Introduction to Criminal Justice

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Boyoung Chae

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We hope you are as excited about this textbook as we were writing it. This is a free academic resource and a free textbook that can be printed at a low cost if you prefer paper. Southern Oregon University's Disability Resource has reviewed this textbook for accessibility to all students.

Introduction to the American Criminal Justice System is an Open Educational Resource (OER) https://en.wikipedia.org/wiki/Open_educational_resources that is licensed under the Creative Commons (CC 4.0) format https://creativecommons.org with support to complete this project from Open Oregon Educational Resources https://openoregon.org.

This introductory textbook is unique because it was a collaborative effort by all Criminology and Criminal Justice professors at Southern Oregon University (SOU) in Ashland, Oregon. This textbook will meet the learning objectives outlined through SOU and as a community college transfer course, as well as cover all other topics expected to find in an introductory course. This book can be used on a quarter or semester system, as well as cover topics that may get left out of some introductory texts such as controversial issues in the criminal justice system. Further, we made it as comprehensive as possible to cover core concepts and areas in the criminal justice system including theory, policing, courts, corrections, and the juvenile justice system. Additionally, we created examples that will help make difficult concepts or ideas more relatable. Every section provides an overview of key terms, critical thinking questions for course engagement, assignments, and other ancillaries such as multimedia links, images, activity ideas, and more.

Feel free to ask any questions. Email Shanell Sanchez at sanchezs2@sou.edu with any specific questions about the book or any other professor if it is specific to their page.

This OER could not be possible without the support from many different people. Our financial support came from a grant through Open Oregon https://openoregon.org.

Dr. Shanell Sanchez wants to personally thank all her colleagues at SOU for taking on this endeavor with her. The first plan was to adapt and edit an existing OER, but after an exhaustive search of OERs, we found there is a dearth of CCJ OERs. We realized that if we wrote this book, we would be one of the first CCJ OERs available. The initial idea seemed a bit overwhelming, but watching it come together was amazing. Dr. Sanchez had a vision for what an ideal textbook should look like for first-year students and our newest majors or potential majors, but it was not possible without all of us working together.

Amy Hofer at Linn-Benton Community College served as our grant manager, but she went beyond that. She has served as an excellent resource, mentor, and helped us find opportunities to present our experiences at conferences.

Dr. Jeffrey Gayton was our university librarian at Southern Oregon University and helped coordinate this project from the start of our application to the release of our OER going live.

Brian Stonelake, a professor in the Mathematics department at Southern Oregon University, provided excellent guidance and insight to us when we were applying for the grant.

Christina Richardson was our student that served as a contributing editor, as well as created our glossary for this OER. She went through the entire book to pose suggestions, edits, and comments that helped make the end product better.

Alison S. Burke, Ph.D., Professor of Criminology and Criminal Justice, Southern Oregon University, https://inside.sou.edu/criminology/faculty/burke.html

Alison S. Burke is a professor of criminology and criminal justice at Southern Oregon University. She earned her Ph.D. from Indiana University of Pennsylvania and her MCJ from the University of Colorado Denver. While in Denver, she worked with adjudicated youth in residential treatment facilities and group homes. She has published a variety of journal articles and book chapters related to juvenile justice, delinquency, and gender, and her primary research interests involve women and crime, juvenile justice and delinquency, and pedagogy in higher education. Her most recent book is titled *Teaching Introduction to Criminology* (2019).

David E. Carter, Ph.D., Associate Professor of Criminology and Criminal Justice, Southern Oregon University, https://inside.sou.edu/criminology/faculty/davidcarter.html

David E. Carter joined the Criminology and Criminal Justice Department in 2008. He received his Ph.D. from the University of Cincinnati. Dave served in the U.S. Army for 8 years as a linguist prior to attending school. He has published works in the Journal of Research in Crime and Delinquency in the area of life-course research, as well as in the Corrections Compendium, where he wrote about U.S. inmate populations. He also works with local agencies (in a consultative role) providing evidence-based practices and evaluations for correctional programs in the area of effective interventions and evidence-based programming. At SOU, Dave has helped facilitate the Lock-In event and annual that provides students with a hands-on experience of the justice system.

Brian Fedorek, Ph.D., Associate Professor of Criminology and Criminal Justice, Southern Oregon University, https://inside.sou.edu/criminology/faculty/brianfedorek.html

Brian Fedorek earned his doctorate at the Indiana University of Pennsylvania in Criminology. He has taught classes in Terrorism, Comparative Criminal Justice, Theories of Criminal Behavior, and introductory courses. His research interests include media and crime, criminological theory, and criminal violence. He has served on the board of the Western Association of Criminal Justice.

Tiffany L. Morey, M.S., Instructor of Criminology and Criminal Justice, Southern Oregon University, https://inside.sou.edu/criminology/faculty/tiffany-morey-m-s.html

Tiffany L. Morey has an almost three-decade career in the law enforcement arena. She retired as a Lieutenant from a police department in Las Vegas, Nevada. Her expertise is in law enforcement, crime scene investigation (CSI), and forensics fields. During her tenure in policing in Las Vegas she worked in patrol, the crime prevention division, community services, recruitment, special events, problem-solving unit (first ever unit/substation for her department in a high gang and drug area), undercover prostitution, and narcotics stings, search warrant service assistance, mounted unit departmental work, CSI (crime scene investigator), forensics, Sergeant and Sergeant field training program and master trainer, Lieutenant and

Lieutenant field training program, and finally Acting Captain. During this time, she was also chosen and paid by an independent firm to travel the country and conduct oral board interviews and assessment center testing and recruiting for law enforcement agencies and fire departments. She developed a ground-breaking class to assist candidates in the law enforcement hiring process and is now under contract to publish the related textbook/study guide. Tiffany continues to operate in the field of CSI and forensics as an expert investigator and witness of violent crime. She also runs a Crime Prevention Through Environmental Design (CPTED) business, offering citizens and owners of businesses CPTED reviews to ensure the safety of their homes and buildings. Finally, in her free time, she runs SOAR Wildlife Center (SoarWildlife.org), which is a non-profit organization, that rehabilitates sick, injured, or orphaned fawns and other baby mammals.

Lore Rutz-Burri, J.D., Professor of Criminology and Criminal Justice, Southern Oregon University, https://inside.sou.edu/criminology/faculty/rutz.html

Lore Rutz-Burri is a 1982 graduate of Southern Oregon State College (now SOU) with a Bachelor of Arts degree in Criminology and Political Science. After graduating, she lived in Southern Austria until 1984. Upon returning to the states, she earned an M.C.J (Master's degree in Criminal Justice) from the University of South Carolina. In 1985 she started in a Ph.D. program at the University of Maryland, College Park, but early on decided she would rather pursue a law degree. In 1989 she graduated "order of the coif" with her doctor of jurisprudence (JD) from the University of Oregon School of Law. Following law school, Lore clerked for the Superior Court of Alaska in Fairbanks for one year and then worked for 5 years as a deputy district attorney in Josephine County, Oregon. There, she prosecuted a variety of crimes, but mostly assault cases. In 1995, she began teaching criminology and criminal justice at SOU. Since 2015 she has been a part-time Circuit Court judge in the Josephine County courts. Lore has been married for over 27 years to her husband, Markus (a Swiss national). They have two sons– Severin (who studied at SOU and majored in psychology) and Jaston (who studied at U of O and majored in philosophy). She has both case books and introductory texts on criminal law and criminal procedure.

Shanell K. Sanchez, Ph.D., Assistant Professor of Criminology and Criminal Justice, Southern Oregon University, https://inside.sou.edu/criminology/faculty/dr-shanell-sanchez.html

Shanell Sanchez joined the Criminology and Criminal Justice department at Southern Oregon University in Ashland, Oregon in 2016. Prior to that, Shanell was an Assistant Professor in Criminal Justice at Colorado Mesa University in Grand Junction, Colorado. She received her Ph.D. from the University of Nebraska-Lincoln in Sociology in 2012. Her research and teaching interests are centered around social change and justice, inequality, and comparative crime and justice.

There is a dearth of OER textbooks in Criminology and Criminal Justice, which made creating this textbook all the more exciting. At times we faced challenges about what or how much to cover, but our primary goal was to make sure this book was as in-depth as the two textbooks we were currently using for our CCJ 230 introduction course. The only way we were willing to undertake this project was as good, or better than the current books students read. We have had very positive feedback about the required textbooks in the course but consistently heard how expensive the books were to buy. We also needed to ensure we met the learning outcomes outlined by SOU for a general education course, as well as the state of Oregon, to make sure this textbook helps students meet those outcomes.

SOU's catalog course description for CCJ 230 states this course surveys the functional areas of criminal justice in the United States. This OER covers law enforcement, criminal courts, sentencing, penal institutions, and community-based sanctions. It also includes historical and contemporary perspectives on components of the criminal justice system, as well as the legal and constitutional frameworks in which they operate.

Learning Objectives

- Students will increase the breadth of their knowledge and understanding of the American Criminal Justice System.
- Students will enhance their critical thinking skills via writing, reading, and discussion.
- Students will learn the history, functions, responsibilities, processes, and importance of each component of the criminal justice system.
- Students will become familiar with research and its relationship to criminal justice policy.
- Students will use the foundations learned about the American criminal justice system in future CCJ courses.

Additionally, myths and controversies are incorporated in the course covering the above-noted content areas in the American criminal justice system. In our experience, this tends to be the most exciting part of the class. It also helps students build all learning outcomes through assignments, readings, and materials covered in class. The primary goal when writing this book was to make it easy to read, with fun examples, thought-provoking discussion questions, and is accessible to all to ensure that students would read. The content level targeted first-year students who are taking their first course in Criminology and Criminal Justice, but also as

a general education course for those that may not intend to major. In order to ensure each area has accessible materials for the course and meets our learning objectives and goals, we have conducted preliminary research in order to determine our best option is moving forward.

1. **Crime, Criminal Justice and Criminology**
2. **Defining and Measuring Crime and Criminal Justice**
3. **Criminal Law**
4. **Criminal Justice Policy**
5. **Criminological Theory**
6. **Policing**
7. **Courts**
8. **Corrections**
9. **Community Corrections**
10. **Juvenile Justice**

We dedicate this book to our students at Southern Oregon University, who continuously work hard in our classes and develop lasting relationships with us. We also dedicate this book to all our partners, children, fur babies, and friends that supported us in the writing process.

1: Crime, Criminal Justice, and Criminology

Learning Objectives

This section will broadly introduce crime, criminal justice, and criminology. This section is designed to be a broad overview of what the subsequent chapters will cover in detail. It also demonstrates how the United States creates laws, policies enacted to enforce laws, and the role of the media. After reading this section, students will be able to:

- Understand the differences between deviance, rule violations, and criminality
- Explain the differences between the interactionist, consensus, and conflict views in the creation of laws
- Identify the three components of the criminal justice system
- Discuss the differences between crime control and the due process model, and application examples to each
- Describe the wedding cake model theory and application examples to each tier
- Briefly explain the role of the media and how media may spread myths in society
- Briefly understand the unique role of victims in the criminal justice process

Background Knowledge Probe: The goal here is to assess current knowledge about the criminal justice system at the start of the course. Each of these topics is covered throughout the course, and they will often be a controversial topic and topics for debate.

You will indicate whether you know each statement to be True or False, but there is no right or wrong answer since it is just to assess your background knowledge.

1. Blacks commit more crimes than any other racial group.

2. The United States has the lowest recidivism rates in the world (return to prison).

3. The death penalty is cheaper than life imprisonment.

4. Politicians shape our thoughts on crime, even if they are inaccurate.

5. Children are most likely to be killed by a stranger.

6. A stranger is most likely to physically harm you.

7. White-collar crime costs our country more every year than street crime.

8. Juveniles are more violent today than ever before.

9. Immigrants commit more crimes than native-born people.

10. Violent crime has risen in the United States over the last 20 years.

SHANELL SANCHEZ

Theft as a Child

The first lesson in crime and criminality I remember was when I was in second grade and stole something from a local drug store. I thought that the bracelet was shiny and perfect. At first, I remember wanting to try it on, but then I did not want to take it off. I had more questions than my Nana may have been ready to answer about why I did it and why I could not keep it. I had to take the bracelet back, which hurt because I loved it. Because of guilt or shame, I told my grandma what I did.

Think about a time in your life when you may have done something similar. Was this first lesson in crime and criminality from the person you were raised by such as a parent(s) or grandparent(s)? Did they teach you that what you did was a crime and, hopefully, how to correct this wrong at a young age?

You were probably punished, and they may have consisted of helping out with more chores or losing your allowance to pay back what you stole.

Imagine all the questions you may have for your parents at the moment: Why was it wrong? What would happen to me if I did not tell you? What is a crime? Who decides what makes a crime? What happens to me if I commit a crime and get caught? What is my punishment? Why was it wrong when there were so many polishes there?

Further, I had to help out around the house for the weekend. In exchange for all this, she did not tell my dad because she knew her punishment was sufficient, and to tell him may be excessive. She took a balanced approach to punishment and I think this is why it was so effective. It was not too strict, it was hard to complete, and I had to think about what I did.

Most criminologists define **crime** as the violation of the laws of a society by a person or a group of people who are subject to the laws of that society (citizens). Thus, crime is defined by the State or Federal government. Essentially, crime is what the law states, and a violation of the law, stated in the statute, would make actions criminal.[1]

For example, if someone murdered another individual in the process of stealing their automobile most people would see this as a criminal and a straightforward example of crime. We often see murder and robbery

1. Lynch, M., Stretesky, P., Long, M. (2015). *Defining crime: A critique of the concept and its implication.* Palgrave Macmillan: US.

as wrong and harm society, as well as social order. However, there are times crime is not as straightforward though and people may hesitate to call it criminal. The community I live in, and many others throughout the area, post signs that it is illegal to give food and other items to homeless individuals in need. If one were to violate this law and give food to a homeless person it would not involve harm to individuals, but to the social order.

Adele MacLean joined others in an Atlanta park to feed the hungry the Sunday before Thanksgiving and was given a citation and a summons to appear in court. Ultimately, MacLean's case was dropped when she showed up in court, but she and her lawyers argued the citation for serving food without a permit was improper and demonstrates callousness toward the homeless. The city and some advocates say feeding people on the streets can hinder long-term solutions and raise sanitation concerns. [2] Approximately 40 cities across the nation have active laws to restrict food sharing, and a few dozen more had attempted such restrictions, according to the National Coalition for the Homeless. [3]

We will talk later about how we may create laws based on what can cause harm. Harm can be to the social order, physical, economic, social, emotional, environmental, and more. In order to ensure that people receive justice in today's society, we use the criminal justice system to administer punishment or reward, and those crimes are often punished based on morals and norms.

The **criminal justice system** is a major social institution that is tasked with controlling crime in various ways. Police are often tasked with detecting crime and detaining individuals, courts often adjudicate and hand down punishments, and the correction system implements punishments and/or rehabilitative efforts for people who have been found guilty of breaking the law.

Criminal Justice Process

When the law is broken, the criminal justice system must respond in an attempt to make society whole again. The criminal justice system is made up of various agencies at different levels of government that can work independently and together, but each attempting to deal with crime. Challenges may arise when agencies do not work together or attempt to work together inefficiently. The notorious serial killer Ted Bundy was an example of U.S. law enforcement agencies not working together because of the lack of technological advancement to freely exchange information and resources about killings in their area. Bundy exploited gaps in the traditional law enforcement, investigative processes throughout different jurisdictions, and ultimately was able to avoid arrest and detection. If various agencies at the Federal, State and Local law enforcement level had worked together they could have potentially stopped Ted Bundy sooner. Following Ted Bundy, a Multi-agency Investigative Team manual, also known as the MAIT Taskforce, was created through the National Institute of Justice to develop information about the crime, it causes, and how to control it https://www.ncjrs.gov/pdffiles1/Digitization/110826NCJRS.pdf. One of the values of the United States is that local agencies will control their local community, but at times this may create unexpected complications.

Working Together?

2. Brumback, K. (2017). Cities, volunteers clash over feeding people without housing in public. Associated Press. https://www.seattletimes.com/nation-world/cities-volunteers-clash-over-feeding-homeless-in-public/
3. National Coalition for the Homeless. (2018).

You are to create an argument for or against law enforcement agencies working together. Some countries have national police forces, whereas we do not. Be prepared to defend your position in the class.

Although agencies may operate differently, the way cases move through the criminal justice system is consistent. The first step after getting caught stealing something from a store is involvement with police when law enforcement is called. The next step in the process is to proceed through the court system to determine guilt or innocence. If you are found guilty then you will receive a sentence that will be carried out in the next step. After conviction, you move to the correctional system for formal punishment and/or treatments as determined by the courts. An individual may not go through the entire process and criminal justice officials decide whether the case should continue on to the next stage. Perhaps the officer decides not to cite you and your contact ends there. However, it may be the district attorney (DA) that decides to drop your case before it even goes to trial. Regardless, the process is typically cops, courts, and then corrections. We will explore each of these in greater detail later on.

News Box: In 2016, more people were arrested for marijuana possession than for all crimes the FBI classifies as violent. [4] Overall in 2016, roughly 1.5 million people were arrested for drug-related offenses, up slightly year-over-year [5] Marijuana enforcement and criminalization goes to the heart of some of the most pressing issues facing the criminal justice system, policymakers, citizens, and the world. Is criminalizing drug use effective, especially for marijuana? Is spending money on enforcing drug laws, prosecuting drug crimes, and punishing drug offenders effective? The United States has taken a get-tough approach toward the War on Drugs, created mandatory minimum sentences, and punished people in large numbers but is it effective?

4. https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-18
5. Ingraham, C. (2017). More people were arrested last year over pot than for murder, rape, aggravated assault, and robbery — combined. *The Washington Post.* https://www.washingtonpost.com/news/wonk/wp/2017/09/26/more-people-were-arrested-last-year-over-pot-than-for-murder-rape-aggravated-assault-and-robbery-combined/?noredirect=on&utm_term=.62735d3474ea

SHANELL SANCHEZ

Nude Ultimate Frisbee

Imagine you recently moved to Oregon for work from Georgia after graduating college and hope to make new friends. Georgia has been your home forever, so Oregon is entirely new. Then one day at the dog park you run into a guy that seems like someone you would like to hang out with and he tells you to come out and play ultimate frisbee this weekend. You decide to take the leap and meet new people, play a new sport, and have some fun.

You arrive on the field, but notice something that stands out as different to you and wonders 'is this allowed in Oregon?' Some women and men are naked, some fully and some just certain parts exposed, but no one seems uncomfortable. You look around at the topless players, all adults, and wonder if this is the wrong place. Other people in costume walk around like Unicorns, Mario, Rainbow Brite, among others. Suddenly, thoughts start racing through your mind: "Why are people dressed strangely? Is it legal to be nude in public in the state of Oregon? Why does no one seem to mind? Can I keep my clothes on? What will my family in Georgia think? Should I just go back to my apartment now?"

Suddenly, the guy from the dog park runs up and tells you to come on over so he can introduce you to the team. Situations like this are often examples we use in the college classroom to demonstrate the difference between deviance, rule violations, and criminal violations. Sometimes there are times that behaviors that appear to be deviant are not illegal, but other times behaviors that are illegal are not deviant.

Just about everyone in society has done something that someone else would disagree with and see as deviant. For example, I recently wore clothes to the gym that were out of style but how did I know they were out of style? Well, easy! The reaction of others to my lack of style in the gym was clear that it is no longer cool to wear knee-high socks with athletic shorts to the gym.

Another time I was at Thanksgiving dinner with my family and I expressed open support for a politician that no one else in the family supported. Their reactions to my support of him made it evident that I was the deviant one that was not going along with the typical political views expected in my reasonably conservative, Republican family.

Alternatively, perhaps I am deviant when I tell you my favorite show on television is, and always will be, the Golden Girls, which seems odd for someone in their early thirties. Perhaps someone thinks it is

utter nonsense and 'crazy' wasting my time watching such shows. These are just a few examples where my behavior, thoughts, actions, or beliefs may be different from those around me.

From a sociological perspective, social norms are all around us and are accepted norms and behaviors that are defined within a specific group. The group you are in can change, which would mean the norms and behaviors that are acceptable at any given time may change.
[1]

Deviance is behavior that departs from the social norm. Goode argues that four things must happen in order for something deviant to take place or exist:

1) a rule or norm must be established; 2) someone has to violate that rule or norm; 3) there must be an audience or someone, that witnesses the act and judges it to be wrong; 4) and there is likely going to be a negative reaction from that audience that can come in many forms (i.e., criticism, disapproval, punishment, and more).

To commit an act of deviance one does not need to violate a dangerous norm, and not all acts that are deviant are criminal. Not all criminal acts are deviant either. Deviance falls on a spectrum that can range from really deviant to not so deviant but remember it is dependent on the audience. Think back to the previous comment about the show Golden Girls. My grandma would not find that as deviant as my husband does because we grew up watching it together. We spent many hours on the couch laughing away at the silliness of it all, so we would both agree it is a beautiful show. [2]



"Facial Tattoos and Piercings"

Applying Knowledge

Assignment: Apply Goode's definition of what needs to happen in order for something to be considered deviant in no less than 500 words and following the example below.

Example: The awkward outfit to the gym: knee socks, athletic shorts, and an oversized Broncos t-shirt mentioned above could be deviant. Based on Goode's definition of deviance, this attire departed from the social norm at the gym in 2018. Whether we realize it or not some specific rules or norms are established in the gym (1); sometimes we have a dress code, but other times, we have to keep up with current 'hip trends' such as yoga pants for women in 2018. Next, I violated that norm by my attire (2); since it was a busy Monday night lots of people saw my attire, my audience, that was able to witness my act and then judge it (3). Lastly, they cannot kick me out for not dressing cool, but the awkward smirks, stares, and giggles were all I needed to know that my clothes were deviant and not cool (4). This could certainly have not been true in 1950, 1980, or even the early 2000s. If I think back to when I started lifting over a decade ago, yoga pants were unheard of and no one wore anything 'tight' to the gym. Today yoga pants are regular and in some parts of the country for women and men.

1. By Tuerto - [1], CC by-SA 3.0, https://commons.wikimedia.org/w/index.php?curid=26526042
2. Goode, E. (2015). *Deviant Behavior,* (10th ed.). New York: Pearson, Education.

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Social Control Exercise

Assignment: We rely on informal social control to influence people's behavior, such as giving the stink eye, cold shoulder, or correcting someone's behavior in order to ensure people conform. Think about a time when a parent, guardian, coach, employer, or teacher (agents of social control) used informal social control to respond to your behavior. What did the agent of informal social control do? Provide an example of when informal social control was applied to another person. What were they doing and how was their behavior controlled through informal social control?

Example: Talking on the phone with a work-related matter and kids start bickering over the slime. I am unable to put the phone down, so I relied on hand motions to show them it was unacceptable. There was no need to hang up or say anything at all. The eye actions indicated they were acting inappropriate and their behavior changed.

Norms can be internalized, which would make an individual conform without external rewards or punishments. There are four types of social norms that can help inform people about behavior that is considered acceptable: folkways, mores, taboos, and law. Further, social norms can vary across time, cultures, places, and even sub-group. [1]

Think back to your first experiences in school and surely you can identify some folkways and mores learned. **Folkways** are behaviors that are learned and shared by a social group that we often refer to as "customs" in a group that are not morally significant, but they can be important for social acceptance. [2] Each group can develop different customs, but there can be customs that are embraced at a larger, societal level.

Folkway Example

Imagine sitting in the college classroom with sixty other people around. As a professor who teaches early morning classes, it is always encouraged to eat if hungry. However, everyone must be considerate of those around them.

1. Goode, E. (2015). *Deviant Behavior,* (10th ed.). New York: Pearson, Education.
2. Augustyn, A., Bauer, P., Duignan, B., Eldridge, A., Gregersen, E., Luebbering, J.E., etc..., (N.D.). *Folkway, Encyclopedia Britannica.*

You should not chew loudly. That would be considered rude, and it is against class 'customs' to do so. To make it worse, imagine burping without saying 'excuse me.' These would be folkway violations. Remember, this may not be disrespectful in all cultures, and it is very subjective.

Perhaps stricter than folkways are more because they can lead to a violation of what we view as moral and ethical behavior. **Mores** are norms of morality, or right and wrong, and if you break one it is often considered offensive to most people of a culture. [3] Sometimes a more violation can also be illegal, but other times it can just be offensive. If more is not written down in legislation, it cannot get sanctioned by the criminal justice system. Other times it can be both illegal and morally wrong.

More Example

If one attended a funeral for a family member, no one would expect to see someone in bright pink clothes or a bikini. Most people are encouraged to wear black clothing out of respect. Although there may not be specific rules or laws that state the expected attire to wear to a funeral, it would be against what most of American society views as right and wrong to attend a funeral in a bikini or be in hot pink leotards. It would be disrespectful to the individual people are mourning. Both mores and folkways are taught through socialization with various sources: family, friends, peers, schools, and more.

A **taboo** goes a step further and is a very negative norm that should not get violated because people will be upset. Additionally, one may get excluded from the group or society. The nature and the degree of the taboo are in the mores. [4]

Taboo Example

A student once gave the example of a man in their neighborhood in Colorado that had multiple wives and also had ten different children from the women. In most of American culture, it is seen as unacceptable to have more than one spouse/partner. However, there are instances where having children with multiple people would not be seen as taboo. Specifically, if a man or woman remarries and then has another child with their new partner. However, again, this is more acceptable today than in the past because of the greater societal acceptance of divorce and remarriage.

If one is religious think of something taboo in that specific religion? How about a sports team in college? Band? Any ideas?

Lastly, and most important to the study of crime and criminal justice, our laws. Remember, a social norm is an obligation to society that can lead to sanctions if one violates them. Therefore, **laws** are social norms that

3. Sumner, W. (1906). *Folkways.*
4. Sumner, W. (1906). *Folkways.*

have become formally inscribed at the state or federal level, and can laws can result in formal punishment for violations, such as fines, incarceration, or even death. Laws are a form of social control that outlines rules, habits, and customs a society uses to enforce conformity to its norms.

Law Example

Let us go back to our example of having multiple wives for a moment. It is illegal, a violation of law, to have multiple wives in American culture. It has not always been this way, and it is not true in every country, but in the United States, it was viewed as so taboo, morally and ethically wrong, that there are laws that can punish people for marrying more than one person at a time. However, there may be some people that do not think it is wrong or some groups, but regardless, it is still illegal.

The following link is for Oregon statue ORS 163.515 Bigamy https://www.oregonlaws.org/ors/163.515

Remember our previous discussion on being the new person to Oregon and trying to figure out if it is allowed to be nude at an ultimate frisbee practice, but they do not feel morally or ethically wrong. The first thing one may do is go home and look up some rules and see if they are violating ultimate frisbee rules. Next, one may check out Oregon laws governing clothing to see if they are violating laws by being nude. In the end, one finds out that it is not 'illegal,' so you cannot call the cops, but you certainly did find a case in Eugene, Oregon that determined not wearing clothes can be a violation of rules on the college campus. https://www.oregonlive.com/news/index.ssf/2009/04/uo_board_says_no_clothes_no_ul.html However, this is a recreational league, and it does not appear to have any formal rules established. No one has to make a decision that is hard: Does one want to be part of a subculture that endorses nudity? Does this go against one's morals and ethics? Alternatively, is one willing to be part of the team and encourage acceptance of a new norm? The criminal justice system cannot act for merely to violate norms, but at times, what feels like a norm can lead to criminal justice involvement. For example, walk a town or city, and many may be found jaywalking because it may be safer, faster, or more accessible. A person can get a ticket for it in most communities because it is technically violating a law. That is the thing with the line between deviance, rule violations, and criminality—it does not allow mean we agree. There are many examples of laws that are not deviant and things that are deviant some subcultures may wish to be illegal. Most, but not all crimes are deviant, and not all deviant acts are criminal. The question then becomes: well, how then do we as a society decide who does and does not have the opportunity to make law?



Jaywalking

Adam Ruins Everything: Why Jaywalking is a Crime? https://www.trutv.com/shows/adam-ruins-everything/videos/why-jaywalking-is-a-crime.html

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Tattoos at Work

An article by Forbes in 2015, encourages employers to revisit their dress code expectations, with a specific suggestion on lifting the 'tattoo taboo.' The article argues "allowing employees to maintain their style or grooming allows your company to project how genuine you are as a brand to employees and to the customers they support." So, instead of suggesting tattoos are taboo in the workforce to employees, according to the article, one can encourage people to 'project who they are' by accepting tattoos and ultimately, improve your business. This example demonstrates how societal changes in how deviance can change through time and space.

Read the Forbes article to learn more about this discussion:

https://www.forbes.com/sites/micahsolomon/2015/01/12/how-rethinking-employee-dress-codes-tattoos-and-piercings-improves-customer-service-and-the-customer-experience/#7b923ad54312

Typically, in our society, a deviant act becomes a criminal act that can be prohibited and punished under criminal law when a crime is deemed socially harmful or dangerous to society.[1]

In criminology, we often cover a wide array of harms that can include economic, physical, emotional, social, and environmental. The critical thing to note is that we do not want to create laws against everything in society, so we must draw a line between what we consider deviant and unusual verse dangerous and criminal. For example, some people do not support tattoos and would argue they are deviant, but it would be challenging to suggest they are dangerous to individuals and society. However, thirty years ago, it may have been acceptable to put into dress code, rules guiding our physical conduct in the workspace, that people may not have visible tattoos and people may not be as vocal as they would today. Today, tattoos may be seen as more normalized and acceptable, which could lead to a lot of upset employees saying those are unfair rules in their work of employment if they are against the dress code.

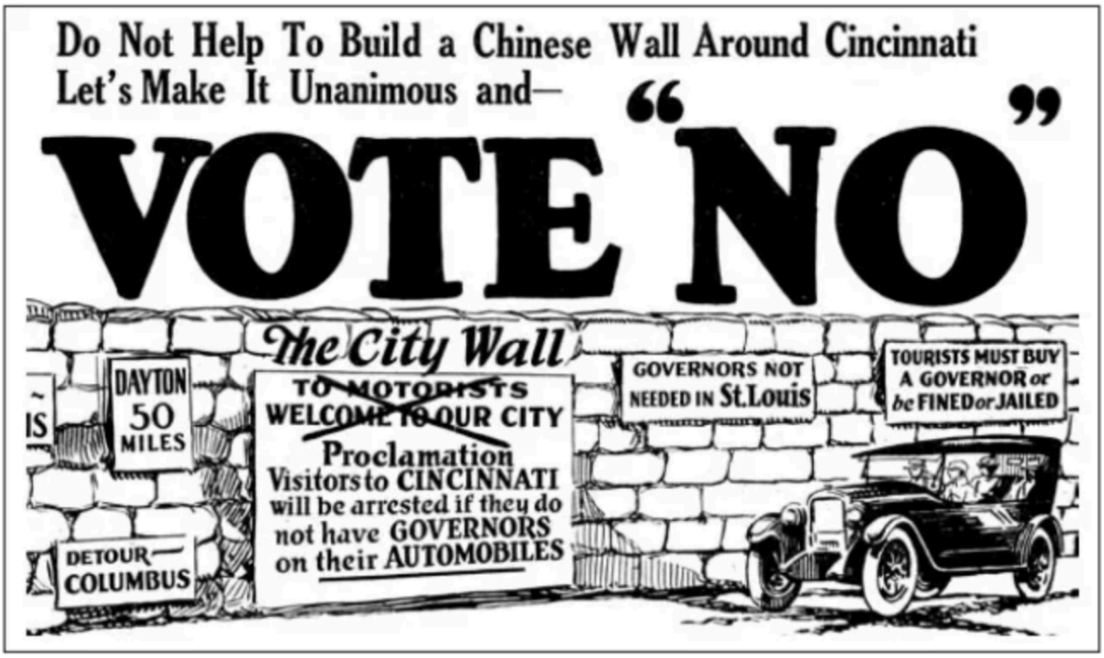
Now that we have a basis for understanding differences between deviance, rule violations, and criminal law violations, we can now discuss who determines if a law becomes **criminalized** or **decriminalized** in the

1. Goode, E. (2016). *Deviant Behavior*. Routledge: New York.

United States. A **criminalized act** is when a deviant act becomes criminal and a law is written, with defined sanctions, that can be enforced by the criminal justice system. [2]

Jaywalking

In the 1920s, auto groups aggressively fought to redefine who owned the city street. As cars began to spread to the streets of America, the number of pedestrians killed by cars skyrocketed. At this time, the public was outraged that elderly and children were dying in what was viewed as 'pleasure cars' because, at this time, our society was structured very differently and did not rely on vehicles. Judges often ruled that the car was to blame in most pedestrian deaths and drivers were charged with manslaughter, regardless of the circumstances. In 1923, 42,000 Cincinnati residents signed a petition for a ballot initiative that would require all cars to have a governor limiting them to 25 miles per hour, which upset auto dealers and sprang them into action to send letters out to vote against the measure.

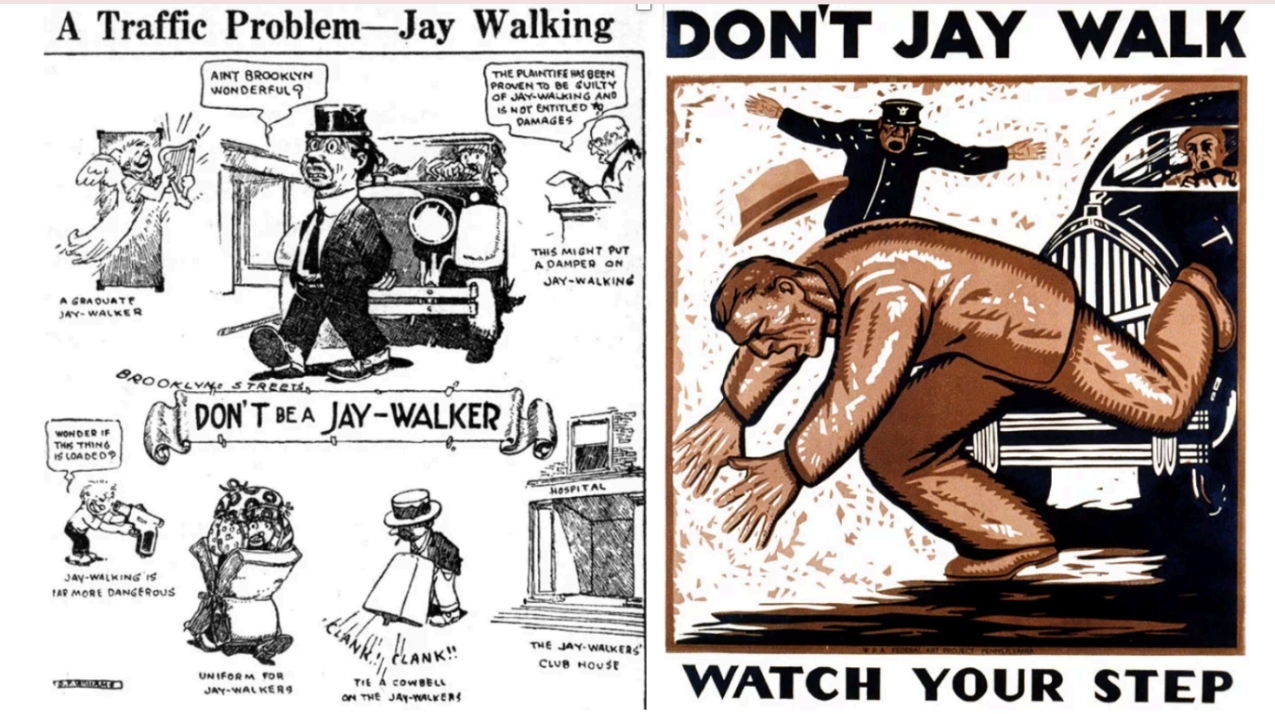


A 1923 ad in the Cincinnati Post, taken out by a coalition of auto dealers. (Cincinnati Post)

Vote No

It was at this point that automakers, dealers, and others worked to redefine the street so that pedestrians, not cars, would be restricted. Today, these law changes can be seen in our expectations for pedestrians to only cross at crosswalks.

2. Farmer, L. (2016). *Making the modern criminal law: Criminalization and civil order.* Oxford: Oxford University Press.



Don't Jaywalk

The Vox Article below has an excellent summary of what we discussed:

https://www.vox.com/2015/1/15/7551873/jaywalking-history

The creation of jaywalking laws would be an example of the interactionist view in lawmaking. The **interactionist view** states that the definition of crime reflects the preferences and opinions of people who hold social power in a particular legal jurisdiction, such as the auto industry. The auto industry used their power and influence to impose what they felt was to be right and wrong and became moral entrepreneurs. [3]

A moral entrepreneur was a phrase coined by sociologist Howard Becker. Becker referred to individuals who use the strength of their positions to encourage others to follow their moral stances. Moral entrepreneurs create rules and argue their causes will better society, and they have a vested interest in that cause that maintains their political power or position. [4] [5]

The auto industry used aggressive tactics to garner support for the new laws: using news media to shift

3. Vuolo, M., Kadowaki, J., & Kelly, B. (2017). *Marijuana's Moral Entrepreneurs, Then and Now.* https://contexts.org/articles/marijuanas-moral-entrepreneurs/
4. Becker, H. (1963). *Outsiders: Studies in the sociology of deviance.* New York: Free Press.
5. Cole, J.M. (2013). *Guidance regarding marijuana enforcement.* Washington, DC: Department of Justice, Office of the Deputy Attorney General. Better known as the "Cole Memorandum,"

the blame for accidents of the drivers and onto pedestrians, campaigning at local schools to teach about the importance of staying out of the street, and shame by suggesting you are in the wrong if you get hit. [6]

Fun fact: Most people may be unaware that the word 'jay' was derogatory and is similar today to being called a hick, or someone who does not know how to behave in the city. The tactic of shaming was powerful and has been used many times in society by moral entrepreneurs to garner support and pass laws against jaywalking.

6. Norton, P. (2007). *Street* rivals*: Jaywalking and the invention of the motor age street. Fighting traffic: The dawn of the motor age in the American city*

Another view of how laws become created is the **consensus view**, which as it states, implies consensus (agreement) among citizens on what should and should not be illegal. This idea implies that all groups come together, regardless of social class, race, age, gender, and more, to determine what should be illegal. This view also suggests that criminal law is a function of beliefs, morality, and rules that apply equally to all members of society. [1]

One Child per Family Policy in China

In modern society, we tend to have consensus in the United States that people cannot kill their baby at birth because they wanted the opposite gender. If a person killed their child, murder charges would occur. At certain points in history in other countries, such as China, this was occurring and was not as deviant as some Americans would like to think it should have been, but it was still illegal. However, when the Chinese Government introduced a One Child per Family Policy, there was a surge in female infanticide. There was immense pressure on families to have sons because of their higher earning potential and contributions to the family. Again, that line between deviance and criminality can often blur, especially when trying to gain consensus. Read the BBC article below for more information.

Read the BBC article below for further information.

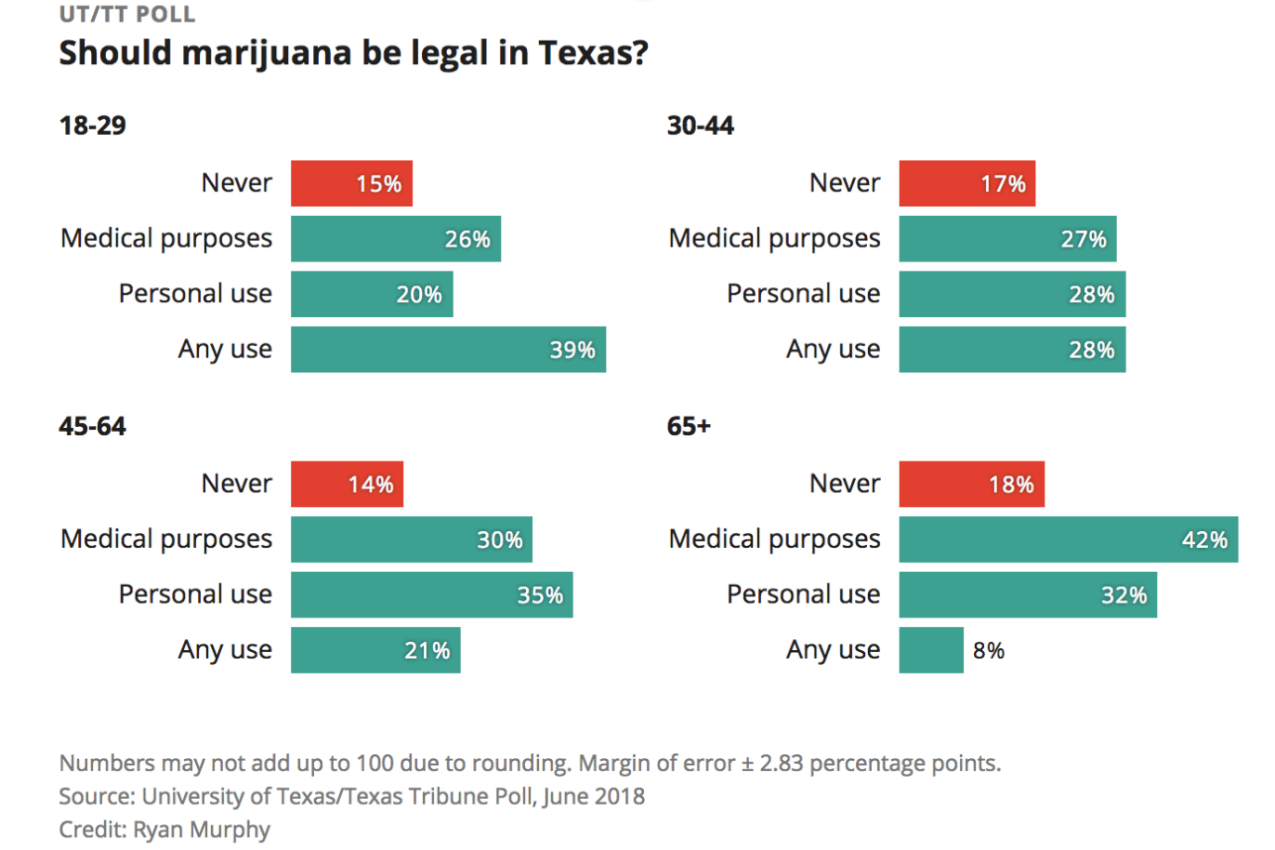
http://www.bbc.co.uk/ethics/abortion/medical/infanticide_1.shtml

Let us take a consensus approach to create laws, but apply it to decriminalizing laws. An act becomes decriminalized when it is no longer criminal and becomes legalized, ultimately reducing or alleviating penalties altogether. Some have proposed a hybrid between decriminalization and criminalizing behaviors, such as prostitution to ensure rights to prostitutes and punish offenders who harm them. [2] An act can be decriminalized at the State level, but not necessarily the Federal level.

1. Dawe, A. (1970). The two sociologies. *The British Journal of Sociology*, *21*(2), 207-218.
2. Lutnick, A. & Cohan, D. (2009). Criminalization, legalization or decriminalization of sex work: what female sex workers say in San Francisco, USA. *Reproductive Health Matters*, *17*(34), 38-46.

Marijuana Legalization

One example of decriminalization that came from a vote of consensus in states like Colorado, Washington, and Oregon was the legalization of recreational marijuana. Recently, Texas has shown signs of potentially decriminalizing marijuana and seeking reform laws. According to the latest University of Texas/Texas Tribune poll, more than half of the state's registered voters support marijuana legalization in the state (a consensus), and only 16 percent said possession of marijuana should remain illegal under any circumstances. Marijuana is certainly a great example of decriminalization, whether it is for recreational or medicinal purposes. University of Texas/Texas Tribune Poll, June 2018 — Summary



University of Texas/Texas Tribune Poll, June 2018 — Summary

Read the article below for more information on Texas proposing changes:

https://www.texastribune.org/2018/06/27/marijuana-democrats-young-adults-texas-poll/

Adam Ruins Everything YouTube Link: The Sinister Reason Weed is Illegal https://www.trutv.com/

shows/adam-ruins-everything/videos/the-sinister-reason-weed-is-illegal.html

A third perspective of how we define crime or create laws is referred to as the conflict view, commonly associated with Karl Marx in the 1800s. The conflict **view** sees society as a collection of diverse groups that can include owners, workers, wealthy, poor, students, professionals, younger older, and more. This view recognizes that the creation of laws is unequal and may not have consensus like in the example discussed previously. [1]

Further, the conflict view takes a very Marxian perspective and suggests that these groups are often in constant conflict with one another. Unlike the consensus perspective, the conflict view would suggest that the crime definitions are controlled by those with wealth, power, and social position in society. Essentially, laws are made by a select group in society, and the laws protect the 'haves.' Criminality shapes the values of the ruling class and is not of 'moral consensus'. [2] There are many examples we use in the criminal justice field that demonstrate the conflict view in action.

Edwin Sutherland: White Collar Crime

Edwin Sutherland, a sociologist, first introduced white-collar crime during his presidential address at the American Sociological Society Meeting in 1939 and later published articles and books on the topic. [3] Specifically, he was concerned with the criminological community's preoccupation with the low-status offender and "street crimes" and the lack of attention given to crimes that were perpetrated by people in higher-status occupations.

Sutherland wrote a book, *White Collar Crime*, that sparked lots of debate. [4] However, there is a limited focus on white-collar crime and even less enforcement of it in the United States. From the conflict view, this would be because white-collar and corporate crime is committed by the 'haves' and they write their laws and define what is or is not a crime. Going back to how we define crime in society, white-collar crime is still a contested one.

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1. Hawkins, D. (1987). Beyond anomalies: Rethinking the conflict perspective on race and criminal punishment. *Social Forces,* 65(3), 719–745, https://doi.org/10.1093/sf/65.3.719
2. Boundless. (2016). The conflict perspective. *Sociology – Cochise College Boundless, 26.*
3. Sutherland, E. (1940). White-collar criminality. *American Sociological Review, 5*(1), 1-12.
4. Sutherland, E. (1949). *White-collar crime.* Dryden Press.
5. Sutherland, E. (1949). *White-collar crime.* Dryden Press.

white-collar crime and even less enforcement of it in the United States. From the conflict view, white-collar and corporate crime gets committed by the 'haves,' and they write the laws and define what is or is not a crime. Going back to how we define crime in society, white-collar crime is still a contested one.

Currently, there are different views of how one should define white-collar crime: defining white-collar crime based on the type of offender, type of offense, studying economic crime such as corporate and/or environmental law violations, health, and safety law violations, and/or the organizational culture rather than the offender or offense. The FBI studies white-collar crime in terms of offense, so official data for white-collar crime will not focus on the background of the offender, which can make the use of Uniform Crime Report Data, UCR data tricky to use if trying to determine a typical offender. The UCR will be covered more fully in chapter two, but it is data collected from police departments, and the FBI compiles reports. Again, conflict view may suggest the lack of focus on white-collar crime in U.S. society would be because the 'haves' creates the laws, not the 'have-nots.' https://ucr.fbi.gov/nibrs/nibrs_wcc.pdf
[6]

6. Barnett, C. (N.D.). The measurement of white-collar crime using: Uniform crime reporting (UCR) data. *U.S. Department of Justice.* Federal Bureau of Investigation

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The Three C's

As previously stated, the criminal justice system is not confined to one level of government and is made up of local, state, and federal governments. The agencies associated with these levels can work together or work separately. In the previous example about marijuana legalization, the federal government has not legalized recreational or medicinal marijuana, but some states have; states have disagreed with federal law, but federal law essentially has the final say. If the federal government wanted to punish states for selling marijuana they indeed could since it remains a Schedule I drug.

We will spend time exploring the three main components of the criminal justice system, or an easy way to remember this is the three main C's: cops, courts, and corrections. This section will briefly introduce the police, courts, and correctional systems and how they often function with each other, whereas subsequent chapters will further focus on how they each operate as their entity.

Cops

Imagine walking downtown on a Friday night and witnessing a robbery in action. The first thing a person would typically do is call 911. Then the person would tell the 911 operator, referred to as dispatch, what they saw, where the event occurred, and any other relevant information. The operator would then send out the call or dispatch it to nearby police on duty. The first point of contact with the criminal justice system for most individuals is the cops. We often refer to them as first responders. We will use a variety of terms for cops, such as police officers and law enforcement, but recognize we are always talking about the men and women who enforce laws and protect the people of the United States. The police respond to calls and can apprehend the offender. Because of technology, the police respond quickly.

Other times, police may witness a crime while on patrol. Police make initial contact, investigate crimes, apprehend offenders/potential offenders (arrest), and then book them in the local jail. Law enforcement does not determine guilt or innocence, hand down punishments, or implement the punishment. [1]

During an investigation, police officers may need to obtain a search warrant. The Fourth Amendment of the Constitution requires that police officers have probable cause before they search a person's home,

1. Fuller, J. (2019). *Introduction to criminal justice: A brief edition*. New York Oxford: University Press

clothing, car, or other property, with some exceptions explored later on. In order to ensure due process, searches usually require a search warrant, issued by a "neutral and detached" judge. Arrests also require probable cause and often occur after the police have gotten an arrest warrant from a judge. Depending on the specific facts of the case, the first step may be an arrest. [2] As stated above, if they catch a person in the commission of a crime, they will arrest them first and investigate later.

Police on Standby



Police on Standby

Courts

The next phase of the criminal justice system is the courts. The courts may consist of prosecutors, defense attorneys, judges, and a reasonable jury of one's peers. The primary role of the courts is to determine whether an offender should be charged with a crime and if so, what charges should exist. The officers will forward information to the district attorneys for review, and the district attorney will determine what charges are filed against an offender, also known as the defendant. [3] In the above scenario, if the prosecutor's office has determined there is enough evidence to charge the individual with robbing the

2. United States Department of Justice. (N.D.). Investigation. https://www.justice.gov/usao/justice-101/investigation
3. Anoka County Attorney's Office. (N.D.). *Roles in the Criminal Justice System.* https://www.anokacounty.us/1434/Roles-in-the-Criminal-Justice-System

business downtown, then charges will be filed, and the suspect is charged with a specific crime. The defendant in the robbery will be informed of all their rights that are afforded to them by the Constitution and that they have the right to legal counsel or a defense attorney. There are private defense attorneys as well as public defenders who are appointed if a person is indigent, or unable to afford their attorney. A defendant, or the accused, will enter a plea of guilty or not guilty, and a trial date is set.

The prosecutor's office will evaluate the type and quality of the evidence they have when deciding to move forward or drop the charges. Direct evidence is evidence that supports a fact without an inference, such as a testimony of an eyewitness to a crime because the person saw the crime. The other type of evidence, circumstantial evidence, would be something that happened before or after the crime or information obtained indirectly or not based on the first-hand experience of a person. Circumstantial evidence includes people's impressions about an event that happened that they did not see. For example, if you went to bed at night, and there was no gas in your tank, and then you awoke to a full tank of gas, while you didn't actually see your dad fill your tank, you assume the did it while you slept because gas tanks cannot fill themselves. [4]

If a defendant pleads guilty, there may be a plea bargain given.

A plea bargain is similar to a deal will be made for a reduced sentence since the defendant pleads guilty. Plea bargains get used a lot for the vast majority of cases in our CJ system, and debates often ensue over the ethics behind them. A defendant should only plead guilty if they committed the crime and must admit to doing so in front of the judge. Once the defendant admits to the crime, they agree they are guilty and agree that they may be "sentenced" by the judge presiding over the court. The judge is the only person authorized to impose a sentence. However, with the current number of cases entering our system every day, pleas bargains have often been called a 'necessary evil." [5]

Let us say the defendant chooses to go to trial. The prosecution and defense will then present their cases before a jury and judge to determine if there is enough evidence to convict the defendant. The prosecutor must prove they have probable cause that the defendant is the one who committed the crime, and the defense ensures the rights of the accused get upheld while defending their client. Judges are important and often get referred to as impartial moderators or referees in the courtroom. The judge receives guidance and assistance from several sources in order to sentence a defendant. Over time, Congress has established minimum and maximum punishments, and the United States Sentencing Commission has produced a set of sentencing guidelines that recommend certain punishments for certain crimes while considering various factors. Further, the judge will look at a pre-sentence report and consider statements from the victims, as well as the defendant and lawyers. The judge may consider a variety of aggravating or mitigating factors. These include whether the defendant has committed the same crime before, whether the defendant has expressed regret for the crime, and the nature of the crime itself. [6]

If a defendant is convicted, then that defendant is found guilty. Let us imagine a surveillance cameras that caught the robber downtown and fingerprints that were left behind matched the offender; this would make a conviction more likely. This phase is known as adjudication. If found guilty, the court is responsible for handing down a punishment. In the vast majority of criminal cases, the judge decides the sentencing hearing, but in some cases, a jury determines the outcome. Although this was a brief overview, it is essential to

4. United States Department of Justice. (N.D.). *Investigation.* https://www.justice.gov/usao/justice-101/investigation
5. United States Department of Justice. (N.D.). *Plea bargaining.* https://www.justice.gov/usao/justice-101/pleabargaining
6. United States Department of Justice. (N.D.). *Sentencing.* https://www.justice.gov/usao/justice-101/sentencing

know that the courts charge defendants, holding a preliminary hearing, arraignment, potential plea bargains, adjudication, and sentencing.

After a defendant is found guilty, they have the right to appeal the outcome if they believe they were wrongly convicted or the sentence was too harsh. An appeal is not another trial, but an opportunity for the defendant to try to raise specific errors that might have occurred at trial. A common appeal is that a decision from the judge was incorrect – such as whether to suppress certain evidence or to impose a certain sentence. Appeals are complicated and sometimes result in the case going back to the trial court. A conviction can get reversed, a sentence altered, or a new trial may be ordered altogether if the Appeals Court decides that particular course of action. If a circuit court judge decides the appeal, then a defendant can try to appeal that decision to the United States Supreme Court in Washington, D.C. The United States Supreme Court is the highest appellate court in the American court system, and they make the final decision concerning a defendant's appeal. The Court is not required to hear an appeal in every case and takes only a small number of cases each year. [7]



More details

The courtroom in Valley County Courthouse in Ord, Nebraska. The Beaux-Arts building was constructed in 1920. It is listed in the National Register of Historic Places.

7. United States Department of Justice. (N.D.). *Appeal.* https://www.justice.gov/usao/justice-101/appeal

In The News: Brendan Dassey



Brendan Dassey, featured in the Netflix documentary The Making of a Murderer in 2015, was charged with murder as a juvenile. Dassey's 2007 conviction was questionable because his videotaped confession to police was problematic. Dassey was 16 without a lawyer or parent present during his confession. He appeared scared and unaware of the gravity of his situation on camera, and his lawyers say he had a low IQ in the seventh percentile of children his age, making him susceptible to suggestions. Dassey was found guilty as an accessory to murder with his uncle Steven Avery in the 2005 murder of Teresa Halbach, a 25-year-old photographer in Manitowoc, Wisconsin. The United States Supreme Court declined to hear his case and did not provide a statement as to why.

8

Video Link Adam Ruins Everything: Why the Public Defender System is So Screwed Up https://www.trutv.com/shows/adam-ruins-everything/videos/why-the-public-defender-system-is-so-screwed-up.html

Corrections

Once a defendant has been found guilty, the correctional system helps carry out the punishment that is ordered by the court. The defendant may be ordered to pay financial restitution or a fine and not serve time under a form of incarceration. When an offender gets sentenced to a period of incarceration, at either a jail or prison, they will serve their sentence under supervision. Offenders that get sentenced to less than a year will serve their sentence in a local jail, but longer sentences will serve time in prison. However, offenders can also get sentenced to community-based supervision, such as probation. In this situation, an offender would get assigned a probation officer (PO), and there would be specific rules they are required to follow. If an offender violates rules, the PO may request the offender be incarcerated in jail or prison to serve the remainder of the sentence. [9] Lastly, an essential part of corrections is helping former inmates with prisoner re-entry or reintegration into society through parole, community-based supervision after serving time in a locked facility, and may require drug-testing, help with finding employment, education, and social support. [10]

8. Victor, D. (2018). Supreme Court Won't Hear Appeal of 'Making a Murderer' Subject Brendan Dassey. *The New York Times.* https://www.nytimes.com/2018/06/25/us/brendan-dassey-supreme-court.html
9. , Fuller, J. (2019). *Introduction to criminal justice: A brief edition.* New York: Oxford University Press.
10. RAND Corporation. (1994-2018). https://www.rand.org/topics/prisoner-reentry.html



SHANELL SANCHEZ

Crime Control and Due Process Model

The criminal justice system can be quite complicated, especially in the attempt to punish offenders for wrongs committed. Society expects the system to be efficient and quick, but the protection of individual rights and justice fairly delivered. Ultimately, the balance of these goals is ideal, but it can be challenging to control crime and quickly punish offenders, while also ensuring our constitutional rights are not infringed upon while delivering justice.

In the 1960s, legal scholar Herbert L. Packer created models to describe exceeding expectations of the criminal justice system. These two models can be competing ideologies in criminal justice, but we will discuss how these models can be merged or balanced to work together. The first tension between these models is often the values they place as most important in the criminal justice system, the crime control model and the due process model. [1]

The **crime control model** focuses on having an efficient system, with the most important function being to suppress and control crime to ensure that society is safe and there is public order. Under this model, controlling crime is more important to individual freedom. This model is a more conservative perspective. In order to protect society and make sure individuals feel free from the threat of crime, the crime control model would advocate for swift and severe punishment for offenders. Under this model, the justice process may resemble prosecutors charge an 'assembly-line': law enforcement suspects apprehend suspects; the courts determine guilt; and guilty people receive appropriate, and severe, punishments through the correctional system. [2] The crime control model may be more likely to take a plea bargain because trials may take too much time and slow down the process.

Murder in the Gym: Crime Control Model Example by Dr. Sanchez

Imagine working out at the local gym, and a man starts shooting people. This man has no mask on so he is easy to identify. People call 911 and police promptly respond and can arrest the shooter within minutes. Under the crime control model, the police should not have to worry too much about how evidence gets collected and expanded. Investigative, arrest, and search powers would be considered necessary. A crime control model would

1. Packer, H. (1964). Two models of the criminal process. *University of Pennsylvania Law Review, 113*(1)
2. Roach, K. (1999). Four models of the criminal process. *Journal of Criminal Law and Criminology, 89*(2), 671-716.

see this as a slam dunk and no need to waste time or money by ensuring due process rights. If there were any legal technicalities, such as warrantless searches of the suspects home, it would obstruct the police from effectively controlling crime. Effective use of time would be to immediately punish, especially since the gym had cameras and the man did not attempt to hide his identity. Any risk of violating individual liberties would be considered secondary over the need to protect and ensure the safety of the community in this model. Additionally, the criminal justice system is responsible for ensuring victim's rights, especially helping provide justice for those murdered at the gym.

The due process model focuses on having a just and fair criminal justice system for all and a system that does not infringe upon constitutional rights. Further, this model would argue that the system should be more like an 'obstacle course,' rather than an 'assembly line.' The protection of individual rights and freedoms is of utmost importance and has often be aligned more with a liberal perspective. [3]

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Murder in the Gym: Due Process Model by Dr. Sanchez

Back to the gym murder, the due process model would want to see all the formalized legal practices afforded to this case in order to hold him accountable for the shooting. If this man did not receive fair and equitable treatment, then the fear is this can happen to other cases and offenders. Therefore, due process wants the system to move through all the stages to avoid mistakes and ensure the rights of all suspects and defendants. If the man in the gym pled not guilty due to the reason of insanity, then he can ask for a jury trial to determine whether he is legally insane. The courts would then try the case and may present evidence to a jury, ultimately deciding his fate. The goal is not to be quick, but to be thorough. Because the Bill of Rights protects the defendant's rights, the criminal justice system should concentrate on those rights over the victim's rights, which are not listed. Additionally, limiting police power would be seen as positive to prevent oppressing individuals and stepping on rights. The rules, procedures, and guidelines embedded in the Constitution should be the framework of the criminal justice system, and controlling crime would be secondary. Guilt would get established on the facts and if the government legally followed the correct procedures. If the police searched the gym shooter's home without a warrant and took evidence then that evidence should be inadmissible, even if that means they cannot win the case. [5]

There are several pros and cons to both models; however, there are certain groups and individuals that side

3. Packer, H. (1964). Two models of the criminal process, 113 U. PA. L. Rev. 1; Yerkes, M. (1969). The limits of the criminal sanction, by Herbert L. Packer (1968). *Loyola of Los Angeles Law Review 176, 2*(1).
4. Yerkes, M. (1969). The limits of the criminal sanction, by Herbert L. Packer (1968). *Loyola of Los Angeles Law Review 176, 2*(1).
5. Yerkes, M. (1969). The limits of the criminal sanction, by Herbert L. Packer (1968). *Loyola of Los Angeles Law Review 176, 2*(1).

with one more often than the other. The notion that these models may fall along political lines is often based on previous court decisions, as well as campaign approaches in the U.S. The crime control model is used when promoting policies that allow the system to get tough, expand police powers, change sentencing practices such as creating "Three Strikes," and more. The due process model may promote policies that require the system to focus on individual rights. These rights may include requiring police to inform people under arrest that they do not have to answer questions with an attorney (*Miranda v. Arizona*), providing all defendants with an attorney (*Gideon v. Wainwright*), or shutting down private prisons that often abuse the rights of inmates.

To state that crime control is purely conservative and due process is purely liberal would be too simplistic, but to recognize that the policies are a reflection of our current political climate is relevant. If Americans are fearful of crime, and Gallup polls suggest they are, politicians may propose policies that focus on controlling crime. However, if polls suggest police may have too many powers and that can lead to abuse, then politicians may propose policies that limit their powers such as requiring warrants to obtain drugs. [6] Again, this may reflect society, a reflection of a part of society, or the interests of a political party or specific politician.

Exercise

Discuss what the primary goal of the criminal justice system should be: to control crime, ensure due process, or both? Explain how this opinion may get influenced by individual factors, such as age, gender/sex, race/ethnicity, economic situation, a country born in, and more. Could goals change with more education given about criminal justice? If so, make an argument in favor of education. If not, make an argument against educating the public on criminal justice.

6. Davis, A. (2016). In the U.S., concern about crime climbs to a 15-year high. *Gallup Poll.*

SHANELL SANCHEZ

How Cases Move Through the System

The criminal justice process is not what gets portrayed on television, and most cases do not go to trial or result in a prison sentence. Part of the problem is that our current system is overloaded and ensuring due process and crime control can be more challenging than one thinks. In order to effectively process cases through the criminal justice system, discretion is an important tool for police, prosecutors, judges, and correctional officials. Discretion provides freedom to make decisions, specifically it is the power to make decisions on issues within legal guidelines. Many people see discretion as for the most powerful tool of the criminal justice system. [1] [2]

Exercise on Discretion

Provide an example of discretion, which can be from a teacher in school, a dean, an officer, a judge, or boss. Describe what discretion impacted life outcomes today. When I was pregnant, my sister and I argued over the phone. This caused me to cry and emotions took over, which led to being pulled over. I encountered an officer who was understanding. He then told asked me to drive safely, and because my record was clean, he was not going to cite me. I was fortunate that I did not have to lose money for a ticket, and still, today, have never had a ticket.

Ethics refers to the understanding of what constitutes good or bad behavior and helps to guide our behaviors. Ethics are important in the criminal justice system because people working in the system get authority, power, and discretion from the government. [3] Imagine in the above case where the speeding and swerving occurred because the person drove drunk due to the break-up. It would be unethical for police to allow them to drive home because they were drinking and driving, which is a crime. Most people would see it as an abuse of discretion if the officer said, "I know you are drunk, but break-ups suck. Please stop crying, drive home, and forget this happened." Ethics and discretion often go hand-in-hand.

1. Kessler, D. & Piehl, A. (1998). The role of discretion in the criminal justice system. *The Journal of Law, Economics, and Organization, 14*(2), 256-276
2. Gottfredson, M., & Gottfredson, D. (1988). *Decision making in criminal justice: Toward the rational exercise of discretion.* New York: Plenum
3. Sellers, B. (2015). Ethics in policing. Wiley online library.

In the News: How Would an Ethical Officer React? The New York Times wrote an article about ethical policing. Tobkin often asked his recruits, in any given situation, "How would an ethical officer react?" All recruits were required to take an ethics class called Police Legitimacy, which deals with how officers are viewed by the public and what they can do to improve or erode those perceptions. "There is about one patrol officer for every thousand citizens, so if the public does not see us as legitimate and they do not acknowledge our authority, then we are in big trouble," Tobkin said. Recruits also closely study the department's "use-of-force continuum," which dictates what level of force is appropriate in response to a suspect's behavior: tasers and batons on when a suspect is kicking or punching an officer, but generally not when a suspect is simply trying to get away. [4]

Samuel Walker referred to the criminal justice system as a funnel. In 1967, The President's Commission on Law Enforcement and the Administration of Justice published a report on the funneling effect of the criminal justice system. [5] The criminal justice system is often referred to as a funnel because most cases do not go through all steps in the system, some because of discretion, and a large portion because they are unknown to police. The question remains: is the criminal justice system effective at catching, prosecuting, convicting, and punishing offenders? Does the system properly do its job at all levels? Walker was critical of this report and said the report did not account for the crimes unknown to police, often referred to as the dark figure of crime. He also recognized that the most serious crimes are often reported the most, which may confuse the public about the reality of other crimes. [6] Others also criticized the report for only looking at reported crimes and adult crimes, but those issues will be highlighted in our next chapter on data in the criminal justice system. It is important to recognize the disparity between crimes that were reported and not reported. This discrepancy was a shock in the 1970s, especially after the United States started asking people about their victimization. The number of crimes people say they experienced far exceeded the crimes they reported to the police. [7]

The main idea to understand is that the funnel effect is said to represent how cases move through the system by the offenses unknown to police verse known, arrests then made, prosecutions, plea bargains or trials, sentencing, and whether the individual receives probation, prison, or parole. [8]

In the News: The Crime Funnel The New York Times wrote an example of the crime funnel. Federal agencies publish numbers of crimes that constitute a big funnel. For example, the "35 million crimes committed each year pour in at the top that can include everything from shoplifting, auto theft and drunken fights to rapes and murders. Of these, about 25 million are serious, since they involve violence or

4. Sessini, J. (2016). How would an ethical officer act? *The New York Times*.
5. The challenge of crime in a free society. 1967. NCJRS. https://www.ncjrs.gov/pdffiles1/nij/42.pdf
6. Walker, S. (2006). *Sense and nonsense about crime and drugs.* Cengage: Wadsworth.
7. Anderson, D. (1994). The crime funnel. *The New York Times*.
8. The challenge of crime in a free society. (1967). *NCJRS.* https://www.ncjrs.gov/pdffiles1/nij/42.pdf

sizable property loss. But millions of these crimes go unpunished because the victims never report them. Only 15 million serious crimes come to the attention of the police." [9]

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Funnel Effect Example

Imagine selling marijuana to friends every week. No one alerts the cops and the person never gets caught, which means this remains in the category of offenses unknown to police. However, a friend gets busted selling too close to an elementary school, so the offense immediately is classified as known to the police. An officer can choose to arrest or not, depending on the amount. If it is illegal in that state to deal, then an ethical officer would arrest and set discretion aside. However, it is up to the prosecutor to decide whether or not to file charges. If charges get filed, the friend may be encouraged to plead guilty and 'get it over with.' This would be more likely under a crime control model. However, his/her mom may say "No, I want you to go to trial," which would be more likely under a due process model, and now that friend now has to decide. If he/she takes the plea bargain, they can skip the trial and go straight to sentencing. Let us say the plea bargain allowed the friend to avoid jail time and serve 300 hours of community service, but if convicted this friend could serve one year. Most may take the community service option

9. Anderson, D. (1994). The crime funnel. *The New York Times.*
10. The challenge of crime in a free society. 1967. NCJRS. https://www.ncjrs.gov/pdffiles1/nij/42.pdf
11. Walker, S. (2006). *Sense and nonsense about crime and drugs.* Cengage: Wadsworth.
12. Anderson, D. (1994). The crime funnel. *The New York Times.*
13. The Challenge of crime in a free society. (1967). *NCJRS.* https://www.ncjrs.gov/pdffiles1/nij/42.pdf

and be under community supervision such as probation. If it were a more serious offense, they may serve a prison sentence and get paroled under community supervision after a specific amount of time.

The funnel is one way to look at the criminal justice system, but we will see later how it can be much more complicated than this analogy suggests. It is important to know many crimes are unknown to the police, which we will often refer to as the dark figure of crime. Additionally, plea bargains are a comprehensive tool, especially since it would cost our society so much to prosecute and allow a trial for every individual that committed a crime. Costs are a genuine issue that the system faces daily, and if the U.S. were to punish everyone for violating the law, there would not have any money left over for important things like education, healthcare, repairing highways, and so much more. We would see most of our taxpayers paying for just crime control, which may not be the best use of all that money. Again, bringing in the importance of discretion in the criminal justice system.

Sometimes taking away discretion is excellent and sometimes having too much is wrong, but finding that balance is very important. Sometimes a judge may use discretion to release a domestic violence offender to community probation when an officer did not have the discretion to arrest. The judge's discretion may cause the victim to get revictimized, but it may not. Some offenders may be at a higher risk of reoffending and being able to determine this is valuable. We will discuss this later when talking about using evidence-based practices in the criminal justice system.

SHANELL SANCHEZ

Violent Times Example

One morning, after checking email, which is a pretty standard task, my grandfather writes a daily email. This morning he discusses the violent times we are all living in and how murder is everywhere. He discusses how he worries about the future of his family members because the United States is a dangerous place to live. He often provides explanations for this 'increase in crime' that I, as a criminologist, know to be untrue. Sometimes he will say kids are violent because of social media or video games, other times he will blame it on immigrants. Regardless, my grandfather lives in fear. He is fearful of someone breaking into his home, and at the age of 80, had a security screen installed in their nice suburban area in Colorado. He avoids downtown Denver because of his belief it is overrun by 'gang bangers.' However, where could all these ideas come from for him. My grandfather has never worked in the criminal justice system, he never studied it, he did not attend college but has such strong thoughts about policies that need to get enacted, problems with society, and he often states them as a fact. The answer: THE NEWS. Perhaps watching too much television can cause an overestimation of rates of crime both in reality and on television. [1]

Media is not a terrible thing that is conspiring to ruin our minds. Please know it is very beneficial and can help share information, but we need to be aware of the downfalls of media and even which media we choose to watch. Do not want to say "I am over the news" because it serves an important purpose! Also, keep in mind that crime is going DOWN and has been consistently doing so. However, research has shown that entertainment and news media create an image that we are living in a dangerous world. [2] It can be easy to become fearful after watching too much news if we let ourselves fall trap to losing the facts. "Factfulness recognizes when we get negative news, and remembering that information about bad events is much more likely to reach us. When things are getting better, we often do not hear about them, which can lead to a systematically too-negative impression of the world around us, which is very stressful." [3]

Public knowledge of crime and justice is derived largely from the media. Research has examined the

1. Hetsroni, A., & Tukachinsky, R. H. (2006). Television-world estimates, real-world estimates, and television viewing: A new scheme for cultivation. *Journal of Communication, 56*, 133-156.
2. Jewkes, Y. (2015). *Media and crime* (3rd ed.).Thousand Oaks, CA: Sage.
3. Rosling, H. (2018). *Factfulness: Ten reasons we are wrong about the world--and why things are better than you think.* Flatiron Books

impact of media consumption on fear of crime, punitive attitudes, and perceived police effectiveness. Studies have found that the more crime-related media an individual consumes, the more fearful of crime they are. [4] [5] However, we also are attracted to specific types of crime and victims when we choose to consume media. In other words, the media is aware of our crime preferences and will report on those more. Glassner (2009) describes what he calls the 'ideal crime story' for journalists to report. He notes that society likes to read about innocent victims, likable people, and the perpetrator needs to be scary and uncaring about the crime. [6]

Our society is fascinated with crime and justice, where we spend hours watching films, reading books, newspapers, magazines, and television broadcasts that keep us constantly engaged in crime "talk." Perhaps what we do not always realize is the mass media plays an important role in the construction of criminals, criminality, and the criminal justice system. Our understanding and perceptions of victims, criminals, deviants, and police are largely determined by their portrayal in the mass media. [7]

The majority of public knowledge about crime and justice is derived from the media. [8] [9] [10] Since Gallup polls began asking whether crime had increased in 1989, a majority of Americans have usually said there is more crime than there was the year before. There is only one year where people did not think it did, which followed 9/11. [11]

Despite decreases in U.S. violent and property crime rates since 2008, most voters say crime has gotten worse during that span. Mostly, Americans' perceptions of crime are often at odds with the data. [12] Research has also shown that there are stark differences across party lines. Specifically, almost eight-in-ten voters who supported President Donald Trump (78%) said this, as did 37% of backers of Democrat Hillary Clinton. Just 5% of pro-Trump voters and a quarter of Clinton supporters said crime has gotten better since 2008, according to a survey of 3,788 adults. [13] All of this is at odds with official data reports that will get discussed in more detail in the next chapter. Since this is the case, how do people have this misperception about crime and criminality? Where do these myths develop?

In the News: This clip was broadcast and could create fear in young women and parents of young women who may want to go running in broad daylight. The initial comments that they believed it was

4. Dowler, K. (2003). Media consumption and public attitudes toward crime and justice: The relationship between fear of crime, punitive attitudes, and perceived police effectiveness. *Journal of Criminal Justice & Popular Culture, 10*, 109-126.
5. Kort-Butler, L., & Sittner-Hartshorn, K. (2011). Watching the detectives: Crime programming, fear of crime, and attitudes about the criminal justice system. *The Sociological Quarterly, 52,* 36-55.
6. Glassner, B. (2009). *The culture of fear: Why Americans are afraid of the wrong things* (Rev. ed.). New York: Basic Books.
7. Dowler, K. (2003). Media consumption and public attitudes toward crime and justice: The relationship between fear of crime, punitive attitudes, and perceived police effectiveness. *Journal of Criminal Justice & Popular Culture, 10*(2), 109-126.
8. Roberts, J., & Doob, A. (1986). Public estimates of recidivism rates: Consequences of a criminal stereotype." *Canadian Journal of Criminology 28,* 229-241;
9. Surette, R. (1990). The media and criminal justice policy: Recent research and social effects. Springfield, IL: Charles C. Thomas.
10. Kappeler, V., & Potter, G. (2018). *The mythology of crime and criminal justice.* (5th ed). Long Grove: Waveland Press, Inc.
11. Swift, A. (2016). Americans' Perceptions of U.S. Crime Problem Are Steady. Gallup. Social Policy and Issues. https://news.gallup.com/poll/197318/americans-perceptions-crime-problem-steady.aspx
12. Gramlich, J. (2016). Voters' perceptions of crime continue to conflict with reality. *Pew Research Center*. http://www.pewresearch.org/fact-tank/2016/11/16/voters-perceptions-of-crime-continue-to-conflict-with-reality/
13. Gramlich, J. (2016). Voters' perceptions of crime continue to conflict with reality. *Pew Research Center.* http://www.pewresearch.org/fact-tank/2016/11/16/voters-perceptions-of-crime-continue-to-conflict-with-reality/

a stranger rape make it frightening, even if that is not the most common victimization. https://6abc.com/news/new-video-shows-ny-woman-on-run-hours-before-murder-/1509645/

The media plays an important role in the perception of crime and the American public's understanding of how the criminal justice system operates and policies Americans are willing to support for reform. Public opinion gets connected with pressure to change crime policies. [14], especially when there is a high fear of a certain crime [15] The media can provide the public with an estimation of how much crime there is, the types of crime that are common, trends in crime rates, and the daily operations of the criminal justice system. However, the media often does not portray an accurate portrayal of crime and criminal justice. [16]

In the News: Follow Up to Case Above https://www.huffingtonpost.com/entry/mistrial-karina-vetrano-killing_us_5bf5909ce4b0eb6d930ad6f9

"Fear is produced more readily in the modern community than it was earlier in our history because of increased publicity" Edwin Sutherland. [17]

Research by the Pew Research Center found that most Americans get their news from social media, despite having concerns about the accuracy and reliability of those sources. Almost 66 percent of Americans get news on social media. The majority (57%) say they expect the news they see on social media to be mostly inaccurate. [18] It appears that convenience outweighs concerns with accuracy.

Media Exercise

Go about a daily routine, but record every time crime is discussed. Write down every time it happens such as watching TV, listening to the news, scrolling through newsfeeds, reading, and more. What was the message?

14. Toch, H., & Maguire, K. (2014). Public opinion regarding crime, criminal justice, and related topics: A retrospect. *Journal of Research in Crime & Delinquency, 51,* 424-444.
15. Dowler, K. (2003). Media consumption and public attitudes toward crime and justice: The relationship between fear of crime, punitive attitudes, and perceived police effectiveness. *Journal of Criminal Justice and Popular Culture, 10,* 109-126.
16. Kappeler, V. & Potter, G. (2018). *The mythology of crime and criminal justice*, (5th ed.). Long Grove: Waveland Press, Inc.
17. Sutherland, E. (1950). The Diffusion of Sexual Psychopath Laws. *American Journal of Sociology, 56,* 142-148.
18. Matsa, K., & Shearer, E. (2018). News use across social media platforms. *The Pew Research Center*. http://www.journalism.org/2018/09/10/news-use-across-social-media-platforms-2018/

Listening to the radio on the way to work? The goal is to record anything heard in the day related to crime and attempt to see the messages one may be receiving. Once enough instances get recorded, write a summary of the findings.

The media focus their attention on crimes that will capture viewers' attention. The more shocking, upsetting, gruesome, and dramatic the case the better! In the above case of Katrina Vetrano, it is shocking that a 30-year-old woman goes out for a jog and winds up raped and murdered. It is even more shocking than it is in the day and then adds to it by a stranger. People will click on this case because it preys upon fears, but this causes problems. How do we devise policies that protect people if we get driven by fear? Women are more likely to be victimized by people they know, not strangers. However, the media makes it seem like it is strangers that are most likely to victimize women. Is this problematic? Yellow journalism is the practice of using sensational stories in print media to attract readers and increase profit, and it works, but not without problems.[19]

While the media plays an important role in creating fear of crime and myths, they are not the only ones that do so. In subsequent chapters, we will talk about the government, politicians, and power elites. [20] In the next section, we will discuss the wedding cake model in an attempt to understand how what we most commonly see in the news media can distort our understanding of crime frequency and types of crimes. The media may report on the stuff that will appear to be interesting, 'If it bleeds, it leads,' even if that is a crime that is less common. Homicides account for more than a quarter of the crime stories on the evening news, but they represent less than 1 percent of all crimes. [21] In order to get people to read or listen to the story, they have to capture our attention. How many people want to read about another marijuana arrest? Not many probably! Most of us want to hear about the gruesome crimes that keep us up at night; despite them being rare. By covering these crimes in-depth, we create fear and a distorted reality of crime, criminals, and criminal justice.

Immigration and Crime Exercise

The fear of immigrants bringing crime to the United States is popular rhetoric right now, especially among politicians https://www.washingtonpost.com/news/politics/wp/2018/06/22/the-original-source-for-trumps-claim-of-63000-immigrant-murders-bad-data-from-steve-king-in-2005/?utm_term=.f6a353aa5109. In the 2016 election, immigration and crime were one of the most perpetuated myths by Republican candidates, such as Donald Trump. He demonized the media, suggesting they do not also perpetuate this myth https://www.washingtonpost.com/news/post-politics/wp/2016/08/27/trump-in-undocumented-immigrants-we-are-going-to-get-rid-of-the-criminals/?utm_term=.d9962af916ee. Be aware that this fear tactic is not unique to Donald Trump and his campaign and has been going on forever. Additionally, fear may change, but fear is an excellent tool to get people to support an agenda. Border control became a hot button, and the argument was that

19. Kappeler, V., & Potter, G. (2018). *The mythology of crime and criminal justice.* (5th ed.). Long Grove: Waveland Press, Inc.
20. Kappeler, V., & Potter, G. (2018). *The mythology of crime and criminal justice* (5th ed.). Long Grove: Waveland Press, Inc.
21. Dorfman, L., & Schiraldi, V. (April 2001). Off-Balance: Youth, Race & Crime in the News. Retrieved April 2006, from http://www.buildingblocksforyouth.org/media/media.html.

we would remove crime and criminals. This myth was created and 'sold' to citizens via social media, news, films, and other media outlets.

First, find two news articles that argue that immigrants are dangerous and bring crime to the United States.

Second, read both NPR links https://www.npr.org/2018/06/22/622540331/fact-check-trump-illegal-immigration-and-crime https://www.npr.org/templates/story/story.php?storyId=5365863

Third, evaluate current belief systems before and after reading these. Write a summary of the knowledge gained from merely double-checking news outlets.

BONUS: To learn even more go and find peer-reviewed research and government research to support the argument that immigrants do not bring crime and are not more dangerous. Start with Sampson. 2008. Rethinking Crime and Immigration https://journals.sagepub.com/doi/pdf/10.1525/ctx.2008.7.1.28

Chavez, L. (2001). Covering Immigration: Popular Images and the politics of the nation. About this book: Media images not only reflect the national mood but also play a dominant role in shaping national discourse. This book brings new questions about the media's influence on the public's increasing fear of immigration.

Immigration Reduces Crime http://www.umass.edu/preferen/You%20Must%20Read%20This/Lee%20Immigration%20and%20Crime.pdf

The article below is a great opinion piece about media and crime.

http://articles.latimes.com/2001/apr/15/opinion/op-51152

Wedding Cake Model

Another model of justice was developed by Samuel Walker who attempts to demonstrate how cases move through the system and may be treated differently by media and society. This model referred to as the Wedding Cake Model Theory, is unique because it differentiates types of crimes by how serious the offense is, the offender's criminal record, and the victim and offender relationship. [1] It is referred to as a wedding cake because of the different tiers or layers on a cake. Take a moment to glance at the wedding cake image below and notice that wedding cakes often have different layers and the bottom tends to be the largest with the top being the smallest. This section will explain what each layer would resemble in the criminal justice system.



We are going to work our way from the bottom of the cake, or the most significant piece, to the smallest piece on top. In the criminal justice system, the bottom layer of the model would represent the most significant number of cases handled by the system, which often includes misdemeanors and traffic

1. Walker, S. (2006). *Sense and nonsense about crime and drugs: A policy guide* (6th ed.). Belmont, CA: Thomson

violations. This layer may also get comprised of first-time offenders of less severe crimes. [2] Misdemeanors are the least dangerous types of crimes which can include, depending on where location, public intoxication, prostitution, graffiti, among others. Imagine getting caught tagging a park wall and never being caught for a crime before, which is where this crime would fall. These are often the crimes most of us have committed, but also most of us may not have been caught or punished. A misdemeanor may result in a monetary fine, rather than jail time.

Bottom-Layer Example (The Largest Portion) Dr. Sanchez

If a person were speeding five over on the interstate, it is unlikely they would get pulled over, or spend time in court. They are likely to pay the fine which admits guilt. However, if they cannot afford the fine, it would require them to go to jail, which brings in a whole host of other issues. The bottom layer of the cake often does not require a person to go to trial because most people with minor crimes are given and accept plea bargains. If one were to go to jail for a misdemeanor, it is typically for less than one year.

When we previously talked about crime control resembling an assembly line, this tier would be an example of that: people get cited for everyday violations, people pay their fines rather than go to court, by paying fines they admit guilt, and their interaction with the system will end. These crimes are the ones that are seen as so common newspapers will rarely report on them. How often would you like to read about someone getting cited for speeding ten mph over? Or being arrested for small possession of marijuana? Although most of these are common marijuana arrests have increased alongside legalization in the U.S. they are annoying to read about from https://www.forbes.com/sites/tomangell/2018/09/24/marijuana-arrests-are-increasing-despite-legalization-new-fbi-data-shows/#43134be64c4b

The second tier, or next layer, is comprised of lower-level felonies that may be violent or non-violent. Again, many of these cases end in a plea bargain and do not end in significant jail or prison time. [3] However, they consume a significant amount of the courts' time. For example, Oregon has three different levels or classes of felonies. Class A is the most serious and can result in up to 20-years imprisonment, Class B can result in up to 10 years imprisonment, and Class C is the least serious with up to five years. [4] The second tier would be comprised mostly of Class C felonies.

The third tier is comprised primarily of what most of us know as serious felonies that tend to be violent and involve offenders with significant criminal histories. In this tier's cases are more likely to go to trial if the offender pleads not guilty, and if found guilty, will result in prison time. As stated in the Oregon example, this would most likely be Class B Felonies and maybe some Class A felonies.

Lastly, the top tier often referred to as celebrated cases, would be the smallest part of the cake and would be made up of the high-profile cases that tend to be profiled by the media. If found guilty, offenders could receive significant punishments which may include life imprisonment or the death penalty. The top tier is less common than the others, but it is also the crime we like to think of as really bad. It is also the cases that garner a lot of news time, and perhaps it is a case that made it to the United States Supreme Court. Therefore, the media may glorify these cases, especially if it is a well-known cases like O.J. Simpson, Bernie

2. Walker, S. (2006). *Sense and nonsense about crime and drugs: A policy guide* (6th ed.). Belmont, CA: Thomson
3. Walker, S. (2006). *Sense and nonsense about crime and drugs: A policy guide* (6th ed.). Belmont, CA: Thomson
4. https://www.criminaldefenselawyer.com/resources/criminal-defense/felony-offense/oregon-felony-class.htm

Madoff, Kobe Bryant, Michael Jackson, Jeffrey Dahmer, and Ted Bundy. Most people know about these cases, and it may have struck fear into the public, but again, these are garnered more attention because they are uncommon, committed by people who are famous, or shock the public consciousness.

Ted Bundy Obsession Example

Our society is so obsessed with the celebrated cases that we often talk a lot about them, cover them extensively on the news, and live in fear because of them. Students in a class that are pro-death penalty often say, "I reserve it for all the Ted Bundy's in the world." They are rare, but we fear them! Take this news link that shares images of his last meals on death row.

https://www.cbsnews.com/pictures/last-meals-of-death-row/8/

The Wedding Cake Model theory not only helps us better understand the operation of the criminal justice system but also how our perceptions of crime and criminality can be skewed by what gets reported in the news. It is uncommon for us to hear or read reports on the most common types of crimes, the bottom tier. When we get bombarded with the crimes that are more at the top, celebrated cases, we may begin to think that is the reality.

Wedding Cake Model Exercise

Find a case for each tier of the wedding cake model in the news and write up a 500 word summary of where it fits and why. Lastly, discuss how it may get influenced by our extensive coverage of rare, yet essential news cases.

As previously demonstrated, crime can be broadly defined, but the two most common types of crime discussed are, street crime and corporate or white-collar crime. Most people are familiar with street crime since it is the most commonly discussed amongst politicians, media outlets, and members of society. Every year the Justice Department puts out an annual report titled "Crime in the United States" which means street crime but has yet to publish an annual Corporate Crime in the United States report. Most Americans will find little to nothing on price-fixing, corporate fraud, pollution, or public corruption.

Street Crime

Street crime is often broken up into different types and can include acts that occur in both public and private spaces, as well as interpersonal violence and property crime. According to the Bureau of Justice (BJS), street crime can include violent crimes such as homicide, rape, assault, robbery, and arson. Street crime also includes property crimes such as larceny, arson, breaking-and-entering, burglary, and motor vehicle theft. The BJS also collects data on drug crime, hate crimes, and human trafficking, which often fall under the larger umbrella of street crime.[1]

Fear of street crime is real in American society; however, street crime may not be as rampant as many think. In a 2017 report, the BJS found that the rate of robbery victimization increased from 1.7 per 1,000 persons in 2016 to 2.3 in 2017. Overall, robbery happens to a small percentage of Americans, which also seems to be a similar trend when looking at the portion of persons age 12 or older who were victims of violent crime. The BJS noted an increase from 0.98% in 2015 to 1.14% in 2017, but note the small percentage overall. Further from 2015 to 2017, the percentage of persons who were victims of violent crime increased among males, whites, those ages 25 to 34, those aged 50 and over, and those who had never married. There are clear risk factors that can be taken into account when attempting to develop policy, which is discussed in subsequent chapters of the book. There were also areas where the BJS noted a downward trend in crime, such as the decline in the rate of overall property crime from 118.6 victimizations per 1,000 households to 108.4, while the burglary rate fell from 23.7 to 20.6. [2]

Polls have consistently found that people are worried about crime in the United States, specifically street crime. Riffkin (2014) found that people worry about various crimes such as homes getting burglarized when they were home, the victim of terrorism, being attacked while driving their car, murdered, the victim of a hate crime, and being sexually assaulted https://news.gallup.com/poll/178856/hacking-tops-list-crimes-

1. https://www.bjs.gov/index.cfm?ty=tp&tid=316
2. Morgan, R., & Truman, J., (December 2018). *NCJ* 252472

americans-worry.aspx. Most people in society, people can go about their daily lives without the fear of being a victim of street crime. Street crime is important to take seriously, but it is reassuring to note that it is unlikely to happen to most people. The conversation should happen around why fears are high, especially amongst those less likely to be a victim. For example, elderly citizens have the greatest fear of street crime, yet they are the group least likely to experience it. Whereas younger people, especially young men, are less likely to fear crime and are the most likely to experience it. [3]

Crime Worries in U.S.

How often do you, yourself, worry about the following things -- frequently, occasionally, rarely or never? How about ...

	% Frequently or occasionally worry
Having the credit card information you have used at stores stolen by computer hackers	69
Having your computer or smartphone hacked and the information stolen by unauthorized persons	62
Your home being burglarized when you are not there	45
Having your car stolen or broken into	42
Having a school-aged child physically harmed attending school	31
Getting mugged	31
Your home being burglarized when you are there	30
Being the victim of terrorism	28
Being attacked while driving your car	20
Being a victim of a hate crime	18
Being sexually assaulted	18
Getting murdered	18
Being assaulted/killed by a coworker/employee where you work	7

Oct. 12-15, 2014

GALLUP

Gallup polls

Because Americans are often fearful of street crime, for various reasons, resources are devoted to prevention and protecting the public. The United States spends roughly $265.2 billion dollars a year and employs more than one million police officers, almost 750,000 correctional officers, and more than 490,000 judicial and legal personnel on street crime. [4] The Uniform Crime Reports (UCR) estimated in 2015 that financial losses from property crime at $14.3 billion in 2014 (FBI, 2015a), but keep that number in mind for a minute. [5] Although it is crucial to recognize that street crime does occur, and it impacts certain groups

3. Doerner, W. G., & Lab, S.P. (2008). *Victimology* (5th ed.). Cincinnati, Ohio: Lexis-Nexis.
4. Kyckelhahn, T. (2012). Justice expenditure and employment extracts. *Bureau of Justice Statistics*
5. FBI. (2015b), September 28). The latest crime stats were released. Washington, DC: US Department of Justice.

disproportionately more than others, it is also important to recognize other types of crimes commonly talked discussed. In fact, the BJS does not have a link that directs people to the next two types of crime discussed when on their main page of crime types.

Corporate Crime

When most people think of crime, they think of acts of interpersonal violence or property crime. The typical image of a criminal is not someone who is considered a 'pillar' in society, especially one who may have an excellent career, donate to charity, devote time to the community, and engage in 'normal' behavior. [6] Corporate crime is an offense committed by a corporation's officers who pursue illegal activity (various kinds) in the name of the corporation. The goal is to make money for the business and run a profitable business, and the representatives of the business. Corporate crime may also include environmental crime if a corporation damages the environment to earn a profit. [7] As C. Wright Mills (1952) once stated, "corporate crime creates higher immorality" in U.S. society. [8] Corporate crime inflicts far more damage on society than all street crime combined, by death, injury, or dollars lost.

Credit Suisse pled guilty to helping thousands of Americans file false income tax returns, and the company got fined $2.6 billion. Last year, BNP Paribas pled guilty to violating trade sanctions and was forced to pay $8.9 billion, which exceeds the yearly pocket yearly costs of all the burglaries and robberies in the United States ($4.5 billion in 2014 according to the FBI). Another example is health care fraud. The estimates suggest this costs Americans $100 billion to $400 billion a year. [9]

In 2001, the energy company Enron committed accounting and corporate fraud, where shareholders lost $74 billion in the four years leading to its bankruptcy, thousands of employees lost jobs, and billions of dollars got lost in pension plans. [10]

In addition to financial loss, corporate crime can be violent. In 2016, the FBI estimated the number of murders in the nation to be 17,250. [11] Compare 54,000 Americans who die every year on the job or from occupational diseases such as black lung and asbestosis and the additional tens of thousands of other Americans who fall victim every year to the silent violence of pollution, contaminated foods, hazardous consumer products, and hospital malpractice. [12] A vast majority of these deaths are often the result of criminal recklessness. Americans are rarely made aware of them, and they rarely make their way through the criminal justice system.

The last major homicide prosecution brought against a major American corporation was in 1980. A Republican Indiana prosecutor charged Ford Motor Co. with homicide for the deaths of three teenage girls who died when their Ford Pinto caught on fire after being rear-ended in northern Indiana. The prosecutor alleged that Ford knew that it was marketing a defective product, with a gas tank that crushed when rear-ended, spilling fuel, where the girls incinerated to death. Ford hired a criminal defense lawyer who in turn hired the best friend of the judge as local counsel, and who, as a result, secured a not guilty verdict after

6. Fuller, J.R. (2019). *Introduction to criminal justice.* New York, Oxford: Oxford University Press.
7. Fuller, J.R. (2019). *Introduction to criminal justice.* New York, Oxford: Oxford University Press.
8. Horowitz, I. (Ed.) (2008), *Power, politics, and people.* Wright Mills, C. (1952). A diagnosis of moral uneasiness (pp.330-339). New York: Ballantine.
9. (2000). License To Steal: How Fraud Bleeds America's Health Care System. Westview Press.
10. Folger, J. (November 2011). The Enron collapse: A look back. *Investopedia.* Retrieved from https://www.investopedia.com/updates/enron-scandal-summary/
11. FBI: UCR. 2016. FBI Murder. https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/murder
12. Mokhiber, R. *Corporate crime & violence: Big business power and the abuse of* the public *trust.* Random House, Inc.

persuading the judge to keep key evidence out of the jury room. [13] https://www.history.com/this-day-in-history/fatal-ford-pinto-crash-in-indiana.

Sometimes the terms corporate and white-collar crime are used interchangeably, but there are important distinctions between the two terms. [14]

White-Collar Crime

In contrast to corporate crime, white-collar crime usually involves employees harming the individual corporation. Sometimes corporate and white-collar crime goes hand in hand, but not always. An example of white-collar crime would be the financial offenses of Bernard Madoff, who defrauded his investors of approximately $20 billion. Instead of trading stocks with his client's money, Madoff had for years been operating an enormous Ponzi scheme, paying off old investors with money he got from new ones.

By late 2008, with the economy in free fall, Madoff could no longer attract new money, and the scheme collapsed, which resulted in hundreds of investors, including numerous charities, being wiped out. As of today, a court-appointed trustee has managed to recover about $13 billion, which is most of the money Madoff's investors put into his funds. The trustee sold off Madoff family's assets, including their homes in the Hamptons, Manhattan, and France and a 55-foot yacht named Bull. [15]

Dr. Sanchez's Professor in Graduate School

In 2008, many people were negatively impacted by Madoff, one of which was a former professor for Dr. Sanchez. He lost his retirement, which required him to keep teaching well into his 80s, as well as lost his home. The impact of Madoff was far-reaching and although most may call it a purely economic crime, people committed suicide and lost everything in this scandal.

No official program measures corporate and white-collar crime like there is with street crime occurring in the United States. Therefore, we estimate costs to society, and who the victims are. Additionally, unlike street crime where the crime can often be discovered instantly and investigated quickly, corporate and white-collar crime can take years to investigate and even longer to prosecute. Remember, Madoff was involved in fraud most of his working life but was not caught until he was nearing the end at the age of 71. [16]

13. Steinzor, R. (Dec. 2014). It's called 'Why Not Jail?': Industrial catastrophes, corporate malfeasance, and government inaction. Cambridge University Press.
14. Kleck, G. (1982). On the use of self-report data to determine the class distribution of criminal and delinquent behavior." *American Sociological Review,* 427-433.
15. Zarroli, J. (2018). For Madoff victims, scars remain 10 years later, *National Public Radio,* https://www.npr.org/2018/12/23/678238031/for-madoff-victims-scars-remain-10-years-later
16. Fuller, J.R. (2019). *Introduction to Criminal Justice.* New York: Oxford, Oxford University Press.

Once an act gets identified as a crime, the law then attempts to define crime in a way that can distinguish the harm done and the severity of the crime. There are different types of crime and two different types of offenses that will get discussed. In the previous section, street crime, corporate crime, and white-collar crime get discussed. However, more broadly, there are crimes against the person, crimes against property, crimes against public order, and drug crimes that typically get counted and fall under street crime.

Crimes Against the Person

Crimes against the person are often considered the most serious and may include homicide, rape, assault, kidnapping, and intimate partner violence. Each of these crimes can carry a different penalty based upon the seriousness of the crime. For example, because Ted Bundy murdered women, rather than 'just' assaulted, Bundy was eligible for capital punishment in the U.S. The state defines the crime and the punishment.

Crimes Against Property

Property crimes are widespread and seen as less severe than crimes against the person. Property crimes may include larceny, burglary, arson, and trespassing. There are varying degrees of liability depending on the circumstances of the case.

Crimes Against Public Order

Public order crimes may not harm other people or property but impact social order. Think back to the example of feeding the homeless in a community where that is illegal. Other typical examples would be disorderly conduct, loitering, and driving under the influence. The victim is society, and the goal is to maintain social order. Many debates whether certain crimes against public order are more or less severe, but get inappropriately punished. For example, driving while intoxicated can take lives and maybe more severe. However, the law will charge for vehicular manslaughter or murder if life gets taken because someone drove drunk.

Drug Offenses

Most often drug offenses can be seen as a crime against public order, but the United States' reaction to illegal drug use has altered the resources of the CJ system because of the "war on drugs." Some examples of drug offenses can be the possession of illegal drugs, being high, and selling. Punishment will vary based on the drug, how much of the drug is in possession or sold, and where it gets sold.

Misdemeanor

A misdemeanor is considered a minor criminal offense that is punishable by a fine and jail time for up to one year.

Felony

A felony is an offense that is punishable by a sentence of more than one year in state or federal prison and sometimes by death.

Many different types of crimes and punishments can be handed out by the criminal justice system. Each state determines what and how this will operate if discussing state-level crime. Other crimes are defined in federal statutes and can get punished at the federal level such as treason. Some crimes are seen as more severe, especially if they are violent in nature or harm people. Others may get seen as 'victimless' or behavior that gets seen as consensual, yet undesirable to those making the laws. This general overview demonstrates the complexity of defining crime and understanding the role society has in shaping these perceptions.

SHANELL SANCHEZ

It was not until 1660 that the word victim was first used in the sense of a person who is hurt, tortured, or killed by another. A victim of crime did not exist until well into the 17th century. Why were victims ignored for so long? [1] A victim is an integral part of the system some say without a victim there would be no need for the CJ system. Victims are the people or communities that suffer physical, emotional, or financial harm as a result of a crime. Over the years different typologies of victims have been created to demonstrate the unique role or position of victims of crime. Typically, when people hear someone has been a victim of a crime we often think of them as completely innocent. A lot of new legislation and policy changes created to provide the victim with a greater role in the CJ offers the stereotypical view of the victim as completely innocent. [2]

Typologies of Crime Victims

Theorists have developed victim typologies that are concerned primarily with the situational and personal characteristics of victims and the relationship between victims and offenders. Benjamin Mendelsohn was one of the first criminologists to create a victim typology, in the 1950s, but was not without controversy. Below is a table of Mendelsohn's typology of crime victims and as you can see he placed a lot of emphasis on most victims' attitude that leads to their victimization. [3]

Mendelsohn's Typology of Crime Victims

1. Hagemann, O., Schäfer, P., & Schmidt, S. (Eds.) (2010). *Victimology, Victim Assistance, and Criminal Justice: Perspectives Shared by International Experts* Wemmers, J. A short history of victimology. at the Inter-University Centre of Dubrovnik. 2010. Available at SSRN: https://ssrn.com/abstract=2482627
2. Fuller, J.R. (2019). *Introduction to Criminal Justice:* New York: Oxford University Press.
3. Mendelsohn, B. (1976). Victimology and contemporary society's trends. *Victimology, 1*(1), 8-28.

Innocent victim	Someone who did not contribute to the victimization and is in the wrong place at the wrong time. This is the victim we most often envision when thinking about enhancing victim rights.
The victim with minor guilt	Does not actively participate in their victimization but contributes to some minor degree, such as frequenting high-crime areas. This would be a person that continues to go to a bar that is known for nightly assault.
The guilty victim, guilty offender	The victim and offender may have engaged in criminal activity together. This would be two people attempting to steal a car, rob a store, sell drugs, etc.
The guilty offender, guiltier victim	The victim may have been the primary attacker, but the offender won the fight.
Guilty victim	The victim instigated a conflict but is killed in self-defense. An example would be an abused woman killing her partner while he is abusing her.
Imaginary victim	Some people pretend to be victims and are not. This would be someone falsifying reports.

Other criminologists developed similar typologies but included other elements. For example, Hans Von Hentig expanded his typology from situational factors that Mendelsohn looked at and considered the role of biological, sociological, and psychological factors. For example, Von Henting said the young, elderly, and women are more susceptible to victimization because of things such as physical vulnerabilities. It is important to recognize that some crimes, and ultimately crime victims, are excluded in these typologies such as white-collar and corporate crime. [4] [5]

Von Hentig's Typology

Young people	Immature, under adult supervision, lack physical strength and lack the mental and emotional maturity to recognize victimization
Females/elderly	Lack of physical strength
Mentally ill/intellectually disabled	Can be taken advantage of easily
Immigrants	Cannot understand language or the threat of deportation makes them vulnerable
Minorities	Marginalized in society, so vulnerable to victimization.
Dull normals	Reasonably intelligent people who are naive or vulnerable in some way. These people are easily deceived.
The depressed The acquisitive	Gullible, easily swayed, and not vigilant. Greedy can be targeted by scammers who would take advantage of their desire for financial gain.
The lonesome and broken-hearted	Often prone to victimization by intimate partners. They desire to be with someone at any cost. They are susceptible to manipulation.
Tormentors	Primary abusers in relationships become victims when the one being abused turns on them.
Blocked, exempted, and fighting victims	Enter situations in which they are taken advantage such as blackmail.

Von Hentig's work was the basis for later theories of **victim precipitation**. Victim precipitation suggests

4. Burgess, A. W. (2013). *Victimology: Theories and applications.* (3rd ed.). Burlington: Jones and Bartlett.
5. Von Hentig, H. (1948). *The criminal and his victim: Studies in the sociobiology of crime.* New Haven: Yale University Press.

many victims play a role in their victimization. First, the victim acted during the offense, and second that the victim instigated the commission of the offense. [6] It is important to note that criminologists were attempting to demonstrate that victims may have some role in the victimization and are not truly innocent. Today we often recognize the role of victimization without blaming the individual because ultimately the person who offended is the person who offended.

6. Smith, M., & Bouffard, L. A. (2014). "Victim precipitation." *The Encyclopedia of Criminology and Criminal Justice,* Wiley Online Library.

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Definition of a Victim

The CJ system refers to a victim as a person who has been directly harmed by a crime that was committed by another person. In some states, victims' rights apply only to victims of felonies (more serious crimes) while other states also grant legal rights to victims of misdemeanors (less serious crimes). Some states allow a family member of a homicide victim or the parent or guardian of a minor, incompetent person, or person with a disability to exercise these rights on behalf of the victims. [1]

The U.S. criminal justice system first introduced services for victims of federal criminal offenses during the 1980s. In the 1990s it was made law and Congress created the Victim's Rights and Restitution Act H.R.5368. The Act requires all Federal law enforcement agency officers and employees to make their best efforts to accord victims of crime the right to (1) be treated with fairness and respect for the victim's dignity and privacy; (2) be protected from their accused offenders; (3) notification of court proceedings; (4) attend public court proceedings related to the offense under certain conditions; (5) confer with the Government attorney assigned to the case; (6) restitution; and (7) information about the conviction, sentencing, imprisonment, and release of the offender. Directs Federal law enforcement agency heads to designate the persons responsible for identifying the victims of a crime and providing certain services to such victims such as (1) informing them where to receive medical care and counseling; (2) arranging protection from an offender; and (3) keeping the victim informed of developments during the investigation and prosecution of the crime and after the trial such as the arrest of a suspected offender or an escape of a convicted offender. [2]

The state prosecutes criminal offenses in the name of society, which is why cases are Smith v. Colorado, so victims and families were often not included in the process since they were not a necessary part of the court system. Today we have introduced various rights and include **victim-impact statements**. Victim-impact statements given an account by the victim, the victim's family, or others affected by the offense that expressed the effects of the offense. [3]

Victim Impact Statements Video: Listen and Learn

1. The National Center for Victims of Crime. (2012). *Victim's rights.* http://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/victims%27-rights
2. https://www.congress.gov/bill/101st-congress/house-bill/5368 H.R.5368 - Victims' Rights and Restitution Act of 1990 101st Congress (1989-1990)
3. http://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/victims%27-rights

You will watch victim impact statements that were created to help educate people on the impact of various crimes. Warning: It is hard to watch at times and may cause you to feel upset, sad, angry, or more.

- First, watch the youtube video https://www.youtube.com/watch?v=_ghpl4vDZ3s
- Second, write a 500-word response about the benefits of victim-impact statements, the impact the film had on you, and any other general thoughts you had while watching.

Victim Rights

Today, all states and the federal government have passed laws to establish a set of victims' rights. The main goal of these laws is to provide victims with certain information and protections. It is important to note that victims' rights, just like criminal offenses, will depend on the jurisdiction where the crime is investigated and prosecuted. The rights may vary from state, federal or tribal government, or military installation. [4]

Overview of Victim's Rights

Below is a list of basic victims' rights from the *National Center for Victims of Crime* that are provided by law in most jurisdictions. Again, it is important to remember these rights vary, depending on federal, state, or tribal law.

1. **Right to be Treated with Dignity, Respect, and Sensitivity**
    1. Victims generally have the right to be treated with courtesy, fairness, and care by law enforcement and other officials throughout the entire criminal justice process. This right is included in the constitutions of most states that have victims' rights amendments and in the statutes of more than half the states., 2 Victim impact statements allow crime victims, during the decision-making process on sentencing or parole, to describe to the court or parole board the impact of the crime on their lives. The victim impact statement may include a description of psychological, financial, physical, or emotional harm the victim experienced as a result of the crime. A judge may use information from these statements to help determine an offender's sentence; a parole board may use such information to help decide whether to grant parole and what conditions to impose in releasing an offender. Many victims have reported that making victim impact statements improved their satisfaction with the criminal justice process and helped them recover from the crime. In some states, the prosecutor is required to confer with the victim before making important decisions. In all states, however, the prosecutor (and not the victim) makes decisions about the case.

4. The National Center for Victims of Crime. (2012). *Victim's rights*. http://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/victims%27-rights

2. **Right to Be Informed**

    1. The purpose of this right is to make sure that victims have the information they need to exercise their rights and to seek services and resources that are available to them. Victims generally have the right to receive information about victims' rights, victim compensation (see "Right to Apply for Compensation," below), available services and resources, how to contact criminal justice officials, and what to expect in the criminal justice system. Victims also usually have the right to receive notification of important events in their cases. Although state laws vary, most states require that victims receive notice of the following events:

        - the arrest and arraignment of the offender
        - bail proceedings
        - pretrial proceedings
        - dismissal of charges
        - plea negotiations
        - trial
        - sentencing
        - appeals
        - probation or parole hearings
        - release or escape of the offender

        States have different ways of providing such information to victims. Usually, information about court proceedings is mailed to the victim. Some states have an automated victim notification system that automatically calls or e-mails the victim with updates on the status of the offender, while others require the victim to telephone the authorities to receive such updates.

3. **Right to Protection**

    1. In many states, victims have the right to protection from threats, intimidation, or retaliation during criminal proceedings. Depending on the jurisdiction, victims may receive the following types of protection:

        - police escorts
        - witness protection programs
        - relocation

- restraining orders

Some states also have laws to protect the employment of victims who are attending criminal proceedings (see "Right to Attend Criminal Proceedings," above).

4. **Right to Apply for Compensation**

    1. All states provide crime victim compensation to reimburse victims of violent crime for some of the out-of-pocket expenses that resulted from the crime. The purpose of compensation is to recognize victims' financial losses and to help them recover some of these costs. All states have a cap on the total compensation award for each crime, and not all crime-related expenses are covered. To be eligible for compensation, victims must apply, usually within a certain period, and show that the losses they are claiming occurred through no fault of their own. Some types of losses that are usually covered include:

        - medical and counseling expenses
        - lost wages
        - funeral expenses

    Compensation programs seldom cover property loss or pain and suffering. Also, victim compensation is a payer of last resort; compensation programs will not cover expenses that can be paid by some other program, such as health insurance or workman's compensation.

5. **Right to Restitution from the Offender**

    1. In many states, victims of crime have the right to restitution, which means the offender must pay to repair some of the damage that resulted from the crime. The purpose of this right is to hold offenders directly responsible to victims for the financial harm they caused. The court orders the offender to pay a specific amount of restitution either in a lump sum or a series of payments. Some types of losses covered by restitution include:
    2. lost wages
    3. property loss
    4. insurance deductibles

6. **Right to Prompt Return of Personal Property**

    1. Crime investigators must often seize some of the victim's property as evidence for

a criminal case. In most states, authorities must return such property to the victim when it is no longer needed. To speed up the return of the property, some states allow law enforcement to use photographs of the item, rather than the item itself, as evidence. The prompt return of personal property reduces inconvenience to victims and helps restore their sense of security.

7. **Right to a Speedy Trial**

8. **Right to Enforcement of Victim's Rights**

    1. To be meaningful, legal rights must be enforced. States are beginning to pass laws to enforce victims' rights, and several states have created offices to receive and investigate reports of violations of victims' rights. Other states have laws that permit victims to assert their rights in court.

5

5. National Center for Victims of Crime. (2012). http://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/victims%27-rights

This unit delved into theories of criminal behavior, and the previous unit sought crime control policies. Each theory suggests an appropriate means to reduce or prevent violence. Some work and some do not. Deterrence theories operate on the assumption that people want to minimize pain. Learning theories suggest people may learn how to be a criminal (or learn how not to be a criminal). Disciplining children is a primary function of the family. Many people believe it is acceptable, or even necessary, to spank their children. Spanking is a form of corporal punishment. Why do parents spank their children? For some parents, they spank as a form of punishment (Remember operant conditioning? It is a form of positive punishment). They are using physical means to stop a behavior from happening again. These are ideological beliefs.

Other parents might say that they've been spanked as a child, and they turned out fine. This belief reinforces the family upbringing myth. Additionally, other parents might feel pressure to discipline their children with physical force. Some parents "think" they seem "weak" if they do not spank their child. Furthermore, grandparents and other family members might encourage new parents to spank their children.

Please listen to or read the National Public Radio's podcast on spanking (NPR's – "The American Academy of Pediatrics On Spanking Children: Don't Do It, Ever.")

There is a difference between physical discipline and physical abuse, but it is a fine line. If you are in favor of spanking, would you let another family member spank your child? Would you let a stranger? Why or why not? It is not illegal to spank children in the United States, but decades of research have recommended other methods of punishment and discipline besides physical force. At the very least, it is easy for children to learn that violence (spanking) is an appropriate method to get what you want. Parents who spank their children because their child "hit" another child or sibling might want to reflect on what a child may learn – "I'm going to hit (spank) you for hitting another person. Don't hit!"

2: Defining and Measuring Crime and Criminal Justice

Learning Objectives

In the previous section, we spent much time trying to understand how to define crime, whereas this section will focus on the task of measuring crime. Measuring crime is quite complex and requires an understanding of different data sets and how we use them. Defining crime seems complex, but measuring crime is just as complicated of a task. Without crime, there is no need for the criminal justice system. We must have a clear and accurate understanding of crime in order to create effective policies to combat it or help minimize it. This section will teach students how to obtain accurate measures of crime so that they can be an informed citizen. Further, if we have an accurate picture of crime and trends, we can better predict the needs of our society, such as increased patrol, rehabilitation services, and more. We will also spend some time talking about evidence-based practices, discussed in greater detail later. After reading this section, students will be able to:

- Develop an understanding of the different data sources used to gather precise and accurate measures of crime
- Recognize the difference between official or reported statistics, self-report statistics, and victimization statistics
- Evaluate the reliability of statistics and data heard about the criminal justice system

Critical Thinking Questions

1. What are the three different types of data sources we often rely on in CJ?
2. What are the strengths and limitations of each data source?
3. Identify when each type of data source would be appropriate for different crimes and why.

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It is difficult to determine that amount of crime that occurs in our communities every year because many crimes never come to the attention of the criminal justice system. There are various reasons that will be discussed, such as victims not reporting, victims not realizing they are victims, and offenders not getting caught. Research reveals, that on average, more than half of the nation's violent crimes, or nearly 3.4 million violent victimizations per year, went unreported to the police between 2006 and 2010, according to a new report published by the Bureau of Justice Statistics (BJS). [1] Because of this underreporting of crime, criminologists often refer to a concept known as the dark figure of crime.

There are three general sources of crime statistics that will be covered in this chapter: official statistics, which we often describe as reported statistics, self-report statistics, and victimization statistics. Each of these sources of crime statistics has pros and cons, and we will spend time discussing those as well. Additionally, we will discuss the importance of looking at crime trends over time, relying upon statistics and research when developing policy, and how data should be a tool that enhances the criminal justice system.

If we have accurate and reliable crime statistics, we can evaluate criminal justice policies and programs. For example, we could use crime statistics to see if incarcerating drug offenders is effective. Such effectiveness is studied in the correctional system via the 'risk principal,' or classifying people based on the level of risk. https://heinonline.org/HOL/LandingPage?handle=hein.journals/fedsen27&div=37&id=&page=

Relying on official statistics can be problematic to grasp a correct understanding of crime in society because many crimes never even come to the attention of the criminal justice system. Official statistics are often the crimes that are known or reported to police or others. It may seem shocking that people do not report crimes, but it is more common than we think. Let us take the example of looking at the gap between reported and unreported crimes.

Dark Figure of Crime Example

My father-in-law grew up in a small town in South Dakota. When his family moved to Colorado, they still had a rural mindset to their property. They often think people should not touch other peoples things, so there is no need to lock up their house, car, or other property. He leaves his vehicle, house, and garage unlocked in Colorado

1. Bureau of Justice Statistics. (2012). Nearly 3.4 million violent crimes per year. https://www.bjs.gov/content/pub/press/vnrp0610pr.cfm

because of that mindset. However, they live in a large, populous part of Colorado in a suburb outside Denver. Most people do not know the neighbor three doors down. One morning he woke up to his truck gone! The first thing he did was realize he left the keys in the truck and the truck was unlocked (normal to him). Next, he decided to take a walk to look for it before phoning the police. He located the truck, and it was damaged. It appeared that kids took it for a joy ride, as evidence from the beer cans and odor. He chose not to call the police. Why? He was happy the property had was located, yet he believed 'it was his fault,' and he had to get to work. Is this type of reaction more common than we may think?

A friend of mine was a victim of domestic violence for over nine months and never told anyone, especially police. Her boyfriend was only presented as perfect, loving, and romantic on social media and around people. When she did come forward, it was after she landed in the emergency room due to him assaulting her. People may initially think domestic violence victims would always call the police, but there are so many reasons people do not come forward.

When victims of crime do not report, or police are not made aware of a crime these crimes go uncounted in the official statistics. They become part of the **'dark figure of crime'** that we will learn about throughout this section. [2]

Some Reasons People May Not Report [3]

1. The victim may not know a crime occurred
2. The offender is a member of the family, a friend, or an acquaintance
3. The victim thinks it is not worth reporting
4. The victim may fear retaliation
5. The victim may also have committed a crime
6. The victim does not trust the police

2. Biderman, A., & Reiss, A. (1967). On exploring the "dark figure of crime." *The Annals of the American Academy of Political and Social Science. 374*(1), 1–15. https://doi.org/10.1177/000271626737400102
3. Brantingham, P., & Brantingham, P. (1984). *Patterns in Crime*, New York: Macmillan.

Despite being aware that crime does go unreported, it is still important to estimate and attempt to measure crime in the country. However, it is essential always to be aware of the data sources strengths and weaknesses when reading crime statistics. Also, be cautious of how changing data collection techniques may alter statistics. For example, if a survey never collected data on prescription drug abuse but then all of a sudden does it could seem like prescription drugs are being abused at high rates. However, it is most likely just because it is the first time the questions got asked and there are no comparison groups.

Official statistics are gathered from various criminal justice agencies, such as the police and courts, and represent the total number of crimes reported to the police or the number of arrests made by that agency. Remember, if an officer uses discretion and does not arrest a person, even if a crime was committed, this does not get reported.

The Federal Bureau of Investigation's (FBI's) Uniform Crime Reports (UCR) is the largest, most common data on crime currently available. The UCR lists the number of crimes that were reported to the police and the number of arrests made. The link below can take you to the UCR homepage https://www.fbi.gov/services/cjis/ucr.

The UCR Program's primary objective is to generate reliable information for use in law enforcement administration, operation, and management. Various groups and agencies rely upon the UCR crime data, such as law enforcement executives, students, researchers, the media, and the public at large seeking information on crime in the nation. [1] The UCR began in 1929 by the International Association of Chiefs of Police to meet the need for reliable uniform crime statistics for the nation. In 1930, the FBI was tasked with collecting, publishing, and archiving those statistics. Every year there are four annual publications produced from data received from more than 18,000 city, university and college, county, state, tribal, and federal law enforcement agencies voluntarily participating in the program. [2]

The UCR Program consists of four data collections: The National Incident-Based Reporting System (NIBRS), the Summary Reporting System (SRS), the Law Enforcement Officers Killed and Assaulted (LEOKA) Program, and the Hate Crime Statistics Program. The UCR also publishes special reports on Cargo Theft, Human Trafficking, and NIBRS topical studies. The UCR Program will manage the new National Use-of-Force Data Collection.

National Incident-Based Reporting System, or NIBRS

1. U.S. Department of Justice. (2017). UCR Reports
2. U.S. Department of Justice. (2017). UCR Reports

The National Incident-Based Reporting System, or NIBRS, was created to improve the overall quality of crime data collected by law enforcement. NIBRS is unique because it collects data on crimes reported to the police, but also incidents where multiple crimes are committed, for example when a robbery escalates into a rape. [3] NIBRS also collects information on victims, known offenders, relationships between victims and offenders, arrestees, and property involved in the crimes. See the link to go directly to NIBRS https://www.fbi.gov/services/cjis/ucr/nibrs

Hate Crime Statistics

Congress passed the Hate Crime Statistics Act, 28 U.S.C. § 534, on April 23, 1990. This required the attorney general to collect data "about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity." Hate crime statistics may assist law enforcement agencies, provide lawmakers with justification for certain legislation, provide the media with credible information, or simply show hate crime victims that they are not alone (FBI, 2018). See the link to go to the FBI's hate crime statistics link https://www.fbi.gov/services/cjis/ucr/hate-crime.

The FBI UCR Program's Hate Crime Data Collection gathers data on the following biases:

Race/Ethnicity/Ancestry

- Anti-American Indian or Alaska Native
- Anti-Arab
- Anti-Asian
- Anti-Black or African American
- Anti-Hispanic or Latino
- Anti-Multiple Races, Group
- Anti-Native Hawaiian or Other Pacific Islander
- Anti-Other Race/Ethnicity/Ancestry
- Anti-White

Religion

- Anti-Buddhist
- Anti-Catholic
- Anti-Eastern Orthodox (Russian, Greek, Other)
- Anti-Hindu
- Anti-Islamic

3. Rantala, R. R. (2000). Effects of NIBRS on crime statistics. *Bureau of Justice Statistics Special Report.* U.S. Department of Justice, Office of Justice Programs. Washington, DC.

- Anti-Jehovah's Witness
- Anti-Jewish
- Anti-Mormon
- Anti-Multiple Religions, Group
- Anti-Other Christian
- Anti-Other Religion
- Anti-Protestant
- Anti-Atheism/Agnosticism/etc.

Sexual Orientation

- Anti-Bisexual
- Anti-Gay (Male)
- Anti-Heterosexual
- Anti-Lesbian
- Anti-Lesbian, Gay, Bisexual, or Transgender (Mixed Group)

Disability

- Anti-Mental Disability
- Anti-Physical Disability

Gender

- Anti-Male
- Anti-Female

Gender Identity

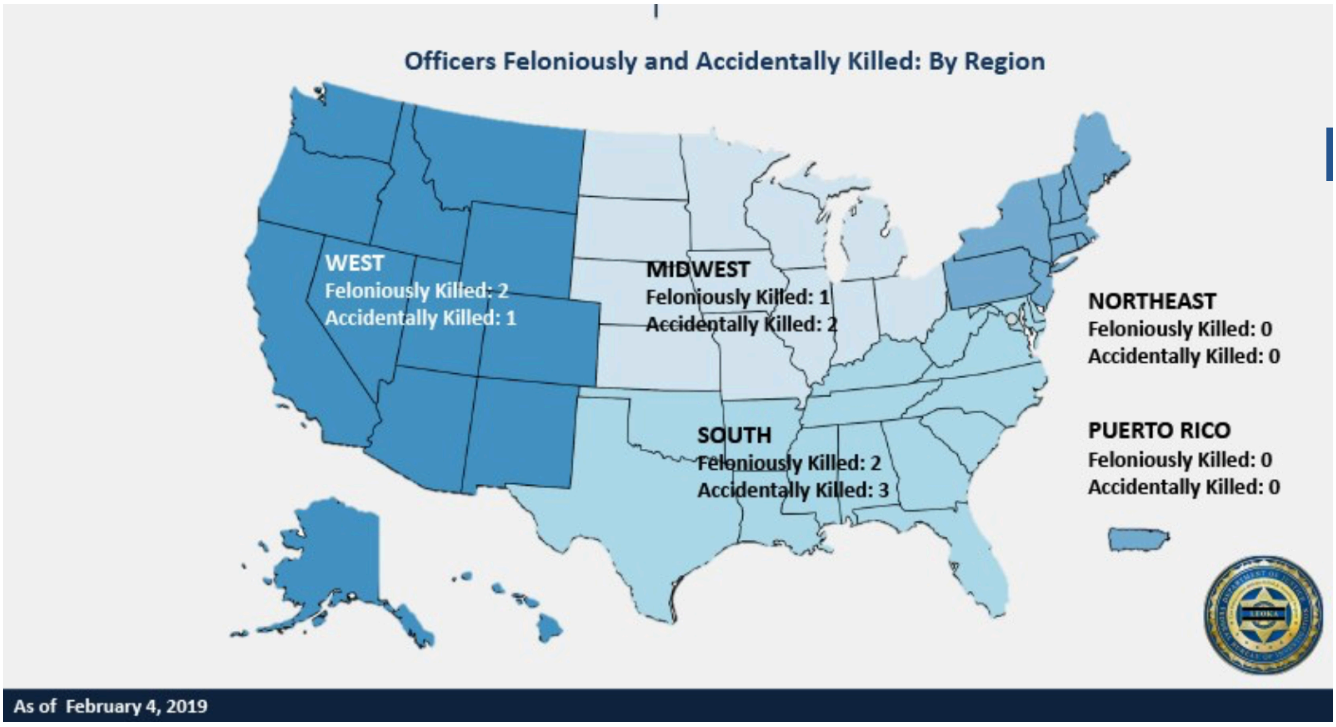
- Anti-Transgender
- Anti-Gender Non-Conforming

The types of hate crimes reported to the FBI are broken down by specific categories. The aggregate hate crime data collected for each incident include the following:

- **Incidents and offenses by bias motivation:** Includes crimes committed by and against juveniles. Incidents may include one or more offense types.
- **Victims:** The types of victims collected for hate crime incidents include individuals (adults and juveniles), businesses, institutions, and society as a whole.
- **Offenders:** The number of offenders (adults and juveniles), and when possible, the race and ethnicity of the offender or offenders as a group.
- **Location type:** One of 46 location types can be designated.
- **Hate crime by jurisdiction:** Includes data about hate crimes by state and agency.

Law Enforcement Officers Killed and Assaulted Program LEOKA

LEOKA provides data and training that helps keep law enforcement officers by providing relevant, high quality, potentially lifesaving information to law enforcement agencies focusing on why an incident occurred as opposed to what occurred during the incident, with the hope of preventing future incidents.[4]



LEOKA Data

4. FBI (2017). https://www.fbi.gov/services/cjis/ucr/leoka

Exclusions from the LEOKA Program's Data Collection

Deaths resulting from the following are not included in the LEOKA Program's statistics:

- Natural causes such as heart attack, stroke, aneurysm, etc.
- On duty, but death is attributed to their own personal situation such as domestic violence, neighbor conflict, etc.
- Suicide

Examples of job positions not typically included in the LEOKA Program's statistics (unless they meet the above exception) follow:

- Corrections/correctional officers
- Bailiffs
- Parole/probation officers
- Federal judges
- The U.S. and assistant U.S. attorneys
- Bureau of Prison officers
- Private security officers

All of these official statistics are a great starting point, although, recognize they are imperfect in nature. Police agencies can change their attention to certain events, which can change the overall number of arrests. For example, if police begin cracking down on domestic violence the statistics may go up. This crackdown can make it appear that the problem has increased, although it can be related to the crackdown. Just remember, if the crime is not reported, or no arrest is made it will not get captured in the data.

Bureau of Justice Statistics Exercise

The BJS is relatively user-friendly. Look at crime statistics by state, region, or city, and explore different years and crime types.
https://www.bjs.gov/index.cfm?ty=datool&surl=/arrests/index.cfm
Examine current state AND city crime trends in the past five years.
Second, pick a state AND city interested in living in and examine the crime trends for the past five years.

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Victimization studies attempt to fill in where police reports are missing by asking people if they have been a victim of a crime in a given year, reported or not. The National Crime Victimization Survey (NCVS) is the primary source of information on criminal victimization in the United States. The NCVS helps fill in gaps that the UCR and NIBRS cannot fill in because that data is only crimes known to police. Every year the U.S. Census Bureau administers the survey and gathers data on frequency, characteristics, and consequences of criminal victimization from approximately 135,000 households, composed of nearly 225,000 persons. The NCVS collects information on nonfatal personal crimes (i.e., rape or sexual assault, robbery, aggravated and simple assault, and personal larceny) and household property crimes (i.e., burglary, motor vehicle theft, and other theft) both reported and not reported to police. [1] It is important to help fill in the gap of the dark figure of crime previously discussed.

The NCVS collects information on age, sex, race and Hispanic origin, marital status, education level, and income, and whether they experienced victimization. Additionally, the NCVS collects information about the offender about age, race and Hispanic origin, sex, and victim-offender relationship, characteristics of the crime (e.g., time and place of occurrence, use of weapons, nature of injury, and economic consequences), whether the crime get reported to police, reason(s) the crime was or do not get reported, and victim experiences with the criminal justice system. [2] See the link below to explore the NCVS https://www.bjs.gov/index.cfm?ty=dcdetail&iid=245

See the report below on findings of repeat victimization from the NCVS: https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6046

NCVS Exercise

1. Bureau of Justice Statistics, Data Collection: National Crime Victimization Survey (NCVS)
2. Bureau of Justice Statistics, Data Collection: National Crime Victimization Survey (NCVS)

Go to the NCVS page and use the analysis tool that allows you to examine the National Crime Victimization Survey (NCVS) data on both violent and property victimization. You can select the victim, household, and incident characteristics.

You can instantly generate tables with national estimates of the numbers, rates, and percentages of victimization from 1993 to the most recent year that NCVS data are available. The pre-set Quick Tables show you trends in crime and reporting to the police. If you would like more detail, use the Custom Tables analyze victimization by excellent characteristics.

https://www.bjs.gov/index.cfm?ty=nvat

As with any data source, there are challenges and limitations to victimization surveys. Respondents may have issues recalling victimization, which can lead to underreporting or overreporting. If an individual was traumatized the event may blur together, and it may have occurred in 2017 rather than 2018, but gets reported as 2018. Other times respondents may lie or omit information for various reasons such as shame, fear, confusion, and a lack of trust. If the respondent is uncomfortable with the interviewers, they may not want to tell them that their partner abused them, out of fear it will get reported to police. However, methodological techniques can attempt to minimize these challenges buy bounding to mitigate the chances of this happening. [3]

3. Lab, S., Holcomb, J., & King, W. (2013). *Criminal justice: The Essentials.* Oxford University Press: Oxford.

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Self-report statistics are stats that are reported by individuals. Self-report statistics get gathered when people are asked to report the number of times they may have committed a particular crime during a set period in the past, regardless of getting caught or not. For example, in-class students take a criminal activity checklist and report behaviors they have engaged in at some point in their lives. People should be honest since the data has no identifying information collected, and report even if no one ever found out what we find during class time it that all the students, for over eight years of teaching, have committed a crime. However, the amount of students that have to get caught is minimal, especially those that received formal sanctioning from the CJ system (funneling of crime).

> Monitoring the Future is an ongoing study of the behaviors, attitudes, and values of American secondary school students, college students, and young adults. Each year, a total of approximately 50,000 8th, 10th, and 12th-grade students get surveyed (12th graders since 1975, and eighth and 10th graders since 1991). Besides, annual follow-up questionnaires are mailed to a sample of each graduating class for some years after their initial participation. The Monitoring the Future Study has been funded under a series of investigator-initiated competing research grants from the**National Institute on Drug Abuse**, a part of the **National Institutes of Health**. MTF is conducted at the **Survey Research Center** in the **Institute for Social Research** at the**University of Michigan**.

> Monitoring the Future Drug Use Amongst Teens

How do we get estimates on drug use amongst teens if most of them do not get caught? We rely on reports like the one above from the MTF. Monitoring the Future (MTF) is a long-term study of substance use among U.S. adolescents, college students, and adult high school graduates through age 60. The survey is conducted annually, which allows us to examine long term trends. MTF findings identify emerging

substance use problems, track substance use trends, and inform national policy and intervention strategies. Respondents are confidential, which means we cannot link their answers to them. Therefore, people may be more likely, to tell the truth. [1]

In the Report: One Form of Drug Use Showed a Sharp Increase in Use in 2018

The most important findings to emerge from the 2018 survey is the dramatic increase in vaping by adolescents. Vaping is a relatively new phenomenon, so we are still developing measures related to this behavior, which included asking separately for the first time in 2017 about the vaping of three specific substances—nicotine, marijuana, and just flavoring. As the section on vaping in this monograph shows, there was a significant and substantial increase in 2018 in the vaping of all three of these substances, including some of the most substantial absolute increases MTF has ever tracked for any substance. Given that nicotine is involved in most vaping, and given that nicotine is a highly addictive substance, this presents a severe threat.[2]

Self-report statistics are great because they can help discover problems we were unaware of, such as vaping. Further, it helps us identify victimless crimes, or crimes to where there is no victim such as drug use, gambling, and underage drinking. Lastly, we uncover offenses that are not as serious such as shoplifting, which are less likely to be known to police. [3]

However, self-report data also has its limitations. Respondents may exaggerate or underreport their criminal behavior, for various reasons. For example, in the class activity we do, many students did not know what they did was illegal behavior until the statute was read, so they would never have thought they committed a crime. Lastly, if we do not capture a large sample, we may limit who gets the survey. If we are surveying kids in school about substance abuse, but not reaching out to all kids even if they get suspended, we may miss important data. [4]

Which Data Should We Use?

In each type of data (official, self-report, and victimization) there are pros and cons. Additionally, each source is more likely to produce a better picture of what is occurring depending on the area of study. If a person wanted to get the best statistics on reported homicides in the US, which source would be best? How about domestic violence? What if we were interested in finding out drug abuse rates amongst teens in high school?

1. Johnston, L.D., Miech, R.A., O'Malley, P.M., Bachman, J.D., Schulenberg, J.E., & Patrick, M.E. (2018). *MTF 2018 Overview Key Findings on Adolescent Drug Use*
2. ohnston, L.D., Miech, R.A., O'Malley, P.M., Bachman, J.D., Schulenberg, J.E., & Patrick, M.E. (2018). *MTF 2018 Overview Key Findings on Adolescent Drug Use*
3. Hindelang, Hirschi, & Weis, (1981). *Measuring delinquency.* Thousand Oaks, CA: Sage Pubs.
4. Lab, S., Holcomb, J., & King, W. (2013). *Criminal justice: The Essentials*. Oxford University Press: Oxford.

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Genocide: Misuse of Statistics Exercise

The misuse of statistics promotes crime myths and generates fear of crime. There are various ways that we can misuse statistics, such as limiting public access to critical information, intending to mislead the public by presenting false information, or using deceptive formats to present information. [1]

Exercise: Find a news article that demonstrates an apparent misuse of statistics for a crime OR an article that demonstrates that people are trying to get release accurate and reliable information about a crime. Specifically, discuss how it is a misuse of statistics or not and why that particular article was picked in 500 words.

For example, the article I found is about the genocide in Myanmar. The article is titled, "What is happening in Myanmar is genocide. Call it by its name" in the Washington Post. For a long time, no one referred to this crime as a genocide, and there were deliberate attempts by the government in Myanmar and the world to not refer to it as genocide. Despite visual evidence that a genocide was occurring, the government tried to deny it. The news said, "NO MORE. Call it what it is."

https://www.washingtonpost.com/opinions/global-opinions/what-is-happening-in-myanmar-is-genocide-call-it-by-its-name/2018/08/29/611a1090-aafe-11e8-a8d7-0f63ab8b1370_story.html?utm_term=.9e76f629a8b3

1. Kappler, V., & Potter, G. 2018. *The Mythology of Crime and Criminal Justice* (5th ed.). Waveland Press, Inc: Long Grove.



Genocide of Rohingya families

Watch the video link embedded at the top of the CNN news clip where the Monks say the international community is wrong and it is not genocide. However, the United Nations took a stance by calling it genocide and calling for the end of it. https://www.cnn.com/2017/11/25/asia/myanmar-buddhist-nationalism-mabatha/index.html

Misusing statistics can happen all the time, and sometimes it is intentional, others accidental. When we think back to the example of my grandfather, he would just cite stats out of nowhere. However, he had never really studied any of the issues and his sources were unreliable. As a child, I often wondered how he knew this? He did not intend to spew inaccurate facts but accidentally did to us because he listened to someone who thought they had knowledge. This happens often when people give 'opinions' without facts, which they are merely opinions. It is important to be able to distinguish this.

3: Criminal Law

Learning Objectives

This section examines the fundamental principles of criminal law. It describes the functions of formal criminal law (what criminal law does and what it cannot do), how crimes differ from civil and moral wrongs, and various classification schemes used in discussing criminal law. This section also examines the sources of substantive and procedural criminal law (where we look to find our criminal law), the limitations that the constitution places on both substantive criminal law and procedural criminal law, and the important concept of the rule of law in American jurisprudence (legal theory). After reading this section, students will be able to:

- Distinguish between a criminal wrong, a civil wrong, and a moral wrong.
- Identify the many ways in which criminal law is classified.
- Recognize the many sources of substantive and procedural criminal law.
- Identify the limitations that the federal constitution and state constitutions place on creating substantive laws and enforcing those laws.
- Recognize the importance of rule of law in American jurisprudence and understand the importance of judicial review in achieving rule of law.

Critical Thinking Questions

1. What does formal law do well? What does formal law not do so well?
2. Should we be able to impose sanctions for violations of moral wrongs?
3. Consider the constitutional requirement of separate but equal branches of government. Why do you think the drafters of the constitution intended each of the branches of government to be a check on each other? How does that "play out" when deciding what laws should be made and what laws should be enforced? What current issues are you aware of that highlight the importance of three separate but equal branches of government?

4. How does direct democracy (in the form of ballot measures and propositions) influence substantive criminal law (creating crimes and punishing crimes). What, if any, are the advantages of using direct democracy to create and punish crime? What, if any, are the disadvantages?
5. Consider state-wide decriminalization of marijuana possession and use across the nation and the federal statute banning possession and use of marijuana. How should this federal/state conflict be resolved? Does your opinion change if the behavior is one that you favor or disfavor?

LORE RUTZ-BURRI

Law is a formal means of social control. Society uses **laws** (rules designed to control citizen's behaviors) so that these behaviors will conform to societal norms, cultures, mores, traditions, and expectations. Because courts must interpret and enforce these rules, laws differ from many other forms of social control. Both formal and informal social control have the capacity to change behavior. Informal social control, such as social media (including Facebook, Instagram, and Twitter) has a tremendous impact on what people wear, how they think, how they speak, what people value, and perhaps how they vote. Social media's impact on human behavior cannot be overstated, but because these informal controls are largely unenforceable through the courts as they are not considered the law.

Laws and legal rules promote social control by resolving basic value conflicts, settling individual disputes, and making rules that even our rulers must follow. Kerper (1979) recognized the advantages of law in fostering social control and identified four major limitations of the law. First, she noted, the law often cannot gain community support without support of other social institutions. [1] (Consider, for example, the United States Supreme Court (Court) case of *Brown v. Board of Education of Topeka, Kansas,* 347 U.S. 483 (1954), which declared racially segregated schools unconstitutional. The decision was largely unpopular in the southern states, and many had decided to not follow the Court's holding. Ultimately, the Court had to call in the National Guard to enforce its decision requiring schools to be integrated.) Second, even with community support, the law cannot compel certain types of conduct contrary to human nature. Third, the law's resolution of disputes is dependent upon a complicated and expensive fact-finding process. Finally, the law changes slowly. [2]

Lippman (2015) also noted that the law does not always achieve its purposes of social control, dispute resolution, and social change, but rather can harm society. He refers to this as the "dysfunctions of law."

"Law does not always protect individuals and result in beneficial social progress. Law can be used to repress individuals and limit their rights. The respect that is accorded to the legal system can mask the dysfunctional role of the law. Dysfunctional means that the law is promoting inequality or serving the interests of a small number of individuals rather than promoting the welfare of society or is impeding the enjoyment of human rights." [3]

1. Kerper, H. B. (1979). *Introduction to the criminal justice system* (2nd ed.). West Publishing Company.
2. Kerper, H. B. (1979). *Introduction to the criminal justice system* (2nd ed., pp. 11). West Publishing Company.
3. Lippman, M. R. (2015). *Law and society* (pp. 11). Thousand Oaks, CA : SAGE Publications.

Similarly, Lawrence Friedman has identified several dysfunctions of law: legal actions may be used to harass individuals or to gain revenge rather than redress a legal wrong; the law may reflect biases and prejudices or reflect the interest of powerful economic interests; the law may be used by totalitarian regimes as an instrument of repression; the law can be too rigid because it is based on a clear set of rules that don't always fit neatly (for example, Friedman notes that the rules of self-defense do not apply in situations in which battered women use force to repel consistent abuse because of the law's requirement that the threat be immediate); the law may be slow to change because of its reliance on precedent (he also notes that judges are also concerned about maintaining respect for the law and hesitate to introduce change that society is not ready to accept); that the law denies equal access to justice because of inability to pay for legal services; that courts are reluctant to second-guess the decisions of political decision-makers, particularly in times of war and crisis; that reliance on law and courts can discourage democratic political activism because Individuals and groups, when they look to courts to decide issues, divert energy from lobbying the legislature and from building political coalitions for elections; and finally, that law may impede social change because it may limit the ability of individuals to use the law to vindicate their rights and liberties. [4]

4. Lippman, M. R. (2015). *Law and society* (pp. 25). Thousand Oaks, CA : SAGE Publications.

LORE RUTZ-BURRI

This chapter is about people committing crimes—engaging in behavior that violates the criminal law—and how society responds to these criminal behaviors. Crimes are only one type of wrong. People can also violate civil law or commit a moral wrong and not be guilty of any crime whatsoever. So, what is the difference between a civil wrong, a criminal wrong, and a moral wrong?

Civil Wrongs

A civil wrong is a private wrong, and the injured party's remedy is to sue the party who caused the wrong/injury for **general damages** (money). The **plaintiff** (the injured party) **sues** or brings a **civil suit** (files an action in court) against the **defendant** (the party that caused the harm). Plaintiffs can be individuals, businesses, classes of individuals (in a **class action suit**), or government entities. Defendants in civil actions can also be individuals, businesses, multinational corporations, governments, or state agencies.

Civil law covers many types of civil actions or suits including: **torts** (personal injury claims), contracts, property or real estate disputes, family law (including divorces, adoptions, and child custody matters), intellectual property claims (including copyright, trademark, and patent claims), and trusts and estate laws (which covers wills and probate).

The primary purpose of a civil suit is to financially compensate the injured party. The plaintiff brings the suit in his or her own name, for example, Sam Smith versus Joe Jones. The amount of damages is theoretically related to the amount of harm done by the defendant to the plaintiff. Sometimes, when the jury finds there is particularly egregious harm, it will decide to punish the defendant by awarding a monetary award called **punitive damages** in addition to general damages. Plaintiffs may also bring civil suits called **injunctive relief** to stop or "enjoin" the defendant from continuing to act in a certain manner. Codes of the civil procedure set forth the rules to follow when suing the party who allegedly caused some type of private harm. These codes govern all the various types of civil actions.

In a civil trial, the plaintiff has the burden of producing evidence that the defendant caused the injury and the harm. To meet this burden, the plaintiff will call witnesses to testify and introduce physical evidence. In a civil case, the plaintiff must convince or persuade the jury that it is more likely than not that the defendant caused the harm. This level of certainty or persuasion is known as **preponderance of the evidence**. Another feature in a civil suit is that the defendant can **cross-sue** the plaintiff, claiming that the plaintiff is actually responsible for the harm.

Criminal Wrongs

Criminal wrongs differ from civil or moral wrongs. Criminal wrongs are behaviors that harm society as

a whole rather than one individual or entity specifically. When people violate the criminal law there are generally sanctions that include incarceration and fines. A crime is an act, or a failure to act, that violates society's rules. The government, on behalf of society, is the plaintiff. A criminal wrong can be committed in many ways by individuals, groups, or businesses against individuals, businesses, governments or with no particular victim.

Criminal Defendant	**Victim**	**Examples**
Individual	Self or with no particular victim	Gambling or drug use
Individual	Other individual(s)	Assault, battery, theft
Individual	Business or government	Trespass, welfare fraud
Group of individuals	Individual(s)	Conspiracy to commit murder
Group of individuals	Government or no particular victim	Riot, rout, disorderly conduct
Business entity	Individuals	Fraud
Business entity	Government or no particular victim	Fraud, pollution, tax evasion

Criminal laws reflect a society's moral and ethical beliefs. They govern how society, through its government agents, holds criminal wrongdoers accountable for their actions. Sanctions or remedies such as incarceration, fines, restitution, community service, and restorative justice program are used to express societal condemnation of the criminal's behavior. Government attorneys **prosecute,** or file charges against, criminal defendants on behalf of society, not necessarily to remedy the harm suffered by any particular victim. The title of a criminal prosecution reflects this: "State of California v. Jones,", "The Commonwealth v. Jones,", or "People v. Jones."

In a criminal **jury trial** (a trial in which a group of people selected from the community decides whether the defendant is guilty of the crime charged) or a **bench trial** (a trial in which the judge decides whether the defendant is guilty or not) the prosecutor carries the burden of producing evidence that will convince the jury or judge beyond any reasonable doubt that the criminal defendant committed a violation of law that harmed society. To meet this burden, the prosecutor will call upon witnesses to testify and may also present physical evidence suggesting the defendant committed the crime. Just as a private individual may decide that it is not worth the time or effort to file a legal action, the state may decide not to use its

resources to file criminal charges against a wrongdoer. A **victim** (a named injured party) cannot force the state to prosecute the wrongdoing. Rather, if there is an appropriate civil **cause of action–**for example, wrongful death–the injured party will need to file a civil suit as a plaintiff and seek monetary damages against the defendant.

Moral Wrongs

Moral wrongs differ from criminal wrongs. "Moral law attempts to perfect personal character, whereas criminal law, in general, is aimed at misbehavior that falls substantially below the norms of the community." [1] There are no codes or statutes governing violations of moral laws in the United States.

"The Witness" Exercise

Watch the 2015 Netflix documentary "The Witness" in which Bill Genovese re-examined what was said, heard and reported about his sister, Kitty Genovese. This frequently cited examples of a moral wrong involve the story of thirty-seven neighbors who purportedly did nothing when "Kitty" Genovese was stabbed to death outside their apartment building in New York City in 1964. There are many discrepancies about this story and what the neighbors knew, or didn't know, and what they did, or didn't do, but the general belief is that they had at least a moral obligation to do something (for example, call the police), and by failing to do anything, they committed a moral wrong. Ultimately, none of the neighbors had any legal obligation to report the crime or intervene to help Ms. Genovese.

Overlap of Civil, Criminal, and Moral Wrongs

Sometimes criminal law and civil law overlap and an individual's action constitute both a violation of criminal law and civil law. For example, if Joe punches Sam in the face, Sam may sue Joe civilly for civil assault and battery, and the state may also prosecute Joe for punching Sam, a criminal assault and battery. Consider the case involving O.J. Simpson. Simpson was first prosecuted in 1994 for killing his ex-wife and her friend (the criminal charges of murder). After the criminal trial in which the jury acquitted Simpson, the Brown and Goldman families filed a wrongful death action against Simpson for killing Nicole Brown and Ronald Goldman. The civil jury found Simpson responsible and awarded compensatory and punitive damages in the amount of $33.5 million dollars. Wrongful death is a type of **tort.** Torts involve injuries inflicted upon a person and are the types of civil claims or civil suits that most resemble criminal wrongs.

Sometimes criminal behavior has no civil law counterpart. For example, the crime of possessing burglary tools does not have a civil law equivalent. Conversely, many civil actions do not violate criminal law. For example, civil suits for divorce, wills, or contracts do not have a corresponding criminal wrong. Even though there is certainly an overlap between criminal law and civil law, it is not a perfect overlap. Because there is no legal action that can be filed for committing a moral wrong, there really is not any overlap between criminal wrongs, civil wrongs, and moral wrongs.

1. Gardner, T.J. (1985) *Criminal Law: Principles and Cases* (3rd ed., pp.7). West Publishing Company.

Where do you look to see if something you want to do violates some criminal law? The answer is "in many places." Criminal law originates from many sources. Some criminal law is the result of constitutional conventions, so you would need to review federal and state constitutions. Other criminal laws result from the legislative or initiative process, so you will need to review state statutes or congressional acts. Other criminal law results from the work of administrative agencies, so you need to review state and federal administrative rules. Other criminal law, called case law, originates from appellate court opinions written by judges. These court opinions, called "decisions", are published in both official and unofficial reporters, but thanks to the Internet, they are now easy to find if you know the parties' names. Much of our criminal law descended from the English common law. This law developed over time, through custom and tradition, and it is a bit more difficult to locate, but it is mentioned in treatises and legal "hornbooks" (like legal encyclopedias) and is often referred to in case decisions.

The Federal Constitution—The Constitution of the United States

Although the United States Constitution recognizes only three crimes (counterfeiting, piracy, and treason), it nevertheless plays a significant role in the American criminal justice system. Most importantly, the Constitution establishes limits on certain types of legislation or substantive law, and it provides significant procedural constraints on the government when it seeks to prosecute individuals for crimes. The Constitution also establishes **federalism** (the relationship between the federal government and state governments), requires the **separation of powers** between the three branches of government (the judicial branch, the legislative branch, and the executive branch), and limits Congress's authority to pass laws not directly related to either its **enumerated powers** (listed in the Constitution) or **implied powers** (inferred because they intertwined with the enumerated powers).

Constitutional Limitations on Criminal Law and Procedure

The drafters of the federal Constitution were so concerned about two historic cases of abuse by English Parliament (ex post facto laws and bills of attainder) that they prohibited Congress from passing these types of laws in the original body of the Constitution. (See, Article I Section 9 of the Constitution.) **Ex post facto laws** are laws that are retroactively applied, or punishments retroactively increased, or changes in the amount and types of evidence that is required of the government in order to successfully prosecute an individual. **Bills of attainders** are laws that are directed at named individual or group of individuals and has the effect of declaring them guilty without a trial.

Most of the other limitations are found within the Bill of Rights, the first ten amendments to the

U.S. Constitution. The states adopted the Bill of Rights in 1791. The statesmen had opposing viewpoints concerning how strong the national government should be and how strong state governments should be. Even as the original federal constitution was being circulated and ratified, the framers were thinking about the provisions that became known as the Bill of Rights.

Music & Law Exercise

For a novel way to explore this dispute, listen to the soundtrack from Alexander Hamilton, the Broadway Musical composed by Lin-Manuel Miranda.

The First Amendment limits Congress's ability to pass laws that limit free speech, freedom of religion, freedom of assembly and association. The Second Amendment limits Congress's ability to outlaw the personal possession of firearms. The Fourth, Fifth, Sixth and Eighth Amendments have provisions that govern criminal procedure during the investigative, pretrial, and trial phases. The Eighth Amendment sets limits on the government's ability to impose certain types of punishments, impose excessive fines, and set excessive bail. The Due Process Clauses of the Fifth and Fourteenth Amendment require that criminal justice procedures be fundamentally fair. The Fourteenth Amendment's Equal Protection Clause requires that, at a minimum, there be some rational reason for treating people differently. For example, states can pass laws prohibiting minors from purchasing and consuming alcohol because states have a reasonable interest in protecting the health and welfare of its citizens. These amendments discussed more fully below, added several constraints on Congress. The impact of the Bill of Rights was to place substantial checks on the federal government's ability to define crimes.

The Incorporation Debate

When drafted and passed, the U.S. Constitution and the Bill of Rights applied only to the federal government. Individual states each had their own guarantees and protections of individuals' rights found in the state constitutions. (See below.) Since 1868, the Fourteenth Amendment has become an important tool for making states also follow the provisions of the Bill of the Rights. It was drafted to enforce the Civil Rights Act passed in 1866 in the post-Civil War states. Section 1 of the Fourteenth Amendment enjoins the states from depriving any person of life, liberty, or property, without due process of law. It prohibits states from adopting any laws that abridge the privileges and immunities of the citizens of the United States and requires that states not deny any person equal protection under the law. U.S. Const. amend. XIV, § 2.

The practice of making the states follow provisions of the Bill of Rights is known as incorporation. Over decades, the Supreme Court debated whether the Bill of Rights should be incorporated all together, in one-fell-swoop, called total incorporation, or piece-by-piece, called selective incorporation. The case-by-case, bit-by-bit approach won. In a series of decisions, the Supreme Court has held that the Due Process Clause of the Fourteenth Amendment makes enforceable against the states those provisions of the Bill of

Rights that are "implicit in the concept of ordered liberty." [1] For example, in 1925 the Court recognized that the First Amendment protections of free speech and free press apply to states as well as to the federal government. [2] In the 1960s, the Court selectively incorporated many of the procedural guarantees of the Bill of Rights. The Court also used the Fourteenth Amendment to extend substantive guarantees of the Bill of Rights to the states. Most recently, on February 20th, 2019 the Court incorporated the right to be free from excessive fines guarantee found in the Eighth Amendment to the states in *Timbs v. Indiana*, ___ U.S. ___ (2019).

First Amendment Limitations

Under the First Amendment, Congress cannot create laws that limit individuals' speech. The Court has recognized symbolic speech (for example, wearing black armbands) and expressive conduct (for example, picketing) as protected under the First Amendment's guarantee that Congress shall not abridge freedom of speech. The Court struck down a law banning flag burning. *Texas v. Johnson,* 491 U.S. 397 (1989). The Court upheld a local ordinance prohibiting public indecency when applied to business establishment wishing to provide totally nude dancing. *Barnes v. Glen Theater,* 501 U.S. 560 (1991). The Court has recognized political speech and commercial speech as protected by the First Amendment as well. See, e.g., *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). The Court has, however, deemed some speech not worthy of protection, and consequently may be limited. According to the Court, non-protected speech includes libel and slander, fighting words, words that present a clear and present danger when spoken, obscenity and profanity. See, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) "There are certain well-defined and narrowly limited classes of speech, the prevention, and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of peace." Similarly, the Court has said anti-hate crime statutes permissibly limit individuals' speech to the extent they are directed at conduct rather than the content of the speech. See, e.g., *Rav v. City of St. Paul*, 505 U.S. 377 (1992) and *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

The First Amendment limits Congress's authority to legislate in the realm of religion as well. Congress cannot make laws that either create a religion (these violate the Establishment Clause) or target and interfere with a person's exercise of their own religion (these violate the Free Exercise Clause). Finally, the First Amendment guarantees that people have the right to freely associate and assemble with others. Thus,

1. *Palko v. Connecticut*, 302 U.S. 319 (1937).
2. *Gitlow v. New York*, 268 U.S. 652 (1925)

Congress cannot make laws that completely limit people's ability to gather together peaceably. However, the Court has indicated that the government can place reasonable time and manner limitations based on the location in which the gathering is to take place. See, e.g., *Cox v. Louisiana,* 379 U.S. 536 (1965).

Second Amendment Limitations

Legislatures can place restrictions on weapons and ammunition purchase and possession, but they cannot completely restrict people's ability to possess guns for the purpose of self-defense. See, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (an individual's right to possess a weapon is unconnected with service in the military). According to the Court, the Second Amendments' protections apply equally to the states. See, *McDonald v. Chicago*, 561 U.S. 742 (2010).

Fourth Amendment Limitations

The Fourth Amendment limits the government's ability to engage in searches and seizures. Under the least restrictive interpretation, the Amendment requires that, at a minimum, searches and seizures be reasonable. Under the most restrictive interpretation, the Amendment requires that government officers need a warrant any time they do a search or a seizure. The Court has interpreted the Fourth Amendment in many cases and, the doctrine of *stare decisis* notwithstanding, search and seizure law is subject to the Court's constant refinement and revision. One thing is clear, the Court has never embraced the most restrictive interpretation of the Fourth requiring a warrant for every search and seizure conducted.

Fifth Amendment Limitations

The Fifth Amendment protects against self-incrimination (having to disclose information that could ultimately harm you) in that it states that no person "shall be compelled in a criminal case to be a witness against himself." Defendants have the right to not testify at trial and the right to remain silent during a custodial interrogation. See, *Miranda v. Arizona*, 384 U.S. 436 (1966). The Fifth Amendment also provides for a grand jury in federal criminal prosecutions, prohibits double jeopardy, demands due process of law, and prohibits taking private property for public use (a civil action). The Court has incorporated the double

jeopardy provision through the Fourteenth Amendment, making states also prohibited from subjecting a person to double jeopardy. However, it has not held that states must provide a grand jury review. The Fifth Amendment's grand jury provision is one of two clauses of the Bill of Rights that has not been incorporated to the states, but most states do use the grand jury at least for some types of cases. The Fifth Amendment also entitled citizens prosecuted by the federal government to the due process of law. This is discussed more fully below as a Fourteenth Amendment right.

Sixth Amendment Limitations

The Sixth Amendment guarantees a criminal defendant: the right to a speedy trial, the right to a public trial, the right to a jury trial, the right to have his or her trial in the district where the crime took place, the right to be told what charges have been filed, the right to confront witnesses at trial, the right to compel witnesses to testify at trial, and the right to assistance of counsel. This Amendment governs the federal court process, but because of the Fourteenth Amendment's Due Process Clause, these rights also apply to defendants in state criminal cases.

Eighth Amendment Limitations

Legislatures cannot make laws that make the punishment for a crime "cruel or unusual." This means that punishments cannot be either **barbaric** (causing needless pain) or **disproportionate** (i.e., too severe to fit the crime). In addition to the prohibition against cruel and unusual punishment, the Eighth Amendment also prohibits the imposition of excessive bail and excessive fines. The Court has dealt with excessive fines in terms of whether the fine is disproportionate to the crime. See, e.g., *Timbs v. Indiana* (above) (forfeiting defendant's $42,000 land rover was excessive compared to the maximum fine he could get for his crime ($10,000.) The prohibition against excessive bail does not mean that courts must set bail in every case, but rather, when courts do set bail, it must not be excessive. Bail is excessive when it is an amount more than necessary to assure the defendant's reappearance. *Stack v. Boyle*, 342 U.S. 1 (1951). *

Fourteenth Amendment limitations

The Fourteenth Amendment mandates that states do not deny their citizen's due process of law. Due process can be summarized as making sure that the government treats people fairly. Part of fairness is giving people fair warning as to what behaviors are permitted and what behaviors are not permitted—putting people on notice of what the law is. Thus, legislators must be very careful when making new laws. They cannot make laws that are so poorly drafted such that a person of ordinary intelligence would not understand the law or that would allow police too much discretion in how they will interpret and apply the law because such a law would be considered void for vagueness.

The Fourteenth Amendment also guarantees equal protection of the law. Generally, legislatures cannot make laws that treat people differently unless the laws are rationally related to a legitimate government interest. When legislatures attempt to pass laws that treat people differently based on sex, then the court reviews the law with heightened scrutiny — the law must be designed to achieve an important government interest and the differential treatment must be based on an actual physiological difference between the sexes and not based on archaic stereotypes. When legislatures attempt to pass laws that treat people differently based upon their race or ethnicity, then they have to have even a more compelling reason to do so, and even then, the courts, employing "strict scrutiny" are likely to declare such laws unconstitutional.

Limitations Found in the "Penumbra" of the Constitution

Sometimes the Constitution doesn't explicitly state protection or right that the courts have nevertheless found to be inherent or found within the Constitution. Justice Douglas, writing the majority opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965), stated

"[The] . . . specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. … Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'

The Fourth and Fifth Amendments were described … as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.' We recently referred in *Mapp v. Ohio*, 367 U. S.

643, 656, to the Fourth Amendment as creating a 'right to privacy, no less important than any other right carefully and particularly reserved to the people.' (Footnote omitted)." 381 U.S. at 484–485.

Thus, legislatures cannot make laws that allow the government to invade people's privacy, even though no specific amendment can be pointed to. The constitutional right to privacy must often be balanced against the state's compelling interests such as promoting public safety. The courts have found the right to privacy in the context of reproductive freedom (See, e.g., *Roe v. Wade*, 410 U.S. 113 (1972) (right to abortion), *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (the right of married persons to possess contraceptives), *Griswold v. Connecticut,* 381 U.S. 479 (1965) (declaring invalid the ban on contraceptives), *Stanley v. Georgia,* 394 U.S. 557 (1969) (the right to view and possess adult pornography), and the right of adults to engage in consensual sexual contact), and *Lawrence v. Texas,* 539 U.S. 558 (2003) (the right of adults to engage in consensual sexual contact).

State Constitutions

States' constitutions, similar to the federal constitution, set forth the general organization of state government and basic standards governing the use of governmental authority. Although the federal constitution is preeminent because of the Supremacy Clause, state constitutions are still significant. State constitutional rules are supreme as compared to any other rules coming from all other state legal sources (statutes, ordinances, administrative rules) and prevail over such laws in cases of conflict. The federal constitution sets the floor of individual rights, but states are free to provide more individual freedoms and protections that are granted by the federal constitution. State constitutions are defined and interpreted by state courts, and even identical provisions in both the state and federal constitution may be interpreted differently. For example, the state constitution's guarantee to be free from unreasonable searches and seizures may mean that, under state law, roadblocks established to identify impaired, intoxicated drivers are impermissible, but under the federal constitution, these roadblocks are permitted and are not deemed to be unreasonable seizures.

Comparing Cases Exercise

Compare the U.S. Supreme Court holding in *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990) to the Michigan Supreme Court holding interpreting the same case under Michigan Constitution, 506 N.W.2d 209 (Mich. 1993).

Rule of Law, Constitutions and Judicial Review

One of the key features of the American legal system has been its commitment to the **rule of law**. Rule of law has been defined as a "belief that an orderly society must be governed by established principles and known standards that are uniformly and fairly applied." [3] Reichel identified a three-step process by which countries can achieve rule of law. [4] The first step is that a country must identify core, fundamental values. The second step is for the values to be reduced to writing and written somewhere that people can point to them. The final step is to establish a process or mechanism whereby laws or governmental actions are tested to see if they are consistent with the fundamental values. When laws or actions embrace the fundamental values, they are considered valid, and when the laws or actions conflict with the fundamental values, they are invalid.

Applying this three-step process to America's approach to law one can see that Americans have recognized fundamental values, such as the right to freedom of speech, the right to privacy, and the right to assemble. Second, we have reduced these fundamental values to writing and, for the most part, have compiled them in our constitutions (both federal and state). Third, we have a mechanism, that of **judicial review,** by which we judge whether our laws and our government actions comply with or violate our fundamental values found within our constitutions. Judicial review is the authority of the courts to determine whether a law (a legislative action) or action (an executive or judicial action) conflicts with the Constitution. Judicial review can be traced to the case of *Marbury v. Madison*, 5 U.S. 137 (1803), in which Chief Justice John Marshall wrote, "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."

3. Feldmeier, J. P., & Schmalleger, F. (2012). *Criminal Law and Procedure for Legal Professionals*. Prenice Hall.
4. Reichel, P. (2018) *Comparative Criminal Justice Systems: A Topical Approach.* New York, NY: Pearson.

Statutes, Ordinances, and Other Legislative Enactments

Most substantive criminal law is legislative law. State legislatures and Congress enact laws which take the form of statutes or congressional acts. Statutes are written statements, enacted into law by an affirmative vote of both chambers of the legislature and accepted (or not vetoed) by the governor of the state or the president of the United States. State legislatures may also create legislative law by participating in **interstate compacts,** or multi-state legal agreements. An example of this includes the Uniform Extradition Act, or the Uniform Fresh Pursuit Act. Congress makes federal law by passing acts and approving treaties between the United States and other nation states. Local legislators, city and town councilors, and county commissioners also make laws through the enactment of local ordinances.

Controversial Issue: Ballot Measures, Initiatives, and Referendums–Direct Democracy and Law Making

In several states, citizens have the power to enact laws through direct democracy by putting "ballot measures" or "propositions" up for a vote. This type of lawmaking by the people started primarily in the Western states around the turn of the 20th century. Initiatives, referendums, and referrals have some slight differences, but generally, these ballot measures ultimately find their way into either statutes or the constitution, and so they are included in this section on legislative law. For example, Oregon Ballot Measure 11, establishing minimum mandatory sentences for 17 person felonies, was voted on in November 1994 and took effect April 1, 1995. It is now found in the Oregon Revised Statutes as ORS 137.700. Proposition 36, approved by Californians in 2012, significantly amended the "three strikes" sentencing laws approved in 1994. Initiatives, referendums, and referrals can be effective in quickly changing the criminal law, like the mandatory sentencing in the 1980s, and is a way to circumvent what can be a contentious legislative process. An example is the decriminalization of marijuana in Washington, Oregon, Colorado, and Alaska.

States' Authority to Pass Criminal Laws

States are sovereign and autonomous, and unless the Constitution takes away state power, the states have

broad authority to regulate activity within the state. Most criminal laws at the state level are derived from the states' general police powers, or authority, to make and enforce criminal law within their geographic boundaries. **Police power** is the power to control any harmful act that may affect the general well being of citizens within the geographical jurisdiction of the state. A state code, or state statutes, may regulate any harmful activity done in the state or whose harm occurs within the state.

Congress's Authority to Pass Laws

Federal lawmakers do not possess police power. Instead, Congress must draw its authority to enact criminal statutes from particular legislative powers and responsibilities assigned to it in the Constitution. Congress's legislative authority may be either enumerated in the Constitution or implied from its provisions, but if Congress cannot tie its exercise of authority to one of those powers, the legislation may be declared invalid.

Enumerated powers, for example, the power to regulate interstate commerce, are those that are specifically mentioned in Article I Section 8 of the Constitution. Over the years, however, courts have broadly interpreted the term "interstate commerce" to mean more than just goods and services traveling between and among the states. Instead, interstate commerce includes any activity—including purely local or intrastate activity—that affects interstate commerce. The affectation doctrine maintains that congressional authority includes the right to regulate all matters having a close and substantial relation to interstate commerce. Although the Court has found limits on what affects interstate commerce, Congress has used its broad power to regulate interstate commerce to criminalize a wide range of offenses including carjacking, kidnapping, wire fraud, and a variety of environmental crimes.

The implied powers of Congress are those that are deemed to be necessary and proper for carrying out all the enumerated powers. Article I Section 8 of the Constitution states, "Congress shall have Power . . . to make laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution." The implied powers doctrine expands legislative power of Congress, and for that reason, the Necessary and Proper Clause has often been called the "expansion clause." Due to the implied powers found in the Necessary and Proper Clause, Congress has authority to pass legislation and regulate a wide variety of activity to the extent that it is able to show that the law furthers one of the enumerated powers. Nevertheless, the Court will overturn acts of Congress when it believes Congress has overstepped its constitutional authority. So, despite the broad expanse of implied powers, Congress's authority is still limited and by no means is as vast as the states' police powers.

Conflicting State and Federal Statutes

Sometimes substantive federal law conflicts with state laws or policies, and sometimes the federal government's interest in prosecuting cases in federal court conflicts with competing interests of the states. One recent conflict between federal interests and state interests involves Oregon's physician-assisted suicide law, the "Death with Dignity Act". See, *Gonzales v. Oregon*, 646 U.S. 243 (2006)(upholding Oregon's law by deciding that the United States Attorney General could not enforce the national controlled substance act against Oregon physicians). Another debate surrounds the conflicting federal and state laws governing marijuana use. Between 1996 and 2018, thirty states and the District of Columbia passed laws legalizing the possession of small quantities of marijuana for medicinal purposes for state residents. Since 2012, Colorado, Washington, Oregon, Alaska, California, Nevada, Massachusetts, and Maine have passed laws through the initiative process legalizing recreational use and possession of small amounts of marijuana by adults. In the 2018 elections, even more, states passed laws allowing for medical use, recreational use. See, https://www.forbes.com/sites/tomangell/2018/12/06/marijuanas-ten-biggest-victories-

of-2018/#7ca0dd5232df. These popular initiatives conflict directly with the federal Controlled Substance Act, 21 U.S.C. 13, § 841, (CSA) which holds that any use or possession of marijuana is a federal crime. In January 2018, the Trump administration through the U.S. Department of Justice, under Attorney General Sessions rescinded the Obama-era restraint policies on marijuana prosecutions and indicated the desire to fully enforce the CSA. However, in April 2018, President Trump announced he was backing down on the crackdown on recreational use of marijuana that had been announced in January 2018.

Movement Towards Codification: The American Institute and the Model Penal Code

By the 1960s and 1970s, all states had begun codifying their criminal laws. These codifications would likely not have taken place if not for the **American Law Institute** (ALI) and the publication of its **Model Penal Code** (MPC). Established in 1923, the ALI is an organization of judges, lawyers, and academics that draft model codes and laws. Its most important work in the criminal justice realm is the Model Penal Code. The ALI began working on the MPC in 1951, and it proposed several tentative drafts over the next decade. In 1962 the Model Penal Code was finally published. It consists of general provisions concerning: criminal liability, definitions of specific crimes, defenses, and sentences. The MPC has had a significant impact on legislative drafting of criminal statutes. Every state has adopted at least some provisions, or at least the approach, of the MPC, and some **code states** have adopted many or most of the provisions in the MPC. No state has adopted the MPC in its entirety.

Administrative Law—Agency-Made Law

State and federal legislatures cannot keep up with the task of enacting legislation on all the myriad subjects that must be regulated by law. In each branch of government, various administrative agencies exist with authority to create administrative law. At the federal level, for example, the Environmental Protection Agency enacts regulations against environmental crimes. At the state level, the Department of Motor Vehicles enacts laws concerning drivers' license suspension. Administrative regulations are enforceable by the courts provided that the agency has acted within the scope of its delegated authority from the legislature.

Common Law

One important source of criminal law in the United States is common law. English law developed over centuries and, generally, when we refer to American common law, we are referring to the common law rules brought over from England to the United States when we became a nation. However, this is not necessarily always clear. [1] LaFave describes the process by which common law was derived in England.

". . . Although there were some early criminal statutes [in England], in the main the criminal law was originally common law. Thus by the 1600s the judges, not the legislature, had created and defined the felonies of murder, suicide, manslaughter, burglary, arson, robbery, larceny rape, sodomy and mayhem; and such misdemeanors as assault, battery, false imprisonment, libel, perjury, and intimidation of jurors. During the period from 1660 . . . to 1860 the process continued with the judges creating new crimes when the need arose and punishing those who committed them: blasphemy (1676), conspiracy (1664), sedition (18th century), forgery (1727), attempt (1784), solicitation (1801). From time to time the judges, when creating new misdemeanors, spoke of the court's power to declare criminal any conduct tending to "outrage decency" or "corrupt public morals." or to punish conduct *contra bonos mores:* thus they found running naked in the streets, publishing an obscene book, and grave-snatching to be common law crimes.

Of course, sometimes the courts refused to denote as criminal some forms of anti-social conduct. At times their refusal seemed irrational, causing the legislature to step in and enact a statute: thus false pretenses, embezzlement, incest and other matters became statutory crimes in England. … Some immoral conduct, mostly of a sexual nature (such as private acts of adultery or fornication, and seduction without conspiracy) was punished by ecclesiastical courts in England. The common law courts never punished these activities as criminal, and thus, they never became English common law crimes.

1. Kerper, H. B. (1979). *Introduction to the criminal justice system* (2nd ed., pp. 27). West Publishing Company.

At the same time that judges were developing new crimes, they were also developing new common law defenses to crime, such as self-defense, insanity, infancy, and coercion. …

About the middle of the nineteenth century, the process of creating new crimes almost came to a standstill in England. " [2]

American courts originally relied on the decisions of the English Courts, but Kerper (1979, p. 27) notes that

"as the number of American decisions grew, the American courts began to rely more and more on their own decisions. At the same times, differences in social and economic conditions (and to some extent, differences in the personalities of the judges) led the courts in different states to take different views of the common law. As a result, while the English tradition produced a core of similarity, there developed significant differences in common law rules in the various states. Thus, the common law standard governing an officer's authority to arrest for minor crimes might be substantially different in Ohio and New York, although the general framework of the common law governing arrests was likely to be similar in both states." [3]

In order to understand the limitations of common law, it is helpful to understand the difference between the common law tradition followed by the United States, and other nations that follow the English model and the civil law tradition which developed in Europe. The civil law tradition uses legislative codes as the primary source of law. Under the civil law tradition, new substantive law replaces, rather than supplements, old substantive law. Thus, judges in the civil law tradition are not bound by prior interpretations of legislative codes, and all courts are free to interpret the codes according to generally accepted principles of legal interpretation. *Stare decisis*, discussed below, plays no persuasive or binding role in the civil law tradition. Under the common law tradition though, new substantive law generally adds to, rather than replaces, old substantive law.

Kerper notes that our common law tradition is not purely one of common law, and that common law is displaced by statutes, case law, and the constitution.

"Though the description of the Anglo-American system as a "common law legal system" notes an important distinction between it and the civil law system, that description should not lead one to ignore the fact that legislation also constitutes an important source of law in the Anglo-American system. That system is actually a mixed system of common law rules and statutory rules. The common law rules established by American and English courts have always been subject to displacement by legislative enactments. Indeed, the courts have the authority to develop common law standards only where the legislatures have not sought to provide legislative solutions. … In our country, the common law also is subject to the legal limitations imposed by federal and state constitutions. The supremacy of the constitutions extends over all forms of law, including the common law. Just as legislation cannot violate a constitutional limitation, neither can a common law rule." [4]

Common law is a source of both substantive and procedural law (discussed below), but it is important to note that there are no federal common law crimes. If Congress has not enacted legislation to make certain conduct criminal, that conduct cannot constitute a federal crime.

Judge-Made Law: Case Law

The term **case law** refers to legal rules announced in opinions written by appellate judges when deciding

2. LaFave, W. R. (2000). *Criminal law* (3rd ed., pp. 70). St. Paul, Minn: West Group.
3. Kerper, H. B. (1979). *Introduction to the criminal justice system* (2nd ed., pp. 27). West Publishing Company.
4. Kerper, H. B. (1979). *Introduction to the criminal justice system* (2nd ed., pp. 28-29). West Publishing Company.

appellate cases before them. Judicial decisions reflect the court's interpretation of constitutions, statutes, common law, or administrative regulations. When the court interprets a statute, the statute, as well as its interpretation, control how the law will be enforced and applied in the future. The same is true when a court interprets federal and state constitutions. When deciding cases and interpreting the law, judges are bound by precedent.

S*tare Decisis* and Precedent: Been There, Done (must do) That.

The **doctrine of *stare decisis*** comes from a Latin phrase that states, "to stand by the decisions and not disturb settled points". It tells the court that if the decisions in the past have held that a particular rule governs a certain fact situation, that rule should govern all later cases presenting the same fact situation. Under the doctrine of *stare decisis*, past appellate court decisions form precedent, that judge must follow in similar subsequent cases. *Stare decisis* permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contribute to the integrity of our constitutional system of government, both in appearance and fact." [5] Trial courts and appellate courts must follow the controlling case law that has already been announced in appellate court decisions from their own jurisdiction. Trial courts must follow precedent when they decide questions of law. [**Questions of law** include what a statute means, what the law states, how the constitution should be interpreted, whether a particular law even applies under the facts in the case before them. On the other hand, **questions of fact** are decided by jurors (or judges in bench trials) and include, for example, how fast was the defendant driving, what color hat the defendant was wearing, or whether the gun went off accidentally.] One way courts get around precedent is to distinguish the facts in the case before them as much different than the facts in the earlier case. For example, if the court may decide that the fact that the defendant was running away from the scene, in this case, is so different from the earlier case in which the defendant was merely walking away from the scene that there is no precedent it must follow.

The advantages of *stare decisis* include efficiency, equality, predictability, the wisdom of past experience, and the image of limited authority. [6] Efficiency occurs because each trial judge and the appellate judge does not have to work out a solution to every legal question. Equality results when one rule of law is applied to all persons in the same setting. "Identical cases brought before different judges should, to the extent humanly possible, produce identical results. … *Stare decisis* assists in providing uniform standards of law for similar cases decided in the same state. It provides a common grounding used by all judges throughout the jurisdiction." [7] *Stare decisis* provides stability in allowing individuals to count on the rules of law that have been applied in the past. Kerper's example is a police officer's reliance on past decisions to help determine the legality of a pending arrest. "Without regard to past decisions, the conduct of a wide variety of activities would take on an added hazard of unpredictable legality. Without stability, the law could well loose (sic)

5. *Vasquez v. Hillery*, 474 U.S. 254 (1986)
6. Kerper, H. B. (1979). *Introduction to the criminal justice system* (2nd ed., pp. 47-49). West Publishing Company.
7. Kerper, H. B. (1979). *Introduction to the criminal justice system* (2nd ed., pp. 49). West Publishing Company.

its effectiveness in maintaining social control." [8] *Stare decisis* also ensures proper recognition of the wisdom and experience of the past. Justice Cardozo observed that "no single judge is likely to have 'a vision at once so keen and so broad' as to ensure that his new ideas of wise policy are indeed the most beneficial for society." [9] Finally, *stare decisis* enhances the image of the courts as the impartial interpreter of the law.

"Stare decisis decreases the leeway granted to the individual judge to settle controversies in accordance with his own personal desires. … Indeed, the doctrine of *stare decisis* indirectly serves to restrict the law-making role of the judge even in those cases presenting "open issues" not resolved by past precedent. … A sudden change in the composition of the judiciary, even at the highest level, should not present an equally sudden change in the substance of the law." [10]

In the federal system, all federal courts must follow the decisions of the Supreme Court as it is the final interpreter of the federal constitution and federal statutes. If, however, the Supreme Court has not ruled on an issue, then the federal trial courts (U.S. District Courts and U.S. Magistrate Courts) and federal appellate courts (Circuit Courts of Appeals) must follow decisions from their own circuit. Each circuit is treated, in effect, as its own jurisdiction, and the court of appeals for the various circuits are free to disagree with each other.

Because stare decisis is not an absolute rule, courts may reject precedent by overruling earlier decisions. One factor that courts will consider before overruling earlier case law is the strength of the precedent. Another factor is the field of law involved. Courts seem to be more reluctant to override precedents governing property or trade where commercial enterprises are more likely to have relied quite heavily on the precedent. Courts also consider the initial source of precedent, such as statutory interpretation. For example, if the courts decided in 1950 that the statute meant that individuals could graze their cattle on federal lands without being in violation of any trespass laws, and then the federal government did not subsequently change the law, the legislature's inaction indicates the interpretation was probably right. The most compelling basis upon which a court will overturn precedent, however, is if it perceives the presence or absence of changed circumstances. For example, scientific or technological developments may warrant the application of new rules. Consider the common law **year and a day rule** which required the government, in a murder prosecution, prove that the victim died within one year and a day of the attack. The rule is premised on the idea that there needed to be some showing that the defendant's act caused the death. Medical science now makes it possible to trace the source of fatal blow, so murder statutes no longer include the year and a day rule. One final ground for overruling a prior decision is general changes in the spirit of the times. For example, in *Trop v. Dulles*, 356 U.S. 86 (1958), the Court looked to "evolving standards of decency" in deciding whether the defendant's punishment was cruel and unusual and thus violated the Eighth Amendment.

8. Kerper, H. B. (1979). *Introduction to the criminal justice system* (2nd ed., pp. 49). West Publishing Company.
9. Cardozo, B. N. (1924). *The Growth of the Law.* New Haven, CT: Yale University Press.
10. Kerper, H. B. (1979). *Introduction to the criminal justice system* (2nd ed., pp. 51-52). West Publishing Company.

Matters of First Impression or "Wow, this is new territory, what should we do now?"

If a court is dealing with a legal issue for the first time, there is no precedent to follow, and it cannot then be bound by *stare decisis*. The court may look to other states to see if there is any persuasive case authority on the matter, but state courts do not have to follow established law from other states. When there is no precedent or controlling cases, the case or issue is referred to as a **matter of the first impression**. In cases of the first impression, courts get to decide what the relevant rule should be. In deciding cases of the first impression, judges will look to relevant statutes, legislative history, and cases involving similar situations

"The situation may be a new one. … Yet the judges do not throw up their hands and say the case may not be decided; they decide it. Maybe they can use some settled law in an analogous situation. … Even if there is no available analogy, or if there are competing analogies, the judge will make (some prefer to say discover) the law to apply to the new situation. The new law will be decided according to the judges' ideas (ideas they acquire as members of society) of what is moral, right, just; of what will further sound public policy, in light of customs and traditions of the people of which the judges are members." LaFave, W. *Criminal Law,* 69(3d. ed., 2000). "

It is not necessarily easy, to interpret the law and apply it to the facts of a case. Facts can be "messy", the law can be less than clear, and not everyone will agree on the appropriate meaning of the law's mandate. Judges, therefore, rely on several tools or approaches when interpreting the language of a statute. LaFave has identified various approaches used by judges to interpret the law. [11] First, judges will look at the plain meaning of the statute and rely on dictionary-like tools to discover the meaning of the words. According to the Court in *Caminetti v. United States*, 242 U.S. 470 (1917), "Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise." Even under this **strict constructionist approach,** judges can still disagree whether the language of the statute is plain. Also, there is a danger with this plain meaning approach, and courts will not follow a statute though apparently plain language when strict application results in injustice, oppression or even an absurd consequence.

Second, judges will look to the drafter's intent revealed in the **legislative history,** or records of legislative hearings and floor debates, when it exists. LeFave notes that sometimes it is easier to figure out the framer's intent than other times. Moreover, different lawmakers may have had different intents when they cast their votes enacting the law. Additionally, sometimes legislators never considered the specific factual scenario facing the court.

"It should be noted also that not all judges are enamored of the use of legislative history in interpreting ambiguous statutes. And in any event, the legislative history is less likely to be controlling in construing criminal statutes than civil statutes. If one purpose of a criminal statute is to warn the public of what conduct will get them into criminal trouble, that is, if prospective criminals are entitled to a fair warning–then the public should be able to ascertain the line between permitted and prohibited conduct from the statute itself." [12]

11. LaFave, W. R. (2000). *Criminal law* (3rd ed., pp. 86-89). St. Paul, Minn: West Group.
12. LaFave, W. R. (2000). *Criminal law* (3rd ed., pp. 89). St. Paul, Minn: West Group.

Third, judges may try to focus on the original understanding or original meaning of the law. Under this approach, the court asks itself how a common person reading the law when it was enacted, would have understood the law. For example, when looking at a statute written in 1972, the court would ask itself how the common person in 1972 would have understood the statute. This approach is problematic because not all people living in 1972 would have interpreted the law in the same way.

Fourth, as discussed above, judges may interpret the law based on precedent. One drawback to this approach is that facts of the earlier cases will always differ somewhat from the facts in the new case the court is trying to interpret. Another difficulty occurs when the court is faced with a new situation or a new law and there is no precedent to guide the court. LaFave identified the difficulty in adhering too closely to precedent:

"Sometimes a court, having earlier construed a criminal statute strictly in favor of the defendant, later decides that its earlier construction was wrong. … Obviously, other things being equal, courts should interpret statutes correctly, regardless of past mistakes. On the other hand, it may not be fair to . . . change the rule now. The difficulty lies in the Anglo-American theory of precedents that case law operates retroactively, and in particular that case law which overrules earlier precedents operates retroactively. When faced with this problem–that of overruling or following an earlier erroneous interpretation . . . [one] court felt obliged to follow case precedent with an invitation to the legislature to change the rule of for the future; but [another court overruled the precedent.]

The choice, however, is not necessarily between following the precedent (thus letting a defendant off but perpetuating a bad decision) and retroactively overruling it (thus eliminating a bad precedent but putting the defendant behind bars). There are two techniques by which the defendant may go free even if the precedent is overruled. It is not impossible for the court to overrule for the future only, letting the defendant go but stating in the opinion that anyone who from now on conducts himself the way this defendant did will be guilty of the crime. The second method is to overrule the erroneous precedent but to give the defendant the defense of mistake of law induced by an appellate court. … Some courts have gone so far as to say that the adoption of a new interpretation of an old statute is forbidden by ex post facto constitutional provision if the new interpretation is harder on the defendant than the old." [13]

Finally, there are common law doctrines which direct the court to interpret ambiguous terms in a specific way. For example, the **rule of lenity** tells the court to interpret the statute in the light that is most favorable to the defendant. Another rule, e*xpressio unius est exclusion alters,* meaning the inclusion of one is the exclusion of all others, holds that when a legislative body includes specific items within a statute, the assumption is that it intends to exclude all other terms. Another doctrine of *in pari materia*, meaning on the same matter or subject, directs the court to interpret an ambiguous statute in a light most consistent with other statutes on the same subject. Finally, there is a general maxim that special language controls over general language, and later statutes control over earlier statutes.

13. LaFave, W. R. (2000). *Criminal law* (3rd ed., pp. 96-97). St. Paul, Minn: West Group.

Court Rules of Procedure

The U.S. Supreme Court and state supreme courts make a law that regulates the procedures followed in the lower courts- both appellate and trial courts- in that jurisdiction. These court rules, adopted by the courts to facilitate the administration and processing of cases, are generally limited in scope, but they may nevertheless provide significant rights for the defendant. For example, the rules governing speedy trials may be governed generally by the Constitution, but very specifically by court rules in a particular jurisdiction.

Local courts may also pass local court rules that govern the day-to-day practice of law in these lower courts. For example, a local court rule may dictate when and how cases are to be filed in that jurisdiction. Generally, the local bar (all the attorneys in the jurisdiction) are consulted, and a workforce consisting of judges, trial court administrators, and representatives from district attorney's office, the public defender's office, assigned counsel consortiums, and private attorneys will meet every few years to decide on the local rules.

Okay, so where do I look to see if my behavior is prohibited?

Because criminal law has many sources–constitutions, legislative enactments, administrative rules, case law, and common law–it is not necessarily an easy task to determine whether your behavior or the way government responds to your behavior, is lawful. First, it is always advisable to know your rights under the federal constitution and your state constitution and understand what limits the constitution places on legislative enactments and law enforcement actions. Still, even assuming that laws have been properly enacted and that police have followed proper procedure, it may be difficult to determine whether your behavior is prohibited. Because most states now codifying their criminal laws by enacting statutes, start there. Then look to any case law which may interpret these statutes. Since courts generally follow precedent due to the doctrine of *stare decisis*, one red flag that your behavior may be unlawful is that, in the past, the courts have found behavior similar to yours to be unlawful.

In this section of the chapter, we turn to the various ways that criminal law has been classified. Classification schemes allow us to discuss aspects or characteristics of the criminal law. Some classifications have legal significance, meaning that how a crime is classified may make a difference in how the case is processed or what type of punishment can be imposed. Some classifications historically mattered (had legal significance), but no longer have much consequence. Finally, some classifications have no legal significance, meaning the classification exists only to help us organize our laws.

Classifications Based on the Seriousness of the Offense

Legislatures typically distinguish crimes based on the severity or seriousness of the harm inflicted on the victim. The criminal's intent also impacts the crime's classification. Crimes are classified as **felonies** or **misdemeanors**. Certain, less serious, behavior may be classified as criminal **violations** or **infractions**. The term **offense** is a generic term that is sometimes used to mean any type of violation of the law, or it is sometimes used to mean just misdemeanors or felonies. Although these classification schemes may seem pretty straight forward, sometimes states allow felonies to be treated as misdemeanors and misdemeanors to be treated as either felonies or violations. For example, California has certain crimes, known as **wobblers**, that can be charged as either felonies or misdemeanors at the discretion of the prosecutor upon consideration of the offender's criminal history or the specific facts of the case.

The distinction between felonies and misdemeanors developed at common law and has been incorporated in state criminal codes. At one time, all felonies were punishable by death and forfeiture of goods, while misdemeanors were punishable by fines alone. Laws change over time, and as capital punishment became limited to only certain felonies (like murder and rape), new forms of punishment developed. Now, felonies and misdemeanors alike are punished with fines and/or incarceration. Generally, felonies are treated as serious crimes for which at least a year in prison is a possible punishment. In states allowing capital punishment, some types of murder are punishable by death. Any crime subject to capital punishment is considered a felony. Misdemeanors are regarded as less serious offenses and are generally punishable by less than a year of incarceration in the local jail. Infractions and violations, when those classifications exist, include minor behavior for which the offender can be cited, but not arrested, and fined, but not incarcerated.

The difference between being charged with a felony or misdemeanor may have legal implications beyond the length of the offender's sentence and in what type of facility an offender will be punished. For example, in some jurisdictions, the authority of a police officer to arrest may be linked to whether the crime is considered

a felony or a misdemeanor. In many states the classification impacts which court will have the authority to hear the case. In some states, the felony-misdemeanor classification determines the size of the jury.

Classifications Based on the Type of Harm Inflicted

Almost all state codes classify crimes according to the type of harm inflicted. The Model Penal Code uses the following classifications:

- Offenses against persons (homicide, assault, kidnapping, and rape, for example)
- Offenses against property (arson, burglary, and theft, for example)
- Offenses against family (bigamy and adultery, for example)
- Offenses against public administration (e.g., bribery, perjury, escape)
- Offenses against public order and decency (e.g., fighting, breach of peace, disorderly conduct, public intoxication, riots, loitering, prostitution)

Classifications based on the type of harm inflicted may be helpful for the purpose of an organization, but some crimes such as robbery may involve both harms to a person and property. Although generally, whether a crime is a person or property crime may not have any legal implications when a person is convicted, it may matter if and when the person commits a new crime. Most sentencing guidelines treat individuals with prior person-crime convictions more harshly than those individuals with prior property-crime convictions. That said, it is likely that the defense will argue that it is the facts of the prior case that matter not how the crime was officially classified.

***Mala in se Mala Prohibita* Crimes**

Crimes have also been classified as either ***mala in se*** (inherently evil) or ***mala prohibita*** (wrong simply because some law forbids them). *Mala in se* crimes, like murder or theft, are generally recognized by every culture as evil and morally wrong. Most offenses that involve injury to persons or property are *mala in se*. All of the common law felonies (murder, rape, manslaughter, robbery, sodomy, larceny, arson, mayhem and burglary) were considered *mala in se* crimes. *Mala prohibita* crimes, like traffic violations or drug possession, are acts that are crimes not because they are evil, but rather because some law prohibits them. Most of the newer crimes that are prohibited as part of a regulatory scheme are *mala prohibita* crimes.

Substantive and Procedural Law

Another classification scheme views the law as either substantive law or procedural law. Both criminal law and civil law can be either substantive or procedural. Substantive criminal law is generally created by statute or through the initiative process and defines what conduct is criminal. For example, substantive criminal law tells us that Sam commits theft when he takes Joe's backpack if he did so without Joe's permission if he intended to keep it. Substantive criminal law also specifies the punishment Sam could receive for stealing the backpack (for example, a fine up to $500.00 and incarceration of up to 30 days). The substantive law may also provide Sam a defense and a way to avoid conviction. For example, Sam may claim he reasonably mistook Joe's backpack as his own and therefore can assert a mistake of fact defense. Procedural law gives us the mechanisms to enforce substantive law. Procedural law governs the process for determining the rights of the parties. It sets forth the rules governing searches and seizures, investigations, interrogations, pretrial procedures, and trial procedures. It may establish rules limiting certain types of evidence, establishing timelines, as well as require the sharing of certain types of evidence and giving a certain type of notice. The primary source of procedural law is judicial interpretations of the federal constitution and state constitutions,

but state and federal statutes, particularly those adopting rules of evidence, also provide much of our procedural law.

Substantive Law

Substantive law includes laws that define crime, meaning laws that tell us what elements the government needs to prove in order to establish that this crime has been committed. Substantive law also includes the definitions of **inchoate crimes** (incomplete crimes) of conspiracies, solicitations, and attempts. Substantive law also sets forth **accomplice liability** (when a person will be held responsible when they work in concert with others to complete a crime). Substantive law also identifies the **defenses** that a person may raise when they are charged with a crime. Finally, substantive law indicates the appropriate penalties and sentences for crimes. Today, the great majority of substantive law has been codified and is found in the state's particular criminal code or in the federal code. Generally, criminal codes are separated into two parts: a general part and a special part. The general part typically defines words and phrases that will be used throughout the code (for example, the word intentionally), indicates all possible defenses and provides the general scheme of punishments. The special part of the code typically defines each specific crime setting forth the **elements of the crime** (components of the crime) the government must prove beyond a reasonable doubt in order to convict a defendant of a crime.

Elements of the crime

With the exception of strict liability crimes and vicarious liability crime (discussed below), the government will always have to prove that the defendant committed some criminal act, the ***actus reus*** element and that he or she acted with criminal intent, the ***mens rea*** element. When proving a **crime of conduct,** the state must prove that the defendant's conduct met the specific actus reus requirement. The government must prove that the defendant's behavior was either a voluntary act (meaning not the product of a reflex or done while asleep, or under hypnosis), a voluntary omission to act (meaning that he or she failed to act) when there was a legal duty to do so, or that he or she possessed some item that should not have been possessed. To meet the mens rea element, the state must prove that the defendant's act was triggered by criminal intent. The elements of a specific crimes may also include what is referred to as **attendant circumstances**. Attendant circumstances are additional facts set out in the substantive law's definition that the state must prove to establish a crime, for example, that the place burglarized be a dwelling, or that the property value is a at least a certain amount.

When proving a **crime of causation**, the state must also prove that the defendant caused specific, listed harm. Although generally not included in the listed elements, to prove a crime of causation, the government must also prove that the defendant is the actual cause of the harm (**actual or but/for cause)** and that it is fair to hold him or her responsible (that the defendant is the **legal or proximate cause** of the harm).

Statutes are generally silent on the other elements of crimes of conduct or crimes of causation: **legality** and **concurrence**. The legality element is met when a law is validly enacted and puts people on notice that certain behavior is illegal. Laws are presumed to be valid, and the state generally does not have to begin each case by proving that proper procedure was followed when the law was enacted. The **concurrence element** requires the state must also prove that the criminal intent triggered the criminal act–that the mens rea and actus reus occurred at the same time.

Occasionally, a statute will be silent as to the *mens rea* element. When this occurs, courts need to decide whether the legislature has intended to create a **strict liability crime** or has just been sloppy in drafting the law. Strict liability crimes are ones where the government does not have to prove criminal intent. Courts are disinclined to find in favor of strict liability statutes unless there is a clear indication that the legislature intended to create strict liability. The courts will examine legislative history, the seriousness of harm caused by the crime, whether the crime is *male in se* or *mala prohibitum*, and the seriousness of the punishment in deciding whether the state should be relieved of its obligation to prove criminal intent of the defendant. As a general rule, the courts are more likely to find that a crime is a strict liability one when there is a small punishment and when the crime is more of a recent, regulatory offense (*mala prohibitum* crime).

Inchoate Offenses: Attempt, Conspiracy, and Solicitation

In order to prevent future harm, state and federal governments have enacted statutes that criminalize attempts to commit crimes, solicitations to commit crimes, and conspiracies to commit crimes. The common law also recognized these **inchoate offenses** or incomplete offenses. With each of the inchoate crimes, the state must prove that the defendant intended to commit some other crime, the highest level of criminal intent. For example, there is no crime of **attempt**, but there is a crime of attempted theft. State laws vary in the approaches and tests of whether the defendant has taken enough steps to be charged with attempt, but all agree that mere preparation does not constitute an attempt. **Conspiracies** involve an agreement between at least two parties to commit some target crime. Some jurisdictions also require that there be an **overt act** in furtherance of the crime (some outward movement towards the commission of the target crime) which reaffirms there is a meeting of the minds between the co-conspirators. **Solicitations** involve a person asking another to commit a crime on his or her behalf, and they do not even require an agreement by the person requested to do so.

Accomplice Liability: Aiders and Abetters

People who commit crimes frequently do so with assistance. Substantive criminal law describes when a person can be found guilty for the acts of another. For example, the common law recognized four parties to a crime: principal in the first degree, principal in the second degree, accessory before the fact, and accessory after the fact. Many complicated legal rules developed to offset the harsh common law treatment of most crimes as **capital offenses** (death penalty eligible). The modern statutory trend has been to recognize **accomplices,** people who render assistance before and during the crime, on one hand, and accessories after the fact, people who help the offender escape responsibility after the crime has been committed, on the other. Accomplices, as treated as equally liable as the main perpetrator as "the hand of one, is the hand of them all." Accessories after the fact, under the modern trend, are charged with hindering prosecution or obstructing justice after the crime are punished to a lesser extent than the main perpetrators.

Vicarious Liability

A few states have enacted **vicarious liability statutes** seeking to hold one person responsible for the acts of another, even when they did not provide any assistance and may have not even known about the other's behavior. These statutes, generally violate our belief in individual responsibility that only people who do

something wrong should be blamed for the crime. Vicarious liability imputes (transfers) both the criminal intent and the criminal act of one person to another. Courts generally invalidate these purported vicarious liability statutes but have at times upheld liability based upon an employer/employee relationship or a parent/child relationship.

Defenses

Assuming the government has proven all the elements of a crime, defendants may nevertheless raise defenses that may result in their acquittal. **Defense** is a general term that includes perfect and imperfect defenses, justifications and excuses, and procedural defenses.

Perfect and Imperfect Defenses

A **perfect defense** is one that completely exonerates the defendant. If the defendant is successful in raising this defense, meaning the jury believes him or her, the jury should find the defendant not guilty. An **imperfect defense** is one that reduces the defendant's liability to that of a lesser crime. If the jury believes the defendant, it should find the defendant guilty of a lesser charge.

Negative Defenses and Affirmative Defenses

Sometimes the government is unable to prove all the elements of the crime charged. When this happens, the defendant may raise a **negative defense** claim. The defendant doesn't have to prove anything, instead, he or she just argues that something is missing in the state's case, that the state did not prove everything the statute said it had to prove, and therefore the jury should find him or her not guilty. For example, when charging a defendant with theft, the state must prove that the defendant intentionally took the property of another. If the jury finds that the defendant did not intend to take the property, or took property that that was rightfully his or hers, then it should find the defendant not guilty. Negative defenses at their essence are claims that there are "proof problems" with the state's case. The defendant's claim that the state failed to prove its case does not depend on whether the defendant has put on any evidence or not.

An **affirmative defense** requires the defendant to put on evidence that will persuade the jury that he or she should either be completely exonerated (for a perfect defense) or be convicted only of a lesser crime (for an imperfect defense). The defendant can meet this requirement by calling witnesses to testify or by introducing physical evidence. Because of the presumption of innocence, the **burden of proof** (the requirement that the party put on evidence and persuade the fact-finder) cannot switch completely to the defendant. The state must ultimately bear the burden of proving defendant's guilt by putting on enough evidence that defendant has committed the crime by proving each and every material element of the crime, and it must convince the jury of this guilt beyond a reasonable doubt. However, when the defendant raises an affirmative defense, the burden of production or persuasion switches, at least in part and temporarily, to the defendant. The defendant's burden is limited, however, to prove the elements of the defense he or she asserts.

Note the interplay of negative defenses and affirmative defenses. Even if a defendant is unsuccessful in raising an affirmative defense, the jury could nevertheless find him or her not guilty based upon the state's failure to prove some other material element of the crime.

Justifications

Sometimes doing the right thing results in harm. Society recognizes the utility of doing some acts in certain circumstances that unfortunately result in harm. In those situations, the defendant can raise a justification defense. Justification defenses allow criminal acts to go unpunished because they preserve an important social value or because the resulting harm is outweighed by the benefit to society. For example, if a surgeon cuts someone with a knife to remove a cancerous growth, the act is a beneficial one even though it results in pain and a scar. In raising a justification defense, the defendant admits he did a wrongful act, such

as taking someone's life, but argues that the act was the right thing to do under the circumstances. At times, the state's view differs from the defendant's view of whether the act was, in fact, the right thing to do. In those cases, the state files charges to which the defendant raises a justification defense.

Justification defenses include self-defense, defense of others, defense of property, defense of habitation, consent, and necessity, also called, choice of evils. Justifications are affirmative defenses. The defendant must produce some evidence in support of these defenses. In most cases, the defendant must also convince the jury that it was more likely than not (a preponderance of the evidence) that his or her conduct was justified. For example, the defendant may claim that he or she acted in self-defense and at trial would need to call witnesses or introduce physical evidence that supports the claim of self-defense, that it was more likely than not that his or her actions were ones done in self-defense. State law may vary about how convinced the jury must be (called the standard of proof) or when the burden switches to the defendant to put on evidence, but all states generally require the defendant to carry at least some of the burden of proof in raising justification defenses.

Excuses

Excuses are defenses to criminal behavior that focus on some characteristic of the defendant. With excuses, the defendant is essentially saying, "I did the crime, but I am not responsible because I was . . . insane (or too young, intoxicated, mistaken, or under duress)." Excuses include insanity, diminished capacity, automatism, age, involuntary intoxication, duress, mistake of fact, and then a variety of non-traditional syndrome excuses. Like justifications, excuses are affirmative defenses in which the defendant bears the burden of putting on some evidence to convince the jury that he or she should not be held responsible for his or her conduct.

Procedural Defenses

Procedural defenses are challenges to the state's ability to bring the case against the defendant for some reason. These defenses point to some problem in the process or the state's lack of authority to bring the case rather than facts surrounding the crime or the criminal. Procedural defenses include: **double jeopardy** (a defense in which the defendant claims that the government is repeatedly and impermissibly prosecuting him or her for the same crime), **speedy trial** (a defense in which the defendant claims the government took too long to get his or her case to trial), **entrapment** (a defense in which the defendant claims the government in some way enticed him or her into committing the crime), the **statute of limitations** (a defense in which the defendant claims the government did not charge him or her within the required statutory period), and several types of **immunity** (a defense in which the defendant claims he or she is immune from being prosecuted). Although procedural defenses are considered procedural criminal law, many states include the availability of these defenses in their substantive criminal codes.

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Substantive criminal law not only defines what behaviors are crimes, but also the law that determines the permissible punishment for the criminal behavior. All three governmental branches of government impact criminal punishment. One of the most important duties of a judge is to **impose a sentence** which means determining the appropriate punishment for an offender upon conviction. Thus, punishing offenders is a judicial function. Because of the trend toward mandatory sentencing, discussed below, much of the discretion of sentencing has been removed from judges and placed on the prosecutors in their screening and charging decision-making. As such, punishing offenders may rightly be considered an executive function. Finally, the lengths of sentences and types of punishment that attach to the various crimes, without regard to who may be committing the offense, is a product of the legislative process. In the last 30 years, through ballot measures, propositions, referendum, and initiatives, the people (the general public through voting) have played a large role in deciding the types and lengths of punishment.

Incarceration/Confinement Sanctions

Confinement sanctions include incarceration in prisons and jails, incarceration in boot camps, house arrest, civil commitment for violent sexual offenders, short term shock incarceration, electronic monitoring, and split probation (when incarceration is imposed as a condition of probation). Most believe that confinement is the only effective way to deal with violent offenders. Although people question the efficacy of prison, regarding it as little more than a factory for producing future criminals, incarceration does protect society outside the prison from dangerous offenders. Prison is effective at incapacitation, but rarely is it effective at rehabilitation. In fact, serving time in prison often reinforces criminal tendencies.

State and federal approaches to incarcerating individuals have shifted in response to prevailing criminal justice thinking and philosophy. Over time, governments have embraced four different approaches to sentencing offenders to incarceration: indeterminate, indefinite, determinate, or definite. Criminal codes may incorporate more than one single approach. These approaches can be seen as a spectrum of judicial discretion**. Indefinite and indeterminate sentences**, at one end, are those that allow judges and parole boards the most discretion and authority. **Determinate and definite sentences**, at the other end, allow little or no discretion. Currently, most states are following determinate sentencing coupled with sentencing guideline, mandatory minimums, habitual offender statutes, and penalty enhancement statutes.

Indeterminate-Indefinite Sentencing Approach

For much of the twentieth century, statutes commonly allowed judges to sentence criminals to imprisonment for indeterminate periods. Under this indeterminate sentencing approach, judges sentenced

the offender to prison for no specific time frame and the offenders' release was contingent upon getting **paroled,** or released by a parole board after a finding that the person was rehabilitated. Because some criminals would quickly be reformed but other criminals would be resistant to change, indeterminate sentencing's open-ended time frame was deemed optimal for allowing treatment and reform to take its course, no matter how quickly or slowly. The decline of popular support for rehabilitation has led most jurisdictions to abandon the concept of indeterminate sentencing. Indefinite sentences give judges discretion, within defined limits, to set a minimum and maximum sentence length. The judge imposes a range of years to be served, and a parole board decides when the offender will ultimately be released.

Determinate-Definite Sentencing Approach

Under determinate sentencing, judges have little discretion in sentencing. The legislature sets specific parameters on the sentence, and the judge sets a fixed term of years within that time frame. The sentencing laws allow the court to increase the term if it finds aggravating factors, and reduce the term if it finds mitigating factors. With determinate sentencing, the defendant knows immediately when he or she will be released. In determinate sentencing, offenders may receive credit for time served while in pretrial detention and "good time" credits. The discretion that judges are allowed in initially setting the fixed term is what distinguishes determinate sentencing from definite sentencing.

Definite sentencing completely eliminates judicial discretion and ensures that offenders who commit the same crimes are punished equally. The definite sentence is set by the legislature with no leeway for judges or corrections officials to individualize punishment. Currently, no jurisdiction embraces this inflexible approach that prohibits any consideration of aggravating and mitigating factors in sentencing. Although mandatory minimum sentencing embraces some aspects of definite sentencing, judges may still impose longer than the minimum sentence and therefore retain some limited discretion.

Presumptive Sentencing Guidelines

In the 1980s, state legislatures and Congress, responding to criticism that wide judicial discretion resulted in great sentence disparities, adopted **sentencing guidelines** drafted by legislatively-established commissions. These commissions proposed sentencing formulas based on a variety of factors, but the two most important factors in any sentencing guideline scheme were the nature of the crime and the offenders' criminal history. Some states enacted advisory sentencing guidelines that gave suggestions to judges statewide of what was considered an appropriate sentence that should be followed in most cases. Some states enacted mandatory sentence guidelines that required judges to impose **presumptive sentences,** the length or type of sentence that was presumed appropriate unless mitigating or aggravating factors were identified on the record.

Sentencing guidelines generally differentiate between presumptive prison sentences and presumptive probation sentences. Judges who **depart**, or (select a different sentence, from the presumptive sentences can do a **dispositional departure** and impose prison when probation was the presumptive sentence or impose probation instead of prison. Judges may also do a **durational departure** in which they sentence the offender to a term length different than the presumptive term length, for example, giving an 18-month sentence rather than a 26-month sentence.

Guideline sentencing allows for judicial discretion, but at the same time, limits that discretion. Judges must generally make findings when sentencing the offender to a term of incarceration that is different from the presumptive sentence. The judge must indicate which **aggravating factors** (factors indicating the offender or offense is worse than other similar crimes) or **mitigating factors** (factors indicating the offender or offense is less serious than other similar crimes). The Sentencing Reform Act of 1984 (18 U.S. C.A. §§

3551 et. seq. 28 U.S.C.A. §§991-998) first established federal sentencing guidelines. The Act applied to all crimes committed after November 1, 1987, and its purpose was "to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes." Scheb, at 681. It created the United States Sentencing Guideline Commission and gave it the authority to create the guidelines. The Commission dramatically reduced the discretion of federal judges by establishing a narrow sentencing range and required that judges who departed from the ranges state in writing their reason for doing so. The Act also established an appellate review of federal sentences and abolished the U.S. Parole Commission.

Most states have adopted some version of sentencing guidelines, from the very simple to the very complex, and many states restrict their guidelines to felonies. Although limiting judicial discretion, state sentencing guideline schemes all allow some wiggle room if the judge finds that the case differs from the run of the mill case. In a series of cases, the Court has found that federal and state sentencing guidelines schemes that do not require the jury to make findings of aggravating factors which justify a harsher sentence imposed by the judge violate the defendant's right to a jury trial (found in the Sixth Amendment). See, *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *United States v. Booker-United States v. Fanfan*, 543 U.S. 220 (2005); *Blakeley v. Washington*, 542 U.S. 296 (2004). Accordingly, some of the sentencing guideline schemes have been invalidated and some modified.

"There is still considerable uncertainty about the efficacy of sentencing guidelines. There is evidence that they have reduced sentencing disparities but they clearly have not eliminated this problem altogether. There is also concern that sentencing guidelines have promoted higher incarceration rates and have thus contributed to the problem of prison overcrowding. It is fair to say that to be successful, sentencing guidelines must be accompanied by policies designed to effectively manage prison populations." [1]

Controversial Issue: Mandatory Minimum Sentences

Legislative enactments, ballot measures, initiatives, and referendums have resulted in **mandatory minimum sentences** schemes in which offenders who commit certain crimes must be sentenced to prison terms for minimum periods. Mandatory minimum sentences take precedence over but do not completely replace, whatever other statutory or administrative sentencing guidelines may be in place. It is possible for a judge to impose a sentence that exceeds the mandatory minimum on an offender who, because of his or her extensive criminal history or particular brutality of the crime, warrants a particularly harsh guideline sentence.

Mandatory minimum sentences are a type of determinate sentence. Most mandatory minimum sentences are for violent offenses or those involving the use of firearms. Federal law also mandates minimum prison terms for serious drug crimes prosecuted in federal courts. For example, a person charged with possession with the intent to distribute more than five kilograms of cocaine is subject to a mandatory minimum sentence of ten years in prison. See, 21 U.S.C.A. §841 (b) (1)(A).

In our attempts to limit judicial discretion, we may have perhaps gone too far. Judges must impose

1. Scheb II, J.M. (2013). *Criminal Law and Procedure* (8th ed., pp. 683). Belmont, CA: Cengage.

mandatory minimum sentences regardless of any compelling mitigating facts that warrant a lesser sentence, even when victims fervently request leniency for the defendant. Sentencing discretion resting with a neutral judge has been replaced by charging discretion resting with the prosecutor. Prosecutors, in filing certain charges, can now compel negotiated pleas, and they now hold most of the cards. Also, mandatory minimum sentencing has resulted in the over-incarceration of non-violent offenders. On December 18, 2018, a bi-partisan bill for criminal justice reform called the First Step Act passed the U.S. Senate with an 87-12 vote. The bill seeks to reverse some of the effects of overly harsh sentences for non-violent drug offenders.

Link to Video on the above link showing the Senate Vote on the First Step Act on December 18th2018

https://d2hpjte286tc4h.cloudfront.net/wp-raycom/(Source_%20Senate%20TV/Twitter/@realDonaldTrump/KCAL/KCBS/CNN/Pool)/2018/12/19/5c1a0dfbe4b0dcad7654b1db/t_cc7087e930cd408498ddba6821c2a690_name_BHDN_PY_02WE_SENATE_PASSES_CRIMINAL_JUSTICE_REFORM_BILL__4AME_CNNA_ST1_1000000004ee5b22_120_2/file_640x360-600-v3.mp4

http://HTTPS://WWW.REGISTER-HERALD.COM/CNHI_NETWORK/IN-BIPARTISAN-ACT-SENATE-PASSES-CRIMINAL-JUSTICE-REFORM-BILL-WITH/VIDEO_115833EC-71D2-5FC3-89BA-980428D75367.HTML

Other Mandatory Sentences–Penalty Enhancements

Legislatures have also exercised their authority over sentencing by passing laws that enhance criminal penalties for crimes against certain victims, for crimes done with weapons, or for hate crimes. For example, Congress passed the Violent Crime Control and Law Enforcement Act of 1994 that included several provisions for enhanced penalties for drug trafficking in prisons and drug-free zones and illegal drug use in federal prisons. States have passed gun enhancements and hate crime enhancements. *See, e.g.*, ORS 161.610 (authorizing enhanced penalties for the use of a firearm during the commission of a felony); *Wisconsin v. Mitchell*, 508 U.S. 486 (1993) (authorizing enhanced penalties for hate crimes).

Concurrent and Consecutive Sentences

Frequently, judges sentence defendants for multiple crimes and multiple cases at the same sentencing hearing. Judges have the option of running terms of incarceration either **concurrently** (at the same time) or **consecutively** (back-to-back). States vary as to whether the default approach on multiple sentences is consecutive sentences or concurrent sentences. The Court has held that the decision to impose concurrent or consecutive sentences was a judicial determination, not a jury determination, and thus not subject to *Apprendi's* rule that any sentencing enhancement factor must be proved to the jury beyond a reasonable doubt. *Oregon v. Ice*,555 U.S. 160 (2009). Justice Ginsberg wrote,

"Most States continue the common law-tradition: They entrust to judges' unfettered discretion the decision whether sentences for discrete offenses shall be served consecutively or concurrently. In some States, sentences for multiple offenses are presumed to run consecutively, but sentencing judges may order concurrent sentences upon finding cause therefor. The other States, including Oregon, constrain judges' discretion by requiring them to find certain facts before imposing consecutive rather than concurrent sentences."[2]

Civil Commitment of Violent Sexual Offenders

Some sexual offenders may still be dangerous even after they serve their entire prison term. Both state and federal laws allow the continued confinement of violent sexual predators after the expiration of their criminal sentences. In 1997, the Court upheld a Kansas statute finding that such confinement did not violate the double jeopardy or *ex post facto* prohibitions. *Kansas v. Hendricks*, 521 U.S. 346 (1997). In 2010, the Court decided that in enacting the Adam Walsh Act, 18 U.S.C. 4248, Congress had not exceeded its authority by allowing civil commitment after an offender has served his or her criminal sanction. Justice Breyer wrote, "the statute is a necessary and proper means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others." [3]

Link to 2015 report on Federal Sentencing (includes incarceration and alternatives) (link also included below with split probation.

https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20150617_Alternatives.pdf

2. *Oregon v. Ice, 555 U.S. 160, at 163-164 (2009).*
3. *United States v. Comstock, 560 U.S. 126,* at (2010).

Physical Punishment

Corporal Punishment

Until 1978, the Supreme Court upheld the use of **corporal punishment** (physical punishment). *Ingraham v. Wright* 430 U.S. 651 (1978). However, it is no longer an approved sanction for a criminal offense in the United States. Nonlethal corporal punishment, such as flogging, was used extensively in English and American common law for non-felony offenses. The misdemeanant was taken to the public square, bound to the whipping post, and administered as many lashes as the law specified.

"An American judge during the early American Republic was able to select from a wide array of punishments, most of which were intended to inflect intense pain and public shame. A Virginia statute of 1748 punished the stealing of a hog with twenty-five lashes and a fine. The second offense resulted in two hours of pillory (public ridicule) or public branding. A third theft resulted in a penalty of death. False testimony during a trial might result in mutilation of the ears or banishment from the colony. These penalties were often combined with imprisonment in a jail or workhouse and hard labor. . .

We have slowly moved away from most of these physically painful sanctions. The majority of states followed the example of the U.S. Congress, which in 1788 prohibited federal courts from imposing whipping and standing in the pillory. Maryland retained corporal punishments until 1953, and Delaware only repealed this punishment in 1972. Delaware, in fact, subjected more than 1600 individuals to whippings in the twentieth century. This practice was effectively ended in 1978 when the Eighth Circuit Court of Appeals ruled that the use of the strap, "offends contemporary standards of decency and human dignity and precepts of civilization which we profess to possess." [1]

Controversial Issue: Capital Punishment: Death Penalty

Capital punishment (lethal physical punishment) is a popular topic, and much has been written about the death penalty. One excellent resource for learning about the death penalty is the death penalty information center (DPIC), a nonprofit organization that publishes studies and analyzes trends in death penalty law and application.

Link to Death Penalty Information Center:
https://deathpenaltyinfo.org/
Link to Death Penalty Information Center Fact Sheet
https://deathpenaltyinfo.org/documents/FactSheet.pdf

1. Lippman, M.R. (2016) *Contemporary Criminal Law: Concepts, Cases, and Controversies* (4th ed., pp. 57). SAGE Publishing.

See Death Penalty Fast Facts at
https://www.cnn.com/2013/07/19/us/death-penalty-fast-facts/index.html
The use of the death penalty as a response to crime in industrialized nations raises many questions:

- Is the death penalty a deterrent?
- Is the death penalty justified by principles of retribution?
- Is the death penalty morally or ethically justified?
- Does it cost more to impose a death sentence or to impose a true-life sentence?
- Are factually innocent individuals erroneously executed (and if so, how often)?
- Is any particular manner of execution cruel and unusual?
- Is the death penalty, in itself, cruel and unusual punishment?

Courts answer only the last two questions, and, to date, the Court has upheld every manner of execution that is currently approved in the United States: firing squad, electrocution, gas chamber, hanging, and lethal injection. The Court appears willing to uphold capital punishment and has found it is not disproportionately cruel and unusual when the crime for which the defendant was convicted resulted in the death of another. It has reached an opposite result when the crime did not involve the victim's death, for example, when the defendant was convicted of rape of an adult woman and a child rape. See, *Coker v. Georgia*, 433 U.S. 584 (1977) The Court prohibited capital punishment for the crime of rape of an adult victim. *Coker* suggests that the death penalty is an inappropriate punishment for any crime that does not involve the taking of human life. In *Kennedy v. Louisiana*, 554 U.S. 407 (2008), the Court invalidated a Louisiana statute that allowed for the death penalty for rape of a child less than twelve years of age. Justice Kennedy (not the defendant, Kennedy) wrote, "the Eighth Amendment bars imposing the death penalty for the rape of a child where the crime did not result and was not intended to result, in the death of the victim."

Mental Illness, Mental Deterioration and the Death Penalty

According to Court interpretations, the Eighth Amendment forbids the execution of someone who is legally insane. *Ford v. Wainwright*, 477 US 399 (1986). In 2007, the Court ruled that a prisoner is entitled to a hearing to determine his mental condition upon making a preliminary showing that his current mental state would bar his execution. *Panetti. v. Quarterman*, 551 US 930 (2007). In one case, the Texas Court of Criminal Appeals in 2013 held that a trial court illegally ordered the forcible medication of a mentally ill death row inmate, Steven Stanley, for the purpose of rendering him competent to be executed. See, http://www.deathpenaltyinfo.org. Staley's mental health began to deteriorate when he entered death row in 1991. He received an execution date in 2006 but was deemed too ill to be executed. A court ordered that his paranoid schizophrenia is treated by forcible medication, which continued for six years. In its ruling, the Texas Court of Criminal Appeals held that "the evidence conclusively shows that appellant's competency to be executed was achieved solely through the involuntary medication, which the trial court had no authority to order under the competency-to-be-executed statute. The finding that appellant is competent must be reversed for lack of any evidentiary support". The ruling did not address whether the state constitution forbids the execution of someone forcibly drugged or whether the defendant, in this case, is too ill to

be executed at all. Another mentally ill individual, John Ferguson, was executed in August 2013 in Florida through four mental health organizations maintained that he had suffered from mental illness for at least 40 years. Similarly, Marshall Gore, another Florida inmate with mental illness, was executed in October 2013.

Link to mental illness and the death penalty
https://deathpenaltyinfo.org/mental-illness-and-death-penalty

A different but related issue is the constitutionality of executing mentally retarded individuals who have committed capital offenses. In 1989, the Court held that executions of mentally retarded prisoners do not necessarily violate the Cruel and Unusual Punishment Clause if juries are allowed to consider evidence of mental retardation as a mitigating factor in the sentencing phase of a capital trial. *Penry v. Lynaugh,* 492 U.S. 302 (1989). Later, in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court reconsidered, holding that there was a sufficient national consensus for the Court to prohibit the execution of mentally retarded persons via the Eighth Amendment. Justice Stevens concluded,

"[M]entally retarded person who meets the law's requirement for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct" [2].

On February 27th, 2019 the Court affirmed that the states may not execute a death row inmate who was unable to understand his punishments due to dementia. In *Madison v. Alabama,* ___ U.S. ___ (2019), the 70-year-old defendant had spent 33 years in solitary confinement after having been sentenced to death for killing a police officer in 1985. Madison had suffered a series of strokes causing severe cognitive impairment due to vascular dementia and the inability to remember his crime. Justice Kagan's majority opinion held that an inmate's failure to remember his crime does not by itself render him immune from execution, but "such memory loss still may factor into the 'rational understanding' analysis that *Panetti* demands." If memory loss "combines and interacts with other mental shortfalls to deprive a person of the capacity to comprehend" his death sentence, "then the *Panetti* standard will be satisfied." ____ U.S. ____, at ____ (2019)

According to the Court, it doesn't matter if these "mental shortfalls" stem from delusions, dementia, or some other disorder. Courts must "look beyond any given diagnosis to a downstream consequence"—whether a disorder can "so impair the prisoner's concept of reality" that he cannot "come to grips with" the meaning of his punishment."

Juvenile Offenders and the Death Penalty

Historically, juveniles were treated no differently than adults in the criminal justice system, and thus, there is a long history of executing juveniles convicted of capital crimes. In the late 1980s, the Court considered whether national sentiment had changed to the point where it would now be considered cruel and unusual punishment to apply the death penalty to juveniles. The Court first held that the Constitution

2. *Atkins v. Virginia*, 536 U.S. 304 (2002).

prohibits executing a juvenile who was fifteen years of age or younger at the time he or she committed the capital crime. *Thompson v. Oklahoma*, 487 U.S. 825 (1988). One year later, the Court, in a 5-4 decision, held that a juvenile sixteen years or older at the time of the crime could be sentenced to death. *Stanford v. Kentucky*, 492 U.S. 361 (1989). Then, in *Roper v. Simmons*, 543 U.S. 551 (2005), the Court said that the Constitution forbade the execution of anyone who was under eighteen at the time of their offense. The *Simmons* decision pointed to the decreasing frequency with which juvenile offenders were being sentenced to death as evidence of an emerging national consensus against capital punishment for juveniles. The Court noted that only 20 of the 37 death penalty states allowed juveniles to be executed, and since 1995, only three states had actually executed inmates for crimes they had committed as juveniles.

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Monetary Punishments

Fines

Fines, or a sum of money the offender has to pay as punishment for the crime, are generally viewed as the least severe of all possible punishments. Fines may either supplement imprisonment or probation, or they may be the sole punishment. Criminal codes generally authorize fines as punishment for most crimes, but some of the older criminal codes did not authorize fines for murder.

The Model Penal Code proposed legislative guidelines on the use of fines, but states have generally rejected this provision. Instead, judges are given extremely broad discretion in setting the fine amounts, and there are few limits on the judge's ability to impose a fine. Frequently, the criminal statute will specify the highest permissible fine. The Eighth Amendment's Cruel and Unusual Punishment Clause prohibits excessive fines, but courts rarely have found a fine to violate this provision. In *Tate v. Short*, 401 U.S. 395 (1971), the Court found that fines that punish poor people more harshly than rich people, and thus, violate the Equal Protection Clause. Historically, magistrates had given offenders the option of paying a fine or serving a jail sentence. Sentences were frequently "thirty dollars or thirty days". If defendants were too poor to pay the fine, they went to jail. The *Tate* Court reasoned that the state could imprison Tate for committing the crime, but by requiring either time or a fine, the state was really incarcerating Tate because he was too poor to pay the fine. After *Tate*, courts began using installment plans that permit poor defendants to pay fines over a period of several months. This practice may nonetheless subject the poor to an increased punishment if the court administration requires interest or some fee associated with a payment plan.

Civil Forfeiture

Federal law allows **civil forfeiture,** the process by which the government confiscates the proceeds (property or money) of criminal activities. *See,*18 USCA §§981-982. Laws that allow the state to forfeit the property used in illicit drug activity are particularly controversial. In deciding whether forfeiture is legal, state courts generally look to constitutional provisions dealing with excessive fines. In *Austin v. United States*, 509 US 602, at 622 (1993), the Supreme Court said that civil forfeiture "constitutes payment to a sovereign as punishment for some offense' . . . and, as such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause." However, the court left it to state and lower federal courts to determine the test of "excessiveness" in the context of forfeiture. The Illinois Supreme Court said that three factors should be considered in this regard: (1) the gravity of the offense relative to the value of the forfeiture, (2) whether the property was an integral part of the illicit activity, and (3) whether the illicit activity involving the property

was extensive. [1] Federally, a $357,144 forfeiture for failing to report to U.S. Customs that more than $10,000 was being taken out of the country was found to be "grossly disproportionate" to the offense. [2] In one Pennsylvania case, the court found that forfeiture of a house used as a base of operations in an ongoing drug business was not excessive. [3]

Defendants, whose property has been taken through civil forfeiture, have argued that either the forfeiture hearing or the criminal trial (whichever happened last) violated their rights to be free from double jeopardy. However, the courts have not agreed. Instead, they hold that the double jeopardy prohibition is not triggered because forfeiture is a civil sanction and not considered a new criminal action. *United States v. Ursery* 518 U.S. 267 (1996). On February 20th, 2019, the Court perhaps provided a different form of attack on civil forfeitures. In a unanimous opinion in *Timbs v. Indiana,* ___ U.S. ___ (2019), Justice Ginsberg wrote that the Eighth Amendment's excessive fines clause applies to the states as well as the federal government, and that when Indiana civilly forfeited Timbs' $42,000 land rover after he sold a couple of hundred dollars worth of heroin, it was imposing an excessive fine.

In order to satisfy due process, the owner is entitled to a hearing before the property can be forfeited. *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993). Courts have found that civil forfeiture is constitutional even when the owner was not aware of the property's criminal use. For example, in *Bennis v. Michigan,* 516 U.S. 442 (1996), the Court upheld the government's seizure and forfeiture of Mrs. Bennis's car, even though she claimed she did not know that her husband was using their car to engage in prostitution.

In 2000, Congress approved the Civil Asset Forfeiture Reform Act. This Act curbed the government's asset forfeiture authority and added additional due process guarantees to ensure that property is not unjustly taken from innocent owners. Under the Act, the government must show by a preponderance of the evidence that the property was used in some criminal venture. The Act also limited the statute of limitations to five years and made it a crime to move or destroy property to prevent seizure for forfeiture. In a similar vein, Oregon voters passed Ballot Measure 3, the Oregon Property Protection Act of 2000, in the November election. This constitutional amendment imposed limits on government forfeiture, allowing forfeiture only if the person from whom the property was seized had been already convicted of the crime, and only if the government could prove by a clear and convincing evidence standard that the property was a proceed or instrument of the crime.

Link to http://www.osbar.org/publications/bulletin/06nov/forfeiture.html, for a discussion of the recent history of asset forfeiture in Oregon and the debate about Ballot Measure 3 and subsequent forfeiture cases and statutes.

Restitution and Compensatory Fines

Restitution refers to the "return of a sum of money, an object, or the value of an object that the defendant wrongfully obtained in the course of committing the crime." [4] When the judge's sentence includes

1. *Waller v. 1989 Ford F350 Truck*, 642 N.E. 2d 460 (Ill. 1994).
2. *United States v. Bajakajian,* 524 U.S. 321 (1998).
3. *In re King Properties*, 6235 A.2d 128 (Pa 1983).
4. Scheb, J.M. & Scheb, J.M. II (2012). *Criminal Procedure* (6th ed., pp. 268). Belmont, CA: Wadsworth, Cengage Learning.

restitution, the amount should be enough money to place the victim in the same position they would have been had the crime not been committed. Restitution orders can include the actual cost of destroyed property, medical bills, counseling fees, and lost wages. Several state laws require offenders to pay restitution as a condition of probation. Judges may order defendants to pay restitution for all damages incurred during a criminal episode, even if the charge is dismissed through negotiations. Judges may also order the defendant to pay restitution to some party other than the victim.

Ordering restitution is not always practical. When offenders are sentenced to incarceration, they frequently are unable to pay fines and restitution. Even offenders sentenced to probation may not be able to make restitution payments. In order to assist crime victims when offenders cannot pay restitution, several states have established **victims' compensations commissions**. Statewide, defendants make their restitution payments to these commissions that pay out restitution claims to victims across the state. Because of the statewide pot of money, victims can then get some, if not all, of what is needed to "make them whole." Also, these commissions make it possible for the victim to get compensated without having to maintain contact with the offender.

In addition to incarceration and monetary sanctions, the defendant may be sentenced to some form of community-based sanction.

Community Shaming

Some judges, seeking alternatives to jail or prison, have imposed creative sentences such as requiring offenders to post billboards, make public apologies, place signs on the door reading, "Dangerous Sex Offender, No children Allowed," and attach bumper stickers proclaiming their crimes. These sentences are intended to shame or humiliate the offender and satisfy the need for retribution. Shame is part of the restorative justice movement, but for it to be effective it needs to "come from within the offender. … Shame that is imposed without almost always hardens the offenders against reconciliation and restoration of the damage done" http://www.critcrim.org/redfeather/journal-pomocrim/vol-8-shaming/scheff.html

"At the heart of the current discussion of shaming offenders is the assumption that shame is a simple emotion that comes in only two sizes: shame or no shame. But actually, shame is a complex emotion which comes in many shapes, sizes, and degrees of intensity. Legal scholars and judges who treat shame as merely binary are in the position of a skier who makes no distinction between the many kinds of snow. Just as lack of knowledge of types of snow may lead a skier to disaster, so the crude treatment of shame in current discussions could be a catastrophe." [1]

Community Service

Although not necessarily specified in the criminal code, judges frequently sentence offenders to complete community service as a condition of probation. Generally, a probation officer or probation staff member will act as the community service coordinator. His or her job is to link the offender to the positions and verify the hours worked.

Probation

Kerper describes how states began to use probation as a sanction for criminal behavior.

"The authority to grant probation probably grew out of the traditional practice of judges of "suspending sentences." The judge would simply fail to set a sentence or set the sentence and fail to direct that it be executed. The offender would then be released. If the offender's subsequent behavior was satisfactory, nothing more would be done. If he had further difficulty with the law, the judge, usually on request of the prosecutor, would revoke his freedom. This time the judge would set a sentence, or reinstate the previous

1. http://www.critcrim.org/redfeather/journal-pomocrim/vol-8-shaming/scheff.html

sentence, and the sentence would be executed. The common law authority of a judge to spend a sentence was questionable, but many judges regularly exercised that authority.

Since the defendant released on a suspended sentence was not subject to formal supervisions, judges tended to suspend sentences only in minor cases. In the late 1800s, courts began to experiment with a combination of a suspended sentence and careful supervision that could be applied to more serious offenses. This new procedure, called probation, soon was authorized by statute and provision was made for the appointment of special probation officers." [2]

Probation is one of the most common alternatives to incarceration. Both probation and parole involve supervision of the offender in a community setting rather than in jail or prison. The primary purpose of probation is to rehabilitate the defendant. Thus, the court releases the offender to the supervision of a probation officer who then monitors the offender to ensure that he or she abides by the conditions of probation. With **parole**, the offender is first incarcerated and is later released from prison to supervised control. Under both procedures, offenders who violate the terms of their supervision can be imprisoned to serve the remainder of their sentences.

The Court has said little on probation since 1932 when it announced that probation conditions must serve "the ends of justice and the best interest of both the public and the defendant." *Burnes v. United States*, 287 U.S. 216 (1932). According to the Ninth Circuit Court of Appeals, "The only factors which the trial judge should consider when deciding whether to grant probation are the appropriateness and attainability of rehabilitation and the need to protect the public by imposing conditions which control the probationer's activities." *Higdon v. United States*, 627 F.2d 893 (9th Circ. 1980). The Court has fashioned a two-step process for reviewing conditions of probation: first, it determines whether the conditions are permissible, and, if so, it determines whether there is a reasonable relationship between the conditions imposed and the purpose of probation.

Many states follow California's standard for testing the reasonableness of probation conditions. This approach holds that probation conditions do not serve the ends of probation and are not valid if (1) the condition of probation has no relationship to the crime of which the offender was convicted, (2) the condition relates to conduct which is not in itself criminal, or (3) the condition requires or forbids conduct which is not reasonably related to future criminal act. *People v. Dominguez*, 64 Cal. Rptr. 290 (Cal. App. 1967) The court struck down a condition that the "probationer not become pregnant without being married," saying it was unrelated to her offense or to future criminality.

Courts have invalidated the following probation conditions:

- Requiring the offender to refrain from using or possessing alcoholic beverages when nothing in the record showed any connection between alcohol consumption and the weapons violation of which the probationer had been convicted. *Biller v. State*, 618 So. 2d 734 (Fla 1993).
- Requiring the defendant to submit to a search of herself, her possessions, and any place where she may be with or without a search warrant, on request of a probation officer. (The

2. Kerper, H. B. (1979). *Introduction to the criminal justice system* (2nd ed., pp. 339). West Publishing Company.

Court noted that search of a probationer and his or her residence, with or without a warrant, based on reasonable suspicion that probationer violated the terms of probation would be valid.) *Commonwealth v. LaFrance*, 525 N.E. 2d 379 (Mass. 1988).

- Prohibiting custody of children unless it had a clear relationship to the crime of child abuse.
- Prohibiting marriage and pregnancy.*Rodriguez v. State*, 378 So.2d 7 (Fla. App. 1979).
- Prohibiting the defendant from fathering any children during the probation period. *Burchell v. State*, 419 So.2d 358 (Fla. App. 1982).
- Requiring the defendant to maintain a short haircut. *Inman v. State*, 183 S.E.2d 413 (GA. App. 1971)(the court found this condition was an unconstitutional invasion of the right to self-expression).

Courts have upheld the following conditions:

- Prohibiting offenders convicted of child pornography from having access to the internet, possessing a computer, and requiring the offender to submit to polygraph testing. See, *United States v. Zinn*, 321 F.3d. 1084 (11th Cir. 2003), *United States v. Rearden*, 349 F.3d 608 (9th Cir. 2003), *State v. Ehli*, 681 N.W. 2d 808 (N.D. 2004), P*eople v. Harrisson*, 134 Cal.App.4th 637 (2005).
- Prohibiting the probationer from fathering any additional children unless he could demonstrate he had the financial ability to support them, and that he was supporting the nine children he had fathered. *State v. Oakley*, 629 N.W. 2d 200 (Wis. 2001).
- Requiring probationers to pay all fees, fines, and restitution, refrain from contacting the victim, undergo treatment for substance abuse, participate in alternatives to violence classes, stay in school, not leave the state without permission, abstain from alcohol, not drive. These conditions that apply to all probationers are referred to as "general conditions of probation."

Many jurisdictions authorize **split probation** and allow the judge to sentence the offender to a short period of jail as a condition of probation. In some cases, the offender will serve his jail time before he returns to the community under probation supervision. In others, he will be released first and serve his time on weekends. The federal system uses a similar procedure involving a more substantial jail sentence. The judges impose a

split sentence under which the probationer is imprisoned for a period up to six-month and then is released on probation.

Link to alternative sentencing for federal system

https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20150617_Alternatives.pdf

Parole and Post-Prison Supervision

Because most states now use determinate sentencing, the use of parole is dwindling and is being replaced by post-prison supervision of offenders after their incarceration. However, for offenders sentenced in the 1970s and 1980s under indeterminate sentencing schemes, parole continues to be very real hope, even if an unlikely possibility.

Charles Manson Exercise

Consider the case of notorious California killer Charles Manson who died in state custody in November 2017 at the age of 83. Manson was found guilty in 1969 of the murder of five people. He was sentenced to death, but his sentence was converted in 1977 to "life with the possibility of parole" after the California Supreme Court invalidated its state death penalty statute. Manson applied for parole for the twentieth time in 2012, he was 78 years old at the time. Under a change in parole release law, the next time Manson would have been eligible for parole was in 2027. The board noted that if he were to complete programs designed to help deal with some of his issues, then he could petition for release sooner. Listen to the hearing at http://abcnews.go.com/US/charles-manson-denied-parole-dangerous-man/story?id=16111128.

"[T]he states which have adopted determinate sentencing structures have either eliminated or drastically restricted parole. In states with indeterminate sentencing, however, parole remains an essential element of the sentencing structure. Parole involves the release of the prisoner subject to conditions similar to those imposed on the probationer. Parole may be granted by the responsible state agency (usually called a parole board) after the prisoner has served his minimum sentence. The parole board usually has several members, who are either interested citizens appointed by the governor or corrections department personnel selected by the head of that department. Frequently the board will be assisted by special hearing officers who hold hearings and make recommendations to the board. Most parole boards automatically schedule hearings for every inmate as soon as he becomes eligible for parole. If he is not released at that point, subsequent hearings will be scheduled at regular intervals." [3]

The procedures of parole hearings vary from state to state. Indeed, not all states regularly hold hearings. A few prefer simply to review the files in the case, permitting the prisoner to submit a statement on his own behalf. Ordinarily, hearings are rather informal affairs held before a hearing officer or one or more board

3. O'Leary, V., & Hanrahan, K. (1977). Law and practice in parole proceedings: A national survey. *Crim. L. Bull.*, 13, 181-197..

members. The prisoner will be informed of the material in their parole file, which relates primarily to their offense, their prior criminal record, and their performance in prison. The prisoner also will be given the opportunity to state their own case for parole and to ask any questions about the parole process. In almost half of the states, they may be assisted by an attorney, and several states will appoint an attorney upon request of an indigent prisoner. The remaining states prohibit representation by an attorney on the ground that it interferes with the board's evaluation of the prisoner's statements and demeanor at the hearing. Shortly after the hearing, most boards will provide the prisoner with a written explanation of its decision. If the prisoner is not released on parole, they must be released after they have served their full sentence.

Parolees are subject to a variety of conditions that are similar to probation conditions. They must contact, or "report to", their parole officers on a regular basis and attend regular meetings. They may be released to halfway houses, residential treatment programs, or daytime work-release programs at the beginning of their parole in order to prepare for return into the community.

Even when states sentencing schemes utilize parole, not all inmates are eligible for parole. In some states, prisoners forfeit their eligibility for parole if they attempt to escape or if they engage in certain violent acts. Also, many states have **true life sentences** or sentences where the offender is not eligible for parole, and persons convicted of first-degree murder are frequently sentenced to life without the possibility of parole.

Post-prison supervision stems from determinate sentencing schemes that states adopted beginning in the 1980s. Post-prison supervision boards are now often combined with parole boards, and they perform a similar function. Offenders do not apply for post-prison supervision since release is automatically given when the determinate sentence has been served. Generally, how long a person will be on post-prison supervision is set out in state sentencing guidelines. A post-prison supervision board will monitor whether the offender is abiding by the conditions of release while living in the community. If an offender violates conditions of release during post-prison supervision, he or she is entitled to a revocation hearing with the same due process protections given to parolees, i.e: notice, opportunity to challenge government's evidence, and the right to assistance of counsel.

As noted above, procedural law governs the process used to investigate and prosecute an individual who commits a crime. Procedural law also governs the ways a person convicted of a crime may challenge their convictions. The source of procedural law includes the same sources of law you have just read about which govern substantive criminal law: the constitution, cases law or judicial opinions, statutes, and common law. Whereas most substantive criminal law is now statutory, most procedural law is found in judicial opinions that interpret the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment to the U.S. Constitution, the U.S. Code, and the state constitutional and legislative counterparts. Generally, the federal and state constitutions set forth broad guarantees (for example, the right to a speedy trial), then statutes are enacted to provide more definite guidelines (for example, the Federal Speedy Trial Act) and then judges flesh out the meaning of those guarantees and statutes in their court opinions.

Phases of the Criminal Justice Process

The processing of a case through the criminal justice system can be broken down into five phases: investigative phase, the pre-trial phase, the trial phase, the sentencing phase, and the appellate or post-conviction phase.

Investigative Phase

The investigative phase is governed by laws covering searches and seizures (searches of persons and places, arrests and stops of individuals, seizures of belongings), interrogations and confessions, identification procedures (for example, line ups, showups, and photo arrays). This phase mostly involves what the police are doing to investigate a crime. However, when police apply for a search, seizure or arrest warrant, "neutral and detached" magistrates (i.e., judges) must decide whether probable cause exists to issue search warrants, arrest warrants, and warrants for the seizure of property and whether the scope of the proposed warrant is supported by the officer's **affidavit** (sworn statement). When an individual is arrested without a warrant, judges will need to promptly review whether there is probable cause exists to hold them in custody before trial.

Pretrial Phase

The pretrial phase is governed by laws covering the initial appearance of the defendant before a judge or magistrate; the securing of defense counsel, the arraignment process (in which the defendant is informed of the charges which have been filed by the state); the process in which the court determines whether to release the defendant pre-trial either with some financial surety (posting bail) or on his or her own recognizance and with court-determined conditions imposed (for example, not having contact with the alleged victim); the selection and use of a grand jury or preliminary hearing processes (in which either a grand jury or a

judge determines whether there is sufficient evidence that a felony has been committed); any pretrial motions such as motions to suppress evidence (for examples, asking the court not to let the government use evidence it may have obtained illegally through a search or getting a confession), motions to challenge a subpoena, motions to change venue (to move the trial), motions to join or sever cases (for example if two or more individuals are charged with the offense, should the trials be held together or separately). During the pretrial phase, prosecutors and defendants through their defense attorneys will engage in plea bargaining, and will generally resolve the case before a trial is held.

Trial Phase

The trial phase is governed by laws covering speedy trial guarantees, the selection and use of **petit jurors** (trial jurors); the **rules of evidence** (statutory and common law rules governing the admissibility of certain types of evidence such as hearsay or character evidence, the competency and impeachment of witnesses, the existence of any privilege, and the exclusion of witnesses during the testimony of other witnesses); the right of the defendant **compulsory process** (to secure favorable testimony and evidence); the right of the defendant to cross-examine any witnesses or evidence presented by the government against him; fair trials free of prejudicial adverse pre-trial or trial publicity; fair trials which are open to the public; and the continued right of the defendant to have the assistance of counsel and be present during his or her trial.

Sentencing Phase

The sentencing phase is governed by rules and laws concerning the substantive criminal laws on punishment (discussed above); time period in which a defendant must be sentenced; the defendant's **right of allocution** (right to make a statement to the court before the judge imposes sentence); any victims' rights to appear and make statements at sentencing; the defendant's rights to present mitigation evidence and witnesses; and the defendant's continued rights to the assistance of counsel at sentencing. In capital cases in which the state is seeking the death penalty, the trial will be **bifurcated** (a trial split into the "guilt/innocence phase" and the "penalty phase") and the sentencing hearing will be more like a mini-trial.

Post-Conviction Phase (Appeals Phase)

The post-conviction phase is governed by rules and laws concerning the time period in which direct appeals must be taken; the defendant's right to file an **appeal of right** (the initial appeal which must be reviewed by an appellate court) and right to file a discretionary appeal; the defendant's right to have the assistance of counsel in helping to file either the appeal of right or a discretionary appeal. The post-conviction phase is also governed by rules and laws concerning the defendant's ability to file a **writ of habeas corpus** (a civil suit against the entity who is currently holding the defendant in custody) or a **post-conviction relief suit** (a civil suit similar to a habeas corpus suit but one which can be filed by the defendant regardless if he or she is in custody). The post-conviction phase would also include any probation and parole revocation hearings.

4: Criminal Justice Policy

Learning Objectives

In this section, you will be introduced to policy in the criminal justice system. Policies that can be examined include issues related to juvenile justice, drug legislation, intimate partner violence, prison overcrowding, school safety, new federal immigration laws, terrorism, and national security. After reading this section, students will be able to:

- Examine the relationship between theory, research, and policy.
- Understand the factors involved in creating moral panics.
- Identify the stages involved in creating policy.
- Understand the role of evidence-based practice in policy.
- Reflect on how current events and politics shape policy.

Critical Thinking Questions

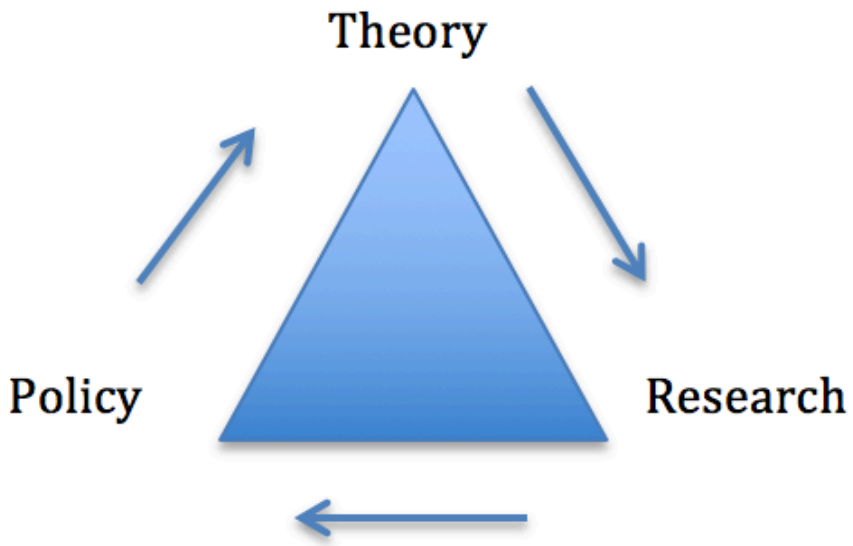
1. What is a current example of a moral panic?
2. How does the media help influence policy?
3. If the media has so much influence over policy, how can we ensure fair and just laws and practices?
4. Think of a crime problem in your area. What policy would you enact to combat it and how would you evaluate this policy to see if it was working?
5. What are some policies you can think of that have changed over time? (eg. Marijuana legalization)?

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Why is Policy so Important in Criminal Justice?

Everyone is affected by the criminal justice system through public policy. Policy represents social control and ensures members of society are compliant and conform to the laws. Policies include issues related: to juvenile justice, drug legislation, intimate partner violence, prison overcrowding, school safety, new federal immigration laws, terrorism, and national security.

Modern-day crime policies can be traced to changes in crime and delinquency in the 1960s. That decade saw major increases in the crime rate along with widespread social unrest as a result of the Vietnam War and the Civil Rights movement. The work of the 1967 President's Commission on Law Enforcement and the Administration of Justice highlighted the crime problem, and the criminal justice system's failure to address the problem. The commission called for new approaches, programs, policies, funding models, and research on the cause of crime. In addressing the causes of crime (theory), and using appropriate data collection (research), effective policies and programs could be proposed.



Theory-Policy-Research

When discussing crime policies, it is important to understand the difference between "crime prevention" and "crime control." Policies and programs designed to reduce crime are crime prevention techniques. Specifically, **crime prevention** "entails any action designed to reduce the actual level of crime and/or the perceived fear of crime." [1] On the other hand, crime control alludes to the maintenance of the crime level. Policies, such as the three strikes law or Measure 11, seek to prevent future crime by incapacitating offenders through incarceration. Other policies like sex offender registration acknowledge that sex offenders exist and registering them will control the level of deviation, sometimes preventing-or perceiving to prevent future offenses.

Public policies and laws are created at different levels of government, with micro-level policies enacted on the local level and macro level applied at the federal or state level. For example, at the local level, some towns and cities might create specific ordinances tailored to their unique needs, such as banning cigarette smoking in the downtown area. At the federal level, policies are created that apply to the federal criminal justice system and can apply to states as well. However, federal laws can differ from state laws, such as marijuana legalization. Individual organizations can also make policies that address their individual agency needs, such as requirements for local police officers. Therefore, depending on who creates the policies, they can be far-reaching or extremely localized. [2]

Fake News Exercise

1. Lab, S. (2016). *Crime Prevention: Approaches, Practices, and Evaluations.* (9th ed.). New York, NY: Routledge.
2. Lab, S P., Williams, M.R. Holcomb, J.E., Burek, M.W., King, W.R., & Buerger, M.E. (2013). *Criminal Justice: The Essentials* (3rd ed.). New York, NY. Oxford University Press.

Fake News has received a lot of press lately. In fact "fake news" was the top word in 2017. For people under 30, online news is more popular than TV news and people under 50 get half of their news from online sources.

Here are 4 steps for evaluating News:

1. Vet the Publisher's Credibility.

- What is the domain name? A domain name that ends with ".com.co" is not to be trusted. Something like abcnews.com looks legit, but if it is listed as abcnews.com.co, be wary.
- What is the publication's point of view? Check out the "About Us" section to learn more about the publishers. It will also tell you if the publication is meant to be satirical, like the Onion.

2. Pay Attention to Writing Quality.

- Does the publication have all caps or way too many emphatic punctuation marks?!?!?!? Proper reporting does not adhere to such informal grammar. The article you are reading is probably not vetted.

3. Check out the Sources and Citations.

- Does the publisher meet academic citation standards? Your teachers and professors constantly tell you to cite and reference appropriately. This is how we can check your sources. The same is true for online news. Check the sources.

Ask the Pros

- Check out fact-checking websites like factcheck.org

Read more at https://www.summer.harvard.edu/inside-summer/4-tips-spotting-fake-news-story

Take the Fake News Quiz! https://www.channelone.com/feature/quiz-can-you-spot-the-fake-news-story/

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Moral panic has been defined as a situation in which public fears and state interventions greatly exceed the objective threat posed to society by a particular individual or group who is/are claimed to be responsible for creating the threat in the first place. [1]

Moral panics arise when distorted mass media campaigns create fear and reinforce previously held or stereotyped beliefs, frequently centered around ethnicity, religion, or social class. Often, moral panics occur swiftly, focusing attention on the behavior and then fluctuating concern over time. The most problematic aspect of the moral panic is that the hysteria often results in a need to "do something" about the issue and most commonly "results in the passing of legislation that is highly punitive, unnecessary, and serves to justify the agendas of those in positions of power and authority." Moral panics focus attention on what we should fear and who we should blame for that fear. Instigators of moral panics frequently misinterpret data for their own agenda. Cohen (1972) said at least five sets of social actors are involved in a moral panic. These include 1) folk devils, 2) rule or law enforcers, 3) the media, 4) politicians, and 5) the public. [2]

Moral Panics, Sex Offender Registration, and Youth

In her article, "There Are Too Many Kids on the Sex Offender Registry," Lenore Skensazy discusses the unpopular view that perhaps sex offender registration is more harmful than helpful.

The purpose of sex offender registries is to prevent one of the worst of the worst crimes: sexual assault. However, Roger Lancaster, author of "Sex Panic and the Punitive State" suggests that "Only a tiny fraction of sex crimes against children are committed by people who are on the registry." About 5 percent of people on the list go on to commit another crime, a far lower recidivism rate than almost any other class of criminals, including drug dealers, arsonists, and muggers (Skenazy, 2018, para 4).

"Available research indicates that sex offenders, and particularly people who commit sex offenses as children, are among the least likely to re-offend," Human Rights Watch has found. Furthermore, the U.S.

1. Bon, S.A (2015, July 20). Moral Panic: Who benefits from fear? *Psychology Today*, https://www.psychologytoday.com/us/blog/wicked-deeds/201507/moral-panic-who-benefits-public-fear
2. Cohen, S. (1972). *Folk devils and moral panics: The creation of the mods and rockers.* London: MacGibbon and Key Ltd.

Bureau of Justice Statistics reports that the "single age with the greatest number of offenders from the perspective of law enforcement was age 14." This means that 14-year-olds, more than any other age, are being placed on a lifetime registry.

Sometimes this results from minors engaging in consensual sexual encounters simply because they are underage and cannot legally consent. And in some states, sexual contact is not required to end up on the registry. In some instances, sexting under the age of 18 is a felony and can earn someone a place on the registry. Until recently, Missouri offenders were grouped together in one category regardless of the offense so individuals who urinated in public endured lifelong registration and were categorized with the worst of the rapists and molesters. There was no distinction or tier structure.

Is lifelong registration appropriate punishment or is it being strictly punitive? Most offenders serve their time in prison and therefore serve their debt to society. This is not the case with life long sex offender registrants who can't live near a school, park, or playground and must report to authorities anytime they get a new job, a new place to live, or even a new hairstyle. They can never fully re-enter society and are seen as never being able to be rehabilitated.

All these requirements are based on the "flawed but pervasive idea that those convicted of sex offenses became incurable and predatory monsters requiring—and deserving—lifetime punishment," writes Emily Horowitz, a professor of sociology at St. Francis College and author of two books on this subject.

What would happen if the registry were to disappear? All other criminal laws would remain in place, including increased penalties for repeat offenses. Only the list, and the dehumanization it wreaks would be gone.

"If my child was victimized, I'd want to kill a person," Horowitz says. "But what if my child was a victimizer? I'd also want them to have a chance" (Skenazy, 2018, para 15).

Read more at: https://reason.com/archives/2018/04/09/there-are-too-many-kids-on-the

Ted Talk: How Fake News Does Real Harm

https://www.ted.com/talks/stephanie_busari_how_fake_news_does_real_harm?language=en

First, **folk devils** are the people who are blamed for being allegedly responsible for the threat to society. Folk devils are completely negative and have no redeeming qualities. This is how juvenile offenders, or "super-predators" as they were referred to in the 1990s. The narrative went like this:

We're talking about kids who have absolutely no respect for human life and no sense of the future….And make no mistake. While the trouble will be greatest in black inner-city neighborhoods, other places are also certain to have burgeoning youth-crime problems that will spill over into upscale central-city districts,

inner-ring suburbs, and even the rural heartland…They kill or maim on impulse, without any intelligible motive…The buzz of impulsive violence, the vacant stares and smiles, and the remorseless eyes…they quite literally have no concept of the future….they place zero value on the lives of their victims, whom they reflexively dehumanize…capable of committing the most heinous acts of physical violence for the most trivial reasons…for as long as their youthful energies hold out, they will do what comes "naturally": murder, rape, rob, assault, burglarize, deal deadly drugs, and get high. [3] Folk devils are the embodiment of evil and center stage of the moral panic drama. They have no redeeming qualities so it is easy for the population to fear and hate them.

Second, the police or other law enforcement officials (prosecutors or even the military) are essential for propagating the moral panic since they are responsible for upholding and enforcing codes of conduct and expectations of the citizens. They are expected to protect society from the folk devils by detecting, apprehending, and punishing their evil ways. Furthermore, the moral panic can offer law enforcement legitimacy as moral crusaders and protectors. Law enforcement has a purpose to defend society and rid it of the folk devils which threaten their safety and well being.

Third, the media are particularly powerful in creating and advancing the moral panic. Generally, news media coverage of folk devils is often skewed and exaggerated. The media coverage often displays the folk devils as much more threatening to society than they really are. Journalists feed public anxiety and fear, which heightens the moral panic. Media influences policy in two ways:

(1) they select the "important" issues (agenda setting),

(2) they problematize policy by attaching meaning to it. In this way, the frame and construct the narratives.

Agenda setting is the way the media draw the public's eye to a specific topic. **Framing** refers to a type of agenda setting in a prepackaged way and **narratives** are about the story that is told. Said another way, framing focuses on the broad categories, segments, or angles through which a story can be told. Frames include factual and interpretive claims that allow people to organize events and experiences into groups. Narrative construction involves decisions by storytellers that determine the specific characters, plot, causal implications, and policy solutions presented. Narratives are pictures that the public already accepts and embraces (See Table 1 for examples of criminal justice frames and narratives). Journalists and reporters are taught to tell stories through first-hand accounts and experiences people have because audiences care about these human experiences and their stories more than they care about abstract societal issues. In theory, then, journalists and reporters are the gatekeepers to the information and they choose how they organize and present ideas to the public. This helps us create social meaning from events or actions (See Table 2 for framing techniques). [4]

Table 1: Criminal Justice Frames and Examples of Narratives

3. Dilulio. (1995). https://www.weeklystandard.com/john-j-dilulio-jr/the-coming-of-the-super-predators

4. Crow, D.A., & Lawlor, A. (2016). Media in the policy process: Using framing and narratives to understand policy influences. *Review of Policy Research. 33*(5): 472-495

Frame	**Cause**	**Policy**
Faulty system	Crime stems from criminal justice leniency and inefficiency.	The criminal justice system needs to get tough on crime
Blocked opportunities	Crime stems from poverty and inequality	The government must address the "root causes" of crime by creating jobs and reducing poverty.
Social breakdown	Crime stems from family and community breakdown	Citizens should band together to recreate traditional communities.
Racist system	The criminal justice system operates in a racist fashion	African Americans should band together to demand justice
Violent media	Crime stems from violence in the mass media	The government should regulate violent imagery in the media
Narrative	**Costume**	**Characteristic**
The PI	Cheap suit and car	Loner, cynical, shrewd, shady but dogged
The rogue cop	Plainclothes, disguise, often has special high tech equipment	Maverick, smart, irreverent, violent but effective
The sadistic guard	Unkempt uniform	Low intelligence, violent, racist, sexist, perverted, and enjoys cruelty, inflicting pain, and humiliation
The corrupt lawyer	Expensive suite and office	Smart, greedy, manipulative, dishonest, smooth talker and liar, able to twist words, logic, and morality
The greedy businessman	Very expensive office and home, trophy wife	Very smart, decisive, and a polished, unquenchable sometimes psychotic need for power and wealth

[Footnote]Surette, R. (2011). *Media, crime, and criminal justice: Images, realities, and policies* (4th ed.). Belmont, CA: Wadsworth Publishing. [/footnote]

Table 2: Framing Techniques

Framing techniques per Fairhurst and Sarr (1996):

- Metaphor: To frame a conceptual idea through comparison to something else.
- Stories (myths, legends): To frame a topic via narrative in a vivid and memorable way.
- Tradition (rituals, ceremonies): Cultural mores that imbue significance in the mundane, closely tied to artifacts.
- Slogan, jargon, catchphrase: To frame an object with a catchy phrase to make it more memorable and relate-able.
- Artifact: Objects with intrinsic symbolic value – a visual/cultural phenomenon that holds more meaning than the object itself.
- Contrast: To describe an object in terms of what it is not.
- Spin: to present a concept in such a way as to convey a value judgment (positive or negative) that might not be immediately apparent; to create an inherent bias by definition. (Fairhurst, G. & Sarr, R. 1996. *The art of Framing*. San Francisco: Jossey-Bass.)

Fourth, politicians are also protagonists in a moral panic. They spin the public opinion and present themselves as the safeguards of the moral high ground. They are similar to law enforcement in this drama and they have an obligation to protect society from folk devils.

The fifth and final category of moral panic is the public. The public is the most important actor on the stage. Public anxiety and fear over the folk devils is the central theme of moral panics. A moral panic only exists because the public cries out for policymakers and law enforcement to "do something" and save them from the alleged threat that has been created.

Carlson, M. (2018). Fake news as an informal moral panic: The symbolic deviance of social media during the 2016 US presidential election. Information, *Communication, and Society*. https://doi.org/10.1080/1369118X.2018.1505934

https://www.tandfonline.com/doi/abs/10.1080/1369118X.2018.1505934?journalCode=rics20

The stages of policy development can generally be categorized into 5 general stages. U.S. policy development encompasses several stages. Most policy models generally include the following stages: (1) identifying the issue to be addressed by the proposed policy, (2) placement on the agenda, (3) formulation of the policy, (4) implementation of the policy, and (5) evaluation of the policy. This is similar to the community police response acronym SARA (scanning, analysis, response, and assessment) and uses some of the same techniques, but on a much bigger, national level.

Dangerous Myths about Juvenile Sex Offenders

https://www.youtube.com/watch?reload=9&v=81hy3AZjkr4

Identifying the Problem and Agenda Setting

Identifying the problem involves addressing what is happening and why it is an issue. In criminal justice, this might look at the increase of opioid use and overdoses or acts of youth violence. Once the issue is identified, there can be a serious debate about the plans of the policy. Once it is decided what the policy will look like, it is placed on the agenda. This is perhaps the most politicized part of the process as it involves many different stakeholders. It involves identifying the legislative, regulatory, judicial, or other institutions responsible for policy adoption and formulation.

Formulation and Adoption

The next stage involved adopting the policy. Depending on the nature of the policy, this could involve a new law or an executive order.

Implementation of the Policy

Implementation is about moving forward, taking action, and spending money. It involves hiring new staff or additional police officers. This is where policies often stall because of the lack of funding. For example, a popular program in 1990, Weed and Seed, involved "weeding" out criminals (targeting arrest efforts) and "seeding" new programs (instituting after-school programs, drug treatment facilities, etc.). The weeding portion of the program was a great success, but the program ultimately failed because of a lack of funding to adequately seed new community programming. Funding is a major roadblock for proper implementation.

Evaluation

Finally, the evaluation examines the efficacy of the policy. There are three different types of evaluation: Impact, Process, and Cost-benefit analysis. **Impact (outcome) evaluations** focus on what changes after the introduction of the crime policy. [1] Changes in police patrol practices aimed at reducing the level of residential burglaries in an area are evaluated in terms of subsequent burglaries. The difficulty with impact evaluations is that changes in the crime rate are rarely, if ever, due to a single intervening variable. For example, after the implementation of curfew laws for juvenile offenders, juvenile crime decreased. Can we say that was because of curfew laws? The entire crime rate for America decreased at the same time. Attributing a single outcome based on a solitary intervention is problematic.

Process evaluations consider the implementation of a policy or program and involve determining the procedure used to implement the policy. These are detailed, descriptive accounts of the implementation of the policy including the goals of the program, who is involved, the level of training, the number of clients served, and changes to the program over time. [2] Unfortunately, process evaluations do not address the actual impact policy has on the crime problem, just what was done about a specific issue or who was involved. While this is indeed a limitation, it is essential to know the inner workings of a program or policy if it is to be replicated.

Cost-benefit evaluations, or analysis, seeks to determine if the costs of a policy are justified by the benefits accrued. A ubiquitous example of this would be an evaluation of the popular anti-drug D.A.R.E. program of the 1980s and 1990s. The D.A.R.E. program was a school-based prevention program aimed at preventing drug use among elementary school-aged children. Rigorous evaluations of the program show that it was ineffective and sometimes actually increased drug use in some youth. The cost of this program was roughly $1.3 billion dollars a year (about $173 to $268 per student per year) to implement nationwide (once all related expenses, such as police officer training and services, materials and supplies, school resources, etc., were factored in). [3] Using a cost-benefit analysis, is that a good use of money to support an ineffective program?

Policy formation is often a knee-jerk reaction to the current problem. Many policies are the result of grassroots efforts to change something in their communities. For example, let us pretend the issue is youth crime in our city. Kids are roaming the streets like packs of wild dogs, jeering at the elderly, and generally making us feel unsafe. A proposed policy might be to hold parents accountable for their child's misbehavior. If parents are responsible, then they will take better care of their kids, right? Take, for example, Little Skippy. He's kind of a jerk. He smokes, curses, and recently stole his neighbor's car. Arrested after crashing into the drive-thru sign at the local Taco Bell, based on parental responsibility law, his mom and dad are to blame for his reckless driving fiasco. Let's look at the policy process.

1. How can this be instituted? Fine the parent? Sentence the parents to jail time? The policy needs to be a concrete solution to a problem. Many states use fines instead of jailing the parents.

1. Lab, S. (2016). *Crime Prevention: Approaches, Practices, and Evaluations* (9th ed.). New York, NY: Routledge.
2. Lab, S. (2016). *Crime Prevention: Approaches, Practices, and Evaluations* (9th ed.). New York, NY: Routledge.
3. Shepard, E. (Winter 2001-2002) A new study finds. We wasted billions on D.A.R.E. *Reconsider Quarterly,*

(Who's to watch over the children if the parents are locked up?) Fines sound great. This will make sure parents take an active interest in their children because they do not want to have to pay money if their kid gets into trouble.

2. Who needs to be involved in lobbying for this law? Legislators? Senators? Local police? Maybe even city officials, local school boards, and religious organizations. So it's put on the agenda and gets moved onto a ballot for an official vote. The citizens who think their city needs to be tough on crime vote to approve this policy.

3. Bam, it's law. It is implemented and now parents of juveniles delinquents are charged fines. This actually is a law in nearly every state. In the 1990s, Silverton, Oregon, was a model for communities interested in imposing ordinances that hold parents accountable for their children's behavior. In Silverton, parents can be fined up to $1,000 if their child is found carrying a gun, smoking cigarettes, or using illegal drugs. Parents who agree to attend parenting classes can avoid fines. Within the first two months after the law was passed in early 1995, seven parents were fined and many others registered for parenting classes.

Oregon has ORS 30.761 (2017), which states:

(1)In addition to any other remedy provided by law, the parent or parents of an unemancipated minor child shall be liable for actual damages to person or property caused by any tort intentionally or recklessly committed by such child. However, a parent who is not entitled to legal custody of the minor child at the time of the intentional or reckless tort shall not be liable for such damages.

(2) The legal obligation of the parent or parents of an unemancipated minor child to pay damages under this section shall be limited to not more than $7,500, payable to the same claimant, for one or more acts.

4. It is law, but is it effective? The evaluation stage of policy is critical. The goal is to curb youth crime and we might expect to see a decrease in the juvenile crime rate. However, charging parents fines for the misdeeds of their children actually *increases* recidivism! It's true! A study of 1,167 youth in Pennsylvania found that the total amount of fines, fees and/or restitution significantly increased the likelihood of recidivism [4]. Justice system–imposed financial penalties increase the likelihood of recidivism in a sample of

4. Piquero and Jennings, 2016, Piquero, A. and Jennings, W.G. (2015)

adolescent offenders [5] In particular, males, non-whites, and youth with prior dispositions and adjudicated with a drug or property offense were at an increased likelihood of recidivism associated with owing fines and fees (Piquero and Jennings, 2016). This is problematic as fees not only increase recidivism but also increase the likelihood of a "revolving door" juvenile justice system for minority youth.

In the end, what is law is not always effective and what is effective is not always law. This is where evidence-based practices come in.

5. Youth Violence and Juvenile Justice, 15 (3) p. 325-340).

ALISON S. BURKE

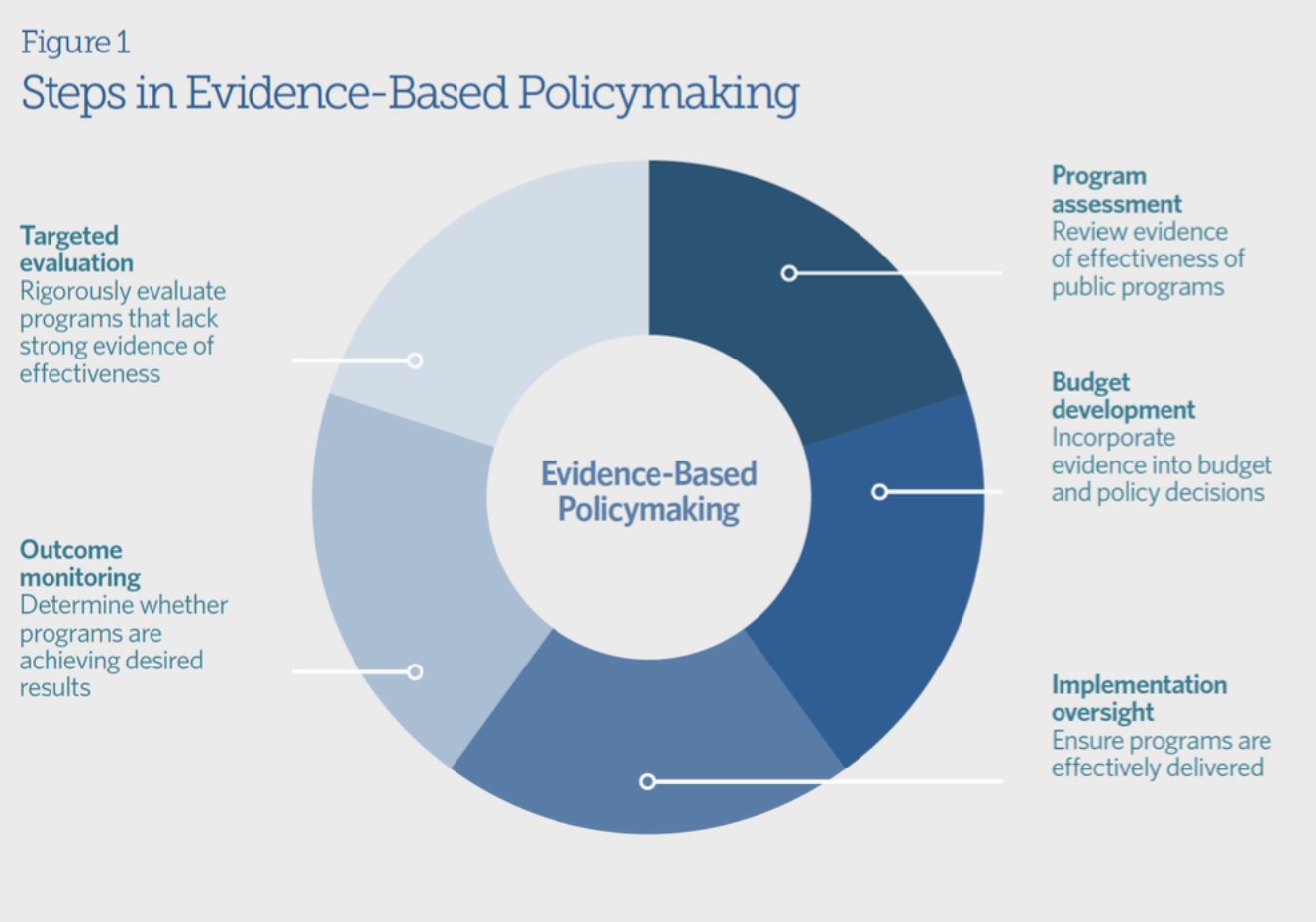
In the 1970s, Martin Robinson issued his infamous claim that "nothing works" in rehabilitating offenders. [1] In the 1980s, numerous research studies were published that contradicted this claim and proposed alternative approaches to combating crime and effective interventions. Since then, countless researchers, agencies, and even Congress have adopted the need to create comprehensive evaluations of effective programs.

Evidence-based practices mean utilizing research in pursuit of identifying programs, policy initiatives, or practices that work. The Office of Justice Programs (OJP) "considers programs and practices to be evidence-based when their effectiveness has been demonstrated by causal evidence, generally obtained through high-quality outcome evaluations," and notes that "causal evidence depends on the use of scientific methods to rule out, to the extent possible, alternative explanations for the documented change." [2] National research clearinghouses are great resources for systematic literature reviews of effective public programs across a plethora of areas, such as:

- the U.S. Department of Education's What Works Clearinghouse,
- the U.S. Department of Justice's CrimeSolutions.gov,
- Blueprints for Healthy Youth Development,
- the Substance Abuse and Mental Health Services Administration's National Registry of Evidence-Based Programs and Practices,
- the California Evidence-Based Clearinghouse for Child Welfare,
- What Works in Reentry, and the Coalition for Evidence-Based Policy.

With evidence-based practices comes evidence-based policymaking. Evidence-based policy-making identifies what works, enables policymakers to use evidence in deciding budgets and policy, identifies where there are gaps or information is lacking, monitors and measures key outcomes, and continuously uses the information to improve performance and objectives. [3] The goal is to create a policy that can be enforced consistently and can withstand political change.

1. Martinson, R. (1974). What works? - questions and answers about prison reform. *The Public Interest, 35*: 22-54.
2. Crimesolutions.gov glossary (www.crimesolutions.gov/glossary).
3. Pew-McArthur Report. (2014).



Steps in Evidence-Based Policy Making

ALISON S. BURKE

Policies represent the current political climate and it is necessary to revisit and change them as necessary. For example, in 1787, only white men over 21 could vote, and the President could serve for as long as he was elected. Obviously, this changed. In the criminal justice world, many crimes are socially constructed and *mala prohibita* rather than *mala in se*, so creating laws and policies around them is as short-lived and fleeting as the new most popular meme. For example, the Eighteenth Amendment states (1917):

> "After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

At the time, it was believed alcohol was the cause of crime, poverty, and social ills. Policy makers believed that the prohibition of alcohol (1920-33), or the "noble experiment" as it was called, would reduce crime and corruption, solve social problems, reduce the tax burden created by prisons and poorhouses, and improve health and hygiene in America. [1] As you know, the experiment was an absolute failure. Crime actually increased and became organized, alcohol became more dangerous to drink because of the lack of regulations on bootlegged and black market production, corruption of public officials was rampant, and courts and prisons were stretched to capacity.

Prohibition was eventually repealed by the 21st Amendment in 1933. There are many more laws and policies enacted every year in the United States that represent a current political climate or agenda. It is necessary, therefore, to reevaluate these policies, apply research the scientific method to assess their efficacy, and change modifies or repeal the laws as society changes. The United States Constitution is a living document, as are laws and policies.

Bizarre, Weird, and Funny Laws

As mentioned in this chapter, laws, and policies need to be revised and amended. Here are a few examples of outdated, bizarre, and just plain old funny laws from around the country.

Alabama: No stink bombs or confetti, spray string or bathing in public fountains.

1. Thornton, M. (1991). Alcohol prohibition was a failure. *Policy Analysis, 157*:1-12. Retrieved https://object.cato.org/sites/cato.org/files/pubs/pdf/pa157.pdf]

Alaska: It is illegal to get drunk or be drunk in a bar.

Arizona: It is unlawful to spit "in or on" any public building, park, sidewalk, or road. Furthermore, if you are caught stealing soap, you must wash until the bar of soap has been completely used up.

Arkansas: Strictly prohibited to pronounce "Arkansas" incorrectly.

California: It is illegal to build, maintain, or use a nuclear weapon within Chico, California city limits.

Colorado: It is illegal to drive a black car on Sundays in Denver.

Connecticut: A pickle cannot be sold unless it bounces.

Delaware: No trick or treating on Sunday. If Halloween falls on a Sunday, door to door trick or treating must happen on Saturday, October 30th.

Florida: It is a felony to sell your children. And if an elephant is left tied to a parking meter the parking fee has to be paid.

Georgia: It is unlawful to eat fried chicken with utensils. "Finger lickin" good was made into law in 1961.

Hawaii: Billboards are strictly prohibited.

Idaho: It is illegal to engage in cannibalism or "non-consensual consumption" of another human. It is also illegal for a man to give his fiancé a box of candy that weighs more than 50 lbs (22.5 kg).

Illinois: Fancy bike riding is a big no-no.

Indiana: Black cats must wear bells on Friday the 13th. And baths may not be taken between the months of October and March.

Iowa: It is illegal to pass off margarine as butter and is punishable by up to 30 days in jail and a $625 fine.

Kansas: It is illegal to throw snowballs in Topeka.

Kentucky: Public officials must swear to not having been engaged in a duel with weapons.

Louisiana: It is illegal to steal another person's crawfish.

Maine: It is illegal to use tombstones for advertising.

Maryland: It is illegal to swear or curse upon any street or highway in Rockville.

Massachusetts: You cannot dance to the national anthem.

Michigan: Before 2006, it was encouraged to kill starlings and crows.

Minnesota: Pig greasing competitions and turkey scrambles are considered misdemeanors. Furthermore, citizens may not enter Wisconsin with a chicken on their head.

Mississippi: No limit on Big Gulp sizes.

Missouri: It is illegal to swing upon another person's motor vehicle and honk their horn for them.

Montana: It is illegal to play Frisbee golf in non-designated areas.

Nebraska: No person afflicted with a venereal disease may get married.

Nevada: In Eureka, it is illegal for you to kiss a woman if you have mustaches.

New Hampshire: It is unlawful to collect seaweed at night.

New Jersey: You may not murder someone while you are wearing a bulletproof vest.

New Mexico: It's forbidden for a female to appear unshaven in public (Carrizozo, New Mexico).

New York: Sliced or "altered" bagels carry an eight cents sales tax.

North Carolina: It's against the law to sing off-key.

North Dakota: It is illegal to set off fireworks after 11 pm.

Ohio: Coal mines must provide toilet paper. And it is illegal to get fish drunk.

Oklahoma: It is illegal to be involved in a horse tripping event or wrestle a bear.

Oregon: Engaging in a test of physical endurance while driving is strictly prohibited.

Pennsylvania: It is illegal to sing in the bath and to use dynamite to catch fish.

Rhode Island: It is unlawful to impersonate an auctioneer.

South Carolina: It is illegal to work or dance on Sundays.

South Dakota: Farmers can set off fireworks to protect their sunflower crops.

Tennessee: Panhandlers must apply for a permit.

Texas: A program has been created that attempts to modify and control the weather. Additionally, you can be considered legally married by publicly announcing a person as your wife/husband by saying it 3 times.

Utah: It is illegal to fish with a crossbow.

Vermont: A woman cannot wear false teeth without her husband's permission.

Virginia: It's against the law for a woman to drive a car in Main Street unless her husband is walking in front of the car waving a red flag.

Washington: You cannot buy meat of any kind on Sunday. Additionally, a motorist with criminal intentions must stop at the city limits and telephone the chief of police as he is entering the town. Most importantly, you can be arrested or fined for harassing Bigfoot.

West Virginia: While whistling underwater is prohibited, you may take roadkill home for supper.

Wisconsin: It is illegal to serve margarine and their cheese must be "highly pleasing."

Wyoming: You may not take a picture of a rabbit from January to April without an official permit.
[2]

Conclusion

We can look at criminal justice policy through three perspectives: theoretical, political, and practical. The theoretical perspective enables us to better understand the causes and consequences of crime and what can be done insofar as crime control or prevention. By researching the theory behind the crime, we can better

2. Isaac. J. (2009). The Wacky World of Laws. San Diego, CA: Lawyer In Blue Jeans Group Publishing. Reader's Digest Editors (n.d.). Here are 50 of the dumbest laws in every state. Reader's Digest. Retrieved: https://www.rd.com/funny-stuff/dumbest-laws-america/ Triangle Realty. (2018). Unusual Laws in Texas. Retrieved https://www.trianglerealtyllc.com/unusual-laws-in-texas/

implement effective policies. From a political perspective, studying policy confirms the need for evidence-based practices and decisions based on research rather than fear and haphazard agenda setting. And finally, the policy is practical. It utilizes theory, research, evidence-based practices to solve practical problems in the world around us.

5: Criminological Theory

Learning Objectives

This section introduces the importance of theory and theory creation. It also briefly describes some of the major paradigms of criminal explanations. After reading this section, students will be able to:

- Distinguish between classical, biological, psychological, and sociological explanations of criminal behavior.
- Understand the links between crime control policy and theories of criminal behavior.
- Demonstrate effective application of criminological theories to behavior.

Critical Thinking Questions

1. How do we know what theories explain crime better than other theories?
2. How did the classical theory of crime influence the American criminal justice system?
3. Why is it difficult to study biological theories of crime without thinking about the social environment?
4. Which theory do you think explains criminal behavior the best? Why?
5. Why do you think there have been so many different explanations to describe the origins of criminal behavior?

BRIAN FEDOREK

A **theory** is an explanation to make sense of our observations about the world. We test hypotheses and create theories that help us understand and explain the phenomena. According to Paternoster and Bachman (2001), theories should attempt to portray the world accurately and must "fit the facts."[1] Criminological theories focus on explaining the causes of crime. They explain why some people commit a crime, identify risk factors for committing a crime, and can focus on how and why certain laws are created and enforced. Sutherland (1934) has referred to criminology as the scientific study of breaking the law, making the law, and society's reaction to those who break the law. [2] Besides making sense of our observations, theories also strive to make predictions. If we understand why crime is happening, we can formulate policies or programs to minimize it.

The building blocks of any theory are concepts. Crime, delinquency, and deviance are all concepts that need to be defined. We seek to explain these concepts with other concepts. For example, some theories may link crime with self-control. Self-control is another concept that needs to be defined. Once we define "crime" and "self-control", we need to measure them. Operationalization is the process of determining how we will measure concepts, which are called variables. We could measure self-control in a number of different ways. For example, we could test a person's ability to resist temptation (The Marshmallow Test). Once we test the relationship between two variables, we also need to make sure another variable is not affecting the results. Spuriousness is when a third variable is causing the other two. We know that ice cream sales and murder rates are positively correlated; when one goes up the other goes up. At first glance, someone may claim that ice cream is causing people to kill. However, what do you think might be a better explanation? Can you think of a third variable that might cause ice cream sales and murder rates to increase?

When we try to explain why crime occurs, we can look at it from many different perspectives. We can create macro-level explanations and micro-level explanations. Macro-level explanations focus on group rate differences. For example, why do some countries have more (or less) violent crime than others? Why do young people commit more crime than older people? Why do males commit more crime than females? Micro-level explanations center on differences among individuals. Macro-level explanations focus on societal structures while micro-level explanations focus on processual differences.

1. Paternoster, R., & Bachman, R. (Eds.) (2001). *Explaining criminals and crime: Essays in contemporary criminological theory*. Oxford: Oxford University Press.
2. Sutherland, E.H. (1934). *Principles of criminology* (2nd ed.). Philadelphia, PA: Lippincott.

It's "Just" a Theory Exercise

Many laypeople will give their opinions on the relationship between phenomenon based on their hunches or observations; these are not theories. A theory explains and interprets the facts. A proper scientific theory must be falsifiable. Criminologists who create theories test their hypotheses. Many times the theorist will modify his or her theory based on the research. Upon more investigation, those theories that have yet to be falsified become accepted as a valid description between the phenomenon.

Darwin's theory of evolution has yet to be falsified. There are numerous unanswered questions, but as time goes by, scientists are discovering more and more evidence to support the theory.

When I was an undergraduate student, I majored in Psychology; I thought I was in control of everything about me. However, when I took my first criminology class, I realized the social environment also had an impact on who I was becoming. For example, I did not choose my parents, their income, how many siblings I had, or where I lived. Each of those had an impact on who I was and who I became friends with in my childhood. Most of my childhood friends, who are still my friends, may have been based solely on how far away they lived from my parents instead of their character, interests, or personality. What do you think?

BRIAN FEDOREK

Numerous criminological theories attempt to explain why people commit a crime. What makes one better than another? How do we judge theories against each other? The natural and physical sciences mostly agree on the knowledge of their disciplines. However, criminology is interdisciplinary, and many criminologists may not agree on what causes criminal behavior. For instance, Cooper, Walsh, and Ellis (2010) have looked at the political ideology of criminologists and their preferred or favored theories. Even one's political leanings can influence a person's set of beliefs about the causes of crime.[1]

We must apply the scientific criteria to test our theories. Akers and Sellers (2013) have established a set of criteria to judge criminological theories: logical consistency, scope, parsimony, testability, empirical validity, and usefulness. [2] Logical consistency is the basic building block of any theory. It refers to a theory's ability to "make sense". Is it logical? Is it internally consistent? A theory's scope refers to its range, or ranges, of explanations. Does it explain crimes committed by males AND females? Does it explain ALL crimes or just property crime? Does it explain the crime committed by ALL ages or just juveniles? Better theories will have a wider scope or a larger range of explanation.

A parsimonious theory is concise, elegant, and simple. There are not too many constructs or hypotheses. Simply put, parsimony refers to a theory's "simplicity". A good scientific theory needs to be testable too. It must be open to possible falsification. "Every genuine *test* of a theory is an attempt to falsify it or to refute it. Testability is falsifiability; but there are degrees of testability: some theories are more testable, more exposed to refutation than others; they take, as it were, greater risks…One can sum up all this by saying that *the criterion of the scientific status of a theory is its falsifiability, or refutability, or testability"* (Popper, 1965, pp. 36-37). [3]

After many tests and different approaches to research, those theories supported by evidence have empirical validity. Thus, according to Gibbs (1990), the verification or repudiation of a given theory through empirical research is the most important principle to judge a theory.[4]

Finally, all theories will suggest how to control, prevent, or reduce crime through policy or program. The premise of a particular theory will guide policy-makers. For example, if a theory suggested that juveniles

1. Cooper, J., Walsh, A., & Ellis, L. (2010). Is criminology ripe for a paradigm shift? Evidence from a survey of American criminologists. *Journal of Criminal Justice Education, 2*, 332-347.
2. Akers, R.L., & Sellers, C.S. (2013). *Criminological theories: Introduction, evaluation, and application*. New York: Oxford.
3. Popper, K.R. (1965). *Conjectures and refutations: The growth of scientific knowledge*. New York: Harper Torchbooks.
4. Gibbs, J.P. (1990). The notion of theory in sociology. *National Journal of Sociology, 4*, 129-159.

learn how to commit crime through a network of delinquent peers, policymakers will try to identify juveniles at-risk for joining delinquent subcultures.

BRIAN FEDOREK

Comte (1851) was interested in epistemology, or in other words, how humans obtain valid knowledge. He claimed human being's progression of knowledge went through three separate stages – theological, metaphysical, and scientific.[1] The theological stage used supernatural or otherworldly powers to explain behaviors, the metaphysical used rational and logical arguments, and the scientific used positivism and scientific inquiry. During the middle ages, spiritual explanations assumed human beings broke laws or did not conform to conventional norms of society because he or she possessed by demons, the devil, or he or she was a wizard or witch. These explanations assumed God-given "natural law"; thus, crime was equivalent to sin. Governments had the moral authority to punish criminals/sinners and the state was acting on behalf of God. As a result, the accused person could "prove" their innocence by a trial by battle (only the victor is innocent) or trial by ordeal (innocent party would be unharmed while the guilty party would feel pain). As you can imagine, punishments and justice were arbitrary and severe, especially when feudal lords, with God's permission, determined guilt. A person's rank, status, and or wealth determined their punishment, rather than the merits of the case at hand.

1. Comte, A. (1877). System of positive polity (4th vol.). New York: Burt Franklin.

BRIAN FEDOREK

During the Enlightenment, citizens and social thinkers began to question how they were ruled. In the *Leviathan* (1651), Hobbes made a few assumptions about human beings.[1] He assumed humans were at conflict with one another, pursued their self-interests, and were rational. Moreover, people would create authority figures out of fear of others, and people should democratically create rules that all citizens must follow. Hobbes wanted a new type of government, one that was ruled by the people and not by monarchs. He believed people had natural rights such as life, liberty, and the pursuit of happiness. If we grant the assumption that people are rational, we would assume people have the ability to consider the possible consequences of their actions. Hobbes was one of the first social contract thinkers. Social contract thinkers believed people would invest in the laws of their society if, and only if, they know government protected them from those who break the law. People will give up a little of their self-interests as long as everyone reciprocates.

Building on Hobbes and other social contract thinkers at the time, humans were assumed to have free will and were rational beings. We can choose one action over another based on perceived benefits and possible consequences. Moreover, human beings are hedonistic. **Hedonism** is the assumption that people will see maximum pleasure and avoid pain (punishment). Consequently, if we grant the assumptions of classical theory, we can hold people 100% responsible for their actions because it was a choice. These assumptions have been the basis for the American criminal justice system since its inception. Although theories may have changed the landscape of understanding criminal behavior and may have changed the philosophies of punishments over time, the criminal justice system has maintained the assumption that crime is a choice. Hence, we can hold offenders 100% responsible for their actions.

Cesare Beccaria (1738–1794) was an Italian mathematician and economist. He was shocked by the unfair treatment of the accused. In protest, he anonymously wrote *An Essay on Crimes and Punishment* (1764), which attacked Europe's use of harsh treatment.[2] Ideally, he wanted to change the excessive and cruel punishment by applying rationalistic, social contract ideas. At the time, judges had tremendous power to determine guilt and create laws based on their decisions. Intellectuals well received his essay at the time, but the Catholic Church banned it. His ideas were exceptionally radical at the time, mainly because his writing questioned the power structures at the time.

1. Hobbes, T. (1651/1968). *Leviathan*. Baltimore, MD: Penguin Books.
2. Beccaria, C. (1963). *On crimes and punishments* (H. Paolucci, Trans.). Indianapolis, IN: Bobbs-Merril. (Original work published in 1764)

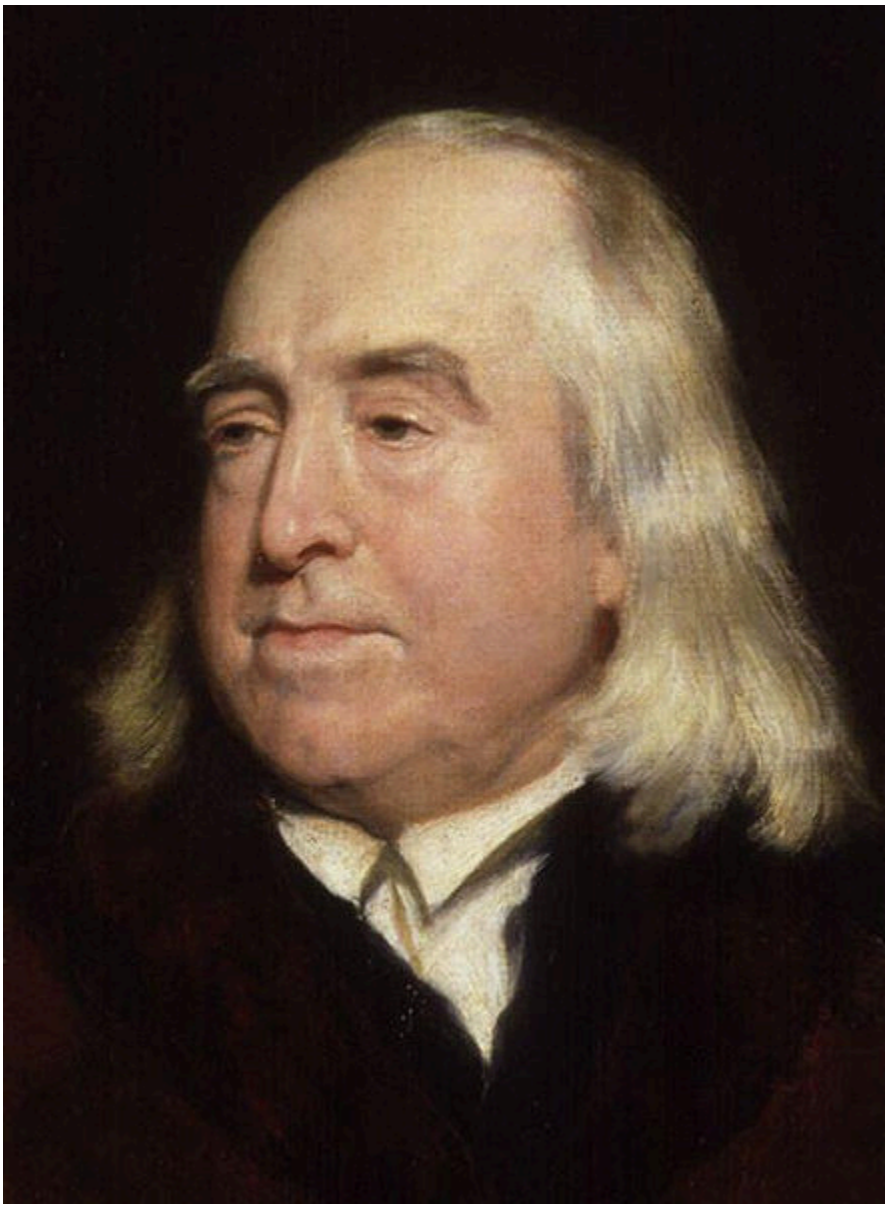


Cesare Bonesana di Beccaria (1738–1794)

Beccaria laid out his ideas about legal reform including how and why to create effective punishments. His *Essay* was highly influential during the Enlightenment, and it may have served as a model during the creation of the American Criminal Justice system. For example, Beccaria advocated that punishments should fit the crime and be proportional to the harm done, laws should only be determined by the legislature, judges should only determine guilt, and every person should be treated equally under the law. He claimed the sole purpose of the law was to deter people from committing the crime. Deterrence can be accomplished if the punishment is certain, swift, and severe. These may seem like common sense today, but they were considered radical ideas at the time.

Jeremy Bentham (1748–1832) was an English philosopher and regarded as a founder of utilitarianism,

which is the belief that decisions are considered right or wrong depending on their effect. He believed a person's expectation of the future was most predictive for deterrence. Therefore, the utility of punishment should be severe enough to deter people from crime. Punishment would promote happiness throughout society by maximizing social benefits. He helped popularize classical theory throughout Europe.[3]



Jeremy Bentham (1748–1832)

3. Bentham, J. (1823). *Introduction to the principles of morals and legislation*. Oxford, UK: Oxford University Press.

BRIAN FEDOREK

Modern deterrence theory is perhaps the most dominant philosophy of the American criminal justice system. Deterrence theory tries to change a person's behavior through laws and punishments. As a form of social control, there is a belief that perceived punishments will serve as a warning of possible consequences, which would hopefully deter the person from committing the crime. There are two types of deterrence: general deterrence and specific deterrence. General deterrence uses punishment to deter crime among people in the general population. It uses punishment as an example for those people not punished. For example, capital punishment can serve as an example to other would-be offenders if they were thinking about murder. Specific deterrence uses punishment to reduce the crime of particular persons. The effect of the punishment depends on the nature of the punishment and who is punished.

News Box. In 1994, Oregon voters passed Measure 11, whcih established mandatory minimum sentencing for several serious crimes. Besides removing the judge's ability to give a lesser sentence, Measure 11 prohibited prisoners from reducing their sentence through good behavior. Additionally, any defendant 15 years old or older who was accused of a Measure 11 offense was automatically tried as an adult. Recently, the Oregon Justice Resource Center reported the effects of Measure 11 on juveniles, esepcially minorities. Below are links to the news article and the report itself.

The Oregonian – "New Report Calls Measure 11 Sentences for Juveniles 'Harsh and Costly'"

Oregon Justice Resource Center's Report

Measure 11 Exercise

After reading the above box and hyperlinks, please explain why many juveniles are not deterred from committing serious crimes in Oregon.

Classical ideology was the dominant paradigm for over a century, but it was eventually replaced by positivist approaches that seek to identify causes of criminal behavior. However, classical ideology had a resurgence during the 1970s in the United States. Neoclassical theory recognizes people experience punishments differently, and a person's environment, psychology, and other conditions can contribute to crime as well. Therefore, crime is a choice based on context. Many crime-prevention efforts used classical and neoclassical premises to focus on "what works" in preventing crime instead of focusing on why people commit criminal acts.

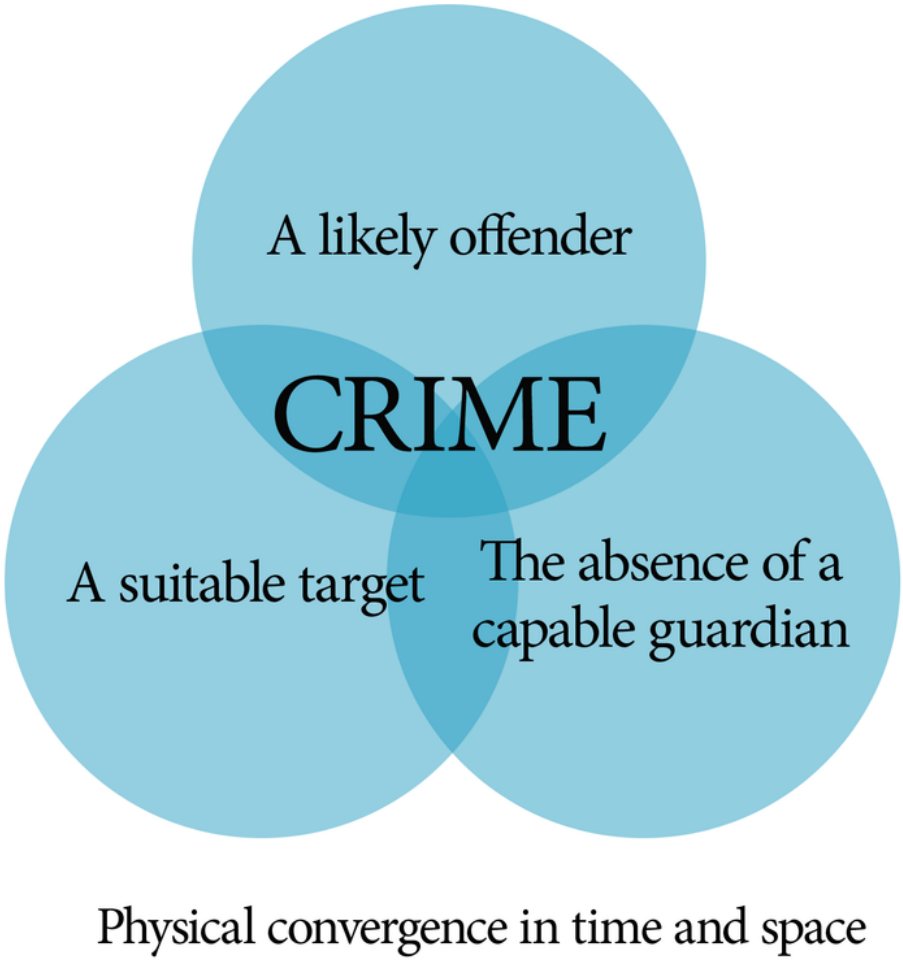
Cornish and Clarke (1986) proposed a Rational Choice Theory to explain criminals' behavior.[1] They claimed offenders rationally calculate costs and benefits before committing crime and assumed people want to maximize pleasure and minimize pain. The theory does not explain motivation, but instead, it expects some people will always commit a crime when given the opportunity. They do not assume offenders are entirely rational, but they do have bounded rationality. Bounded rationality is the constraint of both time and relevant information; offenders must make a decision in a timely fashion with the information at hand. Offenders cannot wait forever nor can they wait for more information before committing a crime. For example, if you were walking down a street and noticed an open window in a parked car, you may contemplate looking in. If you saw something inside, you may then consider stealing it. An entirely rational person may look around to see if there are any witnesses, try to determine if the owner is coming back soon, and so on. Ideally, you may wait until nightfall. However, you may miss your opportunity. Thus, you need to make a quick decision with the relevant facts at that time.

That was an example of a "crime-specific" model. All crimes have different techniques and opportunities. Additionally, they assume all crime is purposeful with the intention to benefit the offender. To dissuade offenders, Rational Choice Theory emphasized the significance of informal sanctions and moral costs. The theory advocates for a situational crime prevention approach by reducing opportunities. Reducing opportunities is much easier to manipulate and change compared to changing society, culture, or individuals. Ultimately, situational crime prevention strategies try to crime a less attractive choice.

Another neoclassical theory is Routine Activity Theory. Cohen and Felson (1979) claimed changes in the modern world have provided more opportunities for offenders.[2] Since the conclusion of World War II, more people have entered the workforce, and more people spend time away from home. Cohen and Felson stated that three things must converge in time in space for a crime to be committed – a motivated offender, a suitable target, and the absence of a capable guardian.

1. Cornish, D.B., & Clarke, R.V. (1986). Crime as a rational choice. In R.V. Clarke and D.B. Cornish, *The reasoning criminal*. New York, NY: Springer-Verlag.
2. Cohen, L.E., & Felson, M. (1979). Social change and crime rate trends: A routine activiity approach. *American Sociological Review*, *44*, 588-608.

Routine activity theory



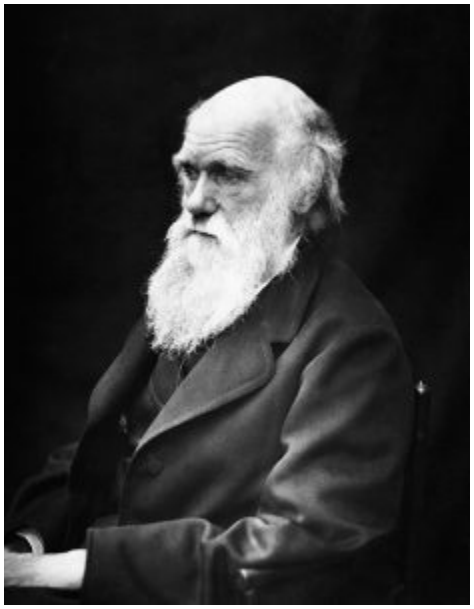
The motivated offender is considered to be a given as there will always be people who will seize opportunities to commit criminal offenses. Besides, there a variety of theories to explain why people commit a crime. Suitable targets can be vacant houses, parked cars, a person, or any item. In reality, almost anything can be a suitable target. Finally, the absence of a capable guardian facilitates the criminal event. What can serve as a "capable" guardian? A plethora of people and things can serve as a guardian. For example, police officers, security guards, a dog, being at home, increased lighting to allow other people to see, CCTV, alarm systems, and deadbolt locks can each reduce opportunities by serving as a capable guardian. Routine activity theory concentrates on the criminal event instead of the criminal offender.

If criminal behavior were merely a choice, the crime rates would more likely be evenly spread. However, when European researchers started to calculate crime rates in the 19th century, some places consistently had more crime from year to year. These results would indicate criminal behavior must be influenced by something other than choice and crime, and must be correlated with other factors.

Positivism is the use of empirical evidence through scientific inquiry to improve society. Ultimately, positivist criminology sought to identify other causes of criminal behavior beyond choice. The basic premises of positivism are measurement, objectivity, and causality.[1] Early positivist theories speculated that there were criminals and non-criminals. Thus, we have to identify what causes criminals.

Charles Darwin wrote *On the Origin of Species* (1859), which outlined his observations of natural selection.[2] A few years later, he applied his observations to humans in *Descent of Man* (1871), whereby he claimed that some people might be evolutionary reversions to an early stage of man.[3] Although he never wrote about criminal behavior, others borrowed Darwin's ideas and applied them to crime.

1. Hagan, F.E. (2018). *Introduction to criminology: Theories, methods, and criminal behavior* (9th ed.). Los Angeles, CA: Sage.
2. Darwin, C. (1859). *On the origin of species by means of natural selection, or preservation of favoured races in the struggle for life.* London: John Murray.
3. Darwin, C. (1871). *The descent of man, and selection in relation to sex*. London: John Murray.



Charles Darwin

BRIAN FEDOREK

Trait theories assume there are fundamental differences that differentiate criminals from non-criminals. These differences can be discovered through scientific investigations. Additionally, many early biological and psychological theories used hard determinism, which implies people with certain traits will be criminals.

Cesare Lombroso was a trained medical doctor in Italy when he had an epiphany. As he was performing autopsies on Italian prisoners, he started to believe many of these men had different physical attributes compared to law-abiding people and that these differences were biologically inherited. In 1876, five years after Darwin's claim about some humans might be evolutionary reversions, Lombroso wrote *The Criminal Man*.[1] Lombroso claimed 1/3 of all offenders were born criminals who were atavistic (evolutionary throwbacks).

He identified a list of physical features he believed to deviate from the "normal" population. These included an asymmetrical face, monkey-like ears, large lips, receding chin, twisted nose, long arms, skin wrinkles, and many more. Lombroso believed he could identify criminals simply by the way they physically looked. Even though his theory was widely rejected years later, it served as an example of the first attempt to explain criminal behavior scientifically.



Atavistic features

A few decades after Lombroso's theory, Charles Goring took Lombroso's ideas about physical differences and added mental deficiencies too. In *The English Convict*, Goring claimed there were statistical differences in physical attributes and mental defects. The focus on mental qualities led to a new kind of biological positivism – the Intelligence Era. Alfred Binet, who created the Intelligence Quotient Test, believed intelligence was dynamic and could change. He wanted to identify youths who were not performing well in school. Unfortunately, H.H. Goddard, like many Americans at the time, believed intelligence was innate and static. That is, intelligence was fixed and could not change. Goddard gave IQ tests to sort people and

1. Lombroso, C. (1876). The criminal man.

those who scored too low were institutionalized, deported, or sterilized. He was an early advocate to sterilize those who were mentally deficient, especially "morons," who were just smart enough to blend in with the normal population. In 1927, the United States Supreme Court in *Buck v. Bell* allowed the use of sterilization.

Even after Lombroso, Goring, and Goddard, contemporary research reveals intelligence is at least as critical as race and social class for predicting delinquency (Hirschi & Hindelang, 1977).[2] However, how we measure intelligence and how we define intelligence are based on our preconceived assumptions of intelligence. For example, is intelligence inherited? Is it related to the dominant culture? Or is it based more on the person's environment? Each has a least some element of truth.

Modern biological theorists have revealed that biology plays a role in our behavior, but we cannot say how much or even how so. Twin studies and adoption studies examined the nature versus nurture debate. Both play a role in our behavior. It is more nature and nurture. Perhaps the question ought to be "how do our biological differences interact with our sociological differences?" There is not a crime gene per se, but some genetic variations are correlated with anti-social behaviors. However, those with genetic variations are not necessarily criminal because of genetics. Though it puts the individual at risk for such behaviors, a caring and supportive environment often mitigates the impact of the genetic code.

Proximate causes, such as neurotransmitters, hormones, the central nervous system, and the autonomic nervous system, have links to aggressive behavior too. However, many of these explanations have several possible causal paths. For example, we know people with higher testosterone levels engage in more aggressive behavior, but when people engage in aggressive behavior, their testosterone levels increase. We do not know which causes which.

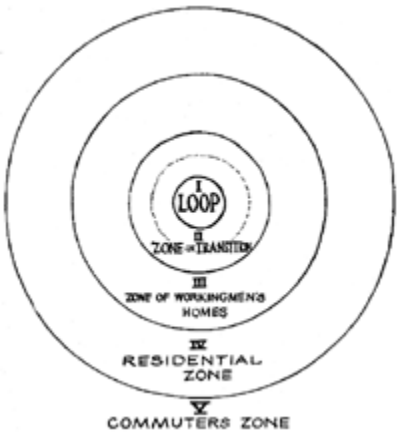
What about criminal personalities? What about sociopaths and psychopaths? The Gluecks (1950) determined there was no real criminal personality; instead, there are some interrelated personality characteristics that were clustered together.[3] Even after giving personality tests to criminals and non-criminals, there does not seem to be any logical relevance to understanding the causes of crime. However, there have been correlations between certain personality traits and criminal behavior. For example, impulsivity, lack of self-control, inability to learn from punishment, and low empathy have all been linked to criminal behaviors.

Consequently, none of these personality characteristics are criminal in and of themselves. The real danger is when a person has many of these personality characteristics. Capsi et al. (1994) found that constraint and negative emotionality, two super traits that contain a number of different characteristics, were "robust correlates of delinquency" (p. 185).[4]

In summary, researchers have been able to say that our biology and personality play a role in criminal behaviors, but we cannot say how much or to what degree. The characteristics of our social environment interact with our biology and personality. Human behavior is quite complex and it is difficult to determine the true causality of human actions.

2. Hirschi, T., & Hindelang, M.J. (1977). Intellegence and delinquency: A revisionist review. *American Sociological Review, 42*, 572-587.
3. Glueck, S., & Glueck, E. (1950). *Unraveling juvenile delinquency*. Cambridge, MA: Harvard University Press.
4. Capsi, A., Moffitt, T.E., Silva, P.A., Stouthamer-Loeber, M., Krueger, R.F., & Schmutte, P.S. (1994). Personality and crime: Are some people crime prone? Replications of the personality-crime relationship acrass countries, genders, races, and methods. *Criminology, 32*(2).

Biological and psychological positivism looked at differences between criminals and non-criminals. Instead of finding differences between kinds of people, the Chicago School tried to detect differences between kinds of places. During the 1920-1930s, the University of Chicago was the vanguard for human ecology, which is the study of the relationship between humans and their environment. Robert Park (1925) viewed cities as "super-organisms," comparing the city-human relationship to the natural ecosystems of plants and animals that share habitats. Furthermore, Burgess (1925) proposed concentric zone theory, which explained how cities grow – from the central business district outwards.[1]



Concentric Zones

Shaw and McKay (1942), who were both former students of Burgess, began to plot the addresses of juvenile court-referred male youths. They noticed many of the addresses were located in the zone in transition.[2] Upon further investigation, Shaw and McKay noticed three qualitative differences in the transitional zone compared to other zones. First, the physical status included the invasion of industry and the largest number of condemned buildings. When many buildings are in disrepair, population levels decrease. Second, the population composition was also different. The zone in transition had higher concentrations of foreign-born and African-American heads of families. It also had a transient population. Third, the

1. Burgess, E.W. (1925). The growth of the city. In R.E.Park, E.W. Burgess, and R.D.McKenzie, Jr., *The city*. Chicago, IL: University of Chicago Press.
2. Shaw, C.R., & McKay, H.D. (1942). *Juvenile delinquency and urban areas*. Chicago, IL: University of Chicago Press.

transitional zone had socioeconomic differences with the highest rates of welfare, lowest median rent, the lowest percentage of family-owned houses. Interrelated, the zone also had the highest rates of infant deaths, tuberculosis, and mental illness.

Shaw and McKay believed the zone in transition led to social disorganization. **Social disorganization** is the inability of social institutions to control an individual's behavior. Since the zone in transition had people moving in and moving out at such high rates, social institutions (like family, school, religion, government, economy) and members could no longer agree on essential norms and values. As earlier stated, many residents were foreign. Thus, speaking different languages and having different religious beliefs may have prevented neighbors from talking to one another and solidifying community bonds. Overall, Shaw and McKay were two of the first theorists to put forth the premise that community characteristics matter when discussing criminal behavior.

BRIAN FEDOREK

Strain theories assume people will commit crime because of strain, stress, or pressure. Depending on the version of strain theory, strain can come from a variety of origins. Strain theories also assume that human beings are naturally good; bad things happen, which "push" people into criminal activity.

Emile Durkheim viewed economic or social inequality as natural and inevitable. Furthermore, inequality and crime were not correlated unless there was also a breakdown of social norms. According to Durkheim, when there is rapid social change (like moving from an agrarian society to an industrial society) social norms breakdown. There is too much too fast, and society needs to reevaluate normative behaviors. He referred to the decline of social norms, or "normlessness," as "anomie." Moreover, social forces have a role in dictating human thought and behaviors. He thought anomie was an inability of societies to control or regulate individuals' appetites. Although Durkheim was interested in looking at how societies change, other researchers adapted his idea of anomie. In the previous section, Shaw and McKay retained the spirit of Durkheim's anomie but focused on neighborhoods instead of societies at large. Robert K. Merton also utilized Durkheimian anomie.

Merton (1938) thought many human appetites originated in the culture of American society rather than naturally.[1] Moreover, the "social structure" of American society restricts some citizens from attaining it. Most, if not all, Americans know of the "American Dream." No matter how you conceptualize the dream, most people would define the American dream as achieving economic success in some form. The culturally approved method of obtaining the American dream is through hard work, innovation, and education. However, some people and groups are not given the same opportunities to achieve the cultural goal. When there is a disjunction between the goals of a society and the appropriate means to achieve that goal, a person may feel pressure or strain. Everyone is aware of the definition and promotion of the American dream. When someone does not achieve this goal, he or she may feel strain or pressure. A person could be rejected or blocked from achieving a cultural goal. Merton claimed there were five personality adaptations between the goals of a society and the means to achieve them.

1. Merton, R.K. (1938). Social structure and anomie. *American Sociological Review, 3.*

Personality Adaptation	Cultural Goals	Institutionalized Means
I. Conformity	+	+
II. Innovation	+	–
III. Ritualism	–	+
IV. Retreatism	–	–
V. Rebellion	+ / –	+ / –

Conformists are the most common adaptation. Without it, societal norms and values would undermine the cultural goals. Conformists accept the goals and legitimate means to achieve the goal. Innovators accept the goal, but they reject the means or have their means blocked. Thus, they innovate ways to meet society's goal. Ritualists conform to the predominant means of achieving wealth and success through hard work, but they may be blocked from achieving success, or they drop the social goal. For example, some people work hard for the sake of working hard. They want their children to see the significance of work ethic above all else, including monetary achievement. Retreatists do not share the shared values of society. Thus, they adjust by dropping out of conventional society. Drug addicts, alcoholics, and vagrants are just some examples who select this adjustment. Finally, rebels reject the current goals and means of society, but they want to replace them with new goals and standards. They seek to establish a new social order.

Even though Merton's theory could explain any strain, he emphasized economic strains. Cohen (1955) claimed stress could come from a lack of status.[2] Cohen wanted to know why most juvenile crimes occurred in groups. He explained that many youths, especially those in lower class families, rejected education and other middle-class values. Instead, many teenagers would seek status and self-worth as a new value system. When teens have no status, reputation, or self-worth, it led to severe strain. To achieve status, youths commit a crime to gain status among their peer group. Cloward and Ohlin (1960) claimed more serious delinquents sought "fast cars, fancy clothes, and well dames" (p. 97).[3] Assuming youths had no legitimate opportunities to improve their economic position, youths would join gangs to pursue illegitimate opportunities to achieve financial success. Criminal gangs provided youths illicit opportunities to gain money, conflict gangs permitted youths to vent their frustrations, and retreatist gangs were double failures; they had no legitimate or illegitimate means to increase income.

The general strain theory, by Robert Agnew, claimed strains come from myriad sources. Agnew defined strain as any event that a person would rather avoid. Three types of strains include the failure to achieve a positively valued stimulus, the removal of a positively valued stimulus, and the confrontation of negative stimuli. Examples include parental rejection, child abuse, bullying, loss of job, loss of a loved one, discrimination, and criminal victimization. However, the characteristics of some strains are more likely to lead to crime. When a person views a strain as high in magnitude and unjust, and the pressure promotes criminal coping mechanism, people with minimal social control are more likely to commit a crime. Strains lead to negative emotions such as anger, depression, and fear. Some people without prosocial coping mechanisms may commit a crime to vent, which can create social control issues (trouble in school, parents,

2. Cohen, A.K. (1955). *Delinquent boys: The culture of the gang*. New York, NY: Free Press.
3. Cloward, R.A., & Ohlin, L. (1960). *Delinquency and opportunity: A theory of delinquent gangs*. Glencoe, IL: Free Press.

employers) as well as facilitate social learning (joining peers who also need to vent their frustration). Overall, criminal behavior serves a purpose – to escape strain, stress, or pressure.[4]

Coping Mechanism Example

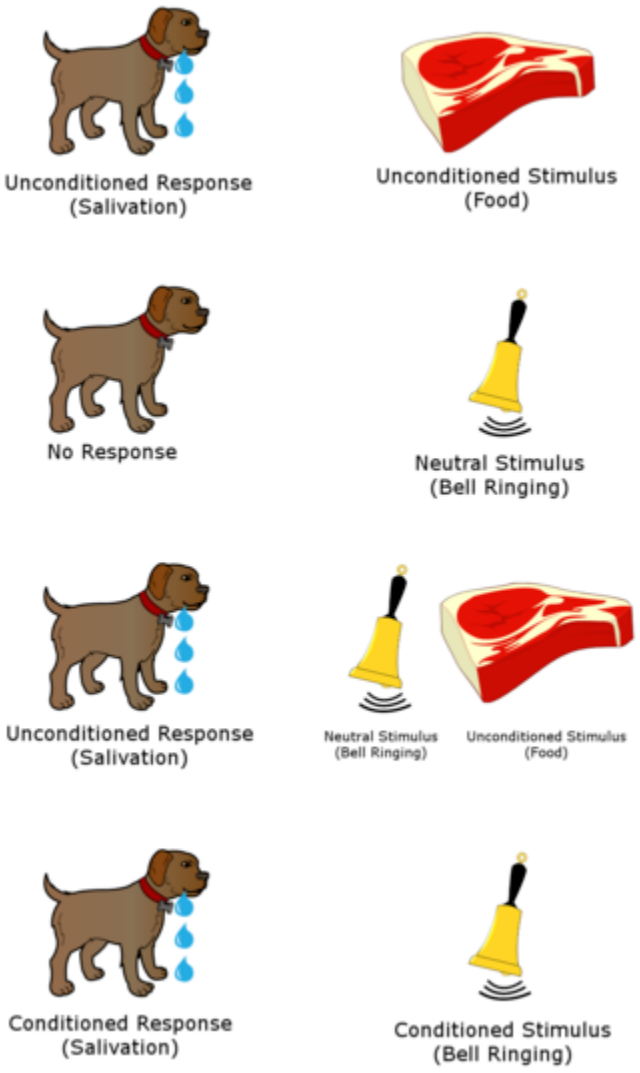
Every one feels stress and each of us copes with stress, pressure, or shame differently. Shame can motivate us to change for the better. For example, if you did poorly on an exam, you may start to study better. When you feel stress, what do you do? When I ask students how they deal with stress, many go for a run or a walk, lift weights, cry, talk, or eat ice cream. These are healthy (maybe not ice cream eating) and pro-social coping mechanism. When I feel stress I write. Often, I write nasty emails and then delete them. Fortunately, I have never accidently sent one.

4. Agnew, R. (2006). Pressured into crime: An overview of general strain. New York, NY: Oxford University Press.

In the previous sections, strain theories focused on social structural conditions that contribute to people experiencing strain, stress, or pressure. Strain theories explain how people can respond to these structures. Learning theories compliment strain theories because learning theories focus on the content and process of learning.

Early philosophers, like Aristotle, believed human beings learned through association. The thought implies humans have a blank slate and our experiences build upon each other. It is through these experiences we recognize patterns and linked phenomena. For example, ancient humans did not have the technological advancements of global positioning satellites, which many people have on their phones. However, they used other celestial bodies like the stars and moon to travel. When early humans looked to the heavens, people began to recognize patterns in the stars. These patterns were consistent and enabled long-distance travel over land and sea.

A few centuries later, Ivan Pavlov was studying the digestive system of dogs, when he noticed the dogs started the digestive process *before* food was in sight. The dogs began to salivate when they heard the assistants' footsteps. The dogs were associating the oncoming footsteps with the upcoming food. This type of learning was called classical conditioning.



Classical Conditioning

The acquisition of this learned response occurred over time. The dogs' salivary reflex was an unconditioned response to the unconditioned stimuli (food). Pavlov wondered if he could get the dogs to salivate with a neutral stimulus (i.e., a ringing bell). He would ring a bell then feed the dog. After a series of these paired occasions, the dogs began to salivate at the sound of the bell alone. The salivation became a conditioned response to a conditioned stimulus. The acquisition of this learned behavior (i.e., conditioned response) will become extinct if the incentive is no longer associated. Human beings most certainly learn via classical conditioning, but it is a passive and straightforward approach to learning. We may shudder when we see flashing blue lights in our rearview mirror, salivate when food is cooking in the kitchen, or dance when we hear our favorite song. We passively learned these paired events through our experiences.

B.F. Skinner was also interested in learning and transformed modern psychology with operant conditioning. Operant condition is active learning where organisms learn to behave based on reinforcements

and punishments. Using rats and pigeons, Skinner wanted animals to learn a simple task (i.e., pushing a bar or key) through reinforcements. A reinforcement is any event that strengthens, or maximizes, a behavior. We reinforce behaviors that we want to continue or increase. We can use positive reinforcement or negative reinforcement. Positive is the addition of something desirable, and negative is the removal of something unpleasant; they do not mean "good" or "bad." For example, if we wanted to more people to wear seatbelts, we would want to reinforce the behavior. A positive reinforcement may be praise or a reward for buckling up. Newer model cars come equipped with seatbelt alarms. The will ring until you buckle up. Once you buckle up, the sound stops. This is an example of negative reinforcement. Both examples reinforce the behavior (wearing a seatbelt) but in different ways.

Consequently, if we want a behavior to stop or decrease, we punish that behavior. Punishments can also be positive or negative. A positive punishment involves the presentation of something unpleasant whereas negative punishment is punishment by removal. For example, a teenager breaks curfew and the parents want their child to stop breaking curfew. The parents can punish the child in one of two ways. An example of positive punishment would be scolding. A negative punishment would be removing the child's driving privileges. Both punishments seek to decrease the adolescent's breaking curfew but in two different ways.

Punishment Exercise

How does the Criminal Justice System positively punish offenders? How does the Criminal Justice System negatively punish? Give examples of both.

Edwin Sutherland (1947) was the first and created the most prominent statement of a micro-level learning theory about criminal behavior. He first presented differential association theory in 1934, and his final revision occurred in 1947.[1] His attempt tried to explain how age, sex, income, and social locations related to the acquisition of criminal behaviors. Sutherland (1947) presented his theory as nine separate, but related propositions, which were:

1. Criminal behavior is learned.
2. Criminal behavior is learned in interaction with other persons in a process of communication.
3. The principal part of the learning of criminal behavior occurs within intimate personal groups.
4. When criminal behavior is learned, the learning includes: a) techniques of committing the crime, which are sometimes very complicated, sometimes very simple; b) the specific direction of the motives, drives, rationalizations, and attitudes.
5. The specific directions of motives and drives are learned from definitions of the legal codes as favorable or unfavorable. In some societies, an individual is surrounded by persons who invariably define the legal codes as rules to be observed, while in others he is surrounded by a person whose definitions are favorable to the violation of the legal codes.
6. A person becomes delinquent because of an excess of definitions favorable to violation of law over definitions unfavorable to violation of the law. This is the principle of differential association.

1. Sutherland, E.H. (1947). *Criminology* (4th ed.). Philadelphia, PA: Lippincott.

7. Differential associations may vary in frequency, duration, priority, and intensity. This means that associations with criminal behavior and also associations with anticriminal behavior vary in those respects.
8. The process of learning criminal behavior by association with criminal and anti-criminal patterns involves all of the mechanisms that are involved in any other learning.
9. While criminal behavior is an expression of general needs and values, it is not explained by those general needs and values, since noncriminal behavior is an expression of the same needs and values.[2]

Sutherland describes the content of what is learned, but also the process of how it is learned. Ultimately, he argued people give meaning to their situation; this meaning-making determined if they would obey the law or break the law. Hence, this meaning-making explains how siblings, who grow up in the same environment may differ in their behavior.

Ironically, Sutherland and B.F. Skinner were teaching at Indiana University during the late 1940s. For some reason or another, Sutherland never used Skinner's ideas of operant conditioning in his differential association theory. However, Ronald Akers utilized both approaches in his "social learning" or "differential reinforcement" theory. Akers' theory comprised the four main concepts of differential association, definitions, differential reinforcement, and imitation/modeling. He was interested in the process of how criminal behavior is acquired, maintained, and modified through reinforcement in social situations and nonsocial situations. Differential associations refer to the people one comes into contact with frequently. These peers are the source of definitions that favor obeying the law or breaking it. It is the most important source of social learning. According to Akers, definitions are the meaning a person attaches to his or her behavior. Those meanings can be general (i.e., religious, moral, or ethical beliefs that remain consistent) or specific (i.e., apply to a specific behavior like smoking or theft). Differential reinforcements refer to the balance between anticipated rewards or punishment and the actual reward or punishment. For example, if a juvenile vandalized a storefront, his or her friends praise may reinforce that behavior. If the juvenile sought more praise, he or she might continue vandalizing more property (the peers' reactionary praise positively reinforced the behavior). The final concept was imitation/modeling. Akers argued that human beings could learn by observing how other people are rewarded and punished. Thus, some people may imitate other people's behavior, especially if that behavior was rewarded or not punished.[3]

Finally, there have been some theories that focus more on the content of what is learned. Residents who may live in disadvantaged neighborhoods, like in the transitional zone, my "learn" different things. Subcultural theories focus on the ideas of what is learned rather than the social conditions that foster these ideas. Some groups may internalize values that are conducive to violence or justify criminal behavior.[4] In other words, where we grow up may influence what we learn about crime, police, government, religion, etc.

2. Sutherland, E.H. (1947). *Criminology* (4th ed.). Philadelphia, PA: Lippincott.
3. Akers, R.L. (1994). *Criminological theories.* Los Angeles, CA: Roxbury.
4. Anderson, E. (1999). *Code of the street: Decency, violence, and the moral life of the inner city.* New York, NY: W.W. Norton.

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Previously discussed theories asked why people commit crime. The methods used tried to identify the driving forces behind a criminal's behavior. For example, biological and psychological theories sought to identify traits that determined criminality. Strain theories assumed people were good, but bad things happen, which causes many to be pushed into criminal behaviors. Learning theories demonstrated the importance of learning criminal attitudes to commit crimes. These attitudes, especially when reinforced, will prevail in social situations. Control theories differ in their approach. Instead of assuming criminals have "something" or experienced "something" that drives their criminal behavior, control theories ask why *more* people do not engage in illegal behavior. Control theories assume people are naturally selfish, and if left to their own devices, will commit illegal and immoral acts. Control theories try to identify what types of "controls" a person may have that stops them from becoming "uncontrollable."

Early control theorists argued that there are multiple controls on individuals. Personal controls are exercised through reflection and following pro-social normative behavior. Social controls originate in social institutions like family, school, and religious conventions. Toby (1957) introduced the phrase "stakes in conformity," which is how much a person has to lose if he or she engages in criminal behavior.[1] The more stakes in conformity a person has, the less likely they would be willing to commit crime. For example, a married teacher with kids has quite a bit to lose if he or she decided to start selling drugs. If caught, he could lose his job, get divorced, and possibly lose custody of his children. However, juveniles tend not to have kids nor are they married. They may have a job, but indeed not a career. Since they have fewer stakes in conformity, they would be much more likely to commit crime compared to the teacher.

Travis Hirschi is most associated with control theories. In 1969, he argued that all humans have the propensity to commit crime, but those who have strong bonds and attachment to social groups like family and school are less likely to commit crime. [2]Often known as social bond theory or social control theory, Hirschi presented four elements of a social bond – attachment, commitment, involvement, and belief. Attachment refers to affection we have towards others. If we have strong bonds, we are more likely to care about their opinions, expectations, and support. Attachment involves an emotional connectedness to others, especially parents, who provide indirect control.

1. Toby, J. (1957). Social disorganization and stake in conformity: Complementary factors in the predatory behavior of hoodlums. *Journal of Criminal Law, Criminology and Police Science, 48*, 12-17.
2. Hirschi, T. (1969). *Causes of delinquency.* Berkeley, CA: University of California Press.

Parenting Exericse

Parenting can be a challenging responsibility. Fare supposed suppose to teach children how to behave. Ideally, parents have control over their children in many ways.

- What are ways parents have "direct" control over their children?
- What are ways parents have "indirect" control over their children?

Commitment refers to the rational component of the social bond. If we are committed to conformity, our actions and decisions will mirror our commitment. People invest time, energy, and money into expected behavior like school, sports, career development, or playing a musical instrument. These are examples of Toby's "stakes in conformity." If people started committing a crime, they would risk losing these investments. Involvement and commitment are related. Since our time and energy are limited, Hirschi thought people who were involved in socially accepted activities would have little time to commit a crime. The observational phrase "idle hands are the devil's worship" fits this component. Belief was the final component of the social bond. Hirschi claimed some juveniles are less likely to obey the law. Although some control theorists believed juveniles are tied to the conventional moral order and "drift" in and out of delinquency by neutralizing controls (Matza, 1964), Hirschi disagreed.[3] He believed people vary in their beliefs about the rules of society. The essential element of the bond is an attachment. Eventually, Hirschi moved away from his social bond theory into the general theory of crime.

Hirschi Exercise

Hirschi believed strong social bonds made people less likely to commit a crime. The components of a social bond include attachment, commitment, involvement, and belief. Please describe each of the components of the social bond and explain how each applies to your educational journey. How can you be attached, committed, involved, and believe in higher education?

Gottfredson and Hirschi (1990) claimed their theory could explain all crime by all people. They argued the lack of self-control was the primary cause of criminal behaviors. They claim most ordinary crimes require few skills to commit and have an immediate payoff.[4] There is not any long-term planning or goal; crimes are committed for immediate pleasure. Moreover, they claim, people who commit these ordinary crimes tend to be impulsive, insensitive to the suffering of others, short-sighted, and adventuresome. If true, these traits (low self-control) were established before the person started committing crimes and will continue to manifest throughout a person's life. The root cause of low self-control is ineffective parenting. If parents are not attached to their child, supervise their child, recognize the child's deviant behaviors, or discipline their

3. Matza, D. (1964). *Delinquency and drift.* New York, NY: John Wiley.
4. Gottfredson, M., & Hirschi, T. (1990). *A general theory of crime*. Stanford, CA: Stanford University Press.

child, the child will develop low self-control. Gottfredson and Hirschi claim self-control, or the lack thereof, is established by eight years old.

Control theories are vastly different from other criminological theories. They assume people are selfish and would commit crimes if left to their own devices. However, socialization and effective child-rearing can establish direct, indirect, personal, and social controls on people. These are all types of informal controls.

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Social Reaction Theories

Initially a response to popular theories at the time, social reaction theories change the focus. Instead of focusing on the offender, social reaction theories concentrate on those people or institutions who label offenders, react to offenders, and want to control offenders. Grounded in symbolic interaction, social reaction theories emphasize how meanings are constructed. Words carry power and meaning. Thus, if someone is labeled as a criminal, it carries a connotation by other people. How will others view him or her with that label? How will society? People will act towards thing by the meanings attached. These meanings can be culturally created through interactions with peers. Perhaps it is why some of us like to wear certain name brand clothes or drive certain name brand vehicles. Those names have "meaning"; they can be cool, reliable, etc. They have status and meaning.

Not everyone who commits a crime is caught. Additionally, not all those who are caught are labeled as a criminal. Why? Labeling theories sought to explain this phenomenon. In general, labeling theorists point to the social construction of crime, which varies over time and place. For instance, marijuana use is federally prohibited, but more and more states are legalizing recreational use. The same behavior can be legal in Oregon but illegal in New York.

Furthermore, labeling theorists emphasize the process of being labeled and treated as a criminal; it can have deleterious effects. If a person is bombarded with a particular label, he or she may adopt that label. If a person was told over and over again that he or she was funny, that person might try to be funnier. What if a person were told over and over again he or she would amount to nothing? Perhaps, he or she would internalize that label and become nothing since others expect that.

Braithwaite (1989) applied some of these ideas in his reintegrative shaming. Not all social reactions are ruthless; in fact, some of them are beneficial. [1] Hence, it is the quality of social responses that is significant. We shame individuals to show disapproval. According to Braithwaite, shaming can be reintegrative or stigmatizing. Reintegrative shaming centers on forgiveness, love, and respect. Ideally, we want to reintegrate the person back into the community by removing the label. However, in some societies, like the United States, stigmatizing shaming reigns supreme. Stigmatizing shaming uses formal punishment, which degrades a person's bond to his or her community. It is counter-productive and tends to shun the offender. For example, in some states, convicted offenders are required to self-identify as a felon on job applications. Do you think this helps their cause to reintegrate successfully into society? Perhaps not. Even though they may

1. Braithwaite, J. (1989). *Crime, shame* and *reintegration*. New York, NY: Cambridge University Press.

have "served their time," they are still labeled as a criminal and punished further. Stigmatizing shaming propels people towards crime whereas reintegrative shaming seeks to correct the behavior through respect and empathy. Critical Theories

Critical Theories

Critical theories originated during the 1960-1970s in the United States. Immediately following World War II, Americans expected the United States to thrive economically, culturally, and politically. Massive political turmoil inside and outside of the country created a generation of scholars who became "critical" of society and more "traditional" theories of crime. According to Cullen, Agnew, and Wilcox (2018), critical theories share some five central themes. First, to understand crime, one must appreciate the fusion between power and inequality. People with power, political and economic, have an enormous advantage in society.[2] Second, crime is a political concept. Not all those who commit crime are caught, nor are those who are caught punished. The poor are injured the most by the enforcement of laws, while the affluent (i.e., powerful) are treated leniently. Third, the criminal justice system and its agents serve the ruling class, the capitalists. As Jeffrey Reiman's (2004) book titled it, *The Rich Get Richer and the Poor Get Prison.*[3] Fourth, the root cause of crime is capitalism because capitalism ignores the poor and their atrocious living conditions. Capitalism demands profits and growth over values and ethically considerations. Perhaps this is why crimes of the streets are punished more severely than crimes of the suites. Finally, critical theories believe the solution to crime is a more equitable society, both politically and economically.

It is beyond the scope of this book to delve into all of the possible explanations of crime. Some theories try to explain the differences between male offending and female offending through feminist theories of crime. Other theories have integrated or combined concepts from other theories to create a newer model of explanation. Why do you think people commit crime?

Gender and Crime Exercise

Write about how you were raised and how sex/gender roles were reinforced through school, family, culture, etc. Do you think men/boys/males are more criminal because of their biology or because of cultural expectations of men/boys/males versus women/girls/females? You should support your claims with personal, vicarious, or well-known examples.

2. Cullen, F.T., Agnew, R., & Wilcox, P. (Eds). (2018). *Criminological theory: Past to present* (6th ed.). New York, NY: Oxford University Press.
3. Reiman, J. (2004). *The rich get richer and the poor get prision: Ideology, class, and criminal justice.* New York, NY: Pearson.

6: Policing

Learning Objectives

In this section, you will be introduced to the history of policing in the United States. Today, policing is under the microscope to ensure past mistakes are not repeated and forward momentum is reached. It is for this reason this section will explore the history, as well as the foundations, that the American policing system was built upon. At the end of this section, students will be able to:

- Discuss how the history of policing relates to current policing
- List the different parts of the history of policing
- Recognize the four eras of policing and identify the important parts of each era
- Explain why Sir Robert Peel is important to policing
- Describe how August Vollmer impacted policing
- List what three issues marked the Political Reform Era
- Illustrate several important occurrences during the Community Policing Era
- Discuss why the fourth era of policing is the Homeland Security Era

Critical Thinking Questions

Discussion Questions:

1. Why is the history of policing important to understand?
2. What about kin policing made it not a good form of policing?
3. What are the four eras of policing?
4. How was the Homeland Security Era established?
5. Why was Sir Robert Peel important to policing?

6. What did August Vollmer believe police should be doing?

TIFFANY MOREY

The development of policing in the United States coincided with the development of policing in England. In fact, the United States legal system traces its roots back to the common law of England. However, we can go all the way back before 1750 BC to see how forms of policing were common during ancient times, to what is now known as **kin policing**. Kin policing is when a tribe or clan policed their own tribe, and it often turned bloody quickly. The blood feuds would go on for a long period of time. [1]

However, it is estimated, also sometime around 1750 BC, that the Code Hammurabi was engraved in stone. This code detailed 282 sections of how one individual should treat another individual in society, and the penalties for such violations. The code is seen as the beginnings of law and justice. Around 1000 BC, Mosaic Law emerged. This law was a new form of rational law and hoped to predict what behaviors were prohibited. In Mosaic Law, the ruling class did not create the law. The Code of Hammurabi and Mosaic Law formed the ladder that would eventually lead to the creation of policing, as we now know it today. [2]

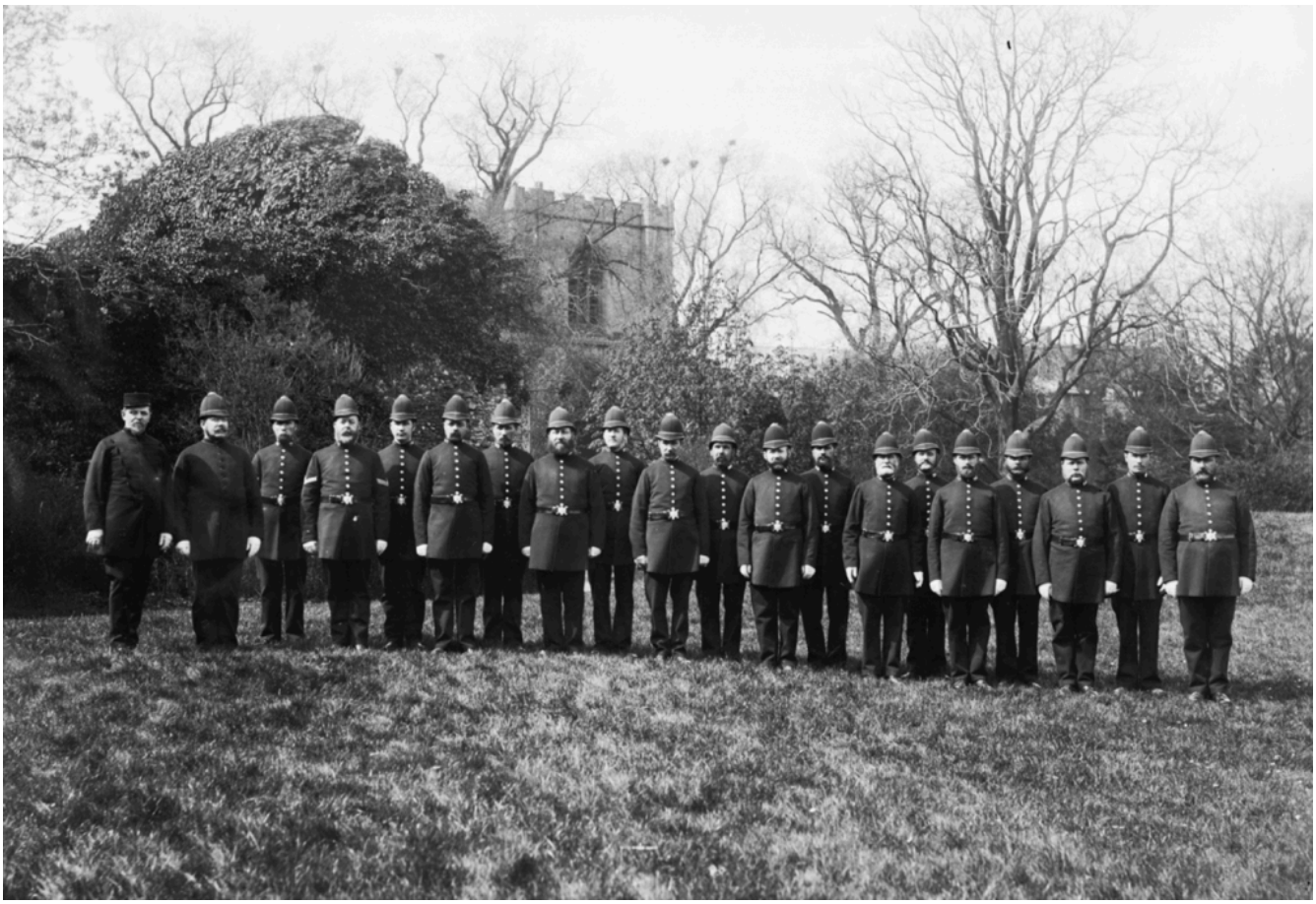
Peisistratus (605-527 BC), who was the ruler of Athens, has been called the father of formal policing. During this time of growth, new Greek city-states were being developed and blood feuds that lasted decades had to be quashed. Kin policing slowly washed away due to its barbaric nature and new doors opened for a modern city driven policing model. The first police service in Athens was developed by Sparta and it is often looked at as the first secret service. [3]

Augustus Caesar (27 BC), who was the first emperor of Rome, was instrumental in creating what is now called the **urban cohorts**. The urban cohorts were men from the Praetorian Guard (Augustus' army), charged with ensuring peace in the city. As crime rose and became more violent, Augustus formed the **vigils**, which were not affiliated with the Praetorian Guard, but were charged with fighting crime and fires. The vigils were given the power to protect and arrest. [4]

From 6 AD until the 12th century, Rome was patrolled day and night, by a public police force. With the fall of the Roman Empire, kings then assumed the role of protection. From the 12th-18th centuries, kings in England appointed sheriffs. At age fifteen, boys could volunteer with the *posse comitatus* to go after wanted felons. Constables, a police officer with limited authority, assisted the sheriffs with serving summons and warrants. Because young volunteers did the policing work, there were several problems, such as corruption

1. Berg, B., (1999). *Policing in a modern society.* Oxford: Elsevier.
2. Berg, B., (1999). *Policing in a modern society.* Oxford: Elsevier.
3. Berg, B., (1999). *Policing in a modern society.* Oxford: Elsevier.
4. Berg, B., (1999). *Policing in a modern society.* Oxford: Elsevier.

and drunkenness. Victims who had the means to hire private police or bodyguards to so for protection, but unfortunately, that meant those who were poor, had neither help nor protection. [5]



5. Berg, B., (1999). *Policing in a modern society*. Oxford: Elsevier.

TIFFANY MOREY

The 19th century in England heavily influenced the history of policing in the United States. Not only did policing radically change for the first time in over six centuries, but the father of modern policing, **Sir Robert Peel,** set up the stage for what is known today as modern policing. Sir Robert Peel, the British Home Secretary, coined the term 'bobbies' as a nickname for cops and he believed policing needed to be restructured. In 1829 he passed the Metropolitan Police Act, which created the first British police force and what the 21st century knows for today's modern-day police. [1]

1. Cordner, G., Novak, K., Roberg, R., & Smith, B., (2017). *Police & Society.* New York: Oxford University Press.



Sir Robert Peel

Sir Robert Peel is best known for the Peelian Principles. He did not create the twelve principles but used a combination of previous codes that he expected police to follow. The exact historical origins of the twelve listed principles below are unknown, but it has been theorized that the principles were slowly created over the years by academics studying Peel.

1- The police must be stable efficient, and organized along military lines;

2- The police must be under government control;

3- The absence of crime will best prove the efficiency of police;

4- The distribution of crime news is essential;

5- The deployment of police strength both by time and area is essential;

6- No quality is more indispensable to a policeman than perfect command of temper; a quiet, determined manner has more effect than violent action;

7- Good appearance commands respect;

8- The securing and training of proper persons is at the root of efficiency;

9- Public security demands that every police officer be given a number;

10-Police headquarters should be centrally located and easily accessible to the people;

11-Policemen should be hired on a probationary basis; and

12-Police records are necessary to the correct distribution of police strength
[2]

2. Cordner, G., Novak, K., Roberg, R., & Smith, B., (2017). *Police & Society.* New York: Oxford University Press.

TIFFANY MOREY

Researchers Kelling and Moore (1991) evaluated the first three eras of policing. These eras are discussed below, and are often referred to as the **Political Era**, the **Reform Era**, and the **Community Era.** Through the microscope of seven topical areas, listed below, an understanding of how policing evolved begins.

1. Authorization
2. Function
3. Organization
4. Demand
5. Environment
6. Tactics
7. Outcomes

These seven characteristics have been used to evaluate how policing operated throughout history, most notably through its organizational structure, tactics, and primary focus. [1]

Political Era: The political era is often referred to as the first era of policing in the United States and it began around the 1840s with the creation of the first bona fide police agencies in America [2]

This era of policing is marked by the industrial revolution, the abolishment of slavery, and the formation of large cities. One way to confirm the start of this era is to look at the creation of police departments in larger cities:

- New York Police Founded 1845

1. Greene, J. R., & Mastrofsky, S. D. (Eds.) (1991). Kelling, G.L., & Moore, M. H. (1991). From political to reform to community: The evolving strategy of the police. In *Community Policing: Rhetoric or Reality.* New York: Paeger.
2. Oliver, W. M. (2006). The fourth era of policing: Homeland security. *International Review of Law, Computers & Technology*

- Chicago Police Founded 1855
- Philadelphia Police Founded 1751
- Jacksonville Police Founded 1822
- Indianapolis Police Founded 1850's
- Detroit Police Founded 1865
- Portland Police Founded 1870
- Eugene Police Founded 1863
- Jackson County, Oregon Police Founded 1852

With the advent of the industrial revolution, came goods and services. Along with new job opportunities, came a myriad of conflict as well. The fast-growing cities had to answer these problems with solutions in the form of policing. The abolishment of slavery and the new free black population created many unforeseen issues too with The Klu Klux Klan. The Klan began to make terrifying appearances and their reign of terror left many in fear. Policing had not yet formally entered the scene; therefore, The Klan operated virtually unencumbered.



London Strike: Truck Under Protection

The United States saw tremendous growth in major cities, had the industrial revolution, and the abolished slavery, which is when the Political Era of policing was set into motion. As its name suggests, it was an era of politics, mainly because of how policing was limited as a result of new laws, made clear by the Constitution. America answered the call by following the English and Sir Robert Peel's principles. Not unlike today, policing during this era was under the control of politicians. Politicians, like the mayor, had no problem controlling everything a policeman did during his call of duty (**NOTE:** the word policeman/men is utilized in this era/context, because during this time period, women were not allowed in the profession, and if they were accepted it was under a microscopic view of certain stereotypical matronly duties to be performed). In fact, Black policemen were rarely hired. Black policemen made their way into policing in the late 1800s, but when the Civil Rights Act of 1875 was ruled unconstitutional, Black officers all but disappeared from policing until the 1950s.

News Box: A look at the salaries:
1957 annual wage for a police patrolman – Milwaukee Police Department: $5,405.40
1957 Annual Report Milwaukee Police Department https://city.milwaukee.gov/ImageLibrary/Groups/…/Archive…/1957AnnualReport.pdf

News Box: 61 years later
2018 annual wage for police patrolman- Milwaukee Police Department:
$57,291.00
Milwaukee, Wisconsin- State website https://city.milwaukee.gov/fpc/Jobs/Police-Officer.html

News Box: 2018 Annual wage for first step trooper- Oregon State Police: $56,184.00
Oregon State Police- Oregon.gov website https://www.oregon.gov/osp/RECRUIT/Pages/salary_benefits.aspx

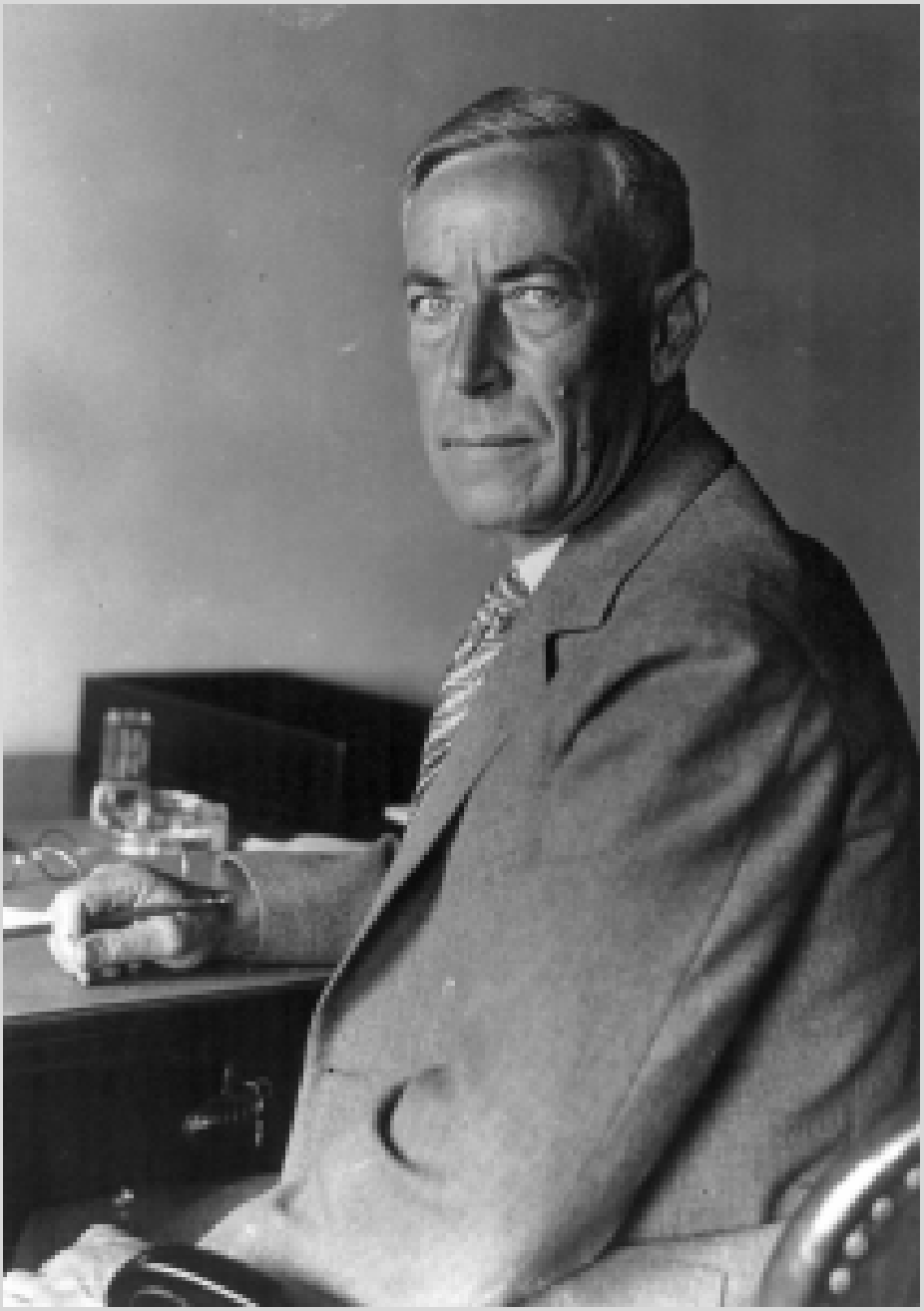
Reform Era: Because the Political Era of policing ended up being laced with corruption and brutality, the panacea for the negativity became the Reform Era. One police chief was largely at the forefront of this new era, Chief **August Vollmer**. He is considered the pioneer for police professionalism. August Vollmer was the Chief of Police in Berkeley, California (1905-1932). He had many new beliefs about policing that would forever change the world of policing:

1. Candidates who were testing to be in policing had to undergo psychological and intelligence tests
2. Detectives would utilize scientific methods in their investigations, through forensic laboratories

3. Recruits, for the first time, would attend a training academy (police did not receive any formal training prior to August Vollmer's arrival)
4. Assisted with the development of the School of Criminology at the University of California at Berkeley

Chief August Vollmer saw policing and officers as social workers that needed to delve into the causes behind the acts in order to solve the issue, instead of just arrest it. [3] He knew in order to rehabilitate offenders, police officers needed to look behind the handcuffs and start looking into the person and reason behind the behavior. [4]

3. Reppetto, T.A. (1978). The Blue Parade. New York: Free Press.
4. Reppetto, T.A. (1978). *The Blue Parade.* New York: Free Press.



"Father of modern law enforcement"

Diversity in policing started to make a mark during this era, but it would fall irrevocably far from meeting any type of quota. It was a better era for diversity than the Political Era, but the numbers don't lie in that it fell dismally short.

The Community Era– 1980s to 2000: In the 1960s and 1970s the crime rate double and it was a time

of unrest and eye-opening policing issues. Civil rights movements spread across America and the police were on the front lines. Media coverage showed controversial contacts between white male officers and African American citizens, which further irritated race relations in policing. The U.S. Supreme Court handed down the landmark *Miranda v. Arizona* and *Mapp v. Ohio* decisions. The writing was on the wall that the policing environment had to change. The days of answering everything with bullying or police professionalism were no more. The Community Era of policing began and those in police administration hoped this new era held the answers to fixing decades-old issues. The police needed help and they would turn towards the community and its citizens for assistance.

This new era of community policing held that police couldn't act alone; the community must pitch in as well. Whether the problems were a dispute between neighbors or high crime area drugs and shootings, these issues did not develop overnight and could not be solved by a response of police alone. Instead, these community problems needed a pronged approach where the police worked together with the community and over time the issues could be systematically solved. Out of the box thinking was common in community policing and often community leaders were identified in order to make the impact. During this time police candidates started showing up to the application process with Associates and Bachelors degrees. The 'old school officers' mocked these degree-holding candidates. But the landscape was changing and officers needed more thorough training than ever to answer the call.

Problem-oriented policing was an after effect of community policing, in that it utilized community policing, but focused on the problems first. The biggest difference was problem-oriented policing used a defined process for working towards the solution. The problem was torn apart layer by layer and rebuilt according to set parameters that have a proven record of working.

The Community Era was also a time for research. Prior to this era, research on crime, police, or criminal justice topics were few and far between. With new federal government funding options available, this era missions could be accomplished through grants and the needed research began. Proof of what worked, what didn't, and suggestions on how to improve policing were abundant. Without research or studies, policing can become stagnant. But with funding available, the answers were a questionnaire or interview away and solutions came rolling in.

Community Era Example

"I remember the Community Era very well. I was a new police officer during this time and actually at the forefront of Community Policing and Problem-Oriented Policing. I was the first woman officer at my police department that was pregnant and the administration was open to suggestions when asked what to do with me when my belly expanded. I politely suggested that once I was five to six months pregnant and began to show (and not fit in my uniform or patrol belt anymore), I will be voluntarily transferred to the Crime Prevention Division. With my doctor approving this decision, my belly grew, and I transferred to this new division. I remember hitting the streets and knocking on doors, spewing how great of a panacea Community Policing was. It took some buy-

in and with the citizens who 'bought-it,' the concept actually became a reality and worked! Months later we had a string of burglaries occurring in a high-crime neighborhood. The detectives, patrol, everyone hit the streets, knocking on doors, questioning everyone, in an attempt to find the criminals responsible. With no avail, I turned to Community Policing. I brought in a mounted police officer and horse. My colleagues chucked and shook their heads in response! What was I thinking?!?! "It was a waste of resources," they balked! How could a cop on a horse solve this crime? I was glad; I 'wasted my time,' because it worked! The officer on the horse brought citizens out of their houses that normally would never have spoken to a police officer normally. The horse was such a spectacle in the neighborhood, that it was the catalyst that caused citizens to not only come out of their houses but to start talking about what and who they had been seeing in and around their neighborhood that did not belong. One such sighting was a vehicle description, which led to criminals responsible for the burglaries. "

The Homeland Security Era- 2001 to Present: On September 11th, 2001, when terrorists hijacked airplanes and flew them into the World Trade Center buildings and Pentagon in the United States, a fourth era of policing, the era of Homeland Security, was said to emerge. [5] The long-lasting repercussions of this terrorist act would forever change life for Americans, but the daily activities of all policing departments. There is some debate in the field as to the order of policing eras and what they should be called. Some scholars list the policing eras as:

1. Pre-Policing Era
2. Political Era
3. Reform Era
4. Community Era

While others believe the policing eras are:

1. Political Era
2. Reform Era
3. Community Era
4. Homeland Security Era

The realities of the tragedy of 9/11 were that it did start a new era of policing. In fact, a case could be made for the large dark line that became metaphorically visible on 9/11/01, when the Community

5. Oliver, W. M. (2006). The fourth era of policing: Homeland security. *International Review of Law, Computers & Technology.*

Era shifted to the Homeland Security Era as airplanes destroyed America's feelings of safety. Policing will probably always involve some sort of Community Era policing in order to make a difference.



Remembering 9/11: A Decade Later

Policing under Homeland Security is marked by a more focused concentration of its resources into crime control, enforcement of the criminal law, traffic law, etc., in order to expose potential threats and gather intelligence. [6]

Scholars have examined the pros and cons of a national police department in the United States. For example, Canada has a Royal Canadian Mounted Police. Whereas, depending on location, one could go through several different cities and counties while driving to the store, all of which have their own respective police departments. With the advent of the Homeland Security Era, a new model of centralized organizational control began due to the need for information dissemination. One of the biggest flaws of 9/11 was the lack of communication between law enforcement agencies. The Department of Homeland Security was developed and one of its first major missions became the dissemination of information and

6. Oliver, W. M. (2006). The fourth era of policing: Homeland security. *International Review of Law, Computers & Technology*.

communication. So, while a national police department does not exist in the United States, communication and information are now a common thread that binds all of the different types of law enforcement agencies.



10:28:24 a.m. on September 11th, 2001 was the precise second that photojournalist Bill Biggart took the final shot of his life. He took his last breath moments later when the North Tower of the World Trade Center collapsed upon him. Four days later, searchers found his body, his burnt-edged press cards, his three demolished cameras, six rolls of film, and one small undisturbed compact flash card carrying almost 150 digital images. It was the remains of one horrifying day and one extraordinary life. "I am certain if Bill had come home at the end of that day, he would have had many stories to tell us, as he always did. And had we asked how it really was, he would have said, 'Take my advice, don't stand under any tall buildings that have just been hit by airplanes."-Wendy Doremus, wife of Bill Biggart.

Homeland Security Era Examples

I remember I awoke to live video showing one of the World Trade Center buildings with smoke billowing from the windows. I wondered hesitantly how the fire started? Then, as one video camera rolled, by happenstance, it caught an airplane flying directly into the second World Trade Center building and my worst fears came true.

I think I stumbled to the edge of my couch and steadied myself, although I really don't remember, as I watched what happened next, slowly unfold. The effects of that day will never be forgotten.

During a trip to New York, last summer, I visited the World Trade Center museum. As I walked through the halls, a pin drop could have been heard. The respect, sadness, and overwhelming feelings that filled me made it difficult to breathe. Not only did the terrorists kill and destroy many things that day with their hate but they forever changed policing. I was a patrol officer at the time when the devastation ravaged America. Sadness filled our department for our brothers and sisters that lost their lives. We didn't realize at the time, but our departments and thousands of others in policing across America were in for major changes, because of the heinous acts of a few. The first changes I remember taking place were: Active shooter updates and training; Incident Command System (ICS) updates and training; NEMA emergency management training; Gas masks were distributed for each individual officer, to be carried full-time, along with 3 month re-check and applicable training; Policy and procedure updates and additional response training depending on the call type; Reconfiguration of call type and responses to each; COMMUNICATION became the center of everything.

It became essential to hire a person to go through all the communication and alerts we received daily and alert those the information effected Unless those in the policing field had blinders on, the era of Homeland Security, was probably at the time, and will probably always be, one of the most substantial in policing history.

TIFFANY MOREY

Learning Objectives

After reading this section, students will be able to:

- Understand the various options for careers in the policing and law enforcement arena
- Discuss educational requirements are required for law enforcement positions with the federal government, state, county, municipal or city officer candidates
- Explain what a state police officer's main objectives are
- Describe the difference between commissioned and civilian
- List several divisions that a commissioned officer can promote to
- List several departments that a civilian can work within a law enforcement type agency
- Discuss why different police departments work with each other

Critical Thinking Questions

1. What education does a candidate need for jobs in federal law enforcement?
2. What education does a candidate generally need for city or county jobs as a police officer?
3. Is there a difference between a person who is considered commissioned and a person who is considered a civilian?
4. Does every law enforcement agency have the same opportunities for advancement?
5. Why do different police departments work together?
6. Can a person be a homicide detective without being a police officer?



Southern Oregon University Criminology and Criminal Justice student Christina Richardson volunteered to try on the Oregon State Police explosive unit bomb suit at the annual Lock-In Event.

Policing Types

It is an exciting time for those entering the policing or law enforcement field. The choices are endless, and one need not look far to find areas that draw the mind and excitement of the prospects in such a career field. All too often, candidates only think of local police departments; i.e., city or county agencies. The options available are genuinely multi-faceted. Whether one is looking for the stereotypical police officer role, or if it is the study of the criminal mind, possibly criminal forensics, or even crime analysis, or if one loves the forest or the water, the options are endless. While the below list is not all-inclusive, it does give a good detailed look at the array of careers one could have in the policing or law enforcement field.



ODOT partnered with the Ashland Police Department to raise awareness about unlicensed movers.

Federal Level: The federal arena of law enforcement careers is broad and vast. The options are almost endless, and the rewards outweigh most of the other local agencies. However, there is a catch, which centers on education and experience. Most law enforcement-related careers in the federal arena require a bachelor's degree, at a minimum plus three years of related full-time work experience before applying.

Candidates interested in the Federal Bureau of Investigation (FBI) as a special agent, for example, are looking at the following educational requirements:

- A bachelor's degree in either accounting, computer science/information technology, foreign language (only a criminal justice major if the candidate is planning on working full-time for a law enforcement agency for at least three years before applying),
- OR a JD degree from an accredited law school,
- OR a diversified bachelor's degree AND three years of professional experience, OR a master's

degree, or Ph.D. along with two years of professional experience.

Federal job possibilities (the list is not comprehensive)

- Federal Bureau of Investigation (FBI)
- Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF)
- Drug Enforcement Administration (DEA)
- Secret Service
- Central Intelligence Agency (CIA)
- National Security Agency (NSA)
- United States Marshals Service (USMS)
- U.S. Park Police
- U.S. Fish and Wildlife Service (USFWS)
- Department of Justice
- Federal Bureau of Prisons
- U.S. Army Criminal Investigation Command (CID)
- U.S. Army Counter Intelligence
- Dept. of Ariculture-Office of Inspector General (USDA-OIG)
- U.S. Forest Service Law Enforcement & Investigations (USFS LEI)
- Department of Commerce-Office of Inspector General (DOC-OIG)
- Office of Security (DOC-OS)
- US Commerce Department Police
- Office of Export Enforcement (OEE)
- National Institute of Standards and Technology Police
- United States Pentagon Police
- Department of Defense-Defense Criminal Investigative Service (DCIS)
- United States Pentagon Police (USPPD)
- Department of Defense Police
- Defense Security Police
- Defense Logistic Agency Police
- United States Coast Guard (USCG)

- Plus Many More ++

State Level: State police work for a state. For example, in Oregon, the state police work for the state of Oregon and the department is Oregon State Police (OSP). In Nevada, the state police are Nevada Highway Patrol (NHP) and work for the Nevada Department of Public Safety. The commissioned (certified by the state with powers of arrest) employees are generally called **troopers** (a.k.a. police officers), their uniform is blue (except for California Highway Patrol who wear tan and dark brown uniforms), they wear round tipped hats, and their primary duty is to patrol the highways and interstates; however, many state police also investigate many different criminal crimes, run criminal forensic labs, along with divisions of fish and wildlife. The duties of each state agency are different and unique to each state. For example, OSP has an explosives unit (see photo below).



Oregon State Police (OSP) Trooper Greg Costanzo showing Southern Oregon University Criminology and Criminal Justice students the OSP explosive unit robot during the annual Lock-In Event.

County Level: There are 3,142 counties in the United States.[1] Each county has an elected Sheriff and **deputies** (a.k.a. police officers) work directly under the Sheriff. Deputies are no different from any other city police officer other than the Sheriff can be responsible for the courts and jails (a.k.a. correctional facility) in their respective county. But there are also many city police departments that are responsible for jails, so it just depends on the department.

Each state is divided into counties, and each county, depending on size, could have a sheriff's office. Examples of sheriff offices (county police) in Oregon:

1. U.S. Department of the Interior (2018, September 23). How many countries are there in the United States. Retrieved from https://www.usgs.gov/faqs/how-many-counties-are-there-united-states.

- Jackson County Sheriff's Office
- Josephine County Sheriff's Office
- Douglas County Sheriff's Office
- Deschutes County Sheriff's Office



Jackson County Sheriff's Office, Sgt. DiCostanzo assisting during the Southern Oregon University Criminology and Criminal Justice annual Lock-In Event (for the K-9 patrol dog demonstration). Every year the CCJ Department along with the CCJ Crim Club puts on the Lock-In Event (February or March). During this event law enforcement agencies across the state participate and assist with spreading the word about law enforcement. For one afternoon students learn about such programs as: K-9 patrol dogs, eplosives unit, defensive tactics, MILO (police officer simulator training), CSI, SWAT, DUI, and parole/probation. Students at SOU can enroll for 1 credit for this one day class and other students in the community can attend as well. Don't miss the Lock-In event if you are interested in law enforcement or in understanding the various facets of law enforcement.



A Deputy monitors Pleasant Creek Road in the early morning adjacent to the Garner Complex. Credit: Facebook – Jackson County Sheriff's Office – Oregon

Municipal/City Level: Municipal/City police work under a municipality or city. If a city has a government, i.e., mayor and city council members and a municipal code (misdemeanor laws for the city), then the city can have city police. If a person works for a city, the designator is a police officer. Some cities have a connected jail (a.k.a. correction or detention facility), while others are operated through the Sheriff and the county.

Most state, county, municipal/city police departments do not require future candidates to have a bachelors' degree. Currently, many of the candidates testing for such positions do have an associates or bachelor's degree, therefore although it is not required, the candidates are more desirable because they have a college degree. Generally, college degrees become a required educational background, when an officer wants to enter management, i.e., sergeant, lieutenant, captain. However, many Chiefs and Sheriffs have either a Masters or Ph.D. The following are municipal/city police departments in Oregon:

- Ashland Police Department
- Talent Police Department
- Phoenix Police Department
- Medford Police Department
- Central Point Police Department
- Eagle Point Police Department



CCJ students in the CCJ 387 Law Enforcement Test Prep Class take a field trip to Medford Police Department, where Sgt. Budreau gives instructions to Officer Josephson on how to properly pull the dummy during the ORPAT test.

Learn More about every law enforcement agency in the U.S.

For a complete list of law enforcement agencies (state, county, municipal/city) visit: http://Discoverpolicing.org

Miscellaneous Policing Jobs: There are many police jobs that may fall under the jurisdiction of the federal government, state, county, or city or they are civilian positions (see below):

- Bailiff for a Court
- Animal Control or Animal Cruelty Investigator
- Computer Forensics
- Correctional Counselor
- Court Clerk or Court Reporter
- Criminologist
- Private Investigator
- Criminal Justice Administration
- Crime Prevention Specialist
- Protection Officer
- Forensic Accountant, Anthropoligist, Artist, Hypnotists, Nurse, Pathologist, Psychologist, Scientist, Serologist, Toxicologist
- Judge
- Juvenile Probation Officer
- Latent Print Examiner
- Legal Secretary/Paralegal
- Loss Prevention Officer
- Mediator/Negotiator
- Pre-trial Officer

- Security Analyst
- Security Officer
- Social Worker
- Victims Advocate
- Plus Many More ++

Becoming an Officer Example

"I regularly get asked the following question: "Do I have to be a 'real cop'- you know, a cop that drives in a patrol car and answers calls for service, to be a homicide detective?" I understand this question because of a lot of the cop, and detective television shows out there today do not accurately represent this situation. I am so glad the television shows are available because they work as a recruitment tool for many departments. But, I have to disappoint many people, when I give the honest answer…"Yes, you have to be a 'real cop' before you can be a detective." And, I go a step further, in explaining that it can take years, or even decades, to test and promote to a homicide detective." I explain that many smaller departments that do not have many homicides in a given year, have positions open in the detective bureau every two-five years. But, the larger departments that have hundreds to thousands of homicides a year, will only promote every ten-to-twenty years, because even though an officer could promote to the detective bureau within several years, the homicide detective is a glamorous position, therefore one must 'do their time' as a property detective, investigating vehicle burglaries, etc., before there is a retirement and they have proven themselves enough to take that position.

Divisions within Each Agency: Law enforcement agencies, whether they are federal, county, state, or municipal/city, generally have jobs available within two major areas: 1- Commissioned 2- Civilian. **Commissioned** is a term that describes an employee that has been through police training is certified as a police officer and has arresting powers in the state. **Civilian** is a term that describes an employee who has not been through police training and does not have arresting powers.

One of the fantastic parts of policing is the vast array of jobs available. Whether a person is looking in the commissioned or civilian arena, there are a plethora of choices. Once a candidate has gone through the testing process for a particular law enforcement agency and is hired after a certain number of years 'on the road' (length of time required on the road, is determined by each department) the seasoned officer can then test for many tantalizing individual divisions. Every department is different as to those specialized divisions. For example, the Ashland Police Department (APD) in Oregon is a smaller police department and offers its officers a chance to engage in community policing and problem-oriented policing at a one-on-one level, due to its smaller size (thirty-fourty officers).

On the other hand, because of its smaller size, the opportunities for advancement are minimal. Officers with the department can also promote to management. However, APD does have a few detectives but they

do not offer its officers the more more glamorous divisions such as those offered by the Portland Police Bureau (PPB). An officer at PPB can promote to the following divisions: Drugs and Vice, Narcotics, Asset Forfeiture, Youth Services Division, Traffic, Family Services Division, Detective, K-9, Explosive Disposal, Gang Enforcement, Air Support Unit, Rapid Response, and more.

Policing can be multifaceted thereby keeping its officers engaged. Unlike many other professions, the daily job of a police officer, depending on the respective department, can change with divisions. One year a police officer may be writing a traffic citation from a patrol car, and the next year the same police officer may be driving an off-road motorcycle patrolling the local park or riding a mounted horse in the downtown area.

The choice to have a career in policing is enormous, but the candidate must go one step further and start researching to decide what type of policing, and then dig even further to pick which agency and what possible divisions the candidate would like to have the opportunity to join one day.



Jackson County Sheriff's Office demonstrates K-9 patrol procedures during the annual Lock-In Event at Southern Oregon University. During this K-9 class students get to learn how patrol dogs operate and they actually get to see a bite demonstration and learn how the K-9's are trained.

COMMISSIONED- Divisions within a Law Enforcement Agency:

- Detective/Investigations (Persons Crimes- Property Crimes- Homicides, Rape, Robbery, Burglary, Auto Theft, DUII, Domestic Violence)
- Motors
- Narcotics
- Human/Sex Trafficking
- VICE
- Crime Scene Investigation (CSI)
- SWAT
- K-9 (patrol, drug, and search & rescue dogs)
- Crisis Negotiator
- Mounted Unit (horses)
- Air Unit
- Training/Range Master
- Academy/Tac Officer
- Bike Patrol
- Recruiting
- Internal Affairs
- Public Information Officer
- Gangs
- Search & Rescue
- Forest and Fish & Wildlife
- Marine
- Various Area Task Force (usually made up of various law enforcement agencies in the area- to sometimes include federal agencies too)
- Plus Many More ++

CIVILIAN- Divisions within a Law Enforcement Agency:

The civilian areas of each police department are also fascinating. Not every person is meant to go into law enforcement as a police officer. It is a strenuous and stressful job that attracts many but only made for a few elite. However, don't fret; there are many options in the law enforcement realm. Putting on a bullet-proof vest, filling a holster with a semi-automatic handgun, and continually training to be in tip-top condition does not appeal to everyone, so there are still many jobs available in the law enforcement arena. Civilians are the other half of the equation and are a much-needed commodity for every law enforcement agency. When a citizen dials 9-1-1, a dispatcher answers the phone, and that dispatcher is a civilian. When a police officer finds heroin on a suspect and takes custody of it and later books it into evidence at the police station, the evidence technician is the civilian that logs and follows through with the chain of custody for the heroin evidence. Civilians are just as important as the commissioned positions at a law enforcement agency.

Example civilian positions at law enforcement agencies:

- Dispatch/911 Operator
- Records
- Crime Analysis
- Forensic Unit/CSI
- Training
- Fleet Management
- Support/Facilities
- Human Resources
- Operations Support Unit
- Recruitment Coordinator
- Volunteer Coordinator
- Administrative Support
- Plus Many More ++



Students at Southern Oregon University with a major in Criminology and Criminal Justice take the CCJ 321 CSI and CCJ 462 Forensic Criminal Investigation classes and practice crime scene investigation skills for a future career as a Crime Scene Investigator

Contact with Outside Agencies: It takes a team to accomplish policing. One federal, state, county, or city police agency cannot do it all alone. In order to succeed the agencies must work together. Whether a narcotics division works with the ATF or an entire SWAT team comprised of officers from various city and county departments, the team concept in policing is unwavering.

Oregon has a lot of examples of coordination between different agencies to make things happen. For example, in Jackson County (Oregon) there is The Medford Area Drug and Gang Enforcement (MADGE) Unit; there was a need in Jackson County, to work towards controlling the gangs and drugs in the valley, and one department could not complete the mission alone. Therefore, MADGE was created to engage the following agencies:
Medford Police, Ashland Police, Central Point Police, Jackson County Sheriff's Office, Oregon State Police, Jackson County Community Corrections, Federal Bureau of Investigation, Homeland Security Investigations Division, and the Oregon Army National Guard. Not only does the job get done more efficiently and more effectively but also the communication that occurs when nine different agencies converge is awe-inspiring.

In the News: MADGE is proactive in gang intelligence and gang prevention. In 2015, MADGE and Medford Police Department investigated 247 gang-related crimes; a strong majority of these crimes were graffiti cases. With the continued help of CSO Todd Sales, this graffiti is removed or painted over with the assistance of youth offenders completing their community service hours, for their part in graffiti. In 2015 there was a 140% increase in gang-related aggravated assault cases, from 5 in 2014 to 12 in 2015. Current numbers of documented gang members have leveled off from past years. In 2015, MADGE and Medford Police have identified 315 documented gang members and associates that participate in organized crime activities. This information is compiled for the furtherance of an investigation involving organized criminal gang activities http://Madge Task Force Retrieved from http://www.ci.medford.or.us/Page.asp?NavID=2400 i City of Medford (2018, September 23). Madge Task Force Retrieved from http://www.ci.medford.or.us/Page.asp?NavID=2400

Finally, once one enters the policing field, the contacts made daily are numerous.

An officer who works for a city police department can have contact with:

- Jails/Correction/Detention Facilities and Employees
- Prisons
- Prosecutors Office
- Defense Attorneys
- Judges and Lawyers
- Various Social Services
- Educational Entities

These contacts are precious to every police officer and without them; the officer could not complete their job effectively.

TIFFANY MOREY

Learning Objectives

After reading this section, students will be able to:

- Describe the parts of the written test
- Discuss why a candidate must study, study, study, for the oral board interview
- Explain the type of questions on an oral board interview
- List the different types of a physical agility test
- Explain why departments are starting to utilize the assessment center test
- Recognize why a candidate's background is the most important part of the testing process
- Describe why candidates fear the psychological evaluation
- Understand the B-Pad Video Test

Critical Thinking Questions

1. What is on the written test?
2. How should a candidate study for the oral board interview?
3. What is the best way to prepare for the physical agility test?
4. How can a candidate prepare for an assessment center?
5. What is the best way to start preparing for the background investigation and interview?
6. Does the psychological evaluation only check if a candidate is psycho or crazy?

History of Recruitment and Hiring

What History? 'Nil' For lack of a better word, would describe the history of recruitment and hiring of new officers. Before the 1960s, as long as the candidate was a white male, had a heartbeat, and there was an opening for a cop, the job was most likely his. Women and officers of color were all but non-existent on the force. Women were only allowed into the 'boys only club' if they wore a pencil skirt and fit a prescribed role consistent with being a woman. In some departments, women were allowed to work in the detective bureau and interview children victims, because women supposedly talked to children better than men, because of their 'maternal' instincts. These stereotypes continued in policing towards women and minorities until new laws forbidding such behavior, made their way into the scene. With new employment laws passed between the 1960s to the late 1990s, many doors opened for women and minorities.

Recruitment and Hiring Example

When I was in the recruitment division of my police department and also as a professor at a university, I continually saw future police candidates unprepared for the Law Enforcement Testing Proces, a.k.a. The LET Prep For some reason, candidates assumed that if they had their associates, or bachelor's degree, they did not need to study and prepare for the LET Prep. Unfortunately, that could not be farther from the truth. Just like a high school student getting ready to enter college, needs to take the ACT or SAT, that student must still study and prepare for those tests if there is to be a successful outcome. Due to the importance and multifaceted LET Prep, it is even that much more critical that the candidate take the time to train and prepare. When asked how much time should be spent studying and preparing? My response was always "as much as you can!" But, in reality, the candidate should start preparing a minimum of six months before the written test (which is the beginning step of the LET Prep). A good guide is one hour a night. Also, I recommend studying appropriately for each part of the LET Prep. For example: The Oral Board Interview should be prepared for with the candidate actually speaking aloud the answers to pre-determined questions (such as: "Tell us about yourself"), the candidate should video themselves to playback, watch and learn from, and if at all possible the candidate should ask friends and family to sit on a 'mock oral board panel' and the candidate should answer questions aloud and in front of the panel. The more realistic the training, the better prepared the candidate will be.

The Law Enforcement Testing Preparation (LET Prep)

One of the most challenging entry-level testing processes in the United States is for the position of police officer. A typical 'regular' job, such as a cashier at a store, requires the candidate to fill out a job application, then go onto a job interview, and poof, they are hired! There is a good reason why the LET Prep is so difficult and thorough. Unlike a cashier, a police officer, once hired and trained, becomes the beholder of great power with authority to take away a person's freedom all under the protection of the government to shoot and possibly take a life, when a life is threatened. Officers have the authority to take away a person's rights and freedoms and this type of power should not be given to anyone with just the flick of a coin, the testing process should be rigorous and thorough. Therefore, with those facts, the law enforcement testing process should be thorough and rigorous, to ensure the right candidate is hired.

When thinking of the LET Prep, it can help to compare it to the ACT, SAT, National Football League Training Camp, and military boot camp, all combined. The best way a new candidate can ensure failure is to forego studying and go into the process unprepared.

Written Test -LET Prep

The written test is tough! It can be compared with the ACT and SAT and some parts are even a bit more difficult! Eighty percent of the candidates that take the written test fail! The written test has the following types of questions:

- Reading Comprehension
- Vocabulary
- Spelling and Grammar
- Observation/Memory
- Deductive Reasoning/Inductive Reasoning
- Spatial Orientation
- Math
- Essay/Incident Report Writing/Written Communication
- Analytical Ability

Every law enforcement department is different, although generally there are two basic ways departments administer the written test. The first is through an online testing service. The candidate registers online to take the test and then will go to a pre-determined location (such as a library) with a proctor, to take the written exam on a computer. The candidate can then send their exam score to a participating law enforcement agency, to which the candidate is applying. The second is through the law enforcement agency itself. The agency the candidate is testing for will post the written test date, and the candidate will respond to the agency and take the written test. Most agencies score the written test on site, and the candidate learns right there and then if they have a passing score to move forward in the testing process. Every agency also differs concerning the passing score. Most agencies require at least a seventy percent to pass the written test and move on in the hiring process. Although there are no set rules as to the passing score, some agencies require seventy-five or eighty percent to pass the written test, it just depends on the individual agency.

The written test is tough! There are no shortcuts for studying for it, except to sit down and put the time in. The best way to study is take one subject at a time, study one hour a night, and follow up with practice tests of the respective subject. List the areas of concern after grading the practice tests and move onto the next subject. After all subjects have been studied, go back and spend more time focusing on the areas of concern. A reasonable period needed to study for the written test is generally six to twelve months.



Hiring Our Heroes
Senior Airman Alfonzsa Jackson of the 127th Maintenance Squadron speaks with Trooper Walter Crider of the Michigan State Police during the Hiring Our Heroes job fair at Selfridge Air National Guard Base, Mich., May. 18, 2013. Jackson, a six-year member of the Air National Guard and recently a member of the 127th MXS Aerospace Ground Equipment crew, attended the job fair to explore possible career opportunities in law enforcement. More than 300 were in attendance visiting with representatives of more than 50 employers. (U.S. Air National Guard photo by TSgt. David Kujawa.)

Physical Agility Test- LET Prep

The physical agility test is given three different ways, depending on the department;

#1-State Physical Agility Test: In Oregon, for example, most of the departments utilize the ORPAT or Oregon Physical Agility Test. The ORPAT is a job sample physical ability assessment process. The goal is to assess an entry-level police officer candidate in the physical demands a police officer is likely to replicate during routine duties.

- Part One- Mobility Run: 1235 Foot Obstacle Run Where the Candidate Demonstrates Mobility, Agility, Flexibility, Power, and General Physical Endurance
- Part Two- Push Activity, Controlled Falls, Pull Activity
- Part Three- 'Dummy' Drag, 165-pound 'Dummy' is Dragged 25 Feet



During the CCJ 387 Law Enforcement Test Prep Class, students took a field trip to Medford Police Department, where Sgt. Budreau assisted the students with the various portions of the ORPAT.

#2-Physical Agility Test: A department will hire various testing agencies that have developed physical agility courses, to set up and test entry-level police candidates.

- A description of a 'dummy' suspect is given (this 'dummy' just committed a crime)
- The candidate runs through various obstacles; four-foot cyclone fence jump, window crawl through, one-hundred to three-hundred yard dash, and six-foot fence jump
- The candidate picks the suspect 'dummy' out of a lineup and drags the one-hundred+ pound suspect 'dummy' twenty+ feet

#3-Military Physical Fitness Test

- Push-ups: a certain number, in a specified amount of time
- Sit-ups: a certain number, in a specified amount of time
- Pull-ups: a certain number, in a specified amount of time
- Two-mile run: in a specified amount of time (times are dependent on sex and age of candidate)

Just as with the written test, the physical agility/physical fitness test must be prepared for. All of the above three tests require the candidate to work out and perform various physical fitness activities for a specified period of time before the testing process in order to ensure the candidate is in proper physical condition for the test. It is also the time for the candidate to realize that physical fitness must be a career-long decision in law enforcement, and this is the perfect time to start with the mindset of keeping physically fit as a lifestyle.


INSTRUCTOR


BURY MY HEART AT WOUNDED KNEE

Officers with the Ashland Police Department teach a defensive tactics class during the annual Lock-In Event. This is a great time for SOU CCJ students to learn the tactics officers train in during the police academy and every year during defensive tactics recertification.

Oral Board Interview- LET Prep

The oral board interview is one of the least prepared for testing portion of the LET Prep since the questions for an entry-level police officer candidate are very basic:

- Tell us about yourself?
- Why do you want to be a police officer?
- What have you done to prepare for the job?

There often is the feeling by candidates, that the answers to the above questions are a given and known, therefore why would one need to study or prepare for such easy questions? However, that way of thinking could not be further from the truth. The oral board interview consists of a table with two-to-four police department represenatives, usually a police officer, possibly a volunteer police department representative, and one or two supervisors on one side of the table, and one chair placed in the center of the room (or the opposite side of the table) for the candidate to sit. This set up is meant to place the candidate on the spot and cause some stress to occur. This will help the panel members see how the candidate responds to stress. The reason behind this is because the job of a police officer will entail at times, stressful situations and being the center of attention when citizens will look towards the police officer for guidance. Therefore, this is one way to gauge how the candidate or future police officer will respond in a stressful situation.

Successful candidates learn positive ways to prepare for the oral board interview by taking college/university classes, obtaining study guides, writing out answers to the obvious questions, memorizing answers, and conducting practice sessions with family and friends where the questions and answers are read aloud.



Paul Donaldson, right, Tallahassee Police Department policeman, speaks to Pamela Cherry and Toccora Ferguson, contract custodians, during the Veterans career fair Oct. 19, 2017, at Moody Air Force Base, Ga. Over 55 potential employers were present to network with attendees, compete for hiring opportunities and schedule interviews

Oral Board Story

I have been a panel member on dozens of entry-level police officer oral board interviews. I was always amazed at how unprepared the candidates were. Once during one oral board interview one candidate, was asked: "Tell us about yourself," to which the candidate began by rolling his eyes towards the ceiling while he chomped on his gum and proceeded to say: "hmm…..well……hmm" and then he put his right hand into his right pant's pocket and began jingling his keys. The room was quiet other than the panel members' thoughts of how this question could have stumped the candidate. The candidate proceeded by swallowing loudly and without making eye contact with any of the panel members said: "I am in college and I just broke up with my girlfriend and … hold on…let me think…I know there was something else…could you repeat the question?"

At this time I put him out of his misery and moved onto the next question. He, of course, continued to flail with each question and at the end, he failed the oral board interview. I do not know if he would have made a good police officer or not, but I do know this…he did not prepare for his oral board interview. I can almost guarantee (because I have seen this from many other candidates as well) that he knew we would ask that particular question, but he figured, why did he need to study that question? He knew all about himself, heck he grew up with himself, and he often spoke to his friends and family about himself regularly so of course, he would not have any troubles rambling

off all the amazing things he had done in his life. Unfortunately, he did not figure on one big thing; STRESS! Stress and nerves cause the most confident of us to freeze and stumble on our words.

Therefore, the most poised of us must prepare a handwritten (or typed) pre-determined answer to many such questions, then create study cards (or notes in a smartphone) of the appropriate answer and finally study, study, and study more, and memorize! That way when the actual stress hits and the nerves take over, the immediate response will be to go back to what was studied. Don't take my word for it. Look it up! It is actually a favorite tool and used by police officers regularly in their weapons and defensive tactics training as well. Can you think of a more stressful, nerve-racking situation, than having a person threaten or point a weapon at you? The way most officers begin to respond to such stressful situations is they revert unknowingly to their training.

A second example of a female candidate on an oral board interview; a common question on the oral board panel has to do with knowledge of the department the candidate is testing for. As I read off the following question to the female candidate, her eyes opened as big as a flying saucer. "Who is the Police Chief of this department?" As the clock ticked away the seconds, her mouth continued to slowly open and eventually it completed the fish open mouth look. She, of course, did not know the answer. As the questions continued, it became apparent that she was going to fail as well, due to her lack of studying. My recommendation… if you want to work somewhere, you really should know a little bit about the department, especially who the top cop is!

Assessment Center/B-Pad- LET Prep

Assessment centers are not new to police department testing. However, they have generally been utilized for management promotional testing, when a police officer tests to be a sergeant or sergeant tests to be a lieutenant. With successful results in the previous arena and with the importance of hiring the best candidate, human resources and recruitment divisions have turned towards assessment centers and B-Pad Video Assessment, as an additional layer of testing in the LET Prep, to ensure hiring of the correct candidate.

Assessment centers are practical testing situations, where the candidate must 'act' out their response. It is a time for the testing agency to see how the candidate might respond in different situations. One of the most common assessment center utilized at the entry police candidate level is the group assessment center. This group assessment center can look very different depending on the agency hosting the assessment, but the general framework is the same for all. For the group assessment center, eight-twelve candidates will enter the testing facility and sit around a table. The proctor will then give the candidates an 'issue' to solve. Example issue: "There have been a large number of bicycles stolen from the university in the last three months. What can we do to stop this?" There will be two-four evaluators at a table adjacent to where the candidates are sitting, and the evaluators watch and listen while the candidates try and solve the issue. It is impressive how quickly candidates lose their temper, become rude to other candidates, talk over candidates, or more positively, how candidates work with other candidates, compliment real ideas, and work quickly towards a viable solution.

B-Pad Video Assessments are completed generally with one candidate at a time. A candidate enters a room alone, and a proctor shows the candidate a projector screen and a video camera. A video camera records the candidate. The proctor starts the video camera recording and leaves the room. Once the video starts playing, the candidate must respond towards the screen, and 'act' out whatever the candidate feels is the appropriate answer to the situation. One such example of the scenario played on the video was of a mentally challenged individual that was asking to return to Mars. The individual in the video had a knife. The candidate had

to talk and act out what should be said to the mentally challenged individual in the video. The recording of the candidate is then watched at a later time by a panel of evaluators from the department and graded accordingly.

Hiring Example

Candidates are often terrified when it comes to the psych eval and the medical physical. One common question I usually get is: "I am currently taking a prescription of an anti-depressant, prescribed by my family doctor because I am bi-polar. Will this keep me from being a police officer?" My answer is always, "I do not know." But I further explain that this is not a decision made by the police agency itself, instead the recommendation to hire or not, is made by the psychlogist (who evaluated the psychological evaluation) and the medical doctor (who evaluated the medical/physical). Both doctors will look at the entire psychological and medical profile of the candidate and together make a recommendation to the hiring agency on whether or not the medication and reason for the use of the medication could be an issue.

Background Investigation-LET Prep

The background investigation is probably one of the most critical portions of the testing process. After the candiate passes the written, phyiscal fitness/agility, oral board interview, and assessment center portions of the test, the candidate is given a background packet to fill out. The packet is very thorough and asks the candidate everything from where the candidate went to school, worked, prior drug use, prior arrests, prior illegal actions/criminal activity (even if not arrested). The background investigator can spend days to weeks, investigating the candidate to ensure honesty and a good moral compass. The biggest issues in this portion of the testing, centers around prior drug use and criminal activity. Unfortunately, most agencies do not list their requirements on past drug use openly. A lot of agencies utilize the FBI's prior drug use police. However, most agencies hold the right to make their own decisions for each individual candidate.

Psychological Evaluation- LET Prep

The psychological evaluation (psych eval) is one of the least understood of the hiring process. When asked, a majority of the candidates openly state they have nothing to worry about since the psych eval only tests for psychos, but they will also admit that they quietly fear the psych eval since it is the unknown that causes the most fear. There is no way to study for the psych eval. The best advice given is to tell the truth and this holds true for every part of the L.E.T. Process. However, do understand that the psych eval is not just looking for those candidates with mental illnesses, it is also looking for those that will not make good police officers or have aggression issues or controlling issues to name a few.

Medical Examination- LET Prep

The state where the candidate is going to work as a police officer will determine the depth at which the medical/physical is completed. Possible testing that could occur during this phase of the testing process is:

- Blood/urine/hair drug tests
- Hearing test
- Eye examination
- Lung capacity

- EKG
- Treadmill stress test
- Chest X-Ray
- Cholesterol test
- Various other blood tests

Chief or Sheriff Interview- LET Prep

Once a candidate has passed the written test, physical agility test, oral board interview, group assessment center/B-Pad assessment, and background investigation, if the department is still interested in the candidate, the candidate is made a 'conditional offer of employment.' In laymen's terms, it means the department is interested in the candidate, but still wants the candidate to go through the psych eval and medical physical. Due to the intrusiveness of those two tests and results, the department must prove they are interested in the candidate enough to make a conditional offer of employment, all of which is dependent on the results of those two tests, of course.

If the candidate shows no issues with the psych eval or medical/physical, the candidate is then called in to the Chief or Sheriff's office (depending on the department) for an interview. After the interview and all of the above testing areas are finished, the Chief or Sheriff will most likely call a meeting with the background investigator and the psychologist who completed psych eval and go over the final candidates one by one. From this meeting a list is created of whom the department will hire. An 'informal' type of interview is informal in nature since the 'top cop' (a.k.a. Chief or Sheriff) is looking to meet a potential new police officer.



Photos above, from left to right: Medford Police Department patrol vehicle, Jackson County Sheriff's Office K-9 patrol vehicle, and Medford Police Department BearCat SWAT vehicle. Law Enforcement agencies across Oregon participate in the Annual Lock-In Event. The above vehicles parked these vehicles for viewing at Lock-In.

Mentoring and Retaining

All too often, departments place everything into the LET Prep, and then after the candidate is offered the job, accepts, and starts the dream job of a police officer, this new officer can be lost and forgotten in the shuffle. Departments must ensure that mentoring and retaining occurs. Mentoring can be completed through proper supervision from the top down and ensuring first-level supervisors are responsible for those they supervise. A good supervisor can make the difference between an officer disliking or loving their job.

TIFFANY MOREY

FBI Past Use Drug Policy

It does matter what you do in school! If you want a career in law enforcement make sure you understand the past use drug policy of law enforcement agencies. Many departments follow the published FBI past drug use policy. For more information see the FBI's past drug use website link below:

https://www.fbijobs.gov/working-at-FBI/eligibility

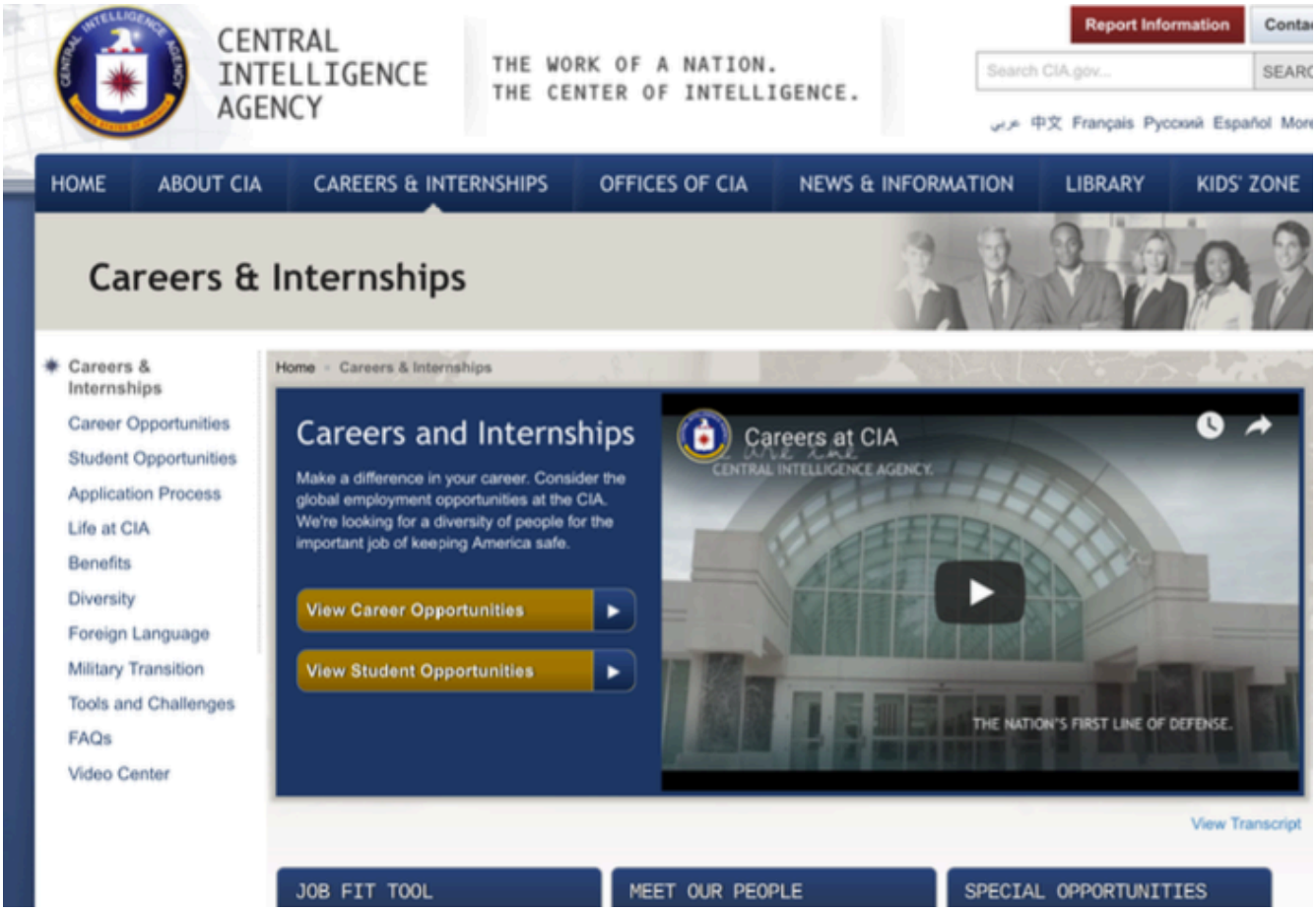
AND FOR MORE INFORMATION ABOUT THE REQUIREMENTS FOR AN FBI SPECIAL AGENT VISIT THE FOLLOWING WEBSITE:

https://www.fbijobs.gov/career-paths/special-agents

VISIT THE WEBSITE BELOW FOR INFORMATION ON BEING A

CIA SPECIAL AGENT:

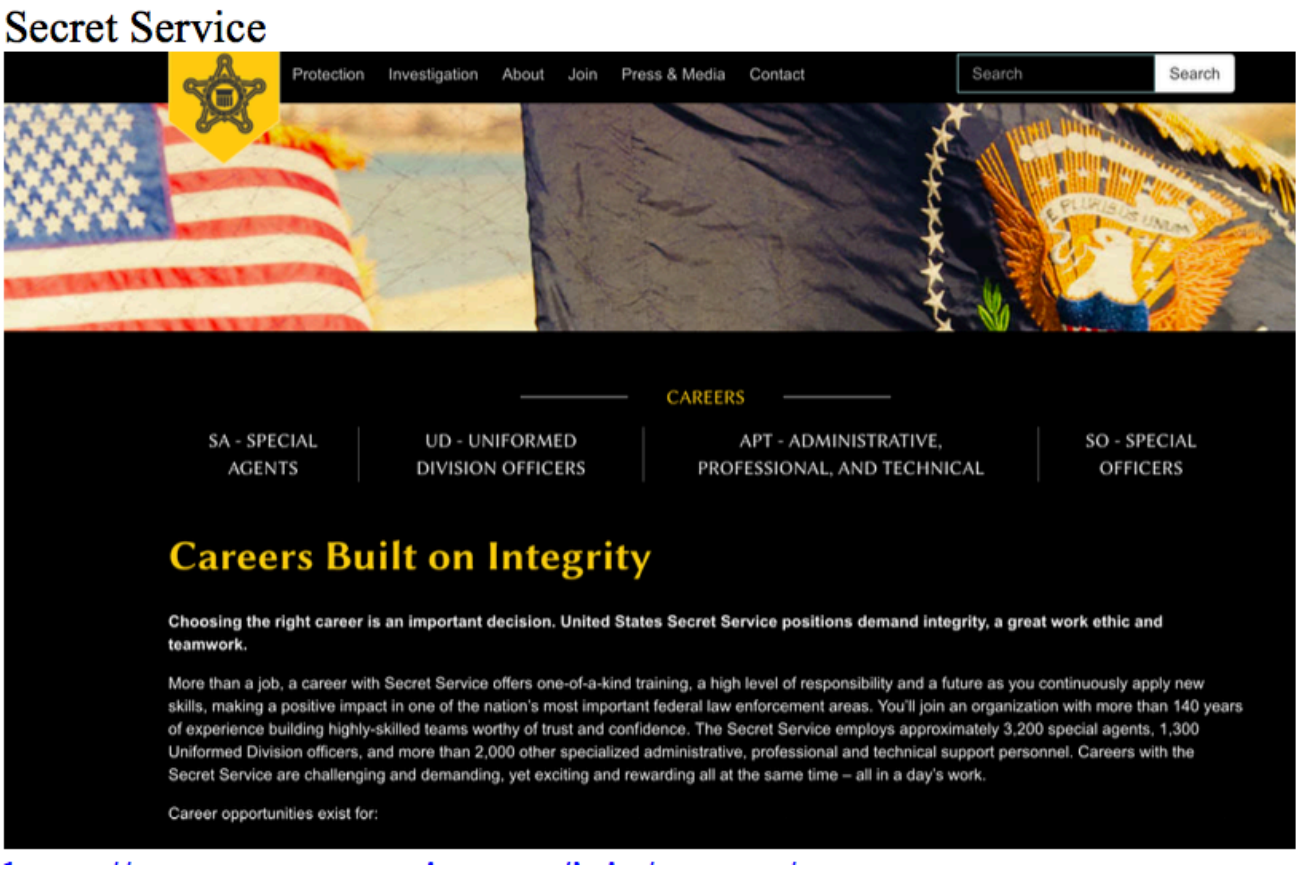
https://www.cia.gov/careers



CIA

VISIT THE WEBSITE BELOW FOR INFORMATION ON BEING A SECRET SERVICE SPECIAL AGENT:

https://www.secretservice.gov/join/careers/



Secret Service

VISIT THE WEBSITE BELOW FOR INFORMATION ON BEING A DEA SPECIAL AGENT:

https://www.dea.gov/careers



DEA

VISIT THE WEBSITE BELOW FOR INFORMATION ON BEING A TROOPER WITH THE OREGON STATE POLICE:

https://www.oregon.gov/osp/RECRUIT/pages/index.aspx

State Departments Recruitment and Hiring Websites



Oregon State Police

VISIT THE WEBSITE BELOW FOR INFORMATION ON BEING A DEPUTY WITH THE JACKSON COUNTY SHERRIF'S OFFICE:

http://jacksoncountyor.org/sheriff/General/Employment-Opportunities

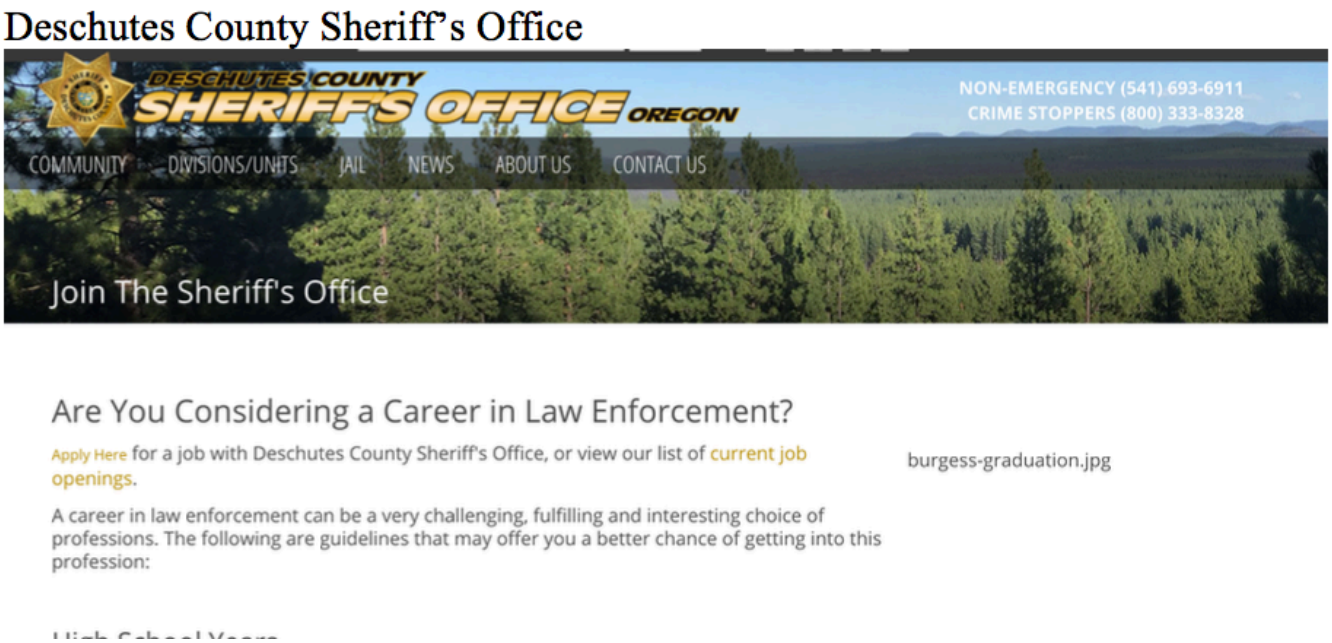
County Departments Recruitment and Hiring Websites



Jackson County Sheriff's Office

VISIT THE WEBSITE BELOW FOR INFORMATION ON BEING A DEPUTY WITH THE DESCHUTES COUNTY SHERIFF'S OFFICE:

https://sheriff.deschutes.org/about-us/join-the-sheriff%27s-office/



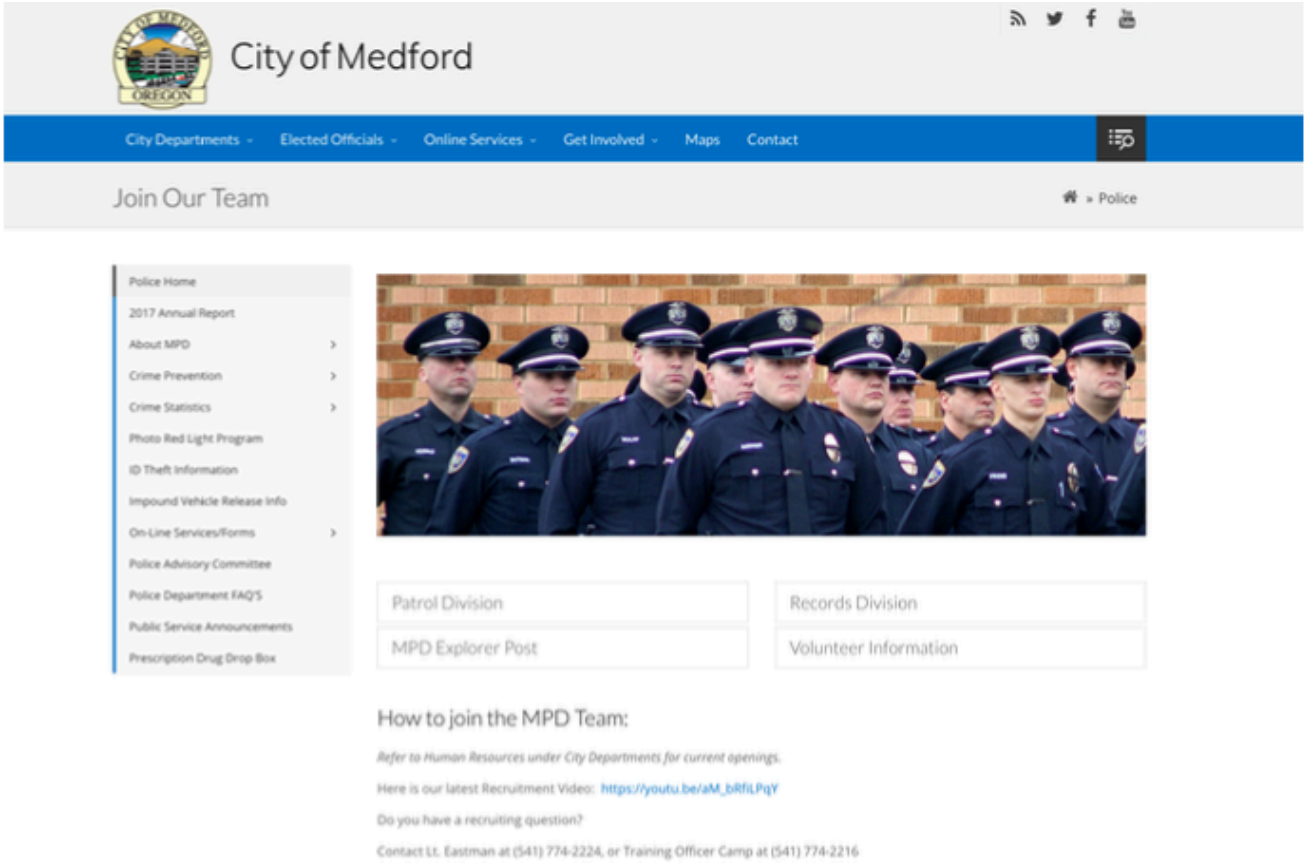
Deschutes County Sheriff's Office

VISIT THE WEBSITE BELOW FOR INFORMATION ON BEING A POLICE OFFICER WITH

THE MEDFORD POLICE DEPARTMENT:

http://www.ci.medford.or.us/Page.asp?NavID=1446

City Departments Recruitment and Hiring Websites
Medford Police Department

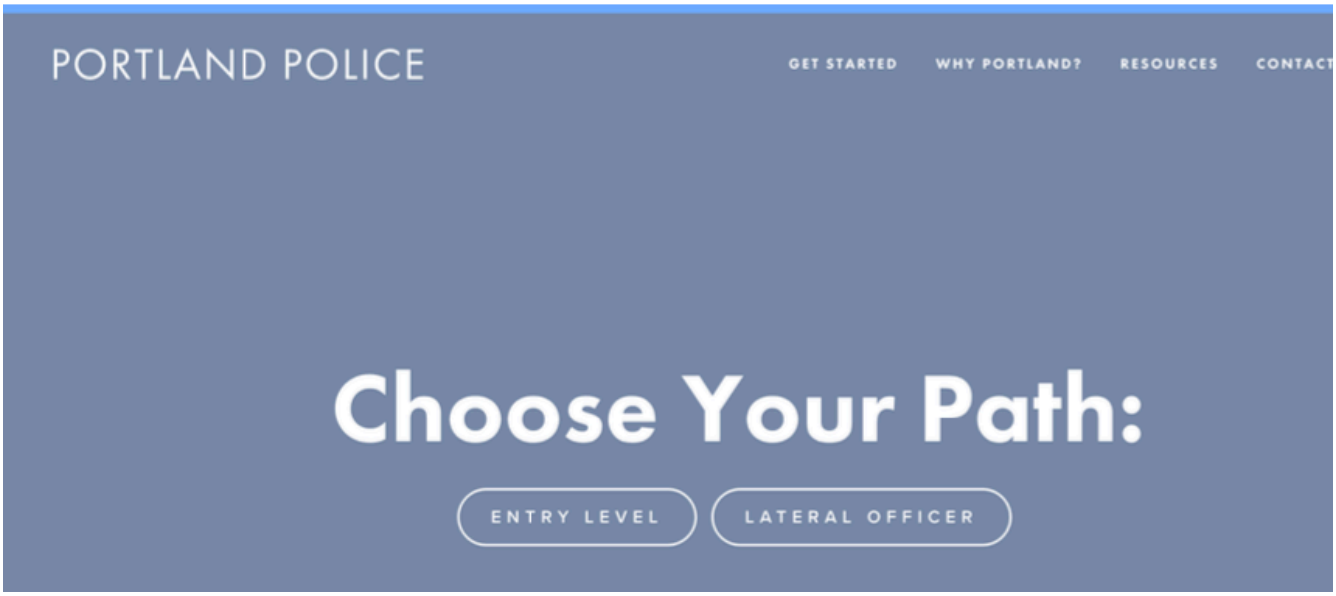


Medford Police Department

VISIT THE WEBSITE BELOW FOR INFORMATION ON BEING A POLICE OFFICER WITH THE

PORTLAND POLICE BUREAU:

https://www.joinportlandpolice.com/start



Portland Police Bureau

TIFFANY MOREY

Learning Objectives

This section will cover police misconduct and accountability. After reading this section, students will be able to:

- Discuss the different corruption types in policing
- Explain the difference between a meat eater and a grass eater
- List the different ways an officer engages in noble-cause corruption
- Describe how a police officer uses stereotyping on the job
- Discuss the importance of having a reliable internal affairs division/bureau
- Explain why excessive use of force is difficult to quantify

Critical Thinking Questions

1. How are grass eaters and meat eaters different?
2. What is noble cause corruption?
3. Why are there misunderstandings of police accountability?
4. What are the functions of an internal affairs division/bureau?
5. What happens if a police department shows a pattern of excessive use of force?

Corruption Types

Police officers have a considerable amount of power. With one fail swoop, an officer can take a person's freedom away. That is a tremendous amount of power. An officer is also given the authority to carry a gun and for protection of either the officer or a person, take the life of a citizen as well. These decisions are

dangerous, and unfortunately, at times there are officers who not only overstep their boundaries but jump directly in the pit of corruption.

While the media paints a picture that most police officers are corrupt, this could not be further from the truth. The Bureau of Justice confirmed that only 0.02% of the police officers in the U.S. engage in some type of corruption. While the media makes money selling stories, the police story that starts the five-o'clock news is not always true. When the media covers a police shooting for instance, the investigation has not been completed, therefore the only answer the police department will have for the media is 'no comment.' A cover-up then comes to mind; however, when the invesitgation is completed weeks to months later, the media is not always as interested in the story, especially if there was no police corruption. Even more importantly it takes two-years to basically train a new police officer. The same police officer then continually trains every month to ensure the knoweldge of current laws and many other tactics are up-to-date. Unless one is a trained commissioned law enforcement officer, there is no way the public, nor media can truly understand why an officer acted and responded the way he or she did, unless they experienced the exact same circumstance.

No matter the profession, whether it is an actor, a cashier, a president of a non-profit organization, or a police officer, corruption can occur. The focus on law enforcement is more dramatic due to the glarmour of the type of work performed. Either way, corruption should not be condoned and if it does occur, the reaction must be swift and stern. Those in law enforcement hold a badge which grants the carrier the authority to take away a person's rights therefore, the authority that comes with the badge should NEVER be taken for granted.

Grass Eaters

In 1970, The Knapp Commission coined the terms '**meat eaters'**and '**grass eaters'** after an exhaustive investigation into New York Police Department corruption. Police officers that were grass eaters accepted benefits. Whether it was a free coffee at the local coffee shop, fifty percent off lunch, or free bottled water from the local convenience store, these cops would take the freebie and not attempt to do the right thing by explaining why they cannot accept the benefit and then pay for the benefit. By accepting benefits, the officer was, in turn, agreeing that whoever gave the benefit, i.e., coffee, or lunch, etc., was to receive something in return. What if the coffee shop wanted the officer to patrol their shop every morning between the busy hours of six and seven a.m.? Would that be fair to other coffee shop owners that did not give free coffee to the officer? [1]

Meat Eaters

These officers expected some tangible item personally from those served, in order to do their job. Whether it was money 'shakedown' to ensure a convenience store was not robbed, or the officer felt there was nothing wrong with stealing from a drug dealer during a drug raid; 'no one would notice a pound of cocaine missing, right?' These officers felt entitled and were aggressive in making sure they got what they thought was theirs. If a person has the lifelong goal of being a police officer, then that same person will want to protect the innocent from those criminals that aim to do them harm.

Noble Cause Corruption

Noble-cause corruption is a lot more commonplace then many think. Many officers work twenty-five years and may never see another cop steal something, but they will see noble-cause corruption. Most officers join the force to make the world a better place in one way or another. While officers understand they cannot

1. Caldero, M. A., Dailey, J. D., & Withrow, B. L. (2018). *Police Ethics: The Corruption of Noble Cause* (4th ed.). New York, NY, USA: Routledge/Taylor and Francis.

solve everything alone, they do think they can make a difference. The **noble-cause** is the goal that most officers have to make the world a better and safer place to live. "I know it sounds corny as hell, but I really thought I could help people. I wanted to do some good in the world, you know? That's what every cop answered when asked why he became a police officer. [2]

Officers sign on and get hired wanting and striving to do the right thing. However, it is a slippery slope that the officer continually slides on from the academy, through field training, and on into the deeper parts of a police career.

Slippery-Slope Model of Noble-Cause Corruption

1. **"Forget everything you learned in training (school), I'll show you how we really do it out here."**This what an officer often first hears from a TO (training officer). The statement is only superficially about the lack of utility of higher education. What it is actually about is loyalty and the importance of protecting the local group of officers with whom the officer works.
2. **Mama Rosa.** It looks like a free meal. This is not to test willingness to graft, but whether an officer is going to be loyal to other officers in the squad. It also serves to put officers together out of the station house.
3. **Loyalty Back-up**. Here, an officer is tested to see if he or she will back up other officers. This is more involved because officers may have to 'testify' (give false testimony), dropsy (remove drugs from a suspect during a pat-down and then discover them in plain sight on the ground), the shake (similar to dropsy, only conducted during vehicle stops), or stiffing-in a call. These are like NC (noble-cause) actions, and may indeed by NC actions, but their purpose is to establish loyalty.
4. **Routine NC (Noble-Cause) Actions Against Citizens**. Magic pencil skills increase penalties by shifting the crime upwards. Protect fellow officers with fictitious chargers. Construct probable cause. Illegal searches of vulnerable citizens.

I am the Law. This is the belief that emerges over time, in which officers view what they do as the right thing to do. This is the practical outcome of the old adage 'power corrupts, and absolute power corrupts absolutely.' A police officer does not have absolute power, but he or she has the backing of the legal system in almost all circumstances. Behavior can become violent, as with the Rampart CRASH unit." [3]

Therefore, every officer can start out wanting to save the world somehow, but when the real-world job of an officer starts to take hold, it is a problematic grasp to release.

2. Baker, M. (1985). *Cops: Their lives in their own words*. New York: Pocket Books.
3. Withrow, B.L., Dailey, J.D., & Caldero, M.A. (2018). *Police ethics: The corruption of noble cause.* New York: Routledge.

TIFFANY MOREY

One of the most controversial issues in regards to policing in the 21st century are police shootings. The 'police shooting' topic causes much debate and is always in the headlines of every media outlet when it occurs. After an officer-involved shooting, citizens want answers, rightfully so. Unfortunately, police departments cannot immediately provide those answers. The all too familiar 'no comment' or 'we do not have any information at this time' or only providing limited facts, does not appease saddened or angry family members or the general public.

Police departments cannot comment because they may genuinely not know the entire story. Police unions are there to protect officers, and the officers need time between the shooting and when they are required to write the police report on the incident and answer questions about the shooting for a variety of reasons. Therefore, directly after the shooting, when the media or the general public wants answers, there might not be any answers known to give. However, this immediately reads as the department has something to hide. Whether that is true does not matter in the eyes of many. An investigation must occur before the department can make a formal statement, and release body camera or dash mounted camera footage and information about the shooting. All too often though, this information comes too late.

One case that signifies this all too well is the officer-involved shooting and killing of Michael Brown, in Ferguson, Missouri. [1]

In the News: Michael Brown- Ferguson Missouri – Officer Involved Shooting

https://www.youtube.com/watch?v=t2104nz_h5A

1. Department of Justice. (2015). *Department of Justice report regarding the criminal investigation into the shooting death of Michael Brown by Ferguson, Missouri police Officer Darren Wilson*. Washington, DC: Department of Justice.



Ferguson Police Department Michael Brown Crime Scene

The riots that occurred during the aftermath of the incident resulted in numerous arrests, millions of dollars in property damage sustained, and almost insurmountable damage to the relationship between police and young Black males. The Ferguson Police Department, where the officer is employed who shot and killed Michael Brown, had many issues; however, much of the information that the media released shortly after the shooting was later investigated and found incorrect.

Police officer involved shootings are very serious. Officers train and qualify quarterly with their duty firearms and regularly review what is required to use deadly force. After every police-involved shooting (use of deadly force), once the investigation is complete, a grand jury or coroner's inquest (depending on the jurisdiction and outcome of the shooting) must take place. There is a trial where the actions of the officer involved are examined to determine if the use of deadly force was justified. The officer describes in detail the shooting and why the officer felt it necessary to use deadly force. Witnesses take the stand and tell what they heard or saw. Finally, a jury decides whether or not the use of deadly force was justified. If the shooting is justified, the officer will not face formal charges for the use of the use of deadly force. However, if the shooting is determined to be unjustified, the officer can face felony charges, up to the murder. Generally, at this point, the officer is fired from the respective police department, and the prosecutor's office files charges against the officer. For instance, at the Portland Police Bureau, any use of deadly force goes through eight different reviews, in order to determine if the officer was justified.

In the News: Officers that utilize deadly force (such as a police shooting) once the investigaiton is completed are required to go through a grand jury or coroner's inquest (depending on the state). This process is similar to any criminal trial. If the jury finds that the officer was NOT justified (in their decision

to use deadly force) that officer is generally fired by their police department and then can face murder or manslaughter charges. For example: Chicago police officer found guilty of murder https://www.cnn.com/videos/us/2018/09/05/jason-van-dyke-trial-orig-bk.cnn

TIFFANY MOREY

Police officers have the power to use force if deemed necessary. If an officer uses more force than required for the situation, this brings up many red flags. The Violent Crime Control and Law Enforcement Act of 1994 authorized the Civil Rights Division of the U.S. Department of Justice (DOJ) to initiate civil actions against policing agencies if the use of force utilized is excessive or constitutes a pattern of depriving individuals of their rights. [1]

One additional issue in police use of force situations is that it is difficult to measure. There are many types of force police can use. The force utilized varies from going hands-on to pepper spray, taser, ASP baton, control holds or takedowns, to deadly force. Every situation is different because it involves human beings and can be interpreted differently from those involved to those standing on the side-lines.

Vehicle Pursuits

Vehicle pursuits have dramatically changed over the last decade. It used to be commonplace for officers to engage in several vehicle pursuits during one-shift. Officers would get in a vehicle pursuit for many reasons, stemming from locating a rolling stolen vehicle to a driver failing to stop after running a stop sign. Vehicle pursuits have at a minimum, two, four-to-five thousand-pound deadly weapons (a.k.a.= the vehicles) that are driven recklessly (most times), chasing one another. The morgue has seen large numbers of fatalities due to vehicle pursuits. Victims range from an innocent person in a crosswalk at the wrong time when the vehicle police pursued, hit the victim, or the innocent person driving across an intersection with a green traffic light struck while the pursuing vehicle runs a red traffic light. There are too many sad stories of the innocent victim killed because the police decided to pursue a vehicle with lights and siren and the pursuing vehicle refused to pull over.

Because of the many senseless fatalities, many police departments have updated their vehicle pursuit policies and procedures. Although the policies of each department do differ in minor areas, most departments have chosen to only approve a vehicle pursuit in dire situations. Such a situation fitting that

1. DOJ. (March 2, 1998). Justice Department Consent Decree Pushes Police to Overhaul Operations, *Pittsburgh Post-Gazette*, C-1.

description would be if the driver of the fleeing vehicle were actively engaging in behavior that was placing other citizens in immediately dire harm.

TIFFANY MOREY

Human beings are infamous for stereotyping. A first impression when meeting a new person takes only seven seconds. According to Pitts (2013), smiling, shaking hands, introductions, speaking clearly, maintaining eye contact, looking smart, and not sitting down, are sure-fire ways to ensure a more positive stereotype; however regardless, the seven seconds is irrefutable.

Stereotyping in policing is almost a foregone conclusion. Citizens expect their police to protect them by being not only reactive but proactive. One of the most popular policing methods is to view a situation and proactively make a quick decision on whether or not a crime is about to occur, and if it is, stop it from happening. One of the ways police proactively operate is through stereotyping. "Police officers spend a great deal of time working their beats…one thing is common to all police officer working personalities: in an effort to know who or what is 'wrong' on their beat, police officers must know who is 'right' or who belongs." [1]

When officers cross over the line is when they leave out the step of asking the who, what, where, when, why, and how after the stereotyping occurs, to confirm their thoughts. It is at this point that the officer is engaging in a type of implicit bias policing and this opens many doors to corruption. It is another slippery slope that officers must always be aware of while performing their many duties.

"Stereotyping or Terry Stop" Example

No matter how controversial policing is today, one common thread is that citizens want police to be proactive, not reactive to violent crime. Whether it is stopping an active shooter in a school, a burglary, or even a robbery, proactivity in policing is necessary to halt horrendous crimes from occurring. In 1968 the United States Supreme Court decided *Terry v. Ohio*, which further explained reasonable searches under the 4th amendment and played a vital role in the below story.

I was one of six officers with my department, chosen to work in our first ever problem-solving unit (PSU). Our substation was placed in a neighborhood where 21 murders had occurred in just a few months. We were tasked with being proactive and working with the community to stop the bloodshed. The two-mile radius neighborhood were composed predominantly of minority residents, and their distrust of our presence was apparent immediately.

1. Perez, D.W. (2011). *The paradoxes of police work*. Florence, KY: Cengage Publ.

The residents had stereotyped us as rotten apple police officers and at first, did not want our assistance, they did not trust us. This was further agitated by the fact that we were there to be proactive and stop any future murders from occurring. Plus, we had the *Terry v. Ohio* decision to assist with our proactive actions. The citizens did not understand what that meant. They also did not understand that as one of the officers pledged to protect the area, I was feeling like an unwanted officer in their neighborhood. They did not know that I got into policing to change the world, if even just a little. They did not know how frustrated it made me feel when no matter how hard I tried, no one would not trust me. One day, as a four-year-old child approached me for a police sticker, the mom grabbed the child by the arm and said, "Get away from that Po-Po, she is a Bi***, and don't you dare talk to her, ever, or you'll get it!" I cried that night when I got home from work, wondering how I could help this neighborhood if I couldn't even get one mom to trust me? Whether or not it was true, stereotyping had occurred in this neighborhood. Then on top of it, I had to utilize the *Terry v. Ohio* decision to be proactive, to keep the murders from occurring. It felt like a Catch-22 with no solution. The answer did not come to me instantly. All I could think to do was my job and stop the murders (as I was directed to do). I remembered that four-year-old in my everyday actions. I knew my efforts could make him safer, but would he ever understand? I utilized *Terry v. Ohio*, by learning the neighborhood, recognizing the residents, and learning who belonged, and who did not. I was either on foot or on a bicycle in this neighborhood due to the small size. This allowed for a lot of interaction with the residents. If I had reasonable suspicion to think a citizen was about to commit a crime or had evidence of a crime, *Terry v. Ohio* gave me the right to investigate further. At first, this angered the neighborhood. They felt we were harassing them, stereotyping them. I could understand how they felt that way, and instead of trying to make this neighborhood safe overnight, I decided to begin to change how the neighborhood perceived us, slowly. The way I did this was through education. Through my daily interactions, I talked to the citizens in the neighborhood about what I was doing and why. Instead of speaking in 'general' I spoke about only one incident at a time.

One night, at 2:00 a.m., I was walking with my partner through the neighborhood. I had to head back to the sub-station and as I rounded one building, I saw two citizens looking through a window of an apartment. I stopped and just watched. Everything ran through my mind. Had they lost their keys? Was this their apartment? Or, were they looking to break-in and burglarize the apartment, possibly even commit a home invasion and hurt those inside? All of this happened in seconds, not minutes. Because of *Terry v. Ohio*, I legally investigated. The two citizens did not live in the apartment and they were trying to burglarize it. One of the suspects had a gun. Because of *Terry v. Ohio*, I was able to be pro-active and stop this from occurring. A single mom and three children under six years of age lived in that apartment and were home. The mom did not trust banks and kept her savings in between her mattresses. I do not know what I stopped that night. I do not know if the suspects would have used the gun, or if they would have found the mom's large cash savings or what else they might have taken; however, I did stop a burglary from occurring and that felt good. The next day while speaking to some of the citizens in the neighborhood, I explained this. I used this one example to explain why my unit was there. How we stopped this crime and how we all wanted to make a difference. This one story did not change how the neighborhood saw us; however, after many more stories such as this, I began to see a change.

Michelle, one of the citizens in the neighborhood got my cellular telephone number (yes we had cell phones back in the day!). She began calling me when she heard talk about a possible crime occurring. We hosted many events in the neighborhood as well. From ice cream socials, back-to-school fairs, and we even worked hard to find donations and get every child in the neighborhood a bicycle (or scooter). After three years, our substation closed.

We had gone a year without a murder and the crime rate dropped 98%. To this day Michelle still calls me and we chat about what is currently occurring in our lives. Michelle is my friend and I dare say I think she thinks of me as her friend too. There was a lot of stereotyping that went on in that neighborhood during those years. I found my way through it all and I think the neighborhood did as well. In the end, we worked together through good ole community policing and made the area safe again.

TIFFANY MOREY

One of the most significant issues with police accountability is knowledge of the job of a police officer. If a person is ignorant about policing policies, procedures, rules, regulations, and how police operate, then there is going to be a disconnect when the media portrays police in different situations. All too often citizens get their knowledge of how the police operate through television shows. *Miranda* admonition is a classic example. The television show 'Law and Order' is notorious for showing the actors playing detectives, giving *Miranda* to a suspect, every single time; they place a suspect under arrest. The classic clip shows the hand-cuffs 'click, click' going on, and then as the detectives walk the suspect to their vehicle, they are verbalizing, from memory, *Miranda*. In reality, this could not be further from the truth.

Police have a considerable amount of power. Due to the temptation to abuse assigned power police must ascribe to a higher standard than someone in a non-policing profession. However, members of the public cannot appropriately identify police misconduct at all levels. "Most citizens possess an incomplete and incorrect understanding of what it entails. Often…American citizens frequently believe the police guilty of misconduct when, in fact, they are not…Dirty Harry is a hero of sorts to many Americans. When a Dirty Harry-type officer engages in curbside justice aimed at a local bully, for example, people tend to be very supportive of this type of misconduct. [1]

Miranda Misconceptions

Thanks to the CSI Effect, Miranda is misunderstood by the general population. Shows such as Law and Order, show the detectives slapping the hand-cuffs on the suspect, after the investigation is completed, and immediately verbalizing the Miranda requirements aloud to the suspect. This is not how Miranda is applied. The Miranda decision requires officers to read certain statements when those officers plan on INTERROGATING a suspect. If the suspect is NOT free to leave and the officer wants to question the suspect, in an attempt for the suspect to make incriminating statements, the suspect must be read Miranda admonishments AND must understand the admonishments. If an officer sees a person break the law, the only time that officer needs to read Miranda prior to interrogating the suspect, is if the officer wants to question the suspect. If the officer sees the crime, there generally is no need to question the suspect about the crime, therefore Miranda is not required. For instance, if an officer is

1. Perez, D.W. (2011). *The paradoxes of police work*. Florence, KY: Cengage Publ.

using a radar gun and sees a vehicle speeding 40 mph in a 25 mph speed zone, the officer does not need to read the driver of the vehicle Miranda, unless that officer wants to interrogate the driver. The officer can write the driver a citation without reading Miranda and in some states the officer can arrest the driver for speeding without reading Miranda (in Oregon, speeding is a traffic violation, therefore, drivers cannot be arrested for speeding, this is not true for all states, in some states traffic violations are misdemeanors).

TIFFANY MOREY

Internal affairs (IA) exists to hold officers accountable for their actions. Whenever there is an issue, either brought forth by another officer, a supervisor or a member of the general public, the IA division of the police department is responsible for conducting a thorough investigation into the incident. Members of the IA division work directly under the Chief or Sheriff.

In the 1960s the overwhelming number of riots revealed the problem of corruption and misconduct in policing- one of the most significant issues centered around citizen complaints against officers and the lack of proper investigation into the complaint. Most officers back then were found exonerated (not guilty) when a complaint ensued, and this did not bode with the public. [1]

Supervisors in Policing Example

As a young girl, I never had dreams of one day being a supervisor in the police world. In fact, I didn't even want to be a cop! However, life would direct me towards policing, and after years of testing, I found myself hired as a police officer in Las Vegas. The life of an officer is full of wonder and excitement, but it is also full of stress, and a lot of pressure! After I completed the police academy, field training, and probation I soon learned that all supervisors (sergeants and lieutenants) were not created equal.I received my first police oficer annual evaluation and found that I ONLY met standards in the areas evaluated. How could that be, I thought? I had never worked harder! I always stayed late, I wrote amazing reports, I volunteered and helped out my community, I engaged in constant training, I did everything I knew AND was trained to do. Yet, I still only met standards. Now I wasn't delusional. I knew that I was a new police officer and had many things to learn, but why was my sergeant failing to mentor or recognize me for my above average efforts in many areas? I was even told by a female sergeant, that she had to work harder than any other police officer because she was a female, so I should have to do the same. Where was mentoring? Where was the training offered by supervision? I soon learned it did not exist and the only way to create it was to test for promotion myself and enter the world of supervision as a sergeant. Don't get me wrong, throughout my tenure as a police officer I did encounter some amazing supervisors, but they were rare and an exception to the rule. I did the test for promotion, and I was promoted to sergeant. My goals were to change the way officers were supervised at my department. I worked hard to create a sergeant training program that ensured future supervisors received the knowledge and power of how-to mentor and train their employees. Three years later I tested and promoted to

1. Goldstein, H. (1977). *Policing a free society*. Cambridge, MA: Ballinger.

lieutenant. I took advantage of my new position in adminstration to mentor many young officers and help them to succeed in their careers.

Discipline

Police departments are paramilitary organizations or a semi-militarized force whose organizational structure, tactics, training, subculture, and (often) function are similar to those of a professional military, but which is formally not part of a government's armed forces. Therefore, the handling of discipline is serious business. If an officer is accused of a minor infraction, such as the use of profanity, the officer's immediate supervisor will generally handle the policy infraction and note what occurred in the officer's file and counsel the officer of the following: 1- Inform the police officer why the conduct was wrong 2- Inform the police officer how to stop engaging in the conduct 3- Inform the police officer when the conduct must stop 4- Inform the police officer the time elapsed after the conduct and a scheduled meeting to review and ensure the conduct is still not occurring. Depending on the conduct, the supervisor may require the officer to attend training to assist the officer.

Another answer was to create external civilian review boards to hold police accountable for their actions by reviewing all use of force incidents. With the onset of the 21st century and new technology, came new tools in policing. One such tool was a new program called IA Pro. This program followed individual officers throughout their entire career. A scheming grass or meat eater officer could bid on a new shift each year, gaining a new supervisor who would be oblivious to past infractions. IA Pro ensured any, and all infractions by an officer were recorded and followed through upon by the applicable supervisor. If an officer used profanity, the program would require the officer to attend training. If the officer used profanity a second time within the prescribed time limits, the officer would be placed on an timed employee development program and could face discipline up to termination. IA Pro was not a panacea, but it would significantly lower the number of officers allowed to continue to operate as grass or meat eaters.

If an officer is accused of a more serious infraction, such as excessive use of force or lying, the officer will immediately be placed on administrative leave and The Internal Affairs Division of the department will investigate the incident. The Internal Affairs Division will offer a finding of 1- Sustained Complaint 2- Not-Sustained Complaint 3- Exonerated Complaint 4- Unfounded Complaint. Once one of the above complaint dispositions is assigned, it is then forwarded to the Command Staff (Chief or Sheriff and Assistant Chief/Sheriff, Deputy Chief/Sheriff, and Captains) for review and discipline. Discipline can include time-off up to termination.

When an Officer Does Something Illegal Example

I was a lieutenant over two sergeants and dozens of officers when I received the dreaded phone call. One of my officers was being placed on administrative leave by Internal Affairs due to a horrendous allegation. The officer had been pulling over female drivers for 'so-called' traffic violations and offering them an 'out' if they performed some sort of sexual activity. My heart sank, how could this have happened and on my watch? After weeks of investigation, I learned that the officer had been engaging in this illegal activity for months. It took several brave women to contact our Internal Affairs Division and tell their stories, to stop it. I racked my brain as to what I could have done

to prevent the officer. Did I miss the signs? Should I have been sterner? What could I have done? Even years later it tears at my soul. What those women had to endure. How scared they must have been. It must have been their worst nightmare come true. I have played many scenarios in my head as to what I could have done or should have done to stop this officer's actions. And I finally learned that some people are just ethically and morally corrupt. No matter how hard we, in supervision, try to identify them through the L.E.T. Process or keep tabs on them when they engage in such acts, sometimes they slip through the cracks and are allowed to spread their evilness. This is what happened with this officer. The officer was smart enough to engage in this activity while alone on patrol, knowing that he could stop this action if another officer or supervisor assisted on the traffic stop. His actions were scary and should send a message to every police department and every supervisor that they must always be on the look-out for those officers that are corrupt and will use their power to engage in illegal and horrendous crimes. This was a hard lesson for me to learn, but an eye-opening one that would forever change the way I supervised those officers in my command.

TIFFANY MOREY

An overwhelming number of police officers welcome body cameras, just like citizens. The reason being the high number of citizen complaints received which center around a citizen exaggerating or lying in order to try and get out of an expensive traffic related citation. 'The officer yelled at me and made me feel stupid and used profanity.' Is an example of a citizen complaint often reported to a supervisor. Body camera footage of the incident more than often shows the exact opposite. The truth often is that the citizen did run the red light or failed to stop at the stop sign and did not want to accept responsibility and pay the fine. Body cameras changed the environment of citizen complaints; however, body cameras also ensure that grass-eaters do not partake in temptation. Moreover, those meat-eaters are held accountable for excessive use of force or illegal actions.

Body cameras would seem to be the panacea for all police misconduct, the truth of the matter is not so concrete. First, body cameras only show one point of view. Until small drones can hover above the officer showing a 360-degree view, the accurate recollection of an event can never be indeed known. Second, no matter how full-proof department policies and procedures regulate the use of body cameras, there will always be a user that can turn off the camera in certain situations. Body cameras are one answer in a giant puzzle to hamper and stop police misconduct. As technology improves, so hopefully will view the body cameras record.

Police Body Cameras: What Do You See Exercise

https://www.nytimes.com/interactive/2016/04/01/us/police-bodycam-video.html

"People are expecting more of body cameras than the technology will deliver," Professor Stoughton said. "They expect it to be a broad solution for the problem of police-community relations, when in fact it's just a tool, and like any tool, there's limited value to what it can do." You will have a 500-word response to the questions below.

- First, go to the above link and complete the activity. Be as honest with yourself as possible.
- Second, after the videos and this experiment, has your view of policing and the role of video changed? Do you think body cameras are worth the expense or could we do without? What are the pros and cons?

TIFFANY MOREY

Many people believe that a traffic officer or for that fact, any police officer, who is engaging in speed enforcement and is hidden, is guilty of entrapment and such behavior is tantamount to harassment. First, an officer does not have to be wholly or partially visible in order for a traffic citation to be valid. Also, the officer does not have to take you to, or show you a photo of, the speed limit sign (applicable for the location you were driving), before a citation is issued. If you get behind the wheel of a motor vehicle, you are required to know the speed limit of the roads you drive. If you decide to speed, even just one mile over the speed limit, you are, by the letter of the law, speeding, and this is a traffic offense. If an officer either through radar or visual speed estimation, determines you are speeding, that officer has every legal right, to issue you a speeding citation.

However, let's consider a different situation. If, while having coffee at a local coffee shop, an officer started chatting with you about a new speed limit along Main St. The officer told you that the speed limit had been raised from 20 mph to 35 mph (which was a lie); and believing that officer, you left the coffee shop and drove along Main St. going 35 mph. You then glanced up and saw the unmistakable red and blue lights in your rear-view mirror. You were stopped by a different officer, who told you the speed limit was only 20 mph (not 35 mph) and issued you a speeding citation. These actions would be considered entrapment because the other officer was trying to get you to engage in criminal behavior.

Now onto why it is not harassment for an officer to give out speeding citations. According to The Association for Safe International Road Travel; "Nearly 1.25 million people die in road crashes each year, and an additional 20-50 million are injured or disabled" (2018). Our police are tasked with making our roads safe and saving lives. Since 3,287 people die every DAY from traffic collisions, police must take responsibility and try to lower this massive number. Therefore, police study not only where these crashes are occurring, but the mitigating factors that cause them. It may surprise you to know that the number one cause for road crashes, is speeding. How do police then slow people down? Education is the first step, however, sometimes the only way to educate is through a speeding citation.

The next time you get a speeding citation (for going faster than the posted speed limit), instead of accusing the officer of harassment, you should take responsibility and be the first step in lowering the number of deaths from related road crashes. [1]

1. Road Safety Facts. (2018). Retrieved from https://www.asirt.org/safe-travel/road-safety-facts/

7: Courts

Learning Objectives

This section examines the structure and function of the criminal courts in America. It examines the concept of jurisdiction and describes the dual court system (the federal court system and the various state court systems). This section also examines the role and function of the various courtroom participants–the people who work in the courts. After reading this section, students will be able to:

- Differentiate between what happens at trial and what happens on appeal and identify the procedural history of a criminal case by reading appellate opinions written in the case.
- Describe how a crime/criminal case proceeds from the lowest level trial court up through the U.S. Supreme Court. (i.e., students should understand the hierarchy of the federal and state courts).
- Discuss the function and selection of state and federal trial and appellate judges in the American criminal justice system.
- Discuss the function and selection of state and federal prosecutors in the American criminal justice system.
- Discuss the importance of the criminal defense attorney in the American criminal justice system.
- Identify at what stages of the criminal justice process a defendant is entitled to the assistance of a court-appointed attorney.

Critical Thinking Questions

1. Knowing what happens at trial and what happens on appeal, would you be more interested in being a trial judge or an appellate judge? Why?
2. Why is there a different standard of review for questions of fact and questions of law?
3. Do you agree that cases should be overturned only when there was a fundamental or prejudicial error

that occurred during the trial?

4. Do you think it is easier to be a defense attorney than a prosecutor believing the defendant is guilty but knowing that the justice system has violated the defendant's rights?
5. Should the defendant ever waive the assistance of counsel?
6. Is there any position as a court staff that particularly interests you? Why?

LORE RUTZ-BURRI

What follows is an examination of the structure and role of the courts in the American criminal justice system and the requirement of **jurisdiction**. As you read this chapter, pay attention to the context when you see the word "court" because it is used in a variety of ways. "Court" can mean a building—it is short for "courthouse" (for example, "he went to the court"); one judge (for example, "the trial court decided in his favor"); a group of judges (for example, "the Supreme Court unanimously upheld the conviction"), or an institution/process generally (for example, "courts hopefully resolve disputes in an even-handed manner"). Courts (the institution and processes) determine both the facts of a crime (did the defendant do the crime?) and also the legal sufficiency of the criminal charge (can the government prove it?). Courts ensure that criminal defendants are provided **due process of law**, or the procedures used to convict the defendant are fair. Courts are possibly more important in criminal cases than in civil cases because, in civil matters, the parties have the option of settling their disputes outside of the court system, but all criminal prosecutions must be funneled through the criminal courts.

After reading this chapter, you will be able to project the trajectory of a criminal case from the filing of criminal charges in a local courthouse through all final appeals processes. This requires an understanding of the **dual court system,** the structure of typical state court systems and the federal court system. This chapter explores the differences between a trial court and an appellate court, and you will learn how trial judges and juries decide (determine the outcome of) a case by applying the legal standards to the facts presented during trial and how appellate judges decide if the case was rightly decided after examining the trial record for legal error. Appellate courts make known their decisions known through their written opinions, and this chapter introduces the types of opinions and rulings of appellate courts.

This chapter also examines the selection, roles, and responsibilities of the participants in the criminal courts frequently referred to as the **courtroom workgroup.** You will become familiar with who the players are during each of these steps of the process.

LORE RUTZ-BURRI

In order to understand the courts, it is essential to understand the many facets of the word **jurisdiction**. Jurisdiction refers to the legal authority to hear and decide a **case** (legal suit).

Jurisdiction Based on the Function of the Court

Trial Courts versus Appellate Courts

Jurisdiction may be based on the function of the court, such as the difference between trial and appellate functions. The federal and state court systems each have court hierarchies that divide trial courts and appellate courts. Trial courts have jurisdiction over pretrial matters, trials, sentencing, probation, and parole violations. Trial courts deal with facts. Did the defendant stab the victim? Was the eyewitness able to clearly see the stabbing? Did the probationer willfully violate terms of probation? As a result, trial courts determine guilt and impose punishments.

Appellate courts, on the other hand, review the decisions of the trial courts. They are primarily concerned with matters of law. Did the trial judge properly instruct the jury about the controlling law? Did the trial court properly suppress evidence in a pretrial hearing? Does the applicable statute allow the defendant to raise a particular affirmative defense? Appellate courts correct legal errors made by trial courts and develop law when new legal questions arise. Appellate courts do not hold hearings in which evidence is developed, but rather they only review the record, or "transcript", of the trial court. In some instances, appellate courts determine if it is legally sufficient, or enough, evidence to uphold a conviction.

Jurisdiction Based on Subject Matter

Jurisdiction can also be based on the subject matter of the case. For example, criminal courts handle

criminal matters, tax courts handle tax matters, and customs and patent courts handle patent matters. Regarding "subject matter jurisdiction" Kerper (1979, 34) noted,

> "The [subject matter] jurisdictional distinction . . . tends to be utilized primarily in distinguishing between different trial courts. Appellate courts ordinarily can hear all types of cases, although there are several states that have separate appellate courts for criminal and civil appeals. At the trial level, most states have established one or more specialized courts to deal with particular legal fields. The most common areas delegated to specialized courts are wills and estates (assigned to courts commonly known as probate . . . courts), divorce, adoption or other aspects of family law (family or domestic relations courts), and actions based on the English law of equity (chancery courts). The federal system also includes specialized courts for such areas as customs and patents. While significant, the specialized courts represent only a small portion of all trial courts. Most trial courts are not limited to a particular subject but may deal with all fields. Such trial courts are commonly described as having general jurisdiction since they cover the general (i.e., non-specialized) areas of law. Criminal cases traditionally are assigned to courts with general jurisdiction." [1]

Jurisdiction Based on the Seriousness of the Case

The jurisdiction of trial courts may also be based on the seriousness of the case. For example, some courts, called **courts of limited jurisdiction** only have authority to try infractions, violations, and petty crimes (misdemeanors) whereas other trial courts, called **courts of general jurisdiction**, have authority to try serious crimes (felonies) as well as minor crimes and offenses.

Jurisdiction Based on the Court's Authority over the Parties to the Case

Jurisdiction also refers to the court's authority over the parties in the case. For example, juvenile courts have jurisdiction over dependency and delinquency cases involving youth. Other courts have jurisdiction that is based on the special nature of the parties are the military tribunals, including courts-martial, Courts of Criminal Appeals, and the United States Court of Appeals for the Armed Services.

1. Kerper, H. B. (1979). *Introduction to the criminal justice system* (2nd ed.). West Publishing Company.

Jurisdiction based on State and Federal Autonomy (Geography)

Finally, jurisdiction is also tied to our system of federalism, the autonomy of both national and state governments. State courts have jurisdiction over state matters, and federal courts have jurisdiction over federal matters. Jurisdiction is most commonly known to represent geographic locations of the court's oversight. For example, Oregon courts do not have jurisdiction over crimes in California.

LORE RUTZ-BURRI

Separate Federal and State Court Systems

Each state has two complete parallel court systems: the federal system, and the state's own system. Thus, there are at least 51 legal systems: the fifty created under state laws and the federal system created under federal law. Additionally, there are court systems in the U.S. Territories, and the military has a separate court system as well.

The state/federal court structure is sometimes referred to as the **dual court system**. State crimes, created by state legislatures, are prosecuted in state courts which are concerned primarily with the applying state law. Federal crimes, created by Congress, are prosecuted in the federal courts which are concerned primarily with applying federal law. As discussed below, it is possible for a case to move from the state system to the federal system when a defendant challenges the conviction on direct appeal through a **writ of certiorari,** or when the defendant challenges the conditions of confinement through a **writ of habeas corpus**.

Dual Court System Structure

Highest Appellate Court	**U.S. Supreme Court** (Justices) (NoteCourt also has original/trial court jurisdiction in rare cases) (Note: Court will also review petitions for writ of certiorari from State Supreme Court cases).	**State Supreme Court** (Justices)
Intermediate Appellate Court	**U.S. Circuit Court of Appeals** (Judges)	**State Appellate Court** (e.g., Oregon Court of Appeals) (Judges)
Trial Court of General Jurisdiction	**U.S. District Court** (Judges) (Note: this court will review petitions for writs of habeas corpus from federal and state court prisoners)	**Circuit Court, Commonwealth Court, District Court, Superior Court** (Judges)
Trial Court of Limited Jurisdiction	**U.S. Magistrate Courts** (Magistrate Judges)	**District Court, Justice of the Peace, Municipal Courts** (Judges, Magistrates, Justices of the Peace)

The Federal Court System

Article III of the U.S. Constitution established a Supreme Court of the United States and granted Congress discretion as to whether to adopt a lower court system. It states the "judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Fearing that the state courts might be hostile to congressional legislation, Congress

immediately created a lower federal court system in 1789. [1] The lower federal court system has been expanded over the years, such as when Congress created the separate appellate courts in 1891.

View the authorized federal judgeships at http://www.uscourts.gov/sites/default/files/allauth.pdf

Trace the history of the federal courts at https://www.fjc.gov/history/timeline/8276

Trace the history of the subject matter jurisdiction of the federal courts here https://www.fjc.gov/history/timeline/8271

View cases that shaped the roles of the federal courts at https://www.fjc.gov/history/timeline/8271

Trace the administration of the federal courts at https://www.fjc.gov/history/timeline/8286

United States Supreme Court

The United States Supreme Court (Court), located in Washington, D.C., is the highest appellate court in the federal judicial system. Nine justices sitting ***en banc,*** as one panel, together with their clerks and administrative staff, make up the Supreme Court. [View the biographies of the current U.S. Supreme Court Justices here: https://www.supremecourt.gov/about/biographies.aspx]. The Court's decisions have the broadest impact because they govern both the state and federal judicial system. Additionally, this Court influences federal criminal law because it supervises the activities of the lower federal courts. The nine justices have the final word in determining what the U.S. Constitution permits and prohibits, and it is most influential when interpreting the U.S. Constitution. Associate Justice of the Supreme Court, Robert H. Jackson stated in *Brown v. Allen*, 344 U.S. 433, 450 (1953), "We are not final because we are infallible, but we are infallible only because we are final." Although it is commonly thought that the U.S. Supreme Court has

1. (The Judiciary Act of 1789 (Ch. 20, 1 Stat 73)

the final say, this is not one hundred percent accurate. After the Court has read written appellate briefs and listened to oral arguments, it will "decide" the case. However, it frequently refers or sends, the case back to the state's supreme court for them to determine what their own state constitution holds. Similarly, as long as the Court has interpreted a statute and not the constitution, Congress can always enact a new statute which modifies or nullifies the Court's holding.

Writs of Certiorari and the Rule of Four

The Court has a discretionary review over most cases brought from the state supreme courts and federal appeals courts in a process called a **petition for the writ of certiorari**. Four justices must agree to accept and review a case, and this only happens in roughly 10% of the cases filed. (This is known as the **rule of four**.) Once accepted, the Court schedules and hears oral arguments on the case, then delivers written opinions. Over the past ten years, approximately 8,000 petitions for writ of certiorari are filed annually. It is difficult to guess which cases the court will accept for review. However, a common reason the court accepts to review a case is that the federal circuits courts have reached conflicting results on important issues presented in the case.

Take a virtual tour of the U.S. Supreme Court building: https://www.oyez.org/tour

The United States Supreme Court Building

"The United States Supreme Court occupies a majestic building in Washington, D.C., with spacious office suites and impressive corridors and library facilities. With enhancements and attributes similar to those of appellate courts, the elegance and dignity of the facilities comport with the significant role of the Court as the final arbiter in the nation's judicial system. There is a sparse crowd at most state and intermediate federal appellate courts; at the Supreme Court, by contrast, parties interested in the decisions that will result from arguments, a coterie of media persons, and many spectators fill the courtroom to hear arguments in cases that often significantly affect the economic, social, and political life of the nation. Photography is not allowed, and the arguments and dialogue between counsel and the justices are observed silently and respectfully by those who attend." [2]

2. Scheb II, J.M. (2013). *Criminal Law and Procedure* (8th ed., pp. 45). Belmont, CA: Cengage.

Take a tour of the U.S. Supreme Court with CNN: https://www.youtube.com/watch?v=Unyswl36q8w

Original (Trial Court) Jurisdiction of the Supreme Court: A Rarity

When the Court acts as a trial court it is said to have **original jurisdiction**, and it does so in a few important situations, such as when one state sues another state. The U.S. Constitution, Art. III, §2, sets forth the jurisdiction of the Court. It states,

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;-to all Cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction;-to Controversies to which the United States shall be a Party;-to Controversies between two or more States;-between a State and Citizens of another State;-between Citizens of different States;-between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations, as the Congress shall make."

Original jurisdiction cases are rare for several reasons. First, the Constitution prohibits Congress from increasing the types of cases over which the Supreme Court has original jurisdiction. Second, parties in an original jurisdiction suit must get permission by petitioning the court to file a complaint in the Supreme Court. In fact, there is no right to have a case heard by the Supreme Court, even though it may be the only venue in which the case may be brought. The Supreme Court may deny petitions for it to exercise original jurisdiction because it finds that the dispute between the states is too trivial, or conversely, too broad, and complex. The Court does not need to explain why it refuses to take up an original jurisdiction case. Original jurisdiction cases are also rare because, except in suits or controversies between two states, the Court has increasingly permitted the lower federal courts to share its original jurisdiction.

United States Courts of Appeal

Ninety-four judicial districts comprise the 13 intermediate appellate courts in the federal system known as the U.S. Courts of Appeals, sometimes referred to as the federal circuit courts. These courts hear challenges to lower court decisions from the U.S. District Courts located within the circuit, as well as appeals from decisions of federal administrative agencies, such as the social security courts or bankruptcy courts. There are twelve circuits based on geographic locations and one federal circuit which has nationwide jurisdiction to hear appeals in specialized cases, such as those involving patent laws, and cases decided by the U.S. Court of International Trade and the U.S. Court of Federal Claims. The smallest circuit is the First Circuit with

six judgeships, and the largest court is the Ninth Circuit, with 29 judgeships. Appeals court panels consist of three judges. The court will occasionally convene *en banc* and only after a party who has lost in front of the three-judge panel requests review. Because the Circuit Courts are appellate courts which review trial court records, they do not conduct trials and, thus, they do not use a jury.

The U.S. Courts of Appeal, like the U.S. Supreme Court, trace their existence to Article III of the U.S. Constitution. These courts are busy, and there have been efforts to both fill vacancies and increase the number of judgeships to help deal with the caseloads. For example, the Federal Judgeship Act of 2013 would have created five permanent and one temporary circuit court judgeships, in an attempt to keep up with increased case filings. However, the bill died in Congress. Fortunately, in recent years, fewer cases have been filed.

Click on this link to see the geographical jurisdiction of the U.S. Courts of Appeals: http://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf

United States District Courts

The U.S. District Courts, also known as "**Article III Courts"**, are the main trial courts in the federal court system. Congress first created these U.S. District Courts in the Judiciary Act of 1789. Now, ninety-four U.S. District Courts, located in the states and four territories, handle prosecutions for violations of federal statutes. Each state has at least one district, and larger states have up to four districts. Each district court is described by reference to the state or geographical segment of the state in which it is located (for example, the U.S. District Court for the Northern District of California). The district courts have jurisdiction over all prosecutions brought under federal criminal law and all civil suits brought under federal statutes. A criminal trial in the district court is presided over by a judge who is appointed for life by the president with the consent of the Senate. Trials in these courts may be jury trials.

Link to a number of cases filed in U.S. District Courts http://www.uscourts.gov/federal-judicial-caseload-statistics-2018-tables

Although the U.S. District Courts are primarily trial courts, district court judges also exercise an appellate-type function in their review of **petitions for writs of habeas corpus** brought by state prisoners. Writs of habeas corpus are claims by state and federal prisoners who allege that the government is illegally confining them in violation of the federal constitution. The party who loses at the U.S. District Court can appeal the case in the court of appeals for the circuit in which the district court is located. These first appeals must be reviewed, and thus are referred to as **appeals of right**.

United States Magistrate Courts

U.S. Magistrate Courts are **courts of limited jurisdiction** in the federal court system, meaning that these legislatively-created courts do not have full judicial power. Congress first created the U.S. Magistrate Courts

with the Federal Magistrate Act of 1968. Under the Act, federal magistrate judges assist district court judges by conducting pretrial proceedings, such as setting bail, issuing warrants, and conducting trials of federal misdemeanor crimes. There are more than five hundred Magistrate Judges who disposed of over one million matters.

In the News: https://www.uscourts.gov/sites/default/files/data_tables/jb_s17_0930.2017.pdf)

U.S. Magistrate Courts are "**Article I Courts"** as they owe their existence to an act of Congress, not the Constitution. Unlike Article III judges who hold lifetime appointments, Magistrate Judges, formerly referred to as "Magistrates" before the Judicial Improvement Act which took effect December 1, 1990, are appointed for eight-year terms.

For a comprehensive review of the U.S. Magistrate Courts and U.S. Magistrate Judges see: http://www.fedbar.org/PDFs/A-Guide-to-the-Federal-Magistrate-Judge-System

Court Assignment

Watch season two of the popular Netflix series, Making a Murder which covers the appeals of the murder convictions of Steven Avery and his nephew Brendan Dassey. Pay attention to the discussions among Brendan Dassey's appellate team from Northwestern School of Law concerning the appeals process from the state courts through the federal Seventh Circuit Court of Appeals, which convened *en banc* after a 2-1 panel decision finding Brendan Dassey's confession was inadmissible.

See also, http://involuntary.http://www.abajournal.com/news/article/en_banc_7th_circuit_reinstates_brendan_dasseys_conviction_in_making_a_murde?icn=most_read

- Write a 500-word response about what you saw during the appeals process and how it made you feel. Did you agree with it or disagree with it? Is this justice?

Click on this link to see the number of filings: http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018

State Court Systems

Each state has its own independent judicial system. State courts handle more than 90 percent of criminal prosecutions in the United States. Although state court systems vary, there are some common features. Every state has one or more level of trial courts and at least one appellate court. Although there is no federal constitutional requirement that defendants be given the right to appeal their convictions, such a right is arguably implicit in the due process clause of the Fourteenth Amendment. Moreover, every state has some provision, usually within its own constitution or statutes, that provides defendants at least one appeal. Most state courts have both courts of general jurisdiction, which conduct felony and major misdemeanor trials, and courts of limited jurisdiction, which conduct violations, infractions, and minor misdemeanor trials. Similar to the U.S. Magistrate Courts, states' courts of limited jurisdiction will also handle pre-trial matters for felonies until they are moved into the general jurisdiction court. Most states have intermediate courts of appeals and some have more than one level of these courts. All states have a **court of last resort,** generally referred to as the Supreme Court. Some states court systems are streamlined, and some are complex, with most states fall between the two extremes.

Hierarchy of State Courts

State trial courts tend to be busy, bustling places with lots of activity. Appellate courts, on the other hand, tend to be solemn and serene, formal places. Scheb noted,

"Appellate courts are different than trial courts, both in function and 'feel.' Unlike a trial court, which is normally surrounded by a busy atmosphere, an appellate court often sits in the state capitol building or its own facility, usually with a complete law library. The décor in the building that house appellate courts is usually quite formal, and often features portraits of former judges regarded as oracles of the law. When a panel of judges sits to hear oral arguments, they normally emerge from behind a velvet curtain on a precise schedule and to the cry of the court's marshal. When not hearing oral arguments, appellate judges usually occupy a suite of offices with their secretaries and law clerks. It is in these individual chambers that appellate judges study and write their opinions on cases assigned to them." [1]

Kerper describes the flow of a case through the hierarchical structure of the courts as follows:

> "When the specialized courts are put to one side, we find that a judicial system typically has three or possibly four levels of courts. This will be the hierarchy commonly applicable to criminal cases.
>
> At the bottom level in the typical hierarchy will be the magistrate court. Judges on that level will

1. Scheb II, J.M. (2013). *Criminal Law and Procedure* (8th ed., pp. 43). Belmont, CA: Cengage.

try minor civil and criminal cases. They will also have some preliminary functions in the more serious felony cases that will eventually be tried in the general trial court. Thus a person arrested on a felony charge initially will be brought before a magistrate who will inform the arrestee of the charge against him, set bail, and screen the prosecution's case to ensure that it is sufficient to send on to the general trial court.

At the next court level is the general trial court, which will try all major civil and criminal cases. While this court is predominantly a trial court, it also serves as an appellate court for the minor cases tired in the magistrate court. Thus, if a defendant is convicted on a misdemeanor charge in a magistrate court, his natural route of appeal is to the general trial court as the next highest court. The appellate review in the general trial court will take a special form where the magistrate court is one described as a court "not of record." In most instances, however, the general trial court will review the record in the magistrate court for possible error in the same way that the appellate court at the next tier will review the trial decisions of the general trial court in major cases.

The court at the next level may be either the first of two or the only general appellate court in the judicial hierarchy. In almost half of the states and the federal system, there are two appellate tiers. The first appellate court, which would be at the third level in the hierarchy, is commonly described as the intermediate appellate court. The next level of appellate court is the appellate court of last resort; it is the highest court to which a case can ordinarily be taken. These highest appellate courts frequently are titled, "supreme courts." . . . Where a judicial system has two tiers of appellate courts, the supreme court will be at the fourth level of the hierarchy. In those states that have only one tier, there is no intermediate appellate court. The supreme court is the court at the third level of the hierarchy.

In most jurisdictions, the losing party at trial is given an absolute right to one level of appellate review, but any subsequent reviews by a higher appellate court are at the discretion of that higher court. Thus, in a system that has no intermediate appellate court, a defendant convicted of a felony in a general trial court has an absolute right to have his conviction reviewed by the next highest court, the supreme court. In a system that has an intermediate appellate court, the felony defendant's absolute right to review extends only to that intermediate court. If that court should decide the case against him, the defendant can ask the supreme court to review his case, but it need do so only at its discretion. The application requesting such discretionary review is called a petition for certiorari. If the court decides to review the case, it issues a writ of certiorari directing that the record in the case be sent to it by the intermediate appellate court. Those supreme courts having discretionary appellate jurisdiction commonly refuse to grant most petitions for certiorari, limiting their review to the most important cases. Consequently, even where a state judicial hierarchy has four rather than three levels, most civil or criminal cases will not get beyond the third level.

Our description of the hierarchy of the courts has assumed so far that all trial courts are "courts of record," and appellate review accordingly will be on the record. There is one major exception to that assumption which we should note—the court "not of record." The division between courts of record and courts not of the record originally was drawn when many trial courts lacked the mechanical capacity to maintain a complete record of their proceedings. If a court could provide such a record, the losing party could readily gain an appellate review of the trial decision before the next highest court. If the record was not available, however, the higher court had no way of examining the proceedings below to determine if an error was committed. Without a court of record, a second look at the case could only be provided by the higher court giving the case de novo consideration (i.e., fresh consideration). This was done by conducting a new trial called a trial de novo. The trial de novo was

not in fact appellate review, since it did not review the decision below, but proceeded as if the case had begun in the higher court. The trial de novo simply was a substitute for appellate review, necessitated by the absence of a record." [2]

2. Kerper, H. B. (1979). *Introduction to the criminal justice system* (2nd ed., pp. 38-39). West Publishing Company.

At trial, the state will present evidence showing facts demonstrating that the defendant committed the crime. The defendant may also present facts that show he or she did not commit the crime. The **principle of orality** requires that the **trier of fact** (generally the jury, but the judge when the defendant waives a jury trial) considers only the evidence that was developed, presented, and received into the record during the trial. As such, jurors should only make their decision based upon the testimony they heard at trial in addition to the documents and physical evidence introduced and admitted by the court. The principle of orality would be violated if, for example, during deliberations, the jury searched the Internet to find information on the defendant or witnesses. Similarly, if the police question the defendant and write a report, the jury cannot consider the contents of the report unless it has been offered in a way that complies with the rules of evidence and the court has received it during the trial. The principle of orality distinguishes the functions of a trial court, developing the evidence, and the function of the appellate courts, reviewing the record for legal error.

The principle of orality is one major difference between the **adversarial system** generally followed by the United States and the **inquisitorial system** generally followed in most other countries. Frequently in **civil law countries** (for example, most European nations), the police, prosecutors, or investigating magistrates question witnesses prior to trial and write summaries of their statements called a **dossier**. In determining guilt, the trier of fact is presented with just the summaries of the witness statements. The trial in civil law countries is less about the presentation of evidence establishing the defendant's guilt and more about the defendant's presentation of mitigation evidence which assists the court in giving an appropriate **sentence**, or sanction.

The Appeals Process

The government cannot appeal a jury's decision by **acquitting** the defendant, or finding the defendant not guilty. Thus, most criminal appeals involve defendants who have been found guilty at trial. The government may appeal a court's pretrial ruling in a criminal matter before the case is tried, for example a decision to suppress evidence obtained in a police search. This is called an **interlocutory appeal**. Although the defendant is permitted to appeal after entering a guilty plea, the only basis for his or her appeal is to challenge the sentence given. When the defendant appeals, he or she is now referred to as the **appellant**, and the State is the **appellee**. (Note that often the court will use the words **petitioner** and **respondent**. The petitioner is the party who lost in the last court who is petitioning the next level court for review; the respondent is the party who won in the last court). In routine appeals, the primary function of appellate courts is to review the record to discern if errors were made by the trial court before, during, or after the trial. No trial is perfect, so the goal is to ensure there was a fair, albeit imperfect, trial. Accordingly, the appellate courts review for **fundamental, prejudicial or plain error**. Appellate courts will reverse the conviction and possibly send the case back for a new trial when they find that trial errors affected the outcome of the case. A lower court's judgment will not be reversed unless the appellant can show that some prejudice resulted from the error and that the outcome of the trial or sentence would have been different if there had been no error. By reviewing for error and then writing opinions that become case law, appellate courts perform dual functions in the criminal process: error correction and lawmaking.

Appellate judges generally sit in panels of three judges. They read the **appellant's brief** (a written document filed by the appellant), the **reply brief** (a written document filed by the the appellee), and any other written work submitted by the parties or **friend of the court amicus curiae briefs.** Amicus curiae are individuals or groups who have an interest in the case or some sort of expertise but are not parties to the case. The appellate panel will generally listen to very short oral arguments, generally twenty minutes or less, by the parties' attorneys. During these oral arguments, it is common for the appellate judges to interrupt and ask the attorneys questions about their positions. The judges will then consider the briefs and arguments and the panel will then meet and deliberate and decide based on majority rule. If the appellate court finds that no error was committed at trial, it will **affirm** the decision, but if it finds there was an error that deprived the losing party of a fair trial, it may issue an **order of reversal**. When the case is reversed, in most instances, the court simply will require a new trial during which the error will not be repeated. This is called a **remand**. In some cases, however, the order of reversal might include a direction to dismiss the case completely, for

example when the appellate court concludes that the defendant's behavior does not constitute a crime under the law in that state. When reading an opinion, also known as decisions, from an appellate court, you can tell the **procedural history** of a case (i.e., a roadmap of where the case has been: what happened at trial, what happened as the case was appealed up from the various appellate courts).

Standards of Review

You have just learned that one function of the appellate courts is to review the trial record and see if there is a prejudicial or fundamental error. Appellate courts do not consider each error in isolation, but instead, they look at the cumulative effect of all the errors during the whole trial. Appellate court judges must sometimes let a decision of a lower court stand, even if they personally don't agree with it. Sports enthusiasts are familiar with the use of instant/video replay, and it provides us a good analogy. Officials in football, for example, will make a call, a ruling on the field, immediately after a play is made. This decision, when challenged, will be reviewed, and the decision will be upheld unless there is "incontrovertible evidence" that the call was wrong. When dealing with appeals, how much deference to show the lower court is the essence of **the standard of review**. Sometimes the appellate courts will give great deference to the trial court's decision, and sometimes the appellate courts will give no deference to the trial court's decision. How much deference to give is based on what the trial court was deciding—was it a question of fact, a question of law, or a mixed question of law and fact.

The appellate court will allow a trial court's decision about a factual matter to stand unless the court clearly got it wrong. The appellate court reasons that the judge and jury were in the courtroom listening to and watching the demeanor of the witnesses and examining the physical evidence. They are in a much better position to determine the credibility of the evidence. Thus, the appellate court will not overturn findings of fact unless it is firmly convinced that a mistake has been made and that the trial court's decision is clearly erroneous or "arbitrary and capricious." The arbitrary and capricious standard means the trial court's decision was completely unreasonable and it had no rational connection between the facts found and the decision made. The lower courts finding will be overturned only if it is completely implausible in light of all of the evidence. One court noted, "Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." [1]

Sometimes the law requires, or at the parties' request, that a trial judge or jury make a special finding of fact. Findings of fact are made on the basis of evidentiary hearings and usually involve credibility determinations that are better made by the trial judge sitting in the courtroom listening to the evidence and observing the demeanor of the witnesses. It is not enough that the appellate court may have weighed the evidence and reached a different conclusion unless the decision was clearly erroneous, the appellate court will defer to the trial judge.

Trial judges often make discretionary rulings., for example, whether to allow a party's request for a continuance or to allow a party to amend its pleadings or file documents late. In these **matters of discretion**, the appellate court will only overturn the trial judge if they find such a decision was an abuse of discretion. The lower court's judgment will be termed an **abuse of discretion** only if the judge failed to exercise sound, reasonable, and legal decision-making skills. A trial court abuses its discretion, for example, when: it does not apply the correct law, erroneously interprets a law, rests its decision on a clearly inaccurate view of the law, rests its decision on a clearly erroneous finding of a material fact, or rules in a completely irrational manner. Abuse of discretion exists when the record contains no evidence to support the trial court's decision.

When it comes to questions of law, the appellate courts employ a different standard of review called **de**

1. *United States v. Yellow Cab Co.*, 338 U.S. 338. 342 (1949).

novo review. De novo review allows the appellate court to use its own judgment about whether the trial court correctly applied the law. Appellate courts give little or no deference to the trial court's determinations and may substitute its own judgment on questions of law. Questions of law include interpretation of statutes or contracts, the constitutionality of a statute, the interpretation of rules of criminal and civil procedure. Trial courts presume that laws are valid and do not violate the constitution, and the burden of proving otherwise falls on the defendant. Trial courts sometimes get it wrong. De novo review allows the court to use its own judgment about whether the court correctly applied the law. Appellate judges are perhaps in a better position to decide what the law is as the trial judge since they are not faced with the fast-pace of the trial and have time to research and reflect.

Sometimes the trial court must resolve a question in a case that presents both factual and legal issues. For example, if police stop and question a suspect, there are legal questions, such as whether the police had reasonable suspicion for the stop or whether the questioning constituted an "interrogation", and factual questions, such as whether police read the suspect the required warnings. Mixed questions of law and fact are generally reviewed *de novo*. However, factual findings underlying the lower court's ruling are reviewed for clear error. Thus, if the application of the law to the facts requires an inquiry that is "essentially factual," review is for clear error.

In reviewing the trial court record, the appellate court may discover an error that parties failed to complain about. Generally, appellate courts will not correct errors that aren't complained about, but this is not the case when they come upon **plain error**. Plain error exists "[w]hen a trial court makes an error that is so obvious and substantial that the appellate court should address it, even though the parties failed to object to the error at the time it was made." [2] If the appellate court determines that the error was evident, obvious, clear and materially prejudiced a substantial right (meaning that it was likely that the mistake affected the outcome of the case below in a significant way), the court may correct the error. Usually, the court will not correct plain error unless it led to a miscarriage of justice.

The selection of the appropriate standard of review depends on the context. For example, the de novo standard applies when issues of law tend to dominate in the lower court's decision. When a mixed question of law and fact is presented, the standard of review turns on whether factual matters or legal matters tend to dominate or control the court's decision. The controlling standard of review may determine the outcome of the case. Sometimes the appellate court can substitute its judgment for that of the trial court and overturn a holding it does not agree with, but other times, it must uphold the lower court's decision even if it would have decided differently.

Appellate Decisions

In most appeals filed in the intermediate courts of appeal, the appellate panel will rule but not write a supporting document called a **written opinion** stating why it ruled as it did. Instead, the appellate panel will **affirm** the lower court's decision **without an opinion** (colloquially referred to as an AWOP). Sometimes, however, appellate court judges will support their decisions with a written opinion stating why the panel decided as it did and its reasons for **affirming** (upholding) or **reversing** (overturning) the lower court's decision. The position and decision by the majority of the panel (or the entire court when it is a supreme court case), is, not surprisingly, called the **majority opinion.** Appellate court judges frequently disagree with one another, and a judge may want to issue a written opinion stating why he or she has a different opinion than the one expressed in the majority opinion. If a particular judge agrees with the result reached in the majority opinion but not the reasoning, he or she may write a separate **concurring opinion**. If a judge

2. (http://www.law.cornell.edu/wex/plain_error.)

disagrees with the result and votes against the majority's decision, he or she will write a **dissenting opinion**. Sometimes opinions are unsigned, and these are referred to as **per curium** opinions. Finally, if not enough justices agree on the result for the same reason, a **plurality opinion** will be written. A plurality opinion controls only the case currently being decided by the court and does not establish a precedent which judges in later similar cases must follow.

LORE RUTZ-BURRI

Through petitions for writ of certiorari, the U.S. Supreme Court will be in a position to review cases coming to it from the state courts. Because the review is discretionary, the Court will generally accept review only when these cases appear to involve a significant question involving the federal constitution. As a case works its way through the state appeals process, the state courts may have made rulings about both the federal constitution and its own state constitution. Depending on the case and how the state opinions were written, the U.S. Supreme Court may find it difficult to determine whether the state interpreted its own constitution, in which case the Court will not accept review, or whether it interpreted the federal constitution, in which case the Court may accept review. The U.S. Supreme Court in *Michigan v. Long*, 463 U.S. 1032, at 1040–1041 (1983), explained when the Court will "weigh in" on a state court matter. [1] It held,

> "When . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.
>
> This approach obviates [*does away with*] in most instances the need to examine state law in order to decide the nature of the state court decision, and will at the same time avoid the danger of our rendering advisory opinions. It also avoids the unsatisfactory and intrusive practice of requiring state courts to clarify their decisions to the satisfaction of this Court. We believe that such an approach will provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference, and yet will preserve the integrity of federal law. 'It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action' (Citations omitted)."

1. *Michigan v. Long*, 463 U.S. 1032, at 1040–1041 (1983)

LORE RUTZ-BURRI

In their 1977 book, *Felony Justice: An organizational analysis of criminal courts,* James Eisenstein and Herbert Jacob, coined the term "courtroom workgroup." [1] They specifically referred to the cooperative working relationship between prosecutors, defense attorneys, and judges in working together (as opposed to an adversarial relationship that the public might expect) to efficiently resolve most of the cases in the criminal courts. This chapter more generally uses the term to include all the individuals working in the criminal courts—judges, attorneys, and the variety of court staff.

The **accusatory phase** (the pre-trial phase) and **adjudicatory phase** (the trial phase) of the criminal justice process include individuals who regularly work together in the trial courts. The prosecutor files the accusatory instrument called either **an information** or **an indictment**, and represents the state in plea bargaining, on pretrial motions, during the trial, and in the sentencing phase. The defense attorney represents the defendant after charges have been filed, through the pre-trial process, in a trial, and during sentencing, and maybe on the appeal as well. Judges, aided by several court personnel, conduct the pretrial, trial, and sentencing hearings. Prosecutors, defense counsel, and judges perform different roles, but all are concerned with the judicial process and the interpretation of the law. These law professionals are graduates of law schools and have passed the bar examination establishing their knowledge of the law and their ability to do legal analysis. As persons admitted by the state or federal bar associations to the practice of law, they are subject to the same legal codes of professional responsibility, disciplinary rules, and ethical rules and opinions for lawyers. Although the American criminal justice system is said to represent the adversarial model, the reality is that prosecutors, defense attorneys, judges and court staff work with cooperation and consensus rather than conflict. This is understandable when considering the common goal of efficient and expedition case processing and prescribed and agreed upon rules for achieving those goals.

Trial judges: Misperceptions and Realities

Trial court judges are responsible for presiding over pre-trial, trial and sentencing hearings, as well as probation and parole revocation hearings. They issue search and arrest warrants, set bail or authorize

1. Eisentstein, J., & Jacob, H. (1977). Felony Justice: An organizational analysis of criminal courts. Boston, MA: Little Brown and Co.

release, sentence offenders, engage in pre-sentence conferences with attorneys, work with court clerks, bailiffs, jail staff, etc. Trial judges have considerable, but not unlimited, discretion. In addition to the ethical and disciplinary rules governing all attorneys in the state, trial judges are subject to judicial codes of conduct. Judges are bound by the applicable rules of law when deciding cases and writing their legal opinions. Some rules governing judges are flexible guidelines while other rules are very precise requirements.

During the pretrial phase, judges make rulings on the parties' motions, such as motions to exclude certain physical or testimonial evidence, motions to compel discovery, and motions to change venue. Because most cases are resolved prior to trial through plea-bargaining, one important judicial function is taking the defendant's guilty plea.

At trial, if the defendant elects to waive a jury, there is a **bench trial,** and the judge sits as the "trier of fact." Like jurors in a jury trial, the judge has considerable discretion when deciding what facts were proven (or not) by the parties and what witnesses he or she finds credible. When the defendant elects for a jury trial, the jury decides what the facts are. In either a bench or jury trial, the trial judge rules: on the admissibility of evidence (whether a jury is entitled to hear certain testimony or look at physical evidence), whether witnesses are competent, whether privileges exist, whether witnesses qualify as experts, whether jurors will be excused from jury service, etc. At the end of the jury trial, the judge gives a set of **jury instructions** to the jurors which informs them on the law that applies to the case they are deciding.

If the defendant is convicted, then the judge will impose the sentence. Except for death penalty cases, jurors are generally not involved with sentencing the defendant. Judges have perhaps the broadest discretion in their role imposing sentences. However, with more states enacting mandatory minimums and sentence guidelines, judicial discretion has been severely curtailed.

"In the eyes of most Americans, the judge is the key player in the courtroom workgroup. The symbolism and ceremony of a criminal trial reinforce this view. The judge is seated on a raised bench, robed in black, and wields a gavel to maintain order in the courtroom. Moreover, the participants and spectators—including the defense attorney and the prosecutor—are commanded to 'all rise' when the judge enters or leaves the courtroom. It is no wonder, then that the judge is seen as the most influential person in court.

This view of the judge, though accurate to some degree, is misleading for at least two reasons. First, although the judge clearly plays an important role—in many cases, the lead role—in state and federal criminal courts, other actors play significant supporting roles. This is particularly the case in the majority of criminal cases that are settled by plea, not trial. In these cases, the key player may be the prosecutor rather than the judge. A second reason why the traditional view of the judge is misleading is that it is based on an inaccurate assessment of the role of the judge. Judging involves more than presiding at trials. In fact, most of what judges do during a typical day or week is something other than presiding at trials—reading case files, conducting hearings, accepting guilty pleas, pronouncing sentences, and managing court dockets." [2]

2. Spohn, C. & Hemmens, C. (2012) *Courts: A Text/Reader* (2nd ed.). Los Angeles, CA: SAGE Publications, Inc.

The role played by the judge, in other words, is both less influential and more varied than the traditional view would have people believe.

Trial Judge Selection and Qualifications

The sole qualification to be a judge in most jurisdictions is graduating from a law school and membership in the state's bar association. Although the trend is for judges to be lawyers prior, a few jurisdictions do not require justices of the peace or municipal judges to be attorneys.

States procedures in selecting judges vary tremendously. "Almost no two states are alike and many states employ different methods of selection depending on the different levels of the judiciary creating 'hybrid' systems of selection" [3]. Nevertheless, the primary differences surround whether judges are elected or appointed, or selected based on merit. There are four primary methods used to select judges in the United States: appointment, with or without confirmation by another agency; partisan political election; non-partisan election; and a combination of nomination by a commission, appointment and periodic reelection (the Missouri Plan).

There are variations within these four primary methods. As noted above, states may use different methods to select judges based on the level in the judicial hierarchy. For example, municipal judges may be appointed, while supreme court judges are elected. Each selection method has its critics and advocates, and the relative merits of each are generally judged by the selection methods ability to achieve judicial independence and accountability. Notwithstanding the critiques of each of the methods, there has been little empirical evidence that the quality of judges, in terms of competency, effectiveness, or honesty, varies depending on the methods used to select the judge. [4] [5][6]

The length of time a judge will "sit", called a **term in office** or **tenure,** varies greatly, generally from four to sixteen years. Frequently, the term for a trial judge is less than a term for an appellate judge. At the appellate level, six years is the shortest term, and many states use terms of ten years or more for their appellate judges. Only a few states have lifetime tenure for their judges.

In the federal system, the President appoints Article III judges (U.S. District Court, U.S. Circuit Court, and U.S. Supreme Court judges) with the advice and consent of the Senate. In Article III, U.S. Constitution states that federal judges are appointed to "hold their Offices during Good Behavior." On February 25, 2019, the Court in Rizo v. Yovino, ___ U.S. ___ (2019) refused to address the merits of the case (an important employment wage discrimination case) because the judge who wrote the Ninth

3. Berkson, L.C. (2005). J*udicial selection in the United States: A special report.* In E.E. Slotnick (Ed.) Judicial Politics: Readings from Judicature (3d ed., pp. 50). Washington, DC: CQ Press
4. Atkins B.M. & Glick, H.R. (1974). Formal judicial recruitment and state supreme court decisions. *American Politics Quarterly*, 2, 427-449
5. Dubois, P.L. (1986), Accountability, independence, and the selection of state judges: The role of popular judicial elections. *Southwestern Law Journal*, 40, 31-52
6. Nagel, S. (1975). *Improving the legal process*. Lexington, MA: Lexington Books.

Circuit opinion died eleven days before its release. What will likely become an oft-quoted sentiment, "Federal judges are appointed for life, not for eternity."

The district courts appoint federal magistrate judges to either four or eight-year terms. Though it would seem that politics has played an increasing role in the selection of judges in the federal system, perceptions are influenced by what we currently hear and read. The reality is that complaints of political overreaching in selecting federal judges have been with us since the federal courts were first staffed.

Link to Washington Post showing political judicial appointments since President Reagan https://www.washingtonpost.com/graphics/2018/politics/trump-federal-judges/?utm_term=.479982ef3fd6)

Link to Washington Post article showing political party breakdown in the confirmation of Justice Gorsuch in 2017 and comparing the breakdown with other current U.S. Supreme Court justices https://www.washingtonpost.com/graphics/politics/scotus-confirmation-votes/?tid=graphics-story&utm_term=.35b33aa30d39

A 1952 article shows that the role of politics in judicial selection is not only a recent concern https://library.cqpress.com/cqresearcher/document.php?id=cqresrre1952012300

Judicial Clerk, Law Clerk, and Judicial Assistants

Generally, judges have one or two main assistants. These individuals are known as "judicial clerk", "clerk of court", "law clerk", or "judicial assistant". Of course, there may be several court clerks who interact each day with all the judges in the courthouse, but generally, judges have only one or two judicial assistants who work directly with them. The clerk of court works directly with the trial judge and is responsible for court records and paperwork both before and after the trial. Usually, each judge has his or her own clerk. The clerk prepares all case files that a judge will need for the day. During hearings and the trial, these clerks record and mark physical evidence introduced in the trial, **swear in the witnesses,** or administer the oath to the witness, take notes cataloging the recordings, etc. In some jurisdictions, the law clerks are lawyers who have just completed law school and may have already passed the bar exam. In other jurisdictions, the law clerks are not legally trained but may have specialized paralegal training or legal assistant training.

Local and State Trial Court Administrators

Local and state trial court administrators oversee the administration of the courts. These administrators' responsibility includes: hiring and training court personnel (clerks, judicial assistants, bailiffs), ensuring that the court caseloads are efficiently processed, keeping records, sending case files to reviewing courts, ensuring that local court rules are being implemented, and working with the local and state bar associations to establish effective communications to promote the expedient resolutions of civil and criminal cases.

Indigency Verification Officers

The Indigency Verification Officer (IVO) is a court employee who investigates defendants' financial status and determines whether they meet the criteria for court-appointed counsel. More than 75% of all individuals accused of a crime qualify as indigent. How poor a defendant must be to qualify for a court-appointed attorney varies from place to place, and each IVO uses a screening device that takes into consideration the cost of defense in the locality as well as defendant's financial circumstances. One difficulty in qualifying for a court-appointed attorney is having equity in a home that cannot be easily sold quickly enough to provide resources for the defendant to hire an attorney. Another difficulty for indigency verification officers is getting the information needed from defendants who may be suffering from mental health issues.

Bailiffs

Bailiffs are the court staff responsible for courtroom security. Bailiffs are often local sheriff deputies or other law enforcement officers (or sometimes former officers), but they can also be civilians hired by the court. Sometimes, courts will use volunteer bailiffs. Bailiffs work under the supervision of the trial court administrator. During court proceedings, bailiffs or clerks call the session to order, announce the entry of the judge, make sure that public spectators remain orderly, keep out witnesses who might testify later (if the judge orders them excluded upon request of either party), and attend to the jurors. As courtroom security becomes a bigger concern, law enforcement officers are increasingly used as bailiffs, and they are responsible for the safety of the court personnel, spectators, witnesses, and any of the parties. In some communities, law enforcement bailiffs may transport in-custody defendants from the jail to the courthouse and back. In most jurisdictions today, bailiffs screen people for weapons and require them to silence cell phones before allowing them to enter the courtroom.

Jury Clerk

The jury clerk: sends out jury summons to potential jurors, works with jurors requests for postponements of jury service, coordinates with the scheduling clerk to make sure enough potential jurors show up at the courthouse each day there is a trial, schedules enough grand jurors to fill all the necessary grand jury panels, arranges payment to jurors for their jury service, and arranges lodging and meals for jurors in the rare event of jury sequestration.

Court Clerks and Staff

Court structure varies from the courthouse to courthouse, but frequently court staff is divided into units. For example, staff may be assigned to work in the criminal unit, the civil unit, the traffic unit, the small claims unit, the juvenile unit, the family unit, or the probate unit. In smaller communities, there may be just a few court clerks who "do it all". With the trend towards specialized courts (drug courts, mental health courts, domestic violence courts, and veteran courts), staff may specialize in and/or rotate in and out of the various units. Court staff are expected to have a vast knowledge of myriad local court rules and protocols, statutes, and administrative rules that govern filing processes, filing fees, filing timelines, accounting, record maintenance, as well as a knowledge of general office practices such as ordering supplies, mastering office machinery, and ensuring that safety protocol is established and followed. Recently, many courts have transitioned to electronic filing of all documents, usually managed through a centralized state court system. This transition presents challenges to court staff as they learn the new filing software, keep up with new filings, and archive the past court documents.

Release Assistance Officers

Release assistance officers (RAO) are court employees who meet with defendants at the jail to gather information to pass on to the judge who makes release decisions. Release assistance officers make their recommendations based on the defendant's likelihood of reappearance and other considerations specified by statute or local rules. In determining whether the defendant is likely to reappear, the RAO considers: the defendant's ties to the community, the defendant's prior record of failures to appear, the defendant's employment history, whether the defendant lives in the community, the nature and seriousness of the charges, and any potential threat the defendant may present to the community.

The availability of space at the jail may also play a role in whether an individual is released. Court and jail

staff may need to work together to establish release protocols when space is limited. The RAO should have a significant voice in drafting those protocols. Whether the RAO recommends security (bail) or conditional release, the RAO will generally suggest to the judge the conditions that the defendant should abide by if he or she makes bail or is conditionally released. Defendants released prior to trial will sign release agreements indicating the conditions of release recommended by the RAO and imposed by the judge. RAOs may also investigate the defendant's proposed living conditions upon release to make sure that they promote lawful activity and the ability for reappearance for all scheduled court appearances.

Scheduling Clerk

The scheduling clerk, or docketing clerk, set all hearings and trials on the court docket. The scheduling clerk notes the anticipated duration of trials (most trials are concluded within one day), speedy trial constraints, statutory and local court rules time frames, etc. The role of the scheduling clerk is extremely important, and an experienced scheduling clerk contributes to the overall efficiency of the legal process. Ineffective or inefficient scheduling causes delay, frustration, and may impede the justice process. Part of scheduling, or docketing, is keeping track of law enforcement officers' and defense attorneys' scheduled vacations. In addition, the scheduling clerk must be mindful of the judges' calendars which should track scheduled vacation time and training days, and also needed desk time, the time necessary for resolving cases they have **taken under advisement.** (Note that trial judges can either decide "from the bench", meaning they will rule immediately on the issues before them during the hearing, or after taking the case under advisement, meaning they will rule through a written decision/opinion letter after spending time researching the law, reviewing the parties written pleadings, and considering the oral arguments).

LORE RUTZ-BURRI

Prosecutors play a pivotal role in the criminal justice and work closely with: law enforcement officials, judges, defense attorneys, probation and parole officers, victims services, human services, and to a lesser extent, with jail and other corrections officers. The authority to prosecute is divided among various city, state and federal officials. City and state officials are responsible for prosecutions under local and state laws, and federal officials for prosecutions under federal law. Associate Justice Robert Jackson, while he was the U.S. Attorney General addressed the Conference of United States Attorneys (federal prosecutors) in Washington, D.C. on April 1, 1940 and stated,

> "The qualities of a good prosecutor are . . . [elusive and . . . impossible to define]. …
>
> The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst. …
>
> Nothing better can come out of this meeting of law enforcement officers than a rededication to the spirit of fair play and decency that should animate the federal prosecutor. Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done. . . .
>
> There is a most important reason why the prosecutor should have, as nearly as possible, a detached and impartial view of all groups in his community. Law enforcement is not automatic. It isn't blind. One of the greatest difficulties of the position of prosecutor is that he must pick his cases because no prosecutor can even investigate all of the cases in which he receives complaints. If the department of justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff would be inadequate. We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning. What every prosecutor is

practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.

… A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility" [1]

State Prosecuting Attorneys

Prosecutors represent the citizens of the state, not necessarily a particular victim of a crime. States vary in how they organize the groups of attorneys hired to represent the state's interest. Ordinarily, the official with the primary responsibility for prosecuting state violations is the local prosecutor who is referred to as the "district attorney", "county attorney", or "state's attorney". Local prosecutors are usually elected from a single county or a group of counties combined into a prosecutorial district. In many states, the state attorney general's office has the authority that trumps over the local prosecutors' authority, but in practice, the state attorney general rarely intervenes in local matters. The state attorney general's office will intervene, for example, if there is a conflict of interest or when requested by the district attorney. It is not uncommon for a small local prosecutor's office faced with the prosecution of a major, complex, time-consuming trial, to request the aid of the attorney general's office. In these smaller offices, there may be insufficient resources to handle complicated prosecutions and still keep up with the day-to-day filings and cases.

The prosecuting attorney and the attorney general ordinarily are the only officials with authority to prosecute violations of state law. City attorneys may be hired to prosecute city ordinances, but these attorneys primarily specialize in civil matters. When city attorneys and prosecuting attorneys have different policies for treating minor offenses, the result may be disparate, or different, treatment of similarly situated offenders. This raises a concern of inconsistent application of the law. Additionally, different county prosecutors may follow different policies on which matters they will charge, the use of diversion programs, the use of plea bargaining, and the use of certain trial tactics. To limit some of these differences, some states have used statewide training, and district attorneys' conferences. Still, the policies and practices are far from uniform.

Generally, assistant prosecutors, called deputy district attorneys, are hired as "at will" employees by the elected district attorney. Historically, the political party of the applicant was a key criterion, and newly elected prosecutors would make a virtual clean sweep of the office and hire outsiders from the former office. Now, most offices hire on a non-partisan, merit-oriented, basis.

Most states require that the prosecutor be a member of the state bar. Some states also require that he or she have several years in the practice of law. Deputy district attorneys, on the other hand, are frequently

1. Associate Justice Robert Jackson while he was the U.S. Attorney General addressed the Conference of United States Attorneys (federal prosecutors) in Washington, D.C. on April 1, 1940

fresh out of law school. They may have limited knowledge of state criminal law, as law school is designed to teach lawyers to enter any new field and educate themselves.

Link to the Oregon District Attorneys Association Website https://www.oregonda.org/

Federal Prosecuting Attorneys

Prosecutors in the federal system are part of the U.S. Department of Justice and work under the Attorney General of the United States. The Attorney General does not supervise individual prosecutors and relies on the 94 United States Attorneys, one for each federal district. U.S. Attorneys are given considerable discretion, but they must operate within general guidelines prescribed by the Attorney General. The U.S. Attorneys have a cadre of Assistant U.S. Attorneys who do the day-to-day prosecution of federal crimes. For certain types of cases, approval is needed from the Attorney General or the Deputy Attorney General in charge of the Criminal Division of the Department of Justice. The Criminal Division of the Department of Justice (DOJ) operates as the arm of the Attorney General in coordinating the enforcement of federal laws by the U.S. Attorneys.

Link to cite to find the U.S. Attorney https://www.justice.gov/usao/find-your-united-states-attorney

Selection and Qualifications of Prosecutors

Most local prosecuting attorneys are elected in a partisan election in the district they serve. State attorney generals may also have significant prosecutorial authority. They are elected in forty-two states, appointed by the governor in six states, appointed by the legislature in one state, and appointed by the state supreme court in another. State attorney generals serve between two to six-year terms, which can be repeated. Federally, senators from each state recommend potential U.S. Attorney nominees who are then appointed by the President with the consent of the Senate. U.S. Attorneys tend to be of the same political party as the President and are usually replaced when a new President from another party takes office.

Prosecutor's Function

Prosecutors arguably have more discretion than any other official in the criminal justice system. They decide whether to charge an individual or not. Much has been written about the prosecutor's broad discretion and the constraints on his or her discretion. If they choose not to prosecute, this is referred to as nolle prosequi, and this decision is largely unreviewable. Spohn and Hemmens (2012, p. 123) concluded in their review of the studies on prosecutor's charging decisions that "these highly discretionary and largely invisible decisions reflect a mix of (1) legally relevant measures of case seriousness and evidence strength and (2) legally irrelevant characteristics of the victim and the suspect" [2].

Prosecutors guide the criminal investigation and work with law enforcement to procure search and arrest warrants. Following arrest, prosecutors continue to be involved with various aspects of the investigation. Roles include: meet with the arresting officers, interview witnesses, visit the crime scene, review the physical evidence, determine the offenders prior criminal history, make bail and release recommendations, appear on pretrial motions, initiate plea negotiations, initiate **diversions** (pre-trial contracts between the government and the defendant which divert cases out of the system), work with law enforcement officers from other states who seek to extradite offenders, prepare the accusation to present to grand jury, call witnesses and present a *prima facia* case (present enough evidence which, when unrebutted by the defendant, shows that the defendant committed the crime) at a preliminary hearing, represent that state at arraignments and status conferences, conduct the trial, and, upon conviction, make sentencing recommendations while representing the state at the sentencing hearing.

In many communities, the prosecutor is the spokesperson for the criminal justice system and appears before the legislature to recommend or oppose penal reform. Prosecutors make public speeches on crime and law enforcement, take positions on requests for clemency for cases they have prosecuted, work extensively with victims' services offices, which may be an arm of the prosecutor's office. In some communities, the prosecutor is also responsible for representing the local government in civil matters and may represent the state in civil commitment proceedings and answer accident claims, contract claims, and labor relation matters for the county. However, only a few counties have prosecutors still perform this function. U.S. Attorneys still have substantial responsibilities for representation of the U.S. government in civil litigation, and there is generally a civil division, a criminal division, and an appellate division of the U.S Attorneys office.

The American Bar Association (ABA) standards indicate that "the prosecutor's [ethical] duty is to seek justice". This means that the state should not go forward with prosecution if there is insufficient evidence of the defendant's guilt or if the state has "unclean hands", for example, illegally conducted searches or seizures or illegally obtained confessions. Ethical and disciplinary rules of the state bar associations govern prosecutors who must also follow state and constitutional directives when they prosecute crimes.

Link to the ABA Standards on the Prosecution Function https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition-TableofContents/

2. Spohn, C. & Hemmens, C. (2012) *Courts: A Text/Reader* (2nd ed.). Los Angeles, CA: SAGE Publications, Inc.

LORE RUTZ-BURRI

The Sixth Amendment to the U.S. Constitution provides, "The accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." Most state constitutions have similar provisions. Historically, the right to counsel meant that the defendant, if he or she could afford to hire an attorney, could have an attorney's assistance during his or her criminal trial. This right has developed over time and now includes the right to have an attorney's assistance at all **critical stages** in the process, or at all criminal proceedings that may substantially affect the right of the accused. Importantly, the right to assistance of a defense counsel has been held to require that the state pay the costs of the defense counsel when a person is **indigent** or has insufficient financial resources to pay.

Privately Retained Defense Attorneys

Individuals accused of any infraction or crime, no matter how minor, have the right to hire counsel and have them appear with them at trial. The attorney must be recognized as qualified to practice law within the state or jurisdiction, and generally, criminal defendants do well to hire an attorney who specializes in criminal defense work. However, because many criminal defendants don't have enough money to hire an attorney to represent them, the court will need to appoint an attorney to represent them in criminal cases.

Appointed Counsel

Federal and state constitutions do not mention what to do when the defendant wants, but cannot afford an attorney's representation. Initially, the Court interpreted the Sixth Amendment as permitting defendants to hire an attorney who would assist them during the trial. Later, the Court held that the Due Process Clause of the Fifth and Fourteenth Amendment includes the right to a fair trial, and a fair trial includes

the right to the assistance of counsel. In *Powell v. Alabama*, 287 U.S. 45, at 58 (1932), the Court concluded that the focus on trial was too narrow. It stated, "[T]he most critical period of the proceeding[s] against the defendants might be that period from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation, and preparation are vitally important. Defendants are as much entitled to . . . [counsel's] aid during that period as at the trial itself." [1]

Powell also dealt with the need for states to provide representation to defendants who could not afford to hire counsel in those cases where fundamental fairness required it. In a statement that led to the dramatic extensions to the right to counsel, the Court continued,

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has a small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he is not guilty, he faces the danger of conviction because he does not know how to establish his innocence." [2]

Powell was decided in 1932, and because of television and the multitude of crime drama programs, people probably know more about the criminal justice process than ever imagined by the *Powell* court. Nevertheless, the Court's admonitions still ring true. Not too many non-lawyers know how to conduct themselves at trial, challenge the state's evidence, make evidentiary objections, or file proper pretrial motions with the rudimentary knowledge gained from watching television. One could consult with the many great Internet sources that are easily accessible, however, many individuals charged with crimes have limited education and lack the sophistication to distinguish between those sources that are applicable to their case and which are not.

Between *Powell* (1932) and the case of *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court decided when the appointment of counsel was necessary for a fair trial in state prosecutions on a case-by-case basis. In *Gideon*, however, the Court held that this case-by case-approach was inappropriate. It held that the state had to provide poor defendants access to counsel in every state felony prosecution. Lawyers in serious criminal cases, it said, were "necessities, not luxuries". Since *Gideon*, the Court has extended the obligation to provide counsel to state misdemeanors prosecutions that result in the defendant receiving a jail term. The Court found that the legal problems presented in a misdemeanor case often are just as complex as those in felonies. [3] In two cases, *Argersinger v. Hamlin*, 407 U.S. 25 (1972) and *Scott v. Illinois*, 440 U.S. 367 (1979), the Court tied the right to counsel in misdemeanor cases to the defendant's actual incarceration. Because

1. *Powell v. Alabama*, 287 U.S. 45, at 58 (1932)
2. Powell v. Alabama, *287* U.S. 45, at 68-69 (1932)
3. *Gideon v. Wainwright*, 372 U.S. 335 (1963)

it is difficult to predict when a judge will want to incarcerate a person convicted of a misdemeanor, this approach is difficult to implement.[4] [5]Many states instead appoint counsel to an indigent defendant charged with a crime where a possible term of incarceration could be imposed.

The Court left it for the lower courts to decide when a person is indigent. Lower courts have generally held that the financial resources of a family member cannot be considered. Also, courts cannot merely conclude that because a college student is capable of financing his or her education that he or she is capable of hiring an attorney. A person does not have to become destitute in order to be classified as indigent. An indigent defendant may have to pay back the court-appointed attorney's fees if they are convicted or enter a plea. In practice, most courts collect appointed attorneys' fees at a standard rate and much reduced from the actual costs of representation as part of the fines that a convicted defendant must pay. When acquitted, defendants are not required to pay the state back for the attorney fees.

Public Defenders, Assigned Attorneys, and Defense Attorney Associations

Most states now have public defenders' offices. Because public defenders and assistant public defenders handle only criminal cases, they become the specialists and have considerable expertise in representing criminal defendants. Public defender offices frequently have investigators on staff to help the attorneys represent their clients. In some states, courts appoint or assign attorneys from the private bar (not from the public defender's office) to represent indigent defendants. The mixed system uses both assigned counsel, or associations of private attorneys who contract to do indigent criminal defense, and public defenders. For example, the public defender's office may contract with the state to provide 80% of all indigent representations in a particular county. The remaining 20% of cases would be assigned to the association of individual attorneys who do criminal defense work- some retained clients, some indigent clients-or private attorneys willing to take indigent defense cases.

In practice, there is no purely public defender system because of "conflict cases." Conflicts exist when one law firm tries to represent more than one party in a case. Assume, for example, that Defendant A conspired with Defendant B to rob a bank. One law firm could not represent both Defendant A and Defendant B. Public defender offices are generally considered one law firm, so attorneys from that office could not represent both A and B, and the court will have to assign a "conflict" attorney to one of the defendants.

Controversial Issue: Link to the 2017 report from the Oregon Public Defense Services about indigent representation in Oregon

https://www.oregon.gov/opds/commission/reports/EDAnnualReport2017.pdf

Link to the National Legal Aid and Defenders Association

4. *Argersinger v. Hamlin*, 407 U.S. 25 (1972)
5. *Scott v. Illinois*, 440 U.S. 367 (1979)

http://www.nlada.org/

Link to the Oregon Criminal Defense Lawyers Association

https://www.ocdla.org/

The Right to Counsel in Federal Trials

The Court in *Johnson v. Zerbst*, 304 U.S. 458 (1938), held that in all federal felony, trials counsel must represent a defendant unless the defendant waives that right. The Court further held that the lack of counsel is a jurisdictional error which would render, or make, the defendant's conviction void. A court that allows a defendant to be convicted without an attorney's representation has no power or authority to deprive an accused of life or liberty. [6]

Zerbst also established rules for a proper waiver of the Sixth Amendment right to counsel. The court said that it is presumed that the defendant has not waived her right to counsel. For a waiver to be constitutional, the court must find that the defendant knew he or she had a right to counsel and voluntarily gave up that right, knowing that he or she had the right to claim it. Therefore, if the defendant silently goes along with the court process without complaining about the lack of counsel, his or her silence does not amount to a waiver. The Court defined waiver as an "intelligent relinquishment or abandonment of a known right or privilege".

In 1945 Congress passed the Federal Rules of Criminal Procedure (FRCP). Rule 44 of the FRCP requires defendants to have counsel, or affirmatively waive counsel, either retained or appointed, at every stage of the proceedings from the initial appearance through appeal. This rule was difficult to implement because there was no recognized federal defense bar, or federal defense attorneys, available or willing to take on appointed cases. So, in 1964, Congress passed the Criminal Justice Act of 1964 that established a national system for providing counsel to indigent defendants in federal courts.

When Does a Defendant Have the Right to Assistance of an Attorney?

Critical Stages of the Criminal Justice Process

In *White v. Maryland*, 373 U.S 59 (1963), the Court found that defendants are entitled to the right to counsel at any critical stage of the proceeding, defined as a stage in which he or she is compelled to make

6. *Johnson v. Zerbst*, 304 U.S. 458 (1938)

a decision which may later formally be used against him or her. The Court has found the following court procedures to be critical stages:

- The initial appearance in which the defendant enters a non-binding plea–*White v. Maryland*, 373 U.S.59 (1963).
- A preliminary hearing–*Coleman v. Alabama*, 399 U.S. 1 (1970).
- A lineup that includes a previously indicted defendant–*Wade v. United States*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967).

During Other Proceedings

The Court has extended the right to counsel to psychiatric examinations, juvenile delinquency proceedings [7], civil commitments proceedings [8]and probation and parole hearings (see, below). Further, the court in *Estelle v. Smith*, 451 U.S. 454 (1981), held that a defendant charged with a capital crime and ordered by the court to be examined by a psychiatrist, to evaluate possible future dangerousness, was entitled to consult with counsel. Similarly, in *Satterwhite v. Texas*, 486 U.S. 249 (1988), the Court found prejudicial error occurs when defense counsel was not appointed to represent a defendant subjected to a psychiatric evaluation. The Court further held that counsel must be made aware of the projected psychiatric evaluation before it occurs.

During Probation and Parole Revocation Hearings

In *Mempa v. Rhay*, 389 U.S. 128 (1967), 17-year-old Mempa was placed on probation for two years after he pleads guilty to "joyriding". About four months later, the prosecutor moved to have petitioner's probation revoked alleging that Mempa had committed a burglary while on probation. Mempa, who was not represented by counsel at the probation revocation hearing. admitted being involved in the burglary. The court revoked his probation based on his admission to the burglary. The U.S. Supreme Court held that Mempa should have had counsel to assist him in his hearing.

Five years later, in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the state sought to revoke defendant's probation. Originally, Gagnon was sentenced to fifteen years of imprisonment for armed robbery, but the judge had suspended the imposition of sentence and placed him instead on seven years of probation. The Court found that the probation revocation hearing did not meet the standards of due process. Because a probation revocation involves a loss of liberty, the probationer was entitled to due process. The Court did not adopt a *per se* rule that all probationers must have the assistance of counsel in every revocation hearings, but rather stated:

"We find no justification for a new, inflexible constitutional rule with respect to the requirement of counsel. We think rather, that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of sound discretion by the state authority charged with responsibility for administering

7. *In re Gault*, 387 U.S. 1 (1967)
8. Stefan, S. (1985). Right to Counsel in Civil Commitment Proceedings. *Mental & Physical Disability L. Rep.*, 9, 230.

the probation and parole system. . . . Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request based on a timely and colorable claim. . . . In passing on a request for the appointment of counsel, the responsible agency should also consider, especially in doubtful cases, whether probationer appears to be capable of speaking effectively for himself. In every case in which a request for counsel at a preliminary or final hearing is refused, the grounds for refusal shall be stated succinctly in the record." [9]

At Some Post-Trial Proceedings

The Sixth Amendment's right to the assistance of counsel does not stop when the jury finds the defendant guilty. When an out-of-custody defendant is found guilty at the end of a trial, the judge may remand the defendant to custody- has the bailiff take the defendant into custody and transport them to the jail- and revokes conditions of bail if there had been any. Counsel must assist the defendant through the end of the sentencing hearing, and the defendant's attorney has the legal obligation to make post-trial motions to preserve the defendant's rights.

The Court has distinguished between the defendant's right to the assistance of counsel on mandatory appeals and discretionary appeals. In *Douglas v. California*, 372 U.S. 353 (1963), the Court found that indigent counsel should be provided to individuals when an appellate court must review their appeal or **an appeal of right**. Once the first appeal has been dismissed or resolved, however, *Ross v. Moffitt*, 417 U.S. 600 (1974), holds that indigent defendants do not have a right to appointed counsel for discretionary review in either the state supreme court or with the U.S. Supreme Court. The *Ross* majority reasoned that the defendant did not need an attorney to have "meaningful access" to the higher appellate courts because all the legal issues would have already been fully briefed in the intermediate appellate court. Additionally, the Court noted that the concept of equal protection does not require absolute equality. The majority opinion states,

> "We do not believe that the Due Process Clause requires North Carolina to provide the respondent with counsel on his discretionary appeal to the State Supreme Court. At the trial stage of a criminal proceeding, the right of an indigent defendant to counsel is fundamental and binding upon the States by virtue of the Sixth and Fourteenth Amendments. But there are significant differences between the trial and appellate stages of a criminal proceeding. The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt. To accomplish this purpose, the State employs a prosecuting attorney who presents evidence to the court, challenges any witnesses offered by the defendant, argues rulings of the court, and makes direct arguments to the court and jury seeking to persuade them of the defendant's guilt. Under these circumstances "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him" (Citations omitted).
>
> By contrast, it is ordinarily the defendant, rather than the State, who initiates the appellate process,

9. *Gagnon v. Scarpelli,* 411 U.S. 788, 790 (1973).

> seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The defendant needs an attorney on appeal not as a shield to protect him against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a word to upset the prior determination of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all. The fact that an appeal has been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way. . . . (Citations omitted.)

The facts show that respondent … received the benefit of counsel in examining the record of his trial and in preparing an appellate brief on his behalf for the state Court of Appeals. Thus, prior to his seeking discretionary review in the State Supreme Court, his claims had "once been presented by a lawyer and passed upon by an appellate court." We do not believe that it can be said, therefore, that a defendant in respondent's circumstances is denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking review in that court. At that stage, he will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case. These materials . . . would appear to provide the Supreme Court of North Carolina with an adequate basis for its decision to grant or deny review" (Citations omitted).

This is not to say, of course, that a skilled lawyer, particularly one trained in the somewhat arcane art of preparing petitions for discretionary review, would not prove helpful to any litigant able to employ him. An indigent defendant seeking review in the Supreme Court of North Carolina is therefore somewhat handicapped in comparison with a wealthy defendant who has counsel assisting him in every conceivable manner at every stage in the proceeding. But both the opportunity to have counsel prepare an initial brief in the Court of Appeals and the nature of discretionary review in the Supreme Court of North Carolina make this relative handicap far less than the handicap borne by the indigent defendant denied counsel on his initial appeal as of right in Douglas. And the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. (Emphasis added). The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process. We think the respondent was given that opportunity under the existing North Carolina system." [10]

Similarly, prisoners have a limited right to legal assistance for the purpose of filing writs of habeas corpus. In *Bounds v. Smith*, 430 U.S. 817 (1977), the Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law". Prisons can meet this obligation by training prisoners to be paralegal assistants to work under a lawyer's supervision or by using law students, paralegals, and volunteer lawyers. Again, it may seem

10. *Ross v. Moffitt,* 417 U.S. 600, 610-611, 614, 616 (1974).

inconsistent that the court requires more for habeas corpus relief than it does for discretionary review on appeals. The difference lies in the nature of habeas corpus as a collateral attack, or side attack, where the claim is often being advanced for the first time and therefore the need for legal assistance may be greater.

Functions of Defense Attorneys

Defense lawyers investigate the circumstances of the case, keep clients informed of any developments in the case, and take action to preserve the legal rights of the accused. Some decisions, such as which witnesses to call, when to object to evidence, and what questions to ask on cross-examination, are considered to be strategic ones and may be decided by the attorney. Other decisions must be made by the defendant, most notably, after getting advice from the attorney about the options and their likely consequences. Defendants' decisions include whether to plead guilty and forego a trial, whether to waive a jury trial, and whether to testify in their own behalf.

The ABA Standards relating to the Defense Function established basic guidelines for defense counsel in fulfilling obligations to the client. The primary duty is to zealously represent the defendant within the bounds of the law. Defense counsel is to avoid unnecessary delay, to refrain from misrepresentations of law and fact, and to avoid personal publicity connected with the case. Fees are set on the basis of the time and effort required by counsel, the responsibility assumed, the novelty and difficulty of the question involved, the gravity of the charge, and the experience, reputation, and ability of the lawyer.

ABA Standard 4– 1.2, The Function of Defense Counsel, states:

(a) Counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused.

(b) The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.

(c) Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused. Defense counsel should comply with the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.

(d) Defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel's attention, he or she should stimulate efforts for remedial action.

(e) Defense counsel, in common with all members of the bar, is subject to standards of conduct stated in

statutes, rules, decisions of courts, and codes, canons, or other standards of professional conduct. Defense counsel has no duty to execute any directive of the accused which does not comport with the law or such standards. Defense counsel is the professional representative of the accused, not the accused's alter ego.

(f) Defense counsel should not intentionally misrepresent matters of fact or law to the court.

(g) Defense counsel should disclose to the tribunal legal authority in the controlling jurisdiction known to defense counsel to be directly adverse to the position of the accused and not disclosed by the prosecutor.

(h) It is the duty of defense counsel to know and be guided by the standards of professional conduct as defined in codes and canons of the legal profession applicable in defense counsel's jurisdiction. Once representation has been undertaken, the functions and duties of defense counsel are the same whether defense counsel is assigned, privately retained, or serving in legal aid or defender program. [11]

Tricky Issues in Representation

Defendants sometimes want to have a friend or family member speak up for them, but, the Court will not permit that. The right to counsel means the right to be represented by an attorney, someone legally trained and recognized as a member of the bar association. Similarly, defendants may not necessarily get the attorney of their choice. For example, in *Wheat v. United States*, 486 U.S. 153 (1988), one defendant who wanted to be represented by the same attorney who was representing his accomplice/co-conspirator in a complex drug distribution conspiracy was not allowed to have that attorney. The Court disallowed his application for the appointment of counsel noting that irreconcilable and unwaivable conflicts of interest would be created since there was the likelihood that the petitioning defendant would be called to testify at a subsequent trial of his co-defendant and that his co-defendant would be testifying in petitioner's trial. On the other hand, in *United States. v. Gonzalez-Lopez*, 553 U.S. 285 (2008), the Court reversed the defendant's conviction because the trial court erroneously deprived the defendant of his choice of counsel. The defendant, Gonzales-Lopez, had hired counsel from a different state, and during pretrial proceedings, the judge and the counsel had some disagreements. The judge then prohibited the attorney from taking part in the defendant's trial. The Court found that a trial judge violated the defendant's Sixth Amendment rights.

Defendants cannot repeatedly "fire" their appointed counsel as a stall tactic, and, at some point, the court will not allow the defendant to substitute attorneys and will require the defendant work with whatever attorney is currently assigned. A defendant may not force an unwilling attorney to represent him or her, but a court does have the discretion to deny an attorney's motion to withdraw from representation after inquiring about counsel's reasons for wishing to withdraw. This may present an ethical dilemma for the attorney because professional rules of responsibility require that even when an attorney withdraws from a case, he or she must still maintain attorney-client confidences. If, for example, the attorney knows that the defendant insists on taking the stand and presenting perjured testimony, the attorney must withdraw. But, at the same time, the attorney cannot discuss with the court why he or she needs to withdraw. At some point

11. ABA Standard 4- 1.2 The Function of Defense Counsel (2015). *Criminal Justice: Prosecution and Defense Function.* American Bar Association.

in the inquiry, after the judge has asked and the attorney has talked around the subject, the judge hopefully catches on, and the judges will allow the attorney to withdraw.

Effective Assistance of Counsel

Defendant's attorneys must provide competent assistance and should not harm the defendant's case by their legal representation. According to *McMann v. Richardson*, 397 U.S. 759 (1970), the right to counsel means the right to effective assistance of counsel. The constitutional standard for evaluating effective assistance was determined in *Strickland v. Washington*, 466 U.S. 688 (1984). The *Strickland* decision looked at two aspects of the representation to determine whether counsel was ineffective. First, the defense attorney's actions were not those of a reasonably competent attorney exercising reasonable professional judgment; and second, the defense attorney's actions caused the defendant prejudice, meaning that they adversely affected the outcome of the case (i.e., they likely caused the jury to find the defendant guilty).

Courts may be more inclined to find ineffective assistance of counsel in a death penalty case than other run-of-the-mill cases. For example, the Court found the defense attorneys provided ineffective assistance in the sentencing portion of defendant's death penalty trial for the murder of a 77-year-old woman because they had failed to conduct an adequate "social history" investigation of the defendant's life and had not presented information to the jury they did have which showed that defendant had been subject to regular sexual abuse as a child. *Wiggins v. Smith*, 539 U.S. 510 (2003). The Court stated,

> "In finding that Schlaich and Nethercott's investigation did not meet Strickland's performance standards, we emphasize that Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does Strickland require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of Strickland. We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that reasonable professional judgments support the limitations on investigation. . . . A decision not to investigate thus must be directly assessed for reasonableness in all the circumstances.

Counsel's investigation into Wiggins' background did not reflect reasonable professional judgment. Their decision to end their investigation when they did was neither consistent with the professional standards that prevailed in 1989, nor reasonable in light of the evidence counsel uncovered in the social services records–evidence that would have led a reasonably competent attorney to investigate further. Counsel's pursuit of bifurcation until the eve of sentencing and their partial presentation of a mitigation case suggest that their incomplete investigation was the result of inattention, not reasoned strategic judgment. In deferring to defense counsel's decision not to pursue a mitigation case despite their unreasonable investigation, the Maryland Court of Appeals unreasonably applied *Strickland."*

Waiving Counsel

Sometimes, a defendant wishes to waive counsel and appear **pro se,** or represent him or herself at trial. The

Court, in *Faretta v. California*, 422 U.S. 806 (1975), held that the Sixth Amendment includes the defendant's right to represent himself or herself. The *Faretta* Court found that, where a defendant is adamantly opposed to representation, there is little value in forcing him or her to have a lawyer. The Court stressed that it was important for the trial court to make certain and establish a record that the defendant knowingly and intelligently gave up his or her rights.

"Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish he knows what he is doing and his choice is made with eyes open." [12]

In *McKaskle v. Wiggins*, 465 U.S. 168, at 174 (1984), the Court held that a "defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure. Nor does the Constitution require judges to take over chores for a pro se defendant that would normally be attended to by trained counsel as a matter of course." The constitutional right to self-representation does not mean that the defendant is free to obstruct the trial, and a judge may terminate self-representation by a defendant who is obstructing the process. Frequently, judges will assign a **standby counsel** to assist defendants. Standby counsel is an attorney who can be available to answer questions of a pro se defendant, and if necessary, standby counsel can step in if the defendant is engaging in misconduct.

Conclusion

Court jurisdiction determines where a case will be filed and which courthouse has the legal authority to hear a case. Jurisdiction can be based on geography, subject matter, or seriousness of the offense. Jurisdiction is also divided between trial courts (original jurisdiction) and appellate courts (appellate jurisdiction).

More than 51 court systems operate in the United States. We have a dual court system comprised of federal trial and appellate courts and state trial and appellate courts. Federal and state courts have similar hierarchical structures with cases flowing from lower trial courts through intermediate courts of appeals and up to the supreme courts.

Defendants who wish to appeal their convictions are entitled to have their cases reviewed at least once, a mandatory appeal of right in the intermediate courts of appeal. After that, the review is discretionary and rare. Appellate courts generally affirm the decision of the trial courts, but may also reverse and remand the case back to the trial court if they determine that prejudicial error occurred. At the intermediate appellate court level, judges most frequently affirm the trial court's decision without writing an opinion, but sometimes the judges will write opinions informing the parties of their decision and the reasons for holding as they did. Judges don't always agree, and at times, judges will write dissenting opinions or concurring opinions. Appellate court opinions become precedent that must be followed in the trial courts.

Judges, prosecutors, defense attorneys work together along with court clerks, bailiffs, and other court staff to process tens of thousands of cases daily in trial courts across the nation. Judges, prosecutors, and defense attorneys play an important role in the criminal justice process. Although few cases actually go to trial, and the vast majority of criminal cases are resolved in the trial courts at the pre-trial stage, the defendants must be represented by an attorney at critical stages in the process, and at the government's expense if they cannot afford to hire an attorney, unless they have voluntarily waived the right and wish to represent themselves.

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8: Corrections

Learning Objectives

Up to this point, we have spent much time on understanding crime, how it is policed, and how it is prosecuted in the courts. This section will cover the last third of the justice system, corrections. This section will focus on a brief history of corrections, to include the philosophical underpinnings of why and how we punish people. After reading this section, students will be able to:

- Understand where the basic concept of punishment comes from
- Recognize the different ideologies of why and how people are punished
- Understand how punishment has evolved in the world, and how that has shaped punishment in the United States

Critical Thinking Questions

1. Why are we more punitive at times than others? What changes our punitive values?
2. What are some of the pros/cons of each of the four correctional ideologies?
3. Does crime change depending on our collective correctional ideology, or practice?
4. Does punishment change, based on our correctional ideology? How?
5. What are some key explanations for the rise in the prison population in the U.S.?

DAVID CARTER

A Brief History of Punishment

Feeling safe and secure in person and home is arguably one of the most discussed feelings in our nation today. The "fear of crime" influences how we think and act day to day. This has caused great fluctuation in the United States in regards to how we punish people who are convicted of violating the law. In part, punishment comes from the will of the people, which is then carried out through the legislative process, and converted into sentencing practices. People have differing views on why people should be punished, and how much punishment they should receive. These correctional ideologies, or philosophical underpinnings of punishment, have been prevalent throughout history, and are not brand new in the United States. This section details basic concepts of some of the more frequently held punishment ideologies, which include: retribution, deterrence, incapacitation, and rehabilitation.

In the News: One of the more frequently used statistics in the news about crime is homicides in the United States. Often, you will hear something about a homicide rate or the number of homicides in a state, or a city for a particular year. An interesting clarifier about this number is that it typically does not include a number of deaths in prison. Deaths in prison occur every year, yet these are not normally counted in any statistic. In 2014, there were approximately 3,927 deaths that occurred in prisons in the United States. There are a variety of reasons for these deaths, to include homicide. For more information on this, look up – Mortality in Correctional Institutions (MCI). This is also formerly known as Deaths in Custody Reporting Program (DCRP). The Bureau of Justice Statistics houses and publishes data on this phenomenon. Additionally, this is a voluntary reporting structure, which may actually not capture all deaths that occur in prison. https://www.bjs.gov/index.cfm?ty=dcdetail&iid=243

Philosophies of Punishment Example

Two stories come on during the crime section of the 6 o'clock news. In the first story, a man is described as a

convicted sex offender. He is living at an address that you know is in your city. Citizens that live on the streets nearby his address are shown picketing in front of his house, voicing their displeasure that he is allowed to live there. The video shows how angry the neighborhood is, and you can visibly see their frustration and angst on the people's faces in the news clip.

The second story is of a woman who was detained (shown in the back of a squad car) for stealing food from a local grocery store, apparently to feed her children. The store manager is then on the screen describing that he is offering to donate the food to her so that she does not have to spend time in jail or get into any more trouble.

How do these two stories make you feel? Is it the same feeling for each story? Does one of these stories make you feel more afraid of crime? More angry or upset? Which one? Who deserves to get punished more? How much punishment should they get? The answers to questions like these instantly flood our thoughts as we are watching news blurbs like this, and in general, when we hear about a crime. This is all normal. And, this process is what generates our own personal punishment ideology.

Now, which one of these two individuals has actually committed a crime? A second point to this story is that our perceptions of punishment can be influenced by the narrative (what is presented to us).

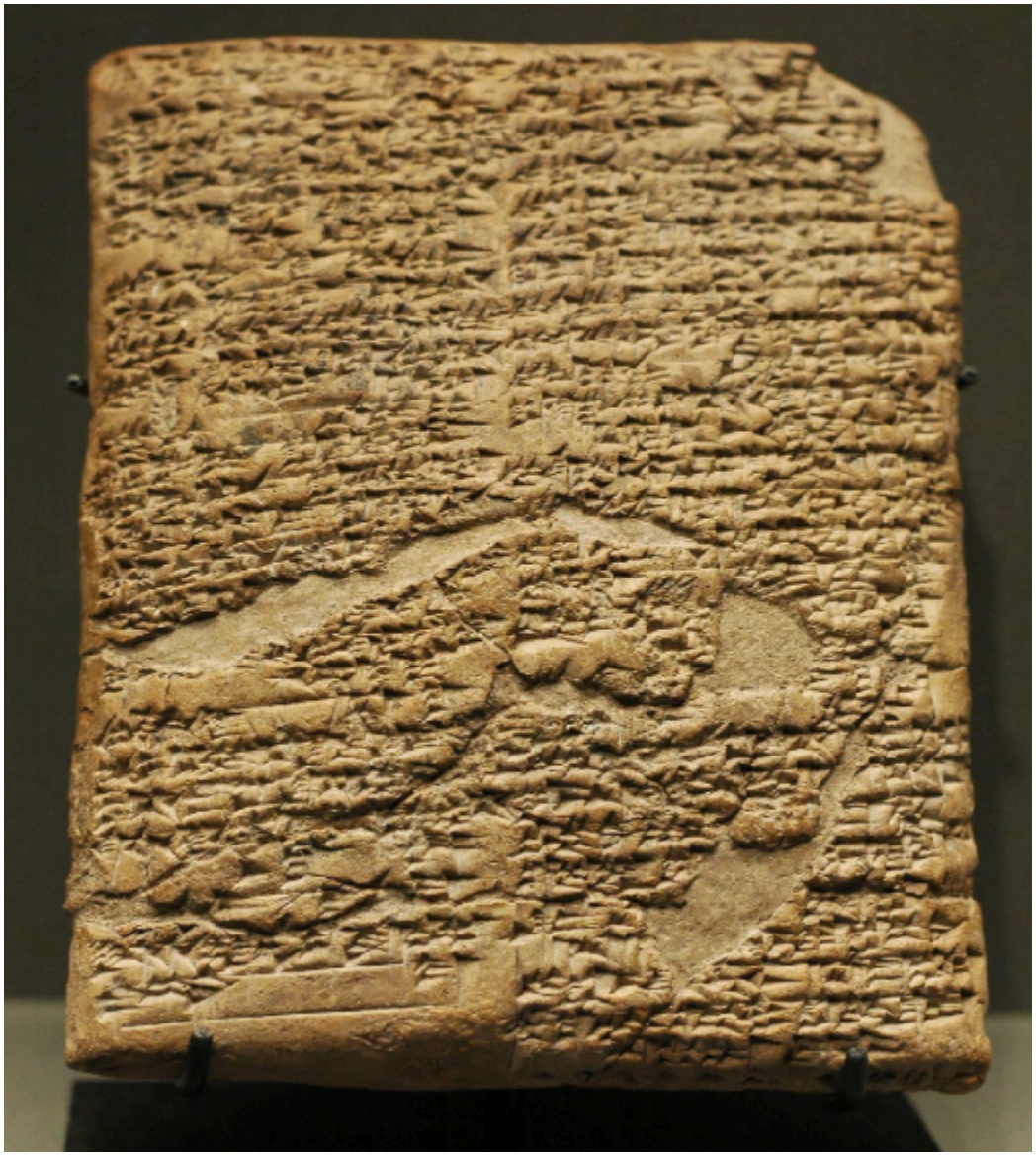
Although the change in our overall perception or use of the rehabilitation ideology is slow, it is necessary. As we will see in the next sections, our reliance on the "Brick and Mortar" approach to punishment comes at a great cost, and the results are less than desirable.

DAVID CARTER

Retribution

Retribution, arguably the oldest of the ideologies/philosophies of punishment, is the only backward-looking philosophy of punishment. That is, the primary goal of retribution (in its original form) is to ensure that punishments are proportionate to the seriousness of the crimes committed, regardless of the individual differences between offenders, other than *mens rea* and an understanding of moral culpability. Thus, retribution focuses on the past offense, rather than the offender. This can be phrased as "a balance of justice for past harm." People committing the same crime should receive a punishment of the same type and duration that balances out the crime that was committed. The term-backward-looking means that the punishment does not address anything in the future, only for the past harm done.

It is argued as the oldest of the main correctional/punishment ideologies because it comes from a basic concept of revenge, or "an eye for an eye." This concept of an eye for an eye, or vengeance, basically means that if someone perceives harm, they are within their right to retaliate at a proportional level. This idea that retaliation against a transgression is allowable has ancient roots in the concept of Lex Talionis, which roughly translates into the law of retaliation. A person who injures someone should be punished with a similar amount of harm (punishment). This concept was developed in early Babylonian law, and it is here that we see some of the first written forms of customs and practices. Thus, around 1780 b.c., the Babylonian Code, or the Code of Hammurabi, is considered the first attempt to codify practices by individuals of a group. We recognize these today to be our first attempt at written laws. These laws (pictured below) represent a retributive approach to punishment. That is proportional punishments for past harms done.



Hammurabi Code

The retributivist philosophy also calls for any suffering beyond what was originally intended during sentencing to be removed. This is because the dosage of punishment is the core principle of retribution: offenders who commit the same crime must receive the same punishment. Punishments beyond the original balancing of justice for the past harm is outside of the scope of retribution, and thus, does not fit with retribution. This also helps to explain why retribution is a backward-looking ideology. As we continue forward in the history of punishment, we see changes to our perceptions of how to react to crime. This includes our changing views of punishment, to include punishment ideologies that are more forward-looking.

DAVID CARTER

Deterrence

Forward-looking ideologies are designed to provide punishment, but also to reduce the level of reoffending (**recidivism**) through some type of change, while the backward-looking approach is solely for the punishment of the offender's past actions. This change in how we view punishment is a large shift that has ripples in culture, the politic of the times, and even religion. Moving many eras forward from Hammurabi, deterrence is the next major punishment ideology. Rooted in the concepts of classical criminology, deterrence is designed to punish current behavior(s), but also ward off future behaviors through sanctions or threats of sanctions. Moreover, it can be focused on a group or on one individual. Thus, the basic concept of **deterrence** is "the reduction of offending (and future offending) through the sanction or threat of sanction."

When looking at punishment through this deterrent design, it can be split into two distinct categories: general and specific. **Specific deterrence** is geared towards trying to teach the individual offender a lesson. It is meant to better that individual so they will not recidivate. By punishing the offender (or threatening a sanction), it is assumed they will not commit a crime again. It is this point that makes deterrence a forward-looking theory of punishment. General deterrence runs along the same track as specific deterrence. However, **general deterrence** differs by when one person offends, the punishment received is going to be the same for all. In this way, the group doing the punishing attempts to relay the message of future events to the masses. If someone commits this act, they will be punished; this is part of the core design for deterrence.

Some other principles of deterrence to discuss in brief are: marginal, absolute, and displacement. Marginal deterrence works on the principle that the action itself is only reduced in amount by the offender, not removed. An example of this would be, a person sees a police officer sitting on the side of the freeway. If they are driving 70 mph, they might slow to 58 mph. Technically, they may still be breaking the law, yet their level of criminal behavior has been reduced. Absolute deterrence is a surrealistic concept often thought to be created by Robert Peel, in his idea of creating a police force to remove all crime. In today's standards, we know this to be false. There is little to no evidence to support that all crime can be deterred within a specific area, or even in general. Displacement argues that crime is not deterred, but rather, it is shifted on three levels. It may be shifted by time, location, or the type of crime committed. Instead of someone stealing cars on the weekend, they may sell drugs during the day. Although the weekend crime carjacking rate will decrease, the daily drug trade will increase.

In order for all of these principles of deterrence to work, the people who are involved (meaning society

as a whole) must have a conceptual (perceived) idea of the level of punishment they will receive. For the efficacy of this theory, three key things must be instilled within each individual in society. They must have free will, some amount of rationality, and felicity. Free will refers to everyone's ability to make choices about their future actions, like choosing when to offend and not offend. They must also have a rationalistic ability (ability to be rational) to see what the outcomes of their choices will be. The third element, hedonism (or a hedonistic calculus), is essential. We must desire more pleasurable things than harmful ones. It is more probable that crime will be deterred if all three of these elements are in place within society. This is both a strength and weakness of the deterrence theory.

Deterrence theory works on these three key elements: **certainty, celerity**, and **severity,** in incremental steps. First, by making certain, or at least making the public think that their offenses are not going to go unpunished, then there will be a deterrent factor. As Beccaria relates, this is the most important of these three elements within deterrence theory. The celerity, or swiftness of punishment, is a secondary factor in rationalizing for the offender. If they know how swift the punishment will be, they will not offend. These concepts were cornerstones to the works of Cesare Beccaria (1738–1794), an Italian philosopher in the latter half of the 18th century. Beccaria's works were profound, and many of his concepts helped to shape the U.S. Bill of Rights. He is also considered the Father of the Classical School of Criminology, and a prominent figure in penology. According to Beccaria, "For punishment to attain its end, the evil which it inflicts has only to exceed the advantage derivable from the crime… All beyond this is superfluous and for that reason tyrannical." [1]

1. Beccaria, 1764/1963, 43.



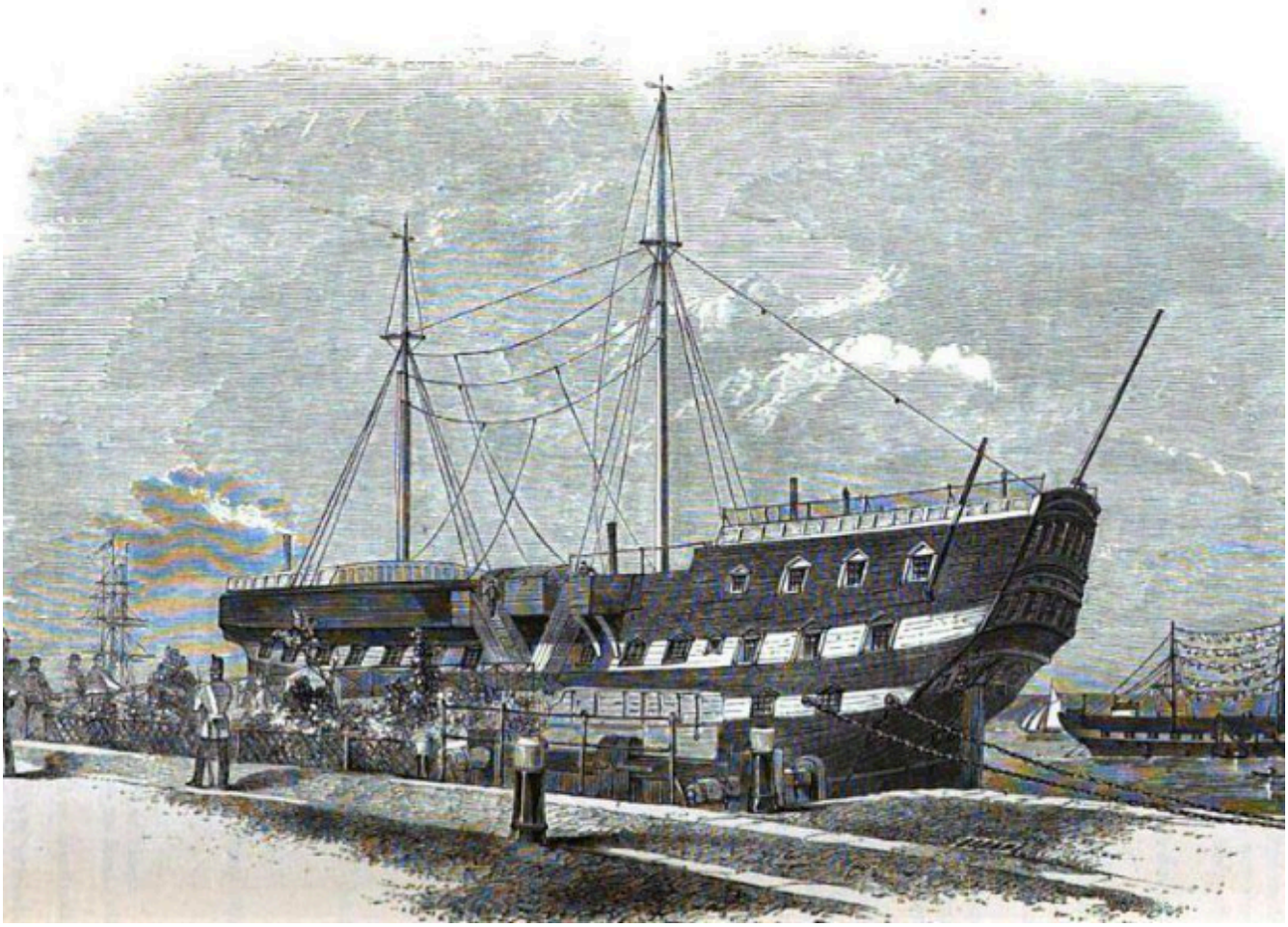
Cesare_Beccaria_1738-1794.jpg

In saying this, Beccaria refers to the severity or amount of punishment. It is not how much punishment that is the primary motivator of deterrence, rather, the certainty. If deterrence is to work, the ideology of the punishment is what should drive this goal of corrections.

Today, we have a better understanding of the effectiveness of deterrence. It does appear to work for lower level offenses, and for individuals that are generally prosocial. However, the overall effect of deterrence is limited. For more detail on things to know about deterrence, please see: https://www.ncjrs.gov/pdffiles1/nij/247350.pdf

Incapacitation

Rooted in the concepts of banishing individuals from society, **incapacitation** is the removal of an individual (from society), for a set amount of time, so as they cannot commit crimes (in society) for an amount of time in the future. In British history, this often occurred on Hulks. **Hulks** were large ships that carried convicted individuals off to far away lands. The point was to not allow them to be able to commit crimes in their community any longer.



The_Warrior_prison_ship.JPG

In the 1950s, punishment became much more of a political topic in the United States, and this is one of the issues that started this section, our perceptions of the fear of crime. Lawmakers, justicians, and others began to campaign with their toughness on crime, using the fear of crime and the criminal element to benefit their agendas. One of the examples of being tough on crime was the use of long periods of incarceration in general. This could be considered as **collective incapacitation**, or the incarceration of large groups of individuals to remove their ability to commit crimes for a set amount of time in the future.

Since this time, and most greatly exacerbated in the 1980s and 1990s, there has been the increasing use of punishment by prison sentences. Thus, we saw rapid growth in the prison population in the United States. The 'politicization of punishment' increased the overall prisoner levels in two ways. First, by changing the views toward the discretion allowed to decision makers, we have gotten tougher on crime. In turn, more people are being sentenced to prison that may have otherwise gone to a specialized probation or community sanction alternatives. Second, these same attitudes have led to harsher and lengthier punishments for certain crimes. Offenders are being sent away for longer sentences, which has caused the intake-to-release ratio to change, causing enormous buildups of the prison population.

The incapacitative ideology followed this design for several decades. In the early 1990s, policies were implemented that would target individuals more specifically. These would come to be known as "three-strikes" policies. These policies would incarcerate an individual for greater lengths of time, based on prior

offenses. The **selective incapacitation** philosophy incarcerated individuals for longer periods of time than others. Thus, it removed their individual ability to commit crimes (in society) for greater periods of time in the future than others.

There are mixed feelings about selective and collective incapacitation. Policymakers would promote their utility through anecdotal examples of locking certain offenders away, in order to help assuage the fear of crime. Others have offered that there are minimal savings at best, stating that these goals do not achieve the intended results as previously suggested. [1] Future styles of selective incapacitation that have evolved include tighter crime control strategies that incorporate variated sentencing strategies to selectively incapacitate the higher rate offender. Others opt for tougher parole procedures to retain the hardened criminals longer. In sum, we do see a definite shift from the insignificance of collective incapacitation, to a more selective approach.

In all, we are still left with the same questions, does it work? And, at what cost? Do these lengthier punishments for particular crimes have an effect by selectively incapacitating hardened criminals? Are there other methods that seem the same or are more effective than the ones already in practice? This takes us to the last of the four main punishment ideologies, rehabilitation.

1. Blokland, A.A.J., & Nieuwbeerta, P. J (2007). Selectively incapacitating frequent offenders: Costs and benefits of various penal scenarios. *Journal of Quantitative Criminology, 23*: 327. https://doi.org/10.1007/s10940-007-9033-3

Rehabilitation

Although not as old as some of the older ideologies, **rehabilitation** is not brand new. Additionally, it is the only one of the four main ideologies that most accurately attempts to address all three goals of corrections, which are:

1. Punish the offender
2. Protect Society
3. Rehabilitate the offender.

Certainly, all four ideologies address the first two goals, punishment, and societal protection. However, the goal of rehabilitating the offender is either silent, or not addressed in retribution, deterrence, or incapacitation. This does come as a cost. As we will talk about in more detail when covering prisons and jails, there is a great paradox that is happening in our society when we heavily rely on jails and prisons. Most offenders will come out of institutions (roughly 95% of all people who enter prisons are released), and little is done to change them while they are there. This is mostly due to our attitudes towards offenders, the policies that are necessarily placed on individuals while they are locked up, and the institutions themselves. And yet, there is the expectation that these individual leaving prisons will not commit crimes in the future.

The question here is this: what have we done to change them so that they are not reoffending? Without the incorporation of some form of rehabilitation, the answer is fairly clear… Nothing. Yet, we expect it.

Rehabilitation has taken on different forms through its history in the United States. We have considered individuals out of touch with God, and so offenders needed to be penitent, in order to get right with God. One of America's earliest prisons was designed with this in mind. The Eastern State Penitentiary, opening in 1829, included outside reflection yards; so that offenders could look up to God for penance.

To see more of this prison, visit https://www.easternstate.org/.

Reformatories were another example of how rehabilitation was viewed in the past. The reform movement tried to rehabilitate the offender through more humane treatment, to include basic education, religious services, work experience, and general reform efforts. This was done in an effort to reform individuals, thus allowing them to come back to society. The Elmira Reformatory was one of the earliest efforts of the reform ideal, and many prisons built in the United States were based on this prison. Below is a picture of Elmira.



Elmira Reformatory

Other attempts at rehabilitation included more medical approaches. In the past, offenders were viewed as sick, and in need of medical cures. This medical approach, while greatly reduced, is still used in some areas today. For example, the chemical castration of certain offenders does still occur. For example HB 2543, in Oklahoma, in September of 2018, focuses on the mandated use of medroxyprogesterone acetate as a treatment, and is required before appropriate release of convicted sex offenders.

Rehabilitation, as an ideology has had critics. This is in large part due to how it is perceived. Many have voiced an objection, as it is seen as being "soft" on offenders. This is also how it has been discounted when coupled with the fear of crime. Several examples are presented as to its ineffectiveness, and weakness to the problem of crime. Probably the most notable example of the ineffectiveness of rehabilitation came in the 1970s. In 1974, Robert Martinson provided support for many that were clambering to demonstrate that the ideas of rehabilitation were ineffective. In a review of over 230 programs, Martinson concluded that "With few and isolated exceptions, the rehabilitative efforts that have been undertaken so far have had no appreciative effect on recidivism" (Martinson, 1974, p. 25). [1] This was the spark that many needed to turn toward the more punitive ideologies that we have so far discussed. However, it did help some to ask more detailed questions about why rehabilitation was not working. Additionally, it helped researchers to ask more critical questions about measurement, how to more properly evaluate rehabilitation and to understand the difference of what does not work versus what does work for offenders. These principles of effective intervention become the cornerstone of modern rehabilitation.

Understanding Risk and Needs in Rehabilitation

1. Martinson, R. (1974). What works? Questions and answers about prison reform. *Public Interest* 35, 22-54.

Today's rehabilitative efforts do still carry punishment and societal protection as goals, but the focus of rehabilitation is on the changing of offenders behaviors so that they are not committing crimes in the future. This is done by understanding what are the items that make offenders at risk for offending. Additionally, based on the levels of risk items, some offenders are at higher risk for offending than other offenders. This includes items like prior criminal history, antisocial attitudes, antisocial (pro-criminal) friends, a lack of education, family or marital problems, a lack of job stability, substance abuse, and personality characteristics (mental health and antisocial personality). Collectively these are considered as risk factors for offending (re-offending). While we can change the number of priors someone already has, all of these other items can be addressed. These are considered as criminogenic needs. Criminogenic needs are items that when changed, can lower an individual's risk of offending. This is a core component of Paul Gendreau's (1996) principles of effective intervention, and are at the heart of most modern effective rehabilitation programs.[2] Additionally, thousands of offenders have been assessed on these items, which has helped to develop evidence-based rehabilitation practices. These are efforts that are based on empirical data about offenders. When these criminogenic needs are addressed, higher-risk offenders demonstrate positive reductions in their risk to offend.

Over the last 40 years, efforts to change these characteristics, in order to reduce offending have been varied. One of the most useful approaches to changing the antisocial attitudes and behaviors of offenders has come in the form of behavioral and cognitive behavioral change efforts. Cognitive behavioral change for offenders is based on the concepts that the behaviors that one exhibit can be changed by changing the thinking patterns behind (before) the behaviors are exhibited. That is (criminal) behavior is based on cognition, values, and beliefs that are learned vicariously through the interactions and observations of others. It is especially relevant since we are receiving individuals from prison, where these ideas, peers, values, and beliefs may dominate the institution. For a more detailed explanation, please see https://www.apa.org/ptsd-guideline/patients-and-families/cognitive-behavioral.pdf.

Today, evidence-based rehabilitative efforts are now used as benchmarks when establishing programs that are seen as effective, versus ones that show little to no (or even negative) results. Rehabilitation programs that follow these principles of effective intervention are showing that they can achieve these three goals of corrections (punishment, societal protection, and offender change). In fact, the U.S. Federal Government has a section of the National Institute of Justice devoted to these evidence-based practices, and what programs are seen as effective, promising, and not effective. This site is called "CrimeSolutions," and can be visited at https://www.crimesolutions.gov/. This resource provides invaluable information for individuals making decisions on what works for offenders and is based on empirical studies of hundreds of different approaches.

2. Gendreau, P. (1996). Principles of effective intervention with offenders. *Choosing correctional options that work: Defining the demand and evaluating the supply*, 117-130, Alan T Harland, ed. -- See NCJ-158983) https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=158988

DAVID CARTER

Learning Objectives

This section focuses on prisons and jails in the United States. We start with a brief historical account of prisons and jails in America. We then turn to our current situation of prisons and jails, to include types, function, and volume. After reading this section, students should be able to:

- Understand the emergence of prisons and jails in the United States
- Recognize the different types of jails
- Recognize the different types of prisons

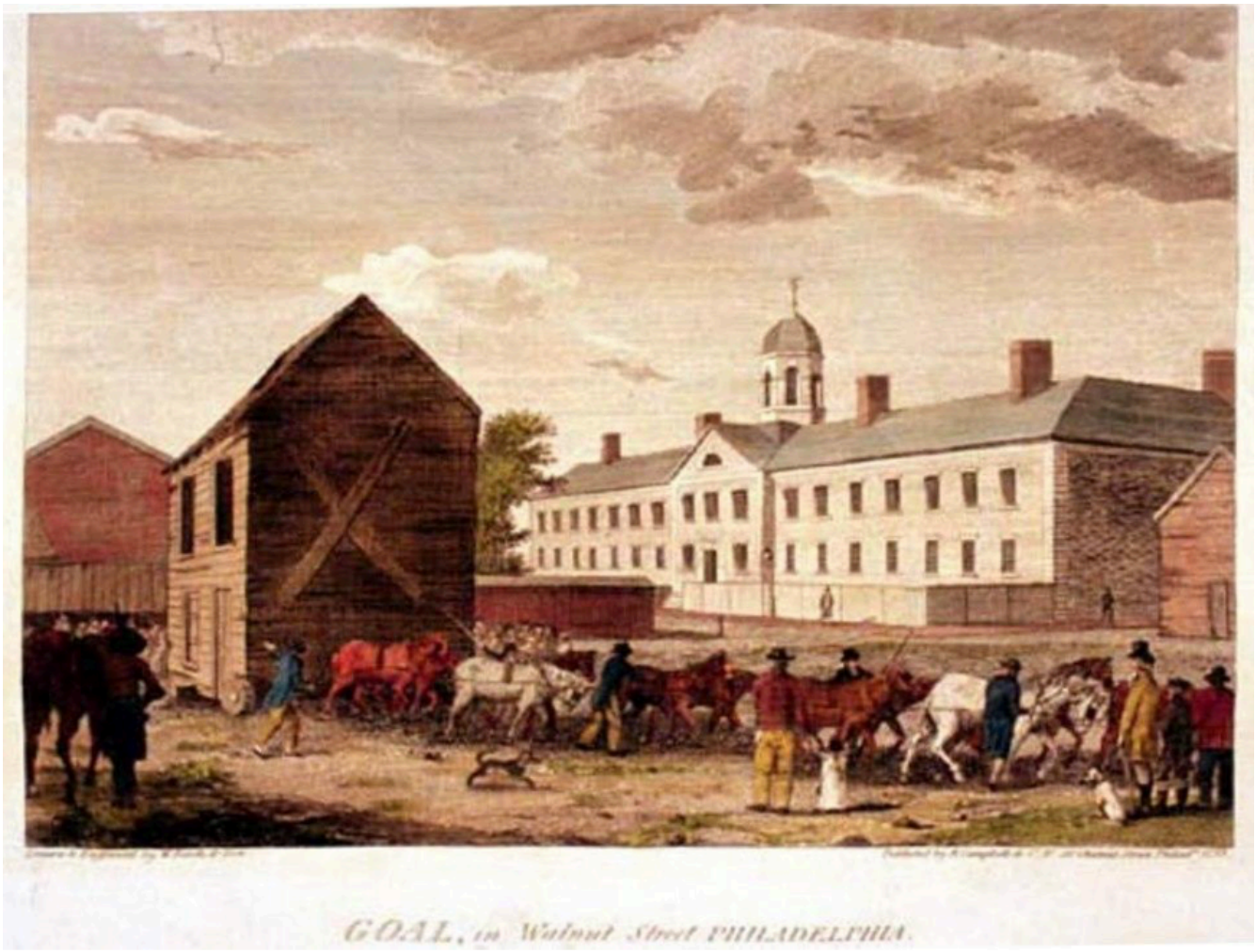
Critical Thinking Questions

1. Explain the operational process of most jails in the United States today. Where does this come from historically?
2. How does the difference in the type of jail influence how the jail is managed?
3. Explain the similarities and differences in the two early types of prisons in the United States.
4. Explain the current operational process of most State prisons in the United States today. Where does this come from historically?

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The Growth of Jails in the United States

The concept of a **jail** (GOAL – old English spelling) is yet another concept that we have carried with us from Western Europe (England, etc…) when the United States was first forming. Spawning from the County-level establishment and management of jails in England; these have largely been run by County Sheriffs in the United States, ever since we began to have them. They have had various names, depending on their function and use, such as **Bridewells**, and Workhouses. Pictured below is what is commonly accepted as the first "built" structure to house individuals that have been processed through the courts, the Walnut Street Jail. Opening around 1790, this facility housed both jail inmates, and at some points in time convicted offenders.



Goal_in_Walnut_Street_Philadelphia_Birch's_views_plate_24_(cropped).jpg

Later, labeled as a prison (as depicted by the historical marker below), the Walnut Street Jail was a blueprint for later prison construction, which we discuss in the latter half of this chapter.

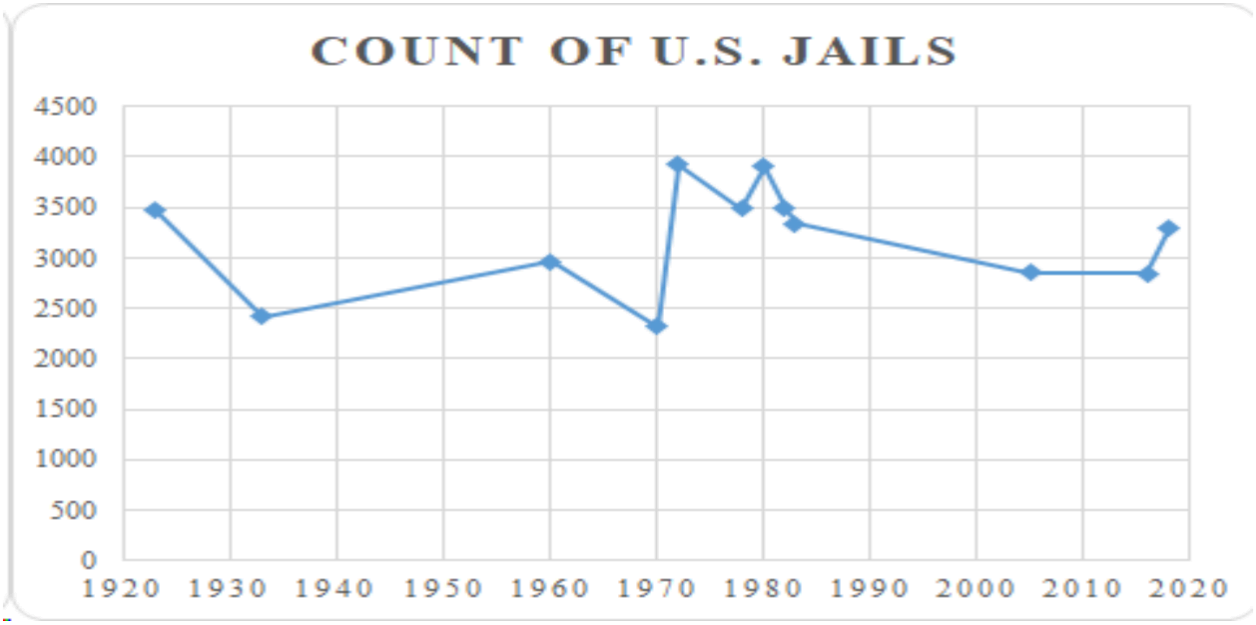


Walnut Street Prison Historical Marker

As the United States began to populate, county lines began to be drawn up for States earning Statehood. Sheriffs began to police their Counties, and also be responsible for managing the lower level infractions (misdemeanors) within their jurisdictions. Thus, County Jails began to flourish in the United States. Initially, many jails were nothing more than parts of a Sheriff's office, literally, cells in the back room. Today, large structures (even multiple structures in a single county) constitute jails in the United States. Overall, we have seen changes in the growth of jails in the United States. While we were certainly growing in the number of jails as States gained Statehood, there has been a shift in jails structures. The vast majority of jails are small in size. There are few larger jails, but they hold more individuals. As can be seen in a report from Cahalan and

Parsons (1986), and reports by Harrison and Beck of the Bureau of Justice Statistics (2005), the numbers of jails has changed immensely. [12]

Table 2-1 Jails in the United States



This is due to a variety of reasons, to include: inclusion or exclusion of Youth Facilities, Native American Facilities, Privately Owned Facilities, and reporting structures (who reports a jail in a given year). Based on these fluctuations, it is difficult to get an exact count of jails each year. However, it appears that there are roughly 3,300 jails in the United States today.

1. Cahalan, M. W., & Parsons, L. A. (1986). Historical corrections statistics in the United States, 1850-1984. *U.S. Department of Justice.* https://www.bjs.gov/content/pub/pdf/hcsus5084.pdf
2. Harrison, P. M., & Beck, A. J. (2005). Prisons and jail inmates at midyear, *2005.BJS Bulletin.* https://www.bjs.gov/content/pub/pdf/pjim05.pdf

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Jails vary greatly in function and size. For example, the vast majority of jails hold less than 50 jail detainees each (roughly 2,000 jails). Yet, the 50 biggest jails hold over half of the total number of detainees, more than 350,000 in the 50 biggest jails. [1] For example, Los Angeles County Jail is actually a system of buildings spread across LA County, which includes the Inmate Reception Center, North Facility, South Facility, LOMA, Twin Towers, Men's Central, just to name a few of the facilities. For a more detailed description of the jail facilities in L.A. County Jail, please see http://shq.lasdnews.net/pages/tgen1.aspx?id=as1.

While most jails are run by County Sheriff, there are some jails that are managed by cities or jurisdictions. For example, Chicago, New York, Philadelphia, and Washington D.C. all have their own jails, which are not managed directly by the county in which they reside.

Jails also vary by how they are designed. While there are others, jails can be separated into two broad types, the older generation, and the new generation. **Older generation jails** are jails that are typically linear in design, with cell doors separating rooms or sections down long corridors. Many jails operate with this design. **Newer generation jails** are more podular in design, where multiple cells face a central area. Additionally, when these podular designs are used, a direct supervision approach is also often used. Direct supervision is where there are no particular barriers between the deputies and the detainees within a facility. For example, the image below depicts what a direct supervision jail may look like.

New Generation Jail Design

1. Minton, T. D. (2012). Jail inmates at midyear, statistical tables. *U.S. Department of Justice.* https://www.bjs.gov/content/pub/pdf/jim11st.pdf



As you can see in the image, the operational booth (immediate left) is open to access the day area or common area, and the doors of the cells for this jail section open to this space. Below is an image of the older generation, linear style of jail. This typically uses the indirect supervision approach.

Older Generation Jail Design



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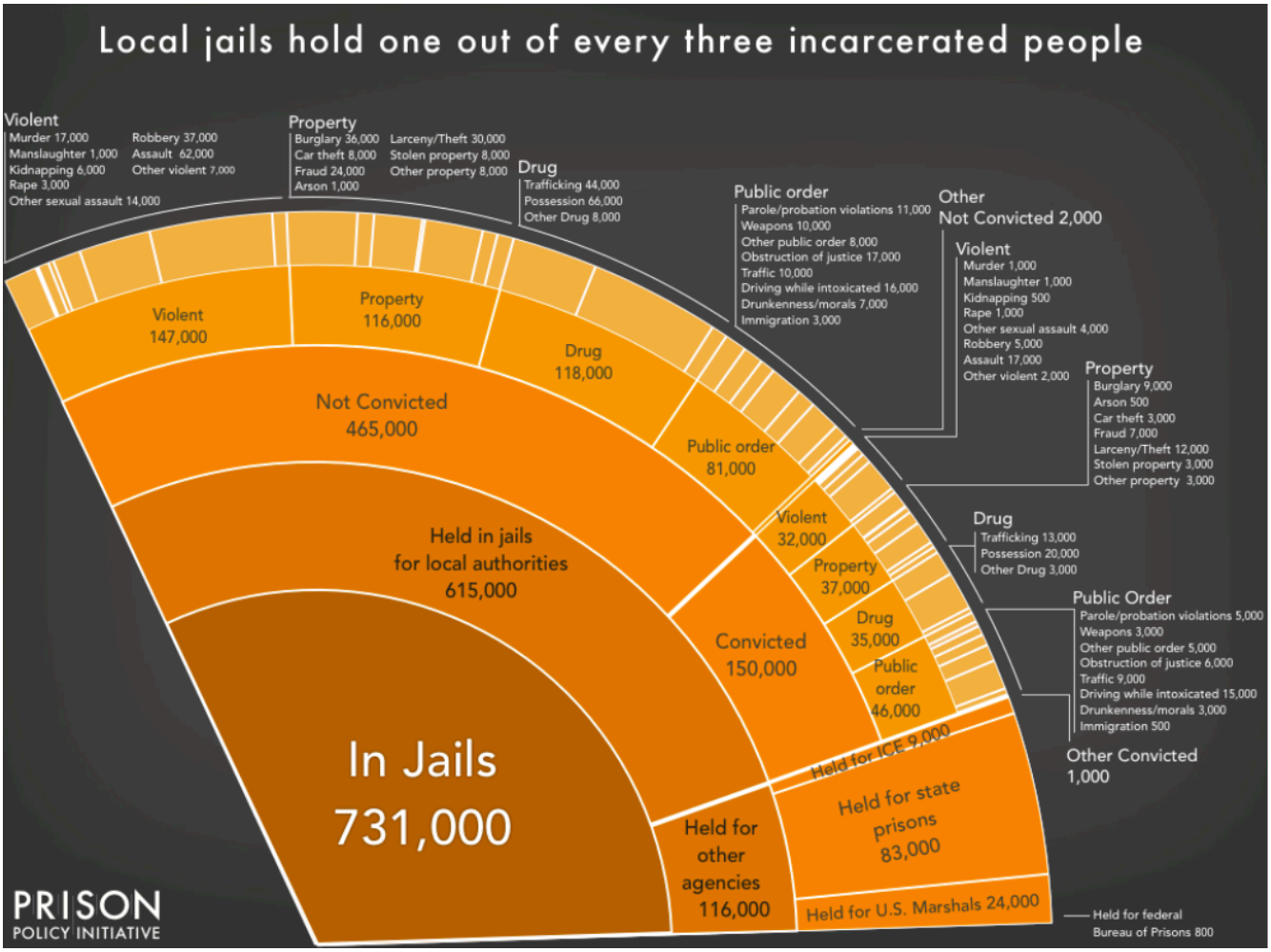
One of the more fascinating aspects of jails in the United States is who gets placed in them. The short answer is everyone. Whenever someone is arrested, this typically starts their process in the criminal justice system. While it might not be the first time they have been arrested, this action places them en route to a jail. Thus, jails are a collection point for many differing agencies, to include: County Sheriff's Office, Municipal, local, City – Police. State Police may send individuals directly to jail, even Federal agencies may use a local jail as a point of entry. For example, ICE (immigration and customs enforcement) houses many thousands of ICE-holds in jails across the country. Jails hold all kinds of individuals. While this list is not comprehensive, it does present many of the types of people held in jails:

- Felons and Misdemeanants
- First time and repeat offenders
- Those awaiting arraignment or trial
- Accused and Convicted
- Parolees stepping down from prison
- Juveniles pending transfer
- Those with mental illness awaiting transfer
- Chronic alcoholics and Drug abusers
- Those held for the military
- Those held for federal agencies
- Protective custody
- Witnesses
- Those in contempt of court
- Persons awaiting transfer to state, federal or other local authorities
- Temporarily detained persons

As one can see from this list, there are many types of people in the 3,300 plus jails at any given time. In fact,

at any given point in time, there are 700,000 plus individuals within jails in the United States. This number has steadily increased since the 1970s. While there have been some decreases in recent years, it generally fluctuates around 725,000 to 750,000 jail inmates. However, this is only one portion of the people in jails. It is estimated that roughly 11 million people process through America's jails annually. Average lengths of stay vary by jurisdiction, but a general average is that a person spends around 25 days in jail. As Wagner and Sawyer (2018) depict in the picture below, the types of people in jail at a point in time is varied. [1]

Snapshot of Individuals in Jail



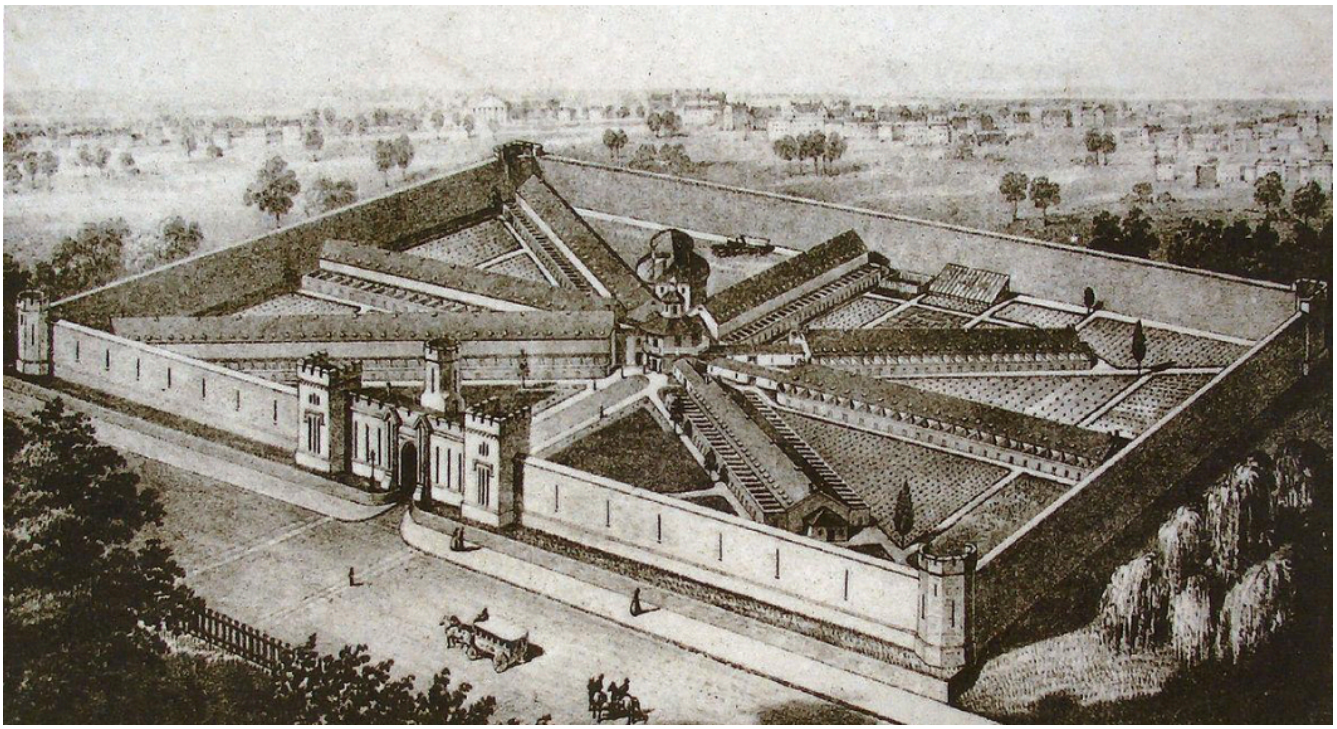
Who goes to jail?

Probably one of the most notable items in the snapshot above is the proportions of individuals that are or are not convicted. Roughly 63% of individuals in jails at any given time are not convicted. Other notable groups are individuals held for other agencies. This could be a matter of processing time or allocations of bed space. In all, it is relatively easy to see the volumes and different types of people that pass through a jail in this graphic. Still, jails only make up one portion of the brick-and-mortar approach to punishment. Prisons are the other large part.

1. Wagner, P., & Sawyer, W. (2018). Mass incarceration: The whole pie 2018. Available at the Prison Policy Organization https://www.prisonpolicy.org/reports/pie2018.html

As mentioned at the beginning of this section on jails and prisons, the Walnut Street Jail is recognized as the first built institution in the United States to house individuals. Soon after, another prison was built, the Eastern State Penitentiary (ESP), and it ran like a prison for nearly 150 years. Many of the prisons today were first built on this idea of a separated penitent prison. Many of the cells in the prison (as depicted below) would open to individual courtyards where individuals could look up and "get right with God," hence the concept of penitentiary (penance).

Eastern State Penitentiary Design

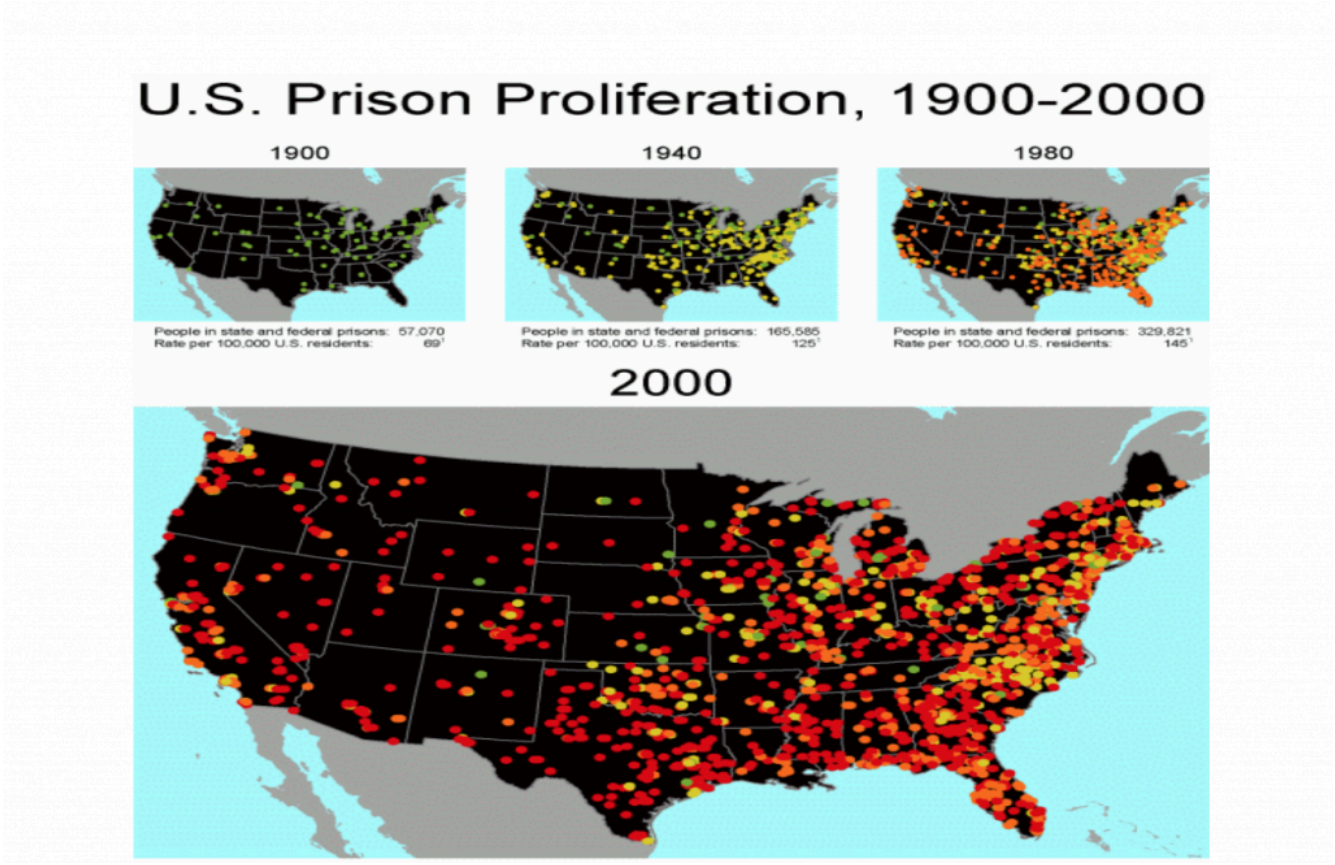


The State Penitentiary for the Eastern District of Pennsylvania, Lithograph by P.S: Duval and Co., 1855.

Individuals in ESP spent much of their time in their cells, or in their own reflection yards, reading

the bible, praying, and always in silence. The solitude was also a way to serve penance. Shortly after the implementation of ESP, another prison was built in New York, in 1819, named the Auburn prison. This prison would become the leader of the second main prison style, the Auburn prison system. Many of the facets of the ESP were in the Auburn, save one. Auburn utilized a congregate system, which meant that (still in silence) the inmates would gather to do tasks or work.

Prison Growth in the United States



Proliferation1900-2000

This concept of labor eventually replaced the ideals of constant solitude. The congregate system took hold as the dominant model for many prisons, and many states began to model their prisons on the Auburn prison. Notably, Auburn was also the prison where the first death by electric chair was executed in 1890. Today, there are roughly 1,700 State or municipal prisons in the United States. As the images demonstrate, it is clear that many of the prisons in the U.S. have been built more recently.

Prisons in the United States can be parcelled out by jurisdiction and by intensity. By jurisdiction, this is referring to who manages the prisons. A prison warden is generally considered the managerial face of the institution. However, a prison warden and the prison itself is usually within a much larger organizational structure. Although not always, these are usually separated by State. There are a few jurisdictions not at the State level that manage or operate prisons. This includes places like New York, Chicago, Philadelphia, and Washington D.C. Puerto Rico (not a State) also has a prison, as does the U.S. territory of the Virgin Islands.

State Prisons

The normal label for the organizational structure of prisons in a particular State is often called Departments of Corrections and are run by a Director, who is usually appointed by a Governor. For example, in Oregon, it is the Oregon Department of Corrections, and Director Peters is the current head of this organization (2012-present). The Oregon Department of Corrections currently overseas 14 State prisons. More information about the ODOC can be found here: https://www.oregon.gov/doc/Pages/default.aspx. California has the California Department of Corrections, and Secretary Diaz is the head of this organization (2018 to present). CDCR oversees 34 adult institutions. For more information about CDCR, see https://www.cdcr.ca.gov/.

Federal Prisons

The Federal Bureau of Prisons was established in the early 1930s as a result of the need to house an increasing number of individuals convicted of federal crimes. There were already some federal prisons in place, but it was not until 1930 that the U.S. Congress passed legislation to create the BOP, housing it under the justice department. Sanford Bates became the first Director of the Federal Bureau of Prisons (FBOP or BOP), based on his long-standing work as an organizer and leader at Elmira Reformatory in New York. As more federal legislation was passed, the need for more prisons became apparent.

Today, the BOP has 109 prisons, along with numerous additional facilities (camps) adjoining at these locations. There are also military prisons, and alternative facilities, reentry centers, and training centers, that are managed by the BOP. The federal prisons are separated into six regions., which include: the Mid-Atlantic Region, the North Central Region, the Northeast Region, the Southeast Region, the South Central Region, and the Western Region.

Within these regions are regional directors, which is similar to state-level directors of departments of corrections. Below is a detailed map of the regions of the Federal Bureau of Prisons. As is depicted, there are several different types of facilities within each region. A central office is also designated for each of the six regions. Click on the link in the annotation of the map to see it in a larger scale.

FBOP Regional Map



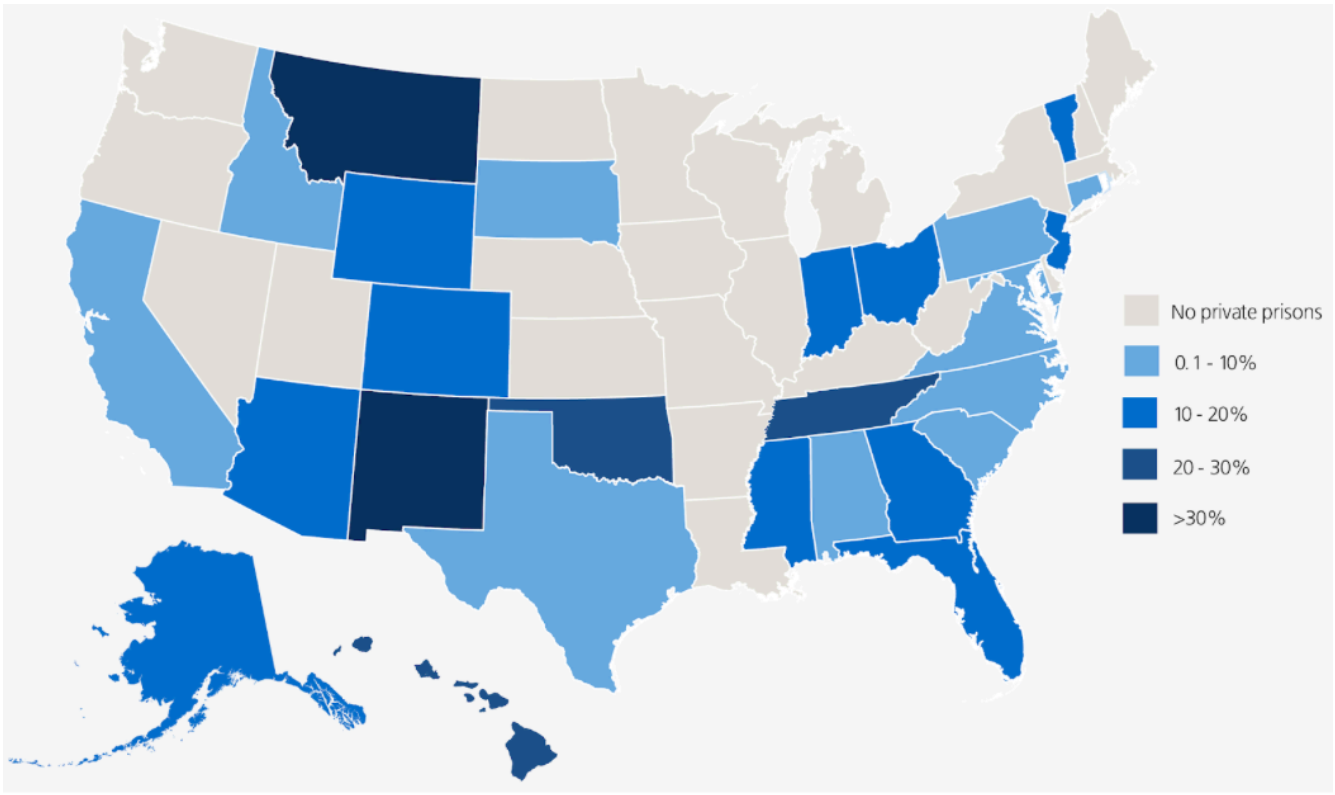
BOP Regional map

Private Prisons

The privatization of goods and services has long been a staple of state departments of corrections, as it allows these organizations to subcontract specific tasks within their prisons. This includes services like food and transportation services, medical, dental, and mental health services, education services, even laundry services. As mentioned in the previous section on punishment, there was much ado about crime in the United States in the 1970s and 1980s. This brought on an increased fear of crime and a more punitive state within the United States. It was during this time that a small company known as Wackenhut, a subsidiary of The Wackenhut Corporation (TWC) sought to privatize the entirety of a prison, not just services within the prison. A second company, Corrections Corporation of America ultimately won the contract and became the first privately owned prison in the United States (1984). Today, Core Civic (formerly Corrections Corporation of America) runs approximately 128 facilities in the United States. [1] The GEO Group, the other primary private prison company runs 136 correctional, detention, or reentry facilities. [2] Pictured below, roughly half of the 50 States in America use private prison industry prisons.

1. See Core Civic facilities map: http://www.corecivic.com/facilities
2. See Geo Group facilities map: https://www.geogroup.com/LOCATIONS

States Using Private Prison Industry



Private Prison State Map

Much debate has come from the incorporation of private prisons. The critics of private prisons denote the lack of transparency in the reporting processes that would come from a normal prison. Still, others tackle a bigger issue – punishment for profit. That is – while taxpayers ultimately pay for all punishment of individuals, either at the State or Federal level, shareholders and administrators of the companies are making money by punishing people, under the guise of capitalism. For a more in-depth review of this, see a report presented by the Sentencing Project: https://www.sentencingproject.org/publications/private-prisons-united-states/ and on NPR: https://www.npr.org/2010/10/28/130833741/prison-economics-help-drive-ariz-immigration-law

Each of these jurisdictions of prisons also has varying degrees of intensity or seriousness. These are often considered prison levels or classifications. Depending on the State, the BOP, or even in the private sector, it is usually associated with the seriousness of the offenders that are housed within these institutions. For example, many States have three classification levels: minimum, medium, and maximum. Some States have a fourth level called super-maximum. Others call this close, or administrative level. The BOP has five levels, minimum, low, medium, high, and unclassified. Although not a true designation, and would be considered an unclassified, administrative control, ADX Florence is a United States Penitentiary (USP) that would be counted as a super-max. It houses the most dangerous individuals at the Federal level. Although not in operation today, Alcatraz was probably the most famous Federal USP (also considered a super-max at one point). It too housed the most dangerous federal inmates. Below are two images of this iconic prison, known as the "rock."

Alcatraz



Alcatraz

Alcatraz in the Bay against the Backdrop of San Francisco



Alcatraz in the Bay against the Backdrop of San Francisco

Other States use a simple number designator to assign prison intensity, such as Level I, Level II, Level III, Level IV, and sometimes Level V. While still, other States incorporate a Camp to their list of designations, indicating a specific purpose within the low level, such as a Fire Camp. These types of camps are dedicated to fighting fires. In all there are some basic concepts to point out for each type:

Minimum – These prisons usually have dorm style housing, typically for only non-violent offenders, with shorter sentences (or sentence lengths left after downgrading). The fencing or perimeters of these types of facilities are usually low levels. The BOP generally refers to these as camps.

Low – These types of prisons are similar to minimums, to include some kind of dormitory style housing. However, there are normally more serious or disruptive offenders in these types of prisons. The fencing around the perimeter of these is generally higher, and maybe even a double fence. Offenders are typically in these institutions for longer periods.

Medium – Here, there is a transition from dorm-style housing to cells. Normally, there are two persons to a cell, but not always. The perimeter is usually a high fence, and may even have barbed wire, or there are large walls surrounding the institution. Freedom of movement within the institution is reduced, seen as privilege. Inmates here typically longer sentences, and include violence convictions.

High or Maximum – Similar to medium, but most of these offenders have violence convictions, and longer sentences, including life. Many of these individuals will spend most of their day in a cell, and more often than not, these are single occupancy.

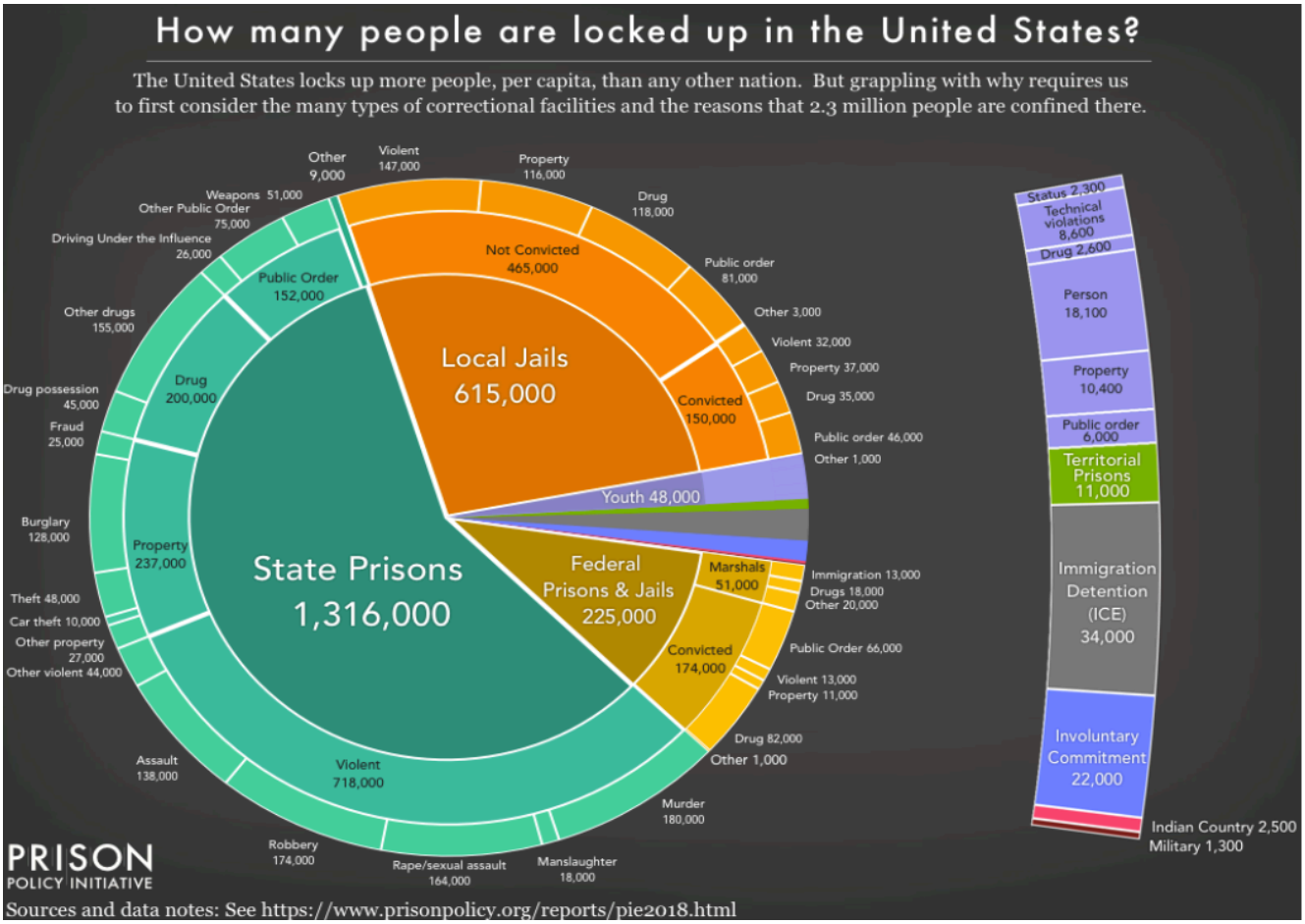
Super-Max or Administrative Control – Depending on what the mission is for that particular prison, the prisoners in these institutions could be vastly different. For instance, if it is a facility that is designated for mental health, it would not operate the same as one that is a super-max. The super-max facilities would have individuals in their cells for almost all of every day. Many services would come to them at their cell, instead of them going somewhere (i.e., sick call), the cells would almost all be single

occupancy. Visitation of these inmates would be much more regimented and monitored. Most of these individuals are also classified as extreme threats to the successful operations of the prison and are long-term inmates (LWOP – life without the possibility of Parole).

Intake Centers – An intake center can be part of an institution, running alongside the normal operations of an institution. The purpose of an intake center is to classify the offenders coming from the various courts in the jurisdiction, post felony conviction. The offender has an initial classification, where they are getting assigned to one of the jurisdiction's prisons, based on a point system for that agency. This assessment is looking at priors, prior and current violence, escape risk, and potential self-harm. For example, Coffee Creek Correctional Facility in Oregon is their intake of prison. It also is the women's prison for Oregon. Inmates come to CCCF and are assessed, then shipped off to one of the other institutions in Oregon (or placed in a level there if female). Inmates will gain later classifications at their destination prison, in terms of work assignments, mental health status, cell assignments, and other items.

The types of people that end up in prison are quite different than individuals that go to jail. Almost all people that go to prisons in the United States are people that have been convicted of felony-level crimes and will be serving more than a year (or they could have multiple years on their jail sentence). To give you a more detailed depiction of this, see the image below.

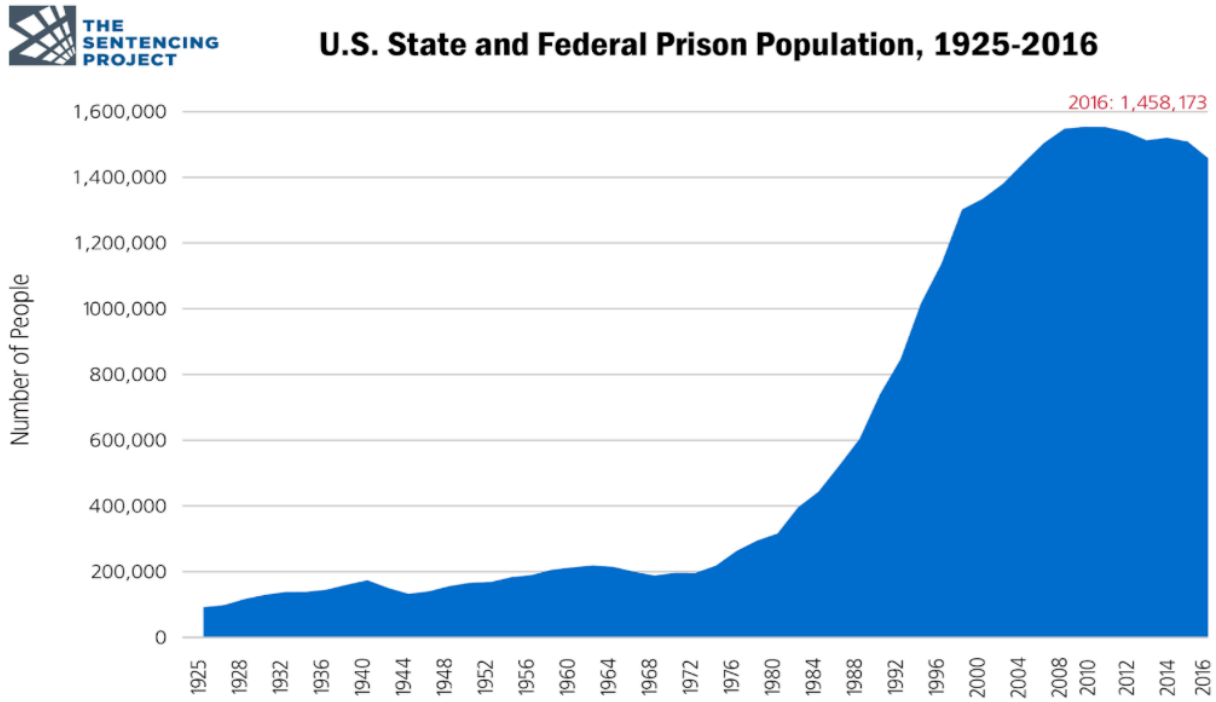
People Incarcerated in the U.S.



People Incarcerated in the U.S.

Focusing in on the left side of the graphic, there are roughly 1,316,000 State Prisoners. Here we can see the types of crimes that they are convicted of. A little over half (54-55%) are incarcerated for violent crimes. Drug crimes and property crimes make up the next big sections for the state prisoners. When you add in the federal prisoners (about 180,000) and the private sector prisoners (another 150,000+), territorial prisoners (11,000), Indian Country prisoners (2,500), we start to see how that number changes to about 1,700,000 prisoners.

One of the more notable items here, and what is different from the jails, roughly 93% of the prisoners are male. In jail, that number is roughly 85% male. While the total volume of prisoners has dropped slightly in the last few years (since 2015), this following graphic shows that we have increased our number substantially over the last 45 years.



u.s.-state-and-federal-prison-population-1925-2016.jpg
Source: https://www.sentencingproject.org/wp-content/uploads/2018/07/u.s.-state-and-federal-prison-population-1925-2016.png
License: public domain, https://www.sentencingproject.org/criminal-justice-facts/
Attribution - Bureau of Justice Statistics http://www.sentencingproject.org/wp-content/uploads/2018/07/u.s.-state-and-federal-prison-population-1925-2016.png

US State and Federal Prison population

This growth of the prison population will be discussed in greater detail in the final section on corrections, Special Issues. However, in the next section, we will discuss where the largest volume of individuals under correctional control resides, probation and community corrections.

9: Community Corrections

Learning Objectives

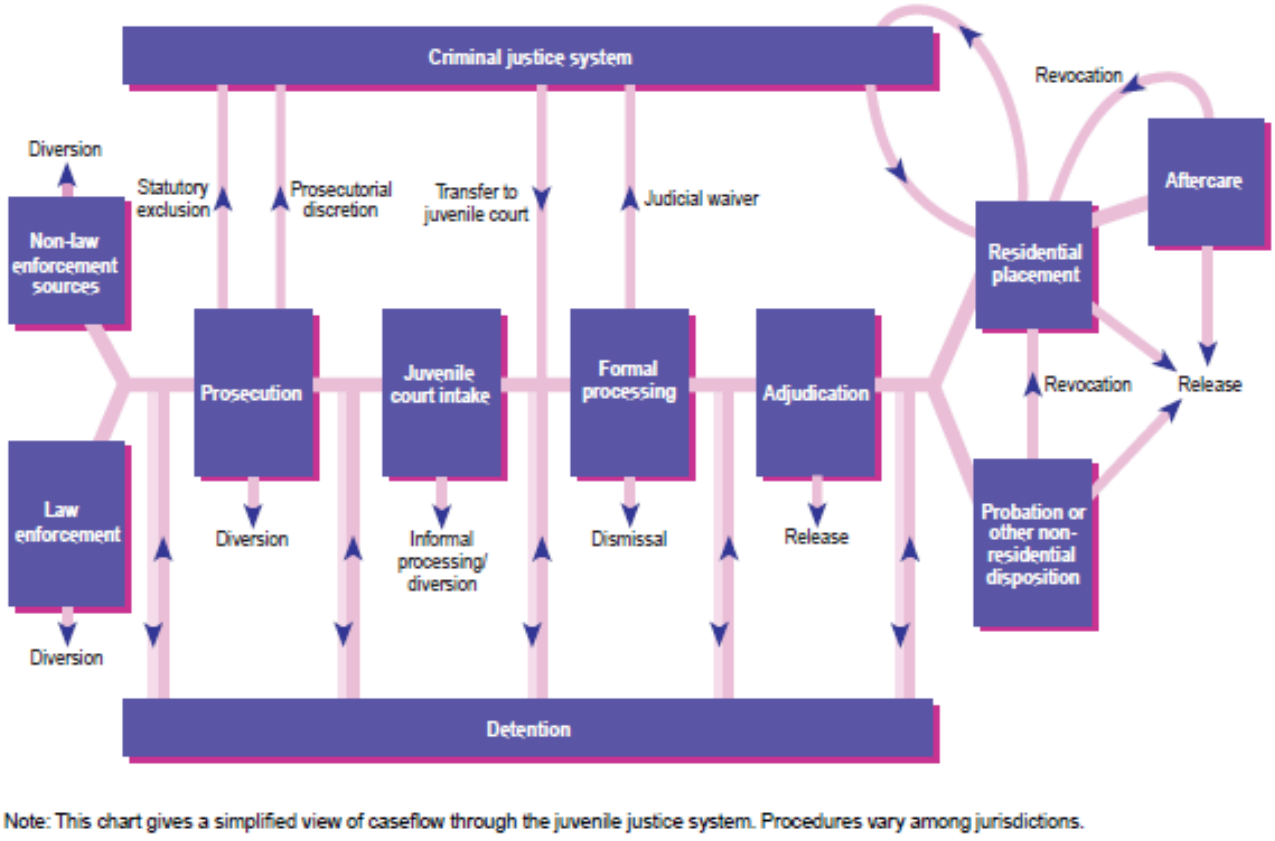
Up to this point, we have spent much time on understanding crime, how it is policed, and how it is prosecuted in the courts. The next section will cover the last third of the justice system, corrections. This section will focus on punishments that happen in the community. Be the end of this section, students should be able to:

- Understand what is meant by Community Corrections
- Recognize the different types of Community Corrections
- Understand the pros/cons of the different main types of Community Corrections

Critical Thinking Questions

1. Why do some people convicted of a crime get jail/prison, while others do not?
2. What factors are involved with the decision to use alternative sanctions, versus incarceration?
3. What are some of the pros/cons of each of these decision points?
4. Does the level of punishment change, based on the person? How?
5. Are there other consequences involved after the punishment has been given? If so, what are they?

The bulk of this chapter deals with official actions from the courts on individuals in the community, while they are under some sanction. However, there is also a large number of individuals that do not even make it that far in the system, due to some form of diversion. Diversion is presented in this chapter, as it is an action that would effectively keep a person in the community. **Diversion** is a process whereby an individual, at some stage, is diverted from continuing on in the formal justice process. Diversion can come as early as initial contact with a law enforcement officer. This discretion that the officer uses could be considered a diversion, as the officer is saying that this individual does not need to continue on the justice path. It could be a verbal warning, a warning ticket, or just a decision by the officer to not start a formal ticket (citation).



Different Diversion Points in the System

Diversion can also be something more formal, for instance, from a judge prior to a judgment, in lieu of a judgment, or as a condition of a judgment. A formal diversion process can start. An example of this could be where a judge could sentence someone to a sanction. In lieu of that sanction, the judge offers a person the chance to complete a diversion program, effectively nullifying the judgment upon successful completion.

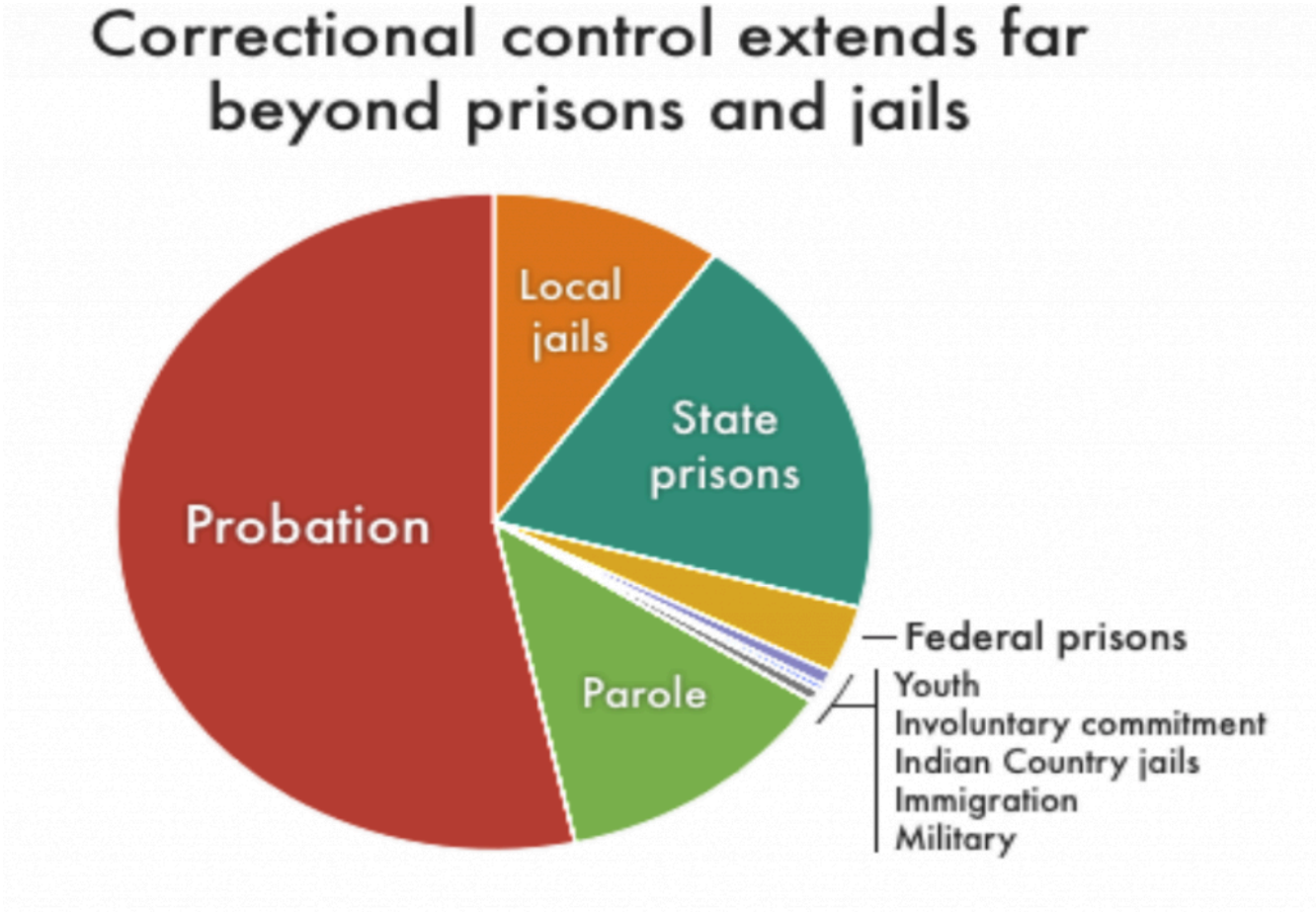
It is difficult to know the exact amount of diversions that occur in the United States, across the variety of places where diversion can occur. However, it is estimated that millions of diversions happen each year. This could be saving the courts or corrections systems hundreds of millions of dollars.

DAVID CARTER

Community corrections as a whole has changed dramatically over the last half-century. Due to a rapid and overwhelming increase of the offender population, largely based on policy changes, we have witnessed an immense increase in the use of sanctions at the community level; this includes probation. It has only been within the most recent 10 years that we have seen a decrease in community corrections. Individuals on probation hover around 3.7 million, with another million in some form of community-level control, for a total of about 4.6 million under community supervision, probation, or parole. [1] Because of the sheer volume of these intermediate sanctions, it is important to put it in the perspective of jails and prisons. Below is a graphic to demonstrate how much we are talking about.

U.S. Correctional Control

1. Bureau of Justice Statistics. (2018). Probation and Parole in the United States, 2016. Available at: https://www.bjs.gov/content/pub/pdf/ppus16_sum.pdf



National correctional control, 2018

This graphic does not include the volume of people in the community corrections outside of regular probation, or parole (which is about another million), but it does shed light on just how much probation is used. Therefore, it important to understand that the vast majority of individuals under correctional control aren't even in the prisons and jails in the United States, even though that alone is a hefty number. The majority of persons under correctional control fall are in sanctions like Probation, Intensive Supervision Probation, Boot Camps/Shock Incarceration, Drug Courts, and Halfway Houses. Therefore, this section will discuss the history and effectiveness of some of the forms of intermediate sanctions we use in the United States.

As we have discussed, in the late 1970s and early 1980s, there was a fundamental shift in corrections. This is largely due to the "Nothing Works" dogma in the area of rehabilitation. Many reforms were made towards the housing of offenders. Many liked this idea because they did not trust the government's attempts at rehabilitation. Others were pleased as well since more emphasis was placed on control. Rooted in deterrence theory, and to lesser extent incapacitation, intermediate sanctions flourished and were seen as an instant success. That is, because they promised to increase control of the growing offender population, maintain security, and do all of this at a reduced cost, they were quickly welcomed across the nation. However, by reviewing each one, we can see the problems that promising too much may have created.

What Would You Do?

As stated before, there are three primary goals for corrections, to punish the offender, to protect society, and to rehabilitate the offender. Often the first two goals might be opposing to the last goal. Additionally, doing too much of the first one might have unfavorable on the second and third. Here is an example of how this might happen.

Let's say there is a guy, who is married, has a couple of kids, a stable blue-collar job, a house /mortgage, and is living just a little bit better than a paycheck to paycheck. We can call him the average Joe Citizen. This might even sound familiar, and you may even know him. Joe likes to hang out with his friends after his men's softball game, having a beer and catching up on life. For all intents and purposes, Joe is a decent guy. He does not have a significant criminal record. Perhaps one misdemeanor when he was a juvenile, and a couple of speeding tickets, like tens of millions of other adults.

However, one time after softball, Joe is driving home and his wife is texting him to pick something up at the store. He looks down at his phone at the exact wrong time that someone pulls out in front of him. An accident occurs. No one is seriously injured, but the damage to both vehicles is enough to warrant a write up of the accident. This leads to police presence. At the scene, the officer smells alcohol on Joe. The officer is obligated to go through standard procedures, which results in Joe being arrested. This is not asking you to debate this action, as it is a violation, and the officer had every right to arrest Joe. The question is this – what should Joe's punishment be?

The reason to ask this is due to both the rule of law and the consequences of those laws. Joe should be punished, as he chose to drive after drinking alcohol. But, would Joe's incarceration lead to other events that may have lasting effects? Probably.

This brings up the question of at what point does the level of punishment last beyond its intended point? If Joe receives a lengthy jail sentence, will he lose his job? Will he lose his family? Will this put him a greater risk of recidivating in the future? What point has the immediate action caused punishment beyond what the law stipulates is punishment? These are all valid questions. There are other alternatives out there, that still cover the concepts of punishment, monitoring, sanctioning, and control. However, these alternatives can still allow individuals to stay in the community, which this chapter will present with community corrections.

DAVID CARTER

Probation is arguably the oldest ,and certainly the largest, of the intermediate sanctions. Its roots stem from concepts of common law from England, like many of our other legal/correctional practices. In early American courts, a person was able to be released on their own recognizance, if they promised to be responsible citizens and pay back what they owed. In the early 1840s, John Agustus, a Boston bootmaker was regularly attending court and began to supervise these individuals as a Surety. A Surety was a person who would help these individuals in court, making sure they repaid these costs to the courts. We would consider John Augustus as the Father of Probation, for this work in the courts in Boston in the 1840s and 1850s. Augustus, pictured below, would take in many of these individuals, providing options like work and housing, to help ensure these individuals would remain crime free and pay back society. He continued this practice for nearly two decades, effectively becoming the first probation officer. For a more lengthy historical discussion of probation, see the history of probation at https://probation.smcgov.org/history-probation.



John Augustus

Probation is a form of a suspended sentence, in that the jail or prison sentence of the convicted offender is resuspended, for the privilege of serving conditions of supervision in the community. Conditions of probation often include: report to a probation officer, submit random drug screens, do not consort with known felons, pay court costs, restitution, and damages, attend AA or NA courses, as well as other conditions. Probation lengths vary greatly, as do the conditions of probation place on an individual. Almost all people on probation will have at least one condition of probation. Some have many conditions, depending on the seriousness of the conviction, while others are just a blanket condition that is imposed on all in that jurisdiction, or for that conviction type. Juvenile Probation Departments were within all States in the 1920s, and by the middle of the 1950s, all States had adult probation.

Probation Officers

Probation officers usually work directly for the state or federal government, but that can be directed through local or municipal agencies. Many Counties will have a community justice level structure where

probation offices operate. Within these offices, probation officers will be assigned cases (caseload), in term of the probationers, they will manage. The volume of cases in a probation officer's caseload can vary from just a few clients if they are high need/risk clients, to several hundred probationers. It depends on the jurisdiction, the structure of the local PO office, and the abilities of the probation officers themselves.

The role of the probation officer is complex, and sometimes diametrically opposing. A PO's primary function is to enforce compliance of individuals on probation. This is done through check-ins, random drug screenings, and enforcement of other conditions that are placed on the probationers. Additionally, the PO may go out into the field to serve warrants, do home checks for compliance, even make arrests if need be.

However, at the same time, a probation officer is trying to help individuals on probation succeed. This is done by trying to help individuals to get jobs, get schooling, enter into substance or alcohol programs, and generally support people on probation to be successful. This is why the job of the PO is complex, as they are trying to be supportive, but also having to enforce compliance. Many equate this to kind of like being a parent. Recently, there has been a movement within probation to have probation officers act more like coaches than just disciplinarians. Here is a talk about how POs can view themselves as coaches to enact positive change within individuals on probation:

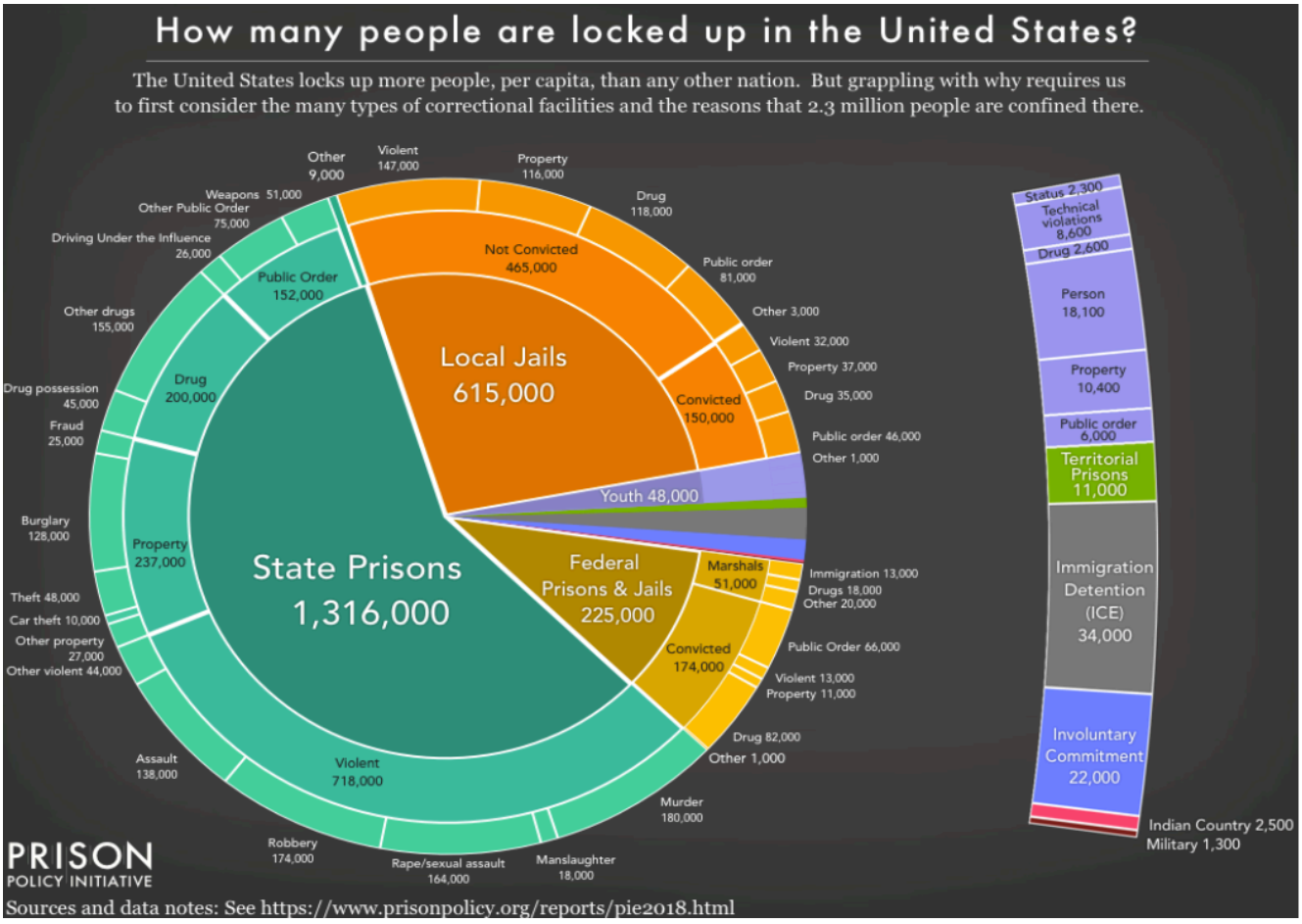
http://criminaljusticeofficehours.libsyn.com/dr-brian-lovins-probation-coaches?fbclid=IwAR2pHROGAPpm09-PFqVzFG10ItFhCi1huFItChe65Ew7-gXDB0OSacCliQs

The other primary function of a probation officer is to complete PSI reports on individuals going through the court process. A PSI or Pre-Sentence Investigation report is a psycho-social workup on a person headed to trial. It includes basic background information on an individual, such as age, education, relationships, physical and mental health, employment, military service, social history, and substance abuse history. It also has a detailed account of the current offense, witness or victim impact statements of the event, and prior offenses (criminal records), which are tracked across numerous agencies. Finally, the PSI also has a section that is devoted to a plan of supervision or recommendations, which are created by the PO. These usually list out the conditions of probation recommendations, if probation is to be granted. Judges use this information during sentencing discussions and hearings, and will usually follow these recommendations often (around 85% of the time). Thus, many of the conditions of probation are prescribed by the PO.

Individuals on Probation

As stated, there are several million people on probation, serving various lengths of probation, and under numerous conditions or condition types. Additionally, the convictions which place individuals on probation vary, to include misdemeanors and felonies. Probationers serve their probation at the state level, and there is even federal probation. As depicted below, it is easy to see how much probation is used in the United States.

Use of Probation in the U.S.



Correctional Control by Type 1975-2016

Probation is not a right, and it is not a suspended sentence. It is a privilege, but it most certainly comes with conditions for the suspension of the incarceration. Due to how cheap probation is, relative to jail or prison, and the ability for lower-risk individuals to maintain connections within their community, millions of people will be on probation in the United States at any given time.

Other important factors that help to decide if a person warrants probation is within the PSI and other assessments are done on the individual. If the person is basically, a prosocial person, has an education and a job, has a family, these would all be considered as ties to the community. These ties to the community could weaken or break if a person was incarcerated. Thus, providing a sanction while allowing the person to stay in the community is often the approach that is utilized within probation and other intermediate sanctions.

Probation Success

There are mixed reviews about probation. Recently, the Bureau of Justice Statistics (2018 report, for 2016. [1] listed the successful completion rate at about 56%. In years past, this number has been reported higher, upwards of 65%, depending on the years 2008-2013. [2] There are a host of reasons listed for unsuccessful completion, which include: incarcerated on a new sentence/charge, or placement for the current sentence/

1. Kaeble, D. (2018). Probation and Parole in the United States, 2013. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, April 2018, NCJ 251148 https://www.bjs.gov/content/pub/pdf/ppus13.pdf
2. Huberman, E. J., & Bonczar, T. P. (2014). Probation and parole in the United States, 2013. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, October 2014, NCJ 248029 https://www.bjs.gov/content/pub/pdf/ppus13.pdf

charge, absconding (fleeing jurisdiction), discharged to warrant or detainer, other unsatisfactory reason, death, or some other unknown or not reported reason. Unsuccessful completion can produce some different responses but can include a concept called tourniquet sentencing. Tourniquet sentencing is where the restrictions of a level of sanction are increased, due to non-compliance, in order to force compliance. If an individual on probation is not adhering to the conditions of probation, a PO can recommend a probation revocation hearing. This bench hearing can lead to an informal admonishment by a judge, an increase in the sanctions or sanction lengths, an increased level of control (moving from regular probation to intensive supervised probation), even up to placement in a secure facility (jail or prison), all depending on the infraction of the condition of probation that has been violated. Many go from regular probation to ISP, in an effort to force compliance through increased monitoring.

Intensive Supervised Probation

Intensive Supervision Probation (ISP) began in the late 1950s, early 1960s, in California. Their basic premise was to allow caseworkers (POs) to have smaller caseloads and increase the level of treatment across offenders. As stated, many promised multiple success measures. However, if an individual who was revoked because of a technical violation due to an increase in control, they were not seen as a failure. Rather, they were seen as a success because of the way the public was served by the recidivism. However, this went directly against the notion that ISPs could save money. Because of these problems, the earlier forms of ISPs may have become less popular. In the 1980s, a newer model of the ISP was created in Georgia. More emphasis was placed on the control aspect rather than on treatment. Further, less emphasis was placed on the reduction of money saved.

ISP and regular probation are similar, except for the frequency of contacts with POs, the increases in surveillance and monitoring, and usually the volume of conditions. Rather than meeting a PO once a month in regular probation, a person on ISP would likely be meeting with their PO weekly, or even more frequently. Additionally, individuals on ISP normally are submitting drug screens weekly. The increased conditions of supervision more frequently include more substance abuse treatment, either in the form of AA, NA, or some other residential or outpatient substance abuse treatment programs. Thus, the core difference is about the increased level of surveillance and control over the offender.

ISP Success

While initial praise of the newer model for its increase on control was evidenced by its rapid spread through the States, some researchers questioned their effectiveness. In one of the largest studies of ISPs, in conjunction with the RAND Corporation. [3] They examined the effectiveness of ISPs in reducing recidivism and saving costs. In a random sample of 14 cities across 9 States, they evaluated the reductions of recidivism against a sample of regular probationers. Their findings suggested that there were higher amounts of technical violations, which were probably substance violations, but there were no significant differences between control-centered ISPs and regular probation, as far as new arrests. Moreover, when looking at outcomes over 3 years, they found that recidivism rates were slightly higher for these ISPs (39%), vs. regular probation (33%). Also, there were no substantive cost savings. Other studies have produced similar findings as to the effects of non-treatment oriented ISPs. While these findings might be better than prison recidivism rates, there were no reductions in prison overcrowding, which was also one of the intents of ISP.

3. Petersilia, J. R., & Deschenes, E. (2004). Evaluating intensive supervision probation/parole (ISP) for drug offenders. Santa Monica, CA: RAND Corporation. https://www.rand.org/pubs/reprints/RP168.html

Another form of intermediate sanction may be seen in the creation of boot camps, also known as shock incarceration facilities. Again developed in the 1980s in Georgia, boot camps were targeted to youths and adults and seen as a way to alter individuals through a "shock" effect. Essentially, boot camps are programs designed to change the recidivism rate through a physical change. That is, designed on a militaristic ideal, boot camps valued that a regimen of strict physical exercise would teach structure and discipline in youths. Once again, because of a high level of face validity (this looks like it will work, so it must work), boot camps flourished in the 1980s and 1990s. Below is an example of one of the few remaining boot camps, Moriah, NY.

Boot Camp Success

While there some positive results, generally, boot camps fail to produce the desired reductions in recidivism. [1] For prosocial individuals, structure and discipline can be advantageous. However, when individuals of differing levels of antisocial attitudes, antisocial associates, antisocial temperament (personality), and antisocial (criminal history) are all mixed together, the reductions in recidivism generally do not appear. As we have discussed in the section on rehabilitation, criminogenic needs are often not addressed within boot camps. Thus, boot camps fail to reduce recidivism for several reasons. First, since boot camps fail to address criminogenic needs, they tend not to be effective. Second, because of the lower admission requirements of boot camps, individuals are generally "lumped" together into a start date within a boot camp. Therefore, high-risk offenders and low-risk offenders are placed together, building a cohesive group. Thus, lower-risk offenders gain antisocial associates that are high-risk. Finally, when boot camps emphasize the increase of physicality, rather than behavioral change, it generally does not reduce aggressive behavior (antisocial personality & recidivism). A recent meta-analysis (a study of studies of a topic) found this to be the case. [2] For more information on the status of boot camps, please see https://www.crimesolutions.gov/PracticeDetails.aspx?ID=5 .

Platoon Formation in a Boot Camp

1. Parent, D. G. (2018). Research for practice: Correctional Boot Camps: Lessons from a decade of research. U.S. Department of Justice, Office of Justice Programs, National Institute of Justice (June 3rd), NCJ 197018 https://www.ncjrs.gov/pdffiles1/nij/197018.pdf
2. Wilson, D. B., MacKenzie, D. L., & Mitchell, F. N. (2005). Effects of correctional boot camps on offending. *Campbell Systematic Reviews*, *6*, 1-42.



Moriah

Drug Courts were also developed in the mid-1980s in Dade County Florida. They are unique in the sense that – the courtroom works in a non-adversarial way for a more supportive program. Judges, prosecutors, caseworkers, and program coordinators all work together in a drug court. As with other intermediate sanctions, the use of drug courts flourished in the United States rapidly, to the point that they are now in every state. Currently, there are almost 3,000 drug, treatment, or specialty courts operating in the United States. This includes Veterans Courts, Mental Health Courts, DUI Courts, Hybrid Courts, and Juvenile Drug Courts. For a detailed account of these, see the map at the National Drug Court Database: https://ndcrc.org/wp-content/NDCRC_Court_Map/ . For the purposes of assessing Drug Courts, only materials referencing Drug Courts only are addressed.

Drug Court Success

While the results on Drug Courts are mixed, as a whole, they are more favorable than boot camps. They are mixed, largely to how they are assessed. If only talking about the cost savings, versus jail or prison, they are seen as an effective community alternative. If looking at recidivism, it depends if the metric is looking solely at drug charges, any arrests, or persistence models (length of time before arrest). As a whole, the risk of being rearrested for a drug-crime for individuals from drug courts was lower than a comparison group. For a more detailed report, see Fluellen and Trone (2000). Other have demonstrated that graduates of drug court program were half as likely to recidivate (10% vs. 20%). [1] While more research is still required, drug courts are not seen as ineffective control oriented ISPs or boot camps. For an in-depth review of the overall rating of Drug Courts, which includes over 30 studies of Drug Courts across the United States, see https://www.crimesolutions.gov/topicdetails.aspx?id=238.

1. Fluellen, R., & Trone, J. (2000). Do drug courts save jail and prison beds? The Vera Institute. https://www.prisonpolicy.org/scans/vera/drugcourts.pdf

Halfway Houses have long been used to control/house offenders. Dating back to the early 1800s from England and Ireland, halfway houses began around 1820 in Massachusetts. Initially, they were designed to help an offender "get back on their feet," and were generally funded in benevolent ways by non-profit organizations like the Salvation Army.

Currently, halfway houses are typically used as a stopping point for offenders coming out of prisons but have also recently been used as more secure measures of monitoring probationers in lieu of going to prison. They are even used as a test measure of parole. With the creation of the IHHA in 1964, halfway houses have become an integral part of every state, with mixed but more promising results than ISPs or boot camps. The core design of a halfway house is meant to be a place where individuals can get back on their feet, half-way out of prison. However, as stated, their uses have evolved, becoming residential, or even partial residential places where individuals under correctional control can check-in, find reprieve or assistance, in order to rejoin society as a normal functioning member.

There are some issues regarding the examination of halfway houses. The IHHA break down halfway houses into four groups along two dimensions. As discussed, halfway houses were initially funded by private non-profit organizations. However, many halfway houses today (in part, due to the IHHA) are both privately and federally (and State) funded. Additionally, halfway Houses are also divided into supportive and interventive groups. That is, halfway houses that serve only a minimal function (a place to stay while reintegrating back into society) are generally labeled supportive. Interventive halfway houses typically have multiple treatment modalities and may have up to 500 beds. However, most halfway houses fall somewhere in the middle of these two continuums.

Halfway House Success

Because of the variations of halfway houses, researchers find them difficult to assess. For instance, it may be difficult to generalize because of the variability. Second, gathering a representative comparison may also prove difficult. That is, halfway houses may have increased recidivism, reduced recidivism, or had no effect. Although clouded, one could argue that halfway houses are at least useful in the sense that these offenders, who received more treatment faired no worse than individuals who needed less treatment.

As a whole, HWH studies show mixed results. That is, some studies yield reductions in recidivism, while some show no difference, and others show almost equal increases. When disaggregated by type, programs using the principles of effective interventions, these halfway houses generally have better reductions in recidivism. One difficulty with understanding the effectiveness of halfway houses may be within their funding. As stated, there are numerous revenue streams for the creation and management of a halfway

house, to include for-profit agencies. This design may override the design of providing the level of care comprehensive enough to match the level of need by the individuals in the halfway houses. As with the other intermediate sanctions, it is important to note that using the principles of effective intervention are among the driving causes of their success.

House arrest is where an individual is remanded to stay home for confinement, in order to serve a punishment, in lieu of jail or prison. There are built-in provisions where individuals are permitted to attend places of worship, places of employment, and places for food. Otherwise, individuals are expected to be home. It is difficult to assess how many are on house arrest at any given time, as these are often short stents given during early stages of probation.

House Arrest Success

As mentioned above, house arrest is often joined with electronic monitoring(EM). Many of the studies incorporate both sanctions at the same time. Given the difficulty in separating EM from house arrest in studies, less is known about the independent effects of house arrest. However, it is certainly a cost saving mechanism, over other forms of sanctions. There is a relatively no-cost to low-cost for house arrest, not coupled with electronic monitoring, especially when comparing house arrest to intensive supervised probation. In all, house arrest would probably best serve individuals with low criminogenic risks and needs. However, it is also argued that those individuals need little sanctions already, in order to be successful. Thus, the utility of house arrest is debatable.

Moving up in the continuum of correctional sanctions, CCCs would be considered the last stop before a lengthy jail or prison sentence, as they can have the highest level of containment. These are often called CCCs (Community Correctional Centers), TCs (Transition Centers), or CBCFs (Community-Based Correctional Facilities), and other names. From this point, these variations will all be considered as CBCFs, as there is a blending of the names to the variety of missions that are within these facilities. However, even two community residential facilities with the same name can be different, as the functions of CBCFs can be multifaceted. CBCFs can function similarly to a halfway house, it can provide a stop for individuals just checking in for the day before they go off to their jobs, they can be used for outpatient services, even residential services where there is a need for public control/safety.

The overall benefit of CBCFs is their ability to have an increased focus in rehabilitation, at a lower cost than a State institution. This is where their greatest effect can materialize if there is adherence to the principles of effective intervention. As we touched on in the first section on punishment, the principles of effective intervention have been demonstrated to have the best impacts on reductions in recidivism. Collectively, we call these the PEI. These include concepts like proper identification of criminogenic risks and needs of offenders, using evidence-based programs that address these items, matching and sorting clients appropriately, and responsivity in terms of programs and services. For a detailed account of how the PEI integrates into community corrections, see a very detailed report by the National Institute of Corrections, under the U.S. Department of Justice: https://s3.amazonaws.com/static.nicic.gov/Library/019342.pdf .

CBCF Success

What should come as no surprise, as is the theme with correctional practices in the community, CBCFs have mixed results. This is largely dependent on the composition of the facility, the individuals within the facility, and the programs offered. When individuals are lumped together, in non-directive programs that do not adhere to the PEI, the outcomes of CBCFs are not favorable over the jail, prison, or probation. However, when CBCFs separate offenders based on risk, putting more programming with the higher risk clients, and little programming on the low-level clients, the outcomes are substantially better. For example, in a study on CBCFs, Lowenkamp and Latessa (2004) found that when the offenders were separated by their risk, targeting higher-risk individuals, much larger reductions in recidivism can be achieved. [1]

Unfortunately, many CBCFs do not adhere to these principles, and thus, their effectiveness is not as

1. Lowenkamp, C.T., & Latessa, E.J. (2004). Residential community corrections and the risk principle: Lessons learned in Ohio. Ohio Department of Rehabilitation and Correction, *Research Compendium*, *2*: 245-254.

positive. As stated, this is the case for many of these agencies within community corrections. When programs do not follow the principles of effective intervention, they do not fare as well. For a recent report on the status of Community-Based Correctional Facilities, see a question and answer session with the PEW Foundation and Dr. Joan Petersillia: https://www.pewtrusts.org/-/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/qacommunitycorrectionspdf.pdf

DAVID CARTER

The process of restorative justice programs is often linked with community justice organizations and is normally carried out within the community. Therefore, RJ is discussed here in the community corrections section. Restorative justice is a community based and trauma-informed practice used to build relationships, strengthen communities, encourage accountability, repair harm, and restore relationships when wrongdoings occur. As an intervention following wrongdoing, restorative justice works for the people who have caused harm, and the victim(s), and community members impacted. Working with a restorative justice facilitator, participants identify harms, needs, and obligations, then make a plan to repair the harm and put things as right as possible. This process, restorative justice conferencing, can also be called victim-offender dialogues. It is within this process that multiple items can occur. First, the victim can be heard within the scope of both the community and within the scope of the offense discussed. This provides the victim(s) an opportunity to express the impact on them, but also to understand what was happening from the perspective of the transgressor. At the same time, it allows the person committing the action to potentially take responsibility for the acts committed, directly to the victim(s) and to the community as a whole. This restorative process provides a level of healing that is often unique to the RJC. Pictured, the different processes that can occur during the different types of dialogues within RJC.

Restorative Justice Processes



Restorative Justice

Restorative Justice Success

For over a quarter century, restorative justice has been demonstrated to show positive outcomes in accountability of harm, and satisfaction in the restorative justice process for both offenders and victims. This is true for adult offenders, as well as juveniles, who go through the restorative justice process. Recently, there have been questions whether there is a cognitive change that occurs in the thought process of the individuals completing a restorative justice program. There is a growing body of research that demonstrates that change in cognitive distortions that may occur through successful completion of restorative justice conferencing (RJC). This will be an area of increasing interest for practitioners, as restorative justice continues to be included in the toolkit of actions within community justice and community corrections.

While the process to get onto parole is unique to all of the other community sanctions we have discussed so far in this section, individuals on parole are in the community. Thus, parole is often placed within the concepts of community corrections. Parole is the release (under conditions) of an individual after they have served a portion of their sentence. It is also accompanied by the threat of re-incarceration if warranted. As with most concepts in our legal system, their roots of parole can be traced back to concepts from England and Europe. However, parole today has greatly evolved based on American values and concepts. Parole in the United States began as a concept at the first American Prison Association meeting in 1870. There was much support for the ideals of reform in corrections in America at the time. Advocates for reform helped to create the concept of parole and how it would look in the U.S., and plans to develop parole went from there. Parole authorities began establishing within the States, and by the mid-1940s, all States had a parole authority. Parole Boards and State parole authorities have fluctuated over the years, but the concept is still practiced, in varying degrees today. It is different than probation, which often operates under the judicial branch. Parole typically operates under the executive branch and is aligned with the departments of corrections, as parole is a direct extension of prison terms and release. Many states operate a post-prison supervision addendum to their sentencing matrix for the punishment of individuals.

Oregon Sentencing Guidelines

Crime Seriousness	A	B	C	D	E	F	G	H	I	Prob Term	Max Depart	PPS
11	225-269	196-224	178-194	164-177	149-163	135-148	129-134	122-128	120-121	5 Years		3 Years
10	121-130	116-120	111-115	91-110	81-90	71-80	66-70	61-65	58-60			
9	66-72	61-65	56-60	51-55	46-50	41-45	39-40	37-38	34-36			
8	41-45	35-40	29-34	27-28	25-26	23-24	21-22	19-20	16-18	3 Years	18 Mos.	
7	31-36	25-30	21-24	19-20	16-18	180 90	180 90	180 90	180 90			2 Years
6	25-30	19-24	15-18	13-14	10-12	180 90	180 90	180 90	180 90			
5	15-16	13-14	11-12	9-10	6-8	180 90	120 60	120 60	120 60	2 Years	12 Mos.	
4	10-11	8-9	120 60	120 60	120 60	120 60	120 60	120 60	120 60			
3	120 60	120 60	120 60	120 60	120 60	120 60	90 30	90 30	90 30		6 Mos.	1 Year
2	90 30	90 30	90 30	90 30	90 30	90 30	90 30	90 30	90 30	1 ½ Years		
1	90 30	90 30	90 30	90 30	90 30	90 30	90 30	90 30	90 30			

Oregon Sentencing Guidelines Grid

As you can see from the graph, the PPS section in gray represents the recommended times for parole (post-prison supervision). Today, there are three basic types of parole in the United States, discretionary, mandatory, and expiatory.

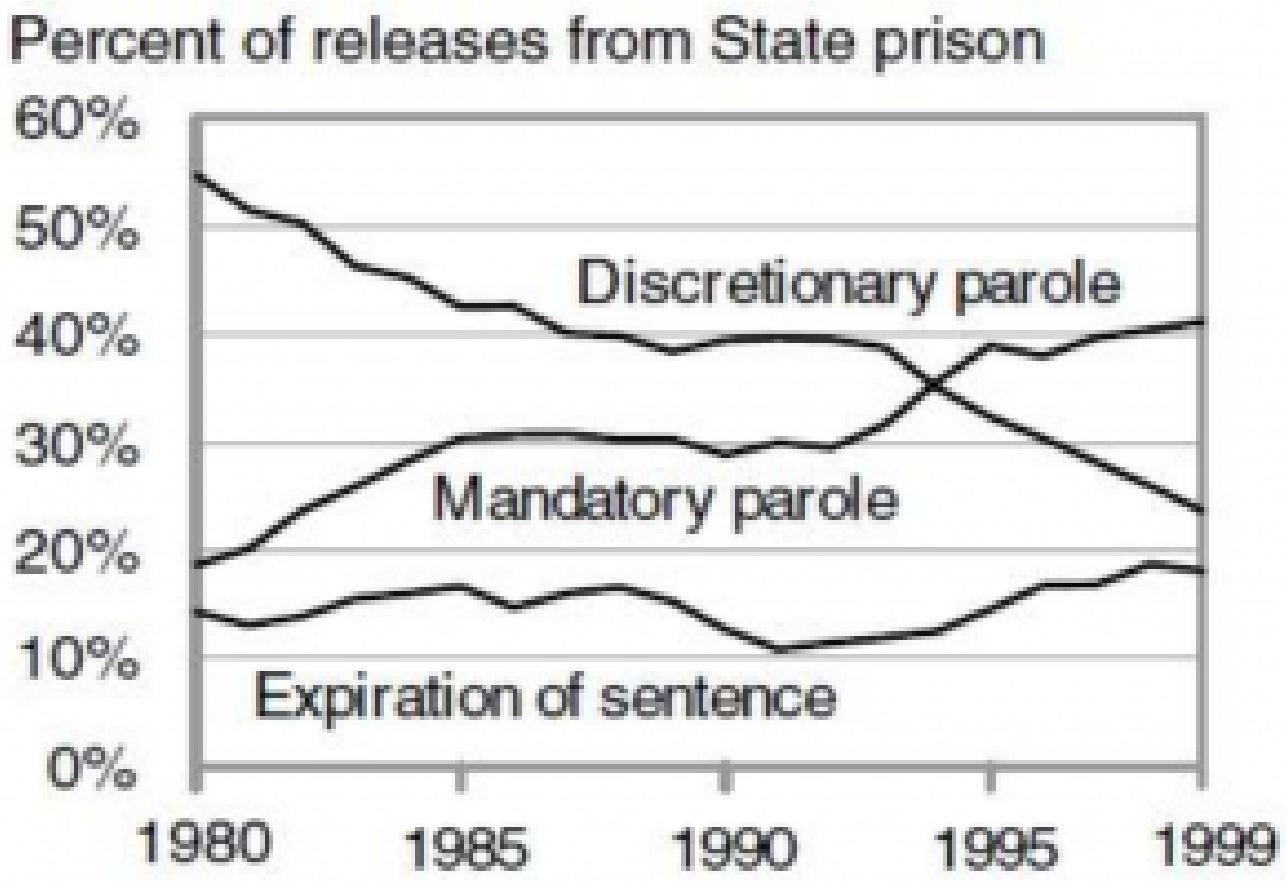
Discretionary parole is when an individual is eligible for parole or goes before a parole board prior to their mandatory parole eligibility date. It is at the discretion of the parole board to grant parole (with conditions) for these individuals. These prisoners are generally well-behaving prisoners that have demonstrated they can function within society (have completed all required programming). Discretionary parole had seen a rapid increase in the 1980s but took a marked decrease starting in the early 1990s. In more recent years, it is continuing to return as a viable release mechanism for over 100,000 inmates a year. [1]

Mandatory parole occurs when a prisoner hits a particular point in time in their sentence. When an inmate is sent to prison, two clocks begin. The first clock is forward counting and continues until their last day. The second clock starts at the end of their sentence and starts to work backward proportional to the "good days" an inmate has. Good days are days that an offender is free from incidents, write-ups, tickets, or other ways to describe rule infractions. For instance, for every week that an offender is a good prisoner, they might get two days taken off of the end of their sentence. When these two times converge, that would be a point in which mandatory parole could kick in for them. This must also be conditioned by truth in sentencing legislation, or what is considered an 85% rule. Many states have laws in place that stipulates that an inmate is not eligible for mandatory parole until they hit 85% of their original sentence. Thus, even though the date for the good days would be before the 85% of a sentence is served, they would only be eligible for mandatory parole once

1. Hughes, W., & Beck (2001).
Trends in State Parole, 1990-2000. *Bureau of Justice Statistics Special Report. ODJ.*

they had achieved 85% of their sentence. Recently, States have begun to soften these 85% rules, as another valve to reduce crowding issues. The Hughes et al. (2001) article also provides their proportions, indicating a direct inverse relationship to discretionary parole during the 1990s [2]. As discretionary parole went down, mandatory parole went up. This is logical though, as once they had passed a date for discretionary parole, the next date would be an inmate's mandatory parole date. As you can see from the image below, these proportions of releases switched in the 1990s.

Parole Releases



Parole Releases

Perhaps most troubling is the Expiatory Release. We see a slow increase of expiatory release in the chart, and this has continued to climb in the 2000s. Expiatory release means that a person has served their entire sentence length (and sometimes more). Based on the need to release individuals to accommodate incoming prisoners, this usually means that an inmate has misbehaved enough to nullify their "good days." This is unfortunate, because of the three types of release, it could be argued that these are the inmates that need the most post-prison supervision. And yet, these are the inmates that are typically receiving the smallest amounts of parole.

Parole Success

2. Hughes, T., Wilson, D., & Beck, A. (2001). Trends in State parole, 1990-2000. Washington, DC: *Bureau of Justice Statistics, Special Report*, NCJ 184735 https://www.bjs.gov/content/pub/pdf/tsp00.pdf .

It should again come as no surprise as to the effectiveness of parole, considering how many of the other community-based sanctions are operating. Successful parole completion rates hover around 50%, given a particular year. In the Hughes et al. (2001) article just mentioned, successful completion was roughly 42% in 1999. The same issues for failure that are found in probation completion are found in parole completion, to include: revocation failures, new charges, absconding, and other infractions. This lower than expected success rate has prompted many critics to argue parole. It is suggested that we are being too lenient on some while keeping lower-level inmates in prison too long. It is also argued that we are releasing dangerous individuals out into the community. Whatever the criticisms are, it is certain that we are bound to use parole as a function of release, even if it is only on paper. For example, California has a concept called non-revocable parole. The basic premise of this is: as long as you do not violate your terms of parole, your parole will be solely on paper, with no parole office check-ins. Additionally, no one will come out to your dwelling to monitor you. Effectively, this version of parole is not enforceable, hence why it is considered as parole on paper only. But, the questions around parole still remain. What are we to do with the hundreds of thousands of offenders we let out of prison each year? Do they need more assistance than a bus ticket back to their county of residence? How should we be doing parole in the United States? A more modern term for parole is called re-entry. The next section covers current issues within corrections, to include what we do for inmates who are re-entering society.

DAVID CARTER

Learning Objectives

In this final section on punishment, we review some of the contemporary special issues that are occurring in our American jails and prisons. Our decisions to incarcerate on a large scale as a solution to many issues does have significant impacts. These impacts not only affect the individuals in the justice system, but also community members as a whole. Some of these issues include overcrowding, gangs, aging prisoners, and substance abuse. This section will provide a report on some of the more pervasive issues facing corrections today. By the end of this section, students should be able to:

- Understand what are some current issues within the world of corrections
- Recognize the different concepts of how we view these issues
- Understand how punishment has increased and what are the outcomes of large scale incarceration

Critical Thinking Questions

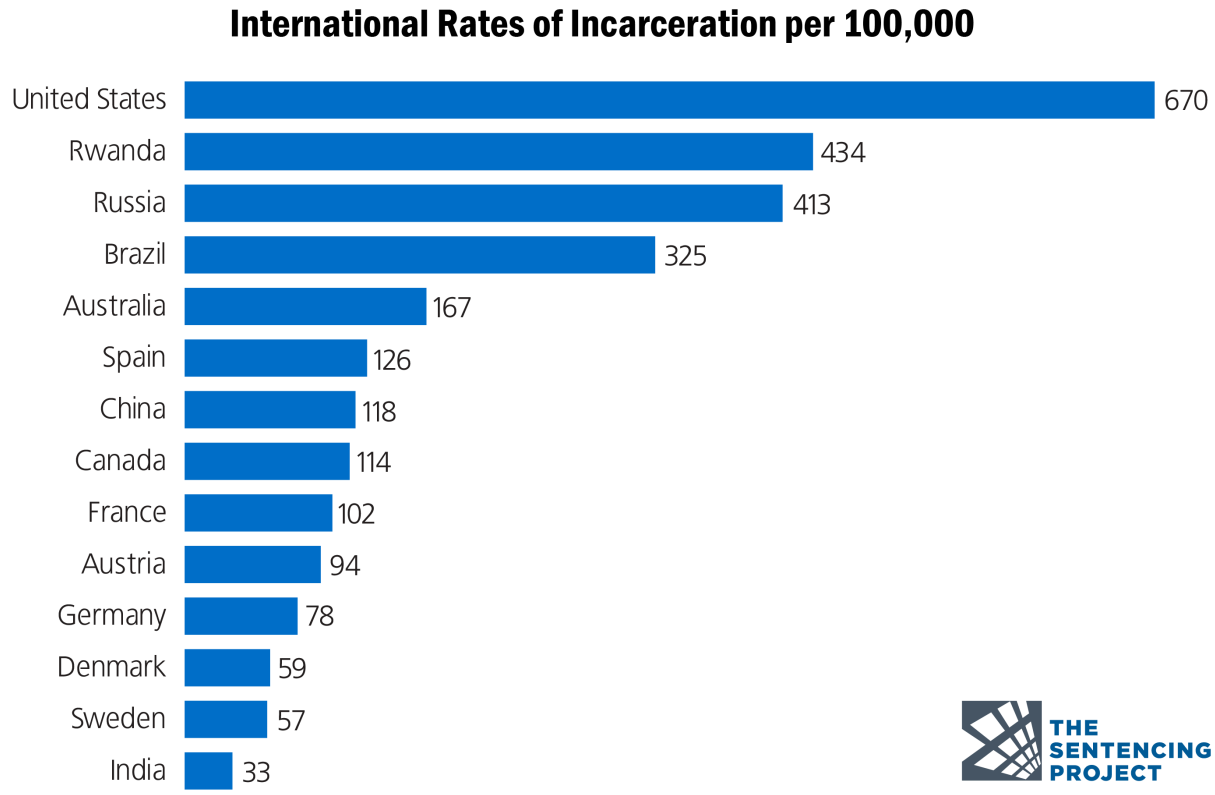
1. What are some of the reasons we have so many people in jails and prisons?
2. What impacts these levels of people under corrections?
3. Can we solve these issues?
4. What has been our approach to this point? Has it worked?

DAVID CARTER

The section on punishment started with a discussion about feeling safe and secure in our homes. Feeling safe and secure in person and home is arguably one of the most discussed feelings in our nation today. Our fear of crime influences how we think and act day to day. This has caused great fluctuation in the United States, in regards to how we punish people who are convicted of violating the law. In part, punishment comes from the will of the people, which is then carried out by the legislative process, and converted into sentencing practices. However, has our desire to feel safe and secure been taken too far by policy? And, have these policies created even bigger problems for us as citizens? This final section on corrections attempts to answer how we as America are doing, in order to solve our crisis in corrections.

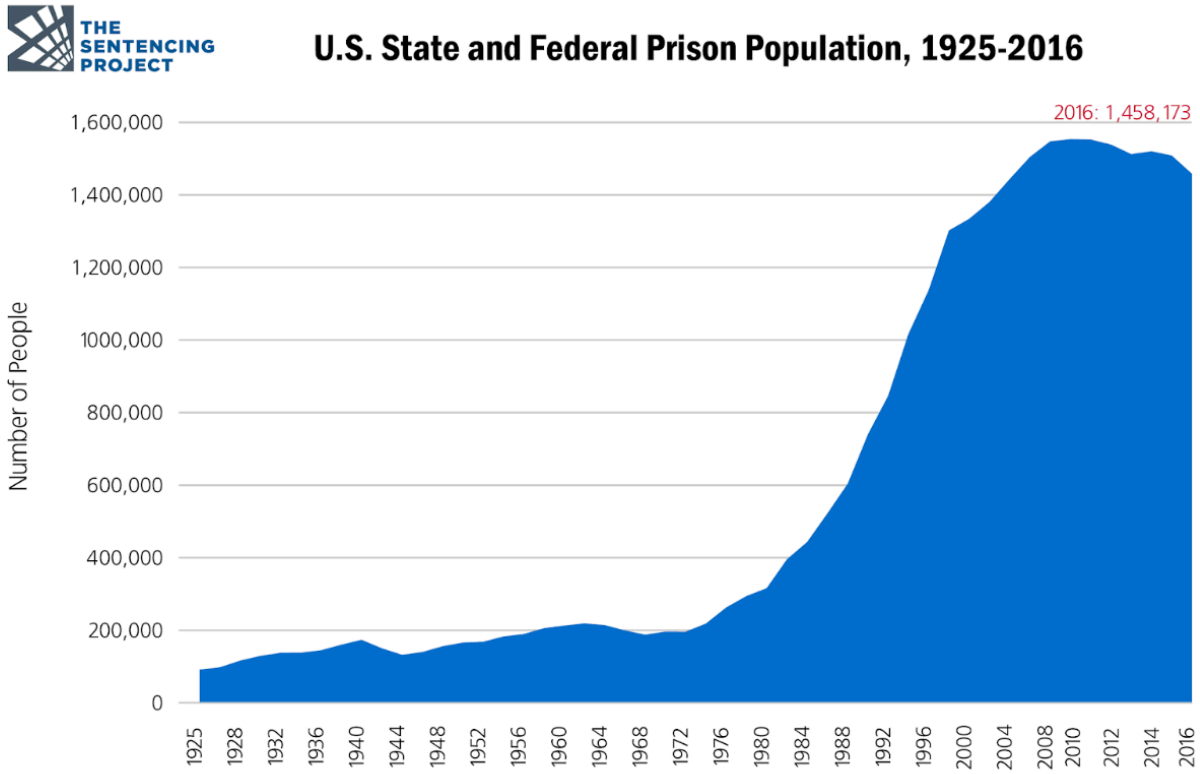
To give an idea about America's use of prisons, here is a comparison of the United States to other countries around the world. As one can see, America uses punishment fairly well. In fact, one could argue that we are the best at it.

International Imprisonment Rates



The United States wasn't always this punitive. As we have discussed, the context of eras that we have moved through, our underlying philosophy of punishment constantly evolves, even if it is rather slow at times. Unfortunately, in the 1970s, there was a confluence of events that kicked us off on a path of incarcerating many types of individuals, more so than we had done in the past. This path of imprisonment or mass incarceration has had lasting effects. Below, you can see when the expansion of the correctional system began.

Mass Increase in Incarceration



Mass Increase in Incarceration

The United States had just gone through a large scale amount of civil unrest, which leads to a civil rights movement of many Americans. As a country, we were not happy with how subpopulations were being treated, and it was during this that many positive changes in the country were being adapted into law. This also corresponded with a massive influx of men that were returning from the Vietnam war. The disapproval of the war, increased our growing distrust of the government to provide programs that could help individuals within the justice system. Many State-funded operations were seen as intrusive on the public, to include mental health facilities. There was also a large scale importation of drugs occurring in America. All of these items and more shifted our ideology rather abruptly in the United States, and we turned toward a more punitive approach to people in society that were getting into trouble. Collectively, we would consider this the "get tough era" on crime. This included the war on drugs (gang involvement), tougher sentencing legislation across the country, transinstitutionalization or transcarceration (the removal of many individuals from state mental health hospitals), and others. Collectively, these all had a large-scale increase in the prison population.

Full Jails?

It is 3:00 AM on a Sunday morning and Terry is getting force-released from jail because the jail is full. Force Releases occur when a facility is at its maximum capacity and a more serious offender is coming in. The decision has to be made in order to protect the community the facility is supposed to protect, but still, maintain the constitutional

rights of the individuals it is required to secure. Like many others in the community, Terry made some poor decisions, was arrested for a lower level of crime and has started the process of going through the justice system. However, for Terry, and unfortunately many others, now Terry is being pushed back out onto the street, prior to receiving some basic services that may help him change his behaviors. This is not his fault, it is only due to the fact that a more dangerous offender is coming into the jail, and a decision had to be made.

To make matters more complicated, Terry is a dually diagnosed individual. This means that he has both a substance abuse problem and a low-level mental health issue. Terry has been managing his mental health issue with medications that he is able to afford because of his job at the local Wal-Mart. Now Terry will probably lose his job because he hasn't shown up for two shifts, due to him being in jail. While not excusing any of Terry's actions that got him in jail, Terry is now out on the street, without his medication. He is nervous that he is not sure what he is going to do.

This story is more common than you think. It happens to tens of thousands of individuals a year. What should the community do?

The war on drugs, initiated by President Nixon in 1971, was framed as an all-out war to eradicate drugs in the United States. The massive expenditures on the curtailment of the drug epidemic also shifted our views on drug use. We became much more punitive towards drugs, treating it as more of a criminal justice issue, rather than as a substance dependence issue. Good or bad, drug use was demonized in the public and media, which aided in the development of much tougher sanctions on drug use in America. The Drug Enforcement Agency was created in 1973, to provide another arm of the government to tackle a specific issue, drugs. By the 1980s, lengthy sentences for drug possession were also in place. One to five-year sentences for possession were increased to upwards of 25 years. There was also an increased focus on gangs, which were held responsible for the majority of the drug trade in the United States.

Gang activity in the United States was prevalent long before the enactment of the war on drugs. However, once the linkages between our fear of crime, and the drug trade by gangs became more pronounced due to the war on drugs, the conflict escalated. While there are hundreds of different gangs in many neighborhoods and communities in the United States today, gangs in prison have converged into four main gangs, or what corrections call security threat groups. These four basic gangs include the Whites, the Blacks, the Southerners (Surenos, or EME), and the Northerners (Nortenos). Not only are these STGs considered violent inside and outside of prison, but they are also actively involved in the continuing drug trade in the United States today, even behind bars. In fact, many of the leaders of all of the gangs on the streets are held in one prison in California, Pelican Bay State Prison.

Within the prisons in the United States, gangs actively recruit members, communicate with gangs on the streets, run the drug trade, and are also at war with each other over the power within the institutions, from their perspective. There have been numerous documentaries on gangs in the U.S., and even mainstream films about gangs and gang life, both inside and out. A few notable examples of films to watch on this subject include Felon (2008), Shot Caller (2017), and American Me (1992).

Transcarceration

At the same time, the proliferation of gangs was occurring in prisons in the United States, there were another sizeable increase of prisoner type, mentally ill inmates. This is due to the transinstitutionalization that occurred for thousands during the late 1970s, 1980s. Transinstitutionalization, or transcarceration is a process that occurred for many with mental health issues when State-run mental health facilities began to close their doors. Having few choices of where to go, many became homeless or destitute. Ultimately, these individuals wound up in America's jails and prisons. This is also compounded by how we have shifted our views on the mentally ill within the courts and justice system. While insanity is a defense that is used in

court, it is rare (roughly 1% of cases), and even more rarely does it conclude in success. This shift occurred within our understanding of guilt surrounding mental illness. In the past, an individual would be held not guilty by reason of insanity. However, this shifted to guilty, but legally insane. The guilt would be grounds to still incarcerated individuals. Changes in policy like this also contributed to the increase in offenders in the 1980s.

Get Tough Policies

Another reason for the large scale increases can be found in our changes to policies surrounding sentences and sentence lengths. Get tough policies flourished in the latter half of the 1980s and into the 1990s. This included truth in sentencing legislation three-strikes policies, and drug crime minimums. Truth in sentencing, also known as the 85% rule, is where mandatory minimums of sentences would be forced to be served by incarcerated individuals. Thus if an individual was sentenced to prison, a mandatory minimum of 85% of the sentence would have to be served before the individual was eligible for release (parole). This added to the average length of sentences served in American prisons, which meant that individuals were not being released as early as in prior years. Thus, as more individuals were coming in due to increases in other legislation, there were already more people in the prisons.

Three strikes policies were enacted in many States. In 1993, Washington overwhelmingly passed (75% voted yes) to approve initiative 593 [1] This policy increased sentence lengths for 40 felonies, which included life imprisonment. Perhaps the largest 3 strikes policy was in 1994, in California, with Proposition 184, commonly called the Three Strikes and You're Out policy. It mandated a minimum of 25 years of prison for individuals committing 3 felonies. What made this policy more pervasive than others was the way in which it could be applied. If a person had two previous strikes for violent, or serious felonies (not necessarily violent), any new felony was life imprisonment, with a minimum of 25 years. For a more detailed view of this policy, see https://lao.ca.gov/2005/3_strikes/3_strikes_102005.htm

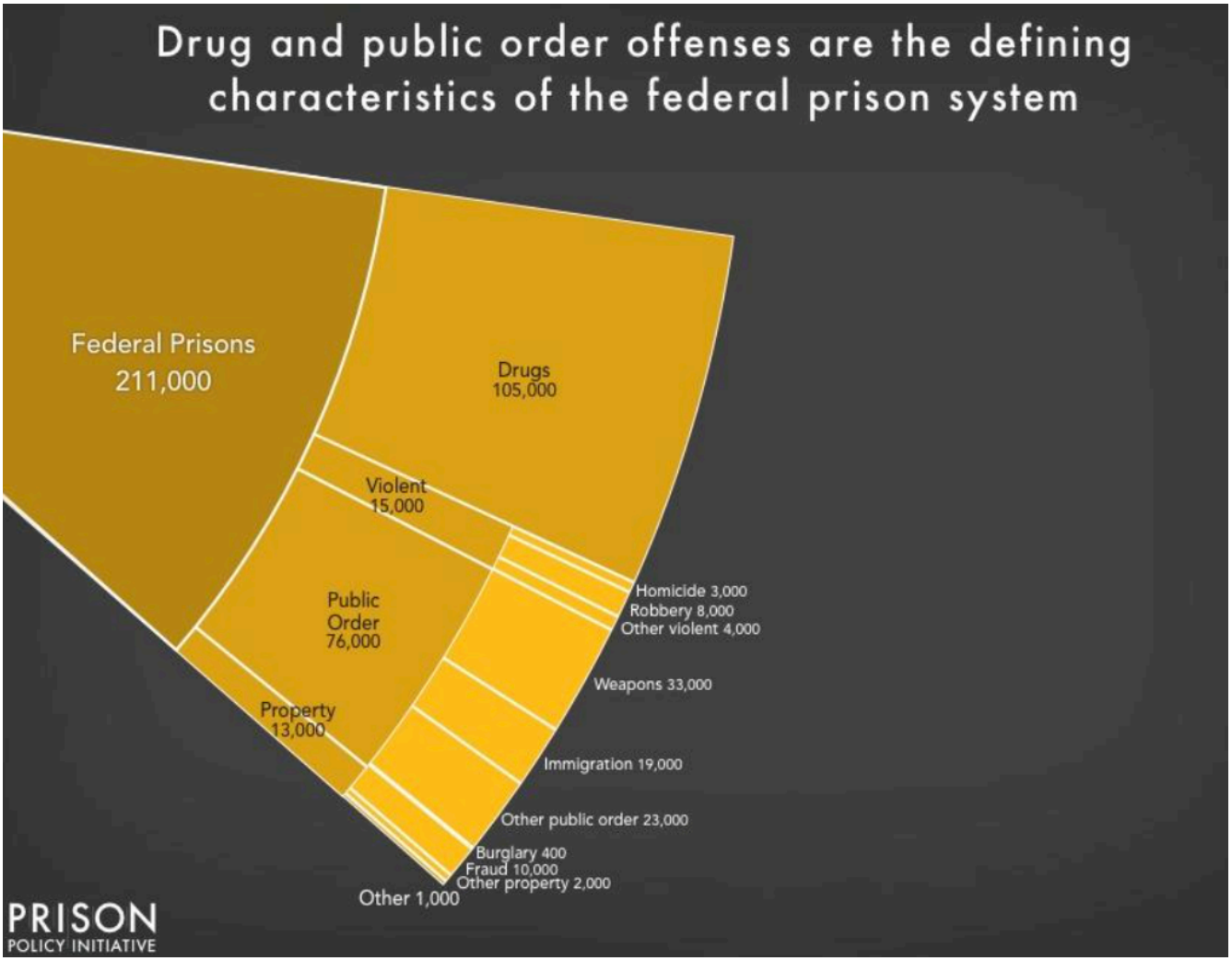
Drug laws were also changing at this time. The Controlled Substances Import and Export Act (1970), started the increases for drugs in the U.S. under federally mandated minimums found within the federal code 21 U.S.C. § 841. For a detailed reporting of these minimums, see https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf

One of the most debated issues within the drug sentencing laws was the differential between cocaine (in powder form) and crack (also form of cocaine, diluted and in a hardened paste form). During the increases in sentencing, there was a disparity in the lengths of sentences for comparable weights of these two drugs. There has been much debate whether this targeted poorer individuals more harshly, as crack was seen as a poor man's cocaine. However, with additional mandatory minimum increases in the 1980s, differences in sentence lengths began to widen. In a detailed report, Barbara Meierhoefer (1992) detailed how the average sentence lengths for African Americans (for similar weights of crack v. cocaine for Whites) was roughly 50% higher, supporting this assertion that drug sentences were not equal. [2]

With over a million arrests per year for drugs, it does add to the prison system as a whole. While the proportion of drug offenders in State prisons hovers around 20-25%, it is much larger at the federal level. As seen below, it makes up over half of the federal prisons. In all, the drug seriousness went up (how drugs are scheduled within federal guidelines), and sentence lengths for drugs went up; certain drugs more than others also went up.

1. Wright, P. (1995). Three strikes racks 'em up. *Journal of Prisoners on Prisons, 6*(2), 3-6. https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=162918
2. Meierhoefer, B. (1992). The general effect of mandatory minimum prison terms: A longitudinal study of federal sentences imposed. *Federal Judicial Center*. https://www.fjc.gov/sites/default/files/2012/GenEffMM.pdf

Federal Drug Inmates

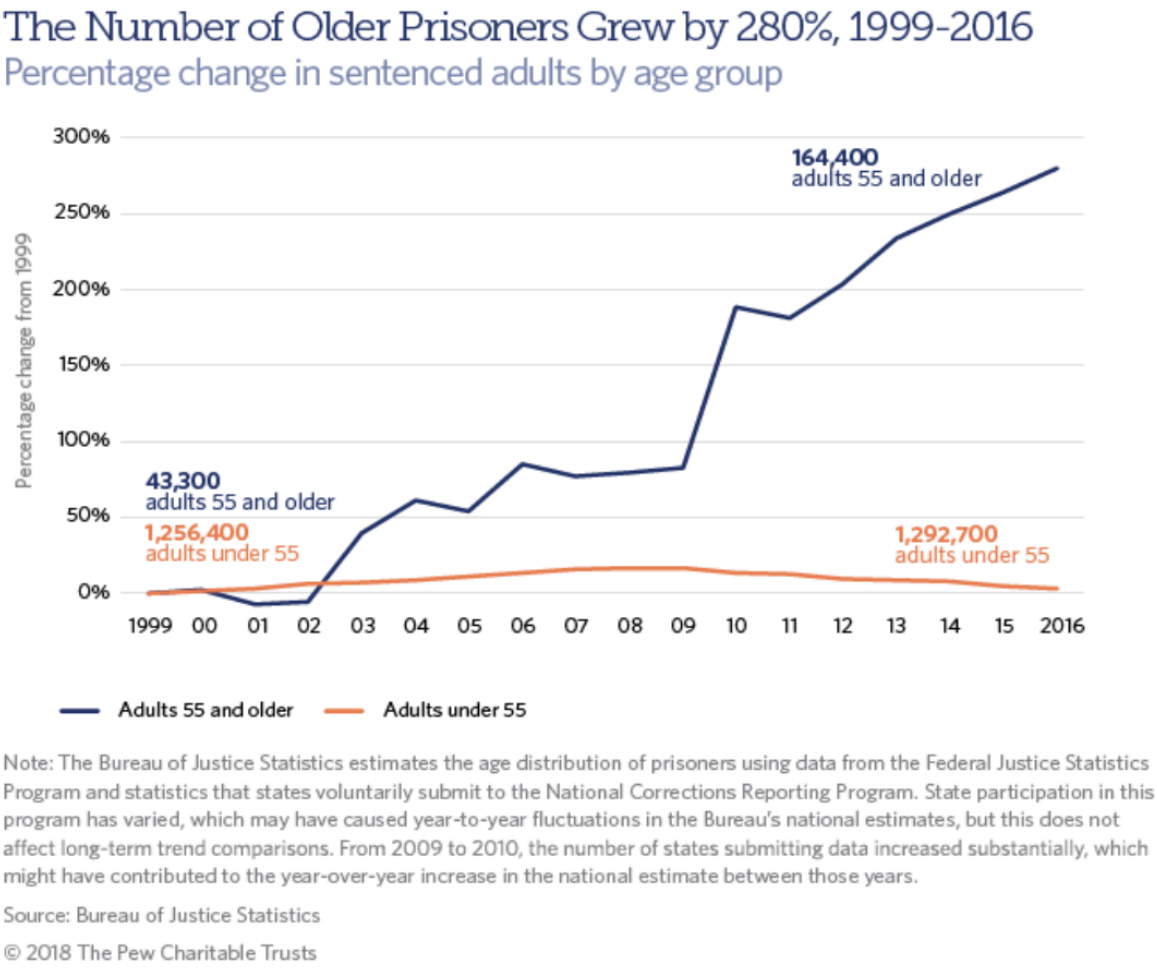


Federal Drug Inmates

One of the side effects of lengthier sentences is that: the individuals in prison get older, in prison. Thus, the amounts of individuals in prisons over 55 years old has dramatically increased. As McKillop and Boucher (2018) relate in the graphic below, based on BJS data, there has been a 280% increase in prisoners, age 55 and older. [1]

Aging Prisoners

1. McKillop, M., & Boucher, A. (2018). Aging prison populations drive up costs. Older individuals have more chronic illnesses and other ailments that necessitate greater spending. Available at: https://www.pewtrusts.org/en/research-and-analysis/articles/2018/02/20/aging-prison-populations-drive-up-costs



Aging Prisoners

And as the title of their article depicts, there is a growing cost within this subpopulation of inmates. McKillop and Boucher (2018) relay that the cost of this group of inmates can be upwards of three times the cost of the normal inmate (30k to 100k per inmate). [2]

Beyond just the cost of these inmates, a more philosophical question has risen, in regards to how to treat prisoners as they enter their last phase in life. Some have articulated for compassionate releases for individuals that are entering hospice care or in need of assisted living conditions. Other articulate that this is unfair to put the burden on the inmate, as they have been incarcerated for long periods of time and have few self-support options available. In a powerful documentary on this matter, Edgar Barens details these issues. Information about this film, The Prison Terminal (2013), can be seen here: https://www.prisonterminal.com/.

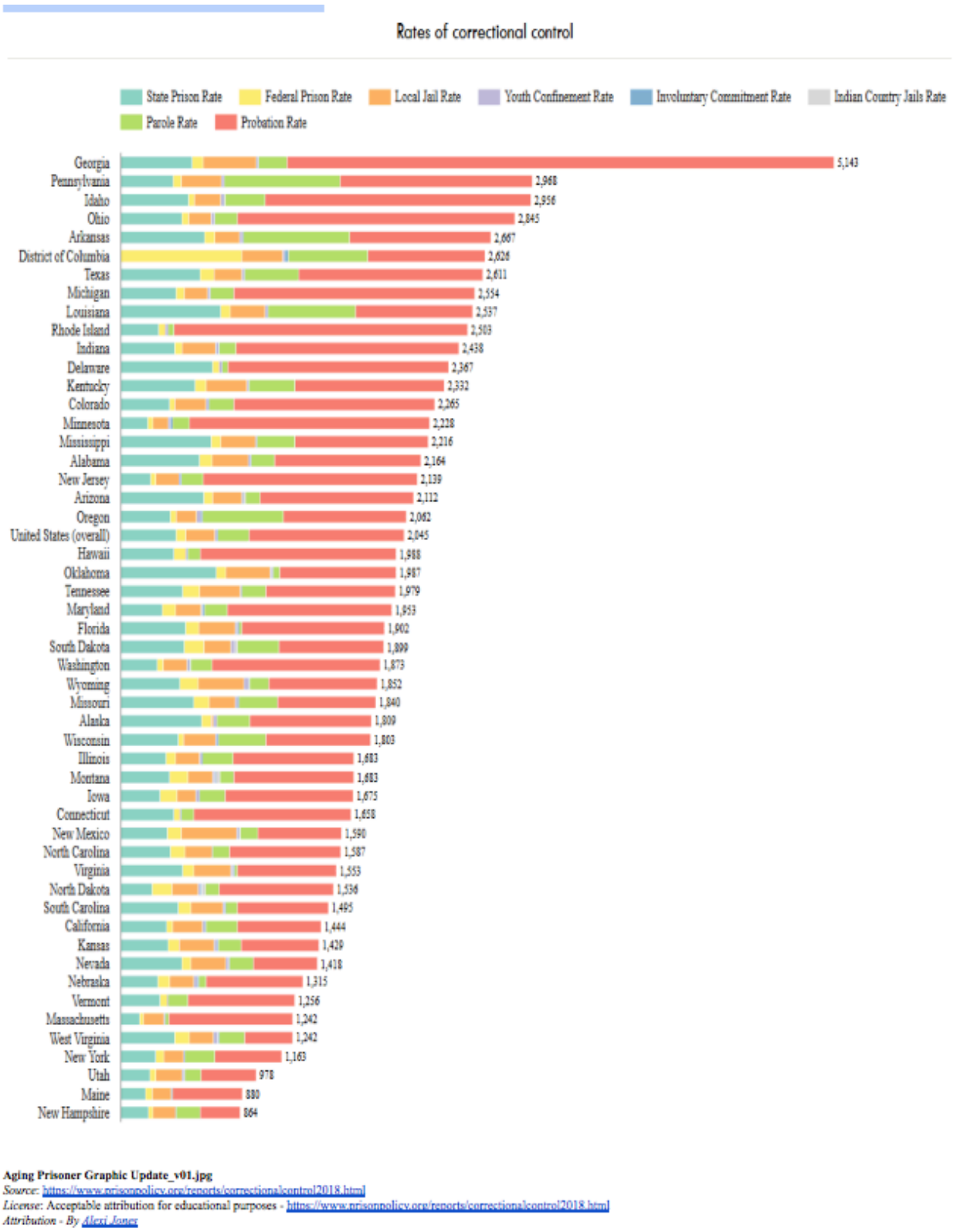
Overcrowding

These issues and others have all contributed to the rising correctional population in the United States. It is estimated that we have over 8 million people in correctional control, and that number does not seem to be subsiding. Yes, there are reductions in certain areas, such as a decline in the prison population in the last

2. McKillop, M., & Boucher, A. (2018). Aging prison populations drive up costs. Older individuals have more chronic illnesses and other ailments that necessitate greater spending. Available at: https://www.pewtrusts.org/en/research-and-analysis/articles/2018/02/20/aging-prison-populations-drive-up-costs

few years, but this does not mean that they are not still under control. In one of the more detailed examples of just where individuals are at in corrections, Alexi Jones (2018) of the Prison Policy Initiative provides a graphic, based on State and Federal data to demonstrate this impact.

Rates of Correctional Control



Aging Prisoner Graphic Update_v01.jpg
Source: https://www.prisonpolicy.org/reports/correctionalcontrol2018.html
License: Acceptable attribution for educational purposes - https://www.prisonpolicy.org/reports/correctionalcontrol2018.html
Attribution - By Alexi Jones

Aging Prisoner Graphic

Not only does this graphic demonstrate the overall volume of correctional control, but it also highlights

how states are handling their populations differentially. The second half of Jones' (2018) [3] report details the volume of individuals with each state. Please take a moment to review the last portion of this report to see how many are under correctional control, found here: https://www.prisonpolicy.org/reports/correctionalcontrol2018.html#statedata

Prison overcrowding is problematic for multiple reasons. First, when there are too many individuals (especially antisocial ones) within a facility, there are more assaults and injuries that occur within the institution. Moreover, there is a safety concern for not only the inmate on inmate violence but also inmate on staff crimes. Second, the more people you have in a facility, the faster that facility wears down. Operating a jail or prison at maximum (or over maximum) capacity causes more items to break or wear out within the facility at a fast rate. Finally, when individuals are unable to access adequate health care because of the excessively long waits, due to overcrowding, it is a violation of their constitutional rights.

As prisoners, we (the public and the State) have a responsibility to house and properly care for the prisoners overseen. This is not to say that offenders are getting premier care, but that they are at least receiving a modicum of care. When this low level of care is deliberately denied due to excessive volumes of individuals, it is a violation of a person's 8th amendment rights against cruel and unusual punishment. As was found in the case of Estelle v. Gamble, (1976). [4] This similar issue was presented in California over ten years ago. A three-judge panel ruled with the prisoners, citing the need for California to reduce its prison population to a level where the individuals could effectively be managed, and cared for [emphasis on the latter]. Dealing with overcrowding is a constant issue for most prisons and jails. Some have resolved to release more out into the community at a higher volume, on parole or just release. However, this too has its own set of problems, as reentry is now becoming the current issue within corrections.

3. Jones, A. (2018). Correctional control 2018: Incarceration and supervision by state Prison Policy Initiative. Available at: https://www.prisonpolicy.org/reports/correctionalcontrol2018.html#statedata .
4. *Estelle v. Gamble*, 429 U.S. 97 (1976).

Reentry and the Revolving Door

Parole, as discussed in the previous chapter, has had mixed reviews. Overall, the effectiveness of parole hovers around 50% success. It is estimated somewhere between 600,000 and 800,000 parolees are on parole in any given year over the last 3 decades. Additionally, several hundred thousand are exiting parole in each of these years. This brings up questions about what happens to these individuals. The reality is that most of them will be rearrested. In one of the more comprehensive studies on recidivism, Alper, Durose, and Markman (2018) discussed the recidivism rate of individuals tracked over a 9-year follow up period. What they found was that rearrest occurred for about 70% in the first three years, and by year 9, 83% of the individuals released has been rearrested. Many of these individuals return to prison, hence the concept of the "revolving door" of justice. In order for reentry programs to be more successful, individuals returning to society need assistance to get back on their feet and stay on their feet. This includes items such as education and training, employment assistance to get a job, legal services, education on public benefits, and housing assistance. Interestingly, it appears as though many of the items here are the same items that many of them had deficits in that landed them in trouble in their lives before [1] That is – many of these items are those same predictors of offending that were discussed in the first section (known as the know predictors of recidivism). Unfortunately, it appears as though they are not getting these while they are incarcerated. Again, creating a cycle of release and catch again.

Situations and circumstances that compound these problems for many ex-offenders is the difficulty faced with trying to get a job once released. Over the last 20 years, there was an overwhelming push to include items on employment applications that asked questions about prior incarceration history. Not only were there questions about prior incarcerations and prior convictions, but many employers also have questions about ever being arrested. If an individual told the truth (which is what they should do), the reality is that their applications would be discarded, or overlooked for others without an arrest/conviction. If an ex-offender lied about it, and it was discovered during a background investigation, the application was certainly discarded. In either scenario, it became increasingly difficult for an individual to obtain legitimate employment.

This is also true on apartment rental applications. Again, when individuals would put down prior arrests, their applications would often be placed at the bottom of the pile. If someone were to lie about it, and it

1. Alper, M., Durose, M. R., & Markman, J. (2018). Update on prisoner recidivism: A 9-year follow-up period (2005-2014). *U.S. Department of Justice Office of Justice Programs Bureau of Justice Statistics.* https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf

was discovered, it could be used as grounds for not selecting an individual for tenancy. Once again, society was making it difficult for ex-offenders to even function as a normal citizen, based on a sentence that they had served, which is when the punishment should have ended. Collectively, these items are included in the concept of collateral consequences. That is – items that are barriers to successful integration that are remnants of prior punishment.

Future Outlook of Corrections

Based on the major issues presented, overcrowding and reentry, the problems faced in corrections are not likely to go away anytime soon. We have seen an increase in the overall correctional population for years now. While there are some reductions in prisons, this is not likely to stay this way, unless changes are made. Additionally, while there is space for growth in the area of community corrections, the functions of CC need to be supported and done based on evidence-based practices if it is to be more successful. It too has limits, and without the support, it is more likely to be another failure. If it is not supported, then the prison population is likely to increase even more, due to the eventual placement of too many failures of individuals in community corrections. Most offenders are in need of some basic assistance to get themselves back to a functioning level in society, including addressing their education, their substance abuse, their employment, and general and mental health. Our correctional system needs to change its habit of treating substance abuse and mental health issues as legal and punish-oriented issues if we are going to curb the tide of the growing problems we face in corrections. If not, our 8 million individuals in all forms of correctional control can quickly turn 10 million. According to a 2016 report from the U.S. Department of Education (p. 13), "from 1979–80 to 2012–13, state and local government expenditures on corrections rose by 324 percent (from $17billion to $71 billion)." [2] Keep in mind that is taxpayer money. We are funding this issue. It is time to address these problems from a more holistic approach if we are going to see a change in our current correctional practices.

2. https://www2.ed.gov/rschstat/eval/other/expenditures-corrections-education/brief.pdf

10: Juvenile Justice

Learning Objectives

In this section, you will be introduced to juvenile justice. This section is designed to be a broad overview of the juvenile court system, to examine the pros and cons of the juvenile justice system, examine the various stages in the juvenile justice system, and discuss contemporary issues facing juvenile justice. After reading this section, students will be able to:

- Summarize the history and purpose of the juvenile court
- Explain the pros and cons of the juvenile justice system.
- Briefly examine the stages of the juvenile justice system
- Examine the reasons supporting and criticizing the process of waiver to adult court
- Explain how due process has evolved through the juvenile court.

Critical Thinking Questions

1. What impact did the child savers have on juvenile justice reform?
2. Explain how due process has been used throughout the history of the juvenile justice system.
3. How has the juvenile justice system evolved since it was created?
4. What are the different types of waiver?
5. What four areas changed the juvenile court?

ALISON S. BURKE

Since the early 1990s, America has witnessed an increase in the fear of youth crime. [1] Sensationalized media exposure in the 1990s facilitated the public's fear of youth crime, which resulted in get tough legislation and a perceived need to "do something" about juvenile crime. [2] The juvenile court was criticized for its inability to control youth crime and, as a result, policies shifted from rehabilitation to punishment of juvenile offenders. [3] This punishment included an increase in the number of states that adopted new legislation or revised their previous statutes to facilitate the transfer of youthful offenders from juvenile court to criminal court to be tried as adults. [4]

Ted Talks: *Jeffrey Brown* An architect of the "Boston miracle," Rev. Jeffrey Brown started out as a bewildered young pastor watching his Boston neighborhood fall apart around him, as drugs and gang violence took hold of the kids on the streets. The first step to recovery: Listen to those kids don't just preach to them and help them reduce violence in their own neighborhoods. It's a powerful talk about listening to make a change. https://www.ted.com/talks/jeffrey_brown_how_we_cut_youth_violence_in_boston_by_79_percent?language=en#t-24954

1. Benekos, P., & Merlo, A. (2004). *Controversies in juvenile justice and delinquency*. Anderson Publishing.
2. Myers, D.L. (2001). *Excluding violent youth from the juvenile court: The effectiveness of legislative waiver*.New York: LBF Scholarly Press.
3. Feld, B.C. (2001). Race, youth violence, and the changing jurisprudence of waiver. *Behavioral Sciences & the Law, 19*(1), 3-22.
4. Snyder, H. N., & Sickmund, M. (2006). Juvenile offenders and victims: 2006 National Report. Washington, DC: *U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention*

ALISON S. BURKE

The contemporary juvenile justice system operates under the premise that juveniles are different than adults and require special attention and treatment. The juvenile justice system believes that juveniles are malleable and can be rehabilitated. The juvenile court is based on the premise that public safety is best served by emphasizing the rehabilitation, rather than the incapacitation and punishment of juveniles. [1] Unfortunately, sensationalized media exposure of violent youth has led to exaggerated public fear of juvenile crime, get tough legislation, and a perceived need to "do something" about juvenile crime. [2] This punitive position is nothing new. Before the inception of the juvenile justice system a mere 100 years ago, youth were treated the same as adults. They were considered culpable for their actions and housed alongside adult offenders in jails and prisons. Recent research has utilized neuroscience to support the need to treat juveniles differently because they are different. The sections of the brain that govern characteristics associated with moral culpability do not stop maturing until the early 20s. Therefore, it is assumed that someone under age 20, such as a juvenile delinquent, has an underdeveloped brain.

When addressing juvenile delinquency in America, the pendulum swings from punitive policies to rehabilitative policies and then back again depending on media, politics, and the current climate. There is no magic bullet approach to preventing juvenile delinquency, but as the court evolves, changes, and utilizes best practices, it gets closer.

Ted Talks: *Stephen Case* The youth crime 'problem' is examined as a social construction and moral panic created by institutions in Western societies. The talk traces the evolution of youth crime into a phenomenon persistently misrepresented as an escalating social epidemic. The developmental life stages of 'childhood' and 'adolescence' as inventions are explored, highlighting differences between young people and adults. In this way, 'youth crime' can be identified as a social problem requiring distinct responses. A running theme is a child as a source of adult anxiety and fear, motivating societies to create structures, processes, theories, and images of youth crime that punish lawbreakers. The 'solution' is the 'positive youth

1. Cox, S. M., Conrad, J. J., & Allen, J. M. (2003). *Juvenile justice: A guide to theory and practice.* McGraw-Hill Humanities, Social Sciences & World Languages.
2. Benekos, P., & Merlo, A. (2004). *Controversies in juvenile justice and delinquency.* Anderson Publishing.

justice' model. Children should not be punished as if they are adults but their criminal behavior should be seen as a normal part of growing up. Instead, they should be worked with to meet their needs, to embrace their human rights and to promote their life chances. https://www.youtube.com/watch?v=QYWPyiZIpV8

ALISON S. BURKE

The juvenile court was created in Cook County Illinois in 1899, but the concept dates back to seventeenth century Europe. The term ***parens patriae*** originated in the 12th century with the King of England and literally means "the father of the country." Applied to juvenile matters, *parens patriae* means the king is responsible for and in charge of everything involving youth. [1] *Parens patriae* was often used by royalty in England from their homes in the name of the king. Children were often seen as property and were thus subject to the wishes of the king or his agents. [2] This was especially relevant when they violated the law.

Within the scope of early English common law, parents had the primary responsibility of raising their children in any manner they deemed fit. However, when children reached 7 years of age or committed a criminal act, chancellors, acting in the name of the king, adjudicated matters concerning the youth. The youth has no legal rights and were essentially wards of the court. As such, the courts were tasked with safeguarding their welfare. While parents were merely responsible for childbearing, the state had the primary and legitimate interest in the upbringing of the children. [3]

The concept of *parens patriae* had a substantial influence on events in the United States, such as the child-saving movement, houses of refuge, and reform schools. The persistent doctrine of *parens patraie* can be seen evolving from "king as a father" to a more general ideology, that of the state "acting in the best interest of the child." Subsequent matters involving youth revolve around this notion of acting in the best interest of the child, whether children were taken away from wayward parents, sent to reform schools for vagrancy, or even held in institutions until they read the age of majority, or 18 years old. The idea is that the state is acting in their best interest, protecting the youth from growing up to be ill-prepared members of society. Thus, the courts are intervening for the youth's own good.

In the nineteenth century, children were gradually seen as vulnerable and in need of special care and supervision. One illustration of this concept was the establishment of a **house of refuge** in New York City in 1825. These were urban establishment used to corral youth who were roaming the street unsupervised or who had been referred by the courts. [4]

These houses were not intended to house criminals, but rather at-risk youth, or youth who were on the verge of falling into a life of crime because of their social circumstances. Because of the notion of *parens*

1. Merlo, A., & Benekos, P. (2019). *The Juvenile Justice System, Delinquency, Processing, and the Law* (9th ed.) Pearson.
2. Shoemaker, D. (2018). *Juvenile Delinquency* (3rd ed.). Rowman & Littlefield.
3. Merlo, A., & Benekos, P. (2019). *The Juvenile Justice System, Delinquency, Processing, and the Law* (9th ed.). Pearson.
4. Merlo, A., & Benekos, P. 2019. *The Juvenile Justice System, Delinquency, Processing, and the Law* (9th ed.). Pearson.

patriea, many of the parents of these youth were not involved in the placement of their children in these houses. The case of ***Ex Parte Crouse*** is an example. [5]

In 1838, a girl named Mary Ann Crouse was sent to a Philadelphia house of refuge at the request of her mother. Her father petitioned to have her released since she was committed without his consent. However, on the grounds that the state has the right to remove children from their home, in their best interest and even sometimes over parental objection (because of parens patriae), the Pennsylvania Supreme Court denied the father's petition. The court declared that failed parents lose their rights to raise their children. Parental custody and control of their children is natural, but not an absolute right. If parents fail to care for their children, educate, train, or supervise them, then the children can be taken by the state. The state is acting in the best interest of the child.

Reform Schools: The 1850s ushered in the development of **reform schools** or institutions used for the housing of delinquent and dependent children. The schools were structured around a school schedule rather than the work hours that defined the workhouses and houses of refuge. Many reform schools operated like a cottage system where the youth were divided into "families" with cottage parents who oversaw the day to day running of the family, discipline of the youth, and schooling. The structure is still used in some youth correction institutions today, however, back in the nineteenth century, children were often exploited for labor and many of the school de-emphasis formal education. [6] Additionally, the emphasis of the reform school was on the strength of the family and they believed that by reinserting a strong family presence in the lives of the youth, they would be deterred from further criminal pursuits. [7] Regardless of the lack of evaluations as to the effectiveness of these institutions, the popularity of reformatories continued to grow.

The state had the legal authority to commit children and youth to reform schools based under *parens patriae*. However, in 1870, a boy named Daniel Turner was considered a "misfortunate", or someone who was in danger of becoming delinquent because his family was poor and unable to care for him. He was remanded to a Chicago house of refuge for vagrancy, not a delinquent act. His father filed a writ of habeas corpus and the court ruled that the state has no power to imprison a child, who has committed no crime, on the mere allegation that he is " destitute of proper parental care, and is growing up in mendicancy, ignorance, idleness, and vice." [8] *People Ex Rel. O'connell v. Turner*, 55 Ill. 280 (Ill. 1870). This effectively closed the reform schools in Illinois since they could no longer house non-criminal children. This case challenged the practice of *parens patriae* and ruled that the state can only take control of children if the parents are completely and utterly unfit and/or the child had committed some act of "gross misconduct." [9]

5. *Ex Parte Crouse* (1839)
6. Mennel, R.M. (1973). *Thorns & Thistles: Juvenile Delinquents in the United States from 1825–1940*. Hanover, NH: University Press of New England.
7. Shoemaker, D. (2018). *Juvenile Delinquency* (3rd ed.). Rowman & Littlefield.
8. *People Ex Rel. O'connell v. Turner,* 55 Ill. 280 (Ill. 1870).
9. Fox, S.J. (1970). Juvenile Justice Reform: An Historical Perspective. *Stanford Law Review, 22*:1187–1239

Child Saving Movement: By the end of the ninetieth century, cities were experiencing the effects of three major things: **industrialization, urbanization, and immigration**. Industrialization refers to the shift in work from agricultural jobs to more manufacturing work. This led to a greater number of people moving from the country to the cities, and the cities increasing exponentially in population without the infrastructure to support the increase. Immigration refers to the internal migration of people in America and the external movement of people from other countries. Within America, people were moving from the southern states (remember, this is not long after the end of the Civil War, which ended in 1865) and immigrating from European countries such as Ireland (the potato famine lasted from 1845-1854 and killed an estimated 1.5 million people). Millions of Germans and Asians also immigrated to America during this time lured by Midwest farmlands and the California Goldrush. [10]

The influx of people into cities weakened the cohesiveness of communities and the abilities of communities and families to socialize and control children effectively. [11] Nonetheless, the **child-saving movement** emerged during this time in an effort to change the way the state was dealing with dependent, neglected, and delinquent children. The child savers were women from middle and upper-class backgrounds.

There is some debate as to the motives of the child savers. The traditional view is that they were progressive reformers who sought to solve problems of urban life, while others contend that they used their station and resources as an effort to preserve their middle-class white way of life by overseeing the treatment of the immigrant children. Regardless of their motives, it is safe to say that child-savers were prominent, influential, philanthropic women, who were "generally well educated, widely traveled, and had access to political and financial resources." [12]

Creation of the Juvenile Court

The juvenile court was created in Cook County, Illinois in 1899. The Illinois Juvenile Court Act of 1899 was the first statutory provision in the United States to provide for an entirely separate system of juvenile justice. The court was created to have jurisdiction over all matters pertaining to youth- dependent, neglected, and delinquent youth.

A 1905 Pennsylvania Supreme Court case*, Commonwealth v. Fisher* [13]*Commonwealth v. Fisher,* 213 Pennsylvania *48 (1905)* [14], conveyed the legal authority of the new juvenile court under *parens patriae*:

> "To save a child from becoming a criminal, or from continuing in a career of crime, . . . the legislatures surely may provide for the salvation of such a child, if its parents or guardians be unable or unwilling to do so, by bringing it into one of the courts of the state without any process at all, for the purpose of subjecting it to the state's guardianship and protection."

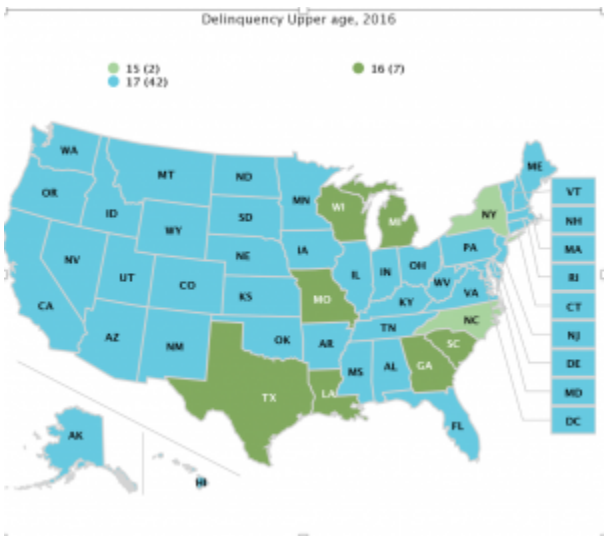
In this case, a juvenile was given a seven-year sentence for a minor crime which would have received a much lesser sentence in adult court. The court upheld the sentence and deemed it was in the best interest

10. History (n.d.). US immigration before 1965. https://www.history.com/topics/u-s-immigration-before-1965
11. Feld, B.C. (1999). *Bad Kids: Race and the Transformation of the Juvenile Court.* New York: Oxford University Press.
12. Platt, A. (1977). *The Child Savers: The Invention of Delinquency (*2nd ed., pp.83). Chicago: University of Chicago Press.

of the child. As a result of the case, parens patriae was back. The court ruled that "importance to the commonwealth which is vitally interested in rescuing and saving its children, wherever rescue, care and a substitute for parental control are required, to the end that they may, in the enjoyment of sober, industrious and happy lives, fill the full measure of good citizenship."

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Before the creation of the juvenile court, there was no such thing as "delinquency." Youth were convicted of crimes, the same as adults. Just as the concept of "childhood" is socially constructed, scholars also say that "juvenile delinquency" is likewise socially constructed as a result of social, economic, and religious changes.[1] The juvenile court oversees cases for youth between the ages of 7 and 17. Seven is considered the lower limit of the reaches or protections of the juvenile justice system, while 17 is the upper limit. At 18, youth are considered adults and are tried under the laws of the adult criminal justice system. However, some states have differing upper age limits. For example, in Oregon, the Oregon Youth Authority houses youth until the age of 25. Other states have similar provisions and although the lower limit is seven years of age, most states do not intervene in cases under nine.



Youth Processing Ages

After the creation of the juvenile court, the child savers and reformers were worried that restricting the court to only deal with criminal youth would make the court function like an adult criminal court rather than a rehabilitative parental figure. Within a couple of years of its founding, amendments to the Illinois Juvenile

1. Feld, B.C. (1999). *Bad Kids: Race and the Transformation of the Juvenile Court.* New York: Oxford University Press.

Court Act broadened the definition of delinquency to include incorrigible youth, or otherwise unruly and out of the control of their parents. [2] The definition of juvenile delinquency now included **status offenses** or offenses that are only illegal because of the age of the offender. Examples include: drinking alcohol, running away, ungovernability, truancy (skipping school), and curfew violations. Overall, the juvenile justice system is responsible for youth who are considered dependent, neglected, incorrigible, delinquent, and/or status offenders.

Podcast: Caught

https://www.npr.org/podcasts/589480586/caught

The purpose of the original court was to act in a rehabilitative ideal. The main function was to emphasize reform and treatment over punishment and punitive action. [3] Terminology in the court is even different, to denote the separate nature from the adversarial adult processes. To initiate the juvenile court process, a **petition** is filed "in the welfare of the child," whereas this is called an indictment in the adult criminal process. The proceedings of juvenile courts are referred to as "hearings," instead of trials, as in adult courts. Juvenile courts find youths to be "**delinquent,**" rather than criminal or guilty of an offense, and juvenile delinquents are given a "**disposition**," instead of a sentence, as in adult criminal courts.

2. Feld, B.C. (1999). *Bad Kids: Race and the Transformation of the Juvenile Court.* New York: Oxford University Press.
3. Feld, B.C. (1999). *Bad Kids: Race and the Transformation of the Juvenile Court.* New York: Oxford University Press.

ALISON S. BURKE

Did you know that there is no uniform juvenile justice system in the United States? It is quite surprising! Matters concerning minors and children who break the law are left to the discretion of individual states and their legislative bodies. States have different priorities, and legislators enact new laws and revise legislation according to their own needs at the time. Although every state operates independently, they manifest common trends and respond to certain issues in a similar manner. For example, the increasing fear of youth violence in the 1990s precipitated more specific and punitive legislation in almost every state. [1] Some states with very specific and real gang problems devised targeted gang suppression laws and legislation, while other states did not. The fear of youth crime led states to create mandatory minimum legislation (like Measure 11 laws in Oregon), waiver and transfer laws, and zero tolerance policies.

The juvenile justice system has two main responsibilities: to oversee cases involving (1) juvenile delinquency (criminal law violations and status offenses) and (2) dependency, neglect, and child abuse. [2] Due to the loose definitions of *parens patrea* and the court's attempt to act in the best interest of the child, after World War II, the juvenile court was criticized for disregarding due process.

Due process refers to the procedural rights established in the Constitution, especially the Bill of Rights. It includes rights such as the right to legal counsel, right to call witnesses, and right to be notified of charges (which will be revisited in *In re Gault*). The original juvenile court did not implement due process rights because it was intervening in the lives of youth for their own good, not in such a formalized adult way where they would need constitutional protections. However, because of the abuse of power, this changed in later decades.

Beginning in the 1960s, four areas drastically changed in the juvenile court:

(1) the juvenile due process revolution from 1966 to 1975

(2) the Juvenile Justice and Delinquency Prevention Act of 1974

(3) a growing emphasis on punishment and accountability in the 1980s and 1990s

(4) contemporary juvenile justice reform that is driven by evidence-based practices and empirical research on adolescent development, which in turn leads us back to rehabilitation

1. Feld, B.C. (2003). *The Politics of Race and Juvenile Justice: The 'Due Process Revolution' and the Conservative Reaction.* Justice Quarterly 20:765-800.
2. Rubin 1985

As discussed, the juvenile court was created with rehabilitation and individualized treatment in mind. However, between 1966 and 1975, the court became more formalized and started "adultifying" the process. Landmark cases for establishing due process rights in the juvenile justice system include.

Kent v. United States (1966) [1]

Morris Kent was a 16-year-old boy living in Washington DC who was on probation for burglary and theft. He was arrested again and charged with three burglaries, three robberies, and two counts of rape. Due to the seriousness of the changes and Kent's previous criminal history, the prosecutors moved to try Kent in adult court. However, because of his age, he was under the exclusive jurisdiction of the juvenile court. Kent's lawyers wanted his case to be heard in juvenile court. Without a hearing or a full investigation, the judge sided with the prosecutors and Kent was tried in adult court. He was found guilty and sentenced to 30 to 90 years in prison. On appeal, Kent lawyers argued that the case should have to stay in juvenile court and it was unfairly moved to adult court without a proper hearing.

The Supreme Court ruled that while minors can be tried in adult court, the original judge needed to conduct a full investigation and an official waiver hearing where the merits of the case were weighed, such as the juvenile's age, prior charges, and mental state. Essentially, Kent was entitled to a hearing that provided "the essentials of due process and fair treatment." This standard includes the right to a formal hearing on the motion of waiver and a written statement of the reasons for a waiver, the right to counsel, and the defense's access to all records involved in the waiver decision. It also ruled that "The *parens patriae* philosophy of the Juvenile Court 'is not an invitation to procedural arbitrariness.'" [2]

1. *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045 (1966).
2. *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, pp. 554-556 (1966)

In re Gault (1967). [3]

Gerald "Jerry" Gault, a 15-year-old Arizona boy, was taken into custody for making obscene calls to a neighbor's house. After the neighbor, Mrs. Cook filed charges, Gault and his friend were taken to the Juvenile Detention Home. At the time he was taken into custody, his parents were at work and the arresting officers made no effort to contact them nor did they leave a note about the arrest or where they were taking their son. They finally learned of his whereabouts from the family of the friend who arrested with him.

When the habeas corpus hearing was held two months later, Mrs. Cook was not present, no one was sworn in prior to testifying, and no notes were taken. He was released and scheduled to reappear a few months later for an adjudication hearing. In the following hearing, again, Mrs. Cook was not present and again, no official transcripts of the proceeding were taken.

The official charge was "making lewd phone calls." The maximum penalty for an adult charge with this was a $50 fine or not more than two months in jail. Gault was found guilty and sentenced to 6 years in juvenile detention.

Gault's parents filed a writ of habeas corpus which was eventually heard by the Supreme Court. The Supreme Court ruled that juveniles are entitled to due process rights when the court proceedings may result in confinement to a secure facility. The specific due process rights highlighted in this case include (1) fair notice of charges; (2) right to counsel; (3) right to confront and cross-examine witnesses; and (4) privilege against self-incrimination.

The Court held that the Due Process Clause of the Fourteenth Amendment applies to juvenile defendants as well as adult defendants. "Juvenile court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."

In re Winship (1970) [4]

Samuel Winship, a 12-year old boy living in New York, was charged with stealing $112 from a woman's purse in a store, a charge that "if done by an adult would constitute the crime or crimes of Larceny." Since he committed a crime, the charges of juvenile delinquency were justified. Winship was found delinquent in a New York juvenile court, using the civil law standard of proof, "preponderance of the evidence." Winship was committed to a state training school for an initial period of 18 months with the annual extension of no more than six years.

Upon appeal, the U.S. Supreme Court ruled that the Due Process Clause of the Fourteenth Amendment

3. *In re Gault,* 387 U.S. 1, 87 S.Ct. 1428 (1967)
4. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970)

requires "proof beyond a reasonable doubt." The court acknowledged that juvenile proceeding is designed to be more informal than adult proceedings, but if charged with a crime, the juvenile is granted protections of proof beyond a reasonable doubt. Winship expanded the constitutional protections established in Gault.

Breed v. Jones (1975) [5]

A 17-year-old boy named Gary Jones was charged with armed robbery and found guilty in a California juvenile court. At the dispositional hearing, the probation officer assigned to the case testified that Jones was not amenable to treatment. After the hearing, the court determined that Jones should subsequently be tried as an adult. Jones' lawyers filed a writ of habeas corpus and argued that waiving the case to adult court after it was already adjudicated in juvenile court violated the double jeopardy clause in the Fifth Amendment. The Supreme Court ruled that, yes, Jones had been placed in double jeopardy. This further formalized the juvenile court, however, The Court moved, "Giving respondent the constitutional protection against multiple trials in this context will not, as petitioner claims, diminish the flexibility and informality of juvenile-court proceedings." [6]

5. *Breed v. Jones*, 421 U.S. 519, 95 S.Ct. 1779 (1975)
6. 27 Raley, Gordon. 1995. "The JJDP Act: A Second Look." *Juvenile Justice Journal, 2*:11–18.

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The Juvenile Justice and Delinquency Prevention (JJDP) Act of 1974 reformed and redefined the philosophy, authority, and procedures of the juvenile justice system in the United States. This was the first major federal initiative to address juvenile delinquency across the nation. [1] While historically, the overseeing of juvenile matters fell on the states, the JJDP Act established some oversight at the federal level.

The JJDP Act attached to state funding to reform efforts. For example, one major reform effort involved revising policies around secure detention, separating juvenile from adult offenders, and deinstitutionalizing status offenders. Status offenders were no longer to be held in secure facilities with delinquent youth. [2] In 1992, as part of the reauthorization of JJDPA, states were encouraged to identify gaps in their ability to provide appropriate services for female juvenile delinquents (42 U.S.C. 5601; OJJDP). The federal government expected states to provide specific services for the prevention and treatment of female delinquency and prohibit gender bias in the placement, treatment, and programming of female delinquents.

Campaign for Youth Justice

http://www.campaignforyouthjustice.org/

1. Office of Juvenile Justice and Delinquency Prevention (1998). *Juvenile female offender: A status of the state's report.*
2. Office of Juvenile Justice and Delinquency Prevention (1998). *Juvenile female offender: A status of the state's report.*

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The 1980s saw a huge shift in the way states and federal laws were addressing juvenile law. Gangs, gun violence, and drugs drew attention to the identification, punishment, and prevention of violent and chronic youth offenders. The Office of Juvenile Justice and Delinquency Prevention (OJJDP) focused research on youth violence and state and local programming. Attention focused on the identification and control of serious, violent, and chronic offenders. [1]

At the state level, lawmakers enacted policies to crack down on youth crime. In the mid-1990s the idea of the juvenile **superpredator–** youth so impulsively violent, remorseless, and have no respect for human life- led to widespread reform and more punitive approaches to juvenile crime and delinquency. This included more punitive sentences, lowering the age at which a juvenile could be tried as an adult, and loosening the provisions for trying juveniles in adult court. The motto "adult time for adult crime" drove accountability initiatives and get-tough campaigns. A youth was no longer seen as vulnerable minors in need of protection and treatment. Instead, the narrative changed and they were seen as violent monsters acting "with no conscience and no empathy", a statement Hillary Clinton has publicly regretted saying.

Rethinking zero tolerance

https://www.youtube.com/watch?v=6ZDFs-EmP74

Waiver and Adult Time

All states have enacted laws that allow juveniles to be tried in adult criminal courts. There are several mechanisms by which a juvenile can be transferred to adult criminal court: **prosecutorial, legislative, and judicial waiver**. The **prosecutorial waiver** also is referred to as "Direct File" and "Concurrent Jurisdiction." With this waiver mechanism, the legislature grants a prosecutor the discretion to determine in which court to file charges against the juvenile. [2] The prosecutor, or district attorney, can choose to file

1. Krisberg, B., & Austin,J. (1978). History of the Control and Prevention of Juvenile Delinquency in America. In B. Krisberg & J. Austin (Eds.), *The Children of Ishmael: Critical Perspective on Juvenile Justice* (pp. 7-50). Palo Alto, CA: Mayfield.
2. Feld, B.C. (2001). Race, youth violence, and the changing jurisprudence of waiver. *Behavioral Sciences & the Law, 19*(1), 3-22.

charges in juvenile court or adult criminal court. This procedure does not require a transfer hearing, so the defense is not accorded the opportunity to present evidence in an attempt to avoid the transfer [3]

Legislative waiver, or statutory waiver, identifies certain offenses which have been mandated by state law to be excluded from juvenile court jurisdiction. It is utilized as a method to decrease or eliminate the discretionary powers of judges and prosecutors. For example, the number of state statutes specifies that violent felony offenses such as homicide, rape, and robbery, when committed by older adolescents, are automatically sent to adult criminal court.

In the News: Raising the Age and Raising the Bar

As part of the "Raise the Age" legislation passed in 2017, all minors on Rikers Island awaiting trial or otherwise, have to be moved out of the notorious New York City jail in October 2018. Rikers Island is famed for abuse, corruption, and violence and has begun the 10 years shut down a plan to close the scandal-ridden jail complex. The jail houses some 9,000 inmates, more than 2,000 who are juveniles. The plan is to reduce the jail population while moving the inmates to other facilities throughout New York's boroughs.

Part of the reduction in the number of inmates stems from the recent law which mandates that 16 and 17 year-olds in New York State will no longer automatically be charged as adults in criminal courts. And the age raises even more, to 18, on October 18, 2 019.

Rikers Island has a sordid history of brutality and inhumane treatment of prisoners. Perhaps the most well-known case in recent history is the story of Kalief Browder, a 16-year-old kid from the Bronx, who was charged with stealing a backpack. Although he claimed he was innocent, he ended up spending three years at Rikers Island, and more than two years were spent in solitary confinement. The charges were eventually dismissed and Browder was released, but the time spent in solitary caused significant and detrimental mental health issues. Tragically, he committed suicide in 2015, just two years after his release. His case garnered national attention prompting New York to ban the use of solitary confinement for inmates under the age of 18.

Research shows that solitary confinement is linked to mental health problems like depression, anxiety, psychosis, and even suicidal ideation. For these reasons, all federal prisons ban solitary confinement for juveniles and most states don't allow the use of solitary in juvenile facilities. However, solitary is still used in adult prisons. Each year around 200,000 youth are tried as adults and many are sentenced to time in regular, adult prisons. Many of these state jails and prisons still use solitary confinement for the "safety" and "protection" of juveniles housed with adults (Resitvo, 2019).

Raising the age legislation is a step in the right direction and will prevent more juveniles from beginning sent to adult facilities. New York and North Carolina were the last two states in the nation to charge 16 and 17 year-olds as adults up until last year when both amended their laws. The legislation will have a profound impact on New York's criminal justice system and is seen as a massive win for reformers who have been pushing for better treatment of children at Rikers Island for years.

3. Steiner, B., Hemmens, C., & Bell, V. (2006). Legislative waiver reconsidered: General deterrent effects of statutory exclusion laws enacted post-1979. *Justice Quarterly, 23*(1), 34-50

Listen to the story and read more at:

https://www.wnycstudios.org/story/raise-age-new-york-minors-rikers
[4]

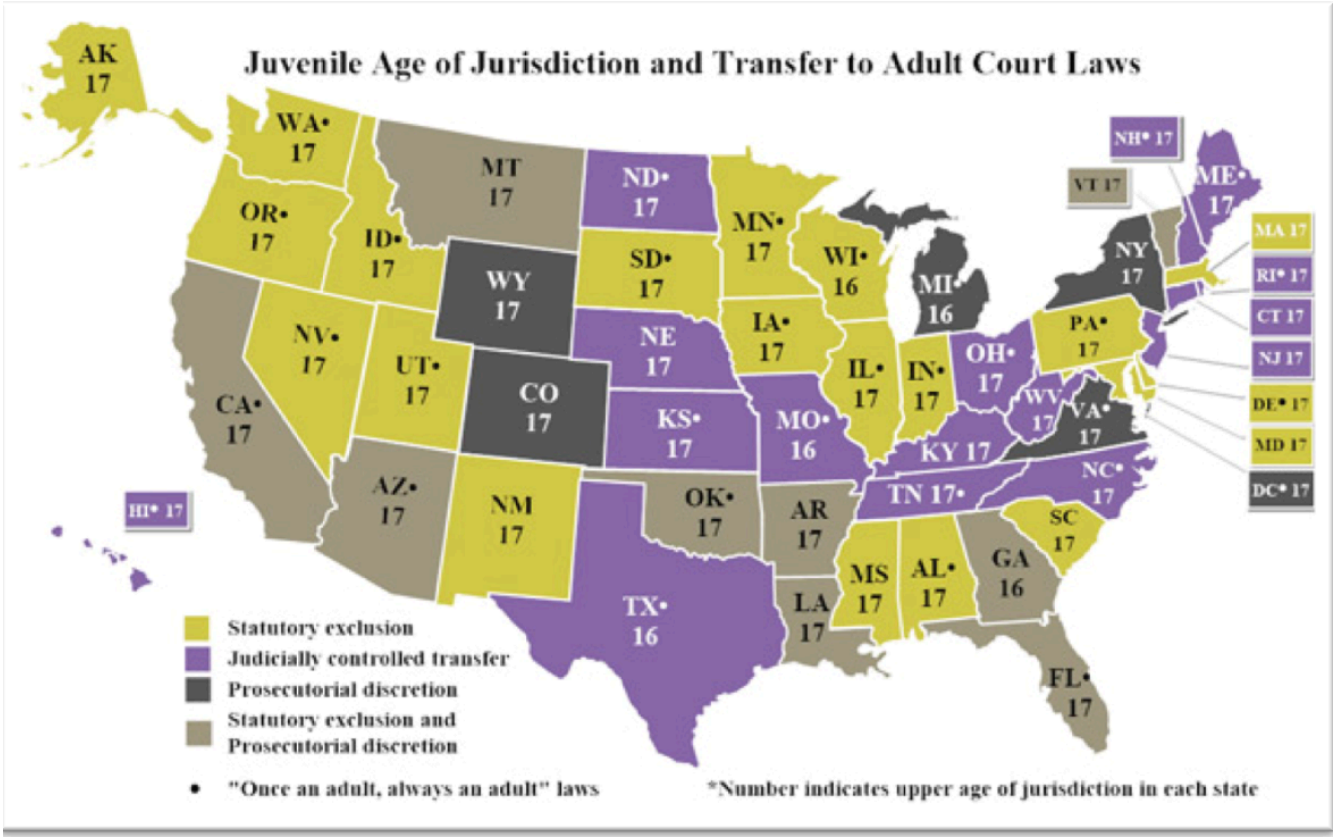
Judicial waiver affords the juvenile court judge the authority to transfer a case to adult criminal court. [5] There are three types of judicial waiver: **discretionary, presumptive, and mandatory**.

The **discretionary** (regular) transfer allows a judge to transfer a juvenile from juvenile court to adult criminal court. [6] With this type of transfer, the burden of proof rests with the state and the prosecutor must confirm that the juvenile is not amenable to treatment. As discussed previously, in *Kent v. United States* (383 U.S. 541, 566-67 [1966]), the Supreme Court outlined threshold criteria that must be met before a court can consider waiving a case. These waiver statutes typically include a minimum age, the specified type of offense, a sufficiently serious prior record, or a combination of the three.

Presumptive waiver shifts the burden of proof from the State to the defendant. It is presumptive because it is *presumed* that it will occur unless the youth can meet the burden of proof and provide a justifiable reason to remain in juvenile court. If the youth is unable to show just cause or sufficient reason why the case should be tried in juvenile court, the case will be transferred and tried in adult court.

The third type of judicial waiver is a **mandatory waiver**. Mandatory waiver means that a juvenile judge must automatically transfer to adult court juvenile offenders who meet certain criteria, such as age and current offense. In these cases, the role of the judge is simply to confirm that the waiver criteria are met and then to transfer the case to adult court. Mandatory waiver attempts to remove all discretionary powers from the juvenile court judge in transfer proceedings. [7]

4. Restivo, E. (2019, Feb 14). Stop putting juveniles in solitary confinement. Daily News. https://www.greensburgdailynews.com/opinion/columns/stop-putting-juveniles-in-solitary-confinement/article_d438d7bc-4e3d-5a9e-97da-22706d6037c8.html
5. Hemmens, S., & Bell, C. (2006). Legislative waiver reconsidered: General deterrent effects of statutory exclusion laws enacted Post 1990. *Justice Quarterly, 23*(1), p34-59.
6. Sanborn, J. (2004). The adultification of youth. In P. Benekos & A. Merlo (Eds.), *Controversies in juvenile justice and delinquency* (pp. 143-164). Anderson Publishing.
7. Burke, A. (2016). Trends of the time.



State juvenile courts with delinquency jurisdiction handle cases in which juveniles are accused of acts that would be crimes if adults committed them.

In 45 states, the maximum age of juvenile court jurisdiction is age 17. Five states– Georgia, Michigan, Missouri, Texas, and Wisconsin–now draw the juvenile/adult line at age 16.

However, all states have transfer laws that allow or require young offenders to be prosecuted as adults for more serious offenses, regardless of their age

In addition to increasing transfer mechanisms, at least 13 states lowered the age of majority to 15, 16, and 17, which allowed the youth of these ages to be automatically tried in adult criminal courts. These were supposed to provide procedures that curbed only the worst of the worst offenders, however, these provisions increased the prosecution of all juvenile offenders and youth of color in particular.

Ted Talks: Alice Goffman In the United States, two institutions guide teenagers on the journey to adulthood: college and prison. Sociologist Alice Goffman spent six years in a troubled Philadelphia neighborhood and saw first-hand how teenagers of African-American and Latino backgrounds are funneled down the path to prison — sometimes starting with relatively minor infractions. In an impassioned talk she asks, "Why are we offering only handcuffs and jail time?" https://www.ted.com/talks/alice_goffman_college_or_prison_two_destinies_one_blatant_injustice?language=en

Empirical research drives recent reform efforts. The past decade has witnessed the identification of key developmental processes associated with delinquent behavior, such as brain development research. Ergo, **evidence-based practices**, which utilize the scientific method to assess the effectiveness of interventions, policies, and programs. In looking at what works, what doesn't, and what is promising, researchers and policymakers alike assess the implementation of interventions to best meet the needs of the individual youth.

Additionally, several noteworthy Supreme Court cases exemplify society's evolving standards of decency and treatment of youth. These key cases demonstrate a move back to rehabilitation and acknowledge the fundamental differences between children and adults.

Key Supreme Court Cases

Roper v Simmons (2005)

In 2005, a landmark decision by the Supreme Court ruled it unconstitutional to impose a death penalty sentence on any youth who was under the age of 18 when they committed their offense (*Roper v. Simmons*). Although Christopher Simmons planned and committed a capital offense (he murdered his neighbor, Shirley Cook), the court ruled that 18 years of age is where criminal responsibility should rest. That is to say, if a child is too young to vote, sign contracts, or do a number of other things (because society deems them not responsible enough), then they are too young to receive the death penalty. The court stated,"the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be "cruel and unusual." Simmons received life in prison. It was ruled that imposing the death penalty on a person who was under the age of 18 at the time of the crime constituted cruel and unusual punishment. At the time of the *Roper v Simmons* verdict, the U.S. was only one out of a handful of countries that still imposed the death penalty on juveniles (among other countries were Yemen, Saudi Arabia, and Iran).

Graham v Florida (2010)

While the death penalty was taken off the table for youth under the age of 18, they were instead being sentenced to **life in prison without the possibility of parole (LWOP**). This was until the 2010 case of *Graham v. Florida*. Terrance Graham received life in prison for a felony offense (armed burglary) when he was only 16 years old. Since Florida does not have parole, his sentence de facto became a life without the possibility of parole. The Supreme Court heard his case and ruled that it was unconstitutional to sentence a minor to life without the possibility of parole for a non-homicide offense.

Miller v Alabama (2012)

Two years later, juvenile law again rested in the hands of the Supreme Court. Even though *Graham v. Florida* abolished life without the possibility of parole for non-homicide offenses, youth under the age of 18 were still receiving that sentence for crimes of murder. In 2012, Evan Miller was 14 years old when he killed his neighbor by severely beating him with a baseball bat while attempting to rob him. With contemporary research about brain formation and juvenile culpability, the Supreme Court ruled that youth are not as responsible as adults for their actions because their brains have not fully formed. In the majority opinion, Justice Elena Kagan wrote that "mandatory life without parole for those under age of 18 at the time of their crime violates the 8th Amendment's prohibition on cruel and unusual punishments." "Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences," Justice Kagan said. "It prevents taking into account the family and home environment that surrounds him – and from which he cannot usually extricate himself – no matter how brutal or dysfunctional."

This seemed like a huge win for juvenile justice reformers. Juveniles could no longer receive the death penalty, life without parole for non-homicide, nor mandatory life without parole for homicide. However, there were still so many people serving LWOP sentences who were juveniles when they committed their crime.

Montgomery v Louisiana (2016)

In 2016, the Supreme Court heard the case of Henry Montgomery, who was 17 years old in 1963 when killed a sheriff's deputy. He initially received a death sentence, but this was overturned because of the

racial tension of the time (Montgomery was black youth who killed a white law enforcement officer.) He instead received a life sentence and appealed this sentence after the Miller v. Alabama ruling. *Montgomery v. Alabama* barred mandatory life without parole sentences retroactively. This meant that all youth sentenced prior to 2012 with LWOP sentences needed to be retried.

These four major Supreme Court cases identify the differences between adults and juveniles. They recognize the difference in brain formation and culpability, owning the ability for rehabilitation of youth and moving step by step away from a retribution/punishment model for youth.

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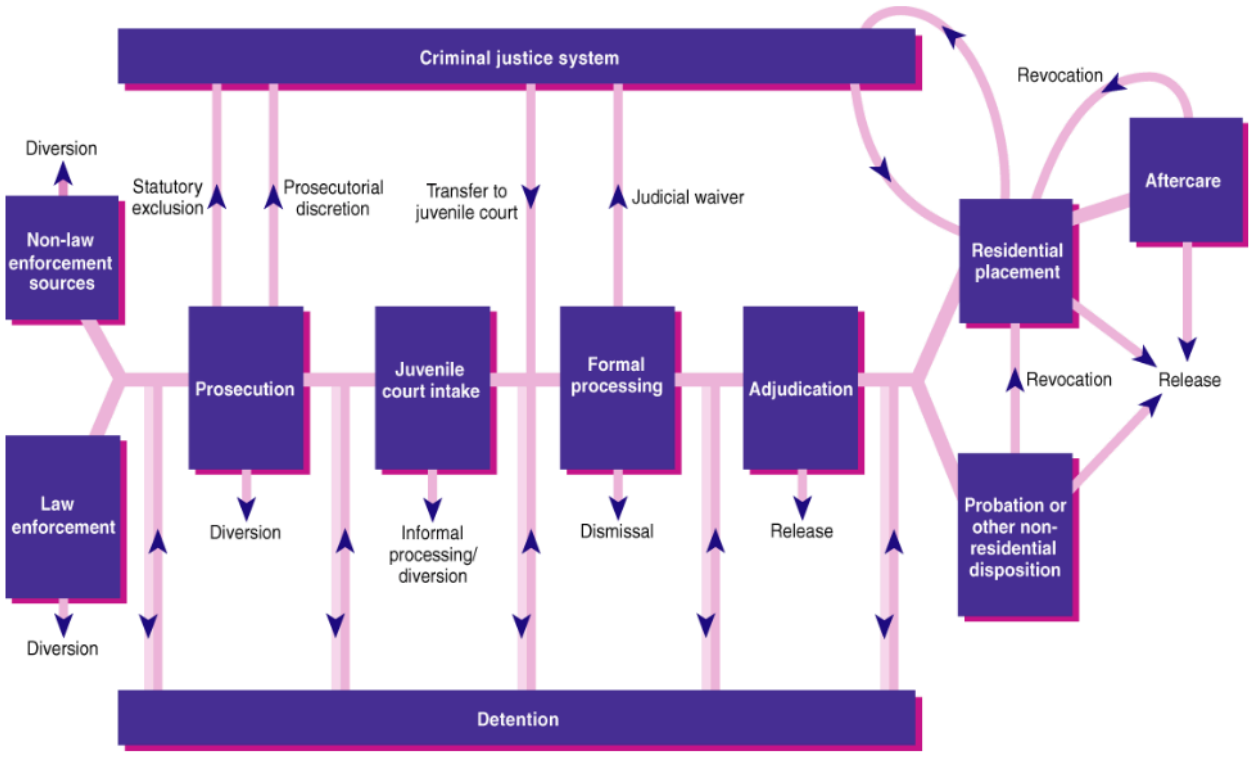
The juvenile justice process involves nine major decision points: (1) arrest, (2) referral to court, (3) diversion, (4) secure detention, (5) judicial waiver to adult criminal court, (6) case petitioning, (7) delinquency finding/adjudication, (8) probation, and (9) residential placement, including confinement in a secure correctional facility (see Juvenile Justice Process flow chart).[1]

The majority of cases are first referred to the juvenile justice system through contact with police. Probation officers, school officials, or parents usually refer to the remaining cases. The most common offenses referred to court are property offenses (roughly 92%), followed by person offenses (89.5%), drugs (88.2%), and general delinquency charges (81.6%). Other referrals come from schools, family, or social workers or probation officers.

At the intake stage, probation officers or attorneys determine whether or not the case needs the attention of the juvenile court or if it can be handled informally, such as diversion to probation or a drug treatment program. If the case progresses to court, the authorities need to determine if the youth can be released to a parent/guardian or if the youth needs to be held in a secure detention center. When determining this, the court needs to assess the risk the youth poses to society and if the youth poses a flight risk. In some cases, the parent cannot be located or, if located, refuses to take custody of the youth. In these cases, the juvenile is remanded to custody. The decision to detain or release the juvenile will be made by the judge at a detention hearing.

If the case is handled in court, the county attorney needs to file a petition. When the youth has a formal hearing, it is called an **adjudication** rather than a trial in adult court. The adjudication of youth as delinquent can result in either dismissal of the charges or confinement at a secure institution. In most juvenile cases, the least restrictive option is usually sought, so the youth is usually put on probation or some sort of community treatment. Formal processing is less common than informal processing involving diversion or community-based programming.

1. Sickmund, M., & Puzzanchera, C. (2014). *Juvenile offenders and victims*: 2014 national report.



The Juvenile Justice Process. The major decision points in this process are: (1) arrest, (2) referral to court, (3) diversion (at multiple points in the process), (4) secure detention, (5) judicial waiver to adult criminal court, (6) case petitioning, (7) delinquency finding/ adjudication, (8) probation, and (9) residential placement, including confinement in a secure correctional facility

Working With Youth

When I graduated from college with a BA in psychology, I applied for a job working with the Division of Youth Corrections in Denver, CO. I worked in a Residential Treatment Facility (RTC), which used behavior modification techniques, assigned case-workers to each youth and their families, and attempted to help the kids learn problem-solving skills and accountability. Youth were confined for a variety of reasons, from committing gang affiliated drive-by shootings, to youth who were designated dependent youth through social services and had nowhere else to go. We had high-risk kids, low-risk kids, conduct disorder and mental health kids all together on the same unit. Having the mix of all these different kids is not a great formula; the low-risk kids learn negative behavior from the high-risk kids, and the conduct disorder kids victimize the mental health kids. In an ideal institution, these different populations would all be on separate units.

Working with youth is hard. They push boundaries, are angry, try to manipulate those around them, and reject authority. However, working with youth is exceptionally rewarding. They are kids. They come from abusive and neglectful homes and are yearning for approval and love. For example, one boy in our facility was named Josh. He was a super angry and violent sixteen-year-old who was sentenced for committing aggravated assault. Through working with counselors and caseworkers, we discovered his anger was hiding immense sadness. He lashed out at those around him when he was sad because he had no way to show his feeling other than through aggression. Many

months of working with him, encouraging him to journal, express his feelings, talk with others, use other tools to help him with his sadness led to amazing results. He left our facility after more than a year, graduated from high school and even went to college! Getting the individualized attention helped Josh change. He became a success story of the juvenile justice system.

Working with youth takes patience, consistency, and compassion. It is one of the most difficult jobs there is, but it is possible to be a very positive influence in the lives of kids who need it the most. If you are interested in working with youth, plan on committing to at least a year. Incarcerated kids are used to having people give up on them and disappoint them, so you do not want to add to their negative experiences. Show up, follow through, and be optimistic about a better future for justice-involved youth.

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Just as the juvenile court has different practices, so too does the correctional side of the juvenile justice system. Since the aim of the juvenile justice system is rehabilitation, the treatment of youth is somewhat different than the treatment of adults. For example, justice-involved youth can be sent to detention centers, group homes, boot or wilderness camps, residential treatment centers, long-term secure facilities, or other institutions.

Detention: In the first stages of the justice system, the court must decide if it will detain the youth. If a youth is detained, he/she is sent to a detention center, which is a short-term, secure facility. These are comparable to adult jails. Youth are often kept in detention facilities while waiting for disposition or transfer to another location. The average length of stay is 2-3 weeks. Factors that increase the likelihood of detention include prior offenses, age at first offense and current age, and the severity of the current offense. Research also suggests that race, gender, and socioeconomic status also play a role in deciding whether to detain a youth.

Group Homes: Group homes are long-term facilities where youth are allowed and encouraged to have extensive contact with the community. Youth attend regular school, hold jobs, take public transportation, etc. In many group homes, youth learn independent living skills that prepare them for living on their own. These are similar to adult halfway houses.

Boot Camps and Wilderness Camps: Boot Camps are secure facilities that operate like military basic training. They focus on drills, manual labor, and physical activity. They are often punitive and overly strict. Despite popular opinion, research shows that these are ineffective for preventing future delinquency. The length of stay is generally for several weeks. On the other hand, ranch/wilderness camps are actually prosocial and preventative. These are long term residential facilities that are non-restrictive and are for youth who not require confinement. These include forestry camps and wilderness programs.

Residential Treatment Centers: RTCs are long term facilities that focus on individual treatment. They include positive peer culture, behavior modification programming, and helping youth develop healthy coping mechanisms. Many have specific targeted populations, such as kids with histories of substance abuse or issues with mental health. They are often considered medium security, and the average stay is often six months to a year.

Long-term Secure Facilities: Long term facilities are strict secure conferment. These include training schools, reformatories, and juvenile correctional facilities. These facilities are often reserved

for youth who have committed serious offenses. They are similar to adult prisons but operate under a different philosophy. For example, incarcerated youth are still required to attend school, which is within the facility.

Disproportionate Minority Contact: Considerable research on disproportionate minority contact has been conducted over the past three decades. **Disproportionate minority contact (DMC)** "occurs when the proportion of youth of color who pass through the juvenile justice system exceeds the proportion of youth of color in the general population." [1] It can be assessed at every stage of the juvenile justice system, from arrest to adjudication. Research shows minority youth are over-represented in arrests, sentencing, waiver, and secure placement. States receiving federal grant money are required to address DMC "regardless of whether those disparities were motivated by intentional discrimination or justified by 'legitimate' agency interests." [2]

In the News: The Prison Pipeline

6-year-old Zachery Christy, a first grader in Newark Delaware, was suspended for 45 days for bringing a spork to school. The camping utensil, which contains a spoon, fork, knife, and bottle opener was a gift for Cubs Scouts. The first grader brought the camping utensil to school although the "dangerous weapon" violated zero tolerance rules at the school.

"Spurred in part by the Columbine and Virginia Tech shootings, many school districts around the country adopted zero-tolerance policies on the possession of weapons on school grounds. More recently, there has been growing debate over whether the policies have gone too far." [3]

Zero Tolerance policies are strict adherence to regulations and bans to prevent undesirable behaviors. The idea behind them is to promote student safety and to be fair and consistent with all children. The idea behind them is to promote a one size fits all approach, so as to treat all children equally, however, research suggests that minority youth are unfairly targeted by such practices, which counters the purposes of them.

However, Zero Tolerance policies contribute to the school to prison pipeline. Children who interact with law enforcement at earlier ages are more likely to end up in the criminal justice system.

What was thought to remove discretion from school administrators in issues of discipline, actually results in African American students being more likely to be suspended or expelled than other students for the same offenses? Additionally, the suspension or expulsion from school severs ties and harms the relationship youth have with school, making it harder for the youth to return and engage.

For Zachary and his spork, it's more than breaking his attachment to school and his teachers. He fears being teased by the other students. If his parents choose not to home school him, he must spend the next 45 days in the district's reform school.

1. Short, J., & Sharp, C. (2005). *Disproportionate minority contact in the juvenile justice system.* Washington, DC: Child Welfare League of America.
2. (Johnson, 2007, p. 374).
3. (Urbina, 2009, para 4).

An in-depth look at zero tolerance policies.

https://sites.duke.edu/education303final/an-in-depth-look-at-zero-tolerance-policies-and-racial-biases/ [4]

Conclusion

The juvenile court has its own philosophy, the court system, and correctional institutions that differ from the adult criminal justice system. The major difference between the juvenile justice system and the adult system is its focus on rehabilitation. The juvenile justice system uses private, informal hearings, and individualized justice to act in the best interest of the delinquent youth.

The past century has witnessed a marked change in the way the law deals with youth. From the inception of the juvenile justice system in 1899 to the ruling of *Mongomery v Louisiana* in 2016, the pendulum of juvenile justice swings from a *parens* patriae model of protection of youth to juvenile waiver, fear of youth crime, and punishment, back to incorporating brain research in assessing rehabilitation. The juvenile justice system was designed to treat juveniles differently from adults and take their unique needs and circumstances into consideration. Youth are malleable and can change their trajectories with the right treatment and intervention at the right time.

4. Urbina, I. (2009, Oct. 1). It's a fork, it's a spoon, it's a….weapon? The New York Times. https://www.nytimes.com/2009/10/12/education/12discipline.html

Acquit: Absolve a person legally from an accusation of criminal guilt

Actus reus: Criminal act

Adjudication: Term for "trial" in juvenile proceedings

Agenda setting: The way the media draw the public's eye to a specific topic

Aggravating factors: Circumstance accompanying the commission of the crime that increases its seriousness

Amicus curiae brief: This brief is filed by interested persons or organizations who are not parties to the suit in order to educate or persuade the court

August Vollmer: Pioneer for police professionalism

Banishment: The sending away, by court order, of an individual from a community

Bills of attainder: Laws that are directed at named individual or group of individuals and has the effect of declaring them guilty without a trial

Bridewell: An early form of a jail. Bridewells and workhouses were synonymous with work output from the inhabitants, during a stent of servitude.

Capital offenses: Crimes punishable by the death penalty

Case law: Body of law made up of judicial rulings that are potentially binding on the current controversy

Celerity: Swiftness, how quickly is someone to be punished if they commit a crime

Certainty: The likelihood that an outcome will occur (how certain is someone to be caught if they commit a crime)

Child-saving movement: Emerged in an effort to change the way the state was dealing with dependent, neglected, and delinquent children

Civil forfeiture: Taking of property used in or obtained through unlawful activities through a civil lawsuit

Civil wrong: Private lawsuit brought to enforce private rights and to remedy violations of private rights

Civilian law enforcement employees: An employee who has not been through police training and does not have arresting powers

Collective incapacitation: Incarceration of large groups of individuals to remove their ability to commit crimes (in society) for a set amount of time in the future

Commissioned law enforcement employees: An employee that has been through police training is certified as a police officer and has arresting powers in the state

Community era: Police and communities began to work together

Concurrence: Requirement that the actus reus (criminal act) joins with the mens rea (criminal intent) to produce criminal conduct.

Conflict view: Society is a collection of diverse groups and the creation of laws is unequal

Consensus view: Implies consensus among citizens on what should and should not be illegal

Corporal punishment: Physical punishment

Cost-benefit evaluations: Seeks to determine if the costs of a policy are justified by the benefits accrued

Crime control model: An efficient system with the most important function being to suppress and control crime to ensure that society is safe and there is public order

Crime prevention: Any action designed to reduce the actual level of crime and/or the perceived fear of crime

Crime: The violation of the laws of a society by a person or a group of people who are subject to the laws of that society

Criminal justice system: A major social institution that is tasked with controlling crime in various ways

Criminal wrongs: Act (or failure to act) that violates norms of a community that is prescribed by some penal law (statute, code, common law) and is punishable by some term of confinement; offense against the law of the state.

Criminalized act: When a deviant act becomes criminal and law is written, with defined sanctions, that can be enforced by the criminal justice system

Criminogenic needs: Are items that when changed, can lower an individual's risk of offending. They include items like prior criminal history, antisocial attitudes, antisocial (pro-criminal) friends, a lack of education, family or marital problems, a lack of job stability, substance abuse, and personality characteristics (mental health and antisocial personality)

Critical stages: Any step in the criminal justice process that is so important to a just outcome that the Supreme Court has attached to it specific due process rights

Dark figure of crime: Crimes that the police are not aware of

De novo review: A trial de novo is a complete retrial of a case, usually before a higher court, which negates the initial tribunal's decision

Delinquent: Term for "criminal" or "guilty" for juvenile proceedings

Deterrence: A philosophical underpinning or punishment ideology that is "the reduction of offending (and future offending) through the sanction or threat of sanction." It can be divided into general deterrence and specific deterrence.

Deviance: Behavior that departs from the social norm

Direct supervision: No barriers between the inmates and the staff

Discretionary waiver: Allows a judge to transfer a juvenile from juvenile court to adult criminal court

Disposition: Term for "sentence" for juvenile proceedings

Disproportionate minority contact: Occurs when the proportion of youth of color who pass through the juvenile justice system exceeds the proportion of youth of color in the general population

Diversion: Generally, a contract between the prosecutor and the defendant in which the defendant agrees to perform certain conditions, the successful completion of which results in a dismissal of the case or charges

Due process model: Focuses on having a just and fair criminal justice system for all and a system that does not infringe upon constitutional rights

Due process: Procedural rights established in the Constitution, especially in the Bill of Rights

Enumerated power: Powers of Congress specifically named or designated in the Constitution

Ethics: The understanding of what constitutes good or bad behavior and helps guide our behaviors

Evidence-based practices: Utilize the scientific method to assess the effectiveness of interventions, policies, and programs

Ex Parte Crouse: Case where the court declared that failed parents lose their rights to raise their children

Ex post facto laws: Laws that make an act criminal after it is committed. Article I Sec. 9 of the U.S. Constitution prohibits Congress from enacting criminal laws that apply retroactively.

Fear of crime: The anxiety or fear that is produced by the perception that one will become a victim to crime or criminals

Felony: Serious crime that is generally punishable by one year or more in prison or by capital punishment (death penalty)

Folk devils: The people who are blamed for being allegedly responsible for the threat to society

Folkways: Behaviors that are learned and shared by a social group

Framing: A type of agenda setting in a prepackaged way

Free will: The ability to make choices about their future actions, like choosing when to offend and not offend

General deterrence: Deterrence (sanction or threat of a sanction) that is geared the general reduction of committing future crimes for all, not someone specifically. It is meant to teach all a lesson

Grass eaters: Police officers who accept benefits

Hedonism: The assumption that people will see maximum pleasure and avoid pain, or punishment

Hedonistic calculus: The desire for pleasurable items or outcomes, over painful ones

Homeland security era: Focused concentration of its resources into crime control enforcement of laws in order to expose potential threats and gather intelligence

House of Refuge: An urban establishment used to corral youth who were roaming the street unsupervised or who have been referred by the courts

Hulks: Large ships that would transport criminals (usually people that were banished) to a far away location

Immigration: The internal migration of people and the external movement of people from other countries

Impact evaluations: Focuses on what changes after the introduction of the crime policy

Implied power: Authority not expressly conferred by a principal upon an agent, but arising out of the language or course of conduct of the principal toward the agent.

Incapacitation: The removal of an individual (from society), for a set amount of time, so as they cannot commit crimes (in society) for an amount of time in the future

Inchoate crimes: Parital crime, i.e: attempt

Indirect supervision: A barrier of glass, or other separation, in a common area

Industrialization: The shift in work from agricultural jobs to more manufacturing work

Infractions: Minor criminal offense, which is generally punishable by only a monetary sanction

Interactionist view: The definition of crime reflects the preferences and opinions of people who hold social power in a particular legal jurisdiction

Jail: A facility used for individuals who are in the custody of a legal arm of a state (or subsidiary)

Judicial review: Review of a legislative, judicial, or executive branch action or law by the courts to see if it complies with the constitution

Judicial waiver: Affords the juvenile court judge the authority to transfer a case to adult criminal court

Jurisdiction: Authority of a court to hear and decide a particular case

Kin policing: A tribe or clan police their own tribe

Laws: Form of social control that outlines rules, habits, and customs a society uses to enforce conformity to its norms

Legislative waiver: Identifies certain offenses which have been mandated by state law to be excluded from juvenile court jurisdiction, also known as statutory waiver

Lex talionis: The term for "law of talion" or law of retaliation. It prescribes that the punishments should fit the crime committed (proportional)

Mala in se: Crime is inherently evil or bad

Mala prohibita: Act is criminal because it is prohibited, not necessarily evil

Mandatory waiver: A juvenile judge must automatically transfer to adult court juvenile offenders who meet certain criteria, such as age and current offense

Meat eaters: Police officers that expect some tangible item personally from those served in order to do their job

Mens rea: The knowledge or intent of wrongdoing

Misdemeanor: Minor crimes for which the penalty is usually less than one year in jail or a fine.

Mitigating factors: Circumstances or factors that tend to lessen culpability.

Moral panic: A situation in which public fears and state interventions greatly exceed the objective threat posed to society by a particular individual or group who is/are claimed to be responsible for creating the threat

Moral wrong: Category of criminal conduct intended to protect the family and social institutions

Mores: Norms of morality, or right and wrong

Narratives: The story that is told

New generation jails: Podular, Design of a jail or facility where the doors face an interior day use or common area, making the cells visible to a jail deputy from one location

Noble-cause: The goal that most officers have to make the world a better and safer place to live

Offense: Act committed or omitted in violation of law forbidding or commanding

Official statistics: Represent the total number of crimes reported to the police or the number of arrests made by that agency

Older generation jails: Linear, Design of a jail or facility that is basically a long corridor with cell doors facing the hallway/corridor

Parens patriae: The king is responsible for and in charge of everything involving youth

Petition: Term for "indictment" for juvenile proceedings

Plain error: The rule applies to errors that are obvious, that affect substantial rights of the accused, and that, if uncorrected, will seriously affect the fairness, integrity, or public reputation of judicial proceedings

Police power: Power of a government to legislate to protect public health, safety, welfare and morality

Political era: First era of policing in the United States marked by the industrial revolution, the abolishment of slavery, and the formation of large cities

Positivism: The use of empirical evidence through scientific inquiry to improve society

Presumptive sentences: Sentencing structure under which a particular sentence is presumed to be typical for a particular offense

Presumptive waiver: Juvenile has the burden of proof that they should remain in juvenile court

Principle of orality: Principle in law that only evidence developed and presented during the course of a trial may be considered by the jurors during deliberation

Pro se: Acting as one's own defense attorney in a criminal proceeding; representing oneself without retaining an attorney

Process evaluations: Considers the implementation of a policy or program and involve determining the procedure used to implement the policy

Prosecutorial waiver: The legislature grants a prosecutor the discretion to determine in which court to file charges against the juvenile

Punishment ideology: A belief structure about how and how severe a person should be punished

Rational: Ability to see and make choices that a normal person could see and make

Recidivism: The reoffending of someone that has been convicted of a crime. This can come in the form of re-arrest, a new charge, a new conviction (for a felony or misdemeanor), or the re-commitment of a offender into an institution

Reform era: Start of diversity in policing

Reform schools: Housing used to hold delinquent and dependent children

Rehabilitation: Changing of offenders behaviors, so that they are not committing crimes in the future

Retribution: A philosophical underpinning or punishment ideology that is geared toward "a balance for past harm." It is the only backward-looking punishment ideology.

Rule of law: Principle that the law, and not one person or group of persons, is the highest authority

Rule of lenity: Principle that when judges apply a criminal statute they must follow the clear letter of the statute and resolve all ambiguities in favor of the defendant (and against the application of the statute)

Selective incapacitation: Targeting specific individuals (with longer sentences) to remove their ability to commit crimes (in society) for longer periods of time

Self-reported statistics: Individuals report the number of times they have committed a particular crime during a set period of time

Severity: The level or punitiveness of a punishment. Prison is more severe than probation

Sir Robert Peel: Father of modern policing, created the first British police force

Social disorganization: The inability of social institutions to control an individual's behavior

Specific deterrence: Deterrence (sanction or threat of a sanction) that is geared toward an individual, designed to keep that person specifically from committing future crimes

Stare decisis: Body of law made up of judicial rulings that are potentially binding on the current controversy

Status offenses: Offenses that are only illegal because of the age of the offender

Strain theories: People commit crime because of strain, stress, or pressure

Strict liability crime: Criminal liability based only on the commission of a prohibited act. The state does not have to prove the defendant had any particular *mens rea*.

Superpredator: Youth so impulsively violent, remorseless, and have no respect for human life

Taboo: Very negative norm that upsets people

Theory: An explanation to make sense of our observations about the world

Urban cohorts: Men from the Praetorian Guard (Augustus' army), charged with ensuring peace in the city

Urbanization: Cities increasing in population

Victimization studies: Ask people if they have been a victim of crime in a given yet

Vigils: People under the ruling of Augustus who were charged with fighting crime and fires

Workhouse: An early form of a jail. Workhouses and bridewells were synonymous with work output from the inhabitants, during a stent of servitude.

Writ of certiorari: Writ issued by the higher court agreeing to review a case

Writ of habeas corpus: Remedy sought by a person requesting release from an allegedly illegal or unconstitutional confinement