains not only a “growing level of tolerance for prostitution and sale of sexual services [worldwide]” (Kohn, 2006, p. 412) but also why “decriminalization, and even legalization, has been endorsed by participants in human rights debate for years” (Hernandez-Truyol & Larsen, 2006, p. 392).

Because laws criminalizing prostitution are punitive, the variable *Arrests for prostitution and commercialized vice* is adequate to the measurement of state punitiveness. As mentioned above, only two American jurisdictions, Nevada and Rhode Island, permit some forms of sex work. These two states were treated as non-punitive because, while arrests for prostitution are common in both of them (see Table 67), they occur because individual sex workers violated regulations set by local governments. Such arrests take place in European

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<sup>66</sup> Feminists that propose legalization are united under the name of the prostitution-as-work movement because they believe that the sex trade is a job and that not all prostitutes are forced into prostitution. This view is also called the prostitute’s right perspective (Bingham, 1998, p.77).

countries as well, most of which legalize prostitution. The remaining 48 states were compared based on the frequency of arrests. Arrest data, instead of conviction data, were used because they are available, have no missing states or cases, and because an arrest is in itself an expression of state punitiveness. The arrest data came from the FBI's report *Crime in the United States, 2005*. These numbers were adjusted for state population size. The higher the arrest rate, the more punitive the state. Because we already have a non-punitive category (consisting of Nevada and Rhode Island), these 48 states were grouped in quartiles instead of quintiles (see Table 68).

### Variable 28: Arrests for Prostitution and Commercialized Vice

Table 67: Arrests for Prostitution (per 1,000,000 residents)

State Name	Prostitution <sup>a</sup>	State Popul. <sup>b</sup>	Arrest Rate	Pun. Score	State Name	Prostitution <sup>a</sup>	State Popul. <sup>b</sup>	Arrest Rate	Pun. Score
Alabama	124	4,631	27	1	Montana	2	1,006	2	1
Alaska	123	700	176	3	Nebraska	148	1,761	84	2
Arizona	1,611	5,230	308	4	Nevada <sup>c</sup>	4,633	2,070	2,238	0
Arkansas	301	2,750	109	2	New Hampshire	74	1,281	58	1
California	13,911	34,441	404	4	New Jersey	2,342	8,392	279	4
Colorado	869	4,468	194	3	New Mexico	300	2,016	149	3
Connecticut	493	3,317	149	3	New York	1,743	18,250	96	2
Delaware	140	800	175	3	North Carolina	1,370	8,227	167	3
Florida	5,715	16,279	351	4	North Dakota	1	677	1	1
Georgia	1,681	8,413	200	3	Ohio	1,282	11,428	112	2
Hawaii	341	1,342	254	4	Oklahoma	456	3,491	131	2
Idaho	3	1,480	2	1	Oregon	635	3,613	176	3
Illinois	4,931	12,266	402	4	Pennsylvania	2,552	12,281	208	3
Indiana	1,809	6,215	291	4	Rhode Island <sup>c</sup>	110	1,012	109	0
Iowa	215	2,941	73	2	South Carolina	742	4,033	184	3
Kansas	8	2,761	3	1	South Dakota	3	810	4	1
Kentucky	509	4,098	124	2	Tennessee	2,025	5,966	339	4
Louisiana	447	4,535	99	2	Texas	5,999	21,487	279	4
Maine	18	1,285	14	1	Utah	344	2,411	143	2
Maryland	1,861	5,467	340	4	Vermont	1	638	2	1
Massachusetts	672	6,310	106	2	Virginia	737	7,324	101	2
Michigan	1,776	9,763	182	3	Washington	1,567	6,258	250	4
Minnesota	2,133	5,055	422	4	West Virginia	163	1,849	88	2
Mississippi	63	2,908	22	1	Wisconsin	121	5,479	22	1
Missouri	1,271	5,718	222	3	Wyoming	3	641	5	1

<sup>a</sup> The arrest data show the number of times that persons of all ages were arrested in 2005, as reported by law enforcement agencies to the UCR Program. Source: FBI: *Crime in the United States, 2005*, Table 69, "Arrests by State, 2005". [http://www.fbi.gov/ucr/05cius/data/table\\_69.html](http://www.fbi.gov/ucr/05cius/data/table_69.html) (Retrieved on August 21, 2007)

<sup>b</sup> Total resident population of states on July 1, 2005 with numbers in thousands. Source: U.S. Census Bureau. <http://www.census.gov/population/projections/state/stpipop.txt> (Retrieved on August 21, 2007)

<sup>c</sup> Nevada and Rhode Island are only two U.S. states that that permit buying and selling of sexual services. While Nevada prohibits prostitution only in some counties, Rhode Island allows it as long as it happens indoors.

Table 68: Calculating Punitiveness Scores across Criminalization of and Arrests for Prostitution

Quartile Description	Levels of Punitiveness	Pun. Score	<i>f</i>	State Name (Arranged by arrest rates)
Decriminalize	Minimum	0	2	Nevada and Rhode Island
1st	Low	1	12	North Dakota, Idaho, Montana, Vermont, Kansas, South Dakota, Wyoming, Maine, Mississippi, Wisconsin, Alabama and New Hampshire
2nd	Moderate	2	12	Iowa, Nebraska, West Virginia, New York, Louisiana, Virginia, Massachusetts, Arkansas, Ohio, Kentucky, Oklahoma and Utah
3rd	High	3	12	Connecticut, New Mexico, North Carolina, Delaware, Alaska, Oregon, Michigan, South Carolina, Colorado, Georgia, Pennsylvania and Missouri
4th	Extreme	4	12	Washington, Hawaii, New Jersey, Texas, Indiana, Arizona, Tennessee, Maryland, Florida, Illinois, California and Minnesota

### **Moral Offense: Arrests for Drug Abuse (Variable 29)**

Continuing the theme of *Punishing “Immorality”*, this section explores another commonly punished moral offense—drug abuse. Much has been written about how narcotics damage families and communities and the extent to which they are responsible for the dramatic rise in the homicide rate, gang activity and domestic violence<sup>67</sup> (Brookoff, 1997; Fitzgerald & Riley, 2000; Harrison & Gfroerer, 1992; Sharps, Campbell, Campbell, Gary, & Webster, 2003; Walker, 2001).

Much of what is written about the negative consequences of drug abuse is hard to challenge, except that the strong positive correlation between drug abuse and criminal activity should by no means be interpreted as if drug use causes crime and delinquency (Nurco, Hanlon, Kinlock, & Duszynski, 1988). Considering my lack of expertise in this area, however, I would not even dare to develop this idea any further. What I am about to argue instead is that treating drug addiction, especially marijuana use, as a criminal act rather than a pathological occurrence is an expression of unreasonable severity by a state; consequently, the more frequently drug addicts are arrested, the more punitive the state. This is a moral argument, but it also has practical underpinnings, since regulating substance use by non-penal means might ameliorate its negative consequences more effectively than arrests and imprisonment would.<sup>68</sup> This idea is consistent with a liberal philosophy, one that advocates prevention, education, and treatment instead of encouraging more arrests and tougher punishments (Walker, 2001).

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<sup>67</sup> Craddock, Collins, and Timrots (1994) write:

Drugs are related to crime in multiple ways. Most directly, it is a crime to use, possess, manufacture, or distribute drugs classified as having a potential for abuse... Drugs are also related to crime through the effects they have on the user's behavior and by generating violence and other illegal activity in connection with drug trafficking (p. 1).

<sup>68</sup> A noticeable tendency towards the legalization of substance use on the European continent is often justified by this argument (Whitman, 2003).

The variable, *Arrests for drug abuse*, was assessed on the basis of data concerning drug abuse violations. They came from the FBI's report *Crime in the United States, 2005*. While these data provide only an aggregate number of both drug sale/manufacture and possession, I nevertheless decided to rely on them because, in 2005, 81.7% of all drug abuse arrests were attributable to drug possession (Northeast - 76.3%, Midwest - 81.5%, South - 80.5% and West - 85.4%) and, of all drug abuse violations, marijuana possession accounted for the biggest portion of arrests (37.7% in the U.S., 42.0% in the Northeast, 47.5% in the Midwest, 44.7% in the South and only 24.3% in the West). Although the goal of this variable was to detect state-level differences for arrests for drug possession in small amounts, such data are not readily available for all states. Therefore, considering that states did not vary substantially in terms of the ratio of drug sale/manufacture to drug possession, and also given that arrests for marijuana possession make up a quarter to a half of all drug abuse violation arrests, it is assumed that these data capture state-level differences regarding possession of drugs in general and of marijuana in particular.

When computing the punitiveness scores for *Arrests for drug abuse*, Nevada and New Jersey were placed in a category of non-punitive states (pun. score = 0).

These state-level arrest data were adjusted for state populations. The arrest rates were broken down into quintiles. An increase in an arrest rate corresponded with an increase in a criterion punitiveness score (see Tables 69 and 70).

## Variable 29: Arrests for Drug Abuse

Table 69: Arrests for Drug Abuse (per 1,000 residents)

State Name	Drug Abuse <sup>a</sup>	State Popul. <sup>b</sup>	Arrest Rate	Pun. Score	State Name	Drug Abuse <sup>a</sup>	State Popul. <sup>b</sup>	Arrest Rate	Pun. Score
Alabama	15,704	4,631	3.39	1	Montana	1,662	1,006	1.65	0
Alaska	1,885	700	2.69	0	Nebraska	11,181	1,761	6.35	4
Arizona	35,722	5,230	6.83	4	Nevada	11,267	2,070	5.44	3
Arkansas	12,009	2,750	4.37	2	New Hampshire	3,209	1,281	2.51	0
California	305,745	34,441	8.88	4	New Jersey	53,846	8,392	6.42	4
Colorado	19,743	4,468	4.42	2	New Mexico	6,439	2,016	3.19	1
Connecticut	14,480	3,317	4.37	2	New York	54,613	18,250	2.99	1
Delaware	5,018	800	6.27	4	North Carolina	38,775	8,227	4.71	3
Florida	160,595	16,279	9.87	4	North Dakota	1,785	677	2.64	0
Georgia	29,513	8,413	3.51	2	Ohio	33,643	11,428	2.94	1
Hawaii	2,132	1,342	1.59	0	Oklahoma	21,468	3,491	6.15	4
Idaho	3,231	1,480	2.18	0	Oregon	20,532	3,613	5.68	3
Illinois	58,093	12,266	4.74	3	Pennsylvania	51,944	12,281	4.23	2
Indiana	24,698	6,215	3.97	2	Rhode Island	2,863	1,012	2.83	1
Iowa	9,740	2,941	3.31	1	South Carolina	29,837	4,033	7.40	4
Kansas	4,569	2,761	1.65	0	South Dakota	979	810	1.21	0
Kentucky	35,313	4,098	8.62	4	Tennessee	34,286	5,966	5.75	3
Louisiana	22,323	4,535	4.92	3	Texas	124,214	21,487	5.78	3
Maine	4,730	1,285	3.68	2	Utah	8,215	2,411	3.41	1
Maryland	52,472	5,467	9.60	4	Vermont	1,312	638	2.06	0
Massachusetts	14,496	6,310	2.30	0	Virginia	26,954	7,324	3.68	2
Michigan	33,492	9,763	3.43	1	Washington	24,809	6,258	3.96	2
Minnesota	20,001	5,055	3.96	2	West Virginia	5,703	1,849	3.08	1
Mississippi	13,953	2,908	4.80	3	Wisconsin	16,207	5,479	2.96	1
Missouri	29,685	5,718	5.19	3	Wyoming	3,283	641	5.12	3

<sup>a</sup> The arrest data show the number of times that persons of all ages were arrested in 2005, as reported by law enforcement agencies to the UCR Program. Source: FBI: *Crime in the United States, 2005*, Table 69, "Arrests by State, 2005". [http://www.fbi.gov/ucr/05cius/data/table\\_69.html](http://www.fbi.gov/ucr/05cius/data/table_69.html) (Retrieved on August 21, 2007)

<sup>b</sup> Total resident population of states on July 1, 2005 with numbers in thousands. Source: U.S. Census Bureau. <http://www.census.gov/population/projections/state/stpipop.txt> (Retrieved on August 21, 2007)

Table 70: Calculating Punitiveness Scores across Arrests for Drug Abuse

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by arrest rates)
1st	Minimum	0	South Dakota, Hawaii, Montana, Kansas, Vermont, Idaho, Massachusetts, New Hampshire, North Dakota and Alaska
2nd	Low	1	Rhode Island, Ohio, Wisconsin, New York, West Virginia, New Mexico, Iowa, Alabama, Utah and Michigan
3rd	Moderate	2	Georgia, Virginia, Maine, Minnesota, Washington, Indiana, Pennsylvania, Connecticut, Arkansas and Colorado
4th	High	3	North Carolina, Illinois, Mississippi, Louisiana, Wyoming, Missouri, Nevada, Oregon, Tennessee and Texas
5th	Extreme	4	Oklahoma, Delaware, Nebraska, New Jersey, Arizona, South Carolina, Kentucky, California, Maryland and Florida

### **Arrests for Gambling (Variable 30)**

Gambling is another controversial criminal justice topic. Unlike prostitution, however, which has always been the subject of scorn and moral outrage, American sentiment towards gambling has been rather ambiguous and highly volatile. Although commonly used by governments, educational or even religious groups until the mid-eighteen hundreds to finance activities ranging from building roads and new buildings to supporting colonial troops during the Revolutionary War (Hurt, 2006; Wajda, 2007), in later years, all forms of gaming for profit were labelled as immoral. The stigma attached to gambling became so extreme that it was deemed inappropriate for polite conversations (Nelson, 1992-3). As Wajda (2007) writes, “during the nineteenth century, gambling took on the image of an immoral activity, fit only for the lazy, and in conflict with the Puritan work ethic” (p. 315).

In the twentieth century, the search for easy money by governments has led to the normalization of a wide range of games of chance. Nevada and New Jersey legalized the first modern casino games in 1931 and 1976, respectively. Lotteries became legal in forty states, pioneered by New Hampshire, which legalized a lottery in 1964. Horse and dog racing have also mushroomed since the 1930s. Finally, states permit even sports betting (Hart, 2006). While a wider acceptance of gambling activities is noticeable across the U.S.<sup>69</sup> (Wajda, 2007), the laws regulating gambling vary significantly.<sup>70</sup> This is understandable, given that federal law allows states to enact their own gambling regulations (Grunfeld, 2007).

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<sup>69</sup> According to Wajda (2007), 25 states allow various forms of “brick-and-mortar” casinos, 40 states – lottery games, and 43 states – horse racing (see discussion on pp. 315-317).

<sup>70</sup> Kiran (2006) provides a typology of gambling laws according to which state regulations can be grouped into following four categories: (1) Absolute prohibition, i.e., no gambling is allowed (Utah and Hawaii); (2) State-run or state-sponsored gambling such as lotteries and raffles; (3) Non-traditional forms of gambling, including racing and bingo; and (4) All forms of gambling (Nevada and New Jersey).

Although various gambling activities are permitted in certain parts of the U.S., in light of more than 10,000 arrests for illegal gambling annually,<sup>71</sup> saying that “the United States now fully embraced gambling” (Wajda, 2007, p. 316) is a simple overstatement. Ten thousand arrests may not seem like a lot. At first, I questioned whether arrests for gambling is an effective gauge of state punitiveness. However, a look at the astonishing variation among American jurisdictions in terms of their frequency of arrests persuaded me to include this variable in the analysis. If not for the punitiveness of the criminal justice system, how else can one explain that, in 2005, there were 3,068 arrests in Illinois but none in Iowa, Kansas, Maine, Massachusetts, Utah, Vermont, Washington and West Virginia (see Table 71)? Besides, although 10,000 may not seem like a lot, this is no excuse for turning a blind eye to this problem. Far fewer than 10,000 individuals are sentenced to death and executed annually. Yet we still talk about the death penalty as an important criterion of penal harshness. This analogy may not be perfect because the death penalty is a much more severe penal policy than an arrest and possible short term imprisonment. But it is also true that those arrested for illegal gambling have not committed a capital offense.

The computation of the punitiveness scores for *Arrest for gambling* followed the logic applied to *Arrests for prostitution and commercialized Vice*. Because Nevada and New Jersey have legalized almost every form of gambling (Kiran, 2006), these two jurisdictions were placed in a category of non-punitive states (pun. score = 0). The rest of the jurisdictions were grouped in quartiles based on their arrest rates for gambling. The rates were adjusted for state population sizes. The most punitive states had the highest rates of arrests (see Tables 71 and 72).

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<sup>71</sup> According to the UCR Program, *Crime in the United States*, there were 12,307 arrest in 2006; 11,180 in 2005; 10,755 in 2004; 10,954 in 2003; and 10,506 in 2002.

Additionally, I tried to use the variations among states in their treatment of gambling activities (e.g., whether social gambling is prohibited, gambling is punishable as a misdemeanor or a felony, and internet gambling is outlawed). Given the conflicting reports of sources, however, such an analysis should be omitted until we know more about state-level prohibitions and regulations of games of chance.

### Variable 30: Arrests for Gambling

Table 71: Arrests for Gambling (per 1,000,000 residents)

State Name	Gamb-ling <sup>a</sup>	State Popul. <sup>b</sup>	Arrest Rate	Pun. Score	State Name	Gamb-ling <sup>a</sup>	State Popul. <sup>b</sup>	Arrest Rate	Pun. Score
Alabama	49	4,631	1,058	3	Montana	2	1,006	199	1
Alaska	2	700	286	2	Nebraska	26	1,761	1,476	3
Arizona	23	5,230	440	2	Nevada	53	2,070	2,560	0
Arkansas	25	2,750	909	2	New Hampshire	4	1,281	312	2
California	672	34,441	1,951	3	New Jersey	283	8,392	3,372	0
Colorado	30	4,468	671	2	New Mexico	7	2,016	347	2
Connecticut	80	3,317	2,412	3	New York	198	18,250	1,085	3
Delaware	12	800	1,500	3	North Carolina	452	8,227	5,494	4
Florida	425	16,279	2,611	4	North Dakota	4	677	591	2
Georgia	216	8,413	2,567	4	Ohio	157	11,428	1,374	3
Hawaii	114	1,342	8,495	4	Oklahoma	19	3,491	544	2
Idaho	1	1,480	68	1	Oregon	9	3,613	249	1
Illinois	3,068	12,266	25,012	4	Pennsylvania	320	12,281	2,606	4
Indiana	17	6,215	274	1	Rhode Island	11	1,012	1,087	3
Iowa	6	2,941	204	1	South Carolina	130	4,033	3,223	4
Kansas	0	2,761	0	1	South Dakota	3	810	370	2
Kentucky	38	4,098	927	2	Tennessee	319	5,966	5,347	4
Louisiana	102	4,535	2,249	3	Texas	377	21,487	1,755	3
Maine	3	1,285	233	1	Utah	0	2,411	0	1
Maryland	387	5,467	7,079	4	Vermont	0	638	0	1
Massachusetts	9	6,310	143	1	Virginia	72	7,324	983	3
Michigan	100	9,763	1,024	3	Washington	6	6,258	96	1
Minnesota	47	5,055	930	2	West Virginia	2	1,849	108	1
Mississippi	345	2,908	11,864	4	Wisconsin	20	5,479	365	2
Missouri	261	5,718	4565	4	Wyoming	19	641	2,964	4

<sup>a</sup> The arrest data show the number of times that persons of all ages were arrested in 2005, as reported by law enforcement agencies to the UCR Program. Source: FBI: *Crime in the United States, 2005*, Table 69, "Arrests by State, 2005". [http://www.fbi.gov/ucr/05cius/data/table\\_69.html](http://www.fbi.gov/ucr/05cius/data/table_69.html) (Retrieved on August 21, 2007)

<sup>b</sup> Total resident population of states on July 1, 2005 with numbers in thousands. Source: U.S. Census Bureau. <http://www.census.gov/population/projections/state/stpipop.txt> (Retrieved on August 21, 2007)

Table 72: Calculating Punitiveness Scores across Arrests for Gambling

Quartile Description	Levels of Punitiveness	Pun. Score	<i>f</i>	State Name (Arranged by arrest rates)
Decriminalize	Minimum	0	2	Nevada and New Jersey
1st	Low	1	12	Kansas, Utah, Vermont, Idaho, Washington, West Virginia, Massachusetts, Montana, Iowa, Maine, Oregon and Indiana
2nd	Moderate	2	12	Alaska, New Hampshire, New Mexico, Wisconsin, South Dakota, Arizona, Oklahoma, North Dakota, Colorado, Arkansas, Kentucky and Minnesota
3rd	High	3	12	Virginia, Michigan, Alabama, New York, Rhode Island, Ohio, Nebraska, Delaware, Texas, California, Louisiana and Connecticut
4th	Extreme	4	12	Georgia, Pennsylvania, Florida, Wyoming, South Carolina, Missouri, Tennessee, North Carolina, Maryland, Hawaii, Mississippi and Illinois

### Arrests for Public Drunkenness (Variable 31)

The final arrest variable is public drunkenness<sup>72</sup>, which is criminalized in most states even if it involves a person of legal drinking age. Arrests for drunkenness may result in citations and fines, but also in short-term imprisonment and probation. Although research shows that the vast majority of arrestees are chronic offenders suffering from alcohol dependency (Stern, 1967), drunkenness is still treated as a crime rather than a health and social problem. This aspect makes this variable relevant to the instrument of state punitiveness.

The present variable uses the 2005 UCR data on arrests for drunkenness after adjusting them for state population sizes. States with no arrests were grouped in a non-punitive category (pun. score = 0) because the absence of arrests indicates at least de facto decriminalization of public drunkenness. There were only eight such states (Arizona, Hawaii, Illinois, Minnesota, Montana, New York, North Carolina and Oregon). The remaining 42 states were separated into quintiles, and states with higher arrest rates were classified as more punitive than states with lower arrest rates (see Table 73).

<sup>72</sup> Public Drunkenness does not include Driving Under the Influence (DUI). The latter is a separate offense the arrests for which are also reported under the UCR reporting program.

Florida did not report arrests for drunkenness despite the fact that disorderly intoxication is a criminal offense here.<sup>73</sup> The data were not available for years preceding 2005 either, making it impossible to substitute the number of arrests for any previous year for the missing value. Therefore, estimation became necessary. To do so, the total number of arrests for prostitution, drug abuse and gambling was used and a correlation analysis was run. The Pearson's Correlation coefficient showed a strong, positive, statistically significant correlation between the *Arrests for public drunkenness* ( $M = 8,425.90$ ,  $SD = 216,664.20$ ,  $N = 49$ ) and the *Total number of arrests for prostitution, drug abuse and gambling* ( $M = 31,905.42$ ,  $SD = 51,709.72$ ,  $N = 50$ ),  $r = .785$ ,  $p < .001$ . This means that 89% ( $r^2 = .886$ ) of the variance of the present variable can be predicted from its relationship with *the Total number of arrests for prostitution, drug abuse and gambling*.

Knowing that these two variables are correlated strongly and positively, I decided to use the average punitiveness score for the previous three arrest variables for Florida to predict the punitiveness score for this state for public drunkenness arrests. Florida received a criterion punitiveness score of 4 for all the three variables, which obviously averages to 4. Accordingly, it is reasonable to assume that had Florida reported arrests for public drunkenness, it would have received a criterion punitiveness score of 4 for the present variable as well.<sup>74</sup>

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<sup>73</sup> Chapter 856.011 (1), *Disorderly Intoxication*, of Florida Code stipulates:

No person in the state shall be intoxicated and endanger the safety of another person or property, and no person in the state shall be intoxicated or drink any alcoholic beverage in a public place or in or upon any public conveyance and cause a public disturbance.

<sup>74</sup> Another option was to leave the space designated for the punitiveness score for Florida empty. Because the total punitiveness score is the average of all criterion punitiveness scores rather than the sum of these scores, the outcome might have been the same. Yet not giving Florida a criterion punitiveness score for this particular variable could have affected the punitiveness scores of other variables, given that states are grouped into quartiles and the score for one state influences the scores of other states. This possible complication persuaded me in favor of the estimation discussed above.

### Variable 31: Arrests for Public Drunkenness

Table 73: Arrests for Public Drunkenness (per 1,000,000 residents)

State Name	Drunkenness <sup>a</sup>	State Popul. <sup>b</sup>	Arrest Rate	Pun. Score	State Name	Drunkenness <sup>a</sup>	State Popul. <sup>b</sup>	Arrest Rate	Pun. Score
Alabama	8,562	4,631	184,884	3	Montana	0	1,006	0	0
Alaska	124	700	17,714	2	Nebraska	3	1,761	170	1
Arizona	0	5,230	0	0	Nevada	147	2,070	7,101	2
Arkansas	7,734	2,750	281,236	4	New Hampshire	4,120	1,281	321,624	4
California	96,308	34,441	279,632	4	New Jersey	16	8,392	191	1
Colorado	247	4,468	5,528	1	New Mexico	729	2,016	36,161	2
Connecticut	9	3,317	271	1	New York	0	18,250	0	0
Delaware	429	800	53,625	2	North Carolina	0	8,227	0	0
Florida <sup>c</sup>	-	16,279	-	4	North Dakota	541	677	79,911	3
Georgia	2,905	8,413	34,530	2	Ohio	4,375	11,428	38,283	2
Hawaii	0	1,342	0	0	Oklahoma	21,167	3,491	606,331	4
Idaho	97	1,480	6,554	2	Oregon	0	3,613	0	0
Illinois	0	12,266	0	0	Pennsylvania	21,315	12,281	173,561	3
Indiana	16,799	6,215	270,298	3	Rhode Island	17	1,012	1,680	1
Iowa	8,651	2,941	294,152	4	South Carolina	11,170	4,033	276,965	3
Kansas	220	2,761	7,968	2	South Dakota	424	810	52,346	2
Kentucky	18,919	4,098	461,664	4	Tennessee	17,177	5,966	287,915	4
Louisiana	2,666	4,535	58,787	2	Texas	117,264	21,487	545,744	4
Maine	22	1,285	1,712	1	Utah	5,015	2,411	208,005	3
Maryland	1	5,467	18	1	Vermont	8	638	1,254	1
Massachusetts	6,963	6,310	110,349	3	Virginia	24,979	7,324	341,057	4
Michigan	626	9,763	6,412	1	Washington	3	6,258	48	1
Minnesota	0	5,055	0	0	West Virginia	4,313	1,849	233,261	3
Mississippi	6,085	2,908	209,250	3	Wisconsin	10	5,479	183	1
Missouri	936	5,718	16,369	2	Wyoming	1,773	641	276,599	3

<sup>a</sup> The arrest data show the number of times that persons of all ages were arrested in 2005, as reported by law enforcement agencies to the UCR Program. Source: FBI: *Crime in the United States, 2005*, Table 69, "Arrests by State, 2005". [http://www.fbi.gov/ucr/05cius/data/table\\_69.html](http://www.fbi.gov/ucr/05cius/data/table_69.html) (Retrieved on August 21, 2007)

<sup>b</sup> Total resident population of states on July 1, 2005 with numbers in thousands. Source: U.S. Census Bureau. <http://www.census.gov/population/projections/state/stpipop.txt> (Retrieved on August 21, 2007)

<sup>c</sup> For Florida, the punitiveness score was estimated based on the punitiveness score of the previous arrest variables. See discussion in the text above.

Table 74: Calculating Punitiveness Scores across Arrests for Public Drunkenness

Quartile Description	Levels of Punitiveness	Pun. Score	<i>f</i>	State Name (Arranged by arrest rates)
Decriminalize	Minimum	0	8	Arizona, Hawaii, Illinois, Minnesota, Montana, New York, North Carolina and Oregon
1st	Low	1	11	Maryland, Washington, Nebraska, Wisconsin, New Jersey, Connecticut, Vermont, Rhode Island, Maine, Colorado and Michigan
2nd	Moderate	2	11	Idaho, Nevada, Kansas, Missouri, Alaska, Georgia, New Mexico, Ohio, South Dakota, Delaware and Louisiana
3rd	High	3	10	North Dakota, Massachusetts, Pennsylvania, Alabama, Utah, Mississippi, West Virginia, Indiana, Wyoming and South Carolina
4th	Extreme	4	10	California, Arkansas, Florida, Tennessee, Iowa, New Hampshire, Virginia, Kentucky, Texas and Oklahoma

### **Summary: Punishing “Immorality”**

Part Three of the study measures state punitiveness on the bases of five additional variables: *Statutory rape and age of consent*, *Arrests for prostitution and commercialized vice*, *Arrests for drug abuse*, *Arrests for gambling*, and *Arrests for public drunkenness*. States were separated into the groups of (a) non-punitive or minimally punitive; (b) slightly or less than moderately punitive; (c) moderately punitive; (d) highly or more than moderately punitive, and (e) extremely punitive, based on their criterion punitiveness scores, which varied between zero (minimal punitiveness) and four (extreme punitiveness). To synthesize these scores, an average punitiveness score was computed (see Table 75).

In terms of regional patterns of state punitiveness, the variables of *Punishing “Immorality”* are similar to the patterns observed for *Political and Symbolic Punishment* variables (Part I). Among the non-punitive or minimally punitive 17 states<sup>75</sup>, only two were southern (Alabama and West Virginia) and most of them were northeastern (Maine, Massachusetts, New York, Rhode Island and Vermont) and western (Alaska, Hawaii, Idaho, Montana, Nevada, New Mexico and Washington). It appears that not northeastern states *per se* but the states bordering Canada are especially non-punitive. If we look from west to the east along the Canadian border, it is very easy to spot the states that were identified as minimally punitive (Alaska, Washington, Idaho, Montana, North Dakota (lowly punitive), Minnesota (lowly punitive), Michigan (moderately punitive), New York, Vermont, New Hampshire (lowly punitive) and Maine). It must be some Canadian mildness or “immorality” spreading across these American states.

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<sup>75</sup> There were 17 such states instead of 10 because 8 states had identical average punitiveness scores of 1.6. The same will apply to the extremely punitive states as 13 states made to that category.

As the climate gets warmer, anti-“immorality” sentiments begin to simmer; once it gets hot, these sentiments reach the boiling point. Ten out of the thirteen most punitive states were southern while only two (Illinois and Missouri) were midwestern and only one (California) western. Hawaii and New Mexico were anomalies, as they were strikingly different from other hot-climate jurisdictions. No northeastern state qualified for this category. This confirms the belief that the moral values are most prevalent and vigorously protected in the South and least so in the Northeast and Northwest.

The remaining two parts—*Conditions of Confinement* and *Juvenile Justice*—offer additional measures of state punitiveness. They will be followed with a more thorough analysis of the patterns of punitiveness that will show whether the contour of states punitiveness observed here is still evident, and if so, whether or not it will continue in the same direction. Given the possibility that northeastern states might appear less lenient once the punitiveness scores for the variables of *Punishing “Immorality”* are merged with those of other variables, I advise against using the above conclusion to portray some states as more punitive and others less so. Such a conclusion will be possible only when we finish analyzing all the measurable criteria of state punitiveness.

Table 75: Combining the Punitiveness Scores of the Variables of Punishing “Immorality”

State Name <sup>a</sup>	Variables 27-31					Sum of Pun. Scores	Mean Pun. Scores
	Statutory Rape & Age of Consent	Arrests for Prostitution	Arrests for Drug Abuse	Arrests for Gambling	Arrests for Drunkenness	$\Sigma X$	$\frac{\Sigma X}{5}$
Montana	1	1	0	1	0	3	0.6
Maine	0	1	2	1	1	5	1.0
South Dakota	0	1	0	2	2	5	1.0
Vermont	2	1	0	1	1	5	1.0
Kansas	2	1	0	1	2	6	1.2
Rhode Island	1	0	1	3	1	6	1.2
Alaska	0	3	0	2	2	7	1.4
Nevada	2	0	3	0	2	7	1.4
West Virginia	0	2	1	1	3	7	1.4
Alabama	0	1	1	3	3	8	1.6
Hawaii	0	4	0	4	0	8	1.6
Idaho	4	1	0	1	2	8	1.6
Iowa	0	2	1	1	4	8	1.6
Massachusetts	2	2	0	1	3	8	1.6
New Mexico	0	3	1	2	2	8	1.6
New York	2	2	1	3	0	8	1.6
Washington	0	4	2	1	1	8	1.6
Minnesota	1	4	2	2	0	9	1.8
New Hampshire	2	1	0	2	4	9	1.8
New Jersey	0	4	4	0	1	9	1.8
North Dakota	3	1	0	2	3	9	1.8
Ohio	1	2	1	3	2	9	1.8
Oregon	2	3	3	1	0	9	1.8
Utah	2	2	1	1	3	9	1.8
Wisconsin	4	1	1	2	1	9	1.8
Arkansas	0	2	2	2	4	10	2.0
Colorado	2	3	2	2	1	10	2.0
Connecticut	1	3	2	3	1	10	2.0
Indiana	0	4	2	1	3	10	2.0
Michigan	2	3	1	3	1	10	2.0
Arizona	1	4	4	2	0	11	2.2
Louisiana	1	2	3	3	2	11	2.2
North Carolina	1	3	3	4	0	11	2.2
Wyoming	0	1	3	4	3	11	2.2
Mississippi	1	1	3	4	3	12	2.4
Nebraska	2	2	4	3	1	12	2.4
Pennsylvania	0	3	2	4	3	12	2.4
Georgia	2	3	2	4	2	13	2.6
Kentucky	1	2	4	2	4	13	2.6
Missouri	1	3	3	4	2	13	2.6
Oklahoma	1	2	4	2	4	13	2.6
Illinois	3	4	3	4	0	14	2.8
Maryland	1	4	4	4	1	14	2.8
South Carolina	0	3	4	4	3	14	2.8
Virginia	3	2	2	3	4	14	2.8
Delaware	3	3	4	3	2	15	3.0
Texas	1	4	3	3	4	15	3.0
Tennessee	2	4	3	4	4	17	3.4
California	4	4	4	3	4	19	3.8
Florida	3	4	4	4	4	19	3.8

<sup>a</sup> States are arranged from the least punitive to the most punitive.

Note: Shaded areas separate the 10 least punitive and the 10 most punitive states from the rest.

## PART FOUR

### Conditions of Confinement

“Conditions of confinement” is a broad category, and a comparative study can rely upon dozens of questions in operationalizing it. Such questions may include: Do prisoners have reasonable amounts of room space, comfortable temperatures, and fresh air? Are personal hygiene requirements met? Are inmates offered adequate clothing, bedding, nutrition, and medical and rehabilitative services in a timely fashion? Are their persons respected by the prison personnel? Are all the necessary measures taken to protect prisoners not only from staff-on-inmate but also inmate-on-inmate violence, intimidation, sexual abuse and humiliation? Are inmates forced to work? Are they offered an opportunity to maintain contact with their families? Is there an effective mechanism of challenging any of these conditions of confinement?

Although one can come up with many other questions relevant to the severity of prison conditions, the methodological difficulty is not in asking them, but in obtaining reliable data and making these data compatible. This explains why comparative studies on prison conditions are almost non-existent and why those that exist are hardly empirical. For example, James Whitman (2003) uses the criterion of “The Mildness of Respectful Treatment” when contrasting German and French prison conditions with those of the United States. Under this title, Whitman discusses various topics that range from whether a prison guard should knock on the door before entering the cell to whether prisoners should wear uniforms (see pp. 84-92). However, his conclusions are based on historical sources and statutes,<sup>76</sup> both of which are incapable of revealing the true nature of contemporary penitentiaries without recent empirical

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<sup>76</sup> For example, Whitman (2003) cites *Kommentar zum Strafvollzugsgesetz* (Punishment Execution Law Commentary) to explain the rationale behind the requirement that guards knock before entering the cell in German prisons (see p. 90).

data. Furthermore, Whitman accepts single cases, often nongeneralizable ones, and then builds his arguments upon them. Such a method does not allow the objective depiction of either the American or European correction systems. In fact, it causes a distortion of the truth and easily convinces the reader that that Whitman first set the agenda to criticize American penal system in light of European prisons, and then looked for evidence to support his views. The opposite could have been just as easily done.

“Which jurisdiction is more punitive based on the conditions in which it holds its prisoners?” is an empirical question that should be answered accordingly despite the fact that normative analysis of international<sup>77</sup> and national statutes governing the standards of confinement can be helpful tools of assessing state punitiveness. This argument is based on my assumptions that (a) there is a wide gap between the standards specified on the books and actually applied, and (b) laws are not to inform us on the human rights crisis inside prisons but to dictate rules. Therefore, this part of the research will offer a state-by-state analysis using the best currently available data on prison overcrowding; the amount of money per inmate that each jurisdiction spends on operating its prisons and supplying its prisoners with food and medical care; inmates’ deaths as a result of suicide and homicide; inmate-on-inmate and staff-on-inmate sexual violence; and, finally, lawsuits filed against agencies or prison personnel.<sup>78</sup> The link among these facets of prison life is fairly visible. The discussions that follow will show that prison overcrowding adversely affects the quality of prison services including food, mental and physical health, which often plays a major role in prisoners’ deaths, whether they

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<sup>77</sup> See, for example, the United Nations’ *Standard minimum rules for the treatment of prisoners*; Universal Declaration of Human Rights (Article 25); the International Convent on Economic, Social and Cultural Rights (Articles 11 and 12); and Council of Europe’s *Recommendation No. R (99) 22: Prison overcrowding and prison population inflation. PC-DP, 2004.*

<sup>78</sup> I also considered using inmates’ hourly wages as an additional variable of state punitiveness with the rationale that states that pay relatively higher wages to their prisoners are less punitive than states that only pay symbolic amounts of money. Yet, after observing a similarity among states (hourly wage ranges from \$6 to \$8 per hour for almost all states (Camp, 2003)), this variable was excluded from the analysis.

are caused by suicide or homicide. Finally, deaths and sexual violence inside prisons culminating in lawsuits against prison administration and staff will be considered.

### **Prison Overcrowding (Variable 32)**

An overcrowded prison system can be defined as one holding more prisoners than it was initially intended to accommodate (Walmsley, 2005). Social research is ambivalent with regards to the extent to which such prison systems contribute to the escalation of the abuse and violence in correctional facilities. One group of researchers argues that prison crowding has little substantive impact on inmate misconduct (Ekland-Olson, Barrick, & Cohen, 1983; Travis, Franklin & Pratt, 2006) while others emphasize increased violence as a consequence of overcrowding (Cox, Paulus & McCain, 1984; Kinkade, Leona & Semond, 1995; Liebling, 1999). A consensus emerges, however, when focusing on the adverse effects of prison crowding on inmates' mental and physical health and an increased risk of prison suicide (Cox et al. 1984; Gibbons & Katzenbach, 2006; Huey & McNulty, 2005; Liebling, 1999). According to the 2007 Amnesty International Report, "Among other things, overcrowding continues to be linked to self-harm and self-inflicted death, greater risk to the safety of staff and inmates, and detention conditions amounting to cruel, inhuman and degrading treatment."

The main solution to this problem is either imprisoning fewer individuals, building new prisons, or both.<sup>79</sup> The United States has invested billions of dollars in making more room for inmates. According to Austin and Irwin (2001), in 1998, there were approximately 83,500 new prison beds under construction and 86,500 beds at planning stage. Costs associated per bed

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<sup>79</sup> Also, nations that use prisons excessively to house inmates awaiting trial may consider alternatives to pretrial detention (e.g., bail or home arrest), as is suggested by the United Nations' *Standard minimum rules for the treatment of prisoners*. Article 6 of the document states: (1) Pretrial detention shall be used as a means of last resort. (2) Alternatives to pre-trial detention shall be employed at as early a stage as possible.

range from \$5,000 to \$128,000.<sup>80</sup> The prison industry continues to flourish even if there is no clear evidence that the public desires further investment in prison construction. Based on a nationally representative sample of 1,300 Americans, Cohen, Rust and Steen (2003) found strong public support for spending more money to reduce crime; however, much of that support was for increased prevention programs targeted to high-risk youth, more police on the street, and drug treatment programs for nonviolent offenders, as opposed to building more prisons.

Constructing new prisons can be indicative of both a decrease and an increase in state punitiveness. It is the former if new prison cells are being built to ameliorate the problem of overcrowding, and it is the latter if the same is done to imprison more people. For example, as eastern European countries expressed their interest in membership in the Council of Europe, many of them began renovating old or constructing new prisons despite their economic turmoil following the collapse of the Soviet economy. Because building new prisons was not associated with a rise in incarceration rates,<sup>81</sup> I perceive this dynamic as an example of decreased state punitiveness.

The American experience with prison construction headed in the opposite direction, i.e., toward an increase in state punitiveness, as new prison beds did not ease the adverse effects of crowding. Instead, they were followed by a dramatic increase in imprisonment. While some states managed to decrease prison overcrowding (e.g., Alabama, Arizona, Illinois, Oklahoma and Wyoming), overall, a twelve-year trajectory starting from 1995 to 2006 did not reveal an improvement (see Table 76). This supports a hypothesis that prisons in the U.S.,

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<sup>80</sup> See discussion on construction costs on pp. 221-223.

<sup>81</sup> In fact, most post-USSR nations began using their prisons less frequently. According to the *European Sourcebook of Crime and Criminal Justice Statistics – 2006*, between 2000 and 2003, Estonia decreased prison population rate per 100,000 population from 341 to 322, Georgia from 167 to 136, Lithuania from 260 to 223, Russia from 722 to 607, and Ukraine from 445 to 395 (see p. 129).

at least for the last 10-15 years, have been primarily constructed for imprisoning more people as opposed to addressing the problem of overcrowding.

This argument should not be construed to mean that all American jurisdictions have problems with prison overcrowding. In fact, between 1995 and 2006, nearly half of all states, on average, have not met their highest prison capacity. Moreover, considering the severity of overcrowding around the world and even in the western world,<sup>82</sup> American prisons do not strike an observer as highly overcrowded. For last twelve years, the average occupancy level in America's state prisons was about 105.6% (see Table 76), which is very similar to those of Australia (105.9%), Japan (105.9%), and Scotland (107.5%) and much lower than that of England and Wales (112.7) (BBC News: World Prison Populations, 2007).

This does not mean, however, that no states face serious difficulties due to the lack of prison space. In Iowa, Massachusetts, Wisconsin, New Jersey, Illinois and California, prison populations are approximately 30 percent higher than their maximum capacity. Between 1996 and 1998, California's average prison capacity well exceeded 200%. In 1995-1998, New Jersey's state prisons housed approximately 60% more inmates than they were designed for. In 2006, Hawaii's prison occupancy level hit its all-time high, 147%, forcing the state to export inmates into other jurisdictions. According to *The New York Times*, about one third of Hawaii's state inmates are now held in private prisons in Arizona, Oklahoma, Mississippi and Kentucky. Alabama and California adopted the same practice (Moore, 2007).

Such transfer practices may be necessary; yet they are not without serious consequences. According to the same article, "[M]oving inmates from prison to prison disrupts

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<sup>82</sup> According to the Penal Reform International, an international non-governmental organization working on penal and criminal justice reforms worldwide, in Europe, prison populations are on average 130% of the maximum reported capacity. Available at <http://www.penalreform.org/prison-overcrowding.html> (Retrieved on January 8, 2008). Also, as BBC News' World Prison Population report, in 2007, Brazil had an occupancy level of 150.9%, Mexico – 133.9%, South Africa – 138.6%, Poland – 124.4%, and Kenya – 284.3%.

training and rehabilitation programs and puts stress on tenuous family bonds, ... making it more difficult to break the cycle of inmates committing new crimes after their release” (Moore, 2007). No doubt being housed hundreds of miles away from one’s families makes visitations almost impossible and phone conversations more costly.<sup>83</sup> This in itself can be viewed as an expression of state punitiveness.

Thus, on the one hand, there are states such as Mississippi, Rhode Island, and Utah with an average occupancy level below 90%, and, on the other hand, there are jurisdictions that, despite transferring inmates to private correctional facilities within their borders or exporting them out of state, still have severe overcrowding problems. This variation must be included when comparing American jurisdictions in terms of their state punitiveness.

The state-by-state disparity in prison occupancy levels is depicted in the variable of *Prison Overcrowding*, the data for which came from the thirteen Bureau of Justice Statistics reports (see references below Table 76). The population counts are based on the number of inmates held in facilities operated by the jurisdiction and exclude inmates held in local jails, in other jurisdictions, or in private facilities. Before grouping states into categories, I calculated average occupancy level for the period between 1995 and 2006. States with an average number not exceeding 100 percent were placed into the category of non-punitive. There were 23 such states. The remaining 27 states were grouped into quartiles with higher occupancy levels denoting an increase in state punitiveness (see Table 77).

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<sup>83</sup> One of the Hawaiian prisoners housed in Arizona admitted that each time he moved, he had to reapply for phone privileges, a process that sometimes takes six months. Once he re-obtained such a privilege, he could not always afford the long-distance bill. This Hawaiian prisoner told to the New York Times’ reporter that without contacts with his family he loses his identity, “And that’s not good, because when we go back into society – and more than 95 percent of us will – the only ones who are going to care of you are your family” (Moore, 2007).

## Variable 32: Prison Overcrowding

Table 76: Prison Overcrowding

State Name	Population housed as a percent of highest capacity, 1995 - 2006 <sup>a</sup>												Average Occupancy 1995-2006	Pun. Score
	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006		
Alabama	103	99	100	100	97	101	102	201	104	101	95	95	108.17	2
Alaska	106	135	147	119	94	102	109	93	100	101	107	105	109.83	2
Arizona	115	111	97	110	101	106	99	100	94	82	84	86	98.75	0
Arkansas	105	101	99	100	100	105	95	95	94	96	92	97	98.25	0
California	189	203	206	230	101	101	101	103	103	102	102	103	137.00	4
Colorado	110	118	115	118	116	98	115	116	116	119	120	120	115.08	3
Connecticut <sup>b</sup>	-	-	-	-	-	-	-	-	-	-	-	-	98.00	0
Delaware	114	121	129	125	-	-	-	164	124	103	102	122	122.67	3
Florida	93	89	83	87	82	81	89	95	98	98	98	92	90.42	0
Georgia	96	107	100	100	89	90	89	99	100	103	103	103	98.25	0
Hawaii	123	151	149	120	102	106	113	107	115	112	110	147	121.25	3
Idaho	104	101	96	95	97	95	99	71	75	76	80	116	92.08	0
Illinois	138	138	142	134	138	137	128	136	138	135	133	75	131.00	4
Indiana	97	100	98	101	96	91	91	93	90	94	94	95	95.00	0
Iowa	164	151	140	130	116	117	118	124	126	109	121	122	128.17	4
Kansas	95	98	97	100	97	95	97	98	99	97	97	94	97.00	0
Kentucky	110	131	124	122	93	96	92	87	82	94	103	95	102.42	1
Louisiana	94	100	100	100	83	99	99	98	97	99	97	115	98.42	0
Maine	107	99	102	99	100	100	101	104	109	111	103	110	103.75	1
Maryland	99	96	97	99	97	99	99	99	100	97	100	97	98.25	0
Massachusetts	137	150	137	122	116	113	114	128	127	126	133	138	128.42	4
Michigan	99	99	99	99	98	97	98	97	98	98	99	99	98.33	0
Minnesota	105	99	98	96	98	96	97	97	99	100	97	99	98.42	0
Mississippi	101	89	92	103	102	100	94	73	73	74	72	74	87.25	0
Missouri	100	102	107	95	95	96	98	97	95	95	99	98	98.08	0
Montana	126	120	117	126	100	112	125	78	77	123	121	114	111.58	2
Nebraska	124	130	135	124	120	129	100	103	107	104	111	111	116.50	3
Nevada	106	107	102	104	99	91	93	96	95	102	56	115	97.17	0
New Hampshire	105	102	110	109	109	91	100	102	100	101	100	114	103.58	1
New Jersey	164	167	160	158	143	141	137	138	87	88	89	98	130.83	4
New Mexico	81	94	82	109	92	92	93	94	97	97	98	54	90.25	0
New York	101	101	106	107	108	105	105	105	105	104	103	104	104.50	2
North Carolina	100	119	117	113	109	107	110	117	112	113	116	113	112.17	2
North Dakota	101	101	126	84	91	92	103	109	109	109	126	128	106.58	2
Ohio	171	134	138	130	125	114	113	120	116	119	121	123	127.00	3
Oklahoma	128	136	104	93	99	95	93	93	95	95	95	92	101.50	1
Oregon	106	105	105	102	99	100	97	101	100	103	102	100	101.67	1
Pennsylvania	154	156	151	117	113	111	110	113	118	107	108	112	122.50	3
Rhode Island	87	65	89	89	76	88	86	86	88	78	84	91	83.92	0
South Carolina	102	108	92	96	89	89	93	100	96	96	97	98	96.33	0
South Dakota	120	113	96	99	96	97	102	102	93	95	97	92	100.17	1
Tennessee	97	97	94	97	96	95	96	96	95	96	96	70	93.75	0
Texas	93	95	96	95	97	96	95	85	86	87	86	86	91.42	0
Utah	82	86	88	81	115	86	92	97	97	94	79	76	89.42	0
Vermont	102	67	111	103	95	96	103	106	91	89	94	98	96.25	0
Virginia	149	152	153	90	91	91	93	95	94	94	93	92	107.25	2
Washington	108	125	108	122	119	110	119	127	109	110	112	111	115.00	3
West Virginia	100	90	100	100	94	94	96	101	98	98	96	101	97.33	0
Wisconsin	145	130	129	136	139	131	126	117	127	124	127	130	130.08	4
Wyoming	113	118	116	115	101	96	89	98	96	98	97	83	101.67	1

<sup>a</sup> Population counts are based on the number of inmates held in facilities operated by the jurisdiction. They exclude inmates held in local jails, in other States, or in private facilities. Source: Gilliard & Beck (1996), Mumola & Beck (1997), Gilliard & Beck (1998), Beck & Mumola (1999), Beck (2000), Beck & Harrison (2001), Harrison &

Beck (2002, 2003, 2004, 2005, 2006), Sabol, Couture & Harrison (2007). See Tables 8 or 9 (depending on the report): “Reported Federal and State prison capacities, yearend 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005 or 2006.” p.7 or p.8 (depending on the report).

<sup>b</sup> Connecticut no longer reports capacity because of a law passed in 1995. Therefore, data for 1994 were used to report the average occupancy level for that state. Source: Beck & Gilliard. (1995). Table 8: “Reported Federal and State prison capacities, yearend 1994.” p. 7.

Table 77: Calculating Punitiveness Scores across Prison Overcrowding

Quartile Description	Levels of Punitiveness	Pun. Score	<i>f</i>	State Name (Arranged by annual average population)
Below 100%	Minimum	0	23	Rhode Island, Mississippi, Utah, New Mexico, Florida, Texas, Idaho, Tennessee, Indiana, Vermont, South Carolina, Kansas, Nevada, West Virginia, Connecticut, Missouri, Arkansas, Georgia, Maryland, Michigan, Louisiana, Minnesota and Arizona
Above 100%: 1st quartile	Low	1	7	South Dakota, Oklahoma, Oregon, Wyoming, Kentucky, New Hampshire and Maine
Above 100%: 2nd quartile	Moderate	2	7	New York, North Dakota, Virginia, Alabama, Alaska, Montana and North Carolina
Above 100%: 3rd quartile	High	3	7	Washington, Colorado, Nebraska, Hawaii, Pennsylvania, Delaware and Ohio
Above 100%: 4th quartile	Extreme	4	6	Iowa, Massachusetts, Wisconsin, New Jersey, Illinois and California

### Money Spent on Prisoners (Variables 33-35)

Modern western criminal justice systems are built on the Beccarian model of criminal law with an emphasis on deterrence through certain, swift, publicized and severe penalties. “Deterrence and punishment are effective only when the act of punishment actually worsens a person’s lifestyle” (Austin & Irwin, 2001, p. 238). Therefore, if prisons provide living conditions superior to what prisoners had before their incarceration, then criminality is rewarded and obedience to the law is punished. As sensible as this argument may seem, the story does not end here. First, a great number of individuals who go to prison already have lives so bad that making them worse would simply amount to torture. Second, incarceration, no matter how comfortable, takes away personal freedoms and valuable connections with loved ones (for an expanded discussion, see Clear (2007b)). Finally, conviction and imprisonment

typically leave dark stains on offenders' mental<sup>84</sup> and physical health, stigmatize them, threaten their job prospects, make them ineligible for various services and benefits (e.g., public assistance and educational loans), and diminish their political rights (e.g., the right to vote).<sup>85</sup> In light of these and other adverse affects of imprisonment, I do not think we need to put any effort into making sure that prison life is in fact worse than life in a free society.

Imprisonment is bad and, given that not all bad things are equally bad, it has degrees that depend on the varying conditions in which prisoners are held. Money is an important consideration here, as the amount a state spends on its prisons directly and indirectly determines how poor these conditions are. The direct effect of money can be observed by the quality of food, medical services, hygiene, rehabilitative programs and prison amenities. Indirect effect of money is seen in two major ways: one, hiring well-qualified personnel and repeatedly training them in issues ranging from the respectful treatment of inmates to using a minimum necessary amount of force; and two, developing security systems that prevent guard-on-inmate and inmate-on-inmate violence, which often results in serious injuries and the deaths of inmates. Thus, spending money on construction and surveillance is also, although indirectly, related to state punitiveness.

Inspired by the premise that jurisdictions that spend fewer dollars are more punitive than those that spend more money, this section introduces three additional variables: *Operating cost per inmate*, *Food service cost per inmate* and *Medical care cost per inmate*. Critics of my

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<sup>84</sup> The International Association for Suicide Prevention Task Force well describes some psychological effects of imprisonment:

Incarceration may represent a loss of freedom, loss of family and social support, fear of the unknown, fear of physical or sexual violence, uncertainty and fear about the future, embarrassment and guilt over the offense, and fear or stress related to poor environmental conditions. Over time, incarceration brings added stress such as conflict with the institution, victimization, legal frustration, and physical and emotional breakdown. (Konrad, Daigle, Daniel, Dear, Frottier, Hayes, Kerkhof, Liebling, & Sarchiapone, 2007, p. 114).

<sup>85</sup> See discussion on the adverse affects of incarceration and felony conviction in Part I of this study.

approach may argue against viewing corrections' budgets as indicative of harshness due to the very different levels of economic development of U.S. states. It is true that Alabama and Mississippi may not afford spending the same amounts of money as New York and Massachusetts, and, at first glance, this has nothing to do with state punitiveness. It may seem that characterizing Alabama as more punitive than New York is equivalent to saying that a billionaire is kinder because he gave \$1,000 to charity than a poor student who shared his lunch with a homeless person. Allow me to disagree with this intuitive rationale.

Economically disadvantaged states could have secured better prison conditions had they incarcerated fewer offenders. Their state punitiveness surfaces with prioritizing incarceration over its alternatives. Even though the raw numbers of costs are sufficient indicators of state punitiveness, this study measures the three *cost-per-inmate* variables more conventionally, by considering the possible effects of states' economic development on their correctional spending. This was taken care of by adjusting the numbers for states' median family income (2006 American Community Survey, U.S. Census Bureau). A correlation analysis justified this step, as it showed that cost per inmate ( $M = \$24,053$ ,  $SD = \$7,914$ ,  $N = 50$ ) and median family income ( $M = \$58,226$ ,  $SD = \$8,782$ ,  $N = 50$ ) are related strongly and positively ( $r = .522$ ,  $p < .01$ ), confirming that higher prison expenditures are closely associated with higher economic development of a state.

Controlling for median family income also addresses an important ethical concern. When family median income is low, spending less money on inmates appears less morally problematic and, consequently, less indicative of state punitiveness. One cannot demand comfortable life in prisons when hard-working law-abiding residents are not provided such lives. Similarly, poor and wealthy nations cannot be expected to have similar prison conditions.

Patterns of state punitiveness began to emerge only when two states with comparable median family income spend significantly different amounts of money on inmates.

Another argument that may be raised is that a relatively lower operating cost per inmate may be caused by a high incarceration rate, which, in itself, might be a state's reaction to a high violent crime rate. Although controlling for both violent crime and incarceration rates is possible since related data are widely available, at this point, this seems redundant. Besides, a control for these variables may require the consideration of many other factors that also influence corrections budgets. Therefore, anyone who undertakes such an experiment risks opening the door so widely that closing it will never be possible.

The three *cost-per-inmate* variables were used instead of only either one for two reasons. First, the issue of money seems an important indicator of state punitiveness and the inclusion of only one variable would not have had enough impact on the overall punitiveness score. Second, food and medical budget variables are important because a high operating cost per inmate does not mean that nutritional and medical needs are adequately met. A high cost per inmate may be attributable to high wages of correctional officers or expensive security systems, both of which affect inmates only indirectly.

A final note in this section will explain the technical aspect of the variables. Because all three of them share a common operationalization, I will discuss them jointly. The budgetary information came from 2001 (Stephan, 2004) and 2002 (Camp, 2003), the latest years for which reliable data for operation cost and food and medical care cost per inmate are available. After adjusting the numbers for median family income, states were grouped into quintiles. Higher spending (i.e., rate per \$1,000 of a median family income) was interpreted as a gauge of a lower degree of state punitiveness. This means that the *cost-per-inmate* variables assign

punitiveness scores in the opposite direction in comparison with previous variables, larger values denoting lower punitiveness (pun. scores = 0 and 1) and smaller values denoting higher punitiveness (pun. scores = 3 and 4) (see Tables 78-83).

### Variable 33: Operating Cost per Inmate

Table 78: Operating Cost per Inmate (after controlling for state median family income)

State Name	Cost <sup>a</sup>	Income <sup>b</sup>	Rate <sup>c</sup>	Pun. Score	State Name	Cost <sup>a</sup>	Income <sup>b</sup>	Rate <sup>c</sup>	Pun. Score
Alabama	8,128	49,207	165.18	4	Montana	21,898	51,006	429.32	1
Alaska	36,730	69,876	525.65	0	Nebraska	25,321	56,940	444.70	1
Arizona	22,476	55,709	403.45	2	Nevada	17,572	61,466	285.88	4
Arkansas	15,619	45,093	346.37	3	New Hampshire	25,949	71,176	364.58	2
California	25,053	64,563	388.04	2	New Jersey	27,347	77,875	351.17	3
Colorado	25,408	64,614	393.23	2	New Mexico	28,035	48,199	581.65	0
Connecticut	26,856	78,154	343.63	3	New York	36,835	62,138	592.79	0
Delaware	22,802	62,623	364.12	3	North Carolina	26,984	52,336	515.59	0
Florida	20,190	54,445	370.83	2	North Dakota	22,425	55,385	404.89	2
Georgia	19,860	56,112	353.93	3	Ohio	26,295	56,148	468.32	1
Hawaii	21,637	70,277	307.88	4	Oklahoma	16,309	47,955	340.09	3
Idaho	16,319	51,640	316.01	4	Oregon	36,060	55,923	644.82	0
Illinois	21,844	63,121	346.07	3	Pennsylvania	31,900	58,148	548.60	0
Indiana	21,841	55,781	391.55	2	Rhode Island	38,503	64,733	594.80	0
Iowa	22,997	55,735	412.61	1	South Carolina	16,762	50,334	333.02	4
Kansas	21,381	56,857	376.05	2	South Dakota	13,853	53,806	257.46	4
Kentucky	17,818	48,726	365.68	2	Tennessee	18,206	49,804	365.55	2
Louisiana	12,951	48,261	268.35	4	Texas	13,808	52,355	263.74	4
Maine	44,379	52,793	840.62	0	Utah	24,574	58,141	422.66	1
Maryland	26,398	77,839	339.14	3	Vermont	25,178	58,163	432.89	1
Massachusetts	37,718	74,463	506.53	1	Virginia	22,942	66,886	343.00	3
Michigan	32,525	57,996	560.81	0	Washington	30,168	63,705	473.56	1
Minnesota	36,836	66,809	551.36	0	West Virginia	14,817	44,012	336.66	3
Mississippi	12,795	42,805	298.91	4	Wisconsin	28,622	60,634	472.05	1
Missouri	12,867	53,026	242.65	4	Wyoming	28,845	57,505	501.61	1

<sup>a</sup> “Cost” refers to annual operating cost per inmate in fiscal year 2001. Source: Stephan (2004). Table 2: “Total, operating, and capital expenditures, and operating costs per State inmate and per U.S. resident, fiscal year 2001”, p. 3.

<sup>b</sup> “Income” refers to median family income based on 2006 American Community Survey. Source: U.S. Census Bureau. Available at <http://www.census.gov/hhes/www/income/medincomeandstate.xls> (Retrieved on January 4, 2008).

<sup>c</sup> Rate was calculated by dividing annual operating cost per inmate by median family income and multiplying by 1,000.

Table 79: Calculating Punitiveness Scores across the Operating Cost per Inmate

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by rate; the higher the rate the less punitive the state)
1st	Minimum	0	Maine, Oregon, Rhode Island, New York, New Mexico, Michigan, Minnesota, Pennsylvania, Alaska and North Carolina
2nd	Low	1	Massachusetts, Wyoming, Washington, Wisconsin, Ohio, Nebraska, Vermont, Montana, Utah and Iowa
3rd	Moderate	2	North Dakota, Arizona, Colorado, Indiana, California, Kansas, Florida, Kentucky, Tennessee and New Hampshire
4th	High	3	Delaware, Georgia, New Jersey, Arkansas, Illinois, Connecticut, Virginia, Oklahoma, Maryland and West Virginia
5th	Extreme	4	South Carolina, Idaho, Hawaii, Mississippi, Nevada, Louisiana, Texas, South Dakota, Missouri and Alabama

### Variable 34: Food Service Cost per Inmate

Table 80: Food Service Cost per Inmate (after controlling for state median family income)

State Name	Cost <sup>a</sup>	Income <sup>b</sup>	Rate <sup>c</sup>	Pun. Score	State Name	Cost <sup>a</sup>	Income <sup>b</sup>	Rate <sup>c</sup>	Pun. Score
Alabama	265	49,207	5.39	4	Montana	425	51,006	8.33	4
Alaska	1,249	69,876	17.87	2	Nebraska	1,427	56,940	25.06	0
Arizona	1,196	55,709	21.47	1	Nevada	1,401	61,466	22.79	1
Arkansas	424	45,093	9.40	4	New Hampshire	876	71,176	12.31	3
California	859	64,563	13.30	3	New Jersey	810	77,875	10.40	4
Colorado	1,425	64,614	22.05	1	New Mexico	854	48,199	17.72	2
Connecticut	1,242	78,154	15.89	3	New York	963	62,138	15.50	3
Delaware	1,351	62,623	21.57	1	North Carolina	191	52,336	3.65	4
Florida	1,090	54,445	20.02	2	North Dakota	1,670	55,385	30.15	0
Georgia	1,150	56,112	20.49	1	Ohio	1,651	56,148	29.40	0
Hawaii	1,777	70,277	25.29	0	Oklahoma	1,011	47,955	21.08	1
Idaho	643	51,640	12.45	3	Oregon	664	55,923	11.87	3
Illinois	1,150	63,121	18.22	2	Pennsylvania	2,077	58,148	35.72	0
Indiana	970	55,781	17.39	2	Rhode Island	1,305	64,733	20.16	1
Iowa	1,756	55,735	31.51	0	South Carolina	435	50,334	8.64	4
Kansas	1,402	56,857	24.66	1	South Dakota	1,561	53,806	29.01	0
Kentucky	564	48,726	11.57	4	Tennessee	1,103	49,804	22.15	1
Louisiana	349	48,261	7.23	4	Texas	638	52,355	12.19	3
Maine	1,835	52,793	34.76	0	Utah	958	58,141	16.48	3
Maryland	639	77,839	8.21	4	Vermont	977	58,163	16.80	2
Massachusetts	885	74,463	11.89	3	Virginia	1,308	66,886	19.56	2
Michigan	995	57,996	17.16	2	Washington	2,074	63,705	32.56	0
Minnesota	1,665	66,809	24.92	1	West Virginia	1,102	44,012	25.04	0
Mississippi	297	42,805	6.94	4	Wisconsin	1,200	60,634	19.79	2
Missouri	751	53,026	14.16	3	Wyoming	1,024	57,505	17.81	2

<sup>a</sup> Annual food budget per inmate in US dollars in 2002. Source: Camp (2003), see table "Correctional agency food and medical budgets for FY 2002", p. 98.

<sup>b</sup> "Income" refers to median family income based on 2006 American Community Survey. Source: U.S. Census Bureau. Available at <http://www.census.gov/hhes/www/income/medincomeandstate.xls> (Retrieved on January 4, 2008).

<sup>c</sup> Rate was calculated by dividing annual food budget per inmate by median family income and multiplying by 1,000.

Table 81: Calculating Punitiveness Scores across the Operating Cost per Inmate

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by rate; the higher the rate the less punitive the state)
1st	Minimum	0	Pennsylvania, Maine, Washington, Iowa, North Dakota, Ohio, South Dakota, Hawaii, Nebraska and West Virginia
2nd	Low	1	Minnesota, Kansas, Nevada, Tennessee, Colorado, Delaware, Arizona, Oklahoma, Georgia and Rhode Island
3rd	Moderate	2	Florida, Wisconsin, Virginia, Illinois, Alaska, Wyoming, New Mexico, Indiana, Michigan and Vermont
4th	High	3	Utah, Connecticut, New York, Missouri, California, Idaho, New Hampshire, Texas, Massachusetts and Oregon
5th	Extreme	4	Kentucky, New Jersey, Arkansas, South Carolina, Montana, Maryland, Louisiana, Mississippi, Alabama and North Carolina

### Variable 35: Medical Care Cost per Inmate

Table 82: Medical Care Cost per Inmate (after controlling for state median family income)

State Name	Cost <sup>a</sup>	Income <sup>b</sup>	Rate <sup>c</sup>	Pun. Score	State Name	Cost <sup>a</sup>	Income <sup>b</sup>	Rate <sup>c</sup>	Pun. Score
Alabama	1,052	49,207	21.38	4	Montana	922	51,006	18.08	4
Alaska	4,047	69,876	57.92	0	Nebraska	3,145	56,940	55.23	1
Arizona	2,765	55,709	49.63	1	Nevada	2,871	61,466	46.71	1
Arkansas	1,616	45,093	35.84	3	New Hampshire	1,706	71,176	23.97	4
California	4,394	64,563	68.06	0	New Jersey	3,261	77,875	41.87	2
Colorado	2,541	64,614	39.33	2	New Mexico	4,665	48,199	96.79	0
Connecticut	3,620	78,154	46.32	2	New York	3,177	62,138	51.13	1
Delaware	2,073	62,623	33.10	3	North Carolina	1,463	52,336	27.95	3
Florida	3,363	54,445	61.77	0	North Dakota	2,678	55,385	48.35	1
Georgia	2,588	56,112	46.12	2	Ohio	2,445	56,148	43.55	2
Hawaii	1,809	70,277	25.74	4	Oklahoma	2,008	47,955	41.87	2
Idaho	1,715	51,640	33.21	3	Oregon	1,284	55,923	22.96	4
Illinois	1,605	63,121	25.43	4	Pennsylvania	3,700	58,148	63.63	0
Indiana	1,827	55,781	32.75	3	Rhode Island	3,756	64,733	58.02	0
Iowa	2,063	55,735	37.01	3	South Carolina	1,290	50,334	25.63	4
Kansas	2,673	56,857	47.01	1	South Dakota	2,044	53,806	37.99	2
Kentucky	960	48,726	19.70	4	Tennessee	1,551	49,804	31.14	3
Louisiana	860	48,261	17.82	4	Texas	2,001	52,355	38.22	2
Maine	5,601	52,793	106.09	0	Utah	1,343	58,141	23.10	4
Maryland	2,177	77,839	27.97	3	Vermont	2,918	58,163	50.17	1
Massachusetts	4,049	74,463	54.38	1	Virginia	2,866	66,886	42.85	2
Michigan	2,841	57,996	48.99	1	Washington	3,412	63,705	53.56	1
Minnesota	3,908	66,809	58.50	0	West Virginia	2,797	44,012	63.55	0
Mississippi	1,255	42,805	29.32	3	Wisconsin	2,249	60,634	37.09	2
Missouri	1,782	53,026	33.61	3	Wyoming	3,891	57,505	67.66	0

<sup>a</sup> Annual medical care cost per inmate in US dollars in 2002. Source: Camp (2003), see table "Correctional agency food and medical budgets for FY 2002", p. 98.

<sup>b</sup> "Income" refers to median family income based on 2006 American Community Survey. Source: U.S. Census Bureau. Available at <http://www.census.gov/hhes/www/income/medincomeandstate.xls> (Retrieved on January 4, 2008).

<sup>c</sup> Rate was calculated by dividing annual medical care cost per inmate by median family income and multiplying by 1,000.

Table 83: Calculating Punitiveness Scores across the Medical Care Cost per Inmate

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by rate; the higher the rate the less punitive the state)
1st	Minimum	0	Maine, New Mexico, California, Wyoming, Pennsylvania, West Virginia, Florida, Minnesota, Rhode Island and Alaska
2nd	Low	1	Nebraska, Massachusetts, Washington, New York, Vermont, Arizona, Michigan, North Dakota, Kansas and Nevada
3rd	Moderate	2	Connecticut, Georgia, Ohio, Virginia, New Jersey, Oklahoma, Colorado, Texas, South Dakota and Wisconsin
4th	High	3	Iowa, Arkansas, Missouri, Idaho, Delaware, Indiana, Tennessee, Mississippi, Maryland and North Carolina
5th	Extreme	4	Hawaii, South Carolina, Illinois, New Hampshire, Utah, Oregon, Alabama, Kentucky, Montana and Louisiana

### **Inmates' Deaths (Variable 36)**

Social scientists attribute inmates' deaths to a mixture of factors that included but are not limited to the problems caused by prison overcrowding (Huey & McNulty, 2005; Liebling, 1999). For example, Way, Miraglia, Sawyer, Beer and Eddy (2005) examined 76 suicides that occurred between 1993 and 2001 in New York State Department of Correctional Services. The researchers found that among common stressors preceding the suicides were inmate-on-inmate conflict (50%), recent disciplinary action (42%), fear (40%), physical sickness (42%), and unpleasant information ranging from loss of good time to disruption of relationships with families and friends (65%). A great number of these suicide victims suffered from serious mental disorders, such as adjustment disorder, schizophrenia, and personality disorder. Comparable findings were reported by the Manchester Centre for Suicide Prevention (Shaw, Baker, Hunt, Moloney, & Appleby, 2004). This national British survey showed that 89% of suicide victims had symptoms suggestive of mental disorder.

These findings, coupled with the knowledge that rates of mental illness among inmates are higher than in community samples (Boothby, 2007), clearly emphasize the crucial nature of adequate mental and physical health services in prison as a part of comprehensive suicide prevention programs.<sup>86</sup> Yet inmates are often treated by underqualified medical staff (Vaughn & Collins, 2004), some of whom go as far as covering up their mistakes in order to hide medical malpractice (Vaughn & Smith, 1999). Human rights activists and health professionals have long stressed a government's obligation to take advantage of imprisonment and address inmates' health problems before their release. The International Association for Suicide Prevention Task Force argues that because suicide may occur not only inside the penitentiary

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<sup>86</sup> As several researchers have found, although mental health services were offered in more facilities in 2000 in comparison with 1988, an increase in correctional populations clearly surpassed an increase in service delivery (Manderscheid, Gravesande, & Goldstrom, 2004).

but also after a prisoner has been released, “[d]oes not mean the correctional services have no responsibility for the suicide of offenders; on the contrary, these vulnerable offenders should be treated while they can be reached inside the prison” (Konrad, Daigle, Daniel, Dear, Frottier, Hayes, Kerkhof, Liebling, & Sarchiapone, 2007, p. 114). Even the U.S. Supreme Court made it clear that “the public [is] required to care for prisoner who cannot by reason of deprivation of his liberty, care for himself.”<sup>87</sup>

Luckily, both suicide and homicide rates among U.S. prisoners and jail inmates have been dropping dramatically. The Bureau of Justice Statistics (BJS) reports that between 1980 and 2002, the suicide rate fell rapidly from 34 to 14, and homicide rate decreased from 54 to 4, all per 100,000 prisoners (Mumola, 2005). Also, between 1983 and 2001, the jail inmate suicide rate has been cut by almost two thirds (from 129 to 47) and the homicide rate has fallen to nearly a half (from 5 to 3), all per 100,000 jail inmates (Mumola, 2005).<sup>88</sup> Such a striking decrease in these specific forms of deaths makes one wonder whether the variable of *Inmates’ deaths* still has anything to do with state punitiveness. It is true that high suicide and homicide rates may indicate “deliberate indifference”<sup>89</sup> of the correctional authorities, or even worse (e.g., one wicked argument can be that inmates’ deaths saves states’ money and eliminate the risk of recidivism). But current suicide or homicide rates, when combined for all states, are not any higher than those for the general public. In fact, the same BJS study found that neither jail

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<sup>87</sup> See Justice Marshall’s opinion in *Estelle v. Gamble*, 429 U.S. 97 (1976). He also wrote that the Eighth Amendment establishes “the government’s obligation to provide medical care for those whom it is punishing by incarceration... . In the worst cases, [a government’s failure to treat inmates’ illness] may actually produce physical ‘torture or lingering death’, the evils of most immediate concern to the drafters of the Amendment.”

<sup>88</sup> Interestingly, the 1990-2001 data of self-inflicted deaths from England and Wales showed an increase rather than a decrease in the number and rate of inmates’ deaths (Snow, Paton, Oram, & Teers, 2002). Other British studies also report increase in prison suicide rates (see e.g., McHugh, 2000).

<sup>89</sup> This standard was first specified by the Supreme Court in *Estelle v. Gamble*, 429 U.S. 97 (1976) and it has since been applied to hundreds of cases of Eighth Amendment liability on the part of prison administration and staff who fail to provide treatment for severely ill prisoners.

nor prison populations had higher rates of suicide and homicide when compared with the overall resident population<sup>90</sup> (Mumola, 2005).

Thus, the BJS convinces us that inmates' suicide and homicide numbers and rates are far from alarming. Had we compared the U.S. rates with those for other nations, American rates would in fact have looked pretty impressive. The current study, however, is concerned with a within-group rather than a between-group variation, i.e., it examines the differences inside the U.S., as opposed to comparing rates internationally. And while overall rates may look promising, a closer analysis uncovers an unlikable reality.

The problem with overall numbers is that they are based on average values that conceal variability and divert attention away from extreme numbers, ones that are particularly important for this study. The 2001-2002 data, used as a basis for *Inmates' deaths*, show that although some states did not report a single prison suicide (Nebraska, New Hampshire, and North Dakota) or homicide (23 states reported no prison homicide during 2001-2002, with 31 states having no homicide in 2001, and 29 states in 2002), others declared comparably much higher rates of suicide (South Dakota - 71, Utah - 49, Vermont, Alaska, and Arkansas, each with 36, New Mexico - 34, Wyoming - 33)<sup>91</sup> and homicide (South Dakota - 34, New Mexico - 17, Utah and Maryland, both with 12)<sup>92</sup> per 100,000 prisoner (see Table 84). If not for this striking variation, I would have excluded this variable from the present analysis.

It is not the combined number of prison suicides or homicides *per se* that makes a state punitive but the lack of adequate preventive measures. Inmates' deaths are merely a

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<sup>90</sup> The researcher standardized general population by age, race, and gender to match the proportions observed in state prisons and jails. The rates measured what the general population mortality rates would be if it had the demographics similar to prison inmates.

<sup>91</sup> In terms of raw numbers, California (52), Texas (49), New York (21), Illinois (20), Wisconsin (13) and Maryland (13) had most suicides, accounting nearly a half of all self-inflicted deaths in the U.S. prisons.

<sup>92</sup> California (21), Texas (10), Maryland (6), Georgia (4) and Oklahoma (4) had the highest numbers of homicides.

manifestation of such an inadequacy. Applying the *mens rea* doctrine to this *casus* (similar to the French Penal Law's usage of this mental state element when establishing the criminal liability of non-physical persons, such as corporations), one can argue that a government may have no desire for inmates' deaths, but it displays negligence with respect to these results. While on the culpability scale, negligent conduct falls greatly below an intentional act, it does not exclude the serious responsibility of the actor, in this case the state, represented by the correctional authority.

Central to negligence law is the concept of obligation (Vaughn & Collins, 2004). We cannot deny that states have a duty to prevent deaths in correctional facilities.<sup>93</sup> The International Covenant on Civil and Political Rights (ICCPR), ratified by the United States, guarantees to all persons, including prison inmates, their right to life (Human Rights Watch, International Legal Standards).<sup>94</sup> As Justice Blackmun argues, because a prisoner is stripped of all means of self-protection, the state has a constitutional duty to provide him/her with protection, treatment and care.<sup>95</sup> Moreover, the experiences with suicide prevention programs over the past two decades have shown that, although the full elimination of inmates' deaths may not be always possible, reducing the numbers is achievable. Admittedly, prisoners' suicides and homicides may be sometimes caused by factors beyond governments' control. Nevertheless, in light of numerous studies repeatedly identifying overcrowding, a lack of adequate health services and rehabilitative programs, failure to segregate vulnerable inmates from aggressors and failure to provide protection promised to a specific inmate as factors associated with self-inflicted deaths and homicides (Cox et al. 1984; Kinkade, Gibbons &

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<sup>93</sup> A sentence of imprisonment can be looked at as a form of contract by which a government assumes a responsibility for keeping an inmate alive.

<sup>94</sup> See a discussion on legal standards at <http://hrw.org/backgrounder/hivaids/condoms0307/4.htm>

<sup>95</sup> *Farmer v. Brennan*, 114 S. Ct. 1970, 1994 (at 1977).

Katzenbach, 2006; Huey & McNulty, 2005; Leona & Semond, 1995; Liebling, 1999; Vaughn, 1996), blaming only the factors beyond a government's control and not assuming any responsibility for inmates' deaths is inexcusable.

Consistent with the above argument, jurisdictions with high combined suicide and homicide rates were characterized as more punitive and those that reported no deaths or very low comparable rates were thought of as being non-punitive or minimally punitive. To standardize prisoners' mortality numbers, a quintile system was adopted and states were assigned criterion punitiveness scores ranging from 0 (non-punitive) to 4 (extremely punitive) (see Tables 84-85).

### Variable 36: Inmate Deaths

Table 84: Inmate Deaths (suicide and homicide rates per 100,000 prisoners)

State Name	Sui- cide <sup>a</sup>	Homi- cide <sup>b</sup>	Death Total	Pun. Score	State Name	Sui- cide <sup>a</sup>	Homi- cide <sup>b</sup>	Death Total	Pun. Score
Alabama	4	2	6	0	Montana	19	0	19	2
Alaska	36	0	36	4	Nebraska	0	0	0	0
Arizona	11	2	13	1	Nevada	15	10	25	3
Arkansas	36	2	38	4	New Hampshire	0	0	0	0
California	16	7	23	3	New Jersey	5	0	5	0
Colorado	14	6	20	2	New Mexico	34	17	51	4
Connecticut	24	0	24	3	New York	15	2	17	2
Delaware	28	0	28	3	North Carolina	12	3	15	2
Florida	8	2	10	0	North Dakota	0	0	0	0
Georgia	11	4	15	1	Ohio	9	2	11	1
Hawaii	19	0	19	2	Oklahoma	5	9	14	1
Idaho	28	0	28	3	Oregon	23	0	23	3
Illinois	22	2	24	3	Pennsylvania	8	3	11	1
Indiana	15	8	23	3	Rhode Island	28	0	28	4
Iowa	18	0	18	2	South Carolina	5	7	12	1
Kansas	23	0	23	3	South Dakota	71	34	105	4
Kentucky	4	4	8	0	Tennessee	6	8	14	1
Louisiana	5	0	5	0	Texas	17	3	20	2
Maine	28	0	28	3	Utah	49	12	61	4
Maryland	27	12	39	4	Vermont	36	0	36	4
Massachusetts	15	0	15	2	Virginia	6	2	8	0
Michigan	11	1	12	1	Washington	13	6	19	2
Minnesota	15	0	15	2	West Virginia	14	0	14	1
Mississippi	7	0	7	0	Wisconsin	32	0	32	4
Missouri	11	2	13	1	Wyoming	33	0	33	4

<sup>a</sup>“Suicide” refers to average annual suicide rate in 2001-02. Source: Mumola (2005), see table 1: “State prison jurisdictions: Number of prisoner deaths, suicides, and homicides, and mortality rates, per 100,000 prisoners in custody, 2001-02”, p. 3.

<sup>b</sup>“Homicide” refers to average annual homicide rate in 2001-02. Source: Mumola (2005), see the same table.<sup>96</sup>

Table 85: Calculating Punitiveness Scores across Inmate Deaths

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by inmate death)
1st	Minimum	0	Nebraska, New Hampshire, North Dakota, Louisiana, New Jersey, Alabama, Mississippi, Kentucky, Virginia and Florida
2nd	Low	1	Ohio, Pennsylvania, Michigan, South Carolina, Arizona, Missouri, Oklahoma, Tennessee, West Virginia and Georgia
3rd	Moderate	2	Massachusetts, Minnesota, North Carolina, New York, Iowa, Hawaii, Montana, Washington, Colorado and Texas
4th	High	3	California, Indiana, Kansas, Oregon, Connecticut, Illinois, Nevada, Delaware, Idaho and Maine
5th	Extreme	4	Rhode Island, Wisconsin, Wyoming, Alaska, Vermont, Arkansas, Maryland, New Mexico, Utah and South Dakota

<sup>96</sup> For more data about inmate deaths, see: BJS: Death in Custody Statistical Tables available at <http://www.ojp.usdoj.gov/bjs/dcrp/prisonindex.htm>; also Camp (2003), *The 2002 Corrections Yearbook; Adult Corrections*, p. 58, “Inmate deaths by type”.

### **Inmate-on-Inmate and Staff-on-Inmate Sexual Violence (Variable 37)**

The spread of violence, including sexual violence, in state prisons is another valid indicator of state punitiveness because it shows the inadequacy of protective measures, expressed, among other things, through poor inmate classification and segregation systems, insufficient penalties for perpetrators or complete failure to prosecute them, understaffing and the lack of effective staff training and inmates' orientation on how to avoid rape and other forms of sexual abuse in correctional facilities, and what to do if one occurs.<sup>97</sup> The Human Rights Watch documented many cases<sup>98</sup> in which "victims of rape behind bars have been left beaten, bloodied and even dead. They have contracted sexually transmissible diseases such as HIV/AIDS and hepatitis A and B. And they have suffered from crippling depression, substance abuse and post-traumatic stress disorder" (Stemple, Patten & Jealous, 2003). It is no surprise that incarceration exposes inmates to a range of forms of abuse and violence. After imprisonment, individuals may no longer protect themselves by the means available to a free society's members. Although inmate-on-inmate violence is a common cause of physical injury, trauma and deaths, inmates are especially vulnerable when violence comes from members of prison staff who might have incentives to overlook their own or their colleagues' misconduct.

The present variable uses the 2006 Bureau of Justice Statistics' data on sexual violence in state prisons (Beck, Harrison & Adams, 2007). The collection of these data was mandated by the Prison Rape Elimination Act of 2003 (PREA), the first federal law of its kind. The source provides aggregate numbers of (a) reported inmate-on-inmate non-consensual sexual intercourse, and (b) staff-on-inmate sexual misconduct. The latter category captures a wide

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<sup>97</sup> As Jamie Fellner, senior counsel for the U.S. program at Human Rights Watch, says: "When nearly one in 20 prisoner reports being raped or sexually abused behind bars, it is clear that prison authorities are not doing enough to prevent these serious crimes." See Human Rights Watch. (2007). *U.S. Federal statistics show widespread prison rape*.

<sup>98</sup> See the Human Rights Watch landmark report of 2001: *No escape: Male rape in U.S. prisons*.

variety of sex-related behaviors, ranging from use of verbal statements of a sexual nature to sexual penetration.<sup>99</sup> These data are broken down into the allegations that have been substantiated (i.e., the evidence was deemed sufficient by investigation), are unsubstantiated, are unfounded (i.e., determined not to have occurred), and are still under investigation.

In theory, the allegations of sexual violence signal the insufficiency of inmates' safety mechanisms and, subsequently state punitiveness, only when they are substantiated. Intuitively speaking, because inmates may make allegations of sexual misconduct as many times as they wish, the aggregate numbers might be misleading. This argument suggests focusing on only those allegations that investigation determined to have sufficient evidentiary basis.

An analysis of actual numbers, however, convincingly evidenced in favor of comparing the aggregate numbers of allegations, as opposed to only the numbers of substantiated allegations. The fact that only about 17% of all allegations nationwide were substantiated (Beck et al., 2007) does not necessarily mean that all unsubstantiated claims are fictitious. Even a quick glance at the numbers of substantiated allegations of prison sexual violence across American jurisdictions reveals something eye-catching: prison authorities in some states simply do not find even a single allegation that would be sufficiently supported by the evidence. For example, none of Arizona's 35, Indiana's 29, Oregon's 23, Minnesota's 22, Nevada's 21, Connecticut's 19 and Tennessee's 17 allegations of inmate-on-inmate nonconsensual sexual intercourse were deemed as substantiated. Moreover, out of Florida's 145 such allegations, only 1 was found as having sufficient evidentiary grounds, and out of Texas' 297 allegations, only 4 were substantiated. On the other hand, approximately 50% of all

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<sup>99</sup> The study found that 57% of all staff-on-inmate sexual relations "appeared to be willing", while 7% of the incidents involved physical force, abuse of power, or pressure. Also, 15% of reported incidents included sexual harassment, 9% - indecent exposure, and 5% - unwanted touching of sexual gratification. There were total of 544 substantiated cases of staff sexual misconduct and harassment in 2006, and 344 in 2005.

such allegations in Arkansas (4 out of 10), Idaho (9 out of 17), New Hampshire (7 out of 8), Vermont (6 out of 12) and Wisconsin (17 out of 40) were substantiated.

The same can be said about the allegations of staff sexual misconduct with inmates. A striking dissimilarity emerges as soon as one looks at states like Florida, the correctional authorities of which did not find a single substantiated claim out of 152 allegations of sexual misconduct by staff, and Arkansas (4 out of 7), Idaho (7 out of 14), Kentucky (5 out of 7), North Carolina (8 out of 9), South Dakota (2 out of 3), Tennessee (8 out of 14) and West Virginia (6 out of 7), where at least every second allegation was acknowledged as having evidentiary grounds.

This variation sparks the belief that not only are state practices of dealing with the allegations of sexual abuse strikingly different, but that some of them are also suspiciously perfunctory in determining whether evidence was (in)sufficient to show that the alleged incident occurred. Therefore, I will argue that the aggregate number of allegations is a much more reliable indicator of how widespread prison sexual abuse is in comparison with those claims that have been identified as substantiated by correctional authorities.

Before computing the punitiveness scores for this variable, I added the aggregate numbers of alleged inmate-on-inmate non-consensual sexual intercourse and staff-on-inmate sexual misconduct. The sum, then, was adjusted for the state prison population sizes (as of mid-2006) by computing the allegation rates per 10,000 inmates. Applying the quantification method used with previous variables, states were segregated into five groups. Higher allegation rate was perceived as indicative of higher punitiveness level (see Tables 86 and 87).

### Variable 37: Inmate-on-inmate and Staff-on-inmate Sexual Violence

Table 86: Inmate-on-inmate and Staff-on-inmate Sexual Violence

State Name	Inmate-on-inmate <sup>a</sup>	Staff-on-inmate <sup>b</sup>	Total	Prisoners in 2006	Rate per 10,000 prisoner	Pun. Score	State Name	Inmate-on-inmate <sup>a</sup>	Staff-on-inmate <sup>b</sup>	Total	Prisoners in 2006	Rate per 10,000 prisoner	Pun. Score
Alabama	2	4	6	23,995	2.50	0	Montana	12	2	14	1,968	71.14	4
Alaska	0	0	0	3,540	0.00	0	Nebraska	7	13	20	4,546	43.99	4
Arizona	35	26	61	30,391	20.07	2	Nevada	21	11	32	12,412	25.78	2
Arkansas	10	7	17	12,643	13.45	1	New Hampshire	8	3	11	2,522	43.62	3
California	76	52	128	169,561	7.55	0	New Jersey	2	2	4	23,987	1.67	0
Colorado	28	44	72	17,204	41.85	3	New Mexico	0	0	0	3,876	0.00	0
Connecticut	19	12	31	19,606	15.81	1	New York	34	209	243	63,479	38.28	3
Delaware	6	2	8	7,090	11.28	1	North Carolina	22	9	31	37,277	8.32	0
Florida	145	152	297	82,223	36.12	3	North Dakota	2	3	5	1,370	36.50	3
Georgia	53	133	186	46,359	40.12	3	Ohio	67	89	156	44,759	34.85	2
Hawaii	1	0	1	3,898	2.57	0	Oklahoma	17	25	42	17,149	24.49	2
Idaho	17	14	31	4,735	65.47	4	Oregon	23	14	37	13,091	28.26	2
Illinois	38	23	61	45,440	13.42	1	Pennsylvania	24	24	48	41,957	11.44	1
Indiana	29	32	61	22,539	27.06	2	Rhode Island	9	2	11	3,645	30.18	2
Iowa	20	48	68	8,659	78.53	4	South Carolina	2	0	2	22,898	0.87	0
Kansas	47	41	88	8,952	98.30	4	South Dakota	1	3	4	3,573	11.20	1
Kentucky	10	7	17	12,967	13.11	1	Tennessee	17	14	31	14,235	21.78	2
Louisiana	24	71	95	17,387	54.64	4	Texas	297	79	376	140,166	26.83	2
Maine	0	2	2	2,028	9.86	0	Utah	15	6	21	4,978	42.19	3
Maryland	15	17	32	22,860	14.00	1	Vermont	12	20	32	1,678	190.70	4
Massachusetts	22	61	83	10,683	77.69	4	Virginia	16	39	55	29,539	18.62	1
Michigan	33	27	60	50,701	11.83	1	Washington	26	34	60	15,289	39.24	3
Minnesota	22	15	37	8,017	46.15	4	West Virginia	1	7	8	4,276	18.71	2
Mississippi	1	5	6	11,528	5.20	0	Wisconsin	40	53	93	22,279	41.74	3
Missouri	49	73	122	30,149	40.47	3	Wyoming	6	15	21	1,229	170.87	4

<sup>a</sup> Allegations of reported inmate-on-inmate nonconsensual sexual acts (substantiated, unsubstantiated, unfounded and investigation ongoing) in 2006.

<sup>b</sup> Allegations of reported staff sexual misconduct with inmate (substantiated, unsubstantiated, unfounded and investigation ongoing) in 2006.

Source: Beck, Harrison & Adams (2007), see appendix table 1a: "Allegations of inmate-on-inmate sexual violence reported by State and Federal prison authorities, by type, 2006", p. 13.

Table 87: Calculating Punitiveness Scores across Prison Sexual Violence

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by rate)
1st	Minimum	0	Alaska, New Mexico, South Carolina, New Jersey, Alabama, Hawaii, Mississippi, California, North Carolina and Maine
2nd	Low	1	South Dakota, Delaware, Pennsylvania, Michigan, Kentucky, Illinois, Arkansas, Maryland, Connecticut and Virginia
3rd	Moderate	2	West Virginia, Arizona, Tennessee, Oklahoma, Nevada, Texas, Indiana, Oregon, Rhode Island and Ohio
4th	High	3	Florida, North Dakota, New York, Washington, Georgia, Missouri, Wisconsin, Colorado, Utah and New Hampshire
5th	Extreme	4	Nebraska, Minnesota, Louisiana, Idaho, Montana, Massachusetts, Iowa, Kansas, Wyoming and Vermont

### **Lawsuits Filed Against Agencies or Staff (Variable 38)**

Even a superficial assessment of conditions of confinement in all state prisons is an unrealistic task. Theoretically, it is possible to send trained researchers into state correctional facilities and ask them to prepare a thorough report based on the previously developed multiple questions (e.g., ranging from relatively simple ones: *Were uniforms recently washed?* to more complicated ones: *Were inmate segregation mechanisms effectively implemented, thus minimizing the chances of housing violent offenders with those susceptible to abuse?*). Yet no money and time would be enough for this type of research, explaining why such a large-scale project has never been undertaken. A pragmatic alternative to this hypothetical study is to rely upon inmates who take action against their treatment in correctional facilities. Therefore, the last variable of Part IV examines another possible sign of poor prison conditions: *Lawsuits filed against correctional agencies and staff*.

The main legal document allowing prisoners to challenge conditions of confinement is Section 42, §1983, of the U.S. Code (Vaughn, 1996). According to the U.S. Supreme Court's interpretation of this statute, inmates may sue state correctional agencies when they feel that their conditions of confinement fail to meet constitutional standards of physical security, adequate health care, freedom of religious expression, and so forth (Hansen & Daley, 1994). Dozens of cases brought to the attention of the Supreme Court included those concerning inadequate medical treatment<sup>100</sup> (*Estelle v. Gamble*, 429 U.S. 97 (1976)),<sup>101</sup>

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<sup>100</sup> According to Jon Wool (2007), a representative of Vera Institute of Justice and Commission on Safety and Abuse in America's Prisons, most federal court litigations about conditions of confinement are driven by claims of constitutionally deficient medical care (p. 27).

<sup>101</sup> A plaintiff filed a lawsuit against the Texas Department of Corrections medical staff and two correctional officials, unsuccessfully arguing that an inadequate treatment of his back injury constituted cruel and unusual punishment prohibited by the Eighth Amendment. The Court, however, stated that "deliberate indifference by prison authorities to a prisoner's serious illness of injury [could constitute] cruel and unusual punishment contravening the Eighth Amendment".

protection from inmate-on-inmate violence (*Farmer v. Brennan*, 114 U.S. 1970 (1994)),<sup>102</sup> and the use of excessive force by prison personnel (*Hudson v. McMillian*, 112 U.S. 995 (1992)).<sup>103</sup> Lawsuits against correctional agencies and staff are typically filed in federal courts and, if won, may result in a monetary compensation to inmates and their families.<sup>104</sup>

To assess the extent to which prison conditions fail to meet the standards of adequate living, medical treatment, and physical safety, the present study relies upon the list of lawsuits filed against correctional authorities in 2001. The data were taken from *The 2001 Corrections Yearbook; Adult Corrections* (Camp, 2003). For six states (California, Florida, Indiana, Michigan, New Hampshire and Vermont), the 2000 data were used instead, as the newer numbers for them were unavailable (Camp & Camp, 2002). Data were not on hand for two additional states (North Carolina and Utah) in any of the latest editions of *The Corrections Yearbook* (1999, 2000 and 2001 editions that would report the numbers for 1997-1999). The estimation of the numbers of lawsuits for these two states was not possible because no other known source contains state-level information about lawsuits filed against correctional agencies.<sup>105</sup> Consequently, the cells for them were left blank. Undesirable though it is, two missing values will have no seriously adverse affect on the distribution of the final scores, given that that overall punitiveness score (that will be soon ascertained for each state) is the mean as opposed to the sum of all criterion punitiveness scores.

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<sup>102</sup> Dee Farmer, a transsexual Delaware prisoner serving a 20-year prison sentence for credit card fraud, was placed in an all-male prison despite her obvious feminine appearance (she had silicone breast implants). Dee Farmer was soon raped by another inmate under the threat of a razor. She brought a civil suit to the Supreme Court, alleging that prison authorities violated the Eighth Amendment by their deliberate indifference to petitioner's safety. The case was remanded for further proceedings.

<sup>103</sup> A plaintiff was brutally beaten by two Louisiana corrections officers. The Court acknowledged that his treatment amounted to cruel and unusual punishment prohibited by the Eighth Amendment.

<sup>104</sup> For example, the Eighth Circuit awarded \$10,000 to a plaintiff who was raped by his cellmate. A 19-year-old plaintiff, convicted for the possession of a stolen car, weighed only 135 pounds and correctional authorities without implementing screening procedures, placed him in a cell with a violent offender who had previously killed the plaintiff's mother (see Vaughn, 1996, p. 142.).

<sup>105</sup> The only available data contained Section 1983 litigations of 1991 (Hansen & Daley, 1994), which are obviously outdated.

Finally, the raw numbers of lawsuits were adjusted for the number of inmates in state correctional facilities in 2001 (Beck, Karberg & Harrison, 2002). States with higher rates of lawsuits per 1,000 prisoners were treated as highly punitive (see Tables 88-89).

### Variable 38: Lawsuits Filed Against Agencies or Staff

Table 88: Lawsuits Filed Against Agencies or Staff

State Name	Law-suits <sup>a</sup>	Inmates <sup>b</sup>	Rate per1,000 inmate	Pun. Score	State Name	Law-suits <sup>a</sup>	Inmates <sup>b</sup>	Rate per1,000 inmate	Pun. Score
Alabama	720	27,286	26.39	3	Montana	34	3,250	10.46	1
Alaska	16	4,197	3.81	0	Nebraska	227	3,944	57.56	4
Arizona	224	27,136	8.25	0	Nevada	143	10,291	13.90	2
Arkansas	111	12,332	9.00	0	New Hampshire	37	2,323	15.93	1
California	583	163,965	3.56	0	New Jersey	143	28,108	5.09	0
Colorado	500	17,122	29.20	3	New Mexico	105	5,288	19.86	2
Connecticut	708	18,875	37.51	3	New York	5,000	69,158	72.30	4
Delaware	82	7,122	11.51	1	North Carolina	-	31,142	0.00	-
Florida	1,980	72,007	27.50	3	North Dakota	20	1,080	18.52	2
Georgia	1,838	45,363	40.52	3	Ohio	984	45,684	21.54	3
Hawaii	60	5,412	11.09	1	Oklahoma	289	23,139	12.49	1
Idaho	95	5,688	16.70	2	Oregon	53	11,077	4.78	0
Illinois	914	45,629	20.03	2	Pennsylvania	1,678	37,105	45.22	4
Indiana	492	20,576	23.91	3	Rhode Island	40	3,147	12.71	1
Iowa	158	8,101	19.50	2	South Carolina	198	22,267	8.89	0
Kansas	464	8,543	54.31	4	South Dakota	22	2,673	8.23	0
Kentucky	281	15,400	18.25	2	Tennessee	400	23,168	17.27	2
Louisiana	758	35,494	21.36	2	Texas	486	164,465	2.96	0
Maine	15	1,693	8.86	0	Utah	-	5,440	0.00	-
Maryland	347	23,970	14.48	2	Vermont	308	1,782	172.84	4
Massachusetts	574	10,734	53.47	4	Virginia	1,008	30,473	33.08	3
Michigan	633	48,371	13.09	1	Washington	1,045	15,242	68.56	4
Minnesota	156	6,514	23.95	3	West Virginia	40	4,130	9.69	1
Mississippi	986	20,672	47.70	4	Wisconsin	512	20,931	24.46	3
Missouri	369	28,167	13.10	1	Wyoming	20	1,679	11.91	1

<sup>a</sup>Lawsuits filed against agencies or staff during 2001, excluding class actions. Source: Camp (2003), see table: "Law suits filed by inmates and court orders", p. 72. For California, Florida, Indiana, Michigan, New Hampshire and Vermont numbers were taken from 2000 because the 2001 data do not contain numbers for these states. Source: Camp & Camp (2002), see table: "Law suits filed by inmates and court orders", p. 74. The data were not available for North Carolina and Utah.

<sup>b</sup>Inmates under state correctional authorities in 2001. Source: Beck, Karberg & Harrison (2002). See table 2: "Prisoners under the jurisdiction of State and Federal correctional authorities, June 30 and December 31, 2000, and June 30, 2001", p. 3.

Table 89: Calculating Punitiveness Scores across Lawsuits Filed Against Agencies or Staff

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by inmate death)
1st	Minimum	0	Texas, California, Alaska, Oregon, New Jersey, South Dakota, Arizona, Maine, South Carolina and Arkansas
2nd	Low	1	West Virginia, Montana, Hawaii, Delaware, Wyoming, Oklahoma, Rhode Island, Michigan, Missouri and Nevada
3rd	Moderate	2	Maryland, New Hampshire, Idaho, Tennessee, Kentucky, North Dakota, Iowa, New Mexico, Illinois and Louisiana
4th	High	3	Ohio, Indiana, Minnesota, Wisconsin, Alabama, Florida, Colorado, Virginia, Connecticut and Georgia
5th	Extreme	4	Pennsylvania, Mississippi, Massachusetts, Kansas, Nebraska, Washington, New York and Vermont

### Summary: Conditions of Confinement

Part Four of the study developed six additional variables—*Prison overcrowding, Operating cost per inmate, Food service cost per inmate, Medical care cost per inmate, Inmate deaths, and Lawsuits filed against agencies or staff*—to explore the concept of state punitiveness in more depth. Each of these variables produced criterion punitiveness scores per state that varied between 0 and 4, with higher numbers denoting an increase in state punitiveness. Subsequently, the average scores were computed for each state (see Table 90).

Part Three, *Punishing “Immorality”*, revealed regional patterns in state punitiveness. States along the Canadian borders were perceived as minimally punitive, and as we moved toward the South, the states became more and more punitive. This dynamic was not present with respect to the variables of *Conditions of Confinement*. Among the least punitive states, three were northeastern (Maine, Rhode Island and Pennsylvania), three were western (Arizona, Alaska and New Mexico), three were Midwestern (Michigan, Minnesota and North Dakota) and two were southern (West Virginia and Florida). Thus, all four regions were represented in the least-punitive category almost evenly, with the South being relatively underrepresented.

A look at the highly punitive states revealed a similar pattern, although southern states (Colorado, Alabama, Maryland and Louisiana) were somewhat overrepresented and northeastern states (Vermont and Massachusetts) underrepresented in this category, while midwestern (Iowa, Illinois and Wisconsin) and western (Utah, Montana and Idaho) states had equal representation.

This distribution showed that states’ economic development levels are not associated with their punitiveness scores across the variables of *Conditions of Confinement*. The most-punitive category included states with the lowest median family income (Louisiana - \$48,261;

and Alabama - \$49,207) and the highest (Maryland - \$77,839; and Massachusetts - \$74,463). The income was more evenly distributed among non-punitive states (see Table 79). This lack of association between economic development and prison conditions can be partly explained by controlling for median family income for the three *cost-per-inmate* variables (variables 33-35).

The next and last part of the study will introduce the variables of *Juvenile Justice*. These variables will be examined in a similar fashion with quintiles and average criterion punitiveness scores. The study will culminate in a final discussion of the average punitiveness scores for all 44 criteria, thus providing an empirical basis for characterizing American jurisdiction as minimally punitive, highly punitive, or something between these two.

Table 90: Combining the Punitiveness Scores of the Variables of Conditions of Confinement

State Name <sup>a</sup>	Variables 32-37							Sum of	Mean Pun.
	Prison Over-crowding	Cost per Inmate	Food Service Cost	Medical Care Cost	Inmate Deaths	Sexual Violence	Lawsuits Filed	Pun. Scores $\Sigma X$	Scores $\frac{\Sigma X}{7}$
Maine	1	0	0	0	3	0	0	4	0.57
Michigan	0	0	2	1	1	1	1	6	0.86
Arizona	0	2	1	1	1	2	0	7	1.00
West Virginia	0	3	0	0	1	2	1	7	1.00
Alaska	2	0	2	0	4	0	0	8	1.14
New Mexico	0	0	2	0	4	0	2	8	1.14
Rhode Island	0	0	1	0	4	2	1	8	1.14
Pennsylvania	3	0	0	0	1	1	4	9	1.29
Florida	0	2	2	0	0	3	3	10	1.43
Minnesota	0	0	1	0	2	4	3	10	1.43
North Dakota	2	2	0	1	0	3	2	10	1.43
Oklahoma	1	3	1	2	1	2	1	11	1.57
Tennessee	0	2	1	3	1	2	2	11	1.57
California	4	2	3	0	3	0	0	12	1.71
Nevada	0	4	1	1	3	2	1	12	1.71
Ohio	3	1	0	2	1	2	3	12	1.71
South Dakota	1	4	0	2	4	1	0	12	1.71
North Carolina	2	0	4	3	2	0	-	( $\Sigma 6$ )11	( $\Sigma 6/6$ )1.83
Georgia	0	3	1	2	1	3	3	13	1.86
Nebraska	3	1	0	1	0	4	4	13	1.86
New Jersey	4	3	4	2	0	0	0	13	1.86
Oregon	1	0	3	4	3	2	0	13	1.86
South Carolina	0	4	4	4	1	0	0	13	1.86
Texas	0	4	3	2	2	2	0	13	1.86
Virginia	2	3	2	2	0	1	3	13	1.86
Wyoming	1	1	2	0	4	4	1	13	1.86
Hawaii	3	4	0	4	2	0	1	14	2.00
Kentucky	1	2	4	4	0	1	2	14	2.00
Washington	3	1	0	1	2	3	4	14	2.00
Arkansas	0	3	4	3	4	1	0	15	2.14
Connecticut	0	3	3	2	3	1	3	15	2.14
Delaware	3	3	1	3	3	1	1	15	2.14
Indiana	0	2	2	3	3	2	3	15	2.14
Kansas	0	2	1	1	3	4	4	15	2.14
Mississippi	0	4	4	3	0	0	4	15	2.14
Missouri	0	4	3	3	1	3	1	15	2.14
New Hampshire	1	2	3	4	0	3	2	15	2.14
New York	2	0	3	1	2	3	4	15	2.14
Colorado	3	2	1	2	2	3	3	16	2.29
Iowa	4	1	0	3	2	4	2	16	2.29
Vermont	0	1	2	1	4	4	4	16	2.29
Alabama	2	4	4	4	0	0	3	17	2.43
Maryland	0	3	4	3	4	1	2	17	2.43
Utah	0	1	3	4	4	3	-	15	2.50
Louisiana	0	4	4	4	0	4	2	18	2.57
Montana	2	1	4	4	2	4	1	18	2.57
Idaho	0	4	3	3	3	4	2	19	2.71
Illinois	4	3	2	4	3	1	2	19	2.71
Massachusetts	4	1	3	1	2	4	4	19	2.71
Wisconsin	4	1	2	2	4	3	3	19	2.71

<sup>a</sup> States are arranged from the least punitive to the most punitive.

Note: Shaded areas separate the 10 least punitive and the 10 most punitive states from the rest.

## PART FIVE

### Juvenile Justice

No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age. The arrest, detention or imprisonment of a child ... shall be used only as a measure of last resort and for the shortest appropriate period of time. [E]very child deprived of liberty shall be separated from adults unless it is considered in the child's best interest... .

Convention on the Rights of the Child, Article 37.

These and other rights guaranteed by this U.N. convention (hereafter UNCRC) are not a luxury but minimum standards that oblige the governments of countries that had already ratified the document to adhere to. While the U.S. signed the convention, it has not yet completed its ratification process.<sup>106</sup> But even if the convention were fully ratified, it does not mean that juveniles<sup>107</sup> will be less frequently sentenced to imprisonment, natural life sentences will be automatically abolished, and children will no longer be tried as adults and placed alongside older, often violent offenders. Reliance on international treaties has never been an American tradition. Those who dared to even consider international standards in shaping U.S. laws have been harshly criticized. One can recall the 2005 landmark debate among the Supreme Court justices in *Roper*,<sup>108</sup> when Justice Kennedy's attempt to cite international instruments and foreign countries' practices<sup>109</sup> was severely attacked by Justices Scalia,

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<sup>106</sup> Somalia is only other U.N. nation that has not ratified the convention.

<sup>107</sup> For the purposes of the present study, I use terms "juvenile", "child", "adolescent", and "minor" interchangeably, referring to 6- to 17-year-olds (unless the age is specified).

<sup>108</sup> *Roper v. Simmons*, 125 S.Ct. 1183 (2005).

<sup>109</sup> Justice Kennedy wrote:

"Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. ...

Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18. ... Parallel prohibitions are contained in other significant international covenants.

Rehnquist and Thomas. Ultimately, however, the Court abolished the death penalty for juveniles, thus satisfying one of the core requirements of the UNCRC.<sup>110</sup>

The nationwide abolition of the death penalty has narrowed one North Atlantic gap in juvenile justice practices, as other western nations had long ago abolished capital punishment for juveniles as well as adults. Hopefully, the next step will be the prohibition of juvenile life sentences. According to the Human Rights Watch (2005), the U.S. still makes the list of 14 nations that sentence juvenile offenders to life without parole,<sup>111</sup> even if, as a later discussion will show, the country is not homogeneous in this practice. Further down the winding path, one can also expect the emergence of a widespread movement against punishing juveniles as adults and today's heavy reliance on juvenile incarceration. But that day will not dawn soon. In fact, the opposite is perfectly possible: soon we might start seeing metastases of America's penal harshness across non-American jurisdictions, instead of the spread of European mildness in the United States.

Assuming that past behavior is the best predictor of future behavior, it is easier to guess that the U.S. will probably continue having varied juvenile justice practices. A number of factors contribute to this prediction. First, there is no centralized U.S. juvenile justice system, and thus states are permitted to develop juvenile justice practices as they wish (of course, within Constitutional boundaries). Second, nationwide changes through activist interpretations

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[O]nly seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.

It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty... . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." See pp. 1198-1200.

<sup>110</sup> The last execution of an offender for a crime committed as a juvenile took place in Oklahoma on April, 2003. Between 1973 and 2005, 226 juvenile death sentences were imposed, 22 of which subsequently resulted in execution (Streib, 2005).

<sup>111</sup> Among the other thirteen nations are Antigua and Barbuda, Australia, Brunei, Burkina Faso, Cuba, Dominica, Israel, Kenya, Saint Vincent and the Grenadines, Solomon Islands, South Africa, Sri Lanka and Tanzania.

of the U.S. Constitution are unforeseeable, especially with the current makeup of the Supreme Court. Thirdly, juvenile justice systems have been strikingly diverse for quite some time. Some states fix the oldest age over which the juvenile court may retain jurisdiction quite high, incarcerate juvenile offenders only within the juvenile correctional system, have low juvenile incarceration rates, prohibit the imposition of natural life sentences on minors and never exceed the maximum juvenile facility's official capacity. Other states pursue the opposite path.

This remarkable variation among America's juvenile justice systems is described in this final part of the study by a means of six variables: *Age for juvenile court jurisdiction*, *Juvenile transfer laws*, *Juvenile inmates in adult prisons*, *Juvenile incarceration rate*, *Juveniles serving life without parole*, and *Overcrowding in juvenile facilities*. The most recent and reliable data collected for these variables should effectively unearth the pattern of state punitiveness targeting juvenile offenders.

### **Age for Juvenile Court Jurisdiction (Variable 39)**

The minimum age at which children are subject to penal law is one of the most valid indicators of state punitiveness. The lower a government fixes the age of responsibility, the more it disregards the emotional and intellectual immaturity of children as compared to adults (Cauffman & Steinberg, 2000). This immaturity is the reason that children are typically deemed incapable to vote, consent to sex, write a will, serve on a jury, or drive a car. The degrees of states' indifference toward children's incompetence or limited competency to stand trial metamorphose into the degrees of their punitiveness: the younger the individual when held responsible (whether we call it a juvenile or criminal responsibility), the harsher the system that punishes her.

The UNCRC mandates “the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law” (Article 40). Although the document fails to specify such an age, the United Nations Committee that monitors compliance with the UNCRC repeatedly condemned the nations that fix the minimum age below 13 years (Urbas, 2000). The age of criminal responsibility of most western countries, as specified by their penal codes, ranges from 12 to 18, with 14 being most common.<sup>112</sup>

The United States does not have one particular age of criminal responsibility. As of 2004, only 16 states have set minimum age limits, ranging from 6 to 10 years<sup>113</sup> (Snyder & Sickmund, 2006). The remaining states rely on common law, which permits the state to hold children liable from the moment they turn 7 (Urbas, 2000). Therefore, while minimum age provisions may be effective indicators of state punitiveness, the fact that the lowest age of responsibility is not fixed in two-thirds of U.S. jurisdictions does not permit a state-by-state assessment. A viable alternative to this measure could have been a comparison of the actual numbers of incarcerated children. A search for such information, however, led to the state-level data that compared only aggregate numbers of incarcerated juveniles who are 12 years old and younger (see Table 99). Once more data are available, such comparison should be conducted.

Considering that American justice systems permit trying juveniles as adults and imprisoning them in adult correctional facilities, one can use two additional age provisions for the purposes of assessing state punitiveness. They are: (a) the oldest age for original juvenile court jurisdiction in delinquency matters (i.e., the point when juvenile court loses its authority

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<sup>112</sup> The minimum age is 12 in Canada, Greece, and Netherlands; 13 in France, Israel, New Zealand (except for murder and manslaughter which lowers the age to 10); 14 in Austria, Germany, Italy, and many Eastern European countries; 15 in Denmark, Finland, Iceland, Norway and Sweden; 16 in Japan, Portugal, and Spain; and 18 in Belgium and Luxemburg (Urbas, 2000, see p. 2).

<sup>113</sup> Youngest age for original juvenile court jurisdiction is 6 in North Carolina; 7 in Maryland, Massachusetts and New York; 8 in Arizona; and 10 in Arkansas, Colorado, Kansas, Louisiana, Minnesota, Mississippi, Pennsylvania, South Dakota, Texas, Vermont, and Wisconsin (Snyder & Sickmund, 2006, see p. 103).

over youth and a case falls under the jurisdiction of criminal courts), and (b) the oldest age over which the juvenile court may retain jurisdiction for disposition purposes in delinquency matters (i.e., the age until which juvenile court authority may extend beyond the upper age of original jurisdiction). Such data are available through the 2006 National Report on Juvenile Offenders and Victims (Snyder & Sickmund, 2006).

These two age provisions were put together to construct the variable of *Age for Juvenile Court Jurisdiction*. The oldest age of juvenile court jurisdiction (Age 1) and the oldest age over which the juvenile court retains its authority (Age 2) were added and then the sum was used to break states into quintiles, with higher numbers representing a lower level of state punitiveness (see Tables 91-92). This variable was suggested by the argument that the lower an age cut-off, the more likely a juvenile is to be treated as an adult and, subsequently, receive a harsher punishment. The variables that follow further explain the transfer laws and their role in the assessment of state punitiveness.

### Variable 39: Age for Juvenile Court Jurisdiction

Table 91: Age for Juvenile Court Jurisdiction

State Name	Age 1 <sup>a</sup>	Age 2 <sup>b</sup>	Age 1 + Age 2	Pun. Score	State Name	Age 1 <sup>a</sup>	Age 2 <sup>b</sup>	Age 1 + Age 2	Pun. Score
Alabama	17	20	37	3	Montana	17	24	41	1
Alaska	17	18	35	4	Nebraska	17	18	35	4
Arizona	17	20	37	3	Nevada	17	20	37	3
Arkansas	17	20	37	3	New Hampshire	16	20	36	3
California	17	24	41	1	New Jersey <sup>c</sup>	17	-	-	0
Colorado <sup>c</sup>	17	-	-	0	New Mexico	17	20	37	3
Connecticut	15	20	35	4	New York	15	20	35	4
Delaware	17	20	37	3	North Carolina	15	20	35	4
Florida	17	21	38	2	North Dakota	17	19	36	3
Georgia	16	20	36	3	Ohio	17	20	37	3
Hawaii <sup>c</sup>	17	-	-	0	Oklahoma	17	18	35	4
Idaho	17	20	37	3	Oregon	17	24	41	1
Illinois	16	20	36	3	Pennsylvania	17	20	37	3
Indiana	17	20	37	3	Rhode Island	17	20	37	3
Iowa	17	18	35	4	South Carolina	16	20	36	3
Kansas	17	22	39	2	South Dakota	17	20	37	3
Kentucky	17	18	36	3	Tennessee	17	18	35	4
Louisiana	16	20	36	3	Texas	16	20	36	3
Maine	17	20	37	3	Utah	17	20	37	3
Maryland	17	20	37	3	Vermont	17	20	37	3
Massachusetts	16	20	36	3	Virginia	17	20	37	3
Michigan	16	20	36	3	Washington	17	20	37	3
Minnesota	17	20	37	3	West Virginia	17	20	37	3
Mississippi	17	19	36	3	Wisconsin	16	24	40	1
Missouri	16	20	36	3	Wyoming	17	20	37	3

<sup>a</sup> Oldest age for original juvenile court jurisdiction in delinquency matters, 2004.

<sup>b</sup> Oldest age over which the juvenile court may retain jurisdiction for disposition purposes in delinquency matters, 2004.

<sup>c</sup> Colorado, Hawaii and New Jersey allow juvenile courts to retain jurisdiction until the full term of the disposition order. These states also have among the highest oldest age for original juvenile court jurisdiction in delinquency matters (Age 1). Therefore, they are treated as minimally punitive (pun. score – 0).

Source: Snyder & Sickmund (2006). Chapter 4: Juvenile justice system structure and process, p. 103.<sup>114</sup>

Table 92: Calculating Punitiveness Scores across the Age for Juvenile Court Jurisdiction

Description	Levels of Punitiveness	Pun. Score	<i>f</i>	State Name (Arranged by sum of Age 1 and Age 2; From highest to lowest)	
Full Term of Disposition	Minimum	0	3	Colorado, Hawaii and New Jersey	
	41-40	Low	1	4	California, Montana, Oregon (41) and Wisconsin (40)
	39-38	Moderate	2	2	Kansas (39) and Florida (38)
	37-36	High	3	33	Alabama, Arizona, Arkansas, Delaware, Idaho, Indiana, Maine, Maryland, Minnesota, Nevada, New Mexico, Ohio, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, Wyoming (37), Georgia, Illinois, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, North Dakota, South Carolina and Texas (36)
	35	Extreme	4	8	Alaska, Connecticut, Iowa, Nebraska, New York, North Carolina, Oklahoma, and Tennessee

<sup>114</sup> See also National Center for Juvenile Justice (NCJJ) for state juvenile justice profiles. Available at <http://www.ncjj.org/stateprofiles/>

### Treating Children as Adults (Variables 40-41)

As criminologist Michael Tonry (2004) argues, rationales for treating children more sympathetically and gently than adults have varied over time and space and among people: “Sometimes the argument is that young people are morally immature and, for that reason, less fully responsible for their actions. Sometimes it is that young people are developmentally immature and thus more malleable and amenable to treatment” (p. 151). Whatever the rationale, how juveniles are treated in different justice systems can speak volumes about the punitiveness of the jurisdiction, especially when governments intentionally overlook the young age of an offender when adjudicating her and choosing a type of correctional facility. In Whitman’s words, “A system that prosecutes minors ‘as adults’ can be called ‘harsher’ than a system that treats them ‘as juveniles’ ” (2003, p. 34). This view would not fully apply to the comparison of the U.S. states, all of which have some kind of mechanism for trying juveniles as adults.

The imposition of criminal punishments on children undermines the very American philosophy that laid the foundation for the first juvenile justice systems more than a century ago.<sup>115</sup> Because children were perceived as more vulnerable and less culpable than adults, juvenile courts were established to isolate minors from adult offenders. These courts began acting as *parens patriae*, i.e., as substitute or surrogate parents, as they prioritized rehabilitation and healing over punishment (Ryba, Cooper, & Zapf, 2003). Over the last decade or so, this philosophy began to vanish. In response to growing fear about violent juvenile crime, politicians and policy makers began routinely ignoring the developmental

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<sup>115</sup> The movement towards building separate juvenile justice systems began almost simultaneously on both sides of the North Atlantic. While the Chicagoan Juvenile Court was established in 1899, the turn of the century was marked by widespread experiments with juvenile courts in Germany, France, the Netherlands, and Great Britain.

assumption that children are less capable of mature judgment and more amenable to treatment than adults (Cauffman & Steinberg, 2000). Proposals for lowering the age of criminal responsibility and treating more and more juveniles as adults came into vogue. Whereas transfer laws were initially developed to cut down on the juvenile violence, by the mid-1990s, 21 states began imposing adult penalties for property offenses as well (Griffin, Torbet, & Szymanski, 1998).

Trying juveniles as adult offenders takes a form of various mechanisms that were incorporated in the structure of the variable *Juvenile transfer laws*. The 2006 National Report (Snyder & Sickmund, 2006) permits a comparison of states across at least 6 such mechanisms:

- 1) *Presumptive judicial waiver*, which authorizes the juvenile court judge to transfer a juvenile to adult court unless he or she convinces the judge that she is amenable to rehabilitation under juvenile justice system.<sup>116</sup>
- 2) *Mandatory judicial waiver*, which requires a transfer to criminal court if an act committed by a juvenile would have been a felony if she were 18 or older.
- 3) *Concurrent jurisdiction*, which gives the prosecutor the authority to decide which court to send the case to when the offense comes under the jurisdiction of both juvenile and criminal courts.
- 4) *Statutory exclusion*, which excludes certain juveniles, such as repeat and especially violent offenders, from the juvenile system.
- 5) “*Once an adult, always an adult*”, meaning that if a juvenile is tried as an adult at least once, any subsequent offense will be handled by the criminal court.

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<sup>116</sup> Terminology varies from state to state. The mechanism of presumptive judicial waiver are also called “transfer”, “decline”, “certification”, “bind-over”, or “remand” for criminal prosecution (Griffin, Torbet, & Szymanski, 1998).

- 6) *Juvenile court blending sentencing*, a mechanism permitting a juvenile court judge to impose adult sentences without sending the case to a criminal court.

Because each of these six mechanisms carries the possibility of imposing much more severe sentences than juveniles would have received otherwise, I will call them *Punitiveness Aggravators (PAs)*.

Additionally, the variable will include two mechanisms that have a positive impact on the sentencing outcome of a juvenile. They will be referred to as *Punitiveness*

*Mitigators (PMs)*:

- 1) *Criminal court blending sentencing*, which, in some ways, is the opposite of juvenile court blending sentencing, as it results in the imposition of relatively lenient sentences, ones that are typically available only through juvenile courts, on certain juveniles by a criminal court without transferring the case to a juvenile court.
- 2) *Reverse waiver*, i.e., the transfer of the case from criminal to juvenile court for adjudication and disposition. A reverse waiver is the opposite of a judicial waiver.

Because most states have a combination of these transfer provisions (Griffin, Torbet, & Szymanski, 1998), blending them became unavoidable. States that adopted transfer laws with the same number of or fewer *PAs* relative to their *PMs* were characterized as minimally punitive (pun. score = 0). Those with a higher number of *PAs* than *PMs* were viewed as either lowly punitive (if the number of *PAs* exceeded the number of *PMs* by one, pun. score = 1), moderately punitive (if the number of *PAs* exceeded the number of *PMs* by two, pun. score = 2), highly punitive (if the number of *PAs* exceeded the number of *PMs* by three, pun. score = 3), and extremely punitive (if the number of *PAs* exceeded the number of *PMs* by four, pun. score = 4). In other words, punitiveness points were computed after adding up all the *PAs* per

state and then subtracting the total number of *PMs* from the sum (see Tables 91-92). Two states, Kentucky and Nebraska, had fewer *PAs* than *PMs*, resulting in a negative final score. They were placed alongside other lowly punitive states.

In addition to this procedural analysis of transfer laws, the study also examines the frequency at which offenders less than 18 years of age are held in state prisons. The actual numbers provide a more complete picture of the adult-like treatment of minors. The data came from the BJS annual report on *Prison and Jail Inmates at Midyear 2006* (Sabol, Minton, & Harrison, 2007), which recently began publishing information about juveniles in state prisons. The numbers of imprisoned minors varied from zero (in California, Kentucky, Maine, Nevada, New Mexico, Washington and West Virginia) to 425. In fact, only five states—Connecticut (425), New York (219), Florida (221), North Carolina (188), and Texas (162)—imprisoned more than half of all the juveniles held in state prisons across the nation.<sup>117</sup>

Instead of using these raw numbers to compute punitiveness scores, the study employed rates per 100,000 juvenile in general population (U.S. Census Bureau, 2000). States without juvenile inmates in state prisons were grouped in the least punitive category (pun. score = 0). The remaining states were segregated into quintiles instead of quartiles and received punitiveness scores between 1 and 4, depending on their rates of juvenile prisoners (see Tables 95-96).

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<sup>117</sup> According to the same report, although the numbers of juveniles in states prisons have been steadily decreasing since 1995, the 12-month period preceding mid-2006 revealed an increase in the number by about 7%. There were 3,896 prisoners in 2000; 3,147 in 2001; 3,038 in 2002; 2,741 in 2003; 2,485 in 2004; 2,208 in 2005; and 2,365 in 2006 (see p. 4).

## Variable 40: Juvenile Transfer Laws

Table 93: Juvenile Transfer Laws

State Name	Six Punitiveness Aggravators				Two Punitiveness Mitigators				Aggravators minus Mitigators	Pun. Score
	Presumptive Judicial Waiver	Mandatory Judicial Waiver	Concurrent Jurisdiction	Statutory Exclusion	Once an Adult, Always an Adult	Juvenile Court Blending Sentencing	Criminal Court Blending Sentencing	Reverse Waiver		
Alabama	-	-	-	yes	yes	-	-	-	2 - 0	2
Alaska	yes	-	-	yes	-	yes	-	-	3 - 0	3
Arizona	-	-	yes	yes	yes	-	-	yes	3 - 1	2
Arkansas	-	-	yes	-	-	yes	yes	yes	2 - 2	0
California	yes	-	yes	yes	yes	-	yes	yes	4 - 2	2
Colorado	yes	-	yes	-	-	yes	yes	yes	3 - 2	1
Connecticut	-	yes	-	-	-	yes	-	yes	2 - 1	1
Delaware	-	yes	-	yes	yes	-	-	yes	3 - 1	2
Florida	-	-	yes	yes	yes	-	yes	-	3 - 1	2
Georgia	-	yes	yes	yes	-	-	-	yes	3 - 1	2
Hawaii	-	-	-	-	yes	-	-	-	1 - 0	1
Idaho	-	-	-	yes	yes	-	yes	-	2 - 1	1
Illinois	yes	yes	-	yes	yes	yes	yes	yes	5 - 2	3
Indiana	-	yes	-	yes	yes	-	-	-	3 - 0	3
Iowa	-	-	-	yes	yes	-	yes	yes	2 - 2	0
Kansas	yes	-	-	-	yes	yes	-	-	3 - 0	3
Kentucky	-	yes	-	-	-	-	yes	yes	1 - 2	(-1) 0
Louisiana	-	yes	yes	yes	-	-	-	-	3 - 0	3
Maine	yes	-	-	-	yes	-	-	-	2 - 0	2
Maryland	-	-	-	yes	yes	-	-	yes	2 - 1	1
Massachusetts	-	-	-	yes	-	yes	yes	-	2 - 1	1
Michigan	-	-	yes	-	yes	yes	yes	-	3 - 1	2
Minnesota	yes	-	-	yes	yes	yes	-	-	4 - 0	4
Mississippi	-	-	-	yes	yes	-	-	yes	2 - 1	1
Missouri	-	-	-	-	yes	-	yes	-	1 - 1	0
Montana	-	-	yes	yes	-	yes	-	yes	3 - 1	2
Nebraska	-	-	yes	-	-	-	yes	yes	1 - 2	(-1) 0
Nevada	yes	-	-	yes	yes	-	-	yes	3 - 1	2
New Hampshire	yes	-	-	-	yes	-	-	-	2 - 0	2
New Jersey	yes	yes	-	-	-	-	-	-	2 - 0	2
New Mexico	-	-	-	yes	-	yes	yes	-	2 - 1	1
New York	-	-	-	yes	-	-	-	yes	1 - 1	0
North Carolina	-	yes	-	-	yes	-	-	-	2 - 0	2
North Dakota	yes	yes	-	-	yes	-	-	-	3 - 0	3
Ohio	-	yes	-	-	yes	yes	-	-	3 - 0	3
Oklahoma	-	-	yes	yes	yes	-	yes	yes	3 - 2	1
Oregon	-	-	-	yes	yes	-	-	yes	2 - 1	1
Pennsylvania	yes	-	-	yes	yes	-	-	yes	3 - 1	2
Rhode Island	yes	yes	-	-	yes	yes	-	-	4 - 0	4
South Carolina	-	yes	-	yes	-	-	-	-	2 - 0	2
South Dakota	-	-	-	yes	yes	-	-	yes	2 - 1	1
Tennessee	-	-	-	-	yes	-	-	yes	1 - 1	0
Texas	-	-	-	-	yes	yes	-	-	2 - 0	2
Utah	yes	-	-	yes	yes	-	-	-	3 - 0	3
Vermont	-	-	yes	yes	-	yes	-	yes	3 - 1	2
Virginia	-	yes	yes	-	yes	-	yes	yes	3 - 2	1
Washington	-	-	-	yes	yes	-	-	-	2 - 0	2
West Virginia	-	yes	-	-	-	-	yes	-	1 - 1	0
Wisconsin	-	-	-	yes	yes	-	yes	yes	2 - 2	0
Wyoming	-	-	yes	-	-	-	-	yes	1 - 1	0

Source: Snyder & Sickmund (2006). Chapter 4: Juvenile justice system structure and process, p. 111.

Table 94: Calculating Punitiveness Scores across Juvenile Transfer Laws

Description	Levels of Punitiveness	Pun. Score	<i>f</i>	State Name
Mitigators $\geq$ Aggravators	Minimum	0	10	Arkansas, Iowa, Kentucky, Missouri, Nebraska, New York, Tennessee, West Virginia, Wisconsin and Wyoming
One more aggravator	Low	1	12	Colorado, Connecticut, Hawaii, Idaho, Maryland, Massachusetts, Mississippi, New Mexico, Oklahoma, Oregon, South Dakota and Virginia
Two more aggravators	Moderate	2	18	Alabama, Arizona, California, Delaware, Florida, Georgia, Maine, Michigan, Montana, Nevada, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, Texas, Vermont and Washington
Three more aggravators	High	3	8	Alaska, Illinois, Indiana, Kansas, Louisiana, North Dakota, Ohio and Utah
Four more aggravators	Extreme	4	2	Minnesota and Rhode Island

### Variable 41: Juvenile Inmates in Adult Prisons

Table 95: Juvenile Inmates in Adult Prisons

State Name	Incarcerated Juveniles <sup>a</sup>	Overall Juvenile Population <sup>b</sup>	Rate per 100,000 juvenile	Pun. Score	State Name	Incarcerated Juveniles <sup>a</sup>	Overall Juvenile Population <sup>b</sup>	Rate per 100,000 juvenile	Pun. Score
Alabama	70	1,123,422	6.23	4	Montana	1	230,062	0.43	1
Alaska	4	190,717	2.10	2	Nebraska	8	450,242	1.78	2
Arizona	112	1,366,947	8.19	4	Nevada	0	511,799	0.00	0
Arkansas	17	680,369	2.50	3	New Hampshire	1	309,562	0.32	1
California	0	9,249,829	0.00	0	New Jersey	17	2,087,558	0.81	2
Colorado	33	1,100,795	3.00	3	New Mexico	0	508,574	0.00	0
Connecticut	425	841,688	50.49	4	New York	219	4,690,107	4.67	4
Delaware	23	194,587	11.82	4	North Carolina	188	1,964,047	9.57	4
Florida	221	3,646,340	6.06	4	North Dakota	1	160,849	0.62	1
Georgia	61	2,169,234	2.81	3	Ohio	64	2,888,339	2.22	2
Hawaii	1	295,767	0.34	1	Oklahoma	5	892,360	0.56	1
Idaho	3	369,030	0.81	1	Oregon	6	846,526	0.71	1
Illinois	103	3,245,451	3.17	3	Pennsylvania	38	2,922,221	1.30	2
Indiana	29	1,574,396	1.84	2	Rhode Island	5	247,822	2.02	2
Iowa	17	733,638	2.32	3	South Carolina	129	1,009,641	12.78	4
Kansas	13	712,993	1.82	2	South Dakota	1	202,649	0.49	1
Kentucky	0	994,818	0.00	0	Tennessee	14	1,398,521	1.00	2
Louisiana	9	1,219,799	0.74	1	Texas	162	5,886,759	2.75	3
Maine	0	301,238	0.00	0	Utah	1	718,698	0.14	1
Maryland	68	1,356,172	5.01	4	Vermont	5	147,523	3.39	3
Massachusetts	4	1,500,064	0.27	1	Virginia	31	1,738,262	1.78	2
Michigan	112	2,595,767	4.31	3	Washington	0	1,513,843	0.00	0
Minnesota	11	1,286,894	0.85	2	West Virginia	0	402,393	0.00	0
Mississippi	38	775,187	4.90	4	Wisconsin	53	1,368,756	3.87	3
Missouri	38	1,427,692	2.66	3	Wyoming	3	128,873	2.33	3

<sup>a</sup> Number under 18 years of age held in state prisons at midyear 2006. Source: Sabol, Minton & Harrison (2007). See appendix table 5: “Number of inmates under age 18 held in state prisons, by state and gender, June 30, 2005, and 2006”, p. 17.<sup>118</sup>

<sup>b</sup> General population under 18 years of age. Source: U.S. Census Bureau. See table 5: Interim projections: Population under age 18 and 65 and older: 2000, 2010, and 2030. Available at [http://crs.uvm.edu/census/projections/state/data/18\\_65\\_2000-2030.xls](http://crs.uvm.edu/census/projections/state/data/18_65_2000-2030.xls) (Retrieved on January 16, 2007)

Table 96: Calculating Punitiveness Scores across Juvenile Inmates in Adult Prisons

Quartiles	Levels of Punitiveness	Pun. Score	<i>f</i>	State Name (Arranged by rate)
none	Minimum	0	7	California, Kentucky, Maine, Nevada, New Mexico, Washington and West Virginia
1st	Low	1	11	Utah, Massachusetts, New Hampshire, Hawaii, Montana, South Dakota, Oklahoma, North Dakota, Oregon, Louisiana and Idaho
2nd	Moderate	2	11	New Jersey, Minnesota, Tennessee, Pennsylvania, Nebraska, Virginia, Kansas, Indiana, Rhode Island, Alaska and Ohio
3rd	High	3	11	Iowa, Wyoming, Arkansas, Missouri, Texas, Georgia, Colorado, Illinois, Vermont, Wisconsin and Michigan
4th	Extreme	4	10	New York, Mississippi, Maryland, Florida, Alabama, Arizona, North Carolina, Delaware, South Carolina and Connecticut

<sup>118</sup> Human Rights Watch (2005) reports that the U.S. departments of corrections do not maintain “publicly accessible and accurate” data about juveniles incarcerated in adult prisons. The data used in this study became available after Human Rights Watch’s report.

### **Juvenile Incarceration Rate (Variable 42)**

“Incarceration represents the most severe punishment available within the juvenile justice system. Historically, and largely for that reason, it has been viewed as the option of last resort after all other attempts at rehabilitation have been tried” (Mears, 2006, p. 483). Today, incarceration is a frequently used method of punishing children of various age groups, sometimes even before they become teens. Based on the 2005 estimates, state juvenile correctional facilities housed more than sixteen hundred individuals of 12 years of age and younger (see Table 97). As children become older, they are incarcerated in greater numbers,<sup>119</sup> and as soon as they turn 18, their numbers in juvenile facilities rapidly decrease because adolescents lose their eligibility for juvenile courts and correctional facilities.

In Part Two of this study, I argued that incarceration has traditionally been used as one of the best measures of state punitiveness (Austin & Irwin, 2001; Gordon, 1989; Lynch, 1988, 1993; Neapolitan, 2001; Tonry, 2001, 2004; Whitman, 2003; Yates & Fording, 2005). I also offered a discussion of several incarceration variables, including *Stock incarceration* (variable 12), *Flow incarceration* (variable 13), *Prison admission trends* (variable 14), and *Prison release trends* (variable 15). Those variables, however, use the number of prisoners excluding the youth held in juvenile correctional facilities. Because not accounting for the frequency of juvenile incarceration would result in the loss of a very revealing facet of state punitiveness, this study explores an additional incarceration variable, *Juvenile incarceration rate*.

The data for this variable came from the *Census of Juveniles in Residential Placement Databook* (Sickmund, Sladky, & Kang, 2005). The numbers refer to individuals who have not

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<sup>119</sup> Among children incarcerated in state juvenile facilities, 1,614 were 12-year-olds and younger; 2,286 were 13-year-olds; 4,437 were 14-year-olds; 8,103 were 15-year-olds; 11,424 were 16-year-olds; 12,265 were 17-year-olds; and 7,536 were 18-year-olds and above (Sickmund, Sladky, & Kang, 2005. See Table 97 for a state-by-state breakdown).

yet turned 21, who have been charged or court-adjudicated for an offense, and who have been placed in a juvenile facility because of that offense (see Table 99). Given that juvenile incarceration may be greater in states where juvenile crime is more widespread (Mears, 2006), a comparison of raw numbers of incarcerated juveniles was omitted. Instead, the rates were computed per 1,000 juvenile arrests. As discussed with *Stock* and *Flow incarceration* variables, criminal punishment in general and incarceration in particular is the state's reaction not to all crimes, but only those that result in arrest.

Subsequently, juvenile incarceration rates were separated into quintiles. States with higher incarceration rates were characterized as highly punitive and those with lower incarceration rates as less punitive (see Tables 97-98).

**Variable 42: Juvenile Incarceration Rate**

Table 97: Juvenile Incarceration Rate

State Name	Incarcerated Juveniles <sup>a</sup>	Juvenile Arrests <sup>b</sup>	Rate per 1,000 arrests	Pun. Score	State Name	Incarcerated Juveniles <sup>a</sup>	Juvenile Arrests <sup>b</sup>	Rate per 1,000 arrests	Pun. Score
Alabama	1,794	13,018	137.81	4	Montana	261	5,292	49.32	2
Alaska	336	5,521	60.86	3	Nebraska	672	13,273	50.63	2
Arizona	1,890	51,400	36.77	1	Nevada <sup>c</sup>	921	12,489	73.74	3
Arkansas	675	9,128	73.95	3	New Hampshire	198	6,575	30.11	0
California	16,782	220,348	76.16	3	New Jersey	1,941	59,499	32.62	0
Colorado	1,776	37,332	47.57	2	New Mexico	606	8,126	74.58	3
Connecticut	627	15,231	41.17	1	New York	4,308	45,172	95.37	4
Delaware	333	6,592	50.52	2	North Carolina	1,203	45,130	26.66	0
Florida	8,208	122,706	66.89	3	North Dakota	246	6,516	37.75	1
Georgia	2,451	36,061	67.97	3	Ohio	4,176	44,836	93.14	4
Hawaii	129	11,743	10.99	0	Oklahoma	1,059	24,678	42.91	1
Idaho	489	16,117	30.34	0	Oregon	1,275	26,649	47.84	2
Illinois <sup>c</sup>	2,715	38,810	69.96	3	Pennsylvania	4,341	103,922	41.77	1
Indiana	3,045	33,746	90.23	4	Rhode Island	342	7,605	44.97	1
Iowa	975	21,176	46.04	2	South Carolina <sup>c</sup>	1,443	15,696	91.93	4
Kansas	1,071	8,309	128.90	4	South Dakota	522	7,832	66.65	3
Kentucky <sup>c</sup>	837	5,717	146.41	4	Tennessee	1,434	30,437	47.11	2
Louisiana	1,821	35,285	51.61	2	Texas	7,662	169,176	45.29	1
Maine	222	9,238	24.03	0	Utah	954	23,684	40.28	1
Maryland	1,167	51,325	22.74	0	Vermont	51	1,527	33.40	0
Massachusetts	1,302	14,694	88.61	4	Virginia	2,376	27,931	85.07	4
Michigan	2,706	43,681	61.95	3	Washington	1,656	36,088	45.89	1
Minnesota	1,527	40,941	37.30	1	West Virginia	498	1,224	406.86	4
Mississippi	528	11,403	46.30	2	Wisconsin	1,524	79,901	19.07	0
Missouri	1,413	48,176	29.33	0	Wyoming	357	6,126	58.28	2

<sup>a</sup> Individuals younger than 21 who were been charged or court-adjudicated for an offense and placed in a juvenile facility because of that offense in 2003. Source: Sickmund, Sladky & Kang (2005). See Table 97.

<sup>b</sup> Total number of juveniles arrested in 2003. Source: FBI *Uniform Crime Reports*—"Crime in the United States", See "Persons Arrested". Available at <http://www.fbi.gov/ucr/ucr.htm> (Retrieved on January 14, 2008).

<sup>c</sup> For Illinois, Kentucky, Nevada and South Carolina, "juvenile arrests" refers to 2002. For Nevada the 2003 data were unavailable, and for Illinois, Kentucky, and South Carolina only limited arrest data were received for 2003.

Table 98: Calculating Punitiveness Scores across Juvenile Incarceration Rate

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by rate)
1st	Minimum	0	Hawaii, Wisconsin, Maryland, Maine, North Carolina, Missouri, New Hampshire, Idaho, New Jersey and Vermont
2nd	Low	1	Arizona, Minnesota, North Dakota, Utah, Connecticut, Pennsylvania, Oklahoma, Rhode Island, Texas and Washington
3rd	Moderate	2	Iowa, Mississippi, Tennessee, Colorado, Oregon, Montana, Delaware, Nebraska, Louisiana and Wyoming
4th	High	3	Alaska, Michigan, South Dakota, Florida, Georgia, Illinois, Nevada, Arkansas, New Mexico and California
5th	Extreme	4	Virginia, Massachusetts, Indiana, South Carolina, Ohio, New York, Kansas, Alabama, Kentucky and West Virginia

Table 99: Number of Individuals in State Juvenile Facilities by Age in 2003  
(Supplement to Table 97)

State Name	Number of Individuals in State Juvenile Facilities by Age							Total
	≤ 12	13	14	15	16	17	≥18	
Alabama	30	108	213	345	417	468	213	1,794
Alaska	3	18	24	45	90	90	66	336
Arizona	48	84	168	399	561	606	24	1,890
Arkansas	12	45	78	132	186	204	15	675
California	147	426	1,206	2,415	3,726	4,794	4,065	16,782
Colorado	18	63	114	270	408	537	366	1,776
Connecticut	9	51	108	195	153	57	51	627
Delaware	6	12	39	57	87	114	21	333
Florida	180	375	891	1,485	1,968	2,221	1,221	8,208
Georgia	57	153	363	594	747	366	174	2,451
Hawaii	0	3	18	12	42	42	12	129
Idaho	15	27	51	87	132	129	48	489
Illinois	30	102	249	552	774	549	459	2,715
Indiana	99	153	342	555	759	816	324	3,045
Iowa	21	45	117	228	288	261	12	975
Kansas	15	36	69	156	261	294	237	1,071
Kentucky	9	36	78	144	231	285	57	837
Louisiana	54	111	231	408	537	348	132	1,821
Maine	0	3	12	24	57	84	39	222
Maryland	15	36	117	249	321	300	129	1,167
Massachusetts	9	45	126	291	399	351	81	1,302
Michigan	93	174	399	636	747	462	195	2,706
Minnesota	27	69	174	288	378	396	195	1,527
Mississippi	18	33	78	135	165	90	6	528
Missouri	39	78	240	363	468	195	33	1,413
Montana	3	12	33	42	78	87	0	261
Nebraska	6	33	60	135	162	210	63	672
Nevada	9	30	99	177	243	294	72	921
New Hampshire	3	15	30	63	78	6	0	198
New Jersey	18	42	120	279	393	573	516	1,941
New Mexico	6	12	36	69	144	195	150	606
New York	114	255	633	1,218	1,311	591	186	4,308
North Carolina	27	90	189	408	342	123	21	1,203
North Dakota	3	12	33	42	69	72	15	246
Ohio	69	180	408	729	1,032	1,122	633	4,176
Oklahoma	3	45	105	201	252	315	138	1,059
Oregon	6	27	108	189	255	297	390	1,275
Pennsylvania	60	168	426	801	1,044	1,191	651	4,341
Rhode Island	3	12	21	57	84	102	63	342
South Carolina	21	78	216	363	486	237	45	1,443
South Dakota	12	36	63	108	108	141	54	522
Tennessee	6	30	102	255	330	480	228	1,434
Texas	135	282	714	1,389	2,205	1,692	1,239	7,662
Utah	30	51	117	165	213	249	126	954
Vermont	0	6	6	15	15	12	0	51
Virginia	27	75	210	405	570	717	372	2,376
Washington	27	84	168	330	354	429	261	1,656
West Virginia	6	15	39	78	114	138	111	498
Wisconsin	42	93	198	366	492	264	69	1,524
Wyoming	24	21	42	54	99	96	18	357

Data refer to individuals younger than 21 who were charged or court-adjudicated for an offense and placed in a juvenile facility because of that offense. Source: Sickmund, Sladky & Kang (2005).

### **Juveniles Serving Life without Parole (Variable 43)**

The only publicly available nationwide data on the number of juveniles serving natural life sentences across the United States were collected and published by Human Rights Watch and Amnesty International as part of a comprehensive report—*The Rest of Their Lives: Life Without Parole for Child Offenders in the U.S.* The report revealed that by 2005, at least 2,225 inmates were serving life without possibility of parole (hereafter LWOP) for crimes they committed as minors. Among them, 16% were between 13 and 15 years old, and 26% were serving natural life sentences for felony murder.

A historical analysis of juvenile life sentences by the same report documented a fluctuating reliance on such sentences nationwide. While natural life sentences were rarely used with minors prior to the 1980s, since then states began imposing LWOP more frequently. By 1989, the number of juvenile life sentences increased up to 50, and by 1996, their number reached 152. Subsequently, the number of life sentences began to fall and, in 2003, only 54 juveniles received LWOP. This downward trend correlates with the imprisonment of minors in adult correctional facilities. According to the report by Sabol, Minton and Harrison (2007), the numbers of juveniles in states prisons have been steadily decreasing between 1995 and 2005 (see p. 4). This trend also mirrors the sharp decrease in the number of juvenile death sentences over the same period (Fagan, 2005).

With the abolition of the juvenile death penalty in *Roper v. Simmons*, 125 S.Ct. 1183 (2005), one should expect an increase in LWOP for juveniles for two reasons. First, *Roper* overturned death sentences for 72 inmates in 18 states (Streib, 2005), most of whom were resentenced to LWOP (Fagan, 2007). Second, some states that did not authorize juvenile life sentences prior to *Roper* began imposing them as a substitute for the death penalty. For

example, Texas made LWOP for youth possible as of September 2005. Therefore, it is essential that the collection of new data will be undertaken as soon as possibly by either human rights organizations or the Bureau of Justice Statistics, preferably both. Before the post-2005 data are available, however, we are compelled to rely on the Human Rights Watch and Amnesty International reports.

*Juveniles serving life without parole* was assessed by comparing states across the rates at which individuals are serving LWOP for offenses they committed as minors. While most of these inmates are no longer juveniles, the rates were computed per 100,000 14-17-year-old residents, as opposed to per capita adult population, because these inmates committed their crimes in that age range.

Based on the report, 12 states (Alaska, Kansas, Kentucky, Maine, New Jersey, New Mexico, New York, Oregon, Texas, Utah, Vermont, and West Virginia) had no natural life inmates incarcerated as juveniles. These states were grouped in the category of non-punitive or minimally punitive (pun. score = 0).

States with LWOP prisoners showed a significant disparity in their use of life sentences. For example, three states (Montana, North Dakota, and Ohio) had one prisoner each. The other end of this continuum was represented by Louisiana with 317 prisoners (rate = 109.56), Michigan with 306 prisoners (rate = 52.87), and Pennsylvania with 332 prisoners (rate = 49.27). These striking variations among states that impose LWOP on juveniles were used to create quartiles, with higher rates denoting an increase in state punitiveness (see Tables 98-99). The numbers are missing for Idaho. Unfortunately, because we have only the Human Rights Watch, no estimation was possible. Therefore, the cell corresponding with Idaho was left empty with an expectation that its adverse effect on the distribution of final scores will be

minimal. (As a reminder, the overall punitiveness scores are the average, not the sum, of all criterion punitiveness scores.)

### Variable 43: Juveniles Serving Life without Parole

Table 100: Juveniles Serving Life without Parole as of 2005

State Name	Total youth serving LWOP	LWOP per 100,000 14-17-year-olds	Pun. Score	State Name	Total youth serving LWOP	LWOP per 100,000 14-17-year-olds	Pun. Score
Alabama	15	5.86	2	Montana	1	1.71	1
Alaska	-	-	0	Nebraska	21	19.57	4
Arizona	30	10.33	2	Nevada	16	15.35	3
Arkansas	46	29.21	4	New Hampshire	3	4.25	1
California <sup>a</sup>	180	9.18	2	New Jersey	0	0	0
Colorado <sup>b</sup>	46	18.75	3	New Mexico	-	-	0
Connecticut	10	5.58	2	New York	-	-	0
Delaware	7	16.31	3	North Carolina	44	10.55	2
Florida <sup>a</sup>	273	33.32	4	North Dakota	1	2.44	1
Georgia	8	1.71	1	Ohio	1	0.15	1
Hawaii	4	6.08	2	Oklahoma	49	23.21	4
Idaho	Data missing		-	Oregon	-	-	0
Illinois <sup>a</sup>	103	14.46	3	Pennsylvania	332	49.27	4
Indiana	2	0.57	1	Rhode Island	2	3.69	1
Iowa	67	38.23	4	South Carolina	26	11.5	3
Kansas	-	-	0	South Dakota	9	17.99	3
Kentucky	-	-	0	Tennessee	4	1.29	1
Louisiana	317	109.56	4	Texas <sup>b</sup>	-	-	0
Maine	-	-	0	Utah	0	0	0
Maryland	13	4.41	1	Vermont	0	0	0
Massachusetts	60	18.49	3	Virginia	48	12.54	3
Michigan <sup>a</sup>	306	52.87	4	Washington	23	6.65	2
Minnesota	2	0.66	1	West Virginia	-	-	0
Mississippi <sup>a</sup>	17	9.48	2	Wisconsin	16	4.91	2
Missouri	116	35.13	4	Wyoming	6	17.88	3

<sup>a</sup> All these states have abolition legislation pending (Fagan, 2007).

<sup>b</sup> Colorado banned LWOP for juveniles in 2006 (Fagan, 2007).

<sup>c</sup> Texas made LWOP for youth possible as of September 2005.

Source: Human Rights Watch (2005). See Appendix D: "State population data table", p. 133.

Table 101: Calculating Punitiveness Scores across Juveniles Serving Life without Parole

Description	Levels of Punitiveness	Pun. Score	<i>f</i>	State Name (Arranged by rate per 100,000 14-17-year-olds)
No LWOP <sup>a</sup>	Minimum	0	12	Alaska, Kansas, Kentucky, Maine, New Jersey, New Mexico, New York, Oregon, Texas, Utah, Vermont and West Virginia
1st quartile	Low	1	10	Ohio, Indiana, Minnesota, Tennessee, Georgia, Montana, North Dakota, Rhode Island, New Hampshire and Maryland
2nd quartile	Moderate	2	9	Wisconsin, Connecticut, Alabama, Hawaii, Washington, California, Mississippi, Arizona and North Carolina
3rd quartile	High	3	9	South Carolina, Virginia, Illinois, Nevada, Delaware, Wyoming, South Dakota, Massachusetts and Colorado
4th quartile	Extreme	4	9	Nebraska, Oklahoma, Arkansas, Florida, Missouri, Iowa, Pennsylvania, Michigan and Louisiana

<sup>a</sup> "No LWOP" means that natural life sentences are: (a) not permitted; (b) permitted but never imposed; or (c) permitted but not imposed at the moment of the data collection.

### **Overcrowding in Juvenile Facilities** (Variable 44)

The effects of overcrowding on prison life have already been discussed in Part Four, *Conditions of Confinement*. Despite some conflicting findings, most studies report that a lack of cell space is often associated with increased inmate-on-inmate and staff-on-inmate violence, rising suicide rates among inmates, and inadequate rehabilitative and medical services (Cox, Paulus & McCain, 1984; Gibbons & Katzenbach, 2006; Huey & McNulty, 2005; Kinkade, Leona & Semond, 1995; Liebling, 1999). Although these studies mainly focused on adult prisoners and jail inmates, it is not hard to imagine that crowding has equally strong, if not stronger, adverse impact on youngsters due to their physical and emotional vulnerability.

The present variable was constructed on the basis of the data from *Juvenile Residential Facility Census, 2002* (Sickmund, 2006). This source provides the most updated information about the percent of inmates in juvenile facilities above officially reported capacity. Here again, the variation was staggering. Only 10 states (Arkansas, Iowa, Kentucky, Maine, Minnesota, New Hampshire, Oklahoma, Vermont, Wisconsin, and Wyoming) met the minimum capacity requirement, meaning that 80% of facilities were overcrowded. Especially severe overcrowding problems were faced by juveniles in Delaware (183%), Hawaii (165%), and Rhode Island (164%). A total of 13 states exceeded their official space capacity by more than 20% (see Table 102). In other words, these states housed at least 6 juveniles in a space designed for only 5 inmates.

To segregate the jurisdictions into five levels of state punitiveness, the quintile system was adopted and states were grouped depending on the extent of overcrowding in their juvenile correctional facilities (see Table 103). By chance, there were 10 states that did not report overcrowding. Accordingly, it was no longer necessary to first separate states that did not

report overcrowding from those that did, and then break down states with experiencing overcrowding into quartiles. Thus, the quintile system worked very well.

### Variable 44: Overcrowding in Juvenile Facilities

Table 102: Overcrowding in Juvenile Facilities

State Name	>100% <sup>a</sup>	Pun. Score	State Name	>100% <sup>a</sup>	Pun. Score	State Name	>100% <sup>a</sup>	Pun. Score
Alabama	9	2	Louisiana	5	1	Ohio	21	3
Alaska	59	4	Maine	0	0	Oklahoma	0	0
Arizona	16	3	Maryland	13	3	Oregon	8	2
Arkansas	0	0	Massachusetts	9	2	Pennsylvania	5	1
California	10	2	Michigan	4	1	Rhode Island	64	4
Colorado	36	4	Minnesota	0	0	South Carolina	27	3
Connecticut	7	2	Mississippi	1	1	South Dakota	1	1
Delaware	83	4	Missouri	7	2	Tennessee	13	3
Florida	11	2	Montana	6	2	Texas	28	4
Georgia	30	4	Nebraska	33	4	Utah	4	1
Hawaii	65	4	Nevada	31	4	Vermont	0	0
Idaho	5	1	New Hampshire	0	0	Virginia	18	3
Illinois	2	1	New Jersey	31	4	Washington	18	3
Indiana	8	2	New Mexico	15	3	West Virginia	24	3
Iowa	0	0	New York	19	3	Wisconsin	0	0
Kansas	5	1	North Carolina	4	1	Wyoming	0	0
Kentucky	0	0	North Dakota	3	1			

<sup>a</sup> Percent of juvenile offenders in facilities over capacity. Source: Sickmund (2006), see table on p. 9.

Table 103: Calculating Punitiveness Scores across Overcrowding in Juvenile Facilities

Quintiles	Levels of Punitiveness	Pun. Score	State Name (Arranged by overcrowding percent from lowest to highest)
1st: 0% overcrowding	Minimum	0	Arkansas, Iowa, Kentucky, Maine, Minnesota, New Hampshire, Oklahoma, Vermont, Wisconsin and Wyoming
2nd: 1-5% overcrowding	Low	1	Mississippi, South Dakota, Illinois, North Dakota, Michigan, North Carolina, Utah, Idaho, Kansas, Louisiana and Pennsylvania
3rd: 6-11% overcrowding	Moderate	2	Montana, Connecticut, Missouri, Indiana, Oregon, Alabama, Massachusetts, California and Florida
4th: 13-27% overcrowding	High	3	Maryland, Tennessee, New Mexico, Arizona, Virginia, Washington, New York, Ohio, West Virginia and South Carolina
5th: 28-83% overcrowding	Extreme	4	Texas, Georgia, Nevada, New Jersey, Nebraska, Colorado, Alaska, Rhode Island, Hawaii and Delaware

### Summary: Juvenile Justice

This fifth and last part of the study has explored the following six variables of state punitiveness: *Age for juvenile court jurisdiction*; *Juvenile transfer laws*; *Juvenile inmates in adult prisons*; *Juvenile incarceration rate*; *Juveniles serving life without parole*; and *Overcrowding in juvenile facilities*. Consistent with the 38 previous variables, these juvenile justice-related items also produced criterion punitiveness scores between 0 (non-punitive or minimally punitive) to 4 (extremely punitive). After assigning these scores to each state, the average punitiveness score was generated.

When looking at the ten least punitive and ten most punitive states, some regional patterns begin to surface. The least punitive group mainly consisted of western states (Oregon, Idaho, Hawaii, Montana, and Utah) and northeastern states (Maine, New Hampshire, New Jersey, and Vermont). The Midwest and the South was represented only by one state each (Wisconsin and Kentucky, respectively). Maine was characterized as the least punitive of all states.

The category of most punitive states was clearly dominated by southern (South Carolina, Delaware, Florida, Alabama, Virginia, and Georgia) and midwestern (Ohio, Nebraska, Michigan, and Illinois) states. Only one western state, Alaska, qualified for this category. Not a single northeastern state was among the most punitive jurisdictions. South Carolina was identified as the most punitive across the juvenile justice variables.

These patterns are somewhat similar to those observed on the bases of the variables of *Punishing "Immorality"* (Part Three). Yet, while in both cases northern states were less punitive than southern, the six variables of *Juvenile Justice* did not portray all states bordering with Canada as non-punitive. It is true that five non-punitive states (Idaho, Montana,

Wisconsin, Vermont, and Maine) are situated along the Canadian border (from West to East), but two northern states (Alaska and Michigan) qualified for the category of “extremely punitive”. Therefore, although the link between the region and punitiveness scores is noticeable, it is relatively weak.

The conclusion that follows will put together the average punitiveness scores from all five average punitiveness scores (generated by the five parts of the study). The mean of these scores will produce overall punitiveness scores (OPSs) for all 50 states. Only then we can make legitimate claims about the state punitiveness of American jurisdictions.

Table 104: Combining the Punitiveness Scores of the Variables of Juvenile Justice

State Name <sup>a</sup>	Variables 39-44						Sum of	Mean Pun.
	Age of Juvenile Court Jurisdiction	Juvenile Transfer Laws	Juveniles in Adult Prisons	Juvenile Incarceration Rate	Juveniles Serving LWOP	Overcrowding in Juvenile Facilities	Pun.Scores $\Sigma X$	Scores $\frac{\Sigma X}{6}$
Maine	3	2	0	0	0	0	5	0.83
Wisconsin	1	0	3	0	2	0	6	1.00
Kentucky	3	0	0	4	0	0	7	1.17
New Hampshire	3	2	1	0	1	0	7	1.17
Oregon	1	1	1	2	0	2	7	1.17
Idaho	3	1	1	0	-	1	( $\Sigma 5$ )6	( $\Sigma 5/5$ )1.20
Hawaii	0	1	1	0	2	4	8	1.33
New Jersey	0	2	2	0	0	4	8	1.33
Vermont	3	2	3	0	0	0	8	1.33
Montana	1	2	1	2	1	2	9	1.50
Utah	3	3	1	1	0	1	9	1.50
California	1	2	0	3	2	2	10	1.67
New Mexico	3	1	0	3	0	3	10	1.67
North Dakota	3	3	1	1	1	1	10	1.67
West Virginia	3	0	0	4	0	3	10	1.67
Minnesota	3	4	2	1	1	0	11	1.83
Oklahoma	4	1	1	1	4	0	11	1.83
Washington	3	2	0	1	2	3	11	1.83
Wyoming	3	0	3	2	3	0	11	1.83
Kansas	2	3	2	4	0	1	12	2.00
Maryland	3	1	4	0	1	3	12	2.00
Missouri	3	0	3	0	4	2	12	2.00
South Dakota	3	1	1	3	3	1	12	2.00
Tennessee	4	0	2	2	1	3	12	2.00
Arkansas	3	0	3	3	4	0	13	2.17
Colorado	0	1	3	2	3	4	13	2.17
Iowa	4	0	3	2	4	0	13	2.17
Mississippi	3	1	4	2	2	1	13	2.17
North Carolina	4	2	4	0	2	1	13	2.17
Pennsylvania	3	2	2	1	4	1	13	2.17
Texas	3	2	3	1	0	4	13	2.17
Connecticut	4	1	4	1	2	2	14	2.33
Louisiana	3	3	1	2	4	1	14	2.33
Massachusetts	3	1	1	4	3	2	14	2.33
Arizona	3	2	4	1	2	3	15	2.50
Indiana	3	3	2	4	1	2	15	2.50
Nevada	3	2	0	3	3	4	15	2.50
New York	4	0	4	4	0	3	15	2.50
Rhode Island	3	4	2	1	1	4	15	2.50
Alaska	4	3	2	3	0	4	16	2.67
Georgia	3	2	3	3	1	4	16	2.67
Illinois	3	3	3	3	3	1	16	2.67
Michigan	3	2	3	3	4	1	16	2.67
Nebraska	4	0	2	2	4	4	16	2.67
Ohio	3	3	2	4	1	3	16	2.67
Virginia	3	1	2	4	3	3	16	2.67
Alabama	3	2	4	4	2	2	17	2.83
Florida	2	2	4	3	4	2	17	2.83
Delaware	3	2	4	2	3	4	18	3.00
South Carolina	3	2	4	4	3	3	19	3.17

<sup>a</sup> States are arranged from the least punitive to the most punitive.

Note: Shaded areas separate the 10 least punitive and the 10 most punitive states from the rest.

## DISCUSSION OF RESULTS

The present study explores the variations among American jurisdictions in terms of state punitiveness. For the purposes of this work, *state punitiveness* refers to the range of criminal justice policies that target suspects, defendants, convicts, inmates, and even formerly incarcerated individuals. These policies inflict pain and suffering upon them, cause them shame and discomfort, adversely affect their financial and political status, and take away their freedom and sometimes even lives. While such consequences are typically achieved through criminal punishment, they are sometimes accomplished through non-criminal law measures (e.g., disenfranchisement or the sex offender registration/notification requirement).

The various data for 50 states were compiled and analyzed. These data created bases for 44 variables, across which the states were compared. Each variable or criterion produced a criterion punitiveness score (CPS) between 0 and 4, with a higher score indicating an increase in state punitiveness. Depending on the values generated through often complicated procedures, state were characterized as *minimally punitiveness* or *non-punitive* (CPS = 0), *lowly* or *less than moderately punitive* (CPS = 1), *moderately punitive* (CPS = 2), *highly* or *more than moderately punitive* (CPS = 3), and *extremely punitive* (CPS = 4). The average of 44 CPSs (for several states, it was less than 44 when the data were unavailable) produced an overall punitiveness score (OPS) per state. These OPSs were used to create a hierarchy of state punitiveness (see Table 102).

The five-pronged interpretation used with CPSs is not fully applicable to OPSs because the average scores no longer have values as high as 3 or 4 (the OPSs ranged from 1.124 to 2.692). To break states into groups, the study used quintiles of OPSs. Given that there were 50 jurisdictions, each quintile consists of 10 states. The first quintile clusters the states with the

lowest OPSs, and the fifth quintile clusters states with highest OPSs. States with scores higher than the OPSs of the first quintile and lower than the OPSs of the fifth quintile were grouped in the second, third, and fourth quintiles, depending on their OPSs. These five quintiles were interpreted in the same manner as the CPSs. The first quintile denotes *minimum punitiveness*, the second quintile *less than average punitiveness*, the third *moderate punitiveness*, the fourth *more than moderate punitiveness*, and the fifth *extreme punitiveness*.

In addition to this quintile method of creating hierarchies of states, the study also used a two-level categorization. The two groups were separated by the median. Twenty-five states fell below the midpoint in a *less punitive category* and 25 states ranked above it in a *more punitive category*. The latter method will be primarily used in discussing regional variations in state punitiveness.

As you can see, the interpretation of punitiveness is not constant but a variable that fluctuates in accordance with the lowest and highest OPSs. Such an interpretation is consistent with the goal of this work—to gauge state punitiveness of American jurisdictions in their relation to each other. This is the most effective method of conducting state punitiveness research, as a jurisdiction (e.g., Russia) can be perceived as minimally punitive when compared to one jurisdiction (e.g., Iran) and highly punitive when compared to another (e.g., Germany). It is impossible to argue that one state is highly punitive unless it is compared with another state. Accordingly, the present study attempts to describe the level of punitiveness of each state through comparisons and contrasts with the 49 remaining jurisdictions. The discussion will be arranged in reverse order, beginning with the fifth quintile, which contains 10 extremely punitive jurisdictions.

*State-by-State Variations in State Punitiveness*

Table 105: Computing the Overall Punitiveness Scores (OPSs) for Fifty States

State Name <sup>a</sup>	PART I	PART II	PART III	PART IV	PART V	Mean of CPSs (i.e., OPS) $\frac{\sum X}{5}$
	Political & Symbolic Punishment	Incarceration	Punishing “Immorality”	Conditions of Confinement	Juvenile Justice	
Maine	0.55	2.73	1.00	0.57	0.83	1.137
Rhode Island	0.73	0.47	1.20	1.14	2.50	1.207
Minnesota	0.55	0.67	1.80	1.43	1.83	1.255
Vermont	1.00	1.07	1.00	2.29	1.33	1.337
North Dakota	1.27	0.80	1.80	1.43	1.67	1.394
West Virginia	1.36	1.60	1.40	1.00	1.67	1.406
Alaska	1.27	1.13	1.40	1.14	2.67	1.523
New Jersey	1.27	1.40	1.80	1.86	1.33	1.532
Hawaii	0.73	2.27	1.60	2.00	1.33	1.585
Oregon	1.55	1.60	1.80	1.86	1.17	1.596
Missouri	1.73	1.53	0.60	2.14	2.00	1.601
New Hampshire	1.09	2.07	1.80	2.14	1.17	1.653
Wisconsin	1.27	1.60	1.80	2.71	1.00	1.676
South Dakota	1.64	2.13	1.00	1.71	2.00	1.697
Utah	1.55	1.40	1.80	2.50	1.50	1.750
New Mexico	1.82	2.73	1.60	1.14	1.67	1.793
Washington	2.45	1.00	1.60	2.00	1.83	1.776
Michigan	0.91	2.67	2.00	0.86	2.67	1.821
New York	1.00	1.87	1.60	2.14	2.50	1.821
Iowa	1.45	2.07	1.60	2.29	2.17	1.916
North Carolina	2.18	1.33	2.20	1.83	2.17	1.943
Idaho	1.82	2.40	1.60	2.71	1.20	1.946
Connecticut	2.00	1.60	2.00	2.14	2.33	2.014
Arizona	1.91	2.60	2.20	1.00	2.50	2.042
Kentucky	2.64	1.93	2.60	2.00	1.17	2.069
Colorado	2.00	1.93	2.00	2.29	2.17	2.079
Wyoming	1.82	2.73	2.20	1.86	1.83	2.089
Arkansas	2.91	1.33	2.00	2.14	2.17	2.111
Massachusetts	0.82	3.13	1.60	2.71	2.33	2.119
Kansas	1.82	3.60	1.20	2.14	2.00	2.152
Oklahoma	2.27	2.53	2.60	1.57	1.83	2.161
Nevada	3.00	1.80	1.40	1.71	2.50	2.164
Nebraska	2.09	1.60	2.40	1.86	2.67	2.124
Indiana	2.18	2.00	2.00	2.14	2.50	2.164
Pennsylvania	1.91	3.13	2.40	1.29	2.17	2.181
Louisiana	2.00	1.87	2.20	2.57	2.33	2.193
California	2.36	1.47	3.80	1.71	1.67	2.201
Tennessee	2.82	1.53	3.40	1.57	2.00	2.265
Ohio	2.09	3.00	1.80	1.71	2.67	2.254
Illinois	1.64	1.67	2.80	2.71	2.67	2.297
Delaware	2.55	0.87	3.00	2.14	3.00	2.312
Maryland	2.18	2.67	2.80	2.43	2.00	2.416
Texas	2.27	3.00	3.00	1.86	2.17	2.460
Montana	2.18	3.47	2.60	2.57	1.50	2.463
Alabama	2.82	2.67	1.60	2.43	2.83	2.469
Virginia	2.73	2.40	2.80	1.86	2.67	2.492
Georgia	2.91	2.60	2.60	1.86	2.67	2.528
Mississippi	2.91	3.07	2.40	2.14	2.17	2.537
South Carolina	2.73	2.67	2.80	1.86	3.17	2.645
Florida	3.00	2.53	3.80	1.43	2.83	2.719

<sup>a</sup> States are arranged from the least punitive to the most punitive.

Note: Shaded areas separate the quintiles.

It comes as no surprise that the results of the study confirmed a widespread stereotype about the penal harshness of the South. Nine out of the 10 *extremely punitive* states were southern (Florida, South Carolina, Mississippi, Georgia, Alabama, Texas, Virginia, Maryland, and Delaware (arranged descendingly here and hereafter, until stated otherwise)). Montana was the only non-southern state in this category. Florida reemerged as the most punitive state of all. Although its CPSs were relatively low across the variables of *Conditions of Confinements* (i.e., state prisons are not poorly maintained here), Florida received the highest CPSs for the variables of *Political and Symbolic Punishment* (alongside Nevada) and *Punishing “Immorality”* (alongside California).

The fourth quintile brought together the states that can be called *more than moderately punitive*. The active presence of southern states continues in this category. Tennessee, Louisiana, Oklahoma, and Arkansas all qualified for the label of “more than moderately punitive”. This means that 13 (65%) out of 20 states situated towards the high end of the punitiveness continuum are southern. The Midwest (Illinois, Ohio, and Indiana) was the second most represented region in the quintile, followed by the West (California and Nevada). Pennsylvania is the only northeastern state among the more than moderately punitive jurisdictions. This makes Pennsylvania the most punitive northeastern state, as no other jurisdiction from this region qualified for either of the two highly punitive quintiles.

The third and middle quintile housed almost equal numbers of *moderately punitive* states from all four regions: three western (Arizona, Colorado, and Wyoming (arranged ascendingly here and hereafter)), three midwestern (Iowa, Nebraska, Kansas), two southern (North Carolina and Kentucky) and two northeastern states (Connecticut and Massachusetts). These ten states can be thought of as moderately punitive.

The second quintile, a category of less than *moderately punitive* states, contained no southern state. Instead it was dominated by western states (Washington, Utah, New Mexico, and Idaho). Three midwestern (Missouri, Wisconsin, South Dakota, and Michigan) and two northeastern (New Hampshire and New York) jurisdictions also qualified for this quintile.

Although the first quintile, *minimally punitive*, was overrepresented by north-eastern states (Maine, Rhode Island, Vermont, and New Jersey), it also contained three western (Alaska, Oregon, and Hawaii), two Midwestern (Minnesota and North Dakota) and one southern (West Virginia) jurisdictions. Maine was identified as the least punitive state of all 50 American states. Although its CPSs for the variables of *Incarcerations* were by no means low, it scored minimally along the variables of *Political and Symbolic Punishment*, *Conditions of Confinements*, *Punishing "Immorality"* and *Juvenile Justice*.

Maine is closely followed by Rhode Island, Minnesota, Vermont and several other states. Therefore, had New Hampshire, Massachusetts, and Connecticut received OPSs even somewhat close to this of Maine, it would have been save to presume that the entire New England area is especially non-punitive. However, New Hampshire ended in the second quintile, and Connecticut and Massachusetts in the middle quintile, thus refuting this presumption. More discussion of regional variations follows.

### *Regional Variations in State Punitiveness*

Because the regions<sup>120</sup> do not consist of the same numbers of states, it is necessary to ascertain the percent by which they are represented in each of the five punitiveness quintiles (see Table 106) and the halves separated by the median (see table 107).

Table 106: Distribution of the Number of States and Percent of States in Five Quintiles  
by Region

Quintiles	Levels of Punitiveness	Four Regions			
		South	West	Midwest	Northeast
1st	Minimum	1 (6.25%)	3 (23.08%)	2 (16.66%)	4 (44.44%)
2nd	Low	0 (0.00%)	4 (30.77%)	4 (33.33%)	2 (22.22%)
3rd	Moderate	2 (12.50%)	3 (23.08%)	3 (25.00%)	2 (22.22%)
4th	High	4 (25.00%)	2 (15.38%)	3 (25.00%)	1 (11.22%)
5th	Extreme	9 (56.25%)	1 (7.69%)	0 (0.00%)	0 (0.00%)
<i>Total</i>		16 (100%)	13 (100%)	12 (100%)	9 (100%)

Table 107: Distribution of the Number of States and Percent of States Below and Above the Median by Region

Halves	Levels of Punitiveness	Four Regions			
		South	West	Midwest	Northeast
Lower	Less Punitive	2 (12.50%)	9 (69.23%)	7 (58.33%)	7 (77.77%)
Higher	More Punitive	14 (87.50%)	4 (30.77%)	5 (41.66%)	2 (22.22%)
<i>Total</i>		16 (100%)	13 (100%)	12 (100%)	9 (100%)

The southern region is a combination of 16 states, which means that 56% (9 states) of those states are eligible for the fifth quintile, 25% (4 states) for the fourth quintile, 13% (2 states) for the third quintile, 0% (0 states) for the second quintile, and 6% (1 states) for the first quintile. Thus, the representation of the South decreases sharply as we glance upwards from the fifth punitiveness quintile. When states are divided by the median (with 25 states above and

<sup>120</sup> The regional classification method was adopted from the Bureau of Justice Statistics. Because this study heavily relies on the data provided by this source, it was convenient to follow the BJS method of dividing the regions.

25 states below it), we can see that 87.5% (14 out of 16 states) of the southern states fell above it, and 12.5% (2 out of 16) fell below. This distribution undoubtedly makes the South highly punitive.

The western region of the United States consists of 13 states. Accordingly, 31% (4 states) qualify for the second quintile, 23% (3 states) for the first and third quintiles each, 15% (2 states) for the fourth quintile, and 8% (1 state) for the fifth quintile.<sup>121</sup> When the states are split by the median, 69% (9 states) of western states are on the lower side, and 31% (4 states) on the upper side. One can use these numbers to describe the West as less rather than more punitive.

The Midwest is comprised of 12 states, 33% (4 states) of which are clustered in the second quintile, 25% (3 states) in the third and fourth quintiles each, 17% (2 states) in the first quintile, and 0% (0 states) in the fifth quintile. The median puts 58% (7 states) of midwestern states in the bottom half, and 42% (5 states) in the top half. Although states are distributed relatively evenly on the two sides of the median, the fact that none of the midwestern states qualified for the most punitive quintile and the greatest proportion of them are clustered in the second quintile suggests that the Midwest stands somewhere in between the categories of *moderately* and *less than moderately punitive*.

America's northeast is a 9-state region. Forty-four percent of its states (4 states) qualified for the first quintile, followed by 22% (2 states) in the second and third quintiles each, 11% (1 state) in the fourth quintile, and 0% (0 states) in the fifth quintile. When divided into halves, 78% (7 states) were placed in the lower half, and 22% (2 states) in the upper half. Consequently, the Northeast can be safely characterized as the least punitive region of all four.

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<sup>121</sup> The percents are rounded. Therefore, they may not add up to 100%.

To conclude, the South can be unquestionably described as a highly punitive region, as well as the most punitive in comparison with other regions, and the Northeast can be thought of as relatively non-punitive, or the least punitive region of all. The gap created by these two regions is filled with western and midwestern jurisdictions. The difference between the latter two regions is almost imperceptible. The West and Midwest have similar representation in the second quintile that clusters most states (31% and 33%, respectively), and in the third quintile (23% and 25%). And although the first quintile is better represented by the West (23%) rather than Midwest (17%), this imbalance is evened out by the fact that the West, unless the Midwest, has one state (8%) in the fifth quintile. Therefore, either there is no difference between the West and the Midwest in their overall punitiveness scores, or this analysis failed to detect it.

*Revisiting Diana Gordon's "Topography of Criminal Justice"*

In 1989, Diana Gordon published her work on the severity of America's criminal justice system, which is the only known study directly comparable to the present research. Her goal was to explore the 1970s and 1980's "get-tough" policies through a 32-variable instrument, which incorporated the variables of sentencing, parole and probation, defendants' rights, investigation and adjudication, population in custody, and criminal justice resources. Using factor analysis, Gordon found evidence for the existence of three major factors—*the custody factor*, *the parole policy factor*, and *the symbolic punishment factor*. Subsequently, she identified the 10 most punitive states across each of these three factors. Although Gordon used fewer and mainly different variables, it is important to see whether her findings from nearly two decades ago have been confirmed by the present research.

The 14 variables loaded into *the custody factor* included the prison rate (factor loading = .88), jail rate (.86), combined probation and parole rate (.67), and juvenile detention rate (.67). Ten jurisdictions that emerged as the toughest on the basis of this factor were the District of Columbia, Nevada, Maryland, Florida, Georgia, Louisiana, New Jersey, Alaska, Texas, and California (arranged from the most to the least punitive).

Because the District of Columbia was not included in the present study, the discussion on it will be omitted. Seven out of the nine remaining states in fact were found highly punitive by the present study as well. Similar to Gordon's findings, this study also suggested that Nevada, Louisiana, and California are *more than moderately punitive* (4<sup>th</sup> quintile), and Maryland, Florida, Georgia, and Texas *extremely punitive* (5<sup>th</sup> quintile). However, Gordon's findings vis-à-vis New Jersey and Alaska are contrary to the present research, according to which both states can be described as least punitive (1<sup>st</sup> quintile).<sup>122</sup>

Gordon's second factor, *the parole policy factor*, included five variables, among which discretionary parole decisions (.87) and sentence lengths (.77) had the strongest loadings. The harshest states were Indiana, Illinois, Maine, Alaska, Oklahoma, Minnesota, Connecticut, Florida, Vermont, and California. These findings are not even remotely comparable with those of the present research, as four (Maine, Alaska, Minnesota, and Vermont) of Gordon's ten toughest states were characterized as minimally punitive by the present study (1<sup>st</sup> quintile). The remaining six states were dispersed across four other quintiles (Indiana, Illinois, and Connecticut – 3<sup>rd</sup> quintile; Oklahoma and California – 4<sup>th</sup> quintile; and Florida – 5<sup>th</sup> quintile).

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<sup>122</sup> When compared only with the findings from Part Two, *Incarceration*, that used somewhat similar variables as those by Gordon in her *custody factor*, all the similarities disappear. There was only one state, Texas, identified as highly punitive by both studies. It seems that, no matter how one assesses punitiveness, Texas always comes out as one of the toughest.

*The symbolic punishment factor* contained nine variables, including sentences for more than 20 years (.70), percent change in criminal justice share of state expenditures (.53), the death penalty (.50), and average length of prison stay (.29). The toughest states were Arkansas, Mississippi, Virginia, Alaska, Oklahoma, Louisiana, Arizona, Delaware, South Carolina, and Indiana. The characterization of these states as the toughest is somewhat consistent with the present study. With the exception of Alaska (1<sup>st</sup> quintile) and Arizona (3<sup>rd</sup> quintile), all the other states were categorized as highly punitive (Arkansas, Oklahoma, Louisiana, and Indiana – 4<sup>th</sup> quintile; and Mississippi, Virginia, Delaware, and South Carolina – 5<sup>th</sup> quintile).

While some similarities between the findings of Gordon's study and present one are obvious (e.g., southern states were described as highly punitive), the differences cannot be overlooked. Four states—Maine, Alaska, Minnesota, and Vermont—were shown as punitive by Gordon's research. In contrast, the present work suggests that these states are minimally punitive. An explanation of this inconsistency requires thorough investigation, which, although it can be undertaken, clearly exceeds the scope of this study. One can nevertheless hypothesize that the discrepancy reported by the two works might be attributable to changes in penal policies over time, differences between the variables used, and/or the variations in operationalizations of the key concepts.

*The Multidimensionality of “State Punitiveness”*

Punitiveness, whether state, public or individual, should not be measured on the basis of one variable (e.g., support for the death penalty), any more than a student’s college readiness can be evaluated on the basis of one high school class. The student could have been outstanding in mathematics, but weak in English and history, which could explain substantial inconsistency across grades. Continuing the analogy, to effectively assess students’ knowledge and skills, most tests such as the SAT and GRE usually include questions testing students’ understanding of mathematics, vocabulary, reasoning, reading and writing skills. The conceptualization of punitiveness relied on in this dissertation uses this multidimensional method of testing.

Once we look through the tables combining the punitiveness scores for the five indices—A. *Political and Symbolic Punishment*, B. *Incarceration*, C. *Punishing “Immorality”*, D. *Conditions of Confinement*, and E. *Juvenile Justice* (see Tables 29, 61, 75, 90 and 104), it becomes apparent that while some states show consistency in their punitiveness levels across various dimensions of penal harshness, most of them do not.

Maine, for instance, was identified as the least punitive of all fifty states based on the combination of the 44 criteria punitiveness scores. In fact, this state emerged as the least punitive across the criteria grouped in indices A., C., D., and E. Yet when measured on the bases of average prison sentences, imposed and served, as well as prison release trends (see index B. *Incarceration*), this non-punitive state metamorphosed into one of the most punitive ones. Its ranking changed from number 1 (for index C, it was number 2) to number 39, thus closely approaching the category of *extremely punitive*.<sup>123</sup> This dynamic shows that Maine

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<sup>123</sup> Remember that ranking ranges from 1 to 50, with 50 corresponding with the total number of states. Higher numbers mean higher levels of state punitiveness.

might have been relatively soft for disfavoring the death penalty, maintaining good prison conditions, tolerating the behaviors that many would call “immoral”, and dealing leniently with its juvenile offenders, but quite harsh due to imposing and making offenders serve relatively longer prison sentences, both of which significantly surpass the national averages. This speaks volumes about a penal philosophy of this state.

Similarly, this measurement identified Florida as the most punitive of all fifty states. Florida ranked 49 for index A., 33 for index B., 50 for indices C. and E., but only 9 for index D. This means that, although *extremely punitive* across most dimensions of state punitiveness, Florida has among the best prison conditions in the country. This approach reveals the penal philosophy of this state, according to which offenders, including those under 18, should be punished severely while the conditions of confinement ought to remain as humane as possible. Ideally, this approach might serve two penal objectives: first, by imposing severe sentences, the state tries to achieve specific and general deterrence; and second, good prison conditions should assure that those to be released from prisons are not experiencing unbearable correctional treatment that would further damage their personality and wellbeing. Neither fiscal nor safety interests of the state can be served by releasing such individuals from its prisons and jails, according to this reasoning.

Finally, New York State<sup>124</sup> fluctuates widely across the criteria of state punitiveness. The state was identified as *minimally punitive* for indices A. and C., but *more than moderately punitive* for indices D. and E. For index B, it was judged as *moderately punitive*. Accordingly, although New York disfavors life-without-possibility-of-parole sentences, the death penalty, three-strike laws, or arrest for drug abuse or drunkenness, it maintains harsh prison conditions and treats its juvenile offenders nearly as harshly as their adult counterparts. Ultimately, when

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<sup>124</sup> NYS was selected because this is the state in which this dissertation was completed.

combining all 5 indices, the state was identified as *less than moderately punitive*, since its *punitively lenient* criminal justice system had showed a slightly bigger dosage of leniency rather than punitiveness. This contradictory nature of New York State requires more research, which, in addition to criminal justice/criminological analysis, would also benefit from utilizing the methods and knowledge that come from other disciplines, such as history and political science.

### *Addressing the Measurement Issues*

The proposed measure of *State Punitiveness* compared America's states and regions by using an additive scale (more specifically, the mean of all criteria punitiveness scores). Additive scales typically assume that all items measure the same construct. Such an assumption was made when constructing this scale as well. All forty-four items were put together on the bases of previous research and theoretical rationale. In the earlier sections, I made assertions as to why each of these forty-four items is relevant to the understanding of state punitiveness. This section offers empirical evidence for the multidimensionality of the proposed *State Punitiveness* scale.

In order to better understand the underlying structure of the scale, I first considered using exploratory factor analysis. Such analysis however is not appropriate, given that the data set contains only 50 cases (corresponding with 50 states), while most statisticians argue that even a poor factor analysis should contain at least 100 cases (see Comrey & Lee, 1992; Field, 2005; Tabachnick & Fidell, 2001). As Tabachnick and Fidel (2001) write, “[I]t is comforting to have at least 300 cases for factor analysis” (p. 640).

A less powerful but nevertheless useful approach is to conduct simple correlations to examine the extent to which five indices—(a) *Political and Symbolic Punishment*, (b) *Incarceration*, (c) *Punishing “Immorality”*, (d) *Conditions of Confinement*, and (e) *Juvenile Justice*—correlate with each other. The analyses showed weak to moderate correlations among them. In fact, of all 10 possible correlations, 8 were weak and 2 moderate (see Table 108). The relationship between *Conditions of Confinement* and *Juvenile Justice* is especially striking due to a negative  $r$  value. This is understandable since a number of states with high punitiveness scores on the former index had relatively low scores on the latter. This finding largely supports Gordon’s (1989) claim that there are several ways in which jurisdictions can be punitive. Hence, being punitive across one dimension does not automatically guarantee high punitiveness scores across other dimensions of state punitiveness.

Table 108: Correlation Matrix with Five Indices

	Political & Symbolic Punishment	Incarceration	Punishing “Immorality”	Conditions of Confinement	Juvenile Justice
Political & Symbolic Punishment	-	.21	.59	.18	.42
Incarceration		-	.15	.06	.08
Punishing “Immorality”			-	.05	.29
Conditions of Confinement				-	-.06
Juvenile Justice					-

The correlations analysis showed that the five indices of state punitiveness are not highly correlated. Yet they all shed light on our understanding of state punitiveness, even if they measure different facets of it. Returning to our earlier example of a student’s college readiness demonstrates the rationale for doing so. A student may have astonishing mathematical skills but extremely weak vocabulary. Accordingly, the math scores can be weakly and negatively correlated with the scores for writing. And although these two scores,

one for mathematics and another for writing, do not measure the same underlying construct, they are both used toward understanding whether a high school student is ready for college. Then the sum of these scores is used to compare this student with her counterpart who may have very comparable total score due to a worse score in mathematics but a better score in writing. Similarly, despite a weak correlation among the indices of state punitiveness, they can be aggregated in an additive scale that creates the hierarchy of jurisdictions

#### *A Comparison of Two Scales of State Punitiveness*

The multidimensionality of the proposed measure reveals its superiority to previously used scales of punitiveness. Because one state comes across as very punitive due to its relatively high incarceration rate, the use of the death penalty, the reliance on mandatory minimum sentences, the adoption of three strikes laws, the application of life-without-possibility-of-parole, and the imposition of longer average prison sentences (these items were used by Michael Tonry (2001)), there might be a significant number of other criteria across which the same state can show remarkable leniency. To demonstrate such a possibility, I borrowed Tonry's six-criterion measurement, used the data collected for the present study to assign punitiveness scores (see Table 109), and arranged states from the least to most punitive. This is to determine whether the order of state punitiveness created by averaging forty-four criteria punitiveness scores does not affect the ranking.

This analysis shows that all but four states (Rhode Island, Missouri, New Hampshire and Georgia) changed their places on the punitiveness ladder (see Table 110). Three states (Vermont, West Virginia and Oregon) identified as minimally punitive by the 44-criteria measurement have been removed into the category of *less than moderately punitive*, while two

*less than moderately punitive* states (Iowa and Utah) became *minimally punitive* under the Tonry measurement. Moreover, three extremely punitive states (Alabama, Delaware and Texas) tuned into *more than moderately punitive* and one state (Maryland) *moderately punitive*.

This finding highlights the importance of including a maximum number of variables in an instrument of state punitiveness. Although such an approach requires a significant amount of work (e.g., a theoretical justification for inclusion, data collection and their adjustment for third variables), it captures the multi-level and often-contradictory nature of state punitiveness. A methodological challenge, and the excitement that comes with it, is identifying such contradictions and dealing with them when constructing the measurements of punitiveness. While an attempt was made to identify and meet these challenges throughout this thesis, I hope that future research on state punitiveness will further this debate.

Table 109: Overall Punitiveness Scores Based on Michael Tonry's Six-Criteria Measurement

State Name	Tonry's Six Criteria of Punitiveness With Corresponding Means						Mean $\frac{\sum X}{5}$
	Incarceration Rate (Stock)	Death Penalty Application	Mandatory Minimum Sentences <sup>a</sup>	Three-Strike Laws	Life Without Parole	Average Severity of Sentences <sup>b</sup>	
Alabama	3	3	-	0	3	3	2.4
Alaska	3	0	-	0	1	0	0.8
Arizona	2	4	-	0	1	3	2.0
Arkansas	1	4	-	2	3	0	2.0
California	2	4	-	3	2	2	2.6
Colorado	2	4	-	1	2	2	2.2
Connecticut	3	4	-	1	2	1	2.2
Delaware	4	4	-	0	4	0	2.4
Florida	1	4	-	2	4	4	3.0
Georgia	4	4	-	4	1	3	3.2
Hawaii	2	0	-	0	1	1	0.8
Idaho	1	2	-	0	3	3	1.8
Illinois	4	4	-	0	2	0	2.0
Indiana	3	4	-	3	0	2	2.4
Iowa	1	0	-	0	4	2	1.4
Kansas	3	2	-	3	0	4	2.4
Kentucky	4	3	-	0	1	1	1.8
Louisiana	4	3	-	3	4	2	3.2
Maine	0	0	-	0	3	4	1.4
Maryland	1	3	-	2	1	3	2.0
Massachusetts	1	0	-	0	4	4	1.8
Michigan	3	0	-	0	3	3	1.8
Minnesota	0	0	-	0	0	0	0.0
Mississippi	4	4	-	0	4	4	3.2
Missouri	2	3	-	0	2	0	1.4
Montana	4	4	-	3	3	4	3.6
Nebraska	0	4	-	0	3	2	1.8
Nevada	1	4	-	2	3	3	2.6
New Hampshire	0	1	-	0	4	2	1.4
New Jersey	0	0	-	2	0	1	0.6
New Mexico	1	4	-	1	0	4	2.0
New York	3	2	-	0	0	2	1.4
North Carolina	1	4	-	2	1	0	1.6
North Dakota	0	0	-	3	2	1	1.2
Ohio	3	3	-	0	0	4	2.0
Oklahoma	3	4	-	0	2	3	2.4
Oregon	2	3	-	0	1	2	1.6
Pennsylvania	2	3	-	2	4	4	3.0
Rhode Island	1	0	-	0	1	0	0.4
South Carolina	4	4	-	4	2	1	3.0
South Dakota	2	2	-	0	4	1	1.8
Tennessee	2	4	-	3	1	0	2.0
Texas	4	4	-	0	0	4	2.4
Utah	0	3	-	2	0	1	1.2
Vermont	4	0	-	1	2	0	1.4
Virginia	2	3	-	2	2	3	2.4
Washington	0	3	-	2	3	1	1.8
West Virginia	3	0	-	0	3	1	1.4
Wisconsin	0	0	-	2	0	2	0.8
Wyoming	0	2	-	0	4	3	1.8

<sup>a</sup> The present study does not include the variable of mandatory minimum sentences independent from the strikes legislation. Therefore, no numbers will be provided for this column.

<sup>b</sup> The average time served for all offenses (variable 17) was used as a proxy for average severity of sentences.

Table 110: A Comparison of Overall Punitiveness Scores (OPSs) Between the Present and Tonyr’s Models

State Name	Mean of 44 Variables $\frac{\sum X}{44}$	State Name	Mean of 5 Variables $\frac{\sum X}{5}$
Maine	1.14	Minnesota	0.0
Rhode Island	1.21	Rhode Island	0.4
Minnesota	1.26	New Jersey	0.6
Vermont	1.34	Alaska	0.8
North Dakota	1.39	Hawaii	0.8
West Virginia	1.41	Wisconsin	0.8
Alaska	1.52	North Dakota	1.2
New Jersey	1.53	Utah	1.2
Hawaii	1.59	Iowa	1.4
Oregon	1.60	Maine	1.4
Missouri	1.60	Missouri	1.4
New Hampshire	1.65	New Hampshire	1.4
Wisconsin	1.68	New York	1.4
South Dakota	1.70	Vermont	1.4
Utah	1.75	West Virginia	1.4
New Mexico	1.79	North Carolina	1.6
Washington	1.78	Oregon	1.6
Michigan	1.82	Idaho	1.8
New York	1.82	Kentucky	1.8
Iowa	1.92	Massachusetts	1.8
North Carolina	1.94	Michigan	1.8
Idaho	1.95	Nebraska	1.8
Connecticut	2.01	South Dakota	1.8
Arizona	2.04	Washington	1.8
Kentucky	2.07	Wyoming	1.8
Colorado	2.08	Arizona	2.0
Wyoming	2.09	Arkansas	2.0
Arkansas	2.11	Illinois	2.0
Massachusetts	2.12	Maryland	2.0
Kansas	2.15	New Mexico	2.0
Oklahoma	2.16	Ohio	2.0
Nevada	2.16	Tennessee	2.0
Nebraska	2.12	Colorado	2.2
Indiana	2.16	Connecticut	2.2
Pennsylvania	2.18	Alabama	2.4
Louisiana	2.19	Delaware	2.4
California	2.20	Indiana	2.4
Tennessee	2.27	Kansas	2.4
Ohio	2.25	Oklahoma	2.4
Illinois	2.30	Texas	2.4
Delaware	2.31	Virginia	2.4
Maryland	2.42	California	2.6
Texas	2.46	Nevada	2.6
Montana	2.46	Florida	3.0
Alabama	2.47	Pennsylvania	3.0
Virginia	2.49	South Carolina	3.0
Georgia	2.53	Georgia	3.2
Mississippi	2.54	Louisiana	3.2
South Carolina	2.65	Mississippi	3.2
Florida	2.72	Montana	3.6

*The Initial Quest for the Causes of State Punitiveness*

Although explaining the causes of state punitiveness goes beyond the scope of this work, a limited discussion of the relevant social factors seems unavoidable.

The existing variation in punitiveness' levels and types among American states may be explained by their populations' diversity in terms of race, age, education, religion (type of religion), religiosity (strength of religious beliefs expressed, for instance, through the frequency of participating in religious services), political affiliation (whether the public or elected officials—governors, mayors, senators, judges and prosecutors—are predominately Democrats, Republicans or Independents), population turnover (including both immigration and migration), economic development (median household income and unemployment rate), as well as by states' population size. This is by no means an exhaustive list of social factors that might affect the dynamics of state punitiveness. Yet these factors come to mind when one begins contemplating what might have influenced penal policy-making across the United States.

Relying on this list of factors, we can specify the following variables (with their operational definitions) and the hypotheses that emerge as they relate to state punitiveness scores:

1. *Race* - percent of whites in the overall population.

It is possible that racially heterogeneous jurisdictions in general and those with a high concentration of blacks and Hispanics in particular have higher punitiveness scores. Although this hypothesis may be supported by the racially discriminatory policies enforced in the U.S., and particularly in its southern region (e.g., the Jim Crow Laws and early versions of disenfranchisement laws) following the abolition of slavery and through Civil Rights

Movement, as the main basis for its direction served a simple observation that southern states, ones that still house more racially diverse communities when compared with northern states, were ranked as especially punitive.

2. *Age* - (a) median age and (b) percent of population 62 years old and above.

Because older people may favor stricter laws for their protection due to their relatively limited abilities to defend themselves from violent offenses (e.g., assault, robbery, or burglary), states with higher median age or percentage of the elderly might be especially punitive. This may explain why Florida, a jurisdiction with the highest percent of retirees (see Table 111), emerged as the most punitive state.

3. *Education* - percent of population with bachelor's degree or higher.

Higher educational attainment might be associated with lower state punitiveness because better-educated individuals may be more likely to recognize the adverse affects of strict sentencing policies and, therefore, less likely to elect government officials (legislators, governors, mayors, judges, and prosecutors) who advocate such policies.

4. *Immigration* - (a) percent of population born outside the United States, and (b) percent of population (5 years and over) who do not speak English at home.

A high proportion of immigrants, documented or undocumented, may be associated with higher state punitiveness scores. It is possible that as immigration increases, residents of a state support more punitive actions not merely toward those who have no legal right to reside in the U.S., but toward anyone who breaks the law. Such a punitive sentiment can be explained by various factors. First, supporting punitive policies may be an expression of the anger that Americans hold against those whom they often blame for taking their jobs away. Second, some may feel uncomfortable or even unsafe hearing a foreign language on a street.

5. *Income* - median household income.

Well-to-do states are less likely to be punitive. This is one of those hypotheses that can be easily argued both for and against. On the one hand, the wealth of a state may attract criminality, which may subsequently result in the punitivization of a jurisdiction. On the other hand, however, financial well-being may have a positive impact on people's happiness, and happy people might be less resentful toward anyone, including those who commit crimes. Besides, financial well-being permits the improvement of crime preventive measures, such as better educational and employment opportunities, the availability of public housing, extensive rehabilitative programs, and safe prison conditions, all of which should diminish the need for punitive policies.

6. *Unemployment rate*.

A high unemployment rate may be correlated with an increase in state punitiveness scores. It is possible that unemployment and crime rates are correlated positively, and a high level of criminality may result in toughening of a state's criminal law, as well as its arrest and incarceration practices. This hypothesis is related to the previous one, yet is somewhat different because having a low unemployment rate does not guarantee a high median household income due to the existence of many low-paid jobs.

7. *Population turnover* - percent of population that lived in the same house for the last 5 years.

High population turnover may be associated with increased punitiveness due to a lack of social cohesion. The longer people live in the same community/houses, the better they are known to their neighbors and the police, and such knowledge strengthens both informal and formal

control mechanisms. When these mechanisms are loosened, crime rates are likely to rise and, subsequently, punitive policies more likely to flourish.

8. *State population size.*

Large states tend to be less cohesive racially, linguistically, religiously, educationally, economically and otherwise. Such incohesiveness can be a reason for a high level of criminality that commonly triggers punitive changes in penal policies. Therefore, one can hypothesize that the larger the state population, the more punitive the state.

9. *Religion* - percent of state residents affiliated with (a) Evangelical Protestant Tradition, (b) Mainline Protestant Tradition, (c) Historically Black Protestant Tradition, (d) Catholic Tradition, (e) all of the above combined, and (f) no religious tradition.

Overall, it is possible that Christian beliefs in the United States are positively correlated with individual punitiveness. Here I have focused on Protestant and Catholic traditions because both of them are frequently associated among the public with holding harsh views toward those who disobey the laws of the community. Also, states with a higher percentage of residents without religious affiliation are less likely to be punitive.

10. *Religiosity* - percent attending religious services on a regular basis (e.g., every Sunday).

States with a larger population of church-goers might be more punitive than those with a smaller population. While most, if not all, religions teach forgiveness of a sin, historically many faith-based organizations (e.g., Spanish Inquisition) were pioneers in engineering especially tortures punishment practices. In some ways, this historical development may still influence contemporary Christianity and its American followers. Besides, systematic participation in organized religious services and rituals may be indicative of religious fundamentalism. Strong religious beliefs often include the belief that evil exists and should be

punished without compassion. Therefore, if criminals are perceived as evil-doers, their harsh punishment can be easily justified, according to this view.

11. *Political affiliation of (a) elected officials* (whether a governor is a Democrat or a Republican) and/or (b) *the public* (percent of the public that voted for a Republican presidential and senatorial candidate in 2004).

States that have Republican governments and voted republican in presidential and congressional elections are more likely to be punitive. This is because the idea of the necessity of punishing the violators of legal and moral norms is more logically intertwined with core Republican beliefs. These beliefs include: drug addiction is an immoral rather than a pathological occurrence; those who engage in prostitution, homosexual sexual intimacy, or abortion deserve criminal punishment; the death penalty is necessary for punishing serious offenders; international human rights law should be disregarded especially when it is incompatible with the U.S. laws, as well as its security, political and economic interests; public welfare services do more harm than good; prison rehabilitation programs are ineffective; and the right to gun ownership is imperative.

Testing these hypotheses requires a significant amount of state-by-state data and sophisticated multivariate analytical techniques. Moreover, the theoretical arguments expressed above should be more fully discussed and documented. Yet while this is the plan for future research, it seems necessary to offer the reader at least some basic explanations of how much these variables relate to the overall state punitiveness, as well as to its five indices. For this purpose, I obtained the readily available data from the U.S. Census Bureau, the Pew Forum, the

National Governors Association, and the Federal Election Commission (see Tables 111-113), and then ran Pearson's Correlations (see Table 114) and Independent-Sample T-Test analyses.

Table 111: Demographic Characteristics by State

State Name	Percent of Whites (one race)	Median Age (in years)	62 years and over	Bachelor's Degree or Higher	Foreign Born	Lang. Other than English Spoken Home	Median Household Income	Unemployment Rate	Lives in Same House in 1995	State Population Size
Alabama	71.1%	35.8	15.5%	19.0%	2.0%	3.9%	\$34,135	3.7%	57.4%	4,447,100
Alaska	69.6	32.2	7.2	24.7	5.9	14.3	51,571	6.1	46.0	626,932
Arizona	75.5	34.2	15.3	23.5	12.8	25.9	46,723	3.4	44.3	5,130,632
Arkansas	80.0	36.0	16.6	16.7	0.5	5.0	32,182	3.7	53.3	2,673,400
California	59.5	33.3	12.6	26.6	26.6	39.5	47,493	4.3	50.2	33,871,648
Colorado	85.2	34.3	11.6	32.7	8.6	15.1	47,203	3.0	44.1	4,301,261
Connecticut	81.6	37.4	16.0	31.4	10.9	18.3	53,935	3.5	58.2	3,405,565
Delaware	74.6	36.0	15.4	25.0	5.7	9.5	47,381	3.4	41.7	783,600
Florida	78.0	38.7	20.3	22.3	16.7	23.1	38,819	3.2	48.9	15,982,378
Georgia	65.1	33.4	11.6	24.3	7.1	9.9	42,433	3.6	49.2	8,186,453
Hawaii	24.3	36.2	15.5	26.2	2.5	26.6	49,820	3.8	56.8	1,211,537
Idaho	91.0	33.2	13.4	21.7	5.0	9.3	37,572	3.8	49.6	1,293,953
Illinois	73.5	34.7	14.2	26.1	12.3	19.2	46,590	3.9	56.8	12,419,293
Indiana	87.5	35.2	14.6	19.4	3.1	6.4	41,567	3.3	55.0	6,080,485
Iowa	93.9	36.6	17.3	21.2	3.1	5.8	39,469	2.8	56.9	2,926,324
Kansas	86.1	35.2	15.4	25.8	5.0	8.7	40,624	2.8	52.4	2,688,418
Kentucky	90.1	35.9	14.9	17.1	2.0	3.9	33,672	3.5	55.9	4,041,769
Louisiana	63.9	34.0	13.8	18.7	2.6	9.2	32,566	4.3	59.0	4,468,976
Maine	96.9	38.6	16.9	22.9	2.9	7.8	37,240	3.1	59.6	1,274,923
Maryland	64.0	36.0	13.5	31.4	1.1	12.6	52,868	3.2	55.7	5,293,486
Massachusetts	86.2	36.5	15.7	33.2	12.2	18.7	50,502	3.0	58.5	6,349,097
Michigan	80.2	35.5	14.5	21.8	5.3	8.4	44,667	3.7	57.3	9,938,444
Minnesota	89.4	35.4	14.2	27.4	5.3	8.5	47,111	2.9	57.0	4,919,479
Mississippi	61.4	33.8	14.4	11.1	1.4	3.6	31,330	4.3	58.5	2,844,658
Missouri	84.9	36.1	15.9	21.6	2.7	5.1	37,934	3.4	53.6	5,595,211
Montana	90.6	37.5	15.8	24.4	1.8	5.2	33,024	4.1	53.6	902,195
Nebraska	89.6	35.3	15.8	23.7	4.4	7.9	39,250	2.5	54.7	1,711,263
Nevada	75.2	35.0	11.0	18.2	15.8	23.1	44,581	4.0	37.4	1,998,257
New Hampshire	96.0	37.1	14.2	28.7	4.4	8.3	49,467	2.7	55.4	1,235,786
New Jersey	72.6	36.7	15.5	29.8	17.5	25.5	55,146	3.7	59.8	8,414,350
New Mexico	66.8	34.6	14.0	23.5	8.2	36.5	34,133	4.4	54.4	1,819,046
New York	67.9	35.9	15.2	27.4	20.4	28.0	43,393	4.3	61.8	18,976,457
North Carolina	73.1	35.3	14.4	22.5	5.3	8.0	39,184	3.4	53.0	8,049,313
North Dakota	92.4	36.2	17.0	22.0	1.9	6.3	34,604	3.0	56.8	642,200
Ohio	85.0	36.2	15.6	21.0	3.0	6.1	40,956	3.2	57.5	11,353,140
Oklahoma	76.2	35.5	15.6	20.3	3.8	7.4	33,400	3.3	51.3	3,450,654
Oregon	86.6	36.3	15.0	25.1	8.5	12.1	40,916	4.2	46.8	3,421,399
Pennsylvania	85.4	38.0	18.1	22.4	4.1	8.4	40,106	3.5	63.5	12,281,054
Rhode Island	85.0	36.7	16.7	25.6	11.4	20.0	42,090	3.6	58.1	1,048,319
South Carolina	67.2	35.4	14.5	20.4	2.9	5.2	37,082	3.6	55.9	4,012,012
South Dakota	88.7	35.6	16.6	21.5	1.8	6.5	35,282	3.0	55.7	754,844
Tennessee	80.2	35.9	14.8	19.6	2.8	4.8	36,360	3.5	53.9	5,689,283
Texas	71.0	32.3	11.9	23.2	13.9	31.2	39,927	3.8	49.6	20,851,820
Utah	89.2	27.1	10.1	26.1	7.1	12.5	45,726	3.4	49.3	2,233,169
Vermont	96.8	37.7	15.0	29.4	3.8	5.9	40,856	2.9	59.1	608,827
Virginia	72.3	35.7	13.4	29.5	8.1	11.1	46,677	2.7	52.2	7,078,515
Washington	81.8	35.3	13.3	27.7	10.4	14.0	45,776	4.1	48.6	5,894,121
West Virginia	95.0	38.9	18.1	14.8	1.1	2.7	29,696	4.0	63.3	1,808,344
Wisconsin	88.9	36.0	15.3	22.4	3.6	7.3	43,791	3.2	56.5	5,363,675
Wyoming	92.1	36.2	14.0	21.9	2.3	6.4	37,892	3.5	51.3	493,782

Source: U.S. Census-2000. Available at <http://www.census.gov/main/www/cen2000.html>

Table 112: Population Religious Characteristics by State

State Name	Evangelical Protestant	Mainline Protestant	Black Protestant	Catholic	Unaffiliated
Alabama	49	15	18	6	8
Alaska	-	-	-	-	-
Arizona	23	15	2	25	22
Arkansas	53	16	10	5	13
California	18	14	4	31	21
Colorado	23	19	2	19	25
Connecticut	10	13	4	43	23
Delaware	15	18	14	27	19
Florida	25	15	8	26	16
Georgia	38	16	16	12	13
Hawaii	-	-	-	-	-
Idaho	22	16	0	18	18
Illinois	19	17	9	32	15
Indiana	34	22	6	18	16
Iowa	24	30	1	25	15
Kansas	29	27	3	23	14
Kentucky	49	17	5	14	12
Louisiana	31	9	20	28	8
Maine	0	26	0	29	25
Maryland	15	20	18	18	17
Massachusetts	11	15	2	43	17
Michigan	26	19	8	23	17
Minnesota	21	32	1	28	13
Mississippi	47	11	23	9	6
Missouri	37	18	6	18	16
Montana	26	21	0	23	20
Nebraska	21	27	3	31	16
Nevada	13	11	2	27	21
New Hampshire	11	23	0	29	26
New Jersey	12	13	5	42	12
New Mexico	25	15	2	26	21
New York	11	16	5	39	17
North Carolina	41	21	13	9	12
North Dakota	24	35	0	25	12
Ohio	26	22	7	21	17
Oklahoma	53	16	3	12	12
Oregon	30	16	1	14	27
Pennsylvania	18	25	7	29	13
Rhode Island	10	13	4	43	23
South Carolina	45	18	15	8	10
South Dakota	24	35	0	25	12
Tennessee	51	18	8	7	12
Texas	34	15	8	24	12
Utah	7	6	1	10	16
Vermont	11	23	0	29	26
Virginia	31	20	10	14	18
Washington	25	23	1	16	23
West Virginia	36	32	2	7	19
Wisconsin	24	23	3	29	16
Wyoming	26	21	0	23	20

*Note:* The percentage of U.S. adults who are affiliated with these religious traditions. Data for Connecticut and Rhode Island were grouped together. Therefore, these states have identical percentages. The same applies to Montana and Wyoming, as well as New Hampshire and Vermont, and South Dakota and North Dakota. Also, Maryland included numbers for Washington D.C. In Utah, 58% of the population is affiliated with the Mormon Tradition.

Source: The Pew Forum, U.S. Religious Landscape Survey. Available at <http://religions.pewforum.org/maps>

Table 113: Political Affiliation by State

State Name	Political Affiliation of Governors	Voted Republican in 2004 Presidential Elections	Voted Republican in 2004 Congressional Elections (Senate only)
Alabama	Republican	62.5%	67.5%
Alaska	Republican	61.1%	48.6%
Arizona	Democrat	54.9%	76.7%
Arkansas	Democrat	54.4%	44.1%
California	Republican	44.4%	37.8%
Colorado	Democrat	51.7%	46.5%
Connecticut	Republican	43.9%	32.1%
Delaware	Democrat	45.8%	-
Florida	Republican	52.1%	49.4%
Georgia	Republican	58.0%	58.2%
Hawaii	Democrat	45.3%	21.0%
Idaho	Republican	68.4%	99.2%
Illinois	Democrat	44.5%	27.0%
Indiana	Republican	59.9%	37.2%
Iowa	Democrat	49.9%	70.2%
Kansas	Democrat	62.2%	69.2%
Kentucky	Democrat	59.5%	50.7%
Louisiana	Republican	56.7%	51.0%
Maine	Democrat	44.6%	33.7%
Maryland	Democrat	43.0%	33.7%
Massachusetts	Democrat	36.9%	-
Michigan	Democrat	47.8%	-
Minnesota	Republican	48.0%	-
Mississippi	Republican	59.1%	-
Missouri	Republican	53.3%	56.1%
Montana	Democrat	59.1%	-
Nebraska	Republican	66.0%	-
Nevada	Republican	50.7%	35.1%
New Hampshire	Democrat	49.0%	66.2%
New Jersey	Democrat	46.2%	-
New Mexico	Democrat	49.8%	-
New York	Democrat	40.1%	24.2%
North Carolina	Democrat	56.1%	51.6%
North Dakota	Republican	62.9%	31.7%
Ohio	Democrat	50.8%	63.8%
Oklahoma	Democrat	65.6%	52.3%
Oregon	Democrat	47.4%	31.7%
Pennsylvania	Democrat	48.5%	52.6%
Rhode Island	Republican	38.7%	-
South Carolina	Republican	58.1%	53.7%
South Dakota	Republican	59.9%	50.6%
Tennessee	Democrat	56.9%	-
Texas	Republican	61.1%	-
Utah	Republican	72.7%	68.7%
Vermont	Republican	38.8%	24.5%
Virginia	Democrat	53.8%	-
Washington	Democrat	45.6%	42.7%
West Virginia	Democrat	56.1%	-
Wisconsin	Democrat	49.4%	44.1%
Wyoming	Democrat	69.0%	-

Sources: For Governors' Political Affiliation: National Governors Association. Available at <http://www.nga.org/portal/site/nga/menuitem.42b929b1a5b9e4eac3363d10501010a0/?vgnnextoid=d54c8aaa2ebbf00VgnVCM1000001a01010aRCRD&vgnnextfmt=curgov>

For the percent voting republican in 2004 presidential (George W. Bush and Richard B. Chaney) and congressional elections: Federal Election Commission, 2004 Official Presidential Election Results. Available at <http://www.fec.gov/pubrec/fe2004/federalelections2004.shtml>

Table 114: Correlations Between Demographic, Economic, and Political Variables with State Punitiveness Scores

Variable Name	Overall Punitiveness Score	Five Indices of State Punitiveness				
		Political & Symbolic Punishment	Incarceration	Punishing "Immorality"	Conditions of Confinement	Juvenile Justice
Percent of white population	-.325**	-.226	-.124	-.312*	-.036	-.271*
Median age	-.154	-.160	.064	-.103	-.219	-.097
Percent of population 62 years and above	-.068	-.107	.111	-.024	-.155	-.057
Percent with Bachelor's degree and higher	-.174	-.390*	-.128	-.039	.206	-.078
Percent of foreign born population	.073	.004	-.136	.261*	-.072	.152
Percent of people speaking language other than English at home	.007	-.093	-.014	.189	-.143	.037
Median household income	-.125	-.299*	-.209	.021	.112	.077
Unemployment rate	-.007	.082	-.085	.020	-.130	.069
Living in the same house for last 5 years (Population turnover)	-.256*	-.430**	.100	-.212	-.016	-.176
State population size	.325**	.165	.104	.523**	-.036	.192
Percentage of adults who are affiliated with Evangelical Protestant tradition	.430**	.607**	.163	.278*	.025	.188
Percentage of adults who are affiliated with Mainline Protestant tradition	-.374**	-.348*	-.076*	-.281*	-.252	-.182
Percentage of adults who are affiliated with Black Protestant tradition	.604**	.540**	.173	.413**	.189	.542**
Percentage of adults who are affiliated with Protestant Tradition (All three combined)	.406**	.531**	.159	.255*	-.010	.269*
Percentage of adults who are affiliated with Catholic tradition	-.313**	-.561*	-.127	-.165	-.015	-.026
Percent unaffiliated with any religious tradition	-.405**	-.351*	-.178	-.247*	-.160	-.308*
Percent Voted Republican in 2004 Presidential Elections	.269*	.380**	.207	.108	.054	.016
Percent Voted Republican in 2004 Senatorial Elections	.245	.222	.408**	.096	.074	.245

Note: numbers represent Pearson's  $r$ .

\*\* Correlation is significant at the 0.01 level (1-tailed).

\* Correlation is significant at the 0.05 level (1-tailed).

As hypothesized, an increase in *the percent of white state residents* was associated with a decrease in the overall punitiveness score (OPS). This decrease is primarily attributable to the variables of *Punishing “Immorality”* and *Juvenile Justice*. One explanation for racially homogenous states being less punitive is their close proximity with Canada, and perhaps the spread of relatively non-punitive Canadian beliefs and penal policies, especially in the areas of dealing with the issues of morality (prostitution, drug abuse, and public drunkenness) and young offenders. Also, the belief that children are immature and less culpable for their actions seems more widespread in the northern part of the North American continent, and the administrative border between Canada and the United States may not be serving the role of a cultural divider.

*Median age* and *Percent of the population of 62 years old and above* did not emerge as statistically significant predictors of state punitiveness, even if they were negatively correlated with it. They however showed a negative correlation, which suggests that states with relatively younger populations and/or fewer retirees might become less punitive (on a statistically significant level) if a multivariate analysis were conducted.

Education did not correlate with the OPS but had a negative, statistically significant correlation with the index of *Political and Symbolic Punishment*, indicating that states with a higher concentration of college graduates (BA and higher) are more likely to disapprove of the death penalty, life imprisonment, disenfranchisement and three-strike laws.

The two immigration variables—*Percent of foreign-born population* and *Percent of residents speaking a non-English language at home*—were also statistically insignificant predictors of state punitiveness. This refutes our hypothesis that high immigration is associated with increased state punitiveness. At the same time, *Percent of foreign-born population* was

correlated positively with *Punishing "Immorality"*, suggesting that states with high proportions of naturalized citizens or non-citizens use more aggressive arrest policies toward moral offenses.

Neither the *Median household income* nor the *Unemployment rate* was correlated at a statistically significant level with the OPS. This can be explained by the fact that these two variables were positively correlated with some indices and negatively with others.

Expectedly, the analysis also shows that high population turnover was associated with increased punitiveness: as the percent of state residents living in the same house increased, the OPS of that state was likely to have decreased. The variable of *Population turnover* will be especially useful when comparing rural and urban communities, because the latter is likely to have higher turnover than the former. Such an analysis was inappropriate in this case because the present study collected the punitiveness data for states, and all states have both types of communities.

*State population size* was correlated positively, thus supporting my earlier argument that because large states tend to be less cohesive racially, linguistically, religiously, educationally, economically and otherwise, they may experience higher crime rates, which one would expect to trigger more punitive penal policies. Besides, it can be that larger states have more big cities, and in big cities crime rates are typically higher in comparison with rural areas.

The relationship between *Religion* and OPS deserves particular attention. Earlier I hypothesized that the close affiliation with both Protestant and Catholic traditions should yield higher OPS of a state. The statistical tests supported this hypothesis only partly: while states with higher concentration of Evangelists and Black Protestants were more likely to be highly punitive, states with the strong Mainline Protestant Tradition and Catholicism were less likely

to be so. This can be explained by the fact that Evangelists and Black Protestants might be more devoted believers than the two latter groups. Therefore, controlling for *Religiosity* (a percent attending religious ceremonies on a regular basis) seems necessary for explaining such a wide disparity in punitiveness scores between the states with predominantly Evangelical and those with Catholic residents. Unfortunately, because no state-by-state data on the strength of religious beliefs are readily available, such an analysis is impossible at this point.

Also, in support of the hypothesis that states with a higher percent of residents without religious affiliation are less likely to be punitive, the test showed a statistically significant moderate positive correlation between *Percent unaffiliated with any religious tradition* and the OPS. Accordingly, Atheism and Agnostism can be linked with decrease in state punitiveness.

Finally, Republican states are indeed more likely to be more punitive, even if the states with Republican ( $N = 21$ ,  $M = 2.00$ ,  $SD = .48$ ) and Democratic ( $N = 29$ ,  $M = 1.97$ ,  $SD = .33$ ) governors do not differ statistically ( $p = .42$  (1-tailed)) in terms of their OPSs. Also, states that elected a Republican or Democratic senator have no remarkable variation in their scores. So far, it is only the 2004 presidential election (Bush-Cheney v. Kerry-Edwards) that distinguishes between relatively punitive and non-punitive states.

This basic analysis demonstrated that the quest for the factors associated with state punitiveness must continue. While it became possible to highlight a number of demographic, economic and political variables that somewhat explained the state-level variations in punitiveness scores, future analyses should go beyond these variables by employing multivariate statistics and focusing on a host of historical and legislative events that shaped contemporary criminal justice system in the United States.

The tests described above showed stronger correlations among some demographic variables than among others. On the one hand, strongly correlated variables can be thought of as being better predictors of state punitiveness. It is easy to calculate  $r^2$  (by squaring each  $r$  from Table 114) to see how good the predictors these variables are.

On the other hand, however, having a high correlation does not mean that an observed effect is not attributable to third variables. For example, having a large population not affiliated with any religious tradition showed a strong negative correlation with the levels of state punitiveness. But it might be that those who are not following any religious tradition are in fact more liberal and it is their liberalism, not atheism or agnosticism per se, that determines the relatively low punitiveness scores of the state in which they reside in greater numbers. Therefore, a larger project that I am hoping to undertake must obtain more data and run multivariate analyses in order to isolate the effects of each variable on the punitiveness score. This will better show why some variables that have high correlation with punitiveness scores are in fact good predictors. Besides, those variables that emerged as statistically non-significant at this point might become significant predictors when we adjust for the effect of third variables.

*Implications of the Study of State Punitiveness*

The obvious question that presents itself at the end of a study concerned primarily with measuring a slippery concept is: why is it important to evaluate state-level differences in punishment practices and sentencing laws? The need for comparative studies such as this one can be divided into two broad categories: *knowledge* and *reform*. Accordingly, one can argue that comparative research on state punitiveness (whether within or between nations) satisfies the requirements of both basic and applied research.

Comparative criminal justice research in general and this dissertation in particular generate knowledge in four ways. First, the present study puts theoretical questions regarding state punitiveness in order. As argued earlier, one must first decide whether one jurisdiction is in fact more punitive than others and, if so, to what degree it is more punitive, before asking “why” questions. Knowing “to what degree” and more importantly “what accounts for increased punitiveness” allows us to move on to the question of “what causes one state to be more punitive than another”. The study provides a finer methodology of measuring state punitiveness, which should benefit researchers interested in comparative penology but can also lead to a better explanation of the causal theories of state punitiveness (Tonry, 2004; Whitman, 2003, 2006).

Second, comparative research teaches us about the penal practices, cultural values and belief systems of others.<sup>125</sup> And while the present study does not carry out a cross-national analysis, given the cultural and philosophical diversity of the U.S., the goal of learning about other parts of this diverse nation is fully applicable to this research. Besides, this study has developed a template that can be used in future cross-national comparisons.

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<sup>125</sup> “Others” does not necessarily mean foreign nations and is used here to denote U.S. jurisdictions other than one’s own.

Third, by learning about others and contrasting them with ourselves, comparative studies permit a better understanding of one's own criminal justice system. How harsh one's penal practices are cannot be known without differentiating these practices from those of other jurisdictions.

Fourth, we can educate others about our own punishment practices and share with them our stories of success and failure.

In addition to these important educational functions, the present study of state punitiveness also has significant practical implications. To begin with, it is useful to have a standard set of indicators to score states, regions, and countries on the extent to which their justice systems use punishment as a response to criminal conduct. Such a comparison may serve as a source of ideas for reforming those jurisdictions that are lagging behind. While assisting policy-makers in deciding what to do in order to improve punishment practices in various jurisdictions, comparative research is also a valuable tool in recognizing what not to do. If it is found that certain reforms were productive in some states, then other states might need to start experimenting with similar policies. Alternatively, if the reforms were not successful in some states then completely different actions would be warranted. And although this study does not provide a measure of success, it lays out the data that can be used to make some educated guesses.

Moreover, this study calls attention to the aspects of current American punitive practices that most need reform, as it provides empirical demonstration of the astonishing gap among the states in their reliance on various forms of punishment. While offering solutions clearly exceeds the scope of this dissertation, the meticulously organized data presented in this

work should assist criminal justice policy-making. The data help us to spot problems, and without identifying problems, one cannot seek solutions.

Comparative research on punishment is also a valuable tool in predicting criminal justice developments. It is hoped that future research will take advantage of the year-by-year and state-by-state criminal justice data compiled for this dissertation and use various statistical techniques in foreseeing what to expect in years to come. Such a proactive, as opposed to reactive, approach is beneficial not merely from a security stance but also from a fiscal standpoint. For example, one can estimate how much money federal and state governments would need to sustain the prison industry at some point in the future if we assume that the current reliance on imprisonment will persist.

Finally, this work, like other comparative studies on punishment, might be utilized to promote human rights debate and focus greater attention on human rights abuses in the criminal justice system. This will contribute to the advancement of constitutional and international human rights laws, both of which regulate states' responsibilities toward their own citizens. The benefit of raising and addressing human rights violations in America's justice system is twofold. While this process will result in greater respect and care for suspects, defendants, convicts, prisoners, probationers, parolees, formerly incarcerated individuals and their families, it will also improve America's standing in the world as a watchdog of human rights violations.

## CONCLUSION

This work has attempted to shed light on the concept of *state punitiveness*, which is a quality, although to different degrees, found in every penal culture. Based on the examination of 44 variables encompassing a mixture of dimensions of the construct across the 50 U.S. states (grouped in four regions), I suggested that the American South is highly punitive, the West and the Midwest moderately punitive, and the Northeast relatively lenient. I also identified Florida as the most punitive and Maine as the least punitive American jurisdictions.

Perhaps some readers would question the objectivity of selecting these criteria. I admit that this work does not provide an exhaustive list of all possible means of measuring state punitiveness; undeniably, some other factors can be found to demonstrate that in some ways the states that I characterized as highly punitive are less so. I kept this potential objection in mind throughout the research and I have tried my best to identify and adequately measure all variables that gauge the punitive qualities of criminal justice systems.

I also attempted to challenge a widespread view of southern punitiveness, but in vain. No matter how one operationalizes *state punitiveness*, the South always seems to lead the list of punitive jurisdictions and there is not enough paint to color the region as lenient. The American South is an anomaly of the contemporary criminal justice systems of Western civilization.

One final thought. At the beginning of this study, I proposed using regional variations in state punitiveness when comparing America's penal policies with those of other nations, instead of speaking of American harshness and European leniency as if they were two homogeneous phenomena (Tonry, 2001; Whitman, 2003). In many senses, Europe's criminal justice systems are becoming more and more harmonized and approximated, while the gaps

between such systems have historically been wide in the United States, with no signs of narrowing.

Therefore, to make sure that we are not comparing apples and oranges, we can take the least punitive U.S. region, which is the North-East, as documented by the present research, and contrast it with supposedly parallel continental European jurisdictions, e.g., the Scandinavian or Benelux states. Similarly, one can take America's South and compare it with the southern and eastern regions of Europe, which exhibit high penal austerity mainly due to poor prison conditions and lack of the procedural rights generally enjoyed by Western European and American suspects, defendants, and convicts.

This will require undertaking similar research on the European continent. An ambitious comparativist will face the challenges of the unavailability, unreliability, and incompatibility of the data from many parts of Europe. However, due to the persistent efforts of the Council of Europe, the United Nations, the Ministry of Justice of the Netherlands, and several other institutions to compile and publish criminal justice statistics,<sup>126</sup> such research, once only dreamed of by comparative scholars, is becoming possible. And again, the importance of such research is not limited merely to creating the labels of "extremely punitive" or "non-punitive", but to learn about other criminal justice systems, learn about our own, and try to identify and address criminal justice problems nationally and internationally. This aspect transports this work from the sphere of basic research into applied research.

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<sup>126</sup> One can immediately think of *The European Sourcebook of Crime and Criminal Justice Statistics*, which is already in its third edition (2006) covering the 2000-2003 data.

## Appendix

### Excerpts from Penal Codes of Fifty States Regarding Statutory Rape and Age of Consent (Variable 27)

#### **Alabama**

ALA. CODE § 13A-6-62. Rape in the second degree.

(a) A person commits the crime of rape in the second degree if:

(1) Being 16 years old or older, he or she engages in sexual intercourse with a member of the opposite sex less than 16 and more than 12 years old; provided, however, the actor is at least two years older than the member of the opposite sex.

§13A-6-64. Sodomy in the second degree.

(a) A person commits the crime of sodomy in the second degree if:

(1) He, being 16 years old or older, engages in deviate sexual intercourse with another person less than 16 and more than 12 years old.

§13A-6-70. Lack of consent.

(c) A person is deemed incapable of consent if he is:

(1) Less than 16 years old.

#### **Alaska**

ALASKA STAT. § 11.41.434. Sexual abuse of a minor in the first degree.

(a) An offender commits the crime of sexual abuse of a minor in the first degree if:

(3) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 16 years of age.

§ 11.41.436. Sexual abuse of a minor in the second degree.

(a) An offender commits the crime of sexual abuse of a minor in the second degree if:

(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is 13, 14, or 15 years of age and at least three years younger than the offender, or aids, induces, causes or encourages a person who is 13, 14, or 15 years of age and at least three years younger than the offender to engage in sexual penetration with another person;

(5) being 18 years of age or older, the offender engages in sexual contact with a person who is under 16 years of age.

#### **Arizona**

ARIZ. REV. STA. ANN. § 13-1405. Sexual conduct with a minor

A. A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age.

#### **Arkansas**

ARK.CODE ANN. § 5-14-103. Rape.

(a)(1) A person commits rape if he or she engages in sexual intercourse or deviate sexual activity with another person:

(C)(i) Who is less than fourteen (14) years of age.

§ 5-14-110. Sexual indecency with a child.

(a) A person commits sexual indecency with a child if:

(1) Being eighteen (18) years of age or older, the person solicits another person who is less than fifteen (15) years of age or who is represented to be less than fifteen (15) years of age to engage in sexual intercourse, deviate sexual activity, or sexual contact.

§ 5-14-125. Sexual assault in the second degree.

(3) Being eighteen (18) years of age or older, engages in sexual contact with another person, not the person's spouse, who is less than fourteen (14) years of age;

§ 5-14-126. Sexual assault in the third degree.

(2)(A) A person commits sexual assault in the third degree if the person being under eighteen (18) years of age engages in sexual intercourse or deviate sexual activity with another person not the person's spouse who is less than fourteen (14) years of age.

§ 5-14-127. Sexual assault in the fourth degree.

(a) A person commits sexual assault in the fourth degree if, being twenty (20) years of age or older, the person engages in:

(1) Sexual intercourse with another person, not the person's spouse, who is less than sixteen (16) years of age.

### **California**

CAL. PENAL CODE § 261.5. (a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a "minor" is a person under the age of 18 years and an "adult" is a person who is at least 18 years of age.

(d) Any person 21 years of age or older who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison for two, three, or four years.

### **Colorado**

COLO. REV. STAT. ANN. § 18-3-402. Sexual assault.

(1) Any actor who knowingly inflicts sexual intrusion or sexual penetration on a victim commits sexual assault if:

(d) At the time of the commission of the act, the victim is less than fifteen years of age and the actor is at least four years older than the victim and is not the spouse of the victim, or

(e) At the time of the commission of the act, the victim is at least fifteen years of age but less than seventeen years of age and the actor is at least ten years older than the victim and is not the spouse of the victim.

§ 18-3-405. Sexual assault on a child.

(1) Any actor who knowingly subjects another not his or her spouse to any sexual contact commits sexual assault on a child if the victim is less than fifteen years of age and the actor is at least four years older than the victim.

### **Connecticut**

CONN. GEN. STAT. § 53a-70. Sexual assault in the first degree: Class B or A felony.

(a) A person is guilty of sexual assault in the first degree when such person:

(2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person.

§ 53a-71. Sexual assault in the second degree: Class C or B felony.

(a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and:

(1) Such other person is thirteen years of age or older but under sixteen years of age and the actor is more than two years older than such person.

§ 53a-73a. Sexual assault in the fourth degree: Class A misdemeanor or class D felony.

(a) A person is guilty of sexual assault in the fourth degree when:

(1) Such person intentionally subjects another person to sexual contact who is (A) under fifteen years of age.

**Delaware**

DEL. CODE ANN. Tit. 11, §§ 771. *Rape in the third degree; class B felony.*

(a) A person is guilty of rape in the third degree when the person:

(1) Intentionally engages in sexual intercourse with another person, and the victim has not reached his or her sixteenth birthday and the person is at least 10 years older than the victim, or the victim has not yet reached his or her fourteenth birthday and the person has reached his or her nineteenth birthday and is not otherwise subject to prosecution pursuant to § 772 or § 773 of this title.

**Florida**

FLA. STAT. ANN. §. 794.05 *Unlawful sexual activity with certain minors.*

(1) A person 24 years of age or older who engages in sexual activity with a person 16 or 17 years of age commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. As used in this section, "sexual activity" means oral, anal, or vaginal penetration by, or union with, the sexual organ of another; however, sexual activity does not include an act done for a bona fide medical purpose.

**Georgia**

GA. CODE ANN. § 16-6-3. *Statutory Rape.*

(a) A person commits the offense of statutory rape when he or she engages in sexual intercourse with any person under the age of 16 years and not his or her spouse, provided that no conviction shall be had for this offense on the unsupported testimony of the victim.

§ 16-6-1. *Rape.*

(a) A person commits the offense of rape when he has carnal knowledge of:

- (1) A female forcibly and against her will; or
- (2) A female who is less than ten years of age.

§ 16-6-2. *Sodomy*

(2) A person commits the offense of aggravated sodomy when he or she commits sodomy with force and against the will of the other person or when he or she commits sodomy with a person who is less than ten years of age.

**Hawaii**

HAW. REV. STAT. ANN. § 707-730. *Sexual assault in the first degree.*

(1) A person commits the offense of sexual assault in the first degree if:

(b) The person knowingly engages in sexual penetration with another person who is less than fourteen years old; or

(c) The person knowingly engages in sexual penetration with a person who is at least fourteen years old but less than sixteen years old; provided that:

(i) The person is not less than five years older than the minor.

§ 707-732. *Sexual assault in the third degree.*

(1) A person commits the offense of sexual assault in the third degree if:

(b) The person knowingly subjects to sexual contact another person who is less than fourteen years old or causes such a person to have sexual contact with the person;

(c) The person knowingly engages in sexual contact with a person who is at least fourteen years old but less than sixteen years old or causes the minor to have sexual contact with the person; provided that:

(i) The person is not less than five years older than the minor.

Commentary: Act 1, Second Special Session Laws 2001, amended §§707-730 and 707-732 to require, for the offenses of sexual assault in the first degree and sexual assault in the third degree, that the minor be at least fourteen years old but less than sixteen years old, and the defendant be at least five years older than the minor and not married to the minor.

**Idaho**IDAHO CODE § 18-1506. *Sexual abuse of a child under the age of sixteen.*

(1) It is a felony for any person eighteen (18) years of age or older, with the intent to gratify the lust, passions, or sexual desire of the actor, minor child or third party, to:

(a) solicit a minor child under the age of sixteen (16) years to participate in a sexual act.

§ 18-6101. *Rape defined.*

Rape is defined as the penetration, however slight, of the oral, anal or vaginal opening with the perpetrator's penis accomplished with a female under any one (1) of the following circumstances:

1. Where the female is under the age of eighteen (18) years.

**Illinois**720 ILL. COMP. STAT. 5/11-6. *Indecent solicitation of a child.*

(a) A person of the age of 17 years and upwards commits the offense of indecent solicitation of a child if the person, with the intent that the offense of aggravated criminal sexual assault, criminal sexual assault, predatory criminal sexual assault of a child, or aggravated criminal sexual abuse be committed, knowingly solicits a child or one whom he or she believes to be a child to perform an act of sexual penetration or sexual conduct as defined in Section 12-12 of this Code.

"Solicit" means to command, authorize, urge, incite, request, or advise another to perform an act by any means including, but not limited to, in person, over the phone, in writing, by computer, or by advertisement of any kind.

"Child" means a person under 17 years of age.

**Indiana**IND. CODE ANN. § 35-42-4-3. *Child molesting*

Sec. 3. (a) A person who, with a child under fourteen (14) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits child molesting, a Class B felony. However, the offense is a Class A felony if:

(1) it is committed by a person at least twenty-one (21) years of age.

§ 35-42-4-5. *Vicarious sexual gratification; sexual conduct in presence of a minor*

Sec. 5. (a) A person eighteen (18) years of age or older who knowingly or intentionally directs, aids, induces, or causes a child under the age of sixteen (16) to touch or fondle himself or another child under the age of sixteen (16) with intent to arouse or satisfy the sexual desires of a child or the older person commits vicarious sexual gratification, a Class D felony. However, the offense is:

(1) a Class C felony if a child involved in the offense is under the age of fourteen (14).

§ 35-42-4-9. *Sexual misconduct with a minor*

Sec. 9. (a) A person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits sexual misconduct with a minor, a Class C felony. However, the offense is:

(1) a Class B felony if it is committed by a person at least twenty-one (21) years of age

**Iowa**IOWA CODE ANN. § 709.3. *Sexual abuse in the second degree*

A person commits sexual abuse in the second degree when the person commits sexual abuse under any of the following circumstances:

2. The other person is under the age of twelve.

§ 709.8. *Lascivious acts with a child*

It is unlawful for any person eighteen years of age or older to perform any of the following acts with a child with or without the child's consent unless married to each other, for the purpose of arousing or satisfying the sexual desires of either of them:

1. Fondle or touch the pubes or genitals of a child.

2. Permit or cause a child to fondle or touch the person's genitals or pubes.

3. Solicit a child to engage in a sex act or solicit a person to arrange a sex act with a child.

§ 702.5 Child

For purposes of title XVI, unless another age is specified, a "child" is any person under the age of fourteen years.

§ 702.17 Sex act

The term "sex act" or "sexual activity" means any sexual contact between two or more persons by: penetration of the penis into the vagina or anus; contact between the mouth and genitalia or by contact between the genitalia of one person and the genitalia or anus of another person; contact between the finger or hand of one person and the genitalia or anus of another person, except in the course of examination or treatment by a person licensed pursuant to chapter 148 , 148C ,150 ,150A, 151 , or 152 ; or by use of artificial sexual organs or substitutes therefore in contact with the genitalia or anus.

**Kansas**

KAN. STAT. ANN. § 21-3502. Rape

(a) Rape is: (1) Sexual intercourse with a person who does not consent to the sexual intercourse, under any of the following circumstances:

(2) sexual intercourse with a child who is under 14 years of age.

§ 21-3504. Aggravated indecent liberties with a child

(a) Aggravated indecent liberties with a child is:

(1) Sexual intercourse with a child who is 14 or more years of age but less than 16 years of age.

§ 21-3505. Criminal sodomy

(a) Criminal sodomy is:

(1) Sodomy between persons who are 16 or more years of age and members of the same sex or between a person and an animal;

(2) sodomy with a child who is 14 or more years of age but less than 16 years of age.

**Kentucky**

KY. REV. STAT. ANN. § 510.020. Lack of consent.

(3) A person is deemed incapable of consent when he is:

(a) Less than sixteen (16) years old.

§ 510.050. Rape in the second degree.

(1) A person is guilty of rape in the second degree when:

(a) Being eighteen (18) years old or more, he engages in sexual intercourse with another person less than fourteen (14) years old;

§ 510.060. Rape in the third degree.

(1) A person is guilty of rape in the third degree when:

(b) Being twenty-one (21) years old or more, he engages in sexual intercourse with another person less than sixteen (16) years old.

§ 510.080. Sodomy in the second degree.

(1) A person is guilty of sodomy in the second degree when:

(a) Being eighteen (18) years old or more, he engages in deviate sexual intercourse with another person less than fourteen (14) years old.

§ 510.090. Sodomy in the third degree.

(1) A person is guilty of sodomy in the third degree when:

(a) He engages in deviate sexual intercourse with another person who is incapable of consent because he is mentally retarded;

(b) Being twenty-one (21) years old or more, he engages in deviate sexual intercourse with another person less than sixteen (16) years old.

## **Louisiana**

### LA. REV. STAT. ANN. § 14:42. Aggravated rape

A. Aggravated rape is a rape committed upon a person sixty-five years of age or older or where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:

(4) When the victim is under the age of thirteen. Lack of knowledge of the victim's age shall not be a defense.

### § 14:43.1. Sexual battery

A. Sexual battery is the intentional engaging in any of the following acts with another person where the offender acts without the consent of the victim, or where the act is consensual but the other person, who is not the spouse of the offender, has not yet attained fifteen years of age and is at least three years younger than the offender:

(1) The touching of the anus or genitals of the victim by the offender using any instrumentality or any part of the body of the offender; or

(2) The touching of the anus or genitals of the offender by the victim using any instrumentality or any part of the body of the victim.

### § 14:80. Felony carnal knowledge of a juvenile

A. Felony carnal knowledge of a juvenile is committed when:

(1) A person who is nineteen years of age or older has sexual intercourse, with consent, with a person who is twelve years of age or older but less than seventeen years of age, when the victim is not the spouse of the offender; or

(2) A person who is seventeen years of age or older has sexual intercourse, with consent, with a person who is twelve years of age or older but less than fifteen years of age, when the victim is not the spouse of the offender.

C. Lack of knowledge of the juvenile's age shall not be a defense.

### § 14:80.1. Misdemeanor carnal knowledge of a juvenile

A. Misdemeanor carnal knowledge of a juvenile is committed when a person who is seventeen years of age or older but less than nineteen years of age has sexual intercourse, with consent, with a person who is fifteen years of age or older but less than seventeen years of age, when the victim is not the spouse of the offender, and when the difference between the age of the victim and age of the offender is greater than two years.

C. Lack of knowledge of the juvenile's age shall not be a defense.

### § 14:81.2. Molestation of a juvenile

A. Molestation of a juvenile is the commission by anyone over the age of seventeen of any lewd or lascivious act upon the person or in the presence of any child under the age of seventeen, where there is an age difference of greater than two years between the two persons, with the intention of arousing or gratifying the sexual desires of either person, by the use of force, violence, duress, menace, psychological intimidation, threat of great bodily harm, or by the use of influence by virtue of a position of control or supervision over the juvenile. Lack of knowledge of the juvenile's age shall not be a defense.

## **Maine**

### ME. REV. STAT. ANN. Tit. 17-A, § 253. Gross sexual assault

1. A person is guilty of gross sexual assault if that person engages in a sexual act with another person and:

B. The other person, not the actor's spouse, has not in fact attained the age of 14 years. Violation of this paragraph is a Class A crime; or [2003, c. 711, Pt. B, §2 (amd).]

### § 254. Sexual abuse of minors

1. A person is guilty of sexual abuse of a minor if:

A. The person engages in a sexual act with another person, not the actor's spouse, who is either 14 or 15 years of age and the actor is at least 5 years older than the other person. Violation of this paragraph is a Class D crime; [2001, c. 383, §21 (amd); §156 (aff).]

§ 255-A. Unlawful sexual contact

1. A person is guilty of unlawful sexual contact if the actor intentionally subjects another person to any sexual contact and:

E. The other person, not the actor's spouse, is in fact less than 14 years of age and the actor is at least 3 years older. Violation of this paragraph is a Class C crime; [2001, c. 383, §23 (new); §156 (aff).]

E-1. The other person, not the actor's spouse, is in fact less than 12 years of age and the actor is at least 3 years older. Violation of this paragraph is a Class B crime; [2003, c. 711, Pt. B, §3 (new).]

F. The other person, not the actor's spouse, is in fact less than 14 years of age and the actor is at least 3 years older and the sexual contact includes penetration. Violation of this paragraph is a Class B crime; [2001, c. 383, §23 (new); §156 (aff).]

### **Maryland**

MD. CODE ANN., CRIM. LAW § 3-304. Rape in the second degree

(a) Prohibited.- A person may not engage in vaginal intercourse with another:

(3) if the victim is under the age of 14 years, and the person performing the act is at least 4 years older than the victim.

§ 3-306. Sexual offense in the second degree

(a) Prohibited.- A person may not engage in a sexual act with another:

(3) if the victim is under the age of 14 years, and the person performing the sexual act is at least 4 years older than the victim.

§ 3-307. Sexual offense in the third degree

(a) Prohibited.- A person may not:

(3) engage in sexual contact with another if the victim is under the age of 14 years, and the person performing the sexual contact is at least 4 years older than the victim;

(4) engage in a sexual act with another if the victim is 14 or 15 years old, and the person performing the sexual act is at least 21 years old; or

(5) engage in vaginal intercourse with another if the victim is 14 or 15 years old, and the person performing the act is at least 21 years old.

### **Mussachusetts**

MASS. ANN. LAWS ANN. ch. 265, § 23. Rape

Whoever unlawfully has sexual intercourse or unnatural sexual intercourse, and abuses a child under sixteen years of age shall, for the first offense, be punished by imprisonment in the state prison for life or for any term of years, or, except as otherwise provided, for any term in a jail or house of correction, and for the second or subsequent offense by imprisonment in the state prison for life or for any term of years, but not less than five years; provided, however, that a prosecution commenced under the provisions of this section shall not be placed on file or continued without a finding.

### **Michigan**

MICH.COMP.LAWS.ANN. § 750.10a. Sexually delinquent persons; definition.

The term "sexually delinquent person" when used in this act shall mean any person whose sexual behavior is characterized by repetitive or compulsive acts which indicate a disregard of consequences or the recognized rights of others, or by the use of force upon another person in attempting sex relations of either a heterosexual or homosexual nature, or by the commission of sexual aggressions against children under the age of 16.

§ 750.520b. Criminal sexual conduct in the first degree; felony.

(1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

(a) That other person is under 13 years of age.

§ 750.520c. Criminal sexual conduct in the second degree; felony.

(1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:

(a) That other person is under 13 years of age.

§ 750.520d. Criminal sexual conduct in the third degree; felony.

(1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist:

(a) That other person is at least 13 years of age and under 16 years of age.

§ 750.520e. Criminal sexual conduct in the fourth degree; misdemeanor.

(1) A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if any of the following circumstances exist:

(a) That other person is at least 13 years of age but less than 16 years of age, and the actor is 5 or more years older than that other person.

### **Minnesota**

MINN. STAT. ANN. § 609.342. Criminal sexual conduct in the first degree.

Subdivision 1. Crime defined.

A person who engages in sexual penetration with another person, or in sexual contact with a person under 13 years of age as defined in section 609.341, subdivision 11, paragraph (c), is guilty of criminal sexual conduct in the first degree if any of the following circumstances exists:

(a) the complainant is under 13 years of age and the actor is more than 36 months older than the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(b) the complainant is at least 13 years of age but less than 16 years of age and the actor is more than 48 months older than the complainant and in a position of authority over the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense

§ 609.344. Criminal sexual conduct in the third degree.

Subdivision 1. Crime defined. A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if any of the following circumstances exists:

(f) the actor has a significant relationship to the complainant and the complainant was at least 16 but under 18 years of age at the time of the sexual penetration. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense.

### **Mississippi**

MISS. CODE ANN. § 97-3-65. Statutory rape

(1) The crime of statutory rape is committed when:

(a) Any person seventeen (17) years of age or older has sexual intercourse with a child who:

(i) Is at least fourteen (14) but under sixteen (16) years of age;

(ii) Is thirty-six (36) or more months younger than the person; and

(iii) Is not the person's spouse.

### **Missouri**

MO. ANN. STAT. § 566.020. Mistake as to incapacity or age--consent not a defense, when.

2. Whenever in this chapter the criminality of conduct depends upon a child being thirteen years of age or younger, it is no defense that the defendant believed the child to be older.

3. Whenever in this chapter the criminality of conduct depends upon a child being under seventeen years of age, it is an affirmative defense that the defendant reasonably believed that the child was seventeen years of age or older.

**Montana**MONT. CODE ANN. § 45-5-501. Definition.

(1) As used in 45-5-503, the term "without consent" means:

(b) the victim is incapable of consent because the victim is:

(iv) less than 16 years old.

§ 45-5-502. Sexual assault.

(3) If the victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury upon anyone in the course of committing sexual assault, the offender shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 4 years, unless the judge makes a written finding that there is good cause to impose a term of less than 4 years and imposes a term of less than 4 years, or more than 100 years and may be fined not more than \$50,000.

§ 45-5-503. Sexual intercourse without consent.

(3) (a) If the victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury upon anyone in the course of committing sexual intercourse without consent, the offender shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 4 years or more than 100 years and may be fined not more than \$50,000, except as provided in 46-18-219 and 46-18-222.

**Nebraska**NEB. REV. STAT. § 28-320.01. Sexual assault of a child; second or third degree; penalties

(1) A person commits sexual assault of a child in the second or third degree if he or she subjects another person fourteen years of age or younger to sexual contact and the actor is at least nineteen years of age or older.

**Nevada**NEV. REV. STAT. ANN. § 200.364. Definitions

3. "Statutory sexual seduction" means:

(a) Ordinary sexual intercourse, anal intercourse, cunnilingus or fellatio committed by a person 18 years of age or older with a person under the age of 16 years; or

(b) Any other sexual penetration committed by a person 18 years of age or older with a person under the age of 16 years with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of either of the persons.

**New Hampshire**N.H. REV. STAT. ANN. § 632-A:2. Aggravated Felonious Sexual Assault

I. A person is guilty of the felony of aggravated felonious sexual assault if such person engages in sexual penetration with another person under any of the following circumstances:

(k) When, except as between legally married spouses, the victim is 13 years of age or older and under 18 years of age and the actor is in a position of authority over the victim and uses this authority to coerce the victim to submit.

(l) When the victim is less than 13 years of age.

§ 632-A:3. Felonious Sexual Assault

A person is guilty of a class B felony if such person:

II. Engages in sexual penetration with a person other than his legal spouse who is 13 years of age or older and under 16 years of age; or

III. Engages in sexual contact with a person other than his legal spouse who is under 13 years of age.

**New Jersey**N.J. STAT. ANN. § 2C:14-2. *Sexual assault.*

c. An actor is guilty of sexual assault if he commits an act of sexual penetration with another person under any one of the following circumstances:

(4) The victim is at least 13 but less than 16 years old and the actor is at least four years older than the victim.

**New Mexico**N.M. STAT. ANN. § 30-9-11. *Criminal sexual penetration*

A. Criminal sexual penetration is the unlawful and intentional causing of a person to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse or the causing of penetration, to any extent and with any object, of the genital or anal openings of another, whether or not there is any emission.

C. Criminal sexual penetration in the first degree consists of all sexual penetration perpetrated:

(1) on a child under thirteen years of age.

D. Criminal sexual penetration in the second degree consists of all criminal sexual penetration perpetrated:

(1) on a child thirteen to eighteen years of age when the perpetrator is in a position of authority over the child and uses this authority to coerce the child to submit.

E. Criminal sexual penetration in the third degree consists of all criminal sexual penetration perpetrated through the use of force or coercion.

Whoever commits criminal sexual penetration in the third degree is guilty of a third degree felony.

Whoever commits criminal sexual penetration in the third degree when the victim is a child who is thirteen to eighteen years of age is guilty of a third degree felony for a sexual offense against a child.

F. Criminal sexual penetration in the fourth degree consists of all criminal sexual penetration:

(1) not defined in Subsections C through E of this section perpetrated on a child thirteen to sixteen years of age when the perpetrator is at least eighteen years of age and is at least four years older than the child and not the spouse of that child; or

(2) perpetrated on a child thirteen to eighteen years of age when the perpetrator, who is a licensed school employee, an unlicensed school employee, a school contract employee, a school health service provider or a school volunteer, and who is at least eighteen years of age and is at least four years older than the child and not the spouse of that child, learns while performing services in or for a school that the child is a student in a school.

**New York**N.Y. PENAL LAW § 130.05. *Sex offenses; lack of consent.*

1. Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without consent of the victim.

3. A person is deemed incapable of consent when he or she is:

(a) less than seventeen years old.

**North Carolina**N.C. GEN. STAT. § 14-27.7A. *Statutory rape or sexual offense of person who is 13, 14, or 15 years old*

(a) A defendant is guilty of a Class B1 felony if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person.

(b) A defendant is guilty of a Class C felony if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is more than four but less than six years older than the person, except when the defendant is lawfully married to the person.

**North Dakota**N.D. CENT. CODE § 12.1-20. Sex Offenses. 12.1-20-01. General provisions

In sections 12.1-20-03 through 12.1-20-08:

1. When the criminality of conduct depends on a child's being below the age of fifteen, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than fourteen.
2. When criminality depends on the victim being a minor, it is an affirmative defense that the actor reasonably believed the victim to be an adult.
3. When criminality depends on the victim being a minor, the actor is guilty of an offense only if the actor is at least four years older than the minor.

**Ohio**OHIO REV. CODE ANN. § 2907.04. Unlawful sexual conduct with minor.

(A) No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard.

(B) Whoever violates this section is guilty of unlawful sexual conduct with a minor.

(3) Except as otherwise provided in division (B)(4) of this section, if the offender is ten or more years older than the other person, unlawful sexual conduct with a minor is a felony of the third degree.

(4) If the offender previously has been convicted of or pleaded guilty to a violation of section 2907.02, 2907.03, or 2907.04 of the Revised Code or a violation of former section 2907.12 of the Revised Code, unlawful sexual conduct with a minor is a felony of the second degree.

§ 2907.06. Sexual imposition.

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

(4) The other person, or one of the other persons, is thirteen years of age or older but less than sixteen years of age, whether or not the offender knows the age of such person, and the offender is at least eighteen years of age and four or more years older than such other person.

**Oklahoma**OKLA. STAT. ANN. Tit. 21, § 1111. Rape defined

A. Rape is an act of sexual intercourse involving vaginal or anal penetration accomplished with a male or female who is not the spouse of the perpetrator and who may be of the same or the opposite sex as the perpetrator under any of the following circumstances:

1. Where the victim is under sixteen (16) years of age;

§ 21-888v1. Forcible sodomy.

B. The crime of forcible sodomy shall include:

1. Sodomy committed by a person over eighteen (18) years of age upon a person under sixteen (16) years of age

**Oregon**OR. REV. STAT. § 163.315. Incapacity to consent; effect of lack of resistance

(1) A person is considered incapable of consenting to a sexual act if the person is:

(a) Under 18 years of age.

**Pennsylvania**18 PA. CONS. STAT. ANN. § 3102. Mistake as to age

Except as otherwise provided, whenever in this chapter the criminality of conduct depends on a child being below the age of 14 years, it is no defense that the defendant did not know the age of the child or reasonably believed the child to be the age of 14 years or older. When criminality depends on the child's

being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age.

### **Rhode Island**

#### R.I. GEN. LAWS § 11-37-6. *Third degree sexual assault*

A person is guilty of third degree sexual assault if he or she is over the age of eighteen (18) years and engaged in sexual penetration with another person over the age of fourteen (14) years and under the age of consent, sixteen (16) years of age.

### **South Carolina**

#### SC Constitution 33. *Age of consent.*

No unmarried woman shall legally consent to sexual intercourse who shall not have attained the age of fourteen years. (1999 Act No. 3, Section 1, eff. February 16, 1999)

*Note:* Although the AOC in South Carolina is hard coded into the constitution, state statutes specify criminality for sexual conduct under the age of 16.

#### S.C. CODE ANN. § 16-15-140. *Committing or attempting lewd act upon child under sixteen.*

It is unlawful for a person over the age of fourteen years to willfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child.

#### § 16-3-655. *Criminal sexual conduct with minors*

(1) A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim who is less than eleven years of age.

#### § 16-15-140. *Committing or attempting lewd act upon child under sixteen*

It is unlawful for a person over the age of fourteen years to willfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child.

### **South Dakota**

#### S.D. CODIFIED LAWS § 22-22-1. *Rape defined*

Rape is an act of sexual penetration accomplished with any person under any of the following circumstances:

- (1) If the victim is less than ten years of age
- (5) If the victim is ten years of age, but less than sixteen years of age, and the perpetrator is at least three years older than the victim

### **Tennessee**

#### TENN. CODE ANN. §39-13-506. *Statutory rape*

a) Mitigated Statutory rape is sexual penetration of a victim by the defendant or of the defendant by the victim when the victim is at least thirteen (13) but less than eighteen (18) years of age and the defendant is at least four (4) years older than the victim.

(b) Statutory rape is the unlawful sexual penetration of a victim by the defendant or of the defendant by the victim when:

- (1) The victim is at least thirteen (13) but less than fifteen (15) years of age and the defendant is at least four (4) years older than the victim; or
- (2) The victim is at least fifteen (15) but less than eighteen (18) years of age and the defendant is more than five (5) years older than the victim.

**Texas**TEX. PENAL CODE ANN. § 21.11. *Indecency with a child.*

(a) A person commits an offense if, with a child younger than 17 years and not the person's spouse, whether the child is of the same or opposite sex, the person:

- (1) engages in sexual contact with the child or causes the child to engage in sexual contact; or
- (2) with intent to arouse or gratify the sexual desire of any person:
  - (A) exposes the person's anus or any part of the person's genitals, knowing the child is present; or
  - (B) causes the child to expose the child's anus or any part of the child's genitals.

**Utah**UTAH CODE ANN. § 76-5-401.2. *Unlawful sexual conduct with a 16 or 17 year old*

(1) For purposes of this section "minor" means a person who is 16 years of age or older, but younger than 18 years of age, at the time the sexual conduct described in this section occurred.

(2) A person commits unlawful sexual conduct with a minor if, under circumstances not amounting to rape, in violation of Section 76-5-402, object rape, in violation of Section 76-5-402.2, forcible sodomy, in violation of Section 76-5-403, or aggravated sexual assault, in violation of Section 76-5-405, the actor who is ten or more years older than the minor at the time of the sexual conduct:

- (a) has sexual intercourse with the minor.
- (3) A violation of Subsection (2) is a third degree felony.

§ 76-5-401.1. *Sexual abuse of a minor*

(1) For purposes of this section "minor" is a person who is 14 years of age or older, but younger than 16 years of age, at the time the sexual activity described in this section occurred.

(2) A person commits sexual abuse of a minor if the person is seven years or more older than the minor and, under circumstances not amounting to rape, in violation of Section 76-5-402, object rape, in violation of Section 76-5-402.2, forcible sodomy, in violation of Section 76-5-403, aggravated sexual assault, in violation of Section 76-5-405, unlawful sexual activity with a minor, in violation of Section 76-5-401, or an attempt to commit any of those offenses, the person touches the anus, buttocks, or any part of the genitals of the minor, or touches the breast of a female minor, or otherwise takes indecent liberties with the minor, or causes a minor to take indecent liberties with the actor or another person, with the intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant.

(3) A violation of this section is a class A misdemeanor.

§ 76-5-402.1. *Rape of a child.*

(1) A person commits rape of a child when the person has sexual intercourse with a child who is under the age of 14.

**Vermont**13 V.S.A. § 2602. *Lewd or lascivious conduct with child*

(a) No person shall willfully and lewdly commit any lewd or lascivious act upon or with the body, or any part or member thereof, of a child under the age of 16 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of such person or of such child.

§ 3252. *Sexual assault*

- (a) A person who engages in a sexual act with another person and
  - (1) Compels the other person to participate in a sexual act;
  - (3) The other person is under the age of 16, except where the persons are married to each other and the sexual act is consensual; or
  - (4) The other person is under the age of 18 and is entrusted to the actor's care by authority of law or is the actor's child, grandchild, foster child, adopted child or step-child;

**Virginia**VA. CODE ANN. § 18.2-63. Carnal knowledge of child between thirteen and fifteen years of age

If any person carnally knows, without the use of force, a child thirteen years of age or older but under fifteen years of age, such person shall be guilty of a Class 4 felony.

For the purposes of this section, (i) a child under the age of thirteen years shall not be considered a consenting child and (ii) "carnal knowledge" includes the acts of sexual intercourse, cunnilingus, fellatio, analingus, anal intercourse, and animate and inanimate object sexual penetration.

§ 18.2-370. Taking indecent liberties with children; penalties.

A. Any person 18 years of age or over, who, with lascivious intent, knowingly and intentionally commits any of the following acts with any child under the age of 15 years is guilty of a Class 5 felony:  
4) Propose to such child the performance of an act of sexual intercourse or any act constituting an offense under § 18.2-361

**Washington**WASH. REV. CODE §§ 9A.44.079. Rape of a child in the third degree

(1) A person is guilty of rape of a child in the third degree when the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.

(2) Rape of a child in the third degree is a class C felony.

**West Virginia**W.VA. CODE ANN. § §61-8B-2. Lack of consent.

(c) A person is deemed incapable of consent when such person is:

(1) Less than sixteen years old.

**Wisconsin**WIS. STAT. ANN. § 948.09. Sexual intercourse with a child age 16 or older

Whoever has sexual intercourse with a child who is not the defendant's spouse and who has attained the age of 16 years is guilty of a Class A misdemeanor.

§ 948.01. Definitions

In this chapter, the following words and phrases have the designated meanings unless the context of a specific section manifestly requires a different construction:

(1) "Child" means a person who has not attained the age of 18 years.

**Wyoming**WYO. STAT. ANN. § 6-2-304. Sexual assault in the third degree

(a) An actor commits sexual assault in the third degree if, under circumstances not constituting sexual assault in the first or second degree:

(i) The actor is at least four (4) years older than the victim and inflicts sexual intrusion on a victim under the age of sixteen (16) years.

§ 6-2-308. Criminality of conduct; victim's age.

(a) Except as provided by subsection (b) of this section, if criminality of conduct in this article depends on a victim being under sixteen (16) years of age, it is an affirmative defense that the actor reasonably believed that the victim was sixteen (16) years of age or older.

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