Introduction to Criminal Justice

INTRODUCTION TO CRIMINAL JUSTICE

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LOUIS: The Louisiana Library Network

CONTENTS

2. Criminological Theory

3. Criminal Law

4: Policing

5: The Courts

6: Sentencing

7: Corrections

8: Community Corrections

9: Juvenile Justice

10: Current Issues in U.S. Criminal Justice

SHARING REFERENCES AND ADAPTATION STATEMENT

About This Book

This textbook was created through Connecting the Pipeline: Libraries, OER, and Dual Enrollment from Secondary to Postsecondary, a $1.3 million project funded by LOUIS: The Louisiana Library Network and the Institute of Library and Museum Services. This project supports the extension of access to high-quality post-secondary opportunities to high school students across Louisiana and beyond by creating materials that can be adopted for dual enrollment environments. Dual enrollment is the opportunity for a student to be enrolled in high school and college at the same time.

The cohort-developed OER course materials are released under a license that permits their free use, reuse, modification and sharing with others. This includes a corresponding course available in Moodle and Canvas that can be imported to other platforms. For access/questions, contact Affordable Learning Louisiana.

If you are adopting this textbook, we would be glad to know of your use via this brief survey.

Cover Image

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Sharing References and Adaptation Statement

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This textbook is particularly unique in that it has been adapted to suit the needs for students in the state of Louisiana using two previous OER submissions. The first and original textbook was collaboratively written by Criminology and Criminal Justice professionals at Southern Oregon University in Ashland, Oregon, with support from Open Oregon Educational Resources. That course text is titled SOU-CCJ230 Introduction to the American Criminal Justice System. It was then adapted with support from Penn State Libraries. That course text was labeled Introduction to the U.S. Criminal Justice System. Each OER was engineered to be specific to the needs of students for the region in which they were studying: CCJ 230 for Southern Oregon University, and CRIMJ 100 for Penn State University, respectively. Likewise, the CCRJ 1013 adaptation is

also tailored to the needs of the students within the state of Louisiana while meeting the learning objectives outlined within, as well as covering the relevant subject matter required for an introductory course in Criminal Justice specifically for high school students seeking dual-enrollment credit for college courses.

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This course can be adapted to be used in both the quarter and semester format as the instructor of record sees the need. There has been considerable focus on core topics that are relevant to current issues including the courts, corrections, policing, and juvenile justice, as well as an expanded section on criminological theory. Newly added material has been included that discusses Cybercrime, Terrorism, and Homeland Security issues as they have arisen in the scope of 9/11, the emergence of social media, and post–Hurricane Katrina emergency disaster management. The Louisiana adaptation has also been mindful of the uniqueness of the Louisiana Judicial System and has incorporated as much of its distinctiveness as possible into this OER for the benefit of the students' learning needs. This adaptation has relatable examples that will test critical thinking skills as well as assessments, exercises, and audio/visual multimedia for enhanced student engagement.

If there are any questions about the Louisiana adaptation, please feel free to contact Shatiqua Mosby-Wilson at swilson@suno.edu. For information regarding the original adaptations, email Shanell Sanchez at sanchezs2@sou.edu with any specific questions about the original Southern Oregon University book or Katherine McLean at kjm47@psu.edu with any questions about the adapted Penn State University text.

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References

UNESCO. (2023, February 27). *Open Educational Resources*. Retrieved from UNESCO: https://www.unesco.org/en/open-educational-resources

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The Louisiana cohort for CCRJ 1013 – Introduction to Criminal Justice would like to thank Jördis Weilandt, Assistant Program Manager, and Amy Minervini, Cohort C Team Lead, from Rebus for their leadership and dedication to guiding us through our journey through this project. For many of us this was our first time building an educational resource of any kind, and we couldn't have done it without your expertise.

The CCRJ 1013 cohort would also like to extend its warmest regards to Emily Frank, Affordable Learning Program Administrator, at Louis: The Louisiana Library Network. Emily kept us on schedule with all of the workshops, webinars, scheduling, and logistical events that kept us on track. She was our light in the darkness and her hard work was greatly appreciated.

The Louisiana adaptation would be remiss if it did not give much-needed love and respect to the men and women who put so much time and effort into their own OER projects that made this one even a possibility. To that effect, the CCRJ 1013 cohort would like to bestow an emphatic thank you to the SOU-CCJ230 Introduction to the American Criminal Justice System cohort and the PSU Introduction to the U.S. Criminal Justice System teams for paving the way and being the beacons of professionalism in OER development for Criminal Justice content.

And finally, a most heartfelt thank you goes to you, the students, for taking this class and educating yourselves on the complexities of the American Criminal Justice System. Hopefully we have been able to provide you with enough material to keep you engaged so that you want to continue your educational journey through whichever career path you choose in the future, and made it a little fun along the way.

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Her law enforcement career spanned 44 years working in different capacities at the Bossier City Police Department. In 2005, Pamela began teaching criminal justice courses as an adjunct instructor for Bossier

Parish Community College. She also taught at Louisiana State University in Shreveport and for the University of Phoenix.

Shortly after her retirement from law enforcement, she was appointed as a full-time faculty member in 2019 at Bossier Parish Community College. She teaches Criminal Law, Criminal Evidence and Procedure, Criminal Investigation, Medicolegal Death Investigation, Violence, Narcotics and Dangerous Drugs, Contemporary Issues in Criminal Justice, and oversees the Criminal Justice Internship.

Pamela is one of two full-time criminal justice instructors. As Program Director, she coordinates the educational experience and establishes program goals and objectives. As an academic advisor, she assists in degree planning and advises students on future career paths.

Pamela is a past president of the Louisiana State University in Shreveport Alumni Association. She is a member of the Lambda Sigma Upsilon Chapter of the National Criminal Justice Honor Society and a member of the Academy of Criminal Justice Sciences.

COURSE DESCRIPTION AND COURSE LEARNING OBJECTIVES (CLO)

With a plethora of both paywalled and OER Criminal Justice textbooks to choose from, we wanted to create something that was wholly Louisiana. The challenge was finding the right mix of content and adapting it to the culturally unique landscape that is our state. Our primary goal was to keep the basic foundational structures of the Criminal Justice System intact but also to give it some Lagniappe – that something extra. We also had to be mindful that the learning outcomes designated by our respective institutions and the state of Louisiana were being met for those high school students who were taking this course for dual-enrollment credit as well as meet the requirements for general education and major curriculum of higher education institutions in the state.

Bossier Parish Community College (BPCC) describes their CJUS 101 – Introduction to Criminal Justice course as a "historical and contemporary survey of the criminal justice system including law enforcement, courts, corrections, and release agencies as applied to deviant behavior and society." Dillard University describes its CJ 101 – Introduction to Criminal Justice course as a "survey course that focuses on the structure and function of the police, courts, and prisons. [It also] provides an examination of the causes of criminal behavior." Louisiana State University (LSU) describes their SOCL 3371 – Sociology of Criminal Justice course as teaching "the criminal justice system and its organizational components." Southern University of New Orleans (SUNO) describes its CRMJ 110 – Introduction to Criminal Justice as "an overview of the Criminal Justice System; roles of law enforcement personnel, the courts, and correctional agencies; and the philosophical and theoretical views." The Louisiana Statewide Common Course Catalog name and number for this course is CCRJ 1013: Intro to Criminal Justice. Course objectives are listed below.

Course Learning Objectives (CLO)

- Recognize criminal justice as a system, a process, and an area of knowledge.
- Identify the major components of the criminal justice system: law enforcement, courts, and corrections.

- Understand the difference between the formal and informal processes of the criminal justice system.
- Analyze the various contemporary criminal justice perspectives on approaching the crime problem.

There are additional interactive materials added within the text to give the students some visual and audio association to the reading. This can help students engage with the material and keep it from becoming "stale." Associating content that features Louisiana encourages students to take an active interest in their environment especially when it comes to the criminal justice system, and hopefully it will encourage them to be more attentive to their surroundings in the future. The content in this adaptation was targeted towards high school students seeking to gain college credit through dual-enrollment courses prior to graduation, but this OER can also be used for entry level college and university courses in the State of Louisiana as an alternative to costly introductory textbooks in the curriculum for Criminal Justice Programs or as a General Elective requirement.

DEDICATION

We dedicate this book to all the students in Louisiana who honor us by taking this course.

We also dedicate this project to all our significant others who supported us through this endeavor—through the endless days, the long nights, and the countless weekends. Without you, none of this would have been possible.

And lastly, this book is dedicated to the individuals, however they identify, who work tirelessly in the Criminal Justice System trying to do their part in making it work as best they can. There are good police officers. There are good judges. There are good corrections personnel out there. They don't get the credit they deserve.

TABLE OF CONTENTS

1. CRIME, CRIMINAL JUSTICE, AND CRIMINOLOGY

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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 discusses how criminal justice policymaking—and policymakers—has shaped the media representations of crime. After reading this section, students will be able to:

- Identify the differences between deviance and criminality
- Describe the three components of the criminal justice system
- Identify the differences between crime control and the due process model
- Identify the differences between the interactionist, consensus, and conflict views in the creation of laws
- Discuss the role of the media and how and how it impacts our criminal justice system

Background Knowledge Probe: Each chapter will begin by assessing your current knowledge about different criminal justice topics. Each of these topics will be covered by the chapter, meaning that you should be able to answer them correctly after you have completed the reading. All definitions can be seen by clicking on the bolded vocabulary terms in each chapter.

Please indicate whether you know each statement to be True or False. This is an ungraded exercise, but you may want to record which questions you answer incorrectly, so that you can verify that your knowledge has improved by the end of the chapter.

An interactive H5P element has been excluded from this version of the text. You can view it online here:
https://louis.pressbooks.pub/criminaljustice/?p=22#h5p-1

1.1 CRIME AND THE CRIMINAL JUSTICE SYSTEM

Shanell Sanchez; Kate McLean; and Pamela Simek

Theft as a Child

The first lesson in crime, or criminality (and private property), I remember was when I was a toddler. Walking through the checkout at the supermarket, I began filling my play purse with candy. I knew that we had to buy items at the store—after all, my parents were paying for our food—but somehow it didn't seem wrong to just take the candy. Since I made no effort to hide my theft, my parents stopped me, horrified, and forced me to return the candy to the shelves. I complied, but not without a fight. I don't remember feeling guilty at the time, but now I'm shocked by my actions.

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? Did they teach you that what you did was (or could be) a crime and how to avoid this behavior again? Were you punished and how?

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?

Perhaps because I was so young, I don't remember being punished. In your opinion, what would be an appropriate punishment for a young child who is caught stealing?

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 government (federal, state, or local). Essentially, crime is what the law states, and a violation of the law, stated in the statute, would make actions criminal (Lynch, Stretesky, & Long, 2015). For example, if someone murdered another individual in the process of stealing their automobile, most people would see this as criminal and a straightforward example of crime. We often see murder and robbery as wrongful acts that harm society, as well as social order. However, there are times that crime is not as straightforward, and people may hesitate to call it criminal. For example, in 2022, the state of Georgia passed a law that makes giving away food or water "within 150 feet of the outer edge of a polling place building, within a polling place, or within 25 feet of any voter in line" a misdemeanor-level

crime, punishable by up to a year in jail or a $1,000 fine (See Georgia Senate Bill 202). While the state claims that this legislation is required in order to prevent illegal campaigning at election sites, voters' rights advocates have argued that the new law will deter voting and suppress turnout, particularly among marginalized voters (The Associated Press, 2022).

Constitutionally, all criminal laws are meant to respond to an existing or likely threat of harm. Harm can concern individuals' physical, economic, social, and emotional well-being, or the social order and environment more generally. But individuals have differing opinions about what actions are harmful, and when the benefits of an action—or law—outweigh the negative consequences. These conflicts may threaten the perceived legitimacy of the criminal justice system.

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 correctional 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 repair the harm that is thus implied. The criminal justice system is made up of various agencies at different levels of government that can work independently and together, using the different powers at their disposal. Challenges may arise when agencies do not work together or work together inefficiently. The case of notorious serial killer Ted Bundy may serve as an example of failed collaboration between U.S. law enforcement agencies, due to a lack of technological means to freely exchange information and resources about killings in their area. Bundy exploited gaps in investigative processes between different jurisdictions and ultimately was able to avoid arrest and detection for over four years (during which he committed at least 30 murders). If various agencies at the federal, state, and local law enforcement levels 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, its causes, and how to control it. As is still evident in political debates today, the United States has historically prided itself on local governance, often rejecting a strong, centralized government; however, this tradition has also resulted in unexpected complications and a sprawling system of law enforcement, with over 18,000 local law enforcement agencies that are not coordinated by any national office (Banks, Hendrix, Hickman, & Kyckelhahn, 2016).

Working Together?

Many countries have national police forces, who are responsible for all law enforcement in the

country. The United States has obviously not followed this model. What is one advantage of a national, centralized police force? What is one advantage of our decentralized system?

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—if law enforcement is called. The next step in the process is to proceed through the court system to determine guilt. If you are found guilty then you will receive a sentence that may be implemented by the correctional system, which is responsible for the formal punishments and/or treatments determined by the courts. An individual may not go through the entire process, and diverse 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. Similarly, the district attorney (DA) may decide to drop your case before it even goes to trial. While the formal criminal justice system is composed of three major components—**Law Enforcement ("Cops"), the Courts, and Corrections**—the above example also reveals a **4th "C": the citizenry** that observes and reports crime. In fact, without the participation of citizens in reporting crime, the rest of the criminal justice chain would be largely unhelpful.

News Box: In 2021, 170,856 individuals were arrested for marijuana possession in the United States, down from over 226,000 in 2020 but still higher than any other narcotic charge (Haines, 2022). In fact, there were more arrests for marijuana possession in 2021 than arrests for aggravated assault, rape, and robbery *combined*. Marijuana criminalization and enforcement go 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 the money used to enforce drug laws, prosecute drug crimes, and punish drug offenders well-spent? The United States has taken a get-tough approach with the "War on Drugs," created mandatory minimum sentences, and punished people in large numbers—but has it worked to deter individuals from using drugs like marijuana? For reference, over 48.2 million Americans over age 12 were estimated to have used marijuana in 2019 (SAMHSA, 2020).

1.2 DEVIANCE, RULE VIOLATIONS, AND CRIMINALITY

Shanell Sanchez; Kate McLean; and Pamela Simek

Louisiana's No Man's Land—Crime and Deviance

One or more interactive elements has been excluded from this version of the text. You can view them online here: https://louis.pressbooks.pub/criminaljustice/?p=26#oembed-1

Video credit: 435American. (2020, June 4.) *Louisiana's Lawless Territory: The Neutral Strip Explained* [Video]. YouTube.

Just about everyone in society has done something that someone else would disagree with and see as deviant.

From a sociological perspective, social norms—or unofficial rules of behavior—are all around us. Social norms are specific to social groups, which means that living in a diverse society can make it hard to always fit in. The group you are in can change, which would mean the norms and behaviors that are acceptable at any given time may change.

"Facial Tattoos and Piercings"

Deviance is behavior that departs from the social norm. The sociologist Erich 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 must be a negative reaction from that audience that can come in many forms (i.e., mockery, criticism, disapproval, punishment, and more; Goode, 2015). When performed by family, friends, teachers, or other actors outside the criminal justice system, such negative reactions represent examples of informal social control. On a day-to-day basis, deviance is much more likely to be met, and suppressed, by informal social control. By contrast, formal social control refers to negative sanctions applied by criminal justice actors (such as the police), in response to criminal acts. In fact, **laws** are simply social norms that have been enshrined, and are enforced, by the government.

To commit an act of deviance, one does not need to act dangerously or harmfully, and not all acts that are deviant are criminal. For that matter, not all criminal acts are deviant either. Deviance falls on a spectrum that can range from really-deviant to not-so-deviant, but in any case, it is dependent on the audience. Think back to the marijuana use and arrest statistics in the previous chapter. If we take our reference point as federal law, marijuana use is certainly a crime. But if we consider the sheer number of people who use, or have used marijuana, is this behavior deviant—and for whom?

An interactive H5P element has been excluded from this version of the text. You can view it online here:
https://louis.pressbooks.pub/criminaljustice/?p=26#h5p-2

1.3 INTERACTIONIST VIEW

Shanell Sanchez and Pamela Simek

Tattoos at Work

An article by BBC.com in 2020 says that "tattoos were against the law until 1948 and, 70 years later, they're still not generally seen as socially acceptable."

"Attitudes about tattoos are often as complex as the designs themselves, but for fans of permanent body art, it's a trend that's here to stay."

This article demonstrates how societal definitions of deviance can change through time and space.

Read the BBC.com article *How Workplaces are Phasing Out the Tattoo Stigma* to learn more about this discussion.

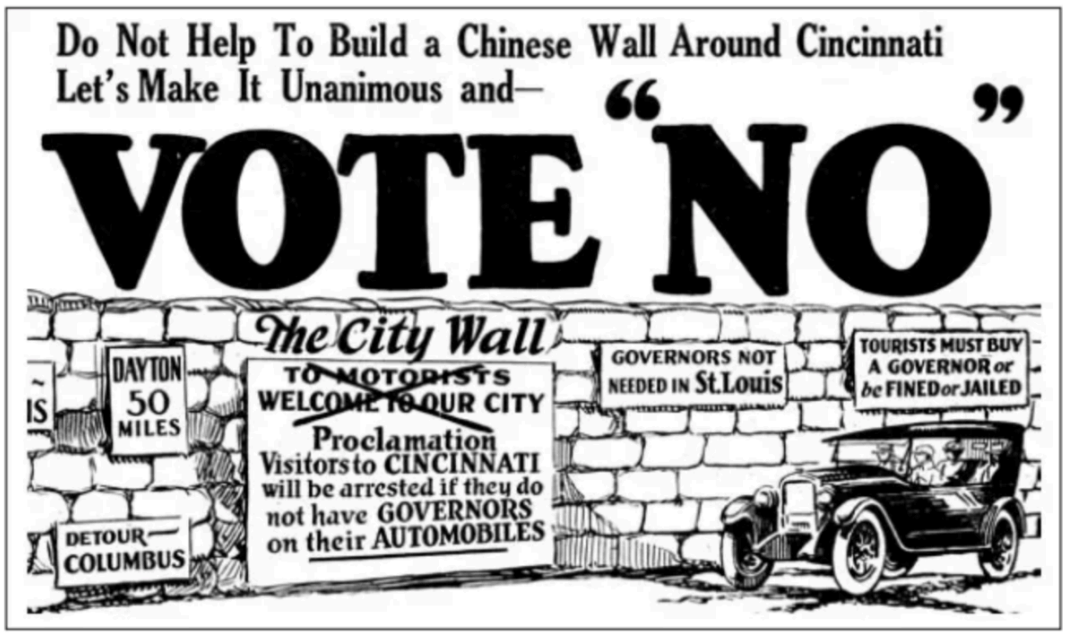
Typically, in our society, a deviant act becomes a criminal act that can be prohibited and punished under criminal law when an act is deemed socially harmful or dangerous to society (Goode, 2015).

In criminology, we often cover a wide array of harms that can include economic, physical, emotional, social, and environmental damages. 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 versus 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 craft a dress code stating that people may not have visible tattoos. Today, tattoos may be seen as more normalized and acceptable, which could lead to a lot of angry and vocal employees who reject such rules.

Now that we have a basis for understanding differences between deviance (norm violations) and crimes (law violations), we can discuss who determines if a behavior becomes criminalized in the 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 (Farmer, 2016).

Jaywalking

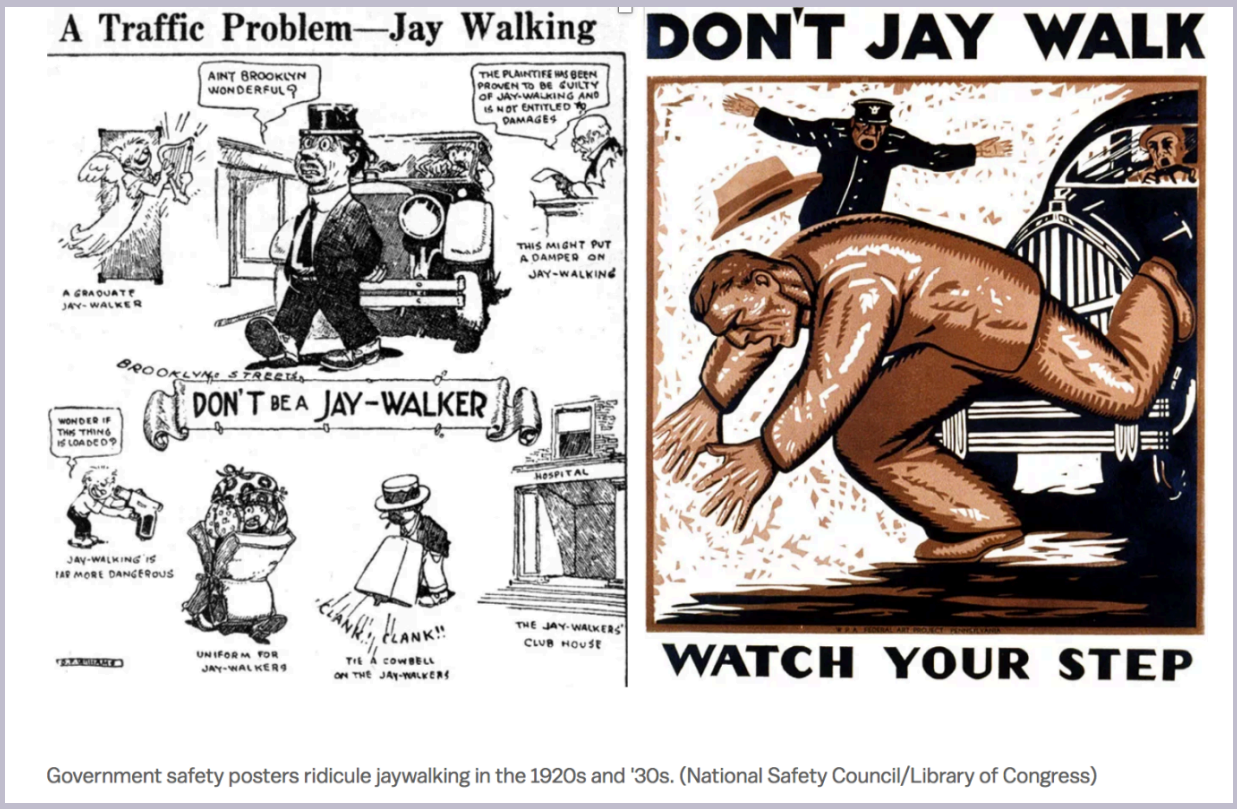
In the 1920s, auto groups aggressively fought to redefine who owned the city street. As cars began to spread on the streets of America, the number of pedestrians killed by cars skyrocketed. At this time, the public was outraged that elderly individuals and children were dying in what was viewed as "pleasure cars," because, at this time, our society was structured very differently and did not largely 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 their speed to 25 miles per hour. This petition infuriated auto dealers and motivated them to send out letters against the measure.



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

Vote No to allow motorists in Cincinnati poster

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 legal changes can be seen in our expectations for pedestrians to only cross at crosswalks.



Government safety posters ridicule jaywalking in the 1920s and '30s. (National Safety Council/Library of Congress)

Don't Jaywalk – Safety posters ridiculing jaywalking in the 1920s and 1930s

The Vox.com article *The forgotten history of how automakers invented the crime of "jaywalking"* has an excellent summary of jaywalking.

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 to be right and wrong, becoming moral entrepreneurs (Vuolo, Kadowaki, & Kelly, 2017).

Moral entrepreneur is a phrase coined by sociologist Howard Becker. Becker used the term to refer 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, often because they have a vested interest in that cause that maintains their political power or position (Becker, 1963; Cole, 2013).

The auto industry used aggressive tactics to garner support for the new laws: using news media to shift the blame for accidents from drivers onto pedestrians and campaigning at local schools to teach children about the importance of staying out of the street (Norton, 2007).

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.

1.4 CONSENSUS VIEW AND DECRIMINALIZING LAWS

Shanell Sanchez; Kate McLean; and Pamela Simek

Another view of how laws become created is the **consensus view**, which 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 so on) to determine what should be illegal. This view also suggests that criminal law is a function of beliefs, morality, and rules that are held equally by all members of society (Dawe, 1970).

One Child per Family Policy in China

In the United States, there appears to be a cultural consensus that parents should not 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 behavior was prevalent, if illegal—but it was not as deviant as Americans might believe. 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.

As of 2016, China has changed the policy. Read about the changes in the Brookings.edu article The End of China's One-Child Policy.

Let's take a consensus approach to legislation but apply it to the process of decriminalization, or the removal of criminal penalties attached to a particular behavior. Can you think of any criminalized actions or behaviors that most Americans would like to see decriminalized? Moreover, is the consensus view supported when there are significant differences in opinion based upon region or religion—even if an absolute majority of citizens are in favor of decriminalization? Some have proposed a hybrid between decriminalization and criminalizing behaviors that are currently criminalized, such as prostitution, to ensure rights to prostitutes and punish

offenders who harm them (Lutnick & Cohan, 2009). An act can be decriminalized at the state level, but not necessarily the federal level.

Marijuana Legalization

One example of decriminalization that came from a vote of consensus in states like Alaska, Arizona, Connecticut, Colorado, Delaware, Hawaii, Idaho, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Washington, Oregon, and Wyoming—and more—was the legalization of recreational marijuana.

In 2023, a bill to decriminalize marijuana in Louisiana died in committee before ever reaching the House floor for debate.

To date, 22 states have passed laws legalizing recreational use of marijuana by adults.

1.5 CONFLICT VIEW

Shanell Sanchez; Kate McLean; and Pamela Simek

A third perspective of how we define crime or create laws is referred to as the conflict view, commonly associated with the philosopher Karl Marx. The **conflict view** sees society as a collection of diverse groups, defined by class, age, occupation, etc. This view recognizes that the creation of laws is divisive and inequitable—not a process supported by consensus, as discussed previously (Hawkins, 1987).

Further, the conflict view suggests that different social groups are often in constant conflict with one another, with social class representing a major axis of conflict. Unlike the consensus perspective, the conflict view would suggest that criminal law is influenced 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." Definitions of criminality are shaped by the values of the ruling class and do not emerge from "moral consensus" (Boundless, 2016). Can you think of a specific crime, or criminal law, that is not only controversial but appears to reflect the interests of powerful social groups? 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 coined the term white-collar crime during his presidential address at the American Sociological Society Meeting in 1939, later publishing articles and books on the topic (Sutherland, 1940). Specifically, he was concerned with the criminological community's preoccupation with low-status offenders 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 much debate in this time (Sutherland, 1949). Still today, there is a limited focus on white-collar crime and even less enforcement of relevant laws in the United States. From the conflict view, this would be because white-collar and corporate crimes are disproportionately committed by the "haves" who write and enforce the law. Going back to how we define crime in society, the definition of white-collar crime is still contested.

Currently, there are different views of how one should define white-collar crime: is it based upon the status of the offender, the type of offense, the underlying organizational culture? Are white-collar crimes primarily committed by corporations, or driven by the profit motive? The FBI studies

white-collar crime in terms of offense, so official data for white-collar crime does not reveal the demographic background of the offender (Barnett, 2000). The UCR will be covered more fully in chapter 2, but it is data that is collected from police departments and compiled by the FBI.

1.6 THE FOUR C'S: COPS, COURTS, CORRECTIONS - AND CITIZENS

Shanell Sanchez; Kate McLean; and Pamela Simek

The Four C's

As previously stated, the U.S. 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 certainly could, since it remains a Schedule I drug.

We will spend time exploring the three main components of the criminal justice system, or what some call the three C's: cops, courts, and corrections. Yet, for the purposes of this class, you are encouraged to keep in mind a fourth "C," without which the criminal justice system would not function: the citizens who report crimes. Even while most crime is not reported, relatively few crimes are observed "in progress" by the police, with citizen calls instead initiating police action. 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 own 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. Indeed, policing in the United States is primarily reactive, not proactive.

Nevertheless, police may witness a crime while on patrol. In this case, officers will make initial contact, investigate crimes, apprehend (arrest) offenders / potential offenders, and then book them in the local jail. Law enforcement does not determine guilt or innocence, hand down punishments, or implement the punishment (Fuller, 2019).

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, clothing, car, or other property, with some exceptions that will be explored later on in this class. In order to ensure due process, searches often 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 (Investigation, n.d.). As stated above, if police catch a person in the commission of a crime, they will arrest them first and investigate later.

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 "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 attorney for review, and the district attorney will determine what charges are filed

against an offender, also known as the defendant (Roles in the Criminal Justice System, n.d.). In the above scenario, if the prosecutor's office has determined there is enough evidence to charge the individual with robbing the business downtown, then charges are 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, including 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 will be 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; the testimony of an eyewitness to a crime represents direct evidence, 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 (i.e., not based on the first-hand experience of a person). Circumstantial evidence includes people's impressions about an event that happened but that they did not see. For example, imagine that you went to bed at night, and your car was nearly out of gas. When you awoke to a full tank of gas, you assumed your partner or a family member filled your car up—though you didn't actually see them do it (Investigation, n.d.). If a defendant pleads guilty, there may be a plea bargain given.

In a plea bargain, the defendant agrees to plead guilty, typically in exchange for reduced charges, or a prosecutor's promise to request a reduced sentence. Plea bargains get used 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, who sentences them. The judge is the only person authorized to impose a sentence. With the current number of cases entering our system every day, plea bargains have often been called a "necessary evil" (Plea Bargaining, n.d.).

Let's 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. For crimes that are adjudicated in federal court, 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 (Sentencing, n.d.).

After a defendant is found guilty, they have the right to appeal the outcome if they believe their due process rights were violated or (depending upon the case) if new evidence emerges. An appeal is not another trial, but an opportunity for the defendant to try to highlight specific errors that might have occurred at trial. A common

appeal is that a decision from the judge was incorrect ("judicial error"), 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 can be altered, or a new trial may be ordered altogether if the Appeals Court decides that particular course of action. If a circuit court judge denies 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 (Appeal, n.d.).

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.

In The News: Brendan Dassey

Brendan Dassey, featured in the Netflix documentary *Making 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 and did not have 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 (cbsnews.com, 2018).

Video Link: Last Week with John Oliver: Public Defenders
The Miranda warning includes the right to a public defender. It doesn't include the fact that public defenders are highly overworked and grossly underpaid.

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 be served 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 their sentence (Fuller, 2019). Lastly, an essential part of corrections is helping former inmates with prisoner re-entry or reintegration into society through parole, which is community-based supervision after serving time in a secure facility (RAND Corporation, n.d.).

An interactive H5P element has been excluded from this version of the text. You can view it online here:
https://louis.pressbooks.pub/criminaljustice/?p=40#h5p-4

1.7 THE CRIME CONTROL AND DUE PROCESS MODELS

Shanell Sanchez; Kate McLean; and Pamela Simek

The Crime Control and Due Process Models

The criminal justice system can be quite complicated, especially when attempting to punish offenders for wrongs committed. Society expects the system to be efficient and quick and also sufficiently protect the rights of individual defendants. Ultimately, the system must strike a balance between these goals, 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 theorized two models that represented the dual expectations of the criminal justice system. These two models can be seen as competing for dominance in the United States, but we will discuss how these models can be merged or balanced to work together. The tension between these models lies in the values they emphasize, as shown in their names: the crime control model and the due process model (Packer, 1964).

The **crime control model** focuses on having an efficient system, with the most important function being the suppression and punishment of crime, ensuring that society is safe and orderly. Under this model, controlling crime is more important than protecting criminal suspects' rights, a perspective that is more aligned with conservative politics. In order to protect society and make sure individuals feel free from the threat of crime, the crime control model advocates for the swift and severe punishment of offenders. Under this model, the justice process may ideally represent an "assembly-line": law enforcement apprehends suspects; the courts determine guilt; and guilty people receive appropriately tough punishments through the correctional system (Roach, 1999). The crime control model may appreciate plea bargains, because trials may take too much time and slow down the process.

The **due process model** focuses on having a just and fair criminal justice system for all, which does not infringe upon suspects' constitutional rights. Further, this model argues that the system should be more like an "obstacle course" than an "assembly line." Overall, the due process model privileges the protection of individual rights and freedoms and is seen as being more aligned with a liberal political perspective (Yerkes, 1969). There are several pros and cons to each model; however, there are certain groups and individuals that side with one more often than the other. The notion that these models may fall along political lines is often based on the perceived party alignment of court decisions, as well as political campaigns in the U.S. The crime control model promotes policies that claim to "get tough," expand police powers, increase prison sentences, or make correctional institutions more unpleasant. The due process model promotes policies that delegate

power to other first responders (such as crisis intervention teams), curb prosecutorial discretion, and emphasize offender rehabilitation. These rights may include requiring police to inform people under arrest that they do not have to answer questions without an attorney (*Miranda v. Arizona,* decided in 1966), providing all defendants with an attorney (*Gideon v. Wainwright*, decided in 1963), or throwing out police evidence seized without a valid warrant (*Mapp v. Ohio*, decided 1961).

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 have too many powers that can lead to abuse, then politicians may propose policies that limit their actions or authority (Brenan, 2022). Again, this may reflect a societal consensus, the feelings of some social groups, or the interests of a political party or specific politician.

In the News

Most people would agree that the death penalty represents the most severe punishment an individual can face in the United States, and as such, would be endorsed by proponents of the "crime control" model. However, the imposition of the death penalty for individuals thus sentenced is hardly swift or certain; in fact, it has been estimated that the average time between a sentence of death and actual execution is nearly 19 years (Snell, 2021).

In your opinion, how might this delay between offender sentencing and execution affect the death penalty's ability to suppress crime? Does this delay effectively uphold, or undermine, individual offenders' rights to humane punishment? Consider the case of Scott Dozier, who sat on death row in Nevada for over a decade, before finally committing suicide in prison. How might this case inform the recalibration, or cooperation, of the two models discussed above?

Read more about Scott Dozier at The Marshall Project.

1.8 HOW CASES MOVE THROUGH THE SYSTEM

Shanell Sanchez; Kate McLean; and Pamela Simek

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 both 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 use one's judgment in making decisions within legal guidelines. A police officer may use their discretion to search an individual who appears to be engaged in specific, criminally suspicious behaviors in public—or to let a speeding motorist go with only a warning. Similarly, prosecutors exercise their discretion in dropping a case that they believe they cannot win in court, or in charging an individual with the violation of every possible criminal law. Many people see discretion as the most powerful, and least regulated, tool of the criminal justice system (Kessler & Piehl, 1998; Gottfredson & Gottfredson, 1988).

Discretion in Action

Provide an example of discretion, which can be from a professor, a college administrator, a police officer, a judge, or a boss. Describe how this exercise of discretion impacted the outcome of your situation, for better or for worse. Do you think that discretion was fairly exercised in this case? Why or why not?

Ethics refers to our understanding of what constitutes good or bad, moral or immoral, behaviors. Ethical behavior is incredibly important in the criminal justice system, because people working in the system get authority, power, and discretion from the government (Sellers, 2015). Imagine a case wherein a police officer let a severely intoxicated driver go with a warning, because the offender explained that they had gotten drunk after a bad break-up. Would it be ethical for police to allow the driver to simply drive off, when they represent a real threat to public safety? Or should the officer use their discretion and express empathy for an individual whose behavior is compromised by personal circumstances? Ethics and discretion often go hand-in-hand.

In the News: How Would an Ethical Officer React? For a recent discussion of what constitutes ethical policing, check out this article from *police1.com*, which takes up the intersection of police ethics, discretion, and legitimacy. In the wake of several devastating killings by, and of, police officers in the United States, Deputy Chief Benjamin M. Murphy implores a recent graduating class of the New Britain Police Academy to "always treat people with dignity and respect, that may be all they have left" (Murphy, 2023).

The criminologist Samuel Walker has referred to the criminal justice system as a funnel, and a leaky one at that. 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. 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. In other words, just as a funnel is wide at the top and narrow at the bottom, the number of crimes that are formally processed by the criminal justice system decreases at every step, from reporting to punishment (The President's Commission on Law Enforcement and Administration of Justice, 1967). Questions remain: 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 (Walker, 2015). 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 (Hansell, Bailey, Kamath, & Corrigan, 2016).

The Funnel Effect in Action

Imagine selling marijuana to friends every week. No one alerts the cops and you never get caught, which means this remains in the category of offenses unknown to police. However, a friend gets busted for selling weed too close to an elementary school, so the offense is immediately classified

as known to the police. An officer can choose to arrest or not, depending on the amount. Then, it is up to the prosecutor to decide whether or not to file charges. If charges get filed, your 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 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 two years in prison. Many would be tempted by the community service option and choose to be under community supervision such as probation.

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. Without discretion, the criminal justice system would likely collapse under the sheer number of criminal cases, and costs would skyrocket. If the U.S. were to arrest, prosecute, and punish everyone who violated the law, there would not be 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.

1.9 MEDIA COVERAGE OF CRIMES

Shanell Sanchez; Kate McLean; and Pamela Simek

In the "background knowledge check" that began this chapter, did you answer this question correctly: "True or False – Violent crime in the United States has reached historical highs since national reporting began"? You might be forgiven if you got this question wrong—research has shown that entertainment and news media create an image that we are living in an ever more dangerous world (Jewkes, 2015). It can be easy to become fearful after watching too much news if we let ourselves lose sight of the fact.

Public knowledge of crime and justice is derived largely from the media. Research has examined the 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 (Dowler, 2003; Kort-Butler & Sittner, 2011). However, we also are attracted to stories about crime and victims when we choose to consume media. In other words, the media is aware of our preference for these topics and thus reports on them 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 perpetrators who are without remorse (Glassner, 2009).

Our society is fascinated with crime and justice, to the point that we spend hours watching films, reading books, listening to podcasts, and consuming TV broadcasts that keep us constantly engaged in crime "talk." Perhaps what we do not always realize is that 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 media (Dowler, 2003).

Again, the majority of public knowledge about crime and justice is derived from the media (Roberts, 1996; Roberts & White, 1986; Surette, 1990; Kappeler & Potter, 2018). 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 estimate an increase in crime—in 2002, following 9/11 (Swift, 2016).

Despite dramatic decreases in U.S. violent and property crime rates since the 1980s, most voters say crime has gotten worse during that span, a perception that is dramatically at odds with the data (Gramlich, 2016). Research has also shown that there are stark differences in perceptions of crime across political party lines. For example, in the 2016 elections, almost eight-in-ten voters who supported President Donald Trump (78%) believed crime was increasing, compared to less than 40% of voters for Democrat Hillary Clinton (Gramlich, 2016). All of this is at odds with official data reports that will get discussed in more detail in the next chapter.

Research by the Pew Research Center has 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, even while a majority (57%) say they expect the news they see on social media to be mostly inaccurate (Shearer & Matsa, 2018). Unfortunately, it appears that convenience outweighs concerns with accuracy.

Media Exercise

Go about your daily routine, but record every time crime is discussed. Write down every time it happens (such as while watching TV, listening to the news, scrolling through news feeds, talking to friends, etc.) What was the message? 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.

Not surprisingly, the media focus their attention on crimes that will capture viewers' attention. The more shocking, upsetting, gruesome, and dramatic the crime, the better! Consider the case of Eliza Fletcher, a 34-year-old teacher (and mother of two) who was abducted and murdered by a stranger while jogging near the University of Memphis in September 2022. It is shocking to imagine that one could leave one's house and family, on a normal routine outing, and never return. It is even more shocking that the abduction occurred near a "safe space"—a major university—and moreover, involved a stranger. People will click on this story because it preys upon their fears, but such interest is problematic. How do we devise policies that effectively protect both would-be victims and offenders if we are driven by fear? Decades of research shows us that 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. Yellow journalism is the practice of using sensational stories in print media to attract readers and increase profit, and it works, but not without compromising political and legislative processes (Kappeler & Potter, 2018).

Immigration and Crime Exercise

Fears of immigrant-related crime have permeated the news in recent years, buoying political candidates who promise to "get tough" on undocumented immigration. However, multiple kinds, and years, of data show that undocumented immigrants are much less likely than their U.S.-born counterparts to engage in criminal activity. How does the media support the public's unwarranted

fears around immigration and crime? What language or imagery has been used to forge this connection?

Read more in the article New Research on Illegal Immigration and Crime at the CATO Institute's website.

1.10 DIFFERENT TYPES OF CRIMES AND OFFENSES

Shanell Sanchez; Kate McLean; and Pamela Simek

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 three different types of crime, and two different types of offenses that will be discussed. The types of crime presented just below follow the categories used by the National Incident-Based Reporting System, or NIBRS, which is a database of all crimes reported in the United States, maintained by the F.B.I. Find more information about NIBRS-defined crimes and their classification at the F.B.I.'s website National Incident-Based Reporting System (NIBRS).

Types of 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. Most, but not all, "crimes against the person" would also be commonly labeled "violent" crimes.

Crimes Against Property

Property crimes are widespread and generally 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 Society

Crimes against society are those that are seen as disrupting social order. They may or may not also imply physical harm to property, people, or other living creatures. (For example, "animal cruelty," "espionage," and "purchasing prostitution" are offenses defined as "crimes against society" by the NIBRS.) In fact, this is the largest category of crime defined by the NIBRS, representing 34 out of 71 offenses. For certain crimes against society, it may be difficult to identify a specific or individual victim. In theory, the victim of these crimes is society, because the social and moral order has been violated. At the same time, because many crimes against society – such as drug offenses – are seen as victimless, there is much debate as to whether many such acts should be the subject of criminal law at all.

Types or Levels of Offense

By definition, the two different types of criminal offense relate to the severity of the punishment that a convicted offender may face. All of the types of crime listed above may include both types of offense, although misdemeanors are often seen as encompassing less harmful crimes, while the felony label applies to more serious crimes.

Misdemeanor

A misdemeanor is considered a more minor criminal offense, punishable by **jail time of up to one year**. Depending on the specific crime, misdemeanors may be labeled as *mala prohibita*, or "bad" simply because they are prohibited.

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. Felony-type offenses are sometimes classified as *mala in se*, or inherently harmful.

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2. CRIMINOLOGICAL THEORY

Image description: Front of Cambridge University School of Criminology, England
Image credit: "Faculty of Criminology" by yellow book is licensed under CC BY 2.0.

Learning Objectives

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

- Differentiate between Classical, Positivist, Chicago, Neoclassical, and Contemporary Schools of Criminological Theory
- Differentiate 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 others?
2. How did the Classical Theory of crime influence the American Criminal Justice System?
3. Why is it difficult to study the biological theories of crime without thinking about the social environment?
4. Could causation theory have progressed without the influence of Positivist theorists? Why?
5. Why do you believe there have been so many different theories to explain the origins of criminal behavior?

Background Knowledge Probe: Each chapter will begin by assessing your current knowledge about different criminal justice topics. Each of these topics will be covered by the chapter – meaning that you should be able to answer them correctly after you have completed the reading. All definitions can be seen by clicking on the bolded vocabulary terms in each chapter.

Please drag and drop the correct answer in the blank space provided. This is an ungraded exercise, but you may want to record which questions you answer incorrectly, so that you can verify that your knowledge has improved by the end of the chapter.

An interactive H5P element has been excluded from this version of the text. You can view it online here:
https://louis.pressbooks.pub/criminaljustice/?p=337#h5p-18

2.1 WHAT IS A THEORY?

Brandon Hamann

A **theory** is an explanation of an observed occurrence in an environment. A theory asks the fundamental questions—Who, What, When, Where, How, and Why—and tries to answer them. These theories should do their best to explain the world according to the facts that are present to them at the time (Paternoster & Bachman, 2001). Theories can also be used to predict outcomes by formulating ideas for experimentation and research to either prove or disprove them.

In the world of Criminology, these theories are used to explain the causes of criminal behavior, both on an individual level (micro) and a group level (macro). They attempt to explain why people commit crimes and identify risk factors for committing a crime and can focus on how certain laws are created and enforced. **Micro-level explanations** focus on causation instances from a personal perspective:

> "He/She/They committed the crime of robbery because of a lack of parental control at home."

Macro-level explanations focus on causation instances from a group perspective:

> "The crime rate in New Orleans is increasing because city leaders are ineffective in providing adequate leadership initiatives to fight the growing problems plaguing the city."

But theories need to have a starting point. They can't just come out of thin air. They must have a solid foundation: a concept. A **concept** is the foundation of any theory (Fedorek, 2019). It is imperative that a theory have a clearly defined concept before the process can begin. In Criminology, these concepts include deviance, delinquency, and even crime itself (Fedorek, 2019). If a theory does not have a clearly defined concept, it cannot be evaluated. To explain, we might try to rationalize a specific increase in convenience store robberies in Shreveport, Louisiana on an inability of the offenders to control their own behavior. This lack of "self-control" now becomes another concept that can now be measured along with the newly defined "robbery" concept.

Now we have our concepts defined: robbery and self-control. Once they are defined, they need to be measured in a process called **Operationalization**. Operationalization will determine how best to measure those concepts, now called variables (Fedorek, 2019). Self-control can be measured in a variety of ways. One such way is to evaluate a person's ability to resist temptation. A good way is through the Cupcake Test. Can you think of any other ways to assess self-control? What other explanations could there be for why a person could be lacking in their own self-control enough to commit a crime of robbery? Once the relationship between variables is tested, they have to be verified to not be affected by any other outside influences. When

two variables are affected by a third, this is called **spuriousness**. We know that convenience stores sell many products that can have addictive properties (tobacco, alcohol, high sugar content junk foods, etc.).

Once the variables are determined and the concepts are defined, our theory becomes more refined. We can now say within a greater reasonable degree of probability that the increase in crime in Shreveport, Louisiana is due to the relationship between addictive products being sold and the lack of self-control of the offenders.

But this is still a theory. How do we know if it is right or wrong? It has to be tested.

Theory Exercise

We all have an opinion on just about everything. We base those opinions on our personal experiences throughout our own perspectives. We gather information by whichever means are convenient to us, and we form our opinions based on our observations. And we believe in our heart of hearts that we are right in our convictions of what we know because we have limited experience. But there is a difference between having an opinion and being an expert. And in the world of Criminology, it's not what you know, it's what you can prove with **empirical fact** – evidence based on observable experimentation. That means forming a proper theory, establishing a process for testing that theory, observing and gathering data through the proper scientific experimentation, analyzing and interpreting that data objectively, and reporting on what the data says regardless of whether or not it confirms the theory or disproves it outright.

A theory has to be able to be proven false (Fedorek, 2019). It is the research that will determine the reliability and the validity of the theory, not the other way around. Once the research is completed, the theory can be modified as many times as needed in accordance with the results of the research. The more research is conducted on a theory, and the more a theory is validated, the more reliable it becomes across the field of study it is referencing. If a theory cannot be proven false, it is validated, but that does not mean that questions stop being asked or that research stops being conducted.

For example, "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" (Fedorek, 2019, p. 159).

There are experiences in our lives that are completely within our control in how they influence our opinion and shape our perspective. There are also those experiences that we have absolutely zero control over that affect us as equally if not more so in our personal journey. We don't get to choose our parents, or our siblings. We don't get to choose where we live or how we dress for the first few

years of our lives. These experiences shape us into who we will become later in life and how we will form our own opinions based on these perspective-building events. What are some other variables that you can think of that are affecting your ability to form an opinion? Are they based on empirical facts, or just "facts" as best as you can tell?

Take a few moments and think about it. Then have a class discussion about your findings. Pay close attention to those experiences that are similar to your own, but also pay even more attention to those that are not.

2.2 WHAT MAKES A GOOD THEORY?

Brandon Hamann

There are many theories on criminal behavior causation. Which one is right? Which is more appropriate than another in a certain circumstance? How do we determine which theory to apply in a situation? Biological Sciences and Physical Sciences are pretty much in agreement as to how to answer these questions. However, Criminology uses a multitude of other disciplines to try and answer the questions of causality, and they don't always agree (Fedorek, 2019). For instance, Turner (2014) looked at how Neoliberalism policies could be affecting youth crime through changes in juvenile justice, education, and consumerism. Even a governing body's political ideology and policymaking can influence the causation of criminal behavior in a population.

Criminologists apply scientific criteria to their theories to evaluate them for validity. Akers and Sellers (2013) developed the criteria to judge these theories:

1. Logical consistency
2. Scope
3. Parsimony
4. Testability
5. Empirical Validity
6. Usefulness (Akers & Sellers, 2013).

Logical consistency means that the theory has to make sense. Is it consistent? **Scope** refers to a theory's range of explanations. Does the theory explain crimes committed in white neighborhoods AND black neighborhoods? Does it explain ALL crimes or just some crimes? Does the theory explain those crimes committed by ALL age groups, or just those crimes committed by juveniles? The broader the range and the wider the scope, the better the theory (Fedorek, 2019). 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 theory must have **testability** – it has to be open to possible falsification. Once a theory is tested for falsification, and it passes, it is then verified, or **empirically validated**. As Wallace (1974) stated of Gibbs (1972), "[A] theory has no connection in the empirical world unless individuals other than the theorists agree in applying some of its constituent symbols to identify particular events or things" (Wallace, 1974, p. 242).

Finally, all theories will suggest how to control, prevent, or reduce crime through policy or program. The premise of a particular theory will guide policymakers. For example, if a theory suggested that juveniles learn how to commit crime through a network of delinquent peers, policymakers will try to identify juveniles at risk for joining delinquent subcultures (Fedorek, 2019).

2.3 WHAT IS CRIMINOLOGY?

Brandon Hamann

Criminology is the scientific study of crime causation. It started out as a branch of Sociology, but later morphed into its own field of study. Criminology has also been referred to as the scientific study of breaking the law, making the law, and society's reaction to those who break the law (Sutherland, 1934). And those professionals who practice in the field of Criminology are called **Criminologists**. A Criminologist is an extremely nuanced profession. It isn't just about researching crime causation (it is, but it isn't). Criminologists have to be experienced in a multitude of subject matters: Psychology, Sociology, Economics, Political Science, Biological Science, Religion, Urban Studies, Social Work, Law, etc. This is because much of what goes into peeling back the multiple layers of criminal behavior has to do with a lot of everything that happens to people that makes them who they are and how they interact with not just their own inner struggles of right and wrong, but also with those external forces that contribute to their micro(individual)-level and macro(group)-level interactions. So, when a Criminologist researches a specific trend in crime, they're not just looking for one specific answer as to how or why, they're looking for as many answers as possible. Criminologists need to understand the entire story behind the act of deviant behavior before they can make a recommendation on a policy shift, or a creation of a law that could potentially affect a diverse population equally. It isn't an easy thing to do, but that's why they do the research.

The most common way a Criminologist goes about proving or disproving a theory is through research. Research is the same with Criminology as it would be for any other science. Even though Criminology is a Social Science, compared to Biology or Physics, which are Biological or STEM Sciences, the process for research is still the same: the Scientific Method. A Criminological Theory produces a possible explanation for a cause of criminal behavior, which in turn leads a Criminologist to develop an observable experimentation to either confirm or disprove that theory. A hypothesis is then formulated; data is collected through observation, analyzed, and interpreted; and a formal conclusion is written. Based on the analysis of the observable data, the hypothesis is either confirmed or disproven, and the theory can then either likewise be said to be valid or invalid based on reliable observable data.

It all sounds really boring and monotonous, but when taken into context that many laws are written based on the results of this process, and many law enforcement and Criminal Justice System policies are also developed from the data produced by what Criminologists are able to generate just from a theoretical perspective, it can be exciting sometimes.

2.4 WHERE DO CRIMINOLOGICAL THEORIES COME FROM?

Brandon Hamann

Criminological Theories can come from anywhere and everywhere. Anyone can be a Criminologist. There are no guidelines for who can or cannot be a Criminologist, nor is there any club membership for who can produce a Criminological Theory. Criminologists can be and have been Economists, Lawyers, Medical Doctors, Social Workers, Police Officers, School Teachers, Journalists, Psychologists, and Counselors. All it takes is a keen interest in observation and research and asking the right questions to formulate a proper theory.

Criminological Theories are broken down into "schools." There have been a few of them throughout their short history, but they are all equally important. They are:

- The Classical (or Modern) School,
- The Positivist School,
- The Chicago (or Social Positivist) School,
- The Neoclassical School, and
- The Contemporary School.

Each School of Criminological Theory produced its fair share of ground-breaking theories, but for the sake of this text, we will only highlight a few of them. First, though, we have to know who some of the important criminological theorists were according to their specific school. The following section will introduce you to some of the most notable theorists/figures in the field of Criminological Theory, however, there are a multitude of them that unfortunately there is not enough room to include. They are covered in advanced theory courses if you so choose to pursue a course of study in the Criminology field or a Criminal Justice degree.

2.5 THE CLASSICAL SCHOOL OF CRIMINOLOGICAL THEORY

Brandon Hamann

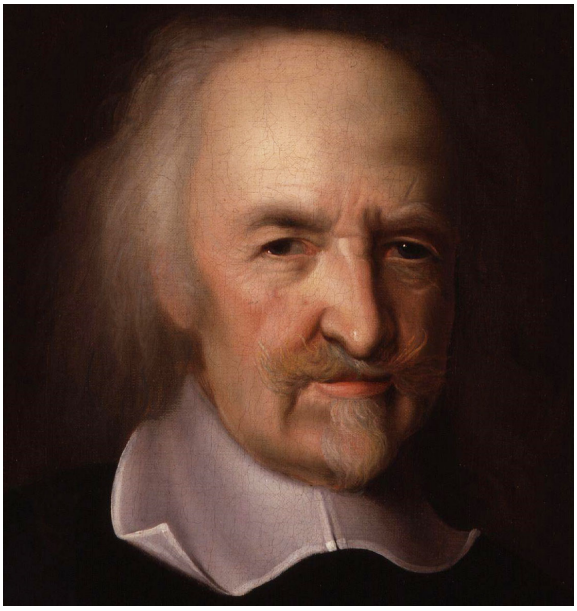

Figure 2.1: Thomas Hobbes (1588-1679)

During the Middle Ages, people began to question the justification for how they were being ruled by their governments (Fedorek, 2019). In the mid-17th century **Thomas Hobbes**[1] (1588-1679), a British philosopher, wrote in his seminal piece *Leviathan* (1651) that people were rational and were entitled to such things as life, liberty, and the pursuit of happiness as well as the right to self-government. In the case of punishment, according to Hobbes (1651), judges were not bound by another's sentencing prescription simply because there was precedence to do so (Hobbes, 1965). This social contract thinking would later be a building block for the modern American Criminal Justice System.

1. Thomas Hobbes (1588-1679) – British philosopher who wrote that people were entitled to life, liberty, and the pursuit of happiness and the right to self-government.

Figure 2.2: Cesare Beccaria (1738-1794)

One of the first "Criminologists" wasn't even one. **Cesare Beccaria**[2] (1738-1794), an Italian philosopher, economist, and politician, is considered to be the "Father of Criminology." He authored a book titled *An Essay on Crimes and Punishment* in 1764 which laid the foundation for what came to be called the **Classical School of Criminological Theory**. In the book, Beccaria theorized that crime occurs when the benefits outweigh the costs—when people pursue self-interest in the absence of effective punishments, and that crime is a free-willed, rational choice. Beccaria also developed the concept of **proportionality**, which states that in order for a punishment to be effective, it must fit the crime that it is intended to deter from repeating (di Beccaria & Voltaire, 1872).

2. Cesare Beccaria (1738-1794) – Italian economist, philosopher, and politician. The Father of Criminology.

2.6 THE POSITIVIST SCHOOL OF CRIMINOLOGICAL THEORY

Brandon Hamann

The **Positivist School of Criminological Theory** was in direct conflict with the Classical School. Think of it like two people who think they know everything having a very loud argument in public. While the Classicists believed that criminal behavior could be explained through rationality of choice and a cost/benefit analysis (more on this later), Positivists believed criminal behavior was a product of scientifically explained phenomena. It was not a matter of choice, according to Positivists, but a matter of observable, empirical fact that criminality could be identified. And there was no better way to prove it than with...SCIENCE!!! The Positivists can be broken down into three subsections: the Biological Positivists, the Psychological Positivists, and the Social Positivists, or as they are more commonly known, the Chicago School.

2.6.1 The Biological Positivists

The Biological Positivists were not Criminologists in the general definition of the word. Not really. They looked at the Social Sciences as some kind of mutated disease because all they did was theorize all day. None of their theories were verifiable because there was no concrete proof to say whether what they were talking about was true or not. At the time, the only true science was medical, or biological science; all other science was **pseudoscience** – statements or beliefs not based on scientific facts – or "fake science." So, the medical/biological scientists went out to prove that they knew better how to answer the questions about criminal causation that the so called "Social Scientists" were just theorizing about. The Biological Positivists believed that some people were born criminals, and some were not, and medical/biological science was going to be the tool that could prove it.

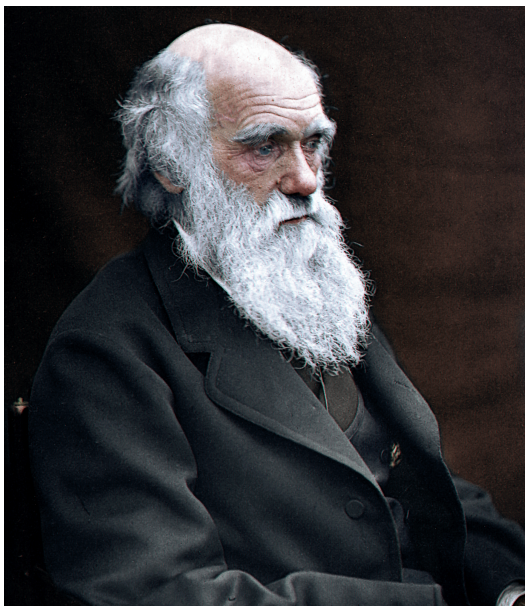

Figure 2.3: Charles Darwin (1809-1882)

The first scientist to give the Biological Positivists their argument for how criminal behavior was caused was none other than **Charles Darwin**[1] (1809-1882). Charles Darwin, a British naturalist who is considered the founder of evolutionary science, wrote *On the Origin of Species* (1859), where he observed what he later conceptualized as natural selection – survival of the fittest. A few years later, he applied his observations to humans in *Descent of Man* (1871), where he exclaimed that some humans may be an evolutionary throwback to a primitive version of modern mankind (Fedorek, 2019). Darwin never wrote about human criminal behavior causation specifically, but his works on species evolution did have a major influence on the Biological Positivists to come (Fedorek, 2019).

1. Charles Darwin (1809-1882) – British naturalist who is considered the founder of evolutionary science.

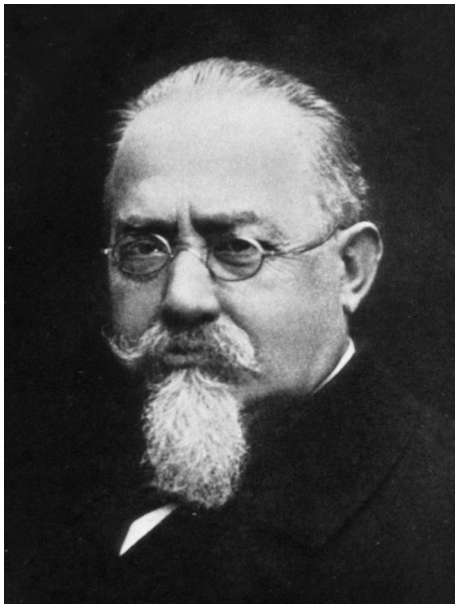

Figure 2.4: Cesare Lombroso (1835-1909)

Perhaps the most influential Biological Positivist was **Cesare Lombroso**[2] (1835-1909), an Italian phrenologist, physician, and the founder of the Italian School of Criminology. What made Lombroso so influential was his use of the Scientific Method in his research experimentation, which helped to legitimize Criminology in the minds of the medical experts as a valid field of scientific study. However, the means by which he went about his experiments left much to be desired. Lombroso published *The Criminal Man* (1876) five years after Darwin drafted his book on evolution and claimed that a third of criminals were born that way because they were **atavistic** – evolutionary throwbacks (Fedorek, 2019). He even went out to prove his theory by developing experiments which measured criminality by physical trait variables: the slope of the forehead, the position of the eyes, the size of the ears, the drop of the mouth, even the color of skin. Widely condemned by experts, Lombroso would later reject his own theoretical rhetoric as he got older, realizing the discriminatory practices of his work, but the groundwork he laid in legitimizing the field of study was immeasurable, because now any Criminological research follows the same procedural process that was developed by Lombroso's experimentations.

2.6.2 The Psychological Positivists

2. Cesare Lombroso (1835-1909) – Italian phrenologist, physician, and founder of the Italian School of Criminology.

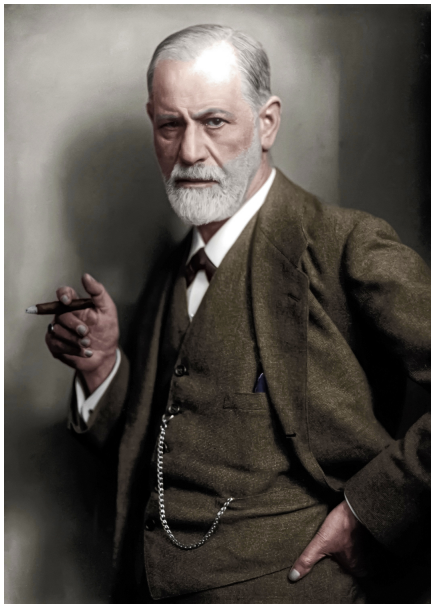

Figure 2.5: Dr. Sigmund Freud (1856-1939)

Best known for his work in the psychological field of personality disorders, Austrian neurologist and psychoanalyst **Sigmund Freud**[3] (1856-1939) postulated that the human mind was separated into three distinct psychoanalytical types: **the Id, the Ego, and the Superego**. Through his studies, Freud theorized that criminal behavior was a product of mental illness, motivated by unconscious psychosexual conflict (Fitzpatrick, 1976). The Id, according to Freud, was the part of the human mind that controlled basic animalistic urges (fear, anger, compulsion, etc.) and was the most basic and earliest to develop, usually in childhood. The Ego helped to control the Id and began to mature as the child matured and learned from its surroundings and its parents what was good behavior and what was bad behavior. The Superego kept everything from going bonkers, hopefully.

3. Sigmund Freud (1856-1939) – Austrian neurologist who developed psychoanalysis.

Figure 2.6: Drs. Sheldon and Eleanor Glueck

Then there were those who wanted to study the personality traits of criminals. **Sheldon and Eleanor Glueck**[4] (1950), Polish-American criminologists, determined that there was no such thing as a criminal personality, but that there were some personality traits that were clustered together (Fedorek, 2019). Their work included a **longitudinal study** – a type of experiment that takes a long time to complete, usually decades – of 1000 teenage juvenile delinquent and non-delinquent boys to try and understand the causes of criminal behavior in youths. Their findings resulted in no explanations as to the causation of delinquent behavior. However, there were correlations in certain personality types and criminal behavior: low self-control, low empathy, and an inability to learn from punishment (Fedorek, 2019).

4. Sheldon and Eleanor Glueck – Polish-American criminologists who studied personality traits in criminals.

2.7 THE CHICAGO SCHOOL OF CRIMINOLOGICAL THEORY

Brandon Hamann

The Biological Positivists looked at criminality through the lens of scientific experimentation, attempting to explain causation through physical traits. The Psychological Positivists tried to explain criminality as a product of mental illness and looked at individual and group personality traits as possible causes. The Chicago School, however, took things to a different level. They saw criminal behavior as a product of one's environment, developing the concept of **human ecology** – the study of the relationship between humans and their environment. The Chicago School was so named because the theorists who produced the groundbreaking research into how humans interacted with their surroundings and how that interaction affected behavior came from the University of Chicago in the 1920s and 1930s (Fedorek, 2019).

Figure 2.7: Dr. Robert E. Park

Robert E. Park[1] (1864-1944), an American urban sociologist, spent his professional career studying human behavior as it pertained to human ecology, race relations, assimilation, migratory patterns, and social structure. Along with his colleagues, noted sociologists Ernest W. Burgess and R. D. McKenzie, Robert Park published

1. Robert E. Park (1864-1944) – American urban sociologist who studied human ecology.

the book *The City* (1925), which conceptualized a city much like a living organism, with interactions between humans and their natural environments acting in both a shared and conflicting manner depending on where a group lived within the city.

It was Burgess, however, who proposed the Concentric Zone Theory, which stated that a city's design was conducive to criminal behavior within its "Zone of Transition" between the areas where people worked and where they lived (Burgess, 1925). In simpler terms, a city could be seen much like a target board, with multiple concentric circles surrounding a central hub (see Figure 2.8). Each inner and outer circle was specific to its municipal function (manufacturing, city business, residential, etc.).

CHART 1. The Growth of the City

Figure 3.8: Burgess's Concentric Zone Model
Source: Burgess, E. W. (1925). The Growth of the City: An Introduction to a Research Project. In R. E. Park, E. W. Burgess, & R. D. McKenzie, The City (pp. 47-62). Chicago: The University of Chicago Press.

Two students of Burgess and Park at the University of Chicago expanded on the concept of the Concentric Zone Model and developed their own theory. Clifford Shaw and Henry McKay (1942) noticed that within the different zones of transition, there were inequalities between them. Some had infrastructure that was in disrepair, some had differing demographics, and some had socioeconomic differences (Fedorek, 2019). What all this meant was that not every residential zone was the same, had the same type of people living in them, or had the same level of income, education, or employment opportunities. Those zones that were more educated, had higher levels of income, and fewer buildings in bad shape, were more organized than those zones with less educated people of color, higher unemployment, lower income, and more "broken windows" (more on this later).

What does all this have to do with crime? According to Shaw and McKay, a great deal. If one community is experiencing a high level of "social disorganization" due to inequalities experienced because of low employment, or low education opportunities, or even the inability to communicate within its own neighborhoods because the population is unable to understand each other, then there can theoretically be a higher chance for criminality within that specific zone of transition. Likewise, the opposite is also theoretically true: If a zone of transition is highly organized, the population is cohesive and stable with higher levels of income, education, and a low unemployment rate, the chances of there being a high crime rate is relatively low.

Figure 2.9: Dr. Edwin Sutherland

Dr. Edwin Sutherland[2] (1883-1950) was an American Sociologist considered to be one of the most influential criminologists of his time. He is credited with the development and definition of Differential Association Theory of Criminality and coined the term "White-Collar Crime" in 1939. Dr. Sutherland earned his PhD in Sociology from the University of Chicago in 1913 and went on to establish the Bloomington School of Criminology at Indiana University. According to Dr. Sutherland's Differential Association Theory, criminality was a learned behavior, commonly brought on by groups of individuals who had splintered from the main group and had deviated in their behaviors from the accepted norms (see Section 2.10.3 for further analysis). Sutherland also was instrumental in combating the established notion that criminal behavior was relegated to only the poor and lower class of society. He famously

2. Dr. Edwin Sutherland (1883-1950) – American Sociologist who is credited with the development of Differential Association Theory and "White-Collar Crime" theory.

theorized that the upper classes were more than capable of criminal behavior and were not immune to the deviance of criminality just because of their social status. Furthermore, Dr. Sutherland's "White-Collar Crime" theory purported that businesses frequently engaged in criminal activity for the benefit of their practice as an expression of their business (Sutherland, 1940).

2.8 THE NEOCLASSICAL SCHOOL OF CRIMINOLOGICAL THEORY

Brandon Hamann

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. While the Classical School saw punishment as a means to an end regarding criminal behavior, Neoclassical theory saw punishment more as a deterrent to future crime, using it to prevent more than to punish. Through the development of specific policies – which will be covered in a later section – Neoclassical theorists sought to change behavior through laws and sanctions (Fedorek, 2019).

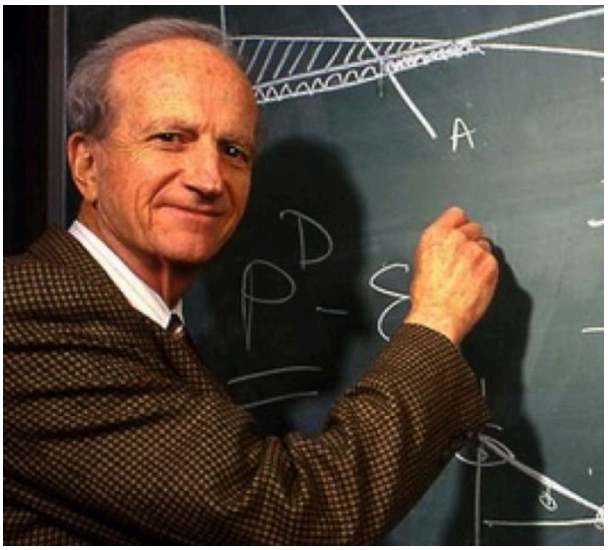

Figure 2.10: Dr. Derek Cornish

Figure 2.11: Dr. Ronald Clarke

Drs. Cornish and Clarke[1](1986) proposed a theory of causation that took a risk/reward approach to criminal behavior. They claimed that offenders "rationally" calculated the costs and benefits of their actions, and if the rewards outweigh the risk, then a crime would most certainly be committed. They didn't propose that all criminals were thinking rationally or that they were at all rational individuals outright – criminals aren't having philosophical debates over the moral and ethical complexities of their actions – but if the situation presented itself, and the circumstances were right, then the probability of a criminal act were much higher.

Cohen and Felson[2](1979) claimed that changes in modern society and environment made it easier for crime to take place. Since the conclusion of World War II, more people had entered the workforce, and more people spent time away from home. This meant that more and more people became accustomed to the routine of their lives doing menial tasks in the view of the public eye (running errands, paying bills, making groceries, fueling the car, etc.). Cohen and Felson stated that three things must converge in time and space for a crime to be committed – a motivated offender, a suitable target, and the absence of a capable guardian. In theory, the activities of our routines make us more prone to being the victim of a criminal act.

1. Cornish and Clarke (1986) – proposed a theory of causation based on Rational Choice and risk/reward.

2. Cohen and Felson (1979) – proposed a theory of causation based on the routine of people as changes in modern society forced them out of their private lives and into the public view.

2.9 THE CONTEMPORARY SCHOOL OF CRIMINOLOGICAL THEORY

Brandon Hamann

The Contemporary School of Criminological Theory concerns itself with newer thoughts on causation of criminal behavior. These new theories look to integrate foundational work of old and form brand new explanations for criminal behavior based on ever-changing environmental, social, psychological, economical, and political events. The Contemporary Theorists will take a little bit of Classical, mix it with some Positivist, splash it with some Neoclassical, and voila! Because there is no absolute when it comes to which theory is correct, Criminologists are able to mix and match multiple theories into a cohesive hodgepodge to suit their needs—as long as the data supports the validity and reliability of the theory, of course.

Figure 2.12: Dr. Francis Cullen

Dr. Francis T. Cullen[1] (1951–) is one such pioneer in the Contemporary School of Criminology who has written extensively on the need for a new way of thinking regarding criminality, specifically on the topics of evidence-based correctional professionalism and reducing offender recidivism through intervention programs (Cullen, 2013). He is also a staunch advocate for criminal justice reform pertaining to those with mental health issues and reforms involving the death penalty and sexual assaults on college campuses. Dr. Cullen's work

1. Dr. Francis T. Cullen (1951–) – Pioneer in the Contemporary School who advocates for reforms in recidivism among other topics.

has been instrumental in the Contemporary School on Criminological Theory, and he was awarded the Stockholm Prize in Criminology in 2022, one of the most prestigious honors in the field.

Figure 13: Dr. Freda Adler

Dr. Freda Adler[2](1934–) is the preeminent expert in gender perspective theory in criminality, specifically the Feminist Theory of Criminology. She is Professor Emeritus at Rutgers University in New Jersey. Dr. Adler has authored multiple books and journal articles on the subject of the gendering of criminology as well as contributed research to areas including international crime, drug use, and social control. During her career, Dr. Adler has advocated for an inclusive shift in the way gender, class, and race are perceived in the study of criminal behavior. She writes that "where once it was permissible simply to ignore women offenders and victims or to attribute female criminality to sexuality and pathology, now it is clear that no theory will be complete—will be truly 'general'—if it does not consider the role of gender in both women's and men's crime" (Adler, 2006, p. 231).

Figure 2.14: Dr. Carol Smart CBE

2. Dr. Freda Adler (1934–) – The preeminent expert in Feminist Theory of Criminology.

Dr. Carol Smart CBE[3] (1948–) is Professor Emerita of Sociology in the Morgan Centre for the Study of Relationships and Personal Life at the University of Manchester, UK. Like Dr. Adler, she has worked extensively in the field of Feminist Criminology while also conducting research in the field of divorce and children of divorced families. Dr. Smart published an article criticizing Classical and Contemporary criminologists for their theoretically and ideologically uniformed studies regarding female criminality (Smart, 1977). Her career has blossomed, and she has continued to champion the cause for a reimagining of the patriarchal authority of theoretical criminological development, having written scores of professional journal articles and books.

Figure 2.15: Dr. Kimberlé Crenshaw

Dr. Kimberlé Crenshaw[4] (1959–), an African American civil rights pioneer, scholar, and writer on feminist legal theory, race, and racism in the law, is a renowned professor at both UCLA School of Law and Columbia University Law School where she specializes in race and gender issues. Dr. Crenshaw has authored many articles and books on the topic of Intersectionality – how race, class, and gender interact to affect criminality. Her work has begun to transform criminological theory on the perspective of social justice and has continued to argue against the patriarchal paradigm of the criminal justice system as a whole and has

3. Dr. Carol Smart CBE (1948–) – British feminist criminologist specializing in divorce and children of divorced families.

4. Dr. Kimberlé Crenshaw (1959–) – African American civil rights pioneer, scholar, and writer on feminist legal theory.

advocated for a more diverse, equal, and inclusive discussion on criminal behavior causation theory development.

Figure 2.16: Dr. Patricia Hill Collins

Dr. Patricia Hill Collins[5] (1948–) is the Distinguished Professor Emerita at the University of Maryland where she specializes in research and scholarship examining issues of race, gender, and social class including sexuality and/or nation. Dr. Collins is a Social Theorist who proposed a theory of Sociology that advocated for the empowerment of sociological theory development from the perspective of African American women.

5. Dr. Patricia Hill Collins (1948–) – African American Social Theorist who specializes in race, class, and gender issues.

2.10 CRIMINOLOGICAL SCHOOLS AND THEIR THEORIES

Brandon Hamann

Each criminological school of theory produced its own renowned historical figures. They also produced their fair share of foundational theories that attempted to answer the questions of criminality: the who, what, when, where, how, and why of criminal behavior. This section will discuss some of those theories, but keep in mind that there are many more out there.

2.10.1 The Classical Theories

We begin with Thomas Hobbes. Remember he developed the concept of social contract, which theorized that humans were rational and had the capacity to consider the consequences of their actions. Social contract thinkers believed people would be willing to invest in laws if they believed those laws were created by the government to protect them (Fedorek, 2019). Social contract thinkers would also be willing to give up some of their own self-interests as long as everyone else did the same.

Building on Hobbes and other social contract thinkers at the time, humans were assumed to have free will. 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 seek 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 (Fedorek, 2019).

Cesare Beccaria was disgusted with how the courts treated the accused. He wanted the courts to apply a more fair and equal treatment to the convicted instead of the cruel and harsh sentencing practices of the time. This is where his concept of proportionality comes in – the punishment must fit the crime committed. Judges were the seat of power during the time of Beccaria, and many laws were made based on the decisions of those judges. Beccaria sought to change all of that, but the Catholic Church refused (Fedorek, 2019). 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 ideas may seem like common sense today, but they were considered radical at the time. Beccaria's works would later influence many future criminologists in their development of theories such as Deterrence Theory and Rational Choice Theory.

2.10.2 Positivist Theories

Cesare Lombroso said that he could tell who a criminal was just by taking body measurements. Charles Darwin theorized that some humans were evolutionary throwbacks to lesser developed humans. There were even Biological Positivists who claimed that physical features were also a prediction of intelligence. A few decades after Lombroso's theory, Charles Goring took Lombroso's ideas about physical differences and added mental deficiencies too. In his book *The English Convict* (1913), Goring argued that physical abnormalities were also evidence of mental degradations and subject to scientific experimentation for proof (Goring, 1913). The focus on mental qualities led to a new kind of biological positivism – the Intelligence Era.

Alfred Binet – the inventor of the IQ test – advocated for the idea of intelligence as a fluid mechanic. His argument was that human intelligence was not static and that we could gain and lose intelligence as we got older and more experienced. Binet wanted to evaluate school-aged youths to determine who was intellectually competent and who was not. Unfortunately, H. H. Goddard, an American psychologist, disagreed and believed that intelligence was fixed and could not change. Goddard performed IQ tests on students and used the results to categorize them based on their perceived "intelligence." Subsequently, those who underperformed were institutionalized, deported, or sterilized (Fedorek, 2019). Goddard's work on intellectual sterilization would lead to the U.S. Supreme Court ruling in *Buck v. Bell* (1927), which allowed for the continuation of a Virginia state law for the sexual sterilization of inmates of institutions to promote the health and safety of the patient and the welfare of society (*Buck v. Bell* 274 US 200 [1927], 2023).

Even after Lombroso, Goring, and Goddard, research into intelligence revealed that it was still as critical to criminality as race and social class in predicting behavior (Hirschi & Hindelang, 1977). This is because we measure and perceive intelligence based on our own perceptions and assumptions. How do we really measure intelligence? Is it general academic knowledge? Is someone "gifted" merely because they are academically so, or are there other considerations that could define the term? Is intelligence inherited? If a couple are having children and they are not mentally incapacitated, what does that mean for their children? What about the opposite? Does a mentally incapacitated individual mean that his/her offspring will be mentally deficient as well? There are also other questions, including those involving environmental influences on intelligence and cultural influences (Fedorek, 2019). Remember, Criminologists try to answer as many questions as possible.

That takes us then to criminal personalities. How do we explain sociopaths and psychopaths? In the section on Positivists, the Gluecks researched adolescent youths to determine if there was a relationship between personality types and criminal behavior. Their **Individual Trait Theory** pointed out that criminals differ

from non-criminals on a number of biological and psychological traits. These traits cause crime in interaction with the social environment. But having the personality traits that are linked to criminal behavior does not necessarily mean that one is going to become a criminal. What is important is how many of these personality traits are present in a person (Fedorek, 2019). You could be sitting next to someone in your classroom who possesses some of the same personality characteristics of a sociopath and you would never know, or you may have them and not know it.

The point is biology and psychology do play a role in how we interact with our environment and how we react to the laws that attempt to regulate behavior. Our environment also influences our behavior both psychologically and biologically. It is all an extremely complex process that is very difficult to understand.

2.10.3 The Chicago Theories

The Chicago School of Criminology is still highly influential in the field of Criminology almost 100 years after its introduction. When it started in the 1920s, it relied on the foundations of Classical and Positivist theories and expanded on them to take criminological theoretical development to a new level. Burgess, Parks, and McKenzie had postulated on the urban dynamic as a living organism and the environment it produced being ripe for criminal behavior based on Burgess's "Concentric Zone Model" (see Figure 2.8). As discussed in an earlier section, that model stated that criminal behavior was more likely within a "Zone of Transition" between the areas where people lived and worked.

Shaw and McKay, who were students of Park, discovered that within the zones of transition, there were properties that made them more likely to have higher rates of crime based on certain criteria. Their **Social Disorganization Theory** stated that crime in communities were caused because informal social controls broke down and criminal cultures emerged. They lack collective efficacy to fight crime and disorder. What does all of this mean? **Informal social controls** are those rules within a community that are unspoken: community pressures, neighborhood watches, religious groups, etc. These are the norms and values of a community that go beyond normal laws of a city/state/country. If a community does not do a good job of policing itself outside of the established laws, then it will have a higher risk of a criminal element and therefore a higher chance of criminality within its population. **Collective Efficacy** is the ability of that community to control the behavior of its population. If a community has low collective efficacy, then groups will splinter off that could potentially rebel against the majority and increase the risk of deviance within the community. Juveniles are especially susceptible to this type of activity as they will undoubtedly break off from the main group and form their own subcultural groups.

Once a criminal subculture is established within a community, it will attract like-minded individuals, and criminal behavior will increase within that community. This is the presumption of the **Differential Association Theory**, first theorized by Edwin Sutherland, another Chicago School Positivist. Sutherland

theorized that criminal behavior would become chronic and repeated if it was reinforced through interactions with antisocial subcultures. To put it more simply, criminal behavior was a learned activity from interactions with individuals who had motives and directions that were conducive to criminal deviance. Much like we try to find groups that are akin to our likes and hobbies, the same can be said for those who are more closely relatable due to those types of deviant behaviors as well. If you were to take a few minutes and think about all the subgroups in your school, you could certainly categorize individuals into specific groups: Jocks, Preps, Goths, Emos, Geeks/Nerds, Wannabes, Druggies, etc. The same can be said for the criminal subcultural groups who are differential to the main group and are more prone to breaking the rules set forth by the norm, like the Bloods, Crips, Latin Kings, MS-13, Yakuza, and the Triads, to name a few.

2.10.4 The Neoclassical Theories

This is where criminological theory really began to take off. The Classical, Positivist, and Chicago Schools laid down some great foundational works, and the Neoclassical theorists took off and ran with it. While the Classical theorists saw crime as a matter of the pursuit of self-interest in the absence of punishment, Positivists viewed crime as an adaptation of biological evolutions that could be measured through scientific experimentation. Chicagoists theorized crime as a manifestation of environmental influences, and the Neoclassical School argued that criminal behavior was specifically generated based on certain criteria and that at any given time, if the circumstances were right, crime would be highly indicative of that situation.

Taking Beccaria's formulation of criminal behavior as a risk/reward action, Cornish and Clarke theorized that criminality was indeed a **rational choice**. Crime was seen as a choice that was influenced by its costs and benefits and was more likely to be deterred if its costs were raised. Information about the costs and benefits of crime could be obtained by direct experiences with punishment and avoidance, and indirectly by observing others who offended. Through years of observation and experimentation, it was later concluded that while criminal behavior could be considered a rational choice, most deviant behavior was situational and the perceptions of the risk of violation of the law failed to influence a person's decision-making process but not their perception of the opportunity of the reward for the outcome of the criminal act (Piliavin, Gartner, Thornton, & Matsueda, 1986).

Remember, the Neoclassical School theorists decided to use the threat of punishment as a deterrent to crime rather than as a means to an end to crime. If a threat of punishment was severe enough to keep a crime from being committed, then a "rational" individual could theoretically make the choice to not commit that specific crime for fear of receiving a punishment that would not be in his/her/their "best interest." But that raises another question: "What is an appropriately proportionate punishment for a specific crime that would influence a rational person to not want to commit it?"

Which then takes us into the Human Ecology portion of the Neoclassical Theories. If you recall, Human

Ecology is the study of how the environment influences human behavior. It was first introduced to criminological theory by the Chicago School and later adapted by Felson and Cohen into their **Routine Activity Theory**, which states that changes in daily routines can affect crime rates. Think about what that means: as our technology has evolved and we have become more dependent on services to complete everyday tasks—banks, grocery stores, gas stations, clothing outlets, etc.—and as we as a society have begun to venture out into the great wide expanse of our world, we have also given ourselves up to the opportunity of unknowingly becoming the victims of crime. Our daily routines have increased our likelihood of being victims of such crimes as Armed Robbery, Carjacking, Purse Snatching, Kidnapping, Bank Robberies, Theft, Muggings, Assaults, and even Murder (Felson & Cohen, 1980). Our dependence on being out and about and our need for social interaction has also made us more prone to criminal activity to the point that more resources are being allocated to the public sector to try and ensure our safety now more than ever.

2.10.5 The Contemporary Theories

As we continue to build through the history of criminological theory development, we arrive at the Contemporary Section. The beauty of this particular part is that the theorists have the advantage of all of their forefathers' works to guide them in their deliberations. Couple that with advancements in medical/biological sciences, psychological/social sciences, technological advancements in statistical analyses, and historical context that has now spanned multiple centuries, and there is now a recipe ripe with ingredients to build new theories. Within this period, many new and exciting theories of crime causation have been introduced and continue to try and answer the ultimate question: "Why do people commit crime?"

One of the most explosive new theories of crime causation to come out of the Contemporary School came from James Q. Wilson and George L. Kelling. In 1982, they both published an article that theorized that crime was a byproduct of the physical aesthetics of a community. The more a neighborhood took care of its surroundings—buildings, parks, public spaces, etc.—the less inclined it would be to attract the criminal element (panhandlers, vagrants, thieves, vandals, drunks, and rowdy teenagers). They theorized and observed that the reverse was also true: whenever a community experienced a downturn in its physical appearance, the crime rate increased. This **"Broken Windows Theory"**—where "serious street crime flourishes in areas in which disorderly behavior goes unchecked" (Wilson & Kelling, 1982, p. 4)—was adapted from the Social Disorganization Theory of Shaw and McKay and has influences of Differential Association Theory from Sutherland. The main argument for Wilson and Kelling is informal social control – the ability of a community to regulate its own inhabitants despite formal law enforcement regulations. Recall back to Social Disorganization Theory and the use of these informal social controls: neighborhood watches, church groups, close-knit neighborhoods, and so forth. The strength of a community and its "collective efficacy" in keeping the grass cut, the streets clean, the parks free of litter, the storefronts clean, the street corners free of vagrants,

no prostitutes, no panhandlers, no drug use, no gangs, no broken windows—this is the hallmark of a safe neighborhood according to Wilson and Kelling.

Another key Contemporary Theory is **Labeling Theory**. This theory states that once a person is stigmatized by a label of "criminal," it is extremely difficult to remove that label from their persona regardless of the measures they take. Labeling Theory has many uses outside of the criminological field. Think about it: How many times have you "labeled" someone based off of a perceived action of that individual? How many times has someone "labeled" you? Are you the embodiment of that label, or are you more than just the description of that label? What would you do to remove the label from your perceived description of you as a person? In the world of crime causation, Labeling Theory excludes people from normal social activities simply by means of their previous antisocial behavior. People who become labeled as criminals become hardened in that role and typically will fall deeper into that label to the point where they no longer can identify with any other personality trait other than that of "criminal." In sociological terms, there are ascribed statuses and achieved statuses, those that are worked towards and those that are given. Labeling Theory can work in the same way.

Contemporary Theories have one major core theme that all the rest fail to take into consideration: gender. Every school of theoretical thought leading up to the Contemporary School has only observed and researched criminal behavior from the male point of view. It wasn't until the 1970s when Dr. Freda Adler introduced the Feminist Theory of crime causation to the discussion of criminality that Criminology began to think of causation from an entirely new perspective. The **Feminist Theory** simply states that crime cannot be understood without thinking about the role that women have to play in its causation. Crime is shaped based on varying social experiences between men and women. Focusing solely on the male perspective of the crime experience (patriarchy) completely overshadows the experiences of the female perspective and leaves out the opportunity to understand the role women have in the social framework of deviance. Women are certainly capable of being criminals, however the circumstances that lead them to becoming deviant can be different for them than it is for men. Furthermore, the higher risks of victimization for women must also be taken into consideration when the issue of rehabilitation treatments are being prescribed through the justice system.

Taking the Feminist Theory a step further, Dr. Kimberlé Crenshaw introduced her theory of **Intersectionality**, which posited that it was not enough that gender be considered with regards to criminal behavior, but also race and class. Criminal causation was a byproduct of discrimination and disadvantage created by systemic and institutionalized mechanisms meant to propel one dominant group over another. Prejudice, bias, and even racism were driving forces behind much of the causes of criminal behavior in many instances of non-majority groups, according to this theory. Criminologists needed to understand not only what it meant to be non-male, but also what it meant to be part of the non-majority group in order to fully grasp the inconsistency of opportunities in social experiences that could lead to a life of crime, according to the intersection of race, class, and gender.

And finally, the Contemporary School gave Criminologists the ability to take different theories of crime causation and marry them together in order to explain deviant behavior. Dr. Cullen initially developed this

Integration Theory – the use of components of other theories to create new ones to explain crime – because trying to generalize behavior into one specific causation model was proving to be problematic. If we looked at a trend of criminal behavior over a long period of time, we could see that one theory could not quantitatively explain that trend completely by itself. However, using Dr. Cullen's Integration Theory of Crime, criminologists could take multiple theories and use them interchangeably to fully grasp the phenomenon and more thoroughly explain the intricacies of crime causation within that specific occurrence.

Theory Exercise

Thinking about the different criminological theories you have read about in the previous sections, is there one that interests you the most? Are there more than one? Take a few minutes and write down a few main talking points about which theory or theories best describe your own personal experience with crime. Use as much personal information as you are comfortable with: family experience, personal experience, what you have read, what you have seen, etc. Then have someone list the different theories and how many times they are mentioned and tally them up.

Which one had the most mentions?

How many were able to integrate more than one theory into their listing?

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3. CRIMINAL LAW

Image description: Criminal law nameplate with gavel and block
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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:

- Identify the differences between a criminal wrong, a civil wrong, and a moral wrong
- Identify the many ways in which criminal law is classified
- Explain the many sources of substantive and procedural criminal law
- Explain the limits the US Constitution and Bill of Rights place on the ability to criminalize

conduct

Critical Thinking Questions

1. What makes a crime a crime, and how is it different from acts of deviance?
2. How do different levels of government (federal, state, and local) respond to criminal acts?
3. Who makes criminal laws in the United States?
4. What type of defenses might an accused person present in court to mitigate their culpability?
5. What are the phases of the criminal justice process, and what happens at each phase?
6. What protections are granted to us in the Constitution and Bill of Rights?

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https://louis.pressbooks.pub/criminaljustice/?p=62#h5p-7

3.1 FUNCTIONS AND LIMITATIONS OF LAW

Lore Rutz-Burri; Kate McLean; and Chantel Chauvin

Law is a formal means of social control. Society uses **laws** (rules designed to control citizen's behaviors, backed by the power of the state) so that people's 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, they are not considered "laws."

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 recognized the advantages of law in fostering social control, while identifying four major limitations of the law. First, she noted, the law often cannot gain community support without support of other social institutions (Kerper, 1979). (Consider, for example, the United States Supreme Court case *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 Southern states, and many decided to not follow the Court's ruling. 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 (Kerper, 1979, p.11).

Lippman also noted that the law does not always achieve its purposes of social control, dispute resolution, and social change, but instead, can harm society. He refers to this as the "dysfunctions of law." He writes, "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" (Lippman, 2015, p.11).

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 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; the law denies equal access to justice because of inability to pay for legal services; courts are reluctant to second-guess the decisions of political decision-makers, particularly in times of war and crisis; 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, the law may impede social change because it may limit the ability of individuals to use the law to vindicate their rights and liberties (Lippman, 2015, p.25).

Dysfunctions of law

Can you think of any examples that illustrate these "dysfunctions of law"?

The case of Cyntoia Brown may be one example. She was a 16-year-old sex trafficking victim who was sentenced to life for murdering her trafficker in 2004. Read more about her case and subsequent release in this article from ABC News.

3.2 CIVIL, CRIMINAL, AND MORAL WRONGS

Lore Rutz-Burri and Chantel Chauvin

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 cover 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 formal acts of **deviance** and are behaviors that harm society as a whole rather than one individual or entity specifically.

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When people violate a criminal law, there are generally sanctions that include incarceration and fines. A **crime** is an act, or a failure to act (an **act of omission**), that violates society's official/formal rules. If there is no formal rule set forth by the government, then there is no criminal action and that act would be considered deviance instead.

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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. See the table below for some examples.

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 programs 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 (although victims are allowed a unique voice in the U.S. criminal justice system). They also have the authority to hold the offender accountable for their actions, punish the offender, and/or attempt to rehabilitate the offender. 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 an alleged 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" (Gardner, 1985, p.7). 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 example of a moral wrong involves 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 actions 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, Nicole Brown, and her friend, Ronald Goldman (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. Torts, however, do not carry the weight of any potential criminal penalties and have a lower burden of proof—a preponderance of evidence—rather than the burden of beyond a reasonable doubt found in criminal cases.

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.

One or more interactive elements has been excluded from this version of the text. You can view them online here: https://louis.pressbooks.pub/criminaljustice/?p=65#oembed-3

3.3 SOURCES OF CRIMINAL LAW: FEDERAL AND STATE CONSTITUTIONS

Lore Rutz-Burri; Kate McLean; and Chantel Chauvin

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 which will be detailed in the next few chapter sections. 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. Moreover, some criminal law results from the work of administrative agencies, so you need to review state and federal administrative rules. Finally, criminal law that emerges from "case law" originates from appellate court opinions written by judges. These court opinions, called "decisions," are published in both official and unofficial reports (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).

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 constitutions may be interpreted differently. For example, a 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. (Click on the hyperlinks to see a copy of the Louisiana State Constitution of 1974 and the updated constitution as well as amendments to the 1974 constitution.)

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" (Feldmeier & Schmalleger, 2012). Reichel identified a three-step process by which countries can achieve rule of law (Reichel, 2018). 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."

3.4 SOURCES OF CRIMINAL LAW: STATUTES, ORDINANCES, AND OTHER LEGISLATIVE ENACTMENTS

Lore Rutz-Burri; Kate McLean; and Chantel Chauvin

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

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 and are a way to circumvent what can be a contentious legislative process. Most notably, this form of "direct democracy" has led to the decriminalization of marijuana in Washington, Oregon, Colorado, and Alaska (among other states)!

States' Authority to Pass Criminal Laws

States are sovereign and autonomous, and unless the Constitution takes away state power, a state has 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. Louisiana's substantive criminal laws can be found in Title 14 of the Louisiana Revised Statutes.

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.

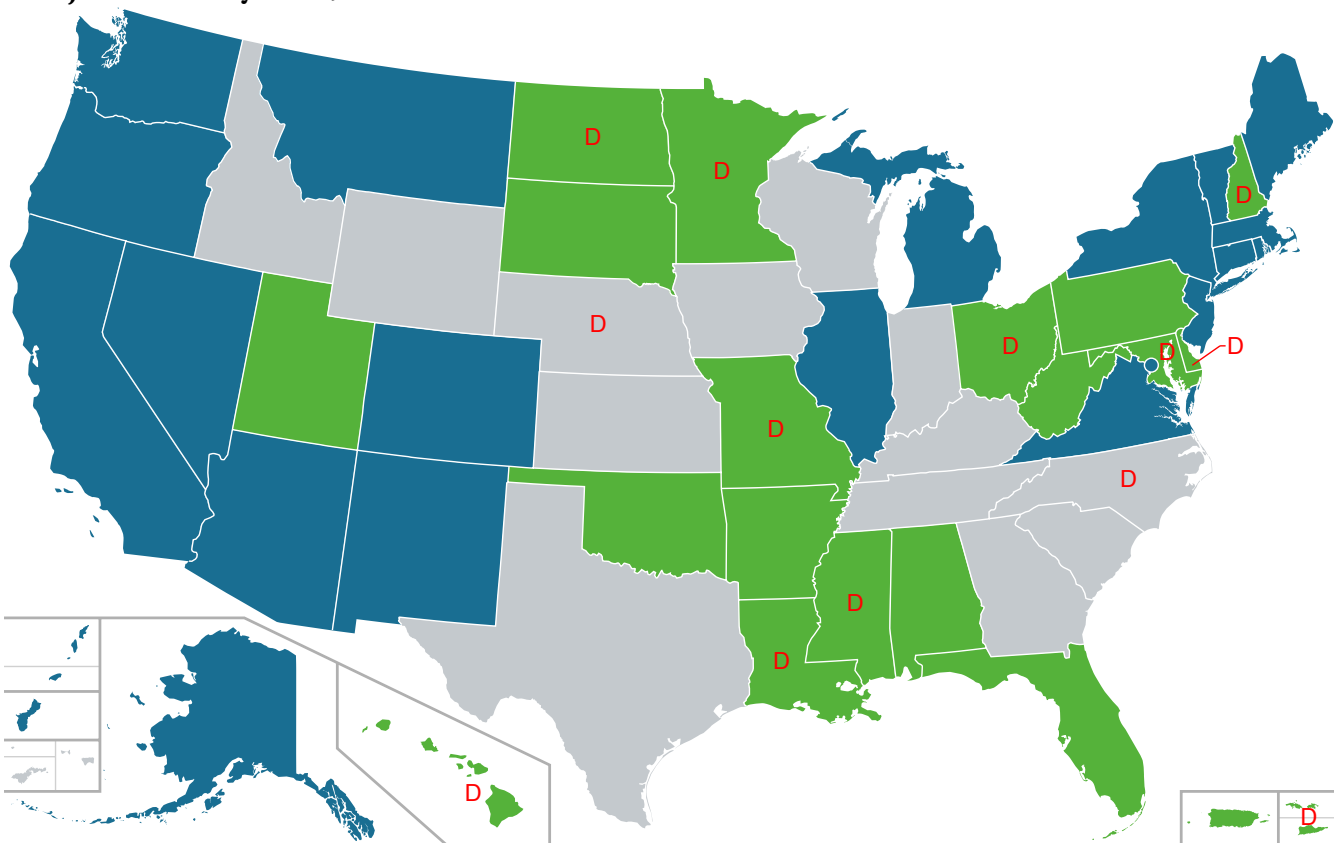
The implied powers of Congress are those that are deemed to be necessary and proper for carrying out all the enumerated powers. Article I, Section 8 of the Constitution states, "Congress shall have Power . . . to make laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution." The implied powers doctrine expands the 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. Substantive federal criminal laws can be found in Title 18 of the US Code.

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 the interests of 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 2022, 42 U.S. states and territories passed laws legalizing the possession of small quantities of marijuana for medicinal purposes for state residents. Since 2012, 19 states (and several territories) have passed laws through the initiative process legalizing recreational use and possession of small amounts of marijuana by adults. (See a full map, updated October 2022, below.) 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 rescinded the Obama-era restraint policies on marijuana prosecutions, and indicated their intentions 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, a policy continued by the Biden Administration.

Marijuana Laws by State, October 2022



Blue = Legal for recreational use, Green = Legal for medical use, Gray = Illegal, D = Decriminalized

Decriminalization and What That Means in Louisiana

Decriminalization means marijuana/cannabis remains illegal, but the legal system would not prosecute a person for possession under a specified amount. Instead, the penalties would range from no penalties at all to civil fines, drug education, or drug treatment.

Louisiana decriminalized the possession of small amounts marijuana in June 2021 with the passage Act No. 247 (House Bill No. 652) during the regular legislative session. Possession of up to 14 grams is now enforced by a summons (like a traffic ticket), not an arrest, that comes with a fine of up to $100. Act No. 247 does **not** reduce penalties for possessing over 14 grams or for possession with intent to distribute or sales of any amount. Those penalties remain harsh including the possibility of fines and/or imprisonment. Repeat offenses where the person is in possession of more than 14 grams see an escalation of penalties with each subsequent conviction.

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. It is designed to stimulate and assist U.S. state legislatures in updating and standardizing the penal law across the United States. The MPC has had a significant impact on the 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.

3.5 SOURCES OF LAW: ADMINISTRATIVE LAW, COMMON LAW, CASE LAW AND COURT RULES

Lore Rutz-Burri; Kate McLean; and Chantel Chauvin

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.

More information can be found on these topics by visiting the LSU Law Library's website. There are pages for Administrative Law and Federal Regulations and Louisiana Administrative Law.

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 (Kerper, 1979, p. 27). LaFave (2000, p. 70) 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.

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. Moreover, common law only stands where there exists no statutory (or legislative) law, and common law standards are always displaced by new legislative enactments. Finally, common law is subject to the same limitations posed by federal and state constitutions.

Louisiana and Its Unique Legal System

Common law legal systems are greatly based on precedent. The common law tradition emerged in England during the Middle Ages and was applied within British colonies. The common law is generally not codified, meaning there is no thorough compilation of legal rules and statutes. While common law jurisdictions rely on some scattered statutes, which are legislative decisions, it is largely based on **precedent**, meaning the judicial decisions that have already been made in similar cases. These precedents are maintained over time in court records and documented in collections of case law known as yearbooks and reports. The precedents to be applied in the decision of each new case are determined by the presiding judge. As a result, judges have an enormous role in shaping American and British law.

On the other hand, civil law systems, also called continental or Romano-Germanic legal systems, are found on all continents and cover about 60% of the world. They are based on concepts, categories, and rules derived from Roman law, with some influence of canon law, sometimes largely supplemented or modified by local custom or culture. The civil law tradition, though secularized over the centuries and placing more focus on individual freedom, promotes cooperation between human beings.

Louisiana is the only civil law jurisdiction in the United States. Louisiana gets its civil law legal system from its colonial past as a possession of two civil law countries, Spain and France. It may be better to think of Louisiana's legal system as a hybrid consisting of both civil and common law influences. Specifically, Louisiana's private law or substantive law between private parties, principally contracts and torts, is based on French and Spanish civil law as well as Roman law with some common law influences. Louisiana's criminal law is directly based on the United States' common law. Louisiana's administrative law is influenced by the administrative law of the United States' federal government.

For more information about Louisiana law, visit the LSU Law Library.

Judge-Made Law: Case Law

The term **case law** refers to legal rules announced in opinions written by appellate judges when deciding 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 judges 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 (*Vasquez v. Hillery*, 1986). 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 the defendant was 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 decides 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, then 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 (Kerper, 1979, pp. 47-49). 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" (Kerper, 1979, p. 49). *Stare decisis* provides stability in allowing individuals to count on the rules of law that have been applied in the past.

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. 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, to 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 a fatal blow, so murder statutes no longer include the year and a day rule. (More recently, the Court considered whether the social and economic opportunity enjoyed by women had significantly improved since the 1972 decision in *Roe v. Wade,* and in turn, whether the constitutional protection of abortion was warranted.) 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.

Court Rules of Procedure

The U.S. Supreme Court and state supreme courts make laws that regulate the procedures followed in the lower courts—both appellate and trial courts—in that jurisdiction. (See US Code Title 18 Part 2- Rules of Criminal Procedure and Louisiana Revised Statutes Title 15- Rules of Criminal Procedure.) 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 workgroup consisting of judges, trial court administrators, and representatives from the 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 the 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.

1. Because most states now codify their criminal laws by enacting statutes, start there.
    - Are there any criminal statutes that you do not think should be defined as criminal acts? What are they and why?
2. Then look to any case law that 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 if, in the past, the courts have found behavior similar to yours to be unlawful.
    - Are there any rulings you disagree with? Why do you disagree with the court?
3. Finally, look for legislative enactments and administrative rules within your state.
    - Are there any policies you disagree with? Why do you disagree?

3.6 CLASSIFICATIONS OF LAW

Lore Rutz-Burri; Kate McLean; and Chantel Chauvin

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, Louisiana 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 in 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 (namely murder), 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 (e.g., homicide, assault, kidnapping, and rape)
- Offenses against property (e.g., arson, burglary, and theft)
- Offenses against family (e.g., bigamy and adultery)
- Offenses against public administration (e.g., bribery, perjury, and escape)
- Offenses against public order and decency (e.g., fighting, breach of peace, disorderly conduct, public intoxication, riots, loitering, and 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 harm 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 versus 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 and 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 and incarceration for 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 for his own and therefore can assert a "mistake of fact" defense. In the Louisiana Revised Statutes, "Title 14, Criminal Law" is an example of substantive criminal laws.

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 or 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. In the Louisiana Revised Statutes, "Title 15, Criminal Procedure" is an example of criminal procedural laws.

3.7 SUBSTANTIVE LAW: DEFINING CRIMES, INCHOATE LIABILITY, AND ACCOMPLICE LIABILITY

Lore Rutz-Burri; Kate McLean; and Chantel Chauvin

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 a crime has been committed. Substantive law also includes the definitions of **inchoate crimes** ("incomplete" crimes, including conspiracy, solicitation, and attempts) and sets forth **accomplice liability** (when a person will be held responsible for working 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 and indicates the appropriate penalties and sentences for crimes.

Today, the great majority of substantive law has been codified and is found in states' particular criminal codes 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 then 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. This means that the government must prove that the defendant's behavior was either a voluntary act (i.e., 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 they possessed some item that they should not have. To meet the *mens rea* element, the state must prove that the defendant's act was triggered by criminal intent. (This is NOT the same thing as motive.) The elements of a specific crime 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 was a dwelling, or that the property value is at least a certain amount).

Occasionally, a statute will not specify 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 the 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). The most common strict liability crimes are traffic offenses, although there are others that imply more harm, namely statutory rape.

In the News: Can a Sleepwalker Act with Intent?

In 2007, a British man was accused of raping a 15-year-old girl; however, he maintained in his defense that he suffered from chronic and uncontrollable sleepwalking, amongst other forms of "para-somnia." The defendant testified, "I was drunk and went to sleep, then I woke up and my life was over. I was standing outside, completely naked, wondering what the hell I was doing there." Should a person who commits a crime while sleepwalking be held responsible? Read more on the outcome of the case in this ABC News article.

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 their 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. (Louisiana Revised Statutes 14:27 discusses attempts.) **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. (Louisiana Revised Statutes 14:26 discusses criminal conspiracy.) **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. (One example of a solicitation statute in the Louisiana Revised Statutes is 14:28.1, Solicitation for Murder.)

Accomplice Liability: Aiders and Abettors

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 possible 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 are treated as equally liable as the main perpetrator under the principle "the hand of one is the hand of them all." Accessories after the fact are typically charged with hindering prosecution or obstructing justice and are punished to a lesser extent than the main perpetrators. (Louisiana Revised Statutes include Principals [LRS 14:24] and Accessories after the fact [LRS 14:25].)

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 vicarious liability statutes but have at times upheld vicarious liability based upon an employer/employee relationship or a parent/child relationship.

3.8 SUBSTANTIVE LAW: DEFENSES

Kate McLean; Shanell Sanchez; and Chantel Chauvin

Defenses

Even if the government can prove all the elements of a crime, defendants may nevertheless raise defenses that result in their acquittal. **Defense** is a general term that includes perfect and imperfect defenses, affirmative and negative 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 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, they may simply argue 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 them 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 was rightfully theirs, 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 out any evidence or not.

An **affirmative defense** requires the defendant to submit evidence that will persuade the jury that they 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** cannot switch completely to the defendant. The state must ultimately bear this burden and prove the defendant's guilt by putting out enough evidence that the defendant has committed the crime by proving each and every material element of the crime; 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 proving 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 defenses. Justifications are affirmative defenses for which the defendant must produce some evidence. In most cases, the defendant must also convince the jury through a **preponderance of evidence** that his or her conduct was justified. For example, the defendant may claim that they acted in self-defense and at trial would need to call witnesses or introduce physical evidence that supports this claim. State law may vary with regards to how convinced the jury must be (called the standard of proof) or when the burden switches to the defendant to put out evidence, but all states generally require the defendant to carry at least some of the burden of proof in raising justification defenses. (Louisiana Revised Statutes 14:18-14:22 discuss 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... (legally insane, too young, intoxicated, mistaken, or under duress)." Excuses include insanity, diminished capacity, automatism, age, involuntary intoxication, duress, and mistake of fact, among others. 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. (Louisiana Revised Statutes 14:13-14:17 discuss various excuses recognized by Louisiana criminal law.)

How often are justifications and excuses used as defenses?

1. Look up one of the above "excuse" defenses and one of the "justification" defenses, and briefly summarize its requirements.

2. Then, see if you can find a recent or famous case that utilized your chosen "excuse" defense.
    - Did the defense work to acquit the defendant or allow the defendant to receive a reduced sentence?

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 prosecution process, or the state's lack of authority to bring the case. 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 them into committing the crime), the **statute of limitations** (a defense in which the defendant claims the government did not charge them within the required statutory period), and several types of **immunity** (a defense in which the defendant claims they are 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.

Watch: When is self-defense justified?

In 2013, Michigan resident Theodore Wafer was charged with the murder of Renisha McBride, a 19-year-old woman who had crashed her car near Wafer's house. Hearing McBride banging on his door at 4:42 AM, Wafer fired a shotgun through the door, fatally wounding the young woman. Watch Wafer testify at trial below. How would you vote as a member of the jury?

One or more interactive elements has been excluded from this version of the text. You can view them online here: https://louis.pressbooks.pub/criminaljustice/?p=78#oembed-1

3.9 PROCEDURAL LAW

Lore Rutz-Burri and Kate McLean

As noted previously, 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 sources of procedural law include the same sources that govern substantive criminal law: the Constitution, case 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 Amendments 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. The next sections will review the major due process protections set further in the Bill of Rights, as well as several landmark cases that elaborated on their practical meanings.

Phases of the Criminal Justice Process

Procedural law applies to every point in the criminal justice process, which can be broken down into five phases: the investigative phase, the pretrial 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, and identification procedures (for example, line-ups 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. They must also decide 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 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 that have been filed by the state); the process in which the court determines whether to release the defendant pretrial; 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); and any pretrial motions (such as motions to suppress illegally-seized evidence). During the pretrial phase, prosecutors

and defendants (through their defense attorneys) may engage in plea bargaining and will generally resolve the case before a trial is held.

Trial Phase

The trial phase is governed by procedural 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); the right of the defendant's **compulsory process** (to secure favorable testimony and evidence); the right of the defendant to cross-examine any witnesses or evidence presented by the government; fair trials free of prejudicial adverse pretrial 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 to be present, during their trial.

Sentencing Phase

The sentencing phase is governed by rules and laws concerning the constitutionality of different punishments; the 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 mitigating 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** (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** (an initial appeal which must be reviewed by an appellate court) and right to file a discretionary appeal; and the defendant's right to have the assistance of counsel in filing either. 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** (similar to a habeas corpus suit, but one which can be filed whether or not the defendant is in custody). The post-conviction phase also includes any probation and parole revocation hearings.

3.10 THE CONSTITUTION

Chantel Chauvin

Constitutional Protections

The U.S. Constitution was originally adopted in 1787. The text of the Constitution contains a handful of procedural justice guarantees to protect citizens from government overreach.

Procedural justice guarantees found within the Constitution include

- *Habeas Corpus*
- Bills of Attainder
- *Ex Post Facto* Laws
- Trial by Jury
- Trial for Treason

Literally, ***habeas corpus*** is Latin for "you should have the body". A **writ of *habeas corpus*** is a court order directed at someone who has custody of a person ordering the release of that person because his or her incarceration was achieved through unlawful processes. Sometimes referred to as "The Great Writ," *habeas corpus* originated in the courts of England as a means of curbing the authority of the king(Sholar, 2007). Its importance grew over the centuries in England, and by the late 1700s, it was deemed so important that the framers of the U.S. Constitution included it in the first article. Article I, Section 9, Clause 2 provides that "the Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Since that time, it has been interpreted more broadly than it ever was in England. The Great Writ is considered "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action" (Harris v. Nelson, 1969, pp. 290–291). The writ of *habeas corpus* is an important form of procedural justice because it provides the mechanism to challenge unlawful incarcerations (Owen, Fradella, Burke, & Jopkins, 2019).

A **bill of attainder** is a legislative act declaring someone guilty of a crime and imposing punishment in absence of a trial. Because the determination of guilt is delegated only to the judicial system, the Constitution prohibits Congress and states from passing bills of attainder. This is to ensure that all people will have their day in court and that courts will hold all responsibility for determining whether or not persons are guilty based on evidence introduced at trial. This is important to the concept of procedural justice because it prevents "legislative oppression of those politically opposed to the majority in control" (Pound, [1930] 1998, p. 133). Guilt will only be adduced after a fair judicial process that accounts for relevant evidence (Owen, et. al, 2019).

The Constitution also prohibits ***ex post facto* laws**. An *ex post facto* law is any law that punishes an act that

was not criminal when it was committed. The prohibition of *ex post facto* laws ensures that guilt can be assigned only after offenders have the opportunity to know their behavior was criminalized (Owen, et. al, 2019).

The Constitution guarantees that **trials for all federal crimes** (other than impeachment) shall be by jury. The Supreme Court has ruled that this right does not apply to petty crimes, military tribunals, or when the defendant has waived the right to a trial by jury. This right was expanded upon in the Sixth Amendment, discussed later in this chapter in greater detail (Owen, et. al, 2019).

The only crime defined in the U.S. Constitution (Article III, Section 3, Clause 1) is **treason**: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." The framers were concerned that simply espousing unpopular views in a new democracy might be considered treasonous. They defined the substantive elements of treason and procedure for proving it to ensure that simple speech could not be interpreted as the crime of treason; the First Amendment's protection of free speech was not yet in existence (Owen, et. al, 2019).

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 Bill of Rights also places certain limits on what behaviors may or may not be criminalized by the government. These limitations are covered in the First and Second Amendments.

Limitations Found in the "Penumbra" of the Constitution

Sometimes the Constitution doesn't explicitly state a 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." (381 U.S. at 484-485)

For the past 57 years, legislatures were effectively prohibited from making laws that allow the government to invade people's privacy, even though no specific amendment can be pointed to. In fact, from 1965 to 2015, the Supreme Court decided many landmark cases that referenced the right to privacy. Specifically, the Court 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 *Lawrence v. Texas,* 539 U.S. 558 [2003; the right of adults to engage in consensual sexual contact]). The right to privacy also supported the Court's decision in *Obergefell v. Hodges* (2015), which required states to license and recognize same-sex marriages.

However, the existence of a constitutional right to privacy suffered a dramatic setback in June 2022, when the Supreme Court overturned its own precedent in *Roe v. Wade* (1972), deciding that the state of Mississippi could restrict access to abortion. While the written decision in *Dobbs v. Jackson Women's Health Organization* (2022) claims that other freedoms underwritten by the right to privacy (such as same-sex marriage, interracial marriage, and access to contraception) were not at risk, legal scholars generally agree that these guarantees may also be subject to judicial revision.

3.11 THE FIRST AMENDMENT

Chantel Chauvin

First Amendment Protections

The First Amendment to the U.S. Constitution states, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." This amendment provides several protections that place limits on the power of government to criminalize speech, religious practices, and the ability to assemble and demonstrate peacefully.

The free speech protections of the First Amendment generally allow people to speak or write about any topic, and the First Amendment even protects symbolic speech. Symbolic speech is conduct that expresses an idea or opinion, like wearing certain clothes, accessorizing using buttons or armbands (e.g., Tinker v. Des Moines, 1969), or picketing or marching in a parade. Even symbolic hate speech, like burning a cross, may receive some First Amendment protection as symbolic speech depending on the circumstances under which such an act occurs. For example, in Texas v. Johnson (1989), the Court held that the law infringed upon people's right to express their dissatisfaction with the government through the symbolic speech embodied in the action of burning the flag. In light of the First Amendment, it is rare for a law to ban any type of protected speech or expression (Owen, et. al, 2019).

As with all constitutional rights, there are limits to free speech, and certain categories of speech receive no First Amendment protection, like libel and slander, falsehoods that damage another person's reputation, obscenity, and the use of words "directed to inciting or producing imminent lawless action" (Brandenburg v. Ohio, 1969, p. 447). Moreover, limits may be placed on the time, place, and manner in which the rights to free speech are exercised in order to prevent fires, health hazards, obstructions or occupations of public buildings, or traffic problems. For example, no one has the right to "insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech" (Cox v. Louisiana, 1965, p. 554) or yell "fire" in a crowded movie theater (Owen, et. al, 2019).

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The First Amendment also generally forbids censorship or other restraints on speech or expression by the media. There are, however, limits to this protection, like in cases involving defamation or obscenity. For

example, the FCC can bar the broadcast of profane language and sexually explicit material on public airways that may be accessed by children. In addition, dissemination of information may be prohibited if it concerns a matter of national security. And, as with free speech, the time, place, and manner in which broadcasts are made can be limited (Owen, et. al, 2019).

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The First Amendment contains two clauses relevant to the freedom of religion: the establishment clause and the free exercise clause. The establishment clause provides a wall of separation between church and state and prevents local, state, and federal governments from enacting any law that establishes an official church or favoring one religion over another. For example, laws that criminalized failure to go to weekly religious services or failure to donate money to a religious organization would be unconstitutional exercises of the state's police power in light of the protections of the Establishment Clause (Owen, et. al, 2019).

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The free exercise clause protects people's rights to act on their beliefs. For instance, the Supreme Court struck down a local ordinance that prohibited the ritual killing of animals (such as "chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles," some of which are cooked and then consumed after sacrifice) because it infringed upon the religious beliefs of a group that practices animal sacrifice (Church of Lukumi Babalu Aye v. City of Hialeah, 1993, p. 525). The freedom to act on religious beliefs is not absolute, however. No one may violate otherwise valid laws in the name of freely practicing religion. For example, (see Reynolds v. United States, 1878) laws criminalizing polygamy have been upheld even if one's religion condones having multiple spouses (Owen, et. al, 2019).

3.12 THE SECOND AMENDMENT

Chantel Chauvin

Second Amendment Protections

The Second Amendment to the US Constitution states, "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." The Second Amendment places substantive limits on laws regulating firearms.

Laws banning the possession of handguns by law-abiding citizens are presumed to be unconstitutional, since they interfere with the "the core lawful purpose of self-defense" (District of Columbia v. Heller, 2008, p. 630). The Heller case specifically endorsed the legality of certain gun control regulations, such as bans on firearm possession by convicted felons and people with serious mental illnesses, bans on carrying firearms "in sensitive places such as schools and government buildings," bans on carrying concealed weapons, and regulations limiting the conditions and qualifications on the commercial sale of firearms (District of Columbia v. Heller, 2008, p. 626). The constitutionality of a variety of other gun-related laws has yet to be decided by the U.S. Supreme Court. Like other constitutional rights, however, the right to bear arms is not unlimited. The Second Amendment does not imply a right to possess weapons suitable for warfare, rather than self-defense, such as bazookas, bombs, grenades, tanks, or biological, chemical, or nuclear weapons (Owen, et. al, 2019).

3.13 THE FOURTH AMENDMENT

Kate McLean and Chantel Chauvin

Fourth Amendment Protections

The Fourth Amendment states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Fourth Amendment limits the government's ability to engage in searches and seizures.

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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. In practice, there are many exceptions to the "warrant rule." 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. While officers are generally empowered to use their discretion in executing a warrantless search, there are several broad scenarios in which the courts have recognized that the "warrant rule" does not apply, as securing a warrant might compromise the officer's safety, the public's safety, or the integrity of criminal evidence. In order to execute any warrantless search, of course, police must first be able to articulate **probable cause.**

While the specific search parameters vary by state, police officers are permitted to search an individual who is being arrested. This is known as a **"search incident to a lawful arrest" (SILA)**. SILA searches are typically limited to the immediate area around the individual—essentially their person (body, clothing) and anything within reaching distance of their person (in some cases, some compartments of their car or a bag/container in their vicinity). SILA searches are intended to protect police officers from an arrestee who may have a concealed weapon or who could potentially destroy evidence.

Suspected offenders who are detained in their cars, or who are believed to be concealing evidence within

their vehicles, may also be subject to warrantless searches. This is known as the **"automobile exception"** (*Carroll v. United States,* 1925). Due to their inherent capacity for movement, vehicles represent a unique threat to any evidence contained within; in the time it takes officers to secure a warrant, the vehicle's owner—and criminal suspect—may move the vehicle, causing a loss of evidence. For this reason, if police have probable cause to believe that a vehicle contains criminal contraband or was used in the perpetration of a crime, they may conduct a warrantless search and seizure. The term "automobile exception" is in fact rather misleading, as this exception applies to any vehicle that can be moved, including a mobile home (provided it is still on wheels and not connected to a power source).

Another common exception to the warrant rule concerns the seizure of evidence that is in **"plain view."** In other words, if a police officer can clearly see criminal contraband, or evidence that appears to be implicated in the commission of a crime, they are permitted to seize it without first going to a judge. "Plain view doctrine" does have some limitations, however. Namely, in order to legally seize evidence in plain view, an officer must be in the area where it is located lawfully, and their observation must be inadvertent. In other words, police are not allowed to bring a stepladder onto your property so that they may peer through your windows (without a warrant, that is)! Case law has effectively extended plain view doctrine to include other senses, such as plain feel, plain hearing, and plain smell. How do you think these "doctrines" may be implemented in practice?

A final exception (that we'll review) to the warrant rule is **consent**. This is perhaps the most straightforward "loophole" within the Fourth Amendment and, at the same time, the one of which we are least aware. Simply put, if an individual consents to a search—of their person, bag, car, or house—then an officer does not require a warrant, so long as probable cause can be articulated. While consent searches may largely be conducted in good faith, we should be aware of circumstances where individuals do not wholly recognize what they are consenting to. For example, how might you react if a police officer asked, "Do you mind if I search you? You don't have anything to hide, do you?" Moreover, the courts have ruled that consent can be implied, and a *lack* of consent must be explicitly and continuously asserted.

Landmark Case: *Mapp v. Ohio*

In 1957, police officers appeared at the home of Dollree Mapp, demanding to search for a male suspect in a bombing. Mapp refused and requested to see a search warrant. When police returned shortly thereafter, they refused to show her a warrant, instead waving a piece of paper that Mapp believed to be blank. While failing to find their suspect, police did locate pornographic material in the house and proceeded to arrest Mapp, who was sentenced to 7 years in prison. However, Mapp's conviction was overturned by the Supreme Court, which incorporated the "exclusionary rule" to states in their 1961 ruling. The "exclusionary rule" states that any evidence seized

illegally—without a search warrant or valid exception to the warrant rule—cannot be used by the prosecution in court.

Read up on other landmark cases concerning the Fourth Amendment here: *Carroll vs. United States*, *Terry v. Ohio*, *Riley v. California*

3.14 THE FIFTH AMENDMENT

Kate McLean and Chantel Chauvin

Fifth Amendment Protections

The Fifth Amendment states, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Fifth Amendment is often referred to the "due process" amendment, in that it contains multiple clauses that aim to preserve criminal defendants against unwarranted, overzealous, or illegal prosecution by the state.

"The Fifth" is probably most known for its protection against **self-incrimination** (having to disclose information that could ultimately harm you), stating 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 by the states—but most states do use a grand jury at least for some types of cases. (For example, in Louisiana, prosecutors can use grand juries in any criminal case but are required to use grand juries to seek an indictment in felony cases that carry the potential sentence of life in prison or the death penalty. When a grand jury is used, the grand jury must indict [issue a true bill] against the offender before the case can move on to trial.) The Fifth Amendment also entitles citizens to be prosecuted by the federal government to the due process of law. This is discussed more fully as a Fourteenth Amendment right in subsequent pages.

Landmark Case: *Miranda v. Arizona*

In 1963, Phoenix resident Ernesto Miranda was arrested on suspicion of rape. Upon being taken to the station house, he was interrogated for two hours before confessing to the rape. At trial, his lawyer characterized his confession as coerced, given that Miranda was not advised of his right to have a lawyer present, nor of his right to decline self-incriminating testimony. While the trial court convicted and sentenced Miranda to up to thirty years in prison, his conviction was nullified by the Supreme Court, who found that Miranda's Fifth Amendment rights had been violated. The majority opinion, penned by Chief Justice Earl Warren, may clearly be seen as giving rise to the "Miranda rights" that we all take for granted today:

> The person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him.

While *Miranda v. Arizona* is now regarded as a landmark case that handed essential protections to citizens, the court's decision was hugely controversial at the time— seen as empowering potentially dangerous criminals; in fact, four out of nine Supreme Court justices dissented. Interestingly, Miranda was re-convicted of the same rape in 1967, ultimately serving five years of prison time.

Want to learn more about *Miranda?* Check out a great podcast on the case from Crime and Precedents.

Read up on other landmark cases concerning the Fifth Amendment: *Frazier v. Cupp, Berghuis v. Thompkins*

3.15 THE SIXTH AMENDMENT

Chantel Chauvin and Lore Rutz-Burri

Sixth Amendment Protections

The Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." The Sixth Amendment guarantees several protections to a criminal defendant in court—namely, 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.

At the same time, we must consider that the text of the Sixth Amendment does not include the many limitations that are imposed upon these rights in practice, nor does it specify the meaning of a **"speedy" trial**. In fact, a "speedy" trial time frame may be different from state to state and between state and federal court. Following the Speedy Trial Act of 1974, federal prosecutors essentially have 100 days to get to trial following the arrest of an individual on federal charges—30 days after the arrest to secure an indictment and then 70 days post-indictment to begin trial. (Interestingly, Congress has also passed legislation imposing a minimum time from arrest to trial—30 days—so that defendants have adequate time to prepare.) The 100-day window imposed by the Speedy Trial Act, however, does not account for delays that are imposed by the defendant. (See more conditions by reading up on *Barker v. Wingo*, linked below.)

The Speedy Trial Act does *not* apply to cases filed in state courts. However, many states do have regulations for speedy trials. In Louisiana, individuals who are charged with a felony criminal offense must be brought to trial within 180 days of their arrest; moreover, if the defendant is held in pre-trial custody, the speedy trial clock is shortened to only 120 days. Of course, the vast majority of cases in both state and federal court are dealt with through plea bargaining, and thus never get to trial. (More details about the right to a speedy trial in Louisiana can be found in the Louisiana Laws Code of Criminal Procedure Article 701.)

Landmark Case: *Gideon v. Wainwright*

In 1961, Clarence Earl Gideon was arrested for petty larceny in Panama City, Florida, after an unknown witness reported seeing him leave the Bay Harbor Pool Room early in the morning carrying a bottle of wine, Coca-Cola, and change. Brought before a judge, Gideon stated that he could not afford a lawyer but believed that the state was responsible for providing him with an attorney. In fact, Florida only extended indigent defense—a lawyer appointed by and paid for by the state—for individuals facing capital offenses. After conviction, Gideon appealed his case from prison, citing a violation of his Sixth Amendment rights—and the Supreme Court agreed. The Court's decision in *Gideon* officially incorporated the Sixth Amendment to states, extending the right to indigent defense (a public or court-appointed defender) to anyone facing criminal charges that could be punished with six months or more of incarceration.

Gideon v. Wainwright also has a podcast episode from the *Washington Post*'s podcast Constitutional.

Read up on more landmark cases concerning the Sixth Amendment here: *Barker v. Wingo*; *Strunk v. United States.*

3.16 THE FOURTEENTH AMENDMENT

Chantel Chauvin and Kate McLean

Fourteenth Amendment Protections

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The Fourteenth Amendment (Section 1) states, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fourteenth Amendment mandates that states do not deny their citizens' **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 could interpret and apply the law because such a law would be considered void due to vagueness.

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Arguably, no other provision in the Constitution is more important to procedural justice than the Fourteenth Amendment because it guarantees due process and equal protection. The due process clause was partially responsible for making nearly all of the criminal procedural rights guaranteed in the Bill of Rights applicable to the states (e.g., Gitlow v. New York, 1925). Additionally, the Due Process Clause has been interpreted as providing an independent source for other procedural justice rights that are not specifically enumerated,

or listed, in the Constitution or Bill of Rights. For example, requiring proof beyond a reasonable doubt for criminal convictions is grounded in the Due Process Clause (In re Winship, 1970). Forbidding a state from compelling a criminal defendant to stand trial before a jury while dressed in identifiable prison clothes is another example (Estelle v. Williams, 1976). The due process clause has also been interpreted as the basis for providing substantive rights not explicitly guaranteed in the Constitution, like the right to privacy, the right of the mentally ill to be free from undue restraints, and the right to refuse medical treatment (Owen, et. al, 2019).

The Fourteenth Amendment also guarantees **equal protection of the law**. Generally, legislatures cannot make laws that treat people differently. Contrary to popular belief, the Equal Protection Clause does not mandate that the law treat everyone the same. Rather, the equal protection clause serves to guarantee equality in requiring that the law treat similarly situated people in a similar way (excluding discrimination based on characteristics like race, ethnicity, and religion). If, however, people are not similarly situated, then the law may treat people differently. Consider, for example, that the law may deprive people convicted of certain felony offenses of a variety of rights and privileges that are available to other people who are not similarly situated (that is, those without felony convictions), such as voting rights, the right to lawfully possess a firearm, and the ability to be licensed in certain professions (Owen, et. al, 2019).

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When legislatures attempt to pass laws that treat people differently based on sex, for example, then the court reviews the law with heightened scrutiny—the law must be designed to achieve an important government interest. For example, laws that imply differential treatment by sex must be based on actual physiological differences and not archaic stereotypes. When legislatures attempt to pass laws that treat people differently based upon their race or ethnicity, then they have to have a more compelling reason to do so, and even then, the courts, employing "strict scrutiny," are likely to declare such laws unconstitutional.

In fact, the Fourteenth Amendment is wary of differential treatment at all stages of the criminal justice process, from arrest to punishment. However, this does not mean that the courts, in their interpretation of the Fourteenth, have categorically prohibited criminal justice strategies that result in different outcomes on the basis of sex or race. In fact, some of the most prominent Fourteenth Amendment landmark cases have legitimized the ability of different criminal justice actors to consider demographic traits. For example, in the 1975 case *United States v. Brignoni-Ponce*, the Supreme Court ruled, unanimously, that law enforcement (in this case, Border Patrol) could not stop a vehicle, or execute a search, based solely on the presumed ethnicity or citizenship of the vehicle's occupants. On its surface, this decision appears to outlaw racial profiling; yet, in its entirety, the Court's decision validates the relevance of presumed ethnicity or citizenship in officers' decisions

to stop and search— as long as the suspect's appearance is not the *only* "articulable fact" underlying reasonable suspicion or probable cause.

Other Court decisions interpreting the Fourteenth Amendment have made it more difficult for individual defendants or (groups of defendants) to argue that illegal discrimination led to their differential treatment in the criminal justice system. Most notably, the Supreme Court erected a nearly insurmountable standard for proving racial discrimination in *McCleskey vs. Kemp* (1987), discussed below.

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 after the Civil War, given the recalcitrance of states in the former Confederacy. Section 1 of the Fourteenth Amendment prohibits 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" (*Palko v. Connecticut*, 1937). 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 (*Gitlow v. New York*, 1925). 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.

Landmark Case: *McCleskey v. Kemp*

In 1987, Warren McCleskey was convicted in the murder of a police officer and sentenced to death. However, McCleskey appealed his sentence on the basis of racially-disparate treatment; specifically, his attorney presented powerful data on racial differences in the imposition of the death penalty in Georgia. According to the "Baldus Study," individuals convicted of homicide in Georgia were four times as likely to receive the death penalty if they had killed white victims compared to Black victims. Yet the justices did not find these statistics sufficiently compelling to overturn McCluskey's sentence, instead writing, "Apparent disparities in sentencing are an inevitable part of our criminal justice system." Moreover, the *McCleskey* decision produced a new standard for proving racial discrimination in the criminal justice system, requiring appellants to produce evidence of conscious race bias—proof that police officers, prosecutors, or judges, for example, had intended to treat an individual differently on the basis of their race. For this reason, *McCleskey v. Kemp* is often lamented as a case that has made the rectification of racial inequalities in the justice system extraordinarily difficult.

Just one more podcast, this time with the Death Penalty Information Center.

Read up on more landmark cases concerning the 14th Amendment here: *Purkett v. Elem.*

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4: POLICING

Image description: New Orleans Police Department SUV patrol unit parked on side of street in New Orleans, Louisiana
Image credit: Photo of New Orleans Police Department SUV patrol unit by Pamela Simek, 2023 / License: Public Domain

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:

- Explain the history of policing as it relates to current policing
- List the different parts of the history of policing
- Recall the different eras of policing and identify the important parts of each era
- Define and understand patterns of police corruption
- Critically assess law enforcement recruitment strategies and training requirements
- Identify the laws and court rulings surrounding police use of violence

An interactive H5P element has been excluded from this version of the text. You can view it online here:
https://louis.pressbooks.pub/criminaljustice/?p=90#h5p-8

4.1 HISTORY OF POLICING IN NEW ORLEANS

Franklyn Scott

The Big Easy, as New Orleans is affectionately known, has a vivid and continuous history; however, the city is also known for violence and high crime rates, with many instances of police corruption and abuse of power. In exploring New Orleans' history, a uniqueness emerged. The city of New Orleans encompasses characteristics of various cities in America as well as the entire Southern region.

Dennis Rousey (1984) is extremely cognizant of both the uniqueness and representation in his recollection of the police in all cities as being the most noticeable organization. There have not been many publications on any particular police department in many years; in the 1980s, the discussion on the topic was synthesized. Police pioneers' historians Roger Lane and Eric Monkkonen focused on criminality and violence. Rousey noted that past historians have briefly discussed cities in the South, noting some of their uniqueness; however, none have ever conducted an extensive study of any particular police department for an extended period of time. Rousey provides in-depth insight into the urban South and New Orleans. His analysis of police use of deadly force with firearms is deemed the most detailed and perceptive given, also finding high rates of police-on-police shootings and nonqualified police officers.

The author provides a description of the development of the New Orleans police department in five phases, a procedure that includes considerable regression and retreat as it progresses. The first phase started in early 1805 as the development of a military-, gendarmerie-styled police department that focused its time and energy on control of the enormous population of slaves. This type of policing was similar to the styles in Mobile, Charleston, Richmond, and Savannah. Rousey argues that the salaried, uniformed, and armed police forces organized by the city mostly operating in the evening were a representation of the "first contemporary styled police." The military-styled police officers were equipped with muskets and sabers, were commanded by officers and marched in a squad, and lived in the barracks. Northeastern cities are often credited with the revolutionizing methods of modern policing as opposed to the predated police as night watchmen. The author's thesis is powerful which causes us to reconsider the policing origins and recounting the influential connection amid racial domination and social control.

The author asserts that crime prevention by way of omnipresence was a vital concept of modern policing; however, the gendarmes did not exemplify this concept. They did not walk the beat as regulated by patrol, and most daily patrolling was completed by detectives that issued warrants through the courts. The gendarmes' purposefulness was restricted to controlling the possible slave criminality and rebellion.

The author believes that due to the popularity of the Jacksonian government, decreased population of

slaves, and an increase in the ethical conflicts in the United States, including entry points of immigrants and an additional city port, the gendarmes were found to be too militant by city officials. The gendarmes were abolished in favor of a more civilian-styled system, which included patrol forces that operated day and night without deadly weapons and uniforms. New York adopted this system in 1845, which showed that New Orleans once again was ahead of the Northeast by several years. Within weeks of this plan's adoption, the city was divided into three autonomous municipalities (allowing self-governing of mostly American and French citizens) with different police departments, basically invalidating the efficacy that could have been provided by the new system. Both had similarities in municipality forces; however, the conflicts of policies and jurisdictions unavoidably rose. The centralized directions of the police forces were lost, and a problem of inmates fleeing one municipality to another was one of the inadequacies created by the partition.

The author declares that by 1852, finally the city and the police were reintegrated. Nativists maintained control in the city for a longer period than other areas. As with other cities, the police force was extremely immersed in partisan politics. By the 1850s, the Nativists decreased in numbers while Irish cops became prominent figures in New Orleans and New York. Nativists resumed their post when the Democrats resumed municipalities power. The city had the reputation of being hell on earth during the 1850s, experienced military occupation disassembly during the 1860s, a short time of ex-Confederate domination of police during the infamous 1866 race riot, and the obligation of a new racial integration of the police force during the Reconstruction era.

The author points out that although this police force was organized at the state-level like other cities' metropolitan police, this police force was considered the best during this time; surely it represented black people and their role in the city. Certainly, as did other organizations of Reconstruction era, the legitimacy of the metropolitans was void in the opinions of whites in the South, who concocted many methods of resistance to the force, including failure to pay taxes and confrontations involving weapons. During the Louisiana redemption of 1877 and the federal troops' removal, control of the police was returned to the Democrats, who significantly decreased the police force, maintained low salaries, and placed the police in the middle of the political conflict of the partisans. Of course, blacks experienced what would be expected by Southern police officers for generations. In 1888, the force was under civil service ruling, with minimal effects on improving the qualities of retention and recruitment, but arrest rates were mainly due to blacks accused of committing minor offenses; signs of regression were shown in the 1890s regarding increased ethical and racially decreased social service commitment.

The author admits that though many in New Orleans did not deserve better police, some did deserve better. Sadly, this still holds true today. The author's account is barely whiggish; he notes that institutional regression exists, and institutions can become victims of forceful political powers that cannot be escaped.

Rousey, D. C. (1984). Cops and guns: Police use of deadly force in nineteenth-century New Orleans. *Am. J. Legal Hist.*, *28*, 41.

Racial Profiling

Many African Americans report being racially profiled. Ponder this article from New York City as Watchdog groups investigate racial profiling by the New York Police Department. The Civilian Complaint Review Board is able to investigate claims of racial profiling as well as make recommendations for disciplinary actions. The review will begin with the examination of incidents involving body cameras being turned off. Click here to read the article.

4.2 SIR ROBERT PEEL

Tiffany Morey; Kate McLean; and Franklyn Scott

Developments in 19th-century England heavily influenced the history of policing in the United States. Not only did municipal law enforcement radically change for the first time in over six centuries, but **Sir Robert Peel** set the stage for what is known today as modern policing. Home Secretary for the United Kingdom from 1828 to 1830, Peel believed that policing needed to be restructured in order to become effective. In 1829 he pushed the Metropolitan Police Act, which created the first British police force, and what we now recognize as the first modern police force. [1] In recognition of his influence, officers of the London Metropolitan Police became known as "bobbies."

The New York City Police Department was the first American police department to follow the London Metropolitan Police Department model. The establishment of police departments in various municipalities was due to the increase in urbanism, crime rates, and public discontentment.

The New Orleans Police Department (NOPD) was established in 1852 due to the incorporation of three autonomously functioning police departments. The creation of the NOPD occurred during massive restructuring that changed all levels of the city of New Orleans' government.

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.” Peel did not himself codify these principles, but rather, scholars who have studied his work and writings have identified these mandates as essential to his policing philosophy.

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]

Are these principles largely in line with what we expect of police today? Which principles do we take for granted, and which still seem aspirational (or like something we continue to strive for)?

2. Cordner, G., Novak, K., Roberg, R., & Smith, B., (2017). *Police & Society.* New York: Oxford University Press.

4.3 LEVELS OF POLICING AND ROLE OF POLICE

Tiffany Morey and Franklyn Scott

Section 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 for law enforcement positions at the federal, state, county, and local levels
- Explain what a state police officer's main objectives are
- Describe the difference between sworn and civilian roles
- List several divisions that a sworn officer can be promoted to
- List several departments in which a civilian can work within a law enforcement agency
- Discuss how 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?

Policing Types

It is an exciting time for those entering the law enforcement field. All too often, candidates only think of local police departments, i.e., city or county agencies, while the options available are genuinely multi-faceted. Whether one is looking for a "typical" police officer career, criminal forensics, or environmental law enforcement, the options are diverse. While the below list is not exhaustive, it does give a detailed look at the array of careers one could have in policing or law enforcement.

Federal Level: The federal arena for law enforcement careers is vast. The options are almost endless, and many would argue that the rewards of a federal law enforcement career are superior to those offered at the local level. However, there is a catch—namely, education and experience requirements. Most law enforcement-related careers in the federal arena require a bachelor's degree, at a minimum, plus several years of related full-time work experience before applying.

Candidates interested in working for 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, or 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 Counterintelligence
- Department of Agriculture-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)
- U.S. 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)

State Level: Learn more about Louisiana State Police.

County Level: There are 3,142 counties in the United States. [1] Each county has an elected sheriff and **deputies** (a.k.a. officers) who work directly under the sheriff. Deputies' work is similar to that of other local police officers, with one twist: sheriff's departments are often responsible for the courts and jails (a.k.a. detention facilities) in their respective counties. This means that some deputies have the option to perform correctional work; they may even be required to begin their career in corrections, if their sheriff's department is a **single-entry** agency. Departments that are **dual-entry** will offer separate application tracks for candidates who wish to perform correctional or law enforcement work.

The Allegheny County Sheriff's Department operates 12 different divisions, including a K-9 unit.

1. U.S. Department of the Interior (2018, September 23). How many counties are there in the United States. Retrieved from https://www.usgs.gov/faqs/how-many-counties-are-there-united-states.

Municipal/Local Level: Municipal or local police work for a specific municipality or city. The vast majority of individuals in law enforcement work for local police agencies, and most police departments serve municipalities. Unlike their federal counterparts, most municipal (and state and county) police departments do not require future candidates to have a bachelor's degree, although many require some higher education (ex. 60 credits, or roughly 2 years of college). Increasingly, college degrees represent a required credential when an officer wants to enter management; in fact, many chiefs and sheriffs have either a Masters or a Ph.D.

Officers with the Pittsburgh Bureau of Police can work five different types of patrol: foot, vehicle, motorcycle, mounted (horse), and bicycle.

Learn more about every law enforcement agency in the U.S.

For a complete list of law enforcement agencies (state, county, municipal/city) visit: Discover Policing

Other Policing Jobs: There are many other police jobs that may fall under the jurisdiction of the federal government, state, county, or city, including civilian (non-sworn) positions. Here's an incomplete list:

- 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, Anthropologist, 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

Divisions within Law Enforcement Agencies

Law enforcement agencies, whether federal, state, county, or local, generally have jobs available within two major areas: sworn or commissioned and civilian. A **sworn or commissioned** employee has been through police training, is certified or licensed as a police officer, and has arresting powers in the state. A **civilian** employee is one who has not been through police training and does not have arresting powers.

One of the exciting aspects of policing is the vast array of jobs available, whether an individual is interested in sworn or civilian employment. Every department offers slightly different specialized divisions, depending on its size. For example, the McKeesport Police Department is a relatively small department (55 full-time officers) but still operates several unique divisions (for example, traffic, patrol, and crime prevention) alongside its Detective Bureau (itself comprising four different investigative divisions.) Officers within this department may be promoted to management, but in order to access even more specialized work, individuals would have to seek employment within a larger agency, such as the Pittsburgh Bureau of Police. An officer at PBP can be promoted to one of 12 specialty units.

Police work is multifaceted and ever-changing, always keeping officers engaged. Moreover, unlike many other professions, the daily job of a police officer, depending on the respective department, can change dramatically with their particular division. 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 all candidates should go one step further and start researching to decide what type of policing, what kind of agency, and what possible divisions the candidate would like to join.

Sworn Officers: Different Divisions within a Law Enforcement Agency:

- Detective/Investigations (Persons Crimes, Property Crimes, Homicides, Rape, Robbery, Burglary, Auto Theft, DUI, Domestic Violence)
- Traffic
- 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)

Civilian Employees: 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 sworn officer. Civilian employees represent an important half of the police equation and are much-needed in 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 controlled substances on a suspect, takes custody, and later books them into evidence at the police station, the evidence technician is a civilian that logs and follows through with the chain of custody for the evidence. Civilians are just as important as those in sworn positions at any 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

4.4 RECRUITMENT AND HIRING IN POLICING

Tiffany Morey; Kate McLean; and Franklyn Scott

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 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 Law Enforcement Recruitment and Hiring

As it happens, the history of formal, competitive police recruitment (and training) is quite short. Before the

1960s, as long as the candidate was a white male with a heartbeat—and there was an opening available—the job was most likely his. Women and officers of color were all but non-existent on police forces. Women were only allowed into the "boys club" if they wore a pencil skirt and fit a prescribed, feminized role. In some departments, women were allowed to work in the detective bureau and interview child victims (because women supposedly had better rapport with children, due to their "maternal" instincts.) These stereotypes continued to limit the policing careers of women and people of color until the passage of civil rights legislation targeting employment discrimination in the 1960s. Over the same period of time, the Law Enforcement Assistance Act provided funding incentives for police departments throughout the country to install minimum recruiting and training standards for all applicants.

Getting Hired: The Application Process

One of the most challenging entry-level recruitment processes in the United States is for the position of police officer. There is a good reason why this process is so difficult and thorough; a police officer, once hired and trained, becomes endowed with great power—the authority to take away a person's freedom, and moreover, employ deadly force when warranted. Naturally, this type of power should not be given to just anyone; rather, the testing process should be rigorous and thorough.

Written Police Exam

While the written exam used to screen initial candidates varies by not only state but by department, these tests may be generally compared with the ACT and SAT. In fact, a high proportion of the candidates that take the written test fail the first time. Written police exams generally showcase 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
- Work Experience
- Personality

While every department is different, there are two basic ways that the written test is administered. 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 and take the written exam on a computer. The candidate can then send their exam score to the participating law enforcement agency to which they're 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 register to take the exam. Many 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 application process. The passing score also varies by agency. Most departments require at least a seventy percent to pass the written test and move on in the hiring process.

Test Prep: NOPD Civil Service Exam Study Guide

The second step in the NOPD hiring process is to sit for the Civil Service Exam. Please click here to view the Sample Civil Service Exam.

Physical Agility Test

Most police departments also employ some test meant to capture physical fitness and agility; in New Orleans, all applicants are required to take a physical agility test, which includes a 1.5-mile run to be completed in a maximum of 19 minutes 50 seconds, a 300 meter sprint within 2 minutes, 14 sit-ups in a minute, and 10 push-ups with no time limit.

Oral Exam or Interview

The oral exam or interview can be one of the most daunting steps for any candidate who proceeds through the hiring process. In New Orleans, NOPD applicants complete a panel interview Hiring Process – JoinNOPD. These exams typically ask candidates to describe their behavior within a given police scenario; they may also be informed of different policies or regulations that legally restrict their behavior on the job. Scoring may be performed by current officers on the job or a trained board of raters. While questions focus on realistic police scenarios, candidates are not assumed to already have a deep technical understanding of law enforcement strategy or criminal law. Instead, the oral exam is meant to assess applicants' communication skills, reasoning and decision-making, integrity, and personality fit for the job (for example, their self-control and empathy).

Test Prep: Oral Exam and Physical Testing for the New Orleans Police Department

New Orleans Police Department (NOPD) requires applicants to complete a panel interview and a physical agility test during the third stage of the hiring process.

The background investigation is probably one of the most critical portions of the testing process. After the candidate passes the written, physical fitness/agility, and oral interview, they are given a background packet to fill out. The packet is very thorough and asks the candidate everything from where they went to school, worked, prior drug use, prior arrests, and prior illegal actions/criminal activity (even if not arrested). The background investigation can take days or weeks, in order to ensure candidates' honesty and moral compass. The biggest "snags" at this stage of the process tend to concern prior drug use and criminal activity. Unfortunately, most agencies do not list their requirements on past drug use openly, while many utilize the FBI's drug use policy. However, most agencies reserve the right to make their own decisions for each individual candidate.

NOPD Master Disqualifications

Please see the list of master disqualifications for applicants seeking to be hired by NOPD.

Psychological Evaluation

The psychological evaluation is one of the least understood stages of the hiring process. Indeed, there is no way to study for the psych eval. The best advice is to tell the truth (a statement that holds true for every part of the hiring process). However, it is important to understand that the "psych eval" is not just looking for candidates who suffer from mental illnesses that would render them unfit for service; rather, it is also seeking to identify those who will not make good police officers or have aggression issues. Some departments require both a written psychological exam and an oral psychological interview. NOPD does not require polygraph exams; instead, applicants undergo a computerized voice stress analysis during the hiring process.

The Lie Detector: Science or Intimidation?

Interested in the history of the lie detector and the science (or mythology) behind it? Check out this 2023 documentary, which claims that "the promise of the polygraph has turned dark."

Medical Examination

By the time a candidate conducts a medical examination, they may already have a conditional offer of employment; the state where the candidate will work ultimately determines the depth and rigor of the medical exam or physical. Possible testing that might occur at this phase of the testing process includes:

- Blood/urine/hair drug tests
- Hearing test
- Eye examination
- Lung capacity
- EKG
- Treadmill stress test
- Chest X-Ray
- Cholesterol test
- Various other blood tests

In the News: Should Recruitment Standards Be Weakened?

Adjustments have been made to the NOPD hiring requirements. Please see the article written by WDSU.com.

Applicants were urged by now Former Chief Shaun Ferguson to reapply if they were previously disqualified during the NOPD hiring process.

4.5 POLICE DIVERSITY AND RECRUITMENT

Franklyn Scott

Louisiana Law RS 23:332

Title VII of the Civil Rights Act of 1964 prohibited employment discrimination on the basis of race, religion, national origin, and gender. In so doing, it opened a pathway into law enforcement professions for groups who had been largely excluded, namely women and people of color. While Title VII lawsuits have successfully struck down hiring requirements that were implicitly discriminatory (such as height or fitness requirements), the Civil Rights Act has also been used to reprimand and force changes at police agencies that did not extend equal opportunities for promotion to all employees or that created work environments that were hostile to those other than white men. Title VII has also led to the court-ordered adoption of affirmative action policies in hiring.

4.6 POLICE MISCONDUCT, ACCOUNTABILITY, AND CORRUPTION

Tiffany Morey; Kate McLean; and Franklyn Scott

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 fell swoop, an officer can seize a person's freedom. An officer is also given the authority to carry a gun and, for the protection of either the officer or a

person, take the life of a citizen as well. These decisions are rarely easy, and at times, there are officers who not only overstep their legal boundaries but jump directly into the pit of corruption.

One of the problems with police corruption, including unjustified uses of force, is that there are few accurate, comprehensive, and public-facing measures. As discussed previously in the text, the FBI's "Use of Force" dataset captures less than half of all police agencies in the United States; the best data on use of force (both legal and illegal) is collected by non-profit organizations, who source their information from the media. Moreover, police corruption ranges across a broad spectrum, and may not come to administrators' attention—or result in punishment. Finally, as will be discussed in subsequent sections, police subculture is defined by values that stress loyalty and suspicion of outsiders (and even police management.) The "blue wall of silence" represents a powerful barrier to addressing corruption in police ranks.

Of course, no matter the profession, corruption can occur. In an occupational context, corruption refers to the misuse of one's position for personal gain. What may be unique—and dangerous—about corruption in law enforcement is the power that individual law enforcement officers may leverage. Whether seeking personal advantage, money, or simply a sense of power,

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 bodega, these cops would take the freebie, and not attempt to do the "right thing" by explaining that they could not accept the gift or tip. By accepting these informal benefits, the officer was, in turn, implicitly agreeing that whoever gave it to them may 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

Unlike "grass eaters," "meat eaters" openly expected, solicited, or took some reward or kickback personally from those they served, as a condition of doing their job. Whether it was monetary "shakedown" to ensure a convenience store was not robbed or money taken from a drug dealer during a drug raid, such officers felt entitled to an unofficial bonus, and were aggressive in making sure they got it. The most notorious "meat eaters"—and the inspiration for the Knapp Commission—were the officer-conspirators who attempted to murder Frank Serpico, who exposed their cooperation with a high-level narcotics gang in 1970s New York City.

Noble Cause Corruption

Noble-cause corruption is a lot more commonplace than one might think. Many officers work twenty-five years and may never see a fellow cop steal something, but they will see noble-cause corruption. Most officers

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.

join the force to make the world a better place in one way or another. While officers understand they cannot 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] However, officers' belief in their own righteous motivation—the noble cause—can be used to justify less-than-noble actions, or illegal means. Noble cause corruption may take many forms: giving false testimony to back up a less-than-legal arrest, planting evidence that was seized in a search that was not "by the book," or adjusting an offense upwards to ensure a higher penalty. All of these actions may become routine for an officer who seriously believes that they are working in the public interest to take dangerous people off the street.

NOPD Retaliation Policy

NOPD has "Whistleblower Protection," however, NOPD also has a policy for retaliation.

Use of Force

As discussed throughout this chapter, police in the United States have a considerable amount of power, including the legal ability to deploy deadly force; however, we must keep in mind that police use-of-force exists on a continuum, from mere police presence to the use of lethal methods. Proper police use-of-force is governed by federal court rulings, state laws, and individual departmental policies, which generally stipulate the following levels of force. [3]

- Officer presence (Police deter criminal activity through their physical presence)
- Verbalization (Police commands, which may increase in volume or aggression)
- Empty-Hand Control (Bodily force, ranging from holds or blocks to punches or kicks)
- Less-Lethal Methods (Batons, projectiles, chemical sprays, or Conducted Energy Devices)
- Lethal Force (Use of firearms when necessary to preserve an officer's or other individual's safety)

How does an officer know what level of force should be used in any given situation? Departmental policies

2. Baker, M. (1985). *Cops: Their lives in their own words*. New York: Pocket Books.

3. National Institute of Justice, "The Use-of-Force Continuum," August 3, 2009, nij.ojp.gov: https://nij.ojp.gov/topics/articles/use-force-continuum

generally require that officers only use methods that they "reasonably believe" to be necessary to execute an arrest, enforce the cooperation of the suspect, or preserve the officer's/public's safety; some departments also stipulate that officers first attempt to deescalate a situation (through presence or verbalization) before employing physical methods of force. Nevertheless, both agency-specific policies and court decisions have recognized that police may find themselves in situations that require split-second decision-making, thus giving officers wide latitude to use their discretion when it comes to use-of-force. For example, in the landmark case, *Graham v. Connor* (1989), the Supreme Court determined that a standard of "objective reasonableness" should be used to determine whether an officer's use-of-force was legal, while further privileging the officer's judgment in the moment: "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." The *Graham* standard has been used to affirm the "reasonableness" of lethal force incidents including the shooting deaths of Michael Brown, Samuel DeBose, Alton Sterling, and Philando Castile.

At the same time, the Supreme Court has issued rulings that attempt to qualify the use of deadly force by police, such as the qualified "fleeing felon" prohibition offered in *Tennessee v. Garner* (1974). In this case, the Court decided that lethal force could not be legally employed *solely* for the purpose of preventing a suspect's escape; instead, the pursuing officer must also have probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others [4].

In the News: NOPD Use of Deadly Force Policy

Please see the NOPD policy on the use of deadly force.

4. *Tennessee v. Garner*, 471 U.S. 1 (1985)

4.7 POLICE ACCOUNTABILITY: INTERNAL AFFAIRS AND DISCIPLINE

Tiffany Morey; Kate McLean; and Franklyn Scott

While issues of police accountability have recently become a major site of public concern in the U.S., they are arguably an inevitable result of the structure of law enforcement in this country. As discussed, policing is both hyper-localized (even very small municipalities have their own agencies) and very decentralized (few federal and state laws and agencies that regulate and monitor local law enforcement actions). On the one hand, these characteristics allow police the flexibility to respond to issues of local concern; on the other, they can complicate police oversight and the enforcement of accountability. Still, different mechanisms for ensuring the acceptability and legality of police behavior exist at different levels, starting with individual law enforcement agencies.

Within departments themselves, Internal Affairs (IA) divisions exist 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. IA work has been greatly assisted by technological developments in policing, such as a new software program called IA Pro. This program follows individual police officers throughout their entire career. In theory, any "grass" or "meat eater" could bid on a new shift each year, gaining a new supervisor who would be unaware of past infractions. However, IA Pro ensures that any and all infractions by an officer are recorded and followed up by the applicable supervisor. For example, if an officer uses profanity toward the public, the program might require the officer to attend training. If the officer used profanity a second time within the prescribed time limits, they might be placed on a timed employee development program, and face discipline up to termination. IA Pro is not a panacea, but it does significantly lower the number of officers who are allowed to continue misbehaving.

If an officer is accused of a more serious infraction, such as excessive use of force or lying, the officer may immediately be placed on administrative leave while the Internal Affairs Division investigates the incident. After, IA will offer one of several findings on the complaint: Sustained (Evidence exists of misconduct); Not Sustained (Evidence of misconduct is not sufficient); Exonerated (Affirmative evidence shows that officer did not violate policy); Unfounded (Evidence shows the complaint to be inaccurate). 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.

Of course, most police departments in the U.S. do not have the resources to fund or staff an entire, separate

IA division. In these cases, investigations into officer misconduct may simply be conducted by the head of the organization (ex., a Chief), the accused officer's supervisors, or external persons/agencies. In the latter case, discipline must still be determined and executed by the department executive (Chief or Sheriff) themselves.

Because internal investigations are typically removed from public view, more transparent means of addressing police misconduct have emerged in some locales. Civilian or Citizen Review Boards, for example, may solicit public complaints of police misconduct (such as unjustified use-of-force), investigate the claims externally, and hold public hearings to disseminate their findings and recommendations for discipline. For example, according to nola.gov,

> The Public Integrity Bureau (PIB) promotes the credibility of, and public confidence in, New Orleans police officers. To do so, PIB adopts preventive and proactive measures to enforce the highest standards of professional police performance and conducts, as well as directing investigations into citizen and NOPD-initiated allegations of police misconduct. PIB receives allegations in a citizen-friendly, non-intimidating environment, and performs exhaustive, objective analysis of these allegations.

4.8 POLICE ACCOUNTABILITY: INDIVIDUAL PROSECUTION

Tiffany Morey; Kate McLean; and Franklyn Scott

One of the most contentious issues in contemporary policing is the apparent immunity of accused officers in criminal prosecution. While federal data on the outcomes of police-involved shootings is not available, some independent researchers have created their own databases, showing how rare criminal indictments and convictions of individual officers (accused of illegal use of deadly force) are. For example, while an estimated 16,000 individuals were killed by police between 2005 and 2020, only 121 officers have been arrested for murder or manslaughter in an on-the-job incident; of those individuals, only 44 have been convicted, sometimes on a lesser charge. [1]

There are many factors that contribute to the outcomes detailed above. First, prosecutors may be reluctant to bring charges against a fellow law enforcement actor, with whom they may collaborate closely. Evidence of misconduct, or the use-of-force in ways that violates departmental policies, may be scant or unavailable, while the "Blue Curtain of Silence" may prevent colleagues from testifying against the accused. And while grand juries (discussed further in the coming chapters) are notorious for handing over indictments (a green flag to proceed with a criminal prosecution), grand jurors may be sympathetic to the plight of police, who are commonly revered as everyday heroes. Finally, the legal standard of "objective reasonableness" favors the officer perspective, representing a stark evidentiary hurdle for those trying to prove an unjustified use-of-force.

Police use-of-force may also result in civil prosecutions seeking individual damages for victims (or victim families) alleging excessive force. In such cases, police officers are often protected by the doctrine of "qualified immunity"—another flashpoint in the contemporary debate around policing. According to the doctrine of qualified immunity, plaintiffs must not only prove that an officer violated their constitutional rights, but that such rights were clearly established in prior court rulings. In other words, the relevant laws must be so clear that any "reasonable officer [would know] that his conduct was unlawful in the situation he confronted."

Please click here to view the article below depicting the dismissal of charges against an NOPD officer in the killing of Henry Glover in the days following Hurricane Katrina in New Orleans, Louisiana, in August 2005.

1. Dewan, S. (2020). Few Police Officers Who Cause Deaths Are Charged or Convicted. *New York Times*.

4.9 POLICE ACCOUNTABILITY: BODY CAMERAS

Tiffany Morey and Franklyn Scott

While the best data available is outdated, a 2018 study by the Bureau of Justice Statistics found that 47% of local law enforcement agencies had obtained body cameras – including 80% of large departments – with the primary motivations to "improve officer safety, increase evidence quality, reduce civilian complaints, and reduce agency liability." [1]

Body cameras would seem to be the panacea for all police misconduct, yet, 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 indeed be known. Second, no matter how "fool-proof" a departmental policy may be, there will always be a user that can turn off the camera in certain situations. Moreover, the cost of storing thousands of hours of body camera footage is often prohibitively high for smaller departments, rendering video of older encounters unavailable. To date, over 70 studies have researched the impact of body cameras on the above outcomes (officer safety, civilian complaints, and use-of-force) with widely mixed reviews. Body cameras are but one answer in a giant puzzle to stop police misconduct – and preserve officer safety.

Police Body Cameras: What Do You See Exercise

According to Professor Stoughton,

> People are expecting more of body cameras than the technology will deliver. 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. However, sometimes the body camera footage can provide a glimpse of the actual officer shooting as seen in the link here of a shooting involving an NOPD officer.

After reading the above article and watching the included video, has your view of policing and the

1. Hyland, S., Body-Worn Cameras in Law Enforcement Agencies, 2016, Bureau of Justice Statistics, November 2018.

role of video changed? Do you think body cameras are worth the expense, or could we do without? What are the pros and cons?

4.10 POLICE ACCOUNTABILITY: FEDERAL INTERVENTIONS

Tiffany Morey; Kate McLean; and Franklyn Scott

Federal Prosecutions: Section 242

Depending upon the specific circumstances, police officers may also face federal criminal or civil charges; in fact, federal law allows for entire law enforcement agencies or cities to be sued when a policy or training practice is believed to underlie a pattern of police misconduct.

Prosecutions of individual police officers in federal court commonly happen under 18 U.S.C. Section 242 (Section 242, for short), which makes it a crime "for a person acting under color of any law to willfully deprive a person of a right or privilege protected by the Constitution or laws of the United States" [1] Here, an individual acting in their capacity as law enforcement – whether on or off-duty – is acting "under color of law," while the right or privilege in question may vary; unjustified police use-of-force is governed by the 4th amendment, which protects citizens against unlawful seizures (including the "seizure" of their life). Section 242 does posit a high evidentiary standard for prosecutors to overcome. Specifically, they must prove that a police officer "willfully" acted to harm the individual in question – that they knew their actions were illegal, and yet they intentionally pursued them anyway. For this reason, Section 242 prosecutions are rare, and *successful* Section 242 cases are even more uncommon.

Under Color of Law: Two Recent Section 242 Prosecutions

While few Section 242 cases are prosecuted successfully, two recent cases bucked this trend, perhaps on the basis of video evidence that spurred widespread national condemnation. In December 2017, Michael Slager, a North Charleston police officer, was sentenced to 20 years in federal prison for the murder of Walter Scott. Dashcam footage captured at the scene showed

1. United States Department of Justice. (2021). Deprivation of Rights Under Color of Law.

Slager shooting Scott as he fled a traffic stop; Slager was subsequently seen planting his taser near the victim's body, a ruse so that he might claim self-defense after the fact.

More recently, four Minneapolis police officers were convicted under Section 242 for the murder of George Floyd – Derek Chauvin, Tou Thao, J. Alexander Kueng, and Thomas Lane. Importantly, the latter three defendants were convicted specifically for their failure to intervene as their colleague, Chauvin, suffocated Floyd – an important precedent for later Section 242 suits.

Federal Prosecutions: Section 1983

While public attention tends to focus on individual officers accused of misconduct, there are powerful federal mechanisms for the redress of wrongdoing at the level of entire police departments. For example, under 42 U.S.C. § 1983 (Section 1983, for short), victims of police misconduct may seek a civil remedy in federal court – including monetary damages, or an injunction against a policy or program that is believed to violate individuals' civil rights. Like Section 242, Section 1983 specifically applies to persons "acting under color of law," but may be used to sue law enforcement agencies or municipalities. For example, *Floyd v. City of New York* represents one of the most powerful Section 1983 cases to date. Filed on behalf of the "minority civilians of the City of New York," *Floyd* – a class-action lawsuit – argued that the New York City Police Department's "Stop-and-Frisk" program represented a form of illegal racial profiling, with Black and brown men disproportionately targeted for pat-down searches, without reasonable suspicion. Ultimately, the trial judge agreed, effectively ordering the end of "stop-and-frisk" as it was carried out.

A Pattern or Practice: Consent Decrees

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 entire police agencies, if evidence suggests a "pattern or practice" of violating civilians' constitutional rights (for example, through the use of excessive force, illegal stops and searches, or racial discrimination). If a "pattern or practice" investigation yields affirmative evidence, the Justice Department may offer departments one of two options: to cooperate under a **consent decree**, which requires significant changes to the illegal policies, programs, or practices – *or* to face a lawsuit in federal court. Given the absence of other federal regulatory mechanisms around local policing, consent decrees represent the most powerful federal tool for changing illegal police practices at the local level. The NOPD, the city of New Orleans, and the DOJ entered into a consent decree on July 24, 2012, which is considered to be the most expansive in the nation. The Consent Decree was court approved on July 11, 2013.

4.11 POLICE ACCOUNTABILITY: REDUCING DISCRETION

Tiffany Morey; Kate McLean; and Franklyn Scott

In 2022, the nonprofit organization "Mapping Police Violence" published a stunning statistic: from 2017 to early 2022, U.S. police had killed nearly 600 individuals in the course of traffic stops. While this number does not specifically highlight illegal or unjustified uses-of-force, it does illuminate a tremendous loss of life, which might be prevented through different policies. Specifically, several larger policies have begun testing new policies that reduce traffic stops for minor violations, such as a broken taillight or failure to signal. These policies operate under the theory that reducing low-level police-citizen interactions will reduce situations that escalate unpredictably, leading to violence.

From the Louisiana Illuminator,

> A New Orleans lawmaker intended to reduce the reasons why police can stop people to ease the financial impact of ticket fees on low-income drivers. But negotiations with law enforcement stripped down the proposal to a bare-bones version that advanced Tuesday from a Louisiana Legislature committee. Click here to view the full article related to Williard's Bill.

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5: THE COURTS

Image description: Courtroom with judge's bench and prosecution and defense tables
Image credit: "Courtroom" by srqpix is licensed under CC BY 2.0.

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:

- Describe how a crime/criminal case proceeds from the lowest level trial court up through the

U.S. Supreme Court.
- Illustrate the appeals process in the American criminal justice system.
- Discuss the function and selection of state and federal judges and prosecutors in the American criminal justice system.
- Discuss the importance of the criminal defense attorney in the American criminal justice system.

Critical Thinking Questions

1. What is jurisdiction, and what types of jurisdiction are there?
2. What is a dual court system?
3. How is the Louisiana court system structured?
4. What is the principle of orality, and how does it work in the American trial courts?
5. What does the appellate process look like in the American court systems?
6. Who are the members of the courtroom workgroup, and what are their roles and responsibilities?
7. What is the general order of the pretrial and trial process, and what happens at each stage of the process?

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https://louis.pressbooks.pub/criminaljustice/?p=123#h5p-9

5.1 INTRODUCTION TO THE U.S. COURT SYSTEM

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 the legal sufficiency of the criminal charge (can the government prove it?). Courts ensure that criminal defendants are provided **due process of law** -meaning that 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 their decisions known through their written opinions, and this chapter introduces the types of opinions and rulings of appellate courts.

One or more interactive elements has been excluded from this version of the text. You can view them online here: https://louis.pressbooks.pub/criminaljustice/?p=124#oembed-1

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.

5.2 JURISDICTION

Chantel Chauvin and 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), and it might depend on the stage of the case (or function of the court), the subject of the case, the seriousness of the case, the persons involved in the case – or simple geography. Each of the boxes below illustrates a different kind of jurisdiction.

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 there 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, p. 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.

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 including military tribunals, courts-martial, Courts of Criminal Appeals, and the United States Court of Appeals for the Armed Services.

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, Louisiana courts do not have jurisdiction over crimes in Florida.

5.3 STRUCTURE OF THE COURTS: THE DUAL COURT AND FEDERAL COURT SYSTEM

Lore Rutz-Burri; Kate McLean; and Chantel Chauvin

The Dual Court System

In the United States, 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 in the country: 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 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 their conviction on direct appeal through a **writ of certiorari**, or when the defendant challenges the conditions of confinement through a **writ of habeas corpus**.

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Dual Court System Structure

Highest Appellate Court	**U.S. Supreme Court** (Justices) (Note: the Court also has original/ trial court jurisdiction in rare cases and will also review petitions for writ of certiorari from State Supreme Court cases).	**State Supreme Court** (Justices)
Intermediate Appellate Court	**U.S. Circuit Courts of Appeals** (Judges)	**State Appellate Court** (e.g., Louisiana Circuit Courts of Appeals) (Judges)
Trial Courts of General Jurisdiction	**U.S. District Courts** (Judges) (Note: this court will review petitions for writs of habeas corpus from federal and state prisoners)	**Name varies by state** (e.g., Louisiana District Courts) (Judges)
Trial Courts of Limited Jurisdiction	**U.S. Magistrate Courts** (Magistrate Judges)	**Magisterial Courts, Minor Courts** (e.g., Parish Courts, City Courts, Mayor's Courts, Juvenile 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 (The Judiciary Act of 1789; Ch. 20, 1 Stat 73). The lower federal court system has been expanded over the years, such as when Congress created the separate appellate courts in 1891.

Federal Judicial Center

Since the establishment of the federal courts in 1789, Congress has periodically reshaped the judiciary through legislation. Such changes have included the creation and abolition of courts, the authorization of new judicial positions, and the reorganization of the judicial circuits.

Trace the history of the federal courts at the Federal Judicial Center website.

United States Supreme Court

The United States Supreme 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.) The Supreme Court's decisions have the broadest impact of any court in the land, because they govern both the state and federal judicial system. 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 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 back cases to the originating state's supreme court, so they can 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 that modifies or nullifies the Court's holding.

U.S. Supreme Court

Take a video tour of the U.S. Supreme Court with CNN.

Writs of Certiorari and the Rule of Four

The Court has discretionary review over most cases brought from 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 – which happens in roughly 10% of the petitions 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 were filed annually. It is difficult to guess which cases the court will accept for review. However, a common reason the court assents to review a case is that the federal circuit courts have reached conflicting results on important issues presented in the case.

Original 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.

One or more interactive elements has been excluded from this version of the text. You can view them online here: https://louis.pressbooks.pub/criminaljustice/?p=129#oembed-2

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 Appeal**, 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 that 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. A full 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.

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. (Louisiana, for example, has three U.S. district courts.) 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. Court for the Western District of Louisiana). 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.

United States Courts

Visit the United States Courts' website. You can see the caseload statistics (including how many cases were filed in each of the courts) for each year going back to 2001.

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 to 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**.

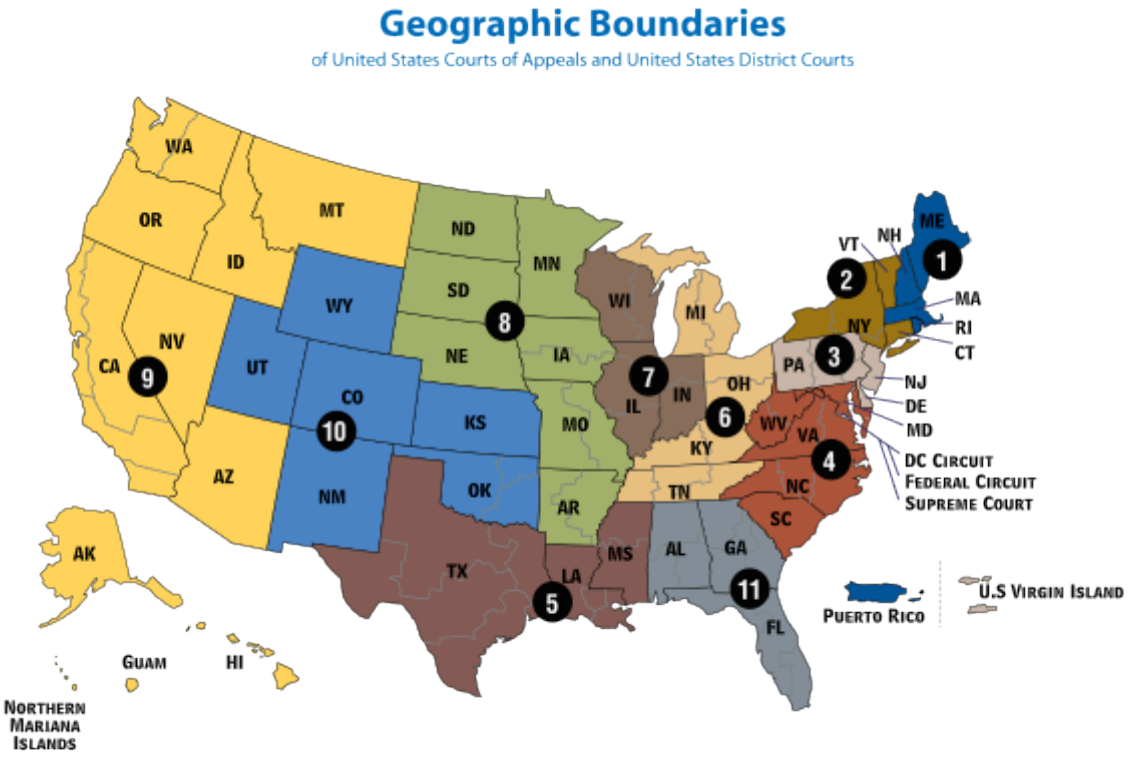


Figure 5.1 Geographic Boundaries of the U.S. Courts of Appeal and the U.S. District Courts

Using the above graphic, you can see the different levels of the federal court system. You can see that each state has at least one District Court (i.e., New Mexico and Oklahoma) while other states have multiple District courts within the state (i.e., Louisiana and California). The varying colors correspond to the different U.S. Courts of Appeal jurisdictions with the number in the black circle indicating the court's number (i.e., Louisiana is in the Fifth Circuit Court of Appeal with Texas and Mississippi.) Finally, the U.S. Supreme Court has jurisdiction over the entire United States and territories.

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 dispose of over one million matters each year.

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, federal Magistrate judges are appointed for eight-year terms.

Up for Debate: Should the Supreme Court Be Expanded?

After several politically-controversial rulings, many commentators and (largely Democratic) politicians have called for the expansion of the Supreme Court beyond its current nine justices. While this may strike some as short-sighted tampering with a sacred institution, the Supreme Court has been expanded, and shrunk, before – in fact, seven times in U.S. history! Such a topic is only imaginable because the U.S. Constitution says nothing about the required number of justices on the Court.

Consider how an expansion of the Court might affect the institution's rulings, efficiency, and public legitimacy – or just read this debate from the *Harvard Law and Policy Review.* Would you support an expansion of the current Court's roster – and why?

5.4 STRUCTURE OF THE COURTS: STATE COURTS

Lore Rutz-Burri; Kate McLean; and Chantel Chauvin

State Court Systems

Each state has its own independent judicial system, which collectively 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 levels 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 pretrial 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.

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 (2013, p. 43) 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 buildings 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."

Kerper (1979, pp. 38-39) 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 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 tried 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.

Louisiana's Court System

Louisiana's court system, similar to the federal court system, has three judicial tiers. At the trial court level (courts of original jurisdiction), there are 43 judicial districts in the state. Each district is made up of at least one parish (i.e., The 17th Judicial District- Lafourche Parish) while other districts are made up of a combination

of parishes (i.e., The 23rd Judicial District- Ascension, Assumption, and St. James Parishes). In addition, Louisiana has five family or juvenile courts, forty-eight city courts, and three parish courts.

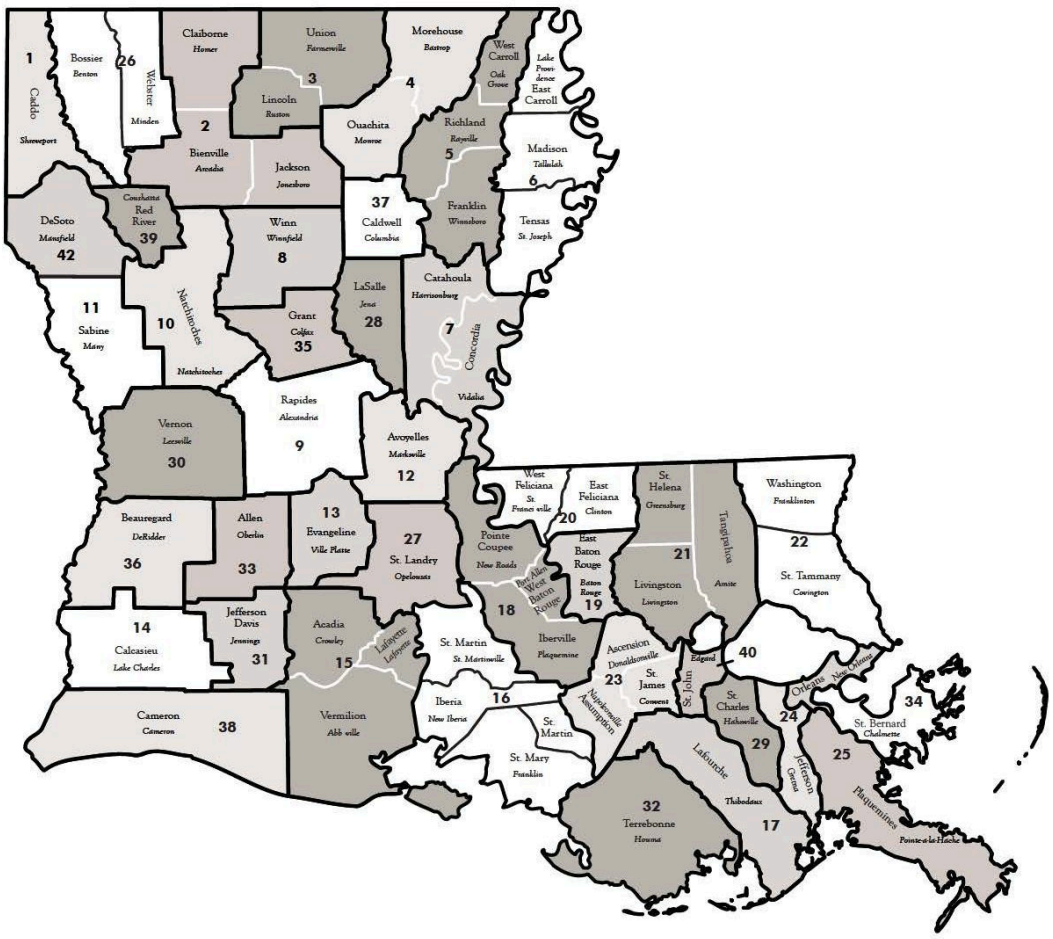


Figure 5.2
Louisiana District Court Map

The first appellate level is the Louisiana Courts of Appeal. There are 5 judicial circuits at this level.

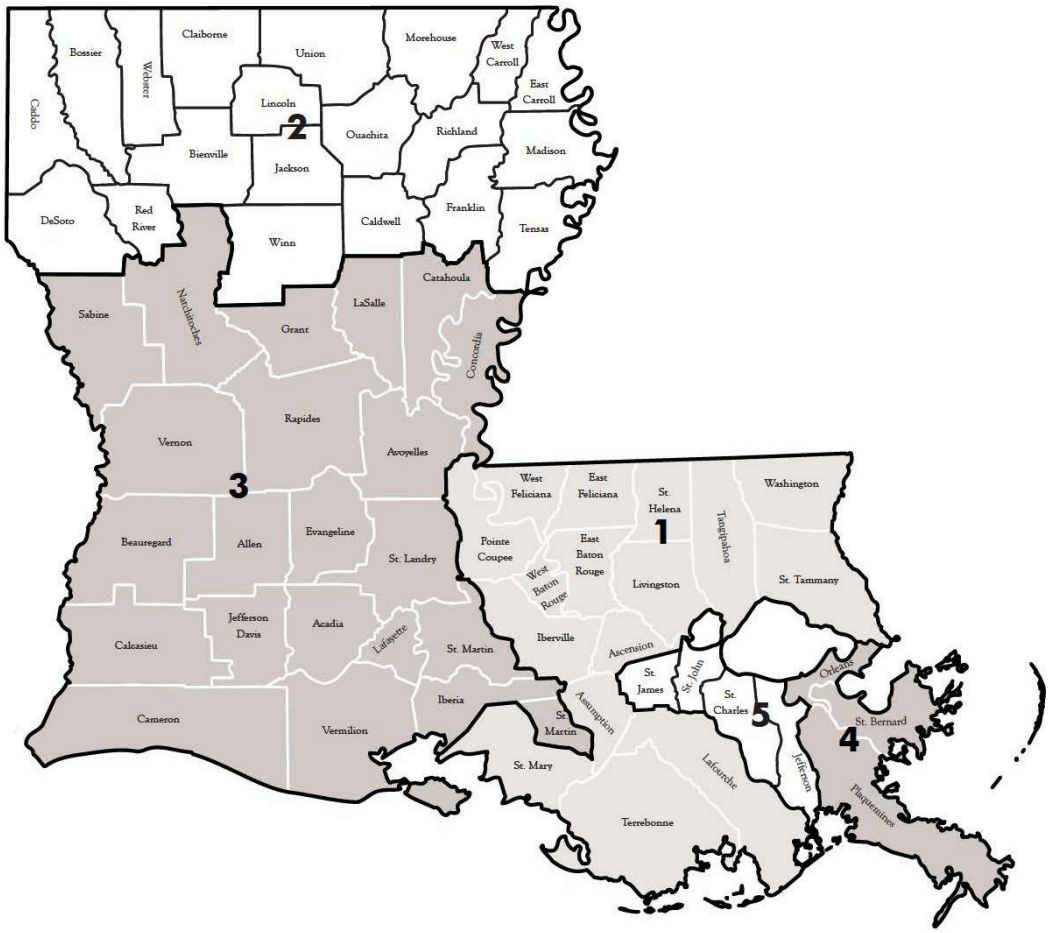


Figure 5.3
Louisiana Courts of Appeal

The court of last resort in Louisiana is the Louisiana Supreme Court, which has jurisdiction over the entire state. You can visit the Louisiana Supreme Court website to learn more about the history of the Louisiana State Court.

5.5 AMERICAN TRIAL COURTS AND THE PRINCIPLE OF ORALITY

Lore Rutz-Burri and Kate McLean

At trial, the state will present evidence demonstrating that the defendant committed the crime. The defendant may also present facts that show they 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.

Think About It: Which System Would You Prefer?

Consider the differences between the adversarial and inquisitorial court systems presented above. If you were a criminal defendant, which system would you prefer for your trial? What if you were a prosecutor – and why?

5.6 THE APPEALS PROCESS, STANDARD OF REVIEW, AND APPELLATE DECISIONS

Lore Rutz-Burri; Kate McLean; and Chantel Chauvin

The Appeals Process

The government cannot appeal a jury's decision to **acquit** the defendant (find them "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, they are 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 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 who are not parties to the case. The appellate panel will generally listen to very short oral arguments (20 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, meeting to 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 decision, from an appellate court, you can view the **procedural history** of a case (i.e., a roadmap of where the case has been: what happened at trial, and what happened as the case was appealed up to 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 or "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" (*United States v. Yellow Cab Co.*, [1949]).

Sometimes the law requires 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, to amend its pleadings, or to 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 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 on such matters, and may substitute their own judgment on questions of law. Questions of law include interpretations of statutes or contracts, the constitutionality of a statute, and 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. Consequently, 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 than the trial judge to decide what the law is, 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 haven't been alleged, but this is not the case when they come upon **plain error**. Plain error exists "when 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" (Cornell Law School, n.d.). 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 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 appellate courts, 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 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.

Federal Appellate Review

Through petitions for writs of certiorari, the U.S. Supreme Court is also in a position to review cases coming from the state courts. Because their review is discretionary, the Court will generally accept review only when 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 concerning both the federal constitution and their 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).

In the News: The Long Appeal of Adnan Syed

After reading about the appeals process above, you likely have a sense of how complicated the questions considered by appellate courts can be. Notably, an appellate panel may clearly disagree with the ruling of a trial court, while still voting to let its decision stand. Such contradictions are well-evidenced in the nearly 25-year legal battle of Adnan Syed, a Baltimore man who was convicted of killing his high school girlfriend in 1999.

When a podcast on his case uncovered new evidence in 2015, he was granted an appeal, then a hearing, and finally a new trial – only to have the Maryland State Supreme Court reinstate his conviction in 2019; the same year, the U.S. Supreme Court denied his petition for a writ of certiorari. In September 2022, Syed was finally released from prison and cleared of all charges after newly-tested DNA evidence exonerated him. You can listen to the Serial podcast for more information on his case.

5.7 COURTROOM PLAYERS: PROSECUTORS

Lore Rutz-Burri and Chantel Chauvin

Prosecutors play a pivotal role in the criminal justice system, and work closely with law enforcement, judges, defense attorneys, probation and parole officers, victims services, human services, and to a lesser extent, jail and other correctional staff. 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. As discussed in the previous sections, prosecutors are one of the most powerful actors in courtroom workgroup, a fact evidenced in this speech by former Supreme Court 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:

> "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. ..."

The boxes below describe the roles of prosecutors at the state and federal level.

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 authority that

trumps that of local prosecutors, 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 state 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 or assistant 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 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.

Louisiana Prosecuting Attorneys

Visit the Louisiana Attorney General's website to learn more about the Louisiana Attorney General's office and to learn more about their criminal division.

If you want to learn more about the district attorneys in Louisiana, you can visit their website.

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 prosecutions, but rather 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.

Visit the United States' Attorney General website and the U.S. Attorney for each of the 94 federal judicial districts website to learn more.

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 (including Louisiana), 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 prosecutors' 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".

Prosecutors guide the criminal investigation and work with law enforcement to procure search and arrest warrants. Following an arrest, prosecutors continue to be involved with various aspects of the investigation. Their role includes meeting with the arresting officers, interviewing witnesses, visiting the crime scene, reviewing the physical evidence, determining the offender's prior criminal history, making bail and release recommendations, appearing on pretrial motions, initiating plea negotiations, initiating **diversions** (pre-trial contracts between the government and the defendant which divert cases out of the system), working with law enforcement officers from other states who seek to extradite offenders, preparing the accusations to present to the grand jury, calling witnesses and presenting a *prima facia* case (i.e., presenting enough evidence which, when unrebutted by the defendant, shows that the defendant committed the crime) at a preliminary hearing, representing the state at arraignments and status conferences, conducting the trial, and, upon conviction, making 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, and 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 who 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.

5.8 COURTROOM PLAYERS: JUDGES AND COURT STAFF

Lore Rutz-Burri; Kate McLean; and Chantel Chauvin

The Courtroom Workgroup

In their 1977 book, *Felony Justice: An organizational analysis of criminal courts,* James Eisenstein and Herbert Jacob coined the term "courtroom workgroup." This term specifically refers to the cooperative working relationship between prosecutors, defense attorneys, and judges (as opposed to the 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 pretrial 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, in pretrial motions, during the trial, and in the sentencing phase. The defense attorney represents the defendant after charges have been filed, through the pretrial process, in a trial, and during sentencing, and maybe during 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 expeditious case processing and the prescribed rules for achieving those goals.

The Judge: The Most Important Actor in the Courtroom?

Trial court judges are responsible for presiding over pretrial, trial and sentencing hearings, as well as probation and parole revocation hearings. They issue search and arrest warrants, set bail or authorize release, sentence offenders, and engage in pre-sentence conferences with attorneys. 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 that inform them of 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 when imposing sentences. However, with more states enacting mandatory minimums and sentencing guidelines, judicial discretion has been severely curtailed.

Despite all of these roles, the view of judges as the most powerful courtroom actors is somewhat misleading. This is because the majority of criminal cases are settled by pleas, not trials. In such cases, the key player may be the prosecutor who determines the criminal charges and ultimately negotiates the plea deal. While the term "plea bargain" may imply that criminal defendants have gained advantage, we would be well reminded to consider that every plea represents a conviction and thus a "win" for the prosecutor. If we further consider that only 2% of criminal cases go to trial in federal court (with a similar figure in the PA Courts of Common Pleas), we might conclude that prosecutors wield significant power indeed (Gramlich, 2019).

One or more interactive elements has been excluded from this version of the text. You can view them online here: https://louis.pressbooks.pub/criminaljustice/?p=137#oembed-1

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 (such as PA) do not require magisterial judges to be lawyers.

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" (Berkson, 2005, p. 50). 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). States may also use different methods to select judges based on their level in the judicial hierarchy (ex. magisterial, trial, appellate, Supreme Court).

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.

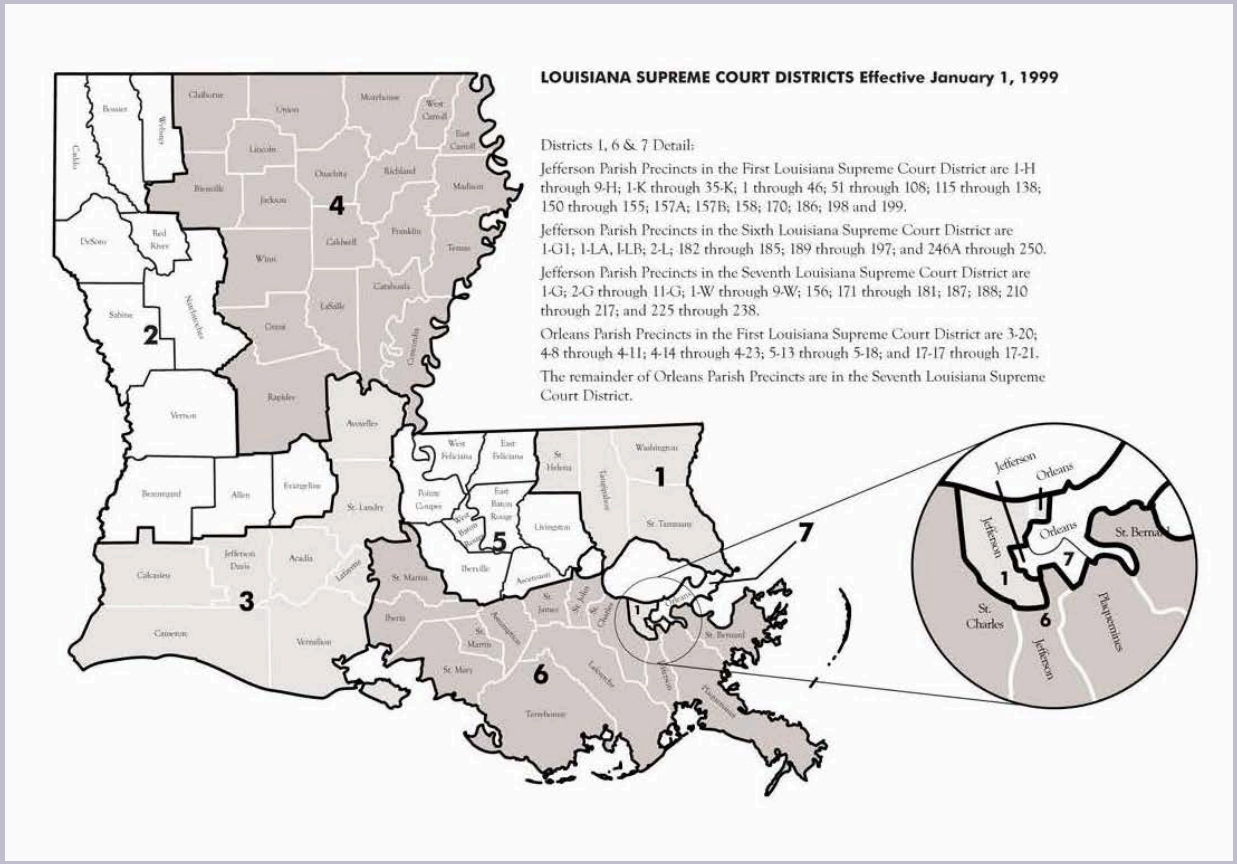
In the federal system, the President appoints Article III judges (U.S. District Court, U.S. Circuit Court, and U.S. Supreme Court judges) with the advice and consent of the Senate. Article III of the U.S. Constitution states that federal judges are appointed to "hold their Offices during Good Behavior" – effectively, for life. The district courts appoint federal magistrate judges to either four- or eight-year terms.

Visit the United States Courts website to learn more about federal judges.

How are Louisiana Judges Selected?

Louisiana judges are selected through partisan elections, serve for multiple-year terms, and must run for re-election if they wish to continue to serve on the court.

The seven Louisiana Supreme Court Justices are chosen from each of the seven districts. One justice is selected from each Supreme Court District.



There are fifty-three justices serving ten-year terms on the Louisiana Circuit Courts of Appeal.

Judges in the Louisiana District Courts, Family Courts, Juvenile Courts, Justice of the Peace Courts, Parish Courts, and City Courts serve six-year terms. Judges in the Mayor's Courts vary in how they are selected and term lengths by municipality.

This website contains additional information detailing how judges are selected in Louisiana and other information about the courts.

Other Members of the Courtroom Workgroup

Each of the boxes below details courtroom personnel with whom you may be less familiar.

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' responsibilities include 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 a defendant's financial circumstances.

Bailiffs

Bailiffs are the court staff responsible for courtroom security. Bailiffs are often local sheriff's 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 juror requests for postponements of 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, sets 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 and 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 take 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).

Listen: The Courtroom Workgroup in Action

As noted above, the adversarial system – which pits prosecutors "against" defense attorneys – is actually quite collaborative in practice. Consider this case covered by the *Serial* podcast on the Cleveland Criminal Court. While the defendant believes herself to be unfairly accused in the assault of a police officer, her defense attorney negotiates a plea deal that is satisfactory to the state and the defense – but clearly derails her life.

5.9 COURTROOM WORKGROUP: DEFENSE ATTORNEYS

Lore Rutz-Burri and Chantel Chauvin

The Sixth Amendment to the U.S. Constitution provides that "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 they could afford to hire an attorney, could have an attorney's assistance during their 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 rights of the accused. Importantly, the right to the 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. The two basic types of defense attorneys – privately-retained and appointed – are described in the gray boxes below.

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 would 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 Clauses 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* (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" (*Powell v. Alabama*, 1932).

Between *Powell* (1932) and the case of *Gideon v. Wainwright* (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 misdemeanor 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 (*Gideon v. Wainwright*, 1963). In two cases, *Argersinger v. Hamlin* (1972) and *Scott v. Illinois* (1979), the Court tied the right to counsel in misdemeanor cases to the defendant's actual incarceration. Because it is difficult to predict when a judge will want to incarcerate a person convicted of a misdemeanor, this approach is difficult to implement (*Argersinger v. Hamlin*, 1972; *Scott v. Illinois*, 1979). 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.

Mechanisms for Appointing Counsel

Different states rely on different mechanisms, and organization, for appointing attorneys to represent "indigent" defendants. 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, the system does not purely use public defenders 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 defenders' offices are generally considered one law firm, so attorneys from that office could not represent both A and B, and the court would have to assign a "conflict" attorney to one of the defendants.

Louisiana Indigency and Public Defenders

Read Louisiana Revised Statute 15:175 which discusses the proceedings to determine indigency in Louisiana. Anyone receiving public assistance or currently serving a sentence in a correctional institution or housed in a mental health facility would be deemed indigent. Others may also be deemed indigent after application to the district public defenders' office.

In addition, you can look at the website for the Louisiana Public Defender Board to learn more about public defenders in the state, how they serve the public, and how they advocate for clients.

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 on their own behalf.

The American Bar Association 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.

Tricky Issues in Representation

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; it does not always mean the right to an attorney of one's 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 the 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 the 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 to 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.

What Is "Effective Assistance of Counsel"?

Defendants' 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 that defense attorneys provided ineffective assistance in the sentencing portion of a 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 which showed that defendant had been subject to regular sexual abuse as a child (*Wiggins v. Smith*, 539 U.S. 510 (2003)).

Waiving Counsel

Sometimes, a defendant wishes to waive counsel and appear **pro se,** or represent himself 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" (*Faretta v. California,* 1975).

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 from a pro se defendant, and if necessary, standby counsel can step in if the defendant is engaging in misconduct.

5.10 PUTTING IT TOGETHER

Kate McLean

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 composed 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, appellate 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 it 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, and 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. 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.

The chart below outlines the basic stages that a criminal case follows after arrest. Click on each stage below to learn more, keeping in mind that the name and order of these steps may differ by jurisdiction.

An interactive H5P element has been excluded from this version of the text. You can view it online here:
https://louis.pressbooks.pub/criminaljustice/?p=143#h5p-11

How Much Does TV Get Right.... or Wrong?

Check out former NYC Prosecutor Lucy Lang's breakdown of 30 courtroom scenes from popular TV dramas and movies. Will you still be taking legal advice from "Suits"?

One or more interactive elements has been excluded from this version of the text. You can view them online here: https://louis.pressbooks.pub/criminaljustice/?p=143#oembed-1

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6: SENTENCING

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:

- Differentiate between the five sentencing philosophies in the American criminal justice system.
- Compare and contrast indeterminate and determinate sentencing.
- Explain sentencing guidelines, mandatory minimums, and sentencing enhancements.
- Explain the various types of punishments used in the American criminal justice system.

Critical Thinking Questions

1. What are the five sentencing philosophies and what is the main reason each gives for punishing criminals?
2. What are the different types of sentences judges can give a criminal?
3. What are mandatory minimum and sentencing enhancements and why might they be good or bad for criminals?
4. What types of physical punishments are allowed today in the United States? Do you agree with the availability of these punishments?
5. What types of other punishments are available today?

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https://louis.pressbooks.pub/criminaljustice/?p=145#h5p-12

6.1 INTRODUCTION TO SENTENCING IN THE U.S.

Lore Rutz-Burri; Kate McLean; and Chantel Chauvin

Substantive criminal laws define what behaviors are crimes, but the same laws also stipulate the permissible punishments for different crimes. All three 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. At the same time, because of a trend toward mandatory sentencing (discussed in the following chapters), much of the discretion in sentencing has been removed from judges and placed on the prosecutors who decide the charges a defendant will face. 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 are 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 also played a large role in deciding the types and lengths of punishment.

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Sentencing Philosophies

Criminal sentences range widely – from confinement sanctions (ex. incarceration in prisons and jails), community sanctions (ex. probation), and monetary sanctions (ex. fines) to physical sanctions (ex. capital punishment) and civil sanctions (ex. civil commitment for violent sexual incarceration in boot camps). Different kinds of sentences, and sentencing mechanisms, typically align to different sentencing or punishment philosophies. Throughout this chapter, we should consider what kind of sentencing/punishment philosophy – or understanding of offenders, their offense, and the purpose of punishment – is expressed through different types of sentencing. There are 5 broad philosophies, which often operate concurrently in a given sentence:

1. **Retribution** – sentences that seek to impose suffering on the defendant as compensation for the suffering they have caused
2. **Incapacitation** – sentences that seek to prevent a specific offender from re-offending by imposing practical limitations on their movement or body.

3. **Rehabilitation** – sentences that seek to address and "fix" aspects of the offender that contributed to their criminality
4. **Deterrence** – sentences that seek to prevent others from offending by threatening a severe punishment if caught
5. **Restoration** – sentences that attempt to reconcile the offender, victim, and larger community through practices that emphasize mutual healing

As noted above, one sentence, or sentencing actor, might combine many of the above philosophies. Consider an individual sentenced to 25 years in prison for second-degree homicide. Facing a quarter-century of incarceration is certain to cause the offender suffering, and that period of confinement will also prevent them from harming others outside the prison (incapacitation). While incarcerated, the offender may be offered extensive counseling, treatment for mental illness or substance use disorders, and educational or vocational training – all methods of rehabilitation. Moreover, those who learn of this severe sentence may be effectively deterred from committing a similar crime. Sentences of incarceration are not known for promoting restorative justice – although there are some exceptions (see the news story below.) Although people question the efficacy of prison, regarding it as little more than a factory for producing future criminals, incarceration can protect society from dangerous offenders. In other words, it is, by definition, effective at incapacitation, but studies show that it is much less effective at rehabilitation. In fact, serving time in prison often reinforces criminal risk factors.

Sentencing Mechanisms

The next four sections will explore 4 different kinds of sentencing mechanisms: indeterminate, determinate, sentencing guidelines, and mandatory minimums/sentencing enhancements. State and federal approaches to sentencing have shifted in response to prevailing criminal justice thinking and philosophies, with criminal codes often incorporating more than one single approach. These approaches endorse a spectrum of judicial discretion**. Indeterminate sentences**, at one end, are those that allow judges and parole boards the most discretion and authority. **Determinate sentences**, at the other end, allow little or no discretion. Currently, most states are following determinate sentencing coupled with sentencing guidelines, mandatory minimums and other sentencing enhancements.

Restorative Justice After Homicide

In 2010, 19-year-old Conor McBride shot and killed his girlfriend of three years, 19-year-old Ann Margaret Grosmaire, during an argument. Facing the death of their only child, the Grosmaires made an unprecedented decision – to forgive Conor, with conditions that led to his personal improvement

and made the community stronger. In a joint negotiation with a local prosecutor, the Grosmaires agreed to a sentence of 20 years, plus probation, for Conor.

You can watch a PSA on teen dating violence, made by Conor and sponsored by the Florida Restorative Justice Association, below.

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6.2 INDETERMINATE SENTENCING

Kate McLean; Lore Rutz-Burri; and Chantel Chauvin

Indeterminate or 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 not to a specific period of time but rather to a time frame that was often quite broad (ex. 5 to 25 years). For an offender given an indeterminate prison sentence, release – at 5 years, 10 years, or any period short of the maximum sentence – was contingent upon getting **paroled** or approved for release by a parole board which determined that the person was rehabilitated.

Because some offenders might rapidly show signs of reform, while others appeared resistant to change, indeterminate sentencing's open-ended time frame was deemed optimal for allowing individual rehabilitation, no matter how quickly or slowly. In other words, an indeterminate sentence functioned almost like an individualized "treatment plan," which was flexible to the needs of the offender. Moreover, the promise of release at the early end or minimum sentence was thought to function as an inmate incentive for "good behavior" and participation in rehabilitative programming.

The Origins of Parole in the United States

The U.S. origins of parole date back to the 19th century, when Zebulon Brockway – warden of the Elmira Reformatory in New York – sought to motivate young inmates through a system of earned "marks."

You can read more about Brockway and the history of the nation's first reformatory.

Yet, skepticism around indeterminate sentencing began to brew in the late 20th century, with critics highlighting both its ineffectiveness and potential for abuse. Indefinite sentences give tremendous discretion, and power, to judges, parole boards, and the prison officials who inform parole decisions. Inmates who were unpopular with correctional officers or wardens – due to their political beliefs, religion, or race – had little hope of a favorable parole recommendation. Moreover, as crime ticked upward in the late 1960s and 1970s,

many began to wonder if indeterminate sentences reformed or merely empowered "unfixable" offenders. In many ways, the end of indeterminate sentencing signaled the origins of mass incarceration in the United States. While many states began to abandon indeterminate sentencing (in favor of determinate sentencing, covered in the next chapter) in the 1970s and 1980s, the federal government legally ended parole for federal prisoners in the 1984 Comprehensive Crime Control Act (CCCA). After the CCCA took effect in 1987, any individual sentenced to federal prison was required to serve at least 85% of their sentence, with (slightly) early release predicated upon the banking of "good time" – not parole.

Watch and Reflect: Day of the Gun

Known best for his trenchant prison activism and two books of collected essays (*Soledad Brother* and *Blood in My Eye*), George Jackson is also one of the best-known victims of indeterminate sentencing in the U.S., receiving a sentence of "one year to life" at age 19 (following an armed robbery conviction). Jackson spent 10 years in the California state prison system before being killed during an alleged escape attempt in 1971.

Interested in learning more? Watch the 2003 documentary on Jackson's life and time, Day of the Gun, below.

One or more interactive elements has been excluded from this version of the text. You can view them online here: https://louis.pressbooks.pub/criminaljustice/?p=148#oembed-1

6.3 DETERMINATE SENTENCING

Kate McLean; Lore Rutz-Burri; and Chantel Chauvin

Determinate Sentencing Approach

Under determinate sentencing, judges have little discretion in sentencing. The legislature sets specific parameters on the sentence (ex. 36 to 41 months), and the judge sets a fixed term of years (or months) within that time frame (ex. 38 months). Often, such sentencing laws allow the court to increase the term (beyond the given window) if it finds **aggravating factors** and reduce the term (below the given window) if it finds **mitigating factors**. With determinate sentencing, the defendant knows immediately when he or she will be released. While determinate sentencing does not allow for parole, there may be some options for early release; namely, offenders may receive credit for time served while in pretrial detention, or "good time" credits for good behavior while incarcerated. The discretion that judges are allowed in initially setting the fixed term is what distinguishes determinate sentencing from definite sentencing.

As noted in the previous chapter, determinate sentencing grew largely out of growing disenchantment with indeterminate sentencing and, more broadly, the "rehabilitative ideal" in sentencing and incarceration. Multiple books and research papers published in the 1970s asserted that rehabilitative programs in prisons simply weren't working; moreover, indeterminate sentences created great disparities between offenders convicted of similar crimes, and further caused inmates unnecessary stress and anxiety. These critiques combined with growing concerns over crime, which were embraced by politicians promoting a "get tough" approach. Ironically, there is little evidence that the move toward determinate sentencing significantly improved sentencing inequities, or prisoners' attitudes toward prison and their sentences. Yet this approach – in combination with "innovations" such as sentencing guidelines, mandatory minimums, and sentencing enhancements – continues to drive much state and federal sentencing.

6.4 PRESUMPTIVE SENTENCING GUIDELINES

Chantel Chauvin; Kate McLean; and Lore Rutz-Burri

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 (for example, the Louisiana Sentencing Commission). These commissions proposed sentencing **formulas** based on a variety of factors, but the two most important factors in any sentencing guideline scheme are (1) the nature of the offense, and (2) the offenders' criminal history. As the guidelines model gained in popularity roughly 40 years ago, some states enacted advisory sentencing guidelines that gave suggestions to judges statewide of what was considered an appropriate sentence and which should be followed in most cases. By contrast, some states enacted mandatory sentencing guidelines that required judges to impose **presumptive sentences** – the length or type of sentence that was presumed appropriate, unless **mitigating factors** or **aggravating factors** were identified on the record (more below).

Sentencing guidelines generally differentiate between presumptive prison sentences and presumptive probation sentences. Judges who depart from presumptive sentencing guidelines may do so in two ways. On the one hand, they may select a wholly different type of sentence in a **dispositional departure**, imposing prison when probation was the presumptive sentence (or probation when prison was the presumptive sentence). 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 the 26-month presumptive sentence).

Guideline sentencing allows for judicial discretion while limiting such discretion at the same time. Judges must generally make findings when sentencing the offender to a term of incarceration that is different from the presumptive sentence. Specifically, the judge must indicate which aggravating factors or mitigating factors were responsible for the sentencing. 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." This law simultaneously created the United States Sentencing Guideline Commission, giving it the authority to create the guidelines. In its issued

guidelines, the Commission dramatically reduced the discretion of federal judges. Not only did the federal Sentencing Guidelines establish much narrower sentencing ranges, but they also required judges who departed from the ranges to state in writing their reason for doing so. In fact, the Sentencing Reform Act also established an appellate review of federal sentences while abolishing the U.S. Parole Commission.

Most states have adopted some version of sentencing guidelines, from the very simple to the very complex, with many states restricting their guidelines to felonies. Although limiting judicial discretion, state sentencing guidelines all allow some wiggle room if the judge finds that an individual case differs from the "run of the mill." At the same time, many sentencing guidelines have come under legal attack, with the U.S. Supreme Court invalidating or requiring modifications to many state – and the federal – guidelines in 2005. Specifically, the Court decided that sentencing guidelines that do not require a jury to make findings of aggravating factors (which in turn suggest a harsher sentence) violate the defendant's right to a jury trial (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)).

While sentencing guidelines remain widely used, in combination with determinate sentencing, they have hardly proven to be a "silver bullet" for sentencing reform. "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" (Scheb 2013, p. 683).

The U.S. Sentencing Guidelines: A User Manual

As noted above, federal sentencing ranges are calculated by judges using two "variables": the seriousness of the offense, and the offender's criminal history. While the latter may be defined at six levels – from no prior arrests to serious criminal records – there are 43 levels (!) of offense seriousness.

Yet sentencing is not as easy as simply plotting the intersection of these two coordinates – judges must also consider whether "specific offense characteristics" change the "base level" of the offense,

while additionally making “adjustments” that may increase or decrease the final offense seriousness.

Learn more about the different offense levels, characteristics and adjustments in this sentencing guidelines document.

6.5 MANDATORY MINIMUMS AND SENTENCING ENHANCEMENTS

Lore Rutz-Burri; Kate McLean; and Chantel Chauvin

Mandatory Minimum Sentences

Legislative enactments, ballot measures, initiatives, and referendums have resulted in **mandatory minimum sentencing** 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 existence. It is possible for a judge to impose a sentence that exceeds the mandatory minimum, following their judgment that an offender warrants a particularly harsh guideline sentence due to their criminal history or the brutality of their crime; however, judges may not impose a sentence lower than the mandatory minimum.

Mandatory minimum sentences are a type of determinate sentence. At the state level, most mandatory minimum sentences are attached to violent offenses or offenses involving the use of firearms. Federal law also mandates minimum prison terms for certain drug crimes prosecuted in federal courts. For example, a person charged with possession with the intent to distribute more than five kilograms of cocaine – or 0.28 kilograms of crack cocaine – is subject to a mandatory minimum sentence of ten years in prison (See, 21 U.S.C.A. §841 (b)(1)(A)). Indeed, the severe mandatory minimums – and unjustified, racialized disparities – for federal drug offenses has driven a growing outcry against mandatory minimum sentencing schemes, which have not been shown to reduce sentencing disparities or offender recidivism.

Racial Disparities in Imprisonment

In fact, studies have shown that certain mandatory minimum laws have increased racial disparities in imprisonment, particularly the imprisonment of Black drug offenders.

Read an excellent paper discussing racial disparities in mandatory minimums from Undergraduate Economic Review.

Many parties across the political spectrum agree that these attempts to limit judicial discretion may have gone

too far. Judges must impose 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 that carry mandatory minimum sentences, can effectively compel negotiated pleas. 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 and was signed into law by President Trump. Ultimately, this law – which makes retroactive changes to mandatory minimum sentences passed in 2010, has resulted in a 13% decline in the federal prison population.

The First Step Act

For an overview of the First Step Act, see the Federal Bureau of Prisons website.

For expanded and detailed information from the Congressional Research Service, you can read their report.

Louisiana Mandatory Minimums: Louisiana state law has in place mandatory minimum sentences for some nonviolent drug offenses that equate to distribution or cultivation of schedule I drugs. Read LA Revised Statute 40:966 – "Penalty for distribution or possession with intent to distribute" to learn more about mandatory minimums in Louisiana.

Other Mandatory Sentences—Penalty Enhancements and Truth-in-Sentencing Laws

Legislatures have also exercised their authority over sentencing by passing laws that enhance criminal penalties for crimes against certain victims (ex. crimes committed with weapons, or hate crimes.) For example, Congress, under President Clinton, passed the Violent Crime Control and Law Enforcement Act in 1994, which 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 both gun crime enhancements and hate crime enhancements.

The 1994 law also provided funding incentives for states that adopted "truth-in-sentencing" laws, or laws that require inmates to serve at least 85% of their given sentence before obtaining release. By 1998, 40 states had passed such laws, resulting in not only dramatically longer sentences for some offenders but an increased

rate of prison admission in those states. Read a special report published by the Bureau of Justice Statistics in January 1999 detailing "Truth in Sentencing in State Prisons."

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** or **consecutively**. States vary as to whether the default approach on multiple sentences is consecutive sentences or concurrent sentences. The Supreme Court has held that the decision to impose concurrent or consecutive sentences is a judicial determination, not a jury determination, and thus not subject to the rule that any sentencing enhancement factor must be proved to the jury beyond a reasonable doubt.

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 Supreme 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 had served his or her criminal sanction. Justice Stephen 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" (*United States v. Comstock,* 2010).

Should "Three Strikes" Laws Be Out?

Alongside mandatory minimum and truth-in-sentencing statutes, habitual offender or "three strikes" laws gained widespread traction in the 1990s. Such laws required an enhanced sentence – and sometimes a mandatory minimum – for individuals who are convicted of a 2nd and 3rd crime – even if they are convicted of three crimes in the same case.

While the impact of "three strikes" laws varied by jurisdiction, their effect was most felt in California, which required a mandatory sentence of 10 years for individuals' "2nd strike" and 25 years for their 3rd.

In 2022, the California State Supreme Court was charged with considering whether prosecutors

were obligated to request sentencing enhancements for repeat offenders or whether they retained discretion over this issue.

Read more about California's three strikes laws and the people convicted under them.

6.6 OTHER SENTENCES: PHYSICAL PUNISHMENT

Lore Rutz-Burri; Kate McLean; and Chantel Chauvin

Corporal Punishment

While the U.S. Supreme Court's 1977 ruling in *Ingraham v. Wright* upheld the use of corporal punishment against public school students, sanctions such as paddling or flogging are not constitutionally approved sanctions for criminal offending in the United States. Nevertheless, such methods do play a prominent role in the history of punishment in the U.S. and England. Nonlethal corporal punishments, such as flogging, were 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 inflict 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....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" (Lippman, 2016, p. 57).

Capital Punishment

While the U.S. Supreme Court has repeatedly affirmed constitutional approval for the death penalty (most recently in *Glossip v. Gross,* decided in 2015), the use of the death penalty in the United States remains controversial. Even as a majority of Americans continue to support the use of capital punishment for murder – 60% as of 2021 – this figure actually represents a historical low; the same survey, captured by the Pew Research Center, also found that 78% of participants agreed that there was some risk of innocent individuals being put to death (Pew Research Center, 2021).

As of 2020, the United States is the only country in the Americas (North and South) which continues to employ the death penalty, and one of only two countries (alongside Japan) in the Organization for Economic

Cooperation and Development, an association of highly-developed nations worldwide. U.S. "exceptionalism" in this realm reflects the many questions other cultures have asked about capital punishment, such as

- 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?

The U.S. Courts are typically empowered to answer only the last two questions (although they have speculated on others), 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. Thus, the Court appears willing to uphold capital punishment at large, finding that it is not disproportionately cruel and unusual when the crime for which the defendant was convicted resulted in the death of another. It has, however, rejected the constitutionality of the death penalty for crimes that did not involve the victim's death, for example, the rape of an adult woman (see *Coker v. Georgia*, 433 U.S. 584 (1977)). *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 the rape of a child less than twelve years of age. Justice 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 U.S. 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 U.S. 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 this Slate article written about the case.) 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 be 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, although 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.

For more information, see the Death Penalty Information Center's website page regarding mental illness and the 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,

"A mentally 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" (*Atkins v. Virginia*, 2002).

On February 27, 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* (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* (2007) 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* (2007) standard will be satisfied." 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."

The morality of executing an individual with severe mental illness, or problems of cognitive development, was recently raised in the sentencing trial of Nikolas Cruz, who shot and killed 17 students and staff attending Marjory Stoneman Douglas High School in Parkland, Florida, in 2018. While Cruz pled guilty to his crimes in 2021, a potential death sentence was considered by a 12-person jury in a separate hearing. In October 2022, a non-unanimous jury handed down a sentence of life in prison. In Florida, a jury must be unanimous in order to deliver a death penalty sentence – and three jurors declined to endorse this punishment, due to their belief that Cruz was severely mentally ill.

Juvenile Offenders and the Death Penalty

Until the late 20th century, 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 Supreme 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 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)). Finally, 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.

6.7 OTHER SENTENCES: MONETARY PUNISHMENT

Lore Rutz-Burri; Kate McLean; and Chantel Chauvin

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. The Model Penal Code proposes legislative guidelines on the use of fines, but states have generally rejected this provision. Instead, judges are given extremely broad discretion in setting 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 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 fees associated with a payment plan. Louisiana allows criminal fines to be put on a payment plan. You can read more about this on the Fines and Fees Justice Center website.

Civil Forfeiture

Federal law allows **civil forfeiture,** the process by which the government confiscates the proceeds (property or money) of criminal activities (see 18 U.S.C.A. §§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 (*Waller v. 1989 Ford F350 Truck*, Ill. 1994). 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 (*United States v. Bajakajian,* 1998). 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 (*In re King Properties*, Pa 1983).

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* (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's $42,000 Land Rover after he sold a couple 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.

Louisiana Civil Forfeiture Laws

In Louisiana, according to RS 40:2606, "property that is alleged to be evidence of a criminal violation may be seized for forfeiture by any law enforcement agency designated by the district attorney…on probable cause."

According to LA RS 40:2616, 20 percent of forfeiture proceeds go to the seizing law enforcement agency, 20 percent goes to the prosecuting district attorney's office, and the remaining 20 percent goes to the criminal court fund.

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" (Scheb & Scheb, 2012, p.268). When the judge's sentence includes restitution, the amount should be enough money to place the victim in the same position they would have enjoyed 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' compensation 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. Read more about Louisiana's Crime Victims programs – the Victim Assistance Program and the Victim Compensation Program.

6.8 OTHER SENTENCES: COMMUNITY-BASED SENTENCES

Lore Rutz-Burri; Kate McLean; and Chantel Chauvin

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," or 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 [outside of the offender] almost always hardens the offenders against reconciliation and restoration of the damage done" (Retzinger, & Scheff, 2000).

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 (1979, p. 339) 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 at the request of the prosecutor, would revoke his freedom. This time the judge would set a sentence, or reinstate the previous sentence, and the sentence would be executed. The common law authority of a judge to suspend a sentence was questionable, but many judges regularly exercised that authority."

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:

1. It determines whether the conditions are permissible, and, if so,
2. It determines whether there is a reasonable relationship between the conditions imposed and the purpose of probation.

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 Court noted that the search of a probationer and his or her residence, with or without a warrant, based on reasonable suspicion that the 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 and 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; and 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 of up to six months and then is released on probation.

Probation and Parole in Louisiana

To learn more about probation and parole in Louisiana, visit the Louisiana Department of Public Safety and Corrections website for the Division of Probation and Parole.

Early form of Probation

Visit San Mateo County's website to learn about the early forms of probation traced back to the English criminal law of the Middle Ages.

Also, you can go to the United States Courts' website to learn more about the history of probation and pretrial services in the United States.

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7: CORRECTIONS

Image description: Entrance to Louisiana State Penitentiary at Angola, Louisiana
Image credit: "Angola Prison" by msppmoore is licensed under CC BY-SA 2.0.

Learning Objectives

This section will cover corrections, the last third of the criminal justice system, to include a brief history of corrections, different ideologies of punishment, and the role of corrections. After reading this section, students will be able to

- Summarize the history of corrections and punishment
- Describe the definitions and roles of levels in corrections
- Contrast the different ideologies of corrections

An interactive H5P element has been excluded from this version of the text. You can view it online here:
https://louis.pressbooks.pub/criminaljustice/?p=162#h5p-13

7.1 A BRIEF HISTORY OF PUNISHMENT

David Carter; Michelle Holcomb; and Kate McLean

A Brief History of Punishment

The Fourth Amendment to the United States Constitution guarantees the people of the United States the right to feel safe and secure in our person and homes. However, many Americans have a "fear of crime" which influences how we think and act in our day-to-day lives. This fear also can have a significant impact on whom we vote for and what policies we support, and it has caused great fluctuations with regard 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 made into law through the legislative process and converted into sentencing practices. Citizens have differing views on why offenders should be punished and how much punishment they should receive. Such correctional ideologies, or philosophical supporting structures of punishment, have emerged throughout history, and are not unique to the United States. The next several sections will expand upon some of the most influential philosophies of punishment which were introduced in part 6, including retribution, deterrence, incapacitation, and rehabilitation.

Think About It: One of the most frequently-cited statistics in the media is the U.S. homicide rate. Often, you will hear about the number of homicides in a state, or a city for a particular year. An interesting clarification regarding this number: it typically does not include a number of deaths that occur in prison.

Given that over 2 million individuals are incarcerated, on any given day, in the United States, deaths in prison (and jail) are common – yet these are not normally counted in any widely-published statistic. In 2019, there were approximately 4,324 deaths that occurred in prisons in the United States – including 311 suicides, 253 overdoses, and 143 homicides. In fact, this was the highest number of homicides recorded in the history of reporting (19 years). Why do you think prison homicides have increased over time?

It should be noted that the "Mortality in State and Federal Prisons" reporting system is voluntary, and so it may not actually capture all deaths that occur in prison. Find out more here: https://www.bjs.gov/index.cfm?ty=dcdetail&iid=243

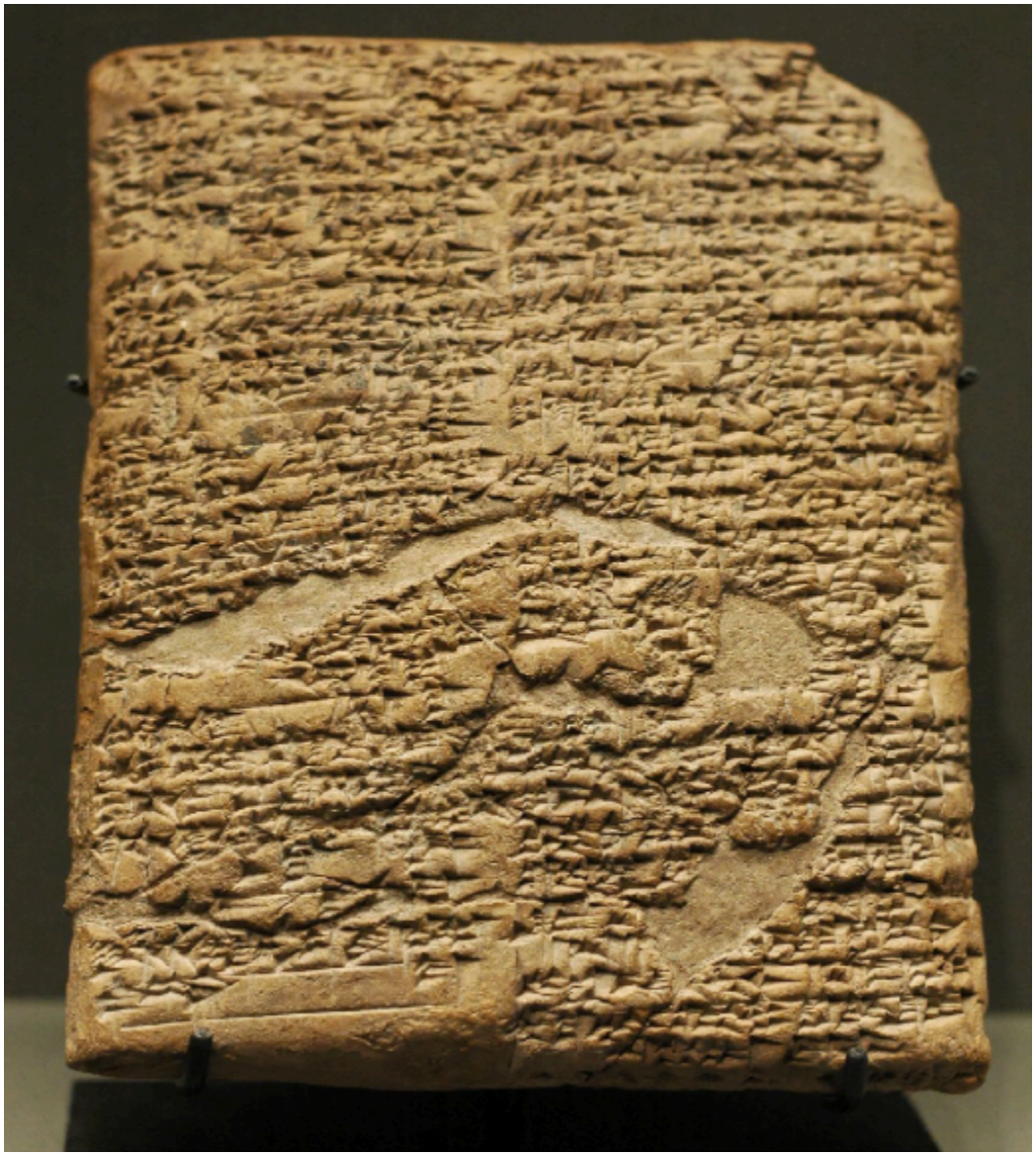
7.2 RETRIBUTION

David Carter; Kate McLean; and Michelle Holcomb

Retribution

Retribution is the only ideology that is "backward-looking," or focused on the past offense. The term "backward-looking" means that the punishment does not address anything in the future, only the past harm done.

Retribution is thought to be the oldest punishment ideology because it expresses the ancient concept of revenge, or "an eye for an eye," also known as *Lex Talionis,* which roughly translates as the "law of retaliation." This concept of vengeance implies that if someone perceives harm, they are within their rights to retaliate at the proportionate level as the harm received. This is because proportionate punishment is a core principle of retribution: offenders who commit the same crime must receive the same punishment. The idea of *Lex Talionis* was developed in early Babylonian law, and it is here that we see some of the first written forms of justice policy. Dated to 1780 B.C.E., the Babylonian Code, or the Code of Hammurabi, is considered to be the first attempt to make into law justice practices within a society. These laws (pictured below) largely represent the philosophy of punishment known as retributive ideology.



Hammurabi Code

Since the primary goal of retribution is to ensure that punishments are proportionate to the seriousness of the crimes committed, regardless of the individual differences between offenders, the United States Supreme Court created the idea of the **proportionality test**. This "test" was created as a result of *Solem v. Helm* (1983), which compares the sentence to the Eighth Amendment to the United States Constitution. 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 then balances out the crime that was committed.

7.3 DETERRENCE

David Carter; Michelle Holcomb; and Kate McLean

Deterrence

Forward-looking ideologies are designed to provide punishment but also to reduce the level of reoffending (**recidivism**). Philosophies of deterrence specifically evolved during the Enlightenment, which also gave rise to the "classical era" of criminology, which regarded crime as a rational – and thus preventable – behavior. Deterrence is designed to punish current behavior(s), while also warding off future criminality through the threat of **sanctions**. Deterrence 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."

Deterrence is often discussed within two categories: general and specific. **Specific deterrence** is geared toward the existing, individual offender. 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 avoid future criminality, having experienced the pains of punishment. It is this point that makes deterrence a forward-looking theory of punishment. General deterrence focuses on more than one person. **General deterrence** intends to dissuade would-be offenders who observe the punishment of others. For example, if an instructor "makes an example" of a late student, refusing to admit them to class, other students may increase their efforts to arrive on time.

In order for deterrence to work, the people to be deterred (including society as a whole) must have some knowledge, and understanding, of the punishments they might receive. Theories of deterrence operate on three basic assumptions: individuals have free will, some level of rationality, and an orientation toward pleasure. Firstly, free will refers to everyone's ability to make choices about their future actions, like choosing when to offend and not offend. Secondly, they must also have the ability to rationally predict the outcomes of their chosen behaviors. Thirdly, individuals must be oriented toward feelings of pleasure and the avoidance of pain. This is known as "hedonistic calculus," or the tendency to balance pleasure with pain. Applied to offending, it means that individuals will weigh the pleasures associated with offending against the pains they may suffer if caught and sanctioned. 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.

The success of deterrence also requires that punishments are **certain, swift,** and **proportionately severe**. First, by making punishment certain (or at least making the public think that their offenses will not go unpunished), would-be offenders may be appropriately deterred. According to classical criminologist Cesare Beccaria (1738-1794), this is the most important of these three preconditions of effective deterrence. The celerity, or swiftness, of punishment is a secondary factor in preventing crime. If offenders know that punishment will be quickly delivered, they may be more afraid to break the law. Finally, in order for the law to retain its legitimacy, punishment must only be as severe as necessary. 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."

Cesare_Beccaria_1738-1794.jpg

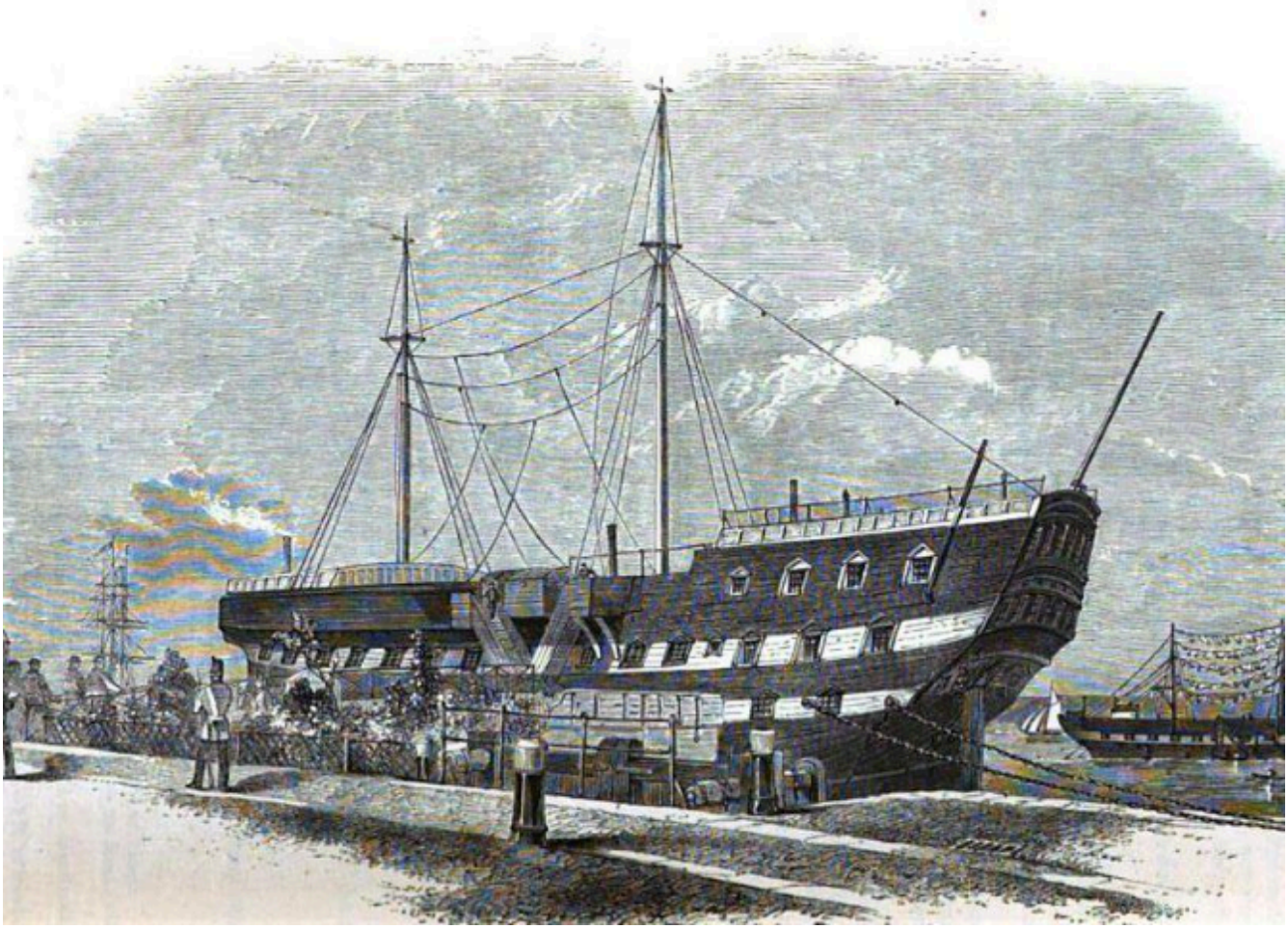
Today, we have a more scientific understanding of the effectiveness of deterrence, based on crime statistics. It does appear to work for some lower-level offenses, and for individuals that are generally prosocial. However, the overall effect of deterrence is limited. Want to know more about the science of deterrence? Check out this data brief from the National Institute of Justice.

7.4 INCAPACITATION

David Carter; Kate McLean; and Michelle Holcomb

Incapacitation

Rooted in the concept of "banishment," **incapacitation** is the removal of an individual from society, for a set amount of time, so that they cannot commit crimes (in society) during that period. In British history, this often occurred on Hulks. **Hulks** were large ships that carried convicted individuals off to faraway lands. The point was to prevent them from committing crimes in their original community.



The_Warrior_prison_ship.JPG

Beginning in the 1950s, punishment became much more of a politically relevant topic in the United States. Lawmakers, justice officials, and others began to campaign on the basis of their "toughness" on crime, using the

public's fear of crime and criminals to benefit their agendas. One way that such officials could show that they were tough on crime was through their support for long prison sentences. Such policies might be considered as **collective incapacitation**, or the incarceration of large groups of individuals in order to restrict their ability to commit crimes.

In fact, the 20th century saw a nearly continual increase in the use of prison – and long prison sentences – to punish offenders. For this reason, the U.S. experienced a rapid growth in state and federal prison populations over the past 40 years – what we commonly refer to now as "mass incarceration." This "politicization of punishment" increased the overall imprisonment rate in two ways. First, by limiting the sentencing discretion of judges, the country as a whole has effectively gotten tougher on crime. Specifically, more people were, and are being, sentenced to prison that may have otherwise gone to specialized probation or community-sanctioned alternatives. Second, the legal sentences and sentencing ranges passed by legislators (and endorsed by prosecutors in their charging decisions) have led to harsher and lengthier punishments for certain crimes. Offenders are being sent to prison for longer sentences, which has caused the intake-to-release ratio to increase, causing enormous buildups of the prison population.

The incapacitative ideology followed this design for several decades. In the early 1990s, policies were implemented that targeted individual offenders more specifically through habitual offender or "three strikes" policies (discussed in the last part). Such policies incarcerate individuals for greater lengths of time if they have prior or concurrent offenses. These policies reflect a philosophy of **selective incapacitation.**

Evidence on the effectiveness of selective and collective incapacitation is mixed, at best. Policymakers may promote their ideals through examples of locking certain offenders away in order to help calm the fear of crime. Researchers, however, have shown that there are minimal savings at best, stating that these goals do not achieve the intended results as previously suggested (Blokland, 2007). Future styles of selective incapacitation have evolved to include tighter crime control strategies that incorporate variated sentencing strategies to selectively incapacitate higher-rate offenders. Others opt for tougher parole procedures to retain more harmful offenders longer.

Overall, 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 are more effective, and less costly, than the ones already in practice? This takes us to the last of the four main punishment ideologies: rehabilitation.

7.5 REHABILITATION

David Carter; Michelle Holcomb; and Kate McLean

Rehabilitation

While its roots are shallower than the three previous 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 at a cost. As we will talk about in more detail when covering prisons and jails, our societal reliance on incarceration has resulted in a persistent paradox. Most offenders will come out of institutions – roughly 95% of all people who enter prisons are released – yet little is done to change them while they are there. This is mostly due to our attitudes towards offenders, the policies that guide prison life, and the institutions themselves. And yet, there is the expectation that the individuals leaving prisons will not commit crimes in the future.

Rehabilitation has taken on different forms through its history in the United States. In the 19th century, a group of justice reformers theorized that prisons might serve as a place for spiritual rehabilitation. Offenders were conceptualized as "out of touch with God", and so a solution to their criminality was to show penitence (or remorse after reflection). 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 in penance.

Reformatories, which followed the penitentiary model, 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 "fix" and improve individuals, thus allowing them to come back to society successfully. 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. Beginning in the early 20th century, some correctional theorists promoted the idea that offenders were sick or biologically abnormal. Such theories supported policies of informal prisoner sterilization, as well as surgical interventions that we would now recognize as pseudoscientific, inhumane, or cruel. The medical approach, while largely discredited, still informs some penal policies today. For example, the chemical castration of certain offenders does still occur. In Oklahoma, as of September 2018, sex offenders must undergo mandatory treatment with medroxyprogesterone acetate before they are released to the community. In Louisiana, as of March 2023, chemical castration is an option for some sex offenders (Reilly, 2023).

Rehabilitation as an ideology has had critics. This is in large part due to how it is perceived. Many have voiced the objection that such efforts are "soft" on offenders – a critique that is particularly effective during times when there is a high fear of crime. Yet researchers have also problematized the utility of rehabilitative efforts in prison, most notably Robert Martinson, who published a trenchant review of such policies in 1974, entitled "What Works?" In his 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). This was the spark that many needed to turn toward the more punitive ideologies that characterize the correctional system today. At the same time, this study did raise many

important questions about why rehabilitation was not working, how to better evaluate rehabilitation, and how to understand the differences between what does, and does not, work for offenders.

Understanding Risk and Needs in Rehabilitation

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 dangerous in the future. This is done by better understanding risk factors for offending and how some offenders are at a higher risk for recidivism than others. Such evidence-based risk factors include 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).

While we can't change the number of prior offenses someone already has, all of these other items can be addressed. These are considered offenders' "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 is at the heart of most modern effective rehabilitation programs. Additionally, thousands of offenders have been assessed on these items, which has helped to further develop evidence-based rehabilitation practices. When these criminogenic needs are addressed, higher-risk offenders demonstrate positive reductions in their future risk for offending.

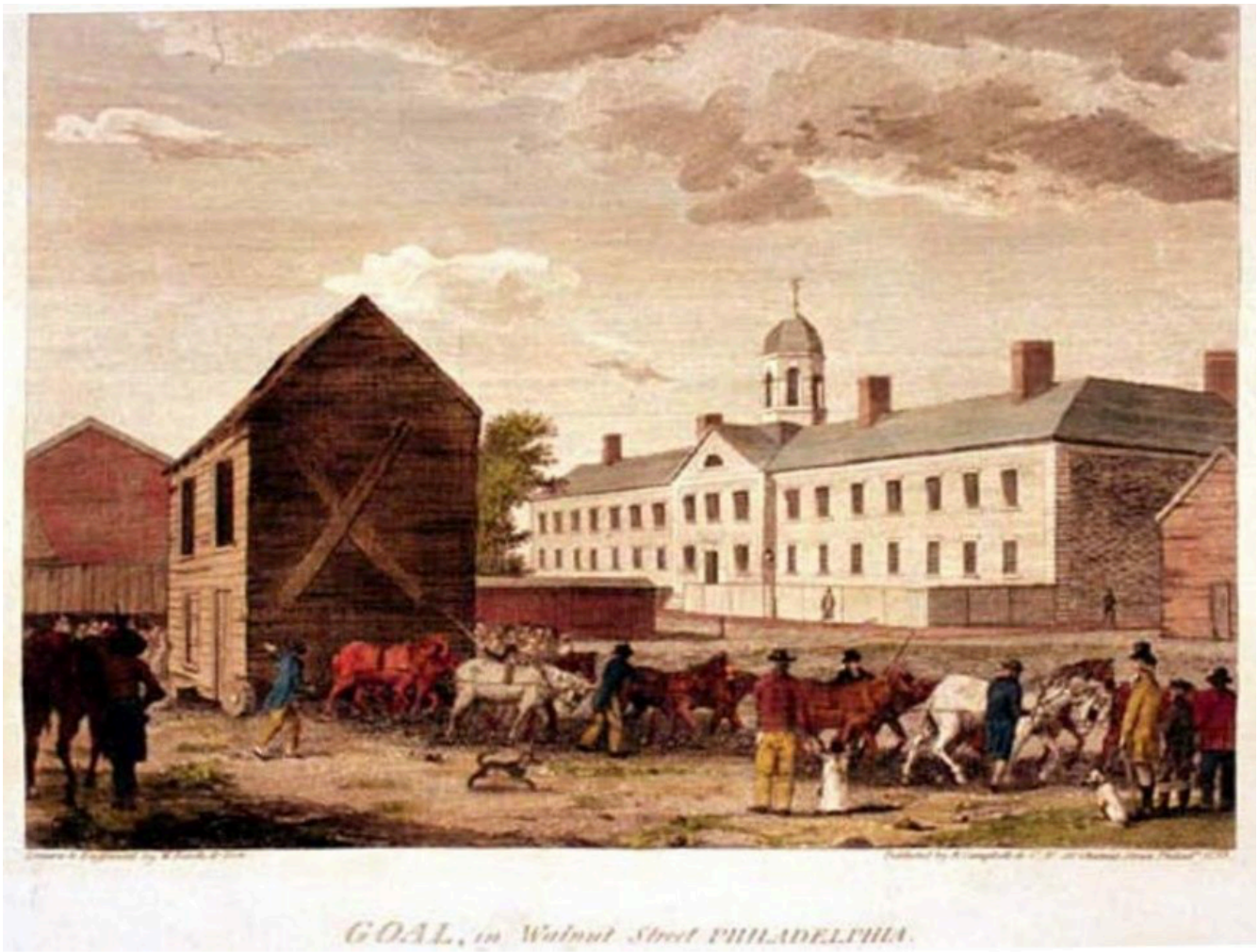
Over the last 40 years, efforts to change these characteristics, in order to reduce offending, have been varied. One of the most useful approaches to changing the antisocial attitudes and behaviors of offenders has come in the form of behavioral and cognitive behavioral change efforts. Cognitive behavioral change for offenders is based on the concept that the behaviors that one exhibits 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 interactions with and observations of others. It is especially relevant since we are receiving individuals from prison, where these ideas, peers, values, and beliefs may dominate. Other evidence-based programs can be reviewed through the National Institute of Justice's "Crime Solutions" web page, which rates correctional (and crime prevention) interventions as effective, promising, and not effective based on available research.

7.6 A BRIEF HISTORY OF PRISONS AND JAILS

David Carter; Michelle Holcomb; and Kate McLean

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 England. Much as in that country, jails are local establishments, originally managed at the level of colonies, and now largely operated out of counties/parishes. In their history, jails have gone by various names, depending upon their function and use, such as "Bridewells" and Workhouses. The first colonial jails differed in their operation and functionality from those that we use today. Namely, jails prior to the late 18th century did not function as a form of punishment but were rather used to (1) hold individuals awaiting trial or execution, or (2) detain debtors, the contagiously sick, those with severe mental illness, and other dependent individuals. Moreover, jails in this period were privately operated, for profit, with no public oversight and absolutely "no frills" – detainees may have been required to provide their own food, drink, clothing, and medication, if not asked to pay for their own stay. The deficiencies of this system – wherein detainees were ill-treated and often escaped – were first addressed in the construction of the Walnut Street Jail, which opened in 1790. 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 became the blueprint for later prison construction, which will be discussed in the latter half of this chapter.

Walnut Street Prison Historical Marker

As the United States began to increase in population, county/parish lines were drawn up within newly established states. Sheriffs began to police their counties/parishes, and also became responsible for managing the lower level infractions (misdemeanors) within their jurisdictions. In this way, county/parish jails began to multiply within the United States. Initially, many jails were nothing more than parts of a Sheriff's office – literally, cells in a back room. Today, large structures (even multiple structures in a single county) constitute jails in the United States. Still today, the vast majority of jails are small in size. And while there are few larger jails, they increasingly hold more individuals – a potential problem within facilities that are mostly populated by

those awaiting trial, who haven't been convicted of a crime. Overall, pretrial detainees represent roughly 81% of all local jail inmates in the United States, while the remaining 19% are individuals who have been sentenced to less than a year of incarceration (or less than two years, in some jurisdictions, such as Pennsylvania) (Sawyer, 2022). At this point in history, jails hold three primary functions: (1) to hold individuals prior to trial; (2) to hold individuals serving short(er) sentences, typically for less serious crimes; and (3) to hold individuals awaiting transportation to another institution.

7.7 WHO GOES TO JAIL?

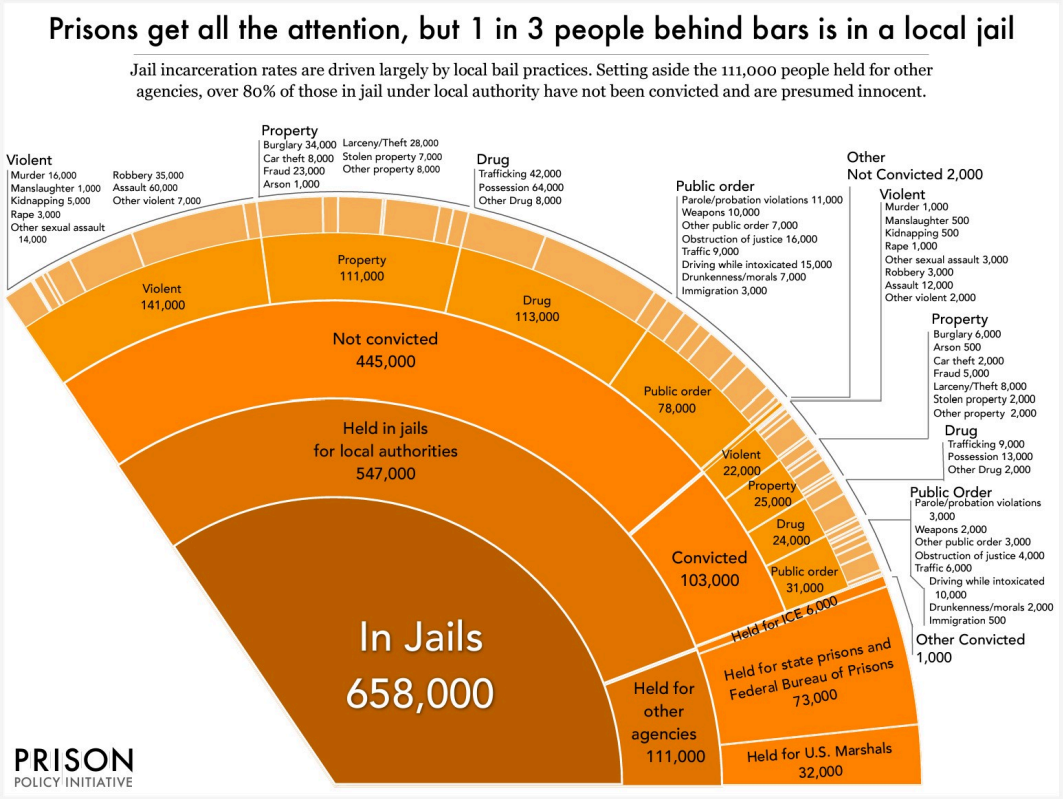
David Carter; Michelle Holcomb; and Kate McLean

One of the more troubling aspects of jails in the United States is the diverse population that gets placed within them. The short description 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, including the County Sheriff's Office and municipal or local police. State police may send individuals directly to jail, and even federal agencies may use local jails as a point of entry. For example, ICE (Immigration and Customs Enforcement) houses many thousands of ICE-holds in jails across the country. At the end of the day, jails hold all kinds of individuals. While this list is not comprehensive, it does represent many of the populations held in jails:

- Felons and misdemeanants
- First-time and repeat offenders
- Those awaiting arraignment or trial
- The accused and convicted
- Parolees stepping down from prison
- Juveniles pending transfer
- Individuals with mental illness awaiting transfer
- Individuals with alcohol and substance use disorders
- Detainees for the military
- Detainees for federal agencies
- Individuals in protective custody
- Witnesses
- Individuals in contempt of court
- Detainees awaiting transfer to state, federal, or other local authorities

As one can see from this list, there are many types of people in the country's 3,300-plus jails at any given time. In fact, on any given day, there are over 650,000 individuals in jail in the United States. This daily census has steadily increased since the 1970s, with some decrease during the COVID-19 pandemic; over the past decade, however, daily jail populations have generally fluctuated between 725,000 to 750,000 inmates. Of course, this is only one portion of the people who enter jail annually. It is estimated that roughly 11 million people are processed through America's jails each year. Average lengths of stay vary by jurisdiction, but a good estimate is

roughly 25 days in jail for each individual. As Wagner and Sawyer (2022) show in the picture linked below, the types of people in jail at a point in time is varied.



Prison populations are mostly housed in local jails. (Click on the image to view the original source. Link opens in a new tab.)

pie2022_jail_detail_vector_on_white

Probably one of the most notable items in the snapshot above is the proportion of individuals that have not been convicted. Roughly 81% of individuals in jails at any given time have not been convicted of a crime, nor sentenced. Other notable groups are individuals held for other agencies. This could be a matter of processing time or allocations of bed space. Still, jails only make up one portion of the brick-and-mortar approach to punishment. Prisons are the other large part.

Think About It

As noted above, an average jail stay in the United States is estimated at 25 days. While this may not seem like an extraordinary amount of time, think about what might happen if you were taken out of your life for just under one month.

- What would happen with your current classes? Your GPA? Your college progress and

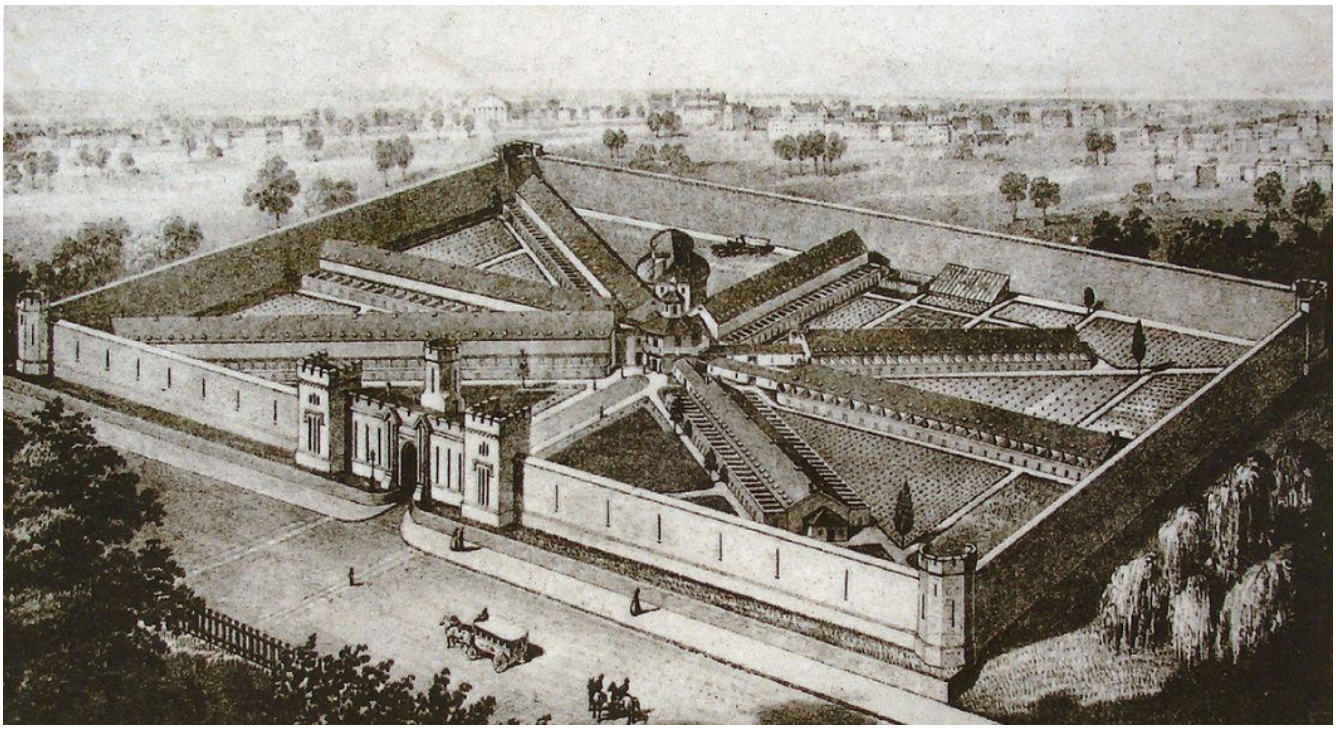
financial aid?

- What would happen with your job if you couldn't appear for over 3 weeks?
- What would happen with your family? Who would feed your pets or take your children to school?
- What would happen with your house or housing? Would your rent or bills be taken care of?

7.8 GROWTH OF PRISONS IN THE UNITED STATES

David Carter; Michelle Holcomb; and Kate McLean

As mentioned at the beginning of this section, the Walnut Street Jail is recognized as the first publicly built institution for incarceration in the United States. Soon after its construction, another prison was built with similarly lofty ideals – the Eastern State Penitentiary (ESP), which operated as a prison for nearly 150 years. Many of the prisons still in operation today were first built on the "Eastern State model" of a penitent prison, where inmates were held in solitary cells and required to be silent and perform some kind of labor. Many of the cells in the original prison (as depicted below) opened to individual courtyards where individuals could look up and meditate on a higher power – hence the concept of a penitentiary.



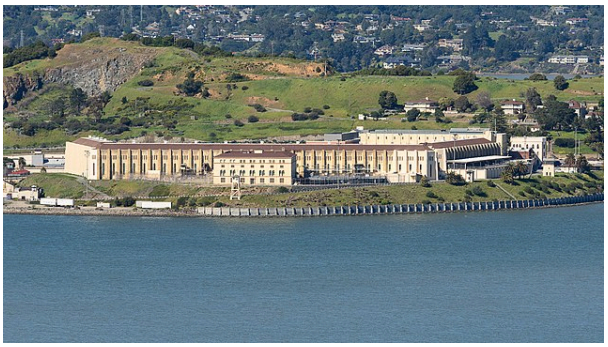
The State Penitentiary for the Eastern District of Pennsylvania, Lithograph by P.S: Duval and Co., 1855.

Individuals in the "ESP" spent all of their time alone, largely in their cells, reading the bible, praying, working on an individual trade or skill – and always silent. This solitude was meant as a way to serve penance.

The "Eastern State" model strove to be rehabilitative, if not progressive; in fact, the society that advocated for and shaped both the Walnut Street Jail and Eastern State Penitentiary was named the "The Philadelphia Society for Alleviating the Miseries of Public Prisons." Yet, the penitentiary quickly earned a reputation for despair related to its universal practice of solitary confinement; it was also extraordinarily expensive to house inmates in individual cells with no room for prison growth. Around the same time as the ESP was created, another prison was built in New York in 1819 – the Auburn prison. This prison would become the model for a second major prison "style", the "Auburn model". Many of the facets of the ESP – an emphasis on silence and labor – were present in the Auburn prison. Auburn utilized a congregate system, which meant that inmates would gather together (still in silence) to perform labor, eat, "enjoy" recreation time, etc.

Ultimately, Auburn proved to be a far more cost-effective model of prison design; not only were inmates more easily housed in "cell-blocks," with multiple prisoners per cell, but the goods they collaboratively produced yielded a significant profit for the prison. (In fact, it was estimated that the Auburn prison was "paying for itself" within 5 years.) For this reason, 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.

Pleasant Valley State Prison in California.



Aerial view of San Quentin Prison in California.

Watch and reflect

The video linked below shows the proliferation of new prisons across the United States, from the 18th century to the present. Watch it while asking:

- Which periods of time saw the heaviest constructions of prisons? What was happening during those periods?
- Which regions of the country appear to have the densest prison construction? And why?
- Is there any obvious relationship between prison construction and crime?

Legend: Green Dots = 1778-1900, Yellow Dots = 1901-1940, Orange Dots = 1941-1980, Red Dots = 1981-2005

Proliferation, by Paul Rucker

7.9 TYPES OF PRISONS

David Carter; Michelle Holcomb; and Kate McLean

Prisons in the United States can be categorized by **jurisdiction** and by the intensity of their supervision. By saying "jurisdiction," we are 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 are usually within a much larger organizational structure, typically defined at the state level. There are a few jurisdictions at other levels that manage or operate prisons. This includes the federal government, which runs its own prison system (Bureau of Prisons), but also jurisdictions below or different from the state level, such as major cities like New York, Chicago, Philadelphia, and Washington D.C., and Puerto Rico also has a prison, as does the U.S. territory of the Virgin Islands.

State Prisons

Typically, the organizational structure that manages state prisons is called the "Department of Corrections," and is run by a Director of Public Safety or Secretary of the State, who is usually appointed by the state governor. For example, in Louisiana, we have the Secretary of Department of Public Safety and Corrections, with James M. Le Blanc as the current head (Secretary) of this organization (2008-present). The Louisiana Department of Corrections currently oversees eight state correctional institutions. The oldest working state correctional facility, Louisiana State Penitentiary (also known as Angola), opened in 1869 as a cotton plantation where forced inmate labor was used to cultivate the cotton. Louisiana State Penitentiary was made as a result of multiple old plantations merging together resulting in a total of about 18,000 acres. In 1901, the official correctional facility was opened on the property and housed about 6,000 inmates. It was known as the "bloodiest prison in America" in the 1980s and 1990s. You can read more about it here: https://ccnmtl.columbia.edu/projects/caseconsortium/casestudies/54/casestudy/www/layout/case_id_54_id_547.html

Federal Prisons

The Federal Bureau of Prisons (BOP) 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 prior to this time, 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 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 these locations. There are also military prisons, alternative facilities, reentry centers, and training centers that are managed by the BOP. The federal prisons are separated into six regions: 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, who are 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. Notice the concentration of federal prisons in not only Pennsylvania but our more rural neighbors to the south. What do you think accounts for prison-building in these places? (Curious? More here.)

FBOP Regional Map

BOP Regional map

Private Prisons

The privatization of certain goods and services offered in prison 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. Moreover, the sale of prison-made goods for profit – and the sale of inmates' labor to private corporations – goes back to the 19th century. Yet the first attempts to privatize an entire prison

institution date back to the 1980s, when the politicization of crime led to rising arrests – and insufficient prison beds.

The term "private prisons" refers to institutions built and managed by private corporations for a profit. Given that the rest of the criminal justice process – policing and the courts – are not privatized (at least not yet), private prisons must contract with states or the federal government, in order to receive and be paid for their housing of prisoners. In order to win contracts, private prison corporations have typically promised lower costs (for the state), with similar or better prisoner outcomes; however, it must be mentioned that private prisons make their money by spending even less than they are paid by the state per inmate. The Corrections Corporation of America won the first U.S. contract for a private prison, opening their first institution in 1984. Today, CoreCivic (formerly Corrections Corporation of America) runs approximately 128 facilities in the United States (CoreCivic). The GEO Group, the other primary private prison company in the United States, runs 136 correctional, detention, or reentry facilities (GEO Group). Today, just over half of states incarcerate some prisoners within private institutions, including Pennsylvania. See the chart below to see where PA falls in the percentages of prisoners housed in private facilities. Check out Data from the Sentencing Project here.

An interactive H5P element has been excluded from this version of the text. You can view it online here:
https://louis.pressbooks.pub/criminaljustice/?p=188#h5p-14

Much debate surrounds the use of private prisons, which house roughly 8% of all prisoners in the United States. Critics note the lack of transparency in private institutions' reporting processes compared to "normal" public prisons. Still, others tackle a bigger moral issue – punishment for profit. While taxpayers ultimately pay for the punishment of all 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.

7.10 PRISON LEVELS

David Carter; Michelle Holcomb; and Kate McLean

Different prison jurisdictions – state, federal, etc. – are also distinguished by varying degrees of supervision intensity – roughly matched to the "dangers" or criminogenic needs presented by the offenders housed therein. These are reflected in prison levels or classifications. Many States have three classification levels: minimum, medium, and maximum. Some States have a fourth level called super-maximum. Others call this level "close" or "administrative" level. The BOP has five levels: minimum, low, medium, high, and unclassified. (The most serious offenders at the federal level are housed in an "unclassified" facility, ADX Florence, located near Florence, Colorado.) Although not in operation today, Alcatraz served as a *de facto* "super-max" within the federal BOP at one point, housing the most infamous federal inmates. Consider the two images – of Alcatraz and ADX Florence – below. How are they similar? Different?

Alcatraz Island, ca. 1934

ADX Florence, ca. 2010

Other states use a simple number designator to describe prison intensity, such as Level I, Level II, Level III, Level IV, and sometimes Level V. Finally, some states also operate "Camps," a type of low-level designation often assigned a specific purpose. For example, "Fire Camps" are dedicated to fighting fires. While taking different names, here are the qualities that generally characterize prisons at different levels of supervision.

Minimum/Level I – These prisons usually have dorm-style housing and are typically reserved for non-violent offenders, with shorter sentences (or sentence lengths left, after downgrading from another facility). The fencing or perimeters at Minimum Security facilities are usually low. The BOP sometimes refers to these as "camps".

Low/Level II – These types of prisons are similar to "minimums", including some kind of dorm-style housing. However, there are normally more serious or disruptive offenders in these types of prisons. The fencing around the perimeter is generally higher, and there may even be doubled fencing. Offenders are typically in these institutions for longer periods.

Medium/Level III – Here, there is a transition from dorm-style housing to cells. Normally, there are two people to a cell, but not always. The perimeter is usually a high fence/barbed wire, or large walls surrounding the institution. Freedom of movement within the institution is reduced and seen as a privilege. Inmates here typically serve longer sentences and include violent convictions.

High or Maximum/Level IV – Similar to medium, but most offenders have violent convictions and longer sentences, including life. Many individuals will spend most of their day in a cell; more often than not, cells are single occupancy.

Super-Max or Administrative Control/Level V – Depending on what the mission is for a particular prison, the prisoners in these institutions could be vastly different. For instance, if it is a facility that is designated for individuals with severe mental health illness, it would not operate the same as one that is not. 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, with almost all cells being 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 its normal operations. The purpose of an intake center is to classify offenders coming from the various courts in the jurisdiction, post–felony conviction. The offender has an initial classification, where they are assigned to one of the jurisdiction's prisons, based on a point system for that agency. This assessment looks at prior convictions, prior and current violence, escape risk, and potential self-harm. Inmates will gain later classifications at their destination prison, in terms of work assignments, mental health status, cell assignments, and other items.

7.11 PRISONER RIGHTS

Michelle Holcomb and Kate McLean

It may come as a surprise to hear that the legal concept of prisoner rights in the United States is less than a century old, dating back to the 1940s (*ex parte Hull, 1941*). Prior to this time, the courts recognized and operated according to the **"hands off" doctrine,** or the idea that the courts should not interfere in the treatment of prisoners in U.S. jails or prisons; previous to the 1941 *Hull* decision, state and federal prisoners were routinely denied access to the courts, where they might litigate the conditions of their confinement. Still, it was not until the broader **"due process revolution,"** instigated by the **Warren Court** that many protections guaranteed by the Bill of Rights were extended to prisoners. The sections below outline some of the most fundamental prisoner rights that have been formalized by the courts, although this list is not exhaustive.

The right to free speech and religion

The Supreme Court has repeatedly ruled that inmates also enjoy the right to the freedom of religion protected by the 1st Amendment, so long as their beliefs are in fact "religious" and "sincerely held." At the same time, inmates' religious practice may be limited, if it can be shown to interfere with institutions' "penological interests." Overall, Courts have ruled in favor of inmates' access to religious texts, attendance of religious services, and access to specific religious diets. For those interested in more detail, an excellent overview of the case law related to inmates' freedom of religion can be found here.

The right to adequate nutrition

Numerous court cases have affirmed that prison conditions that deprive inmates of the "basic necessities of life" violate the 8th Amendment; thus, such cases have found that prisons must provide inmates with an adequate and varied diet, particularly if the prisoners are required to work. At the same time, the courts have denied prisoners' rights to specific diets (unless they are necessary for religious observance) and have identified few meals or foods that violate inmates' 8th Amendment rights (including the infamous "Nutraloaf").

The right to medical care

In several landmark cases, the U.S. Supreme Court has affirmed that penal institutions cannot show "deliberate indifference" to inmates' health but instead must provide necessary medical care; to ignore inmates' medical needs represents a violation of the 8th Amendment (*Estelle v. Gamble*, 1976). More recently, the Court has recognized severe prison overcrowding as a violation of prisoners' 8th Amendment rights, if such prison conditions interfere with the delivery of necessary medical care. In their 2011 decision in *Brown v. Plata,* the Court mandated that California reduce state prison overcapacity to 137.5%, in order to meet their 8th Amendment obligations.

The right to protection against violence

The "deliberate indifference" standard formalized in *Estelle v. Gamble* has also been applied when prisoners are left vulnerable to violence from other inmates. In 1994, the Court recognized that the 8th Amendment rights of Dee Farmer, a transgender inmate incarcerated within a federal men's facility in Indiana, had been violated when prison officials had allowed her to be repeatedly sexually assaulted by other inmates, leading to her infection with HIV.

Prisoner Rights in Action?

In September 2022, 80% of inmates incarcerated in Alabama's state prison system went on strike, leaving their jobs as cooks, cleaners, and other prison maintenance workers. The strike was intended to draw attention to the "deplorable conditions" of their incarceration – visible mold, inadequate food, horrific violence, and severe overcrowding. As you will read in the article below, the U.S. Justice Department even published a scathing report of Alabama's prisons in 2019, which highlighted (among other things) levels of occupancy exceeding 180%, and high rates of violence; the report even described conditions as violating the 8th amendment's protections against cruel and unusual punishment. [See images depicting Alabama's prison violence here.]

Read coverage of the Alabama prisoners' strike from the New York Times here, and consider:

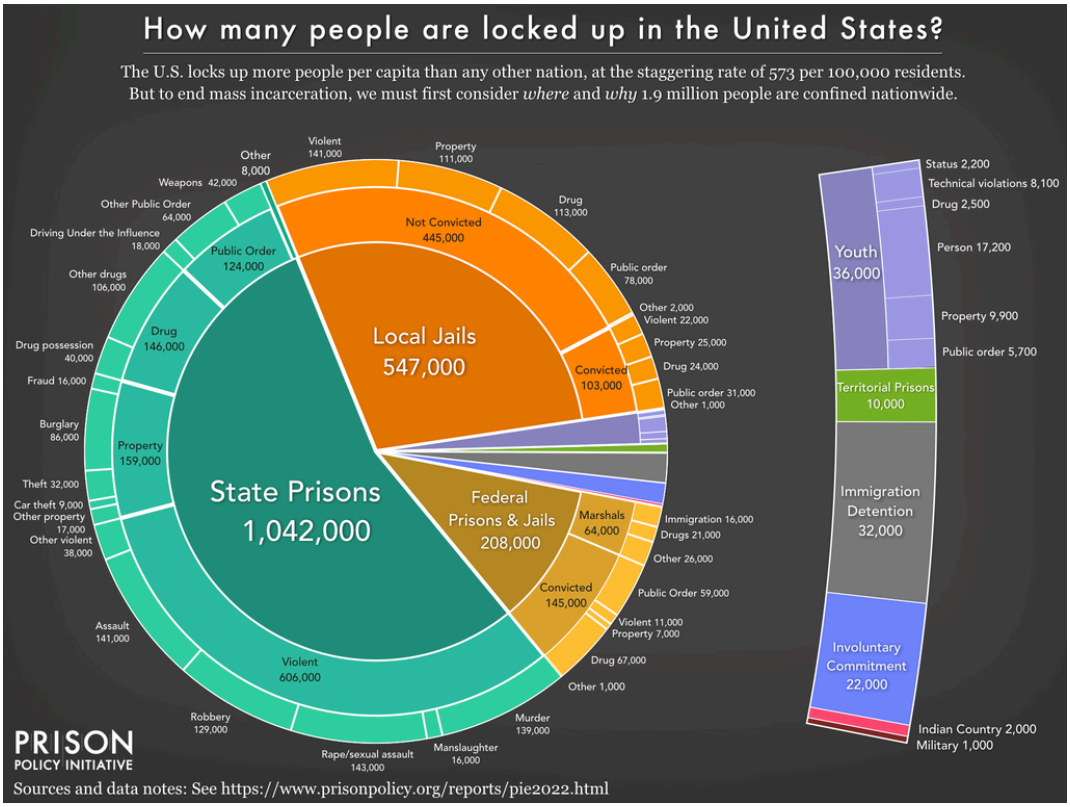
- If conditions in Alabama's prisons are labeled "unconstitutional" by a federal agency, why haven't they changed?
- Protester demands, as well as the Justice report, indicate violations of prisoners' rights to adequate food, protection from violence, and necessary medical care. Reviewing the above photos and story, what other rights should exist, in your opinion?

7.12 WHO GOES TO PRISON?

David Carter; Kate McLean; and Michelle Holcomb

The types of people that end up in prison are quite different from 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. To give you a more detailed depiction of this, see the image below.

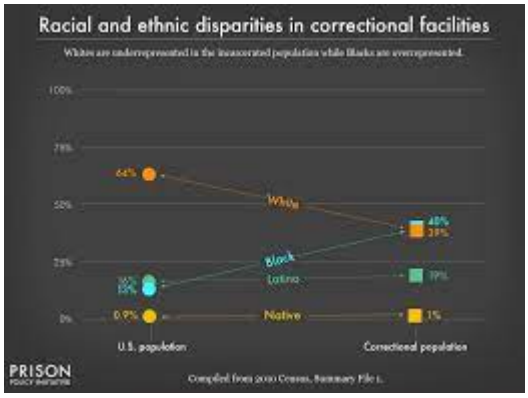
People Incarcerated in the U.S.



Individuals incarcerated in state and federal jails and prisons as of March 2022

Focusing in on the left side of the graphic, there are roughly 1,042,000 State Prisoners. More than half (58%) are incarcerated for violent crimes. Property crimes and drug crimes represent the 2nd and 3rd most common offenses for the state prisoners. This graphic also shows us how many more individuals are in state versus federal institutions, with "only" 208,000 individuals incarcerated in the latter group. You may also notice how drug offenders are represented at a much higher level in federal institutions – over 40% of all federal inmates (versus 14% of all state inmates.)

Roughly 93% of prison inmates – compared to jail inmates – are male. In jail, that percentage is roughly 82% male. Across all detention facilities, there are stark racial disparities as well, as shown in the graph below and discussed further in subsequent chapters.


Racial and ethnic disparities in correctional facilities
100%
75%
50%
25%
0%
64%
White
39%
Black
Latino
19%
0.9%
Native
1%
U.S. population
Correctional population
PRISON

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8: COMMUNITY CORRECTIONS

Image description: Louisiana Probation and Parole Agent Gold Badge
Image credit: "Louisiana Probation and Parole Badge Patch" by ODMP | License: Fair Use

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. Like the previous one, this section will cover the last third of the justice system – corrections – focusing on punishments that happen in the community. By the end of this section, students should be able to

- Explain Community Corrections and its purposes
- Differentiate between the different types of Community Corrections
- Discuss the advantages and disadvantages of the main types of Community Correction

An interactive H5P element has been excluded from this version of the text. You can view it online here:
https://louis.pressbooks.pub/criminaljustice/?p=200#h5p-15

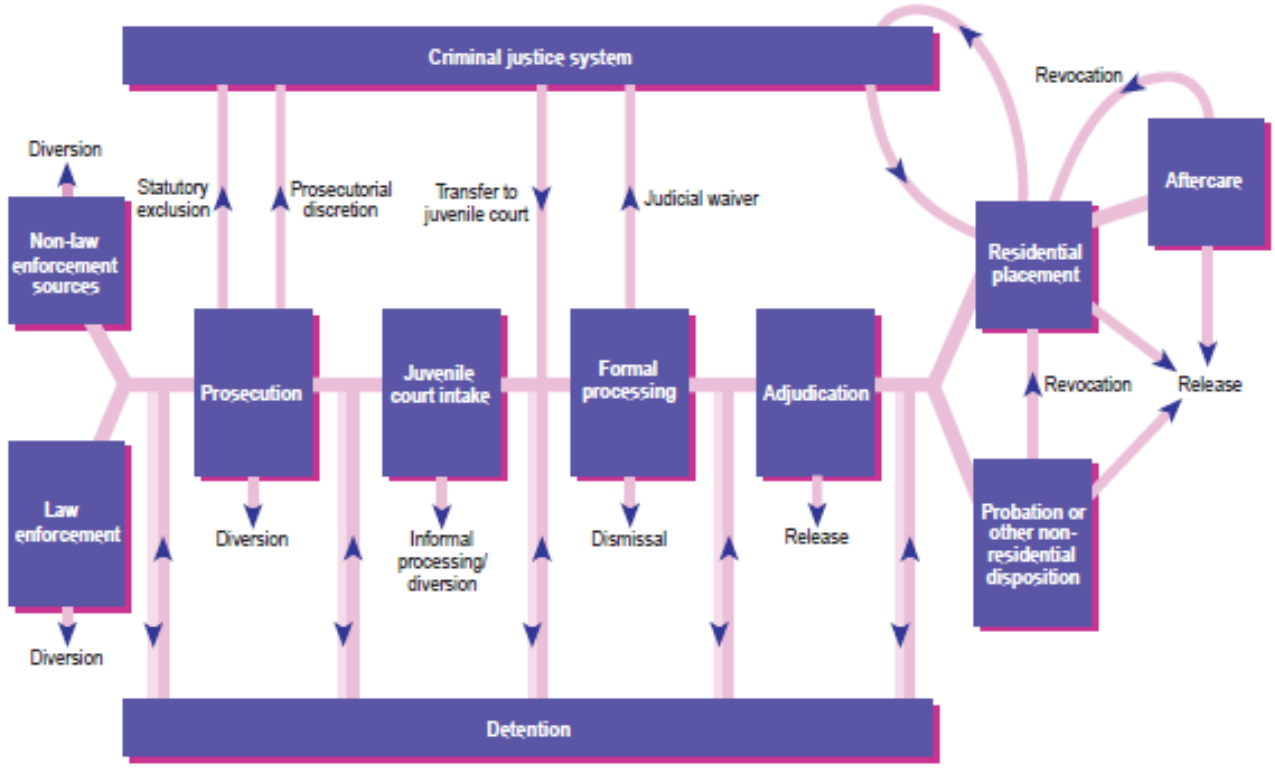
8.1 WHAT IS DIVERSION?

David Carter; Michelle Holcomb; and Kate McLean

This chapter will discuss the official actions from the courts on individuals in the community, while they are under some court-imposed sanction; these individuals have been effectively "processed," and sentenced by the criminal justice system, even if they are monitored in the community. However, there are large numbers of individuals that do not make it that far in the criminal justice system, due to some form of **diversion**. Diversion is *not* the same as community corrections – but it is presented in this chapter as an action that effectively keeps a person in the community.

Diversion is a process whereby an individual, at some stage, is diverted from continuing through the formal justice process. Diversion can come as early as initial contact with a law enforcement officer if they exercise their discretion to not arrest and thus place the individual in the criminal justice system. At this point, diversion might take the form of a verbal warning, a warning ticket, or merely a decision by the officer to not start a formal ticket or citation. Similarly, prosecutors may decide not to charge an individual on the condition that they enter into some kind of rehabilitative program. A judge may also make such a decision in lieu of a judgment or as a condition of a judgment. An example of this would be if your friend Penelope Goins stole some items from the Mardi Gras supply store and she was arrested and appeared in front of the judge. The judge could sentence her to a sanction. However, in lieu of that sanction, the judge offers her the chance to complete a diversion program, effectively nullifying the judgment upon successful completion. See the City of Monroe, Louisiana's Diversion Program here.

It is difficult to know the exact number of diversions that occur in the United States across the variety of places where diversion can occur – not least because decisions to divert are marked by the absence of a record. However, it is estimated that millions of diversions happen each year, at every stage of criminal justice processing. The below chart is a representation of the juvenile justice system, which mirrors the adult criminal justice system. Points of possible diversion are thus explicitly labeled in the below image.



Note: This chart gives a simplified view of caseflow through the juvenile justice system. Procedures vary among jurisdictions.

Different Diversion Points in the System

8.2 INTERMEDIATE SANCTIONS

David Carter; Michelle Holcomb; and Kate McLean

Community corrections on a whole have changed dramatically over the last half-century. Due to a rapid and overwhelming increase in the offender population – largely due to policy changes – we have witnessed an immense increase in the use of sanctions at the community level, including probation and parole. It has only been within the last 10 years that community correctional populations have begun to decrease.

While much attention has been paid to the crisis of mass incarceration in the United States, a majority of individuals under correctional control are supervised in the community. As of 2022, roughly 1.9 million individuals are incarcerated in the United States – while over 3.7 million are under some form of community-level control (Sawyer & Wagner, 2022). The sheer volume of individuals under community correction is rarely noted but has important resonance for offender recidivism, reincarceration, and life chances generally speaking. The public may view probation or parole as concessions to offenders, but in fact, these methods of supervision have the power to dramatically improve offenders' success – or to send them to jail or prison.

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" principle in the area of rehabilitation. In turn, there was a nationwide turn toward the use of "institutional corrections," or prison and jail sentences. Yet, when parole is available, the use of institutional corrections has dramatic implications for community corrections, as incarcerated offenders are ultimately released to the supervision of a parole officer. As the U.S. prison population has bulged, many policymakers have started to realize the value and necessity of community sanctions for relieving an overcrowded, and ineffective, system.

At the same time, community corrections have also evolved in line with the "punitive turn" in criminal justice. The last 40 years has seen the rise of what are often termed "**intermediate sanctions**," or punishments in between traditional probation (offender supervision in the community, with behavioral restrictions) and traditional incarceration (continuous offender detention in prison or jail). Examples include house arrest, electronic monitoring, shock incarceration (incarceration for a very short period), and intensive supervision probation (with more regular check-ins with the probation officer or daily drug testing.)

What Would You Do?

As stated before, there are three primary goals for corrections: to punish the offender, to rehabilitate the offender, and to protect society. Often the first and third goals take precedence, displacing and even opposing the goal of rehabilitation. Here is an example of how this might happen.

Imagine a man who is married and has a couple of small children, a stable blue-collar job, and a house/mortgage and is living just a little bit better than paycheck to paycheck. We can call him Jacques LeBlanc. Jacques likes to hang out with his friends after watching LSU football on Saturdays and have a beer and catch up on life. For all intents and purposes, Jacques 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 evening after the game, Jacques is driving home when his wife texts him to pick up some boudin at the store. He looks down at his phone at the exact same 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 Jacques. The officer is obligated to go through standard procedures, which results in Jacques being arrested. The question is this – what should Jacques' punishment be?

This question forces us to reckon with both the rule of law and the unintended consequences of punishment. Arguably, Jacques should be punished, as he chose to drive after drinking alcohol. But would Jacques' incarceration lead to other events that may have lasting, negative effects for both Jacques, his family, and the larger community?

This brings up the question of "collateral consequences," or the long-term, informal consequences of criminal sanctions. If Jacques 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? At what point has the immediate action caused punishment beyond what the law stipulates is punishment?

8.3 PROBATION

David Carter; Michelle Holcomb; and Kate McLean

Probation is arguably the oldest, and certainly the most common, of the intermediate sanctions. Its roots stem from concepts of common law from England, like many of our other correctional practices in the U.S. 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 (financially or morally). In the early 1840s, John Augustus, a Boston shoemaker, was regularly attending court and began to supervise such individuals as a "**Surety**". A Surety was a person who guaranteed or paid individuals' bond, or the money necessary to secure their release awaiting trial. In turn, Augustus, pictured below, would take in many of these individuals, providing them with work and housing to help ensure that they would remain crime-free and pay back society. He continued this practice for nearly two decades, effectively becoming the first probation officer. He helped so many people during his lifetime at his own personal expense that he died a pauper.

John Augustus

Today, **probation** is a form of a "suspended" sentence, meaning that, instead of serving a certain period in jail or prison, an offender is allowed to serve that same period of supervision in the community. However, the sentence is only suspended subject to certain conditions that the offender must continue to meet; if they deviate from those conditions, they may be ordered to finish their sentence in jail or prison. Conditions of probation often include reporting to a probation officer, submitting to random drug screens, not "consorting" with known felons, paying court costs and restitution, or attending Alcoholics Anonymous (AA) or Narcotics Anonymous (NA) courses, among other conditions. Probation lengths vary greatly, as do the conditions of probation placed on an individual. Almost all people on probation will have at least one condition of probation. Some have many conditions, depending on the seriousness and nature of their conviction. Juvenile

probation departments were established within all states in the 1920s, and by the middle of the 1950s, all states also had adult probation.

Probation Officers

Probation officers usually work directly for the state or federal government, but they can also be directed through local or municipal agencies. Many counties/parishes will have a community justice level structure where probation offices operate. Within these offices, probation officers will be assigned cases (caseload) – probationers – that 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) to several hundred probationers. This depends on the jurisdiction, the structure of the local probation office, and the abilities of the probation officers themselves.

The role of the probation officer (PO) is complex and sometimes contradictory. A PO's primary function is to ensure the compliance of individuals with the conditions of their 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, and even make arrests as needed.

At the same time, a probation officer is trying to help individuals on probation succeed. This is done by trying to help individuals get jobs, improve their education, or enter into substance or alcohol treatment programs (among other things). This is why the job of the PO is complex: they must be supportive, while also enforcing compliance. Recently, there has been a movement within probation to have probation officers act more like coaches than just disciplinarians, an approach that may be associated with less probation revocation and recidivism. Probation Officers are moving toward becoming "resource brokers" where they help the probationers get in touch with various resources needed to ensure successful completion of their probation.

Another 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 investigation of a person headed to trial. It includes basic background information on the individual, such as their age, education, relationships, physical and mental health, employment, military service, social history, and substance abuse history. It also contains a detailed account of their current offense, witness or victim impact statements of the event, and prior offenses, which are tracked across numerous agencies. Finally, the PSI also has a section that is devoted to a plan, or recommendations for supervision, created by the PO. This section may suggest the appropriate conditions of probation, if probation is to be granted. Judges use this information during sentencing discussions and hearings and will usually follow the PSI's recommendations (most of the time). In this way, many of the conditions of probation are prescribed by POs.

Important factors that inform whether an individual is sentenced to probation are contained within the PSI. If the offender is largely a "prosocial" person – has an education, a job, and a family – they would be considered as having significant ties to the community. These ties to the community could weaken or break if a person was incarcerated. Thus, providing a sanction that allows the offender to stay in the community is often the preferred approach, depending on the nature of the offense.

Individuals on Probation

As stated, there are several million people on probation, serving various lengths of probation 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.

Probation Success

There is mixed evidence concerning the effectiveness of probation. Recently, the Bureau of Justice Statistics listed the successful completion rate in 2020 at 43.4% – the lowest rate of successful completion since 2007 (Kaeble, 2023). There are a host of reasons for unsuccessful completion, including incarceration on a new sentence/charge, incarceration for the current sentence/charge, absconding (fleeing jurisdiction), discharge to a warrant or detainer, or even death. Probation represents a form of "tourniquet sentencing," a model where the intensity of a sanction may be increased to force compliance. In this way, an individual on probation who is not adhering to their conditions may face a revocation hearing. This bench hearing may lead to an informal admonishment by a judge, an increase in the probationer restrictions or probation length, an increased level of control (moving from regular probation to intensive supervised probation), or even placement in a secure facility (jail, prison, or community corrections center), all depending on the particular infraction. Many individuals move 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 in California. The basic premise of ISP is to allow POs to have smaller caseloads that they monitor more closely. ISP and standard probation models are similar, differing primarily by 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, a person on ISP would likely be meeting with their PO weekly, or even more frequently. Additionally, individuals on ISP normally submit to drug screens weekly. The increased conditions of supervision often include more substance abuse treatment, either in the form of AA, NA, or some other residential or outpatient substance use treatment program.

The popularity of ISP with policymakers and correctional authorities is evidenced by its rapid spread throughout the United States; yet some researchers have questioned its effectiveness. One of the largest studies of ISPs examined their effectiveness in reducing recidivism and saving costs. In a random sample of 14 cities, across 9 states, researchers evaluated the recidivism rates of ISP versus "regular" probationers. Surprisingly, the study found higher rates of technical violations among individuals in ISP, while there were no significant differences in new arrests by probation type. Moreover, when looking at outcomes over 3 years, researchers found that recidivism rates were slightly higher within ISP (39%) compared to regular probation (33%). Neither model offered substantial cost savings (Petersilia & Deschenes, 2004). Other studies have produced similar findings as to the effects of non-treatment oriented ISPs. On the one hand, these results may reflect the greater "criminogenic needs" of individuals placed on ISP; indeed, this model is reserved for individuals who are believed to be at greater risk of recidivism. On the other hand, such findings critique the very premise of ISP – it should not be surprising that the more you watch someone, the more you will find errors.

8.4 BOOT CAMPS/SHOCK INCARCERATION

David Carter and Michelle Holcomb

Boot camps represent another form of "intermediate sanction," which also follows a model of "**shock incarceration**." Developed in the 1980s in Georgia, boot camps were targeted to youths and young adults and were seen as a way to alter individuals through a brief, intense experience (the shock). At their essence, boot camps are designed to change the offender through physical activity and discipline. Designed on a militaristic ideal, boot camps assume that a regimen of strict physical exercise will inspire lasting discipline through a strict daily structure. 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. The state of Pennsylvania, for example, opened the Quehanna Boot Camp in 1992, which offers a "six-month, military-style program with a drug and alcohol treatment components" (Quehanna, 2022).

Boot Camp Success

While there have been some positive results, boot camps have generally failed to produce the desired reductions in recidivism (Parent, 2003). For prosocial individuals, structure and discipline can be advantageous. However, when individuals of differing levels of antisocial attitudes and social disadvantage are mixed together, 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 diverse criminogenic needs, they tend not to be effective. Second, because of the lower admission requirements of boot camps, individuals are generally "lumped" together at a start date within a boot camp. Therefore, high-risk offenders and low-risk offenders are placed together, building a cohesive group. In this way, lower-risk offenders may gain antisocial associates that are higher-risk. Finally, when boot camps emphasize the increase of physicality, rather than behavioral change, it generally does not reduce aggressive behavior (Wilson et al., 2005). For more information on the status of boot camps, please see Quehanna Boot Camp .

The Dark Side of Boot Camps

While the boot camp model has been ridiculed as an idea that has "come and gone" within U.S. criminal justice (despite the survival of some facilities), the idea that "tough love" works has persisted outside of the justice system. Watch a video about one of the most successful teen boot camps in the United States here.

8.5 DRUG COURTS

David Carter and Michelle Holcomb

Drug courts are also an innovation of the 1980s and were first pioneered in Dade County, Florida. They are unique in the ways in which they alter the courtroom environment, to work in a non-adversarial way that attempts to support participants. Judges, prosecutors, caseworkers, and program coordinators all work together in a drug court to oversee not only individuals' drug treatment but to work on other aspects of their life that may support long-term recovery. This is an informal atmosphere as compared with formal court proceedings. As with other intermediate sanctions, the use of drug courts rapidly increased in the United States, to the point that they are now in every state. Currently, there are almost 3,000 drug, treatment, or other specialty courts operating in the United States. This includes many courts that have co-opted the drug court model: Veterans Courts, Mental Health Courts, DUI Courts, Hybrid Courts, Sex Work Courts, and Juvenile Drug Courts, among others. All of these courts seek to leverage the power of the criminal justice system to incentivize offenders' engagement with diverse forms of treatment. Drug courts are for non-violent drug offenders with moderate to severe drug dependency. Participation in this program is strictly voluntary. If the offender does not want to participate, then they will face regular (more formal) court proceedings.

Drug Court Success

While evidence on the effectiveness of drug courts is also mixed, as a whole, they have been far more successful than boot camps in reducing participants' rearrest and reincarceration. As with anything, the "success" of drug court depends on the metric of evaluation. If we are only talking about the cost savings (drug court versus jail, or prison), drug courts may be an effective community alternative. If looking at recidivism, their effectiveness depends upon whether we are interested in new drug charges, any arrests, or persistence models (length of time before arrest). Research seems to suggest that drug courts lower the risk of re-arrest for a new drug crime, while some studies have found this model to dramatically decrease recidivism across the board (Fluellen & Trone, 2000).

Yet recidivism still remains high among drug court participants, and as with ISP, this model may also result in more jail time for participants, compared to those who are sentenced without mandatory drug treatment. At large, drug courts force compliance with court-ordered drug treatment by threatening sanctions (and promising rewards). Individuals who repeatedly deviate from the terms set by the court may be sent back to jail for days, weeks, or the remainder of their sentence. 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 here.

8.6 HALFWAY HOUSES

David Carter; Michelle Holcomb; and Kate McLean

So-called "halfway houses" have long been used to control/house offenders. Dating back to the early 1800s in England and Ireland, halfway houses first began to appear in the U.S. around 1820, in Massachusetts. Initially, they were designed to help an offender "get back on their feet" and were funded by non-profit organizations like the Salvation Army. At present, halfway houses are typically used as "way stations" for offenders coming out of prisons but have also been used as an intermediate sanction for probationers. At their core, halfway houses are meant to be places where individuals can get back on their feet, "half-way" out of prison, while enjoying the support – and supervision – of trained personnel. In this way, halfway houses embody many of the contradictions of parole.

The International Halfway House Association breaks down halfway houses into four groups (for-profit, non-for-profit, state-funded, and federally-funded) along two dimensions (supportive and interventive). Halfway houses that serve only a minimal correctional function (functioning mainly as a residence for those reintegrating back into society) are generally labeled supportive. Interventive halfway houses, by contrast, typically offer multiple treatment modalities and may have up to 500 beds. Most halfway houses fall somewhere in the middle of these two poles.

Halfway houses can be privately owned or publicly funded. Each halfway house has a different mission, something that the residential facility focuses on, like vocational training, drug/alcohol treatment, individual or group counseling, education, job placement assistance, etc. Some halfway houses only accept males or females. Some facilities accept the dependent children of the offender in order to provide room and board along with group counseling.

Halfway House Success

Because of the great variability in halfway houses, researchers have found them difficult to assess. This is because it is difficult to make general statements about such a diverse group of facilities, and gathering a representative sample is difficult. Perhaps due to these research limitations, studies have found that halfway houses may increase recidivism, reduce recidivism, or have no effect on recidivism. When disaggregated by halfway house type, programs known to deploy evidence-based interventions have a stronger impact on recidivism. Systematic research on halfway houses may also be complicated by the different types of organizations that operate and fund them. Depending on whether they are public or private, halfway houses may operate according to very different models of care and have different staffing requirements and levels of resources. Much like more formal correctional institutions, halfway houses may provide much-needed treatment services – or function as chaotic "no-man's lands" that are hardly safer than many prisons.

8.7 HOUSE ARREST

David Carter; Michelle Holcomb; and Kate McLean

House arrest is when an individual is remanded to stay at home for confinement in lieu of jail or prison. While there are typically standard provisions permitting individuals to attend places of worship and places of employment, individuals are otherwise expected to be home. It is difficult to assess how many offenders are on house arrest at any given time, as these are often short stints given during early stages of probation. Most house arrest programs are used in association with some form of electronic monitoring.

House Arrest Success

As mentioned previously, house arrest is often joined with electronic monitoring (EM). For this reason, studies that seek to evaluate house arrest simultaneously account for the effects of EM; in other words, there is little research on the independent effects of each of these interventions. However, it is certainly a cost-saving mechanism over other forms of sanctions. There is 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 already need little sanctions in order to be successful. Thus, the utility of house arrest is debatable.

8.8 COMMUNITY RESIDENTIAL FACILITIES

David Carter; Michelle Holcomb; and Kate McLean

Moving up in the continuum of community sanctions, community residential facilities would be considered the last stop before jail or prison, as they offer the highest level of supervision. These facilities are often called CCCs (Community Correctional Centers), TCs (Transition Centers), or CBCFs (Community-Based Correctional Facilities), among other names. Community residential facilities often function similarly to halfway houses: providing a stop for individuals just checking in on some days, sometimes providing outpatient treatment services, and even housing residents full-time when they have been judged to require more continuous supervision.

The primary benefit of community residential facilities, in comparison with traditional correctional institutions, is their increased focus on rehabilitation and lower costs. The most effective community residential facilities adhere to the principles of effective intervention, deploying evidence-based programming. Such programs tailor interventions to the criminogenic needs of offenders, match and sort offenders appropriately, and are responsive in their services. For a detailed account of how the PEI (Principles of Effective Intervention) integrates into community corrections, see a very detailed report by the National Institute of Corrections: Implementing Evidence-Based Practice in Community Corrections: The Principles of Effective Intervention.

Community Residential Facility Success

You've probably anticipated this statement if you've gotten this far: research has shown community residential facilities to have mixed effectiveness. Success is largely dependent on the type of facility, the offenders served therein, and the programs they utilize. When diverse offenders are lumped together in non-directive programs that do not adhere to the PEI, community residential facilities show no better outcomes than jail, prison, or even regular probation. However, when these facilities separate offenders based on risk, and differentiate their programming accordingly, outcomes are substantially better (Lowenkamp & Latessa, 2004). Unfortunately, many such facilities do not adhere to these principles, and thus, the full potential of community residential facilities remains to be seen.

8.9 RESTORATIVE JUSTICE

David Carter; Michelle Holcomb; and Kate McLean

Restorative justice (or RJ) remains a marginal philosophy within most criminal justice systems to the present day; instead, RJ is more often linked with community-based non-profit organizations, which sometimes intersect with community corrections. For this reason, RJ is discussed here. Restorative justice is a community-based and trauma-informed practice used to build relationships, strengthen communities, encourage accountability, repair harm, and restore relationships when wrongdoing occurs. As an intervention following wrongdoing, restorative justice works for the people who have caused harm, the victim(s), and the community members impacted. Working with a restorative justice facilitator, participants identify the harms endured, outstanding victim and community needs, and the offenders' obligations. They 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 benefits may occur. First, the victim can be heard within the scope of both the community and the scope of the offense discussed. This provides the victim(s) an opportunity to express the impact of the crime on them but also to understand what was happening from the perspective of the transgressor. At the same time, it allows the person who committed 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 RJ.

Restorative Justice Success

For over a quarter century, restorative justice has been demonstrated to show positive outcomes in terms of offender accountability and satisfaction for both offenders and victims. This is true for adult offenders as well as juvenile offenders (who are more commonly targeted by RJ interventions). Recently, some researchers have wondered whether cognitive changes may occur in individuals completing a restorative justice program. At the same time, many different programs are lumped together under the category of "restorative justice," including programs that are mostly victim- or mostly offender-oriented.

8.10 PAROLE

David Carter and Michelle Holcomb

While the process of **parole** is unique to all of the other community sanctions we have discussed so far in this section, individuals on parole are "held" in the community. Parole is the release (under conditions) of an individual after they have served a portion of their sentence incarcerated. It is also accompanied by the threat of reincarceration if they deviate from those conditions, or commit a new offense. As with most concepts in our legal system, the roots of parole can be traced back to concepts from England and Europe. However, parole today has evolved greatly, based on American values and concepts. Parole in the United States was first conceptualized at the inaugural 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, which was famously pioneered at the Elmira Reformatory, alongside the concept of indeterminate sentencing. By the mid-1940s, all states had a parole authority within their departments of correction. In this way, parole is different from probation, which often operates under the judicial branch. Parole typically operates under the executive branch and is aligned with departments of corrections, as parole is a direct extension of prison terms and release.

Types of Parole

Today, there are two basic types of parole in the United States: discretionary and mandatory. **Discretionary parole** is when an individual is eligible for parole or goes before a parole board prior to their mandatory release date (their maximum sentence). It is at the discretion of the parole board to grant parole (with conditions) for these individuals. These prisoners are generally prisoners with good behavioral records in prison who have completed all required programming. If an individual is not deemed ready for release at the first parole date, they will generally continue to receive periodic parole hearings until they reach their maximum sentence (at which point, they will be released without conditions.) Discretionary parole saw a marked decrease starting in the early 1990s, in line with the "punitive turn" in American justice; however, alongside the COVID-19 pandemic and overflowing prisons, there has been a slight increase in recent years (Kaeble, 2023).

Mandatory parole, which is used within some state systems, occurs when a prisoner hits a particular point in time in their sentence. Under this model, the offender must be paroled, regardless of the recommendations of a parole board, even though they are still subject to certain conditions. Mandatory parole is NOT the same as mandatory release, which occurs when an individual reaches their maximum sentence.

Parole Success

Parole is widely regarded to reflect a "broken system," due to low rates of success (or high rates of revocation,

rearrest, and reincarceration). Successful parole completion rates hover around 50% in any given year. The same issues that mar probation are also seen in parole: technical violations, new charges, absconding, and other infractions. All in all, such low success rates may reflect offenders' unmet criminogenic needs, poor parole supervision, or conversely, overly-vigilant parole monitoring. In any case, many agree that it is in the interest of parole authorities to rectify the failures of parole, as it is a prison release valve much needed by the system itself. One way that states have innovated to overcome high failure rates is through "non-revocable parole." The basic premise of this model is more lenient supervision: as long as parolees do not violate their terms of parole, their parole will be solely on paper, with no parole officer check-ins. While this model does seek to address high rates of prison return among parolees, it is not appropriate for the many parolees who fail due multiple unmet needs, such as housing, mental health treatment, and employment or educational access.

Other Forms of Early Release: Good-Time

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, as the inmate accumulates "good days." 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 earns no violations, they might get two days taken off of the end of their sentence. When these two times converge, good-time release kicks in for them. At the same time, early release may still be conditioned by truth-in-sentencing legislation, or the "85% rule." Many states have laws in place that stipulate that an inmate is not eligible for release until they hit 85% of their original sentence. Thus, even if the "good time clock" indicates that they are eligible for release at an earlier date, inmates would only receive early release once they have achieved 85% of their sentence. Recently, states have begun to soften these 85% rules, as another valve to reduce crowding issues. Unlike individuals who are paroled, those enjoying good-time release are not necessarily subject to any conditions.

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9: JUVENILE JUSTICE

Image description: Early juvenile court in sepia tone
Image credit: "LC-DIG-nclc-04645 Juvenile Court" by Children's Bureau Centennial is licensed under CC BY 2.0.

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 in 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

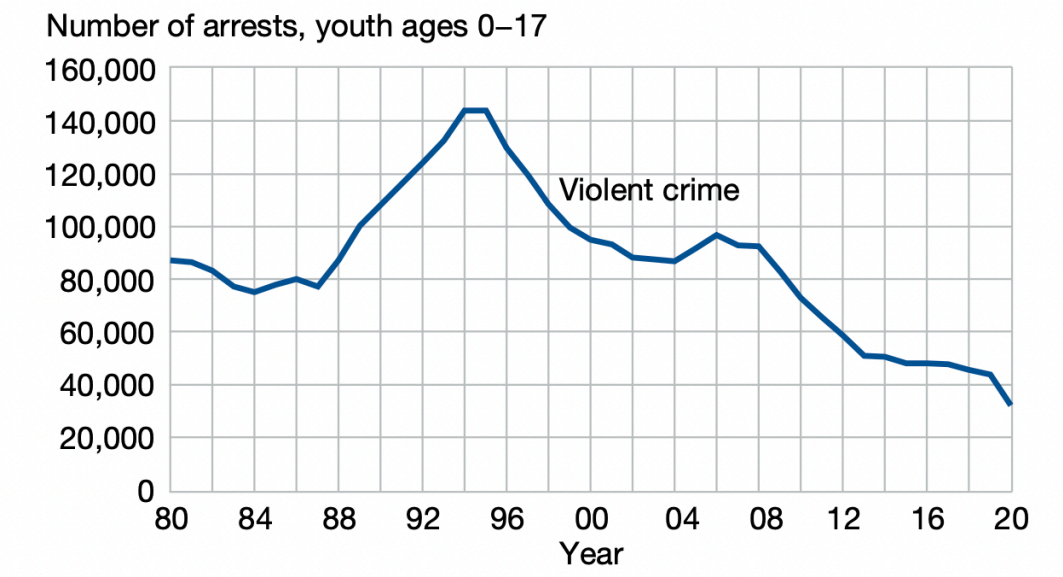
An interactive H5P element has been excluded from this version of the text. You can view it online here:
https://louis.pressbooks.pub/criminaljustice/?p=223#h5p-16

9.1 TRENDS IN YOUTH OFFENDING

Alison S. Burke; Michelle Holcomb; and Kate McLean

Since the early 1990s, America has witnessed an increase in the fear of youth crime (Benekos, 2004). Sensationalized media exposure in the 1990s facilitated the public's fear of juvenile offenders and "**superpredators**", which resulted in "get tough" legislation and a perceived need to "do something" about youth crime (Myers, 2001). Juvenile courts were criticized for their inability to control youth crime, and as a result, policies shifted from rehabilitation to the punishment of juvenile offenders (Feld, 2001). This shift 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 "adult" court to be tried as adults (Snyder, 2006).

Given recent media coverage around surging violence in the United States, you may be surprised to learn that youth arrests for violent crime have fallen dramatically over the last 15 years; in fact, from 2006 to the present, such arrests have fallen 67 percent. Moreover, a declining proportion of all youth arrests involve a violent offense. Take a look at the below chart created by the Office for Justice Programs, which shows a positive trend over nearly two decades.



Youth arrests have fallen consistently since 2006, and dramatically since 1995.

The Myth of the Superpredator

Politicians across the political spectrum were responsible for popularizing the pernicious myth of youthful "superpredators" in the 1990s, a myth that spawned a dramatic increase in the punishment of young offenders – with few positive results. Explore the Marshall Project's archive on the superpredator phenomenon, including videos, new clips, and an interactive timeline. https://youtu.be/TVXlzp0xkRg

9.2 JUVENILE JUSTICE INTRODUCTION

Alison S. Burke; Michelle Holcomb; and Kate McLean

The juvenile justice system was founded on the premise that juveniles are different from adults and require special attention and treatment. The juvenile justice system is responsible for correcting the behavior of troublesome youth. Two fundamental institutional assumptions are (1) juveniles are easily influenced, and thus (2) they can be rehabilitated. For these reasons, the juvenile system believes that public safety is best served by emphasizing the treatment, rather than the incapacitation and punishment, of juveniles (Cox, 2003). Unfortunately, sensationalized media exposure of violent youth led to exaggerated public fear of juvenile crime, "get-tough" legislation, and a perceived need to "do something" about juvenile crime in the 1990s and 2000s (Benekos, 2004). This punitive position is nothing new. Before the inception of the juvenile justice system in 1899, youth were treated the same as adults. They were considered fully blameworthy 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**, behavioral control, and the appreciation of consequences 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 on YouTube: *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 that 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 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.

9.3 HISTORY OF THE JUVENILE JUSTICE SYSTEM

Alison S. Burke; Kate McLean; and Michelle Holcomb

The first juvenile court was created in Cook County, Illinois, in 1899, but the concept of a separate system for juveniles dates back to seventeenth-century Europe. The term ***parens patriae*** originated in the 12th century, with the English monarchy and literally means "the father of the country." Applied to juvenile matters, *parens patriae* means the government is responsible for, and in charge of everything, involving youth (Merlo, 2019). 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 had 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 (Merlo, 2019).

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 patriae* 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 reached the age of majority. 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 may intervene for the youth's own good.

In the nineteenth century, a popular understanding of children as vulnerable, and in need of special care, developed alongside the intertwined phenomena of urbanization, immigration, and industrialization. These forces gave rise to a flourishing number of abandoned, unsupervised, and/or impoverished children in major cities. Many times their parents – sometimes newly-arrived immigrants – were occupied for long hours by factory labor. In turn, the first **house of refuge** was established in New York City in 1824. Houses of refuge, more generally, were urban establishments used to corral youth who were roaming the street unsupervised or who had been referred by the courts (Merlo, 2019). 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 patriae*, 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.

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, the Pennsylvania Supreme Court denied the father's petition on the grounds that the state has the right to remove children from their home if it's in their best interest and even sometimes over parental objection (because of *parens patriae*). The court declared that failed parents lose their rights to raise their children. Parental custody and control of their children is natural but is 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 under the principle that the state is acting in the best interest of the child. Two other juvenile-facing institutions of this era are described in the boxes below.

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 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 correctional institutions today; however, back in the nineteenth century, children were often exploited for labor, and many of the schools de-emphasized formal education (Mennel, 1973). 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 (Shoemaker, 2018).

Child Saving Movement: By the end of the nineteenth 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 Gold Rush. (History)

The influx of people into cities weakened the cohesiveness of communities and the abilities of communities and families to socialize and control children effectively (Feld, 2001). 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 mostly 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." (Platt, 1977)

Creation of the Original Juvenile Court and the Juvenile Courts in Louisiana

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. Other states soon followed, such as Pennsylvania in first in 1901, and Louisiana in 1908. Louisiana has four juvenile courts set up around the state. In order of establishment, the courts are Orleans Parish (1908), Caddo Parish (1922), Jefferson Parish (1958), and finally East Baton Rouge Parish (1990). The 1908 Louisiana State Legislature said, "Section 9. Be it further enacted, etc., That the Juvenile Court in the Parish of Orleans and the District Courts outside of said Parish, sitting as Juvenile Courts, shall have jurisdiction of the trial of all neglected and delinquent children, and of all persons charged with contributing to the neglect or delinquency of such children, or with a violation of any law now in existence or hereafter enacted for the protection of the physical, moral and mental well-being of such children; not punishable by death or at hard labor and of all cases of desertion or non-support of children by either parent" (Louisiana Law Library).

9.4 INVENTION OF DELINQUENCY

Alison S. Burke; Kate McLean; and Michelle Holcomb

Before the creation of the juvenile court, there was no such thing as "**delinquency**." Youth were convicted of crimes, just as adults were. Just as the concept of "childhood" is socially constructed, scholars also say that the emergence of "juvenile delinquency" was (and is) shaped by social, economic, and religious changes (Feld, 1999). We can see this in the changing eligibility rules for juvenile courts nationwide. In general, juvenile courts oversee cases for youth aged 17 and younger. In most states, the youngest age that the juvenile court will accept someone is not specified but instead, left up to the judge. There are a few states that do have the ages specified and those range from 6 to 13. The juvenile court will stop taking juveniles upon reaching their 18th birthday, when youths are considered adults and are thus tried under the laws of the adult criminal justice system. However, as emerging research continues to suggest that the brain, and its capacity for risk assessment and behavioral control, continues to develop into an individual's 20s, some states have begun raising their upper age limits. For example, in New York and Michigan, youths may enter the juvenile court through their 18th year, only "becoming adults" when they are 19; in 2022, Vermont expanded juvenile courts to also serve 19-year-olds. The Oregon Youth Authority houses youth until the age of 25. Similarly, the movement to legislate a minimum age for entry into juvenile court has picked up speed in recent years, with 23 states now stipulating a "floor" for juvenile prosecution (for at least some offenses).

See the Change

While the map linked here is not fully up-to-date, it does allow us to visualize the "social construction of delinquency" by showing changes in the minimum, and maximum, ages of juvenile court over time. Drag the slider from 1997 to 2018, for both the upper and lower age tabs. What has happened over time? Are any regional patterns apparent?

After the creation of the first juvenile court in 1899, reformers were worried that restricting the court to only criminal youth would make it function more like an adult criminal court as opposed to a rehabilitative, treatment-oriented institution. Within a couple of years of its passage, amendments to the Illinois Juvenile Court Act broadened the definition of delinquency to include "incorrigible youth" – children described as unruly and out-of-control (Feld, 1999). The definition of juvenile delinquency was expanded to include **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.

The purpose of the original juvenile court was to act according to the rehabilitative ideal. As such, it emphasized reform and treatment over retribution and punishment (Feld, 1999). To this end, even terminology in juvenile court is different, to denote its separation from the adversarial adult processes. To initiate the juvenile court process, a **petition** is filed "in the welfare of the child" (an "indictment" in the adult criminal process.) The proceedings of juvenile courts are referred to as **hearings** (instead of trials). Juvenile courts **adjudicate** youths to be delinquent rather than convicting them, or finding them guilty of an offense, and juvenile delinquents are given a **disposition**, instead of a sentence, as in adult criminal courts.

Listen Up

Want to learn more about the punitive turn in juvenile justice, and the real lives it continues to affect? Listen to the Caught, a podcast that features real kids talking "about the moment they collided with law and order, and how it changed them forever."

9.5 JUVENILE JUSTICE SYSTEM

Alison S. Burke; Michelle Holcomb; and Kate McLean

If you've made it this far, you shouldn't be surprised that there is no uniform system of processing juvenile offenders nationwide. Matters concerning minors 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 any given time. Although every state operates independently, they do sometimes 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 (Feld, 2003). 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, waiver and transfer laws, and zero tolerance policies.

Paradoxically, the rehabilitative mission of juvenile courts was historically used to deny juvenile offenders access to the due process rights enjoyed by their adult criminal counterparts. In other words, it was assumed that juveniles did not need such protections (like access to a lawyer, or the right to decline self-incriminating testimony), because juvenile court proceedings were less adversarial and were meant to reflect "the best interest" of the child. However, these assumptions began to change in the 1960s, during the larger "due process revolution" that happened in U.S. courts. Between 1966 and 1975, the U.S. Supreme Court verified an array of major due process rights for juvenile offenders (some key cases are reviewed in the next section.) Of course, in the decades following this movement, the punitive turn in criminal justice resulted in the waiver of increasingly younger juvenile offenders into adult criminal court.

9.6 DUE PROCESS REVOLUTION IN JUVENILE COURT

Alison S. Burke; Michelle Holcomb; and Kate McLean

As discussed, the juvenile court was created with rehabilitation and individualized treatment in mind. However, between 1966 and 1975, courts began "adultifying" this process by extending several major due process rights to juveniles. Four landmark cases are described in the boxes below. It should be noted that the Supreme Court has denied the extension of some due process rights to juveniles, such as the right to a jury trial (*McKeiver v. Pennsylvania*, 1971). Moreover, the movement to treat juveniles more like their adult counterparts has not always benefited the former, with the Court finding that the pretrial detention of juveniles is not a violation of their due process rights (*Schall v. Martin*, 1984).

Kent v. United States (1966)

Morris Kent was a 16-year-old boy living in Washington, D.C., 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's lawyers argued that the case should have stayed in juvenile court and 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.'" (*Kent v. United States, 1966)*

In re Gault (1967)

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 was 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. Gault 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)

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, a "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 requires "proof beyond a reasonable doubt." The court acknowledged that juvenile proceedings are designed to be more informal than adult proceedings, but if charged with a crime, the juvenile is then granted protections of proof beyond a reasonable doubt. Winship expanded the constitutional protections established in Gault.

Breed v. Jones (1975)

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 willing to seek treatment. After the hearing, the court determined that Jones should subsequently be tried as an adult. Jones's 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 affirmed that Jones's treatment amounted to a violation of double jeopardy, writing: "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." (Raley, 1995)

9.7 THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT OF 1974

Alison S. Burke and Michelle Holcomb

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 (*Juvenile Female Offender*, 1998). 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 state funding to reform efforts. For example, one major reform effort involved revising policies around secure detention, separating juveniles from adult offenders, and deinstitutionalizing status offenders. Status offenders were no longer to be held in secure facilities with delinquent youth (*Juvenile Female Offender*, 1998). 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 (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.

9.8 GETTING TOUGH: INITIATIVES FOR PUNISHMENT AND ACCOUNTABILITY

Alison S. Burke and Michelle Holcomb

The 1980s saw a huge shift in the way state and federal laws were addressing juvenile justice. 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 (Krisberg, 1978).

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 and remorseless that they 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. Many youths were no longer seen as vulnerable minors in need of protection and treatment. Instead, the narrative changed, constructing them as violent monsters acting "with no conscience and no empathy," a statement made by former Secretary of State Hillary Clinton.

Waivers 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 waivers**. The **prosecutorial waiver** is also referred to as "Direct File" and "Concurrent Jurisdiction." With this waiver mechanism, the legislature grants prosecutors the discretion to determine in which court to file charges against the juvenile (Feld, 2001). The prosecutor, or district attorney, can choose to file 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 (Steiner & Bell, 2006)

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, a number of state statutes specify 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 shutdown plan to close the scandal-ridden jail complex. The jail houses some 9,000 inmates, more than 2,000 of whom 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 rises even more, to 18, on October 18, 2019.

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 being 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 (Restivo, 2019).

Listen to the story and read more at:

https://www.wnycstudios.org/story/raise-age-new-york-minors-rikers

In Louisiana: No Kids in Angola:

Watch this video about Louisiana sending kids to Angola, "The Alcatraz of the South" here.

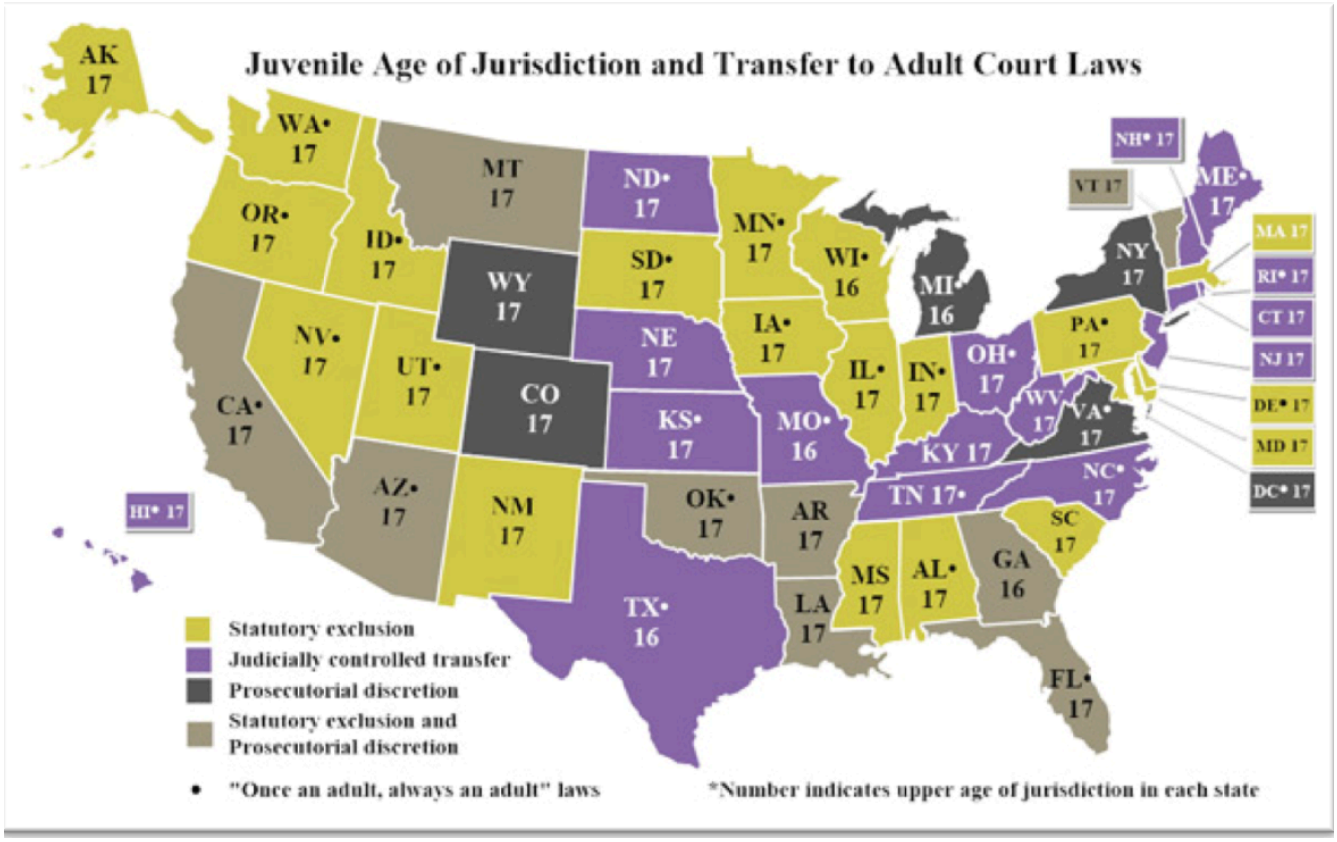
(Inside Story)

Judicial waiver affords the juvenile court judge the authority to transfer a case to adult criminal court (Hemmens & Bell, 2006). 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 (Sanborn, 2004). 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*, 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. Like legislative waivers, mandatory waivers attempt to remove all discretionary powers from the juvenile court judge in transfer proceedings (Burke, 2016).


Juvenile Age of Jurisdiction and Transfer to Adult Court Laws
AK 17
WA• 17
OR• 17
CA• 17
ID• 17
NV• 17
MT 17
WY 17
UT• 17
AZ• 17
CO 17
NM 17
ND• 17
SD• 17
NE 17
KS• 17
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ME• 17
MA 17
RI• 17
CT 17
NJ 17
DE• 17
MD 17
DC• 17
HI• 17
Statutory exclusion
Judicially controlled transfer
Prosecutorial discretion
Statutory exclusion and Prosecutorial discretion
• "Once an adult, always an adult" laws
*Number indicates upper age of jurisdiction in each state

9.9 RETURNING TO REHABILITATION IN THE CONTEMPORARY JUVENILE JUSTICE SYSTEM

Alison S. Burke; Michelle Holcomb; and Kate McLean

Empirical research drives recent reform efforts. The past decade has witnessed the identification of key developmental processes associated with delinquent behavior, with neuroscientists concluding that the regions of the brain associated with impulse control and risk assessment are not fully formed until at least 25 years of age. In light of such research, the courts, policymakers, and other juvenile justice personnel have required or suggested significant changes to the juvenile justice process, including changes in youth sentencing and confinement.

Notably, four landmark Supreme Court cases – all dating to the last 20 years – have reversed many of the punitive policies enacted in the 1990s by prohibiting the most severe punishment for juvenile offenders. Read about these four remarkable cases below, and listen to the oral arguments here, if you're interested.

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 (murdering 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 "adult" things, then they are too young to receive the death penalty. In their decision, the court referenced "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 for his crime. At the time of the *Roper v. Simmons* verdict, the U.S. was only one of a handful of countries that still imposed the death penalty on juveniles.

Graham v. Florida (2010)

While the death penalty was taken off the table for youth under the age of 18, many were instead being sentenced to **life in prison without the possibility of parole (LWOP**) for numerous violent crimes. 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 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 – including record numbers in Pennsylvania. 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. Referencing 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 the 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 or mandatory life without parole for homicide. However, there were still so many people serving LWOP sentences who were juveniles when they committed their crimes.

Montgomery v. Louisiana (2016)

In 2016, the Supreme Court heard the case of Henry Montgomery, who was 17 years old in 1963 when he killed a sheriff's deputy. (He initially received a death sentence, which was overturned upon evidence of racial discrimination in sentencing.) Montgomery instead received a life sentence, which he appealed 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. In Pennsylvania, this has led to the mandatory resentencing of over 500 "juvenile lifers" – the highest population in the country.

9.10 THE STRUCTURE OF THE JUVENILE JUSTICE SYSTEM

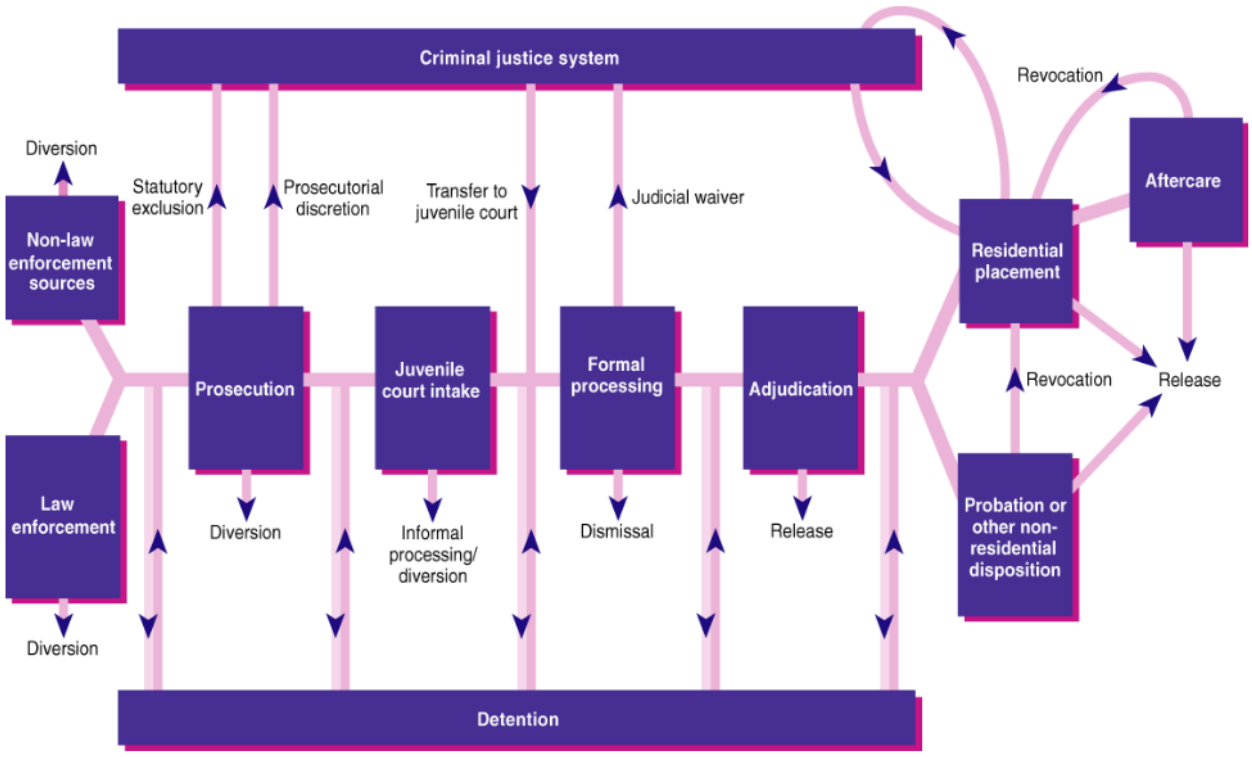
Alison S. Burke; Michelle Holcomb; and Kate McLean

The juvenile justice process involves seven major decision points: (1) arrest or intake, (2) referral to court, (3) secure detention, (4) waiver to adult criminal court, (5) case petitioning, (6) delinquency finding/adjudication, (7) disposition (including probation, or confinement in a secure correctional facility) (Sickmund & Puzzanchera, 2014).

The majority of cases are first referred to the juvenile justice system through contact with police. Probation officers, school officials, or parents usually refer the remaining cases. The most common offenses referred to court are property offenses, followed by person offenses, drug offenses, and general delinquency charges.

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 through diversion. 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 judge will make the decision to detain or release the juvenile 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 youths as delinquent can result in dismissal of the charges, probation, 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.



The Juvenile Justice Process

9.11 JUVENILE INSTITUTIONS

Alison S. Burke; Michelle Holcomb; and Kate McLean

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; they can also be sent to adult jails or prisons, so long as "sight-and-sound" separation is maintained – meaning that they cannot be housed with or next to adult inmates nor share any common spaces. The characteristics of different institutions specific to juveniles are reviewed below.

Detention Centers: In the first stages of the justice system, the court must decide if it will detain the youth. If a youth is detained, they are 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 may 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: As discussed in the last chapter, correctional boot camps largely serve juvenile or young adult populations. 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 very strict. Despite popular opinion, research shows that these are ineffective for preventing future delinquency. The length of stay is generally several weeks. On the other hand, ranch/wilderness camps may be prosocial and preventative. These are long term residential facilities that are non-restrictive and are for youth who do 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" (Short & Sharp, 2005). DMC can be observed 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" (Johnson, 2007).

In the News: The School-to-Prison Pipeline

Six-year-old Zachary Christie, 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 from the Cubs Scouts. The first grader brought the camping utensil to school, although the "dangerous weapon" violated zero-tolerance rules at the school (Urbina, 2009).

Zero Tolerance policies require strict adherence to school regulations and bans, such as the prohibition of weapons on school rounds. While intended to ensure a "one size fits all" approach that treats all children equally, research suggests that minority youth are unfairly targeted by such practices. Zero Tolerance policies also contribute to the so-called "school-to-prison" pipeline, with children who are subject to school discipline ultimately coming into contact with the criminal justice system; the suspension or expulsion from school separates children's ties to important social support, harming their relationship with school and making it harder to return and engage (nj.com)

Is Youth Incarceration Justified?

In 2007, researchers from the University of Pittsburgh published a groundbreaking study known as the "Pathways to Desistance" project. Following over 1,300 serious juvenile offenders over 7 years

following adjudication, the study found that most participants decreased or stopped their offending over time – a phenomenon known as "desistance." Moreover, participants' desistance seemed independent of their specific disposition, with individuals sent to long-term secure facilities no more and no less likely to recidivate than their peers on probation. Given the social, emotional, and financial toll of youth confinement, the "Pathways" study suggested that the benefits may not justify the costs.

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10: CURRENT ISSUES IN U.S. CRIMINAL JUSTICE

Image description: United States map covered by American flag
Image credit: "USA Flag Map" by Lokal_Profil is licensed under CC BY-SA 2.5.

Learning Objectives

This chapter introduces students to current issues challenging the Criminal Justice System in the United States. It also discusses newly developed challenges in Cybercrime and Terrorism and introduces students to the Department of Homeland Security. After reading this chapter, students will be able to

- Define Transcarceration and Recidivism
- Specify the role mental health is playing in the criminal justice system
- Define Terrorism and Counterterrorism

- Recognize the complexities of Cybercrime
- Identify the responsibilities of the Department of Homeland Security

Weaving together threads presented throughout this text, this section will focus largely on the long-term crisis in U.S. prisons and jails – a result of a "punitive turn" that is now a half-century old but refuses to fade. While the past decade has been dotted with sporadic attempts to roll-back draconian sentencing and teeming prisons, the impact of such reforms has been modest. Moreover, state and federal governments have failed to address the collateral damage(s) of mass incarceration, as well as the social-structural problems that continue to fuel it: recurrent drug epidemics, shifting forms of organized crime, a decaying social safety net, and a national struggle to treat mental illness. You have likely seen some of the terms, charts, and statistics shown in the chapters that follow; if so, please consider why such stark data – if widely known – fails to mobilize change and why our culture continues to emphasize punishment over all else.

The data will show us that mass punishment has not worked, so why do we remain oriented toward **retribution**?

Background Knowledge Probe: Each chapter will begin by assessing your current knowledge about different criminal justice topics. Each of these topics will be covered by the chapter – meaning that you should be able to answer them correctly after you have completed the reading. All definitions can be seen by clicking on the bolded vocabulary terms in each chapter.

Please drag and drop the correct answer in the blank space provided. This is an ungraded exercise, but you may want to record which questions you answer incorrectly so that you can verify that your knowledge has improved by the end of the chapter.

An interactive H5P element has been excluded from this version of the text. You can view it online here:
https://louis.pressbooks.pub/criminaljustice/?p=249#h5p-19

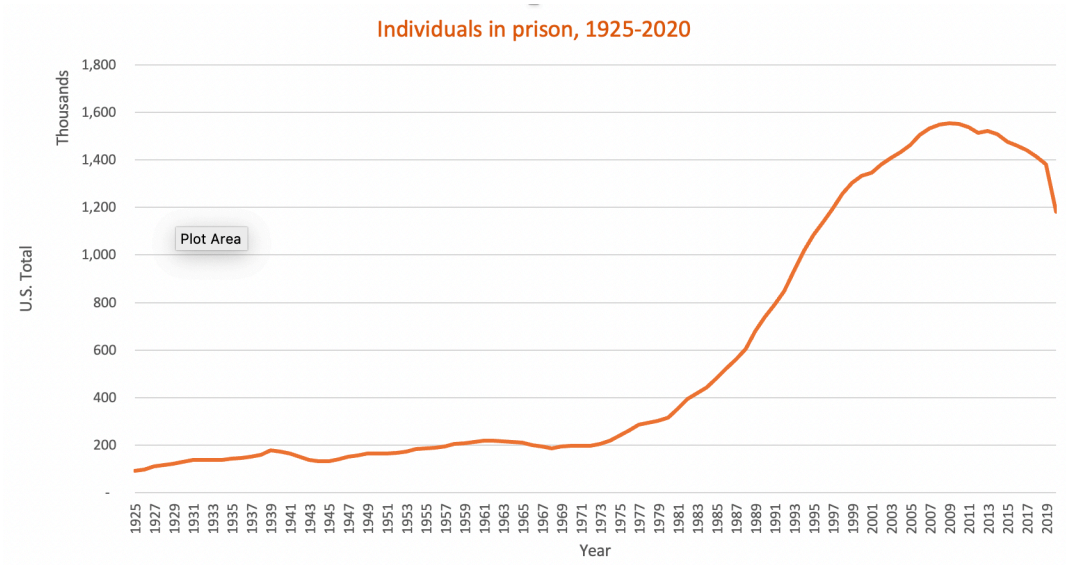
10.1 CURRENT ISSUES: MASS INCARCERATION

David Carter and Brandon Hamann

Feeling safe and secure in one's person and home is arguably one of the most discussed priorities in our nation today. Our fear of crime influences how we think, vote, and act day-to-day. It also shapes how we punish people who are convicted of violating the law. In part, punishment reflects the will of the people, which is then carried out by legislators, and converted into sentencing practices. However, has our desire to feel safe led to counterproductive policies? In other words, have these policies made us less safe? Moreover, has a natural fear of crime been exploited by politicians who try to "out-tough" their opponents? This final section attempts to reflect on how our collective fears have created a system of mass incarceration that has paradoxically made some communities less safe and secure, even as crime on a national scale has fallen dramatically since the 1990s. While this text has focused consistently on fear of crime, the influence of persistent racism (periodically inflamed by the Civil Rights Movement, economic recession, and the election of the nation's first Black president) has undoubtedly contributed to the wars on crime, drugs, and immigration that gave rise to mass incarceration.

To give us a clear understanding of America's use of prisons, here is a comparison of the U.S. rate of incarceration with that of other countries around the world. As one can see here, America uses incarceration quite extensively; in fact, one might argue that we are the "best" at it.

The United States wasn't always this punitive. As we have discussed, our orientation toward punishment has evolved over time (even if it hasn't changed dramatically in the last 40 years). In the 1970s, there was a confluence of events that put the U.S. on a path toward mass incarceration – a path that has had lasting effects. In the graph below, you can see when the expansion of the correctional system began.

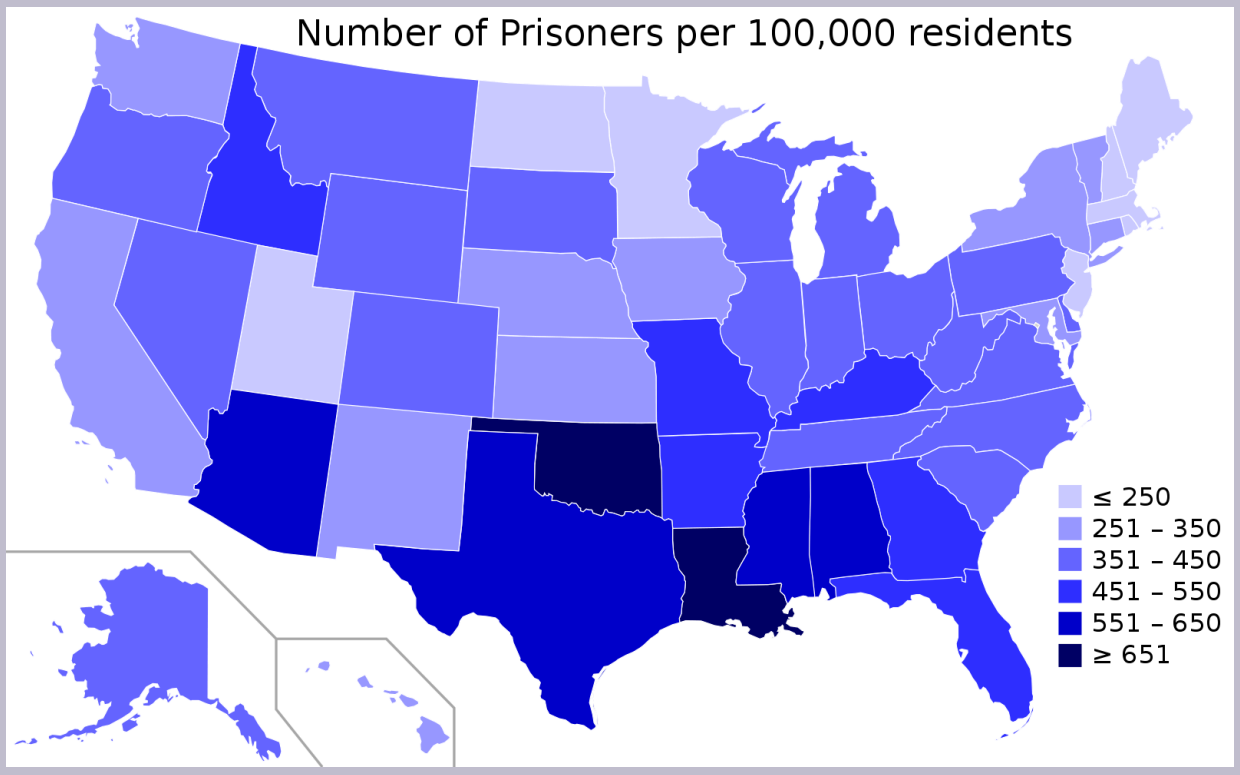


Over the past century, the U.S. prison population has increased nearly 16-fold, while the overall population has not even quadrupled (Data provided by the Sentencing Project).

As you can see from the chart above, the uptick in imprisonment dates to the early 1970s. During this time, the U.S. was in the midst of a period of civil unrest (relating to the Vietnam War, the Civil Rights Movement, and the Women's Liberation Movement, among other social justice movements), while crime had begun to tick up in the previous decade. Many politicians exploited middle class, white Americans' unease with such developments, eagerly conflating the rise in street crime with protests, at a time when the economy was increasingly precarious. Elected to office, such officials sponsored "get-tough" policies – such as the War on Drugs – while other factors also conspired to increase the prison population. Notably, the anti-psychiatry movement and the government's embrace of deinstitutionalization left many individuals suffering severe mental illness with nowhere to turn. The next several sections will explore the diverse policies that conspired to create mass incarceration.

Not Just a National Problem

The increase in the national incarceration rate is not only a problem of the federal government. Many states have also seen an increase in the incarceration of their respective populations in recent history – particularly in the South, where in some instances prison populations are triple compared to that of other states.



Source: Wikimedia Commons

Many factors can be attributed to the increase in prison populations since the Civil Rights Movement of the 1960s, as previously discussed. The War on Drugs is certainly a major contributor. However, what recent studies have found is that the overwhelming majority of people being held in jails, prisons, and other detention facilities are first-time, non-violent offenders who could be subjected to alternative means of adjudication while awaiting their day in court (bail, bond, diversion, etc.). There is also evidence that suggests the population of incarcerated individuals in Louisiana, for example, is overrepresented by people of color. Louisiana is 62% white and 33% black, however, its prison population is the opposite: 64% black and 34% white (Kanu, 2023).

For more information about the Mass Incarceration problem in Louisiana, go here.

10.2 CURRENT ISSUES: THE WAR ON DRUGS AND GANGS

David Carter; Kate McLean; and Brandon Hamann

The War on Drugs, initiated by President Nixon in 1971, was framed as an all-out war to eradicate drugs in the United States. Beyond reorienting governmental policy on substance use toward law enforcement, the war on drugs also led to a profound cultural shift: we became much more punitive towards drugs, treating it largely as a criminal justice issue, rather than a public health issue. (Illicit) drug use was demonized by politicians and the media, which in turn fed the constant intensification of sanctions for drug use. The Drug Enforcement Agency (DEA) was created in 1973, to provide the government with a dedicated agency for battling drugs. In the 1980s, recommended and mandatory sentences for drug violations – as enshrined in the Comprehensive Crime Control Act and the Anti-Drug Abuse Acts of 1986 and 1988 – also skyrocketed, particularly at the federal level. (It is important to note that most statutes distinguish "possession for personal use" and "possession with intent to distribute" solely the quantity of drugs found on an individual; moreover, some statutes do not require physical evidence of contraband but may allow a person to be charged for alleged quantities, as reported by co-defendants or police informants.) What were once to 1-5 year sentences became 5-25 year bids or higher. While drug sentences have plateaued in recent years, following a popular and political backlash, drug offenders still represent significant proportions of state (15-20%) and federal (45%) prison systems. With over one million drug arrests recorded each year, drug laws also cause a steady churn in U.S. jail populations.

The same period also saw 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; indeed, large-scale organized crime was known to control the illicit drug trade through the 1960s, only exiting when the political furor surrounding drugs threatened to ratchet up the costs of involvement with controlled substances. From the mid-century onward, organized criminal control of the drug trade became more decentralized, with newer, smaller gangs taking over distribution in major urban centers. In turn, with less-established organizations battling for control of a profitable commodity, drug-related violence also surged, drawing the attention of policymakers who fused their "war on drugs" with a "war on gangs." Predictably, the latter war not only failed to eliminate new gangs but also entrenched them with the carceral system, where they continue their control of the drug trade (inside and out). While there are thousands of different gangs operating on different blocks, neighborhoods, and cities throughout the United States, gangs in prison are generally organized around racial and ethnic lines, with larger gangs traversing state and federal correctional systems. From "inside," gangs still actively recruit members, communicate with operatives on the

streets, and control the drug trade, battling for dominance in both settings. Want to learn more? Check out the Justice Department's slide show of common gang-related tattoos documented with the federal prison system.

The War on Drugs in Louisiana

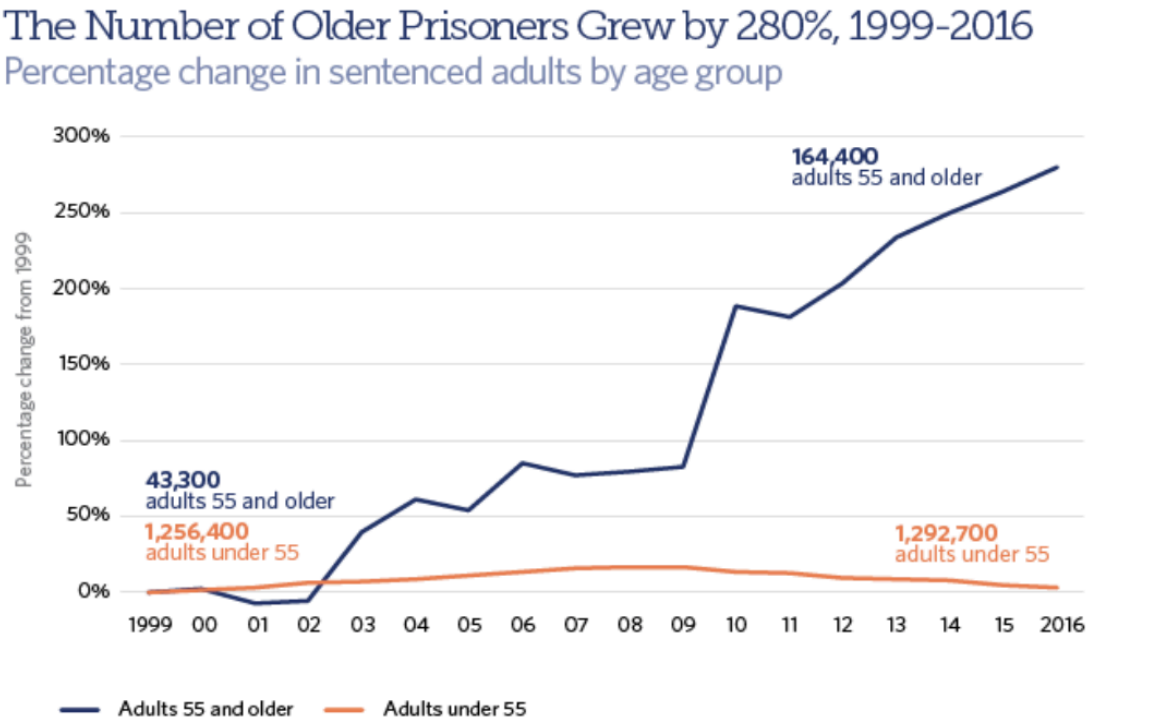
Let's face it, drugs are everywhere. They are easily bought and sold. Every effort is being made by law enforcement and members of our legislatures to combat the growing demand for illicit substances. They are highly addictive and extremely deadly. Some of you more than likely know someone close to you who has had a problem with substance abuse in the past or present. We can't go a day without hearing about someone losing their life tragically because they took something that was laced with an unknown substance that led to their death. Back in the day, it was cocaine, then it was crack, then it was heroin. Now it's opioids and fentanyl. And the amounts that are needed to cause death are getting smaller and smaller with every new drug that is being manufactured. The funny thing about it is, opioids are legal medically. They are used to manage surgical pain, but in a controlled environment prescribed by medical professionals. Louisiana is not immune to the ever-growing dangers of the opioid and fentanyl epidemic, and lawmakers are taking steps to try and pass legislation to make possession even more punishable. Read the article below and discuss the pros and cons of stricter drug laws.

Stefanski hinges attorney general campaign on fentanyl crackdown

10.3 CURRENT ISSUES: AGING AND OVERCROWDED PRISONS

David Carter and Brandon Hamann

One major side effect of longer prison sentences is an aging incarcerated population. In the past 20 years, the nation's correctional system has seen a dramatic increase in the proportion of prisoners over age 55. As McKillop and Boucher (2018) relate in the graphic below (based on BJS data), there has been a 280% increase in such prisoners (McKillop & Boucher, 2018).



Note: The Bureau of Justice Statistics estimates the age distribution of prisoners using data from the Federal Justice Statistics Program and statistics that states voluntarily submit to the National Corrections Reporting Program. State participation in this program has varied, which may have caused year-to-year fluctuations in the Bureau's national estimates, but this does not affect long-term trend comparisons. From 2009 to 2010, the number of states submitting data increased substantially, which might have contributed to the year-over-year increase in the national estimate between those years.

Source: Bureau of Justice Statistics

Aging Prisoners

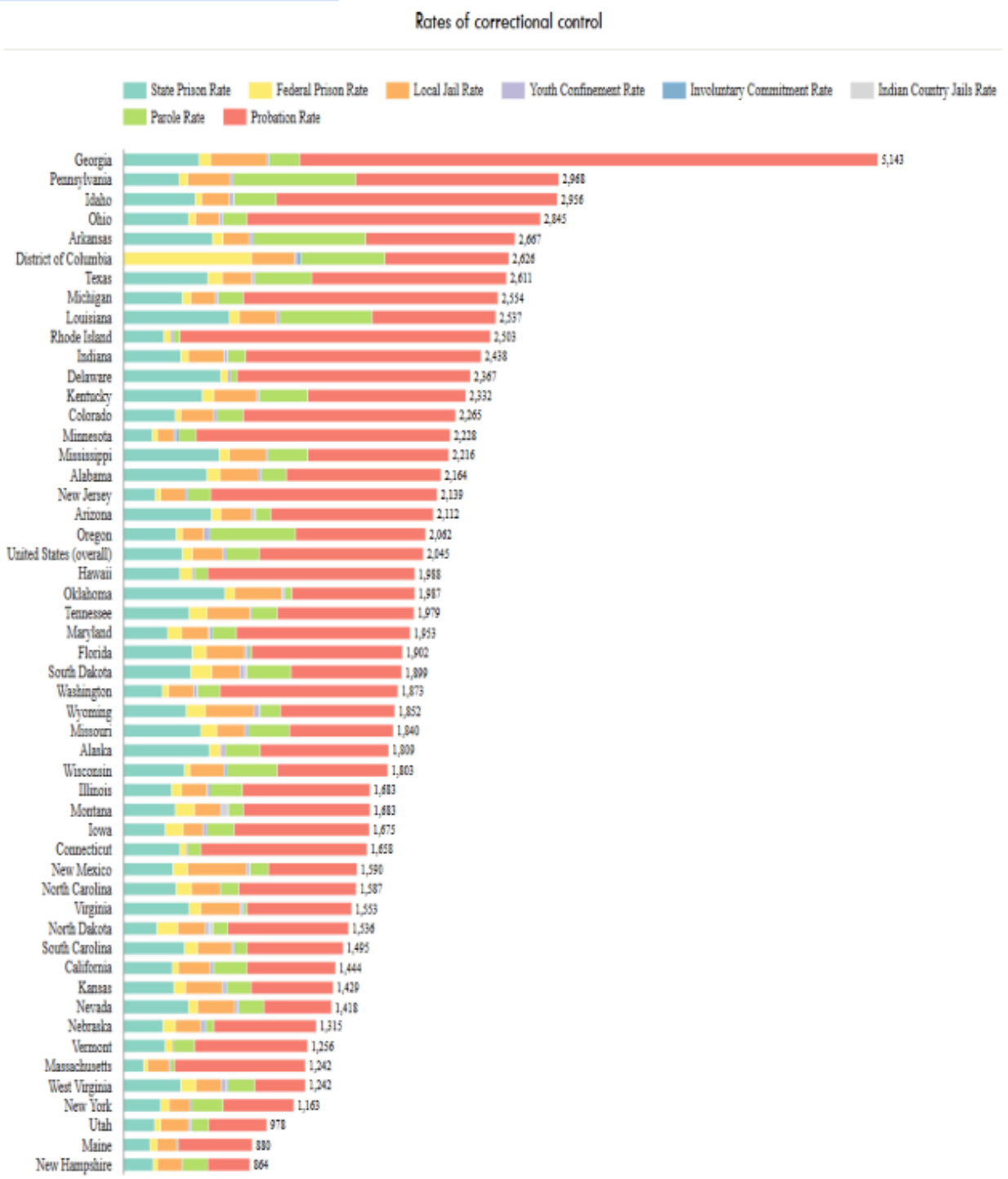
As the title above implies, there is a growing cost associated with this subpopulation of inmates; in fact, the care of inmates over 55 is estimated to be three times as expensive as that of inmates under 55 (McKillop & Boucher, 2018). Beyond the matter of cost, this phenomenon raises moral questions concerning the treatment

of prisoners as they enter the last phase of their lives. Many organizations have advocated for the compassionate release of inmates entering hospice care or in need of assisted living conditions. Others have argued that it is unfair to continue to punish individuals who are at low-risk of re-offending.

Overcrowding

It is widely agreed that the imposition of longer sentences has led to profound overcrowding in many prison systems across the country – and an unmanageable burden of individuals under community supervision. It is estimated that we have nearly 6 million individuals under correctional control in the United States, and while that number has subsided in recent years, the rate of decrease is slow. The below graphic depicts levels of correctional control by state, showing, moreover, how different states "distribute" the offenders they manage (Jones, 2018).

Rates of Correctional Control



Aging Prisoner Graphic Update_v01.jpg
Source: https://www.prisonpolicy.org/reports/correctionalcontrol2018.html
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Attribution - By Alexi Jones

Prison overcrowding is problematic for multiple reasons. First, when there are too many individuals housed within a facility, there are more assaults and injuries that occur within the institution. Moreover, there is a

safety concern for not only inmates, but also staff. 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 found in the case of *Estelle v. Gamble* (1976) and more recently, *Brown v. Plata* (2011) (*Estelle v. Gamble* 429 U.S. 97 (1976), n.d.) (*Brown v. Plata* 563 U.S. 493 (2011), n.d.). Unfortunately, many correctional systems (including California's, which was ordered to dramatically lower its burden of inmates over 10 years ago) have responded to overcrowding by simply moving prisoners around – to county jails, other state systems, or private facilities.

Aging and Overcrowding of Prisons in Louisiana

You can see from the charts and the reading that those who are sent to jails and prisons stay there for quite some time. Even first-time offenders seem to be spending more and more of their lives "inside" thanks to mandatory minimum sentencing guidelines (Vitale, 2021). In Louisiana, the state ranks 13th in the nation in total population in correctional facilities, just over 26,000 (wisevoter, 2023). Data suggests that up to 11.5% of that prison population could be over the age of 55, roughly 3,000 individuals, both men and women (Widra, 2020). Learn more about the problems of mandatory minimum sentencing, prison populations by state, and prison population by gender at the following:

- A LOOK AT THE UNITED STATES' AGING PRISON POPULATION PROBLEM
- Since you asked: How many people aged 55 or older are in prison, by state?
- Prison Population by State

10.4 CURRENT ISSUES: TRANSCARCERATION

Brandon Hamann and Kate McLean

Transcarceration or "Reinstitutionalization"

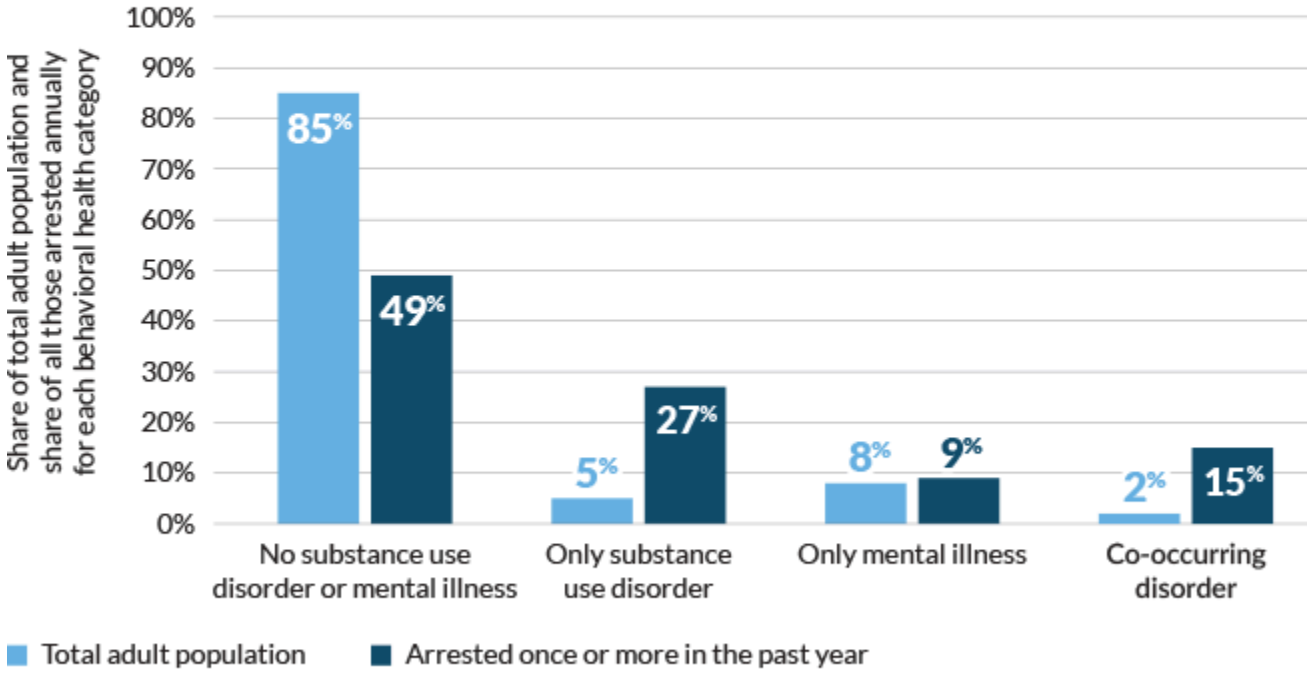
One prominent social justice campaign of the mid-twentieth century that is less remembered today is the anti-psychiatry movement. This movement questioned the science behind psychiatry, the evidence underlying different mental health diagnoses, and the function of psychiatry as an effective form of social control (sometimes leveraged against political dissidents around the world.) Among other goals, the movement sought to reduce the use of involuntary commitment, particularly within state-run hospitals, where "treatment" was sometimes indistinguishable from incarceration. (An important, if disturbing, documentary from 1967, *The Titicut Follies*, reveals in gruesome detail how patients at the Bridgewater State Hospital in Massachusetts were dehumanized by staff.) Deinstitutionalization of individuals with no income, and no other caretakers, may have remained an impossible target, were it not for the advent of the first powerful neurotropic drugs in the 1950s, most notably thorazine – an antipsychotic used to treat schizophrenia.

The Community Mental Health Act (CMHA) of 1963 was the last piece of legislation signed by John F. Kennedy Jr. before his assassination less than one month later. The law sought to provide funding for a vast network of outpatient mental health centers "in the community," thus allowing for the release of thousands of inpatients from state psychiatric hospitals. Unfortunately, while the latter institutions began rapidly shedding patients – and closing – in the years that followed, over half of the promised community centers never materialized. In turn, many individuals with severe mental illness found themselves precariously housed, homeless, and then sometimes incarcerated. Having few choices of where to go, many individuals with severe mental illness became destitute and/or destitute. Ultimately, some wound up in America's jails and prisons, after committing offenses to support themselves, violating anti-homeless ordinances, or acting in ways deemed violent or dangerous by law enforcement. This phenomenon is referred to as **"Transcarceration"** or "Transinstitutionalization," as individuals simply moved from one facility of involuntary confinement to another. At the dawn of the 1960s, the rate of confinement within state psychiatric hospitals was over 800 individuals per 100,000 population, while the incarceration rate was barely over 200 per 100,000; by the new millennium, these rates had flipped, with the population in prisons and jails exceeding 800 per 10,000 populations, and the rate of psychiatric hospital less than 500 per 100,000. (These trajectories are reflected in some stunning charts produced by the scholar Bernard Harcourt – see here.)

Figure 1

Adults With Co-Occurring Mental Health and Substance Use Disorders Make Up About 2 in 100 Adults in the U.S., but 15 in 100 Adults Arrested

Percentage of adult population and the subset of those arrested in the past year by behavioral health type, 2017-19



Source: Pew analysis of data from the National Survey on Drug Use and Health, 2017-19

Today, many might argue that – whatever the deficiencies of state psychiatric hospitals – prisons and jails are more traumatizing institutions that are ill-equipped to treat complicated mental illnesses. It may surprise and shock many to learn that the largest "mental health providers" in the United States are, in order, the Los Angeles County Jail, the Cook County Jail (Chicago), and Rikers Island Jail in New York City, a reality that has had tragic consequences for both mentally-ill inmates as well as those without a diagnosis. Yet, as detailed by Alisa Roth in her 2018 book *Insane: America's Criminal Treatment of Mental Illness*, America's jails are among the few institutions filling in disastrous gaps in outpatient mental health care nationwide. Now, nearly 60 years after President Kennedy signed the CMHA, the question of how to treat homeless individuals with severe mental illness remains pressing and unresolved. Unfortunately, many cities continue to seek ways to arrest and incarcerate such individuals on a larger scale rather than address their underlying diagnoses and risk factors.

Mental Health in Louisiana

There is a stark difference in the science from the 1960s and today regarding mental health and the criminal justice system. Medical science has made significant developments in the diagnoses and treatments of mental health issues in people from every walks of life. However, the criminal justice system as a whole has been unable to keep up with the science in legislating comprehensive relief treatments that are equitable in dealing with individuals who display a need for alternative measures because they are mentally disabled, having either been previously diagnosed or in need of specialized care from an undiagnosed condition. Likewise, research has shown that in some instances, institutionalization of offenders can lead to the development of mental health concerns from lack of adequate care within jails and prisons.

Louisiana ranks 30th nationally, according to one study in mental health well-being, with 23.01% of respondents reporting that they have a mental illness, and 5.72% having a serious mental illness (Masterson & Metz, 2023). Another study found that 1 in 4 Louisianans with a serious mental health illness have been arrested within their lifetime. It is estimated that 40% of the current prison population in Louisiana could have a mental illness, and 7 in 10 incarcerated youth have a mental illness (NAMI, 2023).

To find out more on state rankings for mental health and the NAMI fact sheet, click the links below.

- The Worst States For Mental Health Care, Ranked
- National Association on Mental Health

In the News: A Return to Involuntary Commitment?

In November 2022, New York City Mayor Eric Adams directed police and EMS personnel to remove homeless individuals who exhibit “unawareness or delusional misapprehension of surroundings” or “delusional misapprehension of physical condition or health” from the streets, for potential hospitalization against their will. Importantly, the directive did not require police to determine that

such individuals were violent, or a threat to the public safety. How effective do you think this new policy will be in: Reducing homelessness? Addressing crimes committed by and against individuals with mental illness? Improving access to mental health treatment? Read more here.

10.5 CURRENT ISSUES: THE REVOLVING DOOR

Brandon Hamann and David Carter

Reentry and the Revolving Door

Parole, as discussed in previous chapters, has had mixed success. Overall, the effectiveness of parole hovers around 50% nationwide – meaning that roughly 50% of parolees are sent back to prison to complete their sentences. It is estimated that somewhere between 600,000 and 800,000 individuals are on parole in any given year, with several hundred thousand exiting each year. This brings up questions about what happens to these individuals – do they remain in the community after completing their sentence...or do they return to prison like their less successful parole counterparts?

The reality is that many of them will be rearrested. In one of the most comprehensive studies on reentry outcomes, Alper, Durose, and Markman (2018) tracked the **recidivism rate** of individuals 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 had been rearrested. Many of these individuals return to prison, giving rise to the concept of the "revolving door" of justice. These statistics reflect poorly on the long-term effects of incarceration as well as the reentry programs available to support individuals leaving prison. In order to be more successful, individuals returning to society need assistance to get back on their feet – and stay on their feet. Such assistance includes education and vocational training, employment assistance to get a job, legal services, information on public benefits, and housing connections. Interestingly, it appears as though many of these "reentry needs" here are the same as the "criminogenic needs" that landed individuals in the justice system initially (Alper, Durose, and Markman, 2018). Unfortunately, it appears as though such needs are not being addressed while individuals are incarcerated, creating a cycle of "catch and release."

Many social circumstances and policies compound the challenges offenders face upon release. Over the last 40 years, there has been an overwhelming push to include items on employment applications that ask about prior criminal history. If an individual responds truthfully, their applications may be overlooked or discarded (an act of illegal discrimination, in fact). Moreover, gaps in ex-offenders' career history and education may undermine their attempts at gainful employment after incarceration, a reality that has become even starker in the U.S. "knowledge economy." Discrimination against ex-offenders is also rampant in housing applications, which similarly inquire about criminal history. If an individual reports prior arrests, their applications may be placed at the bottom of the pile. We might further note the ways in which barriers to housing and employment for ex-offenders are mutually reinforcing; it is hard for an individual without stable housing to hold down a job, while someone without a regular income may struggle to pay for housing. Combined, these barriers to reentry

call into question when an ex-offenders sentence has been "served" if consequences continue well beyond the period of formal correctional control. The informal discrimination faced by offenders after release is sometimes labeled as the "collateral consequences" of punishment.

Future Outlook of Corrections

Given the "revolving door" presented above, the problems facing corrections (overcrowding, violence) are not likely to go away anytime soon. Even as crime has decreased dramatically, the U.S. has seen an increase in the overall correctional population for decades. While there has been some reduction in prison populations recently, these changes are unlikely to hold unless other changes are made. Notably, the functions of community corrections need to be better supported, and follow evidence-based practices, if individuals are expected to stay out of prison. Without such support, the prison population is likely to increase once again, due to the eventual return of too many "failures" in community corrections. Most offenders are in need of some basic assistance to get themselves back to a functioning level in society, including help with education, substance use, employment, and general and mental health. Otherwise, the 6 million individuals in all forms of correctional control can quickly turn into 8 million.

Recidivism in Louisiana

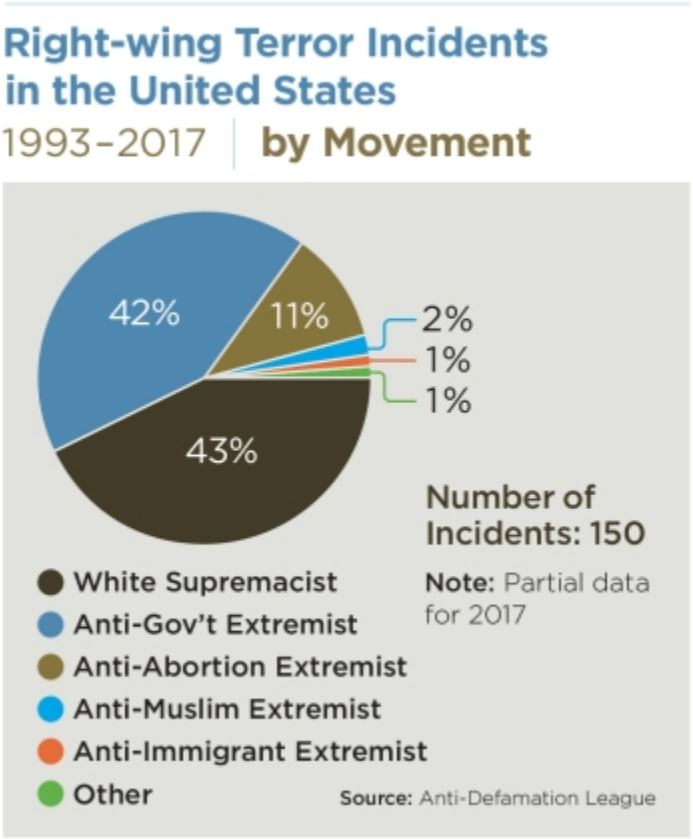
Not everything is all doom and gloom in Louisiana regarding the criminal justice system. One bright spot that can be talked about positively is the recidivism rate in the state. Since 2017, state leadership has signed into law multiple reforms in sentencing, corrections, and community supervision all meant to alleviate the strain on prison overpopulation (Wertheimer, 2022). The effects of these new laws have seen a dramatic decrease in the arrests of re-offenders into the criminal justice system. Louisiana now ranks 11th in the nation in recidivism with a 29.6% rate, well below the national average of 37.1% (wisevoter.com, 2023). The bulk of the success can be attributed to how the state treats its non-violent offenders. In a 5-year period, imprisonment rates per 100,000 dropped by more than 50% for non-violent offenders in the state.

To read more on recidivism rates in Louisiana, click on the links below.

- 5 Years In, 5 Things to Know About Louisiana's Justice System
- Recidivism Rate by State

10.6 CURRENT ISSUES: TERRORISM IN AMERICA

Brandon Hamann



Contrary to popular belief, terrorism in the United States did not begin with the catastrophic events of September 11, 2001. Needless to say, the downing of the World Trade Center Towers in New York City will be forever ingrained in the memories of Americans forever. However, there have been many events that foreshadowed this one incident that were just as memorable, if not more so. Before we get into further detail, it is important that we give a bit of context into the history of Terrorism and its impact on current issues within the Criminal Justice System in the United States, because the United States has had such a unique relationship with the term "terrorism." And what the graphic above shows is that not all acts of terrorism come from foreign adversaries. Much of it is born right here inside the United States.

What is Terrorism?

"Terrorism" is an extremely difficult word to define. It really depends on which side of the argument you are on in how you would describe its meaning. Have you ever heard the phrase "one person's trash is another person's treasure?" When discussing terrorism, the phrase can be reinterpreted as "one person's freedom fighter is another person's terrorist." For example:

STAR WARS

A small group of rebels have banded together in an alliance to fight back against the tyranny of the Galactic Emperor and his powerful Sith Lord Vader to rid the galaxy of their evil and win freedom for their friends and families and bring peace and democracy to the people.

- If you're a supporter of the Rebels, you see them as Freedom Fighters, fighting against the Evil Empire.
- If you're a supporter of the Empire, you see the Rebels as Terrorists, usurpers trying to change your comfortable way of life.

This is an oversimplification of an age-old story plot. However, when discussing terrorism, it can get much more complex.

For the purposes of this Introductory text, a generalized definition of terrorism is the best course. Therefore, **terrorism** is the unlawful use of violence and intimidation, especially against civilians, in the pursuit of political gains.

A Brief History of Terrorism in America

If we were to have a serious global historical discussion about terrorism, this textbook would be very long. In fact, there are entire courses dedicated to the study of Terrorism and **Counterterrorism** at the college level if you choose to pursue a career in that field. We would have to go back to before the creation of the United States to even before the journey of Christopher Columbus. However, we will keep the historical context in America to the 20th century until the present.

The Milwaukee Police Department Bombing (1917)

Italian anarchists protesting against the conscription of men into World War I unintentionally detonated an improvised explosive device inside the Milwaukee, Wisconsin Police Department, killing 9. The bomb was meant to be set off inside a nearby church, where a local priest was campaigning for the war effort (Esmail, Eargle, and Hamann, 2021).

The Tulsa Race Riots (1921)

Image of Greenwood, Oklahoma as it burned during the Tulsa Riots, 1921.

Greenwood, Oklahoma, a suburb of Tulsa, is burned to the ground when an angry mob of white residents descend upon the majority black community after a black man is accused of assaulting a white woman. The area at the time was known as "Black Wall Street" because of the affluence of the black-owned businesses that made up the neighborhood (Esmail, Eargle, and Hamann, 2021).

The Unabomber (1978-1995)

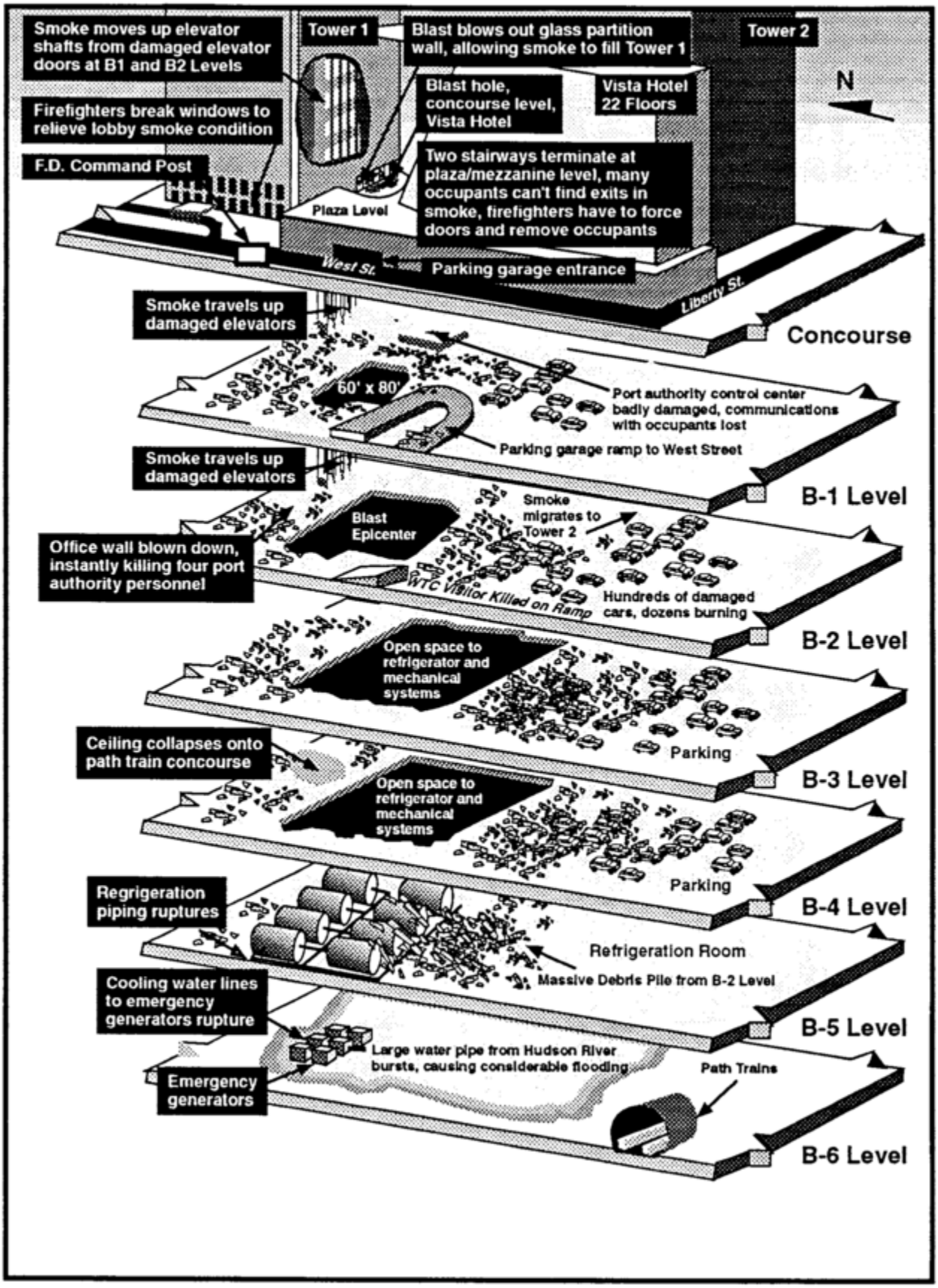
FBI composite sketch of the Unabomber in 1987.

Ted Kaczynski, the Unabomber, FBI mugshot, 1996.

Theodore "Ted" Kaczynski, a noted Harvard educated mathematician and engineer, terrorized the country by sending homemade letter bombs through the mail. It was only after family members recognized his writing style from a manifesto Kaczynski had sent to media outlets that he was apprehended in a small log cabin in rural Montana. Ted Kaczynski took his own life while in prison in June 2023 (Esmail, Eargle, and Hamann, 2021).

World Trade Center Bombing (1993)

Blast Damage



772-2-28-94-7

FEMA illustration of the blast damage from the 1993 WTC bombing.

Believe it or not, the events of September 11 were not the first time the World Trade Center Towers were the victim of a terrorist attack. In the early morning of February 26, 1993, a moving van loaded with a chemical mixture of fuel and fertilizer was detonated in the parking garage of the North Tower. Six were killed, and over 1000 people were injured in the blast. Ramzi Yousef, a member of an international terrorist group called al-Qaeda, was tried and convicted with 5 other co-conspirators (Law, 2016).

The Branch Davidians (1993)

The Branch Davidian compound on fire. Waco, Texas. February, 1993.

Fearing that a group of Christian Fundamentalists called The Branch Davidians were stockpiling illegal weapons and maintaining a meth lab inside their Waco, Texas compound, the ATF and DEA attempted to execute a search warrant on February 28, 1993. Fifty-one days later, 82 members of the Branch Davidian group, including men, women, and children, and multiple federal law enforcement officers, had been killed during

a lengthy standoff that ended in a fire that consumed the building where the leader, David Koresh, had been hiding out.

The Oklahoma City Bombing (1995)


ALLIED
STEEL
CRANE RENTAL
232-7531
65
64

Aftermath of the Oklahoma City bombing, 1995.

In retaliation for the disaster at Waco, among others, two American extremists, Timothy McVeigh and Terry Nichols, detonated an improvised explosive device in front of the FBI building in Oklahoma City, Oklahoma, on April 19, 1995. The explosion killed 168, including children who were attending childcare services for federal employees working in the office building.

Atlanta Olympics Bombing (1996)

During the 1996 Summer Olympics in Atlanta, Georgia, a pipe bomb exploded in Olympic Park, killing 2 and injuring 111. Initially, the FBI had alleged the perpetrator to be a security guard, Richard Jewell, and made every attempt to discredit him in an attempt to get him to confess. Jewell was later exonerated when, in 2003, Eric Rudolph was arrested after a lengthy manhunt for the bombing of an abortion clinic in Alabama, Atlanta, and the bombing of a gay nightclub.

World Trade Center Towers (September 11, 2001)

September 11, 2001. World Trade Center Towers, New York City.

After failing in 1993 to take down the World Trade Center Towers from the inside, al-Qaeda leader Osama bin

Laden orchestrated a daring plot to topple the buildings from the sky. Two commercial airliners were hijacked and flown directly into Towers 1 and 2, culminating in their collapse on September 11, 2001. Additionally, a simultaneous attack was carried out against the Pentagon in Washington, D.C., when another hijacked commercial airliner was flown into it. A fourth attempt was thwarted when passengers were able to successfully subdue the terrorists and force the plane down in a field in rural Pennsylvania. Reports indicated that flight was intended for either the White House or the Capitol Building.

Domestic Terrorism

While the events of 9/11 awakened the United States to the threat of foreign terrorist attacks, there was still the issue of how the country and its criminal justice system defined domestic threats as well. Even while the country fought to avenge the destruction of the World Trade Centers on a global scale, it was wrestling with how to deal with its own homegrown problems. Terrorism in its simplistic definition does involve violence for political gain; that violence gets even more complex when other ideologies become involved, such as

- Religion
- Homophobia
- Xenophobia
- Racism
- Environmental Extremism

Since 9/11, there have been some notable domestic events that have added to the debate of just how far behind the criminal justice system is in dealing with terroristic attacks on U.S. soil by U.S. citizens. In 2015, Congress attempted to fix that by passing The Freedom Act and 18 U.S. Code 2331, both of which were instrumental in defining what **domestic terrorism** was (Hamann, et al., 2021). Unfortunately, neither legislation laid out the groundwork for penalties to be sanctioned on those who were convicted of crimes of domestic terrorism.

Terrorism in Louisiana

Louisiana is no stranger when it comes to terrorism. New Orleans is home to the Eastern District Federal Court, Baton Rouge is home to the Middle District Court, and Lafayette is the Western District seat. If there were ever a national case of domestic terrorism to be heard in Louisiana, it would be heard in one of these District Courts, depending on location of the incident. And there have been a number of domestic terrorism attacks in Louisiana in recent history. In 2020, a rash of

church fires spread across the state. Anti-semitic slurs and white supremacist symbology were found at the scene. Four churches within a 200 mile radius were burned. All four churches were historically black congregations. No suspects have ever been found.

- NAACP president calls series of church fires in Louisiana 'domestic terrorism'

In order to fight global terrorism, the United States government began a counterterrorism campaign that included a war effort against al-Qaeda and the countries alleged to have given them financial support and shelter. This brought the United States into conflict with Afghanistan and Iraq. Ultimately, these campaigns led to the deaths of both the leaders of al-Qaeda, Osama bin Laden and Saddam Hussein, the militant dictator of Iraq. However, by the end of 2017, those war efforts had cost the United States approximately $2.8 trillion dollars (stimson.org).

Domestically, since 9/11, the United States has continuously increased its spending on counterterrorism efforts domestically. President George W. Bush created the Department of Homeland Security in 2002 with the expressed purpose of safeguarding the American people from domestic threats. These threats include cyber attacks, border security, and domestic terrorism in cooperation with the FBI. The Department of Justice has also been given ample budgetary monies to investigate and prosecute domestic offenders. In 2022, the Department of Justice (DOJ) budget request totaled $101.2 million for domestic terrorism threats alone. This allocation would be used for the FBI, U.S. Marshals, U.S. Attorneys, and other offices to research "domestic radicalization" (DOJ, 2022).

The Complexities of Terrorism and the U.S. Criminal Justice System

The difficulty with Terrorism with regards to the U.S. criminal justice system comes from the fact that the majority of domestic offenders are American citizens. Therefore, those who are alleged to have committed acts of violence that could be defined as "terroristic" in nature are still entitled to the same constitutional rights and privileges as everyone else. Furthermore, there is also the consideration of intent. Remember the chapter on criminological theories (chapter 2) and the determination of causation. The most difficult aspect of trying to define an act of violence as the intent, or motivation behind the event. With international terrorism, it's a much simpler definition in most cases: an act of violence, especially against civilians, for political gain. When those acts of violence are perpetrated by citizens against civilians (Americans against Americans) but the ideologies are not consistent with a particular political agenda, then it becomes a much more complex situation than just saying it is a terroristic act.

Also recall the chapter(s) on the amendments. The Constitution of the United States of America provides every American citizen certain rights and protections. And those rights are no more important than when dealing with accusations of criminal wrongdoing. A quick reference to those Rights are:

- **The First Amendment:** Freedom of speech, religion, the press, peaceful protest, and assembly
- **The Fourth Amendment:** The right against illegal search and seizure
- **The Sixth Amendment:** The right to a speedy and public trial, an impartial jury, and the right to an attorney
- **The Eighth Amendment:** The right against excessive bail, excessive fines, and the right against cruel and unusual punishment
- **The Fourteenth Amendment:** Equal protection under the law (due process)

To lessen the complications of the nuances of prosecuting domestic terrorism cases within the United States, or even trying to determine what constitutes a terrorist event within its borders, the U.S. criminal justice system has devised a method of legislative and punitive alternatives that do the same job as international terrorist violations. Instead of labeling everything as a "terrorist attack," the federal government began passing legislation to prosecute violent acts against minority groups, since most of the incidents were being investigated as such. Starting in 1968, Congress passed *18 U.S.C. §245* (Violent Interference with Federally Protected Rights), which gave the criminal justice system the power to prosecute acts of violence against Black communities and Civil Rights activists. Over the course of the next 60 years, those prosecutorial powers have been expanded to include Asian American and Pacific Island heritages, as well as members of the LGBTQ+ communities, and many religious groups. What these powers allow the U.S. criminal justice system to do is to still prosecute and punish violators the same as international terrorists while giving them a bit of flexibility within the system. The crimes are the same, the sentencing is the same, but now the distinction of the violent acts are called "Hate Crimes." To learn more about federal hate crime laws, check out this website.

10.7 CYBERCRIME

Brandon Hamann

iPhone.
TikTok.
Spotify.
Smartwatch.
Wi-Fi.
Google.
Shein.
Hospitals.
Subway Rewards.
Chick-Fil-A App.
This class.
What do they all have in common? They all have your personal information in some form or fashion stored

somewhere digitally in a "secure" location. Oh sure, they say it's "safe," but is it? At any given moment, someone is trying to get into the sensitive areas of every one of those places to attempt to take the personal information that you have entered and steal your identity for the purposes of an illegal act. They will then sell it to whoever will buy it, and that individual will create a persona using your information to open credit cards and bank accounts, make purchases, and ruin your good credit and reputation that you have worked so hard for. And all these criminals need to do it are a computer and an Internet connection. Welcome to the Age of Cybercrime.

Cybercrimes are any illegal acts committed using a communication device. It's a relatively new phenomenon, but the crimes are not. They are the same crimes, just repackaged using new methods. Identity Theft is still theft. Crypto and Digital Currency Robbery is still Robbery. Technological advancements, the Internet, and our willingness to be open and free with the sharing of our personal information makes it that much easier for criminals to take advantage of the large amount of data that is out there, ripe for the taking. But criminals aren't the only ones using our information for nefarious things. Corporations, advertising and marketing firms, and even governments use the same information we provide to tailor experiences and goods and services based on our everyday activities.

But how did it all start? Watch the trailer below to begin that journey.

One or more interactive elements has been excluded from this version of the text. You can view them online here: https://louis.pressbooks.pub/criminaljustice/?p=1301#oembed-1

The movie was "War Games." It was released in 1983. Aside from it being old and one of my favorites growing up, it was important for its time because of who it influenced. President Ronald Reagan watched this movie while on vacation at Camp David, and he was so intrigued by the movie's thematic presence that he immediately called a meeting of his top military advisors and asked the question, "Is this possible?" (Kaplan, 2016). The movie involves a high school youth who just wants to play some video games, so he uses the Internet at the time to "hack into" what he thinks is a new gaming company. What he doesn't realize is that what he unintentionally does is begin communicating with a Top-Secret military computer that simulates Global Nuclear scenarios deep inside a military installation. Ultimately, the computer must learn the difference between what is real and what is just a game as the fate of the world is in the balance.

It sounds extremely far-fetched, but the reality is that it really isn't. The Internet, for example, started out as a U.S. government communications project used to share sensitive information between research teams across great distances. It was easier to transmit data through phone lines and print them out on the other end than to mail them and risk exposure of being captured by an enemy state. What the U.S. government

learned unexpectedly was that they could also intercept that same data from foreign governments without being detected (initially) and so the great Cyber Race began.

And then came the cellphones, and personal computers, and the Worldwide Web. Suddenly, the government no longer had a monopoly on the digital frontier, but they could still listen in undetected. That is until lawmakers began passing legislation guaranteeing the privacy of digital information for American citizens. The first such law passed in 1986, the Electronic Communications Privacy Act. While it banned eavesdropping on personal spoken communications, it did not provide protections for email and other telephone communications. To learn more about the evolution of digital privacy laws, check out this website.

The Evolution of Cybercrime

As the Internet became more of a "thing" and people became more connected with each other through their digital personalities, the opportunities for crime also exponentially increased. As mentioned earlier, the crimes did not change, just the means by which they were committed. Robbery and theft no longer had to be face-to-face. They could be perpetrated simply by using a bit of code and a phone line connection to the Internet. Thieves didn't have to physically be in the building to steal anything of value if they had the means to get past the online security.

Electronic mail (E-mail) and Texting have morphed into new communication services that criminals are using to scam would-be victims. **Phishing** and **Smishing** are new methods of information gathering that are illegal and can trick a person into thinking that they are interacting with legitimate service providers; unbeknownst to them, they are being preyed upon by identity thieves.

Cybercrimes also include bullying and harassing messages sent through social media and other digital platforms. They can also include cyberstalking, as well as many others. Some other common cybercrimes include

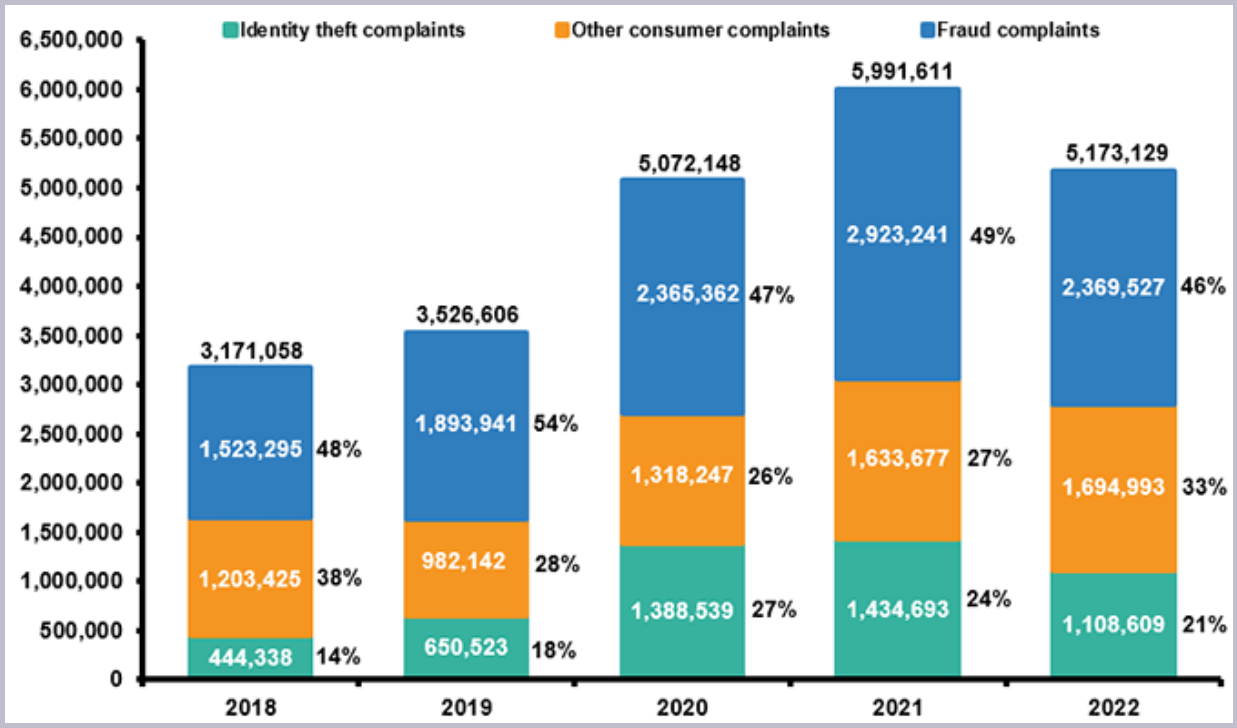
- **Ransomware** – personal data is encrypted and unusable until a payment is made to gain access
- **Hacking** – unauthorized use electronic equipment for the sole purpose of gaining access to restricted information
- **Fraud** – bank theft, misuse of personal information, theft of services
- **Software Piracy** – illegal possession of software by a violation of copyright or license restrictions
- **Cyber Extortion** – DDOS (Direct Denial of Service)

Cybercrimes and the Criminal Justice System

There really isn't much to say about cybercrimes when it comes to the criminal justice system. As mentioned before, the crimes don't change, just the method of how they are committed. The real problem is how they are investigated and apprehended. Law enforcement agencies now have to get creative in their investigative practices because cyber criminals are much more "tech savvy" in their approach to crime. Special teams need to be created to attempt to track these violators who are experienced in the same methods the criminals are using to commit their crimes. Computer programmers, computer scientists, financial experts, forensic accountants,

social media consultants, etc. are all being utilized in an effort to stay up-to-date with all the new ways in which criminals are carrying out their schemes.

Cybercrime in Louisiana



Source: https://www.iii.org/fact-statistic/facts-statistics-identity-theft-and-cybercrime

The chart above illustrates a nationwide problem with cybercrime as it pertains to identity theft and fraud. According to statistics, on a year-to-year basis, these crimes are steadily increasing. Louisiana is no stranger to cybercrimes, either. In 2022, Louisiana ranked 2nd with almost 25,000 reports (534 per 100,000) of identity theft (iii.org, 2022) alone. So what can be done?

The Louisiana State Police in cooperation with LSU have started to use Artificial Intelligence (AI) to track cybercrime. Researchers have developed a new tool, HookTracker, to look for potential malware programs and track them back to their origin points. This would allow investigators to catch would-be cyber criminals and gain valuable evidence to be used in prosecutions. To read more about HookTracker and Artificial Intelligence in the fight against Cybercrime, read this article.

10.8 HOMELAND SECURITY

Brandon Hamann

The Seal of the Department of Homeland Security. Source: Wikimedia Commons

After 9/11, it became clear that the United States Intelligence apparatus was extremely dysfunctional. Many agencies were investigating aspects of domestic terrorism, border protection, immigration, cybercrime, transnational crimes, human trafficking, drug trafficking, fraud, counterfeiting, and many other threats to National Security, but they weren't communicating with each other. There were so many different federal departments with overlapping responsibilities that it was becoming difficult to determine who was in charge of doing what. That changed in 2002 with the passing of the Homeland Security Act, which established the Office of Homeland Security. This department took the task of combining 22 autonomous federal agencies and combined them into one singular entity to streamline and coordinate a national strategy to secure the United States against a terrorist attack. Some of the agencies under the Homeland umbrella include

- United States Customs Service
- Immigration and Naturalization Service
- Federal Emergency Management Agency (FEMA)
- Transportation Security Administration (TSA)
- United States Coast Guard (USCG)

- United States Secret Service

Responsibilities of Homeland Security

With that many agencies under its wing, it's quite easy to get confused as to the role the department plays in the overall function of securing the nation. Some of the jobs that are tasked to Homeland Security include the following:

- Cyber security and infrastructure
- Immigration and border protection
- Drug and human trafficking Investigations
- Money laundering and currency counterfeiting
- Disaster management
- Transportation security (airports, railways, ship docks, etc.)
- Animal and Plant Health Inspections

More recently, as of 2021, a new area of concern has arisen in the fight against Terrorism within the borders of the United States: white supremacy and extremist actions. The Department of Homeland Security under the Biden Administration has been tasked with investigating this new threat.

Immigration and Border Protection

If you have been paying attention to history at all, you'll realize that the United States of America is a country built on immigration. Save for the indigenous peoples that were here prior to colonization by the Europeans, the vast majority of those who call themselves "Americans" can trace their ancestry to somewhere other than here. Regardless of that fact, the issue of immigration today is still a hotly debated topic of discussion as it has always been since the first settlers stepped foot on the shores of this country seeking a better life for themselves and their loved ones.

But we also have to be mindful that while there are those who are seeking refuge and a chance to have a better life for their loved ones than the one they have in their native countries, the United States has laws that must be followed in order to secure those rights and privileges to become a citizen. With threats of international and domestic terrorism, as well as the recent COVID-19 pandemic, national security pertaining to immigration and border protection have become more focused.

Title 42

COVID-19 took the entire world by storm. No one was prepared for the extent of precautions that were necessary or the sacrifices that were needed in order to try and stave off the rampant rate of infection before the scientific community could develop a reliable means of defense in the form of a vaccine. Government's were paralyzed as their disaster responses were tragically inadequate, and millions died because of misinformation and miscommunication. Those countries that were ill-equipped to amass a defense saw their citizens get infected with ferocity, and their medical services were stretched thin. Even well-staffed hospitals were no match for the influx of the sick and dying who needed constant medical care and much needed medicines that were not available.

The pandemic also stressed the situation at the southern border of the United States. Many Central American countries were not able to combat the infection rate of COVID-19, which pushed their citizens into a panic and sent them seeking aid in the only place they knew would be able to help: America. However, many countries, including the United States, issued global travel restrictions, essentially closing their borders for fear of spreading the disease even further.

So in March 2020, under President Trump, the United States issued a decree that any individuals seeking asylum into the United States would be turned away for fear of them possibly transmitting a communicable disease. This new order was termed "Title 42" (Section 265 of U.S. Code Title 42), which gave the Director of the Center for Disease Control permission to expel or suspend the introduction of any person who was suspected of carrying or transmitting a deadly virus or disease from entering the United States from Mexico or Canada. This included any border crossing by land, air, or sea. This policy was kept in place under President Biden until May 2023. To learn more about Title 42 and its impact on border crossings and immigration, read this article.

DACA and The Dreamers

Deferred Action for Childhood Arrivals (**DACA**) is a policy that allows permission for children born of immigrant parents or children of immigrant parents brought to the United States illegally to remain in the country and obtain certain rights. Originally signed in 2001 under The Dream Act, provisions would be provided for undocumented children to obtain citizenship through such programs as receiving a high school diploma or GED equivalent, military service, or relevant work service. These children were also known as "Dreamers," since they were the ones who were most impacted by The Dream Act and DACA. Through the years, DACA and The Dream Act have gone through many revisions, including an attempted rescinding during the Trump administration. However, federal courts issued a decree stating that DACA and The Dream Act were both to be kept active.

Immigration and Louisiana

While the United States Supreme Court has continuously ruled that any person within the borders of the country, regardless of residency status, has protections under the Constitution, including Freedoms of Speech, Religion, Privacy, and Due Process under the law, that does not mean that those who are here illegally have the right to work and stay without proper documentation that allows them to do so. There are ways that this can be accomplished, but those processes can sometimes be extremely time-consuming and costly. For more information as to the requirements for how an undocumented person can work in the United States, click here.

Many states, including Louisiana, have legislated against companies hiring and employing undocumented persons. Even though, according to research, nearly one-third (28%) of adult immigrants living in Louisiana have a college education, and immigrants make up only 4% of the population, it is still a violation of state law to be an undocumented resident (American Immigration Council, 2020). To read more about immigration in Louisiana, go here.

To familiarize yourself with immigration legislation in the state of Louisiana, visit this site.

Disaster Management

Hurricane Katrina, August 28, 2005. Source: Wikimedia Commons.

The above image shows the sheer size of one of the most devastating natural disasters in recent history, Hurricane Katrina. To the top left is the Western border of Louisiana and Texas. The top right shows the peninsula of the state of Florida. The very bottom middle is the Yucatan peninsula of Mexico. This storm was so big it almost covered the entire Gulf of Mexico before it made landfall in August 2005. With winds peaking at over 175 miles per hour (making it a Category 5 storm), Hurricane Katrina buzz-sawed her way through the states of Louisiana, Mississippi, Alabama, and Florida, leaving a path of devastation in her wake. Damages were estimated at over $160 billion US, with thousands of lives lost and the city of New Orleans in near ruin from massive flooding. Homes were lost, families were displaced (some left and never came back), and by some estimations, recovery is still ongoing.

For those of us living in this region of the United States, this is nothing new; it's part of life. Hurricanes, daily flooding in low-lying areas, rain one minute, scorching heat the next: it's just another day in the South. But in other parts of the country, life is not the same. Different regions deal with different disaster threats from natural occurrences from Mother Nature: earthquakes, tornados, landslides, drought, blizzards and snowstorms, avalanches, etc. And when those Americans are in need, just like when those who are impacted from the devastation of a major hurricane, there has to be a process in which those victims can be made whole again. And there is: FEMA.

There is a division of Homeland Security that deals strictly with disaster relief and management, the Federal Emergency Management Agency (**FEMA**). FEMA is responsible for coordinating relief efforts during disaster recovery from all avenues: local, state, and federal governments, as well as public and private charitable organizations and businesses. The goal is to streamline the process and make it easier for those affected by a natural disaster to be able to recover and get back to a relatively normal way of life as quickly as possible by providing as much assistance as possible. The assistance provided can include temporary housing, food, clothing, transportation, income, and other essentials as needed.

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ACCESSIBILITY STATEMENT

The CCRJ 1013 cohort is dedicated to creating a digitally accessible experience for everyone, including people living with disabilities. The work we do to provide the best user experience for everyone is ongoing, through applying the current accessibility standards as they apply to our public Pressbook textbook and Learning Management System (LMS).

Our team has applied the following standards to our textbook and LMS:

- WCAG 2.1 AA
- Section 508

Our Pressbook and LMS websites were assessed on December 14, 2023, for compliance to the WCAG 2.0 AA and Section 508 standards through a manual accessibility audit performed by the CCRJ 1013 Cohort.

Our Pressbook and Moodle websites have had a disability-focused usability assessment completed on December 14, 2023, by the CCRJ 1013 Cohort.

Accessibility Contact: Questions and Feedback

We are here to answer your accessibility questions, assist with any barriers to accessibility you may experience, and take your suggestions. Please contact us through the information below:

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Pam Simek – Assistant Professor of Criminal Justice
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Brandon Hamann – Adjunct Professor of Criminal Justice
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You will receive a response within five business days.

Organizational Efforts Towards Accessibility

Our Cohort has made the following efforts to integrate accessibility into our Pressbook and LMS websites:

- Include accessibility throughout our internal processes.
- Integrate accessibility into our Pressbook and LMS.
- Coordinate accessibility through every cohort member.
- Provide continual accessibility training for our cohort.

This accessibility statement was created on December 15, 2023, by Brandon Hamann.

DERIVATIVE NOTES

The following adaptations/updates have been made to this Textbook:

- Included graphics that were Louisiana-centric to the theme of the subject matter.
- Expanded the Glossary to include relevant terminology per each chapter subject matter.
- Chapter 2 was rewritten using previous adaptations and new source material.
- Chapter 10 was added and written using subject matter source material.
- All chapters were updated and expanded on to include subject matter pertinent to the state of Louisiana.
- H5P activities were added to sections to enhance and reinforce learning objectives.
- A section on Course Learning Objectives was added to the Front Matter.

GLOSSARY

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 toward 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