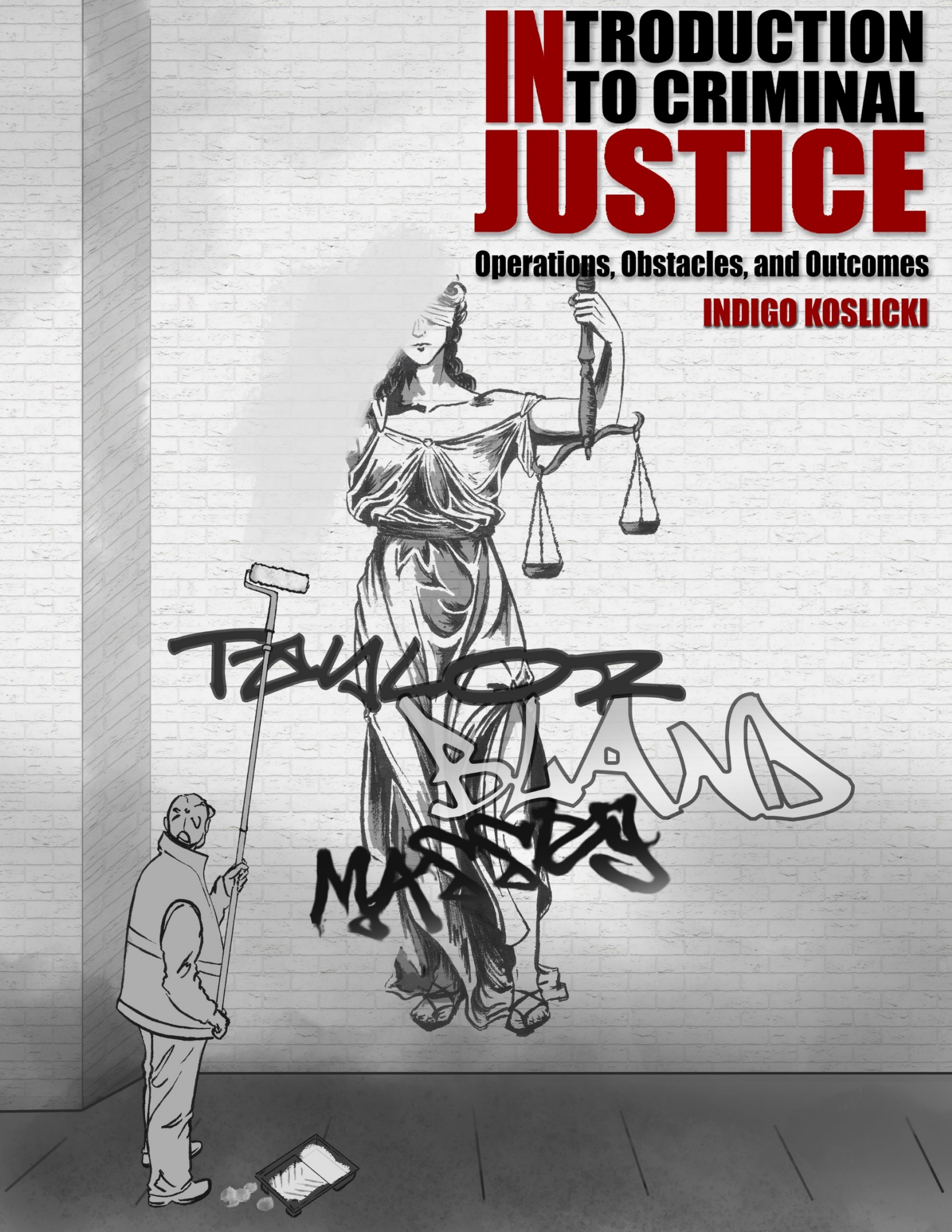
INTRODUCTION TO CRIMINAL JUSTICE

Operations, Obstacles, and Outcomes

INDIGO KOSLICKI



Introduction to Criminal Justice: Operations, Obstacles, and Outcomes

Cover art by Indigo Koslicki, 2024/2025

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About this Open Textbook

In many public universities, Criminal Justice 101 is a general education course option, since the criminal justice system is such an integral part of public life in the U.S. Even if students don't go on to become practitioners, researchers, or academics within the criminal justice field, knowing how the system works (and fails to work) is a significant part of civic education and making informed decisions when it comes to voting, volunteering, and serving the community. True crime podcasts, documentaries, and TV shows often portray an incredibly skewed and/or myopic picture of the system and cannot serve as a substitute for a solid education in the basic workings of the system.

However, in spite of the importance of a good basic grasp of the criminal justice system (and all institutions that relate to it), textbooks are often incredibly expensive and quickly outdated, given the ever-changing nature of state and federal legislation, state and federal supreme court rulings, and other notable events that trigger increased awareness of criminal justice practices and issues. To address this issue, there are a few open textbooks for introductory criminal justice courses out there, but I've found these to either lean more heavily into sociology rather than criminal justice (criminology - the study of criminal offending - comes from sociology, but criminal justice - the study of the institutions and processes of the criminal justice system - is often overlooked from many sociology-based textbooks) or not harness the full potential of an online textbook's ability to integrate video, podcast, and other media. Since I've been teaching CJC 101 for years across two different universities, I already had a great deal of materials, so writing this was just a matter of putting it all together in a way that is approachable and easy to understand for both criminal justice students and any other person who would like to learn more about the U.S. criminal justice system.

For Readers

In order to be as transparent and informative as possible, I've approached my references and citations a bit differently than a normal textbook (you will find the same format in the other textbook I have co-authored, *Injustice at the Intersections*). The open textbook format allows me to use hyperlinks directly in my parenthetical citations, so you may always click on a parenthetical (in-text) citation to read more about the source. Even for sources where the full book or article is not available online, you will be able to see its full publication information just as you would for a traditional reference, but in many cases I was able to link to the full article so you can learn more beyond this textbook. I've found that many readers tend to gloss over the references section of most textbooks, but when citations are hyperlinked, readers are more willing to see where information is sourced. Beyond peer-reviewed publications, academic books, and government reports, I always try to stick to media sources that rate as the most fact-based and the least biased according to the Ad Fontes Media's Media Bias Chart and Media Bias Fact Check tools. It is more important than ever to combat misinformation and politicized

rhetoric by using the most fact-based and evidence-based sources, and to model to readers how to find and use reliable sources. There are occasionally sources that I use that are not on these charts/fact check tools or that appear in the more "slant" or "opinion-based" categories, but I vet these based on my own subject matter expertise to ensure that the specific article I'm linking is still accurate and consistent with peer-reviewed research.

For Instructors

This textbook is published under a CC BY-NC-SA license, meaning that you may integrate it into your courses either as-is, or you may piece it apart and only share individual chapters, or you may swap things around as needed, so long as you attribute me as the original author and do not sell any revision commercially. This means you can swap out videos, documentaries, etc. to tailor to the specific learning outcomes of your course. I do ask that if you change things up, you link to this website as the original source when citing me.

If you use Canvas as your learning management system (LMS), or any other LMS that allows you to create pages using an HTML editor tool, you can use the online version of this text here: *Introduction to Criminal Justice: Operations, Obstacles, and Outcomes*, find the chapters you would like to integrate, and then go to your LMS' HTML editor and enter the code:

<iframe style="overflow: hidden;" src="https://openjusticeproject.weebly.com/chapter-1.html" width="1200" height="9000"></iframe>

(Replace the "https://..." URL with whichever chapter you are integrating) and this will embed the chapter into your LMS page. I've found that students love LMS integration to save them multiple clicks to navigate to the textbook.

If you would like to revise the open textbook content, highlight the content you would like to bring over, then right-mouse click and select "view selection source". Then copy this and paste it into your HTML editor. Everything but the media will carry over (all images in this textbook link to their original sources so you may find and re-link them, and then videos and podcasts have embed codes that you can also carry over), and then you can freely revise within your LMS page. You may also watch the video where I walk through these two options here.

To All

Please feel free to share this resource widely with your friends, family, students, and colleagues! Knowledge is the first step towards reforming our system and moving towards a more just future!

Chapter 1
History and Fundamentals of the American Legal System

Introduction

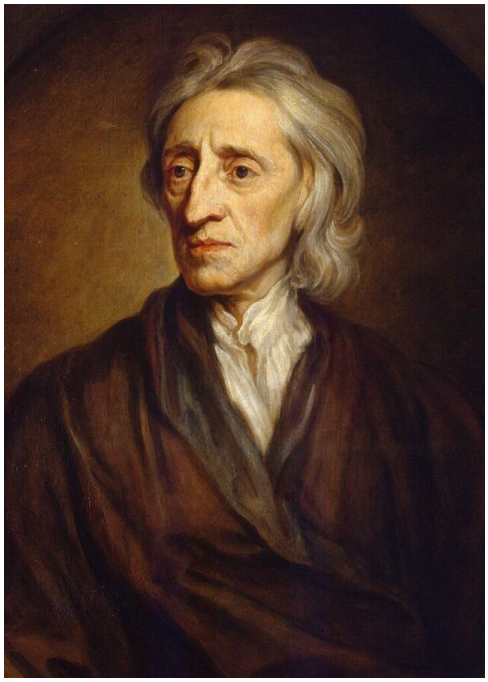
The United States criminal justice system (CJS) has undergone much evolution in the nation's history, though many roots are still shared with the U.K.'s system due to the U.S.'s colonial history. This chapter will provide a brief history of the foundations of the U.S. CJS, the philosophies underpinning its development, and how historic, political, and sociological events and movements contributed to these philosophies. We will also address the relationship between politics and criminal justice policy, and the various perspectives that many apply to the CJS, some of which have had more influence than others on actual criminal justice policy (especially depending on the time in history and the political party in power). While this will be a very brief overview of a whole lot of history, it will help to set the foundations for why our system is the way it is, and what different events and ideologies underpin the process (both its functions and its problems).

Consensus or Conflict

Consensus Theory

Multiple European philosophers are influential in the shaping of the U.S. criminal justice and legal systems. The first of these was **Thomas Hobbes,** an English philosopher from the late 1500s-late 1600s, who was one of the first to conceptualize **the social contract.** Social contract theory essentially states that citizens of a government enter into an agreement (i.e., contract) with their government to abide by the government's authority in order for the government to essentially protect society from the worst version of themselves (Aderibigbe, 2015). Hobbes did not have a rosy view of human nature; he is known for saying that life without the rule of law (and a government to enforce these laws) would be one of "continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short" (Hobbes, 1651, p.i. xiii. 9 Links to an external site.). Essentially, his belief was that humans are prone to selfishness and react to fear with violence, and thus any society will need a powerful government that is capable of reigning in human nature. Since, according to Hobbes, humans are both selfish but also rational, citizens of a society -- knowing that they will live in constant fear of their neighbors without any higher authority that creates and maintains rules -- consent to surrendering absolute freedom in return for the protection and security provided by this higher authority, the government (Aderibigbe, 2015). The consent inherent to the social contract does not have to be expressly given, however; by living within society, an individual gives their inferred consent (Locke later calls this "tacit consent") to abide by the government's rules and authority. Failure

to abide by the government's rules and authority meant a violation of the social contract and thus a temporary or permanent (depending on the degree of violation) removal of the protections granted by society. Ultimately, Hobbes saw the government as absolute and that it must be obeyed at all times, since the alternative in his mind was essentially a *Mad Max*-style post-apocalyptic wasteland.



"Portrait of John Locke" by Godfrey Kneller (1697)

John Locke, an English philosopher from the mid-1600s to early 1700s, took the idea of **consensus theory** but divorced it from Hobbes' view of the absolute rule of law. Locke was one of the most pivotal figures of the Enlightenment, a western philosophical movement that emphasized reason, science, and Liberalism [L*iberalism* as in liberty, equality, and civil rights, not political liberalism as we understand as a counter to political conservatism] and was a foundational ideology that informed America's founding fathers. Locke, in his *Two Treatises of Government*, asserted that a nation's government requires the consent of the governed (citizens) in order to be seen as *legitimate* (i.e., in order for citizens to largely abide by its authority; the concept of *legitimacy* will pop up again a lot when we discuss the policing institution) (Dunn, 1967). Essentially, the majority of the people in a nation will consent to give up some of their rights and freedoms in order to secure a government that will protect them; however, if this government unjustly threatens citizens' lives, it loses legitimacy and therefore has no right to authority (Dunn, 1967). You can start to see why Locke was a popular figure for America's founding fathers to draw on when constructing the U.S. political system: Locke's philosophy emphasized individual rights and limited government, and recognized that a government could lose legitimacy if it failed to protect rights.

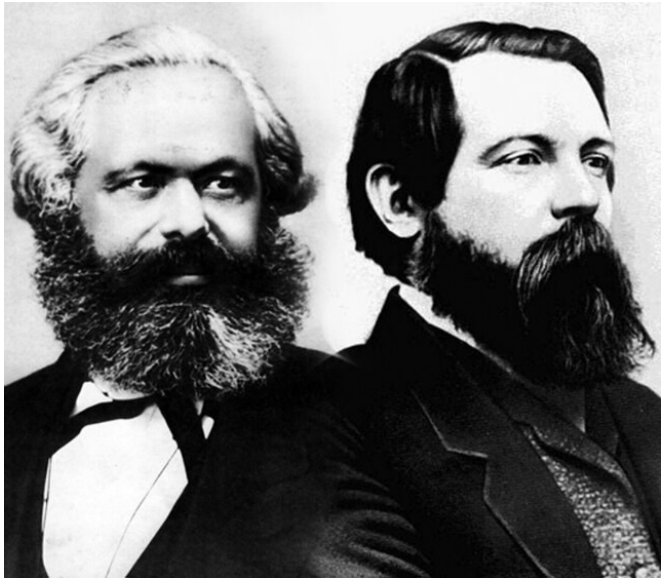
Relating this to the criminal justice system, consensus theory essentially argues that the majority of the general public will dictate criminal justice policies (Chamlin, 2009). While the United States is a mixture between a representative republic and a direct democracy (i.e., citizens vote for representatives who hopefully reflect their views, but also vote directly on some initiatives, bills, and offices, depending on the state), consensus theory would say that the will of the populace is still reflected due to the government's legitimacy being established through the consent of the society's residents.

However, have all people in the U.S. been able to have a say in the structure and policies of the U.S. government and CJS? Even the most cursory glance at the history of the transatlantic slave

trade and post-emancipation Jim Crow laws shows us this isn't the case, which is why we need to examine an alternative understanding of the creation and structure of government.

Conflict Theory

Another notable Enlightenment philosopher, **Jean-Jacques Rousseau,** approached the concept of the social contract with quite a different perspective. His interest in his seminal work, *The Social Contract*, was to theorize the best form of government where citizens would still remaining "as free as before" (Simpson, 2006). While at first glance Rousseau's *The Social Contract* seems very similar to Hobbes' approach (in that Rousseau also believes that humans are motivated by self-love and therefore agree to a government to ensure equity and protection), Rousseau was a critic of Hobbes because Rousseau believed that in their natural state, humans had equal access to an abundance of resources and thus little chance for conflict - it's only when population grew to a point of resource scarcity that humans came together as a society and unequal class structures were born (Hoffman, 1963). Essentially, while Hobbes saw humans as inherently evil, Rousseau saw humans as inherently neutral but driven to violence due to external factors. Even though that seems like a small difference in philosophy, this has major implications for one's view of a perfect government: Hobbes wanted complete authority granted to the government to use force to keep inherently evil citizens in line, while Rousseau wanted the government to grant security to all citizens through a focus on removing the root causes of conflict (i.e., resource scarcity and inequality) (Hoffman, 1963). Essentially, Rousseau saw Hobbes' ideal government as inevitably turning to tyranny, and was concerned that the unequal distribution of power and resources is what leads to conflict.



Karl Marx and Friedrich Engels; photos from the public domain

Taking the idea of conflict further in the 19th Century, **Karl Marx** and **Friedrich Engels** advanced conflict theory as we know it today. Noted for their *The Communist Manifesto,* Marx and Engels observed an extreme divide between the ruling class and laboring class in many countries in Europe, where the wealthy ruling classes (the **bourgeoisie**) owned the results of the labor of factory workers (the **proletariat**) following the Industrial Revolution. Rather than a thriving middle class of artisans and tradesmen benefiting directly from selling the goods they produced, Marx and Engels saw factory owners benefiting from the labor of factory workers, who could no longer enjoy selling their wares but instead received a low wage from the factory workers, who were able to profit off the sale of

the proletariat's product. While Marx and Engels were focused primarily on the economy, sociologists and criminologists later applied their theory to criminal justice, arguing that those in economic, political, and/or social power will pass or support laws that enable them to maintain their power, and that prevent the proletariat (or other perceived threats to the status quo, such as people of color or immigrants) from obtaining more power. Criminological theories that align with this perspective are known as **critical theories** and will be discussed more in Chapter 3.

Establishment of the U.S. Government System

While some historians and theorists argue that Rousseau was also pivotal in shaping the U.S. founding fathers' idea of an ideal government, most believe that Locke was the most influential of the philosophers we've covered in this chapter. However, to really understand the foundation behind the U.S. criminal justice system, both in its early days and the present time, we need to go back a bit further in U.S. history to the colonial era, particularly the main beliefs of early colonists as compared to the beliefs of the founding fathers.

Puritans vs. the Enlightenment

Early colonists to North America were largely Puritans, who were a minority sect of English Protestants who had more fundamentalist beliefs than the Church of England. Puritans, like the Church of England, believed in Calvinist theology (which - among other things - taught that humans are totally depraved and only a small "elect" are predestined to spiritual salvation), but thought that the Church of England still retained too many practices that were similar to the Roman Catholic church. They initially tried to press for England to adopt their preferred reforms, but many grew tired of waiting and began to attend their own church services separate from those of the national church, which was illegal in England at the time (Bremer, 2009). Because this was illegal, several notable Puritan Separatists were persecuted, leading many to flee to other countries, including the Americas in the 1600s (Bremer, 2009). It should be noted that - while it is accurate to say that they were fleeing religious persecution for their beliefs - they were not attempting to separate church from state, but rather were working towards convincing the country of England adopting their own religious practices and interpretations. When that failed, they left in the hopes of practicing their religious beliefs and allowing these beliefs to govern law elsewhere.

In the Puritan-majority colonies in the U.S., much colonial law was indeed driven by Calvinist interpretations of Protestant Christianity (Christianity as a religion is not only largely divided between Protestants and Catholics, but Protestants themselves are divided among different theological interpretations, such as Presbyterians, Lutherans, Methodists, Baptists, and others). Colonialists brought from England their understanding of **English common law,** which was essentially the legal code of England that was commonly practiced and enforced. English

common law differentiated between serious crimes (what we call felonies) and minor crimes (what we call misdemeanors), a very truncated trial system (grand juries but no defense attorneys or prosecutors), and had a constable that assisted in catching suspected offenders (but did not carry out investigations) (Friedman, 1993). The Puritan colonial spin on English common law was a theocratic - far from democratic - application of their religious belief system to the legal code. Alternative belief systems were criminalized, as well as many other morality offenses such as blasphemy, not observing the Sabbath, adultery, sexual immorality, and other religious offenses outlined in the Old Testament (such as the book of Leviticus) (Friedman, 1993). Because there was no distinction between moral/religious sins and crimes, the common law distinction between serious crimes and minor crimes was blurred, and while there was some belief in forgiveness and rehabilitation, the death penalty was often used for offenses that called for death in Leviticus up until the 18th Century (Friedman, 1993).

Much of what informed the Puritan approach to the government, outside of literal interpretations of books of the Bible, was also the belief in the nature of humanity as being totally depraved - that is, bent towards sinfulness and hurting others. If you recall from our earlier philosophers, this aligns with Hobbes' assertion that humans, left to their own devices and without an absolutely powerful government to rule them, would make life "nasty, brutish, and short" for one another. A strong hand of government force, according to both Hobbes and the Puritans' belief system, was necessary to keep citizens in line, and also required full and total obedience from these citizens.

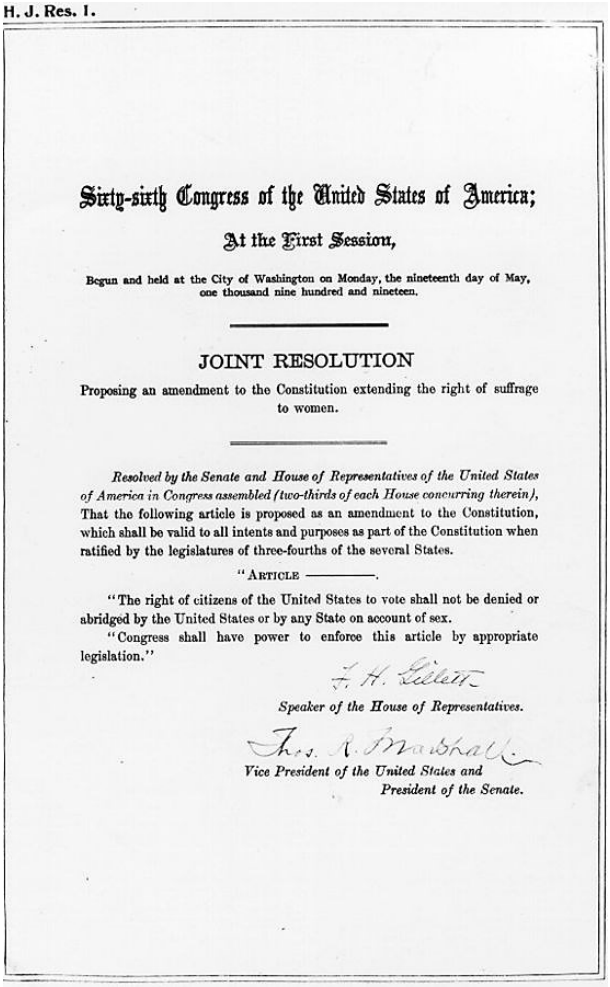
Not all colonies were majority-Puritan, and some enjoyed more religious diversity, particularly with the spread of the Enlightenment in the late 17th and 18th Centuries. Notable Enlightenment thinkers were deists (people who believed in a higher power but did not always subscribe to a specific religious system) who emphasized human reason rather than human depravity (such as John Locke). When designing the U.S. political system, the founding fathers therefore emphasized unalienable (i.e., inherent and cannot be removed) rights to life, liberty, and property, particularly for the courts system. They recognized a human bent towards amassing power - hence their separation of the U.S. political system into three powers: the **executive branch** (the president), the **legislative branch** (Congress), and the **judicial branch** (the Supreme Court) - but also assumed human nature to be consensus-oriented and rational enough to protect against abuses. This is why in modern times, recent controversies have arisen regarding the life-long terms of Supreme Court justices and presidential immunity from criminal liability and prosecution while in office.

Keep in mind, however, that the U.S. Bill of Rights was not applied to individual states until 1833, through the **incorporation doctrine** via the Due Process Clause of the **14th Amendment.** This meant that initially, heavily Puritan-populated and governed states still operated largely off of their religious legal code because the U.S. Bill of Rights only restricted *federal government* actions and did nothing to limit *state and local governments.* The founding fathers, while wary of possible tyranny from a federal power, were initially tolerant of concentrated state power

(Friedman, 1993). Fast forwarding to modern times, the incorporation doctrine has now applied the Bill of Rights to state and local actions, meaning all lower courts need to abide by U.S. Supreme Court interpretations, and all state legislation must still be in line with U.S. Congressional acts (we will discuss these processes later on). Additionally, regardless of whether Enlightenment-inspired thinkers approached the nature of humans as being neutral and rational, or Puritan-inspired thinkers approached human nature as inherently evil, both groups saw criminal activity as a deliberate choice with little acknowledgment of social and economic factors that could increase the likelihood of offending, and with much disagreement about which crimes were considered ***mala in se*** (evil in and of themselves) or ***mala prohibita*** (considered bad because the majority decides to prohibit the activity). We'll expand more on this in our perspectives discussion later in the chapter.

Consensus of Some, Not All

Since the Bill of Rights was not initially incorporated into individual states' laws, not only were religious-based laws and criminal codes the norm, but there were many opportunities for state and local governments to exclude large populations from having a say in government structure and function. Enslaved people, especially enslaved Black people, were considered property - not persons - and thus entirely exempt from the conceptualization of unalienable rights and liberty, even after the application of the incorporation doctrine to states. The **Three-fifths Compromise** is an example of slave-holding states using enslaved people to their advantage with no actual return of representation for Black people: enslaved people were counted towards a state's total population in the rate of every 3/5ths of all non-free persons, in order to increase the number of seats in the U.S. House of Representatives (Finkelman, 2001). While called persons in this compromise, enslaved people were not granted the rights that were considered unalienable to every human, and the increase in Representatives that the compromise granted these states only led to further



H. J. Res. 1.

Sixty-sixth Congress of the United States of America;

At the First Session,

Begun and held at the City of Washington on Monday, the nineteenth day of May, one thousand nine hundred and nineteen.

JOINT RESOLUTION

Proposing an amendment to the Constitution extending the right of suffrage to women.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States.

"ARTICLE ———.

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

"Congress shall have power to enforce this article by appropriate legislation."

F. H. Gillett

Speaker of the House of Representatives.

Thos. R. Marshall

Vice President of the United States and President of the Senate.

The 19th Amendment of the US Constitution, photo in the public domain

exploitation of enslaved people. Enlightenment ideals of consensus of the governed only benefited a portion of U.S. residents, in a way that conflict theorists would say benefited the "haves" while continuing to repress the "have-nots".

Women were also excluded from this equation until rather late compared to other Western democratic societies, and even then, the **19th Amendment** did not apply to all women of all racial/ethnic backgrounds (Schaeffer, 2020). If a woman married a non-U.S. citizen (such as an immigrant or Native American), she also lost her citizenship according to some states' laws, all the way up to 1907 (Smith, 1998). This is not even touching the history of colonial/U.S. government treatment of Native Americans, but suffice to say, there were large numbers of people in the U.S. that were completely left out of (and outright excluded from) the consensus equation. It was not until the 1960s and 1970s that theorists - able to find a voice due to the Civil Rights Movement - started revisiting conflict theory as a viable explanation for persistent inequities in the U.S. political, legal, and criminal justice systems. As we go through this course, we will touch on the disparities in the CJS and historic and modern discriminatory practices. By **disparities,** this means that criminologists examine differences in statistical outcomes that fall along group membership (e.g., race, ethnicity, gender, gender identity, sexual orientation, etc.). A disparity may not be due to actual biased motivation by policymakers or practitioners, but it still signals that we need to look deeper to see what's going on to cause those disparate experiences. By **discrimination**, this means either the explicit or implicit treatment of a person or group differently based on that person's membership to that group identity. Discrimination may also occur due to policies and practices within an organization or broader institution that are known to create disparities but are still put into practice. The term you've likely seen a lot in the last several years, ***systemic racism,*** gets to this concept by referring to institutional policies and practices that still cause racially unjust outcomes, even when the *individuals* within that institution aren't being racist. We'll talk about a number of these policies throughout the course.

Politics & Policy

You may be wondering at this point why the first chapter of an introductory *criminal justice* text is so heavy on political theory and history, but hopefully you're also starting to see how they're so closely intertwined. From the very start, crime and the functioning of the legal system has been dictated by political (and as we mentioned, religious and cultural) ideologies, many of which are in conflict with each other. The U.S. is unique in that it is a democratic nation with only two major political parties (most other democracies have much more), so bills that define criminal justice policy will largely be passed by whichever political party holds the majority in Congress (both at the federal level and at individual state levels, since most states' bill passage systems closely mirror that of the U.S. Congress). At the executive level, executive orders that affect federal law enforcement will likely reflect the president's party affiliation, and many

pivotal criminal justice roles - such as the attorney general (director of the Department of Justice) and U.S. Supreme Court Justices - are appointed by the president. Even at the local level, the political climate may determine who is promoted, hired, fired, and appointed (for example, the mayor generally appoints the local police chief, which can lead to corruption if the reasons are due to political benefits/connections rather than merit). Some states also require partisan voting for criminal justice positions like judges and coroners, and elections for sheriffs are nearly always partisan.

Research-wise, every policy decision that is studied and/or recommended will have political implications, given the power dynamics of who is in government roles and who is often targeted by the criminal justice system. Laws and polices that criminalize and/or disenfranchise groups of people will maintain and deepen this power dynamic. We cannot have a deep conversation about specific laws and policies without avoiding the topic of power dynamics and (often) specific politicians/political parties that support or oppose these laws, so be warned that – while the purpose of this text is never to try to sway your vote or heap hate on a specific politician or party – this text will address issues that are politically volatile (especially in a very politically divided time).

The Seven Criminal Justice Perspectives

Political ideologies, religious views, cultural views, and philosophies (all of which tend to overlap and inform each other) will also dictate how policy-makers (e.g., legislators, representatives, executives), practitioners (people working within the criminal justice system), and other decision-makers (e.g., the judicial branch) view the *goals* of the criminal justice system. Earlier in this chapter, we've discussed how beliefs about human nature (whether intrinsically evil or intrinsically neutral) can dictate one's view of an ideal government, and how beliefs about consensus versus conflict can dictate one's understanding of why people commit crime. There's a reason we covered some early colonial/post-Revolution history, since these ideas are still quite prevalent today, and inform the seven main criminal justice perspective. Keep in mind that some of these might overlap or pair well with each other; however, others are directly contradictory to each other.

While reading through, think about the perspective(s) that you align with the most, as well as how different the different perspectives might be more supported or more opposed by different political parties. This will give you some insight into your own approach to the CJS, as well as just how integral the political system is to the history and modern-day functioning of (and issues surrounding) the U.S. criminal justice system. However, it is always important to keep in mind that criminal justice and criminology is an applied social science discipline, meaning scholars rely heavily on conducting research to make criminal justice practices evidence-based. *Ideally*, every criminal justice policy should be informed by scientific evidence and not one's own ideological perspective. However, due to the political nature of our criminal justice system, you

tend to see personal/political perspectives informing policy rather than evidence informing policy. As future criminal justice practitioners, scholars, and voters, it's important that you constantly check your own perspectives and beliefs against the current research, and are aware of how to suss out good research compared to that using shoddy methods (more on that in Chapter 3).

Due process

The **due process model** is one of the foundational models of the founding fathers' conception of government and the legal system. It holds that the suspect/accused person is innocent until proven guilty and that the court system should be an **adversarial process**, like an "obstacle course" that must be run through completely before the suspect is convicted after the state (represented by the prosecutor) proves "beyond a reasonable doubt" that the suspect is guilty. This model also holds that criminal justice practitioners should have limited **discretion** (the authority to make decisions) so that individual civil rights aren't accidentally violated (Rich, 1977).

One could say that the due process model is an idealization of the concept of Liberalism (the emphasis of rights and civil liberties) and is immediately informed by the Enlightenment ideas of Locke: a belief that the government serves the people, rather than a belief that the people should obey the absolute authority of the government (what Hobbes argued). While the 14th Amendment protects due process rights, many court decisions and other developments of policy and practice over the years have evolved the CJS into a more "assembly line" model (see below) than an "obstacle course" (for example, later we will discuss plea bargaining, which is the opposite of an "obstacle course" or adversarial process). However, the **Warren Court** (the era of the U.S. Supreme Court where Justice Earl Warren was chief justice, between 1953-1969) is a good example of a period of U.S. political and criminal justice history where due process rights were emphasized, leading to a major strengthening of civilian rights and emphasis on the rights of marginalized groups (particularly people of color), and - conversely - a further limitation of the actions that government actors, such as the police, could do (Horwitz, 1993).

Crime control

The **crime control model** is seen as the conceptual opposite to the due process model, in that it emphasizes efficiency in processing suspects through the criminal justice system, rather than the "obstacle course" brought about by the adversarial process of the courts (some call the crime control model an "assembly line" rather than an "obstacle course" for this reason). This model emphasizes giving *more* discretion to criminal justice practitioners like police officers (Rich, 1977). Because the priority of the crime control model is to suppress criminal activity (and behaviors that are later categorized as crimes or seen as *criminogenic* - potentially leading to crime), one could say this model is more of a reflection of Hobbes' ideas that the government

should be an absolute authority, and that citizens will inevitably commit crimes without a strong arm of government to keep them in line.

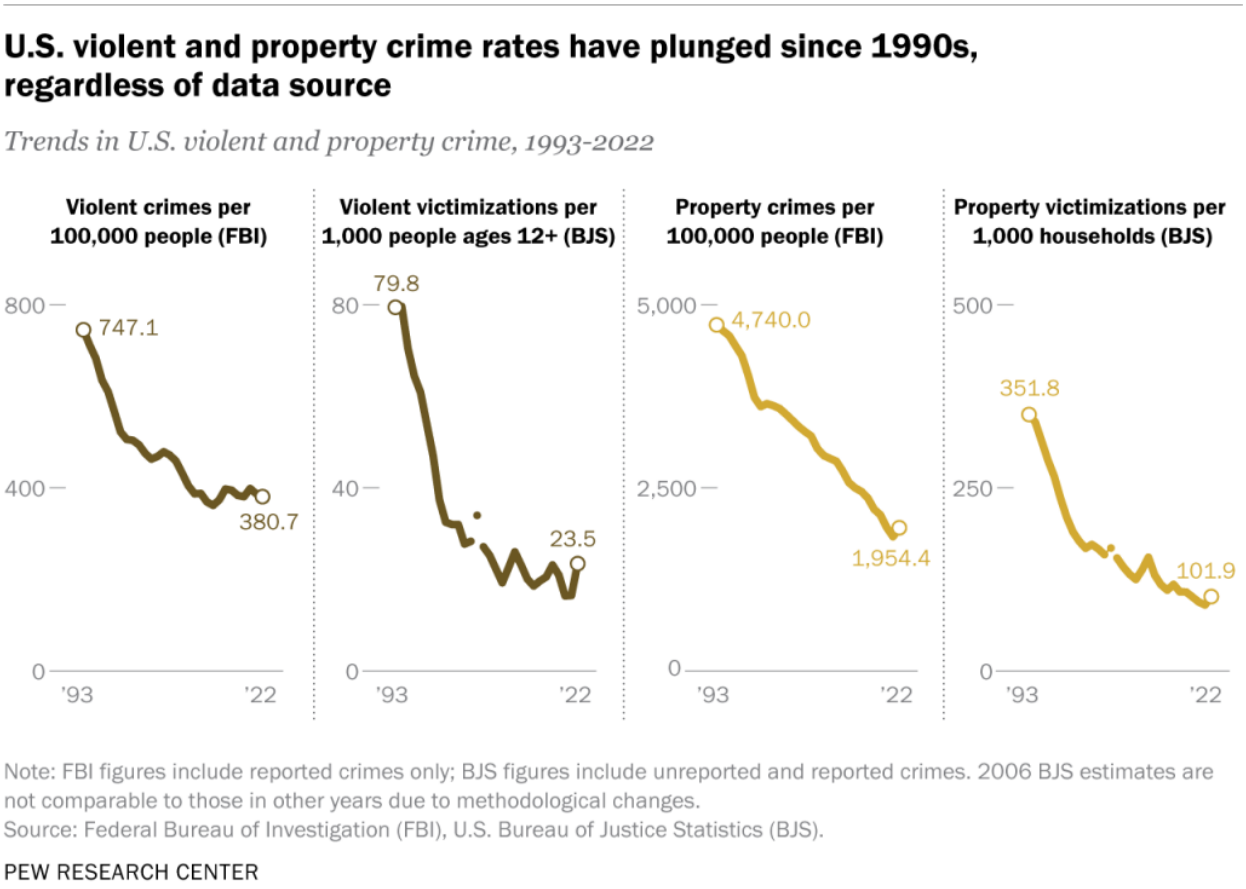


Chart illustrating violent and property crime rates from 1993-2022, in "What the data says about crime in the U.S." by Pew Research Center, Washington, D.C. (2024)

The crime control model is often favored more by political conservatives than political liberals in the United States, though there have been some notable historic exceptions. For example, President Lyndon B. Johnson, a liberal Democrat president, declared a "war on crime" in 1965, which granted far more discretion (and military gear) to law enforcement and changed sentencing laws to be harsher on offenders (Hinton, 2015).Later in the 1990s, Democrat president Bill Clinton fueled the Nixon and Reagan "war on drugs" with the 1994 Crime Bill, which significantly "widened the net" (increased the number of people entering into the criminal justice system by criminalizing more behaviors or using police to address non-criminal activity) in the name of suppressing criminal activity (Eisen, 2019). Because citizens tend to perceive higher crime rates than what's actually occurring (media fixations on violent crimes and the cultural obsession with true crime doesn't help matters), politicians of the 1990s and 2000s generally didn't want to appear "weak" on crime and would often appeal to desires to be

"tough on crime" in order to gain votes (Gramlich, 2024; Beckett & Sasson, 2000). Unfortunately the brief rise in homicides in 2020 (violent crime is now decreasing again since 2022) has prompted a new trend towards appealing to "tough on crime" rhetoric again (Hernandez, 2024).

Incapacitation

The **incapacitation model** overlaps with the crime control model, but emphasizes a preference towards prisons as the main form of punishment. Again, thing of Hobbes' version of human nature informing his ideas about the need for an authoritarian government, and how a violation of the "social contract" should be met with harsh punishment and removal from society (and how this also overlaps with Puritan ideas of sin, crime, and their response). Examples of incapacitation-informed policies are policies like **three-strikes laws,** which carry long prison sentences (including up to life in prison) for the third offense committed by the same person - these additional offenses may be required to be felonies by some states' laws, but others, such as the California three-strikes law (repealed in 2012), required a life sentence for the third offense regardless of whether it was serious or violent (Stanford Law, n.d.). Another example would be the rise in juvenile life without parole (JLWOP) sentences and transfers of juveniles to the adult court system in reaction to the "juvenile superpredator" moral panic in the mid-1990s (a few major cases of violent crimes committed by juveniles were amplified to create mass panic that young people, especially boys of color, were beyond rehabilitation and reform) (EJI, 2014).

While some may only prefer incapacitation in the cases of very violent serial offenders (for the record, in spite of the U.S. cultural obsession surrounding serial killers, they are incredibly rare (Mello-Klein, 2023)), the incapacitation model generally supports long sentences for even non-violent offenders, such as people found in possession of marijuana during the war on drugs. Later we will discuss the large amount of resources that are needed to maintain and run prisons, as well as the difficulties facing offenders upon release. While incapacitation through incarceration will remove convicted offenders from society for a period of time, the issue is far more complex than it seems, and many questions need to be asked, such as: are these laws an accurate reflection of research? Is enforcement and conviction equal across offenders' racial/ethnic demographics and socioeconomic statuses? Which criminal violations should be seen as prison-worthy and which should be considered lower-level offenses punishable through fines or other minor sentences? What are the resources needed to house inmates? How should offenders be reintegrated back into society following release? We will cover many of these in later chapters.

Rehabilitation

The **rehabilitation model** emphasizes treatment of offenders to address the underlying causes of crime, so that offenders don't **recidivate** (commit a new crime). While at first glance this perspective seems to align with Rousseau's perspective that crime often arises due to conflict over resources, the rehabilitation model has historically been informed by a mixture of religious

concepts (for example, the "reformatory" model of corrections that will be addressed later on), philanthropic ideas applied to poorer people by people in wealthier classes, and junk science that attributed criminal behavior to explanations like "hysteria" or "feeblemindedness" (Rafter, 1995). This is not to say that rehabilitation is always a bad perspective, but instead that it is ***essential*** to research rehabilitation theories and programs ethically in order to ensure that they are evidence-based and not creating disparities among marginalized groups. Take, for example, the infamous rise in the popularity of lobotomies as a "treatment" for socially undesirable behaviors in the 1940s and 1950s: many victims of this popular but completely understudied practice were women who were lobotomized to make them more "compliant" (Tone, 2018). While research methods are much more regulated (university affiliated researchers must be approved by an internal review board that ensures protections are in place for test subjects, and any medication for treatment has to pass the rigorous Food and Drug Administration [FDA] review process), the modern problem now is ensuring that all members of marginalized groups have the same *access* to evidence-based rehabilitation programs (Jaffe & Jimenez, 2016).

Restorative Justice

The **restorative justice model** is a much more accurate reflection of Rousseau's ideas about resource scarcity leading to conflict (and thus crime), as it believes that the primary goal of government discipline should be to make the offender realize the harm they've done to the community, and that **reintegration** into the community should be a major goal of the CJS. Rousseau, however, was not the foundation of the restorative justice model, which actually comes from many indigenous traditions which operate in a much more collectivist (society working for the common good of all) way than an individualistic way (society emphasizing individual liberties, like the U.S.) (Fosse, 2020). Those that hold to a more restorative justice perspective (as well as a rehabilitation perspective) believe that offenders will recidivate because, in general, we don't do a very good job of preparing offenders for reintegrating into society after their release from prison. Facing unemployment, poverty, homelessness/housing insecurity, potential addiction issues, a lack of social skills or job skills, and so on, an offender may turn back to criminal offending. Restorative justice advocates call for more emphasis to be placed on addressing the needs and issues that offenders have so they can learn to better reintegrate into society. Part of this includes making the offender realize the ways in which they have harmed victims or the community, and finding ways in which the offender can make amends.

Politically, it can sometimes be difficult to motivate voters to support rehabilitation and restorative justice policies that seek to help offenders, especially those who've committed violent crimes. This perspective is certainly one where there is a rather clear political divide between conservatives (who tend to prefer an emphasis on personal responsibility for criminal offending) and progressives (who tend to prefer collectivism and government funding for social programs and institutions so that housing insecurity, poverty, addiction, and other destabilizing social problems are addressed).

Nonintervention

The **nonintervention** perspective believes that there are many crimes that are *mala prohibita* (remember, these are behaviors that are prohibited because some segment of society dislikes them, as opposed to *mala in se*, which are behaviors that the majority of society thinks are inherently evil), and that our current CJS punishes far too many behaviors and leave former offenders with an unfair stigma (for example, a person with a record of marijuana possession faces the stigma of having to disclose that they've been convicted of a felony on a job application). Nonintervention can take three main forms:

- **Deinstitutionalization/Decarceration** - a focus on removing nonviolent offenders from prison and de-prioritizing prison as a response to non-violent offenses
- **Diversion** - a focus on directing nonviolent offenders to informal community programs rather than the formal CJS
- **Decriminalization** - a focus on reducing the penalty for a criminal act to a lower-level offense (such as a fine)

Full legalization (different from decriminalization in that decriminalization still carries a penalty, whereas legalization makes the activity fully approved) may also be an approach by noninterventionists, such as growing movement across states to legalize marijuana for recreational or at least medical use. Because the nonintervention perspective tends to focus mainly on nonviolent crimes, it often overlaps with the other models discussed here, as someone may prefer nonintervention for nonviolent crimes but another model for violent crime types. However, overall this perspective can reflect the recognition by some conflict theorists that some behaviors are only defined as "crimes" in order to repress the people who most often engage in these activities, and/or to profit off imprisoning non-violent offenders (such as through prison labor).

Abolition

The **abolition** approach is the most directly aligned with conflict/critical theories, as it sets out to upend structures that are seen as perpetuating systemic inequalities and injustices. Abolition may refer to abolishing a specific *practice* within the CJS, such as the death penalty, or may refer to abolishing an entire *institution* (policing, courts, or corrections) within the CJS. There is also a spectrum of views within that latter category (e.g., abolishing prisons but still retaining temporary holding facilities for the most violent offenders, or abolishing police as they are currently organized but retaining a public safety model with a unit of armed responders). While abolition is sometimes offered as a reform recommendation by some scholars and activists, it is not a common practice in the United States, given the longstanding reliance on more punitive policies surrounding punishment and the need for collectivist action (i.e., community violence prevention groups are needed to enhance a public safety model with fewer police). Abolishing

specific *practices* is becoming less controversial, especially with the opposition to the death penalty becoming closely aligned with left-leaning voters.

Abolishing an entire institution within the CJS would require much research and slow implementation so as not to create a vacuum in the system. For example, research of developing and post-conflict nations shows that an immediate removal of police often leads to organized crime groups and militias filling the vacuum to provide "security" to citizens (for a price) (Ezrow, 2017). This means that if abolition at the local level were to work, a much slower process would need to take place to ensure that alternative public safety measures were already up and running to prevent the security vacuum from happening. Some cities across the U.S. have experimented with this model (Ferner, n.d.), but it is definitely a one-size-fits-one process (i.e., tailored to the specific needs, resources, and culture of the city/town) rather than a one-size-fits-all process.

Conclusion

No discussion of the U.S. criminal justice system is complete without a bit of sociopolitical and philosophical/religious history, since these are all so intertwined from the beginning of the colonial era to the present-day. While we've addressed some of the main perspectives, we'll go into much further detail in Chapter 3 about how some of these perspectives have been informed by theories that can be examined through the scientific method (which also helps us to see that not all theories are created equally; i.e., not all theories hold similar weight or veracity, especially those that were specifically formed to advance pseudo-science or scientific racism/misogyny). Before we get to that though, it's important to set out the fundamentals of our modern CJS, which we will examine in the next chapter.

Chapter 2
Elements of Law, Crime, and the Criminal Justice System

Introduction

Last chapter you got a nice dosage of history and philosophy; this chapter, you'll learn more of the applied workings of the legal and criminal justice systems. There will be a lot of Latin terminology, as well as a whole lot of new terms as we walk through the criminal justice system (CJS) flowchart. Try not to get overwhelmed, as we'll revisit these a lot throughout the rest of the text. However, it's important to address them now so you have a bird's eye view of how everything works together before we zoom in and explore each CJS institution - the police, the courts, and the corrections system - individually.

Types and Levels of Law

Criminal vs. Civil Legal System

One of the first foundational concepts of criminal justice is understanding the difference between the *civil* legal system and the *criminal* legal system. **Civil law** is a type of law that has to do with interpersonal private disputes, where one private citizen (the **plaintiff**) levies a complaint against another (the **defendant**); common examples include family disputes (divorce, custody, wills), contract disputes (such as a worker who thinks their employer violated their terms of employment), trusts (financial contracts), and torts (complaints about harm from the defendant's actions; we will discuss these more in a little bit) (LLI, 2022). A judge will hear the dispute in civil court, but there is no jury or prosecutor. This means that the **burden of proof** (who is required to "prove" that the defendant did what they are accused of) is on the plaintiff (the parties may have attorneys represent them, but no attorney represents the state or country like a state or federal prosecutor would). The **standard of proof** - that is, the degree of proof needed to convince the judge that the defendant did indeed do the thing they are accused of doing - is based on a **preponderance of the evidence.** This means that, based on the summary of the evidence presented, it is more likely than not that the defendant did the thing they were accused of doing. If the defendant is found guilty, the penalty is usually a monetary fine made to the plaintiff.

Criminal law, on the other hand (and the focus of the rest of this text), has to do with violations of criminal law, where the state - represented by the prosecutor, who has the burden of proof - brings a case against the defendant, who has been arrested due to the suspected criminal activity. A criminal trial may ensue (unless a plea agreement is reached beforehand, more on that later), which may include a jury. The standard of proof is much ***higher*** in that the

prosecutor must prove **beyond a reasonable doubt** that the defendant committed the crime that they are charged with. If the defendant is found guilty, the penalty is usually a sentence that includes a fine but also goes beyond it by requiring community service, probation, or incarceration.

	Civil Law	Criminal Law
Parties Involved	Plaintiff vs. Defendant	Government vs. Defendant
Process	Bench trial (judge hears case)	Plea bargain, jury trial, or bench trial (judge hears case)
Burden of Proof	Plaintiff must prove	Prosecutor must prove
Standard of Proof	Preponderance of the Evidence	Beyond a Reasonable Doubt
Penalty	Fine/compensation	Fine, community corrections, incarceration

Differences between the civil and criminal legal systems, by Koslicki (2024)

The civil and criminal legal systems are not mutually exclusive, however, especially in the realm of **torts**. Remember that torts are harms that the plaintiff alleges that the defendant has done against them; these harms can include criminal violations against the plaintiff/victim, who then sues the defendant in court for this harm. The victim could also contact the police and press charges to enable the criminal legal system to kick in. Because the standard of proof is much higher in a criminal legal trial, the defendant may not get convicted; however, because the plaintiff/victim has also sued the defendant under the civil legal system (which has a lower standard of proof), this gives the plaintiff/victim the ability to still win financial compensation for the physical, emotional, and other damages caused by the crime. For example, victims and victims' families of police brutality often bring lawsuits against the officer's law enforcement agency (qualified immunity prevents police from being sued as individuals for actions done on the job; more on that in future chapters), as it is notoriously difficult to get criminal charges against police officers to "stick" (Thomson-DeVeaux et al., 2020). A recent example is how the family of Breonna Taylor filed a wrongful death lawsuit and were awarded compensation from the city of Louisville, even though the trial against Hankison (the officer who shot and killed Taylor) was declared a mistrial (i.e., the jury could not reach a verdict) on November 2023; his new trial will start in October 2024 (Burke, 2023).

State vs. Federal Legal Codes

"How does a bill become a law?" by USA.gov – click for full size

When it comes to criminal law, there is a division between each state's laws and the federal legal system. Because the U.S. is a federal republic, each state is granted the authority to pass its own legislation that dictates its legal code, but the federal government also enforces its own criminal law under Title 18 of the U.S. Code, which includes crimes like arson, counterfeiting, forgery, espionage, trafficking, and several others (essentially any crime that crosses state borders or occurs in the sea) (LLI, 2022). The federal government can amend or revise its legal code through Congressional (the Legislative branch) action. Basically a bill is proposed in the House of Representatives or the Senate; if it passes it goes to the other chamber (so from the House of Representatives to the Senate or vice versa), if it passes again with amendments it goes back to its chamber of origin for both chambers to work out any differences, and if it passes again it will go to the President (the Executive branch) to sign into law or veto (in the case of a veto, Congress may vote to override this veto).

Each state's system closely mirrors that at the federal level, though they may have their own little differences (e.g., whether the state legislature may override a governor's veto with a simple majority or whether it takes a 2/3 vote). Because each state controls this process, there can be vast variation between states as to what is considered a criminal violation. For example, when the U.S. Supreme Court overturned *Roe v. Wade* in 2022 in their decision on *Dobbs vs. Jackson Women's Health,* the majority of justices ruled that the states should decide whether to allow abortion or ban it. This has led to a major disparity in abortion access, as some states ban abortion at conception, some allow for exceptions in cases of rape and incest and others do not,

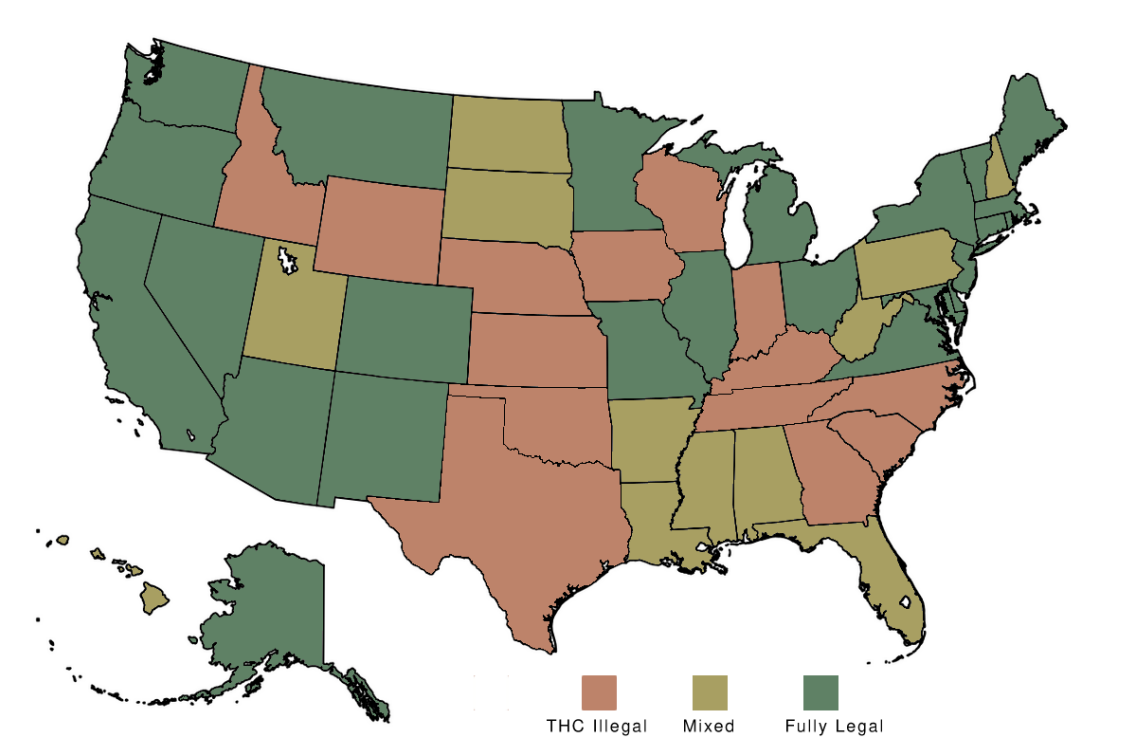
and others have different numbers of weeks where it is allowed (see a full map here by Sherman et al., 2024). To further complicate matters, some states allowed for direct citizen vote on whether or not to ban abortion, such as Ohio, whereas 24 states (including Indiana) do not allow for direct citizen-led ballot initiatives because that right is not included in the state's constitution (Ruhman, 2023).

Because the federal government has its own legal code separate from state legal codes, it also has its own court system, which mostly stays separate from the state court system until cases reach the U.S. Supreme Court (the Judicial branch), which may hear cases from both the federal and state court systems. We will discuss the structure of this dual court system in Chapter 7, but for now remember that with the separation of powers at the federal level, the Judicial branch's ideal mandate is to interpret new laws passed by the Legislative branch (whether the federal Legislative branch or a state legislature) in light of the Constitution. At the state and lower federal court level, courts rely on the legal concept of ***stare decisis***, which literally means "let the decision stand". This means that court rulings will rely on previous court decisions for similar cases (i.e., cases with similar facts or issues at hand), which is the concept of **precedent.** While the U.S. Supreme court has the power to ignore or overturn precedent in the justices' legal interpretations (more on this in Chapter 8), lower courts are expected to apply previous rulings to similar cases in order to make the justice system consistent (LII, 2020).

LOOKING FURTHER: Why can states legalize marijuana if it's illegal at the federal level?

Marijuana has been classified as a Schedule I drug by the Controlled Substances Act (CSA) since 1970, meaning that the federal legal system considers it to have a high potential for abuse and no accepted medicinal benefits, and placing it among drugs like heroin, ecstasy, and LSD (DEA, n.d.). The inclusion of marijuana into the Schedule I classification has a long and racist history predating the CSA, starting with Harry Anslinger, commissioner of the Federal Bureau of Narcotics starting in 1930, who included marijuana among cocaine and heroin as drugs to be eliminated from the U.S. Anslinger relied on unproven claims that marijuana caused violence, and also heavily emphasized the use of marijuana by Black and Latino Americans, spreading many racist myths about people of color and proclivity to violence (Adams, 2016). When the CSA replaced the 1937 Marijuana Tax Act, marijuana was ushered right into its Schedule I classification largely due to Anslinger and other propaganda supported by the Nixon, Reagan, and Clinton Administrations. Because of its classification, this has also made it incredibly difficult for scientists to study marijuana's effects using large-scale randomized controlled trials, which are the "gold standard" of scientific research, but also incredibly expensive. Essentially, scientists need government funding to carry out such resource-intensive studies, but they cannot receive this funding because of

marijuana's classification (Hudak & Wallack, 2015). Ultimately, marijuana was classified as a Schedule I drug partially based on false claims about its effects on the body (the other basis being straight-up racism), and now that it's scheduled that way, scientists are unable to conduct large-scale studies to even assess whether the medical/physiological claims have any truth to them.



A map of marijuana laws by state, as of April 2024, by Koslicki (2024); map template by Wolfson (2019)

However, starting in 2012, states started legalizing marijuana (Oregon had decriminalized marijuana use in 1973, but remember Chapter 1's discussion on the difference between legalization and decriminalization). Now as of 2024, 24 states have fully legalized marijuana, meaning that adults 21 and older may use it both recreationally and for medicinal purposes. Thirteen states are "mixed", meaning they allow for medicinal marijuana use but some have different stipulations on how much THC (the psychoactive compound in marijuana) is considered legal (Breen, 2024).

Why are states allowed to do this? Essentially, if something is illegal at the federal level, that does not *require* states to add laws to their own legal codes that outline state enforcement. States must allow federal law enforcement to come in at any time and investigate federal law violations, but states are not required to investigate/prosecute *on behalf of* the federal government. For marijuana specifically, the Department of Justice (DOJ) under the Obama Administration released the Cole Memo in 2013, essentially saying that the federal government would take on a strategy of non-

enforcement in states that legalize marijuana, except in cases where trafficking or organized violence is suspected (DOJ, 2013).

Most recently in April 2024, the Biden Administration announced plans to finally reclassify marijuana, taking it from its Schedule I status and moving it to Schedule III (deemed "moderate to low potential for physical and psychological dependence" and among other drugs such as ketamine, testosterone, and medications with less than 90 mg of codeine [DEA, n.d.]). This reclassification, while not legalizing marijuana federally, would remove government funding restrictions for further medical research and would revise how people would be sentenced if found in violation of federal drug laws. This classification would also not affect state laws, but does seem to be more in line with changing views and increasing acceptance about marijuana use nation-wide (Miller et al., 2024).

Elements and Categorizations of Crime

Elements

While there are many variations across states' legal codes, there are still consistent standards applied to the *determination* of whether a behavior is classified as a crime. These are known as the **elements of a crime**, and there are (with some exceptions) two elements that are required: ***mens rea*** and the ***actus reus.*** All crimes in states' penal codes will have various elements beyond *mens rea* and *actus reus*, but these will vary based on the specific crime and how it is defined in the state code. ***Mens rea*** refers to the *criminal intent*, meaning the intention to commit the behavior that resulted in the crime. Keep in mind that this is an intention to commit the behavior and may not be the intention to commit the actual outcome, which is why a person who is driving under the influence may still be charged with negligent homicide if they kill another driver or passenger on the road. While the person did not *intend* to kill another person while driving, they still intended to drive while intoxicated, so they are still liable for not just for the crime of driving while intoxicated, but also for the crime of negligent homicide.

The ***actus reus*** is the actual criminal act. Thankfully no one can be criminally charged just for having a thought (or else criminal justice practitioners would be in big trouble too, since to better understand a suspect's behavior you have to start thinking like one too); you have to actually act on that *mens rea* thought in order for it to be considered criminal. That criminal act also has to violate a law in place, meaning if you have the *mens rea* intent to commit vandalism, and then you go and commit the *actus reus* of spray painting a wall, but turns out that the wall was part of a community art project where public participation is welcomed, then you actually didn't commit a crime even though you fully intended to and acted on it. Your goal of starting a life of crime is foiled.

There are, however, almost always exceptions to the general rules of the criminal justice system. When it comes to the two elements of crime, the exception is crimes that fall under the category of *strict liability.* Strict liability offenses typically have to do with public safety or protection of vulnerable groups, and the *mens rea* element is not always required. For example, driving over the speed limit is still an offense, even if you were tuned out to your favorite song on the radio and had no idea you were going so fast. You did not have the *mens rea* intent, but you would still fall under a *recklessness* standard. However, there's an exception to the exception, in that some crimes that used to fall under the "strict liability" category have evolved to require further proof of mental culpability beyond simple *mens rea*, elevating the intent to *knowingly* and *willfully.* An example of this is statutory rape, where if an adult thinks the person they're hooking up with is another adult and therefore thinks that they obtained consent, but in fact the person is below the state's age of consent, the adult would have still been charged before a 1964 case (*Hernandez v. California*) allowed for "honest and reasonable" mistake of age to become a valid defense. In the ruling, the U.S. Supreme Court ruled that culpability must be proven and that a mistake of the facts is not criminal intent (Irvin, 1965).

There are also some crimes that require *mens rea* but do not require an *actus reus*, but instead require an *absence* of action. These are called negligent offenses, where the person chose *not* to act when they should do an action to stay within the law. An easy example would be that of gross negligence from a parent towards their child, where a parent *voluntarily* chooses (thus they have the *mens rea*) to withhold necessary care (e.g., food, clothing, a place to sleep, medical care, etc.) from their child. By failing to act the way they *should* act towards their child, the parent is criminally liable.

Categories

State laws will also define the level of seriousness of crimes, based on a mix of determinations of risk, violence, harm, and whether there were other actions present that elevate the seriousness. In general, **felonies** are considered the most serious crimes and typically carry more than one year of incarceration as a penalty, while **misdemeanors** are considered less serious crimes and may carry less than a year of incarceration (if incarceration is even part of the sentence at all). However, this determination is definitely a mix and is informed by sociopolitical and historic factors in addition to risk and harm, as some victimless crimes may still be classified as felonies (such as possession of 30+ grams of marijuana in Indiana if you have a prior drug charge), while some violent or potentially dangerous crimes may still be classified as misdemeanors (such as domestic battery or unlawful possession of a firearm by a domestic batterer in Indiana). Lastly, **infractions** are very minor offenses that may still be considered violations of the law but are not criminal, such as moving violations (small violations of traffic law) or things like breaking local noise ordinances.

Each state code generally has multiple degrees for felonies and misdemeanors, depending on whether other elements are present. For example, a common example is the spectrum of

different degrees within the category of homicide. While **homicide** is broadly defined as the killing of another person, this can be intentional (murder), unintentional (manslaughter), or intentional but defensible (self-defense). Even within each of these divisions there are multiple degrees depending on the intent and planning of the *actus reas*. **Murder in the first degree** typically requires premeditation (planning ahead of time) and "malice aforethought" meaning a malicious intent that has existed for a while. **Murder in the second degree** still requires the malicious intent, but is not premeditated, such as if an armed bank robber shoots someone who gets in the way of their escape. **Voluntary manslaughter** is very similar in that it requires malicious intent and no premeditation, but there is an action that provoked the suspect to act "in the heat of the moment". **Involuntary manslaughter** does not have malicious intent; however, as discussed earlier, the suspect still chose to do something illegal that led to the death of someone else, such as driving under the influence and then killing another driver. Every state is unique, such as Indiana, which only has one category of murder (no splitting into first and second degrees) (IC 35-42-1-1). When it comes to infractions other than moving violations, these are often set out in local city or county codes that outline **ordinances**, which are local laws that control behavior. Ordinances and their penalties may not violate state codes but can still outline specific behaviors that the local government wishes to restrict or regulate.

Do all of these ins and outs seem confusing yet? This is why if you wish to become a criminal attorney (or practice some other branch of law), many states require you to pass the bar exam for that specific state, since definitions vary greatly. This is also why, if you have specific legal questions, your professor will likely always say "it depends". There are a lot of "it depends" answers when it comes to the workings of the criminal justice system!

Criminal Defenses

Taking the above example of homicide, in states that allow "Stand Your Ground" laws (laws that justify the use of deadly force in self-defense if they "reasonably believe" that deadly force is necessary), a person who kills another in self-defense may not even be charged by a prosecutor. However, in states that don't have these laws, the person may use an **affirmative defense**, meaning that the defendant is admitting to the action, but is providing an explanation to either excuse or justify their actions. The defense team (the defendant and their attorney) therefore have the burden of proof to demonstrate that the defendant was excused or justified in doing the action, so they must have sufficient **exculpatory evidence** (evidence that helps to exonerate the defendant) to demonstrate their defense during the trial. **Excuse defenses** are essentially admissions to the crime accompanied with an explanation behind why the defendant is not legally responsible. Excuse defenses include:

- **Age** - the defense argues that, due to the defendant's young age, they were not able to form the sufficient *mens rea* to be culpable for their actions. However, this is not a clear-cut line, as different states and jurisdictions may have different rules about which crimes

require the defendant to be tried as an adult, regardless of the age they were when the crime occurred.

- **Insanity** - the defense argues that, at the time of the crime, the defendant was in such a mentally impaired state that they could not tell right from wrong (again, therefore being unable to form the sufficient *mens rea*). In spite of media popularity, the insanity defense is not often successful, and even if successful, usually leads to institutionalization in a psychiatric facility rather than incarceration in prison (Justia, 2023).

- **Entrapment** - the defense argues that the police or another government authority led the defendant to commit a crime that *the defendant otherwise would not have committed.* For example, if an undercover police officer approaches defendant Smith asking Smith to sell them drugs and Smith declines, but then the officer continuously stalks and harasses Smith at his workplace, home, sports events, etc. repeatedly demanding that Smith sell drugs, Smith might end up caving and procuring drugs to sell the undercover officer in an attempt to get rid of the "stalker" who's threatening his reputation. Smith's defense attorney would have to show the court the evidence of the harassment and continuous threats/demands that the undercover officer subjected Smith to in order for the defense to have a chance at success.

- **Involuntary intoxication** - as with entrapment, the defense must show that the defendant did not *willingly* set out to get drunk or high, but instead was forced or tricked into doing so. While not a case in the U.S., there was a recent example of a driver in Belgium who was acquitted of drunk driving charges because of his very rare disorder where his body produces its own alcohol! While involuntary intoxication has a better chance of being successful, in some rare cases, *voluntary* intoxication may also be raised as a defense to lessen the degree of the crime, such as the defense arguing that the defendant *voluntarily* went out partying and got drunk, and was so intoxicated he didn't realize he was breaking into another person's apartment, thinking it was his own (Justia, 2023).

- **Mistakes of facts** - the defense argues that the defendant thought they were actually doing something perfectly legal due to mistaken facts. *This does not mean ignorance of the law*; mistaking what the law says hardly ever counts as a defense. Rather, this would be like taking a cell phone off a library study table thinking it was yours, only to find out later that you took someone else's by mistake.

Justification defenses are the other main category of affirmative defenses, where the defendant admits to the action but provides evidence to explain why the action was *necessary*. Justification defenses include:

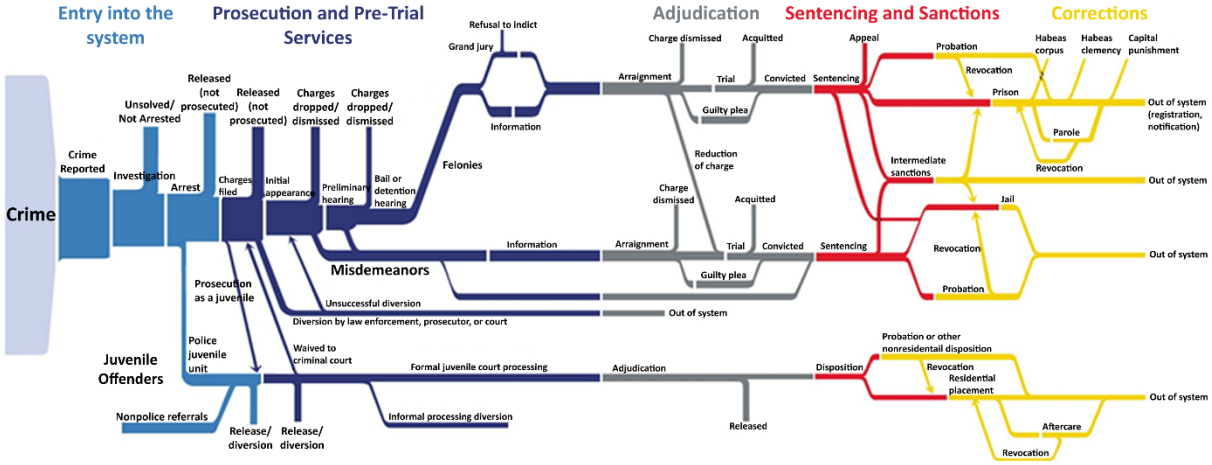
- **Self-defense** - as stated earlier, if the state does not have "Stand Your Ground" laws and the prosecutor presses charges of assault or homicide, the defense may show that the

defendant had to commit the act in order to protect themselves or others from a *reasonable and imminent* threat of violence. "Reasonable" means that the defendant can't have acted with fatal force if they were merely shoved by an unarmed attacker in a public place (the force must be proportional), and "imminent" means there must be reason to believe that violence will immediately follow, and the defendant must not have acted long after the threat of violence ends (Justia, 2023).

- **Duress** - the defense must demonstrate that the defendant was forced to commit the act. This is different from entrapment, as entrapment requires the coercion to come from a government authority or officer; with duress, the coercion can come from anyone. A prime example is if an offender held a gun to the defendant's head and told them to commit a criminal act. The defendant could argue that they were forced to do so out of fear of being killed, not of their own free will.
- **Necessity** - the defense must demonstrate that the action was for a significant, necessary purpose, like the protection of life. For example, if a tornado is imminent and a person outside breaks into a structure to seek shelter, they can argue that while they knew they were trespassing and "breaking and entering", they had to do so in order to protect their life from the oncoming tornado.
- **Consent** - the defense argues that the victim consented to the activity and therefore it was not criminal. While affirmative, voluntary consent is often discussed in terms of sexual encounters (and is very important!), it expands to any action where the other party consented to the action taking place; for example, if two people enter a boxing match and the loser presses charges against the winner for assault, the winner may raise this defense by showing proof that both parties voluntarily agreed to the boxing match.

The above list isn't exhaustive, but covers some of the main ones that you will often see cropping up during criminal trials. Speaking of criminal trials, we'll back up a little bit now and walk through an overview of the whole CJ system. All throughout this course we'll be zeroing in on each stage, but looking at the overall process will assist you in understanding the general "flow" of a case through the system.

The Criminal Justice System Flowchart



The criminal justice system flowchart, relabeled for clarity, adapted from "The challenge of crime in a free society" by the President's Commission on Law Enforcement and Administration of Justice (1967) – click to see full size

At first glance of this chart above, the criminal justice system can seem like a confusing and unwieldy process (and indeed, based on what we've discussed about the variances in state laws and how "seriousness" can be dictated by society, politics, and history, it can get pretty unwieldy and sometimes swerve far away from what most would consider true *justice*). However, this is a useful overall illustration of how the CJS works, in general, depending on the types of cases (felonies vs. misdemeanors) and who commits them (adults vs. juveniles). We will start from the left to the right of the chart, and mainly focus on the adult system if a felony is committed, which is the top branch of the chart (we will discuss the juvenile justice system more in Chapter 14). [Note: my apologies to anyone with color vision deficiency about the color-coded nature of the chart. At the very top of the chart there are labels, so you can follow along those labels in addition to my description below.]

Entry into the system

Light blue in the chart covers the *entry into the system*, which is the realm of the **police institution.** Police are known as the "gatekeepers of the CJS", in that they make the initial decision regarding which calls for service to respond to the quickest, which cases to investigate in detail, and who to arrest. At each point in this portion, the case could either not be responded to, go cold (no suspect identified), or get dropped (the initially identified suspect is cleared); if any of these happen, then the case does not continue through the rest of the CJS. However, if the police respond to the crime, identify a suspect, and build a case and turn it over to the state prosecutor, then we begin the next step.

Prosecution and Pretrial Services

Navy blue covers the next step which is the beginning of the **courts institution** and starts with the prosecutor. While police **discretion** (the ability to make independent decisions) is a subject of much discussion and controversy given their ability to use physical (and up to fatal) force, when speaking in terms of the CJS *system,* prosecutors are said to have the highest degree of discretion since they make the ultimate decision of whether to file charges or drop the case.

If they decide to file charges, then the suspect as to attend the **initial appearance**, which is when the suspect is informed by the judge of the charges against them, informed of their civil rights, and the judge may also set bail at this time (LII, 2023).

The next step is the **preliminary hearing**, which is when the judge examines the evidence against the suspect (know known as the defendant) and determines whether there is sufficient **probable cause** (reasonably trustworthy information and/or evidence to suspect that the person did indeed commit the specific criminal act; we'll discuss this more in our Policing unit) that they committed the crime(s) they are being charged of. If it's determined that the police did not have sufficient probable cause to make the arrest and the prosecutor did not have sufficient evidence or information to demonstrate probable cause, the case is dismissed. If probable cause is identified however, then the case proceeds to a **bail or detention hearing** if it is a felony (if it is a misdemeanor it proceeds straight to the next step).

The next step is the **indictment** or **information.** If the case is a felony and there is a grand jury (some states do not require them), then the grand jury will issue an **indictment** - a formal accusation of the charges - if they agree with the prosecutor's accusations. The grand jury may also fail to indict, which then ends the defendant's journey through the CJS. If a grand jury is not used, then an **information** is filed directly by the prosecutor (an information is also used in misdemeanor cases) (U.S. Department of Justice, n.d.).

Adjudication

Gray covers the **adjudication** stage, which is essentially where all the "action" of the adversarial process takes place. The first step is **arraignment**, where the defendant is read the charges, advised of their right to a defense attorney, and told to enter a plea. The defendant may either plead **guilty** (at which point they go straight to sentencing if the judge accepts the plea), **innocent** (at which point the case proceeds to trial), or ***nolo contendere.*** *Nolo contendere* is a Latin term meaning "no contest", where the defendant accepts the penalty but does not admit guilt (this plea will also advance straight to sentencing if the judge accepts the plea). While at first glance this seems like an odd choice, consider how long and expensive a jury trial is, even for defendants who qualify for indigent defense (i.e., they are considered low income to the point where a public defender is assigned to them rather than having to pay for a private attorney): missed work will lead to missed wages, childcare may need to be arranged, the defendant may lose their job from missed work...as law professor Malcolm Feeley titled his

book on plea bargaining in 1979, "the process is the punishment". So much of the adjudication process is so burdensome to defendants that they may forego their rights and plead *nolo contendere* or agree to a plea bargain, even if they are innocent.

Speaking of **plea bargaining** - where the prosecution and the defense work out a deal to grant the defendant a lesser penalty in exchange for pleading guilty (thus foregoing the lengthy trial process) - this process also may occur at the arraignment. We will discuss plea bargaining more at length later on, but for now it is worth knowing that about 98% of cases are plea bargained according to the American Bar Association (ABA), which is quite concerning due to the numerous defendants that feel pressured to plead guilty in spite of their innocence (Johnson, 2023). Adjudication in practice is certainly more of an "assembly line" than the "obstacle course" that it is theoretically supposed to be. Very few cases, about 2%, make it to the actual adversarial trial process.

For the few cases that do proceed to trial, the defendant may waive their right to a jury trial and request a **bench trial**, which means only the judge hears the case, rather than a jury with the judge presiding. This may occur if the case is one that has been receiving a lot of media coverage and public opinion is already largely turned against the defendant. In this case, a defendant may not have high chances of receiving an unbiased jury, and may opt for a bench trial instead. If certain judges are known for being more lenient towards certain crimes, or a judge is known for fairness while a community is biased or prejudiced, a defendant may consider a bench trial as well. On the other hand, with a bench trial, decision-making rests with one individual, whereas a jury – in general (there are some state exceptions to the rule) – splits decision-making among twelve people (considered a defendant's peers, though when it comes to shared race and socioeconomic status, that is historically and notoriously mismatched), who have to deliberate (sometimes extensively) until a unanimous decision is reached. There are different situations where one is seen as more advantageous over the other, so as always, "it depends" is the main answer to whether a bench or jury trial is more beneficial to the defendant.

Sentencing

If the defendant is found guilty during the trial (or plead guilty or *nolo contendere*), the judge will then determine the sentence. Some states require sentencing guidelines to be used by the judge in an attempt to keep sentences standardized across convicted offenders and avoid subjective bias. The judge will also consider aggravating and mitigating circumstances during the sentencing hearing; **aggravating circumstances** are those facts of the case that increase the blame of the defendant (for example, if they tortured a homicide victim before committing the homicide), whereas **mitigating circumstances** are those that decrease the severity of the action (such as the defendant having no prior criminal record). Depending on the jurisdiction and crime type, the defendant may serve an **indeterminate sentence**, which is a range (e.g., 2-5 years), where parole (an early release into the community where the offender serves the rest of

their sentence outside of jail/prison) may be granted if the offender demonstrates good behavior. The defendant/offender may also serve a **determinate sentence**, which is a fixed number of years that the offender must serve before release is considered.

After the sentence is handed down, the defendant has the right to appeal by requesting **appellate review**. This means that they are requesting a higher court to review the case if the defendant believes their rights were violated (such as receiving ineffective counsel, or that improper procedure was followed that violates the Constitution). The higher court that receives this request may decide whether or not to review the case, except in instances where the death penalty was imposed - in such cases, the appellate court is *required* to review the case at appeal.

Corrections

The sentence may include community corrections (where the offender serves their sentence in the community, which is known as probation) or incarceration in a correctional facility (jails or prisons). In general, jail is for offenders serving less than one year of incarceration (though jails are also used as holding facilities for prison inmates who are being transferred from one facility to another, and are also used for pre-trial holding), and prison is for offenders serving more than one year of incarceration (as with everything in the CJS, there are exceptions to this general rule).

You'll notice that - while there's an "out of system" line on the end of the chart - there is no "re-entry" portion of the chart. Unfortunately not much has changed in the U.S. since this chart was originally drawn up in 1997 in that few resources are committed to assisting former inmates in re-entering public life after incarceration. In spite of many reform advocates calling for a more restorative and rehabilitative approach as discussed in Chapter 1, our CJS mostly operates according to the crime control and incapacitation models in practice. Often this leads to what is referred to as the "revolving door", where former offenders **recidivate**, meaning they commit another crime and then oftentimes just end right back up in the system. We will address this problem too later in the course, as well as possible solutions to ensure that a person's first journey through the CJS is their last one.

Conclusion

If this seemed like a lot of information all at once, don't worry! This was a quick overview of the entire process and concepts that we will be discussing over the course of the whole semester. The main goal of this chapter is to illustrate how our legal system generally functions and how everything flows together in the general major stages. We will start to zoom in on the three main institutions - the police, the courts, and corrections - but first, we'll use the next chapter to take a dive into criminological theory (theories to explain criminal behavior) and methods of measurement to test theories and evaluate criminal justice policies and practices.

Chapter 3
Explaining Crime and Criminality

Introduction

The study of why people engage in criminal or antisocial behavior is known as *criminology,* which originally branched from anthropology and sociology to focus on criminal behavior rather than other social and cultural behaviors. Theories created to explain criminal behavior have evolved over time, and some - after losing popularity for a time - re-emerge at a later date due to sociocultural and political trends. This staying power for some theories links to the perspectives and fundamental beliefs about human nature and behavior that were discussed in Chapter 1, rather than what actual research shows. Additionally, there is still much that gets discovered and revised in the criminological field, as crime and antisocial behavior can be caused by *many* various factors. Notice also that "antisocial behavior" is mentioned in addition to crime, as many actions that are violent took a long time to become criminalized, such as spousal rape in the U.S., which was finally made illegal in all 50 states in 1993 (VAWnet, 2006). Conversely, some behaviors that are considered "crimes" may not actually be considered "antisocial" anymore by the majority public, such as recreational marijuana use (Green, 2022). It is important that theorists define their terms clearly in order to obtain accurate research results.

Schools of Criminological Theory

There are many schools (or broad categorizations of) of criminological theory, each defined by the main hypothetical (a proposed explanation that can be tested by the scientific method) predictor variable (an explanatory factor that affects the behavior outcome; we'll discuss more about variables later in this chapter). The earliest theories, however, did not follow the scientific method of question -> hypothesis -> data gathering -> experiment -> outcomes -> conclusion, and were based more on philosophical and ideological explanations. Even the Positivist school, named after *positivism* (a philosophy that relies on scientific evidence and reason to inform conclusions), relied on political and classist ideologies to inform its research in the early days (and unfortunately later days, among some theorists) of the school. The first of these pre-scientific schools, however, is the Classical school.

The Classical School

The Classical school has its origins in the philosophy of Cesare Beccaria, a jurist (an early legal expert) and Enlightenment philosopher. At Beccaria's time in Italy and much of Europe, laws were often vague and subjectively interpreted by judges, leading to much injustice in sentencing as judges handed out easy penalties to the affluent (who could afford bribes and had political

leverage) and harsh penalties to the poor (who could not afford bribes and were generally looked down upon) (Cullen et al., 2014). Beccaria hoped to reform the legal system by clarifying and publicizing the law, and also applying certain principles to punishment. Referencing the work of Hobbes that we mentioned in Chapter 1, Beccaria mixed Hobbes' views of the innate rationality and self-interested nature of humanity with other Enlightenment concepts, such as utilitarianism (the promotion of actions that are likely to bring the greatest good to the greatest amount of people); probabilism (mathematical language about probability and certainty/uncertainty); associationism (the belief that humans will make associations between concurrent events); and sensationalism (the belief that human sensory perceptions usually govern decision-making). All of this was combined into a concept known as the *hedonic calculus,* meaning people will make decisions based on a calculation of rewards and punishment (like a cost/benefit analysis). If punishment is meted out swiftly, and people are certain that it will be meted out, and if the punishment is sufficiently severe enough, humans (being rational actors according to the classical school) will likely determine that a criminal act isn't worth doing in the long run. Other utilitarian philosophers of this era, such as Jeremy Bentham, expanded this theory and assisted in its popularization in the United States.

Essentially, the five main tenants of Classical school are: 1) criminal behavior is rational; 2) people weigh the costs and benefits of criminal action (i.e., the hedonic calculus) and commit crime when the benefit (personal gain) is greater than the cost (the pain of punishment); 3) if punishment is *swift, severe,* and *certain,* people will be deterred from committing crime; 4) the punishment should be proportional to the crime; and 5) the criminal justice system should not be arbitrary, and laws should be known to the public. These tenants have had a significant effect on the U.S. legal system and the punishment-focused emphasis of our criminal justice system, and re-emerged later in history as deterrence theory, which we will discuss later on in this chapter.

However, you can probably already identify some criticisms of this theory. Beyond not being tested by the scientific method, there are many assumptions that the Classical school must take to be true for the main hypothesis to work. The first of these is the assumption that all people act on their own self-interest when committing crime, which isn't always the case (consider the struggling mother who shoplifts diapers for her infant because she can't afford them, or the person who acts on sudden rage instead of a rational calculation of costs and benefits). The second of these is the assumption that people always commit crime to increase their personal gain and decrease potential pain (consider someone facing methamphetamine addiction whose drug consumption is actively destroying their health). The third assumption is that swiftness, severity, and certainty of punishment are the most effective ways to prevent crime; however, the "revolving door" of former offenders recidivating and being reincarcerated shows us that punishment is not the main explanatory factor behind people's behavior (Cullen et al., 2014). Indeed, rising crime and social unrest near the latter part of the 19th Century led much of the Western world to question whether the Classical school was accurate in its theory and applications.

The Positivist School

Cover of the American Phrenological Journal, [public domain (1848)]

This 19th Century criticism of the Classical School gave rise to a new school that touted the scientific method as a way to study criminal offending: the Positivist school. At the start of this school was Cesare Lombroso, an Italian physician who focused on biological factors that he believed explained a person's criminality. While some textbooks still call Lombroso the "father of modern-day criminology", this moniker is misplaced unless we wish to assert that modern-day criminology relies heavily on pseudoscience, racism, and eugenics, this this was unfortunately what motivated Lombroso's research activity. Lombroso was a believer in phrenology, a pseudoscience that asserted that different bumps, dents, and measurements on certain portions of the head were linked to different behaviors (Lack & Rousseau, 2016), and he expanded this line of thinking to hypothesize that other physical traits could be used to distinguish the "*atavistic*" offenders (people who were born as genetic "throwbacks" to an earlier evolutionary stage) from the "*criminaloids*" (people who learned criminal behavior from their social environment, rather than being born with criminal traits). Among the many mistakes of his theory was to misconstrue *correlation* (two things seeming to happen or coincide together) with *causation* (the predictor variable/variables actually *causing* a change in the outcome variable); more on that when we discuss research methods. For example, Lombroso was only examining prison inmates when forming his theory, so rather than having a control group (i.e., non-criminal offenders) to compare to his sample, he only drew inferences from people who had already committed crime (this also means he wasn't studying those who'd committed crimes but weren't caught, those who committed crimes but were powerful enough to bribe judges, or those who were incarcerated in spite of being innocent). Additionally, the narrowness of his examination of only physical traits left out other temporary conditions that could lead to criminal offending (for example, poverty - which is a changeable condition, not an unchangeable trait). What he considered innate physical traits (such as irregular teeth or twisted noses) may also be indicative of poverty and abuse rather than inborn genetic traits. Most alarmingly, due to the popularity of evolution as a new theory of animal origins, Lombroso took some rather serious misunderstandings of the theory, among these being that the "throwback" traits that he observed were linked to Black people and other minorities, essentially arguing that only some

ethnicities of White Europeans were modern evolved humans (Lombroso, 2006). This is what we refer to as scientific racism - taking scientific theories of the day and misapplying, misinterpreting, or manipulating research to advance racist ideologies - and unfortunately Lombroso's Positivist school started a whole line of theories that perpetuated scientific racism and eugenics in the name of "preventing" future criminality (Rafter, 1997).

Following in Lombroso's footsteps, theorists like William Sheldon (early 1900s) and Henry Goddard (1910s) examined physical traits like body types and expanded to looking at mental and developmental disabilities as a trait that caused criminality. While some adherents to these theories initially sought to help those who were mentally impaired and developmentally disabled, policy outcomes of these theories quickly evolved into a notion that "feeble-mindedness" (the awful term coined by Goddard) was inherited and thus - mixing with the overemphasis on "evolutionary fitness" of the time - people who were identified as having this "trait" were to be institutionalized indefinitely to prevent passing their genes to new generations (Rafter, 1997). The mentally ill were criminalized and seen as "degenerate", with morality blended in, such that women who were sexually promiscuous or didn't adhere to the strict gender roles of the time were also labeled as mentally and morally "backwards" (Rafter, 1997). These ideas can be seen as stark examples of scientific ableism and scientific misogyny, which - like scientific racism - uses pseudoscience or poorly researched "science" to advance misogynist ideology (another example being the long history of "hysteria" as a medical diagnosis [Cohut, 2020]). This is also a form of net-widening, meaning a redefinition of criminality led to far more people being incarcerated for behaviors (or even just statuses and identities) that were not considered criminal in the past. Unfortunately this whole movement also dovetailed with the U.S. eugenics movement, which was prominent from the 1920s to 1940s (though forced sterilization of the "feeble-minded" and "unfit" women continued well into the 1970s); Nazi Germany actually adopted some of the U.S. eugenic sterilization policies as a template for their own, which led to the U.S. finally distancing itself from the movement (Lee, 2019; NIH, n.d.).

By the 1950s, Positivist theorists started integrating social and environmental factors into their theories. For example, famous criminologists Sheldon and Eleanor Glueck incorporated school accomplishment and social factors (especially family relationships) into their famous study *Unraveling Juvenile Delinquency*, though their primary emphasis was still body type, IQ, temperament, and personality. While their theory still alluded to "poor hygienic and moral legacies" and "inferiority of families", they were the first biological/Positivist theorists to acknowledge the impact of social environment and the fact that juveniles may "age out" of crime (Chicago school criminologists, which we will cover next, were the first to focus on social environment as early as the 1920s) (Glueck & Glueck, 1950). Modern biological/trait theories still focus on psychological and biological factors and how these influence a person's *interpretation* of social factors, and how these interpretations and interactions may increase the likelihood of crime or antisocial behavior. However, some of these theories can still be rather problematic if scholars are not careful to consider internal validity (the extent to which the causal relationship can be established, and the confidence that the predictor variable isn't itself

explained by another factor). For example, some later studies still used low IQ as a predictor variable when IQ is more of a reflection of sociological and environmental factors (such as access to good schools or the potential or the influence of lead on brain development) (Stotskopf, 2012). Other biological theories, such as twin studies (where twins who were adopted by two different families in very different social environments are examined to discern the influence of their shared genes as opposed to their socialization), recognize that much of what is currently known is correlational rather than causal, especially as specific genes have yet to be identified (Cullen et al., 2014). Interdisciplinary research that includes neurological imaging can be beneficial in identifying the specific brain responses to social and environmental inputs and how these influence behavior, but many of these lack external validity (the extent to which the relationship found in the study can be applied to the broader population) and are limited to permanent anomalies that show up on imaging scans (Bigenwald & Chambon, 2019). Modern neurological/biological studies tend to take a hybrid approach that assess cultural and ecological inputs such as the DNERM (developmental neuro-ecological risk-taking model) by Defoe (2021) and recognize that the brain is plastic (especially in young people), rather than fixed or biologically determined to stay one way since birth.

LOOKING FURTHER: Pseudoscience, the Manosphere, and Incel Violence

"How deep does the rabbit hole go?" by Fairchild (2010)

An apt example of the influence of pseudoscience and debunked (or at least severely cherry-picked) positivist theories being used to support antisocial behavior is that of the incel (straight cis-men who claim to be involuntarily celibate) subculture, which is a subculture within the broader "manosphere", a largely online group that is explicitly misogynist and anti-feminist that adheres to the "red pill" philosophy (a co-optation of an analogy used in the film *The Matrix)*. Foundational to this philosophy is the use of evolutionary psychology theories that have long been discredited, *or* are explicitly meant to only describe behavior in general rather than concrete "rules" of behavior (Lindsay, 2022). By using pseudoscience and cherry-picked theories, they argue that biology strictly determines male and female behavior (biological determinism and gender essentialism), with women being inherently sexually promiscuous and men falling into a hierarchy of Alphas, Betas, etc. depending on their genetic aptitude (and financial capital; many of these ideologies

start from the premise that capitalism is rigged to benefit the wealthy and exploit the working class, but rather than advocating for systemic change, influences tend to individualize the issue with “get rich quick” schemes and/or pin the blame on women’s entry into the workforce) (Cannito & Camoletto, 2022; Johnson, 2025). In addition to evolutionary psychology, biological criminology theories that became popular in the 1990s (such as Ellis and Walsh's *Gene-Based Evolutionary Theories in Criminology*) are also used for support in describing sexual behavior and violence among humans, in spite of making comparisons with birds, horses, gerbils, fish, lizards, prairie dogs, hamsters, and more (basically creatures that aren't in the same genus, family, order, or even class of humans when examining the taxonomic hierarchy). In spite of significant evidence to the contrary, this philosophy asserts that women "victimize" men by denying sexual access and do not realize their "place" as a market commodity; for this reason, rape, sexual assault, or sexual degradation of women is justified for men to "regain" control from women (Cannito & Camoletto, 2022).

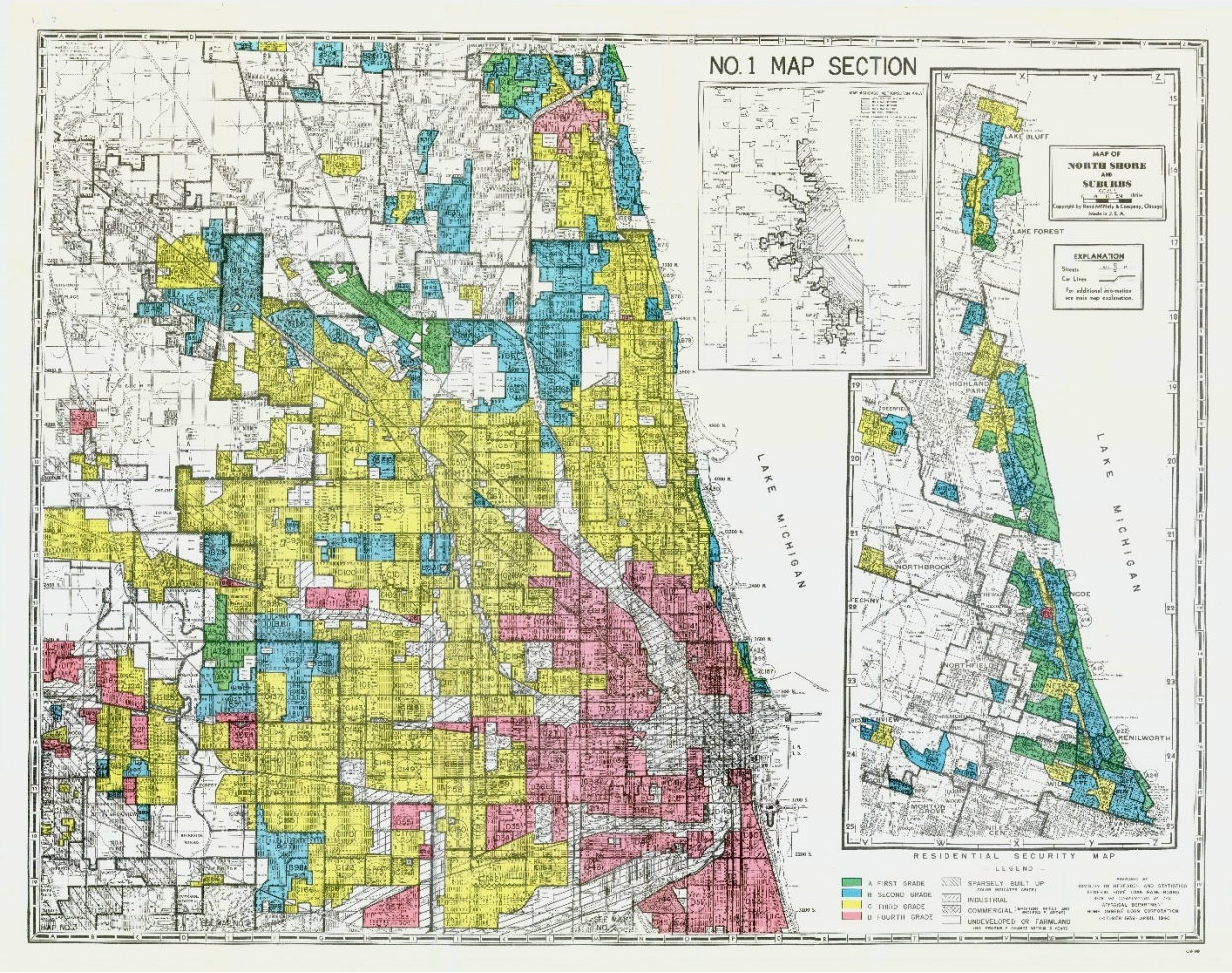
While this rhetoric perpetuates misogyny, rape myths, harmful gender stereotypes (for all genders), and unhealthy relationship behavior in general, the incel subculture within the manosphere - which claims to have chosen the "black pill" - has elevated their ideology into explicit violent attacks targeting women (though men and children often get hurt in mass violent attacks such as shootings), with approximately 90 fatalities being attributed to incel extremism from 2014-2020 (Tomkinson et al., 2020). Recent research has examined the radicalization process where new members, largely young men, are socialized into increasingly violent ideology in the "black pill" pipeline (Green et al., 2023).

The incel subculture is an alarming modern example of how debunked theories, even ones that were attempting to use evolutionary psychology and criminology to *explain* sexual violence, have been used to now *justify* sexual and physical violence (essentially this is a modern example of scientific misogyny). This subculture is also an example of specialty groups that sometimes require their own theory of offending (i.e., some criminological theories exist to explicitly explain the behavior of serial homicide offenders, or white-collar offenders, rather than to be a general theory to explain all sorts of criminal offending). Does radicalized ideological violence warrant its own criminological theory to explain the behavior, or do some of the modern applications of social process and social learning theories (explained below) do a sufficient job in explaining the radicalization pipeline?

The Chicago School

The Chicago school officially rose to prominence in the 1930s but had its earliest roots in Park's and Burgess' 1925 *Concentric Zone theory.* Parks and Burgess looked at the different "zones" of

Chicago in the 1920s, which was marked by major social change due to the Industrial revolution (many immigrants moved to Chicago for factory labor), the Great Migration (Black families moving north to escape the brutality of the South during Jim Crow segregation), and the aftermath of WWI, and hypothesized that areas in the city that are the least affluent (usually the closest to the center of the city, where factories were located) will experience more crime. Note, however, that Burgess in particular was still a eugenicist (since this was all the rage at the time) and his assumption was that the city just "evolved" to be this way due to Darwinian resource competition, rather than being largely shaped by racist policies (such as segregation of immigrants) and income inequality. Unfortunately, Burgess' theory was used to inform policies like redlining practices in Chicago (redlining is when banks refused loans to minority groups due to their housing areas being determined as "high risk"; this "high risk" determination was often couched in faulty ties between minority neighborhoods and crime, which Burgess had a hand in).



A redlining map of Chicago created by the Home Owner's Loan Corporation, 1939=1940; the zoning laws coincide with Burgess' theory of the central parts of the city (pink) being lower in affluence and higher in crime, the "transition zone" (yellow) being mid-level in crime, and the suburbs (blue) being most affluent and – according to Burgess – lowest in crime. Image by Zelasko (2012) – click image for full size.

Social Structure Theories

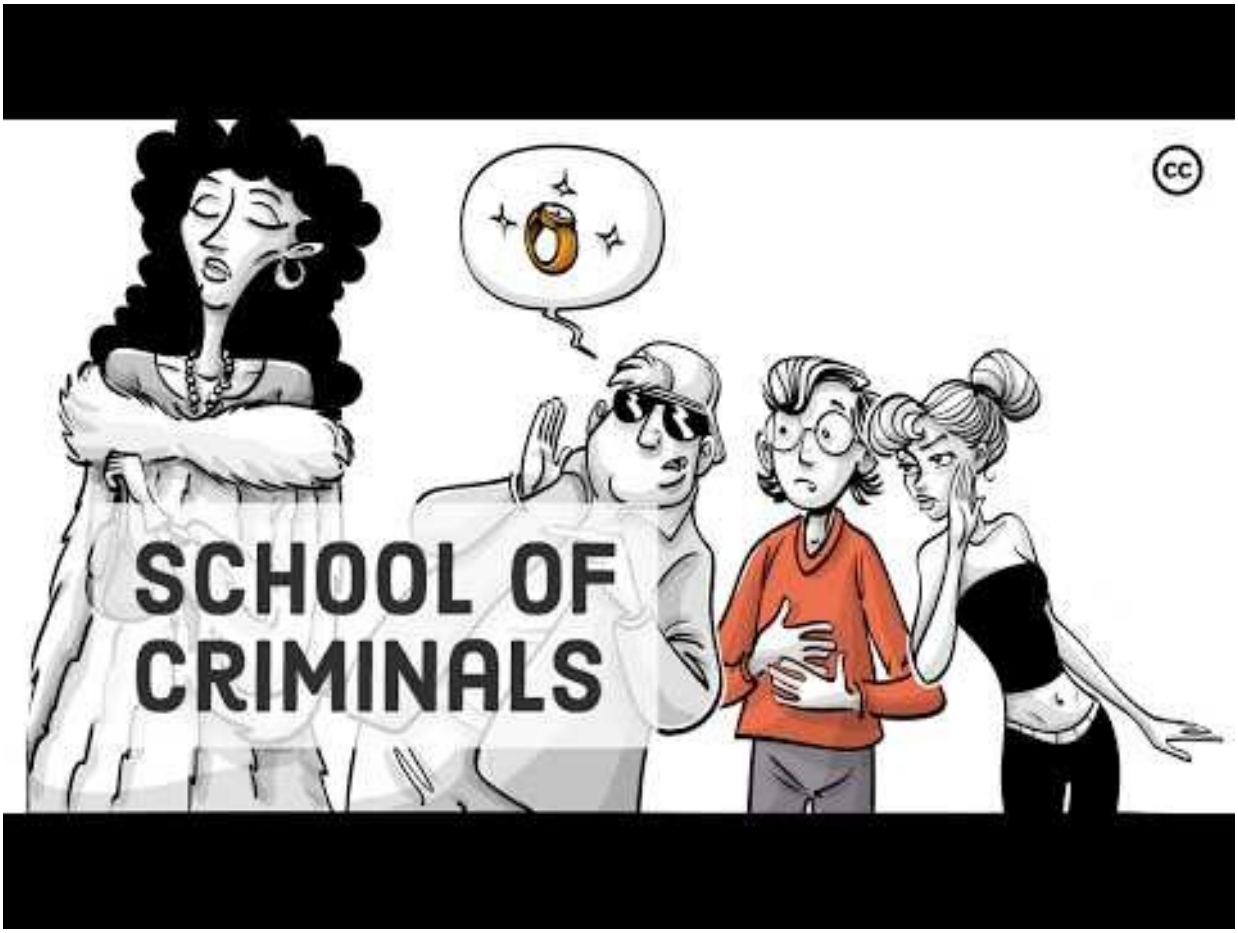
Park and Burgess' location, Chicago, became a school of much sociological inquiry into crime that started to break away from the social Darwinism roots by the 1940s. The Chicago school can be even further broken down into Social Structure theories (those that examine the structure of society and how it influences individuals or groups) and Social Process theories (how closer individuals *learn* criminal behavior or attitudes favorable to crime through close societal relationships). Shaw and McKay (1942) were foundational Social Structure theorists with their Social Disorganization theory, which examined the concepts of formal and informal social control. Formal social control is the control of citizens by the government, such as the police making an arrest; informal social control, on the other hand, is when the public "control" each other by enforcing shared morality and values, such as when someone in the grocery store reminds another person that it's rude to cut in line. Shaw and McKay hypothesized that a breakdown in *informal* social control leads to a higher likelihood of criminal offending, and that high residential turnover (people moving in and out of an area often, or what Shaw and McKay called socially disorganized areas) would contribute to a breakdown in informal social control, since there would be few stable, trustworthy neighbors and other trustworthy informal social institutions (such as regular school teachers, faith leaders, and so on) who could reinforce prosocial values in juveniles. In families with prosocial parents or parent figures, the prosocial values taught by the parents compete with the unstable (and possibly antisocial/criminal) influences surrounding the youth in these areas. Youth may therefore get mixed into street gangs and other forms of offending (Cullen et al., 2014). However, social disorganization theory as Shaw and McKay described it still doesn't entirely pinpoint *causal* factors as opposed to *correlation*, especially as they focused on immigrant groups and areas rather than also assessing crime in White, middle-class areas. Later theorists, especially Sampson (a criminologist who was quite active and influential in the 1990s), tried to conceptualize informal social control in terms of collective efficacy, which is the willingness of neighbors and other associates to keep each other "in line" with pro-social norms, and also introduced the concept of concentrated disadvantage (a measure that combines several economic variables like poverty, unemployment, people on government assistance, and several others) to control for the factors that might decrease collective efficacy. His research fixed some early problems with Shaw and McKay's theory, but theorists need to be careful to fully *operationalize* the concept of collective efficacy (*operationalization* refers to breaking down an abstract concept into parts that can actually be measured quantitatively). Concentrated disadvantage, however, has a widely agreed-upon operationalization through multiple U.S. Census data points and is often used as a control variable in criminological research today.

Another notable theorist within the Social Structure subcategory was Robert Merton, whose Strain theory (also called Anomie theory) proposed that crime may occur when there is a *primary social goal* but *no possible legitimate means to achieve that goal* (Merton, 1938). Merton's research was done in the 1920s (published later in the 30s), when biological/positivist

theories were still all the rage among criminologists. However, with the 1920s, America saw Prohibition and the accompanying rise of illicit distillers and sellers of alcohol to fill the consumer demand for it, as well as rising income inequality that prevented many from achieving the "American dream" of wealth and a comfortable life (in Merton's words, they lacked the "legitimate" or "institutionalized" means to reach that goal). Those who saw Prohibition as a promising way to achieve the American dream were “innovative” (as Merton calls it) and intelligent; applying the labels of “atavistic” or “evolutionary throwbacks” no longer made sense. Merton was also among the first of the Chicago school to clearly identify inequalities in society, and how not all have equal access to the means through which to achieve the primary societal goal. The strain placed on individuals who do not have legitimate access to the means through which to achieve the societal goal may lead to four main reactions to the strain: innovation (committing crime in order to achieve the goal of wealth); ritualism (going through the motions and abiding by the law even though you'll never get ahead); retreatism (turning to drugs and alcohol and/or just checking out of societal participation); and rebellion (Merton, 1938). While this theory came under criticism in the 1960s and 1970s, later theories in the 2000s dusted it off and found support when examining the satisfaction people have with their financial situation (with those who are more dissatisfied likely to report higher criminality), and when applied to communities that have higher rates of economic deprivation or concentrated disadvantage (Cullen et al., 2014).

Social Process Theories

Among the Social Process theories, Sutherland and Cressey's Differential Association theory became quite influential in the 1960s and continues to evolve as a theory that is applied and tested today. Differential association theory posits that association with different peer groups (i.e., differential/different association) can influence a juvenile to learn attitudes favorable to crime (that is, attitudes that approve of or justify criminal offending in certain situations), especially if the pro-criminality peer group exerts stronger influence than other peer groups (for example, if one's closest friend group is pro-criminality, that will have a much stronger influence on your attitudes than your cousins that you only see once a year). Today, Differential Association is used to partially explain juvenile delinquency, but does not fully explain why some juveniles turn to antisocial behavior (you'll find that most Chicago school theories are still partially supported today, though no single theory fully explains criminal or anti-social behavior) (Alduraywish, 2021). Sutherland's nine principles of Differential Association theory are described in the video below. Which perspective(s) discussed in Chapter 1 might this theory most closely align with?



"Differential Association Theory: The Psychology of Criminal Behavior" by Sprouts (2022)

Another notable Social Process theory is Hirschi's Social Bond theory, which hypothesizes that criminality is caused by a person's low self-control, and that self-control is developed through the influence of parents and other attachments. Hirschi, like Hobbes back in Chapter 1, believed that humans are inclined towards lawbreaking, and that fear of consequences is the main thing that prevents criminal offending or antisocial behavior (Hirschi, 1969). Hirschi later updated his theory in the 1990s, refocusing from indirect control (the psychological control one feels is exerted on others, like the fear of your reputation being harmed or the fear of letting your parents down) to direct control (parent supervision and discipline/consistent punishment - which has echoes of Classical theory here). Interestingly, recent re-tests of Hirschi's theories show more support for his original Social Bond theory rather than his later revisions (Cassino & Rogers, 2016).

The last of major Social Process theories is Labeling theory, which argues that once someone (especially a young person going through the major developmental stages) is labeled as a "rule-breaker" or "criminal", one is likely to be treated that way. Eventually the person will accept this criminal label and commit more crime, as it's impossible to shake the label so they may as well reap the benefits (personal gain from crime) of the label that they cannot escape even if acting

in non-criminal ways. Additionally, after a person has been through the CJS and now has a criminal record, that "ex-offender" label follows them well after their sentence has been served, preventing them from securing stable employment, housing, relationships, and other social bonds that keep them from reoffending. As with other theories, labeling doesn't fully explain criminal offending but is still used as a partial explanatory factor in studies today (Cullen et al., 2020).

The Critical School

Theories from the Critical school of criminology focus on social structure similar to some Chicago school theories, but the primary question of criminology is turned on its head. Where most criminological theories ask *"what makes a person more likely to commit crime?",* the primary question among critical criminologists is *"who* gets to define what crime is, and *how* do these definitions benefit those who are already in power?". As with the conflict theorists discussed in Chapter 1, critical criminologists believe that the main goal of those with the most political and economic power is to maintain that power by creating laws that keep those with little power from gaining more. Broadly, critical theories examine inequalities and how these may be perpetuated by current social/cultural/legal/political practices.

OG Critical theory stems straight from Marx & Engels and predominately examines the political power of those with economic control, and how they leverage the CJS to enforce 1.) laws that criminalize only the behavior of those without political/economic power; 2.) differentially enforce general laws (i.e., while all critical criminologists believe violent crimes like homicide are a human rights violation, they point to the tendency of affluent offenders receiving much lesser penalties than low-income offenders (such as the tendency for white-collar crime offenders to receive shorter sentences than street crime offenders [Pollack & Smith, 1984]).

While these theories started with examining class/economic divides, they have now expanded to race/ethnicity and gender (as well as the intersection of class, race, and gender together). For example, a critical race theory lens helps us to examine Jim Crow laws and how behaviors were criminalized by a white majority to perpetuate racial segregation. Laws during the war on drugs that ascribed heavier penalties to crack cocaine use vs. powder cocaine use are also a relevant example, particularly given the direct racialized rhetoric that officials like Harry Anslinger brought into the DEA (as discussed in Chapter 2). Indeed, research still shows that Black and Latino offenders of White victims to receive longer sentences for most violent crimes than White offenders of Black or Latino victims (Lehmann, 2020) so critical theories look into the specific reasons behind the passage (and enforcement) of these laws to see why racial/ethnic disparities persist. Regarding gender, critical gender theories examine explicit or implicit misogyny in the passage and enforcement of law, such as the examples previously discussed regarding "hysteria" and forced sterilization of women, which was legitimized by the U.S. Supreme Court in *Buck v. Bell* (1927), leading to over 70,000 forced sterilizations (Cohen, 2016). Critical feminist theories also look at how the pathways to offending are different for girls and

gender minorities, who often run away from home due to sexual abuse from a family member, which then exposes them to the hardships of homelessness on the streets and increases the likelihood of criminal offending for survival (Chesney-Lind & Shelden, 2014). Due to these different pathways towards crime, critical gender theorists argue that the response to women's offending needs to be trauma-informed, and that current corrections policies exacerbate the trauma rather than addressing it.

Because of their focus on the definition of crime and power imbalances, critical theories are typically considered macro-theories in that they examine broad questions of policies and their effects, instead of individuals. Theories that try to explain what increases the likelihood of an individual committing anti-social/criminal behavior are known as micro-theories.

Neo-Classical and Environmental Theories

A broken window, by Castelazo (2009)

Classical theories began to re-emerge in the 1980s, predominately due to two conservative presidencies (the Reagan and Bush administrations) support of the war on drugs and general fears of rising crime. These theories became known as neo-Classical (neo = new) theories, and re-emphasized the idea of deterrence through swift, severe, and certain punishment. One of the most influential of these theories was Wilson and Kelling's Broken Windows theory, which argued that petty crime and signs of "urban decay" (such as vandalism, broken windows, and public drunkenness; *not* the 1990s makeup brand that I was too into in my youth) would lead to violent crime in an area because people would withdraw from exerting informal social control on each other. At first glance this may seem very similar to Social Disorganization and the concept of collective efficacy, but the significant difference is in Wilson and Kelling's direct link made between low-level crime and violent crime. Wilson and Kelling did not offer any statistics to support their theory, but it was quite influential due to their publishing it in the public magazine *The Atlantic* rather than a paywalled academic journal, and because it seemed to be a "common sense" response to the fear of drug and violent crimes at the time (Cullen et al., 2014). It also conveyed this sense of community-oriented policing that was both zero-tolerance towards low-level crime (under their argument that low-level crime must be cracked down on in order to prevent future violent crime), and community-friendly by encouraging police to partner with long-term community members (Wilson & Kelling, 1982).

We will discuss Broken Windows theory as it relates to the history of policing more in the next chapter, but for now it is best to know that this theory has come under heavy criticism due to its lack of empirical support, contribution to mass incarceration (especially of people of color), and contribution to police brutality (Harcourt, 2001; Hinkle & Weisburd, 2008; Howell, 2016).

Because of its focus on the external environment (not in a "trees and greenery" sense of the word environment, but in its focus on neighborhood living conditions), Broken Windows can also be known as an environmental theory. Though the macro-level aspect of the environment is considered, these theories still tend to center around what kinds of environments *deter* or discourage criminal offending; thus they are still micro-level, deterrence-based theories. Another notable environmental theory is Routine Activity Theory, which theorizes that a person is more likely to commit crime when the person is already motivated or willing to commit crime, there is a desirable target, and there is a lack of capable guardianship (Felson & Cohen, 1980). While sometimes still used as a basis for environmental design (such as the placement of cameras and lights in a neighborhood or retail store), this theory has been criticized as encouraging victim-blaming by placing the burden of crime prevention on an individual rather than examining root causes of why the offender is willing to commit crime in the first place. Particularly in the instance of sexual violence, this theory has been used to feed into rape myths that women fail to protect themselves or are "asking for it" when wearing certain clothes (being a "desirable target") rather than placing the burden of crime prevention on men's attitudes and behaviors towards women.

Conclusion

Criminology (the science of criminal offending) is quite complex and has evolved throughout time. Because of this, not all theories are created equal! Some have been thoroughly debunked, and others have been tweaked and modernized as analytic research methods have advanced and as data access increases. The theories with the best explanatory ability for criminal offending are those that involve a wide variety of different factors to control for many different influences that could affect behavior or systemic inequities. The next chapter will delve into our main methods of measurement and the basics about how we test theories statistically and qualitatively.

Chapter 4
Measuring Crime and Victimization

Introduction

Obtaining accurate research results hinges on obtaining quality data. This chapter will discuss the key data sources that are used for measuring national crime data, the advantages and drawbacks of these data sources, and brief fundamentals of how these (and other) data are used for researching both criminological theory (again, the study of human criminal or antisocial behavior) and criminal justice evaluation (the study of whether a criminal justice policy or practice is achieving the desired outcomes). Data can be manipulated, however, so *ethical* research is of upmost importance to avoid the warning popularized by Mark Twain about the three kinds of lies: "Lies, Damned Lies, and Statistics". While many of you may not become statisticians in the criminal justice or criminological fields, it is important to understand how spot shoddy methods, unethical research, and bad media reporting of research, and how these tactics have been used to perpetuate injustice and bad practice.

Measuring Crime and Victimization

UCR and NIBRS

There used to be three major national data sources for measuring crime and victimization, though very recently these have been reduced to two. The now-defunct one that you still may see referenced in some crime graphs and charts is the **Uniform Crime Reports (UCR)**, which were started by the Federal Bureau of Investigation (FBI) in 1929 and put in effect in 1930 with the goal to collect reliable crime statistics across the United States (until then there was no national data available). Of the 18,888 police agencies in the U.S., about 18,000 would contribute their data to the FBI voluntarily as of the 2021 swap over to the **National Incident-Based Reporting System (NIBRS)**, which we'll get to in a bit.

There were several notable limitations with the UCR's collection and reporting method, however. Given its division into Part I crimes (the most serious, these being homicide, assault, robbery, rape, larceny, burglary, arson, and motor vehicle theft) and Part II crimes (a variety of notable crimes such as hate crimes, terrorism, drug crimes, and white collar crimes), it did not include all types of crimes. It also abided by the **hierarchy rule**, which means that only the most serious crime was logged. In most crime events, people tend to commit several other crimes along the way, so the hierarchy rule had the unfortunate effect of under-counting overall crime.

Because of this major drawback, the FBI switched over to **NIBRS** in 2021 because the NIBRS system doesn't abide by the hierarchy rule, collects data on 47 more crime types, and provides

much more data about offenders, victims, and locations (DOJ, 2023). While NIBRS has been around for much longer than 2021 (it was initially established in 1989), agency participation was very low because the reporting method was more complex than the UCR reporting method (only about 6,000 of those 18,888 agencies reported NIBRS statistics in the 2010s). The complete transition from UCR to NIBRS in 2021 was also a bit rough because many police agencies weren't prepared for the extra and different work. According to an investigation by the Vera Institute, only 63% of police agencies submitted data to NIBRS, and only about half of police departments submitted a full year of data in 2021 (Digard & Kang-Brown, 2022). Thankfully the participation rate has increased to 82.3% as of 2022 (FBI, n.d.). **If you would like to play around with the FBI's Crime Data Explorer and see all the different NIBRS crime reports for different crime types and different years, you should head on over there using this link.**

While NIBRS applies a more standardized approach to crime definitions than the UCR did, it's still affected by different states' definitions of crime types and even just individual officers' reports (Digard & Kang-Brown, 2022). Additionally, not all crimes are even reported to the police (especially when the victim knows the offender and does not want to get them in trouble, or fears retaliation from the offender), and police departments will make different rates of arrest depending on how many resources they have, and also due to the **under-policing/over-policing paradox,** which is when police fail to respond to serious crimes in minority and low-income neighborhoods but over-police low-level crimes like drug possession and loitering (Natapoff, 2006). For all of these reasons, while NIBRS gives us a general snapshot, it is important to find other data sources to give a more accurate picture of crime occurrence in the United States and locally.

NCVS

The **National Crime Victimization Survey (NCVS)** is the primary method used to fill in the NIBRS gaps. The NCVS is a massive survey that is administered to about 150,000 households across the nation, inquiring about their experiences with crime. Everyone 12 years and older is asked to participate, and the survey is administered every 6 months for a year. The NCVS is massively beneficial, as again, *many* crimes never actually get reported to the police (between 2006-2010, 52% of victims surveyed by the NCVS did not report their victimization to the police [BJS, 2012]), and many also don't show up on NIBRS (in 2021, 2/3 of violent crimes reported on the NCVS were simple assaults, which are not included in NIBRS reporting [Digard & Kang-Brown, 2022]).

While the NCVS provides a more accurate picture of crime victimization (and therefore crimes committed), it has its own limitations. The first of these is survey-taker fatigue. When I say the NCVS survey is massive, I mean it! It covers every possible scenario, but that means that most people (especially 12-year-olds with shorter attention spans) will give up partway. Click this link to see an example survey to see what I mean! The second limitation is potential sampling error. This means that the sample may not be as representative as we'd like. Think of how this survey

is administered (households): this excludes homeless or transient populations, and you may have families that fill out the survey once and then don't want to do so again in 6 months since it was such a massive survey (or they've moved in that time). The third limitation is that no data is collected on homicide (since homicide victims can't report their own victimization from beyond the grave), arson (due to the difficulty in determining whether fires were set intentionally or accidentally), or crimes against children under 12 (since 12 is the youngest age allowed to report).

Other Sources and Types of Data

The NIBRS and NCVS aren't the only data sources used for studying crime. These and other data that are collected by an agency or entity that isn't the current researcher are known as **secondary data sources**. Many researchers collect their own data (such as surveys or interviews of individuals), which is known as **primary data**. As you can imagine, primary data collection is a far more extensive process, since scholars have to identify their sample (more on that below), undergo ethics review if dealing with human subjects, and collect data from their sample, without having the data readily available already through a secondary source.

Since NIBRS and NCVS only assess crime and victimization, they also exclude some significant data depending on your research question. For example, if you are studying the kinds of re-entry supports or rehabilitation programs keep offenders from recidivating, you need to get additional data that isn't just on crime commission (your measure for recidivating), but also shows you who your former offenders are who went through the rehabilitation program or used the re-entry supports. If you were to test one of the theories in the previous chapter, like Differential Association, you'd also need data about friend groups of juvenile offenders and the beliefs and behaviors of these close peers. If you were to test Critical Race theory, you'd want to do an archival study or policy review study of different laws or collect data on sentencing decisions from courts and how they are disparately applied.

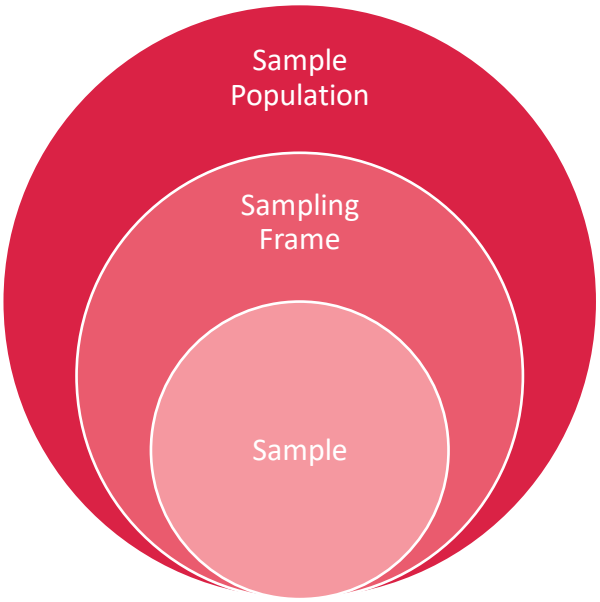
All of these data fall into two major categories: **quantitative** and **qualitative**. **Quantitative** data is anything that can be measured and counted using numbers (for example, crime rates, sentence lengths in years, number of friends with a criminal record, and so on). **Qualitative** data looks at typologies, categorizations, subjective experiences, or other contexts that cannot be quantified by numbers (for example, a research technique known as an *ethnography* is when a researcher observes a group to see how they interact, what their experiences are, and what may cause their experiences to be unique; none of this can have a number attached to it). Some data gathering techniques are known as **mixed-method** approaches: a survey that asks "how many times" and "what did you feel about X?" is gathering both quantitative and qualitative data. Many studies can also use both secondary and primary data; for example, if I conduct a survey (primary data collection), I may still want to then link up my survey responses with U.S. Census data about the neighborhoods that my respondents are from (secondary data) in order to control for the influence of neighborhood factors.

How to (Ethically) Use and Interpret Data

In a quantitative research study (either testing a criminological theory or evaluating a criminal justice practice or process), researchers must first narrow down their research question into testable hypotheses. This process often includes **operationalization,** the breaking down of concepts into clearly measurable parts. The researcher then needs to determine their **independent or predictor variable(s)** - the *causal* variable ("causal" as in "causes something", not "casual" as in informal, in spite of what spellcheck often tries to say) that is hypothesized to affect the outcome variable and is assumed to not be affected by another outside variable - and their **dependent or outcome variable** - the main outcome that they are examining (such as crime commission).

For example, my own research focuses on police millitarization. First, I need to figure out my overall research question: let's say the question is - does police militarization increase police use of fatal force? But wait, to go any further I need to operationalize police militarization: what do I *mean* when I say police militarization and how do I measure that? In one of my studies, I operationalized police militarization through its materiel dimension (the extent to which law enforcement agencies acquire military equipment) by examining military weapons and vehicles obtained through the 1033 Program (a government program that transfers surplus military equipment to local police agencies).

Now that I've operationalized my concept I can form my hypothesis, which hinges on my independent variable (1033 Program equipment) and my dependent variable (police fatal force per agency). This means I need data on both the 1033 Program (publicly available if you want to check it out), as well as police fatal force. Thankfully both of these are secondary data sources, which saves me a lot of time. If I were to gather primary data, such as a survey of police departments that have used the 1033 Program to request militarized equipment so I can ask agencies how often they've used these items and for what kinds of callouts, I would need to take some extra steps. First, I'd need to determine my **sampling population**, which is the entire group of entities (could be either people or agencies/departments; for my example study, it would be police departments) that are relevant to my research question – so here it would be the entire population of police



An ideal sample represents the sampling frame, which represents the sample population; image by Koslicki (2024)

agencies that have used the 1033 Program. Then I'd narrow this to my **sampling frame**, which is the actual list of agencies from the sampling population that I will contact to ask to take my survey (sometimes the sampling population is small enough that the sampling frame is the same; however, for very large sampling populations, such as the total population of U.S. law enforcement agencies, the sampling frame is usually smaller and determined by various sampling methods that you don't need to know at this point). Lastly, my **sample** is the group that I actually end up getting results from.

Regardless of whether I use only secondary data sources or if I collect primary data myself, if I want to add **control variables** (which is highly recommended for robust studies; essentially you are controlling for the influence of other potential independent/predictor variables on your dependent variable), I can bring in NIBRS data to control for violent crime rates. I could also bring in U.S. Census data to control for population demographics and concentrated disadvantage. Hopefully you're starting to see how *many* different data sources are needed for a study!

When forming my hypothesis, I can either make it directional (saying that an increase or decrease in the independent variable will increase or decrease the dependent variable), or I can make it non-directional (saying that the independent variable will affect the dependent variable) - often this is up to the scholar's preference and nature of the research question. A directional hypothesis for my study would be: "**An increase in the amount of 1033 Program equipment obtained will significantly increase an agency's reported fatal force."** A non-directional hypothesis for my study would be "**The amount of 1033 Program equipment obtained will significantly affect an agency's reported fatal force."**

Correlation, Causation, and Types of Statistical Tests

Now that I've operationalized my terms, gathered all my data, and formed my hypotheses, I need to actually conduct statistical analyses. This isn't a stats class so I'm not about to go into the weeds of statistics, but for now it's good for you all to know the difference between **correlations** and **causation,** and the different categories of statistical tests that can determine causation.

At the very basic level, just looking at one variable's trend line is what we would call **univariate statistics** (*uni* meaning "one", *variate* meaning "variable"). Many of the trendline graphs that you see from news reports about crime rates, stock prices, and so on are all univariate. While these are helpful in illustrating changes in a single variable, univariate statistics cannot be used to test my proposed hypotheses above, and univariate statistics do not give the reader any understanding about what may have influenced the changes in that variable. For example, does a chart showing an increase in sexual harassment in the workplace after 2017 mean that actual sexual harassment *increased* post-2017, or does this illustrate that *reporting* of sexual harassment increased after the #MeToo movement encouraged more women to speak up? A more sophisticated test is needed to determine this, so beware of any media report showing a

graph and making a huge deal about what it “means” without any further studies to back up the claims.

Most studies, however, include univariate statistics in what’s called a “descriptives” table, meaning that the general description of each variable is presented in either the mean (the average) for interval/ratio variables (any variable that is numeric) or the frequency for nominal or ordinal variables (nominal being categorical variables, such as race/ethnicity having multiple different categories with no order, and ordinal variables being ordered categories where there is a clear hierarchy, like a Likert scale).

Looking at the interrelation between two variables is called **bivariate statistics** (*bi* meaning “two”, with *variate* meaning “variable”). This is where correlations come in, as well as other bivariate tests like ANOVA and chi-square testing (not that you need to know these right now, but when you encounter them in the future you will recognize them as bivariate tests). A **correlation** is when two variables co-occur with each other or follow the same pattern. **Causation,** on the other hand, is when one variable actually *causes* a change in another one (the dependent variable) and is determined through much more robust analysis methods like **multivariate statistics** (“multi” indicating that we are looking at relationships between more than two variables now). While we would expect our independent and dependent variables to correlate, we need to examine them further with multivariate statistical methods (and more brainstorming about what may or may not be left out of the analysis that could be another explaining factor) in order to determine causation. One of my favorite nerdy examples is Tyler Vigen's *Spurious Correlations* collection, which you can visit here or click the nearly perfect correlation graph (statistically significant too!) below between MSCI Inc. stock prices and Google searches for "that is sus" (the relationship is sus indeed). An oft-given example of a criminal justice spurious correlation is the correlation between ice cream consumption and homicide rates. It doesn't bode well for me if my favorite dessert causes homicidal tendencies! Think about it for a second though - what might cause *both* ice cream consumption and homicide rates to increase? Maybe sunny weather? If you guessed that then you're right - we tend to see homicide increase in the summer rather than the winter, because when someone's already considering homicide, they're more likely to do it when they're not bundled up inside trying to stay warm.

"Google searches for 'that is sus' correlates with MSCI Inc.'s stock price (MSCI)" by Tyler Vigen (2024)

While the above example is kind of silly, there can be grave outcomes when correlation is mistaken for causation. Remember back to the critique of early positivist theories in the last chapter? They were the first to attempt a scientific, hypothesis-driven observational method, but they mistook correlation with causation while also bringing in their own biases and beliefs. A good practice when reading through the theories we covered above would be to try to format a possible hypothesis in your head (or figure out if the theory would best be studied qualitatively), then think of other potential causal factors that could affect *both* your independent and dependent variables, and then think of your own biases and beliefs and whether that is influencing what data you're considering bringing in or leaving out.

It's good to note here that not all multivariate statistical tests are created equal. Many studies using multivariate tests are **quasi-experimental**, meaning that we are unable to say with certainty that our independent variable *truly* causes the dependent variable since we cannot possibly control for all factors. This is why there are statistical guidelines like how large your sample needs to be, and how to test for the overall model "fit" and variance explained. A true experimental design requires a methodological approach (before even analyzing the data statistically) known as a **randomized controlled trial (RCT)**, which includes a treatment group and control group (where the control group does not experience exposure to the independent variable) *and* a pre-test of both groups before independent variable exposure to the treatment group and post-test of both groups after.

As you can imagine when dealing with large numbers of people, RCTs can be incredibly expensive, time consuming, and require very strict ethical guidelines to ensure that historic injustices like the Tuskegee syphilis study are not repeated. Because of the expense and time-consuming nature of RCTs, this leads most criminological research to be quasi-experimental, though sometimes federal grants can fund large tests of new practices like body-worn camera implementation.

Bringing it All Together

Once I've determined my statistical test for my hypothesis, the final step when writing up findings and results is to address my study's **limitations**. Remember the difference between *internal validity* and *external validity*? Essentially, I need to look at my study through the lens of each and address both. For example, internal validity may be threatened by another factor causing the increase in fatal force, such as militaristic culture (since I only examined militaristic equipment). External validity is limited to only other police agencies that have military equipment. My statistical method will also have its limitations, such as if I only ran correlations rather than a multivariate statistical test like regression analysis.

An unethical research study is not only one that manipulates data but can also be one that fails to address its limitations, making it appear more influential and robust than it actually is. Always pay attention to this when reading research studies, or when hearing them being reported on the news. Speaking of news, make sure you're always accessing reputable news sources (such as those listed on Ad Fontes Media's Media Bias Chart), and if they mention a study, try to find the actual study rather than relying on a second-hand report of it.

If you do find the actual study and can access the entire study without a paywall, there are a number of steps you can follow to break down the information easily. The first is to determine whether the study is **peer-reviewed**. The peer-review process exists to ensure that renegade researchers don't go off spouting nonsense, pass plagiarized work as their own, and/or apply problematic research methods. To ensure this doesn't happen, academic publishing has a number of steps:

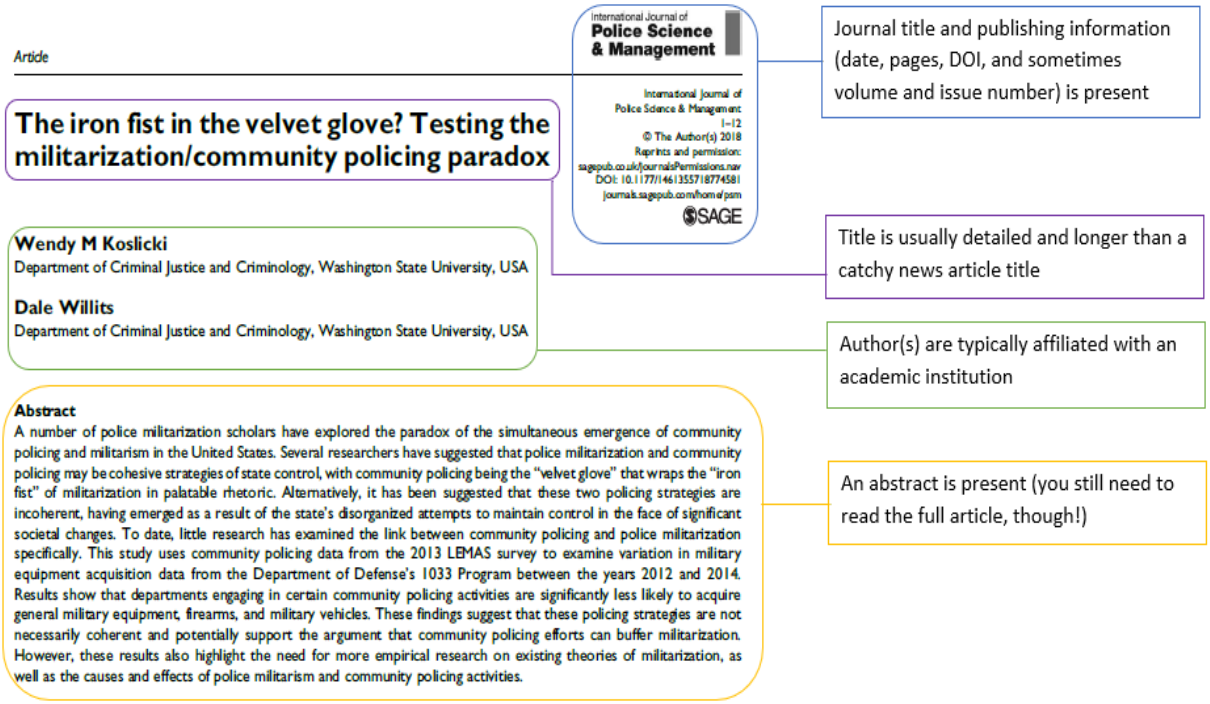
1. A scholar (or group of them) conducts a study and writes an article identifying the reason for the study and the findings, then submits this article to an academic journal.
2. The editor of the academic journal sees the topic of the article and identifies two (sometimes three) other published scholars in the same general topic area.
3. These two/three other scholars review the article to make sure it is well-researched and uses accurate research methods. They might suggest revisions one or a few times, or reject the paper.
4. After one or a few rounds, the article is either accepted into the journal, or rejected if the reviewers agree that it wasn't at the right caliber to be published and the editor agrees.

tl/dr: Peer-review is designed to ensure only quality research makes it to academic journals. (There are exceptions, but ideally this is what happens).

This is why peer-reviewed articles considered the gold standard of academic sources and references: they've been through an extensive screening process, unlike a book or government report - which may be well-written and informative but are ultimately not reviewed for accuracy by other scholars before publication. Books, government reports, and reputable news sources may assist in building a research paper or providing some statistics or current events, but these do not provide current, quality-controlled research findings in the way that peer-reviewed articles do.

To identify peer-reviewed articles, ask yourself the following questions:

- Is there a list of references at the end of the article? If so, it's likely peer-reviewed (if it has the following other markers).
- Is the article structured by sections indicated by headings? For example, **Introduction, Literature Review, Methods, Analysis, Findings, Discussion, Conclusion**
- Is the publisher a professional *academic* organization? Most online peer-reviewed articles have a live link for the journal or you can google it to find more information about the journal.
- What's the appearance of the article? The following is a handy breakdown of a peer-reviewed article's first page:



The first page of an article written by yours truly and colleague Dale Willits; image by Koslicki (2024)

Now that you've identified your peer-reviewed research article, the next step is to break it down. USC Libraries has an excellent guide here, and for the general introductory level, I would suggest following the AID method: Abstract (so you know the overview of the research study), Introduction (so you know the scope of the problem and the study's research questions/hypothesis), and Discussion (so you can read in plain English what the findings and implications of the study are, as well as the limitations). If you advance to the graduate level in criminal justice, you can start making sense of regression tables, but for now all you need to know is that asterisks (*) denote statistical significance, with a negative sign (-) indicating a negative relationship (i.e., an increase in the independent variable is related to a *decrease* in the dependent variable) and no negative sign indicating a positive relationship (i.e., an increase in the independent variable is related to an increase in the dependent variable).

Conclusion

This was a dense chapter with a great deal of statistical terms, but hopefully you're starting to see why studies of criminal justice and criminology must be done carefully in order to accurately inform theory and policy decisions. If you continue on to continue a criminal justice and criminology major, you will have to take a required statistics course to go deeper into all of this. If you're not a math person and that seems intimidating, don't worry! I didn't think I was particularly good at math until I took my first statistics course and everything made so much more sense because I was dealing with real-world questions rather than improbable word problems or geometry proofs. You will also gain a lot more confidence in learning how to make sense of news reports on crime data and criminological studies, which can better inform your opinions on criminal justice practice, whether you enter the criminal justice field, the policy field, or just try to make the best voting decisions at local and national elections.

Chapter 5
Structure and History of U.S. Law Enforcement

Introduction

This chapter will start off with the basic levels of law enforcement agencies, from federal to local and specialty, and general structure of local police agencies. This will give you a baseline to understand the history and development of U.S. law enforcement, as some of that historic discussion will discuss federal agencies and local agencies, so it's good to know the jurisdictions of each and how they interrelate.

The history of U.S. law enforcement to provide a foundation and understanding of how policing in the U.S. has developed, how it's changed, and how - in many ways - it's stayed the same. While there's been some tremendous change in technology and some applications of the 4th Amendment (search and seizure), there are ways where policing has largely remained unchanged in culture and practice.

As Locke asserted, the government needs to gain and retain legitimacy in order to maintain the consent of the governed (citizens); the U.S. policing institution is an apt example of tensions between the enforcement arm of the government and its citizens, leading to legitimacy crises at multiple points in history (especially since police are the most visible institution of the CJS, leading to more public awareness of wrongdoing or inaction). Additionally, any discussion of legitimacy must also ask the question of *who* within the public has a say in what "police legitimacy" looks like? Recall the discussion in Chapter 1 about the groups that have been systematically excluded from providing consent to be governed in a specific way through voting rights and access. This is quite intertwined into the history of policing.

Levels of Law Enforcement

U.S. law enforcement takes different forms and jurisdictions depending on the level. An important concept to know is how the U.S. police institution is **decentralized**, meaning there is no central agency/entity that controls all of the nation's policing. While there is a jurisdictional hierarchy that we will discuss inherent to the levels of law enforcement, there is no single, centralized locus of control of all U.S. law enforcement due to the federalist system of state powers discussed in Chapter 2. That being said, the main levels are federal, state, county, and municipal agencies (often you will see the term "local law enforcement" being used to include both county and municipal agencies together). There are also tribal law enforcement agencies for reservation lands, as well as specialty law enforcement agencies through municipal agreements, such as university police departments that operate separately from the municipal police department where the university is located.

Decentralization is the main reason why so many law enforcement agencies can operate under their own policies and practices, as long as they are abiding by state law and by U.S. Supreme Court interpretations of relevant amendments (mainly the 4th and 5th Amendments). This is also why, in spite of prominent figures like August Vollmer and O.W. Wilson during the Reform Era discussed below, individual law enforcement agencies could easily ignore their recommendations - there are often no teeth behind the recommendations of reformers or even presidential investigatory commissions (like the Kerner Commission which will be discussed more in the History section of this chapter, or the more recent 2015 President's Task Force on 21st Century Policing). U.S. Congress *could* in theory pass a bill that dictates police practice on a national level (thus requiring all law enforcement agencies to follow the new law), but partisan divides have long prevented this.

For example, following the murder of George Floyd and national protests in 2020, the U.S. House of Representatives passed the George Floyd Justice in Policing Act in 2021 - an Act that would have required many reforms and accountability measures (H.R.1280, 2021-2022) - but the Act was not passed in the Senate. U.S. Presidents can pass **executive orders** in an attempt to dictate law enforcement practice, but these can only be enacted across federal law enforcement. For example, in spite of the George Floyd Justice in Policing Act not passing Congress, the Biden Administration issued an executive order that applied many of the bill's reforms to federal law enforcement agencies and programs (White House, 2022) in May of 2022. This executive order has no power over state or local law enforcement but does affect federal law enforcement agencies and programs that federal law enforcement utilizes.

Federal Law Enforcement

There are a number of federal law enforcement agencies, with most being organized within the **Department of Justice (DOJ)** or Department of Homeland Security (DHS), and a few serving Congress and the U.S. Supreme Court, as the graph by Statista (2020) shows. The agencies within the DOJ are:

- The **Federal Bureau of Investigation (FBI)**, which is the primary agency for investigating any federal crime
- The **U.S. Marshals**, which track and apprehend federal

"Who has the power over federal law enforcement?" by Statista

fugitives and provide protection in federal courts

- The **Drug Enforcement Administration (DEA)**, which enforces federal drug laws
- The **Bureau of Alcohol, Tobacco, and Firearms (ATF)**, which regulates these products and investigates illegal manufacturing of firearms and explosives
- The **Bureau of Prisons (BOP)**, which oversees and operates federal prisons

While popular TV shows like to always depict animosity between federal law enforcement agencies and local police, there is often much more coordination and cooperation when local police face a crime that is too complex and resource-intensive than they have the capacity to handle. However, some tension may arise when the DOJ (usually through the FBI) exercises its limited regulation powers (limited in that only Congress can enforce widespread police reform, as discussed further below) to put individual police departments under **a consent decree**, which is a process where a department is told the changes it must implement. This is only after there has been an established "pattern of practice" of repeated civil rights violations from the local police agency, such that the DOJ has to be involved to protect the rights of the people in that municipality and essentially get the police department to "shape up". Again, this is limited only to those departments that have shown a pattern of practice. Unfortunately the outcomes of consent decrees haven't been rigorously studied, but what evidence exists shows that they are generally effective, as long as the departments commit to the DOJ's recommended and enforced reforms (Jiao, 2021).

Agencies organized within the **Department of Homeland Security (DHS)** include:

- The **Secret Service**, which protects U.S. political/government figures and their families, and also investigates counterfeit money
- **Immigration and Customs Enforcement (ICE)**, which enforces federal laws against illegal immigration and investigates homeland security threats
- **Customs and Border Protection (CBP)**, which enforces travel inspection (assessing documents and checking for illegal contraband) and investigates smuggling
- The **Transportation Security Administration (TSA)**, which ensures that transportation systems (such as air flights) are secure
- The **U.S. Coast Guard**, which enforces any federal law violation and security threat at sea, and also assists with search and rescue for maritime accidents

Often people ask the question about the difference between ICE and CBP, especially as both agencies have increasingly been in the news for the past decade or so due to contentious policies, practices, and arguments regarding immigration at America's Southern border. This optional article explains the difference but also the blurred lines between the agencies:

Werthan (2018): What ICE Really Does: There's Immigration and Customs Enforcement. There's Customs and Border Protection. Who does what?

State Law Enforcement

Each state has its own statewide agency - often called state or highway patrol or state troopers - that has state-wide jurisdiction to enforce highway and interstate traffic laws and to assist local agencies in resource-intensive cases or cases that cross multiple local jurisdictional borders (but stay within the same state; if they move across state lines then it's generally the FBI that is called on to assist in coordination of the investigation). Hawaii, being comprised of multiple islands, is the only exception in that it has a Department of Law Enforcement but no state troopers; instead, it has four county police agencies that cover the five counties (two counties are within the Maui County Police jurisdiction).

County and Municipal Law Enforcement

Speaking of counties, county law enforcement is typically overseen by the Sheriff's office or department of each county within a state. **Sheriffs** typically maintain the county jail and enforce laws in unincorporated areas (areas that fall outside of municipal [city/town] boundaries) within the county, and - depending on the size of the county - can serve a wide variety of other tasks, such as narcotics task forces, search and rescue, and sometimes coroner duties (conversely, in some areas, only the coroner is allowed to arrest the sheriff!). As of 2020, there are 2,889 sheriff's offices across the U.S., with none in Alaska or Connecticut (Goodison, 2022).

Sheriffs are quite unique in that they are generally directly elected by citizens of the county (some state constitutions even require partisan election of the sheriff). Some are appointed by elected representatives, but this is relatively rare across the U.S. The general argument in support of elections is that it makes sheriffs more accountable to the community and provides a counter-balance to mayor-appointed municipal police chiefs, though critics say that this could lead to sheriff candidates that run on populist platforms or the public's fear of crime (Neuhauser, 2016). While an example of direct democracy, sheriff's elections are nearly always partisan, meaning that often voters select whomever aligns with their party alignment, rather than investigating the sheriff candidate's qualifications or plans for county law enforcement; this also means that some sheriff candidates may switch parties just to vie against an incumbent, even if they actually agree with the incumbent's political platform (for example, if the incumbent is Republican, an otherwise right-leaning candidate may run as a Democrat to get a chance to be elected), though some state laws allow local political parties to reject this (e.g., Brams, 2024).

In cities and towns, **municipal police agencies** are those that can only operate within city/town limits and are often what people think of when they think of "police". As of 2020, there are 11,788 municipal police agencies, and 45.5% of these agencies have 9 or fewer full-time sworn

officers (Goodison, 2022)! Many tend to think of very large agencies like New York Police Department or Chicago Police Department, but agencies of this size are only in the top .8%.

Because most municipal police agencies are very small, they tend to operate on a rather simple hierarchical structure. For example, the following link shows a typical smaller structure of a municipal police agency: Watertown Police Department (2024) Organizational Chart. The Chief of Police - appointed by the mayor - oversees all operations, with Captains reporting to the Chief. In the Field Operations division, patrol officers are immediately supervised by Sergeants. in the Administrative Services division, detectives, and staff development officers (such as training officers) work as sworn officers, while the other divisions (communications, records, evidence, and so on) are operated by civilian staff. Conversely, the following image here shows a much larger agency: Houston Police Department (2024) Organizational Chart. This agency has multiple special units and a much more bureaucratic structure. This type of specialization was brought on during the Reform Era, which will be discussed more below.

Regarding the ranks used beyond those of Chief (sometimes Commissioner or Chief Superintendent), Captain, Sergeant, and Officer, additional ranks are included if the department is large and specialized and tend to follow the rank naming conventions of the U.S. Army or Marine Corps generally up until the rank of Major.

Tribal and Specialty Agencies

Outside of the general levels of federal, state, county, and municipal law enforcement agencies, there are also **tribal police** agencies and some specialty agencies, depending on the area. Tribal police may enforce the tribal laws of their specific tribe on their specific reservation land and may enact their own justice and court system on reservation members. However, if a non-Native suspect is found on reservation land, tribal police may only detain them temporarily and must wait for the local municipal agency outside of reservation borders to come and pick the suspect up, according to *United States v. Cooley, 2021*. In the instance of a non-Native suspect crossing borders and committing crimes too complex for either tribal or municipal police to deal with, only federal law enforcement may enter reservation territory to assist with the investigation. This optional article discusses the confusion and issues surrounding jurisdiction issues with reservations, even in spite of *United States v. Cooley's* ruling: **Maher (2021) Supreme Court Rules Tribal Police Can Detain Non-Natives, But Problems Remain.**

Specialty agencies, such as park police, metro transit police, and university police, all vary in their sizes and operations, but generally may operate as independent police agencies as long as they do not violate the ordinances and codes of the cities they are located within. The main executive of these agencies is appointed through various means; for example, at Ball State University, the Chief of University Police is appointed by and reports to the Vice President of Student Affairs.

The Five Eras of Policing History

The history of U.S. police can be split into five major eras, though you may encounter textbooks and articles that refer to three. This original conceptualization of three eras counted the first to start at around 1840; there's some reason for this which we'll get into, but it's also inaccurate to start at this date since the precursors to law enforcement in the U.S. had existed for some time before this. Additionally, the third era ended on 9/11, which ushered in a fifth era (since the third era is the fourth if you add in colonial times) that we are in now.

The Colonial Era

Law enforcement in the colonial days was comprised of **the watch** and **private policing**. The earliest watch was formed in Boston in 1634, with New York and Philadelphia soon following. Watches were always night watches (until the 1830s; right before policing largely evolved into a government-sanctioned, organized institution), and were notoriously inefficient, as there were few forms of accountability (no one to make sure watchmen weren't drinking or sleeping on the job). Constables – law enforcement officers who were paid for warrants served – were the main official overseers of the watch. This role evolved a bit, to the point of having no clear definition today (constables still exist in some jurisdictions). Sheriffs had the most prominent and official role, with their variety of miscellaneous duties narrowing to county law enforcement today. Private policing is mainly as the term sounds: men hired individually to provide security for individuals

Eras of U.S. Policing; Image by Koslicki (2024)

or businesses. There was no real oversight here, other than from the employer.

Down in the southern colonies, there was a third, disturbing form of law enforcement, which were the **slave patrols**. Slave patrols could actually be seen as one of the first modern police forces, due to the organization and the legitimacy that they had in Southern colonies, meaning that – unlike the night watch – these were formalized groups with a state (government)-sanctioned ability to use force (against the Black population) (Walker, 1980). Slave patrol members were either appointed by county courts or were qualified through legislature to serve, with the qualifications mainly being that they be white, male property owners with former militia service (Hadden, 2003). These militias evolved into police forces that mainly focused on enforcing Jim Crow laws (enforcement of racial segregation) after the Civil War (Grant & Terry, 2005; Hasset-Walker, 2020-2021). Hopefully by now, you're recalling that initial question we began with: who/what groups *within* the public have a say in what legitimate law enforcement looks like?

The Political Era

Before we get to the Political Era in the U.S. and the formalization of policing in the U.S. Northeast, it's important to jump over to the UK and take a look at **Sir Robert Peel**, who reformed the British police (creating the **London Metropolitan Police** in 1829) and criminal code while serving as Home Secretary (1822-1830).

Sir Robert Peel was a major advocate for "policing by consent", similar to Locke's concept of "consent of the governed". According to Peel, the police are responsible for building a good enough reputation and establishing trustworthiness, which will then lead to the public seeing them as legitimate. To illustrate this philosophy, Peel created nine guiding principles for his reformed police:

1. *The primary purpose of the police is to prevent crime, not to repress it by force or severe punishment.*
2. *The ability of the police to do their duty depends entirely upon the public's approval and respect.*
3. *The police have the duty to secure public cooperation, in order to gain their approval and respect.*
4. *The degree of public cooperation that can be gained diminishes proportionately with the necessity for using physical force.*
5. *The police will garner public favor not by pandering to their will, but by being impartial, unbiased, courteous, having a sense of humor, and being ready to sacrifice themselves in the protection of others.*
6. *Police should only use physical force when absolutely necessary to ensure compliance to the law, and only after sufficient warning.*
7. *The police are the public and the public are the police.*

8. *The police should never overstep their role and attempt to take on the powers of the judiciary or corrections.*
9. *"The test of police efficiency is the absence of crime and disorder, not the visible evidence of police action in dealing with them."* (Gov.UK, 2012)

As you can see from these, Peel was very much focused on community cooperation, visibility, and crime prevention. However, the police are also to be impartial and unbiased, and must never overstep their role or use force except when absolutely necessary, because violating these rules will lead to loss of public trust. Many remember his principles as being summed up by Principle #7 ("the police are the public and the public are the police"): this means that the police must never see themselves as "above" the public and must always remember that they are a member of the public too; conversely, the public are the police in that the public - when they trust the police and believe they are legitimate - will share the tips, information, and evidence that the police need in order to effectively do their jobs.

Borrowing largely from the London Metropolitan Police, the **New York City Municipal Police Act** of 1845 – modeled largely after London – was enacted to bring law enforcement into a more formalized and democratic form to appease the public majority (Miller, 1977). This was smack in the middle of a major era of international immigration coming into the United States. There was strong nativist sentiment among the New York residents who could trace their genealogy to early colonists against the new European and Asian immigrants, and riots/strikes from factory workers were also erupting due to the working conditions at the time (Miller, 1977; Silver, 1967). This led to an increasing demand from politicians for the police to focus on controlling the "dangerous classes": groups of immigrants and labor strikers who *were not actually committing the most crime*, but were perceived as threats to the social and economic status quo (Shleden & Vasiliev, 2017).

The "dangerous classes" were those who were predominately poor, foreign immigrants (other than the Irish, who were initially marginalized but by the late 1800s primarily made up the police ranks), and free Black individuals (Miller, 1977; Shleden & Vasiliev, 2017). The public and political demand to control these "dangerous classes", along with pre-existing ethnic tensions among immigrants, often led to the police using aggressive tactics to control crime and disorder. This, in turn, led to increased public distrust and disrespect of the police, causing a downward spiral of police-public relations. Thinking back to Sir Robert Peel's nine principles, we can see that, largely, the paramilitary *structure and organization* of the New York police was borrowed from the London Metropolitan Police, but the *principles* didn't stick for too long. A large part of this difference is that commissioners in the London Metro Police, unlike commissioners in New York, *were not hired, fired, and promoted by politicians*. Hence the name of the era in the U.S. being the **Political Era**.

We also need to look further beyond New York when examining the politically-driven police initiatives during the Political Era. About 30 years after the New York City Municipal Policing Act, the federal U.S. government was starting to initiate a new strategy of forced assimilation when

it came to the treatment of Native Americans. Prior to this time, U.S./Native American history was in what is known today as the Reservation Era, when Native American tribes were pressured to create treaties to stay on reservation land (though these treaties were not always respected by the U.S. government, such as the violation of the Fort Laramie Treaty; see Chapter 2 of Dr. Koslicki and Dr. Gray's textbook on race, gender, and justice for more background about Native American history and the CJ system). The Reservation Period Era to and end with the passing of the Dawes Act in 1887, ushering in the Allotment Era, though attempts to enforce assimilation started around the late 1870s, when **Native American Boarding Schools** began to receive significant amounts of federal funding with the explicit goal of breaking the bonds between Native American parents and their children, thus achieving *cultural genocide* (government-initiated destruction of a culture's practices, norms, and values) (Newland, 2024). The police, being the primary enforcement branch of law and government initiatives (along with the military in this case), were relied upon to enforce Native American family separation, which including seizing the children by force (Newland, 2022). (While sources specify that the police who did this were "Indian Police," this title was given to non-Native law enforcement agents of the Interior Department; individual tribes were not able to organize their own tribal police until 1975, and this still must be done under the organization of the Bureau of Indian Affairs [Wakeling et al., 2001]). This brutal mandate continued through the next two policing eras, with about $23 billion in today's dollars appropriated by Congress to fund these schools and enforcement, and nearly 1,000 confirmed child deaths from the rampant abuse (though the Department of Interior recognizes that the number is likely higher) (Newland, 2024). When thinking of the "Reform Era" and "Community Era" (the latter of which I call the "Order Maintenance Era," for reasons you all will read in a bit), it is necessary to also think of police practices that were *excluded* from reform and the groups that were *excluded* from community policing, as the impact of forced assimilation of Native Americans in the United States is a very under-discussed issue in criminal justice texts.

There are rather blurry lines between the transition from the Political Era to the Reform Era. Police reform efforts began alongside the progressivism movement in the early 1900s and 1910s, and progressivist reforms on labor laws and business regulation assisted in easing some of the labor tensions that contributed to the strikes and riots that the police were dealing with since their official inception. However, another outcome of progressivism – namely, Prohibition – created avenues for bribery and corruption that formerly didn’t exist in such high concentrations. **The Wickersham Commission** was actually established to investigate police activities during Prohibition and found that some police forces were aggressively interrogating suspects, but that the police also often failed to arrest notorious offenders. The “professionalized” outcomes of the Reform Era arguably didn’t take place until the 1930s following the Wickersham Commission.

The Reform Era

Springfield police in a patrol car; public domain (1916)

Also known as the Professionalism Era, the **Reform Era** was a culmination of several precursors that were happening in the background of the late Political Era. Following the end of the Civil War, several Black police officers began to join police departments, with the earliest recorded to have joined in 1867. By the 1870s, more Black officers were sworn into southern police departments, and in 1875, Bass Reeves was the first Black man to become a Deputy U.S. Marshal (DOJ, 2017). Alice Stebbins Wells became one of the first female law enforcement officer with full arrest powers in 1910 (women had worked for law enforcement agencies earlier than this, but could only work with juveniles), followed by Georgia Ann Robinson becoming the first African-American woman to be a police officer in 1916.

In addition to the slow but steady diversification of policing, several new technologies emerged to fundamentally change the operations of police stations: the patrol car, the two-way radio, and the telephone. Patrol vehicles were a necessary adaptation to keep up with the times, and police administrators believed this would make patrol more efficient (efficiency was a primary value of the professionalization movement). Vehicles and the more widely-used telephone enabled police departments to receive public calls and the police were able to respond more quickly. Think back to before telephones became widespread: there was no "calling the police"! However, with these new technologies and the new focus on efficiency, police departments shifted their focus away from crime *prevention* exclusively towards crime *response* and became more numbers-driven. It's easier to measure *crimes responded to* over *crimes prevented* (how would anyone know the latter)? While one could argue that this shift was a somewhat positive development (as the focus on crime prevention still led to some aggressive policing tactics back when the police were controlling the "dangerous classes" and social disorder in the 1850s), it largely removed the officer from the public and de-emphasized human contact. Officers themselves were expected to be more aloof in their dealings with citizens, though there was also a positive emphasis on impartiality as a promoted policing value.

The two-way radio is arguably the most important invention of the Reform Era, as it was the first significant accountability mechanism to be introduced to U.S. policing. Recall way back in the colonial days: no one could really keep an eye on whether the night watch slept or drank on duty. As cities grew larger during the Political Era, an officer's reputation and actions were more visible, though political ties could keep corrupt officers from being removed from service. The

two-way radio enabled sergeants to monitor patrol officers' movements, and patrol officers benefited significantly from the ability to call for backup when needed. Officer safety and accountability were both substantially enhanced due to this technology in the Reform Era.

Unfortunately, when it came to more representative police ranks, the roles of Black officers – like the roles of women – were limited during the Professionalization Era. Minority officers were often only given beats in racially segregated areas and police commissioners often did not have the foresight to hire more Black officers as a response to rising tensions between the police and Black communities (Walker & Katz, 2013). Tensions and discrimination-induced race riots didn't come into national focus until the 1960s, but there were two notable figures working in the background to emphasize diversification and other reforms during this era: **August Vollmer** and **O.W. Wilson.** August Vollmer started making waves when, as chief of the Berkeley (CA) Police Department in 1905, he fired ***all*** of the officers due to widespread corruption and replaced them with officers with college degrees (Oliver, 2017). He criticized his fellow law enforcement peers as violent, corrupt, and being too influenced by local politics, and pushed for the creation of police academies to actually train and professionalize officers (Vollmer & Schneider, 1917). In addition to this, he was the first to leverage using patrol cars for greater efficiency, two-way radios for officers, juvenile policing units, and evolving investigatory methods of the time (more on that in Chapter 6).

O.W. Wilson, Vollmer's protégé, made Vollmer's reforms more widespread, and also emphasized the focus on efficiency through motor patrol and rapid response to calls for service. Wilson was also notable in his communication with Civil Rights leaders such as Rev. Dr. Martin Luther King, Jr., to discuss ways to address the racist police brutality and violence that was becoming more visible across the nation (and even directly recognized by a presidential commission, the Kerner Commission, in 1967). Due to the widespread racist violence in the South that was committed by both the public and the police (Jim Crow laws gave a layer of legitimacy to racist violence), thousands of Black families migrated northward during the Great Migration starting in the 1910s (Library of Congress, n.d.). While Northern states offered African-Americans better job opportunities and fewer barriers to voting, there was quite a lot of racist backlash from Northern White people who were angry at the social change brought about by the Great Migration and WWI (Black workers who filled open positions while White servicemen were at war were targeted, as well as Black servicemen who were treated better in Europe than in the U.S. and came back openly questioning their treatment by fellow Americans) (National Archives, 2021). In the summer of 1919 (now often known as **red summer**), White violence against Black Americans reached its head, erupting into racist riots of White rioters targeting Black citizens of approximately 25 cities across the nation, leaving many dead and injured (38 dead and 547 injured in Chicago alone) (Britannica, 2024). Unfortunately in many of these instances the police stood by or did not aid in deescalating (what we know as riot police were not created until the aftermath of the 1965 Watts Rebellion, when Black citizens of Los Angeles widely protested police brutality) (Bates & Fuller, 2019; Philbrook, 2008). Violent events continued across the U.S., such as the Tulsa Massacre in 1921 (100-300 were killed, with no

government prosecutions of the perpetrators [Oklahoma Commission, 2001]), and another surge of racist violence in 1955, precipitating the Civil Rights Movement (Library of Congress, n.d.). O.W. Wilson, attentive to these events and the problems of police brutality against Black citizens and police inaction of protecting Black citizens from targeted White violence, was active in attempting to address this widespread problem.

However, because of Dr. King's assassination in 1968 (and the earlier Kennedy assassination in 1963), the U.S. was thrown into widespread social crisis and shock. Policing in the U.S. (and U.S. criminal justice in general) entered into what is called a "legitimacy crisis" among criminal justice researchers, largely due to the resulting mistrust that the public had of the police (police also viewed the public as hostile and unable to see things from their point of view). There was also an explosion of research that occurred in the 1960s and early 1970s, including the **Kansas City Preventative Patrol Experiment** (which found that crime did not decrease regardless of whether patrol in an area was increased, decreased, or stayed the same [Kelling et al., 1974]). This was a pivotal decade in U.S. criminal justice history, and – coupled with mostly rising violent crime rates – led to widespread disillusionment with the criminal justice system. By the end of the 1970s, the widespread sentiment was that a new model of policing was needed.

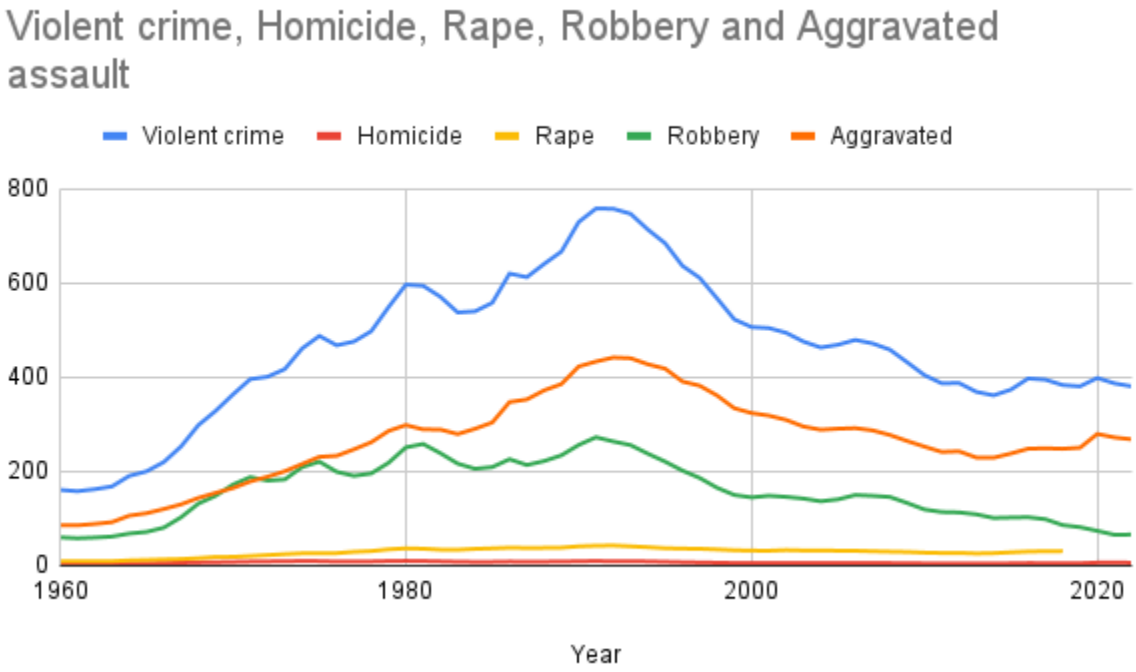
The Order Maintenance Era

This era is rather idealistically known by some as the "Community Policing Era" or "Community Era", though based on my research the "order maintenance" moniker suits it better. Though it would be wonderful to say that we had a full throwback to Sir Robert Peel's nine principles, the real outcomes were actually rather fractured or disjointed. We'll get to that in a bit. First, though, it's important to look at the historical context of the time. Garland (2001), a prominent criminal justice historian, calls the 1970s/1980s the "Crisis Decade," and lists a few reasons why:

- One reason is that the U.S. experienced a number of economic recessions at this time. There was a stock market crash in the 1970s, oil crises, and an energy crisis within this time period.
- Related to this was further labor stratification, meaning that there was a wider gap between low-wage/low-skill jobs and high-wage/high-skill jobs. It was more difficult to move up the ladder or find jobs that were in-between. The "American Dream" was becoming unattainable for those stuck at the lower end.
- New advances in transportation and the changing labor market meant that more people were moving for jobs and/or shifting their family structure to earn living wages (the term "latchkey kid" was coined to define the children of this era because both parents were working, and childcare options were limited at this time).
- Because of the increase in transportation and people moving for work, there was also a breakdown in common informal social controls. People became more transient, so there

were fewer informal sources of social control (and support). (Which theories from Chapter 3 could connect with this?)

- Unfortunately, some white, middle-class groups were still opposed to desegregation and the Civil Rights Movement, and moved to more homogeneous suburbs and neighborhoods, causing more demographic stratification (this is known as "white flight").



Graph of violent crime, homicide, rape, robbery, and aggravated assault, assembled using BJS and UCR data, by Mr. Swordfish (2024)

We also had rising violent crime rates that started sharply increasing in the 60s, peaking in the mid-90s. While our overall violent crime trends have been dropping as discussed in Chapter 1, the steady rise from the 60s onward led to widespread public questioning of the police practices of the day. Along with all of these changes and events during the Crisis Decade, advances in technology had made the media more far-reaching than ever before. Unfortunately, this also meant that moral panics were also more easily communicated and spread. A **moral panic**, if you've not heard the term before, refers to a large-scale social fear about some perceived rising evil or threat to society. Often these fears (or arguments of why everyone should be afraid) are spread by vocal social movements, politics/politicians, and the media. During the New Developments Era of policing, we saw two major moral panics:

1. The **War on Drugs** in the 1970s-2000s
2. Juvenile "superpredators" in the mid-1990s

The War on Drugs

The war on drugs was officially declared by President Nixon in 1971, though recall from Chapter 2 that it had its roots much earlier in Harry Anslinger's work to make marijuana illegal. Remember that a decade prior, there was some pretty heavy drug use going on in the 1960s; not everyone approved, and in the 1970s there was increasing media coverage about drug cartels and the effects of heavy drug use. Due to Nixon's influence, the Drug Enforcement Administration (DEA) was created in 1973. President Reagan substantially expanded the reach of the war on drugs in the 1980s, with President Clinton doing the same in the 1990s.

Poster by the U.S. Alcohol, Drug Abuse, and Mental Health Administration from the 1980s, by National Library of Medicine (2010)

Unfortunately, significant negative outcomes were brought about by the war on drugs. Myths fueled by media coverage demonized crack cocaine (you may have heard of the term "crack babies", referring to children whose mothers used crack cocaine while pregnant; the myth conveyed was that these children had significantly more negative developmental effects than those whose mothers used any other type of serious controlled substance), and policies followed (Okie, 2009). One of the most discriminatory of these policies was the sentencing of crack cocaine versus powder cocaine: the 1986 Anti-Drug Abuse Act made possession of 5 grams of crack cocaine to carry a minimum of 5 years, while it took 500 grams of powder cocaine to achieve the same sentence (Matza, 2022). This is known as the **100:1 sentencing disparity.**

This had a heavy effect on those of low socioeconomic status (SES), as they were the primary users of crack cocaine (powder, being more expensive, was primarily used by those of higher SES backgrounds). Due to the intersection of SES and race/ethnicity (especially at the time), it was primarily black individuals who were receiving these heavy sentences (often for nonviolent offenses, such as possession). Mandatory minimum sentencing policies also led to prison overcrowding and mass incarceration. As early as 1995, the U.S. Sentencing Commission found

that the Anti-Drug Abuse Act penalized small-scale crack dealers far more harshly than large-scale powder cocaine traffickers and sought to lower the sentencing ration to 1:1 for powder-to-crack cocaine; their repeated attempts were dismissed by Congress (U.S. Sentencing Commission, 2009). In 2010 the Obama Administration reduced the disparity to **18:1** with the **Fair Sentencing Act (FSA)** (but this was well after the end of the Order Maintenance Era, so we're getting ahead of ourselves). Before the FSA, however, harsh crackdowns on low-level street sellers were contributing not only to arrest disparities, but mass incarceration as well.

Juvenile "Superpredators"

Violent crime rates peaked in 1992-1994, while the media increased its coverage of sensational news stories (I'm sure you've all heard the term: "if it bleeds, it leads"). Among these stories were cases of juvenile homicides and other violent crimes, and a prominent article (pictured above) warned of a rise of violent, young repeat offenders who couldn't be reformed. All of this led to another national moral panic, this time focused on juvenile delinquents. "Get tough" policies were passed, leading to many juveniles being involved in the criminal justice system (many of whom weren't violent) (Larson & Carvente, 2017). Sadly and ironically, violent crime rates among all populations had begun to sharply decline right around the rise of this moral panic (look back at the crime rate trend graph earlier in this chapter), and instances of violent, repeat juvenile offenders were relatively infrequent. However, these policies led to increased pressures on law enforcement to enforce tougher policies on juveniles, instead of making other discretionary decisions that would bypass involving juveniles into the system.

Fractured Policing Outcomes

Both of these moral panics increased political and public pressures on the police to "get tough on crime" and enforce laws more aggressively. However, at the same time (1980s/1990s), another way of policing came into focus due to a significant article written by Wilson and Kelling: ***Broken Windows.*** Recall from Chapter 3 that Wilson and Kelling argued that visible signs of disorder communicated the message that no one cares about the location that is disorderly, thus encouraging more disorder and crime to come into the area. Their emphasis was on involving citizens in policing (citizens would assist officers in identifying causes of disorder and would do their part to police and fix disorder), and in police cracking down on any sign of disorder to supposedly prevent the occurrence of actual crime.

However, at this time the war on drugs was in full swing, and though there was an increase in national attention on Wilson and Kelling's theory, the community-oriented policing (COP) philosophy that they had started was a vague philosophy with no clear definition. Still, it was pushed by both the public and government as a way to respond to the legitimacy crisis of the 1960s/1970s. However, the message of Broken Windows and COP was unclear, since the former seemed to mix zero-tolerance, "tough on crime" policies with community cooperation, and the latter was vague and not clearly defined. This led to two clear and seemingly opposing

messages being communicated to the police: **be tough on crime (especially drug offenses and juveniles with the potential of being violent)** and **be community oriented**.

This led to a spectrum of COP implementation across police departments. On one end, departments would adopt aggressive, "zero-tolerance" type policing; on the other, departments would adopt more of the relationship-building version of COP that emphasized community cooperation, foot patrol, and community-relations activities. Most departments fell in between, as it was up to individual departments to figure out how to navigate these two different demands; most seemed to find a way to integrate both in spite of the conceptual cognitive dissonance (Kraska & Paulsen, 1996).

The Neo-Political Era

Near the end of the Order Maintenance Era, we saw the terrorist attacks on September 11, 2001 and the resulting war on terror. 9/11 was a significant shock to the American system: other than Pearl Harbor, we had never suffered such a dramatic attack on U.S. soil, and unlike Pearl Harbor, we were not at war at the time, so this was especially unprecedented to the American public. The resulting war on terror created a shift in the policing mandate to now turn increasing attention to the threat of international terrorism, though much of the expanded authority given to the police in the name of homeland security was still used to engage in the war on drugs. In response to the 9/11 attacks, the Bush Administration created the Office of Homeland Security in late 2001, and Congress passed the Homeland Security Act in 2002, which authorized the creation of a new federal agency, the Department of Homeland Security (DHS) in 2003. The DHS brought several pre-existing agencies under its authority, as well as several new agencies, such as Immigration and Customs Enforcement (ICE), Customs and Border Patrol (CBP), and the Transportation Security Administration (TSA) (the TSA was created in 2001 in the aftermath of 9/11 and quickly became part of the DHS in 2003). The creation of the DHS was significant in its centralization and creation of several significant law enforcement agencies focused on border security. Because the DHS is headed by the Secretary of Homeland Security, a position appointed by the president, it is difficult to separate the partisan political influence of a president's platform from the operations of the DHS.

Recalling the concept of the "dangerous classes" from the Political Era, 9/11 brought into focus a new "dangerous class" (which remember, is a group that is *construed* as a threat to public, political, or economic status quo, rather than a group who disproportionately commits crime), which was Muslim Americans. The passage of **The Patriot Act** - an act that authorized detention of immigrants without trial or length limitations, greatly expanded domestic and international surveillance, and eroded some 4th Amendment protections (more on this in the next chapter) - in 2001 vastly increased law enforcement surveillance and harassment of Muslim Americans and people of Arab descent, often just due to their religion and ethnicity (Institute for Social Policy and Understanding, 2004; Ramachandran, 2021). The Patriot Act also greatly increased and facilitated cross-agency communication and cooperation, such that the Central Intelligence

Agency (CIA) - an agency that operates on non-U.S. soil for intelligence gathering - was leveraged to collaborate with the Federal Bureau of Investigation (the FBI) - our main federal domestic law enforcement agency - during the interrogation of detainees in Guantanamo, Cuba (a black site that is now notorious for the brutality of torture methods used) (Rosenberg, 2021). In 2006, the U.S. Supreme Court ruled that the treatment of Guantanamo detainees violated the Geneva Convention and U.S. federal law in *Hamdan v. Rumsfeld*.

Nogales Border Wall and concertina wire, by U.S. Customs and Border Protection (2019)

Also roped into the concept of the "dangerous classes" were immigrants from South America (though recall from Chapter 2 that Mexican immigrants were quickly demonized due to myths and associations with marijuana) as border control quickly became a political hot-button topic after a 70s-90s push for border enforcement due to the war on drugs. The Bush Administration's new CBP started implementing zero-tolerance border enforcement, and the Secure Fence Act of 2006 authorized construction of 700 miles of fencing along the Southern border (while Bush had pushed for guest-worker programs and citizenship facilitation as part of his immigration bill, this was removed due to push-back by other Republicans in Congress) (Stout, 2006). The Obama Administration initiated DACA, the Deferred Action for Childhood Arrivals, in 2012 to allow young unauthorized immigrants without a criminal record to stay in the U.S. temporarily and obtain work permits, and expanded DACA in 2014 with an additional program DAPA (Deferred Action for Parents of Americans and Lawful Permanent Residents), which allowed parents of permanent residents and citizens to stay in the U.S. temporarily to obtain work permits (Wallenfeldt, 2024). However, the DHS under the new Trump Administration rescinded DAPA and the expanded DACA and eventually canceled DACA altogether (Wallenfeldt, 2024). Dissatisfied with the Obama Administration's stance on immigration, individual GOP-majority states attempted to leverage local law enforcement to enforce border laws, such as Arizona's SB 1070 from 2010 (which was partially reversed by the U.S. Supreme Court in *Arizona v. United States* on the reaffirmation that unauthorized immigration is federal - not local - law enforcement's jurisdiction). A very recent attempt by Texas is SB 4, which the Department of Justice has filed a lawsuit against as unconstitutional based on *Arizona v. United States* and other precedent (DOJ, 2024).

Most recently, a major political maneuver by the current Trump Administration has been to utilize the **Alien Enemies Act** of 1798 to fast-track deportation of Venezuelan immigrants and pro-Palestinian protestors on green cards under the justification that these groups represent an invasion of the United States (the Alien Enemies Act allows for the deportation of foreign

nationals based only on suspicion during times of war and invasion. While only Congress can declare war - not the president - presidents can declare invasion, though historically this has only meant in the literal sense [i.e., an invading nation] rather than figurative/subjective]. In January 20, President Trump signed an executive order declaring undocumented immigrants as an invasion and threat to national security, using rhetoric about immigrant criminality that has been disproven by criminological research (Flagg et al., 2024; Waldman, 2024). We will discuss this issue and how it relates to federal courts and Constitutional issues further in Chapter 8.

Hopefully you're all seeing the political maneuverings as an illustration of the close political ties that still exist with law enforcement today, and why I call this the "Neo-Political" era (*neo* means new). As a reminder, this text is not here to tell you who to vote for, but political maneuverings are so intricately tied to the CJS, it is unavoidable to discuss these goings-on. While close political ties have existed with law enforcement through the Reform and Order Maintenance Eras, this current era has included several groups into the concept of the "dangerous classes", as with the original Political Era. Beyond the original Political Era, police unions in this modern era have not only become influential entities in preventing police discipline and accountability, but have also been found to spend millions in political campaign contributions to influence local, state and national elections (Bump, 2021; Perkins, 2020). Recall also that the Political Era attempted to integrate Sir Robert Peel's reforms into United States police, but the only things that really "stuck" were the paramilitary order and structure, while the "community oriented" principles didn't really take due to the corruption and political interference. While "community oriented policing" still often gets called on as a solution to issues in police use of force - especially police use of force against unarmed Black people - research shows that community oriented policing is largely ineffective (Cortright et al., 2020; Crowl, 2017).

Speaking of racialized police use of force, police militarization came into the public eye in the police response to the 2014 Black Lives Matter (BLM) protests in Ferguson, MO, after the shooting of Michael Brown. A government assessment report of the poor coordination and response criticized the use of military tactics, such as police snipers in overwatch position during the peaceful daytime protests, and the use of mine-resistant vehicles and camouflaged, unidentifiable uniforms that confused and alienated demonstrators and other members of the public (IRR, 2015), and the Obama Administration published the President's Task Force on 21st Century Policing to respond to concerns of police brutality and militarization, but as discussed earlier in the chapter, reform recommendations are only recommendations outside of Congress passing a bill or the president issuing an executive order that affects federal law enforcement only. Because most agencies responding to the BLM protests and acquiring military gear were and are local agencies, executive orders do not affect local police protest responses. The Obama Administration passed an executive order to limit the transfer of some items from the military to local agencies through the 1033 Program (the 1033 Program is federally administered through the Department of Defense so presidents have the power to do so), but these restrictions were rescinded by a Trump Administration executive order, allowing local police agencies to again receive grenade launchers, fixed wing aircraft, bayonets, and tracked vehicles

among rifles, mine-resistant vehicles, camouflage, and body armor (Davenport et al., 2018). The video below by Washington Post identifies the military weapons used by police who responded to the Ferguson demonstrations:

"What weapons were police using in Ferguson?" by Washington Post (2014)

Excessive police militarization and aggressive police protest responses to BLM protests came to a national spotlight again in 2020 after the murder of George Floyd. While the majority (approximately 95%) of the BLM protests were peaceful, police response to these protests was often heavily militarized and violent at the local level (ACLED, 2021). At the federal level, the Trump Administration deployed federal law enforcement agents from the DOJ, including ATF, DEA, and U.S. Marshals. Agents from the Department of Homeland Security (DHS) also responded. There were several alarming issues from a constitutional/legal and scholarly perspective (Vladeck, 2020). Another issue with Operation Diligent Valor (the name of the federal mission in Portland) and with Operation Legend (the declared mission of federal troops being sent to Democrat cities [Holland & Lambert, 2020]) is that they do not align with the powers granted by the Insurrection Act of 1807, which authorizes the use of U.S. Military and National Guard troops to respond to special cases of civil unrest. Agents from the DOJ and DHS do not receive the same crowd control training as National Guard troops do, and there were

documented instances of police brutality and inappropriate tactics. However, critics state that the Insurrection Act as currently written can be abused by presidents to send the National Guard in without approval from governors or mayors, such as former president Trump threatened to do (Gould, 2024).

Speaking of the National Guard, concern about the optics of being overused following the 2020 BLM protests was one of the factors behind the long delay before National Guard deployment to respond to the January 6 insurrection attempt (Broadwater, 2024). While U.S. Capitol Police attempted to rebuff insurrectionists, they were unprepared. Some news articles have drawn attention to the very different police responses to the BLM protests and not just the January 6 insurrection attempt, but other protests such as the COVID-19 stay-at-home order protests (Jones et al., 2021 Links to an external site.), and a research study that yours truly is working on with several colleagues has shown stark differences between the way police respond to left-aligned protests and right-aligned protests. Police response to these events and the clear politicization of the police has led to another legitimacy crisis, which is where we are currently at. In some ways this is also like the end of the Reform Era, where police responses to the anti-Vietnam War demonstrations (which are currently being compared to the police response to campus protests about Gaza [Breed & Gecker, 2024]) were also heavily criticized near the end of the era and the resulting legitimacy crisis; our policing eras like to swing back and forth like a pendulum, and some crises and issues may take on different aspects but the root causes are the same. How can we reform the police institution without repeating the same mistakes of the prior and current eras?

Conclusion

This was a whole lot of history in one chapter, but history is important to understand some of the long-standing roots of various issues and controversies that we see in policing today. With a sufficient understanding of history and the levels and jurisdictions of U.S. law enforcement, you will start to understand how social, political, economic, and cultural issues interrelate with the criminal justice system, especially with police being the "gatekeepers" to the system. Many of these concepts will also help you to understand the historic and modern impacts of the 4th Amendment and how it impacts police practice, which we will discuss in the next chapter.

Chapter 6
Police Training, Search, and Seizure

Introduction

This chapter will focus on the ins and outs of police officer selection and training. Then we'll zero in on two specific training topics: police use of force and constitutional law instruction – especially as relates to the 4th Amendment and search and seizure. These will lay a foundation for understanding the socialization process and ethical issues surrounding academy training and police practice that will be discussed in Chapter 7.

Recall from the prior chapter that, because our police institution is decentralized, there is no central regulatory body/agency that makes selection and training standardized across departments. As long as local agencies (which we will focus on with this chapter) are abiding by state law and U.S. Supreme Court interpretations of the Constitution, they are free to set their own standards. For example, several states allow people to apply to be officers at 18, while most require the applicant to be 21 (or 20 when applying and 21 by time of acceptance); some states also have limitations on the maximum age of application, such as Indiana which caps applicants at 35 years old. When it comes to training, this is even more varied, as we will explore below.

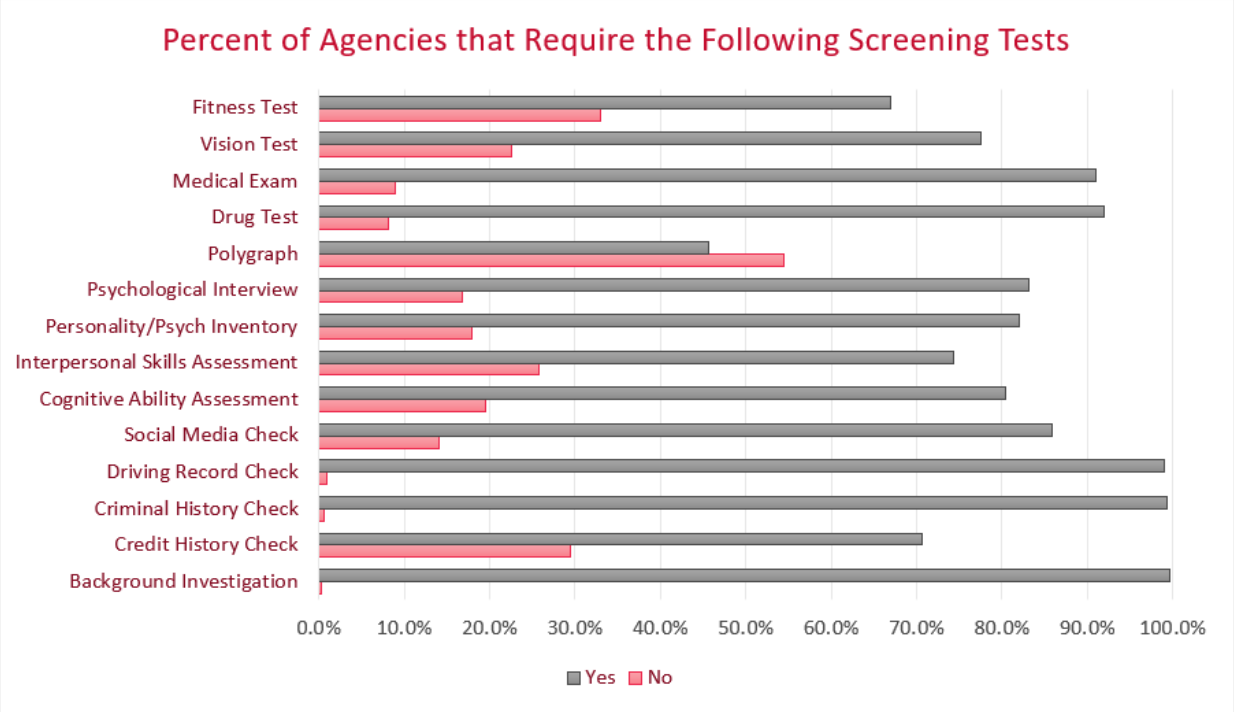
Police Selection & Training

The Selection Process

Selection criteria vary across police departments, as you can see in the graph below, compiled from the most recent (2020) Law Enforcement Management and Statistics (LEMAS) survey (a national survey of law enforcement conducted by the Bureau of Justice Statistics). While most (99.7%) require a background check, departments vary on whether they require drug tests, psychological evaluations, interpersonal skills assessments, or even a physical fitness test. Interestingly, almost half of the agencies (45.6%) still require a polygraph exam, in spite of criticism for the lack of standards about which polygraph test to use and lack of robust research for either of the main tests (Synnott et al. 2015). The majority of agencies (85.9%) now do a social media check too as part of their screening criteria, in case there is evidence of bigotry/biases, illegal behaviors, or legal but unapproved behaviors (e.g., smoking marijuana where it's legal, but the police department requires no recent drug use).

Other selection criteria include applicant testing, such as the National Police Officer Standards and Training (POST) certification or something similar (POST is required in some states but not others). These tests include sections on written communication and reading comprehension,

and many include memory tests and different cases to ascertain the respondent's preferred decision. You may also be provided with a diagram of a city grid or a blueprint layout of a room to go along with exam questions to test your spatial visualization ability, cardinal directions, and street name memory.



Data from the 2020 Law Enforcement Management and Statistics (LEMAS) Survey

"Percent of law enforcement agencies that require various screening tests"; image by Koslicki (2024)

Academy Statistics

The most recent information that we have regarding police academies nationwide is from the 2018 Census of Law Enforcement Training Academies (CLETA). This census is distributed and collected approximately every six years, so hopefully we get new statistics shortly, but for now what we know is from 2018. As of the earlier CLETA statistics, in 2018 there were slight increases in the percentage of women (19%, compared to 15-17% in earlier years), Black (14% compared to 13%), and Hispanic/Latino (17% compared to 13%) recruits enrolled in academies (Buehler, 2021). When comparing these figures to general population statistics in the U.S. overall, women are still *vastly* underrepresented in law enforcement (women comprise 50.4% of the U.S. population), Black recruits have reached parity (13.6% of the U.S. population), and Latinos are slightly underrepresented (19.1% of the U.S. population (U.S. Census, 2024). However, keep in mind that these are entering recruits and not those who pass basic training (the average across all groups is 85.6% who complete/pass academy) (Buehler, 2021).

Subject areas that academies offered and recruits received during basic training and average length of instruction, 2018

Subject area	Percent of academies	Percent of recruits	Average length of instruction*
Operations			
Basic first aid/CPR	96.8%	92.9%	24 hours
Computers	62.9	65.2	12
Emergency vehicle operation	97.0	96.8	40
Evidence processing	96.3	96.8	16
Intelligence gathering	64.8	66.9	10
Interrogation	95.3	96.6	13
Investigations	97.2	97.5	36
Patrol procedures	98.0	99.0	52
Radar/lidar	49.8	40.8	18
Report writing	99.5	99.7	24
Traffic accidents	96.6	97.3	26
Weapons/defensive tactics			
Deescalation/verbal judo	88.3%	92.3%	18 hours
Defensive tactics	99.5	99.7	61
Firearms skills	99.3	99.5	73
Nonlethal weapons	92.3	91.4	20
Legal			
Criminal/constitutional law	99.3%	99.3%	51 hours
Juvenile justice law	97.1	97.8	11
Traffic law	97.2	98.6	26
Community policing			
Community building	77.0%	79.5%	11 hours
Crime mapping	26.3	23.3	6
Cultural diversity	93.8	96.8	14
Mediation/conflict management	74.7	77.9	13
Problem solving	74.9	79.5	16
Research methods to study crime/disorder	31.4	36.8	9
Self-improvement			
Basic foreign language	24.5%	24.0%	14 hours
Communications	89.1	92.2	16
Ethics and integrity	99.3	99.6	12
Health and fitness	98.0	97.0	50
Professionalism	87.1	89.4	12
Stress prevention	87.5	89.9	9
Special topics			
Active shooter response	90.4%	91.6%	14 hours
Clandestine drug labs	69.6	67.9	5
Crimes against children	90.4	95.2	8
Cyber/internet crimes	63.3	62.3	4
Domestic violence	97.7	98.8	15
DUI/sobriety	94.1	95.2	25
Elder abuse	73.4	78.8	4
Emergency management	80.8	82.3	9
Gangs	82.1	89.1	5
Hate/bias crimes	82.2	86.9	5
Human trafficking	75.9	73.1	5
Mental illness	96.9	98.1	16
Opioids	81.5	84.7	5
Sexual assault	93.5	97.0	7
Sexual harassment	77.2	80.0	4
Terrorism	86.3	88.5	6
Victim response	87.5	88.1	6

Note: Percentage of recruits is based on recruits who started basic training. See appendix table 8 for standard errors.
*Includes academies that reported offering the subject area.
Source: Bureau of Justice Statistics, Census of Law Enforcement Training Academies, 2018.

Subject areas taught in academy; table by the [Bureau of Justice Statistics (2021)]

While in academy, recruits will go through a mix of stress-based (paramilitary or military boot camp-style) and nonstress-based (academic or classroom-based) training (22.5% of academies are more/mostly/all stress-based, with 52% of academies reporting a balance). The average length of training that recruits go through in academy is 833 hours. The table above shows the percentage of academies that teach the different subject areas on the left, and the average length of instruction (in hours). Again, keep in mind that these are averaged across academies nationwide, as each academy has its own ability to dictate subjects and length of instruction (as long as they are abiding by state laws and requirements).

It's worth looking at not only the percent of academies that cover the subject areas shown in the table, but also the hours devoted towards the different subjects. For example, 73 hours are spent on firearms training, while only 9 are spent on stress prevention. While it's very rare for an officer to have to discharge their sidearm (in fact, only about 27% of officers surveyed by Pew have ever fired their sidearm [Morin & Mercer, 2017]), we want officers to be quick enough to mitigate harm to themselves or others, and accurate enough to mitigate collateral harm. However, we also need officers to be able to handle the stressors of policing such that they do not grow too quick to draw or fire their handgun out of stress-based snap judgments. For another example, while only 5 hours of training on clandestine drug labs may make sense due to their general rarity compared to most other criminal activity, training on sexual assault response averages to 7 hours, in spite of over 1 in 2 women and almost 1 in 3 men experiencing sexual violence at some point in their lifetimes (CDC, 2024). Thankfully more academies offer the former training compared to the latter (93.5% compared to 69.6%), but the imbalance of training emphases is often critiqued, especially given the majority of a patrol officer's time being spent on noncriminal calls for service and traffic infractions rather than violent crime (Asher & Horwitz, 2021).

Use of Force Training

Regardless of most police time being spent on nonviolent crime or general service calls (or report writing and administrative duties), police use of force training is heavily emphasized, though also widely varied depending on the department. As the table below demonstrates, when it comes to defensive tactics, the only portion that 100% of recruits are trained on is verbal command presence (which is very important, as a strong presence can prevent the situation from getting out of control); less than half of recruits are trained on neck restraints (the lack of training and the danger they pose is one of the reasons many departments have banned them or made them only allowed in instances where fatal force would be warranted, especially following the deaths of several unarmed Black men like Eric Garner), and half are trained in full body restraints. Closed hand techniques are like strikes and punches; open hand are like control holds (grabbing a person to escort them elsewhere).

Most police academies will train police with a **use of force continuum** to illustrate what type of force is appropriate depending on the level of resistance the officer is facing from a citizen or suspect. This is to assist in teaching officers **reasonable force**, which is the degree and amount of force necessary to achieve a valid law enforcement objective, as established by **Graham v. Connor** in 1989. *Graham v. Connor*, while determining that the officer in the case used excessive force, was rather vague in that its definition of "reasonable force" is not a hard-and-fast rule, but rather relies on what a "reasonable person" thinks is the right degree of force (but in a diverse society where many people have many different opinions, will a room full of "reasonable people" agree?). Use of force continuums at least help to visualize to officers what would constitute reasonableness. While several models are used (which one is used is up to the training academy), every model is an attempt at illustrating what level of force an officer should use, based on the person/suspect's behavior. **You can see the National Institute of Justice's recommended/example use of force continuum here.**

Control and defensive tactics training that academies offered and recruits received during basic training, 2018

Type of control/ defensive tactics training	Percent of academies	Percent of recruits
Closed hand technique	95.6%	95.4%
Full body restraints	54.7	50.0
Hold/neck restraint (e.g., carotid hold)	47.2	45.7
Knife/edged weapon defense	88.4	90.1
Leg hobble/other restraints (excluding handcuffs)	50.1	48.0
Open hand techniques	98.4	99.1
Pressure point control	93.3	90.9
Speed cuffing	83.9	85.0
Takedown techniques (e.g., straight arm bar)	99.3	99.5
Verbal command presence	100	100
Weapon retention	99.7	99.7
Other	10.9	13.5

Note: Percentage of recruits is based on recruits who started basic training. See appendix table 11 for standard errors.
Source: Bureau of Justice Statistics, Census of Law Enforcement Training Academies, 2018.

Defensive tactics training taught in academies; table by the Bureau of Justice Statistics (2021)

Some criticize traditional use of force continuums because they seem to show that every situation starts at the lowest level and moves up in escalation, when in reality, a person can go from 0-10 in an instant (especially if they're on controlled substances), or a situation may already start out with the person at a high level of escalation. Another criticism is that the officer's action seems to "match" the suspect's resistance, when in reality, the officer should always have a bit more control over the situation (without being very unbalanced). However, use of force continuums are still common among academies and police departments to assist in training and determining whether force was reasonable or if it was **excessive force** - when an officer uses far more force than would have been necessary to gain compliance/take control of the situation.

The only other major court case dictating police use of force is **Tennessee v. Garner** (1985). *Tennessee v. Garner* is much clearer about when force can be used, but it is very narrow in that it applies to only *fatal force*, and only situations where the suspect is running away. *Tennessee v. Garner* overturned an old Tennessee law that allowed officers to use fatal force on *anyone* who fled, assuming that fleeing was an admission of guilt; the Supreme Court of the time instead

ruled that police may only use fatal force on a fleeing felon (i.e., not a misdemeanant) if the officer has probable cause (more on that in a bit) to believe that the person fleeing poses a significant threat of death or serious injury to the officer or other people. Again, while this is a much more hard-and-fast rule about using force, it is very limited in scope.

One of the biggest issues about police use of force training is there is very little regulation (or even data) about *who* or *what groups* are providing the training. For example, a now-defunct firm Street Cop came under scrutiny this year after recordings were released of trainers joking about shooting people (Difilippo, 2024), and training philosophies like Dave Grossman's "Killology" have come under scrutiny for emphasizing a violent mindset over de-escalation (Hauptman, 2021). Quite alarmingly, a Reuters investigation also found a number of police instructors with far-right extremist ties who work for multiple police training firms (Harte & Ulmer, 2022). Assuming that the trainers are not problematic, there is still also a lack of evidence backing different types of use of force training approaches. Even among those promising training programs, very little evaluation research has been done to see if the effects can be generalized to other academies (McLean et al, 2022). The video below walks through some of the above problems, as well as additional issues in police training.

"The Business of Police Training in the United States" by CNBC (2020)

In addition to the "junk science" discussed in the video and overall lack of evidence-based training, there is little in terms of follow-up training after a recruit passes academy. While officers are often required to attend annual mandatory trainings as required by the state, few require regular fitness testing, which can lead to an officer preferring their service weapon or a less-lethal weapon (like a taser or baton) rather than feeling confident enough to go hands-on with a suspect if deescalation fails. This optional article from a popular policing website addresses some of these concerns and the need to reform training: **Cunningham (2020) Opinion: Why use-of-force training is failing police officers.**

Constitutional Law Instruction

Looking back up at our massive table on academy subjects, an average of 51 hours is spent on Constitutional Law. This is good, given that there's a lot to cover! Constitutional rulings, especially on the 4th Amendment, can constantly change, so it is good for recruits to get up-to-date training on how to apply U.S. Supreme Court interpretations to their everyday practice. This is also a problem of follow-up, though – if an officer is not required to do annual refresher training, they may operate off of old interpretations that have since been overruled. Particularly with the evolution of technology, the landscape of the application of the 4th Amendment to different technologies is constantly in flux. However, we'll work in reverse-order of the Bill of Rights and first look at the 5th Amendment, since this one is somewhat simpler than applications of the 4th.

The 5th Amendment

The 5th Amendment is protection against self-incrimination. However, it wasn't until 1966 in ***Miranda v. Arizona*** that law enforcement was required to remind suspects of their right against self-incrimination. This right was then extended to juveniles in 1967. Because of the name of the landmark court case, what cops recite to suspects is often called a **Miranda warning,** and it has even become a verb: to ***mirandize*** someone is to recite to them their 5th Amendment rights. TV shows and other fictional media tend to portray officers giving the Miranda warning when arresting the suspect. While some officers do this so they can cover their bases early, the explicit ruling of when a suspect should be mirandized is *before interrogation*. If an officer doesn't mirandize the suspect at arrest, the officer is still working within the bounds of the 5th Amendment (as long as they remember to mirandize before interrogating the suspect).

If a suspect or citizen *voluntarily* shares things with the police before being mirandized, and happens to admit to a crime (or is suspiciously silent when asked a question but doesn't invoke their 5th Amendment rights) before being put into custody and interrogated, this is not a violation of the 5th Amendment, according to *Salinas v. Texas (2013).*

The 5th Amendment also contains the double-jeopardy clause, but we'll skip that for now and revisit it when exploring the courts institution.

The 4th Amendment

The 4th Amendment is one of the most complex and controversial amendments in the police institution, since it governs search, seizure, and even use of force (*Graham v. Connor* and *Tennessee v. Garner* both considered physical force to essentially be the police *seizing* a person). Before getting into the ins and outs, it's first necessary to read the full text of the amendment to break down its elements:

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.

Essentially, **probable cause** is required in order to obtain a *particular* warrant in order to conduct a *reasonable* search/seizure. A warrant must be *particular* in that it specifically describes the place, person, and things - an officer can't just vaguely wave their hand over a whole apartment complex and ask the judge (who grants warrants) for permission to search the entire thing. The search and seizure must be *reasonable*, as there are searches that "shock the conscience" (established by Rochin v. California, 1952). And essentially, a search requires probable cause, which is an evidence-based basis for believing that a crime has been committed or someone is about to commit one (LII, n.d.). Probable cause is a level above **reasonable suspicion**, which is when an officer suspects that something wrong is afoot but mainly based on a combination of observations and intuition but with no evidence or concrete basis for their suspicion.

However, in spite of the requirement for probable cause and warrants inherent to the text of the 4th Amendment, applications of the 4th Amendment to police have evolved into many instances where warrants are not required (such as vehicle searches when **exigent circumstances**, which are those which require immediate action, exist), and when probable cause is not required (stop and frisk requires only reasonable suspicion based on the Supreme Court's decision that a "stop" is not a full "seizure", though critics argue that many who are stopped by police are not actually free to walk away). The required podcast below illustrates this evolution and history (click here for a transcript of the podcast).

Throughline (2024) The 4th Amendment: Search and Seizure

As mentioned in the podcast, the war on drugs greatly expanded police search power under the 4th Amendment, basically further eroding its protections of civil rights for the public. During the time of the war on drugs, that concept of *exigent circumstances* was applied to searches of dwellings where drugs were suspected to be hidden, under the justification given by the ruling of *Richards v. Wisconsin,* which allowed for no-knock drug raids when police have "a reasonable

suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence" (*Richards v. Wisconsin, 1997*). Essentially, if the police had reasonable suspicion (again, lower than probable cause, though they still needed to outline their probable cause in order to secure the warrant) that knocking and announcing would be dangerous or would allow destruction of evidence, they would be allowed to conduct a no-knock warrant. No-knock and "quick knock" (where police quickly knock but do not announce their presence or identify themselves as police) warrants have come under significant scrutiny by militarization scholars starting in the 1990s, but to the public especially after the death of Breonna Taylor in 2020. **An optional six-part podcast series by the Washington Post details many of the issues and controversies surrounding no-knock warrants and can be listened to here.** Unfortunately many states do not track no-knock warrants granted or the outcomes, though at least 22 people have been killed from 2015-2022, according to a Washington Post investigation (Kan et al., 2022). A New York Times investigation found that ***at least 81 citizens and 13 law enforcement officers have died as a result of no-knock raids from 2010-2016*** (Sacks, 2017).

The Patriot Act, as discussed in the previous chapter, also gave rise to **delayed-notice warrants** (also known as "sneak and peak" warrants), which allow police to enter and search a residence when the owner is not home, as long as they notify the resident after the fact. While these were justified as a counter-terrorism measure and to investigate large-scale drug manufacturing rings, the Patriot Act allows for delayed-notice warrants to even be allowed for misdemeanor crimes (Abramson & Godoy, 2005). The 2005 revision of the Patriot Act required that delayed-notice search warrants be tracked, so each annual report can be found and read here. As you can see, in any given year, the majority are used for drug investigations.

LOOKING FURTHER: Tension Between the 4th and 2nd Amendments

Recent media coverage of the police shooting death of U.S. Air Force Senior Airman Roger Fortson (pictured) has brought attention to the long-standing tension between the 4th Amendment powers granted to the police and the 2nd Amendment right for citizens to bear arms. As discussed in the Throughline podcast episode, the 4th Amendment, while originally written to ensure protections of the public against the government, has evolved into one of the few Amendments in the Bill of Rights that arguably grants more power to the police than to the public.

When civil rights conflict with each other, the result can be drastic and even fatal, in the case of the clash between the 4th and 2nd Amendments.

To those not familiar with the case, Senior Airman Fortson was fatally shot when he heard a banging noise on his front door and answered it while carrying his legally owned handgun. The person banging on the door turned out to be a sheriff's deputy and, seeing the gun in Fortson's hand, immediately opened fire. The deputy's supervisor claimed self-defense, but Florida, where Fortson lived, has a "stand your ground" law that allows citizens to use deadly force when necessary for self-defense (Morrison, 2024). The deputy did not announce himself, and stepped to the side of the door so as not to be seen through the door's peephole, keeping Fortson from identifying him as an officer (Horton et al., 2024).

Unfortunately, this is not an isolated incident. Many recall that Breonna Taylor died in the crossfire when her boyfriend, Kenneth Walker, thought they were being robbed (the police did not announce themselves) and shot at the perceived robbers, who turned out to be the police (Stump, 2022). Another lawful gun owner, Amir Locke, was killed in his own home when police executed a no-knock raid, Locke sat up from sleeping with his handgun in his hand, and police immediately shot him (Alfonseca, 2022). In 2023, Robert Dotson was shot and killed when police arrived at the wrong house very early in the morning and Dotson opened the door with his gun is his hand. Police immediately shot and killed Dotson, so his wife, Kimberly, began shooting at the perceived attackers until realizing they were police (she survived) (Mayeux, 2023). A police detective was shot and killed when conducting a no-knock raid and being perceived as an assailant in the case of Marvin Guy, who was convicted of murder (prosecutors initially pursued the death penalty) in spite of Texas having a "castle doctrine" law (essentially a "stand your ground" law but applied to home defense), and in spite of having no evidence of drugs in his apartment other than a glass pipe (Dungca & Abelson, 2022). In the same state, a similar case happened when Henry Magee shot and killed a deputy with a legal firearm, thinking he was being robbed when a no-knock raid was conducted to bust an assumed major marijuana grow (Magee had one small plant); Magee's self-defense claim was accepted (critics have pointed out the difference between Magee and Guy's case outcomes and the racial disparity: Guy is Black and Magee is White) (Balko, 2014).

While we do not know how many fatalities as a result of no-knock raids involve legal gun owners (though now I definitely plan to do a deep dive into the data that I have), all of the above cases illustrate the lethality of no-knock raids for both legal gun owners and the officers conducting the raids. *Richards v. Wisconsin* stated that no-knock raids may be necessary when officers feel that announcing their presence would endanger them, but is this reasoning evidence-based? If nothing changes at a congressional or

U.S. Supreme Court level, how should police training change to better enhance public and officer safety when serving warrants?

Image above: "US Air Force portrait of the deceased Roger Fortson" [cropped], by the United States Airforce (2019)

What if a Search Violates the 4th Amendment?

There are several rules in place that kick in if a police search or seizure violates the 4th Amendment. The first of these is **the exclusionary rule**, which states that illegally obtained evidence cannot be used during trial. In spite of a lot of courtroom TV shows playing up the drama and showing the defense or prosecution being surprised by presented evidence, the process of *discovery* ensures that both "sides" know about all the evidence that will come up in trial before the trial actually occurs. This ensures that the jury won't be prejudiced by seeing evidence that might have actually been obtained illegally. At this point, the legality of evidence may be questioned, and if it comes out that an officer violated 4th Amendment rulings in order to obtain the evidence, then it cannot go to trial.

The second rule is **fruit of the poisonous tree**, which is like a continuation of the exclusionary rule. This rule states that any evidence that's found as a result of the initially illegally obtained evidence also cannot be used during trial. For example, if an officer breaks into an apartment without a warrant and finds enough hair to get a DNA sample, and the resulting DNA match is used to connect multiple other pieces of evidence together, it *all* has to be thrown out before trial because that initial evidence (the hair) was obtained illegally (since the officer didn't get a warrant).

The third rule is searches that **"shock the conscience"**. The case where this was derived dealt with a man who was forcibly taken to the hospital by police after they failed to get him to throw up by punching his stomach, where they had medical personnel give him an emetic and intubate him until he threw up some drugs he had swallowed (*Rochin v. California*, 1952). The U.S. Supreme Court ruled that the officer's actions were so far above "reasonable" that they "shocked the conscience". However, other searches, like strip searches of minors, are often allowed to continue (ABA, 2021). How do we as a society create more standardization for what "shocks the conscience" and what is a "reasonable" search?

Conclusion

Academy training is an essential part to becoming a police officer and learning the procedures and practices of the job, as well as the applications of the 5th and 4th Amendments. However, another layer of "training" happens during the academy and beyond, and that is the

socialization process into the police subculture. We will address the socialization process and its relation to ethical issues in policing in the next chapter.

Chapter 7
Police Culture and Ethical Issues in Law Enforcement

Introduction

When discussing ethical issues in policing, it is important to learn that corruption doesn't just happen in a vacuum. There is often a build-up to corruption, assisted by an over-emphasis on certain values in the police subculture. While subcultures can vary across individual police departments at the organizational level (think of your hometown police department compared to what you know about the NYPD or LAPD [assuming you're not from New York or LA! If you are, then think of our University Police Department if you've been here on campus]), at the *occupational* level there are many cultural values that are shared across police officers and agencies. Much of the content here will borrow from Michael Caldero, a late police ethics scholar who used to serve in law enforcement and then became an academic and police ethics trainer to assist future generations of officers from falling into the same patterns of behavior that he experienced, observed, and studied. If you are looking to become a police officer, I would highly recommend reading his *Police Ethics: The Corruption of Noble Cause (4th ed.)* by Caldero, Dailey, and Withrow (2018).

Before we get into that, we first need a good working definition of **ethics**, which is the study of what is defined as good or bad conduct, or, more specifically, how one's conduct *affects* another person or other people. Sometimes the concept of ethics can overlap with morality (an individual's own internal moral code and understanding of right and wrong), but the main difference is that ethics is concerned with the impact one's actions have on the outside world. For example, you may morally believe that all workers deserve fair treatment, so you seek out ethical or fair-trade coffee or chocolate because you want to make sure your purchases don't negatively affect people in the industry (in this case your morals and ethics are aligned). For a more criminal justice-related example, you might personally believe that the death penalty is deserved in some instances (that is your moral judgment), but you don't think that it can be administered in a humane way so therefore it is unethical in your view (in this case your morals and ethics are not aligned). In this latter example, the lack of alignment between your morals and ethical philosophy is not inherently a bad thing, since if you had alignment in some cases, that could actually turn out quite badly (e.g., you believe the death penalty is deserved in some instances, and then you decide to mete it out yourself in the name of what you think is "just"). Ethical problems in policing have two major sources: first is the large amount of **discretion** (the ability or authority to make independent decisions) that police officers have in how they do their jobs (and most tasks of their jobs affect others); the second is the countless vague, unpredictable, and unique situations that officers face every day. Even with a predetermined *moral* compass, making decisions in these vague and often emotionally heated situations still evokes many dilemmas. And, as you will see throughout this chapter, socialization into police

subculture may influence the moral and ethical compasses in a way that can make corruption and unethical behavior more likely.

Entering Policing

Those who enter police work tend to have a number of shared ideals and values that led them to be interested in policing in the first place. While *motivations* to enter police work may vary based on identity, location, and background (Elntib & Milincic, 2021), what recruits *value* as ideal goals trend towards three main things: 1.) justice/morality, 2.) a high emotional connection to or protectiveness of victims, and 3.) bravery, or a commitment to self-sacrifice for the good of others (Caldero et al., 2018). Of course, there are those with explicitly discriminatory biases or who pursue the role to gain power, but the majority of officers and applicants that Caldero studied and observed started out with these main values.

While a lot of recruits start out with these shared moral values, they may start out with different ethical orientations. Broadly, there are two: **deontological ethics** and **teleological ethics. Deontological ethics** (*deon* means "duty") is a focus on the duty to make the ethically right decision in any given situation; the *end* result is not in question, but whether the person did the right thing according to the rules or policies they are required to follow and the knowledge they had at the time of the decision. For example, a police officer may pull over a man for speeding in a school zone with the lights flashing. After walking up to the man's car, it becomes clear that the man is panicked, and he explains that his wife is in labor and he's rushing her to the hospital. The officer looks in the back seat and sees that this is definitely the case, and there are no kids around who would have been endangered by the man's speeding, but the officer still writes him a ticket. The time it took for the officer to run the driver's ID and write up the ticket could cause a lot of harm to the woman and baby if there were any complications, but a deontological ethic would say that the decision was right because it fulfilled the officer's duty.

The above example is one in which a deontological ethical system can have a negative impact on a driver who was acting in a way that many of us would in a similar situation. However, another aspect of deontology is that, if the officer follows it completely, then everyone will be treated exactly the same because the officer will be abiding by policy for every decision. This gets us to philosophy again, because is "justice" actually treating everyone the exact same (which is equality), or is it treating everyone a bit differently to ensure they receive equal *benefit* (which is equity)?

Teleological ethics (*telos* means "results") is a focus on the *end result* of the action, not the meaning of the action itself. That is, as long as the end result is a net positive, then the *means* it took to get there - even if that means bending or even outright breaking the rules sometimes - don't matter. In the speeding vehicle example, this means the officer would cut the man a

break, especially since there were no schoolkids around who could be threatened by a speeding driver. However, while most of us would want an officer who cuts drivers a break for emergency situations, a teleological ethical system can also have major drawbacks when taken too far, especially since humans can't see the future and *know* that a rule-bending or rule-breaking action will actually achieve a just end. As humans, there's also a tendency for our version of a "good end" to be very biased. Teleological ethics is tied to **utilitarianism**, which is a philosophy that says that actions are just when they achieve the greatest good for the greatest number. While the officer allowing the speeding man to rush his wife to the hospital is a true example of the greatest good for the greatest number (the man, his wife, and their child all benefit), the **Dirty Harry problem**, first tied to policing research by Carl Klockars (1980) is an illustration of teleological decision-making not being utilitarian.

There aren't any public domain/CC images of Dirty Harry, but here's Clint Eastwood in another cop role in the 1977 film "The Gauntlet", so you get the picture. Image is a publicity still by Warner Bros. Inc. (1977)

The **Dirty Harry problem** is a reference that is quite dated now and probably only familiar to classic movie buffs, but it's a reference to the 1971 Clint Eastwood film, in which Inspector "Dirty" Harry Callahan is known for violating suspects' civil rights in order to achieve "justice". Spoiler alert for a 53-year-old film: a serial killer has kidnapped a teenage girl, and Dirty Harry violates all sorts of civil rights laws in order to find the girl, only for her to be dead. Since all of the evidence Dirty Harry found to build the case was obtained illegally, it's inadmissible in court due to the exclusionary rule, so Harry again takes justice into his own hands, chases down the serial killer, kills him, and then throws his badge on the ground and walks away. Dirty Harry's views of justice (saving the girl) motivated him to pursue illegal means to get there. In a perfect world, his actions would have led to a good outcome and the girl would be saved, but - since no one can see into the future - not only was the girl found to be dead, but his actions were so illegal that the evidence against the serial killer was thrown out. Had the film ended there, it would have been a rather philosophical commentary on the futility of teleological decision-making when taken too far. Since no "good" person benefited from Harry's means (only the serial killer), his teleological decision-making didn't even achieve a utilitarian end. However, for the film to continue with Harry killing the serial killer and then tossing his badge, it seems to be commenting that true justice can only be obtained outside of the system, and that's what many viewers took away from it (especially since a very cool film protagonist will often influence viewers to agree with their decisions).

While *Dirty Harry* is an old film, I'm sure you can all think of police procedural TV shows that have some form of teleological decision-making, with rule-bending or rule-breaking being communicated to viewers as ultimately a "good" thing. Caldero (2018) observes that this may be why many people who self-select into policing are already at least somewhat favorable towards teleological ethics rather than deontological ethics, which is a lot more rigid and inflexible in a world and society where there are many layers and ethical dilemmas. In reality, humans are not automatons who are programmed into one ethical "program" or another, so most people straddle both ethical systems depending on the situation (on one day, your moral system may tell you that it was good that you looked the other way and didn't alert a staff member when you saw a stressed mother stealing formula from the grocery store [teleology]; the next day, you are faced with a situation where there was ultimately no good outcome, and you have to tell yourself that at least you made the correct choice in the moment with the information you had [deontology]). As you will soon see, however, the police subculture tends to favor teleological ethics, which can be both understandable and also lead to terribly unjust outcomes.

Socialization at the Academy

When a recruit enters the academy, they will not only be taught the foundational knowledge that we covered in the previous chapter but will also receive underlying messages about the job from their instructors. Caldero and colleagues (2018) identify many instances where academy trainers communicate one thing (the message they are supposed to communicate), but the way they deliver their message conveys a different message altogether; they call these **black swan anecdotes.** An example from Buerger (1998, p. 44-45) was told by anonymous recruit: "[trainers] were just spouting the official [agency] line on everything, all the while strongly suggesting that it was all bullshit and we would learn the real stuff out on the street - 'ya know, we can't tell you to slap the shit out of those punk gang-bangers back in the alley here, but don't worry about that, you'll learn soon enough'...'What we teach here...is the official bullshit to cover our butts legally, not the real deal'". Other stories told during the academy may not be black swan anecdotes (their underlying contend doesn't contradict the "legal" message), but are instead **war stories**, which are like morality tales (think of Proverbs or Aesop's Fables) in that they communicate how recruits should act and what police officers value. This is where those three values mentioned earlier - justice, protectiveness of victims, and bravery - get communicated in different ways and contexts.

Danger and Authority

In addition to the emphasis on these three values, two of the major messages conveyed by war stories are the **prevalence of danger** and the absolute necessity for officers to **maintain authority**. Policing is not the most dangerous job in the United States (policing is not in the top

10 of deadliest professions, at least according to the Bureau of Labor Statistics in 2022), but it is still more dangerous than the average job. While the fatalities caused by accidents rather than homicides tends to hover around roughly half in any given year (Bureau of Labor Statistics, 2024), the risk of homicide danger and the *unpredictability* of the job tends to lead officers and trainers to greatly exaggerate the prevalence of danger in the war stories that are told to new recruits (Caldero et al., 2018). Situational awareness - being aware of your surroundings, potential dangers, routes of escape, people and their general demeanors - is an important part of policework, but the over-emphasis of danger can quickly lead to an "us versus them" mindset, where every citizen is viewed as a potential threat. Skolnick (2011), a noteworthy police culture scholar, identified this overemphasis on danger as contributing to the police concept of the **symbolic assailant:** essentially, this is what you instantly picture in your head when I say "dangerous felon". War stories told by police trainers and senior officers emphasize *who* should be classified as the most likely to pose danger to the officer, so officers start to gain this mental picture as operational shorthand when out on patrol. While the brain tends to create categorizations based on our socialization and experiences, this can pose two problems: officers being too quick to associate a person with danger if they fit the profile of the "symbolic assailant", and conversely, officers being too slow to react when someone who does not fit their mental profile suddenly poses a threat. Additionally, this leads to officers conceptualizing anyone fitting the profile as being guilty until proven innocent, rather than the reverse (which is what our justice system is ideally based on). As covered in the podcast in the last chapter, this can lead to officers trailing drivers for as long as it takes to observe an offense they can pull a suspect over for. It can also lead to more problematic actions, which we will cover below in the Post-Academy section.

The other significant message, that officers always maintain authority or control over the situation, is equally as understandable but problematic when over-emphasized. Part of the reason why 100% of police academies train recruits on verbal command presence (see Chapter 5) is because if an officer quickly and verbally establishes their control of the situation, people are less likely to question or test them, so the situation is less likely to escalate or get out of hand. When an officer loses control over a situation, not only does this mean not achieving their objective, but it also poses a real risk of danger to the officer (which then takes us back to the messages about the prevalence of danger). However, as with the overemphasis on danger, the overemphasis of authority can go badly. Officers who mistake being *authoritative* - confident in their abilities and control of the situation - with *authoritarian* - requiring immediate obedience and harshly "punishing" those who don't comply - will quickly start to abuse force. Abusing force when someone questions an officer's authority can further be mentally justified by the officer, because if the person was allowed to question the officer's authority and get away with it, then - in the officer's mind - that could lead to danger to the officer, according to the socialization they received in academy and from senior officers. This is a problem described by Van Maanen (1978), where he finds that officers are more likely to use excessive force on people who question their authority, rather than people who are actually exhibiting suspicious

behavior. The officer sees it as necessary to "correct" (through excessive force) those who threaten his authority, not just because of the potential danger of letting a person get away with it, but also because the officer sees himself as representing a higher moral authority (the law); thus disobedience to him is disobedience to the law itself in his eyes (Van Maanen, 1978).

Hopefully you're starting to see how the overemphasis of danger and authority not only work off of each other, but also work with the other values, such as a high commitment to justice: *over*commitment to justice can work with these other messages to result in an officer seeing his/her own actions as representing "justice", regardless of whether they actually reflect the law.

The Racialized Symbolic Assailant

When Skolnick examined the concept of the "symbolic assailant", he recognized that the mental image that most officers were trained to picture was often a young man of color. However, he didn't go too deeply into the racial bias inherent to the concept, but more recent scholars have. Bell (2018) unpacks the concept further while assessing the high rate of police killings of Black people (which remains a problem even after controlling for crime rates, crime commission, and whether or not the person was armed [Ross et al., 2021]). Because of overall socialization into a culture that still associates "danger" with Blackness, the extra messages received in academy only serve to exacerbate these implicit biases rather than working to undo them. Bell (2018) describes a situation where the target used during firearm practice in an academy was that of a Black man, which is unfortunately something that an agency was uncovered doing even last year (Alfonseca, 2023). While these are blatant examples of linking "danger" to Black citizens, a study by Ford (2003) found that when suspects were White, police war stories told at academy never mentioned their race; however, when suspects were Black, war stories would mention race and be more likely to emphasize the potential danger to the officer and how officers should react in such scenarios.

Not only might recruits gain stronger associations between danger and Black citizens, but the emphasis of authority may also contribute to animosity towards Black people protesting police brutality, since the nature of the protest is a direct challenge to police authority (keep in mind that this does not only apply to the 2020 BLM protests, but those throughout the historic eras covered in Chapter 5) (Davenport et al., 2011). Additionally, two of the other main values - namely, justice/morality and protectiveness of victims - are also involved in the implicit anti-Black biases. Again, if an officer perceives their actions as being representative of a higher moral authority/law and order (and more on that in a bit), and perceives Black citizens as inherently dangerous, then an officer may be able to mentally justify the use of excessive force (Caldero et al., 2018). When examining "warrior" mentalities (such as that taught by Dave Grossman's "Killology") versus "guardian" mentalities (a community-oriented protect-and-serve mindset), Carlson (2020) found that "warrior" oriented officers were explicitly biased in their idea of who warranted the use of force, but "guardian" officers also predominately described White, middle-

class neighborhoods as needing protection. This means that at worst, Black people are perceived as threats, and at best, Black people do not factor into the equation at all of who needs protection. Bell (2018) also described how the detectives she worked with didn't start to fully understand the hardships of the Black communities they policed until they started seeing Black victims of crime as actual victims. As with broader societal messages (e.g., "missing White woman syndrome"), who we view as a "victim" deserving of police protection and compassion is often very racially biased (and classist and ageist) (Neely, 2015).

This is not to say that every officer graduates academy with equal levels of bias or with an approval for racist policing. However, the main point is that the racial biases conveyed in the war stories *align* with other values and *exacerbate* biases that we all pick up from broader society. This is not just a White officers being biased against Black citizens issue either: Menifield and colleagues (2019) find that the race of the officer doesn't significantly factor into the equation: essentially, minority citizens are disproportionately killed by police, but the race of the officer is not significant. Menifield and colleagues (2019) describe the socialization process of the broader police subculture, and how that and biased policies affect officers' actions regardless of race. With the likelihood of being killed by police being about 1 in 1,000 for Black men in America (Edwards et al., 2019), this is a significant ethical issue that still needs to be addressed in policing and especially the police socialization process and culture.

Ethical Issues Post-Academy

After graduating academy, rookie officers are assigned a field training officer (FTO) for six to eight months. FTOs have an incredibly powerful influence on rookie officers, since they're the ones who model how academy training is actually applied to the real world on a day-to-day, call-by-call basis. However, this may also present opportunities for rookie officers to hear "forget everything you learned in the academy; this is how we *really* do it out here" from FTOs who are cynical or antagonistic towards new professionalizing subjects that are taught at the academy (Caldero et al., 2018). Because FTOs not only model fieldwork to rookie officers, but also hold power over whether or not they advance, rookie officers often feel pressured to adopt the FTO's behaviors and mindset and are unable to question the FTO's authority.

Beyond field training, newer officers are also exposed to senior officers who also convey war stories to communicate the values that all officers must adhere to. While some may vary on the organizational (agency) level, oftentimes these values echo the ones covered earlier in this chapter: justice/morality, protectiveness of victims, bravery, and "maintaining the edge" (maintaining authority over a situation so as to stave off danger or be prepared for it). Lessons are learned through continuous war stories and storytelling, which only senior or seasoned officers are allowed to do (Schaefer & Tewksbury, 2018). Newer officers not only learn the lessons conveyed by these stories themselves, but also learn how to react by observing other officers' reactions, and in so doing they quickly learn not to criticize officers' actions in a story

(Schaefer & Tewksbury, 2018). This further reinforces the **solidarity** (loyalty and support) that is expected of new recruits (and all officers). While solidarity is expected in any job where there is a component of danger or even just stress (think of servicemen and women bonding due to shared experiences with danger, or retail workers bonding over shared experiences with feral customers), the solidarity expected of police officers is so influential as to cause many ethical issues that are not just a matter of "a few bad apples", but of "the entire barrel" being spoiled by keeping quiet.

The Blue Code of Silence/The Blue Curtain

The extreme emphasis on solidarity is also a major contributor to the **blue code of silence** or **blue curtain**. Breaking the silence can have drastic, potentially fatal consequences, as former officer Shannon Spalding describes in the required video below. Spalding was a narcotics officer in Chicago who discovered an organized group of officers that were targeting residents of the South Side housing projects, trumping up false charges and leading to hundreds of people being falsely imprisoned. Her choice to become a whistleblower was an ethical one according to both the teleological (many innocent lives were improved through her actions) and deontological (she did her duty in the situation, even though it completely went against police subculture) ethic, but she also lost nearly everything due to her choice:

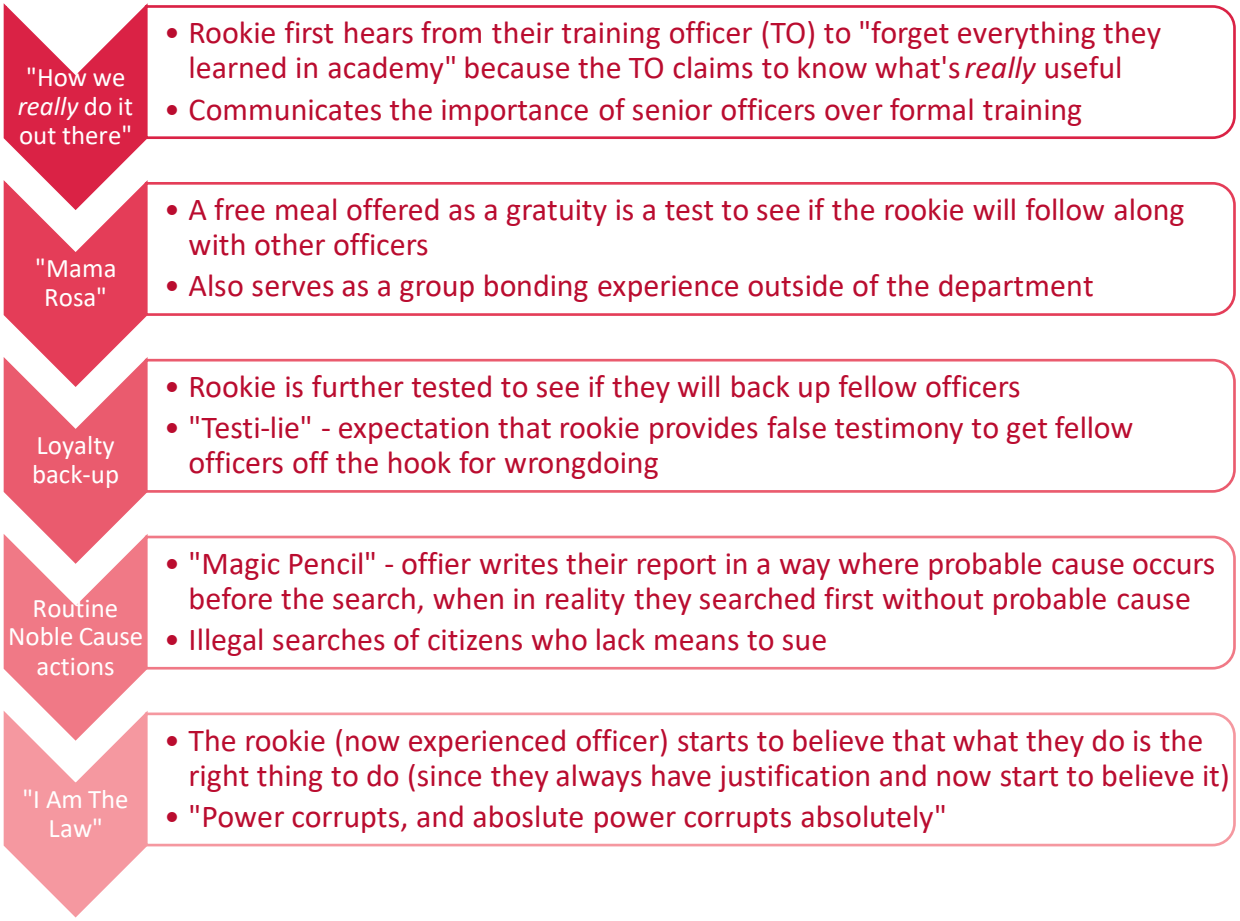
"Why I Broke the Code of Silence | Shannon Spalding | TEDxNorthbrookLibrary" by Tedx Talks (2018)

Stories like Spalding's illustrate how incredibly strong the police subculture is on officers, even when (or especially when) subcultural values of solidarity are completely opposed to actual police policy. This is also likely why, in spite of Minneapolis Police Department already having a "duty to intervene" policy in place, former officers Keung and Thao did not intervene to stop Chauvin's murder of George Floyd (Arango, 2022). The officers in this case were rookies and likely to be quite influenced by the blue curtain and the hierarchical nature of policing where rookies shouldn't question senior officers (Bailey, 2022); what needs to change about police culture and organization to ensure that police subculture actually aligns with police policies?

Noble-Cause Corruption

All of these cultural and ethical issues link back to the Dirty Harry Problem that was discussed above. Remember that the film *Dirty Harry* ultimately conveyed a message that true justice (killing the serial killer) is only achieved by breaking procedural law and policy. This ends-over-means, teleological orientation contributes to what we call **noble-cause corruption**: essentially, engaging in corruption but for "noble" (or what the officer feels is noble) reasons. Think of all the values and messages we've discussed so far and link them to the corrupt ring that Spalding (the whistleblower in the video) brought to light: while these officers' actions were highly immoral, in their own minds, they could likely justify their actions as "cleaning up" the South Side, and that - even if they didn't find real evidence on the people they arrested *yet*, these people fit the profile of the "symbolic assailant" and were therefore probably still guilty of something. As discussed earlier, the "symbolic assailant" can lead to the presumption of guilt until innocence is proven (and even if innocence is proven, such as a vehicle search that yields nothing, the mindset encouraged by that of the police subculture is "you're not guilty *this time*" (Caldero et al., 2018).

This is also why, while noble-cause corruption seems different from **material-rewards corruption** (officers engaging in corrupt activity so as to gain a benefit, like stealing cash from a home while serving a search warrant), they are two sides of the same coin. When an officer sees themselves as being the law, and sees certain people as undeserving of protection, they will be more likely to commit material-rewards corruption. However, if they see themselves as being the law and are engaged in a case with a victim they think *deserves* protection, that's when the likelihood of noble-cause corruption is higher. Caldero and colleagues (2018) illustrate this with their "Slippery Slope Model of Noble Cause Corruption" (while "slippery slope" is often a logical fallacy, they are illustrating a cumulative effect of socialization from academy, field training, and interacting with senior officers, so you could easily call this the "Socialization Process into Noble Cause Corruption"):



Paraphrased from the steps provided by Caldero et al. (2018) in "Police Ethics: The Corruption of Noble Cause (4th Ed.), pp. 120-121; image by Koslicki (2024)

The first step happens during field training, as we've covered above. The second step, "Mama Rosa", refers to a Mexican restaurant that lets police officers eat for free. The officers' department, however, doesn't allow them to accept gratuities (gratuities are free goods and services that businesses give to members of certain occupations, like police, servicepeople, veterans, and teachers). Senior officers accept the free meal anyways, because how is a gratuity really *unjust*? One day they take the rookie officer with them, and he pulls out his wallet to pay. They tell him to put it away since Mama Rosa always lets them eat for free, so the rookie is faced with a dilemma: abide by department policy and still pay (thus showing the other officers that he can't be trusted to be loyal to them) or go along with the other officers and violate policy.

The third step, loyalty back-up, is when officers continuously test whether the new officer has their backs while they continuously bend or break the rules in the name of "justice" (noble cause actions). This escalates to the fourth step: routine noble cause actions against citizens. "Magic pencil skills" here refers to "magically" conjuring up probable cause when writing the police report in order to construct a legally-sound narrative to cover illegal police actions. A lot

of this isn't due to personal animosity that the officer has towards the suspect, but instead because the officer truly believes that the suspect deserves jail time, so the officer falsifies the report "for the greater good". As discussed earlier in this chapter, this is often when the officer thinks that the person is guilty, even if there is no evidence to provide enough substance to show probable cause. It could also be for when the person is a suspect for a lesser charge, but the officer believes they should be charged with a greater crime, so the officer narrates the circumstances in such a way to trump up the guilt of the suspect.

Eventually when officers engage in this activity long enough, believe that their actions are ultimately for the greater good of justice, and have fellow officers who have their backs and support them through thick and thin, this can eventually lead to a mentality that whatever the officer does is justifiable and just.

It's after this point that an officer who started out with a strong ethical compass can grow more open to material-rewards corruption, since they've now learned to place their own version of morality above the law and actual ethical code that they are supposed to abide by (Caldero et al., 2018). And it's here again that the solidarity of fellow officers often covers for material-rewards corruption just as they do for noble-cause corruption, leaving it very difficult for corruption to be fully ferreted out once it sets in. This is why, as covered back in Chapter 5, August Vollmer fired his entire department to start from square one and hire new officers. When such a mentality is even carried by the chief of a department, however, such drastic reform efforts will likely not come from inside the house.

Conclusion

This chapter got a bit philosophical again with the coverage of ethical systems, values, and subcultural messages and beliefs. Hopefully you are all seeing the link between these and real-world corruption and ethical issues that you've observed about policing in the news and on social media. Policing is an unpredictable job where a variety of choices are always available to the officer: some good, some quite bad, and many where there's no way of knowing the end results, so in a way, it is very comforting to have a subcultural system that tells you how to act, what to think, and that will always have your back, even if you make the wrong decisions. Without oversight, correction, and ethical accountability, however, this can foster widespread and systemic corruption, especially against marginalized groups.

We will now turn to the courts system, when the police hand over their case to the prosecutor. While police actions are more visible and more varied since they deal with the public and all the complexity that is involved in public life, prosecutors, by making the ultimate decision of which cases to take up and which to drop, are said to have the greatest discretion, even more than police. It is to prosecutors and other members of the courtroom work group that we will turn to next.

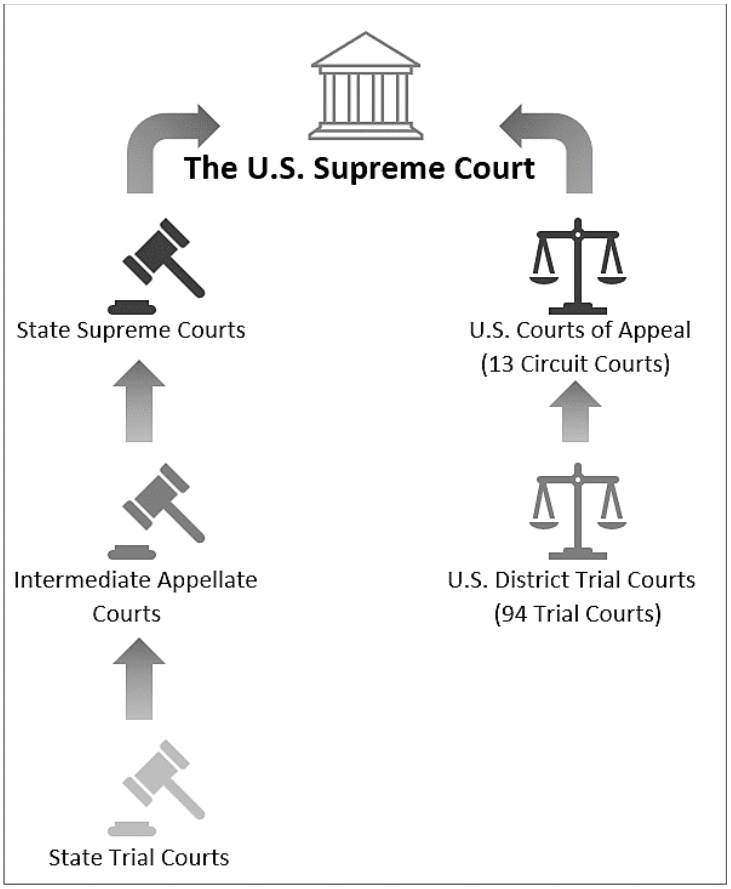
Chapter 8
Structure and History of U.S. Courts

Introduction

Before we get to the courtroom work group and all the details about criminal trials and the ethical issues inherent to the process, it's first important to review the basic structure and components of the U.S. courts institution, as well as the history behind its development and the importance of several constitutional amendments. While I'm personally biased in thinking that policing history is much more exciting (I'm a policing scholar after all), it's just as important to look at some of the historic roots and the evolution of our courts system to understand some of the current issues we are facing today. These will directly influence your understanding of the next couple of chapters, so it's good to address this, as well as how different court levels relate to each other, as our first chapter in our court institution unit.

Structure of our Court Institution

Because of our federalist system granting states the power to construct their own criminal codes, while our nation has its own federal legal code, the U.S. court institution is **bicameral,** meaning it has two different branches: the state-level branch and then the federal branch. The figure here illustrates the hierarchy and layout of these branches. Starting with the state side (the left), **state trial courts** are those that deal with the initial cases that have to do with violations of the state's criminal code. Trial courts are actually split into two different levels (not pictured): courts of limited jurisdiction and courts of general jurisdiction. Courts of **limited jurisdiction** (at the state level) are not common compared to courts of general



The dual court system; image by Koslicki (2024)

jurisdiction, but these are courts that have to do with specific types of cases (like a county or municipality having a traffic court that is separate from the larger court system (LII, 2020). The majority of state trial courts are courts of **general jurisdiction**, meaning they try many different kinds of cases. These can go under many different names depending on the jurisdiction (such as district courts, circuit courts, or superior courts, but I don't want you all mixing these up with *federal* district or circuit courts, which we'll get to when talking about the federal branch), and the number of courts per county also largely depends on the population density and size of the area.

Navigating Through the State Branch

If you recall back to our overview of the CJS in Chapter 2, remember that **booking** is the final stage under police control, where the suspect is taken to jail, information is documented, and bail may be set for the suspect to be free until the next stage of the process (this isn't always the case, especially in cases of violent crimes). The prosecutor is notified, and then it is in their hands to make a charging decision or drop the case.

If the prosecutor chooses to pursue the case and submits a charging decision, then the suspect (now considered a defendant) appears before the judge during the **initial appearance**. The defendant is informed of the charges and asked to submit a plea (remember that they can plead guilty, not guilty, or *nolo contendere* - no contest - where they accept the charges but do not plead guilty). **Bail** is set at this time, but at the judge's discretion. For violent crimes, especially homicide or other crimes where the defendant is determined to be a risk to community safety, bail may not even be allowed, and the defendant will stay in pre-trial holding until their trial date. Unfortunately there is consistent evidence that bail setting is racially discriminatory, with Black defendants being held without bail or being charged more for bail than White defendants, even when controlling for the offense type (Arnold et al., 2020; NACDL, 2022). In an attempt to circumvent racial bias in judicial decision-making, some jurisdictions have strict mandatory bail amounts ascribed to different charges, but the problem with this is that this does not adjust for the defendant's income level; since income level is still tied to race and gender in many ways due to social stratification, this still leads to racial disparities (NACDL, 2022). The **8th Amendment**, which we will address again in Chapter 9, states that bail must not be excessive, but there are many additional factors that judges and prosecutors cite when determining bail, none of which are regulated by any current interpretation of the 8th Amendment by the U.S. Supreme Court (LII, 2022). The 1984 Bail Reform Act determined that bail cannot be excessive in relation to the charge that the defendant is facing, but - particularly given increasing income inequality and spiking housing costs - we may be due for another examination of bail, affordability, and equity.

After the initial appearance and bail setting, the next stage is the **preliminary hearing**, where the judge decides if there is enough probable cause for the case to continue (the judge may also do this earlier during the initial appearance). This is to provide an additional layer of

accountability, since the police make the first determination of probable cause, then the prosecutor checks and confirms it, and then the judge checks and confirms that. The defense may also present evidence to the judge at this stage (remember that evidence that will help the defendant's case is called *exculpatory evidence*). This is where the **discovery process** often takes place, where both the prosecutor and the defense attorney will have access to each other's evidence and witnesses that will be brought up at trial - this way both sides can plan their cases and have the ability to challenge evidence that may have been obtained illegally (violating the exclusionary rule) or witnesses that may be unreliable. Different details regarding discovery are governed by state law (LII, 2020). The judge may dismiss the entire case if she/he determines that there is insufficient evidence for the trial to continue.

Formal **charging** then occurs; remember that if done by the prosecutor, then the formal document of charges is called an *information;* if done by a grand jury, this document is called an *indictment*. After all of those charging and all the other pre-trial stages are completed and the case continues to trial, it enters what we call the **adjudication process.**

The first step of adjudication is the **arraignment**, which is the last chance for a defendant to enter a plea. **Plea bargaining** - a negotiation between the prosecutor and defense team to give a lighter sentence in exchange for a "guilty" plea - may also occur at this stage. There are three main types of plea bargaining:

1. **Charge bargaining** - a defendant agrees to a charge of a lesser degree, such as agreeing to plead guilty to "criminal recklessness" (a Class B misdemeanor in Indiana) rather than "criminal recklessness with a deadly weapon" (a Level 6 felony in Indiana). This means since the defendant agrees to the lesser charge, they also receive a lesser penalty (with the example given, this would be a difference between less than a year in jail and up to a $1,000 fine, versus 6-2.5 months in prison and up to a $10,000 fine).

2. **Count bargaining** - a defendant agrees to plead guilty to a portion of counts and the prosecutor agrees to dismiss the rest. Since most people commit a variety of criminal offenses when carrying out a serious crime, they can have multiple charges against them (for example, breaking and entering, intimidation, battery, and robbery all in the course of robbing a house or apartment). In this case, the prosecutor might present a deal where the defendant agrees to plead guilty to the battery and serve the sentence for that crime and the prosecutor agrees to dismiss the other charges.

3. **Sentence bargaining** - a defendant agrees to plead guilty to the charges, but the prosecutor offers a lower sentence for all of the charges. For example, most states have sentencing guidelines that offer a range of months/fines depending on the level of the crime. The prosecutor could offer the lowest minimum within this range in exchange for a guilty plea from the defendant.

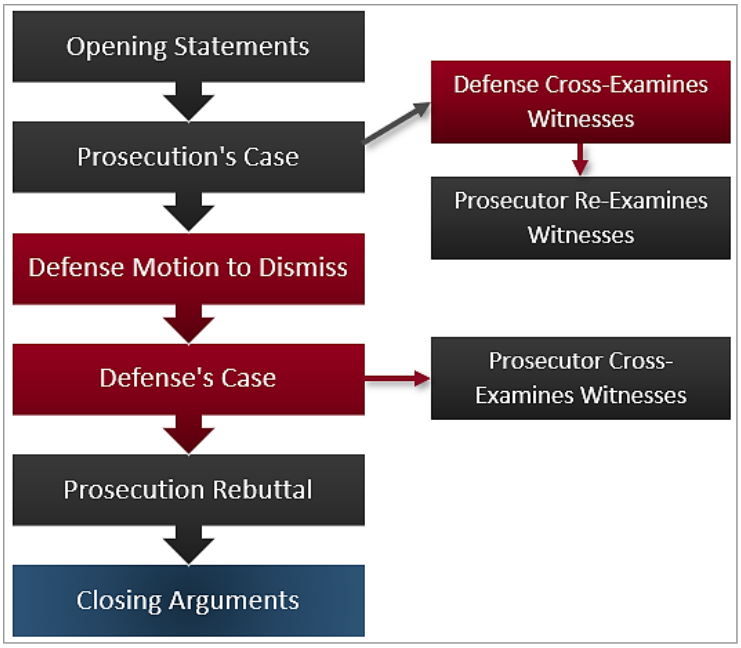
As mentioned in Chapter 2, the American Bar Association (ABA) estimates that about 98% of criminal cases end in a plea deal (Johnson, 2023). This is very concerning to civil rights

advocates, because it circumvents our due process ideal of an "obstacle course" through the trial process and may pressure defendants to accept the plea even if they are innocent (we'll address this more in Chapter 9). For example, many people who struggle with poverty may accept the plea deal because they cannot afford to go to trial (while people in poverty may receive a public defender, public defenders are often over-burdened and underpaid, so acquiring one's own attorney usually helps to provide much higher quality representation, but for a much higher cost. We'll talk about this more in Chapter 8). If the defendant *is* guilty, the victim or the victim's family may be upset at what seems to be a much lighter penalty for what they believe should be a much heftier one. Members of the public may also feel shocked at lower sentences obtained through plea bargaining in certain cases, such as crimes against children and when the sentence is very light (such as probation rather than any incarceration) (Golding et al., 2017).

Case law-wise, we'll address the evolution of plea bargaining later in this chapter, but for now, know that if the defendant refuses to take a plea deal and insists on their innocence, this is when a criminal trial occurs. Not all cases are guaranteed a trial by a jury, but criminal trials are under the 6th Amendment (state laws dictate when a defendant may waive their right to a jury trial and instead select a **bench trial**, where the judge determines guilt without a jury). If the defendant chooses a jury trial, then several steps kick in to obtain the jury:

- A questionnaire is sent out to residents of the court's jurisdiction
- Qualified residents (based on their responses to the questionnaire) are then summoned to compose a jury pool
- Of this pool, a smaller group is selected
- This group is then questioned to determine whether they can be fair and impartial (a process known as ***voir dire***)
- The prosecution and defense may also remove jurors without reason, up to a set number

This very last point (the ability to remove jurors without reason, up to a set number) is called a **peremptory challenge**. There are some constrictions, such as ruled in *Batson v. Kentucky* (1986), where peremptory challenges cannot be used to remove jurors on any basis of race. However, studies show that Black potential jurors are removed at higher rates than white potential jurors (DeCamp & DeCamp, 2020; Kingsbeck, 2023; LaCrisha & McAllister, 2020-2021). Even though race cannot be explicitly identified as a factor for removal, what are other way that race (or gender, socioeconomic status, or other marginalized identity) can be targeted without explicitly stating that the removal was race-based?



The typical order of a jury trial; image by Koslicki (2024)

Pretrial motions are the final adjudication step before the actual trial begins. These motions are filed by prosecutors and defense attorneys for various reasons, such as requests to suppress evidence (if new information came to light that it was obtained illegally, after the preliminary hearing and discovery processes), requests to change the venue (usually to avoid media coverage or outraged citizens from gathering outside the courthouse in cases where the defendant or case are already well-known), challenges of search and seizure (if new information came to light about the potential violation of the defendant's 4th Amendment rights), and questions of witness competency. In some jurisdictions, the discovery process happens at this stage rather than during or right after the preliminary hearing.

With all of that out of the way, the actual courtroom drama begins! Because the prosecutor has the burden of proof and represents the state, they usually go first during **opening statements** to outline the facts. The defendant's defense attorney may follow and provide their own opening statements. The prosecutor, again because of their burden of proof and representation of the state, is then the first to present their case, bring up witnesses, and admit evidence for the jury to see. The defense may cross-examine the witnesses brought up by the prosecution, and then the prosecution may re-examine the witnesses in case the defense's cross-examination brought up some issues that the prosecutor thinks will bring the jury over to the defendant's side. After re-examining, the prosecutor then rests her/his case.

As a formality, the defense attorney representing the defendant will usually make a **motion to dismiss** all charges against the defendant. Following this, then it's the defense's turn to present their case, bring up witnesses, and admit exculpatory evidence. The prosecutor then has a chance to cross-examine these witnesses. What then follows is the prosecution's rebuttal, which is a final step for the prosecutor to refute the defense's case with evidence.

When all is said and done, **closing arguments** are given by each side (which side goes first depends on the state/jurisdiction). After these closing arguments, the judge then gives the jury general guidelines, explains the laws that apply to the case, and reminds the jury of the defendant's due process rights (this process is called **jury instruction**). The jury then deliberates to come up with a verdict of guilty, not guilty, or guilty of some (but not all) charges. Previously,

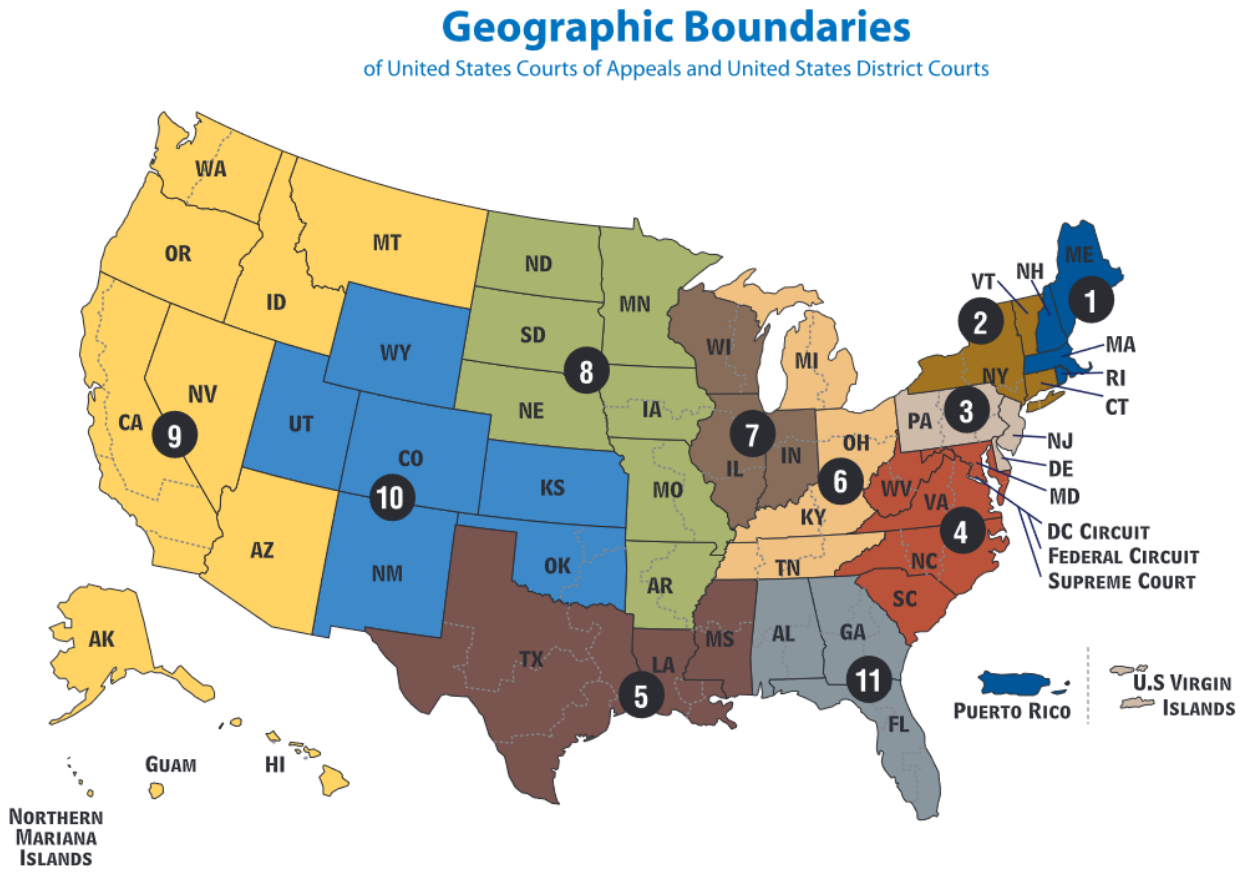
it was up to states to determine whether the jury had to be unanimous (all jury members agreeing) or just a majority, but in 2020, the U.S. Supreme Court ruled in *Ramos v. Louisiana* that juries must be unanimous in state criminal trials. A **hung jury** is when a jury can't reach a unanimous decision, at which point the case is declared a *mistrial* and the trial is rescheduled to be tried again at a later time (note that mistrials can occur for more reasons than just a hung jury; we'll discuss this more later in the chapter).

Once the jury (assuming it's not a hung jury) hands down their verdict, the judge will then decide the sentence if the jury decided to convict the defendant. The judge will weigh aggravating and mitigating circumstances and consult the state's sentencing guidelines (if the state has them) to determine the penalty. We'll talk all about sentencing in Chapter 9, so hang tight for now.

The defendant has the right to appeal if they believe that the trial violated their civil rights at any step. For most states, these appeals will go to **intermediate appellate courts**, which are courts of limited jurisdiction in that they can only hear appeals and not fresh cases (and they are required to hear every appeal received). Forty-two states have intermediate appellate courts, but eight do not; for these eight, then every appeal goes straight to the **state supreme court**, which must hear every appeal (in these eight states). For the 42 states with intermediate appellate courts, their state supreme courts can pick and choose which cases they would like to take up and which ones to ignore (thus letting the intermediate appellate court's decision stand). The exception is death penalty cases (in states that still practice the death penalty), which usually go straight to the state supreme court.

Navigating Through the Federal Branch

Over on the left side of our initial chart (the first image in this chapter) is the federal branch of our court institution, which generally deals with violations of the federal legal code. **U.S. District Courts** are the lowest rung of the federal court system ladder and see the most cases (just like state trial courts do on the state branch). Because they only hear cases where a major federal violation has occurred, they are always courts of limited jurisdiction. There are 94 U.S. District Courts throughout the United States and U.S. territories, which are marked in the image to the right by gray dashes (you can see that several states have multiple district courts, such as Texas, which has four) (U.S. Courts, n.d.). The cases they try are things like constitutional violations, cases where the U.S. is a party, crimes committed on federal property, bankruptcy, maritime crimes, federal fraud cases (mail fraud, credit card fraud, tax evasion, counterfeiting, and so on), federal code violations, and any cross-border crimes (such as trafficking).



Geographic boundaries of the U.S. Courts of Appeals and U.S. District Courts, by United States Courts (n.d.)

U.S. Circuit Courts are the appellate courts of the federal court branch. There are 13 U.S. Circuit Courts (demarcated by color groupings on the map to the right; not sure why the numbering stops at 11, but 12 and 13 are the territories and the DC Circuit), and they vary in the number of judges presiding. The largest circuit court is the 9th Circuit (all of the West Coast, Hawaii, and Alaska). If a federal inmate wants to appeal their conviction by a U.S. District Court, they will file a ***writ of habeas corpus*** (Latin for "that you have the body" or "present the body"), which is essentially a petition for the U.S. Circuit Court in the jurisdiction to review their case and assess whether they were unlawfully incarcerated (LII, 2022). U.S. Circuit Courts may also hear state case appeals if the appeal rests on a claim of constitutional rights violation; that is, if a person convicted in a state court believes that their civil rights were violated, they may file a *habeas* petition (another term for a *writ of habeas corpus*) to have their appeal heard by a U.S. Circuit Court. The same is true for any death penalty case (U.S. Courts, n.d.).

LOOKING FURTHER: Federal Courts and Executive Orders

Image of CECOT in El Salvador, where Venezuelan immigrants in the US are being deported to, March 2025 (DHS, 2025)

Recent events under the Trump Administration have revealed tension between the Executive and Judiciary branches, particularly the Trump Administration's use of the Alien Enemies Act to fast-track deportation of Venezuelan immigrants under suspicion of Tren de Aragua gang ties and pro-Palestinian student and faculty protestors under suspicion that they are tied to Hezbollah. Without the invocation of the Alien Enemies Act, typically immigrants suspected of criminal activity are taken before a DOJ immigration court, where a federal judge will determine whether there is probable cause to support the accusation that the immigrant committed a crime, and will determine whether the crime is serious enough to order deportation to their home country (ICE is the agency that carries out these deportations). The Alien Enemies Act, as applied by the Trump Administration, is bypassing deportation proceedings and being used to deport Venezuelan immigrants not to their home countries but to El Salvador, which has a rapidly declining democracy and increase in human rights violations under President Nayib Bukele, according to Human Rights Watch (Barrera, 2024).

However, whether the Trump Administration is properly applying the Alien Enemies Act has been under federal judicial scrutiny, and federal judges have ordered ICE to refrain from moving immigrants out of state, only for ICE to openly defy judicial orders (Offenhartz et al., 2025). District Court Justice James Boasberg, a federal judge appointed by conservative Supreme Court Justice John Roberts, blocked the Trump order deporting Venezuelans to El Salvador and ordered planes transporting Venezuelan immigrants to El Salvador to turn back around, but was ignored (Kunzelman, 2025). The Trump Administration has responded by proposing that there should be additional limits on judicial power and potential impeachment of judges that aren't immediately in agreement with executive administrative goals (Mascaro, 2025).

Regardless of personal political views, this should be alarming to all Americans from a Constitutional standpoint. Our nation's separation of powers, particularly the power of the federal judiciary to order **universal injunctions** (nationwide pauses of executive or state actions to allow time for further judicial review) has long-standing precedent to protect citizens (and immigrants) against executive overreach (Sohoni, 2020). Using the

rhetoric of "invasion", the Trump Administration is now considering suspending the right to an appeal (*habeas corpus*) for people suspected of gang ties, which will also greatly increase racial profiling of individuals who "look" like they may be immigrants (Gamboa & Acevedo, 2025; Vazquez, 2025).

The U.S. Supreme Court

At the top of both branches of the court institution is the U.S. Supreme Court, which hear cases from both the state branch and the federal branch. Because the U.S. Supreme Court has jurisdiction over all lower courts, it also has the power to issue a ***writ of certiorari*** (Latin for, roughly, "an order to be fully informed"), which is a request to a lower court to surrender the case record for the higher court's review (other courts in the hierarchy may do this to lower courts as well). The U.S. Supreme Court is the final interpreter of constitutional law, and sets the precedent for all like cases in the lower courts. The U.S. Supreme Court divides its time into four quadrants over a 9-month term (from October to June or July): 1. reading through all petitions; 2. hearing oral arguments of the cases they decide to take up; 3. private discussion; 4. writing of opinions. Keep in mind that the annual term is 9 months, not to be confused with term *limits*, of which there are none for U.S. Supreme Court justices, who serve on lifetime appointments (unless they voluntarily resign or retire or are removed from office – the latter of which is notoriously difficult because the Constitution does not define "good behavior" for justices). This is a source of much controversy, especially as life expectancies increase and generational public opinions change from preceding generations, and since the overall appointment process of justices is undemocratic (Johnson, 2016; Lewis, 2021; Scherer, 2022). We will revisit the U.S. Supreme Court in the next chapter when discussing further controversies regarding judicial ethics, but for now, we'll foray into a bit of history.

History of the U.S. Court Institution

Our nation's court institution isn't quite split into well-known historic eras like the historic police eras (and the historic corrections eras that we will address later on). Because of this, it seems right to first address the history of the U.S. Supreme Court and its evolution in function. This will lay the foundation for understanding the different U.S. Supreme Court rulings on notable civil rights that apply to defendants during the adjudication process. The required podcast episode provides some history regarding the U.S. Supreme Court and how its operations evolved up to the present day. Near the end of the episode, partisanship is discussed that could also apply to our next chapter concerning ethics, so take that as a sampling for Chapter 9. The transcript for the podcast episode can be found here.

Throughline (2023) The Supreme Court's Shadow Docket

As addressed in the podcast episode, for the first 101 years of the U.S. Supreme Court's history, it was Congress that controlled the docket, which led to quite a bit of political shenanigans, such as revoking the Supreme Court's jurisdiction over certain cases. This was an initial oversight of Article III of the Constitution, which failed to define several issues (such as the definition of "good behavior" as discussed earlier) and also left incredible leeway up to Congress to dictate the number of Supreme Court justices (the number 9 was set in 1869), impeachment of justices, and jurisdiction of federal courts. After the reforms discussed in the podcast episode in the 1920 and 1930s, the U.S. Supreme Court was able to control its own docket through use of *writs of certiorari,* rather than having Congress define the Court's caseload. Specifically, it was the **Rules Enabling Act of 1934** that allowed the Supreme Court to set its own procedural rules, rather than having them dictated by Congress (LII, 2021). While the Court was required to still try some cases in that "balance" period discussed by the podcast, between 1925-the 1980s, the power balance began tipping towards the U.S. Supreme Court's favor. For example, in *Maryland v. Baltimore Radio Show* (1950), the U.S. Supreme Court ruled that the denial of a petition does not have to be accompanied with written justification, as this would take too much time from other Supreme Court duties. You can see that - though this could be a justifiable stance - this starts to remove a bit of transparency. As Professor Vladeck asserts in the podcast episode, part of this was also due to Congress making the choice not to intervene with the Supreme Court during the 40s-60s.

With the rise of death penalty emergency appeals in the 1980s, the U.S. Supreme Court changed from having a single justice review emergency applications to the full court, but this full court model – in the name of efficiency – did not write its reasoning or sign its rulings, which was the beginning of what we call the "shadow docket". As discussed in the podcast, many of these decisions were to reject emergency death penalty appeals, and even force lower state courts to stop granting emergency relief to death penalty inmates appealing their cases. We will discuss the death penalty more in Chapter 10, but this lays a bit of foundation for how the U.S. Supreme Court evolved in its power and function. In Chapter 9, we will also address how the shift of power has become unbalanced, and possible ways to strike a middle-ground between the extreme Congressional control in the early days of the U.S. Supreme Court, and the extreme power in the hands of the U.S. Supreme Court today.

For now, however, we will go through some historic shifts in U.S. Supreme Court rulings on notable civil rights that apply to the trial process. Specifically, we will examine the 5th, 6th, and 14th Amendments (we will examine the 8th Amendment when discussing sentencing in Chapter 10).

The 5th Amendment

Double Jeopardy

Remember the 5th Amendment? We discussed it briefly in Chapter 6, as it relates to policing: the 5th Amendment protects against self-incrimination, so police must inform suspects of this

right before interrogation. However, there's another clause in the 5th Amendment, and that's to protect people from being "subject for the same offense to be twice put in jeopardy of life or limb" - essentially, people cannot be tried twice for the same crime, which is what has become known as the **double jeopardy clause**. Double jeopardy applies to completely new trials, however, and so *mistrials* (such as a mistrial from a hung jury, as mentioned previously) do not count as a second "new" trial, but rather a re-do of the initial trial.

Double jeopardy has a relatively recent application to state trials, since it wasn't incorporated into state practice until 1969 through ***Benton v. Maryland*** (LII, 2022). Benton was charged with committing burglary and larceny; he was acquitted of larceny but convicted and sentenced for burglary. After his trial, a Maryland law requiring jurors to swear affirmation of believing in God was struck down by a higher court. Since Benton was tried while the unconstitutional law was still in place, he was given the option of having a new trial, which he chose, but it went pretty badly for him: this time he was convicted of both burglary *and* larceny. The majority of the U.S. Supreme Court at the time ruled that this violated the double jeopardy clause, and that the double jeopardy clause should be incorporated into state law in order to prevent citizens from being tried for crimes that were acquitted in prior trials (*Benton v. Maryland*, 1969).

The double jeopardy clause also does not prevent someone from being both criminally charged and civilly sued. In *One Lot Emerald Cut Stones v. United States* (1972) (how's that for a mouthful of a case?), the U.S. Supreme Court essentially ruled that Congress may impose both criminal and civil penalties for the same action, so a criminal trial and a civil suit are not two trials of concerning the same penalty, but rather the criminal trial carries the criminal penalty and the civil trial carries the civil penalty, if the defendant is convicted at both the criminal and civil levels.

The 6th Amendment

The 6th Amendment is a rather significant one in terms of court procedure, as it contains a number of civil rights and legal practices that are integral to the courts institution. For the sake of clarity, we'll walk through each separately.

Right to a Speedy Trial

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial..." Sounds pretty simple, right? Unfortunately, the verbiage is simple, but its application is not so straightforward. It wasn't until 1972 in ***Barker v. Wingo*** that the U.S. Supreme Court established a four-prong balancing test to determine if this right has been violated, but even this test is rather broad. The four aspects of the test are: 1.) the length of the delay (a year or more is suggested as being too long); 2.) the reason for the delay; 3.) the manner that defendant asserted their 6th Amendment right; and, 4.) the degree of prejudice against the defendant that the delay has caused (for example, if a defendant suspected of being a brutal serial killer waits

for a very long time until his trial, public opinion could already condemn him as the killer long before his trial).

At the federal level (but not applied to individual states), the **Speedy Trial Act of 1974** mandates 30 days from arrest to indictment and 70 days from indictment to trial (so 100 days total) (DOJ, n.d.). Again, however, this is only for federal crimes tried by U.S. District Courts and not state trial courts.

Plea Bargaining

While plea bargaining isn't expressly mentioned in the 6th Amendment, many court rulings use the 6th Amendment as a foundation because of its mention of a speedy trial and right to council, both of which are parts of the plea bargaining process (it definitely speeds things up by bypassing the trial, and one needs a good attorney to negotiate a good plea deal). There are quite a number of landmark cases that contributed to the evolution of plea bargaining, but we will discuss four notable ones here.

The first case to really emphasize procedural law surrounding the practice was ***Boykin v. Alabama*** (1968), where Boykin, Jr. was charged with five counts of robbery and plead guilty to all of them. However, there was nothing in the court record showing that Boykin, Jr. was informed of his 6th Amendment rights (specifically the right to a jury trial and the right to confront witnesses), or that he made his guilty pleas *knowingly and voluntarily*. In Alabama at the time, armed robbery could carry the death sentence and the jury agreed to convict and sentence Boykin, Jr. to death. Once the appeal made its way up to the U.S. Supreme Court, the justices ruled that the lower courts were in error since a "guilty" plea is not sufficient evidence that the defendant was voluntarily confessing.

The case that applied the "*knowingly and voluntarily*" requirement specifically to plea bargaining was ***Brady v. United States*** (1970), where Brady - accused of kidnapping, which carried the possibility of the death penalty at the time - argued that his acceptance of a plea deal was not given voluntarily, since the threat of capital punishment influenced his decision to take the deal. After Brady's initial trial, the U.S. Supreme Court ruled in *United States v. Jackson* (1968) that capital punishment as a penalty for kidnapping was unconstitutional because the threat of death places an undue burden on defendants considering a "not guilty" plea (essentially if you plea "not guilty", you are risking a jury deciding to sentence you to death). Back to Brady, at his appeal, he argued that *United States v. Jackson* ought to be applied retroactively to his case. The Court decided that *United States v. Jackson* did not retroactively apply to previous cases where the death penalty was on the line, especially considering that Brady agreed to the plea with the help of competent council and fear of capital punishment did not seem to be a motivating factor at the time (*Brady v. United States*, 1970).

A year later, in ***Santobello v. United States*** (1971), the U.S. Supreme Court ruled that the prosecution must abide by the original terms of the plea deal that the defendant agreed to. In this case, Santobello initially pleaded "not guilty" to two felony counts but decided to agree to a

plea deal for a lesser sentence (remember that a defendant must plead guilty in order to accept a plea bargain). Unfortunately, the prosecutor and defense attorney changed by the time Santobello was sentenced, and the prosecutor - unaware of the original plea bargain - decided to pursue the maximum sentence. The U.S. Supreme Court overturned this decision and ruled that defendants have the right to request a new trial if a prosecutor fails to abide by the original terms of the plea bargain (*Santobello v. United States*, 1971).

The final case we'll address here is ***Bordenkircher v. Hayes*** (1978), which was rather controversial and received a much more divided decision (5-4) from the Supreme Court Justices. In this case, Hayes was charged with forgery, and the prosecutor said that if Hayes pleaded "guilty" he would receive a 5-year sentence, but if he pleaded "not guilty", the prosecutor would use the Kentucky Habitual Crime Act of the time to convict Hayes of an even longer sentence because of Hayes' prior criminal record. Hayes did not agree to the plea deal and still pleaded "not guilty", so the prosecutor did what he said he would, and under the Kentucky Habitual Crime Act, Hayes received a life sentence. This case, like several others, incorporated the 14th Amendment as well, since Hayes argued that the 14th Amendment Due Process clause prohibits prosecutors from making threats. However, the U.S. Supreme Court ruled that Hayes' due process rights were not violated, since it is in the prosecutor's "legitimate interest" to threaten heavier penalties if the prosecutor is aware of other sentencing laws that may apply to the defendant's case (*Bordenkircher v. Hayes,* 1978).

Indigent Defense

Plea bargaining as a practice relies on the defendant knowingly and voluntarily waiving their rights to a jury trial, which also means that they ought to receive council that assists them in understanding the plea bargain drawn up by the prosecutor. The 6th Amendment ends with "...and to have the Assistance of Counsel for his [the accused] defense." Again, seems pretty straightforward, right? However, for a long time, while defendants had the *right* to counsel, *access* to counsel was a whole other issue and not guaranteed.

Hiring one's own defense attorney is an incredibly expensive undertaking, which not many can afford without major financial consequences. With arrest rates being higher in low-income and poverty-stricken areas, this means that a lot of low-income defendants (*indigent* is an old-fashioned word for being poor and unable to afford basic necessities) cycle through the criminal justice system. Early in the 20th Century (remember that mass immigration from European countries and the Great Migration led to an influx of immigrants and Black people escaping Jim Crow laws; both populations faced financial struggles due to their inability to take much with them and the lack of worker protections at the time), it became clear to the courts that something needed to change to enable better access to this right.

In ***Powell v. Alabama*** (1932), nine Black teens (known later as the Scottsboro boys) were rushed through trial proceedings due to being accused of raping two White women. The death penalty was on the line, and - due to Jim Crow laws and unequal access to education - the boys were

illiterate, and even though Alabama required counsel to be provided for capital punishment cases, no actual counsel was provided to the boys. Doctors confirmed that there was no actual evidence of rape, but 8 out of the 9 boys were still sentenced to death. The U.S. Supreme Court overturned this sentence, ruling that the boys' 14th Amendment due process rights were violated, and that a record of actual provision of counsel must be shown for death penalty cases. The picture to the right depicts them four years after the Supreme Court's decision.

The ruling in *Powell* seemed to only be limited to death penalty cases, however, so there was some debate about its application to non-death penalty trials until ***Gideon v. Wainright*** (1963). Because the Florida State understanding of *Powell* was that counsel must only be provided in death penalty cases, Gideon was not provided counsel when charged with breaking and entering, and so he was forced to represent himself. This hardly ever goes well, and he was inevitably found guilty. When his appeal traveled up to the U.S. Supreme Court, the justices again applied the 14th Amendment along with the 6th Amendment and ruled that counsel must be provided for any criminal felony defendant.

"The Scottsboro Boys and Juanita Jackson Mitchell" by Ernest Taggart (1936); from the National Portrait Gallery, Smithsonian Institution; acquired through the generosity of Elizabeth Ann Hylton

Lastly, ***Argersinger v. Hamlin*** (1973) extended the right to a provided public defender for misdemeanor cases where incarceration could still be a penalty, again on the basis of both the 6th and 14th Amendments.

Ineffective Assistance of Council

While we now have the right to a public defense attorney for any case where incarceration/jail time could be considered, public defenders are notoriously underpaid and overburdened with a boatload of cases on any given day. What happens if they do not provide sufficient or effective counsel due to being overburdened? The main court case to know here is ***Strickland v. Washington*** (1988), which established a two-prong test to decide whether counsel violated the defendant's rights to effective counsel: 1.) the defense attorney's counsel fell "below an objective standard of reasonableness", and 2.) there is a "reasonable probability that, but for the counsel's unprofessional errors", the outcome of the trial would have been different (LII, 2023). Unfortunately, this is very hard for the defendant to prove since they essentially have to demonstrate a hypothetical - that the trial's outcome would have been different if counsel had not made certain errors.

The 14th Amendment

Our final amendment that applies to many appellate decisions is the 14th Amendment, which we've already addressed in several cases above. The 14th Amendment has five different sections, but the two most applied to criminal and civil law, the **due process clause** and **equal protection clause**, are as follows:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

An entire chapter (or book) could be written on the 14th Amendment alone due to its different clauses and their applicability to both criminal and civil law. For now, understand that its protection of **due process** has been understood to mean two forms: ***substantive due process*** and ***procedural due process***. *Procedural* due process means that the adjudication process follows the proper procedures as outlined by law and by constitutional interpretations. *Substantive* due process has to do with the actual substance of what due process protects (i.e., rights and liberties to engage in different things) (LII, 2022). Many of the cases addressed above were *procedural* due process cases, in that the appellant was arguing in these cases that the *process* of their trial was in some way carried out erroneously or unconstitutionally. Many familiar 14th Amendment cases that have to do with the *substance* of rights themselves are usually those that deal with the right to privacy (e.g., *Griswold v. Connecticut, Loving v. Virginia, Roe v. Wade, Obergefell v. Hodges,* and now *Dobbs v. Jackson Women's Health).*

That second clause ("*nor deny to any person within its jurisdiction the equal protection of the laws"*) is incredibly important to safeguarding against discrimination, but it is unfortunately very difficult to prove, since it is on the discriminated-against party to prove **1.** that they were discriminated against by a government office or process, and **2.** that the discrimination caused

harm (i.e., were it not for the discrimination, the outcome would have been substantially different) (LII, 2022). By placing the burden of proof on the discriminated-against party (and given that many marginalized people may come from backgrounds where it is difficult to afford a good attorney), this often allows discrimination to perpetuate in the system.

Conclusion

Sometimes the U.S. Courts institution is daunting, given its two-branch structure and all the legal ins and outs of case law. However, it's essential to learn how trials proceed through the system in order to understand a lot of news about notable court cases, and it's essential to learn about landmark civil rights cases to see how we got to where we are today.

With some of the facts of the cases we discussed, you can already see many different avenues where error and outright misconduct can occur. We will discuss more about the actual actors and practitioners in the system in the next chapter, and how - as with any position that carries a great deal of power with it - corruption and injustice can occur during the adjudication and appeals processes.

Chapter 9
The Courtroom Workgroup and Ethical Issues in the Courts

Introduction

As you've started to gather from the last chapter (especially the plea bargaining process), what's often depicted as an adversarial process within the courts is actually a lot more cooperative, especially as prosecutors, public defenders, and judges get to know each other very well over the course of their careers. While this often alludes itself to favorable outcomes for the defendants (e.g., the prosecutor and defense attorney are on good enough terms to work an advantageous deal, or the attorneys know the idiosyncrasies of different judges and plan their cases accordingly), it can also lead to incredibly unjust outcomes and civil rights violations when taken too far or done the wrong way. This chapter will discuss the various challenges and ethical issues that members of the courtroom workgroup, as well as defendants who are affected by their work, often face.

The Courtroom Workgroup

The "courtroom workgroup" is a term that refers to the informal cooperation between prosecutors, defense attorneys, and judges within a trial court. While these roles have very distinct *formal* role differences, these three roles are often *informally* very cooperative, especially as plea bargaining has become the predominate way of settling cases. However, as with anything in the CJS, the dynamics between the three main roles are more complex than just generally working together with equal measures of cooperation. For example, Metcalf (2016) found that familiarity between prosecutors and judges increased the likelihood of a plea bargain, but if the defense attorney is familiar with the judge and prosecutor, the case is more likely to go to trial. This indicates that privately hired defense attorneys might be more likely to pursue a plea bargain rather than public defenders, and that public defenders - based on their familiarity with the prosecutors and judges - may be better at predicting when a jury trial will be in their client's best interest.

The COVID-19 pandemic was a recent historic disruption to the entire process of the courtroom workgroup's ability to gain familiarity outside of the formalized court system (many things can be learned in the hallways, before, and after formal court proceedings), and preliminary studies show that this may have negatively impacted defense attorneys and defendants (Webster et al., 2023). While Zoom and other web-based video call software assisted in the continuation of trial and plea bargain proceedings, one of the main problems for defendants was the lack of quality internet access; because the courtroom workgroup has access to reliable internet in their offices, defendants - most of whom are from low-income, transient, or other challenging

backgrounds - were not always able to access the internet for court proceedings, which many public defenders were concerned about for their clients. Field and colleagues (2023) also found - through qualitative interviews - that public defenders were more aware of structural causes of crime (just like the Webster et al. finding that public defenders were aware of structural inequities like internet access), whereas prosecutors are more likely to have very different beliefs about what causes crime. Reflecting back to those seven main perspectives that we discussed in Chapter 1, you can see how these perspectives are so influential in affecting different practitioners' choices and their interactions with one another.

When thinking back to Chapter 7 and the ethical issues that police officers face, noble cause corruption is a concept that can be tied to the courtroom workgroup as well. Since the group tends to operate more efficiently when all members cooperate (except for the nuances we discussed about defense attorneys in the prior paragraph), there is a danger of accepting corruption or ethical missteps for the sake of efficiency and what the workgroup members perceive is "justice". Prosecutors in particular may fall into the trap of noble cause corruption by justifying to themselves that some misconduct is acceptable in order to achieve the "just" outcome of putting a defendant behind bars. Judges likewise may accept some misconduct in the name of "justice", and defense attorneys faced with defending a defendant who has privately admitted guilt may be tempted to provide the barest minimum of counsel so that the defendant is still punished. However, while noble cause corruption may be an issue for every member of the courtroom workgroup, there are also unique issues that each role faces given the requirements of their positions in the courts.

Ethical Issues for Defense Attorneys

Defense attorneys are unfortunately often socially and culturally maligned since they are required to defend suspects who may indeed be guilty, and may be guilty of some pretty heinous crimes. Welkener (2013) explores this ethical dilemma and how the standard types of ethics that we've discussed before - deontological and teleological ethics - may be insufficient in describing the defense attorney's ethical systems for approaching their roles, since there are two ethical demands on the defense attorney: doing the right thing for their client (protecting the client's civil rights), but also doing the right thing for the jury and public at large (not misrepresenting the client's character if the client is indeed guilty). Defense attorneys may prefer a more **virtue-based ethic** (a focus on ideals, rather than duty or results) to approach this dilemma by only making the case for their client's innocence when there is indeed evidence of innocence, and - if there is a high likelihood of the defendant's guilt - not making claims of innocence but rather emphasizing the need for the prosecutor to prove guilt "beyond a reasonable doubt" (i.e., the defense attorney defaults to a more procedural justice claim rather than making a *substantive* argument about their client's innocence) (Welkener, 2013).

Some scholars have found that defense attorneys may actually struggle the most when defending clients that are likely innocent (Howe, 2015). While that may seem odd at first, since some would think that it would be easier to zealously defend an innocent client than one that likely committed a heinous crime, the problem arises for defense attorneys when they experience just how unjust and brutal the criminal justice system can be towards innocent defendants. Cynicism and disillusionment with the CJS may occur when an innocent client is still convicted and imprisoned, in spite of every effort made by the defense attorney to protect their client's rights (Howe, 2015).

Public defenders usually also face extremely high caseloads with very low pay when considering how much they paid to get through law school. Nationwide, states have reduced budget spending for the already quite underfunded court institution, which means that public defenders are often unable to actually provide enough focus to each case in order to offer effective counsel (Baxter, 2012-2013). Indeed, counties with lower caseloads usually result in felony defendants with shorter sentences than counties with higher caseloads, showing that the defendant's attorneys were able to achieve better outcomes for their clients when not as burdened (Gottlieb & Arnold, 2021). Still, many public defenders still report devotion to their roles, often citing their value of Constitutional rights, social justice advocacy, ideological values, peer support, and government benefits as reasons to remain in the public sector (Bacak et al., 2020).

Ethical Issues for Prosecutors

Unfortunately, while prosecutors are often seen as the "good guys" of the adversarial trial process in their zealous pursuit of putting offenders behind bars, prosecutorial misconduct is rampant in the U.S. court institution. A recent report by the National Registration of Exonerations found that 44% of exonerations (overturning convictions for innocent people) were due to police and prosecutors intentionally hiding evidence that could have shown the defendant's innocence, and 30% of all exonerations were due to recorded instances of prosecutorial misconduct (NRE, 2020). This first issue, intentionally hiding evidence that could show a defendant's evidence, is called a **Brady violation**, in reference to ***Brady v. Maryland*** (1963), where the U.S. Supreme Court ruled that withholding exculpatory evidence was a violation of the defendant's 14th Amendment due process rights. Unfortunately, the **harmless error doctrine**, which holds that an unconstitutional action is not harmful unless it is reasonably assumed to have changed the outcome of the trial, is often used to assist prosecutors in avoiding any real accountability (Bastain, 2023). Very recent research by Garrett et al. found that courts found Brady violations in about 10% of all cases of reported misconduct, that most of these were committed by prosecutors (not police), and that appellants making Brady violation claims waited an average of 10 years to be granted relief (Garrett et al., 2023).

As mentioned earlier, noble cause corruption is a particularly prevalent challenge for prosecutors, who tend to align more with police when it comes to shared perspectives about justice and the causes of crime. Research by Grometstein (2010) finds that noble-cause corruption is particularly prevalent in highly publicized cases where there is public outcry about the victim (such as the victim being a child and/or being killed in a very brutal way). Both personal and public pressure may strongly influence a prosecutor to do everything they can to put a suspect behind bars, to the point of violating suspects' rights and ignoring exculpatory evidence (also called **Brady evidence** because of *Brady v. Maryland*) that show's the defendant's innocence (Grometstein, 2010). Just as with policing, though the ends-oriented justification for noble-cause corruption motivates misconduct, oftentimes this results in *more* injustice as the outcome for the most people, not less. For example, Weintraub (2020) found that increases in prosecutorial misconduct leads to decreases in identifying the actual perpetrator, meaning that not only does prosecutorial misconduct land an innocent person behind bars, it also leaves the public vulnerable to the actual perpetrator still being free to commit further crime.

Additionally, the District Attorney (often referred to as the DA), who is the chief prosecutor and supervisor of the jurisdiction's deputy district attorneys (prosecutors who handle the majority of cases), is often a partisan elected position. This means that many of the issues we discussed about sheriff partisan elections also apply to prosecutors, especially the DA. Prosecutors tend to align with more politically conservative and crime-control politics, which may lead to either the role being uncontested (with no left-leaning candidate challenging the right-leaning one), a right-leaning candidate running as a Democrat to secure votes from a "blue" district but still choosing to pursue more conservative practices, or right-leaning candidates playing up "tough on crime" initiatives in order to secure votes from a "red" district (Hessick et al., 2023; Okafor, 2022; Sances, 2021). Because prosecutors wield a great deal of discretion and have very little oversight, elections are one of the few accountability processes to ensure a democratic check on prosecutorial power, but unchallenged incumbents and voter ignorance can be major barriers to accountability (Hessick et al., 2023).

In order to appeal to voters (or to appeal to supervisors, in the case of trial prosecutors), DAs and deputy district attorneys may also be overly concerned with their records of how many cases they "win", rather than recognizing that a just outcome sometimes includes "losing" a case when the defendant is innocent. The required video below discusses such issues, as well as Brady violations and a very rare instance of a prosecutor losing their license for misconduct.

“The System – Prosecutorial Misconduct” by Al Jazeera English (2015)

Ethical Issues for Judges

Stage Judges

Judges in particular are charged with remaining impartial interpreters of the law, but are vulnerable to personal biases as all humans are. The American Bar Association (ABA) has created a Model Code for Judicial Conduct that not only requires impartiality and an avoidance of impropriety, but also avoidance of personal or political activity that is inconsistent with judicial impartiality and integrity (ABA, 2020). However, these are only guidelines and are not binding (though states have adopted them in various different forms). Based on their interpretation and adoption of the ABA's model code, states have their own judicial discipline committees, but these committees often lack transparency and have been accused as tolerating high degrees of misconduct before meting out any discipline, which - when it happens - is also often criticized as just being a "slap on the wrist" (Hurst, 2024).

The way in which judges come to serve may also affect their likelihood of misconduct. There are at least five main methods for judicial selection, which largely depends on the jurisdiction:

1. The **Missouri Plan** - judges are selected based on an evaluation of merit by a nominating commission, which then recommends judges to the governor for appointment
2. Partisan elections - judges run on political platforms, much like DAs and sheriffs
3. Non-partisan elections - judges run for election but are not registered as Democrats or Republicans
4. **Gubernatorial appointment** - judges are appointed by the state's governor
5. **Legislative appointment** - judges are appointed by members of the state's congress

For partisan elections, judges may feel pressured to appeal to major party ideals in spite of their professional role requiring them to be fair and impartial. Political campaigns may also run off of large donations by members of the party, leaving judicial candidates at risk of showing favoritism to large campaign donors. Gubernatorial and legislative appointments may also introduce heavily partisan biases, as governors and legislators tend to prefer appointments that share their partisan politics, especially to appeal to voters if they (the governor and legislators) are running for re-election or building their resume to run for a more influential office in the future).

Federal Judges

All federal judges in the U.S. District Courts, U.S. Circuit Courts, and U.S. Supreme Court are appointed by the president to serve lifetime terms until they pass away, retire, resign, or are impeached. This can cause a great deal of issues, and - while they are often the subject of current discourse given the ProPublica investigation of U.S. Supreme Court Clarence Thomas (optional reading) - have had a much longer history. Watch this required video below to see some of the history and ethical problems for the federal judiciary:

"Supreme Court's Ethical Dilemmas Began Before Clarence Thomas" by Bloomberg Law (2023)

The major legitimacy crisis facing the U.S. Supreme Court (54% of Americans now have an unfavorable view of the U.S. Supreme Court, according to Pew, 2023), senators in Congress have re-introduced a Supreme Court ethics bill, this time known as **S.325 Supreme Court Ethics Act.** This act would apply the code of conduct that applies to other federal judges to U.S. Supreme Court justices as well, and would create an ethics investigation counsel to address allegations of misconduct (Congress, 2024).

However, in spite of the fact that federal judges (other than Supreme Court justices) are bound by the code of conduct outlined in the United States Code (namely, chapter 57 of title 28), other federal judges can be notoriously difficult to impeach, especially for instances of sexual misconduct. Olsen (2021) investigated sexual harassment and assault complaints against federal judges, and found that employees and staffers for the judges' offices were not made aware of the fact that sexual harassment protections do not apply to federal judges. Even for the only federal judge, Samuel Kent, who has actually been impeached for sexual assault, it took 6 years between the report of sexual assault and his impeachment, and much of the delay was caused by protections from Kent's judicial peers and victim-blaming rumors spread about Cathy McBroom, the whistleblower (Olsen, 2021).

Conclusion

Unfortunately, ethical issues and misconduct contributes to major injustices wrought by our "justice" system. While smartphones, body-worn cameras, and other recording devices are making the public more aware of police misconduct when it arises, misconduct in the court institution is far less visible and therefore even more difficult to address and reprimand. Systemic problems, especially when police and prosecutors work together to hide evidence, or when judicial peers protect one another against misconduct allegations, or when public defenders are unable to provide effective counsel due to caseloads, can harm innocent lives and the lives of victims, and have an overall negative effect on public beliefs of the legitimacy of the courts and overall CJS. Keep these in mind when we discuss sentencing decisions, the death penalty, and exonerations, which we will turn to in the next chapter.

Chapter 10
Sentencing and the Death Penalty

Introduction

The sentencing process lies at the transition point between the courts institution and the corrections institution. Many of the practices and ethical issues we've discussed in the previous chapters will dictate the length and type of sentences that defendants receive, which will then dictate the prison and jail populations. In this chapter, we will discuss types of sentences - including the death penalty - as well as issues in false convictions.

Types of Sentences and Sentencing Guidelines

Defendants may receive sentences that are either determinate or indeterminate, as well as consecutive or concurrent (to continue with the theme you've probably picked up from previous chapters, which one is used all depends on the jurisdiction and/or state).

Determinate vs. Indeterminate

Determinate sentences are those that are a fixed length, and the defendant must serve the entirety of that length of incarceration. For example, if a defendant is given a sentence of five years in prison, they must serve all five years. **Indeterminate** sentences, on the other hand, are those that are not a fixed length, so the judge has discretion in giving a range of years (e.g., 2-5 years), and then a **parole board** (a committee of people - usually appointed by the governor - who review offenders' cases and behavior while incarcerated) may allow the defendant to have early release within that range of time to serve out the rest of their sentence in the community (LII, 2021).

Consecutive vs. Concurrent

Consecutive sentences are those that follow one-after-another. Since most people violate several laws during the commission of a criminal event, they can be convicted and sentenced for multiple crimes (unless a count bargain was arranged with the prosecutor during plea bargain negotiations). If the defendant is sentenced for multiple crimes and must serve them consecutively, as soon as the sentence for one crime is done, then they will start serving time for their next criminal conviction, and so on. For example, say someone is convicted and sentenced for breaking and entering (1 year), burglary (2 years), and destruction of property (1 year), under a consecutive sentencing scheme, they would have to serve 4 years total. Consecutive sentences have been criticized as being one of the major contributors to mass

incarceration (which we will talk about in the next few chapters) since it creates very long overall sentences for defendants (Galvin, 2022).

Conversely, a **concurrent** sentence means the defendant can serve all of these sentences at the same time. So for the same example, their total time served would be 2 years, since while serving time for the burglary, they are *concurrently* serving time for the breaking and entering and the destruction of property. As you can imagine, a concurrent sentence is one that will contribute to lower overall prison populations, since defendants will serve their time quicker. However, some victims (or victim's family) may be concerned about the lack of what they perceive as justice if the defendant serves their time all at once. In cases of domestic violence and intimate partner violence especially, since some state laws are still quite lax about domestic abuse, prosecutors may pursue every charge possible in order to keep the abuser behind bars and away from the victim(s); however, if the judge chooses a concurrent sentence (remember that the jury decides whether or not to convict, and the judge decides the sentence), the abuser will be released when the longest sentence has been served.

Sentencing Guidelines

For most of America's history, sentencing followed an indeterminate scheme and judicial sentencing decisions were very vulnerable to implicit (or outright explicit) biases. During the peak of the war on drugs, growing criticism of long sentences being ascribed to predominately Black and low-income defendants - while White and affluent defendants for similar crimes received much shorter ones - led to a demand for more standardized guidelines that all judges should follow in order to mitigate bias and make sentencing more equal. Other critics were less worried about discrimination and bias, but more worried about some crimes not receiving *enough* incarceration time (remember that this was during a very crime control-oriented era). In 1980, Minnesota became the first state to create **sentencing guidelines** (a standardized document showing which crimes should receive which sentence lengths, while also accounting for the offender's prior record and other relevant factors), followed soon after by the **Sentencing Reform Act of 1984**, which enacted the Federal Sentencing Guidelines in 1987 (Mitchell, 2017).

The primary goals of the Sentencing Reform Act were to amend sentencing disparities and establish a sentencing commission to constantly research and update federal sentencing guidelines. The U.S. Sentencing Commission has been an official entity since this act, and you may browse their most recent (2023) sentencing guidelines manual here (for optional reading). However, while these guidelines started out as mandatory with the Sentencing Reform Act, in ***United States v. Booker*** (2005), the U.S. Supreme Court ruled that they are no longer mandatory but rather advisory (strongly recommended) for federal justices to follow.

Because of our division between the federal and state courts systems, these federal guidelines do not apply to individual states, who can either follow the federal model as their own

foundation, or may create an entirely different set of sentencing guidelines for all judges within the state to follow.

The image to the right is an example of Washington State's Adult Sentencing Guidelines Manual (2023), since Washington has received widespread recognition for the clarity of their guidelines. Each offense has a different seriousness level assigned to it, based on different legislative statutes. Each defendant also receives an "offender score" based on prior offense record and other aggravating and mitigating circumstances. The grid is then used to match up the seriousness level to the offender score, and each box shows the sentencing range (the lower line) and the midpoint (the upper line). So for example, if someone committed Burglary 1, that is considered a VII seriousness level. If the defendant's offender score is 0, then their sentencing range would be 15-20 months, with the midpoint being 17.5 months. You may also see Indiana State's sentencing guidelines here (for optional reading).

Seriousness Level	Offender Score 0	1	2	3	4	5	6	7	8	9+
LEVEL XVI	LIFE SENTENCE WITHOUT PAROLE/DEATH PENALTY									
LEVEL XV	280m 240 - 320	291.5m 250 - 333	304m 261 - 347	316m 271 - 361	327.5m 281 - 374	339.5m 291 - 388	364m 312 - 416	394m 338 - 450	431.5m 370 - 493	479.5m 411 - 548
LEVEL XIV	171.5m 123 - 220	184m 134 - 234	194m 144 - 244	204m 154 - 254	215m 165 - 265	225m 175 - 275	245m 195 - 295	266m 216 - 316	307m 257 - 357	347.5m 298 - 397
LEVEL XIII	143.5m 123 - 164	156m 134 - 178	168m 144 - 192	179.5m 154 - 205	192m 165 - 219	204m 175 - 233	227.5m 195 - 260	252m 216 - 288	299.5m 257 - 342	347.5m 298 - 397
LEVEL XII	108m 93 - 123	119m 102 - 136	129m 111 - 147	140m 120 - 160	150m 129 - 171	161m 138 - 184	189m 162 - 216	207m 178 - 236	243m 209 - 277	279m 240 - 318
LEVEL XI	90m 78 - 102	100m 86 - 114	110m 95 - 125	119m 102 - 136	129m 111 - 147	139m 120 - 158	170m 146 - 194	185m 159 - 211	215m 185 - 245	245m 210 - 280
LEVEL X	59.5m 51 - 68	66m 57 - 75	72m 62 - 82	78m 67 - 89	84m 72 - 96	89.5m 77 - 102	114m 98 - 130	126m 108 - 144	150m 129 - 171	230.5m 149 - 198
LEVEL IX	36m 31 - 41	42m 36 - 48	47.5m 41 - 54	53.5m 46 - 61	59.5m 51 - 68	66m 57 - 75	89.5m 77 - 102	101.5m 87 - 116	126m 108 - 144	150m 129 - 171
LEVEL VIII	24m 21 - 27	30m 26 - 34	36m 31 - 41	42m 36 - 48	47.5m 41 - 54	53.5m 46 - 61	78m 67 - 89	89.5m 77 - 102	101.5m 87 - 116	126m 108 - 144
LEVEL VII	17.5m 15 - 20	24m 21 - 27	30m 26 - 34	36m 31 - 41	42m 36 - 48	47.5m 41 - 54	66m 57 - 75	78m 67 - 89	89.5m 77 - 102	101.5m 87 - 116
LEVEL VI	13m 12+ - 14	17.5m 15 - 20	24m 21 - 27	30m 26 - 34	36m 31 - 41	42m 36 - 48	53.5m 46 - 61	66m 57 - 75	78m 67 - 89	89.5m 77 - 102
LEVEL V	9m 6 - 12	13m 12+ - 14	15m 13 - 17	17.5m 15 - 20	25.5m 22 - 29	38m 33 - 43	47.5m 41 - 54	59.5m 51 - 68	72m 62 - 82	84m 72 - 96
LEVEL IV	6m 3 - 9	9m 6 - 12	13m 12+ - 14	15m 13 - 17	17.5m 15 - 20	25.5m 22 - 29	38m 33 - 43	50m 43 - 57	61.5m 53 - 70	73.5m 63 - 84
LEVEL III	2m 1 - 3	5m 3 - 8	8m 4 - 12	11m 9 - 12	14m 12+ - 16	19.5m 17 - 22	25.5m 22 - 29	38m 33 - 43	50m 43 - 57	59.5m 51 - 68
LEVEL II	0-90 days	4m 2 - 6	6m 3 - 9	8m 4 - 12	13m 12+ - 14	16m 14 - 18	19.5m 17 - 22	25.5m 22 - 29	38m 33 - 43	50m 43 - 57

Statute (RCW)	Offense	Class	Seriousness Level
10.95.020	Aggravated Murder 1	A	XVI
9A.48.020	Arson 1	A	VIII
9A.36.011	Assault 1	A	XII
9A.36.021(2)(a)	Assault 2	B	IV
9A.36.021(2)(b)	Assault 2 With a Finding of Sexual Motivation	A	IV
9A.36.120	Assault of a Child 1	A	XII
9A.36.130	Assault of a Child 2	B	IX
9A.76.170(3)(a)	Bail Jumping with Murder 1	A	VI
9A.52.020	Burglary 1	A	VII
9A.44.083	Child Molestation 1	A	X
9A.44.086	Child Molestation 2	B	VII
70.245.200(2)	Coerce Patient to Request Life-ending Medication	A	Unranked
69.50.415	Controlled Substance Homicide	B	DG-III
70.74.180	Explosive Devices Prohibited	A	IX
9A.56.120	Extortion 1	B	V
70.245.200(1)	Forging Request for Medication	A	Unranked
9A.32.055	Homicide by Abuse	A	XV
79A.60.050(1)(c)	Homicide by Watercraft - Disregard for the Safety of Others	A	VII

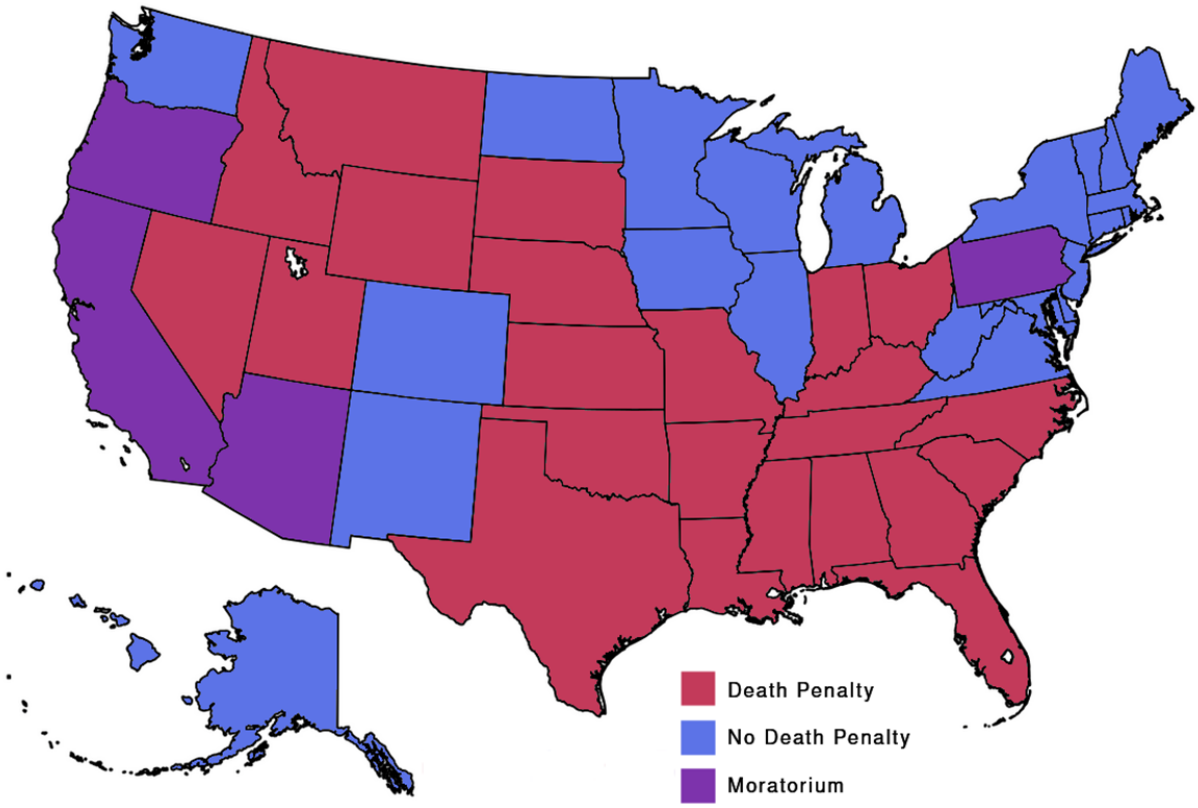
The Death Penalty

No discussion of courts and sentencing is complete without in-depth coverage of the death penalty. The United States is unique among analogous ("analogous" meaning similar or comparative in terms of development, GDP, and similar democratic political structures) nations in its continued practice of the death penalty. For example, Germany banned the practice in 1949 and 1987 (German reunification is the reason behind the two dates), Australia banned it in 1985, and both Canada and the UK banned the practice in 1998. Approximately 2/3 of the countries in the world have abolished the death penalty (Amnesty International, 2023). The United States is 9th in the list of countries with the most executions, as of 2021, following China, Iran, Egypt, Saudi Arabia, Syria, Somalia, Iraq, and Yemen (Amnesty International, 2023).

Evolution of the Death Penalty

The death penalty was carried into the U.S. through the old colonial codes borrowed and brought over from British colonizers. However, some colonies (and later states) established their own rules of when it could/couldn't be used. Throughout US history, some states have placed ***moratoriums*** - temporary bans or pauses in law or policy - on capital punishment, and others have permanently banned the practice. The map below created using data from the Death Penalty Information Center (2023) and other state statutes shows each state's current standing with capital punishment, with states that have permanently banned the practice in blue and those that have placed moratoriums on the death penalty in purple.

At the federal level, the US has also gone through a series of moratoriums and changes. in the first of these cases, ***Furman v. Georgia*** (1972), SCOTUS ruled that the death penalty was unconstitutional as a violation of the 8th amendment (remember that the ***8th Amendment*** protects against cruel and unusual punishment). Specifically, the Court ruled that it violated the 8th amendment when applied in an arbitrary or discriminatory manner, and the Court confirmed that people of color were being disproportionately sentenced to the death penalty, even holding criminal offenses constant (Cornell Law School, n.d.). This national moratorium was short-lived, however, as four years later, in ***Gregg v. Georgia*** (1976), SCOTUS ruled that the death penalty was not a violation of the 8th amendment, as long as it was a sentence restricted to homicide cases and was not arbitrarily applied, but instead was applied after careful consideration of the offender's case and character (Cornell Law School, n.d.). This decision re-instated the practice of the death penalty in states that had not previously banned the practice.



States Death Penalty Statutes, as of 2023, by Indigo Koslicki (2024); map template by Wolfson (2019)

However, questions over whether the death penalty was being applied in a discriminatory way against people of color and the poor continued. In 1987, the case ***McClesky v. Kemp*** raised this particular concern in light of studies that were showing that the death penalty was still being disproportionately applied to Black defendants. The specific study used in the defendant's (Warren McCleskey's) case had found that the death penalty was still being arbitrarily applied, with Black defendants who were tried for killing White victims receiving the death penalty more often than any other offender/victim racial dyad. In a 5-4 vote, SCOTUS ruled that the study was not enough to demonstrate that the death penalty was systemically discriminatory; essentially, racially discriminatory *motivation* must be proven by defendants on appeal, not just the racially discriminatory outcome (McCleskey v. Kemp, 481 U.S. 279 - 1987). Justice Powell, one of the majority, later regretted his vote, and continued studies that show racial disparities in the application of the death penalty still persist (Liptak, 2020). Specifically, Phillips and Marceau (2020) found that when the victim is White, the defendant is **17x more likely** to be sentenced to the death penalty than if the victim is Black. Critics of the death penalty, including former Justice Stevens (one of the dissenting Justices in the case), have compared the devaluing of Black lives as compared to White lives to the practice of legal lynching in the South (Liptak, 2020), a comparison further explained by civil rights lawyer Brian Stevenson in the required

video below [note: as we'll discuss more later in this chapter, Alabama as of this year no longer allows judges to override jury verdicts]:

"Bryan Stevenson on Justice and Capital Punishment | Bob Herbert's Op-Ed.TV"by CUNY TV (2014)

While the US still allows for the death penalty in spite of evidence of racially disproportionate sentencing, there's been further evolution of the law regarding *who* can receive the death penalty. In ***Atkins v. Virginia*** (2002), SCOTUS ruled that the death penalty cannot be applied to defendants with severe intellectual disability. However, states are allowed to define what constitutes a severe intellectual disability, leading many scholars and civil rights lawyers to criticize the decision as an "empty holding", as many severely intellectually disabled people still sit on death row (Barger, 2008; Hagstrom, 2009; White, 2009 - note: the Court decision used the R-word for those with intellectual disabilities, so the linked articles use this word as well; heads up to sensitive readers). Three years later, SCOTUS ruled that juveniles cannot be sentenced to death if they were juveniles at the time of the crime in ***Roper v. Simmons*** (2005).

Public Opinion and Political Actions

Public opinion regarding capital punishment has changed quite a bit over time. As you can see by the figure to the right, in the mid-late '60s, the majority of Americans were opposed, likely due to the influence of the Civil Rights Movement and its effects in waking people up to racial injustice and the ways in which the criminal justice system was discriminatory towards Black Americans.

Historically, there was a violent crime spike across the United States from the '70s to the mid-'90s, and you can see that this correlates with a decline in opposition/increase in favor towards the death penalty for someone convicted of murder. After the crime spike starts going down in the mid-'90s, we see an increase in opposition against the death penalty again. We are currently now at a record low, since this graph ends in 2022 and only has to do with murder. As of 2023, 50% of the public now believes the death penalty is applied unfairly (47% believes it is applied fairly) (Gallup, 2024). This is notable since right now there's a general perception that violent crime is increasing, yet unlike in the past, this is not accompanied by increased approval of the death penalty.

Many who do not support the death penalty point to multiple issues, such as discrimination, wrongful convictions, its lack of deterrence effect, and its expense compared to life without parole. Concerning the first of these - arbitrary sentencing that discriminates on race - many studies still show that when the defendant is Black, prosecutors are more likely to pursue the death penalty, *especially* if the victim is White (Death Penalty Information Center, n.d.). Concerning wrongful convictions, since 1973, ***197 people have been exonerated from death row*.** Many of these wrongful convictions come from lack of (or improper use of) DNA evidence, mistakes in eye witness testimony, and rampant prosecutorial misconduct (Death Penalty Information Center, 2023; Innocence Project, 2023). While much media coverage concerns police misconduct, prosecutorial is more hidden due to its low visibility (it is much easier for people to witness police misuse of force on a public street than it is to witness prosecutorial corruption behind closed doors). According to the Prosecutorial Accountability Project, more than 600 cases have been found so far since 1972 in which prosecutorial misconduct led to a capital punishment sentence that was either overturned by a higher court, or where the convicted person was eventually exonerated (Death Penalty Information Center, 2023).

As for the lack of deterrence effect, those who support the death penalty sometimes argue that capital punishment will deter people from committing homicide when they know that execution will be the penalty. However, research has found evidence for a ***brutalization effect,*** meaning there can sometimes be an *increase* in homicide following an execution (Vito & Vito, 2017). As for the expense of the death penalty, research has found that the death penalty is more expensive than an alternative sentence such as life without parole, due to a combination of the jury selection process (more rigorous and therefore more resource-intensive when the prosecutor makes a death-eligible charge), expenses from death row (which requires more

security and specialization than most levels of prisons), legal costs due to appeals, and - if the execution is actually carried out (some inmates on death row die of natural causes, have their sentences commuted, or are successfully exonerated) - the cost of the execution drugs themselves (California Commission on the Fair Administration of Justice, 2008; Cook, 2009; Death Penalty Information Center, 2023; Spangenberg & Walsh, 1989). This is true for both states and at the federal level, as found by the Judicial Conference of the United States (Gould & Greenman, 2010).

For prison personnel who were directly involved in the execution process, a recent investigation has found that interviewed personnel reported trauma and mental, physical emotional impacts; the interviewees who witnessed executions no longer support the death penalty and have changed their political views to match their lack of support (Eisner, 2022). The interviewees' reasons varied, with many citing the traumatic impact of watching botched executions, preparing inmates for executions, and the lack of access to psychological support (Eisner, 2022). Politically, however, decision-making about the death penalty may not always follow public opinion. For example, the Trump Administration resumed federal death row executions after a 17-year pause, and continued to do so in the "lame duck" period (the period after a general presidential election but before the new president takes office, in this case when Biden had been elected); this led to 13 executions, which was more than in the previous 56 years combined (Tarm & Kunzelman, 2021). The current DOJ Attorney General under the Biden Administration, Merrick Garland, paused federal executions for investigation (Office of the Attorney General, 2021), but the future of the death penalty at the federal level is uncertain.

SPOTLIGHT: Methods of Execution and the 8th Amendment

[**Content warning**: this section discusses details of human suffering during botched and completed executions.]

Today lethal injection is the most prevalent form of execution at the federal level and for states that still continue to enact the death penalty. However, America has historically experimented with a number of different methods - such as the electric chair - that came to be declared unconstitutional by several states (no federal/U.S. Supreme Court decision has ever declared a specific execution method as a violation of the 8th Amendment, but some states have). Remember that the **8th Amendment** protects against "cruel and unusual punishment", though the U.S. Supreme Court stands by its 1890 decision that the death penalty is only cruel and unusual if the method involves

"torture or a lingering death" (*In re Kemmler, 1890*). Because the electric chair was not *intended* to cause torture or a lingering death, the U.S. Supreme Court ruled that it was constitutional even though it had never before been used on a human; William Kemmler, the defendant in question on death row, was then executed by electric chair and the execution went horribly. The first electrical current (strong enough to have killed a horse during a prior experiment) did not kill him, and the second burst his capillaries under his skin, causing him to appear to sweat blood, and essentially charred his brain from the inside (New York Times Archives, 1890). The presiding doctor stated "I have seen hangings that were immeasurably more brutal than this execution, but I have never seen anything more awful", and George Westinghouse, the leading developer of the electrical current at the time, stated that "they could have done a better job with an axe" (New York Times Archives, 1890; Rosenwald, 2017).

Regardless, the use of the electric chair continued, with another notable case arising in 1947. In *Louisiana ex rel. Francis v. Resweber*, Black teenager Willie Francis (who may not have even been guilty), survived a botched electric chair execution attempt and was scheduled for a second attempt, so the attorney who took up his case appealed to the U.S. Supreme Court under the argument that this was cruel and unusual to put Francis through the ordeal twice (King, 2008). The U.S. Supreme Court again rejected the argument that the electric chair, even when the first attempt malfunctions, is cruel and unusual (*Louisiana ex rel. Francis v. Resweber*, 1947). Much later in 1997, more national scrutiny was turned towards the electric chair when Cuban refugee Pedro Medina - who insisted on his innocence in the murder of a schoolteacher - was executed and foot-long flames burst from his head underneath the metal helmet he was required to wear (Baker, 1997). The state supreme courts of Georgia and Nebraska soon ruled the electric chair as unconstitutional after this event, though the U.S. Supreme Court remains silent.

Early in 2024, in January, a new controversial method was tested on Kenneth Eugene Smith, who was sentenced due to committing a murder-for-hire (the jury voted to convict for a life sentence, but the judge overruled this decision and chose the death penalty - a practice that is no longer allowed in Alabama). Smith was initially scheduled to be executed via lethal injection, but administrators could not find a vein for the PICC line and his execution was botched after several hours of attempts. Similar to the case of Willie Francis, Smith's attorney petitioned for a stay of execution under the argument that the initial execution attempt was traumatic and further attempts would be cruel and unusual. This petition was rejected, and Smith was again scheduled for execution, but this time using nitrogen gas, which had never before been used on a human (even the American Veterinary Medical Association condemns the use of nitrogen gas for animal euthanasia [Spady, 2024]). However, as with *In re Kemmler* in 1890, the U.S. Supreme Court allowed this experimental method to continue. While the State of

Alabama expected death in a matter of seconds, witnesses stated that Smith was conscious for several minutes and thrashed violently (BBC, 2024; Chandler 2024). Many of the states that still practice the death penalty are exploring alternatives to lethal injection because large manufacturers of the different drugs needed for lethal injection refuse to let their products be used for executions (Murphy, 2024). Do you think experimentation with new and untested methods is in line with 8th Amendment protections against cruel and unusual punishment?

Photo above is of the San Quentin State Prison lethal injection room, by California Department of Corrections and Rehabilitation, 2010

False Convictions

Unfortunately, false convictions (whether to death row for accused capital murder, or to prison for other offenses) are an issue that plagues our criminal justice system. The National Registry of Exonerations reports **3,519 exonerations since 1989** for any crime, and these are the cases that have been taken up by pro-bono attorneys and non-profits working towards justice, meaning this figure does not account for smaller cases that did not reach widespread attention, or cases where the defendant or their family members have now passed away (and thus were unable to reach out for assistance) (NRE, 2024). For further optional investigation, you can see the NRE's interactive database of exonerations here, where you can see exonerations by state, race, crime type, and more.

Specific to the death penalty, **197 exonerations from death row have been reported since 1973**, according to the Death Penalty Information Center (2024). For both general exonerations and exonerations from death row specifically, there are many issues that can lead to false convictions, such as eye witness misidentification, false confessions made under extreme pressure, racial and ethnic discrimination (from witnesses, attorneys, and juries), and the use of evidence other than DNA (pre-1987, DNA was not gathered as part of investigations, so this is why the National Registry of Exonerations counts from 1989 onward, when lawyers first started using DNA to re-investigate cases where the defendant may have been innocent).

Specific to non-DNA evidence, while 44% of exonerations were found to be due to Brady violations as discussed in our last chapter, there are also problems of false convictions based on bad investigatory practices and what's known as "junk science" or pseudoscience in forensics investigations. Listen to or watch this required video below (you may stop after 56:11) to hear a discussion by M. Chris Fabricant - a lawyer and author of "Junk Science and the American Criminal Justice System" speak about some of the problems with our system's reliance on pseudo-scientific forensics methods. One thing in particular that he points out is how our court system, being based on the precedence set before it, is inherently opposed to the evolution and constant testing/revising/retesting that the scientific method entails (he calls this *eminence-*

based wisdom [precedent] over *evidence-based wisdom* [science-based]). How should we approach the use of forensics methods during trials and "expert witness" testimony in an evidence-based way rather than an eminence-based way?

"'Junk Science and the Criminal Justice System' – Chris Fabricant and NCIP Discussion" by [Northern California Innocence Project (2022)]

As a follow-up note, the bill that is mentioned in the video has since passed, but only for the State of California.

Conclusion

The subject of sentencing is one that is often driven by personal and ideological beliefs about justice and morality, but it is important to factually assess the outcomes and impacts of sentencing decisions, especially when "science" is used in ways that may carry out *injustice* or inhumane sentencing. Ideologically and politically-driven sentencing decisions also significantly impact our corrections institution, which we will turn towards in the next chapter.

Chapter 11
Structure and History of U.S. Corrections

Introduction

The corrections institution is the third and final of the three main institutions of the criminal justice system. However, while the corrections institution conceptually occurs at the end of the criminal justice process (following sentencing), in reality, corrections facilities are used throughout the process after arrest, as the arrestee is generally detained in jail for a while. This chapter will outline the different main corrections facilities (jails, prisons, and security levels of prison), and then will go through the different eras in the evolution of our corrections institution. Keep in mind that this chapter will be focused on adult facilities; the juvenile justice system is its own ideally (though not always in practice) separate justice system that we will cover in Chapter 15.

Structure of Jails and Prisons

Jails

A **jail** is a short-term corrections facility that holds arrestees (suspects/defendants) awaiting trial, offenders that are sentenced to less than one year of incarceration, and prison inmates that are in the middle of being transferred from one prison facility to another (BJS, n.d.). In this way, jails are typically considered a "catch-all" of corrections facilities but, given the short duration of holding inmates (less than a year or even shorter, for those awaiting trial or in the midst of transfer), they are often severely lacking in resources like rehabilitation programs, skill-building programs for future employment, educational classes, and methods to contact outside family members. Additionally, jails are usually run by the county sheriff or other local official, so they have to work within the local or county budget. Smaller municipal areas (cities or towns) may have their own small jails but rely on the larger county jails for longer holding times and better resources).

For this reason, there's a very wide variance in how jails are structured and what kinds of opportunities are available for inmates. As a personal example, when I was a reserve officer in the town where I got my bachelor's, the local jail was so small and understaffed that it could not hold people for more than 24 hours (it was located in the municipal police department). It was useful for holding the occasional drunk party-goer who decided to get up to some mischief (my favorite was the frat guys who stole a door from one of the campus buildings so they could play beer pong), but if we arrested someone who was suspected of a more serious offense, we'd have to drive them over to the county jail, which was much larger and better resourced because it had the entire county budget to assist in funding it.

Larger jails may appear more like a campus complex with several wings for different inmate needs and classifications. For example, where I live, the current jail is actually built from an old high school, so anyone who feels as though their high school days felt like being in a jail can feel validated. Smaller jurisdictions may have more of a pod structure, where a central monitoring pod looks out over all the different wings, allowing for a small number of staff to still keep tabs on a larger number of inmates.

A typical county jail has a lot more of an administrative building look rather than the high security associated with prisons. "Sarpy County Jail in Papillon, Nebraska" by Ammodramus (2010)

Prisons

A **prison** is a long-term corrections facility meant to hold offenders who are serving sentences for longer than one year. This means that - with very few exceptions (like the rare case of the defendant being placed on death row *even before conviction* that Bryan Stevenson discussed in the video in Chapter 9) - all inmates have been convicted of a crime and are serving sentences, rather than awaiting trial like a portion of the jail population. Prisons may take the form of **state prisons** (housing offenders sentenced in state trial courts), **federal prisons** (housing offenders who violated the federal criminal code and were sentenced in U.S. District Courts), and **private prisons** (for-profit facilities that may house both state and federal inmates by contracting with state and federal agencies).

State prisons will follow each state's legislation regarding inmate classification. For example, Indiana's classification levels are minimum (for non-violent offenses, and inmates have the most opportunities for socializing and program participation), low medium (for higher-level offenses), high medium (for violent offenses, and inmates are offered programs but with much less freedom of movement), and maximum (for high-level, violent offenses and a history of violence), with the criteria for each specified by the Indiana Department of Corrections (IDOC) Classification Division (INDOC, n.d., IN.gov, 2023; Keffer Hirschauer, 2022). Some states, like

Montana, house almost half (49%) of their prison inmates in private prisons rather than state-run prison facilities, followed by states like Hawaii, New Mexico, Arizona, Tennessee, and Alaska (Budd, 2024). For states that contract with private prisons, the state government enters into a contract to pay the private prison corporation per head or per bed. While there are many criticisms that can be levied against state-run prisons (we will discuss these in the next chapter), private prisons are far worse in terms of violence and injuries for both inmates and correctional staff (DOJ, 2016). Much of this is due to the fact that any for-profit business is going to want to cut its expenditures to ensure higher profit margins, but in this case, its expenditures are spent on security, supervision, sufficient staffing, and inmates' needs. We will discuss the reason for the emergence of private prisons later on in this chapter.

Federal prisons follow six levels of classification (Bureau of Prisons, 2024):

1. **Minimum** - for non-violent offenders; facilities have dorm-style housing rather than individual cells and offer the most skill-building and rehabilitation programs
2. **Low** - for low-level offenders; facilities are mostly dorm-style or cubicle-style housing and have skill-building and rehabilitation programs, but also have double-fenced perimeters for higher security
3. **Medium** - for higher-level and violent offenses; facilities have cell-type housing, double-fencing with heightened security features, and more internal monitoring and controls
4. **High** (also known as United States Penitentiaries, or USPs) - for high-level violent offenses; facilities have cell-type housing, solid walls or additional fencing, and the greatest amount of staff (a high staff-to-inmate ratio)
5. **Federal Correctional Complexes** - these are institutional complexes where multiple different classification level facilities are all located around each other to enable better transfer and communication/resource-sharing
6. **Administrative** - these are specialty institutions, such as pre-trial holding facilities (like the federal version of jails), facilities for inmates with special or chronic medical needs, and the federal maximum-level security facility.

"Arial view of United States Penitentiary, Atwater, CA" (a United States Penitentiary), by Platinummedia (2021)

History of the Corrections Institution

The United States houses almost a quarter of the world's prison population, in spite of the entire U.S. population making up about 4.2% of the worlds general population (U.S. Census, 2024; World Population Review, 2024). The U.S. has the ***largest incarcerated population of any country*** at 1,767,200 people incarcerated as of 2021, and is ***sixth*** in the ranking of incarceration *rate* (that is, how many people per capita, or per 100,000, are incarcerated), with El Salvador, Cuba, Rwanda, Turkmenistan, and American Samoa leading consecutively (World Population Review, 2024). You can quickly tell that none of these nations are analogous to the U.S. in terms of government structure and GDP; when comparing the U.S. to NATO (North Atlantic Treaty Organization) member countries, the U.S. takes the lead, and you can use **this tool by the Prison Policy Initiative to see where your state falls on Figure 2.**

Not great at all, and thankfully reducing from the peak in the 2010s, but very slowly. This section will go through the many different eras of sentencing and incarceration to show the lead-up to where we are today.

The Colonial Era (1600s-1780s)

As discussed all the way back in Chapter 1, the colonies before The Enlightenment really gained a foothold in what would become the United States were often organized around Puritan interpretations of the Bible, with the border between religious sins and legal crimes being quite blurred. Some colonies, however, were more strongly governed by Quakers (another Protestant denomination or group, but with vastly different views than the Puritans), so it's not entirely accurate to paint all of the Colonial Era with one broad brush, since the colonies were very tight-knit, homogeneous villages rather than the extremely large and heterogeneous states that we have now (Friedman, 1993).

"Execution of Ann Hibbins" by Merril (1886)

Given the tight-knit and village-like nature of early colonies, minor infractions were largely dealt with through informal social control (citizen-to-citizen) rather than formal social control (involving village/government authorities). More serious infractions were dealt with by a local magistrate (judge), whose main goal (particularly in Puritan colonies) was to extract a confession from the

suspect. For this reason, Friedman (1993, p. 24-26) calls the nature of the "justice system" at this time "inquisitorial", since the focus was on confession of sins and "the willingness of the accused to submit to authority" rather than due process, rehabilitation, or restoring the offender back to the community. However, most punishments did not include imprisonment, except in short instances of "debtors prisons", where people would stay if they could not pay off debts, or for religious infractions. What incarceration facilities *did* exist, however, were chaotic and unisex, with no separation for gender or age (Friedman, 1993).

The death sentence was used for the most egregious violations of the colonies' moral codes, with "egregious" encompassing activities beyond homicide, as in the case of heterodox (going against the theology of the main denomination) beliefs and of the moral panic surrounding witchcraft. As an example of the former, the Colony of Massachusetts had very harsh and draconian laws against Quakers, since Quaker beliefs were seen as heterodox and dangerous to public order; punishments included whipping, imprisonment, banishment, and execution if a banished person returned (Acevedo, 2019). Other minority religious groups were the targets of much more minor punishments with the goal to convert members to the Puritan church, but Quakers were seen as beyond redemption (Acevedo, 2019). Similarly, women who acted outside of social norms or were deemed as a threat to social order (either by being unmarried and childless and thus a "burden" on community resources, or by being influential and thus likely to convince women to be non-conformist) were accused of witchcraft in some colonies, such as Massachusetts (again), and Connecticut (Klein, 2019; Kocic, 2010; Reis, 1997). Since this was considered a capital crime in these colonies, many women (and some men) were executed.

The Penitentiary Era (1790s-1860s)

Rapid expansion after the U.S. became an independent nation brought a new need to reconsider the goals and nature of punishment and sentencing. Classical theory (recall Chapter 3) became a predominate theory of criminal offending rather than moral failing, and with classical theory came a belief in deterrence. If punishment was swift, severe, and certain enough (according to theorists like Beccaria), the offender would essentially be "scared straight" and not re-offend after serving their first sentence. Right before actual penitentiaries were created, prisons were starting to form that mixed deterrence with old colonial ideas of public humiliation, so inmates were often forced to do hard physical labor in public areas (such as roads, highways, and fields). However, this was quickly condemned since - while the public could observe these punishments and hopefully also be deterred - the inmates were able to talk with each other and commiserate rather than reflect on their own behaviors that got them there (Friedman, 1993).

Arial view of Eastern State Penitentiary, by Boucher (2003)

For this reason, large prison facilities called **penitentiaries** became the preferred model of separating offenders from society and each other so they would not only be deterred through their awful experience of solitary confinement and labor, but they could also (in theory) reflect alone on their crimes and come to be *penitent* (regretful of their choices). Later however, in the late 1810s, the penitentiary model started to evolve into a more community-based model again, given the inhumane outcomes of total isolation. Inmates would work together during the day, but still have enforced scheduled times of solitude and silence. Some penitentiaries still required total silence (so inmates could work together but could not talk), and all were strictly regimented under a paramilitary-type structure (Friedman, 1993). The photo above is of the Eastern State Penitentiary, which was opened in 1829, and was revolutionary in its construction and separation of offender levels (it was also one of the few of the era that prioritized rehabilitation rather than straight-up deterrence).

While the overall name for this era is the penitentiary era, states in the South still tended to prefer the colonial-style punishments of whippings and hangings, especially of enslaved people as a way to maintain fear (Friedman, 1993).

The Reformatory Era (1870s-1890s)

The penitentiary model came under heavy criticism when it became clear that it did nothing to deter **recidivism** (committing a new crime after having served time for a prior one). **Zebulon Brockway,** one of the notable criminologists and prison reformers of the day, was one of the main advocates for moving the goal of prison from deterrence to reform (hence the name *reform*atory). He and other reform advocates introduced three major new practices that we still continue today: the **indeterminate sentence, parole** and **probation**. The indeterminate sentence, however, was not a range with an upper end like we have now in most state sentencing guidelines, but was truly indeterminate (with no end point). The goal was to sort out the person who was truly rehabilitated after serving their time (so then they could be released one it was determined that they showed signs of reform), versus the person who seemed to show no signs of reform (so then they would stay in prison indefinitely) (Friedman, 1993). As you can imagine, though this was a "reform" for the era, this opened up a lot of room for abuse (notable in the following era). Parole was a much less problematic reform and did not look

much different than it does today: an early release into the community based on good behavior (some of the problematic aspects of parole in this time, such as revoking parole for arbitrary decisions, also still exist today, which we'll cover in Chapter 12). Probation also took on a very similar nature as we see today, and was seen as a way to reduce the incarcerated population, especially for offenders that had no history of violence.

Among other reforms of this era were the creation of actual women's facilities rather than separating women into a different wing of the same institution, and the creation of the juvenile justice system as a separate system with separate facilities from the adult system and incarceration facilities in 1880.

Unfortunately, not all was as it seemed with Brockway. In the late 1890s, enough allegations of inmate mistreatment were made for the State Board of Charities in New York to investigate the treatment of inmates in Elmira Reformatory, the institution where Brockway was warden. The State Board of Charities issued a report that showed evidence of cruel and unusual punishment (including corporal punishment, lack of medical care, and sexual abuse, among others) (Pisciotta, 1994). He received criticism for this during the time, but another portion of his beliefs/actions that wasn't criticized during the time but definitely *should* be in modern times was the fact that Brockway was very motivated by **eugenics** beliefs. Unfortunately this led to the following problematic era:

The Philanthropist Era (1890s-1930s)

If you recall from our Chapter 3, there was an unfortunately prevalent eugenics movement that swept across the western world and really took root in the United States. With the popularity of biological pseudoscience trying to explain crime as being associated with "feeblemindedness", evolutionary "atavism", or other physical traits, this led to a widespread movement to institutionalize the mentally and morally "unfit" (Rafter, 1997). While this gives modern readers pause, a great deal of this movement was funded by philanthropists, who believed they were doing the "right" thing for the best of society by keeping "bad genes" from reproducing (good old utilitarian ethics) by funding institutions and pressuring policymakers to pass laws that institutionalized the mentally and developmentally disabled (Rafter, 1997). Some philanthropists also truly believed they were doing the right thing for those they deemed "feebleminded", but much of society's definition of the "unfit" and "feebleminded" was extremely ableist, racist, classist, and misogynist (Rafter, 1997). Remember Brockway's indeterminate sentences? This is where it really got dicey: mentally and developmentally disabled people (as well anyone deemed "morally unfit", like promiscuous women) were given indeterminate sentences which essentially incarcerated them indefinitely, since they were not provided the help or resources needed to change or show the evidence of "reform" needed to allow their release. The paternalistic philanthropists thought this was best, since these inmates were supposedly receiving more help than they would in broader society. This also suited the eugenicist philanthropists just fine, since it removed the "unfit" from any chance of spreading their genes.

Some texts call this era the "Progressive Era", since between the 1890s and 1930s the U.S. saw a widespread movement towards addressing corruption (just like what turned the Political Era to the Reform Era in policing), securing more worker's rights, targeting business monopolies, and gaining the right to vote (suffrage) for women. While it's true that the Progressive movement occurred during this time and achieved many positive outcomes across the nation, there is little evidence that its influence reached the corrections institution. However, the Progressive movement of the early 20th Century had an offshoot called the "social hygiene movement", which had some misogynist elements and unfortunately overlapped with the eugenic racial and mental "hygiene" movements (Farber, 2008; Ziegler, 2008). Several notable philanthropists were also big movers and shakers within the Progressive movement, so there was certainly a Venn Diagram that could be drawn between these different ideologies and main figures. However, since "progressivism" in the modern sense is very critical of systemic racist, sexist, and ableist policies and opposed to mass incarceration (Congressional Progressive Caucus, n.d., Pew Research Center, 2021), so it is somewhat misleading to call the era of corrections between 1890-1930 the "Progressive Era" given changes in word meanings and political ideologies.

The Medical Era (1930s-1970s)

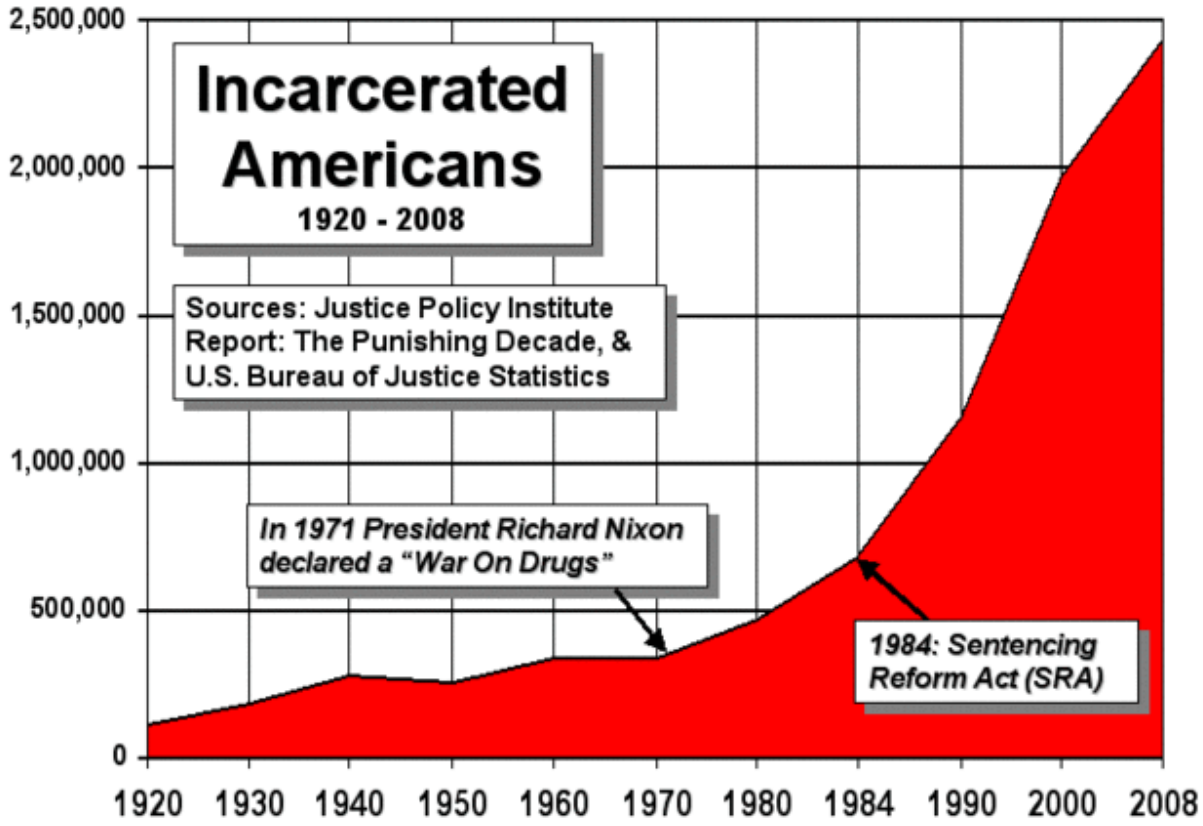
By the 1930s, the more paternalistic view of corrections won out, and there was a strong push for rehabilitation, especially as new developments in pharmaceuticals offered promising (at the time) results for managing mental illness. Like the previous era, crime was thought to largely be caused by psychological and mental factors, and medication was a promising new way to assist with therapy (Lehman, 1972). As a bit of course-correction from the previous era, a lot more focus was placed on humane treatment and moving away from incarceration or institutionalization. Inmate classification was also emphasized as a way to determine the rehabilitation needs for inmates beyond medications (such as other forms of therapy). While the Reformatory Era and Philanthropist Era was rehabilitative in name but not practice, penologists (criminologists who focus on corrections) of the Medical Era really focused on what Garland (2001) called "penal welfarism", which meant that the overarching ideology driving prison practices was focused on improving the offender's life so they would not recidivate.

The Community Era (1960s-1970s)

The Medical Era and Community Eras essentially overlapped for a decade, with the focus of the Community Era being not just *rehabilitation* (a focus on improving the offender's wellbeing) but also *reintegration* (restoring the offender back into the community). Reformers realized that prisons, even under the rehabilitative model of the early Medical Era, were ill-equipped to prepare offenders to re-enter society, and are actually **criminogenic,** meaning they *increase* crime because they are structured in a way that is radically different (and harmful) from outside society (for example, prisons are very regimented and do not prepare inmates for independent time management, and prisons deprive inmates of many social needs and may encourage a survivalist mindset) (Vieraitis et al., 2007). Trust in experts (such as scientists, academics,

psychiatrists, penologists) was also quite high during this time, accompanied by a distrust of the government due to the Vietnam war, so this led to an overall societal preference towards a rehabilitative and restorative model driven by experts rather than relying on state and federal prisons as the predominate form of punishment (Garland, 2001). Punishment itself was quite low in terms of priority, with the primary goal of corrections at this time being to truly "correct" the offender's behavior rather than just punish them.

The Crime-Control Era (1980s-2000s)



U.S. Incarceration Timeline by November Coalition (2010), public domain

The Community Era was short-lived, however, and it and the Medical Era both came to an end near the late 1970s. There were many things that contributed to the major shift in eras, but recall from our discussion of the policing eras that this was a decade of major societal and political crisis. Violent crime rates started escalating, fear of crime soared, and the criminal justice system lost legitimacy in the eyes of the public. For corrections specifically, a major research project by sociologist **Robert Martinson** showed that the major rehabilitation strategies of the previous decades were not working. Though he didn't explicitly say "nothing works", this was the chief takeaway from members of the public, policymakers, and even fellow academics of the time, leading to an overall disappointment with the rehabilitative approach to

sentencing (Cullen, 2013). While considered a policing-focused theory, Wilson and Kelling's "Broken Windows Theory" had a major impact on corrections since it offered a new way to prevent violent crime: zero-tolerance of minor crimes. This, along with the war on drugs, fear of violent crime, and the disillusionment with rehabilitation, led to a widespread national shift back to punitive sentences where the goal was to punish and incarcerate rather than restore and rehabilitate (Garland, 2001).

The graph above shows the skyrocketing incarceration rate during this era. The U.S. imprisonment rate went from 93 per 100,000 people in 1972 to about 500 per 100,00 people by 2010 (Geurino et al., 2011; Nellis, 2024). Not only did the war on drugs start to fuel zero-tolerance policing of drug crimes, but the **Sentencing Reform Act (SRA)** that we discussed a bit in Chapter 9 also contributed by removing federal judicial discretion in sentencing and removing parole as an option for federal offenders (remember that the sentencing guidelines were mandatory until 2005). The mandatory 100:1 crack to powder sentencing disparity drove up incarceration numbers and worsened racial and class disparities, given that crack cocaine was more widely available in low-income and minority neighborhoods, and small-time dealers were easier to target than large-scale traffickers (Nellis, 2024). Life sentences, especially life without parole, began to increase significantly in the early 2000s due to policies like three-strikes laws and the overall trend towards punishment and removal from society.

The Reckoning Era (2010s-Present)

While in many ways we are still in an era of mass incarceration, and some state governments still predominately operate off of a crime-control model, penologists, academics, and the federal government began to reckon with the implications and expenses of mass incarceration starting in the 2010s. In 2010, Congress passed the **Fair Sentencing Act (FSA)** to reduce the crack to powder sentencing disparity from 100:1 down to 18:1. Social policies that sought to address structural inequities that could drive addiction and the re-emergence of studies examining new rehabilitation programs with better methods have assisted in a course-correct that is happening in response to the effects of the Crime-Control era. In a push to provide evidence-based recommendations and divert offenders (especially low-level offenders) from incarceration, innovations like drug courts (which started in the 1990s but gained prominence after research showed them to be effective) and offender assessments came into focus (Lurigio, 2008). Increasingly positive (or at least less negative) views towards marijuana led to many states decriminalizing or legalizing marijuana use, relaxing a major focus of the war on drugs and alleviating states' incarceration populations.

As with the political aspects of our current policing era, the modern era in corrections is very divided based on partisanship, with Democrats favoring less prison time and Republicans favoring more (Gramlich, 2021). States' incarceration policies, as well as policies at the federal level, will largely be dictated by voters, so the full picture of what the future holds for our current or next era in corrections is yet to be seen.

Conclusion

While we briefly covered the current era of corrections history here to illustrate how things have changed and the swing back and forth between retributive punishment and rehabilitative corrections, there is much more to be discussed about the current state and nature of the corrections institution. The following chapter will provide a much more detailed breakdown of our current prison population, jail population, and probation and parole populations, as well as myths and truths surrounding current policies and practices.

Chapter 12
Mass Incarceration and Ethical Issues

Introduction

This chapter will explore the issue of mass incarceration and ethical problems faced by prison personnel (corrections officers and administrators). This chapter will look a little different, since it will incorporate a major report by the Prison Policy Initiative (2025) about the current state of mass incarceration, myths surrounding mass incarceration, and the nuances about our current jail and prison populations. Why reinvent the wheel when such a perfect one has been made? After reading through the Prison Policy Initiative report, head back here for a discussion of ethical issues in our corrections institution.

Mass Incarceration

As mentioned in Chapter 10, The United States has the highest incarceration rate among NATO countries, and ranks 6th overall when compared to all countries when looking at inmates per capita (100,000 residents). The report below by the Prison Policy Initiative (2025) walks through the post pressing issues of the day. Read through it all (you can swipe or click on additional charts where there are multiple thumbnails below the largest chart/image) up until the "Data Sources/Methodology" section (which is optional):

Sawyer, W., & Wagner, P. (2025) *Mass Incarceration: The Whole Pie 2025.* The Prison Policy Initiative.

Ethical Issues in Corrections

As with police and members of the courtroom workgroup, corrections personnel (corrections officers and upper administrators like wardens) may be susceptible to noble cause corruption. Similar to the police, most correctional facilities are still paramilitary and hierarchical in structure, and the solidarity shared among front-line corrections officers mirrors that of the police, with similar problematic outcomes (Stohr et al., 2000). However, due to two major aspects of their position, they face a couple of unique contributors to ethical issues: the population they monitor, and the proximity to this population.

Unlike police officers, who encounter many non-suspicious, friendly, and law-abiding citizens on a daily basis, corrections officers can carry a cynical mindset towards the population they monitor because every inmate is presumably there for violating a law. This can lead

to **dehumanization** of inmates, treating them as less than human. This cynical (and sometimes downright problematic and punitive) mindset can be initially brought into the role by new officers (Burton et al., 2023), or developed over time as officers themselves feel dehumanized by their supervisors (Stinglhamber et al., 2022). The consequences of corrections officers (COs) dehumanizing inmates can be dire, with recent headlines covering COs beating inmates to death, freezing inmates to death in a facility freezer, using less-lethals on inmates going through mental crisis, beating cuffed inmates, promoting White supremacist assaults on Black inmates, and - horrifically local to Indiana - selling male inmates the key to female inmates' cells for $1,000, leading to the rape and assault of numerous women (Burton et al., 2024; Bickerton, 2022). Some Australian correctional facilities have rolled out body-worn cameras similar to the push for body-worn cameras for cops, but it's been slow for U.S. facilities to catch on, and the one study of U.S. CO attitudes shows even worsening perceptions of COs towards inmates after BWC implementation (Peterson et al., 2023).

Dehumanization of inmates isn't just a CO issue, but also a widespread societal issue (in Chapter 13 we will explore the stigma that previously incarcerated people face in society, which makes it difficult to secure housing, jobs, and other needs that keep people from committing crime). This optional video (8:18 min. runtime) below highlights the experiences of an inmate while in prison, the dehumanization incarcerated people often face from society, and how to rehumanize formerly incarcerated people:

The proximity that COs have to the inmates they supervise can also pose ethical problems. Unlike police officers, who tend to see a wide variety of people in their daily work (though in small towns there are often familiar faces), COs will encounter the same inmates on a daily

basis, for however long the inmate is incarcerated. This can lead to a blurring of ethical boundaries between the CO and familiar inmates, which is especially problematic given the power differential between COs and inmates. For male inmates with male COs, this can lead to a "buddy"-type relationship where inmates expect reciprocity (a favor in return) for good behavior; however, for female inmates, this can lead to fears of sexual abuse given the power that COs wield over women who are trapped by the very nature of their incarceration (Blackburn et al., 2011). At the federal level, a bipartisan Senate report found that women were abused by mostly-male correctional staff in at least 66% of federal women's correctional facilities (Owen, 2022), while a Bureau of Justice Statistics (BJS) report recently found that in adult corrections facilities across the U.S., the majority of staff-on-inmate sexual misconduct perpetrators were female COs (67%), while the majority of staff-on-inmate sexual harassment perpetrators were male COs (69%) (BJS, 2023).

Correctional facility administrators must take these problems seriously rather than being complicit in the code of silence that can shroud corrections facilities just as much as it does police practices. Corrections administrators face the challenge of gaining CO respect and buy-in (so their directives are not dismissed or ignored), but not doing so in a way that messages lax standards (Amicis, 2005). Unfortunately, due to the closed-off nature of corrections institutions, there isn't as much research on correctional facility administrator decision-making as there is about police chief/administrator decision-making, but many of these conflicts likely overlap, with the additional concerns about population (dehumanization) and proximity discussed above. What kinds of approaches should a correctional facility administrator take to train and supervise his/her staff to ensure that dehumanization and abuse do not occur?

Conclusion

This was an in-depth look into the issue of mass incarceration and ethics problems in our corrections institution, but in a way, it has barely scratched the surface. Because of the wide variety of prisons and jails in the United States, there can be all sorts of unique issues faced by each facility and each inmate and staff member. However, incarceration facilities are not the only aspect of our corrections institution that exists: many offenders are either sentenced to probation, or are released on parole after serving some time in prison. The next chapter will explore the definitions and details of community corrections, which is the umbrella term for probation, parole, and any sentence served in the community rather than behind bars.

Chapter 13
Community Supervision

Introduction

While the "Whole Pie" report linked in the previous chapter addressed some aspects of **probation** (the offender serves a community sentence and no time behind bars) and **parole** (the offender is in prison but then granted early release to serve the rest of their sentence in the community), we'll delve into these concepts more in depth in this chapter. Once again, a portion of this chapter will contain a linked report from the Prison Policy Initiative, as they've collected the most timely and comprehensive data to date. Read through it and then return here for further discussion about ways to improve supervision.

Probation and parole both fall under the umbrella term of **community supervision**, meaning that they both serve as forms of punishment/discipline but take place in the outside community rather than behind bars. Another term you may come across is **alternative sanctions**, which is also another name for community sanctions, and can entail probation and parole, as well as other things like fines, public cleanup (especially if the offender caused the property damage in the first place, like cleaning up graffiti that the offender created), or more controversial (and not evidence-based) things like boot camps and "scared straight" programs. This chapter will walk through some of the problems with our common forms of community sanctions, followed by a video discussion of how to make them more effective and less burdensome on offenders and their communities.

The State of Supervision

As with the last chapter, read through this report and read until the "Conclusion" section (the rest is optional, though there is a lot to explore for further reading"):

Wang, L. (2023). *Punishment Beyond Prisons 2023: Incarceration and Supervision by State*. Prison Policy Initiative.

An additional reason why probation and parole don't "work" for so many people is because courts have a lot of discretion regarding ***conditions*** of probation and parole. Some examples are: not being allowed to sit in the front seat of a car; not being allowed to get pregnant while on probation; not being allowed to consume alcohol (when substance abuse was not part of the initial offense); having to abide by a curfew (Klingele, 2013). While a condition like not being allowed to consume alcohol may make sense for someone struggling with addiction and

addiction-related offenses, these are questionable at best when the offense did not entail substance abuse, and the others are downright arbitrary and can be entirely out of the hands of the person on probation/parole. For example, what if the only job they could find keeps them out past curfew (or the job ends before curfew but transportation home lasts longer)? What if a female probationer's birth control fails (or worse, she is a victim of sexual assault) and she lives in a state where abortion is illegal or personally does not believe in getting an abortion? Placing undue burdens that cause offenders' probation/parole to be revoked due to mere **technical violations** (violations of the terms of probation/parole) rather than actual **substantive violations** (committing a new crime) creates more burden on the offenders themselves and the jurisdiction's corrections system.

The landmark case ***Morrissey v. Brewer*** (1972) does allow parolees to have certain 14th Amendment rights when there's a possibility of parole being revoked. Parolees must be given written notice of their alleged violations, they may have a preliminary hearing, they may see the evidence against them, present their own witnesses and cross-examine opposing witnesses. The preliminary hearing for parolees is known as a "**Morrissey hearing**" due to this case.

Ways to Improve Supervision

In addition to some of the state and city examples provided by the Prison Policy Initiative report above, the required video below (3:56 min. run time) discusses three main areas to improve if we want to improve the efficacy of probation and parole in reducing recidivism. What are some roadblocks to passing policies that emphasize these three main areas, and what are potential ways to overcome them?

"How Probation and Parole Create Intergenerational Poverty" by NowThis Impact (2022)

Conclusion

Community sanctions are a way to reduce the incarceration population and - when done correctly - can be a way to assist offenders in re-entry into the community (for parole) or maintaining their community ties (for probation), which can be a significant step towards reducing recidivism and setting the former offender back on a non-criminal path. However, it really depends on *how* the offender is supervised, as well as their own dynamic factors (such as whether they have family ties, a stable job, stable housing, resources to help with addiction [if struggling with substance abuse], and others), to determine whether their re-entry is smooth and stable. Unfortunately, there are many gaps in most U.S. states' and jurisdictions' approaches to re-entry, which we will discuss in the next chapter.

Chapter 14
Reentry, Recidivism, and the Revolving Door

Introduction

When discussing U.S. prisons, we often speak of the "revolving door". This refers to the repeated return of formerly incarcerated people back into jail or prison due to recidivism or technical violations. This page will cover the current known statistics, barriers to reentry, and recommendations to assist reentry.

First, however, we need to discuss an issue about the definition of ***recidivism***. One of the major problems in the criminal justice field when discussing reentry and treatment programs is that there's no specific, agreed-upon definition of recidivism. "Recidivism", depending on the study or program you're reading/assessing, can mean:

- Being arrested for a new crime (keep in mind, though, that being arrested doesn't mean that one actually committed the crime
- Being charged of a new crime (however, a charge can be plea-bargained out, so this doesn't always lead to being incarcerated for a new crime)
- Being sentenced for committing a new crime (again, this doesn't always lead to being incarcerated for a new crime, since the offender can be sentenced to probation instead)
- Being incarcerated for committing a new crime (which is what we speak of when talking about the "revolving door")

Given these different definitions of "recidivism" that get thrown around, policymakers sometimes make the wrong conclusions when they read different studies that use different definitions. We really need a standardized definition. For the rest of this page, many of the statistics you will see here count "recidivism" as being *arrested* for a new crime.

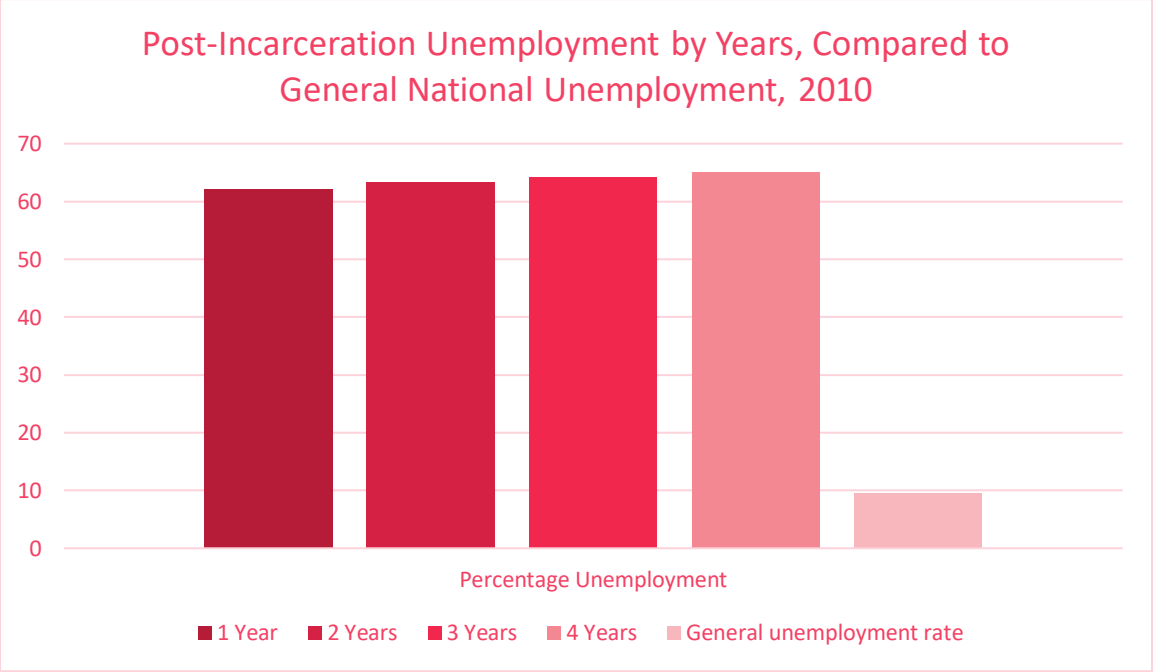
Current Statistics

About 610,000 people are released from prisons (both state and federal) each year; specific to Indiana, 10,988 prison inmates were released in Indiana as of 2019 (Prison Policy Initiative, 2024). As for state and federal jails, about 10,203,730 people were released as of 2019 (243,482 from Indiana) (Prison Policy Initiative, 2024).

Unfortunately, the majority (68%) of people who are released are re-arrested within 3 years (BJS, 2018). Most of these new arrests are for what we call "**crimes of poverty**" (things that people tend to turn to when struggling financially, such as substance abuse, larceny, and public

disorder), especially for people whose first offense was non-violent. For people whose first offense was a violent offense, the rate of recidivism is higher, with the majority (28.4%) being new arrests for assault, followed by public order offenses (15.6%), drug trafficking offenses (11.1%), robbery (7.2%), larceny/theft (7.1%), and drug possession (6.4%). Other than assault and robbery, however, rearrest for other violent crimes like rape or homicide remain quite low (2.2% and 1.9%, respectively) (United States Sentencing Commission, 2019).

Regarding the crimes of poverty especially, formerly incarcerated people tend to be disproportionately impacted by poverty, unemployment, and homelessness. For joblessness, what's especially alarming is the fact that, while we would think that the longer it's been since the person was released, the less of an impact their criminal record would have on them, in fact the opposite is true (Wang & Bertram, 2022). As you can see in the graph below, 62.15% of people one year post-release were unemployed, compared to 65% after 4 years (by contrast, the general national unemployment rate in 2010 was 9.6%). Unfortunately, our only data for post-release employment for former inmates of federal prisons are from 2010, but these stark differences in unemployment mean that formerly incarcerated people have a much more difficult time finding the stability what would assist in keeping them from re-offending.



Data from the Bureau of Justice Statistics (2021) Employment of Persons Released from Federal Prison in 2010, Table 5, and the U.S. Bureau of Labor Statistics (2011) State Unemployment Rates in 2010; image by Koslicki (2024)

As anyone who's been on the job search for a job that will actually provide benefits and a living wage will tell you, it's quite difficult (Malinsky, 2023). Unfortunately, it's even more difficult for someone with a record, and the statistics bear this out: formerly incarcerated people made, on average, $269/week (compared to $507/week for those without a record) on their year of release. This does increase over time, with formerly incarcerated people making $464/week

(compared to $555/week for those without a record) four years post-release (statistics were compared from 2010 to 2014, which is why the wages of the non-incarcerated population also went up even though they weren't 4 years "post-release" (Wang & Bertram, 2022). This creates a domino effect, as the lack of employment (or meaningful/gainful employment) contributes to additional barriers.

Barriers to Reentry

The figures above segue into a much-needed discussion of barriers to reentry for formerly incarcerated people. Homelessness has a disproportionate impact on formerly incarcerated people. As of 2018, formerly incarcerated people were found to be almost **10x more likely to be homeless** than people without a record (Couloute, 2018). The lack of stable housing (made worse by a lack of stable and gainful employment) often lands people back into the CJS when they turn to substances to cope, larceny and petty theft to survive, or are picked up for local laws that criminalize vagrancy or loitering, which contributes to the vicious cycle that makes it even harder to reintegrate into society because of the major disruptions and additions to the person's criminal record (hence the term "revolving door").

Homelessness has a disproportionate impact on formerly incarcerated women in particular: studies show that **75-80% of women** struggle to find stable housing upon release (the percentages vary depending on the area studied, since some places have higher costs of living) (Carter & Marcum, 2017). This places them at a higher risk of sexual victimization when homeless and living on the streets; this consequently increases the risk of them developing or exacerbating serious mental illness, which in turn contributes to women's offending (Wright et al., 2012). For women with children, homelessness also prevents them from regaining custody of their children (Brown & Bloom, 2009). Family reunification is consistently shown to be a protective factor against parents' recidivism, as well as a protective factor against the child committing crime (Denney et al., 2014; Fahmy et al., 2019), so it's of particular importance to address the homelessness crisis faced by former inmates.

SPOTLIGHT: The Criminalization of Homelessness

Homelessness has often been criminalized through anti-vagrancy laws and other city ordinances that make certain behaviors related to homelessness an arrestable offense. This lands already struggling people into the system, and - in the case of people who have already been incarcerated and had no

assistance with reentry - only contributes to the revolving door.

In ***Robinson v. California*** (1962), the U.S. Supreme Court at the time ruled that criminalizing someone's *status* is a violation of the 8th Amendment's cruel and unusual punishment clause. In this case, Robinson was arrested, charged, and convicted for being addicted to drugs, and his defense team appealed because his addicted *status* should not be considered the same as drug-related criminal *behaviors*. Even back in the 1960s, the U.S. Supreme Court justices at the time understood addiction to be an illness rather than a purposeful action, and overturned Robinson's conviction.

This 1962 case has been very recently cited in a case involving city ordinances passed by Grants Pass, Oregon, that make it a crime to sleep or camp on public property within city limits (*Johnson v. Grants Pass*, 2024). However, Grants Pass (like many other cities) faces a crisis of the homeless shelters not having enough beds for unhoused people, meaning they are *forced* to sleep outside. The Ninth Circuit (one of the federal U.S. Circuit courts) cited *Robinson v. California* in its ruling against the Grants Pass ordinance, stating that one's *status* of being homeless should not be criminalized, and while in this case the status of being homeless led to some sleeping on the streets (thus being a behavior and not just a status), the lack of city resources to provide beds for the homeless population is a reasonable extension of the 8th Amendment ruling in *Robinson,* since unhoused people basically have no choice when there are no shelter beds available. Given the skyrocketing housing costs and the struggle of people - especially former offenders trying to reenter society - to obtain jobs that can provide a living wage, ***Johnson v. Grants Pass*** was an incredibly significant recent case facing thousands of Americans and formerly incarcerated people today.

The U.S. Supreme Court heard oral arguments in April of 2024 and decided in a 6-3 decision along partisan lines in June that the Oregon law did not constitute cruel and unusual punishment, thus overturning the Ninth Circuit Court's decision. Ultimately, now unhoused people can be arrested and charged for violating city ordinances, even if there is nowhere else that they can go due to insufficient or full shelters.

Photo above is of the National Park Service's eviction of homeless tent encampments in Washington, DC, photo by Barnes (2023)

Homelessness and addiction also often co-occurs with mental illness, creating a complex set of factors that a former offender needs resources to treat and manage in order to reintegrate. In addition to mental illnesses that some offenders bring into their first incarceration experience, some scholars have created the term **post-incarceration syndrome** to refer to the mental illness and trauma that many incarcerated people develop after serving time behind bars. Even as far back as 1958, the penologist **Gresham Sykes** identified five fundamental human needs that people are deprived of while in prison: loss of liberty, loss of goods and services, loss of

autonomy, loss of security, and loss of healthy romantic relationships (Sykes originally identified this last one as loss of heterosexual relationships, but this is way overdue for an update since people of all orientations are separated from pre-existing outside romantic ties, the loss of security can make consent among inmates dicey, and the loss of autonomy impedes consenting inmates from many actions that would be normal or healthy in a relationship outside of prison) (Sykes, 1958/2020). With these five deprivations, along with boredom, disconnection from family (not just romantic partners), unpredictability, and sometimes observing or witnessing violence perpetrated by other inmates (or COs), inmates may develop a trauma response that can create a barrier to reentry, especially if they have had a long sentence behind bars and if they had pre-existing mental illness that is exacerbated by this new trauma (Quandt & Jones, 2021). Because most people who are sentenced to prison (it is different for jails since jail sentences tend to be for lower-level crimes) are statistically more likely to have experienced first-hand or second-hand violence victimization before incarceration, the experience or observation of violence while in prison just compounds the pre-existing trauma (Widra, 2020).

Recommendations to Facilitate Reentry

Specific to the compounded trauma, far more resources need to be contributed to mental health aftercare for incarcerated people upon release. This is especially important for marginalized populations that will face even more struggles and hardships with identifying appropriate resources, getting to appointments, picking up and regularly taking medication, and staying on track. Widra (2020) also recommends training reentry supervisors in the signs of post-incarceration syndrome and how to provide trauma-informed care, but states that the best way to prevent this overall is to minimize exposure to prisons in the first place by not seeing prison as the default sentence for most felonies.

Regarding homelessness, the Prison Policy Initiative (2021) makes four major recommendations:

1. Create state-level systems to help former offenders with finding and securing housing - this will create a more coordinated approach rather than relying on piecemeal approaches from different counties and municipalities (which often fall short due to lack of funding and/or popular support).

2. Ending the criminalization of homelessness - revising the order-maintenance approach of policing to divert rather than arrest unhoused people.

3. Expanding social services for the homeless that prioritize stable housing - a lot of homeless shelters focus on food and employment, which is useful for someone without a record facing acute homelessness and ready to bounce back to their feet; priority for formerly incarcerated people and people who've been homeless for a long time is finding housing first.

4. **Ban the box** - this is the term for a movement to remove the "have you ever been convicted of a felony" box from housing applications (and job applications as well).

However, in order to gain support for all of these above recommendations, American society needs a perspective shift. Due to the life-long stigma that gets attached to former inmates (especially those who committed violent felonies), many Americans will be hesitant to support policies that will facilitate reentry, especially due to media- and politician-driven fears of crime and not knowing about the recidivism statistics (i.e., the very low rate of re-arrest for homicide) discussed earlier in the chapter. Watch the required Tedx Talk video below (8:03 min. run time) for one formerly incarcerated man's experience and two proposals for assisting reentry for former violent offenders:

"Breaking the Chains of Second-Class Citizenship for Former Felons | Corey Frazier | TEDxWilsonPark" by TEDx Talks (2023)

There has been a lot of recent movement that signals that there is a societal shift supported by voters and legislators across the U.S. The National Conference of State Legislatures' (NCSL) most recent legislation summary (as of 2023) identified 13 states that have passed laws that either clear criminal records, ban the box, set aside government assistance for reentry, limiting fines and fees, and researching the efficacy of these programs (NCSL, 2024). To balance citizen

concerns and societal safety, Hawaii and Colorado also passed laws for to ensure victim notification when offenders of certain crimes are released (NCSL, 2024). In the year prior (2022), 13 states passed laws for record clearing, government assistance for reentry, limiting fines and fees, researching program efficacy, and enhancing employment training and readiness (NCSL, 2023).

Conclusion

Reentry is unfortunately an overlooked and underfunded part of the CJS, which contributes to the revolving door of recidivism and mass incarceration. Though some in U.S. society align with a more crime-control or incapacitation perspective (believing the goal of corrections to be punishment rather than reincarceration) the criminogenic nature of prisons and the lack of reentry support tends to create more crime rather than deterring offenders. If you believe that some component of the CJS should involve punishment, how should we balance the goal of punishment with the goal of rehabilitation and restoration (i.e., the idea that the CJS should assist former offenders in making amends and becoming a productive member of society)?

While we addressed older adults in this chapter, the next chapter will cover juveniles and the juvenile justice system, so it's also good to start thinking about ways to assist juvenile reentry, and what invisible barriers that juveniles might face that are different than those of older adults.

Chapter 15
Juvenile Justice

Introduction

As we've covered throughout this text, there's significant overlap between offending, policing, sentencing, and incarceration, and this is no less true when it comes to society's treatment of juveniles. This chapter will examine a brief history of juvenile justice in the U.S., juvenile and police contact and the school-to-prison pipeline, the modern juvenile justice system, juvenile sentencing and incarceration, and juvenile-focused alternatives.

The History of Juvenile Justice

Up to the late 1800s

In the early 1800s, many juvenile offenders were dismissed and did not go through a formalized justice system or sentencing process. From the colonial era up to the 1800s, there was a larger reliance on informal social control (remember that ***informal social control*** refers to non-government institutions and entities, such as families and neighbors, keeping others from offending and demonstrating disapproval of certain actions; the stereotypical grouchy neighbor yelling "get off my lawn" to a bunch of squirrely kids is a perfect example of informal social control. By contrast, ***formal social control*** is the involvement of formal government institutions and systems to control a person's behavior, so like the neighbor being a jerk and calling the police on the squirrely kids. We will see a transition towards formal social control occurring throughout the 1800s when it comes to juveniles). There was also a general understanding that children, if incarcerated or held for any reason, shouldn't be incarcerated alongside adults.

In the East Coast, ***Houses of Refuge*** were one of the first types of holding institutions for juveniles. They were created to house and feed vagrant children, while also providing education and vocational skills. However, these Houses of Refuge were not as positive as that last sentence sounds. They were created long before child labor laws were put into place, so many Houses of Refuge put children to work as manual laborers with harsh and unsafe working conditions (Ra Do, 2022). Houses of Refuge also relied on using corporal punishment, solitary confinement, and inhumane abuses as discipline, and disproportionately confined immigrant youth, particularly those of Irish descent (Ra Do, 2022; Shelden, 2005). You can start to see that even the first forms of juvenile "justice" had disparities across ethnic and socioeconomic status lines, which are still unfortunately present today. As for racial discrimination, this was very obvious in the South, where Black youth were often not even considered separate from adults, and were therefore subject to the same harsh prison sentences and inmate labor camps as adults (Webster, 2020). Houses of Refuge, while still very problematic in their own way, were

often not even an option for Black juvenile offenders (a decade after their creation, they began to accept some Black youth, though these children faced a disproportionately high death rate within these Houses of Refuge compared to their White peers) (Bell, n.d.; Frey, 1981). Both pre- and post-slavery, segregation laws criminalized activities done by Black people if done in areas designated for Whites under Jim Crow laws, which also netted many Black youth into the system. We still see that the majority of youth sentenced as adults are Black youth (Children's Defense Fund, 2020), thus continuing this historic legacy of equivocating Black juvenile offenders with Black adults. Societal biases and stereotypes also tend to reinforce the myth that Black youth mature faster than young people of other races, which is still a prevalent stereotype/myth today, and usually referred to as **adultification.**

Houses of Refuge morphed into ***Reformatories***, which were similar but carried a philosophy that offenders should be rehabilitated (sometimes Houses of Refuge are referred to as "reformatories", which is technically correct, as "reformatory" has become a catch-all term for any forced holding facility of youth at this time; Reformatories, however, were more explicit in their ideology that young offenders could be reformed). Unfortunately these were often just as punitive and abusive, with strategies for rehabilitation still based largely on Puritan ideas of moral reform through manual labor and education.

At the same time, legal understanding of juvenile justice was evolving in the mid-late 1800s. The first legal term you should all be aware of is ***in loco parentis,*** which is an understanding that the state/government should act "in the place of the parent". This was established by two key cases: ***Ex Parte v. Crouse*** (1839), which approved the state removal of children from abusive home environments; and ***People ex rel. O'Connell v. Turner*** (1870), which finally limited government placement of youth into reformatories, stating that they can only do so in response to criminal activity, not poverty/homelessness (up until this time, Houses of Refuge and other reformatories were confining children who had not even committed a criminal offense).

Finally, in 1899, the ***Illinois Juvenile Court Act*** was passed to create a separate juvenile court system, and we still generally use this dual system today (it has evolved and its current structure will be illustrated later in this page, but we still generally adhere to the philosophy and primary goals). The Act had four primary goals: 1. separation of minors from adults; 2. youth confidentiality in offending records; 3. community-based corrections; and 4. individualized justice. At the same time, legal understanding came to include the concept of ***parens patriae***, which literally means "the state as the parent", meaning that the state/government has the duty to intervene for the protection and rehabilitation of children if the child's guardians are insufficient.

The 20th and 21st Centuries

For a large part of the early 20th Century, the Illinois Juvenile Court Act's new juvenile court operated without much change, until later in the 1960s and 1970s, when the Civil Rights Movement brought national attention towards youth civil rights in addition to Black civil rights

and those of other racial/ethnic groups, women, and LGBTQ+ people. Up until this time, while the juvenile court operated according to noble goals, it was lacking in many important civil rights protections that adults enjoy. The first case to challenge this was ***Kent v. United States*** (1966), which allowed for the right to counsel (a component of the 6th amendment) to extend to juveniles, after Kent was transferred to adult court without an attorney to defend him. A year later, in ***In re Gault*** (1967), after a teen was sentenced to a reform school (after being accused of making obscene prank calls) without notification of Gault's parents or any notification to Gault of what he was being charged with, the U.S. Supreme Court ruled that juveniles must be granted the same rights granted to adults under the 14th amendment Due Process clause, especially the right to be informed of charges (which is also a component of the 6th amendment), right to confront witnesses, and the right against self-incrimination (this latter right also being inherent in the 5th amendment) (U.S. Courts, n.d.). Lastly, ***In re Winship*** (1970) changed the standard of proof needed for juvenile conviction to be *beyond a reasonable doubt*, the same standard of proof as required to convict an adult of a criminal offense. Juvenile conviction used to be based on a "preponderance of the evidence" before *Winship*, which is the standard of proof for civil court, and a much lower standard of proof. *Winship* finally elevated juvenile conviction to require the same strength of evidence and prosecutorial casework as is required for adults.

In 1974, the nation also experienced a major reform of the juvenile justice system with the ***Juvenile Justice & Delinquency Prevention Act (JJDPA)***. This act did not replace the Illinois Juvenile Court Act, but instead refocused the nation's strategy for treatment of juveniles on four main goals:

1. Deinstitutionalization of status offenders (remember that ***status offenses*** are offenses that are only considered offenses because of one's status as a minor. An example of this would be truancy; it's not illegal for an adult college student to skip out on their classes! Status offenses used to carry potential incarceration sentences, so the JJDPA called attention to this and sought to find alternative solutions and sentences to status offenses instead of incarceration.)
2. Sight and sound separation (this is the prohibition of sight and sound contact with adults when juveniles are placed in adult facilities)
3. Adult jail and lockup removal (this is the limitation of the amount of time juveniles can spend in adult jails; often this is 6 hours for urban areas, 24 hours for rural areas)
4. Disproportionate minority contact (this refers to a commitment to examine and reduce disproportionate contact between minority juveniles and the CJ system)

The JJDPA was renewed in 2018, with additional requirements for individual states to reduce racial and ethnic disparities in their juvenile justice systems (more about this in your Chapter 12).

Flash forward 30-40 years from the passage of the first JJDPA, and we saw a few more developments in the law for juveniles in the 21st Century. First of these was ***Roper v. Simmons*** (2005), which declared the execution of juveniles and those with severe mental impairment to be unconstitutional under the 8th amendment (connecting back to the racial disparities inherent with the death penalty that we discussed last week, the youngest known juvenile who was executed was George Stinney, a 14 year-old Black boy who was interrogated alone [this was before *Kent, Gault,* and *Winship*] and then convicted by an all-white jury in 1944). ***J.D.B. v. North Carolina*** (2011) expanded the Miranda warning of the 5th amendment to juveniles questioned by the police (while *In re Gault* affirmed juveniles' rights against self-incrimination, this was understood to be a right during court proceedings and not earlier during police questioning; *J.D.B. v. North Carolina* changed this to require that juveniles receive the same Miranda warning as adults do before police interrogation). A year later, both ***Miller v. Alabama*** and ***Jackson v. Hobbs*** declared juvenile life without parole (JLWOP) to be unconstitutional under the 8th amendment, and ***Montgomery v. Louisiana*** (2016) mandated that *Miller v. Alabama* and *Jackson v. Hobbs* be applied retroactively, meaning that people who were sentenced to JLWOP for crimes committed while they were still minors would have their cases reviewed and be re-sentenced.

Juvenile/Police Contact

Not only did the war on drugs increase police-juvenile contact, especially for young people of color, but a moral panic in the 1990s also brought many juvenile offenders into the system. The ***superpredator*** myth at the root of this moral panic was a theory started by a political scientist who argued that there was an increasing population of very violent juveniles who were beyond reform or rehabilitation (Bogert & Hancock, 2020; Boghani, 2020). The myth was also highly racialized, focusing on "urban" (the '90s code word for Black) juvenile offending specifically (Bogert & Hancock, 2020; Jennings, 2014). Policymakers and politicians ran with this moral panic, passing punitive laws, including JLWOP sentences and mandates that police enforce "quality of life" crimes more harshly.

Remember that "quality of life" crimes were the focus of Broken Windows Theory - created in the 1980s and still popular in the 1990s - which emphasized harsh enforcement of minor offenses like loitering, graffiti, and public drunkenness under the assumption that this would prevent violent crime. While this theory was not empirically proven, it was very popular at the time because it offered a simple solution to complex social problems, and the theory, the war on drugs that it informed, and the "superpredator" myth all created the perfect storm of punitive policies for juveniles in the U.S., and contributed to continued racial disparities in the juvenile justice system.

At the same time (but not gaining much scholarly attention until the 2000s), the ***school-to-prison pipeline*** was another process that contributed to disproportionate minority contact with the police (and thus with the criminal justice system). The school-to-prison pipeline refers to the

criminalization of school misconduct and status offenses, as well as the use of school resource officers (SROs) or municipal police officers to enforce these policies through arrest. Watch the required video below for an explanation behind the process and statistics (heads up, there is some footage of officer assault of a minor):

"The school-to-prison pipeline, explained" by Vox (2016)

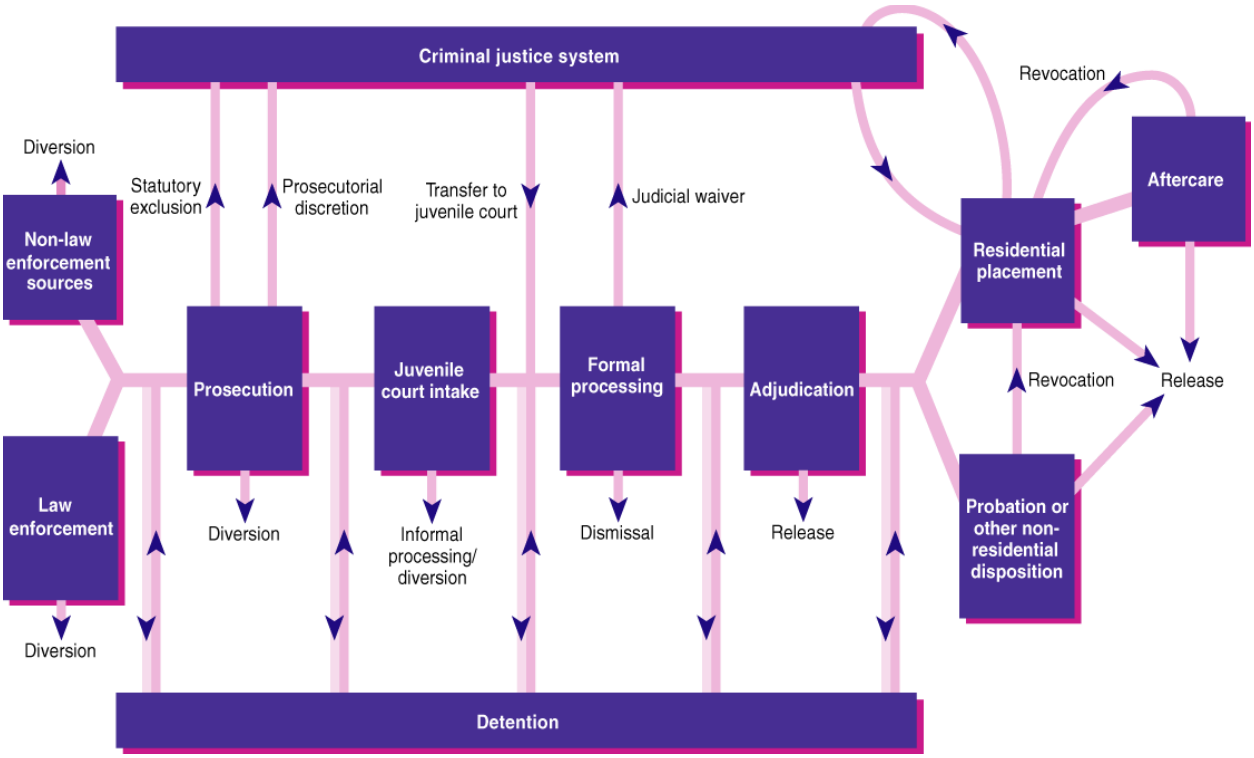
While this video is several years old now, recent statistics on the school-to-prison pipeline are still discouraging. According to the ACLU (2023):

- Schools with police report **3.5x** as many arrests as schools without police presence/SROs
- Black boys face the highest likelihood of arrest
- Black girls are **4x more likely** than white girls to be arrested
- While student misconduct is often linked to traumatic childhood events or mental health issues, **only 3 states** have the recommended student-to-counselor ratio
    - 1.7 million students are in schools with SROs but no counselors

- 6 million students are in schools with SROs but no school psychologists

The Modern Juvenile Justice System

The diagram below shows the juvenile justice system flowchart, with the top bar labeled "Criminal justice system" referring to the adult system. This indicates that – while the youth system ideally flows through the middle steps, juveniles may be referred to adult court at multiple steps in the process, through multiple means (statutory exclusion (which means the crime requires that the perpetrator be tried as an adult from the very beginning; this depends on the state), prosecutorial discretion, or judicial waiver).



"Case Flow Diagram of the Juvenile Justice System" by the Office of Juvenile Justice and Delinquency Prevention (2021). Click to see full size.

Residential placement refers to an incarceration or treatment facility specific to juveniles. However, if tried as an adult, the juvenile may end up in an adult facility (remember that the JJDPA goal of sight and sound separation is an ideal and not always a reality, sadly).

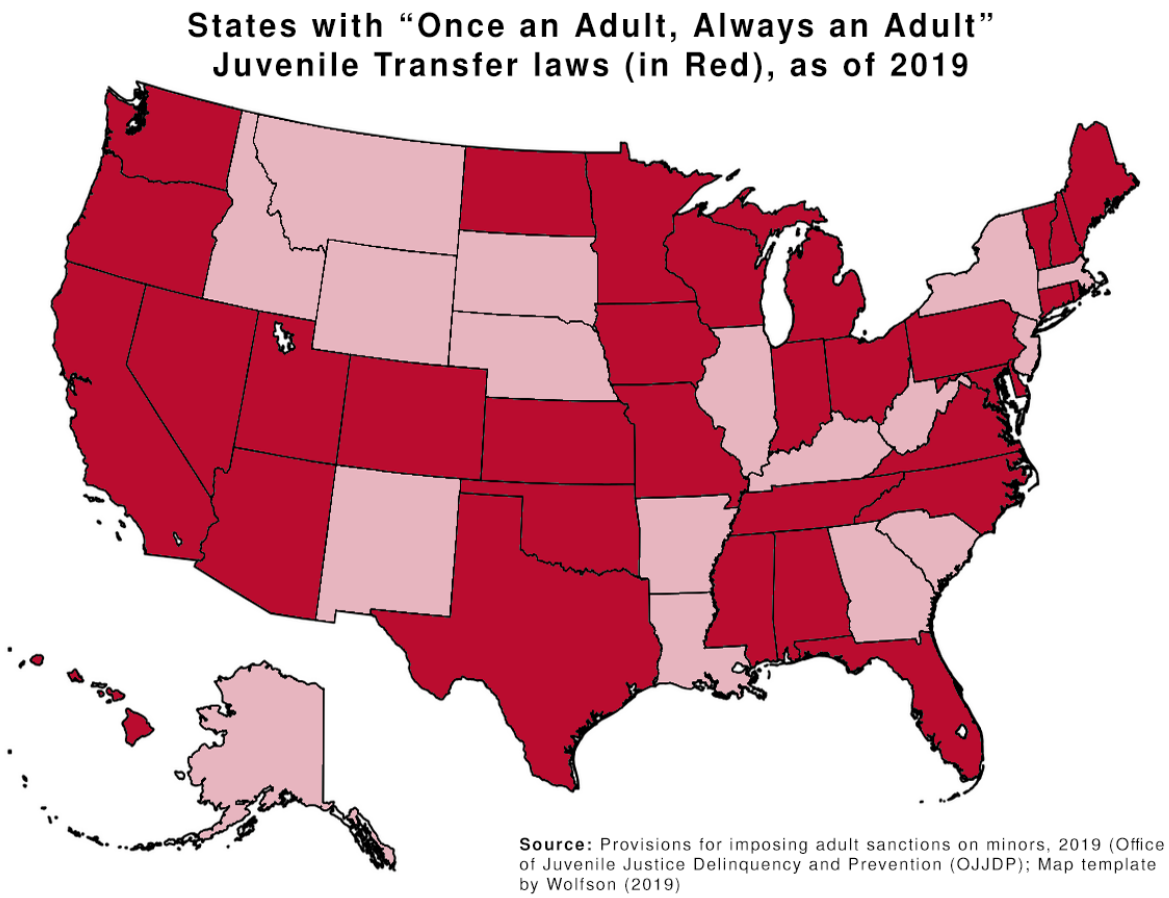
Due largely to increased policing during the war on drugs and the "superpredator" moral panic, there was a surge in youth being tried and sentenced as adults in the 1990s-2000s. In fact, in 1990-2000, an estimated 250,000 youth were tried and sentenced as adults *every year*

(National Juvenile Justice Network, 2008). In the 2010s, there were some encouraging signs that this trend is decreasing. In 2015, 75,900 youth were sentenced to adult court, and in 2019, even fewer (53,000) youth were sentenced to adult court (Kelly, 2023). This is an 80% decrease from the 1990s-2000s estimate. However, the overall trend seems to be reversing again, with now 24 states having no mandatory minimum age for transfer to adult court (an increase from 13 in 2018).

Additionally, these numbers aren't evenly distributed across the U.S.; as with a lot of criminal justice issues, juvenile transfer laws vary widely by state. According to the National Conference of State Legislatures (2024), these types of transfer laws tend to fall under one of four main categories:

- **statutory exclusion** – indicates crimes that require any offender automatically be tried as an adult (this means if a juvenile commits one of these crimes, they do not see the juvenile justice system but instead immediately go to adult court)
- **judicially controlled transfer –** indicates that all juvenile cases must start in juvenile court, and can only be transferred to adult court if the judge believes the facts of the case require transfer
- **prosecutorial discretion –** indicates that the prosecutor may decide during the charging process whether the juvenile should be tried in juvenile or adult court (for certain offenses)
- **statutory exclusion and prosecutorial discretion –** indicates a blend of the above two systems (except judicially controlled)

These definitions don’t encompass another form of transfer law: "once an adult, always an adult". Essentially this means that once a juvenile is charged as an adult, any subsequent offense is automatically tried in adult court (there is "no going back", even if they are found innocent in the initial trial as an adult). **Thirty-five states** have these transfer laws as of 2019 (Office of Juvenile Justice and Delinquency Prevention, n.d.). The map below by Koslicki (2024) visualizes these states (in red).



States with "Once an Adult, Always an Adult" juvenile transfer laws, image by Koslicki (2024)

Holding offense seriousness and record constant, there are still disproportionate numbers of minority and low-SES juveniles who are transferred to adult court. Adult sentencing practices severely limit the available rehabilitative programs for these juveniles. This practice also increases youth vulnerability to victimization, and the following trauma and learning from other inmates puts these juveniles at higher risk of recidivism than if they were placed in juvenile residential placement (NJJN, n.d.). Taking all of this into consideration, how do we address these disparities and ensure a more rehabilitative environment for juveniles?

Conclusion

This last question is one that has long been asked, but policies and legislation have been slow to take hold to actually address these issues and push towards reform. How we treat our society's children is a major reflection on our justice system and culture as a whole, and we need to change things in the juvenile system if we hope to divert them from offending as adults. If we can successfully divert and help young people to avoid getting involved in the criminal justice system, we can reduce the revolving door of mass incarceration and alleviate the case burden of courts, probation, and parole officers.

Chapter 16
New Avenues in Preventing Crime and CJS Involvement

Introduction

It's easy to get overwhelmed by the inefficiencies of the criminal justice system and multiple obstacles to justice that we've explored throughout this textbook. So, what better way to conclude than to examine ways to prevent entry into the system in the first place? This final chapter will explore new avenues (and some not-so-new but still not widely practiced) in preventing crime and involvement in the criminal justice system. You'll find that many of these align more closely with some of the perspectives discussed in Chapter 1 than others, but even if you align with perspectives that aren't represented here, this is a great opportunity to look into the evidence for ways to practices and programs that not only alleviate the burden on the institutions of the CJS (for example, the need for plea bargaining in our overwhelmed court institution) but will prevent the life-long and complex impacts of having a criminal record that we've discussed in recent chapters.

Net-Narrowing

Way back in Chapter 3, I mentioned the concept of **net-widening** when discussing how the early Positivist School of criminology began to net more people into the system by drawing faulty associations between intellectual and developmental disabilities and criminality. Net-widening is essentially any policy or practice that begins to increase the amount of people processed through the CJS, essentially like casting a much bigger net to catch far more fish than before. The early Positivist School and eugenics movement wasn't the only form of historic net-widening in the United States; things like Prohibition (criminalizing the manufacture and sale of alcohol), the War on Drugs (criminalizing the manufacture, sale, use, and even possession of controlled substances), broken windows-style policing (criminalizing nuisance crimes and "crimes of poverty" such as homelessness and loitering), and the school-to-prison pipeline (criminalizing activities that used to be handled by schools internally) are all examples of net-widening.

Unfortunately, while many in society and across the CJS institutions have embraced the evidence that we need to move away from such practices, there have been recent significant net-widening events in some states, particularly after the decision in *Dobbs v. Jackson Women's Health Organization* (2022) made the legality/criminalization of abortion a matter of state decision rather than a national constitutionally-protected practice before fetal viability. While I respect that many have their own personal and religious view surrounding the practice of abortion, from a criminal justice perspective, the prohibitions that were enacted in some states

following the *Dobbs* decision have increased the possibility of healthcare providers being "netted" into the CJS for making emergency medical decisions and of women themselves being arrested for pregnancy loss. Regarding healthcare providers, a recent lawsuit *Zurawski v. Texas* was rejected by the Texas State Supreme Court on the grounds that "life of the mother" exceptions were broad enough to allow doctors to legally perform abortions, but the defendants argued that the penalty for abortion otherwise – up to life in prison – and the unclear wording of the law puts doctors at risk of prosecution and women at risk of pregnancy complications and death (Vertuno & Stengle, 2024). Unfortunately, we know from other countries that fear of legal fallout can lead to death of mothers with pregnancy complications (Arie, 2006). A federal law, the Emergency Medical Treatment & Labor Act (EMTALA) requires hospitals to provide emergency medical care, but abortion was not clearly named by EMTALA and medical providers in fear of state laws (in the states with restrictive abortion laws or bans) have expressed fear of defying these laws, sometimes even performing riskier procedures perceived as medical loopholes (Simmons-Duffin, 2022). Further, when the Biden Administration attempted to argue that EMTALA applied to emergency abortions in states with strict bans, Texas sued the Department of Health and Human Services in order to prevent EMTALA enforcement; the 5th Circuit Court of Appeals upheld the decision of the lawsuit in favor of Texas, and the U.S. Supreme Court has refused to review the 5th Circuit Court's decision (Marimow and Kitchener, 2024). What this means is that healthcare providers can't look to federal law to protect their actions, and instead must navigate narrow exceptions in state laws with the fear of criminal prosecution.

Regarding the criminalization of pregnancy loss, Bach and Wasilczuk (2024) have found at least 210 cases (likely an undercount) where women were criminally charged for their miscarriages or behaviors during their pregnancy post-*Dobbs*. While criminal prosecution of women who face pregnancy loss is unfortunately not new (the non-profit Pregnancy Justice identified over 1,800 cases between 1973-2022), 210 cases in just two years is a record increase and is likely due to the *Dobbs* decision increasing states' pushes for "fetal personhood" laws (Bach and Wasilczuk, 2024). The majority of women charged in these cases are low-income or women of color, and rather than the state being required to prove guilt beyond a reasonable doubt, as we covered in Chapter 2, many of these charges did not involve actual evidence that any harm was done to the fetus or baby (Mulvihill, 2024). Even more recently, states such as Alabama, Arkansas, California, Georgia, Ohio, Oklahoma, and South Carolina have been found to have laws that criminalize miscarriage, with West Virginia recently passing a law similar to those in Ohio and Georgia that could criminalize improper disposal of miscarried remains (Aspinwall, 2025; Clark, 2025). With miscarriage being a traumatic and sometimes medically life-threatening process in the case of hemorrhaging, women may not know what to do in the moment with the miscarried remains of their pregnancies. Additionally, reporting the pregnancy loss to 911 could open additional investigation into whether the woman did anything that could have potentially contributed to the pregnancy loss (which may lead to jailing and charging before the remains are even autopsied) (Aspinwall, 2025).

Net-narrowing is not really a common term, but it's the conceptual opposite of net-widening: addressing criminal laws that are not in line with societal beliefs and practices and either decriminalizing or legalizing the practice (think back to Chapter 1; which perspective does this most align with?). With the post-*Dobbs* issues addressed above, this would entail reassessing bans in light of public referendums (individual issues that residents of that state may vote on); however, 24 states do not allow for citizen-initiated referendums or ballot measures (Ballotpedia.org, 2024), meaning that citizens of these states can only hope to address specific issues, like abortion or marijuana decriminalization, by electing representatives that they hope will raise these concerns in the state legislative process. Net-narrowing could also be achieved at the national level through an act in Congress that passes both the House and Senate and is signed into law by the president.

"Weed the people – legalize it!"; image by ~filth~filler~ (2015) (image cropped from original)

What are other ways to narrow the net? What policy or social issues show a misalignment between majority public beliefs and current criminal laws? (Pro tip: head over to Pew Research Center if you want to see reliable polling on public views about different policies and social issues.) While the issues addressed above are more at the broader policy level, we'll address a few examples of local programs and responses at various levels before entry into the CJS.

Leveraging Social Services

Specific to the policing institution, police are known as the "gate-keepers" of the criminal justice system, since their actions ultimately decide who ends up filtering through the CJS and who ends up avoiding it altogether. Net-narrowing policies can affect police practices and assist in reducing the caseload of the police and the ultimate number of people going through the CJS.

A major recent effort to do this was called (rather unfortunately) “defunding the police” in 2020. I say “unfortunately”, as “defunding” led to many assumptions that the practice only entailed stripping the police of resources, rather than the original concept’s strategy of reallocating city funding to social support services that can work *alongside* police to reduce the burden of cases that police aren’t sufficiently trained to deal with. This concept is actually not new at all, with police scholars like Peter Manning as far back as 1978 advocating for social services to answer to public needs and disorder issues while having police focus on felonies and violent crimes (Manning, 1978). This concept started to be put into action in the 1980s through Mobile Crisis Teams (MCTs) like the CAHOOTS (Crisis Assistance Helping Out On The Streets) program in Eugene, Oregon. Watch the video below for more information about how CAHOOTS works.

“CAHOOTS: Crisis Assistance Helping Out On The Streets” by Chris Stewart (2020)

Efforts to enhance community safety without criminalization don’t have to be full MCTs like the CAHOOTS program. Other programs can include crisis centers, community-based violence intervention programs that work in conjunction with police and social services, and community safety departments. Explore Safer Cities, a nonprofit that compiles research on programs like these, to see the variety that exists in cities across the United States.

To implement programs like this, communities need to take a "one-size-fits-one" rather than a "one-size-fits-all" approach. Each city is unique in the resources it already has, the social supports it lacks, and the crime (or criminalized) issues and social challenges that it faces. However, many police agencies agree that partnerships with people who are more equipped to handle people with mental health needs, severe addiction issues, and other crises are ideal for helping community members, offloading already burdened police agencies, and preventing mishandled responses to calls for service (Council of State Governments, 2019). Additionally, with many police agencies struggling to recruit enough officers to replace the retiring generation, it may behoove some departments to consider innovative ways to maintain response coverage to violent crimes by offloading nonviolent/public disorder calls to non-law enforcement agencies and community partners.

Moving Towards a Public Health Framework

All of this aligns with a recent shift in perspective among some criminal justice scholars to tap into the public health field for a more holistic approach to enhancing community safety while reducing the involvement of people in the CJS. Indeed, some public health scholars have highlighted the problem of the CJS exacerbating many issues that public health is expected to address, such as overpolicing increasing injuries to community members, mass incarceration being linked to poor health outcomes, and the war on drugs doing nothing to actually treat addiction (Fleming et al., 2021; Simckes et al., 2021).

Shifting towards a public health framework means being more attuned to the causes of poor health outcomes (including violent victimization) and addressing these with health partnerships instead of solely relying on the criminal justice system. For example, gun violence, rather than solely requiring the CJS to investigate and prosecute the suspect, requires preventative measures that can assist in reducing illegal access to firearms, enhancing better mental health responses, and improving school partnerships to teach about pro-social problem solving and emotional regulation. While there is still a need for the CJS to respond to crimes that have already happened (particularly crimes that our society considers *mala in se*), leveraging public health networks assists in reducing the need overall, and may also assist in reconceptualizing some *mala prohibita* criminalized activities (such as drug use) as health issues rather than crime issues. Read more about a public health approach from the Center for Disease Control (2024): *About the Public Health Approach to Violence Prevention.*

Leveraging the Community

While experts should still assist in informing community programs about best-practices, community members are the most attuned to the distinct needs and struggles of their immediate communities. Examples of effective community programs are Narcan (Naloxone, a drug used to reverse opioid overdose) distribution centers and youth mentoring programs, the latter of which has been shown to be effective in multiple studies (DuBois et al., 2021). Additional nonprofits, like YWCA USA, Inc., have local branches that are involved in empowering

women, addressing racism, and advocating for domestic violence and gender-based violence prevention, mainly by using community partnerships and local community grants to fund programs, while also pressuring local governments to address pertinent community issues.

What community organizations are you aware of that address violence or crime prevention? Thinking back to Chapter 4, how might these programs be evaluated for their efficacy?

Conclusion

This was a short chapter, not for lack of the vast majority of programs out there that are addressing crime prevention without involving the CJS, but because I'm a big believer in getting readers to go out there and find ones for themselves! It is an encouraging practice to actually search for programs like these, because the results that come up (especially if they are local) will assist in gaining hope that – while there are many obstacles to real justice in the CJS and many frustrating outcomes – there are always people and groups who believe in making society better by alleviating the overall impact that the CJS has on individual lives, and also alleviating the overall case burden on CJS practitioners.

Of course, not all programs are created equally. Always examine the evidence that strategies or programs work as they should (or if they haven't been researched or evaluated yet, ask yourself what evidence one would look for if researching the program: what would be the best measure of efficacy?). Also ask yourself what would need to happen to implement this strategy or program in your own hometown: is it a local policy that needs public support? A policy to be implemented by city government or state government? By finding these programs and asking these questions, you can start to see how change might be possible.