INTRODUCTION TO CRIMINOLOGY



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Criminology 1 – Introduction to Criminology

George Cartwright

Madera Community College

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Preface

Welcome to Introduction to Criminology at Reedley College. This textbook was designed especially for Reedley College Criminology students. It will provide an overview of the three components of the Criminal Justice System: Law Enforcement, Courts, and Corrections. There are four types of interactive features in this book to help you, the student, engage with the various concepts and procedures behind criminology.

1.

	Pin It! Boxes These boxes refer to information that you should mentally "pin" for later. Remembering the information included in Pin It! boxes will help you better understand following textbook material.

2.

	Think about It… Boxes Think about It… boxes encourage you to do just that, think about the information provided in the box and form an opinion. Often, what's placed in these boxes are ideas or issues that are controversial, such as the death penalty or immigration concerns. Sometimes these topics can be difficult to think about objectively because they are emotionally charged. However, taking a moment to consider your values and beliefs and how they affect your opinions and decision making, produces mental stamina which is an important life skill. Remember, the brain is a muscle too.

3.

	Quotable - Box Quotable boxes contain relevant quotes that pertain to information in the text. A good quote is an effective way to quickly summarize a complex topic or idea.

4.

	Act it Out - Box Act it Out boxes provide you opportunities to interact with the materials, either by dividing into class groups and answering questions, or doing some investigative research on your own.

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CHAPTER OVERVIEW

1: Perspectives on Justice and History of Policing

Key Terms

Amalgamation, August Vollmer, Beat, Civil Service, Code of Hammurabi, Decentralized, Frankpledge System, Hue and Cry, Hundred, Kin Policing, Magna Carta, Mosaic Code, Mutual Pledge System, Nationalization, O. W. Wilson, Parish, Political Era, Posse Comitatus, Preventive Patrol, Proactive, Reactive, Reform Era, Sheriff, Shire, Shire-reeve, Tithing, Tithingman, Watch and Ward

1.1: Early History of Policing

1.2: Defining Key Criminology Terms

1.3: The Formal Criminal Justice Process

1.4: Perspectives On Justice

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1.1: Early History of Policing

Early History of Policing

The legal system of the United States traces its roots back to the common law of England. The enforcement of those ancient laws was the responsibility of a criminal justice system that grew and evolved over a protracted period. The protections against the abuse of police power that Americans enjoy today have their roots in English constitutional documents such as the Magna Carta . Legally limited police authority and a decentralized organizational structure are two of the most important features of modern American policing attributable to its English colonial past.

Ancient Policing

Historians and anthropologists regard the earliest system of law enforcement as kin policing . In this primitive system, members of a clan or tribe banded together to enforce the rules of the group on rogue members. The essence of kin policing was the idea that an attack on one member of the group was tantamount to an attack on the entire group. Note that this method was extremely informal: there were no courts or written system of laws. Behavioral expectations were derived from group norms and customs.

When formal, written laws emerged, the need to enforce those laws emerged concurrently. King Hammurabi of Babylon is credited with the first written criminal code. The codes of ancient Greece and Rome have had an influence on Western law, as has the Mosaic Code . One of the earliest forms of written law, the Code of Hammurabi, was carved in large stones in the tenth century B.C.

Hammurabi's Code

Learning Objective

- Describe the significance of Hammurabi's code

Key Points

- The Code of Hammurabi is one of the oldest deciphered writings of length in the world (written c. 1754 BCE), and features a code of law from ancient Babylon in Mesopotamia.
- The Code consisted of 282 laws, with punishments that varied based on social status (slaves, free men, and property owners).
- Some have seen the Code as an early form of constitutional government, as an early form of the presumption of innocence, and as the ability to present evidence in one's case.
- Major laws covered in the Code include slander, trade, slavery, the duties of workers, theft, liability, and divorce. Nearly half of the code focused on contracts, and a third on household relationships.
- There were three social classes: the amelu (the elite), the mushkenu (free men) and ardu (slave).
- Women had limited rights, and these were mostly based around marriage contracts and divorce rights.

TERMS

- Cuneiform: Wedge-shaped characters used in the ancient writing systems of Mesopotamia, impressed on clay tablets.
- Ardu: In Babylon, a slave.
- Mushkenu: In Babylon, a free man who was probably landless.
- Amelu: In Babylon, an elite social class of people.
- Stele: A stone or wooden slab, generally taller than it is wide, erected as a monument.

The Code of Hammurabi is one of the oldest deciphered writings of length in the world and features a code of law from ancient Babylon in Mesopotamia. Written in about 1754 BCE by the sixth king of Babylon, Hammurabi, the Code was written on stone stele and clay tablets. It consisted of 282 laws, with punishments that varied based on social status (slaves, free men, and property owners). It is most famous for the "an eye for an eye, a tooth for a tooth" (lex talionis) form of punishment. Other forms of codes of law had been in existence in the region around this time, including the Code of Ur-Nammu, king of Ur (c. 2050 BCE), the Laws of Eshnunna (c. 1930 BCE) and the codex of Lipit-Ishtar of Isin (c. 1870 BCE).

The laws were arranged in groups, so that citizens could easily read what was required of them. Some have seen the Code as an early form of constitutional government, and as an early form of the presumption of innocence, and the ability to present evidence in one's case. Intent was often recognized and affected punishment, with neglect severely punished. Some of the provisions may have been codification of Hammurabi's decisions, for the purpose of self-glorification. Nevertheless, the Code was studied, copied, and used as a model for legal reasoning for at least 1500 years after.

The prologue of the Code features Hammurabi stating that he wants "to make justice visible in the land, to destroy the wicked person and the evil-doer, that the strong might not injure the weak." Major laws covered in the Code include slander, trade, slavery, the duties of workers, theft, liability, and divorce. Nearly half of the code focused on contracts, such as wages to be paid, terms of transactions, and liability in case of property damage. A third of the code focused on household and family issues, including inheritance, divorce, paternity and sexual behavior. One section establishes that a judge who incorrectly decides an issue may be removed from his position permanently. A few sections address military service.

One of the most well-known sections of the Code was law #196: "If a man destroy the eye of another man, they shall destroy his eye. If one break a man's bone, they shall break his bone. If one destroy the eye of a freeman or break the bone of a freeman he shall pay one gold mina. If one destroy the eye of a man's slave or break a bone of a man's slave he shall pay one-half his price."

The Social Classes

Under Hammurabi's reign, there were three social classes. The amelu was originally an elite person with full civil rights, whose birth, marriage and death were recorded. Although he had certain privileges, he also was liable for harsher punishment and higher fines. The king and his court, high officials, professionals and craftsmen belonged to this group. The mushkenu was a free man who may have been landless. He was required to accept monetary compensation, paid smaller fines and lived in a separate section of the city. The ardu was a slave whose master paid for his upkeep, but also took his compensation. Ardu could own property and other slaves and could purchase his own freedom.

Women's Rights

Women entered into marriage through a contract arranged by her family. She came with a dowry, and the gifts given by the groom to the bride also came with her. Divorce was up to the husband, but after divorce he then had to restore the dowry and provide her with an income, and any children came under the woman's custody. However, if the woman was considered a "bad wife" she might be sent away or made a slave in the husband's house. If a wife brought action against her husband for cruelty and neglect, she could have a legal separation if the case was proved. Otherwise, she might be drowned as punishment. Adultery was punished with drowning of both parties, unless a husband was willing to pardon his wife.

Discovery of The Code

Archaeologists, including Egyptologist Gustave Jequier, discovered the code in 1901 at the ancient site of Susa in Khuzestan; a translation was published in 1902 by Jean-Vincent Scheil. A basalt stele containing the code in cuneiform script inscribed in the Akkadian language is currently on display in the Louvre, in Paris, France. Replicas are located at other museums throughout the world.



Figure 1.1 The Code of Hammurabi. This basalt stele has the Code of Hammurabi inscribed in cuneiform script in the Akkadian language. [1]

Early Western Policing

Among the earliest documented Western systems of law and law enforcement was the mutual pledge system . The mutual pledge system consisted of groups of ten families bound to uphold the law, bring violators to court, and keep the peace. These groups of ten families were known as tithings . Each tithing was governed by a tithingman . All men over the age of twelve were required to

raise the hue and cry when a crime was detected and pursue the criminal with all of the men of the tithing. A group of ten tithings was called the hundred , and the office of constable developed out of this organizational unit. If a criminal could not be produced in court, then the Crown could fine the entire hundred. In other words, every man was responsible for the conduct of every other man.

Hundreds were combined into administrative units known as Shires (or Counties), under the jurisdiction of the shire-reeve . The shire-reeve, whose job it was to maintain the King's peace in the Shire, was later shortened to the modern term sheriff . The sheriff has the power to raise all able-bodied men in the county to pursue a criminal. This power was known by the Latin phrase posse comitatus .

In 1066, the Normans invaded England and seized the throne. The Norman King, William the Conqueror, quickly modified the mutual pledge system to aid in the consolidation of his power. The modified system-known as the frankpledge system -was a tightening of the system then Normans found in place.

By the end of the thirteenth century, the constable system had developed into the system of rural law enforcement common to all of England. The office of constable was filled by yearly elections within each parish (a religious division similar to a County). The constable had the same responsibility as the tithingman, with the additional duties of being a royal officer. In urban areas, the watch and ward system developed along similar lines. Officers of the watch would guard the town gates at night, conduct patrols to prevent burglary, arrest strangers appearing at night, and put out fires. By the 1361 A.D., the old system had given way to constables working under justices of the peace. This system would remain in place until the industrial revolution.

Colonial America

When the early colonists set up a system of laws and law enforcement in America, they brought the common law system of England with them. In this early system, the county sheriff was the most important law enforcement official. The duties of the sheriff in those times were far more expansive than they are today. Then the sheriff collected taxes, supervised elections, and so forth. As far as law enforcement goes, the role of the sheriff in colonial America was completely reactive. If a citizen complained, the sheriff would investigate the matter. If evidence could be collected, an arrest would be made. There were no preventive efforts, and preventive patrol was not conducted.

The Rise of Modern Policing

The United States has followed a different path than many other countries. Whereas many western nations have national police forces, the United States is still very fragmented. Policing is done mostly on the local level. One term for this decentralized . While there are some rather abstract political advantages to a decentralized system of law enforcement, it is not without cost. Many critics call for the amalgamation and centralization of police forces, citing a wide variety of reasons such as preventing wasted effort and wasted resources. The decentralized nature of modern American policing stems from its roots in the English past.

In 1829, Home Secretary Robert Peel convinced the Parliament in England to pass the Metropolitan Police Act. The primary purpose of the Act was to do away with the ineffectual patchwork of policing measures then practiced in London, and establish an around the clock, uniformed police force charged with preventing disorder and crime. Peel is credited with many innovations that became standard police practice around the world. A major shift was an effort at crime prevention rather than "raising the hue and cry" after a crime was committed. In other words, the focus of policing efforts shifted from reactive to proactive . This shift meant that the new police force was tasked with preventing crime before it occurred rather than responding to it after the fact. A key element of this proactive strategy was preventive patrol . Police constables became known as "Bobbies" after Robert Peel. The city of London was divided up into beats , and the Bobbies were ordered to patrol their beats on foot. The idea was that the presence of these uniformed officers on the streets would deter crime.

The militaristic nature of most modern police forces was also one of Peel's innovations. He used a military-style organizational structure, complete with ranks like sergeant, lieutenant, and captain. While commonplace now, military-style uniforms were an innovation. Command and discipline were also conducted along military lines.

It was not long before the value of such police forces was noted by America's largest cities and the idea was selectively imported. The main element of the British model that Americans rejected was the nationalization of police services. Americans at the time were still fearful of strong central authority and elected to establish police forces on a local level. While arguably more democratic, decentralized police forces organized on the local level were not nearly as well insulated from local politics as their British counterparts. Political leaders were able to exert a large amount of influence over police hiring, policymaking, and field practices.

There is some debate amongst the concerned departments as to whether Boston or New York City was the first modern police force in the United States. Boston's day watch was established in 1838, and many credit this as the first modern police force. New York City formed its police force in 1844. Most other large cities soon followed suit, and full-time, salaried officers became the norm.

Early Problems with Police

As previously mentioned, early police forces were highly political. Graft and corruption were rampant. Police ranks were filled with officers of particular ethnic groups to garner votes for particular politicians. Criminals paying off the police to ignore vice crimes was also common. Policing was more about political advantage than protecting public safety in many neighborhoods. Efforts to eliminate corruption were doomed from the start because the very politicians that had the power to end it benefited from it. This period from approximately 1940 to 1920 has become known as the political era of policing due to these political ties.

The Reform Era

The end of the 19 th century saw progressive thinkers attempt to reform the police. Progressivism was a broadly focused political and social movement of the day, and the police were swept up in this wave of progress, improvement, and reform. The status quo of policing would not withstand its momentum. A primary objective of the police reformers of this era was to reduce substantially the power of local politicians over the police.

An important reform was the institution of civil service . The aim of civil service was to make selection and promotion decisions based on merit and testing rather than by the corrupt system of political patronage of the previous era. Within police circles, the progressive movement spawned an interest in the professionalization of policing. Model professional police departments would be highly efficient, separated from political influence, and staffed by experts.

One of the most notable police reformers and champions of police professionalism was the Chief of police in Berkeley, California from 1909 to 1932. August Vollmer defined police professionalism in terms of effective crime control, educated officers, and nonpolitical public service. Like Peel a generation before, Vollmer is known for many firsts in policing. He was the first to develop an academic degree program in law enforcement in an era long before the establishment of criminal justice as a field of study in American universities. His agency was among the first to use forensic science to aid investigations, and among the first to use automobiles. His agency was among the first to establish a code of ethics, which prohibited the acceptance of gratuities and favors by officers.

One of Vollmer's students, O. W. Wilson is known for introducing the concepts of scientific management into policing and increasing efficiency. Wilson was one of the first police administrators to advocate single officer patrols. Later in his career he became a professor at the University of California at Berkeley and was known as America's foremost expert on police administration.

19 th and 20 th Eras of Policing [2]

Researchers Kelling and Moore (1991) evaluated the first three eras of policing. These eras are discussed below, and are often referred to as the Political Era , the Reform Era , and the Community Era. Through the microscope of seven topical areas, listed below, an understanding of how policing evolved begins.

1. Authorization
2. Function
3. Organization
4. Demand
5. Environment
6. Tactics
7. Outcomes

These seven characteristics have been used to evaluate how policing operated throughout history, most notably through its organizational structure, tactics, and primary focus. [1]

Political Era

The political era is often referred to as the first era of policing in the United States and it began around the 1840s with the creation of the first bona fide police agencies in America [2]

This era of policing is marked by the industrial revolution, the abolishment of slavery, and the formation of large cities. One way to confirm the start of this era is to look at the creation of police departments in larger cities:

- New York Police Founded 1845
- Chicago Police Founded 1855
- Philadelphia Police Founded 1751
- Jacksonville Police Founded 1822
- Indianapolis Police Founded 1850's
- Detroit Police Founded 1865
- Portland Police Founded 1870
- Eugene Police Founded 1863
- Jackson County, Oregon Police Founded 1852

With the advent of the industrial revolution, came goods and services. Along with new job opportunities, came a myriad of conflict as well. The fast-growing cities had to answer these problems with solutions in the form of policing. The abolishment of slavery and the new free black population created many unforeseen issues too with The Klu Klux Klan. The Klan began to make terrifying appearances and their reign of terror left many in fear. Policing had not yet formally entered the scene; therefore, The Klan operated virtually unencumbered.



Figure 1.2 London Strike: Truck Under Protection

The United States saw tremendous growth in major cities, had the industrial revolution, and the abolished slavery, which is when the Political Era of policing was set into motion. As its name suggests, it was an era of politics, mainly because of how policing was limited as a result of new laws, made clear by the Constitution. America answered the call by following the English and Sir Robert Peel's principles. Not unlike today, policing during this era was under the control of politicians. Politicians, like the mayor, had no problem controlling everything a policeman did during his call of duty (NOTE: the word policeman/men is utilized in this era/context, because during this time period, women were not allowed in the profession, and if they were accepted it was under a microscopic view of certain stereotypical matronly duties to be performed). In fact, Black policemen were rarely hired. Black

policemen made their way into policing in the late 1800s, but when the Civil Rights Act of 1875 was ruled unconstitutional, Black officers all but disappeared from policing until the 1950s.

Pin It! A Look at the Salaries

- 1957 annual wage for a police patrolman – Milwaukee Police Department: $5,405.40
  1957 Annual Report Milwaukee Police Department

61 years later

- 2018 annual wage for police patrolman- Milwaukee Police Department:
  $57,291.00
  Milwaukee, Wisconsin- State website
- 2018 Annual wage for first step trooper- Oregon State Police:
  $56,184.00
  Oregon State Police- Oregon.gov website

Reform Era

Because the Political Era of policing ended up being laced with corruption and brutality, the panacea for the negativity became the Reform Era. One police chief was largely at the forefront of this new era, Chief August Vollmer . He is considered the pioneer for police professionalism. August Vollmer was the Chief of Police in Berkeley, California (1905-1932). He had many new beliefs about policing that would forever change the world of policing:

1. Candidates who were testing to be in policing had to undergo psychological and intelligence tests
2. Detectives would utilize scientific methods in their investigations, through forensic laboratories
3. Recruits, for the first time, would attend a training academy (police did not receive any formal training prior to August Vollmer's arrival)
4. Assisted with the development of the School of Criminology at the University of California at Berkeley

Chief August Vollmer saw policing and officers as social workers that needed to delve into the causes behind the acts in order to solve the issue, instead of just arrest it. [3] He knew in order to rehabilitate offenders, police officers needed to look behind the handcuffs and start looking into the person and reason behind the behavior. [4]



Figure 1.3 "Father of modern law enforcement"

Diversity in policing started to make a mark during this era, but it would fall irrevocably far from meeting any type of quota. It was a better era for diversity than the Political Era, but the numbers don't lie in that it fell dismally short.

The Community Era- 1980s to 2000

In the 1960s and 1970s the crime rate double and it was a time of unrest and eye-opening policing issues. Civil rights movements spread across America and the police were on the front lines. Media coverage showed controversial contacts between white male officers and African American citizens, which further irritated race relations in policing. The U.S. Supreme Court handed down the landmark Miranda v. Arizona and Mapp v. Ohio decisions. The writing was on the wall that the policing environment had to change. The days of answering everything with bullying or police professionalism were no more. The Community Era of policing

began and those in police administration hoped this new era held the answers to fixing decades-old issues. The police needed help and they would turn towards the community and its citizens for assistance.

This new era of community policing held that police couldn't act alone; the community must pitch in as well. Whether the problems were a dispute between neighbors or high crime area drugs and shootings, these issues did not develop overnight and could not be solved by a response of police alone. Instead, these community problems needed a pronged approach where the police worked together with the community and over time the issues could be systematically solved. Out of the box thinking was common in community policing and often community leaders were identified in order to make the impact. During this time police candidates started showing up to the application process with Associates and bachelor's degrees. The 'old school officers' mocked these degree-holding candidates. But the landscape was changing, and officers needed more thorough training than ever to answer the call.

Problem-oriented policing was an after effect of community policing, in that it utilized community policing, but focused on the problems first. The biggest difference was problem-oriented policing used a defined process for working towards the solution. The problem was torn apart layer by layer and rebuilt according to set parameters that have a proven record of working.

The Community Era was also a time for research. Prior to this era, research on crime, police, or criminal justice topics were few and far between. With new federal government funding options available, this era missions could be accomplished through grants and the needed research began. Proof of what worked, what didn't, and suggestions on how to improve policing were abundant. Without research or studies, policing can become stagnant. But with funding available, the answers were a questionnaire or interview away and solutions came rolling in.



Quotable - Community Era

"I remember the Community Era very well. I was a new police officer during this time and actually at the forefront of Community Policing and Problem-Oriented Policing. I was the first woman officer at my police department that was pregnant, and the administration was open to suggestions when asked what to do with me when my belly expanded. I politely suggested that once I was five to six months pregnant and began to show (and not fit in my uniform or patrol belt anymore), I will be voluntarily transferred to the Crime Prevention Division. With my doctor approving this decision, my belly grew, and I transferred to this new division. I remember hitting the streets and knocking on doors, spewing how great of a panacea Community Policing was. It took some buy-in and with the citizens who 'bought-it,' the concept actually became a reality and worked! Months later we had a string of burglaries occurring in a high-crime neighborhood. The detectives, patrol, everyone hit the streets, knocking on doors, questioning everyone, in an attempt to find the criminals responsible. With no avail, I turned to Community Policing. I brought in a mounted police officer and horse. My colleagues chucked and shook their heads in response! What was I thinking?!?! "It was a waste of resources," they balked! How could a cop on a horse solve this crime? I was glad; I 'wasted my time,' because it worked! The officer on the horse brought citizens out of their houses that normally would never have spoken to a police officer normally. The horse was such a spectacle in the neighborhood, that it was the catalyst that caused citizens to not only come out of their houses but to start talking about what and who they had been seeing in and around their neighborhood that did not belong. One such sighting was a vehicle description, which led to criminals responsible for the burglaries. "

The Homeland Security Era- 2001 to Present

On September 11 th , 2001, when terrorists hijacked airplanes and flew them into the World Trade Center buildings and Pentagon in the United States, a fourth era of policing, the era of Homeland Security, was said to emerge. [5] The long-lasting repercussions of this terrorist act would forever change life for Americans, but the daily activities of all policing departments. There is some debate in the field as to the order of policing eras and what they should be called. Some scholars list the policing eras as the following:

1. Pre-Policing Era
2. Political Era
3. Reform Era
4. Community Era

Others enumerate the policing eras as follows:

1. Political Era
2. Reform Era
3. Community Era
4. Homeland Security Era

The realities of the tragedy of 9/11 were that it did start a new era of policing. In fact, a case could be made for the large dark line that became metaphorically visible on 9/11/01, when the Community Era shifted to the Homeland Security Era as airplanes destroyed America's feelings of safety. Policing will probably always involve some sort of Community Era policing in order to make a difference.



Figure 1.4 Remembering 9/11: A Decade Later

Policing under Homeland Security is marked by a more focused concentration of its resources into crime control, enforcement of the criminal law, traffic law, etc., in order to expose potential threats and gather intelligence.

Scholars have examined the pros and cons of a national police department in the United States. For example, Canada has a Royal Canadian Mounted Police. Whereas, depending on location, one could go through several different cities and counties while driving to the store, all of which have their own respective police departments. With the advent of the Homeland Security Era, a new model of centralized organizational control began due to the need for information dissemination. One of the biggest flaws of 9/11 was the lack of communication between law enforcement agencies. The Department of Homeland Security was developed and one of its first major missions became the dissemination of information and communication. So, while a national police department does not exist in the United States, communication and information are now a common thread that binds all of the different types of law enforcement agencies.



Figure 1.5 10:28:24 a.m. on September 11th, 2001 was the precise second that photojournalist Bill Biggart took the final shot of his life. He took his last breath moments later when the North Tower of the World Trade Center collapsed upon him. Four days later, searchers found his body, his burnt-edged press cards, his three demolished cameras, six rolls of film, and one small undisturbed compact flash card carrying almost 150 digital images. It was the remains of one horrifying day and one extraordinary life. “I am certain if Bill had come home at the end of that day, he would have had many stories to tell us, as he always did. And had we asked how it really was, he would have said, ‘Take my advice, don’t stand under any tall buildings that have just been hit by airplanes.”- Wendy Doremus, wife of Bill Biggart.

“

Quotable - Homeland Security Era

“I remember I awoke to live video showing one of the World Trade Center buildings with smoke billowing from the windows. I wondered hesitantly how the fire started? Then, as one video camera rolled, by happenstance, it caught an airplane flying directly into the second World Trade Center building and my worst fears came true. I think I stumbled to the edge of my couch and steadied myself, although I really don’t remember, as I watched what happened next, slowly unfold. The effects of that day will never be forgotten.

During a trip to New York, last summer, I visited the World Trade Center museum. As I walked through the halls, a pin drop could have been heard. The respect, sadness, and overwhelming feelings that filled me made it difficult to breathe. Not only did the terrorists kill and destroy many things that day with their hate but they forever changed policing. I was a patrol officer at the time when the devastation ravaged America. Sadness filled our department for our brothers and sisters that lost their lives. We didn’t realize at the time, but our departments and thousands of others in policing across America were in for major changes, because of the heinous acts of a few. The first changes I remember taking place were: Active shooter updates and training; Incident Command System (ICS) updates and training; NEMA emergency management training; Gas masks were distributed for each individual officer, to be carried full-time, along with 3-month re-check and applicable training; Policy and procedure updates and additional response training depending on the call type; Reconfiguration of call type and responses to each; communication became the center of everything. It became essential to hire a person to go through all the communication and alerts we received daily and alert those the information effected Unless those in the policing field had blinders on, the era of Homeland Security, was probably at the time, and will probably always be, one of the most substantial in policing history. ”

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1.2: Defining Key Criminology Terms

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

The building blocks of any theory are concepts. Crime, delinquency, and deviance are all concepts that need to be defined. We seek to explain these concepts with other concepts. For example, some theories may link crime with self-control. Self-control is another concept that needs to be defined. Once we define "crime" and "self-control", we need to measure them. Operationalization is the process of determining how we will measure concepts, which are called variables. We could measure self-control in a number of different ways. For example, we could test a person's ability to resist temptation.

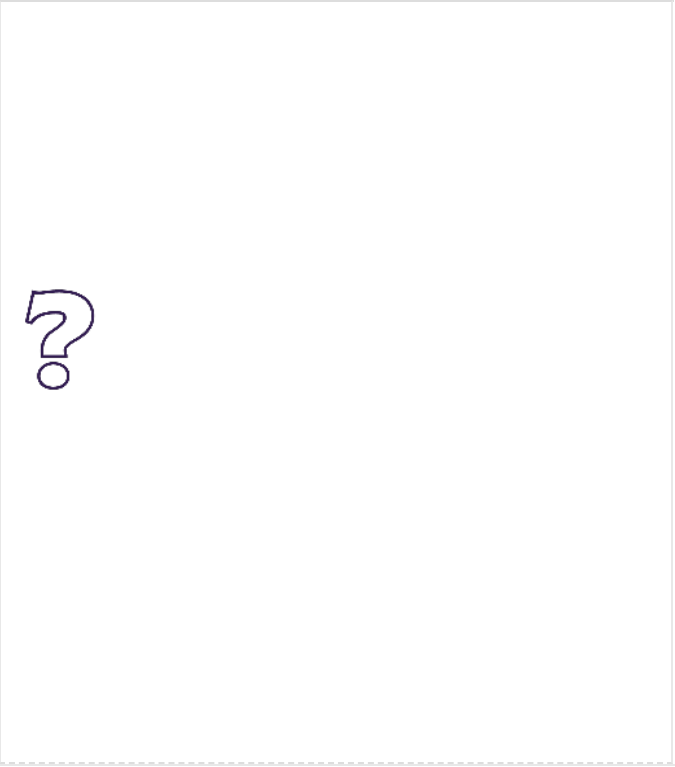


Pin It! The Marshmallow Test
The Marshmallow Test tests children's aptitude for self-control.

Once we test the relationship between two variables, we also need to make sure another variable is not affecting the results. Spuriousness is when a third variable is causing the other two. We know that ice cream sales and murder rates are positively correlated; when one goes up the other goes up. At first glance, someone may claim that ice cream is causing people to kill. However, what do you think might be a better explanation? Can you think of a third variable that might cause ice cream sales and murder rates to increase?

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

males commit more crime than females? Micro-level explanations center on differences among individuals. Macro-level explanations focus on societal structures while micro-level explanations focus on processual differences.



Think About It… It's "Just" a Theory

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

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

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

Components of the Criminal Justice System (CJS) [4]

Learning Outcomes

- Understand the three branches of the U.S. criminal justice system

A criminal justice system is an organization that exists to enforce a legal code. There are three branches of the U.S. criminal justice system: the police, the courts, and the corrections system.

Police

Police are a civil force in charge of enforcing laws and public order at a federal, state, or community level. No unified national police force exists in the United States, although there are federal law enforcement officers. Federal officers operate under specific government agencies such as the Federal Bureau of Investigation (FBI); the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF); and the Department of Homeland Security (DHS). Federal officers can only deal with matters that are explicitly within the power of the federal government, and their field of expertise is usually narrow. A county police officer may spend time responding to emergency calls, working at the local jail, or patrolling areas as needed, whereas a federal officer would be more likely to investigate suspects in firearms trafficking or provide security for government officials.

State police have the authority to enforce statewide laws, including regulating traffic on highways. Local or county police, on the other hand, have a limited jurisdiction with authority only in the town or county in which they serve.



Figure 1.6 Afghan National Police Crisis Response Unit members train in Surobi, Afghanistan. [5]

Courts

Once a crime has been committed and a violator has been identified by the police, the case goes to court. A court is a system that has the authority to make decisions based on law. The U.S. judicial system is divided into federal courts and state courts. As the name implies, federal courts (including the U.S. Supreme Court) deal with federal matters, including trade disputes, military justice, and government lawsuits. Judges who preside over federal courts are selected by the president with the consent of Congress.



Figure 1.7 This county courthouse in Kansas (left) is a typical setting for a state trial court. Compare this to the courtroom of the Michigan Supreme Court (right). [6]

State courts vary in their structure but generally include three levels: trial courts, appellate courts, and state supreme courts. In contrast to the large courtroom trials in TV shows, most noncriminal cases are decided by a judge without a jury present. Traffic court and small claims court are both types of trial courts that handle specific civil matters.

Criminal cases are heard by trial courts with general jurisdictions. Usually, a judge and jury are both present. It is the jury's responsibility to determine guilt and the judge's responsibility to determine the penalty, though in some states the jury may also decide the penalty. Unless a defendant is found "not guilty," any member of the prosecution or defense (whichever is the losing side) has the right to appeal the outcome if they believe they were wrongly convicted, or the sentence was too harsh. An appeal is not another trial, but an opportunity for the defendant to try to raise specific errors that might have occurred at trial. A common appeal is that a decision from the judge was incorrect – such as whether to suppress certain evidence or to impose a certain sentence. Appeals are complicated and sometimes result in the case going back to the trial court. A conviction can get reversed, a sentence altered, or a new trial may be ordered altogether if the Appeals Court decides that particular course of action. If a circuit court judge decides the appeal, then a defendant can try to appeal that decision to the United States Supreme Court in Washington, D.C. The United States Supreme Court is the highest appellate court in the American court system, and they make the final decision concerning a defendant's appeal. The Court is not required to hear an appeal in every case and takes only a small number of cases each year.



Figure 1.8 Brendan Dassey, featured in the Netflix documentary The Making of a Murderer in 2015, was charged with murder as a juvenile. Dassey's 2007 conviction was questionable because his videotaped confession with police was problematic. Dassey was 16 without a lawyer or parent present during his confession. He appeared scared and unaware of the gravity of his situation on camera, and his lawyers say he had a low IQ in the seventh percentile of children his age, making him susceptible to suggestion. 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.

Think About It…Is the American Court System Just?

If an individual cannot afford a lawyer, under federal law, the government is required to provide them one. These lawyers are known as public defenders. But how effective is the public defender system? Watch Why the Public Defender System is So Screwed Up to discover some of the problems with the public defender system. Can these issues be improved? Should they be?

Corrections

The corrections system , more commonly known as the prison system, is charged with supervising individuals who have been arrested, convicted, and sentenced for a criminal offense. At the end of 2010, approximately seven million U.S. men and women were behind bars (BJS 2011d); an estimated 6,613,500 persons were under the supervision of U.S. adult correctional systems in 2016 and the decline is due solely due to a declining probation population (the numbers of people in prison, jail, and on probation remain steady). [1] .

The U.S. incarceration rate has grown considerably in the last hundred years. In 2008, more than 1 in 100 U.S. adults were in jail or prison, the highest benchmark in our nation's history. And while the United States accounts for 5 percent of the global population, we have 25 percent of the world's inmates, the largest number of prisoners in the world (Liptak 2008b).

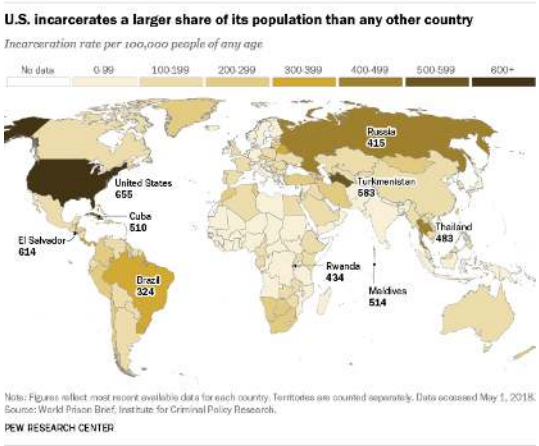


Figure 1.9 "America's incarceration rate is at a two-decade low." Pew Research Center, Washington, D.C. (May 2, 2018). "U.S. Incarcerates a Larger Share of Its Population than Any Other Country." [7]

Prison is different from jail. A jail provides temporary confinement, usually while an individual awaits trial or parole. Prisons are facilities built for individuals serving sentences of more than a year, whereas jails are small and local, prisons are large and run by either the state or the federal government. Increasingly jails operate more like larger prisons, as institutions like Los Angeles County Jail have nearly 20,000 inmates (63 percent of which are non-violent offenders) in seven facilities over 4,000 square miles. Rikers Island in New York City, which sits on a 40-acre complex with ten different facilities (including a juvenile facility), house nearly 14,000 inmates [2] .

Parole refers to a temporary release from prison or jail that requires supervision and the consent of officials. Parole is different from probation, which is supervised time used as an alternative to prison. Probation and parole can both follow a period of incarceration in prison, especially if the prison sentence is shortened.



Think About It… Wrongful Incarceration
Read this story about Kalief Browder, arrested at age 16 on a robbery charge, held at Rikers Island for more than 1,000 days, including two years in solitary confinement, and then released when his charges were dropped. His story has been documented in a six-part Netflix series titled The Kalief Browder Story .

Glossary

- corrections system: the system tasked with supervising individuals who have been arrested for, convicted of, or sentenced for criminal offenses
- court: a system that has the authority to make decisions based on law
- crime: a behavior that violates official law and is punishable through formal sanctions
- criminal justice system: an organization that exists to enforce a legal code
- legal codes: codes that maintain formal social control through laws
- police: a civil force in charge of regulating laws and public order at a federal, state, or community level

Types of Law [8]

Criminal Law

It is a crime to make unauthorized and harmful physical contact with another person (battery). In fact, it is a crime even to threaten such contact (assault). Criminal law prohibits and punishes wrongful conduct, such as assault and battery, murder, robbery, extortion, and fraud. In criminal cases, the plaintiff—the party filing the complaint—is usually a government body acting as a representative of society. The defendant—the party charged in the complaint—may be an individual (such as your roommate) or an organization (such as a business). Criminal punishment includes fines, imprisonment, or both.

Civil Law

Assault and battery may also be a matter of civil law—law governing disputes between private parties (again, individuals or organizations). In civil cases, the plaintiff sues the defendant to obtain compensation for some wrong that the defendant has allegedly done the plaintiff. Thus, your roommate may be sued for monetary damages by the homeowner's neighbor, with whom he made unauthorized and harmful physical contact.

In civil litigation, contract and tort claims are by far the most numerous. The law attempts to adjust for harms done by awarding damages to a successful plaintiff who demonstrates that the defendant was the cause of the plaintiff's losses. Torts can be intentional torts, negligent torts, or strict liability torts. Employers must be aware that in many circumstances, their employees may create liability in tort.

Tort Law

The term tort is the French equivalent of the English word wrong . The word tort is also derived from the Latin word tortum , which means "twisted or crooked or wrong." Thus, conduct that is twisted or crooked and not straight is a tort.

Long ago, tort was used in everyday speech; today it is left to the legal system. A judge will instruct a jury that a tort is usually defined as a wrong for which the law will provide a remedy, most often in the form of money damages. The law does not remedy all "wrongs." The preceding definition of tort does not reveal the underlying principles that divide wrongs in the legal sphere from those in the moral sphere. Hurting someone's feelings may be more devastating than saying something untrue about him behind his back; yet the law will not provide a remedy for saying something cruel to someone directly, while it may provide a remedy for "defaming" someone, orally or in writing, to others.

Although the word is no longer in general use, tort suits are the stuff of everyday headlines. More and more people injured by exposure to a variety of risks now seek redress (some sort of remedy through the courts). Headlines boast of multimillion-dollar jury awards against doctors who bungled operations, against newspapers that libeled subjects of stories, and against oil companies that devastate entire ecosystems. All are examples of tort suits.

The law of torts developed almost entirely in the common-law courts; that is, statutes passed by legislatures were not the source of law that plaintiffs usually relied on. Usually, plaintiffs would rely on the common law (judicial decisions). Through thousands of cases, the courts have fashioned a series of rules that govern the conduct of individuals in their noncontractual dealings with each other. Through contracts, individuals can craft their own rights and responsibilities toward each other. In the absence of contracts, tort law holds individuals legally accountable for the consequences of their actions. Those who suffer losses at the hands of others can be compensated.

Many acts (like homicide) are both criminal and tortious. But torts and crimes are different, and the difference is worth noting. A crime is an act against the people as a whole. Society punishes the murderer; it does not usually compensate the family of the victim. Tort law, on the other hand, views the death as a private wrong for which damages are owed. In a civil case, the tort victim or his family, not the state, brings the action. The judgment against a defendant in a civil tort suit is usually expressed in monetary terms, not in terms of prison times or fines, and is the legal system's way of trying to make up for the victim's loss.

Kinds of Torts

There are three kinds of torts: intentional torts, negligent torts, and strict liability torts. Intentional torts arise from intentional acts, whereas unintentional torts often result from carelessness (e.g., when a surgical team fails to remove a clamp from a patient's abdomen when the operation is finished). Both intentional torts and negligent torts imply some fault on the part of the defendant. In strict liability torts, by contrast, there may be no fault at all, but tort law will sometimes require a defendant to make up for the victim's losses even where the defendant was not careless and did not intend to do harm.

Dimensions of Tort Liability

There is a clear moral basis for recovery through the legal system where the defendant has been careless (negligent) or has intentionally caused harm. Using the concepts that we are free and autonomous beings with basic rights, we can see that when others interfere with either our freedom or our autonomy, we will usually react negatively. As the old saying goes, "Your right to swing your arm ends at the tip of my nose." The law takes this even one step further: under intentional tort law, if you frighten someone by swinging your arms toward the tip of her nose, you may have committed the tort of assault, even if there is no actual touching (battery).

Under a capitalistic market system, rational economic rules also call for no negative externalities. That is, actions of individuals, either alone or in concert with others, should not negatively impact third parties. The law will try to compensate third parties who are harmed by your actions, even as it knows that a money judgment cannot actually mend a badly injured victim.

Fault

Tort principles can be viewed along different dimensions. One is the fault dimension. Like criminal law, tort law requires a wrongful act by a defendant for the plaintiff to recover. Unlike criminal law, however, there need not be a specific intent. Since tort law focuses on injury to the plaintiff, it is less concerned than criminal law about the reasons for the defendant's actions. An innocent act or a relatively innocent one may still provide the basis for liability. Nevertheless, tort law—except for strict liability—relies on standards of fault, or blameworthiness.

The most obvious standard is willful conduct. If the defendant (often called the tortfeasor—i.e., the one committing the tort) intentionally injures another, there is little argument about tort liability. Thus, all crimes resulting in injury to a person or property

(murder, assault, arson, etc.) are also torts, and the plaintiff may bring a separate lawsuit to recover damages for injuries to his person, family, or property.

Most tort suits do not rely on intentional fault. They are based, rather, on negligent conduct that in the circumstances is careless or poses unreasonable risks of causing damage. Most automobile accident and medical malpractice suits are examples of negligence suits.

The fault dimension is a continuum. At one end is the deliberate desire to do injury. The middle ground is occupied by careless conduct. At the other end is conduct that most would consider entirely blameless, in the moral sense. The defendant may have observed all possible precautions and yet still be held liable. This is called strict liability. An example is that incurred by the manufacturer of a defective product that is placed on the market despite all possible precautions, including quality-control inspection. In many states, if the product causes injury, the manufacturer will be held liable.

Nature of Injury

Tort liability varies by the type of injury caused. The most obvious type is physical harm to the person (assault, battery, infliction of emotional distress, negligent exposure to toxic pollutants, wrongful death) or property (trespass, nuisance, arson, interference with contract). Mental suffering can be redressed if it is a result of physical injury (e.g., shock and depression following an automobile accident). A few states now permit recovery for mental distress alone (a mother's shock at seeing her son injured by a car while both were crossing the street). Other protected interests include a person's reputation (injured by defamatory statements or writings), privacy (injured by those who divulge secrets of his personal life), and economic interests (misrepresentation to secure an economic advantage, certain forms of unfair competition).

Excuses

A third element in the law of torts is the excuse for committing an apparent wrong. The law does not condemn every act that ultimately results in injury.

One common rule of exculpation is assumption of risk. A baseball fan who sits along the third base line close to the infield assumes the risk that a line drive foul ball may fly toward him and strike him. He will not be permitted to complain in court that the batter should have been more careful or that management should have either warned him or put up a protective barrier.

Another excuse is negligence of the plaintiff. If two drivers are careless and hit each other on the highway, some states will refuse to permit either to recover from the other. Yet another excuse is consent: two boxers in the ring consent to being struck with fists (but not to being bitten on the ear).

Damages

Since the purpose of tort law is to compensate the victim for harm actually done, damages are usually measured by the extent of the injury. Expressed in money terms, these include replacement of property destroyed, compensation for lost wages, reimbursement for medical expenses, and dollars that are supposed to approximate the pain that is suffered. Damages for these injuries are called compensatory damages.

In certain instances, the courts will permit an award of punitive damages. As the word punitive implies, the purpose is to punish the defendant's actions. Because a punitive award (sometimes called exemplary damages) is at odds with the general purpose of tort law, it is allowable only in aggravated situations. The law in most states permits recovery of punitive damages only when the defendant has deliberately committed a wrong with malicious intent or has otherwise done something outrageous.

Punitive damages are rarely allowed in negligence cases for that reason. But if someone sets out intentionally and maliciously to hurt another person, punitive damages may well be appropriate. Punitive damages are intended not only to punish the wrongdoer, by exacting an additional and sometimes heavy payment (the exact amount is left to the discretion of jury and judge), but also to deter others from similar conduct. The punitive damage award has been subject to heavy criticism in recent years in cases in which it has been awarded against manufacturers. One fear is that huge damage awards on behalf of a multitude of victims could swiftly bankrupt the defendant. Unlike compensatory damages, punitive damages are taxable.

Table 1.1 below provides a more complete list of intentional torts, along with the types of compensatory damages normally awarded in each type of case.

Table 1.1 Categories of Intentional Torts [9]

Category	Type	Definition	Compensatory Damages Usually Awarded
Against persons	Assault	Threatening immediate harm or offensive contact	For medical bills, lost wages, and pain and suffering
	Battery	Making unauthorized harmful or offensive contact with another person	
	Defamation	Communicating to a third party information that's harmful to someone's reputation	For measurable financial losses
	Invasion of privacy	Violating someone's right to live his or her life without unwarranted or undesired publicity	For resulting economic loss or pain and suffering
	False imprisonment	Restraining or confining a person against his or her will and without justification	For treatment of physical injuries and lost time at work
	Intentional infliction of emotional distress	Engaging in outrageous conduct that's likely to cause extreme emotional distress to the party toward whom the conduct is directed	For treatment of physical illness resulting from emotional stress
Against property	Trespass to realty	Entering another person's land or placing an object on another person's land without the owner's permission	For harm caused to property and losses suffered by rightful owner
	Trespass to personality	Interfering with another person's use or enjoyment of personal property	For harm to property
	Conversion	Permanently removing property from the rightful owner's possession	For full value of converted item
Against economic interests	Disparagement	Making a false statement of material fact about a business product	For actual economic loss
	Intentional interference with a contract	Enticing someone to breach a valid contract	For loss of expected benefits from contract
	Unfair competition	Going into business for the sole purpose of taking business from another concern	For lost profits
	Misappropriation	Using an unsolicited idea for a product or marketing method without compensating the originator of the idea	For economic losses

As we indicated, your roommate may have committed assault and battery in violation of both criminal and civil statutes. Consequently, he may be in double trouble: not only may he be sued for a civil offense by the homeowner's neighbor, but he may also be prosecuted for a criminal offense by the proper authority in the state where the incident took place. It's also conceivable that he may be sued but not prosecuted, or vice versa. Everything is up to the discretion of the complaining parties—the homeowner's neighbor in the civil case and the prosecutor's office in the criminal case.

Why might one party decide to pursue a case while the other decides not to? A key factor might be the difference in the burden of proof placed on each potential plaintiff. Liability in civil cases may be established by a preponderance of the evidence —the weight of evidence necessary for a judge or jury to decide in favor of the plaintiff (or the defendant). Guilt in criminal cases, however, must be established by proof beyond a reasonable doubt —doubt based on reason and common sense after careful, deliberate consideration of all the pertinent evidence. Criminal guilt thus carries a tougher standard of proof than civil liability, and it's conceivable that even though the plaintiff in the civil case believes that he can win by a preponderance of the evidence, the prosecutor may feel that she can't prove criminal guilt beyond a reasonable doubt.

Finally, note that your roommate would be more likely to face criminal prosecution if he had committed assault and battery with criminal intent —with the intent, say, to kill or rob the homeowner's neighbor or to intimidate him from testifying about the accident with the paint bucket. In that case, in most jurisdictions, his action would be not only a crime but a felony—a serious or "inherently evil" crime punishable by imprisonment. Otherwise, if he's charged with criminal wrongdoing at all, it will probably be for a misdemeanor—a crime that's not "inherently evil" but that is nevertheless prohibited by society.

Table 1.2 below summarizes some of the key differences in the application of criminal and civil law.

Table 1.2 Civil versus Criminal Law [10]

Terms	Civil Law	Criminal Law
Parties	Individual or corporate plaintiff vs. individual or corporate defendant	Local, state, or federal prosecutor vs. individual or corporate defendant
Purpose	Compensation or deterrence	Punishment/deterrence/rehabilitation
Burden of proof	Preponderance of the evidence	Beyond a reasonable doubt
Trial by jury/jury vote	Yes (in most cases)/specific number of votes for judgment in favor of plaintiff	Yes/unanimous vote for conviction of defendant
Sanctions/penalties	Monetary damages/equitable remedies (e.g., injunction, specific performance)	Probation/fine/imprisonment/capital punishment

Common Law

Common law consists of decisions by courts (judicial decisions) that do not involve interpretation of statutes, regulations, treaties, or the Constitution. Courts make such interpretations, but many cases are decided where there is no statutory or other codified law or regulation to be interpreted. For example, a state court deciding what kinds of witnesses are required for a valid will in the absence of a rule (from a statute) is making common law.

United States law comes primarily from the tradition of English common law. By the time England's American colonies revolted in 1776, English common-law traditions were well established in the colonial courts. English common law was a system that gave written judicial decisions the force of law throughout the country. Thus, if an English court delivered an opinion as to what constituted the common-law crime of burglary, other courts would stick to that decision, so that a common body of law developed throughout the country. Common law is essentially shorthand for the notion that a common body of law, based on past written decisions, is desirable and necessary.

In England and in the laws of the original thirteen states, common-law decisions defined crimes such as arson, burglary, homicide, and robbery. As time went on, US state legislatures either adopted or modified common-law definitions of most crimes by putting them in the form of codes or statutes. This legislative ability—to modify or change common law into judicial law—points to an important phenomenon: the priority of statutory law over common law.

Statutory Law

Another source of law is statutory law. While the Constitution applies to government action, statutes apply to and regulate individual or private action. A statute is a written (and published) law that can be enacted in one of two ways. Most statutes are written and voted into law by the legislative branch of government. This is simply a group of individuals elected for this purpose. The US legislative branch is Congress, and Congress votes federal statutes into law. Every state has a legislative branch as well, called a state legislature, and a state legislature votes state statutes into law. Often, states codify their criminal statutes into a penal code.

State citizens can also vote state statutes into law. Although a state legislature adopts most state statutes, citizens voting on a ballot can enact some very important statutes. For example, a majority of California's citizens voted to enact California's medicinal marijuana law, California Compassionate Use Act of 1996, Cal. Health and Safety Code § 11362.5. In another example of statutory law, California's three-strikes law was voted into law by both the state legislature and California's citizens and actually appears in the California Penal Code in two separate places.

An important fact to note is that Statutory law is inferior to constitutional law, which means that a statute cannot conflict with or attempt to supersede constitutional rights. If a conflict exists between constitutional and statutory law, the courts must resolve the conflict. Courts can invalidate unconstitutional statutes pursuant to their power of judicial review.

Key Takeaways

- The legal environment of business is the area in which business interacts with the legal system.
- Criminal law prohibits and punishes wrongful conduct. The plaintiff —the party filing the complaint—is usually a government body acting as a representative of society. The defendant —the party charged in the complaint—may be an individual or an organization. Criminal punishment includes fines, imprisonment, or both. Civil law refers to law governing disputes between private parties. In civil cases, the plaintiff sues the defendant to obtain compensation for some wrong that the defendant has allegedly done the plaintiff.
- Tort law covers torts , or civil wrongs—injuries done to someone's person or property. The punishment in tort cases is the monetary compensation that the court orders the defendant to pay the plaintiff.
- An intentional tort is an intentional act that poses harm to the plaintiff. Intentional torts may be committed against a person, a person's property, or a person's economic interest. In addition to intentional torts, the law recognizes negligence torts and strict liability torts .
- Liability in civil cases may be established by a preponderance of the evidence —the weight of evidence necessary for a judge or jury to decide in favor of the plaintiff (or the defendant). Guilt in criminal cases must be established by proof beyond a reasonable doubt —doubt based on reason and common sense after careful, deliberate consideration of all the pertinent evidence.
- A crime may be a felony —a serious or "inherently evil" crime punishable by imprisonment—or a misdemeanor —a crime that's not "inherently evil" but that is nevertheless prohibited by society.

Criminal Law in Depth

Substantive Criminal Law [11]

As previously discussed, the criminal law in its broadest sense encompasses both the substantive criminal law and criminal procedure . In a more limited sense, the term criminal law is used to denote the substantive criminal law , and criminal procedure is considered another category of law. (Most college criminal justice programs organize classes this way). Recall that the substantive law defines criminal acts that the legislature wishes to prohibit and specifies penalties for those that commit the prohibited acts. For example, murder is a substantive law because it prohibits the killing of another human being without justification.

No Crime without Law

It is fundamental to the American way of life that there can be no crime without law. This concept defines the idea of the Rule of Law. The rule of law is the principle that the law should govern a nation, not an individual. The importance of the rule of law in America stems from the colonial experience with the English monarchy. It follows that, in America, no one is above the law.

Constitutional Limits

Unlike the governments of other countries, the legislative assemblies of the United States do not have unlimited power. The power of Congress to enact criminal laws is circumscribed by the Constitution. These limits apply to state legislatures as well.

Bills of Attainder and Ex Post Facto Laws . A bill of attainder is an enactment by a legislature that declares a person (or a group of people) guilty of a crime and subject to punishment for committing that crime without the benefit of a trial. An ex post facto law is a law that makes an act done before the legislature enacted the law criminal and punishes that act. The prohibition also forbids the legislature from making the penalty for a crime more severe retroactively. Both of these types of laws are strictly prohibited by the Constitution.

Fair Notice and Vagueness . The due process clauses of the Fifth and Fourteenth Amendments mandate that the criminal law afford fair notice . The idea of fair notice is that people must be able to determine exactly what is prohibited by the law, so vague and ambiguous laws are prohibited. If a law is determined to be unclear by the Supreme Court, it will be struck down and declared void for vagueness . Such laws would allow for arbitrary and discriminatory enforcement if allowed to stand.

First Amendment

The First Amendment to the United States Constitution guarantees all Americans the “freedom of expression.” Among these “expressions” are the freedom of religion and the freedom of speech. In general, Americans can say pretty much whatever they like without fear of punishment. Any criminal law passed by the legislature that infringes on these rights would not withstand constitutional scrutiny. There are, however, some exceptions.

When the health and safety of the public are at issue, the government can curtail the freedom of speech. One of the most commonly cited limiting principles is what has been called the clear and present danger test . This test, established by the Supreme Court in Schenck v. United States (1919), prohibits inherently dangerous speech, such as falsely shouting “fire!” in a crowded theater.

Another prohibited type of speech has been referred to as fighting words . This means that the First Amendment does not protect speech calculated to incite a violent reaction. Other types of unprotected speech include hate speech, profanity, libelous utterances, and obscenity. These latter types of speech are very difficult to regulate by law because they are very hard to define and place limits on. The current trend has been to protect more speech that would have once been considered obscene or profane.

The freedom to worship as one sees fit is also enshrined in the Constitution. Appellate courts will strike down statutes that are designed to restrict this freedom of religion . The high court has protected door-to-door solicitations by religious groups and even ritualistic animal sacrifices. The Court, however, has not upheld all claims based on the free exercise of religion. Statutes criminalizing such things as snake handling, polygamy, and the use of hallucinogenic drugs have all been upheld.

The First Amendment protects the right of the people to assemble publicly, but as with the other freedoms previously discussed, it is not absolute. The courts have upheld restrictions on the time, place, and manner of public assemblies, so long as those restrictions were deemed reasonable. The reasonableness of such restrictions usually hinges on a compelling state interest . The freedom of assembly , then, does not protect conduct that jeopardizes the public health and safety.

Second Amendment

The constitutionally guaranteed “right to keep and bear arms” in the Second Amendment is by no means absolute has been the source of much litigation and political debate in recent years. The Supreme Court has established that the second Amendment confers a right to the carrying of a firearm for self-defense, and that right is applicable via the Fourteenth Amendment to the states. Typical restrictions include background checks and waiting periods. Some jurisdictions highly regulate the concealing, carrying, and purchase of firearms, and many limit the type of firearms that can be purchased. Many criminal laws have enhanced penalties when they are committed with firearms. Most gun laws and concealed carry laws vary widely from jurisdiction to jurisdiction.

Eighth Amendment

The Eighth Amendment to the United States Constitution prohibits the imposition of Cruel and Unusual Punishments . Both the terms cruel and unusual do not mean what they mean in everyday usage; they are both legal terms of art. The Supreme Court has incorporated the doctrine of proportionality into the Eighth Amendment. Recall that proportionality means that the punishment should fit the crime, or at least should not be grossly disproportionate to the offense. The idea of proportionality has appeared in cases that considered the grading of offenses, the validity of lengthy prison sentences, and whether the imposition of the death penalty is constitutional. (The legal controversies of three strikes laws and the death penalty will be discussed at greater length in a later section).

The Right to Privacy

Most American's view the right to privacy as a fundamental human right. It is shocking, then, to find that the Constitution never expressly mentions a right to privacy. The Supreme Court agrees that such a right is fundamental to due process and has established the right as being inferred from several other guaranteed rights. Among these are the right of free association, the prohibition against quartering soldiers in private homes, and the prohibition against unreasonable searches and seizures. The right to privacy has been used to protect many controversial practices that were (at least at the time) socially unacceptable to large groups of people. Early courts decided that laws prohibiting single people from purchasing contraceptives were unconstitutional based on privacy rights arguments. The right to an abortion established in Roe v. Wade (1973) hinged primarily on a privacy rights argument. More recently, in Lawrence v. Texas (2003), the court ruled that laws prohibiting private homosexual sexual activity were unconstitutional. In the Lawrence case, privacy rights were the deciding factor.

Key Terms
Bill of Attainder, Clear and Present Danger Test, Compelling State Interest, Concealed Carry Law, Criminal Procedure, Cruel and Unusual Punishment, Eighth Amendment, Ex Post Facto Law, Fair Notice, Fighting Words, First Amendment, Freedom of Assembly, Freedom of Expression, Freedom of Religion, Lawrence v. Texas (2003), Right to Privacy, Roe v. Wade (1973), Schenck v. United States (1919), Second Amendment, Void for Vagueness

Procedural Criminal Law [12]

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

Phases of the Criminal Justice Process

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

Investigative Phase

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

Pre-trial Phase

The pretrial phase is governed by laws covering the initial appearance of the defendant before a judge or magistrate; the securing of defense counsel, the arraignment process (in which the defendant is informed of the charges which have been filed by the state); the process in which the court determines whether to release the defendant pre-trial either with some financial surety (posting bail) or on his or her own recognizance and with court-determined conditions imposed (for example, not having contact with the alleged victim); the selection and use of a grand jury or preliminary hearing processes (in which either a grand jury or a judge determines whether there is sufficient evidence that a felony has been committed); any pretrial motions such as motions to suppress evidence (for examples, asking the court not to let the government use evidence it may have obtained illegally through a search or getting a confession), motions to challenge a subpoena, motions to change venue (to move the trial), motions to join or sever cases (for example if two or more individuals are charged with the offense, should the trials be held together or separately). During the

pretrial phase, prosecutors and defendants through their defense attorneys will engage in plea bargaining and will generally resolve the case before a trial is held.

Trial Phase

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

Sentencing Phase

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

Post-Conviction Phase (Appeals Phase)

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

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1.3: The Formal Criminal Justice Process

The Formal Criminal Justice Process [13]

Components of Criminal Justice

Most of these criminal justice systems consist of five components- law enforcement, prosecution, defense attorneys, courts, and corrections. Each of these play a unique but critical role in criminal justice proceedings.

Law enforcement officers are tasked with hearing and investigating reports for crimes which happen in their jurisdiction. These officers investigate crimes by gathering and protecting evidence, making arrests, providing testimony during court processes, and conducting follow-up investigations as needed.

After law enforcement officers investigate a criminal offense, it is up to the prosecution to represent the state or federal government throughout the court process. Prosecutors must review the evidence gathered by officers and determine whether to file formal charges against the suspect or to drop the case. They are also tasked with presenting the evidence in court, questioning witnesses, determining what charges a suspect will be charged with, and more.

While the prosecution represents the state or federal government, it is the job of defense attorneys to represent the individuals accused of a criminal offense. They can either be hired by the defendant themselves or assigned by the court since legal representation is a basic right outlined in the Constitution.

Both the prosecution and defense attorneys are involved in the courts which are run by judges. Their role is to ensure that the law is followed along with overseeing what happens in court. Judges are able to determine whether or not to release offenders before a trial, accept or reject plea agreements, oversee trials, and sentence individuals convicted of illegal acts. Judges are easily some of the most powerful individuals in the criminal justice system.

Finally, after an individual has been investigated, tried, convicted, and sentenced, they enter the last criminal justice component of corrections including jails and prisons. These terms are often used interchangeably, but in reality, jails are used to house individuals sentenced to less than one year of incarceration as well as those awaiting trial, while prisons house individuals sentenced to be incarcerated for a year or more. Correction officers are tasked with supervising convicted individuals in jail or prison, and also include probation (jail) and parole (prison) officers who are responsible for monitoring these individuals either after they have completed their sentence or in some cases in lieu of incarceration. Corrections officers typically prepare pre-sentencing reports on the individual which are used to help judges decide on sentences as well as overseeing the day-to-day custody of incarcerated inmates (NCVC, 2008a).

What is the sequence of events in the criminal justice system?

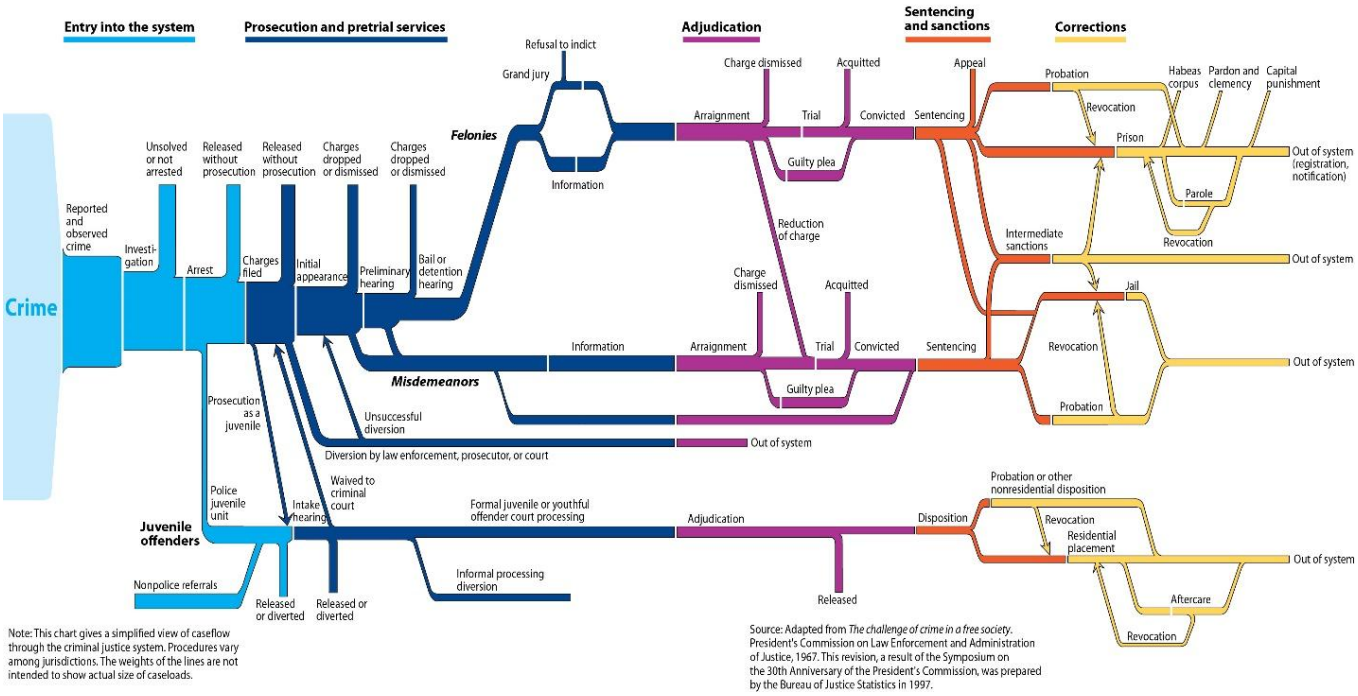


Figure 1. 10 The flowchart of the events in the criminal justice system (shown in the diagram) updates the original chart prepared by the President's Commission on Law Enforcement and the Administration of Justice in 1967. The chart summarizes the most common events in the criminal and juvenile justice systems including entry into the criminal justice system, prosecution and pretrial services, adjudication, sentencing and sanctions, and corrections. A discussion of the events in the criminal justice system follows. [14]

Initial Contact [15]

Initial contact is the step in which the police takes some action against the suspected perpetrator. The police contact the suspect and inform him/her about the violation he/she has committed. Making initial contact, investigating crimes, apprehending offenders/potential offenders (arrest), and booking them in the local jail all happens after the officer has made initial contact. Making initial contact does not mean that the suspect has actually committed the crime; law enforcement does not determine guilt or innocence, hand down punishments, or implement the punishment.

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



Figure 1.11 Police on Standby [16]

Investigation [17]

“For the court to be satisfied that the investigator acted lawfully and within the bounds of legally prescribed authority, the judge needs to hear the investigator describe their thinking processes to form reasonable grounds, or in some emergency cases, to have a reasonable suspicion that justifies the action taken.”

An effective strategy for learning any new skill is to define it and break it down into logical steps, establishing a progression that can be followed and repeated to reach the desired results. The process of investigation is no exception and can be effectively explained and learned in this manner. In this chapter, you will learn how each of the following issues relates to the process of investigation.

1. The distinction between investigative tasks and investigative thinking
2. The progression of the investigative process
3. The distinction between tactical investigative and strategic investigative responses
4. The concepts of event classification and offence recognition
5. The threat vs. action response dilemma
6. The distinction between active events and inactive events
7. The connection of active events and Level 1 priority results to the powers afforded under exigent circumstance
8. The Response Transition Matrix (RTM) and the critical need to transition from tactical response to strategic response

Topic 1: The Distinction Between Investigative Tasks and Investigative Thinking

To understand the process of investigation, it is necessary to comprehend the distinction between investigative tasks and investigative thinking. Investigative tasks relate to the information gathering processes that feed into investigative thinking and the results. Investigative thinking, on the other hand, is the process of analyzing information and theorizing to develop investigative plans. Let us consider this distinction in a little more depth.

Investigative Tasks

Investigative tasks relate to identifying physical evidence, gathering information, evidence collection, evidence protection, witness interviewing, and suspect interviewing and interrogation. These are essential tasks that must be learned and practiced with a high degree of skill to feed the maximum amount of accurate information into the investigative thinking process. Criminal investigation is aimed at collecting, validating, and preserving information in support of the investigative thinking process. Accordingly, it is important to learn to do these evidence collection tasks well.

Investigative Thinking

Investigative thinking is aimed at analyzing the information collected, developing theories of what happened, the way an event occurred, and establishing reasonable grounds to believe. Those reasonable grounds to believe will identify suspects and lead to arrest and charges. Investigative thinking is the process of analyzing evidence and information, considering alternate possibilities to establish the way an event occurred and to determine if they are reasonable.

Topic 2: Progression of the Investigative Process

The investigative process is a progression of activities or steps moving from evidence gathering tasks, to information analysis, to theory development and validation, to forming reasonable ground to believe, and finally to the arrest and charge of a suspect. Knowing these steps can be helpful because criminal incidents are dynamic and unpredictable. The order in which events take place, and the way evidence and information become available for collection, can be unpredictable. Thus, only flexible general rules to structured responses can be applied. However, no matter how events unfold or when the evidence and information are received, certain steps need to be followed. These include collection, analysis, theory development and validation, suspect identification and forming reasonable grounds, and taking action to arrest, search, and lay charges.

In any case, as unpredictable as criminal events may be, the results police investigators aim for are always the same. And you should always keep the desired results in mind to provide focus and priority to the overall investigative process. We will talk more later in this book about developing a mental map of the investigative process to assist in recording, reporting, and recounting events. It is mentioned now because a mental map is an appropriate metaphor to illustrate the investigative thinking process.

In this process, even though the path we will take to investigate may be unclear and unpredictable at first, the destination, the results we seek in our investigation , will always be the same and can be expressed in terms of results and their priorities .

Results and priorities focus first on the protection of the lives and safety of people. They focus second on the priorities of protecting property, gathering and preserving evidence, accurately documenting the event, and establishing reasonable grounds to identify and arrest offenders.

Priorities refer to Level One Priorities, as the protection of the lives and safety of people. This includes the protection and safety of the police officer's own life and the life and safety of other officers.

The Level Two priorities are the four remaining aforementioned results, and these may be considered equal value to each other. Depending on circumstances, a rationale can be made for choosing to concentrate on one Level Two priority at the expense of another depending on the circumstances presenting.



Figure 1.12 Priority Results [18]

The critical point to be made here is that under no circumstances should an investigator ever choose to focus his or her efforts and attention to a Level Two priority if doing so would compromise the Level One priority of protecting the life and safety of a person, including police officers themselves. In the event that evidence is lost or destroyed, or that a suspect is not identified or apprehended because investigators were taking care of the Level One priority, that is a justifiable outcome. A response that would sacrifice the safety of people to achieve a level two priority would not be justifiable and could even lead to civil or criminal outcomes against the investigators making such a choice.

Now that we have looked at the critical aspects of investigative tasks and the response priorities police investigators need to apply to decision making when they take action, we can proceed to examine the two different types of investigative response. We will refer to these as the Tactical Investigative Response and the Strategic Investigative Response .

Topic 3: Distinction Between a Tactical Investigative Response and a Strategic Investigative Response

These two different types of investigative responses are defined by the nature and status of the event that the investigator is facing. If it is an active event, it will require a Tactical Investigative Response and if it is an inactive event it will require a Strategic Investigative Response. It is important for an investigator to understand these two different levels of response because they include different response protocols, different legal authorities, and limitations to authority.

Tactical Investigative Response

Tactical Investigative Response is faced by operational officers who are engaged in the frontline response to criminal events. As mentioned earlier, police are often challenged to respond to events, sometimes life and death situations, where information is limited, and critical decisions need to be made to take action. In these Tactical Investigative Responses, the responding officers often have little or no time to undertake the tasks of gathering information. They must rely on the information of a dispatched complaint, coupled with their own observations made once they arrive at the scene. If an officer takes the action of making an arrest or using force to bring the situation under control, they are accountable for the action they have taken, and they may be called upon by the court to articulate their thinking, albeit based on limited information.

Strategic Investigative Response

Once an investigator has arrived at the scene of an event and has brought the event under control by either making an arrest or by determining that the suspect has fled the scene and no longer poses a threat to the life or safety of persons, the investigation becomes a strategic investigative response. With this expiration of life and safety issues, also comes the expiration of exigent circumstances and the additional authorities to detain persons suspected and to enter and search private property without a warrant.

Clearly understanding and being able to define and articulate the circumstances of either an active event and tactical response, or a controlled event and a strategic response is critical. In court, it becomes important for a police investigator to describe what they were told going into the complaint, what they saw and heard when they arrived at the complaint, and, most importantly, what they were thinking to justify the action that was taken. For the court to be satisfied that the investigator acted lawfully, the judge needs to hear the investigator describe their thinking process to form reasonable grounds, or in some emergency cases, to have a reasonable suspicion that justifies the action taken.

To properly articulate their thinking in these investigative responses, it is important for the officer to understand the situational elements that can help define their thinking process when they testify in court. Two of the most important situational elements to understand are event classification and offence recognition .

Topic 4: Event Classification and Offence Recognition

In order to enter any investigation in either the tactical or the strategic response mode, an investigator must engage their thinking processes and make decisions about the event they are confronting. Is it an active event in progress that requires immediate and decisive tactical actions; or is it an inactive event where a less urgent, slower, and more strategic approach can be taken? This slower and more considered approach is the strategic investigative response, and the situational elements of this approach will be discussed in detail later in this chapter. Thinking about these situational elements of active event or inactive event is call event classification.

Considering the possible crime being committed in the event is called “offence recognition,” and this recognition of a specific offence activates the investigator’s thinking to look for the evidence that supports the elements of that recognized offence.

Topic 5: Classifying the Event as Either an Active Event or an Inactive Event

For each of these classifications of active event or inactive event , the investigator has some different legal authorities to put into action, as well as some immediate responsibilities for the protection, collection, and preservation of evidence. When attending the scene of any reported event, the investigator should assume that the event is active until it has been established to be inactive.

In many cases, an event can be re-classified as an inactive event when it is determined that the suspect has left the scene of the event, or the event has concluded by the suspect being arrested. In cases where the suspect is still at the scene of an active event, the investigator needs to be thinking about the possibility of detaining the suspect or making an arrest of that suspect for an offence in progress. To make that detention or arrest, the investigator should be thinking about what possible offence they are being called to investigate by the initial complaint, and also by the evidence they are seeing and hearing upon arrival.

The classification of active event or inactive event is critical. It is a distinction that will guide an officer to determine what powers of detention, arrest, use of force, entry to property, and search may be relied upon to take action. The defining elements between active event and inactive event are:

An Active Event

1. The criminal act is or may still be in progress at the scene.
2. The suspect is or may still be at the scene of the event.
3. The situation is, or may be, a danger to the life or safety of a person, including the life or safety of attending police officers.

An Inactive Event

1. The criminal act has concluded at the scene.
2. The suspect or suspects have left the scene or have been arrested or detained.
3. The situation at the scene no longer represents a danger to the life or safety of a person, including police officers.

Topic 6: Threat vs. Action Analysis Dilemma

The critical elements of this Threat vs. Action Analysis Dilemma were demonstrated in what became known as “Active Shooter calls” flowing from the incident at Columbine High School in 1999 (Police Executive Research Forum, 2014). In this incident, two armed teenagers went on a shooting spree in the high school killing 13 people and wounding 20 others before turning their weapons on themselves and committing suicide. Officers responding to that call followed departmental protocols of that era. These protocols dictated they should wait for the arrival of their Emergency Response Team in events where armed suspect confrontations were taking place. The fact that these first responders waited despite ongoing killing taking place inside the high school led to a determination that police have a duty to take action in such cases, and waiting is not the correct response. As a result of these determinations, active shooter response protocols were adopted across North America and police agencies re-trained their personnel to respond to active shooters with more immediate action and strategies to enter and confront the shooters in order to protect lives of possible victims.

The Threat vs. Action Analysis Dilemma response protocols in the active shooter response situations now provide the standard or benchmark that a responding officer must consider when faced with the decision to enter a dangerous situation alone and take action, or to wait for back-up before entering to take action. For active shooter situations, the protocols across North America are now prescribed responses, where responding officers are trained to enter and confront with minimal back-up. That said, not every potentially dangerous Threat vs. Action Analysis Dilemma is going to be an active shooter. Responding officers will often be faced with other calls where danger exists to the safety of persons and the decision to enter or wait for back-up must still be made. In these cases, the responding officer must weigh the available information and respond or wait for back-up per their own threat vs risk assessment of the facts. The active shooter protocols have provided something of a calibration to this analysis where extreme ongoing threat to life and safety of person equals high duty and high expectation to take action.

Topic 7: Rules of Engagement for an Active Event or an Inactive Event

Police officers may be called to action by many different means. It may be a radio dispatch 911 call to attend an emergency, a citizen flagging down the passing police car to report an incident, or an officer coming upon a crime in progress. Whatever the means of being called to action, this is the first step of the police officer becoming engaged in a thinking process to gather and evaluate information, make decisions, and take action. The first step of this thinking process for the investigator is to make the evaluation and ask the questions:

1. Is this an Active Event requiring a Tactical Investigative Response?
2. Is this an Inactive Event requiring a Strategic Investigative Response?

As a subsequent part of this evaluation determining an Active Event or Inactive Event, the investigator should also be alert to the type crime being encountered. For example, is it an assault, a robbery, or a theft? From the perspective of police tactical investigative response, an investigator confronted with an active event must first assess the threat level. Is there a danger to the life or safety of persons that would require a Level One Priority Result , taking immediate action to protect life and safety of persons, including the life and safety of attending police officers?

In assessing these threat levels to life and safety, police are often faced with very limited information. Sometimes there is only a possible threat, or an implied threat to the life or safety of persons. In such cases, it is only necessary for the police to suspect that there is a threat to the life or safety of a person to evoke the extended powers provided by exigent circumstances. In these cases of implied threats, police are authorized to rely on the powers afforded by exigent circumstances to enter private property without a warrant and to detain and search suspects who may present a danger. These are significant powers, and an investigator must be aware that if they use these powers, there is a strong possibility they will later be called upon to justify the exercise of those power.

An officer desiring to conduct a search needs probable cause for the search to be lawful. Because society expects police officers to find evidence and arrest criminals, they may be overzealous in determining whether they do or do not have probable cause. Generally, the evidence establishing probable cause must be submitted to an impartial magistrate , and if the magistrate agrees that probable cause exists, then he or she will issue a search warrant .

Scenario #1

A uniform patrol officer receives a call to attend a complaint through radio dispatch. The 911 caller is reporting that he has just witnessed his neighbor punch his wife in the front yard and then drag her forcibly into their house. The responding officer is immediately able to classify this event as an active event . The officer's offence recognition of the criminal act is that it is likely an assault and possibly a forcible confinement. Given this assessment, the situation requires a Tactical Investigative Response . The suspect is still at the scene and there is an ongoing possibility of danger to the life or safety of the suspect's wife. In this type of case, the officer can draw upon the extended powers under exigent circumstances to ensure the safety of the wife. Considering the information that has been reported, the officer may go to the residence with a view to using the necessary force to enter without a warrant to investigate the safety and well-being of the identified victim. If, after entering the home, further investigation provides evidence to confirm an assault, the officer can arrest the identified suspect for that offence. In this scenario, the information that allows the classification of the active event and the offence recognition is fairly clear in the reported circumstances.

Scenario #2

Sometimes an event cannot be immediately classified as either an active event or an inactive event. In these cases, where the information is less clear, the investigator may be justified to assume an ongoing danger to the life or safety of persons and remain in the tactical investigative response mode utilizing the powers afforded under exigent circumstances to pursue the investigation until it is determined that an implied danger no longer exists. For example, consider the situation where police dispatch receives a 911 call from a woman crying. Before any further information can be obtained from the caller, the call is terminated from the caller's end. A patrol unit is dispatched to attend the residential address associated with the identified phone number. Upon arrival at the front door of the caller's address, attending officers are met by a male resident of the home who identifies himself as the homeowner. The attending officers advise the male that a terminated 911 call from a crying woman was received from this address. The male states that there is nothing wrong in his home and he refuses to allow officers to enter the premises. The officers advise the male that they need to enter the premises to satisfy themselves that there is no ongoing threat to the life or safety of the crying woman caller. The officers warn the man that they will be entering the premises and if he resists, he will be arrested for obstructing a police officer.

The man steps aside and the officers enter the home and find a woman in the bedroom area with a bleeding nose and a bruised face. The woman tells officers that the male, her husband, punched her in the face during an argument and when she attempted to call police, he ripped the phone cord from the wall and struck her again. She states that he threatened to kill her if she cried out when the police came to the door. The man is arrested for assault, forcible confinement, and uttering threats. He is provided with his Charter Rights and warning, and he is then asked if he wishes to make any statement.

To evaluate this scenario, the officers had very little information in the first instance that would allow them to make a determination of active event or inactive event. The information to identify a criminal act was equally limited. Fortunately, case law has evolved to recognize this kind of information-limited case, and it provides a framework for making a response that can protect life and safety. In such situations, an officer is still empowered to act under the authority of "exigent circumstances." Considering information-limited circumstances like this, the officer only needs to have a suspicion that there is a threat to the life or safety of a person to act. That threat may be simply implied by the circumstances being presented. In this case, the implied threat to life or safety of a person was the disconnected 911 call. The officers had a duty to attend and resolve the possible threat to life or safety of a person implied in this disconnected 911 call (R v Godoy , 1999).

As you might imagine, an officer attending the calls outlined in the preceding scenarios needs to be very clear on the circumstances where implicit distress and exigent circumstances can be interpreted to use the powers to enter private property. This same need extends to using appropriate levels of force and making an arrest. Considering these are active and still evolving criminal events, there is urgency to act. It is critical for the investigating officer to have a clear understanding of these principles to quickly assess the presented facts, make the event classification, and take the necessary action in an expedient manner.

As outlined earlier in this book, there is a significant difference between reasonable grounds to believe and reasonable grounds to suspect, and an officer who is not clear on the distinction might have a difficult time articulating to the court how and why they took the initiative to act or not to act. It is these types of cases, where there is implied distress, or an implied threat to life or safety, that an investigator must be clear on their interpretation of the event and on their authorities to take action. The thinking involved might be described as an active event and an explicit or implied threat to life or safety equals exigent circumstances.



Figure 1.13 Exigent Circumstances [19]

More on Offence Recognition

At the same time the event is being classified as either active event or inactive event, the investigator should be engaging in the thinking process of offence recognition. In other words, what offence is being reported or what is the offence being observed in the fact pattern that is unfolding? With this offence recognition, the investigator will begin to assemble a mental inventory of the evidence and information that will be required to support the recognized offence(s). Having an offence in mind, the investigator will also begin to consider their range of powers and authorities that can be used under the law regarding that offence. The investigator will ask themself

- Is this a summary conviction offence where the suspect must be found committing to justify an arrest?
- Or, is it an indictable or dual procedure offence where there is direct evidence or strong circumstantial evidence to support an arrest?

If the investigator determines that they are attending to an Active Event and their offence recognition suggests that there may be a danger to the life or safety of a person, such as assault causing bodily harm, they will know that they need only find evidence to form reasonable grounds to believe in order to make an arrest. As part of attendance to the scene of the event, the investigator should be classifying the location to determine what their legal requirements are for their authority to enter. Consideration of the possible authorities to enter private property would include:

- Consent of the property owner
- Section 487 CCC warrant to search
- Exigent circumstances to suspect a need to protect the life or safety of a person
- Exigent circumstance with reasonable grounds to believe there will be a destruction of evidence of an indictable offence
- Fresh pursuit of a suspect found committing an offence

If the investigator arrives at the scene where a suspect is immediately apparent, the investigator can make an immediate detention or perhaps even an arrest. The investigator may rely on the Section 529 (2) of the Criminal Code of Canada (1985) under exigent circumstance to enter private property without a warrant to make the arrest and ensure the safety of persons at the scene. If the investigator makes an arrest after forming reasonable grounds for belief, they are required by the Canadian Charter of Rights and Freedoms to tell the suspect what offence they are being arrested for.

Required Warnings

The following is the standard Charter of Rights (Canadian Charter, 1982, s 10(a,b)) warning and police warning. These standard caution warnings are given as follows:

I am arresting you (or detaining you) for [name of offence(s)].

POLICE WARNING

I wish to give you the following warning: You need not say anything. You have nothing to hope from any promise or favor, and nothing to fear from any threat whether or not you do say anything. Anything you do or say may be used as evidence.

Do you understand? (Transit Police, 2015)

CHARTER WARNING

You have the right to retain and instruct counsel without delay. You also have the right to free and immediate legal advice from duty counsel by making free telephone calls to [toll-free phone number(s)] during business hours and [toll-free phone number(s)] during non-business hours.

Do you understand?

Do you wish to call a lawyer?

You also have the right to apply for legal assistance through the provincial legal aid program.

Do you understand? (Transit Police, 2015)

Let us consider the following scenario to illustrate these principles in action.

Scenario #3

An officer is dispatched to attend the complaint of an assault with a weapon and determines that it is taking place in a residential dwelling house in a nearby subdivision. Upon arrival, the officer is met on the front lawn by a man claiming to have witnessed the owner of the home stab a visitor to the home during an altercation as a second male runs out the front door holding his side and bleeding from an apparent wound. A third man holding a bloody knife comes to stand in the front doorway and the witness identifies him as the owner of the home. The officer directs the man with the knife to drop it on the ground and step out of the residence. The man complies and is arrested for assault with a weapon.

From this fact pattern the investigator could make an immediate arrest for assault with a weapon. The investigator would seize the bloody knife and protect it as evidence of that offence. The facts within this scenario that allow the investigator to take action, enter the private property, and form their reasonable grounds for belief and make the arrest. When the case goes to court, the investigator of this case will articulate the chain of events along with their thinking to substantiate their reasonable grounds for belief. To achieve this, the investigator's testimony would be that:

- they were dispatched to attend a complaint of assault with a weapon in progress,
- the suspect was still on scene and it was an active event,
- considering the potential danger to life or safety of a person, they entered the property under the provisions of exigent circumstances,
- an independent witness at the scene stated the homeowner had stabbed a guest in the home,
- a man bleeding from an apparent wound ran from the home, and
- another man standing in the doorway was holding a bloody knife and was identified by the witness as the homeowner.

The investigating officer arriving at the scene of this event would treat this as a Level One priority because there is an ongoing danger to the life and safety of persons. Under these circumstances, the Criminal Code authorities of exigent circumstances would apply. The investigator would be justified in detaining all parties present, including the witness and the victim, on the reasonable suspicion that they may all have been involved in combative behavior and might each still pose a threat to the life and safety of others, including the investigator. The powers of exigent circumstances are significant in this kind of scenario and provide authority to take immediate action that will neutralize threats to the safety of people. Even if the facts of this assault with a weapon had evolved to show that it was taking place inside the private home of the suspect with the bloody knife, the authority of exigent circumstances would permit the investigator to enter that home without a warrant to protect the life and safety of persons. A very significant point to be made here is that as soon as the event is under control the extended powers of exigent circumstances expire.

Once this event has been brought under control and the threat to the life or safety of persons had been eliminated by arresting or detaining all persons present, the investigator must reclassify this event as an inactive event. As soon as this occurs, some of the rules of engagement and legal authorities to take action change, and the investigation must switch to a Strategic Investigative Response.

With the expiry of exigent circumstances and the switch to a Strategic Investigative Response, several factors change. If this assault with a weapon had been taking place in the suspect's private home, and the investigator had entered under the authority of exigent circumstance, the authority to remain in the private residence and search it would expire. If the investigator needed to collect additional physical evidence in that home, such as blood from the stabbing assault, a warrant or consent to search would now be required.

In this type of case, the residence of the suspect could be locked down externally and all persons removed until a search warrant was obtained to complete the investigation. Evidence obtained up to the point where the arrest was made and before exigent circumstances expired would be lawfully seized without a warrant. This would include the seizure of the bloody knife as plain-view search or a search incidental to arrest. Anything else searched for and seized after the arrest could be challenged as an unlawful seizure if it was taken without a search warrant.

In addition to the requirement for search warrants, in some cases after exigent circumstances expire, other priorities and investigative must also change. As you will recall, the protection of life and safety of people is the Level One priority. With that priority, the court allows significant leeway to investigators in regard to the protection of crime scenes and the collection of evidence. If an investigator is attending any criminal event, the protection and collection of evidence always takes a backseat to the protection of life or safety of people. That said, once the life and safety issues have been resolved, the securing of the crime scene and the subsequent protection and collection of evidence becomes the number one priority.

Once the life and safety issues are resolved, it is time to lock down the crime scene and start protecting evidence for court. If it is possible to protect the life and safety of people and collect, protect, and preserve evidence, this is the preferred outcome. If it is not possible, the court will accept the fact that damage to evidence occurred prior to life and safety issues being resolved. Once those issues are resolved, the expectation is that a high level of care will be taken. If proper care is not taken, and evidence becomes contaminated, or continuity of possession is lost, the evidence may be ruled inadmissible at a trial. It is important for the investigator to fully grasp the construct that dictates when to transition from Tactical Investigative Response to Strategic Investigative Response.

Topic 8: Response Transition Matrix (RTM)

The RTM is a matrix tool to illustrate the considerations for police response when considering the authorities and issues to escalate or de-escalate from a Tactical Investigative Response to Strategic Investigative Response. Considering the following questions will help an investigator to identify an event as either a Tactical Investigative Response or a Strategic Investigative Response:

1. Is the event active or inactive?
2. What offence(s) is possibly occurring?
3. Do I suspect an implicit or explicit danger to the life or safety of a person?
4. Do I have reasonable grounds to believe evidence of an indictable offence will be lost or destroyed?
5. What immediate actions can be taken to protect the life or safety of persons?
6. What immediate action can be taken to protect evidence, without compromising life or safety?
7. Have life and safety issues been resolved, and should the change be made from Tactical Investigative Response to Strategic Investigative Response?

For example, in the Canadian justice system, both statutory law and case law have evolved to establish a range of authorities and police powers that allow rapid response at the more dangerous end of the matrix, and more time-consuming restrictions to act at the less threatening end of the matrix. The chart below illustrates the duty to act, the authority to act, and the priorities for action to consider.

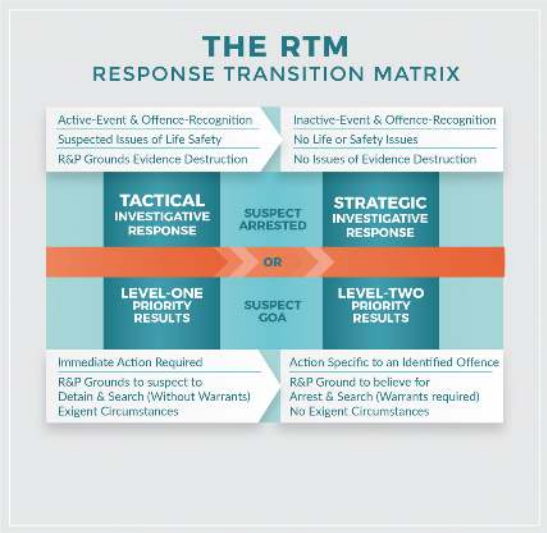


Figure 1.14 The RTM Matrix [20]

Summary

In this chapter, we have discussed the progression of the investigative process and the key elements within the progression that must be considered by an investigator. These elements within the investigative process are the signposts on the roadway of a mental map. These signposts of active event or inactive event tell us to either take action within the extended authorities of exigent circumstances or to modify our response for an inactive event and recognize the need to make the transition to a strategic response. An investigator's understanding of the changes in circumstances that define these situations and the change from active to inactive events can make the difference between successful and unsuccessful investigative outcomes.

Study Questions

1. What is the difference between investigative tasks and investigative thinking?
2. What is the difference between Level One Priorities and Level Two Priorities?
3. What is the difference between a Tactical Investigative Response and a Strategic Investigative Response?
4. What is the difference between an active event and an inactive event?
5. When would an investigator consider the Threat vs. Action Analysis Dilemma?
6. When does an investigator have the authority to enter a dwelling house without a warrant?
7. Why is it important for an investigator to thinking about "offence recognition" at the same time they are thinking about whether a situation should be classified as an active event or an inactive event?
8. What is the Response Transition Matrix (RTM)?

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1.4: Perspectives On Justice

Crime Control Perspective [21]

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



Think About It… Murder in the Gym: Crime Control Model Example by Dr. Sanchez

Imagine working out at the local gym, and a man starts shooting people. This man has no mask on, so he is easy to identify. People call 911 and police promptly respond and can arrest the shooter within minutes. Under the crime control model, the police should not have to worry too much about how evidence gets collected and expanded. Investigative, arrest, and search powers would be considered necessary. A crime control model would see this as a slam dunk and no need to waste time or money by ensuring due process rights. If there were any legal technicalities, such as warrantless searches of the suspects home, it would obstruct the police from effectively controlling crime. Effective use of time would be to immediately punish, especially since the gym had cameras and the man did not attempt to hide his identity. Any risk of violating individual liberties would be considered secondary over the need to protect and ensure the safety of the community in this model. Additionally, the criminal justice system is responsible for ensuring victim's rights, especially helping provide justice for those murdered at the gym.

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

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‘assembly line.’ The protection of individual rights and freedoms is of utmost importance and has often be aligned more with a liberal perspective. [4]



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

There are several pros and cons to both 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 previous court decisions, as well as campaign approaches in the U.S. The crime control model is used when promoting policies that allow the system to get tough, expand police powers, change sentencing practices such as create “Three Strikes,” and more. The due process model may promote policies that require the system to focus on individual rights. These rights may include requiring police to inform people under arrest that they do not have to answer questions with an attorney (Miranda v. Arizona), providing all defendants with an attorney (Gideon v. Wainwright), or shutting down private prisons who often abuse the rights of inmates.

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



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

Rehabilitation Perspective [22]

Although not as old as some of the older ideologies, rehabilitation is not brand new. Additionally, it is the only one of the four main ideologies that most accurately attempts to address all three goals of corrections, which are:

1. Punish the offender
2. Protect Society
3. Rehabilitate the offender.

Certainly, all four ideologies address the first two goals, punishment, and societal protection. However, the goal of rehabilitating the offender is either silent, or not addressed in retribution, deterrence, or incapacitation. This does come as a cost. As we will talk about in more detail when covering prisons and jails, there is a great paradox that is happening in our society when we heavily rely on jails and prisons. Most offenders will come out of institutions (roughly 95% of all people who enter prisons are released), and little is done to change them while they are there. This is mostly due to our attitudes towards offenders, the policies that are necessarily placed on individuals while they are locked up, and the institutions themselves. And yet, there is the expectation that these individual leaving prisons will not commit crimes in the future.

The question here is this: what have we done to change them so that they are not reoffending? Without the incorporation of some form of rehabilitation, the answer is fairly clear… Nothing. Yet, we expect it.

Rehabilitation has taken on different forms through its history in the United States. We have considered individuals out of touch with God, and so offenders needed to be penitent, in order to get right with God. One of America's earliest prisons was designed with this in mind. The Eastern State Penitentiary, opening in 1829, included outside reflection yards; so that offenders could look up to God for penance.

Pin It! Eastern State Penitentiary
To see more of this prison, visit https://www.easternstate.org/

Reformatories were another example of how rehabilitation was viewed in the past. The reform movement tried to rehabilitate the offender through more humane treatment, to include basic education, religious services, work experience, and general reform efforts. This was done in an effort to reform individuals, thus allowing them to come back to society. The Elmira Reformatory was one of the earliest efforts of the reform ideal, and many prisons built in the United States were based on this prison. Below is a picture of Elmira.



Figure 1.15 Elmira Reformatory [23]

Other attempts at rehabilitation included more medical approaches. In the past, offenders were viewed as sick, and in need of medical cures. This medical approach, while greatly reduced, is still used in some areas today. For example, the chemical castration of certain offenders does still occur. For example, HB 2543, in Oklahoma, in September of 2018, focuses on the mandated use of medroxyprogesterone acetate as a treatment, and is required before appropriate release of convicted sex offenders.

Rehabilitation, as an ideology has had critics. This is in large part due to how it is perceived. Many have voiced an objection, as it is seen as being "soft" on offenders. This is also how it has been discounted when coupled with the fear of crime. Several examples are presented as to its ineffectiveness, and weakness to the problem of crime. Probably the most notable example of the ineffectiveness of rehabilitation came in the 1970s. In 1974, Robert Martinson provided support for many that were clamoring to demonstrate that the ideas of rehabilitation were ineffective. In a review of over 230 programs, Martinson concluded that "With few and isolated exceptions, the rehabilitative efforts that have been undertaken so far have had no appreciative effect on recidivism" (Martinson, 1974, p. 25). [1] This was the spark that many needed to turn toward the more punitive ideologies that we have so far discussed. However, it did help some to ask more detailed questions about why rehabilitation was not working. Additionally, it helped researchers to ask more critical questions about measurement, how to more properly evaluate rehabilitation and to understand the difference of what does not work versus what does work for offenders. These principles of effective intervention become the cornerstone of modern rehabilitation.

Understanding Risk and Needs in Rehabilitation

Today's rehabilitative efforts do still carry punishment and societal protection as goals, but the focus of rehabilitation is on the changing of offenders' behaviors so that they are not committing crimes in the future. This is done by understanding what are the items that make offenders at risk for offending. Additionally, based on the levels of risk items, some offenders are at higher risk for offending than other offenders. This includes items like prior criminal history, antisocial attitudes, antisocial (pro-criminal) friends, a lack of education, family or marital problems, a lack of job stability, substance abuse, and personality characteristics (mental health and antisocial personality). Collectively these are considered as risk factors for offending (re-offending). While we can change the number of priors someone already has, all of these other items can be addressed. These are considered as criminogenic needs. Criminogenic needs are items that when changed, can lower an individual's risk of offending. This is a core component of Paul Gendreau's (1996) principles of effective intervention, and are at the heart of most modern effective rehabilitation programs. [2] Additionally, thousands of offenders have been assessed on these items, which has helped to develop evidence-based rehabilitation practices. These are efforts that are based on empirical data about offenders. When these criminogenic needs are addressed, higher-risk offenders demonstrate positive reductions in their risk to offend.

Over the last 40 years, efforts to change these characteristics, in order to reduce offending have been varied. One of the most useful approaches to changing the antisocial attitudes and behaviors of offenders has come in the form of behavioral and cognitive behavioral change efforts. Cognitive behavioral change for offenders is based on the concepts that the behaviors that one exhibit can be changed by changing the thinking patterns behind (before) the behaviors are exhibited. That is (criminal) behavior is based on cognition, values, and beliefs that are learned vicariously through the interactions and observations of others. It is especially relevant since we are receiving individuals from prison, where these ideas, peers, values, and beliefs may dominate the institution. For a more detailed explanation, please see https://www.apa.org/ptsd-guideline/patients-and-families/cognitive-behavioral.pdf .

Today, evidence-based rehabilitative efforts are now used as benchmarks when establishing programs that are seen as effective, versus ones that show little to no (or even negative) results. Rehabilitation programs that follow these principles of effective intervention are showing that they can achieve these three goals of corrections (punishment, societal protection, and offender change). In fact, the U.S. Federal Government has a section of the National Institute of Justice devoted to these evidence-based practices, and what programs are seen as effective, promising, and not effective. This site is called "CrimeSolutions," and can be visited at https://www.crimesolutions.gov/ . This resource provides invaluable information for individuals making decisions on what works for offenders and is based on empirical studies of hundreds of different approaches.

Restorative Justice Perspective [24]

The process of restorative justice programs is often linked with community justice organizations and is normally carried out within the community. Therefore, RJ is discussed here in the community corrections section. Restorative justice is a community based and trauma-informed practice used to build relationships, strengthen communities, encourage accountability, repair harm, and restore relationships when wrongdoings occur. As an intervention following wrongdoing, restorative justice works for the people who have caused harm, and the victim(s), and community members impacted. Working with a restorative justice facilitator, participants identify harms, needs, and obligations, then make a plan to repair the harm and put things as right as possible. This process, restorative justice conferencing, can also be called victim-offender dialogues. It is within this process that multiple items can occur. First, the victim can be heard within the scope of both the community and within the scope of the offense discussed. This provides

the victim(s) an opportunity to express the impact on them, but also to understand what was happening from the perspective of the transgressor. At the same time, it allows the person committing the action to potentially take responsibility for the acts committed, directly to the victim(s) and to the community as a whole. This restorative process provides a level of healing that is often unique to the RJC. Pictured, the different processes that can occur during the different types of dialogues within RJC.

Restorative Justice Processes



Figure 1.16 Restorative Justice [25]

Restorative Justice Success

For over a quarter century, restorative justice has been demonstrated to show positive outcomes in accountability of harm, and satisfaction in the restorative justice process for both offenders and victims. This is true for adult offenders, as well as juveniles, who go through the restorative justice process. Recently, there have been questions whether there is a cognitive change that occurs in the thought process of the individuals completing a restorative justice program. There is a growing body of research that demonstrates that change in cognitive distortions that may occur through successful completion of restorative justice conferencing (RJC). This will be an area of increasing interest for practitioners, as restorative justice continues to be included in the toolkit of actions within community justice and community corrections.

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CHAPTER OVERVIEW

2: Views of Defining Crime and Crime Patterns

2.1: Views of Defining Crime

2.2: Crime Trends

2.3: Crime Patterns

2.4: Victim Patterns

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2.1: Views of Defining Crime

Views of Defining Crime

Consensus View [26]

Laws are rules that govern everyone living in a community. They are instituted to protect the members of the community from physical harm and abuse of their rights. But where do laws originate and how are they instituted? One view of how laws are created is the consensus view , which as it states, implies consensus (agreement) among citizens on what should and should not be illegal. This idea implies that all groups come together, regardless of social class, race, age, gender, and more, to determine what should be illegal. This view also suggests that criminal law is a function of beliefs, morality, and rules that apply equally to all members of society. [1]

One Child per Family Policy in China

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

Think About It… Female Infanticide
Infanticide is the unlawful killing of very young children. It is found in both indigenous and sophisticated cultures around the world. Read this article on Female Infanticide by the BBC. How does this practice tie to consensus?

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

Marijuana Legalization

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

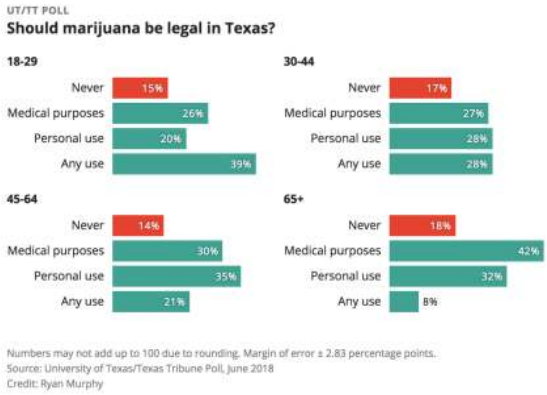


Figure 2.1 University of Texas/Texas Tribune Poll, June 2018 — Summary [27]

Think About It… Marijuana
Investigate this poll on Texas's proposed changes for marijuana regulations . Then watch this video on the how weed came to be considered a class one drug in the United States

Conflict View [28]

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

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

Edwin Sutherland: White Collar Crime

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

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

Sutherland wrote a book, White Collar Crime, that sparked lots of debate. [5] However, there is a limited focus on white-collar crime and even less enforcement of it in the United States. From the conflict view, white-collar and corporate crime gets committed by the 'haves,' and they write the laws and define what is or is not a crime. Going back to how we define crime in society, white-collar crime is still a contested one.

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

Interactionist View [29]



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

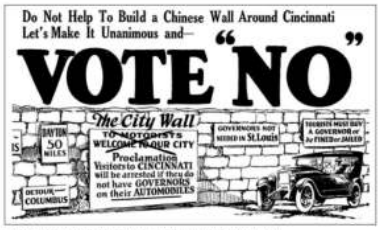
Typically, in our society, a deviant act becomes a criminal act that can be prohibited and punished under criminal law when a crime is deemed socially harmful or dangerous to society. [1]

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

Now that we have a basis for understanding differences between deviance, rule violations, and criminal law violations, we can now discuss who determines if a law becomes criminalized or decriminalized in the United States. A criminalized act is when a deviant act becomes criminal and law is written, with defined sanctions, that can be enforced by the criminal justice system. [2]

Pin It! Jaywalking

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



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

Figure 2.2 Vote No [30]

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



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

Figure 2.2 Don't Jaywalk [31]

To learn more about how American streets became car rather than people friendly read this vox article on 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 was to be right and wrong and became moral entrepreneurs. [3]

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

The auto industry used aggressive tactics to garner support for the new laws: using news media to shift the blame for accidents of the drivers and onto pedestrians, campaigned at local schools to teach about the importance of staying out of the street, and shame by suggesting you are in the wrong if you get hit. [6]

Fun fact: Most people may be unaware that they 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.

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2.2: Crime Trends

Crime Trends

How Crime is Measured [32]

A crime is an act or omission that is prohibited by law. To be a good law, a particular punishment or range of punishments must be specified. In the United States, the most common punishments are fines and imprisonment. As a matter of legal theory, a crime is a failed duty to the community for which the community will exact some punishment. This is the reason that prosecutions are always brought forward by the government, as a representation of the community that government serves. Historically, legal scholars differentiated between things that were “wrongs in themselves,” which were referred to as mala in se offenses. These were distinct from mala prohibita offenses, which represented acts that were criminal merely because the government wished to prohibit them. Many criminal justice scholars use these terms to differentiate between heinous crimes like rape and murder and victimless crimes such as gambling and vagrancy.

Felonies, Misdemeanors and Violations

Today, the most common and most basic division of crimes is based on the seriousness of the offense, and thus the possible punishment. Misdemeanors are less serious crimes that are punishable by fine and confinement in a local jail for a period not to exceed a year. Felonies are more serious crimes that the government punishes by fines, imprisonment (most commonly under the auspices of the state’s Department of Corrections) for a period exceeding a year, or death. The distinction between misdemeanors and felonies is of ancient origin, coming to us through the Common Law of England . Common law felonies included murder, rape, mayhem, robbery, sodomy, larceny, arson, manslaughter, and burglary.

What is classified as a misdemeanor largely depends on the jurisdiction. Common examples are petty theft, prostitution, public intoxication, simple assault, disorderly conduct, and vandalism. Some crimes can be both misdemeanors and felonies, depending on the circumstances. A battery that results in a handprint on the victim’s face may be classified as a misdemeanor, while a kick that breaks the victim’s ribs may be a felony. Similarly, an arson that does relatively little damage (in terms of financial costs) may be a misdemeanor, while an arson that destroys a home will be a felony. These distinctions have made it into our popular culture, where criminals who commit felonies are often known as felons . Less commonly used is the term misdemeanant , who is a person convicted of s misdemeanor.

Most jurisdictions recognize a class of offenses that do not result in any period of incarceration and are punished with only a fine. These minor breaches of the law are usually called violations . We will delve much deeper into the particulars of what constitutes various crimes in a later section.

Measuring Crime

In order to understand crime and the criminal justice system, we need to understand the prevalence of crime. Good crime statistics are critically important to understanding crime trends. The more federal and state agencies know about crime trends, the more intelligently they can allocate precious resources and maximize efforts at crime suppression and prevention. Crime statistics are also frequently used as an evaluation tool for justice programs. If the rate of a particular crime is falling, then what the system is doing will seem to be working. If the rate of a particular crime is rising, then it will seem to indicate that the criminal justice system is failing.

In the United States, the most frequently cited crime statistics come from the FBI’s Uniform Crime Reports (UCR) . The UCR are crime data collected by over 16,000 local and state law enforcement agencies on crimes that have been brought to the attention of police. These law enforcement agencies voluntarily send information to the FBI, which compiles them into an annual published report along with several special reports on particular issues.

Pin It! Uniform Crime Reports

To learn more about the Uniform Crime Reports (UCR) and the National Incident Based Reporting System (NIBRS), visit the FBI’s UCR page at: http://www.fbi.gov/ucr/ucr.htm

Most UCR data concern the so-called Part I Offenses, eight felonies that the FBI considers the most serious. Four of these are violent crimes: homicide, rape, aggravated assault, and robbery; four are property crimes: burglary, larceny (e.g., shoplifting, pickpocketing, purse snatching), motor vehicle theft, and arson.

According to the FBI, in 2008 almost 1.4 million violent crimes and 9.8 million property crimes occurred, for a total of almost 11.2 million serious crimes, or 3,667 for every 100,000 Americans. This is the nation's official crime rate, and by any standard it is a lot of crime. However, this figure is in fact much lower than the actual crime rate because, according to surveys of random samples of crime victims, more than half of all crime victims do not report their crimes to the police , leaving the police unaware of the crimes. (Reasons for nonreporting include the belief that police will not be able to find the offender and fear of retaliation by the offender.) The true crime problem is therefore much greater than suggested by the UCR.



Figure 2.3 When a crime occurs, the police do not usually find out about it unless the victim or a witness informs the police about the crime. [33]

This underreporting of crime represents a major problem for the UCR's validity. Several other problems exist (Lynch & Addington, 2007). First, the UCR omits crime by corporations and thus diverts attention away from their harm (see a little later in this chapter). Second, police practices affect the UCR. For example, the police do not record every report they hear from a citizen as a crime. Sometimes they have little time to do so, sometimes they do not believe the citizen, and sometimes they deliberately fail to record a crime to make it seem that they are doing a good job of preventing crime. If they do not record the report, the FBI does not count it as a crime. If the police start recording every report, the official crime rate will rise, even though the actual number of crimes has not changed. In a third problem, if crime victims become more likely to report their crimes to the police, which might have happened after the 911 emergency number became common, the official crime rate will again change, even if the actual number of crimes has not changed.

To get a more accurate picture of crime, the federal government began in the early 1970s to administer a survey, now called the National Crime Victimization Survey (NCVS), to tens of thousands of randomly selected U.S. households. People in the households are asked whether they or their residence has been the victim of several different types of crimes in the past half year. Their responses are then extrapolated to the entire U.S. population to yield fairly accurate estimates of the actual number of crimes occurring in the nation. Still, the NCVS's estimates are not perfect. Among other problems, some respondents decline to tell NCVS interviewers about victimizations they have suffered, and the NCVS's sample excludes some segments of the population, such as the homeless, whose victimizations therefore go uncounted.

Table 2.1 "Number of Crimes: Uniform Crime Reports and National Crime Victimization Survey, 2009" lists the number of violent and property crimes as reported by the UCR (see earlier) and estimated by the NCVS. Note that these two crime sources do not measure exactly the same crimes. For example, the NCVS excludes commercial crimes such as shoplifting, while the UCR includes them. The NCVS includes simple assaults (where someone receives only a minor injury), while the UCR excludes them. These differences notwithstanding, we can still see that the NCVS estimates about twice as many crimes as the UCR reports to us.

Table 2.1 Number of Crimes: Uniform Crime Reports and National Crime Victimization Survey, 2009 [34]

Type of crime	UCR	NCVS
Violent crime	1,318,398	4,343,450
Property crime	9,320,971	15,713,720
Total	10,639,369	20,057,170

A third source of crime information is the self-report survey. Here subjects, usually adolescents, are given an anonymous questionnaire and asked to indicate whether and how often they committed various offenses in a specific time period, usually the past year. They also answer questions about their family relationships, school performance, and other aspects of their backgrounds. Although these respondents do not always report every offense they committed, self-report studies yield valuable information about delinquency and explanations of crime. Like the NCVS, they underscore how much crime is committed that does not come to the attention of the police. [35]

Since its inception in the 1930s, many people have been critical of the UCR system for a variety of reasons. Among these reasons are the facts that the UCR includes only crimes reported to the police, only counts the most serious crime committed in a series of crimes, does not differentiate between completed crimes and attempts, and does not include many types of crimes, such as white-collar crimes and federal crimes. Another critical complaint (especially among scholars) was that the UCR did not obtain potentially important information about the victim, the offender, the location of the crime and so forth. Without this information, social scientists could not use the UCR data in attempts to explain and predict crime. These complaints eventually led to the development of a much more informative system of crime reporting known as the National Incident Based Reporting System (NIBRS) .

The NIBRS is an incident-based reporting system in which agencies collect data on each single crime occurrence. NIBRS data come from local, state, and federal automated records' systems. The NIBRS collects data on each single incident and arrest within 22 offense categories made up of 46 specific crimes called Group A offenses. For each of the offenses coming to the attention of law enforcement, specified types of facts about each crime are reported. In addition to the Group A offenses, there are 11 Group B offense categories for which only arrest data are reported.

According to the FBI, participating in NIBRS can benefit agencies in several ways. The benefits of participating in the NIBRS are:

- The NIBRS can furnish information on nearly every major criminal justice issue facing law enforcement today, including terrorism, white collar crime, weapons offenses, missing children where criminality is involved, drug/narcotics offenses, drug involvement in all offenses, hate crimes, spousal abuse, abuse of the elderly, child abuse, domestic violence, juvenile crime/gangs, parental abduction, organized crime, pornography/child pornography, driving under the influence, and alcohol-related offenses.
- Using the NIBRS, legislators, municipal planners/administrators, academicians, sociologists, and the public will have access to more comprehensive crime information than the summary reporting can provide.
- The NIBRS produces more detailed, accurate, and meaningful data than the traditional summary reporting. Armed with such information, law enforcement can better make a case to acquire the resources needed to fight crime.
- The NIBRS enables agencies to find similarities in crime-fighting problems so that agencies can work together to develop solutions or discover strategies for addressing the issues.
- Full participation in the NIBRS provides statistics to enable a law enforcement agency to provide a full accounting of the status of public safety within the jurisdiction to the police commissioner, police chief, sheriff, or director.

The major problem with NIBRS today is that is has not been universally implemented. Agencies and state Programs are still in the process of developing, testing, or implementing the NIBRS. In 2004, 5,271 law enforcement agencies contributed NIBRS data to the UCR Program. The data from those agencies represent 20 percent of the U.S. population and 16 percent of the crime statistics collected by the UCR Program. Implementation of NIBRS is occurring at a pace commensurate with the resources, abilities, and limitations of the contributing law enforcement agencies.

A commonly cited problem with the UCR is that there are many, many crimes that do not come to the attention of police. This is not limited to minor offenses. For example, it is estimated that nearly half of all rapes go unreported. These undocumented offenses are often referred to as the dark figure of crime . This is the reason that the United States is the Bureau of Justice Statistics' (BJS)

developed the National Crime Victimization Survey (NCVS) . The NCVS, which began in 1973, provides a detailed picture of crime incidents, victims, and trends. Today, the survey collects detailed information on the frequency and nature of the crimes of rape, sexual assault, personal robbery, aggravated and simple assault, household burglary, theft, and motor vehicle theft. It does not measure homicide or commercial crimes (such as burglaries of stores).

Two times a year, U.S. Census Bureau personnel interview household members in a nationally representative sample of approximately 42,000 households (about 75,000 people). Approximately 150,000 interviews of persons age 12 or older are conducted annually. Households stay in the sample for three years. New households are rotated into the sample on an ongoing basis.

The NCVS collects information on crimes suffered by individuals and households, whether or not those crimes were reported to law enforcement. It estimates the proportion of each crime type reported to law enforcement, and it summarizes the reasons that victims give for reporting or not reporting.

The survey provides information about victims (age, sex, race, ethnicity, marital status, income, and educational level), offenders (sex, race, approximate age, and victim-offender relationship), and the crimes (time and place of occurrence, use of weapons, nature of injury, and economic consequences). Questions also cover the experiences of victims with the criminal justice system, self-protective measures used by victims, and possible substance abuse by offenders. Supplements are added periodically to the survey to obtain detailed information on topics like school crime. BJS publication of NCVS data includes Criminal Victimization in the United States, an annual report that covers the broad range of detailed information collected by the NCVS.

Pin It! National Crime Victimization Survey

To learn more about the National Crime Victimization Survey (NCVS), visit the BJS Criminal Victimization page at: http://www.ojp.usdoj.gov/bjs/cvictgen.htm

Index Crimes

The Federal Bureau of Investigation (FBI) designates certain crimes as Part I or index offenses because it considers them both serious and frequently reported to the police. The Part I offenses are defined as follows:

Criminal homicide : Murder and nonnegligent manslaughter: the willful (nonnegligent) killing of one human being by another. Deaths caused by negligence, attempts to kill, assaults to kill, suicides, and accidental deaths are excluded.

Forcible rape : The carnal knowledge of a female forcibly and against her will. Rapes by force and attempts or assaults to rape, regardless of the age of the victim, are included. Statutory offenses (no force used, victim under age of consent) are excluded.

Robbery : The taking or attempting to take anything of value from the care, custody, or control of a person or persons by force or threat of force or violence and/or by putting the victim in fear.

Aggravated assault : An unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury. This type of assault usually is accompanied by the use of a weapon or by means likely to produce death or great bodily harm. Simple assaults are excluded.

Burglary (breaking or entering) : The unlawful entry of a structure to commit a felony or a theft. Attempted forcible entry is included.

Larceny-theft (except motor vehicle theft) : The unlawful taking, carrying, leading, or riding away of property from the possession or constructive possession of another. Examples are thefts of bicycles, motor vehicle parts and accessories, shoplifting, pocket picking, or the stealing of any property or article that is not taken by force and violence or by fraud. Attempted larcenies are included. Embezzlement, confidence games, forgery, check fraud, etc., are excluded.

Motor vehicle theft : The theft or attempted theft of a motor vehicle. A motor vehicle is self-propelled and runs on land surface and not on rails. Motorboats, construction equipment, airplanes, and farming equipment are specifically excluded from this category.

Arson : Any willful or malicious burning or attempt to burn, with or without intent to defraud, a dwelling house, public building, motor vehicle or aircraft, personal property of another, etc.

Key Terms
Aggravated Assault, Arson, Burglary, Common Law Felonies, Criminal Homicide, Dark Figure of Crime, Felon, Forcible Rape, Index Offenses, Larceny-theft, Mala In Se, Mala Prohibita, Misdemeanant, Motor Vehicle Theft, National Crime Victimization Survey (NCVS), National Incident Based Reporting System (NIBRS), Omission, Rate, Robbery, U.S. Census Bureau, Uniform Crime Reports (UCR), Victimless Crime, Violation

Overview of Crime Trends [36]

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

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

The Federal Bureau of Investigation's (FBI's) Uniform Crime Reports (UCR) is the largest, most common data on crime currently available. The UCR lists the number of crimes that were reported to the police and the number of arrests made.

Pin It! Uniform Crime Reports

The link below can take you to the UCR homepage https://www.fbi.gov/services/cjis/ucr

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

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

Hate Crime Statistics

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

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

Race/Ethnicity/Ancestry

- Anti-American Indian or Alaska Native
- Anti-Arab
- Anti-Asian
- Anti-Black or African American

- Anti-Hispanic or Latino
- Anti-Multiple Races, Group
- Anti-Native Hawaiian or Other Pacific Islander
- Anti-Other Race/Ethnicity/Ancestry
- Anti-White

Religion

- Anti-Buddhist
- Anti-Catholic
- Anti-Eastern Orthodox (Russian, Greek, Other)
- Anti-Hindu
- Anti-Islamic
- Anti-Jehovah's Witness
- Anti-Jewish
- Anti-Mormon
- Anti-Multiple Religions, Group
- Anti-Other Christian
- Anti-Other Religion
- Anti-Protestant
- Anti-Atheism/Agnosticism/etc.

Sexual Orientation

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

Disability

- Anti-Mental Disability
- Anti-Physical Disability

Gender

- Anti-Male
- Anti-Female

Gender Identity

- Anti-Transgender
- Anti-Gender Non-Conforming

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

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

Law Enforcement Officers Killed and Assaulted Program LEOKA

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



Figure 2.4 LEOKA Data [37]

Exclusions from the LEOKA Program's Data Collection

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

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

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

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

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

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

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2.3: Crime Patterns

Crime Patterns [38]

Learning Objectives

- Explain why males commit more crime than females.
- Discuss whether social class differences exist in crime rates.
- Discuss whether racial/ethnic differences exist in crime rates.

While people from all walks of life commit street crime, some people are still more likely than others to break the law because of their social backgrounds. These social backgrounds include their gender, age, social class, urban/rural residence, and race and ethnicity. Despite their inaccuracies, the three data sources discussed in the first section of this chapter all provide a similar picture of what kinds of people, in terms of their social backgrounds, are more or less likely to commit street crime. We briefly discuss each background in turn.

Gender

Simply put, males commit much more crime than females. In UCR data, men comprise about 81 percent of all arrests for violent crime and about 63 percent of all arrests for property crime. In the NCVS, victims report that males commit most of the violent crimes they experienced, and self-report studies find that males far outpace females in the commission of serious street offenses. When it comes to breaking the law, crime is a man's world.

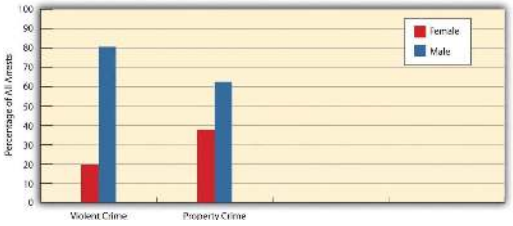


Figure 2.4 Gender and Arrest (Percentage of All Arrests) [39]

The key question is why such a large gender difference exists. Some scholars attribute this difference to biological differences between the sexes, but most criminologists attribute it to sociological factors. One of these is gender role socialization: Despite greater recognition of gender roles, we continue to raise our boys to be assertive and aggressive, while we raise our girls to be gentle and nurturing (Lindsey, 2011). Such gender socialization has many effects, and one of these is a large gender difference in criminal behavior. A second factor is opportunity. Studies find that parents watch their daughters more closely than they watch their sons, who are allowed to stay out later at night and thus have more opportunity to break the law.



Figure 2.5 Males have higher crime rates than females. An important reason for this gender difference is that boys are socialized to be assertive and aggressive, while girls are socialized to be gentle and nurturing. [40]

Age

Age also makes a difference in criminal behavior: Offending rates are highest in the late teens and early twenties and decline thereafter. Accordingly, people in the 15–24 age range account for about 40 percent of all arrests even though they comprise only about 14 percent of the population.

Several factors again seem to account for this pattern (Shoemaker, 2010). First, peer relationships matter more during this time of one's life than later, and peers are also more likely during this period than later to be offenders themselves. For both reasons, our peer relationships during our teens and early twenties are more likely than those in our later years to draw us into crime. Second, adolescents and young adults are more likely than older adults to lack full-time jobs; for this reason, they are more likely to need money and thus to commit offenses to obtain money and other possessions. Third, as we age out of our early twenties, our ties to conventional society increase: Many people marry, have children, and begin full-time employment, though not necessarily in that order. These events and bonds increase our stakes in conformity, to use some social science jargon, and thus reduce our desire to break the law (Laub, Sampson, & Sweeten, 2006).

Social Class

Findings on social class differences in crime are less clear than they are for gender or age differences. Arrests statistics and much research indicate that poor people are much more likely than wealthier people to commit street crime. However, some scholars attribute the greater arrests of poor people to social class bias against them. Despite this possibility, most criminologists would probably agree that social class differences in criminal offending are "unmistakable" (Harris & Shaw, 2000, p. 138). Reflecting this conclusion, one sociologist has even noted, with tongue only partly in cheek, that social scientists know they should not "stroll the streets at night in certain parts of town or even to park there" and that areas of cities that frighten them are "not upper-income neighborhoods" (Stark, 1987, p. 894). Thus, social class does seem to be associated with street crime, with poor individuals doing more than their fair share.

Explanations of this relationship center on the effects of poverty, which, as the next section will discuss further, is said to produce anger, frustration, and economic need and to be associated with a need for respect and with poor parenting skills and other problems that make children more likely to commit antisocial behavior when they reach adolescence and beyond. These effects combine to lead poor people to be more likely than wealthier people to commit street crime, even if it is true that most poor people do not commit street crime at all.

Although the poor are more likely than the wealthy to commit street crime, it is also true that the wealthy are much more likely than the poor to commit white-collar crime, which, as argued earlier, can be much more harmful than street crime. If we consider both street crime and white-collar crime, then there does not appear to be a social class-crime relationship, since the poor have higher rates of the former and the wealthy have higher rates of the latter.

Urban versus Rural Residence

Where we live also makes a difference for our likelihood of committing crime. We saw earlier that big cities have a much higher homicide rate than small towns. This trend exists for violent crime and property crime more generally. Urban areas have high crime

rates in part because they are poor, but poverty by itself does not completely explain the urban-rural difference in crime, since many rural areas are poor as well. A key factor that explains the higher crime rates of urban areas is their greater population density (Stark 1987). When many people live close together, they come into contact with one another more often. This fact means that teenagers and young adults have more peers to influence them to commit crime, and it also means that potential criminals have more targets (people and homes) for their criminal activity. Urban areas also have many bars, convenience stores, and other businesses that can become targets for potential criminals, and bars, taverns, and other settings for drinking can obviously become settings where tempers flare and violence ensues.

Race and Ethnicity

In discussing who commits crime, any discussion of race and ethnicity is bound to arouse controversy because of the possibility of racial and ethnic stereotyping. But if we can say that men and younger people have relatively high crime rates without necessarily sounding biased against individuals who are male or younger, then it should be possible to acknowledge that certain racial and ethnic groups have higher crime rates without sounding biased against them.

Keeping this in mind, race and ethnicity do seem to be related to criminal offending. In particular, much research finds that African Americans and Latinos have higher rates of street crime than non-Latino whites. For example, although African Americans comprise about 13 percent of the US population, they account for about 39 percent of all arrests for violent crime.

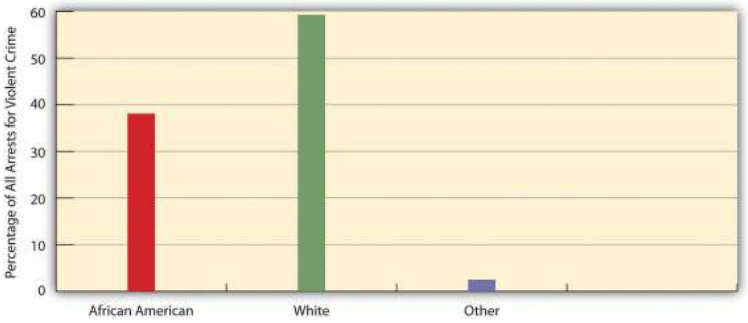


Figure 2.6 Race and Arrest for Violent Crime (Percentage of All Violent Crime Arrests) [41]

Latinos also have higher crime rates than non-Latino whites, but lower rates than those for African Americans. Although racial and ethnic bias by the criminal justice system may account for some of these racial/ethnic differences in offending, most criminologists agree that such differences do in fact exist for serious street crimes (Walker, Spohn, & DeLone, 2012).

Why do these differences exist? A racist explanation would attribute them to biological inferiority of the groups, African Americans and Latinos, with the relatively high rates of offending. Such explanations were popular several generations ago but fortunately lost favor as time passed and attitudes changed. Today, scholars attribute racial/ethnic differences in offending to several sociological factors (Unnever & Gabbidon, 2011). First, African Americans and Latinos are much poorer than whites on the average, and poverty contributes to higher crime rates. Second, they are also more likely to live in urban areas, which, as we have seen, also contribute to higher crime rates. Third, the racial and ethnic discrimination they experience leads to anger and frustration that in turn can promote criminal behavior. Although there is less research on Native Americans' criminality, they, too, appear to have higher crime rates than whites because of their much greater poverty and experience of racial discrimination (McCarthy & Hagan, 2003).

In appreciating racial/ethnic differences in street crime rates, it is important to keep in mind that whites commit most white-collar crime, and especially corporate crime, as it is white people who lead and manage our many corporations. Just as social class affects

the type of crime that people do, so do race and ethnicity. Wealthy, white people commit much crime, but it is white-collar crime they tend to commit, not street crime.

Key Takeaways

- Males commit more street crime than females, in part because of gender role socialization that helps make males more assertive and aggressive.
- Young people commit a disproportionate amount of street crime, in part because of the influence of their peers and their lack of stakes in conformity.
- The disproportionate involvement of African Americans and Latinos in street crime arises largely from their poverty and urban residence.

Review

- If we say that males commit more crime than females, does that imply that we are prejudiced against males? Why or why not?
- Write a brief essay that outlines social class and racial/ethnic differences in street crime and explains the reasons for these differences.

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2.4: Victim Patterns

Victim Patterns [42]

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

Typologies of Crime Victims

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

Mendelsohn's Typology of Crime Victims

Table 2.2 Types of Victims

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

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

Von Hentig's Typology

Table 2.3 Von Hentig's Typology

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

Von Hentig's work was the basis for later theories of victim precipitation . Victim precipitation suggests many victims play a role in their victimization. First, the victim acted first during the course of the offense, and second that the victim instigated the commission of the offense. [6] It is important to note that criminologists were attempting to demonstrate that victims may have some role in the victimization and are not truly innocent. Today we often recognize the role in victimization without blaming the individual because ultimately the person who offended is the person who offended.

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CHAPTER OVERVIEW

3: Theories of Criminology

3.1: Theories

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3.1: Theories

Theories

Punishments (like imprisonment, fines, infliction of pain, or death) are imposed by authorities when criminal laws or regulations are broken. These punishments are called criminal sanctions . Views on criminal sanctions vary widely, but what people believe to be appropriate is largely determined by the theory of punishment to which they subscribe. That is, people tend to agree with the theory of punishment that is most likely to generate the outcome they believe is the correct one. This system of beliefs about the purposes of punishment often spills over into the political arena. Politics and correctional policy are intricately related. Many of the changes seen in corrections policy in the United States during this time were a reflection of the political climate of the day. During the more liberal times of the 1960s and 1970s, criminal sentences were largely the domain of the judicial and executive branches of government. The role of the legislatures during this period was to design sentencing laws with rehabilitation as the primary goal. During the politically conservative era of the 1980s and 1990s, lawmakers took much of that power away from the judicial and executive branches. Much of the political rhetoric of this time was about “getting tough on crime.” The correctional goals of retribution, incapacitation, and deterrence became dominate, and rehabilitation was shifted to a distant position.

Rational Choice Theory [43]

It has been a popular notion throughout the ages that fear of punishment can reduce or eliminate undesirable behavior. This notion has always been popular among criminal justice thinkers. These ideas have been formalized in several different ways. The Utilitarian philosopher Jeremy Bentham is credited with articulating the three elements that must be present if deterrence is to work: The punishment must be administered with celerity, certainty, and appropriate severity. These elements are applied under a type rational choice theory . Rational choice theory is the simple idea that people think about committing a crime before they do it. If the rewards of the crime outweigh the punishment, then they do the prohibited act. If the punishment is seen as outweighing the rewards, then they do not do it. Sometimes criminologists borrow the phrase cost-benefit analysis from economists to describe this sort of decision-making process.

When evaluating whether deterrence works or not, it is important to differentiate between general deterrence and specific deterrence. General deterrence is the idea that every person punished by the law serves as an example to others contemplating the same unlawful act. Specific deterrence is the idea that the individuals punished by the law will not commit their crimes again because they “learned a lesson.”

Critics of deterrence theory point to high recidivism rates as proof that the theory does not work. Recidivism means a relapse into crime. In other words, those who are punished by the criminal justice system tend to reoffend at a very high rate. Some critics also argue that rational choice theory does not work. They argue that such things as crimes of passion and crimes committed by those under the influence of drugs and alcohol are not the product of a rational cost-benefit analysis.

As unpopular as rational choice theories may be with particular schools of modern academic criminology, they are critically important to understanding how the criminal justice system works. This is because nearly the entire criminal justice system is based on rational choice theory . The idea that people commit crimes because they decide to do so is the very foundation of criminal law in the United States. In fact, the intent element must be proven beyond a reasonable doubt in almost every felony known to American criminal law before a conviction can be secured. Without a culpable mental state , there is no crime (with very few exceptions).

Incapacitation

Incapacitation is a very pragmatic goal of criminal justice. The idea is that if criminals are locked up in a secure environment, they cannot go around victimizing everyday citizens. The weakness of incapacitation is that it works only as long as the offender is locked up. There is no real question that incapacitation reduces crime by some degree. The biggest problem with incapacitation is the cost. There are high social and moral costs when the criminal justice system takes people out of their homes, away from their families, and out of the workforce and lock them up for a protracted period. In addition, there are very heavy financial costs with this model. Very long prison sentences result in very large prison populations which require a very large prison industrial complex. These expenses have placed a crippling financial burden on many states.

Rehabilitation

Rehabilitation is a noble goal of punishment by the state that seeks to help the offender become a productive, noncriminal member of society. Throughout history, there have been several different notions as to how this help should be administered. When our modern correctional system was forming, this was the dominate model. We can see by the very name corrections that the idea was to help the offender become a non-offender. Education programs, faith-based programs, drug treatment programs, anger management programs, and many others are aimed at helping the offender "get better."

Overall, rehabilitation efforts have had poor results when measured by looking at recidivism rates. Those that the criminal justice system tried to help tend to reoffend at about the same rate as those who serve prison time without any kind of treatment. Advocates of rehabilitation point out that past efforts failed because they were underfunded, ill-conceived, or poorly executed. Today's drug courts are an example of how we may be moving back toward a more rehabilitative model, especially with first time and nonviolent offenders.

Retribution

Retribution means giving offenders the punishment they deserve. Most adherents to this idea believe that the punishment should fit the offense. This idea is known as the doctrine of proportionality . Such a doctrine was advocated by early Italian criminologist Cesare Beccaria who viewed the harsh punishments of his day as being disproportionate to many of the crimes committed. The term just desert is often used to describe a deserved punishment that is proportionate to the crime committed.

In reality, the doctrine of proportionality is difficult to achieve. There is no way that the various legislatures can go about objectively measuring criminal culpability. The process is one of legislative consensus and is imprecise at best.

A Racist System?

The United States today can be described as both multiracial and multiethnic. This has led to racism . Racism is the belief that members of one race are inferior to members of another race. Because white Americans of European heritage are the majority, racism in America usually takes on the character of whites against racial and ethnic minorities. Historically, these ethnic minorities have not been given equal footing on such important aspects of life as employment, housing, education, healthcare, and criminal justice. When this unequal treatment is willful, it can be referred to as racial discrimination . The law forbids racial discrimination in the criminal justice system, just as it does in the workplace.

Disproportionate minority contact refers to the disproportionate number of minorities who come into contact with the criminal justice system. Disproportionate minority contact is a problem in both the adult and juvenile systems at every level of those systems. As the gatekeepers of the criminal justice system, the police are often accused of discriminatory practices.

Courts are not immune to cries of racism from individuals and politically active groups. The American Civil Liberties Union (2014), for example, states, "African-Americans are incarcerated for drug offenses at a rate that is 10 times greater than that of whites."

The literature on disproportionate minority sentencing distinguishes between legal and extralegal factors . Legal factors are those things that we accept as legitimately, as a matter of law, mitigating or aggravating criminal sentences. Such things as the seriousness of the offense and the defendant's prior criminal record fall into this category. Extralegal factors include things like class, race, and gender. These are regarded as illegitimate factors in determining criminal sentences. They have nothing to do with the defendant's criminal behavior, and everything to do with the defendant's status as a member of a particular group.

One way to measure racial disparity is to compare the proportion of people that are members of a particular group (their proportion in the general population) with the proportion or that group at a particular stage in the criminal justice system. In 2013, the Bureau of the Census (Bureau of the Census, 2014) estimated that African Americans made up 13.2% of the population of the United States. According to the FBI, 28.4% of all arrestees were African American. From this information we can see that the proportion of African Americans arrested was just over double what one would expect.

The disparity is more pronounced when it comes to drug crime. According to the NAACP (2014), "African Americans represent 12% of the total population of drug users, but 38% of those arrested for drug offenses, and 59% of those in state prison for a drug offense."

There are three basic explanations for these disparities in the criminal justice system. The first is individual racism . Individual racism refers to a particular person's beliefs, assumptions, and behaviors. This type of racism manifests itself when the individual police officer, defense attorney, prosecutor, judge, parole board member, or parole officer is bigoted. Another explanation of racial disparities in the criminal justice system is institutional racism . Institutional racism manifests itself when departmental policies (both formal and informal), regulations, and laws result in unfair treatment of a particular group. A third (and controversial) explanation is differential involvement in crime. The basic idea is that African Americans and Hispanics are involved in more criminal activity. Often this is tied to social problems such as poor education, poverty, and unemployment.

While it does not seem that bigotry is present in every facet of the criminal and juvenile justice systems, it does appear that there are pockets of prejudice within both systems. It is difficult to deny the data: Discrimination does take place in such areas as use of force by police and the imposition of the death penalty. Historically, nowhere was the disparity more discussed and debated than in federal drug policy. While much has recently changed with the passage of the Fair Sentencing Act of 2010 , federal drug law was a prime example of institutional racism at work.

Under former law, crimes involving crack cocaine were punished much, much more severely than powder cocaine. The law had certain harsh penalties that were triggered by weight, and a provision that required one hundred times more powder than crack. Many deemed the law racist because the majority of arrests for crack cocaine were of African Americans, and the majority of arrests for powder cocaine were white. African American defendants have appealed their sentences based on Fourteenth Amendment equal protection claims.

Biosocial Theory [44]

A biological theory of deviance proposes that an individual deviates from social norms largely because of their biological makeup.

Learning Objective

- Outline the main assumptions of three biological theories of deviance.

Key Points

- A biological interpretation of formal deviance was first advanced by the Italian School of Criminology, a school of thought originating from Italy during the mid-nineteenth century.
- The school was headed by medical criminologist Cesare Lombroso, who argued that criminality was a biological trait found in some human beings. The term Lombroso used to describe the appearance of organisms resembling ancestral forms of life is atavism.
- The idea of atavism drew a connection between an individual's appearance and their biological propensity to deviate from social norms.
- Enrico Ferri took this idea farther, arguing that anyone convicted of a crime should be detained for as long as possible. According to Ferri's line of thought, if individuals committed crimes because of their biological constitution, what was the point of deterrence or rehabilitation?
- Garofalo is perhaps best known for his efforts to formulate a "natural" definition of crime. According to his view, those who violate human universal laws are themselves "unnatural".

Key Terms

- penology : The processes devised and adopted for the punishment and prevention of crime.
- atavism : The reappearance of an ancestral characteristic in an organism after several generations of absence.
- Italian School of Criminology : The Italian school of criminology was founded at the end of the 19th century by Cesare Lombroso (1835–1909) and two of his Italian disciples, Enrico Ferri (1856–1929) and Raffaele Garofalo (1851–1934).

A biological theory of deviance proposes that an individual deviates from social norms largely because of their biological makeup. The theory primarily pertains to formal deviance, using biological reasons to explain criminality, though it can certainly extend to informal deviance.

Cesare Lombroso

A biological interpretation of formal deviance was first advanced by the Italian School of Criminology, a school of thought originating from Italy during the mid-nineteenth century. The school was headed by medical criminologist Cesare Lombroso, who argued that criminality was a biological trait found in some human beings. Enrico Ferri and Raffaelo Garofalo continued the Italian School as Lombroso's predecessors. The Italian School was interested in why some individuals engaged in criminal behavior and others did not. Their explanation was that some individuals had a biological propensity for crime.

The term Lombroso used to describe the appearance of organisms resembling ancestral forms of life is atavism. He believed that atavism was a sign of inherent criminalities, and thus he viewed born criminals as a form of human sub-species. Lombroso believed that atavism could be identified by a number of measurable physical stigmata - protruding jaw, drooping eyes, large ears, twisted and flattish nose, long arms relative to the lower limbs, sloping shoulders, and a coccyx that resembled "the stump of a tail. " The concept of atavism was glaringly wrong, but like so many others of his time, Lombroso sought to understand behavioral phenomena with reference to the principles of evolution as they were understood at the time.



Figure 3.1 Cesare Lombroso: Cesare Lombroso argued that criminality was a biological trait found in some human beings [45]

Enrico Ferri

Lombroso's work was continued by Erico Ferri's study of penology, the section of criminology that is concerned with the philosophy and practice of various societies in their attempt to repress criminal activities. Ferri's work on penology was instrumental in developing the "social defense" justification for the detention of individuals convicted of crimes. Ferri argued that anyone convicted of a crime should be detained for as long as possible. According to Ferri's line of thought, if individuals committed crimes because of their biological constitution, what was the point of deterrence or rehabilitation? For Ferri, none of these therapeutic interventions could change the offender's biology, making them pointless. After an individual had been convicted of a crime, the state 's responsibility was to protect the community and prevent the criminal from doing more harm—as his biology determined he would do.

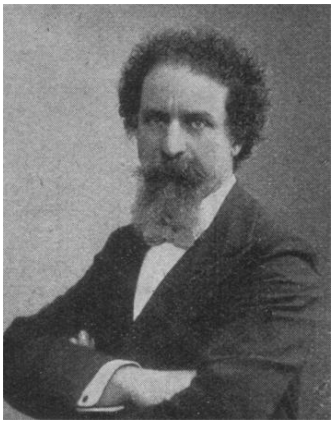


Figure 3.2 Enrico Ferri: Lombroso's work was continued by Erico Ferri's study of penology, the section of criminology that is concerned with the philosophy and practice of various societies in their attempt to repress criminal activities [46] .

Raffaelo Garofalo

Garofalo is perhaps best known for his efforts to formulate a “natural” definition of crime. Classical thinkers accepted the legal definition of crime uncritically; crime is what the law says it is. This appeared to be rather arbitrary and “unscientific” to Garofalo, who wanted to anchor the definition of crime in something natural. Most significant was Garofalo’s reformulation of classical notions of crime and his redefinition of crime as a violation of natural law, or a human universal.

A human universal is a trait, characteristic, or behavior that exists across cultures, regardless of the nuances of a given context. A famous example of a universal is the incest taboo. Exempting a very small number of small communities, all human cultures have a taboo against incest in some form. Garofalo’s presentation of crime as a violation of a human universal allows for one to characterize criminals as unnatural. As soon as criminals are marked as inhuman or unnatural, the public has license to think of an individual convicted of a crime as completely unlike the rest of society; a whole new range of punishments are authorized, including serious social stigmatization.

Biological Theories Today

Italian School biological explanations have not resonated in criminal justice systems in America. However, some traces still exist. Now, the conversation about crime and biological explanations focuses more on the relationship between genetics and crime than the relationship between phenotypic features and crime. Because the modern emphasis is on actual genetics rather than phenotypic expressions of genes, stereotyping of individuals with “criminal” traits or propensities is more difficult. For example, when walking down the street, you can tell who has a protruding jaw, but you can’t tell who has the genetic combination that increases one’s propensity for aggression. Though the debate has mutated, a biological explanation for deviance and crime is still commonplace.

Psychological Theories

Psychodynamic Theory [47]

Learning Objectives

- Describe the assumptions of the psychodynamic perspective on personality development.
- Define and describe the nature and function of the id, ego, and superego.
- Define and describe the defense mechanisms.
- Define and describe the psychosexual stages of personality development.

Sigmund Freud (1856–1939) is probably the most controversial and misunderstood psychological theorist. When reading Freud’s theories, it is important to remember that he was a medical doctor, not a psychologist. There was no such thing as a degree in psychology at the time that he received his education, which can help us understand some of the controversy over his theories today. However, Freud was the first to systematically study and theorize the workings of the unconscious mind in the manner that we associate with modern psychology.

In the early years of his career, Freud worked with Josef Breuer, a Viennese physician. During this time, Freud became intrigued by the story of one of Breuer’s patients, Bertha Pappenheim, who was referred to by the pseudonym Anna O. (Launer, 2005). Anna O. had been caring for her dying father when she began to experience symptoms such as partial paralysis, headaches, blurred vision, amnesia, and hallucinations (Launer, 2005). In Freud’s day, these symptoms were commonly referred to as hysteria. Anna O. turned to Breuer for help. He spent 2 years (1880–1882) treating Anna O. and discovered that allowing her to talk about her experiences seemed to bring some relief of her symptoms. Anna O. called his treatment the “talking cure” (Launer, 2005). Despite the fact the Freud never met Anna O., her story served as the basis for the 1895 book, Studies on Hysteria , which he co-authored with Breuer. Based on Breuer’s description of Anna O.’s treatment, Freud concluded that hysteria was the result of sexual abuse in childhood and that these traumatic experiences had been hidden from consciousness. Breuer disagreed with Freud, which soon ended their work together. However, Freud continued to work to refine talk therapy and build his theory on personality.

Levels of Consciousness

To explain the concept of conscious versus unconscious experience, Freud compared the mind to an iceberg. He said that only about one-tenth of our mind is conscious, and the rest of our mind is unconscious. Our unconscious refers to that mental activity of which we are unaware and are unable to access (Freud, 1923). According to Freud, unacceptable urges and desires are kept in our unconscious through a process called repression. For example, we sometimes say things that we don’t intend to say by

unintentionally substituting another word for the one we meant. You've probably heard of a Freudian slip, the term used to describe this. Freud suggested that slips of the tongue are actually sexual or aggressive urges, accidentally slipping out of our unconscious. Speech errors such as this are quite common. Seeing them as a reflection of unconscious desires, linguists today have found that slips of the tongue tend to occur when we are tired, nervous, or not at our optimal level of cognitive functioning (Motley, 2002).

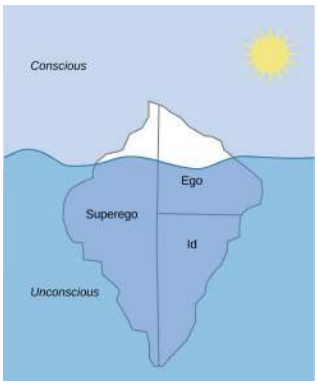


Figure 3.3 Freud believed that we are only aware of a small amount of our mind's activities and that most of it remains hidden from us in our unconscious. The information in our unconscious affects our behavior, although we are unaware of it. [48]

According to Freud, our personality develops from a conflict between two forces: our biological aggressive and pleasure-seeking drives versus our internal (socialized) control over these drives. Our personality is the result of our efforts to balance these two competing forces. Freud suggested that we can understand this by imagining three interacting systems within our minds. He called them the id, ego, and superego ([link]).

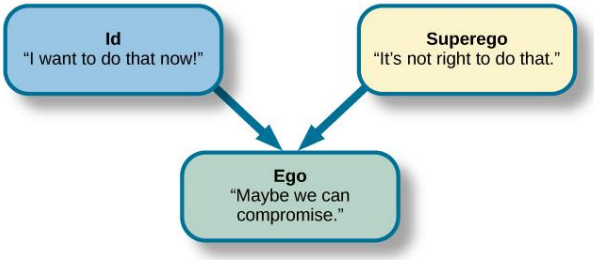


Figure 3.4 The job of the ego, or self, is to balance the aggressive/pleasure-seeking drives of the id with the moral control of the superego . [49]

The unconscious id contains our most primitive drives or urges and is present from birth. It directs impulses for hunger, thirst, and sex. Freud believed that the id operates on what he called the "pleasure principle," in which the id seeks immediate gratification. Through social interactions with parents and others in a child's environment, the ego and superego develop to help control the id. The superego develops as a child interacts with others, learning the social rules for right and wrong. The superego acts as our conscience; it is our moral compass that tells us how we should behave. It strives for perfection and judges our behavior, leading to feelings of pride or—when we fall short of the ideal—feelings of guilt. In contrast to the instinctual id and the rule-based superego, the ego is the rational part of our personality. It's what Freud considered to be the self, and it is the part of our personality that is seen by others. Its job is to balance the demands of the id and superego in the context of reality; thus, it operates on what Freud called the "reality principle." The ego helps the id satisfy its desires in a realistic way.

The id and superego are in constant conflict, because the id wants instant gratification regardless of the consequences, but the superego tells us that we must behave in socially acceptable ways. Thus, the ego's job is to find the middle ground. It helps satisfy the id's desires in a rational way that will not lead us to feelings of guilt. According to Freud, a person who has a strong ego, which can balance the demands of the id and the superego, has a healthy personality. Freud maintained that imbalances in the system can lead to neurosis (a tendency to experience negative emotions), anxiety disorders, or unhealthy behaviors. For example, a person who is dominated by their id might be narcissistic and impulsive. A person with a dominant superego might be controlled by feelings of guilt and deny themselves even socially acceptable pleasures; conversely, if the superego is weak or absent, a person might become a psychopath. An overly dominant superego might be seen in an over-controlled individual whose rational grasp on

reality is so strong that they are unaware of their emotional needs, or, in a neurotic who is overly defensive (overusing ego defense mechanisms).

Defense Mechanisms

Freud believed that feelings of anxiety result from the ego's inability to mediate the conflict between the id and superego. When this happens, Freud believed that the ego seeks to restore balance through various protective measures known as defense mechanisms (learn more about Freud's ego defense mechanisms). When certain events, feelings, or yearnings cause an individual anxiety, the individual wishes to reduce that anxiety. To do that, the individual's unconscious mind uses ego defense mechanisms, unconscious protective behaviors that aim to reduce anxiety. The ego, usually conscious, resorts to unconscious strivings to protect the ego from being overwhelmed by anxiety. When we use defense mechanisms, we are unaware that we are using them. Further, they operate in various ways that distort reality. According to Freud, we all use ego defense mechanisms.

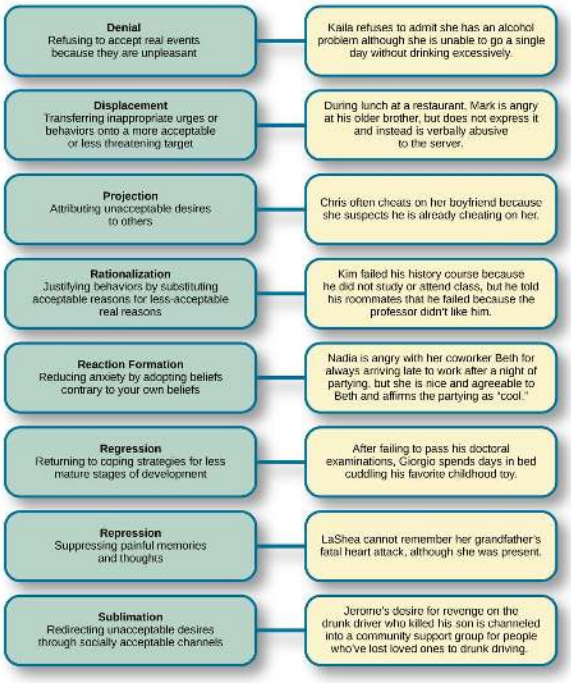


Figure 3.4 Defense mechanisms are unconscious protective behaviors that work to reduce anxiety. [50]

While everyone uses defense mechanisms, Freud believed that overuse of them may be problematic. For example, let's say Joe Smith is a high school football player. Deep down, Joe feels sexually attracted to males. His conscious belief is that being gay is immoral and that if he were gay, his family would disown him, and he would be ostracized by his peers. Therefore, there is a conflict between his conscious beliefs (being gay is wrong and will result in being ostracized) and his unconscious urges (attraction to males). The idea that he might be gay causes Joe to have feelings of anxiety. How can he decrease his anxiety? Joe may find himself acting very "macho," making gay jokes, and picking on a school peer who is gay. This way, Joe's unconscious impulses are further submerged.

There are several different types of defense mechanisms. For instance, in repression, anxiety-causing memories from consciousness are blocked. As an analogy, let's say your car is making a strange noise, but because you do not have the money to get it fixed, you just turn up the radio so that you no longer hear the strange noise. Eventually you forget about it. Similarly, in the human psyche, if a memory is too overwhelming to deal with, it might be repressed and thus removed from conscious awareness (Freud, 1920). This repressed memory might cause symptoms in other areas.

Another defense mechanism is reaction formation, in which someone expresses feelings, thoughts, and behaviors opposite to their inclinations. In the above example, Joe made fun of a homosexual peer while himself being attracted to males. In regression, an individual acts much younger than their age. For example, a four-year-old child who resents the arrival of a newborn sibling may act like a baby and revert to drinking out of a bottle. In projection, a person refuses to acknowledge her own unconscious feelings and instead sees those feelings in someone else. Other defense mechanisms include rationalization, displacement, and sublimation.

Stages of Psychosexual Development

Freud believed that personality develops during early childhood: Childhood experiences shape our personalities as well as our behavior as adults. He asserted that we develop via a series of stages during childhood. Each of us must pass through these childhood stages, and if we do not have the proper nurturing and parenting during a stage, we will be stuck, or fixated, in that stage, even as adults.

In each psychosexual stage of development, the child's pleasure-seeking urges, coming from the id, are focused on a different area of the body, called an erogenous zone. The stages are oral, anal, phallic, latency, and genital (learn more about psychosexual stages of development).

Freud's psychosexual development theory is quite controversial. To understand the origins of the theory, it is helpful to be familiar with the political, social, and cultural influences of Freud's day in Vienna at the turn of the 20th century. During this era, a climate of sexual repression, combined with limited understanding and education surrounding human sexuality, heavily influenced Freud's perspective. Given that sex was a taboo topic, Freud assumed that negative emotional states (neuroses) stemmed from suppression of unconscious sexual and aggressive urges. For Freud, his own recollections and interpretations of patients' experiences and dreams were sufficient proof that psychosexual stages were universal events in early childhood.

Table 3.1 Freud's Stages of Psychosexual Development

Stage	Age (years)	Erogenous Zone	Major Conflict	Adult Fixation Example
Oral	0–1	Mouth	Weaning off breast or bottle	Smoking, overeating
Anal	1–3	Anus	Toilet training	Neatness, messiness
Phallic	3–6	Genitals	Oedipus/Electra complex	Vanity, overambition
Latency	6–12	None	None	None
Genital	12+	Genitals	None	None

Oral Stage

In the oral stage (birth to 1 year), pleasure is focused on the mouth. Eating and the pleasure derived from sucking (nipples, pacifiers, and thumbs) play a large part in a baby's first year of life. At around 1 year of age, babies are weaned from the bottle or breast, and this process can create conflict if not handled properly by caregivers. According to Freud, an adult who smokes, drinks, overeats, or bites her nails is fixated in the oral stage of her psychosexual development; she may have been weaned too early or too late, resulting in these fixation tendencies, all of which seek to ease anxiety.

Anal Stage

After passing through the oral stage, children enter what Freud termed the anal stage (1–3 years). In this stage, children experience pleasure in their bowel and bladder movements, so it makes sense that the conflict in this stage is over toilet training. Freud suggested that success at the anal stage depended on how parents handled toilet training. Parents who offer praise and rewards encourage positive results and can help children feel competent. Parents who are harsh in toilet training can cause a child to become fixated at the anal stage, leading to the development of an anal-retentive personality. The anal-retentive personality is stingy and stubborn, has a compulsive need for order and neatness, and might be considered a perfectionist. If parents are too lenient in toilet training, the child might also become fixated and display an anal-expulsive personality. The anal-expulsive personality is messy, careless, disorganized, and prone to emotional outbursts.

Phallic Stage

Freud's third stage of psychosexual development is the phallic stage (3–6 years), corresponding to the age when children become aware of their bodies and recognize the differences between boys and girls. The erogenous zone in this stage is the genitals. Conflict arises when the child feels a desire for the opposite-sex parent, and jealousy and hatred toward the same-sex parent. For boys, this is called the Oedipus complex, involving a boy's desire for his mother and his urge to replace his father who is seen as a

rival for the mother's attention. At the same time, the boy is afraid his father will punish him for his feelings, so he experiences castration anxiety . The Oedipus complex is successfully resolved when the boy begins to identify with his father as an indirect way to have the mother. Failure to resolve the Oedipus complex may result in fixation and development of a personality that might be described as vain and overly ambitious.

Girls experience a comparable conflict in the phallic stage—the Electra complex. The Electra complex, while often attributed to Freud, was actually proposed by Freud's protégé, Carl Jung (Jung & Kerenyi, 1963). A girl desires the attention of her father and wishes to take her mother's place. Jung also said that girls are angry with the mother for not providing them with a penis—hence the term penis envy . While Freud initially embraced the Electra complex as a parallel to the Oedipus complex, he later rejected it, yet it remains as a cornerstone of Freudian theory, thanks in part to academics in the field (Freud, 1931/1968; Scott, 2005).

Following the phallic stage of psychosexual development is a period known as the latency period (6 years to puberty). This period is not considered a stage, because sexual feelings are dormant as children focus on other pursuits, such as school, friendships, hobbies, and sports. Children generally engage in activities with peers of the same sex, which serves to consolidate a child's gender-role identity.

Genital Stage

The final stage is the genital stage (from puberty on). In this stage, there is a sexual reawakening as the incestuous urges resurface. The young person redirects these urges to other, more socially acceptable partners (who often resemble the other-sex parent). People in this stage have mature sexual interests, which for Freud meant a strong desire for the opposite sex. Individuals who successfully completed the previous stages, reaching the genital stage with no fixations, are said to be well-balanced, healthy adults.

While most of Freud's ideas have not found support in modern research, we cannot discount the contributions that Freud has made to the field of psychology. It was Freud who pointed out that a large part of our mental life is influenced by the experiences of early childhood and takes place outside of our conscious awareness; his theories paved the way for others.

Summary

Sigmund Freud presented the first comprehensive theory of personality. He was also the first to recognize that much of our mental life takes place outside of our conscious awareness. Freud also proposed three components to our personality: the id, ego, and superego. The job of the ego is to balance the sexual and aggressive drives of the id with the moral ideal of the superego. Freud also said that personality develops through a series of psychosexual stages. In each stage, pleasure focuses on a specific erogenous

zone. Failure to resolve a stage can lead one to become fixated in that stage, leading to unhealthy personality traits. Successful resolution of the stages leads to a healthy adult.

SELF CHECK QUESTIONS

Critical Thinking Questions:

- How might the common expression “daddy’s girl” be rooted in the idea of the Electra complex?
- Describe the personality of someone who is fixated at the anal stage.

Personal Application Questions:

- What are some examples of defense mechanisms that you have used yourself or have witnessed others using?

Answers:

- 1. Since the idea behind the Electra complex is that the daughter competes with her same-sex parent for the attention of her opposite-sex parent, the term “daddy’s girl” might suggest that the daughter has an overly close relationship with her father and a more distant—or even antagonistic—relationship with her mother.
- 2. If parents are too harsh during potty training, a person could become fixated at this stage and would be called anal retentive. The anal-retentive personality is stingy, stubborn, has a compulsive need for order and neatness, and might be considered a perfectionist. On the other hand, some parents may be too soft when it comes to potty training. In this case, Freud said that children could also become fixated and display an anal-expulsive personality. As an adult, an anal-expulsive personality is messy, careless, disorganized, and prone to emotional outbursts.

GLOSSARY

- anal stage: psychosexual stage in which children experience pleasure in their bowel and bladder movements
- conscious: mental activity (thoughts, feelings, and memories) that we can access at any time
- defense mechanism: unconscious protective behaviors designed to reduce ego anxiety
- displacement: ego defense mechanism in which a person transfers inappropriate urges or behaviors toward a more acceptable or less threatening target
- ego: aspect of personality that represents the self, or the part of one’s personality that is visible to others
- genital stage: psychosexual stage in which the focus is on mature sexual interests
- id: a spect of personality that consists of our most primitive drives or urges, including impulses for hunger, thirst, and sex
- latency period: psychosexual stage in which sexual feelings are dormant
- neurosis: tendency to experience negative emotions
- oral stage: psychosexual stage in which an infant’s pleasure is focused on the mouth
- phallic stage: psychosexual stage in which the focus is on the genitals
- projection: ego defense mechanism in which a person confronted with anxiety disguises their unacceptable urges or behaviors by attributing them to other people
- psychosexual stages of development: stages of child development in which a child’s pleasure-seeking urges are focused on specific areas of the body called erogenous zones
- rationalization: ego defense mechanism in which a person confronted with anxiety makes excuses to justify behavior
- reaction formation: ego defense mechanism in which a person confronted with anxiety swaps unacceptable urges or behaviors for their opposites
- regression: ego defense mechanism in which a person confronted with anxiety returns to a more immature behavioral state
- repression: ego defense mechanism in which anxiety-related thoughts and memories are kept in the unconscious
- sublimation: ego defense mechanism in which unacceptable urges are channeled into more appropriate activities
- superego: aspect of the personality that serves as one’s moral compass, or conscience
- unconscious: mental activity of which we are unaware and unable to access

Behavioral/Social Learning Theory [51]

Behavioral Learning Theory

Operant Conditioning and Repeating Actions

Operant Conditioning is another learning theory that emphasizes a more conscious type of learning than that of classical conditioning. A person (or animal) does something (operates something) to see what effect it might bring. Simply said, operant

conditioning describes how we repeat behaviors because they pay off for us. It is based on a principle authored by a psychologist named Thorndike (1874–1949) called the law of effect. The law of effect suggests that we will repeat an action if it is followed by a good effect.

Skinner and Reinforcement

B.F. Skinner (1904–1990) expanded on Thorndike's principle and outlined the principles of operant conditioning. Skinner believed that we learn best when our actions are reinforced. For example, a child who cleans his room and is reinforced (rewarded) with a big hug and words of praise is more likely to clean it again than a child whose deed goes unnoticed. Skinner believed that almost anything could be reinforced. A reinforcer is anything following a behavior that makes it more likely to occur again. It can be something intrinsically rewarding (called intrinsic or primary reinforcers), such as food or praise, or it can be something that is rewarding because it can be exchanged for what one really wants (such as money to buy a cookie). Such reinforcers are referred to as secondary reinforcers or extrinsic reinforcers.

Positive and Negative Reinforcement

Sometimes, adding something to the situation is reinforcing as in the cases we described previously with cookies, praise, and money. Positive reinforcement involves adding something to the situation in order to encourage a behavior. Other times, taking something away from a situation can be reinforcing. For example, the loud, annoying buzzer on your alarm clock encourages you to get up so that you can turn it off and get rid of the noise. Children whine in order to get their parents to do something and often, parents give in just to stop the whining. In these instances, negative reinforcement has been used.

Operant conditioning tends to work best if you focus on trying to encourage a behavior or move a person into the direction you want them to go rather than telling them what not to do. Reinforcers are used to encourage a behavior; punishers are used to stop behavior. A punisher is anything that follows an act and decreases the chance it will reoccur. But often a punished behavior doesn't really go away. It is just suppressed and may reoccur whenever the threat of punishment is removed. For example, a motorist may only slow down when the highway patrol is on the side of the freeway. Another problem with punishment is that when a person focuses on punishment, they may find it hard to see what the other does right or well. And punishment is stigmatizing; when punished, some start to see themselves as bad and give up trying to change.

Reinforcement can occur in a predictable way, such as after every desired action is performed, or intermittently, after the behavior is performed a number of times or the first time it is performed after a certain amount of time. The schedule of reinforcement has an impact on how long a behavior continues after reinforcement is discontinued. So, a parent who has rewarded a child's actions each time may find that the child gives up very quickly if a reward is not immediately forthcoming. Think about the kinds of behaviors you may have learned through classical and operant conditioning. You may have learned many things in this way. But sometimes we learn very complex behaviors quickly and without direct reinforcement. Bandura explains how. (6)

Social Learning Theory

Albert Bandura is a leading contributor to social learning theory. He calls our attention to the ways in which many of our actions are not learned through conditioning; rather, they are learned by watching others (1977). Young children frequently learn behaviors through imitation. Sometimes, particularly when we do not know what else to do, we learn by modeling or copying the behavior of others. An employee on his or her first day of a new job might eagerly look at how others are acting and try to act the same way to fit in more quickly. Adolescents struggling with their identity rely heavily on their peers to act as role models. Newly married couples often rely on roles they may have learned from their parents and begin to act in ways they did not while dating and then wonder why their relationship has changed. Sometimes we do things because we've seen it pay off for someone else. They were operantly conditioned, but we engage in the behavior because we hope it will pay off for us as well. This is referred to as vicarious reinforcement (Bandura, Ross and Ross, 1963).

Do Parents Socialize Children or Do Children Socialize Parents?

Bandura (1986) suggests that there is interplay between the environment and the individual. We are not just the product of our surroundings; rather, we influence our surroundings. There is interplay between our personality and the way we interpret events and how they influence us. This concept is called reciprocal determinism. An example of this might be the interplay between parents and children . Parents not only influence their child's environment, perhaps intentionally through the use of reinforcement, etc., but children influence parents as well. Parents may respond differently with their first child than with their fourth. Perhaps they try to

be the perfect parents with their firstborn, but by the time their last child comes along they have very different expectations both of themselves and their child. Our environment creates us, and we create our environment.

Other social influences: TV or not TV? Bandura (et al. 1963) began a series of studies to look at the impact of television commercials on the behavior of children. Are children more likely to act out aggressively when they see this behavior modeled? What if they see it being reinforced? Bandura began by conducting an experiment in which he showed children a film of a woman hitting an inflatable clown or "bobo" doll. Then the children were allowed in the room where they found the doll and immediately began to hit it. This was without any reinforcement whatsoever. Later children viewed a woman hitting a real clown and sure enough, when allowed in the room, they too began to hit the clown! Not only that, but they found new ways to behave aggressively. It's as if they learned an aggressive role. (6)

Strictly speaking, behavioral theories are not developmental theories. Both Freud and Erikson were interested in developmental stages and how we change across time. Behavioral theories believe that reinforcers and punishers function the same regardless of age or stage of development, which is why they are psychological theories, but not developmental theories. (1)

Cognitive Theory [52]

When applied to explaining why people commit crimes, cognitive psychology focuses on how people learn to solve social problems.

Piaget (1932) was the first cognitive psychologists to argue that people's reasoning abilities develop in a predictable, orderly way. He believed that during the first stage of development (what he called the "sensor-motor stage"), children respond to their social environment in a simple way by focusing their attention on interesting objects and developing motor skills. By the final stage of the development (what he called the "formal operations stage"), children have developed into mature adults who are capable of complex reasoning and abstract thought.

Kohlberg

In 1969, Kohlberg applied this concept of moral development to criminal behavior. According to his work, there are six fundamental stages in moral development. The most basic type of moral development is avoiding the prohibited behavior out of fear of punishment. By the time the person reaches the sixth and final stage, universal principles such as justice, concern for others, and a sense of equity motivate behavior. According to Kohlberg's research findings, violent youth had stunted moral development when compared to nonviolent youth. This relationship held even when the social background of participants was controlled statistically. Simply put, people who have empathy and concern for others are much less likely to commit crimes of violence than those who avoid violence merely because they fear punishment.

This in essence holds that the criminal calculus of the Utilitarians actually does play a role in criminal behavior, but it is the simplest and least dependable behavioral drive when it comes to criminality. Kohlberg's research also connected higher levels of moral development to prosocial behaviors such as altruism and generosity. Such individuals can be counted on to act according to social norms regardless of what formal social controls are in place. Those with lower levels of moral reasoning will act more in accordance with perceived self-interest, and formal social controls will play a much larger role in predicting their behavior. They are likely to engage in crime when they calculate that they can "get away with it." Society can depend on those with high levels of moral development to do the right thing simply because it is the right thing to do.

Other researchers from the field of cognitive psychology have considered the role of information processing in criminality. A large body of research in this field suggests that when people make decisions, they engage in a series of complex thought processes. The basic model of behavior from this perspective is that a stimulus occurs in the person's environment; the person then decodes and interprets the stimuli. They then must search for a proper reaction to the stimuli, and when one is decided upon, the person acts on the decision. Some researchers in this field have hypothesized that violent behavior may be the result of the individual using information incorrectly to make decisions. I person with a history of violence, for example, may tend to see others as more aggressive or more dangerous than is appropriate. This may in turn evoke a violent response with only minimal provocation. An aggressive person, the theory suggest, would tend toward hypervigilance and suspicion of others. This in turn would increase the occurrence of violent behavior. Very few individual self-report violence against another person merely out of spite or rage; while this does happen, the majority of violent individuals explain that their actions were taken in self-defense. A more rational analysis of the circumstances preceding the act of violence may reveal that the level of threat was grossly exaggerated in the mind of the

actor. It has been further suggested that many violent, predatory criminals fail to realize—because of information processing errors—that their behavior is as harmful as it is to victims. They simply do not recognize the harm that they are causing.

Personality Theory [53]

In personality theory, the problem lies not in unconscious motivation, but in the content of the person's personality. The basic proposition here is that criminals have abnormal, inadequate personality traits that differentiate them from law-abiding people.

One version Explains criminal behavior as an expression of such deviant personality traits as impulsiveness, aggressiveness, sensation seeking, rebelliousness, hostility, and so on.

Another Version Claims that criminals differ from law-abiding persons in basic personality type. Conformity reflects a normal personality. Serious criminal violations spring from an aberrant personality, variously labeled as psychopathic, antisocial, or sociopath personality. These labels are applied to self-centered persons who have not been properly socialized into prosocial attitudes and values, which have developed no sense of right and wrong, and no empathy with others, no remorse for wrongs committed.

Evaluation is problematic: The concept is so broad that it can be applied to anyone who violates the law. Estimates range from 10% to 80% of offenders, depending on the definition. Some definitions use measures of criminal activity to determine personality disorders—creating a tautology.

The research using personality inventories and other methods of measuring personality characteristics have not been able to produce findings to support personality variables as major causes of criminal and delinquent behavior.

According to this perspective, criminals should be treated as sick people who are not responsible in any rational sense. Punishment will not help; only create more guilt and make things worse. Once underlying emotional problems are fixed criminality will go away.

Psychoanalytic treatment: The criminal must undergo psychoanalytic treatment to help him uncover the repressed causes of the behavior, which lies hidden in the unconscious. The objective is to reveal to the person's conscious mind the deep-seated unconscious motivations driving criminality—then it can be handled by the conscious mind.

Social Structure Theories [54]

Social structure theories all stress that crime results from the breakdown of society's norms and social organization. They trace the roots of crime to problems in the society itself rather than to biological or psychological problems inside individuals. By doing so, they suggest the need to address society's social structure in order to reduce crime. Several social structure theories exist.

Strain Theory [55]

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

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

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

Everyone is aware of the definition and promotion of the American dream. When someone does not achieve this goal, he or she may feel strain or pressure. A person could be rejected or blocked from achieving a cultural goal. Merton claimed there were five personality adaptations between the goals of a society and the means to achieve them.

Table 3.2 Personality Adaptations

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

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

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

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

control issues (trouble in school, parents, employers) as well as facilitate social learning (joining peers who also need to vent their frustration). Overall, criminal behavior serves a purpose – to escape strain, stress, or pressure.



Think About It… Coping Mechanisms

Every-one feels stress and each of us copes with stress, pressure, or shame differently. Shame can motivate us to change for the better. For example, if you did poorly on an exam, you may start to study better. When you feel stress, what do you do? When I ask students how they deal with stress, many go for a run or a walk, lift weights, cry, talk, or eat ice cream. These are normal and generally pro-social coping mechanism. When I feel stress, I write. Sometimes, I write angry emails and then delete them. Fortunately, I have never accidently sent one.

Cultural Deviance Theory [56]

Cultural deviance theory suggests that conformity to the prevailing cultural norms of lower-class society causes crime. Researchers Clifford Shaw and Henry McKay (1942) studied crime patterns in Chicago in the early 1900s. They found that violence and crime were at their worst in the middle of the city and gradually decreased the farther someone traveled from the urban center toward the suburbs. Shaw and McKay noticed that this pattern matched the migration patterns of Chicago citizens. New immigrants, many of them poor and lacking knowledge of the English language, lived in neighborhoods inside the city. As the urban population expanded, wealthier people moved to the suburbs and left behind the less privileged.

Shaw and McKay concluded that socioeconomic status correlated to race and ethnicity resulted in a higher crime rate. The mix of cultures and values created a smaller society with different ideas of deviance, and those values and ideas were transferred from generation to generation.

The theory of Shaw and McKay has been further tested and expounded upon by Robert Sampson and Byron Groves (1989). They found that poverty, ethnic diversity, and family disruption in given localities had a strong positive correlation with social disorganization. They also determined that social disorganization was, in turn, associated with high rates of crime and delinquency —or deviance. Recent studies Sampson conducted with Lydia Bean (2006) revealed similar findings. High rates of poverty and single-parent homes correlated with high rates of juvenile violence.

Social Process Theories

Social Conflict Theory [57]

Conflict theory sees society as a dynamic entity constantly undergoing change as a result of competition over scarce resources.

Learning Objective

- Identify the tenets of and contributors to conflict theory, as well as the criticisms made against it

Key Points

- Conflict theory sees social life as a competition, and focuses on the distribution of resources, power, and inequality.
- Unlike functionalist theory, conflict theory is better at explaining social change, and weaker at explaining social stability.
- Conflict theory has been critiqued for its inability to explain social stability and incremental change.
- Conflict theory derives from the ideas of Karl Marx.

Key Terms

- conflict theory : A social science perspective that holds that stratification is dysfunctional and harmful in society, with inequality perpetuated because it benefits the rich and powerful at the expense of the poor.
- functionalism : Structural functionalism, or simply functionalism, is a framework for building theory that sees society as a complex system whose parts work together to promote solidarity and stability.

The conflict perspective, or conflict theory, derives from the ideas of Karl Marx, who believed society is a dynamic entity constantly undergoing change driven by class conflict. Whereas functionalism understands society as a complex system striving for equilibrium, the conflict perspective views social life as competition. According to the conflict perspective, society is made up of individuals competing for limited resources (e.g., money, leisure, sexual partners, etc.). Competition over scarce resources is at the heart of all social relationships. Competition, rather than consensus, is characteristic of human relationships. Broader social structures and organizations (e.g., religions, government, etc.) reflect the competition for resources and the inherent inequality competition entails; some people and organizations have more resources (i.e., power and influence), and use those resources to maintain their positions of power in society.

C. Wright Mills is known as the founder of modern conflict theory. In his work, he believes social structures are created because of conflict between differing interests. People are then impacted by the creation of social structures, and the usual result is a differential of power between the " elite " and the "others". Examples of the "elite" would be government and large corporations. G. William Domhoff believes in a similar philosophy as Mills and has written about the "power elite of America".

Sociologists who work from the conflict perspective study the distribution of resources, power, and inequality. When studying a social institution or phenomenon, they ask, "Who benefits from this element of society? "

Conflict Theory and Change

While functionalism emphasizes stability, conflict theory emphasizes change. According to the conflict perspective, society is constantly in conflict over resources, and that conflict drives social change. For example, conflict theorists might explain the civil rights movements of the 1960s by studying how activists challenged the racially unequal distribution of political power and economic resources. As in this example, conflict theorists generally see social change as abrupt, even revolutionary, rather than incremental. In the conflict perspective, change comes about through conflict between competing interests, not consensus or adaptation. Conflict theory, therefore, gives sociologists a framework for explaining social change, thereby addressing one of the problems with the functionalist perspective.

Criticism of Conflict Theory

Predictably, conflict theory has been criticized for its focus on change and neglect of social stability. Some critics acknowledge that societies are in a constant state of change but point out that much of the change is minor or incremental, not revolutionary. For example, many modern capitalist states have avoided a communist revolution, and have instead instituted elaborate social service programs. Although conflict theorists often focus on social change, they have, in fact, also developed a theory to explain social stability. According to the conflict perspective, inequalities in power and reward are built into all social structures. Individuals and groups who benefit from any particular structure strive to see it maintained. For example, the wealthy may fight to maintain their privileged access to higher education by opposing measures that would broaden access, such as affirmative action or public funding.

Developmental Theory [58]

The defining feature of developmental theory is its focus on offending in relation to changes over time in individuals and their life circumstances, with most research being focused in practice on childhood and adolescence.

As you probably realize by now, most theories and discussions of socialization concern childhood. However, socialization continues throughout the several stages of the life course, most commonly categorized as childhood, adolescence, adulthood, and old age. Within each of these categories, scholars further recognize subcategories, such as early adolescence and late adolescence, early adulthood and middle adulthood, and so forth. This section sketches some important aspects of the major life course stages.

Childhood

Despite increasing recognition of the entire life course, childhood (including infancy) certainly remains the most important stage of most people's lives for socialization and for the cognitive, emotional, and physiological development that is so crucial during the early years of anyone's life. We have already discussed what can happen if an infant does not receive "normal" socialization from at least one adult, and feral children are a sad reminder that socialization is necessary to produce an entity that not only looks human but really is human in the larger sense of the word.

Beyond this basic importance of childhood, however, lies an ugly truth. In regard to education, health, and other outcomes, many children do not fare well during childhood. Moreover, how well they do fare often depends on their social location—their social

class, their race and ethnicity, and their gender. The Federal Interagency Forum on Child and Family Statistics regularly publishes a report called America's Children: Key National Indicators of Well-Being (including a shorter version in some years). This report provides an annual update of how children are faring on more than three dozen measures. The Forum's latest report, published in July 2010, provided some disturbing facts about children's well-being, and it also showed the difference that social location makes for their well-being (Federal Interagency Forum on Child and Family Statistics, 2010).

In one important finding, only about 55% of children aged 3–5 and not in kindergarten had a family member read to them daily. This figure varied by income level. Only 40% of children in families below the poverty level profited in this way, compared to 64% of children whose families' incomes were at least twice as high as the poverty level.



Figure 3.1 About 55% of children aged 3–5 who are not in kindergarten have a family member read to them every day. Social class affects the likelihood of reading to children: only 40% of children in families below the poverty level are read to daily, compared to 64% of children in families with incomes twice the poverty level or higher. [59]

In other important findings, about one-fifth of U.S. children lived in poverty in 2008, a figure that rose to more than 30% of African American and Latino children. As well, slightly more than one-fifth of children were in families that sometimes were "food insecure," meaning they had trouble providing food for at least one family member. More than 40% of households with children in 2007 were characterized by crowded or physically inadequate conditions.

What happens during childhood can have lifelong consequences. Traumatic experiences during childhood—being neglected or abused, witnessing violence, being seriously injured, and so forth—put youngsters at much greater risk for many negative outcomes. They are more likely to commit serious delinquency during adolescence, and, throughout the life course, they are more likely to experience various psychiatric problems, learning disorders, and substance abuse. They are also less likely to graduate high school or attend college, to get married or avoid divorce if they do marry, and to gain and keep a job (Adams, 2010). The separate stages of the life course are really not that separate after all.

Adolescence

As many readers may remember, adolescence can be a very challenging time. Teenagers are no longer mere children, but they are not yet full adults. They want their independence, but parents and teachers keep telling them what to do. Peer pressure during adolescence can be enormous, and tobacco, alcohol, and other drug use become a serious problem for many teens.

These are all social aspects of adolescence, but adolescence also is a time of great biological change—namely, puberty. Puberty obviously has noticeable physiological consequences and, for many adolescents, at least one very important behavioral consequence—sexual activity. But early puberty also seems to have two additional effects: among both boys and girls, it increases the likelihood of delinquency and also the likelihood of becoming a victim of violence (Schreck, Burek, Stewart, & Miller, 2007). These twin consequences are thought to happen for at least two reasons. First, early puberty leads to stress, and stress leads to antisocial behavior (which can also result in violence against the teen committing the behavior). Second, teens experiencing early puberty (early maturers) are more likely to hang out with older teens, who tend to be more delinquent because they are older. Because their influence "rubs off," early maturers get into trouble more often and are again more likely to also become victims of violence.

Romantic relationships, including the desire to be in such a relationship, also matter greatly during adolescence. Wishful thinking, unrequited love, and broken hearts are common. Dating multiple partners is thought to contribute to delinquency and substance abuse, in part because dating occurs at parties and in other unsupervised settings where delinquency and drug use can occur, and in part because the emotional problems sometimes accompanying dating may result in delinquency, drug use, or both (Seffrin, Giordano, Manning, & Longmore, 2009).

As the discussion on childhood suggested, social class, race and ethnicity, and gender continue to affect the experiences of individuals during adolescence. Adolescence can certainly be an interesting stage of the life course, but how we fare during adolescence is often heavily influenced by these three fundamental aspects of our social location.

Emerging Adulthood

2008 was a year of financial upheaval in the United States. Rampant foreclosures and bank failures set off a chain of events sparking government distrust, loan defaults, and large-scale unemployment. How has this affected the United States' young adults?



Figure 3.2 Young Adults [60]

Millennials, sometimes also called Gen Y, is a term that describes the generation born during the early eighties to early nineties. While the recession was in full swing, many were in the process of entering, attending, or graduating from high school and college. With employment prospects at historical lows, large numbers of graduates were unable to find work, sometimes moving back in with their parents and struggling to pay back student loans.

According to the New York Times , this economic stall is causing the Millennials to postpone what most Americans consider to be adulthood: "The traditional cycle seems to have gone off course, as young people remain untethered to romantic partners or to permanent homes, going back to school for lack of better options, traveling, avoiding commitments, competing ferociously for unpaid internships or temporary (and often grueling) Teach for America jobs, forestalling the beginning of adult life" (Henig 2010). The term Boomerang Generation describes recent college graduates, for whom lack of adequate employment upon college graduation often leads to a return to the parental home (Davidson, 2014).

Emerging adulthood, as exemplified by the experience of many Millennials, is a relatively recent phase of the life span located between the adolescence and full-fledged adulthood. The term describes young adults who do not have children, do not live in their own home, or do not have sufficient income to become fully independent. Jeffrey Arnett (2000) suggests emerging adulthood is the distinct period between 18 and 25 years of age where adolescents become more independent and explore various life possibilities. Arnett argues that this developmental period can be isolated from adolescence and young adulthood. Emerging adulthood is proposed as a new developmental stage centered on "identity exploration, instability, self-focus, and feeling in-between". Arnett called this period "roleless role" because emerging adults do a wide variety of activities but are not constrained by any sort of "role requirements".

The five milestones that define adulthood, Henig writes, are "completing school, leaving home, becoming financially independent, marrying, and having a child" (Henig 2010). These social milestones are taking longer for Millennials to attain, if they're attained at all. Sociologists wonder what long-term impact this generation's situation may have on society as a whole.

Adulthood

Adulthood is usually defined as the 18–64 age span. Obviously, 18-year-olds are very different from 64-year-olds, which is why scholars often distinguish young adults from middle-age adults. In a way, many young adults, including most readers of this book, delay entrance into "full" adulthood by going to college after high school and, for some, then continuing to be a student in graduate or professional school. By the time the latter obtain their advanced degree, many are well into their 30s, and they finally enter the labor force full time perhaps a dozen years after people who graduate high school but do not go on to college. These latter individuals may well marry, have children, or both by the time they are 18 or 19, while those who go to college and especially those who get an advanced degree may wait until their late 20s or early to mid-30s to take these significant steps.



Figure 3.3 Marriage and parenthood are “turning points” in many young adults’ lives that help them to become more settled and to behave better than they might have behaved during adolescence. [61]

One thing is clear from studies of young adulthood: people begin to “settle down” as they leave their teenage years, and their behavior generally improves. At least two reasons account for this improvement. First, as scientists are increasingly recognizing, the teenaged brain is not yet fully mature physiologically. For example, the frontal lobe, the region of the brain that governs reasoning and the ability to consider the consequences of one’s actions, is not yet fully formed, leaving teenagers more impulsive. As the brain matures into the mid- and late 20s, impulsiveness declines and behavior improves (Ruder, 2008).

Second, as sociologists recognize, young adulthood is a time when people’s “stakes” in society and conformity become stronger. Many get married, some have children, and most obtain their first full-time job. These “turning points,” as they are called, instill a sense of responsibility and also increase the costs of misbehavior. If you are married, your spouse might not be very happy to have you go barhopping every weekend night or even more often; if you are employed full time, your employer might not be very happy to have you show up hung over. Marriage and employment as turning points thus help account for the general improvement in behavior that occurs after people reach adulthood (Laub, Sampson, & Sweeten, 2006).

Social class, race and ethnicity, and gender continue to affect how people fare during adulthood.

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CHAPTER OVERVIEW

4: Aspects of Law and Criminal Defenses

4.1: Criminal Law

4.2: Criminal Defenses

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4.1: Criminal Law

Learning Objectives

- Ascertain the basis for grading.
- Compare malum in se and malum prohibitum crimes.
- Compare the punishment options for felonies, misdemeanors, felony-misdemeanors, and infractions.
- Compare jail and prison.

Criminal Law [62]

Criminal law generally defines the rights and obligations of individuals in society. Some common issues in criminal law are the elements of specific crimes and the elements of various criminal defenses. Criminal procedure generally concerns the enforcement of individuals' rights during the criminal process. Examples of procedural issues are individuals' rights during law enforcement investigation, arrest, filing of charges, trial, and appeal.



Figure 4.1 Criminal Law [63]

Classifications of Law [64]

Crimes can be classified in many ways. Crimes also can be grouped by subject matter. For example, a crime like assault, battery, or rape tends to injure another person's body, so it can be classified as a "crime against the person." If a crime tends to injure a person by depriving him or her of property or by damaging property, it can be classified as a "crime against property." These classifications are basically for convenience and are not imperative to the study of criminal law.

More important and substantive is the classification of crimes according to the severity of punishment. This is called grading. Crimes are generally graded into four categories: felonies, misdemeanors, felony-misdemeanors, and infractions. Often the criminal intent element affects a crime's grading. Malum in se crimes, murder, for example, are evil in their nature and are generally graded higher than malum prohibitum crimes, which are regulatory, like a failure to pay income taxes.

Felonies

Felonies are the most serious crimes. They are either supported by a heinous intent, like the intent to kill, or accompanied by an extremely serious result, such as loss of life, grievous injury, or destruction of property. Felonies are serious, so they are graded the highest, and all sentencing options are available. Depending on the jurisdiction and the crime, the sentence could be execution, prison time, a fine, or alternative sentencing such as probation, rehabilitation, and home confinement. Potential consequences of a felony conviction also include the inability to vote, own a weapon, or even participate in certain careers.

Misdemeanors

Misdemeanors are less serious than felonies, either because the intent requirement is of a lower level or because the result is less extreme. Misdemeanors are usually punishable by jail time of one year or less per misdemeanor, a fine, or alternative sentencing like probation, rehabilitation, or community service. Note that incarceration for a misdemeanor is in jail rather than prison. The difference between jail and prison is that cities and counties operate jails, and the state or federal government operates prisons,

depending on the crime. The restrictive nature of the confinement also differs between jail and prison. Jails are for defendants who have committed less serious offenses, so they are generally less restrictive than prisons.

Felony-Misdemeanors

Felony-misdemeanors are crimes that the government can prosecute and punish as either a felony or a misdemeanor, depending on the particular circumstances accompanying the offense. The discretion whether to prosecute the crime as a felony or misdemeanor usually belongs to the judge , but in some instances the prosecutor can make the decision.

Infractions

Infractions, which can also be called violations, are the least serious crimes and include minor offenses such as jaywalking and motor vehicle offenses that result in a simple traffic ticket. Infractions are generally punishable by a fine or alternative sentencing such as traffic school.

Wobblers [65]

Although the above classification schemes may seem straightforward, sometimes states allow felonies to be treated as misdemeanors and misdemeanors to be treated as either felonies or violations. For example, California has certain crimes, known as wobblers , that can be charged as either felonies or misdemeanors at the discretion of the prosecutor upon consideration of the offender's criminal history or the specific facts of the case.

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

The difference between being charged with a felony or misdemeanor may have legal implications beyond the length of the offender's sentence and in what type of facility an offender will be punished. For example, in some jurisdictions, the authority of a police officer to arrest may be linked to whether the crime is considered a felony or a misdemeanor. In many states the classification impacts which court will have the authority to hear the case. In some states, the felony-misdemeanor classification determines the size of the jury.

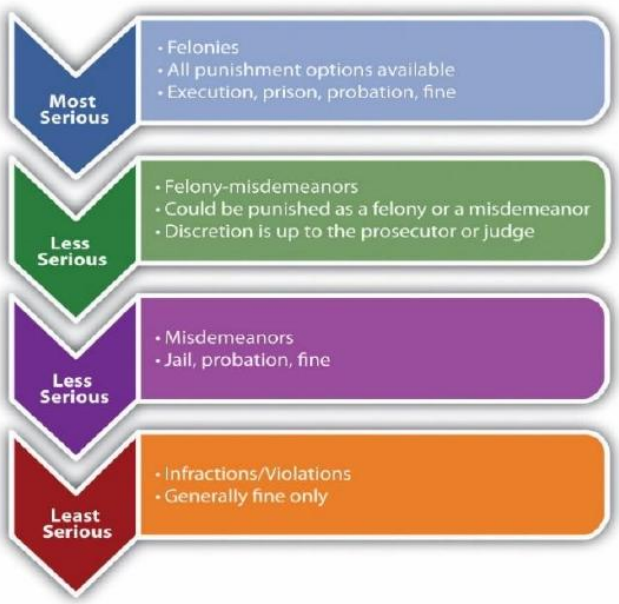


Figure 4.2 Diagram of Grading [66]

Key Takeaways

- Grading is based on the severity of punishment.
- Malum in se crimes are evil in their nature, like murder. Malum prohibitum crimes are regulatory, like a failure to pay income taxes.
- Felonies are graded the highest. Punishment options for felonies include the following:
- Execution
- Prison time
- Fines
- Alternative sentencing such as probation, rehabilitation, and home confinement
- Misdemeanors are graded lower than felonies. Punishment options for misdemeanors include the following:
- Jail time of one year or less per misdemeanor
- Fines
- Alternative sentencing such as probation, rehabilitation, and community service
- Felony-misdemeanors are punished as either a felony or a misdemeanor.
- Infractions, also called violations, are graded lower than misdemeanors and have less severe punishment options:
- Fines
- Alternative sentencing, such as traffic school
- One difference between jail and prison is that cities and counties operate jails, and the state or federal government operates prisons, depending on the crime. The restrictive nature of the confinement is another difference. Jails are for defendants who have committed less serious offenses, so they are generally less restrictive than prisons.

Sources of Law

Criminal Statute [67]

Crimes can be broken down into elements, which the prosecution must prove beyond a reasonable doubt. Criminal elements are set forth in criminal statutes , or cases in jurisdictions that allow for common-law crimes. With exceptions, every crime has at least three elements: a criminal act, also called actus reus; a criminal intent , also called mens rea; and concurrence of the two. The term conduct is often used to reflect the criminal act and intent elements. As the Model Penal Code explains, "'conduct' means an action or omission and its accompanying state of mind" (Model Penal Code § 1.13(5)).

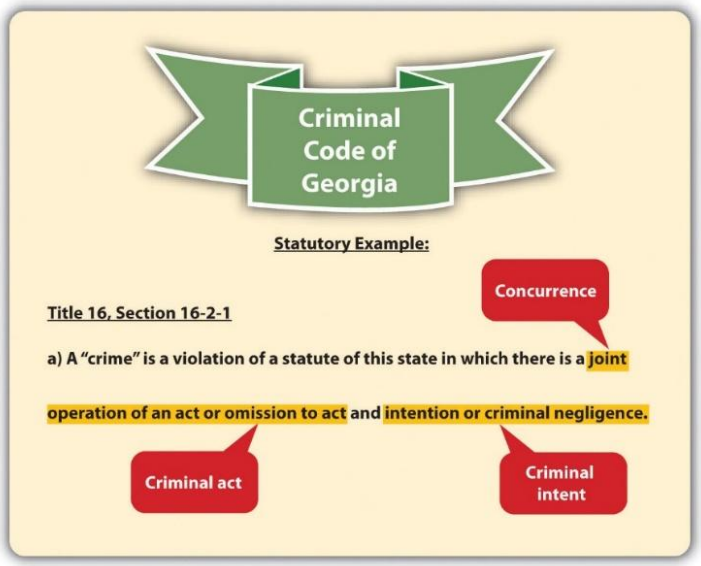


Figure 4.3 Criminal Code of Georgia [68]

Note, not all crimes require a bad result . If a crime does require a bad result, the prosecution must also prove the additional elements of causation and harm .

Another requirement of some crimes is attendant circumstances. Attendant circumstances are specified factors that must be present when the crime is committed. These could include the crime's methodology, location or setting, and victim characteristics, among others.

Case Law [69]

Another source of law is case law . When judges rule on the facts of a particular case, they create case law. Federal case law comes from federal courts, and state case law comes from state courts. Case law has its origins in English common law.

English Common Law

In Old England, before the settlement of the United States, case law was the most prevalent source of law. This was in contrast to countries that followed the Roman Law system, which primarily relied on written codes of conduct enacted by legislature. Case law in England was mired in tradition and local customs. Societal principles of law and equity were the guidelines when courts issued their rulings. In an effort to be consistent, English judges made it a policy to follow previous judicial decisions, thereby creating a uniform system of laws throughout the country for the first time. Case law was named common law because it was common to the entire nation (Duhaime, L., 2010).

The English system of jurisprudence made its way to the United States with the original colonists. Initially, the thirteen colonies unanimously adopted common law as the law of the land. All crimes were common-law crimes, and cases determined criminal elements, defenses, and punishment schemes. Gradually, after the Revolutionary War, hostility toward England and modern reform led to the erosion of common-law crimes and a movement toward codification. States began replacing common-law crimes with statutes enacted by state legislatures. Oxford professor Sir William Blackstone's Commentaries on the Law of England, which interpreted and summarized English common law, became an essential reference as the nation began the process of converting common-law principles into written statutes, ordinances, and penal codes (Duhaime, L., 2010).

Limitations on Common-Law Crimes

In modern society, in many states and the federal government (United States v. Hudson & Goodwin, 2010), judges cannot create crimes. This violates notions of fairness. Making up a new crime and punishing the defendant for it does not provide consistency or predictability to our legal system. It also violates the principle of legality, a core concept of American criminal justice embodied in this phrase: "Nullum crimen sine lege, nulla poena sine crimen" (No crime without law, no punishment without crime).

In states that do not allow common-law crimes, statutes must define criminal conduct. If no statute exists to criminalize the defendant's behavior, the defendant cannot be criminally prosecuted , even if the behavior is abhorrent. As the Model Penal Code

states, “[n]o conduct constitutes an offense unless it is a crime or violation under this Code or another statute of this State” (Model Penal Code § 1.05(1)).

The common law still plays an important role in criminal lawmaking, even though most crimes are now embodied in statutes. Classification of crimes as felonies and misdemeanors is a reflection of English common law. Legislatures often create statutes out of former common-law crimes. Judges look to the common law when defining statutory terms, establishing criminal procedure, and creating defenses to crimes. The United States is considered a common-law country. Every state except Louisiana, which is based on the French Civil Code, adopts the common law as the law of the state except where a statute provides otherwise (Legal Definition, 2010).

Example of a Court’s Refusal to Create a Common-Law Crime

Read Keeler v. Superior Court , 470 P.2d 617 (1970). In Keeler , the defendant attacked his pregnant ex-wife, and her baby was thereafter stillborn. The California Supreme Court disallowed a murder charge against Keeler under California Penal Code § 187 because the statute criminalized only the malicious killing of a “human being.” The court reached its decision after examining the common-law definition of human being and determining that the definition did not include a fetus. The court reasoned that it could not create a new crime without violating the due process clause, separation of powers, and California Penal Code § 6, which prohibits the creation of common-law crimes. After the Keeler decision, the California Legislature changed Penal Code § 187 to include a fetus, excepting abortion (Cal. Penal Code, 2010).

Powerful Nature of Case Law

Generally, if there is a statute on an issue, the statute is superior to case law, just as the Constitution is superior to statutory law. However, judges interpret constitutional and statutory law, making case law a powerful source of law. A judge can interpret a constitution in a way that adds or creates exceptions to its protections. A judge can also interpret a statute in a way that makes it unconstitutional and unenforceable. This is called the power of judicial review (Marbury v. Madison, 2010).

Example of Judicial Review

An example of judicial review is set forth in Texas v. Johnson , 491 U.S. 397 (1989). In Johnson , the US Supreme Court ruled that burning a flag is protected self-expression under the First Amendment to the US Constitution. Thus, the Court reversed the defendant’s conviction under a Texas statute that criminalized the desecration of a venerated object. Note how Johnson not only invalidates a state statute as being inferior to the US Constitution but also changes the US Constitution by adding flag burning to the First Amendment’s protection of speech.

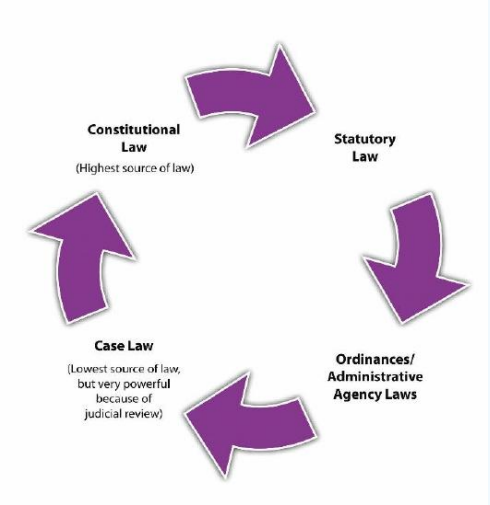


Figure 4.4: Diagram and Hierarchy of the Sources of Law [70]

Stare Decisis and Precedent

Cases are diverse, and case law is not really law until the judge rules on the case, so there must be a way to ensure case law’s predictability . It would not be fair to punish someone for conduct that is not yet illegal. Thus, judges adhere to a policy called stare

decisis. Stare decisis is derived from English common law and compels judges to follow rulings in previous cases. A previous case is called precedent. Once judges have issued a ruling on a particular case, the public can be assured that the resulting precedent will continue to be followed by other judges. Stare decisis is not absolute; judges can deviate from it to update the law to conform to society's modern expectations.

Rules of Stare Decisis and Use of Precedent

Case precedent is generally an appeal rather than a trial . There is often more than one level of appeal, so some appeals come from higher courts than others. This book discusses the court system, including the appellate courts, in Chapter 2 "The Legal System in the United States" .

Many complex rules govern the use of precedent . Lawyers primarily use precedent in their arguments, rather than statutes or the Constitution , because it is so specific. With proper research, lawyers can usually find precedent that matches or comes very close to matching the facts of any particular case. In the most general sense, judges tend to follow precedent that is newer , from a high court , and from the same court system , either federal or state.

Example of Stare Decisis and Use of Precedent

Geoffrey is a defense attorney for Conrad, who is on trial for first-degree murder. The murder prosecution is taking place in New Mexico. Geoffrey finds case precedent from a New York Court of Appeals, dated 1999, indicating that Conrad should have been prosecuted for voluntary manslaughter , not first-degree murder. Brandon, the prosecuting attorney, finds case precedent from the New Mexico Supreme Court , dated 2008 , indicating that a first-degree murder prosecution is appropriate. The trial court will probably follow the precedent submitted by Brandon because it is newer, from a higher court, and from the same court system as the trial.

Case Citation

Cases must be published to become case law. A published case is also called a judicial opinion. This book exposes you to many judicial opinions that you have the option of reading on the Internet. It is essential to understand the meaning of the case citation. The case citation is the series of numbers and letters after the title of the case and it denotes the case's published location. For example, let's analyze the case citation for Keeler v. Superior Court , 470 P.2d 617 (1970).

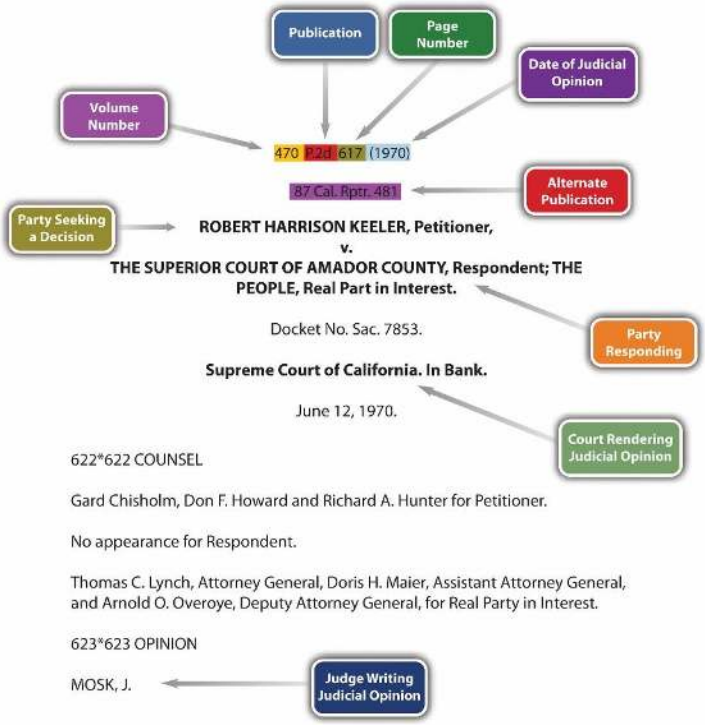


Figure 4.5 Keeler Case Citation [71]

As you can see from the diagram, the number 470 is the volume number of the book that published the Keeler case. The name of that book is “P.2d” (this is an abbreviation for Pacific Reports, 2d Series). The number 617 is the page number of the Keeler case. The date (1970) is the date the California Supreme Court ruled on the case.

Case Briefing

It is useful to condense judicial opinions into case brief format. The Keeler case brief is shown in the image below.

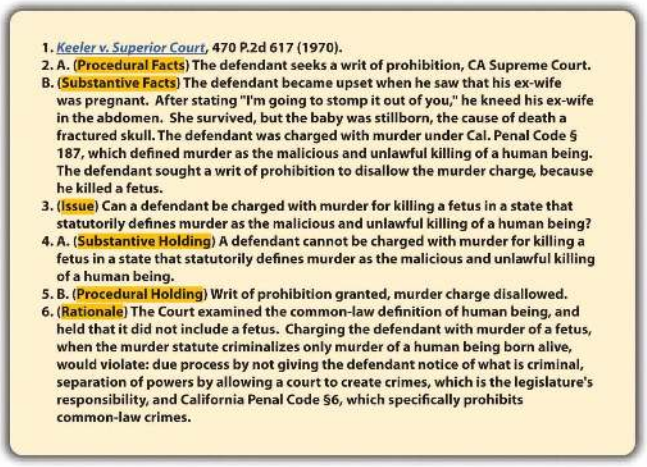

1. *Keeler v. Superior Court*, 470 P.2d 617 (1970).
2. A. (Procedural Facts) The defendant seeks a writ of prohibition, CA Supreme Court.
B. (Substantive Facts) The defendant became upset when he saw that his ex-wife was pregnant. After stating "I'm going to stomp it out of you," he kneed his ex-wife in the abdomen. She survived, but the baby was stillborn, the cause of death a fractured skull. The defendant was charged with murder under Cal. Penal Code § 187, which defined murder as the malicious and unlawful killing of a human being. The defendant sought a writ of prohibition to disallow the murder charge, because he killed a fetus.
3. (Issue) Can a defendant be charged with murder for killing a fetus in a state that statutorily defines murder as the malicious and unlawful killing of a human being?
4. A. (Substantive Holding) A defendant cannot be charged with murder for killing a fetus in a state that statutorily defines murder as the malicious and unlawful killing of a human being.
5. B. (Procedural Holding) Writ of prohibition granted, murder charge disallowed.
6. (Rationale) The Court examined the common-law definition of human being, and held that it did not include a fetus. Charging the defendant with murder of a fetus, when the murder statute criminalizes only murder of a human being born alive, would violate: due process by not giving the defendant notice of what is criminal, separation of powers by allowing a court to create crimes, which is the legislature's responsibility, and California Penal Code §6, which specifically prohibits common-law crimes.

Figure 4.6 Keeler Case Brief [72]

Pin It! Keeler Case

Follow this link for the full text of the Keeler case

Published judicial opinions are written by judges and can be lengthy. They can also contain more than one case law, depending on the number of issues addressed. Case briefs reduce a judicial opinion to its essentials and can be instrumental in understanding the most important aspects of the case. Standard case brief formats can differ, but one format that attorneys and paralegals commonly use is explained in the following paragraph.

Review the Keeler case brief. The case brief should begin with the title of the case , including the citation . The next component of the case brief should be the procedural facts . The procedural facts should include two pieces of information: who is appealing, and which court the case is in. As you can see from the Keeler case brief, Keeler brought an application for a writ of prohibition, and the court is the California Supreme Court. Following the procedural facts are the substantive facts , which should be a short description of the facts that instigated the court trial and appeal. The procedural and substantive facts are followed by the issue . The issue is the question the court is examining, which is usually the grounds for appeal. The case brief should phrase the issue as a question. Cases usually have more than one issue. The case brief can state all the issues or only the issue that is most important. The substantive holding comes after the issue, is actually the case law , and answers the issue question. If more than one issue is presented in the case brief, a substantive holding should address each issue.

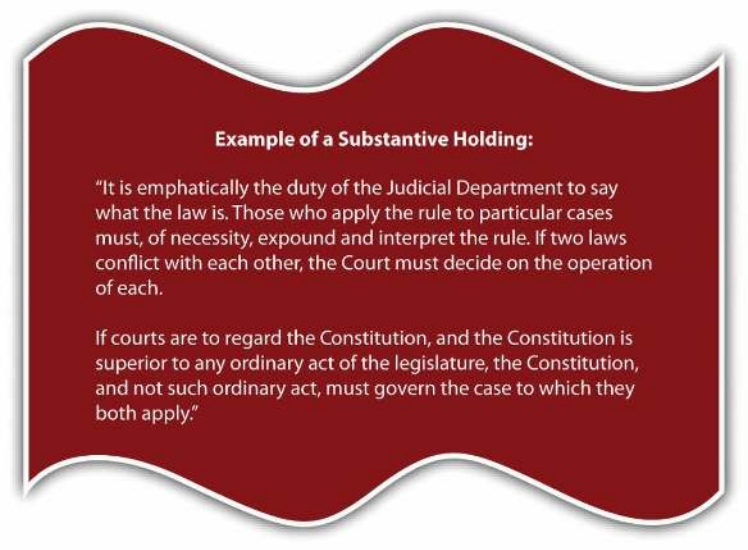


Figure 4.7 Example of a Substantive Holding [73]

Pin It! Marbury v Madison

Follow this link to read the full text of the Marbury v Madison case .

A procedural holding should follow the substantive holding. The procedural holding discusses what the court did procedurally with the case. This could include reversing the lower court's ruling, affirming the lower court's ruling, or adjusting a sentence issued by the lower court. Last, but still vital to the case brief, is the rationale . The rationale discusses the reasoning of the judges when ruling on the case. Rationales can set policy , which is not technically case law but can still be used as precedent in certain instances.

One judge writes the judicial opinion. Judges vote how to rule, and not all cases are supported by a unanimous ruling. Occasionally, other judges will want to add to the judicial opinion. If a judge agrees with the judicial opinion, the judge could write a concurring opinion , which explains why the judge agrees. If a judge disagrees with the judicial opinion, the judge could write a dissenting opinion explaining why the judge disagrees. The dissenting opinion will not change the judicial opinion, but it may also be used as precedent in a future case if there are grounds for changing the law.

Legal definition [74]

Actus Reus

Nobody can read minds, and the First Amendment means that people can say pretty much whatever they want. What you think and say (within limits) is protected. It is what you do-your behaviors-that the criminal law seeks to regulate. Lawyers use the legal Latin phrase actus reus to describe this element of a crime. It is commonly translated into English as the guilty act . The term act can be a bit confusing. Most people tend to think of the term act as an action verb-it is something that people do. The criminal law often seeks to punish people for things that they did not do. When the law commands people to take a particular action and they do not take the commanded action, it is known as an omission . The law commands that people feed and shelter their children. Those who do not are guilty of an offense based on the omission. The law commands that people pay their income taxes; if they do not pay their taxes, the omission can be criminal. Threatening to act or attempting an act can also be the actus reus element of an offense.

In addition to acts and omissions, possession of something can be a criminal offense. The possession of certain weapons, illicit drugs, burglary tools, and so forth are all guilty acts as far as the criminal law is concerned. Actual possession is the legal idea that most closely coincides with the everyday use of the term. Actual possession refers to a person having physical control or custody of an object. In addition to actual possession, there is the idea of constructive possession . Constructive possession is the legal idea that the person had knowledge of the object, as well as the ability to exercise control over it.

Criminal Intent

A fundamental principle of law is that to be convicted of a crime, there must be a guilty act (the actus reus) and a culpable mental state. Recall that culpability means blameworthiness. In other words, there are literally hundreds of legal terms that describe mental states that are worthy of blame. The most common is intent . The Model Penal Code boils all of these different terms into four basic culpable mental states: purposely, knowingly, recklessly, and negligently.

Purposely : According to the Model Penal Code, a person acts purposely when “it is his conscious object to engage in conduct of that nature….”

Knowingly : A person acts knowingly if “he is aware that it is practically certain that his conduct will cause such a result.” In other words, the prohibited result was not the actor’s purpose, but he knew it would happen.

Recklessly : A person acts recklessly if “he consciously disregards a substantial and unjustifiable risk.” Further, “The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”

Negligently : A person acts negligently when “he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct.” The idea is that a reasonably carefully person would have seen the danger, but the actor did not.

At times, the legislature will purposely exclude the mens rea element from a criminal offense. This leaves only the guilty act to define the crime. Crimes with no culpable mental state are known as strict liability offenses. Most of the time, such crimes are mere violations such as speeding. An officer does not have to give evidence that you were speeding purposely, just that you were speeding. If violations such as this had a mental element, it would put an undue burden on law enforcement and the lower courts. There are a few instances where serious felony crimes are strict liability, such as the statutory rape laws of many states.

Mens Rea

As mentioned earlier in this chapter, criminal intent or mens rea is an essential element of most crimes. Under the common law, all crimes consisted of an act carried out with a guilty mind. In modern society, criminal intent can be the basis for fault , and punishment according to intent is a core premise of criminal justice. Grading is often related to the criminal intent element. Crimes that have an “evil” intent are malum in se and subject the defendant to the most severe punishment. Crimes that lack the intent element are less common and are usually graded lower, as either misdemeanors or infractions.

Concurrence

For an act to be a crime, the act must be brought on by the criminal intent. In most cases, concurrence is obvious and does not enter into the legal arguments. A classic example is an individual who breaks into a cabin in the woods to escape the deadly cold outside. After entering, the person decides to steal the owner’s property. This would not be a burglary (at common law) since burglary requires a breaking and entering with the intent to commit a felony therein. Upon entry, the intent was to escape the cold, not to steal. Thus, there was no concurrence between the guilty mind and the guilty act.

Stare Decisis [75]

The principle of stare decisis (to "stand by things decided") refers to the requirement that when a legal issue has been determined and decided, other courts should follow the decision.

The principle is the "glue that holds together the various levels of courts and it is the principle that elevates the rule of law above the rule of individual judges." It is considered "essential to law" and a "central pillar" to our system of law. It ensures predictability without which differing results would be unjust.

The requirement ensures "consistency, certainty, predictability and sound judicial administration" and the adherence to precedent "enhances the legitimacy and acceptability of judge-made law, and by so doing enhances the appearance of justice".

The principle does not apply where a decision does not lay out a "substantive rule of law", but simply applies an existing rule to a set of facts.

A statement of a legal principle will amount to an "opinion of the Court" where the principle is accepted by a majority of the Court regardless of the number of dissenters on the result.

Components of Stare Decisis

The principle can be divided into two components. Stare decisis as among the same level of court ("horizontal" stare decisis) and as between different levels of court ("vertical" stare decisis).

Irrelevant Factors to Application

The application of stare decisis does not depend on factors such as the length of the judgement, the extent of the judgement's analysis, or whether the decision is wrong in law. [8]

Previous Dissenter

A judge who previously dissented on the same issue before the court, should generally apply to law as it was decided by the majority on the prior case.

Strict Liability [76]

An exception to the requirement of a criminal intent element is strict liability. Strict liability offenses have no intent element (Ala. Code, 2011). This is a modern statutory trend, which abrogates the common-law approach that behavior is only criminal when the defendant commits acts with a guilty mind. Sometimes the rationale for strict liability crimes is the protection of the public's health, safety, and welfare. Thus, strict liability offenses are often vehicle code or tax code violations, mandating a less severe punishment (Tex. Penal Code, 2011). With a strict liability crime, the prosecution has to prove only the criminal act and possibly causation and harm or attendant circumstances, depending on the elements of the offense.

Example of a Strict Liability Offense

A vehicle code provision makes it a crime to "travel in a vehicle over the posted speed limit." This is a strict liability offense. So, if a law enforcement officer captures radar information that indicates Susie was traveling in a vehicle five miles per hour over the posted speed limit, Susie can probably be convicted of speeding under the statute. Susie's protests that she "didn't know she was traveling at that speed," are not a valid defense. Susie's knowledge of the nature of the act is irrelevant. The prosecution only needs to prove the criminal act to convict Susie because this statute is strict liability and does not require proof of criminal intent.

Criminal Defenses [77]

Quotable

A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence…

— Fla. Stat. Ann. §776.013(4) , cited in Section 5.3.3 "Defense of Habitation"

Learning Objectives

- Distinguish between a denial or failure of proof defense and an affirmative defense.
- Distinguish between imperfect and perfect defenses.
- Distinguish between factual and legal defenses.
- Give examples of factual and legal defenses.
- Distinguish between defenses based on justification and excuse.

A plethora of criminal defenses exist. Defenses may completely exonerate the criminal defendant, resulting in an acquittal, or reduce the severity of the offense.

Categorization of Defenses

Defenses can be categorized as denial or failure of proof, affirmative, imperfect, or perfect. Defenses can also be categorized as factual, legal, based on justification, or excuse. Lastly, defenses can be created by a court (common law) or created by a state or federal legislature (statutory).

Definition of Denial or Failure of Proof and Affirmative Defenses

A criminal defendant will be acquitted if the prosecution cannot prove every element of the offense beyond a reasonable doubt. In certain cases, the defendant can either deny that a criminal element(s) exists or simply sit back and wait for the prosecution to fail in meeting its burden of proof. This legal strategy is sometimes referred to as either a denial or failure of proof defense.

An affirmative defense is not connected to the prosecution's burden of proof. When the defendant asserts an affirmative defense, the defendant raises a new issue that must be proven to a certain evidentiary standard. State statutes often specify whether a defense is affirmative. The Model Penal Code defines an affirmative defense as a defense that is deemed affirmative in the Code or a separate statute, or that "involves a matter of excuse or justification peculiarly within the knowledge of the defendant" (Model Penal Code § 1.12 (3) (c)). Procedurally, the defendant must assert any affirmative defense before or during the trial, or the defense cannot be used as grounds for an appeal.

Example of an Affirmative Defense

A fight breaks out at a party, and Juan is severely injured. Jasmine and Jerome are arrested and charged for battering Juan. Jerome claims that he did not touch Juan; someone else battered him. Jasmine claims that she did not batter Juan because she was legally defending herself against Juan's attack. Jerome's claim focuses on the elements of battery and asserts that these elements cannot be proven beyond a reasonable doubt. Technically, Jerome can do nothing and be acquitted if the prosecution fails to prove that he was the criminal actor. Jasmine's self-defense claim is an affirmative defense. Jasmine must do something to be acquitted: she must prove that Juan attacked her to a certain evidentiary standard.



Figure 4.8 Denial and Affirmative Defenses [78]

Burden of Proof for Affirmative Defenses

States vary as to their requirements for the defendant's burden of proof when asserting an affirmative defense (Findlaw.com, 2010). Different defenses also have different burdens of proof. Some states require the defendant to meet the burden of production but require the prosecution to thereafter meet the burden of persuasion, disproving the defense to a preponderance of evidence, or in some states, beyond a reasonable doubt. Other states require the defendant to meet the burden of production and the burden of persuasion. In such states, the defendant's evidentiary standard is preponderance of evidence, not beyond a reasonable doubt.

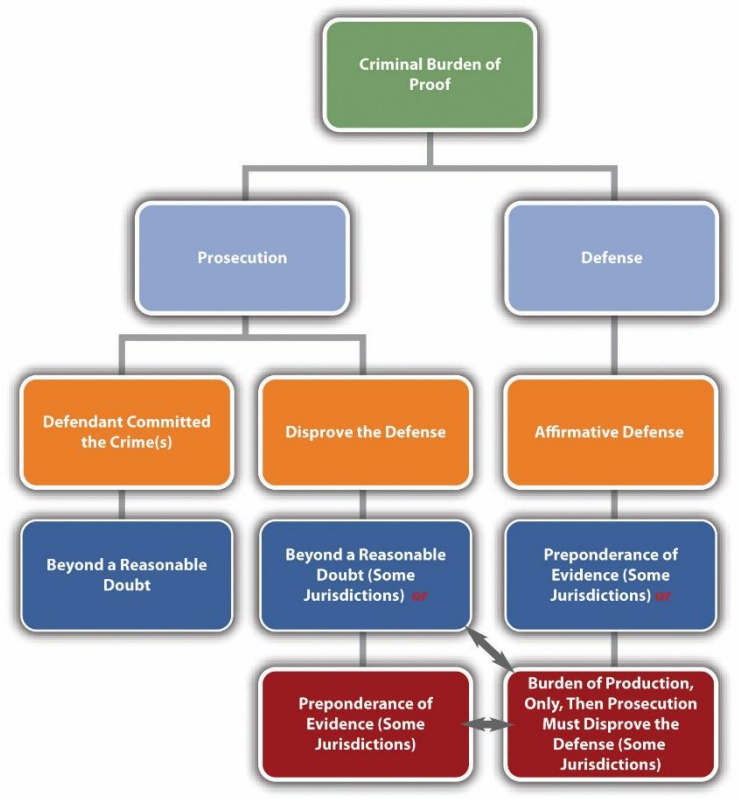


Figure 4.9 Diagram of the Criminal Burden of Proof [79]

Definition of Imperfect and Perfect Defenses

As stated previously, a defense can reduce the severity of the offense, or completely exonerate the defendant from criminal responsibility. If a defense reduces the severity of the offense, it is called an imperfect defense. If a defense results in an acquittal, it is called a perfect defense. The difference between the two is significant. A defendant who is successful with an imperfect defense is still guilty of a crime; a defendant who is successful with a perfect defense is innocent .

Example of Imperfect and Perfect Defenses

LuLu flies into a rage and kills her sister Lola after she catches Lola sleeping with her fiancé. LuLu is thereafter charged with first-degree murder. LuLu decides to pursue two defenses. First, LuLu claims that the killing should be manslaughter rather than first-degree murder because she honestly but unreasonably believed Lola was going to attack her , so she thought she was acting in self-defense. Second, LuLu claims she was insane at the time the killing occurred. The claim of manslaughter is an imperfect defense that will reduce LuLu's sentence but will not acquit her of criminal homicide. The claim of insanity is a perfect defense that will result in an acquittal.

Definition of Factual and Legal Defenses

A defense must be based on specific grounds . If a defense is based on an issue of fact , it is a factual defense. If a defense is based on an issue of law , it is a legal defense.

Example of Factual and Legal Defenses

Armando is charged with the burglary of Roman's residence. Armando decides to pursue two defenses. First, Armando claims that he was with Phil on the date and time of the burglary. This is called an alibi defense. Second, Armando claims that it is too late to prosecute him for burglary because of the expiration of the statute of limitations. Armando's alibi defense is a factual defense; it is based on the fact that Armando could not have committed the burglary because he was somewhere else at the time it occurred. Armando's statute of limitations defense is a legal defense because it is based on a statute that limits the amount of time the government has to prosecute Armando for burglary.

Definition of Justification and Excuse

With the exception of alibi, most affirmative defenses are based on either justification or excuse. Typically, justification and excuse defenses admit that the defendant committed the criminal act with the requisite intent but insist that the conduct should not be criminal.

A defense based on justification focuses on the offense . A justification defense claims that the defendant's conduct should be legal rather than criminal because it supports a principle valued by society. A defense based on excuse focuses on the defendant . An excuse defense claims that even though the defendant committed the criminal act with criminal intent, the defendant should not be responsible for his or her behavior.

Example of Justification and Excuse

A fight breaks out at a party, and Juan is severely injured. Jasmine and Jerome are arrested and charged for battering Juan. Jerome claims that he did not touch Juan; someone else battered him. Jasmine claims that she did not batter Juan because she was legally defending herself against Juan's attack. Jerome's claim focuses on the elements of battery and asserts that these elements cannot be proven beyond a reasonable doubt. Technically, Jerome can do nothing and be acquitted if the prosecution fails to prove that he was the criminal actor. Jasmine's self-defense claim is an affirmative defense. Jasmine must do something to be acquitted: she must prove that Juan attacked her to a certain evidentiary standard. Jasmine's self-defense claim is based on justification . Society believes that individuals should be able to protect themselves from harm, so actions taken in self-defense are justified and noncriminal. Note that a self-defense claim focuses on the offense (battery) in light of the circumstances (to prevent imminent harm).

Table 4.1 Categorization of Defenses

Defense Type	Characteristics
Common-law	Created by a court
Statutory	Created by a state or federal legislature
Denial or failure of proof	Creates doubt in one or more elements of the offense and prevents the prosecution from meeting its burden of proof
Affirmative	Raises an issue separate from the elements of the offense
Imperfect	Reduces the severity of the offense
Perfect	Results in an acquittal
Factual	Based on an issue of fact
Legal	Based on an issue of law
Alibi	Asserts that the defendant was somewhere else when the crime was committed
Expiration of the statute of limitations	Asserts that it is too late for the government to prosecute the defendant for the crime
Justification	Claims that the criminal conduct is justified under the circumstances
Excuse	Claims that the defendant should be excused for his or her conduct

Key Takeaways

- A denial or failure of proof defense focuses on the elements of the crime and prevents the prosecution from meeting its burden of proof. An affirmative defense is a defense that raises an issue separate from the elements of the crime. Most affirmative defenses are based on justification or excuse and must be raised before or during the trial to preserve the issue for appeal.
- An imperfect defense reduces the severity of the offense; a perfect defense results in an acquittal.
- If the basis for a defense is an issue of fact, it is called a factual defense. If the basis for a defense is an issue of law, it is called a legal defense.
- An example of a factual defense is an alibi defense, which asserts that the defendant could not have committed the crime because he or she was somewhere else when the crime occurred. An example of a legal defense is a claim that the statute of limitations has expired, which asserts that it is too late for the government to prosecute the defendant for the crime.
- An affirmative defense is based on justification when it claims that criminal conduct is justified under the circumstances. An affirmative defense is based on excuse when it claims that the criminal defendant should be excused for his or her conduct.

Excuses Defenses [80]

To successfully obtain a conviction, the prosecutor must show all of the elements of the crime beyond a reasonable doubt in criminal court. This is not the end of it in some cases. It must also be shown (if the issue is raised) that the actus reus and the mens rea was present, but also that the defendant committed the act without justification or excuse . Both justifications and excuses are species of legal defenses . If a legal defense is successful, it will either mitigate or eliminate guilt.

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

Ignorance or Mistake

It is often said, “Everybody makes mistakes.” The law recognizes this, and mistake can sometimes be a defense to a criminal charge. Mistakes made because the situation was not really the way the person thought it was are known as mistakes of fact . These can be a criminal defense. Mistakes as to matters of law (mistakes of law) can never be used as a criminal defense. There is a presumption in American law that everyone knows the criminal law. This may seem like a preposterous assumption but consider the alternative. If a defendant could mount a defense by claiming that he or she did not know the act was criminal, then everyone could commit every crime at least once and get away with it by claiming that they did not know. For this reason, the law has to presume that everybody knows the law.

Insanity

The term insanity comes from the law; psychology and medicine do not use it. The everyday use of the term can be misleading. If a person acts abnormally, they tend to be considered by many as “crazy” or “insane.” At law, merely having a mental disease or mental defect is not adequate to mitigate guilt. It must be remembered that Jeffery Dahmer was determined to be legally sane, even though everyone who knows the details of his horrible acts knows that he was seriously mentally ill. To use insanity as a legal excuse, the defendant has to show that he or she lacked the capacity to understand that the act was wrong, or the capacity to understand the nature of the act. Some jurisdictions have a not guilty by reason of insanity plea.

The logic of the insanity defense goes back to the idea of mens rea and culpability. We as a society usually only want to punish those people who knew what they were doing was wrong. Most people believe that it is morally wrong to punish someone for an unavoidable accident. Likewise, society does not punish very young children for acts that would be crimes if an adult did them. The logic is that they do not have the maturity and wisdom to foresee and understand the nature of the consequences of the act. Put in oversimplified terms, if a person is so crazy that they do not understand that what they are doing is wrong, it is morally wrong to punish them for it.

Over the years, different courts in different jurisdictions have devised different tests to determine systematically if a criminal defendant is legally insane. One of the oldest and most enduring tests is the M’Naghten rule , handed down by the English court in 1843. The basis of the M’Naghten test is the inability to distinguish right from wrong. The Alabama Supreme Court, in the case of Parsons v. State (1887), first adopted the Irresistible Impulse Test . The basic idea is that some people, under the duress of a mental illness, cannot control their actions despite understanding that the action is wrong.

Today, all of the federal courts and the majority of state courts use the substantial capacity test developed within the Model Penal Code . According to this test, a person is not culpable for a criminal act “if at the time of the crime as a result of mental disease or defect the defendant lacked the capacity to appreciate the wrongfulness of his or her conduct or to conform the conduct to the requirements of the law.” In other words, this test contains the awareness of wrongdoing standard of M’Naghten as well as the involuntary compulsion standard of the irresistible impulse test.

It is a Hollywood myth that many violent criminals escape justice with the insanity defense. In fact, the insanity defense is seldom attempted by criminal defendants and is very seldom successful when it is used. Of those who do successfully use it, most of them spend more time in mental institutions than they would have spent in prison had they been convicted. The insanity defense is certainly no “get out of jail free card.”

Intoxication

While there is some logic to the idea that being intoxicated diminishes a person’s capacity to develop mens rea , it usually serves to enhance rather than mitigate criminal culpability. There are some jurisdictions that allow voluntary intoxication as a factor that mitigates culpability, such as when murder in the first degree is reduced to murder in the second degree. Involuntary intoxication is another matter. If a defendant has been given a drug without their knowledge, then a defense of involuntary intoxication may be available.

Justification Defenses [81]

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

even though it results in pain and a scar. In raising a justification defense, the defendant admits he did a wrongful act, such as taking someone's life, but argues that the act was the right thing to do under the circumstances. At times, the state's view differs from the defendant's view of whether the act was, in fact, the right thing to do. In those cases, the state files charges to which the defendant raises a justification defense.

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

Consent

Consent by the victim can also form the basis of a justification defense to criminal conduct. Consent is most commonly used as a defense to sex crimes such as rape, and lack of consent is a criminal element of most sexual offenses that must be proven beyond a reasonable doubt. Consent is a defense that can be statutory or common law, perfect or imperfect, depending on the jurisdiction.

Elements of the Consent Defense

Consent can be a valid defense to a crime only if the victim chooses to render it. Thus, it must be proffered knowingly and voluntarily, or it is ineffective. Under the Model Penal Code, consent is ineffective if "it is given by a person who is legally incompetent to authorize the conduct…it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable to make a reasonable judgment…it is induced by force, duress or deception" (Model Penal Code § 2.11(3)). In general, consent is not knowing if it is given by an individual who is too young, mentally incompetent (Colo> Rev. Stat. Ann., 2010), or intoxicated. In general, consent is not voluntary if it is induced by force, threat of force, or trickery (Del. Code Ann. tit. 11, 2010).

Example of Unknowing Consent

Gina drinks six glasses of wine at a party and offers to be the "donkey" in a game of pin the tail on the donkey. Other party members watch as Gina staggers her way to the front of the room and poses in front of the pin the tail on the donkey poster. Geoff walks up to Gina and stabs her several times in the buttocks with a pin. Geoff probably cannot claim consent as a defense to battery in this case. Gina consented to battery while she was intoxicated, and clearly, she was unable to make a reasonable judgment. Thus, her consent was not given knowingly and was ineffective in this situation.

Example of Involuntary Consent

Change the example with Gina and Geoff. Imagine that Gina just arrived at the party and has not consumed any alcohol. Geoff tells Gina he will poke out her eye with a pin if she does not volunteer to be the donkey in the pin the tail on the donkey game. He exemplifies his threat by making stabbing gestures at Gina's eye with the pin. Frightened, Gina goes to the front of the room and poses in front of the donkey poster until Geoff stabs her in the buttocks with the pin. Geoff probably cannot claim consent as a defense to battery in this case. Gina consented in response to Geoff's threat of physical harm. Thus, her consent was not given voluntarily and was ineffective in this situation.

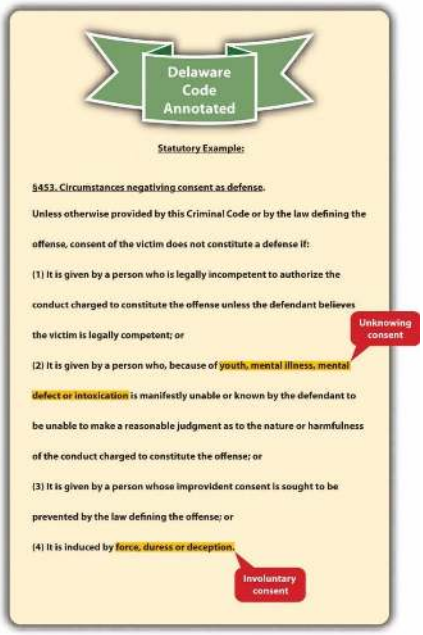


Figure 4.10 Delaware Code Annotated [82]

Situations Where Consent Can Operate as a Defense

Consent is a defense to only a few crimes. In most jurisdictions, consent can operate only as a defense to sexual conduct, injury that occurs during a sporting event, and crimes that do not result in serious bodily injury or death (Me. Rev. Stat. Ann., 2010). As the Model Penal Code states, "[w]hen conduct is charged to constitute an offense because it causes or threatens bodily harm, consent to such conduct or to the infliction of such harm is a defense if: (a) the bodily harm consented to or threatened by the conduct consented to is not serious; or (b) the conduct and the harm are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport" (Model Penal Code § 2.11(2)).

Stand your Ground

Sandy and Sue have an argument in the park. Sue pulls a knife out of a sheath that is strapped to her leg and begins to advance toward Sandy. Sandy also has a knife in her pocket. In a state that follows the retreat doctrine , Sandy must attempt to escape, if she can do so safely. In a state that follows the stand-your-ground doctrine , Sandy can defend herself using her own knife and claim lawful self-defense. Note that Sandy was not the initial aggressor in this situation. If Sandy pulled a knife first, she could not use the knife and claim self-defense, whether the state follows the stand-your-ground doctrine or the duty to retreat doctrine.

Entrapment

Historically, no legal limit was placed on the government's ability to induce individuals to commit crimes. The Constitution does not expressly prohibit this governmental action. Currently, however, all states and the federal government provide the defense of entrapment. The entrapment defense is based on the government's use of inappropriately persuasive tactics when apprehending criminals. Entrapment is generally a perfect affirmative statutory or common-law defense.

Entrapment focuses on the origin of criminal intent. If the criminal intent originates with the government or law enforcement , the defendant is entrapped and can assert the defense. If the criminal intent originates with the defendant , then the defendant is acting independently and can be convicted of the offense. The two tests of entrapment are subjective entrapment and objective entrapment. The federal government and the majority of the states recognize the subjective entrapment defense (Connecticut Jury Instruction on Entrapment, 2010). Other states and the Model Penal Code have adopted the objective entrapment defense (People v. Barraza, 2010).

Subjective Entrapment

It is entrapment pursuant to the subjective entrapment defense when law enforcement pressures the defendant to commit the crime against his or her will. The subjective entrapment test focuses on the defendant's individual characteristics more than on law

enforcement's behavior. If the facts indicate that the defendant is predisposed to commit the crime without law enforcement pressure, the defendant will not prevail on the defense.

The defendant's criminal record is admissible if relevant to prove the defendant's criminal nature and predisposition. Generally, law enforcement can furnish criminal opportunities and use decoys and feigned accomplices without crossing the line into subjective entrapment. However, if it is clear that the requisite intent for the offense originated with law enforcement , not the defendant , the defendant can assert subjective entrapment as a defense.

Example of Subjective Entrapment

Winifred regularly attends Narcotics Anonymous (NA) for her heroin addiction. All the NA attendees know that Winifred is a dedicated member who has been clean for ten years, Marcus, a law enforcement decoy, meets Winifred at one of the meetings and begs her to "hook him up" with some heroin. Winifred refuses. Marcus attends the next meeting, and follows Winifred out to her car pleading with her to get him some heroin. After listening to Marcus explain his physical symptoms of withdrawal in detail, Winifred feels pity and promises to help Marcus out. She agrees to meet Marcus in two hours with the heroin. When Winifred and Marcus meet at the designated location, Marcus arrests Winifred for sale of narcotics. Winifred may be able to assert entrapment as a defense if her state recognizes the subjective entrapment defense . Winifred has not used drugs for ten years and did not initiate contact with law enforcement. It is unlikely that the intent to sell heroin originated with Winifred because she has been a dedicated member of NA, and she actually met Marcus at an NA meeting while trying to maintain her sobriety. Thus it appears that Marcus pressured Winifred to sell heroin against a natural predisposition , and the entrapment defense may excuse her conduct.

Objective Entrapment

The objective entrapment defense focuses on the behavior of law enforcement , rather than the individual defendant. If law enforcement uses tactics that would induce a reasonable , law-abiding person to commit the crime, the defendant can successfully assert the entrapment defense in an objective entrapment jurisdiction. The objective entrapment defense focuses on a reasonable person, not the actual defendant, so the defendant's predisposition to commit the crime is not relevant. Thus, in states that recognize the objective entrapment defense, the defendant's criminal record is not admissible to disprove the defense.

Example of Objective Entrapment

Winifred has a criminal record for prostitution. A law enforcement decoy offers Winifred $10,000 to engage in sexual intercourse. Winifred promptly accepts. If Winifred's jurisdiction recognizes the objective entrapment defense , Winifred may be able to successfully claim entrapment as a defense to prostitution. A reasonable , law-abiding person could be tempted into committing prostitution for a substantial sum of money like $10,000. The objective entrapment defense focuses on law enforcement tactics, rather than the predisposition of the defendant, so Winifred's criminal record is irrelevant and is not admissible as evidence. It appears that law enforcement used an excessive inducement, and entrapment may excuse Winifred's conduct in this case.

Duress

Duress , sometimes known as coercion , means that the actor did the criminal act because they were forced to do so by another person by means of a threat. The idea is that while the actor commits the actus reus of the offense, the mens rea element, the criminal intent, was that of the person that coerced the actor to commit the crime. The effect of a successful duress defense is a matter of state law, so may be different in different jurisdictions. Most jurisdictions require that the actor have no part in becoming involved in the situation.

Necessity

The defense of necessity is based on the idea that it is sometimes necessary to choose one evil to prevent another, such as when property is destroyed to save lives. The necessity defense is sometimes referred to as the lesser of two evils defense because the evil that the actor seeks to prevent must be a greater harm that the evil that he or she does to prevent it. In most jurisdictions, the defense will not be available if the person created the danger they were avoiding.

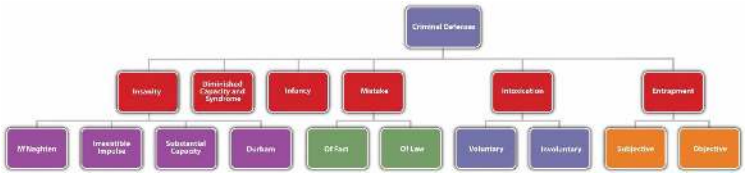


Figure 4.11 Diagram of Defenses [83]

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4.2: Criminal Defenses

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CHAPTER OVERVIEW

5: Bill of Rights and The Exclusionary Rule

5.1: Bill of Rights
5.2: The Exclusionary Rule

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5.1: Bill of Rights

Learning Objectives[84]

- What is the Bill of Rights?
- What historical periods were central to the evolution of civil liberties protections?
- What is the relationship of the Fourteenth Amendment to civil liberties?

Bill of Rights

Many of the aspects of our nation's laws and criminal justice systems have been molded by the United States' founding documents. The foundation of civil liberties is the Bill of Rights, the ten amendments added to the Constitution in 1791 to restrict what the national government may do.

The state conventions that ratified the Constitution obtained promises that the new Congress would consider adding a Bill of Rights. James Madison—the key figure in the Constitutional Convention and an exponent of the Constitution's logic in the Federalist papers—was elected to the first House of Representatives. Keeping a campaign promise, he surveyed suggestions from state-ratifying conventions and zeroed in on those most often recommended. He wrote the amendments not just as goals to pursue but as commands telling the national government what it must do or what it cannot do. Congress passed twelve amendments, but the Bill of Rights shrank to ten when the first two (concerning congressional apportionment and pay) were not ratified by the necessary nine states.

Pin It! The Bill of Rights

View the Bill of Rights online.

The first eight amendments that were adopted address particular rights. The Ninth Amendment addressed the concern that listing some rights might undercut unspoken natural rights that preceded government. It states that the Bill of Rights does not "deny or disparage others retained by the people." This allows for unnamed rights, such as the right to travel between states, to be recognized. We discussed the Tenth Amendment in module 2, as it has more to do with states' rights than individual rights.

The Rights

Even before the addition of the Bill of Rights, the Constitution did not ignore civil liberties entirely. It states that Congress cannot restrict one's right to request a writ of habeas corpus giving the reasons for one's arrest. It bars Congress and the states from enacting bills of attainder (laws punishing a named person without trial) or ex post facto laws (laws retrospectively making actions illegal). It specifies that persons accused by the national government of a crime have a right to trial by jury in the state where the offense is alleged to have occurred and that national and state officials cannot be subjected to a "religious test," such as swearing allegiance to a particular denomination.

The Bill of Rights contains the bulk of civil liberties. Unlike the Constitution, with its emphasis on powers and structures, the Bill of Rights speaks of "the people," and it outlines the rights that are central to individual freedom. [1]

The main amendments fall into several broad categories of protection, as follow:

1. Freedom of expression (I)
2. The right to "keep and bear arms" (II)
3. The protection of person and property (III, IV, V)
4. The right not to be "deprived of life, liberty, or property, without due process of law" (V)
5. The rights of the accused (V, VI, VII)
6. Assurances that the punishment fits the crime (VIII)
7. The right to privacy implicit in the Bill of Rights

The Bill of Rights and the National Government

Congress and the executive have relied on the Bill of Rights to craft public policies, often after public debate in newspapers. [2] Civil liberties expanded as federal activities grew.

The First Century of Civil Liberties



Figure 5.1 Frederick Douglass, c. 1847–52. The ex-slave Frederick Douglass, like many prominent abolitionists, published a newspaper. Much of the early debate over civil liberties in the United States revolved around the ability to suppress such radical statements. [85]

The first big dispute over civil liberties erupted when Congress passed the Sedition Act in 1798, amid tension with revolutionary France. The act made false and malicious criticisms of the government—including Federalist president John Adams and Congress—a crime. While printers could not be stopped from publishing, because of freedom of the press, they could be punished after publication. The Adams administration and Federalist judges used the act to threaten with arrest and imprisonment many Republican editors who opposed them. Republicans argued that freedom of the press, before or after publication, was crucial to giving the people the information they required in a republic. The Sedition Act was a key issue in the 1800 presidential election, which was won by the Republican Thomas Jefferson over Adams; the act expired at the end of Adams's term. [3]

Debates over slavery also expanded civil liberties. By the mid-1830s, Northerners were publishing newspapers favoring slavery's abolition. President Andrew Jackson proposed stopping the US Post Office from mailing such "incendiary publications" to the South. Congress, saying it had no power to restrain the press, rejected his idea. Southerners asked Northern state officials to suppress abolitionist newspapers, but they did not comply. [4]

World War I

As the federal government's power grew, so too did concerns about civil liberties. When the United States entered the First World War in 1917, the government jailed many radicals and opponents of the war. Persecution of dissent caused Progressive reformers to found the American Civil Liberties Union (ACLU) in 1920. Today, the ACLU pursues civil liberties for both powerless and powerful litigants across the political spectrum. While it is often deemed a liberal group, it has defended reactionary organizations, such as the American Nazi Party and the Ku Klux Klan, and has joined powerful lobbies in opposing campaign finance reform as a restriction of speech.

The Bill of Rights and the States

Later we discuss the Fourteenth Amendment, added to the Constitution in 1868, and how its due process clause, which bars states from depriving persons of "life, liberty, or property, without due process of law," is the basis of civil rights. The Fourteenth Amendment is crucial to civil liberties, too. The Bill of Rights restricts only the national government; the Fourteenth Amendment allows the Supreme Court to extend the Bill of Rights to the states.

The Supreme Court exercised its new power gradually. The Court followed selective incorporation: for the Bill of Rights to extend to the states, the justices had to find that the state law violated a principle of liberty and justice that is fundamental to the inalienable rights of a citizen. Table 1, "The Supreme Court's Extension of the Bill of Rights to the States," below, shows the years when many protections of the Bill of Rights were applied by the Supreme Court to the states; some have never been extended at all.

Table 5.1 The Supreme Court's Extension of the Bill of Rights to the States

Date	Amendment	Right	Case
1897	Fifth	Just compensation for eminent domain	Chicago, Burlington & Quincy Railroad v. City of Chicago
1925	First	Freedom of speech	Gitlow v. New York
1931	First	Freedom of the press	Near v. Minnesota
1932	Fifth	Right to counsel	Powell v. Alabama (capital cases)
1937	First	Freedom of assembly	De Jonge v. Oregon
1940	First	Free exercise of religion	Cantwell v. Connecticut
1947	First	Non-establishment of religion	Everson v. Board of Education
1948	Sixth	Right to public trial	In Re Oliver
1949	Fourth	No unreasonable searches and seizures	Wolf v. Colorado
1958	First	Freedom of association	NAACP v. Alabama
1961	Fourth	Exclusionary rule excluding evidence obtained in violation of the amendment	Mapp v. Ohio
1962	Eighth	No cruel and unusual punishment	Robinson v. California
1963	First	Right to petition government	NAACP v. Button
1963	Fifth	Right to counsel (felony cases)	Gideon v. Wainwright
1964	Fifth	Immunity from self-incrimination	Mallory v. Hogan
1965	Sixth	Right to confront witnesses	Pointer v. Texas
1965	Fifth, Ninth, and others	Right to privacy	Griswold v. Connecticut
1966	Sixth	Right to an impartial jury	Parker v. Gladden
1967	Sixth	Right to a speedy trial	Klopfer v. N. Carolina
1969	Fifth	Immunity from double jeopardy	Benton v. Maryland
1972	Sixth	Right to counsel (all crimes involving jail terms)	Argersinger v. Hamlin
2010	Second	Right to keep and bear arms	McDonald v. Chicago
Rights not extended to the states			
Third	No quartering of soldiers in private dwellings		
Fifth	Right to grand jury indictment		
Seventh	Right to jury trial in civil cases under common law		
Eighth	No excessive bail		
Eighth	No excessive fines		

Interests, Institutions, and Civil Liberties

Many landmark Supreme Court civil-liberties cases were brought by unpopular litigants: members of radical organizations, publishers of anti-Semitic periodicals or of erotica, religious adherents to small sects, atheists and agnostics, or indigent criminal defendants. This pattern promotes a media frame suggesting that civil liberties grow through the Supreme Court's staunch protection of the lowliest citizen's rights.

The finest example is the saga of Clarence Gideon in the book Gideon's Trumpet by Anthony Lewis, then the Supreme Court reporter for the New York Times . The indigent Gideon, sentenced to prison, protested the state's failure to provide him with a lawyer. Gideon made a series of handwritten appeals. The Court heard his case under a special procedure designed for paupers. Championed by altruistic civil-liberties experts, Gideon's case established a constitutional right to have a lawyer provided, at the state's expense, to all defendants accused of a felony. [5] Similar storylines often appear in news accounts of Supreme Court cases. For example, television journalists personalize these stories by interviewing the person who brought the suit and telling the touching individual tale behind the case. [6]

This mass-media frame of the lone individual appealing to the Supreme Court is only part of the story. Powerful interests also benefit from civil-liberties protections. Consider, for example, freedom of expression: Fat-cat campaign contributors rely on freedom of speech to protect their right to spend as much money as they want to in elections. Advertisers say that commercial speech should be granted the same protection as political speech. Huge media conglomerates rely on freedom of the press to become unregulated and more profitable. [7]

Many officials have to interpret the guarantees of civil liberties when making decisions and formulating policy. They sometimes have a broader awareness of civil liberties than do the courts. For example, the Supreme Court found in 1969 that two Arizona newspapers violated antitrust laws by sharing a physical plant while maintaining separate editorial operations. Congress and the president responded by enacting the Newspaper Preservation Act, saying that freedom of the press justified exempting such newspapers from antitrust laws.

Summary

In this section we defined civil liberties as individual rights and freedoms that government may not infringe on. They are listed primarily in the Bill of Rights, the ten amendments added in 1791 by the founders to address fears about the new federal government's potential to abuse power. Initially limited to the federal government, they now apply, though unevenly, to the states. What those liberties are and how far they extend are the focus of political conflict. They are shaped by the full range of people, processes, and institutions in American politics. Both unpopular minorities and powerful interests claim civil liberties protections to gain favorable outcomes.

The Fourteenth Amendment [86]

The Fourteenth Amendment (Amendment XIV) to the United States Constitution was adopted on July 9, 1868. It was one of the Reconstruction Amendments . The amendment discusses citizenship rights and equal protection of the laws . It was proposed in response to issues related to former slaves following the American Civil War . This amendment was bitterly contested. Southern states were forced to ratify it in order to regain representation in Congress. The Fourteenth Amendment is one of the most litigated parts of the Constitution. It forms the basis for landmark decisions such as Roe v. Wade (1972), and Bush v. Gore (2000). It remains the most important Constitutional amendment since the Bill of Rights was passed in 1791.

Summary

At the end of the Civil War, Abraham Lincoln freed the slaves. The problem was, he did not ask Congress . Congress had not passed a law to free slaves. Meanwhile, some states still had slavery. The Thirteenth Amendment freed the slaves. It became law in late 1865. Three years later the Fourteenth Amendment provided civil rights . Republicans controlled Congress during this period. They wanted to give full citizenship to freed slaves. But they also realized that giving civil rights to blacks , it opened the door for women's suffrage . It would lead to giving women the right to vote, which Congress did not want to do. If only section one was included in the amendment, the wording "all persons born or naturalized in the United States" would include women. For this reason, the word "male" was inserted in section two so the amendment would be approved by Congress.

Section one - citizenship

The first section of the Fourteenth Amendment gave citizenship to “all persons born or naturalized in the United States”, and "subject to the jurisdiction thereof". The second clause, commonly called the Privileges and Immunities Clause , states that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." This gave all Americans the protection of civil rights under the law. It forbids states from denying citizens their life, their liberty or their property without due process . States could not deny persons "equal protection of the laws." [5] It meant that for the first time all people would have the same protection no matter what their color. The fact that states were mentioned makes them responsible for these protections the same as the federal government . The Fourteenth Amendment is cited more often in lawsuits than any other amendment.

Section two - apportionment

The second section changed a part of the original Constitution which counted slaves as three-fifths of a person. This was for the purpose of determining how many U.S. congressmen a state could have (apportionment). The second section established that every citizen would be counted as one person.

Sections three, four and five

The third section was intended to be strict with members of the Confederacy who fought against the United States. It required a two-thirds vote of Congress to allow leaders of the Confederacy to regain their citizenship or hold office. To be allowed to hold a federal office, former confederates had to swear an oath to uphold the constitution. Section four said the federal government would not repay Confederate debts. Section five means what it says, Congress will enforce the provisions of the 14th amendment.



Figure 5.2 Representative John A. Bingham of Ohio, the main framer of the Fourteenth Amendment [87]

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5.2: The Exclusionary Rule

The Exclusionary Rule [88]

The exclusionary rule holds that evidence collected in violation of the defendant's rights is sometimes inadmissible.

Learning Objectives

- Describe the constitutional bases of the exclusionary rule

Key Points

- The exclusionary rule is grounded in the Fourth Amendment and is intended to protect citizens from illegal searches and seizures .
- The exclusionary rule is designed to provide disincentive to prosecutors and police who illegally gather evidence in violation of the Fifth Amendment of the Bill of Rights.
- The exclusionary rule is not applicable to aliens residing outside of U.S. borders. In United States v. Alvarez-Machain, 504 U.S. 655, the U.S. Supreme Court decided that property owned by aliens in a foreign country is admissible in court.

Pin It! Rights

- constitutional right : Rights given to citizens by the constitution.
- right to counsel : When a citizen accused has the right to be legally represented by a legal defense.

EXAMPLE:

- In 1914, the U.S. Supreme Court announced a strong version of the exclusionary rule in the case of Weeks v. United States under the Fourth Amendment prohibiting unreasonable searches and seizures. This decision, however, created the rule only on the federal level. The "Weeks Rule," which made an exception for cases at the state level, was adopted by numerous states during prohibition .

Background

The exclusionary rule is a legal principle in the United States holding that evidence collected or analyzed in violation of the defendant 's constitutional rights is sometimes inadmissible for criminal prosecution. This may be considered an example of a prophylactic rule formulated by the judiciary in order to protect a constitutional right. However, in some circumstances, the exclusionary rule may also be considered to follow directly from the constitutional language. For example, the Fifth Amendment's command that no person "shall be deprived of life, liberty or property without due process of law. "

The exclusionary rule is grounded in the Fourth Amendment and is intended to protect citizens from illegal searches and seizures. The exclusionary rule is also designed to provide disincentive to prosecutors and police who illegally gather evidence in violation of the Fifth Amendment of the Bill of Rights. The exclusionary rule furthermore applies to violations of the Sixth Amendment, which guarantees the right to counsel .

Most states have their own exclusionary remedies for illegally obtained evidence under their state constitutions and/or statutes. This rule is occasionally referred to as a legal technicality because it allows defendants a defense that does not address whether the crime was actually committed. In this respect, it is similar to the explicit rule in the Fifth Amendment protecting people from double jeopardy. In strict cases, when an illegal action is used by police/prosecution to gain any incriminating result, all evidence whose recovery stemmed from the illegal action can be thrown out from a jury .

The exclusionary rule applies to all persons within the United States regardless of whether they are citizens, immigrants (legal or illegal), or visitors.

Limitations of the Rule

The exclusionary rule was passed in 1917, and does not apply in a civil case, a grand jury proceeding , or a parole revocation hearing.

Even in a criminal case, the exclusionary rule does not simply bar the introduction of all evidence obtained in violation of the Fourth, Fifth, or Sixth Amendments.

The exclusionary rule is not applicable to aliens residing outside of U.S. borders. In United States v. Alvarez-Machain, 504 U.S. 655, the Supreme Court decided that property owned by aliens in a foreign country is admissible in court. Prisoners, probationers, parolees and persons crossing U.S. borders are among those receiving limited protections. Corporations, by virtue of being, also have limited rights under the Fourth Amendment.

Criticism of the Rule

The exclusionary rule as it has developed in the U.S. has been long criticized, even by respected jurists and commentators. Judge Benjamin Cardozo, generally considered one of the most influential American jurists, was strongly opposed to the rule, stating that under the rule, "The criminal is to go free because the constable has blundered. "



Figure 5.3 U.S. Supreme Court Seal. The Supreme Court of the United States is the highest court in the country. It has ultimate (but largely discretionary) appellate jurisdiction over all federal courts and over state court cases involving issues of federal law, and original jurisdiction over a small range of cases. [89]

Court Cases Pertaining to The Exclusionary Rule

Pin It! Map v Ohio

Oyez (pronounced OH-yay)—a free law project from Cornell's Legal Information Institute (LII), Justia, and Chicago-Kent College of Law—is a multimedia archive devoted to making the Supreme Court of the United States accessible to everyone. It is the most complete and authoritative source for all of the Court's audio since the installation of a recording system in October 1955. Some of the following Court cases in this text will be presented through Oyez court briefs. Follow the link to learn more about Map v Ohio through the Oyez project.

Pin It! Hudson v Michigan

Follow the link to learn more about Hudson v Michigan through the Oyez project.

Key Points

- The exclusionary rule is grounded in the Fourth Amendment and is intended to protect citizens from illegal searches and seizures .
- The exclusionary rule is designed to provide disincentive to prosecutors and police who illegally gather evidence in violation of the Fifth Amendment of the Bill of Rights.
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CHAPTER OVERVIEW

6: Modern Policing and The Police Organization

6.1: Policing Today
6.2: Police Organization, and Functions

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6.1: Policing Today

Police function as an active element of legislation, the enforcement of the law. But perhaps the most enduring myth of criminal justice is the actual role of the police officer in our society. From early television programs such as Dragnet up to today's most compelling crime dramas, cops live a life full of danger, always encountering dangerous fugitives, serial killers, and other villains that must be outwitted, outfought, and outgunned. Of course, danger is part of the police job. It is, however, a mistake to assume that this is the only job that the police do. Most of what the police do on a daily basis is to deal with what Herman Goldstein (1990) called "the residual problems of society."

Police Functions

Movies and television have defined the role of the police in the popular imagination as that of "crime fighter." In reality, catching "bad guys" and investigating crimes is only a small fraction of what the police are called upon to do every day. Calls for social services order maintenance tasks are far more common.

A large fraction of the average police officer's shift is spent helping people with problems that have nothing to do with apprehending felons. People get hurt in automobile accidents, and police officers are there to render aid. People lose things ranging from cell phones to children and expect the police to help find them. Some authors estimate that well over fifty percent of calls for police services involve these kinds of social service tasks. By comparison, these same authors estimate that only about 20% of calls for police services relate to crime.

Many law enforcement activities have to do with keeping society running smoothly. These things-such as traffic control, crowd control, and moving prostitutes off the streets-are frequently referred to as "order maintenance" activities. A key difference between law enforcement and order maintenance is that order maintenance activities are not generally concerned with the letter of the law, but rather keeping the peace. Arrest is always an option when an officer is trying to preserve the peace, but less formal solutions are far more commonly employed. For example, when the driver of a stopped car that is blocking traffic complies with an officer's request to move along, no citation is issued.

The American Bar Association (1986), in a document called Standards Relating to the Urban Police Function , lists 11 responsibilities of the police:

1. identify criminal offenders and criminal activity and, where appropriate, to apprehend offenders and participate in subsequent court proceedings;
2. reduce the opportunities for the commission of some crimes through preventive patrol and other measures;
3. aid individuals who are in danger of physical harm;
4. protect constitutional guarantees;
5. facilitate the movement of people and vehicles;
6. assist those who cannot care for themselves;
7. resolve conflict;
8. identify problems that are potentially serious law enforcement or governmental problems;
9. create and maintain a feeling of security in the community;
10. promote and preserve civil order; and
11. provide other services on an emergency basis.

The last element in this list provides the primary reason why the police are called upon to deal with the "residual problems" of society: There is no one else available twenty-four hours a day, seven days a week.

Another key factor that makes the police unique is what some authors have referred to as a "monopoly on the use of force." The authorization to use force means that the police hold a position of great power within our society, and this translates into a great responsibility to use that force ethically.

Despite all of that power, there is a trend among policing experts to call for broad discretion for police officers. Officers who have their hands bound by excessive policies and procedures cannot solve community problems. Officers must have the authority to identify community problems, tailor solutions to those problems, and implement those solutions. Even in departments where community policing is not the dominant paradigm, officers still have a great deal of discretion. For example, officers decide who

gets a warning and who gets a citation. Officers decide who is arrested. Officers decide when force is necessary. Of course, some obvious factors are used by officers when making a discretionary decision. The seriousness of a crime and the strength of evidence, for example, are factors in the decision to make or not make an arrest. Personal factors also come into play; researchers discovered long ago that the demeanor of the suspect plays an important role in the decision to arrest. Respectful and deferential citizens are less likely to be arrested than rude or belligerent ones.

The Structure of Policing in America

Local police departments make up more than two-thirds of the 18,000 state and local law enforcement agencies in the United States. The Bureau of Justice Statistics (BJS) defines a local police department is a general-purpose law enforcement agency, other than a sheriff's office, that is operated by a unit of local government such as a town, city, township, or county. Tribal police are classified as local police BJS statistics. In 2008, local police departments had about 593,000 full-time employees, including 461,000 sworn officers. About 60% of all state and local sworn personnel were local police officers.

Federal Law Enforcement Agencies

The Federal Bureau of Investigation (FBI): The FBI is housed within the United States Department of Justice. The FBI is rather unique in that it has both law enforcement and national security concerns as part of its mission. As the FBI's Mission Statement puts it, they are a "… national security organization with both intelligence and law enforcement responsibilities…" The Mission Statement further explains, "The mission of the FBI is to protect and defend the United States against terrorist and foreign intelligence threats, to uphold and enforce the criminal laws of the United States, and to provide leadership and criminal justice services to federal, state, municipal, and international agencies and partners." The FBI employs 13,785 special agents and 22,117 support professionals, such as intelligence analysts, language specialists, scientists, information technology specialists, and other professionals (FBI, 2013).

The Bureau of Alcohol, Tobacco, and Firearms (ATF): The ATF has a reputation for dealing with illegal firearms. Its mission is rather broader in reality. Housed within the United States Department of Justice, the ATF protects American communities from violent criminals, criminal organizations, the illegal use and trafficking of firearms, the illegal use and storage of explosives, acts of arson and bombings, acts of terrorism, and the illegal diversion of alcohol and tobacco products (ATF, 2013).

The Drug Enforcement Administration (DEA): "The mission of the Drug Enforcement Administration (DEA) is to enforce the controlled substances laws and regulations of the United States and bring to the criminal and civil justice system of the United States, or any other competent jurisdiction, those organizations and principal members of organizations, involved in the growing, manufacture, or distribution of controlled substances appearing in or destined for illicit traffic in the United States; and to recommend and support non-enforcement programs aimed at reducing the availability of illicit controlled substances on the domestic and international markets" (DEA, 2013).

The U.S. Marshals Service : "The U.S. Marshals Service (USMS) is the nation's oldest and most versatile federal law enforcement agency. Federal Marshals have served the country since 1789, often times in unseen but critical ways. The USMS is the enforcement arm of the federal courts, and as such, it is involved in virtually every federal law enforcement initiative. Presidentially appointed U.S. Marshals direct the activities of 94 districts – one for each federal judicial district. More than 3,950 Deputy Marshals and Criminal Investigators form the backbone of the agency. Among their many duties, they apprehend more than half of all federal fugitives, protect the federal judiciary, operate the Witness Security Program, transport federal prisoners, conduct body searches, enforce court orders and Attorney General orders involving civil disturbances and acts of terrorism, execute civil and criminal processes, and seize property acquired by criminals through illegal activities."

The Secret Service: The United States Secret Service began as an agency dedicated to the investigation of crimes related to the Treasury, and then evolved into the United States' most recognized protection agency. The Secret Service was a part of the Department of the Treasury until March 1, 2003, when it became a part of the Department of Homeland Security. "The mission of the United States Secret Service is to safeguard the nation's financial infrastructure and payment systems to preserve the integrity of the economy, and to protect national leaders, visiting heads of state and government, designated sites and National Special Security Events."

The Citizenship and Immigration Service (USCIS): U.S. Citizenship and Immigration Services is the government agency that oversees lawful immigration to the United States. "USCIS will secure America's promise as a nation of immigrants by providing

accurate and useful information to our customers, granting immigration and citizenship benefits, promoting an awareness and understanding of citizenship, and ensuring the integrity of our immigration system. The agency is composed of over 19,000 government employees and contractors of USCIS working at 223 offices across the world.

Transportation Security Administration (TSA) . The primary mission of the TSA is to protect travelers and interstate commerce. TSA uses a risk-based strategy and works closely with transportation, law enforcement, and intelligence communities to set the standard for excellence in transportation security.

State Law Enforcement Agencies

Every state in the United States has a state-level police force with the exception of Hawaii. The largest of these state-level agencies is the California Highway Patrol.

One of the major purposes of the state police in most jurisdictions is to provide patrol services, especially on remote highways where local law enforcement is sparse. State police are often called upon to aid local law enforcement in criminal investigations that are complex or cross local jurisdictional lines. Often, they are responsible for maintaining centralized criminal records for the state, operating crime labs, and training local officers.

Local Law Enforcement Agencies

In the United States today, there is a Hollywood generated myth that the federal government does major fraction of the law enforcement workload. This is not true. The vast majority of criminal cases are generated by local agencies such as sheriffs' departments and local police departments.

Sheriffs' Offices

According to the BJS (Burch, 20012), an estimated 3,012 sheriffs' offices performing law enforcement functions in the United States employed 369,084 sworn and civilian personnel. Sheriffs' offices represented approximately a fifth of the estimated 15,600 general-purpose law enforcement agencies operating in the United States. Although sheriffs' offices may have countywide responsibilities related to jail operation, process serving, and court security, their law enforcement jurisdictions typically exclude county areas served by a local police department. In certain counties, municipalities contract with the sheriffs' office for law enforcement services. Large agencies (employing 100 or more sworn personnel) represented about 12% of all sheriffs' offices but employed nearly two-thirds (65%) of all full-time sworn personnel.

Local Police Departments

About half of local police departments employed fewer than 10 sworn personnel, and about three-fourths served a population of less than 10,000. In 2007, about 1 in 8 local police officers were women, compared to 1 in 13 in 1987. About 1 in 4 officers were members of a racial or ethnic minority in 2007, compared to 1 in 6 officers in 1987. In 2007, more than 4 in 5 local police officers were employed by a department that used physical agility tests (86%) and written aptitude tests (82%) in the hiring process, and more than 3 in 5 by one that used personality inventories (66%).

Wilson's Police Management Styles

James Wilson (not to be confused with O. W. Wilson), identified three police management styles:

1. The watchman style of management focuses on order maintenance. Officers often ignore minor violations of the law, unless the violation constitutes a breach of the peace. Minor violations and disputes between citizens are largely handled in an informal way.
2. The legalistic style tends to handle matters formally. In other words, policing is done "by the book." The administrative emphasis is on reducing line officer discretion and effecting unvarying, impartial arrests for all violations.
3. The service style emphasizes community service above enforcing the law. Arrest is often seen as a last resort, used only when referrals to social service organizations and agencies will be ineffectual.

Quasi-military Features

As one of Peel's major innovations, the organization of police agencies along military lines has withstood the test of time. Police officers in most jurisdictions still wear uniforms, carry weapons, and have military ranks. These ranks suggest a military style,

authoritarian command structure where orders come down from the top. This militaristic view of the police is encouraged by political rhetoric such as the “war on crime” and the “war on drugs.” While most America citizens take this quasi-military organization for granted, there are those that see it as a problem.

Detractors of the quasi-military organization of America’s police forces suggest that by subscribing to the idea that they are engaged in a war, police officers will be tempted to slip into the mentality that “all is fair in war.” They fear that a warfare mentality will lead to an “ends justify the means” mentality that results in unethical police conduct such as perjury, brutality, and other abuses of power. Other critics feel that the militaristic look of police uniforms, especially BDUs and SWAT gear, serve to intimidate the public.

The Police Bureaucracy

Modern American Police agencies are characterized by a bureaucratic structure. The positive aspects of bureaucratic organizations revolve around competence and clarity. Tasks and duties are specialized, qualifications for different positions are carefully and clearly defined, everyone acts according to rules and regulations, and authority exists within a clearly defined hierarchy. The idea of bureaucracy is to improve efficiency and effectiveness. The downside to this is often a lack of flexibility, being bogged down in “red tape,” and ignoring the human element of serving the community.

Key Terms

American Bar Association, BDU, Bureau of Alcohol, Tobacco, and Firearms (ATF), Citizenship and Immigration Service (USCIS), Drug Enforcement Administration (DEA), Federal Bureau of Investigation (FBI), James Wilson, Legalistic Style, Local Police Department, Order Maintenance, Quasi-Military Organization, Residual Problems of Society, Secret Service, Service Style, SWAT, Sworn Officer, Transportation Security Administration (TSA), Tribal Police, U.S. Marshals Service (USMS), Watchman Style

Police Organization, and Functions [90]

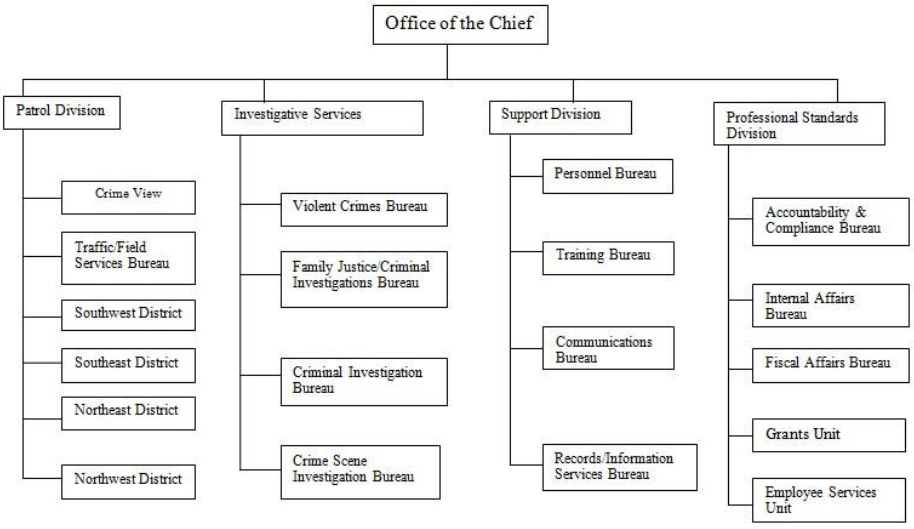


Figure 6.1 Fresno CA Police Department Organizational Chart [91]

The Investigative Function [92]

Quotable

“A good investigator needs to be conscious of his or her own thinking, and that thinking needs to be an intentional process.”

It is too bad we cannot just provide you with a basic template to follow every time you needed to conduct a criminal investigation; but it is not that simple. Criminal investigations can be imprecise undertakings, often performed in reaction to unpredictable and still-evolving events with incomplete information to guide the process. As such, it is impossible to teach or learn a precise methodology that can be applied in every case. Still, there are important concepts, legal rules, and processes that must be respected in every investigation. This book outlines these concepts, rules, and processes with the goal of providing practical tools to ensure

successful investigative processes and investigative practices. Most importantly, this book informs you on how to approach the investigative process using “investigative thinking.” In this first chapter, we set the foundation for the book by calling attention to five important topics:

1. Criminal investigation as a thinking process
2. The need to think through the process
3. Towards modern-day investigation
4. The path to becoming an investigator
5. Understanding the investigative mind

Topic 1: Criminal Investigation as a Thinking Process

Criminal investigation is a multi-faceted, problem-solving challenge. Arriving at the scene of a crime, an officer is often required to rapidly make critical decisions, sometimes involving life and death, based on limited information in a dynamic environment of active and still evolving events. After a criminal event is over, the investigator is expected to preserve the crime scene, collect the evidence, and devise an investigative plan that will lead to the forming of reasonable grounds to identify and arrest the person or persons responsible for the crime. To meet these challenges, police investigators, through training and experience, learn investigative processes to develop investigative plans and prioritize responses.

In this book, these investigative responses, information analyses, and plan-making skills are broken out using illustrations of both tactical and strategic investigative thinking. The aim of the book is to guide you into the structured practices of tactical investigative response and strategic investigative thinking.

Criminal investigation is not just a set of task skills, it is equally a set of thinking skills. To become an effective investigator, these skills need to be consciously understood and developed to the point where they are deliberately engaged to work through the problem-solving process that is criminal investigation. Trained thinking and response can be difficult to adapt into our personal repertoires because we are all conditioned to be much less formal and less evidence driven in our everyday thinking. Still, as human beings, we are all born investigators of sorts. As Taber (2006) pointed out in his book, Beyond Constructivism , people constantly construct knowledge, and, in our daily lives, we function in a perpetual state of assessing the information that is presented to us. Interpreting the perceptions of what we see and what we hear allows us reach conclusions about the world around us (Taber, 2006). Some people are critically analytical and want to see evidence to confirm their beliefs, while others are prepared to accept information at face value until they are presented facts that disprove their previously held beliefs. Either strategy is generally acceptable for ordinary people in their everyday lives.

Topic 2: The Need to Think Through the Process

Diametrically opposing the analysis processes of everyday people, in the role of a police investigator, the process of discovering, interpreting, and determining the validity of information is different and this difference is critical. As an investigator, it is no longer sufficient to use the strategies that ordinary people use every day. Instead, it is incumbent on investigators to critically assess all the information they encounter because every investigation is an accountable process in which the investigator is not just making a determination about the validity and truth of the information for personal confirmation of a belief. Rather, the police investigator is responsible and empowered under the law to make determinations that could significantly affect the lives of those being investigated as well as the victims of crime.

The investigator’s interpretation of information and evidence commonly requires answers to many questions that can lead critical of decisions, actions, and outcomes, such as:

- What must be done to protect the life and safety of persons?
- Should force, up to and including deadly force, be used to resolve a situation?
- Who will become the focus or subject of a criminal investigation?
- What is the best plan to apprehend the person or persons responsible for a criminal act?
- Will someone be subjected to a search of their person or of their home?
- Will someone be subjected to detention or arrest and questioning for a criminal act?
- Will someone have a criminal charge sworn against them?
- Will someone be subjected to a criminal trial?

- Will someone's liberty as a free person be at risk?
- Will justice be served?
- Will the community be protected?

Significant to these possible outcomes, the investigator must always be ready to explain their thinking and actions to the court. For example, when an investigator is asked by a court, "How did you reach that conclusion to take your chosen course of action?" an investigator must be able to articulate their thinking process and lay out the facts and evidence that were considered to reach their conclusions and form the reasonable grounds for their actions and their investigative decision-making process. For an investigator speaking to the court, this process needs to be clear and validated through the articulation of evidence-based thinking and legally justifiable action. Thinking must illustrate an evidence-based path to forming reasonable grounds for belief and subsequent action. Thinking must also demonstrate consideration of the statutory law and case law relevant to the matter being investigated.

Considering this accountability to outcomes, it is essential for police investigators to have both the task skills and the thinking skills to collect and analyze evidence at a level that will be acceptable to the criminal justice system. Investigation is the collection and analysis of evidence. To be acceptable to the court, it must be done in a structured way that abides by the legal rules and the appropriate processes of evidence collection. Additionally, it must be a process the investigator has documented and can recall and articulate in detail to demonstrate the validity of the investigation.

Obviously, it is not possible for someone to remain in a constant state of vigilance where they are always critically assessing, documenting, and determining the validity of every piece of information they encounter. However, when on duty, it is frequently necessary for a police investigator to do this. For a police investigator, this needs to be a conscious process of being mentally engaged and "switched on" to a more vigilant level of information collection, assessment, and validation while on duty. A police investigator must master this higher and more accountable level of analytical thinking for both tactical and strategic investigative response. The "switched on" police investigator must:

- Respond appropriately to situations where they must protect the life and safety of persons
- Gather the maximum available evidence and information from people and locations
- Recognize the possible offence or offences being depicted by the fact pattern
- Preserve and document all evidence and information
- Critically analyze all available information and evidence
- Develop an effective investigative plan
- Strategically act by developing reasonable grounds to either identify and arrest those responsible for criminal acts, or to eliminate those who are wrongfully suspected

Most traditional police training provides new officers with many hours of instruction in the task skills of investigation. However, the learning of investigative thinking skills is expected to develop through field experience, learning from mistakes, and on the job mentoring. This learning does not always happen effectively, and the public expectations of the justice system are evolving in a model where there is little tolerance for a mistake-based learning.

The criminal investigation of serious crimes has always drawn a substantial level of interest, concern, and even apprehensive fascination from the public, the media, and the justice system. Police actions and investigations have been chronicled and dissected by commissions of inquiry and the media. From the crimes of the serial killers like Paul Bernardo (Campbell, 1996), and Robert Pickton (Oppal, 2013) to the historical wrongful convictions of David Milgaard (MacCallum, 2008) and Guy Paul Morin (Kaufman, 1998), true life crimes are scrutinized, and the investigations of those crimes are examined and critically assessed.

When critiquing past investigations, the same types of questions are frequently asked:

- Is it possible that the wrong person was arrested or convicted?
- Is it possible that other persons were involved?
- Were all the possible suspects properly eliminated?
- Was information properly shared among police agencies?
- Did the investigators miss something?
- Was all the evidence found?
- Was the evidence properly interpreted?
- Were the investigative theories properly developed and followed to the correct conclusion?

- Was tunnel vision happening and misdirecting the investigation?

Today, transparency throughout the criminal justice system and public disclosure of evidence through investigative media reports make it much easier for the public and the media to examine the investigative process. Public and media access to information about police investigative techniques and forensic tools has created an audience that is more familiar and sophisticated about police work. The ability of both social and traditional media to allow public debate has created a societal awareness where a higher standard for the investigation of serious crimes is now an expectation.

One only needs to look at the historical and contemporary judicial reviews and public inquiries to appreciate that there is an expectation for police investigators and police organizations to maintain and demonstrate a high level of competency. In a judicial review, it is often too late if an investigator discovers that they have pursued the wrong theory or they have failed to analyze a piece of critical information or evidence. These situations can be career-altering or even career-ending. A good investigator needs to be conscious of his or her-own thinking, and that thinking needs to be an intentional process.

Topic 3: Towards Modern-Day Investigation

Today, criminal investigation is a broad term encompassing a wide range of specialties that aim to determine how events occurred, and to establish an evidence-based fact pattern to prove the guilt or innocence of an accused person in a criminal event. In some cases, where a person is found committing the criminal act and apprehended at the scene, the criminal investigation is not a complex undertaking. However, in cases where the criminal event is discovered after the fact, or when the culprit is not readily apparent, the process of criminal investigation becomes more complex and protracted.

Although in both cases the criminal investigator must follow practices of identifying, collecting, recording, and preserving evidence; in the case of the unknown suspect, additional thinking skills of analysis, theory development, and validation of facts must be put to work.

The craft of criminal investigation has been evolving since the birth of modern policing in the mid-1700s when the Chief Magistrate of Bow Street, Henry Fielding, organized a group of volunteer plainclothes citizens and tasked them to attend the scenes of criminal events and investigate crimes. This group became known as the Bow Street Runners. Their existence speaks to an early recognition that attending a crime scene to gather information was a timely and effective strategy to discover the truth of what happened (Hitchcock, 2015).

From these early investigators, one of the first significant cases using forensic evidence-based investigation was recorded. To summarize the account by McCrery (2013) in his book Silent Witness ; in one notable recorded case in 1784, the Bow Street Runners removed a torn piece of paper wadding from a bullet wound in the head of a murder victim who had been shot at point-blank range. In this early era of firearms, flintlock muskets and pistols required muzzle loading. To muzzle load a weapon, gunpowder would be poured down the barrel of the weapon, and then a piece of “wadding paper” would be tamped into place on top of the gunpowder using a long metal rod. The wadding paper used in this loading process was merely a piece of thick dry paper, usually torn from a larger sheet of paper kept by the shooter to reload again for the next shot. The musket ball bullet would be pushed down the barrel on top of the wadding paper. When the gun was fired, the wadding paper would be expelled by the exploding gunpowder, thus pushing the lead ball-bullet out of the barrel as a deadly projectile. This loading process required the shooter to be in possession of dry gunpowder, wadding paper, and musket balls to reload and make the weapon ready to fire. The Bow Street Runners considered this weapon loading practice and knew their shooter might be in possession of wadding paper. Upon searching their prime suspect, they did find him in possession of that kind of paper and, in a clever forensic innovation for their time, they physically matched the torn edges of wadding paper found in the victim’s wound to a larger sheet of wadding paper found in the pocket of their suspect. From this evidence, the accused was convicted of murder (McCrery, 2013).

This use of forensic physical matching is an example of circumstantial forensic evidence being used to link a suspect to an offence. This type of early forensic evidence also illustrates the beginnings of what exists today as a broad variety of forensic sciences to aid investigators in the development of evidence. This is also the beginning of forensic evidence being recognized as an investigative tool. In 1892, not long after the Bow Street Runners investigation, Sir Francis Galton published his book on the study of fingerprints. In 1900, Galton’s work was used by Sir William Henry who developed and implemented the Henry System of fingerprint classification, which is the basis of the fingerprint classifications system still in use today (Henry, 1900).

Only a few years earlier, in 1886, the use of photography for the first Rogues Gallery of criminal photographs was implemented by the New York City Police Department. This first Rogues Gallery was an organized collection of photographs of known criminals taken at the time of their most recent conviction for a crime (Byrnes, 2015). Prior to this organized collection of criminal photos, facial characteristics on wanted posters had been limited to sketch artists' renderings. With the advances evolving in photography, having the ability to preserve an actual picture of the suspect's face amounted to a significant leap forward. With this innovation of photography, the use of mugshots and photographic identification of suspects through facial recognition began to evolve.

These early forensic innovations in the evolution of criminal investigation (such as physical matching, fingerprint identification, and facial recognition systems) demonstrate a need for investigators to develop the knowledge and skills to locate and utilize physical evidence that enables circumstantial links between people, places, and events to prove the facts of criminal cases. Physical evidence is the buried treasure for criminal investigators. Physical evidence can be collected, preserved, analyzed, and used in court to establish a fact. Physical evidence can be used to connect an accused to their victim or used at a crime scene to establish guilt or innocence. Forensic evidence may prove a point in fact that confirms or contradicts the alibi of an accused, or one that corroborates or contradicts the testimony of a witness.

Another significant development in forensic evidence from the 1800s started with the work of French criminal investigator Alphonse Bertillon who developed the Bertillon system of recording measurements of physical evidence (Petherick, 2010). One of Bertillon's students, Dr. Edmond Locard, a medical doctor during the First World War, went on to further Bertillon's work with his own theory that a person always leaves some trace of themselves at a crime scene and always takes some trace of the crime scene with them when they leave. This theory became known as "Locard's Exchange Theory" (Petherick, 2010). To this day, Locard's theory forms the foundational concepts of evidence transfer theory.

Today, the ability of forensic experts to identify suspects and to examine physical evidence has increased exponentially when compared to early policing. Scientific discoveries in a wide range of disciplines have contributed to the development and evolution of forensic specialties in physical matching, chemical analysis, fingerprints, barefoot morphology, odontology, toxicology, ballistics, hair and fiber, biometric analysis, entomology, and, most recently, DNA analysis.

Many of these forensic science specialties require years of training and practice by the practitioner to develop the necessary level of expertise whereby the courts will accept the evidence of comparisons and subsequent expert conclusions. Obviously, it is not possible for a modern-day investigator to become a proficient practitioner in all of these specialties. However, the modern-day investigator must strive to be a forensic resource generalist with an understanding of the tools available and must be specialist in the deployment of those tools to build the forensic case.

In a criminal investigation, there is often a multitude competing possibilities guiding the theory development of how a criminal incident occurred with circumstantial links pointing to who committed the crime. Competing theories and possibilities need to be examined and evaluated against the existing facts and physical evidence. Ultimately, only strong circumstantial evidence in the form of physical exhibits, testimony from credible witnesses, or a confession from the accused may satisfy the court beyond a reasonable doubt. Critically, the quality of an investigation and the competency of the investigators will be demonstrated through the manner in which that evidence was located, preserved, analyzed, interpreted, and presented.

In the past, police officers generally took their primary roles as first responders and keepers of the peace. Criminal investigation was only a limited component of those duties. Now, given the accessibility to a wide range of effective forensic tools, any police officer, regardless of their assignment, could find themselves presented with a scenario that requires some degree of investigative skill. The expectation of police investigators is that they be well-trained with the knowledge and skills to respond and investigate crime. These skills will include:

- Critical Incident Response
- Interpretation of criminal law and offence recognition
- Crime scene management
- Evidence identification and preservation
- Engaging forensic tools for evidence analysis
- Witness assessment and interviewing
- Suspect questioning and interrogation
- Case preparation and documentation

- Evidence presentation in court

In addition to these task skills of process and practice, investigators must also have strategic analytical thinking skills for risk assessment and effective incident response. They must have the ability to apply deductive, inductive, and quantitative reasoning to examine evidence and form reasonable grounds to identify and arrest suspects.

Engaging these higher-level thinking skills is the measure of expertise and professionalism for investigators. As our current justice system continues to change and evolve, it relies more and more on information technology and forensic science. With this evolution, the need for investigators to demonstrate higher levels of expertise will continue to grow.

Topic 4: The Path to Becoming an Investigator

For many people, their idea of what an investigator does is based on what they see, hear, and read in the media, movies, TV, and books. These depictions characterize personas ranging from dysfunctional violent rebels fighting for justice by their own rules, to by-the-book forensic investigators who get the job done clinically using advanced science and technology. Realistically, good investigation and real-life investigators are unlikely to make a captivating fictional script. Professional investigators and competent investigation rely on the tedious processes of fact-finding and sorting through evidence and information. It is about eliminating possibilities, validating events, and recording evidence, all the while engaging in an intentional process of thinking, analyzing, and strategically working towards predetermined goals; not to mention extensive note taking and report writing.

Sometimes, new police investigators are, at first, deluded by fictional representations, only to find out, by experience, that the real job, although having moments of action, satisfaction, and excitement, is more about hard work and deliberate attention to detail.

Another common misnomer about the job is the conception that investigation is the exclusive domain of a police officer. Although this may have been true in the earlier evolution of the investigative craft, it has become much less the case today. This change is a result of the enactment of many regulatory compliance statutes that require investigative knowledge, skills, and thinking. Compliance investigators maintain adherence to regulated activities which often involve legal compliance for industries where non-compliance can pose significant risks that threaten the lives and safety of people or the environment. These regulated activities are often responsibilities of the highest order. What starts as a regulatory violation can escalate into criminal conduct. The investigative skills of compliance investigators and inspectors must be capable of meeting the same tests of competency as the police.

Not just anyone can become an investigator. There are certain personal traits that tend to be found in good investigators. Among these traits are:

- Being passionate about following the facts to discover the truth, with a goal of contributing to the process of justice
- Being detail-oriented and observant of the facts and the timelines of events
- Being a flexible thinker, avoiding tunnel vision, and being capable of concurrently examining alternate theories while objectively using evidence as the measure to confirm or disconfirm validity of theories
- Being patient and capable of maintaining a long-term commitment to reaching a conclusion
- Being tenacious and not allowing setbacks and false leads to deter continued efforts
- Being knowledgeable and skilled at the tasks, process, and procedure while respecting legal authorities and the limitations to take action
- Being self-aware of bias and intuitive responses, and seeking evidence to support gut-feelings
- Being trained in the processes of critical thinking that provide reliable analysis of evidence that can later be described and articulated in reports and court testimony

Considering this list of traits, we can appreciate that good investigators are people with particular attitudes, aptitudes, and intentional thinking processes. These traits all form part of the investigative mindset. Although you cannot teach someone to be passionate about discovering the truth, anyone who has these traits can work towards developing and refining their other traits and skills to become an investigator. Developing the mindset is a learning journey, and the first step of this journey is to become intentionally aware of and engaged in your own thinking processes.

Toward this point, the investigator must always be mindful of the proposition of Shah and Oppenheimer (2008) in their book Heuristics Made Easy: An Effort Reduction Framework . Shah and Opprenheimer remind us that people have learned to become quick thinkers using mental short cuts, known as heuristics, in an effort to make decisions quickly and problem solve the challenges we encounter. They offer the proposition that heuristics reduce work in decision-making by giving the user the ability to scrutinize

a few signals and/or alternative choices in decision-making, thus diminishing the work of retrieving and storing information in memory. This streamlines the decision-making process by reducing the amount of integrated information necessary in making the choice or passing judgment (Shah, 2008).

In this book, we will point out that these heuristic shortcuts are often instinctive or intuitive reactions, as opposed to well-reasoned, evidence-based responses. Although they may serve us well in our everyday thinking, they must be monitored and recognized for their shortfalls when we are required to investigate matters where the outcomes are critical.

To achieve the investigative mindset and be an objective investigator, it is important to be aware of the heuristic shortcuts and other negative investigative tendencies that can become obstacles to successful outcomes. For example, a good investigator needs to be focused on the objective of solving the case and making an arrest in a timely manner but becoming too focused can lead to "tunnel vision," which is the single-minded focus on a favorite suspect or theory to the extent that other suspects or alternate theories are ignored. Moreover, a good investigator needs to take responsibility and be accountable for the outcomes of the investigation; however, taken to the extreme, this can lead to an investigator taking complete ownership of the investigation to the exclusion of allowing the ideas of others to provide guidance and influence. Finally, a good investigator needs to be careful about how much information is shared with others. However, excessive secrecy can inhibit information sharing with those who might contribute to the successful conclusion of the case.

Thinking as an objective investigator, it is often necessary to consider and evaluate several competing theories or possibilities of how a crime was committed and who the suspect may be. Often, new investigators, or those uninitiated to the objective mindset, will focus on a favorite theory of events or a favorite suspect, and rush to be first to reach the conclusion and to make the arrest. There is a trap in shortcuts and the focused rush to make a fast arrest. In this trap, other viable suspects and theories are too quickly ignored or discarded. This sometimes leads to investigations being derailed by "tunnel vision." Worse yet, tunnel vision can lead to the misinterpretation of evidence, ultimately leading to charges against an innocent person, while the guilty remain undiscovered.

To summarize the observations made by Kim Rossmo (2009) in his book on criminal investigative failures, tunnel vision and lost objectivity have been part of the findings in many public inquiries. Commissioners at public inquiries have concluded that, at times, investigators relentlessly pursue a favorite suspect. Sometimes an alternate suspect should have been apparent, or exculpatory evidence was present that should have caused the investigators to stop and re-evaluate their favorite suspect, but tunnel vision had set in and the objective investigative mindset had been lost (Rossmo, 2009).

Similarly, and not totally unrelated to tunnel vision, other negative thinking responses also come into play, and can be observed in the behaviors of case ownership and excessive secrecy. It may seem that an investigator taking ownership for his or her investigation and maintaining some degree of secrecy in the management of case related information, is completely acceptable and perhaps even desirable. However, as happens with any human behavior, it can negatively influence the outcome of investigations. Information appropriately shared with the right people can often reveal connections that contribute to the evidence of a case, and investigators must remain open to this appropriate sharing. Many negative examples can be found where a police investigator, or even an investigative team, adopted the attitude that the conduct of an investigation is their own exclusive domain (Campbell, 1996). With that exclusive ownership, no one else is entitled or allowed to participate, and relevant information that needs to be shared with others can be jealously guarded. Opportunities are missed for other investigators to see details that could connect a similar fact pattern or make the connection to a viable suspect.

Topic 5: Understanding the Investigative Mindset

When we talk about the investigative mindset, in part, we are talking about the self-awareness and the organizational awareness to avoid negative outcomes. Once learned and practiced, this awareness can be a safety net against destructive investigative practices (i.e., tunnel vision, case ownership, and excessive secrecy). Criminal investigation can require complex thinking where the investigator must assess and determine the validity of information and evidence to guide the investigative process. This thinking strives to move from a position of mere suspicion to one of reasonable grounds for belief to make an arrest and ultimately articulate evidence upon which the court can make a finding of guilt beyond a reasonable doubt. This is a conscious process of gathering and recording information and thinking analytically to form reasonable grounds for belief supporting defendable actions of arrest and charges. From this conscious process, the investigator in court can articulate a mental map to describe how they derived their conclusions.

Sting Operations [93]

Another element of criminal investigation is the use of an undercover agent or decoy—the policeman who poses as a buyer of drugs from a street dealer or the elaborate “sting” operations in which ostensibly stolen goods are “sold” to underworld “fences.” Sometimes these methods are the only way by which certain kinds of crime can be rooted out and convictions secured.

But a rule against entrapment limits the legal ability of the police to play the role of criminals. The police are permitted to use such techniques to detect criminal activity; they are not permitted to do so to instigate crime. The distinction is usually made between a person who intends to commit a crime and one who does not. If the police provide the former with an opportunity to commit a criminal act—the sale of drugs to an undercover agent, for example—there is no defense of entrapment. But if the police knock on the door of one not known to be a drug user and persist in a demand that he purchase drugs from them, finally overcoming his will to resist, a conviction for purchase and possession of drugs can be overturned on the ground of entrapment.

Forensic Science [94]



Quotable

“Knowledge of forensic tools and services provides the investigator with the ability to recognize and seize on evidence opportunities that would not otherwise be possible.”

Another critical element of investigation is forensic science. In this section, we examine various forensic sciences and the application of forensic sciences as practical tools to assist police in conducting investigations. This section is not intended to be a comprehensive dissertation of the forensic sciences available. Rather, it is intended to be an overview to demonstrate the broad range of forensic tools available. It is not necessary for an investigator to be an expert in any of the forensic sciences; however, it is important to have a sound understanding of forensic tools to call upon appropriate experts to deploy the correct tools when required. The forensic analysis topics covered in this section include:

1. Physical Matching
2. Fingerprint Matching
3. Hair and fiber analysis
4. Ballistic Analysis
5. Blood Spatter Analysis
6. DNA Analysis
7. Forensic Pathology
8. Chemical Analysis
9. Forensic Anthropology
10. Forensic Entomology
11. Forensic Odontology
12. Forensic Engineering
13. Criminal Profiling
14. Geographic Profiling
15. Forensic Data Analysis
16. Forensic Document Analysis
17. Forensic Identification Sections
18. Crime Detection Laboratories

Various types of physical evidence can be found at almost any crime scene. The types of evidence and where it is found can assist investigators to develop a sense of how the crime was committed. Tool marks where a door was forced open can indicate a point of entry, shoe prints can show a path of travel, and blood stains can indicate an area where conflict occurred. Each of these pieces of physical evidence is a valuable exhibit capable of providing general information about spatial relationships between objects, people, and events. In addition, the application of forensic examination and analysis could turn any of these exhibits into a potential means of solving the crime.

Topic 1: Physical Matching

If we think back to the example in Chapter 1 where the Bow Street Runners (McCrery, 2013) made a physical match from the torn edges of one piece of wadding paper to the original sheet from which it was torn, we can appreciate that physical matching is a forensic technique that can be applied, to some extent, by the investigator personally viewing and studying details of the evidence. At this level, physical matching can be used by investigators to do on site analysis of evidence. That said, the more sophisticated aspects of physical matching do require the expertise of a person trained in the techniques to form and articulate an opinion that the court will accept as expert evidence.

During a crime investigation, physical matching is typically conducted on items, such as fingerprints, shoe prints, tire prints, glove prints, tool impressions, broken glass, plastic fragments, and torn edges of items, such as paper, tape, or cloth. In these physical matchings, there are two levels of examination that are typically considered: an examination for class characteristics and an examination for accidental characteristics .

Level One — The Examination of the Item for Class Characteristics

Determining class characteristics takes place in relation to items, such as shoe prints, tire prints, glove prints, and tool impressions. At the first level of examination, these items can be classified and sorted based on type, make, model, size, and pattern. For example, if a shoe print is found at the scene of a crime and is determined to be a left shoe of a size 9, Nike brand, Air Jordan model, running type shoe with a wavy horizontal sole pattern, these class characteristics collectively provide a description of the suspect's shoe based on five defined descriptors.

In turn, these class characteristics may allow the investigators to narrow their focus to suspects having that class description of shoe. It is not a positive identification of the shoe to any particular suspect, but it does allow the potential elimination of suspects who wear different sizes, brands, and sole patterns of running shoe. Using this Level One examination, an investigator at the crime scene may find a suspect shoe print showing a distinct size and sole pattern. If a suspect with a matching size and sole pattern is found near the crime scene, this Level One observation would provide strong circumstantial evidence to assist in forming reasonable grounds to suspect that this person was involved in this crime.

A Level Two examination may be able to produce a conclusive match. Positive identification requires this next level of examination, namely the examination for accidental characteristics.

Level Two — Accidental Characteristics

Accidental characteristics are the unique marks and features that develop on any item resulting from wear and tear. Looking back at the Nike Air Jordan Running Shoe, to make a positive match of a suspect's shoe to the impression found at the crime scene, the crime scene impression would be examined for nicks, gouges, and wear patterns typically present on a worn shoe. These features would then be compared to a rolled impression of a suspect's shoe, and if the same nicks, gouges, and wear patterns could be shown in all the same locations on the suspect's shoe, a positive match could be made.

This Level Two method of comparison for things, such as shoes prints, tire prints, glove prints, and tool impressions, is the practice for physical matching. Investigators can often use these physical matchings to link the suspect back to the crime scene or the victim. Finding a suspect in possession of a shoe, a tire, or a tool that is a positive match to an impression at the criminal event is a powerful piece of circumstantial evidence.

With items, such as broken glass and plastic fragments, the process of physical matching requires significantly greater levels of expertise. At Level One, these items are first matched for general characteristics, such as material color and thickness; however, the process for making the comparison of broken edges requires microscopic examination and photographic overlay comparison of broken edge features to demonstrate a positive match. For investigators, these kinds of comparisons can be called upon where there is broken glass at a crime scene and fragments of glass have been found on a suspect's clothing, or in cases where glass or plastic fragments are left at the scene of a hit-and-run car crash and a suspect vehicle is found with damage that includes similarly broken items. Glass fracture analysis can also be used to demonstrate which side of a piece of glass received the impact that caused the fracture. This can be a helpful tool in confirming or challenging a version of events, such as insurance fraud, break-in reports, and motor vehicle crashes where the damage has been exaggerated or staged. Glass fracture analysis can also be used to demonstrate the sequence and order in which a series of bullets have passed through the glass of a window. This can be helpful for an investigator to establish the origin location of the shooter, and, in cases of a drive-by shooting, the direction of travel.

Topic 2: Fingerprint Matching

The forensic science of fingerprints has a longstanding history in policing. Fingerprints have been accepted as being individually unique to each person. The courts frequently accept positive fingerprint matches conducted by an expert witness, as proof of identity beyond a reasonable doubt (Jain, 2010).

Prior to the modern advent of DNA analysis and biometric scanning technologies for positive identification, fingerprints and dental record x-rays were the only truly positive means of making a conclusive identification.

Fingerprints are unique patterns of lines and ridges that exist on the areas of our hands and fingertips, known as the plantar surfaces. These unique patterns have been classified in categories and features since the late 1800's (Dass, 2016). The various categories and features allow each digit of a person's fingers to be catalogued in a searchable system or database. These unique categories and features do not change throughout a person's life, unless they are subjected to damage through physical injury or intentional abrasion. The impressions of our fingerprints are often left on items we touch because the oils our bodies produce act like an invisible ink adhering to smooth surfaces we touch, thus transferring these fingerprint impressions to those surfaces. These virtually invisible image transfers are commonly called latent fingerprints, and they are easily made visible on most surfaces through the application of colored fingerprinting powder that adheres to the oils left by our fingers. The powder sticking to the oil reveals the image of lines and ridges that make up the fingerprint. It is also possible for a fingerprint impression to be exposed on surfaces, such as plastic, dry paper, or paint though a process of chemical fuming that reacts with the oils of the fingerprint changing their color, thereby exposing the image. Fingerprints are sometimes also visible when they are transferred to an object because the finger has some foreign material on it, such as ink or blood. Other forms of visible fingerprints can be found as an actual molded impression of the fingerprint when a person touches a malleable surface, such as clay or cheese.

The unique lines and ridges of an unknown fingerprint can be searched in a database of known criminal fingerprints for identification. Today, this type of search is done electronically using a biometric scanning process known as Automated Fingerprint Identification System (AFIS). For smaller partial prints, identification of a suspect requires sorting through possible suspects and conducting specific searches of print characteristics to make a match. If the person who left the print does not have a criminal record or their fingerprints are not on file, the only way a comparison can be made is to obtain a set of fingerprint impressions from that person. When this is done, the print examination will be conducted by a trained fingerprint expert who will search the print to establish as many points of comparison between the suspect print and the known-print as possible. The general accepted standard for accepting a match is to find ten points of comparison.

The location and identification of a suspect's fingerprint at the scene of a crime, or on some crime-related object, is strong circumstantial evidence from which the court can draw the inference that the suspect is, in some way, connected to the crime. The investigative challenge of finding a suspect's print is to eliminate other possible ways that the print may have been left at the scene, other than through involvement in the crime.

Topic 3: Hair and Fiber Analysis

In considering once again "Locard's Theory of Evidence Transfer," (Petherick, 2010) it was suggested that a person cannot be at the scene of a crime without leaving something behind and cannot leave the scene of a crime without taking something with them. Exhibits of hair and fiber fit support this theory well. As humans, we are constantly shedding materials from our bodies and our clothing. We enter a room, and we leave behind strands of hair that fall from our heads, oily impressing of our fingerprints as we touch objects, and fibers of our clothing materials. As we leave a room, we take away hairs from other occupants of the room or fibers from the carpet and furniture adhering to our clothing. The analysis of hair and fiber, although not an exact science, can provide corroborative evidence. Hair samples can be compared taking a shed sample at the crime scene to the hair from a suspect to establish a similarity within a limited degree of certainty. If the hair happens to have been pulled out and still has root tissue, there is a possibility for more positive identification using DNA analysis. Somewhat more identifiable than hair samples, fiber samples can often be narrowed down to make a higher probability comparison using microscopic examination for size, color, and type between an unknown sample and control sample.

Topic 4: Ballistic Analysis

Given the number of gun-related crimes, the understanding of ballistic analysis is important for investigators. Ballistics is the study of all things that are launched into flight, how they are launched, and how they fly. In most cases, investigators find themselves dealing with several common types of firearms.

1. Handguns as either semi-automatic pistols or revolvers
2. Long rifles that are single shot bolt action, automatic, or semi-automatic
3. Shotguns that are breach loading or chambered pump action

There are techniques in ballistic science that address the unique aspects of firearms and bullets. Because ballistic comparisons seek to determine if a particular gun was the originating source of an unknown bullet or cartridge casing, this examination process is sometimes referred to as ballistic fingerprinting. If a particular gun touched a particular bullet or cartridge-casing, it leaves behind some unique identifiable marks, or a ballistic fingerprint.

Ballistic Fingerprints

When a modern-day firearm is being loaded to fire, the cartridge loaded into the gun is composed of several components. The bullet portion of the cartridge is tightly pressed into a brass tube, called the casing. At the bottom of this brass casing is a round, flat base slightly larger than the casing, and this base prevents the casing from sliding completely into the cartridge chamber of the gun when being loaded. On the bottom of this flat base of the cartridge is the primer. When the trigger is pulled, the primer is the portion of the cartridge that will be struck by the firing pin of the gun. When struck, the primer ignites the gun powder contained inside the brass casing with an explosion that causes the bullet to leave the casing, travel down the gun barrel, and exit the gun.

Each of the components of the cartridge casing can be examined forensically and comparisons can be made to suspect guns. In some instances, it is possible to determine if a cartridge has been fired from the chamber of a specific gun. This can be done by examining the unique and identifiable marks left by four aforementioned components of the gun. Like the process of physical matching, this is also a two-level process.

At Level One , cartridges are classified by the caliber, which is the size of the bullet, the maker of the cartridge, and the primer location; either a center-fire or a rim-fire cartridge on the cartridge base.

For ballistic purposes, guns are classified by their caliber, chambering and ejector mechanisms, and firing pin, namely either center-fire or rim-fire. Eliminations of suspect weapons can often be made at Level One. For instance, a .38 caliber bullet removed from a crime scene cannot have been fired from a .22 caliber weapon. Or, that same .38 caliber bullet showing marks from an ejector mechanism could not have been fired from a .38 caliber revolver that does not have an ejector mechanism.

At Level Two , the more decisive ballistic fingerprint comparisons are often made using the following methods:

1. Striations Matching
2. Chamber Markings
3. Firing-Pin Comparison
4. Ejector markings

1. Striations Matching. Bullets fired from either a handgun or long rifle, other than a shotgun, fire a single projectile each time. This fired projectile is a lead or lead-composite bullet. When fired, this bullet travels down the barrel of the gun and begins to spin because the inside of the gun barrel has been intentionally machined with long gently turning grooves, called rifling. These grooves catch the soft-lead sides of the bullet spinning it like a football, and this spinning makes the bullet travel straighter and truer to the target. As a result of these grooves designed into gun barrels, every bullet fired will arrive at its target with markings etched into the bullet material from contact with the grooves in the barrel. These etched markings are call striations , and they are uniquely identifiable back to the gun they were fired from. For an investigator, these striations create an opportunity to match the bullet to the gun that fired it. Recovered bullets can be recovered and compared to test bullets fired from a suspected gun. When striations of a recovered bullet are compared to known samples fired from a suspected gun, a side-by-side microscopic technique is used to match striation markings. An expert ballistic examiner can sometimes identify and illustrate matches in the striations to make a positive match.
2. Cartridge Chamber Markings . When a cartridge is loaded into the chamber of a gun, the shiny brass casing comes into contact with the hard steel sides of the chamber. This chambering of the cartridge can leave unique and identifiable scratch marks on the side of the casing. A cartridge casing ejected or unloaded from a weapon and left at the crime scene can sometimes be matched to the suspect gun by comparing these markings.
3. Firing Pin Comparison. When the firing pin of any gun strikes the primer on the bottom of a cartridge, it leaves an indentation mark. This firing pin indentation can sometimes be matched to the firing pin of a suspect weapon. This requires microscopic

examination that looks for the unique characteristics of the firing pin that become impressed into the soft metal of the primer when the firing contact happens.

4. Ejector Mechanism Markings. Methods for loading and unloading weapons have evolved considerably due to different gun designs. The simplest guns allow the user to open the breach of the gun exposing the cartridge chamber to manually insert the cartridge and close the breach to make ready for firing. There is no ejector mechanism for these guns, so there will be no ejector marks left on the base of a cartridge when it is unloaded from the weapon. Other guns have a variety of different ejector methods, including ejectors that catch the base of the cartridge casing to physically pull it from the breach and eject them away from the gun. In cases where a gun does have an ejector mechanism, these mechanisms leave very distinct and unique marks on the soft brass cartridge base. These markings can sometimes be compared and matched back to the ejector of a suspect weapon. With this broad variety of ballistic comparison techniques, an investigator has a significant number of tools that can be deployed and strategies that can be engaged to assist in matching a bullet to the gun that fired it. Considering these tools, the cartridge casing left at the scene of a shooting can be as important as a bullet removed from the body of a shooting victim. An investigator needs to keep this in mind when seizing cartridge casings as evidence. Great care needs to be exercised to document the location where each individual casing was found, and to preserve each casing in a manner that does not degrade the possible markings that could enable a match to be made. Damage can be done by placing casings into a common bag where they can rub against each other causing more characteristics and obliterating existing marks.

Trajectory Analysis

In addition to the ballistic fingerprinting examinations, another area of ballistic science is known as trajectory analysis. The trajectory of a bullet is the path it travels from the time it leaves the barrel of the gun to the point where it finally loses the propulsion energy of the gunpowder and comes to rest. The flight of a bullet can be very short, as in the case of a point blank shooting, where a victim is shot at very close range, or it can be very distant where the target is one mile away or more, as in the case in some sniper shootings.

When the bullet is travelling a longer distance, it travels that distance in an arched path or trajectory of travel as it is pulled towards the ground by gravity. When the bullet arrives at its destination, it will have a distinct angle of entry into the target. This angle of entry can sometimes be calculated as trajectory to estimate the geographic location of the originating shot. In cases where a bullet passes through several objects, such as two walls of a house, the trajectory of the bullet can be used to determine where the shooter was located. In cases of drive-by shootings, for example, where several shots are fired, the pattern of trajectories can show if the shooter was moving and, if so, demonstrate the direction of travel.

Topic 5: Blood Spatter Analysis

Blood spatter analysis, also known as blood stain pattern analysis, is a relatively new forensic specialty. The purpose of this analysis is to determine the events of a crime where blood has been shed. This is accomplished through the careful examination of how blood is distributed inside the crime scene. Studies have shown that when blood is released during an attack, certain patterns of distribution can be expected (National Science Forensic Technology Center, 2012). For instance, a person being struck with a baseball bat will begin to bleed, and blood will be distributed in a droplet spatter pattern in the direction of the strike behind the victim. These droplets of blood will have a direction of travel that will be indicated by the directional slide of each droplet as the bat hits objects in its path. Blood from the victim adhering to the bat can also be distributed when the bat is on the upstroke for the next strike. This blood will be distributed in an upward directional slide pattern, for example, up a wall, onto a ceiling, or behind the attacker. Calculations of how many strikes were made may become evident from the tracking of multiple streams of droplets behind the victim and behind the attacker. Given this developing science, blood spatter analysis can be useful in criminal event reconstruction.

Topic 6: DNA Analysis

DNA, or deoxyribonucleic acid, is a molecule that holds the genetic blueprint used in the development, functioning, and reproduction of all living organisms. As such, it carries the unique genetic information and hereditary characteristics of the cells from which living organism are formed. Except for identical twins, the DNA profile of each living organism is unique and distinct from other organisms of the same species. There are some rare cases where one person may carry two distinct types of DNA, known as Chimera (Rogers, 2016) where paternal twin embryo merge during gestation, or in cases where a bone marrow transplant

enables the production of the marrow donor DNA in the recipient's blood. In these rare cases, a person may test for two distinct DNA profiles for different parts of their body.

In human beings, DNA comparison can enable high probability matches to be made between discarded bodily substances and the person from whom those substances originated. Bodily substances containing cellular material, such as blood, semen, seminal fluid, saliva, skin, and even hair root tissue can often be compared and matched back to its original owner with high statistical probabilities of comparison (Lindsey, 2003). Sometimes, even very old bodily substances, such as dried blood, dried saliva, or seminal stains, can be analyzed for a DNA profile. The introduction of DNA analysis has allowed investigators for advocates to re-examine historical evidence and exonerate persons wrongfully convicted and imprisoned for criminal offences (Macrae, 2015).

DNA is a very powerful tool for investigators and can be considered anytime discarded bodily material is found at a crime scene. Even very small amounts of material can yield enough material for DNA comparison. Importantly, DNA databanks of known criminals and unsolved crimes are now becoming well established in North America (Royal Canadian Mounted Police, 2006). When a person is convicted of certain criminal offences, DNA is collected and submitted to these databases.

Topic 7: Forensic Pathology

Forensic Pathology is the process of determining the cause of death by examining the dead body during an autopsy. An autopsy generally takes place in the pathology department of a hospital. In the case of a suspicious death or a confirmed homicide, police investigators will be present at an autopsy to gather information, take photographs, and seize exhibits of a non-medical nature, such as clothing, bullet fragments, and items that might identify the body. These items would include personal documents, fingerprints, and DNA samples.

During an autopsy, a forensic pathologist dissects the body carefully examining, documenting, and analyzing the body parts to determine the cause of death. In the first stage of an autopsy, the pathologist examines the body for external injuries and indicators of trauma that may provide a cause of death. In this first stage of examination, the pathologist will make an estimate of the time-of-death by observing evidence of four common post-mortem (after-death) indicators. These are body temperature, the degree of rigor mortis, post-mortem lividity, and progress of decomposition.

Body Temperature

Algor Mortis is the scientific name given to the loss of body temperature after death which can sometimes be used to estimate the time of death (Guharaj, 2003). This is a viable technique in cases where the body is being examined within 24 hours following death. This method of estimating time of death can vary significantly dependent upon many possible variables, such as:

- Ambient room temperature being within a normal range of approximately 22° Celsius
- Pre-death body temperature of the victim not being elevated by illness or exertion
- Thickness of clothing that might insulate the body temperature escape
- The temperature and conductivity of the surface the body was located on that could artificially increase or decrease temperature loss

Considering a normal body temperature of 37° Celsius at the time of death, it can be estimated that the body will cool at a rate of 1° – 1.5° Celsius per hour. This calculation is known as the Glaister Equation (De Saram, Webster, and Kathirgamatamby, 1956). So, taking an internal rectal temperature and subtracting that from 37° Celsius will provide an estimate of the number of hours that have passed since the time of death. For example, a dead body with a measured temperature of 34° Celsius would provide a time range of 3 to 4.5 hours since the time of death.

Rigor Mortis

Rigor mortis is a term used to describe the stiffening of the body muscles after death. A dead body will go from a flaccid or limp muscle condition to one where all the muscles become contracted and stiff causing the entire body to become constricted into a fixed position. After being in a constricted and fixed position, the muscles eventually become flaccid again (Advameg, Inc., 2017). In normal room temperatures, this stiffening of muscles and the relaxing again has a predictable time progression of approximately 36 hours. In this progression, the stiffening of muscles will take approximately 12 hours, the body will remain stiff for 12 hours and will progressively become flaccid again over the next 12 hours.

Stiffening of muscles begins with the small muscles of the hands and face during the first 2 to 6 hours, and then progresses into the larger muscle groups of the torso, arms, and legs over the next 6 to 12 hours. These are general rules; however, the rate of rigor mortis can be different for infants, persons with extreme muscle development, or where extensive muscle activity precedes death, such as a violent struggle (Cox, 2015).

In determining the time of death in average environmental temperatures, Cox (2015) recommended that:

1. If the body feels warm and is flaccid, it has been dead for less than 3 hours
2. If the body feels warm and is stiff, it has been dead for 3 to 8 hours
3. If the body feels cold and stiff, it has been dead for 8 to 36 hours
4. If the body feels cold and is flaccid, it has been dead more than 36 hours

Post-Mortem Lividity

Post-mortem lividity refers to a discoloration or staining of the skin of a dead body as the blood cells settle to the lowest part of the body due to gravity. This discoloration will occur across the entire lower side of a body; however, in places where parts of the body are in contact with the floor or another solid object, the flesh compresses and staining will not occur in that area. The staining is a reddish-purple coloring, and it starts to become visible within 1 hour of death and becomes more pronounced within 4 hours. Within the first 4 hours, lividity stains are not fixed and, if the body is moved, the blood products will shift and stain the part of the body that has become lower. In most cases, these stains become fixed between 12 and 24 hours. As such, they can be viewed as an indicator of how the body was left at the time of death. Importantly, if a body is found with post-mortem lividity stains not at the lowest point in the body, it can be concluded that the body has been moved or repositioned after the 12-to-24-hour stain setting period (Cox, 2015).

Decomposition

This is the final indicator a pathologist can look at to estimate the time of death. Sometimes, dead bodies are not discovered in time to use body temperature, rigor mortis, or early lividity indicators to estimate a more exact time of death. In these cases, assessing the progress of decomposition becomes important. Decomposition starts as soon as the body ceases to be alive. Subject to environmental conditions of extreme heat or cold, the readable signs of decomposition will become apparent 36 to 48 hours after death (EnkiVillage, 2017). These signs include bloating of the body and a marbling discoloration of the skin in a spider web pattern along surface blood vessels. As the body continues to decay, the skin surface will open, and body fluids will begin to seep out. In advanced stages of decomposition, the body is often no longer identifiable by facial recognition, and DNA testing or dental records become the tools to determine identity. At very advanced stages of decomposition, flies and maggots begin to emerge, and the number of life cycles of the maggot-to-fly can be estimated by a forensic entomologist to provide the amount of time that has passed since these insect life cycles began.

Once these preliminary examinations have been made, the pathologist will cut the corpse open to conduct a detailed internal examination of each organ to look for signs of trauma, disease, or external indicators that might explain the cause of death, such as water in lungs or toxins in blood.

Causes of Death

There are a wide range of possible causes of death and pathologists are trained to look for these indicators, gather the evidence, and develop an expert opinion regarding the cause of death. Causes of death can include:

- Laceration or Stabbing
- Shooting
- Blunt force trauma
- Asphyxiation
- Toxic substances
- Electrocution
- Depriving necessities of life

In cases of laceration or stabbing, wounds are inflicted by a sharp weapon or pointed object. The pathologist will attempt to determine if the death was caused by damaging a vital organ or by blood loss. The distinction here is that a person may be cut or stabbed in a way that causes them to bleed to death, which will be indicated to the pathologist by only a small amount of blood

remaining in the body. Alternately, a laceration or stab wound may penetrate the heart, lungs, or the brain in a way that causes the organ to stop functioning and causes death. In these cases, the pathologist will make a determination and render an opinion of fatal organ damage.

In cases of stabbing, the pathologist can sometimes illustrate the entry point of the wound and trace the wound path to determine an angle of entry indicating how the stab wound was inflicted. The size, depth, and width of the wound may indicate the size and type of weapon used to create the injury. Similarly, examining the characteristics of the wound can provide information to allow the pathologist to offer an expert opinion on the direction of a laceration or cut wound by illustrating the start point and the termination point. This information can be helpful for investigators in reconstructing or confirming the actual actions and weapons used in a criminal event.

In cases of shooting, the pathologist will make a determination of whether death was caused by the fatal destruction of a vital organ or by blood loss. Recovery of a bullet or fragments of a bullet from inside the body can be helpful in ballistic analysis. Examining the entry wound can sometimes indicate the distance from which the wound was inflicted. In cases of point blank or direct contact shootings, gunshot (burned gun powder) residue will be present at the entry point of the wound. As with stab wounds, the pathway that the bullet travelled from the entry point into the body to where it came to rest can sometimes be identified by a pathologist to determine the angle of entry. For investigators, this information can be helpful in reconstructing the criminal event and determining the location of the shooter. In cases of self-inflicted gunshot wounds, a point blank entry point and a bullet path indicating a logical weapon position in the hand of the victim can provide some confirmation or contradiction of the self-inflicted wound theory.

In cases of blunt force trauma, the pathologist will look for indications of organ destruction or massive internal bleeding causing death. Blunt force trauma can be inflicted in many ways, such as massive sudden trauma from a fall from a great height, or a high-speed car crash that can immediately damage the brain, the heart, or the lungs to the point where they cease to function resulting in death. Other blunt force traumas, such as a strike to the head with a weapon, may not immediately cause death, but result in massive bleeding and internal accumulation of blood that can cause death. In cases of head injuries pathologists will sometimes be able to determine the contact point where the injuries were inflicted, and they will be able to point to the contre coupe injury effect, which happens when the head is struck on one side and the brain is so traumatically moved inside the skull that it also become damaged on the opposite side and bleeding occurs at the top of the brain. This bleeding inside the skull can sometimes cause death.

In a similar effect, Shaken Baby Syndrome (SBS), (Elsevier, 2016) occurs when an infant child is violently shaken by a person and the baby's brain moves back and forth traumatically inside the skull causing bruising and sometimes fatal bleeding at the front and back of the brain. An examination by the pathologist for the contact points and internal bleeding can provide valuable clues to the manner in which the blunt force trauma was inflicted. According to An Investigator's Manual for Shaken Baby Syndrome, studies indicate that SBS is the leading cause of death in children under two years of age and research studies the United Kingdom and the United States indicate that SBS may occur each year in as many as 24 to 30 per 100,000 children under two years of age (Smith, 2010).

In cases of asphyxiation, a pathologist will look for indicators of how the body was deprived of oxygen. Several common means include strangulation, suffocation, smoke inhalation, or drowning. For strangulation, the pathologist will look for bruising around the neck inflicted by choking hands or by a ligature. A ligature is any item, such as a rope or a belt, which could be used to restrict breathing and stop oxygenated blood going to the brain, thus causing death. If a ligature has been used and removed, it will leave a distinct abrasion line. If a dead body is found with a ligature in place, investigators should take great care to not untie the ligature, but cut it off of the victim, as this allows the ligature size to be measured and compared to the size of the neck to determine the amount of breathing that was restricted. Once the ligature is removed from a dead body, a distinct ligature mark or a groove in the flesh will sometimes be visible.

To determine strangulation, the pathologist will examine the eyes of the victim for the presence of small, ruptured blood vessel that appear as red spots on the white of the eyeball. These spots are known as petechial hemorrhage and will often be visible in victims of strangulation (Jaffe, 1994).

Suffocation as a cause of asphyxiation occurs when a victim's breathing is stopped by an object, such as a pillow or a plastic bag, which restricts the ability of a victim to breath, thus causing death. Unlike strangulation, suffocation has fewer indicators of violent trauma. Suffocation deaths are sometimes accidental and are harder for pathologist to conclusively determine. The presence of a suffocation device at the scene of the death is sometimes a first clue to this cause. Other contributing causes can be the limited

ability of a victim to remove the device that accidentally obstructs their breathing, as may be found with a very young child, a handicapped person, or a frail elderly victim.

Another unique type of asphyxiation death is Auto Erotic Asphyxia (AEA). This occurs when a person is attempting to enhance their sexual arousal or pleasure while masturbating and apply self-strangulation with a ligature device. Their goal in AEA is not suicide but rather to reach a state of extreme oxygen deprivation and euphoria at the time of orgasm. This strategy can go wrong when the individual passes out and their ligature does not release causing continued strangulation and death. These cases can resemble suicide; however, they are really death by misadventure because the victim had no intent to kill themselves. AEA can sometimes be distinguished from suicide by the existence of apparent masturbation, pornography at the scene, and ligature devices that have releasable controls.

In cases where asphyxiation is caused by smoke inhalation, a pathologist can find signs of soot blackening in the lungs and, if the air containing the smoke was sufficiently hot, the lungs will also show signs of burn trauma. Because arson is sometimes used as a means of disguising a homicide, finding a dead body in a burning building, and not finding signs of smoke in the lungs, is a red flag for possible death by homicide.

In cases where asphyxiation is caused by drowning, a pathologist will find signs of water present in the lungs. If there is a question as to the location of the drowning, it is possible to have a diatom test conducted on the victim's tissue. If the victim was drowned in fresh water, the diatom material, which is microscopic algae, will have migrated from the water in the lungs to the blood and tissue of the victim. These microscopic algae are species unique to a particular body of water. Diatom material found in a victim's lungs should match the diatom sample from the water where the body was found. If it does not match, this suggests that the victim drowned elsewhere.

In cases of toxic substances, a pathologist will test the stomach contents, the blood, eye fluid known as vitreous humor, and tissue samples from various organs in the body for poisons, drug overdose, the ingestion of toxic chemicals, or toxic gas inhalation. Any of these substances can cause death if ingested or inhaled in sufficient quantities.

In cases of electrocution, a person dies because of an electrical current passing through their body that stops the heart. A pathologist will look for signs to confirm that a current passed through the body, including contact burns where a person has touched a source of power that entered their body and existed to a grounding point. This grounding point is often at the ground through the feet, but can be through a shorter contact pathway, if another hand or part of the body was in contact with a grounded object. Burns will also be visible where the electrical current exited the body.

Cases where the necessities of life have been deprived generally occur where there is a dependent relationship between a caregiver and a victim. The victims in these cases are typically very young or very elderly persons who are unable to take care of their own needs. These cases often take place over and extended periods of time and may include other types of physical neglect or abuse. Failing to provide necessities of life is such a significant issue that the Criminal law in Canada makes provision for this as an offence.

Duty of persons to provide necessaries215

1. Everyone is under a legal duty

1. as a parent, foster parent, guardian or head of a family, to provide necessaries of life for a child under the age of sixteen years;
2. to provide necessaries of life to their spouse or common-law partner; and
3. to provide necessaries of life to a person under his charge if that person

1. is unable, by reason of detention, age, illness, mental disorder or other cause, to withdraw himself from that charge, and
2. is unable to provide himself with necessaries of life.

Marginal note: Offence

2. Everyone commits an offence who, being under a legal duty within the meaning of subsection (1), fails without lawful excuse, the proof of which lies on him, to perform that duty, if

1. with respect to a duty imposed by paragraph (1)(a) or (b),

1. the person to whom the duty is owed is in destitute or necessitous circumstances, or

2. the failure to perform the duty endangers the life of the person to whom the duty is owed, or causes or is likely to cause the health of that person to be endangered permanently; or

with respect to a duty imposed by paragraph (1)(c), the failure to perform the duty endangers the life of the person to whom the duty is owed or causes or is likely to cause the health of that person to be injured permanently. (Justice Laws Canada, 2017) Marginal note: Punishment

3. Everyone who commits an offence under subsection (2)

1. is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
2. is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months. (Justice Laws Canada, 2017)

If the death of a person is found to be the result of failing to provide the necessities of life, the responsible caregiver can ultimately be charged with criminal negligence causing death.

Topic 8: Chemical Analysis

There are a wide range of chemicals and usages that can be used in the commission of a crime or found at the scene of a crime. In addition to general chemical analysis, there are several sub-areas for analysis in cases of:

- Accelerants used in the crime of arson;
- Explosive analysis in cases of conventional crimes and terrorism;
- Toxic chemicals and biological agents used in cases of murder, industrial negligence, and terrorism;
- Drug analysis in the cases of trafficking and drug overdoses;
- Gunshot residue analysis; and
- Analysis and chemical matching of paint transfer in cases of hit and run motor vehicle crashes.

Topic 9: Forensic Archaeology

Relatively new in the forensic world, forensic archaeology is the use of archaeological methods by experts to exhume crimes scenes, including bodies. These forensic experts are trained to methodically excavate and record their dig. They document the recovery of artifacts (evidence), such as human remains, weapons, and other buried items, that may be relevant to the criminal event. Forensic archaeologists will often work in concert with other forensic experts in DNA, physical matching, forensic entomology, and forensic odontology in the examination of evidence.

Topic 10: Forensic Entomology

Forensic entomology is a very narrow field of forensic science that focuses on the life cycle of bugs. When a dead body has been left out in the elements and allowed to decompose, the investigative challenge is not only to identify the body, but to establish the time of death. Once a body has decomposed, the process of determining time of death can be aided by a forensic entomologist. As discussed in a previous chapter, these experts look at the bugs that live on a decomposing body through the various stages of their life cycle. From these life-cycle calculations, scientists are sometimes able to offer and estimate relative time of death.

Topic 11: Forensic Odontology

To paraphrase the description provided by Dr. Leung (2008), forensic odontology is essentially forensic dentistry and includes the expert analysis of various aspects of teeth for the purposes of investigation. Since the advent of dental x-rays, dental records have been used as a reliable source of comparison data to confirm the identity of bodies that were otherwise too damaged or too decomposed to identify through other means. The development of DNA and the ability to use DNA in the identification of badly decomposed human remains has made identity through dental records less critical. That said, even in a badly decomposed or damaged corpse, teeth can retain DNA material inside the tooth, allowing it to remain a viable source of post-mortem DNA evidence (Gaytmenn, 2003).

Beyond the identification of dead bodies, forensic odontology can sometimes also provide investigators with assistance in confirming the possible identity of a suspect responsible for a bite mark. This comparison is done by the examination and photographic preservation of the bite mark on a victim or an object, and the subsequent matching of the details in that bite mark configuration to a dental mold showing the bite configuration of a known suspect's teeth. Although bite mark comparison has been

in practice for over fifty years there remain questions to the reliability for exact matching of an unknown bite mark to a suspect (Giannelli, 2007).

Topic 12: Forensic Engineering

Forensic engineering is a type of investigative engineering that examines materials, structures, and mechanical devices to answer a wide range of questions. Often used in cases of car crashes, forensic engineers can often estimate the speed of a vehicle by examining the extent of damage to a vehicle. They can also match damage between vehicles and road surface to determine the point of impact and speed at the time of impact. Many police agencies now have specialized traffic personnel trained in accident analysis and accident reconstruction. These officers utilize a variety of forensic engineering techniques to examine and document the dynamics of car crashes to establish how and why a crash occurred.

In cases of building collapses, forensic engineers can conduct analyzes to determine the cause of a structural failure and, in the case of an intention explosion, such as in acts of terrorism, this can point to the location of the planted explosive device. The investigative possibilities for forensic engineering are too extensive to elaborate here, but if damage to a building, an object, or a piece of equipment poses an investigative question, the tools of forensic engineering should be used to seek answers.

Topic 13: Criminal Profiling

Criminal profiling, also referred to as psychological profiling, is the study of criminal conduct to develop the most likely social and psychological profile of the person who may have committed the crime based on the actions of known criminals who have committed that same type of crime in the past (Royal Canadian Mounted Police, 2015). Criminal profiling draws on information from many sources, including historical criminal statistics of known criminals. Additionally, other information is collected about violent criminals and their modus operandi . This kind of information can shed light on details, such as preferences for luring victims, taking trophies, abduction methods, bondage preference, torture methods, means of killing, and displaying a dead body after death. With information and specific data collected from a wide assortment of offenders, psychological profilers work with investigators to examine the details of a criminal investigation, and, based upon the known historical criminal conduct data, they determine probable descriptors and characteristics that might be expected in a current suspect's profile.

For investigators, this kind of profiling can be helpful in focusing the investigation on the most likely persons. As an extension of these profiling techniques, a database known as Violent Crime Linkage Analysis System (ViCLAS) has been in place in Canada since the 1990s. This system documents the criminal conduct of convicted violent offenders and sex offenders, as well as certain unsolved cases, with a goal of documenting crime types and criminal conduct into a searchable database where unsolved crimes can be linked to offenders with matching profiles. According to the ViCLAS system web page, "Since the implementation of ViCLAS across the country, the database continues to swell with cases. As of April 2007, there were approximately 300,000 cases on the system and over 3,200 linkages have been made thus far" (Royal Canadian Mounted Police, 2015). Criminal profiling provides a valuable tool for sorting and prioritizing suspects identified for further investigation. In some cases, a new suspect may even be identified through the existing data within the ViCLAS database.

Topic 14: Geographic Profiling

Geographic profiling is similar to psychological profiling in that it seeks to focus on the possible conduct of an unknown criminal based on the data collected from the known past criminal conduct of others. Unlike psychological profiling, geographic profiling is focused specifically on where a suspect might reside relative to the location where his or her crimes are currently being committed.

In the late 1980's, police Detective Inspector Kim Rossmo developed a mathematical formula that began the evolution in the new forensic science of geographic profiling. Dr. Rossmo validated his mathematical formula from his observation that criminals generally seemed to live within an identifiable proximity to the chosen locations where they committed their crimes (Rossmo, 1987). Applying this method, when a criminal is suspected of committing a series of offences, it is possible to have the locations of those offences examined by a geographic profiler to estimate where that suspect most likely resides. This assessment can be helpful in searching for and identifying new suspects by prioritizing suspects based on the location of their residence relative to the identified area with the highest probability for a suspect to be found.

Topic 15: Forensic Data Analysis

In today's digital world, criminal conduct frequently includes evidence in the form of digital data. The collection of data from cellular phones as proof of a criminal conspiracy, or the message tracking of images passed in the distribution of child pornography,

all require significant levels of specialized technological knowledge to collect, preserve, and analyze the exhibits. Some crimes, such as identity theft and the subsequent fraudulent misappropriation of funds, are almost entirely digital data crimes, and they cross over several fields of technological expertise. It is now incumbent upon ordinary investigators to understand the basics of how to preserve digital evidence, and to know when and if digital evidence may be present. An ordinary investigator without forensic data skills and qualifications should never attempt to recover digital data evidence without help. The destruction of evidence would be like an untrained investigator trying to lift fingerprints at a crime scene.

Topic 16: Forensic Document Analysis

Forensic document analysis is typically done by certified forensic document examiners working as independent contractors or as employees within the service of government funded crime detection laboratories. Most often tasked within the scope of fraud investigations, these specialists examine items, such as wills, land titles, contracts, deeds, seals, stamps, bank checks, identification cards, handwritten documents and documents from photocopiers, fax machines, and printers. These documents are often examined to authenticate them as genuine or unaltered original documents where an allegation of misrepresentation or fraud has been made. Original signatures are also sometimes called into question, and these examiners can make a determination of authenticity by comparing the signature sample to samples known to be genuine. Forensic experts are also called upon to analyze threatening letters, ransom letters, or hold-up notes to make a connection to an identified suspect.

Topic 17: Forensic Identification Sections

Forensic identification sections are the frontline forensic specialists typically working within their own police agency. Usually, these specialists are experienced police officers who have taken forensic training in photography, fingerprint examination, physical matching, evidence collection, and crime scene management to work within this type of section. The daily work of forensic identification sections involves attending crime scenes and conducting a variety of examinations using special fingerprint dusts, chemical fuming agents, and ultraviolet light sources to uncover impressions of fingerprint, shoeprints, tool marks or even body fluid stains not visible to the naked eye. Once the stain or the image of a forensic impression is found, these specialists can record, preserve, and recover the exhibit using photography and specialized tools for lifting the exhibit from a surface or removing the entire imprinted surface as an exhibit.

Topic 18: Crime Detection Laboratories

Crime Detection Laboratories, such as the RCMP labs across Canada, provide a range of specialties, including;

- Biology — Comparison of the suspect's and victim's body fluids and hair; most often DNA analysis
- Chemistry — Identifying non-biological substances found at a crime scene, such as paint, glass, liquids, fuels, and explosive substances
- Toxicology — The examination of body fluids to determine the level of alcohol present in the body, and providing expert opinions in relation to the extent of intoxication
- Documents Examination — The analysis of documents to determine authenticity for fraud allegations. Can also provide handwriting comparison
- Firearms Ballistics — Matching shells, casing, and fired bullets to a weapon and making a determination of bullet trajectory
- Tool mark examination — Matching tool impressions to an originating suspect tool

Scientists hired to work in these crime detection laboratories require a four-year specialized degree in the field of their choice. Once hired, they undergo an understudy period of 12 to 18 months in a laboratory with an expectation that they will become proficient enough in their chosen field to achieve expert qualification from the court. This expert status will allow them, on a case-by-case basis, to render expert opinion evidence on their examination of forensic exhibits.

For an investigator wishing to engage the services of the Crime Detection Laboratory, it is necessary to complete a request for analysis of the exhibit they wish to have examined and deliver that exhibit, either in person or by double registered mail, directly to the Crime Detection Laboratory to ensure continuity of the exhibit. Once examined, the analyst will return the exhibit again either by calling for a personal pick up or by double registered mail along with a certificate of analysis detailing the result of the examination. The certificate of analysis can become an exhibit for disclosure to the defense in a criminal case, and, if uncontested, will be accepted by the court as evidence. If contested, the Crime Detection Laboratory Scientist will be called to attend court and provide testimony of the examination and the results as an expert witness. They are generally cross examined by the defense to validate their expert qualifications and analyzes.

Summary

This chapter outlined a wide variety of forensic tools and services available for criminal investigators. For any investigator, knowledge of forensic tools and services provides him/her with the ability to recognize and seize on evidence opportunities that would not otherwise be possible. The picture of physical evidence found at any crime scene only has face value as a collection of objects to be viewed and considered in their existing connection to the event. Analysis of those same objects using forensic tools can add significant information, making a circumstantial connection between the players and the event, and adding new insights. Forensic analysis can be the tipping point in solving a crime, keeping from becoming a cold case.

Study Questions

- In terms of a physical matching, what is the difference between a Level One and a Level-Two examination?
- How are latent fingerprints made visible?
- What is the difference between a Level One and Level Two ballistics examination?
- What is blood spatter analysis?
- What are four common post-mortem indicators considered in an autopsy?
- How else can a pathologist be helpful to police besides being able to speak to cause of death?
- What is forensic archaeology?
- What is forensic entomology?
- What is criminal profiling?
- What is ViCLASS?

Broken Windows Policing [95]

Banishment policies grant police the authority to formally ban individuals from entering public housing and arrest them for trespassing if they violate the ban. Despite its widespread use and the social consequences resulting from it, an empirical evaluation of the effectiveness of banishment has not been performed. Understanding banishment enforcement is an evolution of broken windows policing, this study explores how effective bans are at reducing crime in public housing. We analyze crime data, spanning the years 2001–2012, from six public housing communities and 13 surrounding communities in one southeastern U.S. city. Using Arellano-Bond dynamic panel models, we investigate whether or not issuing bans predicts reductions in property and violent crimes as well as increases in drug and trespass arrests in public housing. We find that this brand of broken windows policing does reduce crime, albeit relatively small reductions and only for property crime, while resulting in an increase in trespass arrests. Given our findings that these policies have only a modest impact on property crime yet produce relatively larger increases in arrests for minor offenses in communities of color, and ultimately have no significant impact on violent crime, it will be important for police, communities, and policy makers to discuss whether the returns are worth the potential costs.

Introduction

The broken windows theory of crime suggests that physical disorder in neighborhoods leads to social disorder and eventually serious crime. In efforts to reduce serious crime, proponents of the theory have developed a broken windows policing strategy, which was made famous by New York City's "quality-of-life policing" strategy. Broken windows policing targets low-level misdemeanor crimes to prevent serious crime. While the effectiveness of the strategy has been debated and its use is controversial, within public housing, an evolution of broken windows policing has made its way into the lives of residents through a process of legal banishment. Banishment policies grant police the authority to formally prohibit individuals from entering public housing properties and arrest them for trespassing if they then violate the ban.

Public housing agencies (PHAs) justify banishment by arguing that it is a strategy for reducing serious crime in public housing. In addition to attempting to stymie social disorder through the issuing of formal bans, this policy grants police the opportunity to more easily control drug possession and potential sales since banned individuals can be arrested for trespassing and subsequently searched if they enter public housing. In this way, banishment serves two purposes for police: it allows them to remove potential criminals and makes it easier to enforce drug laws.

Despite the widespread use of banishment policies and the evaluation of policing efforts in public housing, an empirical evaluation of the impact of banishment on reducing crime or making drug arrests has not been performed. This study is the first to explore the effect these bans have on crime and drug arrests in public housing. As will be explained below, this strategy, which has been shown

to be disproportionately used in disenfranchised communities, empowers the police and can result in citizens being permanently excluded from spaces even if they have been invited. The result of these policies can have serious social consequences for the banned individuals, their families, and the communities in which it is used. Given the potential social costs, understanding the effectiveness of banishment enforcement in public housing is therefore critical. Thus, the current study adds to the extant literature on broken windows policing broadly, the policing of public housing generally, and banishment in public housing specifically.

More precisely, we extend on the work done by Torres which investigated the perceived effectiveness of banishment and police in Kings Housing Authority (KHA) and found that public housing residents are more likely to find banishment and police effective if they trusted the police. Notwithstanding the significance of perceptions toward banishment's effectiveness, we turn our attention here to address whether issuing bans predicts reductions in property and violent crimes in KHA. 1 We also explore whether issuing bans predicts increases in drug and trespass arrests. We rely on crime data from 19 communities in one southeastern U.S. city: six public housing communities and 13 surrounding communities. We find that this brand of broken windows policing does work to reduce crime, albeit relatively small reductions and only for property crime. Furthermore, we find that banishment results in an increase in trespass arrests. Both of these findings raise questions about whether or not PHAs and police departments should continue to use banishment. On the one hand, banishment has been shown to modestly reduce property crime. However, it generates a significant increase in trespass arrests, which brings into question its usefulness as a deterrent, increases the number of low-level arrests in neighborhoods that are disproportionately composed of people of color, and does not significantly reduce violent crime.

Background

Banishment in Public Housing

In the wake of the War on Drugs and specifically the Anti-Drug Abuse Act of 1988, PHAs took considerable measures to stem the proliferation of drugs and violence within their communities. One logical strategy was banishment or "no-trespass policies". Under banishment policies, PHAs can ask their local police department to warn nonresidents that they may be banned if they engage in criminal and civil behaviors, past or present, that PHAs consider worthy of banishment. Banned persons are placed on a no-trespass list maintained by PHAs or police. Once banned, individuals found on the property can be arrested for trespassing. For an idea of how critical PHAs have felt that banishment is vital to crime suppression, a survey of PHAs was conducted in 2003 by the Council of Large Public Housing Authorities, the National Association of Housing and Redevelopment Officials, and the Public Housing Authorities Directors Association. Results from the survey indicate that 85 percent (307 out of 368) of PHAs had adopted no-trespass policies, 97 percent had adopted these policies "in whole or in part as a measure to protect residents from crime or illegal drugs," and over 98 percent felt that no-trespass policies were "essential to controlling crime and drugs in [their] developments".

The re-emergence of banishment policies grew as cities took measures to combat social disorder through civility codes. During the 1960s and 1970s, vagrancy statutes were invalidated by the Supreme Court due to their racially biased enforcement and vague interpretation that led to wide discretion in vagrancy enforcement. In the 1980s, with police departments feeling the need for a law enforcement response to social disorder, courts responded in support of the police through the enactment of civility codes. Instead of the vague loitering and vagrancy statutes of the 1960s and 1970s, newly established civility codes required localities to specify the exact behaviors that can result in an arrest [7]. Through civility codes, police can now target the socially undesirable, such as homeless or publicly intoxicated individuals, by enforcing codes that outlaw their behaviors (e.g., public urination, sleeping on a park bench, panhandling).

Banishment in public housing is based on the enforcement of such civility codes by codifying into PHA policy the prohibition of specific civil and criminal acts, past or present, that when observed by PHA officials and law enforcement can result in banishment and potentially an arrest for trespassing. Due to civility codes, the banning of non-residents by PHAs follows strict guidelines that have been specifically detailed. While many initial banishment policies in public housing failed to delineate the behaviors that could qualify for banishment, the courts did not abolish banishment altogether in cases that questioned the legality of banishment stops—they simply required PHAs to specify the criteria for banishment.

Despite these court mandates, the current criteria for banning in PHAs sometimes involve vague, broad, and numerous acts, allowing the possibility for any non-resident to get banned. For example, the following reasons, taken from publicly available PHA banishment policies, have been cited for instituting bans: having no legal right or legitimate purpose to be on the property; not being an invited guest of a resident; having a prior criminal history; engaging in activities that interfere with the quiet and peaceful

enjoyment of residents; and involvement in drug activity or violence on public housing property. Not surprisingly, the ability of these policies to ban nearly anyone has received much criticism from scholars. However, since such policies are civil in nature they are beyond judicial review.

Broken Windows

In 1982, James Q. Wilson and George Kelling published an Atlantic Monthly article introducing the broken windows theory of crime. The broken windows theory of crime posits that physical disorder, such as graffiti, may not only change the physical character of an area but may lead to social disorder and ultimately to serious crime. Specifically, the theory argues that serious crime may be the final outcome, because physical decay conveys to criminals that informal social controls in the area are weak as local residents become more fearful of the ensuing social disorder and withdraw from the community. The theory was instrumental for a 1980s era that was synonymous with “get tough” on crime measures focused mainly on sentencing regimes.

While the major theoretical foundation of broken windows relies on the link between physical disorder and crime, the idea that social disorder can manifest into more serious crime became the ideology behind broken windows policing. Here, law enforcement concentrates on the second aspect of broken windows, social disorder. If social disorder leads to more serious crime, then arrests should be targeted at low-level offenses that visibly convey social disorder, such as loitering, drinking in public, public urination, panhandling, and prostitution. This style of policing would later take center stage in New York City during the 1990s under Mayor Giuliani and Police Commissioner William Bratton. Together they introduced an aggressive form of broken windows policing that targeted low-level misdemeanor offenses, sometimes called “quality-of-life policing”.

Chapter 7 - Community Oriented Policing vs. Problem Oriented Policing [96]

Community Oriented Policing (COP) and Problem Oriented Policing COP) burst onto the police scene, primarily in the New York City Police Department in 1990’s, touted as the “silver bullet” for addressing crime issues in the Big Apple. Community Policing was in place in many police organizations well before this, but under the guise of community service; particularly in smaller police agencies (10-25 sworn members). The increased crime notoriety and attention garnered in major cities added expediency to the issue of addressing crime in a more effective and efficient fashion; ergo the Community Oriented and Community Policing philosophies gained prominence among policy makers.

What is COP and POP? And why does it deserve attention? These are often misunderstood and considered strategies rather than as a philosophy that focuses on the way that departments are organized and managed and how the infrastructure can be changed to support the philosophical shift that may support community policing. They are both defined as a philosophy, but COP is designed to build partnerships within the community that are helpful to resolve issues and problems (Goldstein, 2001 cited by Choi, Turner, & Volden, 2002). Whereas POP is a management strategy that further breaks disorder, disruption, criminal activity and criminal enterprise into more microscopic units for examination. POP utilizes crime data analysis, community input and police officer experience to develop a strategic and systemic approach to resolving the issues impacting quality of life. POP is generally employed for purpose of finality rather than simply relocating the problem. Both philosophies (strategies incorporated) place greater value on prevention through public and private collaborations for the sole purpose of increasing the quality of life while reducing crime and the fear of crime. Most often these are employed through robust strategies with a commitment to implement long-term strategy, rigorously evaluating its effectiveness, and, subsequently, reporting the results in ways that will benefit other police agencies and that will ultimately contribute to building a body of knowledge that supports the further professionalization of the police (Goldstein, 2001 cited by Choi et al., 2002).

Community and Problem Oriented Policy:

Since the unrest of the 60’s in the United States the need for police/community collaboration was never more evident than in York, PA. The need for community-oriented policing (COP) and problem-oriented policing (POP) was not only needed but was in demand. However as in most government initiatives, resources were not readily available. An individual component of COP/POP Philosophy is the data driven information derived from community data files. Discussed as a single strategy in most situations is COMPSTAT. COMPSTAT is a statistical measure of crime used in forecasting crime and supports innovative strategies to combat future crime. Strategies commonly deal with quality-of-life issues, and community orchestrated programs to prevent further debilitation of neighborhoods; however, they should not be confused as standalone strategies with any efficiencies. These strategies

are ineffective unless in collaboration with each other or other strategies provided as examples in this historical review of York City.

Did the need for COP/POP exist in York, PA? Mr. Bobby Simpson, Director of Crispus Attucks of York (personal communication, 2011) likened the York City Police Force of the 1950's, 1960's and 1970's to those of Alabama during the Countries racial crisis. The police brutality was insidious, pervasive and had the blessing of the white community, the media at the time, and the business community. Researchers maintain "This governing class maintains and manages our political and economic structures in such a way that these structures continue to yield an amazing proportion of our wealth to minuscule upper class" (p. 94). The G.I. Bill after World War II, as it relates to educational benefits, may be classified as affirmative action programs for white males because they were not extended to African Americans or women of any race (Ore, 2009). Mr. Simpson, Director of Crispus Attucks, contends that although problems remain today, overall things have improved in the City of York (personal communications, 2011).

Much of the black population considered police hostile to minorities. Police were poorly trained particularly in coping with civil disturbances. Police lacked policies dealing with canines, firearms and chemicals and The York City administration rigidly adhered to a policy of preservation of status quo and the exclusion of non-whites from policy making (PA Human Relations Commission, 1968). Mayor John Brenner issued his direction to address these and other policing policies as previously stated. The Mayor directed as part of the overarching approach of securing a greater quality of life in York is that of COP/POP policy and required the York City Police Department to devise and implement programs consistent with the needs of the community.

The police policies required triangulated data using neighborhood input, local crime data, and useable intelligence in cooperation with educational systems, job training, and neighborhood restoration projects to rejuvenate York City. In particular, local data should be the most reliable, current data, and used in an efficient manner that may produce efficiencies otherwise left to chance. COMPSTAT (Computerized Statistics) a nationally recognized program originally introduced in New York City is a strategic problem-solving system that combines "state-of-the art management principles with cutting-edge crime analysis and geographic systems technology" (Willis, Mastrofski, & Weisburd, 2004).

A COMPSTAT program has as its explicit purpose to help police departments fight crime and improve the quality of life in their communities. This is achieved by overcoming traditional bureaucratic irrationalities, such as loss of focus on reducing crime, department fragmentation, and lack of cooperation between units because of "red tape" and turf battles, and lack of timely data on which to base crime control strategies and to evaluate the strategies that are implemented (Weisburd, Mastrofski, McNally, Greenspan, & Willis, 2003).

A Problem Oriented Policing strategy that was found useful in New York City's transition was that of the information produced by the COMPSTAT that was also used by the Police Commissioner to judge the performance of precinct commanders and by precinct commanders to hold their officers accountable. Unlike traditional police bureaucracies, the COMPSTAT is intended to make police organizations "more focused, knowledge-based, and agile" (Willis et al., 2004). COMPSTAT has proven itself, however it is posited here that COMPSTAT enacted without simultaneous strategies is nothing more than another single tool in the agency toolbox. COMPSTAT is a singular strategy that when used in concert with other COP/POP strategies will provide the intended results of efficiency and effectiveness addressing community problems and concerns. COMPSTAT as an inter-disciplinary research topic has significant impact on other criminal justice systems and one does not have to travel too far from NYPD to find such a study. A similar data collection and accountability was initiated in York City and was led by the Captain of Operations.

A similar COMPSTAT program is engineered by the New York City Department of Corrections that operates under the Total Efficiency Accountability Management Systems (TEAMS) (Horn, 2008). In addition to decreasing jail violence and improving the health and safety of the inmates TEAMS tracks data on more than 600 large and small aspects of the day-to-day life of the city's jails. These aspects range from escapes and homicides to the number of inmates regularly attending religious services and the length of time inmates must wait before they are seen for medical care in the clinic. The Department measures the time it takes to process and house a newly admitted inmate and counts searches, contraband finds, days lost to sick leave, overtime, maintenance order backlogs and hundreds of other metrics. Knowing that information is management power; the Department even measures the cleanliness of its showers and toilets, and here too, data management and accountability have produced positive results (Horn, 2008).

Again, TEAMS is not a stand-alone proposition, but rather a strategy that is used in unison with other data/information, programs and strategies simultaneously. Management to line-officer accountability has demonstrated positive developments within the

criminal justice field when used in concert with other adaptations for improvement.

Walsh and Vito (2004) contend that “COMPSTAT is a goal-oriented, strategic management process that uses information technology, operational strategy and managerial accountability to guide police operations…reduce crime and improve the quality of life” (p.57). Further bolstering the point that COMPSTAT cannot be successful without collaboration with other tactics it is asserted in the FBI Law Enforcement Bulletin, four crime reduction principles that create the framework for the COMPSTAT process are: accurate and timely data; effective tactics; rapid deployment of personnel and resources; and relentless follow-up (Shane, 2004).

Additionally, police have access to a closely associated by-product of the computer age, Crime Mapping, which is the implementation of geographic mapping of crime using these systems they link maps of the agency jurisdiction with other computerized police records and replaces the old pin maps (LaVigne and Wartell, 2000). Technology has advanced rapidly and continues to do so daily, however not all police agencies have access to either of these systems nor do they have the required resources required for implementation.

COMPSTAT is an important strategy for Community Oriented Policing and Problem Oriented Policing philosophy implementation. Although critical, COMPSTAT is not without critics who have cited the program as a method of stricter control over managers and line-officers in a police organization. In practice it appears that COMPSTAT, at least so far, is just another way—albeit one that employs advanced technology and different management principles—for police leadership to control mid-level managers (precinct commanders) and street-level police officers (Moore, 2003). COMPSTAT is important to both the COP/POP as it represents accurate, timely data critical to the decision-making process, particularly during resource limited situations as is the City of York’s case.

Critics argue that COMPSTAT has had the opposite effect desired in an atmosphere of Community Policing. Rather than empowering line-officers to act independent of the bureaucracy, it has grieved the line-officer to an art form of submissiveness more fearful to act. COMPSTAT represents a sea change in managing police operations, and perhaps the most radical change in history (McDonald, 2004), but remains a single tool in the toolbox of COP/POP. The question remains- “Have today’s law enforcement leaders-maintained pace with the technology and information highway, altered leadership styles accordingly to more efficiently manage the organization, and empowerment of those providing the service?”

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6.2: Police Organization, and Functions

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CHAPTER OVERVIEW

7: Community Oriented Policing vs. Problem Oriented Policing

7.1: Community and Problem Oriented Policy

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7.1: Community and Problem Oriented Policy

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CHAPTER OVERVIEW

8: Characteristics of Policing

8.1: Characteristics of Policing
8.2: Police Discretion

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8.1: Characteristics of Policing

Demographic Makeup

Female Police Officers [97]

Societal prejudices are often carried to workplace through gender discrimination, various occupations mirror these social inequalities and biases based on gender, race etc. at workplace. Like many other public institutions, the police reproduce the stereotypes and prejudices of their society with respect to women and men. Gender inequity is conspicuous in Police profession as it is popularly perceived to be one of the most masculine jobs [1]. Yet it is heartening to see women breaking new grounds and entering into police profession that was hitherto considered as exclusive male jobs [2,3]. However, the representation of women in police force remain dismal. Statistics suggest that women composition in police force globally is less than 10%. While developed countries and sub-Saharan countries show marginally better representation with 12-13% proportion being women, yet in developing countries like India women constitute less than 3 % of police force. From equity point of view this gender discrimination at workplace is disheartening as women comprise half of world population and take on two thirds of work burden and yet end up being owners of 10% of world property [4]. Gender equity is considered to be the prerequisite for achieving women empowerment. The United Nations Charter recognized gender equality and called for the rights of individuals to be respected regardless of sex, and whether they come from large or small nations. This recognition is clearly enshrined in the United Nations Universal Declaration of Human Rights (UDHR) of 1948. The Convention on the Elimination of All Forms of Discrimination against Women [5]. (CEDAW) was adopted in 1979 by the UN General Assembly. This Convention marked the advent of globalization of the rights to equality for all women and guaranteed equal access to opportunities Owing to it paramount importance it has been incorporated as one of the eight goals under Millennium Development (MDGs) Goals set by United nations and do believe that unless the third goal gender equity is achieved the remaining of MDG goals are unlikely to be achieved. MDG [6].

Discrimination in Assignments

It has been observed that women have gained entry into masculine police force but their struggle for equity continues. They are being hired in inconsequential positions, are given uninteresting assignments, suffer from inadequate job training, and face resistance from male colleagues [7]. While women have made good progress in the police force by way of increasing their share in terms of absolute number, yet they remain in less powerful occupational positions that are often boring, low paying and with very little advancement for promotions [8]. Discrepancies can be seen in female under representation in prestigious specialist roles such as firearms, combat deployment etc. carrying with its possible implications for lateral and upwards progression. One of the researchers suggest women vulnerability in police force can be mitigated by substantially increasing the representation of women and it is believed that a critical mass of 35% representation would be desirable. But it important to understand that mere numeric representation as mandated by legal directions may not be an effective intervention unless the very culture and mind set in police force is changed by promoting women friendly policies. It is well documented that while women may be successful in getting entry into police force but very often, she remains stagnated career wise struggling to get promoted to higher positions hence Law driven hiring may help women in recruitment but does not ensure equality in promotion [9-11].

Perception of Men

One of the most important barriers that the women face in the police force is the fixed ideas and deep-rooted prejudices that their male co-workers have towards them. Women colleagues are considered to be physically weak, docile, lack in aggression and are considered inefficient in commanding respect among the public [12-14]. Some researchers have analyzed deeper roots of men opposing women's entry into the police force. The explanation essentially boils down to their anxiety over the self-declared right to manage law and order [15]. Gender experts are of the opinion that such masculine concerns are borne out of their type casted idea that women are basically not suited to be officers as they are inferior to men. It is also feared that women in commanding positions will undermine the solidarity among men. Such perceptions among men officers prevent them talking to lady officers and deliberately make them feel isolated and unwanted. Sometimes this insecurity drives men to bully or even terrorize lady officers by way of rude and derogatory comments in repulsive tone [16].

Barriers

Once into the police force, women are faced with multiple impediments that can be broadly classified as intrinsic and extrinsic barriers. Intrinsic factors are related to job related factors namely workplace environment, confrontational male colleague, negative appraisal by superiors [17] They essentially all sum up the prejudices and biases that target women and are systematically aimed at displacing women from positions or assignments that place them in commanding positions. This is evidently reflected in denial of prestigious transfers and high-profile assignments such as narcotics, gang units, foreign assignments etc. but instead are relegated to what is considered to be typically feminine units i.e., community relationship, domestic violence, child abuse etc. [18]. This differential treatment makes women officers feel unfairly discriminated. Besides women are often topics of sex jokes that make them feel highly uncomfortable in the company of male colleagues [19]. Extrinsic factors are the barriers that come to the fore due to double burden of work and family. It revolves around stress relating managing family and work-related pressures. Women are expected to be the primary care givers in majority of homes that leads to double burden of work and home. Policewomen are stressed given their unpredictable demands of their duty calls that invariably lead to conflicts at home.

Sexual Harassment

Sexual harassment at workplace is very often downplayed and dismissed in the name of friendly flattering between man and women among police colleagues. While this kind of relationship is acceptable when the couple is dating or while in the private places that couples go with mutual consent, but it would be highly inappropriate at the workplaces [20] But have to continue with harassment. One of the main reasons why sexual harassment go unreported in police work force is due to peculiarities of policing in itself like subordination, solidarity etc. [21]. Workplace sexual harassment is very common in police where men and women work together. The vulnerability is heighted in the police due to strict subordination and nature of group work that require women teaming up with male colleagues. This proximity to male colleagues increases woman's vulnerability for sexual exploitation. Many policewomen also blame it on excessive concentration of power of discretion in the hands of their superiors. Higher ranking male officers often abuse power by enraging the modesty of women during the course of work. It sometimes takes other extreme of over patronization of women by putting on them unreasonable restrictions. The situation is compounded by lack of well laid systems and procedures for women grievance redressal mechanism. The existing systems for reporting sexual misconduct are so cumbersome that it deters any proactive step by the women in reporting workplace sexual harassment [22]. It is also ironical that due to protocols of reporting many times the petition of the victim has to pass through the very superior who has perpetrated the sexual crime. In traditional contexts, both the police and society at large generally favor negotiation and compromise as the appropriate ways to deal with sexual violence. This can lead to situations in which men forgive men for violence committed against women. Such culturally determined behaviors are very hard to alter through institutional reforms unless society is engaged as a whole. Stereotyped behaviors have direct bearing on the institutional culture, affecting mandates, operations and resource allocation [23]. Legal and social change is required for increasing men's awareness of women's rights by use of media and popular culture [4].

Stress

Police personnel are confronted with two distinct types of stress that could be categorized as static stress and dynamic stress. Static stress mainly involves social structures and systems that are related to individual background such as Caste, religion, ethnicity, socio-economic status, gender and age. Women police personnel have to particularly deal with gender role and demands for gender appropriate behavior that is often major source of static stress [24]. Dynamic stress is attributable to work environment and ability of police personnel in coping with work related stress. It is well known that policing profession puts the person in the face of grave dangers. Police personnel have to contend with violence and death at crime scenes, [25] loss of life of a colleague or to be firing line personally to save lives of civilians or some time are forced to take lives of criminals all of which get remain embedded as haunting memories [26]. The unpredictability and violent work environment of policing profession prove to be major source of stress.

Maternity Related Issues

Police establishment have been less than sensitive in treating women during their pregnancy period or once they are back from maternity leave. There is absence of clarity on role allocation during pregnancy period, while some women are relegated to clerical work whereas some pregnant women are forced to carry out their regular duty without any concession e.g., patrolling late into their pregnancy, [27] Pregnant women have to very often utilize their personal leave, exhaust all the sick leave or forced to take leave with loss of pay for routine and mandatory ante natal care that require regular hospital visits. Exceeding mandated entitled leave and loss of pay leaves results into loss of seniority which adversely affect their career prospectus. Fear of jeopardizing career

prospectus often prevent policewomen to disclose their pregnancy status to their colleagues and reporting officers consequently putting themselves and their unborn child to great dangers. The culmination of pregnancy resulting into successful delivery brings in fresh set of problems with childcare issues, managing work and family conflicts all of which adversely affect job satisfaction. The stress gets acute for the breast-feeding mothers once they return back to duty for the constant need to visit their infant. Lack of private and hygienic place to express and store milk at workplace adds to the stressful experience of policewomen [9,28,29]. There are unfair regulations that requires policewomen to resign if she became pregnant on duty without being married. Unjust victimization of unmarried policewomen happens when they become pregnant out of wed lock consequently, they are unceremoniously suspended or dismissed from the work. In the backdrop of the high incidence of sexual abuse and exploitation at workplace by male colleagues, unmarried policewomen very often tend to become pregnant. Due to unjust regulations women are forced to terminate their pregnancies without revealing the perpetrator of sexual crime at workplace for the fear of dismissal or loss of job [30].

Retention

It is observed that lady police officers are more likely to resign from the job for family reasons as compared to their men counterparts which is vindicated by the exit interviews. Management of home and family, child rearing responsibilities and resultant maternity leave etc. are cited as the major reasons. Resignation rates of women police officers remain low, and broadly comparable between men and women. However, female officers are more likely than male officers to leave for domestic reasons [9]. Pointers to police reforms specially to enhance retention of women personnel can be gathered from exit interviews which are important indicators to widespread discrimination at workplace that women have to put up with. Retention strategies can also be devised by implementing flexible working time to ensure the police service remains an employer of choice. Family support-oriented policies that include maternity leave, flexi timings on working days for woman officers having fed and infant babies will go long way to retain women in police force [4,31,32].

Masculine and Feminine Attribute Display During Work

Behavior at workplace called as occupational behavior is largely determined by the prescribed norms guiding people to do or enact gender within the larger parameters of social structures. Gender does not have a standard, rigid or defined attribute [41]. but it is either reflected or is actually enacted in everyday interactions. The show of masculinity by men or for that matter display of femininity by women can be seen to be emerging from social interactions at workplace [35]. Since norms expect women to behave in certain appropriate manner in society in relation to men, the same is expected by men at the workplace. Demands of authoritarian behavior from police profession from women is totally in contrast to socially prescribed behavior from women, this gender conflict is acutely felt by both by men and women alike [21].

Sociological Effect on Women Police

In some countries newly recruited policewomen are confronted with unfair departmental rules that govern their personal decisions like marriage. There are mandatory two year wait periods before newly recruited policewomen obtain permission to get married. There are similar unfair rules and practices that undermine women’s freedom to decide on the personal issues of pregnancy and childbirth after the marriage. Policewomen face social problem when it comes to marriage as their prospective husbands are officially scrutinized for suitability to marry a policewoman. Often such verification includes personal interrogation and verification of background of prospective husband to make sure that he has no criminal record or tendencies. On the contrary, policemen are free to marry any women of their choice without going through any police verification of their antecedents. Such stipulations are not only discriminatory in nature but are potentially very exploitative as male superiors might delay the process of approval, prolonging the investigations and making women vulnerable to sexual harassment and exploitation in order to speed up verification processes. Socially, policewomen find it difficult find prospective husbands for themselves because men find the process of police verification of their background demeaning and humiliating. Civilian men who are already intimidated by the police are further discouraged by the prospects of being interrogated and investigated [30,42].

Sociological Issues

Social Isolation is part of police profession and the avoidance to intermingle with society is mutual. Civilians tend to avoid police personnel either for the fear or intimidation that the profession inspires in the public. On the other hand, police personnel avoid socialization for professional reasons. Police by profession have to work under thick veil of secrecy, the professional unity and loyalty in the face of threat perception from certain sections of society tend to bind them together to form their own social gathering

hence isolating them further away from the society [43]. The process of Defeminization of women is accentuated by the specific dressing code that women have to adhere by making it mandatory to wear typical trousers and tucked in shirts. They are also barred from wearing any jewelry, that are symbols of being married women in certain societies. In some country's policewomen are required to place the alphabet "W" before their rank and are provided with special type of identification number for easier recognition of them as women. some countries there are discriminatory accommodation and welfare regulation that bars policewomen with civilian spouses to take accommodation and reside in police barracks. Policewomen married to civilian spouses are there by deprived of having the security that police barracks offer and there by exposing them to the public dangers. [30,44].

Benefits of Women in Police

Women, because of their minority status, have developed more refined communication skills and have learned, as perceived second-class citizens, to practice higher levels of empathy. Some research suggests that female inmates will receive sympathetic care from women police officials which would catalyze the transformation of criminal women to shun illegal means and lead a normal law-abiding life [45]. Because of their enhanced communication and empathy skills Policewomen are in a better position resolve and calm down possible violent and acrimonious scene, they also are less likely behave inappropriately in public places as compared to their male counter parts. Policewomen show less inclination to use firearms there by reducing fatal outcomes, they receive lesser resistance from the male offenders and have better cooperation during interrogation [46].

UN Initiatives: Benefit of gender sensitization

United Nations is taking an initiative in promoting gender sensitive reforms in police profession across the world to bring in gender equity within the police force. Gender sensitive police reforms will benefit society at large as it would be help in developing police institution that are responsive to people's needs. Gender sensitization also will help police to be fair, just and free from any discriminatory approach to crime in society. Sensitization of police will also help them remain committed to their primary mandate to uphold the rule of law in the society. Gender sensitive police reforms have catalyzed the process of establishing exclusive police stations. Specially designated police units have been established to check sexual violence, prostitution, human trafficking and domestic violence in the society. Dedicated gender units in the police force are brought into existence with the larger goal of bringing in the attitudinal change in the society and promote improved reporting of gender-based crimes. It is expected that by pushing gender reforms in police stations will in itself have positive influence of gender equation within the police force. The gender sensitization process is also expected to bring in many administrative and operating procedures amendments within police profession. Making gender equality as an institutional value of police force can revolutionize the entire process of recruitment, promotion and retirement that would be nondiscriminatory in nature [4].

Benefits of Gender Sensitization

One of the indicators for the gender sensitization of police reform is to increase the representation of women in the police force. The idea is to make the police force more community oriented and unless more women are inducted into police it would not get legitimacy in reflecting the population composition. Presence of women in police will also help to moderate extreme use of deadly weapons and force in dealing with volatile situation. One of the biggest gains of gender sensitization would be to reduce crime against women by the way of giving them greater security and reducing their vulnerability to sexual violence against women. Recruiting a greater number of women into police force, providing them with equal opportunity and rewarding them for excellence would pave the way for women rising up in the hierarchy of police ranking. A Successful woman in police would command higher respect in the society there by help in bring in change in public perception towards women [30,47,48].

Police Subculture [98]

At the root of all that is good and bad in law enforcement, there is a strong subculture that permeates most agencies. While a common theme in academic discourse is that police culture is negative, entrenched in cynicism, masochism, loyalty above all else, and an "us versus them" mentality, it has positive aspects that are often overlooked. Members of the law enforcement subculture share values that enable officers to survive what at times is a difficult and emotionally taxing job. Values such as supportiveness, teamwork, perseverance, empathy, and caring enable officers to cope with post-traumatic stress; they are part of team of colleagues who care for their coworkers. The support received from other officers is the result of shared values within the culture. Officers who are faced with dangerous situations are able to rely on their comrades because of other values they believe these members also possess. Values such as bravery, camaraderie, and sacrifice will embolden members to place themselves in harm's way.

The following table outlines both positive and negative attributes within the police culture.

Table 6.1 Police Culture: Positive and Negative Attributes

Positive attributes	Negative attributes
Safety	Cynicism
Camaraderie	Close-mindedness
Empathy	Biases
Support	Prejudice
Caring	Non-scientific tactics
Teamwork	Overly conservative
Loyalty	Loyalty
Sacrifice	Alienated
	Suspicion
	Authoritarianism

In spite of the positive aspects of police subculture, what society may define as ethical or good conduct may not be viewed within the subculture as relevant to the task, which is, among other things, to continue the mission of "safe-guarding social order" (Reiner, 2010, p.120). The tactics that are relevant to the police subculture may include using trickery and lies to elicit confessions and receiving minor gratuities to foster community relations (Reiner, 2010). Examining ethics and its relation to the police subculture is important to help delineate not only the grey area of ethics but also the grey area within which the police operate.

Once selected and hired by municipal police agencies, police recruits are exposed to police subculture during their training partially due to the instruction they receive from police officers who are recently retired or seconded to the police academy. However, the choice to become a police officer is not made in a vacuum. When recruits start their training, they often think like police officers on a visceral level, because generally certain individuals are drawn to the occupation (Conti, 2010). In an ethnographic study observing police recruits at an American police academy, Conti (2010) observed that the evolution of recruits into members who reflect the police mindset likely started at an early age when they formed the belief that they would become police officers. As potential officers enter the selection process, they become involved in an extensive application process, which is their first introduction into the police subculture. Rokeach, Miller, and Snyder (1971) concluded that a police personality distinct from others does exist, and proposed the idea that individuals come into an occupation with predetermined attributes that are identified with their new occupation. However, Rokeach et al. (1971) also found that this distinct police personality is attributed to predispositions of personality that are present before the recruits' induction into the police subculture. These distinct predispositions are conducive to a career in policing and allow the individuals to comfortably choose and fit into the subculture (Conti, 2010; Rokeach et al., 1971). While the police subculture is distinct, at times it does attempt to catch up to the norms of the mainstream culture and can shift from negative attributes to positive attributes (Skolnick, 2008).

A historical look at the police subculture offers a view into the changing nature of how police officers see the world. In analyzing the police subculture in the 1940s, Myrdal (1964) observed in an ethnographic study of police officers in America that officers behaved in an overtly bigoted fashion toward African Americans. Myrdal (1964) observed that these were the norms of the day and that the police subculture reflected the attitude of mainstream society toward African Americans. While not supported empirically, it would be a logical conclusion that police recruits or rookie police officers would have shared the same cultural bigotry as mainstream society and their fellow police officers. More recently, when we see and question incidents involving police use of force on racial minorities, it is important to look broadly at society as well. The shooting of Michael Brown in Ferguson, Missouri, is an example where prominent civic leaders pointed out that the incident was merely a manifestation of a broader issue of racism that is widespread throughout the United States.

As society has evolved so too have law enforcement agencies. Ethical conduct and diversity play a large role in recruiting and are considered important attributes of potential officers. Crank and Caldero (2010) have concluded that due to society's emphasis on ethics and the stringent hiring process, recruits are typically very ethical. The subculture, they argue, is not only present but also highly influential; the recruits' ethical orientations are formed earlier, well before their application process commences (Crank and Caldero, 2010). Conversely, Conti (2010) and Banish and Ruiz (2003) argue that the police subculture is present when the officers start at the police academy and that its influence on recruits' ethics is negative and destructive.

Conti views a recruit's induction into the police academy as a transformation of the recruit into the "organizational ideal" (Conti, 2010). It is in this way, Conti (2010) argues, that the police subculture, ever-present at the police academy, assists in the conversion of the recruit from civilian to police officer. These cultural nuances are passed on through a variety of means such as:

- Parades and drills (Campbell, 2007)
- Marching (Davis, 1996)
- Storytelling (Banish and Ruiz, 2003; Ford, 2003; Newburn and Reiner, 2007).

Storytelling by instructors in the police academy can be a valuable and effective teaching tool, as demonstrated by Conti's (2010) study of an American police academy. Stories told by trainers must reflect ethical conduct and be relatable to the lesson plan goals and outcomes. Conversely, stories by instructors may inflate the recruits' perception of danger (Banish and Ruiz, 2003) or cynicism (Ford, 2003), but instructors' stories can also serve to relay positive outcomes, such as surviving life and death situations confronted by police (Conti, 2010). Ultimately, storytelling perpetuates the police subculture by passing on both truisms as well as not-so-true legends (Newburn and Reiner, 2007). Banish and Ruiz (2003) further contend that storytelling affects the police culture negatively by instilling negative traits of cynicism, suspicion, conservatism, and authoritarianism.

These negative traits are often associated with a police subculture that affects senior police officers, and it is specifically these traits that define an individual as a police officer. Skolnick (2008) considers the police vocation as being similar to that of a priest or the clergy: the culture wholly defines what it means to be a police officer by the traits that police officers share. These traits, according to Skolnick, include "skepticism, cynicism, mistrust of outsiders—all are traits observers of police apply to them and that they apply to themselves" (2008, p.36). Twersky-Glasner (2005) concurs, noting that the police are members of a unique occupation in which they are the insiders and the rest of society are the outsiders. The insiders are those who are trustworthy while outsiders are viewed with suspicion (Skolnick, 2008). This is reflected not only in the culture in which recruits find themselves, but also in the training they receive and the way in which they as civilians are accepted into the academy to begin training.

In a qualitative study of police officers, Loftus (2010) followed officers on the street and determined that two characteristics are ever-present in the police culture: cynicism and moral conservatism. While older officers exhibit these traits, Loftus (2010) did observe that newer officers are hired from a more diverse background that includes different sexual orientations, cultures, and races. This may enable the police subculture to adapt and overcome its more negative characteristics.

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8.2: Police Discretion

Police Discretion[99]

According to researcher Joan McGregor (Kleinig,1996), discretion can only be interpreted as those decisions that are made with lawful authority rather than decisions made for illegal reasons. Furthermore, the individuals within an institution must have lawful authority to make the decisions and must operate under the constraints acceptable to others within the organization or profession. This definition is useful as it allows discretion to be considered in a legal context rather than only when police officers operate illegally and decide to commit prohibited acts, which is not considered to be lawful discretion. Kleinig (1996) accordingly considers these illegal acts not as discretion but rather as a decision to engage in forbidden conduct. In a law enforcement context, discretion only concerns decisions that are made in a legal setting. When decisions that are made by officers do not yield the desired positive results, but are made in good faith, these decisions still fall under the umbrella of discretion. Decisions made by officers without good faith are not classified as discretionary.

Discretion in law enforcement, and especially within policing, is critical to both the functioning of the police department and to the relationship with the public the police department serves. It is unusual within the paramilitary policing environment, due to the inverse relationship between discretion at the top of the rank structure and that of the lower end of the rank structure, compared to military bodies and some commercial enterprises (Manning, 2010). Officers who have recently started in patrol exercise more discretion than the chief constable or the highest rank within the department. In comparison, a general in the army possess discretionary powers at a much higher level than does a low-ranking soldier.

There is an inevitable tension that exists between paramilitary agencies that require members of all ranks to follow orders and those agencies that acknowledge discretion among members of lower ranks is necessary to function. In the military, discretion is seldom used at lower levels. Orders are given and are to be followed regardless of the feelings or desires of the subordinate. The move toward more discretion inevitably leads police services away from the military hierarchical structure to a more organic structure in which decisions are made throughout the organization (Hughes and Newton, 2010). Key to the argument, however, is that some in law enforcement view professionalism as partially gauged on the amount of discretion that is afforded to an occupation, and it is in this respect that a shift toward more discretion will result in police services being more professional.

It is also important to explain how the term professionalism will be used in the context of law enforcement. While arguments persist as to whether or not policing is a “profession” or an “occupation,” it is important to note that professionalism , within a law enforcement context, is related to the ability of police officers to exercise discretion with a level of autonomy (Villiers, 2003). More specifically, the meaning of professionalism in this context is related to the freedom of police to make discretionary operational decisions. When discretion is removed from police due to managerialism and accountability, professionalism decreases. Klofas, Stojkovic, and Kalinich (1990) use the term deprofessionalization to describe this process. Without discretion, it is argued, an organization loses its professionalism.

The shift to more professionalism requires the need for management to proactively promote operational decisions in a manner that is reflective of an organic organization and still be able to control its members (Jones, 2008).

However, Sanders and Young (2007) take a dim view of police management’s ability to control the discretion of operational police officers. Discretion, they argue, has the potential to:

- Lead officers to fabricate evidence
- Look for guilt rather than truth
- Summarize statements with bias
- Handle exhibits poorly and fail to disclose evidence

The ability to control and provide effective leadership to officers, who possess more discretion and autonomy than the management, raises serious implications for police managers.

Crawshaw, Devlin, and Williamson (1998, p.24) argue that it is due to the discretion afforded to police at the operational level that police work is unsupervised and for large amounts of the officer’s day “unsupervisorable.” Pagon (2003, p.159) refers to this as the “discretionary paradox” in which police officers are answerable to their superiors even though they operate with a high degree of autonomy and out of view of their supervisors.

An irony within law enforcement exists because while a law enforcement structure is different from the military, the police still have a quasi-military structure. To further complicate matters, within policing specifically, sergeants have an increased role in administration, which has limited their ability to provide supervision on the street. Ultimately, this does not allow for close supervision of junior officers who are forced to exercise their discretion often without the benefit of the wisdom of experienced supervisors (Butterfield, Edwards, and Woodall, 2005). Lipsky (1980) warns that the need for a high degree of control through supervision is critical in allowing discretion to be effective; without such control, officers will make decisions that are self-promoting and in opposition to organizational goals. Maintaining direct supervision and control is difficult for front-line managers who are faced with an increased workload.

Because of the discretionary mistakes that are inevitably made by officers, attempts have been made to control operational decision making among police officers (Butterfield, Edwards, and Woodall, 2005). Lipsky (1980) notes that discretion has been curtailed in regard to domestic assaults where police officers are encouraged to charge offenders rather than informally resolve the situation. In British Columbia, the Violence Against Women in Relationships Policy was introduced in 1993 and underwent changes in 2010. The policy makes clear to officers the protocols, roles, operational procedures, and responsibilities they must adhere to when investigating instances of domestic assault (British Columbia Ministry of Public Safety and Solicitor General Ministry of Attorney General, Ministry of Children and Family Development, 2010). Policies such as these are regarded as examples of positive arrest policies (or legislation) where the intention is to limit discretion in favor of arrests (Rowe, 2007). Since this policy is intended to limit discretion, it ultimately holds officers accountable if they choose not to arrest while still affording them the facade of autonomy (Rowe, 2007).

Studies have shown that there are problems with such policies and legislation, and an examination of such problems highlights the benefits of a shift to more discretion (Fyfe, 1996; Mastrofski, 2004; Neyroud, 2008; Rowe, 2007). In a study of officers' perceptions of the Domestic Violence, Crime and Victims Bill, an equivalent example from Britain, Rowe (2007) found that officers were concerned about the ethics of positive arrest policies in cases where they would not have arrested had it been left to their discretion. Officers felt that when they are forced to arrest suspects in cases where they would otherwise operationally decide against charges, their ethical standards would be compromised as they believed that such charges would be unjust. Other problems associated with the legislation included such things as increased workload, reduced professionalism, and the potential for worsening a situation due to the arrest (Rowe, 2007). The Domestic Violence, Crime and Victims Bill (2003) demonstrates inherent problems when discretion is curtailed either through legislation or organizational policy; however, it does highlight three benefits that would result from a shift to more discretionary powers in operational decision making, namely greater efficiency or a smaller workload (Davies and Thomas, 2003), professionalism and ethics (Villiers, 2003), and leadership within the junior ranks of the service (Bass, 1990).

It is impossible for the police to detect all crimes all the time. However, even if the police were able to detect every crime, resources would not be sufficient to investigate each one and make an arrest. Discretion is needed to filter offences so that only those that are most important will be investigated, even though at times such discretion may be misused (Tillyer and Klahm IV, 2011). Without discretion the police, and indeed the whole criminal justice system, would become overwhelmed with cases, resulting in public displeasure (McLaughlin, 2009). Lipsky (1980) further asserts that discretion among police officers will always be mandatory due to the inevitable lack of resources and the need for an efficient service. Decisions, ethically made, will allow for charges to be limited to only those that matter and will render the police service more efficient in prosecuting only such offences.

However, while efficiency is important in all public organizations, there is the danger that police agencies will lose their way if efficiency is promoted over ethical and rightful decisions concerning the protection of the public and if citizens are denied justice. Rawls (1971, p.71), in his seminal theory on justice, observes that "the principle of efficiency cannot serve alone as a conception of justice." Discretion, according to Rawls (1971), should not be used as a means of ensuring efficiency but rather as a way of applying a utilitarianism counterbalance to unjust laws within the justice system. The end result should never be efficiency at the expense of human rights and ethical policing. Dobel (2005, p.161) extends this thought process to discretion when noting "that the existence of discretion increases the tension between liberal democracy and public management and administration." The end result of using discretion as a means to ensure maximum efficiency potentially leads to an abuse of process in which the rights of individuals are superseded by the will to maximize results with minimal resources (Dobel, 2005).

Therefore, the goals of the organization can become ambiguous, caught between ensuring democracy and individual rights and promoting efficiency. Goal ambiguity can lead to placing the rights of individuals at lower levels of importance and can be further

fostered by the different subcultures within the police service (Lipsky, 1980).

Goal ambiguity is consistent with some of the inherent problems faced by police officers in operational decision making. Lipsky (1980) identifies a conflict that police confront between client-oriented goals, social-engineering goals, and organizational-centered goals, and spousal-assault policies are an example. In this instance, an officer is mandated to charge where there is evidence even if the officer feels charges are not appropriate and go against the goals of the client—for example, if the victim does not wish to pursue charges (Rowe, 2007). Likewise, an officer who is acting only to comply with policy guidelines may be inclined to perform poorly to compromise the investigation, thereby subverting the charge which he or she was obliged to make, however reluctantly (Lipsky,1980).

Proper use of discretion, within the parameters of McGregor's definition (as cited in Kleinig, 1996), will effectively allow the state to save resources while enforcing only the violations that the public want enforced. According to Reiner (2010), police require the ability to use discretion due to the inevitable lack of police resources to enforce all laws all the time. While police services chronically lack the resources to formally enforce all laws, they must, as a result, allow officers to determine which laws will be enforced at the operational level (Crawshaw, Devlin and Williamson, 1998; Lipsky, 1980). The discretion allowed at the lower levels of the hierarchy allows police services to spare precious front-line resources while concentrating on those offences that should be enforced in accordance with the police service's values and/or the values of the community the agency serves. While discretion creates an efficient system, the proper operational decisions must be made at the lower levels of the hierarchy, which will benefit the agency by fostering leadership throughout the organization.

Emotional Intelligence [100]

Learning Objectives

- Understand Affective Events Theory.
- Understand the influence of emotions on attitudes and behaviors at work.
- Learn what emotional labor is and how it affects individuals.
- Learn what emotional intelligence is.

Emotions Affect Attitudes and Behaviors at Work

Emotions shape an individual's belief about the value of a job, a company, or a team. Emotions also affect behaviors at work. Research shows that individuals within your own inner circle are better able to recognize and understand your emotions.

So, what is the connection between emotions, attitudes, and behaviors at work? This connection may be explained using a theory named Affective Events Theory (AET). Researchers Howard Weiss and Russell Cropanzano studied the effect of six major kinds of emotions in the workplace: anger, fear, joy, love, sadness, and surprise. Their theory argues that specific events on the job cause different kinds of people to feel different emotions. These emotions, in turn, inspire actions that can benefit or impede others at work.



Figure 8.1 According to Affective Events Theory, six emotions are affected by events at work. [101]

For example, imagine that a coworker unexpectedly delivers your morning coffee to your desk. As a result of this pleasant, if unexpected experience, you may feel happy and surprised. If that coworker is your boss, you might feel proud as well. Studies have found that the positive feelings resulting from work experience may inspire you to do something you hadn't planned to do before. For instance, you might volunteer to help a colleague on a project you weren't planning to work on before. Your action would be an affect-driven behavior. Alternatively, if you were unfairly reprimanded by your manager, the negative emotions you experience may cause you to withdraw from work or to act mean toward a coworker. Over time, these tiny moments of emotion on the job can influence a person's job satisfaction. Although company perks and promotions can contribute to a person's happiness at work, satisfaction is not simply a result of this kind of "outside-in" reward system. Job satisfaction in the AET model comes from the inside-in—from the combination of an individual's personality, small emotional experiences at work over time, beliefs, and affect-driven behaviors.

Jobs that are high in negative emotion can lead to frustration and burnout—an ongoing negative emotional state resulting from dissatisfaction. Depression, anxiety, anger, physical illness, increased drug and alcohol use, and insomnia can result from frustration and burnout, with frustration being somewhat more active and burnout more passive. The effects of both conditions can impact coworkers, customers, and clients as anger boils over and is expressed in one's interactions with others.

Emotional Labor

Negative emotions are common among workers in service industries. Individuals who work in manufacturing rarely meet their customers face-to-face. If they're in a bad mood, the customer would not know. Service jobs are just the opposite. Part of a service employee's job is appearing a certain way in the eyes of the public. Individuals in service industries, such as police officers, are professional helpers. As such, they are expected to be upbeat, friendly, and polite at all times, which can be exhausting to accomplish in the long run.

Humans are emotional creatures by nature. In the course of a day, we experience many emotions. Think about your day thus far. Can you identify times when you were happy to deal with other people and times that you wanted to be left alone? Now imagine trying to hide all the emotions you've felt today for 8 hours or more at work. That's what cashiers, schoolteachers, fire fighters, and police, among other professionals, are asked to do. As individuals, they may be feeling sad, angry, or fearful, but at work, their job title trumps their individual identity. The result is a persona—a professional role that involves acting out feelings that may not be real as part of their job.

Emotional labor refers to the regulation of feelings and expressions for organizational purposes. Three major levels of emotional labor have been identified. Hochschild, A. (1983).

1. Surface acting requires an individual to exhibit physical signs, such as smiling, that reflect emotions customers want to experience. A children's hairdresser cutting the hair of a crying toddler may smile and act sympathetic without actually feeling so. In this case, the person is engaged in surface acting.
2. Deep acting takes surface acting one step further. This time, instead of faking an emotion that a customer may want to see, an employee will actively try to experience the emotion they are displaying. This genuine attempt at empathy helps align the emotions one is experiencing with the emotions one is displaying. The children's hairdresser may empathize with the toddler by imagining how stressful it must be for one so little to be constrained in a chair and be in an unfamiliar environment, and the hairdresser may genuinely begin to feel sad for the child.
3. Genuine acting occurs when individuals are asked to display emotions that are aligned with their own. If a job requires genuine acting, less emotional labor is required because the actions are consistent with true feelings.



Figure 8.2 When it comes to acting, the closer to the middle of the circle that your actions are, the less emotional labor your job demands. The further away, the more emotional labor the job demands. [102]

Research shows that surface acting is related to higher levels of stress and fewer felt positive emotions, while deep acting may lead to less stress. Emotional labor is particularly common in service industries that are also characterized by relatively low pay, which creates the added potentials for stress and feelings of being treated unfairly. In a study of 285 hotel employees, researchers found that emotional labor was vital because so many employee-customer interactions involve individuals dealing with emotionally charged issues. Emotional laborers are required to display specific emotions as part of their jobs. Sometimes, these are emotions that the worker already feels. In that case, the strain of the emotional labor is minimal. For example, a funeral director is generally expected to display sympathy for a family's loss, and in the case of a family member suffering an untimely death, this emotion may be genuine. But for people whose jobs require them to be professionally polite and cheerful, such as flight attendants, or to be serious and authoritative, such as police officers, the work of wearing one's "game face" can have effects that outlast the working day. To combat this, taking breaks can help surface actors to cope more effectively. In addition, researchers have found that greater autonomy is related to less strain for service workers in the United States as well as France.

Cognitive dissonance is a term that refers to a mismatch among emotions, attitudes, beliefs, and behavior, for example, believing that you should always be polite to a customer regardless of personal feelings, yet having just been rude to one. You'll experience discomfort or stress unless you find a way to alleviate the dissonance. You can reduce the personal conflict by changing your behavior (trying harder to act polite), changing your belief (maybe it's OK to be a little less polite sometimes), or by adding a new fact that changes the importance of the previous facts (such as you will otherwise be laid off the next day). Although acting positive can make a person feel positive, emotional labor that involves a large degree of emotional or cognitive dissonance can be grueling, sometimes leading to negative health effects.

Emotional Intelligence

One way to manage the effects of emotional labor is by increasing your awareness of the gaps between real emotions and emotions that are required by your professional persona. "What am I feeling? And what do others feel?" These questions form the heart of emotional intelligence. The term was coined by psychologists Peter Salovey and John Mayer and was popularized by psychologist Daniel Goleman in a book of the same name. Emotional intelligence looks at how people can understand each other more completely by developing an increased awareness of their own and others' emotions.

There are four building blocks involved in developing a high level of emotional intelligence. Self-awareness exists when you are able to accurately perceive, evaluate, and display appropriate emotions. Self-management exists when you are able to direct your emotions in a positive way when needed. Social awareness exists when you are able to understand how others feel. Relationship management exists when you are able to help others manage their own emotions and truly establish supportive relationships with others.



Figure 8.3 The four steps of emotional intelligence build upon one another. [103]

In the workplace, emotional intelligence can be used to form harmonious teams by taking advantage of the talents of every member. To accomplish this, colleagues well versed in emotional intelligence can look for opportunities to motivate themselves and inspire others to work together. Chief among the emotions that helped create a successful team, Goleman learned, was empathy—the ability to put oneself in another's shoes, whether that individual has achieved a major triumph or fallen short of personal goals. Those high in emotional intelligence have been found to have higher self-efficacy in coping with adversity, perceive situations as challenges rather than threats, and have higher life satisfaction, which can all help lower stress levels.

Key Takeaway

Emotions affect attitudes and behaviors at work. Affective Events Theory can help explain these relationships. Emotional labor is higher when one is asked to act in a way that is inconsistent with personal feelings. Surface acting requires a high level of emotional labor. Emotional intelligence refers to understanding how others are reacting to our emotions.

Exercises

What is the worst job you have ever had (or class project if you haven't worked)? Did the job require emotional labor? If so, how did you deal with it?Research shows that acting "happy" when you are not can be exhausting. Why do you think that is? Have you ever felt that way? What can you do to lessen these feelings?How important do you think emotional intelligence is at work? Why

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CHAPTER OVERVIEW

9: Challenges of Policing and Use of Force

9.1: Problems
9.2: Use of Force

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9.1: Problems

Chapter 9 – Challenges of Policing and Use of Force

Problems [104]



Think About It… Excessive Force

"Allegations of the use of excessive force by U.S. police departments continue to generate headlines more than two decades after the 1992 Los Angeles riots brought the issue to mass public attention and spurred some law enforcement reforms . Recent deaths at the hands of police have fueled a lively debate across the nation in recent years." Read this article on Excessive or reasonable force by police? Research on law enforcement and racial conflict , what are your views on police force? Why do you think this topic has become a topic of national discourse? DO you think this is a recent issue in American policing or a longstanding historical trend?

New Crimes Due to Emerging Social Issues

The direction of criminology has been shifting, as the structure of the criminal justice system has been weakened over the last 200 years. "New crime" which is being countered by new crimefighting methods is conflicting with "old criminology." The emergence of new relations between victims and offenders, criminal justice and social justice, as well as the development of innovative modes of regulation are, it is argued, changing the social and criminological landscape. This raises issues of theory and practice that challenge traditional conceptualizations of crime and punishment. [105]

Physician-Assisted Suicide [106]

Euthanasia

Euthanasia is an emotionally charged word, and definitional confusion has been fermented by characterizations such as passive versus active euthanasia. Some have suggested avoiding using the word altogether. 1 , 2 We believe it would be a mistake to abandon the word, but we need to clarify it.

The word's etymology is straightforward: eu means good and Thanatos means death. Originally, euthanasia meant the condition of a good, gentle, and easy death. Later, it took on aspects of performativity; that is, helping someone die gently. An 1826 Latin manuscript referred to medical euthanasia as the "skillful alleviation of suffering", in which the physician was expected to provide conditions that would facilitate a gentle death but "least of all should he be permitted, prompted either by other people's request or his own sense of mercy, to end the patient's pitiful condition by purposefully and deliberately hastening death". 3 This understanding of euthanasia is closely mirrored in the philosophy and practice of contemporary palliative care. Its practitioners have strongly rejected euthanasia. 4

Recently, the noun has morphed into the transitive verb "to euthanize". The sense in which physicians encounter it today, as a request for the active and intentional hastening of a patient's demise, is a modern phenomenon; the first sample sentence given by the Oxford English Dictionary to illustrate the use of the verb is dated 1975. 5 The notion of inducing, causing, or delivering a (good) death, so thoroughly ensconced in our contemporary, so-called "progressive values" cultural ethos, is a new reality. That fact should raise the question: "Why now?" The causes go well beyond responding to the suffering person who seeks euthanasia, are broad and varied, and result from major institutional and societal changes. 6

Physicians need a clear definition of euthanasia. We recommend the one used by the Canadian Senate in its 1995 report: "The deliberate act undertaken by one person with the intention of ending the life of another person in order to relieve that person's suffering." 7

Terms such as active and passive euthanasia should be banished from our vocabulary. An action either is or is not euthanasia, and these qualifying adjectives only serve to confuse. When a patient has given informed consent to a lethal injection, the term

"voluntary euthanasia" is often used; when they have not done so, it is characterized as "involuntary euthanasia". As our discussion of "slippery slopes" later explains, jurisdictions that start by restricting legalized euthanasia to its voluntary form find that it expands into the involuntary procedure, whether through legalizing the latter or because of abuse of the permitted procedure.

In the Netherlands, Belgium, and Lichtenstein, physicians are legally authorized, subject to certain conditions, to administer euthanasia. For the sake of clarity, we note here that outside those jurisdictions, for a physician to administer euthanasia would be first-degree murder, whether or not the patient had consented to it.

Assisted suicide

Assisted suicide has the same goal as euthanasia: causing the death of a person. The distinction resides in how that end is achieved. In PAS, a physician, at the request of a competent patient, prescribes a lethal quantity of medication, intending that the patient will use the chemicals to commit suicide. In short, in assisted suicide, the person takes the death-inducing product; in euthanasia, another individual administers it. Both are self-willed deaths. The former is self-willed and self-inflicted; the latter is self-willed and other-inflicted. Although the means vary, the intention to cause death is present in both cases.

Some will argue that agency is different in assisted suicide and euthanasia; in the former, the physician is somewhat removed from the actual act. To further this goal, two ethicists from Harvard Medical School in Boston, Massachusetts, USA, have proposed strategies for limiting physician involvement in an active death-causing role. 8 It is, indeed, the case that patients provided with the necessary medication have ultimate control over if, when, and how to proceed to use it; they may change their mind and never resort to employing it. However, in prescribing the means to commit suicide, the physician's complicity in causing death is still present. There are, however, some limits on that complicity, even in the jurisdictions where it has been legalized. For instance, even supporters of PAS in those jurisdictions agree it is unethical for physicians to raise the topic with individuals, as that might constitute subtle coercion or undue influence, whether or not intended.

PAS has been decriminalized in Oregon, Washington State, Montana, and Vermont, and absent a "selfish motive", assisted suicide is not a crime in Switzerland. 9 Even in these jurisdictions, however, one cannot legitimately speak of a "right" to suicide because no person has the obligation to assist in the suicide. Rather, assisting suicide has been decriminalized for physicians in the American states listed and for any person in Switzerland; that is, it is not a criminal offence for those who comply with the applicable laws and regulations.

Terminal sedation and palliative sedation

A lethal injection can be classified as "fast euthanasia". Deeply sedating the patient and withholding food and fluids, with the primary intention of causing death, is "slow euthanasia". The use of "deep sedation" at the end of life has become a more common practice in the last decade and has been the focus of controversy and conflict, especially because of its probable abuse.

Certain terminology, such as "palliative terminal sedation", creates confusion between sedation that is not euthanasia and sedation that is euthanasia. It was used, for example, by the Quebec Legislative Assembly in drafting a bill to legalize euthanasia. 10 We note that creating such confusion might constitute an intentional strategy to promote the legalization of euthanasia. In the amended bill, the term "palliative terminal sedation" was replaced by "continuous palliative sedation", which the patient must be told is irreversible, clearly indicating the legislature's intention to authorize "slow euthanasia", although many people might not understand that is what it means. The bill died on the order paper when a provincial election was called before it was passed. Immediately after the election the bill was reintroduced at third reading stage by unanimous consent of all parties and passed by a large majority. This new law allowing euthanasia in Quebec, the only jurisdiction in North America to do so, remains the focus of intense disagreement and is now being challenged as ultra vires the constitutional jurisdiction of Quebec.

"Palliative sedation", which is relatively rarely indicated as an appropriate medical treatment for dying people, is used when it is the only reasonable way to control pain and suffering and is given with that intention. It is not euthanasia. "Terminal sedation" refers to a situation in which the patient's death is not imminent and the patient is sedated with the primary intention of precipitating their death. This is euthanasia. The terms palliative terminal sedation and continuous palliative sedation confound these two ethically and legally different situations.

Euthanasia advocates have been arguing that we cannot distinguish the intention with which these interventions are undertaken, and therefore, this distinction is unworkable. But the circumstances in which such an intervention is used and its precise nature allow us to do so. For instance, if a patient's symptoms can be controlled without sedation, yet they are sedated, and especially if the patient

is not otherwise dying and food and fluids are withheld with the intention of causing death, this is clearly euthanasia. Needing to discern the intention with which an act is carried out is not unusual. For instance, because intention is central to determining culpability in criminal law, judges must do so on a daily basis. We note, also, that intention is often central in determining the ethical and moral acceptability of conduct, in general.

Within the realm of decision-making in a medical context, withdrawal of artificial hydration and nutrition has continued to be a very contentious issue in situations in which persons are not competent to decide for themselves about continuing or withdrawing this treatment. The questions raised include: When does its withdrawal constitute allowing a person to die as the natural outcome of their disease (when it is not euthanasia)? And when does its withdrawal constitute starving and dehydrating a person to death (when it is euthanasia)?

Basic concepts related to euthanasia and PAS

-The right to die

The “right to die” terminology is used in the euthanasia debate to propose there is a right to have death inflicted. Death is inherent to the human body, vulnerable and inexorably aging; death can be accelerated or temporarily delayed, but never thwarted. The inevitability of death is an explicit, necessary, noncontingent, and universalizable phenomenon true for all living beings. There is no “right to die”. In contradistinction, there are fundamental human rights to “life, liberty and security of the person”.

Where there is a right, there is an obligation; therefore, were a “right to die” to exist, a logical consequence would be that some other person or agent would have a duty to inflict death (especially if the requisitioner were physically incapable of accomplishing the act themselves). Pro-euthanasia advocates rely heavily on this line of logic and have used it to impose responsibility for carrying out euthanasia onto the medical profession.

The claim to a right to die must be distinguished from a “right to be allowed to die”; for instance, by refusing life-support treatment. The right to permit the dying process to unfold unimpeded flows from and is a consequence of persons’ exercise of their right to inviolability, the right not to be touched without their informed consent. It does not establish any right to die in the sense of a “right to be killed”.

A recent case from British Columbia, Carter v. Canada (Attorney General) , 12 illustrates the arguments that emerge between those arguing for a right to die (legalized euthanasia) and those opposing it. Gloria Taylor, a woman with amyotrophic lateral sclerosis who was one of the plaintiffs, challenged the constitutional validity of the prohibition on assisted suicide in the Canadian Criminal Code. 13 Suicide and attempted suicide used to be crimes under the code, but these crimes were repealed by the Canadian Parliament in 1972. However, the crime of assisting suicide was not repealed. The trial judge in the Carter case, Justice Lynn Smith, considered the reasons for that repeal. She accepted that it was not done to give a personal choice to die priority over “the state interest in protecting the lives of citizens; rather, it was to recognize that attempted suicide did not mandate a legal remedy”. 12 With respect, we propose an alternative explanation: The designation of those acts as crimes was abolished to try to save the lives of suicidal people. It was hoped that if society removed the threat of possibly being charged with a criminal offence, they and their families would be more likely to seek medical assistance.

In coming to her conclusions that PAS can be ethically acceptable and ought to be legally allowed in certain circumstances, Justice Smith relied heavily on the fact that it is no longer a crime to commit or attempt to commit suicide and asked, why, then, is it a crime to assist it? “What is the difference between suicide and assisted suicide that justifies making the one lawful and the other a crime, that justifies allowing some this choice, while denying it to others?” 12

The answer is that decriminalizing suicide and attempted suicide is intended to protect life; decriminalizing assisted suicide does the opposite. As explained earlier, intentions are often central in deciding what is and is not ethical.

Society tries to prevent suicide. Notwithstanding the influence of pro-euthanasia advocates, the preponderant societal view is that suicide, at least outside the context of terminal illness, must not be tolerated. Suicide is generally considered a failure of sorts: the manifestation of inadequately treated depression, a lapse in community support, a personal shortcoming, societal disgrace, or a combination thereof. Even if in certain societies in ancient times suicide was not illegal, it was generally frowned upon.

Importantly, the decriminalization of suicide does not establish any right to die by suicide. Furthermore, if there were such a right, we would have a duty not to treat people who attempt suicide. In other words, if there were a right to choose suicide, it would mean that we have correlative obligations (perhaps subject to certain conditions such as ensuring the absence of coercion) not to prevent

people from making that choice. Hospital emergency rooms and health care professionals faced with a patient who has attempted suicide do not, at present, act on that basis. Psychiatrists who fail to take reasonable care that their patients do not commit suicide, including by failing to order their involuntary hospitalization to prevent them committing suicide, when a reasonably careful psychiatrist would not have failed to do so, can be liable for medical malpractice, unprofessional conduct, and even, in extreme cases, criminal negligence.

Another distinguishing feature between suicide and assisted suicide must be underlined. Suicide is a solitary act carried out by an individual (usually in despair). PAS is a social act in which medical personnel licensed and compensated by society are involved in the termination of the life of a person. It asks not that we attempt to preserve life, the normal role of medicine and the state, but that we accept and act communally on a person's judgment that his or her life is unworthy of continuance. (We are indebted to Canadian bioethicist Dr Tom Koch for this particular formulation of the issue.)

Autonomy

Advocates of euthanasia rely heavily on giving priority to the value of respect for individuals' rights to autonomy and self-determination. Respect for autonomy is the first requirement listed in the principalism approach to biomedical ethics, known as the "Georgetown mantra", which strongly influenced the early development of applied ethics in the 1980s. 15 It refers to a person's right to self-determination, to the inherent right of individuals to make decisions based on their constructions of what is good and right for themselves. The autonomous personal self is seen to rule supreme. It washes over the relational self, the self that is in connection with others in the family and community. Autonomy is often treated as an "uber" right trumping all other rights. It renders moot many obligations, commitments, and considerations beyond the risks, harms, and benefits to the individual involved. The inclination to attribute primary importance to autonomy may be alluring at first glance; clearly, no physician educated in today's ethical zeitgeist (patient-centered, partnership-seeking, and consent-venerating) would want to be seen to be violating someone's autonomy by disrespecting their right to make personal choices. That would smack of paternalism or authoritarianism, which are seen by "progressives" as heinous wrongs.

The way in which respect for autonomy is implemented in practice and in law is through the doctrine of informed consent. Among many requirements, it demands that the patient be fully informed of all risks, harms, benefits, and potential benefits of the proposed procedure and its reasonable alternatives. As a consequence, to obtain legally valid informed consent to euthanasia, the patient must be offered fully adequate palliative care. As well, the patient must be legally and factually mentally competent, and their consent must be voluntary: free of coercion, duress, or undue influence. We question whether these conditions can be fulfilled, at least with respect to many terminally ill patients.

Individual autonomy and perspectives from the individual's family

It is useful to consider the historical roots of individual autonomy and its possible links to the movement to legalize euthanasia. The belief that one has the right to die at the time, place, and in the conditions of one's choosing is based on the conviction that one owns one's body and that one can do with it as one pleases. It is an idea deeply rooted in the humanist worldview.

The notion of a personal self emerged in the Renaissance, where it was thought that the personal self could be worked on and perfected. It was quite distinct from more ancient concepts of humans as part of a greater and unified whole. Pica della Mirandola (quoted in Proctor 1988) 16 captures the sentiment: "We have made thee neither of heaven nor of earth, neither mortal nor immortal, so that with freedom of choice and with honor, as though the maker and molder of thyself, thou mayest fashion thyself in whatever shape thou shalt prefer." It does not require a huge conceptual leap to appreciate that if the self can be created, the process should be reversible: self-making balanced with self-annihilation. Self-determinationism is a type of solipsism discernible at the very core of most philosophical arguments in favor of euthanasia.

The concept of autonomy can be problematized. It is, as ethicist Alfred Tauber has suggested, two-faced. 17 He describes two conceptions of autonomy: one that is dependent on radical self-direction and human separateness and another that is other-entwined and constitutive of social identities. He places interdependence, interpersonal responsibility, and mutual trust as counterpoints to free choice. He argues that both are necessary for society to thrive and for medicine to fulfill its moral imperative. Autonomy is also being rethought by some feminist scholars through a concept called "relational autonomy". 18 This recognizes that, hermits aside, we do not live as solitary individuals but, rather, in a web of relationships that influence our decisions, and that these must be taken into account in assessing whether or not our decisions are autonomous. The role that respect for autonomy should play in

relation to the decision whether to legalize euthanasia must be examined not only from the perspective of the patient but also from the perspective of the patient's relations. In the current debate, the latter have often been neglected.

It is ethically necessary to consider the effects on a person's loved ones of that person's decision to request euthanasia. We illustrate this by making reference to the BBC television program "Coronation Street", the longest-running television soap opera in history. It recently focused on a character named Hayley Cropper. In a series of episodes in early 2014, Hayley was diagnosed with pancreatic cancer and subsequently resorted to suicide in the presence of her husband, Roy Cropper. The producers of the show succeeded in plucking at heart strings and eliciting empathic responses from the audience. The character had a complex personal narrative that permitted one to appreciate why she might have wanted to hasten her own death: she was a transsexual woman who feared reverting to her previous male identity as her dying process progressed. The producers, always attuned to contemporary societal issues, made sure to balance Hayley's suffering with a reciprocal harm, wrought on her husband Roy and another character, Fiona (Fiz) Brown. Roy became tormented with guilt by association, and Fiz was seriously traumatized because she was deprived of the opportunity to say goodbye to Hayley, her foster mother. The point made was that self-willed death may be merciful to oneself and simultaneously cruel to others. There is an essential reciprocity in human life. We are neither islands in the seas nor autonomous, self-sufficient planets in the skies.

We must also examine the effect of legalizing euthanasia from the perspective of physicians' and other health care professionals' autonomy with respect to freedom of conscience and belief, and the effect it would have on institutions and society as a whole. The overwhelming thrust of the euthanasia debate in the public square has been at the level of individual persons who desire euthanasia. Although that perspective is an essential consideration, it is not sufficient. Even if euthanasia could be justified at the level of an individual person who wants it (a stance with which we do not agree), the harm it would do to the institutions of medicine and law and to important societal values, not just in the present but in the future, when euthanasia might become the norm, means it cannot be justified.

Loss of autonomy, experienced or anticipated, is one of the reasons that might prompt a patient to request death from their physician. Other reasons include pain, but it is not the most important. Thankfully, modern medicine is, with few exceptions, effective at relieving physical symptoms, particularly pain. These other sources of suffering are largely in the psychosocial domain, as the recent annual report by Oregon's Public Health Division (released on January 28, 2014) demonstrates. During a 14-year period (1998–2012), the three most frequently mentioned end-of-life concerns were loss of autonomy (91.4%), decreasing ability to participate in activities that made life enjoyable (88.9%), and loss of dignity (80.9%). 19 A loss in bodily function is linked to the fear of becoming a burden on loved ones and is often experienced as an assault on human dignity. It is important to note that depression can represent either an indication or a contraindication for euthanasia. A list of end-of-life concerns that can be linked to requesting euthanasia is presented in Figure 9.1.

Reason
Loss of autonomy and independence (eg, loss of control over decisions, inability to make decisions, loss of self-care abilities)
Less able to engage in activities making life enjoyable
Perceived loss of human dignity; this is often related to an impairment of physiological functions in basic body systems (eg, bowel functioning, swallowing, speech, reproduction) or preoccupations with bodily appearance
A fear of becoming a burden on family, friends, and community
Cognitive impairment or fear of cognitive impairment
Depression, hopelessness (nothing to look forward to), or demoralization*
Feeling useless, unwanted, or unloved; social isolation
Inadequate pain control or concern about it
Existentialist angst or terror, mortality salience, fear of the unknown
Intractable symptoms other than pain (eg, pruritus, seizures, paresthesias, nausea, dyspnea)
Financial implications of treatment

Figure 9.1 A list of end-of-life concerns that can be linked to requesting euthanasia [107]

We turn now to another critically important value, respect for life, which, in the context of euthanasia, is in conflict with respect for autonomy. In discussing euthanasia, the one cannot be properly considered in isolation from the other.

Respect for Human Life

Respect for human life must be maintained at two levels: respect for each individual human life and respect for human life in general. Even if it were correct, as pro-euthanasia advocates argue, that when a competent adult person gives informed consent to

euthanasia there is no breach of respect for human life at the level of the individual, there is still a breach of respect for human life in general. If euthanasia is involved, how one person dies affects more than just that person; it affects how we all will die.

Respect for life is implemented through establishing a right to life. We return to the trial judgment in the Carter case because it illustrates how such a right can be distorted and co-opted in the service of legalizing PAS or even euthanasia. In applying the right to life in section 7 of the Canadian Charter of Rights and Freedoms 20 to Ms. Taylor's situation, Justice Smith says:

[T]he [Criminal Code] legislation [prohibiting assisted suicide] affects her right to life because it may shorten her life. Ms. Taylor's reduced lifespan would occur if she concludes that she needs to take her own life while she is still physically able to do so, at an earlier date than she would find necessary if she could be assisted. 12

What is astonishing is the novel, to say the least, way in which Justice Smith constructs a breach of Ms. Taylor's Charter right to life. In effect, Justice Smith's reasoning converts the right to life to a right to death by PAS or euthanasia. Justice Smith's judgment was overturned by a two to one majority in the British Columbia Court of Appeal, as contrary to a Supreme Court of Canada precedent ruling that the prohibition of assisted suicide is constitutionally valid. 21 It is now on appeal to the Supreme Court of Canada; we note its liberty to override its previous precedents.

Main Arguments of Proponents and Opponents

Proponents of euthanasia often use rhetorical devices to foster agreement with their stance by making it more palatable. One of these is to eliminate the use of words that have a negative emotional valance. As mentioned previously, "suicide" has been a taboo for many cultures and across time. Some commentators have described concepts such as suicide clusters, suicidal contagion, and suicide scripting; none of these are considered beneficial to society. As a consequence, there have been efforts at replacing the terminology of assisted suicide with assisted dying. A former editor of the New England Journal of Medicine , Marcia Angell, has stated that the latter expression is more appropriate because it describes someone "who is near death from natural causes anyway while the former refers to something occurring in someone with a normal life expectancy". 22 We doubt that she was actually meaning to imply that human lives have less intrinsic worth as persons approach death; however, that interpretation is logical and inevitable.

Another strategy to whitewash "death talk" is to figuratively wrap it within the white coat of medicine. Cloaking these acts in medical terms softens them and confers legitimacy. This has spawned a host of euphemisms such as "medically assisted death", "medical-aid-in-dying", and "death with dignity". After all, we all want good medical care when we are dying. A strategy that may escape scrutiny is to link assisted suicide with physicians; that is, PAS. However, assisted suicide and euthanasia are not necessarily glued to physicians. Nurses could perform these procedures, although most recoil at the prospect. In theory, almost anyone (ambulance drivers, veterinarians, pharmacists, lawyers) could be empowered and trained to euthanize. We have argued elsewhere that if society is going to legalize euthanasia (which we oppose it doing), it could equip itself with a new occupation of euthanology, 23 thereby relieving physicians of having to contravene their ancient guiding principle of primum non nocere.

One must also be wary of euphemisms because they dull our moral intuitions and emotional responses that warn us of unethical conduct. In our world of desktops, laptops, and smartphones, where one's existence is proclaimed and validated on computer screens and intersubjectivity is channelled in cyberspace, we would not be surprised to see some enterprising euthanologist of the future advertise a gentle "logging-off". Although fanciful, this prediction is well aligned with a conception of the world that views persons as reducible to bodies with complex networks of neurological circuits wherein the entire range of human experiences can be created, recorded, interpreted, and terminated.

This conception of human existence can also breed rather extreme points of view, such as the one that considers the failing body as "unwanted life support". David Shaw has suggested that, "if a patient is mentally competent and wants to die, his body itself constitutes unwarranted life support unfairly prolonging his or her mental life". 24

Many current attitudes and values could affect how terminally ill, dying, and vulnerable people are treated. For example, if materialism and consumerism are priority values, euthanasia fits with the idea that, as one pro-euthanasia Australian politician put it: "When you are past your 'use by' or 'best before' date, you should be checked out as quickly, cheaply and efficiently as possible." But we are not products to be checked out of the supermarket of life. As this shows, some who advocate in favor of euthanasia resort to intense reductionism in buttressing their arguments. If one thinks of a human being as having an essence comprised of more than bodily tissues, then the intellectual, emotional, and social barriers to euthanasia come to the fore.

Euphemizing euthanasia through choice of language is not the only "legalizing euthanasia through confusion" strategy. 25 Another is the "no difference" argument. The reasoning goes as follows: refusals of treatment that result in a shortening of the patient's life are ethical and legal; this is tantamount to recognizing a right to die. Euthanasia is no different from them, and it's just another way to implement the right to die. Therefore, if we are to act consistently, that too should be seen as ethical and legal. The further, related, argument is that euthanasia is simply another form of medical treatment. However, as explained previously, the right to refuse treatment is not based on a right to die, and both the intention of the physician and the causation of death are radically different in those cases compared with euthanasia.

The main arguments in favor of and in opposition to euthanasia are presented in Figure 9.2. Prominent on the yea side are the autonomy principle and the belief that putting an end to suffering through euthanasia is merciful and justifies euthanasia. Prominent on the nay side are the corrosive consequences for upholding society's respect for life, the risks of abuse of vulnerable people, and the corruption of the physician's role in the healing process.

Arguments
Arguments in favor of euthanasia
Persons have an inalienable right to self-determination; that is, patients can decide how, where, and when they are going to die.
Euthanasia is a profoundly humane, merciful, and noble humanitarian gesture because it relieves suffering.
Assistance in dying is a logical and reasonable extension to end-of-life care and involves only an incremental expansion of practices that are legal and seen as ethical.
It bypasses physicians' reluctance to accept patients' advanced directives and their requests to limit interventions.
It can be carried out humanely and effectively, with negligible risk of slippery slopes.
Arguments against euthanasia
Intentionally taking a human life, other than to save innocent human life, is inherently wrong and a violation of a universal moral code.
The value of respect for autonomy must be balanced by other values, particularly respect for individual human life and respect for human life in general.
It is different in kind from other palliative care interventions aimed at relieving suffering, such as pain management, and from respect for patients' refusals of life support treatment.
Slippery slopes are unavoidable.
It introduces an unacceptable potential for miscommunication within the doctor–patient relationship.
It is incompatible with the role of the physician as healer and would erode the character of the hospital as a safe refuge.

Figure 9.2 Main arguments advanced by proponents and opponents of euthanasia [108]

Alternatives to Euthanasia

There are two great traditions in medicine: the prolongation of life and the relief of suffering. The concept of suffering, the fact that it is an affliction of whole persons, rather than bodies only, was explicated several decades ago by the American physician Eric Cassel in his seminal paper: "The Nature of Suffering and the Goals of Medicine." This understanding represents one of the central tenets of palliative care medicine. The provision of high-quality care by individuals who share in this belief and are able to act to address the full range of human suffering is the most important goal with respect to terminally ill patients. It also constitutes the obvious and necessary alternative to euthanasia.

A specific approach to palliative care, with conceptual anchors in the concept of healing, has recently been described and used by Canadian psychiatrist Harvey Max Chochinov and colleagues; it is called "dignity therapy". Although we prefer the original term,

"dignity-conserving care", because it implies somewhat more modest goals and suggests less of a transfer of agency from patient to physician, this approach holds great promise for assisting patients at the end of life. It provides an entry for a deep exploration of dignity: How does the individual patient conceive of it? How is it threatened? How does it link to vulnerability or a sense of "control"? Where does one get the idea that we are ever in control? It is focused on issues such as "intimate dependencies" (e.g., eating, bathing, and toileting) and "role preservation". Chochinov has described one's social roles and their associated responsibilities as "the bricks and mortar" of self. 34 The therapeutic approach described aims to preserve persons' inherent dignity, in part by helping them to see that their intimate dependencies can be attended to without their losing self-respect and that they can continue to play meaningful roles.

Consequences

A major disagreement between euthanasia advocates and opponents revolves around the existence of slippery slopes. There are two types: the logical slippery slope, the extension of the circumstances in which euthanasia may be legally used, and the practical slippery slope, its abuse (see Figure 9.3). The evidence during the last decade demonstrates that neither slope can be avoided. 35 , 36 For example, although access to euthanasia in the Netherlands has never required people to be terminally ill, since its introduction it has been extended to include people with mental, but not physical, illness, as well as to newborns with disabilities and older children. In Belgium, euthanasia has recently been extended to children, it is being considered whether to do the same for people with dementia, and organs are being taken from euthanized people for transplantation. 37 The logical and practical slippery slopes are unavoidable because once we cross the clear line that we must not intentionally kill another human being, there is no logical stopping point.

Slopes
The practical slippery slope
Performing euthanasia without informed consent or any consent
Persons administering euthanasia who are not legally authorized to do so
Failure of reporting euthanasia or physician assisted suicide as required
Misclassifying euthanasia as "palliative sedation"
Noncompliance with safeguard protocols (eg, not obtaining psychiatric evaluations of competence, circumventing policies for mandatory second opinions, functioning as "willing providers" without having had a previous clinical relationship with the patient)
The logical slippery slope
Euthanasia offered to those with existentialist angst, mental illness, anorexia nervosa, depression
Euthanasia expanded to include patients with dementia
Euthanasia expanded to persons who are neither physically nor mentally ill: "over 70 and tired of life"
Extending legislation to include children
Euthanasia becomes accepted as medical care, as a sort of "therapeutic homicide"

Figure 9.3 Slippery Slopes [109]

When euthanasia is first legalized, the usual justification for stepping over the "do not kill" line is a conjunctive one composed of respect for individual autonomy and the relief of suffering. This justification is taken as both necessary and sufficient for euthanasia. But as people and physicians become accustomed to euthanasia, the question arises, "Why not just relief of suffering or respect for autonomy alone?" and they become alternative justifications.

As a lone justification, relief of suffering allows euthanasia of those unable to consent for themselves according to this reasoning: If allowing euthanasia is to do good to those mentally competent people who suffer, denying it to suffering people unable to consent for themselves is wrong; it is discriminating against them on the basis of mental handicap. So, suffering people with dementia or newborns with disabilities should have access to euthanasia.

If one owns one's own life, and no one else has the right to interfere with what one decides for oneself in that regard (as pro-euthanasia advocates claim), then respect for the person's autonomy as a sufficient justification means that the person need not be suffering to access euthanasia. That approach is manifested in the proposal in the Netherlands that euthanasia should be available to those "over 70 and tired of life".

Once the initial justification for euthanasia is expanded, the question arises, "Why not some other justification, for instance, saving on health care costs, especially with an aging population?" Now, in stark contrast to the past when saving health care costs through euthanasia was unspeakable, it is a consideration being raised.

Familiarity with inflicting death causes us to lose the awesomeness of what euthanasia entails; namely, inflicting death. The same is true in making euthanasia a medical act. And both familiarity with inflicting death and making euthanasia a medical act make its

extension, and probably abuse, much more likely, indeed, we believe inevitable, were it to be legalized. We need to stay firmly behind the clear line that establishes that we must not intentionally kill one another.

Those most at risk from the abuse of euthanasia are vulnerable people: those who are old and frail or people with mental or physical disabilities. We have obligations to protect them, and euthanasia does the opposite, it places them in danger. We need, also, to consider the cumulative effect of how we treat vulnerable people. What would be the effect of that on the shared values that bind us as a society and in setting its "ethical tone"? As one of us (MAS) has repeatedly pointed out, we should not judge the ethical tone of a society by how it treats its strongest, most privileged, most powerful members, but rather by how it treats its weakest, most vulnerable and most in need. Dying people belong to the latter group.

Among the most dangerous aspects of legalizing euthanasia are the unintended boomerang effects it will have on the medical profession. The concept of "unanticipated consequences of purposive social action" is a well-described phenomenon in sociology. 39 In his classic paper, American sociologist Robert Merton distinguishes between the consequences of purposive actions that are exclusively the result of the action and those, unpredictable and often unintended, that are mediated by social structures, changing conditions, chance, and error. For example, with respect to euthanasia, there is really no guarantee that the legal and administrative policies erected today, even if currently they functioned as intended, which is doubtful, will be as effective in a different cultural context decades hence.

Then there are the insidious changes induced by the force of habit: the unexamined and autonomic modes of human behavior. How will the legitimatization of euthanasia and its insertion in the everyday professional vernacular and practice alter the ethos of medicine? The risks are of a grave nature and are immeasurable. How will the involvement of physicians in inflicting death affect their thinking, decisions, and day-to-day practice? Given that euthanasia may be routinized and expedient, there is a distinct possibility that death will become trivialized and that avenues for dignity-preserving care will remain unexplored. What are the potential corrosive effects on hospitals of accepting the language of euthanasia and in implementing that mandate? The language we use not only reflects reality but constructs reality. As German philosopher Martin Heidegger has said, "Language is the house of Being. In its home man dwells". One can imagine that "H", currently a symbol of hospice and hope, will become conflated with an "H" that stands for hollowness and hastened death. We have little doubt that the slippery slopes include a language of abandonment, generating medical practices that will vitiate hope, and a profession that will struggle to identify a true north on its moral compass.

Stalking [110]

Learning Objectives

- Identify the individuals covered by domestic violence statutes.
- Identify some of the special features of domestic violence statutes.
- Define the criminal act element required for stalking.
- Define the criminal intent element required for stalking and compare various statutory approaches to stalking criminal intent.
- Define the harm element required for stalking and compare various statutory approaches to ascertaining harm.
- Analyze stalking grading.

Domestic violence and stalking are modern crimes that respond to societal problems that have escalated in recent years. Domestic violence statutes are drafted to address issues that are prevalent in crimes between family members or individuals living in the same household. Stalking generally punishes conduct that is a precursor to assault, battery, or other crimes against the person.

Domestic Violence

Domestic violence statutes generally focus on criminal conduct that occurs between family members. Although family cruelty or interfamily criminal behavior is not a new phenomenon, enforcement of criminal statutes against family members can be challenging because of dependence, fear, and other issues that are particular to the family unit. In addition, historical evidence indicates that law enforcement can be reluctant to get involved in family disputes and often fails to adequately protect victims who are trapped in the same residence as the defendant. Specific enforcement measures that are crafted to apply to defendants and victims who are family members are an innovative statutory approach that many jurisdictions are beginning to adopt. In general, domestic violence statutes target crimes against the person, for example, assault, battery, sex offenses, kidnapping, and criminal homicide.

Domestic Violence Statutes' Characteristics

The purpose of many domestic violence statutes is equal enforcement and treatment of crimes between family members and maximum protection for the domestic violence victim (RCW § 10.99.010, 2011). Domestic violence statutes focus on individuals related by blood or marriage, individuals who share a child, ex-spouses and ex-lovers, and individuals who reside together (Ariz. Rev. Stat. § 13-3601(A), 2011). Domestic violence statutes commonly contain the following provisions:

- Special training for law enforcement in domestic issues (RCW § 10.99.030, 2011)
- Protection of the victim by no-contact orders and nondisclosure of the victim's residence address (RCW § 10.99.040, 2011)
- Duty of law enforcement or prosecutors to inform the victim of the decision of whether to prosecute and the duty to inform the victim of special procedures available to protect domestic violence victims (RCW § 10.99.060, 2011)
- Ability to arrest domestic violence offenders with or without a warrant (Ariz. Rev. Stat. § 13-3601(B), 2011)
- Special factors to consider in the sentencing of domestic violence defendants (RCW § 10.99.100, 2011)
- Peace officer immunity for enforcement of domestic violence provisions (Ariz. Rev. Stat. § 13,3601(G), 2011)

Stalking

California was the first state to enact a stalking law in 1990, in response to the high-profile murder of a young actress named Rebecca Schaeffer whose attacker stalked her for two years. Now all states and the federal government have stalking laws (18 U.S.C. § 2261A, 2011). Although statutes criminalizing stalking are gender-neutral, in reality, most stalking victims are women, and most stalking defendants are men.

Before the states enacted stalking laws, a victim who was threatened and harassed but not assaulted had no remedy except to go to court and obtain a restraining order. A restraining order is a court order mandating that the defendant neither contact nor come within a certain distance of the victim. If the defendant violated the restraining order, law enforcement could arrest him or her. Until a restraining order was in place, however, the defendant was free to continue frightening the victim. Restraining orders typically take some time to obtain. The victim must contact and employ an attorney and also set up a court hearing. For this reason, the restraining order method of preventing a defendant from stalking was cumbersome, ineffective, and frequently resulted in force or violence against the stalking victim.

The modern crime of stalking allows law enforcement to arrest and incapacitate defendants before they complete an assault, battery, or other violent crime against a victim. Like all crimes, stalking requires the defendant to commit a voluntary act supported by criminal intent. In many jurisdictions, stalking also has the elements of causation and harm.

Stalking Act

Various approaches have been made to criminalize stalking, and a plethora of descriptors now identify the stalking criminal act. In the majority of jurisdictions, the criminal act element required for stalking includes any course of conduct that credibly threatens the victim's safety, including following (Tex. Penal Code § 42.072, 2011), harassing (Cal. Penal Code § 646.9, 2011), approaching (Md. Code Ann. § 3-802, 2011), pursuing, or making an express or implied threat to injure the victim, the victim's family member (Ala. Code § 13A-6-90, 2011), or the victim's property (Tex. Penal Code § 42.072(a), 2011). In general, credible threat means the defendant has the apparent ability to effectuate the harm threatened (S. D. Codified Laws § 22-19A-6, 2011). The stalking criminal act is unique among criminal acts in that it must occur on more than one occasion or repeatedly (Colo. Rev. Stat. Ann. § 18-3-602, 2011). The popularity of social networking sites and the frequency with which defendants use the Internet to stalk their victims inspired many states to specifically criminalize cyberstalking, which is the use of the Internet or e-mail to commit the criminal act of stalking (Alaska Stat. § 11.41.270, 2011).

Example of a Case Lacking Stalking Act

Elliot tells Lisa on two separate occasions that he loves her. Lisa intensely dislikes Elliot and wants nothing to do with him. Although Elliot's proclamations of love are unwelcome, Elliot probably has not committed the criminal act element required for stalking. Elliot's behavior does not threaten Lisa's safety or the safety of her family members or property. Thus, Elliot may not be charged with and convicted of stalking in most jurisdictions.

Example of Stalking Act

Change the above example so that Elliot tells Lisa he loves her on one occasion. Lisa frowns and walks away. Elliot then follows Lisa and tells her that he will “make her pay” for not loving him. Lisa ignores Elliot’s statement, climbs into her car, and drives away. Later that evening, Elliot rings Lisa’s doorbell. Lisa does not answer the door but yells at Elliot, telling him to leave. Disgruntled and angry, Elliot carves, “you will die for not loving me” into Lisa’s front door with his pocketknife.

Elliot’s conduct could constitute the criminal act element required for stalking in most jurisdictions. In this example, Elliot has followed Lisa and approached her, which is a repeated course of conduct. On two occasions Elliot threatened Lisa: once by telling her he will “make her pay” and again by carving a death threat into her front door. Keep in mind that Elliot’s threat to Lisa’s safety must be credible in many jurisdictions. Thus, if Elliot is unable to actually harm Lisa for any reason, the trier of fact could find that he does not have the apparent ability to carry out his threat, and he could not be convicted of stalking.

Stalking Intent

The criminal intent element required for stalking also varies, depending on the jurisdiction. In most states, the defendant must commit the criminal act willfully or maliciously (Cal. Penal Code § 646.9, 2011). This indicates a specific intent or purposeful conduct. However, in states that require the victim to experience harm , a different criminal intent could support the harm offense element. States that include bad results or harm in their stalking statutes require either specific intent or purposely , general intent or knowingly , reckless intent , negligent intent , or strict liability (no intent) to cause the harm, depending on the state (Ncvc.org, 2011).

Example of Stalking Intent

Review the stalking act example in Section 10 “Example of Stalking Act” . In the majority of states, Elliot must make the threatening statement and carve the threatening message into Lisa’s front door willfully or maliciously . However, the requirement that Elliot act with the intent to cause Lisa’s reaction to this conduct varies, depending on the jurisdiction. In some jurisdictions, Elliot must act with the specific intent or purposely to cause Lisa to suffer the stalking harm, which is generally fear for bodily safety, the safety of family members, or fear of damage to Lisa’s property. In others, Elliot can act to cause Lisa’s fear with general intent or knowingly, reckless intent, or negligent intent. In some jurisdictions, Elliot’s purpose or awareness as to Lisa’s feeling of fear is irrelevant because strict liability is the intent supporting the harm or bad results requirement.

Stalking Causation

In jurisdictions that require harm for stalking, the defendant’s criminal act must be the factual and legal cause of the harm, which is defined in Section 10 “Stalking Harm” .

Stalking Harm

As stated previously, some states require a specific harm element in their stalking statutes. This element is defined differently depending on the state but generally amounts to victim fear . The fear is typically fear of bodily injury or death of the victim (Ala. Code § 13A-6-90, 2011) or of the victim’s family member (Alaska Stat. § 11.41.270, 2011), or damage to the victim’s property (Tex Penal Code § 42.072(a), 2011). States also employ different tests to ascertain the harm element. States can require subjective and objective fear (Tex. Penal Code § 42.072(a), 2011), just subjective fear (Alaska Stat. § 11.41.270, 2011), or just objective fear (Md. Code Ann. § 3-802, 2011). Subjective fear means the victim must actually experience fear. Objective fear means a reasonable victim under similar circumstances would experience fear.

Example of Stalking Harm

Review the stalking act example presented previously in this chapter. In jurisdictions that require subjective and objective victim fear as the harm element for stalking, Elliot must cause Lisa to experience fear that is reasonable under the circumstances. In a jurisdiction that requires only subjective victim fear, Elliot must cause Lisa to feel fear, either reasonably or unreasonably. In a jurisdiction that requires only objective fear, Elliot must act in a manner that would cause a reasonable victim under similar circumstances to experience fear. Keep in mind that if Lisa is aware of a circumstance that makes it unlikely that Elliot can carry out his threat, Elliot could not be convicted of stalking in a jurisdiction that requires Lisa to experience subjective fear.

Stalking Grading

Jurisdictions vary as to how they grade stalking. Many states divide stalking into degrees or grade it as simple and aggravated. First-degree or aggravated stalking is generally graded as a felony, and second-degree or simple stalking is generally graded as a

misdemeanor (Alaska Stat. §§ 11.41.260, 2011). Factors that could enhance grading are the violation of a restraining or protective order, the use of a weapon, a youthful victim, or previous convictions for stalking (Alaska Stat. § 11.41.260, 2011).

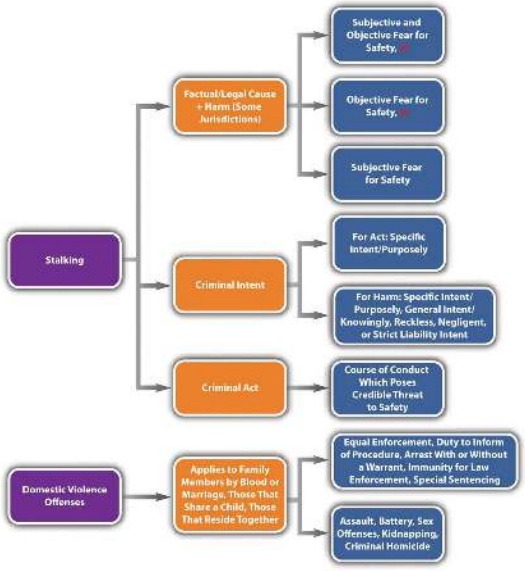


Figure 9.4 Diagram of Domestic Violence and Stalking

Key Takeaways

- Individuals covered by domestic violence statutes are relatives by blood or marriage, individuals who share a child, ex-spouses and ex-lovers, and individuals who reside together.
- Some special features of domestic violence statutes are special training for law enforcement in domestic issues, protection of the victim by no-contact orders and nondisclosure of the victim's residence address, the duty of law enforcement or prosecutors to inform the victim of the decision of whether to prosecute and the duty to inform the victim of special procedures available to protect domestic violence victims, the ability to arrest domestic violence offenders with or without a warrant, special factors to consider in the sentencing of domestic violence defendants, and peace officer immunity for enforcement of domestic violence provisions.
- The criminal act element required for stalking varies, but in general it is repeatedly engaging in a course of conduct that poses a credible threat to the victim's safety, including following, harassing, approaching, or pursuing the victim.
- The criminal intent supporting the stalking criminal act is specific intent or purposely in most jurisdictions. Some jurisdictions require a different criminal intent to support the harm requirement: either specific intent or purposely, general intent or knowingly, reckless intent, negligent intent, or strict liability.
- Some jurisdictions require the defendant to cause harm, which is victim fear of serious bodily injury, fear of death of the victim or the victim's family member, or damage to the victim's property. The test for victim fear varies and could be either subjective and objective fear, just subjective fear, or just objective fear.
- It is common to divide stalking into degrees or grade it as simple and aggravated. First-degree or aggravated stalking is generally graded as a felony, and second-degree or simple stalking is generally graded as a misdemeanor. Factors that can aggravate grading are the violation of a restraining or protective order, the use of a weapon, a youthful victim, or previous convictions for stalking.



Figure 9.5 Washington is one of several states where marijuana use has been legalized, decriminalized, or approved for medical use. [112]

Twenty-three states in the United States have passed measures legalizing marijuana in some form; the majority of these states approve only medical use of marijuana, but fourteen states have decriminalized marijuana use, and four states approve recreational use as well. Washington state legalized recreational use in 2012, and in the 2014 midterm elections, voters in Alaska, Oregon, and Washington DC supported ballot measures to allow recreational use in their states as well (Governing 2014). Florida's 2014 medical marijuana proposal fell just short of the 60 percent needed to pass (CBS News 2014).

The Pew Research Center found that a majority of people in the United States (52 percent) now favor legalizing marijuana. This 2013 finding was the first time that a majority of survey respondents supported making marijuana legal. A question about marijuana's legal status was first asked in a 1969 Gallup poll, and only 12 percent of U.S. adults favored legalization at that time. Pew also found that 76 percent of those surveyed currently do not favor jail time for individuals convicted of minor possession of marijuana (Motel 2014).

Even though many people favor legalization, 45 percent do not agree (Motel 2014). Legalization of marijuana in any form remains controversial and is actively opposed; Citizen's Against Legalizing Marijuana (CALM) is one of the largest political action committees (PACs) working to prevent or repeal legalization measures. As in many aspects of sociology, there are no absolute answers about deviance. What people agree is deviant differs in various societies and subcultures, and it may change over time.

Tattoos, vegan lifestyles, single parenthood, breast implants, and even jogging were once considered deviant but are now widely accepted. The change process usually takes some time and may be accompanied by significant disagreement, especially for social norms that are viewed as essential. For example, divorce affects the social institution of family, and so divorce carried a deviant and stigmatized status at one time. Marijuana use was once seen as deviant and criminal, but U.S. social norms on this issue are changing.

Use of Force [113]

Police officers have the power to use force if deemed necessary. If an officer uses more force than required for the situation, this brings up many red flags. The Violent Crime Control and Law Enforcement Act of 1994 authorized the Civil Rights Division of the U.S. Department of Justice (DOJ) to initiate civil actions against policing agencies if the use of force utilized is excessive or constitutes a pattern of depriving individuals of their rights.

One additional issue in police use of force situations is that it is difficult to measure. There are many types of force police can use. The force utilized varies from going hands-on to pepper spray, taser, ASP baton, control holds or takedowns, to deadly force. Every situation is different because it involves human beings and can be interpreted differently from those involved to those standing on the side-lines.

Types of Force [114]

Learning Objectives

- Ascertain the elements required for the defense of others.
- Define real and personal property.
- Explain the appropriate circumstances and degree of force a defendant can use when defending property.
- Ascertain the elements required for the defense of ejection of trespasser.
- Distinguish defense of property from defense of habitation.
- Ascertain the three elements required for the use of deadly force in defense of habitation under modern castle laws.
- Identify three common features of modern castle laws.
- Ascertain the constitutional parameters of the use of force by law enforcement to arrest or apprehend criminal suspects.

Aside from self-defense, a defendant can legally use force to defend another person , real or personal property , and habitation . In addition, law enforcement can use force to arrest or capture individuals who reasonably appear to be committing crimes. In this section, the elements of several use-of-force defenses will be reviewed. Keep in mind that these defenses can be statutory, common-law, perfect, or imperfect, depending on the facts and the jurisdiction.

Defense of Others

According to early common law, a defendant could use force to defend another only when the defendant and the person defended had a special relationship , such as a family connection. Most jurisdictions now reject this common-law restriction on defense of others and allow a defendant to defend anyone to the same degree that he or she could use self-defense (People v. Kurr, 2010). Thus, in a majority of jurisdictions, defense of others requires the same elements as self-defense: the individual defended must be facing an unprovoked, imminent attack, and the defendant must use a reasonable degree of force with a reasonable belief that force is necessary to repel the attack.

Occasionally, a defendant uses force to defend another who has no legal right to use force in self-defense. Under the common law, the defendant could not use force legally if the individual defended could not use force legally in self-defense. However, the majority of states now allow a defendant to use force to defend another person if it reasonably appears that use of force is justified under the circumstances (Commonwealth v. Miranda, 2010). The Model Penal Code allows the defense of another when “under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force” (Model Penal Code § 3.05(1) (b)). Thus, if the defendant has a subjective belief that the individual defended could use force legally in self-defense, defense of others is appropriate under the Model Penal Code.

Example of Defense of Others

Alex and Shane, aspiring law enforcement officers, are performing a training maneuver in a rural area. Their instructor Devin is watching nearby. Alex pretends to attack Shane. Just as Devin is about to demonstrate a takedown, Timmy, who is jogging in the area, dashes over and begins beating Alex. Under the older common-law rule, Timmy could be successfully prosecuted for battery of Alex. Shane did not have the right to use self-defense during a practice maneuver, so neither did Timmy . In jurisdictions that allow defense of others if it reasonably appears that self-defense is warranted, Timmy could probably use the defense to battery because it reasonably appeared that Alex was about to unlawfully attack Shane. In jurisdictions that follow the Model Penal Code, Timmy can most likely use defense of others as a defense to battery because it is clear Timmy honestly believed Shane had the right to use self-defense in this situation.

Defense of Property

All jurisdictions allow individuals to use force in defense of property under certain specified circumstances. Property can be real or personal. Real property is land, and anything permanently attached to it. This includes a home. Personal property is any movable object.

In the majority of states, the defendant can use force only to defend real or personal property if the defendant has an objectively reasonable belief that an imminent threat of damage, destruction, or theft will occur (California Criminal Jury Instructions, 2010). The Model Penal Code provides “the use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary: (a) to prevent or terminate an unlawful entry or other trespass upon land or a trespass against or the unlawful carrying away of tangible, movable property” (Model Penal Code §3.06(1) (a)). Thus, if the defendant has a

subjective belief that force is immediately necessary to protect real or personal property, force is appropriate under the Model Penal Code.

The amount of force that a defendant may legally use to protect real or personal property is reasonable force, under the circumstances (K.S.A., 2010). The defendant can also chase someone who steals personal property and take the item back (Conn. Gen. Stat., 2010). The Model Penal Code provides "the use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary…to retake tangible movable property" (Model Penal Code §3.06(1) (b)). In general, the Model Penal Code and most states do not authorize the use of deadly force to protect property (other than the home) under any circumstances (Fla. Stat. Ann., 2010).

Example of Defense of Property

Kelsey sees Keith, her stepbrother, approaching her brand-new car with a key in his hand. It appears that Keith is about to scrape the paint on the door of the car with this key. Kelsey tackles Keith to prevent him from vandalizing the car. Kelsey has probably used reasonable force under the circumstances and can claim defense of property as a defense to battery. If Keith testifies that he was simply going to hand Kelsey the key, which she left in the house, the attack could still be justified if the trier of fact determines that it was objectively reasonable for Kelsey to believe Keith was about to damage her property. In jurisdictions that follow the Model Penal Code, Kelsey can probably use defense of property as a defense to battery because it is clear Kelsey believed that force was immediately necessary to protect her personal property in this situation. Of course, if Kelsey pulls out a gun and shoots Keith, she could not claim defense of property because deadly force is never justifiable to protect real or personal property from harm.

Ejection of Trespasser

A simple trespasser is an individual who is present on real property without consent of the owner. Property owners have the legal right to eject trespassers under certain specified circumstances.

Most states authorize the ejection of a trespasser if the trespasser is first asked to leave and fails to comply within a reasonable time (N.J. Stat., 2010). The degree of force that can be used to eject the trespasser is reasonable force , under the circumstances (Iowa Code, 2010). Deadly force is never reasonable to eject a trespasser unless the trespasser threatens imminent deadly force against the defendant or another individual (State v. Curley, 2010). Deadly force under these circumstances is justified by self-defense or defense of others , not ejection of trespasser.

Example of Ejection of Trespasser

Sam sees Burt sitting on his lawn. Sam goes up to Burt and asks him to "move along." Burt looks up but does not stand. Sam goes into the house and calls law enforcement, but they inform Sam that there is a local emergency, and they cannot come and eject Burt for at least five hours. Sam goes back outside and sees that Burt is now sprawled out across the lawn. Sam grabs Burt, lifts him to his feet, and pushes him off the lawn and onto the sidewalk. Sam can probably use ejection of trespasser as a defense to battery of Burt. Sam asked Burt the trespasser to leave, and Burt ignored him. Sam's attempt to rely on law enforcement was likewise unsuccessful. Sam's use of nondeadly force appears objectively reasonable. Thus, Sam's ejection of a trespasser is most likely appropriate under these circumstances.

Defense of Habitation

Defense of habitation is a defense that applies specifically to the defendant's residence . At early common law, a person's home was as sacred as his or her person, and deadly force could be employed to protect it. The majority of states have since enacted modern castle laws that embody this common-law doctrine. Other than the use of deadly force, defense of habitation generally follows the same rules as defense of property, self-defense, and defense of others. Thus, this defense of habitation discussion focuses primarily on the use of deadly force.

The first state to expand the defense of habitation to include the use of deadly force was Colorado, with its "make my day" self-defense statute (Colo. Rev. Stat. Ann., 2010). In 2005, Florida began a wave of castle law modifications that resulted in most states revising their defense of habitation laws (Fla. Stat. Ann., 2010). Generally, three elements must be present before the use of deadly force is appropriate to defend habitation under modern castle laws. First, the intruder must actually enter or be in the process of entering the residence owned by the defendant (Fla. Stat. Ann., 2010). This excludes intruders who are outside or in the curtilage, which is the protected area around the home. Second, the residence must be occupied when the entry occurs. This excludes devices

like spring-guns that protect unoccupied dwellings with deadly force (People v. Ceballos, 2010). Third, the defendant must have an objectively reasonable belief that the intruder intends to commit a crime of violence against the occupant(s) after entry (Or. Rev. Stat., 2010). The Model Penal Code provides "[t]he use of deadly force is not justifiable…unless the actor believes that…the person against whom the force is used is attempting to dispossess him of his dwelling…or…attempting to commit…arson, burglary, robbery or other felonious theft…and either…has employed or threatened deadly force…or…the use of force other than deadly force would expose the actor or another in his presence to substantial danger of serious bodily harm" (Model Penal Code § 3.06 (3)(d)).

The majority of states' castle laws abolish any duty to retreat when inside the home (Alaska Stat., 2010). Florida's castle law creates a presumption that the defendant has a reasonable fear of imminent peril of death or great bodily injury when the intruder makes an unlawful or forceful entry (Fla Stat. Ann., 2010). This compels the prosecution to disprove the defendant's reasonable belief of death or great bodily injury beyond a reasonable doubt, which is extremely difficult. Additional features of many castle laws are civil immunity and criminal immunity from prosecution (720 ILCS, 2010). Immunity from prosecution means that a defendant who complies with the castle law requirements cannot be sued for damages or prosecuted for a crime based on injury or death to the intruder.

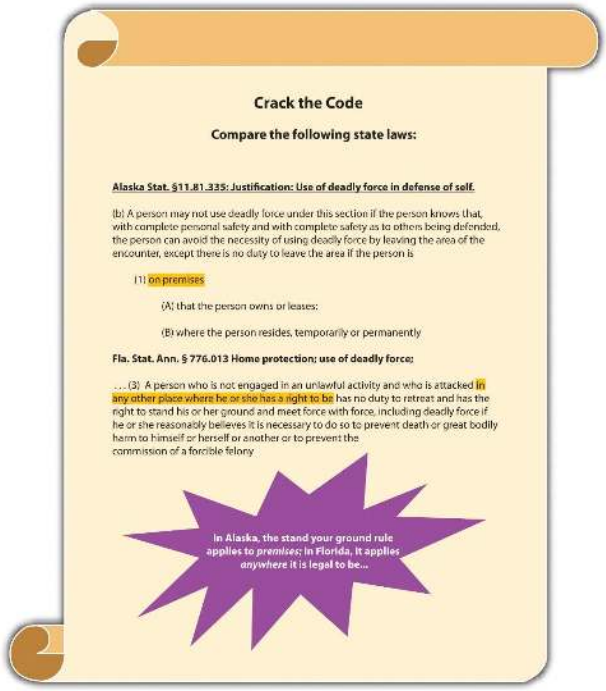


Figure 9.6 Crack the Code [115]

Example of Defense of Habitation under a Castle Law

Nate, a homeowner with three children, hears the front door open in the middle of the night. Nate removes a handgun from the nightstand and creeps silently down the stairs. He sees Bob tiptoeing toward his daughter's bedroom. Nate shoots and kills Bob. Unfortunately, Bob is Nate's daughter's boyfriend, who was trying to enter her bedroom for a late-night get-together. Nate could probably assert the defense of protection of habitation under modern castle laws in most jurisdictions. Bob made entry into an occupied residence . It is difficult to identify individuals in the dark and to ascertain their motives for entering a residence without the owner's consent. Thus, it was objectively reasonable for Nate to feel threatened by Bob's presence and to use deadly force to protect his domicile and its residents. If Nate is successful with his defense, he will also be immune from a civil suit for damages if the castle law in his jurisdiction provides this immunity.

Change the example with Nate and Bob so that Bob enters the residence during the day, and Nate identifies him as his daughter's boyfriend. Under these circumstances, the prosecution could rebut any presumption that Nate's actions were objectively reasonable. A reasonable person would ask Bob why he was entering the residence before shooting and killing him. The trier of fact might determine that Nate's intent was not to protect himself and his family, but to kill Bob, which would be malice aforethought. If

Nate's actions are not justifiable by the defense of habitation, he could be charged with and convicted of first-degree murder in this situation.

Use of Force in Arrest and Apprehension of Criminal Suspects

Occasionally, law enforcement must use force to effectuate an arrest or apprehend a criminal suspect. The appropriate use of force during an arrest or apprehension can operate as a defense to assault, battery, false imprisonment, kidnapping, and criminal homicide. At early common law, law enforcement could use reasonable, nondeadly force to arrest an individual for a misdemeanor and reasonable, even deadly force, to arrest an individual for any felony. Modern law enforcement's ability to use deadly force is governed by the US Constitution.

The US Supreme Court clarified the constitutional standard for law enforcement's use of deadly force in Tennessee v. Garner , 471 U.S. 1 (1985). In Garner , the Court invalidated a Tennessee statute that allowed law enforcement to exercise any degree of force to apprehend and arrest a fleeing felon. The law enforcement officer in Garner admitted that he shot and killed a suspect, reasonably believing he was unarmed . The Court held that the Fourth Amendment governed law enforcement's use of deadly force in this situation because the use of deadly force is a seizure . Thus, law enforcement's use of deadly force must be scrutinized pursuant to the standard of constitutional reasonableness . According to the Court, the only constitutionally reasonable circumstances under which law enforcement can use deadly force to arrest or apprehend a fleeing felon is when law enforcement has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

Currently, most jurisdictions have statutes protecting law enforcement's reasonable use of force when effectuating an arrest or apprehending a fleeing suspect. Under Garner , these statutes must restrict the lawful use of deadly force to potentially deadly situations. If a law enforcement officer exceeds the use of force permitted under the circumstances, the law enforcement officer could be prosecuted for a crime or sued for civil damages (or both).

Example of Reasonable Force by Law Enforcement to Arrest

Example, Linda puts a bra in her purse without paying for it at an expensive department store. When she attempts to leave the store, an alarm is activated. Linda begins sprinting down the street. Colin, a police officer, just happens to be driving by with the window of his patrol car open. He hears the store alarm, sees Linda running, and begins shooting at Linda from the car. Linda is shot in the leg and collapses. In this example, no facts exist to indicate that Linda poses a potentially deadly threat to Colin or others. The fact that Linda is running down the street and an alarm is going off does not demonstrate that Linda has committed a crime necessitating deadly force to arrest. Thus, Colin can use only nondeadly force to arrest Linda, such as his hands, or possibly a stun gun or Taser to subdue her. If Linda is unarmed and Colin uses a firearm to subdue her, the utilization of deadly force is excessive under these circumstances and Colin has no defense to assault with a deadly weapon or to attempted murder.

Change this example and imagine that Colin pulls over and attempts to arrest Linda. Linda removes a gun from her purse. Under most modern statutes, Colin does not have a duty to retreat and can use deadly force to arrest or apprehend Linda. Under Garner , it is reasonable to believe that Linda poses a danger of death or serious bodily injury to Colin or others. Thus, Colin can constitutionally use deadly force to protect himself and the public from harm in this situation. Note that Linda's theft is probably a misdemeanor , not a felony . However, it is Linda's exhibition of deadly force to resist arrest that triggers Colin's deadly force response. Under these circumstances, Colin's use of deadly force is justified and can operate as a legal defense in a criminal prosecution or civil suit for damages.

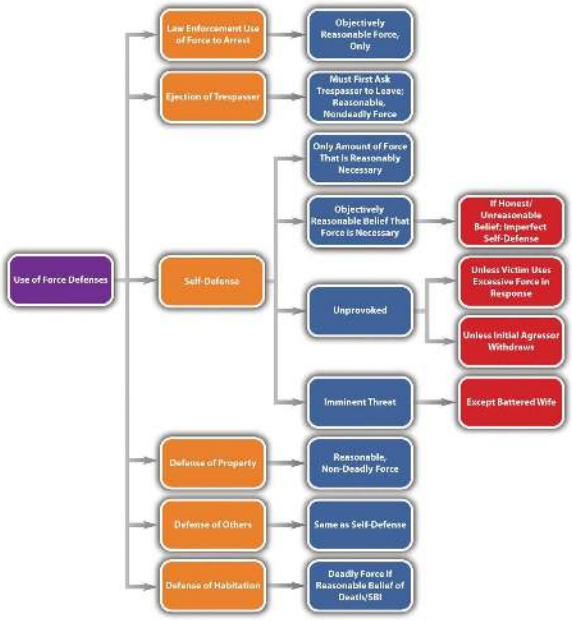


Figure 9.7 Diagram of Use-of-Force Defenses [116]

Key Takeaways

- Defense of others has the same elements as self-defense: the individual defended must be facing an unprovoked, imminent attack, and the defendant must use a reasonable degree of force with a reasonable belief that force is necessary to repel the attack.
- Real property is land, and anything permanently attached to it. Personal property is any movable object.
- The defendant can use nondeadly force to defend real or personal property if the defendant has an objectively reasonable belief that an imminent threat of damage, destruction, or theft will occur.
- Property owners can use reasonable nondeadly force to eject a trespasser after first asking the trespasser to leave.
- Only nondeadly force may be used to defend property; deadly force may be used to defend habitation.
- The defendant can use deadly force to defend habitation under modern castle laws if an intruder enters occupied premises, and the defendant has an objectively reasonable belief that the intruder will seriously injure or kill the occupants.
- Modern castle laws abolish the duty to retreat when inside the home, occasionally include a presumption that the defendant has an objectively reasonable belief the intruder is going to seriously injure or kill the occupants and provide civil and criminal immunity from prosecution.
- Use of deadly force by law enforcement is considered a seizure under the Fourth Amendment, so law enforcement cannot use deadly force to apprehend or arrest a criminal suspect unless there is probable cause to believe the suspect will inflict serious physical injury or death upon the officer or others.

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9.2: Use of Force

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CHAPTER OVERVIEW

10: Interrogations and Police Searches

10.1: Interrogations
10.2: Admissions vs. Confessions

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10.1: Interrogations

Interrogations [117]

> **Quotable**
>
> "Understanding the correct processes and legal parameters for interviewing, questioning, and interrogation, can make the difference between having a suspect's confession accepted as evidence by the court or not."

In this chapter, we will examine the interviewing, questioning, and interrogation of suspects as information gathering techniques police use to aid them in investigations. In modern day policing, interviewing, questioning, and interrogation techniques are measured, objective, and ethical. They are aimed at the goal of discovering the truth; not just getting a confession to a crime. This is a contrast to earlier times of policing, when techniques called the "third degree" sometimes involved threats, intimidation, coercion, and even physical violence. Fortunately, these "third degree" techniques were identified in the United States by the Wickersham Commission in 1931, as being unlawful police practices that caused false confessions and miscarriages of justice, where suspects were sometimes wrongfully convicted and imprisoned (Head, 2010).

Emerging from this, police forces across North America, who were using the "third degree" techniques to varying extents, started moving towards less oppressive and less aggressive methods of interrogating suspects (Gubrium, 2002).

While there has been a significant evolution to more objective and ethical practices, the courts still remain vigilant in assessing the way police interview, question, and interrogate suspects during criminal investigations. The courts expect police to exercise high standards using practices that focus on the rights of the accused person and minimize any physical or mental anguish that might cause a false confession. In meeting these expectations, the challenges of suspect questioning and interrogation can be complex, and many police agencies have trained interrogators and polygraph operators who undertake the interrogation of suspects for major criminal cases. But not every investigation qualifies as a major case, and frontline police investigators are challenged to undertake the tasks of interviewing, questioning, and interrogating possible suspects daily. The challenge for police is that the questioning of a suspect and the subsequent confession can be compromised by flawed interviewing, questioning, or interrogation practices. Understanding the correct processes and the legal parameters can make the difference between having a suspect's confession accepted as evidence by the court or not. With the above in mind, this chapter will focus on several salient issues, including:

1. The progression from interviewing to questioning to interrogating, and how this progression relates to investigative practices
2. The junctures that demonstrate the need to change from interviewing a witness to questioning a detained suspect to interrogating an arrested suspect
3. The issues of physical and mental distress, and how to avoid the perception of officer-induced distress during an interrogation
4. The seven elements to review to prepare an interrogation plan
5. The five common reasons arrested suspects waive their right to silence and provide statements and confessions
6. The interrogation strategies to initiate statements using the motivations within the five common reasons
7. The three types of false confessor and strategies to deal with false confessions
8. The additional rights of young offenders and practices required to meet the investigative obligations under Canada's Youth Criminal Justice Act
9. Ancillary offense recognition

Topic 1: Interviewing, Questioning, and Interrogating

Police investigations can be dynamic, and the ways in which events unfold and evidence is revealed can be unpredictable. This premise also holds true for interviewing, questioning, interrogating suspects. Players in a criminal event may be revealed as suspects at different stages of the investigation. To properly secure and manage the statement evidence that is gained during interactions with suspects or possible suspects, it is important for investigators to understand the actions that should be taken at each stage, while remembering that interviewing, questioning, and interrogating are terms that refer to separate stages in the process of gathering verbal responses from a suspect or a possible suspect. But each stage is different in relation to when and how the information gathering process can and should occur. The differences between these three stages needs to be defined in the mind of the investigator since they will move through a process of first interviewing, then questioning, and finally interrogating a

suspect. When this progression occurs, the investigator needs to recognize the changing conditions and take the appropriate actions at the correct junctures to ensure that, if a confession is obtained, it will be admissible at trial. Given this, let us examine the operational progression of these three stages and identify the circumstances that make it necessary to switch from one stage to the next.

Interviewing a possible suspect is the first stage and the lowest level of interaction. In fact, the person is not even definable as a suspect at this point. As pointed out in our chapter on witness management, suspects often report criminal events while posing as witnesses or even victims of the crime. The investigator receiving a statement report from such a person may become suspicious that they are not being truthful; however, until those suspicions are confirmed by evidence that meets the test of forming reasonable grounds for belief, the investigator may continue to talk to this possible suspect without providing any Section 10 Charter or cautions. There is a unique opportunity at that point to gather the poser's version of events, including any untrue statements that may afford an opportunity to later investigate and demonstrate a possible fabrication, which is by itself a criminal offense. The transition point for an investigator to move from interviewing a witness or victim to detaining and questioning the person as a possible suspect should occur when real evidence is discovered giving the investigator reasonable grounds to suspect that the person is involved in the event. Discovering real evidence and gaining "reasonable grounds to suspect" creates an obligation for the investigator to stop interviewing the person who then becomes a suspect. At this point, the person is a suspect a should be detained for the suspected offense and provided the appropriate Section 10 Charter and Statement Caution before proceeding with the questioning of the suspect.

Questioning a suspect is the next level of interaction. For a suspect to be questioned, there will be some type of circumstantial evidence that allows the investigator to detain that suspect. In our previous scenario of the young man found at 3AM standing under the tree in a residential area at the boarder of an industrial complex one block away from the building where a break-in was confirmed to have taken place, that young man was properly detained, chartered, and warned for the investigation of the break-in. However, there was no immediate evidence that could link him to that actual crime at that point. He was only suspected by the circumstantial evidence of time, conduct, and proximity to the event. He was obligated to provide his name and identification. If he had tried to leave, he could have been arrested for obstructing a police officer in the execution of duty. The investigator at the scene of that incident would have questioned this suspect, and by his rights under the Canadian Charter of Rights and Freedoms , the suspect would not be obliged to answer questions.

This right to not talk does not preclude the investigator from asking questions, and the investigator should continue to offer the suspect an opportunity to disclose information that may be exculpatory and enable the investigator to eliminate that person as a suspect in the crime being investigated. As an example of this, again, consider our young man who was detained when found standing under the tree near a break-in. If that man had answered the question, "What are you doing here?" by stating that he lived in the house just across the street, and when he heard the break-in alarm, he came outside to see what was happening, this would greatly reduce suspicion against the young man once this statement was confirmed. Subsequent confirmation by a parent in the home that they had heard him leave when the alarm sounded could eliminate him as a suspect and result in his release.

Interrogation is the most serious level of questioning a suspect, and interrogation is the process that occurs once reasonable grounds for belief have been established, and after the suspect has been placed under arrest for the offense being investigated. Reasonable grounds for belief to make such an arrest require some form of direct evidence or strong circumstantial evidence that links the suspect to the crime. Of course, where an arrest is made, the suspect will be provided with their charter rights and the police caution, as per the following:

Charter Warnings

Section 10(a)

"I am arresting/detaining you for: (State reason for arrest/detention, including the offense and provide known information about the offense, including date and place.)"

Section 10(b)

"It is my duty to inform you that you have the right to retain and instruct Counsel in private, without delay. You may call any lawyer you want. There is a 24-hour telephone service available which provides a legal aid duty lawyer who can give you legal advice in private. This advice is given without charge and the lawyer can explain the Legal Aid Plan to you. If you wish to contact a legal aid duty lawyer, I can provide you with the telephone number.

Do you understand?

Do you want to call a lawyer?" (Canadian Charter, 1982, s 10(a,b))

Police Warning

"You are not obliged to say anything, but anything you do say may be given in evidence." (Transit Police, 2015)

If the suspect has already had communication with the police in relation to the offense being investigated, they should be provided with the secondary caution. This secondary caution serves to advise the accused person that, even if they have previously made a statement, they should not be influenced by that to make further statements.

Secondary Police Warning

"(Name), you are detained with respect to: (reason for detainment). If you have spoken to any police officer (including myself) with respect to this matter, who has offered you any hope of advantage or suggested any fear of prejudice should you speak or refuse to speak with me (us) at this time, it is my duty to warn you that no such offer or suggestion can be of any effect and must not influence you or make you feel compelled to say anything to me (us) for any reason, but anything you do say may be used in evidence" (Transit Police, 2015).

Once the accused has been afforded the opportunity to speak with a lawyer, the caution obligations of the police to the accused have been met, and the suspect may be questioned with respect to their involvement in the offense. These cautions and warnings may sound like a great deal of effort aimed at discouraging a suspect from saying anything at all to the police, and, in many cases that is the result. However, if the cautions are properly administered, and the opportunities to speak with counsel are properly provided, a major obstacle to the admission of any future statements has been satisfied.

Interrogation generally takes place in the formal environment of an interview room and is often tape-recorded or video-recorded to preserve the details of what was said. A video recording is the preferred means because it accurately represents the environment of the interview room in which the interrogation was conducted. In challenging the processes of an interrogation where a statement has been made by an accused, defense counsel will look for anything that can be pointed to as an oppressive environment or threatening conduct by the investigator. Within the appropriate bounds of maintaining an environment of safety and security, the investigator should make every effort to demonstrate sensitivity to these issues.

Seating in the room should be comfortable and balanced for face-to-face contact. The investigator should not stand over the suspect or walk around the room behind the suspect while conducting the interview. More than one investigator in the room with the suspect can be construed as being oppressive and should be avoided. The suspect should be offered a beverage or food if appropriate and should be told that a bathroom is available for their needs upon request. The demeanor of the investigator should be non-aggressive and calm, demonstrating an objective professional tone as a seeker of the truth. Setting a non-aggressive tone and establishing an open rapport with the suspect is not only beneficial to demonstrate a positive environment to the court, but it also helps to create a positive relationship of openness and even trust with the suspect. This type of relationship can be far more conducive to gaining cooperation towards a statement or even a confession.

Prior to beginning the actual interrogation, the investigator should prepare an interrogation plan by:

1. Reviewing the suspect's profile, criminal record, and past investigations
2. Reviewing the full details of the existing investigation to date
3. Determining the elements of the offense that will need to be proved
4. Determining if sufficient evidence has already been obtained to submit a prima facia case to Crown
5. Examining evidence that demonstrates motive, opportunity, and means
6. Determining what evidence was located and considered in forming reasonable grounds to arrest the suspect
7. What physical evidence has been found that may yet be analyzed to prove the suspect's involvement

Preparing the interrogation plan can assist the investigator in developing a strategy to convince the suspect to answer questions or confess to the crime. Those uninitiated to the process of interrogation might wonder why anyone would possibly choose to answer questions or confess when they have been provided with their Charter of Rights and Freedoms and the standard caution that they are not obliged to say anything, and anything they do say may be used as evidence. There are several reasons that can motivate or persuade a suspect to answer questions or confess. Statements or confessions are often made despite the warnings that would seemingly deter anyone from saying anything. These reasons include:

- Wishing to exonerate oneself,
- Attempting deception to outsmart the system,
- Conscience,
- Providing an explanation to minimize one's involvement in the crime, or
- Surrender in the face of overwhelming evidence.

Investigators who are familiar with these reasons and motivations can utilize them in assessing their suspect and developing a strategy for their interrogation plan.

Exoneration

After making an arrest, an objective investigator must always be prepared to hear an explanation that will challenge the direct evidence or the assumptions of the circumstantial evidence that led to the reasonable grounds for belief to make that arrest. The best reason an arrested suspect can be offered to answer questions is to be exonerated from the crime. It is possible, and it does occur, that persons are arrested for a crime they have not committed. Sometimes, they are wrongly identified and accused by a victim. Other times, they are incriminated by a pattern of circumstantial evidence that they can ultimately explain. The interrogation following the arrest is an opportunity for the suspect to put their version of events on the record, and to offer an alternate explanation of the evidence for investigators to consider. Exoneration is not just an interrogation strategy; it is the duty of an objective investigator to offer a suspected person the opportunity of make an explanation of the evidence that led to their arrest. This can be initiated by offering the suspect the proposition, "This is the evidence that led to your arrest. If there is an alternate explanation for this evidence, please tell me what that is." In some cases, the statements made by the suspect will require additional investigation and confirmation of facts to verify the exoneration. Conducting these investigations is also the duty of an objective investigator.

Deception to Outsmart the System

Some experienced criminals or persons who have committed well-planned crimes believe that they can offer an alternate explanation for their involvement in the criminal event that will exonerate them as a suspect. An investigator may draw answers from this type of suspect by offering the same proposition that is offered for exoneration. This is the opportunity for a suspect to offer an alibi or a denial of the crime and an alternate explanation or exonerating evidence. It can be very difficult for a suspect to properly explain away all the evidence. Looking at the progression of the event, an interrogator can sometimes ask for additional details that the suspect cannot explain. The truth is easier to tell because it happened, and the facts will line up. In contrast, a lie frequently requires additional lies to support the untrue statement. Examining a statement that is believed to be untrue, an interrogator can sometimes ask questions that expose the lies behind the original lie.

Conscience

As much as the good guys versus the bad guys' concept of criminal activity is commonly depicted in books and movies, experienced investigators can tell you that people who have committed a criminal offense often feel guilt and true regret for their crime. This is particularly true of persons who are first-time offenders and particularly young offenders who have committed a crime against a person.

Suspects fitting this category may be identified by their personal profile, which typically includes no criminal record, no police record or limited police record of prior investigations, evidence of poor planning, or evidence of emotional/spontaneous actions in the criminal event.

Suspects who fit this profile may be encouraged to talk by investigators who have reviewed the effect that the criminal act has had on the victim or the victim's family. Following this review of victim impact, the investigator can accentuate the suspect's lack of past criminal conduct, while making the observation that the suspect probably feels really bad about this. Observing the suspect during this progression, a suspect affected by guilt will sometimes exhibit body language or facial expressions of concern or remorse. Responses, such as shoulders slumping, head hung down, eyes tearing up, or avoiding eye contact, can indicate the suspect is ashamed and regretful of the crime. Observing this type of response, an investigator may move to a theme of conversation that offers the suspect the opportunity to clear their conscience by taking responsibility for their actions and apologizing or by taking some other action to right the wrong that has been done.

Explanation to Minimize Involvement

Suspects who have been arrested will sometimes be willing to provide an additional explanation of their involvement or the events to reduce their level of culpability or blame for the crime. In cases where multiple suspects have been arrested for a crime, one of those suspects may wish to characterize their own involvement as peripheral, sometimes as being before the fact or after the fact involvement. Examples of this would be a person who left the door unlocked for a break-in to take place or merely driving the getaway car. These less involved suspects hope to gain a reduced charge or even be reclassification as a witness against their co-accused. In such cases, where multiple suspects are arrested, the investigator can initiate this strategy by offering the proposition, "If you have only a limited or minimal level of involvement in this crime, you should tell me about that now."

Surrender to Overwhelming Evidence

The arrested suspect in a criminal investigation waiting in custody for interrogation has plenty to think about. Even the most experienced criminals will be concerned about how much evidence the police have for proving their connection to the crime. In the process of presenting a suspect with the opportunity to address the evidence that has been collected, an additional strategy can sometimes be engaged where there is a large volume of incriminating evidence or undeniable direct evidence, such as eyewitnesses or strong forensic evidence for circumstantial connections of the suspect to the crime. In such cases, if the interrogator can reveal the evidence in detail to the suspect, this disclosure may result in the suspect losing hope and making a confession to the crime. Although this tendency to surrender to overwhelming evidence may seem illogical, it does happen. Sometimes, this surrender has more to do with conscience and shame of the crime, but other times, the offender has just lost the energy to resist what they perceive to be a hopeless fight. As counter intuitive as this may seem, research has found that the suspect's perception of the strength of police evidence is one of the most important factors influencing their decision to confess to police (Gudjonsson & Petursson, 1991). More recent research has shown that the stronger the evidence, the more likely a suspect was to confess (Gudjonsson, 2015).

Topic 2: Dealing with False Confessions

As noted at the beginning of this chapter, the goal of ethical interviewing, questioning, and interrogation is to elicit the truth, and the truth can include statements that are either inculpatory confessions of guilt or exculpatory denial of involvement in a crime. Whenever an investigator has interrogated a suspect, and a confession of guilt has been obtained, that investigator needs to take some additional steps to ensure that the confession can be verified as truthful before it goes to court. These additional steps are required because, although the investigator has not used any illegal or unethical techniques, the court will still consider whether the accused, for some reason, has confessed to a crime they did not commit. A skilled defense lawyer will often present arguments alleging that psychological stresses of guilt or hopelessness from exposure to overwhelming evidence have been used to persuade a suspect to confess to a crime they did not commit. In such cases, it is helpful for the court to hear any additional statements made by the accused, such as those that reveal that the suspect had direct knowledge of the criminal event that could only be known to the criminal responsible.

In police investigations, there are many details of the criminal event that will be known to the police through their examination of the crime scene or through the interview with witnesses or victims. These details can include the actual way the crime was committed, such as the sequence of events, the tools used in the crime; or the means of entry, path of entry/exit, along with other obscure facts that could only be known by the actual perpetrator. There are opportunities in a crime scene examination for the investigator to observe one or more unique facts that can be withheld as "hold back evidence." This hold back evidence is not made part of reports or media release and is kept exclusively to test for false confessions. Confessing to the crime is a step, but confessing to the crime and revealing intimate details is much more compelling to the court. Regardless of the effort and care that investigators take to not end up with a false confession, they still occur, and there are some more common scenarios where false confessions happen. It is important for an investigator to consider these possibilities when a confession is obtained. These situations are:

1. The confessor was enlisted to take the blame — On occasions where persons are part of organized crime, a person of lower status within the group is assigned or sacrificed to take the blame for a crime in place of a person of higher status. These organizational pawns are usually persons with a more minor criminal history or are a young offender, as they are likely to receive a lesser sentence for the offense.

2. The Sacrificial Confessor — Like the confessor enlisted in an organized criminal organization, there is another type of sacrificial confessor; the type who steps forward to take the blame to protect a friend or loved one. These are voluntary confessors, but their false confession can be exposed by questioning the confessor about the hold back details of the event.
3. The Mentally Ill False Confessor — This type of false confessor is encountered when there is significant media attention surrounding a crime. As Pickersgill (2015) noted, an innocent person may voluntarily provide a false confession because of a pathological need for notoriety or the need to self-punish due to guilt over an unrelated past offense. Additionally, those suffering from psychosis, endogenous depression, and Munchausen Syndrome may falsely confess to a crime they did not commit (Abed, 2105) . As with other false confessors, these people can be discovered using hold back detail questioning.

Topic 3: Interviewing, Questioning, and Interrogating Young Offenders

Over the past century, with the Juvenile Delinquents Act (1908), the Young Offenders Act (1984), and the Youth Criminal Justice Act (2003), there has been an increased recognition in Canada of the need to treat young offenders differently than their adult counterparts. Recognizing the special needs of youth, each of these acts moved to treat young offenders less punitively and with a greater attention to rehabilitation. Further, under the Youth Criminal Justice Act (YCJA), young offenders are regarded as a special category of suspect, and some very strict rules apply to the process of arresting, questioning, or interrogating a young offender. For instance, the YCJA requires the notification and inclusion of parents or guardians in situations where a youth is being subjected to action for an investigation or a charge for an offense. As well, any young persons must have their Charter Rights explained by the investigator with language appropriate to their age and level of understanding. This means that the officer must talk with and assess an accused youth to determine their ability to understand their rights before taking their statement.

The officer's process of assessment will be questioned and examined by the court before any statement made by a youth is admitted as evidence. During this examination, the court will determine from the evidence whether the youth fully understood the rights being explained to them. An officer presenting evidence of having conducted a proper assessment of an accused youth should have notes reflecting the conversations and specific observations of the youth's responses to satisfy the court that adequate efforts were made to ensure that the youth did understand their rights. Good evidence of understanding can be achieved by asking the youth to repeat, summarize, or paraphrase their understanding of the rights that were explained to them.

In addition to the right to instruct counsel, as afforded to any adult under the Canadian Charter of Rights and Freedoms , a youth must also be afforded the additional right of being given a reasonable opportunity to consult with a parent or, in the absence of a parent, an adult relative or any other appropriate adult chosen by the young person, as long as that person is not a co-accused or under investigation for the same offense.

Further, in addition to this right, there is also an obligation on the police investigator to provide independent notice to the parent of a detained young person as soon as possible. The requirement for notice to the parent is a separate obligation for police, and it requires specific notification of (a) the name of the young person, (b) the charge against the young person, and (c) a statement that the young person has the right to be represented by counsel. If a parent is not available to receive this notice, it may be given to a person whom the investigator deems appropriate. In the case of some young people, this could be an older sibling, an adult caregiver, or, for those in the care of Social Services, a social worker in charge of the young person care. In any case, these requirements and others specific to young offenders are spelled out under Sec 146 of the Youth Criminal Justice Act :

Youth Criminal Justice Act (Section 146)

1. Subject to this section, the law relating to the admissibility of statements made by persons accused of committing offenses applies in respect of young persons.
2. No oral or written statement made by a young person who is less than eighteen years old, to a peace officer or to any other person who is, in law, a person in authority, on the arrest or detention of the young person or in circumstances where the peace officer or other person has reasonable grounds for believing that the young person has committed an offense is admissible against the young person unless

1. the statement was voluntary;
2. the person to whom the statement was made has, before the statement was made, clearly explained to the young person, in language appropriate to his or her age and understanding, that

1. the young person is under no obligation to make a statement,
2. any statement made by the young person may be used as evidence in proceedings against him or her,

3. the young person has the right to consult counsel and a parent or other person in accordance with paragraph (c), and
4. any statement made by the young person is required to be made in the presence of counsel and any other person consulted in accordance with paragraph (c), if any, unless the young person desires otherwise;

3. the young person has, before the statement was made, been given a reasonable opportunity to consult

1. with counsel, and
2. with a parent or, in the absence of a parent, an adult relative or, in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person, as long as that person is not a co-accused, or under investigation, in respect of the same offense; and(d) if the young person consults a person in accordance with paragraph (c), the young person has been given a reasonable opportunity to make the statement in the presence of that person.

3. The requirements set out in paragraphs (2)(b) to (d) do not apply in respect of oral statements if they are made spontaneously by the young person to a peace officer or other person in authority before that person has had a reasonable opportunity to comply with those requirements.
4. A young person may waive the rights under paragraph (2)(c) or (d) but any such waiver

1. must be recorded on video tape or audio tape; or
2. must be in writing and contain a statement signed by the young person that he or she has been informed of the right being waived.

5. When a waiver of rights under paragraph (2)(c) or (d) is not made in accordance with subsection (4) owing to a technical irregularity, the youth justice court may determine that the waiver is valid if it is satisfied that the young person was informed of his or her rights, and voluntarily waived them.
6. When there has been a technical irregularity in complying with paragraphs (2)(b) to (d), the youth justice court may admit into evidence a statement referred to in subsection (2), if satisfied that the admission of the statement would not bring into disrepute the principle that young persons are entitled to enhanced procedural protection to ensure that they are treated fairly, and their rights are protected.
7. A youth justice court judge may rule inadmissible in any proceedings under this Act a statement made by the young person in respect of whom the proceedings are taken if the young person satisfies the judge that the statement was made under duress imposed by any person who is not, in law, a person in authority.
8. A youth justice court judge may in any proceedings under this Act rule admissible any statement or waiver by a young person if, at the time of the making of the statement or waiver,

1. the young person held himself or herself to be eighteen years old or older;
2. the person to whom the statement or waiver was made conducted reasonable inquiries as to the age of the young person and had reasonable grounds for believing that the young person was eighteen years old or older; and
3. in all other circumstances the statement or waiver would otherwise be admissible.

9. For the purpose of this section, a person consulted under paragraph (2) (c) is, in the absence of evidence to the contrary, deemed not to be a person in authority. (Government of Canada, 2015)

Topic 4: Ancillary Offense Recognition

Criminal acts can be complex and persons committing crimes can be devious. For every law prohibiting a criminal act, there are those who seek to avoid prosecution or to subvert the law completely. Criminal law has evolved into the current model to reflect the different types of crimes that are possible, and this evolution now includes laws known as ancillary offenses. For an investigator, part of the investigative skill set is learning to recognize the evidence and fact patterns that constitute these ancillary criminal acts. These offenses include:

- Conspiracy to commit an offense
- Attempting to commit an offense
- Being an accessory after the fact to an offense
- Aiding and abetting an offense
- Counselling a person to commit an offense
- Compounding an indictable offense

For any of these offenses, an investigator needs to be aware of the types of information and evidence that will support these charges. Sometimes an investigation will identify a suspect participant where there appears to be a nexus of involvement to the crime, but that nexus is not sufficient evidence of a criminal act to support an arrest or a charge. In these cases, an ancillary offense may be appropriate.

Conspiracy to Commit an offense

A conspiracy to commit any offense requires an agreement between two or more persons to commit a criminal act.

Conspiracy offense

1. Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy:

1. everyone who conspires with anyone to commit murder or to cause another person to be murdered, whether in Canada or not, is guilty of an indictable offense and liable to a maximum term of imprisonment for life;
2. everyone who conspires with anyone to prosecute a person for an alleged offense, knowing that he did not commit that offense, is guilty of an indictable offense and liable

1. to imprisonment for a term not exceeding ten years, if the alleged offense is one for which, on conviction, that person would be liable to be sentenced to imprisonment for life or for a term not exceeding fourteen years, or
2. to imprisonment for a term not exceeding five years, if the alleged offense is one for which, on conviction, that person would be liable to imprisonment for less than fourteen years;

1. everyone who conspires with anyone to commit an indictable offense not provided for in paragraph (a) or (b) is guilty of an indictable offense and liable to the same punishment as that to which an accused who is guilty of that offense would, on conviction, be liable; and
2. everyone who conspires with anyone to commit an offense punishable on summary conviction is guilty of an offense punishable on summary conviction. (Dostal, 2012)

The offense that is being conspired upon is called the “target offense,” and that offense does not need to be carried out to constitute the offense of conspiracy. All that is required to establish the offense of conspiracy is evidence that two or more persons conspired together and formed a common intent to commit the targeted offense.

As an interesting side note to the conspiracy charge: if two persons conspire together to commit any offense outside of Canada and that offense would be an offense if committed in Canada, they may be charged with conspiracy (Government of Canada, 2017). In other words, two persons may conspire in Canada to commit a murder in the United States, and, even if that murder is not committed, they could be charged with conspiracy to commit murder.

Conspiracy opens the door to many possibilities where persons not otherwise chargeable may be held accountable for their part in a criminal act or in a proposed criminal act.

Consider the situation where an armed robbery of a bank occurs, and three suspects flee the scene as police respond. The last suspect to exit the bank, William Tooslow, is stopped and arrested by police responding to the alarm, but the other two suspects escape. As the investigation proceeds, no additional evidence is found to identify the two robbers who escaped, but searches of Mr. Tooslow’s cell phone reveal book messages and emails with another male, Iben Faster, where plans to rob this bank were clearly being made over the past week.

Although there is not enough evidence to place Mr. Faster in the bank at the time of the robbery, he could still be charged with conspiracy to commit armed robbery, while Mr. Tooslow is charged with the actual offense of armed robbery. During an interrogation, a suspect may attempt to minimize their involvement in the crime and admit only to participating in making the plan. An investigator needs to recognize that this is still a chargeable offense.

Attempting to Commit an offense

Like conspiracy, attempting to commit an offense does not require that the offense is committed.

Attempts

24. (1) Everyone who, having an intent to commit an offense, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offense whether or not it was possible under the circumstances to commit the

offense. (Dostal, 2012)

Unlike conspiracy, attempting to commit an offense only requires one person planning the crime to commit the target offense. For the offense of attempting to commit an offense to be completed, there must be evidence to show that the accused went past the point of mere planning and did something or omitted to do something in the furtherance of their plan. This attempting to commit provision can be a useful strategic tool for investigators because it provides the option to intervene before an offense in the planning stage takes place.

Consider the scenario where a suspect, Franky Yapsalot, tells a friend that he is planning to do a home invasion at the residence of a wealthy local businessman on Saturday night. The friend informs to the police and investigators conduct surveillance on Mr. Yapsalot. On Saturday night, Mr. Yapsalot is observed wearing dark clothing and gloves and gets into his car with a sawed-off shotgun. As he drives into the residential area of the businessman's home, police stop his car and make the arrest. In this case, sufficient evidence would exist to make a charge of attempted break and enter with intent to commit an indictable offense.

The offense of attempting to commit an offense can sometimes allow police to take effective enforcement action and intervene before the target offense occurs, without endangering the proposed victim of the planned offense. At the interrogation stage of an investigation, a suspect wanting to minimize his culpability may admit to sufficient planning and action to make out the offense of attempting to commit.

Being an Accessory After the Fact to an offense

Accessory after the fact is another offense where a person can be charged with participating in a crime, even if they were not directly involved in planning or carrying out the primary offense.

Accessory after the fact

23. (1) An accessory after the fact to an offense is one who, knowing that a person has been a party to the offense, receives, comforts or assists that person for the purpose of enabling that person to escape. (Dostal, 2012)

A person can be charged as an "accessory after-the-fact" to an offense, if evidence is discovered to show that they knew that another person had committed the primary offense and they received, comforted, or assisted that person to enable them to escape justice. An example of this offense could be where a person receives a phone call from a friend asking to be transported and hidden away after escaping from prison. If the friend complies with this request, they will become an accessory after the fact to the offense of escaping lawful custody.

Counselling a Person to Commit an offense

In this type of ancillary crime, the person providing the counselling becomes a party to the offense if it is committed.

Person counselling offense

22. (1) Where a person counsels another person to be a party to an offense and that other person is afterwards a party to that offense, the person who counselled is a party to that offense, notwithstanding that the offense was committed in a way different from that which was counselled.

Idem

(2) Everyone who counsels another person to be a party to an offense is a party to every offense that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

Definition of "counsel"

(3) For the purposes of this Act, "counsel" includes procure, solicit or incite.
R.S., 1985, c. C-46, s. 22; R.S., 1985, c. 27 (1st Supp.), s. 7. (Dostal, 2012)

Like conspiracy and aiding/abetting, it is not necessary for the person providing the counselling to participate in the offense, and the offense does not even need to be committed following the exact instruction of the counsellor. A condition to this offense is that the counsellor will only be a party if they knew or should have known that the other person was likely to commit that crime in consequence of the counselling. An interrogator recognizing this offense would seek to draw out admissions of what the counselling suspect knew or should have known about the likelihood of the perpetrator committing the offense.

Parties to an offense

The ancillary offense of being a party to an offense, under section 21(1) of the Criminal Code is also often referred to as aiding and abetting.

Parties to offense
21. (1) Everyone is a party to an offense who

1. actually commits it;
2. does or omits to do anything for the purpose of aiding any person to commit it; or
3. abets any person in committing it.

Common intention

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offense, each of them who knew or ought to have known that the commission of the offense would be a probable consequence of carrying out the common purpose is a party to that offense. R.S., c. C-34, s. 21. (Dostal, 2012)

Aiding and abetting is different from other ancillary offenses in that it does not become a separate charge from the primary offense. In the cases of conspiracy, counselling, and accessory after the fact, persons are charged with those ancillary offenses; however, in the case of aiding and abetting an offense, the person is charged with the primary offense. So, where evidence shows that a person purchased the weapons to enable an armed robbery to take place, that person would be charged under the section for armed robbery proper.

Summary

So far, we have defined the stages and discussed the issues surrounding the investigative tasks of interviewing, questioning, and interrogating suspects in criminal investigations. We have also called attention to the specific change obligations that must be recognized and responded to by an investigator as the investigation progresses. In terms of the interrogation of suspects, this chapter examined the process of developing an interrogation plan by considering the variety of motivations that might cause a suspect to make a confession to a crime, and the additional protections afforded to youth was also discussed. In this chapter's final section, definitions and examples of hybrid ancillary offenses was presented, as was the need to interrogate suspects and investigate for additional evidence in support of proving the unique elements of ancillary offenses, if they have occurred.

Study Questions

- At what point would an investigator move from interviewing a person to questioning them?
- At what point would an investigator move from questioning a suspect to interrogating them?
- What are three common scenarios where an investigator is likely to come across a false confession?
- What are two ways in which young offenders must be treated differently than adults by an investigator in the process of questioning them about involvement in a crime?
- What are six examples of ancillary offenses that investigators need to be aware of?
- What evidence must be provided to show that a person can be charged with being an "accessory after the fact"?
- How is "aiding and abetting" different from other ancillary offenses?

Miranda Rule [118]

The Miranda warning is a statement read by police to criminal suspects that asserts their right to counsel and right to remain silent.

Learning Objectives

- Describe the Miranda Rights and the obligations they impose on police

Key Points

- The Miranda warning (also referred to as Miranda rights) is a warning given by police in the United States to criminal suspects in police custody.
- The Miranda rule applies to the use of testimonial evidence in criminal proceedings that is the product of custodial police interrogation. Miranda right to counsel and right to remain silent are derived from the self-incrimination clause of the Fifth Amendment .
- The Miranda rule would apply unless the prosecution can establish that the statement falls within an exception to the Miranda rule. The three exceptions are (1) the routine booking question exception (2) the jailhouse informant exception and (3) the public safety exception.

Terms

- testimonial evidence : It is the proof given by the product of custodial police interrogation.
- procedure rule : It is the body of law that sets out the rules and standards that courts follow when adjudicating civil lawsuits (as opposed to procedures in criminal law matters).

EXAMPLE

- In Berghuis v. Thompkins, the Court ruled that a suspect must clearly and unambiguously assert right to silence. Merely remaining silent in face of protracted questioning is insufficient to assert the right.

Background

The Miranda warning (also referred to as Miranda rights) is a warning given by police in the United States to criminal suspects in police custody (or in a custodial interrogation) before they are interrogated to preserve the admissibility of their statements against them in criminal proceedings.



Figure 10.1 Incorporating Amendment V Here, a US law enforcement official reads an arrested person his rights. Amendment V, the right to due process, has been incorporated against the states. [119]

In other words, a Miranda warning is a preventive criminal procedure rule that law enforcement is required to administer to protect an individual who is in custody and subject to direct questioning or its functional equivalent from a violation of his or her Fifth Amendment right against compelled self-incrimination. In Miranda v. Arizona, the Supreme Court held that the admission of an elicited incriminating statement by a suspect not informed of these rights violates the Fifth and the Sixth Amendment right to counsel.

Mirada refers to Ernesto Miranda. In 1963 Miranda was arrested in Phoenix and charged with rape, kidnapping, and robbery. Miranda was not informed of his rights prior to the police interrogation. During the two-hour interrogation, Miranda allegedly confessed to committing the crimes, which the police apparently recorded. Miranda, who had not finished ninth grade and had a history of mental instability, had no counsel present. At trial , the prosecution's case consisted solely of his confession. Miranda was convicted of both rape and kidnapping and sentenced to 20 to 30 years in prison. Miranda appealed to the U.S. Supreme Court and won his case. The Supreme Court devised a statement that must be read to those who are arrested.

Thus, in theory, if law enforcement officials decline to offer a Miranda warning to an individual in their custody, they may still interrogate that person and act upon the knowledge gained, but may not use that person's statements to incriminate him or her in a

criminal trial. However, in the pragmatic interactions between police and citizens, this is rarely true. In Berghuis v. Thompkins, the court held that unless a suspect actually states that he is relying on this right, his subsequent voluntary statements can be used in court and police can continue to interact with or question him. The Miranda rule applies to the use of testimonial evidence in criminal proceedings that is the product of custodial police interrogation. The Miranda right to counsel and right to remain silent are derived from the self-incrimination clause of the Fifth Amendment.

It is important to note that immigrants who live in the United States illegally are also protected and should receive their Miranda warnings as well when being interrogated or placed under arrest. Aliens receive constitutional protections when they have come within the territory of the United States and have developed substantial connections with this country.

Assertion of Miranda Rights

If the defendant asserts his right to remain silent all interrogation must immediately stop and the police may not resume the interrogation unless the police have "scrupulously honored" the defendant's assertion and obtain a valid waiver before resuming the interrogation. In determining whether the police "scrupulously honored" the assertion the courts apply a totality of the circumstances test. The most important factors are the length of time between the termination of the original interrogation and commencement of the second and a fresh set of Miranda warnings before resumption of interrogation.

The consequences of assertion of Fifth Amendment right to counsel are stricter. The police must immediately cease all interrogation and the police cannot reinitiate interrogation unless counsel is present (merely consulting with counsel is insufficient) or the defendant contacts the police on his own volition. If the defendant does reinitiate contact, a valid waiver must be obtained before interrogation may resume.

In Berghuis v. Thompkins, the Court ruled that a suspect must clearly and unambiguously assert right to silence. Merely remaining silent in face of protracted questioning is insufficient to assert the right.

Exceptions of Miranda Rights

The Miranda rule would apply unless the prosecution can establish that the statement falls within an exception to the Miranda rule. The three exceptions are (1) the routine booking question exception (2) the jailhouse informant exception and (3) the public safety exception. Arguably only the last is a true exception–the first two can better be viewed as consistent with the Miranda factors. For example, questions that are routinely asked as part of the administrative process of arrest and custodial commitment are not considered "interrogation" under Miranda because they are not intended or likely to produce incriminating responses. Nonetheless, all three circumstances are treated as exceptions to the rule.

Admissions vs. Confessions [120]

Admissions and confessions are a family of statements made by an accused that are admissible as evidence. An admission is a statement, usually inculpatory, made by an accused to a civilian witness. A confession is a statement, usually inculpatory, made by an accused to a person in authority.

Admissions to Undercover Officer

Generally, statements that are spontaneous to an undercover officer will not violate the right to silence. However, the police conduct must not "subvert" the accused's rights.

There is no bar on exchanges between undercover and suspect who chooses to freely speak to someone who happens to be an undercover.

Where the accused knows that they are talking to an agent of the state and makes voluntary admissions, there will be no violation of the right to silence.

Out of Custody vs In Custody Admission

An undercover officer who is in contact with an accused out of custody, such as during a "Mr. Big" operation, may listen and actively attempt to elicit confessions.

In-Custody Admissions

An undercover officer posing as an inmate within a prison may only listen and not actively seek a confession.

Cell Plant or Cell Shot After Interview

Where there has been a refusal by a detainee to give a statement during a formal cautioned interview, there is no rule precluding the use of a cell plant afterwards to gain admissions.

"actively elicited information"

An undercover officer cannot "actively elicited information" from the accused without violating their s. 7 right to silence. They may only passively observe. To determine whether a statement was "actively elicited" or not, depends on consideration of whether "considering all the circumstances of the exchange between the accused and the state agent, is there a causal link between the conduct of the state agent and the making of the statement by the accused?"

Steps of Analysis

First, it must be determined if the person receiving the statement was an agent or not. Second, it must be determined if the statement was "actively elicited" contrary to the right to silence.

-Factors of Analysis

The question of elicitation involves two dimensions:

1. concerns of "the nature of the exchange between the accused and the state agent"
2. concerns of "the nature of the relationship between the state agent and the accused". This includes whether there was a relationship of trust that was exploited.

The focus on the first factors should be upon whether the conversations were functionally equivalent to an interrogation.

Admission to Agents

Where the informer is acting independent of the will of the police, any statements obtained will generally not be subject to the right to silence. This asks the question of whether the exchange would have still taken place, in the form and manner that it did, but for the intervention of the state.

Confessions

General Principles

A confession is a written or oral statement by the accused to a person in authority that admits a factual element to the Crown's case. The law regarding confessions applies equally to inculpatory statements as well as exculpatory statements.

Where a confession has been admitted as evidence in the Crown's case, the trier-of-fact may consider the statement as proof of facts found within it.

Voluntariness of Confessions

All confessions must be voluntary to be admissible. This is the court's key concern. When it is not voluntary is it not reliable and so is not admissible in evidence.

Burden of Proof

This Crown must prove voluntariness beyond a reasonable doubt in.

Vague Statements

The confession must be given sufficient context background to be admissible. If the statement is too vague and the context of the statement could have multiple meanings, it should not be admitted. However, vagueness on the exact wordings of the statement without loss of meaning is not sufficient.

Methods of Recording Statement

There is no requirement that the statement be recorded to be admissible as voluntary.

Where the statement was not recorded under suspicious circumstances, such as where recording facilities were readily available, the judge must determine "whether or not a sufficient substitute for an audio or video tape record has been provided ... to prove voluntariness beyond a reasonable doubt." The "completeness, accuracy and reliability of the record have everything to do with the

court's inquiry into and scrutiny of the circumstances surrounding the taking of the statement." However, where the recording was not done properly, the Crown will have a heavy onus to admit the statement.

Admission of Guilt

An admission of guilt can encompass statements that are direct admissions of guilt or admission of fact that tends to prove guilt.

Such an admission can be by words or by conduct that could reasonably be taken as intending to be an assertion.

By the Accused

The rules on confessions apply only to statements made by the accused.

This does not include statements by third parties in the presence of the accused. These statements are only admissible as adoptive admissions.

Persons in Authority

A confession includes statements made merely in the presence of a person in authority as long as the accused was aware of their presence.

Voir Dire

A voir dire on the admissibility of a statement to a person in authority requires the judge to determine: [1]

1. whether there is some evidence that it was made; and
2. whether it was given voluntarily.

The voir dire should generally be held as part of the Crown's case regardless of whether the statement is only to be used for cross-examination. There are circumstances where the voluntariness can be proven at the time of cross-examination of the accused.

Where the accused denies the statement, the voir dire is not to determine whether the statement was actually made beyond a reasonable doubt. The issue of whether the statement was made for the purpose of trial is determined after the voir dire.

In the voir dire, the judge only needs to have "some credible evidence" that the statement was made.

There is no need to have a voir dire for the admission where the statement of the accused is part of the offense (e.g., uttering threats, perjury, refusal).

Circumstances of the Statement

Suspect Statements Made before Arrest or Detention

When a suspect is invited to give a formal statement to police the statement is admissible as long as it is given voluntarily and not while detained or charged. If the suspect is detained or charged then they are entitled to have access to counsel .

Statements Made upon Arrest

Exculpatory statements of the accused upon arrest are admissible as an exception to prohibiting self-serving evidence when tendered by the Crown. However, it has been held that such exculpatory statements can be admitted by the accused's testimony.

Derived Confessions

Confessions that follow an inadmissible involuntary confession may also be excluded from evidence as a derived confession.

The judge must consider the connection between the statements and the influence the improper conduct had on the derived confession, taking into account all relevant circumstances including:

1. the time span between the statements;
2. advertence to the earlier statement during questioning in the subsequent interview, including whether there were cautions that the prior statement should not influence the decision to make subsequent statements;
3. discovery of additional information after completion of the first statement;
4. the presence of the same police officers during both interviews; and
5. other similarities between the two sets of circumstances.

The derived statement will be involuntary if "the tainting features that disqualified the first continue to be present" or if "the fact that the first statement was made was a substantial factor that contributed to the making of the second statement". All of this is to the view of whether the derived statement was contaminated by the first statement.

Connection between statements includes a temporal, contextual and causal connection.

Contamination is not limited to involuntariness but also to Charter breaches such as the right to counsel under s. 10(b) of the Charter. In such cases, the admissibility is based on s. 24(2) of the Charter.

A secondary caution or warning can be a major factor in eliminating any contamination that a previous involuntary statement would have on a subsequent derived statement.

Admission of a Confession as Part of Case or for Cross-Examination

A confession that is found to be admissible may be used by the Crown to be admitted as part of its case for the truth of its contents as a hearsay exception or it may be held for cross-examination purposes.

If the Crown introduces the as part of its case, the parts favorable to the defense also become admissible. The trier-of-fact, however, determines what part of the statement to accept as fact. When the statement is put in as part of the Crown's case, the Court must consider the statement as if he had testified.

The rule requiring the admission of the whole statement, however, cannot be used to force the Crown to adduce all statements made by the accused. The rule should not be allowed to be used by defense to avoid subjecting the accused to cross-examination, challenges to credibility. The exception to the hearsay rule permitting admission is based on the reliability of statements of guilt. Exculpatory statements are self-serving and so are not considered as reliable.

An accused cannot lead evidence of any of his statements made at the time as it permits the accused from avoiding to testify, it self-serving and lacks probative value. Exceptions exist for circumstances such as recent possession .

Whether the statement is inculpatory or exculpatory or a mix, does not affect its admissibility.

The answers to questions given during police questioning should be considered in light of the impermissible rules on cross-examination. Questions that would be impermissible as a cross-examination may be equally inadmissible within a statement. The police asking the accused "why would complainant lie", is considered inappropriate to put to the jury.

An accused statement adduced by the Crown can be afforded the same weight as the actual testimony, however, it may also be given lesser weight in light of it not being under oath and not subject to cross-examination. An accused statement can still be used to establish reasonable doubt.

Editing Statements

Once a statement has been found to be admissible, the court has a "heavy duty to edit out the prejudicial aspects of the statement, but must also ensure that what remains is meaningful".

Where the statement cannot be appropriately edited then the statement should not be admitted.

Any statements that are admitted with bad character evidence should require the judge to give a limiting instruction.

Searches [121]

To understand how the Constitution of the United States limits the criminal law, it is important to consider the right to privacy. Shockingly, the term “privacy” never appears in the Constitution. Yet, over the years, the Supreme Court has said that several of the rights that are explicitly stated in the constitution come together to create a right to privacy. In the world of procedural law, it must be remembered, if the Supreme Court of the United States says it, it is so.

The right to privacy places a limit on many forms of police conduct, from searches to arrest. It is important, however, to understand there is a limit to how far the right goes. It is not absolute. The police are not prohibited from interfering with a citizen’s privacy interest, but it must be reasonable when they do so.

When it comes to the police conducting searches of people, vehicles, homes, offices and anywhere else a person has a right to privacy, the idea of reasonableness comes down to probable cause. Probable cause means that there is sufficient evidence to make a reasonable person would believe that the person is doing something contrary to the law.

Police activity that the courts consider a search must be based on probable cause but remember that the courts define a search differently that the everyday use of the term. There are many exceptions to the probable cause requirement that, while the average person may consider the police conduct a search, it is not considered so by the courts. Objects in plain view , for example, are not subject to the probable cause standard, nor are things located in open fields . When the probable cause standard does apply because the courts consider a particular police action a search, the police are not allowed to determine if there is in fact probable cause. That job goes to the courts.

Search Warrants

An officer desiring to conduct a search needs probable cause for the search to be lawful. Because society expects police officers to find evidence and arrest criminals, they may be overzealous in determining whether they do or do not have probable cause. As a general rule, the evidence establishing probable cause must be submitted to an impartial magistrate , and if the magistrate agrees that probable cause exists, then he or she will issue a search warrant .

Probable Cause

For a warrant to be issued, the magistrate must determine that probable cause exists. This has to be in the form of a sworn statement called an affidavit . When determining probable cause for a search, the reasonableness test used by the courts considers the experience and training of police officers. That is, the test is not merely what a reasonable person would believe, but what a reasonable police officer would believe considering the evidence as well as the officer's training and experience. Note that the standard for establishing probable cause is more likely than not . This is a far lesser standard that the proof beyond a reasonable doubt standard required for a conviction in criminal court.

The Particularity Requirement

Another requirement for a search warrant to be valid is that it must particularly describe the person or thing to be seized. There are many supreme court cases that establish what this means in particular circumstances. As a general rule regarding search warrants, it means that the place to be searched is sufficiently described that it cannot be confused with some other place.

Obtaining and Executing a Search Warrant

The warrant application process varies in exact detail from jurisdiction to jurisdiction. Often, the Supreme Court of the state in which the warrant is sought provides the details in a legal document known as the Rules of Criminal Procedure . The basic rules, however, are dictated by the Supreme Court as interpretations of the Fourth Amendment. All of the officer's evidence must be contained in an affidavit. The rules also dictated how a warrant must be executed. As a general rule, the warrant must be served during daylight hours, and officers must identify themselves as officers and request entry into the place to be searched. This identification requirement is known as knock and announce .

No-knock Warrants

The general rule that officers must "knock and announce" when serving a warrant is not absolute, but special permission from a judge must be obtained before it can be lawfully circumnavigated. A no-knock warrant can be issued have a legitimate fear that announcing their presence would endanger lives or give criminals time to destroy evidence. Such a warrant authorizes law enforcement to break down doors without warning and to enter a structure. These types of warrants are controversial. Civil liberty advocates say that such warrants violate the spirit of the Fourth Amendment. Police defend such warrants on the grounds that they save lives and very frequently result in the seizure of contraband.

Searches Without Warrants

There are several exceptions to the general requirement that officers must obtain search warrant for a search to be legal. The Supreme Court has determined that exigent circumstances justify an exception to the rule. Exigency is another word for emergency. Thus, an exigent-circumstances search is an entry into a place that would otherwise require a warrant but for the emergency situation.

Another common warrantless search is a consent search . Most of the rights guaranteed by the constitution can be waived by the person that has the right. If a person gives the police permission to search, so long as the permission is given voluntarily, then there is no violation of the person's Fourth Amendment rights. A shocking number of criminal convictions come as a result of consent searches. Many criminals do not do what is in their legal best interest. According to the Supreme Court of the United States, the

police are not obligated to inform citizens that they have the right to refuse consent. Some state courts (e.g., Arkansas), however, have interpreted state constitutions to give this right.

Another exception to the general requirement that police have a warrant to conduct a search is known as a hot pursuit search . If an officer chases an offender into a private place, there is no legal requirement that the officer break off the pursuit. If contraband is discovered in such a pursuit, it can be seized and will be admissible in court.

Most of the exceptions to the warrant requirement above do not, for one reason or another, require probable cause. An automobile search is an interesting hybrid because it does require probable cause to obtain a warrant, even though the officer is not obligated to actually obtain the warrant. The court allows this compromise because of the inherent mobility of vehicles. The criminal suspect could simply drive away of the officer were required to leave the scene and go obtain a warrant. Merely citing the driver for a traffic violation, however, is not sufficient to establish probable cause for a lawful search.

To preserve evidence and to protect officers from hidden weapons, officers are allowed to search a person after they have been arrested. Such a search is known as a search incident to arrest . As an extension of this idea, the officer may search the area immediately surrounding the arrested person. That is, the area immediately under the arrestee's control. The Court has ruled the fact that the suspect is in handcuffs and could not reach for a weapon is immaterial.

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10.2: Admissions vs. Confessions

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CHAPTER OVERVIEW

11: The Court System

Learning Objectives

- explore the major aspects of state and local courts.
- discuss how these court systems operate.
- outline selection processes for the judiciary.
- introduce the topic of judicial federalism; including the challenges courts will face in the future.
- discuss the impacts courts have had and will have in the future with respect to the promotion of sustainability.

When thinking about courts, many of us think about the statute of “Blind Justice” – also known as Lady Justice – that adorns the front of many courthouses around the country. Often portrayed blindfolded and holding balance scales and a sword, the figure represented is Themis , the Greek Goddess of Justice and law. The blindfold she wears represents the impartiality with which justice is served, the scales represent the weighing of evidence on either side of a dispute brought to the court, and the sword signifies the power that is held by those making the ultimate decision arrived at after an impartial and fair hearing of evidence. In fact, in ancient Greece judges were considered servants of Themis , and they were referred to as “ themistopolois .”

Whether or not state and local court systems in these modern times are providing blind justice as represented by the statute of Themis could be debated. While residents in communities around the country ideally hope their own court system is impartial and immune to outside influences, few who work in or participate in American state court systems believe this is fully true; in fact, there is evidence that suggests that protection from outside influences upon the courts is becoming less and less assured. Judges today are increasingly called upon to make tough public policy decisions, with the outcomes – some of which entail promoting sustainability – often being popular with the parties engaged in a particular policy issue. Very often such decisions affect tradeoffs of economic, social and environmental goals, leaving some parties pleased and others anxious to “redress the balance” either in new statutory language or through further litigation in the courts. This continuation of the dispute through legal action often involves seeking out “more friendly courts” with more sympathetic judges in which to file their actions.

At the beginning of the American republic, the Founding Fathers clearly believed that the judicial branch would be weak — far weaker than either the Executive or the Legislative branches. In this regard, according to Alexander Hamilton (1788) writing in the Federalist Papers (number 78):

The Executive not only dispenses the honors but also holds the sword of the community. The legislature not only commands the purse but also prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. 1

Simply speaking, Hamilton thought the judicial branch, with its lack of command of either physical or financial resources, could never overpower the two other branches of government.

Contemporary state, county, and municipal courts face many challenges, with some of these challenges placing an impact upon the provision of “Blind Justice” which society expects of its courts. Despite the critical role of courts in state and local government, many citizens are unaware of the importance of their state and local court systems. In a July 2005 survey about civic education carried out by the American Bar Association, only 55 percent of the participants were able to name the three branches of government. In point of fact, state and local courts have 100 plus times the number of trials and handle five times as many appeals as the federal courts. 3

11.1: State Courts
11.2: Federal Courts

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11.1: State Courts

State Court Systems

Unlike other countries with a single, centralized judicial system the United States operates under a dual system of judicial power – one system of courts operates within each state's constitution, and the other system of courts derives from the provisions of Article III of the United States Constitution. Thus, each state, as well as the federal government, are responsible for enforcing the laws, and state and local courts and federal courts adjudicate both civil and criminal case matters. It follows that Americans are dual citizens; not only are they citizens of the United States of America, but they are citizens of the state, which they reside as well.

With the exception of the appellate process, and possibly in the procedural realm of injunctive relief, the national and state courts are virtually separate and distinct entities. For example, since the U.S. Constitution gives the U.S. Congress authority to make uniform laws concerning bankruptcies, state courts largely lack jurisdiction in the matter. On the other hand, the U.S. Constitution does not give the federal government authority over the regulation of family life; in matters of family law (e.g., divorce, child custody, probate, division of property, etc.) a state court would have jurisdiction and a federal court would likely not hear cases. 4 While operating largely separately, the two systems can come together in the U.S. appellate courts (including the U.S. Supreme Court). The U.S. Supreme Court has final interpretative authority in the country with respect to disputes regarding the meaning of the U.S. Constitution and interpretation of its provisions by all "inferior" (i.e., subordinate) courts in the country. This situation of the coming together of the state and federal courts is a rather rare occurrence and only happens when there is a substantial federal question of law and all remedies at the state level are fully exhausted. Even then, it is entirely left up to the U.S. Supreme Court to decide if it wishes to hear the case. 5

State courts were in place after the American Revolution, but with fresh memories of the Colonial Courts controlled as an extension of English rule Americans generally distrusted these state courts. 6 Since most states were predominantly rural in the distribution of their populations, conflicts between people tended to be relatively simple and were typically settled informally without the need of court intervention. It wasn't until the mid-19th century that modern unified state court systems emerged, with many of these "upgrades" in the procedures and practices of minor courts coming in response to the many new legal challenges arising from the industrial revolution. With industrialization, the American society was changing so rapidly in so many areas that state legislatures, most of which met for only brief periods of time, neither had the time nor the resources to develop statutes to cope with the rising problems. For example, with the advent of labor unions, patent rights and royalties associated with new technology, and complaints over growing corporate monopolies such as utilities and the railroads brought many disputes to the courts for resolution in the absence of governing statutes. 7 This set of circumstances resulted in many conflicts entering into state courts through parties asking the courts to use their common law "equity" powers to resolve contentious commercial, real estate, industrial insurance, and similar disputes born of a rapidly industrializing nation.

While general jurisdiction county courts were well established in American society and enjoyed growing legitimacy as the memories of colonial rule faded over time, these courts were neither adequately staffed nor properly organized to address the increasingly complicated problems of the day. When state and local courts became overwhelmed with litigation and lost faith in the legislative process to bring timely relief, the State Bar Associations (the professional licensing association of lawyers in a state) began to orchestrate reform in state court systems. This reformation depended on the separation of powers argument that empowered state supreme courts to create "unified" courts by mandate of the court as opposed to legislative action. More specifically, state supreme courts acted on their own authority as a separate branch of government, establishing a system of courts wherein the state supreme court sits atop a system of interconnected courts, all of which adhere to the same rules and procedures on how cases (criminal, civil and equity) are processed, and appeals are made. In due course, state legislatures codified the key elements of unified court operations into state statutory law. In virtually all of the states, this creation of unified court systems resulted in the addition of new jurisdictions, the development of uniform procedures, the common training of court personnel, and in many cases, the development of specialized courts such as small claims courts, juvenile courts, and family law courts.

Through the U.S. Constitution (Article 111, Sec. 1) the U.S. Congress has the power to establish "inferior courts" for hearing cases arising from federal law. As previously noted, the interaction between the federal and state courts is relatively rare, with the most notable exception being in the area of Civil Rights. Federal statutes such as the Civil Rights Act and Voting Rights Act can, and have, brought federal and state court systems into close contact. As a general rule, state courts cannot interpret state constitutions in

a way that undermines a U.S. Supreme Court ruling by condoning a less protective standard with respect to a civil right recognized to exist in the U.S. Constitution. On the other hand, state courts are permitted to interpret their state constitutions to require greater protections than those required by the federal courts.

Though federal and state court systems happily coexist in most respects, such mutual coexistence is not uniformly the case. For example, during the 1960s there was so much conflict between federal and state courts that a U.S. constitutional revision was proposed calling for the creation of the "Court of the Union," a judicial tribunal which would have addressed the alleged encroachments upon state judicial power by the federal system. 8 Even though the "Court of the Union" idea ultimately failed to gain traction with either the public or the legal community, the conflict between the two systems that gave rise to the idea has not fully abated. An example of this conflict is the deep disagreement over capital punishment arising in late 2007.

While waiting for a U.S. Supreme Court decision as to whether the current method of lethal injection represents "cruel and unusual punishment," a violation of the Eighth Amendment of the U.S. Constitution, many of the 36 states using lethal injection as a method of execution placed a de facto moratorium on executions. Other states boldly rebuked the U.S. Supreme Court and moved ahead with planned executions, despite the Supreme Court's plea to await the outcome of its hearing of a key case. On November 2, 2007, barely a month after the U.S. Supreme Court agreed to hear the case [granted certiori] on lethal injection, the Florida Supreme Court unanimously ruled that their state's new method for carrying out lethal injections, after changes in the procedure were made which were prompted by a botched execution in December, do not violate the U.S. Constitution's prohibition against cruel and unusual punishment.

How State Courts Work

Comparing one state court to another is like comparing apples to oranges in some respects. Some state court systems are extremely complex, while others are rather simple in their structure. For example, the state of New York, with a population of 19 million residents in the year 2000, are served by approximately 3,500 full-time judges working within 13 different layers of courts. In contrast, California, with almost double the population of New York, has only three layers of courts and employs only 1,600 judges. Even though both California and New York, and their respective local court systems, operate under the same general principles and under the structure of a unified court system, they do not operate in the same way. In order for attorneys to practice law in state courts, they must be able to demonstrate knowledge of that particular state's legal system by either passing the state bar examination or otherwise demonstrating sufficient command of the particular state's system of courts. The caseloads for state courts vary widely, and these workloads seem to have little to do with the size of the state's population. Generally speaking, western states' courts, which were formed later in the nation's history, tend to be more modern and simplified when compared to those of longstanding operation in the eastern states.

The organization of state and local courts tends to reflect two major influences: 1) the organizational model set by the federal courts; and 2) each state's judicial preferences as manifested in state constitutions and judiciary statutes. 9 The increased influence of states' constitutions within their judicial system, particularly in regards to civil rights, is known as judicial federalism . As the chapter on State Constitutions noted, Judicial Federalism is at play when state courts address the state's constitutional claims first, and only consider federal constitutional claims when extant cases cannot be resolved solely upon state grounds.

The legal terminology and structure of each state's court are quite diverse, but they all follow a generic three-tiered structure. At the base is a system of general and limited jurisdiction trial courts of original jurisdiction, with an intermediate set of appellate courts in the middle, and, at the top, the Court of Last Resort (also an appellate court). In addition, many states are increasingly using specialized, sometimes known as problem-solving, courts as needed. The fundamental distinction between trial courts and appellate courts is that trial courts are those of the first instance that decide a dispute by examining the facts. Appellate courts review the trial court's application of the law with respect to the facts as recorded in the official proceedings of the case in question. 10 Figure 8.1 reflects how a generic three-tiered court system with a specialized court may operate. Some states' court structure, usually those with small populations, may be more simplified than the generic system, while in some cases the states' structure is more complex than the diagram implies.



Figure 11.1 State Court Structures [123]

Trial Courts:

Trial courts often don't garner the attention of either states' higher courts or the federal courts, but they represent the veritable workhorses of the court system. Typically, each state has two types of trial courts of original jurisdiction, one of limited jurisdiction and one of general jurisdiction. Funding for trial courts of general jurisdiction generally comes from a combination of state and local sources. In most states, courts of limited jurisdiction are principally funded by local governments.

Trial courts of limited jurisdiction, as the name suggests, deal with specific types of cases and are often presided over by a single judge operating without a jury. Found in all but six states, courts of this type typically hold preliminary hearings in felony cases and exercise exclusive jurisdiction over misdemeanor and ordinance violation cases. 11 Geographically, the jurisdiction of these courts varies across the states, but by-and-large they possess either a countywide jurisdiction or serve a specific local government such as a city or town. If there were an entity we could call a "community court," it would be these courts. They are located within or near a community and handle cases arising from misdemeanor offenses and ordinance violations. The courts of this type include, but are not limited to the following:

- Probate Court : Handles matters concerning administering the estate of a person who has died.
- Family Court : Handles matters concerning adoption, annulments, divorce, alimony, custody, child support, and other family matters.
- Traffic Court : Regarding cases involving minor traffic violations.
- Juvenile Court : Handles cases involving delinquent children under a certain age.
- Municipal Court : This court handles cases involving offenses against city ordinances.

General jurisdiction trial courts are the main trial courts in the state system, and in most cases, the highest trial court. These courts are generally divided into circuits or districts. In some cases, the county serves as the judicial district, but in most states, a judicial district embraces a number of counties, which is why they are often referred to as county courts. General jurisdiction trial courts hear cases outside the jurisdiction of the limited jurisdiction trial courts, such as felony criminal cases and high stakes civil suits. In most states cases are heard in front of a single judge, often with a jury.

Intermediate Appellate Court:

Intermediate Appellate Courts go by many names, including Superior Court, Appellate Division, Court of Appeals, and even Supreme Court. With the exception of 11 states, which usually have small populations, states have some form of intermediate appellate courts. The main role of these courts is to hear appeals from trial courts. Any party, except in a case where a defendant in a criminal trial has been found not guilty, who is not satisfied with the outcome from the trial court may appeal to an intermediate appellate court. States' intermediate appellate courts are structured in a variety of ways, but typically they are regionally based and

divided into “divisions,” “courts” or “districts.” For example, Florida has five District Courts of Appeal while more sparsely populated Idaho has a single Court of Appeals. The courts are usually set up with the judges working in panels of three or more (always an odd number), and the majority of judges decides the outcome of the cases brought to the court. The appellate courts do not have juries, do not hear from witnesses or review the facts of the case, but instead read briefs and hear arguments from the parties’ attorneys to decide issues of law or process raised in the cases brought up on appeal. The majority of the time its decisions are final, but it is possible to appeal to the next appellate court level, often the Court of Last Resort.

Court of Last Resort:

All states have a Court of Last Resort, primarily referred to as the Supreme Court, which acts as the state’s highest appellate court. In fact, two American states — Oklahoma and Texas — have two Courts of Last Resort; one represents a conventional Supreme Court and the second constitutes a Criminal Court of Appeals. The most common arrangement, found in 28 states, is a seven-judge court; 16 states have five Supreme Court justices, while five states have nine judges. 12

With the exception of the 11 states that don’t have an intermediate court of appeals, the Courts of Last Resort have discretion as to whether or not they will hear a case. As an appellate court, it hears cases without a jury, focusing on major questions of law and constitutional issues. Many Courts of Last Resort do have original jurisdiction in certain specific matters, such as the reapportioning of legislative districts. The decisions coming from these courts are final, with the extremely rare exception of when the U.S. Supreme Court decides to hear an appeal from a state.

There are two ways a case regarding a state can be heard in the U.S. Supreme Court. The first, and almost nonexistent, is with the U.S. Supreme Court’s original jurisdiction, which involves cases between the United States and a state, between two or more states, and between a state and a foreign country. These cases typically go through the federal system, therefore rarely involve a decision from a state court. The second path for a state-based case is through the U.S. Supreme Court’s appellate jurisdiction. In these instances, the U.S. Supreme Court can choose to hear a case appealed from a state’s Court of Last Resort. In order for this to occur, there must be a substantial federal question involved and the case must be viewed as “ripe,” meaning the petitioner has exhausted all potential remedies in the state court system and the resolution of the case can set a useful precedent for the future resolution of similar cases.

The Fifth Amendment case of Dolan v. City of Tigard serves as a good example of such a case. This case centered on zoning regulations and property rights. Dolan, an owner of a plumbing supplies store, appealed her claim though the Oregon court system where the Oregon Supreme Court found for the City and rejected the argument that an unconstitutional taking of private property by the government without just compensation occurred as a result of a zoning decision made by the city. As the case involved Fifth Amendment constitutional rights, the federal courts determined that this case raised a question of federal law. Given that essential determination, Dolan was able to appeal her case to the federal courts, and ultimately all the way to the U.S. Supreme Court. The U.S. Supreme Court found in favor of Dolan, causing local governments across the country to take notice of new requirements for determining just compensation in similar cases.

Problem-Solving Courts:

Problem-solving courts commonly referred to as “specialized courts” dispensing “therapeutic jurisprudence,” have emerged in most American states over the past decade. Problem-solving courts relieve overwhelmed legal systems dealing with persons and families whose actions stem from problems better dealt with by “supervised treatment” rather than incarceration or similar forms of punitive governmental sanctions. These courts represent an attempt to craft new, adaptive responses to chronic social, human and legal problems that are resistant to conventional solutions associated with the adversarial process. 13

Though lacking a precise definition or legal philosophy, problem-solving courts share a basic theme: a desire to improve the results that courts achieve for victims, litigants, defendants, and communities through a collaborative process rather than the conventional adversarial process. 14 Traditional courts tend to focus on the finding of guilt or innocence, entail looking backward in time, and are conducted in an adversarial way. In comparison, specialized courts focus on the identification of therapeutic interventions, seek to affect future outcomes, make use of a collaborative process, and involve a wide range of court-based and community-based services and stakeholders. 15

There are a number of factors that have led to the rise of special courts, including prison (state facilities) and jail (county and city facilities) overcrowding, highly stressed social and community institutions, and increased awareness of social issues such as domestic violence. While increased social awareness has indeed played some role in the development of these specialized courts,

the lack of resources available to state and local court systems has been the major driver behind the broadening use of such courts; the caseloads of the courts have increased substantially in recent decades while the resources available to the courts have not increased proportionately. For example, from 1984 to 1997 the number of domestic violence cases in state courts increased by 77 percent. 16 Commenting on rising caseloads, Minnesota Chief Justice Kathleen Blaze stated, “You just move ‘em, move ‘em, move ‘em. One of my colleagues on the bench said, ‘you know, I feel like I work for McJustice: We sure aren’t good for you, but we are fast.” 17

Problem-solving courts got their start in 1989 when Dade County, Florida experimented with a drug court. The drug court, in an attempt to address the problem of criminal recidivism (re-offense) among illegal drug use offenders, sentenced such repeat offenders to a long-term, judicially supervised drug treatment instead of incarceration. In reflection of Dade County’s success with this alternative to incarceration, drug courts taking a similar approach to drug use offenders began to crop up all over the United States. As of April 2007, the U.S. Department of Justice reported that there were 1,699 fully operational drug courts in the United States, and another 62 tribal drug courts. 18

Since this development in 1989, a variety of specialized courts have emerged, primarily designed to tackle difficult social issues. For example, New York City opened its Midtown Community Court in 1993 to target misdemeanor “quality-of-life” crimes, such as prostitution and shoplifting. Instead of relying upon traditional sentencing involving incarceration, offenders were required to pay back the community for the harm they caused by community service work such as cleaning local parks, sweeping streets and painting over graffiti. In addition, to address the underlying cause of the problem behavior, the offenders were mandated to receive “therapeutic” social services, such as counseling, anger management instruction, substance abuse treatment, and job training. 19 Typically, elements of the local community are also engaged in the work of the problem-solving courts by participating on advisory panels, providing volunteer services, and taking part in town hall meetings. The City of Portland, Oregon, for example, opened a number of “Community Courts” throughout the city, in many cases holding court at existing local community centers.

Evidence collected in evaluation studies conducted on many drug courts indicates that these problem-solving courts tend to achieve favorable results with regards to keeping offenders in treatment, reducing their drug use, reducing recidivism, and economizing on jail and prison costs. The rate of retention in drug abuse treatment ordered by drug courts is typically 60 percent, as compared to only 10 to 30 percent for voluntary programs. Moreover, drug court participants have far lower re-arrest rates than do persons taken into the traditional court process. 20 Even after fully accounting for administrative and overhead costs, in a two-year period, the drug court in Multnomah County(Oregon) saved $2.5 million in criminal justice system costs, with an additional savings being made in outside the court system costs such as reduced theft and reduced public assistance payments. Those associated costs were estimated at $10 million. 21

The types of problem-solving courts are many, but the majority of them fall into the categories of limited or general jurisdiction trial courts (courts of original jurisdiction). The most common specialized courts are those that work on social issues, primarily substance abuse and family courts. Some examples of specialized courts include gun courts, gambling courts, homeless indigent courts, mental-health courts, teen courts, domestic violence courts, elder courts, and community courts involving lay citizens in the process of arranging for property crime offenders to engage in compensatory justice with respect to those whom they victimized.

Some states have taken it upon themselves to permit the establishment of specialized courts for the protection of the environment and for addressing the economic costs and benefits of pursuing sustainability. Such specialized courts have been created to deal with highly complex issues, which require extraordinary scientific and technical knowledge on the part of the court. For example, the State of Montana created a Water Court to expedite and facilitate the statewide adjudication of state water right claims; once the adjudication process is complete the state may dissolve the court. 22

In addition to the difficult adjudication of rival water rights claims, Colorado’s version of the Water Court has jurisdiction over the use and administration of water and all water matters within its statewide jurisdiction. 23 Vermont has established an Environmental Court to hear matters on municipal and regional planning and development, to hear disputes over state solid waste ordinances, and to handle cases arising from the enforcement actions of the Vermont Agency of Natural Resources. As matters relating to global climate change and the more rigorous regulation of greenhouse gases arise, it is likely that more specialized courts will be created in other states to deal with the disputes arising from the active pursuit of sustainability in our states and local governments.

States are also developing specialized courts to manage economic disputes that arise in the course of commercial activity (such as business formation, business transactions, and the sale/purchase of business assets). Five states have Tax Courts that deal exclusively with tax disputes. Montana, Nebraska, and Rhode Island developed specialized courts to deal exclusively with Workers' Compensation cases. In many states, which do not have such specialized courts there has been a steady trend in the growth of the number and range of activities of administrative law judges . These "hearings officers" work within administrative agencies, which engage in regulatory actions that give rise to many disputes (environmental regulations, labor/management actions under collective bargaining agreements, compensation for damages incurred from state government action on one's property, etc.). These administrative law judges (ALJs) hold quasi-judicial hearings, carefully weigh the arguments of the agency and aggrieved citizens, and have the authority to mediate, arbitrate and ultimately decide upon an outcome to a case, which is binding on all parties. While such decisions made by ALJs can be appealed to the courts, state court judges seldom overturn their rulings.

Judicial Selection

The manifest aim of the judicial selection process in the American states is to select a judiciary that is as impartial as the Greek Goddess Themis , but one that is at the same time accountable to the will of the people of the state. Unlike the federal judiciary where lifetime appointments are made to the federal district, circuit and supreme courts, in the states nearly all judges serve for fixed terms of office and most are subject to some method of retention in office-based upon a vote of the people. Each state uses a system of selecting judges they feel is best suited to accomplish the dual goals of impartiality and accountability to the people. In most cases, a state's judicial selection process does not catch the public's attention given the limited knowledge citizens typically command regarding the courts and the actions of their judges; some particularly cynical observers have characterized judicial selection processes as being "about as exciting as a game of checkers…played by the mail."

There is no simple way to describe states with respect to their form of judicial selection system, because judges in different (or even the same levels of courts) within one state may be selected through different methods. A system to select a judge for the intermediate appellate court, for example, may be different than the system used for the Court of Last Resort, and different again from the system used for recruitment to the trial courts. Making things even more complex, the selection process for subsequent terms may be different than the initial term of office.

No single selection process – such as gubernatorial appointment, merit commission screening for gubernatorial appointment, non-partisan election, partisan election, legislative appointment, nomination to vacancies by county commissioners – currently dominates over other processes, nor do these selection processes within each state remain static over time. For example, in 1980 it was the case that 45 percent of the states used partisan elections and 29 percent of the states used non-partisan elections as their respective methods for selecting judges to trial courts; by 2004, however, those figures were just about reversed; in 2004, 44 percent of the states were using non-partisan elections and 35 percent were using partisan elections for selecting their trial court judges.

While there are many types of selection processes, four principal processes are used in the U.S. for judicial selection within the states: partisan election, non-partisan election, appointment, and the Merit System (known as the Missouri Plan). No one process dominates the others in extent of use, or in the level of controversy associated with its use. There are some regional differences in evidence in where each type of judicial selection process tends to be concentrated. For example, some of the nation's most conservative states, including Texas and states in the "Deep South," use partisan elections principally, while many Midwest states tend to make use of the gubernatorial appointment process. Table 11.1 shows how each state selects its judiciary as of the present time

Table 11.1 State Judiciary Selection Process

State	Court of Last Resort Name/s	Method of Selection	Intermediate Appellate Court/s
Alabama	Supreme Court	Partisan Election	Court of Criminal Appeals / Court of Civil Appeals
Alaska***	Supreme Court	Appointment	Court of Appeals
Arizona***	Supreme Court	Appointment	Court of Appeals
Arkansas	Supreme Court	Nonpartisan Election	Court of Appeals
California	Supreme Court	Appointment	Court of Appeal
Colorado***	Supreme Court	Appointment	Court of Appeals
Connecticut	Supreme Court	Appointment	Appellate Court
Delaware	Supreme Court	Appointment	–
Florida	Supreme Court	Appointment	District Courts of Appeals
Georgia	Supreme Court	Nonpartisan Election	Court of Appeals
Hawaii	Supreme Court	Appointment	Intermediate Court of Appeals
Idaho	Supreme Court	Nonpartisan Election	Court of Appeals
Illinois	Supreme Court	Partisan Election	Appellate Court
Indiana***	Supreme Court	Appointment	Court of Appeals/Tax Court
Iowa***	Supreme Court	Appointment	Court of Appeals
Kansas***	Supreme Court	Appointment	Court of Appeals
Kentucky	Supreme Court	Nonpartisan Election	Court of Appeals
Louisiana	Supreme Court	Partisan Election	Court of Appeal
Maine	Supreme Judicial Court	Appointment	–
Maryland	Court of Appeals	Appointment	Court of Special Appeals
Massachusetts	Supreme Judicial Court	Appointment	Appeals Court
Michigan	Supreme Court	Nonpartisan Election	Court of Appeals
Minnesota	Supreme Court	Nonpartisan Election	Court of Appeals
Mississippi	Supreme Court	Nonpartisan Election	Court of Appeals
Missouri***	Supreme Court	Appointment	Court of Appeals
Montana	Supreme Court	Nonpartisan Election	–
Nebraska***	Supreme Court	Appointment	Court of Appeals
Nevada	Supreme Court	Nonpartisan Election	–
New Hampshire	Supreme Court	Appointment	–
New Jersey	Supreme Court	Appointment	Appellate Division of Superior Court
New Mexico	Supreme Court	Partisan Election	Court of Appeals

New York	Supreme Court	Appointment	Appellate Division of Supreme Court/Appellate Terms of Supreme Court
North Carolina	Supreme Court	Nonpartisan Election	–
North Dakota	Supreme Court	Nonpartisan Election	–
Ohio	Supreme Court	Partisan Election	Courts of Appeals
Oklahoma***	Supreme Court/Criminal Court of Appeals	Appointment/Appointment	Court of Appeals
Oregon	Supreme Court	Nonpartisan Election	Court of Appeals
Pennsylvania	Supreme Court	Partisan Election	Superior Court/Commonwealth Court
Rhode Island	Supreme Court	Appointment	–
South Carolina	Supreme Court	Appointment #	Court of Appeals
South Dakota	Supreme Court	Appointment	–
Tennessee	Supreme Court	Appointment	Court of Appeals/Court of Criminal Appeals
Texas	Supreme Court/Criminal Court of Appeals	Partisan Election/Partisan Election	Court of Appeal
Utah***	Supreme Court	Appointment	Court of Appeals
Vermont	Supreme Court	Appointment	–
Virginia	Supreme Court	–	Court of Appeals
Washington	Supreme Court	Appointment #	Court of Appeals
West Virginia	Supreme Court of Appeals	Nonpartisan Election	–
Wisconsin	Supreme Court	Partisan Election	Court of Appeals
Wyoming***	Supreme Court	Nonpartisan Election	–

Table 8.2 Judicial Selection Method by State (*=Justices chosen by district; **=Chief Justice chosen statewide, associate judges chosen by

district; ***=Uses of the Merit System for Judicial Selection; #=Legislative Appointment)

State	Appellate Court Justices	General Trial Court/s	Method of Selection
Alabama	Partisan Election / Partisan Election	Circuit Court	Partisan Election
Alaska***	Appointment	Superior Court	Appointment
Arizona***	Appointment	Superior Court	Appointment
Arkansas	Nonpartisan Election	Chancery/Probate Court/Circuit Court	Nonpartisan Election
California	Appointment	Superior Court	Nonpartisan Election
Colorado***	Appointment	District Court	Appointment
Connecticut	Appointment	Superior Court	Appointment
Delaware	–	Superior Court/Court of Chancery	Appointment/Appointment
Florida	Appointment	Circuit Court	Nonpartisan Election
Georgia	Nonpartisan Election	Superior Court	Nonpartisan Election
Hawaii	Appointment	Circuit Court	Appointment
Idaho	Nonpartisan Election	District Court	Nonpartisan Election
Illinois	Partisan Election*	Circuit Court	Partisan Election
Indiana***	Appointment/Appointment/Appointment	Superior Court/Probate Court/Circuit Court	Partisan Election
Iowa***	Appointment	District Court	Appointment
Kansas***	Appointment	District Court	Appointment
Kentucky	Nonpartisan Election*	Circuit Court	Nonpartisan Election
Louisiana	Partisan Election*	District Court	Partisan Election
Maine	–	Superior Court	Appointment
Maryland	Appointment #	Circuit Court	Partisan Election
Massachusetts	Appointment	Supreme Court	Appointment
Michigan	Nonpartisan Election	Circuit Court	Nonpartisan Election
Minnesota	Nonpartisan Election	District Court	Nonpartisan Election
Mississippi	Nonpartisan Election*	Circuit Court	Nonpartisan Election
Missouri***	Appointment	Circuit Court	Partisan Election
Montana	–	District Court	Nonpartisan Election
Nebraska***	Appointment**	District Court	Appointment
Nevada	–	District Court	Nonpartisan Election
New Hampshire	–	Superior Court	Appointment

New Jersey	Appointment	Superior Court	Appointment
New Mexico	Partisan Election	District Court	Partisan Election
New York	Appointment/Appointment	Supreme Court/County Court	Partisan Election/Partisan Election
North Carolina	–	Superior Court	Nonpartisan Election
North Dakota	–	District Court	Nonpartisan Election
Ohio	Partisan Election	Court of Common Pleas	Partisan Election
Oklahoma***	Appointment*	District Court	Nonpartisan Election
Oregon	Nonpartisan Election	Circuit Court/Tax Court	Nonpartisan Election/Nonpartisan Election
Pennsylvania	Partisan Election/Partisan Election	Court of Common Pleas	Partisan Election
Rhode Island	–	Superior Court	Appointment
South Carolina	Appointment #	Circuit Court	Appointment
South Dakota	–	Circuit Court	Nonpartisan Election
Tennessee	Partisan Election/Partisan Election	Circuit, Criminal, Chancery, & Probate Court	Appointment
Texas	Partisan Election	District Court	Partisan Election
Utah***	Appointment	District Court	Appointment
Vermont	–	Superior Court/District Court	Appointment/Appointment
Virginia	Appointment #	Circuit Court	Appointment
Washington	Nonpartisan Election	Superior Court	Nonpartisan Election
West Virginia	–	Circuit Court	Partisan Election
Wisconsin	Nonpartisan Election	Circuit Court	Nonpartisan Election
Wyoming***	–	District Court	Appointment

Partisan and Non-Partisan Elections:

As of 2006, 39 states elect some or all of their judges; this represents nearly 90 percent of state judiciaries across the country. From this statistic alone it is clear that the goals of impartiality and public accountability are both important elements of state and local government judicial selection in the U.S. Alexander Hamilton (1788) spoke for the Founding Fathers in Federalist Paper No. 78 wherein he argued that if judges in federal courts were chosen by elected officials they would harbor “too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws.” In 1939, well over a century after Hamilton’s warning, President William Howard Taft described judicial elections in the U.S. as “disgraceful, and so shocking…that they ought to be condemned.”

Alexander Hamilton and former-President Taft may well be turning in their respective graves as the results of one national survey conducted in 2000 found that 78 percent of Americans believe their state and local judges are influenced (that is, their impartiality is compromised) by having to raise campaign funds. Even so, voter turnout for judicial elections is habitually low as many voters skip past these elections. At times the biases in the operation of courts associated with popular elections can be severe. For example, 1990 the U.S. Justice Department used federal anti-discrimination statutes to invalidate the State of Georgia’s system of electing judges because it was found to be discriminatory against African Americans.

Citizens are poorly informed about judges because, in most states, there are state supreme court-issued limits or guidelines, derived from the American Bar Association's judicial canons, as to what a judicial candidate can say or do while campaigning for judicial office. These limitations tend to be especially strict in states with non-partisan elections. For example, the Minnesota Code of Judicial Conduct Canon 5(A)(3)(d)(i) prohibits judicial candidates from announcing their views on disputed legal or political issues. Yet there are a handful of states, such as Texas, where the judicial elections are highly partisan, extremely expensive, and vehemently contested.

According to Henry Glick and Kenneth Vines, in a great many cases judicial seats that are nominally up for election are vacated by sitting judges shortly prior to the end of their terms of office and filled by judges that are appointed by the sitting governor. The governor's appointee then runs as an incumbent judge during the next election. The impact of such interim appointments has greatly shaped the composition of the nation's state and local judiciary: between 1964-2004, more than half (52 percent) of the judges serving in partisan election states gained their position through an interim appointment, with the state-specific percentages ranging from 18 to 92 percent. These interim appointments more often than not become permanent due to the extremely high retention rate judicial incumbents enjoy in their elections once they get to the bench.

Partisan elections are those in which judicial candidates, including incumbents, run in party primaries and are listed on the ballot as a candidate of a political party. In contrast, non-partisan elections are those in which the judicial candidates run on a ballot without a political party designation. There are a few cases where candidates are chosen in a party primary and backed by the party, but they appear without the label on the ballot. The party affiliations of judges aren't exactly the best-kept secrets; judicial candidates often list a party affiliation in their official biographies, and political parties will often endorse particular judicial candidates.

In comparing the two elective systems, each one has its own pros and cons. The proponents of partisan election tend to feel strongly that the party affiliation next to a judicial candidate's name provides important information to voters with respect to the candidate's likely political philosophy. The proponents counter that "justice is not partisan" – that is, there is no Democratic or Republican form of justice, only the impartial justice dispensed by the blindfolded Themis who is unaware of whether the parties coming before her are Democrats or Republicans. The proponents of partisan election counter that in the non-partisan judicial elections it is the voters who are blindfolded and unable to exercise popular accountability over judges as intended in the election process.

One additional drawback associated with partisan judicial elections is that they can lead to an imbalance among a state's judiciary in cases where a state features strong one-party dominance. The State of Texas encountered this problem during the indictment of former House Majority Leader Tom Delay for corruption charges. Since Texas judges are elected on a partisan ticket, and often contribute openly to partisan causes, quite a scramble was necessary to identify an impartial trial judge who was acceptable to both the prosecution and defense in the Delay case.

Judicial Appointments and the Merit System:

There are two common methods of judicial appointment, "simple" gubernatorial appointment and the "Merit System" of appointment. The simple gubernatorial appointment is much like that for federal judges, where the highest elected official (the President in the federal government and the Governor in the states) fill vacancies on the bench. How judges are selected by state governors depends on the governor in question and traditions in the state. Generally speaking, the background of the judge (former prosecutors, defense attorneys, type of pro bono work done, level of activity in local bar associations, etc.), the political needs of the governor (someone from a particular area of the state is needed to balance out an appellate bench), presence or absence of advocacy for particular persons by interest groups (women attorneys, minority attorneys, etc.), the views of leaders of the State Bar Association, and the preferences of the political parties are all more or less in play when state governors make their judicial appointments.

The Merit System or Missouri Plan system for judicial appointment was designed to "take politics out of judicial selection" by combining the methods of appointment with election in a very particular way. Featuring three distinct components, it is the most complex of the judicial selection processes. Fourteen states use some version of the Missouri plan, with some additional states using a modified version of this type of selection process. Under the provision of the Missouri Plan, candidates for judicial vacancies are first reviewed by an independent, bipartisan commission of both lawyers and prominent lay citizens. From a list of nominees submitted to the commission, three names are provided to the governor from which one person is selected to fill the

vacancy on the bench in question. If the governor doesn't pick one of the three persons put forward by the commission within sixty days, the commission is empowered to make the selection.

Once the judge selected by this process has been in office for one year or more, they must stand in a "retention election" during the next scheduled general election period. In such an election there is no opponent – voters are either voting to retain the judge in office or remove him or her from the judicial post in question. If there is a majority vote to remove the judge from office, the judge must step down and the process starts anew (Missouri Judicial Branch). By making the appointed judge stand for a retention election, the people over whom the judge exercises judicial authority have the ability to remove a judge they feel does not perform his or her duties well. Whether or not this was intentional on the plan of Missouri Plan designers, judicial removal is exceedingly rare; in the first 179 elections held under the Missouri Plan only one judge did not retain his position, and this was a case in which extraordinary circumstances were present.

The term "merit" in the Missouri Plan judicial selection process implies that nominating commissions are disengaged from party politics, but the extent to which this disengagement is achieved depends in large measure on who selects the commissioners and how they carry out their duties. These two factors vary considerably across the states using the Missouri Plan. In a number of states, the governor has a major role in picking members of the commission, and in other states, interest groups play a significant role, thereby to some extent circumventing of the "de-politicization" goal of the merit selection system.

The geographic basis for the selection of trial court and appellate judges is somewhat different for each state, and for each type of court within the state's unified court system. For trial courts, a useful general rule of thumb is that judges are elected from within the jurisdiction over which they preside. For example, Montana's Municipal courts are elected in a nonpartisan election within the city wherein the court operates, while the Water Court, which exercises statewide jurisdiction, is elected in a nonpartisan election from throughout the state. In the majority of states, thirty in all, levels of the state's appellate courts are either elected or appointed statewide, while six states select all of their appellate justices by district or region.

When it comes to discussions concerning how judges should be selected, the most contentious debates occur on the question of how judges on the Courts of Last Resort should be selected. Even though they are appellate courts, and often use the same process for selecting the immediate appellate court judiciary, there are nonetheless noteworthy differences. The geographic basis for selecting a judge is usually statewide, although in eight states the Courts of Last Resort select judges via districts. This difference between district and statewide selection can be a source of considerable contention within states, particularly in those states with liberal urban centers and conservative rural areas. Terms of office for a judge on the Court of Last Resort ranges from a low of five years to a high of 14 years. There are three exceptions to the fixed-term system of judicial appointment; Massachusetts, New Jersey, and Rhode Island all appoint their justices until they reach the age of 70 or die in office. Judicial terms offices are eight years or less in 29 states, and more than eight years in 18 states. Naturally, the shorter the term of service, the more often a justice has to run in a retention election and must rely upon supporters to organize and finance their campaign. Whenever anyone runs for public office, whether they are a governor, a legislator, or a judge, they'll need to raise campaign funds and ask citizens and interest groups for their endorsements and "get out the vote" efforts for their candidacy. This type of "politics" carried out by judicial candidates and their challengers, raises the questions of "from whom and how much money was raised," and how much influence will that citizen or group have when the judge decides cases brought to his or her court?

An overarching question on judicial selection is this — does the method of selection really matter or affect the way courts operate? Evidence suggests that different selection processes produce different results in terms both of who tends to make it to the bench and in terms of rulings made. For example, Nicholas Lovrich and Charles Sheldon found that judicial selection systems that require judicial candidates to campaign actively in competitive elections result in judicial electorates (voters who participate in elections for judges) who are better informed than judicial selection systems which feature only retention elections. Similarly, it has been reported that appointed judges are likely to respond to a wider variety of groups and interests, and support individual rights more strongly in their rulings than elected judges.

Current and Future Challenges Facing State and Local Courts

State court systems are facing many challenges, both with respect to their workload and their resource limitations. The civil and criminal caseloads of state and local courts are rising appreciatively, but their resources are not growing to match demands being placed upon a "stressed" system of justice in America. The threat to physical safety in the courts and its judiciary is a serious one in many places and a quite justifiable concern in some urban areas in particular. Rural courts, with their broad geographic reaches,

face challenges not contemplated in America's urban centers. The rapidly rising costs of judicial elections in many states reflect an attempt to politicize the courts on the part of some interests, and in the minds of some observers, this movement toward high-cost judicial elections represents a threat to our independent judiciary. In the state of North Carolina the state legislature grew so concerned about this particular danger that they enacted a law setting up a system of publicly financed judicial elections as an experiment.

The demand upon state court systems is rising in all sectors, and at a more rapid rate than the increase of the general population. Between 1993-2002 trial courts across the country saw a 12 percent increase in civil case filings, an increase in criminal case filings by 19 percent, an increase in domestic relations case filings by 14 percent, an increase in juvenile case filings of 16 percent, and an increase in traffic cases by 2 percent. Though traffic cases account for about 60 percent of all cases filed in trial courts, the increase in the number of complicated and time-intensive cases such as civil, criminal and domestic relations case filings place a far greater strain on the courts than the more routine traffic cases. The number of judges and courtrooms in operation has not kept pace with the growth in caseloads; in the period 1993 to 2002, state court system judiciaries increased by only 5 percent.

Court-related violence and courtroom safety is a chronic, costly preoccupation for those professionals working inside the criminal justice system, but it is not one that gets much public attention. Although this is an ongoing issue throughout the country, a number of high profile incidents occurred in 2005 which served to highlight the serious threats state and local courts must plan for on a regular basis. In February of 2005, a Federal judge arrived at her Chicago residence to find her husband and mother murdered by Bart Ross, a 57-year-old electrician whose medical malpractice claim was dismissed in a court hearing. A mere two weeks later in Atlanta, Georgia four people, including a state judge and court reporter, were murdered when a defendant on trial for rape overpowered the sheriff's deputy escorting him to the courtroom and took the deputy's gun. In a less violent, but more commonly occurring case of threatening behavior toward judges, the Florida state court trial judge who ordered the feeding tube removed from Terri Schiavo, who was severely brain-damaged, was harassed and received death threats from people who disagreed with his ruling.

In reaction to such events, a study on courtroom safety provisions present in California courts found that two-thirds of the state's courthouses lacked adequate security, and a companion survey found that 40 percent of California's state and local prosecutors felt threatened in their jobs. Areas with the poorest security provisions were rural and local courts, which usually rely on local funding for their operations. As an appellate court judge noted, "In a society as litigious as ours, the courtroom has become the theater for emotional catharsis."

Heavy caseloads, the lack of resources and inadequate courtroom security are real concerns for professionals working in the criminal justice system, but it is the increased politicization of the courts and judiciary that is considered the greatest long-term threat to the state and local court systems. This term applies to attempts made to provide one political party or major interest group an unfair advantage to promote their interests at the likely expense of the public interest. While all Americans have an interest in the existence of impartial, efficient and legally competent court services, narrow interests sometimes seek to "plant" judges on the bench to gain an advantage in cases involving the adjudication of their affairs. The independence and impartiality of the judiciary, as well as the effective operation of the checks and balances between the three branches of government, are compromised when excessive politicization occurs. The two means used most frequently to politicize the courts are "Court Stripping" and judicial selection.

According to the editors of the Oxford American Dictionary, "Court stripping is when legislatures try to remove power from the courts, usually federal but often state, so that the courts can't rule on laws they passed." The most blatant instance of this method of politicization of the judiciary occurred in 2005 when the Republican majority in the United States Congress attempted to strip Florida state courts of their jurisdiction over a state matter – in this case, the regulation of medical practice – by imposing federal jurisdiction and ordering the federal courts to consider the claims of Teri Schiavo's parents. The Florida Court ordered that Teri Schiavo's feeding tube be removed, an action which would ultimately end her life; her parents wanted the tube to remain in hopes she would one day recover from her injuries. Ultimately, the Florida state court decision stood as a consequence of the reaffirmation of state authority to regulate medical practice within their jurisdictions. There are, and will continue to be, further attempts at court stripping. Upset with some court rulings, some Arizona legislators tried, without success, to enact legislation that would have shifted the power to write court rules from the Arizona Supreme Court, their court of last resort, to the legislature. Court stripping can sometimes happen after a court ruling; for example, although clearly an unconstitutional action in violation of

the separation of powers, the Delaware Legislature recently enacted legislation overturning its Supreme Court's interpretation of "life imprisonment with the possibility of parole."

Often veiled as "judicial reform," political parties and interest groups in some states are trying to alter the process of how judges are selected and retained in order to change the political makeup of the judiciary. Usually, the techniques used appear to be politically neutral "improvements," such as changing the geographic location of selection, the process of selection, and the term lengths. However, underlying the proposed changes are plans for "stacking the deck" with judges more friendly to their interests. For example, in 2006 Oregon Ballot Measure 40 was introduced to amend the Oregon State Constitution to require judges for the Supreme Court and the Appellate Court to be elected by district rather than statewide. The candidate would have to be a resident of the newly formed district for at least a year before the election. The ballot measure failed with 56 percent of the voters opposing. Had the measure passed and been enacted, the political makeup of the Oregon courts could have been altered as the state's sparsely populated rural areas are typically conservative and the heavily populated urban centers are generally liberal. This type of politicization of courts is nothing new, of course. In 1997 the Illinois General Assembly changed the state's Supreme Court districts to make it more difficult for Democrats to dominate the judiciary. In an attempt at politicization, a 2006 initiative in Montana was circulated permitting the recall of a judge "for any reason acknowledging electoral dissatisfaction." Due to fraud uncovered in the collection of signatures, the measure was removed from the ballot prior to the election.

In yet another case, state legislators, unhappy with some court decisions made in Missouri, introduced legislation to reduce the initial term of service for appellate judges from 12 to five years, and require a two-thirds voter majority rather than a simple majority for retention. Clearly, in the balance between judicial independence and popular accountability, it is likely that parties that disagree strongly with the decisions of their state courts will in some cases seek to limit the independence of the courts and create a judicial selection process more likely to put judges of their own liking on to state and local benches.

Nowhere has the politicizing of courts and the judiciary been more apparent than in judicial elections, especially in partisan elections. It was the 2002 U.S. Supreme Court decision in Republican Party of Minnesota v. White that accelerated the politicizing of judicial elections. Prior to White , judicial candidates in Minnesota, which used the nonpartisan election process for judicial selection, were forbidden by Canon 5 of the Minnesota Code of Judicial Conduct from announcing their views on disputed legal or political issues, from affiliating themselves with political parties, or from personally soliciting or accepting campaign contributions. In the White case, the U.S. Supreme Court ruled that the three clauses of Canon 5 violated the First Amendment rights of judicial candidates, and in so ruling invalidated them and all comparable limitations in place to other states.

The decision of the U.S. Supreme Court in the White case made nonpartisan judicial election processes nonpartisan in name only. Judicial candidates in states featuring judicial elections can now personally solicit campaign funds from lawyers or litigants, they can engage in partisan political activities, and they can declare their views on virtually any matter of public concern – whether or not the matter may be the subject of current or future litigation brought to the court. While Canons of Judicial Conduct continue to exist in all states, the ability of a state Supreme Court or state Bar Association to sanction a judicial candidate for violating such professional and ethical standards has been undermined by the White decision.

Partisan elections, as noted previously, are increasingly becoming more like those of the other two branches of government – namely, expensive, mass media oriented, and rancorous. Surprisingly, in recent years the most expensive elections have been "retention-only" elections where voters only need to decide whether or not to keep a judge in office. In 1986 almost $12 million was spent in California to remove the state Supreme Court's Chief Justice and two or her colleagues because of their opposition to the death penalty and because of the claim that they were "soft on crime." In an obvious case of conflict of interest, plaintiffs in a $25 million punitive damages suit made contributions to two of the state's Supreme Court Justices who were up for re-election and scheduled to hear the case; the justices refused to recuse themselves — or refrain from participating because of a conflict in interest — and ruled in the favor of the plaintiffs.

Special interests are more visible in judicial elections today than ever before; the most visible and active are those with the financial resources to "contribute" and with the most to win or lose in decisions made by courts. For example, the Ohio Chamber of Commerce spent $3 million to defeat a judge who had overturned a tort reform law worth many times as much for business; trial lawyers and unions spent about $1 million in a counteroffensive to retain the judge in question on the Ohio court. Large amounts of funding, and tides of negative advertising can be attributed to efforts by special interest groups to pursue their policy agenda. The ongoing fight between large corporations and plaintiffs' attorneys over tort reform is a current source of potential politicization.

Despite the presence of strong pressures to further politicize the courts and the judiciary, the public's general perception of the courts is still generally one of presumed independence and impartiality. A national public opinion survey conducted in 2005 found that while the public's knowledge of the judiciary is rather poor, its belief in their courts' adherence to the original principles of Themis are strong. Americans believe that their courts represent fairness, due process, impartiality, and play a key role in the preservation of citizen rights. Furthermore, 61 percent of the respondents to the 2005 survey believe that "politicians should not prevent the courts from hearing cases, even on controversial issues such as on gay marriage, because the purpose of the courts is to provide access to justice to everyone, even those with unpopular beliefs."



Act it Out – Courts: What Can I do?

- Visit NCSC's states homepage to learn more about your own state's court system: https://www.ncsc.org/
- Consider visiting your local county or city court and watch the proceedings. Many court activities and trials are open to the public. Locate your local county or city court through the National Association of Counties website (http://www.naco.org/), the International City Managers Association (http://icma.org/), or the U.S. Courts website (http://www.uscourts.gov/courtlinks/).

State and Local Courts and Sustainability

The judicial branch may not "hold the sword" as does the executive branch, nor "command the purse" as does the legislative branch, but contrary to Alexander Hamilton's view, it does have great influence over American society. In many areas of American life, the courts have fostered needed change when the "political branches" could not do so. In the areas of freedom of speech, racial equality, business regulation, the rights of the accused, and environmental protection, the victories made along the way were often seen not in legislation, but rather in the American courts. State and local courts may be somewhat reluctant participants in the public policy process, but they do have an important role as policymakers nonetheless. Judges are called upon to exercise judicial review of both the legislative and executive branches, interpret laws and constitutions, and make judicial policy. While unified state courts ensure a high level of consistency in the operation of courts, the decentralized operations of local courts make it possible for judges to become key actors in local political life by dealing with litigation reflecting local social, economic, environmental and political conflicts in impartial and constructive ways. Many of the decisions trial court judges make have the potential of establishing important policies affecting local practices in such important areas as zoning, public access to information, the provision of legal services to indigents, permissible policing practices, and equal access to education.

Cases heard in local trial courts can have an important impact on sustainable development throughout the nation; the most recent such case is that of Kelo v. City of New London, Connecticut . The case in question, as with the Dolan case from Oregon discussed above, concerned Fifth Amendment rights set forth in the U.S. Constitution. The controversial issue arose when the City of New London chose to use its power of eminent domain to condemn some private homes so that the property on which they sat could be used as part of the city's economic development plan; a plan would result in this private property being condemned for use by another private party working in concert with the City of New London. The homeowners on the property in question filed a lawsuit in which they challenged the right of the City of New London to exercise its power of eminent domain for this purpose, and their case moved all the way from Connecticut trial and appellate courts to the U.S. Supreme Court. A majority of justices on the U.S. Supreme Court found that the benefits to the community involved justified the condemnation and that the City of New London had provided just compensation for the loss of property suffered by the affected homeowners.

In reaction to this decision, many state legislatures viewed the U.S. Supreme Court's decision as too greatly benefiting large corporations at the expense of families and neighborhood communities. As a result, legislation was introduced in several states and ballot measures were placed on the ballot in other states aimed at amending state constitutions to provide greater protection of private property rights from this type of use (i.e., economic development) of the municipal power of eminent domain. That power is typically employed when there is some pressing need for public ownership of some private land to serve clearly public purposes (for example, creating a roadway for traffic control).

Some could say the City of New London's action condemning some private land for the economic benefit of the entire community represents an action in line with the philosophy of sustainability since economic vitality is one of the pillars upon which sustainability rests. Others might argue that such actions threaten sustainability because they displace neighborhoods and promote social inequity in the form of privileged access to large, outside corporate interests. Such varied interpretations are clearly possible, and it is certain that more court cases such as this will be filed and heard as a consequence of municipal actions taken to promote economic viability coming into conflict with property owners seeking to preserve the current use being made of the land in question.

The Kelo case has caused the strengthening of private property rights in many states because this is a politically popular (and apparently cost-free) action for elected officials to take. However, by strengthening private property rights, states enacting greater protections to homeowners may make it more difficult to promote sustainable development. For example, should a municipality seek to use its power of eminent domain to locate solar collectors to provide cheaper and renewable energy to its utility subscribers, should private property owners adversely affected by the location of those collectors be allowed to prevent such a use of eminent domain? Should the pursuit of sustainability goals be one of the "reasonable grounds" justifying the use of eminent domain in the states where laws more protective of homeowners' rights were enacted in the wake of the Kelo case? One thing is for certain, state court and the judges sitting on trial court and appellate court benches in our states will be hearing just such cases in the years ahead.

State and local courts have impacted sustainability in the past, and they will most certainly do so in the future. Generally speaking, the higher the level of the court, the larger the swath of impact its actions have on sustainability. If a state's Court of Last Resort makes a precedential ruling, then the state's lower courts must follow the dictates of that ruling. This is not to say trial courts are unimportant, as they are most often the first to hear a case that could lead to a change in the law, good or bad, around the rest of the state. Illustrative of the importance of courts in the area of sustainability promotion in state and local government, the case of the widowed grandmother in Orem, Utah stands out. This elderly woman was arrested and taken away in handcuffs for refusing to give a policeman her name so he could issue her a ticket for failing to water her lawn on a regular basis, a violation of an Orem zoning ordinance. If the case goes to trial, it would be heard in the Orem Municipal Court. The reason the grandmother provided for not watering her lawn was that of inability to afford the expense associated with maintaining a green lawn. However, the national attention generated from the case has led to question as to why someone should have to defend themselves in court for a practice that is both uneconomical and wasteful of a precious natural resource – particularly since Utah is the second driest state in the nation.

Conclusion

There are two clear areas within the purview of state and local courts which can impact sustainability in a major way; these are Judicial Federalism and the maintenance of judicial impartiality. Judicial Federalism is a legal term referenced earlier which characterizes situations in which state courts give priority of a state question addressed in state constitutional law over a federal question addressed in federal constitutional law. In the recent past, Judicial Federalism has focused on enhancing the civil rights of a state's vulnerable minorities (e.g., racial and ethnic minorities, the criminally accused) beyond the rights provided in the U.S. Constitution. Today, in the context of the need to address global climate change and actively pursue sustainability, Judicial Federalism could expand its purview to include the protection of other vulnerable environmental minority interests such as wildlife, water resources, ecosystem services, and rural communities. The wellbeing of these interests coincide with the economic and social vitality of local communities, and their interests could be served more flexibly in state law than in federal rules and regulations. In order for Judicial Federalism to be able to work in this area, the state legislatures must refine their constitutions and statutes to reflect the states' desire to pursue sustainable development so that judges in state and local courts can do their part to support public and private actions intended to promote sustainability.

The second area of particular concern, that of the maintenance of judicial impartiality, requires judges and their courts to be independent from outside influences, making decisions based on legal principles, fairness, and equity as opposed to the provision of special consideration based on political party or privileged interest. As much as Americans would love to maintain their current belief in the ideal of blind justice, human fallibility will always be present. The recent trends toward a politicization of the courts and the judicial selection process bought on in the wake of the White decision open the door to the possibility that private interests that benefit from unsustainable practices – such as urban sprawl, sole reliance upon automobile travel for transportation, over-harvesting of forests and excessive extraction of natural resources – will seek to "plant" judges friendly to their interests on state

trial and appellate court benches. Efforts are needed by those who support the goals of sustainability to promote both the independence of their state and local courts and to stem the rising tide of the politicization of courts and the judiciary.

Discussion Questions

- Of the two common methods of judicial appointment — gubernatorial appointment and the merit system (Missouri Plan) — which do you think is the best method and why? Is it really possible to remove "politics" out of judicial appointments?
- What are the various types of state and local courts and what functions do they serve? How about problem solving courts — do they increase the institutional sustainability of communities?
- What are some of the current and potentially future challenges facing state and local court systems? Do you think the politicization of judicial processes will increase or decrease in the future? Why?

Federal Courts [124]

Learning Objectives

- Describe the differences between the U.S. district courts, circuit courts, and the Supreme Court
- Explain the significance of precedent in the courts' operations
- Describe how judges are selected for their positions

Congress has made numerous changes to the federal judicial system throughout the years, but the three-tiered structure of the system is quite clear-cut today. Federal cases typically begin at the lowest federal level, the district (or trial) court. Losing parties may appeal their case to the higher courts—first to the circuit courts, or U.S. courts of appeals, and then, if chosen by the justices, to the U.S. Supreme Court. Decisions of the higher courts are binding on the lower courts. The precedent set by each ruling, particularly by the Supreme Court's decisions, both builds on principles and guidelines set by earlier cases and frames the ongoing operation of the courts, steering the direction of the entire system. Reliance on precedent has enabled the federal courts to operate with logic and consistency that has helped validate their role as the key interpreters of the Constitution and the law—a legitimacy particularly vital in the United States where citizens do not elect federal judges and justices but are still subject to their rulings.

The Three Tiers of Federal Courts

There are ninety-four U.S. district courts in the fifty states and U.S. territories, of which eighty-nine are in the states (at least one in each state). The others are in Washington, DC; Puerto Rico; Guam; the U.S. Virgin Islands; and the Northern Mariana Islands. These are the trial courts of the national system, in which federal cases are tried, witness testimony is heard, and evidence is presented. No district court crosses state lines, and a single judge oversees each one. Some cases are heard by a jury, and some are not.

There are thirteen U.S. courts of appeals , or circuit courts , eleven across the nation and two in Washington, DC (the DC circuit and the federal circuit courts). Each court is overseen by a rotating panel of three judges who do not hold trials but instead review the rulings of the trial (district) courts within their geographic circuit. As authorized by Congress, there are currently 179 judges. The circuit courts are often referred to as the intermediate appellate courts of the federal system, since their rulings can be appealed to the U.S. Supreme Court. Moreover, different circuits can hold legal and cultural views, which can lead to differing outcomes on similar legal questions. In such scenarios, clarification from the U.S. Supreme Court might be needed.

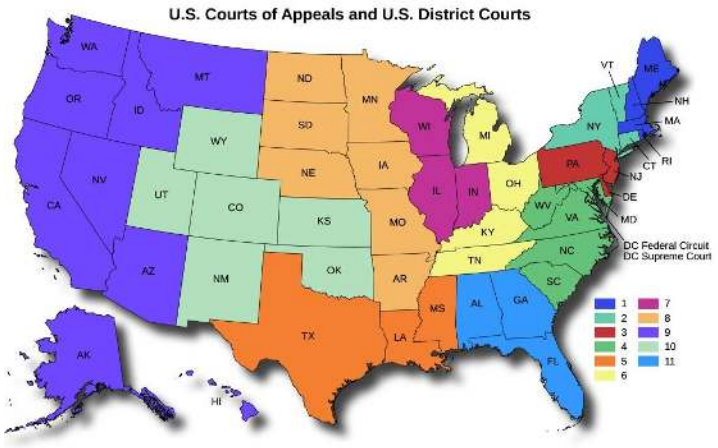


Figure 11.2 There are thirteen judicial circuits: eleven in the geographical areas marked on the map and two in Washington, DC. [125]

Today's federal court system was not an overnight creation; it has been changing and transitioning for more than two hundred years through various acts of Congress. Since district courts are not called for in Article III of the Constitution, Congress established them and narrowly defined their jurisdiction, at first limiting them to handling only cases that arose within the district. Beginning in 1789 when there were just thirteen, the district courts became the basic organizational units of the federal judicial system. Gradually over the next hundred years, Congress expanded their jurisdiction, in particular over federal questions, which enables them to review constitutional issues and matters of federal law. In the Judicial Code of 1911 , Congress made the U.S. district courts the sole general-jurisdiction trial courts of the federal judiciary, a role they had previously shared with the circuit courts.

The circuit courts started out as the trial courts for most federal criminal cases and for some civil suits, including those initiated by the United States and those involving citizens of different states. But early on, they did not have their own judges; the local district judge and two Supreme Court justices formed each circuit court panel. (That is how the name "circuit" arose—judges in the early circuit courts traveled from town to town to hear cases, following prescribed paths or circuits to arrive at destinations where they were needed.) Circuit courts also exercised appellate jurisdiction (meaning they receive appeals on federal district court cases) over most civil suits that originated in the district courts; however, that role ended in 1891, and their appellate jurisdiction was turned over to the newly created circuit courts, or U.S. courts of appeals. The original circuit courts—the ones that did not have "of appeals" added to their name—were abolished in 1911, fully replaced by these new circuit courts of appeals.

While we often focus primarily on the district and circuit courts of the federal system, other federal trial courts exist that have more specialized jurisdictions, such as the Court of International Trade, Court of Federal Claims, and U.S. Tax Court. Specialized federal appeals courts include the Court of Appeals for the Armed Forces and the Court of Appeals for Veterans Claims. Cases from any of these courts may also be appealed to the Supreme Court, although that result is very rare.

On the U.S. Supreme Court , there are nine justices—one chief justice and eight associate justices. Circuit courts each contain three justices, whereas federal district courts have just one judge each. As the national court of last resort for all other courts in the system, the Supreme Court plays a vital role in setting the standards of interpretation that the lower courts follow. The Supreme Court's decisions are binding across the nation and establish the precedent by which future cases are resolved in all the system's tiers.

The U.S. court system operates on the principle of stare decisis (Latin for stand by things decided), which means that today's decisions are based largely on rulings from the past, and tomorrow's rulings rely on what is decided today. Stare decisis is especially important in the U.S. common law system, in which the consistency of precedent ensures greater certainty and stability in law and constitutional interpretation, and it also contributes to the solidity and legitimacy of the court system itself. As former Supreme Court justice Benjamin Cardozo summarized it years ago, "Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts."

With a focus on federal courts and the public, this website reveals the different ways the federal courts affect the lives of U.S. citizens and how those citizens interact with the courts.

When the legal facts of one case are the same as the legal facts of another, stare decisis dictates that they should be decided the same way, and judges are reluctant to disregard precedent without justification. However, that does not mean there is no flexibility or that new precedents or rulings can never be created. They often are. Certainly, court interpretations can change as times and circumstances change—and as the courts themselves change when new judges are selected and take their place on the bench. For example, the membership of the Supreme Court had changed entirely between Plessey v. Ferguson (1896), which brought the doctrine of "separate but equal" and Brown v. Board of Education (1954), which required integration.

The Selection of Judges

Judges fulfill a vital role in the U.S. judicial system and are carefully selected. At the federal level, the president nominates a candidate to a judgeship or justice position, and the nominee must be confirmed by a majority vote in the U.S. Senate, a function of the Senate's "advice and consent" role. All judge s and justices in the national courts serve lifetime terms of office.

The president sometimes chooses nominees from a list of candidates maintained by the American Bar Association , a national professional organization of lawyers. The president's nominee is then discussed (and sometimes hotly debated) in the Senate Judiciary Committee . After a committee vote, the candidate must be confirmed by a majority vote of the full Senate. He or she is then sworn in, taking an oath of office to uphold the Constitution and the laws of the United States.

When a vacancy occurs in a lower federal court, by custom, the president consults with that state's U.S. senators before making a nomination. Through such senatorial courtesy , senators exert considerable influence on the selection of judges in their state, especially those senators who share a party affiliation with the president. In many cases, a senator can block a proposed nominee just by voicing his or her opposition. Thus, a presidential nominee typically does not get far without the support of the senators from the nominee's home state.

Most presidential appointments to the federal judiciary go unnoticed by the public, but when a president has the rarer opportunity to make a Supreme Court appointment, it draws more attention. That is particularly true now, when many people get their news primarily from the Internet and social media. It was not surprising to see not only television news coverage but also blogs and tweets about President Obama 's most recent nominees to the high court, Sonia Sotomayor and Elena Kagan.



Figure 11.3 President Obama has made two appointments to the U.S. Supreme Court, Justices Sonia Sotomayor (a) in 2009 and Elena Kagan (b) in 2010. Since their appointments, both justices have made rulings consistent with a more liberal ideology. The death of Justice Antonin Scalia in February 2016 has prompted the most recent discussion of appointing a new justice, with Obama nominating Merrick Garland to fill the vacant seat. [126]

Presidential nominees for the courts typically reflect the chief executive's own ideological position. With a confirmed nominee serving a lifetime appointment, a president's ideological legacy has the potential to live on long after the end of his or her term. President Obama surely considered the ideological leanings of his two Supreme Court appointees, and both Sotomayor and Kagan have consistently ruled in a more liberal ideological direction. The timing of the two nominations also dovetailed nicely with the Democratic Party's gaining control of the Senate in the 111th Congress of 2009–2011, which helped guarantee their confirmations.

But some nominees turn out to be surprises or end up ruling in ways that the president who nominated them did not anticipate. Democratic-appointed judges sometimes side with conservatives, just as Republican-appointed judges sometimes side with liberals. Republican Dwight D. Eisenhower reportedly called his nomination of Earl Warren as chief justice—in an era that saw substantial broadening of civil and criminal rights—"the biggest damn fool mistake" he had ever made. Sandra Day O'Connor , nominated by Republican president Ronald Reagan , often became a champion for women's rights. David Souter , nominated by Republican George H. W. Bush , more often than not sided with the Court's liberal wing. And even on the present-day court, Anthony Kennedy , a Reagan appointee, has become notorious as the Court's swing vote, sometimes siding with the more conservative justices but

sometimes not. Current chief justice John Roberts , though most typically an ardent member of the Court's more conservative wing, has twice voted to uphold provisions of the Affordable Care Act.

Once a justice has started his or her lifetime tenure on the Court and years begin to pass, many people simply forget which president nominated him or her. For better or worse, sometimes it is only a controversial nominee who leaves a president's legacy behind. For example, the Reagan presidency is often remembered for two controversial nominees to the Supreme Court—Robert Bork and Douglas Ginsburg , the former accused of taking an overly conservative and "extremist view of the Constitution" and the latter of having used marijuana while a student and then a professor at Harvard University. President George W. Bush's nomination of Harriet Miers was withdrawn in the face of criticism from both sides of the political spectrum, questioning her ideological leanings and especially her qualifications, suggesting she was not ready for the job.

After Miers' withdrawal, the Senate went on to confirm Bush's subsequent nomination of Samuel Alito , who remains on the Court today. The 2016 presidential election is especially important because the next president is likely to choose three justices.



Figure 11.4 Presidential nominations to the Supreme Court sometimes go awry, as illustrated by the failed nominations of Robert Bork (a), Douglas Ginsburg (b), and Harriet Miers (c).

Presidential legacy and controversial nominations notwithstanding, there is one certainty about the overall look of the federal court system: What was once a predominately white, male, Protestant institution is today much more diverse. As a look at the table reveals, the membership of the Supreme Court has changed with the passing years.

Table 11.3 Supreme Court Justice Firsts

Supreme Court Justice Firsts	Justice
First Catholic	Roger B. Taney (nominated in 1836)
First Jewish person	Louis J. Brandeis (1916)
First (and only) former U.S. President	William Howard Taft (1921)
First African American	Thurgood Marshall (1967)
First Woman	Sandra Day O'Connor (1981)
First Hispanic American	Sonia Sotomayor (2009)

The lower courts are also more diverse today. In the past few decades, the U.S. judiciary has expanded to include more women and minorities at both the federal and state levels. However, the number of women and people of color on the courts still lags behind the overall number of white men. As of 2009, the federal judiciary consists of 70 percent white men, 15 percent white women, and between 1 and 8 percent African American, Hispanic American, and Asian American men and women.

Summary

The structure of today's three-tiered federal court system, largely established by Congress, is quite clear-cut. The system's reliance on precedent ensures a consistent and stable institution that is still capable of slowly evolving over the years—such as by increasingly reflecting the diverse population it serves. Presidents hope their judicial nominees will make rulings consistent with the chief executive's own ideological leanings. But the lifetime tenure of federal court members gives them the flexibility to act in ways that may or may not reflect what their nominating president intended. Perfect alignment between nominating president and justice is not expected; a judge might be liberal on most issues but conservative on others, or vice versa. However, presidents have

sometimes been surprised by the decisions made by their nominees, such as President Eisenhower was by Justice Earl Warren and President Reagan by Justice Anthony Kennedy.

Chapter 12 – Key Players in the Courtroom

Key Players in the Courtroom [127]

Now that we have familiarized ourselves with structure of the court system, we will learn about the positions within the system. In their 1977 book, Felony Justice: An organizational analysis of criminal courts, James Eisenstein and Herbert Jacob, coined the term "courtroom workgroup." They specifically referred to the cooperative working relationship between prosecutors, defense attorneys, and judges in working together (as opposed to an adversarial relationship that the public might expect) to efficiently resolve most of the cases in the criminal courts. This chapter more generally uses the term to include all the individuals working in the criminal courts—judges, attorneys, and the variety of court staff.

The accusatory phase (the pre-trial phase) and adjudicatory phase (the trial phase) of the criminal justice process include individuals who regularly work together in the trial courts. The prosecutor files the accusatory instrument called either an information or an indictment , and represents the state in plea bargaining, on pretrial motions, during the trial, and in the sentencing phase. The defense attorney represents the defendant after charges have been filed, through the pre-trial process, in a trial, and during sentencing, and maybe on the appeal as well. Judges, aided by several court personnel, conduct the pretrial, trial, and sentencing hearings. Prosecutors, defense counsel, and judges perform different roles, but all are concerned with the judicial process and the interpretation of the law. These law professionals are graduates of law schools and have passed the bar examination establishing their knowledge of the law and their ability to do legal analysis. As persons admitted by the state or federal bar associations to the practice of law, they are subject to the same legal codes of professional responsibility, disciplinary rules, and ethical rules and opinions for lawyers. Although the American criminal justice system is said to represent the adversarial model, the reality is that prosecutors, defense attorneys, judges and court staff work with cooperation and consensus rather than conflict. This is understandable when considering the common goal of efficient and expedition case processing and prescribed and agreed upon rules for achieving those goals.

Trial Judges: Misperceptions and Realities

Trial court judges are responsible for presiding over pre-trial, trial and sentencing hearings, as well as probation and parole revocation hearings. They issue search and arrest warrants, set bail or authorize release, sentence offenders, engage in pre-sentence conferences with attorneys, work with court clerks, bailiffs, jail staff, etc. Trial judges have considerable, but not unlimited, discretion. In addition to the ethical and disciplinary rules governing all attorneys in the state, trial judges are subject to judicial codes of conduct. Judges are bound by the applicable rules of law when deciding cases and writing their legal opinions. Some rules governing judges are flexible guidelines while other rules are very precise requirements.

During the pretrial phase, judges make rulings on the parties' motions, such as motions to exclude certain physical or testimonial evidence, motions to compel discovery, and motions to change venue. Because most cases are resolved prior to trial through plea-bargaining, one important judicial function is taking the defendant's guilty plea.

At trial, if the defendant elects to waive a jury, there is a bench trial, and the judge sits as the "trier of fact." Like jurors in a jury trial, the judge has considerable discretion when deciding what facts were proven (or not) by the parties and what witnesses he or she finds credible. When the defendant elects for a jury trial, the jury decides what the facts are. In either a bench or jury trial, the trial judge rules on the admissibility of evidence (whether a jury is entitled to hear certain testimony or look at physical evidence), whether witnesses are competent, whether privileges exist, whether witnesses qualify as experts, whether jurors will be excused from jury service, etc. At the end of the jury trial, the judge gives a set of jury instructions to the jurors which informs them on the law that applies to the case they are deciding.

If the defendant is convicted, then the judge will impose the sentence. Except for death penalty cases, jurors are generally not involved with sentencing the defendant. Judges have perhaps the broadest discretion in their role imposing sentences. However, with more states enacting mandatory minimums and sentence guidelines, judicial discretion has been severely curtailed.

"In the eyes of most Americans, the judge is the key player in the courtroom workgroup. The symbolism and ceremony of a criminal trial reinforce this view. The judge is seated on a raised bench, robed in black, and wields a gavel to maintain order in the courtroom. Moreover, the participants and spectators—including the defense attorney and the prosecutor—are commanded to 'all

rise' when the judge enters or leaves the courtroom. It is no wonder, then that the judge is seen as the most influential person in court.

This view of the judge, though accurate to some degree, is misleading for at least two reasons. First, although the judge clearly plays an important role—in many cases, the lead role—in state and federal criminal courts, other actors play significant supporting roles. This is particularly the case in the majority of criminal cases that are settled by plea, not trial. In these cases, the key player may be the prosecutor rather than the judge. A second reason why the traditional view of the judge is misleading is that it is based on an inaccurate assessment of the role of the judge. Judging involves more than presiding at trials. In fact, most of what judges do during a typical day or week is something other than presiding at trials—reading case files, conducting hearings, accepting guilty pleas, pronouncing sentences, and managing court dockets."

The role played by the judge, in other words, is both less influential and more varied than the traditional view would have people believe.

Trial Judge Selection and Qualifications

The sole qualification to be a judge in most jurisdictions is graduating from a law school and membership in the state's bar association. Although the trend is for judges to be lawyers prior, a few jurisdictions do not require justices of the peace or municipal judges to be attorneys.

States procedures in selecting judges vary tremendously. "Almost no two states are alike and many states employ different methods of selection depending on the different levels of the judiciary creating 'hybrid' systems of selection." Nevertheless, the primary differences surround whether judges are elected or appointed, or selected based on merit. There are four primary methods used to select judges in the United States: appointment, with or without confirmation by another agency; partisan political election; non-partisan election; and a combination of nomination by a commission, appointment and periodic reelection (the Missouri Plan).

There are variations within these four primary methods. As noted above, states may use different methods to select judges based on the level in the judicial hierarchy. For example, municipal judges may be appointed, while supreme court judges are elected. Each selection method has its critics and advocates, and the relative merits of each are generally judged by the selection methods ability to achieve judicial independence and accountability. Notwithstanding the critiques of each of the methods, there has been little empirical evidence that the quality of judges, in terms of competency, effectiveness, or honesty, varies depending on the methods used to select the judge.

The length of time a judge will "sit", called a term in office or tenure, varies greatly, generally from four to sixteen years. Frequently, the term for a trial judge is less than a term for an appellate judge. At the appellate level, six years is the shortest term, and many states use terms of ten years or more for their appellate judges. Only a few states have lifetime tenure for their judges.

In the federal system, the President appoints Article III judges (U.S. District Court, U.S. Circuit Court, and U.S. Supreme Court judges) with the advice and consent of the Senate. In Article III, U.S. Constitution states that federal judges are appointed to "hold their Offices during Good Behavior." On February 25, 2019, the Court in Rizo v. Yovino, ___ U.S. ___ (2019) refused to address the merits of the case (an important employment wage discrimination case) because the judge who wrote the Ninth Circuit opinion died eleven days before its release. What will likely become an oft-quoted sentiment, "Federal judges are appointed for life, not for eternity."

The district courts appoint federal magistrate judges to either four or eight-year terms. Though it would seem that politics has played an increasing role in the selection of judges in the federal system, perceptions are influenced by what we currently hear and read. The reality is that complaints of political overreaching in selecting federal judges have been with us since the federal courts were first staffed.

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 defendant's financial circumstances. One difficulty in qualifying for a court-appointed attorney is having equity in a home that cannot be easily sold quickly enough to provide resources for the defendant to hire an attorney. Another difficulty for indigency verification officers is getting the information needed from defendants who may be suffering from mental health issues.

Bailiffs

Bailiffs are the court staff responsible for courtroom security. Bailiffs are often local sheriff deputies or other law enforcement officers (or sometimes former officers), but they can also be civilians hired by the court. Sometimes, courts will use volunteer bailiffs. Bailiffs work under the supervision of the trial court administrator. During court proceedings, bailiffs or clerks call the session to order, announce the entry of the judge, make sure that public spectators remain orderly, keep out witnesses who might testify later (if the judge orders them excluded upon request of either party), and attend to the jurors. As courtroom security becomes a bigger concern, law enforcement officers are increasingly used as bailiffs, and they are responsible for the safety of the court personnel, spectators, witnesses, and any of the parties. In some communities, law enforcement bailiffs may transport in-custody defendants from the jail to the courthouse and back. In most jurisdictions today, bailiffs screen people for weapons and require them to silence cell phones before allowing them to enter the courtroom.

Jury Clerk

The jury clerk sends out jury summons to potential jurors, works with jurors requests for postponements of jury service, coordinates with the scheduling clerk to make sure enough potential jurors show up at the courthouse each day there is a trial, schedules enough grand jurors to fill all the necessary grand jury panels, arranges payment to jurors for their jury service, and arranges lodging and meals for jurors in the rare event of jury sequestration.

Court Clerks and Staff

Court structure varies from the courthouse to courthouse, but frequently court staff is divided into units. For example, staff may be assigned to work in the criminal unit, the civil unit, the traffic unit, the small claims unit, the juvenile unit, the family unit, or the probate unit. In smaller communities, there may be just a few court clerks who "do it all". With the trend towards specialized courts (drug courts, mental health courts, domestic violence courts, and veteran courts), staff may specialize in and/or rotate in and out of the various units. Court staff are expected to have a vast knowledge of myriad local court rules and protocols, statutes, and administrative rules that govern filing processes, filing fees, filing timelines, accounting, record maintenance, as well as a knowledge of general office practices such as ordering supplies, mastering office machinery, and ensuring that safety protocol is established and followed. Recently, many courts have transitioned to electronic filing of all documents, usually managed through a centralized state court system. This transition presents challenges to court staff as they learn the new filing software, keep up with new filings, and archive the past court documents.

Release Assistance Officers

Release assistance officers (RAO) are court employees who meet with defendants at the jail to gather information to pass on to the judge who makes release decisions. Release assistance officers make their recommendations based on the defendant's likelihood of

reappearance and other considerations specified by statute or local rules. In determining whether the defendant is likely to reappear, the RAO considers: the defendant's ties to the community, the defendant's prior record of failures to appear, the defendant's employment history, whether the defendant lives in the community, the nature and seriousness of the charges, and any potential threat the defendant may present to the community.

The availability of space at the jail may also play a role in whether an individual is released. Court and jail staff may need to work together to establish release protocols when space is limited. The RAO should have a significant voice in drafting those protocols. Whether the RAO recommends security (bail) or conditional release, the RAO will generally suggest to the judge the conditions that the defendant should abide by if he or she makes bail or is conditionally released. Defendants released prior to trial will sign release agreements indicating the conditions of release recommended by the RAO and imposed by the judge. RAOs may also investigate the defendant's proposed living conditions upon release to make sure that they promote lawful activity and the ability for reappearance for all scheduled court appearances.

Scheduling Clerk

The scheduling clerk, or docketing clerk, set all hearings and trials on the court docket. The scheduling clerk notes the anticipated duration of trials (most trials are concluded within one day), speedy trial constraints, statutory and local court rules time frames, etc. The role of the scheduling clerk is extremely important, and an experienced scheduling clerk contributes to the overall efficiency of the legal process. Ineffective or inefficient scheduling causes delay, frustration, and may impede the justice process. Part of scheduling, or docketing, is keeping track of law enforcement officers' and defense attorneys' scheduled vacations. In addition, the scheduling clerk must be mindful of the judges' calendars which should track scheduled vacation time and training days, and also needed desk time, the time necessary for resolving cases they have taken under advisement. (Note that trial judges can either decide "from the bench", meaning they will rule immediately on the issues before them during the hearing, or after taking the case under advisement, meaning they will rule through a written decision/opinion letter after spending time researching the law, reviewing the parties written pleadings, and considering the oral arguments).

Supreme Court Decisions

Roe v. Wade [128]

A pregnant single woman (Roe) brought a class action challenging the constitutionality of the Texas criminal abortion laws, which proscribe procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life. A licensed physician (Hallford), who had two state abortion prosecutions pending against him, was permitted to intervene. A childless married couple (the Does), the wife not being pregnant, separately attacked the laws, basing alleged injury on the future possibilities of contraceptive failure, pregnancy, unpreparedness for parenthood, and impairment of the wife's health.

A three-judge District Court, which consolidated the actions, held that Roe and Hallford, and members of their classes, had standing to sue and presented justiciable controversies. Ruling that declaratory, though not injunctive, relief was warranted, the court declared the abortion statutes void as vague and over broadly infringing those plaintiffs' Ninth and Fourteenth Amendment rights. The court ruled the Does' complaint not justiciable. Appellants directly appealed to this Court on the injunctive rulings, and appellee cross-appealed from the District Court's grant of declaratory relief to Roe and Hallford.

Held:

1. While 28 U.S.C. § 1253 authorizes no direct appeal to this Court from the grant or denial of declaratory relief alone, review is not foreclosed when the case is properly before the Court on appeal from specific denial of injunctive relief and the arguments as to both injunctive and declaratory relief are necessarily identical.
2. Roe has standing to sue; the Does and Hallford do not.

- Contrary to appellee's contention, the natural termination of Roe's pregnancy did not moot her suit. Litigation involving pregnancy, which is "capable of repetition, yet evading review," is an exception to the usual federal rule that an actual controversy must exist at review stages, and not simply when the action is initiated.
- The District Court correctly refused injunctive, but erred in granting declaratory, relief to Hallford, who alleged no federally protected right not assertible as a defense against the good faith state prosecutions pending against him. Samuels v. Mackell , 401 U. S. 66.

- The Does' complaint, based as it is on contingencies, any one or more of which may not occur, is too speculative to present an actual case or controversy.

3. State criminal abortion laws, like those involved here, that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. Though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of the woman's approach to term.

- For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
- For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
- For the stage subsequent to viability, the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

4. The State may define the term "physician" to mean only a physician currently licensed by the State and may proscribe any abortion by a person who is not a physician as so defined.
5. It is unnecessary to decide the injunctive relief issue, since the Texas authorities will doubtless fully recognize the Court's ruling that the Texas criminal abortion statutes are unconstitutional.

Brown v Board of Education [129]

Consolidated action brought to challenge racial segregation in public schools; Right to equal protection under the 14th Amendment; Judicial review of the "separate but equal" doctrine; Equality / Non-discrimination; Racial Discrimination; Right to Education.

Date of the Ruling:

May 17, 1954

Forum:

U.S. Supreme Court

Type of Forum:

Domestic

Summary:

This class action consolidated a number of cases brought on behalf of black schoolchildren denied admission to segregated public schools, under state law. Public facilities were previously racially segregated in the United States, particularly in the South. The case sought to challenge the "separate but equal" doctrine set forth in Plessy v . Ferguson , 163 U.S. 537 (1896), that governed racial segregation at the time. This doctrine held that substantially equal but separate facilities amounted to equal treatment of the races. The plaintiffs argued that racially segregated public schools are not and cannot be made equal and therefore such a system deprived them of their right to equal protection under the law, in violation of the Fourteenth Amendment of the Constitution of the United States.

The Court, emphasizing the importance of education as a government function and the principal instrument to a child's progression and ultimate success, struck down the legality of racial segregation in public schools. Furthermore, the Court held that when the state undertakes to provide public education it must be made available to all on equal terms, pursuant to the Fourteenth Amendment. The Court concluded that state sanctioned segregation, on the sole basis of race, generates a feeling of inferiority among black children that is likely to undermine their educational and mental development. The Court noted that "separate educational facilities are inherently unequal." Segregated schools deprive minority children of equal educational opportunities, regardless of whether they have access to facilities and other "tangible" factors that are otherwise equal.

Enforcement of the Decision and Outcomes:

After the decision in this landmark case, a number of school districts across the country desegregated peacefully. However, resistance to school desegregation at times resulted in open defiance and violent confrontations, including race riots, civil disturbances, and general resistance to integration in many states. The federal government in some instances deployed federal troops to assist in the integration of public schools; such was the case in Little Rock, Arkansas, in 1957. Cases involving racial segregation in schools still continue. Although racial segregation is no longer legal, in reality, due to economic and other factors, racial segregation in practice continues. Several cases have developed to response to these issues including: Guey Heung Lee v. Johnson , 404 U.S 1215 (1971) – desegregation of Asian schools despite opposition of the Asian students' parents; Milliken v. Bradley , 418 U.S. 717 (1974) — rejected bussing students across school district lines as an effort to facilitate racially diverse schools; Parents Involved in Community Schools v. Seattle School District No. 1 551 U.S. 701, 127 S. Ct. 2738 (2007) — rejected assigning students to schools solely on the basis of race; and the Edgewood decisions which have allowed funding for schools to be generated by property taxes regardless of the disparate funding following racial and economic lines that results.

Groups involved in the case:

- National Association for the Advancement of Colored People (NAACP): http://www.naacp.org/content/main/

Significance of the Case:

Brown v. Board of Education was one of many cases launched by the National Association for the Advancement of Colored People (NAACP) to contest Jim Crow laws – state laws which allowed for or mandated racial segregation or discrimination. This landmark case effectively brought an end to state sanctioned racial segregation and discrimination in the United States. The case not only began an era of racial integration, but also served as an important steppingstone in the Civil Rights Movement and human rights movement in the United States.

Gideon v. Wainwright



Pin It! Gideon v. Wainwright
Follow the link to learn more about Gideon v. Wainwright through the Oyez project.

Loving v. Virginia [130]

Argued April 10, 1967.Decided June 12, 1967.APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA. Bernard S. Cohen and Philip J. Hirschkop argued the cause and filed a brief for appellants. Mr. Hirschkop argued pro hac vice, by special leave of Court.

R. D. McIlwaine III, Assistant Attorney General of Virginia, argued the cause for appellee. With him on the brief were Robert Y. Button, Attorney General, and Kenneth C. Patty, Assistant Attorney General.

William M. Marutani, by special leave of Court, argued the cause for the Japanese American Citizens League, as amicus curiae, urging reversal.

Briefs of amici curiae, urging reversal, were filed by William M. Lewers and William B. Ball for the National Catholic Conference for Interracial Justice et al.; by Robert L. Carter and Andrew D. Weinberger for the National Association for the Advancement of Colored People, and by Jack Greenberg, James M. Nabrit III and Michael Meltsner for the N. A. A. C. P. Legal Defense & Educational Fund, Inc.

T. W. Bruton, Attorney General, and Ralph Moody, Deputy Attorney General, filed a brief for the State of North Carolina, as amicus curiae, urging affirmance.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due

Process Clauses of the Fourteenth Amendment. For reasons which seem to us to reflect the central meaning of those constitutional commands, we conclude that these statutes cannot stand consistently with the Fourteenth Amendment.

In June 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia pursuant to its laws. Shortly after their marriage, the Lovings returned to Virginia and established their marital abode in Caroline County. At the October Term, 1958, of the Circuit Court of Caroline County, a grand jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriages. On January 6, 1959, the Lovings pleaded guilty to the charge and were sentenced to one year in jail; however, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years. He stated in an opinion that:

"Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."

After their convictions, the Lovings took up residence in the District of Columbia. On November 6, 1963, they filed a motion in the state trial court to vacate the judgment and set aside the sentence on the ground that the statutes which they had violated were repugnant to the Fourteenth Amendment. The motion not having been decided by October 28, 1964, the Lovings instituted a class action in the United States District Court for the Eastern District of Virginia requesting that a three-judge court be convened to declare the Virginia anti-miscegenation statutes unconstitutional and to enjoin state officials from enforcing their convictions. On January 22, 1965, the state trial judge denied the motion to vacate the sentences, and the Lovings perfected an appeal to the Supreme Court of Appeals of Virginia. On February 11, 1965, the three-judge District Court continued the case to allow the Lovings to present their constitutional claims to the highest state court.

The Supreme Court of Appeals upheld the constitutionality of the anti-miscegenation statutes and, after modifying the sentence, affirmed the convictions. The Lovings appealed this decision, and we noted probable jurisdiction on December 12, 1966, 385 U. S. 986.

The two statutes under which appellants were convicted and sentenced are part of a comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages. The Lovings were convicted of violating § 20-58 of the Virginia Code:

" Leaving State to evade law. —If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage."

Section 20-59, which defines the penalty for miscegenation, provides:

" Punishment for marriage. —If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years."

Other central provisions in the Virginia statutory scheme are § 20-57, which automatically voids all marriages between "a white person and a colored person" without any judicial proceeding, and §§ 20-54 and 1-14 which, respectively, define "white persons" and "colored persons and Indians" for purposes of the statutory prohibitions. The Lovings have never disputed in the course of this litigation that Mrs. Loving is a "colored person" or that Mr. Loving is a "white person" within the meanings given those terms by the Virginia statutes.

Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications. Penalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period. The present statutory scheme dates from the adoption of the Racial Integrity Act of 1924, passed during the period of extreme nativism which followed the end of the First World War. The central features of this Act, and current Virginia law, are the absolute prohibition of a "white person" marrying other than another "white person," a prohibition against issuing marriage licenses until the issuing official is satisfied that the applicants' statements as to their race are correct, certificates of "racial composition" to be kept by both local and state registrars, and the carrying forward of earlier prohibitions against racial intermarriage.

I.

In upholding the constitutionality of these provisions in the decision below, the Supreme Court of Appeals of Virginia referred to its 1955 decision in Naim v. Naim, 197 Va. 80, 87 S. E. 2d 749, as stating the reasons supporting the validity of these laws. In Naim, the state court concluded that the State's legitimate purposes were "to preserve the racial integrity of its citizens," and to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride," obviously an endorsement of the doctrine of White Supremacy. Id., at 90, 87 S. E. 2d, at 756. The court also reasoned that marriage has traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment.

While the state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power, Maynard v. Hill, 125 U. S. 190 (1888), the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so in light of Meyer v. Nebraska, 262 U. S. 390 (1923), and Skinner v. Oklahoma, 316 U. S. 535 (1942) . Instead, the State argues that the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element 8*8 as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree. Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race. The second argument advanced by the State assumes the validity of its equal application theory. The argument is that, if the Equal Protection Clause does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages. On this question, the State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.

Because we reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose. The mere fact of equal application does not mean that our analysis of these statutes should follow the approach we have taken in cases involving no racial discrimination where the Equal Protection Clause has been arrayed against a statute discriminating between the kinds of advertising which may be displayed on trucks in New York City, Railway Express Agency, Inc. v. New York, 336 U. S. 106 (1949), or an exemption in Ohio's ad valorem tax for merchandise owned by a nonresident in a storage warehouse, Allied Stores of Ohio, 9*9 Inc. v. Bowers, 358 U. S. 522 (1959) . In these cases, involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures. In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.

The State argues that statements in the Thirty-ninth Congress about the time of the passage of the Fourteenth Amendment indicate that the Framers did not intend the Amendment to make unconstitutional state miscegenation laws. Many of the statements alluded to by the State concern the debates over the Freedmen's Bureau Bill, which President Johnson vetoed, and the Civil Rights Act of 1866, 14 Stat. 27, enacted over his veto. While these statements have some relevance to the intention of Congress in submitting the Fourteenth Amendment, it must be understood that they pertained to the passage of specific statutes and not to the broader, organic purpose of a constitutional amendment. As for the various statements directly concerning the Fourteenth Amendment, we have said in connection with a related problem, that although these historical sources "cast some light" they are not sufficient to resolve the problem; "[a]t best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among `all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect." Brown v. Board of Education, 347 U. S. 483, 489 (1954) . See also Strauder 10*10 v. West Virginia, 100 U. S. 303, 310 (1880) . We have rejected the proposition that the debates in the Thirty-ninth Congress or in the state legislatures which ratified the Fourteenth Amendment supported the theory advanced by the State, that the requirement of equal protection of the laws is satisfied by penal laws defining offenses based on racial classifications so long as white and Negro participants in the offense were similarly punished. McLaughlin v. Florida, 379 U. S. 184 (1964) .

The State finds support for its "equal application" theory in the decision of the Court in Pace v. Alabama, 106 U. S. 583 (1883) . In that case, the Court upheld a conviction under an Alabama statute forbidding adultery or fornication between a white person and a Negro which imposed a greater penalty than that of a statute proscribing similar conduct by members of the same race. The Court reasoned that the statute could not be said to discriminate against Negroes because the punishment for each participant in the offense was the same. However, as recently as the 1964 Term, in rejecting the reasoning of that case, we stated " Pace represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court." McLaughlin v. Florida, supra, at 188 . As we there demonstrated, the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States. Slaughter-House Cases, 16 Wall. 36, 71 (1873) ; Strauder v. West Virginia, 100 U. S. 303, 307-308 (1880) ; Ex parte Virginia, 100 U. S. 339, 344-345 (1880) ; Shelley v. Kraemer, 334 U. S. 1 (1948) ; Burton v. Wilmington Parking Authority, 365 U. S. 715 (1961) .

Unquestionably, Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." Hirabayashi v. United States, 320 U. S. 81, 100 (1943) . At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," Korematsu v. United States, 323 U. S. 214, 216 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. Indeed, two members of this Court have already stated that they "cannot conceive of a valid legislative purpose . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense." McLaughlin v. Florida, supra, at 198 (STEWART, J., joined by DOUGLAS, J., concurring).

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

II.

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. Skinner v. Oklahoma, 316 U. S. 535, 541 (1942) . See also Maynard v. Hill, 125 U. S. 190 (1888) . To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

These convictions must be reversed.

It is so ordered.

MR. JUSTICE STEWART, concurring.

I have previously expressed the belief that "it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor." McLaughlin v. Florida, 379 U. S. 184, 198 (concurring opinion) . Because I adhere to that belief, I concur in the judgment of the Court.

Section 1 of the Fourteenth Amendment provides:

"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."

206 Va. 924, 147 S. E. 2d 78 (1966).

Section 20-57 of the Virginia Code provides:

" Marriages void without decree. —All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process." Va. Code Ann. § 20-57 (1960 Repl. Vol.).

Section 20-54 of the Virginia Code provides:

" Intermarriage prohibited; meaning of term `white persons.' —It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term `white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter." Va. Code Ann. § 20-54 (1960 Repl. Vol.).

The exception for persons with less than one-sixteenth "of the blood of the American Indian" is apparently accounted for, in the words of a tract issued by the Registrar of the State Bureau of Vital Statistics, by "the desire of all to recognize as an integral and honored part of the white race the descendants of John Rolfe and Pocahontas…" Plecker, The New Family and Race Improvement, 17 Va. Health Bull., Extra No. 12, at 25-26 (New Family Series No. 5, 1925), cited in Wadlington, The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective, 52 Va. L. Rev. 1189, 1202, n. 93 (1966).

Section 1-14 of the Virginia Code provides:

" Colored persons and Indians defined. —Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one fourth or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes existing in this Commonwealth having one fourth or more of Indian blood and less than one sixteenth of Negro blood shall be deemed tribal Indians." Va. Code Ann. § 1-14 (1960 Repl. Vol.).

After the initiation of this litigation, Maryland repealed its prohibitions against interracial marriage, Md. Laws 1967, c. 6, leaving Virginia and 15 other States with statutes outlawing interracial marriage: Alabama, Ala. Const., Art. 4, § 102, Ala. Code, Tit. 14, § 360 (1958); Arkansas, Ark. Stat. Ann. § 55-104 (1947); Delaware, Del. Code Ann., Tit. 13, § 101 (1953); Florida, Fla. Const., Art. 16, § 24, Fla. Stat. § 741.11 (1965); Georgia, Ga. Code Ann. § 53-106 (1961); Kentucky, Ky. Rev. Stat. Ann. § 402.020 (Supp. 1966); Louisiana, La. Rev. Stat. § 14:79 (1950); Mississippi, Miss. Const., Art. 14, § 263, Miss. Code Ann. § 459 (1956); Missouri, Mo. Rev. Stat. § 451.020 (Supp. 1966); North Carolina, N. C. Const., Art. XIV, § 8, N. C. Gen. Stat. § 14-181 (1953); Oklahoma, Okla. Stat., Tit. 43, § 12 (Supp. 1965); South Carolina, S. C. Const., Art. 3, § 33, S. C. Code Ann. § 20-7 (1962); Tennessee, Tenn. Const., Art. 11, § 14, Tenn. Code Ann. § 36-402 (1955); Texas, Tex. Pen. Code, Art. 492 (1952); West Virginia, W. Va. Code Ann. § 4697 (1961).

Over the past 15 years, 14 States have repealed laws outlawing interracial marriages: Arizona, California, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming.

The first state court to recognize that miscegenation statutes violate the Equal Protection Clause was the Supreme Court of California. Perez v. Sharp, 32 Cal. 2d 711, 198 P. 2d 17 (1948) .

Appellants point out that the State's concern in these statutes, as expressed in the words of the 1924 Act's title, "An Act to Preserve Racial Integrity," extends only to the integrity of the white race. While Virginia prohibits whites from marrying any nonwhite (subject to the exception for the descendants of Pocahontas), Negroes, Orientals, and any other racial class may intermarry without statutory interference. Appellants contend that this distinction renders Virginia's miscegenation statutes arbitrary and unreasonable even assuming the constitutional validity of an official purpose to preserve "racial integrity." We need not reach this contention because we find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the "integrity" of all races.



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CHAPTER OVERVIEW

12: Key Players in the Courtroom

Now that we have familiarized ourselves with structure of the court system, we will learn about the positions within the system. In their 1977 book, Felony Justice: An organizational analysis of criminal courts, James Eisenstein and Herbert Jacob, coined the term "courtroom workgroup." They specifically referred to the cooperative working relationship between **prosecutors, defense attorneys, and judges** in working together (as opposed to an adversarial relationship that the public might expect) to efficiently resolve most of the cases in the criminal courts. This chapter more generally uses the term to include all the individuals working in the criminal courts—judges, attorneys, and the variety of court staff.

The **accusatory phase** (the pre-trial phase) and **adjudicatory phase** (the trial phase) of the criminal justice process include individuals who regularly work together in the trial courts. The prosecutor files the accusatory instrument called either **an information or an indictment,** and represents the state in plea bargaining, on pretrial motions, during the trial, and in the sentencing phase. The defense attorney represents the defendant after charges have been filed, through the pre-trial process, in a trial, and during sentencing, and maybe on the appeal as well. Judges, aided by several court personnel, conduct the pretrial, trial, and sentencing hearings. Prosecutors, defense counsel, and judges perform different roles, but all are concerned with the judicial process and the interpretation of the law. These law professionals are graduates of law schools and have passed the bar examination establishing their knowledge of the law and their ability to do legal analysis. As persons admitted by the state or federal bar associations to the practice of law, they are subject to the same legal codes of professional responsibility, disciplinary rules, and ethical rules and opinions for lawyers. Although the American criminal justice system is said to represent the adversarial model, the reality is that prosecutors, defense attorneys, judges and court staff work with cooperation and consensus rather than conflict. This is understandable when considering the common goal of efficient and expedition case processing and prescribed and agreed upon rules for achieving those goals. Trial Judges: Misperceptions and Realities Trial court judges are responsible for presiding over pre-trial, trial and sentencing hearings, as well as probation and parole revocation hearings. They issue search and arrest warrants, set bail or authorize release, sentence offenders, engage in pre-sentence conferences with attorneys, work with court clerks, bailiffs, jail staff, etc. Trial judges have considerable, but not unlimited, discretion. In addition to the ethical and disciplinary rules governing all attorneys in the state, trial judges are subject to judicial codes of conduct. Judges are bound by the applicable rules of law when deciding cases and writing their legal opinions. Some rules governing judges are flexible guidelines while other rules are very precise requirements.

12.1: Key Players in the Courtroom
12.2: Supreme Court Decisions

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12.1: Key Players in the Courtroom

Trial Judges: Misperceptions and Realities

Trial court judges are responsible for presiding over pre-trial, trial and sentencing hearings, as well as probation and parole revocation hearings. They issue search and arrest warrants, set bail or authorize release, sentence offenders, engage in pre-sentence conferences with attorneys, work with court clerks, bailiffs, jail staff, etc. Trial judges have considerable, but not unlimited, discretion. In addition to the ethical and disciplinary rules governing all attorneys in the state, trial judges are subject to judicial codes of conduct. Judges are bound by the applicable rules of law when deciding cases and writing their legal opinions. Some rules governing judges are flexible guidelines while other rules are very precise requirements.

During the pretrial phase, judges make rulings on the parties' motions, such as motions to exclude certain physical or testimonial evidence, motions to compel discovery, and motions to change venue. Because most cases are resolved prior to trial through plea-bargaining, one important judicial function is taking the defendant's guilty plea.

At trial, if the defendant elects to waive a jury, there is a **bench trial,** and the judge sits as the "trier of fact." Like jurors in a jury trial, the judge has considerable discretion when deciding what facts were proven (or not) by the parties and what witnesses he or she finds credible. When the defendant elects for a jury trial, the jury decides what the facts are. In either a bench or jury trial, the trial judge rules on the admissibility of evidence (whether a jury is entitled to hear certain testimony or look at physical evidence), whether witnesses are competent, whether privileges exist, whether witnesses qualify as experts, whether jurors will be excused from jury service, etc. At the end of the jury trial, the judge gives a set of **jury instructions** to the jurors which informs them on the law that applies to the case they are deciding.

If the defendant is convicted, then the judge will impose the sentence. Except for death penalty cases, jurors are generally not involved with sentencing the defendant. Judges have perhaps the broadest discretion in their role imposing sentences. However, with more states enacting mandatory minimums and sentence guidelines, judicial discretion has been severely curtailed.

"In the eyes of most Americans, the judge is the key player in the courtroom workgroup. The symbolism and ceremony of a criminal trial reinforce this view. The judge is seated on a raised bench, robed in black, and wields a gavel to maintain order in the courtroom. Moreover, the participants and spectators—including the defense attorney and the prosecutor—are commanded to 'all rise' when the judge enters or leaves the courtroom. It is no wonder, then that the judge is seen as the most influential person in court.

This view of the judge, though accurate to some degree, is misleading for at least two reasons. First, although the judge clearly plays an important role—in many cases, the lead role—in state and federal criminal courts, other actors play significant supporting roles. This is particularly the case in the majority of criminal cases that are settled by plea, not trial. In these cases, the key player may be the prosecutor rather than the judge. A second reason why the traditional view of the judge is misleading is that it is based on an inaccurate assessment of the role of the judge. Judging involves more than presiding at trials. In fact, most of what judges do during a typical day or week is something other than presiding at trials—reading case files, conducting hearings, accepting guilty pleas, pronouncing sentences, and managing court dockets."

The role played by the judge, in other words, is both less influential and more varied than the traditional view would have people believe.

Trial Judge Selection and Qualifications

The sole qualification to be a judge in most jurisdictions is graduating from a law school and membership in the state's bar association. Although the trend is for judges to be lawyers prior, a few jurisdictions do not require justices of the peace or municipal judges to be attorneys.

States procedures in selecting judges vary tremendously. "Almost no two states are alike and many states employ different methods of selection depending on the different levels of the judiciary creating 'hybrid' systems of selection." Nevertheless, the primary differences surround whether judges are elected or appointed, or selected based on merit. There are four primary methods used to select judges in the United States: appointment, with or without confirmation by another agency; partisan political election; non-partisan election; and a combination of nomination by a commission, appointment and periodic reelection (the Missouri Plan).

There are variations within these four primary methods. As noted above, states may use different methods to select judges based on the level in the judicial hierarchy. For example, municipal judges may be appointed, while supreme court judges are elected. Each selection method has its critics and advocates, and the relative merits of each are generally judged by the selection methods ability to achieve judicial independence and accountability. Notwithstanding the critiques of each of the methods, there has been little empirical evidence that the quality of judges, in terms of competency, effectiveness, or honesty, varies depending on the methods used to select the judge.

The length of time a judge will "sit", called a term in office or tenure, varies greatly, generally from four to sixteen years. Frequently, the term for a trial judge is less than a term for an appellate judge. At the appellate level, six years is the shortest term, and many states use terms of ten years or more for their appellate judges. Only a few states have lifetime tenure for their judges.

In the federal system, the President appoints Article III judges (U.S. District Court, U.S. Circuit Court, and U.S. Supreme Court judges) with the advice and consent of the Senate. In Article III, U.S. Constitution states that federal judges are appointed to "hold their Offices during Good Behavior." On February 25, 2019, the Court in Rizo v. Yovino, ___ U.S. ___ (2019) refused to address the merits of the case (an important employment wage discrimination case) because the judge who wrote the Ninth Circuit opinion died eleven days before its release. What will likely become an oft-quoted sentiment, "Federal judges are appointed for life, not for eternity."

The district courts appoint federal magistrate judges to either four or eight-year terms. Though it would seem that politics has played an increasing role in the selection of judges in the federal system, perceptions are influenced by what we currently hear and read. The reality is that complaints of political overreaching in selecting federal judges have been with us since the federal courts were first staffed.

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 courtappointed attorney varies from place to place, and each IVO uses a screening device that takes into consideration the cost of defense in the locality as well as defendant's financial circumstances. One difficulty in qualifying for a court-appointed attorney is having equity in a home that cannot be easily sold quickly enough to provide resources for the defendant to hire an attorney. Another difficulty for indigency verification officers is getting the information needed from defendants who may be suffering from mental health issues.

Bailiffs

Bailiffs are the court staff responsible for courtroom security. Bailiffs are often local sheriff deputies or other law enforcement officers (or sometimes former officers), but they can also be civilians hired by the court. Sometimes, courts will use volunteer bailiffs. Bailiffs work under the supervision of the trial court administrator. During court proceedings, bailiffs or clerks call the session to order, announce the entry of the judge, make sure that public spectators remain orderly, keep out witnesses who might testify later (if the judge orders them excluded upon request of either party), and attend to the jurors. As courtroom security becomes a bigger concern, law enforcement officers are increasingly used as bailiffs, and they are responsible for the safety of the court personnel, spectators, witnesses, and any of the parties. In some communities, law enforcement bailiffs may transport in-custody defendants from the jail to the courthouse and back. In most jurisdictions today, bailiffs screen people for weapons and require them to silence cell phones before allowing them to enter the courtroom.

Jury Clerk

The jury clerk sends out jury summons to potential jurors, works with jurors requests for postponements of jury service, coordinates with the scheduling clerk to make sure enough potential jurors show up at the courthouse each day there is a trial, schedules enough grand jurors to fill all the necessary grand jury panels, arranges payment to jurors for their jury service, and arranges lodging and meals for jurors in the rare event of jury sequestration.

Court Clerks and Staff

Court structure varies from the courthouse to courthouse, but frequently court staff is divided into units. For example, staff may be assigned to work in the criminal unit, the civil unit, the traffic unit, the small claims unit, the juvenile unit, the family unit, or the probate unit. In smaller communities, there may be just a few court clerks who “do it all”. With the trend towards specialized courts (drug courts, mental health courts, domestic violence courts, and veteran courts), staff may specialize in and/or rotate in and out of the various units. Court staff are expected to have a vast knowledge of myriad local court rules and protocols, statutes, and administrative rules that govern filing processes, filing fees, filing timelines, accounting, record maintenance, as well as a knowledge of general office practices such as ordering supplies, mastering office machinery, and ensuring that safety protocol is established and followed. Recently, many courts have transitioned to electronic filing of all documents, usually managed through a centralized state court system. This transition presents challenges to court staff as they learn the new filing software, keep up with new filings, and archive the past court documents.

Release Assistance Officers

Release assistance officers (RAO) are court employees who meet with defendants at the jail to gather information to pass on to the judge who makes release decisions. Release assistance officers make their recommendations based on the defendant’s likelihood of reappearance and other considerations specified by statute or local rules. In determining whether the defendant is likely to reappear, the RAO considers: the defendant’s ties to the community, the defendant’s prior record of failures to appear, the defendant’s employment history, whether the defendant lives in the community, the nature and seriousness of the charges, and any potential threat the defendant may present to the community.

The availability of space at the jail may also play a role in whether an individual is released. Court and jail staff may need to work together to establish release protocols when space is limited. The RAO should have a significant voice in drafting those protocols. Whether the RAO recommends security (bail) or conditional release, the RAO will generally suggest to the judge the conditions that the defendant should abide by if he or she makes bail or is conditionally released. Defendants released prior to trial will sign release agreements indicating the conditions of release recommended by the RAO and imposed by the judge. RAOs may also investigate the defendant’s proposed living conditions upon release to make sure that they promote lawful activity and the ability for reappearance for all scheduled court appearances.

Scheduling Clerk

The scheduling clerk, or docketing clerk, set all hearings and trials on the court docket. The scheduling clerk notes the anticipated duration of trials (most trials are concluded within one day), speedy trial constraints, statutory and local court rules time frames, etc. The role of the scheduling clerk is extremely important, and an experienced scheduling clerk contributes to the overall efficiency of the legal process. Ineffective or inefficient scheduling causes delay, frustration, and may impede the justice process. Part of scheduling, or docketing, is keeping track of law enforcement officers’ and defense attorneys’ scheduled vacations. In

addition, the scheduling clerk must be mindful of the judges' calendars which should track scheduled vacation time and training days, and also needed desk time, the time necessary for resolving cases they have **taken under advisement**. (Note that trial judges can either decide "from the bench", meaning they will rule immediately on the issues before them during the hearing, or after taking the case under advisement, meaning they will rule through a written decision/opinion letter after spending time researching the law, reviewing the parties written pleadings, and considering the oral arguments).

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12.2: Supreme Court Decisions

Roe v. Wade

A pregnant single woman (Roe) brought a class action challenging the constitutionality of the Texas criminal abortion laws, which proscribe procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life. A licensed physician (Hallford), who had two state abortion prosecutions pending against him, was permitted to intervene. A childless married couple (the Does), the wife not being pregnant, separately attacked the laws, basing alleged injury on the future possibilities of contraceptive failure, pregnancy, unpreparedness for parenthood, and impairment of the wife's health.

A three-judge District Court, which consolidated the actions, held that Roe and Hallford, and members of their classes, had standing to sue and presented justiciable controversies. Ruling that declaratory, though not injunctive, relief was warranted, the court declared the abortion statutes void as vague and over broadly infringing those plaintiffs' Ninth and Fourteenth Amendment rights. The court ruled the Does' complaint not justiciable. Appellants directly appealed to this Court on the injunctive rulings, and appellee cross-appealed from the District Court's grant of declaratory relief to Roe and Hallford.

Held:

1. While 28 U.S.C. § 1253 authorizes no direct appeal to this Court from the grant or denial of declaratory relief alone, review is not foreclosed when the case is properly before the Court on appeal from specific denial of injunctive relief and the arguments as to both injunctive and declaratory relief are necessarily identical.

2. Roe has standing to sue; the Does and Hallford do not.

- Contrary to appellee's contention, the natural termination of Roe's pregnancy did not moot her suit. Litigation involving pregnancy, which is "capable of repetition, yet evading review," is an exception to the usual federal rule that an actual controversy must exist at review stages, and not simply when the action is initiated.
- The District Court correctly refused injunctive, but erred in granting declaratory, relief to Hallford, who alleged no federally protected right not assertible as a defense against the good faith state prosecutions pending against him. Samuels v. Mackell, 401 U. S. 66.
- The Does' complaint, based as it is on contingencies, any one or more of which may not occur, is too speculative to present an actual case or controversy.

3. State criminal abortion laws, like those involved here, that except from criminality only a lifesaving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. Though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of the woman's approach to term.

- For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
- For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
- For the stage subsequent to viability, the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

4. The State may define the term "physician" to mean only a physician currently licensed by the State and may proscribe any abortion by a person who is not a physician as so defined.

5. It is unnecessary to decide the injunctive relief issue, since the Texas authorities will doubtless fully recognize the Court's ruling that the Texas criminal abortion statutes are unconstitutional.

Source

Martella, M. Law 101: Fundamentals of the Law. ROE v. WADE | Law 101: Fundamentals of the Law. https://courses.lumenlearning.com/suny-monroe-law101/chapter/roe-v-wade-410-u-s-113- 1973/.

Brown v Board of Education

Consolidated action brought to challenge racial segregation in public schools; Right to equal protection under the 14th Amendment; Judicial review of the "separate but equal" doctrine; Equality / Nondiscrimination; Racial Discrimination; Right to Education.

Date of the Ruling: May 17, 1954

Forum: U.S. Supreme Court

Type of Forum: Domestic

Summary:

This class action consolidated a number of cases brought on behalf of black schoolchildren denied admission to segregated public schools, under state law. Public facilities were previously racially segregated in the United States, particularly in the South. The case sought to challenge the "separate but equal" doctrine set forth in **Plessy v. Ferguson,** 163 U.S. 537 (1896), that governed racial segregation at the time. This doctrine held that substantially equal but separate facilities amounted to equal treatment of the races. The plaintiffs argued that racially segregated public schools are not and cannot be made equal and therefore such a system deprived them of their right to equal protection under the law, in violation of the Fourteenth Amendment of the Constitution of the United States.

The Court, emphasizing the importance of education as a government function and the principal instrument to a child's progression and ultimate success, struck down the legality of racial segregation in public schools. Furthermore, the Court held that when the state undertakes to provide public education it must be made available to all on equal terms, pursuant to the Fourteenth Amendment. The Court concluded that state sanctioned segregation, on the sole basis of race, generates a feeling of inferiority among black children that is likely to undermine their educational and mental development. The Court noted that "separate educational facilities are inherently unequal." Segregated schools deprive minority children of equal educational opportunities, regardless of whether they have access to facilities and other "tangible" factors that are otherwise equal.

Enforcement of the Decision and Outcomes:

After the decision in this landmark case, a number of school districts across the country desegregated peacefully. However, resistance to school desegregation at times resulted in open defiance and violent confrontations, including race riots, civil disturbances, and general resistance to integration in many states. The federal government in some instances deployed federal troops to assist in the integration of public schools; such was the case in Little Rock, Arkansas, in 1957. Cases involving racial segregation in schools still continue. Although racial segregation is no longer legal, in reality, due to economic and other factors, racial segregation in practice continues. Several cases have developed to response to these issues including: **Guey Heung Lee v. Johnson**, 404 U.S 1215 (1971) – desegregation of Asian schools despite opposition of the Asian students' parents; **Milliken v. Bradley**, 418 U.S. 717 (1974) — rejected bussing students across school district lines as an effort to facilitate racially diverse schools; **Parents Involved in Community Schools v. Seattle School District No. 1** 551 U.S. 701, 127 S. Ct. 2738 (2007) — rejected assigning students to schools solely on the basis of race; and the **Edgewood** decisions which have allowed funding for schools to be generated by property taxes regardless of the disparate funding following racial and economic lines that results.

Groups involved in the case:

• National Association for the Advancement of Colored People (NAACP): http://www.naacp.org/content/main/

Significance of the Case:

Brown v. Board of Education was one of many cases launched by the National Association for the Advancement of Colored People (NAACP) to contest Jim Crow laws – state laws which allowed for or mandated racial segregation or discrimination. This landmark case effectively brought an end to state sanctioned racial segregation and discrimination in the United States. The case not only began an era of racial integration, but also served as an important steppingstone in the Civil Rights Movement and human rights movement in the United States.

Source

Burrell, K. United States History: Reconstruction to the Present. Lumen. https://courses.lumenlearning.com/atd-hostos-ushistory/chapter/brown-v-board-of-education347-u-s-483/.

Gideon v. Wainwright

Note

Follow the link to learn more about Gideon v. Wainwright through the Oyez project.

Loving v. Virginia

Argued April 10, 1967.Decided June 12, 1967.APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA. *Bernard S. Cohen and Philip J. Hirschkop* argued the cause and filed a brief for appellants. Mr. Hirschkop argued pro hac vice, by special leave of Court.

R. D. McIlwaine III, Assistant Attorney General of Virginia, argued the cause for appellee. With him on the brief were R*obert Y. Button*, Attorney General, and *Kenneth C. Patty*, Assistant Attorney General.

William M. Marutani, by special leave of Court, argued the cause for the Japanese American Citizens League, as amicus curiae, urging reversal.

Briefs of amici curiae, urging reversal, were filed by *William M. Lewers* and *William B. Ball* for the National Catholic Conference for Interracial Justice et al.; by *Robert L. Carter* and *Andrew D. Weinberger* for the National Association for the Advancement of Colored People, and by *Jack Greenberg*, *James M. Nabrit III* and *Michael Meltsner* for the N. A. A. C. P. Legal Defense & Educational Fund, Inc.

T. W. Bruton, Attorney General, and *Ralph Moody*, Deputy Attorney General, filed a brief for the State of North Carolina, as amicus curiae, urging affirmance.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. For reasons which seem to us to reflect the central meaning of those constitutional commands, we conclude that these statutes cannot stand consistently with the Fourteenth Amendment.

In June 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia pursuant to its laws. Shortly after their marriage, the Lovings returned to Virginia and established their marital abode in Caroline County. At the October Term, 1958, of the Circuit Court of Caroline County, a grand jury issued an indictment charging the Lovings with violating Virginia’s ban on interracial marriages. On January 6, 1959, the Lovings pleaded guilty to the charge and were sentenced to one year in jail; however, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years. He stated in an opinion that:

“Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.”

After their convictions, the Lovings took up residence in the District of Columbia. On November 6, 1963, they filed a motion in the state trial court to vacate the judgment and set aside the sentence on the ground that the statutes which they had violated were repugnant to the Fourteenth Amendment. The motion not having been decided by October 28, 1964, the Lovings instituted a class action in the United States District Court for the Eastern District of Virginia requesting that a three-judge court be convened to declare the Virginia anti-miscegenation statutes unconstitutional and to enjoin state officials from enforcing their convictions. On January 22, 1965, the state trial judge denied the motion to vacate the sentences, and the Lovings perfected an appeal to the Supreme Court of Appeals of Virginia. On February 11, 1965, the three-judge District Court continued the case to allow the Lovings to present their constitutional claims to the highest state court.

The Supreme Court of Appeals upheld the constitutionality of the anti-miscegenation statutes and, after modifying the sentence, affirmed the convictions. The Lovings appealed this decision, and we noted probable jurisdiction on December 12, 1966, 385 U. S. 986.

The two statutes under which appellants were convicted and sentenced are part of a comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages. The Lovings were convicted of violating § 20-58 of the Virginia Code:

"Leaving State to evade law.—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage."

Section 20-59, which defines the penalty for miscegenation, provides:

"Punishment for marriage.—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years."

Other central provisions in the Virginia statutory scheme are § 20-57, which automatically voids all marriages between "a white person and a colored person" without any judicial proceeding, and §§ 20- 54 and 1-14 which, respectively, define "white persons" and "colored persons and Indians" for purposes of the statutory prohibitions. The Lovings have never disputed in the course of this litigation that Mrs. Loving is a "colored person" or that Mr. Loving is a "white person" within the meanings given those terms by the Virginia statutes.

Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications. Penalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period. The present statutory scheme dates from the adoption of the Racial Integrity Act of 1924, passed during the period of extreme nativism which followed the end of the First World War. The central features of this Act, and current Virginia law, are the absolute prohibition of a "white person" marrying other than another "white person," a prohibition against issuing marriage licenses until the issuing official is satisfied that the applicants' statements as to their race are correct, certificates of "racial composition" to be kept by both local and state registrars, and the carrying forward of earlier prohibitions against racial intermarriage.

I. In upholding the constitutionality of these provisions in the decision below, the Supreme Court of Appeals of Virginia referred to its 1955 decision in Naim v. Naim, 197 Va. 80, 87 S. E. 2d 749, as stating the reasons supporting the validity of these laws. In Naim, the state court concluded that the State's legitimate purposes were "to preserve the racial integrity of its citizens," and to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride," obviously an endorsement of the doctrine of White Supremacy. Id., at 90, 87 S. E. 2d, at 756. The court also reasoned that marriage has traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment.

While the state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power, Maynard v. Hill, 125 U. S. 190 (1888), the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so in light of Meyer v. Nebraska, 262 U. S. 390 (1923), and Skinner v. Oklahoma, 316 U. S. 535 (1942). Instead, the State argues that the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element 8*8 as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree. Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race. The second argument advanced by the State assumes the validity of its equal application theory. The argument is that, if the Equal Protection Clause does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages. On this question, the State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.

Because we reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose. The mere fact of equal application does not mean that our analysis of these statutes should follow the approach we have taken in cases involving no racial discrimination where the Equal Protection Clause has been arrayed against a statute discriminating between the kinds of advertising which may be displayed on trucks in New York City, Railway Express Agency, Inc. v. New York, 336 U. S. 106 (1949), or an exemption in Ohio's ad valorem tax for merchandise owned by a nonresident in a storage warehouse, Allied Stores of Ohio, 9*9 Inc. v. Bowers, 358 U. S. 522 (1959). In these cases, involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures. In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.

The State argues that statements in the Thirty-ninth Congress about the time of the passage of the Fourteenth Amendment indicate that the Framers did not intend the Amendment to make unconstitutional state miscegenation laws. Many of the statements alluded to by the State concern the debates over the Freedmen's Bureau Bill, which President Johnson vetoed, and the Civil Rights Act of 1866, 14 Stat. 27, enacted over his veto. While these statements have some relevance to the intention of Congress in submitting the Fourteenth Amendment, it must be understood that they pertained to the passage of specific statutes and not to the broader, organic purpose of a constitutional amendment. As for the various statements directly concerning the Fourteenth Amendment, we have said in connection with a related problem, that although these historical sources "cast some light" they are not sufficient to resolve the problem; "[a]t best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among `all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect." Brown v. Board of Education, 347 U. S. 483, 489 (1954). See also Strauder 10*10 v. West Virginia, 100 U. S. 303, 310 (1880). We have rejected the proposition that the debates in the Thirty-ninth Congress or in the state legislatures which ratified the Fourteenth Amendment supported the theory advanced by the State, that the requirement of equal protection of the laws is satisfied by penal laws defining offenses based on racial classifications so long as white and Negro participants in the offense were similarly punished. McLaughlin v. Florida, 379 U. S. 184 (1964).

The State finds support for its "equal application" theory in the decision of the Court in Pace v. Alabama, 106 U. S. 583 (1883). In that case, the Court upheld a conviction under an Alabama statute forbidding adultery or fornication between a white person and a Negro which imposed a greater penalty than that of a statute proscribing similar conduct by members of the same race. The Court reasoned that the statute could not be said to discriminate against Negroes because the punishment for each participant in the offense was the same. However, as recently as the 1964 Term, in rejecting the reasoning of that case, we stated "Pace represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court." McLaughlin v. Florida, supra, at 188. As we there demonstrated, the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States. Slaughter-House Cases, 16 Wall. 36, 71 (1873); Strauder v. West Virginia, 100 U. S. 303, 307-308 (1880); Ex parte Virginia, 100 U. S. 339, 344-345 (1880); Shelley v. Kraemer, 334 U. S. 1 (1948); Burton v. Wilmington Parking Authority, 365 U. S. 715 (1961).

Unquestionably, Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." Hirabayashi v. United States, 320 U. S. 81, 100 (1943). At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," Korematsu v. United States, 323 U. S. 214, 216 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. Indeed, two members of this Court have already stated that they "cannot conceive of a valid legislative purpose . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense." McLaughlin v. Florida, supra, at 198 (STEWART, J., joined by DOUGLAS, J., concurring).

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

II. These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. Skinner v. Oklahoma, 316 U. S. 535, 541 (1942). See also Maynard v. Hill, 125 U. S. 190 (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

These convictions must be reversed.

It is so ordered.

MR. JUSTICE STEWART, concurring.

I have previously expressed the belief that "it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor." McLaughlin v. Florida, 379 U. S. 184, 198 (concurring opinion). Because I adhere to that belief, I concur in the judgment of the Court.

Section 1 of the Fourteenth Amendment provides:

"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."

206 Va. 924, 147 S. E. 2d 78 (1966).

Section 20-57 of the Virginia Code provides:

"*Marriages void without decree.*—All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process." Va. Code Ann. § 20-57 (1960 Repl. Vol.).

Section 20-54 of the Virginia Code provides:

"*Intermarriage prohibited; meaning of term `white persons.'*—It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term `white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter." Va. Code Ann. § 20-54 (1960 Repl. Vol.).

The exception for persons with less than one-sixteenth "of the blood of the American Indian" is apparently accounted for, in the words of a tract issued by the Registrar of the State Bureau of Vital Statistics, by "the desire of all to recognize as an integral and honored part of the white race the descendants of John Rolfe and Pocahontas…" Plecker, The New Family and Race Improvement, 17 Va. Health Bull., Extra No. 12, at 25-26 (New Family Series No. 5, 1925), cited in Wadlington, The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective, 52 Va. L. Rev. 1189, 1202, n. 93 (1966).

Section 1-14 of the Virginia Code provides:

"Colored persons and Indians defined.—Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one fourth or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes existing in this Commonwealth having one fourth or more of Indian blood and less than one sixteenth of Negro blood shall be deemed tribal Indians." Va. Code Ann. § 1-14 (1960 Repl. Vol.).

After the initiation of this litigation, Maryland repealed its prohibitions against interracial marriage, Md. Laws 1967, c. 6, leaving Virginia and 15 other States with statutes outlawing interracial marriage: Alabama, Ala. Const., Art. 4, § 102, Ala. Code, Tit. 14, § 360 (1958); Arkansas, Ark. Stat. Ann. § 55-104 (1947); Delaware, Del. Code Ann., Tit. 13, § 101 (1953); Florida, Fla. Const., Art. 16, § 24, Fla. Stat. § 741.11 (1965); Georgia, Ga. Code Ann. § 53-106 (1961); Kentucky, Ky. Rev. Stat. Ann. § 402.020 (Supp. 1966); Louisiana, La. Rev. Stat. § 14:79 (1950); Mississippi, Miss. Const., Art. 14, § 263, Miss. Code Ann. § 459 (1956); Missouri, Mo. Rev. Stat. § 451.020 (Supp. 1966); North Carolina, N. C. Const., Art. XIV, § 8, N. C. Gen. Stat. § 14-181 (1953); Oklahoma, Okla. Stat., Tit. 43, § 12 (Supp. 1965); South Carolina, S. C. Const., Art. 3, § 33, S. C. Code Ann. § 20-7 (1962); Tennessee, Tenn. Const., Art. 11, § 14, Tenn. Code Ann. § 36-402 (1955); Texas, Tex. Pen. Code, Art. 492 (1952); West Virginia, W. Va. Code Ann. § 4697 (1961).

Over the past 15 years, 14 States have repealed laws outlawing interracial marriages: Arizona, California, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming.

The first state court to recognize that miscegenation statutes violate the Equal Protection Clause was the Supreme Court of California. Perez v. Sharp, 32 Cal. 2d 711, 198 P. 2d 17 (1948).

Appellants point out that the State's concern in these statutes, as expressed in the words of the 1924 Act's title, "An Act to Preserve Racial Integrity," extends only to the integrity of the white race. While Virginia prohibits whites from marrying any nonwhite (subject to the exception for the descendants of Pocahontas), Negroes, Orientals, and any other racial class may intermarry without statutory interference. Appellants contend that this distinction renders Virginia's miscegenation statutes arbitrary and unreasonable even assuming the constitutional validity of an official purpose to preserve "racial integrity." We need not reach this contention because we find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the "integrity" of all races.

Source

Knights, W. Loving v. Virginia. Constitutional Law. https://pressbooks.online.ucf.edu/constitutionallaw/chapter/loving-v-virginia/.

Marbury v. Madison

Note

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CHAPTER OVERVIEW

13: Bail and the Trial Process

13.1: The Trial Process

13.2: Legal Rights During Trial

13.3: Standards of Proof

13.4: Steps in Jury Trial

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13.1: The Trial Process

The Trial Process [131]

When a trial occurs, the first order of business is to select a jury. (in a civil case of any consequence, either party can request one, based on the Sixth Amendment to the US Constitution.) The judge and sometimes the lawyers are permitted to question the jurors to be sure that they are unbiased. This questioning is known as the voir dire (pronounced vwahr-DEER). This is an important process, and a great deal of thought goes into selecting the jury, especially in high-profile cases. A jury panel can be as few as six persons, or as many as twelve, with alternates selected and sitting in court in case one of the jurors is unable to continue. In a long trial, having alternates is essential; even in shorter trials, most courts will have at least two alternate jurors.

In both criminal and civil trials, each side has opportunities to challenge potential jurors for cause. For example, in the Robinsons' case against Audi, the attorneys representing Audi will want to know if any prospective jurors have ever owned an Audi, what their experience has been, and if they had a similar problem (or worse) with their Audi that was not resolved to their satisfaction. If so, the defense attorney could well believe that such a juror has a potential for a bias against her client. In that case, she could use a challenge for cause, explaining to the judge the basis for her challenge. The judge, at her discretion, could either accept the for-cause reason or reject it.

Even if an attorney cannot articulate a for-cause reason acceptable to the judge, he may use one of several peremptory challenges that most states (and the federal system) allow. A trial attorney with many years of experience may have a sixth sense about a potential juror and, in consultation with the client, may decide to use a peremptory challenge to avoid having that juror on the panel.

After the jury is sworn and seated, the plaintiff's lawyer makes an opening statement, laying out the nature of the plaintiff's claim, the facts of the case as the plaintiff sees them, and the evidence that the lawyer will present. The defendant's lawyer may also make an opening statement or may reserve his right to do so at the end of the plaintiff's case.

The plaintiff's lawyer then calls witnesses and presents the physical evidence that is relevant to her proof. The direct testimony at trial is usually far from a smooth narration. The rules of evidence (that govern the kinds of testimony and documents that may be introduced at trial) and the question-and-answer format tend to make the presentation of evidence choppy and difficult to follow.

Anyone who has watched an actual televised trial or a television melodrama featuring a trial scene will appreciate the nature of the trial itself: witnesses are asked questions about a number of issues that may or may not be related, the opposing lawyer will frequently object to the question or the form in which it is asked, and the jury may be sent from the room while the lawyers argue at the bench before the judge.

After direct testimony of each witness is over, the opposing lawyer may conduct cross-examination. This is a crucial constitutional right; in criminal cases it is preserved in the Constitution's Sixth Amendment (the right to confront one's accusers in open court). The formal rules of direct testimony are then relaxed, and the cross-examiner may probe the witness more informally, asking questions that may not seem immediately relevant. This is when the opposing attorney may become harsh, casting doubt on a witness's credibility, trying to trip her up and show that the answers she gave are false or not to be trusted. This use of cross-examination, along with the requirement that the witness must respond to questions that are at all relevant to the questions raised by the case, distinguishes common-law courts from those of authoritarian regimes around the world.

Following cross-examination, the plaintiff's lawyer may then question the witness again: this is called redirect examination and is used to demonstrate that the witness's original answers were accurate and to show that any implications otherwise, suggested by the cross-examiner, were unwarranted. The cross-examiner may then engage the witness in re-cross-examination, and so on. The process usually stops after cross-examination or redirect.

During the trial, the judge's chief responsibility is to see that the trial is fair to both sides. One big piece of that responsibility is to rule on the admissibility of evidence. A judge may rule that a particular question is out of order—that is, not relevant or appropriate—or that a given document is irrelevant. Where the attorney is convinced that a particular witness, a particular question, or a particular document (or part thereof) is critical to her case, she may preserve an objection to the court's ruling by saying "exception," in which case the court stenographer will note the exception; on appeal, the attorney may cite any number of exceptions as adding up to the lack of a fair trial for her client and may request a court of appeals to order a retrial.

For the most part, courts of appeal will not reverse and remand for a new trial unless the trial court judge's errors are "prejudicial," or "an abuse of discretion." In short, neither party is entitled to a perfect trial, but only to a fair trial, one in which the trial judge has made only "harmless errors" and not prejudicial ones.

At the end of the plaintiff's case, the defendant presents his case, following the same procedure just outlined. The plaintiff is then entitled to present rebuttal witnesses, if necessary, to deny or argue with the evidence the defendant has introduced. The defendant in turn may present "surrebuttal" witnesses.

When all testimony has been introduced, either party may ask the judge for a directed verdict—a verdict decided by the judge without advice from the jury. This motion may be granted if the plaintiff has failed to introduce evidence that is legally sufficient to meet her burden of proof or if the defendant has failed to do the same on issues on which she has the burden of proof. (For example, the plaintiff alleges that the defendant owes him money and introduces a signed promissory note. The defendant cannot show that the note is invalid. The defendant must lose the case unless he can show that the debt has been paid or otherwise discharged.)

The defendant can move for a directed verdict at the close of the plaintiff's case, but the judge will usually wait to hear the entire case until deciding whether to do so. Directed verdicts are not usually granted, since it is the jury's job to determine the facts in dispute.

If the judge refuses to grant a directed verdict, each lawyer will then present a closing argument to the jury (or, if there is no jury, to the judge alone). The closing argument is used to tie up the loose ends, as the attorney tries to bring together various seemingly unrelated facts into a story that will make sense to the jury.

After closing arguments, the judge will instruct the jury. The purpose of jury instruction is to explain to the jurors the meaning of the law as it relates to the issues they are considering and to tell the jurors what facts they must determine if they are to give a verdict for one party or the other. Each lawyer will have prepared a set of written instructions that she hopes the judge will give to the jury. These will be tailored to advance her client's case. Many a verdict has been overturned on appeal because a trial judge has wrongly instructed the jury. The judge will carefully determine which instructions to give and often will use a set of pattern instructions provided by the state bar association or the supreme court of the state. These pattern jury instructions are often safer because they are patterned after language that appellate courts have used previously, and appellate courts are less likely to find reversible error in the instructions.

After all instructions are given, the jury will retire to a private room and discuss the case and the answers requested by the judge for as long as it takes to reach a unanimous verdict. Some minor cases do not require a unanimous verdict. If the jury cannot reach a decision, this is called a hung jury, and the case will have to be retried. When a jury does reach a verdict, it delivers it in court with both parties and their lawyers present. The jury is then discharged, and control over the case returns to the judge. (If there is no jury, the judge will usually announce in a written opinion his findings of fact and how the law applies to those facts. Juries just announce their verdicts and do not state their reasons for reaching them.)

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13.2: Legal Rights During Trial

Learning Objectives[132]

- Describe the most significant constitutional rights of defendants in US courts and name the source of these rights.
- Explain the Exclusionary rule and the reason for its existence.

Search and Seizure

The rights of those accused of a crime are spelled out in four of the ten constitutional amendments that make up the Bill of Rights (Amendments Four, Five, Six, and Eight). For the most part, these amendments have been held to apply to both the federal and the state governments. The Fourth Amendment says in part that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Although there are numerous and tricky exceptions to the general rule, ordinarily the police may not break into a person's house or confiscate his papers or arrest him unless they have a warrant to do so. This means, for instance, that a policeman cannot simply stop you on a street corner and ask to see what is in your pockets (a power the police enjoy in many other countries), nor can your home be raided without probable cause to believe that you have committed a crime. What if the police do search or seize unreasonably?

The courts have devised a remedy for the use at trial of the fruits of an unlawful search or seizure. Evidence that is unconstitutionally seized is excluded from the trial. This is the so-called exclusionary rule, first made applicable in federal cases in 1914 and brought home to the states in 1961. The exclusionary rule is highly controversial, and there are numerous exceptions to it. But it remains generally true that the prosecutor may not use evidence willfully taken by the police in violation of constitutional rights generally, and most often in the violation of Fourth Amendment rights. (The fruits of a coerced confession are also excluded.)

Double Jeopardy

The Fifth Amendment prohibits the government from prosecuting a person twice for the same offense. The amendment says that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb." If a defendant is acquitted, the government may not appeal. If a defendant is convicted and his conviction is upheld on appeal, he may not thereafter be reprosecuted for the same crime.

Self-Incrimination

The Fifth Amendment is also the source of a person's right against self-incrimination (no person "shall be compelled in any criminal case to be a witness against himself"). The debate over the limits of this right has given rise to an immense literature. In broadest outline, the right against self-incrimination means that the prosecutor may not call a defendant to the witness stand during trial and may not comment to the jury on the defendant's failure to take the stand. Moreover, a defendant's confession must be excluded from evidence if it was not voluntarily made (e.g., if the police beat the person into giving a confession). In Miranda v. Arizona , the Supreme Court ruled that no confession is admissible if the police have not first advised a suspect of his constitutional rights, including the right to have a lawyer present to advise him during the questioning. Miranda v. Arizona , 384 US 436 (1966). These so-called Miranda warnings have prompted scores of follow-up cases that have made this branch of jurisprudence especially complex.

Speedy Trial

The Sixth Amendment tells the government that it must try defendants speedily. How long a delay is too long depends on the circumstances in each case. In 1975, Congress enacted the Speedy Trial Act to give priority to criminal cases in federal courts. It requires all criminal prosecutions to go to trial within seventy-five days (though the law lists many permissible reasons for delay).

Cross-Examination

The Sixth Amendment also says that the defendant shall have the right to confront witnesses against him. No testimony is permitted to be shown to the jury unless the person making it is present and subject to cross-examination by the defendant's counsel.

Assistance of Counsel

The Sixth Amendment guarantees criminal defendants the right to have the assistance of defense counsel. During the eighteenth century and before, the British courts frequently refused to permit defendants to have lawyers in the courtroom during trial. The right to counsel is much broader in this country, as the result of Supreme Court decisions that require the state to pay for a lawyer for indigent defendants in most criminal cases.

Cruel and Unusual Punishment

Punishment under the common law was frequently horrifying. Death was a common punishment for relatively minor crimes. In many places throughout the world, punishments still persist that seem cruel and unusual, such as the practice of stoning someone to death. The guillotine, famously in use during and after the French Revolution, is no longer used, nor are defendants put in stocks for public display and humiliation. In pre-Revolutionary America, an unlucky defendant who found himself convicted could face brutal torture before death.

The Eighth Amendment banned these actions with the words that "cruel and unusual punishments [shall not be] inflicted." Virtually all such punishments either never were enacted or have been eliminated from the statute books in the United States. Nevertheless, the Eighth Amendment has become a source of controversy, first with the Supreme Court's ruling in 1976 that the death penalty, as haphazardly applied in the various states, amounted to cruel and unusual punishment. Later Supreme Court opinions have made it easier for states to administer the death penalty. As of 2010, there were 3,300 defendants on death row in the United States. Of course, no corporation is on death row, and no corporation's charter has ever been revoked by a US state, even though some corporations have repeatedly been indicted and convicted of criminal offenses.

Presumption of Innocence

The most important constitutional right in the US criminal justice system is the presumption of innocence. The Supreme Court has repeatedly cautioned lower courts in the United States that juries must be properly instructed that the defendant is innocent until proven guilty. This is the origin of the "beyond all reasonable doubt" standard of proof and is an instruction given to juries in each criminal case. The Fifth Amendment notes the right of "due process" in federal proceedings, and the Fourteenth Amendment requires that each state provide "due process" to defendants.

Key Takeaway

The US Constitution provides several important protections for criminal defendants, including a prohibition on the use of evidence that has been obtained by unconstitutional means. This would include evidence seized in violation of the Fourth Amendment and confessions obtained in violation of the Fifth Amendment.

Discussion Questions

1. Do you think it is useful to have a presumption of innocence in criminal cases? What if there were not a presumption of innocence in criminal cases?
2. Do you think public humiliation, public execution, and unusual punishments would reduce the amount of crime? Why do you think so?
3. "Due process" is another phrase for "fairness." Why should the public show fairness toward criminal defendants?

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13.3: Standards of Proof

Standards of Proof [133]

The standard of proof asks how convinced the trier of fact must be in order to make a finding. Canadian criminal law has three core standards:

1. Proof beyond a reasonable doubt which is the standard to be met by the Crown against the accused;
2. a balance of probabilities or Proof on a preponderance of the evidence which is the burden of proof on the accused when he has to meet a presumption requiring him to establish or to prove a fact or an excuse;
3. Evidence raising a reasonable doubt which is what is required to overcome any other presumption of fact or of law. Once a prima facie case has been established by the evidence of the crown, there is no need to prove innocence. Rather the accused need only raise a doubt in the evidence.

The US has a fourth standard known as "clear and convincing evidence" which is a middle ground between the two standards. When a proposition at issue in a case, such as an element of an offence, must be proven, the standard must be reached using the weight of the totality of evidence presented, not on each individual piece of evidence.

Totality Principle

When weighing evidence against any standard of proof, the general rule of totality will govern. Each piece of evidence or each fact cannot be considered in isolation to establish a fact. They must be considered in the context as a whole. This principle is central to consideration of Circumstantial Evidence .

Standards

The standard of proof for establishing a fact in most cases will be on a balance of probabilities. However, there are “certainly rare occasions when the admission of the evidence may itself have a conclusive effect with respect to guilt” where a standard of proof beyond a reasonable doubt may be required. Those exceptions that have a "conclusive effect" include confessions and hearsay evidence that satisfies the co-conspirators' exception.

Generally, the standard of proof beyond a reasonable doubt will apply to essential elements of the offence, but not to any other facts.

"Some Evidence" and " prima facie Case"

The standard of "some evidence "prima facie case" are unique standards of proof that apply to certain evidentiary tests.

These two standards are obviously lower than that of balance of probabilities.

Balance of Probabilities

The "balance of probabilities" is described as being "more probable than not", "more likely than not", or more technically, the chance of the proposition being true is more than 50%. This standard is known as the civil standard as it exclusively used in civil trial cases.

Generally, where there are factual questions that are preconditions to the admissibility of evidence should be on a standard of balance of probabilities. This standard should only be increased "in those certainly rare occasions when the admission of the evidence may itself have a conclusive effect with respect to guilt".

Admissibility Usually on a BOP

In most circumstances the standard of proof required for the admissibility of evidence is on a balance of probabilities. Only in "rare occasions" where the admission of the evidence is determinative of guilt will the court apply a standard beyond a reasonable doubt. [5]

Sufficiency of Proof

Before any evidence gets to a trier of fact there is often a requirement to discharge an evidential burden for the trier of law (i.e., the judge).

In a preliminary inquiry, the state must show on the whole that the evidence they will present is sufficient to potentially convict the accused. The purpose of this initial evaluation is to avoid frivolous suiting being brought in that has no chance of success.

The standard of proof needed before evidence can be put to the jury is "whether the evidence is sufficient to justify him in withdrawing the case from the jury, and this is to be determined according to whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilt."

In a case where some of the evidence is not directly to the issue of the case, the state must satisfy the judge that "the evidence, if believed , could reasonably support an inference of guilt." [2]

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13.4: Steps in Jury Trial

The Jury[134]

The right to a trial by jury in federal criminal cases is guaranteed by the Sixth Amendment to the Constitution.

Extensive background on juries is available. In addition, most district courts post a jury plan on their websites, which explains how potential jurors are selected from the community, as well as the court's policy on whether and when to release jurors' names.

By law, the courts seek to empanel juries that are a "fair cross-section" of the community. This starts with a "jury wheel," a traditional term that dates to when prospective jurors' names were drawn from a revolving container. Today, the jury wheel is an automated database filled with names randomly selected from a source list or source lists, for use in further random selection of possible jurors for qualification and summoning. The number of names included in a court's jury wheel is proportional to the number of registered voters in each county comprising the district or jury division within the district.

During jury selection, often called voir dire, the judge, the lawyers, or both will question prospective jurors about their backgrounds, and potential biases that may hinder their ability to be impartial. In federal court, often only the judge will question potential jurors; counsel can request that specific questions be asked.

Voir dire is critical to ensuring an impartial jury. Prospective jurors may be struck from the panel in two ways. Lawyers may exercise a "challenge for cause," claiming the juror cannot be impartial. If the judge agrees, the potential juror is excused. Lawyers also may exercise "peremptory challenges," allowing them to remove jurors without stating a reason. The number of available peremptory challenges varies by case type, pursuant to statute and the Federal Rules of Criminal Procedure .

During voir dire, a party may object to another party's exercise of a peremptory challenge on grounds that the party tried to exclude a potential juror based on race, ethnicity, or gender. Such objections are known as "Batson challenges," referring to Batson v. Kentucky , a 1986 Supreme Court decision that ruled such exclusions unconstitutional.

Unless the parties agree otherwise, the jury consists of 12 persons. The court may impanel up to six alternates to replace any jurors who become disqualified or otherwise are unable to perform their duties.

In death penalty and other complex cases, jury selection can take as long as several weeks. In some courts, judges handling a high-profile trial will have hundreds or, in rare instances, even thousands of potential jurors fill out an extensive questionnaire. A manageable number of eligible jurors are then called in each day to be questioned individually.

In death penalty and other complex cases, jury selection can take as long as several weeks.

On the final day of jury selection, the qualified pool of jurors is called in to the courtroom, and both sides exercise their peremptory challenges until the jury is seated. In capital cases, each side is allowed a greater number of peremptory challenges, in accordance with the Federal Rules of Criminal Procedure .

For exceptional cases, a judge may decide there is a need to sequester a jury – that is, keep all jurors in the court's protection until the trial concludes.

As noted in Jurors , journalists should not contact a juror before a case is concluded. Even where a court permits the release of jurors' names after the trial, a judge may order that jurors in a specific case remain anonymous.

Juror payment amounts are set by federal statute, and current rates are available at Juror Pay . Jurors also are reimbursed for reasonable transportation expenses and parking fees, and a judge may authorize an additional $10 a day if a proceeding lasts more than 10 days. Federal law does not require an employer to pay jurors during a trial, but the Jury Act forbids any employer from firing, intimidating, or coercing any permanent employee because of his or her federal jury service.

Opening Statements

Defense counsel are not obligated to make an opening statement or present any evidence, since the defendant is presumed innocent.

At the beginning of a criminal trial, lawyers are limited to telling the jury what they believe the evidence will show. Thus, this is an opening statement, not an argument.

Prosecutors go first because they bear the burden of proving beyond a reasonable doubt that the defendant committed the offense(s) he or she has been charged with. Defense counsel are not obligated to make an opening statement or present any evidence, since the defendant is presumed innocent. Defense counsel may choose to make an opening statement at the conclusion of the initial set of prosecution witnesses, as opposed to at the start of trial. Reporters usually want to be present for opening statements. Not only do they hear a road map of the case the lawyers intend to present, but they often can get quotes that are useful to their coverage.

Witnesses

Some individual judges or local rules of court require the prosecution to file a list of potential witnesses prior to trial, along with a list of exhibits that may be entered into evidence. Reporters may ask the clerk of court's office before the trial whether either list will be available to the public.

Prosecution witnesses take the stand first. Each will be asked questions by the prosecutor and can be cross-examined by the defense lawyer. If a witness is cross-examined, the prosecution is permitted a "redirect," asking the witness only questions related to the topics discussed during cross-examination.

You may speak to witnesses after they are excused by the court, unless the judge indicates the witness is subject to recall to the stand later in the trial. The witness, however, is not obligated to answer your questions, and often may be advised by counsel not to do so.

Exhibits, Transcripts, and Courtroom Audio

Trial exhibits that are admitted into evidence become part of the public record. Subject to logistical considerations, they usually are available through the clerk of court's office to inspect and copy. You also can request a copy of an exhibit from the party that introduced it. In some courts this is necessary, because parties retain custody of exhibits even after they have been introduced into evidence.

In high-profile cases, courts may work with the parties to make extra copies of exhibits that the news media can review, or the court may decide to post exhibits on its website. The presiding judge has some discretion in this area, so he or she might deny public access to certain evidence until after the conclusion of the trial.

In high-profile cases, courts may work with the parties to make extra copies of exhibits that the news media can review, or the court may decide to post exhibits on its website.

Transcripts of courtroom proceedings are not produced unless ordered by a party, a member of the public, or the court. However, by statute, every session of the court is recorded in some format.

Written transcripts are produced by a court reporter or transcriber. As noted in the Federal Court Reporting Program webpage, under Judicial Conference policy these transcripts are not available on PACER until 90 days after they are delivered to the clerk's office.

During this 90-day period, transcripts are available at the clerk's office for inspection only or may be purchased from the court reporter or transcriber. The maximum per-page fee is set by the Judicial Conference, and each district sets a local rate subject to that maximum. A few courts have special exceptions to set their transcript rates higher.

After the 90-day period, transcripts can be viewed, downloaded, or printed for 10 cents per page on PACER. Additionally, the transcript is available for inspection and copying in the clerk's office under the same terms and conditions as any other official public document in the case file.

In most bankruptcy cases, and also in some district court cases (especially proceedings involving magistrate judges), the official record is kept through digital audio recordings. When this is the case, under Judicial Conference policy, the presiding judge may choose to make a copy of the recordings available through PACER.

Copies of such digital audio recordings also may be purchased from the clerk's office. The current rate is available in the miscellaneous fee schedules for district courts and for bankruptcy courts , which are set by the Judicial Conference. Courts may make these recordings available via tape, CD, email, and/or digital download. When a court reporter is employed to create a transcript, there is no public entitlement to the reporter's personal backup recording.

Motion to Acquit

After the prosecution's last initial witness, the defense often makes a Rule 29 motion. Named after Federal Rule of Criminal Procedure 29, the motion asks the judge to acquit the defendant because the prosecution's evidence is insufficient to sustain a conviction. This motion also may be made after the conclusion of testimony by defense witnesses.

These motions are not granted often, but when they are, the defendant goes free. The prosecution cannot appeal such a ruling and the defendant cannot be tried again in federal court on the same charges because of the constitutional protection against "double jeopardy." If, however, the judge grants a Rule 29 motion after the jury reaches a guilty verdict, prosecutors can then appeal the judge's acquittal.

Closing Arguments

Unlike during the opening statement, prosecutors and defense lawyers are permitted to make an argument after the completion of testimony. That is, they may marshal facts in an attempt to prove or disprove the government's allegations.

The prosecution goes first, followed by the defense and a rebuttal by the prosecution. Because the prosecution has the burden of proof, it gets the final word. Reporters will want to be present for this portion of the trial.

Jury Instructions, Deliberations, and the Verdict

Before deliberations, the judge will give the jury its final instructions, a step that can have enormous impact on the verdict. Both sides may request in writing that specific language be included in the instructions. Once the judge finalizes proposed instructions, both sides review them in advance. Any objections must be submitted on the record before the jury begins deliberation. While jury instructions typically are given in open court and can be tedious to listen to, they spell out the matters the jurors are to consider and those they are not. In complex or high-profile cases, reporters may find it useful to be present.

Jury deliberations are private; nobody other than the jurors may be present during this process. Jurors have two responsibilities: to determine the facts based on the evidence presented during the trial and to apply the relevant law that the judge provides during the jury instructions. During deliberations, the jurors may have questions about the evidence or the instructions. If they do, they give a note to the deputy marshal or the appropriate person designated by the court, who takes it to the judge. The judge then calls the lawyers back into court to discuss what the answers to the note should be, calls the jurors back into the courtroom, and gives them the answer, provided it does not deal with issues outside the scope of the case or require the judge to interpret the facts for the jurors.

Criminal juries must reach a unanimous verdict of guilty "beyond a reasonable doubt" or not guilty. After thorough deliberation, the jury may report to the judge that it is deadlocked and unable to reach a verdict. At this point, the judge may give the jury what is known as the Allen charge. Named after an 1896 U.S. Supreme Court case, the Allen charge urges jurors to reconsider their positions, as well as those of other jurors, and resume their deliberations in an effort to reach a verdict. If they attempt to do so but still report that they are deadlocked, the judge may declare a mistrial.

In most federal courthouses, once a jury has reached a verdict, it is announced as soon as all the lawyers can get to the courtroom. Reporters may have as little as 15 minutes' warning. Inquire before the trial how members of the media will be notified when a verdict has been reached. Reporters will want to be present for the reading of the verdict.

Post-Verdict Interviews

Any media interviews must be arranged directly with lawyers and their clients. In high-profile cases, some type of media availability is common for prosecutors and defense lawyers, in or near court property, once a trial is completed. Rules regarding cameras are set by the court. You also are free to speak to jurors after the verdict is read. As noted in Jurors , they are not obligated to grant interviews. Similarly, lawyers and their clients are free to determine whether they wish to talk with the media or not.

Non-Capital Sentencing

Whether there is a plea agreement or a trial that ends with a conviction, sentencing is generally scheduled for a later date. The court's probation office prepares a presentence investigation report on circumstances that may help the judge in determining a

sentence. The report is based on conversations with the defendant and his or her family and friends, victims and their families, and others with relevant information. It is always filed under seal and accessible only to the judge, prosecutor, and defense counsel.

Since 1987, sentencing in federal court has been governed by the U.S. Sentencing Guidelines. They are set by the U.S. Sentencing Commission , an independent agency in the judicial branch, created by Congress to make sentencing more consistent and proportionate. In January 2005, the Supreme Court ruled that the guidelines are merely advisory. Judges are urged to consider the guidelines but can depart from the guideline ranges, so long as the sentence is reasonable and does not exceed the maximum term set by statute for a particular crime.

The presentence report makes a recommendation based on how the guidelines rate the seriousness of the offense and on the defendant's criminal history. The judge is not required to follow the recommendations of the probation office or the parties, but if the judge rejects a sentence agreed to by the defense and prosecution, a defendant may withdraw a guilty plea. During the sentencing hearing, defendants are given a chance to tell the court anything they believe the judge should consider before the sentence is imposed.

Death Penalty Sentencing

When a capital crime may have been committed, federal prosecutors must receive written authorization from the attorney general before they can seek the death penalty. Federal law provides for a two-part, or bifurcated, trial in a death penalty case. If a defendant is found guilty of a crime punishable by death, the same jury that convicted him or her will determine the sentence. During a second phase of the trial, known as the penalty phase, both sides can present witnesses and evidence. The prosecution presents aggravating circumstances to justify the death penalty, while the defense presents mitigating circumstances that support a sentence less than death. The jury has only two choices: execution or life in prison.

Death penalty cases are fairly rare in federal courts. When they do occur, a defendant is given two lawyers, including one who has specific expertise in capital trials, as well other resources to support the defense.

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CHAPTER OVERVIEW

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14.1: A BRIEF HISTORY OF PUNISHMENT

CHAPTER 14 - PUNISHMENT AND SENTENCING

A BRIEF HISTORY OF PUNISHMENT [135]

Feeling safe and secure in person and home is arguably one of the most discussed feelings in our nation today. The “fear of crime” influences how we think and act day to day. This has caused great fluctuation in the United States in 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 carried out through the legislative process, and converted into sentencing practices. People have differing views on why people should be punished, and how much punishment they should receive. These correctional ideologies, or philosophical underpinnings of punishment, have been prevalent throughout history, and are not brand new in the United States. This section details basic concepts

of some of the more frequently held punishment ideologies, which include retribution, deterrence, incapacitation, and rehabilitation.



Pin It! In the News : One of the more frequently used statistics in the news about crime is homicides in the United States. Often, you will hear something about a homicide rate or the number of homicides in a state, or a city for a particular year. An interesting clarifier about this number is that it typically does not include a number of deaths in prison. Deaths in prison occur every year, yet these are not normally counted in any statistic. In 2014, there were approximately 3,927 deaths that occurred in prisons in the United States. There are a variety of reasons for these deaths, to include homicide. For more information on this, look up – Mortality in Correctional Institutions (MCI). This is also formerly known as Deaths in Custody Reporting Program (DCRP). The Bureau of Justice Statistics houses and publishes data on this phenomenon. Additionally, this is a voluntary reporting structure, which may actually not capture all deaths that occur in prison . https://www.bjs.gov/index.cfm?ty=dcdetail&iid=243



Think About It… Philosophies of Punishment

Two stories come on during the crime section of the 6 o'clock news. In the first story, a man is described as a convicted sex offender. He is living at an address that you know is in your city. Citizens that live on the streets nearby his address are shown picketing in front of his house, voicing their displeasure that he is allowed to live there. The video shows how angry the neighborhood is, and you can visibly see their frustration and angst on the people's faces in the news clip.

The second story is of a woman who was detained (shown in the back of a squad car) for stealing food from a local grocery store, apparently to feed her children. The store manager is then on the screen describing that he is offering to donate the food to her so that she does not have to spend time in jail or get into any more trouble.

How do these two stories make you feel? Is it the same feeling for each story? Does one of these stories make you feel more afraid of crime? Angrier or upset? Which one? Who deserves to get punished more? How much punishment should they get? The answers to questions like these instantly flood our thoughts as we are watching news blurbs like this, and in general, when we hear about a crime. This is all normal. This process is what generates our own personal punishment ideology.

Now, which one of these two individuals has actually committed a crime? A second point to this story is that our perceptions of punishment can be influenced by the narrative (what is presented to us).

Although the change in our overall perception or use of the rehabilitation ideology is slow, it is necessary. As we will see in the next sections, our reliance on the "Brick and Mortar" approach to punishment comes at a great cost, and the results are less than desirable

THEORIES OF PUNISHMENT [136]

Learning Objective: Key Terms

- Celerity, Certainty, Cesare Beccaria, Cost Benefit Analysis, Culpable Mental State, Deterrence, Disproportionate Minority Contact, Drug Court, Fair Sentencing Act of 2010, General Deterrence, Incapacitation, Individual Racism, Institutional Racism, Multiethnic, Multiracial, NAACP, Racial Discrimination, Racism, Rational Choice Theory, Recidivism, Rehabilitation, Retribution, Severity, Specific Deterrence

When it comes to criminal sanctions, what people believe to be appropriate is largely determined by the theory of punishment to which they subscribe. That is, people tend to agree with the theory of punishment that is most likely to generate the outcome they believe is the correct one. This system of beliefs about the purposes of punishment often spills over into the political arena. Politics and correctional policy are intricately related. Many of the changes seen in corrections policy in the United States during this time were a reflection of the political climate of the day. During the more liberal times of the 1960s and 1970s, criminal sentences were largely the domain of the judicial and executive branches of government. The role of the legislatures during this period was to design sentencing laws with rehabilitation as the primary goal. During the politically conservative era of the 1980s and 1990s, lawmakers took much of that power away from the judicial and executive branches. Much of the political rhetoric of this time was about “getting tough on crime.” The correctional goals of retribution, incapacitation, and deterrence became dominate, and rehabilitation was shifted to a distant position.

DETERRENCE

It has been a popular notion throughout the ages that fear of punishment can reduce or eliminate undesirable behavior. This notion has always been popular among criminal justice thinkers. These ideas have been formalized in several different ways. The Utilitarian philosopher Jeremy Bentham is credited with articulating the three elements that must be present if deterrence is to work: The punishment must be administered with celerity, certainty, and appropriate severity. These elements are applied under a type rational choice theory . Rational choice theory is the simple idea that people think about committing a crime before they do it. If the rewards of the crime outweigh the punishment, then they do the prohibited act. If the punishment is seen as outweighing the rewards, then they do not do it. Sometimes criminologists borrow the phrase cost-benefit analysis from economists to describe this sort of decision-making process.

When evaluating whether deterrence works or not, it is important to differentiate between general deterrence and specific deterrence. General deterrence is the idea that every person punished by the law serves as an example to others contemplating the same unlawful act. Specific deterrence is the idea that the individuals punished by the law will not commit their crimes again because they “learned a lesson.”

Critics of deterrence theory point to high recidivism rates as proof that the theory does not work. Recidivism means a relapse into crime. In other words, those who are punished by the criminal justice system tend to reoffend at a very high rate. Some critics also argue that rational choice theory does not work. They argue that such things as crimes of passion and crimes committed by those under the influence of drugs and alcohol are not the product of a rational cost-benefit analysis.

As unpopular as rational choice theories may be with particular schools of modern academic criminology, they are critically important to understanding how the criminal justice system works. This is because nearly the entire criminal justice system is based on rational choice theory . The idea that people commit crimes because they decide to do so is the very foundation of criminal law in the United States. In fact, the intent element must be proven beyond a reasonable doubt in almost every felony known to American criminal law before a conviction can be secured. Without a culpable mental state , there is no crime (with very few exceptions).

INCAPACITATION

Incapacitation is a very pragmatic goal of criminal justice. The idea is that if criminals are locked up in a secure environment, they cannot go around victimizing everyday citizens. The weakness of incapacitation is that it works only as long as the offender is locked up. There is no real question that incapacitation reduces crime by some degree. The biggest problem with incapacitation is the cost. There are high social and moral costs when the criminal justice system takes people out of their homes, away from their families, and out of the workforce and lock them up for a protracted period. In addition, there are very heavy financial costs with

this model. Very long prison sentences result in very large prison populations which require a very large prison industrial complex. These expenses have placed a crippling financial burden on many states.

REHABILITATION

Rehabilitation is a noble goal of punishment by the state that seeks to help the offender become a productive, noncriminal member of society. Throughout history, there have been several different notions as to how this help should be administered. When our modern correctional system was forming, this was the dominate model. We can see by the very name corrections that the idea was to help the offender become a non-offender. Education programs, faith-based programs, drug treatment programs, anger management programs, and many others are aimed at helping the offender "get better."

Overall, rehabilitation efforts have had poor results when measured by looking at recidivism rates. Those that the criminal justice system tried to help tend to reoffend at about the same rate as those who serve prison time without any kind of treatment. Advocates of rehabilitation point out that past efforts failed because they were underfunded, ill-conceived, or poorly executed. Today's drug courts are an example of how we may be moving back toward a more rehabilitative model, especially with first time and nonviolent offenders.

RETRIBUTION

Retribution means giving offenders the punishment they deserve. Most adherents to this idea believe that the punishment should fit the offense. This idea is known as the doctrine of proportionality . Such a doctrine was advocated by early Italian criminologist Cesare Beccaria who viewed the harsh punishments of his day as being disproportionate to many of the crimes committed. The term just desert is often used to describe a deserved punishment that is proportionate to the crime committed.

In reality, the doctrine of proportionality is difficult to achieve. There is no way that the various legislatures can go about objectively measuring criminal culpability. The process is one of legislative consensus and is imprecise at best.

A RACIST SYSTEM?

The United States today can be described as both multiracial and multiethnic. This has led to racism . Racism is the belief that members of one race are inferior to members of another race. Because white Americans of European heritage are the majority, racism in America usually takes on the character of whites against racial and ethnic minorities. Historically, these ethnic minorities have not been given equal footing on such important aspects of life as employment, housing, education, healthcare, and criminal justice. When this unequal treatment is willful, it can be referred to as racial discrimination . The law forbids racial discrimination in the criminal justice system, just as it does in the workplace.

Disproportionate minority contact refers to the disproportionate number of minorities who come into contact with the criminal justice system. Disproportionate minority contact is a problem in both the adult and juvenile systems at every level of those systems. As the gatekeepers of the criminal justice system, the police are often accused of discriminatory practices.

Courts are not immune to cries of racism from individuals and politically active groups. The American Civil Liberties Union (2014), for example, states, "African-Americans are incarcerated for drug offenses at a rate that is 10 times greater than that of whites."

The literature on disproportionate minority sentencing distinguishes between legal and extralegal factors . Legal factors are those things that we accept as legitimately, as a matter of law, mitigating or aggravating criminal sentences. Such things as the seriousness of the offense and the defendant's prior criminal record fall into this category. Extralegal factors include things like class, race, and gender. These are regarded as illegitimate factors in determining criminal sentences. They have nothing to do with the defendant's criminal behavior, and everything to do with the defendant's status as a member of a particular group.

One way to measure racial disparity is to compare the proportion of people that are members of a particular group (their proportion in the general population) with the proportion or that group at a particular stage in the criminal justice system. In 2013, the Bureau of the Census (Bureau of the Census, 2014) estimated that African Americans made up 13.2% of the population of the United States. According to the FBI, 28.4% of all arrestees were African American. From this information we can see that the proportion of African Americans arrested was just over double what one would expect.

The disparity is more pronounced when it comes to drug crime. According to the NAACP (2014), "African Americans represent 12% of the total population of drug users, but 38% of those arrested for drug offenses, and 59% of those in state prison for a drug

offense.”

There are three basic explanations for these disparities in the criminal justice system. The first is individual racism . Individual racism refers to a particular person’s beliefs, assumptions, and behaviors. This type of racism manifests itself when the individual police officer, defense attorney, prosecutor, judge, parole board member, or parole officer is bigoted. Another explanation of racial disparities in the criminal justice system is institutional racism . Institutional racism manifests itself when departmental policies (both formal and informal), regulations, and laws result in unfair treatment of a particular group. A third (and controversial) explanation is differential involvement in crime. The basic idea is that African Americans and Hispanics are involved in more criminal activity. Often this is tied to social problems such as poor education, poverty, and unemployment.

While it does not seem that bigotry is present in every facet of the criminal and juvenile justice systems, it does appear that there are pockets of prejudice within both systems. It is difficult to deny the data: Discrimination does take place in such areas as use of force by police and the imposition of the death penalty. Historically, nowhere was the disparity more discussed and debated than in federal drug policy. While much has recently changed with the passage of the Fair Sentencing Act of 2010 , federal drug law was a prime example of institutional racism at work.

Under former law, crimes involving crack cocaine were punished much, much more severely than powder cocaine. The law had certain harsh penalties that were triggered by weight, and a provision that required one hundred times more powder than crack. Many deemed the law racist because the majority of arrests for crack cocaine were of African Americans, and the majority of arrests for powder cocaine were white. African American defendants have appealed their sentences based on Fourteenth Amendment equal protection claims.

SENTENCING [137]

Learning Objective: Key Terms

- Appeal, Asset Forfeiture, Boot Camps, Community Service, Concurrent Sentence, Consecutive Sentence, Day Fine, Death Penalty, Determinate Sentencing, Electronic Monitoring, Fine, Forfeiture, Good Time, Home Confinement, House Arrest, Indeterminate Sentencing, Intensive Supervision Probation (ISP), Mandatory Sentences, Overturn, Presentence Investigation Report, Probation, Proportionality Doctrine, Remand, Scarlet-Letter Punishments, Sentencing, Sentencing Hearing, Sentencing Reform Act of 1984, Sentencing Statute, U.S. Sentencing Commission, Uphold, Victim Impact Statement

In most jurisdictions, the judge holds the responsibility of imposing criminal sentences on convicted offenders. Often, this is a difficult process that defines the application of simple sentencing principles. The latitude that a judge has in imposing sentences can vary widely from state to state. This is because state legislatures often set the minimum and maximum punishments for particular crimes in criminal statutes. The law also specifies alternatives to incarceration that a judge may use to tailor a sentence to an individual offender.

PRESENTENCE INVESTIGATION

Many jurisdictions require that a presentence investigation take place before a sentence is handed down. Most of the time, the presentence investigation is conducted by a probation officer, and results in a presentence investigation report . This document describes the convict’s education, employment record, criminal history, present offense, prospects for rehabilitation, and any personal issues, such as addiction, that may impact the court’s decision. The report usually contains a recommendation as to the sentence that the court should impose. These reports are a major influence on the judge’s final decision.

VICTIM IMPACT STATEMENTS

Many states now consider the impact that a crime had on the victim when determining an appropriate sentence. A few states even allow the victims to appear in court and testify. Victim impact statements are usually read aloud in open court during the sentencing phase of a trial. Criminal defendants have challenged the constitutionality of this process on the grounds that it violates the Proportionality Doctrine requirement of the Eighth Amendment, but the Supreme Court has rejected this argument and found the admission of victim statements constitutional.

THE SENTENCING HEARING

Many jurisdictions pass final sentences in a phase of the trial process known as a sentencing hearing . The prosecutor will recommend a sentence in the name of the people or defend the recommended sentence in the presentence investigation report, depending on the jurisdiction. Defendants retain the right to counsel during this phase of the process. Defendants also have the right to make a statement to the judge before the sentence is handed down.

INFLUENCES ON SENTENCING DECISIONS

The severity of a sentence usually hinges on two major factors. The first is the seriousness of the offense. The other, which is much more complex, is the presence of aggravating or mitigating circumstances. In general, the more serious the crime, the harsher the punishment.

TYPES OF SENTENCES

A sentence is the punishment ordered by the court for a convicted defendant. Statutes usually prescribe punishments at both the state and federal level. The most important limit on the severity of punishments in the United States is the Eighth Amendment.

THE DEATH PENALTY

The death penalty is a sentencing option in thirty-eight states and the federal government. It is usually reserved for those convicted of murders with aggravating circumstances. Because of the severity and irrevocability of the death penalty, its use has heavily circumscribed by statutes and controlled by case law. Included among these safeguards is an automatic review by appellate courts.

INCARCERATION

The most common punishment after fines in the United States is the deprivation of liberty known as incarceration . Jails are short-term facilities, most often run by counties under the auspices of the sheriff's department. Jails house those awaiting trial and unable to make bail, and convicted offenders serving short sentences or waiting on a bed in a prison. Prisons are long-term facilities operated by state and federal governments. Most prison inmates are felons serving sentences of longer than one year.

PROBATION

Probation serves as a middle ground between no punishment and incarceration. Convicts receiving probation are supervised within the community and must abide by certain rules and restrictions. If they violate the conditions of their probation, they can have their probation revoked and can be sent to prison. Common conditions of probation include obeying all laws, paying fines and restitution as ordered by the court, reporting to a probation officer, not associating with criminals, not using drugs, submitting to searches, and submitting to drug tests.

The heavy use of probation is controversial. When the offense is nonviolent, the offender is not dangerous to the community, and the offender is willing to make restitution, then many agree that probation is a good idea. Due to prison overcrowding, judges have been forced to place more and more offenders on probation rather than sentencing them to prison.

INTENSIVE SUPERVISION PROBATION (ISP)

Intensive Supervision Probation (ISP) is similar to standard probation but requires much more contact with probation officers and usually has more rigorous conditions of probation. The primary focus of adult ISP is to provide protection of the public safety through close supervision of the offender. Many juvenile programs, and an increasing number of adult programs, also have a treatment component that is designed to reduce recidivism.

BOOT CAMPS

Convicts, often young men, sentenced to boot camps live in a military style environment complete with barracks and rigorous physical training. These camps usually last from three to six months, depending on the particular program. The core ideas of boot camp programs are to teach wayward youths discipline and accountability. While a popular idea among some reformers, the research shows little to no impact on recidivism.

HOUSE ARREST AND ELECTRONIC MONITORING

The Special Curfew Program was the federal courts' first use of home confinement. It was part of an experimental program-a cooperative venture of the Bureau of Prisons, the U.S. Parole Commission, and the federal probation system-as an alternative to Bureau of Prisons Community Treatment Center (CTC) residence for eligible inmates. These inmates, instead of CTC placement, received parole dates advanced a maximum of 60 days and were subject to a curfew and minimum weekly contact with a probation

officer. Electronic monitoring became part of the home confinement program several years later. In 1988, a pilot program was launched in two districts to evaluate the use of electronic equipment to monitor persons in the curfew program. The program was expanded nationally in 1991 and grew to include offenders on probation and supervised release and defendants on pretrial supervision as those who may be eligible to be placed on home confinement with electronic monitoring (Courts, 2015).

Today, most jurisdictions stipulate that offenders sentenced to house arrest must spend all or most of the day in their own homes. The popularity of house arrest has increased in recent years due to monitoring technology that allows a transmitter to be placed on the convict's ankle, allowing compliance to be remotely monitored. House arrest is often coupled with other sanctions, such as fines and community service. Some jurisdictions have a work requirement, where the offender on house arrest is allowed to leave home for a specified window of time in order to work.

FINES

Fines are very common for violations and minor misdemeanor offenses. First time offenders found guilty of simple assaults, minor drug possession, traffic violations and so forth are sentenced to fines alone. If these fines are not paid according to the rules set by the court, the offender is jailed. Many critics argue that fines discriminate against the poor. A $200 traffic fine means very little to a highly paid professional but can be a serious burden on a college student with only a part-time job. Some jurisdictions use a sliding scale that bases fines on income known as day fines . They are an outgrowth of traditional fining systems, which were seen as disproportionately punishing offenders with modest means while imposing no more than "slaps on the wrist" for affluent offenders.

This system has been very popular in European countries such as Sweden and Germany. Day fines take the financial circumstances of the offender into account. They are calculated using two major factors: The seriousness of the offense and the offender's daily income. The European nations that use this system have established guidelines that assign points ("fine units") to different offenses based on the seriousness of the offense. The range of fine units varies greatly by country. For example, in Sweden the range is from 1 to 120 units. In Germany, the range is from 1 to 360 units.

The most common process is for court personnel to determine the daily income of the offender. It is common for family size and certain other expenses to be taken into account.

RESTITUTION

When an offender is sentenced to a fine, the money goes to the state. Restitution requires the offender to pay money to the victim. The idea is to replace the economic losses suffered by the victim because of the crime. Judges may order offenders to compensate victims for medical bills, lost wages, and the value of property that was stolen or destroyed. The major problem with restitution is actually collecting the money on behalf of the victim. Some jurisdictions allow practices such as wage garnishment to ensure the integrity of the process. Restitution can also be made a condition of probation, whereby the offender is imprisoned for a probation violation is the restitution is not paid.

COMMUNITY SERVICE

As a matter of legal theory, crimes harm the entire community, not just the immediate victim. Advocates see community service as the violator paying the community back for the harm caused. Community service can include a wide variety of tasks such as picking up trash along roadways, cleaning up graffiti, and cleaning up parks. Programs based on community service have been popular, but little is known about the impact of these programs on recidivism rates.

"SCARLET-LETTER" PUNISHMENTS

While exact practices vary widely, the idea of scarlet-letter punishments is to shame the offender. Advocates view shaming as a cheap and satisfying alternative to incarceration. Critics argue that criminals are not likely to mend their behavior because of shame. There are legal challenges that of kept this sort of punishment from being widely accepted. Appeals have been made because such punishments violate the Eighth Amendment ban on cruel and unusual punishment. Others have been based on the idea that they violate the First Amendment by compelling defendants to convey a judicially scripted message in the form of forced apologies, warning signs, newspaper ads, and sandwich boards. Still other appeals have been based on the notion that shaming punishments are not specifically authorized by State sentencing guidelines and therefore constitute an abuse of judicial discretion (Litowitz, 1997).

ASSET FORFEITURE

Many jurisdictions have laws that allow the government to seize property and assets used in criminal enterprises. Such a seizure is known as forfeiture . Automobiles, airplanes, and boats used in illegal drug smuggling are all subject to seizure. The assets are often given over to law enforcement. According to the FBI, “Many criminals are motivated by greed and the acquisition of material goods. Therefore, the ability of the government to forfeit property connected with criminal activity can be an effective law enforcement tool by reducing the incentive for illegal conduct. Asset forfeiture takes the profit out of crime by helping to eliminate the ability of the offender to command resources necessary to continue illegal activities” (FBI, 2015).

Asset forfeiture can be both a criminal and a civil matter. Civil forfeitures are easier on law enforcement because they do not require a criminal conviction. As a civil matter, the standard of proof is much lower than it would be if the forfeiture was a criminal penalty. Commonly, the standard for such a seizure is probable cause. With criminal asset forfeitures, law enforcement cannot take control of the assets until the suspect has been convicted in criminal court.

APPEALS

An appeal is a claim that some procedural or legal error was made in the prior handling of the case. An appeal results in one of two outcomes. If the appellate court agrees with the lower court, then the appellate court affirms the lower court’s decision. In such cases the appeals court is said to uphold the decision of the lower court. If the appellate court agrees with the plaintiff that an error occurred, then the appellate court will overturn the conviction. This happens only when the error is determined to be substantial. Trivial or insignificant errors will result in the appellate court affirming the decision of the lower court. Winning an appeal is rarely a “get out of jail free” card for the defendant. Most often, the case is remanded to the lower court for rehearing. The decision to retry the case ultimately rests with the prosecutor. If the decision of the appellate court requires the exclusion of important evidence, the prosecutor may decide that a conviction is not possible.

SENTENCING STATUTES AND GUIDELINES

In the United States, most jurisdictions hold that criminal sentencing is entirely a matter of statute. That is, legislative bodies determine the punishments that are associated with particular crimes. These legislative assemblies establish such sentencing schemes by passing sentencing statutes or establishing sentencing guidelines . These sentences can be of different types that have a profound effect on both the administration of criminal justice and the life of the convicted offender.

INDETERMINATE SENTENCES

Indeterminate sentencing is a type of criminal sentencing where the convict is not given a sentence of a certain period in prison. Rather, the amount of time served is based on the offender’s conduct while incarcerated. Most often, a broad range is specified during sentencing, and then a parole board will decide when the offender has earned release.

DETERMINATE SENTENCES

A determinate sentence is of a fixed length and is generally not subject to review by a parole board. Convicts must serve all of the time sentenced, minus any good time earned while incarcerated.

MANDATORY SENTENCES

Mandatory sentences are a type of sentence where the absolute minimum sentence is established by a legislative body. This effectively limits judicial discretion in such cases. Mandatory sentences are often included in habitual offender laws, such as repeat drug offenders. Under federal law, prosecutors have the powerful plea-bargaining tool of agreeing not to file under the prior felony statute.

THE SENTENCING REFORM ACT OF 1984

The Sentencing Reform Act of 1984 was passed in response to congressional concern about fairness in federal sentencing practices. The Act completely changed the way courts sentenced federal offenders. The Act created a new federal agency, the U.S. Sentencing Commission, to set sentencing guidelines for every federal offense. When federal sentencing guidelines went into effect in 1987, they significantly altered judges’ sentencing discretion, probation officers’ preparation of the presentence investigation report, and officers’ overall role in the sentencing process. The new sentencing scheme also placed officers in a more adversarial environment in the courtroom, where attorneys might dispute facts, question guideline calculations, and object to the information in the presentence report. In addition to providing for a new sentencing process, the Act also replaced parole with “supervised release,” a term of community supervision to be served by prisoners after they completed prison terms (Courts, 2015).

When the Federal Courts began using sentencing guidelines, about half of the states adopted the practice. Sentencing guidelines indicate to the sentencing judge a narrow range of expected punishments for specific offenses. The purpose of these guidelines is to limit judicial discretion in sentencing. Several sentencing guidelines use a grid system, where the severity of the offense runs down one axis, and the criminal history of the offender runs across the other. The more serious the offense, the longer the sentence the offender receives. The longer the criminal history of the offender, the longer the sentence imposed. Some systems allow judges to go outside of the guidelines when aggravating or mitigating circumstances exist.

INDETERMINATE-INDEFINITE SENTENCING APPROACH

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

DETERMINATE-DEFINITE SENTENCING APPROACH

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

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

PRESUMPTIVE SENTENCING GUIDELINES

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

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

Guideline sentencing allows for judicial discretion, but at the same time, limits that discretion. Judges must generally make findings when sentencing the offender to a term of incarceration that is different from the presumptive sentence. The judge must indicate which aggravating factors (factors indicating the offender or offense is worse than other similar crimes) or mitigating factors (factors indicating the offender or offense is less serious than other similar crimes). The Sentencing Reform Act of 1984 (18 U.S. C.A. §§ 3551 et. seq. 28 U.S.C.A. §§991-998) first established federal sentencing guidelines. The Act applied to all crimes

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

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

“There is still considerable uncertainty about the efficacy of sentencing guidelines. There is evidence that they have reduced sentencing disparities, but they clearly have not eliminated this problem altogether. There is also concern that sentencing guidelines

have promoted higher incarceration rates and have thus contributed to the problem of prison overcrowding. It is fair to say that to be successful, sentencing guidelines must be accompanied by policies designed to effectively manage prison populations." [1]



Think About It… Controversial Issue: Mandatory Minimum Sentences

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

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

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

The following is a link to video showing the Senate Vote on the First Step Act on December 18 th, 2018 -

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

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

CONCURRENT VERSUS CONSECUTIVE SENTENCES [138]

It is not uncommon for a person to be indicted on multiple offenses. This can be several different offenses, or a repetition of the same offense. In many jurisdictions, the judge has the option to order the sentences to be served concurrently or consecutively . A concurrent sentence means that the sentences are served at the same time. A consecutive sentence means that the defendant serves the sentences one after another.

FACTORS THAT AFFECT SENTENCING [139]

OFFENDER'S PRIOR CRIMINAL RECORD

EFFECT OF CRIMINAL RECORDS IN SENTENCING

A criminal record will be an aggravating factor in sentencing. The criminal record can show that the offender is a "scofflaw", is not rehabilitated or has not "learned from past mistakes".

An offender who has demonstrated an exemplary life since a prior offence and demonstrates remorse may be considered for a reduced sentence and reduce the need for specific deterrence.

It is an error in principle to determine a sentence based only on the sentence from a previous conviction. It is a "relevant consideration" but the sentence must be driven by the facts of the case.

A person who has received a discharge can still be considered a "first time offender".

OVER-WEIGHING CRIMINAL RECORD

The record "should not be given so much weight such that it becomes more influential than the circumstances of the offence."

It is important that the prior criminal record not be over-emphasized such that it amounts "to a re-sentencing of the accused for the previous offence(s)."

TIMING OF PRIOR RECORD

A criminal record can only be considered where the offender had one at the time of the index offence (this is known as the Coke Rule).

However, when a judge sentences for a convicted offence, the judge may take into consideration other criminal acts, and in a limited fashion, such as offences admitted in an agreed statement of facts or pending charges.

AGE AND YOUTHFULNESS

Age is relevant to sentencing as a mitigating factor. A youthful person is seen as having a greater chance of reforming and maturing over time. The courts in certain cases recognize young adults as sometimes foolish, inexperienced, irresponsible, immature and have a "greater prospects for rehabilitation". This diminishes their level of responsibility and moral blameworthiness. [1]

Likewise, the principle of restraint is a prominent factor for young offenders. [2]

Youthfulness as a factor is of primary importance for first time offenders. [3] The factor becomes less important when the youthful offender has "considerable amount of experience in the criminal justice system, has been subject to various forms of probationary and correctional supervision, and has not only breached those conditions but has also re-offended". [4]

Where not otherwise required, a judge sentencing of a youthful offender should put more weight on rehabilitation over general deterrence. [5]

The objectives for youthful first offenders should primarily be on rehabilitation and specific deterrence. [6]

The "length of a penitentiary sentence for a youthful offender should rarely be determined solely by the objectives of denunciation and general deterrence". [7]

For an older accused, age can factor against rehabilitation and reform. [8]

At a certain age there is a recognized category of offender for which imprisonment would be considered "pointless or an unreasonable burden". [9] However, some cases have also pointed to advanced age being an inappropriate reason for sentence reduction as it should be dealt with during sentence administration. [10]

ADVANCED AGE OFFENDERS

An offender of advanced age can "in some circumstances" be considered a mitigating feature. [11] This has been justified on the basis that prison time is tougher on older persons and that they will have less life expectancy after release.

EMPLOYMENT

In general, a good work history is mitigating as it indicates a prior good character. [1]

The offender's "opportunity for employment" is an important factor to determine if there is a "reasonable prospect for rehabilitation".

POLICE OFFICERS

Offences committed by persons who are "sworn to uphold the law" such as police officers have a "special duty to be faithful to the justice system" and so sentences require the objectives of denunciation has heightened significance. [1]

Police officer offenders who commit a breach of trust will be subject to "severe sentences" absent exceptional mitigating factors. [2]

A peace officer being sentenced to a period of incarceration is at risk from the general population and will inevitably serve much of the sentence in protective custody, which should warrant mitigating the punishment.

EFFECT ON EMPLOYMENT AND STATUS

Loss of professional or social status is not generally a mitigating factor nor is the ability to do a particular job well a mitigating factor. [1]

However, it has been said that the "ruin and humiliation" brought upon the accused and his family as well as the loss of professional status can provide denunciation and deterrence

Degree of Remorse and Attitude

Remorse is a mitigating factor. [1] Remorse is demonstrated by the acceptance of responsibility through word or action as well as demonstrated insight into the offender's actions. A lack of remorse, however, does not make for an aggravating factor, but simply does not allow for the mitigating effect of remorse. [2]

The courts should have "restraint...for persons who spontaneously acknowledge their culpability, have genuine remorse and seek voluntarily to make reparations." [3]

A lack of remorse or acceptance of responsibility generally cannot be taken as an aggravating factor, but rather can only be taken as an absence of mitigating factors. [4] Only in exceptional circumstances can the lack of remorse be taken as aggravating. [5]

Remorse is a "one-way street" and can only have the effect of providing reduction to sentence. [6]

An offender who "continues to maintain his innocence" cannot be found by that fact alone to lack "remorse or insight". [7]

Strong Case

Remorse has little importance when the case is so strong that "guilt is inevitable". [8]

Misconduct Negating Remorse

Where there is misconduct on the part of the accused during the course of proceedings, it will be "much more difficult to perceive the existence of remorse". [9]

Mistake of Law

While not strictly a defense at trial, a mistake of law can be medicating for sentence. Where the accused honestly but mistakenly believe in the lawfulness of their actions they are therefore less morally blameworthy.

Shame and Embarrassment

The resultant shame and scorn suffered by an offender as a result of the offence should generally not warrant a lighter sentence. [1]

When it comes to offences committed in the course of professional work, there should be little impact on sentence as the offender had "consciously chosen [to commit the offence while] they enjoyed a good reputation and a position of trust and status, which they abused to commit their crimes."

REPAYMENT AND RESTITUTION

Where there has been "full restitution" made in a property offence, this might be a "special circumstance" justifying a conditional sentence where a jail sentence was otherwise appropriate. [1]

It should still take "secondary role" to denunciation and deterrence in large scale frauds involving breach of trust.

CHARACTER

A mitigating factor that may be considered is whether the offence is "out of character".

"Stressors" that "precipitated" the offence rendering the offence "out of character" will have a mitigating effect. [1]

Letters from members of the community and family of the offender can be put into evidence at sentencing. However, the weight may be limited where there is no indication that the writers knew about the circumstances of the offence or prior record

RISK TO RE-OFFEND

The risk that the accused poses to re-offend is a valid factor for sentencing. [1]

A greater the risk to re-offend the more consideration there will be upon a custodial sentence. [2]

In sexual abuse against children, the fact that an accused is unlikely to re-offend is not a significant consideration. The emphasis should be on general deterrence and denunciation

POST OFFENCE CONDUCT

Efforts at rehabilitation and career advancement post-offence is a mitigating factor. [1]

Rehabilitation, while the accused has fled to avoid sentencing, is not a mitigating factor. [2]

Post-offence bad behavior is generally not an aggravating factor. [3] Criminal offences committed after the offence will not be aggravating. [4] However, efforts in attempting to frustrate the investigation, such as telling a victim not to report the offence or attempting to commit further offences, can be used as aggravating. [5]

Failure to Assist in the Investigation

Where an accused fails or refuses to assist police in an investigation it can at best neutralize mitigating factors. It cannot be an aggravating factor.

OFFENDER'S HISTORY OF TRAUMA

The presence of relevant abuse in the offender's history is sometimes found to be mitigating. This is particularly notable in child sexual offences where the offender had a history of abuse upon themselves.

ADDICTION AND SUBSTANCE ABUSE

Substance abuse, by itself, is not ordinarily a mitigating factor. [1] Nor is a history of addiction a mitigating factor to sentence. However, it can suggest a lower level of moral culpability and otherwise good character but for the addiction. It is also helpful for the court to know about to determine whether rehabilitation is a possibility when crafting an appropriate sentence.

Gambling addiction is not generally a mitigating factor. [2] However, some courts have treated it as a reduction to moral culpability as it has the effect of reducing the accused's free will and power of control due to a mental disease. [3]

An offender with issues with substance abuse may be subject to probationary terms requiring them to abstain absolutely from the possession or consumption of the substances. However, some courts will take the view that such restrictions can be counter-productive where there is no belief that they will comply with the conditions.

MENTAL HEALTH

Mental health can be a mitigating factor to sentence even where it is not so severe to remove criminal responsibility.

Reduction of sentences due to psychiatric grounds fall into two categories. The mental illness contributed to or caused the commission of the offence or the effect of imprisonment or penalty would be disproportionately severe because of the offender's condition.

An offender's emotional condition due to the personal circumstances of the accused should not be conflated with "mental health problems" that should accord some special treatment in sentence.

Causal Connection

Mental disorders, such as schizophrenia, can be a mitigating factor even when there is not a direct causal connection between the offence and the illness. This is also true where the offender was not suffering from delusions at the time. It is sufficient that the

illness contributed in some way to the offence. However, the offender's mental health condition is not a factor in sentencing where there is no connection at all between the offence and the condition.

By contrast, a person who commits a crime of violence "while in a sane and sober condition, unaffected by mental impairment of any kind, has the highest level of responsibility, or moral culpability."

Incarceration

Treatment in the community is generally preferred over incarceration. However, this is less so for serious offences.

Mental illness is often considered a basis to order treatment and supervision over punishment.

Deterrence and Denunciation

General deterrence should be given "very little, if any, weight" since it is not an appropriate manner of making an example to others.

Where mental health plays "a central role in the commission of the offence ... deterrence and punishment assume less importance".

However, at times mental illness will be considered an aggravating factor that will increase sentence where it is necessary to protect the public from a dangerous person who has committed a dangerous offence. Mental illness reduces the importance of denunciation and deterrence and increases the importance of treatment. This includes situations where rehabilitation or cure is impossible.

It is suggested it should be given little if any weight since the punishing of the offender will not make an example to others by way of general deterrence.

The mental condition will attenuate the relative importance of deterrence and denunciation.

Degree of Responsibility

A mental illness diminishes the offender’s degree of responsibility.

Impact of Jail

Incarceration of persons with mental health issues can create a disproportionate impact upon them, which can be a mitigating factor.

An Offenders mental illness can make a jail sentence more severe.

Cognitive Deficits

Diminished intellectual capacity is not a mitigating factor warranting a lesser sentence.

The cognitive deficit from Fetal Alcohol Spectrum Disorder (FASD) results in limited restraints as well as an appreciation of the immorality of their actions. This reduces the impact on deterrence and denunciation and increases the mitigation on sentence.

Systemic failures to treat the offender's mental health are mitigating factors.

CAPITOL PUNISHMENT [140]

Learning Objective: Key Points

- Crimes that can result in a death penalty are known as capital crimes or capital offences.
- Supporters of the death penalty argue that the death penalty is morally justified when applied to murder cases, especially cases with aggravating elements, such as multiple homicide, child murder, torture murder and mass killing including terrorism or genocide.
- Capital punishment is often opposed on the grounds that innocent people will inevitably be executed.
- Abolitionists believe capital punishment is the worst violation of human rights.

Learning Objective: Key Terms

- insubordination : The quality of being insubordinate; disobedience to lawful authority.
- capital punishment : Punishment by death.
- capital crime : A crime that is punishable by death

WHAT IS CAPITAL PUNISHMENT?

Capital punishment is a legal process whereby a person is put to death by the state as a punishment for a crime. Crimes that can result in a death penalty are known as “capital crimes” or “capital offenses. ” Capital punishment has in the past been practiced by most societies. Currently, only 58 nations actively practice it, and 97 countries have abolished it. Although many nations have abolished capital punishment, over 60% of the world’s population live in countries where executions take place–the People’s Republic of China, India, the United States, and Indonesia–the four most-populous countries in the world, that continue to apply the death penalty.

Execution of criminals and political opponents has been used by nearly all societies–both to punish crime and to suppress political dissent. In most places that practice capital punishment, it is reserved for murder, espionage, treason, or as part of military justice. In some countries, sexual crimes, such as rape, adultery, incest, and sodomy, carry the death penalty, as do religious crimes, such as apostasy in Islamic nations. In many countries that use the death penalty, drug trafficking is also a capital offense. In China, human trafficking and serious cases of corruption are punished by the death penalty. In militaries around the world courts, martial have imposed death sentences for offenses, such as cowardice, desertion, insubordination, and mutiny.

ARGUMENTS FOR AND AGAINST

IN SUPPORT OF CAPITOL PUNISHMENT

Supporters of the death penalty argue that the death penalty is morally justified when applied in murder, especially with aggravating elements, such as multiple homicide, child murder, torture murder, and mass killing including terrorism or genocide. Some even argue that not applying the death penalty in latter cases are patently unjust. Supporters of the death penalty, especially those who do not believe in the deterrent effect of the death penalty, say the threat of the death penalty could be used to urge capital defendants to plead guilty, testify against accomplices, or disclose the location of the victim’s body.

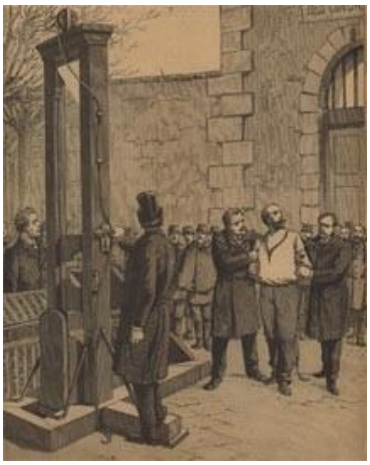


Figure 14.1 Capital Punishment: Anarchist Auguste Vaillant guillotined in France in 1894. [141]

ARGUMENTS AGAINST CAPITOL PUNISHMENT [142]

Capital punishment is often opposed on the grounds that innocent people will inevitably be executed. Between 1973 and 2005, 123 people in 25 states were released from death row when new evidence of their innocence emerged. Abolitionists believe capital punishment is the worst violation of human rights, because the right to life is the most important, and judicial execution violates it without necessity and inflicts to the condemned to a psychological torture. In addition, opponents of the death penalty use the argument that executing a criminal costs more than life imprisonment does. Many states have found it cheaper to sentence criminals to life in prison than to go through the time-consuming and bureaucratic process of executing a convicted criminal.

Horrendous crimes are committed and will continue to be committed. Even before clear legal systems existed, people wanted to see perpetrators properly punished for the crimes they committed, and the more heinous the crime, the worse the punishment. Rape, murder, torture, and molestation will always be at the top of the list of crimes that are intolerable, as they are all gross violation of another’s autonomy. I could describe a crime that would make anyone’s blood boil and ignite a rage for vengeance on the criminal that had the coldness to carry out such a depraved act. I will spare the reader such a story, but you can imagine the types of crimes I am referring to. Once we catch a person that would do such a thing, the next issue we are faced with is clear: What do we do with

this person? How do we punish them? Historically, execution, also known as capital punishment, has been used widely for many crimes. Today, it is reserved for the worst of the worst crimes and criminals in countries where it is used. However, many countries (notably, all of Europe except for Belarus) have either outlawed the punishment or chosen not to implement it. We thus ought to consider whether, in today's world, we should ever execute criminals.

While some crimes and criminals might deserve to be executed for their crimes, it is not a penalty that we should continue to implement, especially in the United States of America. There are four reasons for this: 1) the justice system is flawed, and with the finality of death, we should avoid punishments that cannot be properly compensated for; 2) on top of variations in prosecutors in seeking the death penalty, there are worrisome geographic and racial variations in the implementation of capital punishment that mean it is not applied fairly; 3) it is sought and carried out infrequently; and, 4) the United States is one of the few "Western" countries to still have it, and abolishing it would put the USA in-step with its closest allies and provide an important expression of moral fortitude.

My arguments will hinge on one major claim: a life behind bars would appear to be an equally just punishment when compared to the death penalty. While one has actual life, there is no freedom to go with it. The value of living might be completely removed if one is behind bars forever, making this punishment on equal footing to death. The Spanish phrase for life imprisonment is the poetic cadena perpetua , which literally translates to "perpetual chain," a reminder that the focus of such punishment isn't on living but being imprisoned. In both prison and death freedom is removed, and never living free again is a fate that is akin to death, as any semblance of a quality life can only be a farce. On top of this, should there be good reason to do so, we can always lessen the term of the punishment and release the prisoner. Additionally, as the Dread Pirate Roberts told Westley in The Princess Bride , "Good night, Westley. Good work. Sleep well. I'll most likely kill you in the morning," there would remain the possibility of execution in the future if justice demands it (notwithstanding potential legal problems with altering a punishment); but we can't bring someone back to life (yet) if we execute them and regret it. This doesn't illustrate that execution is wrong but shows a technical way that life imprisonment can be advantageous. In any event, it is unclear to me that execution is the only appropriate punishment for the crimes that it is a potential punishment for.

I have not mentioned anything about costs. My reasoning is simple: it is unclear whether life in prison or the death penalty is more costly overall, as the likelihood of a shorter time spent in prison is offset by the increased costs of housing the prisoner and the longer court processes (such as multiple appeals) required for capital punishment. Of the many studies that have occurred and the analyses of the studies, there is no clear answer to the question of which one costs more, as costs per trial vary greatly based upon the details of the trial, and where it is carried out, as well as the overall costs of housing or executing an individual prisoner in a specific prison. Even if there were an answer, it is beside the point: if the death penalty is the only just punishment, then we ought to implement it since it would be appropriate to do so. It is very costly to put a car thief into prison, and a lot cheaper to implement the religious punishment of removing a hand. But it is often deemed inappropriate to do the latter, as mutilation is a permanent disfigurement that is particularly cruel. A few years of lost freedom (and maybe a monetary fine) are now deemed to be much more just.

Why should we execute people and for what crimes? There are three main reasons that hold philosophical value: justice, deterrence, and the impossibility of rehabilitation. The first, and most important, reason is that the criminal deserves to die. The act they have committed is so depraved and caused such harm, execution is the only way we can fairly punish the offender. If we kill people for awful crimes, then the threat of punishment also can function as a deterrent. If you might be killed for doing something awful, perhaps you'll refrain from doing it. Lastly, what should we do with those people that are so depraved they are beyond rehabilitation? Some people will just continue to do bad things, and will not, by their own admission, stop. Experts can interview them and concur. They are lost, there is no hope, and they may even see death as just and preferable. Certainly, these people should be executed. On top of all of this, it gives the families of victims justice and satisfies our primal hunger for revenge.

To turn back to my primary reasons for advocating for the abolition of the death penalty in the United States, my first claim is that given the finality of the punishment and the potential of executing innocent individuals, we ought to avoid it. Let's assume this occurs, and an innocent person was executed. Let's also assume that execution is appropriate for certain crimes. Would executing one innocent person be worth executing all of the actually guilty individuals that would come to have the punishment of execution? After all, we allow emergency vehicles to violate all sorts of traffic laws, resulting in the occasionally fatal, and likely avoidable, accident. We believe this cost is worth it because it means that more people, on the whole, are saved. Is execution so appropriate

and so important that there are no suitable alternatives or that the only alternatives are actually, all-things-considered, significantly less just?

To alleviate this concern, someone might be quick to point out that no person has been executed and later been found to be innocent since the United States restarted capital punishment in 1977. As of this writing, 161 people have been exonerated before execution (out of approximately 7,800) making the wrongful sentencing rate at least 2% (for updated information on this and all of the statistics mentioned in this work, visit http://deathpenaltyinfo.org). Of course, there is little reason to find out if someone was actually innocent after they have died, so those sentenced to death that die before, or as a result of, execution are unlikely to be exonerated, should they actually be innocent. All crimes carry the chance of wrongful convictions, but most of the punishments can, at least in theory, be compensated for, assuming that the value of money can be comparable to the value of time. There is no compensation for a dead person that the person will directly benefit from. As such, the risk of executing an innocent person is too great, especially when life in prison would appear to be a fitting alternative.

There is extreme variation on the implementation of the death penalty across racial and geographic lines and its application is very dependent on the prosecutor. Where the death penalty is allowed, if you are a black male that killed a white female during a robbery, the odds of receiving the death penalty over a white male that tortured a black female before death are significant, and both are much greater than a white woman that tortured then killed a black man (I don't know the exact number since no one has crunched the numbers on all of these, but consider that less than 2% of all death row inmates are women despite committing roughly 10% of eligible homicides and that black males are 97% more likely to get the death penalty when they kill a white person over a black person). The race of the perpetrator and the victim both influence whether the death penalty is sought and applied. Justice is supposed to be blind, and even if everyone who got the death penalty deserved it, the application of it is unfair. This should be concerning.

The death penalty is sought in less than 1% of eligible cases. This statistic speaks for itself: capital punishment is rarely sought as a punishment even in cases where it can be used. Capital punishment will work as a deterrent if it actually deters, but since it is rarely used, it would be reasonable for criminals to believe they would not be executed if they commit capital crimes, and thus unlikely to work as a deterrent. For the threat of capital punishment to clearly work as a deterrent, it should be implemented a lot more frequently than it is. As there is no consensus in the research on whether it is effective as a deterrent, relying upon this reason to support maintaining the death penalty is problematic.

Finally, abolishing the death penalty in the United States would send a very important symbolic and humanitarian message: we stand with the rest of the NATO countries and majority of the world (and move away from being the country with the third most executions behind China and Saudi Arabia) in deciding not to systematically execute people in the name of justice. European countries did not disavow the death penalty because it was inappropriate, but rather many did so because of all the practical concerns I have laid out. If it is unfair in how it is used, then it shows the legal system disrespects its own desire for impartiality. It undermines the integrity of the legal and justice system itself.

Yet, there is still something to be said for keeping the death penalty in light of all of my reasons for abolishing it. 26 Despite my claims that life in prison is just as bad as execution, many people disagree with this. Importantly, many criminals that face these punishments might disagree with it. The threat of execution could motivate criminals to cooperate and accept guilt more frequently, sparing us both the costs of seeking conviction and avoiding the possibility that they are found innocent (this is assuming that they really are guilty). Beyond this, people spending life in prison might not have anything other than their lives to lose, so keeping capital punishment gives them one final thing to fear and thereby prevent them from continuing to do awful things behind bars. Lastly, there might not be any value to the positive expression of our moral fortitude that abolishing the death penalty might bring with it. In fact, keeping it might be more expressive by saying that we will never tolerate extremely depraved acts.

I concede that each of these arguments provides a good reason to keep the death penalty on the table. Indeed, the fact it is rarely used is irrelevant for each of these arguments: it's on the table as a possible punishment, and that's what matters. However, the finality of the death penalty doesn't necessarily have to be the goalpost. We do not chain people to walls until they die in prison: inmates in prison for life are afforded some amount of pleasure and freedom behind walls, at the very least, in hopes of reform and an existence that contributes positively to society. We are also not heartless and can recognize the humanity in even the most hardened criminals. Thus, there can be (and are) varying degrees of freedom one may be privileged to while imprisoned, and the threat of continued loss of freedoms could be used as motivating factors in lieu of execution. To the last objection, that we do not need to show anything to our Western allies or make any statements on punishment (and that having the death penalty might even

be the statement we should be making), I'd like to point out that execution is the only punishment we have that intentionally inflicts direct physical harm on a criminal. We no longer lash people, use medieval torture devices, or otherwise use methods with the intention of inflicting physical harm. While we restrain and restrict, the purpose of all other types of punishments and incarcerations are not to physically harm. If physical harm comes, it is an unintended consequence. Abolishing the death penalty, the last bastion of physical violence as a punishment, illustrates that we have moved beyond intentionally inflicting physical harm as a form of punishment.

On March 12, 2019, the governor of California, Gavin Newsom, issued a moratorium on executions during his governorship. This means that while he is governor, no one will be executed and everyone on death row will be treated as if they are in prison for life. Future governors can restart executions, however. This move was met some anger, with the loudest shouting two things: (1) voters have constantly reiterated the desire for the death penalty and the governor disregarding this is overreaching on his part, and (2) that certain people deserve to die as a result of their crimes, and the justice system has confirmed this. The former argument is one about the political structure of the state and where powers lie, and while I can be sympathetic to this viewpoint, the facts are that the governor has the power to take the actions he did, an ability he has in order to maintain a proper system of checks and balances. Whether the system is actually balanced is a separate issue and not one I need to tackle right now. The second reason had people advocating for the killing of other human beings. It struck me as odd that the cause they are getting riled up about is one that involves such an act of violence. It feels as if we have lost our humanity if we scream and fight so that we may kill another person in the name of the law, because there is no other action that could possibly bring justice. It might be the only way to get revenge, but the law should not be used for revenge. I do believe that some crimes are worthy of such a sentence, but it is not something worth fighting for, especially when the alternative of life in prison is a sufficient proxy. I fully sympathize with the families of victims and in no way want to ignore the awfulness of the crimes these people committed, but fighting for someone else to die in the name of justice does not promote the values we ought to promote as a modern society.

To summarize, while some crimes are heinous enough that the offender can be deserving of capital punishment, implementing execution is riddled with too many problems and complications to be morally appropriate in today's world. It should thus be abolished because the alternative of life in prison is an acceptable replacement.

REFUTING CAPITAL PUNISHMENT IN AMERICA [143]

Ray Krone came home after finishing his mail route on New Year's Eve, 1991, planning a fun evening to ring in the new year with some of his friends. His night would go nothing as planned. Instead, a dozen police officers were waiting in his driveway. Ray was immediately apprehended and charged for the kidnapping, sexual assault, and murder of a 26-year-old woman who worked at the local bar. Ray is an African American man. The murdered woman was white. (The significance of race will be discussed later in this essay.) At trial, he was convicted of first-degree murder and kidnapping; he was later sentenced to death (Krone).

The Death Penalty Information Center showed that at the time of Ray's sentencing, around 80% of Americans supported the death penalty and saw no problem with this conviction. This position would argue that Krone committed an act of murder; therefore, he should be executed. However, Ray Krone was wrongly convicted. An innocent, honorable man was to be deprived of his life because of an act of injustice he didn't even commit. On April 8th, 2002, after serving 5 years on death row and another 5 years waiting for his innocence to be proven, Ray was exonerated (Krone). His case is one of the many that readily shows the flaws in the legal system and problems with capital punishment, such as innocence, lack of access to adequate counsel, racial disparities, and deterrence, which I will further explore to prove that the death penalty should be illegal in the United States.

Ray Krone is not the only person to be exonerated after serving time on death row. In fact, he was the 100th person, and as of 2016, there have been 156 death row exonerees (Dejong 325). Published in the scholarly journal, Criminal Justice Ethics , Hon-Lam Hi's research from the 1980s showed that around 3.3 to 5% of all convictions in U.S. capital rape-murder cases were erroneous. So, since erroneous convictions are inevitable because humans make mistakes, is it acceptable to execute around 4 innocent people out of every 100 executions?

Although this question seems to only have one morally acceptable answer, it can be answered in two very different ways, either using Li's principle of contractualism or the opposing principle of utilitarianism. People who hold the view of utilitarianism agree with the death penalty, as this position holds that if the benefits of an act outweigh its harm, then the act is permissible. In answering the question, the principle of utilitarianism would state that the cost of killing these 4 individuals is outweighed by the benefits the community receives for the incapacitation of the other 96 murderers and the deterrence of further crime. However, if

one of those 4 people were you, a friend, or a family member, would you still hold a utilitarian perspective? It is very doubtful. The more intuitive reasoning, contractualism, holds that an act is permissible if and only if it is justifiable to everyone affected by it. This view would say that the killing of these 4 wrongfully convicted persons cannot be justified to the innocent people, their friends, or their families. Therefore, the act of killing is not permissible (Li 152). In itself, according to this view, rates of erroneous convictions, leading to possible executions of innocent people, are enough to make the death penalty unjustifiable and morally unacceptable.

Along with the way that Ray's innocence reveals moral issues regarding the death penalty, his status as an indigent defendant raises significant legal issues. Indigent defendants do not have enough money to pay for representation in court, so, per the 6th Amendment, "the accused shall enjoy the right to . . . have the assistance of counsel for his defense," meaning the state had to provide an attorney for Ray (U.S. Constitution). The 1984 case Strickland v. Washington extends the 6th Amendment because the Supreme Court ruled that defendants in capital cases have the right to effective representation that meets an "objective standard of reasonableness." However, little pay is given to defense attorneys who are hired to represent indigent defendants, and, in most cases, this attracts the least skilled and unexperienced attorneys.

A large number of attorneys assigned to represent the accused have little to no experience in criminal law, let alone litigating capital cases. They have no idea as to how they should proceed with the cases, which leads to a large number of death row sentences. In 1999, an extensive investigation into capital punishment in Illinois was conducted by the Chicago Tribune , and it found that 33 defendants who were sentenced to death were represented by attorneys who had been, or were later, disbarred or suspended for conduct that was "incompetent, unethical, or criminal" (Dejong 329). Moreover, a 2002 study conducted by the Texas Defender Service found that Texas death row inmates face a 1 in 3 chance of being executed without having had proper case investigations or a competent attorney to argue for them (Death Penalty Info Center). Although the Strickland v. Washington case should eliminate the problem many indigent defendants have with inadequate representation, the ruling stated that the defendant has to prove ineffective counsel by showing that in absence of this assistance, the results would have been different. And here lies the problem many indigent defenders have; not only is this objective standard of reasonableness quite ambiguous and hard to prove, but the state hires these attorneys, so it is highly unlikely states will rule that their provided counsel is ineffective. Therefore, indigent defenders in capital cases are not fully protected by the 6th Amendment, yet another reason the death penalty is an unjust punishment.

Another major issue with imposing the death penalty is racial disparity, an aspect relevant to Ray's case. Section one of the 14th Amendment states that "No state shall . . . deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws" (U.S. Constitution). For many years now, some people have believed problems with racial discrimination in the U.S. are nearing an end, yet evidence is readily available in our criminal justice system that these problems persist. A U.S. military study conducted from 1984 to 2005 examined all of the 105 potentially death-eligible cases during that time. Fifteen of those cases resulted in a death sentence, and from the data, evidence of three types of racial disparities was found. The most common of the race-based effects is known as "race of the victim discrimination," which shows that capital-offense charging and sentencing decisions are applied more punitively in cases involving white victims than in similarly situated cases involving victims of color. Of the 15 cases that received the death penalty, 14 had white victims.

The second form of disparity is known as "minority-defendant/white-victim" discrimination. In these cases, there is more punitive treatment when a case involves a minority defendant and a white victim than any other race combination. Nine of the 15 executions showed this form of racial discrimination. The last identified disparity is known as "main effect" racial discrimination. In these cases, there was more punitive treatment with a minority defendant than a white defendant, and of the 15 people sentenced to death, 10 were minorities (Baldus 1229, 1265).

Although this study was conducted over a decade ago, similar trends appear in capital cases today. Since the death penalty was declared constitutional in 1976 with the Supreme Court ruling in Gregg v Georgia , the "race of the victim discrimination" has been very prominent. According to Baldus, only around 50% of the victims in murder cases overall are white, but this percentage is much higher for death penalty cases, around 76%. In Ray's case, if the woman who was murdered had not been white, it would have been much less likely that the prosecution against him would have sought the death penalty as a punishment. All these stats reveal continuing signs of racial disparities in the criminal justice system, giving another reason the death penalty should be illegal. As Ray's case sadly demonstrates, the phrase, "equal protection of the laws," from the 14th Amendment does not rightfully and equally protect racial minorities in our country.

As mentioned earlier, at the time of Ray's conviction, around 80% of the population agreed with capital punishment. Most advocates supported it because they believed a combination of the following three factors: it is a sufficient deterrent, it is a form of proper retribution, or it is less costly than life in prison. However, there are proven flaws with each of these factors.

First of all, capital punishment has not been statistically or scientifically proven to be a deterrent of future crime. Many criminals act on impulse and do not consider the consequences before committing a crime. As stated in Charles Manski and John Pepper's article, published in the Journal of Quantitative Criminology , "the outcomes of counterfactual policies are unobservable" (Manski and Pepper 124-26). Referring to deterrence, Manski and Pepper attribute this statement to the research that has been conducted around the effectiveness of deterrence. The research has found vastly different results for this effectiveness, due to the biased assumptions researchers hold about deterrence. In turn, these individual assumptions about deterrence, as either seeing deterrence as effective or ineffective, have impacted the findings. In both cases, the results sway toward the beliefs of the particular researchers, as the researchers are cognitively biased, failing to account for factors that may stop them from reaching their desired outcome. Furthermore, Manski and Pepper argue there is too much ambiguity to properly measure the deterrent effects of capital punishment, so a conclusion cannot be drawn to determine if the death penalty increases or decreases homicide rates (Manski and Pepper 124-26).

The main reason we, as a society, seek to use the death penalty is not because of deterrence, but for retribution purposes. It is in our nature to want revenge against someone who wronged us, and the death penalty, as an ultimate punishment, seems like a proper way to make criminals suffer. Nonetheless, this is very hypocritical. We value human life and believe murder is wrong, yet we murder criminals to supposedly uphold our beliefs against murder; but two wrongs do not make a right. Ray would also argue that the death penalty should not be used as a form of retribution because – after his experience of 10 years locked up in prison – he found that many convicts would rather die than spend the rest of their lives, slowly rotting away in their cells. To them, death is the easy way out (Krone).

Overall, the death penalty is not morally correct or as strong a form of punishment as life in prison. Life in prison, contrary to many beliefs, is less costly than seeking the death penalty. Many people look at the wrong stats when deciding which punishment costs the government less in tax dollars. They see that the drugs used for lethal injections, the most used form of execution, only cost a total of $346.51 per execution, while life in prison costs around $1 million per person (Banner 295). However, litigating capital cases and reaching the point of execution, takes a lot of time and resources. Capital cases may take many years, as they must go through trial and, most times, several appeals before reaching a final sentencing decision. In capital cases, most of the accused are indigent defenders so the government has to pay for the defense attorneys, along with the judges, prosecutors, other court employees, and expert witnesses. After all that, the price of obtaining a conviction and execution can range anywhere from $2.5 to $5 million (Banner 295). So not only is the death penalty immoral, it also costs citizens and the government a large amount of money for such an ineffective form of punishment.

Today, 31 states, Washington D.C., the U.S. Military, and the federal government have authorized the use of the death penalty within their jurisdictions. Since 1976, a total of 1,465 executions have been performed (Death Penalty Info Center). I am proposing we ban the death penalty as a form punishment and make it illegal throughout the Unites States, as many developed nations have done before us.

In proposing this, I am not saying we should allow criminals to get away with murder and remain in society. Rather, I believe we should sentence these criminals to life in prison without parole. This form of punishment allows for retribution and eliminates major legal and discriminatory issues that arise in capital cases. Of those 1,465 persons that have been executed, we are not sure how many of them have had their rights violated or were wrongly convicted. In the words of the late Supreme Court Justice Thurgood Marshall, "no matter how careful courts are, the possibility of perjured testimony and human error remain all too real. We have no way of judging how many innocent persons have been executed, but we can be certain that there were some" (qtd in Li 152). Ray Krone could have easily been one of these innocent persons executed. Due to all the legal issues that arise and the

amount of potential error in capital cases, which suggests we cannot apply the death penalty with fairness and certainty, the death penalty should be illegal.



Think About It… For Review and Discussion

- Do you think there are certain crimes where execution is appropriate? If so, which ones and why? If not, why not?
- Assume that execution is the appropriate punishment for some crimes. Should it be used? Why or why not?
- Is execution a “cruel” or “unusual” punishment? Why or why not?

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CHAPTER OVERVIEW

15: Probation and Restorative Justice

15.1: Probation
15.2: Intermediate Sanctions

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15.1: Probation

Probation[144] is arguably the oldest, and certainly the largest, of intermediate sanctions. Its roots stem from concepts of common law from England, like many of our other legal/correctional practices. In early American courts, a person was able to be released on their own recognizance, if they promised to be responsible citizens and pay back what they owed. In the early 1840s, John Agustus, a Boston bootmaker was regularly attending court and began to supervise these individuals as a Surety. A Surety was a person who would help these individuals in court, making sure they repaid these costs to the courts. We would consider John Augustus as the Father of Probation, for this work in the courts in Boston in the 1840s and 1850s. Augustus, pictured below, would take in many of these individuals, providing options like work and housing, to help ensure these individuals would remain crime free and pay back society. He continued this practice for nearly two decades, effectively becoming the first probation officer. For a lengthier historical discussion of probation, see the history of probation at https://probation.smcgov.org/history-probation .



Figure 15.1 John Augustus [145]

Probation is a form of a suspended sentence, in that the jail or prison sentence of the convicted offender is resuspended, for the privilege of serving conditions of supervision in the community. Conditions of probation often include reporting to a probation officer, submitting random drug screens, not consorting with known felons, paying court costs, making restitution and damages, and attending AA or NA courses, among other conditions. Probation lengths vary greatly, as do the conditions of probation place on an individual. Almost all people on probation will have at least one condition of probation. Some have many conditions, depending on the seriousness of the conviction, while others are just a blanket condition that is imposed on all in that jurisdiction, or for that conviction type. Juvenile Probation Departments were within all States in the 1920s, and by the middle of the 1950s, all States had adult probation.

PROBATION OFFICERS

Probation officers usually work directly for the state or federal government, but that can be directed through local or municipal agencies. Many Counties will have a community justice level structure where probation offices operate. Within these offices, probation officers will be assigned cases (caseload), in term of the probationers, they will manage. The volume of cases in a probation officer's caseload can vary from just a few clients if they are high need/risk clients, to several hundred probationers. It depends on the jurisdiction, the structure of the local PO office, and the abilities of the probation officers themselves.

The role of the probation officer is complex, and sometimes diametrically opposing. A PO's primary function is to enforce compliance of individuals on probation. This is done through check-ins, random drug screenings, and enforcement of other conditions that are placed on the probationers. Additionally, the PO may go out into the field to serve warrants, do home checks for compliance, even make arrests if need be.

However, at the same time, a probation officer is trying to help individuals on probation succeed. This is done by trying to help individuals to get jobs, get schooling, enter into substance or alcohol programs, and generally support people on probation to be successful. This is why the job of the PO is complex, as they are trying to be supportive, but also having to enforce compliance. Many equate this to kind of like being a parent. Recently, there has been a movement within probation to have probation officers

act more like coaches than just disciplinarians. Here is a talk about how POs can view themselves as coaches to enact positive change within individuals on probation:

http://criminaljusticeofficehours.libsyn.com/dr-brian-lovins-probation-coaches?fbclid=IwAR2pHROGAPpm09-PFqVzFG10ItFhCi1huFItChe65Ew7-gXDB0OSacCliQs

The other primary function of a probation officer is to complete PSI reports on individuals going through the court process. A PSI or Pre-Sentence Investigation report is a psycho-social workup on a person headed to trial. It includes basic background information on an individual, such as age, education, relationships, physical and mental health, employment, military service, social history, and substance abuse history. It also has a detailed account of the current offense, witness or victim impact statements of the event, and prior offenses (criminal records), which are tracked across numerous agencies. Finally, the PSI also has a section that is devoted to a plan of supervision or recommendations, which are created by the PO. These usually list out the conditions of probation recommendations, if probation is to be granted. Judges use this information during sentencing discussions and hearings and will usually follow these recommendations often (around 85% of the time). Thus, many of the conditions of probation are prescribed by the PO.

INDIVIDUALS ON PROBATION

As stated, there are several million people on probation, serving various lengths of probation, and under numerous conditions or condition types. Additionally, the convictions which place individuals on probation vary, to include misdemeanors and felonies. Probationers serve their probation at the state level, and there is even federal probation. As depicted below, it is easy to see how much probation is used in the United States.

USE OF PROBATION IN THE U.S.

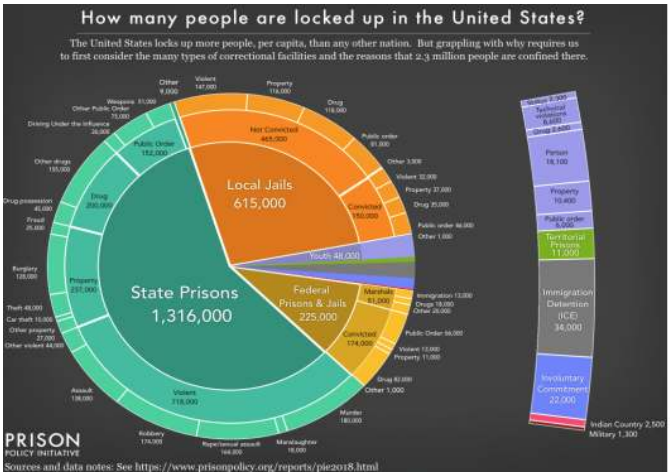


Figure 15.2 Correctional Control by Type 1975-2016 [146]

Probation is not a right, and it is not a suspended sentence. It is a privilege, but it most certainly comes with conditions for the suspension of the incarceration. Due to how cheap probation is, relative to jail or prison, and the ability for lower-risk individuals to maintain connections within their community, millions of people will be on probation in the United States at any given time.

Other important factors that help to decide if a person warrants probation is within the PSI and other assessments are done on the individual. If the person is basically, a prosocial person, has an education and a job, has a family, these would all be considered as ties to the community. These ties to the community could weaken or break if a person was incarcerated. Thus, providing a sanction while allowing the person to stay in the community is often the approach that is utilized within probation and other intermediate sanctions.

PROBATION SUCCESS

There are mixed reviews about probation. Recently, the Bureau of Justice Statistics (2018 report, for 2016) listed the successful completion rate at about 56%. In years past, this number has been reported higher, upwards of 65%, depending on the years 2008-2013. There are a host of reasons listed for unsuccessful completion, which include: incarcerated on a new sentence/charge, or

placement for the current sentence/charge, absconding (fleeing jurisdiction), discharged to warrant or detainer, other unsatisfactory reason, death, or some other unknown or not reported reason. Unsuccessful completion can produce some different responses but can include a concept called tourniquet sentencing. Tourniquet sentencing is where the restrictions of a level of sanction are increased, due to non-compliance, in order to force compliance. If an individual on probation is not adhering to the conditions of probation, a PO can recommend a probation revocation hearing. This bench hearing can lead to an informal admonishment by a judge, an increase in the sanctions or sanction lengths, an increased level of control (moving from regular probation to intensive supervised probation), even up to placement in a secure facility (jail or prison), all depending on the infraction of the condition of probation that has been violated. Many go from regular probation to ISP, in an effort to force compliance through increased monitoring.

INTENSIVE SUPERVISED PROBATION

Intensive Supervision Probation (ISP) began in the late 1950s, early 1960s, in California. Their basic premise was to allow caseworkers (POs) to have smaller caseloads and increase the level of treatment across offenders. As stated, many promised multiple success measures. However, if an individual who was revoked because of a technical violation due to an increase in control, they were not seen as a failure. Rather, they were seen as a success because of the way the public was served by the recidivism. However, this went directly against the notion that ISPs could save money. Because of these problems, the earlier forms of ISPs may have become less popular. In the 1980s, a newer model of the ISP was created in Georgia. More emphasis was placed on the control aspect rather than on treatment. Further, less emphasis was placed on the reduction of money saved.

ISP and regular probation are similar, except for the frequency of contacts with POs, the increases in surveillance and monitoring, and usually the volume of conditions. Rather than meeting a PO once a month in regular probation, a person on ISP would likely be meeting with their PO weekly, or even more frequently. Additionally, individuals on ISP normally are submitting drug screens weekly. The increased conditions of supervision more frequently include more substance abuse treatment, either in the form of AA, NA, or some other residential or outpatient substance abuse treatment programs. Thus, the core difference is about the increased level of surveillance and control over the offender.

ISP SUCCESS

While initial praise of the newer model for its increase on control was evidenced by its rapid spread through the States, some researchers questioned their effectiveness. In one of the largest studies of ISPs, in conjunction with the RAND Corporation. They examined the effectiveness of ISPs in reducing recidivism and saving costs. In a random sample of 14 cities across 9 States, they evaluated the reductions of recidivism against a sample of regular probationers. Their findings suggested that there were higher amounts of technical violations, which were probably substance violations, but there were no significant differences between control-centered ISPs and regular probation, as far as new arrests. Moreover, when looking at outcomes over 3 years, they found that recidivism rates were slightly higher for these ISPs (39%), vs. regular probation (33%). Also, there were no substantive cost savings. Other studies have produced similar findings as to the effects of non-treatment oriented ISPs. While these findings might be better than prison recidivism rates, there were no reductions in prison overcrowding, which was also one of the intents of ISP.

ELEMENTS OF PAROLE [147]

Learning Objective: Key Terms

- Conditions of Release, Fourth Waiver, Fundamental Rights, Mempa v. Rhay (1967), Morrissey v. Brewer (1972), Parole Revocation

For most of the history of probation and parole in the United States, offenders were viewed as having received a gift from the state when they were not sent to prison. Because being on probation or parole was viewed as a privilege conferred by the state, most states believed that they were under no obligation to provide probationers and parolees with the elements of due process they were afforded prior to conviction. In today's legal landscape, the Supreme Court has intervened and now probationers and parolees enjoy some, but not all, of the protections afforded by the Constitution. Note that most of the Supreme Court decisions regarding the rights of probationers and parolees blur the distinction. That is, most of the Court's rulings on probation issues apply to parole as well, and vice versa.

REVOCATION OF PAROLE

Implicit in the criminal justice system's concern with parole violations is the idea that individuals on parole are entitled to retain their liberty as long as they largely abide by the conditions of parole (or probation). When parolees do fail to live up to these standards, their parole can be revoked. The first step in the parole revocation process involves answering a factual question: whether the parolee has in fact acted in violation of one or more conditions of his or her parole. Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation?

The second question involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing antisocial acts. This part of the decision, too, depends on facts, and therefore it is important for the parole board to know not only that some violation was committed but also to know accurately how many and how serious the violations were. Yet this second step, deciding what to do about the violation once it is identified, is not purely factual but also predictive and discretionary.

Parole revocation is very serious for the offender. If a parolee is returned to prison, he or she usually receives no credit for the time "served" on parole. Thus, the violator may face a potential of substantial imprisonment. Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions. This means that the legal standards for parole revocation are not the same as a finding of guilt in criminal court.

DUE PROCESS

The liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others. Historically, it was common for judges to speak of this problem in terms of whether the parolee's liberty was a "right" or a "privilege." By whatever name, the Supreme Court has determined that liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Because of this, the courts have determined that its termination calls for some orderly process, however informal.

In Morrissey v. Brewer (1972), the Supreme Court refused to write a code of procedure for parole revocation hearings; that, they said, is the responsibility of each State. In this case, the court pointed out that most States have set out procedures by legislation. The Supreme Court did establish a list of minimum due process requirements that must be followed in all revocation proceedings. They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Specifically, then, Morrissey held that a parolee is entitled to two hearings, one a preliminary hearing at the time of his arrest and detention to determine whether there is probable cause to believe that he has committed a violation of his parole, and the other a somewhat more comprehensive hearing prior to the making of the final revocation decision.

In Gagnon v. Scarpelli (1973), the court considered the problem of probation revocation hearings. In Scarpelli, the court stated:

Petitioner does not contend that there is any difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation, nor do we perceive one. Probation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty. Accordingly, we hold that a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in Morrissey v. Brewer.

In Mempa v. Rhay (1967), the Court held that a probationer is entitled to be represented by appointed counsel at a combined revocation and sentencing hearing. Reasoning that counsel is required "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected."

THE FOURTH AMENDMENT

As with due process rights, a person's Fourth Amendment rights are not nullified just because they are convicted of a crime. What makes probationers and parolees different than the average citizen are their conditions of release. Most states require parolees to give up their right to be free from unreasonable searches as part of their conditions. Because the parolee is giving up Fourth Amendment rights, this element is often referred to as a Fourth waiver . The rules that govern officer conduct vary from state to

state. In some states, an officer must have reasonable suspicion before conducting a probation search. In many states, an officer can conduct a suspicionless search at any time, without reason to believe that the offender committed a new crime. Who may search also varies from jurisdiction to jurisdiction? Some jurisdictions only allow probation and parole officers to search without probable cause, and some extend this authority to police officers as well.

CONDITIONS OF PROBATION AND PAROLE

As previously discussed, offenders are only granted probation or parole if they agree to abide by certain, specified conditions. These can be general conditions that apply to all offenders released in a particular jurisdiction, or they can be tailored to the special needs of a particular offender. The intent of these conditions is to help ensure that the dual objectives of control and rehabilitation are met. Because of the fragmented nature of courts in the United States, there is a great deal of variability in the philosophy and practice of imposing these conditions.

The power to impose conditions of probation and parole is most often vested in the courts. Judges have immense discretion when it comes to choosing conditions. Most courts rely on community corrections officers to make suggestions, but the final say is up to the judge. This wide discretion is not, however, without bounds.

CLARITY

Recall the void for vagueness doctrine discussed in the criminal law chapter. The basis of this legal limit on the power of lawmakers is that it is fundamentally unfair when a reasonable person cannot figure out what exactly a law prohibits. The courts have viewed conditions of probation in the same light. In other words, if the offender cannot figure out what exactly is prohibited because the specification of the condition is too vague, then the condition is unconstitutional. In practice, this means that conditions of probation can vary widely in subject, purpose, and scope, but what is prohibited (or mandated) must be specified in such a way that there is no confusion as to what is required. Conditions that are crafted in vague terms such as “must live honorably” will be struck down by the courts.

REASONABLENESS

In the context of probation and parole conditions, the term reasonableness is often synonymous with realistic. The basic requirement is that the conditions set forth by the judge must be such that the offender has the ability to abide by them. If the offender is likely to fail because the conditions cannot possibly be complied with, then the condition will be deemed not reasonable by the courts. It would be unreasonable, for example, to order an indigent offender to pay $10,000 a month in restitution. Addicts have argued that it is unreasonable to expect them to refrain from drug and alcohol use because of the nature of addiction. These claims fail the vast majority of the time. Various courts have reasoned that drug use is illegal, and illegal behavior by probationers and parolees cannot be tolerated.

RELATED TO PROTECTION AND REHABILITATION

Since the major goals of probation and parole are to protect society from crime and to rehabilitate the offender, conditions of probation and parole must be reasonably related to one or both of these objectives. If a condition does not relate to these objectives, it will likely be struck down by the courts. In practice, this gives judges very wide latitude in selecting conditions that may be related to these goals. Many courts have struck down conditions of probation that were obviously intended to be “scarlet letter” punishments.

CONSTITUTIONALITY

Several courts have nullified conditions that were contrary to constitutionally protected actions. When constitutional rights are at stake, the government will usually have to establish a compelling state interest in violating the right. In other words, the appellate court will balance the interest the state has in curtailing the right with the cost to the offender. Some rights are afforded greater protection by the court than other rights. These special liberties are often referred to as fundamental rights . The freedom of the press, freedom of assembly, freedom of speech, and freedom of religion are among these fundamental rights. For example, courts have struck down conditions that required and offender to attend Sunday school on a regular basis. The court reasoned that forcing someone to participate in a church activity violated the offender’s freedom of religion. As previously discussed, Fourth Amendment rights are not nearly so well protected.

LEGAL RIGHTS

GRIFFIN V. WISCONSIN [148]

In Griffin v. Wisconsin, the court found a warrant or probable cause is not required to search the home of a person on probation provided “reasonable grounds” for a search exists. The court explained, “A State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, . . . presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements” “Probation, like incarceration, is a form of criminal sanction”. The Court also noted a requirement of a warrant or probable cause would interfere with the proper functioning of the ongoing [non- adversarial] supervisory relationship.

REVOCATION RIGHTS

An offer gives an offeree the power to form a contract by accepting. The Restatement (Second) of Contracts describes a number of ways that the offeree’s power to accept may end:

Methods of Termination of the Power of Acceptance [149]

- An offeree’s power of acceptance may be terminated by
- rejection or counteroffer by the offeree, or
- lapse of time, or
- revocation by the offeror, or
- death or incapacity of the offeror or offeree.
- In addition, an offeree’s power of acceptance is terminated by the non-occurrence of any condition of acceptance under the terms of the offer.

We will discuss both the common law and UCC rules governing rejection and counteroffers in the next section. For the moment, note that an offer ordinarily remains open long enough to give the offeror a reasonable opportunity to accept. An oral offer made during a face-to-face or telephone conversation expires at the end of that conversation unless the offeror has indicates a willingness to keep the offer open beyond that time. The offeror nevertheless retains the right to terminate her offer at any subsequent time unless she has also expressly agreed not to revoke it—thus creating a “firm offer.”

Recall that in order to accept an offer of a unilateral contract an offeree must tender a performance rather than a reciprocal promise. The consequences of a revocation are especially acute when an offeror revokes such an offer after the offeree has begun performing. In the following excerpt, a scholar defends the early common law rule, which required full performance for acceptance:

Suppose A says to B, “I will give you $100 if you walk across the Brooklyn Bridge,” and B walks — is there a contract? It is clear that A is not asking B for B’s promise to walk across the Brooklyn Bridge. What A wants from B is the act of walking across the bridge. When B has walked across the bridge there is a contract, and A is then bound to pay to B $100. At that moment there arises a unilateral contract. A has bartered away his volition for B’s act of walking across the Brooklyn Bridge.

When an act is thus wanted in return for a promise, a unilateral contract is created when the act is done. It is clear that only one party is bound. B is not bound to walk across the Brooklyn Bridge, but A is bound to pay B $100 if B does so. Thus, in unilateral contracts, on one side we find merely an act, on the other side a promise.

It is plain that in the Brooklyn Bridge case as first put, what A wants from B is the act of walking across the Brooklyn Bridge. A does not ask for B’s promise to walk across the bridge and B has never given it. B has never bound himself to walk across the bridge. A, however, has bound himself to pay $100 to B, if B does so. Let us suppose that B starts to walk across the Brooklyn Bridge and has gone about one-half of the way across. At that moment A overtakes B and says to him, “I withdraw my offer.” Has B then any rights against A? Again, let us suppose that after A has said, “I withdraw my offer,” B continues to walk across the Brooklyn Bridge and completes the act of crossing.

Under these circumstances, has B any rights against A? In the first of the cases just suggested, A withdrew his offer before B had walked across the bridge. What A wanted from B, what A asked for, was the act of walking across the bridge. Until that was done, B had not given to A what A had requested. The acceptance by B of A’s offer could be nothing but the act on B’s part of crossing the bridge. It is elementary that an offeror may withdraw his offer until it has been accepted. It follows logically that A is perfectly

within his rights in withdrawing his offer before B has accepted it by walking across the bridge — the act contemplated by the offeror and the offeree as the acceptance of the offer.

More recent decisions have rejected this traditional approach. Courts now protect the offeree who has begun performance by barring revocation of the offer until the offeree has had a reasonable opportunity to complete the requested performance. The Restatement (Second) of Contracts sensibly describes the resulting obligation as an option contract.

IRREVOCABLE OFFERS

The rule for unilateral contracts described in Restatement (Second) § 45 creates an implied option contract once an offeree has begun performing and gives her a reasonable time to complete performance. In other circumstances, however, parties may prefer to create an express option contract.

INTERMEDIATE SANCTIONS [150]

Community corrections as a whole has changed dramatically over the last half-century. Due to a rapid and overwhelming increase of the offender population, largely based on policy changes, we have witnessed an immense increase in the use of sanctions at the community level; this includes probation. It has only been within the most recent 10 years that we have seen a decrease in community corrections. Individuals on probation hover around 3.7 million, with another million in some form of community-level control, for a total of about 4.6 million under community supervision, probation, or parole. [1] Because of the sheer volume of these intermediate sanctions, it is important to put it in the perspective of jails and prisons. Below is a graphic to demonstrate how much we are talking about.

U.S. CORRECTIONAL CONTROL

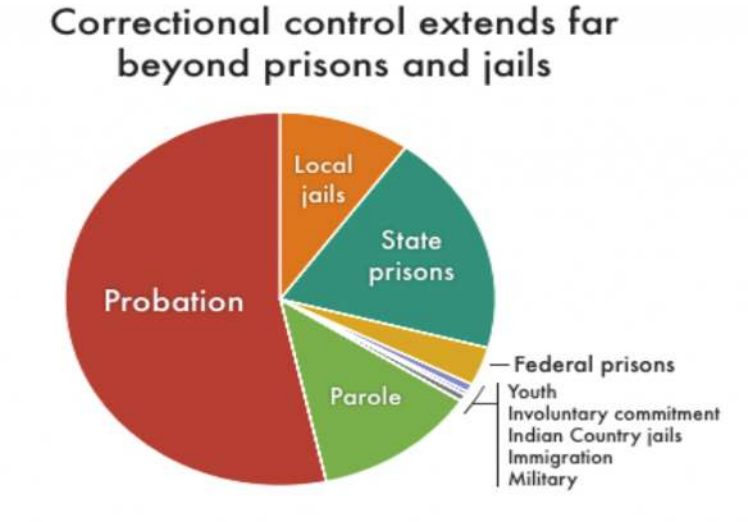


Figure 15.3 National correctional control, 2018 [151]

This graphic does not include the volume of people in the community corrections outside of regular probation, or parole (which is about another million), but it does shed light on just how much probation is used. Therefore, it important to understand that the vast majority of individuals under correctional control aren't even in the prisons and jails in the United States, even though that alone is a hefty number. The majority of persons under correctional control fall are in sanctions like Probation, Intensive Supervision Probation, Boot Camps/Shock Incarceration, Drug Courts, and Halfway Houses. Therefore, this section will discuss the history and effectiveness of some of the forms of intermediate sanctions we use in the United States.

As we have discussed, in the late 1970s and early 1980s, there was a fundamental shift in corrections. This is largely due to the "Nothing Works" dogma in the area of rehabilitation. Many reforms were made towards the housing of offenders. Many liked this idea because they did not trust the government's attempts at rehabilitation. Others were pleased as well since more emphasis was placed on control. Rooted in deterrence theory, and to lesser extent incapacitation, intermediate sanctions flourished and were seen as an instant success. That is, because they promised to increase control of the growing offender population, maintain security, and do all of this at a reduced cost, they were quickly welcomed across the nation. However, by reviewing each one, we can see the problems that promising too much may have created.

Think About It… What Would You Do?

As stated before, there are three primary goals for corrections, to punish the offender, to protect society, and to rehabilitate the offender. Often the first two goals might be opposing to the last goal. Additionally, doing too much of the first one might have unfavorable on the second and third. Here is an example of how this might happen.

Let's say there is a guy, who is married, has a couple of kids, a stable blue-collar job, a house /mortgage, and is living just a little bit better than a paycheck to paycheck. We can call him the average Joe Citizen. This might even sound familiar, and you may even know him. Joe likes to hang out with his friends after his men's softball game, having a beer and catching up on life. For all intents and purposes, Joe is a decent guy. He does not have a significant criminal record. Perhaps one misdemeanor when he was a juvenile, and a couple of speeding tickets, like tens of millions of other adults.

However, one time after softball, Joe is driving home, and his wife is texting him to pick something up at the store. He looks down at his phone at the exact wrong time that someone pulls out in front of him. An accident occurs. No one is seriously injured, but the damage to both vehicles is enough to warrant a write up of the accident. This leads to police presence. At the scene, the officer smells alcohol on Joe. The officer is obligated to go through standard procedures, which results in Joe being arrested. This is not asking you to debate this action, as it is a violation, and the officer had every right to arrest Joe. The question is this – what should Joe's punishment be?

The reason to ask this is due to both the rule of law and the consequences of those laws. Joe should be punished, as he chose to drive after drinking alcohol. But would Joe's incarceration lead to other events that may have lasting effects? Probably.

This brings up the question of at what point does the level of punishment last beyond its intended point? If Joe receives a lengthy jail sentence, will he lose his job? Will he lose his family? Will this put him a greater risk of recidivating in the future? What point has the immediate action caused punishment beyond what the law stipulates is punishment? These are all valid questions. There are other alternatives out there, that still cover the concepts of punishment, monitoring, sanctioning, and control. However, these alternatives can still allow individuals to stay in the community, which this chapter will present with community corrections.

RESTORATIVE JUSTICE [152]

The process of restorative justice programs is often linked with community justice organizations and is normally carried out within the community. Therefore, RJ is discussed here in the community corrections section. Restorative justice is a community based and trauma-informed practice used to build relationships, strengthen communities, encourage accountability, repair harm, and restore relationships when wrongdoings occur. As an intervention following wrongdoing, restorative justice works for the people who have caused harm, and the victim(s), and community members impacted. Working with a restorative justice facilitator, participants identify harms, needs, and obligations, then make a plan to repair the harm and put things as right as possible. This process, restorative justice conferencing, can also be called victim-offender dialogues. It is within this process that multiple items can occur. First, the victim can be heard within the scope of both the community and within the scope of the offense discussed. This provides the victim(s) an opportunity to express the impact on them, but also to understand what was happening from the perspective of the transgressor. At the same time, it allows the person committing the action to potentially take responsibility for the acts committed, directly to the victim(s) and to the community as a whole. This restorative process provides a level of healing that is often unique to the RJC. Pictured, the different processes that can occur during the different types of dialogues within RJC.

RESTORATIVE JUSTICE PROCESSES



Figure 15.4 Restorative Justice [153]

RESTORATIVE JUSTICE SUCCESS

For over a quarter century, restorative justice has been demonstrated to show positive outcomes in accountability of harm, and satisfaction in the restorative justice process for both offenders and victims. This is true for adult offenders, as well as juveniles, who go through the restorative justice process. Recently, there have been questions whether there is a cognitive change that occurs in the thought process of the individuals completing a restorative justice program. There is a growing body of research that demonstrates that change in cognitive distortions that may occur through successful completion of restorative justice conferencing (RJC). This will be an area of increasing interest for practitioners, as restorative justice continues to be included in the toolkit of actions within community justice and community corrections.

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15.2: Intermediate Sanctions

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CHAPTER OVERVIEW

16: Corrections, Prisoners' Rights, and Parole

16.1: Corrections
16.2: Prisoner's Rights

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16.1: Corrections

REENTRY AND THE REVOLVING DOOR [154]

Parole, as discussed in the previous chapter, has had mixed reviews. Overall, the effectiveness of parole hovers around 50% success. It is estimated somewhere between 600,000 and 800,000 parolees are on parole in any given year over the last 3 decades. Additionally, several hundred thousand are exiting parole in each of these years. This brings up questions about what happens to these individuals. The reality is that most of them will be rearrested. In one of the more comprehensive studies on recidivism, Alper, Durose, and Markman (2018) discussed the recidivism rate of individuals tracked over a 9-year follow up period. What they found was that rearrest occurred for about 70% in the first three years, and by year 9, 83% of the individuals released has been rearrested. Many of these individuals return to prison, hence the concept of the "revolving door" of justice. In order for reentry programs to be more successful, individuals returning to society need assistance to get back on their feet and stay on their feet. This includes items such as education and training, employment assistance to get a job, legal services, education on public benefits, and housing assistance. Interestingly, it appears as though many of the items here are the same items that many of them had deficits in that landed them in trouble in their lives before. That is – many of these items are those same predictors of offending that were discussed in the first section (known as the know predictors of recidivism). Unfortunately, it appears as though they are not getting these while they are incarcerated. Again, creating a cycle of release and catch again.

Situations and circumstances that compound these problems for many ex-offenders is the difficulty faced with trying to get a job once released. Over the last 20 years, there was an overwhelming push to include items on employment applications that asked questions about prior incarceration history. Not only were there questions about prior incarcerations and prior convictions, but many employers also have questions about ever being arrested. If an individual told the truth (which is what they should do), the reality is that their applications would be discarded, or overlooked for others without an arrest/conviction. If an ex-offender lied about it, and it was discovered during a background investigation, the application was certainly discarded. In either scenario, it became increasingly difficult for an individual to obtain legitimate employment.

This is also true on apartment rental applications. Again, when individuals would put down prior arrests, their applications would often be placed at the bottom of the pile. If someone were to lie about it, and it was discovered, it could be used as grounds for not selecting an individual for tenancy. Once again, society was making it difficult for ex-offenders to even function as a normal citizen, based on a sentence that they had served, which is when the punishment should have ended. Collectively, these items are included in the concept of collateral consequences. That is – items that are barriers to successful integration that are remnants of prior punishment.

FUTURE OUTLOOK OF CORRECTIONS

Based on the major issues presented, overcrowding and reentry, the problems faced in corrections are not likely to go away anytime soon. We have seen an increase in the overall correctional population for years now. While there are some reductions in prisons, this is not likely to stay this way, unless changes are made. Additionally, while there is space for growth in the area of community corrections, the functions of CC need to be supported and done based on evidence-based practices if it is to be more successful. It too has limits, and without the support, it is more likely to be another failure. If it is not supported, then the prison population is likely to increase even more, due to the eventual placement of too many failures of individuals in community corrections. Most offenders are in need of some basic assistance to get themselves back to a functioning level in society, including addressing their education, their substance abuse, their employment, and general and mental health. Our correctional system needs to change its habit of treating substance abuse and mental health issues as legal and punish-oriented issues if we are going to curb the tide of the growing problems we face in corrections. If not, our 8 million individuals in all forms of correctional control can quickly turn 10 million. According to a 2016 report from the U.S. Department of Education (p. 13), "from 1979–80 to 2012–13, state and local government expenditures on corrections rose by 324 percent (from $17billion to $71 billion)." Keep in mind that is taxpayer money. We are funding this issue. It is time to address these problems from a more holistic approach if we are going to see a change in our current correctional practices.

HISTORY OF CORRECTIONAL FACILITIES [155]

Prior to the 1800s, common law countries relied heavily on physical punishments. Influenced by the high ideas of the enlightenment, reformers began to move the criminal justice system away from physical punishments in favor of reforming offenders. This was a dramatic shift away from the mere infliction of pain that had prevailed for centuries. Among these early reformers was John Howard , who advocated the use of penitentiaries . Penitentiaries, as the name suggests, were places for offenders to be penitent . That is, they would engage in work and reflection on their misdeeds. To achieve the appropriate atmosphere for penitence, prisoners were kept in solitary cells with much time for reflection.

Philadelphia's Walnut Street Jail was an early effort to model the European penitentiaries. The system used there later became known as the Pennsylvania System . Under this system, inmates were kept in solitary confinement in small, dark cells. A key element of the Pennsylvania System is that no communications whatsoever were allowed. Critics of this system began to speak out against the practice of solitary confinement early on. They maintained that the isolated conditions were emotionally damaging to inmates, causing severe distress and even mental breakdowns. Nevertheless, prisons across the United States began adopting the Pennsylvania model, espousing the value of rehabilitation.

The New York system evolved along similar lines, starting with the opening of New York's Auburn Penitentiary in 1819. This facility used what came to be known as the congregate system . Under this system, inmates spent their nights in individual cells, but were required to congregate in workshops during the day. Work was serious business, and inmates were not allowed to talk while on the job or at meals. This emphasis on labor has been associated with the values that accompanied the Industrial Revolution. By the middle of the nineteenth century, prospects for the penitentiary movement were grim. No evidence had been mustered to suggest that penitentiaries had any real impact on rehabilitation and recidivism.

Prisons in the South and West were quite different from those in the Northeast. In the Deep South, the lease system developed. Under the lease system, businesses negotiated with the state to exchange convict labor for the care of the inmates. Prisoners were primarily used for hard, manual labor, such as logging, cotton picking, and railroad construction. Eastern ideas of penology did not catch on in the West, with the exception of California. Prior to statehood, many frontier prisoners were held in federal military prisons.

Disillusionment with the penitentiary idea, combined with overcrowding and understaffing, led to deplorable prison conditions across the country by the middle of the nineteenth century. New York's Sing Prison was a noteworthy example of the brutality and corruption of that time. A new wave of reform achieved momentum in 1870 after a meeting of the National Prison Association (which would later become the American Correctional Association). At this meeting held in Cincinnati, members issued a Declaration of Principles. This document expressed the idea that prisons should be operated according to a philosophy that prisoners should be reformed, and that reform should be rewarded with release from confinement. This ushered in what has been called the Reformatory Movement .

One of the earliest prisons to adopt this philosophy was the Elmira Reformatory , which was opened in 1876 under the leadership of Zebulon Brockway . Brockway ran the reformatory in accordance with the idea that education was the key to inmate reform. Clear rules were articulated, and inmates that followed those rules were classified at higher levels of privilege. Under this "mark" system, prisoners earned marks (credits) toward release. The number of marks that an inmate was required to earn in order to be released was established according to the seriousness of the offense. This was a movement away from the doctrine of proportionality, and toward indeterminate sentences and community corrections.

The next major wave of corrections reform was known as the rehabilitation model , which achieved momentum during the 1930s. This era was marked by public favor with psychology and other social and behavioral sciences. Ideas of punishment gave way to ideas of treatment, and optimistic reformers began attempts to rectify social and intellectual deficiencies that were the proximate causes of criminal activity. This was essentially a medical model in which criminality was a sort of disease that could be cured. This model held sway until the 1970s when rising crime rates and a changing prison population undermined public confidence.

After the belief that "nothing works" became popular, the crime control model became the dominate paradigm of corrections in the United States. The model attacked the rehabilitative model as being "soft on crime." "Get tough" policies became the norm throughout the 1980s and 1990s, and lengthy prison sentences became common. The aftermath of this has been a dramatic increase in prison populations and a corresponding increase in corrections expenditures. Those expenditures have reached the point that many states can no longer sustain their departments of correction. The pendulum seems to be swinging back toward a rehabilitative

model, with an emphasis on community corrections. While the community model has existed parallel to the crime control model for many years, it seems to be growing in prominence.

PRISON TYPES [156]

Prisons in the United States today are usually distinguished by custody levels . Super-maximum-security prisons are used to house the most violent and most escape prone inmates. These institutions are characterized by almost no inmate mobility within the facility, and fortress-like security measures. This type of facility is very expensive to build and operate. The first such prison was the notorious federal prison Alcatraz, built by the Federal Bureau of Prisons in 1934.

Maximum-security prisons are fortresses that house the most dangerous prisoners. Only 20% of the prisons in the United States are labeled as maximum security, but, because of their size, they hold about 33% of the inmates in custody. Because super-max prisons are relatively rare, maximum-security facilities hold the vast majority of America's dangerous convicts. These facilities are characterized by very low levels of inmate mobility, and extensive physical security measures. Tall walls and fences are common features, usually topped with razor wire. Watchtowers staffed by officers armed with rifles are common as well. Security lighting and video cameras are almost universal features.

States that use the death penalty usually place death row inside a maximum-security facility. These areas are usually segregated from the general population, and extra security measures are put in place. Death row is often regarded as a prison within a prison, often having different staff and procedures than the rest of the facility.

Medium-security prisons use a series of fences or walls to hold prisoners that, while still considered dangerous, are less of a threat than maximum-security prisoners. The physical security measures placed in these facilities is often as tight as for maximum-security institutions. The major difference is that medium-security facilities offer more inmate mobility, which translates into more treatment and work options. These institutions are most likely to engage inmates in industrial work, such as the printing of license plates for the State.

Minimum-security prisons are institutions that usually do not have walls and armed security. Prisoners housed in minimum-security prisons are considered to be nonviolent and represent a very small escape risk. Most of these institutions have far more programs for inmates, both inside the prison and outside in the community. Part of the difference in inmate rights and privileges stems from the fact that most inmates in minimum-security facilities are "short timers." In other words, they are scheduled for release soon. The idea is to make the often-problematic transition from prison to community go more smoothly. Inmates in these facilities may be assigned there initially, or they may have worked their way down from higher security levels through good behavior and an approaching release date.

Women are most often housed in women's prisons . These are distinguished along the same lines as male institutions. These institutions tend to be smaller than their male counterparts are, and there are far fewer of them. Women do not tend to be as violent as men are, and this is reflected in what they are incarcerated for. The majority of female inmates are incarcerated for drug offenses. Inmate turnover tends to be higher in women's prisons because they tend to receive shorter sentences.

A few states operate coeducational prisons where both male and female inmates live together. The reason for this is that administrators believe that a more normal social environment will better facilitate eventual reintegration of both sexes into society. The fear of predation by adult male offenders keeps most facilities segregated by gender.

In the recent past, the dramatic growth in prison populations led to the emergence of private prisons. Private organizations claimed that they could own and operate prisons more efficiently than government agencies can. The Corrections Corporation of America is the largest commercial operator of jails and prisons in the United States. The popularity of the idea has waned in recent years, mostly due to legal liability issues and a failure to realize the huge savings promised by the private corporations.

Prisons in the United States can also be parceled out by jurisdiction and by intensity. By jurisdiction, this is referring to who manages the prisons. A prison warden is generally considered the managerial face of the institution. However, a prison warden and the prison itself is usually within a much larger organizational structure. Although not always, these are usually separated by State. There are a few jurisdictions not at the State level that manage or operate prisons. This includes places like New York, Chicago, Philadelphia, and Washington D.C. Puerto Rico (not a State) also has a prison, as does the U.S. territory of the Virgin Islands.

STATE PRISONS

The normal label for the organizational structure of prisons in a particular State is often called Departments of Corrections and are run by a Director, who is usually appointed by a Governor. For example, in Oregon, it is the Oregon Department of Corrections, and Director Peters is the current head of this organization (2012-present). The Oregon Department of Corrections currently overseas 14 State prisons. More information about the ODOC can be found here: ODOC - Oregon Department of Corrections . California has the California Department of Corrections, and Secretary Diaz is the head of this organization (2018 to present). CDCR oversees 34 adult institutions. For more information about CDCR, see CDCR .

FEDERAL PRISONS

The Federal Bureau of Prisons was established in the early 1930s as a result of the need to house an increasing number of individuals convicted of federal crimes. There were already some federal prisons in place, but it was not until 1930 that the U.S. Congress passed legislation to create the BOP, housing it under the justice department. Sanford Bates became the first Director of the Federal Bureau of Prisons (FBOP or BOP), based on his long-standing work as an organizer and leader at Elmira Reformatory in New York. As more federal legislation was passed, the need for more prisons became apparent.

Today, the BOP has 109 prisons, along with numerous additional facilities (camps) adjoining at these locations. There are also military prisons, and alternative facilities, reentry centers, and training centers, that are managed by the BOP. The federal prisons are separated into six regions., which include the Mid-Atlantic Region, the North Central Region, the Northeast Region, the Southeast Region, the South Central Region, and the Western Region.

Within these regions are regional directors, which is similar to state-level directors of departments of corrections. Below is a detailed map of the regions of the Federal Bureau of Prisons. As is depicted, there are several different types of facilities within each region. A central office is also designated for each of the six regions. Click on the link in the annotation of the map to see it in a larger scale.



Table 16.1 FBOP Regional map [157]

PRIVATE PRISONS

The privatization of goods and services has long been a staple of state departments of corrections, as it allows these organizations to subcontract specific tasks within their prisons. This includes services like food and transportation services, medical, dental, and mental health services, education services, even laundry services. As mentioned in the previous section on punishment, there was much ado about crime in the United States in the 1970s and 1980s. This brought on an increased fear of crime and a more punitive state within the United States. It was during this time that a small company known as Wackenhut, a subsidiary of The Wackenhut Corporation (TWC) sought to privatize the entirety of a prison, not just services within the prison. A second company, Corrections Corporation of America ultimately won the contract and became the first privately owned prison in the United States (1984). Today, Core Civic (formerly Corrections Corporation of America) runs approximately 128 facilities in the United States. The GEO Group,

the other primary private prison company runs 136 correctional, detention, or reentry facilities. Pictured below, roughly half of the 50 States in America use private prison industry prisons.

STATES USING PRIVATE PRISON INDUSTRY

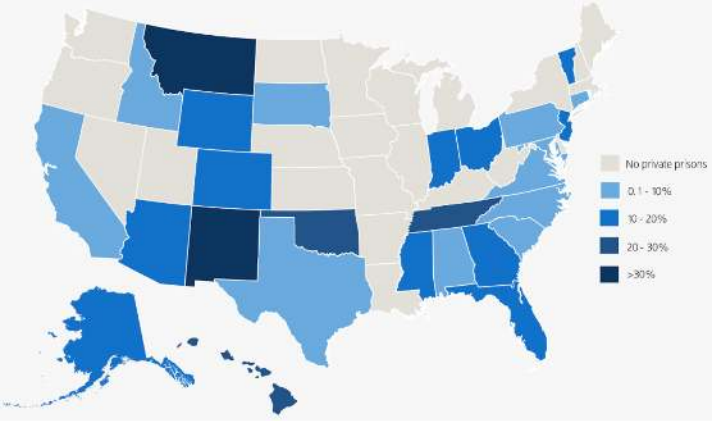


Table 16.2 Private Prison State Map [158]

Much debate has come from the incorporation of private prisons. The critics of private prisons denote the lack of transparency in the reporting processes that would come from a normal prison. Still, others tackle a bigger issue – punishment for profit. That is – while taxpayers ultimately pay for all punishment of individuals, either at the State or Federal level, shareholders and administrators of the companies are making money by punishing people, under the guise of capitalism. For a more in-depth review of this, see a report presented by the Sentencing Project https://www.sentencingproject.org/publications/private-prisons-united-states/ and on NPR: https://www.npr.org/2010/10/28/130833741/prison-economics-help-drive-ariz-immigration-law

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16.2: Prisoner's Rights

PRISONER'S RIGHTS [159]

Learning Objective: Key Terms

- Estelle v. Gamble (1976), Hudson v. Palmer (1984), Johnson v. Avery (1969), Political Right, Right to Access to the Courts, Right to Assemble, Right to be Free from Cruel and Unusual Punishment, Right to Free Speech, Right to the Free Exercise of Religion, Right to Vote, Shakedown, Wolff v. McDonnell (1974)

American courts were reluctant to get involved in prison affairs during most of the 19 th century. Until the 1960s, the courts used a hands-off approach to dealing with corrections. Since then, the court has recognized that "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution" (Turner v. Safley, 1987). Prisoners do give up certain rights because of conviction, but not all of them. The high courts have established that prisoners retain certain constitutional rights. As the Court stated in Hudson v. Palmer (1984), "While prisoners enjoy many protections of the Constitution that are not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration, imprisonment carries with it the circumscription or loss of many rights as being necessary to accommodate the institutional needs and objectives of prison facilities, particularly internal security and safety." From this statement, it can be seen that institutional safety and security will usually trump inmate rights when the two collide in Court.

POLITICAL RIGHTS

The phrase " political right " is used to refer to rights related to the participation in the democracy of the United States. Chief among these is the right to vote. The Constitution of the United States allows states to revoke a person's right to vote upon conviction but does not require it. Several states revoke the right to vote while a person is incarcerated but restore the right once the person is released from prison. A few states revoke the right to vote for life when a person is convicted of a felony. The right to vote cannot be denied to those who are pretrial detainees confined to jail or a misdemeanant. These individuals are usually given the right to vote by absentee ballot.

THE RIGHT TO FREE SPEECH AND ASSEMBLY

The First Amendment right of prisoners to free speech is curtailed, but not eliminated. Prison administrators must justify restrictions on free speech rights. The rights to assemble is generally curtailed. As a rule, prison administrators can ban any inmate activity that is a risk to the security and safety of the institution.

THE RIGHT TO FREEDOM OF RELIGION

Generally, prisoners have the right to free exercise of their religious beliefs. These, however, can be curtailed when the health and safety of the institution are at risk. To be protected, the particular religious beliefs must be "sincerely held." Prison officials may not, however, legally show preference for one religion over another. In practice, some religious customs have conflicted with prison policies, such as requiring work on religious holidays that forbid labor. These types of policies have been upheld by the courts.

THE RIGHT OF ACCESS TO THE COURTS

The First Amendment guarantees the right "to petition the Government for a redress of grievances." For prisoners, this has translated to certain types of access to the courts. The two major categories of petitions that can be filed by prisoners are criminal appeals (often by habeas corpus petitions) and civil rights lawsuits. The right to petition the courts in these ways is referred to as the right of access to the courts . The court discusses this right at length in the case of Johnson v. Avery (1969).

FREEDOM FROM RETALIATION

Inmates who file complaints, grievances, and lawsuits against prison staff have a constitutional right to be free from retaliation. The Supreme Court based this right on the logic that retaliation by prison staff hampers the exercise of protected constitutional rights. In practice, this right has been difficult for inmates to assert. Prison staff can often find legitimate reasons for taking action that was intended as retaliation.

RIGHTS DURING PRISON DISCIPLINARY PROCEEDINGS

In the landmark case of Wolff v. McDonnell (1974), the Supreme Court defined the contours of prisoner rights during prison disciplinary proceedings. While not all due process rights due a criminal defendant were due the prisoner in a disciplinary proceeding, some rights were preserved. Among those rights were:

- Advance written notice of charges must be given to the disciplinary action inmate, no less than 24 hours before his appearance before the Adjustment Committee.
- There must be a written statement by the factfinders as to the evidence relied on and reasons for the disciplinary action.
- The inmate should be allowed to call witnesses and present documentary evidence in his defense if permitting him to do so will not jeopardize institutional safety or correctional goals.
- The inmate has no constitutional right to confrontation and cross-examination in prison disciplinary proceedings, such procedures in the current environment, where prison disruption remains a serious concern, being discretionary with the prison officials.
- Inmates have no right to retained or appointed counsel.

THE RIGHT TO PRIVACY

The right to privacy is closely related to the law of search and seizure. In the landmark case of Hudson v. Palmer (1984), the Court determined that inmates do not have a reasonable expectation of privacy in their living quarters. In the Court's rationale, the needs of institutional security outweigh the inmate's right to privacy. The policy implication of this decision is that shakedowns may be conducted at the discretion of prison staff, and no evidence of wrongdoing is necessary to justify the search.

THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT

The right to be free from cruel and unusual punishment as guaranteed by the Eighth Amendment to the United States Constitution. The amendment only applies to criminal punishments; it has no bearing on civil cases.

Conditions in prison must not involve the "wanton and unnecessary" infliction of pain. Prison conditions, taken alone or in combination, may deprive inmates of the "minimal civilized measure of life's necessities." If this happens, the Court will judge the conditions of confinement unconstitutional. Conditions that cannot be said to be cruel and unusual under "contemporary standards" are not unconstitutional. According to the Court, prison conditions that are "restrictive and even harsh," are part of the penalty that criminal offenders pay for their "offenses against society" (Rhodes v. Chapman , 1981).

In Estelle v. Gamble (1976), the court ruled that "Deliberate indifference by prison personnel to a prisoner's serious illness or injury constitutes cruel and unusual punishment contravening the Eighth Amendment."

PAROLE [160]

While the process to get onto parole is unique to all of the other community sanctions we have discussed so far in this section, individuals on parole are in the community. Thus, parole is often placed within the concepts of community corrections. Parole is the release (under conditions) of an individual after they have served a portion of their sentence. It is also accompanied by the threat of re-incarceration if warranted. As with most concepts in our legal system, their roots of parole can be traced back to concepts from England and Europe. However, parole today has greatly evolved based on American values and concepts. Parole in the United States began as a concept at the first American Prison Association meeting in 1870. There was much support for the ideals of reform in corrections in America at the time. Advocates for reform helped to create the concept of parole and how it would look in the U.S., and plans to develop parole went from there. Parole authorities began establishing within the States, and by the mid-1940s, all States had a parole authority. Parole Boards and State parole authorities have fluctuated over the years, but the concept is still practiced, in varying degrees today. It is different than probation, which often operates under the judicial branch. Parole typically operates under the executive branch and is aligned with the departments of corrections, as parole is a direct extension of prison terms and release. Many states operate a post-prison supervision addendum to their sentencing matrix for the punishment of individuals.

OREGON SENTENCING GUIDELINES

Crime Seriousness	A	B	C	D	E	F	G	H	I	Prob Term	Max Depart	PPS
11	225-269	196-224	178-194	164-177	149-163	135-148	129-134	122-128	120-121	5 Years		3 Years
10	121-130	116-120	111-115	91-110	81-90	71-80	66-70	61-65	58-60			
9	66-72	61-65	56-60	51-55	46-50	41-45	39-40	37-38	34-36			
8	41-45	35-40	29-34	27-28	25-26	23-24	21-22	19-20	16-18	3 Years	18 Mos.	
7	31-36	25-30	21-24	19-20	16-18	180 90	180 90	180 90	180 90			
6	25-30	19-24	15-18	13-14	10-12	180 90	180 90	180 90	180 90			2 Years
5	15-16	13-14	11-12	9-10	6-8	180 90	120 60	120 60	120 60	2 Years	12 Mos.	
4	10-11	8-9	120 60	120 60	120 60	120 60	120 60	120 60	120 60			
3	120 60	120 60	120 60	120 60	120 60	120 60	90 30	90 30	90 30	1 ½ Years	6 Mos.	1 Year
2	90 30	90 30	90 30	90 30	90 30	90 30	90 30	90 30	90 30			
1	90 30	90 30	90 30	90 30	90 30	90 30	90 30	90 30	90 30			

Table 16.3 Oregon Sentencing Guidelines Grid [161]

As you can see from the graph, the PPS section in gray represents the recommended times for parole (post-prison supervision). Today, there are three basic types of parole in the United States, discretionary, mandatory, and expiatory.

Discretionary parole is when an individual is eligible for parole or goes before a parole board prior to their mandatory parole eligibility date. It is at the discretion of the parole board to grant parole (with conditions) for these individuals. These prisoners are generally well-behaving prisoners that have demonstrated they can function within society (have completed all required programming). Discretionary parole had seen a rapid increase in the 1980s but took a marked decrease starting in the early 1990s. In more recent years, it is continuing to return as a viable release mechanism for over 100,000 inmates a year.

Mandatory parole occurs when a prisoner hits a particular point in time in their sentence. When an inmate is sent to prison, two clocks begin. The first clock is forward counting and continues until their last day. The second clock starts at the end of their sentence and starts to work backward proportional to the “good days” an inmate has. Good days are days that an offender is free from incidents, write-ups, tickets, or other ways to describe rule infractions. For instance, for every week that an offender is a good prisoner, they might get two days taken off of the end of their sentence. When these two times converge, that would be a point in which mandatory parole could kick in for them. This must also be conditioned by truth in sentencing legislation, or what is considered an 85% rule. Many states have laws in place that stipulates that an inmate is not eligible for mandatory parole until they hit 85% of their original sentence. Thus, even though the date for the good days would be before the 85% of a sentence is served, they would only be eligible for mandatory parole once they had achieved 85% of their sentence. Recently, States have begun to soften these 85% rules, as another valve to reduce crowding issues. The Hughes et al. (2001) article also provides their proportions, indicating a direct inverse relationship to discretionary parole during the 1990s. As discretionary parole went down, mandatory parole went up. This is logical though, as once they had passed a date for discretionary parole, the next date would be an inmate’s mandatory parole date. As you can see from the image below, these proportions of releases switched in the 1990s.

PAROLE RELEASES

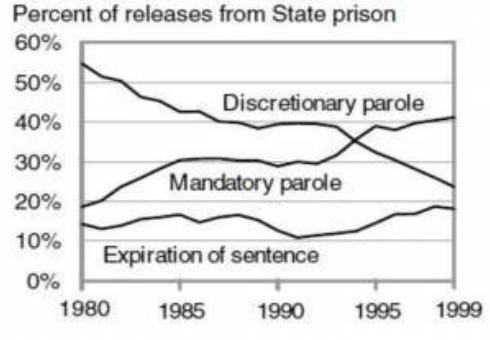


Table 16.4 Parole Releases [162]

Perhaps most troubling is the Expiatory Release. We see a slow increase of expiatory release in the chart, and this has continued to climb in the 2000s. Expiatory release means that a person has served their entire sentence length (and sometimes more). Based on the need to release individuals to accommodate incoming prisoners, this usually means that an inmate has misbehaved enough to

nullify their “good days.” This is unfortunate, because of the three types of release, it could be argued that these are the inmates that need the most post-prison supervision. And yet, these are the inmates that are typically receiving the smallest amounts of parole.

PAROLE SUCCESS

It should again come as no surprise as to the effectiveness of parole, considering how many of the other community-based sanctions are operating. Successful parole completion rates hover around 50%, given a particular year. In the Hughes et al. (2001) article just mentioned, successful completion was roughly 42% in 1999. The same issues for failure that are found in probation completion are found in parole completion, to include: revocation failures, new charges, absconding, and other infractions. This lower-than-expected success rate has prompted many critics to argue parole. It is suggested that we are being too lenient on some while keeping lower-level inmates in prison too long. It is also argued that we are releasing dangerous individuals out into the community. Whatever the criticisms are, it is certain that we are bound to use parole as a function of release, even if it is only on paper. For example, California has a concept called non-revocable parole. The basic premise of this is: as long as you do not violate your terms of parole, your parole will be solely on paper, with no parole office check-ins. Additionally, no one will come out to your dwelling to monitor you. Effectively, this version of parole is not enforceable, hence why it is considered as parole on paper only. But the questions around parole still remain. What are we to do with the hundreds of thousands of offenders we let out of prison each year? Do they need more assistance than a bus ticket back to their county of residence? How should we be doing parole in the United States? A more modern term for parole is called re-entry. The next section covers current issues within corrections, to include what we do for inmates who are re-entering society.

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CHAPTER OVERVIEW

17: Juvenille Justice

17.1: THE STRUCTURE OF THE JUVENILE JUSTICE SYSTEM

17.2: PREVENTING DELINQUENCY

17.3: TERRORISM

17.4: CYBER CRIME

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17.1: THE STRUCTURE OF THE JUVENILE JUSTICE SYSTEM

CHAPTER 17 - JUVENILLE JUSTICE

THE STRUCTURE OF THE JUVENILE JUSTICE SYSTEM [163]

The juvenile justice system is used to handle cases in which minors are convicted of criminal offences, using early intervention in delinquency cases to discourage future adult criminal behavior. The juvenile justice process involves nine major decision points: (1) arrest, (2) referral to court, (3) diversion, (4) secure detention, (5) judicial waiver to adult criminal court, (6) case petitioning, (7) delinquency finding/adjudication, (8) probation, and (9) residential placement, including confinement in a secure correctional facility (see Juvenile Justice Process flow chart).

The majority of cases are first referred to the juvenile justice system through contact with police. Probation officers, school officials, or parents usually refer to the remaining cases. The most common offenses referred to court are property offenses (roughly 92%), followed by person offenses (89.5%), drugs (88.2%), and general delinquency charges (81.6%). Other referrals come from schools, family, or social workers or probation officers.

At the intake stage, probation officers or attorneys determine whether or not the case needs the attention of the juvenile court or if it can be handled informally, such as diversion to probation or a drug treatment program. If the case progresses to court, the authorities need to determine if the youth can be released to a parent/guardian or if the youth needs to be held in a secure detention center. When determining this, the court needs to assess the risk the youth poses to society and if the youth poses a flight risk. In some cases, the parent cannot be located or, if located, refuses to take custody of the youth. In these cases, the juvenile is remanded to custody. The decision to detain or release the juvenile will be made by the judge at a detention hearing.

If the case is handled in court, the county attorney needs to file a petition. When the youth has a formal hearing, it is called an adjudication rather than a trial in adult court. The adjudication of youth as delinquent can result in either dismissal of the charges or confinement at a secure institution. In most juvenile cases, the least restrictive option is usually sought, so the youth is usually put on probation or some sort of community treatment. Formal processing is less common than informal processing involving diversion or community-based programming.

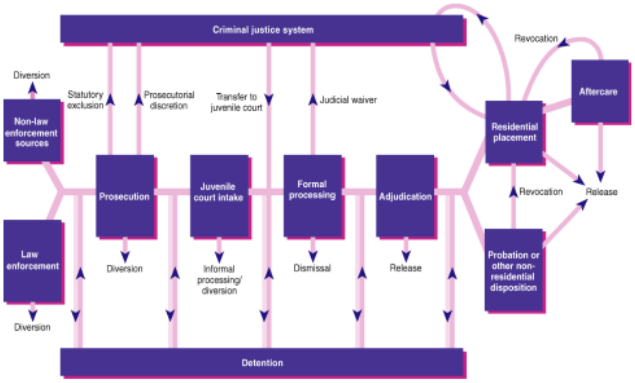


Figure 17.1 The Juvenile Justice Process. The major decision points in this process are: (1) arrest, (2) referral to court, (3) diversion (at multiple points in the process), (4) secure detention, (5) judicial waiver to adult criminal court, (6) case petitioning, (7) delinquency finding/adjudication, (8) probation, and (9) residential placement, including confinement in a secure correctional facility [164]

Think About It… Working with Youth

When I graduated from college with a BA in psychology, I applied for a job working with the Division of Youth Corrections in Denver, CO. I worked in a Residential Treatment Facility (RTC), which used behavior modification techniques, assigned caseworkers to each youth and their families, and attempted to help the kids learn problem-solving skills and accountability. Youth were confined for a variety of reasons, from committing gang affiliated drive-by shootings, to youth who were designated dependent youth through social services and had nowhere else to go. We had high-risk kids, low-risk kids, conduct disorder and mental health kids all together on the same unit. Having the mix of all these different kids is not a great formula; the low-risk kids learn negative behavior from the high-risk kids, and the conduct disorder kids victimize the mental health kids. In an ideal institution, these different populations would all be on separate units.

Working with youth is hard. They push boundaries, are angry, try to manipulate those around them, and reject authority. However, working with youth is exceptionally rewarding. They are kids. They come from abusive and neglectful homes and are yearning for approval and love. For example, one boy in our facility was named Josh. He was a super angry and violent sixteen-year-old who was sentenced for committing aggravated assault. Through working with counselors and caseworkers, we discovered his anger was hiding immense sadness. He lashed out at those around him when he was sad because he had no way to show his feeling other than through aggression. Many months of working with him, encouraging him to journal, express his feelings, talk with others, use other tools to help him with his sadness led to amazing results. He left our facility after more than a year, graduated from high school and even went to college! Getting the individualized attention helped Josh change. He became a success story of the juvenile justice system.

Working with youth takes patience, consistency, and compassion. It is one of the most difficult jobs there is, but it is possible to be a

very positive influence in the lives of kids who need it the most. If you are interested in working with youth, plan on committing to at least a year. Incarcerated kids are used to having people give up on them and disappoint them, so you do not want to add to their negative experiences. Show up, follow through, and be optimistic about a better future for justice-involved youth.



Pin It! In re Gault (1967) [165]

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. He was released and scheduled to reappear a few months later for an adjudication hearing. In the following hearing, again, Mrs. Cook was not present and again, no official transcripts of the proceeding were taken. The official charge was "making lewd phone calls." The maximum penalty for an adult charge with this was a $50 fine or not more than two months in jail. Gault was found guilty and sentenced to 6 years in juvenile detention.

Gault's parents filed a writ of habeas corpus which was eventually heard by the Supreme Court. The Supreme Court ruled that juveniles are entitled to due process rights when the court proceedings may result in confinement to a secure facility. The specific due process rights highlighted in this case include (1) fair notice of charges; (2) right to counsel; (3) right to confront and cross-examine witnesses; and (4) privilege against self-incrimination.

The Court held that the Due Process Clause of the Fourteenth Amendment applies to juvenile defendants as well as adult defendants. "Juvenile court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."

PREVENTING DELINQUENCY [166]

Learning Objective

- Describe the factors that influence the development of delinquency in youth and the ways the legal system deals with this delinquency

Learning Objective: Key Points

- A juvenile delinquent is a person who is typically under the age of 18 and commits an act that otherwise would have been charged as a crime had they been an adult.
- There are three categories of juvenile delinquency: delinquency, criminal behavior, and status offenses. Delinquency includes crimes committed by minors which are dealt with by the juvenile courts and justice system.
- Criminal behavior are crimes dealt with by the criminal justice system.
- Status offenses are offenses which are only classified as such because the person is a minor; they also dealt with by the juvenile courts.
- Poverty is a large predictor of low parental monitoring, harsh parenting, and association with deviant peer groups, all of which are in turn associated with juvenile offending. Family factors also have an influence on delinquency.
- Delinquency prevention is the broad term for all efforts aimed at preventing youth from becoming involved in criminal or other antisocial activity.
- Poverty is a large predictor of low parental monitoring, harsh parenting, and association with deviant peer groups, all of which are in turn associated with juvenile offending.
- Family factors which may have an influence on offending include: the level of parental supervision, the way parents discipline a child, particularly harsh punishment, parental conflict or separation, criminal parents or siblings, parental abuse or neglect, and the quality of the parent-child relationship
- Delinquency prevention is the broad term for all efforts aimed at preventing youth from becoming involved in criminal, or other antisocial, activity.

Learning Objective: Key Terms

- Delinquency Prevention : Delinquency prevention is the broad term for all efforts aimed at preventing youth from becoming involved in criminal or other antisocial activity. Prevention services may include activities such as substance abuse education and treatment, family counseling, youth mentoring, parenting education, educational support, and youth sheltering. Increasing availability and use of family planning services, including education and contraceptives helps to reduce unintended pregnancy and unwanted births, which are risk factors for delinquency.
- Status Offenses : A status offense is an action that is prohibited only to a certain class of people, and most often applied to offenses only committed by minors.
- Juvenile delinquency : Participation in illegal behavior by minors.

JUVENILE DELINQUENCY

Juvenile delinquency is participation in illegal behavior by minors. Most legal systems prescribe specific procedures for dealing with juveniles, such as juvenile detention centers and courts. A juvenile delinquent is a person who is typically under the age of 18 and commits an act that would have otherwise been charged as a crime if the minor was an adult. Depending on the type and severity of the offense committed, it is possible for persons under 18 to be charged and tried as adults.

Juvenile delinquency can be separated into three categories:

- Delinquency: crimes committed by minors that are dealt with by the juvenile courts and justice system;
- Criminal behavior: crimes dealt with by the criminal justice system;
- Status offenses: offenses which are only classified as such because one is a minor, such as truancy, also dealt with by the juvenile courts.

Young men disproportionately commit juvenile delinquency. Feminist theorists and others have examined why this is the case. One suggestion is that ideas of masculinity may make young men more likely to offend. Being tough, powerful, aggressive, daring, and

competitive becomes a way for young men to assert and express their masculinity. Alternatively, young men may actually be naturally more aggressive, daring, and prone to risk-taking. According to a study led by Florida State University criminologist Kevin M. Beaver, adolescent males who possess a certain type of variation in a specific gene are more likely to flock to delinquent peers. The study, which appeared in the September 2008 issue of the Journal of Genetic Psychology, is the first to establish a statistically significant association between an affinity for antisocial peer groups and a particular variation (called the 10-repeat allele) of the dopamine transporter gene (DAT1).

There is also a significant skew in the racial statistics for juvenile offenders. When considering these statistics, which state that Black and Latino teens are more likely to commit juvenile offenses, it is important to keep the following in mind: poverty is a large predictor of low parental monitoring, harsh parenting, and association with deviant peer groups, all of which are in turn associated with juvenile offending. The majority of adolescents who live in poverty are racial minorities.

Family factors that may have an influence on offending include:

- the level of parental supervision,
- the way parents discipline a child,
- particularly harsh punishment,
- parental conflict or separation,
- criminal parents or siblings,
- parental abuse or neglect,
- the quality of the parent-child relationship.

Delinquency prevention is the broad term for all efforts aimed at preventing youth from becoming involved in criminal or other antisocial activity. Because the development of delinquency in youth is influenced by numerous factors, prevention efforts need to be comprehensive in scope. Prevention services may include activities like substance abuse education and treatment, family counseling, youth mentoring, parenting education, educational support, and youth sheltering. Increasing availability and use of family planning services, including education and contraceptives, helps to reduce unintended pregnancy and unwanted births—which are risk factors for delinquency.

Juvenile Delinquency : Juvenile delinquency refers to antisocial or illegal behavior by children or adolescents, for dealing with juveniles, such as juvenile detention centers. There are a multitude of different theories on the causes of crime, most if not all of which can be applied to the causes of youth crime.

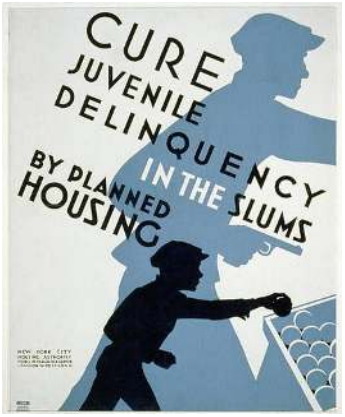


Figure 17.2 Cure Juvenile Delinquency by Planned Housing [167]

TERRORISM [168]

Terrorism is an act of violence intended to create fear, which is then leveraged in order to achieve goals.

Learning Objective

- Explain why terrorism is difficult to define.
- List the major types of terrorism.
- Evaluate the law enforcement and structural-reform approaches for dealing with terrorism.

Criticize an instance in history in which the term “terrorist” or “terrorism” has been misused to describe a religious group, government, or revolutionary action, using the definition of terrorism in this text

Learning Objective: Key Points

- Terrorism has been practiced by a broad array of political organizations for furthering their objectives.
- An abiding characteristic of terrorism is indiscriminate use of violence against noncombatants to gain publicity for an individual, group or cause.
- The perpetrators of acts of terrorism can be individuals, groups or states.
- Religious terrorism is terrorism performed by groups or individuals, the motivation of which is typically rooted in faith-based tenets.
- The terms “terrorism” and “terrorist” (someone who engages in terrorism) carry strong negative connotations.

Learning Objective: Key Terms

- perpetrator : One who perpetrates; especially, one who commits an offense or crime.
- terrorism : The deliberate commission of an act of violence to create an emotional response through the suffering of the victims in the furtherance of a political or social agenda.
- noncombatant : A non-fighting member of the armed forces

Terrorism is the systematic use of terror, especially as a means of coercion. Although the term lacks a universal definition, common definitions of terrorism refer to violent acts intended to create fear (terror). These acts are perpetrated for a religious, political, or ideological goal, and deliberately target or disregard the safety of non-combatants (civilians).

Terrorism has been practiced by a broad array of political organizations for furthering their objectives. It has been practiced by right-wing and left-wing political parties, nationalistic groups, religious groups, revolutionaries, and ruling governments. An abiding characteristic is the indiscriminate use of violence against noncombatants to gain publicity for a group, cause or individual. Therefore, the power of terrorism comes from its ability to leverage human fear to help achieve these goals.

DEFINING TERRORISM [169]

There is an old saying that “one person’s freedom fighter is another person’s terrorist.” This saying indicates some of the problems in defining terrorism precisely. Some years ago, the Irish Republican Army (IRA) waged a campaign of terrorism against the British government and its people as part of its effort to drive the British out of Northern Ireland. Many people in Northern Ireland and elsewhere hailed IRA members as freedom fighters, while many other people condemned them as cowardly terrorists. Although most of the world labeled the 9/11 attacks as terrorism, some individuals applauded them as acts of heroism. These examples indicate that there is only a thin line, if any, between terrorism on the one hand and freedom fighting and heroism on the other hand. Just as beauty is in the eyes of the beholder, so is terrorism. The same type of action is either terrorism or freedom fighting, depending on who is characterizing the action.

Although dozens of definitions of terrorism exist, most take into account what are widely regarded as the three defining features of terrorism: (a) the use of violence; (b) the goal of making people afraid; and (c) the desire for political, social, economic, and/or cultural change. A popular definition by political scientist Ted Robert Gurr (1989, p. 201) captures these features: “The use of unexpected violence to intimidate or coerce people in the pursuit of political or social objectives.”



Figure 17.1 Twin Towers Attacked on 9/11 [170]

As the attacks on 9/11 remind us, terrorism involves the use of indiscriminate violence to instill fear in a population and thereby win certain political, economic, or social objectives.

TERRORISTS

The terms “terrorism” and “terrorist” carry strong negative connotations. These terms are often used as political labels to condemn such violence as immoral, indiscriminate, or unjustified or to condemn an entire segment of a population. However, some groups, when involved in a liberation struggle, have been called terrorists by the Western governments or media. In some liberation struggles, these same persons can become the leaders or statesman of these liberated nations. Thus, the perpetrators of terrorism can widely vary; terrorists can be individuals, groups or states. According to some definitions, clandestine or semi-clandestine state actors may also carry out terrorist acts outside the framework of a state of war.



Figure 17.2 A pro-ETA mural in Durango, Biscay. The ETA is considered a terrorist organization by most governments but proclaims its own mission to be liberation . [171]



Figure 17.3 The Twin Towers with Smoke Plumes Rising [172]

The 9/11 attacks spawned an immense national security network and prompted the expenditure of more than $3 trillion on the war against terrorism.

Terrorism is hardly a new phenomenon, but Americans became horrifyingly familiar with it on September 11, 2001. The 9/11 attacks remain in the nation's consciousness, and many readers may know someone who died on that terrible day. The attacks also spawned a vast national security network that now reaches into almost every aspect of American life. This network is so secretive, so huge, and so expensive that no one really knows precisely how large it is or how much it costs (Priest & Arkin, 2010). However, it is thought to include 1,200 government organizations, 1,900 private companies, and almost 900,000 people with security clearances (Applebaum, 2011). The United States has spent an estimated $3 trillion since 9/11 on the war on terrorism, including more than $1 trillion on the wars in Iraq and Afghanistan whose relevance for terrorism has been sharply questioned. Questions of how best to deal with terrorism continue to be debated, and there are few, if any, easy answers to these questions.

Not surprisingly, sociologists and other scholars have written many articles and books about terrorism. This section draws on their work to discuss the definition of terrorism, the major types of terrorism, explanations for terrorism, and strategies for dealing with terrorism. An understanding of all these issues is essential to make sense of the concern and controversy about terrorism that exists throughout the world today.

TYPES OF TERRORISM

When we think about this definition, 9/11 certainly comes to mind, but there are, in fact, several kinds of terrorism—based on the identity of the actors and targets of terrorism—to which this definition applies. A typology of terrorism, again by Gurr (1989), is popular: (a) vigilante terrorism, (b) insurgent terrorism, (c) transnational (or international) terrorism, and (d) state terrorism. Table 17.1 "Types of Terrorism" summarizes these four types.

Table 17.1 Types of Terrorism

Type of Terrorism	Definition
Vigilante terrorism	Violence committed by private citizens against other private citizens.
Insurgent terrorism	Violence committed by private citizens against their own government or against businesses and institutions seen as representing the "establishment."
Transnational terrorism	Violence committed by citizens of one nation against targets in another nation.
State terrorism	Violence committed by a government against its own citizens.

Vigilante terrorism is committed by private citizens against other private citizens. Sometimes the motivation is racial, ethnic, religious, or other hatred, and sometimes the motivation is to resist social change. The violence of racist groups like the Ku Klux

Klan was vigilante terrorism, as was the violence used by white Europeans against Native Americans from the 1600s through the 1800s. What we now call “hate crime” is a contemporary example of vigilante terrorism.

Insurgent terrorism is committed by private citizens against their own government or against businesses and institutions seen as representing the “establishment.” Insurgent terrorism is committed by both left-wing groups and right-wing groups and thus has no political connotation. US history is filled with insurgent terrorism, starting with some of the actions the colonists waged against British forces before and during the American Revolution, when “the meanest and most squalid sort of violence was put to the service of revolutionary ideals and objectives” (Brown, 1989, p. 25). An example here is tarring and feathering: hot tar and then feathers were smeared over the unclothed bodies of Tories. Some of the labor violence committed after the Civil War also falls under the category of insurgent terrorism, as does some of the violence committed by left-wing groups during the 1960s and 1970s. A relatively recent example of right-wing insurgent terrorism is the infamous 1995 bombing of the federal building in Oklahoma City by Timothy McVeigh and Terry Nichols that killed 168 people.

Transnational terrorism is committed by the citizens of one nation against targets in another nation. This is the type that has most concerned Americans at least since 9/11, yet 9/11 was not the first time Americans had been killed by international terrorism. A decade earlier, a truck bombing at the World Trade Center killed six people and injured more than 1,000 others. In 1988, 189 Americans were among the 259 passengers and crew who died when a plane bound for New York exploded over Lockerbie, Scotland; agents from Libya were widely thought to have planted the bomb. Despite all these American deaths, transnational terrorism has actually been much more common in several other nations: London, Madrid, and various cities in the Middle East have often been the targets of international terrorists.

State terrorism involves violence by a government that is meant to frighten its own citizens and thereby stifle their dissent. State terrorism may involve mass murder, assassinations, and torture. Whatever its form, state terrorism has killed and injured more people than all the other kinds of terrorism combined (Gareau, 2010). Genocide, of course is the deadliest type of state terrorism, but state terrorism also occurs on a smaller scale. As just one example, the violent response of Southern white law enforcement officers to the civil rights protests of the 1960s amounted to state terrorism, as officers murdered or beat hundreds of activists during this period. Although state terrorism is usually linked to authoritarian regimes, many observers say the US government also engaged in state terror during the nineteenth century, when US troops killed thousands of Native Americans (D. A. Brown, 2009).

Pin It! Religious Terrorism

Religious terrorism is performed by groups or individuals, the motivation of which is typically rooted in faith-based tenets. Terrorist acts throughout the centuries have been performed on religious grounds with the hope to either spread or enforce a system of belief, viewpoint or opinion. Religious terrorism does not in itself necessarily define a specific religious standpoint or view, but instead usually defines an individual or group interpretation of that belief system ‘s teachings.

EXPLAINING TERRORISM

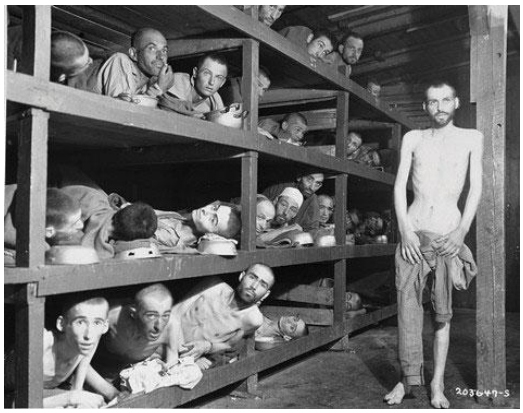


Figure 17.4 Prisoners in a Concentration Camp [173]

Genocide is the deadliest type of state terrorism. The Nazi holocaust killed some 6 million Jews and 6 million other people.

Why does terrorism occur? It is easy to assume that terrorists must have psychological problems that lead them to have sadistic personalities, and that they are simply acting irrationally and impulsively. However, most researchers agree that terrorists are psychologically normal despite their murderous violence and, in fact, are little different from other types of individuals who use violence for political ends. As one scholar observed, “Most terrorists are no more or less fanatical than the young men who charged into Union cannon fire at Gettysburg or those who parachuted behind German lines into France. They are no more or less cruel and coldblooded than the Resistance fighters who executed Nazi officials and collaborators in Europe, or the American GI’s ordered to ‘pacify’ Vietnamese villages” (Rubenstein, 1987, p. 5).

Contemporary terrorists tend to come from well-to-do families and to be well-educated themselves; ironically, their social backgrounds are much more advantaged in these respects than are those of common street criminals, despite the violence they commit.

If terrorism cannot be said to stem from individuals’ psychological problems, then what are its roots? In answering this question, many scholars say that terrorism has structural roots. In this view, terrorism is a rational response, no matter how horrible it may be, to perceived grievances regarding economic, social, and/or political conditions (White, 2012). The heads of the US 9/11 Commission, which examined the terrorist attacks of that day, reflected this view in the following assessment: “We face a rising tide of radicalization and rage in the Muslim world—a trend to which our own actions have contributed. The enduring threat is not Osama bin Laden but young Muslims with no jobs and no hope, who are angry with their own governments and increasingly see the United States as an enemy of Islam” (Kean & Hamilton, 2007, p. B1). As this assessment indicates, structural conditions do not justify terrorism, of course, but they do help explain why some individuals decide to commit it.

THE IMPACT OF TERRORISM

The major impact of terrorism is apparent from its definition, which emphasizes public fear and intimidation. Terrorism can work, or so terrorists believe, precisely because it instills fear and intimidation. Anyone who might have happened to be in or near New York City on 9/11 will always remember how terrified the local populace was to hear of the attacks and the fears that remained with them for the days and weeks that followed.



Figure 17.5 ATL’s Baggage Check [174]

Hardly anyone likes standing in the long airport security lines that are a result of the 9/11 attacks. Some experts say that certain airport security measures are an unneeded response to these attacks.

Another significant impact of terrorism is the response to it. As mentioned earlier, the 9/11 attacks led the United States to develop an immense national security network that defies description and expense, as well as the Patriot Act and other measures that some say threaten civil liberties; to start the wars in Iraq and Afghanistan; and to spend more than $3 trillion in just one decade on homeland security and the war against terrorism. Airport security increased, and Americans have grown accustomed to having to take off their shoes, display their liquids and gels in containers limited to three ounces, and stand in long security lines as they try to catch their planes.

People critical of these effects say that the “terrorists won,” and, for better or worse, they may be correct. As one columnist wrote on the tenth anniversary of 9/11, “And yet, 10 years after 9/11, it’s clear that the ‘war on terror’ was far too narrow a prism through which to see the planet. And the price we paid to fight it was far too high” (Applebaum, 2011, p. A17). In this columnist’s opinion,

the war on terror imposed huge domestic costs on the United States; it diverted US attention away from important issues regarding China, Latin America, and Africa; it aligned the United States with authoritarian regimes in the Middle East even though their authoritarianism helps inspire Islamic terrorism; and it diverted attention away from the need to invest in the American infrastructure: schools, roads, bridges, and medical and other research. In short, the columnist concluded, "in making Islamic terrorism our central priority—at times our only priority—we ignored the economic, environmental and political concerns of the rest of the globe. Worse, we pushed aside our economic, environmental and political problems until they became too great to be ignored" (Applebaum, 2011, p. A17).

To critics like this columnist, the threat to Americans of terrorism is "over-hyped" (Holland, 2011b). They acknowledge the 9/11 tragedy and the real fears of Americans, but they also point out that in the years since 9/11, the number of Americans killed in car accidents, by air pollution, by homicide, or even by dog bites or lightning strikes has greatly exceeded the number of Americans killed by terrorism. They add that the threat is overhyped because defense industry lobbyists profit from overhyping it and because politicians do not wish to be seen as "weak on terror." And they also worry that the war on terror has been motivated by and also contributed to prejudice against Muslims (Kurzman, 2011).

Learning Objective: Key Takeaways

- Terrorism involves the use of intimidating violence to achieve political ends. Whether a given act of violence is perceived as terrorism or as freedom fighting often depends on whether someone approves of the goal of the violence.
- Several types of terrorism exist. The 9/11 attacks fall into the transnational terrorism category.

Learning Objective: For Your Review

- Do you think the US response to the 9/11 attacks has been appropriate, or do you think it has been too overdone? Explain your answer.
- Do you agree with the view that structural problems help explain Middle Eastern terrorism? Why or why not?

THE USA PATRIOT ACT [175]

After the 9/11 terrorist attack in 2001, Congress passed the USA Patriot Act. The U.S. Department of Justice's website has a page entitled Preserving Life & Liberty. (https://www.justice.gov/archive/ll/highlights.htm) The top of that page states the following regarding the Patriot Act.

The Department of Justice's first priority is to prevent future terrorist attacks. Since its passage following the September 11, 2001 attacks, the Patriot Act has played a key part – and often the leading role – in a number of successful operations to protect innocent Americans from the deadly plans of terrorists dedicated to destroying America and our way of life. While the results have been important, in passing the Patriot Act, Congress provided for only modest, incremental changes in the law. Congress simply took existing legal principles and retrofitted them to preserve the lives and liberty of the American people from the challenges posed by a global terrorist network.

Congress enacted the Patriot Act by overwhelming, bipartisan margins, arming law enforcement with new tools to detect and prevent terrorism: The USA Patriot Act was passed nearly unanimously by the Senate 98-1, and 357-66 in the House, with the support of members from across the political spectrum.

The Act Improves Our Counter-Terrorism Efforts in Several Significant Ways:

1. The Patriot Act:

- allows investigators to use the tools that were already available to investigate organized crime and drug trafficking. Many of the tools the Act provides to law enforcement to fight terrorism have been used for decades to fight organized crime and drug dealers and have been reviewed and approved by the courts. As Sen. Joe Biden (D-DE) explained during the floor debate about the Act, "the FBI could get a wiretap to investigate the mafia, but they could not get one to investigate terrorists. To put it bluntly, that was crazy! What's good for the mob should be good for terrorists." (Cong. Rec., 10/25/01)
- allows law enforcement to use surveillance against more crimes of terror. Before the Patriot Act, courts could permit law enforcement to conduct electronic surveillance to investigate many ordinary, non-terrorism crimes, such as drug crimes, mail fraud, and passport fraud. Agents also could obtain wiretaps to investigate some, but not all, of the crimes that terrorists often

commit. The Act enabled investigators to gather information when looking into the full range of terrorism-related crimes, including chemical-weapons offenses, the use of weapons of mass destruction, killing Americans abroad, and terrorism financing.

- allows federal agents to follow sophisticated terrorists trained to evade detection. For years, law enforcement has been able to use “roving wiretaps” to investigate ordinary crimes, including drug offenses and racketeering. A roving wiretap can be authorized by a federal judge to apply to a particular suspect, rather than a particular phone or communications device. Because international terrorists are sophisticated and trained to thwart surveillance by rapidly changing locations and communication devices such as cell phones, the Act authorized agents to seek court permission to use the same techniques in national security investigations to track terrorists.
- allows law enforcement to conduct investigations without tipping off terrorists. In some cases, if criminals are tipped off too early to an investigation, they might flee, destroy evidence, intimidate or kill witnesses, cut off contact with associates, or take other action to evade arrest. Therefore, federal courts in narrow circumstances long have allowed law enforcement to delay for a limited time when the subject is told that a judicially approved search warrant has been executed. Notice is always provided, but the reasonable delay gives law enforcement time to identify the criminal’s associates, eliminate immediate threats to our communities, and coordinate the arrests of multiple individuals without tipping them off beforehand. These delayed notification search warrants have been used for decades, have proven crucial in drug and organized crime cases, and have been upheld by courts as fully constitutional.
- allows federal agents to ask a court for an order to obtain business records in national security terrorism cases. Examining business records often provides the key that investigators are looking for to solve a wide range of crimes. Investigators might seek select records from hardware stores or chemical plants, for example, to find out who bought materials to make a bomb, or bank records to see who’s sending money to terrorists. Law enforcement authorities have always been able to obtain business records in criminal cases through grand jury subpoenas and continue to do so in national security cases where appropriate. These records were sought in criminal cases such as the investigation of the Zodiac gunman, where police suspected the gunman was inspired by a Scottish occult poet and wanted to learn who had checked the poet’s books out of the library. In national security cases where use of the grand jury process was not appropriate, investigators previously had limited tools at their disposal to obtain certain business records. Under the Patriot Act, the government can now ask a federal court (the Foreign Intelligence Surveillance Court), if needed to aid an investigation, to order production of the same type of records available through grand jury subpoenas. This federal court, however, can issue these orders only after the government demonstrates the records concerned are sought for an authorized investigation to obtain foreign intelligence information not concerning a U.S. person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a U.S. person is not conducted solely on the basis of activities protected by the First Amendment.

2. The Patriot Act facilitated information sharing and cooperation among government agencies so that they can better “connect the dots.” The Act removed the major legal barriers that prevented the law enforcement, intelligence, and national defense communities from talking and coordinating their work to protect the American people and our national security. The government’s prevention efforts should not be restricted by boxes on an organizational chart. Now police officers, FBI agents, federal prosecutors and intelligence officials can protect our communities by “connecting the dots” to uncover terrorist plots before they are completed. As Sen. John Edwards (D-N.C.) said about the Patriot Act, “we simply cannot prevail in the battle against terrorism if the right hand of our government has no idea what the left hand is doing” (Press release, 10/26/01) Prosecutors and investigators used information shared pursuant to section 218 in investigating the defendants in the so-called “Virginia Jihad” case. This prosecution involved members of the Dar al-Arqam Islamic Center, who trained for jihad in Northern Virginia by participating in paintball and paramilitary training, including eight individuals who traveled to terrorist training camps in Pakistan or Afghanistan between 1999 and 2001. These individuals are associates of a violent Islamic extremist group known as Lashkar-e-Taiba (LET), which operates in Pakistan and Kashmir, and that has ties to the al Qaeda terrorist network. As the result of an investigation that included the use of information obtained through FISA, prosecutors were able to bring charges against these individuals. Six of the defendants have pleaded guilty, and three were convicted in March 2004 of charges including conspiracy to levy war against the United States and conspiracy to provide material support to the Taliban. These nine defendants received sentences ranging from a prison term of four years to life imprisonment.
3. The Patriot Act:

- updated the law to reflect new technologies and new threats. The Act brought the law up to date with current technology, so we no longer have to fight a digital-age battle with antique weapons-legal authorities leftover from the era of rotary telephones. When investigating the murder of Wall Street Journal reporter Daniel Pearl, for example, law enforcement used one of the Act's new authorities to use high-tech means to identify and locate some of the killers.
- allows law enforcement officials to obtain a search warrant anywhere a terrorist-related activity occurred. Before the Patriot Act, law enforcement personnel were required to obtain a search warrant in the district where they intended to conduct a search. However, modern terrorism investigations often span a number of districts, and officers therefore had to obtain multiple warrants in multiple jurisdictions, creating unnecessary delays. The Act provides that warrants can be obtained in any district in which terrorism-related activities occurred, regardless of where they will be executed. This provision does not change the standards governing the availability of a search warrant but streamlines the search-warrant process.
- allows victims of computer hacking to request law enforcement assistance in monitoring the "trespassers" on their computers. This change made the law technology-neutral; it placed electronic trespassers on the same footing as physical trespassers. Now, hacking victims can seek law enforcement assistance to combat hackers, just as burglary victims have been able to invite officers into their homes to catch burglars.

4. The Patriot Act:

- increased the penalties for those who commit terrorist crimes. Americans are threatened as much by the terrorist who pays for a bomb as by the one who pushes the button. That's why the Patriot Act imposed tough new penalties on those who commit and support terrorist operations, both at home and abroad.
- prohibits the harboring of terrorists. The Act created a new offense that prohibits knowingly harboring persons who have committed or are about to commit a variety of terrorist offenses, such as: destruction of aircraft; use of nuclear, chemical, or biological weapons; use of weapons of mass destruction; bombing of government property; sabotage of nuclear facilities; and aircraft piracy.
- enhanced the inadequate maximum penalties for various crimes likely to be committed by terrorists: including arson, destruction of energy facilities, material support to terrorists and terrorist organizations, and destruction of national-defense materials.
- enhanced a number of conspiracy penalties, including for arson, killings in federal facilities, attacking communications systems, material support to terrorists, sabotage of nuclear facilities, and interference with flight crew members. Under previous law, many terrorism statutes did not specifically prohibit engaging in conspiracies to commit the underlying offenses. In such cases, the government could only bring prosecutions under the general federal conspiracy provision, which carries a maximum penalty of only five years in prison.
- punishes terrorist attacks on mass transit systems.
- punishes bioterrorists.
- eliminates the statutes of limitations for certain terrorism crimes and lengthens them for other terrorist crimes.

The government's success in preventing another catastrophic attack on the American homeland since September 11, 2001, would have been much more difficult, if not impossible, without the USA Patriot Act. The authorities Congress provided have substantially enhanced our ability to prevent, investigate, and prosecute acts of terror.

CYBER CRIME [176]

TYPES OF CYBERCRIME

Crime has evolved with the advancements of the internet and social media. The parallel between technology and the types of crimes that are committed is astonishing. As technology became more readily available to the masses, the types of crimes committed shifted over time. A clear distinction has been formed based on the involvement of cybertechnology in crime. Crimes that would not exist or be possible without the existence of cybertechnology are true Cybercrimes. To be most accurate, these crimes can be classified as cyberspecific crimes. Crimes that can be committed that do not necessarily need cybertechnology to be possible, but are made easier by its existence, are known as cyber-related crimes. Of Cyber-related crimes, there are two distinct categories that can be identified. The first are Cyber-assisted crimes. These are crimes in which cybertechnology is simply used to aid a crime, such as committing tax fraud or being assaulted with a computer. The other category is known as Cyberexacerbated crimes, which are crimes that have increased significantly due to cybertechnology.

CYBER-ASSISTED CRIMES

Cyber-assisted crimes are the most basic crimes that can be committed with the use of cybertechnology. Put simply, these are essentially normal crimes that have occurred throughout time on a regular basis. The only difference is that cybertechnology has played some small part in the crime. Property damage, for example, is one kind of cyber-assisted crime. If someone destroys your computer or cellphone, it constitutes as property damage but can also be classified as a cyber-assisted crime. Similarly, if you are assaulted with a phone, printer, computer or other device, the attack constitutes as assault but can also be classified as a Cyber-assisted crime.

The most common type of cyber-assisted crime that you will see is fraud. Fraud typically is a crime that does not require much thought to actually commit. As a crime, it has always been relatively easy to commit. With the use of cybertechnology, it only becomes much easier to actually carry out from start to finish.

CYBEREXACERBATED CRIMES

Cyberexacerbated crimes are a type of cyber-related crime, but they are much worse than cyber-assisted crimes. These crimes have increased significantly due to cybertechnology. Most crimes have evolved to maintain their own categories due to the sheer volume of crimes and their slight uniqueness due to their ease with the use of cybertechnology.

Cyberbullying is defined as the “intentional and repeated harm inflicted on people through the use of computers, cellular telephones, and other electronic devices.” Previously something that happened offline only, cyberbullying is a huge crime that leads to victims suffering from low self-esteem, depression, and sometimes even driving them to commit suicide. With the use of the internet, it is possible for people to receive thousands of hateful comments from individuals at a single time.

Cyberstalking is exactly what one would think, except occurring in a digital space. Cybertechnology allows for criminals to keep tabs on people, watching all of their online activity and making it very uncomfortable for victims to even want to utilize things such as their own personal social media. Perhaps the most disconcerting thing is that the perpetrator can always be online.

Internet pedophilia and pornography are some of the more disturbing cyberexacerbated crimes. Due to the ability for communities of like-minded individuals to be easily formed online, pedophiles are able to form online communities and facilitate the creation and dissemination of child pornography.

CYBERSPECIFIC CRIMES

Cyberspecific crimes do not exist without the internet as we know it. Because of that, these are the most unique cybercrimes and could be considered as the only “true” cybercrimes. Cybertrespassing is one of these crimes. At its core, cybertrespassing takes its roots from actual trespassing. Essentially, perpetrators gain access to stores of information that they otherwise should not have access to because of the lack of permissions. The reason why this is so dangerous is because it opens the door for cybertrespassing to easily become a data breach if information is taken.

Cybervandalism is another form cyberspecific crime. Taking its roots from actual vandalism, cybervandalism began harmlessly with the defacing of websites on the internet. While annoying, it didn’t necessarily present any damage. It wasn’t until cyberattacks with the intent of harming computers were created that cybervandalism became a huge issue.

TYPES OF CYBER ATTACKS

Viruses are pieces of computer programming code that causes a computer to behave in an undesirable way. Viruses can be attached to files or stored in the computer’s memory. Viruses may be programmed to different things such when they are downloaded or activated by a specific action for example viruses attached to file will infect that computer and any file created or modified on that machine. Viruses may also have programmed to display a message when certain activities are performed to execute the virus. Worms like viruses bury themselves in the memory of a machine and then duplicates itself with help from any help. It can send itself through emails and other connections. Phishing is when hackers try to obtain financial or other confidential information from Internet users, typically by sending an e-mail that looks as if it is from a legitimate organization, usually a financial institution, but contains a link to a fake Web site that replicates the real one. These con - artists urge the recipient of such emails to take action for rewards or avoid consequences. Hackers may use a backdoor within a computer system that is vulnerable, this allows them to remain undetected while they access important information. Key-logger programs allow attackers to view information that has been

logged into a particular machine undetected. Botnets are a collection of computers that could be spread around the world; they are connected to the internet and controlled by one single computer.

Summary

As the 21 st century progresses, technology and crime will continue to become more closely linked; technology is changing the face of crime and policing is adapting as a result. Yet many of the core motivations behind policing and the philosophies utilized in making policing policies will continue to shape the field of law and law enforcement. Technology and goals may shift but good policework is derived from self-awareness, emotional intelligence, community consciousness, and adaptability.

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