CRIMINAL JUSTICE



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Book: Criminal Justice (Lumen)

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Detailed Licensing

Licensing

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Approaches to Sociological Research

When sociologists apply the sociological perspective and begin to ask questions, no topic is off limits. Every aspect of human behavior is a source of possible investigation. Sociologists question the world that humans have created and live in. They notice patterns of behavior as people move through that world. Using sociological methods and systematic research within the framework of the scientific method and a scholarly interpretive perspective, sociologists have discovered workplace patterns that have transformed industries, family patterns that have enlightened family members, and education patterns that have aided structural changes in classrooms.

The crime during a full moon discussion put forth a few loosely stated opinions. If the human behaviors around those claims were tested systematically, a police officer, for example, could write a report and offer the findings to sociologists and the world in general. The new perspective could help people understand themselves and their neighbors and help people make better decisions about their lives. It might seem strange to use scientific practices to study social trends, but, as we shall see, it's extremely helpful to rely on systematic approaches that research methods provide.

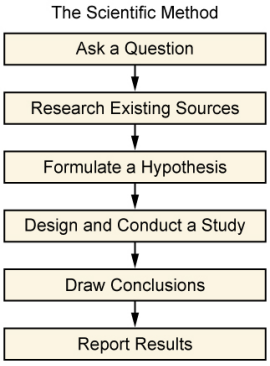
Sociologists often begin the research process by asking a question about how or why things happen in this world. It might be a unique question about a new trend or an old question about a common aspect of life. Once the sociologist forms the question, he or she proceeds through an in-depth process to answer it. In deciding how to design that process, the researcher may adopt a scientific approach or an interpretive framework. The following sections describe these approaches to knowledge.

The Scientific Method

Sociologists make use of tried and true methods of research, such as experiments, surveys, and field research. But humans and their social interactions are so diverse that these interactions can seem impossible to chart or explain. It might seem that science is about discoveries and chemical reactions or about proving ideas right or wrong rather than about exploring the nuances of human behavior.

However, this is exactly why scientific models work for studying human behavior. A scientific process of research establishes parameters that help make sure results are objective and accurate. Scientific methods provide limitations and boundaries that focus a study and organize its results.

The scientific method involves developing and testing theories about the world based on empirical evidence. It is defined by its commitment to systematic observation of the empirical world and strives to be objective, critical, skeptical, and logical. It involves a series of prescribed steps that have been established over centuries of scholarship.



The scientific method is an essential tool in research.

But just because sociological studies use scientific methods does not make the results less human. Sociological topics are not reduced to right or wrong facts. In this field, results of studies tend to provide people with access to knowledge they did not have before—knowledge of other cultures, knowledge of rituals and beliefs, or knowledge of trends and attitudes. No matter what research approach they use, researchers want to maximize the study's reliability, which refers to how likely research results are to be replicated if the study is reproduced. Reliability increases the likelihood that what happens to one person will happen to all people in a group. Researchers also strive for validity, which refers to how well the study measures what it was designed to measure. Returning to the crime rate during a full moon topic, reliability of a study would reflect how well the resulting experience represents the average adult crime rate during a full moon. Validity would ensure that the study's design accurately examined what

it was designed to study, so an exploration of adult criminal behaviors during a full moon should address that issue and not veer into other age groups' crimes, for example.

In general, sociologists tackle questions about the role of social characteristics in outcomes. For example, how do different communities fare in terms of psychological well-being, community cohesiveness, range of vocation, wealth, crime rates, and so on? Are communities functioning smoothly? Sociologists look between the cracks to discover obstacles to meeting basic human needs. They might study environmental influences and patterns of behavior that lead to crime, substance abuse, divorce, poverty, unplanned pregnancies, or illness. And, because sociological studies are not all focused on negative behaviors or challenging situations, researchers might study vacation trends, healthy eating habits, neighborhood organizations, higher education patterns, games, parks, and exercise habits.

Sociologists can use the scientific method not only to collect but also to interpret and analyze the data. They deliberately apply scientific logic and objectivity. They are interested in—but not attached to—the results. They work outside of their own political or social agendas. This doesn't mean researchers do not have their own personalities, complete with preferences and opinions. But sociologists deliberately use the scientific method to maintain as much objectivity, focus, and consistency as possible in a particular study.

With its systematic approach, the scientific method has proven useful in shaping sociological studies. The scientific method provides a systematic, organized series of steps that help ensure objectivity and consistency in exploring a social problem. They provide the means for accuracy, reliability, and validity. In the end, the scientific method provides a shared basis for discussion and analysis (Merton 1963).

Typically, the scientific method starts with these steps—1) ask a question, 2) research existing sources, 3) formulate a hypothesis—described below.

Ask a Question

The first step of the scientific method is to ask a question, describe a problem, and identify the specific area of interest. The topic should be narrow enough to study within a geography and time frame. "Are societies capable of sustained happiness?" would be too vague. The question should also be broad enough to have universal merit. "What do personal hygiene habits reveal about the values of students at XYZ High School?" would be too narrow. That said, happiness and hygiene are worthy topics to study. Sociologists do not rule out any topic, but would strive to frame these questions in better research terms.

That is why sociologists are careful to define their terms. In a hygiene study, for instance, hygiene could be defined as "personal habits to maintain physical appearance (as opposed to health)," and a researcher might ask, "How do differing personal hygiene habits reflect the cultural value placed on appearance?" When forming these basic research questions, sociologists develop an operational definition, that is, they define the concept in terms of the physical or concrete steps it takes to objectively measure it. The operational definition identifies an observable condition of the concept. By operationalizing a variable of the concept, all researchers can collect data in a systematic or replicable manner.

The operational definition must be valid, appropriate, and meaningful. And it must be reliable, meaning that results will be close to uniform when tested on more than one person. For example, "good drivers" might be defined in many ways: those who use their turn signals, those who don't speed, or those who courteously allow others to merge. But these driving behaviors could be interpreted differently by different researchers and could be difficult to measure. Alternatively, "a driver who has never received a traffic violation" is a specific description that will lead researchers to obtain the same information, so it is an effective operational definition.

Research Existing Sources

The next step researchers undertake is to conduct background research through a literature review, which is a review of any existing similar or related studies. A visit to the library and a thorough online search will uncover existing research about the topic of study. This step helps researchers gain a broad understanding of work previously conducted on the topic at hand and enables them to position their own research to build on prior knowledge. Researchers—including student researchers—are responsible for correctly citing existing sources they use in a study or that inform their work. While it is fine to borrow previously published material (as long as it enhances a unique viewpoint), it must be referenced properly and never plagiarized.

To study hygiene and its value in a particular society, a researcher might sort through existing research and unearth studies about child-rearing, vanity, obsessive-compulsive behaviors, and cultural attitudes toward beauty. It's important to sift through this

information and determine what is relevant. Using existing sources educates researchers and helps refine and improve studies' designs.

Formulate a Hypothesis

A hypothesis is an assumption about how two or more variables are related; it makes a conjectural statement about the relationship between those variables. In sociology, the hypothesis will often predict how one form of human behavior influences another. In research, independent variables are the *cause* of the change. The dependent variable is the *effect*, or thing that is changed.

For example, in a basic study, the researcher would establish one form of human behavior as the independent variable and observe the influence it has on a dependent variable. How does gender (the independent variable) affect rate of income (the dependent variable)? How does one's religion (the independent variable) affect family size (the dependent variable)? How is social class (the dependent variable) affected by level of education (the independent variable)?

Examples of Dependent and Independent VariablesTypically, the independent variable causes the dependent variable to change in some way.

Hypothesis	Independent Variable	Dependent Variable
The greater the availability of affordable housing, the lower the homeless rate.	Affordable Housing	Homeless Rate
The greater the availability of math tutoring, the higher the math grades.	Math Tutoring	Math Grades
The greater the police patrol presence, the safer the neighborhood.	Police Patrol Presence	Safer Neighborhood
The greater the factory lighting, the higher the productivity.	Factory Lighting	Productivity
The greater the amount of observation, the higher the public awareness.	Observation	Public Awareness

At this point, a researcher's operational definitions help measure the variables. In a study asking how tutoring improves grades, for instance, one researcher might define a "good" grade as a C or better, while another uses a B+ as a starting point for "good." Another operational definition might describe "tutoring" as "one-on-one assistance by an expert in the field, hired by an educational institution." Those definitions set limits and establish cut-off points that ensure consistency and replicability in a study.

As the table shows, an independent variable is the one that causes a dependent variable to change. For example, a researcher might hypothesize that teaching children proper hygiene (the independent variable) will boost their sense of self-esteem (the dependent variable). Or rephrased, a child's sense of self-esteem depends, in part, on the quality and availability of hygienic resources.

Of course, this hypothesis can also work the other way around. Perhaps a sociologist believes that increasing a child's sense of self-esteem (the independent variable) will automatically increase or improve habits of hygiene (now the dependent variable). Identifying the independent and dependent variables is very important. As the hygiene example shows, simply identifying two topics, or variables, is not enough; their prospective relationship must be part of the hypothesis.

Just because a sociologist forms an educated prediction of a study's outcome doesn't mean data contradicting the hypothesis aren't welcome. Sociologists analyze general patterns in response to a study, but they are equally interested in exceptions to patterns. In a study of education, a researcher might predict that high school dropouts have a hard time finding rewarding careers. While it has become at least a cultural assumption that the higher the education, the higher the salary and degree of career happiness, there are certainly exceptions. People with little education have had stunning careers, and people with advanced degrees have had trouble finding work. A sociologist prepares a hypothesis knowing that results will vary.

Once the preliminary work is done, it's time for the next research steps: designing and conducting a study and drawing conclusions. These research methods are discussed below.

Interpretive Framework

While many sociologists rely on the scientific method as a research approach, others operate from an interpretive framework. While systematic, this approach doesn't follow the hypothesis-testing model that seeks to find generalizable results. Instead, an

interpretive framework, sometimes referred to as an interpretive perspective, seeks to understand social worlds from the point of view of participants, which leads to in-depth knowledge.

Interpretive research is generally more descriptive or narrative in its findings. Rather than formulating a hypothesis and method for testing it, an interpretive researcher will develop approaches to explore the topic at hand that may involve a significant amount of direct observation or interaction with subjects. This type of researcher also learns as he or she proceeds and sometimes adjusts the research methods or processes midway to optimize findings as they evolve.

Summary

Using the scientific method, a researcher conducts a study in five phases: asking a question, researching existing sources, formulating a hypothesis, conducting a study, and drawing conclusions. The scientific method is useful in that it provides a clear method of organizing a study. Some sociologists conduct research through an interpretive framework rather than employing the scientific method.

Scientific sociological studies often observe relationships between variables. Researchers study how one variable changes another. Prior to conducting a study, researchers are careful to apply operational definitions to their terms and to establish dependent and independent variables.

Section Quiz

A measurement is considered _____ if it actually measures what it is intended to measure, according to the topic of the study.

1. reliable
2. sociological
3. valid
4. quantitative

Sociological studies test relationships in which change in one _____ causes change in another.

1. test subject
2. behavior
3. variable
4. operational definition

In a study, a group of ten-year-old boys are fed doughnuts every morning for a week and then weighed to see how much weight they gained. Which factor is the dependent variable?

1. The doughnuts
2. The boys
3. The duration of a week
4. The weight gained

Which statement provides the best operational definition of “childhood obesity”?

1. Children who eat unhealthy foods and spend too much time watching television and playing video games
2. A distressing trend that can lead to health issues including type 2 diabetes and heart disease
3. Body weight at least 20 percent higher than a healthy weight for a child of that height
4. The tendency of children today to weigh more than children of earlier generations

Short Answer

Write down the first three steps of the scientific method. Think of a broad topic that you are interested in and which would make a good sociological study—for example, ethnic diversity in a college, homecoming rituals, athletic scholarships, or teen driving. Now, take that topic through the first steps of the process. For each step, write a few sentences or a paragraph: 1) Ask a question about the topic. 2) Do some research and write down the titles of some articles or books you'd want to read about the topic. 3) Formulate a hypothesis.

Further Research

For a historical perspective on the scientific method in sociology, read "The Elements of Scientific Method in Sociology" by F. Stuart Chapin (1914) in the *American Journal of Sociology*: http://openstaxcollege.org/l/Method-in-Sociology

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Glossary

dependent variables
a variable changed by other variables

hypothesis
a testable educated guess about predicted outcomes between two or more variables

independent variables
variables that cause changes in dependent variables

interpretive framework
a sociological research approach that seeks in-depth understanding of a topic or subject through observation or interaction; this approach is not based on hypothesis testing

literature review
a scholarly research step that entails identifying and studying all existing studies on a topic to create a basis for new research

operational definitions
specific explanations of abstract concepts that a researcher plans to study

reliability
a measure of a study's consistency that considers how likely results are to be replicated if a study is reproduced

scientific method
an established scholarly research method that involves asking a question, researching existing sources, forming a hypothesis, designing and conducting a study, and drawing conclusions

validity
the degree to which a sociological measure accurately reflects the topic of study

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Research Methods

Sociologists examine the world, see a problem or interesting pattern, and set out to study it. They use research methods to design a study—perhaps a detailed, systematic, scientific method for conducting research and obtaining data, or perhaps an ethnographic study utilizing an interpretive framework. Planning the research design is a key step in any sociological study.

When entering a particular social environment, a researcher must be careful. There are times to remain anonymous and times to be overt. There are times to conduct interviews and times to simply observe. Some participants need to be thoroughly informed; others should not know they are being observed. A researcher wouldn't stroll into a crime-ridden neighborhood at midnight, calling out, "Any gang members around?" And if a researcher walked into a coffee shop and told the employees they would be observed as part of a study on work efficiency, the self-conscious, intimidated baristas might not behave naturally. This is called the Hawthorne effect—where people change their behavior because they know they are being watched as part of a study. The Hawthorne effect is unavoidable in some research. In many cases, sociologists have to make the purpose of the study known. Subjects must be aware that they are being observed, and a certain amount of artificiality may result (Sonnenfeld 1985).

Making sociologists' presence invisible is not always realistic for other reasons. That option is not available to a researcher studying prison behaviors, early education, or the Ku Klux Klan. Researchers can't just stroll into prisons, kindergarten classrooms, or Klan meetings and unobtrusively observe behaviors. In situations like these, other methods are needed. All studies shape the research design, while research design simultaneously shapes the study. Researchers choose methods that best suit their study topics and that fit with their overall approaches to research.

In planning studies' designs, sociologists generally choose from four widely used methods of social investigation: survey, field research, experiment, and secondary data analysis, or use of existing sources. Every research method comes with plusses and minuses, and the topic of study strongly influences which method or methods are put to use.

Surveys

As a research method, a survey collects data from subjects who respond to a series of questions about behaviors and opinions, often in the form of a questionnaire. The survey is one of the most widely used scientific research methods. The standard survey format allows individuals a level of anonymity in which they can express personal ideas.



Questionnaires are a common research method; the U.S. Census is a well-known example. (Photo courtesy of Kathryn Decker/flickr)

At some point, most people in the United States respond to some type of survey. The U.S. Census is an excellent example of a large-scale survey intended to gather sociological data. Not all surveys are considered sociological research, however, and many surveys people commonly encounter focus on identifying marketing needs and strategies rather than testing a hypothesis or contributing to social science knowledge. Questions such as, "How many hot dogs do you eat in a month?" or "Were the staff helpful?" are not usually designed as scientific research. Often, polls on television do not reflect a general population, but are merely answers from a specific show's audience. Polls conducted by programs such as *American Idol* or *So You Think You Can Dance* represent the opinions of fans but are not particularly scientific. A good contrast to these are the Nielsen Ratings, which determine the popularity of television programming through scientific market research.



American Idol uses a real-time survey system—with numbers—that allows members in the audience to vote on contestants. (Photo courtesy of Sam Howzit/flickr)

Sociologists conduct surveys under controlled conditions for specific purposes. Surveys gather different types of information from people. While surveys are not great at capturing the ways people really behave in social situations, they are a great method for discovering how people feel and think—or at least how they say they feel and think. Surveys can track preferences for presidential candidates or reported individual behaviors (such as sleeping, driving, or texting habits) or factual information such as employment status, income, and education levels.

A survey targets a specific population, people who are the focus of a study, such as college athletes, international students, or teenagers living with type 1 (juvenile-onset) diabetes. Most researchers choose to survey a small sector of the population, or a sample: that is, a manageable number of subjects who *represent* a larger population. The success of a study depends on how well a population is represented by the sample. In a random sample, every person in a population has the same chance of being chosen for the study. According to the laws of probability, random samples represent the population as a whole. For instance, a Gallup Poll, if conducted as a nationwide random sampling, should be able to provide an accurate estimate of public opinion whether it contacts 2,000 or 10,000 people.

After selecting subjects, the researcher develops a specific plan to ask questions and record responses. It is important to inform subjects of the nature and purpose of the study up front. If they agree to participate, researchers thank subjects and offer them a chance to see the results of the study if they are interested. The researcher presents the subjects with an instrument, which is a means of gathering the information. A common instrument is a questionnaire, in which subjects answer a series of questions. For some topics, the researcher might ask yes-or-no or multiple-choice questions, allowing subjects to choose possible responses to each question. This kind of quantitative data—research collected in numerical form that can be counted—are easy to tabulate. Just count up the number of "yes" and "no" responses or correct answers, and chart them into percentages.

Questionnaires can also ask more complex questions with more complex answers—beyond "yes," "no," or the option next to a checkbox. In those cases, the answers are subjective and vary from person to person. *How do plan to use your college education? Why do you follow Jimmy Buffett around the country and attend every concert?* Those types of questions require short essay responses, and participants willing to take the time to write those answers will convey personal information about religious beliefs, political views, and morals. Some topics that reflect internal thought are impossible to observe directly and are difficult to discuss honestly in a public forum. People are more likely to share honest answers if they can respond to questions anonymously. This type of information is qualitative data—results that are subjective and often based on what is seen in a natural setting. Qualitative information is harder to organize and tabulate. The researcher will end up with a wide range of responses, some of which may be surprising. The benefit of written opinions, though, is the wealth of material that they provide.

An interview is a one-on-one conversation between the researcher and the subject, and it is a way of conducting surveys on a topic. Interviews are similar to the short-answer questions on surveys in that the researcher asks subjects a series of questions. However, participants are free to respond as they wish, without being limited by predetermined choices. In the back-and-forth conversation of an interview, a researcher can ask for clarification, spend more time on a subtopic, or ask additional questions. In an interview, a subject will ideally feel free to open up and answer questions that are often complex. There are no right or wrong answers. The subject might not even know how to answer the questions honestly.

Questions such as, "How did society's view of alcohol consumption influence your decision whether or not to take your first sip of alcohol?" or "Did you feel that the divorce of your parents would put a social stigma on your family?" involve so many factors that the answers are difficult to categorize. A researcher needs to avoid steering or prompting the subject to respond in a specific way; otherwise, the results will prove to be unreliable. And, obviously, a sociological interview is not an interrogation. The researcher will benefit from gaining a subject's trust, from empathizing or commiserating with a subject, and from listening without judgment.

Field Research

The work of sociology rarely happens in limited, confined spaces. Sociologists seldom study subjects in their own offices or laboratories. Rather, sociologists go out into the world. They meet subjects where they live, work, and play. Field research refers to gathering primary data from a natural environment without doing a lab experiment or a survey. It is a research method suited to an interpretive framework rather than to the scientific method. To conduct field research, the sociologist must be willing to step into new environments and observe, participate, or experience those worlds. In field work, the sociologists, rather than the subjects, are the ones out of their element.

The researcher interacts with or observes a person or people and gathers data along the way. The key point in field research is that it takes place in the subject's natural environment, whether it's a coffee shop or tribal village, a homeless shelter or the DMV, a hospital, airport, mall, or beach resort.

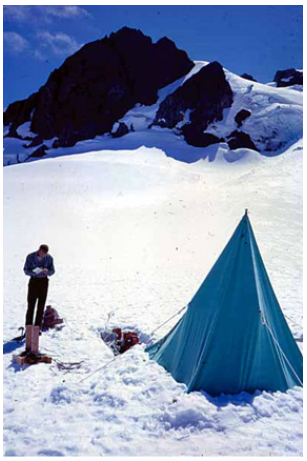


Photo Courtesy of Olympic National Park

Sociological researchers travel across countries and cultures to interact with and observe subjects in their natural environments. (Photo courtesy of IMLS Digital Collections and Content/flickr and Olympic National Park)

While field research often begins in a specific *setting*, the study's purpose is to observe specific *behaviors* in that setting. Field work is optimal for observing *how* people behave. It is less useful, however, for understanding *why* they behave that way. You can't really narrow down cause and effect when there are so many variables floating around in a natural environment.

Much of the data gathered in field research are based not on cause and effect but on correlation. And while field research looks for correlation, its small sample size does not allow for establishing a causal relationship between two variables.

PARROTHEADS AS SOCIOLOGICAL SUBJECTS



Business suits for the day job are replaced by leis and T-shirts for a Jimmy Buffett concert. (Photo courtesy of Sam Howzitt/flickr)

Some sociologists study small groups of people who share an identity in one aspect of their lives. Almost everyone belongs to a group of like-minded people who share an interest or hobby. Scientologists, folk dancers, or members of Mensa (an organization for people with exceptionally high IQs) express a specific part of their identity through their affiliation with a group. Those groups are often of great interest to sociologists.

Jimmy Buffett, an American musician who built a career from his single top-10 song "Margaritaville," has a following of devoted groupies called Parrotheads. Some of them have taken fandom to the extreme, making Parrothead culture a lifestyle. In 2005, Parrotheads and their subculture caught the attention of researchers John Mihelich and John Papineau. The two saw the way Jimmy Buffett fans collectively created an artificial reality. They wanted to know how fan groups shape culture.

What Mihelich and Papineau found was that Parrotheads, for the most part, do not seek to challenge or even change society, as many sub-groups do. In fact, most Parrotheads live successfully within society, holding upper-level jobs in the corporate world. What they seek is escape from the stress of daily life.

At Jimmy Buffett concerts, Parrotheads engage in a form of role play. They paint their faces and dress for the tropics in grass skirts, Hawaiian leis, and Parrot hats. These fans don't generally play the part of Parrotheads outside of these concerts; you are not likely to see a lone Parrothead in a bank or library. In that sense, Parrothead culture is less about individualism and more about conformity. Being a Parrothead means sharing a specific identity. Parrotheads feel connected to each other: it's a group identity, not an individual one.

In their study, Mihelich and Papineau quote from a recent book by sociologist Richard Butsch, who writes, "un-self-conscious acts, if done by many people together, can produce change, even though the change may be unintended" (2000). Many Parrothead fan groups have performed good works in the name of Jimmy Buffett culture, donating to charities and volunteering their services.

However, the authors suggest that what really drives Parrothead culture is commercialism. Jimmy Buffett's popularity was dying out in the 1980s until being reinvigorated after he signed a sponsorship deal with a beer company. These days, his concert tours alone generate nearly $30 million a year. Buffett made a lucrative career for himself by partnering with product companies and marketing Margaritaville in the form of T-shirts, restaurants, casinos, and an expansive line of products. Some fans accuse Buffett of selling out, while others admire his financial success. Buffett makes no secret of his commercial exploitations; from the stage, he's been known to tell his fans, "Just remember, I am spending your money foolishly."

Mihelich and Papineau gathered much of their information online. Referring to their study as a "Web ethnography," they collected extensive narrative material from fans who joined Parrothead clubs and posted their experiences on websites. "We do not claim to have conducted a complete ethnography of Parrothead fans, or even of the Parrothead Web activity," state the authors, "but we focused on particular aspects of Parrothead practice as revealed through Web research" (2005). Fan narratives gave them insight into how individuals identify with Buffett's world and how fans used popular music to cultivate personal and collective meaning.

In conducting studies about pockets of culture, most sociologists seek to discover a universal appeal. Mihelich and Papineau stated, "Although Parrotheads are a relative minority of the contemporary US population, an in-depth look at their practice and conditions illuminate [sic] cultural practices and conditions many of us experience and participate in" (2005).

Here, we will look at three types of field research: participant observation, ethnography, and the case study.

Participant Observation

In 2000, a comic writer named Rodney Rothman wanted an insider's view of white-collar work. He slipped into the sterile, high-rise offices of a New York "dot com" agency. Every day for two weeks, he pretended to work there. His main purpose was simply to see whether anyone would notice him or challenge his presence. No one did. The receptionist greeted him. The employees smiled and said good morning. Rothman was accepted as part of the team. He even went so far as to claim a desk, inform the receptionist of his whereabouts, and attend a meeting. He published an article about his experience in *The New Yorker* called "My Fake Job" (2000). Later, he was discredited for allegedly fabricating some details of the story and *The New Yorker* issued an apology. However, Rothman's entertaining article still offered fascinating descriptions of the inside workings of a "dot com" company and exemplified the lengths to which a sociologist will go to uncover material.

Rothman had conducted a form of study called participant observation, in which researchers join people and participate in a group's routine activities for the purpose of observing them within that context. This method lets researchers experience a specific aspect of social life. A researcher might go to great lengths to get a firsthand look into a trend, institution, or behavior. Researchers temporarily put themselves into roles and record their observations. A researcher might work as a waitress in a diner, live as a homeless person for several weeks, or ride along with police officers as they patrol their regular beat. Often, these researchers try to blend in seamlessly with the population they study, and they may not disclose their true identity or purpose if they feel it would compromise the results of their research.



Is she a working waitress or a sociologist conducting a study using participant observation? (Photo courtesy of zoetnet/flickr)

At the beginning of a field study, researchers might have a question: "What really goes on in the kitchen of the most popular diner on campus?" or "What is it like to be homeless?" Participant observation is a useful method if the researcher wants to explore a certain environment from the inside.

Field researchers simply want to observe and learn. In such a setting, the researcher will be alert and open minded to whatever happens, recording all observations accurately. Soon, as patterns emerge, questions will become more specific, observations will lead to hypotheses, and hypotheses will guide the researcher in shaping data into results.

In a study of small towns in the United States conducted by sociological researchers John S. Lynd and Helen Merrell Lynd, the team altered their purpose as they gathered data. They initially planned to focus their study on the role of religion in U.S. towns. As they gathered observations, they realized that the effect of industrialization and urbanization was the more relevant topic of this social group. The Lynds did not change their methods, but they revised their purpose. This shaped the structure of *Middletown: A Study in Modern American Culture*, their published results (Lynd and Lynd 1959).

The Lynds were upfront about their mission. The townspeople of Muncie, Indiana, knew why the researchers were in their midst. But some sociologists prefer not to alert people to their presence. The main advantage of covert participant observation is that it allows the researcher access to authentic, natural behaviors of a group's members. The challenge, however, is gaining access to a setting without disrupting the pattern of others' behavior. Becoming an inside member of a group, organization, or subculture takes time and effort. Researchers must pretend to be something they are not. The process could involve role playing, making contacts, networking, or applying for a job.

Once inside a group, some researchers spend months or even years pretending to be one of the people they are observing. However, as observers, they cannot get too involved. They must keep their purpose in mind and apply the sociological perspective. That way, they illuminate social patterns that are often unrecognized. Because information gathered during participant observation is mostly qualitative, rather than quantitative, the end results are often descriptive or interpretive. The researcher might present findings in an article or book and describe what he or she witnessed and experienced.

This type of research is what journalist Barbara Ehrenreich conducted for her book *Nickel and Dimed*. One day over lunch with her editor, as the story goes, Ehrenreich mentioned an idea. *How can people exist on minimum-wage work? How do low-income workers get by?* she wondered. *Someone should do a study.* To her surprise, her editor responded, *Why don't you do it?*

That's how Ehrenreich found herself joining the ranks of the working class. For several months, she left her comfortable home and lived and worked among people who lacked, for the most part, higher education and marketable job skills. Undercover, she applied for and worked minimum wage jobs as a waitress, a cleaning woman, a nursing home aide, and a retail chain employee. During her participant observation, she used only her income from those jobs to pay for food, clothing, transportation, and shelter.

She discovered the obvious, that it's almost impossible to get by on minimum wage work. She also experienced and observed attitudes many middle and upper-class people never think about. She witnessed firsthand the treatment of working class employees. She saw the extreme measures people take to make ends meet and to survive. She described fellow employees who held two or three jobs, worked seven days a week, lived in cars, could not pay to treat chronic health conditions, got randomly fired, submitted to drug tests, and moved in and out of homeless shelters. She brought aspects of that life to light, describing difficult working conditions and the poor treatment that low-wage workers suffer.

Nickel and Dimed: On (Not) Getting By in America, the book she wrote upon her return to her real life as a well-paid writer, has been widely read and used in many college classrooms.



Field research happens in real locations. What type of environment do work spaces foster? What would a sociologist discover after blending in? (Photo courtesy of drewzhrodague/flickr)

Ethnography

Ethnography is the extended observation of the social perspective and cultural values of an entire social setting. Ethnographies involve objective observation of an entire community.

The heart of an ethnographic study focuses on how subjects view their own social standing and how they understand themselves in relation to a community. An ethnographic study might observe, for example, a small U.S. fishing town, an Inuit community, a village in Thailand, a Buddhist monastery, a private boarding school, or an amusement park. These places all have borders. People live, work, study, or vacation within those borders. People are there for a certain reason and therefore behave in certain ways and respect certain cultural norms. An ethnographer would commit to spending a determined amount of time studying every aspect of the chosen place, taking in as much as possible.

A sociologist studying a tribe in the Amazon might watch the way villagers go about their daily lives and then write a paper about it. To observe a spiritual retreat center, an ethnographer might sign up for a retreat and attend as a guest for an extended stay, observe and record data, and collate the material into results.

Institutional Ethnography

Institutional ethnography is an extension of basic ethnographic research principles that focuses intentionally on everyday concrete social relationships. Developed by Canadian sociologist Dorothy E. Smith, institutional ethnography is often considered a feminist-inspired approach to social analysis and primarily considers women's experiences within male-dominated societies and power structures. Smith's work is seen to challenge sociology's exclusion of women, both academically and in the study of women's lives (Fenstermaker, n.d.).

Historically, social science research tended to objectify women and ignore their experiences except as viewed from the male perspective. Modern feminists note that describing women, and other marginalized groups, as subordinates helps those in authority maintain their own dominant positions (Social Sciences and Humanities Research Council of Canada, n.d.). Smith's three major works explored what she called "the conceptual practices of power" (1990; cited in Fensternmaker, n.d.) and are still considered seminal works in feminist theory and ethnography.

THE MAKING OF MIDDLETOWN: A STUDY IN MODERN U.S. CULTURE

In 1924, a young married couple named Robert and Helen Lynd undertook an unprecedented ethnography: to apply sociological methods to the study of one U.S. city in order to discover what "ordinary" people in the United States did and believed. Choosing Muncie, Indiana (population about 30,000), as their subject, they moved to the small town and lived there for eighteen months.

Ethnographers had been examining other cultures for decades—groups considered minority or outsider—like gangs, immigrants, and the poor. But no one had studied the so-called average American.

Recording interviews and using surveys to gather data, the Lynds did not sugarcoat or idealize U.S. life (PBS). They objectively stated what they observed. Researching existing sources, they compared Muncie in 1890 to the Muncie they observed in 1924. Most Muncie adults, they found, had grown up on farms but now lived in homes inside the city. From that discovery, the Lynds focused their study on the impact of industrialization and urbanization.

They observed that Muncie was divided into business class and working class groups. They defined business class as dealing with abstract concepts and symbols, while working class people used tools to create concrete objects. The two classes led different lives with different goals and hopes. However, the Lynds observed, mass production offered both classes the same amenities. Like wealthy families, the working class was now able to own radios, cars, washing machines, telephones, vacuum cleaners, and refrigerators. This was an emerging material new reality of the 1920s.

As the Lynds worked, they divided their manuscript into six sections: Getting a Living, Making a Home, Training the Young, Using Leisure, Engaging in Religious Practices, and Engaging in Community Activities. Each chapter included subsections such as "The Long Arm of the Job" and "Why Do They Work So Hard?" in the "Getting a Living" chapter.

When the study was completed, the Lynds encountered a big problem. The Rockefeller Foundation, which had commissioned the book, claimed it was useless and refused to publish it. The Lynds asked if they could seek a publisher themselves.

Middletown: A Study in Modern American Culture was not only published in 1929 but also became an instant bestseller, a status unheard of for a sociological study. The book sold out six printings in its first year of publication, and has never gone out of print (PBS).

Nothing like it had ever been done before. Middletown was reviewed on the front page of the New York Times. Readers in the 1920s and 1930s identified with the citizens of Muncie, Indiana, but they were equally fascinated by the sociological methods and the use of scientific data to define ordinary people in the United States. The book was proof that social data was important—and interesting—to the U.S. public.



A classroom in Muncie, Indiana, in 1917, five years before John and Helen Lynd began researching this "typical" U.S. community. (Photo courtesy of Don O'Brien/flickr)

Case Study

Sometimes a researcher wants to study one specific person or event. A case study is an in-depth analysis of a single event, situation, or individual. To conduct a case study, a researcher examines existing sources like documents and archival records, conducts interviews, engages in direct observation and even participant observation, if possible.

Researchers might use this method to study a single case of, for example, a foster child, drug lord, cancer patient, criminal, or rape victim. However, a major criticism of the case study as a method is that a developed study of a single case, while offering depth on a topic, does not provide enough evidence to form a generalized conclusion. In other words, it is difficult to make universal claims based on just one person, since one person does not verify a pattern. This is why most sociologists do not use case studies as a primary research method.

However, case studies are useful when the single case is unique. In these instances, a single case study can add tremendous knowledge to a certain discipline. For example, a feral child, also called "wild child," is one who grows up isolated from human beings. Feral children grow up without social contact and language, which are elements crucial to a "civilized" child's development. These children mimic the behaviors and movements of animals, and often invent their own language. There are only about one hundred cases of "feral children" in the world.

As you may imagine, a feral child is a subject of great interest to researchers. Feral children provide unique information about child development because they have grown up outside of the parameters of "normal" child development. And since there are very few feral children, the case study is the most appropriate method for researchers to use in studying the subject.

At age three, a Ukranian girl named Oxana Malaya suffered severe parental neglect. She lived in a shed with dogs, and she ate raw meat and scraps. Five years later, a neighbor called authorities and reported seeing a girl who ran on all fours, barking. Officials brought Oxana into society, where she was cared for and taught some human behaviors, but she never became fully socialized. She has been designated as unable to support herself and now lives in a mental institution (Grice 2011). Case studies like this offer a way for sociologists to collect data that may not be collectable by any other method.

Experiments

You've probably tested personal social theories. "If I study at night and review in the morning, I'll improve my retention skills." Or, "If I stop drinking soda, I'll feel better." Cause and effect. If this, then that. When you test the theory, your results either prove or disprove your hypothesis.

One way researchers test social theories is by conducting an experiment, meaning they investigate relationships to test a hypothesis —a scientific approach.

There are two main types of experiments: lab-based experiments and natural or field experiments. In a lab setting, the research can be controlled so that perhaps more data can be recorded in a certain amount of time. In a natural or field-based experiment, the generation of data cannot be controlled but the information might be considered more accurate since it was collected without interference or intervention by the researcher.

As a research method, either type of sociological experiment is useful for testing *if-then* statements: *if* a particular thing happens, *then* another particular thing will result. To set up a lab-based experiment, sociologists create artificial situations that allow them to manipulate variables.

Classically, the sociologist selects a set of people with similar characteristics, such as age, class, race, or education. Those people are divided into two groups. One is the experimental group and the other is the control group. The experimental group is exposed to the independent variable(s) and the control group is not. To test the benefits of tutoring, for example, the sociologist might expose

the experimental group of students to tutoring but not the control group. Then both groups would be tested for differences in performance to see if tutoring had an effect on the experimental group of students. As you can imagine, in a case like this, the researcher would not want to jeopardize the accomplishments of either group of students, so the setting would be somewhat artificial. The test would not be for a grade reflected on their permanent record, for example.

AN EXPERIMENT IN ACTION



Sociologist Frances Heussenstamm conducted an experiment to explore the correlation between traffic stops and race-based bumper stickers. This issue of racial profiling remains a hot-button topic today. (Photo courtesy of dwightsghost/flickr)

A real-life example will help illustrate the experiment process. In 1971, Frances Heussenstamm, a sociology professor at California State University at Los Angeles, had a theory about police prejudice. To test her theory she conducted an experiment. She chose fifteen students from three ethnic backgrounds: black, white, and Hispanic. She chose students who routinely drove to and from campus along Los Angeles freeway routes, and who'd had perfect driving records for longer than a year. Those were her independent variables—students, good driving records, same commute route.

Next, she placed a Black Panther bumper sticker on each car. That sticker, a representation of a social value, was the independent variable. In the 1970s, the Black Panthers were a revolutionary group actively fighting racism. Heussenstamm asked the students to follow their normal driving patterns. She wanted to see whether seeming support of the Black Panthers would change how these good drivers were treated by the police patrolling the highways. The dependent variable would be the number of traffic stops/citations.

The first arrest, for an incorrect lane change, was made two hours after the experiment began. One participant was pulled over three times in three days. He quit the study. After seventeen days, the fifteen drivers had collected a total of thirty-three traffic citations. The experiment was halted. The funding to pay traffic fines had run out, and so had the enthusiasm of the participants (Heussenstamm 1971).

Secondary Data Analysis

While sociologists often engage in original research studies, they also contribute knowledge to the discipline throughsecondary data analysis. Secondary data don't result from firsthand research collected from primary sources, but are the already completed work of other researchers. Sociologists might study works written by historians, economists, teachers, or early sociologists. They might search through periodicals, newspapers, or magazines from any period in history.

Using available information not only saves time and money but can also add depth to a study. Sociologists often interpret findings in a new way, a way that was not part of an author's original purpose or intention. To study how women were encouraged to act and behave in the 1960s, for example, a researcher might watch movies, televisions shows, and situation comedies from that period. Or to research changes in behavior and attitudes due to the emergence of television in the late 1950s and early 1960s, a sociologist would rely on new interpretations of secondary data. Decades from now, researchers will most likely conduct similar studies on the advent of mobile phones, the Internet, or Facebook.

Social scientists also learn by analyzing the research of a variety of agencies. Governmental departments and global groups, like the U.S. Bureau of Labor Statistics or the World Health Organization, publish studies with findings that are useful to sociologists. A public statistic like the foreclosure rate might be useful for studying the effects of the 2008 recession; a racial demographic profile might be compared with data on education funding to examine the resources accessible by different groups.

One of the advantages of secondary data is that it is nonreactive research (or unobtrusive research), meaning that it does not include direct contact with subjects and will not alter or influence people's behaviors. Unlike studies requiring direct contact with people, using previously published data doesn't require entering a population and the investment and risks inherent in that research process.

Using available data does have its challenges. Public records are not always easy to access. A researcher will need to do some legwork to track them down and gain access to records. To guide the search through a vast library of materials and avoid wasting time reading unrelated sources, sociologists employ content analysis, applying a systematic approach to record and value information gleaned from secondary data as they relate to the study at hand.

But, in some cases, there is no way to verify the accuracy of existing data. It is easy to count how many drunk drivers, for example, are pulled over by the police. But how many are not? While it's possible to discover the percentage of teenage students who drop out of high school, it might be more challenging to determine the number who return to school or get their GED later.

Another problem arises when data are unavailable in the exact form needed or do not include the precise angle the researcher seeks. For example, the average salaries paid to professors at a public school is public record. But the separate figures don't necessarily reveal how long it took each professor to reach the salary range, what their educational backgrounds are, or how long they've been teaching.

When conducting content analysis, it is important to consider the date of publication of an existing source and to take into account attitudes and common cultural ideals that may have influenced the research. For example, Robert S. Lynd and Helen Merrell Lynd gathered research for their book *Middletown: A Study in Modern American Culture* in the 1920s. Attitudes and cultural norms were vastly different then than they are now. Beliefs about gender roles, race, education, and work have changed significantly since then. At the time, the study's purpose was to reveal the truth about small U.S. communities. Today, it is an illustration of 1920s' attitudes and values.

Summary

Sociological research is a fairly complex process. As you can see, a lot goes into even a simple research design. There are many steps and much to consider when collecting data on human behavior, as well as in interpreting and analyzing data in order to form conclusive results. Sociologists use scientific methods for good reason. The scientific method provides a system of organization that helps researchers plan and conduct the study while ensuring that data and results are reliable, valid, and objective.

The many methods available to researchers—including experiments, surveys, field studies, and secondary data analysis—all come with advantages and disadvantages. The strength of a study can depend on the choice and implementation of the appropriate method of gathering research. Depending on the topic, a study might use a single method or a combination of methods. It is important to plan a research design before undertaking a study. The information gathered may in itself be surprising, and the study design should provide a solid framework in which to analyze predicted and unpredicted data.

Main Sociological Research MethodsSociological research methods have advantages and disadvantages.

Method	Implementation	Advantages	Challenges
Survey	• Questionnaires • Interviews	• Yields many responses • Can survey a large sample • Quantitative data are easy to chart	• Can be time consuming • Can be difficult to encourage participant response • Captures what people think and believe but not necessarily how they behave in real life
Field Work	• Observation • Participant observation • Ethnography • Case study	• Yields detailed, accurate real-life information	• Time consuming • Data captures how people behave but not what they think and believe • Qualitative data is difficult to organize
Experiment	• Deliberate manipulation of social customs and mores	• Tests cause and effect relationships	• Hawthorne Effect • Ethical concerns about people's wellbeing

Method	Implementation	Advantages	Challenges
Secondary Data Analysis	• Analysis of government data (census, health, crime statistics) • Research of historic documents	• Makes good use of previous sociological information	• Data could be focused on a purpose other than yours • Data can be hard to find

Section Quiz

Which materials are considered secondary data?

1. Photos and letters given to you by another person
2. Books and articles written by other authors about their studies
3. Information that you have gathered and now have included in your results
4. Responses from participants whom you both surveyed and interviewed

What method did researchers John Mihelich and John Papineau use to study Parrotheads?

1. Survey
2. Experiment
3. Web Ethnography
4. Case study

Why is choosing a random sample an effective way to select participants?

1. Participants do not know they are part of a study
2. The researcher has no control over who is in the study
3. It is larger than an ordinary sample
4. Everyone has the same chance of being part of the study

What research method did John S. Lynd and Helen Merrell Lynd mainly use in their *Middletown* study?

1. Secondary data
2. Survey
3. Participant observation
4. Experiment

Which research approach is best suited to the scientific method?

1. Questionnaire
2. Case study
3. Ethnography
4. Secondary data analysis

The main difference between ethnography and other types of participant observation is:

1. ethnography isn’t based on hypothesis testing
2. ethnography subjects are unaware they’re being studied
3. ethnographic studies always involve minority ethnic groups
4. ethnography focuses on how subjects view themselves in relationship to the community

Which best describes the results of a case study?

1. It produces more reliable results than other methods because of its depth

2. Its results are not generally applicable
3. It relies solely on secondary data analysis
4. All of the above

Using secondary data is considered an unobtrusive or _____ research method.

1. nonreactive
2. nonparticipatory
3. nonrestrictive
4. nonconfrontive

Short Answer

What type of data do surveys gather? For what topics would surveys be the best research method? What drawbacks might you expect to encounter when using a survey? To explore further, ask a research question and write a hypothesis. Then create a survey of about six questions relevant to the topic. Provide a rationale for each question. Now define your population and create a plan for recruiting a random sample and administering the survey.

Imagine you are about to do field research in a specific place for a set time. Instead of thinking about the topic of study itself, consider how you, as the researcher, will have to prepare for the study. What personal, social, and physical sacrifices will you have to make? How will you manage your personal effects? What organizational equipment and systems will you need to collect the data?

Create a brief research design about a topic in which you are passionately interested. Now write a letter to a philanthropic or grant organization requesting funding for your study. How can you describe the project in a convincing yet realistic and objective way? Explain how the results of your study will be a relevant contribution to the body of sociological work already in existence.

Further Research

For information on current real-world sociology experiments, visit: http://openstaxcollege.org/l/Sociology-Experiments

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Glossary

case study
in-depth analysis of a single event, situation, or individual

content analysis
applying a systematic approach to record and value information gleaned from secondary data as it relates to the study at hand

correlation
when a change in one variable coincides with a change in another variable, but does not necessarily indicate causation

ethnography
observing a complete social setting and all that it entails

experiment
the testing of a hypothesis under controlled conditions

field research
gathering data from a natural environment without doing a lab experiment or a survey

Hawthorne effect
when study subjects behave in a certain manner due to their awareness of being observed by a researcher

interview
a one-on-one conversation between the researcher and the subject

nonreactive research
using secondary data, does not include direct contact with subjects and will not alter or influence people’s behaviors

participant observation
when a researcher immerses herself in a group or social setting in order to make observations from an “insider” perspective

population
a defined group serving as the subject of a study

primary data
data that are collected directly from firsthand experience

quantitative data
represent research collected in numerical form that can be counted

qualitative data
comprise information that is subjective and often based on what is seen in a natural setting

random sample

a study's participants being randomly selected to serve as a representation of a larger population

samples
small, manageable number of subjects that represent the population

secondary data analysis
using data collected by others but applying new interpretations

surveys
collect data from subjects who respond to a series of questions about behaviors and opinions, often in the form of a questionnaire

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Ethical Concerns

Sociologists conduct studies to shed light on human behaviors. Knowledge is a powerful tool that can be used toward positive change. And while a sociologist's goal is often simply to uncover knowledge rather than to spur action, many people use sociological studies to help improve people's lives. In that sense, conducting a sociological study comes with a tremendous amount of responsibility. Like any researchers, sociologists must consider their ethical obligation to avoid harming subjects or groups while conducting their research.

The American Sociological Association, or ASA, is the major professional organization of sociologists in North America. The ASA is a great resource for students of sociology as well. The ASA maintains a code of ethics—formal guidelines for conducting sociological research—consisting of principles and ethical standards to be used in the discipline. It also describes procedures for filing, investigating, and resolving complaints of unethical conduct.

Practicing sociologists and sociology students have a lot to consider. Some of the guidelines state that researchers must try to be skillful and fair-minded in their work, especially as it relates to their human subjects. Researchers must obtain participants' informed consent and inform subjects of the responsibilities and risks of research before they agree to partake. During a study, sociologists must ensure the safety of participants and immediately stop work if a subject becomes potentially endangered on any level.

Researchers are required to protect the privacy of research participants whenever possible. Even if pressured by authorities, such as police or courts, researchers are not ethically allowed to release confidential information. Researchers must make results available to other sociologists, must make public all sources of financial support, and must not accept funding from any organization that might cause a conflict of interest or seek to influence the research results for its own purposes. The ASA's ethical considerations shape not only the study but also the publication of results.

Pioneer German sociologist Max Weber (1864–1920) identified another crucial ethical concern. Weber understood that personal values could distort the framework for disclosing study results. While he accepted that some aspects of research design might be influenced by personal values, he declared it was entirely inappropriate to allow personal values to shape the interpretation of the responses. Sociologists, he stated, must establish value neutrality, a practice of remaining impartial, without bias or judgment, during the course of a study and in publishing results (1949). Sociologists are obligated to disclose research findings without omitting or distorting significant data.

Is value neutrality possible? Many sociologists believe it is impossible to set aside personal values and retain complete objectivity. They caution readers, rather, to understand that sociological studies may, by necessity, contain a certain amount of value bias. It does not discredit the results but allows readers to view them as one form of truth rather than a singular fact. Some sociologists attempt to remain uncritical and as objective as possible when studying cultural institutions. Value neutrality does not mean having no opinions. It means striving to overcome personal biases, particularly subconscious biases, when analyzing data. It means avoiding skewing data in order to match a predetermined outcome that aligns with a particular agenda, such as a political or moral point of view. Investigators are ethically obligated to report results, even when they contradict personal views, predicted outcomes, or widely accepted beliefs.

Summary

Sociologists and sociology students must take ethical responsibility for any study they conduct. They must first and foremost guarantee the safety of their participants. Whenever possible, they must ensure that participants have been fully informed before consenting to be part of a study.

The ASA maintains ethical guidelines that sociologists must take into account as they conduct research. The guidelines address conducting studies, properly using existing sources, accepting funding, and publishing results.

Sociologists must try to maintain value neutrality. They must gather and analyze data objectively and set aside their personal preferences, beliefs, and opinions. They must report findings accurately, even if they contradict personal convictions.

Section Quiz

Which statement illustrates value neutrality?

1. Obesity in children is obviously a result of parental neglect and, therefore, schools should take a greater role to prevent it

2. In 2003, states like Arkansas adopted laws requiring elementary schools to remove soft drink vending machines from schools
3. Merely restricting children's access to junk food at school is not enough to prevent obesity
4. Physical activity and healthy eating are a fundamental part of a child's education

Which person or organization defined the concept of value neutrality?

1. Institutional Review Board (IRB)
2. Peter Rossi
3. American Sociological Association (ASA)
4. Max Weber

To study the effects of fast food on lifestyle, health, and culture, from which group would a researcher ethically be unable to accept funding?

1. A fast-food restaurant
2. A nonprofit health organization
3. A private hospital
4. A governmental agency like Health and Social Services

Short Answer

Why do you think the ASA crafted such a detailed set of ethical principles? What type of study could put human participants at risk? Think of some examples of studies that might be harmful. Do you think that, in the name of sociology, some researchers might be tempted to cross boundaries that threaten human rights? Why?

Would you willingly participate in a sociological study that could potentially put your health and safety at risk, but had the potential to help thousands or even hundreds of thousands of people? For example, would you participate in a study of a new drug that could cure diabetes or cancer, even if it meant great inconvenience and physical discomfort for you or possible permanent damage?

Further Research

Founded in 1905, the ASA is a nonprofit organization located in Washington, DC, with a membership of 14,000 researchers, faculty members, students, and practitioners of sociology. Its mission is "to articulate policy and implement programs likely to have the broadest possible impact for sociology now and in the future." Learn more about this organization at http://openstaxcollege.org/l/ASA.

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Glossary

code of ethics

a set of guidelines that the American Sociological Association has established to foster ethical research and professionally responsible scholarship in sociology

value neutrality

a practice of remaining impartial, without bias or judgment during the course of a study and in publishing results

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The Court System

Learning Objectives

1. Compare federal and state courts.
2. Define jurisdiction.
3. Compare original and appellate jurisdiction.
4. Identify the federal courts and determine each court's jurisdiction.
5. Identify the state courts and determine each court's jurisdiction.

Every state has *two* court systems: the *federal* court system, which is the same in all fifty states, and the *state* court system, which varies slightly in each state. Federal courts are fewer in number than state courts. Because of the Tenth Amendment, discussed earlier in Section 2.1.2 "The Scope of State Law", most laws are state laws and therefore most legal disputes go through the state court system.

Federal courts are exclusive; they adjudicate only *federal* matters. This means that a case can go through the federal court system only if it is based on a federal *statute* or the federal *Constitution*. One exception is called **diversity of citizenship** (28 U.S.C. § 1332, 2010).If citizens from different states are involved in a civil lawsuit and the amount in controversy exceeds $75,000, the lawsuit can take place in federal court. All federal *criminal prosecutions* take place in federal courts.

State courts are nonexclusive; they can adjudicate state or federal matters. Thus an individual who wants to sue civilly for a federal matter has the option of proceeding in state or federal court. In addition, someone involved in a lawsuit based on a federal statute or the federal Constitution can remove a lawsuit filed in state court to federal court (28 U.S.C. § 1441, 2010). All state *criminal prosecutions* take place in state courts.

Jurisdiction

Determining which court is appropriate for a particular lawsuit depends on the concept of jurisdiction. Jurisdiction has two meanings. A court's jurisdiction is the power or authority to hear the case in front of it. If a court does not have jurisdiction, it cannot hear the case. Jurisdiction can also be a geographic area over which the court's authority extends.

There are two prominent types of court jurisdiction. Original jurisdiction means that the court has the power to hear a trial. Usually, only *one* opportunity exists for a trial, although some actions result in both a criminal and a civil trial, discussed previously in Chapter 1 "Introduction to Criminal Law". During the trial, evidence is presented to a trier of fact, which can be either a judge or a jury. The trier of fact determines the facts of a dispute and decides which party prevails at trial by applying the law to those facts. Once the trial has concluded, the next step is an appeal. During an appeal, *no evidence is presented*; the appellate court simply reviews what took place at trial and determines whether or not any major errors occurred.

The power to hear an appeal is called appellate jurisdiction. Courts that have appellate jurisdiction review the **trial record** for error. The trial record includes a court reporter's **transcript**, which is typed notes of the words spoken during the trial and pretrial hearings. In general, with exceptions, appellate courts cannot review a trial record until the trial has ended with a *final judgment*. Once the appellate court has made its review, it has the ability to take three actions. If it finds no compelling or prejudicial errors, it can affirm the judgment of the trial court, which means that the judgment remains the same. If it finds a significant error, it can reverse the judgment of the trial court, which means that the judgment becomes the opposite (the winner loses, the loser wins). It can also remand, which means send the case back to the trial court, with instructions. After remand, the trial court can take action that the appellate court cannot, such as adjust a sentence or order a new trial.

Some courts have only original jurisdiction, but most courts have a little of original and appellate jurisdiction. The US Supreme Court, for example, is primarily an appellate court with appellate jurisdiction. However, it also has original jurisdiction in some cases, as stated in the Constitution, Article III, § 2, clause 2: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate jurisdiction."

Example of Original and Appellate Jurisdiction

Paulina is prosecuted for the attempted murder of Ariana. Paulina is represented by public defender Pedro. At Paulina's trial, in spite of Pedro's objections, the judge rules that Paulina's polygraph examination results are admissible, but prohibits the admission of certain witness testimony. Paulina is found guilty and appeals, based on the judge's evidentiary rulings. While Pedro is writing

the appellate brief, he discovers case precedent barring the admission of polygraph examination results. Pedro *can include* the case precedent in his appellate brief but *not the prohibited witness testimony*. The appellate court has the jurisdiction to hold that the objection was improperly overruled by the trial court, but is limited to reviewing the trial record for error. The appellate court *lacks* the jurisdiction to admit new evidence not included in the trial record.

The Federal Courts

For the purpose of this book, the focus is the federal trial court and the intermediate and highest level appellate courts because these courts are most frequently encountered in a criminal prosecution. Other federal specialty courts do exist but are not discussed, such as bankruptcy court, tax court, and the court of military appeals.

The federal trial court is called the **United States District Court**. Large states like California have more than one district court, while smaller states may have only one. District courts hear all the federal trials, including civil and criminal trials. As stated previously, a dispute that involves only state law, or a state criminal trial, cannot proceed in district court. The exception to this rule is the diversity of citizenship exception for civil lawsuits.

After a trial in district court, the loser gets one appeal of right. This means that the intermediate appellate federal court *must* hear an appeal of the district court trial if there are sufficient grounds. The intermediate appellate court in the federal system is the **United States Court of Appeals**. There is less federal law than state law, so only thirteen US Courts of Appeals exist for all fifty states. The US Courts of Appeals are spread out over thirteen judicial circuits and are also referred to as Circuit Courts.

Circuit Courts have appellate jurisdiction and can review the district court criminal and civil trials for error. The Circuit Court reviews only trials that are federal in nature, with the exception of civil lawsuits brought to the district court under diversity of citizenship. As noted in Chapter 1 "Introduction to Criminal Law", the federal Constitution governs criminal trials, so *only a guilty defendant* can appeal. In general, with exceptions, appeal of a not-guilty verdict (also called an acquittal) violates a defendant's double jeopardy protection.

After a Circuit Court appeal, the loser has one more opportunity to appeal to the highest-level federal appellate court, which is the **United States Supreme Court**. The US Supreme Court is the highest court in the country and is located in Washington, DC, the nation's capital. The US Supreme Court has eight associate justices and one chief justice: all serve a lifetime appointment.

The US Supreme Court is a discretionary court, meaning it does not have to hear appeals. Unlike the Circuit Courts, the US Supreme Court can pick and choose which appeals it wants to review. The method of applying for review with the US Supreme Court is called filing a petition for a writ of certiorari.

Any case from a Circuit Court, or a case *with a federal matter at issue* from a state's highest-level appellate court, can petition for a writ of certiorari. If the writ is granted, the US Supreme Court reviews the appeal. If the writ is denied, which it is the majority of the time, the ruling of the Circuit Court or state high court is the final ruling. For this reason, the US Supreme Court reverses many cases that are accepted for review. If the US Supreme Court wants to "affirm" the intermediate appellate court ruling, all it has to do is deny the petition and let the lower court ruling stand.

The State Courts

For the purpose of this book, a representative state court system is reviewed. Slight variations in this system may occur from state to state.

Most states offer their citizens a "people's court," typically called small claims court. **Small claims court** is a civil court designed to provide state citizens with a low-cost option to resolve disputes where the amount in controversy is minimal. A traditional small claims court only has the jurisdiction to award money damages. This means that it cannot adjudicate criminal matters or family court matters such as granting a petition for divorce. Small claims courts also limit the amount of money damages available, typically less than $10,000.

Small claims court has special rules that make it amenable to the average individual. Attorneys cannot represent clients in small claims court, although they certainly can represent themselves just like any other individual. Small claims court proceedings are generally informal, and usually no court reporter types what is said. Therefore, no court record exits for appeal. Small claims court *appeals* are the exception to the general rule and are usually new trials where evidence is accepted.

States generally have a **state trial court** that can also be the appellate court for small claims court appeals. This trial court is usually called superior court, circuit court, or county court. State trial courts are generally all-purpose and hear civil litigation matters, state criminal trials, and nonlitigation cases including family law, wills and probate, foreclosures, and juvenile

adjudications. States can, however, create “specialty courts” to hear special matters and free up the trial courts for basic criminal prosecutions and civil litigation trials. Some states divide their trial courts into lower and higher levels. The lower-level trial court adjudicates infractions and misdemeanors, along with civil lawsuits with a smaller amount in controversy. The higher-level trial court adjudicates felonies and civil lawsuits with a higher amount in controversy.

The intermediate appellate court for the state court system is usually called the **state court of appeals**, although some smaller or low-population states may have only *one*appellate court called the **state supreme court**. The state courts of appeal provide appeals of right, meaning they *must* hear an appeal coming from the state’s trial court if adequate grounds are present. Appeals can be of any case adjudicated in the state trial court. In state criminal prosecutions, as stated earlier in the discussion of federal appeals, only a guilty defendant can appeal without violating the protection against double jeopardy. At the appellate level, the state court of appeal simply reviews the trial court record for error and does not have the **jurisdiction** to hear new trials or accept evidence.

The highest appellate court for the state court system is usually called the state supreme court. In states that have both intermediate and high-level appellate courts, the state supreme court is a discretionary court that gets to select the appeals it hears, very similar to the US Supreme Court. The state supreme court generally grants a petition for writ of certiorari, or a **petition for review**, if it decides to hear a civil or criminal case coming out of the state court of appeal. If review is denied, the state court of appeal ruling is the final ruling on the case. If review is granted and the state supreme court rules on the case, the loser has one more chance to appeal, *if there is a federal matter*, to the US Supreme Court.

Figure 2.7 Diagram of the Court System



Key Takeaways

- Federal courts are exclusive and hear only federal matters or cases involving diversity of citizenship. State courts are nonexclusive and can hear state and federal matters. All federal criminal prosecutions take place in federal court, and all state criminal prosecutions take place in state court.
- Jurisdiction is either the court’s power to hear a matter or a geographic area over which a court has authority.
- Original jurisdiction is a court’s power to hear a trial and accept evidence. Appellate jurisdiction is a court’s power to hear an appeal and review the trial for error.
- Three federal courts adjudicate criminal matters: the trial court, which is called the United States District Court; the intermediate court of appeal, which is called the United States Court of Appeals or Circuit Court; and the high court of appeal, which is called the United States Supreme Court. The district court has original jurisdiction; the Circuit Court and US Supreme Court have primarily appellate jurisdiction.
- State courts are usually limited to four, and only three adjudicate criminal matters. Small claims court is a “people’s court” and hears only civil matters with a low threshold of damages. The state trial court, often called superior, circuit, or county court, is the trial court for the state system. Some states have an intermediate court of appeal, which is generally called the state court of appeals. Some states have a high court of appeal, which is generally called the state supreme court. The trial court has original jurisdiction; the state court of appeal and state supreme court primarily have appellate jurisdiction.

Exercises

Answer the following questions. Check your answers using the answer key at the end of the chapter.

- Jenna sues Max for $25,000, based on a car accident that occurs in Indiana. Jenna loses at trial and appeals to the highest state appellate court in Indiana, where she loses again. Can Jenna appeal her case to the US Supreme Court? Why or why not?

1. Read *United States v. P.H.E., Inc.*, 965 F.2d 848 (1992). In *P.H.E., Inc.*, the defendant never went to trial but was *indicted*. The defendant challenged the indictment, which was upheld by the trial court. The government claimed that the Court of Appeals for the Tenth Circuit could not hear an appeal of the trial court’s decision, because there was never a “final judgment.” Did the Circuit Court agree? Why or why not? The case is available at this link: http://scholar.google.com/scholar_case?case=16482877108359401771&hl=en&as_sdt=2&as_vis=1&oi=scholarr.
2. Read *Hertz Corp. v. Friend*, 130 S. Ct. 1181 (2010). How did the US Supreme Court determine citizenship of a *corporation* for the purpose of diversity jurisdiction? The case is available at this link: http://scholar.google.com/scholar_case?case=11481058059843290042&hl=en&as_sdt=2&as_vis=1&oi=scholarr.

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CHAPTER OVERVIEW

1: Research Methods and Theories of Behavior/Punishment

1.1: Introduction to Sociological Research
1.2: Defining and Measuring Crime

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1.1: Introduction to Sociological Research



Many believe that crime rates go up during the full moon, but scientific research does not support this conclusion. (Photo courtesy of Jubula 2/flickr)

Have you ever wondered if home schooling affects a person's later success in college or how many people wait until they are in their forties to get married? Do you wonder if texting is changing teenagers' abilities to spell correctly or to communicate clearly? How do social movements like Occupy Wall Street develop? How about the development of social phenomena like the massive public followings for Star Trek and Harry Potter? The goal of research is to answer questions. Sociological research attempts to answer a vast variety of questions, such as these and more, about our social world.

We often have opinions about social situations, but these may be biased by our expectations or based on limited data. Instead, scientific research is based on empirical evidence, which is evidence that comes from direct experience, scientifically gathered data, or experimentation. Many people believe, for example, that crime rates go up when there's a full moon, but research doesn't support this opinion. Researchers Rotton and Kelly (1985) conducted a meta-analysis of research on the full moon's effects on behavior. Meta-analysis is a technique in which the results of virtually all previous studies on a specific subject are evaluated together. Rotton and Kelly's meta-analysis included thirty-seven prior studies on the effects of the full moon on crime rates, and the overall findings were that full moons are entirely unrelated to crime, suicide, psychiatric problems, and crisis center calls (cited in Arkowitz and Lilienfeld 2009). We may each know of an instance in which a crime happened during a full moon, but it was likely just a coincidence.

People commonly try to understand the happenings in their world by finding or creating an explanation for an occurrence. Social scientists may develop a hypothesis for the same reason. A hypothesis is a testable educated guess about predicted outcomes between two or more variables; it's a possible explanation for specific happenings in the social world and allows for testing to determine whether the explanation holds true in many instances, as well as among various groups or in different places. Sociologists use empirical data and the scientific method, or an interpretative framework, to increase understanding of societies and social interactions, but research begins with the search for an answer to a question.

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Glossary

empirical evidence
evidence that comes from direct experience, scientifically gathered data, or experimentation

meta-analysis
a technique in which the results of virtually all previous studies on a specific subject are evaluated together

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1.2: Defining and Measuring Crime

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.

HomeFelonies, 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 victims 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.

HomeMeasuring 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.

Learn More Online
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

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.

Learn More Online
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, pocketpicking, 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.

Home *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

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CHAPTER OVERVIEW

2: Justice and the Law

2.1: Substantive Criminal Law
2.2: Elements of Crimes
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2.5: Introduction
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2.1: Substantive Criminal Law

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.

HomeNo 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.

HomeConstitutional 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.

Home *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

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2.2: Elements of Crimes

The legal definitions of all crimes contain certain **elements**. If the government cannot prove the existence of these elements, it cannot obtain a conviction in a court of law. Other elements are not part of all crimes, but are only found in crimes that prohibit a particular *harm*. Often, a difference in one particular element of a crime can distinguish it from another related offense, or a particular degree of the same offense. At common law, for example, manslaughter was distinguished from murder by the mental element of **malice aforethought**.

HomeThe Criminal Act

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.

HomeCriminal 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.

HomeConcurrence

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.

HomeCriminal Harm and Causation

In criminal law, **causation** refers to the relationship between a person's behavior and a negative outcome. Some crimes, such as murder, require a prohibited outcome. There is no murder if no one has died (although there may be an *attempt*). In crimes that require such a prohibited harm, the *actus reus* must have caused that **harm**.

Home *Key Terms*

Actual Possession, Actus Reus, Causation, Concurrence, Constructive Possession, Elements (of crimes), Harm, Knowingly, Malice Aforethought, Model Penal Code, Negligently, Omission, Possession, Purposely, Recklessly

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2.3: Legal Defenses

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.

A *justification* consists of a permissible reason for committing an act that would otherwise be a crime. Under normal circumstances, for example, it would be a crime to shoot a man dead on the street. If, however, the man was a mugger and had the shooter at knifepoint, then the justification of self-defense could be raised. A justification means that an act would normally be wrong, but under the circumstances it was the right thing to do. An excuse is different.

HomeThe Insanity Defense

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 capacitytest** 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.”

HomeEntrapment

Entrapment is a defense that removes blame from a person who commits a criminal act when convinced to do so by law enforcement. In other words, people have the defense of entrapment available when police lure them into crime. A valid entrapment defense has two related elements: There must be a government inducement of the crime, and the defendant’s lack of predisposition to engage in the criminal conduct. Mere **solicitation**, however, to commit a crime is not inducement. Inducement requires a showing of at least persuasion or mild coercion.

HomeSelf-defense

As a matter of political theory, the right to use force is handed over to the government via the social contract. This power to use force is entrusted to law enforcement. Thus, when force is called for to end a confrontation, people should call the police. There are times, however, when the police are not available in emergencies. In these rare instances, it is permissible for the average citizen to use force to protect themselves and others from violent victimization.

The legality of using force in **self-defense** hinges on reasonableness. Whether a use of force decision was a reasonable one will always depend on the circumstances of each individual situation. The amount of force used should be the minimum likely to repel the attack. The defense also requires that the danger be **imminent**. In other words, the use of force cannot be preemptive or retaliatory. Generally, **deadly force** can only be used to prevent loss of life. Some jurisdictions allow the use of **non-deadly force** to prevent thefts.

HomeIntoxication

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.

HomeMistake

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.

HomeNecessity

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 he 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.

HomeDuress

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.

Home *Key Terms*

Coercion, Deadly Force, Duress, Entrapment, Excuse, Imminent Danger, Insanity Defense, Involuntary Intoxication, Irresistible Impulse Test, Justification, Lesser of Two Evils Defense, Mistake Defense, Mistake of Face, Mistake of Law, M'Naghten Rule, Necessity Defense, Non-deadly Force, Not Guilty By Reason of Insanity, *Parsons v. State*(1887), Self-defense, Solicitation, Substantial Capacity Test, Voluntary Intoxication

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2.4: Substantive Offenses

Once the essential elements of crimes are understood, it is a relatively easy matter to consider the elements that must be proven in court to obtain a conviction. Recall that each element of the crime must be proven beyond a reasonable doubt.

HomeMurder

At common law, **murder** was defined as killing another human being with malice aforethought. Malice aforethought is a legal term of art that goes beyond the obvious meaning of the two terms. The term *malice* means the intention to do evil. It is sometimes defined as "ill will." *Aforethought* means thought about or planned beforehand. If we put the two together, it suggests that the plan to cause harm was premeditated. This "murder with intent to kill" is one legal way to look at it, but at common law, malice aforethought could be satisfied in other ways. An alternative was a murder committed when the intent was only to cause **grievous bodily harm**. In addition, a person was guilty of murder if someone else was killed in the while committing a felony. This is known as the **felony murder rule**.

Most murders require the specific intent to harm the person that dies. When someone does something that kills somebody but there was no specific target, then there is a **depraved heart murder.** A classic example of this is firing a rifle into a passenger train car. No specific victim was intended, but it was highly likely that someone would die.

While there are some differences in these common law classifications of murder and the modern statutory classifications, their underlying prohibitions are the same. The Model Penal Code, for example, prohibits purposefully or knowingly killing another human being. This functions in a nearly identical way to the common law rule against intentional murder. The Model Penal Code punishes killings that come from "extreme recklessness" in a way that mimics the depraved heart murder of common law. The Model Penal Code creates a **rebuttable presumption** that a killing committed during the commission of certain felonies shows extreme recklessness. This provision mimics the felony murder rule in function.

HomeAssault and Battery

In everyday language, **assault** and **battery** are used interchangeably. In many jurisdictions, however, they are two distinct offenses. An assault is an act that creates an imminent fear that the victim will be harmed, but no actual harm occurs. In other words, an assault is a threat of force. A battery is a physical act that results in some actual harm to the victim. Some jurisdictions include any offensive touching in the definition of battery. Many jurisdictions define an unwanted touching of the sexual organs of another person as a **sexual battery**. Note that in most cases, the assault is a lesser-included offense of the battery. That means that in jurisdictions that have both assault and battery statutes, both offenses cannot be charged against the same person for the same act.

HomeRape

Rape is a crime that has evolved dramatically over time. At common law, rape was defined as *the unlawful carnal knowledge of a female without her consent*. In this common law context, the term unlawful means that law did not authorize the act. Historically, this precluded applying the rape law to a husband who forced his wife to have sex (now known as **marital rape**). ***Carnal knowledge*** is synonymous with *sexual intercourse*. Thus, the law was very specific; many violent sexual acts (such as those perpetrated against men) did not fit the legal definition of rape.

Historically, rape has been a very difficult crime for the state to prove. The most difficult element to prove in court tends to be the fact that the woman did not consent to the act. Many jurisdictions required that the victim offer forceful resistance to the perpetrator. In addition, many required that the victim be of "previously chaste character." Defense attorneys would use this requirement to attack the victim on the witness stand, increasing the trauma of an already traumatic event. Most states have now passed what are known as **rape shield laws**. These are laws designed to protect victims of rape from further trauma. Most of these laws prohibit the introduction of evidence about the victim's past sexual history and reputation.

The changing legal climate of rape law has influenced the definition used by the FBI's Uniform Crime Reports program. The traditional UCR definition was "The carnal knowledge of a female forcibly and against her will." Many agencies interpreted this definition as excluding a long list of sex offenses that are criminal in most jurisdictions, such as offenses involving oral or anal penetration, penetration with objects, and rapes of males. The new Summary definition of Rape is: "Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim." This language is very similar to that of the Model Penal Code's rape statute.

HomeArson

Arson has always been considered a very serious crime. At various times, the penalty under the common law was death by burning. **Common law arson** was very narrowly defined as the *malicious burning of the dwelling of another*. In the common law context, a malicious burning was one where the perpetrator had criminal intent. The *burning* requirement did not mean that the dwelling had to be completely consumed by the fire. Smoke and blackening were generally considered to be insufficient; some part of the structure (albeit a very small amount) must be destroyed by the fire.

Modern statutory definitions have tended to expand on what is covered by arson. Today, most all structures will qualify. Many states include the burning of any valuable property in the definition of arson, setting the penalty based on the value of the property destroyed. The model penal code requires that the arsonist have the purpose of destroying another person's building or other structure.

HomeRobbery

Robbery is the taking of the property of another by the use of force or threat of force. Because of the force involved, most jurisdictions classify robbery as a crime against persons rather than a property crime. For this reason, some force is required for a theft of property to amount to a robbery. Purse snatching, for example, does not constitute a robbery in most jurisdictions because the only force involved was the amount necessary to acquire possession of the property. Many states divide robbery into categories based on the seriousness of the offense. The use of a weapon, especially a firearm, often elevates the crime to aggravated robbery or first-degree robbery, depending on the jurisdiction. Most robbery statutes are state laws, but some robberies, notably those that affect interstate commerce or the currency, are matters of federal law.

HomeBurglary

At common law, **burglary** required that the crime take place in the dwelling house of another at night. Most states have greatly broadened this requirement to include any structure at any time of day. Many jurisdictions draw a distinction between residential burglary and commercial burglary, with the penalty being more severe for residential burglary. Burglary is much more serious than a mere theft of property because it involves the home, which is sacred under the common law tradition, and the risk of violence is high.

Most modern statutes require a breaking and entering into the home or other structure of another person with the intent to commit a crime therein. Under most circumstances, the crime will be a theft. Other offenses contemplated within the structure, such as rape, can also meet the requirements for burglary.

HomeClassification of Juvenile Behaviors

Recall that there is a separate juvenile system that is operated in parallel with the adult system. The special treatment of juveniles extends into the criminal law along with other aspects of the criminal justice system. The OJJDP estimates that about 1.3 million juveniles were arrested in 2013, continuing a downward trend in the number of persons under the age of 18 arrested each year. Only about 61,000 if these were offenses listed on the Violent Crime Index. The remaining offenses were property crimes and nonviolent offenses. Some of these were status offenses, such as **truancy**, curfew violations, and running away.

The vast majority of these arrests were for nonviolent crimes. About 5% were for minor offenses, such as **truancy**, running away, or curfew violations. Because the juvenile justice system is different that the adult criminal justice system, a different classification scheme has been developed to describe children. There are three basic categories of youths under the jurisdiction of the Juvenile Courts.

Delinquents

Delinquents are youths who commit acts that would be considered as criminal of the same act were committed by an adult. This classification includes both misdemeanors and felonies.

Status Offenders

Status offenders are youths who commit acts that would not be defined as criminal if committed by an adult, but are only taken notice of *because* of the juvenile's age (e.g., truancy, running away from home, and curfew violations).

Dependent and Neglected Children

Dependent and neglected children are youths who are disadvantaged in some way and in need of support and supervision.

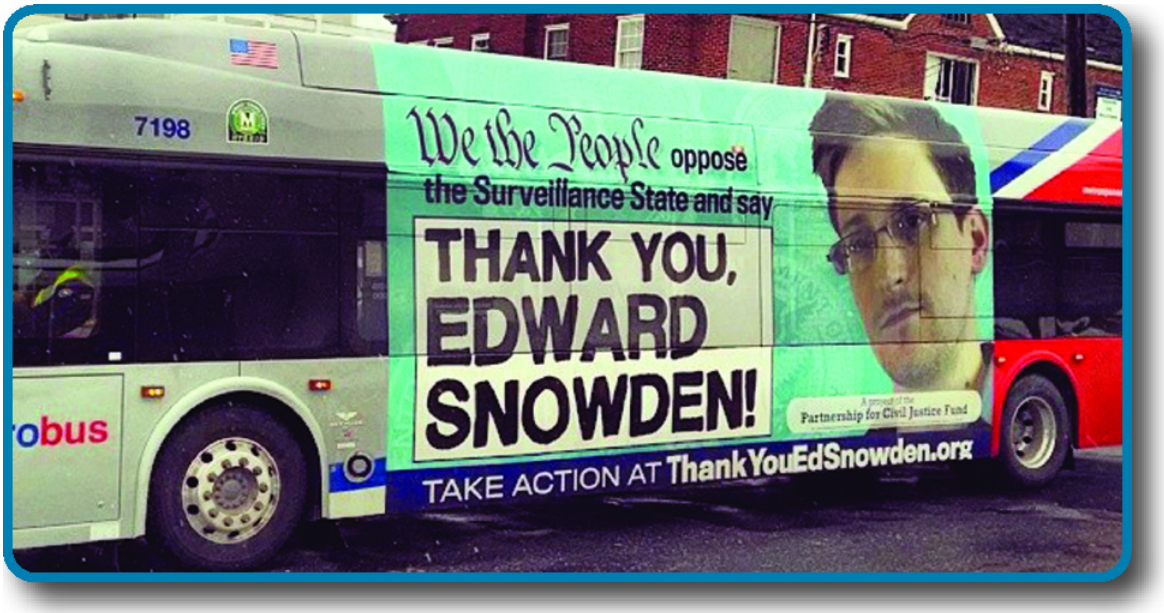
Arson, Assault, Battery, Burglary, Carnal Knowledge, Commercial Burglary, Common Law Arson, Delinquents, Dependent and Neglected Children, Depraved Heart Murder, Dwelling House, Felony Murder Rule, Grievous Bodily Harm, Lesser-included Offense, Marital Rape, Murder, Rape, Rape Shield Laws, Rebuttable Presumption, Residential Burglary, Robbery, Sexual Battery, Status Offenders, Status Offenses, Truancy

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2.5: Introduction



Those concerned about government surveillance have found a champion in Edward Snowden, a former contractor for the U.S. government who leaked thousands of classified documents to journalists in June 2013. These documents revealed the existence of multiple global surveillance programs run by the National Security Agency. (credit: modification of work by Bruno Sanchez-Andrade Nuño)

Americans have recently confronted situations in which government officials appeared not to provide citizens their basic freedoms and rights. Protests have erupted nationwide in response to the deaths of African Americans during interactions with police. Many people were deeply troubled by the revelations of Edward Snowden (Figure) that U.S. government agencies are conducting widespread surveillance, capturing not only the conversations of foreign leaders and suspected terrorists but also the private communications of U.S. citizens, even those not suspected of criminal activity.

These situations are hardly unique in U.S. history. The framers of the Constitution wanted a government that would not repeat the abuses of individual liberties and rights that caused them to declare independence from Britain. However, laws and other "parchment barriers" (or written documents) alone have not protected freedoms over the years; instead, citizens have learned the truth of the old saying (often attributed to Thomas Jefferson but actually said by Irish politician John Philpot Curran), "Eternal vigilance is the price of liberty." The actions of ordinary citizens, lawyers, and politicians have been at the core of a vigilant effort to protect constitutional liberties.

But what are those freedoms? And how should we balance them against the interests of society and other individuals? These are the key questions we will tackle in this chapter.

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2.6: The Civil Rights Revolution

A political pendulum, swinging back and forth from liberal to conservative, marks the history of the U.S. Supreme Court. Obviously, conservative courts are courts composed of conservative justices, usually appointed by conservative presidents. Liberal courts, on the other hand, are composed of liberal justices, usually appointed by liberal presidents. These courts are often characterized by the name of the chief justice at the time. During the 1960s, the pendulum swung to the apex of liberalism when Chief Justice Earl Warren (1953 – 1969) led it. The Warren Court adhered to Packer's *Due Process Model*, at least after the judicial activists achieved a majority on the court with the retirement of Justice Frankfurter's retirement in 1962. This date marks the true beginning of the **civil rights revolution**. This liberal court, headed by Warren, emphasized civil rights across the legal spectrum. The most enduring changes in criminal justice occurred in their interpretations of the **Fourth Amendment** and Fifth Amendments, with many landmark cases coming down that were designed by the court to shield citizens from the abuse of police powers.

Prior to the 1960's, the Supreme Court rarely interfered in the way that states ran their own criminal justice systems. The 1960s was a time of rapid social change, and that change is reflected in the decisions of the Warren Court. When the Warren court passed down its decision in ***Mapp v. Ohio*** in 1961, the criminal justice system in America was changed forever. However, this was only the beginning. Over the reminder of Warren's tenure as Chief Justice, the court would hand down many more decisions that would redefine the American legal landscape in terms of civil liberties.

A more conservative Supreme Court, back in 1949, stated that the exclusionary rule applied only to federal law enforcement officers. According to the ruling in ***Wolf v. Colorado*** **(1949)**, if citizens had any protection against illegally obtained evidence being used against them in court, it was up to state supreme courts to interpret state constitutions in such a way. Many courts did implement the exclusionary rule on the state level, following the lead of the U.S. Supreme Court, but some did not. When *Mapp* overruled *Wolf*, the exclusionary rule was applied to all law enforcement in the United States, no matter what level of government employed them.

Another landmark decision influencing law enforcement practice passed down by the Supreme Court was ***Chimel v. California*** **(1969)**. Today, we teach that *Chimel* established an exception to the warrant requirement known as a search incident to arrest. As an exception to the search warrant requirement, this may seem like a case that fits Packer's *crime control model*. This is because an exception to the search warrant requirement is generally considered to benefit law enforcement, and is thus a victory for law and order at the expense of a civil right. The facts of the case paint a different picture. When the police arrested Chimel in his home for burglary, they searched his home for stolen coins that were the fruits of his crime. The coins were found in a garage attached to the house. The court ruled that while the search was incident to the arrest, the search of the garage went too far. The proper scope of a search incident to arrest was the area in the suspect's "immediate control." We can see from this that the court limited a common police practice, effectively doing away with an unwritten arrest exception to the search warrant requirement of the Fourth Amendment. Because this was deemed a due process issue by the Supreme Court, that clause of the Fourteenth Amendment was used to apply the Fourth Amendment rule to state law enforcement.

While the decisions of the Warren court had a weighty impact on many aspects of American life, the most profound effects on the criminal justice system were in the area of due process and defendants' rights. In ***Gideon v. Wainwright*** (1963), the court held that indigent defendants facing jail time had the right to appointed counsel if they could not afford their own lawyer. In ***Miranda v. Arizona*** (1966), the Warren court ruled that police must inform suspects of certain rights prior to a custodial interrogation. Due to popular culture, most every American knows the statement that is read to suspects by the police: *" You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to have an attorney present during questioning. If you cannot afford an attorney, one will be appointed for you by the state. "*

Not every case decided by the Warren Court served to benefit criminal defendants. In ***Terry v. Ohio*** (1968), for example, the Court ruled that the police could search suspects for weapons with less than probable cause.

The pendulum began to swing the other way in the 1970s, and continued to do so through the present day. This swing occurred because the composition of the court began to change. As liberal justices retired from the court, they were replaced by Republican presidents such as Nixon, Reagan, and Bush. By the end of the first Bush administration, the court had transitioned from the very liberal Warren Court to a much more conservative body. These conservative courts hammered out many exceptions to the blanket protections created by the Warren Court. This has created an increasingly broad scope of lawful investigative activity for law enforcement. This shift from the Due Process Model to the Crime Control Model did not take place only within the courts. It took place in the executive and the legislative branches as well.

The **Burger Court** (1969 – 1986) was far more conservative than the Warren Court, but there was no conservative majority. One of the most controversial cases decided by the Burger Court was ***Furman v. Georgia*** (1972), which abolished the death penalty as it was enacted at the time. This was not in keeping with the conservative expectations of the Burger Court because Warren Burger was a conservative appointed by President Richard Nixon. Conservatives hoped that a court led by Burger would be far more conservative, even to the point of overruling the more liberal of the Warren Court's rulings. This was not to happen. The court may have chipped away at the major Warren Court doctrines, but it declined to overturn them. The chief justice may have been conservative when *Furman* was handed down, but the remnants of the warren Court still sitting on the bench kept the court liberal, at least to a degree, in its majority decisions. Because the composition of the court had shifted, some conservative decisions were handed down. Burger voted with the majority of the court in 1976 to reinstate the death penalty in ***Gregg v. Georgia*** (1976).

The **Rehnquist Court** (1986 – 2005) was far more conservative than the Burger Court. These conservative courts, perhaps out of concern for the time-honored tradition of cohesion and unity of the Supreme Court, did not overrule many of the liberal decisions of the Warren Court. Rather, they "chipped away" at them by creating scores of exclusions. That is, things like the exclusionary rule still existed as a matter of law, but there would be many exceptions that were created during the Reagan-Bush years. Conservatives applauded this as strengthening the ability of the police to do their jobs, and liberals lamented it as the erosion of hard one civil liberties.

Rehnquist was a strong believer in states' rights. Much of his decisionmaking hinged on the Tenth Amendment's reservation of powers to state government. He also rejected the broad view of the Fourteenth Amendment taken by the Warren Court, and believed that such an interpretation overstepped the proper bounds of federal power. An example of the chipping away at liberal interpretations of the fourth amendment includes ***Maryland v. Garrison***(1987). In this case, the court held that a search pursuant to a warrant that the police believed incorrectly to be valid did not violate the searched person's Fourth Amendment Rights. This **good faith exception** meant that such evidence could be admitted at trial. Another example is ***California v. Greenwood*** (1988), in which the court ruled that a warrant was not necessary to search a garbage can left on the curb for pickup (outside the curtilage of the home).

Prior to the 1960s, few people challenged the sweeping powers of the juvenile justice system. During the Civil Rights Revolution, the Supreme Court considered the rights of juveniles at the time and found them wanting. In a series of fundamental cases, the Supreme Court greatly expanded the rights of juveniles. Many critics point out that these changes made the juvenile justice system look a lot more like the adult system.

In the landmark case of ***In Re Gault*** (1967), the Supreme Court extended many due process rights enjoyed by adults accused of a crime to juveniles. The facts of the case were rather shocking: A 15-year old boy named Gerald Gault had been sentenced to six years in a state "training school" for making a prank phone call. If Gerald had been an adult, the maximum penalty for this offense would have been a maximum fine of $50 and a maximum jail sentence of two months. As most juvenile cases proceeded at that time, Gerald was convicted and sentenced in a shockingly (by today's standards) informal proceeding without the benefit of a lawyer. In reviewing the case, the court determined that all juveniles risking incarceration had the fundamental rights to have a lawyer for their defense, to confront and examine their accusers in court, and to have adequate notice of the charges against them.

In re Gault represented the beginning of a long series of cases where the court extended rights enjoyed by adults in the criminal justice system to children in the juvenile justice system. In ***In Re Winship*** (1970), the court established that the state must establish guilt "beyond a reasonable doubt" as it was in adult courts. In ***Breed v. Jones*** (1975) the Court extended the constitutional protection against Double Jeopardy to juveniles when it ruled that juveniles cannot be found delinquent in juvenile court and then transferred to adult court without a hearing on the transfer. There were limits to the number of adult rights that the court was willing to extend to juveniles. In ***McKeiver v. Pennsylvania*** (1971), the Supreme Court determined that juveniles do not have the right to a trial by jury.

During the "get tough on crime" era of the 1980s, juveniles were not immune to toughening sanctions. Legislators made similar changes to the juvenile justice system as they had to the adult system. In ***Schall v. Martin*** (1984) for example, the court determined that juveniles could be held in preventive detention if it was determined that they posed a risk of committing additional crimes while awaiting action by the courts. There was also a broadening of the range of juveniles that qualified for waiver to adult criminal court.

***Breed v. Jones* (1975), Burger Court (1969 -1986), *California v. Greenwood* (1988), *Chimel v. California* (1969), Civil Rights Revolution, Fourth Amendment, *Furman v. Georgia* (1972), *Gideon v. Wainwright* (1963), Good Faith Exception, *Gregg v. Georgia*(1976),*In Re Gault* (1967), *In Re Winship* (1970), *Mapp v. Ohio* (1961), *Maryland v. Garrison* (1987), *McKeiver v. Pennsylvania* (1971), *Miranda v. Arizona* (1966), *Rehnquist Court* (1986-2005), *Schall v. Martin* (1984), Search Incident to Arrest, *Terry v. Ohio*(1968), *Wolf v. Colorado* (1949)**

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2.7: Sources of Criminal Law

The primary function of the substantive criminal law is to define crimes, including the associated punishment. The **procedural criminal law** sets the procedures for arrests, searches and seizures, and interrogations. In addition, it establishes the rules for conducting trials. Where does criminal law come from?

HomeThe Common Law

The term **common law** can be disturbingly vague for the student. That is because different sources use it in several different ways with subtle differences in meaning. The best way to get a grasp on the term's meaning is to understand a little of the history of the American legal system. Common law, which some sources refer to as "judge-made" law, first appeared when judges decided cases based on the legal customs of medieval England at the time. It may be hard for us to imagine today, but in the early days of English common law, the law was a matter of *oral* tradition. That is, the definitions of crimes and associated punishments were not written down in a way that gave them binding authority.

By the end of the medieval period, some of these cases were recorded in written form. Over a period, imported judicial decisions became recorded on a regular basis and collected into books called **reporters**. The English-speaking world is forever indebted to Sir William Blackstone, an English legal scholar, for collecting much of the common law tradition of England and committing it to paper in an organized way. His four-volume set, ***Commentaries on the Laws of England***, was taken to the colonies by the founding fathers. The founding fathers incorporated the common law of England into the laws of the Colonies, and ultimately into the laws of the United States.

In modern America, most crimes are defined by statute. These statutory definitions use ideas and terms that come from the common law tradition. When judges take on the task of interpreting a statute, they still use common law principles for guidance. The definitions of many crimes, such as murder and arson, have not deviated much from their common law origin. Other crimes, such as rape, have seen sweeping changes.

One of the primary characteristics of the common law tradition is the importance of **precedent**. Known by the legal Latin phrase ***stare decisis***, the doctrine of precedence means that once a court makes a decision on a particular matter, they are bound to rule the same way in future cases that have the same legal issue. This is important because a consistent ruling in identical factual situations means that everyone gets the same treatment by the courts. In other words, the doctrine of *stare decisis* ensures equal treatment under the law.

HomeConstitutions

When the founding fathers signed the Constitution, they all agreed that it would be the supreme law of the land; the Framers stated this profoundly important agreement in Article VI. After the landmark case of *Marbury v. Madison* (1803), the Supreme Court has had the power to strike down any law or any government action that violates constitutional principles. This precedent means that any law made by the Congress of the United States or the legislative assembly of any state that does not meet constitutional standards is subject to nullification by the Supreme Court of the United States.

Every state adopted this idea of constitutional supremacy when creating their constitutions. All state laws are subject to review by the high courts of those states. If a state law or government practice (e.g., police, courts, or corrections) violates the constitutional law of that state, then it will be struck down by that state's high court. Local laws are subject to similar scrutiny.

HomeStatutory Law

Statutes are written laws passed by legislative assemblies. Modern criminal laws tend to be a matter of statutory law. In other words, most states and the federal government have moved away from the common-law definitions of crimes and established their own versions through the legislative process. Thus, most of the criminal law today is made by state legislatures, with the federal criminal law being made by Congress. Legislative assemblies tend to consider legislation as it is presented, not in subject order. This chronological ordering makes finding the law concerning a particular matter very difficult. To simplify finding the law, most all statutes are organized by subject in a set of books called a code. The body of statutes that comprises the criminal law is often referred to as the criminal code, or less commonly as the penal code.

HomeAdministrative Law

The clear distinction between the executive, legislative, and judicial branches of government becomes blurry when U.S. governmental agencies and commissions are considered. These types of bureaucratic organizations can be referred to as semi-

legislative and semi-judicial in character. These organizations have the power to make rules that have the force of law, the power to investigation violations of those laws, and the power to impose sanctions on those deemed to be in violation. Examples of such agencies are the Federal Trade Commission (FTC), the Internal Revenue Service (IRS), and the Environmental Protection Agency (EPA). When these agencies make rules that have the force of law, the rules are collectively referred to as **administrative law**.

HomeCourt Cases

When the appellate courts decide a legal issue, the doctrine of precedence means that future cases must follow that decision. This means that the holding in an appellate court case has the force of law. Such laws are often referred to as **case law**. The entire criminal justice community depends on the appellate courts, especially the Supreme Court, to evaluate and clarify both statutory laws and government practices against the requirements of the Constitution. These legal rules are all set down in court cases.

Home *Key Terms*

Administrative Law, Case Law, *Commentaries on the Laws of England*, Common Law, Criminal Law, Cybercrime, Damages, Embezzlement, Felony, Hate Crime, Misdemeanor, Ordinary Crime, Organized Crime, Phishing, Precedent, Procedural Criminal Law, Reporter, Sir William Blackstone, *Stare Decisis* , Street Crime, Substantive Criminal Law, Tort, Visible Crime

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CHAPTER OVERVIEW

3: Criminal Justice Systems and Processes

3.1: Introduction to Deviance, Crime, and Social Control
3.2: What Are Civil Liberties?
3.3: Securing Basic Freedoms
3.4: The Rights of Suspects
3.5: 5.5- Interpreting the Bill of Rights
3.6: An Overview of the System
3.7: Dual Federalism
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3.1: Introduction to Deviance, Crime, and Social Control



Washington is one of several states where marijuana use has been legalized, decriminalized, or approved for medical use. (Photo courtesy of Dominic Simpson/flickr)

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.

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3.2: What Are Civil Liberties?

Learning Objectives

By the end of this section, you will be able to:

- Define civil liberties and civil rights
- Describe the origin of civil liberties in the U.S. context
- Identify the key positions on civil liberties taken at the Constitutional Convention
- Explain the Civil War origin of concern that the states should respect civil liberties

The U.S. Constitution—in particular, the first ten amendments that form the Bill of Rights—protects the freedoms and rights of individuals. It does not limit this protection just to citizens or adults; instead, in most cases, the Constitution simply refers to "persons," which over time has grown to mean that even children, visitors from other countries, and immigrants—permanent or temporary, legal or undocumented—enjoy the same freedoms when they are in the United States or its territories as adult citizens do. So, whether you are a Japanese tourist visiting Disney World or someone who has stayed beyond the limit of days allowed on your visa, you do not sacrifice your liberties. In everyday conversation, we tend to treat freedoms, liberties, and rights as being effectively the same thing—similar to how separation of powers and checks and balances are often used as if they are interchangeable, when in fact they are distinct concepts.

DEFINING CIVIL LIBERTIES

To be more precise in their language, political scientists and legal experts make a distinction between civil liberties and civil rights, even though the Constitution has been interpreted to protect both. We typically envision civil liberties as being limitations on government power, intended to protect freedoms that governments may not legally intrude on. For example, the First Amendment denies the government the power to prohibit "the free exercise" of religion; the states and the national government cannot forbid people to follow a religion of their choice, even if politicians and judges think the religion is misguided, blasphemous, or otherwise inappropriate. You are free to create your own religion and recruit followers to it (subject to the U.S. Supreme Court deeming it a religion), even if both society and government disapprove of its tenets. That said, the way you practice your religion may be regulated if it impinges on the rights of others. Similarly, the Eighth Amendment says the government cannot impose "cruel and unusual punishments" on individuals for their criminal acts. Although the definitions of *cruel* and *unusual* have expanded over the years, as we will see later in this chapter, the courts have generally and consistently interpreted this provision as making it unconstitutional for government officials to torture suspects.

Civil rights, on the other hand, are guarantees that government officials will treat people equally and that decisions will be made on the basis of merit rather than race, gender, or other personal characteristics. Because of the Constitution's civil rights guarantee, it is unlawful for a school or university run by a state government to treat students differently based on their race, ethnicity, age, sex, or national origin. In the 1960s and 1970s, many states had separate schools where only students of a certain race or gender were able to study. However, the courts decided that these policies violated the civil rights of students who could not be admitted because of those rules.

Green v. County School Board of New Kent County, 391 U.S. 430 (1968); Allen v. Wright, 468 U.S. 737 (1984).

The idea that Americans—indeed, people in general—have fundamental rights and liberties was at the core of the arguments in favor of their independence. In writing the Declaration of Independence in 1776, Thomas Jefferson drew on the ideas of John Locke to express the colonists' belief that they had certain inalienable or natural rights that no ruler had the power or authority to deny to his or her subjects. It was a scathing legal indictment of King George III for violating the colonists' liberties. Although the Declaration of Independence does not guarantee specific freedoms, its language was instrumental in inspiring many of the states to adopt protections for civil liberties and rights in their own constitutions, and in expressing principles of the founding era that have resonated in the United States since its independence. In particular, Jefferson's words "all men are created equal" became the centerpiece of struggles for the rights of women and minorities (Figure).



Actors and civil rights activists Sidney Poitier (left), Harry Belafonte (center), and Charlton Heston (right) on the steps of the Lincoln Memorial on August 28, 1963, during the March on Washington.

Founded in 1920, the American Civil Liberties Union (ACLU) is one of the oldest interest groups in the United States. The mission of this non-partisan, not-for-profit organization is "to defend and preserve the individual rights and liberties guaranteed to every person in this country by the Constitution and laws of the United States." Many of the Supreme Court cases in this chapter were litigated by, or with the support of, the ACLU. The ACLU offers a listing of state and local chapters on their website.

CIVIL LIBERTIES AND THE CONSTITUTION

The Constitution as written in 1787 did not include a Bill of Rights, although the idea of including one was proposed and, after brief discussion, dismissed in the final week of the Constitutional Convention. The framers of the Constitution believed they faced much more pressing concerns than the protection of civil rights and liberties, most notably keeping the fragile union together in the light of internal unrest and external threats.

Moreover, the framers thought that they had adequately covered rights issues in the main body of the document. Indeed, the Federalists did include in the Constitution some protections against legislative acts that might restrict the liberties of citizens, based on the history of real and perceived abuses by both British kings and parliaments as well as royal governors. In Article I, Section 9, the Constitution limits the power of Congress in three ways: prohibiting the passage of bills of attainder, prohibiting ex post facto laws, and limiting the ability of Congress to suspend the writ of habeas corpus.

A bill of attainder is a law that convicts or punishes someone for a crime without a trial, a tactic used fairly frequently in England against the king's enemies. Prohibition of such laws means that the U.S. Congress cannot simply punish people who are unpopular or seem to be guilty of crimes. An ex post facto law has a retroactive effect: it can be used to punish crimes that were not crimes at the time they were committed, or it can be used to increase the severity of punishment after the fact.

Finally, the writ of habeas corpus is used in our common-law legal system to demand that a neutral judge decide whether someone has been lawfully detained. Particularly in times of war, or even in response to threats against national security, the government has held suspected enemy agents without access to civilian courts, often without access to lawyers or a defense, seeking instead to try them before military tribunals or detain them indefinitely without trial. For example, during the Civil War, President Abraham Lincoln detained suspected Confederate saboteurs and sympathizers in Union-controlled states and attempted to have them tried in military courts, leading the Supreme Court to rule in *Ex parte Milligan* that the government could not bypass the civilian court system in states where it was operating.

Ex parte Milligan, 71 U.S. 2 (1866).

During World War II, the Roosevelt administration interned Japanese Americans and had other suspected enemy agents—including U.S. citizens—tried by military courts rather than by the civilian justice system, a choice the Supreme Court upheld in *Ex parte Quirin* (Figure).

Ex parte Quirin, 317 U.S. 1 (1942); See William H. Rehnquist. 1998. All the Laws but One: Civil Liberties in Wartime. New York: William Morrow.

More recently, in the wake of the 9/11 attacks on the World Trade Center and the Pentagon, the Bush and Obama administrations detained suspected terrorists captured both within and outside the United States and sought, with mixed results, to avoid trials in civilian courts. Hence, there have been times in our history when national security issues trumped individual liberties.



Richard Quirin and seven other trained German saboteurs had once lived in the United States and had secretly returned in June 1942. Upon their capture, a military commission (shown here) convicted the men—six of them received death sentences. *Ex parte Quirin*set a precedent for the trial by military commission of any unlawful combatant against the United States. (credit: Library of Congress)

Debate has always swirled over these issues. The Federalists reasoned that the limited set of enumerated powers of Congress, along with the limitations on those powers in Article I, Section 9, would suffice, and no separate bill of rights was needed. Alexander Hamilton, writing as Publius in *Federalist* No. 84, argued that the Constitution was "merely intended to regulate the general political interests of the nation," rather than to concern itself with "the regulation of every species of personal and private concerns." Hamilton went on to argue that listing some rights might actually be dangerous, because it would provide a pretext for people to claim that rights *not* included in such a list were not protected. Later, James Madison, in his speech introducing the proposed amendments that would become the Bill of Rights, acknowledged another Federalist argument: "It has been said, that a bill of rights is not necessary, because the establishment of this government has not repealed those declarations of rights which are added to the several state constitutions."

American History from Revolution to Reconstruction and Beyond, "Madison Speech Proposing the Bill of Rights June 8 1789," http://www.let.rug.nl/usa/documents/1786-1800/madison-speech-proposing-the-bill-of-rights-june-8-1789.php (March 4, 2016).

For that matter, the Articles of Confederation had not included a specific listing of rights either.

However, the Anti-Federalists argued that the Federalists' position was incorrect and perhaps even insincere. The Anti-Federalists believed provisions such as the elastic clause in Article I, Section 8, of the Constitution would allow Congress to legislate on matters well beyond the limited ones foreseen by the Constitution's authors; thus, they held that a bill of rights was necessary. One of the Anti-Federalists, Brutus, whom most scholars believe to be Robert Yates, wrote: "The powers, rights, and authority, granted to the general government by this Constitution, are as complete, with respect to every object to which they extend, as that of any state government—It reaches to every thing which concerns human happiness—Life, liberty, and property, are under its controul [sic]. There is the same reason, therefore, that the exercise of power, in this case, should be restrained within proper limits, as in that of the state governments."

Constitution Society, "To the Citizens of the State of New-York," http://www.constitution.org/afp/brutus02.htm (March 4, 2016).

The experience of the past two centuries has suggested that the Anti-Federalists may have been correct in this regard; while the states retain a great deal of importance, the scope and powers of the national government are much broader today than in 1787—likely beyond even the imaginings of the Federalists themselves.

The struggle to have rights clearly delineated and the decision of the framers to omit a bill of rights nearly derailed the ratification process. While some of the states were willing to ratify without any further guarantees, in some of the larger states—New York and Virginia in particular—the Constitution's lack of specified rights became a serious point of contention. The Constitution could go into effect with the support of only nine states, but the Federalists knew it could not be effective without the participation of the largest states. To secure majorities in favor of ratification in New York and Virginia, as well as Massachusetts, they agreed to consider incorporating provisions suggested by the ratifying states as amendments to the Constitution.

Ultimately, James Madison delivered on this promise by proposing a package of amendments in the First Congress, drawing from the Declaration of Rights in the Virginia state constitution, suggestions from the ratification conventions, and other sources, which were extensively debated in both houses of Congress and ultimately proposed as twelve separate amendments for ratification by the states. Ten of the amendments were successfully ratified by the requisite 75 percent of the states and became known as the Bill of Rights (Table).

Rights and Liberties Protected by the First Ten Amendments	
First Amendment	Right to freedoms of religion and speech; right to assemble and to petition the government for redress of grievances
Second Amendment	Right to keep and bear arms to maintain a well-regulated militia
Third Amendment	Right to not house soldiers during time of war
Fourth Amendment	Right to be secure from unreasonable search and seizure
Fifth Amendment	Rights in criminal cases, including due process and indictment by grand jury for capital crimes, as well as the right not to testify against oneself
Sixth Amendment	Right to a speedy trial by an impartial jury
Seventh Amendment	Right to a jury trial in civil cases
Eighth Amendment	Right to not face excessive bail, excessive fines, or cruel and unusual punishment
Ninth Amendment	Rights retained by the people, even if they are not specifically enumerated by the Constitution
Tenth Amendment	States' rights to powers not specifically delegated to the federal government

DEBATING THE NEED FOR A BILL OF RIGHTS

One of the most serious debates between the Federalists and the Anti-Federalists was over the necessity of limiting the power of the new federal government with a Bill of Rights. As we saw in this section, the Federalists believed a Bill of Rights was unnecessary—and perhaps even dangerous to liberty, because it might invite violations of rights that weren't included in it—while the Anti-Federalists thought the national government would prove adept at expanding its powers and influence and that citizens couldn't depend on the good judgment of Congress alone to protect their rights.

As George Washington's call for a bill of rights in his first inaugural address suggested, while the Federalists ultimately had to add the Bill of Rights to the Constitution in order to win ratification, and the Anti-Federalists would soon be proved right that the national government might intrude on civil liberties. In 1798, at the behest of President John Adams during the Quasi-War with France, Congress passed a series of four laws collectively known as the Alien and Sedition Acts. These were drafted to allow the president to imprison or deport foreign citizens he believed were "dangerous to the peace and safety of the United States" and to restrict speech and newspaper articles that were critical of the federal government or its officials; the laws were primarily used against members and supporters of the opposition Democratic-Republican Party.

State laws and constitutions protecting free speech and freedom of the press proved ineffective in limiting this new federal power. Although the courts did not decide on the constitutionality of these laws at the time, most scholars believe the Sedition Act, in particular, would be

unconstitutional if it had remained in effect. Three of the four laws were repealed in the Jefferson administration, but one—the Alien Enemies Act—remains on the books today. Two centuries later, the issue of free speech and freedom of the press during times of international conflict remains a subject of public debate.

Should the government be able to restrict or censor unpatriotic, disloyal, or critical speech in times of international conflict? How much freedom should journalists have to report on stories from the perspective of enemies or to repeat propaganda from opposing forces?

EXTENDING THE BILL OF RIGHTS TO THE STATES

In the decades following the Constitution's ratification, the Supreme Court declined to expand the Bill of Rights to curb the power of the states, most notably in the 1833 case of *Barron v. Baltimore*.

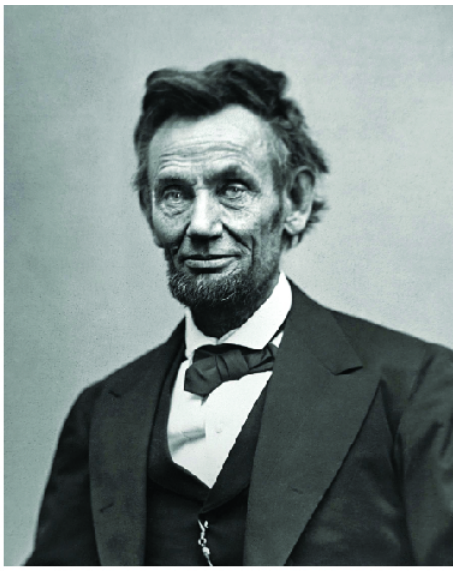
Barron v. Baltimore, 32 U.S. 243 (1833).

In this case, which dealt with property rights under the Fifth Amendment, the Supreme Court unanimously decided that the Bill of Rights applied only to actions by the federal government. Explaining the court's ruling, Chief Justice John Marshall wrote that it was incorrect to argue that "the Constitution was intended to secure the people of the several states against the undue exercise of power by their respective state governments; as well as against that which might be attempted by their [Federal] government."

In the wake of the Civil War, however, the prevailing thinking about the application of the Bill of Rights to the states changed. Soon after slavery was abolished by the Thirteenth Amendment, state governments—particularly those in the former Confederacy—began to pass "black codes" that restricted the rights of former slaves and effectively relegated them to second-class citizenship under their state laws and constitutions. Angered by these actions, members of the Radical Republican faction in Congress demanded that the laws be overturned. In the short term, they advocated suspending civilian government in most of the southern states and replacing politicians who had enacted the black codes. Their long-term solution was to propose two amendments to the Constitution to guarantee the rights of freed slaves on an equal standing with whites; these rights became the Fourteenth Amendment, which dealt with civil liberties and rights in general, and the Fifteenth Amendment, which protected the right to vote in particular (Figure). But, the right to vote did not yet apply to women or to Native Americans.



(a)



(b)

Representative John Bingham (R-OH) (a) is considered the author of the Fourteenth Amendment, adopted on July 9, 1868. Influenced by his mentor, Salmon P. Chase, Bingham was a strong supporter of the antislavery cause; after Chase lost the Republican presidential nomination to Abraham Lincoln (b), Bingham became one of the president's most ardent supporters.

With the ratification of the Fourteenth Amendment in 1868, civil liberties gained more clarification. First, the amendment says, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," which is a provision that echoes the privileges and immunities clause in Article IV, Section 2, of the original Constitution ensuring that states treat citizens of other states the same as their own citizens. (To use an example from today, the punishment for speeding by an out-of-state driver cannot be more severe than the punishment for an in-state driver). Legal scholars and the courts have extensively debated the meaning of this privileges or immunities clause over the years; some have argued that it was supposed to extend the

entire Bill of Rights (or at least the first eight amendments) to the states, while others have argued that only some rights are extended. In 1999, Justice John Paul Stevens, writing for a majority of the Supreme Court, argued in *Saenz v. Roe* that the clause protects the right to travel from one state to another.

Saenz v. Roe, 526 U.S. 489 (1999).

More recently, Justice Clarence Thomas argued in the 2010 *McDonald v. Chicago* ruling that the individual right to bear arms applied to the states because of this clause.

McDonald v. Chicago, 561 U.S. 742 (2010).

The second provision of the Fourteenth Amendment that pertains to applying the Bill of Rights to the states is the due process clause, which says, "nor shall any State deprive any person of life, liberty, or property, without due process of law." This provision is similar to the Fifth Amendment in that it also refers to "due process," a term that generally means people must be treated fairly and impartially by government officials (or with what is commonly referred to as substantive due process). Although the text of the provision does not mention rights specifically, the courts have held in a series of cases that it indicates there are certain fundamental liberties that cannot be denied by the states. For example, in *Sherbert v. Verner* (1963), the Supreme Court ruled that states could not deny unemployment benefits to an individual who turned down a job because it required working on the Sabbath.

Sherbert v. Verner, 374 U.S. 398 (1963).

Beginning in 1897, the Supreme Court has found that various provisions of the Bill of Rights protecting these fundamental liberties must be upheld by the states, even if their state constitutions and laws do not protect them as fully as the Bill of Rights does—or at all. This means there has been a process of selective incorporation of the Bill of Rights into the practices of the states; in other words, the Constitution effectively inserts parts of the Bill of Rights into state laws and constitutions, even though it doesn't do so explicitly. When cases arise to clarify particular issues and procedures, the Supreme Court decides whether state laws violate the Bill of Rights and are therefore unconstitutional.

For example, under the Fifth Amendment a person can be tried in federal court for a felony—a serious crime—only after a grand jury issues an indictment indicating that it is reasonable to try the person for the crime in question. (A grand jury is a group of citizens charged with deciding whether there is enough evidence of a crime to prosecute someone.) But the Supreme Court has ruled that states don't have to use grand juries as long as they ensure people accused of crimes are indicted using an equally fair process.

Selective incorporation is an ongoing process. When the Supreme Court initially decided in 2008 that the Second Amendment protects an individual's right to keep and bear arms, it did not decide then that it was a fundamental liberty the states must uphold as well. It was only in the *McDonald v. Chicago* case two years later that the Supreme Court incorporated the Second Amendment into state law. Another area in which the Supreme Court gradually moved to incorporate the Bill of Rights regards censorship and the Fourteenth Amendment. In *Near v. Minnesota* (1931), the Court disagreed with state courts regarding censorship and ruled it unconstitutional except in rare cases.

Near v. Minnesota, 283 U.S. 697 (1931).

The Bill of Rights is designed to protect the freedoms of individuals from interference by government officials. Originally these protections were applied only to actions by the national government; different sets of rights and liberties were protected by state constitutions and laws, and even when the rights themselves were the same, the level of protection for them often differed by definition across the states. Since the Civil War, as a result of the passage and ratification of the Fourteenth Amendment and a series of Supreme Court decisions, most of the Bill of Rights' protections of civil liberties have been expanded to cover actions by state governments as well through a process of selective incorporation. Nonetheless there is still vigorous debate about what these rights entail and how they should be balanced against the interests of others and of society as a whole.

The Bill of Rights was added to the Constitution because _____.

1. key states refused to ratify the Constitution unless it was added
2. Alexander Hamilton believed it was necessary
3. it was part of the Articles of Confederation
4. it was originally part of the Declaration of Independence

An example of a right explicitly protected by the Constitution as drafted at the Constitutional Convention is the _____.

1. right to free speech
2. right to keep and bear arms
3. right to a writ of habeas corpus
4. right not to be subjected to cruel and unusual punishment

The Fourteenth Amendment was critically important for civil liberties because it _____.

1. guaranteed freed slaves the right to vote
2. outlawed slavery
3. helped start the process of selective incorporation of the Bill of Rights
4. allowed the states to continue to enact black codes

Briefly explain the difference between civil liberties and civil rights.

Briefly explain the concept of selective incorporation, and why it became necessary.

Glossary

civil liberties
limitations on the power of government, designed to ensure personal freedoms

civil rights
guarantees of equal treatment by government authorities

due process clause
provisions of the Fifth and Fourteenth Amendments that limit government power to deny people "life, liberty, or property" on an unfair basis

selective incorporation
the gradual process of making some guarantees of the Bill of Rights (so far) apply to state governments and the national government

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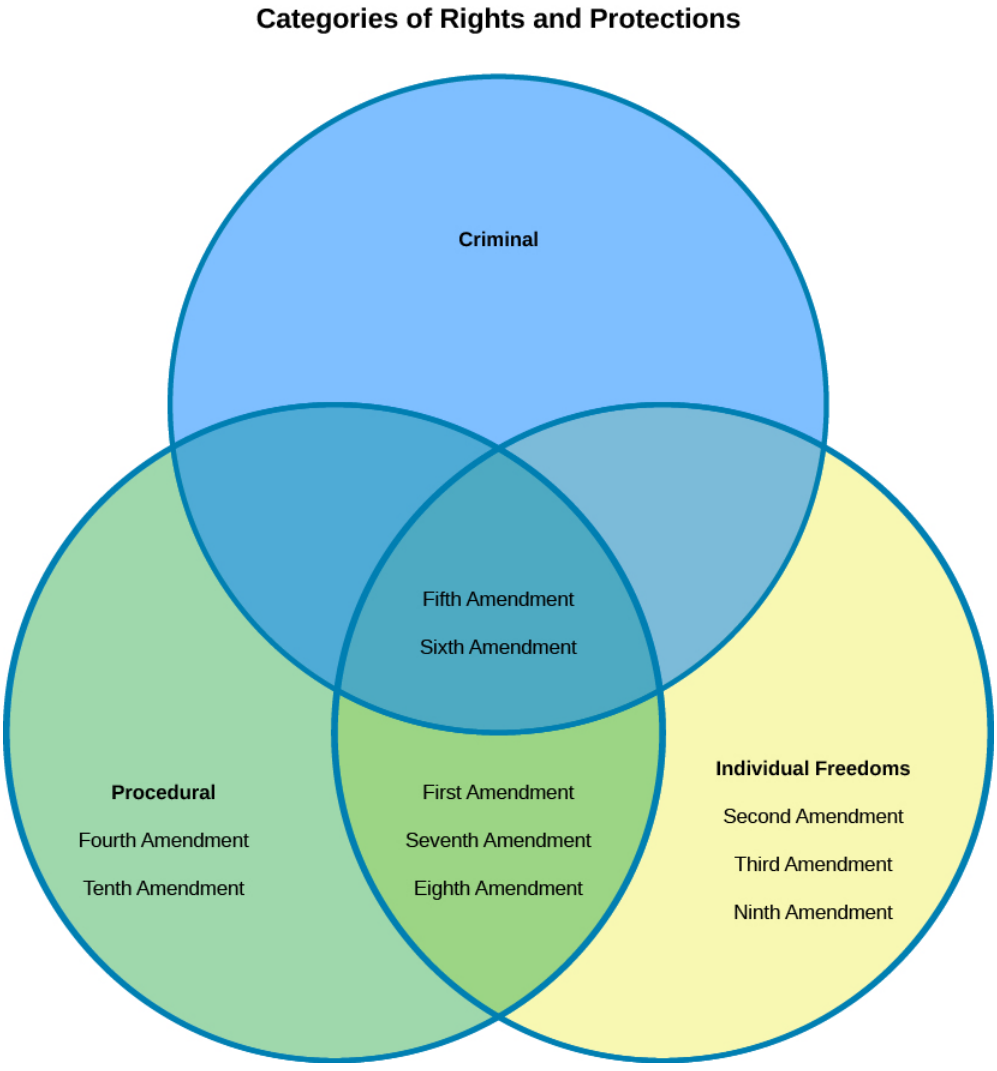
3.3: Securing Basic Freedoms

Learning Objectives

By the end of this section, you will be able to:

- Identify the liberties and rights guaranteed by the first four amendments to the Constitution
- Explain why in practice these rights and liberties are limited
- Explain why interpreting some amendments has been controversial

We can broadly divide the provisions of the Bill of Rights into three categories. The First, Second, Third, and Fourth Amendments protect basic individual freedoms; the Fourth (partly), Fifth, Sixth, Seventh, and Eighth protect people suspected or accused of criminal activity; and the Ninth and Tenth, are consistent with the framers' view that the Bill of Rights is not necessarily an exhaustive list of all the rights people have and guarantees a role for state as well as federal government (Figure).



The First Amendment protects the right to freedom of religious conscience and practice and the right to free expression, particularly of political and social beliefs. The Second Amendment—perhaps the most controversial today—protects the right to defend yourself in your home or other property, as well as the collective right to protect the community as part of the militia. The Third Amendment prohibits the government from commandeering people's homes to house soldiers, particularly in peacetime. Finally, the Fourth Amendment prevents the government from searching our persons or property or taking evidence without a warrant issued by a judge, with certain exceptions.

THE FIRST AMENDMENT

The First Amendment is perhaps the most famous provision of the Bill of Rights; it is arguably also the most extensive, because it guarantees both religious freedoms and the right to express your views in public. Specifically, the First Amendment says:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Given the broad scope of this amendment, it is helpful to break it into its two major parts.

The first portion deals with religious freedom. However, it actually protects two related sorts of freedom: first, it protects people from having a set of religious beliefs imposed on them by the government, and second, it protects people from having their own religious beliefs restricted by government authorities.

The Establishment Clause

The first of these two freedoms is known as the establishment clause. Congress is prohibited from creating or promoting a state-sponsored religion (this now includes the states too). When the United States was founded, most countries around the world had an established church or religion, an officially sponsored set of religious beliefs and values. In Europe, bitter wars were fought between and within states, often because the established church of one territory was in conflict with that of another; wars and civil strife were common, particularly between states with Protestant and Catholic churches that had differing interpretations of Christianity. Even today, the legacy of these wars remains, most notably in Ireland, which has been divided between a mostly Catholic south and a largely Protestant north for nearly a century.

Many settlers in the United States found themselves on this continent as refugees from such wars; others came to find a place where they could follow their own religion with like-minded people in relative peace. So as a practical matter, even if the early United States had wanted to establish a single national religion, the diversity of religious beliefs would already have prevented it. Nonetheless the differences were small; most people were of European origin and professed some form of Christianity (although in private some of the founders, most notably Thomas Jefferson, Thomas Paine, and Benjamin Franklin, held what today would be seen as Unitarian and/or deistic views). So for much of U.S. history, the establishment clause was not particularly important—the vast majority of citizens were Protestant Christians of some form, and since the federal government was relatively uninvolved in the day-to-day lives of the people, there was little opportunity for conflict. That said, there were some citizenship and office-holding restrictions on Jews within some of the states.

Worry about state sponsorship of religion in the United States began to reemerge in the latter part of the nineteenth century. An influx of immigrants from Ireland and eastern and southern Europe brought large numbers of Catholics, and states—fearing the new immigrants and their children would not assimilate—passed laws forbidding government aid to religious schools. New religious organizations, such as the Church of Latter-day Saints (the Mormon Church), Seventh-day Adventists, Jehovah's Witnesses, and many others, also emerged, blending aspects of Protestant beliefs with other ideas and teachings at odds with the more traditional Protestant churches of the era. At the same time, public schooling was beginning to take root on a wide scale. Since most states had traditional Protestant majorities and most state officials were Protestants themselves, the public school curriculum incorporated many Protestant features; at times, these features would come into conflict with the beliefs of children from other Christian sects or from other religious traditions.

The establishment clause today tends to be interpreted a bit more broadly than in the past; it not only forbids the creation of a "Church of the United States" or "Church of Ohio" it also forbids the government from favoring one set of religious beliefs over others or favoring religion (of any variety) over non-religion. Thus, the government cannot promote, say, Islamic beliefs over Sikh beliefs or belief in God over atheism or agnosticism (Figure).



In this illustration from a contemporary manuscript, Henry Bolingbroke (i.e., Henry IV) claims the throne in 1399 surrounded by the Lords Spiritual and Temporal (secular). While the Lords Spiritual have been a minority in the House of Lords since the time of Henry VIII, and religion does not generally play a large role in British politics today, the Church of England nevertheless remains represented in Parliament by twenty-six bishops.

The key question that faces the courts is whether the establishment clause should be understood as imposing, in Thomas Jefferson's words, "a wall of separation between church and state." In a 1971 case known as *Lemon v. Kurtzman*, the Supreme Court established the Lemon test for deciding whether a law or other government action that might promote a particular religious practice should be allowed to stand.

Lemon v. Kurtzman, 403 U.S. 602 (1971).

The Lemon test has three criteria that must be satisfied for such a law or action to be found constitutional and remain in effect:

1. The action or law must not lead to *excessive government entanglement* with religion; in other words, policing the boundary between government and religion should be relatively straightforward and not require extensive effort by the government.

2. The action or law cannot either *inhibit* or *advance* religious practice; it should be neutral in its effects on religion.

3. The action or law must have some *secular purpose*; there must be some non-religious justification for the law.

For example, imagine your state decides to fund a school voucher program that allows children to attend private and parochial schools at public expense; the vouchers can be used to pay for school books and transportation to and from school. Would this voucher program be constitutional?

Let's start with the secular-purpose prong of the test. Educating children is a clear, non-religious purpose, so the law has a secular purpose. The law would neither inhibit nor advance religious practice, so that prong would be satisfied. The remaining question—and usually the one on which court decisions turn—is whether the law leads to excessive government entanglement with religious practice. Given that transportation and school books generally have no religious purpose, there is little risk that paying for them would lead the state to much entanglement with religion. The decision would become more difficult if the funding were unrestricted in use or helped to pay for facilities or teacher salaries; if that were the case, it might indeed be used for a religious purpose, and it would be harder for the government to ensure that it wasn't without audits or other investigations that could lead to too much government entanglement with religion.

The use of education as an example is not an accident; in fact, many of the court's cases dealing with the establishment clause have involved education, particularly public education, because school-age children are considered a special and vulnerable population. Perhaps no subject affected by the First Amendment has been more controversial than the issue of prayer in public schools. Discussion about school prayer has been particularly fraught because in many ways it appears to bring the two religious liberty clauses into conflict with each other. The free exercise clause, discussed below, guarantees the right of individuals to practice their religion without government interference—and while the rights of children are not as extensive in all areas as those of adults, the courts have consistently ruled that the free exercise clause's guarantee of religious freedom applies to children as well.

At the same time, however, government actions that require or encourage particular religious practices might infringe upon children's rights to follow their own religious beliefs and thus, in effect, be unconstitutional establishments of religion. For

example, a teacher, an athletic coach, or even a student reciting a prayer in front of a class or leading students in prayer as part of the organized school activities constitutes an illegal establishment of religion.

Engel v. Vitale, 370 U.S. 421 (1962).

Yet a school cannot prohibit voluntary, non-disruptive prayer by its students, because that would impair the free exercise of religion. So although the blanket statement that "prayer in schools is illegal" or unconstitutional is incorrect, the establishment clause does limit official endorsement of religion, including prayers organized or otherwise facilitated by school authorities, even as part of off-campus or extracurricular activities.

See, in particular, Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000), which found that the school district's including a student-led prayer at high school football games was illegal.

But some laws that may appear to establish certain religious practices are allowed. For example, the courts have permitted religiously inspired blue laws that limit working hours or even shutter businesses on Sunday, the Christian day of rest, because by allowing people to practice their (Christian) faith, such rules may help ensure the "health, safety, recreation, and general well-being" of citizens. They have allowed restrictions on the sale of alcohol and sometimes other goods on Sunday for similar reasons.

The meaning of the establishment clause has been controversial at times because, as a matter of course, government officials acknowledge that we live in a society with vigorous religious practice where most people believe in God—even if we disagree on what God is. Disputes often arise over how much the government can acknowledge this widespread religious belief. The courts have generally allowed for a certain tolerance of what is described as ceremonial deism, an acknowledgement of God or a creator that generally lacks any substantive religious content. For example, the national motto "In God We Trust," which appears on our coins and paper money (Figure), is seen as more an acknowledgment that most citizens believe in God than any serious effort by government officials to promote religious belief and practice. This reasoning has also been used to permit the inclusion of the phrase "under God" in the Pledge of Allegiance—a change that came about during the early years of the Cold War as a means of contrasting the United States with the "godless" Soviet Union.

In addition, the courts have allowed some religiously motivated actions by government agencies, such as clergy delivering prayers to open city council meetings and legislative sessions, on the presumption that—unlike school children—adult participants can distinguish between the government's allowing someone to speak and endorsing that person's speech. Yet, while some displays of religious codes (e.g., Ten Commandments) are permitted in the context of showing the evolution of law over the centuries (Figure), in other cases, these displays have been removed after state supreme court rulings. In Oklahoma, the courts ordered the removal of a Ten Commandments sculpture at the state capitol when other groups, including Satanists and the Church of the Flying Spaghetti Monster, attempted to get their own sculptures allowed there.



(a)



(b)

The motto "In God We Trust" has appeared intermittently on U.S. coins since the 1860s (a), yet it was not mandated on paper currency until 1957. The Ten Commandments are prominently displayed on the grounds of the Texas State Capitol in Austin (b), though a similar sculpture was ordered to be removed in Oklahoma. (credit a: modification of work by Kevin Dooley)

The Free Exercise Clause

The free exercise clause, on the other hand, limits the ability of the government to control or restrict religious practices. This portion of the First Amendment regulates not the government's promotion of religion, but rather government *suppression* of religious beliefs and practices. Much of the controversy surrounding the free exercise clause reflects the way laws or rules that apply to everyone might apply to people with particular religious beliefs. For example, can a Jewish police officer whose religious

belief, if followed strictly, requires her to observe Shabbat be compelled to work on a Friday night or during the day on Saturday? Or must the government accommodate this religious practice, even if it means the general law or rule in question is not applied equally to everyone?

In the 1930s and 1940s, cases involving Jehovah's Witnesses demonstrated the difficulty of striking the right balance. In addition to following their church's teaching that they should not participate in military combat, members refuse to participate in displays of patriotism, including saluting the flag and reciting the Pledge of Allegiance, and they regularly engage in door-to-door evangelism to recruit converts. These activities have led to frequent conflict with local authorities. Jehovah's Witness children were punished in public schools for failing to salute the flag or recite the Pledge of Allegiance, and members attempting to evangelize were arrested for violating laws against door-to-door solicitation of customers. In early legal challenges brought by Jehovah's Witnesses, the Supreme Court was reluctant to overturn state and local laws that burdened their religious beliefs.

Minersville School District v. Gobitis, 310 U.S. 586 (1940).

However, in later cases, the court was willing to uphold the rights of Jehovah's Witnesses to proselytize and refuse to salute the flag or recite the Pledge.

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); Watchtower Society v. Village of Stratton, 536 U.S. 150 (2002).

The rights of conscientious objectors—individuals who claim the right to refuse to perform military service on the grounds of freedom of thought, conscience, or religion—have also been controversial, although many conscientious objectors have contributed service as non-combatant medics during wartime. To avoid serving in the Vietnam War, many people claimed to have a conscientious objection to military service on the basis that they believed this particular war was unwise or unjust. However, the Supreme Court ruled in *Gillette v. United States* that to claim to be a conscientious objector, a person must be opposed to serving in *any* war, not just some wars.

Gillette v. United States, 401 U.S. 437 (1971).

Establishing a general framework for deciding whether a religious belief can trump general laws and policies has been a challenge for the Supreme Court. In the 1960s and 1970s, the court decided two cases in which it laid out a general test for deciding similar cases in the future. In both *Sherbert v. Verner*, a case dealing with unemployment compensation, and *Wisconsin v. Yoder*, which dealt with the right of Amish parents to homeschool their children, the court said that for a law to be allowed to limit or burden a religious practice, the government must meet two criteria.

Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

It must demonstrate both that it had a "compelling governmental interest" in limiting that practice and that the restriction was "narrowly tailored." In other words, it must show there was a very good reason for the law in question and that the law was the only feasible way of achieving that goal. This standard became known as the Sherbert test. Since the burden of proof in these cases was on the government, the Supreme Court made it very difficult for the federal and state governments to enforce laws against individuals that would infringe upon their religious beliefs.

In 1990, the Supreme Court made a controversial decision substantially narrowing the Sherbert test in *Employment Division v. Smith*, more popularly known as "the peyote case."

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

This case involved two men who were members of the Native American Church, a religious organization that uses the hallucinogenic peyote plant as part of its sacraments. After being arrested for possession of peyote, the two men were fired from their jobs as counselors at a private drug rehabilitation clinic. When they applied for unemployment benefits, the state refused to pay on the basis that they had been dismissed for work-related reasons. The men appealed the denial of benefits and were initially successful, since the state courts applied the Sherbert test and found that the denial of unemployment benefits burdened their religious beliefs. However, the Supreme Court ruled in a 6–3 decision that the "compelling governmental interest" standard should not apply; instead, so long as the law was not designed to target a person's religious beliefs in particular, it was not up to the courts to decide that those beliefs were more important than the law in question.

On the surface, a case involving the Native American Church seems unlikely to arouse much controversy. But because it replaced the Sherbert test with one that allowed more government regulation of religious practices, followers of other religious traditions grew concerned that state and local laws, even ones neutral on their face, might be used to curtail their religious practices. In 1993, in response to this decision, Congress passed a law known as the Religious Freedom Restoration Act (RFRA), which was followed

in 2000 by the Religious Land Use and Institutionalized Persons Act after part of the RFRA was struck down by the Supreme Court. In addition, since 1990, twenty-one states have passed state RFRAs that include the Sherbert test in state law, and state court decisions in eleven states have enshrined the Sherbert test's compelling governmental interest interpretation of the free exercise clause into state law.

Juliet Eilperin, "31 states have heightened religious freedom protections," Washington Post, 1 March 2014. http://www.washingtonpost.com/blogs/the-fix/wp/2014/03/01/where-in-the-u-s-are-there-heightened-protections-for-religious-freedom/. Three more states passed state RFRAs in the past year.

However, the RFRA itself has not been without its critics. While it has been relatively uncontroversial as applied to the rights of individuals, debate has emerged about whether businesses and other groups can be said to have religious liberty. In explicitly religious organizations, such as a fundamentalist congregation (fundamentalists adhere very strictly to biblical absolutes) or the Roman Catholic Church, it is fairly obvious members have a meaningful, shared religious belief. But the application of the RFRA has become more problematic in businesses and non-profit organizations whose owners or organizers may share a religious belief while the organization has some secular, non-religious purpose.

Such a conflict emerged in the 2014 Supreme Court case known as *Burwell v. Hobby Lobby*.

Burwell v. Hobby Lobby Stores, Inc., 573 U.S. __ (2014).

The Hobby Lobby chain of stores sells arts and crafts merchandise at hundreds of stores; its founder, David Green, is a devout fundamentalist Christian whose beliefs include opposition to abortion and contraception. Consistent with these beliefs, he used his business to object to a provision of the Patient Protection and Affordable Care Act (ACA or Obamacare) requiring employer-backed insurance plans to include no-charge access to the morning-after pill, a form of emergency contraception, arguing that this requirement infringed on his conscience. Based in part on the federal RFRA, the Supreme Court agreed 5–4 with Green and Hobby Lobby's position and said that Hobby Lobby and other closely held businesses did not have to provide employees free access to emergency contraception or other birth control if doing so would violate the religious beliefs of the business' owners, because there were other less restrictive ways the government could ensure access to these services for Hobby Lobby's employees (e.g., paying for them directly).

In 2015, state RFRAs became controversial when individuals and businesses that provided wedding services (e.g., catering and photography) were compelled to provide these for same-sex weddings in states where the practice had been newly legalized (Figure). Proponents of state RFRA laws argued that people and businesses ought not be compelled to endorse practices their religious beliefs held to be immoral or indecent and feared clergy might be compelled to officiate same-sex marriages against their religion's teachings. Opponents of RFRA laws argued that individuals and businesses should be required, per *Obergefell v. Hodges*, to serve same-sex marriages on an equal basis as a matter of ensuring the civil rights of gays and lesbians, just as they would be obliged to cater or photograph an interracial marriage.

Obergefell v. Hodges, 576 U.S. ___ (2015).



One of the most recent notorious cases related to the free exercise clause involved an Oregon bakery whose owners refused to bake a wedding cake for a lesbian couple in January 2013, citing the owners' religious beliefs. The couple was eventually awarded $135,000 in damages as a result of the ongoing dispute. (credit: modification of work by Bev Sykes)

Despite ongoing controversy, however, the courts have consistently found some public interests sufficiently compelling to override the free exercise clause. For example, since the late nineteenth century, the courts have consistently held that people's religious beliefs do not exempt them from the general laws against polygamy. Other potential acts in the name of religion that are also out of the question are drug use and human sacrifice.

Freedom of Expression

Although the remainder of the First Amendment protects four distinct rights—free speech, press, assembly, and petition—we generally think of these rights today as encompassing a right to freedom of expression, particularly since the world's technological evolution has blurred the lines between oral and written communication (i.e., speech and press) in the centuries since the First Amendment was written and adopted.

Controversies over freedom of expression were rare until the 1900s, even though government censorship was quite common. For example, during the Civil War, the Union post office refused to deliver newspapers that opposed the war or sympathized with the Confederacy, while allowing pro-war newspapers to be mailed. The emergence of photography and movies, in particular, led to new public concerns about morality, causing both state and federal politicians to censor lewd and otherwise improper content. At the same time, writers became more ambitious in their subject matter by including explicit references to sex and using obscene language, leading to government censorship of books and magazines.

Censorship reached its height during World War I. The United States was swept up in two waves of hysteria. Anti-German feeling was provoked by the actions of Germany and its allies leading up to the war, including the sinking of the RMS *Lusitania* and the Zimmerman Telegram, an effort by the Germans to conclude an alliance with Mexico against the United States. This concern was compounded in 1917 by the Bolshevik revolution against the more moderate interim government of Russia; the leaders of the Bolsheviks, most notably Vladimir Lenin, Leon Trotsky, and Joseph Stalin, withdrew from the war against Germany and called for communist revolutionaries to overthrow the capitalist, democratic governments in western Europe and North America.

Americans who vocally supported the communist cause or opposed the war often found themselves in jail. In *Schenck v. United States*, the Supreme Court ruled that people encouraging young men to dodge the draft could be imprisoned for doing so, arguing that recommending that people disobey the law was tantamount to "falsely shouting fire in a theatre and causing a panic" and thus presented a "clear and present danger" to public order.

Schenck v. United States, 249 U.S. 47 (1919).

Similarly, communists and other revolutionary anarchists and socialists during the Red Scare after the war were prosecuted under various state and federal laws for supporting the forceful or violent overthrow of government. This general approach to political speech remained in place for the next fifty years.

In the 1960s, however, the Supreme Court's rulings on free expression became more liberal, in response to the Vietnam War and the growing antiwar movement. In a 1969 case involving the Ku Klux Klan, *Brandenburg v. Ohio*, the Supreme Court found that only speech or writing that constituted a direct call or plan to imminent lawless action, an illegal act in the immediate future, could be suppressed; the mere advocacy of a hypothetical revolution was not enough.

Brandenburg v. Ohio, 395 U.S. 444 (1969).

The Supreme Court also found that various forms of symbolic speech—wearing clothing like an armband that carried a political symbol or raising a fist in the air, for example—were subject to the same protections as written and spoken communication.

BURNING THE U.S. FLAG

Perhaps no act of symbolic speech has been as controversial in U.S. history as the burning of the flag (Figure). Citizens tend to revere the flag as a unifying symbol of the country in much the same way most people in Britain would treat the reigning queen (or king). States and the federal government have long had laws protecting the flag from being desecrated—defaced, damaged, or otherwise treated with disrespect. Perhaps in part because of these laws, people who have wanted to drive home a point in opposition to U.S. government policies have found desecrating the flag a useful way to gain public and press attention to their cause.



On the eve of the 2008 election, a U.S. flag was burned in protest in New Hampshire. (credit: modification of work by Jennifer Parr)

One such person was Gregory Lee Johnson, a member of various pro-communist and antiwar groups. In 1984, as part of a protest near the Republican National Convention in Dallas, Texas, Johnson set fire to a U.S. flag that another protestor had torn from a flagpole. He was arrested, charged with "desecration of a venerated object" (among other offenses), and eventually convicted of that offense. However, in 1989, the Supreme Court decided in Texas v. Johnson that burning the flag was a form of symbolic speech protected by the First Amendment and found the law, as applied to flag desecration, to be unconstitutional.

Texas v. Johnson, 491 U.S. 397 (1989).

This court decision was strongly criticized, and Congress responded by passing a federal law, the Flag Protection Act, intended to overrule it; the act, too, was struck down as unconstitutional in 1990.

United States v. Eichman, 496 U.S. 310 (1990).

Since then, Congress has attempted on several occasions to propose constitutional amendments allowing the states and federal government to re-criminalize flag desecration—to no avail.

Should we amend the Constitution to allow Congress or the states to pass laws protecting the U.S. flag from desecration? Should we protect other symbols as well? Why or why not?

Freedom of the press is an important component of the right to free expression as well. In *Near v. Minnesota*, an early case regarding press freedoms, the Supreme Court ruled that the government generally could not engage in prior restraint; that is, states and the federal government could not in advance prohibit someone from publishing something without a very compelling reason.

Near v. Minnesota, 283 U.S. 697 (1931).

This standard was reinforced in 1971 in the Pentagon Papers case, in which the Supreme Court found that the government could not prohibit the *New York Times* and *Washington Post* newspapers from publishing the Pentagon Papers.

New York Times Co. v. United States, 403 U.S. 713 (1971).

These papers included materials from a secret history of the Vietnam War that had been compiled by the military. More specifically, the papers were compiled at the request of Secretary of Defense Robert McNamara and provided a study of U.S. political and military involvement in Vietnam from 1945 to 1967. Daniel Ellsberg famously released passages of the Papers to the press to show that the United States had secretly enlarged the scope of the war by bombing Cambodia and Laos among other deeds while lying to the American public about doing so.

Although people who leak secret information to the media can still be prosecuted and punished, this does not generally extend to reporters and news outlets that pass that information on to the public. The Edward Snowden case is another good case in point. Snowden himself, rather than those involved in promoting the information that he shared, is the object of criminal prosecution.

Furthermore, the courts have recognized that government officials and other public figures might try to silence press criticism and avoid unfavorable news coverage by threatening a lawsuit for defamation of character. In the 1964 *New York Times v. Sullivan*case, the Supreme Court decided that public figures needed to demonstrate not only that a negative press statement about them was untrue but also that the statement was published or made with either malicious intent or "reckless disregard" for the truth.

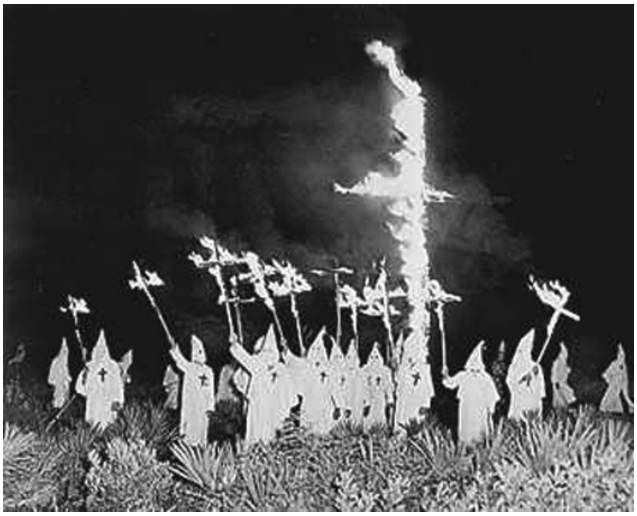
New York Times v. Sullivan, 376 U.S. 254 (1964).

This ruling made it much harder for politicians to silence potential critics or to bankrupt their political opponents through the courts.

The right to freedom of expression is not absolute; several key restrictions limit our ability to speak or publish opinions under certain circumstances. We have seen that the Constitution protects most forms of offensive and unpopular expression, particularly political speech; however, *incitement* of a criminal act, "fighting words," and genuine threats are not protected. So, for example, you can't point at someone in front of an angry crowd and shout, "Let's beat up that guy!" And the Supreme Court has allowed laws that ban threatening symbolic speech, such as burning a cross on the lawn of an African American family's home (Figure).

See, for example, Virginia v. Black, 538 U.S. 343 (2003).

Finally, as we've just seen, defamation of character—whether in written form (libel) or spoken form (slander)—is not protected by the First Amendment, so people who are subject to false accusations can sue to recover damages, although criminal prosecutions of libel and slander are uncommon.



The Supreme Court has allowed laws that ban threatening symbolic speech, such as burning crosses on the lawns of African American families, an intimidation tactic used by the Ku Klux Klan, pictured here at a meeting in Gainesville, Florida, on December 31, 1922.

Another key exception to the right to freedom of expression is obscenity, acts or statements that are extremely offensive under current societal standards. Defining obscenity has been something of a challenge for the courts; Supreme Court Justice Potter Stewart famously said of obscenity, having watched pornography in the Supreme Court building, "I know it when I see it." Into the early twentieth century, written work was frequently banned as being obscene, including works by noted authors such as James Joyce and Henry Miller, although today it is rare for the courts to uphold obscenity charges for written material alone. In 1973, the Supreme Court established the Miller test for deciding whether something is obscene: "(a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

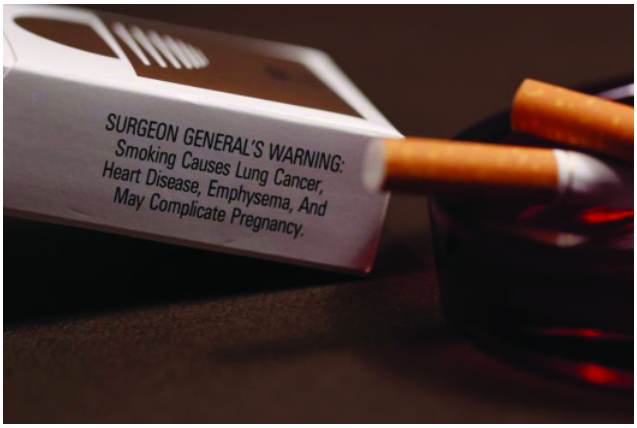
Miller v. California, 413 U.S. 15 (1973).

However, the application of this standard has at times been problematic. In particular, the concept of "contemporary community standards" raises the possibility that obscenity varies from place to place; many people in New York or San Francisco might not bat an eye at something people in Memphis or Salt Lake City would consider offensive. The one form of obscenity that has been banned almost without challenge is child pornography, although even in this area the courts have found exceptions.

The courts have allowed censorship of less-than-obscene content when it is broadcast over the airwaves, particularly when it is available for anyone to receive. In general, these restrictions on indecency—a quality of acts or statements that offend societal norms or may be harmful to minors—apply only to radio and television programming broadcast when children might be in the audience, although most cable and satellite channels follow similar standards for commercial reasons. An infamous case of televised indecency occurred during the halftime show of the 2004 Super Bowl, during a performance by singer Janet Jackson in which a part of her clothing was removed by fellow performer Justin Timberlake, revealing her right breast. The network responsible for the broadcast, CBS, was ultimately presented with a fine of $550,000 by the Federal Communications Commission, the government agency that regulates television broadcasting. However, CBS was not ultimately required to pay.

On the other hand, in 1997, the NBC network showed a broadcast of *Schindler's List*, a film depicting events during the Holocaust in Nazi Germany, without any editing, so it included graphic nudity and depictions of violence. NBC was not fined or otherwise punished, suggesting there is no uniform standard for indecency. Similarly, in the 1990s Congress compelled television broadcasters to implement a television ratings system, enforced by a "V-Chip" in televisions and cable boxes, so parents could better control the television programming their children might watch. However, similar efforts to regulate indecent content on the Internet to protect children from pornography have largely been struck down as unconstitutional. This outcome suggests that technology has created new avenues for obscene material to be disseminated. The Children's Internet Protection Act, however, requires K–12 schools and public libraries receiving Internet access using special E-rate discounts to filter or block access to obscene material and other material deemed harmful to minors, with certain exceptions.

The courts have also allowed laws that forbid or compel certain forms of expression by businesses, such as laws that require the disclosure of nutritional information on food and beverage containers and warning labels on tobacco products (Figure). The federal government requires the prices advertised for airline tickets to include all taxes and fees. Many states regulate advertising by lawyers. And, in general, false or misleading statements made in connection with a commercial transaction can be illegal if they constitute fraud.



The surgeon general's warning label on a box of cigarettes is mandated by the Food and Drug Administration. The United States was the first nation to require a health warning on cigarette packages. (credit: Debora Cartagena, Centers for Disease Control and Prevention)

Furthermore, the courts have ruled that, although public school officials are government actors, the First Amendment freedom of expression rights of children attending public schools are somewhat limited. In particular, in *Tinker v. Des Moines* (1969) and *Hazelwood v. Kuhlmeier* (1988), the Supreme Court has upheld restrictions on speech that creates "substantial interference with school discipline or the rights of others"

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

or is "reasonably related to legitimate pedagogical concerns."

Hazelwood School District et al. v. Kuhlmeier et al., 484 U.S. 260 (1988).

For example, the content of school-sponsored activities like school newspapers and speeches delivered by students can be controlled, either for the purposes of instructing students in proper adult behavior or to deter conflict between students.

Free expression includes the right to assemble peaceably and the right to petition government officials. This right even extends to members of groups whose views most people find abhorrent, such as American Nazis and the vehemently anti-gay Westboro

Baptist Church, whose members have become known for their protests at the funerals of U.S. soldiers who have died fighting in the war on terror (Figure).

National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977); Snyder v. Phelps, 562 U.S. 443 (2011).

Free expression—although a broad right—is subject to certain constraints to balance it against the interests of public order. In particular, the nature, place, and timing of protests—but not their substantive content—are subject to reasonable limits. The courts have ruled that while people may peaceably assemble in a place that is a public forum, not all public property is a public forum. For example, the inside of a government office building or a college classroom—particularly while someone is teaching—is not generally considered a public forum.



Protesters from Westboro Baptist Church picket outside the U.S. Supreme Court in July 2014 prior to the decision ruling that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional. (credit: Jordan Uhl)

Rallies and protests on land that has other dedicated uses, such as roads and highways, can be limited to groups that have secured a permit in advance, and those organizing large gatherings may be required to give sufficient notice so government authorities can ensure there is enough security available. However, any such regulation must be viewpoint-neutral; the government may not treat one group differently than another because of its opinions or beliefs. For example, the government can't permit a rally by a group that favors a government policy but forbid opponents from staging a similar rally. Finally, there have been controversial situations in which government agencies have established free-speech zones for protesters during political conventions, presidential visits, and international meetings in areas that are arguably selected to minimize their public audience or to ensure that the subjects of the protests do not have to encounter the protesters.

Since 2011, as part of the White House website, the Obama administration has included a dedicated system, "We the People: Your Voice in our Government," for people to make petitions that will be reviewed by administration officials.

THE SECOND AMENDMENT

There has been increased conflict over the Second Amendment in recent years due to school shootings and gun violence. As a result, gun rights have become a highly charged political issue. The text of the Second Amendment is among the shortest of those included in the Constitution:

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

But the relative simplicity of its text has not kept it from controversy; arguably, the Second Amendment has become controversial in large part because of its text. Is this amendment merely a protection of the right of the states to organize and arm a "well regulated militia" for civil defense, or is it a protection of a "right of the people" as a whole to individually bear arms?

Before the Civil War, this would have been a nearly meaningless distinction. In most states at that time, white males of military age were considered part of the militia, liable to be called for service to put down rebellions or invasions, and the right "to keep and

bear Arms" was considered a common-law right inherited from English law that predated the federal and state constitutions. The Constitution was not seen as a limitation on state power, and since the states expected all able-bodied free men to keep arms as a matter of course, what gun control there was mostly revolved around ensuring slaves (and their abolitionist allies) didn't have guns.

With the beginning of selective incorporation after the Civil War, debates over the Second Amendment were reinvigorated. In the meantime, as part of their black codes designed to reintroduce most of the trappings of slavery, several southern states adopted laws that restricted the carrying and ownership of weapons by former slaves. Despite acknowledging a common-law individual right to keep and bear arms, in 1876 the Supreme Court declined, in *United States v. Cruickshank*, to intervene to ensure the states would respect it.

United States v. Cruickshank, 92 U.S. 542 (1876).

In the following decades, states gradually began to introduce laws to regulate gun ownership. Federal gun control laws began to be introduced in the 1930s in response to organized crime, with stricter laws that regulated most commerce and trade in guns coming into force in the wake of the street protests of the 1960s. In the early 1980s, following an assassination attempt on President Ronald Reagan, laws requiring background checks for prospective gun buyers were passed. During this period, the Supreme Court's decisions regarding the meaning of the Second Amendment were ambiguous at best. In *United States v. Miller*, the Supreme Court upheld the 1934 National Firearms Act's prohibition of sawed-off shotguns, largely on the basis that possession of such a gun was not related to the goal of promoting a "well regulated militia."

United States v. Miller, 307 U.S. 174 (1939).

This finding was generally interpreted as meaning that the Second Amendment protected the right of the states to organize a militia, rather than an individual right, and thus lower courts generally found most firearm regulations—including some city and state laws that virtually outlawed the private ownership of firearms—to be constitutional.

However, in 2008, in a narrow 5–4 decision on *District of Columbia v. Heller*, the Supreme Court found that at least some gun control laws *did* violate the Second Amendment and that this amendment does protect an individual's right to keep and bear arms, at least in some circumstances—in particular, "for traditionally lawful purposes, such as self-defense within the home."

District of Columbia et al. v. Heller, 554 US 570 (2008), p. 3.

Because the District of Columbia is not a state, this decision immediately applied the right only to the federal government and territorial governments. Two years later, in *McDonald v. Chicago*, the Supreme Court overturned the *Cruickshank* decision (5–4) and again found that the right to bear arms was a fundamental right incorporated against the states, meaning that state regulation of firearms might, in some circumstances, be unconstitutional. In 2015, however, the Supreme Court allowed several of San Francisco's strict gun control laws to remain in place, suggesting that—as in the case of rights protected by the First Amendment—the courts will not treat gun rights as absolute (Figure).

Richard Gonzales, "Supreme Court Rejects NRA Challenge to San Francisco Gun Rules," National Public Radio, 8 June 2015. http://www.npr.org/sections/thetwo-w...-s-f-gun-rules (March 4, 2016).



A “No Firearms” sign is posted at Binghamton Park in Memphis, Tennessee, demonstrating that the right to possess a gun is not absolute. (credit: modification of work by Thomas R Machnitzki)

THE THIRD AMENDMENT

The Third Amendment says in full:

“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”

Most people consider this provision of the Constitution obsolete and unimportant. However, it is worthwhile to note its relevance in the context of the time: citizens remembered having their cities and towns occupied by British soldiers and mercenaries during the Revolutionary War, and they viewed the British laws that required the colonists to house soldiers particularly offensive, to the point that it had been among the grievances listed in the Declaration of Independence.

Today it seems unlikely the federal government would need to house military forces in civilian lodgings against the will of property owners or tenants; however, perhaps in the same way we consider the Second and Fourth amendments, we can think of the Third Amendment as reflecting a broader idea that our homes lie within a “zone of privacy” that government officials should not violate unless absolutely necessary.

THE FOURTH AMENDMENT

The Fourth Amendment sits at the boundary between general individual freedoms and the rights of those suspected of crimes. We saw earlier that perhaps it reflects James Madison’s broader concern about establishing an expectation of privacy from government intrusion at home. Another way to think of the Fourth Amendment is that it protects us from overzealous efforts by law enforcement to root out crime by ensuring that police have good reason before they intrude on people’s lives with criminal investigations.

The text of the Fourth Amendment is as follows:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

The amendment places limits on both *searches* and *seizures*: Searches are efforts to locate documents and contraband. Seizures are the taking of these items by the government for use as evidence in a criminal prosecution (or, in the case of a person, the detention or taking of the person into custody).

In either case, the amendment indicates that government officials are required to apply for and receive a search warrant prior to a search or seizure; this warrant is a legal document, signed by a judge, allowing police to search and/or seize persons or property. Since the 1960s, however, the Supreme Court has issued a series of rulings limiting the warrant requirement in situations where a

person can be said to lack a “reasonable expectation of privacy” outside the home. Police can also search and/or seize people or property without a warrant if the owner or renter consents to the search, if there is a reasonable expectation that evidence may be destroyed or tampered with before a warrant can be issued (i.e., exigent circumstances), or if the items in question are in plain view of government officials.

Furthermore, the courts have found that police do not generally need a warrant to search the passenger compartment of a car (Figure), or to search people entering the United States from another country.

See, for example, Arizona v. Gant, 556 U.S. 332 (2009).

When a warrant is needed, law enforcement officers do not need enough evidence to secure a conviction, but they must demonstrate to a judge that there is probable cause to believe a crime has been committed or evidence will be found. Probable cause is the legal standard for determining whether a search or seizure is constitutional or a crime has been committed; it is a lower threshold than the standard of proof at a criminal trial.

Critics have argued that this requirement is not very meaningful because law enforcement officers are almost always able to get a search warrant when they request one; on the other hand, since we wouldn’t expect the police to waste their time or a judge’s time trying to get search warrants that are unlikely to be granted, perhaps the high rate at which they get them should not be so surprising.



A state police officer conducting a traffic stop near Walla Walla, Washington. (credit: modification of work by Richard Bauer)

What happens if the police conduct an illegal search or seizure without a warrant and find evidence of a crime? In the 1961 Supreme Court case *Mapp v. Ohio*, the court decided that evidence obtained without a warrant that didn’t fall under one of the exceptions mentioned above could not be used as evidence in a state criminal trial, giving rise to the broad application of what is known as the exclusionary rule, which was first established in 1914 on a federal level in *Weeks v. United States*.

Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

The exclusionary rule doesn’t just apply to evidence found or to items or people seized without a warrant (or falling under an exception noted above); it also applies to any evidence developed or discovered as a result of the illegal search or seizure.

For example, if police search your home without a warrant, find bank statements showing large cash deposits on a regular basis, and discover you are engaged in some other crime in which they were previously unaware (e.g., blackmail, drugs, or prostitution), not only can they not use the bank statements as evidence of criminal activity—they also can’t prosecute you for the crimes they discovered during the illegal search. This extension of the exclusionary rule is sometimes called the “fruit of the poisonous tree,” because just as the metaphorical tree (i.e., the original search or seizure) is poisoned, so is anything that grows out of it.

Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

However, like the requirement for a search warrant, the exclusionary rule does have exceptions. The courts have allowed evidence to be used that was obtained without the necessary legal procedures in circumstances where police executed warrants they believed

were correctly granted but in fact were not (“good faith” exception), and when the evidence would have been found anyway had they followed the law (“inevitable discovery”).

The requirement of probable cause also applies to arrest warrants. A person cannot generally be detained by police or taken into custody without a warrant, although most states allow police to arrest someone suspected of a felony crime without a warrant so long as probable cause exists, and police can arrest people for minor crimes or misdemeanors they have witnessed themselves.

The first four amendments of the Bill of Rights protect citizens’ key freedoms from governmental intrusion. The First Amendment limits the government’s ability to impose certain religious beliefs on the people, or to limit the practice of one’s own religion. The First Amendment also protects freedom of expression by the public, the media, and organized groups via rallies, protests, and the petition of grievances. The Second Amendment today protects an individual’s right to keep and bear arms for personal defense in the home, while the Third Amendment limits the ability of the government to allow the military to occupy civilians’ homes except under extraordinary circumstances. Finally, the Fourth Amendment protects our persons, homes, and property from unreasonable searches and seizures, and it protects the people from unlawful arrests. However, all these provisions are subject to limitations, often to protect the interests of public order, the good of society as a whole, or to balance the rights of some citizens against those of others.

Which of the following provisions is *not* part of the First Amendment?

1. the right to keep and bear arms
2. the right to peaceably assemble
3. the right to free speech
4. the protection of freedom of religion

The Third Amendment can be thought of as _____.

1. reinforcing the right to keep and bear arms guaranteed by the Second Amendment
2. ensuring the right to freedom of the press
3. forming part of a broader conception of privacy in the home that is also protected by the Second and Fourth Amendments
4. strengthening the right to a jury trial in criminal cases

The Fourth Amendment’s requirement for a warrant _____.

1. applies only to searches of the home
2. applies only to the seizure of property as evidence
3. does not protect people who rent or lease property
4. does not apply when there is a serious risk that evidence will be destroyed before a warrant can be issued

Explain the difference between the *establishment clause* and the *free exercise clause*, and explain how these two clauses work together to guarantee religious freedoms.

Explain the difference between the *collective rights* and *individual rights* views of the Second Amendment. Which of these views did the Supreme Court’s decision in *District of Columbia v. Heller* reflect?

Glossary

blue law
a law originally created to uphold a religious or moral standard, such as a prohibition against selling alcohol on Sundays

common-law right
a right of the people rooted in legal tradition and past court rulings, rather than the Constitution

conscientious objector
a person who claims the right to refuse to perform military service on the grounds of freedom of thought, conscience, or religion

establishment clause

the provision of the First Amendment that prohibits the government from endorsing a state-sponsored religion; interpreted as preventing government from favoring some religious beliefs over others or religion over non-religion

exclusionary rule
a requirement, from Supreme Court case *Mapp v. Ohio*, that evidence obtained as a result of an illegal search or seizure cannot be used to try someone for a crime

free exercise clause
the provision of the First Amendment that prohibits the government from regulating religious beliefs and practices

obscenity
acts or statements that are extremely offensive by contemporary standards

prior restraint
a government action that stops someone from doing something before they are able to do it (e.g., forbidding someone to publish a book he or she plans to release)

probable cause
legal standard for determining whether a search or seizure is constitutional or a crime has been committed; a lower threshold than the standard of proof needed at a criminal trial

search warrant
a legal document, signed by a judge, allowing police to search and/or seize persons or property

Sherbert test
a standard for deciding whether a law violates the free exercise clause; a law will be struck down unless there is a "compelling governmental interest" at stake and it accomplishes its goal by the "least restrictive means" possible

symbolic speech
a form of expression that does not use writing or speech but nonetheless communicates an idea (e.g., wearing an article of clothing to show solidarity with a group)

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3.4: The Rights of Suspects

Learning Objectives

By the end of this section, you will be able to:

- Identify the rights of those suspected or accused of criminal activity
- Explain how Supreme Court decisions transformed the rights of the accused
- Explain why the Eighth Amendment is controversial regarding capital punishment

In addition to protecting the personal freedoms of individuals, the Bill of Rights protects those suspected or accused of crimes from various forms of unfair or unjust treatment. The prominence of these protections in the Bill of Rights may seem surprising. Given the colonists' experience of what they believed to be unjust rule by British authorities, however, and the use of the legal system to punish rebels and their sympathizers for political offenses, the impetus to ensure fair, just, and impartial treatment to everyone accused of a crime—no matter how unpopular—is perhaps more understandable. What is more, the revolutionaries, and the eventual framers of the Constitution, wanted to keep the best features of English law as well.

In addition to the protections outlined in the Fourth Amendment, which largely pertain to investigations conducted before someone has been charged with a crime, the next four amendments pertain to those suspected, accused, or convicted of crimes, as well as people engaged in other legal disputes. At every stage of the legal process, the Bill of Rights incorporates protections for these people.

THE FIFTH AMENDMENT

Many of the provisions dealing with the rights of the accused are included in the Fifth Amendment; accordingly, it is one of the longest in the Bill of Rights. The Fifth Amendment states in full:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The first clause requires that serious crimes be prosecuted only after an indictment has been issued by a grand jury. However, several exceptions are permitted as a result of the evolving interpretation and understanding of this amendment by the courts, given the Constitution is a living document. First, the courts have generally found this requirement to apply only to felonies; less serious crimes can be tried without a grand jury proceeding. Second, this provision of the Bill of Rights does *not* apply to the states because it has not been incorporated; many states instead require a judge to hold a preliminary hearing to decide whether there is enough evidence to hold a full trial. Finally, members of the armed forces who are accused of crimes are not entitled to a grand jury proceeding.

The Fifth Amendment also protects individuals against double jeopardy, a process that subjects a suspect to prosecution twice for the same criminal act. No one who has been acquitted (found not guilty) of a crime can be prosecuted again for that crime. But the prohibition against double jeopardy has its own exceptions. The most notable is that it prohibits a second prosecution only at the same level of government (federal or state) as the first; the federal government can try you for violating federal law, even if a state or local court finds you not guilty of the same action. For example, in the early 1990s, several Los Angeles police officers accused of brutally beating motorist Rodney King during his arrest were acquitted of various charges in a state court, but some were later convicted in a federal court of violating King's civil rights.

The double jeopardy rule does not prevent someone from recovering damages in a civil case—a legal dispute between individuals over a contract or compensation for an injury—that results from a criminal act, even if the person accused of that act is found not guilty. One famous case from the 1990s involved former football star and television personality O. J. Simpson. Simpson, although acquitted of the murders of his ex-wife Nicole Brown and her friend Ron Goldman in a criminal court, was later found to be responsible for their deaths in a subsequent civil case and as a result was forced to forfeit most of his wealth to pay damages to their families.

Perhaps the most famous provision of the Fifth Amendment is its protection against self-incrimination, or the right to remain silent. This provision is so well known that we have a phrase for it: "taking the Fifth." People have the right not to give evidence in court

or to law enforcement officers that might constitute an admission of guilt or responsibility for a crime. Moreover, in a criminal trial, if someone does not testify in his or her own defense, the prosecution cannot use that failure to testify as evidence of guilt or imply that an innocent person would testify. This provision became embedded in the public consciousness following the Supreme Court's 1966 ruling in *Miranda v. Arizona*, whereby suspects were required to be informed of their most important rights, including the right against self-incrimination, before being interrogated in police custody.

Miranda v. Arizona, 384 U.S. 436 (1966).

However, contrary to some media depictions of the Miranda warning, law enforcement officials do not necessarily have to inform suspects of their rights before they are questioned in situations where they are free to leave.

Like the Fourteenth Amendment's due process clause, the Fifth Amendment prohibits the federal government from depriving people of their "life, liberty, or property, without due process of law." Recall that due process is a guarantee that people will be treated fairly and impartially by government officials when the government seeks to fine or imprison them or take their personal property away from them. The courts have interpreted this provision to mean that government officials must establish consistent, fair procedures to decide when people's freedoms are limited; in other words, citizens cannot be detained, their freedom limited, or their property taken arbitrarily or on a whim by police or other government officials. As a result, an entire body of procedural safeguards comes into play for the legal prosecution of crimes. However, the Patriot Act, passed into law after the 9/11 terrorist attacks, somewhat altered this notion.

The final provision of the Fifth Amendment has little to do with crime at all. The *takings clause* says that "private property [cannot] be taken for public use, without just compensation." This provision, along with the due process clause's provisions limiting the taking of property, can be viewed as a protection of individuals' economic liberty: their right to obtain, use, and trade tangible and intangible property for their own benefit. For example, you have the right to trade your knowledge, skills, and labor for money through work or the use of your property, or trade money or goods for other things of value, such as clothing, housing, education, or food.

The greatest recent controversy over economic liberty has been sparked by cities' and states' use of the power of eminent domain to take property for redevelopment. Traditionally, the main use of eminent domain was to obtain property for transportation corridors like railroads, highways, canals and reservoirs, and pipelines, which require fairly straight routes to be efficient. Because any single property owner could effectively block a particular route or extract an unfair price for land if it was the last piece needed to assemble a route, there are reasonable arguments for using eminent domain as a last resort in these circumstances, particularly for projects that convey substantial benefits to the public at large.

However, increasingly eminent domain has been used to allow economic development, with beneficiaries ranging from politically connected big businesses such as car manufacturers building new factories to highly profitable sports teams seeking ever-more-luxurious stadiums (Figure). And, while we traditionally think of property owners as relatively well-off people whose rights don't necessarily need protecting since they can fend for themselves in the political system, frequently these cases pit lower- and middle-class homeowners against multinational corporations or multimillionaires with the ear of city and state officials. In a notorious 2005 case, *Kelo v. City of New London*, the Supreme Court sided with municipal officials taking homes in a middle-class neighborhood to obtain land for a large pharmaceutical company's corporate campus.

Kelo et al. v. City of New London et al., 545 U.S. 469 (2005).

The case led to a public backlash against the use of eminent domain and legal changes in many states, making it harder for cities to take property from one private party and give it to another for economic redevelopment purposes.



AT&T Stadium in Arlington, Texas, sits on land taken by eminent domain. (credit: John Purget)

Some disputes over economic liberty have gone beyond the idea of eminent domain. In the past few years, the emergence of on-demand ride-sharing services like Lyft and Uber, direct sales by electric car manufacturer Tesla Motors, and short-term property rentals through companies like Airbnb have led to conflicts between people seeking to offer profitable services online, states and cities trying to regulate these businesses, and the incumbent service providers that compete with these new business models. In the absence of new public policies to clarify rights, the path forward is often determined through norms established in practice, by governments, or by court cases.

THE SIXTH AMENDMENT

Once someone has been charged with a crime and indicted, the next stage in a criminal case is typically the trial itself, unless a plea bargain is reached. The Sixth Amendment contains the provisions that govern criminal trials; in full, it states:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [sic]."

The first of these guarantees is the right to have a speedy, public trial by an impartial jury. Although there is no absolute limit on the length of time that may pass between an indictment and a trial, the Supreme Court has said that excessively lengthy delays must be justified and balanced against the potential harm to the defendant.

See, for example, Barker v. Wingo, 407 U.S. 514 (1972).

In effect, the speedy trial requirement protects people from being detained indefinitely by the government. Yet the courts have ruled that there are exceptions to the public trial requirement; if a public trial would undermine the defendant's right to a fair trial, it can be held behind closed doors, while prosecutors can request closed proceedings only in certain, narrow circumstances (generally, to protect witnesses from retaliation or to guard classified information). In general, a prosecution must also be made in the "state and district" where the crime was committed; however, people accused of crimes may ask for a change of venue for their trial if they believe pre-trial publicity or other factors make it difficult or impossible for them to receive a fair trial where the crime occurred.

Although the Supreme Court's proceedings are not televised and there is no video of the courtroom, audio recordings of the oral arguments and decisions announced in cases have been made since 1955. A complete collection of these recordings can be found at the Oyez Project website along with full information about each case.

Most people accused of crimes decline their right to a jury trial. This choice is typically the result of a plea bargain, an agreement between the defendant and the prosecutor in which the defendant pleads guilty to the charge(s) in question, or perhaps to less serious charges, in exchange for more lenient punishment than he or she might receive if convicted after a full trial. There are a

number of reasons why this might happen. The evidence against the accused may be so overwhelming that conviction is a near-certainty, so he or she might decide that avoiding the more serious penalty (perhaps even the death penalty) is better than taking the small chance of being acquitted after a trial. Someone accused of being part of a larger crime or criminal organization might agree to testify against others in exchange for lighter punishment. At the same time, prosecutors might want to ensure a win in a case that might not hold up in court by securing convictions for offenses they know they can prove, while avoiding a lengthy trial on other charges they might lose.

The requirement that a jury be impartial is a critical requirement of the Sixth Amendment. Both the prosecution and the defense are permitted to reject potential jurors who they believe are unable to fairly decide the case without prejudice. However, the courts have also said that the composition of the jury as a whole may in itself be prejudicial; potential jurors may not be excluded simply because of their race or sex, for example.

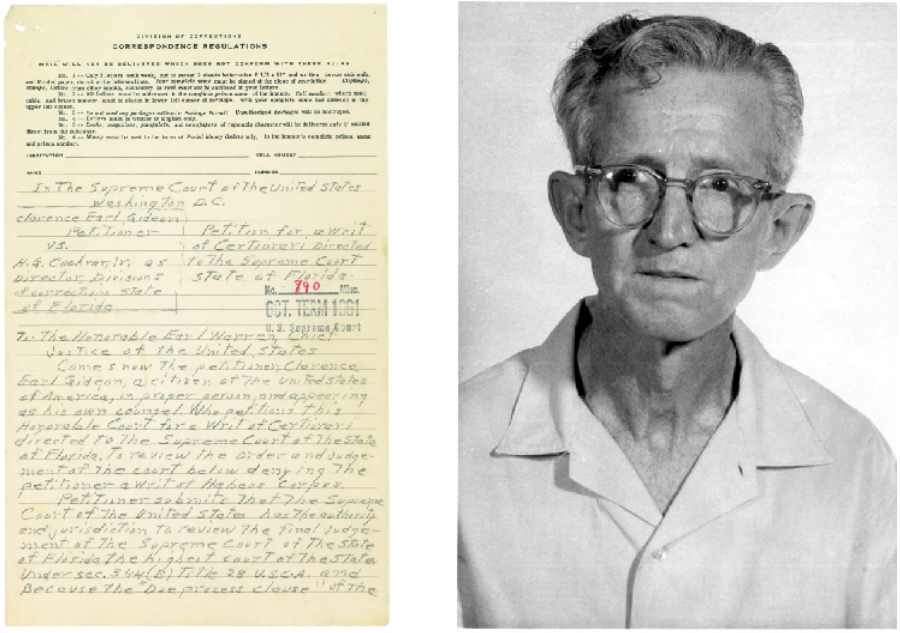
See, for example, Batson v. Kentucky, 476 U.S. 79 (1986); J. E. B. v. Alabama ex rel. T. B., 511 U.S. 127 (1994).

The Sixth Amendment guarantees the right of those accused of crimes to present witnesses in their own defense (if necessary, compelling them to testify) and to confront and cross-examine witnesses presented by the prosecution. In general, the only testimony acceptable in a criminal trial must be given in a courtroom and be subject to cross-examination; hearsay, or testimony by one person about what another person has said, is generally inadmissible, although hearsay may be presented as evidence when it is an admission of guilt by the defendant or a "dying declaration" by a person who has passed away. Although both sides in a trial have the opportunity to examine and cross-examine witnesses, the judge may exclude testimony deemed irrelevant or prejudicial.

Finally, the Sixth Amendment guarantees the right of those accused of crimes to have the assistance of an attorney in their defense. Historically, many states did not provide attorneys to those accused of most crimes who could not afford one themselves; even when an attorney was provided, his or her assistance was often inadequate at best. This situation changed as a result of the Supreme Court's decision in *Gideon v. Wainwright* (1963).

Gideon v. Wainwright, 372 U.S. 335 (1963).

Clarence Gideon, a poor drifter, was accused of breaking into and stealing money and other items from a pool hall in Panama City, Florida. Denied a lawyer, Gideon was tried and convicted and sentenced to a five-year prison term. While in prison—still without assistance of a lawyer—he drafted a handwritten appeal and sent it to the Supreme Court, which agreed to hear his case (Figure). The justices unanimously ruled that Gideon, and anyone else accused of a serious crime, was entitled to the assistance of a lawyer, even if they could not afford one, as part of the general due process right to a fair trial.



(a) (b)

The handwritten petition for appeal (a) sent to the Supreme Court by Clarence Gideon, shown here circa 1961 (b), the year of his Florida arrest for breaking and entering.

The Supreme Court later extended the *Gideon v. Wainwright* ruling to apply to any case in which an accused person faced the possibility of "loss of liberty," even for one day. The courts have also overturned convictions in which people had incompetent or ineffective lawyers through no fault of their own. The *Gideon* ruling has led to an increased need for professional public defenders, lawyers who are paid by the government to represent those who cannot afford an attorney themselves, although some states instead require practicing lawyers to represent poor defendants on a pro bono basis (essentially, donating their time and energy to the case).

The National Association for Public Defense represents public defenders, lobbying for better funding for public defense and improvements in the justice system in general.

CRIMINAL JUSTICE: THEORY MEETS PRACTICE

Typically a person charged with a serious crime will have a brief hearing before a judge to be informed of the charges against him or her, to be made aware of the right to counsel, and to enter a plea. Other hearings may be held to decide on the admissibility of evidence seized or otherwise obtained by prosecutors.

If the two sides cannot agree on a plea bargain during this period, the next stage is the selection of a jury. A pool of potential jurors is summoned to the court and screened for impartiality, with the goal of seating twelve (in most states) and one or two alternates. All hear the evidence in the trial; unless an alternate must serve, the original twelve decide whether the evidence overwhelmingly points toward guilt or innocence beyond a reasonable doubt.

In the trial itself, the lawyers for the prosecution and defense make opening arguments, followed by testimony by witnesses for the prosecution (and any cross-examination), and then testimony by witnesses for the defense, including the defendant if he or she chooses. Additional prosecution witnesses may be called to rebut testimony by the defense. Finally, both sides make closing arguments. The judge then issues instructions to the jury, including an admonition not to discuss the case with anyone outside the jury room. The jury members leave the courtroom to enter the jury room and begin their deliberations (Figure).



A typical courtroom in the United States. The jury sits along one side, between the judge/witness stand and the tables for the defense and prosecution.

The jurors pick a foreman or forewoman to coordinate their deliberations. They may ask to review evidence or to hear transcripts of testimony. They deliberate in secret and their decision must be unanimous; if they are unable to agree on a verdict after extensive deliberation, a mistrial may be declared, which in effect requires the prosecution to try the case all over again.

A defendant found not guilty of all charges will be immediately released unless other charges are pending (e.g., the defendant is wanted for a crime in another jurisdiction). If the defendant is found guilty of one or more offenses, the judge will choose an appropriate sentence based on the law and the circumstances; in the federal system, this sentence will typically be based on guidelines that assign point values to various offenses and facts in the case. If the prosecution is pursuing the death penalty, the jury will decide whether the defendant should be subject to capital punishment or life imprisonment.

The reality of court procedure is much less dramatic and exciting than what is typically portrayed in television shows and movies. Nonetheless, most Americans will participate in the legal system at least once in their lives as a witness, juror, or defendant.

Have you or any member of your family served on a jury? If so, was the experience a positive one? Did the trial proceed as expected? If you haven't served on a jury, is it something you look forward to? Why or why not?

THE SEVENTH AMENDMENT

The Seventh Amendment deals with the rights of those engaged in civil disputes; as noted earlier, these are disagreements between individuals or businesses in which people are typically seeking compensation for some harm caused. For example, in an automobile accident, the person responsible is compelled to compensate any others (either directly or through his or her insurance company). Much of the work of the legal system consists of efforts to resolve civil disputes. The Seventh Amendment, in full, reads:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Because of this provision, all trials in civil cases must take place before a jury unless both sides waive their right to a jury trial. However, this right is not always incorporated; in many states, civil disputes—particularly those involving small sums of money, which may be heard by a dedicated small claims court—need not be tried in front of a jury and may instead be decided by a judge working alone.

The Seventh Amendment limits the ability of judges to reconsider questions of fact, rather than of law, that were originally decided by a jury. For example, if a jury decides a person was responsible for an action and the case is appealed, the appeals judge cannot decide someone else was responsible. This preserves the traditional common-law distinction that judges are responsible for deciding questions of law while jurors are responsible for determining the facts of a particular case.

THE EIGHTH AMENDMENT

The Eighth Amendment says, in full:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Bail is a payment of money that allows a person accused of a crime to be freed pending trial; if you "make bail" in a case and do not show up for your trial, you will forfeit the money you paid. Since many people cannot afford to pay bail directly, they may instead get a *bail bond*, which allows them to pay a fraction of the money (typically 10 percent) to a person who sells bonds and who pays the full bail amount. (In most states, the bond seller makes money because the defendant does not get back the money for the bond, and most people show up for their trials.) However, people believed likely to flee or who represent a risk to the community while free may be denied bail and held in jail until their trial takes place.

It is rare for bail to be successfully challenged for being excessive. The Supreme Court has defined an excessive fine as one "so grossly excessive as to amount to deprivation of property without due process of law" or "grossly disproportional to the gravity of a defendant's offense."

Waters-Pierce Oil Co. v. Texas, 212 U.S. 86 (1909); United States v. Bajakajian, 524 U.S. 321 (1998).

In practice the courts have rarely struck down fines as excessive either.

The most controversial provision of the Eighth Amendment is the ban on "cruel and unusual punishments." Various torturous forms of execution common in the past—drawing and quartering, burning people alive, and the like—are prohibited by this provision.

See, for example, the discussion in Wilkerson v. Utah, 99 U.S. 130 (1879).

Recent controversies over lethal injections and firing squads to administer the death penalty suggest the topic is still salient. While the Supreme Court has never established a definitive test for what constitutes a cruel and unusual punishment, it has generally allowed most penalties short of death for adults, even when to outside observers the punishment might be reasonably seen as disproportionate or excessive.

Perhaps the most notorious example, Harmelin v. Michigan, 501 U.S. 957 (1991), upheld a life sentence in a case where the defendant was convicted of possessing just over one pound of cocaine (and no other crime).

In recent years the Supreme Court has issued a series of rulings substantially narrowing the application of the death penalty. As a result, defendants who have mental disabilities may not be executed.

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

Also, defendants who were under eighteen when they committed an offense that is otherwise subject to the death penalty may not be executed.

Roper v. Simmons, 543 U.S. 551 (2005).

The court has generally rejected the application of the death penalty to crimes that did not result in the death of another human being, most notably in the case of rape.

Kennedy v. Louisiana, 554 U.S. 407 (2008).

And, while permitting the death penalty to be applied to murder in some cases, the Supreme Court has generally struck down laws that require the application of the death penalty in certain circumstances. Still, the United States is among ten countries with the most executions worldwide (Figure).

Rate of Execution in the 10 Countries with the Most Executions, 2007–2012

Country	Number of annual executions, on average	Number of annual executions, per capita
Iran	277.2	0.000381%
Saudi Arabia	70.5	0.000257%
Iraq	42.7	0.000157%
China	1720–2400	0.000129–0.000180% (estimate)
Libya	6.5	0.000116%
Yemen	25.3	0.000109%
North Korea	17.5	0.000073%
Pakistan	28.5	0.000016%
United States	36.7	0.000012%
Vietnam	9.7	0.000001%

Source: Amnesty International. "Death Penalty Statistics, Country by Country." 2012.

The United States has the ninth highest per capita rate of execution in the world.

At the same time, however, it appears that the public mood may have shifted somewhat against the death penalty, perhaps due in part to an overall decline in violent crime. The reexamination of past cases through DNA evidence has revealed dozens in which people were wrongfully executed.

Elizabeth Lopatto, "How Many Innocent People Are Sentenced To Death?," Forbes, 29 April 2014. http://www.forbes.com/sites/elizabethlopatto/2014/04/29/how-many-innocent-people-are-sentenced-to-death/#6e9ae5175cc1 (March 1, 2016).

For example, Claude Jones was executed for murder based on 1990-era DNA testing of a single hair that was determined at that time to be his; however, with better DNA testing technology, it was later found to be that of the victim.

Dave Mann, "DNA Tests Undermine Evidence in Texas Execution: New Results Show Claude Jones was Put to Death on Flawed Evidence," Texas Observer, 11 November 2010. http://www.texasobserver.org/texas-o...xas-execution/ (March 4, 2016).

Perhaps as a result of this and other cases, seven additional states have abolished capital punishment since 2007. As of 2015, nineteen states and the District of Columbia no longer apply the death penalty in new cases, and several other states do not carry out executions despite sentencing people to death.

See, for example, "States With and Without the Death Penalty," Death Penalty Information Center, http://www.deathpenaltyinfo.org/stat...-death-penalty (March 4, 2016).

It remains to be seen whether this gradual trend toward the elimination of the death penalty by the states will continue, or whether the Supreme Court will eventually decide to follow former Justice Harry Blackmun's decision to "no longer… tinker with the machinery of death" and abolish it completely.

The rights of those suspected, accused, and convicted of crimes, along with rights in civil cases and economic liberties, are protected by the second major grouping of amendments within the Bill of Rights. The Fifth Amendment secures various procedural safeguards, protects suspects' right to remain silent, forbids trying someone twice at the same level of government for the same criminal act, and limits the taking of property for public uses. The Sixth Amendment ensures fairness in criminal trials, including through a fair and speedy trial by an impartial jury, the right to assistance of counsel, and the right to examine and compel testimony from witnesses. The Seventh Amendment ensures the right to jury trials in most civil cases (but only at the federal level). Finally, the Eighth Amendment prohibits excessive fines and bails, as well as "cruel and unusual punishments," although the scope of what is cruel and unusual is subject to debate.

The Supreme Court case known as *Kelo v. City of New London* was controversial because it _____.

1. allowed greater use of the power of eminent domain
2. regulated popular ride-sharing services like Lyft and Uber
3. limited the application of the death penalty
4. made it harder for police to use evidence obtained without a warrant

Which of the following rights is not protected by the Sixth Amendment?

1. the right to trial by an impartial jury
2. the right to cross-examine witnesses in a trial
3. the right to remain silent
4. the right to a speedy trial

The double jeopardy rule in the Bill of Rights forbids which of the following?

1. prosecuting someone in a state court for a criminal act he or she had been acquitted of in federal court
2. prosecuting someone in federal court for a criminal act he or she had been acquitted of in a state court
3. suing someone for damages for an act the person was found not guilty of
4. none of these options

The Supreme Court has decided that the death penalty _____.

1. is always cruel and unusual punishment
2. is never cruel and unusual punishment
3. may be applied only to acts of terrorism
4. may not be applied to those who were under 18 when they committed a crime

Explain why someone accused of a crime might negotiate a plea bargain rather than exercising the right to a trial by jury.

Explain the difference between a criminal case and a civil case.

Glossary

double jeopardy
a prosecution pursued twice at the same level of government for the same criminal action

economic liberty
the right of individuals to obtain, use, and trade things of value for their own benefit

eminent domain
the power of government to take or use property for a public purpose after compensating its owner; also known as the takings clause of the Fifth Amendment

Miranda warning
a statement by law enforcement officers informing a person arrested or subject to interrogation of his or her rights

plea bargain
an agreement between the defendant and the prosecutor in which the defendant pleads guilty to the charge(s) in question or perhaps to less serious charges, in exchange for more lenient punishment than if convicted after a full trial

self-incrimination
an action or statement that admits guilt or responsibility for a crime

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3.5: 5.5- Interpreting the Bill of Rights

Learning Objectives

By the end of this section, you will be able to:

- Describe how the Ninth and Tenth Amendments reflect on our other rights
- Identify the two senses of "right to privacy" embodied in the Constitution
- Explain the controversy over privacy when applied to abortion and same-sex relationships

As this chapter has suggested, the provisions of the Bill of Rights have been interpreted and reinterpreted repeatedly over the past two centuries. However, the first eight amendments are largely silent on the status of traditional common law, which was the legal basis for many of the natural rights claimed by the framers in the Declaration of Independence. These amendments largely reflect the worldview of the time in which they were written; new technology and an evolving society and economy have presented us with novel situations that do not fit neatly into the framework established in the late eighteenth century.

In this section, we consider the final two amendments of the Bill of Rights and the way they affect our understanding of the Constitution as a whole. Rather than protecting specific rights and liberties, the Ninth and Tenth Amendments indicate how the Constitution and the Bill of Rights should be interpreted, and they lay out the residual powers of the state governments. We will also examine privacy rights, an area the Bill of Rights does not address directly; instead, the emergence of defined privacy rights demonstrates how the Ninth and Tenth Amendments have been applied to expand the scope of rights protected by the Constitution.

THE NINTH AMENDMENT

We saw above that James Madison and the other framers were aware they might endanger some rights if they listed a few in the Constitution and omitted others. To ensure that those interpreting the Constitution would recognize that the listing of freedoms and rights in the Bill of Rights was not exhaustive, the Ninth Amendment states:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

These rights "retained by the people" include the common-law and natural rights inherited from the laws, traditions, and past court decisions of England. To this day, we regularly exercise and take for granted rights that aren't written down in the federal constitution, like the right to marry, the right to seek opportunities for employment and education, and the right to have children and raise a family. Supreme Court justices over the years have interpreted the Ninth Amendment in different ways; some have argued that it was intended to extend the rights protected by the Constitution to those natural and common-law rights, while others have argued that it does not prohibit states from changing their constitutions and laws to modify or limit those rights as they see fit.

Critics of a broad interpretation of the Ninth Amendment point out that the Constitution provides ways to protect newly formalized rights through the amendment process. For example, in the nineteenth and twentieth centuries, the right to vote was gradually expanded by a series of constitutional amendments (the Fifteenth and Nineteenth), even though at times this expansion was the subject of great public controversy. However, supporters of a broad interpretation of the Ninth Amendment point out that the rights of the people—particularly people belonging to political or demographic minorities—should not be subject to the whims of popular majorities. One right the courts have said may be at least partially based on the Ninth Amendment is a general right to privacy, discussed later in the chapter.

THE TENTH AMENDMENT

The Tenth Amendment is as follows:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Unlike the other provisions of the Bill of Rights, this amendment focuses on *power* rather than rights. The courts have generally read the Tenth Amendment as merely stating, as Chief Justice Harlan Stone put it, a "truism that all is retained which has not been surrendered."

United States v. Darby Lumber, 312 U.S. 100 (1941).

In other words, rather than limiting the power of the federal government in any meaningful way, it simply restates what is made obvious elsewhere in the Constitution: the federal government has both enumerated and implied powers, but where the federal

government does not (or chooses not to) exercise power, the states may do so.

At times, politicians and state governments have argued that the Tenth Amendment means states can engage in *interposition* or *nullification* by blocking federal government laws and actions they deem to exceed the constitutional powers of the national government. But the courts have rarely been sympathetic to these arguments, except when the federal government appears to be directly requiring state and local officials to do something. For example, in 1997 the Supreme Court struck down part of a federal law that required state and local law enforcement to participate in conducting background checks for prospective gun purchasers, while in 2012 the court ruled that the government could not compel states to participate in expanding the joint state-federal Medicaid program by taking away all their existing Medicaid funding if they refused to do so.

Printz v. United States, 521 U.S. 898 (1997); National Federation of Independent Business v. Sebelius, 567 U.S. __ (2012).

However, the Tenth Amendment also allows states to guarantee rights and liberties more fully or extensively than the federal government does, or to include additional rights. For example, many state constitutions guarantee the right to a free public education, several states give victims of crimes certain rights, and eighteen states include the right to hunt game and/or fish.

See Douglas Shinkle, "State Constitutional Right to Hunt and Fish." National Conference of State Legislatures, November 9, 2015. http://www.ncsl.org/research/environment-and-natural-resources/state-constitutional-right-to-hunt-and-fish.aspx (March 4, 2016).

A number of state constitutions explicitly guarantee equal rights for men and women. Some permitted women to vote before that right was expanded to all women with the Nineteenth Amendment in 1920, and people aged 18–20 could vote in a few states before the Twenty-Sixth Amendment came into force in 1971. As we will see below, several states also explicitly recognize a right to privacy. State courts at times have interpreted state constitutional provisions to include broader protections for basic liberties than their federal counterparts. For example, although in general people do not have the right to free speech and assembly on private property owned by others without their permission, California's constitutional protection of freedom of expression was extended to portions of some privately owned shopping centers by the state's supreme court (Figure).

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).



This sign outside a California branch of the Trader Joe's supermarket chain is one of many anti-solicitation signs that sprang up in the wake of a court case involving the Pruneyard Shopping Center, which resulted in the protection of free expression in some privately owned shopping centers. (credit: modification of work by "IvyMike"/Flickr)

These state protections do not extend the other way, however. If the federal government passes a law or adopts a constitutional amendment that restricts rights or liberties, or a Supreme Court decision interprets the Constitution in a way that narrows these rights, the state's protection no longer applies. For example, if Congress decided to outlaw hunting and fishing and the Supreme Court decided this law was a valid exercise of federal power, the state constitutional provisions that protect the right to hunt and fish would effectively be meaningless. More concretely, federal laws that control weapons and drugs override state laws and

constitutional provisions that otherwise permit them. While federal marijuana policies are not strictly enforced, state-level marijuana policies in Colorado and Washington provide a prominent exception to that clarity.

STUDENT-LED CONSTITUTIONAL CHANGE

Although the United States has not had a national constitutional convention since 1787, the states have generally been much more willing to revise their constitutions. In 1998, two politicians in Texas decided to do something a little bit different: they enlisted the help of college students at Angelo State University to draft a completely new constitution for the state of Texas, which was then formally proposed to the state legislature.

The Texas Politics Project, "Trying to Rewrite the Texas Constitution," https://texaspolitics.utexas.edu/archive/html/cons/features/0602_01/slide1.html (March 1, 2016).

Although the proposal failed, it was certainly a valuable learning experience for the students who took part.

Each state has a different process for changing its constitution. In some, like California and Mississippi, voters can propose amendments to their state constitution directly, bypassing the state legislature. In others, such as Tennessee and Texas, the state legislature controls the process of initiation. The process can affect the sorts of amendments likely to be considered; it shouldn't be surprising, for example, that amendments limiting the number of terms legislators can serve in office have been much more common in states where the legislators themselves have no say in whether such provisions are adopted.

What rights or liberties do you think ought to be protected by your state constitution that aren't already? Or would you get rid of some of these protections instead? Find a copy of your current state constitution, read through it, and decide. Then find out what steps would be needed to amend your state's constitution to make the changes you would like to see.

THE RIGHT TO PRIVACY

Although the term *privacy* does not appear in the Constitution or Bill of Rights, scholars have interpreted several Bill of Rights provisions as an indication that James Madison and Congress sought to protect a common-law right to privacy as it would have been understood in the late eighteenth century: a right to be free of government intrusion into our personal life, particularly within the bounds of the home. For example, we could perhaps see the Second Amendment as standing for the common-law right to self-defense in the home; the Third Amendment as a statement that government soldiers should not be housed in anyone's home; the Fourth Amendment as setting a high legal standard for allowing agents of the state to intrude on someone's home; and the due process and takings clauses of the Fifth Amendment as applying an equally high legal standard to the government's taking a home or property (reinforced after the Civil War by the Fourteenth Amendment). Alternatively, we could argue that the Ninth Amendment anticipated the existence of a common-law right to privacy, among other rights, when it acknowledged the existence of basic, natural rights not listed in the Bill of Rights or the body of the Constitution itself.

See Griswold v. Connecticut, 381 U.S. 479 (1965). This discussion parallels the debate among the members of the Supreme Court in the Griswold case.

Lawyers Samuel D. Warren and Louis Brandeis (the latter a future Supreme Court justice) famously developed the concept of privacy rights in a law review article published in 1890.

Samuel Warren and Louis D. Brandeis. 1890. "The Right to Privacy," Harvard Law Review 4, No. 193.

Although several state constitutions do list the right to privacy as a protected right, the explicit recognition by the Supreme Court of a right to privacy in the U.S. Constitution emerged only in the middle of the twentieth century. In 1965, the court spelled out the right to privacy for the first time in *Griswold v. Connecticut*, a case that struck down a state law forbidding even married individuals to use any form of contraception.

Griswold v. Connecticut, 381 U.S. 479 (1965)

Although many subsequent cases before the Supreme Court also dealt with privacy in the course of intimate, sexual conduct, the issue of privacy matters as well in the context of surveillance and monitoring by government and private parties of our activities, movements, and communications. Both these senses of privacy are examined below.

Sexual Privacy

Although the *Griswold* case originally pertained only to married couples, in 1972 it was extended to apply the right to obtain contraception to unmarried people as well.

Eisenstadt v. Baird, 405 U.S. 438 (1972).

Although neither decision was entirely without controversy, the "sexual revolution" taking place at the time may well have contributed to a sense that anti-contraception laws were at the very least dated, if not in violation of people's rights. The contraceptive coverage controversy surrounding the Hobby Lobby case shows that this topic remains relevant.

The Supreme Court's application of the right to privacy doctrine to abortion rights proved far more problematic, legally and politically. In 1972, four states permitted abortions without restrictions, while thirteen allowed abortions "if the pregnant woman's life or physical or mental health were endangered, if the fetus would be born with a severe physical or mental defect, or if the pregnancy had resulted from rape or incest"; abortions were completely illegal in Pennsylvania and heavily restricted in the remaining states.

See Rachel Benson Gold. March 2003. "Lessons from Before Roe: Will Past be Prologue?" The Guttmacher Report on Public Policy 6, No. 1. https://www.guttmacher.org/pubs/tgr/06/1/gr060108.html (March 4, 2016).

On average, several hundred American women a year died as a result of "back alley abortions" in the 1960s.

The legal landscape changed dramatically as a result of the 1973 ruling in *Roe v. Wade*,

Roe v. Wade, 410 U.S. 113 (1973).

in which the Supreme Court decided the right to privacy encompassed a right for women to terminate a pregnancy, at least under certain scenarios. The justices ruled that while the government did have an interest in protecting the "potentiality of human life," nonetheless this had to be balanced against the interests of both women's health and women's right to decide whether to have an abortion. Accordingly, the court established a framework for deciding whether abortions could be regulated based on the fetus's viability (i.e., potential to survive outside the womb) and the stage of pregnancy, with no restrictions permissible during the first three months of pregnancy (i.e., the first trimester), during which abortions were deemed safer for women than childbirth itself.

Starting in the 1980s, Supreme Court justices appointed by Republican presidents began to roll back the *Roe* decision. A key turning point was the court's ruling in *Planned Parenthood v. Casey* in 1992, in which a plurality of the court rejected *Roe*'sframework based on trimesters of pregnancy and replaced it with the undue burden test, which allows restrictions prior to viability that are not "substantial obstacle[s]" (undue burdens) to women seeking an abortion.

Planned Parenthood v. Casey, 505 U.S. 833 (1992).

Thus, the court upheld some state restrictions, including a required waiting period between arranging and having an abortion, parental consent (or, if not possible for some reason such as incest, authorization of a judge) for minors, and the requirement that women be informed of the health consequences of having an abortion. Other restrictions such as a requirement that a married woman notify her spouse prior to an abortion were struck down as an undue burden. Since the *Casey* decision, many states have passed other restrictions on abortions, such as banning certain procedures, requiring women to have and view an ultrasound before having an abortion, and implementing more stringent licensing and inspection requirements for facilities where abortions are performed. Although no majority of Supreme Court justices has ever moved to overrule *Roe*, the restrictions on abortion the Court has upheld in the last few decades have made access to abortions more difficult in many areas of the country, particularly in rural states and communities along the U.S.–Mexico border (Figure). However, in *Whole Woman's Health v. Hellerstedt* (2016), the Court reinforced Roe 5–3 by disallowing two Texas state regulations regarding the delivery of abortion services.

Whole Woman's Health v. Hellerstedt, 579 U.S. ___ (2016).



(a)



(b)

A “March for Life” in Knoxville, Tennessee, on January 20, 2013 (a), marks the anniversary of the *Roe v. Wade* decision. On November 15, 2014, protestors in Chicago demonstrate against a crisis pregnancy center (b), a type of organization that counsels against abortion. (credit a: modification of work by Brian Stansberry; credit b: modification of work by Samuel Henderson)

Beyond the issues of contraception and abortion, the right to privacy has been interpreted to encompass a more general right for adults to have noncommercial, consensual sexual relationships in private. However, this legal development is relatively new; as recently as 1986, the Supreme Court ruled that states could still criminalize sex acts between two people of the same sex.

Bowers v. Hardwick, 478 U.S. 186 (1986).

That decision was overturned in 2003 in *Lawrence v. Texas*, which invalidated state laws that criminalized sodomy.

Lawrence v. Texas, 539 U.S. 558 (2003).

The state and national governments still have leeway to regulate sexual morality to some degree; “anything goes” is not the law of the land, even for actions that are consensual. The Supreme Court has declined to strike down laws in a few states that outlaw the sale of vibrators and other sex toys. Prostitution remains illegal in every state except in certain rural counties in Nevada; both polygamy (marriage to more than one other person) and bestiality (sex with animals) are illegal everywhere. And, as we saw earlier, the states may regulate obscene materials and, in certain situations, material that may be harmful to minors or otherwise indecent; to this end, states and localities have sought to ban or regulate the production, distribution, and sale of pornography.

Privacy of Communications and Property

Another example of heightened concerns about privacy in the modern era is the reality that society is under pervasive surveillance. In the past, monitoring the public was difficult at best. During the Cold War, regimes in the Soviet bloc employed millions of people as domestic spies and informants in an effort to suppress internal dissent through constant monitoring of the general public. Not only was this effort extremely expensive in terms of the human and monetary capital it required, but it also proved remarkably ineffective. Groups like the East German Stasi and the Romanian Securitate were unable to suppress the popular uprisings that undermined communist one-party rule in most of those countries in the late 1980s.

Technology has now made it much easier to track and monitor people. Police cars and roadways are equipped with cameras that can photograph the license plate of every passing car or truck and record it in a database; while allowing police to recover stolen vehicles and catch fleeing suspects, this data can also be used to track the movements of law-abiding citizens. But law enforcement officials don’t even have to go to this much work; millions of car and truck drivers pay tolls electronically without stopping at toll booths thanks to transponders attached to their vehicles, which can be read by scanners well away from any toll road or bridge to monitor traffic flow or any other purpose (Figure). The pervasive use of GPS (Global Positioning System) raises similar issues.



One form of technology that has made it easier to potentially monitor people’s movements is electronic toll collection, such as the E-ZPass system in the Midwest and Northeast, FasTrak in California, and I-Pass in Illinois. (credit: modification of work by Kerry Ceszyk)

Even pedestrians and cyclists are relatively easy to track today. Cameras pointed at sidewalks and roadways can employ facial recognition software to identify people as they walk or bike around a city. Many people carry smartphones that constantly report their location to the nearest cell phone tower and broadcast a beacon signal to nearby wireless hotspots and Bluetooth devices. Police can set up a small device called a Stingray that identifies and tracks all cell phones that attempt to connect to it within a radius of several thousand feet. With the right software, law enforcement and criminals can remotely activate a phone’s microphone and camera, effectively planting a bug in someone’s pocket without the person even knowing it.

These aren't just gimmicks in a bad science fiction movie; businesses and governments have openly admitted they are using these methods. Research shows that even metadata—information about the messages we send and the calls we make and receive, such as time, location, sender, and recipient but excluding their content—can tell governments and businesses a lot about what someone is doing. Even when this information is collected in an anonymous way, it is often still possible to trace it back to specific individuals, since people travel and communicate in largely predictable patterns.

The next frontier of privacy issues may well be the increased use of drones, small preprogrammed or remotely piloted aircraft. Drones can fly virtually undetected and monitor events from overhead. They can peek into backyards surrounded by fences, and using infrared cameras they can monitor activity inside houses and other buildings. The Fourth Amendment was written in an era when finding out what was going on in someone's home meant either going inside or peeking through a window; applying its protections today, when seeing into someone's house can be as easy as looking at a computer screen miles away, is no longer simple.

In the United States, many advocates of civil liberties are concerned that laws such as the USA PATRIOT Act (i.e., Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act), passed weeks after the 9/11 attacks in 2001, have given the federal government too much power by making it easy for officials to seek and obtain search warrants or, in some cases, to bypass warrant requirements altogether. Critics have argued that the Patriot Act has largely been used to prosecute ordinary criminals, in particular drug dealers, rather than terrorists as intended. Most European countries, at least on paper, have opted for laws that protect against such government surveillance, perhaps mindful of past experience with communist and fascist regimes. European countries also tend to have stricter laws limiting the collection, retention, and use of private data by companies, which makes it harder for governments to obtain and use that data. Most recently, the battle between Apple Inc. and the National Security Agency (NSA) over whether Apple should allow the government access to key information that is encrypted has made the discussion of this tradeoff salient once again.



Several groups lobby the government, such as The Electronic Frontier Foundation and The Electronic Privacy Information Center, on issues related to privacy in the information age, particularly on the Internet.

All this is not to say that technological surveillance tools do not have value or are inherently bad. They can be used for many purposes that would benefit society and, perhaps, even enhance our freedoms. Spending less time stuck in traffic because we know there's been an accident—detected automatically because the cell phones that normally whiz by at the speed limit are now crawling along—gives us time to spend on more valuable activities. Capturing criminals and terrorists by recognizing them or their vehicles before they can continue their agendas will protect the life, liberty, and property of the public at large. At the same time, however, the emergence of these technologies means calls for vigilance and limits on what businesses and governments can do with the information they collect and the length of time they may retain it. We might also be concerned about how this technology could be used by more oppressive regimes. If the technological resources that are at the disposal of today's governments had been available to the East Germany Stasi and the Romanian Securitate, would those repressive regimes have fallen? How much privacy and freedom should citizens sacrifice in order to feel safe?

The interrelationship of constitutional amendments continues to be settled through key court cases over time. Because it was not explicitly laid out in the Constitution, privacy rights required clarification through public laws and court precedents. Important cases addressing the right to privacy relate to abortion, sexual behavior, internet activity, and the privacy of personal texts and cell phone calls. The place where we draw the line between privacy and public safety is an ongoing discussion in which the courts are a significant player.

Which of the following rights is not explicitly protected by some state constitutions?

1. the right to hunt
2. the right to privacy
3. the right to polygamous marriage
4. the right to a free public education

The right to privacy has been controversial for all the following reasons *except* _____.

1. it is not explicitly included in the Constitution or Bill of Rights
2. it has been interpreted to protect women's right to have an abortion
3. it has been used to overturn laws that have substantial public support
4. most U.S. citizens today believe the government should be allowed to outlaw birth control

Which of the following rules has the Supreme Court said is an *undue burden* on the right to have an abortion?

1. Women must make more than one visit to an abortion clinic before the procedure can be performed.
2. Minors must gain the consent of a parent or judge before seeking an abortion.
3. Women must notify their spouses before having an abortion.
4. Women must be informed of the health consequences of having an abortion.

A major difference between most European countries and the United States today is _____.

1. most Europeans don't use technologies that can easily be tracked
2. laws in Europe more strictly regulate how government officials can use tracking technology
3. there are more legal restrictions on how the U.S. government uses tracking technology than in Europe
4. companies based in Europe don't have to comply with U.S. privacy laws

Explain the difference between a right listed in the Bill of Rights and a common-law right.

Describe two ways in which new technological developments challenge traditional notions of privacy.

The framers of the Constitution were originally reluctant to include protections of civil liberties and rights in the Constitution. Do you think this would be the case if the Constitution were written today? Why or why not?

Which rights and freedoms for citizens do you think our government does a good job of protecting? Why? Which rights and freedoms could it better protect, and how?

In which areas do you think people's rights and liberties are at risk of government intrusion? Why? Which solutions would you propose?

What are the implications of the Supreme Court decision in *Burwell v. Hobby*?

How does the provision for and the protection of individual rights and freedoms consume government resources of time and money? Since these are in effect the people's resources, do you think they are being well spent? Why or why not?

There is an old saying that it's better for 100 guilty people to go free than for an innocent person to be unjustly punished. Do you agree? Why or why? What do you think is the right balance for our society to strike?

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Glossary

Patriot Act
a law passed by Congress in the wake of the 9/11 attacks that broadened federal powers to monitor electronic communications; the full name is the USA PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act)

right to privacy
the right to be free of government intrusion

undue burden test
a means of deciding whether a law that makes it harder for women to seek abortions is constitutional

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3.6: An Overview of the System

One of the most important advantages to living in a civil society is the security that it provides. In contemporary society, the role of ensuring security is relegated to government. That is, citizens have a reasonable expectation that society, as a collective, will protect us from rogue members. In giving power to government to perform this critical security function, we create the potential for the abuse of that power. In the American system of criminal justice, we see two competing and equally important ideas: We demand both security and freedom from governmental abuse of power. These freedoms are collectively known as **individual rights** or **civil liberties**. These civil rights are woven into the very fabric of our government at both the state and federal level.

In this context, we can view the **criminal justice system** is a collection of rules and people (usually in the form of public agencies) working together to protect the public from harm. These elements are commonly divided into three broad categories: police, courts, and corrections. These three elements have the same basic function: To respond to crime. A **crime** is a violation of some criminal law with no legal justification or excuse. Local, state, and federal governments can make criminal laws. The vast majority of criminal laws are a matter of state **statutes** .

Saying that the criminal justice system has the purpose of "responding to crime" results in a dramatically oversimplified view of how the system works. Every agency within the criminal justice system will agree that it responds to crime, but we find profoundly different mission statements, goals, objectives, and methods among these myriad agencies. A major reason for these differences is that the public has several conflicting definitions of the concept of **justice**.

Course Learning Objectives

After completing this course, the student will be able to:

1.	Describe the pathway that an individual follows from first arrest to incarceration.
2.	Describe the basic structure, function, and origin of each of the major elements of the criminal justice system and the juvenile justice system at the local, state, and federal levels of government.
3.	Explain the roles of the various actors in the criminal justice process, and describe how constitutional safeguards limit the actions of these actors.
4.	Describe the roles of various actors, institutions, and political ideologies in shaping criminal justice policies.
5.	Explain the basic functioning of both the procedural and substantive criminal law.
6.	Identify and define basic terms and concepts that are needed for advanced study in criminal justice.
7.	Explain the importance of ethics, professionalism, communication skills, and an appreciation for diversity to a successful career in criminal justice.
8.	Identify and describe the various methods by which crime statistics are gathered, and identify trends in the data.

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3.7: Dual Federalism

Dual federalism refers to the governmental system of the United States where there are 50 state governments and a single federal government. At least theoretically, the states are allowed to exercise their own powers without interference from the federal government. In other words, some powers are delegated to the federal government while others remain with the states. In reality, this boils down to an ever-evolving body of law. The trend has been toward the federal government gaining more and more influence in the sphere of criminal justice over the years since the Constitution was drafted.

HomeHomeThe Hierarchy of Laws

Article Six of the U.S. Constitution has long been interpreted as meaning that federal law trumps state law whenever the two come into conflict. Conversely, the power of the federal government was thought to be held in check by the **Bill of Rights**, which are the first ten amendments to the Constitution. The exact reach of federal power has long been debated and is still not fully resolved. Major changes in how the federal government exercised its power in relation to the states have happened quickly at times, such as a dramatic increase in federal power during the Civil War, the passage of the Fourteenth Amendment immediately after the war, and during the New Deal era prior to World War II. Many political scientists contend that dual federalism is no longer an accurate term, stating that the states and the federal government share powers in a model that may more accurately be described as **cooperative federalism**. Nowhere has this overlap of power been more obvious than in the criminal laws of the United States and how those laws overlap the criminal codes of the various states.

HomeThe Hierarchy of Courts

As a direct result of American federalism, a dual court system exists within the United States today. There is a complete and independent federal court system, and there is a complete and somewhat independent state court system in every state. The idea of **separation of powers**does not suggest that the courts are completely independent of the other branches of government. The laws that federal courts arbitrate, for example, are passed by Congress and signed by the President. The federal courts, in turn, have the authority to decide the constitutionality of federal laws and resolve other disputes over them. On the other hand, judges depend upon the executive branch to enforce court decisions. It can be seen from these few examples that the branches of government depend on each other to function.

The U.S. Constitution gives Congress the power to create federal courts other than the Supreme Court and to determine the jurisdiction of those courts. It is Congress, not the judges, that controls the type of cases that may be addressed in the various federal courts. Congress has other constitutional responsibilities that determine how the courts operate. Congress decides how many judges there should be and where they will work. Congress, through the confirmation process, has a role in determining which presidential nominees eventually become federal judges. Congress also approves the federal courts' budget and appropriates money for the judiciary to operate (Congress wields this authority over many components of the criminal justice system. The power to control funding is often called the **power of the purse**). According to the Administrative Office of the US Courts, "the judiciary's budget is a very small part- substantially less than one percent-of the entire federal budget."

United States District Courts

The **United States District Courts** are the trial courts of the federal court system. Within limits set by Congress and the Constitution, the district courts have jurisdiction to hear nearly all categories of federal cases, including both civil and criminal matters. There are 94 federal judicial districts, including at least one district in each state, the District of Columbia and Puerto Rico. Three territories of the United States-the Virgin Islands, Guam, and the Northern Mariana Islands-have district courts that hear federal cases.

United States Courts of Appeal

The 94 U.S. judicial districts are organized into 12 regional circuits, each of which has a **United States Court of Appeals**. A court of appeals hears appeals from the district courts located within its circuit, as well as appeals from decisions of federal administrative agencies. Because these courts are organized into circuits, they are sometimes referred to as **circuit courts**.

The United States Supreme Court (USSC)

The United States Supreme Court consists of the Chief Justice of the United States and eight associate justices. At its discretion, and within certain guidelines established by Congress, the Supreme Court each year hears a limited number of the cases it is asked to decide. Those cases may begin in the federal or state courts, and they usually involve important questions about the Constitution

or federal law. This standard is often referred to as a **substantial federal question**. Thus, only certain state court cases are eligible for review by the U.S. Supreme Court. State courts are the final deciders of state laws and constitutions. Their interpretations of federal law or the U.S. Constitution may be appealed to the U.S. Supreme Court. The Supreme Court may choose to hear or not to hear such cases.

State Court Structures

The Constitution and laws of each state establish the state courts. A **court of last resort**, often known as a supreme court, is usually the highest court in a state. Some states also have an **intermediate court of appeals**. Below these appeals courts are the state trial courts. Some are referred to as circuit or district courts. Historically, states usually had courts that handled specific legal matters, (e.g., probate courts, juvenile court; family court, etc.). Many states, however, have followed the federal model and have combined these various courts. Parties dissatisfied with the decision of the trial court may take their cases to the intermediate court of appeals in states that have them, or to the court of last resort in states that do not.

HomeThe Hierarchy of Law Makers

As previously discussed, Article Six of the United States Constitution contains what is known as the **supremacy clause**. The second clause of Article VI of the Constitution of the United States pronounces: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." What exactly this means has been subject to interpretation over the years, but several Supreme Court cases have clarified things.

In ***Gibbons v. Ogden*** (1824), for example, the court stated that when laws "though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution…the act of Congress…is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it." This means that when a federal law (so long as it is constitutional) comes into conflict with a state law, the federal law wins and the state law is null and void.

HomeThe Dual Executive

Often neglected in discussions of federalism are the issues that arise from having dual executive functions within the government structures of the states as well as the federal government. Just as there are federal laws and federal courts, there are federal law enforcement agencies. The federal agencies can only enforce federal laws. Law enforcement officers within those states only enforce state laws. Importantly, each level of government can provide support for the law enforcement efforts of the other.

HomeThe Third Layer of Cake

The dual federalist system in the United States has been referred to (especially in its earlier versions) as **layer cake federalism**. The idea of a layer cake suggests the distinct yet united spheres of power held by the federal government and by the various states. In a 1960 report entitled *Goals for Americans: The Report of the President's Commission on National Goals*, political scientist Morton Grodzins compared the layer cake analogy to **marble cake federalism**. The marbling of this type of cake symbolized the overlapping and concurring powers of the state and federal governments.

Often forgotten in this power tug of war between the state and federal governments is that there is a third tier of government within nearly every jurisdiction in the United States: the local governments. The term **local government** is used to discuss the governing bodies of America's myriad cities and counties. Local governments are critically important to criminal justice because most of the workload of the criminal justice system is taken care of on a local level. The vast majority of police officers are employed at the municipal (city) level of government. A large number of law enforcement officers and correctional officers are employed by country (or parish, depending on the state) governments under the auspices of the Sheriff's Department.

For legal purposes, most local and county agencies are considered state agencies. Municipal police officers and country deputies are charged with enforcing state laws; they can do nothing about violations of federal law except for turning a case over to federal authorities. Local governments are also empowered to make "minor" laws known as ordinances. In the criminal justice system, ordinances regulating conduct are usually considered violations, resulting in only a fine. Local governments are not entrusted by the state and federal governments with the power to enact laws that punish by imprisonment.

Article Six, Circuit Courts, Cooperative Federalism, Court of Last Resort, *Gibbons v. Ogden* (1824), Intermediate Court of Appeals, Layer Cake Federalism, Local Government, Marble Cake Federalism, Power of the Purse, Separation of Powers, Substantial Federal Question, Supremacy Clause, United States Courts of Appeals, United States District Courts

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3.8: Politics in Criminal Justice

Politics is the art and science of running a government and guiding governmental policy. The nature of politics in America is conflict and debate about policy, and criminal justice policy falls into that arena. The American political system and the criminal justice system involve actions of the President, Congers, courts, bureaucracies, interest groups, elections, and the media. These groups are mirrored on the state level and to some degree on the local level. The actions of elected officials have a direct impact on the system, and the policies they implement directly affect how justice is done.

HomeThe Politics of Selecting Decision Makers

In a democratic republic, one of two ways selects criminal justice decision makers: They either are elected by the public, or are appointed by a public official (often an elected one). Elected mayors, for example, often appoint chiefs of police. The President of the United States (an elected official) appoints Supreme Court justices with the confirmation of the U.S. Senate (a body of elected officials). Both methods are highly political and cannot be understood without understanding something of the political process.

HomeThe Politics of Law Making

Although the federal legal system and that of most states relies on the old common law for its historical foundations, criminal law is mostly a matter of statute these days. That is, criminal laws are made by legislative assemblies that decide which acts are prohibited, and what punishments are appropriate for those that commit those acts in violation of the law. Obviously, politics influences the laws that assemblies pass. Today the nation finds itself at the conclusion of what has been a “get tough” era of criminal justice. Ushered in by the “crack epidemic” of the early 1980s, this has been a period of harsher punishments, longer prison sentences, less therapeutic programs, and skyrocketing corrections budgets. The pendulum seems to have reached the far right, and now may be swinging back toward the middle. Many states have begun concentrated efforts at finding alternatives to incarceration, and the federal government is considering early release for drug offenders sentenced under the “get tough” drug laws of the previous two decades.

HomeThe Politics of Policing

Most police departments try to distance themselves from the vicissitudes of politics as much as possible. To be effective, law enforcement must be seen as fair and impartial, serving all of the community without favoritism or political patronage. The political climate of a community can have a huge impact on the police department. Elected officials appoint police administrators, and can often fire them just as easily. The style of law enforcement, formal departmental policy, and informal norms can all be heavily influenced by local politics. The structure of local government can have an impact on how police services are delivered. Professional city managers, for example, are less likely to get involved in police affairs than are mayors and city council members.

HomeThe Politics of Prosecution

While police departments are often somewhat shielded from politics and influenced by it indirectly, prosecutors in most jurisdictions are elected officials and thus highly political. At the federal level, an essentially political process appoints U.S. attorneys. The career paths of these federal lawyers tend to be linked to one particular political party or the other. It is common to see prosecutors at both the state and federal level using their tenure as prosecutors to launch political careers. This fact gives rise to the unethical possibility of political prosecutions against political enemies. In fact, many at the time stated that this was the sort of thing that was happening with the impeachment proceedings launched against then-President Bill Clinton.

HomeThe Politics of the Judiciary

There is a tendency among academic writers to view the judiciary as somehow above partisan politics. In the modern American reality, this is a pleasant fiction. Judges at all levels of government are either elected or appointed, and this fact makes them political creatures. Elected judges fear public reactions to issues with political foundations, such as appearing “soft on crime” or being in favor of the death penalty, or for it, depending on the political climate in the judge’s jurisdiction. Those political affiliations and beliefs necessarily inform judges’ decisions. Conservative courts tend to side with law and order, willing to sacrifice some civil liberties to maintain law and order. Liberal judges tend to take the opposite, ruling in favor of civil liberties at the expense of (in the minds of the opposition) public safety. It has been said that the real job of appellate courts is balancing the civil rights of the people with the desire of the people to be safe from crime. Obviously, the political belief of the justices making these decisions weighs heavily in the outcome of important cases.

HomeThe Politics of Corrections

As with the other elements of the criminal justice systems, corrections is a highly politicized aspect of government. At the local level, the operation of jails is tied to the office of sheriff in many jurisdictions, which ties jail operations to the politics of particular individuals being elected and reelected as sheriff. At the state level, departments of corrections are highly political, with administrators and budgets being politically determined. Another highly political aspect of corrections is the membership and functioning of parole boards, which is established by appointment of the governor in most jurisdictions. If parole boards make release decisions that later reflect badly on the board members, the bad press will ultimately turn to the governor.

HomeThe Politicization of Justice

As politics is such an integral part of criminal justice, a high potential for serious problems generated by politics exists. Rash decisions can be made, poorly considered policies can be implemented, and ill-conceived laws can be written that hamper the efficient and ethical administration of justice. Unscrupulous politicians can easily make appeals to people's emotions, fears, and prejudices to improve their own chances at reappointment or reelection. Sadly, emotionally charged decisions do not tend to be rational decisions. In the high-stakes world of criminal justice, clear, rational thinking is often overshadowed by politically charged emotionality.

HomeCrime Control versus Due Process

Herbert Packer (1964) outlined two competing models of the value systems operating within criminal justice today: The **crime control model** and the **due process model**. These two models of how the justice system should operate reflect two opposing sets of political ideologies that have a massive impact on criminal justice decision-making at all levels. The divide is not as simple as Democrat or Republican. Both models represent core values in the American way of life. After all, every good citizen wants to see crime controlled. We want to live in safe, orderly communities. As Americans, we also highly value freedom. We loath the idea of oppressive governments that interfere with our personal liberties. We are proud of our rights to be free from government oppression, and we value our right to privacy.

According to Packer, "The value system that underlies the Crime Control Model is based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process." There is a definite political philosophy that underlies this assertion: "The failure of law enforcement to bring criminal conduct under tight control is viewed as leading to the breakdown of public order and thence to the disappearance of an important condition of human freedom. If the laws go unenforced, which is to say, if it is perceived that there is a high percentage of failure to apprehend and convict in the criminal process, a general disregard for legal controls tends to develop." Therefore, adherents of the Crime Control Model advocate enhancing the powers of the police to investigate and prosecute criminals. These necessarily include enhanced powers of search and seizure. Under this philosophy of criminal justice, the primary focus of the system should be discovering the truth and establishing the facts.

The Due Process Model takes a rather opposite view of how the system should operate. The key to understanding this position is that it hinges on protecting the civil rights of every citizen. Under this philosophy, the most important function of the criminal justice system is to ensure procedural due process, which mean maintaining fundamental fairness in all aspects of the criminal justice process. A major policy implication if this view is to limit police powers in order to prevent the oppression of the individual citizen. Adherents of this position hold that merely establishing guilt is not adequate; the government must show guilt in a fair and legal way that respects the rights of the accused.

In reality, the courts and other elements of the criminal justice system have to strike a balance of these two positions. It must be realized that the relative importance of each of these positions is not static: There is a constant tug of war between the two positions. As the makeup of America's high courts change, so too does the underlying philosophy that dominates the decisions of those courts. Liberal courts establish broad civil liberties, and conservative courts erode those liberties in the name of law and order.

HomeThe Juvenile Justice System

The 1800s saw a revolution in the way Americans controlled juvenile delinquency. The movement away from treating juveniles as adults began as early as 1825 when the Society for the Prevention of Juvenile Delinquency began advocating separate facilities for juvenile offenders. Privately run juvenile facilities sprang up, and soon generated controversy over reported abuses. This criticism led many states to create their own juvenile detention facilities.

Detention facilities were not the only facet of the system that was changing. Illinois passed the **Juvenile Court Act of 1899**, which established the America's first juvenile court. The British policy of ***parens patriae*** (the government as parent) was the rationale for the state becoming involved in the lives of children differently than it did with adult offenders. The doctrine was interpreted to mean that the state had both the right and the obligation to intervene when natural parents failed to adequately discipline and protect children. A critical aspect of the developing juvenile justice system was a focus on the welfare of the child. Delinquent youths were seen as being in need of the benevolent guidance of the court. Rather than merely punishing delinquents for their wrongdoings, juvenile courts sought to turn delinquents into productive citizens through treatment rather than the punitive measures used in adult cases.

By 1910, 32 States had established juvenile courts, and many of those had established probation services. By 1925, all but two States had established the foundations of a juvenile justice system. The statutes that created these courts made the doctrine of *parens patriae*explicit. The different philosophy of the juvenile courts led to both substantive and procedural differences between adult cases and juvenile cases. Ultimately, most states had systems where those accused of crimes and less than 18 years of age had their cases heard in juvenile courts. An important difference was that juvenile courts were not adversarial in nature, and prosecutors were not responsible for bringing cases before the court. Juvenile courts tended to handle their own intake. Juvenile courts were prone to consider extralegal factors when deciding how to deal with a particular case. Many juvenile courts had intake procedures that allowed for the informal diversion of youthful offenders where no formal judicial action was taken.

Another major difference between juvenile courts and adult courts was the level of formality. Juvenile proceedings were handled in a much less formal way than adult trials. Because the court used the **best interest of the child** standard, many due process protections afforded adult defendants were considered unnecessary. A wide range of dispositions were available for juvenile judges seeking to rehabilitate wayward children. The doctrine of proportionality did not necessarily apply, and delinquent children could receive anything from a verbal warning to being locked up in a secure detention facility. The duration of these dispositions was very fluid. The child would continue his or her "treatment" until they were cured, or became an adult.

By the 1960s, many people had become disillusioned with the juvenile courts and their ability to rehabilitate. The treatment options available to juvenile judges never achieved the level of success that the public demanded. The underlying assumptions about the validity of individualized treatment of delinquent youths was not widely challenged, but the application of the philosophy by the juvenile courts was brought into question.

The 1960s saw a radical change in society and the United States Supreme Court's opinions regarding civil liberties. These changes, while causing radical changes in police procedure, were also felt by the juvenile justice system. The justices believed that children should be afforded many of the same constitutional safeguards to their liberty as adult offenders. Accordingly, they made several rulings in a short span of time that protected these rights. A side effect of these procedural protections was the formalization of the juvenile courts. Juvenile courts started to look much more like adult courts than they did at their inception. Delinquents facing the possibility of confinement were guaranteed the right to an attorney, protection against self-incrimination, and the right to receive notice of the charges. The standard of proof changed from a **preponderance of the evidence** to beyond a reasonable doubt in juvenile cases.

The Supreme Court declined to extend all adult rights to children. They, for example, determined that juveniles had no right to a trial by jury. Congress was not silent on juvenile justice issues during this time. In the **Juvenile Delinquency Prevention and Control Act of 1968**, congress recommended that children charged with nonserious status offenses be handled outside the court system. This was the beginning of a movement toward community based sanctions, **deinstitutionalization**, and moving juvenile offenders away from adult offenders.

The "get tough on crime" movement that swept the Nation during the 1980s did not leave the juvenile justice system unscathed. The public perception was that serious juvenile crime was on the rise, and that the juvenile courts were too lenient on offenders. Many states responded to this public outcry for tougher sanctions by passing more punitive laws. One of the most controversial strategies was the removal of certain classes of offenders from the juvenile system and placing them in the adult system. Others revamped their juvenile courts to operate more like adult courts. As a result, offenders charged with certain offenses are excluded from juvenile court jurisdiction or face mandatory **waiver** to criminal court. Prior to this time, waivers to adult courts was possible, but it was relatively rare and done on a case by case basis.

Every state made modifications to the juvenile justice system during the 1990s. These were widely varied. Three major components were changed in nearly every state. State legislatures passed laws that made it easier to transfer juveniles from the juvenile justice system to the criminal justice system. Most states passed laws that gave criminal and juvenile courts expanded sentencing options.

Most legislatures also modified or removed traditional juvenile court confidentiality provisions by making records and proceedings more open to the public.

Key Terms

Best Interest of the Child, Crime Control Model, Deinstitutionalization, Doctrine of Proportionality, Due Process Model, Extralegal Factors, Informal Diversion, Juvenile Court Act of 1899, Juvenile Delinquency, Juvenile Delinquency Prevention Act of 1968, Parens Patriae, Parole Board, Partisan Politics, Policy, Politicized, Politics, Preponderance of the Evidence, Sheriff, Static, Waiver

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CHAPTER OVERVIEW

4: Courts – Structure and processes

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4.1: Introduction



The Marriage Equality Act vote in Albany, New York, on July 24, 2011 (left), was just one of a number of cases testing the constitutionality of both federal and state law that ultimately led the Supreme Court to take on the controversial issue of same-sex marriage. In the years leading up to the 2015 ruling that same-sex couples have a right to marry in all fifty states, marriage equality had become a key civil rights issue for the LGBT community, as demonstrated at Seattle's 2012 Pride parade (right). (credit left: modification of work by "Celebration chapel"/Wikimedia; credit right: modification of work by Brett Curtiss)

If democratic institutions struggle to balance individual freedoms and collective well-being, the judiciary is arguably the branch where the individual has the best chance to be heard. For those seeking protection on the basis of sexual orientation, for example, in recent years, the courts have expanded rights, culminating in 2015 when the Supreme Court ruled that same-sex couples have the right to marry in all fifty states (Figure).

Obergefell v. Hodges, 576 U.S. __ (2015).

The U.S. courts pride themselves on two achievements: (1) as part of the framers' system of checks and balances, they protect the sanctity of the U.S. Constitution from breaches by the other branches of government, and (2) they protect individual rights against societal and governmental oppression. At the federal level, nine Supreme Court judges are nominated by the president and confirmed by the Senate for lifetime appointments. Hence, democratic control over them is indirect at best, but this provides them the independence they need to carry out their duties. However, court power is confined to rulings on those cases the courts decide to hear.

In cases of original jurisdiction the courts cannot decide—the U.S. Constitution mandates that the U.S. Supreme Court must hear cases of original jurisdiction.

How do the courts make decisions, and how do they exercise their power to protect individual rights? How are the courts structured, and what distinguishes the Supreme Court from all others? This chapter answers these and other questions in delineating the power of the judiciary in the United States.

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4.2: Guardians of the Constitution and Individual Rights

Learning Objectives

By the end of this section, you will be able to:

- Describe the evolving role of the courts since the ratification of the Constitution
- Explain why courts are uniquely situated to protect individual rights
- Recognize how the courts make public policy

Under the Articles of Confederation, there was no national judiciary. The U.S. Constitution changed that, but its Article III, which addresses "the judicial power of the United States," is the shortest and least detailed of the three articles that created the branches of government. It calls for the creation of "one supreme Court" and establishes the Court's jurisdiction, or its authority to hear cases and make decisions about them, and the types of cases the Court may hear. It distinguishes which are matters of original jurisdiction and which are for appellate jurisdiction. Under original jurisdiction, a case is heard for the first time, whereas under appellate jurisdiction, a court hears a case on appeal from a lower court and may change the lower court's decision. The Constitution also limits the Supreme Court's original jurisdiction to those rare cases of disputes between states, or between the United States and foreign ambassadors or ministers. So, for the most part, the Supreme Court is an appeals court, operating under appellate jurisdiction and hearing appeals from the lower courts. The rest of the development of the judicial system and the creation of the lower courts were left in the hands of Congress.

To add further explanation to Article III, Alexander Hamilton wrote details about the federal judiciary in *Federalist* No. 78. In explaining the importance of an independent judiciary separated from the other branches of government, he said "interpretation" was a key role of the courts as they seek to protect people from unjust laws. But he also believed "the Judiciary Department" would "always be the least dangerous" because "with no influence over either the sword or the purse," it had "neither force nor will, but merely judgment." The courts would only make decisions, not take action. With no control over how those decisions would be implemented and no power to enforce their choices, they could exercise only judgment, and their power would begin and end there. Hamilton would no doubt be surprised by what the judiciary has become: a key component of the nation's constitutional democracy, finding its place as the chief interpreter of the Constitution and the equal of the other two branches, though still checked and balanced by them.

The first session of the first U.S. Congress laid the framework for today's federal judicial system, established in the Judiciary Act of 1789. Although legislative changes over the years have altered it, the basic structure of the judicial branch remains as it was set early on: At the lowest level are the district courts, where federal cases are tried, witnesses testify, and evidence and arguments are presented. A losing party who is unhappy with a district court decision may appeal to the circuit courts, or U.S. courts of appeals, where the decision of the lower court is reviewed. Still further, appeal to the U.S. Supreme Court is possible, but of the thousands of petitions for appeal, the Supreme Court will typically hear fewer than one hundred a year.

"The U.S. Supreme Court." The Judicial Learning Center. http://judiciallearningcenter.org/the-us-supreme-court/ (March 1, 2016).



This public site maintained by the Administrative Office of the U.S. Courts provides detailed information from and about the judicial branch.

HUMBLE BEGINNINGS

Starting in New York in 1790, the early Supreme Court focused on establishing its rules and procedures and perhaps trying to carve its place as the new government's third branch. However, given the difficulty of getting all the justices even to show up, and with no permanent home or building of its own for decades, finding its footing in the early days proved to be a monumental task. Even when the federal government moved to the nation's capital in 1800, the Court had to share space with Congress in the Capitol building. This ultimately meant that "the high bench crept into an undignified committee room in the Capitol beneath the House Chamber."

Bernard Schwartz. 1993. A History of the Supreme Court. New York: Oxford University Press, 16.

It was not until the Court's 146th year of operation that Congress, at the urging of Chief Justice—and former president—William Howard Taft, provided the designation and funding for the Supreme Court's own building, "on a scale in keeping with the importance and dignity of the Court and the Judiciary as a coequal, independent branch of the federal government."

"Washington D.C. A National Register of Historic Places Travel Itinerary." U.S. Department of the Interior, National Park Service. http://www.nps.gov/nr/travel/wash/dc78.htm (March 1, 2016).

It was a symbolic move that recognized the Court's growing role as a significant part of the national government (Figure).



The Supreme Court building in Washington, DC, was not completed until 1935. Engraved on its marble front is the motto "Equal Justice Under Law," while its east side says, "Justice, the Guardian of Liberty."

But it took years for the Court to get to that point, and it faced a number of setbacks on the way to such recognition. In their first case of significance, *Chisholm v. Georgia* (1793), the justices ruled that the federal courts could hear cases brought by a citizen of one state against a citizen of another state, and that Article III, Section 2, of the Constitution did not protect the states from facing such an interstate lawsuit.

Chisholm v. Georgia, 2 U.S. 419 (1793).

However, their decision was almost immediately overturned by the Eleventh Amendment, passed by Congress in 1794 and ratified by the states in 1795. In protecting the states, the Eleventh Amendment put a prohibition on the courts by stating, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." It was an early hint that Congress had the power to change the jurisdiction of the courts as it saw fit and stood ready to use it.

In an atmosphere of perceived weakness, the first chief justice, John Jay, an author of *The Federalist Papers* and appointed by President George Washington, resigned his post to become governor of New York and later declined President John Adams's offer of a subsequent term.

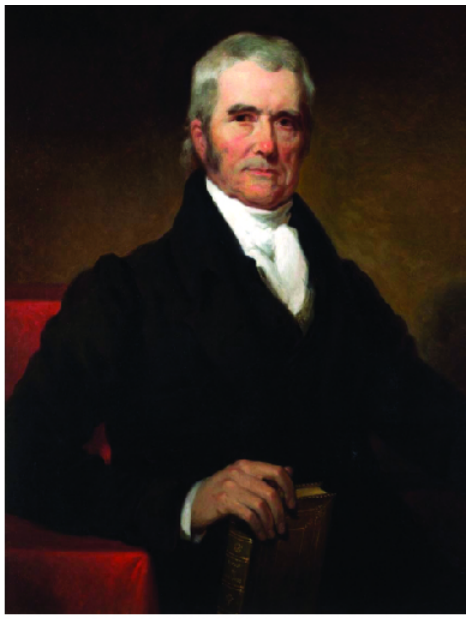
Associated Press. "What You Should Know About Forgotten Founding Father John Jay," PBS Newshour. July 4, 2015. http://www.pbs.org/newshour/rundown/forgotten-founding-father.

In fact, the Court might have remained in a state of what Hamilton called its "natural feebleness" if not for the man who filled the vacancy Jay had refused—the fourth chief justice, John Marshall. Often credited with defining the modern court, clarifying its power, and strengthening its role, Marshall served in the chief's position for thirty-four years. One landmark case during his tenure changed the course of the judicial branch's history (Figure).

"Life and Legacy." The John Marshall Foundation. http://www.johnmarshallfoundation.org (March 1, 2016).



(a)



(b)

John Jay (a) was the first chief justice of the Supreme Court but resigned his post to become governor of New York. John Marshall (b), who served as chief justice for thirty-four years, is often credited as the major force in defining the modern court's role in the U.S. governmental system.

In 1803, the Supreme Court declared for itself the power of judicial review, a power to which Hamilton had referred but that is not expressly mentioned in the Constitution. Judicial review is the power of the courts, as part of the system of checks and balances, to look at actions taken by the other branches of government and the states and determine whether they are constitutional. If the courts find an action to be unconstitutional, it becomes null and void. Judicial review was established in the Supreme Court case *Marbury v. Madison*, when, for the first time, the Court declared an act of Congress to be unconstitutional.

Marbury v. Madison, 5 U.S. 137 (1803).

Wielding this power is a role Marshall defined as the "very essence of judicial duty," and it continues today as one of the most significant aspects of judicial power. Judicial review lies at the core of the court's ability to check the other branches of government —and the states.

Since *Marbury*, the power of judicial review has continually expanded, and the Court has not only ruled actions of Congress and the president to be unconstitutional, but it has also extended its power to include the review of state and local actions. The power of judicial review is not confined to the Supreme Court but is also exercised by the lower federal courts and even the state courts. Any legislative or executive action at the federal or state level inconsistent with the U.S. Constitution or a state constitution can be subject to judicial review.

Stephen Hass. "Judicial Review." National Juris University.
http://juris.nationalparalegal.edu/(X(1)S(wwbvsi5iswopllt1bfpzfkjd))/JudicialReview.aspx (March 1, 2016).
MARBURY V. MADISON (1803)

The Supreme Court found itself in the middle of a dispute between the outgoing presidential administration of John Adams and that of incoming president (and opposition party member) Thomas Jefferson. It was an interesting circumstance at the time, particularly because Jefferson and the man who would decide the case—John Marshall—were themselves political rivals.

President Adams had appointed William Marbury to a position in Washington, DC, but his commission was not delivered before Adams left office. So Marbury petitioned the Supreme Court to use its power under the Judiciary Act of 1789 and issue a writ of mandamus to force the new president's secretary of state, James Madison, to deliver the commission documents. It was a task Madison refused to do. A unanimous Court under the leadership of Chief Justice John Marshall ruled that although Marbury was entitled to the job, the Court did not have the power to issue the writ and order Madison to deliver the documents, because the provision in the Judiciary Act that had given the Court that power was unconstitutional.

Marbury v. Madison, 5 U.S. 137 (1803).

Perhaps Marshall feared a confrontation with the Jefferson administration and thought Madison would refuse his directive anyway. In any case, his ruling shows an interesting contrast in the early Court. On one hand, it humbly declined a power—issuing a writ of mandamus—given to it by Congress, but on the other, it laid the foundation for legitimizing a much more important one—judicial review. Marbury never got his commission, but the Court's ruling in the case has become more significant for the precedent it established: As the first time the Court declared an act of Congress unconstitutional, it established the power of judicial review, a key power that enables the judicial branch to remain a powerful check on the other branches of government.

Consider the dual nature of John Marshall's opinion in Marbury v. Madison: On one hand, it limits the power of the courts, yet on the other it also expanded their power. Explain the different aspects of the decision in terms of these contrasting results.

THE COURTS AND PUBLIC POLICY

Even with judicial review in place, the courts do not always stand ready just to throw out actions of the other branches of government. More broadly, as Marshall put it, "it is emphatically the province and duty of the judicial department to say what the law is."

Marbury v. Madison, 5 U.S. 137 (1803).

The United States has a common law system in which law is largely developed through binding judicial decisions. With roots in medieval England, the system was inherited by the American colonies along with many other British traditions.

"The Common Law and Civil Law Traditions." The Robbins Collection. School of Law (Boalt Hall). University of California at Berkeley. https://www.law.berkeley.edu/library...raditions.html (March 1, 2016).

It stands in contrast to code law systems, which provide very detailed and comprehensive laws that do not leave room for much interpretation and judicial decision-making. With code law in place, as it is in many nations of the world, it is the job of judges to simply apply the law. But under common law, as in the United States, they interpret it. Often referred to as a system of judge-made law, common law provides the opportunity for the judicial branch to have stronger involvement in the process of law-making itself, largely through its ruling and interpretation on a case-by-case basis.

In their role as policymakers, Congress and the president tend to consider broad questions of public policy and their costs and benefits. But the courts consider specific cases with narrower questions, thus enabling them to focus more closely than other government institutions on the exact context of the individuals, groups, or issues affected by the decision. This means that while the legislature can make policy through statute, and the executive can form policy through regulations and administration, the judicial branch can also influence policy through its rulings and interpretations. As cases are brought to the courts, court decisions can help shape policy.

Consider health care, for example. In 2010, President Barack Obama signed into law the Patient Protection and Affordable Care Act (ACA), a statute that brought significant changes to the nation's healthcare system. With its goal of providing more widely attainable and affordable health insurance and health care, "Obamacare" was hailed by some but soundly denounced by others as bad policy. People who opposed the law and understood that a congressional repeal would not happen any time soon looked to the courts for help. They challenged the constitutionality of the law in *National Federation of Independent Business v. Sebelius*, hoping the Supreme Court would overturn it.

National Federation of Independent Business v. Sebelius, 567 U.S. __ (2012).

The practice of judicial review enabled the law's critics to exercise this opportunity, even though their hopes were ultimately dashed when, by a narrow 5–4 margin, the Supreme Court upheld the health care law as a constitutional extension of Congress's power to tax.

Since this 2012 decision, the ACA has continued to face challenges, the most notable of which have also been decided by court rulings. It faced a setback in 2014, for instance, when the Supreme Court ruled in *Burwell v. Hobby Lobby* that, for religious reasons, some for-profit corporations could be exempt from the requirement that employers provide insurance coverage of contraceptives for their female employees.

Burwell v. Hobby Lobby, 573 U.S. __ (2014).

But the ACA also attained a victory in *King v. Burwell*, when the Court upheld the ability of the federal government to provide tax credits for people who bought their health insurance through an exchange created by the law.

King v. Burwell, 576 U.S. __ (2015).

With each ACA case it has decided, the Supreme Court has served as the umpire, upholding the law and some of its provisions on one hand, but ruling some aspects of it unconstitutional on the other. Both supporters and opponents of the law have claimed victory and faced defeat. In each case, the Supreme Court has further defined and fine-tuned the law passed by Congress and the president, determining which parts stay and which parts go, thus having its say in the way the act has manifested itself, the way it operates, and the way it serves its public purpose.

In this same vein, the courts have become the key interpreters of the U.S. Constitution, continuously interpreting it and applying it to modern times and circumstances. For example, it was in 2015 that we learned a man's threat to kill his ex-wife, written in rap lyrics and posted to her Facebook wall, was not a real threat and thus could not be prosecuted as a felony under federal law.

Elonis v. United States, 13-983 U.S. __ (2015).

Certainly, when the Bill of Rights first declared that government could not abridge freedom of speech, its framers could never have envisioned Facebook—or any other modern technology for that matter.

But freedom of speech, just like many constitutional concepts, has come to mean different things to different generations, and it is the courts that have designed the lens through which we understand the Constitution in modern times. It is often said that the Constitution changes less by amendment and more by the way it is interpreted. Rather than collecting dust on a shelf, the nearly 230-year-old document has come with us into the modern age, and the accepted practice of judicial review has helped carry it along the way.

COURTS AS A LAST RESORT

While the U.S. Supreme Court and state supreme courts exert power over many when reviewing laws or declaring acts of other branches unconstitutional, they become particularly important when an individual or group comes before them believing there has been a wrong. A citizen or group that feels mistreated can approach a variety of institutional venues in the U.S. system for assistance in changing policy or seeking support. Organizing protests, garnering special interest group support, and changing laws through the legislative and executive branches are all possible, but an individual is most likely to find the courts especially well-suited to analyzing the particulars of his or her case.

The adversarial judicial system comes from the common law tradition: In a court case, it is one party versus the other, and it is up to an impartial person or group, such as the judge or jury, to determine which party prevails. The federal court system is most often called upon when a case touches on constitutional rights. For example, when Samantha Elauf, a Muslim woman, was denied a job working for the clothing retailer Abercrombie & Fitch because a headscarf she wears as religious practice violated the company's dress code, the Supreme Court ruled that her First Amendment rights had been violated, making it possible for her to sue the store for monetary damages.

Elauf had applied for an Abercrombie sales job in Oklahoma in 2008. Her interviewer recommended her based on her qualifications, but she was never given the job because the clothing retailer wanted to avoid having to accommodate her religious practice of wearing a headscarf, or hijab. In so doing, the Court ruled, Abercrombie violated Title VII of the Civil Rights Act of 1964, which prohibits employers from discriminating on the basis of race, color, religion, sex, or national origin, and requires them to accommodate religious practices.

Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, 575 U.S. __ (2015).

Rulings like this have become particularly important for members of religious minority groups, including Muslims, Sikhs, and Jews, who now feel more protected from employment discrimination based on their religious attire, head coverings, or beards.

Liptak, Adam. "Muslim Woman Denied Job Over Head Scarf Wins in Supreme Court." New York Times. 1 June 2015. http://www.nytimes.com/2015/06/02/us/supreme-court-rules-in-samantha-elauf-abercrombie-fitch-case.html?_r=0.

Such decisions illustrate how the expansion of individual rights and liberties for particular persons or groups over the years has come about largely as a result of court rulings made for individuals on a case-by-case basis.

Although the United States prides itself on the Declaration of Independence's statement that "all men are created equal," and "equal protection of the laws" is a written constitutional principle of the Fourteenth Amendment, the reality is less than perfect. But it is evolving. Changing times and technology have and will continue to alter the way fundamental constitutional rights are defined and applied, and the courts have proven themselves to be crucial in that definition and application.

Societal traditions, public opinion, and politics have often stood in the way of the full expansion of rights and liberties to different groups, and not everyone has agreed that these rights should be expanded as they have been by the courts. Schools were long

segregated by race until the Court ordered desegregation in *Brown v. Board of Education* (1954), and even then, many stood in opposition and tried to block students at the entrances to all-white schools.

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

Factions have formed on opposite sides of the abortion and handgun debates, because many do not agree that women should have abortion rights or that individuals should have the right to a handgun. People disagree about whether members of the LGBT community should be allowed to marry or whether arrested persons should be read their rights, guaranteed an attorney, and/or have their cell phones protected from police search.

But the Supreme Court has ruled in favor of all these issues and others. Even without unanimous agreement among citizens, Supreme Court decisions have made all these possibilities a reality, a particularly important one for the individuals who become the beneficiaries (Table). The judicial branch has often made decisions the other branches were either unwilling or unable to make, and Hamilton was right in *Federalist* No. 78 when he said that without the courts exercising their duty to defend the Constitution, "all the reservations of particular rights or privileges would amount to nothing."

Over time, the courts have made many decisions that have broadened the rights of individuals. This table is a sampling of some of these Supreme Court cases.

Examples of Supreme Court Cases Involving Individuals		
Case Name	Year	Court's Decision
Brown v. Board of Education	1954	Public schools must be desegregated.
Gideon v. Wainwright	1963	Poor criminal defendants must be provided an attorney.
Miranda v. Arizona	1966	Criminal suspects must be read their rights.
Roe v. Wade	1973	Women have a constitutional right to abortion.
McDonald v. Chicago	2010	An individual has the right to a handgun in his or her home.
Riley v. California	2014	Police may not search a cell phone without a warrant.
Obergefell v. Hodges	2015	Same-sex couples have the right to marry in all states.

The courts seldom if ever grant rights to a person instantly and upon request. In a number of cases, they have expressed reluctance to expand rights without limit, and they still balance that expansion with the government's need to govern, provide for the common good, and serve a broader societal purpose. For example, the Supreme Court has upheld the constitutionality of the death penalty, ruling that the Eighth Amendment does not prevent a person from being put to death for committing a capital crime and that the government may consider "retribution and the possibility of deterrence" when it seeks capital punishment for a crime that so warrants it.

Gregg v. Georgia, 428 U.S. 153 (1976).

In other words, there is a greater good—more safety and security—that may be more important than sparing the life of an individual who has committed a heinous crime.

Yet the Court has also put limits on the ability to impose the death penalty, ruling, for example, that the government may not execute a person with cognitive disabilities, a person who was under eighteen at the time of the crime, or a child rapist who did not kill his victim.

Atkins v. Virginia, 536 U.S. 304 (2002); Roper v. Simmons, 543 U.S. 551 (2005); Kennedy v. Louisiana, 554 U.S. 407 (2008).

So the job of the courts on any given issue is never quite done, as justices continuously keep their eye on government laws, actions, and policy changes as cases are brought to them and then decide whether those laws, actions, and policies can stand or must go. Even with an issue such as the death penalty, about which the Court has made several rulings, there is always the possibility that further judicial interpretation of what does (or does not) violate the Constitution will be needed.

This happened, for example, as recently as 2015 in a case involving the use of lethal injection as capital punishment in the state of Oklahoma, where death-row inmates are put to death through the use of three drugs—a sedative to bring about unconsciousness (midazolam), followed by two others that cause paralysis and stop the heart. A group of these inmates challenged the use of midazolam as unconstitutional. They argued that since it could not reliably cause unconsciousness, its use constituted an Eighth Amendment violation against cruel and unusual punishment and should be stopped by the courts. The Supreme Court rejected the inmates' claims, ruling that Oklahoma could continue to use midazolam as part of its three-drug protocol.

Glossip v. Gross, 576 U.S. __ (2015).

But with four of the nine justices dissenting from that decision, a sharply divided Court leaves open a greater possibility of more death-penalty cases to come. The 2015–2016 session alone includes four such cases, challenging death-sentencing procedures in such states as Florida, Georgia, and Kansas.

"October Term 2015." SCOTUSblog. http://www.scotusblog.com/case-files...15/?sort=mname (March 1, 2016).

Therefore, we should not underestimate the power and significance of the judicial branch in the United States. Today, the courts have become a relevant player, gaining enough clout and trust over the years to take their place as a separate yet coequal branch.

Summary

From humble beginnings, the judicial branch has evolved over the years to a significance that would have been difficult for the Constitution's framers to envision. While they understood and prioritized the value of an independent judiciary in a common law system, they could not have predicted the critical role the courts would play in the interpretation of the Constitution, our understanding of the law, the development of public policy, and the preservation and expansion of individual rights and liberties over time.

The Supreme Court's power of judicial review _____.

1. is given to it in the original constitution
2. enables it to declare acts of the other branches unconstitutional
3. allows it to hear cases
4. establishes the three-tiered court system

The Supreme Court most typically functions as _____.

1. a district court
2. a trial court
3. a court of original jurisdiction
4. an appeals court

In *Federalist* No. 78, Alexander Hamilton characterized the judiciary as the _____ branch of government.

1. most unnecessary
2. strongest
3. least dangerous
4. most political

Explain one positive and one negative aspect of the lifetime term of office for judges and justices in the federal court system. Why do you believe the constitution's framers chose lifetime terms?

What do you find most significant about having a common law system?

Glossary

appellate jurisdiction
the power of a court to hear a case on appeal from a lower court and possibly change the lower court's decision

common law

the pattern of law developed by judges through case decisions largely based on precedent

judicial review

the power of the courts to review actions taken by the other branches of government and the states and to rule on whether those actions are constitutional

Marbury v. Madison

the 1803 Supreme Court case that established the courts' power of judicial review and the first time the Supreme Court ruled an act of Congress to be unconstitutional

original jurisdiction

the power of a court to hear a case for the first time

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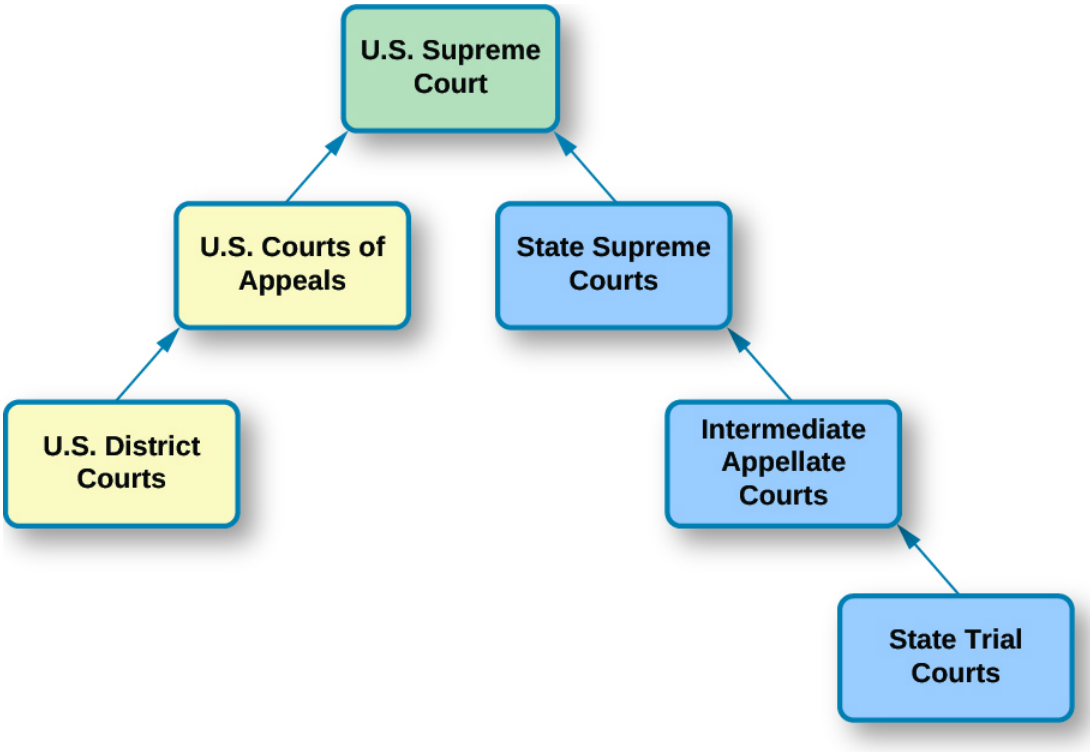
4.3: The Dual Court System

Learning Objectives

By the end of this section, you will be able to:

- Describe the dual court system and its three tiers
- Explain how you are protected and governed by different U.S. court systems
- Compare the positive and negative aspects of a dual court system

Before the writing of the U.S. Constitution and the establishment of the permanent national judiciary under Article III, the states had courts. Each of the thirteen colonies had also had its own courts, based on the British common law model. The judiciary today continues as a dual court system, with courts at both the national and state levels. Both levels have three basic tiers consisting of trial courts, appellate courts, and finally courts of last resort, typically called supreme courts, at the top (Figure).



The U.S. judiciary features a dual court system comprising a federal court system and the courts in each of the fifty states. On both the federal and state sides, the U.S. Supreme Court is at the top and is the final court of appeal.

To add to the complexity, the state and federal court systems sometimes intersect and overlap each other, and no two states are exactly alike when it comes to the organization of their courts. Since a state's court system is created by the state itself, each one differs in structure, the number of courts, and even name and jurisdiction. Thus, the organization of state courts closely resembles but does not perfectly mirror the more clear-cut system found at the federal level.

Bureau of International Information Programs, United States Department of State. Outline of the U.S. Legal System. 2004.

Still, we can summarize the overall three-tiered structure of the dual court model and consider the relationship that the national and state sides share with the U.S. Supreme Court, as illustrated in Figure.

Cases heard by the U.S. Supreme Court come from two primary pathways: (1) the circuit courts, or U.S. courts of appeals (after the cases have originated in the federal district courts), and (2) state supreme courts (when there is a substantive federal question in the case). In a later section of the chapter, we discuss the lower courts and the movement of cases through the dual court system to the U.S. Supreme Court. But first, to better understand how the dual court system operates, we consider the types of cases state and local courts handle and the types for which the federal system is better designed.

COURTS AND FEDERALISM

Courts hear two different types of disputes: criminal and civil. Under criminal law, governments establish rules and punishments; laws define conduct that is prohibited because it can harm others and impose punishment for committing such an act. Crimes are usually labeled felonies or misdemeanors based on their nature and seriousness; felonies are the more serious crimes. When someone commits a criminal act, the government (state or national, depending on which law has been broken) charges that person with a crime, and the case brought to court contains the name of the charging government, as in *Miranda v. Arizona*discussed below.

Miranda v. Arizona, 384 U.S. 436 (1966).

On the other hand, civil law cases involve two or more private (non-government) parties, at least one of whom alleges harm or injury committed by the other. In both criminal and civil matters, the courts decide the remedy and resolution of the case, and in all cases, the U.S. Supreme Court is the final court of appeal.



This site provides an interesting challenge: Look at the different cases presented and decide whether each would be heard in the state or federal courts. You can check your results at the end.

Although the Supreme Court tends to draw the most public attention, it typically hears fewer than one hundred cases every year. In fact, the entire federal side—both trial and appellate—handles proportionately very few cases, with about 90 percent of all cases in the U.S. court system being heard at the state level.

"State Courts vs. Federal Courts." The Judicial Learning Center. http://judiciallearningcenter.org/state-courts-vs-federal-courts/ (March 1, 2016).

The several hundred thousand cases handled every year on the federal side pale in comparison to the several million handled by the states.

State courts really are the core of the U.S. judicial system, and they are responsible for a huge area of law. Most crimes and criminal activity, such as robbery, rape, and murder, are violations of state laws, and cases are thus heard by state courts. State courts also handle civil matters; personal injury, malpractice, divorce, family, juvenile, probate, and contract disputes and real estate cases, to name just a few, are usually state-level cases.

The federal courts, on the other hand, will hear any case that involves a foreign government, patent or copyright infringement, Native American rights, maritime law, bankruptcy, or a controversy between two or more states. Cases arising from activities across state lines (interstate commerce) are also subject to federal court jurisdiction, as are cases in which the United States is a party. A dispute between two parties not from the same state or nation and in which damages of at least $75,000 are claimed is handled at the federal level. Such a case is known as a diversity of citizenship case.

"State Courts vs. Federal Courts." The Judicial Learning Center. http://judiciallearningcenter.org/state-courts-vs-federal-courts/ (March 1, 2016).

However, some cases cut across the dual court system and may end up being heard in both state and federal courts. Any case has the potential to make it to the federal courts if it invokes the U.S. Constitution or federal law. It could be a criminal violation of federal law, such as assault with a gun, the illegal sale of drugs, or bank robbery. Or it could be a civil violation of federal law, such as employment discrimination or securities fraud. Also, any perceived violation of a liberty protected by the Bill of Rights, such as freedom of speech or the protection against cruel and unusual punishment, can be argued before the federal courts. A summary of the basic jurisdictions of the state and federal sides is provided in Table.

Jurisdiction of the Courts: State vs. Federal	
State Courts	Federal Courts
Hear most day-to-day cases, covering 90 percent of all cases	Hear cases that involve a "federal question," involving the Constitution, federal laws or treaties, or a "federal party" in which the U.S. government is a party to the case

Jurisdiction of the Courts: State vs. Federal	
State Courts	Federal Courts
Hear both civil and criminal matters	Hear both civil and criminal matters, although many criminal cases involving federal law are tried in state courts
Help the states retain their own sovereignty in judicial matters over their state laws, distinct from the national government	Hear cases that involve “interstate” matters, “diversity of citizenship” involving parties of two different states, or between a U.S. citizen and a citizen of another nation (and with a damage claim of at least $75,000)

While we may certainly distinguish between the two sides of a jurisdiction, looking on a case-by-case basis will sometimes complicate the seemingly clear-cut division between the state and federal sides. It is always possible that issues of federal law may start in the state courts before they make their way over to the federal side. And any case that starts out at the state and/or local level on state matters can make it into the federal system on appeal—but only on points that involve a federal law or question, and usually after all avenues of appeal in the state courts have been exhausted.

“U.S. Court System.” Syracuse University. http://www2.maxwell.syr.edu/plegal/scales/court.html (March 1, 2016).

Consider the case *Miranda v. Arizona*.

Miranda v. Arizona, 384 U.S. 436 (1966).

Ernesto Miranda, arrested for kidnapping and rape, which are violations of state law, was easily convicted and sentenced to prison after a key piece of evidence—his own signed confession—was presented at trial in the Arizona court. On appeal first to the Arizona Supreme Court and then to the U.S. Supreme Court to exclude the confession on the grounds that its admission was a violation of his constitutional rights, Miranda won the case. By a slim 5–4 margin, the justices ruled that the confession had to be excluded from evidence because in obtaining it, the police had violated Miranda’s Fifth Amendment right against self-incrimination and his Sixth Amendment right to an attorney. In the opinion of the Court, because of the coercive nature of police interrogation, no confession can be admissible unless a suspect is made aware of his rights and then in turn waives those rights. For this reason, Miranda’s original conviction was overturned.

Yet the Supreme Court considered only the violation of Miranda’s constitutional rights, but not whether he was guilty of the crimes with which he was charged. So there were still crimes committed for which Miranda had to face charges. He was therefore retried in state court in 1967, the second time without the confession as evidence, found guilty again based on witness testimony and other evidence, and sent to prison.

Miranda’s story is a good example of the tandem operation of the state and federal court systems. His guilt or innocence of the crimes was a matter for the state courts, whereas the constitutional questions raised by his trial were a matter for the federal courts. Although he won his case before the Supreme Court, which established a significant precedent that criminal suspects must be read their so-called Miranda rights before police questioning, the victory did not do much for Miranda himself. After serving prison time, he was stabbed to death in a bar fight in 1976 while out on parole, and due to a lack of evidence, no one was ever convicted in his death.

THE IMPLICATIONS OF A DUAL COURT SYSTEM

From an individual’s perspective, the dual court system has both benefits and drawbacks. On the plus side, each person has more than just one court system ready to protect his or her rights. The dual court system provides alternate venues in which to appeal for assistance, as Ernesto Miranda’s case illustrates. The U.S. Supreme Court found for Miranda an extension of his Fifth Amendment protections—a constitutional right to remain silent when faced with police questioning. It was a right he could not get solely from the state courts in Arizona, but one those courts had to honor nonetheless.

The fact that a minority voice like Miranda’s can be heard in court, and that his or her grievance can be resolved in his or her favor if warranted, says much about the role of the judiciary in a democratic republic. In Miranda’s case, a resolution came from the federal courts, but it can also come from the state side. In fact, the many differences among the state courts themselves may enhance an individual’s potential to be heard.

State courts vary in the degree to which they take on certain types of cases or issues, give access to particular groups, or promote certain interests. If a particular issue or topic is not taken up in one place, it may be handled in another, giving rise to many

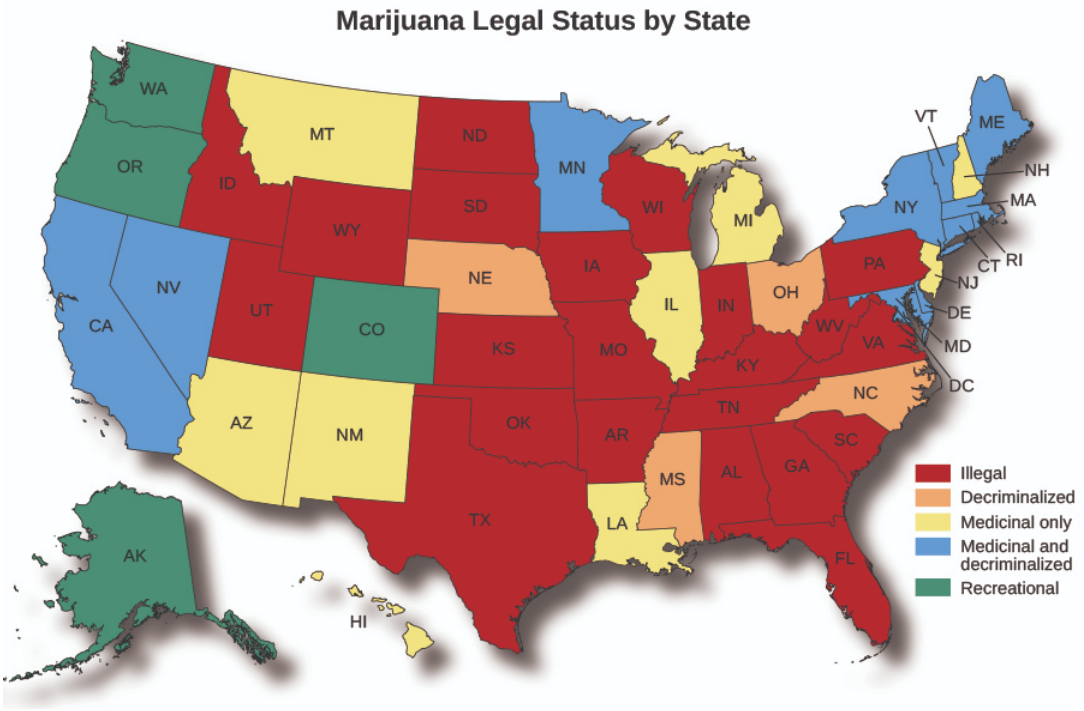
different opportunities for an interest to be heard somewhere across the nation. In their research, Paul Brace and Melinda Hallfound that state courts are important instruments of democracy because they provide different alternatives and varying arenas for political access. They wrote, “Regarding courts, one size does not fit all, and the republic has survived in part because federalism allows these critical variations.”

Paul R. Brace and Melinda Gann Hall. 2005. “Is Judicial Federalism Essential to Democracy? State Courts in the Federal System.” In Institutions of American Democracy, The Judicial Branch, eds. Kermit L. Hall and Kevin T. McGuire. New York: Oxford University Press.

But the existence of the dual court system and variations across the states and nation also mean that there are different courts in which a person could face charges for a crime or for a violation of another person’s rights. Except for the fact that the U.S. Constitution binds judges and justices in all the courts, it is state law that governs the authority of state courts, so judicial rulings about what is legal or illegal may differ from state to state. These differences are particularly pronounced when the laws across the states and the nation are not the same, as we see with marijuana laws today.

MARIJUANA LAWS AND THE COURTS

There are so many differences in marijuana laws between states, and between the states and the national government, that uniform application of treatment in courts across the nation is nearly impossible (Figure). What is legal in one state may be illegal in another, and state laws do not cross state geographic boundary lines—but people do. What’s more, a person residing in any of the fifty states is still subject to federal law.



Marijuana laws vary remarkably across the fifty states. In most states, marijuana use is illegal, as it is under federal law, but some states have decriminalized it, some allow it for medicinal use, and some have done both. Marijuana is currently legal for recreational use in four states.

For example, a person over the age of twenty-one may legally buy marijuana for recreational use in four states and for medicinal purpose in nearly half the states, but could face charges—and time in court—for possession in a neighboring state where marijuana use is not legal. Under federal law, too, marijuana is still regulated as a Schedule 1 (most dangerous) drug, and federal authorities often find themselves pitted against states that have legalized it. Such differences can lead, somewhat ironically, to arrests and federal criminal charges for people who have marijuana in states where it is legal, or to federal raids on growers and dispensaries that would otherwise be operating legally under their state’s law.

Differences among the states have also prompted a number of lawsuits against states with legalized marijuana, as people opposed to those state laws seek relief from (none other than) the courts. They want the courts to resolve the issue, which has left in its wake contradictions and conflicts between states that have legalized marijuana and those that have not, as well as conflicts between states and the national government. These lawsuits include at least one filed by the states of Nebraska and Oklahoma against Colorado. Citing concerns over cross-border trafficking, difficulties with law enforcement, and violations of the Constitution’s supremacy clause, Nebraska and Oklahoma have petitioned the U.S. Supreme Court to intervene and rule on the legality of Colorado’s marijuana law, hoping to get it overturned.

States of Nebraska and Oklahoma v. State of Colorado. Motion for Leave to File Complaint, Complaint and Brief in Support. December 2014. http://www.scribd.com/doc/250506006/Nebraska-Oklahoma-Lawsuit.

The Supreme Court has yet to take up the case.

How do you think differences among the states and differences between federal and state law regarding marijuana use can affect the way a person is treated in court? What, if anything, should be done to rectify the disparities in application of the law across the nation?

Where you are physically located can affect not only what is allowable and what is not, but also how cases are judged. For decades, political scientists have confirmed that political culture affects the operation of government institutions, and when we add to that the differing political interests and cultures at work within each state, we end up with court systems that vary greatly in their judicial and decision-making processes.

Joel B. Grossman and Austin Sarat. 1971. "Political Culture and Judicial Research." Washington University Law Review. 1971 (2) Symposium: Courts, Judges, Politics—Some Political Science Perspectives. http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=2777&context=law_lawreview.

Each state court system operates with its own individual set of biases. People with varying interests, ideologies, behaviors, and attitudes run the disparate legal systems, so the results they produce are not always the same. Moreover, the selection method for judges at the state and local level varies. In some states, judges are elected rather than appointed, which can affect their rulings.

Just as the laws vary across the states, so do judicial rulings and interpretations, and the judges who make them. That means there may not be uniform application of the law—even of the same law—nationwide. We are somewhat bound by geography and do not always have the luxury of picking and choosing the venue for our particular case. So, while having such a decentralized and varied set of judicial operations affects the kinds of cases that make it to the courts and gives citizens alternate locations to get their case heard, it may also lead to disparities in the way they are treated once they get there.

Summary

The U.S. judicial system features a dual court model, with courts at both the federal and state levels, and the U.S. Supreme Court at the top. While cases may sometimes be eligible for both state and federal review, each level has its own distinct jurisdiction. There are trial and appellate courts at both levels, but there are also remarkable differences among the states in their laws, politics, and culture, meaning that no two state court systems are exactly alike. The diversity of courts across the nation can have both positive and negative effects for citizens, depending on their situation. While it provides for various opportunities for an issue or interest to be heard, it may also lead to case-by-case treatment of individuals, groups, or issues that is not always the same or even-handed across the nation.

Of all the court cases in the United States, the majority are handled _____.

1. by the U.S. Supreme Court
2. at the state level
3. by the circuit courts
4. by the U.S. district courts

Both state and federal courts hear matters that involve _____.

1. civil law only
2. criminal law only
3. both civil and criminal law
4. neither civil nor criminal law

A state case is more likely to be heard by the federal courts when _____.

1. it involves a federal question
2. a governor requests a federal court hearing
3. it involves a criminal matter
4. the state courts are unable to come up with a decision

The existence of the dual court system is an unnecessary duplication to some but beneficial to others. Provide at least one positive and one negative characteristic of having overlapping court systems in the United States.

Which court would you consider to be closest to the people? Why?

Glossary

appellate court
a court that reviews cases already decided by a lower or trial court and that may change the lower court's decision

civil law
a non-criminal law defining private rights and remedies

criminal law
a law that prohibits actions that could harm or endanger others, and establishes punishment for those actions

dual court system
the division of the courts into two separate systems, one federal and one state, with each of the fifty states having its own courts

trial court
the level of court in which a case starts or is first tried

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4.4: State and Federal Courts

The U.S. court system is very complex due to dual federalism. Each level of government-state, local, and federal-has its own courts. Perhaps the easiest criminal court system to understand is the federal system. When an act violates a federal criminal law, the suspect is tried in federal court. When a suspect violates a state law, it can be tried at the local or state level, depending on the state.

This disparity occurs because each state has its own court system. No two of the fifty are exactly alike. In addition, the federal government operates courts within each of the fifty states. The vast majority of criminal cases are tried in state courts. Most state court systems and the federal court system can be described as hierarchical or "pyramid shaped."

HomeLower Courts

At the bottom of the court hierarchy are the **lower courts**. The majority of cases heard by these courts are traffic violations and misdemeanor cases. The names vary widely, depending on the state. Municipal courts, police courts, and traffic courts are common examples. There are also many specialized courts at this level. Juvenile courts, for example, often exist at this level.

These courts tend to hear relatively minor matters. Many can, however, sentence violators to jail and impose large fines. Some of these courts also deal with preliminary matters in criminal cases, such as conducting arraignments and preliminary hearings. These felony cases are subsequently transferred to a higher court for trial. Many people-especially those appearing in them-are critical of the "assembly line" justice offered by many municipal courts.

HomeCourts of General Jurisdiction

While the lower courts can only hear nonserious matters, this level of the court system can hear felony cases. **Courts of general jurisdiction** are the trial courts of record of the state court systems. Generally, these courts operate more formally and professionally than the lower courts. There are fewer of them. The name varies depending on the state; in some states, they are called district courts, and in others, they are called circuit courts. This can be very confusing in states that are the reverse of the federal system (where district courts are trial courts and circuit courts are appellate courts). Only a small fraction of cases filed by prosecutors ever go to full trial in these courts. The vast majority end in a plea bargain.

HomeCourts of Appellate Jurisdiction

When a party is dissatisfied with the results of a trial, then they can appeal to a higher court. Appellate courts mostly hear appeals cases, and are higher up in the court hierarchy. The number of levels of appeals courts depends largely on the population of the state. In states with relatively small populations, the losing party at trial can appeal directly to the state's highest court, the state supreme court. In larger states, there is usually an intermediate appeals court that lightens the workload of the state supreme court.

The supreme courts usually have a broad discretion in deciding whether to hear a case or not. The judges are free in many circumstances to decide what cases are important, and to only hear those.

HomeThe Federal Court System

Federal courts are organized along very similar lines to state courts, although the more general subject matter jurisdiction of federal courts makes them more streamlined that many state systems.

U.S. District Courts

In the hierarchy of courts, the trial courts of general jurisdiction are always near the bottom. At the federal level, these workhorses of the court system are the 94 U.S. District Courts. Every state in the United States has at least one district court, and some states have several. According to an annual report entitled *Judicial Business of the U.S. Courts* (2014), "filings for criminal defendants (including defendants transferred from other districts) fell 3 percent to 91,266 in 2013. This was the lowest total since 2008." Drug offenses counted for the largest percentage of these filings at around 32% of all criminal cases. Shifts in enforcement strategies have seen a dramatic decline in federal prosecutions for marijuana-related offenses, with an 8% drop in 2013 over the previous year. Immigration, fraud, and firearms related crime made up the bulk of remaining cases.

U.S. Courts of Appeals

Above the federal district courts in the federal court hierarchy are the U.S. Courts of Appeal. They serve mostly to hear appeals from the district courts. Appeals judges do not sit alone when deciding cases, but rather sit in panels of three judges. Rare and important cases are sometimes heard *en banc*, meaning all of the judges in that circuit hear the case together.

These courts lack the discretion of which cases they hear that the Supreme Court enjoys. The docket of the appeals courts is dictated by the number and types of appeals that are filed. Filings in the 12 regional courts of appeals fell 2 percent to 56,475. Decreases occurred in filings of criminal appeals, appeals of administrative agency decisions, and civil appeals. Growth was reported for prisoner petitions, bankruptcy appeals, and original proceedings (Administrative Office of the U.S. Courts, 2014).

The U.S. Supreme Court (USSC)

The U.S. Supreme Court crowns the hierarchy of United States Courts. It hears appeals that come out of both federal and state courts. Considering there are only nine justices, the workload of the Supreme Court is very heavy. The Supreme Court is different than lower level courts in that they exercise **certiorari power**. This means that the justices get to decide which cases to review and which to pass over. The cases that they do select tend to have very broad national implications. Because the Supreme Court functions mostly as a court of appeals, most of the cases they decide result in a lower court's decision either being **affirmed**or **reversed**.

HomeProblems with the Courts

One of the biggest problems facing the courts today is the high volume of cases. For example, in 2013, combined filings for civil cases and criminal defendants in the U.S. district courts totaled 363,914. According to the Court Statistics Project, over 10.6 million cases were processed in state trial courts in 2009 (the last year for which data is available).

The tough drug sanctions of the recent past caused a steadily increasing caseload for the courts. A majority of state courts are perpetually behind on hearing cases. Accordingly, there has been an increasing interest on both the state and federal level with how to reduce caseloads and speed up the flow of cases.

Reducing Caseloads

Perhaps the most popular effort to reduce caseloads has been the advent of *drug courts*. A big difference between drug courts and regular courts is that drug courts tend to sentence nonviolent, first-time offenders to drug treatment rather than probation or prison. The main purposes of drug courts are to reduce recidivism and reduce the caseload of the regular courts. The empirical research suggests that drug courts are more effective at reducing recidivism than traditional probation or prison.

Speeding Up Court Processing

When there are too many cases being processed by the courts, the speed at which cases can be processes slows down, sometimes dramatically. This is especially problematic in criminal courts where defendants have a constitutional guarantee of a speedy trial. For this and other reasons, the public is dissatisfied when case resolution becomes a long, drawn-out process.

At the federal level, there has been legislation to force the courts to run faster. **The Speedy Trail Act of 1974** sets time standards for two different stages in the federal progression. The law stipulates that the prosecutor has a maximum of thirty days from the time of arrest to arraign a suspect, and an additional seventy days from the indictment to the trial. Every state has followed the federal example by enacting some form of speedy trial law.

HomeHomeThe Role of Judges

The many responsibilities of the trial court judge extend throughout the entire criminal court process. From the time of an arrest, judges make critical decisions that have a deep impact on the cases and lives of those accused of crimes. Because they must evaluate probable cause and issue search and arrest warrants, judges are often involved in criminal cases before an arrest takes place. Once the offender is arrested, the judge must decide if bail is to be granted, the amount of bail, rule on pretrial motions made by both the prosecution and the defense, hear pleas, referee trials, and pass sentences. At all stages of the process, the judge must perform a balancing act, protecting the rights of the accused while also protecting the best interest of the public. Appeals court judges have different responsibilities than trial judges. While trial judges are mostly referees in the adversarial battle between prosecution and defense, appeals court judges serve as legal scholars by researching, clarifying, and writing opinions on legal issues.

Federal Judges

Federal judges tend to be the cream of the crop. They tend to come from families with a long history of public service and attend the finest law schools in the world. Some critics argue that those families are also wealthy, and that federal judges are selected from the social and cultural elite and that the process is unfair.

State Judges

State level judges tend to be drawn heavily from whichever political party dominates that particular state. There are a variety of ways that judges are selected, depending on state law. Some states have partisan elections, meaning that candidates for judgeships run under the banner of a particular political party. In other states, judges are elected, but they run as nonpartisan candidates, meaning that they state no allegiance to a particular political party. Some states use an appointment system, where the governor of the state appoints judges. Still other states select judges by legislative appointment. Some states, such as Missouri, use a merit system.

Judicial Decision Making

The very nature of being a judge requires making important decisions. Judges make decisions that have an enormous impact on the lives of defendants. Trial court judges are often called upon to make decisions in an instant, while appeals court judges have more time to ponder weighty issues and seek input from colleagues and staff.

Because of the doctrine of *stare decisis*, the decisions of judges are tempered by the existing legal landscape. That is, most judges follow precedent when it is available, and try to use the legal logic of past cases to guide them when novel legal questions arise. Political values often come into play, although these are not as readily recognized as is legal tradition.

HomeHomeJudicial Misconduct

Judges have an awesome amount of power, and this power sometimes corrupts. Judges, like other criminal justice professionals, sometimes act in unethical and illegal ways. These inappropriate activities undermine the public confidence in the judiciary and create injustice. Each state has some sort of mechanism in place to deal with unethical conduct by judges. At the federal level, judges can only be removed by impeachment by the Senate.

HomeHomeJudicial Independence

The founding fathers decided early on that the courts should be independent of the other branches of government. There are several reasons for this separation of powers. Perhaps the most important reason for judicial independence is that it allows judges to preside over cases in a just and impartial way. Another important reason is that the courts serve as a check on the power of the executive and legislative branches.

It is a mistake, however, to view the judiciary as completely independent. The other branches of government have the ability to influence the judiciary. The executive often has the power of appointment over judges. The legislative branch has the power of the purse, controlling the budget of the courts. These powers, while significant, are limited. Federal judges, for example, are appointed for life tenure. That means that once appointed by the executive, they cannot be fired. The founding fathers formed government in this way because they understood that a judge fearful of losing his job could not be a neutral and detached magistrate that is willing to rule against the legislative or the executive.

HomeJuveniles and the Courts

Just as with the adult criminal justice system, the courts powerfully influence the juvenile justice system. This is true at both the juvenile court level, and at the appellate level.

Juvenile Courts

Perhaps the most important member of the juvenile justice system is the juvenile court judge. Juvenile judges have the role of a traditional judge, but this role is greatly expanded when a judge presides over a juvenile court. In many jurisdictions, the juvenile judge oversees not only the operations of the juvenile court, but juvenile probation departments as well. In many small jurisdictions, juvenile court judges are responsible for the fiscal management of the courts as well as probation departments.

The beliefs, attitudes, and behaviors of juvenile judges can have an incredible impact on other criminal justice agencies in particular, and the entire community in general. For example, judges that do a poor job of dealing with juvenile delinquency in the schools runs the risk of creating a disruptive and lawless learning environment. At the other end of the spectrum, judges that are overly punitive in their decisions run the risk of violating the doctrine of *parens patriae*.

Much of what juvenile court judges do can be described as a balancing act. Juvenile judges must ensure that all processes and decisionmaking are carried out in a fair and unbiased manner. They must make sure that all decisions balance the best interests of the juvenile with the best interests of the victim and community. In addition, they must ensure that the constitutional rights of all parties are upheld. While the juvenile justice system is substantially different than the adult system, constitutional guarantees of due

process must be upheld in juvenile proceedings. In practice, this requirement creates an often-uncomfortable conflict of adversarial process versus the best interest of the child.

HomeThe Supreme Court & Juveniles

Historically, juvenile proceedings rarely made it to the U.S. Supreme Court. Starting with the Warren court in the 1960s, however, the Supreme Court handed down several cases that dramatically altered the structure and function of the juvenile justice system.

Landmark Court Decisions in Juvenile Justice

Kent v. United States (1966)	Held that juveniles must be afforded due process rights in court proceedings.
In re Gault (1967)	Held that juveniles accused of crimes must be afforded many of the same due process rights as adults.
Breed v. Jones (1975)	Held that finding a child delinquent in a juvenile court then trying the child in adult court amounts to double jeopardy.
Schall v. Martin (1984)	Held that the preventive detention of a juvenile does not necessarily violate due process.
Doe v. Renfrow (1981)	Upheld a lower court decision that a search of schoolchildren for narcotics by a drug dog is not rights violation.
New Jersey v. TLO (1985)	Set the evidentiary standard for searches of students by school officials at reasonable suspicion.
Qutb v. Strauss (1993)	Held that curfew laws were constitutional because they are designed to protect the community.

Home *Key Terms*

Affirmed, Assembly Line Justice, Certiorari Power, Courts of General Jurisdiction, *Doe v. Renfrow* (1981), Judicial Independence, Judicial Misconduct, *Kent v. United States*(1966), Lower Courts, Municipal Courts, *New Jersey v. TLO* (1985), Police Courts, *Qutb v. Strauss* (1993), Reversed, Speedy Trial Act of 1974, Traffic Courts, U.S. Courts of Appeal, U.S. District Courts

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4.5: The Supreme Court

Learning Objectives

By the end of this section, you will be able to:

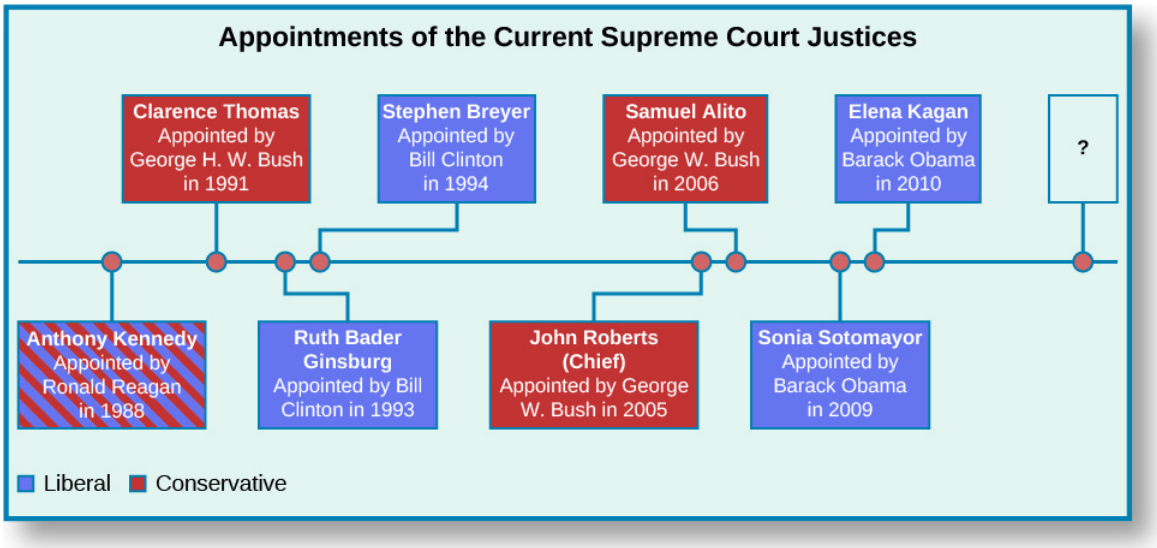
- Analyze the structure and important features of the Supreme Court
- Explain how the Supreme Court selects cases to hear
- Discuss the Supreme Court's processes and procedures

The Supreme Court of the United States, sometimes abbreviated SCOTUS, is a one-of-a-kind institution. While a look at the Supreme Court typically focuses on the nine justices themselves, they represent only the top layer of an entire branch of government that includes many administrators, lawyers, and assistants who contribute to and help run the overall judicial system. The Court has its own set of rules for choosing cases, and it follows a unique set of procedures for hearing them. Its decisions not only affect the outcome of the individual case before the justices, but they also create lasting impacts on legal and constitutional interpretation for the future.

THE STRUCTURE OF THE SUPREME COURT

The original court in 1789 had six justices, but Congress set the number at nine in 1869, and it has remained there ever since. There is one chief justice, who is the lead or highest-ranking judge on the Court, and eight associate justices. All nine serve lifetime terms, after successful nomination by the president and confirmation by the Senate.

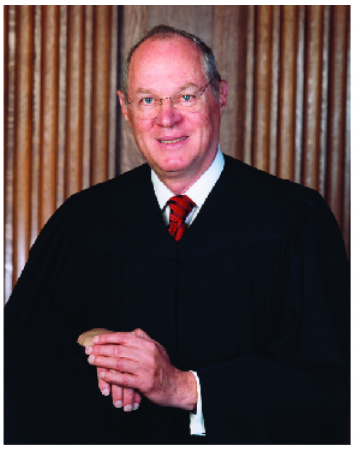
The current court is fairly diverse in terms of gender, religion (Christians and Jews), ethnicity, and ideology, as well as length of tenure. Some justices have served for three decades, whereas others were only recently appointed by President Obama. Figurelists the names of the eight justices serving on the Court as of November 2016, along with their year of appointment and the president who nominated them.



With the death of Associate Justice Antonin Scalia in February 2016, there remain three current justices who are considered part of the Court's more conservative wing—Chief Justice Roberts and Associate Justices Thomas and Alito, while four are considered more liberal-leaning—Justices Ginsburg, Breyer, Sotomayor, and Kagan (Figure). Justice Kennedy has become known as the "swing" vote, particularly on decisions like the Court's same-sex marriage rulings in 2015, because he sometimes takes a more liberal position and sometimes a more conservative one. Had the Democrats retained the presidency in 2016, the replacement for Scalia's spot on the court could have swung many key votes in a moderate or liberal direction. However, with Republican Donald Trump winning the election and the Republicans retaining Senate control, it is likely that the replacement in 2017 will be more conservative.



(a)



(b)



(c)

Justice Ruth Bader Ginsburg (a) is part of the liberal wing of the current Supreme Court, whereas Justice Anthony Kennedy (b) represents a key swing vote. Chief Justice John Roberts (c) leads the court as an ardent member of its more conservative wing.

While not formally connected with the public the way elected leaders are, the Supreme Courtnonetheless offers visitors a great deal of information at its official website.

For unofficial summaries of recent Supreme Court cases or news about the Court, visit the Oyez website or SCOTUS blog.

In fact, none of the justices works completely in an ideological bubble. While their numerous opinions have revealed certain ideological tendencies, they still consider each case as it comes to them, and they don't always rule in a consistently predictable or expected way. Furthermore, they don't work exclusively on their own. Each justice has three or four law clerks, recent law school graduates who temporarily work for him or her, do research, help prepare the justice with background information, and assist with the writing of opinions. The law clerks' work and recommendations influence whether the justices will choose to hear a case, as well as how they will rule. As the profile below reveals, the role of the clerks is as significant as it is varied.

PROFILE OF A UNITED STATES SUPREME COURT CLERK

A Supreme Court clerkship is one of the most sought-after legal positions, giving "thirty-six young lawyers each year a chance to leave their fingerprints all over constitutional law."

Dahlia Lithwick. "Who Feeds the Supreme Court?" Slate.com. September 14, 2015. http://www.slate.com/articles/news_and_politics/jurisprudence/2015/09/supreme_court_feeder_judges_men_and_few_women_send_law_clerks_to_scotus.html.

A number of current and former justices were themselves clerks, including Chief Justice John Roberts, Justices Stephen Breyer and Elena Kagan, and former chief justice William Rehnquist.

Supreme Court clerks are often reluctant to share insider information about their experiences, but it is always fascinating and informative to hear about their jobs. Former clerk Philippa Scarlett, who worked for Justice Stephen Breyer, describes four main responsibilities:

"Role of Supreme Court Law Clerk: Interview with Philippa Scarlett." IIP Digital. United States of America Embassy. http://iipdigital.usembassy.gov/st/english/publication/2013/02/20130211142365.html#axzz3grjRwiG (March 1, 2016).

***Review the cases:** Clerks participate in a "cert. pool" (short for writ of certiorari, a request that the lower court send up its record of the case for review) and make recommendations about which cases the Court should choose to hear.*

***Prepare the justices for oral argument:** Clerks analyze the filed briefs (short arguments explaining each party's side of the case) and the law at issue in each case waiting to be heard.*

***Research and draft judicial opinions:** Clerks do detailed research to assist justices in writing an opinion, whether it is the majority opinion or a dissenting or concurring opinion.*

***Help with emergencies:** Clerks also assist the justices in deciding on emergency applications to the Court, many of which are applications by prisoners to stay their death sentences and are sometimes submitted within hours of a scheduled execution.*

Explain the role of law clerks in the Supreme Court system. What is your opinion about the role they play and the justices' reliance on them?

HOW THE SUPREME COURT SELECTS CASES

The Supreme Court begins its annual session on the first Monday in October and ends late the following June. Every year, there are literally thousands of people who would like to have their case heard before the Supreme Court, but the justices will select only a handful to be placed on the docket, which is the list of cases scheduled on the Court's calendar. The Court typically accepts fewer than 2 percent of the as many as ten thousand cases it is asked to review every year.

"Supreme Court Procedures." United States Courts. http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (March 1, 2016).

Case names, written in italics, list the name of a petitioner versus a respondent, as in *Roe v. Wade*, for example.

Roe v. Wade, 410 U.S. 113 (1973).

For a case on appeal, you can tell which party lost at the lower level of court by looking at the case name: The party unhappy with the decision of the lower court is the one bringing the appeal and is thus the petitioner, or the first-named party in the case. For example, in *Brown v. Board of Education* (1954), Oliver Brown was one of the thirteen parents who brought suit against the Topeka public schools for discrimination based on racial segregation.

Most often, the petitioner is asking the Supreme Court to grant a writ of *certiorari*, a request that the lower court send up its record of the case for review. Once a writ of *certiorari* (*cert.* for short) has been granted, the case is scheduled on the Court's docket. The Supreme Court exercises discretion in the cases it chooses to hear, but four of the nine Justices must vote to accept a case. This is called the Rule of Four.

For decisions about *cert*., the Court's Rule 10 (Considerations Governing Review on Writ of *Certiorari*) takes precedence.

"Rule 10. Considerations Governing Review on Certiorari." Rules of the Supreme Court of the United States. Adopted April 19, 2013, Effective July 1, 2013. http://www.supremecourt.gov/ctrules/2013RulesoftheCourt.pdf.

The Court is more likely to grant *certiorari* when there is a conflict on an issue between or among the lower courts. Examples of conflicts include (1) conflicting decisions among different courts of appeals on the same matter, (2) decisions by an appeals court or a state court conflicting with precedent, and (3) state court decisions that conflict with federal decisions. Occasionally, the Court will fast-track a case that has special urgency, such as *Bush v. Gore* in the wake of the 2000 election.

Bush v. Gore, 531 U.S. 98 (2000).

Past research indicated that the amount of interest-group activity surrounding a case before it is granted *cert.* has a significant impact on whether the Supreme Court puts the case on its agenda. The more activity, the more likely the case will be placed on the docket.

Gregory A. Caldeira and John R. Wright. 1988. "Organized Interests and Agenda-Setting in the U.S. Supreme Court," American Political Science Review 82: 1109–1128.

But more recent research broadens that perspective, suggesting that too much interest-group activity when the Court is considering a case for its docket may actually have diminishing impact and that external actors may have less influence on the work of the Court than they have had in the past.

Gregory A. Caldeira, John R. Wright, and Christopher Zorn. 2012. "Organized Interests and Agenda Setting in the U.S. Supreme Court Revisited." Presentation at the Second Annual Conference on Institutions and Lawmaking, Emory University. http://polisci.emory.edu/home/cslpe/...n_cwzpaper.pdf.

Still, the Court takes into consideration external influences, not just from interest groups but also from the public, from media attention, and from a very key governmental actor—the solicitor general.

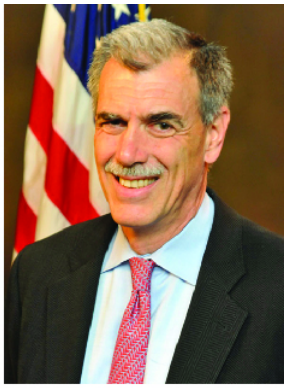
The solicitor general is the lawyer who represents the federal government before the Supreme Court: He or she decides which cases (in which the United States is a party) should be appealed from the lower courts and personally approves each one presented (Figure). Most of the cases the solicitor general brings to the Court will be given a place on the docket. About two-thirds of all Supreme Court cases involve the federal government.

"About the Office." Office of the Solicitor General. The United States Department of Justice. http://www.justice.gov/osg/about-office-1 (March 1, 2016).

The solicitor general determines the position the government will take on a case. The attorneys of his or her office prepare and file the petitions and briefs, and the solicitor general (or an assistant) presents the oral arguments before the Court.



(a)



(b)

Thurgood Marshall (a), who later served on the Supreme Court, was appointed solicitor general by Lyndon Johnson and was the first African American to hold the post. Donald B. Verrilli Jr. (b) was the forty-sixth solicitor general of the United States, starting his term of office in June 2011 when Elena Kagan left the post to join the Supreme Court.

In other cases in which the United States is not the petitioner or the respondent, the solicitor general may choose to intervene or comment as a third party. Before a case is granted *cert.*, the justices will sometimes ask the solicitor general to comment on or file a brief in the case, indicating their potential interest in getting it on the docket. The solicitor general may also recommend that the justices decline to hear a case. Though research has shown that the solicitor general's special influence on the Court is not unlimited, it remains quite significant. In particular, the Court does not always agree with the solicitor general, and "while justices are not lemmings who will unwittingly fall off legal cliffs for tortured solicitor general recommendations, they nevertheless often go along with them even when we least expect them to."

Ryan C. Black and Ryan J. Owens. "Solicitor General Influence and the United States Supreme Court." Vanderbilt University. http://www.vanderbilt.edu/csdi/archived/working%20papers/Ryan%20Owens.pdf (March 1, 2016).

Some have credited Donald B. Verrilli, the solicitor general under President Obama, with holding special sway over the five-justice majority ruling on same-sex marriage in June 2015. Indeed, his position that denying homosexuals the right to marry would mean "thousands and thousands of people are going to live out their lives and go to their deaths without their states ever recognizing the equal dignity of their relationships" became a foundational point of the Court's opinion, written by Justice Kennedy.

Mark Joseph Stern., "If SCOTUS Decides in Favor of Marriage Equality, Thank Solicitor General Don Verrilli," Slate.com. April 29, 2015. http://www.slate.com/blogs/outward/2015/04/29/don_verrilli_solicitor_general_was_the_real_hero_of_scotus_gay_marriage.html.

With such power over the Court, the solicitor general is sometimes referred to as "the tenth justice."

SUPREME COURT PROCEDURES

Once a case has been placed on the docket, briefs, or short arguments explaining each party's view of the case, must be submitted—first by the petitioner putting forth his or her case, then by the respondent. After initial briefs have been filed, both parties may file subsequent briefs in response to the first. Likewise, people and groups that are not party to the case but are interested in its outcome may file an *amicus curiae* ("friend of the court") brief giving their opinion, analysis, and recommendations about how the Court should rule. Interest groups in particular can become heavily involved in trying to influence the judiciary by filing *amicus* briefs—both before and after a case has been granted *cert*. And, as noted earlier, if the United States is not party to a case, the solicitor general may file an *amicus* brief on the government's behalf.

With briefs filed, the Court hears oral arguments in cases from October through April. The proceedings are quite ceremonial. When the Court is in session, the robed justices make a formal entrance into the courtroom to a standing audience and the sound of a banging gavel. The Court's marshal presents them with a traditional chant: "The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States. Oyez! Oyez! Oyez! [Hear ye!] All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court!"

"The Court and its Procedures." Supreme Court of the United States. May 26, 2015.

It has not gone unnoticed that the Court, which has defended the First Amendment's religious protection and the traditional separation of church and state, opens its every public session with a mention of God.

During oral arguments, each side's lawyers have thirty minutes to make their legal case, though the justices often interrupt the presentations with questions. The justices consider oral arguments not as a forum for a lawyer to restate the merits of his or her case as written in the briefs, but as an opportunity to get answers to any questions they may have.

"Supreme Court Procedures." United States Courts. http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (March 1, 2016).

When the United States is party to a case, the solicitor general (or one of his or her assistants) will argue the government's position; even in other cases, the solicitor general may still be given time to express the government's position on the dispute.

When oral arguments have been concluded, the justices have to decide the case, and they do so in conference, which is held in private twice a week when the Court is in session and once a week when it is not. The conference is also a time to discuss petitions for *certiorari*, but for those cases already heard, each justice may state his or her views on the case, ask questions, or raise concerns. The chief justice speaks first about a case, then each justice speaks in turn, in descending order of seniority, ending with the most recently appointed justice.

"Supreme Court Procedures." United States Courts. http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (March 1, 2016).

The judges take an initial vote in private before the official announcement of their decisions is made public.

Oral arguments are open to the public, but cameras are not allowed in the courtroom, so the only picture we get is one drawn by an artist's hand, an illustration or rendering. Cameras seem to be everywhere today, especially to provide security in places such as schools, public buildings, and retail stores, so the lack of live coverage of Supreme Court proceedings may seem unusual or old-fashioned. Over the years, groups have called for the Court to let go of this tradition and open its operations to more "sunshine" and greater transparency. Nevertheless, the justices have resisted the pressure and remain neither filmed nor photographed during oral arguments.

Jonathan Sherman. "End the Supreme Court's Ban on Cameras." New York Times. 24 April 2015. http://www.nytimes.com/2015/04/24/opinion/open-the-supreme-court-to-cameras.html.

Summary

A unique institution, the U.S. Supreme Court today is an interesting mix of the traditional and the modern. On one hand, it still holds to many of the formal traditions, processes, and procedures it has followed for many decades. Its public proceedings remain largely ceremonial and are never filmed or photographed. At the same time, the Court has taken on new cases involving contemporary matters before a nine-justice panel that is more diverse today than ever before. When considering whether to take on a case and then later when ruling on it, the justices rely on a number of internal and external players who assist them with and influence their work, including, but not limited to, their law clerks, the U.S. solicitor general, interest groups, and the mass media.

The Supreme Court consists of _____.

1. nine associate justices
2. one chief justice and eight associate justices
3. thirteen judges
4. one chief justice and five associate justices

A case will be placed on the Court's docket when _____ justices agree to do so.

1. four
2. five
3. six
4. all

One of the main ways interest groups participate in Supreme Court cases is by _____.

1. giving monetary contributions to the justices

2. lobbying the justices
3. filing *amicus curiae* briefs
4. protesting in front of the Supreme Court building

The lawyer who represents the federal government and argues cases before the Supreme Court is the _____.

1. solicitor general
2. attorney general
3. U.S. attorney
4. chief justice

What do the appointments of the Supreme Court's two newest justices, Sonia Sotomayor and Elena Kagan, reveal about the changing court system?

Glossary

amicus curiae
literally a "friend of the court" and used for a brief filed by someone who is interested in but not party to a case

associate justice
a member of the Supreme Court who is not the chief justice

brief
a written legal argument presented to a court by one of the parties in a case

chief justice
the highest-ranking justice on the Supreme Court

conference
closed meeting of the justices to discuss cases on the docket and take an initial vote

docket
the list of cases pending on a court's calendar

oral argument
words spoken before the Supreme Court (usually by lawyers) explaining the legal reasons behind their position in a case and why it should prevail

Rule of Four
a Supreme Court custom in which a case will be heard when four justices decide to do so

solicitor general
the lawyer who represents the federal government and argues some cases before the Supreme Court

writ of *certiorari*
an order of the Supreme Court calling up the records of the lower court so a case may be reviewed; sometimes abbreviated *cert*.

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4.6: The Policymaking role of the Supreme Court

The Supreme Court of the United States has an extremely important policymaking role, and this has an enormous impact on the criminal justice system. As discussed in a previous section, the Supreme Court has the power of judicial review. This power was first exercised in the landmark case of ***Marbury v. Madison***, decided in 1803. In that case, the Court struck down a statute that it considered "repugnant to the Constitution." This case served as the precedent for judicial review, and the Supreme Court has exercised the power ever since that time. Judicial review, then, is the authority of the Supreme Court to review the acts of Congress, and determine if those acts meet the standards set forth in the Constitution. It is interesting that the power of judicial review was never directly vested in the court in the text of the Constitution. The Court (in the *Marbury v. Madison* decision) inferred the power for itself.

Recall that the Supreme Court has the judicial power to interpret the law. This provides yet another method for the Supreme Court to make criminal justice policy. The Due Process Clause has proven very important in the Court's shaping of policy through this power. What exactly constitutes due process is extremely vague, and when the Court decides whether something is required by due process, they are in effect making policy. The evolution of police procedure during the Warren Court years is an enduring example of this policy-making power at work.

In theory, Supreme Court justices should practice what constitutional scholars have called judicial modesty. Judicial modesty refers to the idea that justices should only strike down acts of the legislative branch when those laws are in direct conflict with a constitutional provision. There has been a historical trend of judicial self-restraint among at least some justices. These justices feel that policy is best left in the hands of the legislative and executive branches. Striking down a law merely because a majority of justices disagrees with the legislature is wrong under this doctrine. The way our system functions, there is nothing to stop the justices from doing this. Other justices take the position that the court should be active in cases of civil liberties and civil rights. When it comes to allowing political agendas enter into the judicial decision-making process, the justices must police themselves.

HomePolitical Tendencies

Supreme Court justices, in theory, sit in order to interpret the law. This interpretation is, in reality, filtered through a political lens. No matter how well-meaning these justices may be, their perceptions of what is right in wrong in the law is impacted by their personal political beliefs. While there are always individual differences, a common way to divide the political leanings of the court is to use the terms **liberal** and**conservative** to describe both individual justices, the court in general, and particular decisions. Illustrations of **liberal decisions** are decisions favoring criminal defendants, people claiming discrimination, and those claiming violations of civil rights. Decisions that appear to favoring police, prosecutors, and other governmental entities are said to be **conservative**.

Currently, the Supreme Court as a clear cluster of four judges that consistently vote liberal, and another cluster of four justices that vote conservative. Justice Anthony Kennedy sits right in the middle of the political spectrum, and is the "swing" vote that makes predicting the outcome of Supreme Court decisions very difficult.

Not all liberal justices are equally liberal. In the 2013 term, Justices Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan cast liberal votes 70 percent of the time. While still left leaning, Justice Stephen Breyer is substantially more conservative than his female counterparts.

HomeJudicial Activism versus Judicial Restraint

There are two major vantage points from which to regard the work of the Supreme Court. The first is that the constitution should be interpreted as it is written. A second is that the Constitution must be interpreted in the context of modern life and modern problems. The is debate has been characterized as one between **judicial activism** and **judicial restraint**. Judicial activism represents the idea that the court should actively seek to right wrongs that other branches of government actively promote or will not do anything about. The majority of justices on the Warren Court were known as judicial activists. These justices believed that the court should take an active role in ensuring the civil rights of all Americans. Judicial restraint, on the other hand, is the idea that the democratic process should direct changes in policy. That is, policy should be set by legislative enactments that represent the will of the people. Advocates of judicial restraint commonly argue that since Justices are appointed rather than elected, they are not the proper body to make policy changes. Note that while the Warren court was liberal in its judicial activism, that court's example should not lead to the conclusion that activism is always liberal. The reality is that there will always be a tug of war between a strict constructionist view of the constitution and the dynamic body of ideas envisioned by extreme judicial activists. The reality of an evolving society utilizing evolving technology dictates that the Constitution be somewhat dynamic. The modern history of the Fourth Amendment

demonstrates this. A literal interpretation of the constitution would indicate that your phone calls, texts, and emails are all subject to "seizure" by the government without a warrant. Those things did not exist when the Fourth Amendment was written, so they could not be protected. The fundamental question that remains is one of striking a balance between nullifying the democratic process and not allowing the Constitution to remain relevant over time.

The legal framework that judges work within limits judicial activism to some extent. Before a federal court can hear a case, certain conditions must be met. Under the Constitution, federal courts exercise only judicial powers. This means that federal judges may interpret the law only through the resolution of actual legal disputes, referred to in Article III of the Constitution as "Cases or Controversies." A court cannot attempt to correct a problem on its own initiative (unless it has to do with the rules governing the court systems), or to answer a hypothetical legal question. Second, assuming there is an actual case or controversy, the plaintiff in a federal lawsuit also must have legal **standing** to ask the court for a decision. That means the plaintiff must have been aggrieved, or legally harmed in some way, by the defendant. Thus, organizations such as the American Civil Liberties Union cannot sue the police directly, but they can fund legal assistance for a party that actually alleges harm done by the police. In addition, the case must present a category of dispute that the law in question was designed to address, and it must be a complaint that the court has the power to remedy. That is, the court must be authorized, under the Constitution or a federal law, to hear the case. For example, if there is no substantial federal question, the Supreme Court cannot review a case originating in state courts. In addition, the case cannot be **moot.** A case is moot if it does not present an ongoing problem for the court to resolve. The federal courts, thus, are courts of **limited jurisdiction** because they may only decide certain types of cases as provided by Congress or as identified in the Constitution.

Even with these limits, the policymaking role of the Supreme Court should not be underestimated. The rulings of the court are just as consequential as acts of congress and the executive decisions of the president. Many times, the ruling of the court is not based merely on a literal reading of the law. In many cases, the justices are invoking their own interpretations of what the law should be, and not what it objectively is.

Home *Key Terms*

American Civil Liberties Union, Article III, Conservative, Conservative Decisions, Judicial Activism, Judicial Restraint, Justice Anthony Kennedy, Justice Elena Kagan, Justice Ruth Bader Ginsburg, Justice Sonia Sotomayor, Justice Stephen Breyer, Liberal, Liberal Decisions, Limited Jurisdiction, Marbury v. Madison (1803), Moot, Right to Counsel, Standing, Warren Court

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4.7: Judicial Decision-Making and Implementation by the Supreme Court

Learning Objectives

By the end of this section, you will be able to:

- Describe how the Supreme Court decides cases and issues opinions
- Identify the various influences on the Supreme Court
- Explain how the judiciary is checked by the other branches of government

The courts are the least covered and least publicly known of the three branches of government. The inner workings of the Supreme Court and its day-to-day operations certainly do not get as much public attention as its rulings, and only a very small number of its announced decisions are enthusiastically discussed and debated. The Court's 2015 decision on same-sex marriage was the exception, not the rule, since most court opinions are filed away quietly in the *United States Reports*, sought out mostly by judges, lawyers, researchers, and others with a particular interest in reading or studying them.

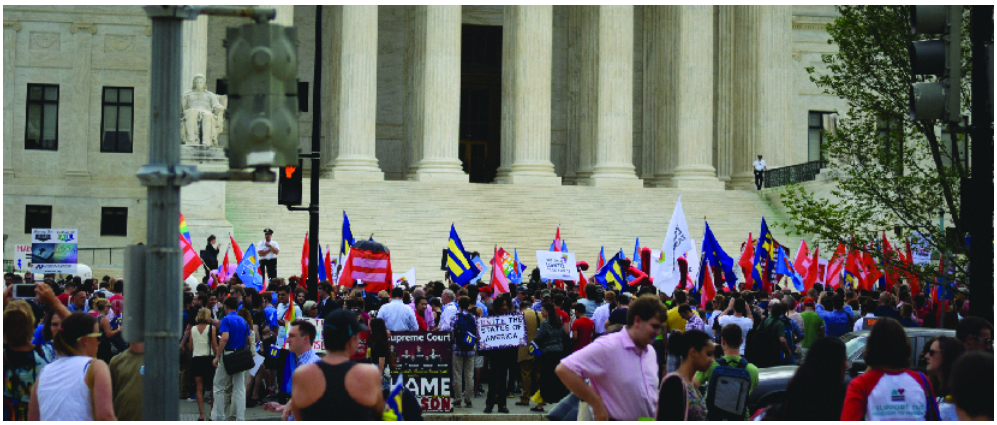
Thus, we sometimes envision the justices formally robed and cloistered away in their chambers, unaffected by the world around them, but the reality is that they are not that isolated, and a number of outside factors influence their decisions. Though they lack their own mechanism for enforcement of their rulings and their power remains checked and balanced by the other branches, the effect of the justices' opinions on the workings of government, politics, and society in the United States is much more significant than the attention they attract might indicate.

JUDICIAL OPINIONS

Every Court opinion sets precedent for the future. The Supreme Court's decisions are not always unanimous, however; the published majority opinion, or explanation of the justices' decision, is the one with which a majority of the nine justices agree. It can represent a vote as narrow as five in favor to four against. A tied vote is rare but can occur at a time of vacancy, absence, or abstention from a case, perhaps where there is a conflict of interest. In the event of a tied vote, the decision of the lower court stands.

Most typically, though, the Court will put forward a majority opinion. If he or she is in the majority, the chief justice decides who will write the opinion. If not, then the most senior justice ruling with the majority chooses the writer. Likewise, the most senior justice in the dissenting group can assign a member of that group to write the dissenting opinion; however, any justice who disagrees with the majority may write a separate dissenting opinion. If a justice agrees with the outcome of the case but not with the majority's reasoning in it, that justice may write a concurring opinion.

Court decisions are released at different times throughout the Court's term, but all opinions are announced publicly before the Court adjourns for the summer. Some of the most controversial and hotly debated rulings are released near or on the last day of the term and thus are avidly anticipated (Figure).



On June 26, 2015, supporters of marriage equality in front of the U.S. Supreme Court building eagerly await the announcement of a decision in the case of *Obergefell v. Hodges* (2015). (credit: Matt Popovich)

One of the most prominent writers on judicial decision-making in the U.S. system is Dr. Forrest Maltzman of George Washington University. Maltzman's articles, chapters, and manuscripts, along with articles by other prominent authors in the field, are downloadable at this site.

INFLUENCES ON THE COURT

Many of the same players who influence whether the Court will grant *cert*. in a case, discussed earlier in this chapter, also play a role in its decision-making, including law clerks, the solicitor general, interest groups, and the mass media. But additional legal, personal, ideological, and political influences weigh on the Supreme Court and its decision-making process. On the legal side, courts, including the Supreme Court, cannot make a ruling unless they have a case before them, and even with a case, courts must rule on its facts. Although the courts' role is interpretive, judges and justices are still constrained by the facts of the case, the Constitution, the relevant laws, and the courts' own precedent.

A justice's decisions are influenced by how he or she defines his role as a jurist, with some justices believing strongly in judicial activism, or the need to defend individual rights and liberties, and they aim to stop actions and laws by other branches of government that they see as infringing on these rights. A judge or justice who views the role with an activist lens is more likely to use his or her judicial power to broaden personal liberty, justice, and equality. Still others believe in judicial restraint, which leads them to defer decisions (and thus policymaking) to the elected branches of government and stay focused on a narrower interpretation of the Bill of Rights. These justices are less likely to strike down actions or laws as unconstitutional and are less likely to focus on the expansion of individual liberties. While it is typically the case that liberal actions are described as unnecessarily activist, conservative decisions can be activist as well.

Critics of the judiciary often deride activist courts for involving themselves too heavily in matters they believe are better left to the elected legislative and executive branches. However, as Justice Anthony Kennedy has said, "An activist court is a court that makes a decision you don't like."

Matt Sedensky. "Justice questions way court nominees are grilled." The Associated Press. May 14, 2010. http://www.boston.com/news/nation/articles/2010/05/14/justice_questions_way_court_nominees_are_grilled/.

Justices' personal beliefs and political attitudes also matter in their decision-making. Although we may prefer to believe a justice can leave political ideology or party identification outside the doors of the courtroom, the reality is that a more liberal-thinking judge may tend to make more liberal decisions and a more conservative-leaning judge may tend toward more conservative ones. Although this is not true 100 percent of the time, and an individual's decisions are sometimes a cause for surprise, the influence of ideology is real, and at a minimum, it often guides presidents to aim for nominees who mirror their own political or ideological image. It is likely not possible to find a potential justice who is completely apolitical.

And the courts themselves are affected by another "court"—the court of public opinion. Though somewhat isolated from politics and the volatility of the electorate, justices may still be swayed by special-interest pressure, the leverage of elected or other public officials, the mass media, and the general public. As times change and the opinions of the population change, the court's interpretation is likely to keep up with those changes, lest the courts face the danger of losing their own relevance.

Take, for example, rulings on sodomy laws: In 1986, the Supreme Court upheld the constitutionality of the State of Georgia's ban on sodomy,

Bowers v. Hardwick, 478 U.S. 186 (1986).

but it reversed its decision seventeen years later, invalidating sodomy laws in Texas and thirteen other states.

Lawrence v. Texas, 539 U.S. 558 (2003).

No doubt the Court considered what had been happening nationwide: In the 1960s, sodomy was banned in all the states. By 1986, that number had been reduced by about half. By 2002, thirty-six states had repealed their sodomy laws, and most states were only selectively enforcing them. Changes in state laws, along with an emerging LGBT movement, no doubt swayed the Court and led it to the reversal of its earlier ruling with the 2003 decision, *Lawrence v. Texas* (Figure).

Lawrence v. Texas, 539 U.S. 558 (2003).



"All the News That's Fit to Print"

The New York Times

Late Edition

VOL. CLII ... No. 52,527 NEW YORK, FRIDAY, JUNE 27, 2003 ONE DOLLAR

JUSTICES, 6-3, LEGALIZE GAY SEXUAL CONDUCT IN SWEEPING REVERSAL OF COURT'S '86 RULING

State Underfinancing Damages City Schools, New York Court Finds

CITE PRIVACY RIGHT

Texas Sodomy Law Held Unconstitutional — Scathing Dissent

The Supreme Court's 2003 decision in *Lawrence v. Texas* that overturned an earlier ruling on sodomy made national headlines and shows that Court rulings can change with the times.

Heralded by advocates of gay rights as important progress toward greater equality, the ruling in *Lawrence v. Texas* illustrates that the Court is willing to reflect upon what is going on in the world. Even with their heavy reliance on precedent and reluctance to throw out past decisions, justices are not completely inflexible and do tend to change and evolve with the times.

THE IMPORTANCE OF JURY DUTY

Since judges and justices are not elected, we sometimes consider the courts removed from the public; however, this is not always the case, and there are times when average citizens may get involved with the courts firsthand as part of their decision-making process at either the state or federal levels. At some point, if you haven't already been called, you may receive a summons for jury duty from your local court system. You may be asked to serve on federal jury duty, such as U.S. district court duty or federal grand jury duty, but service at the local level, in the state court system, is much more common.

While your first reaction may be to start planning a way to get out of it, participating in jury service is vital to the operation of the judicial system, because it provides individuals in court the chance to be heard and to be tried fairly by a group of their peers. And jury duty has benefits for those who serve as well. You will no doubt come away better informed about how the judicial system works and ready to share your experiences with others. Who knows? You might even get an unexpected surprise, as some citizens in Dallas, Texas did recently when former President George W. Bush showed up to serve jury duty with them.

Have you ever been called to jury duty? Describe your experience. What did you learn about the judicial process? What advice would you give to someone called to jury duty for the first time? If you've never been called to jury duty, what questions do you have for those who have?

THE COURTS AND THE OTHER BRANCHES OF GOVERNMENT

Both the executive and legislative branches check and balance the judiciary in many different ways. The president can leave a lasting imprint on the bench through his or her nominations, even long after leaving office. The president may also influence the Court through the solicitor general's involvement or through the submission of *amicus* briefs in cases in which the United States is not a party.

President Franklin D. Roosevelt even attempted to stack the odds in his favor in 1937, with a "court-packing scheme" in which he tried to get a bill passed through Congress that would have reorganized the judiciary and enabled him to appoint up to six additional judges to the high court (Figure). The bill never passed, but other presidents have also been accused of trying similar moves at different courts in the federal system. Most recently, some members of Congress suggested that President Obama was attempting to "pack" the District of Columbia Circuit Court of Appeals with three nominees. Obama was filling vacancies, not adding judges, but the "packing" term was still bandied about.

Louis Jacobson. "Is Barack Obama trying to 'pack' the D.C. Circuit Court of Appeals?" Tampa Bay Times, PolitiFact.com. June 5, 2013. http://www.politifact.com/truth-o-meter/statements/2013/jun/05/chuck-grassley/barack-obama-trying-pack-dc-circuit-court-appeals/.



A 1937 cartoon mocks the court-packing plan of President Franklin D. Roosevelt (depicted on the far right). Roosevelt was not successful in increasing the number of justices on the Supreme Court, and it remains at nine.

Likewise, Congress has checks on the judiciary. It retains the power to modify the federal court structure and its appellate jurisdiction, and the Senate may accept or reject presidential nominees to the federal courts. Faced with a court ruling that overturns one of its laws, Congress may rewrite the law or even begin a constitutional amendment process.

But the most significant check on the Supreme Court is executive and legislative leverage over the implementation and enforcement of its rulings. This process is called judicial implementation. While it is true that courts play a major role in policymaking, they have no mechanism to make their rulings a reality. Remember it was Alexander Hamilton in *Federalist* No. 78who remarked that the courts had "neither force nor will, but merely judgment." And even years later, when the 1832 Supreme Court ruled the State of Georgia's seizing of Native American lands unconstitutional,

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

President Andrew Jackson is reported to have said, "John Marshall has made his decision, now let him enforce it," and the Court's ruling was basically ignored.

"Court History." Supreme Court History: The First Hundred Years. http://www.pbs.org/wnet/supremecourt.../history2.html (March 1, 2016).

Abraham Lincoln, too, famously ignored Chief Justice Roger B. Taney's order finding unconstitutional Lincoln's suspension of habeas corpus rights in 1861, early in the Civil War. Thus, court rulings matter only to the extent they are heeded and followed.

The Court relies on the executive to implement or enforce its decisions and on the legislative branch to fund them. As the Jackson and Lincoln stories indicate, presidents may simply ignore decisions of the Court, and Congress may withhold funding needed for implementation and enforcement. Fortunately for the courts, these situations rarely happen, and the other branches tend to provide support rather than opposition. In general, presidents have tended to see it as their duty to both obey and enforce Court rulings, and Congress seldom takes away the funding needed for the president to do so.

For example, in 1957, President Dwight D. Eisenhower called out the military by executive order to enforce the Supreme Court's order to racially integrate the public schools in Little Rock, Arkansas. Eisenhower told the nation: "Whenever normal agencies prove inadequate to the task and it becomes necessary for the executive branch of the federal government to use its powers and authority to uphold federal courts, the president's responsibility is inescapable."

Dwight D. Eisenhower. "Radio and Television Address to the American People on the Situation in Little Rock." Public Papers of the Presidents of the United States: Eisenhower, Dwight D., The American Presidency Project. September 24, 1957. http://www.presidency.ucsb.edu/ws/?pid=10909.

Executive Order 10730 nationalized the Arkansas National Guard to enforce desegregation because the governor refused to use the state National Guard troops to protect the black students trying to enter the school (Figure).



President Eisenhower sent federal troops to escort nine black students (the “Little Rock Nine”) into an Arkansas high school in 1957 to enforce the Supreme Court’s order outlawing racial segregation in public schools.

So what becomes of court decisions is largely due to their credibility, their viability, and the assistance given by the other branches of government. It is also somewhat a matter of tradition and the way the United States has gone about its judicial business for more than two centuries. Although not everyone agrees with the decisions made by the Court, rulings are generally accepted and followed, and the Court is respected as the key interpreter of the laws and the Constitution. Over time, its rulings have become yet another way policy is legitimately made and justice more adequately served in the United States.

Summary

Like the executive and legislative branches, the judicial system wields power that is not absolute. There remain many checks on its power and limits to its rulings. Judicial decisions are also affected by various internal and external factors, including legal, personal, ideological, and political influences. To stay relevant, Court decisions have to keep up with the changing times, and the justices’ decision-making power is subject to the support afforded by the other branches of government in implementation and enforcement. Nevertheless, the courts have evolved into an indispensable part of our government system—a separate and coequal branch that interprets law, makes policy, guards the Constitution, and protects individual rights.

When using judicial restraint, a judge will usually _____.

1. refuse to rule on a case
2. overrule any act of Congress he or she doesn’t like
3. defer to the decisions of the elected branches of government
4. make mostly liberal rulings

When a Supreme Court ruling is made, justices may write a _____ to show they agree with the majority but for different reasons.

1. brief
2. dissenting opinion
3. majority opinion
4. concurring opinion

Which of the following is a check that the legislative branch has over the courts?

1. Senate approval is needed for the appointment of justices and federal judges.

2. Congress may rewrite a law the courts have declared unconstitutional.
3. Congress may withhold funding needed to implement court decisions.
4. all of the above

What are the core factors that determine how judges decide in court cases?

Discuss some of the difficulties involved in the implementation and enforcement of judicial decisions.

In what ways is the court system better suited to protect the individual than are the elected branches of the government?

On what types of policy issues do you expect the judicial branch to be especially powerful, and on which do you expect it to exert less power?

Discuss the relationship of the judicial branch to the other branches of government. In what ways is the judicial more powerful than other branches? In what ways is SCOTUS less powerful than other branches? Explain.

What should be the most important considerations when filling judge and justice positions at the federal level? Why?

The shirking of jury duty is a real problem in the United States. Give some reasons for this and suggest what can be done about it.

Take a closer look at some of the operational norms of the Supreme Court, such as the Rule of Four or the prohibition on cameras in the courtroom. What is your opinion about them as long-standing traditions, and which (if any), do you believe should be changed? Explain your answer.

Books written by current and former justices:

Breyer, Stephen. 2006. *Active Liberty: Interpreting the Democratic Constitution*. New York: Vintage; 2010; Making Democracy Work: A Judge's View. New York: Knopf.

O'Connor, Sandra Day. 2004. *The Majesty of the Law: Reflections of a Supreme Court Justice*. New York: Random House.

Rehnquist, William. 2002. *The Supreme Court*. New York: Vintage.

Scalia, Antonin. 1998. *A Matter of Interpretation: The Federal Courts and the Law*. Princeton, NJ: Princeton University Press.

Sotomayor, Sonia. 2014. *My Beloved World*. New York: Vintage Books.

Stevens, John Paul. 2011. *Five Chiefs: A Supreme Court Memoir*. New York: Little, Brown.

Thomas, Clarence. 2008. *My Grandfather's Son: A Memoir*. New York: Harper.

Books about the U.S. court system:

Coyle, Marcia. 2013. *The Roberts Court: The Struggle for the Constitution*. New York: Simon and Schuster.

Ferguson, Andrew G. 2013. *Why Jury Duty Matters: A Citizen's Guide to Constitutional Action*. New York: New York University Press.

Millhiser, Ian. 2015. *Injustices: The Supreme Court's History of Comforting the Comfortable and Afflicting the Afflicted*. New York: Nation Books.

Peppers, Todd C., and Artemus Ward. 2012. *In Chambers: Stories of Supreme Court Law Clerks and Their Justices*. Charlottesville: University of Virginia Press.

Tobin, Jeffrey. 2012. *The Oath: The Obama White House and the Supreme Court*. New York: Doubleday.

Vile, John R. 2014. *Essential Supreme Court Decisions: Summaries of Leading Cases in U.S. Constitutional Law*, 16th ed. Lanham: Rowman & Littlefield.

Films:

1981. *The First Monday in October*.

1993. *The Pelican Brief*.

HBO. 2000. *Recount*.

2015. *Confirmation*.

2015. *On the Basis of Sex*.

Glossary

concurring opinion
an opinion written by a justice who agrees with the Court's majority opinion but has different reasons for doing so

dissenting opinion
an opinion written by a justice who disagrees with the majority opinion of the Court

judicial activism
a judicial philosophy in which a justice is more likely to overturn decisions or rule actions by the other branches unconstitutional, especially in an attempt to broaden individual rights and liberties

judicial restraint
a judicial philosophy in which a justice is more likely to let stand the decisions or actions of the other branches of government

majority opinion
an opinion of the Court with which more than half the nine justices agree

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4.8: The Federal Court System

Learning Objectives

By the end of this section, you will be able to:

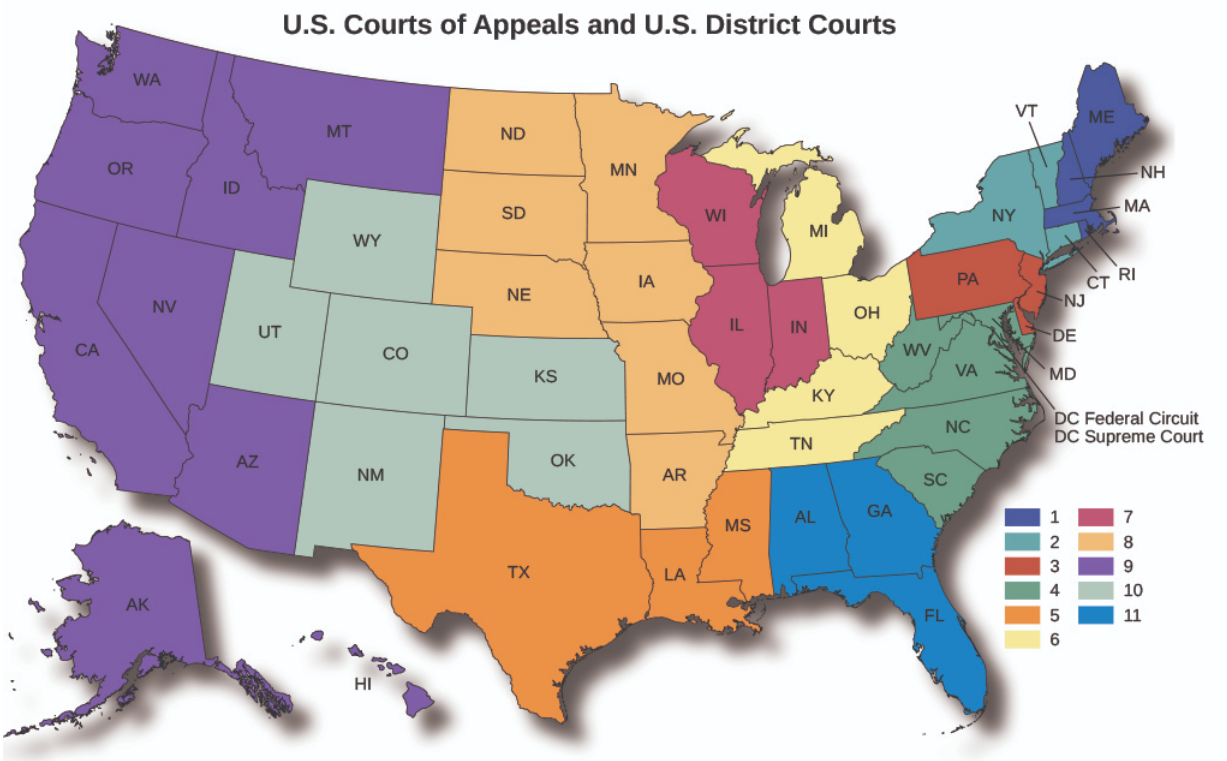
- Describe the differences between the U.S. district courts, circuit courts, and the Supreme Court
- Explain the significance of precedent in the courts' operations
- Describe how judges are selected for their positions

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), as illustrated in Figure. 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.



There are thirteen judicial circuits: eleven in the geographical areas marked on the map and two in Washington, DC.

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 U.S. District Courts and the Federal Judiciary." Federal Judicial Center. http://www.fjc.gov/history/home.nsf/page/courts_district.html (March 1, 2016).

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 Riding." Encyclopedia Britannica. http://www.britannica.com/topic/circuit-riding (March 1, 2016).

) 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.

"The U.S. Circuit Courts and the Federal Judiciary." Federal Judicial Center. http://www.fjc.gov/history/home.nsf/...s_circuit.html (March 1, 2016).

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."

Benjamin N. Cardozo. 1921. The Nature of the Judicial Process. New Haven: Yale University Press. http://www.constitution.org/cmt/cardozo/jud_proc.htm.



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.

Plessy v. Ferguson, 163 U.S. 537 (1896); Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

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 judges 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.

American Bar Association Coalition for Justice. 2008. "Judicial Selection." In American Bar Association, eds. American Judicature Society and Malia Reddick. http://www.americanbar.org/content/dam/aba/migrated/JusticeCenter/Justice/PublicDocuments/judicial_selection_roadmap.authcheckdam.pdf.

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).



(a)



(b)

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. However, action on this nominee is unlikely given the election of Republican Donald Trump to the presidency. The Republican Senate will take up a Trump nominee in early 2017.

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.

American Bar Association Coalition for Justice. 2008. "Judicial Selection." In American Bar Association, eds. American Judicature Society and Malia Reddick.
http://www.americanbar.org/content/dam/aba/migrated/JusticeCenter/Justice/PublicDocuments/judicial_selection_roadmap.authcheckdam.pdf.

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.

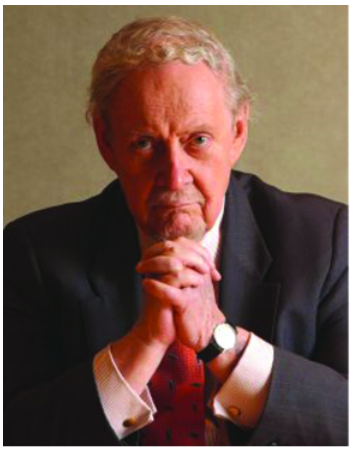
Once a justice has started his or her lifetime tenure on the Court and years begin to pass, many people simply forget which president nominated him or her. For better or worse, sometimes it is only a controversial nominee who leaves a president's legacy behind. For example, the Reagan presidency is often 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"

John M. Broder. "Edward M. Kennedy, Senate Stalwart, Is Dead at 77." New York Times. 26 August 2009.

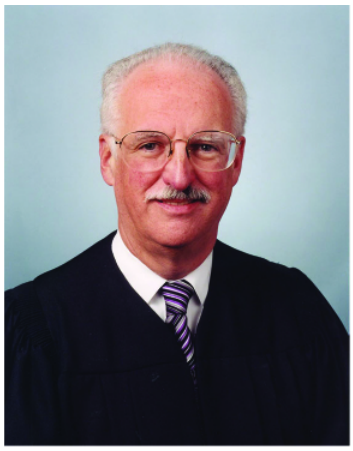
and the latter of having used marijuana while a student and then a professor at Harvard University (Figure). President George W. Bush's nomination of Harriet Miers was withdrawn in the face of criticism from both sides of the political spectrum, questioning her ideological leanings and especially her qualifications, suggesting she was not ready for the job.

Michael A. Fletcher and Charles Babington. "Miers, Under Fire From Right, Withdrawn as Court Nominee." Washington Post. 28 October 2005. http://www.washingtonpost.com/wp-dyn...102700547.html.

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 between Hillary Clinton and Donald Trump was especially important because the next president is likely to choose three justices.



(a)



(b)



(c)

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 Table reveals, the membership of the Supreme Court has changed with the passing years.

Supreme Court Justice Firsts	
First Catholic	Roger B. Taney (nominated in 1836)
First Jew	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.

Bureau of International Information Programs. United States Department of State. Outline of the U.S. Legal System. 2004.

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.

Russell Wheeler. "The Changing Face of the Federal Judiciary." Governance Studies at Brookings. August 2009. http://www.brookings.edu/~/media/res...ry_wheeler.pdf.

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.

Besides the Supreme Court, there are lower courts in the national system called _____.

1. state and federal courts
2. district and circuit courts
3. state and local courts
4. civil and common courts

In standing by precedent, a judge relies on the principle of _____.

1. *stare decisis*
2. amicus curiae
3. judicial activism
4. laissez-faire

The justices of the Supreme Court are _____.

1. elected by citizens
2. chosen by the Congress
3. confirmed by the president
4. nominated by the president and confirmed by the Senate

Do you believe federal judges should be elected rather than appointed? Why or why not?

When it comes to filling judicial positions in the federal courts, do you believe race, gender, religion, and ethnicity should matter? Why or why not?

Glossary

circuit courts
the appeals (appellate) courts of the federal court system that review decisions of the lower (district) courts; also called courts of appeals

courts of appeals
the appellate courts of the federal court system that review decisions of the lower (district) courts; also called circuit courts

district courts
the trial courts of the federal court system where cases are tried, evidence is presented, and witness testimony is heard

precedent
the principles or guidelines established by courts in earlier cases that frame the ongoing operation of the courts, steering the direction of the entire system

senatorial courtesy
an unwritten custom by which the president consults the senators in the state before nominating a candidate for a federal vacancy there, particularly for court positions

stare decisis
the principle by which courts rely on past decisions and their precedents when making decisions in new cases

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CHAPTER OVERVIEW

5: Policing

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5.1: Deviance and Control



Much of the appeal of watching entertainers perform in drag comes from the humor inherent in seeing everyday norms violated. (Photo courtesy of Cassiopeija/Wikimedia Commons)

What, exactly, is deviance? And what is the relationship between deviance and crime? According to sociologist William Graham Sumner, deviance is a violation of established contextual, cultural, or social norms, whether folkways, mores, or codified law (1906). It can be as minor as picking your nose in public or as major as committing murder. Although the word "deviance" has a negative connotation in everyday language, sociologists recognize that deviance is not necessarily bad (Schoepflin 2011). In fact, from a structural functionalist perspective, one of the positive contributions of deviance is that it fosters social change. For example, during the U.S. civil rights movement, Rosa Parks violated social norms when she refused to move to the "black section" of the bus, and the Little Rock Nine broke customs of segregation to attend an Arkansas public school.

"What is deviant behavior?" cannot be answered in a straightforward manner. Whether an act is labeled deviant or not depends on many factors, including location, audience, and the individual committing the act (Becker 1963). Listening to your iPod on the way to class is considered acceptable behavior. Listening to your iPod during your 2 p.m. sociology lecture is considered rude. Listening to your iPod when on the witness stand before a judge may cause you to be held in contempt of court and consequently fined or jailed.

As norms vary across culture and time, it makes sense that notions of deviance change also. Fifty years ago, public schools in the United States had strict dress codes that, among other stipulations, often banned women from wearing pants to class. Today, it's socially acceptable for women to wear pants, but less so for men to wear skirts. In a time of war, acts usually considered morally reprehensible, such as taking the life of another, may actually be rewarded. Whether an act is deviant or not depends on society's response to that act.

WHY I DRIVE A HEARSE

When sociologist Todd Schoepflin ran into his childhood friend Bill, he was shocked to see him driving a hearse instead of an ordinary car. A professionally trained researcher, Schoepflin wondered what effect driving a hearse had on his friend and what effect it might have on others on the road. Would using such a vehicle for everyday errands be considered deviant by most people?

Schoepflin interviewed Bill, curious first to know why he drove such an unconventional car. Bill had simply been on the lookout for a reliable winter car; on a tight budget, he searched used car ads and stumbled upon one for the hearse. The car ran well, and the price was right, so he bought it.

Bill admitted that others' reactions to the car had been mixed. His parents were appalled, and he received odd stares from his coworkers. A mechanic once refused to work on it, and stated that it was "a dead person machine." On the whole, however, Bill received mostly positive reactions. Strangers gave him a thumbs-up on the highway and stopped him in parking lots to chat about his car. His girlfriend loved it, his friends wanted to take it tailgating, and people offered to buy it. Could it be that driving a hearse isn't really so deviant after all?

Schoepflin theorized that, although viewed as outside conventional norms, driving a hearse is such a mild form of deviance that it actually becomes a mark of distinction. Conformists find the choice of vehicle intriguing or appealing, while nonconformists see a fellow oddball to whom they can relate. As one of Bill's friends remarked, "Every guy wants to own a unique car like this, and you can certainly pull it off." Such anecdotes remind us that although deviance is often viewed as a violation of norms, it's not always viewed in a negative light (Schoepflin 2011).



A hearse with the license plate "LASTRYD." How would you view the owner of this car? (Photo courtesy of Brian Teutsch/flickr)

Social Control

When a person violates a social norm, what happens? A driver caught speeding can receive a speeding ticket. A student who wears a bathrobe to class gets a warning from a professor. An adult belching loudly is avoided. All societies practice social control, the regulation and enforcement of norms. The underlying goal of social control is to maintain social order, an arrangement of practices and behaviors on which society's members base their daily lives. Think of social order as an employee handbook and social control as a manager. When a worker violates a workplace guideline, the manager steps in to enforce the rules; when an employee is doing an exceptionally good job at following the rules, the manager may praise or promote the employee.

The means of enforcing rules are known as sanctions. Sanctions can be positive as well as negative. Positive sanctions are rewards given for conforming to norms. A promotion at work is a positive sanction for working hard. Negative sanctions are punishments for violating norms. Being arrested is a punishment for shoplifting. Both types of sanctions play a role in social control.

Sociologists also classify sanctions as formal or informal. Although shoplifting, a form of social deviance, may be illegal, there are no laws dictating the proper way to scratch your nose. That doesn't mean picking your nose in public won't be punished; instead, you will encounter informal sanctions. Informal sanctions emerge in face-to-face social interactions. For example, wearing flip-flops to an opera or swearing loudly in church may draw disapproving looks or even verbal reprimands, whereas behavior that is seen as positive—such as helping an old man carry grocery bags across the street—may receive positive informal reactions, such as a smile or pat on the back.

Formal sanctions, on the other hand, are ways to officially recognize and enforce norm violations. If a student violates her college's code of conduct, for example, she might be expelled. Someone who speaks inappropriately to the boss could be fired. Someone who commits a crime may be arrested or imprisoned. On the positive side, a soldier who saves a life may receive an official commendation.

The table below shows the relationship between different types of sanctions.

Informal/Formal Sanctions Formal and informal sanctions may be positive or negative. Informal sanctions arise in social interactions, whereas formal sanctions officially enforce norms.

	Informal	Formal
Positive	An expression of thanks	A promotion at work
Negative	An angry comment	A parking fine

Summary

Deviance is a violation of norms. Whether or not something is deviant depends on contextual definitions, the situation, and people's response to the behavior. Society seeks to limit deviance through the use of sanctions that help maintain a system of social control.

Section Quiz

Which of the following best describes how deviance is defined?

1. Deviance is defined by federal, state, and local laws.
2. Deviance's definition is determined by one's religion.
3. Deviance occurs whenever someone else is harmed by an action.
4. Deviance is socially defined.

During the civil rights movement, Rosa Parks and other black protestors spoke out against segregation by refusing to sit at the back of the bus. This is an example of _____.

1. An act of social control
2. An act of deviance
3. A social norm
4. Criminal mores

A student has a habit of talking on her cell phone during class. One day, the professor stops his lecture and asks her to respect the other students in the class by turning off her phone. In this situation, the professor used _____ to maintain social control.

1. Informal negative sanctions
2. Informal positive sanctions
3. Formal negative sanctions
4. Formal positive sanctions

Societies practice social control to maintain _____.

1. formal sanctions
2. social order
3. cultural deviance
4. sanction labeling

One day, you decide to wear pajamas to the grocery store. While you shop, you notice people giving you strange looks and whispering to others. In this case, the grocery store patrons are demonstrating _____.

1. deviance
2. formal sanctions
3. informal sanctions
4. positive sanctions

Short Answer

If given the choice, would you purchase an unusual car such as a hearse for everyday use? How would your friends, family, or significant other react? Since deviance is culturally defined, most of the decisions we make are dependent on the reactions of others. Is there anything the people in your life encourage you to do that you don't? Why don't you?

Think of a recent time when you used informal negative sanctions. To what act of deviance were you responding? How did your actions affect the deviant person or persons? How did your reaction help maintain social control?

Further Research

Although we rarely think of it in this way, deviance can have a positive effect on society. Check out the Positive Deviance Initiative, a program initiated by Tufts University to promote social movements around the world that strive to improve people's lives, at http://openstaxcollege.org/l/Positive_Deviance.

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Glossary

deviance
a violation of contextual, cultural, or social norms

formal sanctions
sanctions that are officially recognized and enforced

informal sanctions

sanctions that occur in face-to-face interactions

negative sanctions
punishments for violating norms

positive sanctions
rewards given for conforming to norms

sanctions
the means of enforcing rules

social control
the regulation and enforcement of norms

social order
an arrangement of practices and behaviors on which society's members base their daily lives

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5.2: 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.

HomeAncient 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 **Code of Hammurabi** was carved in large stones in the tenth century B.C. The codes of ancient Greece and Rome have had an influence on Western law, as has the **Mosaic Code**.

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.

HomeColonial 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.

HomeThe 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.

HomeEarly 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.

HomeThe Reform Era

The end of the 19th 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.

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

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5.3: The Structure and Nature of Policing

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."

HomePolice 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. In reality, 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:

(a) identify criminal offenders and criminal activity and, where appropriate, to apprehend offenders and participate in subsequent court proceedings;

(b) reduce the opportunities for the commission of some crimes through preventive patrol and other measures;

(c) aid individuals who are in danger of physical harm;

(d) protect constitutional guarantees;

(e) facilitate the movement of people and vehicles;

(f) assist those who cannot care for themselves;

(g) resolve conflict;

(h) identify problems that are potentially serious law enforcement or governmental problems;

(i) create and maintain a feeling of security in the community;

(j) promote and preserve civil order; and

(k) 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.

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.

HomeState 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.

HomeLocal 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:

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.

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.

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.

Home *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

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5.4: Theoretical Perspectives on Deviance



Functionalists believe that deviance plays an important role in society and can be used to challenge people's views. Protesters, such as these PETA members, often use this method to draw attention to their cause. (Photo courtesy of David Shankbone/flickr)

Why does deviance occur? How does it affect a society? Since the early days of sociology, scholars have developed theories that attempt to explain what deviance and crime mean to society. These theories can be grouped according to the three major sociological paradigms: functionalism, symbolic interactionism, and conflict theory.

Functionalism

Sociologists who follow the functionalist approach are concerned with the way the different elements of a society contribute to the whole. They view deviance as a key component of a functioning society. Strain theory, social disorganization theory, and cultural deviance theory represent three functionalist perspectives on deviance in society.

Émile Durkheim: The Essential Nature of Deviance

Émile Durkheim believed that deviance is a necessary part of a successful society. One way deviance is functional, he argued, is that it challenges people's present views (1893). For instance, when black students across the United States participated in sit-ins during the civil rights movement, they challenged society's notions of segregation. Moreover, Durkheim noted, when deviance is punished, it reaffirms currently held social norms, which also contributes to society (1893). Seeing a student given detention for skipping class reminds other high schoolers that playing hooky isn't allowed and that they, too, could get detention.

Robert Merton: Strain Theory

Sociologist Robert Merton agreed that deviance is an inherent part of a functioning society, but he expanded on Durkheim's ideas by developing strain theory, which notes that access to socially acceptable goals plays a part in determining whether a person conforms or deviates. From birth, we're encouraged to achieve the "American Dream" of financial success. A woman who attends business school, receives her MBA, and goes on to make a million-dollar income as CEO of a company is said to be a success. However, not everyone in our society stands on equal footing. A person may have the socially acceptable goal of financial success but lack a socially acceptable way to reach that goal. According to Merton's theory, an entrepreneur who can't afford to launch his own company may be tempted to embezzle from his employer for start-up funds.

Merton defined five ways people respond to this gap between having a socially accepted goal and having no socially accepted way to pursue it.

1. *Conformity*: Those who conform choose not to deviate. They pursue their goals to the extent that they can through socially accepted means.
2. *Innovation*: Those who innovate pursue goals they cannot reach through legitimate means by instead using criminal or deviant means.
3. *Ritualism*: People who ritualize lower their goals until they can reach them through socially acceptable ways. These members of society focus on conformity rather than attaining a distant dream.
4. *Retreatism*: Others retreat and reject society's goals and means. Some beggars and street people have withdrawn from society's goal of financial success.
5. *Rebellion*: A handful of people rebel and replace a society's goals and means with their own. Terrorists or freedom fighters look to overthrow a society's goals through socially unacceptable means.

Social Disorganization Theory

Developed by researchers at the University of Chicago in the 1920s and 1930s, social disorganization theory asserts that crime is most likely to occur in communities with weak social ties and the absence of social control. An individual who grows up in a poor neighborhood with high rates of drug use, violence, teenage delinquency, and deprived parenting is more likely to become a

criminal than an individual from a wealthy neighborhood with a good school system and families who are involved positively in the community.



Proponents of social disorganization theory believe that individuals who grow up in impoverished areas are more likely to participate in deviant or criminal behaviors. (Photo courtesy of Apollo 1758/Wikimedia Commons)

Social disorganization theory points to broad social factors as the cause of deviance. A person isn't born a criminal but becomes one over time, often based on factors in his or her social environment. Research into social disorganization theory can greatly influence public policy. For instance, studies have found that children from disadvantaged communities who attend preschool programs that teach basic social skills are significantly less likely to engage in criminal activity.

Clifford Shaw and Henry McKay: Cultural Deviance Theory

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.

Conflict Theory

Conflict theory looks to social and economic factors as the causes of crime and deviance. Unlike functionalists, conflict theorists don't see these factors as positive functions of society. They see them as evidence of inequality in the system. They also challenge social disorganization theory and control theory and argue that both ignore racial and socioeconomic issues and oversimplify social trends (Akers 1991). Conflict theorists also look for answers to the correlation of gender and race with wealth and crime.

Karl Marx: An Unequal System

Conflict theory was greatly influenced by the work of German philosopher, economist, and social scientist Karl Marx. Marx believed that the general population was divided into two groups. He labeled the wealthy, who controlled the means of production and business, the bourgeois. He labeled the workers who depended on the bourgeois for employment and survival the proletariat. Marx believed that the bourgeois centralized their power and influence through government, laws, and other authority agencies in order to maintain and expand their positions of power in society. Though Marx spoke little of deviance, his ideas created the foundation for conflict theorists who study the intersection of deviance and crime with wealth and power.

C. Wright Mills: The Power Elite

In his book *The Power Elite* (1956), sociologist C. Wright Mills described the existence of what he dubbed the power elite, a small group of wealthy and influential people at the top of society who hold the power and resources. Wealthy executives, politicians,

celebrities, and military leaders often have access to national and international power, and in some cases, their decisions affect everyone in society. Because of this, the rules of society are stacked in favor of a privileged few who manipulate them to stay on top. It is these people who decide what is criminal and what is not, and the effects are often felt most by those who have little power. Mills' theories explain why celebrities such as Chris Brown and Paris Hilton, or once-powerful politicians such as Eliot Spitzer and Tom DeLay, can commit crimes and suffer little or no legal retribution.

Crime and Social Class

While crime is often associated with the underprivileged, crimes committed by the wealthy and powerful remain an under-punished and costly problem within society. The FBI reported that victims of burglary, larceny, and motor vehicle theft lost a total of $15.3 billion dollars in 2009 (FB1 2010). In comparison, when former advisor and financier Bernie Madoff was arrested in 2008, the U.S. Securities and Exchange Commission reported that the estimated losses of his financial Ponzi scheme fraud were close to $50 billion (SEC 2009).

This imbalance based on class power is also found within U.S. criminal law. In the 1980s, the use of crack cocaine (cocaine in its purest form) quickly became an epidemic that swept the country's poorest urban communities. Its pricier counterpart, cocaine, was associated with upscale users and was a drug of choice for the wealthy. The legal implications of being caught by authorities with crack versus cocaine were starkly different. In 1986, federal law mandated that being caught in possession of 50 grams of crack was punishable by a ten-year prison sentence. An equivalent prison sentence for cocaine possession, however, required possession of 5,000 grams. In other words, the sentencing disparity was 1 to 100 (New York Times Editorial Staff 2011). This inequality in the severity of punishment for crack versus cocaine paralleled the unequal social class of respective users. A conflict theorist would note that those in society who hold the power are also the ones who make the laws concerning crime. In doing so, they make laws that will benefit them, while the powerless classes who lack the resources to make such decisions suffer the consequences. The crack-cocaine punishment disparity remained until 2010, when President Obama signed the Fair Sentencing Act, which decreased the disparity to 1 to 18 (The Sentencing Project 2010).



From 1986 until 2010, the punishment for possessing crack, a "poor person's drug," was 100 times stricter than the punishment for cocaine use, a drug favored by the wealthy. (Photo courtesy of Wikimedia Commons)

Symbolic Interactionism

Symbolic interactionism is a theoretical approach that can be used to explain how societies and/or social groups come to view behaviors as deviant or conventional. Labeling theory, differential association, social disorganization theory, and control theory fall within the realm of symbolic interactionism.

Labeling Theory

Although all of us violate norms from time to time, few people would consider themselves deviant. Those who do, however, have often been labeled "deviant" by society and have gradually come to believe it themselves. Labeling theory examines the ascribing of a deviant behavior to another person by members of society. Thus, what is considered deviant is determined not so much by the behaviors themselves or the people who commit them, but by the reactions of others to these behaviors. As a result, what is considered deviant changes over time and can vary significantly across cultures.

Sociologist Edwin Lemert expanded on the concepts of labeling theory and identified two types of deviance that affect identity formation. Primary deviance is a violation of norms that does not result in any long-term effects on the individual's self-image or interactions with others. Speeding is a deviant act, but receiving a speeding ticket generally does not make others view you as a bad person, nor does it alter your own self-concept. Individuals who engage in primary deviance still maintain a feeling of belonging in society and are likely to continue to conform to norms in the future.

Sometimes, in more extreme cases, primary deviance can morph into secondary deviance. Secondary deviance occurs when a person's self-concept and behavior begin to change after his or her actions are labeled as deviant by members of society. The person may begin to take on and fulfill the role of a "deviant" as an act of rebellion against the society that has labeled that individual as such. For example, consider a high school student who often cuts class and gets into fights. The student is reprimanded frequently by teachers and school staff, and soon enough, he develops a reputation as a "troublemaker." As a result, the student starts acting out even more and breaking more rules; he has adopted the "troublemaker" label and embraced this deviant identity. Secondary deviance can be so strong that it bestows a master status on an individual. A master status is a label that describes the chief characteristic of an individual. Some people see themselves primarily as doctors, artists, or grandfathers. Others see themselves as beggars, convicts, or addicts.

THE RIGHT TO VOTE

Before she lost her job as an administrative assistant, Leola Strickland postdated and mailed a handful of checks for amounts ranging from $90 to $500. By the time she was able to find a new job, the checks had bounced, and she was convicted of fraud under Mississippi law. Strickland pleaded guilty to a felony charge and repaid her debts; in return, she was spared from serving prison time.

Strickland appeared in court in 2001. More than ten years later, she is still feeling the sting of her sentencing. Why? Because Mississippi is one of twelve states in the United States that bans convicted felons from voting (ProCon 2011).

To Strickland, who said she had always voted, the news came as a great shock. She isn't alone. Some 5.3 million people in the United States are currently barred from voting because of felony convictions (ProCon 2009). These individuals include inmates, parolees, probationers, and even people who have never been jailed, such as Leola Strickland.

Under the Fourteenth Amendment, states are allowed to deny voting privileges to individuals who have participated in "rebellion or other crime" (Krajick 2004). Although there are no federally mandated laws on the matter, most states practice at least one form of felony disenfranchisement. At present, it's estimated that approximately 2.4 percent of the possible voting population is disfranchised, that is, lacking the right to vote (ProCon 2011).

Is it fair to prevent citizens from participating in such an important process? Proponents of disfranchisement laws argue that felons have a debt to pay to society. Being stripped of their right to vote is part of the punishment for criminal deeds. Such proponents point out that voting isn't the only instance in which ex-felons are denied rights; state laws also ban released criminals from holding public office, obtaining professional licenses, and sometimes even inheriting property (Lott and Jones 2008).

Opponents of felony disfranchisement in the United States argue that voting is a basic human right and should be available to all citizens regardless of past deeds. Many point out that felony disfranchisement has its roots in the 1800s, when it was used primarily to block black citizens from voting. Even nowadays, these laws disproportionately target poor minority members, denying them a chance to participate in a system that, as a social conflict theorist would point out, is already constructed to their disadvantage (Holding 2006). Those who cite labeling theory worry that denying deviants the right to vote will only further encourage deviant behavior. If ex-criminals are disenfranchised from voting, are they being disenfranchised from society?



Should a former felony conviction permanently strip a U.S. citizen of the right to vote? (Photo courtesy of Joshin Yamada/flickr)

Edwin Sutherland: Differential Association

In the early 1900s, sociologist Edwin Sutherland sought to understand how deviant behavior developed among people. Since criminology was a young field, he drew on other aspects of sociology including social interactions and group learning (Laub 2006). His conclusions established differential association theory, which suggested that individuals learn deviant behavior from those close to them who provide models of and opportunities for deviance. According to Sutherland, deviance is less a personal choice

and more a result of differential socialization processes. A tween whose friends are sexually active is more likely to view sexual activity as acceptable.

Sutherland's theory may explain why crime is multigenerational. A longitudinal study beginning in the 1960s found that the best predictor of antisocial and criminal behavior in children was whether their parents had been convicted of a crime (Todd and Jury 1996). Children who were younger than ten years old when their parents were convicted were more likely than other children to engage in spousal abuse and criminal behavior by their early thirties. Even when taking socioeconomic factors such as dangerous neighborhoods, poor school systems, and overcrowded housing into consideration, researchers found that parents were the main influence on the behavior of their offspring (Todd and Jury 1996).

Travis Hirschi: Control Theory

Continuing with an examination of large social factors, **control theory** states that social control is directly affected by the strength of social bonds and that deviance results from a feeling of disconnection from society. Individuals who believe they are a part of society are less likely to commit crimes against it.

Travis Hirschi (1969) identified four types of social bonds that connect people to society:

1. *Attachment* measures our connections to others. When we are closely attached to people, we worry about their opinions of us. People conform to society's norms in order to gain approval (and prevent disapproval) from family, friends, and romantic partners.
2. *Commitment* refers to the investments we make in the community. A well-respected local businesswoman who volunteers at her synagogue and is a member of the neighborhood block organization has more to lose from committing a crime than a woman who doesn't have a career or ties to the community.
3. Similarly, levels of *involvement*, or participation in socially legitimate activities, lessen a person's likelihood of deviance. Children who are members of little league baseball teams have fewer family crises.
4. The final bond, *belief*, is an agreement on common values in society. If a person views social values as beliefs, he or she will conform to them. An environmentalist is more likely to pick up trash in a park, because a clean environment is a social value to him (Hirschi 1969).

Functionalism	**Associated Theorist**	**Deviance arises from:**
Strain Theory	Robert Merton	A lack of ways to reach socially accepted goals by accepted methods
Social Disorganization Theory	University of Chicago researchers	Weak social ties and a lack of social control; society has lost the ability to enforce norms with some groups
Cultural Deviance Theory	Clifford Shaw and Henry McKay	Conformity to the cultural norms of lower-class society
Conflict Theory	**Associated Theorist**	**Deviance arises from:**
Unequal System	Karl Marx	Inequalities in wealth and power that arise from the economic system
Power Elite	C. Wright Mills	Ability of those in power to define deviance in ways that maintain the status quo
Symbolic Interactionism	**Associated Theorist**	**Deviance arises from:**
Labeling Theory	Edwin Lemert	The reactions of others, particularly those in power who are able to determine labels
Differential Association Theory	Edwin Sutherlin	Learning and modeling deviant behavior seen in other people close to the individual
Control Theory	Travis Hirschi	Feelings of disconnection from society

Summary

The three major sociological paradigms offer different explanations for the motivation behind deviance and crime. Functionalists point out that deviance is a social necessity since it reinforces norms by reminding people of the consequences of violating them. Violating norms can open society's eyes to injustice in the system. Conflict theorists argue that crime stems from a system of inequality that keeps those with power at the top and those without power at the bottom. Symbolic interactionists focus attention on the socially constructed nature of the labels related to deviance. Crime and deviance are learned from the environment and enforced or discouraged by those around us.

Section Quiz

A student wakes up late and realizes her sociology exam starts in five minutes. She jumps into her car and speeds down the road, where she is pulled over by a police officer. The student explains that she is running late, and the officer lets her off with a warning. The student's actions are an example of _____.

1. primary deviance
2. positive deviance
3. secondary deviance
4. master deviance

According to C. Wright Mills, which of the following people is most likely to be a member of the power elite?

1. A war veteran
2. A senator
3. A professor
4. A mechanic

According to social disorganization theory, crime is most likely to occur where?

1. A community where neighbors don't know each other very well
2. A neighborhood with mostly elderly citizens
3. A city with a large minority population
4. A college campus with students who are very competitive

Shaw and McKay found that crime is linked primarily to _____.

1. power
2. master status
3. family values
4. wealth

According to the concept of the power elite, why would a celebrity such as Charlie Sheen commit a crime?

1. Because his parents committed similar crimes
2. Because his fame protects him from retribution
3. Because his fame disconnects him from society
4. Because he is challenging socially accepted norms

A convicted sexual offender is released on parole and arrested two weeks later for repeated sexual crimes. How would labeling theory explain this?

1. The offender has been labeled deviant by society and has accepted a new master status.
2. The offender has returned to his old neighborhood and so reestablished his former habits.
3. The offender has lost the social bonds he made in prison and feels disconnected from society.
4. The offender is poor and responding to the different cultural values that exist in his community.

_____ deviance is a violation of norms that _____result in a person being labeled a deviant.

1. Secondary; does not
2. Negative; does
3. Primary; does not
4. Primary; may or may not

Short Answer

Pick a famous politician, business leader, or celebrity who has been arrested recently. What crime did he or she allegedly commit? Who was the victim? Explain his or her actions from the point of view of one of the major sociological paradigms. What factors best explain how this person might be punished if convicted of the crime?

If we assume that the power elite's status is always passed down from generation to generation, how would Edwin Sutherland explain these patterns of power through differential association theory? What crimes do these elite few get away with?

Further Research

The Skull and Bones Society made news in 2004 when it was revealed that then-President George W. Bush and his Democratic challenger, John Kerry, had both been members at Yale University. In the years since, conspiracy theorists have linked the secret society to numerous world events, arguing that many of the nation's most powerful people are former Bonesmen. Although such ideas may raise a lot of skepticism, many influential people of the past century have been Skull and Bones Society members, and the society is sometimes described as a college version of the power elite. Journalist Rebecca Leung discusses the roots of the club and the impact its ties between decision-makers can have later in life. Read about it at http://openstaxcollege.org/l/Skull_and_Bones.

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Glossary

conflict theory
a theory that examines social and economic factors as the causes of criminal deviance

control theory
a theory that states social control is directly affected by the strength of social bonds and that deviance results from a feeling of disconnection from society

cultural deviance theory
a theory that suggests conformity to the prevailing cultural norms of lower-class society causes crime

differential association theory
a theory that states individuals learn deviant behavior from those close to them who provide models of and opportunities for deviance

labeling theory
the ascribing of a deviant behavior to another person by members of society

master status
a label that describes the chief characteristic of an individual

power elite
a small group of wealthy and influential people at the top of society who hold the power and resources

primary deviance
a violation of norms that does not result in any long-term effects on the individual’s self-image or interactions with others

secondary deviance
deviance that occurs when a person’s self-concept and behavior begin to change after his or her actions are labeled as deviant by members of society

social disorganization theory
a theory that asserts crime occurs in communities with weak social ties and the absence of social control

strain theory
a theory that addresses the relationship between having socially acceptable goals and having socially acceptable means to reach those goals

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5.5: Crime and the Law



How is a crime different from other types of deviance? (Photo courtesy of Duffman/Wikimedia Commons.)

Although deviance is a violation of social norms, it's not always punishable, and it's not necessarily bad. Crime, on the other hand, is a behavior that violates official law and is punishable through formal sanctions. Walking to class backward is a deviant behavior. Driving with a blood alcohol percentage over the state's limit is a crime. Like other forms of deviance, however, ambiguity exists concerning what constitutes a crime and whether all crimes are, in fact, "bad" and deserve punishment. For example, during the 1960s, civil rights activists often violated laws intentionally as part of their effort to bring about racial equality. In hindsight, we recognize that the laws that deemed many of their actions crimes—for instance, Rosa Parks taking a seat in the "whites only" section of the bus—were inconsistent with social equality.

As you have learned, all societies have informal and formal ways of maintaining social control. Within these systems of norms, societies have legal codes that maintain formal social control through laws, which are rules adopted and enforced by a political authority. Those who violate these rules incur negative formal sanctions. Normally, punishments are relative to the degree of the crime and the importance to society of the value underlying the law. As we will see, however, there are other factors that influence criminal sentencing.

Types of Crimes

Not all crimes are given equal weight. Society generally socializes its members to view certain crimes as more severe than others. For example, most people would consider murdering someone to be far worse than stealing a wallet and would expect a murderer to be punished more severely than a thief. In modern U.S. society, crimes are classified as one of two types based on their severity. Violent crimes (also known as "crimes against a person") are based on the use of force or the threat of force. Rape, murder, and armed robbery fall under this category. Nonviolent crimes involve the destruction or theft of property but do not use force or the threat of force. Because of this, they are also sometimes called "property crimes." Larceny, car theft, and vandalism are all types of nonviolent crimes. If you use a crowbar to break into a car, you are committing a nonviolent crime; if you mug someone with the crowbar, you are committing a violent crime.

When we think of crime, we often picture street crime, or offenses committed by ordinary people against other people or organizations, usually in public spaces. An often-overlooked category is corporate crime, or crime committed by white-collar workers in a business environment. Embezzlement, insider trading, and identity theft are all types of corporate crime. Although these types of offenses rarely receive the same amount of media coverage as street crimes, they can be far more damaging.

An often-debated third type of crime is victimless crime. Crimes are called victimless when the perpetrator is not explicitly harming another person. As opposed to battery or theft, which clearly have a victim, a crime like drinking a beer when someone is twenty years old or selling a sexual act do not result in injury to anyone other than the individual who engages in them, although they are illegal. While some claim acts like these are victimless, others argue that they actually do harm society. Prostitution may foster abuse toward women by clients or pimps. Drug use may increase the likelihood of employee absences. Such debates highlight how the deviant and criminal nature of actions develops through ongoing public discussion.

HATE CRIMES

On the evening of October 3, 2010, a seventeen-year-old boy from the Bronx was abducted by a group of young men from his neighborhood and taken to an abandoned row house. After being beaten, the boy admitted he was gay. His attackers seized his partner and beat him as well. Both victims were drugged, sodomized, and forced to burn one another with cigarettes. When questioned by police, the ringleader of the crime explained that the victims were gay and "looked like [they] liked it" (Wilson and Baker 2010).

Attacks based on a person's race, religion, or other characteristics are known as hate crimes. Hate crimes in the United States evolved from the time of early European settlers and their violence toward Native Americans. Such crimes weren't investigated until the early 1900s, when the Ku

Klux Klan began to draw national attention for its activities against blacks and other groups. The term "hate crime," however, didn't become official until the1980s (Federal Bureau of Investigations 2011).

An average of 195,000 Americans fall victim to hate crimes each year, but fewer than five percent ever report the crime (FBI 2010). The majority of hate crimes are racially motivated, but many are based on religious (especially anti-Semitic) prejudice (FBI 2010). After incidents like the murder of Matthew Shepard in Wyoming in 1998 and the tragic suicide of Rutgers University student Tyler Clementi in 2010, there has been a growing awareness of hate crimes based on sexual orientation.



In the United States, there were 8,336 reported victims of hate crimes in 2009. This represents less than five percent of the number of people who claimed to be victims of hate crimes when surveyed. (Graph courtesy of FBI 2010)

Crime Statistics

The FBI gathers data from approximately 17,000 law enforcement agencies, and the Uniform Crime Reports (UCR) is the annual publication of this data (FBI 2011). The UCR has comprehensive information from police reports but fails to account for the many crimes that go unreported, often due to victims' fear, shame, or distrust of the police. The quality of this data is also inconsistent because of differences in approaches to gathering victim data; important details are not always asked for or reported (Cantor and Lynch 2000).

Due to these issues, the U.S. Bureau of Justice Statistics publishes a separate self-report study known as the National Crime Victimization Report (NCVR). A self-report study is a collection of data gathered using voluntary response methods, such as questionnaires or telephone interviews. Self-report data are gathered each year, asking approximately 160,000 people in the United States about the frequency and types of crime they've experienced in their daily lives (BJS 2013). The NCVR reports a higher rate of crime than the UCR, likely picking up information on crimes that were experienced but never reported to the police. Age, race, gender, location, and income-level demographics are also analyzed (National Archive of Criminal Justice Data 2010).

The NCVR survey format allows people to more openly discuss their experiences and also provides a more-detailed examination of crimes, which may include information about consequences, relationship between victim and criminal, and substance abuse involved. One disadvantage is that the NCVR misses some groups of people, such as those who don't have telephones and those who move frequently. The quality of information may also be reduced by inaccurate victim recall of the crime (Cantor and Lynch 2000).

Public Perception of Crime

Neither the NCVR nor the UCS accounts for all crime in the United States, but general trends can be determined. Crime rates, particularly for violent and gun-related crimes, have been on the decline since peaking in the early 1990s (Cohn, Taylor, Lopez, Gallagher, Parker, and Maass 2013). However, the public believes crime rates are still high, or even worsening. Recent surveys (Saad 2011; Pew Research Center 2013, cited in Overburg and Hoyer 2013) have found U.S. adults believe crime is worse now than it was twenty years ago.

Inaccurate public perception of crime may be heightened by popular crime shows such as *CSI*, *Criminal Minds* and *Law & Order*(Warr 2008) and by extensive and repeated media coverage of crime. Many researchers have found that people who closely follow media reports of crime are likely to estimate the crime rate as inaccurately high and more likely to feel fearful about the chances of experiencing crime (Chiricos, Padgett, and Gertz 2000). Recent research has also found that people who reported watching news coverage of 9/11 or the Boston Marathon Bombing for more than an hour daily became more fearful of future terrorism (Holman, Garfin, and Silver 2014).

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 Investigations (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.



Here, Afghan National Police Crisis Response Unit members train in Surobi, Afghanistan. (Photo courtesy of isafmedia/flickr)

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.

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) can appeal the case to a higher court. In some states, the case then goes to a special appellate court; in others it goes to the highest state court, often known as the state supreme court.





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). (Photo (a) courtesy of Ammodramus/Wikimedia Commons; Photo (b) courtesy of Steve & Christine/Wikimedia Commons)

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).

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).

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.

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.

Summary

Crime is established by legal codes and upheld by the criminal justice system. In the United States, there are three branches of the justice system: police, courts, and corrections. Although crime rates increased throughout most of the twentieth century, they are now dropping.

Section Quiz

Which of the following is an example of corporate crime?

1. Embezzlement
2. Larceny
3. Assault
4. Burglary

Spousal abuse is an example of a _____.

1. street crime
2. corporate crime
3. violent crime
4. nonviolent crime

Which of the following situations best describes crime trends in the United States?

1. Rates of violent and nonviolent crimes are decreasing.
2. Rates of violent crimes are decreasing, but there are more nonviolent crimes now than ever before.
3. Crime rates have skyrocketed since the 1970s due to lax corrections laws.
4. Rates of street crime have gone up, but corporate crime has gone down.

What is a disadvantage of the *National Crime Victimization Survey* (NCVS)?

1. The NCVS doesn’t include demographic data, such as age or gender.
2. The NCVS may be unable to reach important groups, such as those without phones.
3. The NCVS doesn’t address the relationship between the criminal and the victim.
4. The NCVS only includes information collected by police officers.

Short Answer

Recall the crime statistics presented in this section. Do they surprise you? Are these statistics represented accurately in the media? Why, or why not?

Further Research

Is the U.S. criminal justice system confusing? You’re not alone. Check out this handy flowchart from the Bureau of Justice Statistics: http://openstaxcollege.org/l/US_Criminal_Justice_BJS

How is crime data collected in the United States? Read about the methods of data collection and take the National Crime Victimization Survey. Visit http://openstaxcollege.org/l/Victimization_Survey

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Glossary

corporate crime
crime committed by white-collar workers in a business environment

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

hate crimes
attacks based on a person's race, religion, or other characteristics

legal codes
codes that maintain formal social control through laws

nonviolent crimes
crimes that involve the destruction or theft of property, but do not use force or the threat of force

police
a civil force in charge of regulating laws and public order at a federal, state, or community level

self-report study
a collection of data acquired using voluntary response methods, such as questionnaires or telephone interviews

street crime
crime committed by average people against other people or organizations, usually in public spaces

victimless crime
activities against the law, but that do not result in injury to any individual other than the person who engages in them

violent crimes
crimes based on the use of force or the threat of force

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5.6: Police Methods

For most of its history in America, the work of the patrol officer and the investigator constituted the vast majority of police work. Uniformed officers patrolled the streets of America's cities, serving as a highly visible deterrent to crime and attempting to catch criminals in the act. If patrol failed, the investigator's job was to follow up, solving crimes by questioning victims, witnesses, and suspects. Only since the 1960s has empirical research highlighted the limits of both preventive patrol and criminal investigations in dealing with America's crime problem. It was not until the early 1990s that this research spawned a new wave of police reform aimed at proactive policing strategies. These proactive strategies meant that police efforts would shift (at least to some degree) from responding to calls for service to initiating action.

HomePatrol

Patrol is often called the "backbone" of the police department, and for good reason. Patrol consumes most of the average police department's resources. The basic philosophy and strategy of preventive patrol has not changed from Peel's time: the patrol officer makes circuits through a specified area, often called a beat. During Peel's time, most patrols were done on foot, with the occasional horse patrol. Technology ushered in the automobile, and modern police forces take full advantage of the benefits offered by cars. The most important of these advantages is the area that a single officer can cover. Automobile patrol officers can cover much wider beat areas than officers on foot. The bottom line is that because an officer in a car can cover a much wider geographic area, departments need fewer officers. This translates into huge savings. Automobile patrol is much cheaper than foot patrol.

The effectiveness of patrol operations within a department is usually judged by three major functions. These include answering calls for service, deterring crime by a highly visible police presence, and investigating suspicious circumstances. Of these three major functions of patrol, crime deterrence is the most controversial. The historical assumption, stemming from Peel's day, was that a highly visible officer patrolling a beat would serve as a deterrent to would-be criminals. Research evidence since the 1970s has supported the idea that random preventive patrol has very little if any impact on crime.

HomeThe Kansas City Preventive Patrol Experiment

In the 1970s, criminal justice researchers began to question the underlying assumption of preventive patrol. They designed an experiment to find out of preventive patrol reduced crime and made citizens feel safe from crime. They also wondered about patrol strength. In other words, did the number of officers on patrol in a given area have an impact on both actual crime and citizens' perceptions of crime?

The researchers' experiment was conducted in conjunction with the Kansas City, Missouri police department. The department divided the city's 15 beat areas into 3 groups. As with any good experiment, the experimenters needed a control group. To serve this purpose, one cluster of 5 beats made no changes in the amount of patrol officers working in the area. In a second area, the police withdrew all preventive patrol and served a completely reactive role. They entered this "reactive" area only when calls for service were received. In the third area, they raised preventive patrol to four times the normal level. If the conventional wisdom about the effectiveness of preventive patrol held true, then the experimenters should observe a higher crime rate in the reactive area, no change in the crime rate in the control area, and a drop in the intensified patrol area.

What the researchers found staggered the world of policing: There was almost no difference in actual crime or citizens fear of crime. Citizen's opinions about how good a job the police were doing did not change. It seemed that law-abiding citizens and criminals alike simply did not notice the changes. As one would expect, this caused a flurry of opinions to come out regarding the interpretation of these findings. Some argued that the findings must be wrong, and that preventive patrol was and always had been a good thing. Others argued that patrol was just a bad idea and that the police should focus on different things. Many stood the middle ground, focusing on making patrol more effective by changing the way it was done. One of the few things that almost all commentators agreed on was that just pouring more officers out on the street would have little impact on crime. What was needed was a fundamental change.

HomeThe Proactive Paradigm Shift

While the research evidence seems to indicate that the mere presence of uniformed officers in an area does little to deter crime, the same cannot be said of more aggressive patrol strategies. Proactive patrol operations shift from random to targeted. Specific types of offenders, specific places, and specific types of victims can be considered. Myriad tactics fall under this general philosophy. Undercover operations, the use of informants, using decoys, saturating problem areas, and frequent patrols of "hot spots" are just a few examples.

An important argument in how to better utilize patrol is that random patrols do not work well because crime is not a random phenomenon. While it may seem fair, giving every neighborhood in a city an equal amount of police time and resources is horribly inefficient. A smarter use of resources is to concentrate police resources in high crime areas, and limit resources in areas that experience very little crime. Research evidence suggests that this strategy does indeed have a positive impact on crime. Researchers found that the 911 system received a heavy amount of calls for service from a small number of locations. Brief periods of intensive patrolling in those high crime areas effectively reduced robberies and other crimes.

Other strategies, such as those used in the **San Diego Field Interrogation Study**, have shown that aggressively interrogating suspicious persons can lead to a reduction in both violent crime and disorder. The New York City Street Crimes Unit has had success using decoys to apprehend repeat offenders. By having an undercover officer play a "perfect victim," officers were able to increase dramatically arrests of muggers.

HomeProblem-oriented Policing

The traditional model of policing in the United States was decidedly *reactive* in nature. The primary methods used by police were preventive patrols and retroactive investigations. Early efforts at innovation were designed to be proactive, but they focused on the deterrence of crime through a limited "toolbox" of arrests, summons, and citations. Recent decades have seen a shift in focus, due in large part to the confluence of two major developments in how both practitioners and academics viewed policing. The first was **Problem-Oriented Policing (POP)**, and the other was a broader philosophy that would include POP, known as **Community-Oriented Policing (COP)**.

Problem-oriented policing began with a seminar article published by Herman Goldstein in 1979. Goldstein essentially suggested that the basic, most fundamental job of the police was to deal with community problems. To do this job effectively, the police needed to develop a much larger toolbox, and a much more sophisticated method of detecting, analyzing, and ultimately solving these problems. This seminal article led to an explosion of interest and publication in the emerging field of problem-oriented policing. The research suggested something extraordinary about POP: it actually worked (see Braga, 2008 for a review of these studies).

A major tool in the analysis of community problems is the ***Problem Analysis Triangle***. The idea of the crime triangle is to depict graphically depict the interaction between the features of the victim, the features of the location, and the features of the offender. As Spelman and Eck (1989) point out, 10% of crime victims are involved in up to 40% of victimizations, 10% of offenders are involved in 50% of crimes, and about 10% of addresses are the location for about 60% of crimes. This suggests that a focus on a few high volume victims, offenders, and locations can maximize the impact of scarce police resources.

To understand the problem-solving process, it is helpful to consider what is meant by "problem." To understand the scope of problems of interest to police, it is helpful to consider the police mission. Under the professional model of policing, the focus was almost entirely on "catching bad guys." Other duties were often considered outside the prevue of "real police work." Goldstein suggests the following list of major police goals:

1. to prevent and control conduct threatening to life and property (including serious crime);

2. to aid crime victims and protect people in danger of physical harm;

3. to protect constitutional guarantees, such as the right to free speech and assembly;

4. to facilitate the movement of people and vehicles;

5. to assist those who cannot care for themselves, including the intoxicated, the addicted, the mentally ill, the physically disabled, the elderly, and the young;

6. to resolve conflict between individuals, between groups, or between citizens and their government;

7. to identify problems that have the potential for becoming more serious for individuals, the police or the government; and

8. to create and maintain a feeling of security in the community

HomeCommunity-oriented Policing

Community policing is a philosophy that promotes organizational strategies that support the systematic use of partnerships and problem-solving techniques to proactively address the immediate conditions that give rise to public safety issues such as crime, social disorder, and fear of crime. A dramatic departure from traditional policing is the idea of collaborative partnerships. These partnerships are between police agencies and the individuals and organizations they serve. These partnerships are designed to

develop solutions to problems and increase trust in police. To accomplish these goals, important changes must be made within departments. There must be a realignment of organizational management, structure, personnel, and information systems to support community partnerships and proactive problem solving.

Community policing recognizes that the idea of a small band of officers, no matter how well intentioned and well trained, can solve all of the crime, delinquency, and disorder problems in a society as vast and complex as that of the United States. Rarely can solve public safety problems alone. Community policing encourages interactive partnerships with relevant **stakeholders**. The range of potential partners is large, and these partnerships can be used to accomplish the two interrelated goals of developing solutions to problems through collaborative problem solving and improving public trust. A fundamental principle of community policing is that "The public should play a role in prioritizing and addressing public safety problems" (COPS Office, 2014, p. 4).

Partnerships

Police departments can partner with a number of other government agencies to identify community concerns and offer alternative solutions. Examples of agencies include legislative bodies, prosecutors, probation and parole, public works departments, neighboring law enforcement agencies, health and human services, child support services, ordinance enforcement, and schools. In addition, people who live, work, or otherwise have an interest in the community-volunteers, activists, formal and informal community leaders, residents, visitors and tourists, and commuters-are a valuable resource for identifying community concerns. These diverse members of the community can be engaged in achieving specific goals at town hall meetings, neighborhood association meetings, decentralized offices and storefronts in the community, and team beat assignments. Community-based organizations that provide services to the community and advocate on its behalf can be powerful partners. These groups often work with or are composed of individuals who share common interests and can include such entities as victims groups, service clubs, support groups, issue groups, advocacy groups, community development corporations, and the faith community.

For-profit businesses also have a great stake in the health of the community and can be key partners because they often bring considerable resources to bear in addressing problems of mutual concern. Businesses can help identify problems and provide resources for responses, often including their own security technology and community outreach. The local chamber of commerce and visitor centers can also assist in disseminating information about police and business partnerships and initiatives, and crime prevention practices. The media represent a powerful mechanism by which to communicate with the community. They can assist with publicizing community concerns and available solutions, such as services from government or community agencies or new laws or codes that will be enforced. In addition, the media can have a significant impact on public perceptions of the police, crime problems, and fear of crime.

Organizational Change

The community policing philosophy focuses on the way that departments are organized and managed and how the infrastructure can be changed to support the philosophical shift behind community policing. It encourages the application of modern management practices to increase efficiency and effectiveness. Community policing emphasizes changes in organizational structures to institutionalize its adoption and infuse it throughout the entire department, including the way it is managed and organized, its personnel, and its technology. Under the community policing model, police management infuses community policing ideals throughout the agency by making a number of critical changes in climate and culture, leadership, formal labor relations, decentralized decision making and accountability, strategic planning, policing and procedures, organizational evaluations, and increased transparency. Changing the climate and culture means supporting a proactive orientation that values systematic problem solving and partnerships. Formal organizational changes should support the informal networks and communication that take place within agencies to support this orientation.

Line Officer Buy-In

If community policing is going to be effective, **police unions** and similar forms of organized labor must be a part of the process and function as partners in the adoption of the community policing philosophy. Including labor groups in agency changes can ensure support for the changes that are imperative to community policing implementation. Experience has shown that departments that try to implement community policing without line officer support will almost certainly fail.

Home *Key Terms*

Automobile Patrol, Community Oriented Policing (COP), Community Policing, Control Group, Foot Patrol, Herman Goldstein, Hot Spot, Investigator, Kansas City Preventive Patrol Experiment, Line Officer, Police Union, Problem Analysis Triangle, Problem Oriented Policing (POP), San Diego Field Interrogation Study, Stakeholder, Town Hall Meeting

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5.7: Investigations and Specialized Units

Hollywood is responsible for several archetypical “investigators.” Most of these are merely Hollywood myths that reflect nothing of what criminal investigators actually do. Perhaps the most unrealistic myth is the super sleuth that “always gets his man.” In reality, police clear only about 20% of index crimes. The next most unrealistic myth is that detective live a professional life if danger and excitement. The reality is that detectives do a huge amount of boring paperwork.

HomeWhat Investigators Do

Many crimes that result in arrest do so because of the “detective work” of the patrol officer that responded to the call for service. If the patrol officer cannot conclude the investigation with an arrest, the case is turned over to a criminal investigator. The primary job of the investigator is to gather information. A good detective is a jack of all trades. Much knowledge about a wide array of subjects and many skills are required. These are needed to accomplish three major functions: Conducting interviews of victims, witnesses, and suspects is perhaps the most common and most important. Second, a good investigator must have the necessary knowledge and skill to properly conduct a crime scene investigation. Finally, good detectives must have the ability to develop and maintain informants.

The research suggests that the traditional investigator’s role is not that important in solving crimes. According to the National Institute of Justice (NIJ), no amount of investigation will solve many of the serious crimes that occur in America’s communities. There simply is not enough evidence to go on. Other studies have found that the majority of cleared cases are cleared because of the work of patrol officers. Arrests of offenders at the scene are more common that offenders being apprehended after lengthy investigations. These findings have led to much discussion of how to improve investigations. As one would expect in an era of community policing, much of that discussion has been centered on how to make detectives a more proactive part of the police department.

The Patrol Function

While detectives are usually assigned cases in the form of a follow-up investigation, the first responder is most often a uniformed patrol officer. The early stages of a criminal investigation, often called a *preliminary investigation*, begins when dispatchers receive a call, most often through a 911 system. In many small departments, the patrol officer conducting the preliminary investigation will see the investigation through to the end. This is because either the small number of detectives available are otherwise engaged, or because the department is so small that no one is assigned permanently to investigations.

The first priority of every officer arriving at every crime scene is officer safety. The safety of the public is a close but secondary concern. This may seem counterintuitive, but wounded officers cannot protect the safety of the public and investigate crimes. Logically, officer safety must be a first priority. This is why most “active shooter” training dictates that officers first eliminate the threat before attending to the medical needs of victims. After safety issues have been adequately dealt with, the focus shifts to discovering what happened. This requires rapid assessment of the scene and the quick identification of any potential witnesses. An ongoing goal of the first responder is the security and integrity of the scene. It is vital to the preservation of evidence that absolutely no unnecessary personnel (law enforcement or civilian) enter the scene.

Once dangers have been eliminated, witnesses have been identified, and the scene has been secured, the first responder will evaluate what further (if any) investigative actions should be taken. This can mean conducting further investigations, calling in technicians, or calling in an investigator. Some crimes will fall into the jurisdiction of another agency (e.g., state police or FBI). The decision to turn an investigation over to another department or agency will usually be made at the administrative level. Patrol officers may be required to make this judgment call, however, when the public safety demands immediate action. Acts of terrorism and hazardous material spills are examples of circumstances where outside agencies should be notified immediately.

A critical aspect of all investigative activity is the meticulous keeping of accurate records. These records will take the form of departmental forms and reports, written notes, sketches, and photographs. Many patrol officers fail at this important task, mistakenly believing that crime scene documentation is a task for investigators. It must be remembered that if the job of the first responder is not done well, the chances of an investigator being able to salvage the investigation are slim.

HomeSpecialized Units

There is a strong correlation between the size of an agency’s jurisdiction (in terms of population, not land area), and the existence of specialized units. That is, the bigger a city, the more specialized officers tend to be within that city’s police department. The most common specialized units within American police departments are traffic units and drug enforcement units. How such units operate

depends largely on departmental policy, but national priorities can also be important because the national government often funds law enforcement initiatives through grants.

Many larger departments divide investigative duties between *crimes against persons* and *crimes against property*. Each of these major categories may involve types of cases that require investigators to have special knowledge or skills. Most criminal investigators, however, are generalists. They develop a wide array of skills to perform a wide array of criminal investigations efficiently. When agencies do create specialized investigative units, they often target a specific type of crime. Domestic violence, vice, organized crimes, and sex crimes are common divisions.

Domestic Violence

Violence against intimate partners was a social problem long before that fact was widely recognized by the public. In days past, abuse of women by husbands and boyfriends was considered a "family matter," and the criminal justice system ignored most cases. Today, things have changed for the better as far as public awareness and the mandate for an appropriate police response go. The problem is still present at a level many find disturbing. Domestic violence tends to be cyclical (repeating), and the magnitude of the violence tends to increase as time goes on. In about one-third of homicide cases where the victim is female, the killer was a husband or boyfriend. Myriad acts fall under the heading of domestic violence, but the definitions used by social and behavioral scientists tend to be much broader than those used in criminal codes. Officers that subscribe to the code enforcer paradigm will often respond inappropriately or much too late.

In response to this persistent and tragic problem, many police departments have created specialized units to deal with this particular crime. These departments are in essence acknowledging that normal police tools (i.e., arrest) do not work well in domestic violence cases, and that officers need specialized training to understand the dynamics of domestic violence, and they need outside help if victims are to be assisted. In progressive departments, investigators are paired with social workers to place victim assistance on an equal footing with the criminal investigation. Aside from the obvious virtue of helping the victim escape a life of abuse, this problem-oriented approach tends to reduce dramatically the number of calls for service stemming from the same abusive relationship. Investigation and arrest alone are woefully inefficient at ending the problem of domestic violence.

Vice

The term **vice** is used to designate a category of criminal acts that are considered victimless crimes by most people. Prostitution, gambling, and drug use are common examples. Not all police departments have vice units, and specialized drug units are another common way of dealing with that particular problem. The legal codes that make these types of activities criminal are under fire from a growing number of citizens. Because the laws are unpopular, enforcement is often unpopular as well. The movement toward legalization of marijuana is currently the most commonly discussed of these issues. Several states have made the recreational use and possession of marijuana legal, contrary to the federal government's stance. For this reason, the likelihood of being arrested for possession of marijuana depends largely on the jurisdiction.

Organized Crime

The basic characteristic of *organized crime* is a group of people working together to achieve some criminal purpose. This definition includes the **mafia**, but goes far beyond it. Organized crime can be centered on supplying illegal goods and services, such as gambling and drugs. It can also include predatory crimes, such as theft, burglary, and murder. When criminal organizations are large and complex, criminal investigations become large and complex as well. Often, criminal organizations will stretch beyond state and local borders, complicating the idea of jurisdiction. Often state and local agencies become involved in these types of investigations because of the extra resources they have and their expanded jurisdiction. In addition, investigators often need special financial expertise (examining records of financial crimes) that is beyond the capability of local police. Electronic surveillance is common in the investigation of organized crime, and the technical and legal issues are often better suited to the resources and skills of state and federal investigators. The use of **confidential informants** is also common, and this adds an additional layer of legal complexity to such cases.

Internal Affairs

The question of exactly who polices the police has been controversial throughout the history of policing in America. Starting in the late 1950s, many departments set up special units within the department to investigate allegations of police misconduct. This trend continued through the 1960s, and by the end of the decade, many of America's largest police forces had **internal affairs** divisions. This development took place against a backdrop of social turmoil and the civil rights revolution that was taking place in the federal courts. The use of excessive force and corruption are perhaps the most common issues considered by internal affairs, but all

violations of the law and police codes of conduct are possible targets. Internal affairs officers are usually placed outside of the usual police command structure, answering directly to the chief.

HomeJuveniles and the Police

Crime statistics demonstrate that juveniles are responsible for a disproportionate amount of crime. This suggests that dealing with juveniles represents a disproportionate amount of police work. The juvenile impact on police workload is enhanced due to the existence of *status offenses*. Status offenses are acts that would not be criminal if done by an adult, but are prohibited for minors. Common status offenses that the police must deal with are *truancy*, running away from home, and **juvenile curfew** violations. Additionally, police are called upon to deal with juveniles in matters that are not criminal (at least on the part of the child), such as missing persons, **child abuse**, and **child neglect**. The impact of juveniles on police work is so great that many large, urban police departments have established specialized juvenile units.

Police officers encounter a wide array of problems involving juveniles; these range from dealing with status offenses to investigating serious crimes such as murder. Most police encounters with juveniles involve what policing experts refer to as **order maintenance**. Order maintenance activities include things like asking loiterers to "move along" and crowd control at large events. Research has shown that juveniles are less likely than adults to respect the police and the law, and that authoritarian rule enforcement causes resentment among juveniles. This mistrust and resentment means that policing juveniles is a difficult task.

Community policing holds promise to mend the divide between juveniles and the police. Recall that the community policing philosophy maintains that communities and police can work together to solve community problems. These problem-solving efforts can only be successful with the participation and input of all community members, including juveniles. Despite the advice of community policing experts, community policing tends to be implemented in a programmatic way. The two most common community policing programs targeting juveniles are D.A.R.E. (Drug Awareness Resistance Education) programs and the emergence of School Resource Officers (SROs) working in an increasing number of schools throughout the United States.

The D.A.R.E. program had its beginnings in Los Angeles, but quickly spread throughout the United States. In most jurisdictions, specialized juvenile officers undergo weeks of intensive training before they can become D.A.R.E. officers. This training focuses on educational material targeting mostly fifth and sixth graders. D.A.R.E. was unique in its collaborative approach between educational institutions and police departments. A common element of most D.A.R.E. programs is teaching upper elementary school children peer resistance strategies that consist of different ways of saying "no." Empirical research has shown that the programs have little long-term impact on later drug use. Despite the disappointing research findings, the programs remain quite popular and have undergone substantial revision to improve effectiveness. Perhaps the most valuable aspect of D.A.R.E. programs was demonstrating to the nation that collaboration between police and schools was possible.

An additional community policing strategy is to place uniformed police officers in the schools. This practice is more common in large urban areas, but School Resource Officers (SROs) can be found in any size school. The Omnibus Crime Control and Safe Streets Act of 1968 defines the SRO as "a career law enforcement officer, with sworn authority, deployed in community-oriented policing, and assigned by the employing police department or agency to work in collaboration with school and community-based organizations." In practice, the community policing philosophy is often not put into practice. Rather than community collaborators that build relationships and solve problems, many SROs are relegated to the function of a security guard. The U.S. Department of Justice's Office of Community Oriented Policing Services (COPS) provided $68 million that was awarded to hire and train 599 SROs in 289 communities throughout the United States. The special funding signaled a recognition that the SRO's complex role as law enforcement officer, counselor, teachers, and liaison between police, schools, and other community elements requires training beyond that traditionally offered in police academies. Research has shown that a least some SRO programs have been successful at reducing disruptive and illegal student conduct. Prosocial relationships formed between officers and students have also led to a phenomenon that community policing advocates would have predicted: School Resource Officers obtain information concerning crime in the broader community from students, improving the overall effectiveness of the police department.

Home *Key Terms*

Active Shooter, Child Abuse, Child Neglect, Clearance Rate, Confidential Informant, Crime Scene Investigation (CSI), Domestic Violence, Drug Awareness Resistance Education (D.A.R.E.), Drug Enforcement Unit, Informant, Internal Affairs, Juvenile Curfew, Mafia, Scene Integrity, School Resource Officer (SRO), Specialized Units, Traffic Unit, Vice

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5.8: The Legal Environment of Policing

Criminal law is often used as a very general term to describe the entire body of law that is of concern to the criminal justice system. Recall that the two major parts are the substantive criminal law and the procedural criminal law. The substantive criminal law consists largely of statutes that define criminal acts. The procedural criminal law dictates how the criminal justice system should treat people. Because the police are the gatekeepers of the criminal justice system and come into contact with citizens far more often than any other component of the criminal justice system, the law of criminal procedure has more to say about how the police treat people than any other topic.

Criminal procedure, then, can be seen as a branch of law that dictates how the government investigates, prosecutes, judges, and sentences those accused of crimes. The bulk of this law is a matter of interpreting the Constitution of the United States. When it comes to how the police must treat people, the most important body of law stems from the Bill of Rights. The Supreme Court of the United States interprets the Bill of Rights, and that court has the power to establish police practice in the field. There are also state constitutions, statutes, and administrative rules that circumscribe police conduct. These are also part of the body of procedural law. Perhaps the most important laws that concern police conduct are the Fourth and Fifth Amendments of the United States Constitution.

The Fourth Amendment States 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, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

The Fifth Amendment states that: “No person … shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.”

The **Sixth Amendment** guarantees the right to a public and speedy trial, as well as the right to the assistance of counsel. The right to counsel is protected at many stages of the criminal justice process, not just at trial. Criminal defendants have the right to an attorney during custodial interrogations, for example.

The Fourteenth Amendment requires the States to observe the due process standards set forth in the federal Constitution as interpreted by federal appeals courts. This gives the federal appellate courts the authority to consider the constitutionality of acts of government agents employed by the state such as police officers and corrections officers. It also gives the high courts the authority to review the constitutionality of state statutory laws. Not all federal constitutional rights are considered to be due process rights, so some protections are not forced on the states. For example, many states do not observe the right to an indictment by a grand jury; they use a system of prosecutorial information instead.

HomeThe Right to Privacy

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.

HomeSearches

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.

HomeHomeSearch 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 the 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 in light of 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.

HomeSearches 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 an 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 amount 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.

HomeArrests

The Supreme Court has determined that an arrest is a seizure of the person for legal purposes. Accordingly, the Fourth Amendment prohibition against unreasonable searches and seizures comes into play. A person is generally considered to have been arrested when they are taken into custody with the purpose of being charged with a crime.

Most arrests are made without **arrest warrants**, despite the constitution's general requirement that officers have one. Under all circumstances, an officer must have probable cause to make an arrest. When it comes to arrests, probable cause means that the officer has reasonable grounds to believe that the person has committed or is about to commit a crime. When a warrant is sought, the supporting evidence must be included in an affidavit, just as with a search warrant.

The old common law rule was that an officer could make an arrest, without a warrant, if he believed he had evidence amounting probable cause that the person had committed a felony. In the case of a misdemeanor, the crime had to be committed in the officer's presence. These same basic common law rules are still followed in many jurisdictions today. Many jurisdictions, however, have created special rules where misdemeanors that the officer did not witness directly (such as with many domestic battery statutes) can result in lawful arrests without a warrant. Such rules are usually created by state legislatures as a matter of statute.

HomeArrest Warrants

As previously described, an arrest warrant is a document issued by a court ordering any law enforcement officer to take a particular individual into custody. While there are many exceptions, there are times when a warrant is required to make a lawful arrest. To enter a person's home to make an arrest, the police must have an arrest warrant. (To enter the home of someone other than the person to be arrested to make an arrest, the police must have a search warrant). Of course, the exigent circumstances exception can be applied to arrest warrants just as it can with search warrants.

HomeDomestic Violence Arrests

Social scientific research as resulted in at least some evidence that arresting the **primary aggressor** in domestic violence cases prevents further battering. This research spawned legislation in many states that require police to identify and arrest the primary aggressor in domestic violence situations. While these offenses are generally classified as misdemeanors, these special legislative enactments command law enforcement to take the primary aggressor into custody despite not having a warrant or having seen the crime take place. Despite such laws being in place in many jurisdictions since the 1970s, many police departments do a poor job in dealing with domestic violence cases.

HomeTerry Stops

Making an arrest is a substantial interference with a citizen's constitutionally protected freedom. As such, it requires probable cause. The courts have ruled that there are sorts of intrusions that are less than an arrest, and thus require a lesser standard of evidence. Because the Supreme Court described this sort of situation in a 1968 case styled ***Terry v. Ohio***, these types of "stops" are often referred to as **Terry stops**. In *Terry*, the court said that the police have the right to stop individuals for a short period of time when their behavior seems suspicious, ask them questions, and pat them down for weapons. This type of stop is also known as a **stop and frisk**. The evidentiary standard set forth in *Terry* was less than probable cause, but more than a **mere hunch**. The court called this standard **reasonable suspicion**. Unlike courtroom testimony, reasonable suspicion can be based on hearsay.

HomeThe Exclusionary Rule

As previously discussed, the Supreme Court of the United States can tell law enforcement officers how to treat people as long as they have a constitutional reason for doing so. What happens if the cops do not listen to the Court and violate somebody's rights? There are several **remedies**, but the most important one to the criminal justice system is the *exclusionary rule*. The exclusionary rule is very simple. It states that illegally obtained evidence cannot be admitted into a criminal court. Here, *illegally obtained* means obtained in violation of the defendant's constitutional rights. In practice, the defendant's attorney must file a motion to suppress the evidence before trial. The judge will then review the evidence, and if the judge determines that it was obtained in

violation of the defendant's rights, it will be suppressed, and the jury will never see the evidence. Its existence cannot even be mentioned at trial.

The exclusionary rule was established by the U.S. Supreme Court in 1914 in the case of ***Weeks v. U.S***. At that time, the rule only applied to Federal agents. States were on their own to decide whether to allow illegally obtained evidence into state courts. It was not until 1961 in *Mapp v. Ohio* that the Court decided that the exclusionary rule was fundamental to a fair trial and was thus applicable to the state via the Fourteenth Amendment's due process clause. The liberal Warren Court decided *Mapp*. Since the time of the warren court, the Supreme Court has become more and more conservative. Conservative justices, while not willing to overrule the basic premise of the exclusionary rule, have eroded it by creating various exceptions. For example, in the 1984 case of ***U.S. v. Leon***, the court created a *good faith exception*. The good faith exception states that if the police are acting on a warrant they believe to be valid and a court later determines that the warrant is invalid, the evidence can still be used in court.

HomeThe Fifth Amendment

The common expression "to plead the fifth" refers to the Fifth Amendment to the United States Constitution. The Fifth Amendment gives criminal defendants the right to remain silent, and thus is a right against self-incrimination. The Fifth Amendment has an enormous impact on the practice of police interrogations.

In the days before the civil rights revolution, the police would use any means necessary to gain a confession. Torture, both physical and psychological, was shockingly common. Threats were often used. The problem with confessions made under such duress is that innocent persons may well confess to crimes simply to make the pain stop. The first major case prohibiting this sort of conduct was ***Brown v. Mississippi*** (1936).

The right against self-incrimination is not as broad as it may first seem. It applies only to confessions. That is, communications that are considered "testimonial" in court. The protection does not extend to physical evidence, so a suspect can be compelled to give fingerprints, DNA samples, blood tests, blood alcohol tests, and so forth. Just as with most constitutional rights, a person can knowingly and voluntarily waive the right to remain silent. If it were not for such waivers, the art of interrogation would hold little value for police.

HomeConfessions and Counsel

The Court has linked the Fifth Amendment right against self-incrimination to the right to counsel. In the case of ***Escobedo v. Illinois*** (1964), the Court ruled that when police questioning moves from merely investigatory to accusatory in nature, the right to counsel becomes active. In other words, once a witness develops into a suspect, then the right to comes into play.

HomeMiranda Warnings

Ultimately, the court was not satisfied with the scope of the protections set forth in *Escobedo*. Two years later, the court established specific interrogation procedures to ensure the Fifth Amendment rights of criminal defendants in *Miranda v. Arizona* (1966). In this landmark case, a man named Miranda confessed to kidnapping and rape. Police obtained the confession without a lawyer being present and without advising Miranda that he had the right to remain silent. The Court held that Miranda was entitled to such a warning, and thus his confession was inadmissible.

The decision in Miranda reached far beyond Miranda's case. It obliged every police officer in America to advise suspects if their rights before asking them questions while in custody. In addition to being advised of the right to remain silent, suspects must be advised that anything that they do say can be used against them in court, that they have the right to an attorney, and that if they cannot afford an attorney they will be provided one by the state. Of course, the suspect may knowingly and voluntarily waive any or all of these rights. The right to remain silent can be invoked at any time. In other words, even if suspects waive their right to remain silent, they can stop the questioning at any time, and must be provided with a lawyer if they so request.

Many police officers and conservative commentators at the time regarded *Miranda* as a legal technicality created by the courts to handcuff the police. On several occasions, increasingly conservative courts have refused to overrule *Miranda*, but they have weakened it by creating several exceptions to it. For example, in ***New York v. Quarles*** (1984), the Court created a **public safety exception**. The public safety exception allows officers to ask questions without giving the *Miranda* warnings if there is some exigency involving the public safety is involved. In ***Nix v. Williams*** (1984), the court created the **inevitable discover exception**. This controversial exception means that if the police would have inevitably discovered the evidence without benefit of the improper questioning, then the evidence will be admissible.

There are many situations in which the person may not necessarily feel free to leave, but they are not in "custody" for *Miranda* purposes. For example, Miranda does not come into play when the police stop a person to (briefly) talk to them on the street, or during traffic stops. Other circumstances do not invoke *Miranda* because there is no questioning of the suspect involved. For example, if a person confesses to an officer without the officer asking any questions, then *Miranda* does not apply.

HomePolice Use of Force

Police officers have the lawful authority to use force, but only if that force is reasonably necessary to accomplish a legitimate criminal justice purpose. Obviously, taking a person into custody by making an arrest, or preventing a suspect from fleeing are examples of legitimate criminal justice purposes. Most questions about the legitimacy of police use of force revolve around the reasonableness of it. If too much force is used, then the use of force will not be lawful. The problem is that defining how much force is necessary in a given situation is a highly subjective process. When the police use more force than someone regards as reasonable in a given situation, it is often referred to as **police brutality**.

HomeCivil Liability and Criminal Prosecution

When the police go beyond reasonable, legitimate use of force, they risk law suits and criminal charges. Under the laws of most states, individual police officers can be sued for torts, such as wrongful death and false imprisonment. There are also federal remedies in place, such as **1983 suits**.

HomeHomeDeadly Force

As one would expect, police officers have the legal right to use deadly force (most often a shooting) when they reasonably believe that they are in imminent danger of serious bodily harm or death. That right extends to the protection of others. Until the court's decision in *Tennessee v. Garner* (1985), many jurisdictions subscribed to the idea of the **fleeing felon rule**. The *fleeing felon rule* was the common law doctrine that allowed an officer to use deadly force to apprehend a felon that was seeking to escape custody or a lawful arrest. In *Tennessee v. Garner*, the court struck down a Tennessee statute stating "if, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest." This, in effect, declared the fleeing felon rule unconstitutional. With the abolishment of the fleeing felon rule, the standard become one of dangerousness.

HomeHomeLaw Enforcement Jobs Outlook

According to the Bureau of Labor Statistics (2013), the median income for police officers and detectives in 2010 (the most recent statistics available) was $55,010 per year (or $26.45 per hour). There were 794,300 such jobs in the United States, and the expected growth rate over the next decade is projected to be around 7%. Of course, this does not reflect the fact that local political and economic conditions are a major factor in any particular agency's decision to hire new officers. The prediction is that local agencies will do most of the new hiring, and that federal jobs will remain very competitive. According to the BJS, average starting salaries for entry-level local police officers in 2007 ranged from $26,600 per year in the smallest jurisdictions to $49,500 in the largest. Overall, the average starting salary earned by entry-level officers was about $40,500. More than 90% of local police departments serving 25,000 or more residents were using in-field computers during 2007. This suggests that those looking to careers in law enforcement should develop computer skills.

Home *Key Terms*

1983 Suit, Affidavit, Arrest Warrant, Automobile Search, *Brown v. Mississippi* (1936), Consent Search, *Escobedo v. Illinois* (1964), Exigent Circumstances Exception, Fleeing Felon Rule, Hot Pursuit Search, Inevitable Discovery Exception, Knock and Announce, Mere Hunch, *New York v. Quarles* (1984), *Nix v. Williams* (1984), No-knock Warrant, Open Fields Doctrine, Particularity Requirement, Plain View Doctrine, Police Brutality, Primary Aggressor, Public Safety Exception, Reasonable Person Test, Reasonable Suspicion, Remedy, Right to Remain Silent, Rules of Criminal Procedure, Sixth Amendment, Stop and Frisk, *Tennessee v. Garner* (1985), *Terry* Stop, *U.S. v. Leon* (1984), *Weeks v. U.S.* (1914)

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CHAPTER OVERVIEW

6: Corrections

6.1: Jails
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6.1: Jails

The idea of jails has a long history, and the historical roots of American jails are in the “gaols” of feudal England. Sheriffs operated these early jails, and their primary purpose was to hold accused persons awaiting trial. This English model was brought over to the Colonies, but the function remained the same. In the 1800s, jails began to change in response to the penitentiary movement. Their function was extended to housing those convicted of minor offenses and sentenced to short terms of incarceration. They were also used for other purposes, such as holding the mentally ill and vagrants. The advent of a separate juvenile justice system and the development of state hospitals alleviated the burden of taking care of these later categories.

Today’s jails are critical components of local criminal justice systems. They are used to address the need for secure detention at various points in the criminal justice process. Jails typically serve several law enforcement agencies in the community, including local law enforcement, state police, wildlife conservation officers, and federal authorities. Jails respond to many needs in the criminal justice system and play an integral role within every tier of American criminal justice. These needs are ever changing and influenced by the policies, practices, and philosophies of the many different users of the jail. Running a jail is a tough business, usually undertaken by a county sheriff. Often, much of the Sheriff’s authority is delegated to a jail administrator.

Running a jail is such a complicated endeavor partly because jails serve an extremely diverse population. Unlike prisons where inmate populations are somewhat homogenous, fails hold vastly different individuals. Jails hold both men and women, and both children and adults. Most state prisoners are serious offenders, whereas jails old both serious offenders as well as minor offenders who may be vulnerable to predatory criminals. Those suffering from mental illness, alcoholism, and drug addiction often find themselves in jail. It is in this environment that jail staff must accomplish the two major functions of jails: Intake and Custody.

HomeBooking and Intake

The booking and intake function of jails serves a vital public safety function by providing a secure environment in which potentially dangerous persons can be assessed, and the risk these individuals pose the public can be determined.

HomeCustody

The second major function of jails is the idea of custody. That is, people are deprived of their liberty for various reasons. The two most common of these reasons are *pretrial detention* and *punishment*.

Pretrial Detention

A major use of modern jails is what is often referred to as **pretrial detention**. In other words, jails receive accused persons pending arraignment and hold them awaiting trial, conviction, or sentencing. More than half of jail inmates are accused of crimes and are awaiting trial. The average time between arrest and sentencing is around six months. Jails also readmit probation and parole violators and absconders, holding them for judicial hearings. The major purpose of pretrial detention is not to punish offenders, but to protect the public and ensure the appearance of accused persons at trial.

According to the Bureau of Justice Statistics, there are around 3,300 jails currently in operation within the United States. This large number points to a very important fact: Jails are primarily a local concern. **Jails** (and **detention centers**) are facilities designed to safely and securely hold a variety of criminal offenders, usually for a short period. The wide variety of offenders comes from the fact that jails have dual roles. They hold criminal defendants waiting on processing by the criminal justice system, and they hold those convicted of crimes and sentenced to a jail term. In addition, jails hold prisoners for other agencies, such as state departments of correction, until bed space becomes available in a state prison.

The size of jails can vary widely depending on the jurisdiction the facility serves. Both geographic and legal jurisdiction must be considered. The single most important determinant of jail size is population density. The more people a given jurisdiction has, the more jail inmates they are likely to have. Many rural jails are quite small, but America’s largest population centers tend to have massive jail complexes. Most counties and many municipalities operate jails, and a few are operated by federal and other non-local agencies. There has been a trend for small, rural jurisdictions to combine their jails into regional detention facilities. These consolidated operations can increase efficiency, security, and better ensure prisoners’ rights.

Punishment

A primary function of jails is to house criminal defendants after arrest. Within a very narrow window of time, the arrestee must appear before a judge. The judge will consider the charges against the defendant and the defendant’s risk of flight when determining bail. The judge may decide to remand the defendant to the custody of the jail until trial, but this is rare. Most often,

pretrial release will be granted. The arrestees may be required to pay a certain amount of money to ensure their appearance in court, or they may be released on their own recognizance.

As a criminal sanctioning option, jails provide a method of holding offenders accountable for criminal acts. Jails house offenders that have been sentenced to a jail term for misdemeanor offenses, usually for less than one year. There are many ways that jail sentences can be served, depending largely on the laws and policies of the particular jurisdiction. A central goal of incarceration as punishment in the criminal justice system is the philosophical goal of *deterrence*. Many believe that jail sentences discourage offenders from committing future criminal acts (specific deterrence) and to potential criminals about the possible costs of crime (general deterrence). Rehabilitation and reintegration are sometimes considered secondary goals of incarceration. These goals are not usually deemed amenable to the jail environment, and few programs designed to meet these goals exist. Many local jails do make a modest effort to provide inmates with opportunities for counseling and change to deter future criminal behavior, but always within the constraints of scant resources.

Miscellaneous Functions

Jails in some jurisdictions are responsible for transferring and transporting inmates to federal, state, or other authorities. Jails are also tasked with holding mentally ill persons pending their transfer to suitable mental health facilities where beds are often unavailable. Jails also hold people for a variety of government purposes; they hold individuals wanted by the armed forces, for protective custody of individuals who may not be safe in the community, for those found in contempt of court, and witnesses for the courts. Jails often hold state and federal inmates due to overcrowding in prison facilities. Jails are commonly tasked with community-based sanctions, such as work details engaged in public services.

HomeJail Populations

Arrestees often arrive at the jail with myriad many problems. Substance abuse, alcohol abuse, and mental illness often mean that jail inmates are not amenable to complying with the directions of jail staff. Many have medical problems, psychological problems, and emotional problems. Inmates can display the full gambit of human emotions: fail staff may see fear, anxiety, anger, and depression every day. Behaviors often mirror emotional state, and at times staff must deal with noncompliant, suicidal, or violent inmates. While inmates are in custody, the jail is responsible for their health and wellbeing.

Jails function in a role as a service provider for the rest of the criminal justice community. Jail administrators have very little discretion in who goes to jail and how long they remain in custody. Law and policy play a big role in dictating who goes to jail, as do the discretionary decisions of probation and parole officers, law enforcement, and judges. Prevalent community attitudes are also important, because voters can place pressure on law enforcement and the courts to make more arrests and prosecute more offenders. When this happens, more people end up in jail.

HomeJuvenile Detention

Many jails temporarily detain juveniles pending transfer to juvenile authorities.

Recent research by the Office of Juvenile Justice and Delinquency Prevention (OJJDP) shows that the trend in juvenile incarceration is toward lower numbers and a move toward local facilities. The juvenile offender population dropped 14% from 2010 to 2012, to the lowest number since 1975. In the March 2015 report, it was noted that for the first time since 2000, more offenders were in local facilities than were in state operated facilities.

The degree of security present in juvenile facilities tends to vary widely between jurisdictions. An important measure of security used in OJJDP reports is locking youth in “sleeping rooms.” Recent data indicates that public agencies are far more likely to lock juveniles in their sleeping quarters at least some of the time. A majority of state agencies (61%) reported engaging in this practice, while only a relatively small number (11%) of private agencies reported this practice. More than half of all facilities reported that they had one or more confinement features in addition to locking juveniles in their sleeping room (which usually happens at night). These security features usually consist of locked doors and gates designed to keep juveniles within the facility.

Unlike adult jails, juvenile detention takes place in a variety of different environments. According to the OJJDP study, the most common type of facility were facilities that considered themselves to be “residential treatment centers,” followed by those that considered themselves to be “detention centers.” The classifications of “group home,” “training school,” “shelter,” “wilderness camp,” and “diagnostic center” are also used. Group homes and shelters tended to be privately owned, and detention centers tended to be state run facilities.

Corporal Punishment, Custody, Detention Centers, Detention Facility, Diagnostic Center, Gaol, Group Home, Intake, Juvenile Detention Center, Office of Juvenile Justice and Delinquency Prevention (OJJDP), Penitence, Prison Industrial Complex, Residential Treatment Center, Shelter, Training School, Wilderness Camp

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6.2: Prisons

As inmates enter a prison system after sentencing, they are typically assessed at a classification or reception facility based on the nature of their crime, criminal history, escape risk, health needs, and any behavioral issues that must be addressed. The goal of these assessments is to determine the dangerousness of the offender and the viability of various treatment options. Based on the assessment results, prison personnel will assign the offender to a particular prison facility. The primary concern when assigning an inmate to a facility is safety, followed by practical concerns about bed space. The needs of the inmate are also considered in the process. Prisoners thus have almost no control of where they are confined. Some prisons do allow for transfers to facilities closer to family, but these requests are subject to security concerns and bed space. Often, female inmates are housed far from family because the small number of female facilities often means that there are no options close to family.

HomeDevelopment of Modern Prisons

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 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.

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.

HomeSpecial Populations

A major problem affecting the operation of prisons in the United States is what is known as **special populations**. Among these are elderly inmates. An aging population in general coupled with mandatory sentencing laws has caused an explosion in the number. This is an expensive proposition for the American correctional system. A substantial reason for this increased cost is the increased medical attention people tend to require as they grow older. Prisons that rely on prison industry to subsidize the cost of operations find that elderly inmates are less able to work than their younger counterparts. There is also the fear that younger inmates will prey on elderly ones. This phenomenon has caused the federal prison system and many state systems to rethink the policies that contribute to this "graying" of correctional populations.

Substantial growth has also been seen in the number of inmates that are ill. Arthritis and hypertension are the most commonly reported chronic conditions among inmates, but more serious and less easily treated maladies are also common. Many larger jails and prisons have special sections devoted to inmates with medical problems. In addition to the normal security staff, these units must employ medical staff. Recruiting medical staff that are willing to work in confinement with inmates is a constant problem for administrators.

According to many critics of mental health in America, the number of mentally ill inmates has reached crisis level. There has been explosive growth in the incarceration of mentally ill persons since the *deinstitutionalization* movement of the 1960s. As well-meaning people advocated for the rights of American's mentally ill, they fostered in a sinister unintended consequence: As mental hospitals closed, America's jails became the dumping ground for America's mentally ill population. This problem was exacerbated at the federal level by the passage of the Community Mental Health Act of 1963, which substantially reduced funding of mental health hospitals. With state hospitals gone or severely restricted, communities had to deal with the issue of what to do with mentally ill persons. Most communities responded with the poor solution of criminalizing the mentally ill.

HomePrison Overcrowding

While the trend in prison population data is down, prison overpopulation is still a major problem in many states. Many of those states are under court order to fix overcrowding problems, which are unconstitutional. Governments have responded with many programs aimed at reducing **prison overcrowding**. More prisons have been built, existing facilities have been retrofitted to house more inmates within legal guidelines, early release programs have been instituted, and the range of criminal sanctions beyond traditional parole and prison sentences has been implemented. Many states have altered the criminal laws to decriminalize or reduce the classification of crimes, in effect sending fewer people to prison.

HomePrison Programs

Prisons are like small cities in many respects. All of the requirements of life must be met, and rehabilitative objectives must be facilitated. Medical services must be rendered, and religious needs must be met. Inmates have a right to some types of recreation. Many prisons have labor and industry programs. Rehabilitative programs include job training, addiction treatment, therapy for psychological and emotional problems, and many other programs are common.

Home *Key Terms*

American Correctional Association, Congregate System, Crime Control Model, Custody Level, Death Row, Declaration of Principles, Elmira Reformatory, John Howard, Lease System, Maximum-security Prison, Medical Model, Medium-security Prison, Minimum-security Prison, Penitent, Penitentiary, Pennsylvania System, Prison Overcrowding, Prison Programs, Private Prisons, Reception Facility, Reformatory Movement, Rehabilitation Model, Special Populations, Super-maximum-security Prison, Walnut Street Jail, Women's Prisons, Zebulon Brockway

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6.3: Prisoner's Rights

American courts were reluctant to get involved in prison affairs during most of the 19th century. Until the 1960s, the courts used a hands-off approach to dealing with corrections. Since, it 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."

Home *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)**

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6.4: Parole, Probation, and Community Sanctions

Parole and probation, taken together with other forms of non-prison sanctions, are called **community corrections**. This is because these offenders reside in the community rather than in jail or prison. The idea of probation and parole is to reintroduce the offender into society as a productive member. The other major goal of probation and parole is to keep the community safe from predation.

Community-based sanctions are becoming increasingly popular as corrections budgets continue to rise, and overcrowding remains an issue. It is much cheaper to house an offender in the community than it is to keep them in prison. It is estimated that community supervision costs less than $1,000 per person supervised, while incarceration costs as much as $30,000 per prisoner. The push has been to increase prison time for predatory offenders, and to make room for them by finding alternatives to incarceration for nonviolent offenders.

HomeParole

The practice of releasing prisoners on parole before the end of their sentences has become an integral part of the correctional system in the United States. **Parole** is a variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed by the courts. It also serves to lessen the costs to society of keeping an individual in prison. The essence of parole is release from prison, before the completion of sentence, on the condition that **parolees** abide by certain rules during the balance of the sentence. Under some systems, parole is granted automatically after the service of a certain portion of a prison term. Under others, parole is granted by the discretionary action of a board, which evaluates an array of information about a prisoner and makes a prediction whether he is ready to reintegrate into society.

To accomplish the purpose of parole, those who are allowed to leave prison early are subjected to specified conditions for the duration of their parole. These **conditions of parole**restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen. Typically, parolees are forbidden to use alcohol and other intoxicants or to have associations or correspondence with certain categories of undesirable persons (such as felons). Typically, also they must seek permission from their parole officers before engaging in specified activities, such as changing employment or housing arrangements, marrying, acquiring or operating a motor vehicle, traveling outside the community, and incurring substantial indebtedness. Additionally, parolees must regularly report to their **parole officer**.

The parole officers are part of the administrative system designed to assist parolees and to offer them guidance. The conditions of parole serve a dual purpose; they prohibit, either absolutely or conditionally, behavior that is deemed dangerous to the restoration of the individual into normal society. Moreover, through the requirement of reporting to the parole officer and seeking guidance and permission before doing many things, the officer is provided with information about the parolee and an opportunity to advise him. The combination puts the parole officer into the position in which he can try to guide the parolee into constructive development.

The enforcement advantage that supports the parole conditions derives from the authority to return the parolee to prison to serve out the balance of his sentence if he fails to abide by the rules. In practice, not every violation of parole conditions automatically leads to revocation. Typically, a parolee will be counseled to abide by the conditions of parole, and the parole officer ordinarily does not take steps to have parole revoked unless he thinks that the violations are serious and continuing so as to indicate that the parolee is not adjusting properly and cannot be counted on to avoid antisocial activity. The broad discretion accorded the parole officer is also inherent in some of the quite vague conditions, such as the typical requirement that the parolee avoid “undesirable” associations or correspondence. Yet revocation of parole is not an unusual phenomenon, affecting only a few parolees. According to the Supreme Court in *Morrissey v. Brewer*, 35% – 45% of all parolees are subjected to revocation and return to prison. Sometimes revocation occurs when the parolee is accused of another crime; it is often preferred to a new prosecution because of the procedural ease of recommitting the individual on the basis of a lesser showing by the State.

HomeProbation

Probation is very similar to parole, and many of the legal issues are identical. Many jurisdictions combine the job of probation and parole officer, and these officers are often employed in departments of community corrections. The most basic difference between probation and parole is that probationers are sentenced to community sanctions rather than a prison sentence. Parolees have already served at least some prison time. Some jurisdictions can sentence an offender to a split sentence. A **split sentence** requires the offender to stay in prison for a short time before being released on probation.

Most criminal justice historians trace the roots of modern probation to **John Augustus**, who began his professional life as a businessperson and boot maker. Augustus became known as the father of probation largely due to his strong belief in abstinence from alcohol. He was an active member in the Washington Total Abstinence Society, an organization that believed criminals motivated by alcohol could be rehabilitated by human kindness and moral teachings rather than incarceration. His work began in earnest when, in 1841, he showed up in a Boston police court to bail out a "common drunkard." Augustus accompanied the man on his court date three weeks later, and those present were stunned at the change in the man. He was sober and well kempt. For 18 years, he served in the capacity of a probation officer on a purely voluntary basis. Shortly after his death in 1859, a probation statute was passed so that his work could continue under the auspices of the state. With the rise of psychology's influence in the 1920s, probation officers moved from practical help in the field to a more therapeutic model. The pendulum swung back to a more practical bent in the 1960s when probation officers began to act more as service brokers. They assisted probationers with such things as obtaining employment, obtaining housing, managing finances, and getting an education.

Many jurisdictions have several levels of supervision. The most common distinction between levels of probationers is **active supervision** and **inactive supervision**. Probationers on active supervision are required to report in with a probation officer at regular intervals. Probationers can be placed on inactive supervision because they committed only minor offenses. Serious offenders can sometimes be placed on inactive supervision when they have completed much of a long probation sentence without problems.

The preferred method of checking in depends on the jurisdiction. Many require in person visits, but some jurisdictions allow phone calls and checking in via mail. Inactive probationers are not required to check in at all or very infrequently. Checking in with an officer is a condition of probation. Other conditions often include participation in treatment programs, paying fines, and not using drugs or alcohol. If these conditions are not followed, the the probationer is said to be a **violator**. Violators are subject to probation **revocation**. Revocations often result in a prison sentence, but some violators are given second chances, and some are sentenced to special programs for **technical violations**. Many jurisdictions classify **absconders** differently than other violators. An absconder is a probationer (or parolee) that stops reporting and "disappears."

Following the trend of mass incarceration in the United States over the past several decades has been a similar trend in what has been called "mass community supervision." In 1980, about 1.34 million offenders were on probation or parole in the United States. That figure exploded to nearly 5 million by 2012. The Bureau of Justice Statistics (Maruschak & Parks, 2014) provides a look at these numbers from a different vantage point: about 1 in 50 adults in the United States were under community supervision at yearend 2012. The community supervision population includes adults on probation, parole, or any other post-prison supervision.

Many jurisdictions combine the role of probation officer and parole officer into a single job description. In *Gagnon v. Scarpelli* (1973), the court had this to say of the duties of the such officers: "While the parole or probation officer recognizes his double duty to the welfare of his clients and to the safety of the general community, by and large concern for the client dominates his professional attitude. The parole agent ordinarily defines his role as representing his client's best interests as long as these do not constitute a threat to public safety." This statement suggests a dichotomy in the responsibility of parole (and probation) officers; these must look out for the best interest of the client as well as looking out for the best interest of the public. This fact frequently enters into politics. Liberals tend to focus on the treatment and rehabilitation of the offender, and conservatives focus more on the safety of the public and just deserts for the offender.

From the perspective of the parole officers, they must perform law enforcement duties that are designed to protect the public safety. These functions very much resemble the tasks of police officers. They are also officers of the court, and are responsible for enforcing court orders. These orders often include such things as drug testing programs, drug treatment programs, alcohol treatment programs, and anger management programs. Officers are often required to appear in court and give testimony regarding the activities of their clients. They frequently perform searches and seize evidence of criminal activity or technical violations. The courts often ask officers to make recommendations when violations do occur. Officers may recommend that violators be sent to prison, or continue on probation or parole with modified conditions.

There is ambivalence about the role of probation and parole officers within the criminal justice community. This has to do with an artificial dichotomy, often being characterized as police work versus social work. The detection and punishment of law and technical violations are characterized as the law enforcement role. The rehabilitation and reintegration of the offender are regarded as the social work role. Officers tend to lean more heavily toward one of these objectives than the other. Some officers embrace the law enforcement perspective, and seek strict compliance with the law and conditions of parole. Other officers view themselves more as counselors, helping the offender reform, and brokering community resources to help resolve problems. Which model a

particular officer exemplifies has many influences. The officer's personal beliefs, the dominate culture of the local office, the policy dictates of agency heads, and legislative enactments driven by political philosophies all play a role in shaping the working personality of each officer. The most effective officers are likely to be hybrids that fall somewhere in between the two archetypes.

HomeIntermediate Sanctions

Traditionally, a person convicted of an offense was sentenced to probation, or sentenced to prison. There was no middle ground. The purpose of intermediate sanctions is to seek that middle ground by providing a punishment that is more severe than probation alone, yet less severe that an period of incarceration. Perhaps the most common among these alternatives is *Intensive Supervision Probation* (ISP). Offenders given to this sort of intermediate sanction are assigned to an officer with a reduced caseload. Caseloads are reduced in order to provide the officer with more time to supervise each individual probationer. Frequent surveillance and frequent drug testing characterize most ISP programs. Offenders are usually chosen for these programs because they have been judged to be at a high risk for reoffending.

Another common type of alternative to prison is the **work release program**. These programs are designed to maintain environmental control over offenders while allowing them to remain in the workforce. Most often, offenders sentenced to a work release program reside in a work release center, which can be operated by a county jail, or be part of the state prison system. Either way, work-release center residents are allowed to leave confinement for work related purposes. Otherwise, they are locked in a secure facility.

Correctional *boot camps* are facilities run along similar lines to military boot camps. Military style discipline and structure along with rigorous physical training are the hallmarks of these programs. Usually, relatively young and nonviolent offenders are sentenced to terms ranging from three to six months in boot camps. Research has found that convicts view boot camps as more punitive than prison, and would prefer prison sentence to being sent to boot camp. Research has also shown that boot camp programs are no more effective at reducing long-term recidivism than other sanctions.

Home *Key Terms*

Absconder, Active Supervision, Community Corrections, Conditions of Parole, *Gagnon v. Scarpelli* (1973), Inactive Supervision, John Augustus, Parole, Parole Officer, Parolee, Revocation, Split Sentence, Technical Violation, Violator, Work Release Program

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6.5: Probation, Parole , and the Law

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.

HomeRevocation 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."

HomeThe 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.

HomeConditions 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 insure 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 us 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.

HomeRelated 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.

Home *Key Terms*

Conditions of Release, Fourth Waiver, Fundamental Rights, *Mempa v. Rhay* (1967), *Morrissey v. Brewer* (1972), Parole Revocation

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CHAPTER OVERVIEW

7: Sentencing

7.1: Excessive Punishment

7.2: Theories of Punishment

7.3: Sentencing

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7.1: Excessive Punishment

Learning Objectives

1. Compare an inhumane procedure with disproportionate punishment under the Eighth Amendment.
2. Identify the most prevalent method of execution pursuant to the death penalty.
3. Ascertain crime(s) that merit capital punishment.
4. Identify three classifications of criminal defendants who cannot be constitutionally punished by execution.
5. Define three-strikes laws, and ascertain if they constitute cruel and unusual punishment pursuant to the Eighth Amendment.
6. Ascertain the constitutionality of sentencing enhancements under the Sixth Amendment right to a jury trial.

The prohibition against cruel and unusual punishment comes from the Eighth Amendment, which states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." State constitutions often have similar provisions (Texas Constitution, 2010). Although the ban on cruel and unusual punishment relates directly to *sentencing*, which is a criminal *procedure* issue, criminal statutes mandating various penalties can be held unconstitutional under the Eighth Amendment just like statutes offending the due process clause, so a brief discussion is relevant to this chapter. Another facet of excessive punishment is a criminal sentencing enhancement that is based on facts not found beyond a reasonable doubt by a jury. This has been held to violate the Sixth Amendment, which states, "In all criminal prosecutions, the accused shall enjoy the right to a…trial, by an impartial jury of the State and district wherein the crime shall have been committed."

In this section, three issues are analyzed and discussed: the infliction of *cruel punishment*, a criminal sentence that is *too severe*, and a criminal sentence that is invalid under the right to a *jury trial*.

Infliction of Cruel Punishment

In general, the government must refrain from inflicting cruel or barbaric punishments on criminal defendants in violation of the Eighth Amendment. In particular, cases asserting that a criminal punishment is inhumane often focus on capital punishment, which is the death penalty.

Synopsis of the History of Capital Punishment

The death penalty has been used as a criminal punishment since the eighteenth century BC. American death penalty law is influenced by the British because the colonists brought English common-law principles, including capital punishment, with them to the New World. The first execution in America took place in 1608, for spying (Death Penalty Information Center, 2010). Methods of execution and capital crimes varied from colony to colony. In the late 1700s, a movement to abolish the death penalty began, and in 1846 Michigan was the first state to eliminate the death penalty for all crimes except treason (Death Penalty Information Center, 2010). Throughout the nineteenth and twentieth centuries, the United States fluctuated in its attitude toward capital punishment. Executions were at an all-time high in the 1930s (Death Penalty Information Center, 2010). However, in 1972, in the landmark decision of *Furman v. Georgia*, 408 U.S. 238 (1972), the US Supreme Court held that Georgia's death penalty statute, which gave the jury complete discretion to sentence a criminal defendant to death, was *arbitrary* and therefore authorized *cruel and unusual* punishment in violation of the Eighth Amendment. This decision invalidated death penalty statutes in forty states. Later, in 1976, the US Supreme Court case of *Gregg v. Georgia*, 428 U.S. 153 (1976), affirmed the procedure of a bifurcated trial, separating the guilt phase from the penalty phase for death penalty cases. *Gregg* also affirmed the death penalty's constitutionality under the Eighth Amendment. Currently, thirty-four states and the federal government authorize the death penalty, while sixteen states and the District of Columbia do not (Death Penalty Information Center, 2010).

Inhumane Capital Punishment

A claim that capital punishment is *inhumane* and therefore unconstitutional under the Eighth Amendment focuses on the *method* of execution. Throughout the history of the death penalty, many methods of execution have been employed, including shooting, hanging, electrocution, the gas chamber, and lethal injection. At the time of this writing, the law is in a state of flux as to which methods of execution are constitutional because many state and federal decisions have stricken virtually every method available. The current focus of the courts is *lethal injection* because it is one of the few methods that has not been condemned as unconstitutional. Most states that authorize the death penalty use lethal injection as the primary method of execution. In a recent statement on this issue, the US Supreme Court in *Baze v. Rees*, 128 S. Ct. 1520 (2008), held that Kentucky's four-drug lethal injection procedure was *not* cruel and unusual punishment under the Eighth Amendment. In other states, including Missouri and Tennessee, federal courts using different facts have ruled the multidrug procedure *unconstitutional* (Death Penalty Information

Center, 2010). It is impossible to predict the future of death penalty methodology under the Eighth Amendment because each case will be decided based on the circumstances presented. However, it is clear that the law in this area is ripe for a definitive statement of constitutionality under the Eighth Amendment's cruel and unusual punishment clause.

Disproportionate Punishment

Disproportionate punishment is a different issue than inhumane punishment, but it is still within the parameters of the Eighth Amendment. Disproportionate punishment asserts that a criminal punishment is *too severe* for the crime. Two criminal punishments garner many disproportionate punishment claims: **capital punishment**and punishment pursuant to three-strikes statutes.

Capital Punishment as Disproportionate

Capital punishment can be disproportionate because it is too severe for the *crime* or because it is too severe for the *criminal defendant*.

Examples of Capital Punishment That Is Disproportionate to the Crime

Death is the ultimate punishment, so it must be equivalent to the crime the defendant committed. Although the states and the federal government have designated many capital crimes that may not result in death, for example, treason that does not lead to death, the US Supreme Court has confirmed that the death penalty is too severe for most crimes. In *Coker v. Georgia*, 433 U.S. 584 (1977), the Court held that capital punishment is disproportionate for the crime of raping an adult woman. Many years later in *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008), the Court extended the disproportionality principle to invalidate the death penalty for child rape. *Kennedy*maintained the distinction between crimes committed against *individuals* and crimes committed against the *government*, like treason. The only crime against an individual that currently merits the death penalty is criminal homicide, which is the unlawful killing of one human being by another. Criminal homicide is discussed in detail in Chapter 9 "Criminal Homicide".

Figure 3.8 Crack the Code


Crack the Code

Examples of Capital Punishment That Are Disproportionate to the Criminal Defendant

Recent US Supreme Court precedent has targeted specific classifications of criminal defendants for whom capital punishment is overly severe. Recent cases hold that the death penalty is cruel and unusual punishment for a criminal defendant who was a *juvenile* when the crime was committed (Roper v. Simmons, 2010), who is *mentally ill*(Ford v. Wainwright, 2010), or has an *intellectual disability* (Atkins v. Virginia, 2010) at the time of the scheduled execution. Although states vary in their classifications of juveniles (discussed in detail in Chapter 6 "Criminal Defenses, Part 2"), the Eighth Amendment prohibits capital punishment for an individual who was under eighteen years of age when he or she committed criminal homicide. Mental illness could cover a variety of disorders, but the US Supreme Court has held that a criminal defendant has a constitutional right to a determination of sanity before execution (Ford v. Wainwright, 2010). Intellectual disability is distinct from mental illness and is defined by the US Supreme Court as a substantial intellectual impairment that impacts everyday life, and was present at the defendant's birth or during childhood (Atkins v. Virginia, 2010). However, this standard is broad, so states vary in their legislative definitions of this classification (Death Penalty Information Center, 2010).

Example of Capital Punishment That Is Inhumane and Disproportionate to the Crime and the Criminal Defendant

Jerry is sentenced to death for rape. The state death penalty statute specifies death by decapitation. While on death row, Jerry begins to hear voices and is diagnosed as schizophrenic by the prison psychiatrist. The state schedules the execution anyway. In this example, the state death penalty statute is *inhumane* because death by decapitation is too severe a punishment for any crime. The death penalty statute is also *disproportionate* to the *crime* because execution is not a constitutional punishment for the crime of rape. Lastly, the death penalty statute is *disproportionate* to Jerry, *the criminal defendant*, because it is cruel and unusual to execute someone who is mentally ill.

Disproportionate Punishment Pursuant to Three-Strikes Laws

California was the first state to enact a "three strikes and you're out" law (Cal. Penal Code § 667, 2010). Generally, three-strikes statutes punish habitual offenders more harshly when they commit a second or third felony after an initial serious or violent felony

(Cal. Penal Code § 667, 2010). To date, California's three-strikes law is the toughest in the nation; it mandates a minimum twenty-five-year- to life sentence for felons convicted of a third strike. California enacted its three-strikes legislation after the kidnapping, rape, and murder of Polly Klaas by a habitual offender. Twenty-four states followed, indicating public support for the incapacitation of career criminals (Three Strikes and You're Out, 2010).

Three-strikes statutes vary, but those most likely to be attacked as disproportionate count *any* felony as a strike after an initial *serious* or *violent* felony. Counting any felony might levy a sentence of *life in prison* against a criminal defendant who commits a *nonviolent* felony. However, the US Supreme Court has upheld lengthy prison sentences under three-strikes statutes for relatively minor second or third offenses, holding that they are not cruel and unusual punishment under the Eighth Amendment (Ewing v. California, 2010).

Figure 3.9 The Eighth Amendment



Sentencing that Violates the Right to a Jury Trial

Modern US Supreme Court precedent has expanded the jury's role in sentencing pursuant to the Sixth Amendment. Although a detailed discussion of sentencing procedure is beyond the scope of this book, a brief overview of sentencing and the roles of the judge and jury is necessary to a fundamental understanding of this important trial right, as is set forth in the following section.

The Role of the Judge and Jury in Sentencing Fact-Finding

As stated in Chapter 2 "The Legal System in the United States", the trier of fact decides the facts and renders a decision on innocence or guilt using **beyond a reasonable doubt** as the standard for the burden of proof. The trier of fact in a criminal prosecution is almost always a *jury* because of the right to a jury trial in the Sixth Amendment. Occasionally, the defendant waives the right to a jury trial and has a bench trial with a judge playing the role of trier of fact. Although the jury determines innocence or guilt during a jury trial, the verdict defines the end of their role as the trier of fact, and the *judge* sets the sentence. The death penalty is an exception to the jury's limited role in sentencing; a jury must decide whether to sentence the defendant to death at a separate hearing after the trial has concluded.

Generally, criminal sentencing takes place after the trial. Although the sentencing procedure varies from state to state and from state to federal, a sentencing hearing is typically held after guilt has been determined at trial or after a guilty plea. For many years, judges have had almost *exclusive* control of sentencing. Although judges are restricted by the fact-finding done at trial, they can receive new evidence at sentencing if it is relevant. For example, a judge is bound by a jury determination that the defendant used a weapon when committing an armed robbery. However, the judge can accept new evidence at sentencing that reveals the defendant had two prior convictions for armed robbery and can enhance the sentence under a habitual offender or three-strikes statute.

Sentencing Enhancement by Judges

Until recently, judges could use evidence received at the sentencing hearing to enhance a sentence beyond the statutory maximum by making a determination of the *new* facts to a **preponderance of evidence**. However, in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the US Supreme Court held that the right to a jury trial prohibits judges from enhancing criminal sentences beyond the statutory maximum based on facts not determined by a jury **beyond a reasonable doubt**. In *Apprendi*, the trial court enhanced the defendant's sentence beyond the statutory maximum for possession of a firearm with an unlawful purpose under New Jersey's hate crimes statute. Although the jury did not determine that the defendant's crime was a hate crime, the judge accepted new evidence at sentencing that indicated the defendant's shooting into a residence was racially motivated. The US Supreme Court reversed the New Jersey Supreme Court, which upheld the sentencing procedure. The Court held that *other than evidence of a prior conviction*, a judge cannot enhance a defendant's sentence beyond the statutory maximum unless there has been a factual determination by a jury beyond a reasonable doubt of the facts supporting the sentencing enhancement. The Court based its holding on the Sixth Amendment right to a jury trial as incorporated and applied to the states through the Fourteenth Amendment due process clause.

Post-*Apprendi*, this holding was extended to federal sentencing guidelines in *U.S. v. Booker*, 543 U.S. 220 (2005). In *Booker*, a federal judge enhanced a sentence following mandatory US Sentencing Guidelines, which permitted judges to find the sentencing enhancement facts using the preponderance of evidence standard. The US Supreme Court ruled that the enhancement was invalid under the Sixth Amendment right to a jury trial and held that the US Sentencing Guidelines would be *advisory* only, never mandatory. *Booker* was based on *Blakely v. Washington*, 542 U.S. 296 (2004), which invalidated a similar Washington State sentencing procedure.

Pursuant to *Apprendi*, *Booker*, and *Blakely*, a criminal defendant's sentence is unconstitutional under the Sixth Amendment right to a jury trial if it is *enhanced*beyond the statutory maximum by facts that were *not* determined by a jury beyond a reasonable doubt. This premise applies in *federal* and *state* courts and also to *guilty pleas* rather than jury verdicts (Blakely v. Washington, 2010).

Example of an Unconstitutional Sentence Enhancement

Ross is tried and convicted by a jury of simple kidnapping. The maximum sentence for simple kidnapping is five years. At Ross's sentencing hearing, the judge hears testimony from Ross's kidnapping victim about the physical and mental torture Ross inflicted during the kidnapping. The victim did not testify at trial. The judge finds that the victim's testimony is credible and rules that Ross used cruelty during the kidnapping by a **preponderance of evidence**. The judge thereafter enhances Ross's sentence to eight years, based on a statutory sentencing enhancement of three years for "deliberate cruelty inflicted during the commission of a crime." The three-year sentencing enhancement is most likely unconstitutional. Under the Sixth Amendment right to a jury trial, the jury must find deliberate cruelty **beyond a reasonable doubt**. A court can strike the enhancement of three years on appeal, and on remand, the trial court cannot increase the sentence beyond the five-year maximum.

Figure 3.10 The Sixth Amendment



Figure 3.11 Diagram of Constitutional Defenses



Key Takeaways

- An inhumane procedure punishes a defendant too severely for any crime. A disproportionate punishment punishes a defendant too severely for the crime he or she committed.
- Lethal injection is the most prevalent method of execution pursuant to the death penalty.
- Criminal homicide is the only crime against an individual that merits capital punishment.
- Criminal defendants who were juveniles when the crime was committed, are mentally incompetent, or have an intellectual disability cannot be subjected to capital punishment.
- Three-strikes laws punish criminal defendants more severely for committing a felony after they have committed one or two serious or violent felonies. Three-strikes laws have been held constitutional under the Eighth Amendment, even when they levy long prison sentences for relatively minor felonies.
- Sentencing enhancements beyond the statutory maximum are unconstitutional unless they are based on facts determined by a jury beyond a reasonable doubt under the Sixth Amendment right to a jury trial.

Exercises

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Andrew is sentenced to death for torture. In Andrew's state, there is an "eye-for-an-eye" statute that mandates punishment that mimics the crime the defendant committed. Pursuant to this statute, Andrew will be tortured to death. Is the state's eye-for-an-eye statute constitutional under the Eighth Amendment? Why or why not?
2. Read *Lockyer v. Andrade*, 538 U.S. 63 (2003). What was the defendant's sentence in *Lockyer*? What was the defendant's crime? Did the US Supreme Court hold that the defendant's sentence was constitutional under the Eighth Amendment? The case is available at this link: http://scholar.google.com/scholar_case?case=18105647395364234 77&hl=en&as_sdt=2&as_vis=1&oi=scholarr.
3. Read *Fierro v. Gomez*, 77 F.3d 301 (1996). Did the US Court of Appeals for the Ninth Circuit hold that the gas chamber procedure in California was constitutional under the Eighth Amendment? The case is available at this link: http://scholar.google.com/scholar_case?case=26906922262871934&hl=en&as_sdt=2&as_vis=1&oi=scholarr.
4. Read *Gall v. U.S.*, 128 S. Ct. 586 (2007). In *Gall*, the federal judge departed from the US Sentencing Guidelines and imposed a sentence of probation because the defendant had reformed and rejected his criminal lifestyle. Did the US Supreme Court uphold this sentence? Why or why not? The case is available at this link: http://scholar.google.com/scholar_case?case=5158806596650877502&q= Gall+v.+U.S.&hl=en&as_sdt=2,5&as_vis=1.

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7.2: Theories of Punishment

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 problems 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.

HomeA 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.

Home *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

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7.3: Sentencing

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.

HomePresentence 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.

HomeVictim 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.

HomeThe 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.

HomeInfluences 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.

HomeConcurrent versus Consecutive Sentences

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.

HomeTypes 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.

HomeAppeals

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.

HomeSentencing 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.

Sentencing Guidelines

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.

Home *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

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8.1: Ch 2.1Multiple Choice Questions (15)

Courts in each of the 11 federal judicial districts of the U.S. that functions as an appellate court for the lower federal courts.

- *Article Six*
- *Circuit Courts*
- *United States Courts of Appeals*
- *Gibbons v. Ogden (1824)*

The governmental bodies that run a particular city, town, county, or district.

- *Local Government*
- *Circuit Courts*
- *Supremacy Clause*
- *Marble Cake Federalism*

A reference to the ability of legislative bodies to control other branches of government through the control of public money.

- *Article Six*
- *Intermediate Court of Appeals*
- *Power of the Purse*
- *Separation of Powers*

In order for the federal courts to hear an appellate case, there must be some federal legal issue involved, such as a Constitutional rights violation.

- *Substantial Federal Question*
- *Separation of Powers*
- *Court of Last Resort*
- *United States Courts of Appeals*

A metaphor for federalism where the layers of a cake signify the separate spheres in which the federal and state governments operate and have power.

- *Court of Last Resort*
- *Layer Cake Federalism*
- *United States District Courts*
- *Gibbons v. Ogden (1824)*

A metaphor of federalism that symbolizes the mixing of powers and resources among local, state, and federal governments.

- *Marble Cake Federalism*
- *Intermediate Court of Appeals*
- *United States District Courts*
- *United States Courts of Appeals*

A conceptualization of federalism wherein national, state, and local governments work together to solve common problems as opposed to operating separately.

- *Court of Last Resort*
- *United States District Courts*
- *Cooperative Federalism*
- *Circuit Courts*

Article VI contains the supremacy clause, which establishes the superiority of federal law over state law.

- *Gibbons v. Ogden (1824)*
- *Cooperative Federalism*
- *Article Six*
- *Court of Last Resort*

An appellate court positioned between the trial courts and the court of last resort in the court hierarchy.

- *Layer Cake Federalism*
- *Substantial Federal Question*
- *Intermediate Court of Appeals*
- *Supremacy Clause*

The "highest" court beyond which there is no appeal; usually refers to a Supreme Court.

- *Supremacy Clause*
- *Article Six*
- *Court of Last Resort*
- *United States District Courts*

A SCOTUS decision that adopted an expansive view of the supremacy clause.

- *United States Courts of Appeals*
- *Power of the Purse*
- *Gibbons v. Ogden (1824)*
- *Supremacy Clause*

The idea of vesting the legislative, judicial, and executive powers of government in separate bodies.

- *Marble Cake Federalism*
- *Separation of Powers*
- *Supremacy Clause*
- *United States District Courts*

At the federal level, the layer of appellate courts situated between the federal district (trial) courts and the Supreme Court.

- *Layer Cake Federalism*
- *Court of Last Resort*
- *Separation of Powers*
- *Circuit Courts*

Term used to denote Article VI of the U.S. Constitution.

- *Article Six*
- *Supremacy Clause*
- *Layer Cake Federalism*
- *Substantial Federal Question*

The trial courts of general jurisdiction in the federal court system.

- *Gibbons v. Ogden (1824)*
- *Supremacy Clause*
- *United States District Courts*
- *Marble Cake Federalism*

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8.2: OER CRJ CH 2.2 Multiple Choice Questions (20)

A federal law aimed at creating community-level responses to juvenile delinquency.

- *Juvenile Court Act of 1899*
- *Partisan Politics*
- *Crime Control Model*
- *Juvenile Delinquency Prevention Act of 1968*

The activities associated with government as well as the public debates surrounding these activities.

- *Parens Patriae*
- *Politics*
- *Extralegal Factors*
- *Due Process Model*

A conceptualization of criminal justice system characterized by an emphasis on aggressive crime suppression.

- *Parens Patriae*
- *Extralegal Factors*
- *Waiver*
- *Crime Control Model*

The transfer of a juvenile to adult court, denying the juvenile the special treatment afforded by the juvenile court.

- *Best Interest of the Child*
- *Parens Patriae*
- *Waiver*
- *Deinstitutionalization*

An Illinois law that established America's first Juvenile Court in Chicago.

- *Crime Control Model*
- *Juvenile Delinquency*
- *Juvenile Court Act of 1899*
- *Politicized*

A Latin legal phrase referring to the power of the government to provide guardianship of those (especially children) in need of care or supervision.

- *Parens Patriae*
- *Deinstitutionalization*
- *Sheriff*
- *Static*

Violations of law committed by juveniles.

- *Juvenile Delinquency*
- *Juvenile Delinquency Prevention Act of 1968*
- *Informal Diversion*
- *Politics*

Factors that exist outside of the law or that are contrary to the law.

- *Waiver*
- *Informal Diversion*
- *Extralegal Factors*
- *Static*

The legal doctrine that the punishment should fit the crime rather than being too lenient or too harsh.

- *Deinstitutionalization*
- *Doctrine of Proportionality*

- *Juvenile Delinquency*
- *Preponderance of the Evidence*

The guiding principle and primary focus of juvenile courts.

- *Politics*
- *Crime Control Model*
- *Juvenile Court Act of 1899*
- *Best Interest of the Child*

The removal of a person from the criminal justice system or the juvenile justice system such that they do not have a criminal conviction and criminal record.

- *Due Process Model*
- *Informal Diversion*
- *Juvenile Court Act of 1899*
- *Preponderance of the Evidence*

An evidentiary standard in civil cases where the party to a case with the most compelling (convincing) evidence wins.

- *Waiver*
- *Doctrine of Proportionality*
- *Due Process Model*
- *Preponderance of the Evidence*

A panel of people that decide whether a prisoner should be released on parole after a minimum sentence has been served.

- *Parole Board*
- *Partisan Politics*
- *Preponderance of the Evidence*
- *Deinstitutionalization*

The process of moving residents of institutions, such as state hospitals, into the community.

- *Juvenile Delinquency Prevention Act of 1968*
- *Deinstitutionalization*
- *Parole Board*
- *Politicized*

A conceptualization of criminal justice system d characterized by an emphasis on protecting civil liberties.

- *Best Interest of the Child*
- *Crime Control Model*
- *Due Process Model*
- *Policy*

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8.3: CJ Ch 2.3 Multiple Choice Questions (19)

Establishes the Supreme Court, and specifies how the lower courts in the federal system are to be created.

- *Justice Ruth Bader Ginsburg*
- *Justice Stephen Breyer*
- *Article III*
- *Judicial Activism*

A state of a case where further legal proceedings will have no practical effect; the matter has become strictly academic and of no practical importance.

- *Moot*
- *Conservative Decisions*
- *Liberal Decisions*
- *Marbury v. Madison (1803)*

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall…have the Assistance of Counsel for his defense."

- *Conservative Decisions*
- *Justice Sonia Sotomayor*
- *Right to Counsel*
- *Standing*

A political view that focuses on change and a tendency to disregard tradition as valuable.

- *Conservative Decisions*
- *Liberal*
- *Justice Stephen Breyer*
- *Right to Counsel*

An ideological inclination to preserve the traditional or current order.

- *American Civil Liberties Union*
- *Liberal*
- *Judicial Activism*
- *Conservative*

A court that has the authority to hear only certain kinds of cases; usually used as a synonym of lower courts.

- *Marbury v. Madison (1803)*
- *Warren Court*
- *Limited Jurisdiction*
- *Judicial Restraint*

The SCOTUS during the tenure of Earl Warren as Chief Justice (1953 to 1969); very liberal, and can be credited as a major force in the Civil Rights Revolution.

- *Liberal Decisions*
- *Judicial Activism*
- *Warren Court*
- *Justice Sonia Sotomayor*

Court decisions that can be viewed as upholding civil rights over public order.

- *Marbury v. Madison (1803)*
- *Liberal Decisions*
- *Warren Court*
- *Judicial Activism*

A nonprofit organization dedicated to the preservation of freedoms from government tyranny in America.

- *Right to Counsel*
- *Justice Stephen Breyer*
- *Judicial Activism*
- *American Civil Liberties Union*

Associate Justice of the SCOTUS who was appointed by President Ronald Reagan in 1988; known to be a swing vote in many of the courts 5-4 decisions.

- *Moot*
- *Justice Sonia Sotomayor*
- *Justice Anthony Kennedy*
- *Justice Elena Kagan*

Associate Justice of the SCOTUS who was appointed by President Obama in 2010; tends to vote along liberal lines.

- *Liberal*
- *Justice Anthony Kennedy*
- *Article III*
- *Justice Elena Kagan*

Associate Justice of the SCOTUS who was appointed by President Clinton in 1994; usually considered a moderate.

- *Judicial Activism*
- *Justice Stephen Breyer*
- *Conservative Decisions*
- *Moot*

A judicial philosophy that holds that judges' personal political beliefs should not influence court decisions.

- *Limited Jurisdiction*
- *Right to Counsel*
- *Justice Stephen Breyer*
- *Judicial Restraint*

A landmark SCOTUS decision in which the Court established its power of judicial review.

- *Conservative Decisions*
- *Judicial Restraint*
- *Marbury v. Madison (1803)*
- *Standing*

Associate Justice of the SCOTUS appointed by Bill Clinton in 1993; tends to vote liberal.

- *Justice Sonia Sotomayor*
- *Liberal Decisions*
- *Justice Ruth Bader Ginsburg*
- *Standing*

Associate Justice of the SCOTUS who was appointed by President Obama in 2009; tends to vote along liberal lines.

- *Justice Sonia Sotomayor*
- *American Civil Liberties Union*
- *Moot*
- *Right to Counsel*

Judicial decisions based on personal political beliefs rather than existing law.

- *Conservative Decisions*
- *Liberal Decisions*
- *Judicial Activism*
- *Justice Elena Kagan*

The idea that only the person harmed by an action can take a complaint about the action before a court.

- *Right to Counsel*
- *Judicial Restraint*
- *Standing*
- *Justice Anthony Kennedy*

Court decisions that align with the crime control model as opposed to the due process model.

- *Conservative*
- *Conservative Decisions*
- *American Civil Liberties Union*
- *Justice Anthony Kennedy*

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8.4: CJ Ch 2.4 Multiple Choice Questions (21)

A SCOTUS decision that established the rule that police do not need a warrant to search garbage left outside the curtilage of the home.

- *Breed v. Jones (1975)*
- *McKeiver v. Pennsylvania (1971)*
- *California v. Greenwood (1988)*
- *Search Incident to Arrest*

A SCOTUS decision in which the Court held that the evidentiary standard for juveniles accused of crimes was beyond a reasonable doubt, just as in an adult court.

- *Schall v. Martin (1984)*
- *In Re Gault (1967)*
- *In Re Winship (1970)*
- *Miranda v. Arizona (1966)*

Extended the constitutional protection against Double Jeopardy to juveniles when it ruled that juveniles cannot be found delinquent in juvenile court and then transferred to adult court without a hearing on the transfer.

- *Furman v. Georgia (1972)*
- *Maryland v. Garrison (1987)*
- *Breed v. Jones (1975)*
- *Good Faith Exception*

A landmark SCOTUS decision where the Court established the reasonable suspicion evidentiary standard for a stop and frisk.

- *Maryland v. Garrison (1987)*
- *Chimel v. California (1969)*
- *California v. Greenwood (1988)*
- *Terry v. Ohio (1968)*

A landmark SCOTUS decision in which the Court determined that police must issue warnings about specific constitutional rights to suspects before a custodial interrogation begins.

- *Schall v. Martin (1984)*
- *Furman v. Georgia (1972)*
- *Miranda v. Arizona (1966)*
- *Breed v. Jones (1975)*

A SCOTUS decision in which the court held that the exclusionary rule was not constitutionally required in state courts; effectively overruled by Mapp v. Ohio.

- *Breed v. Jones (1975)*
- *Terry v. Ohio (1968)*
- *Wolf v. Colorado (1949)*
- *Maryland v. Garrison (1987)*

A constitutionally permissible search of a person and his or her immediate surroundings at the time of arrest; also called the Chimel rule.

- *Search Incident to Arrest*
- *Chimel v. California (1969)*
- *Civil Rights Revolution*
- *In Re Winship (1970)*

A SCOTUS decision that upheld a statute allowing for the pretrial detention of a juvenile judged to be a serious risk to the community.

- *Gideon v. Wainwright (1963)*

- *Maryland v. Garrison (1987)*
- *Schall v. Martin (1984)*
- *Rehnquist Court (1986-2005)*

A SCOTUS decision in which the Court held that juveniles accused of crimes in juvenile court must be afforded many of the same due process rights as adults, but not all.

- *Burger Court (1969 -1986)*
- *In Re Gault (1967)*
- *Terry v. Ohio (1968)*
- *Gregg v. Georgia (1976)*

A SCOTUS decision that limited the scope of a search incident to an arrest to the area in the arrestee's immediate control.

- *Chimel v. California (1969)*
- *Rehnquist Court (1986-2005)*
- *Mappv. Ohio (1961)*
- *Wolf v. Colorado (1949)*

The era of the Supreme Court defined by the years that Warren Earl Burger presided as chief justice.

- *Burger Court (1969 -1986)*
- *Schall v. Martin (1984)*
- *Terry v. Ohio (1968)*
- *Fourth Amendment*

A landmark SCOTUS decision in which the Court established a "good faith" exception to the exclusionary rule when police acted in reliance on a faulty warrant that they reasonably believed to be valid.

- *Miranda v. Arizona (1966)*
- *Schall v. Martin (1984)*
- *Rehnquist Court (1986-2005)*
- *Maryland v. Garrison (1987)*

A landmark SCOTUS decision in which the Court expanded the exclusionary rule to state courts.

- *California v. Greenwood (1988)*
- *Mapp v. Ohio (1961)*
- *Search Incident to Arrest*
- *In Re Winship (1970)*

The Supreme Court of the United States during the time that William Rehnquist was the chief justice; this court tended to vote very conservatively.

- *California v. Greenwood (1988)*
- *Rehnquist Court (1986-2005)*
- *McKeiver v. Pennsylvania (1971)*
- *Breed v. Jones (1975)*

A SCOTUS decision that established the right to appointed counsel for indigent offenders charged with serious offenses.

- *Gregg v. Georgia (1976)*
- *Gideon v. Wainwright (1963)*
- *California v. Greenwood (1988)*
- *Burger Court (1969 -1986)*

A landmark SCOTUS decision in which the Court determined that juveniles are not entitled to a trial by jury in juvenile court proceedings.

- *Schall v. Martin (1984)*
- *Good Faith Exception*
- *In Re Gault (1967)*

- *McKeiver v. Pennsylvania (1971)*

A SCOTUS ruling that effectively made the death penalty unconstitutional; effectively overturned by Gregg v. Georgia 4 years later.

- *Furman v. Georgia (1972)*
- *Mapp v. Ohio (1961)*
- *Chimel v. California (1969)*
- *Schall v. Martin (1984)*

A period of rapid social and legal change during the 1960s that saw major civil rights reforms brought about by the Warren Court as well as action by other branches of government.

- *Maryland v. Garrison (1987)*
- *Chimel v. California (1969)*
- *Civil Rights Revolution*
- *Good Faith Exception*

An Amendment to the U.S. Constitution that prohibits unreasonable searches, seizures, and arrests.

- *Rehnquist Court (1986-2005)*
- *Terry v. Ohio (1968)*
- *In Re Winship (1970)*
- *Fourth Amendment*

A SCOTUS decision where the Court ruled that the death penalty for a convicted murderer was not in itself a violation of the Eighth Amendment's prohibition against cruel and unusual punishment.

- *Schall v. Martin (1984)*
- *Terry v. Ohio (1968)*
- *Gregg v. Georgia (1976)*
- *Breed v. Jones (1975)*

An exception to the exclusionary rule allowing for the admission of illegally obtained evidence when police act in an honest belief that they have lawful authority to search for and seize evidence, such as when relying on a defective warrant.

- *Schall v. Martin (1984)*
- *California v. Greenwood (1988)*
- *Good Faith Exception*
- *Mapp v. Ohio (1961)*

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8.5: CRJ OER CJ CH 3.2 Multiple Choice Questions (20)

Although there is no explicit _____ in the text of the Bill of Rights, the Supreme Court has found an implicit right on several different occasions.

- *Compelling State Interest*
- *Second Amendment*
- *First Amendment*
- *Right to Privacy*

Punishments that are inhumane or violate basic human dignity; prohibited by the Eighth Amendment.

- *Fair Notice*
- *Cruel and Unusual Punishment*
- *Compelling State Interest*
- *Freedom of Religion*

A landmark SCOTUS decision that struck down a Texas sodomy law, effectively ruling criminal laws that prohibit homosexual sexual activity unconstitutional.

- *Lawrence v. Texas (2003)*
- *Criminal Procedure*
- *Freedom of Religion*
- *Freedom of Assembly*

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

- *Eighth Amendment*
- *Freedom of Expression*
- *Right to Privacy*
- *Clear and Present Danger Test*

An unconstitutional type of legislative act that pronounces a person guilty of a crime.

- *Void for Vagueness*
- *Freedom of Religion*
- *Fair Notice*
- *Bill of Attainder*

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

- *Criminal Procedure*
- *Second Amendment*
- *Void for Vagueness*
- *Freedom of Expression*

A set of statutory provisions in some states that allow licensed citizens to carry firearms on their person in a manner not obviously visible to the public.

- *Fair Notice*
- *Right to Privacy*
- *Concealed Carry Law*
- *Freedom of Religion*

The basic due process requirement that the government give the public notice as to what acts are criminal; closely related to the concept of void for vagueness.

- *Bill of Attainder*
- *First Amendment*
- *Fair Notice*

- *Clear and Present Danger Test*

The doctrine by which appellate courts strike down laws that are not clear in what exactly they prohibit.

- *Void for Vagueness*
- *Clear and Present Danger Test*
- *Criminal Procedure*
- *Ex Post Facto Law*

An unconstitutional type of statute that criminalizes and act after the act has occurred.

- *Fair Notice*
- *Freedom of Expression*
- *Ex Post Facto Law*
- *Lawrence v. Texas (2003)*

The body of law that dictates how criminal cases are processed by the criminal justice system.

- *Right to Privacy*
- *Criminal Procedure*
- *Freedom of Assembly*
- *Ex Post Facto Law*

A test of constitutionality created by the SCOTUS that balances the interests of the government against the rights of the individual.

- *Compelling State Interest*
- *Cruel and Unusual Punishment*
- *Lawrence v. Texas (2003)*
- *Bill of Attainder*

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8.6: CRJ OER CJ CH 3.3 Multiple Choice Questions (15)

Having physical control or custody over something.

- *Negligently*
- *Actual Possession*
- *Malice Aforethought*
- *Recklessly*

A culpable mental state that requires the actor to be aware of the nature of his or her action; the actor knew what would happen when he or she acted.

- *Actus Reus*
- *Knowingly*
- *Constructive Possession*
- *Harm*

For crimes that name a particular _____ that the law seeks to prohibit (such as the killing of a person in murder), the _____ must actually occur.

- *Harm; Harm*
- *Omission; Concurrence*
- *Actual Possession; Harm*
- *Concurrence; Possession*

A culpable mental state specifying that the actor should have been aware of a substantial and unjustifiable risk.

- *Concurrence*
- *Actus Reus*
- *Knowingly*
- *Negligently*

An element of crimes requiring that the criminal act (actus reus) be a product of the criminal intent (mens rea).

- *Model Penal Code*
- *Negligently*
- *Concurrence*
- *Actual Possession*

An element of some crimes that requires that the criminal act (actus reus) cause the harm the law seeks to prohibit.

- *Concurrence*
- *Malice Aforethought*
- *Causation*
- *Knowingly*

A standard criminal code first developed by the American Law Institute (ALI) in 1962; adopted by many states.

- *Harm*
- *Model Penal Code*
- *Concurrence*
- *Malice Aforethought*

Having dominion or control over something; the actus reus of many crimes such as the control of weapons or controlled substances.

- *Recklessly*
- *Possession*
- *Knowingly*
- *Elements (of crimes)*

A set of facts that must be proven to convict a defendant of a particular crime.

- *Constructive Possession*
- *Elements (of crimes)*
- *Malice Aforethought*
- *Knowingly*

A deliberate, premeditated intent to cause a criminal harm; an element of common law murder.

- *Causation*
- *Omission*
- *Malice Aforethought*
- *Constructive Possession*

A culpable mental state requiring that the actor consciously disregard a substantial and unjustifiable risk.

- *Recklessly*
- *Negligently*
- *Possession*
- *Constructive Possession*

Failure to perform a legally required act such as paying taxes or providing care to children; a type of actus reus in criminal law.

- *Recklessly*
- *Purposely*
- *Concurrence*
- *Omission*

A culpable mental state requiring that the actor have the criminal act as his or her "conscious object;" the criminal harm was done on purpose.

- *Possession*
- *Causation*
- *Purposely*
- *Actual Possession*

The legal doctrine of a person being in possession of an object even when they were not in actual physical control of the object at the time.

- *Possession*
- *Constructive Possession*
- *Purposely*
- *Model Penal Code*

The act or omission that a statute seeks to prohibit.

- *Purposely*
- *Actus Reus*
- *Causation*
- *Harm*

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8.7: CRJ OER CJ CH 3.4 Multiple Choice Questions (23)

A type of criminal defense where the accused claims that they would not have done the criminal act if it were not for substantial encouragement by police.

- *Substantial Capacity Test*
- *Mistake of Law*
- *Parsons v. State (1887)*
- *Entrapment*

A _____ and circumstances surrounding an event can sometimes be a defense to criminal charges.

- *Entrapment*
- *Deadly Force*
- *Parsons v. State (1887)*
- *Mistake of Fact*

A legal defense based on the idea that a small harm can sometimes be necessary to prevent a greater harm from occurring; another name for the necessity defense.

- *Solicitation*
- *Involuntary Intoxication*
- *Justification*
- *Necessity Defense*

An error as to the facts and circumstances surrounding an event can sometimes be a defense to criminal charges; a error of law is never an excuse.

- *Entrapment*
- *Mistake Defense*
- *Mistake of Fact*
- *Solicitation*

A criminal defense based on the logic that the defendant should not be held liable because he or she acted criminally due to an inebriation that the defendant did not cause.

- *Imminent Danger*
- *Involuntary Intoxication*
- *M'Naghten Rule*
- *Not Guilty By Reason of Insanity*

A potential harm that is likely to occur at any moment.

- *Self-defense*
- *Lesser of Two Evils Defense*
- *Irresistible Impulse Test*
- *Imminent Danger*

A plea that must be entered (in some jurisdictions) when the defendant is planning to use a "guilty but mentally ill" defense.

- *M'Naghten Rule*
- *Irresistible Impulse Test*
- *Mistake Defense*
- *Not Guilty By Reason of Insanity*

An insanity defense test that asks if the defendant could or could not control his or her actions.

- *Non-deadly Force*
- *Lesser of Two Evils Defense*
- *Irresistible Impulse Test*
- *Insanity Defense*

The crime of inducing another person to commit a crime, usually for money.

- *Lesser of Two Evils Defense*
- *Excuse*
- *Irresistible Impulse Test*
- *Solicitation*

A type of criminal defense where the accused admits to the criminal act, but maintains that they are not blameworthy because of extenuating circumstances.

- *Mistake of Fact*
- *Excuse*
- *Mistake Defense*
- *Substantial Capacity Test*

A state of inebriation knowingly and voluntarily entered into; not a viable criminal defense

- *Non-deadly Force*
- *Irresistible Impulse Test*
- *Duress*
- *Voluntary Intoxication*

A criminal defense based on the idea that a person who commits a crime because of a mental disease or defect is not culpable.

- *Entrapment*
- *Duress*
- *Justification*
- *Insanity Defense*

Force that is not likely to cause death or serious bodily injury.

- *Imminent Danger*
- *Lesser of Two Evils Defense*
- *Mistake of Fact*
- *Non-deadly Force*

The Model Penal Code test for insanity that includes elements of the M'Naughten rule as well as elements of the irresistible impulse test.

- *Justification*
- *Coercion*
- *Mistake of Law*
- *Substantial Capacity Test*

A legal defense based on the idea that a small harm can sometimes be necessary to prevent a greater harm from occurring; another name for the necessity defense.

- *Lesser of Two Evils Defense*
- *Parsons v. State (1887)*
- *Non-deadly Force*
- *Voluntary Intoxication*

The practice (usually criminal) of using force or the threat of force to gain compliance.

- *Lesser of Two Evils Defense*
- *Parsons v. State (1887)*
- *Duress*
- *Coercion*

An important Alabama Supreme Court case decided in 1887 that established the Irresistible Impulse Test of insanity.

- *Non-deadly Force*
- *Justification*

- *Parsons v. State (1887)*
- *Not Guilty By Reason of Insanity*

A criminal defense that allows for the use of force to protect one's person from harm, as well as the protection of others.

- *Self-defense*
- *M'Naghten Rule*
- *Coercion*
- *Involuntary Intoxication*

A legal defense available to a person who does something against their will under threat of harm.

- *Duress*
- *Self-defense*
- *Necessity Defense*
- *Mistake Defense*

A legal defense based on a claim that the act, while usually criminal, was right under the particular circumstances.

- *Necessity Defense*
- *Justification*
- *Imminent Danger*
- *Lesser of Two Evils Defense*

A_____is never an excuse.

- *Mistake of Law*
- *M'Naghten Rule*
- *Deadly Force*
- *Coercion*

An amount of force likely to cause serious bodily injury or death if used against a person.

- *Parsons v. State (1887)*
- *Not Guilty By Reason of Insanity*
- *Mistake of Law*
- *Deadly Force*

A legal test of insanity that hinges in the defendant's inability to know right from wrong; originated in an English court case in 1843, making it the first major test for insanity.

- *Coercion*
- *M'Naghten Rule*
- *Lesser of Two Evils Defense*
- *Duress*

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8.8: CRJ OER CJ CH 3.5 Multiple Choice Questions (25)

Laws that prohibit asking the victim of rape about her past sexual history in court in order to attack her character.

- *Marital Rape*
- *Rape Shield Laws*
- *Rape*
- *Burglary*

A juvenile who has committed an act that would have been legal if the juvenile was an adult, such as possession of alcohol.

- *Truancy*
- *Robbery*
- *Arson*
- *Status Offender*

A juvenile who has committed an act that would be called a "crime" if the actor was an adult.

- *Residential Burglary*
- *Rape Shield Laws*
- *Delinquent*
- *Felony Murder Rule*

A common law doctrine meaning that when a person caused the death of another person during the commission of a felony, then the actor was guilty of murder, regardless of the intent to kill.

- *Felony Murder Rule*
- *Depraved Heart Murder*
- *Arson*
- *Rape Shield Laws*

Entering or remaining unlawfully in a structure with the intent to commit a crime therein.

- *Carnal Knowledge*
- *Status Offense*
- *Burglary*
- *Residential Burglary*

A deliberate serious physical injury inflicted on one person by another.

- *Dwelling House*
- *Grievous Bodily Harm*
- *Common Law Arson*
- *Delinquent*

A crime that makes up part of the legal definition of a more serious offense, such as a breaking and entering that some burglary statutes require.

- *Marital Rape*
- *Commercial Burglary*
- *Dependent and Neglected Children*
- *Lesser-included Offense*

Any unwanted sexual contact for the purpose of sexual arousal or gratification; many jurisdictions grade this offense based on the degree of harm done to the victim.

- *Burglary*
- *Murder*
- *Sexual Battery*
- *Grievous Bodily Harm*

An act that is prohibited because of the age of the actor, and which would not be a crime if committed by an adult.

- *Status Offender*
- *Common Law Arson*
- *Dependent and Neglected Children*
- *Status Offense*

A killing as a result of gross negligence or what the Model Penal Code calls a "wanton disregard for the value of human life."

- *Depraved Heart Murder*
- *Rape Shield Laws*
- *Grievous Bodily Harm*
- *Murder*

Under common law, rape was defined as intercourse by a man against a woman who is not his wife by force or threat and against her will

- *Assault*
- *Delinquent*
- *Rape*
- *Dependent and Neglected Children*

A classification of children in the courts because they are in need of care and supervision, not because of delinquent activity.

- *Common Law Arson*
- *Residential Burglary*
- *Dependent and Neglected Children*
- *Battery*

Juvenile staying away from school without a valid excuse.

- *Marital Rape*
- *Depraved Heart Murder*
- *Felony Murder Rule*
- *Truancy*

The act of a man having sex with a woman (consensual)

- *Rape*
- *Carnal Knowledge*
- *Dwelling House*
- *Arson*

The entry into a non-residential structure to commit either a theft or any felony.

- *Commercial Burglary*
- *Marital Rape*
- *Rebuttable Presumption*
- *Grievous Bodily Harm*

At common law, _____ was the killing another human being with malice aforethought.

- *Common Law Arson*
- *Murder*
- *Carnal Knowledge*
- *Truancy*

With the intent to commit a crime against a person or property therein, a person enters or remains unlawfully in a dwelling.

- *Robbery*
- *Commercial Burglary*
- *Residential Burglary*
- *Rebuttable Presumption*

At common law, an offense defined as an "intentional act by one person that creates an apprehension in another of an imminent harmful or offensive contact."

- *Dependent and Neglected Children*
- *Carnal Knowledge*
- *Assault*
- *Rape*

At common law, _____was defined as "the malicious burning of the dwelling of another."

- *Status Offender*
- *Status Offense*
- *Arson*
- *Delinquent*

A non-consensual sex act committed by a person who is married to the victim.

- *Truancy*
- *Carnal Knowledge*
- *Delinquent*
- *Marital Rape*

At common law, _____ was the taking of the property of another, with the intent to permanently deprive the person of that property, by means of force or fear.

- *Common Law Arson*
- *Robbery*
- *Rape*
- *Residential Burglary*

A crime defined by unwanted physical contact, most often requiring that some harm be done to the victim.

- *Murder*
- *Rebuttable Presumption*
- *Battery*
- *Commercial Burglary*

A fact that the court will assume to be true unless a party to the case presents evidence that proves otherwise.

- *Arson*
- *Rebuttable Presumption*
- *Dependent and Neglected Children*
- *Marital Rape*

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8.9: CRJ OER CJ CH 3.1 Multiple Choice Questions (23)

The legal system that originated in England and is now in use in the United States, which relies on the articulation of legal principles in a historical succession of judicial decisions.

- *Misdemeanor*
- *Case Law*
- *Common Law*
- *Sir William Blackstone*

Crimes conducted over the internet or other computer network.

- *Embezzlement*
- *Tort*
- *Commentaries on the Laws of England*
- *Cybercrime*

The body of law that defines crimes and the punishments that go with them.

- *Precedent*
- *Criminal Law*
- *Damages*
- *Tort*

Crimes that are highly visible to the public; also called street crime.

- *Ordinary Crime*
- *Stare Decisis*
- *Visible Crime*
- *Street Crime*

A series of books containing the written judicial opinions of a particular court.

- *Reporter*
- *Cybercrime*
- *Embezzlement*
- *Substantive Criminal Law*

An English legal scholar who wrote the Commentaries on the Laws of England, a set of law books that had a major influence of the development of the criminal law in the United States.

- *Sir William Blackstone*
- *Phishing*
- *Case Law*
- *Commentaries on the Laws of England*

A serious crime, usually punishable by at least one year in prison.

- *Felony*
- *Case Law*
- *Damages*
- *Street Crime*

An offense punishable by one year of imprisonment (usually in a county jail) or less.

- *Misdemeanor*
- *Damages*
- *Sir William Blackstone*
- *Cybercrime*

Theft of an employer's property by an employee.

- *Case Law*

- *Hate Crime*
- *Embezzlement*
- *Substantive Criminal Law*

A crime motivated by racial or other prejudice; often violent.

- *Case Law*
- *Reporter*
- *Hate Crime*
- *Common Law*

A group having some manner of a formalized structure and whose primary objective is to obtain money through illegal activities.

- *Criminal Law*
- *Precedent*
- *Commentaries on the Laws of England*
- *Organized Crime*

Obtaining financial or other sensitive information from online account holders by posing as a legitimate business or organization.

- *Case Law*
- *Stare Decisis*
- *Criminal Law*
- *Phishing*

A treatise on the common law of England by Sir William Blackstone that heavily influenced the law of the early United States.

- *Sir William Blackstone*
- *Precedent*
- *Commentaries on the Laws of England*
- *Case Law*

The body of law that controls how the various agents and elements of the criminal justice system treat people.

- *Commentaries on the Laws of England*
- *Hate Crime*
- *Street Crime*
- *Procedural Criminal Law*

Another name for street crime; offenses committed in public places.

- *Cybercrime*
- *Ordinary Crime*
- *Visible Crime*
- *Embezzlement*

The part of the criminal law that specifies prohibited acts and the punishments associated with those acts.

- *Misdemeanor*
- *Substantive Criminal Law*
- *Tort*
- *Felony*

A civil, not criminal, wrong.

- *Tort*
- *Common Law*
- *Phishing*
- *Procedural Criminal Law*

Legal Latin for "to stand by things decided;" the doctrine that rules of law established in past court cases should be followed in present ones.

- *Commentaries on the Laws of England*

- *Stare Decisis*
- *Precedent*
- *Organized Crime*

A court decision in an earlier case with facts and legal issues similar to a dispute currently before a court.

- *Tort*
- *Precedent*
- *Embezzlement*
- *Visible Crime*

The law as established in previous court decisions; A synonym for legal precedent.

- *Procedural Criminal Law*
- *Case Law*
- *Damages*
- *Organized Crime*

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8.10: Intro CJ Ch 2.5 Multiple Choice Questions (24)

1. *The act or process of restoring something to its original state of being.*
2. *Specific Deterrence*
3. *Rehabilitation*
4. *Severity*
5. *Drug Court*

_____refers to the uneven number of non-white youth who come into contact with the juvenile justice system, as well as the uneven number of people of color who come into contact with police.

- *Cesare Beccaria*
- *Disproportionate Minority Contact*
- *Multiracial*
- *Rehabilitation*

The belief that some races of people are better than other races.

- *Racism*
- *Drug Court*
- *Celerity*
- *Individual Racism*

A situation that occurs when one person is treated less favorably than another because of his or her race.

- *Drug Court*
- *Incapacitation*
- *General Deterrence*
- *Racial Discrimination*

Racism stemming from a person's attitudes and beliefs about other races.

- *Cesare Beccaria*
- *NAACP*
- *Individual Racism*
- *Racism*

Constituting multiple racial groups.

- *Drug Court*
- *Multiracial*
- *Certainty*
- *Deterrence*

Constituting multiple ethnic groups.

- *Specific Deterrence*
- *Drug Court*
- *Multiethnic*
- *Racism*

A psychological state sufficient for a person to be worthy of blame for a criminal act, such as acting intentionally, knowingly, recklessly, or negligently.

- *Multiracial*
- *Severity*
- *Incapacitation*
- *Culpable Mental State*

The corrections goal of removing the ability of the offender to commit future crimes.

- *Rational Choice Theory*

- *Incapacitation*
- *Restitution*
- *Individual Racism*

Money paid to the victim of a crime as part of a criminal sanction.

- *Institutional Racism*
- *Specific Deterrence*
- *Restitution*
- *Multiethnic*

Swiftness of movement; As an element of rational choice theory, the term is used to indicate that punishment should administered swiftly to be effective.

- *Culpable Mental State*
- *Recidivism*
- *Certainty*
- *Celerity*

The systematic weighing positive consequences against negative consequences in decision making.

- *Specific Deterrence*
- *Cost Benefit Analysis*
- *General Deterrence*
- *Institutional Racism*

The perspective that people choose a particular course of action when they perceive that the benefits of the action outweigh the costs.

- *Culpable Mental State*
- *Rational Choice Theory*
- *Racial Discrimination*
- *Incapacitation*

The National Association for the Advancement of Colored People is an African-American civil rights organization founded in 1909.

- *Racial Discrimination*
- *NAACP*
- *Severity*
- *Restitution*

A type of deterrence based on the idea that the individual offender will be dissuaded from future criminality by experiencing punishment.

- *Celerity*
- *Specific Deterrence*
- *Rational Choice Theory*
- *Cesare Beccaria*

The idea that the punishment for a crime should be just severe enough to offset the benefit of committing it.

- *Certainty*
- *Severity*
- *Racism*
- *Institutional Racism*

A type of deterrence based on the premise that society in general will avoid crime because of the example of those that have been punished.

- *Fair Sentencing Act of 2010*
- *Institutional Racism*
- *Multiracial*

- *General Deterrence*

Racial inequalities that result from institutional policies and procedures.

- *Disproportionate Minority Contact*
- *Incapacitation*
- *Institutional Racism*
- *Recidivism*

A relapse into criminal behavior; an important measure of how good of a job probation, parole, and prison programs are doing at rehabilitating offenders.

- *Severity*
- *Celerity*
- *Multiethnic*
- *Recidivism*

In rational choice theories, used to indicate that punishments are only effective if criminals are relatively sure they will be punished.

- *Fair Sentencing Act of 2010*
- *Certainty*
- *Drug Court*
- *Celerity*

The idea that criminal punishments will prevent future crimes because the offenders have learned from their punishments, AND that society learns from the example of the punished.

- *Racial Discrimination*
- *Specific Deterrence*
- *Deterrence*
- *General Deterrence*

A law that reduced the disparity between sentences for possession and distribution of crack cocaine and powdered cocaine; many critics considered the disparity as racist.

- *Specific Deterrence*
- *NAACP*
- *Rehabilitation*
- *Fair Sentencing Act of 2010*

Specialized courts with jurisdiction over drug offenses and a focus on rehabilitation and treatment.

- *Celerity*
- *Restitution*
- *Drug Court*
- *Individual Racism*

18thC Italian philosopher that argued punishment should only be severe enough to offset the pleasure gained from committing the crime.

- *Rehabilitation*
- *Cesare Beccaria*
- *Certainty*
- *Cost Benefit Analysis*

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8.11: CRJ 1B ch 1.3

Multiple Choice Questions (14)

An criminal event -based reporting system used by law enforcement agencies in the United States for collecting and reporting data on crimes.

- *Mala In Se*
- *U.S. Census Bureau*
- *Felon*
- *National Incident Based Reporting System (NIBRS)*

A failure to do something that is legally required.

- *Felon*
- *Mala Prohibita*
- *Omission*
- *U.S. Census Bureau*

A term used to refer to crimes that do no direct harm to a particular victim, such as prostitution and gambling.

- *National Incident Based Reporting System (NIBRS)*
- *Victimless Crime*
- *Violation*
- *Omission*

A person who has been found guilty of committing a misdemeanor crime.

- *U.S. Census Bureau*
- *Omission*
- *Misdemeanant*
- *Rate (Crime)*

The nine common-law felonies were: murder, robbery, manslaughter, rape, sodomy, larceny, arson, mayhem and burglary.

- *Mala Prohibita*
- *Common Law Felonies*
- *Misdemeanant*
- *Dark Figure of Crime*

A Latin legal phrase referring to crimes that are "wrongs in themselves."

- *Misdemeanant*
- *National Incident Based Reporting System (NIBRS)*
- *Mala Prohibita*
- *Mala In Se*

Official crime statistics for the United States that are collected and compiled by the FBI.

- *Uniform Crime Reports (UCR)*
- *Mala Prohibita*
- *National Incident Based Reporting System (NIBRS)*
- *Felon*

A major national survey designed to measure the dark figure of crime.

- *U.S. Census Bureau*
- *National Crime Victimization Survey (NCVS)*
- *Rate (Crime)*
- *Mala Prohibita*

Acts that are criminal merely because they are prohibited by the government.

- *National Crime Victimization Survey (NCVS)*
- *Uniform Crime Reports (UCR)*
- *Omission*
- *Mala Prohibita*

The number of times a crime occurs per 100,000 residents.

- *National Incident Based Reporting System (NIBRS)*
- *National Crime Victimization Survey (NCVS)*
- *U.S. Census Bureau*
- *Rate (Crime)*

Crimes unknown to police and not included in the official crime statistics.

- *Mala Prohibita*
- *Dark Figure of Crime*
- *Omission*
- *Uniform Crime Reports (UCR)*

A government agency partly responsible for conducting the NCVS.

- *Rate (Crime)*
- *Felon*
- *U.S. Census Bureau*
- *Mala In Se*

A person who has been found guilty of committing a felony crime.

- *Felon*
- *Mala In Se*
- *Mala Prohibita*
- *Omission*

A category of acts that are contrary to law, but do not reach the level of a misdemeanor, such as traffic offenses.

- *Mala In Se*
- *Omission*
- *Mala Prohibita*
- *Violation*

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8.12: Intro CJ 5.1 Multiple Choice Questions (18)

A landmark SCOTUS decision in which the Court ruled that school officials do not need a warrant to search students under their supervision.

- *New Jersey v. TLO (1985)*
- *Lower Courts*
- *Assembly Line Justice*
- *Police Courts*

A U.S. Court of Appeals decision that held that curfew laws were constitutional, balancing the good of the community against the liberty of the juvenile.

- *New Jersey v. TLO (1985)*
- *Doe v. Renfrow (1981)*
- *Qutb v. Strauss (1993)*
- *Courts of General Jurisdiction*

A court which makes decisions that are subject to appeal; often used by appellate courts to describe trial courts.

- *U.S. Courts of Appeal*
- *Doe v. Renfrow (1981)*
- *Affirmed*
- *Lower Courts*

A federal statute which established time limits for indictments, arraignments, and criminal prosecutions.

- *Courts of General Jurisdiction*
- *New Jersey v. TLO (1985)*
- *Speedy Trial Act of 1974*
- *Assembly Line Justice*

A landmark SCOTUS decision holding that juveniles must be afforded certain due process rights.

- *Judicial Independence*
- *Kent v. United States (1966)*
- *U.S. District Courts*
- *Certiorari Power*

Lower courts that have jurisdiction over minor crimes and violations.

- *Courts of General Jurisdiction*
- *U.S. Courts of Appeal*
- *Certiorari Power*
- *Police Courts*

Invalidated or revoked by a higher court.

- *Reversed*
- *Affirmed*
- *Kent v. United States (1966)*
- *Judicial Misconduct*

A lower court having jurisdiction over minor offenses within a particular city.

- *Municipal Courts*
- *Courts of General Jurisdiction*
- *U.S. District Courts*
- *U.S. Courts of Appeal*

A ruling by the Seventh Circuit that suspicionless dog sniffs of public school children are not searches for Fourth Amendment purposes.

- *Kent v. United States (1966)*
- *Certiorari Power*
- *Doe v. Renfrow (1981)*
- *U.S. Courts of Appeal*

In the practice of the court of appeals, it means that the court of appeals has concluded that the lower court decision is correct and will stand as rendered by the lower court.

- *Affirmed*
- *Assembly Line Justice*
- *U.S. District Courts*
- *Speedy Trial Act of 1974*

Court in each of the 11 federal judicial districts of the U.S. that functions as an appellate court for the lower federal courts.

- *Reversed*
- *Traffic Courts*
- *U.S. Courts of Appeal*
- *Municipal Courts*

A court with the authority to hear cases of all kinds as opposed to a court of limited jurisdiction which can only hear relatively minor cases.

- *Courts of General Jurisdiction*
- *Reversed*
- *Judicial Independence*
- *Municipal Courts*

A term used to describe the extremely rapid processing of cases by lower courts, often without due concern for defendants' rights.

- *Doe v. Renfrow (1981)*
- *Affirmed*
- *Assembly Line Justice*
- *Qutb v. Strauss (1993)*

The trial courts of general jurisdiction in the federal court system.

- *Traffic Courts*
- *U.S. District Courts*
- *Certiorari Power*
- *U.S. Courts of Appeal*

A lower court charged with the disposition of petty offenses such as traffic citations.

- *Municipal Courts*
- *Kent v. United States (1966)*
- *Speedy Trial Act of 1974*
- *Traffic Courts*

Unethical behavior by a judge.

- *Lower Courts*
- *Municipal Courts*
- *Judicial Misconduct*
- *Police Courts*

The idea that the judiciary should be kept separated from the undue influence of other branches of government and private political interests.

- *Certiorari Power*
- *Police Courts*
- *Qutb v. Strauss (1993)*

- *Judicial Independence*

The authority of an appellate court to order a lower court to send up the record of a case for review.

- *Certiorari Power*
- *Assembly Line Justice*
- *Police Courts*
- *Courts of General Jurisdiction*

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8.13: Intro CJ Ch 5.2 Multiple Choice Questions (11)

A log containing the complete history of each case in the form of brief chronological entries summarizing the court proceedings.

- *Assistant U.S. Attorney*
- *Nolle Prosequi*
- *Independent Counsel*
- *Docket*

A Supreme Court decision that requires the appointment of counsel before a prison sentence can be levied against a criminal defendant.

- *United States Attorneys*
- *Assistant U.S. Attorney*
- *City Attorney*
- *Argersinger v. Hamlin (1972)*

A lawyer appointed by the federal government to investigate allegations of wrongdoing by a government official.

- *Indigent Defendant*
- *State's Attorney*
- *Nolle Prosequi*
- *Independent Counsel*

U.S. Government attorneys who serve as prosecutors in federal criminal cases.

- *Assistant U.S. Attorney*
- *Argersinger v. Hamlin (1972)*
- *State's Attorney*
- *Independent Counsel*

The attorney, usually an elected official, tasked with prosecuting accused persons in the name of the state.

- *District Attorney (D.A.)*
- *Docket*
- *Faretta v. California (1975)*
- *Assistant U.S. Attorney*

A Latin legal phrase meaning "will no longer prosecute;" formal notice by a prosecutor that a case is being dropped.

- *State's Attorney*
- *District Attorney (D.A.)*
- *Nolle Prosequi*
- *City Attorney*

A civil servant lawyer tasked with representing a city in legal matters, often including prosecutions.

- *Independent Counsel*
- *District Attorney (D.A.)*
- *City Attorney*
- *Assistant U.S. Attorney*

A SCOTUS ruling that established the precedent that people have a right to self-representation in criminal cases.

- *Argersinger v. Hamlin (1972)*
- *City Attorney*
- *Faretta v. California (1975)*
- *Independent Counsel*

A person that cannot afford an attorney to defend them against a criminal accusation.

- *Assistant U.S. Attorney*
- *Nolle Prosequi*

- *Indigent Defendant*
- *District Attorney (D.A.)*

Conduct most of the trial work in which the United States is a party.

- *Docket*
- *United States Attorneys*
- *Assistant U.S. Attorney*
- *State's Attorney*

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8.14: Intro CJ Ch 5.3 Multiple Choice Questions (25)

The phase of a juvenile delinquency proceeding analogous to the sentence in an adult trial.

- *Disposition*
- *Discovery*
- *Pretrial Motions*
- *Adjudicated Delinquent*

A Latin legal phrase meaning "for the public good;" often used to describe attorneys representing indigent clients free of charge.

- *Petition*
- *Pro Bono Publico*
- *U.S. v. Salerno (1987)*
- *Not Guilty Plea*

Similar to an adult trial, a fact finding process whereby the juvenile court determines if the allegations made in the petition were sustained.

- *Judicial Diversion*
- *Adjudicatory Hearing*
- *Motion to Suppress*
- *U.S. v. Salerno (1987)*

The landmark SCOUS decision that established the presumption of innocence in American criminal law.

- *Coffin v. U.S. (1895)*
- *Pretrial Motions*
- *Bail Reform Act of 1984*
- *Not Guilty Plea*

A plea meaning that the defendant denies culpability for the alleged criminal act.

- *Guilty Plea*
- *Exculpatory Evidence*
- *Not Guilty Plea*
- *Bail Reform Act of 1984*

A release from custody based strictly on the defendants promise to return to court for further proceedings.

- *Release on Recognizance (ROR)*
- *Judicial Diversion*
- *Pretrial Motions*
- *Petition*

An admission of culpability (blameworthiness) for a crime.

- *Judicial Diversion*
- *Coffin v. U.S. (1895)*
- *Guilty Plea*
- *Pretrial Motions*

Motions made before a trail gets underway, i.e. to suppress evidence or to dismiss the case entirely for want of evidence.

- *Federal Public Defender*
- *Pretrial Motions*
- *Motion to Suppress*
- *Pro Bono Publico*

A plea of "no contest."

- *Community Defender Organization*
- *Discovery*

- *Nolo Contendere Plea*
- *Disposition Hearing*

A finding by a juvenile judge that the allegations against a juvenile are true; The juvenile court analog of a guilty verdict in adult court.

- *Ex Parte*
- *Pro Bono Publico*
- *Criminal Justice Act (CJA)*
- *Sustaining the Petition*

A court treatment of a case where no official record of a conviction is made if certain conditions are met by the defendant.

- *Judicial Diversion*
- *Criminal Justice Act (CJA)*
- *Petition*
- *Adjudicatory Hearing*

Procedures used to obtain disclosure of evidence before trial.

- *Not Guilty Plea*
- *Discovery*
- *Adjudicatory Hearing*
- *Ex Parte*

A juvenile that has been found guilty by a judge of committing a delinquent act.

- *Pro Bono Publico*
- *Adjudicated Delinquent*
- *Bail Reform Act of 1984*
- *Racketeering and Corrupt Influence Organization (RICO)*

Enacted in 1964 to establish a comprehensive system for appointing and compensating lawyers to represent defendants financially unable to retain counsel in federal criminal proceedings.

- *Bifurcated Hearing*
- *Criminal Justice Act (CJA)*
- *Disposition*
- *Adjudicatory Hearing*

A two-part juvenile court proceeding where the adjudicatory phase is separated from the disposition phase.

- *Sustaining the Petition*
- *Bifurcated Hearing*
- *Motion to Suppress*
- *Racketeering and Corrupt Influence Organization (RICO)*

A document filed in juvenile court alleging that a juvenile is a delinquent and asking that the court assume jurisdiction.

- *Adjudicatory Hearing*
- *Petition*
- *Exculpatory Evidence*
- *Disposition*

The phase in a juvenile delinquency hearing where the judge decides what to do with the juvenile; analogous to the sentencing phase in an adult trial.

- *Coffin v. U.S. (1895)*
- *Pretrial Motions*
- *Adjudicated Delinquent*
- *Post-disposition Hearing*

An attorney employed by the federal courts on a full-time basis to provide legal defense to defendants who are unable to afford counsel.

- *Racketeering and Corrupt Influence Organization (RICO)*
- *Federal Public Defender*
- *Disposition Hearing*
- *Petition*

Non-profit organizations that provide attorneys to indigent defendants in criminal cases.

- *Not Guilty Plea*
- *U.S. v. Salerno (1987)*
- *Community Defender Organization*
- *Pretrial Motions*

A federal statute designed to make it easier to prosecute organized crime cases.

- *Racketeering and Corrupt Influence Organization (RICO)*
- *Criminal Justice Act (CJA)*
- *Federal Public Defender*
- *Pro Bono Publico*

A landmark SCOTUS decision in which the court ruled that the pretrial detention of a dangerous defendant was not a due process violation so long as the dangerousness was proven.

- *Guilty Plea*
- *U.S. v. Salerno (1987)*
- *Disposition Hearing*
- *Post-disposition Hearing*

Evidence that tends to prove the innocence of the defendant in a criminal trial.

- *U.S. v. Salerno (1987)*
- *Racketeering and Corrupt Influence Organization (RICO)*
- *Exculpatory Evidence*
- *Criminal Justice Act (CJA)*

A formal request to a judge that certain evidence not be considered at trial.

- *Disposition Hearing*
- *Motion to Suppress*
- *Petition*
- *Racketeering and Corrupt Influence Organization (RICO)*

A federal law that authorizes and sets forth the procedures for a judicial officer to order the release or detention of an arrested person pending trial, sentence, and appeal.

- *Post-disposition Hearing*
- *Adjudicatory Hearing*
- *Petition*
- *Bail Reform Act of 1984*

A proceeding brought before a court by one party only, without notice to or challenge by the other side.

- *Ex Parte*
- *Sustaining the Petition*
- *Exculpatory Evidence*
- *Release on Recognizance (ROR)*

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8.15: Intro CJ Ch 5.4 Multiple Choice Questions (29)

Evidence that requires an inference be made by the finder of fact.

- *Circumstantial Evidence*
- *Foreperson*
- *Bifurcated Trial*
- *Hearsay*

The Sixth Amendment guarantees the right of the people to be given fair notice of the charges against them.

- *Bifurcated Trial*
- *Jury Nullification*
- *Aggravating Circumstances*
- *Right to Notice of Accusations*

Legal rules that govern what, how, and for what purpose evidence can be admitted into court.

- *Charge to the Jury*
- *Rules of Evidence*
- *Hearsay*
- *Aggravating Circumstances*

An individual liberty guaranteed by the Sixth Amendment; the basic purpose of the right is to prevent accused persons from being found guilty of a crime in an unfair way.

- *Hung Jury*
- *Right to a Trial by Jury*
- *Direct Evidence*
- *Foreperson*

A trial without a jury, in which the judge serves as the fact-finder.

- *Testimonial Evidence*
- *Closing Arguments*
- *Alibi*
- *Bench Trial*

The leader and spokesperson for a jury who is usually responsible for reading the jury's verdict in court.

- *Foreperson*
- *Rules of Evidence*
- *Sequester*
- *Challenge for Cause*

A request after a legal judgement has been made that a new trial be given because of significant legal errors in the first trial.

- *Mitigating Circumstances*
- *Aggravating Circumstances*
- *Motion for a New Trial*
- *Voir Dire*

A type of challenge used in the voir dire process that excludes a potential juror for a stated reason that is allowed by law.

- *Voir Dire*
- *Confrontation Clause*
- *Challenge for Cause*
- *Rules of Evidence*

Situational factors that can serve to reduce the culpability of a criminal act, such as the defendant's age, metal disease, or lack of a prior criminal record.

- *Sequester*

- *Right to a Public Trial*
- *Mitigating Circumstances*
- *Hung Jury*

The unconstitutional practice of prosecuting a person twice for the same offense within the same jurisdiction.

- *Double Jeopardy*
- *Right to a Public Trial*
- *Rebuttal*
- *Hearsay*

A clause of the Sixth Amendment to the United States Constitution which provides that "in all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him."

- *Motion for a New Trial*
- *Mitigating Circumstances*
- *Bifurcated Trial*
- *Confrontation Clause*

A finding of not guilty by a jury that believes the defendant does not deserve punishment.

- *Rules of Evidence*
- *Testimonial Evidence*
- *Closing Arguments*
- *Jury Nullification*

The Sixth Amendment guarantees criminal defendants the right to face their accusers in court.

- *Right to a Speedy Trial*
- *Hearsay*
- *Peremptory Challenge*
- *Right to Confront Witnesses*

A judge's explanation of the applicable law to the jury at the conclusion of a criminal trial prior to jury deliberation.

- *Mitigating Circumstances*
- *Testimonial Evidence*
- *Charge to the Jury*
- *Jury Instructions*

A legal defense based on the claim of being elsewhere when a crime occurred.

- *Right to a Speedy Trial*
- *Right to a Public Trial*
- *Charge to the Jury*
- *Alibi*

Rules established by the SCOTUS in an effort to codify the many rules of presenting evidence in federal criminal courts.

- *Right to a Public Trial*
- *Right to Notice of Accusations*
- *Federal Rules of Evidence*
- *Right to Confront Witnesses*

Situational factors that increase the seriousness or culpability of a criminal act, such as the heinousness of the crime.

- *Foreperson*
- *Peremptory Challenge*
- *Aggravating Circumstances*
- *Bifurcated Trial*

An individual liberty guaranteed by the Sixth Amendment. The purpose is to keep justice out in the open.

- *Mitigating Circumstances*

- *Right to a Trial by Jury*
- *Right to a Public Trial*
- *Hung Jury*

Evidence presented by a witness who did not see or hear the incident in question but heard about it from someone else.

- *Challenge for Cause*
- *Hearsay*
- *Jury Nullification*
- *Charge to the Jury*

A jury unable to reach a decision as to the guilt of the defendant; results in a mistrial.

- *Right to a Public Trial*
- *Hung Jury*
- *Bench Trial*
- *Closing Arguments*

An oral or written assertion offered into evidence as proof of a fact.

- *Right to a Speedy Trial*
- *Closing Arguments*
- *Bifurcated Trial*
- *Testimonial Evidence*

An individual liberty guaranteed by the Sixth Amendment; the basic purpose of the right is to prevent accused persons from languishing in jail.

- *Motion for a New Trial*
- *Right to a Public Trial*
- *Circumstantial Evidence*
- *Right to a Speedy Trial*

A reiteration of each side's important arguments at the conclusion of a criminal trial.

- *Double Jeopardy*
- *Challenge for Cause*
- *Circumstantial Evidence*
- *Closing Arguments*

A trial that has a first phase where guilt is determined, and then a second phase where the sentence is determined.

- *Hung Jury*
- *Foreperson*
- *Closing Arguments*
- *Bifurcated Trial*

The phase of a criminal trial where an effort by one side is made to refute the evidence of the other side.

- *Hung Jury*
- *Rebuttal*
- *Federal Rules of Evidence*
- *Circumstantial Evidence*

Jury selection process of questioning prospective jurors, to ascertain their qualifications and determine any basis for a challenge.

- *Right to a Trial by Jury*
- *Hearsay*
- *Voir Dire*
- *Right to Notice of Accusations*

Evidence that proves the truth of an assertion without the need for any inferences.

- *Closing Arguments*

- *Federal Rules of Evidence*
- *Right to a Trial by Jury*
- *Direct Evidence*

To isolate members of a jury so they are not exposed to outside information about a case.

- *Hearsay*
- *Sequester*
- *Federal Rules of Evidence*
- *Circumstantial Evidence*

A court may grant each side in a civil or criminal trial the right to exclude a certain number of prospective jurors without cause or giving a reason.

- Right to a Public Trial
- Hung Jury
- Peremptory Challenge
- Rules of Evidence

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8.16: Intro CJ Ch 5.5 Multiple Choice Questions (31)

An intermediate sanction intended to be an alternative to incarceration but that is more intense than standard probation.

- *House Arrest*
- *Boot Camps*
- *Intensive Supervision Probation (ISP)*
- *Sentencing Reform Act of 1984*

Prison terms for two or more offenses to be served at the same time, rather than one after the other.

- *Community Service*
- *House Arrest*
- *Victim Impact Statement*
- *Concurrent Sentence*

A type of corrections sentence that consists of a short-term residential program that resembles military basic training.

- *Home Confinement*
- *Concurrent Sentence*
- *Sentencing*
- *Boot Camps*

A request made after a trial by a party that has lost on one or more issues that a higher court review the decision to determine if it was correct.

- *Overturn*
- *Consecutive Sentence*
- *Appeal*
- *Probation*

A type of sentencing environment where judicial discretion in sentence length is limited by statutory law.

- *Death Penalty*
- *Consecutive Sentence*
- *Community Service*
- *Mandatory Sentences*

Instruments through which legislative bodies determine the punishments that are associated with particular crimes.

- *Sentencing Statute*
- *Appeal*
- *Boot Camps*
- *Asset Forfeiture*

A prison sentence of a fixed length that is not subject to reduction by a parole board or other body.

- *Determinate Sentencing*
- *Asset Forfeiture*
- *Consecutive Sentence*
- *Probation*

Another name for Home Confinement.

- *House Arrest*
- *Uphold*
- *Proportionality Doctrine*
- *Probation*

A system of assessing fine amounts based on the offender's income rather than a set amount.

- *Sentencing Statute*
- *Indeterminate Sentencing*

- *Probation*
- *Day Fine*

Created a new federal agency, the U.S. Sentencing Commission, to set sentencing guidelines for every federal offense.

- *Uphold*
- *Fine*
- *Overturn*
- *Sentencing Reform Act of 1984*

The overruling or setting aside the decision of a lower court by a higher court.

- *Overturn*
- *Remand*
- *Determinate Sentencing*
- *Sentencing Reform Act of 1984*

In some jurisdictions, this hearing is separated from the finding of guilt.

- *Sentencing Hearing*
- *Asset Forfeiture*
- *Home Confinement*
- *Uphold*

Money paid to the government as punishment for a violation or crime.

- *Electronic Monitoring*
- *Fine*
- *Concurrent Sentence*
- *Day Fine*

The use of electronic equipment to monitor a person's movement to ensure compliance with court-ordered conditions, such as house arrest.

- *Proportionality Doctrine*
- *Death Penalty*
- *Good Time*
- *Electronic Monitoring*

The confiscation of assets by the government through either civil or criminal process.

- *Consecutive Sentence*
- *Appeal*
- *Sentencing Hearing*
- *Asset Forfeiture*

A homicide sanctioned and ultimately committed by the state as a punishment for crime.

- *Appeal*
- *U.S. Sentencing Commission*
- *Death Penalty*
- *Determinate Sentencing*

A type of sentence where the length of imprisonment is determined by the inmate's conduct while in prison rather than being of a set length.

- *Indeterminate Sentencing*
- *Proportionality Doctrine*
- *Death Penalty*
- *Determinate Sentencing*

Unpaid work intended to be of some social value.

- *Community Service*

- *Concurrent Sentence*
- *Mandatory Sentences*
- *Forfeiture*

The stage of the criminal justice process where the convicted person is brought before the court to have a punishment determined.

- *Remand*
- *Presentence Investigation Report*
- *Uphold*
- *Sentencing*

A statement made by the victim of a crime and given to the judge responsible for sentencing the perpetrator.

- *Victim Impact Statement*
- *Appeal*
- *Presentence Investigation Report*
- *Overturn*

The appellate court agrees with the lower court decision and allows it to stand.

- *Scarlet-Letter Punishments*
- *Electronic Monitoring*
- *Uphold*
- *Sentencing*

To send back [to police or jail custody]

- *Asset Forfeiture*
- *Good Time*
- *Remand*
- *Sentencing*

A special condition the court imposes that requires an individual to remain at home except for certain approved activities such as work and medical appointments.

- *Home Confinement*
- *Mandatory Sentences*
- *Victim Impact Statement*
- *Determinate Sentencing*

Prison terms for two or more offenses to be served one after the other.

- *Uphold*
- *House Arrest*
- *Day Fine*
- *Consecutive Sentence*

A specified amount of time taken off of a prisoner's sentence for not violating rules while incarcerated.

- *Good Time*
- *Concurrent Sentence*
- *Victim Impact Statement*
- *Sentencing Hearing*

The agency responsible for the establishment of sentencing policies and procedures for the federal court system.

- *Indeterminate Sentencing*
- *U.S. Sentencing Commission*
- *Boot Camps*
- *Victim Impact Statement*

The legal doctrine that the punishment should fit the crime rather than being too lenient or too harsh.

- *Remand*

- *Asset Forfeiture*
- *Home Confinement*
- *Proportionality Doctrine*

A report summarizing for the court the background information needed to determine the appropriate sentence.

- *Presentence Investigation Report*
- *Death Penalty*
- *Appeal*
- *Sentencing Reform Act of 1984*

Punishments designed to work primarily through humiliation.

- *House Arrest*
- *Determinate Sentencing*
- *Sentencing Hearing*
- *Scarlet-Letter Punishments*

A criminal sanction where the court releases the person to the community and orders him or her to complete a period of supervision and to abide by certain conditions.

- *Probation*
- *Mandatory Sentences*
- *Concurrent Sentence*
- *Victim Impact Statement*

Being forced by the government to give up something as a punishment for crime.

- *Probation*
- *Uphold*
- *Forfeiture*
- *Sentencing Hearing*

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8.17: Intro CJ Ch 6.1 Multiple Choice Questions (12)

Showing regret and sorrow for wrongdoing.

- *Penitence*
- *Intake*
- *Custody*
- *Training School*

A home where a small number of individuals in need of care or supervision live together.

- *Intake*
- *Detention Facility*
- *Group Home*
- *Gaol*

Residential placements that provide participants with a series of physically challenging outdoor activities designed to prevent or reduce delinquent behavior and recidivism.

- *Juvenile Detention Center*
- *Residential Treatment Center*
- *Training School*
- *Wilderness Camp*

A somewhat dated label for juvenile correctional institutions.

- *Training School*
- *Corporal Punishment*
- *Residential Treatment Center*
- *Detention Facility*

A facility where people (often juveniles) are held for a short period of time awaiting a court appearance of other legal action.

- *Detention Facility*
- *Wilderness Camp*
- *Corporal Punishment*
- *Detention Centers*

Having physical control over and legal responsibility for a prisoner or juvenile.

- *Corporal Punishment*
- *Office of Juvenile Justice and Delinquency Prevention (OJJDP)*
- *Diagnostic Center*
- *Custody*

A center where all juveniles are sent for psychological, educational, and security evaluations before being sent to a long-term placement facility.

- *Penitence*
- *Diagnostic Center*
- *Detention Facility*
- *Group Home*

Provides national leadership, coordination, and resources to stop and respond to juvenile misbehavior and victimization.

- *Detention Facility*
- *Juvenile Detention Center*
- *Group Home*
- *Office of Juvenile Justice and Delinquency Prevention (OJJDP)*

House youths with significant psychiatric, psychological, behavioral, or substance abuse problems who have been unsuccessful in outpatient treatment and other non-secure environments.

- *Residential Treatment Center*
- *Custody*
- *Intake*
- *Wilderness Camp*

A predecessor to the modern term jail; still used in names of historical buildings and places in Britain and Ireland.

- *Custody*
- *Office of Juvenile Justice and Delinquency Prevention (OJJDP)*
- *Gaol*
- *Detention Centers*

A screening process used when a juvenile first comes into contact with the court to determine the best course of action to take with a given case.

- *Gaol*
- *Intake*
- *Office of Juvenile Justice and Delinquency Prevention (OJJDP)*
- *Diagnostic Center*

Physical punishments such as flogging.

- *Gaol*
- *Wilderness Camp*
- *Corporal Punishment*
- *Detention Centers*

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8.18: Intro CJ Ch 6.2 Multiple Choice Questions (20)

A type of prison designed to house very dangerous inmates and characterized by a very high degree of physical and procedural security measures.

- *Maximum-security Prison*
- *Reception Facility*
- *Rehabilitation Model*
- *American Correctional Association*

A corrections term that indicates the extent of security measures that must be in place for an inmate of a particular classification.

- *Reception Facility*
- *Custody Level*
- *Crime Control Model*
- *Pennsylvania System*

An area within a prison set aside for inmates sentenced to death.

- *Medium-security Prison*
- *Death Row*
- *Walnut Street Jail*
- *Prison Programs*

An international association of corrections professionals dedicated to improving the effectiveness of corrections.

- *American Correctional Association*
- *Minimum-security Prison*
- *Reception Facility*
- *Maximum-security Prison*

A period beginning in the mid-1800s when juveniles were moved out of adult prisons and into specialized facilities geared toward rehabilitating youth.

- *Special Populations*
- *Penitent*
- *Reformatory Movement*
- *Custody Level*

A prison facility that houses only female inmates; there are far fewer of these than male prisons.

- *Custody Level*
- *Special Populations*
- *Women's Prisons*
- *American Correctional Association*

The idea that criminal offenders commit crimes for reasons outside of choosing to do so, and they can be rehabilitated (made noncriminal) by some form of treatment that eliminates the causes of crime.

- *Custody Level*
- *Congregate System*
- *Rehabilitation Model*
- *Private Prisons*

Prison facilities operated by third-party for profit companies under government contracts.

- *Private Prisons*
- *Super-maximum-security Prison*
- *American Correctional Association*
- *Zebulon Brockway*

A corrections system popular in the South during Reconstruction where convicts were leased to private companies to provide hard labor.

- *Elmira Reformatory*
- *Reformatory Movement*
- *Lease System*
- *Medical Model*

People that require special consideration or resources from corrections, such as the infirm, the elderly, juveniles, and women.

- *American Correctional Association*
- *Zebulon Brockway*
- *Elmira Reformatory*
- *Special Populations*

A system of prison discipline characterized by solitary confinement which was believed to foster penitence; arose in the late 18th century.

- *Medium-security Prison*
- *Pennsylvania System*
- *Declaration of Principles*
- *Reception Facility*

The philosophical approach to corrections that focuses on the identification, prevention, and elimination of the underlying causes of crime.

- *Prison Overcrowding*
- *Prison Programs*
- *Medical Model*
- *Minimum-security Prison*

A situation that occurs when the number of inmates within a particular facility exceeds the amount of space required for safe and legal operations.

- *Prison Programs*
- *Penitentiary*
- *Prison Overcrowding*
- *Minimum-security Prison*

Another name for the Auburn System, which was a philosophy of penitentiary management where inmates worked in silence during the day, and were in solitary confinement at night.

- *Pennsylvania System*
- *Congregate System*
- *Elmira Reformatory*
- *Zebulon Brockway*

Another name for prison that arose during the period when offenders where expected to be penitent.

- *Maximum-security Prison*
- *Custody Level*
- *Penitentiary*
- *Special Populations*

The guiding ideologies of the National Prison Association (now the ACA) which were adopted in 1870; considered a milestone in the professionalization of corrections.

- *Reformatory Movement*
- *Prison Overcrowding*
- *Declaration of Principles*
- *Minimum-security Prison*

Type of prison that holds the largest number of inmates; characterized by dormitory living arrangements.

- *Lease System*
- *John Howard*
- *Medium-security Prison*
- *Custody Level*

A type of institution designed to house the least dangerous offenders who pose little flight risk.

- *Medium-security Prison*
- *Minimum-security Prison*
- *Declaration of Principles*
- *John Howard*

Activities that are designed to help the offender reintegrate into society and avoid recidivism, such as substance abuse, anger management, and education.

- *Super-maximum-security Prison*
- *Prison Programs*
- *Crime Control Model*
- *Pennsylvania System*

A conceptualization of the criminal justice system developed by Herbert Packer that is characterized by an emphasis on aggressive crime suppression and control.

- *Reception Facility*
- *Private Prisons*
- *Crime Control Model*
- *Penitent*

Prisons that hold the highest risk prisoners in the most secure institutions in the country.

- *Super-maximum-security Prison*
- *Declaration of Principles*
- *Reformatory Movement*
- *Private Prisons*

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8.19: Intro CJ Ch 6.3 Multiple Choice Questions (12)

A right of inmates that is not specifically described in the Constitution; articulated by the Supreme Court based on several provisions of the Bill of Rights.

- *Right to Access to the Courts*
- *Shakedown*
- *Johnson v. Avery (1969)*
- *Right to Assemble*

As a general rule, all Americans have the right to vote in government elections; the voting rights of persons convicted of crimes vary from state to state.

- *Shakedown*
- *Right to Vote*
- *Right to Free Speech*
- *Hudson v. Palmer (1984)*

A thorough search of a prisoner's person or cell.

- *Wolff v. McDonnell (1974)*
- *Right to be Free from Cruel and Unusual Punishment*
- *Right to Access to the Courts*
- *Shakedown*

A right guaranteed by the Eighth Amendment; what constitutes cruel and unusual punishment tends to evolve over time.

- *Right to Assemble*
- *Political Right*
- *Right to be Free from Cruel and Unusual Punishment*
- *Hudson v. Palmer (1984)*

The First Amendment guarantees the right of the people to share their ideas with others; often referred to as the freedom of expression.

- *Wolff v. McDonnell (1974)*
- *Right to Free Speech*
- *Political Right*
- *Right to Access to the Courts*

A ruling by the SCOTUS that deliberate indifference to an inmate's serious medical needs could result in a successful Section 1983 lawsuit, but medical malpractice did not rise to that standard.

- *Wolff v. McDonnell (1974)*
- *Political Right*
- *Estelle v. Gamble (1976)*
- *Hudson v. Palmer (1984)*

A SCOTUS decision in which the court held that prisoners have specific due process rights in prison disciplinary proceedings, such as written notice of charges, a written statement of evidence, and the right to present evidence and call witnesses.

- *Wolff v. McDonnell (1974)*
- *Estelle v. Gamble (1976)*
- *Right to be Free from Cruel and Unusual Punishment*
- *Right to Free Speech*

A landmark SCOTUS decision that articulated the right of access to the courts.

- *Right to be Free from Cruel and Unusual Punishment*
- *Estelle v. Gamble (1976)*
- *Johnson v. Avery (1969)*

- *Wolff v. McDonnell (1974)*

A right guaranteed by the First Amendment, so long as the practice does not run afoul of a "public morals" or a "compelling" governmental interest.

- *Right to Free Speech*
- *Right to the Free Exercise of Religion*
- *Political Right*
- *Shakedown*

The right to participate in the selection and operation of government, such as the right to vote; these rights are severely curtailed when a person is convicted of a crime and sent to prison.

- *Political Right*
- *Right to Vote*
- *Johnson v. Avery (1969)*
- *Right to be Free from Cruel and Unusual Punishment*

The First Amendment guarantees the right of the people to gather together, so long as they do so peacefully.

- *Right to the Free Exercise of Religion*
- *Johnson v. Avery (1969)*
- *Right to Assemble*
- *Hudson v. Palmer (1984)*

A landmark SCOTUS decision in which the Court determined that inmates do not have a reasonable expectation of privacy in their living quarters, thus suspicionless searches are not unreasonable.

- *Political Right*
- *Estelle v. Gamble (1976)*
- *Wolff v. McDonnell (1974)*
- *Hudson v. Palmer (1984)*

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8.20: Intro CJ Ch 6.4 Multiple Choice Questions (12)

An officer charged with the supervision of offenders sentenced to community-based sanctions.

- *Conditions of Parole*
- *Inactive Supervision*
- *Parole Officer*
- *Split Sentence*

A SCOTUS ruling that enumerated certain due process rights in probation revocation hearings.

- *Work Release Program*
- *Gagnon v. Scarpelli (1973)*
- *Split Sentence*
- *Parole*

A program that allows trusted or closely monitored inmates to leave confinement for the purpose of work, then returning to secure confinement when the workday is complete.

- *Work Release Program*
- *Gagnon v. Scarpelli (1973)*
- *Revocation*
- *Absconder*

Rules that parolees must follow in order to remain on parole, such as not using drugs and not associating with known felons.

- *Gagnon v. Scarpelli (1973)*
- *Absconder*
- *Conditions of Parole*
- *Split Sentence*

A person who has been released from prison on parole.

- *Conditions of Parole*
- *Parolee*
- *Absconder*
- *Parole Officer*

The act of taking an offender off of parole or probation and sending them to prison.

- *Absconder*
- *Split Sentence*
- *Parole Officer*
- *Revocation*

A type of early release from prison where the offender must abide by certain specified conditions and be supervised in the community.

- *Active Supervision*
- *Parole*
- *Split Sentence*
- *Inactive Supervision*

A type of sentence where the offender spends up to half of the sentence outside of prison under community supervision.

- *Community Corrections*
- *Split Sentence*
- *Revocation*
- *Work Release Program*

A Boston bootmaker that became the "Father of Probation" in the United States.

- *Work Release Program*

- *John Augustus*
- *Community Corrections*
- *Conditions of Parole*

The supervision of criminal offenders in the resident population, as opposed to confining offenders in secure correctional facilities.

- *Parole Officer*
- *Active Supervision*
- *Community Corrections*
- *Technical Violation*

A type of probation or parole where the client is required to regularly report to a probation or parole officer.

- *Inactive Supervision*
- *Active Supervision*
- *Community Corrections*
- *Technical Violation*

A probationer or parolee that does not "check in" with his or her probation officer within a specified amount of time.

- *Active Supervision*
- *Split Sentence*
- *John Augustus*
- *Absconder*

A probation (or parole) status where the probationer does not have to report.

- *Work Release Program*
- *Inactive Supervision*
- *Parole*
- *Community Corrections*

A violation of the conditions of probation or parole.

- *Split Sentence*
- *Absconder*
- *Parole Officer*
- *Technical Violation*

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8.21: Intro CJ Ch 6.5 Multiple Choice Questions (6)

A landmark SCOTUS decision in which the Court decided that a probationer has the right to counsel in a hearing where a suspended prison sentence may be imposed.

- *Parole Revocation*
- *Conditions of Release*
- *Fundamental Rights*
- *Mempa v. Rhay (1967)*

A common condition of probation and parole whereby probationers and parolees waive their right to be free from unreasonable government searches and seizures.

- *Fundamental Rights*
- *Parole Revocation*
- *Fourth Waiver*
- *Conditions of Release*

A category of rights that the SCOTUS has set aside as deserving special protection from infringement by the government.

- *Conditions of Release*
- *Morrissey v. Brewer (1972)*
- *Mempa v. Rhay (1967)*
- *Fundamental Rights*

A landmark SCOTUS decision in which the court determined that a revocation hearing must be held to determine the factual basis of a probation revocation.

- *Mempa v. Rhay (1967)*
- *Fourth Waiver*
- *Morrissey v. Brewer (1972)*
- *Conditions of Release*

Rules that person released on bail must follow in order to stay out of jail, such as not leaving the jurisdiction of the court.

- *Mempa v. Rhay (1967)*
- *Conditions of Release*
- *Fourth Waiver*
- *Fundamental Rights*

The process of sending an offender back to prison for violating the conditions of parole.

- *Fundamental Rights*
- *Parole Revocation*
- *Mempa v. Rhay (1967)*
- *Conditions of Release*

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8.22: CRJ 1C ch 1.4 Multiple Choice Questions (23)

A jury, usually composed of 23 jurors, that are tasked with determining if the state has enough evidence to hold a criminal trial.

- *Grand Jury*
- *Preliminary Hearing*
- *Standing Mute*
- *Indictment*

A hearing to determine of enough evidence exists that a person committed a crime to move on to a trial.

- *Knowingly and Voluntarily*
- *Preliminary Hearing*
- *Magistrate*
- *Grand Jury*

The first time an accused person is brought before a judge.

- *Arrest*
- *Preliminary Hearing*
- *Follow-Up Investigation*
- *Initial Appearance*

A record maintained by a law enforcement agency concerning an arrest, including statements, evidence, and related charging information.

- *Magistrate*
- *Follow-Up Investigation*
- *Graham v. Connor (1989)*
- *Arrest Report*

The formal charge issued by a grand jury stating that there is enough evidence that the defendant committed the crime to justify having a trial.

- *Information*
- *Indictment*
- *Magistrate*
- *Standing Mute*

A document that when filed with the court begins formal criminal proceedings against the defendant, such as complaints, information, and indictments.

- *Graham v. Connor (1989)*
- *Charging Document*
- *Grand Jury*
- *Presentence Report*

Refusing to speak when asked a question, especially in court.

- *Standing Mute*
- *Booking*
- *Objectively Reasonable*
- *Initial Appearance*

The lawyers in a case.

- *Counsel*
- *Plea*
- *Objectively Reasonable*
- *Pretrial Services Officer*

Attorneys that conduct most of the trial work in which the United States is a party.

- *Grand Jury*
- *U.S. Attorney*
- *Knowingly and Voluntarily*
- *Probable Cause*

The process of identifying, searching, and charging a person before they are admitted to jail.

- *Preliminary Investigation*
- *Initial Appearance*
- *Booking*
- *Arrest Report*

A SCOTUS decision where an objective reasonableness standard was adopted for evaluating excessive force claims against police.

- *Knowingly and Voluntarily*
- *Charging Document*
- *Arrest Report*
- *Graham v. Connor (1989)*

The deprivation of a person's freedom of movement.

- *U.S. Attorney*
- *Charging Document*
- *Preliminary Hearing*
- *Arrest*

Pretrial services officers focus on investigating the backgrounds of federal criminal defendants to help the court determine whether to release or detain them while they await trial.

- *Information*
- *Objectively Reasonable*
- *Pretrial Services Officer*
- *Arrest Report*

A formal accusation by a government attorney that the defendant committed a criminal offense.

- *Preliminary Hearing*
- *Booking*
- *Magistrate*
- *Information*

A report summarizing for the court the background information needed to determine the appropriate sentence.

- *Preliminary Hearing*
- *Standing Mute*
- *Presentence Report*
- *Arrest*

A reasonably prudent and cautious person would find an office's actions reasonable under the circumstances.

- *Objectively Reasonable*
- *Booking*
- *Plea*
- *Preliminary Investigation*

A minor judicial official with limited authority.

- *Information*
- *Magistrate*
- *Indictment*
- *Probable Cause*

The defendant's statement of "guilty" or "not guilty" in answer to the charges.

- *Arrest Report*
- *Graham v. Connor (1989)*
- *Knowingly and Voluntarily*
- *Plea*

Investigative activities that take place as soon as an officer arrives at the crime scene.

- *Objectively Reasonable*
- *Indictment*
- *Preliminary Investigation*
- *Charging Document*

"…facts and circumstances within the officers' knowledge…are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."

- *Arrest*
- *Probable Cause*
- *Plea*
- *Graham v. Connor (1989)*

An amount of force that a reasonable person would deem necessary to accomplish a lawful objective and no more.

- *Preliminary Investigation*
- *Grand Jury*
- *Reasonable Force*
- *Presentence Report*

A legal requirement (that defendants understand the potential outcomes of what they are doing, and that they are doing so free of coercion.

- *Preliminary Hearing*
- *Magistrate*
- *Knowingly and Voluntarily*
- *Grand Jury*

Police information gathering that takes place between the filing of the initial report and the case being ready for trial.

- *Follow-Up Investigation*
- *Plea*
- *Magistrate*
- *Probable Cause*

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8.23: CRJ OER 1.2 Multiple Choice Questions (32)

The highest court in the United States; composed of eight associate Justices and one Chief Justice.

- *Infancy Defense*
- *Common Law*
- *United States Supreme Court*
- *Federal Rules of Criminal Procedure*

An elected body, such as Congress, that has the constitutional authority to make laws.

- *Legislature*
- *Dual Federalism*
- *Plea Bargain*
- *Trial Court*

Rules promulgated by the SCOTUS that govern how federal criminal prosecutions are conducted.

- *Unconstitutional*
- *Federal Rules of Criminal Procedure*
- *SCOTUS*
- *Efficiency*

An argument that the components of the criminal justice system are in conflict, and that there is actually no system at all.

- *Juvenile Justice*
- *Fairness*
- *United States Supreme Court*
- *Non-system Argument*

The constitutional idea that the criminal justice system must treat people in a fundamentally fair way.

- *Executive Branch*
- *Dual Court System*
- *Hierarchical*
- *Procedural Due Process*

A negotiated agreement between the prosecution and the defendant where the defendant agrees to plead guilty to a lesser crime than that originally charged, or to a lesser sentence than can normally be expected if the case goes to trial.

- *Juvenile Justice*
- *Plea Bargain*
- *Hierarchical*
- *Three Branches of Government*

A body of fundamental principles by which a nation or state is governed.

- *Plea Bargain*
- *Due Process*
- *Trial Court*
- *Constitution*

The legal system that originated in England and is now in use in the United States; relies heavily on judicial decisions.

- *Common Law*
- *Decisions (courts)*
- *Appellate Court*
- *Trial Court*

A system of government like that of the United States where there are both national and state governments.

- *Procedural Due Process*
- *Due Process*

- *Trial Court*
- *Dual Federalism*

The court system of a country or state; judges taken collectively.

- *Code*
- *Judiciary*
- *Efficiency*
- *Procedural Due Process*

The _____ established by the Constitution are the executive, legislative, and judicial branches.

- *Code*
- *SCOTUS*
- *Due Process*
- *Three Branches of Government*

Not in accordance with the provisions of the Constitution of the United States or the Constitution of a particular state.

- *Judiciary*
- *Penal Code*
- *Unconstitutional*
- *Dual Court System*

A body of statutes that specify crimes and their punishments; more commonly referred to as the substantive criminal law or the criminal code.

- *SCOTUS*
- *Due Process*
- *Penal Code*
- *Unconstitutional*

The mission of the _____ is to collect, analyze, publish, and disseminate information on crime, criminal offenders, victims of crime, and the operation of justice systems at all levels of government.

- *Juvenile Justice*
- *Effectiveness*
- *Bureau of Justice Statistics*
- *Executive Branch*

An organizational structure where elements are arranged by rank.

- *Three Branches of Government*
- *Judicial Review*
- *Hierarchical*
- *Legislature*

Carrying out justice system activities with proper regard for equity, proportionality, constitutional protections afforded defendants and convicted offenders, and public safety.

- *Effectiveness*
- *Penal Code*
- *Judiciary*
- *Non-system Argument*

The branch of government tasked with the administration of public affairs, and the enforcement of laws and policies.

- *Judicial Review*
- *Hierarchical*
- *Trial Court*
- *Executive Branch*

A group of interrelated parts that work together to accomplish a common set of objectives.

- *Legislature*
- *Bureau of Justice Statistics*
- *Unconstitutional*
- *System*

A court having original jurisdiction in criminal matters as opposed to an appellate court.

- *Trial Court*
- *Congress of the United States*
- *Effectiveness*
- *Efficiency*

The power of the Supreme Court to determine the constitutionality of legislative enactments.

- *Unconstitutional*
- *Constitution*
- *Judicial Review*
- *Federal Rules of Criminal Procedure*

A comprehensive set of laws arranged by subject.

- *Judiciary*
- *Code*
- *Legislature*
- *Judicial Review*

A court that is empowered to rehear cases originating in a trial court.

- *United States Supreme Court*
- *Judicial Review*
- *Hierarchical*
- *Appellate Court*

Economically applying available resources to accomplish statutory goals as well as to improve public safety.

- *Three Branches of Government*
- *Efficiency*
- *Nonsystem Argument*
- *Judicial Review*

The common law doctrine that very young children were incapable of forming a culpable mental state, and thus were not subject to criminal prosecution.

- *Infancy Defense*
- *Unconstitutional*
- *Appellate Court*
- *Juvenile Justice*

The legislative branch of the United States government, composed of the U.S. House of Representatives and the U.S. Senate.

- *Decisions (courts)*
- *Congress of the United States*
- *Due Process*
- *Federal Rules of Criminal Procedure*

Supreme Court of the United States

- *Due Process*
- *SCOTUS*
- *Constitution*
- *Common Law*

The constitutional guarantee that a defendant will receive fair and impartial treatment by the criminal justice system.

- *Efficiency*
- *Decisions (courts)*
- *Fairness*
- *Due Process*

The portion of the United States Code or the Code of an individual state that deals with criminal law.

- *Dual Court System*
- *United States Supreme Court*
- *Criminal Code*
- *Nonsystem Argument*

The written opinions of appellate courts that have the force of law in common law countries like the United States.

- *United States Supreme Court*
- *Federal Rules of Criminal Procedure*
- *Decisions (courts)*
- *Judiciary*

A term describing the American governmental structure characterized by having both state courts and federal courts.

- *SCOTUS*
- *Judicial Review*
- *United States Supreme Court*
- *Dual Court System*

Justice issues such as assuring equal treatment and handling of like offenders and giving equal weight to legally relevant factors in sentencing.

- *Congress of the United States*
- *Criminal Code*
- *Fairness*
- *Plea Bargain*

Elements of the criminal justice system designed to deal with lawbreaking by those not old enough to enter the adult system.

- *Juvenile Justice*
- *Code*
- *Nonsystem Argument*
- *Three Branches of Government*

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8.24: American Government Ch 4

The Supreme Court has decided that the death penalty _____.

- *is always cruel and unusual punishment*
- *is never cruel and unusual punishment*
- *may be applied only to acts of terrorism*
- *may not be applied to those who were under 18 when they committed a crime**

The Fourth Amendment's requirement for a warrant _____.

- *applies only to searches of the home*
- *applies only to the seizure of property as evidence*
- *does not protect people who rent or lease property*
- *does not apply when there is a serious risk that evidence will be destroyed before a warrant can be issued**

_____are freedoms, which have limitations on government power, intended to protect freedoms that governments may not legally intrude on.

- *Civil Rights*
- *Civil Liberties**
- *Bill of Rights*
- *Constitution*

_____are guarantees that government officials will treat people equally and that decisions will be made on the basis of merit rather than race, gender, or other personal characteristics.

- *Civil Rights**
- *Civil Liberties*
- *Bill of Rights*
- *Constitution*

Right to be secure from unreasonable search and seizure

- *4^{th} amendment**
- *5^{th} amendment*
- *8^{th} amendment*
- *9^{th} amendment*

Rights in criminal cases, including due process and indictment by grand jury for capital crimes, as well as the right not to testify against oneself

- *4^{th} amendment*
- *5^{th} amendment**
- *8^{th} amendment*
- *9^{th} amendment*

Right to a speedy trial by an impartial jury

- *4^{th} amendment*
- *6^{th} amendment**
- *8^{th} amendment*
- *9^{th} amendment*

Right to not face excessive bail, excessive fines, or cruel and unusual punishment

- *4^{th} amendment*
- *5^{th} amendment*
- *8^{th} amendment**
- *9^{th} amendment*

Rights retained by the people, even if they are not specifically enumerated by the Constitution

- *4th amendment*
- *6th amendment*
- *8th amendment*
- *9th amendment**

Which of the following rights is not protected by the Sixth Amendment?

- *right to trial by an impartial jury*
- *right to cross-examine witnesses in a trial*
- *right to remain silent**
- *right to a speedy trial*

The double jeopardy rule in the Bill of Rights forbids which of the following?

- *prosecuting someone in state court for a criminal act acquitted of in federal court*
- *suing someone for damages for an act the person was found not guilty of*
- *prosecuting someone in federal court for a criminal act acquitted of in a state court*
- *none of these options**

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8.25: American Government 13 [20 questions]

The Supreme Court's power of judicial review _____.

- *is given to it in the original constitution*
- *enables it to declare acts of the other **
- *branches unconstitutional*
- *allows it to hear cases*

The Supreme Court most typically functions as_____.

- *a district court*
- *a trial court*
- *a court of original jurisdiction*
- *an appeals court**

Both state and federal courts hear matters that involve _____.

- *civil law only*
- *criminal law only*
- *both civil and criminal law**
- *neither civil nor criminal law*

A state case is more likely to be heard by the federal courts when _____.

- *it involves a federal question*
- *a governor requests a federal court hearing*
- *it involves a criminal matter*
- *the state courts are unable to come up with a decision*

Besides the Supreme Court, there are lower courts in the national system called _____.

- *state and federal courts*
- *district and circuit courts**
- *state and local courts*
- *civil and common courts*

In standing by precedent, a judge relies on the principle of _____.

- *stare decisis*
- *amicus curiae*
- *judicial activism*
- *laissez-faire*

The justices of the Supreme Court are _____.

- *elected by citizens*
- *chosen by the Congress*
- *confirmed by the president*
- *nominated by the president and confirmed by the Senate**

The Supreme Court consists of _____.

- *nine associate justices*
- *one chief justice and eight associate justices*
- *thirteen judges*
- *one chief justice and five associate justices*

A case will be placed on the Court's docket when _____ justices agree to do so.

- *Four**
- *five*
- *six*

- *all*

One of the main ways interest groups participate in Supreme Court cases is by _____.

- *giving monetary contributions to the justices*
- *lobbying the justices*
- *filing amicus curiae briefs*
- *protesting in front of the Supreme Court building*

The lawyer who represents the federal government and argues cases before the Supreme Court is the _____.

- *solicitor general**
- *attorney general*
- *U.S. attorney*
- *chief justice*

When using judicial restraint, a judge will usually _____.

- *refuse to rule on a case*
- *overrule any act of Congress he or she doesn't like*
- *defer to the decisions of the elected branches of government**
- *make mostly liberal rulings*

When a Supreme Court ruling is made, justices may write a _____ to show they agree with the majority but for different reasons.

- *brief*
- *dissenting opinion*
- *majority opinion*
- *concurring opinion*

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8.26: Crim Law CH 1.1 – 1.4

Definitions:

_____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 Law*
- Criminal Procedure
- Civil Law
- Infractions

_____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.

- Criminal Law
- Criminal Procedure*
- Civil Law
- Infractions

_____"the body of law having to do with the private rights of individuals" … the law is between individuals, not *the government*.

- Criminal Law
- Criminal Procedure
- Civil Law*
- Infractions

_____can 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. These are generally punishable by a fine or alternative sentencing such as traffic school.

- Criminal Law
- Criminal Procedure
- Civil Law
- Infractions*

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8.27: QCrim Law Ch 1-6 to 1-7

Which of these is not a source of law?

- *Constitutional*
- *Statutory*
- *Case*
- *Social outcry**

Which of these is the highest source of law?

- *Constitutional**
- *Statutory*
- *Case*
- *Social outcry*

Which of these is the lowest source of law?

- *Constitutional*
- *Statutory*
- *Case**
- *Judicial Review*

When judges rule on the facts of a particular case, they create _____ law.

- *Constitutional*
- *Statutory*
- *Case**
- *Judicial Review*

_____ laws apply to and regulate individual or private action. These are written (and published) laws that can be enacted in one of two ways. Most are written and voted into law by the legislative branch of government

- *Constitutional*
- *Statutory**
- *Case*
- *Judicial Review*

_____is derived from English common law and compels judges to follow rulings in previous cases.

- *Constitution*
- *Stare decisis**
- *Precedent*
- *Judicial Review*

A previous case is called _____

- *Constitution*
- *Stare decisis*
- *Precedent**
- *Judicial Review*

Cases must be published to become case law. A published case is also called a _____

- *Constitution*
- *Stare decisis*
- *Precedent*
- *Judicial Review**

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8.28: Crim Law Ch 2.3 Quiz

The branch of government responsible for interpreting all laws, including statutes, codes, ordinances, and the federal and state constitutions is _____

- *Judicial*
- *Executive*
- *Legislative*
- *Congress*

_____allows the judicial branch to invalidate any unconstitutional law in the statutory source of law and also to change the federal and state constitutions by interpretation

- *Case Law*
- *Executive Action*
- *Judicial Dissent*
- *Judicial Review*

A court's _____is the power or authority to hear the case in front of it.

- *Jurisdiction*
- *Executive Action*
- *Judicial Dissent*
- *Judicial Review*

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8.29: CRIM LAW 2.4 [6 questions]

The _____ is a party's responsibility to prove a disputed charge, allegation, or defense

1 preponderance of evidence

2 burden of proof*

3 inference

4 presumption

A Plaintiff's burden of proof in a civil case is called preponderance of evidence.

1 preponderance of evidence*

2 burden of proof

3 inference

4 presumption

The prosecution's burden of proof in a criminal case is the most challenging burden of proof in law because it must be_____.

1 preponderance of evidence

2 burden of proof

3 beyond a reasonable doubt*

4 presumption

An _____ is a conclusion that the judge or jury *may* make under the circumstances. It is never mandatory but is a choice.

1 inference*

2 burden of proof

3 beyond a reasonable doubt

4 presumption

A _____is a conclusion that the judge or jury *must* make under the circumstances.

1 inference

2 burden of proof

3 beyond a reasonable doubt

4 presumption*

_____ indirectly proves a fact

1 direct evidence

2 circumstantial evidence *

3 burden of proof

4 presumption

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8.30: Crim Law 3.6 Quiz

The prohibition against cruel and unusual punishment comes from the _____, which states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." State constitutions often have similar provisions.

- *Fifth Amendment*
- *Sixth Amendment*
- *Eighth Amendment*
- *Ninth Amendment*

Another facet of excessive punishment is a criminal sentencing enhancement that is based on facts not found beyond a reasonable doubt by a jury. This has been held to violate the _____, which states, "In all criminal prosecutions, the accused shall enjoy the right to a…trial, by an impartial jury of the State and district wherein the crime shall have been committed."

- Fifth Amendment
- Sixth Amendment
- Eighth Amendment
- Ninth Amendment

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8.31: SOC CH 2

A measurement is considered _____ if it actually measures what it is intended to measure, according to the topic of the study.

- *reliable*
- *sociological*
- *valid*
- *quantitative*

Sociological studies test relationships in which change in one _____ causes change in another.

- *test subject*
- *behavior*
- *variable*
- *operational definition*

In a study, a group of ten-year-old boys are fed doughnuts every morning for a week and then weighed to see how much weight they gained. Which factor is the dependent variable?

- *The doughnuts*
- *The boys*
- *The duration of a week*
- *The weight gained*

Which statement provides the best operational definition of "childhood obesity"?

- *Children who eat unhealthy foods and spend too much time watching television and playing video games*
- *A distressing trend that can lead to health issues including type 2 diabetes and heart disease*
- *Body weight at least 20 percent higher than a healthy weight for a child of that height*
- *The tendency of children today to weigh more than children of earlier generations*

Which materials are considered secondary data?

- *Photos and letters given to you by another person*
- *Books and articles written by other authors about their studies*
- *Information that you have gathered and now have included in your results*
- *Responses from participants whom you both surveyed and interviewed*

Why is choosing a random sample an effective way to select participants?

  - *Participants do not know they are part of a study*
  - *The researcher has no control over who is in the study*
  - *It is larger than an ordinary sample*
  - *Everyone has the same chance of being part of the study*

Which research approach is best suited to the scientific method?

  - *Questionnaire*
  - *Case study*
  - *Ethnography*
  - *All of the above*

The main difference between ethnography and other types of participant observation is:

- *ethnography isn't based on hypothesis testing*
- *ethnography subjects are unaware they're being studied*
- *ethnographic studies always involve minority ethnic groups*
- *ethnography focuses on how subjects view themselves in relationship to the community*

Which best describes the results of a case study?

  - *It produces more reliable results than other methods because of its depth*
  - *Its results are not generally applicable*

- *It relies solely on secondary data analysis*
- *All of the above*

Using secondary data is considered an unobtrusive or _____ research method.

- *nonreactive*
- *nonparticipatory*
- *nonrestrictive*
- *nonconfrontive*

To study the effects of fast food on lifestyle, health, and culture, from which group would a researcher ethically be unable to accept funding?

- *A fast-food restaurant*
- *A nonprofit health organization*
- *A private hospital*
- *A governmental agency like Health and Social Services*

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8.32: Test Bank Questions

Chapter 7

- *Ally's father was sent to prison when she was 12 for the trafficking of narcotics; her brother was arrested when she was 13 for possession of methamphetamines. By the age of 18, Ally has been arrested three times for possession of marijuana. Which theory best describes Ally's experience?*
  - *Differential association theory**
  - *Strain theory*
  - *Labeling theory*
  - *Opaque theory*
- *A violation of established contextual, cultural, or social norms, whether folkways, mores, or codified law*
  - *social control*
  - *immorality*
  - *deviance **
  - *Sin*
- *What is the difference between a violent crime and a hate crime?*
  - *A violent crime is based on a person's race, religion, or other characteristics.*
  - *A violent crime is punishable in a court of law; a hate crime is not.*
  - *A hate crime is punishable in a court of law; a violent crime is not.*
  - *A hate crime is based on a person's race, religion, or other characteristics.**
- *Jake receives a promotion at his law firm after winning an important case. This is an example of a:*
  - *Positive informal sanction*
  - *Negative informal sanction*
  - *Positive formal sanction**
  - *Negative formal sanction*
- *Which theorist studied the power elite, and the influence they had over society?*
  - *Karl Marx*
  - *Carl Sagan*
  - *Émile Durkheim*
  - *C. Wright Mills**
- *A behavior that violates official law and is punishable through formal sanctions.*
  - *social control*
  - *immorality*
  - *crime **
  - *Sin*
- *Functionalist Émile Durkheim believed some deviance within society was:*
  - *Necessary; it challenged people's views.**
  - *Dangerous; it encouraged disruptive behavior.*
  - *Insignificant; deviance within society is largely ignored.*
  - *Instrumental; it encouraged the population to rebel.*
- *Which of the following is not a branch of the U.S. Criminal Justice System?*
  - *The police*
  - *The jury**
  - *The courts*
  - *The corrections system*
- *The term **secondary deviance** can be defined as:*
  - *When positive formal sanctions cause an individual to deviate from society's expectations.*

- *When a violation of norms does not result in any long-term effects on the individual's self-image or interactions with others.*
- *When negative informal sanctions encourage an individual to seek more positive behavioral choices.*
- *When a person's self-concept and behavior begin to change after his or her actions are labeled as deviant by members of society.**

- *Which of the following is an example of a negative informal sanction?*
  - *Mario being sent to jail after robbing a CVS.*
  - *Beatrix being booed off stage after telling an offensive joke during her comedy routine.**
  - *Eleanor being given a "Teacher of the Year" award for her work as a high school English teacher.*
  - *Meredith receiving compliments on her hair after visiting the salon.*
- *The regulation and enforcement of norms*
  - *social control**
  - *immorality*
  - *deviance*
  - *Sin*
- *This theory addresses the relationship between having socially acceptable goals and having socially acceptable means to reach those goals.*
  - *Strain theory**
  - *Control theory*
  - *Differential association*
  - *Labeling theory*
- *In first grade, Scott is unfairly singled out by his teacher for bad behavior, partly because his older brothers had behavioral problems themselves. Throughout grade school, Scott gains a reputation as a "problem" child. Scott eventually drops out of school, thinking he was born to fail anyway. Which school of thought best fits Scott's experience?*
  - *Strain theory*
  - *Control theory*
  - *Differential association*
  - *Labeling theory**
- *Bernie Madoff, recently sentenced to 150 years in prison for creating a Ponzi scheme which caused clients to lose millions of dollars, engaged in which form of crime?*
  - *Street crime*
  - *Corporate crime**
  - *Violent crime*
  - *Institutional crime*
- *An average of _____ people in the United States fall victim to hate crimes each year?*
  - *100,000*
  - *150,000*
  - *195,000**
  - *200,000*

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8.33: CRJ 4.1 Multiple Choice Questions (28)

Another name for the Frankpledge System.

- *Hue and Cry*
- *Mutual Pledge System*
- *Political Era*
- *Civil Service*

The ancient code of laws that, according to the Old Testament, were given by God to Moses.

- *Decentralized*
- *O. W. Wilson*
- *Mosaic Code*
- *Preventive Patrol*

A period during the Nineteenth Century when policing in America's large urban centers was defined by political patronage and graft and corruption were rampant.

- *Magna Carta*
- *Reform Era*
- *Proactive*
- *Political Era*

The geographical territory to which a patrol officer is assigned.

- *Beat*
- *Posse Comitatus*
- *Code of Hammurabi*
- *Frankpledge System*

A period beginning in the early 1900s when police professionalism became the dominate paradigm of policing in the United States.

- *Reform Era*
- *Political Era*
- *Preventive Patrol*
- *Proactive*

A church based administrative division of territory; corresponds to a county in modern usage.

- *Hundred*
- *Parish*
- *Code of Hammurabi*
- *O. W. Wilson*

A man elected to preside over a tithing (a group of ten families) under the mutual pledge system.

- *Reform Era*
- *Beat*
- *Tithingman*
- *O. W. Wilson*

A group of ten families under the mutual pledge system.

- *Frankpledge System*
- *Tithing*
- *Tithingman*
- *Nationalization*

The chief law enforcement officer of a county; the office originated in feudal England as the shire-reeve.

- *August Vollmer*
- *Sheriff*

- *Shire*
- *Kin Policing*

A Latin legal phrase meaning the "power of the county;" a group of all able bodied men that the sheriff could summon to give chase to a fugitive.

- *Political Era*
- *Preventive Patrol*
- *Posse Comitatus*
- *Decentralized*

A police reformer known for his strong support for higher education and professionalism in policing.

- *Watch and Ward*
- *Kin Policing*
- *Mutual Pledge System*
- *August Vollmer*

A system of government service employment based on merit and examinations rather than on political patronage.

- *Tithingman*
- *Civil Service*
- *Posse Comitatus*
- *Amalgamation*

Acting in response to a situation rather than creating it or controlling it; the opposite of proactive.

- *Reactive*
- *Frankpledge System*
- *Nationalization*
- *Civil Service*

An English office during feudal times that evolved into the modern office of sheriff.

- *Shire-reeve*
- *Political Era*
- *Parish*
- *Tithing*

An influential leader in policing, popularizing the idea of police professionalism that would shape policing in America for decades to come.

- *O. W. Wilson*
- *Decentralized*
- *Hue and Cry*
- *Civil Service*

The process or result of uniting or consolidating things.

- *Amalgamation*
- *Kin Policing*
- *Tithing*
- *Preventive Patrol*

A charter of liberties that the English Barons forced King John to sign in 1215.

- *Proactive*
- *Preventive Patrol*
- *Amalgamation*
- *Magna Carta*

A policing strategy based on the idea that officers in highly visible uniforms and vehicles will deter crime by their mere presence in the community.

- *Kin Policing*
- *Preventive Patrol*
- *Civil Service*
- *Hundred*

An old English term for a geographical area equivalent to a modern county.

- *Shire*
- *Tithingman*
- *Watch and Ward*
- *Proactive*

Controlling a situation by causing something to happen rather than responding to an event after it has happened.

- *Amalgamation*
- *Proactive*
- *Code of Hammurabi*
- *Tithingman*

A calling out to the members of a community in order to collectively pursue a criminal, as was mandated under old English law.

- *Magna Carta*
- *Reform Era*
- *Hue and Cry*
- *Code of Hammurabi*

A system of policing used in England during the Early Middle Ages whereby communities were divided into small groups (tithings) that were collectively responsible for the conduct of all members.

- *Amalgamation*
- *Beat*
- *Frankpledge System*
- *Code of Hammurabi*

An ancient system of law enforcement where law enforcement responsibility was held by all citizens, and everyone was responsible for the conduct of their extended families.

- *Political Era*
- *Kin Policing*
- *August Vollmer*
- *Amalgamation*

A policing system used in Medieval English towns where community members were appointed to serve as guards during the day (the ward) and at night (the watch).

- *O. W. Wilson*
- *Political Era*
- *Watch and Ward*
- *Mosaic Code*

A unit of ten tithings (or 100 households) under the old English Frankpledge system.

- *Shire-reeve*
- *Reform Era*
- *Hundred*
- *Tithingman*

To bring under the control of a nation, such as the government of the United States.

- *Reform Era*
- *Reactive*
- *Nationalization*

- *Tithingman*

A set of laws developed by Babylonian King Hammurabi that date back to the 18th century BC; the earliest written legal code known.

- *Posse Comitatus*
- *Shire-reeve*
- *Mosaic Code*
- *Code of Hammurabi*

Not having a single administrative center.

- *Amalgamation*
- *Decentralized*
- *Reactive*
- *Kin Policing*

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8.34: CRJ 4.2 Multiple Choice Questions (20)

How Herman Goldstein, the Father of Problem-oriented Policing, described the police role in society.

- *Quasi-Military Organization*
- *Residual Problems of Society*
- *Tribal Police*
- *Transportation Security Administration (TSA)*

A branch of the Department of Homeland Security that has the responsibility of dealing with lawful immigration matters, such as the issuance of green cards.

- *Order Maintenance*
- *Bureau of Alcohol, Tobacco, and Firearms (ATF)*
- *Citizenship and Immigration Service (USCIS)*
- *Local Police Department*

Enforces federal laws, supports other criminal justice agencies, and provides security and transport for the federal courts.

- *Drug Enforcement Administration (DEA)*
- *Bureau of Alcohol, Tobacco, and Firearms (ATF)*
- *Secret Service*
- *U.S. Marshals Service (USMS)*

A style of policing characterized by a concern for code enforcement and the use of written policies and procedures.

- *Bureau of Alcohol, Tobacco, and Firearms (ATF)*
- *Drug Enforcement Administration (DEA)*
- *Legalistic Style*
- *Federal Bureau of Investigation (FBI)*

An American political scientists that wrote extensively on criminal justice issues, perhaps most famous for developing Broken Windows Theory.

- *Residual Problems of Society*
- *U.S. Marshals Service (USMS)*
- *James Q. Wilson*
- *Sworn Officer*

Protects and defends the U.S .against terrorist and foreign intelligence threats, upholds and enforces the criminal laws of the U.S., and provides leadership and criminal justice services to federal, state, municipal, and international agencies and partners.

- *Federal Bureau of Investigation (FBI)*
- *James Q. Wilson*
- *Transportation Security Administration (TSA)*
- *Service Style*

Police officers employed by a Native American tribe as opposed to a municipality.

- *Transportation Security Administration (TSA)*
- *Drug Enforcement Administration (DEA)*
- *Service Style*
- *Tribal Police*

An organization that has some but not all of the characteristics of the military.

- *Local Police Department*
- *Quasi-Military Organization*
- *Service Style*
- *SWAT*

Military style uniforms also known as fatigues.

- *American Bar Association*
- *Citizenship and Immigration Service (USCIS)*
- *BDU*
- *Residual Problems of Society*

An acronym for Special Weapons and Tactics; a tactical response team trained to deal with unusually dangerous situations.

- *Tribal Police*
- *Watchman Style*
- *Quasi-Military Organization*
- *SWAT*

A law enforcement agency with the primary law enforcement responsibility within a particular municipality.

- *Sworn Officer*
- *Federal Bureau of Investigation (FBI)*
- *Secret Service*
- *Local Police Department*

Enforces the controlled substances laws and regulations of the United States.

- *Service Style*
- *Secret Service*
- *Drug Enforcement Administration (DEA)*
- *Quasi-Military Organization*

A style of policing that focuses on order maintenance rather than code enforcement.

- *Bureau of Alcohol, Tobacco, and Firearms (ATF)*
- *SWAT*
- *Watchman Style*
- *Legalistic Style*

A police responsibility that deals with threats to the public peace and order as opposed to dealing with serious crimes.

- *Quasi-Military Organization*
- *American Bar Association*
- *Citizenship and Immigration Service (USCIS)*
- *Order Maintenance*

Conducts criminal investigations, regulates the firearms and explosives industries, and assists other law enforcement agencies.

- *American Bar Association*
- *SWAT*
- *Secret Service*
- *Bureau of Alcohol, Tobacco, and Firearms (ATF)*

A bona fide law enforcement officer with arrest powers; so-called because such officers are required to take an oath of office that includes an oath to defend the Constitution.

- *Sworn Officer*
- *Watchman Style*
- *Quasi-Military Organization*
- *Legalistic Style*

A respected, national association of attorneys that is very active in civil rights and other criminal justice issues.

- *Local Police Department*
- *Drug Enforcement Administration (DEA)*
- *American Bar Association*
- *Service Style*

A style of policing that is concerned more with helping members of the community than with strict code enforcement.

- *Service Style*
- *SWAT*
- *Watchman Style*
- *Sworn Officer*

A branch of the United States Department of Homeland Security tasked with providing protection to the President as well as investigating certain types of financial crimes.

- *Secret Service*
- *Sworn Officer*
- *Order Maintenance*
- *U.S. Marshals Service (USMS)*

Protects the nation's transportation systems to ensure freedom of movement for people and commerce.

- *Service Style*
- *U.S. Marshals Service (USMS)*
- *SWAT*
- *Transportation Security Administration (TSA)*

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8.35: CRJ 4.3 Multiple Choice Questions (16)

A police officer with the primary duty to probe crimes.

- *Problem Analysis Triangle*
- *Control Group*
- *Investigator*
- *Foot Patrol*

Another name for Community Oriented Policing (COP).

- *Foot Patrol*
- *Kansas City Preventive Patrol Experiment*
- *Community Policing*
- *Stakeholder*

A landmark study in policing that demonstrated a lack of effectiveness of traditional preventive patrol, opening the door for innovations in policing.

- *Kansas City Preventive Patrol Experiment*
- *Problem Analysis Triangle*
- *Stakeholder*
- *Hot Spot*

A police patrol method that relies on officers walking a beat rather than riding in automobiles; this method of patrol has enjoyed a resurgence in popularity since the advent of Community-oriented Policing.

- *Foot Patrol*
- *Control Group*
- *Problem Oriented Policing (POP)*
- *Stakeholder*

An individual or a group with an interest or concern in something.

- *Stakeholder*
- *Investigator*
- *Problem Analysis Triangle*
- *Community Policing*

An early use of scientific experiments to inform police practice.

- *Foot Patrol*
- *San Diego Field Interrogation Study*
- *Community Oriented Policing (COP)*
- *Control Group*

An officer who directly provides police services to the public, as opposed to staff officers which are primarily police managers.

- *Line Officer*
- *Police Union*
- *Problem Oriented Policing (POP)*
- *Control Group*

In a scientific experiment, a group that does not receive the experimental treatment so it can serve as a baseline with which to compare the group that did receive the experimental treatment.

- *Stakeholder*
- *Line Officer*
- *Automobile Patrol*
- *Control Group*

An idea that assumes that crime or disorder results when (1) likely offenders and (2) suitable targets come together in (3) time and space, in the absence of capable guardians for that target.

- *Community Oriented Policing (COP)*
- *Kansas City Preventive Patrol Experiment*
- *Problem Analysis Triangle*
- *Problem Oriented Policing (POP)*

A policing reformer known as the "Father of Problem-oriented Policing."

- *Hot Spot*
- *Herman Goldstein*
- *Investigator*
- *Problem Analysis Triangle*

A method of policing where the community and police work together to analyze community difficulties and developing customized responses to them.

- *Herman Goldstein*
- *San Diego Field Interrogation Study*
- *Problem Oriented Policing (POP)*
- *Kansas City Preventive Patrol Experiment*

A police patrol method utilizing radio technology and the speed of cars to respond rapidly to calls for service.

- *Herman Goldstein*
- *Automobile Patrol*
- *Kansas City Preventive Patrol Experiment*
- *Line Officer*

_____ is a philosophy that promotes organizational strategies that support the systematic use of partnerships and problem-solving techniques to proactively address the immediate conditions that give rise to public safety issues such as crime, social disorder, and fear of crime.

- *Police Union*
- *Community Oriented Policing (COP)*
- *Automobile Patrol*
- *Problem Oriented Policing (POP)*

Collective bargaining organizations that protect the interests of line officers.

- *Police Union*
- *Line Officer*
- *San Diego Field Interrogation Study*
- *Control Group*

An informal public gathering, usually held to address a specific topic.

- *Problem Oriented Policing (POP)*
- *Investigator*
- *Town Hall Meeting*
- *Kansas City Preventive Patrol Experiment*

A geographical area containing a high volume of criminal incidents.

- *Hot Spot*
- *Community Policing*
- *Problem Oriented Policing (POP)*
- *Stakeholder*

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8.36: CRJ 4.4. Multiple Choice Questions (18)

A cooperative program between police and schools designed to keep youth from becoming involved with drugs.

- *Crime Scene Investigation (CSI)*
- *Drug Awareness Resistance Education (D.A.R.E.)*
- *Juvenile Curfew*
- *Clearance Rate*

A person who secretly provides information to law enforcement, often in return for money or an agreement not to prosecute that person.

- *Confidential Informant*
- *Drug Enforcement Unit*
- *Crime Scene Investigation (CSI)*
- *Internal Affairs*

A specialized unit within a police department that investigates allegations of misconduct by the department's officers.

- *Juvenile Curfew*
- *Internal Affairs*
- *Confidential Informant*
- *Drug Enforcement Unit*

The idea of keeping a crime scene free from contamination and tampering.

- *Internal Affairs*
- *Specialized Units*
- *Mafia*
- *Scene Integrity*

Failure to provide reasonably necessary care to a child.

- *Drug Awareness Resistance Education (D.A.R.E.)*
- *Child Neglect*
- *Confidential Informant*
- *Specialized Units*

An individual actively engaged in killing or attempting to kill people in a confined and populated area.

- *Mafia*
- *Active Shooter*
- *Drug Enforcement Unit*
- *Confidential Informant*

The proportion of crimes known to the police that are solved (an arrest is made) versus all crimes known to the police.

- *Traffic Unit*
- *Clearance Rate*
- *Domestic Violence*
- *Drug Enforcement Unit*

Any subdivision of a law enforcement agency that has a mission different from patrol.

- *Vice*
- *Specialized Units*
- *Traffic Unit*
- *Crime Scene Investigation (CSI)*

An informal term used to denote 'victimless crimes' such as gambling, prostitution, and drug possession.

- *Clearance Rate*
- *Mafia*

- *Active Shooter*
- *Vice*

A component of the overall criminal inquiry process wherein evidence is collected, documented, and preserved at the location where lawbreaking took place.

- *Crime Scene Investigation (CSI)*
- *School Resource Officer (SRO)*
- *Vice*
- *Clearance Rate*

Specialized components within one or more (such as multiagency taskforces) local law enforcement agencies that focus on drug related crimes.

- *Crime Scene Investigation (CSI)*
- *Drug Enforcement Unit*
- *School Resource Officer (SRO)*
- *Mafia*

A specialized component within police departments tasked with enforcing transportation regulations and providing related services such as writing accident reports.

- *Traffic Unit*
- *Clearance Rate*
- *School Resource Officer (SRO)*
- *Confidential Informant*

A person who provides helpful information to the police.

- *Internal Affairs*
- *Clearance Rate*
- *Informant*
- *Drug Enforcement Unit*

The physical, emotional, psychological, or sexual mistreatment of a minor.

- *Drug Enforcement Unit*
- *Scene Integrity*
- *Specialized Units*
- *Child Abuse*

A law (most often a municipal ordinance) that prohibits persons under a certain age from being out in public after a certain time at night.

- *Clearance Rate*
- *Specialized Units*
- *Mafia*
- *Juvenile Curfew*

Sworn peace officers assigned to public institutes for the purposes of crime prevention and education.

- *School Resource Officer (SRO)*
- *Active Shooter*
- *Drug Awareness Resistance Education (D.A.R.E.)*
- *Juvenile Curfew*

Forceful, aggressive, or harmful behavior within the home, most often defined in terms of spouses or romantic or dating partners.

- *Domestic Violence*
- *Scene Integrity*
- *Informant*
- *Drug Enforcement Unit*

A criminal organization brought to the United States by Italian immigrants in the early nineteenth century.

- *Mafia*
- *Active Shooter*
- *School Resource Officer (SRO)*
- *Internal Affairs*

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8.37: CRJ 4.5 Multiple Choice Questions (33)

The most significant contributor to the violence in a domestic violence situation.

- *Police Brutality*
- *Automobile Search*
- *Escobedo v. Illinois (1964)*
- *Primary Aggressor*

A ruling by the SCOTUS that criminal suspects have the right to have a lawyer present at police interrogations.

- *Escobedo v. Illinois (1964)*
- *Particularity Requirement*
- *Exigent Circumstances Exception*
- *Hot Pursuit Search*

An exclusion to the Miranda warning requirements in situations where the public safety demands the police ask questions immediately, such as the location of a dangerous weapon that may cause harm to someone.

- *Knock and Announce*
- *Right to Remain Silent*
- *Brown v. Mississippi (1936)*
- *Public Safety Exception*

An exception to certain procedural protections based in the idea that the public safety comes ahead of individual liberties.

- *Affidavit*
- *Exigent Circumstances Exception*
- *Sixth Amendment*
- *Rules of Criminal Procedure*

Common law rule that police could use deadly force to stop a person known to be a offender from getting away.

- *Escobedo v. Illinois (1964)*
- *Exigent Circumstances Exception*
- *Fleeing Felon Rule*
- *Police Brutality*

A "pat down" search of a person for weapons; only lawful if the officer has reasonable suspicion to believe the suspect is armed.

- *1983 Suit*
- *Reasonable Suspicion*
- *Arrest Warrant*
- *Terry Stop*

An exception to the search warrant requirement that allows an officer to seize contraband when the contraband is seen from a place where the officer has a lawful right to be.

- *Plain View Doctrine*
- *Brown v. Mississippi (1936)*
- *Tennessee v. Garner (1985)*
- *Stop and Frisk*

Prohibited the use of torture as a means of obtaining confessions by the police.

- *Brown v. Mississippi (1936)*
- *Exigent Circumstances Exception*
- *Tennessee v. Garner (1985)*
- *Inevitable Discovery Exception*

A special type of warrant that waives the knock and announce requirement.

- *Arrest Warrant*

- *Consent Search*
- *No-knock Warrant*
- *Affidavit*

A Constitutional Amendment that contains several clauses dealing with the rights of accused persons.

- *Particularity Requirement*
- *Mere Hunch*
- *Hot Pursuit Search*
- *Sixth Amendment*

Court enforcement of some right.

- *Remedy*
- *Reasonable Suspicion*
- *Mere Hunch*
- *Automobile Search*

An exception to the exclusionary rule that allows illegally obtained evidence to be used in court if it would have been found legally anyway.

- *Tennessee v. Garner (1985)*
- *Fleeing Felon Rule*
- *Inevitable Discovery Exception*
- *Police Brutality*

A landmark SCOTUS decision in which the Court established an "inevitable discovery exception" to the exclusionary rule.

- *Knock and Announce*
- *Nix v. Williams (1984)*
- *Plain View Doctrine*
- *Exigent Circumstances Exception*

A warrantless but lawful search of premises for a person actively evading a police chase.

- *Hot Pursuit Search*
- *Knock and Announce*
- *Weeks v. U.S. (1914)*
- *Affidavit*

A written order, issued by a judge, commanding any law enforcement officer within the court's jurisdiction to take the named person into custody and bring them before the court.

- *Mere Hunch*
- *Reasonable Suspicion*
- *Arrest Warrant*
- *New York v. Quarles (1984)*

A type of search that requires probable cause as specified by the Fourth Amendment, but is exempt from the general warrant requirement of the Fourth Amendment.

- *Automobile Search*
- *Affidavit*
- *Mere Hunch*
- *U.S. v. Leon (1984)*

Comes from the Fifth Amendment's protection from compelled self-incrimination.

- *Right to Remain Silent*
- *Remedy*
- *Affidavit*
- *Weeks v. U.S. (1914)*

An intuitive feeling that a suspect is engaging in criminal activity, but no specific evidence can be articulated.

- *Police Brutality*
- *Automobile Search*
- *Open Fields Doctrine*
- *Mere Hunch*

An evidentiary standard falling between a mere hunch and probable cause.

- *Reasonable Suspicion*
- *Brown v. Mississippi (1936)*
- *Arrest Warrant*
- *Automobile Search*

A "pat down" search of a person for weapons; only lawful if the officer has reasonable suspicion to believe the suspect is armed.

- *Brown v. Mississippi (1936)*
- *Stop and Frisk*
- *Automobile Search*
- *Plain View Doctrine*

The use of force by police in excess of what is reasonably necessary to accomplish a legitimate criminal justice purpose.

- *Stop and Frisk*
- *1983 Suit*
- *Nix v. Williams (1984)*
- *Police Brutality*

A type of police search that relies on the knowing and voluntary waiver of the Fourth Amendment rights of the person being searched.

- *Inevitable Discovery Exception*
- *Automobile Search*
- *Reasonable Person Test*
- *Consent Search*

A legal doctrine holding that a warrantless search outside the curtilage of the home is not a violation of the property owner's Fourth Amendment rights.

- *Public Safety Exception*
- *Rules of Criminal Procedure*
- *Right to Remain Silent*
- *Open Fields Doctrine*

A type of lawsuit originating under Section 1983 of Title 42 of the United States Code that allows people to sue government employees for violating their constitutional rights.

- *Open Fields Doctrine*
- *1983 Suit*
- *Reasonable Person Test*
- *Arrest Warrant*

A landmark SCOTUS decision in which the Court created the "good faith" exception to the exclusionary rule.

- *U.S. v. Leon (1984)*
- *Reasonable Person Test*
- *Automobile Search*
- *1983 Suit*

A written or printed statement made under oath.

- *Affidavit*
- *Nix v. Williams (1984)*

- *Brown v. Mississippi (1936)*
- *Plain View Doctrine*

A Fourth Amendment principle that requires officers to clearly and precisely describe the place to be searched and the things to be seized in order for a search warrant application to be approved by a magistrate.

- *Reasonable Suspicion*
- *Hot Pursuit Search*
- *Particularity Requirement*
- *Exigent Circumstances Exception*

A landmark SCOTUS decision that established the exclusionary rule in federal courts.

- *Rules of Criminal Procedure*
- *Weeks v. U.S. (1914)*
- *Open Fields Doctrine*
- *Exigent Circumstances Exception*

A test of rationality based on how a typical person, with ordinary prudence, would act in certain circumstances.

- *Open Fields Doctrine*
- *Tennessee v. Garner (1985)*
- *Reasonable Person Test*
- *Fleeing Felon Rule*

A landmark SCOTUS decision where the Court invalidated a Tennessee statute that codified the fleeing felon rule.

- *Mere Hunch*
- *Hot Pursuit Search*
- *Tennessee v. Garner (1985)*
- *1983 Suit*

A common law rule incorporated into the Fourth Amendment that requires officers to _____ their identity as police officers before entering a person's home to serve a search warrant.

- *Knock and Announce*
- *Nix v. Williams (1984)*
- *Weeks v. U.S. (1914)*
- *Public Safety Exception*

Rules promulgated by the SCOTUS that govern how federal criminal prosecutions are conducted.

- *Police Brutality*
- *Public Safety Exception*
- *Terry Stop*
- *Rules of Criminal Procedure*

A landmark SCOTUS decision in which the Court established a public safety exception to the Miranda warnings.

- *New York v. Quarles (1984)*
- *Terry Stop*
- *Sixth Amendment*
- *Primary Aggressor*

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8.38: Essays

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What type of criminological data can surveys gather? For what specific criminal justice topics would surveys be the best research method? What drawbacks might you expect to encounter when using a survey to measure criminal justice topics? To explore further, ask a criminal justice research question and write a hypothesis. Then create a survey of about six questions relevant to the topic. Provide a rationale for each question. Now define your population and create a plan for recruiting a random sample and administering the survey

American Government “American Government” by OpenStax is licensed under CC BY 4.0

In which areas do you think people’s rights and liberties are at risk of government intrusion? Why? Which solutions would you propose?

- In your answer, explain why someone accused of a crime might negotiate a plea bargain rather than exercising the right to a trial by jury. What amendment might this weaken and how does plea bargaining weaken the Bill of Rights?

OR

- IN your answer, What amendment addresses privacy rights for criminal justice and describe two ways in which new technological developments challenge traditional notions of privacy, potentially weakening the Bill of Rights?

Introduction to Criminal Justice “Introduction to Criminal Justice” by Adam McKee is licensed under CC BY-NC 4.0

Describe the differences between the individual rights and public order perspective. **AND** Describe the need for a system of order maintenance within society and explain the role of law within that system.

Describe the role of each of the three branches of government in shaping the criminal justice system. **AND** Discuss the critical role of the Constitution of the United States in limiting criminal justice policy.

Explain the meaning of due process of law, and identify where due process guarantees can be found in American law. **AND** Define the Civil Rights Revolution and provide examples of case law that altered criminal justice procedure.

Explain the checks and balances that curtail the power of the courts. **AND** Explain the analogies of “layer cake” and “marble cake” used to describe federalism in the United States today.

Describe the role of legislative branch politics in shaping criminal justice policy. **AND** Explain Herbert Packer’s crime control model and due process model, giving examples of policies that would fit each.

Explain the meaning of due process of law, and identify where due process guarantees can be found in American law. **AND** Define the Civil Rights Revolution and provide examples of case law that altered criminal justice procedure.

Explain the concept of deterrence, and explain the elements necessary for it to work under rational choice theory. Additionally, explain rehabilitation as a goal of punishment, and provide an example of a rehabilitation program. Last, Explain the idea of retribution in criminal justice philosophy, and how it relates to the idea of just deserts.

Describe the doctrine of stare decisis and its impact on the American legal system.

AND Identify the various sources of law in America, and describe the nature of each. **AND** List and describe the limits placed on criminal statutes by the Constitution of the United States.

Compare and contrast the two major categories of legal defenses. **AND** Discuss the frequency and probability of success of the insanity defense.

List and describe the various steps on the criminal justice process. **AND**Describe how discretionary decisions impact case flow through the criminal justice system.

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8.39: CRJ OER CJ CH 1A Multiple Choice Questions (40)

An Amendment to the U.S. Constitution that prohibits states from violating people's due process rights.

- *Equity*
- *Police*
- *Criminal Justice System*
- *Fourteenth Amendment*

Individual rights protected by law from violation by the government.

- *Civil Liberties*
- *Adversarial System*
- *Discretion*
- *Parole*

Treating everyone the same.

- *Discretion*
- *Parole*
- *Fourteenth Amendment*
- *Equality*

A trial without a jury, in which the judge serves as the fact-finder.

- *Bench Trial*
- *Individual Rights*
- *Due Process Clause*
- *Finder of Fact*

A person (such as a judge) or a group of people (such as a jury) who are responsible for determining the facts in a trial or other legal proceeding.

- *Finder of Fact*
- *U.S. Code*
- *Equity*
- *Justice*

The several sets of agencies and processes established by governments to prevent and control crime and impose penalties on those who violate laws.

- *Due Process*
- *Due Process Clause*
- *Fifth Amendment*
- *Criminal Justice System*

A civil (rather than military) force tasked with the prevention and detection of crime and disorder, as well as many service functions.

- *Judge*
- *U.S. Code*
- *Sheriff's Deputies*
- *Police*

A complex concept involving the ideas of fairness and conformity to the law.

- *Fourteenth Amendment*
- *Rule of Law*
- *Justice*
- *Equity*

Doctrine that says evidence obtained in violation of a criminal defendant's constitutional or statutory rights is not admissible at trial.

- *Defendant*
- *Rule of Law*
- *Exclusionary Rule*
- *Equity*

Government entity authorized to resolve legal disputes.

- *Court*
- *Fourteenth Amendment*
- *Parole*
- *Probation*

Both the Fifth and the Fourteenth Amendments contain a _____ that protect people from fundamentally unfair practices by the criminal justice system.

- *Due Process Clause*
- *Prosecutor*
- *Fourteenth Amendment*
- *Bill of Rights*

The principle of government by established law rather than the will of a group or individual.

- *Exclusionary Rule*
- *Rule of Law*
- *Bill of Rights*
- *Retributive Justice*

Imprisonment is the same as _____

- *Due Process*
- *Bill of Rights*
- *Incarceration*
- *Corrections*

Instead of sending an individual to prison, the court releases the person to the community and orders him or her to complete a period of supervision and to abide by certain conditions.

- *Trial by Jury*
- *Jail*
- *Probation*
- *Defendant*

An official of the Judicial branch with authority to decide lawsuits brought before courts.

- *Jail*
- *Finder of Fact*
- *Parole*
- *Judge*

A Latin legal phrase signifying the law of retaliation, whereby criminals are punished to the same degree and kind as the harm done by their crimes.

- *Lex Talionis*
- *Criminal Justice System*
- *Sheriff's Deputies*
- *Statute*

A type of trial where a jury (usually composed of 12 citizens) decides if the prosecutor has proven guilt beyond a reasonable doubt.

- *Fourteenth Amendment*
- *Trial by Jury*
- *Due Process*
- *Finder of Fact*

A legal system of common law origin where two parties advocate opposing positions and a neutral finder of fact such as a judge or jury determines the truth in the matter.

- *Retributive Justice*
- *Adversarial System*
- *Jury*
- *Police*

The chief law enforcement officer of a county; the office originated in feudal England as the shire-reeve.

- *Lex Talionis*
- *Adversarial System*
- *Sheriff*
- *Exclusionary Rule*

A warranted punishment.

- *Justice*
- *Exclusionary Rule*
- *Court*
- *Just Deserts*

An attorney who conducts cases against criminal defendants in the name of the state.

- *Due Process*
- *Probation*
- *Procedural Justice*
- *Prosecutor*

Rights related to an individual's freedom to pursue goals without interference from government.

- *Fourteenth Amendment*
- *Parole*
- *Individual Rights*
- *Bench Trial*

A law passed by a legislature.

- *Prison*
- *Statute*
- *Defense Counsel*
- *Judge*

_____ imposes restrictions on the government's prosecution of people accused of crimes.

- *Rule of Law*
- *Incarceration*
- *Fifth Amendment*
- *Due Process*

Sometimes called procedural fairness; a synonym of due process.

- *Procedural Justice*
- *Defendant*
- *Civil Liberties*
- *Adversarial System*

An act or omission that is prohibited by law and has an associated punishment.

- *Judge*
- *A dversarial System*
- *Crime*
- *Defendant*

An institution designed for the confinement of persons found guilty of serious crimes.

- *Prison*
- *Civil Liberties*
- *Exclusionary Rule*
- *Judge*

In a civil case, the person or organization against whom the plaintiff brings suit; in a criminal case, the person accused of the crime.

- *Equality*
- *Due Process Clause*
- *Just Deserts*
- *Defendant*

Giving everyone what they deserve.

- *Criminal Justice System*
- *Equity*
- *Retributive Justice*
- *Due Process*

Sworn law enforcement officers working under the direction of a county sheriff.

- *Exclusionary Rule*
- *Sheriff's Deputies*
- *Fifth Amendment*
- *Criminal Justice System*

The freedom of a criminal justice agent to decide what should be done in a particular situation based on professional judgement.

- *Discretion*
- *Jail*
- *Rule of Law*
- *Retributive Justice*

The various methods and institutions by which society deals with criminal offenders, such as prisons, jails, probation, and parole.

- *Corrections*
- *Adversarial System*
- *Incarceration*
- *Crime*

A collection of all the laws passed by the Congress of the United States, organized by subject.

- *Civil Liberties*
- *U.S. Code*
- *Probation*
- *Rule of Law*

The group of people selected to hear the evidence in a trial and render a verdict on matters of fact.

- *Jail*
- *Sheriff's Deputies*
- *Jury*

- *Retributive Justice*

A lawyer retained for and usually specializing in the legal protection of a person accused of a crime.

- *Prosecutor*
- *Sheriff's Deputies*
- *Equity*
- *Defense Counsel*

A type of early release from prison where the parolee must abide by certain specified conditions and be supervised in the community by a parole officer.

- *Parole*
- *Fifth Amendment*
- *Police*
- *Civil Liberties*

In criminal law, the constitutional guarantee that a defendant will receive a fair and impartial trial.

- *Due Process*
- *Procedural Justice*
- *Corrections*
- *Individual Rights*

A secure confinement facility that holds persons accused of crimes and persons convicted of minor crimes.

- *Bill of Rights*
- *Prosecutor*
- *Fifth Amendment*
- *Jail*

A model of criminal justice based on the punishment of offenders rather than other goals such as rehabilitation.

- Bill of Rights
- Trial by Jury
- Judge
- Retributive Justice

The first ten Amendments to the Constitution which guarantee many fundamental rights.

- Defense Counsel
- Jail
- Bill of Rights
- Civil Liberties

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