Unit 1

WHAT IS CRIMINAL JUSTICE?

The mood and temper of the public with regard to the treatment of crime and criminals is the most unfailing test of the civilization of any country (Sir Winston Churchill)

Welcome to the academic discipline of criminal justice, an interdisciplinary, liberal arts field of study that began in the late 1920s when August Vollmer and others convinced the University of California to offer courses on the subject. Vollmer was a police chief in Berkeley, California, and is considered the founder of the discipline. One might refer to these early years (1930-50) as the "Police Science Era" since policing was the main focus. Vollmer’s work was carried on throughout the U.S. by a number of proteges such as O.W. Wilson, William Wiltberger, and V. A. Leonard. For many years, undergraduate education in criminal justice mostly followed a Wiltberian model which emphasized police-oriented specializations. Criminology was one such specialization until it became dominated by sociology later. However, then as now, the only course criminal justice usually borrows from another discipline is the methods of research (or statistics) course. Doing so has always added scientific rigor and a social science orientation.

During the late 1960s and early 70s, in the so-called "great transformation" which made college education accessible to most Americans, the focus of criminal justice broadened dramatically. It was one of many programs (along with military science) that students protested against at college campuses across America. Subsequently, courses in criminal justice (as well as criminology) fell into the hands of Sociology or Political Science departments during the 1960s (and some are still "encapsulated" in such fields). All that changed around 1974 when the federal government subsidized colleges and universities (to the tune of about $100,000 apiece) to start financial aid (LEEP) and research programs (LEAA) for the study of criminal justice. Most police-oriented programs became part of the country's community college system, and over 600 four-year colleges created a liberal arts-based criminal justice curriculum or program of study. Today, criminal justice is well-established as a broad-based academic discipline, with over 1500 Associate (2-year) degree programs, 900 Bachelors (4-year) degree programs, 90 Masters (2-year) degree programs, and 18 Ph.D. (3-year) programs.

SOME DEFINITIONS

Criminal justice is the study of criminal (penal) law, social control, constitutional law, criminal procedure and evidence, criminology, victimology, components that make up the loose array of institutions and activities we call a system (policing, courts, corrections, and community services), politics, and the idealistic notion of "truth in action" we call administration of justice. Each area of study is equally important, and will be explained briefly. A penal law is one that has a provision for punishment. Hence, we are primarily concerned with laws that legislators pass which have penalties. Social control involves the range of pressures brought to bear on people to establish conformity. It can range from customs and folkways (dirty looks) to norms and mores (more aggressive responses to deviants). Constitutional law is the study of that balancing act between public order and individual rights, since a constitution is, after all, a contract between a society and the individual. Criminal procedure and evidence point to the notion of justice as both process and outcome. Justice as process means treating people fairly; justice as outcome means giving people what they deserve. Criminology and victimology have long had a separate academic base, and best represent the infusion of interdisciplinary content. The system components (sometimes called the three Cs: Cops, Courts, and Corrections - although "cops" is a pejorative word) form the basis of cultural literacy in the field. Politics is what criminal justice is inseparably linked to, from decisions about what should be considered "crime" to policy analysis of crime control legislation. Administration of justice is the study of workplace and organizational factors along with a focus on ethical and discretionary decision-making (justice in action).

More definitions exist, and the problem, of course, is that justice means different things to different people. A victim of crime would be interested in outcome (punishment, desert, retribution, or getting even). A person accused of crime would be interested in process, and want to be treated fairly and
impartially. True justice is, in fact, both process and outcome, or as Schmidt (2006) puts it, a constellation of elements (desert, reciprocity, equality, and need) that exhibit a certain degree of integration and unity that help us to map the universe. Indeed, justice is many things, but some simply want to believe in a just world where it all "works out," and they receive due appreciation (equity) for their efforts, abilities, or needs. If one consults a dictionary, one finds such terms as righteousness and honorableness (making the sublime out of the profane), truthfulness (never lying), fairness (impartiality or neutrality), and scrupulousness (attention to detail). Given such noble and idealistic definitions, one might easily ask if it is indeed possible or realistic to establish "justice for all?"

A related term, justice studies, can be looked at several ways. I prefer to look at it as bridging the gap between the real and ideal, by implementing as many types of justice as possible in this world. My preferences overlap, however, with the concerns of other justice conceptions. Social justice, for example, embraces aspects of civilized life, cultural beliefs about right and wrong, fundamental relationships of human dignity, and ideals of personal and societal development. Civil justice, another example, concerns itself with private relationships, contractual obligations, equality of treatment, and ideal remedies that reflect a basic understanding of right and wrong. There are other conceptions of justice, mostly revolving around the notions of equality (measurability), equity (the smell, taste, or feel of justice), fairness (sportsmanship), and blindness (dispassionateness), but one might easily ask if criminal justice can even be achieved in the absence of social and civil justice? Although Crank (2003) and others have done so too, Lakoff (2002) provides a good list of all the different models of justice as fairness (which is in large part concerned with the question of how to distribute things of value):

1) Equal distribution: one child, one cookie
2) Equal opportunity: one person, one raffle ticket
3) Procedural distribution: Playing by the rules determines what you get
4) Rights-based fairness: You get what you have a right to
5) Need-based fairness: The more you need, the more you have a right to
6) Scalar distribution: The more you work, the more you get
7) Contractual distribution: You get what you agree to
8) Equal distribution of responsibility: We share the burden equally
9) Scalar distribution of responsibility: The greater your abilities, the greater your responsibilities
10) Equal distribution of power: one person, one vote

**STEPS OF THE PROCESS**

There are many ways to model or represent the process of criminal justice in America. Models exist with as few as eight steps in them and as many as fifteen steps. Here, we use a ten-step model to be consistent with the textbook. There are also different ways to diagram the criminal justice system. Some sources have diagrams that look like a big machine gun with multiple barrels, and others utilize what looks like a multi-layered wedding cake or a funnel turned sideways. Regardless of the model chosen, it's important to remember that these are more analytical tools than a reflection of reality. The purpose is to try and present the loose array of multi-jurisdictional agencies, institutions, and procedures ("non-system") as an aggregate, comprehensive whole ("system"). Admittedly, the notion of a coordinated, perfectly harmonious system is more fiction than reality.

1. INVESTIGATION and ARREST -- The process begins with the police discovering something or having it discovered for them. This is known as proactive or reactive policing, respectively. Most policing is reactive, with the police diligently following up, or probing, the truthfulness of any allegations or complaints. Someone becomes a "subject" of investigation when they are someone police are looking into, and someone becomes a "target" of investigation when it is likely they will be charged with a crime. Although there are special procedures for when somebody formally becomes a "suspect", all investigative procedures at this level are characterized by suspicion. Police always work up from a state of being naturally suspicious. That's what police do. When they arrest somebody, they have worked up to probable cause. There are many constitutional safeguards at this step of the process, but nobody questions the right of police to investigate and make arrests.
2. BOOKING -- This is a part of the process that involves custody, detainment, deprivation of liberty, and other personal intrusions, up to and including body cavity searches. Someone is "booked" when their picture and fingerprints are taken. An administrative record is made of the arrest, and it's at this step of the process when the suspect finds out the details of what they are being charged with and fills out a form that they have been advised of their rights. This step is characterized by accuracy of identification and records. Interrogation and confession can also occur at this stage.

3. FIRST APPEARANCE -- Within hours of being booked, suspects are either brought before a magistrate, have their cases heard before a magistrate, or have the going rate determined by a magistrate, all for the purpose of setting the amount of bail. Bail bondsmen and appointed counsel also become initially involved at this step, depending upon a person's financial circumstances. This step is characterized by something that makes the justice system look bad - how much money a person has.

4. PRELIMINARY HEARING -- The purpose of a prelim is for a hearing judge to look into the probable cause that police used and determine if jacked-up probable cause exists for continuing with legal proceedings. A hearing judge considers the sufficiency of evidence, whether a nexus, or connection, exists between the statutory elements of the crime and what police say the person did, and whether the proper jurisdiction exists. This step is characterized by discovery and disclosure, which means that a number of people share information about the suspect in their respective advocacy roles (prosecution, defense). It's the step one often hears about in terms of the myth that the case is thrown out if the suspect shows up and the police do not (the truth is it depends upon the evidence and presentation of witnesses). Upon completion of this step, a suspect has either cleared themselves, is declared incompetent to stand trial, or formally becomes a defendant for trial.

5. INFORMATION or INDICTMENT -- The word information refers to a form the prosecutor files with a court to declare his or her intention to prosecute the case. An information is only filed upon completion of a successful preliminary hearing. A prosecutor also has the option (and is required in some states) to go before a Grand jury, which is best seen as a standing committee of honorable citizens. Defendants and their attorneys are not allowed in Grand jury proceedings, and any majority vote by the Grand jury to proceed with prosecution is known as a True bill, resulting in a different form, called an indictment, filed with a court. As a general rule, felonies are usually handled by indictments and misdemeanors by information. This step is characterized by power, as it should be obvious that prosecutors have an enormous amount of resources and decision-making authority at this point.

6. ARRAIGNMENT -- This is the first public appearance of the defendant in open court, a court that has the jurisdiction to conduct a trial. The accused must stand and listen as the indictment or information is read, although they should have already been given a copy. Their identification is confirmed, and they are asked if they have been informed of the charges and their legal rights. The judge may also inquire as to whether the defendant has legal counsel, and why or why not, but this is not required and many judges prefer not to go into it. An arraignment is generally a brief process where the judge only wants to hear one of three things: guilty, not guilty, or no-contest (nolo contendere, an admission of guilt that cannot be used as an admission of guilt in civil justice). This is known as the plea, and the defendant must utter one of those with no room for explanation or elaboration. If the defendant pleads guilty or no-contest, they are sentenced on the spot. If they plead not guilty, or give the court any static, they are scheduled for trial and/or ordered to undergo psychiatric evaluation. A defendant who stands mute has a plea of not guilty entered on their behalf. Most defendants will have had their defense attorney arrange a plea bargain beforehand, so that the act of pleading guilty is openly noted as a negotiated plea to which the judge has or does not have prior knowledge of, but in all cases must consent to. Some 90% of all criminal cases are resolved with plea bargains, but they can't go on at the last minute during arraignment. A judge can reject a plea of guilty if they think it was made under duress, non-intelligently, or if the bargain is too last-minute or lenient. This step of the process is characterized by speed.

7. ADJUDICATION -- This is an open or closed trial in which matters of fact and law are examined for the purpose of reaching a judgment of conviction or acquittal. A jury is usually the trier of fact (did they do it) and the judge the trier of law (admissibility of evidence and penalties). Less serious offenses don't require
a jury, and even in serious cases (if state law allows), the defendant can waive his or her right to a jury trial. Such proceedings are called bench trials where the judge serves as both trier of fact and law. The adjudication stage is ruled by strict rules of procedure, evidence, and precedent. An adversarial system is also adhered to where both sides (prosecution, defense) argue vociferously within boundaries set by professional ethics. The standard for conviction is beyond a reasonable doubt. This step is characterized by being enormously expensive, time-consuming, and stressful. There are many salaries to be paid. Private attorneys, for example, make $800 an hour for time spent in the courtroom (public defenders make less, about $40 an hour). Add DNA testing or forensic analysis, and each modern trial in America easily costs millions of dollars.

8. SENTENCING -- This is a hearing held after a judgment of conviction where a judge imposes some form of punishment. Prior to this hearing, the judge may order a presentence investigation on the defendant's family history, economic circumstances, emotional state, social background, and criminal history. A judge has considerable discretion in sentencing, although some state and federal laws now place limits on that discretion. Offenders found guilty on more than one charge can serve sentences consecutively (one at a time) or concurrently (all at the same time). Sentencing is also used to order court costs and victim reparations be paid by the offender. Many sentences are appealed, but the appeals process is complex. This step is characterized by the court's desire to settle everything.

9. CORRECTIONS -- This is the process of doing time in prison, being classified according to local procedures, being housed in an appropriate facility, and being assigned to an adequate treatment program. Also called institutional corrections, prisons are generally places characterized by violence, overcrowded conditions, and minimal opportunities for treatment. There are no luxuries, and prison life is becoming less and less attractive with the elimination of privileges like smoking, cable TV, weightlifting, boxing, and martial arts. At a cost of about $25,000 per year to house and feed two million inmates, corrections today is a relative bargain.

10. PROBATION and PAROLE -- Not all convicted persons wind up in prison, and most of those that do eventually get released back into the community. Traditionally, probation occurs as an alternative to prison and parole as a form of supervision after prison, but things such as shock probation (a taste of prison life before probation) and shock parole (a taste of prison life after parole) have become commonplace. Also called community corrections, probation and parole involve monitoring readjustment to society under strict rules or conditions. Violators of those conditions are called technical violators, and those kind of violators far outnumber the few who commit new crimes while out in the community. A large number of people are on probation or parole. Adding them to the correctional count (calling it the number under some form of correctional care) comes out to about 6 million.

CONSTITUTIONAL GUARANTEES

Although criminal justice is primarily a state and local function that (judicially) processes about one million people (felons) a year, the practice of it is severely constrained by the U.S. Constitution, particularly the first ten amendments known as the Bill of Rights. These are not ideals, but fundamental rights guaranteed to each and every individual. They are best seen as due process rights, which is a matter of procedural fairness. From time to time, the Supreme Court clarifies, expands, or retracts these rights. They are as follows:

| Right to be assumed innocent until proven guilty | Right to know the charges |
| Right against unreasonable searches & seizures | Right to cross-examine witnesses |
| Right against arrest without probable cause | Right to speak and present witnesses |
| Right against self-incrimination | Right not to be tried twice for same offense |
| Right to fair questioning by police | Right against cruel & unusual punishment |
| Right to protection from physical harm throughout the process | Right to due process |
| | Right to speedy trial |
The notion of due process (as individual rights) is in constant tension with the notion of crime control (as individual responsibility). One of the first to point this out was Herbert Packer in his 1968 book, The Limits of the Criminal Sanction, published by Stanford University Press. It remains a definitive work in the field. It's mentioned in all the introductory textbooks; it's mentioned in class by many instructors; analysis of it is commonly given out as assignments; and professors wish more students would grasp Packer's ideas. However, this 385-page book is hard to find and hard to read, so here's my review of it.

[Review of Packer's crime control model]: Packer starts out explaining that he's an utilitarian and not a retributivist. This means he's more concerning with preventing crime than with punishing criminals. He also doesn't believe in rehabilitation. He believes in limiting the reach of the law to observable conduct and offenses where there are clear examples of moral and secular outrage on the part of the community. He offers drug offenses, the crimes of attempt, conspiracy, and solicitation (inchoate offenses), and the insanity defense as examples of "hands-off" areas in criminal justice. He analyzes the "strain" on the system (as he calls it) of using the criminal sanction indiscriminately. He proposes that no law be passed unless it can be enforced even-handedly, his favorite example (p. 289) being the "St. Patrick's Day Effect," where police concentrate in one area (the parade route) while the criminals are active in another area. It's in this context that he presents his model of criminal justice as caught up in the conflicting, dual goals of crime control and due process which is only resolved at the practitioner level. At this level, it's a philosophy or attitude of ambivalence (sometimes you feel like a "tough" and sometimes you don't), and it's this attitude that criminal justice professors wish their students would pick up. Working in criminal justice is like that, being part angel and being part devil, at times not knowing which part is right, but knowing both parts anyway. Packer outlined polar ends of the spectrum, the point being that regardless of how much society embraces either end during its pendulum swing, it's the human practitioners of justice who make remain balanced and make both values operative in real life. The customary representation of Packer's model is as follows:

<table>
<thead>
<tr>
<th>CRIME CONTROL (assembly-line justice)</th>
<th>DUE PROCESS (obstacle-course justice):</th>
</tr>
</thead>
<tbody>
<tr>
<td>Efficiency (of operation)</td>
<td>Error (possibility of mistake)</td>
</tr>
<tr>
<td>Magnitude (speed and finality)</td>
<td>Quality control (no emphasis on finality)</td>
</tr>
<tr>
<td>Expertness (few restrictions on fact finding)</td>
<td>Skepticism (moral, utilitarian restrictions)</td>
</tr>
<tr>
<td>Factual guilt (we know you did it)</td>
<td>Legal guilt (prove it in a court of law)</td>
</tr>
<tr>
<td>Presumption of guilt (a mood of confidence)</td>
<td>Presumption of innocence (a mood of doubt)</td>
</tr>
</tbody>
</table>

More than anything, Packer would like to see a mood of equality, an even-handed embracing of the need for crime control (the necessity of efficiency) and a sensitivity to claims of injustice (everyone with their day of justice). If we take away the right to air one's side of the story (even for criminals we know are manipulating) and have no skepticism in our minds about the morality of it all, we risk jeopardizing the whole set of fundamental freedoms and constitutional guarantees that we all want to enjoy. That is what makes the criminal justice system so special, and that is what makes those who work in it the guardians of civil and human rights.

WORKING IN THE SYSTEM

It is sometimes said the U.S. has 51 criminal justice systems, one for each state and a federal one (Walker 1998). There are a total of about 50,000 agencies in federal, state, and local government that serve criminal justice functions. Most of these are police agencies, employing about 940,000 people with annual
expenditures of $53 billion. Second in size is corrections, employing about 650,000 people at $41 billion. Ranking third in size are the courts, employing about 75,000 people at $26 billion.

The field of private security employs about 2 million people at an annual cost of $104 billion. America's private law enforcement system has always been twice the size of public law enforcement, and it's growing at a faster rate. The field of national security employs an undisclosed number of people across 56 different intelligence agencies. The field of forensic science is also rapidly growing, as each state and large local authority has its own forensic laboratory, in addition to the 120 private labs and the chain of state, federal, and private psychiatric hospitals.

The variety of job titles in CJ is amazing. It makes little sense to ask if criminal justice is a "growth industry" as it always is. Visit the Bureau of Labor Statistics Employment Projections to find out the hiring and salary trends at least five years into the future. This site will also give you information about qualifications and job responsibilities. Every college student, faculty, and administrator ought to bookmark this site.

For criminal justice job descriptions, visit Dr. Carlie's AdviseNet or my Employment Mega-Site. Be careful in looking for federal job information. Use free sites like Government Jobs or the federal government itself, and it's a good idea to familiarize yourself with the federal applications like form OF-612. Most job-seekers have a copy of OF-612 downloaded, filled out, and are constantly editing and updating it. Specialized sites exist for the Courts and Corrections, but not many. One devoted to finding paralegal and legal assistant work is The Legal Employment Search Site. For jobs in the corrections field, The Corrections Connection Career Center is darn good, and visit any of the following Super-Sites in Forensic Science for more than you'd ever want to know:

- Carpenter's Forensic Science Resources
- Kruglick's List of Forensic Science links
- Zeno's Forensic Page

The average level of education among criminal justice workers is only 2.5 years of college according to LEMAS (Law Enforcement Management and Administrative Statistics) data from the Bureau of Justice Statistics (BJS), but that average is rising. If you are in a 4-year college program and get the urge or opportunity to quit school and work in the system, my advice is don't do it. Stay in school. Although you won't need a 4-year or graduate degree for most careers in CJ (unlike other fields like psychology or sociology where you'll almost need a Masters or Doctorate), the educational requirements are rising. Studies have found that college-educated workers have enhanced written and verbal skills, are better able to communicate effectively with the public (especially minority groups), are less likely to have disciplinary problems, generate fewer citizen complaints, and are more likely to be promoted than their less-educated peers. Supervisors often report their more educated employees to be more reliable, flexible, and exhibit more initiative in job performance. Citizens report that educated workers in CJ excel in the use of good judgment and problem solving.

Doctorates and doctoral programs in CJ are vastly needed. There's a real shortage of criminal justice professors. See the Graduate Education Mega-Site for links to all the grad schools and practical advice on going this far with your education. For Law Schools, visit Cornell University's list. Every year, there are about 300 criminal justice professor vacancies which go unfilled because no one has the credentials. Criminal justice is a growth area with some urgent need for good people.

INTERNET RESOURCES

About.com - Crime/Punishment
About.com - Current Events: Law
Societal Responses to President's Crime Commission--a 30-year retrospective
The Sherman Report (Preventing Crime: What Works)
Unit2

CRIME DATA

There are three types of lies. Lies, Damn lies, and Statistics (Mark Twain)

No way of measuring crime is perfect, and it is extremely difficult, if not impossible, to know exactly how much crime is going on in any jurisdiction at any time. First of all, crime is a label slapped on some behaviors and not on others. There are known inaccuracies in the labeling process. Secondly, much crime goes undetected. Thirdly, some crimes are not reported to police. Crimes that go undetected and unreported obviously cannot be counted. Finally, the police themselves may, for various reasons, not record something as a crime, or inaccurately report something as a crime when it is not. Criminologists refer to all crime that escapes counting for any of the above reasons as the dark figure of crime. Do we really know how much crime is out there? Is what we really know only the tip of the iceberg?

Here's an example of a typical police department's manipulation of crime reporting. In 2004, Atlanta's own police chief ordered an audit be carried out for crime reporting from previous years. The audit found that the city police department had underreported crime for many years in an attempt to boost the city's appeal to tourists and win the site selection process for the 1996 Olympics. The audit was carried out by the New York-based auditing firm Linder & Associates. It found that in many cases (22,000), crime reports were simply lost because the department was overworked, understaffed, and sloppy. However, in many other cases, crime incidents were deliberately downgraded, underreported, or discarded in order to make the city look good on paper. The result of all this deliberate activity was that the crime rate in Atlanta was reported as 7% lower than it should have been. The standard FBI crime report margin of error is 2%. It may also be noted that Atlanta has about 15 law enforcement agencies (university, hospital, public transportation police, etc.) which do not send their crime reports into either the Atlanta police or the FBI.

POLICY IMPLICATIONS

Accurate crime data serve important purposes. It is used by public agencies and officials in determining policies, budgets, legislation, funding priorities, and evaluation of existing programs. If the government was not in the business of trying to collect accurate crime data, it would have to rely upon mostly inaccurate and unrealistic public opinion polls. The agencies involved run all the way down from the White House Briefing Room to each state's Statistical Analysis Center. It may or may not also be apparent that crime data is often used to convince voters of the success or failure of crime control policies. Private,
nonprofit agencies also use crime data to justify their position on crime issues. The web has an abundance of victim-oriented sites in this regard.

Social science researchers also analyze crime data in comparison to other data, like sociologists interested in "social indicators." A sociologist, for example, might compare emergency hospital room admissions for drug related problems with the numbers for drug related arrests by police. A criminologist might stick to criminal justice statistics and look at rising rates of the incarcerated offender population and how they relate to crime rates overall.

MAIN SOURCES OF CRIME DATA

**NCJRS**, the National Criminal Justice Reference Service, maintains one of the largest repositories of web sites devoted to criminal justice statistics. NCJRS is probably the most extensive source of information on criminal justice in the world. It's a group of clearinghouses supporting all the bureaus of the U.S. Department of Justice, Office of Justice Programs, the National Institute of Justice (NIJ), the Office of Juvenile Justice and Delinquency Prevention (OJJDP), the Bureau of Justice Statistics (BJS), the Bureau of Justice Assistance (BJA), the Office of Victims of Crime (OVC), and the Office of National Drug Control Policy (ONDCP).

Academics and more serious researchers often make use the Sourcebook of Criminal Justice Statistics, which highlights and tracks some of the most important tables or indicators in the field. Students often report that the Sourcebook is an excellent place to download figures and graphics for term papers.

To go right to the source of crime data collection, however, one uses the FBI's **Uniform Crime Reports** (UCR) or BJS's **National Crime Victimization Survey (NCVS)**. It is customary for students to learn and remember various details about the UCR and NCVS as they are the oldest and most well-known methods of crime data gathering.

THE UNIFORM CRIME REPORTS

The UCR program was started in 1929 by order of the U.S. Attorney General, and the FBI is responsible for administering the program. Over 17,000 law enforcement agencies (city, country, state) report to the FBI monthly the number of crimes known to them in their respective jurisdictions. These crimes are reported as rates (which is the number of crimes per some unit of population, such as 1,000 people for a small jurisdiction, and 100,000 people for a large, or national jurisdiction). The idea since the beginning is that the UCR program would enable comparisons and serve as an indicator, estimate, or index of the nation's well-being or moral health, at least when it comes to crime. Eight (8) offenses -- murder, rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, and arson -- became the basis of this crime index, also known as Part I offenses.

UCR terminology includes things such as the hierarchy rule, which means that when multiple crimes are known to have been committed by an offender the same year, only the most serious crime is counted. The hierarchy rule is considered a limitation of the UCR. Another limitation is the limited amount of data on arrestees and victims (except in homicides), and the complete absence of any data on victim-offender relationships. Nonetheless, the UCR has been helpful in comparing the number of arrests with the number of crimes known to police. That comparison is the traditional measure of police effectiveness, and is known as the clearance rate. There are cases where the police know who did it, but cannot make an arrest for one reason or another (suspect fled the country, committed suicide, died, or was convicted in another jurisdiction), and these situations are called exceptional clearances. Below is a ranking of the (most frequently occurring) Index (and the less serious Part II) offenses, along with clearance rates for the year 2000:
### Frequency of Occurrence

<table>
<thead>
<tr>
<th>Offenses Known</th>
<th>Clearance Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Larceny-Theft</td>
<td>7 million</td>
</tr>
<tr>
<td>2. Burglary</td>
<td>2 million</td>
</tr>
<tr>
<td>3. Motor Vehicle Theft</td>
<td>1.2 million</td>
</tr>
<tr>
<td>4. Aggravated Assault</td>
<td>1 million</td>
</tr>
<tr>
<td>5. Robbery</td>
<td>500,000</td>
</tr>
<tr>
<td>6. Rape</td>
<td>100,000</td>
</tr>
<tr>
<td>7. Arson</td>
<td>80,000</td>
</tr>
<tr>
<td>8. Murder</td>
<td>16,000</td>
</tr>
</tbody>
</table>

#### Part II Offenses

<table>
<thead>
<tr>
<th>Offenses Known</th>
<th>Clearance Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Drugs</td>
<td>1.6 million</td>
</tr>
<tr>
<td>2. Driving under the Influence</td>
<td>1.5 million</td>
</tr>
<tr>
<td>3. Simple Assault</td>
<td>1.3 million</td>
</tr>
<tr>
<td>4. Liquor Law Violations</td>
<td>700,000</td>
</tr>
<tr>
<td>5. Disorderly Conduct</td>
<td>600,000</td>
</tr>
<tr>
<td>6. Public Drunkenness</td>
<td>600,000</td>
</tr>
<tr>
<td>7. Fraud</td>
<td>350,000</td>
</tr>
<tr>
<td>8. Vandalism</td>
<td>300,000</td>
</tr>
<tr>
<td>9. Curfew Violation/Loitering</td>
<td>150,000</td>
</tr>
<tr>
<td>10. Family Nonsupport</td>
<td>150,000</td>
</tr>
</tbody>
</table>

UCR data provide information on patterns and trends in various offense categories, as well as patterns in the overall crime trend. Murder, for example, is known to be more common in southern states (a fact that theorists of the "Southerness hypothesis" have been trying to explain). We also know murder is a crime committed by friends or acquaintances; few strangers are involved. July and August produce the highest number of murders. Rape is a crime where it is estimated only one out of four offenses are reported, so use of UCR data on rape might not be wise, but according to it, rape follows some of the same patterns as murder. Robbery occurs quite frequently, primarily in urban areas among the young, and 20% of the time, the victim is shot, and 3% of the time, the victim is raped. Aggravated assaults ("aggravated" because it involves a weapon or results in hospitalization) are fairly easy to solve, and you'll notice the clearance rate is almost as high as murder. Burglary, believe it or not, tends to happen more frequently during daytime than nighttime, according to UCR records. Larceny-theft (larceny being the taking of anything not belonging to you and theft being the dollar amount) is the most frequently reported crime, and motor vehicle parts or contents tend to be the most common item taken. Motor vehicle theft tends to be frequently reported but rarely cleared.

The overall crime trend may or may not be a useful figure for indexing moral health, but it does tend to show certain regularities that may be of other theoretical interest, or more practically, for purposes of agency budgeting, personnel deployment, and tourism planning. Crime overall (both violent and property, but mostly violent) tends to exhibit a strong seasonality factor. For example, summertime is definitely crime time, and the crime season usually starts on Memorial Day weekend. The regularity in the cycle goes like this -- crime rates bottom out during January and February; in March they start to increase, increasing regularly over April and May; with June being the month when the crime rate usually rises above the national average; and with August being the peak month. In September, the crime rate usually starts to decline. Nobody is really sure how to explain this regularity, and explanations can be found ranging from thermal stress to the effects of air pollution, although opportunity may be the only important variable.
NEW METHODS OF CRIME REPORTING

NIBRS stands for National Incident-Based Reporting System and is a new FBI method of collecting data that was introduced back during 1985 and slowly became implemented in the states. About 4,300 law enforcement agencies (city, county, state) contribute NIBRS data to the FBI every year. This new system eliminates the hierarchy rule and collects a significant amount of more information about the crime, such as victim-offender relationship, property details, and other details about the offender such as motivation. Known as IBR (Incident-Based Reporting), this strategy allows analysis of the incidence of crime (# of events) rather than simply calculating the prevalence of crime (# of people). Incidents are the number of cases known to police, and incidence is treated as relationship linkages. For example, if five offenders attack five victims, the UCR would only count five crimes, but NIBRS would look at the age, race, sex, and ethnicity (in NC) of each offender, plus a relationship linkage between each victim and offender, and the database might be able to come up with a count of as many as ten or twenty crimes based on relationship linkages between these elements. Clearance rates are still based on arrest, but NIBRS “Group A” offenses consist not only of arrests, but investigative reports and incident reports as well, which include attempts and suspected events. “Group B” offenses are based solely on arrest. This method is ideal for strategic and tactical crime analysis at the local and regional level, and the database is robust enough to allow creation of new categories, such as Crimes Against Society, or for the researcher to explore other interesting relationships among the variables, usually online via the NACJD website. The crimes that make up Group A and B offenses are quite interesting, and of modern concern, such as pornography, counterfeiting, prostitution, embezzlement, bad checks, weapons violations, and Peeping Tom activity. The following is a table of Group A and Group B offenses, and items marked with an asterisk generally do NOT have investigative or incident reports associated with them, although sometimes they do:

<table>
<thead>
<tr>
<th>NIBRS Group A Offenses</th>
<th>NIBRS Group B Offenses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder</td>
<td>Motor Vehicle Theft</td>
</tr>
<tr>
<td>Negligent Manslaughter</td>
<td>Counterfeiting/Forgery</td>
</tr>
<tr>
<td>Justifiable Homicide</td>
<td>False Pretenses/Swindle</td>
</tr>
<tr>
<td>Kidnapping</td>
<td>Credit Card/Teller Fraud</td>
</tr>
<tr>
<td>Forcible Rape</td>
<td>Impersonation</td>
</tr>
<tr>
<td>Forcible Sodomy</td>
<td>Welfare Fraud</td>
</tr>
<tr>
<td>Sexual Assault with Object</td>
<td>Wire Fraud</td>
</tr>
<tr>
<td>Forcible Fondling (Child)</td>
<td>Embezzlement</td>
</tr>
<tr>
<td>Robbery</td>
<td>Stolen Property Offenses</td>
</tr>
<tr>
<td>Aggravated Assault</td>
<td>Damage/Vandalism of Property</td>
</tr>
<tr>
<td>Simple Assault</td>
<td>Drug/Narcotic Violations*</td>
</tr>
<tr>
<td>Intimidation</td>
<td>Drug Equipment Violations*</td>
</tr>
<tr>
<td>Arson</td>
<td>Incest</td>
</tr>
<tr>
<td>Extortion/Blackmail</td>
<td>Statutory Rape</td>
</tr>
<tr>
<td>Burglary/B &amp; E</td>
<td>Pornography/Obscene Material*</td>
</tr>
<tr>
<td>Pocket-Picking</td>
<td>Betting/Wagering*</td>
</tr>
<tr>
<td>Purse-Snatching</td>
<td>Assisting Gambling*</td>
</tr>
<tr>
<td>Shoplifting</td>
<td>Gambling Equipment Violations*</td>
</tr>
<tr>
<td>Theft from Building</td>
<td>Sports Tampering*</td>
</tr>
<tr>
<td>Theft from Coin-Operated Machine or Device</td>
<td>Prostitution*</td>
</tr>
<tr>
<td>Theft from Motor Vehicle</td>
<td>Assisting Prostitution*</td>
</tr>
<tr>
<td>Theft of Motor Vehicle Parts</td>
<td>Bribery</td>
</tr>
<tr>
<td>All Other Thefts</td>
<td>Weapon Law Violations*</td>
</tr>
<tr>
<td></td>
<td>Runaway*</td>
</tr>
<tr>
<td></td>
<td>Trespass of Real Property*</td>
</tr>
<tr>
<td></td>
<td>All Other Offenses*</td>
</tr>
<tr>
<td></td>
<td>Parole and probation violations*</td>
</tr>
</tbody>
</table>
In 1990, Congress also passed two new laws, the Campus Crime and Security Act, which requires colleges to issue annual reports, and the Hate Crime Statistics Act, which requires police to document hate-related incidents. During the year 2000 on college campuses, there were 400 murders, 4,000 rapes, 13,000 robberies, 19,000 aggravated assaults, 31,000 motor vehicle thefts, and 70,000 burglaries. With regard to hate crime, police documented 8,150 incidents, including 19 murders, a few robberies and rapes, but the vast majority were assaults. The most common motive was racial hatred (60% of the time), religious bias (17% of the time), and based on sexual orientation (homophobia, 16% of the time). The remainder of cases had undeterminable motive.

THE NATIONAL CRIME VICTIMIZATION SURVEY

The NCVS began operation in 1972, and continues to surprise analysts and researchers with its results. Cities and towns that the UCR showed to have little crime turned out, via the NCVS, to actually have high rates of crime. As a general rule for most places, *NCVS data will most usually show twice as much crime as the UCR indicates.* NCVS interviewers consist of both Justice Department employees and U.S. Census Bureau employees who interview 50,000 households twice each year. Households are rotated randomly every three years. The BJS publishes the report, entitled *Criminal Victimization,* every year. The NCVS uses the hierarchy rule and records the same Part I offenses as the UCR, but it doesn't ask about offenses that might be too sensitive in an interview situation, like murder and arson. Not only does it not measure homicide, but it doesn't measure commercial crime (such as burglaries of stores), hence the name of NCVS reports are called *Households Touched by Crime.* It does a good job of focusing on precisely the amount of value attached to any property stolen. The NCVS collects information on crimes suffered by individuals and households, whether or not those crimes were reported to law enforcement. It estimates the proportion of each crime type reported to law enforcement, and it summarizes the reasons that victims give for reporting or not reporting. It provides information about victims (age, sex, race, ethnicity, marital status, income, and educational level), offenders (sex, race, approximate age, and victim-offender relationship), and the crimes (time and place of occurrence, use of weapons, nature of injury, and economic consequences). Questions also cover the experiences of victims with the criminal justice system, self-protective measures used by victims, and possible substance abuse by offenders. Supplements are added periodically to obtain detailed information on topics like school crime.

The patterns and trends from the NCVS indicate that 25% of all households are touched by crime every year. That's a total of 25 million victimizations, far greater than totals from the UCR. Below is a table indicating the most frequent crimes, according to NCVS data, 2000:

<table>
<thead>
<tr>
<th>Crime Type</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Larceny-Theft</td>
<td>14 million</td>
</tr>
<tr>
<td>2. Burglary</td>
<td>4 million</td>
</tr>
<tr>
<td>3. Aggravated Assault</td>
<td>2 million</td>
</tr>
<tr>
<td>4. Motor Vehicle Theft</td>
<td>1 million</td>
</tr>
<tr>
<td>5. Robbery</td>
<td>700,000</td>
</tr>
<tr>
<td>6. Rape</td>
<td>300,000</td>
</tr>
</tbody>
</table>

As indicated, the amount of crime indicated by the NCVS is significantly greater than that indicated by the UCR. The only exception to this is motor vehicle theft, which can probably be explained by insurance companies requiring a police report, which citizens dutifully do, even to discover later their vehicle was not missing. The NCVS relies upon random sampling of victims and their memories. Some respondents may also lie, cheat, or exaggerate (called *falsification*), but the main memory problems are *decay* (incident
happened recently, but person forgot it) and *telescoping* (incident happened long ago, but person remembers it like yesterday).

**SELF-REPORT CRIME SURVEYS**

A third method of collecting crime data is to make up your own questionnaire or survey. This is exactly what is done by most academic researchers and private foundations, and a few government agencies have been doing it since the 1970s. The Monitoring the Future project and National Youth Survey are the best known examples. A few private projects have been federally funded, and several researchers hope to devise the perfect measuring instrument. Much of the information used in recidivism studies is derived from self-report data. A self-report survey is typically administered to high school students, although sometimes college samples are involved. Other samples have involved incarcerated prisoners as well as attempts to find uncaught criminals. Regardless of the sample population, the purpose is to get respondents to read the questions and mark down how many times they have committed a serious offense and gotten away with it.

The results of most self-report studies are shocking. They typically indicate, that for any population (even a law-abiding one), about 90% of the people in the sample have committed a crime for which the punishment is more than a year in prison. This has led many people to question the accuracy of such surveys. The main problems are, of course, *validity* and *reliability*, but it may be just as true that people lie or exaggerate on these questionnaires (falsification). There are few self-report studies of white-collar crime, and it is easy for researcher bias and measurement error to creep in. Golub et. al (2002) probably provided one of the best summaries of the limitations of self report data when they found, compared to criminal records checks and urinalysis screens, things like marijuana use were most often accurately disclosed while involvement in violent crime was least often disclosed, but if prior conviction matched self-reported data on prior convictions, then there was reason to believe that the rest of the data was fairly reliable.

**OTHER TERMS IN THE STUDY OF CRIME DATA**

There are a number of terms one will encounter with analyses of crime data, and a variety of definitions abound. Here are some of the most common terms with their definitions. The *frequency* of crime, or frequencies, refer to the time span the researcher, usually a self-report researcher, is interested in. The most common time spans are "ever" and "last year", but there is also one called "last month", with last year taken as a measure of *seriousness* and last month interpreted as a measure of *persistence*. Hence, one talks about a frequent, serious, or persistent offender as one who scores high on those survey items. Most surveys are retrospective; that is, they ask the respondent to report crime they did in the past. There are also surveys which are *prospective*, which ask the respondent how much crime they think they'll commit in the future. Prospective surveys are interesting, especially when the researcher combines them with items measuring possible causes of crime.

Criminologists often distinguish between *prevalence* and *incidence*, which is the distinction between the number of people committing crime (known offenders) and the number of offenses committed by criminals (known offenses). These terms are also known as *participation* and *lambda*, respectively. Dividing the number of known offenses by known offenders and multiplying by a constant, such as 100,000 is a way of calculating crime rates (incidence divided by prevalence times 100,000). Lambda is the more important term for those interested in criminal career research, for those interested in identifying high-rate offenders whose criminality does not seem to decline with age. In most studies, lambda is usually calculated as between 3-8 offenses, which means that for every offender apprehended on the instant offense, there are an additional 3-8 other crimes they are responsible for in the past year. Deterrence can be measured by setting the arrest rate equal to the product of lambda and the probability of apprehension (which generally runs at 1:1000 for most offenses). Incapacitation can be measured by estimating career length.
Career criminal research involves some other terms one might encounter. The notion of *chronicity* (as in chronic offender) is commonly seen in the context of 7-70 theory (Wolfgang et al. 1972) like "seven percent of offenders commit 70% of the crime", which is well-established in the literature. The notion of *velocity* (as in the velocity of crime) refers to calculating the average amount of street time to the next offense. Hence, a chronic offender, in and out of jail quite often, who averages 7-8 days between offenses, is less of a high-velocity offender than one who averages 2-3 days between offenses.

Chronic, high-velocity offenders out on the street are probably a rarity, however. Most research of this type is done on incarcerated offenders, which most likely produces overestimates. On the street, the study of what keeps people from a life of crime, or turns them away from it is called the *desistance* field of research. Theoretically, such variables as vulnerability and insulation (also called buffering) are important, which refer to conditions or states that turn good people bad or bad people good. However, researchers have been more interested in the deterrent effect of imprisonment, which has been estimated as having no more than a 10-20% deterrent effect per year (Shinnar & Shinnar 1975). The fact of the matter is that more people age out of crime than for any other method of desistence (Gottfredson & Hirschi 1990), and the so-called *age-curve constant* is remarkably stable, even for high-rate, persistent offenders. In fact, as Golub's (1990) research shows, imprisonment may actually disrupt the normal pattern of desistence.

**INTERNET RESOURCES**
- Bureau of Justice Statistics Home Page
- Campus Crime and Security Website
- Crime Data MegaSite
- Crime Statistics Guide
- FBI Uniform Crime Reports
- Forecasting of Crime Seasonality (pdf)
- National Archive of Criminal Justice Data
- Sourcebook of Criminal Justice Statistics
- When Incarceration Increases Crime

**PRINTED RESOURCES**

Unit3

**CRIME THEORIES AND THE FIELD OF CRIMINOLOGY**

*The function of theory is to provide puzzles for research* (Lewis Coser)

To understand criminal justice, it is necessary to understand crime. Most policy-making in criminal justice is based on criminological theory, whether the people making those policies know it or not. In fact, most of the failed policies (what doesn't work) in criminal justice are due to misinterpretation, partial implementation, or ignorance of criminological theory. Much time and money could be saved if only policymakers had a thorough understanding of criminological theory. At one time, criminological theory was rather pure and abstract, with few practical implications, but that is not the case anymore. For example, almost all criminologists today use a legalistic rather than *normative* definition of crime. A legalistic definition of crime takes as its starting point the statutory definitions contained in the penal code, legal statutes or ordinances. A crime is a crime because the law says so. Sure, there are concerns about overcriminalization (too many laws) and undercriminalization (not enough laws), but at least on the surface, a legalistic approach seems practical. It is also advantageous to a normative definition, which sees crime as a violation of norms (social standards of how humans ought to think and behave), although there are times when criminology can shed light on norms and norm violators.

Every criminological theory contains a set of assumptions (about human nature, social structure, and the principles of causation, to name a few), a description of the phenomena to be explained (facts a theory must fit), and an explanation, or prediction, of that phenomenon. The assumptions are also called meta-theoretical issues, and deal with debates like those over free will v. determinism or consensus v. conflict. The description is a statistical profile, figure, diagram, or table of numbers representing the patterns, trends, and correlates of the type of crime taken as an exemplar (most appropriate example) of all crime. The explanation is a set of variables (things that can be tweaked or changed) arranged in some kind of causal order so that they have statistical and meaningful significance. Criminological theories are primarily concerned with etiology (the study of causes or reasons for crime), but occasionally have important things to say about actors in the criminal justice system, such as police, attorneys, correctional personnel, and victims.

There are basically thirteen (13) identifiable types of criminological theory, only three (3) of which are considered "mainstream" or conventional criminology (strain, learning, control). The oldest theory (biochemistry) goes back to 1876 and the last four theories (left realism, peacemaking, feminist, postmodern) have only developed in the past twenty-five years. The following table illustrates, with more information about each theory below the table:

<table>
<thead>
<tr>
<th>Theory</th>
<th>Causes</th>
<th>Policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Biochemistry</td>
<td>heredity, vitamin deficiency, allergy, tumor, toxins, brain dysfunction, hormonal imbalance</td>
<td>isolation, treatment</td>
</tr>
<tr>
<td>2. Psychology</td>
<td>low intelligence, psychopathy, stress</td>
<td>treatment, counseling</td>
</tr>
</tbody>
</table>
3. Ecology  disorganized neighborhoods  community empowerment
4. Strain  economic goal blockage  increased opportunities
5. Learning  imitation, reinforcement schedules  more effective negative reinforcement, more use of positive reinforcement
6. Control  socialization, low self-control  child-rearing, social bonds
7. Labeling  shunning, identity immersion  nonintervention, reintegration
8. Conflict  power differentials, competition  increased equality
9. Radical  class struggle, capitalism  praxis, socialism
10. Left Realism  predatory relationships  more effective police protection
11. Peacemaking  inner suffering and turmoil  spiritual rejuvenation
12. Feminist  gender inequity, patriarchy  end sex discrimination
13. Postmodern  hierarchical privileges and language  more informal social control

1. Biochemistry is known by many names: biological, constitutional (having to do with the structure of the body's morphology), genetic, and anthropological criminology. The oldest field is criminal anthropology, founded by the father of modern criminology, Cesare Lombroso, in 1876. He was one of the first exponents of the positivist approach to explaining crime, positivism meaning a search for the causes of crime using scientific method, as opposed to the classical approach, which relies upon free will as the main cause of crime. Historically, theories of the biochemistry type have tried to establish the biological inferiority of criminals, but modern biocriminology simply says that heredity and body organ dysfunctions produce a predisposition toward crime.

2. Psychological criminology has been around since 1914, and attempts to explain the consistent finding that there is an eight-point IQ difference between criminals and noncriminals. That gap isn't enough to notice, but it might make them more impulsive and foolhardy, and even smart people with high IQs are vulnerable to folly. Other psychocriminologists focus on personality disorders, like the psychopaths, sociopaths, and antisocial personalities.

3. Ecological criminology was the first sociological criminology, developed during the 1920s at the Department of Sociology at the University of Chicago. Hence, it is also called Chicago School sociology. Ecology is the study of relationships between an organism and its environment, and this type of theory explains crime by the disorganized eco-areas where people live rather than by the kind of people who live there.

4. Strain, sometimes called by the French word anomie, is a 1938 American version of French sociology, invented by the father of modern sociology, Emile Durkheim (1858-1917). This type of theory sees crime as the normal result of an "American dream" in which people set their aspirations (for wealth, education, occupation, any status symbol) too high, and inevitably discover strain, or goal blockages, along the way. The only two things to do are reduce aspirations or increase opportunities.

5. Learning theories tend to follow the lead of Edwin Sutherland's theory of differential association, developed in 1947, although ideas about imitation or modeling go back to 1890. Often oversimplified as "peer group" theories, learning is much more than that, and involves the analysis of what is positively and negatively rewarding (reinforcing) for individuals.

6. Control theories in criminology are all about social control. Only those called containment or low-self control theories have to do with individual psychology. Control theory has pretty much dominated the criminological landscape since 1969. It focuses upon a person's relationships to their agents of
socialization, such as parents, teachers, preachers, coaches, scout leaders, or police officers. It studies how effective bonding with such authority figures translates into bonding with society, hence keeping people out of trouble with the law.

7. Labeling theory was a child of the 1960s and 1970s which saw criminals as underdogs who initially did something out of the ordinary, and then got swept up in a huge, government-sponsored labeling or shunning reaction. It argues that anyone facing such an overwhelming, negative labeling social reaction will eventually become more like the label because that is the only way out for their identify formation. It points out that sometimes its best to do nothing (for minor offending), and that there are few reintegrative rituals designed to help people fit back into their communities.

8. Conflict theory holds that society is based on conflict between competing interest groups; for example, rich against poor, management against labor, whites against minorities, men against women, adults against children, etc. These kind of dog-eat-dog theories also have their origins in the 1960s and 1970s, and are characterized by the study of power and powerlessness.

9. Radical theories, also from the 1960s and 1970s, typically involve Marxist (referring to Karl Marx 1818-1883) critiques of capitalist society which allows things to exist like millions of billionaires and millionaires while the vast majority of people live in poverty or just get by. Such fundamental economic disparities reflect basic contradictions in the way work is organized into demoralizing, brutalizing, and oppressive conditions. Crime is seen as a reflection of class struggle, a kind of primitive rebellion with criminals behaving as rebels without a clue. Only through praxis (informed action based on theoretical understanding) will the new socialist society be formed and crime will go away.

10. Left realism is a mid-1980s British development that focuses upon the reasons why people of the working class prey upon one another, that is, victimize other poor people of their own race and kind. It wants the police to have more power in protecting poor people, but on the other hand, doesn't want the police to be invasive or intrusive.

11. Peacemaking criminology came about during the 1990s as the study of how "wars" on crime only make matters worse. It suggests that the solution to crime is to create more caring, mutually dependent communities and strive for inner rebirth or spiritual rejuvenation (inner peace).

12. Feminist criminology matured in the 1990s, although feminist ideas have been around for decades. The central concept is patriarchy, or male domination, as the main cause of crime. Feminists also tend to call for more attention to female points of view.

13. Postmodern criminology matured in the 1990s, although postmodernism itself (as a rejection of scientific rationality to the pursuit of knowledge) was born in the late 1960s. It tends to focus upon how stereotypical words, thoughts, and conceptions limit our understanding, and how crime develops from feelings of being disconnected and dehumanized. It advocates replacing our current legal system with informal social controls such as group and neighborhood tribunals.

CRIMINOLOGY AS A FIELD OF STUDY

What is criminology? In a classic definition, the father of American criminology, Edwin Sutherland (Sutherland & Cressey, 1960, Principles of Criminology, 6th ed., Philadelphia: Lippencott, p. 3) said:

*Criminology includes the scientific study of making laws, breaking laws, and reacting toward the breaking of laws.*

Note that the three (3) areas in Sutherland's definition (making, breaking, and reacting) form the foundation of specialty areas in criminology. Those who specialize in the study of making laws are
criminologists with a legal bent (many have law degrees), and they refer to their area of study as the criminology of criminal law, or in the case of criminologists with sociology degrees, the sociology of law. An example would be the conflict criminologist, William Chambliss, who in 1964 wrote a famous treatise on the law of vagrancy to argue for a ruling class domination theory of crime. Theories in this specialty area are sometimes called theories of criminalization, not theories of crime. They involve the study of why some acts, but not others, come to the attention of authorities, and why some acts, but not others, come to be formally penalized by the state as crimes.

The second area of specialization (breaking laws) is what most people think of when they think of criminology, and it is generally referred to as the area of criminogenesis, etiology (the study of causes), or crime causation. This area is the most interdisciplinary one in criminology, and pretty much, anyone with an interest in studying the criminal mind is welcome, regardless of whether their degree is in anthropology, economics, political science, psychology, or sociology (although sociology dominated criminology for most of the twentieth century). It is important to note that this specialty area is NOT concerned with fighting crime or catching criminals more effectively. It is concerned with scientific theory and method for uncovering truth. Any insights gained from studying the criminal mind are supposed to be useful in understanding human nature and the society we live in. There is some disagreement about this, however, with so-called clinical, applied, and praxis (theory in action) criminology, as well as the field of criminal justice, advocating better management, investigation, social change, and systems, respectively.

The third area (reacting to lawbreaking) is the most sociological of the three, and specialists here tend to refer to themselves as societal reaction theorists, social response theorists, normative theorists, relativity of crime researchers, or less commonly as criminologists of criminal justice. The authors of your textbook for this course represent this specialty area. Societal reaction theorists study things like media glamorization of crime or the moral boundaries by which communities tolerate or do not tolerate crime in their midst. Social response theorists are interested in the justifications and consequences of different styles of reacting to crime (e.g., lock-em-up strategies versus mediation). Normative theorists are interested in the determinants of norms (expectations for behavior), since norm violations are often the root source of both deviance and crime. Relativity of crime specialists are interested in whether there is a consensus of public opinion about the seriousness of various criminal acts. Criminologists of criminal justice are often indistinguishable from criminal justice specialists (criminal justice being a separate, but related discipline) in that they study things like society's carrying capacity (rates of imprisonment and how many prisoners prisons can hold) or police strength (as an indicator of repressive social control). The three parts of Sutherland's definition are sometimes abbreviated as the study of lawmaking, lawbreaking, and reactions.

THE IMPORTANCE OF THEORY

Regardless of specialty area, all criminologists strive toward good theory. What is theory? As any dictionary definition makes clear, a theory is any system of ideas arranged in rational order that produce general principles which increase our understanding and explanations. The general principles in a theory are derived from, and representative, of particular facts, but those principles are not dependant upon the particular thing to be explained (Kaplan 1964). This means that theories have a life of their own in the ever-increasing generalities they provide. Theories are like children. Someone gives birth to them, and they go out into the world and no longer belong to anyone. Some of them become ideologies (get used for political purposes) and others become endless puzzles that scientists work on for centuries.

Ideally, theory should: (1) focus attention on a particular phenomenon; (2) fit the known facts about a particular phenomenon; (3) contribute to scientific paradigms; (4) provide a way it can be tested or falsified; (5) establish boundaries and domains by which laws and truth statements can be generalized; and (6) enable propositions which can be added or compared to those of other theories. In addition, theories should shed light on some of the more fundamental issues in metaphysics -- the problem of action, and the problem of order. Briefly, the fundamental problem of action has to do with motivation, whether behavior is motivated selfishly and rationally or whether it is motivated emotionally, unconsciously, or in non-rational fashion. The term "action" is used to distinguish behavior motivated by some purpose, or instrumentally, in other words. The fundamental problem of order is the basic quest of sociology when
sociologists ask "How is society possible", and involves how collective systems, structures, and patterns are linked, if at all, to individual choices, decisions, and freedom. Criminology has an extensive set of fundamental issues it is concerned with, as follows:

<table>
<thead>
<tr>
<th>Comparison</th>
<th>Issue</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rational v. Irrational</td>
<td>The problem of action, the metaphysics of motivation</td>
</tr>
<tr>
<td>Macro v. Micro</td>
<td>The problem of order, the metaphysics of societal possibility</td>
</tr>
<tr>
<td>Structure v. Process</td>
<td>Time or temporality; whether behavior is best explained by a snapshot observation or over a length of time</td>
</tr>
<tr>
<td>Consensus v. Conflict</td>
<td>Conceptions of society; whether people agree or disagree on the seriousness of crime and/or the building blocks of society</td>
</tr>
<tr>
<td>Free will v. Determinism</td>
<td>Also known as the Classical v. Positivist debate (see below)</td>
</tr>
<tr>
<td>Optimism v. Pessimism</td>
<td>Concerns about whether crime control can be effective or not</td>
</tr>
</tbody>
</table>

Every theory has at least 2-3 meta-theoretical levels above it. The fundamental issues are usually addressed at the APPROACH level, and are often called the assumptions, or starting points, of a theory, although the term "assumptions" more strictly refers to the background or domain boundaries one can draw generalizations about. Above the approach level is the PERSPECTIVE level, the largest unit of agreement within a scientific community, and in fact, the names for the scientific disciplines. Perspectives are sometimes called paradigms or viewpoints, although some people use the term paradigm to refer to untestable ideologies such as: (1) rational choice; (2) pathogenesis; (3) labeling; (4) critique for the sake of critique; and (5) theoretical integration.

Theory is the foundation of criminology and of criminal justice, and we study theory to know why we are doing what we do (Bohm 1985). Theory without research is not science. All research must be based on theory. People who are uninterested in theory choose to move blindly through life, or in the case of criminal justice, intervene in people's lives with only vague notions about why they are doing what they are doing.

The most important task of theory is explanation, which is also called prediction. An explanation is a sensible way of relating the facts about some particular phenomenon to the intellectual atmosphere of a people at a particular time or place. Any group of like-minded, receptive people at a particular time and place is called a school of thought. Explanations are always tied to context (inter-subjective reliability) and concepts (the intellectual words and phrases in use at any given time). What makes a person a "theorist" is their creative ability at wordsmithing, the ability to describe something that everyone knows is there, but no one has come along before to say it exactly like that. The theorist's creativity is based on what are called constructs (images, ideas, or new words in the theorist's head), and the art of theory construction is the translation of constructs into concepts. The notion that concepts always deal with something observable or something that can be experimented upon is called empiricism.

THE IMPORTANCE OF CAUSATION

Criminology has no monopoly on explanation. Everyone makes explanations all the time. There are popular ones, spiritual ones, natural ones, unscientific ones. What makes a theory scientific is that it focuses on causal relationships between variables. What is a cause? Causes are sequential changes in the properties of one thing brought about by sequential, determinant changes in the properties of another thing. Causes are distinguished from primitive terms like factors. Causes get down into the qualities or properties of particulars. We call these properties variables, and they represent not the totality of an object, but various aspects or subsets of an object we suspect are involved in its efficient operation. In other words, we find causes where we find things that move about, which may only be present in varying degrees.
A variable is some subset of a phenomenon that you can have more or less of, as opposed to a constant, which you either have or don't have. That's why they're called variables, because they vary. There are no such things as theories about constants. Everything in science is about variables. The cause of something is called the independent variable (you have more or less of what makes you want to commit crime), and the effect of something is called the dependent variable (you engage in crime on a more or less regular basis). This IV-DV relationship is important for two reasons: (1) concomitant variation is the basis for almost all the statistical methods in mathematics; and (2) by focusing upon a relationship of some kind, theories are inherently predictive. That makes prediction of something an important part of criminology, however:

- Classical criminology -- this free will approach is more concerned with explanation than with prediction. That's because the independent variable (motivation to commit crime) is taken for granted or treated as a constant (everyone is equally possessed of free will). Classical criminologists therefore use variables like changes in the law and how that affects crime rates. That's why they are often criminalization or deterrence theorists.
- Positivist criminology -- this deterministic approach is more concerned with prediction than with explanation. It takes the motivation as problematic (each person is exposed to a different set of forces that might make them want to commit a crime) and then relates that to variable outcomes (either generalized or specialized criminal behavior). That's why positivists are often theorists interested in etiology (the causes of crime).

Finally, theories can be verified, falsified, or integrated. Verification is the process of testing theories, bit by bit, piece by piece. It's the incremental process of science, moving slowly, going over each and every word the theorist had to say and constructing an hypothesis about it, designing an experiment to test it, carrying out research on it, and reporting the statistical results. It's the most common procedure for handling theories in criminology, and involves two additional approaches: specification and elaboration. Specification is any effort to figure out the details of a theory (especially its dependent variable side, or the effect), how the variables work together; usually associated with a belief that many, competing theories are better than integrated efforts. Elaboration is any effort to figure out the implications of a theory, what other variables might be added to the theory (especially on the independent variable side, or the cause); often associated with the belief that theory competition is better than theoretical integration. Falsification is when the researcher does some of their own thinking, and devises a negative test case or some hypothetical situation which would test exactly what the opposite of what the theory is saying. It is intended to disprove or prove the theory, or at least some bit of it. It's not done much in criminology; first of all, because theorists rarely provide any leads for constructing falsification statements; and second of all, because the theorist can always say it wasn't a fair test, or that wasn't what they meant. Integration doesn't often involve any research at all, although it can with causal modeling and other advanced statistical techniques. Instead, it's usually when the researcher (or another theorist) combines the similarities or differences between two different theories to construct a bigger theory.

WHY IT IS SO HARD TO DEFINE CRIME?

This is a surprisingly difficult question to answer. What constitutes crime varies from culture to culture, and from time to time. Criminals have been various things to different people throughout time -- heroes, villains, fools, revolutionaries, deviants, scumbags. Criminologists try to be scientifically objective and open-minded, however, rather than succumb to popular definitions. It's an important part of what makes criminology a science (other than its research and research methods). Some people regard the definitional problem as the most important task in criminology. Here's a list of some of the most common definitional approaches:

- Legalistic -- In this view, crime is defined as behavior that violates the criminal code. Although this isn't suitable for criminologists of the criminal law (who take law as problematic), it's by far the most common approach in criminology, and it makes the field inherently conservative. It's associated with the arguments made in 1947 by Paul Tappan ("Who is the Criminal?" American Sociological Review 12,1, 96-102) who was responding to a challenge thrown down by the famous
philosopher Mortimer Adler. The legalistic approach in criminology believes in the same principles of criminal law (culpability or criminal intent, mala in se versus mala prohibita, and responsibility or justifications and excuses).

- **Conduct norms** -- In this view, popularized by a 1938 book written by Thorstein Sellin (pronounced "cell-eene") (*Culture Conflict and Crime*, NY: Social Science Research Council), crime is just one form of conduct norm violations. Every group one belongs to, regardless of political boundaries, regardless of embodiment in law, has conduct norms. Norms are the unspoken rules of right (normal) and wrong (abnormal) that are contained in custom, tradition, ethics, religion, family, and other social institutions. The importance of the Sellin definition is that it frees criminologists as scientists to define their own subject matter.

- **Social harm** -- This view is most closely associated with Sutherland's interests in white collar crime (*White Collar Crime*, New Haven, Yale Univ. Press) although there are other influences. To Sutherland (and to most criminologists), it is clearly unfair that white collar criminals get off with civil fines rather than criminal punishments. Corporations that pollute the environment have to pay a million dollar penalty (nothing more than a slap on the wrist to them) while someone who shares a marijuana cigarette with a friend gets 6 years in prison for trafficking (quite a lengthy restriction of liberty). Criminologists adhering to this sense of unfairness tend to believe that crime is any socially harmful act or analogous social injury, whether legally permissible or not. In this view, crime includes untimely death, illness or disease, deprivation of food, shelter, clothing, medical care, racism, sexism, and tobacco, etc.

- **Human rights violation** -- This view is most closely associated with the arguments made by Herman and Julia Schwendinger (1975, "Defenders of Order or Guardians of Human Rights" in *Critical Criminology*, ed. by Ian Taylor, Paul Walton & Jock Young, pp. 113-46, London, Routledge & Kegan Paul) although there are other influences. For the Schwendingers, not only anything that causes social injury (imperialism, sexism, racism, poverty) is crime, but also anything that thwarts the right to a dignified human existence (freedom of movement, free speech, a good education, employment, the right to unionize, life, liberty, happiness, and so on). The concept of human rights has the advantage of cutting across cultures and over time.

- **Deviance and Social Control** -- The view that crime is deviance, or norm-violating behavior is associated most with sociological criminology. The norms can originated from any source; religion, political belief, etiquette, fashion, or criminal law. In fact, deviance occurs whenever there is stigmatization, isolation, rejection, segregation, punishment, treatment, or rehabilitation. Social control can be coercive (forceful), normative (attitudinal), or an exchange solution (sets of rewards and incentives). Not all deviant acts are criminal (and vice versa). Deviance is in the eye of the beholder. Law is but one form of social control, a coercive, governmental solution. The term "criminalization" refers to the process whereby criminal law is selectively applied to certain behaviors, and many criminalization specialists adhere to a deviance and social control viewpoint, asking the question if criminalization is a neutral process or if it serves the interests of the powerful. Other forms of social control are sometimes studied, like dispute resolution, mediation, therapeutic, counseling, rehabilitation, reconciliation, restitution (self-help, avoidance, negotiation, settlement, and toleration). Deviance and social control specialists tend to focus on distinguishing kinds of acts (contextual explanations) from kinds of people (compositional explanations). Those who adhere to a compositional explanation used to be called social pathologists, and study the three D's (delinquent, defective, and dangerous classes), but they are a dying breed.

- **Social problem** -- As almost any college student who has taken a social problems class knows, crime is but one of many enduring conditions that seems to have always been there and show no signs of going away (like homosexuality, teenage pregnancy, poverty, or aging). The social problems approach tries to avoid "reductionism", or explaining crime by virtue of any one explanation, biological, psychological, or even sociological. It tends to look at the social meanings, or collective definitions, of crime. It therefore closely studies things like media polls or public opinion. Media portrayals, images of crime, and the measurement of crime are serious concerns to social problems specialists, although they wouldn't call themselves specialists because they are anti-specialists, among other things, in adhering to the principles outlined in a little book called *The Sociological Imagination* by C. Wright Mills (1959, NY: Oxford Univ. Press). In that book, some of the most important principles are: never infer value from fact; remember that a social problem, or issue, is trans-jurisdictional, not a local trouble; imagine micro-macro links; and
keep a playfulness of mind (pure reason limits freedom) in shifting from levels of abstraction (no grand theory and no abstracted empiricism either).

- **Sin or evil** -- I hesitate to add this point of view. Few scholars do, but there are some similarities between theology and criminology worth noting. One of these is theodicy (the study of suffering) which has many similarities to a social harm approach. Another is the similarity between criminal intent (mens rea, or guilty mind) and evil mind. Although the Gluecks (a famous husband and wife research team of criminologists at Harvard during 1930-1950), among others, pretty much pointed out the futility of the evil causes evil fallacy, the fact remains that the law imputes a certain amount of blameworthiness that resembles the imputation of evil. There are other similarities we need not go into. It's not really an important area of study in criminology.

- **Chaos** -- I also hesitate to add this, because I basically don't feel all that literate in postmodern, chaos theory approaches, to defining crime. To the best of my understanding, there are things called oscillators and attractors, the former referring to what a time-series analysis of crime rates would look like if plotted on a three-dimensional graph, the latter referring to laws or social control mechanisms that produce nonlinear effects indicating more or less steady states of chaos (randomness).

### DIFFERENCES BETWEEN CRIMINOLOGY AND CRIMINAL JUSTICE

Criminology is an older, larger field of study than criminal justice. Criminology adheres to the natural science model, trying to be like Biology, Chemistry, or Physics. Criminal justice adheres to the social science model, and is more receptive to disciplines like business, the arts, and humanities. Criminology borrows heavily from philosophy, psychology and sociology. Criminal justice borrows heavily from administrative public policy and lay sciences (like police science or investigative science). Criminology has many theories, some of which conflict with one another. Criminal justice has very few theories.

Many criminologists are hard-core, Vienna-school (measurable concepts only), logical positivists (Williams 1984). The most hard-core "numbers crunchers", or quantitative criminologists, dominate the top journals. Even qualitative researchers are starting to use computers with software programs like NUDist and so forth. Criminologists conduct research incrementally, by data mining, and by working on puzzles that have been in existence for decades. Criminal justice research operates by serendipity, and by going on "fishing expeditions" for topics to study.

Academic criminology is essentially a discursive discipline based on talk between its practitioners. Academic criminal justice is essentially ideological factionalization. Both fields suffer from the Wozzle Effect (where unique terms lose their unique meaning) and Obliteration By Incorporation (where unique contributors are lost), aka the Matthew Effect. Criminal justice is ascending vis-à-vis criminology because of its system focus and financial support. Theories in criminology may devolve into "theories of the system" that emphasize pragmatic efficiency, reification of social control, and political falsifiability. Now, more than ever, we need to increase our criminological IQ.

### INTERNET RESOURCES

- [A TimeLine of Criminological Theory](#)
- [Canadian Comprehensive Criminology](#)
- [CrimeTheory.com](#)
- [Criminology Mega-Site](#)
- [Philosophical Issues and Criminological Theory](#)
- [Prof. Hamlin’s Notes on Deviance Theory](#)
- [Prof. Keel’s Theories of Deviance](#)

### PRINTED RESOURCES


This lecture on criminal law is intended to be the most basic, rudimentary overview of the subject, in
plain and simple language. First off, we will define the legal requirement of what a crime is, then present a
table classifying the major crimes, and then try to explain the origins of criminal law. It may be important
at the outset to give some preliminary advice before engaging in the study of law -- you have to "love" it.
Unless you have a "love" of law, or in contrast, approach it from some biased, jaundiced point of view, you
will not get very far in your study of it. Some people are attracted to the mystery of it, others to the logic of
it, but whatever it is that attracts you to it, you had better make sure your motives are good, and you had
better enjoy following every last line of thought down to its last repercussion.

First, we will attempt to do three things. One, an attempt will be made at a clear exposition of the
defined function of law. Secondly, the problems and prospects for a society that uses (and overuses) law
are discussed as the consequences of living in over-litigious times, put in comparative perspective. Thirdly,
the judicial boundaries of a profession comprised of lawyers and judges are subjected to overview.
Overall, the purpose is to acquaint readers with an initial understanding of "judicial process" -- those
structures and action which constitute the conjunction of principles, purpose, and practice for a court, or

Unit 4

LAWS ON CRIME
Laws were made to be broken (John Wilson)
judiciary, system. To begin with, a useful definition of law comes from Stephen Ford’s (1974) book, *The American Legal System*, which says that “law is a social norm the infraction of which is sanctioned in threat or in fact by the application of physical force by a party possessing the socially recognized privilege of so acting.” This definition emphasizes three things which in combination distinguish law from other forms of social control like etiquette, customs, and folkways – (1) force, (2) socially recognized privilege, and (3) “so acting” or regularity in execution and purpose. Let’s examine each of these components in detail.

**Force** – although it might be possible to imagine a system of laws where everybody lived in perfect peace and harmony (utopia), a system without laws and/or no rules or regulations (anarchism), and likewise, a system where religious scruples kept everybody in line (theocracy), no such systems would be a system of law. Law is probably best considered a necessary institution in the most functional (capitalist) of all societies, and it’s supposed to be the worst that such a society can throw at you. If the legal system is a game, it’s a game of bringing out the “big guns” like punishment for wrongdoing. In an imperfect world where evil-doers are bound to exist, the possibility of physical and/or psychological punishment must exist, ostensibly to deter potential lawbreakers. Law is an integral part of criminal justice (as in cops, courts, and corrections), and in this context, the sociologist of policing, Egon Bittner (1970), once remarked that the role of force in society is a response to “something ought not to be happening, and something ought to be done about it right now.” If people are to live together amicably, and conflicts are to be resolved peacefully, then the force of law must be an essential part of everyday life. Another way of saying this is that law always compels, coerces, orders, demands, or rules. It never asks nicely. It makes a terrible tool for gently nudging people toward conformity because of this "or else" quality.

**Socially recognized privilege** – this refers to legality or legitimacy, depending upon your point of view toward authority, or the idea of belief in the legitimacy of the actions of a dominant individual or group. Alternatively, one might want to follow a Hohfeldian schema (Hohfeld 1919) of rights and duties, where if A has a right against B, B must have a duty to honor A's right, but if B has no duty, that means that B can do whatever he or she pleases because B has no duty to refrain from doing it, and A has no right to prohibit B from doing so. These kind of complex interrelationships must be regulated, and individuals, often as well, need guidance toward what to avoid as well as what to grasp or accomplish. Now, fascists and revolutionaries of all stripes understand the fact that he who holds the power usually gets to be recognized as a valid legal authority, but the fact of the matter is that illegitimate systems held together by unnecessary force usually have to rely on propaganda, involuntary cooperation, and a lot of unsavory other practices. When respect for the law is voluntarily taught at every mother’s knee, freely and without compulsion, that’s when the component of law as a socially recognized privilege exists, and to some extent, this further characterizes the idea of rule of law.

**Regularity** – this is the same as rationality. The famous sociologist of law, Max Weber (1914), once analyzed that as a corps of professionalized administrators of justice emerged who have received their legal training formally and systematically, there is also likely to develop a socio-political system which becomes rationalized in similar ways, and associated with this will be constitutions, written documents, established offices, regularized modes of representation, and regularized procedures, as opposed to other forms of governance such as monarchy and dictatorships where there are no well developed sets of rules and procedures. Law is therefore tied up with socioeconomic change. At its most basic, law is all about uniformity, consistency, and predictability. In a way, it’s kind of like the meaning of a “law” in science; i.e., the production of known from unknown, or the explanation of observables from unobservables. Social progress, in fact, can be defined as the achievement of making good laws for future generations, for the common good.

**THE POSITIVE FUNCTIONS OF LAW**

In similarity to the concept of "procedure," law is like the concept of balance. Always being balanced is whether a society has too much or too little of something (aka the concept of regulation). Too much law and you have totalitarianism; too little and you have anarchy. The trick is to strike a balance ensuring that the good things law can do are not strangled by the bad things law can do, the latter usually being the result
of having too many laws (overcriminalization) or bad laws (a normative approach to the study of law). Too often, a liberal arts education will overemphasize critical thinking and emphasize the bad things at the expense of the good. So, what are the good things that law can do? They are as follows:

**Providing Order and Predictability** -- a totally safe and predictable world cannot be guaranteed, but a climate can be created which makes it worthwhile for people to be productive and live rich, fulfilling lives, focused on their hopes and dreams for tomorrow, as opposed to a "live for today" attitude. Law is supposed to enrich everyday life in society. It's supposed to produce a reaction in people where they say "the law will take care of that" so they can go on about their business.

**Resolving Disputes** -- both individuals and organizations are going to have disagreements, and unless we are willing to tolerate vigilantism, then the much preferred system is one in which people turn over their disputes to the proper authorities for official handling. Disputes are then "settled" according to one or more standards of proof, which in most justice systems consist of the following categories subject to various theoretical and applied interpretations.

**Protecting Individuals and Property** -- most laws deal with protection of self and property, and exist to punish those who harm, steal, destroy, or cheat. In addition, a civil law exists which allows victims to sue for damages. The function of law here is pretty clear-cut -- to keep people from being in fear and constant anxiety about the potential loss of life and property. Property is a central concept in law (see [Wikipedia Entry on Ownership Rights](https://en.wikipedia.org/wiki/Ownership)) and a term subject to philosophical debate, but the point is that property rights are the best known way of protecting the "little guy" from "big guys."

**Providing for the General Welfare** -- law has a synergistic effect and also enables the biggest bang for the smallest buck. It allows numerous groups in society to at least vent and/or accomplish things that individuals could not accomplish alone. Written constitutions usually contain guarantees of this; e.g., providing for the common defense, secure the blessings of liberty, etc. This function also usually entails the government stepping in to coordinate or create some public service which is handled badly by individuals or the private sector. The concept of general welfare is similar to the concept of "commonwealth" which is the idea that all interests in society are to be protected, not just a narrow class of interests or some segment of the population.

**Protecting Individual Liberties** -- stated as well as implied (civil) rights exist under a rule of law, and often the weaker, more implied rights are in need of the most protection, sometimes from the government itself. It is an unique feature of sophisticated legal systems of law that the law-givers and law-enforcers are also subject to the same laws that ordinary citizens are accountable for, not that this is dwelled upon, but it cannot be taken for granted either. This is just in the nature of the idea of rights, that they are always contestable, and that they always involve subjective perceptions of injustice. A compendium of basic rights is as follows:

<table>
<thead>
<tr>
<th>BASIC RIGHTS</th>
<th><a href="https://en.wikipedia.org/wiki/Ownership">Wikipedia Entry on Ownership Rights</a></th>
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<tbody>
<tr>
<td>Right to be assumed innocent until proven guilty</td>
<td>Right against unreasonable searches &amp; seizures</td>
</tr>
<tr>
<td>Right against self-incrimination</td>
<td>Right to protection from physical harm throughout the process</td>
</tr>
<tr>
<td>Right to an attorney</td>
<td>Right to trial by jury</td>
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<tr>
<td>Right to know the charges</td>
<td>Right to cross-examine witnesses</td>
</tr>
<tr>
<td>Right to speak and present witnesses</td>
<td>Right not to be tried twice for same offense</td>
</tr>
<tr>
<td>Right against cruel &amp; unusual punishment</td>
<td>Right to due process</td>
</tr>
<tr>
<td>Right to speedy trial</td>
<td>Right against excessive bail &amp; fines</td>
</tr>
<tr>
<td>Right to be treated the same as others</td>
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</tbody>
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THE LITIGIOUS SOCIETY
Americans look to the courts, perhaps too much, to solve problems and resolve disputes for them. A quarter of a million lawsuits are filed in federal courts every year, and another 100 million lawsuits are filed in state courts every year (Carp et. al. 2004). That works out to be about one lawsuit for every two people in the United States (and another number that Carp et al. cite is one lawyer for every 250 people in America). The famous French observer Alexis de Tocqueville (1835) said that “there is hardly a political question in the United States which does not sooner or later turn into a judicial one.” Unknown commentators have stated that filing lawsuits has become America’s second favorite indoor sport, and another has compared it to religion.

“We have always been a highly litigious nation, as much as we have always been an immigrant nation. Ours is a law-drenched age. We are constantly inventing new and better ways of bumping into one another, and we are constantly seeking orderly means of dulling the blows and repairing the damage. Of all the ways of redressing grievances and settling disputes…only suing…has steadily won the day. Though litigation has not routed other forms of fight, it is gaining public favor as the legitimate and most effective means of seeking and winning one’s just deserts. The impulse to sue is so widespread that litigation has become the nation’s secular religion, and a growing array of procedural rules and substantive provisions is daily gaining adherents” (Lieberman 1983).

Other societies which have experienced a “litigation explosion” include England, Denmark, Canada, New Zealand, and Australia. The common hallmark of such a phenomenon is an increase in the number of “frivolous lawsuits.” Of course, they are not frivolous to the parties who initiated them, but some deal with such trivial matters that they stagger the imagination. Examples include people suing their employers for mundane or irrational matters (imaginary vapors coming thru walls), and obese people suing fast-food restaurants for serving them food (didn’t know it would make them fat). In China, the fastest growing area of public law involves parents suing their children to provide for them in their old age.

All this fueled a “tort reform” movement in America. There had always been some attempt at controlling it. Rule 11 of the Federal Rules of Civil Procedure forbids the filing of worthless lawsuits, and this was made stronger in 1983 when trial judges were given authority to impose sanctions on such behavior. In 1991, with the cases of Chambers v. US Dept. of Army 499 US 645 and Kunstler v. Britt 499 US 969, large fines for filing frivolous lawsuits became commonplace. By 2001, at least thirty-five states had enacted legislation providing severe penalties for filing frivolous lawsuits.

**JUDICIAL LIMITATIONS**

This section takes up consideration of the kinds of things that judges and lawyers (the actors in judicial process) would not do. Systems of law are self-restraining. Surely there are built-in legal constraints, technicalities mostly, pertaining to matters of jurisdiction and so forth, which keep the law from being abused or stretched too thin. For example, in a dual court system (both federal and state), there is the matter of whether or not an issue poses enough of a "federal question" (it is not enough to say "this is an important case" or "a lot of money is involved") to warrant being in federal courts (normally, the Constitution, a federal law, or a treaty must be invoked). To guard further against overuse, there are principles involved. Carp et al. (2004) discuss these as principles of judicial self-restraint (forbidden or discouraged from engaging in), but they could just as easily be talked about as principles of "justiciability" or when something is appropriate for the law to handle. Following those listed in Chapter 4 of Carp et al. (2004), there are ten (10) of these principles, a few of which have corollaries.

1. **A definite controversy must exist** -- disputes between parties must involve the protection of a meaningful, nontrivial right and/or the prevention or redress of a wrong. There are three corollaries to this principle:
   - (a) courts do not render advisory opinions, rulings about hypothetical situations, or rulings that have not involved an authentic clash between adversaries (the exception being some state courts which can offer declaratory judgments)
   - (b) parties to a legal action must have proper legal "standing" which essentially means that someone has suffered (or is about to suffer) a personalized injury (the exception to this being class action suits, filed
on behalf of others)

(c). courts do not ordinarily hear "moot" cases, although sometimes a judge is the best one to decide whether something is still "ripe" for adjudication.

2. A plea must be specific -- the petitioner in a case must clearly cite a specific part of the law (or constitutional protection) to demonstrate the merits of their case. It is not enough to say something "violated the spirit of the law" or "offended the values of the Founders."

3. Beneficiaries may not sue -- if a person has already been the beneficiary of a law (or government endeavor), and then subsequently challenges that law, they cannot attack in court that which they have gained financially from. For example, someone already receiving a government benefit cannot sue to get a better benefit because they think some other beneficiary like them has something better. This is simply not the purpose of law.

4. Appellate courts rule on legal - not factual - questions -- trial courts are reserved for factual questions, in theory at least, because they are closer to the evidence and the parties in the case. An appeal may appear to deal in facts because, in practice, an appeal determines in principle whether the facts at trial were arranged, amassed, or presented in a legally admissible way. It is not the appeals courts' job, however, to rearrange those facts or reassemble them in any way.

5. A Supreme Court is not (technically) bound by precedents -- although much of what a Supreme Court does involves precedent, it would be unwise and unsafe for society if such a court did not also have flexibility, or the power to occasionally reverse itself and/or have a way to retreat from forced interpretations based solely on precedent.

6. Other remedies must be exhausted -- both legal and administrative attempts must have been made because, in principle, use of the law is kind of like working your way up the ladder. It's not enough to bypass something simply because one thinks they would lose anyway.

7. Courts do not decide "political questions" -- the Founding Fathers never intended for the judiciary to be an instrument of popular will or the handmaiden of politicians. A court may have to step in when elections are contested, but will generally defer to other branches of government regarding disputes that are clearly in executive or legislative domains.

8. The burden of proof is on the petitioner -- laws (and all official government deeds) are considered or presumed legal until proven otherwise, unless, of course, the case involves an issue of special scrutiny, an issue of insanity, or a number of other things for which the burden of proof is reversed and the state bears responsibility for showing a necessary or compelling interest for being involved there in the first place.

9. Laws are overturned on the narrowest grounds only -- usually a judge will first look for any misdeeds on the part of the government or responsible party in a case, and then will try to "save" or "salvage" the law by nullifying the misdeed and/or only invalidating a portion of an existing law (if possible) and/or only voiding an entire law if necessary (as a last resort).

10. No rulings are made on the wisdom of legislation -- just because some laws are passed which are plain stupid, unfair, fiscally irresponsible, or bad public policy doesn't make them a legal issue appropriate for the courts to settle. Surely, there is a judicial review function of law, but law is not the same as policy analysis, and it's an imperfect tool to base all policy formulation and implementation upon. Law is, in fact, often "far behind" on this, constantly playing catch-up to all the things which drive a society; e.g., external, uncontrollable things like demographics and technology.

WHAT IS A CRIME?
A crime is a violation of law. An understanding of what the law says is a crime requires an understanding of what law is. It is important to know that "law" is not a tangible object of the real world, like a set of books or something you can touch. Law is a social invention, or convention, that societies need to survive. Law is all around us, enveloping us like a cocoon. The citizen who fills out a tax form or is dealing with criminal charges is only having to deal with legislative behavior; i.e., written codes or statutes. Legislation, codes, statutes, and courts are only the tip of the iceberg. Think of society as one big "house" and of law as the "house rules."

The world of law is a world of authoritative rules; that is, they have some authority behind them. Who's authority? The authority of those who claim and deserve the special privilege of carrying out the physical or psychological force necessary to make those rules, interpret those rules, and carry them out. Here's a couple definitions of law by a famous anthropologist and famous sociologist:

"A law or legal norm exists if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting."

"Law, legal rules, and order exist if they are externally guaranteed by the probability of coercion (physical or psychological) to bring about conformity or avenge violation, and is applied by a staff of people holding themselves specially ready for that purpose."

A crime is an intentional violation of the law committed without defense or excuse and penalized by the state. However, this condensed legal definition doesn't do justice to all the characteristics necessary to make some behavior a crime. Technically and ideally, a crime has not been committed unless all seven (7) of the following characteristics are present:

1. Harm -- There are external consequences that injure somebody else physically or psychologically. Thinking about committing a crime or being angry enough to commit a crime is not a crime. Victimless crimes that injure only the offender are still crimes if it can be shown that there are consequences, like harm to families, friends, or the moral fabric of society.

2. Legality -- Things less serious than crimes are called "wrongs" and although wrongs may be frowned upon, they do not consist of criminal behavior. People do a lot of bad things in this world, and just because it stimulates "there ought to be a law" response doesn't necessarily mean criminal law. Instead, crimes are forbidden things for which the evil-doing has been specified in advance. There can be no *ex post facto* law, which goes back retroactively and converts a wrong into a crime.

3. Actus reus -- (Guilty act) A crime always requires action, or people doing things. Inaction when the law calls for action is also a crime. For example, if parents do not provide adequate necessities for their children, this behavior of omission is just as much a crime as someone who does something actively. When the act is due to infancy, intoxication, insanity, or other bodily disease, we say that the crime has an *excuse*, and hold the offender less responsible.

4. Mens rea -- (Guilty mind) A crime always has certain mental aspects, such as intent and purpose, but also recklessness and negligence. These are all mental states, short of motive, that the law recognizes as worthy of blame. The law realizes that clear cut, well planned motives don't happen all that often, whether the behavior is directed toward good or evil. When the mental state involves duress, self-defense, entrapment, or necessity, we say that the crime has a *justification*, and hold the offender less responsible.

5. Causation -- A crime must lead directly or indirectly to the harm without too much delay. Actual cause is direct and *proximate cause* is indirect. Logic must be used to determine the fairness of how far back in time the setting in motion of a chain of events resulted in foreseeable harm.
6. Concurrence -- The criminal conduct (actus reus) and criminal intent (mens rea) must occur together at about the same time or within a year and a day of when the intent was formed. This element refers mostly to the circumstances surrounding the criminal behavior, such as whether motive was accompanied by opportunity and means.

7. Punishment -- This is just the definition of law as having some authority behind it, but it clearly requires some sort of penal sanction, whether retribution, restitution, compensation, regulation, or rehabilitation.

**THE MAJOR CRIMES**

The major crimes are those that injure society, and there is some consensus about the degree of wrong done to society. Some things are just evil in themselves (*mala in se*), others are evil because it is in the public interest to prohibit them (*mala prohibita*), others are evil because of being old, outdated, or inflexible (*mala antiqua*), others because of being too new (*mala nova*), and still others because they are confusing and ambiguous (*mala ambigua*). In each case, the wrong is done to society, and any harm done to the victim is just incidental. There are about twelve (12) different categories of crime in criminal law, and most typologies of this kind are simply analytical devices, but at a basic level, they shed light on whatever evils in society the law is protecting us from. The following table must be taken figuratively, not literally, but illustrates to some degree what is being talked about here:

<table>
<thead>
<tr>
<th>CATEGORY</th>
<th>SOCIAL WRONG OR EVIL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Violent Crime</td>
<td>Killing, force, violence, threats of violence, dangerousness</td>
</tr>
<tr>
<td>Property Crime</td>
<td>Taking, depriving, trespass, converting, misleading, concealing</td>
</tr>
<tr>
<td>Crimes Against Morality</td>
<td>Fornication, seduction, illicit behavior</td>
</tr>
<tr>
<td>Crimes Against Public Order</td>
<td>Disorderliness, threats to public safety and peace</td>
</tr>
<tr>
<td>Crime Against Government</td>
<td>Rebellion, treason, sedition, perjury, corruption</td>
</tr>
<tr>
<td>Crime By Government</td>
<td>Genocide, torture, brutality, civil rights violations</td>
</tr>
<tr>
<td>Hate Crime</td>
<td>Bias, prejudice, discrimination</td>
</tr>
<tr>
<td>Organized Crime</td>
<td>Illegal good and services, too highly disciplined</td>
</tr>
<tr>
<td>White-Collar Crime</td>
<td>Deception, fixing, gouging, nonviolent illicit financial gain</td>
</tr>
<tr>
<td>Occupational Crime</td>
<td>Opportunism, misuse of professional capacities</td>
</tr>
<tr>
<td>Victimless Crime</td>
<td>Addiction, too strongly demanded, illegal exchange</td>
</tr>
<tr>
<td>High Technology Crime</td>
<td>Stealth, gleefulness, too sophisticated</td>
</tr>
</tbody>
</table>

The job of the legislature, or law-making body, is to translate these evils and wrongs into statutory language (the language of criminal statutes, codes, or ordinances). They are free to draw upon other sources, but their main inspiration comes from what are called the common law elements of a crime. These elements (enumerated below) provide the guidelines for police training and what evidence the prosecutor needs to convict. The common law (explained below) is an age-old consensus on what judges have always thought defined a crime. It is more the history of judicial decision-making than law of the land (an erroneous assumption). The process of translating the common law into statutory law is called codification, and the following table depicts some common law definitions and elements:

<table>
<thead>
<tr>
<th>CRIME</th>
<th>DEFINITION</th>
<th>ELEMENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder</td>
<td>unlawful killing of a human being with malice aforethought</td>
<td>1. unlawful killing</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2. of human being</td>
</tr>
</tbody>
</table>
3. malice aforethought

<table>
<thead>
<tr>
<th>Crime</th>
<th>Definition</th>
<th>Elements</th>
</tr>
</thead>
</table>
| Rape      | the act of unlawful carnal knowledge, forcibly and against will           | 1. unlawful  
2. carnal knowledge  
3. force or fear  
4. without consent or against will |
| Robbery   | felonious taking of money or goods with intent to steal from another, in their presence, forcibly and against will | 1. trespass  
2. taking  
3. carrying away  
4. property of another  
5. with intent to steal  
6. in presence  
7. violence or intimidation |
| Assault   | unlawful offer or attempted injury of another with ability to create a fear of imminent peril | 1. attempt or offer  
2. force or violence  
3. apparent ability  
4. immediate injury |
| Battery   | unlawful touching of another in person or by some object                   | 1. unlawful  
2. application of force  
3. to person of another |
| Kidnapping| forcibly detaining or restraining another against their will or moving them to another place | 1. detaining another  
2. force or without consent  
3. without legal cause  
4. moving another place |
| Arson     | willful and malicious burning of a dwelling or curtilage (outbuilding)    | 1. burning  
2. dwelling or curtilage  
3. belong or occupied by another  
4. maliciousness |
| Burglary  | breaking and entering a dwelling of another at nighttime with intent to commit a felony therein | 1. breaking or entering  
2. dwelling  
3. of another  
4. nighttime  
5. intent to commit felony |

**THE ORIGINS OF LAW**

In American society, criminal law is usually divided into two subtypes: substantive and procedural law. Substantive law is the penal law, the codes, statutes, and ordinances that specify a punishment and spell out what people legally may and may not do. The common law definitions of offenses (such as robbery and burglary) make up the substantive law. Procedural law is also called adjective or remedial law, and governs the way suspects are put under suspicion, arrested, searched, interrogated, tried, and punished. Procedural law is the same as due process of law.

The first laws were created about 5,000 years ago, and ruled over property and marriage relations. Around 2200 B.C. the Code of Hammurabi, like the Mosaic Law which came later, tended to focus on trade, family, and work-related injuries. Anglo-Saxon law (feudalism, which basically dealt with property relations) ruled England until the Norman Conquest in 1066 A.D., when the Normans (French) invented the institution of the eyre, a system of traveling judges who represented the king in local courts. It was the decisions of these judges in eyre that formed the body of legal precedent that became known as the common law. Because the common law was built case-by-case, it is also known as case law. In the year 1215, the Magna Carta placed limits on royal power, and in 1639, the colony of Connecticut created the
first written constitution. Constitutional law (federal, then state) is the highest form of law, and deals with
the relationship between individuals and their governments.

Constitutional law in the U.S. is what governs criminal procedural law, specifically the first ten
amendments, known as the Bill of Rights, passed in 1791. The Fourteenth Amendment, passed in 1868,
incorporates the first ten, making them binding on the states, but they have also been selectively, or
individually incorporated by landmark Supreme Court decisions since 1937, a process known as selective
incorporation. The study of these landmark Supreme Court decisions makes up the great bulk of criminal
justice scholarship.

4th Amendment Jurisprudence (legal wisdom) -- The Supreme Court has consistently held to a doctrine
of "reasonableness" in 4th Amendment jurisprudence. Precisely what reasonableness means remains vague
after 100 years since the amendment was ratified. Since this amendment deals with searches and seizures
(arrest), the most common interpretation is that police must always have a warrant before any search or
seizure, and warrants can only be issued upon grounds of probable cause. Probable cause is but one of
several standards of proof in criminal law, this being displayed in the following tables:

<table>
<thead>
<tr>
<th>STANDARDS OF PROOF IN CRIMINAL JUSTICE</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Mere suspicion</strong></td>
</tr>
<tr>
<td>gut feeling</td>
</tr>
</tbody>
</table>

Police cannot even stop anyone with mere suspicion. Stop (and frisk) requires reasonable suspicion.
To search or arrest requires probable cause. Preponderance is the main standard in civil law, and in
criminal law is used in cases of inevitable discovery and waivers of counsel. Clear and convincing is the
main standard in federal courts, and in criminal law is used to judge insanity. Beyond a reasonable doubt is
what is needed to find someone guilty in a criminal trial. No criminal justice activity requires absolute
certainty.

Exceptions to the warrant rule in 4th Amendment jurisprudence exist. To date, police can conduct
warrantless searches when evidence is close enough to be destroyed (*Chimel v. California* 1969), possibly
hidden in the passenger compartment and trunks of cars (*California v. Acevedo* 1991), within plain view
(*Harris v. U.S.* 1968), revealed through a protective sweep search of closets and adjoining rooms
(*Maryland v. Buie* 1990), obtainable under consent to search even without telling people they have a right
to withhold consent (*Schenckloth v. Bustamonte* 1973). In general, police can justify warrantless search
under the exigent circumstances rule (any emergency, unforeseen circumstances).

The 4th Amendment also has some teeth in it to protect against police abuse. This is known as the
exclusionary rule, first establishing in *Weeks v. U.S.* (1914), but applied to the states in 1961 with the case
of *Mapp v. Ohio*. Simply put, if evidence is illegally obtained by the police, it cannot be legally admitted at
trial. There are several exceptions to the exclusionary rule, however, that are not mentioned here.

5th Amendment Jurisprudence -- The Supreme Court has less consistently held onto the doctrines of
"free and voluntary" and "knowingly and intelligently" with 5th Amendment jurisprudence. These
doctrines reflect the law's reliance upon free will and the Constitution's purpose as a contract between each
individual and the state. Because the 5th Amendment deals with confessions and other forms of self-
incrimination, the legal doctrines in place are, by necessity, subjective standards, which require balancing
what is in the mind of the individual with what is on the mind of the state. American police are quite good at extracting confessions; they are successful at it some 60% of the time; so the law requires balancing how "tough a nut" the suspect is to crack with how "coercive and hostile" the police interrogation is.

Specific guarantees include the protection against double jeopardy (Benton v. Maryland 1969), self-incrimination (Miranda v. Arizona 1966), the right to "plead the fifth" (Malloy v. Hogan 1964), and the right not to take the witness stand (Griffin v. California 1965). The right to a grand jury has not yet been specifically incorporated for the states.

6th Amendment Jurisprudence -- There are no less than six (6) different rights guaranteed by this Amendment: notification, assistance of counsel, speedy trial, impartial jury, confrontation, and compulsory process; and the Supreme Court has fairly consistently held to the notion of a "balancing test" for these rights. A balancing test (also called a two-prong, three-prong, or four-prong test) attempts to spell out, objectively, the criteria to be used in weighing the needs of the individual with the needs of the state.

Notification and assistance of counsel are pre-trial rights established in Twining v. New Jersey (1908) and Gideon v. Wainwright (1963) respectively, but Sixth Amendment rights can trace their origins to at least the Magna Carta, if not earlier. Fairness and orderliness are the objective criteria to be considered when balancing pre-trial rights. For speedy trial, the landmark case is Barker v. Wingo (1972) where the reason and impact of delay must be considered. Delay would be acceptable for a critical piece of evidence like the search for a missing witness, but that must also be weighed against any possible prejudicial effect of delay upon the defendant. For impartial jury, the landmark case is Duncan v. Louisiana (1968) which has to do with how cross-sectional, or representative, the jury pool is when selecting candidates for jury duty. The issue of venue (or place of trial) is a good example, and requires consideration of how great or small any local publicity is. For confrontation, the landmark case is Pointer v. Texas (1965) which, in essence, means the defendant has a right to suggest questions his or her lawyer should ask witnesses, but this is balanced by a consideration of how disruptive this would be. Compulsory process is the power of subpoena to call witnesses on one's behalf, and the landmark case is Washington v. Texas (1967). This is generally an unchallenged right, but there are important privilege exceptions for some witnesses.

8th Amendment Jurisprudence -- This Amendment prohibits excessive bail and cruel and unusual punishment. The Supreme Court has loosely held onto the standards of "wanton and freakish" and "evolving decency" with landmark cases including Wilkerson v. Utah (1878) which regarded any old punishments, such as beheading and hanging, as too old-fashioned for society, and Weems v. U.S. (1910) which reversed this historical viewpoint and created the notions of proportionality and evolving decency. Another standard, "civilized society" was created in 1958 with the case of Trop v. Dulles. In 1972, the death penalty was declared unconstitutional in Furman v. Georgia, and in 1976, it was declared constitutional once again in Gregg v. Georgia. Current concern is with how the death penalty is arrived at, and carried out, and the so-called Gregg factors require juries to consider both mitigating and aggravating circumstances before issuing the death penalty. This area of law is one of the few areas where the Supreme Court regards the "will of the people" as important, as obtained thru public opinion polls.

INTERNET RESOURCES
About.com Current Events: Law
American Tort Reform Association
Anatomy of a Murder: A Trip Thru the Legal System
CourtTV.com
FindLaw: Constitutional Rights
Mega-Site on Law
Nolo Law for All
Stanford Encyclopedia Entry on Nature of Law
What Happens When You're Charged with a Crime
What is the General Welfare
Wikipedia Entry on Law
THE POLICE COMPONENT OF CRIMINAL JUSTICE

Police have to be lawyers, scientists, medics, psychologists, athletes, and public servants (Ramsey Clark)

A basic overview of the police, as agents of law and order, should include a brief synopsis of their history, their structure and function at different levels (federal, state, local), a profile of private security, and an introduction to police responsibilities. Those are exactly the topics covered here, as subsequent lectures delve into controversies and legal issues. First, however, it is important to clarify what role police play in society, and why we have them.

WHY POLICE EXIST
Police, whether public or private, exist to do things that people don't want to do for themselves. The work is always stressful, exciting, dangerous and boring. Police are the most visible symbol of authority in any government. Citizens rely on them to perform a variety of functions, such as catching criminals, preventing crime, keeping the peace, maintaining order, interpreting the law, making people feel good, knowing the answers to miscellaneous questions, and, in general, keeping things on an even keel. As the opening quote by Ramsey Clark indicates, police officers have to be a "lawyer, scientist, medic, psychologist, athlete, and public servant" and Egon Bittner once described the police function as a response to "something ought not to be happening, and something ought to be done about it right now."

Undoubtedly, police are a conservative institution because their mission is so closely tied into maintaining the status quo. It's not that they preserve the status quo at all costs or lack any innovation; it's just that successful accomplishment of their mission is driven toward an idyllic, almost utopian, society of yesteryear -- a communal, crime-free society where people settled minor disputes peacefully between themselves. It's doubtful if societies like that ever existed, and debatable if the ultimate function of policing is to put itself out of business, but the point is clear -- police are expected to do the impossible and always do it efficiently -- that is, with limited resources and never the possibility of becoming a police state.

The roles that police play have an intimate connection with the idea of a free and open society. They must always be shining examples of the judicious use of power. The police have many powers, from the right to know more information about citizens than the average person needs to know to the right to bully people around without any backtalk when it's necessary. How wisely, or judiciously, they use these powers is the primary determinant of how free and open a society is. Whether they know it or not, the police are the guardians of human rights, but they must operate in a political environment where others (politicians and judges) get to determine who's rights and what rights are most important for a stable democracy.

POLICE HISTORY

History tells us that prior to the Thirteenth century, justice was primarily a matter of private revenge (although there were some notable attempts to establish public police in ancient Egypt, Greece, and Rome). All that existed in the English-speaking world from 1066-1285 was the frankpledge system, also called the tithing system, where much like a church member is expected to donate one tenth of their earnings (a tithe) each Sunday, every ten householders living near each other were expected to uphold law and order. When a man became aware of a crime, he was obligated to raise a hue and cry, and join the tithing in tracking down the criminal. Over time, this evolved into the parish constable-watch system, a method of appointing one man in each parish of tithings to serve as police officer (constable) for a year. Constables employed what were called watchmen to work at night. In rural areas, ten tithings made up what was called the hundred, and one or several hundreds constituted a shire. Each shire had a shire-reeve (sheriff) appointed or elected, but in 1326, England replaced its shire-reeves with justices of the peace.

The American colonies adopted English policing wholesale, and even resurrected the office of sheriff. Most early American police forces consisted of day and night watchmen, and by 1845 (following NYC's lead), most American cities had police chiefs. Americans also copied as many innovations and reforms as they could from England, the most notable examples being Henry Fielding's Bow Street Runners, the world's first detectives (circa 1748), and Sir Robert Peel's principles of policing for the London Metropolitan police force (circa 1829), also called "bobbies" (after Peel's first name). Among other things, Peel established the habit of police walking around rather than waiting for a hue and cry. He made the watchman system obsolete. America kept its watchmen, however, and American policing fell into a period of political corruption and patronage that lasted until 1930.

A Presidential Commission, known as the Wickersham Commission (named after its chairman, George Wickersham), released a report in 1931 that was authored primarily by one man - a police chief from Berkeley named August Vollmer. Along with other police reformers, such as Leonhard Fuld, Raymond Fosdic, Bruce Smith, and O.W. Wilson, Vollmer helped remove the corruption (politics) out of policing, and make it more technological and efficient. Another important figure was Teddy Roosevelt and his contributions, which include creating state police agencies (as Governor of Pennsylvania) and the FBI (as
President). With the origins of private security, the most important figure was Alan Pinkerton and his famous Pinkerton detectives.

The years 1969-1982 saw the growth of scientific, professional policing, largely through funding for research and education provided by a federal agency called the Law Enforcement Assistance Administration (LEAA). It's hard to overstate the impact of LEAA and other funding sources, like the Ford Foundation, in the research-driven Seventies and Eighties. Numerous studies were carried out for the first time on what works and doesn't work in policing, such as random patrol (Kansas City Experiment), foot patrol (Flint Michigan and Newark Experiments), one- versus two-officer units (San Diego Experiment), team policing (Cincinnati Experiment), reducing domestic violence (Minneapolis Experiment), reducing fear of crime (Houston Experiment), and problem-oriented policing (Newport News Experiment). From these experiments, the Nineties and current emphasis upon community policing was born.

**STRUCTURE AND FUNCTION**

There are approximately 18,760 total police agencies in the U.S. with approximately 940,275 employees and a combined annual budget of about $51 billion (year 2000 data). There are approximately 60 different federal police agencies, and most of them are in the departments of Justice or Treasury. There are 26 agencies called Highway Patrol and 23 agencies called State Police (Hawaii doesn't have a state police agency per se, but a Department of Public Safety). Thirty-five states have additional state agencies with limited purpose or special investigative powers. There are 3,088 sheriffs departments in the U.S. There are about 15,000 municipal police departments in the U.S. No other nation in the world has ever had as many different types of police departments as the U.S., a fact that means no two police agencies in America are structured alike or function in the same way.

The federal agencies are specialized, having specific mandates to enforce certain types of federal laws (there are only about 200 federal crimes). They are also starting to station their agents overseas, in efforts to deal with the growing problem of transnational crime. The top five largest agencies (in terms of sworn officers) are the INS (Immigration and Naturalization Service), BOP (Bureau of Prisons), FBI (Federal Bureau of Investigation), Customs, and the Secret Service. No federal police agencies have peacekeeping or order maintenance duties typical of local law enforcement. No federal police agency, not even the FBI, is considered a "national" police force. The following table contains some selected examples of how federal agencies function:

<table>
<thead>
<tr>
<th>Agency</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>INS</strong>:</td>
<td>Monitor and control the flow of immigrants by patrolling borders and territories; apprehend, charge, and deport aliens who have entered the country illegally and violated naturalization laws. The southern border with Mexico is a violent place, and the &quot;soft&quot; border with Canada raises national security concerns. Since 9/11, the INS plans to add 1,000 new Border Patrol agents a year until 2008.</td>
</tr>
<tr>
<td><strong>FAA</strong>:</td>
<td>The Federal Aviation Administration is poised to become the nation's largest federal police agency with plans to hire between 15,000 and 20,000 Air Marshals as quickly as possible. This would make them as large or larger than the INS, which along with the U.S. Marshals and Customs, is helping provide necessary security and profiling on aircraft.</td>
</tr>
<tr>
<td><strong>FBI</strong>:</td>
<td>Leadership in investigations over terrorism, espionage, organized crime, white collar crime, and selected federal drug offenses; assist state and local agencies thru training, information databases, fingerprinting, DNA, and laboratory services; operate legal attaché offices in 57 different countries.</td>
</tr>
<tr>
<td><strong>DEA</strong>:</td>
<td>Enforce national drug laws and assist other federal and foreign agencies in combating illegal drug manufacture and trade on an international level; also enforce the Controlled Substances Act, which includes prescription drugs; operate a network of regional laboratories to test and categorize drugs; provide state and local agencies with access to those labs; register physicians who can prescribe drugs.</td>
</tr>
<tr>
<td><strong>ATF</strong>:</td>
<td>Police the illegal sale, possession, and use of firearms, explosives, bombs, and untaxed tobacco and liquor products; also enforce the Gun Control Act on the sale and trade of firearms; also enforce</td>
</tr>
</tbody>
</table>
The state agencies were created for four reasons: (1) to assist local law enforcement; (2) to investigate cross-county crime; (3) to provide a law enforcement presence in areas that have no local or county presence; (4) to break strikes and control labor movements. For many years, the state police were the personal tool of governors, but evolved into general all-purpose law enforcement. Some of the earliest state agencies were the Texas Rangers, which from 1835-1874 was just a mercenary army, and the Pennsylvania Constabulary, formed in 1905 and recognized as the first modern state police force. By 1925, each state formed either a state police force (centralized all-purpose policing) or a highway patrol department (with separate bureaus of investigation, identification, crime labs, alcohol and drug control, and drivers license examination). All state agencies administer computer systems that link up with federal computer systems, and most concentrate on criminal violations that occur on state property, including roads and highways.

The county agencies are usually run by an elected sheriff, and consist of sworn deputies, civilians, and special deputies (part-timers sworn in for crowd control or special purposes). They perform a wide variety of functions, including the investigation of crime, traffic enforcement, civil process paper service, courtroom security, and confinement and transport of prisoners. Some county jails house hundreds and thousands of prisoners. For example, the Los Angeles County Sheriff's Department employs over 3,500 employees in its custodial division alone. The elected nature of the sheriff's office has both advantages and disadvantages. Sheriffs generally have a freer hand in running their agencies than police chiefs, but partisan politics sometimes intrudes as does political patronage. Seventeen states have done away with or are doing away with the election of sheriffs. County agencies often lack jurisdiction over cities and towns, their authority being relegated to unincorporated areas or small towns that have no police forces of their own.

The municipal agencies, which is a category that would include specialized groups like campus police and transit police, are an example of "local" law enforcement. The U.S. is a nation of small, local police forces. Every incorporated municipality in the U.S. has the authority to create its own police force. Small communities hire only one officer, others about five officers, and the national average size is 10 full-time officers. Some communities with no police force of their own make contracts with private security or a sheriff's office. In stark contrast are large agencies like the New York City Police Department with over 40,000 employees. Municipal agencies are the workhorses of U.S. law enforcement, and have broad authority to apprehend suspects, maintain order, and provide community services. Duties range from investigating homicides, burglaries, and thefts to intervening in domestic disputes to responding to noise complaints or chasing bats out of a caller's house. It is sometimes said the acronym PEPPAS best describes the functions of municipal police:

P -- Protect life and property (via patrol, crime scene control, recovery of stolen goods)
E -- Enforce the law (via warnings, tickets, complaints, and seizures)
P -- Prevent crime (by giving advice, directed patrol, or through DARE programs)
P -- Preserve the peace (visibility, disband disorderly groups, neighborhood intervention)
A -- Arrest violators (apprehend suspects, conduct raids, stings, and other crackdowns)
S -- Serve the public (give directions, first aid, and emergency services)

PRIVATE SECURITY

On average, the private security sector is twice (2x) as large as the public law enforcement sector. There are four times (4x) as many personnel, and spending is 73% higher than for public law enforcement. It's also a more efficient sector, on average, producing about twice as much a drop in crime that the public sector is capable of. The U.S. Department of Labor has long classified private security as one of the fastest growing industries in the country. The first private agency was started in 1860 as the Pinkerton National Detective Agency, and today includes over 4,000 separate agencies, the big ones being Pinkerton Burns, Wackenhut, Guardsmark, Wells Fargo, and Allied, and a number of more bodyguard-oriented firms with...
names such as Advance, Globe, Trojan, American Protective Services and Security Bureau. The big firms are involved in everything from department store loss prevention to shopping mall, hospital, and nuclear security. There is a growing proliferation of bodyguard firms. In addition, there are about 40,000 private detectives and investigators in the U.S., and a growing number of bounty hunter firms.

The government sponsors periodical analyses of private security via reports written by Hallcrest Systems called the Hallcrest Reports. Private policing is tailored policing funded by the guarded organization rather than by public money. Many wealthy neighborhoods and suburbs in America also have their own private police force. Private security services are commonly classified as either contract or proprietary. Contract security is fee-for-service extra protection, such as that provided at sporting events or dignitary protection during a trip. Proprietary security is the ongoing provision of an in-house security staff which act as the company's own security staff. The qualifications and salaries of proprietary security personnel are generally higher than those of contract security officers.

Although many superbly qualified people work in private security, the vast majority have less training and education than police officers. In most states, for example, becoming a private security officer requires little more than a week-long training course and a practical firearms proficiency test. There are other issues too, with police officers "moonlighting" in private security, and concerns over the few constitutional limitations that private security operates under. The notion of diminished public responsibility adequately sums up many concerns about private security.

POLICE RESPONSIBILITIES

Police spend a lot of time handling mundane incidents and poring over paperwork. Actual crime fighting is a rare activity, and there's plenty of unsupervised time which allows for discretionary decision making. The irony is that the lowest paid employees, with the least amount of authority, do most of the work and make the most important day-to-day decisions. There is a good deal of debate over how to make police more effective, how to use their discretionary spare time, and what responsibilities should be given priority. As an organization, police have been unreceptive to many efforts at reform. For example, many people believe that the military chain of command structure is dysfunctional for police work because it inspires fear, impedes communication, and inhibits good community relations. Attempts to change the military structure have met with great resistance. Another area of reform involves experimenting with the source of executive authority in the police chief position, removing political interference from mayors, managers, and city councils. So far, nothing has been found that works at eliminating the last vestiges of politics from policing. There is also the issue of educational qualifications. Most experts would say that the variety of skills expected of police should require a graduate degree, yet the field is characterized by employees with an average high school degree and "some" college. Better educated, and more women and minority officers would go a long way in accomplishing the police mission.

Police responsibilities include crime fighting, crime prevention, peacekeeping, and providing service. These require the police be extremely knowledgeable about criminal nature (if not human nature), be able to detect a threat to society and take reasonable action to prevent that threat from maturing; be able to make trustworthy decisions that "fix" or "handle" complex, peacekeeping situations; and provide numerous types of assistance in areas that are not ordinarily police business. All these, and the ability to protect oneself and others from danger, are, in a nutshell, the police responsibilities.

INTERNET RESOURCES

ASIS (American Society for Industrial Security)
CATO Institute article on Expanding Federal Police Power
CopSeek Directory (leolinks)
GoLawEnforcement.com
Law Enforcement Sites on the Web
New York City's Precincts
Occupational Outlook Handbook on Private Detectives
Officer.com
Unit 6

POLICE ISSUES

Quis custodiet ipsos custodes? (Who guards the guardians)

There are a limited number of issues (matters of trans-jurisdictional concern) in policing, and there are only about ten (10) or so main areas of scholarly interest in the field known as police science. Any of these areas would make up enough content for a separate course, but only a brief overview is presented here. There's no specific order in which the issues have to be examined, but the following lineup will be used -- police organization & management; styles of policing; operational strategies; police use of technology; socialization into the police culture, including recruitment, selection, and training; use of force; police dangers and stress; police ethics; accountability of police to the public; and multiculturalism in policing.

POLICE MANAGEMENT

History has shown, time and time again, the disastrous consequences of bad police management. Police managers include any sworn rank above that of sergeant and/or any sworn or non-sworn administrators. This isn't just an issue of who gets promoted or the unique stressors at each rank - although those are important areas of research in themselves. It's more a problem with the shape of the organizational pyramid -- always a hierarchy with the chief at the top and rigid chains of command flowing to the bottom. Several experts have suggested the pyramid needs to be inverted, with the community at top, followed by line officers, then managers. Police organizations are tall, closed, hierarchical, paramilitary bureaucracies, and for the most part, organizational theory holds that this combination represents the worst of management science.

Police managers serve as a citizen's gateway to the criminal justice system. This is reflected in the experience of being told "that's not a police problem", which is a management decision, with line officers simply relaying what their supervisors will or will not accept. In actual fact, it's probably the line officer and the citizenry who should be deciding what's a police problem. Unfortunately, the bureaucracy gets in the way by: (1) limiting ingenuity -- no lower level employee gets to use their particular skills, ideas, or talents; (2) limiting contact with the community -- a pseudo-professional distance develops between people and the police; and (3) limiting contact within the department -- employees in one area don't know what employees in the other area are up to.
Delegation of authority is supposed to make the system work. The chief delegates authority to commanders, who delegate authority to managers, and so on down the line. Written guidelines in the form of policies and procedures also regulate conduct. However, delegation only seems to work in small-to-medium departments where everyone is alike and a generalist. Large police departments have precincts, divisions, bureaus, and specialists where authority cannot be easily delegated. The fact is that real authority only passes down thru those who fit the mold of a uniformed street cop. Another problem (or perhaps not a problem at all) is the growth of generalists who compete with specialists in police organizations. In any event, trying to make effective change in the rank structure of policing has been compared to trying to bend granite (Guyot 1979).

POLICE STYLE

A police style is how each department and officer view their particular mission or purpose and identify with particular methods or techniques to fulfill that purpose. At the departmental level, style reflects the historical legacy of the agency, and to a lesser degree, the socio-demographic characteristics of the population it serves. At the individual officer level, style reflects "grace under pressure", or what has developed in the person as the best part of their philosophy of policing or the "war stories" that make up the symbols of what they see as good police work. Other definitions of style exist, but these are as good as any.

The first person to study style was Wilson (1968), and his typology of three styles remains useful today. Each department usually has one of three styles, although some may be a mix of two. The three styles are: (1) watchman; (2) legalistic; and (3) service. Briefly, a watchman style is generally found in poorer communities and emphasizes informal police intervention - persuasion, threats, roughing up - rather than arrest because the priority is maintaining order. A legalistic style is a commitment to enforcing the letter of the law and frequent use of arrests in a focus on community safety, but takes a hands-off approach to community problems that are not crimes. A service style is bent on helping the community by working hand in hand with social service agencies, and by using referrals rather than arrest.

Other models of police work have been suggested by Kleinig (1996) who proposes that police departments tend to think of themselves in one of the following ways: (1) crimefighters - using the military model to portray criminals as the enemy or bad guys and police as the good guys; (2) emergency operators - using the firefighter model to portray themselves as emergency handling professionals who just happen to be competent at crime control; (3) social enforcers - using the band-aid model to portray themselves as fixer-uppers who settle things once and for all by force if necessary; or (4) social peacekeepers - using the peacekeeping model to portray themselves as pacifiers of the populace, bringing peace and psychologically satisfying closure to social conflicts.

Individual officer styles have been proposed by Broderick (1977) and Muir (1977). Broderick's typology is based on respect for due process, and consists of: (1) enforcers - with little respect for due process; (2) idealists - who want to keep the peace but respect due process; (3) optimists - who emphasize due process; and (4) realists - who don't seem to care about anything, much less due process. Muir's typology is based on passion to use force, with what he calls professionals and enforcers who use force, and reciprocators and avoiders who avoid force. Some criminal justice experts find the study of police style to be a futile attempt to stereotype or pigeonhole departments and officers. Others find it an illuminating and useful area of study.

POLICE STRATEGY

A strategy (as opposed to a tactic) is a long-range goal or plan designed to bring about some particular accomplishment or outcome. Strategies are always practical or operational in character, but often have long-term impacts on both the agency and community. Most strategies can be identified with the time periods when they were popular. A strategy popular in the 1960s, for example, was police-community relations. Abbreviated and known as PCR programs, this was a strategic approach to getting people to
respect the police again (since the 1960s were characterized by riots and hatred of police). Specific operational forms of PCR included ride-alongs (so people could spend a day seeing what police went through), and open houses (so people could come inside police stations and see there were no dungeons, torture chambers, or the like). Some PCR programs still exist, such as neighborhood watch, Officer Friendly (DARE) programs, Police Athletic Leagues (midnight basketball), and property engraving services.

During the 1970s, police experimented briefly with team policing, an idea thought to have originated in Aberdeen, Scotland, but took different forms in America. In some places, it was a demilitarization movement, getting rid of uniforms and replacing them with stylish civilian blazers. In other places, it was the elimination of detectives (who make up 15% of an average department), and giving patrol officers the authority to do detective work. In most places, however, it involved officers being semi-permanently assigned to particular neighborhoods, to get to know the local people and problems intimately.

In the 1980s, police tried different variations of patrol strategy. Directed patrol was tried, where police concentrated their patrol time in areas that crime analysis showed were hot spots. Aggressive patrol was tried, which is the same as roadblocks or crackdowns. A few places tried foot patrol. Other places tried split-force policing, known today as differential response, which is when half the patrol cars are committed to certain problem areas and the other half can respond to calls. The 1980s also saw widespread abandonment of two-person patrol cars.

The 1990s have been characterized by two strategies: problem-oriented policing, the idea that police find out what is causing citizen calls for service, or the crime problem; and community policing, a philosophy of cooperation with citizens on what citizens regard as their problems and needs. Research on the effectiveness of police strategies has produced mixed results, although it looks like the general trend toward more community involvement is here to stay. The 21st Century saw the birth of homeland security policing, which had some situational awareness features like community policing, but also had strong federalization or centralization features.

Policing has always been technology-driven. For example, inventions such as radio, telephone, and automobiles have profoundly shaped police work. Computers and forensic techniques, however, have a long way to go (although there are some sparkling examples of high-tech computing and forensic labs in some places). Even today, one might find police departments that still use typewriters, Vascar (a low-tech version of radar), and have no idea how to collect and process DNA. Fairly rapid progress is being made, but the main problem, as most experts see it, is that police are interested primarily in technological advances that deal with weapons, armor, SWAT-like stuff, and newer, better ways of taking people down to control and detain them -- as opposed, unfortunately, to technology that might get at the root causes of crime and allow police to work smarter, not harder. For example, a police officer might never complain about the battery life on a laser-guided handgun, but one minor glitch in a software program that analyzes crime hot spots and the whole idea of using computers to do better police work is thrown out the window. There is a certain ambivalence about technology in police work, and the legal system, culture, and academia to some degree reinforce the notion that police ought to be nothing more than "super-sentinels" who used nothing more than their God-given, yet highly-trained human senses to catch criminals. Anything else might be unfair, and no one wants the police turned into some domestic monitoring organization, although this is all changing in the homeland security era.

No other occupation has had their culture and personality more thoroughly analyzed than the police. In all fairness and frankness, attention in this area is rather embarrassing, but reveals some unpleasant facts. First of all, there's the problem of recruitment. Recruits generally come from the blue-collar labor force or the military, people who are tired of being carpenters, plumbers, truck drivers, or contractors, and soldiers
who have been steered into police work by military tradition. The cause may be because newspaper ads for police jobs are typically placed in the unskilled or skilled labor sections of newspapers, but it represents a serious problem because it means police have never figured out how to recruit from college campuses, the private security industry, or places where women and minorities might be found.

Following recruitment is selection. Some good people are weeded out from police work because of unfortunate accidents with the law, drugs, or their credit history. Some police departments can't hire the foreign-language speaking officers they need because of naturalization requirements. Some people, with disabilities, could easily do the work, but at best, only get conditional offers of employment and/or a finding that reasonable accommodations cannot be made. Vision requirements prohibit some from even applying. The physical fitness standards are very tough.

After selection comes training, a formal course of study at police academy, which is often nothing more than fourteen weeks of boot camp. After the academy, there's still a probationary period of field training, where they're told to "forget all that stuff learned at the academy." On the job, there are few opportunities for in-service training, other than watching videos or the occasional workshop.

The process of socialization, defined as learning the values, symbols, and beliefs of a group takes place throughout recruitment, selection, and training. Add attitudes to what is learned, and you've got what is called a subculture. The police subculture has been characterized long ago by Skolnick (1966) as consisting of the qualities of danger, authority, and isolation. Everything that is important to believe in (to become a police officer) revolves around sensing danger, how to exert authority, and keeping quiet about police business. Experts have been warning for years that this kind of police subculture has got to change because it's a ready-made recipe for excessive force against citizens.

Socialization results in personality change, or at least a working personality that one puts on for short periods of time. Few souls have enough hardiness to avoid falling into habits of behaving, knowing, and moralizing that accompany development of the police personality. Using a trait approach to the study of personalities, experts have consistently found anywhere from 6-13 dominant traits among police officers (Skolnick 1966; Neiderhoffer 1967; Brown 1981; Wilson 1990). The following table is a list of those traits:

<table>
<thead>
<tr>
<th>Dominant Personality Traits of Police Officers</th>
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</thead>
<tbody>
<tr>
<td>Authoritarian</td>
</tr>
<tr>
<td>Suspicious</td>
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<tr>
<td>Insecure</td>
</tr>
<tr>
<td>Honorable</td>
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</tbody>
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POLICE USE OF FORCE

Nothing defines the central role of police in society better than its monopoly over the unquestionable use of force (Bittner 1970). Aggressiveness, toughness, relentlessness, and (one might say) a cult of violence all tend to permeate the adrenaline-soaked nature of police work. A couple of horrific examples where the monopoly on force was abused would include the Abner Louima case in 1997, where the aggressive tactics of New York City’s Street Crimes Unit (SCU) involved rectal damage on a suspect with a toilet plunger. Over a two year period, the SCU unit processed 45,000 people with their get-tough methods. Another example would be the Amadou Diallo case in 1999, where an immigrant who fit the profile of a serial rapist was shot 41 times after reaching for his wallet. Extreme examples such as this are called illegal use of force, where criminal and civil liability issues arise.

About two million people a year are subjected to police force if we include aggressive handcuffing along with rough physical touching and verbal threats. Weaponless tactics are the most common use of force, and it occurs most frequently when alcohol, drugs, or mental illness are involved on behalf of the suspect.
A small percentage of officers appear to be over-represented among the more extreme incidents of force. It makes sense to refer to excessive force as what some individual officers do and excessive use of force as what is practiced on a department-wide basis. There is no inherent connection between the two, as at the department-level, there may be good policies regulating use of force thru specific "rules of engagement" (which are what separate police action from military action), but at the individual-level, there may be instances of discretion abuse and/or situational variations (Punch 1985).

In an average year, 600 suspects are shot and killed by police, while another 1,200 are shot and wounded, and 1,800 are shot at and missed. Black property offenders are twice as likely as any other group to be shot at by police, and another interesting statistic is the growing percentage of cases (over 10%) that involve suicide by cop, where a note is usually found saying "Sorry to get you involved. I just needed to die."

Criminal justice experts are divided over whether racial differences exist with respect to police use of force (Weisburd et al. 2000). On the one hand, the Christopher Commission (1991) stated that white officers were somewhat more likely to use excessive force against African-Americans, and watchdog groups like the ACLU, Amnesty International, and Human Rights Watch have stated a pattern exists, but on the other hand, respected researchers like Adams (1996) and Tonry (1995) as well as the U.S. government itself have never unveiled a pattern.

POLICE STRESS

There are some unique dangers and stressors that police officers must face. Some people are not cut out for the work, and others are. The job sometimes takes away the best of them. Many officers meet their death while performing police work. On-the-job deaths occur from stress, training accidents, auto crashes, and at the hands of criminals. Law Enforcement Officers Killed in the Line of Duty have averaged 150 a year until the year 2001, when it jumped to over 200 (the most frequent causes being terrorist attack, criminal gunfire, and auto accidents). Studies by the FBI have not found that slain officers differ in any respect from non-slain officers. They were well-liked, friendly, and easy-going.

Officers are often exposed to blood and other bodily fluids that transmit serious diseases like AIDS. While only a couple cases of officers contracting the disease are known, precautions are necessary at crime scenes, when frisking suspects, collecting evidence, and such things as the emergency delivery of babies in squad cars. It's exposure to risks and dangers like these that may contribute to alcoholism or drug abuse. Other officers report family stress, or the problems of trying to hold together a police family, hence, divorce rates are unusually high among police officers, although this may qualify as a myth more than fact. Others suffer heart disease or gastrointestinal disease.

The most debilitating stress in police work may come from the fatigue of working long hours around the clock, such as at a disaster or rescue scene where there is repeated exposure to carnage and suffering. Shift work in policing is also stressful. Fatigue contributes to accidents, injuries, and misconduct.

Another source of stress is the criminal justice system itself. Police are accustomed to getting things done, and seeing something happen for the good of society. Unfortunately, not all arrests lead to conviction, not all evidence is admitted in court, and not all punishments are harsh enough. Police experience a terrible sense of helplessness and powerlessness when they see repeat offenders back on the street and victims go without justice for the harm done them. It's this kind of stress that is associated with police suicide, which is twice the rate of the general population.

POLICE ETHICS

The oldest problem in law enforcement is corruption, but other misbehaviors are of concern, ranging from use of profanity to sexual deviance. Is it feasible to expect untarnished "goody two shoe" behavior, all the time, from every police officer? Codes of ethics are either aspirational hopes and dreams or
regulatory codes of conduct, and most professions in the U.S. use the aspiration variety. This allows us to use words like fidelity and integrity as unreachable goals with no practical ideas on how to achieve them. However, the movement for training in police ethics is growing, and it is based on the idea that police officers need to hold themselves to higher standards than is expected of the average person.

The problem of ethics is not so much an individual matter as an issue of professionalization. A group with professionalization (as opposed to just being a profession) possesses a special morality that attaches to its social roles rather than the people who inhabit those roles. Mere professions can be created by certification, licensure, or continuing education, and anybody can create a code of ethics. Some of the defining qualities of professionalization include: a monopoly over an essential public service (and police certainly have that, but must work to maintain that trust); a regulatory code of ethics (one that guarantees the public the exact standards by which services are delivered); special knowledge and expertise (never a resort to plain old-fashioned common sense); higher education (not just training, but lifelong learning); autonomy and discretion (the ability to make judgments and be creative rather than rule-driven); and self-regulation (successfully earning the right to say that outsiders can never appreciate the constraints and pressures of police work). The basic reason why policing has remained unethical and sub-professionalized is because police have demanded self-regulation instead of earning it (they have also abused their monopoly trust and never made a dent in any of the other defining qualities of professionalism).

POLICE ACCOUNTABILITY

Police power and authority exists not because of some inherent quality of the office, but because power and authority exist as social relationships or a characteristic of society. People comply with authority because they believe that those who exercise authority know what they are doing with it. People in positions of authority are therefore accountable to those who (continuously, socially) give them authority. Therefore, it is an incumbent duty of the police to arrange accountability mechanisms for the public, to assure the public that the police know what they are doing. Accountability is not the same as liability. Suing the police for damages isn't going to change anything or lead to reforms that makes the police more willing to open themselves up to self-examination, public inspection, or continuous improvement.

There are a variety of accountability mechanisms that the police could do. The simplest thing is to prepare annual reports (like corporations), and release them to the public and the media. These shouldn't be reports about crime rates going up or down, but reports about how citizen complaints were handled and the like. The next thing would be admission of errors in judgment. Nobody expects the police to be perfect, or never make mistakes. People are tired of the blue wall of silence and cover-ups. The police also should have rulebooks that are sensitive to different local and social conditions. One policy manual size doesn't fit all. Police should have civilian advisory boards that assist them with planning, and the logical extension of this -- civilian review boards (replacing Internal Affairs units for the investigation of misconduct).

POLICE RACISM AND SEXISM

The issues of diversity and multiculturalism make up the last topic here, and can be approached in different ways. Statistically, blacks make up 12% of all sworn officers nationwide, and other minorities make up 8%. Women make up 13% of law enforcement. These are token levels, and it's also safe to say minorities and women are underutilized and under-promoted. Some experts have said that policing, following the military, is the world's most racist and sexist organization, but it's debatable over whether that's deliberate or not, intent being a key element of racism and sexism, unless recourse is made to improbable concepts like latent or institutional racism.

For example, let's take the notion of racial profiling, a late 1990s phenomena defined as any police action that relies on race, ethnicity, or national origin rather than behavior or information in identifying a criminal suspect. Racial profiling goes in many areas of government and business, and in the most common variety of its practice, it leads police to stop and inspect selected people passing through public places — passengers on airplanes, drivers on highways, pedestrians in urban areas, visitors crossing national borders
— because they fit a statistical profile based on group membership (Pampel 2004). Racial profiling is quite different from psychological profiling, but the technique can be traced to drug courier profiling, a DEA technique developed in the early 1980s to spot traffickers at airports. Arguments in favor of racial profiling include the statistics that blacks are 13 times more likely to be carrying drugs than whites, that minorities have higher offender rates, and communities are much safer when police focus their efforts on high-incidence and high-prevalence areas and people. Arguments against racial profiling include the statistics that most people do not favor it, statistical-driven police work leads to stereotype-driven police work, it is morally and ethically wrong, and it generates a public perception of policing as biased. Of these, perhaps the strongest argument is public perception of bias, because most of what passes for multicultural policing is not substantive, but appearance aimed at improving public perception of the police. In the end, it may be that perception is all that matters.

INTERNET RESOURCES

About.com Crime's Backgrounder on Police Violence
ACLU Fighting Police Abuse
ACLU Rights to Encounters with Police
Amnesty International Page on Police Brutality
Amnesty International Report on Police Brutality in the U.S.
Human Rights Watch Report on Police Brutality and Accountability
New York City's Precincts
Officer Down Memorial Page
Police Use of Excessive Force against Black Males

PRINTED RESOURCES

The study of legal constraints on police, or what might be awkwardly called police law, is generally the study of four areas -- stop and frisk, search and seizure, arrest, and interrogation -- and in-depth analysis of two rules devised by the Supreme Court -- the exclusionary rule and Miranda rule. There's a vast difference between the perfect world of policing as the law and Supreme Court would have it and the imperfect world of policing on the street. The U.S. Constitution and Bill of Rights contain specific provisions protecting citizens from abuses of police power, but interpretation of those provisions in modern times is no easy matter.

The era of Supreme Court history known as the Warren Court (1953-1969) gave us most of the rules that "straight-jacketed" the police, but conservative courts since then have created numerous rule exceptions. The U.S. has a unique set of checks and balances on police power, and it will appear shocking at times to see the guilty go free because of a police mistake or blunder, but that's all part of our great experiment -- as the Supreme Court sees it -- by punishing society for police mistakes in hopes of getting police to make fewer mistakes.

STOP AND FRISK

There are times when the police are not interested in arresting anybody, nor in securing any admissible evidence for use in court. These are the times when police are only in the initial stages of an investigation, and are only interested in checking out any person(s) or place(s) that looks suspicious. These activities are known by a variety of names -- field interrogations, field interviews, field inquiries, threshold inquiries, pretext stops, or just routine questioning -- but what they all have in common is that they are subject to stop and frisk law as outlined in Terry v. Ohio (1968), a case where police stopped and patted down three men looking suspiciously into a store window. The American practice of stop and frisk is very similar to the "identity checks" that police do in foreign countries.

Stop and frisk law gives the police a right to temporarily detain somebody in a public place if there are specific articulable facts leading a reasonable police officer to believe a crime might be occurring. This standard is known as "reasonable suspicion", although some people call it articulable suspicion or more than mere suspicion. It is not necessary for the officer to identify any specific crime they think is being committed, only that a set of circumstances exist that would lead a reasonable officer to believe some kind of criminal activity is occurring. The Supreme Court thinks of it as one step above a hunch, and the police think of it as profiling.

Now, there's certain things the police cannot obviously do. They cannot stop and frisk anyone in a private place, especially a private dwelling. If they were to possess X-ray eyes or infrared scanning devices, and used them to look inside your house, that would be illegal without a warrant (the Supreme Court decided that in Kylo v. U.S. in 2001). In fact, the whole thrust of Fourth Amendment jurisprudence is in the direction of less, rather than more, technology in the hands of police.

The next thing they cannot legally do is racial profiling. You simply cannot use skin color or the fashion accessories of a particular minority group as a basis for anything in criminal justice - period. What they can do is engage in drug courier profiling (and here's a list of indicators) which does allow consideration of nervous appearance and ostentatious apparel, among other things.

The last thing they cannot do is strip you down and invade the orifices of your body, for example, cavity searches are out of the question. The frisk, or "pat down" must be primarily for weapons and only involve the outer clothing. The amount of time a citizen is delayed must be reasonable, and there's no arbitrary
limit, but times of 30 minutes have been declared reasonable and times of 90 minutes have been declared unreasonable. It all depends on the situation or circumstances, a standard known as the totality of circumstances, which is an integral part of stop and frisk law, along with the experienced police officer standard, which lets police determine for themselves when they are in fear of harm.

What they can do is stop anyone who is acting strangely, does not seem to "fit" the time or place, is loitering, appears to be associating with known criminals, or fits the description of a wanted criminal. The most controversial part of this is that police can stop anyone they think is considering or thinking about a crime. This will likely be an issue that soon comes up in a future Supreme Court session.

SEARCH AND SEIZURE

It was 1961 (in the case of Mapp v. Ohio) that the Supreme Court finally held state and local police departments accountable to the exclusionary rule. Prior to that, it was only the federal police and a handful of states that had rules about the exclusion of improperly obtained evidence. Every place had always used warrants, where an officer swore under oath that evidence of a crime could be found, but the standard was (and still is) probable cause, and this made for little distinction between a search warrant and an arrest warrant. Instead, what Mapp enforcement of the exclusionary rule meant was that the 4th amendment standard of reasonableness would now be applied across-the-board. Reasonableness is a complex word with many meanings -- logical, practical, sensible, intelligent, and plausible. It's definition is debated among legal scholars. Probable cause is when police use their training, experience, or expertise to infer or recognize a pattern.

The exclusionary rule is the courts' most powerful tool for controlling the police. All it takes is one piece of illegally obtained evidence -- it could be (and often is) the most critical, incriminating piece of evidence, such as the murder weapon -- and something called fruit of the poisoned tree kicks in, and any subsequent evidence derived from that one piece of illegally obtained evidence is inadmissible. However, there are numerous exceptions to the exclusionary rule, as the following table illustrates:

| Good faith or minor transgressions (the police thought they had probable cause, but legally didn't) | U.S. v. Leon (1984)  
Maryland v. Garrison (1987)  
| Plain View or public inspection (police "sightings" by coincidence; inevitable discovery of evidence anyway) | Harris v. U.S. (1968)  
Coolidge v. New Hampshire (1971)  
U.S. v. Irizarry (1982)  
Horton v. California (1990)  
| Automobile or inventory exception (searches of passenger compartments, trunks, door, floor panels; any moving vehicle) | Carroll v. U.S. (1925)  
Chambers v. Moroney (1970)  
California v. Carney (1985)  
California v. Acevedo (1991)  
| Emergency, exigent, or incidental exception (danger to life, risk of escape, or destruction of evidence; when knocking and announcing would be dangerous or futile; protective sweep searches; prompt action necessary in name of public safety) | Warden v. Hayden (1967)  
Chimel v. California (1969)  
Mincey v. Arizona (1978)  
|
These exceptions mean that police don't need a warrant to conduct a search and seize evidence. In practice, they often do try and obtain a warrant, or cover themselves, as the majority of cases do, with the consent exception, relying upon respect for authority. You'd be surprised how many suspects simply assume they will get into trouble if they don't let the police in when they ask.

ARREST

Arrest is a special type of seizure in which a person is seized or taken into custody. The standard has been, and always will be, probable cause. However, the Supreme Court allows this standard to be mixed with local procedures since sometimes an arrest is necessary before there's time to get a warrant. Also, we're only talking about intrusive arrests, the kind that involve some degree of physical coercion or force used to deprive someone of their freedom of movement. This generally means being handcuffed, placed in a transport vehicle, and taken to a police station. Arrest does not refer to stops, commands to freeze, heated conversations, telephone calls, or any other situation where the person is (theoretically) free to leave. The key element of arrest is custody.

The probable cause restriction on arrest power in America is designed to prevent the police from rounding up “undesirables” and, in any event, judges have the last word on probable cause, not the police. Unfortunately, what is probable cause to one judge might not be to another, as there are many ways of interpreting the Fourth Amendment. The common sense approach is probably the dominant interpretation, and says that probable cause consists of a “substantial probability” that a crime has been or is being committed.

INTERROGATION

Once a person is in custody and it begins to appear as if the focus of the investigation is upon them as a particular suspect (often custody and focus are synonymous, sometimes they're not), they must be read aloud their Miranda rights (to remain silent; any statement will be used against them, an attorney may be present during questioning or be consulted; and if they cannot afford an attorney, one will be provided for them). Miranda Law is usually referred to as “the marriage of the 5th and 6th Amendment.”

A violation of Miranda law will result in an immediate (and automatic) suppression of any evidence based on the defendant's spoken words, rendering useless whatever statements they made to the police and any use the police made with those statements. However, a violation of Miranda law, in itself, is not grounds for an acquittal nor a reversal of conviction.
Miranda warnings are "triggered", or apply if TWO elements are present: CUSTODY and INTERROGATION. Both are more difficult to define than what might appear at first glance. The general rule is that custody occurs whenever a suspect is placed in unfamiliar and hostile surroundings. Interrogation inherently involves persuasion or pressure, the ultimate goal being verbal trickery to obtain a confession, or at least an admission (soft confession)..., anything that would implicate the suspect in criminal behavior. The suspect must make a clear, unambiguous request for counsel (the Edwards rule), and the police must honor it (somewhat), and cease questioning. Clear and unambiguous means language stronger than "Maybe I should talk to a lawyer." If after police cease questioning, the suspect himself re-initiates conversation, or further communication with police, then any incriminating statements made may be used against him. There are a variety of other rules, listed below:

- ATTORNEY WAIVERS (Moran v. Burbine 1985) If a suspect is talking to police after having waived his right to have an attorney present and the suspect's lawyer has called the police to indicate a desire to advise his client not to talk, the police are under no obligation to inform the suspect of his lawyer's wishes.
- BOOKING PROCEDURES (Pennsylvania v. Muniz 1990) Miranda is not required if standard police procedures are being followed, specifically booking procedures, where a suspect is simply being fingerprinted and photographed.
- DELAYED WARNINGS (Oregon v. Elstad 1985) If a suspect confesses right away prior to receiving Miranda warnings but is later given warnings at the police station and confesses, the initial statements may not be used, but the later confession can be used. The failure to give warnings right way does not invalidate later interrogations.
- DERIVATIVE EVIDENCE (Michigan v. Tucker 1974) Applies if suspect has not been Mirandized and asserts an alibi defense in response to police questioning. If police check out the alibi, and it, or the witness leads from it, lead to incriminating information against the suspect, it can be used against them. The reliability of any witness's testimony is not affected by Miranda violations.
- ILLEGAL SEARCH AND SEIZURE (New York v. Harris 1990) If the police unlawfully enter a home and illegally make an arrest, but then take the suspect to the police station, read him his rights, and he confesses, the illegal search and seizure does not taint the subsequent legal confession.
- IMPEACHMENT (Harris v. New York 1971) Impeachment is the in-trial process of destroying a witness' credibility. The law allows an illegally obtained confession to be admitted at trial if the defendant testifies on their own behalf. This is to show that the defendant committed perjury. Also, silence at the time of police interrogation is a presumption of guilt if the defendant later attempts a defense strategy of self-defense at trial. This is because if self-defense was the motive, it would have been reasonable for the defendant to tell the police about it.
- INDEPENDENT EVIDENCE (Arizona v. Fulminante 1991) If an inmate is under threat of physical attack by other prisoners and a fellow inmate, in reality an undercover officer, promises to protect him in return for the truth, the confession is coerced because of the threat of physical attack, but the conviction need not be overturned if sufficient independent evidence supporting a guilty verdict is introduced.
- PRIVATE SECURITY (U.S. v. Garlock 1994) Talking to a probation officer, a private detective (perhaps one hired by the victim's family), or any private law enforcement official does not involve Miranda at all. Even the most outrageous conduct of private actors cannot violate a suspect's 5th Amendment right against self-incrimination.
- PUBLIC SAFETY (New York v. Quarles 1984) If police capture or chase somebody who has hid or discarded a gun or drugs somewhere where innocent members of the public might come across this contraband, the officers don't have to read Miranda in order to ask "Where is it?"
- PURGED TAINT (Wong Sun v. U.S. 1963) A confession obtained following an unlawful arrest is admissible if the "taint" caused by the police illegality is somehow "purged". Usually applies in cases involving multiple questioning at different points in time; e.g., marathon interrogations with breaks, or (more commonly) the suspect coming back in voluntarily to continue answering questions after being released. The suspect's voluntariness to talk after a break in time "purges" the taint of previous police illegality.
RESUMED QUESTIONING (Michigan v. Mosley 1975) If a second officer a few hours later in a different room starts a new interrogation, the suspect does not have to be re-Mirandized, although something called the staleness doctrine will apply if a significant period of time has passed. Re-Mirandizing is required if there are two or more interrogations by different police agencies, state and federal, for example.

SURREPTITIOUS QUESTIONING (Illinois v. Perkins 1990) The Miranda rule and a suspect's 5th Amendment rights are not violated if undercover police or their informants are used to obtain incriminating testimony from a suspect. The suspect's 6th Amendment rights are violated, however, if any of these techniques are used after formal charges have been filed. Miranda warnings are not required when suspect is unaware he is speaking to a law enforcement official.

INTERNET RESOURCES
About.com Civil Liberties Search & Seizure
ACLU Page on Racial Profiling
Article on Effective Search & Seizure
Lecture on Probable Cause
Miranda Law and Self-Incrimination
Nolo Press Guide to Arrest Law
Nolo Press Guide to Search & Seizure Law
Search and Seizure Law
Stop and Frisk Law

PRINTED RESOURCES

Unit 8

AN OVERVIEW OF THE COURT COMPONENT IN CRIMINAL JUSTICE
No! No! Sentence first -- verdict afterwards (Lewis Carroll, Alice in Wonderland)

At a basic level, courts are places where people bring disputes to be settled by law. In order for court systems to have legitimacy, they must responsibly exercise their governmental powers and obligations, for which there are many: the seizure of property and persons; the determination of legal family status; enforcement of economic obligations: protection of the average person from arbitrary governmental interference; and putting a non-bureaucratic face on justice. Among the population, courts must have unquestioned, widespread support, and to accomplish this, courts must be fair and impartial, granting each person equal access to an equal chance of presenting their case with an equal chance of success. Courts should be places of awe and majesty, resulting in at least the appearance of justice (Rubin 1976). Whether or not justice is actually done usually depends upon who wins and who loses. Courts may be primary examples of justice as a sporting event or morality play, but they are also places where you need professionals. Every year in the U.S., at least 30,000 new binding decisions are made in the court systems,
and this in addition to more than 18,000,000 published decisions make up the body of precedent, which are previous decisions that are guides to future decisions.

In ancient times, people used temples, like the Oracle of Delphi, to assist them in making just decisions. Other societies, like the early Hebrews, settled matters with a roll of the dice. Early African tribal justice resembled a game of musical chairs. There has always been a metaphysical, or unknown, element to the process of courtroom justice. Even today, one can never predict the outcome of jury deliberation. Likewise, the differences between judges and lawyers in their training, socialization, and politics (Wice 1991) make for variation in how decisions are arrived at. Sociopolitical factors do not so much influence the final disposition of cases, but the process of handling cases. It makes little sense to talk about places where courts are more “lenient” or “harsh” than other places. Courtroom justice varies by courthouse location at the procedural level precisely because a set of shared norms and values develop between key actors in the workplace, this being called the courtroom workgroup concept (Eisenstein & Jacob 1977). The primary differences involve how fast a case is processed, how much pressure is brought to bear on producing a plea bargain, and how much due process is sacrificed in the name of efficiency. Eisenstein & Jacob (1977) found that all courtroom workgroups attempted to emulate the qualities of speed (a desire to dispose rather than dispense), factual guilt (they all assumed people who made it this far were guilty, and considered a finding of legal guilt routine), cohesion (all parties, even adversarial ones, tried to get along), and secrecy (most major decisions were negotiated in hallways or back rooms).

Courts are NOT bureaucratic organizations in the usual sense of the term. They are generally regarded as nonbureaucratic workgroups, and the concept of “courtroom workgroup” is unique to the field of criminal justice (Eisenstein & Jacob 1974). In particular, courts do NOT have the following characteristic of bureaucracies: well-defined rules over the disposition of particular tasks. Courts are, instead, informal work groups in which participants have discretion in carrying out their tasks, and a common professional bond exists because most of the participants are lawyers. This creates a unique reward/punishment system which is based on informal norms. An attorney who does not file unnecessary motions may be rewarded with more information, for example, but nowhere are these rules written down or acknowledged. They simply have to be learned by acculturation into each courtroom workgroup. The following are four (4) characteristics of Courtroom Workgroups:

(1) SPEED - a desire to dispose (of cases) rather than dispense (justice)
(2) GUILT - a belief that any defendant in court is de facto guilty, it's the legal guilt that matters
(3) COHESION - the need to get along and work together; group cohesion
(4) SECRECY - a tendency to keep hallway & backroom negotiations private

Courts are organized along the principle of JURISDICTION. Lower courts (aka magistrate, municipal, county courts) have limited jurisdiction which means they can only handle certain kinds of cases. Trial courts (aka district or circuit courts) have exclusive or general jurisdiction which means they can usually handle any kind of case. Appellate courts (aka courts of last resort) have jurisdiction over appeals only. The phenomenon known as court unification involves reorganizing and unifying court systems on a statewide basis. It does away with the confusion, redundancy, and fragmentation that a nonunified system would have by eliminating jurisdictional demarcations based on the type of crime or amount of penalty that can be given out. Unification usually involves three (3) components:

(1) a simplified state trial court structure
(2) judicial policy-making vested in the state supreme court or judicial council
(3) state funding of all or a substantial portion of the state court system

Unification is a response to the disturbing tendency of recent years to proliferate a whole new series of small, local, specialized courts, such as drug courts, night courts, you-name-it courts. The most serious problem of the courts is, however, DELAY. There is no agreed-upon definition of delay, but it is what causes cases to languish on the docket for months or years. Delay is part of the reason why innocent people might plead guilty, and nevertheless, it is a violation of our speedy trial rights. There are many reasons for delay, ranging from slow mail delivery, change of addresses on the part of defendants and witnesses,
prisoner housing & transport problems, and unnecessary pretrial hearings. The following is a list of reasons for why defendants missed their court dates:

<table>
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<tr>
<th>Reason</th>
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<tbody>
<tr>
<td>(1) I was hospitalized</td>
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<tr>
<td>(2) I forgot/was confused</td>
</tr>
<tr>
<td>(3) I was incarcerated for another crime</td>
</tr>
<tr>
<td>(4) I never received my notification letter</td>
</tr>
<tr>
<td>(5) I was sick</td>
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<tr>
<td>(6) I had transportation problems</td>
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<td>(7) I had a family emergency</td>
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<td>(8) I could not get together with my attorney in time to prepare</td>
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<tr>
<td>(9) I was in an alcohol/detox facility</td>
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<tr>
<td>(10) I was dead</td>
</tr>
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</table>

Some of the more common pretrial motions that add to the problem of delay are: (1) change of venue (2) change of judge (3) double jeopardy hearings (4) competency to stand trial hearings (5) suppression of evidence hearings.

Two important issues in the area of judicial administration are ASSIGNMENT OF COUNSEL for the Indigent Offender and BAIL SYSTEMS. Indigent (meaning "poor") defendants are usually assessed by a court official for their eligibility in obtaining the free services of an attorney. Eligibility criteria need to be established, and some common ones are: (1) cash assets less than $300, (2) net income does not exceed $500, (3) person is not living with parents who have clear ability to obtain counsel, (4) other determination factors, such as length of employment, number of children and family responsibilities, and number and nature of debts.

Bail systems also have point determination systems which need to be tailored for local circumstances. Bail is a serious stage in the criminal justice process because it is the best predictor of sentence length. Those charged with high bail usually get lengthier sentences. There have been major shifts in the bail reform movement in recent years, from cash to 10% down (Illinois plan) systems, to Release on Recognizance (Vera Institute) systems, to PROMIS (Prosecutor Management Information Systems) - based dangerousness systems. Some of the typical criteria include: (1) same address for a year or more, (2) lives with family, (3) same job for a year or more, (4) no prior convictions. The original purpose of bail was to reduce failure-to-appear rates, but in recent years, the purpose has been to reduce rearrest-while-on-bail rates.

The American judiciary has unique powers. Article III of the Constitution establishes a strong judiciary as an integral part of a system of checks and balances. The American judiciary has power over other branches of government. It can declare laws and executive directives unconstitutional. It can issue "cease and desist" orders to agencies or agency personnel. It has the summary power of contempt (jail time up to three years), and enormous resources other than simple detention and seizure. Without any police force of its own, the judiciary can exercise control over guardianship, trusteeship, tax collection, legal status, or in short, every economic factor that matters. Federal courts can determine when invasions of privacy are warranted. Criminal courts can determine life or death. Municipal courts can raise their own revenues by assessing fees (cash, check, or money order accepted), although federal and state courts are more financially independent.

The court component of criminal justice is the least expensive component to operate because of the small number of employees involved. However, they are usually the highest paid employees in the criminal justice system. The lowest paid state judge makes $80,000 a year, and federal judges average $150,000 a year. The average starting lawyer's salary in the U.S. is about $45,000, but after about 10 years, it tends to reach $127,000. Legal assistants only make $35,000 a year, but prosecutors and public defenders tend to make close to $100,000 a year in any mid-sized city.

Most Americans (85%) say that judges are honest, and almost half (47%) say lawyers are honest. These figures have been slowly dropping in recent years. The Center for Judicial Conduct Organizations estimates that every year, 12 judges have to be removed from office for misconduct, another 80 are publicly censured or admonished, and another 150 are privately censured or admonished. Also every year, NOLO estimates that 550 lawyers are disbarred, and hundreds of others are suspended from practice temporarily. Most states allow disbarred lawyers to apply for reinstatement (and 1 in 20 get it), but some wind up in
jail. There are three common pathways to getting disbarred. The first is when the lawyer steals funds from his or her client. The second is when they commit a serious crime, such as homicide, rape, or tax fraud. The third, and least common, way is when they deliberately lie in court. There are serious problems with America’s attorney discipline system because it is a self-regulating monopoly.

Lawyers, of course, receive legal training and pass a bar examination to become lawyers. Judges don’t receive any special training as they are simply appointed or elected to positions. There are problems with the educational standards for lawyers. All have to take the LSAT (which is a poor predictor of success in law school); they take 2-3 years of coursework beyond a bachelor’s to earn a JD, or juris doctorate, and mistakenly think they have the equivalent of a PhD; and numerous watchdog organizations report racism, sexism, and politics play a part in whether someone passes a given state bar. In addition, graduation from a non-ABA approved law school does not prohibit one from the practice of law, as it only requires them to practice in the state where the school was located. America currently has a glut of almost a million lawyers, one for every 275 citizens. With judges, the Constitution doesn’t prohibit the President from nominating someone for a federal judgeship without a legal education or experience as a practicing attorney. All federal judges are appointed for life, and can only be removed via impeachment. In addition, Congress cannot lower or modify their salaries. At the state level, the vast majorit_y of states (28 states) hold elections to select judges. Half of these states hold “partisan” elections, which requires the judge to identify with a political party and raise campaign money. The other half hold “nonpartisan” elections which attempt to restrict political influence. Another eighteen (18) states use nominating commissions, but most combine them with a general election that gives voters a chance to retain them in office (the Missouri Plan). Four (4) states allow their governor or legislature to select state judges. Most state judgeships are for a period of 6-8 years. No law degree is required for some lower court positions. No one method of selecting judges has been found to ensure that judges are fair and honest.

No chart or diagram ever does justice to the diversity of the American court system, but most are arranged into three-, four-, or five-tier hierarchies. Lawyers sometimes speak in terms of appeals courts and trial courts, higher courts and lower courts, superior courts and inferior courts. Some states can be described as having a three-tiered judicial system composed of a trial-court level (sometimes called superior courts, district courts or circuit courts), an appellate court (often called the court of appeals) and a court of last resort (usually called the supreme court). Other states have an additional level of appeal or an additional level of trial courts. State trials are presided over by a single judge (often sitting with a jury); entry-level appellate cases are heard by a three-judge panel; and in state supreme courts, cases are heard by all members of the court, which usually number seven or nine justices. Understanding the federal court system is usually easier than understanding state court systems. Much criminal justice study of the court system is aimed at understanding the bewildering array of courts and how they are structured and operate. The U.S. has a complex system of upper and lower courts, all deriving their authority to hear certain kinds of cases from specific uses of the term jurisdiction -- which technically refers to sovereignty over subject matter, geography, or place in the court hierarchy, although the term is also used to describe how much discretionary power a court has in accepting or rejecting cases. America operates under a dual court system, one for the federal system and one for state systems, and the federal system is definitely a three-tier system and state systems are usually four-tier systems.

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<tr>
<th>THE DUAL COURT FEDERAL (THREE-TIER) AND STATE (FOUR-TIER) SYSTEMS</th>
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<tr>
<td><strong>U.S. Supreme Court:</strong> seats 9 justices, a chief and eight associates; has original jurisdiction in cases involving ambassadors or state versus state disputes; hears other cases when 4 agree to issue a writ of certiorari (pronounced sur-shee-uh-rah-ree) to review a lower court case, and different sides file briefs and attorneys make oral arguments; a vote of 5:4 or higher, with concurring opinions and/or dissents may be a landmark decision if it ends controversy and settles Constitutional interpretation.</td>
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<tr>
<td>U.S. Circuit of Appeals</td>
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<td>consist of 167 judges among 13 courts, dispersed regionally, twelve to look for judicial error in lower courts, and one that handles patents and when the U.S. government is a defendant; they have mandatory jurisdiction (must hear appeals) from lower courts, and appeals are either frivolous, ritualistic, or nonconsensual, with nonconsensual appeals sometimes settled as precedent at this level.</td>
</tr>
<tr>
<td>U.S. District Courts</td>
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<tr>
<td>consist of 650 judges among 95 courts dispersed in every state and territory; they have original jurisdiction (conduct trials) over criminal violations of federal law, and are assisted by 369 U.S. Magistrates who handle pre-trial matters and may try minor offenders; some courts at this level have specific responsibilities; many have cases backlogged.</td>
</tr>
<tr>
<td>State Trial Courts of Limited Jurisdiction</td>
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<tr>
<td>variously called inferior, lower, city, municipal, country, or magistrate courts, they consist of about 13,000 courts most of which are funded by city or county governments (which sometimes mistakenly call them circuit or district courts), hearing traffic cases, ordinance violations, and criminal misdemeanors; no jury trials are held, and no transcripts are kept, requiring a trial de novo if an appeal is made.</td>
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**STATE COURTS:** There are two basic facts about state court systems: (1) no two states are completely alike; and (2) you can’t tell what a court does by its name. All states have trial courts devoted to criminal cases, but in places like Ohio and Pennsylvania that have a unified court system, the criminal courts are known as courts of common pleas; in California, criminal courts are called superior courts; in New York as supreme courts; and in Michigan as recorder’s courts. So, even narrowing our focus down to criminal courts is of little help, and the situation gets worse when you start looking at chancery courts, probate courts, magistrate courts, municipal courts, family courts, juvenile courts, night courts, drug courts, county courts, mayor’s courts, and inferior courts. Some jurisdictions have put together Internet guides to find the court you need.

Major criminal cases begin at the trial-court level. These courts are often divided into two levels: courts of general jurisdiction and specialized courts. Cases decided by a trial court are subject to appeal to and review by an appellate court. In some states, as noted above, there is only one level of appeal from the lowest state court. In states in which there are two courts of appeal, rules differ as to whether a case will automatically go to the appeals court or the state supreme court. In some states, appeals from the trial court are brought to the mid-level state appellate court, with subsequent discretionary review by the state supreme court. In other states, litigants bring appeals from the trial-level court directly to the supreme court, which decides whether to hear the case itself or to have the appeal resolved by the intermediate appeals court. Under either of these scenarios, the state supreme court generally reviews cases that involve significant matters of state law or policy.

All states have a court of last resort, and although the name varies, these are usually state supreme courts which like all supreme courts, have the power to selectively pick and choose which cases they want to hear. States also have appellate courts which consider civil and criminal appeals and review lower court decisions. Appellate courts must hear cases if an attorney files the right paperwork. The lower courts (ironically called superior courts in some jurisdictions) are the entry point for most criminal cases, especially misdemeanors. For felonies, the lower courts hold initial appearances, preliminary hearings, and make bail decisions.
Specialized state courts are trial-level courts of limited jurisdiction that only hear cases that deal with specific kinds of legal issues or disputes. Although these courts vary from state to state, many states have specialized courts for traffic matters, family law matters, probate for the administration of decedents' estates, and small claims (for cases involving less than a specific sum of money). Rulings of these specialized courts are subject to appeal and review by state courts of general jurisdiction. Local courts also exist at the municipality level, in towns or villages, and are presided over by local magistrates, who are public civil officers possessing judicial power delegated under the local governing laws. This may include the power to rule on laws relating to zoning authority, the collection and expenditure of local taxes, or the establishment and operation of public schools. New Jersey maintains an informative site with good information on municipal court systems.

Somewhat problematic is a lower court known as the Justice of the Peace court (aka commissioner's court) where the judge doesn't even have to be an attorney. Another problem area is with various municipalities that sometimes use police courts, where the desk sergeant acts as a magistrate. These types of courts generally are a relic of red-light districts that used to exist in major metropolitan areas. In such courts, magistrates from various backgrounds exercised assembly-line justice against groups of prostitutes, drunkards, traffic offenders, minor offenders, etc., under conditions of little dignity.

The major reform effort in changing state court systems is called court unification, but local and county governments don't usually want to give up administration of their own courts. In recent years, the opposite of unification has occurred with municipalities creating specialized, speedy "drug courts," domestic violence "night courts," and teen courts, so precisely the opposite has been happening at the state level -- instead of unifying, courts have been proliferating.

**FEDERAL COURTS:** While on the state level some justices are popularly elected, no federal judge is elected by any constituency. They also do not serve a fixed term, but rather hold office for life "during good behavior." These two provisions result from constitutional attempts to isolate judicial decisions from political pressures, and contribute to the independence of the judiciary. Originally (in 1789), there were 13 U.S. district courts, but today, there are 95 of them, distributed throughout all 50 states and U.S. territories. District courts are the most common trial courts of the federal system. They have general jurisdiction over all federal crimes, bankruptcies, and when somebody challenges the constitutionality of a state or federal law. No district court crosses state lines. Large states like California, New York, and Texas each have four U.S. district courts. The number of judges depends on the size and population and workload. Although each district has numerous judges, a single judge presides over each case.

Above the district courts are the U.S. courts of appeals, and they are placed in 13 geographic regions called circuits. Sometimes, all the judges in a circuit get together to decide a case, a practice called en banc. The federal appeals courts review cases from the district courts and also administrative decisions of federal regulatory agencies. Appellate judges are allowed to hire three law clerks. The intermediate courts of appeals are considered the workhorse of the federal court system because the brunt of cases are resolved there. Appeals are taken from U.S. district courts to the U.S. courts of appeals if a losing party feels that the judge in the district court made an error of law. Appeals may not be taken to correct perceived errors of fact, unless there is a clear error of law. Thus, for example, a losing party may argue that the judge erred by admitting a certain document into evidence; but the losing party may not argue that the judge or jury reached a bad conclusion based only on that document.

The U.S. Courts of Appeals may decide cases on the basis of written briefs submitted by the litigants or may order oral argument. A decision is based on written opinion drafted by one of the judges and circulated to the other two panel members. The opinion of the court also must be signed by at least two panel members. Any of the judges on the panel may write a concurring opinion in which the judge agrees with the result reached in the majority opinion but for different or additional reasons. A judge that disagrees with the opinion of the court may instead write a dissenting opinion explaining why he or she has reached a different conclusion. Although dissenting and concurring opinions do not have the force of law, they may be highly influential in subsequent court decisions. After the three-judge panel has rendered a decision, litigants have several options: they may seek reconsideration of the decision by the same three-judge panel;
they may seek rehearing of the panel's decision by all of the judges of that circuit sitting together; or they may seek review by the U.S. Supreme Court by filing a motion for a *writ of certiorari*, (when the lower courts have ruled on the case and disagreed on their opinions). Each of these measures of relief is discretionary, however, and is rarely granted.

Finally, there is the **U.S. Supreme Court**, which has been the subject of much criminal justice study. Judges at the supreme level are called *justices*, not judges, and usually limit themselves to hearing about 100 cases a year. The Supreme Court's general jurisdiction is largely discretionary through the process of *certiorari*. Under the so-called rule of four, if four of the nine justices favor hearing a case then *certiorari* will be granted. The Court often accepts cases in which there is a split of authority among different U.S. circuit courts or in which important constitutional or other legal principles are implicated. The denial of *certiorari* does not imply agreement with the lower courts' decisions, but simply indicates that the requisite number of justices for whatever reason did not want to hear the case. Besides a *writ of certiorari*, the Supreme Court can review cases on appeal from federal courts or state supreme courts whose decisions are based on an issue of federal law (for example, when a federal appeals court invalidates a state statute; or when a state court strikes down a federal statute). The Court also may decide specific legal issues referred to it by lower federal courts. The Supreme Court also has original jurisdiction over certain limited cases: controversies between two states; controversies between the United States and an individual state; actions by a state against a citizen of another state or an alien; and cases brought by or against a foreign ambassador or consul.

Special courts include the **U.S. Court of Federal Claims**, which handles monetary suits brought against the United States, and the **U.S. Court of International Trade**, which is authorized to hear and decide civil actions against the United States, federal agencies or their employees, arising out of any law pertaining to international trade. There is also one specialized federal appeals court — the **U.S. Court of Appeals for the Federal Circuit**. This court has jurisdiction over appeals from all district courts in cases arising under patent laws as well as over appeals from the U.S. Court of Federal Claims and the Court of International Trade. The federal system also embraces a number of courts known as legislative or **Article I courts**, referring to Article I of the U.S. Constitution. Article I courts act pursuant to Congress' legislative powers and have the authority to decide factual questions relating to specific matters. Examples of Article I courts include the **U.S. Court of Appeals for the Armed Forces**, the **U.S. Court of Veterans Appeals**, the **U.S. Tax Court** and the **U.S. Bankruptcy Courts**. Appeals from these courts may be brought to the U.S. Courts of Appeals.

Administrative courts mean that an agency will sit as a fact-finding tribunal in applying federal regulations. When disagreements occur, the parties present their evidence to an administrative law judge (ALJ), who acts as the fact-finder. Either party may appeal the judge's decision, usually to a board or commission established by the federal agency that issued the regulations. Because the ALJ has already served the fact-finding function that would normally be undertaken by a federal district court, appeals from rulings of major agencies (e.g., National Labor Relations Board or the Federal Trade Commission) are brought directly before the U.S. Courts of Appeals. Although such appeals may be brought in any circuit, as a practical matter the D.C. Circuit hears most appeals from federal agencies.

Finally, there are about 275 federally-recognized tribal justice systems in the U.S. on **Native American** lands. They do not use lawyers nor operate under an adversary system. They resolve disputes through a process of consensus achieved via the use of peacemaking, elder councils, or sentencing circles. Likewise, **juvenile** courts operate under a completely different philosophy.

**DECISION MAKING IN TRIAL COURTS**

Judges make all kinds of decisions in the course of handling cases. For example, there are pretrial decisions, trial decisions, sentencing decisions, and appeal decisions. The appellate level of decision making is covered later. This section focuses on trial courts (solo judge situation) where it is expected that the main actors will often have to make snap judgments on the spur of the moment with little to guide them sometimes. As Carp et al. (2004) put it, judges should not be seen as "judicial computers who take in the
facts, law, and legal doctrines and spew out 'correct' rulings." Judges are human, too, and not immune from coming under the criminal justice microscope. We shall therefore review, in this lecture, some of the various theories about judicial decision making.

In criminal justice, this area of study involves the so-called "legal/extralegal controversy" (Nagel 1983), and two general theoretical approaches predominate --- "focal concerns theory" (Steffensmeier et al. 1998) aka "bounded rationality theory" (Albonetti 1991) -- and "legal" or "functional theory" (Nuebauer 1996) aka "formal rationality theory" (Dixon 1995). Basically, focal concerns theory holds that a judge's decision is affected by extra-legal factors, such as their assessment of the offender's culpability, their assessment of what is needed to protect the community, and their concern about the social costs of sentencing decisions. It is believed by many criminal justice scholars that if focal concerns theory is true, then that opens the door to inappropriate extralegal factors such as ethnicity, race, age, and gender. In other words, stereotyping occurs, and there is a significant amount of literature on the topic of minority stereotyping by judges (e.g., Marin 1984; Mann 1993; Spohn 2000; Shusta et al. 2002). By contrast, legal-functional theory (which has about as much literature; see Resources listed below) holds that only the legal statuses of the offender as well as only offense-related attributes carry any weight; things like prior criminal record, type of offense, seriousness of offense, and number of charges. Researchers working from this latter approach tend to see things somewhat functionally, as "all else being equal" there should be a direct, causal connection between sentencing outcomes and all legally-relevant decision making variables, once adjusting for differentials in the legally-relevant variables (Steury & Frank 1990).

In political science, the leading theoretical approach can safely be said to be Richardson & Vine's (1970) theory of judicial decision-making which holds that all jurists are subject to two kinds of influence: the legal subculture and the democratic subculture; and that when (this is supported by research) judges find no significant precedent to guide them (i.e., no legal subculture), they usually turn to the democratic subculture (which includes personal ideology and a number of other determinants).

THE NATURE OF LEGAL REASONING

The kind of reasoning which predominates among those who are trained in the practice of law is reasoning by analogy (also called reasoning by example). Analogical reasoning can be very powerful (if used correctly), but it suffers from two main dangers or pitfalls: (a) overly superficial decisions; and (b) confirmatory biased decisions. Basically how it works is that the decision maker (when faced with a novel or unfamiliar problem) thinks back to some similar situation that they might be able to draw lessons from, and then they transfer that learning to the present situation. Readers might be more familiar with this in the context of education because educators are always trying to find ways to improve the "transfer of learning" which is what students are expected to carry with them and remember from previous semesters. Law has raised this fairly basic mode of reasoning to a fine art. However, deductive reasoning works better for avoiding superficiality (as does trial and error, another form of basic reasoning), and confirmation bias (also called anchoring, or the difficulty of dislodging bad patterns of thinking), in all fairness, is inherent in most every form of reasoning. Therefore, we shouldn't expect perfection in judicial decision making guided by analogical reasoning, although there are many texts which seem devoted to that topic. Classic literature exists on the topic of precedent, or more precisely, the "doctrine of precedent" in law (e.g., Levi 1948), and which basically works in the same basic way as described above; i.e., a similarity is seen between two cases and the rule of law is extracted and applied from the first case to the second case. Belief in the doctrine of precedent makes up a large part of what is called the "legal subculture" of judicial decision making.

DECISION MAKING IN COLLEGIAL (APPEALS) COURTS

It may be hypothesized, as Carp et al. (2004) do, that judicial decision-making is or is not "different" in a multijudge (or panel) environment, as opposed to a one-judge situation. Group interaction variables and/or other factors may be influential, and "collegiality" may play a role. Likewise, the presence of divisiveness may play a role, and most probably does from a theoretical standpoint (Brace & Hall 1993). In point of fact, however, most studies of the topic have shown that, for the most part, multijudge (appellate) decision-
making adheres to much of the same legal reasoning process as decision-making by trial courts. But, that doesn't say much except lawyers will be lawyers. If the purpose of an appeals court is to be "open" and flexible, then there must be something to find (and theorize about) regarding the alternative hypothesis. The expansion of personal liberties and focus on the rights of minorities did not start, of course, with the Warren Court. It can be traced at least as far back as Justice Stone's famous "Footnote Four" in his 1937 Carolene Products opinion, which presaged the Court's shift away from protecting economic rights toward guarding civil liberties (U.S. v. Carolene Products Co., 304 U.S. 144 [1938]). It was under the Warren Court, however, that this new agenda reached its apex.

INTERNET RESOURCES
A Comparison of the Adversary System and Inquisitorial System
Article on Role & Impact of Chief Judges in an Appeals Court
BJS Court and Sentencing Statistics
Brennan Center for Justice at NYU
Center for State Court Information
Center for Federal Court Information
Court TV
Federal Judicial Center
Federal Judiciary Homepage
Gendered Justice: A Select Bibliography
Glossary of Legal Terms
Judicial Watch (Honesty)
Justice at Stake Campaign for Fair State Courts
LII Federal Courts Overview
National Legal Aid & Defenders Association
National Center for State Courts
National Tribal Justice Resource Center
NCJRS Courts Page
North Carolina Court System
Salaries of Prosecutors and Public Defenders
Sourcebook of Criminal Justice Statistics on Courts
Speedy Trial and Other Important Features of the Court System
Well-done Court sites on the web
Why Our Courts Aren't Broken

PRINTED RESOURCES


A court must do a great deal of work before a trial even starts, and the judge or magistrate is the leader. In the early phases, the judge acts as a negotiator, and most decisions are reached by conferences held in the judge's chambers. These pretrial decisions generally consist of the following:

- whether or not to issue (additional) search or arrest warrants
- whether or not to authorize (additional) electronic surveillance
- whether or not to continue the pretrial detention of defendants
- consideration of the amount of bail, or if bail is even a possibility
- consideration of any pretrial motions (continuance, discovery, venue, suppression, severance)
- consideration of pleas and any plea bargain

As the date approaches for trial, the judge acts as an administrator, and must handle the calendar of cases, called a courtroom docket. This not only schedules the trial, but manages the paperwork and time that various courthouse employees must put in on the case. Most judges have staff personnel assigned to help them, and a few courts have special professionals known as court administrators who handle budgets as well as case flow. New Jersey created the first state-level court administrator in 1948, but the movement didn't catch on until the 1970s. The federal system has had courtroom administrators since 1939.

At the trial, the judge acts as a referee and teacher. They are expected to be an impartial referee between the two opposing sides of a case. They are not supposed to be too closely interested in the facts of a case, but in how legal (and ethical) each of the two sides are behaving. For this reason, it is sometimes said the judge is a trier of law. Throughout the trial, and especially at the end, the judge acts as teacher for the jury (a jury is sometimes called the trier of fact), explaining complicated points of law to the jury, and at the end, giving them an hour or so mini-lesson in law before the jury deliberates on its verdict. This mini-lesson in law is called the jury instructions, and a judge must be very careful with these so as not to suggest the jury vote a certain way, but also inform them of what evidence needs to be weighted more heavily.

ASSEMBLY-LINE JUSTICE

Perhaps the most serious problems facing the courts today are backlog, delay, and congestion. Each of these seriously threatens the quality and dignity of justice because courts get behind in their work and then try to speed up and process as many cases as possible. Courts aren't designed to work well under stress, and when they try to work rapidly, all sorts of careless mistakes happen in what is called assembly-line justice. First of all, busy prosecutors will drop cases for no reason at all (this is called nolle prosequi) in addition to cases where they think the police have obtained insufficient evidence. It is suspected that most nolle prosequi cases involve situations where the prosecutor doesn't think a conviction is a sure thing, or slam dunk. Secondly, busy courts tend to increase their rates of plea bargaining. In addition to the usual sentence bargain which involves a lighter punishment, busy courts may increase the number of charge bargains, which means a serious crime the person is charged with gets renamed as a less serious crime in order to produce a plea bargain and get the case over with. Both practices jeopardize the safety of the public. In addition, a stressed-out court component has implications for the rest of the justice system. Police will make more or less arrests depending upon how busy they perceive the courts to be. If the courts are too busy, police may let minor offenders go free, but the unlucky ones will experience extra police pressure on obtaining a confession, because police perceive the busy prosecutor only wants slam dunk cases. Technology, specialty courts, and mediation or dispute-resolution centers are hoped-for ways of alleviating stress-out court systems.
About 35 states have such a stressed-out court system that it's not uncommon for jailed defendants awaiting trial to get "time served" (while in jail awaiting trial) as their one and only penalty when they do come up for trial (Gaines & Miller 2003). This is simply a travesty because such people are often not in jail so much for dangerousness, but because they couldn't come up with bail money. They often only have a public defender to represent them, and most public defenders in America's big cities may handle as many as 200-400 clients at a time (twice the average caseload of any caseworker). Approximately 80% of everyone accused of a felony in America makes use of a public defender. Public defenders are only paid an average of $45 an hour, far less than the $200-400 an hour a private lawyer would charge. It's difficult to prove a lawyer is incompetent. The Strickland test (from Strickland v. Washington 1984) requires showing that the lawyer's behavior was deficient and, additionally, showing that this deficiency caused a losing case. The second part of this is difficult to prove, as it points back to the evidence, not the lawyer's incompetence.

THE ADVERSARY SYSTEM

A misunderstanding of the adversary system is probably the most important reason that the general public is confused or disheartened about the criminal justice system. Because of the adversary system, some opinion polls report that the public has more confidence in garbage collectors than lawyers. The public's image of justice doesn't recognize a lawyer's oath or obligation to protect the adversary system. True justice is associated with truth; adversarial justice is all about winning--of course, winning within the confines of rules about procedure and evidence. An adversary system has four basic components: (1) a neutral decision maker, either a judge or jury; (2) rules on the presentation of evidence; (3) rules about the procedures to be followed; and (4) two sides opposing each other where there is only one clear winner. The assumption, and admittedly it's a big assumption, is that in this setting, truth will emerge as a by-product of opposition between two intensely partisan sides, each of whose goal is to win. Winning is, therefore, everything; and it's this atmosphere that gives lawyers an image many of them hold dear--that of prize fighter or gladiator. Truth is synonymous with victory; to the victor goes the spoils. A lawyer is expected to be an advocate for their client, guilty or innocent, to save their client by any means necessary. They should not consider any harm they bring to others as long as they are preserving the adversary system. Lawyers don't lie; they engage in dissimulation; they use dramatic devices, and rhetorical flourishes.

For what it's worth, the adversary system is better than most alternatives, particularly what is called the "inquisitorial system," used in many European and Asian countries. Preservation of the adversary system as it now exists is a conservative force in America that severely limits the chances for legal reform, and its preservation is intended to prevent the possibility of ever becoming an inquisitorial society. Few other alternatives, outside of mediation, are regularly explored. Many of the rules are designed to favor the defense because the prosecution side has so many more advantages and financial resources. Prosecutors are powerful people even in inquisitorial countries, where judges are usually all-powerful. The methods a prosecutor uses are rarely questioned because it's further assumed that prosecutors are out to seek justice, not just obtain a conviction. Defense attorneys, on the other hand, hold to the motto of "deny everything, admit nothing, demand proof." Visit the National Legal Aid and Defender Association for a list of all the things a zealous defense lawyer should do to save their client. You'll be amazed at all the things a lawyer can do on behalf of their client.

Movies like *Liar, Liar*, which starred Jim Carrey, portray the problems of a lawyer forced to tell the truth. Likewise, the *Devil's Advocate*, which starred Al Pacino, portrayed lawyering as the devil's work. Such media portrayals only serve to feed public misconception about a lawyer's dedication to uphold the adversary process. It's more complicated than any movie could portray. A lawyer's obligation is listed below. I'll leave you with it to determine for yourself if it's an outmoded, conservative relic--or part and parcel of human rights protection:

To preserve the adversary trial system as it now exists and to fight for the preservation of the rights of individuals; to resist any efforts to curtail the rights of persons who have been injured to seek redress in a court of law; to continue the education of the plaintiff's bar in all phases of trial practice; and to safeguard and defend the advocacy system so that the rights and remedies of all individuals are protected. In other
THE BAIL SYSTEM

The most important part of a defendant's initial, or first appearance before a magistrate, or lower-court judge is the determination of bail. A few jurisdictions bypass the first appearance and proceed directly to arraignment, and a few other jurisdictions add the step of a probable cause hearing, but the bail hearing (usually done within 48 hours of arrest according to the McNabb rule (from McNabb v. U.S. 1943), is a matter of determining the economic resources of a defendant. These resources, after all, determine if the person can afford a private attorney or must have a public defender. It is also a point at which many defendants are still unruly, intoxicated, or uncooperative. In such cases, the bail hearing is held in their absence. BJS figures for 2001 report the average amount of bail for a violent crime is usually $25,000 or more; for property crimes $10,000-25,000; for drug crimes $5,000-10,000, and for public order offenses $5,000 or less. Defendants charged with murder are frequently denied bail.

Traditionally, the original purpose of bail was to ensure the person's return to court. In other words, the risk of flight was the sole concern. However, since the 8th Amendment doesn't guarantee bail, but just prohibits excessive bail, and offenders coming before the courts are able to have their dangerousness assessed fairly reliably, the modern purpose of bail is to minimize risk to public safety. Nowadays, if the charges are serious enough, and the defendant has a criminal record with few community ties, chances are that bail is denied, and the person is kept under pretrial detention. Defendants facing minor charges, with no criminal record and strong community ties, usually receive pretrial release, also called release on recognizance (ROR), which is a promise that they will appear in court later when required. ROR was invented in the 1960s in an experiment called the Manhattan Bail Project where it was found that only 1% of minor offenders with residential and occupational stability skipped out on their promise. Some research today finds the skip rate to be about 12% for such offenders.

Those who have to post bail are of more concern. Many states utilize the Illinois Plan, which requires only 10% of the amount of bail be put down, but then most of this amount is eventually eaten up by lower-court fees. Some places require more than 10%, up to the full amount, and such defendants often have to convert property over as collateral or deal with a bondsman. The federal court system tends to use property conversion or property bonds, and state court systems tend to rely on bondsmen and bail bonds. The way a bail bond works is like a secured loan. The defendant obtains the services of a bondman by paying 10-15% of the total bail amount directly to the bondsmen up front as a fee. The bondsmen then covers the whole bail amount. If the defendant "skips" or "jumps", the bondsmen has unlimited powers to pursue, arrest, and forcibly extradite the person without regard to due process and without interference from law enforcement. The practice is more than skip tracing, and is more like bounty hunting, and one often hears cases that go horribly wrong with someone shot dead.

THE GRAND JURY

The Jon Benet Ramsey case brought public attention on the institution known as the Grand Jury in criminal justice. Nothing came out of the grand jury deliberations in that case, and it appears that the modern role of the grand jury is rapidly emerging into that of an independent investigating body. A grand jury is composed of private citizens, usually twenty-three persons, although some states have reduced the number, and all states usually follow the federal rule of a quorum of sixteen. They decide things by majority vote (twelve votes constitute a majority). Their deliberations are secret, and they are not bound by the usual rules of evidence (which means they can consider hearsay evidence). The defendant and his/her attorney have no right to appear in front of a grand jury. The reason why due process safeguards are so relaxed is because the grand jury represents the citizenry, not agents of the government. It's the classic case of being judged by one's peers, and in fact, the accusatory role of the grand jury is well known in reflecting the community's conscience when it comes to naming corrupt government officials and organized crime figures.
The function of the grand jury is to hear evidence presented by the prosecutor and to decide whether there is probable cause to return the indictment presented by the prosecutor. If they return the indictment, that is called a true bill. All states except Pennsylvania grant their grand juries the power to indict. The indictment is an official document stating the name of the accused, the charge, and the essential facts supporting the charge. By contrast, when a judge is used in the alternative procedure, known as a preliminary hearing, the judge returns what is called an information. Grand juries have been criticized for being a "rubber stamp" for the prosecutor. Grand juries are not bound by any decisions of a magistrate at any preliminary level. Once a grand jury is convened, it may initiate its own investigations. When a grand jury proceeds on its own via its own investigation, it returns a presentment. The presentment is an official document asking the prosecutor to prepare an indictment. Grand juries have the power to subpoena witnesses and mandate a review of books, records, and other documents crucial to their investigations. After an indictment or information is filed with a court, an arraignment is scheduled, unless of course, there is a challenge about the defendant's competence to stand trial at this point, which essentially throws the process into a round of forensic or medical examinations that temporarily delay the trial or pieces of the trial. Insanity claims don't delay trial, as the examinations are often quickly done, and become the basis of the trial, with the burden of proof on the prosecutor to prove sanity.

THE ARRAIGNMENT

The definition of an arraignment is the first appearance in a court with the jurisdiction to conduct a trial on the specific kind of criminal case at hand. Usually, this is a upper-level court, with a powerful judge, one who closely follows the Rules of Criminal Procedure. Such a judge only wants to hear one of two things out of the defendant's mouth when asked "How Do You Plea?" -- guilty or not guilty. A few offenders will try to plea no contest (nolo contendere), but this is rare, and only used to protect someone when there is a simultaneous civil lawsuit going on. 90% of the time, a guilty plea is entered on the basis of a pre-established plea bargain, and another 4% simply plead guilty. Only 6% of defendants plead not guilty. Those who plead guilty are sentenced there on the spot, receiving what is known as the "going rate" for their offense in that jurisdiction. Rules prohibit plea bargaining from being conducted in open court during the arraignment, but sometimes a short continuance is granted for the purpose of putting one together at the last minute, and some judges do allow open court last-minute negotiation. Rules also require the judge to inquire if the defendant: (1) understands the rights they are forfeiting by pleading guilty; (2) is making a voluntary plea; (3) is making their plea on the basis of a plea bargain agreement; and (4) has a factual basis for making their plea.

The last of these inquiries is important, as it concerns the judge attempting to find out whether or not the defendant is actually (factually) guilty or not. It is the thing that comes closest to truth. Unfortunately, because of the nature of plea bargaining, there may be no resemblance at all between what the person did and what the plea is for. For example, a crime of rape might be reduced to a crime of assault. Most plea bargains involve minimizing the social stigma of what a person really did, and plea bargains are chosen on the basis of the going rate for punishments rather than for accuracy in description (Sudnow 1965). Theoretically, there is a doctrine called the principle of lesser included offenses, which means that there should be some relationship accuracy. A driving while intoxicated crime, for example, should only be reduced to something involving automobiles, for instance. However, most states have a long way to go toward standardizing what counts as lesser included offenses. In addition, states with strong victim rights legislation often require the victim to be notified of any plea bargains that change the name of what a person did, and give the victim a right to complain about it.

PROSECUTION AND DEFENSE

Prosecutors work under a constraint known as the speedy trial requirement. The right to a speedy trial was guaranteed by the 6th Amendment, made binding on the states in Klopfer v. North Carolina 1967, made a non-fighting right in Barker v. Wingo 1972, and formalized with the Federal Speedy Trial Act of 1974. It is essentially a way of starting and stopping the clock. A federal prosecutor has 30 days from the date of arrest to obtain an indictment or information, and 70 days after that to go to trial. This means a guarantee of trial in 100 days (the federal standard). States use a 180 day standard. Delays attributable to
the defendant or their defense attorney (such as motions for continuance) stop the clock from running. Delays attributable to the prosecutor do not stop the clock. This inhibits prosecutors from making too many pretrial motions. Exceptions include a 30-day extension to assemble the grand jury when not in session, and a 110-day extension for locating missing witnesses. The prosecutor is not an employee of the court. They are only a representative of the government. People who are employed by the court include the judge, the court reporter (who must type 200 words a minute), the clerk of the court, the bailiff, and the jury (who are temporary employees).

Prosecutors can be considered the chief law enforcement officers of their jurisdiction. They can investigate even police chiefs and sheriffs, and often do in cases of corruption or organized crime. They can launch vice investigations, and often have their own small staff of detectives or investigators. They can order crime lab tests. Prosecutors also cannot engage in prosecutorial vindictiveness, which occurs if they act harsh simply because a defendant has exercised their right to a time-consuming jury trial. They cannot legally consider court backlog or judicial leniency as factors in deciding whether to drop a case or not. They cannot ethically consider community sentiments against a defendant who has achieved "celebrity" status in the media, but it would be naive to think that prosecutors don't consider their political future at stake during such times. Politically, most prosecutors look upon their job as a "stepping stone" to higher office, as they often want to run for Governor, Congress, or the Presidency one day.

Prosecutorial discretion has been studied extensively for the reasons why some cases are dropped and others are prosecuted (Jacoby 1979). These reasons are sometimes called the prosecutor's philosophy, or charging patterns, and there are four of them: (1) legal sufficiency, where the presence of evidence supporting both act and intent means the case is prosecuted; (2) system efficiency, where weak cases are screened out and strong cases may involve overcharging in order to force the system into plea bargain mode; (3) defendant rehabilitation, which describes those rare cases when the prosecutor thinks a defendant can be treated or cured; and (4) trial sufficiency, which is the same as the winnability of the case, or what makes the prosecutor look good. It is estimated the first and fourth patterns are the most common. Prosecutors can also grant immunity, and frequently do so, if they think a defendant makes a useful informant in some case against a more important criminal.

Defense attorneys operate under the presumption (premise) that anyone charged with a crime is innocent until proven guilty, a presumption that's supposed to characterize the entire criminal justice system. Its purpose is to enable a vigorous and zealous defense even for clients that defense attorneys know are guilty. The Sixth Amendment guarantees the right to effective assistance of counsel, not just any counsel. The Supreme Court has also extended this right to any critical stage of the process, including interrogation, lineup, preliminary hearing, first appeal, and probation and parole revocation hearings. Juveniles also have a right to counsel. The effectiveness of counsel, in practice, is determined by who the lawyer knows, not what they know, and most clients are better helped by courthouse regulars rather than high-priced private attorneys. Any defense lawyer, however, can visit the local jail at all hours of the day or night. Legally, effectiveness of counsel is determined by the Strickland test (from Strickland v. Washington 1984), which requires a review finding the lawyer did not only advocate ineffectively, but that their ineffectiveness led to the conviction. It is sometimes easier to find instances of reversible error on the part of a judge's mistake than to claim ineffective counsel.
Defense attorneys are either privately hired or publicly hired. A defendant is allowed to have as many private defense attorneys as they can afford. They can also represent themselves (pro se), but this is strongly discouraged. A defendant is entitled to have a public attorney hired for them, but only if the maximum possible punishment exceeds 6 months (the same being true for the right to jury). When a defendant requests a public attorney be hired for them, the court examines that person's finances to decide on eligibility for an indigent defense program, these having been required since Gideon v. Wainwright (1963). One type of such program is the assigned counsel system, which calls upon the good graces and volunteer time (pro bono) of attorneys in the area. This is the oldest and at one time, the most widely used system of indigent defense (today, only 23% of jurisdictions use it exclusively). Bar association ethics requires lawyers do volunteer service anyway. The court usually reimburses this kind of attorney, but it is far less than what they are used to making, and there certainly isn't any money available for independent investigators or lab tests. The second type of program is the public defender system, which is better equipped to conduct separate investigations, but is overworked and used exclusively in 28% of jurisdictions. Women and minorities are somewhat overrepresented among the ranks of public defender offices. The third type of system is the contract attorney program (used in 8% of jurisdictions), which involves the court making semi-annual contracts (lowest bid accepted) to retain the services of a large firm or consortium of firms to supply lawyers when needed. The rest of jurisdictions use some combination of programs.

THE JURY SYSTEM

The Constitution requires that a person be tried by a jury of their peers. However, the Supreme Court has never interpreted this literally. Instead, a jury pool (called a venire) is selected from a broad base of citizens who are representative of the community. Registered voter lists, a driver's license database, or local phone directory are often used for the venire. A common criticism is this excludes some people who are too poor to own a car or phone. When a person is called up for jury duty from the venire, they have the opportunity to decline, but each jurisdiction sets legitimate reasons and illegitimate reasons for declining to serve. Illegitimate reasons include that it’s not worth it for $40 a day. Legitimate reasons include illness, conviction of a felony, not being able to comprehend English, and being in a public service occupation. A rather large group of potential jurors are called, and then questioned by each side for their fairness (this questioning being called voir dire). Eventually, the group will boil down to 12 persons and no less than 2 alternates. This number of jurors is not a Constitutional requirement, but a tradition. Some states allow juries as small as 6, 7, or 8.

There are two kinds of questions during the jury selection phase of voir dire. Each side, prosecution and defense, can ask an unlimited number of questions about anything that might bias the potential juror. These are known as challenges for cause. For example, a juror might be excused from duty if they say they were once a victim of a crime similar to the one in this case. Another type of question is called a peremptory challenge, and involves any subjective hunch or feeling that the juror just isn’t “right” for this case. The basis for asking such a question may only be known to the attorney asking it, but all the attorney has to say is they didn’t like the answer, and can have this juror excused from duty. Attorneys are only allowed a limited number of peremptory challenges.

There are other issues associated with the jury system. One of these is scientific jury selection, an emerging technique that allows lawyers to use correlation statistics from social science research to pick which type of juror would vote for conviction or acquittal. Wealthy defendants can also use a technique called a shadow jury, which consists of persons privately hired who demographically match the real jurors, and the defense can try out various arguments on them as practice before going in front of the real jury. All these techniques, and many more involving consultants and presentation aids, fall into the emerging field of litigation support, for which companies like DOAR, Inc. is an industry leader. In recent years, sequestered juries, like gag orders, have become an issue because jurors seem to be more willing to talk to the media and/or write a book or something after their experience. Race and juries are still an issue because in some states, 95% of the time, the only black person in the courtroom is the defendant. The jury system as we know it may be an outdated institution, as Rothwax (1996) and others (Hernandez 1996) have argued. Many critics have argued for replacing the lay person jury system with one characterized by professional
jurors. In conjunction with improved technology, a professional jury system would go a long way at addressing numerous problems that courts presently face or will face in the future, such as the need for bilingual translators.

THE COURT REFORM MOVEMENT

Alexis de Tocqueville once observed: "The courts of justice are the visible organs by which the legal profession is enabled to control democracy. The judge is a lawyer who works with lawyers to maintain the status quo and aggressively denounce any legal reform that would strengthen the Constitutional rights of the American people. Lawyers are united in their common interests and intent to maintain the status quo at all times.” Too often when the guilty go free or the innocent get convicted, Americans chalk it up to chance without considering whether the system is at fault. After all, it's the "best" legal system in the world, isn't it? Or if it isn't the best, it's the only one we got, and every patriotic American ought to support it, right? Well, actually no, on both counts. England runs a far better adversarial system than America does (with solicitors investigating cases and barristers trying them), and it's the duty of every American to cast a critical eye on their legal system. A dynamic society must continually reevaluate its institutions. They exist to serve us, not to be served. Legitimacy is not a tenure to be presumed.

Oliver Wendell Holmes, the famous Supreme Court justice, used to admonish young, idealistic lawyers by saying "This is a court of law, young man, not a court of justice." It must be remembered that judges and lawyers don't define “justice” in substantive terms. They define justice procedurally. If the procedures followed are fair, they think the outcome must also be fair. This is all that is legally meant by doing justice, or seeing that justice shall be done. The American courtroom was never intended as a forum for social reform. It's badly overextended as a panacea for social, economic, and political problems. Yet Americans seem to think that litigation is the answer for just about anything, and they expect their lawyers to use every dirty trick and handball tactic in the book to advocate on their behalf. It's hypocritical to expect a more just society when we individually expect whatever injustice suits our purposes.

In a nutshell, what got us to where we are at today is the notion of trial by ordeal. There were many ordeals in colonial America (fire, hot water, poison, combat). What they all had in common was some physical trauma inflicted upon the accused, followed by some evaluation of the bodily reaction. One reaction indicated God's determination of guilt; the opposite reaction innocence. Generally, if the defendant healed quickly, the verdict was innocent. Today, we know from biocriminology that rapid healing is associated more with guilt than innocence, but the point is that even back then, justice was firmly established as procedural. God was the actual decision-maker; people only established the tests by which God's decisions were interpreted.

However primitive, ordeals were an improvement over the hue and cry system, in which posses of townspeople were hastily put together to hunt down and kill perpetrators on the spot. The more civilized ordeals were usually accompanied by a process of compurgation, or oath-taking. A defendant could defeat the claims against him if he obtained the required number of compurgators (usually twelve) who would swear to his innocence. Procedural effectiveness was determined by how sincere the oath was sworn. If a compurgator stuttered or vocalized any errors during their testimony, it was taken as a sign of the defendant's guilt. This process eventually became the basis of evidence rules on how lawyers could or could not rattle and chastise witnesses on the stand. The side with the least-rattled witnesses wins the case, today as in yesterday.

Lawyers like to think they got involved in the system from the ritual of trial by combat. This practice was brought into Anglo-American law by William the Conqueror during the Norman Conquest. The basic idea is that litigants could hire mercenaries or "champions" to fight a battle for them. Thus arose a profession of "hired guns," roaming the country for clientele. Lawyers today think of themselves as professional adversaries or "champions" engaged in a battle of "hired guns."

The jury system, as we know it, is also a Norman-French rather than English development. Juries in England were essentially spies for the King or Queen. The word juror comes from the French jure, which
means "sworn" to truth. America, however, kept the number of jurors as twelve in deference to English methods.

The role of judge must be understood by contrast with the inquisitorial system (which existed throughout much of Europe and is also known as Romano-Germanic law). Anglo-American law is based on the adversarial system (which existed in England and America and has Hebrew roots). Briefly, inquisitorial systems conduct trials as an inquest by the state. The defendant is already presumed guilty, the trial is mostly a sham, and judges are expected to take an active part in the persecution of the accused. Under the adversarial system, a defendant is presumed innocent until proven guilty, and judges are expected to be impartial and disinterested observers.

CHARACTERISTICS OF THE ADVERSARY SYSTEM

Presumption of Conflict -- The court system is designed to only handle conflicts, or disputes (as they are called) which cannot be resolved by means other than adversarial proceedings. Once the dispute is in court, it becomes the property of the court and it does not matter if the parties to the dispute are able to settle their differences out of court. The parties are bound to obey any declarations by the court in resolving a dispute. Courts are under no obligation to inquire if their resolution solves the underlying problem or not.

Party Autonomy -- The parties in court are expected to frame their dispute in legal terms, not everyday language. It is the responsibility of opposing parties, not the court, to see to it that evidence, testimony, and information flow reaches the decision maker. If it becomes apparent that the real source of conflict is something other than the case before the court at present, judges are not allowed to expand the parameters of the trial to those issues.

Zealous Advocacy -- Parties are to be represented by attorneys who not only can but should do everything to advance their client's position. The lawyer's advocacy should be energetic but not illegal or unprofessional. Lawyers have an obligation to their client as well as one to their own interests in remaining an upright person who can earn a satisfactory living.

Judicial Impartiality -- Judges must avoid even the appearance of partisanship. They should not pose their own questions or suggest which witnesses to call. Their role is limited to that of a referee overseeing adherence to rules of procedure and avoiding adverse publicity. They should neither endorse nor shy away from popular or unpopular opinions for the sake of their political careers.

Lay Jury -- Juries will always consist of amateurs untrained in the law with no special fact finding skills. A jury of one's peers means jurors representative of the community. Lawyers and judges are under an obligation to ferret out any biased jurors. When it is time for a verdict, the judge must instruct the jury on the law, and the jury must apply the law to the facts as it finds them. Jury deliberations are secret, and they need not explain their methods of deliberation, their fact finding, or how they applied the law.

Zero Sum Remedy -- There is always to be only one winner and one loser. There are no shades of black or white, right or wrong. All parties must be sent away either victorious or defeated. Courts are not allowed to distribute gain or loss other than by fully awarding complete gain or loss. All decisions in terms of remedy are final; only procedures can be questioned afterwards on appeal.

Adversarial-style combat may be one way to justice, but in a larger sense, it institutionalizes and sublimes our battle instinct. The legal system's greatest contribution to society may be that it's a fairly decent and civilized substitute for bloody fistfights. In this sense, the legal system serves much the same purpose as the Olympic Games, which were instituted to avoid battle among nations. It provides a soapbox or arena to showcase the talents and creativity of our best litigants, or modern-day gladiators.

THE SPECTACLE OF JUSTICE
The United States has more lawyers per capita than any other country in the world. A lawyer is supposed to be your friend as well as willing to do battle for you. Courtrooms are supposed to be user-friendly. Alexander Hamilton, in Federalist Paper #83, referred to our court system as the friendly aspect of liberty. An important subset of this friendliness aspect is the entertainment value. Going to court is always supposed to be a matter of taking your chances, at winning the prize. This unpredictability is why 90% of cases get plea-bargained before going to court. Judge Roscoe Pound called it the sporting theory of justice, and the dean of evidence law, John Wigmore, called it legalized gambling. Others have called it a game of chess. The most ironic thing about it is that people want to win so bad they will use the law to beat the law. Few games offer that much manipulation of the rules.

The most obvious defect of our legal system is its incapacity for truth-finding. The most common justification for our present system is that the truth will emerge when two sides fight it out down to the last detail. However, does it really make sense to believe that truth will emerge when two sides fight as unfairly as possible? Fight does not necessarily lead to truth, only honor and valor. Heated arguments don't bring out the truth, and ugly partisanship has no place in the courts, just as it has no place in law-making or politics as a whole. Courts are inherently political, and politics always succumbs to distortion of the truth. How are you supposed to trust that a friend who lies for you isn't lying to you?

The origin of the idea that truth emerges from dialogue comes from Plato. His Dialogues teach that by conversing a long time over something, examining every presupposition, negation, and proof along the way, some sort of flash or insight will occur, and both sides will see the truth all at once. We've come a long way since Plato, but our legal system hasn't. Plato didn't believe in science, or have the benefit of scientific improvements. Courts are inherently unscientific. They stick to a rudimentary method of determining truth, reliability, and validity.

One reason for why the truth never comes out is because of less than pristine evidence. Smoking-guns (being caught red-handed), holy grails (confessions), and eyewitnesses (reliable ones) are rare. Circumstantial evidence and just-yes-or-no questions are more common. It's rare for the truth, the whole truth, and nothing but the truth to come out. Both pretrial and trial tactics are geared to victory, not the discovery of truth.

THE PROBLEM WITH PROSECUTORS AND DEFENSE ATTORNEYS

Any prosecutor receives a great deal of media attention. In all but a few jurisdictions, they run a political campaign to get elected. Being a prosecutor has often been a stepping stone to higher public office. Politically, it's the ideal public office because it's the source of much patronage and can be used to destroy the political careers of your rivals. Patronage in this case means protection since the prosecutor can decide not to prosecute and legally need not provide any reason, a process known as nolle prosequi.

Prosecutors often hire assistants, but there is much turnover. The office may be organized to handle cases horizontally (a zone defense) by having assistants specialize or vertically (by caseload) by having assistants see a case throughout the entire judicial process. The duty of a prosecutor is to seek justice, not merely to convict, and in practice they accomplish this by holding the police to high evidentiary standards. Because these standards are often at the winnable level of beyond a reasonable doubt, it's rare to see any prosecutor with less than a 99.9% conviction rate. Prosecutors are a continual source of irritation to police departments because they don't communicate what they are looking for in cases that are other than "slam dunks."

Defense attorneys are private advocates, and by private is meant they are not bound by any government obligation to seek the truth. In fact, their job is to thwart the truth. The presumption of innocence requires that the State's case be put in the worse possible light, and it's the duty of a defense attorney to make the State look bad. Defenders don't really care if their clients are innocent or guilty, and they're not supposed to care. It's best if they don't know. Anyone facing any kind of prison sentence and cannot afford to hire a lawyer is entitled to a public defender. It's debatable which is worse, a private defender or public defender. Private defenders require at least part of their fee up front because most clients stiff them, so they therefore have to take a lot of cases to capitalize their time. Public defenders are likewise overworked, and have the
additional disadvantage of low salary. Some 70% of the nation's population is served by public defenders.

Public defenders have nothing to gain politically since they can't run for office with a record of being tough on crime. Their clients often resent them because they are being paid by the enemy, and like most welfare institutions, you get what you pay for. The public defender's role is to make it look like justice is being done, to give the appearance of legitimacy to the system. They rarely risk contempt charges by being aggressive on behalf of their clients. It's almost impossible to prove inadequate counsel since the standard under Strickland v. Washington (1984) requires that even if one's defense lawyer falls asleep or is drunk during trial, it must be shown that this unduly prejudiced the jury or caused a harsh verdict.

THE PROBLEM WITH WITNESSES

In direct examination, a lawyer puts their own witnesses on the stand and tries to get them to say "I'm absolutely positive" as many times as possible. In cross-examination, a lawyer questions the witnesses of the other side and tries to get them to say "I don't remember" as many times as possible. A standard practice is for lawyers to interview witnesses prior to trial. Sometimes, these interviews are put down in the form of written statements or recordings, called depositions. If any inconsistencies come out at trial between the trial testimony and the prior deposition, a lawyer will seize on the opportunity to play word games. More commonly, prior interviews involve coaching sessions. Coaching is illegal in most states, but the practice is known by a variety of names -- rehearsing, relaxing, prepping, horseshedding, and sandpapering.

During cross-examination, lawyers use a variety of dirty tricks. The most common question is "How did you know that?" Objections can be raised, sustained or denied, but rarely is a lawyer disciplined for excessive showmanship. Rule 8.4 of the Model Rules of Professional Responsibility (MRPC) prohibits: conduct involving dishonesty, fraud, deceit or misrepresentation; and conduct that is prejudicial to the administration of justice.

THE PROBLEM WITH JURIES

Juries consist of 12 people that decide who has the better lawyer. The jury is supposed to be concerned with fact-finding and truth. This role for the jury has never been realized in practice. In fact, it's probably beyond the capacity of the average juror. The main problem is that juries are too often confounded by the rules of law they must apply to the facts. It's not that they are untrained in law. They are just structurally located in a position to receive the finer points of law that would confound even the most skilled legal scholar. Courts treat juries as idiots one minute, and then expect them to perform legal miracles the next. Courts are inherently inconsistent. They prohibit juries from seeing or hearing certain things, order them to forget things the next, and then, at the end, give them a short course in law, called the jury instructions. Along the way, each and every legal standard, doctrine, test, or terminology is explained. A basic paradox exists in trying to educate jurors in law: if you give juries complicated instructions, they may not understand the law and misapply the facts, but the judge and lawyers are satisfied because the quality of legal interpretation is high. If you give juries simplified instructions, they may overlook a relevant point of law and over generalize the facts, giving lawyers grounds for appellate reversal.

More and more each day, juries engage in something called jury nullification. Broadly defined, this means a verdict that is clearly at odds with the law. The most common pattern is towards leniency. The phenomenon is believed by many to be the impact of extralegal factors entering into the jury's decision, but others believe it may be a reaction to the way courts treat juries. Let's take a look at some of the ways most courts treat juries:

Jurors cannot take notes
Jurors cannot ask questions
Jurors cannot hear evidence in a logical, sequential order
Jurors cannot get a transcript of testimony
Jurors cannot view videotapes
The most common justification for a prohibition on note-taking is that jurors would doodle or scribble. The reason they can't ask questions is because that would supply feedback to the lawyers who would then tailor legal arguments. Trials often present evidence in disorderly fashion, and judges are reluctant to respond to jury requests for a transcript of a particular witness' testimony because they don't want them unduly influenced by any one witness. Videotapes are avoided, as well as computer animations, because they too, might be overly influential.

Juries are also selected in a manner which almost ensures jury incompetence. Almost any white-collar professional can get exempted from jury service. Voir dire challenges also weed out people who are too competent, at least from the lawyer's point of view in terms of not being easily swayed. A common tactic when the lawyer knows their client is guilty is to pick jurors based on personalities -- jurors who hate one another. That way, the jury is likely to become deadlocked in deliberations. No verdict; no conviction.

THE PROBLEM WITH JUDGES

Judges act as mediators or referees. They are supposed to be unbiased and impartial, which means they safeguard the rights of the accused as well as look out for the public interest. They are also supposed to be the finders of law (juries are the finders of fact), which means that they should be concerned with legal guilt, not factual guilt, and they should not let their courtrooms be used for anything other than fact-finding or law-finding. In most jurisdictions, judges sometimes dispense substantive justice in the form of sentences after a verdict has been rendered or when someone waives their right to a jury trial. However, most of their duties are tied up in ruling on matters of law, weighing objections, deciding on admissibility of evidence, and disciplining people who act up in court.

Judgeships operate on the principle of seniority. Older, more experienced judges get to become chief judges because they have sat a long time on the bench, not because they have any special managerial talent. All federal judgeships require Presidential nomination and Senate confirmation. At the state level, judges either run for office in political campaigns or receive a gubernatorial appointment. Politics plays a role either way in state systems. Some states have adopted what is called the Missouri Plan, which has a nonpartisan commission of citizens recommend appointments to the Governor and then has the judge run for election after a specified term in office. Arrangements like the Missouri Plan are the closest thing to merit review.

In rural courts, family courts, justice of the peace courts, local magistrate, and some district courts, judges don't even have to have a law degree, college credentials, or be a member of the bar. This number accounts for about 80% of all judges. To their credit, most jurisdictions do perform a criminal background check.

The most common cases of judicial misconduct involve fixing tickets (for friends) and sexual harassment. When judges are brought up on charges, the most common punishment is censure, which still allows them to serve on the bench. Even judges who commit criminal acts can only be removed by impeachment, which takes a two-thirds vote of the legislature. A few states, mostly in the West, allow for recall or referendum elections if the public circulates a petition with enough names on it. Some states have established judicial inquiry boards, but these are used mainly for charges of being old, feeble, or incompetent, and although they have the power of forcing involuntary retirement, they usually don't go that far. Judges are some of the most overpaid and overrespected individuals in the criminal justice system.

THE EVILS OF PLEA BARGAINING

Ninety percent (90%) of cases involve plea "agreements" (nobody uses the dirty word "bargaining" anymore). It is defined as anytime the defendant enters a guilty plea with a reasonable expectation of receiving some consideration from the State. In many ways, the trial is also like a plea bargain since the defendant's side quickly learns that NOT objecting as the trial proceeds might result in a lenient sentence. While plea agreements might serve a small number of understandable goals, like reduction of court
overcrowding and avoidance of uncertainty with a jury trial, there are many arguments against it.

First of all, it encourages police and prosecutor overcharging. This is when the State throws the book at a defendant, something like 14 different criminal charges for one act. Police do it because officers get credit for the most serious charge they can call something by. Prosecutors do to leave room for plea agreements and collect "favors" from defense attorneys. Critics often say plea agreements encourage leniency, but the whole process is about convenience and expediency for those who work in the court system, not the defendants who come and go.

Overcharging leads to higher bail, so defendants spend more time in jail awaiting trial. Jails are worse than prisons, and jail overcrowding is worse than prison overcrowding. The constant pressures put on defendants to accept plea agreements creates undue stress on defendants while relieving stress for the State. The defendant is disadvantaged at every turn. Innocent people plead guilty because they see no hope. Those daring enough to reject a plea agreement and go to trial often find themselves with a longer sentence (though perfectly legal, the maximum the law will allow). Conformity is rewarded. Attorneys who participate in the process build up credit or "chips" they can cash in, about once a year, on any big case they really need a break on.

THE PRICE TAG

The United States has the clumsiest and most expensive court system in the world. It is slow and inefficient. It takes at least four years for a civil suit to come to trial, and about a year and a half for a criminal case. Delay tactics are common and serve several purposes other than pressuring the innocent to plead guilty just to get it over with. Civil defendants use delay to defer making payments. Criminal defendants who can afford bail get to remain free while awaiting trial. Witnesses die, papers get lost, etc. Pretrial motions and getting a jury seated account for 80% of trial delay. The cost for any trial involving a shooting, for example, can easily run close to $1 million. Celebrity cases easily cost about $5 million. The average courtroom in America costs the taxpayer about $6,500 a day to run, which includes salaries, staff, overhead, depreciation, maintenance, etc. Insanity and death penalty cases are the most expensive because of all the additional hearings, appeals, scientific witnesses, and time involved.

Attorney fees in the U.S. are higher than anyplace else in the world. Every country other than the U.S. regulates attorney fees. American lawyers also bill by the hour ($150-$200), a practice unheard of in other countries where lawyers offer standard rates for specific services. One of the most controversial practices in the U.S. is the contingency fee, where lawyers agree to represent somebody in a suit against another party and set their fee based on a cut of how much they can get out of the other party's deep pockets. Jurors and expert witnesses, are by contrast, notoriously underpaid. Courts are inherently economic, the sole source of income to those working full time in the legal profession, and play an unrecognized role in a market economy. The decline of the industrial era may have more to do with lawyers than the information age. Whole sections of the manufacturing industry have had to shut down, close plants, or downsize because of astronomical settlements achieved by lawyers in suits against business.

The best lawyers are only available to the wealthy. The rich enjoy mock-jury preparations, jury consultants, computer support, and a thorough re-investigation of the crime. Unequal wealth equals unequal justice. Public defender systems exist for the poor, but these lawyers are only paid an average of $45 an hour. There is no Sixth Amendment equivalent of the public defender system in the civil justice system; claimants have to use Legal Aids, Clinics, or Societies. The American Bar Association (ABA) has long recognized that 70% of the population is not being reached by the legal profession.

REFORM IDEAS

It is highly important that the worst excesses of the adversary system be done away with -- overly zealous advocacy, hardball tactics, discovery and pretrial motion abuse, witness coaching, and dirty tricks. Attorneys, however, nourish these freedoms as much as writers nourish their creative freedom. Currently, the only thing standing in the way of these excesses are the often-unenforced ethical codes of bar
associations. There should be laws preventing the truth from being thwarted, distorted, or hidden. Mandatory discovery or disclosure laws should require parties to exchange all information.

Juries should either be done away with, or replaced by a system of professional jurors trained in the law. The present system selects jurors who cannot possibly comprehend the law, and it seems as if this system contributes to complexity, obfuscation, and pettifoggery. Jurors should be allowed to see all the evidence, perhaps even hearsay evidence. Some cases should not even go to trial; they should be handled by non-legal arbitration and mediation centers.

There should be strict merit standards on appointing judges, and their power in the courtroom should be expanded. Judges should perhaps be given the power of paycheck, rewarding attorneys on the basis of their performance. Complex trials should be broken down into smaller, more issue-separated trials, and time limits ought to be placed on discovery and pretrial motions. Court managers should be used to schedule and administrate court systems.

All attorneys (judges, prosecutors, defenders) should be required to undergo regular professional development training. There needs to be more specialization in criminal law, and perhaps special licensing, certification, or accreditation standards. The same can be said for expert witnesses. Criminal law specialists need to concentrate on their role as working professionals, avoiding part-time extravagances such as teaching criminal justice at local colleges or seeking honorariums in other ways. In order to make sure they earn a decent income, there should be tax relief for such professionals, perhaps tied to their performance evaluations.

It's also time to do away with the bar's monopoly on legal services. In the field of medicine, paramedics and nurse practitioners do as good a job as doctors. In law, paralegals can often do as adequate a job as lawyers. Reform of the marketplace cannot come too soon. Our present system is too costly, too unfair, too destructive, and too inefficient for a civilized society.

INTERNET RESOURCES
Adversary System and Divorce
A Look Inside How a Court Operates
American Law Sources Online
Association of Trial Lawyers of America
Court Reform of the Adversarial System
Grand Jury FAQ
How Grand Juries Operate
Is the Adversarial System Eroding?
National Association of Criminal Defense Lawyers
Philosophic Logic of the Adversary System

PRINTED RESOURCES
Unit 10

TRIAL, SENTENCING, AND APPEAL

The object of punishment is prevention of evil (Horace Mann)

A trial is a structured proceeding based on the adversary process, an open battle between opposing lawyers that is assumed to be the best way to discover the truth. Trials are rare events, only occurring about 10% of the time in criminal justice, and jury trial are even rarer, only occurring about 4% of the time. Trials take up considerable time and resources. Attorneys frequently spend weeks and months preparing for them. The following table lists the steps in a criminal trial:

<table>
<thead>
<tr>
<th>Reading of Charges</th>
<th>Prosecution's Opening Statements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defense's Opening Statements</td>
<td>Brief Recess</td>
</tr>
<tr>
<td>Prosecution Case in Chief</td>
<td>(A) Direct Exam</td>
</tr>
<tr>
<td>(B) Cross Exam</td>
<td>(C) Redirect</td>
</tr>
<tr>
<td>(D) Recross</td>
<td>The State Rests</td>
</tr>
<tr>
<td>Motion for Judgment</td>
<td>Defense Case in Chief</td>
</tr>
<tr>
<td>The Defense Rests</td>
<td>Prosecution Rebuttal</td>
</tr>
<tr>
<td>Defense Rejoinder</td>
<td>Closing Arguments</td>
</tr>
<tr>
<td>(A) Prosecutorial Summation</td>
<td>(B) Defense Summation</td>
</tr>
<tr>
<td>(C) Prosecution Rebuttal</td>
<td>Jury Instructions</td>
</tr>
<tr>
<td>Jury Deliberation and Verdict</td>
<td>Dismissal of Jury</td>
</tr>
</tbody>
</table>

A firm distinction exists between the trial stage and the sentencing stage of criminal procedure.

SENTENCING, or the imposition of a penalty, occurs after a trial where someone is convicted of a crime. Some states require that sentencing be a separate hearing, and in other states, sentencing is held right after trial. Most places separate the two, and these are called bifurcated proceedings. At the sentencing stage, the gloves are off, and all kinds of evidence can be admitted, but this usually depends upon who the sentencing judge is. When juries are allowed to exercise sentencing power, the judge must issue instructions to the jury about the law, its application to sentencing, and which factors should be given more consideration than others. Sentencing is more an art than a science. It's also a joint decision-making process involving all members of the "courtroom workgroup," a concept intended to point out the non-bureaucratic nature of how courts are organized and operate. Probation officers, prosecutors, defense attorneys, and judges all usually reach agreement on whatever sentence is to be imposed, and sometimes this is even decided fairly
early on in charge bargaining when the past pattern of a judge's sentencing is considered in what to charge
the defendant with. Judges say that sentencing, however, is the most difficult part of the job. Sentences are
supposed to be individualized, but they often represent whatever the "going rate" is in that jurisdiction or
whatever the "normal penalty" in for "normal crimes" (Sudnow 1965) in that state. Sentencing is a part of
the criminal justice process closely related to the philosophies of punishment, and since sentencing is in the
hands of the judicial system, whatever philosophy that judges use may be inconsistent with whatever
philosophy the correctional system uses. The phrase "going rate" refers in part to the routinization of plea-
bargaining and is defined as follows:

<table>
<thead>
<tr>
<th>The &quot;going rate&quot;</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;shared beliefs about appropriate sentence levels for defendants charged with crimes who</td>
</tr>
<tr>
<td>possess similar records [as well as] standard operating procedures which regularize sentences</td>
</tr>
<tr>
<td>and routinize plea bargaining.&quot; (Casper &amp; Brereton 1984)</td>
</tr>
</tbody>
</table>

The most important factors in sentencing are the seriousness of the offense and prior record, with a
certain amount of leverage extended to uncertainty and public opinion. Uncertainty is due to the
workgroup's attempt to factor in what the "real offense" was, regardless of what the charges, conviction, or
finding of legal guilt was. Courts differ over what they perceive as serious AND in how they consider
"prior record". Some courts choose to consider prior arrest record; others consider only a conviction record.
In addition, the velocity of crime, or the estimated amount of street time between offenses, is often a
consideration. The amount of bail is often the best predictor of sentence length because it indicates
whatever threat to society the offender poses.

SENTENCING STRUCTURE AND VARIATION

Basically, there are two (2) types of sentencing structures: indeterminate and determinate, although a
number of other types exist which aren't easily classified, and a third (3) type might include presumptive
sentencing.

(1) Indeterminate sentencing means that the judge sets a minimum and maximum outdate, and then a
state parole board starts conducting hearings for that inmate every 1-3 years starting with the minimum
outdate year; e.g. Aggravated robbery = 10 - 15 years, with the opportunity for parole every two years after
the tenth year. In its most extreme form, the judge simply hands the offender over to corrections officials
and lets those officials determine the length of the sentence. This is the way sentencing was done for
hundreds of years in American history, until dissatisfaction surfaced in 1971 and determinate sentencing
became popular. However, thirty-six (36) states and the District of Columbia still allow the practice of
indeterminate sentencing, although legislatures have become involved, fixing the statutory limits for the
minimum and maximum range that a judge can impose.

(2) Determinate (or fixed) sentencing means that judges apply whatever the legislature has said the
sentence is for the crime; e.g., Aggravated robbery = 15 years. States with determinate sentencing (and
there are 14 of them, including North Carolina) deny the judge any discretion over the length of the
sentence and also often rule out any possibility of probation or alternative to prison (although this latter
aspect is sometimes called Mandatory sentencing). Determine sentencing eliminates parole boards and
credit for participation in rehabilitation programs. Each sentence is fixed with a known outdate, and the
only way this outdate can be reduced is for good behavior while in prison (day-for-day good behavior, as
determined by security personnel).

Indeterminate sentencing was the dominant philosophy up until the 1970s, and by the 1990s, most states
were using a determinate sentencing model in one form or another. Parole, in fact, was officially abolished
under federal guidelines in 1984. No sentencing system operates in pure form. A third common model is:

(3) Presumptive sentencing is a fairly new strategy that came about around 1984, and means that the
legislature, or some sentencing commission, has developed a "grid" (or sentence guidelines, using the
Minnesota model) depicting a range for each offense that the judge cannot sentence either less or more than. If the judge wants to go outside of this range (upward or downward revisions), they must justify their decision in writing on an "override" form. Then, in some cases, a sentencing commission adjusts the exact outdate to even out the sentence disparity with similar cases in the system; e.g., Aggravated robbery = 10 - 15 years, with an override for aggravating factors applied, for a sentence of 17 years, revised by commission as a sentence of 16 years. The federal courts and a handful of states (most notably Florida) used presumptive sentencing, although many states have sentencing commissions looking into it. A picture of what a sentencing grid looks like is reproduced in almost any criminal justice textbook, and the link above (to the Minnesota model) also gives you a look at it. Modern versions of it use computer software, such as SAGES (Sentencing Analysis Guidelines Entry System) which is operational in places like Florida.

Beyond these three types of sentencing structures, there is one thing that judges still have power over, and that's what to do when the offender is convicted of multiple charges or multiple counts (not an uncommon occurrence). A "tough" judge will usually be one that makes all the sentences for multiple charges add up to a really long sentence, and that's called letting the charges run consecutively. The following describes this, and it's opposite, letting the charges run concurrently:

(A) Concurrent sentences only apply if the defendant is convicted of multiple offenses, and each sentence on each offense is served at the same time; e.g., Robbery = 10 years + Battery = 5 years = 10 years max, with credit for time served on the battery running concurrently with the time to be served on the robbery.

(B) Consecutive sentences also only apply if the defendant is convicted of multiple offenses, and each sentence on each offense can not run concurrently. Therefore, all the sentences stack up: e.g., Robbery = 10 years + Battery = 5 years = 15 years minimum, with the only credits for time served to be good time afforded by the prison authorities.

Sentencing philosophy is guided by different objectives:

- Uniformity - similar offenses should receive similar punishments; when virtually identical offenses receive wildly different sentences, this is called sentencing disparity.
- Certainty and Truth in Sentencing - the sentence imposed should be the actual sentence served
- Retribution, Deterrence, Incapacitation - rehabilitation of the offender is not the primary concern

Mandatory minimums are presumptory sentencing models which focus in on raising the minimum part of the range allowable with crimes involving violence and narcotics. Generally, this means a harsher sentence if the offense is either gun-related or drug-related.

Three Strikes You're Out sentencing requires a 25 years-to-life imprisonment term (usually without the possibility of parole) for any third conviction of a felony. States vary on how serious each crime has to be before it counts for this. Results also vary on how effective this policy is, the majority of studies showing no effect on the incidence of serious crime.

Both mandatory minimum and three strike systems have resulting in a "trickle down" effect where prosecutors become pressured to engage in more (lenient) plea bargaining because the judge's hands are tied and, in some cases, it doesn't make sense to put somebody away for life on 3 minor felony charges.

What is called sentence DISPARITY is the study of whether one group of offenders (such as poor people or minorities) are regularly getting tougher sentences that another group of offenders, for the same crimes. The results of such studies have produced mixed findings. Some studies find evidence of disparity while other studies don't. One area where disparity was found is in the penalties for crack cocaine versus powder cocaine, since people sentenced in federal court for crack cocaine (from 1986 until 1997 when the laws were changed) usually received a much harsher sentence. People who seem keen on finding criticism with
the criminal justice system usually study sentencing disparity with an eye to whether or not mandatory minimums and three strikes laws produce disparity.

**SENTENCING RIGHTS**

The 6th Amendment right of confrontation does not apply at sentencing. Judges can consider all sorts of information from sources that did not come out at trial -- suppressed evidence, hearsay evidence, victim impact statements, presentence investigation (PSI) reports by probation officers, anyone who knows the offender's background, etc. Judges can also consider the conduct of the defendant during the trial. There is a right to counsel at sentencing, but it's essentially a stand-up role with the defendant while he's being sentenced.

The 5th Amendment right to protection against double jeopardy does not apply at sentencing. Judges are allowed to consider a defendant's past acquitted record, if say, they've been lucky at escaping conviction in previous trials. The inferred prior conduct can then be used to impose a harsher sentence. This is called a sentencing enhancement.

The cruel and unusual clause of the 8th Amendment limits the sentencing authority of judges, legislatures, and sentencing commissions. According to Supreme Court interpretation, this clause does not apply to the length of a sentence, only the form of punishment (something is cruel and unusual if it inflicts unnecessary or wanton pain, is shocking to the conscience of society, or is grossly disproportionate to the offense - the proportionality principle). The only exception is the "death is different" rule, which automatically triggers consideration of the cruel and unusual clause.

**THE SENTENCE OF DEATH**

The Supreme Court has held that a sentence of death is not cruel and unusual as long as the judge or jury have considered both mitigating and aggravating factors. Looking at seriousness of the offense and prior record (which are the two main factors in most sentencing) is not enough when the death penalty is at stake. Mitigating and aggravating factors are also used in the determination of other crimes not carrying the death penalty, and students should not confuse these with the aggravating factors built into the elements of certain statutory offenses, like aggravated battery, for example. Mitigating factors are background factors that work in the defendant's favor at sentencing, while aggravating factors are "real offense" characteristics that work against the defendant. The following table summarizes these factors:

<table>
<thead>
<tr>
<th>Mitigating factors:</th>
<th>Aggravating factors:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. No significant prior record</td>
<td>1. Prior record of felonies</td>
</tr>
<tr>
<td>2. Extreme mental or emotional disturbance</td>
<td>2. Offense is a felony murder</td>
</tr>
<tr>
<td>3. Defendant was a minor participant in the crime</td>
<td>3. Offense involved more than one victim</td>
</tr>
<tr>
<td>4. Defendant was a youth at the time of the offense</td>
<td>4. Victim was a police officer or other public official</td>
</tr>
<tr>
<td></td>
<td>5. Torture or heinous crime</td>
</tr>
<tr>
<td></td>
<td>6. Defendant tried to avoid arrest</td>
</tr>
<tr>
<td></td>
<td>7. Defendant tried to escape</td>
</tr>
</tbody>
</table>

**OTHER TYPES OF SENTENCES**

Probation is by far the most common sentence (for all crimes, both major and minor), with either imprisonment (more than a year) or jail (less than a year) tied for a close second. The following table expresses, for major crimes, the national average for three common sentences, imprisonment, jail, and probation:
## ISSUES IN SENTENCING

Almost all issues in sentencing can be summed up by the words discrimination and disparity. Discrimination refers to illegitimate, extralegal factors in sentencing, like bias, racism, or gender inequality. Disparity refers to inconsistencies in the sentencing process. Discrimination can not be proven by evidence of imbalances in outcomes, nor is statistical social science evidence allowed to prove discrimination (McCleskey v. Kemp 1987), even though blacks who murder whites are 11 times more likely to be sentenced to death than blacks or whites who murder blacks.

The Court has ruled that statistics doesn’t prove anything, and there are plenty of other studies showing that there’s no causal linkages between race and sentencing. The gender and sentencing studies are much more suggestive, however, but not in the direction of harsher sentences, but more lenient ones. Disparities are usually due to geographical variation, judicial backgrounds, and the attitudes of judges even in the same jurisdiction. Southern judges tend to be "hanging judges"; Republican judges tend to be tougher than Democrats. Religion and the judge’s experience as a district attorney are also factors. Individual judges often get colorful nicknames like "Hang Em High Harry" or "Cut Em Loose Bruce" in the courtroom workgroup.

## PUNISHMENT PHILOSOPHIES

It is important to consider Sentencing and Punishment Philosophies -- what they are, why they're important, and where to find information on them. Throughout history, there have been four theories put forward as adequately justifying punishment: (1) rehabilitation; (2) retribution; (3) incapacitation; and (4) deterrence. These will be defined later, but for now, it's important to ask "Why would we need to justify punishment anyway?" and "Why can't we just punish for punishment's sake?"

There are several answers, but the most important one is that punishment always needs to be justified because it is wrong. It's immoral. It's fighting evil with evil. It's two wrongs attempting to make a right. This is the puzzle that has intrigued philosophers for years. Vengeance is NOT a punishment philosophy, and it's not even a rationale. For something to be a philosophy, it must provide a theory of human nature (ontology), a theory of learning (epistemology), and a theory for prioritizing values (axiology). Can you imagine what kind of society we'd have if vengeance was at the top of our values?

A second reason is rooted in society’s deep-seated need to undo the crime. If it were only possible to turn back the hands of crime or throw the switch on a time machine, and make it all happen over again differently, we would do it. Unfortunately, we cannot, and that's why punishment needs a philosophy. It
would serve ideological purposes by giving us something to believe in, something stronger and more sublime than our basic needs.

The third reason is that punishment in the hands of nonexperts is dangerous. We elect people to the highest calling of office to make the decisions about how to hurt, harm, injure or kill our fellow citizens. That's just the nature of democratic government. Our overall crime control policies are determined in large measure by the punishment philosophies we believe in, or at least, our legislators believe in. Almost every instance of disarray, disorganization, and chaos in the criminal justice system is due to the collective failure of our two party system to consistently agree upon and follow a common philosophy of punishment.

(1) Rehabilitation, or reformation, of the offender focuses on providing the opportunities for change and self-improvement, for example through education, religion, or therapy. The backbone of this philosophy was the indeterminate sentence where expert treatment personnel would decide when a person could be safely released. It dominated U.S. criminal justice policy during the 1960s and 1970s until about 1981 when an America fed up with crime turned to more get-tough policies.

(2) Retribution is based on two ideas: (1) that the offender has treated law-abiding citizens unfairly, and owes them a debt of some kind that must be repaid; and (2) that the offender deserves to be punished because failure to do so would be a sign of disrespect for the human being or a sign of weakness in the state. Sometimes the twin notions of debt and deserving are combined in the concept of desert, as in the modern "just deserts" philosophy which holds that if the state has provided punishment, the punishment is deserved. It's the rationale for mandatory sentencing. Critics argue retribution is simply the old idea of revenge disguised behind a bunch of philosophical window-dressing.

(3) Incapacitation is the idea of doing whatever is necessary to keep the offender from ever repeating the offense again. It's not just a "lock 'em up and throw away the key" philosophy. That just transfers the violence to prison guards, although incarceration may be the only thing we can do given Eighth Amendment prohibitions. In earlier times, we amputated thieves, castrated rapists, or disfigured prostitutes, but some times today, "chemical castration" is not unheard of, and is a technique fully compatible with this philosophy. America has experimented with selective incapacitation since the mid-1980s, trying to target the most hard-core repeaters.

(4) Deterrence is based on the belief that crime is rational and can be prevented if people are afraid of the penalties. Specific deterrence is aimed at preventing repeat offenders. General deterrence is aimed at preventing others from committing similar acts. The deterrence philosophy has a couple of sound bites going for it: (1) punishment should fit the crime, not the criminal; and (2) punishment should be swift, certain, and severe. You'll soon discover that most research carried out in this area is on the death penalty, and that the research results are contradictory. It may be that only certain types of crime and certain types of people can be deterred. The relatively new area of study into perceived deterrence looks at internalization of norms rather than fear.

WHERE TO FIND INFORMATION

The Sherman Report is a well-presented compendium of what works in criminal justice, and Bruce Hoffman, a criminologist, has also posted an interesting paper on Beccaria, Deterrence and Punishment. It's also interesting to explore the Attorney General offices, which are usually found off of state government home pages: http://www.government.thelinks.com/. You can also try using this list of Attorney General and crime data sites as a starting point. Try looking in unusual places to get information. There's also an unusual website on the history of stocks and pillories, as well as ElectricChair.com. (At this site, you can also find out what the capital punishment is for your home state, if you don't know already. You can even learn why the electric chair is a chair and not a bed.)
Lethal injection, of course, is the most popular form of execution today, and it goes like this. A room is prepared where the subject is strapped down on a stainless steel table. Eight syringes are prepared, two filled with saline solution (to mix with the other chemicals), two with Sodium Pentathol, two with Pancuronium Bromide, and two with Potassium Chloride. All the syringes are connected to a multiple inlet device which controls the mix and release of chemicals via an electronic control box which the executioner operates in an adjacent room. Manual pull rods are also available to release the chemicals if the electronic device fails to function. All tubes lead to one hyperdermic needle that sticks intravenously into the subject's arm. Although some states have special procedures, most states follow the 8-Step Unified Execution Protocol, which consists of the following:

1. an injection of 10cc antihistamine, one half hour prior to execution.
2. an injection of 8cc 2% Sodium Pentathol five minutes prior to transmittal of subject to death chamber.
3. an injection of 15cc Sodium Pentathol 2% Solution delivered over a ten second time period.
4. a one minute wait.
5. an injection of 15cc Pancuronium Bromide over a ten second time period.
6. a one minute wait.
7. an injection of 15cc Potassium Chloride.
8. a two minute wait (subject should be dead by this time).

Lethal injections are a peaceful way to die, a lot better than the violent and messy method of electrocution. However, in some states that allow it, the subject can choose their own method of execution, and not all of them prefer lethal injection. Some prefer a firing squad, if that's available, perhaps because they can look their executioner(s) in the eye or perhaps because of a "live by the gun, die by the gun" ideology. Maybe lethal injection is too peaceful. Is it really modern? What precedent does it set? What does it say about the role of punishment in society? These are all questions we need to ask ourselves after knowing all we can about the methods of execution.

If you'd like to know who is scheduled to receive the death penalty, and hear a little bit about what they did to receive their sentence, a good place to get that information is Pending Executions. To take it a step further and learn what life is like awaiting execution on death row, then visit the University of Alaska Justice Center's Focus on Death Row, which contains the web's one and only collection of death row links from various state department of correction web sites.

DNA EXONERATION

Every defendant in court and every inmate in state correctional facilities across America it seems, right now, is demanding a DNA exoneration test, at state expense, to prove their wrongful conviction. They also want to see the test results and analyze the results for themselves. Unfortunately, there's no discovery or disclosure processes at the postconviction stage, and the procedures are no more simplified at the pretrial level. The best that the government can do is set up hearings to determine if "reasonable probability" exists to order a DNA test. Ordinary citizens, in the meantime, can have their DNA tested for any significant "law enforcement purpose."

In September 1999, the Justice Department released its Guidelines for Handling Requests for Postconviction Testing. It's an interesting document, but it offers little hope to the potentially thousands of wrongfully convicted. First of all, it's important to understand what "wrongfully convicted" means. It may include repeat offenders who may have committed many (or related) crimes, but are innocent of the specific charge for which they are serving their present offense. It may include innocent people who, faced with overwhelming evidence against them, such as wrongful identification, perjury, or forged documentation, were greatly tempted to accept the plea bargain that their lawyer so strongly recommended. It may include or exclude people who got "lost in the system," or were held without trial for long periods of time while being detained in a jail, out on bond, or simply awaiting charges (such cases are more properly termed wrongful imprisonment). It may exclude those who are factually guilty but are found not guilty by reason of the exclusionary rule, or who have escaped justice because of some loophole, police mishandling
of evidence, violation of constitutional rights, or reversal upon appeal (there is a difference between being "legally innocent" and complete exoneration because one is factually innocent).

Many states have no wrongful-conviction compensation laws. As of late 2004, only 18 states have such laws, which financially compensate someone if they were "wrongfully convicted." In the states that don't have such laws, the person would have to sue the state privately or lobby for some new legislation in that state.

There's a shortage of DNA Crime Laboratories (BJS 1998) in America. As of 2004, there are only about 120 of them, and they all have at least a year's backlog of work. Meanwhile, starting in 1999, the U.S. government has concentrated its efforts on taking samples of blood for a CODIS database on 99.8 percent of all babies born. Inmates routinely have their DNA samples tested in a handful of states with DNA identification laws. Defendants and ordinary citizens can voluntarily include themselves in state DNA databanks.

It's a nightmare at a trial with DNA evidence. Most everyone remembers the O.J. Simpson trial where DNA testimony was the longest part of it. It's often said that juries rebel against complicated scientific evidence. DNA evidence has the potential to be exculpatory, but DNA lab reports aren't exactly the easiest thing to discuss, challenge, or replicate. The reports either say "inclusion," "exclusion," or "inconclusive," and they express probabilities out to so many decimal places that it covers the potential population of three or four solar systems. They bring an unaccustomed degree of certitude to the courts.

So what can you do if you're a defense lawyer and the report says "inclusion"? Well, before you try any last-minute strategies of claiming your client left their DNA at the scene by accident or during a previous visit (as you might with fingerprints), you'll probably want to obtain your own test, but this has the same self-incrimination effect as putting your client on the stand. In any event, further DNA testing will only cause delay and additional expense. About the only thing you can do is attack the lab for its (lack of) quality assurance and proficiency testing, use a "Chewbacca defense" (thanks to the South Park TV show for this phrase), or try to razzle-dazzle the jury about how complex and complicated the other side's evidence is. It's a defense strategy of putting the government on trial, reversing the role of who's the prosecutor, and trying the case in the media. The last thing you want to hear about if you're a lawyer or judge is DNA testing, and there are various ways to do DNA testing, as follows:

1. RFLP -- Restriction Fragment Length Polymorphism, the oldest, most accurate and time-consuming technique, involving radioactive fragmentation and examiner comparison
2. PCR -- Polymerase Chain Reaction, a copying technique for small or broken pieces of DNA, which are copied or amplified, not cloned, and a computer or operator estimates match probabilities
3. STR -- Short Tandem Repeats (sometimes called VNTR, Variable Number of Tandem Repeats), a method which uses markers for short, repeating segments of microvariant allele patterns, as short as three to seven base pairs, usually involving computer expert systems although visual detection is possible
4. Mitochondrial DNA -- a type of PCR used by the Defense Dept. to identify war remains, or by archeologists on samples subjected to extreme environmental conditions, and because mitochondrial DNA is inherited solely from the mother, it has also been used in cases of disputed maternity
5. Rapid DNA ID Microchip-Based Genetic Detectors -- these are field-ready laptop analysis units capable of being used at crime scenes, displaying profiles onsite or electronically uploading to a CODIS database. The technology uses the same microchips that detect genetic diseases, but modified to transport, concentrate, and hybridize DNA via electric currents and to discriminate individual genetic markers

DNA testing has only freed about sixty-three people since the late 1980s. There's often resistance on the part of police and prosecutors to reopen cases. It may very well turn out to be a technology that overpowers the criminal justice system. If we use it on inmates, how do we decide which inmates? If we use it on average citizens are we invading their privacy? These are all questions that are sure to be in the public spotlight for the next few years.
The prison population has been rapidly expanding with an annual growth average of 5 percent a year since 1990. According to BJS data, there were 1,860,520 inmates at mid-year 1999, about 60,000 more than a year earlier. The nation’s jail population at mid-year 1999 was 712,000 inmates. This amounts to about one of every 147 Americans living behind bars. Louisiana, California, Texas, Ohio, and the federal prison systems hold approximately a quarter of all inmates in the United States, and have been the leaders behind the growth trend. All states, with the exception of Maryland, Wyoming, and Washington, D.C., have been experiencing growth.

Mandatory minimum sentences, especially for drug crimes, appear to be the leading cause of prison overcrowding. You can learn all you ever wanted to know about Mandatory Minimum Sentences (MMS) at the R.E.A.L. web site called Families Against Mandatory Minimums. Essentially, they are laws requiring judges to hand out tough sentences regardless of mitigating factors. An example would be the law requiring a five-year sentence for five grams or more of crack cocaine. The Sentencing Project web site contains information in the form of fact sheets about the controversies of crack cocaine laws if you are interested in this particular cause of overcrowding.

Another cause is reflected in the rather simple phrase “If you build it, they will come.” It’s no secret that states are now spending about 10-15% of their annual budgets on new prison construction. Northern and Eastern states like Vermont, New Jersey, and Virginia are among the fastest builders. The South, in places like Louisiana and Texas, already has large mega-complexes like Angola and Huntsville with huge amounts of land in a ready state of expansion. States without an adequate amount of prison space, or “carrying capacity,” have to pay other states or contract with private companies to hold their overflow.

The consequences of prison overcrowding can be both positive and negative. It’s positive if a number of predatory or disorderly offenders get off the streets as this will lead to an improvement in the quality of life for law-abiding citizens. That’s exactly what many of the public opinion polls show. Crime rates go down, but people don’t necessarily feel safer since fear of crime operates on a different (irrational) basis than actual risk of victimization. Quality of life, however, is something that citizens almost always think has improved, especially when they are informed and asked what they think about prison overcrowding. This is the positive consequence. The negative consequence is that prisons become harder and harder places to control. Overcrowding is definitely an environmental, predisposing, or preconditioning factor in prison violence and riots. At the risk of sounding psychic, we’re sitting on a powder keg these days, and one could fully expect major prison riots these years. We haven’t seen anything like that since the tumultuous decade of the seventies.

**APPEAL**

There is no constitutional right to appeal, but federal and state statutes have created the right to appeal. Appeals are either: (1) automatic - to a state appellate court; or (2) discretionary - to a state supreme court. The principles of mootness, raise or waive, and plain error govern the appeals process. Appeals are direct attacks on conviction, while habeas corpus reviews (testing the lawfulness of imprisonment) are indirect attacks on conviction. The constitution does provide the right to habeas corpus review, but that right has been slightly eroded in recent years. Appeals of convictions have also had a hard time meeting standards, as this bad example of a pro se petition for appeal demonstrates.

Every jurisdiction in the United States has created a statutory right to appeal. The defense must initiate the appeal process in any effort to overturn a finding of guilty by a judge or jury. The role of defense attorney is more like a sword than a shield for their client, and a client requires a somewhat “aggressive” lawyer for an appeal. Most states have a two-tiered appellate structure. This means that there is an automatic right to appeal to the next higher court, usually an intermediate appellate court. To appeal even higher - to a state Supreme Court - requires that the case have some constitutional merit, and such an appeal is not a right, but discretionary, since any Supreme Court (be it state or federal) only hears cases on the basis of a writ of certiorari (outlining the constitutional significance of the case). Beginning in the 1980s, most Supreme Courts have limited the number of certiorari cases they will hear. Intermediate appellate
courts, however, are extremely busy. The process of working a case through the intermediate courts is called appellate review.

**APPELLATE REVIEW**

There are three (3) doctrines that define the scope of appellate review:

- **Mootness doctrine** -- This determines if the case is or is not a "moot" point; that is, whether it really matters or not. Defendants who have already served their time or paid their fines generally are considered to be "moot" cases because the sentence has already been served. The case is over with. Some states, but not all, allow appeals for the purpose of clearing someone's "good name", and there is something called the collateral consequences exception which gives favorable consideration to things like loss of professional license or loss of employment upon conviction.

- **Raise or waive doctrine** -- This requires the defense to have raised some objection to something at trial, or otherwise, they forever waive their right to bring it up again on appeal. Even when counsel is overruled on an objection, they usually indicate their future appeal intentions by saying "We except". This doctrine is also called the contemporaneous objection rule or timely objection requirement.

- **Plain error doctrine** -- This catches all the sorts of objections that could have been made, but were not, at trial. It applies when there are "plain errors affecting substantial rights" or cases of "manifest injustice" or "miscarriages of justice". Courts generally apply the doctrine sparingly, and the "harmless error rule" protects judges by not allowing a trial judge's error alone to be the basis of a reversal. Plain errors are usually procedural or evidentiary errors.

When appellate courts review cases, they may affirm the decision of the lower court, reverse the decision of the lower court, or affirm only a portion of the lower court's decision and reverse other portions of it. Although a reversal accomplishes the same thing, they also have the power to order the whole case dismissed, as if it didn't happen. More often, if this is the case, however, the appellate court will remand the case, which means that it is returned to the trial court and may be retried. If they feel strongly about what the ultimate outcome should be in a case, they will indicate reverse and remand. If the appellate court indicates that there was insufficient evidence to convict in the first place, the state trial court cannot even retry the case because double jeopardy protection kicks in. In any retrials the state cares to do, they cannot charge the defendant with anything other than what they were charged with in the original trial, but the sentence at the retrial can be harsher following a successful appeal.

**HABEAS CORPUS**

In the normal appeals process, defendants take their cases from a state trial court to a state intermediary court to a state Supreme Court and then to the U.S. Supreme Court. Habeas corpus, on the other hand, is a form of collateral attack. In a collateral attack, the convicted offender takes their case from a state trial court to a federal district court and then through the federal appellate system up to the U.S. Supreme Court. It's a way of asking the federal government to challenge, or at least look at, the legality of the state conviction by using federal law as a benchmark.

It's important to understand that initiating a habeas corpus proceeding in federal court for a state conviction is not an ordinary criminal proceeding, and according to reforms passed in 1996, there's a 1-year statute of limitations. It challenges the lawfulness of the defendant's imprisonment, either in jail prior to conviction or in state prison following conviction, or both. It's not the same as a conditions-of-confinement lawsuit for overcrowding, second-hand smoke, or any other allegations of prison mistreatment. It's also not the same as a post-conviction petition which is filed in a state court. The doctrine of exhaustion requires that an inmate must exhaust their post-conviction remedies in state court before filing for federal habeas corpus review.
The U.S. Constitution (Article I) specifically mentions that the "several courts of the U.S. shall have the power to grant writs of habeas corpus in all cases [in all states] where any person may be restrained of his or her liberty in violation of the Constitution, or any treaty or law of the United States." This clause has been interpreted both broadly and narrowly:

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<th>Broad interpretation</th>
<th>Narrow interpretation</th>
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<td>The clause empowers the federal courts to review the whole state proceeding to determine possible violations of federal law and constitutional law.</td>
<td>The clause empowers the federal courts to only review the jurisdictional authority of the state court - over territory, person, and subject matter.</td>
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The broader interpretation was dominant during the Warren Court days, when the philosophy of the Court was more liberal. The Rehnquist Court of the 1990s has taken a decidedly narrow interpretation, for conservative reasons.

The problem with habeas corpus is that inmates can file an endless number of them, although there are some restrictions such as requiring a "certificate of appealability" from a judge denying any previous claims, usually for reasons of involving a constitutional issue. If they fail to gain relief the first time, they are encouraged and assisted by "jailhouse lawyers" to keep filing and filing, and sometimes they are written completely by jailhouse lawyers. There's always some new angle at federal or constitutional law that can be used to modify or change the contents of each writ; and prisons usually have excellent law libraries. Why can they file so many times over and over again? The rule of res judicata (that once a matter is decided, it cannot be reopened) does not apply to habeas corpus.

Here are some of the various requirements for filing habeas corpus writs:

- The convicted offender must claim that their defense counsel was incompetent. It's not enough to say that they made tactical errors or didn't have time to raise an objection at trial. In repeated habeas corpus claims, the offender must come up with some new way of describing how their counsel was incompetent or ineffective, otherwise the claim is regarded as frivolous (abuse of writ rule).
- The convicted offender must show that the failure to raise any objection, or the fact of being represented by ineffective counsel substantially prejudiced their case, either by some piece of evidence weighing too heavily on the judge or jury or by a prejudiced atmosphere covering the whole trial (cause and prejudice rule).
- The convicted offender must demonstrate that they are victims of a manifest injustice or miscarriage of justice. It's not that they are claiming their innocence. They are questioning the fact that they are legally guilty via some mention of procedural irregularities, but they are not normally allowed to refer to the reasonable doubt standard. (manifest injustice rule).

**POST-SENTENCING PRINCIPLES**

This section is not anywhere near an adequate coverage of prisoner rights. Instead, it's a discussion of two theoretical principles associated with the work of Professor Sieh (1989): the Principle of Non-Superiority and the Principle of Less Eligibility. These common-law principles underlie and make sense of a number of other issues, such as the rights an ex-convict loses permanently.

**THE PRINCIPLE OF NON-SUPERIORITY**

This is the principle that no ex-inmate should live better after prison than they lived before prison. It's not measured in terms of economics, but in terms of quality of life. "Paying your dues" to society extends well beyond completion of the sentence. There's supposed to be some sort of "lasting stigma" that affects social
standing. Common law roots of the principle are practical, and in many ways, endorse the policy of asset forfeiture. Inmates are not supposed to have any hidden wealth or loot that accumulates interest while they are in prison.

Another part of the principle is that ex-inmates should receive no further financial (or social) support from their prison upon release. There should be no prisoner support groups, no prisoner credit unions, no alumni organizations, and definitely nothing more than the $50-100 they get from the prison upon their release. They should never show up again at the prison gate, saying "Warden, can you spare an extra $100". Likewise, for any fraternization with prison staff.

THE PRINCIPLE OF LESS ELIGIBILITY

This principle was actually first expressed by Jeremy Bentham back in 1780 in The Principles of Morals and Legislation. It's best seen as a reaction to the 14th Century "Black Death" plague that wiped out a third of the Earth's population. During those times, one of the most important crimes was vagrancy (wandering about aimlessly with no visible means of support). England passed its Poor Laws (which distinguished between the deserving and undeserving poor, but that's another story about the difference between workhouses and almshouses) and as Bentham pointed out, the key element in these legislations was the Principle of Lesser Eligibility -- no poorhouse, not even houses of corrections, should ever be attractive or comfortable enough that the pauper or criminal comes to prefer idleness to decent, honest labor (working for a living).

In other words, "The ordinary condition of a convict ought not to be made more eligible than that of the poorest class of subjects who work for an honest living" -- and that's exactly what Bentham said. In modern terms, no inmate should enjoy a standard of living that's better than that of the poorest, honest folk in society. Similarly with welfare, society should never make the benefits so attractive that it serves as an incentive for dishonest people to find out ways to make themselves "eligible" for the benefits. There's a lot more to this principle, and it makes for interesting discussion.

LOST RIGHTS

At common law, it's acceptable to penalize people even after they have served their sentence to society. This is called the law of attainder, although the term also refers to any law aimed at a specific person. An attainder is the loss of all civil rights due to conviction for a felony offense, and although the Constitution (Article 1, Section 9) specifically prohibits "bills of attainder" which forfeit all rights, creating a situation of "civil death", many states take away a significant number of selective rights for ex-felons. Although legislators are constantly changing the law (the most recent gain being return of the right to vote for ex-offenders), here's a list of lost rights and some indication of how common they are:

- almost all states allow spousal divorce on grounds of imprisonment
- almost all states prohibit ex-offenders from serving on a jury
- almost all states allow criminal records to impeach testimony as a witness
- almost all states prohibit ex-offenders from owning a gun
- almost all states disqualify ex-offenders from adopting children
- about half of all states prohibit ex-offenders from holding public office
- about half of all states prohibit ex-offenders from public employment (those that don't still require a showing that the offense is not possibly job-connected)
- about half of all states take away parental privileges from ex-offenders
- about half of all insurance companies (possibly more) make it difficult or expensive for ex-offenders to get life and automobile insurance
- about half of all 1500 licensed occupations (possibly more) automatically bar ex-offenders from applying by licensing board action
INTERNET RESOURCES
Lecture on Trial Format
Lecture on Objections at Trial
Families Against Mandatory Minimums
Death Penalty Links
History of Prisoner Appeals & Litigation
Minnesota Sentencing Commission Guidelines
National Association of Criminal Defense Lawyers
The Other Side of the Wall
Reasons to Amend Three-Strike Laws
Sentencing: The Judge's Problem
Tales of Justice and Vengeance
U.S. Sentencing Commission

PRINTED RESOURCES

Unit 11

COMMUNITY CORRECTIONS

There is nothing that can be called the "American system" of corrections (Michael Tonry)

The phrase "community corrections" is an umbrella term that encompasses everything from pretrial diversion to intermediate punishments. By definition, it includes any nonincarcerative, yet supervised way of dealing with offenders who are facing conviction or who have already been convicted. Probation and parole are the most well-known forms of community corrections, but the term also includes home confinement, electronic monitoring, day fine programs, work release, furloughs, halfway houses, restitution, community service, drug/alcohol checks, check-in programs, curfews, mediation and restorative justice centers, and any other offender monitoring or reporting program that walks the line between trust and safety.

There is tremendous variation by jurisdiction in how community corrections is done. However, there are at least four (4) things that all programs tend to have in common: (1) an emphasis on residential stability - that is, the place the offender is kept or located is either their home, a group home, or someplace made to look like a home - this being the philosophy of reintegration, maintaining family and residential ties to the community; (2) the provision of voluntary, and sometimes mandatory, professional services of a medical or psychological nature - this being the philosophy of rehabilitation, and also of trust, especially if the treatment or services provision is voluntary; (3) a focus on accountability, for both offender and supervisor, which means that a plan is put in place for the offender to measure progress as well as a system is put in place for the supervisor to (frequently) report progress; and (4) the function of economic efficiency, not only in the way offenders are expected to find and hold a job (or pursue an education), but in the way they would pay some or all of the costs. Community corrections helps alleviate prison overcrowding, keep the
costs of criminal justice down, and represents a whole new way of looking at corrections as the end of the criminal justice process.

Of the many philosophies put forward, reintegration has long been regarded by many scholars as the ideal philosophy of choice, and some (Braithwaite 1989; Braithwaite & Pettit 1990) call this philosophy restorative justice, which is actually a broader term referring to a holistic approach that generates a complete change in life. The basic idea is that ex-offenders are only ready to re-join the community of free people when they come to recognize the injustice in the harm they have caused others. Restorative justice means redemption is earned through repairing injustice. Reintegration has somewhat different goals -- to prepare offenders to re-enter society and to prepare communities to accept ex-offenders. Reintegration also means full inclusion in a wider moral community, and contains the following components:

- approval of the person
- respectfulness
- forgiveness
- pride

Approval of the person is approval as a person, not for what the person did, but for their basic humanity and potential to be a good person. Respectfulness is the basic decency in the way a person is treated. Forgiveness involves the act or ritual of charity. Pride is recognition of the talents and skills that people can contribute to their community. It is from these philosophical positions that criminal justice scholars critically examine, and are often critical of, community corrections, especially probation and parole.

PROBATION AND PAROLE

Close to four (4) million people, on any given day, are on probation. The offenses they are on probation for range from minor misdemeanors to moderate felonies. Probation is the most widely used sentence in criminal justice, and it is usually straight probation with at least monthly contact, instead of intensive probation, where the caseloads are lower and more frequent contact is expected. There are about 2,000 community correctional programs in the U.S., and many of them are state funded programs. Thirty (30) states combine their probation and parole agencies. These agencies usually maintain lists of employers willing to hire ex-offenders. A person on probation or parole is called a client, and the persons who supervise them are called POs. Technically, a probationer is still under the supervision of their original sentencing judge, and parolees are usually under the jurisdiction of a parole board. An offender becomes eligible for probation long before the original sentence is issued, in a background check that the probation office has done - called a pre-sentence investigation - to assist the judge at sentencing. In addition, most agencies utilize another form - called a need and risk assessment - which balances the offender's rehabilitative possibilities with the potential for danger to the community.

The size of a PO's caseload varies, depending upon location. In New York and California, for example, it's not unusual for a PO to have a caseload as high as 400 clients. In rural areas, the typical caseload is around 25 clients. Some overloaded jurisdictions have established drive-up windows, postcard mail-in programs, or digital palm scanning devices at central locations. Most probation programs can be called "pee 'em and see 'em" programs. There are some places, however, that emphasize frequent, random, face-to-face checks or home visits. Supervising offenders in the community requires proactive intervention and case management strategies. POs have the same arrest powers as police officers, and it is usually at their own discretion if they want to carry a weapon, although agency policies vary.

To become a probation officer, a bachelor's degree is usually required. There is also a written test for most jobs. In addition, about half of all agencies require a psychological test. There is usually a six-week pre-service training period, and in-service training is frequently emphasized. Salaries average in the low to mid-thirties, around $33,500 as a national average, but in some places, like Alaska, the salary can be as high as $83,000. The federal probation system pays quite well, significantly more than the states. In general, probation work pays better than parole work. Parole officers tend to come from backgrounds with
two or three years of police or correctional officer work, and they have closer ties with law enforcement and/or corrections. Because the salaries are fairly adequate, and professionalization has occurred with college credentials, there is little turnover among personnel in this field. However, the work is stressful, and burnout is somewhat common.

John Augustus (1784-1859) is regarded as the "father" of probation because in Boston during the 1850s, he started attending criminal courts and offered to take carefully selected offenders into his home rather than see them sent to prison. At first, he only took drunkards, but by the time he died, he had successfully "binded out" and rehabilitated over 2,000 offenders. Massachusetts started the first public-funded probation office in 1878, and was soon followed by Missouri, Vermont, and Rhode Island. By 1925, all 48 states had probation as a regular part of their criminal justice system.

**INTERMEDIATE SANCTIONS**

There are a variety of programs other than probation and parole. For example, there is Work Release, also known as day pass, day parole, temporary release, and work or education furloughs. It was first used in Vermont in 1906 when sheriffs allowed their jail inmates to work in the community during the day. Conjugal visits, where the offender is allowed to socialize in private with their spouse, are also a type of furlough. Furloughs originated in 1918 in Mississippi, and reached their peak of popularity in the 1970s and 80s, but public outrage since then has significantly cut back on their use. There are only about 5,000 clients on furlough at any given time nationwide. Research on day release programs has shown a beneficial effect on self-esteem, and release for educational purposes has been quite effective.

House arrest, or home confinement, is a fairly recent invention of the 1980s and 90s, where the offender must obey a curfew to stay in their residence during evening hours or on weekends. There are no house arrest programs where the offender must stay in their residence all the time. At any given time, there are about 20,000 clients under house arrest nationwide. Research has shown that this option works best for older, married clients with established jobs. Critics argue that it is plagued with class and race bias.

Electronic monitoring, or the use of ankle or wrist bracelets that emit a telemetry signal, is also a fairly recent invention. Initial costs are quite high, but once the system is in place, it costs as little as $3 a day to monitor a client. There are a variety of gadgets involved: continuous signal devices; pre-programmed signal devices; and devices that look like cell phones. There are about 75,000 clients under electronic monitoring nationwide. Known benefits include avoiding the criminogenic atmosphere of jails and prison.

Halfway houses have been around for a long time, and are similar to outreach missions in that they provide temporary residence and basic needs, such as food and shelter, for poorer clients. Generally, such places combine homeless people with ex-inmates who have no place to go. So-called "halfway-out" houses are more common than "halfway-in" houses. Most states are getting out of the halfway house business, and there are currently only about 15,000 clients in such programs.

Day reporting centers, also called community residential centers or community correctional centers, are offices that look like houses in residential neighborhoods where the client has to check-in sometime during daylight hours to fulfill some part of their probation conditions. Employment counseling is the most common service provided, although such places can also be used for organizing community service activities, helping work out victim restitution, and/or mediation or reconciliation activities between victims and offenders. Daily check-ins are usually required. Many day centers, like other programs in community corrections, are staffed with volunteers, who serve as tutors, mentors, advisors, or skills trainers. From time to time, scandals erupt where a client and a volunteer have gotten too close or intimate in a program. From a management perspective, it's better to use paraprofessionals (who at least have some formal training) than volunteers.

There are a vast number of other private programs. Privatization in community corrections is a significant issue. For some reason, and nobody seems to know why, private facilities have lower client
recidivism rates than public facilities. It is frequently argued that private facilities screen in only the best candidates for success, a practice known as creaming, or cherry-picking.

ISSUES IN COMMUNITY CORRECTIONS

Only about 62% of probationers successfully complete their probationary period. Two thirds of probationers commit new crimes within 3 years of completing their sentence. Ex-probationers in many states are responsible for murders and countless other violent crimes, some while they were on probation. 90% of probationers are under court order to get drug treatment, to pay restitution or fines. About 50% of them, however, do not comply with these court orders. Fewer than 40% receive any kind of effective drug treatment during their sentence. Some 300,000 probationers (2%) are officially listed as ‘absconders’, which means, essentially, that they are out there, hiding in public view, flaunting the laws, and ignoring the system.

There are two ways to violate probation or parole: by a technical violation and by committing a new offense (often called the instant offense as opposed to the original offense). On average, all violators comprise about 50% technical violations and 50% new offense violations. A technical violation is misbehavior by an offender under supervision that is not by itself a criminal offense and generally does not result in arrest (e.g., failing to report for a scheduled office visit, missing a curfew, lack of employment or attendance at school, testing positive for drug or alcohol use, or contacting a victim or co-defendant). Serious technical violations (e.g., escape or repeated failure to report, tendencies toward violence) or substantive patterns of misbehavior can result in revocation and re-imprisonment. Some technical violators receive no sanctions and others may have their conditions modified to respond to the misbehavior, yet continue to be supervised in the community rather than sent to prison. Probation and parole officers have a range of graduated sanctions available to address technical violations from a verbal reprimand and increased reporting requirements to referrals to treatment or service programs, electronic monitoring, and re-incarceration. Conditions attached to the successful completion of probation are so stringent that many offenders prefer to choose jail or prison rather than probation.

Traditional, or straight, probation is not the only arrangement that can be made. Some jurisdictions (like North Carolina) allow the judge to enter a prayer for judgment, which means you’re found guilty but if you behave for a set period of time (typically one to three years), the offense will not go on your record. Other jurisdictions used what was once called deferred prosecution, or what is more commonly called a suspended sentence. These are all descendants of a practice once known as judicial reprieve. With a suspended sentence, a conviction is recorded but no conditions are attached for supervision. The judge reserves the option of revoking the suspended sentence if they ever see that offender in their courtroom again. Other arrangements include shock probation, also known as the split sentence, where the offender spends some initial time in jail, followed by a period of probation. Shock incarceration is somewhat different in that the offender must petition the court while in jail to be released on probation. There is even a type of intermittent arrangement called shock parole, where the offender serves some jail time, some parole time, and then some more jail time.

PAROLE

Only about 58% of parolees successfully complete their parole period, and the figures are much worse if the convict gets out of prison the "hard way" - by doing their whole sentence behind bars. Year and year of statistics have shown that among inmates who "max out" or get out of prison the "hard way," over two-thirds (67%) of them will be re-arrested within three years. Parole used to be the normal course of events, but more and more inmates are exiting correctional facilities after serving all the time they were sentenced to. The history of parole is tied into the history of reformatories, New York's Elmira Reformatory, to be exact, in 1876, although some scholars trace its origins to 1840 when Alexander Maconochie implemented "tickets-of-leave" for inmates at Norfolk Island, a British penal colony off the coast of Australia. In America, parole evolved more by accident than design. It is defined as the release of a person from a correctional facility before they have completed their full sentence. It is a privilege rather than a right. Parolees are placed under supervision, and conditions are imposed on their behavior. Parole is usually
granted by a parole board specially appointed (or elected) for the purpose of determining who would most benefit, in terms of rehabilitation, by an early release. Other times, the prison administration (correctional counselors, really) releases inmates early by calculating legislatively-approved good time credits given for good behavior while incarcerated, but this isn't really parole--it's called conditional or supervised release, or something else. Parole's the only thing left that's really representative of rehabilitation. However, the average parole officer today has a caseload of 69 parolees and averages only 1.6 face-to-face contacts per month.

Ironically, parole shouldn't even exist. It was officially abolished in 1984 according to federal sentencing guidelines released that year. Not all states followed the feds, however, in their recommendation to abolish it. Some states simply combined it (the parole board system) with their good time/early release system; others (like Virginia) passed Truth-in-Sentencing laws letting anyone out who had served at least 85 percent of their sentence. Even the feds themselves realized the importance of supervision--parole at least meant that someone was watching the releasees; good time release meant that no one was watching them--so they combined parole into their probation system, creating the job of federal probation/parole officer, one of the more attractive jobs (and well-paying too) in criminal justice. Currently, only 15 states have abolished parole, and the feds have passed all kinds of phase-out acts to prolong the lifespan of the U.S. Parole Commission.

It doesn't make sense to talk about a "parole system" in the U.S. because it's extremely disorganized. One state may have an independent parole board authority; another consolidates parole authority in a department of corrections division. Hearings are not conducted the same from state to state, and inmates may appear before the whole board or just a small part of it. There's also a lot of variation in what parole boards consider in terms of the rehabilitation potential for each inmate. Attitude appears to be all-important, and inmates have always said that disciplinary record doesn't seem to matter, just how things go that day. Nothing "cleans up" the inmate population more than the day the parole board comes to visit a prison.

Sex offender notification laws came into being in 1996 nationwide after New Jersey passed its Megan's Law in 1994. These laws require communities and schools to be notified, by bulletin, flyer, or signpost, that a paroled sex offender is within residence nearby. These laws have been frequently challenged as unconstitutional on many grounds, and everyone is awaiting the Supreme Court to take up the issue. In the meantime, however, at least 16 states go a step further than these laws, setting the maximum end of the parole period to life.

REENTRY

The problem of reentry is the problem that ex-inmates find in trying to re-adjust to the free community. If they have spent any length of time behind bars, they have come to see the rules of free world etiquette as upside-down. They have learned in prison, for example, that a smile when greeting someone means you are looking for trouble. Being nice or kind to anyone is a sign of weakness, and ex-inmates typically overreact to anything that threatens to put them down or make them feel hopeless. The most common reason for not being able to adjust back into society is an inability to handle all the strange, angry emotions and hassles that come up in almost every social or interpersonal encounter with people in the free community.

The rights of ex-inmates are restricted, the theory being that they do not have the required honesty and proper values to participate in some of the things that free people enjoy. These restrictions vary by jurisdiction, and some places are slowly lifting them. The following table of what is restricted in "most" and "some" jurisdictions is about all that can be summarized:

<table>
<thead>
<tr>
<th>Rights Lost in Most Jurisdictions</th>
<th>Rights Lost in Some Jurisdictions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. to hold public office</td>
<td>1. to vote</td>
</tr>
<tr>
<td>2. to be employed in the public sector</td>
<td>2. to obtain work in some licensed occupations</td>
</tr>
</tbody>
</table>
3. to own firearms
4. to serve on a jury
5. to adopt children
6. to obtain some kinds of insurance

3. to own an automobile and auto insurance
4. to sue for money in civil court
5. to obtain a passport or visa
6. to apply for general assistance or welfare

Some jurisdictions allow ex-inmates to clean up their rap sheets, for example, by sealing juvenile records or making sure the same arrest or conviction does not show several times. Also in existence are forms called Certificates of Relief From Disabilities, or Certificates of Good Conduct, which indicate the person has been rehabilitated.

It would not be an exaggeration to say that the United States is undergoing a reentry crisis. The American model of a reentry system lacks an adequate theory of criminogenesis (what causes people to commit crime) as well as effective principles of management (the carrot-and-stick approach characterizes most community corrections). The carrot and stick approach has turned probation and parole officers into half-cop, half-social workers. This model of punishment and welfare hasn't worked very well. It's degrading, and deficit-based. The ex-offender is not only treated suspiciously like a would-be criminal, but they are also treated like a welfare recipient. It's the worst of two possible worlds. Further, there has never been any strong tradition in American culture about when a person has "paid their debt to society." Ex-convicts often feel they have paid their debt to society and should be left alone after release, and when they 'get out,' they want to be out. Any compromise or half-measure, any 'hoops' or hassles placed in their path, breeds resentment.

There are number of things that prisoners and ex-prisoners can do to contribute to communities. Many of these things are already done, but not publicized widely. They need to be published widely, and there needs to be more things that build on strengths instead of deficits. The following table lists some of these activities:

<table>
<thead>
<tr>
<th>THINGS THAT INMATES OR EX-INMATES CAN DO</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Build homes for low-income people (Habitat for humanity)</td>
</tr>
<tr>
<td>2. Provide respite or hospice care for people dying of AIDS and other illnesses</td>
</tr>
<tr>
<td>3. Train companion dogs for the blind and disabled</td>
</tr>
<tr>
<td>4. Plant gardens and clean-up graffiti in neighborhoods</td>
</tr>
<tr>
<td>5. Repair computers to be donated to schools</td>
</tr>
<tr>
<td>6. Fight forest fires or provide other relief services in floods and natural disasters</td>
</tr>
<tr>
<td>7. Become mentors or counselors for the alcohol- and drug-addicted</td>
</tr>
<tr>
<td>8. Become community social service helpers</td>
</tr>
</tbody>
</table>

INTERNET RESOURCES
Amber's Probation & Parole Site
American Probation & Parole Association
Bill Sand's 7th Step Society
Broken Windows Probation: The Next Step in Fighting Crime
Carolina Correctional Services
Center for Restorative Justice
Five Futures for Probation & Parole
Georgia Parole & Pardon Board
History of John Augustus: Father of Probation
Mark's Parole and Crime
Measuring the Performance of Community Corrections
Parole and Prisoner Reentry in the United States (pdf)
United States Parole Commission
Welcome Home: Examining the Reentry Court Concept
What Probation is like in Hunt County, Texas
The role of prisons or correctional systems (as the vast array of prison or prison-related facilities, programs, and services are called) is to make society a safer place. Prisons are based on the idea that some people are so inherently evil that they must be cut off from the rest of society and closely monitored. Theoretically, however, they should be based on some type of philosophy or rationale for punishment - such as deterrence, retribution, reintegration, incapacitation, or rehabilitation. Throughout most of the twentieth century, the dominant philosophies have been incapacitation, deterrence, and retribution (this combination being called the custodial model) except for a brief period from 1954 to 1974 when rehabilitation (also called the medical model) was experimented with. Rehabilitation died in 1974 with publication of the so-called Martinson Report (Martinson 1974) that "nothing works" and was further delivered the death blow in 1989 with Mistretta v. United States which allowed judges to sentence defendants without regard to the amenability toward treatment or potential for rehabilitation. Martinson's findings that all 231 different ways of treating criminals had failed were called into question by others.
(Gendreau & Ross 1987; Palmer 1991), but the general consensus remains in criminal justice that prisons not only don't work, but are an expensive way of making bad people worse (Waddington 1992; Blumstein 1995). The Canadians and Brits are about the only ones left in the world who believe in the correctional rehabilitation of criminals, although there is a trend in contemporary jurisprudence for courts to take a more therapeutic approach.

Corrections is believed by many experts to be *the most challenging and frustrating component of criminal justice*. There are the challenges of managing the inmates daily as well as the frustrations of inevitable mismanagement at attempting to accomplish multiple goals. New challenges present themselves every day. In a very real sense, employees in a correctional system are doing time the same as the inmates are doing time. It's easy to conduct a trial and sentence somebody; what's difficult is what to do with them after they're sentenced. Everything in corrections is done on a large scale because there is an endless stream of prisoners. On average, one new jail or prison is built every week in America.

Operating the American correctional system is quite costly. Expenses run about $32 billion a year, and a conservative estimate is that each prisoner costs the American taxpayer about $21,000 annually (35,000 a year is the most commonly cited figure), two or three times that amount if the prisoner is aged or sickly, and about $100,000 a year at high-cost facilities like Riker's Island. On any given day, there are about 5 and a half million people under some form of correctional custody, which is a figure that includes things like community corrections. There are about 600,000 correctional employees with a variety of job titles, and corrections is the fastest growing part of the criminal justice system. The average pay for correctional officers is $30,000, but an extra $10,000 is usually available by working overtime. Most of the employees work at the state-level (62%), the second largest group in city and county jails (34%), and the rest in federal prisons (4%). The average employee is white and from a rural background; only 34% of correctional officers belong to minority groups, and only 22% are women. There are 4500 correctional facilities in the U.S.; 1084 state prisons, 3304 city and county jails, and 112 federal prisons. Then, because we've only been talking about adults so far, there is the additional group of one and a half million juvenile delinquency cases each year that produces about 70,000 people for the juvenile prison system, 40,000 into private juvenile prisons, and the rest into a variety of detention centers, halfway houses, camps, ranches, and shelters. In addition, approximately seven million Americans spend at least a day in jail every year.

Prison overcrowding is a global problem. Although official numbers are hard to come by, some countries are believed to have the overcrowding problem worse than the U.S., for example, Australia, Russia, Brazil, and most Asian countries. Housing more inmates in a cell than what it is designed for is common in the U.S. and anywhere else overcrowding is present. The average prison cell built today is at least 70 square feet (7x11 or 8x9), but only about 60 square feet are usable, resulting in 30 square feet per prisoner if double celled. Some older prison and jail cells provide 40 to 56 square feet (5x8 or 7x8). Federal judges in many states have ruled since 1977 that every prisoner deserves at least 60 square feet of cell space. The fact is that cell size varies depending upon the type of facility. In state prisons, the average inmate is male (females only make up about 7% of the prisoner population), around 30 years of age, a high-school dropout (only 22% have finished high school, and between 50-75% are unable to read), and African-American (46%), white (33%), Hispanic (18%), or other (3%). The majority of inmates (60%) have served time before, at least twice, primarily for a violent crime. In federal prisons, one is more likely to find a preponderance of drug and property offenders. More than half of all prison and jail inmates report some type of employment at the time of their arrest, and those that did have a job reported an annual income of less than $10,000 a year. Forty-two (42%) percent of state prison inmates report that they had at least one other family member - usually a brother, parent, or sister -- incarcerated at some time. Globally, the world has some 9 million people incarcerated at any given time. The following table, from Dammer (2005), shows 2005 figures of the total prison populations and imprisonment rates by country:

<table>
<thead>
<tr>
<th>Prison Population and Imprisonment Rates Around the World</th>
<th>United States</th>
<th>China</th>
<th>Russia</th>
<th>India</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>2,085,620</td>
<td>1,548,498</td>
<td>765,000</td>
<td>313,635</td>
</tr>
<tr>
<td>Belarus</td>
<td>554</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Russia</td>
<td>533</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bermuda</td>
<td>532</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Brazil 308,304  Palau 523
Ukraine 198,386  Virgin Islands 490
Thailand 191,970  Turkmenistan 489
Mexico 191,890  Cuba 487
South Africa 186,739  Belize 459
Iran 133,658  Suriname 437

**TYPES OF FACILITIES**

During the 1500s and 1600s, prisons evolved alongside the practices of banishment (exile into the wilderness) and transportation (sending offenders to one of the nation's colonies). Prisons were also seen as a humane alternative to such practices as branding, flogging, and mutilation. Around the year 1550, England created what were called workhouses, also known as houses of correction (London's famous Bridewell workhouse being an example). These became horribly unsanitary and overcrowded places where inmate labor was exploited to turn a profit. When the Walnut Street Jail in Philadelphia during 1790 was converted from a jail to a prison, this event is generally marked as America's first state prison. Also in the 1790s, a group of reformers started what became known as the penitentiary movement (Cesare Beccaria 1738-1794; John Howard 1726-1790; Jeremy Bentham 1748-1832). This movement lasted almost one hundred years, and was followed in 1870 by the reformatory movement (Enoch Wines 1806-1879; Zebulon Brockway 1827-1920). The reformatory movement was short-lived, however, and only lasted about twenty years, as by the turn of the century, America was seeking a way to make prison systems more industrial and punitive. During the Great Depression of the 1920s and 1930s, some older penitentiaries and reformatories were expanded in size and became known as big house prisons. Other penitentiaries and reformatories, along with other architectural models became the basis of various correctional center designs throughout the twentieth century. The late 1940s saw a resurgence of interest in rehabilitation again, but like the reformatory movement, only lasted about twenty or thirty years. Most prisons built since 1980 are designed for warehousing or custodial purposes which is sometimes called the just deserts model (a get tough philosophy involving the multiple purposes of incapacitation, deterrence, and retribution).

The 1790 penitentiary followed a hub and spokes pattern (as shown in the birds-eye view to the right). This is also known as the radial design. The subtype known as the Pennsylvania system placed the administration building in the center, and the Auburn (NY) system placed this building on the outer wall. The Pennsylvania system (pictured) was based on solitary and silent confinement, with the Auburn system based on congregate work and meals with silent confinement (but inmates developed hand signals). The administration building in the Pennsylvania system is centered.

The 1950 panopticon, or roundhouse design, was a type of modern penitentiary advocated long ago by Jeremy Bentham. Only two were built in the world. The guard tower is a cylindrical structure going up the middle of the inside, hence the name, panopticon, or all-seeing-eye.
The 1870 reformatory is a large structure like a penitentiary, but notice how the cell doors open inward into a mass hallway (like a hotel). Penitentiaries, by contrast, either have cells with windows on the back of them, or the cells are centered inside the cellblock so inmates can look out their cell doors to see the outside thru the cellblock windows. Reformatories became used for special populations, like juveniles and women. If extra floors are added to the top of a reformatory or penitentiary, the design is called the big house prison design. The original reformatories were designed for rehabilitation, and inmates earned early release, or parole, based on how many points they accumulated for good behavior.

The 1890 courtyard design is also known as a Taggert Fortress, named after an ex-civil war entrepreneur, Colonel Taggert, who bought up a few Army forts, and converted them into prison camps. Convicts were often leased out as laborers or on road crews, or made to exercise, drill, or become industrious.

The 1945 campus design tried to blend in with the environment by allowing trees, rolling hills, etc., and the grounds aren't usually surrounded by a wall, but concertina razor wire instead. The outer perimeter is patrolled by guards on foot, vehicle, and sometimes by a mini-train. The educational center is usually the largest building on campus.

The 1950 telephone pole design, which was advocated by the federal government, is based on a long hallway with living or work quarters as add-on module units attached to the sides. Many federal BOP prisons are based on this model. A few states, like New Mexico, have experienced some terrible riots in them.

The 1980 skyscraper design, like the one shown here, which is the Piedmont Correctional facility in North Carolina, was designed for little more than warehousing offenders, although some of the floors may contain classrooms and/or work rooms. Exercise yards are usually located on the roof. Most major cities (and the feds) have what are called Metro prisons of this type, and often local jails are of this architectural design, as are many private prisons operated by corporations who contract with the government.

The 1990 modular design is also known as a pod prison, direct supervision jail, or new generation design, and like the TV show OZ, consists of living quarters with tall ceilings, mezzanine balconies, sharp architectural angles, Plexiglas panels, and hi-tech environmental control equipment.
Prisons are operated on the basis of care, custody, and control. Of these, control is probably the most important. Prisoners are classified by security level (type of crime) as well as by custody level (flight risk and privileges earned by good behavior), but prisons are only classified by security level (maximum, medium, and minimum). A maximum security prison tends to put the cellblocks near the center of the facility, and inmate movement is severely restricted. Medium security prisons still have some restrictions on movement, and frequently require inmates to be at a certain place to stand for count. Minimum security prisons usually allow inmates to walk around freely. The correctional enterprise is ultimately evaluated on how well all its activities, its treatment as well as security programs, come together and eventually allow for the replacement of correctional control with self-control. There are no simple way to do this. Corrections is affected by laws, political appointments, judicial decisions, and demographics. It has no power to restrict the flood of people that enter its doors every day. Yet it must do something, anything, to treat, rehabilitate, and reintegrate its clientele. It is a fascinating area of study, full of challenges and frustrations, and ripe for new ideas.

CORRECTIONAL PARADOXES

There are many paradoxes when it comes to the study of corrections. A paradox is simply something you wouldn't expect to find, kind of like irony. The industry seems particularly vulnerable to cyclical patterns in the ebb and flow of ideas, but as much as things change, things remains the same. Ironies and paradoxes are some of the least-researched areas in criminal justice, and a few of them are mentioned below for the sake of triggering thought about them.

Paradox 1: Corrections is an unarmed paramilitary organization. Sure, there are a few guards who have guns up in the towers, but by-and-large, weapons are not a routine part of everyday life, and most guards don't carry guns. No one really knows for sure why, but corrections adopted a military model, like the police; but unlike the police, they're comparatively unarmed.

Paradox 2: Corrections is an organization where everyone is a supervisor. Everyone, all the way up to the front-office secretary, is expected to keep an eye on any inmates who might be working in that area. Another way of putting it is that every job position has some inmate supervision responsibilities. Non-custodial staff do not normally put "correctional administrator" down on their resume, but technically, they could. Such people are also pressed into security service during lockdowns and other periods of institutional crisis.

Paradox 3: Corrections has the loosest set of executive titles imaginable. While many job titles are set by the state's civil service authority, once you start talking about the upper-echelon of management, you run into the widespread use of discretion to make (political) appointments, set salaries, and create job titles. This is one of the places where you run into the proliferation of titles like "assistant-to-the-assistant," "deputy-under," and "vice-executive," to name a few.

Paradox 4: Corrections is the only profession where a significant majority of employees will tell you that they entered the field by accident. I defy you to name another field of work, other than truck driving, that people simply fell into out of unemployment or insecurity. This complete lack of any recruitment mechanism has enormous consequences. For one, employees can be regarded as expendable; and two, it limits professionalism as long as the field is perceived as one of easy entry--"hire 'em and throw 'em the keys."

Paradox 5: Correctional officers are regarded by inmates as the lowest form of human life possible. They believe that only the worst form of human being would take a job locking up other human beings. They hate guards worse than police. This unique stereotype defies analysis by the usual methods of studying inmate subculture. It appears to be something picked up as soon as you walk in the gate, and has some societal currency.
Paradox 6: Correctional officers are usually white, low-income people from rural areas (in part, due to the fact that most prisons are located in rural areas). Inmates are usually black, low-income people from urban areas. The rural-urban dimension stands out in stark contrast, and its effects go far beyond what sociology and other disciplines claim to know about rural-urban differences. In many ways, it goes to the heart of many prison issues.

Paradox 7: Correctional officer attitudes are surprisingly liberal. Survey after survey shows that guards actually believe in things like rehabilitation. They're optimistic about inmate chances for success when they get out. They believe that they (the guards) are important "change agents" and that incarceration does have a rehabilitative effect. This is surprising, since we would expect criminal justice employees who come into the closest contact with criminals, manipulators, and so forth, to have hardened attitudes (like the police do) about criminals, but not so with correctional officers. There's some research indicating that if guards were allowed to have more input into the counseling and rehabilitation of inmates, they might do a better job.

Paradox 8: There's no proof that higher education has any benefit to correctional employees. In fact, it may actually lower job satisfaction. This is because, in part, no bona fide job task analysis has ever been thoroughly conducted on the benefits of higher education; another reason might be because employees with higher education have more career options than remaining in corrections work.

RIOTS AND DISTURBANCES

Big institutions are places where riots happen, and there has been no shortage of riot studies in criminal justice. Most of this study has been oriented toward predictors of riots, as the following information illustrates.

- Separation of inmates along racially divided lines
- Excessive purchases of food items at inmate commissary (in preparation for lockdown)
- Unusually high number of inmate requests for transfer to another prison
- Unusually high number of staff requests for sick leave and/or resignations
- Increase in number of inmates entered in disciplinary or protective custody lockup
- Threats/confrontations/intimidation by inmates against officers and/or warnings to friendly officers
- Harsh stares from inmates and/or unusually subdued actions by normally active inmate groups
- Drop in attendance at movies or other popular functions
- Appearance of inflammatory and rebellious materials/increase in gang literature
- Increase in inmate/staff complaints and grievances
- Outside agitation by lawyers or activists
- Unusual number of outside phone calls inquiring about conditions at the prison
- Letters and phone calls from concerned inmate families demanding protection for their relative

CONCEPTUAL MODELS OF PRISON RIOTS

Key:
Precipitating factor = biological urges, instincts, etc.
Attracting factor = psychological factors, perceptions, etc.
Predisposing factor = sociological factor, environmental, etc.

(1) ENVIRONMENTAL CONDITIONS -- a model based mostly on predisposing factors, although the word "preconditioning" is sometimes used. The prison is likely to be "a bomb waiting to explode"

(2) SPONTANEITY -- a model based mostly on precipitating factors. Here, any incident or a string of incidents trigger an emotional outburst.
(3) CONFLICT -- a model based mostly on attracting factors like the perception of a repressive power regime with perceived limited options available for conflict resolution.

(4) SOCIAL CONTROL -- a model based mostly on attracting factors. The perception is that "something's broke" and needs fixing, but nothing is being done.

(5) POWER VACUUM -- a model based mostly on attracting factors. The perception (or reality) is that there have been abrupt changes in the administrative personnel; i.e., nobody's in charge.

(6) RISING EXPECTATIONS -- a model based mostly on predisposing factors and the concept of relative deprivation. An external group (like the Courts) have created higher levels of expectation.

RIOT PREVENTION

Simple, clear, and easy-to-understand disciplinary, grievance, and classification appeal processes go a long way at allowing inmates to "vent" their frustrations. There should always be at least the perception of fairness no matter how arbitrary and bureaucratic the grievance/appeal process actually is. Data collected from the inmate grievance process is also more valuable information than that collected from a snitch system. Management of information should include establishing channels of communication to both staff and inmates to eliminate misinformation and quell destructive rumors. Rumor control is essential.

Security audits are also helpful. Almost every major riot in U.S. history began with some breach of security. Riots also occur when visitors, dignitaries, and the news media are in the prison, so special security measures should be taken to protect visiting dignitaries. Routine and random shake downs for contraband will only go so far, as there should also be surprise integrity and security checks. First-level supervisors who are on "friendly" terms with inmates should be consulted, not just the gung-ho, heavy-handed security types, on security matters.

Top-level management can assist by practicing MBWA (Management by Walking Around). They should appear to be paying attention, identifying and addressing problems, and interacting with staff and inmates. An unannounced or random walk can also be a performance audit, with the administrator assessing various outcome measures, such as:

SECURITY
staffing adequacy
freedom of movement
suspicion of alcohol/drug use

ORDER
perceived control
strictness of enforcement

ACTIVITY
involvement in work/education/recreation

CONDITIONS
space/social density and privacy
noise, sanitation, food

SAFETY
dangerousness of inmates
environmental safety issues

CARE
inmate stress levels, illnesses, syndromes
adequacy of counseling, staff concern

JUSTICE
fairness of staff decisions, delays
use of force

MANAGEMENT
legal resources and access
staff stress and burnout, educational benefits

RIOT CONTROL

Planning is an important part of riot control. A riot plan should exist which includes a predetermined use-of-force policy as well as clear lines of authority in case of loss of key personnel. Training is also essential, and simulated riot exercises make the best training. Hostage negotiation training is also helpful. After a riot occurs, about the only options are: (1) forcible retake; (2) negotiate an end; and (3) wait it out. A riot can always be put out, of course, by overwhelming force, but the lessons of Attica are important to know. Overwhelming force as a tactic works best if done soon after the riot breaks out, in order to prevent
inmates from fashioning weapons, fortifying positions, and so forth. Intelligence information about leadership, location of hostages, and inmate weaponry should be obtained. Sometimes, bringing in an outside negotiator is helpful since persons in command authority should refrain from speaking directly with inmates, but whoever is the negotiator should stay the negotiator to ensure continuity.

**Lofgreen's Model of the Life Cycle of Inmate-Staff Power Relationships:**

Stage I - Staff dominant, inmates submissive; prison is probably on lockdown  
Stage II - Staff dominant, inmate labor groups active (essential services, food, laundry, etc)  
Stage III - Inmates dominant, staff reactionary (inmates press for more privileges, rights)  
Stage IV - Inmates dominant, staff compromised (riot-prone)

**Some Famous Riots**

The first prison riot in America was in 1774 at Newgate Prison in Simsbury, CT. More recent riots include: Attica, NY (1971), Santa Fe, NM (1980), Atlanta, GA and Oakdale, LA (1989), and Lucasville, OH (1993).

**INTERNET RESOURCES**

*After Martinson: The Case for Reintegration*  
*Canada's Correctional Service*  
*Cook County Jail*  
*Corrections Connection*  
*Corrections Education Connection*  
*Departments of Corrections for all States*  
*Federal Bureau of Prisons; UNICOR; National Institute of Corrections*  
*It's Official: Prison Does Work After All (UK)*  
*New York City Jail*  
*John Howard Society Article on Prison Overcrowding*  
*PreventingCrime Report on Rehabilitation and Treatment*  
*Prof. Logan's Page on Privatization in Corrections*  
*Prison and Corrections MegaLinks*  
*Sentencing Project*  
*Yahoo's Headlines in Corrections News*

**PRINTED RESOURCES**

Prisons are commonly referred to as "total institutions" (Goffman 1961) where almost every aspect of life is controlled by the authorities. Prisons are also places which accelerate the aging process. It has been estimated that in terms of physical toll on the body, an inmate doing any amount of substantial time will be 10 years older than their actual chronological age. The one thing that's certain, for everybody concerned, staff included, is that they are "doing time" (a phrase that refers to all the kinds of human suffering that surround the prison environment). Correctional officers, for example, suffer abnormally high rates of heart attacks, ulcers, hypertension, depression, alcoholism, and divorce. Statistically, serving twenty years in prison will take 16 years off your life expectancy (Silverman and Vega 1996). In terms of control, the reality is that there are two groups -- the convicts and the staff -- who are totally at odds with one another, each one constantly fighting each other in numerous ways. Each side sees the other only in terms of stereotypes, and there is no such thing as getting to know the real person in prison. Examples of well-run prisons are rare, and although each prison may have its own local customs, the majority of prisons have many issues, or problems, a select few which are discussed below.

Every institution has total (encompassing) tendencies, but not all of them have totalitarian tendencies. The following table illustrates some of the differences.

<table>
<thead>
<tr>
<th>Total Institution:</th>
<th>Totalitarian Institution:</th>
</tr>
</thead>
<tbody>
<tr>
<td>All aspects of life (work, play, sleep) are carried out under one roof.</td>
<td>There is complete isolation from the outside world.</td>
</tr>
<tr>
<td>All activity is in groups and strictly scheduled.</td>
<td>All activities are physically debilitating, exhausting.</td>
</tr>
<tr>
<td>All activities are planned, to suit a rational goal: (1) to maintain inmate-staff split, social distance, prevent development of normal work ethic (2) mortification of self; each case is an unique experiment in the self-stripping process (3) maintain authority, evaluation anxiety, multitude of items coming up for judgment (dress, etc)</td>
<td>All activities are unplanned. There is uncertainty.</td>
</tr>
<tr>
<td>There is a privilege system (of house rules, small rewards, you can build a world around minor privileges, and the privileges eventually become</td>
<td>There is no privilege system. There is only constant personal humiliation if you try.</td>
</tr>
</tbody>
</table>
There is an argot system (a lingo, an inmate code, secondary adjustments, a ranking of employees & inmates). They are constantly devising new forms of psychological harassment.

There are situational adaptations:
(1) withdrawal -- all at once or a progressive continuum
(2) rebellion -- it's what raises moral in a total institution
(3) colonization -- a mixture of home & institution life
(4) conversion -- taking the staff's view of self

There is torture, a pattern of deliberately-planned severely abusive treatment.

Goffman's list of total institutions:
(1) homes for the aged, blind, orphans, or poor
(2) mental asylums, TB sanitariums, leprosy camps
(3) jails, prisons, POW camps, concentration camps
(4) army barracks, ships, military bases, boarding schools
(5) abbeys, monasteries, convents, retreats

Prisons have also traditionally been considered "schools of crime" because the prison experience helps build up a reservoir of resentment, not to mention a grab bag of criminal tricks, that released inmates take back into society. Many inmates go in as petty, nonviolent offenders, and come out as serious, violent offenders. Serious, violent crime is committed by a "revolving door" group of people, referred to as 7/70 theory, where 7% of offenders commit 70% of the crime (Wolfgang et. al. 1972). It's customary to state that two-thirds of all released prisoners will be back in prison within three years of their release.

There are at least four sets of codes, or rules, that govern prison life: (1) the official administrative rules and regulations; (2) the convict code; (3) the color line; and (4) gang membership rules. The official rules tend to be basic expressions of do's and don'ts, and the convict code tends to be an idealized description of how the perfect convict should behave. The color line tends to be invisible, but one becomes instantly aware of it when certain racial groups are seen dominating turf areas, such as the weightlifting equipment. Race tends to determine friends, assignments, and cell location in what is sometimes called the process of balkanization (Carroll 1988). Gang codes of conduct tend to be underground outlines for criminal enterprise, and what little we know of them comes from translations of confiscated written material. In criminal justice, the official rules and the convict code (Cloward et. al. 1960) are the most studied.

| OFFICIAL RULES: Obey all orders; carry your ID card; stand for count; stand for searches; keep your cell orderly; report to assignments and your cell promptly; don't fight; don't gamble; don't have weapons or drugs; don't possess contraband. |
| CONVICT CODE: Mind your own business; watch what you say; be loyal to convicts as a group; play it cool; be sharp; be honorable; do your own time; be tough; be a man; pay your debts; don't snitch; don't pressure; don't lose your head; don't attract attention; don't exploit others; don't break your word. |

Note that the convict code doesn't outlaw beating, raping, or killing another inmate. Those activities might possibly draw unnecessary attention, but they go on all the time, and are, in fact, positively endorsed by the other codes involving the color line and gang membership. Violations of the convict code result in penalties ranging from disrespectful stares to swift death. Violations of official rules result in penalties
ranging from 30 days loss of privileges (movie, yard, commissary) to 180 days in the hole (disciplinary segregation, or isolation).

SEGREGATION AND CONTROL

Use of a segregation cell where the inmate doesn't get to go out for 30, 60, or 90 days is the prison's ultimate tool for control. There are four ways an inmate can wind up in segregation: (1) disciplinary; (2) voluntary; (3) administrative; and (4) medical. There are also some prisons, designated supermax, which consist totally of segregated living units. The front of segregation cells are usually covered with a hard, Plexiglas covering designed to cut down on talking and reaching. Living conditions are usually harsh with a dim light on all the time, insects crawling all around, and poorly functioning toilets. Loud inmates are sometimes strapped down and sometimes gagged in segregation cells, although this practice is officially banned as unconstitutional. Symptoms of solitary confinement include hearing voices, seeing ghosts, amnesia, and violent psychosis. There are high rates of self-mutilation, head-banging, and suicide.

Disciplinary Seg (short for segregation) is the most common type, and generally consists of one side of a converted cellblock (four or five stories). Voluntary Seg (also known as Protective Custody) generally consists of the same setup in another cellblock on the other side of the prison. Administrative Seg often involves transfer to a supermax facility based upon the inmate's classification as being a security risk. Medical seg units consist of psychiatric floors, suicide watch wards, and hospital-like wards for the elderly, infirm, or seriously ill inmates. While in disciplinary seg, an inmate is entitled to one hour of outdoor recreation a day, and most prisons have small, special fenced-in areas for this, but "yard" privileges depend upon good behavior, both in segregation and general population.

Privileges are revoked on the basis of behavior, and depend upon custody level (A grade = all privileges; B grade = some privileges; C grade = no privileges). Usually a mini-hearing (often by a correctional counselor) is held for minor violations, and yard, movie, commissary, phone, or job assignment privileges can be revoked for period of time. For major violations, or adjustment issues, a hearing is held (often by a panel of three employees) and good time can be revoked. Good time is the prison's second most powerful tool for control. All but four states have good time policies, and although the amount varies, the following is typical: day-for-day good time (where one year of good behavior results in one less year to serve); compensatory good time (something like five to ten days a month are earned, much like an employee earns sick time or vacation time); and meritorious good time (doing something like saving a guard's life or turning in some lost keys) which ranges from 90-180 days per year at the discretion of the warden. Good time is also sometimes awarded for successful completion of an educational or vocational program, and some states have passed laws requiring at least a GED or high school diploma to be released.

The snitch game, or snitch system, is the prison's third tool for control, existing side-by-side with another tool, the referent power of guards who have the respect of inmates because they are connected with the administration. New penology (DiIulio 1987) dictates that good governance by correctional officers is the key to maintenance of good prisons. Others (Rolland 1997) argue that use (and abuse) of a snitch system is the main cause of violence in prison.

PATTERNS OF INMATE ADAPTATION

One of the oldest areas of research in criminal justice is the study of how (male) inmates adapt, accommodate, or adjust to prison life. Classic books by some well-known authors in this area include Clemmer (1940), Sykes (1958), Cloward (1960), and Cressey (1961). These works were less concerned with the process of institutionalization whereby an inmate becomes so adjusted they prefer prison life over street life (an idea best captured by Goffman's term colonization), and were more concerned with the concept of prisonization (a term generally attributed to Clemmer) whereby inmates learn the values, attitudes, roles, and argot (language) of inmate life. These authors intended to see if sociological principles of organization applied to prisons as mini-societies.
Wheeler (1961), for example, found that inmate commitment to prison society followed a U-shaped curve. That is, when an inmate first enters the prison, they are still highly committed to the rules of conventional society. As time passes, their misbehavior increases, reflecting more of a commitment to inmate codes. As they get close to release from prison, they renew a commitment to the values of the outside world. This is both good and bad. It means most inmates orient themselves for law-abiding behavior shortly before they get out, but on the other hand, there is no sharp increase in prosocial behavior toward the end like there is in the J-shaped curve of conformity in the free population.

Other researchers have debated what might be called the importation-exportation hypothesis. This refers to the question of whether inmate codes are simply a reflection of general criminal values, and imported or brought to prison from the street, or whether general criminal values originate from the deprivations of prison life, and are exported by prisoners raised in these schools of crime. This debate remains largely unsettled, and it still persists in many circles where prisoner argot, or language, is studied to see if the words have the same meaning to criminals out on the street. To me, there appears to be more support for the importation argument because in the 1960s and 1970s at least, prisoners seemed sensitive to protest and demonstrations going on in the outside world (Jacobs 1977). Irwin (1970) describes, for example, the way prisoner subcultures tend to reflect cultural changes on the outside. The exportation (also called the deprivation or indigenous origin) model also has its adherents, such as Sykes' (1958) listing of the pains of imprisonment -- which allegedly form the nexus around which prisoner and criminal subcultures are built:

- loss of liberty
- loss of goods and services
- loss of heterosexual relationships
- loss of autonomy
- loss of personal security

Certain forms of rhyming, rap, tattoos, and dress have prison origins. For example, the practice known as "sagging" where adolescent boys allow their pants to sag -- exposing their underwear -- originates from jail and prison policies denying inmates the use of belts (because they could be used as a weapon or means to commit suicide). It was exported to the streets on or around 1995 as a statement of African American solidarity as well as a way to offend white society.

INMATE PERSONALITY AND HEALTH

There have been many studies about what types of personalities develop while in prison, and these typologies have been analyzed dozens of ways, from the psychological perspective (Toch 1977) to the more modern tendency to regard them as "desocialized" lifestyles typified by insecurity, stress, and unpredictability (Cordilia 1983). The lifestyle approach refers to inmates finding their niche, or place, in inmate society, and there are three general ones (Schrag 1961). A "doing time" lifestyle involves comfort-seeking and avoiding any trouble that might lengthen one's sentence. A "jailing" lifestyle is embraced by state-raised inmates who are colonized. A "gleaning" lifestyle focuses on self-improvement while in prison. A fourth category, "disorganized" is used to refer to inmates who are unable to develop any of the other three orientations (Irwin 1970). The disorganized types (often those with low IQs or mental impairments) are the most frequent violators of official prison rules.

Many prisons have significant problems with the physical and mental health of their inmates. Most lawsuits by prisoners against the prison have to do with substandard medical treatment. Some prisons now contain geriatric wings to house a growing number of elderly inmates over 75 years of age. Older, ill inmates costs taxpayers twice as much a year as an average inmate, about $65,000 a year. A little over 2% (26,000) of inmates are infected with the AIDS virus and are HIV positive, but only about 19 states test for HIV/AIDS upon admission, whereas the other states test only if the inmate belongs to a high-risk group, or upon request. Tuberculosis (TB) rates run higher than HIV rates because prisons provide optimal conditions for the spread of this disease. The U.S. DOJ did a study in 1996 and found that 14% of inmates
had positive tuberculin skin test results, but it was not known how infectious their conditions were. AIDS, however, is the single leading cause of inmate death, with about 1,500 inmates dying every year from it.

It is commonly reported that at least 20% of inmates have some form of serious mental illness. The rates are higher in the nation's jail system. Only about 13% of this population are receiving regular treatments of psychotropic medication. A smaller fraction, about 2%, are so mentally ill that they need to be housed in a special mental health unit. The demographic group with the highest rates of mental illness are white female prisoners. Blacks and Hispanics, for some reason, have much lower rates of mental illness in prison. The most common type of mental illness is full-blown psychosis with symptoms including delusions, hallucinations, and paranoia.

TREATMENT AND REHABILITATION

Educational programs seem to be the most effective treatment program. The most common figure quoted on its success is that inmates who complete at least a GED or high school diploma are at least 10% less likely to reoffend after release. Prior to the Comprehensive Crime Control Act of 1994, it used to be that inmates could obtain college educations by qualifying for federal aid, but now that is up to each state in how it decides to find funding for higher education. Vocational training programs have mixed results, with some work programs (like computer data entry) producing trouble-free employment rates of 30% for ex-offenders with other programs (like food service) only producing 1% success rates. Psychological, counseling, and social work programs have been studied extensively, with some experts in criminal justice agreeing with the Martinson Report (Martinson 1974) that “nothing works” in the hundred or so variations of treatments that have been evaluated, to Palmer's (1991) findings that certain programs can work if adequately funded and properly run. A basic problem is, that in most prisons, rehabilitative programs only reach about 5% of the inmate population.

VIOLENCE IN PRISON

Prisoners suffer injuries caused by staff, other inmates, and from accidents. Most violence is socialized, which means it's a normative part of coping with the status hierarchies and gangs in prison. There is no statistical reporting system for injuries in prison, but best estimates are that 26,000 serious assaults occur each year. Prisons have a more widespread problem with instances of sexual abuse. The Stop Prisoner Rape organization estimates that one-fourth (25%) of inmates experience at least one forced sex episode. In a 2001 article, "The Rape Crisis Behind Bars", the New York Times estimated that more than 290,000 males are sexually assaulted behind bars every year, and many victims report single incidents becoming daily assaults. Another organization put the daily estimate at 60,000 unwanted sexual acts per day. Each year, about 100 prisoners commit suicide, 100 more are murdered by fellow inmates, and an additional 250 die of unknown causes that were apparently not natural, self-inflicted, accidental, or resulting from homicide.

Gangs are implicated in about 85% of all prison violence, and racial or ethnic gangs dominate prison society in many institutions. Prison gangs usually have stricter "blood-in, blood-out" rituals than street gangs, and they control the hidden economy and rackets in many prisons. They are more tightly organized than street gangs, and in some cases, can arrange the killing of someone on the street or in another prison.

Riots have been extensively studied, especially during the extraordinary 1970s prison riot decade (Useem &Kimball 1989). One theory, called the deprivation model, holds that prison riots are caused by the stressful and oppressive conditions of living without freedom and the staples of life outside the institution. The Attica riot of 1971 may have been due to deprivation, as the inmates there felt a pent-up frustration of being treated like animals. Another theory, called the power vacuum model, holds that prison riots occur when there is turnover among staff and particularly when wardens and assistant wardens come and go. During times of personnel turnover (and prisons have notoriously high rates of turnover), power tends to concentrate in the hands of mid-level managers, who rely on snitch systems, enact inconsistent
policies, and believe they are accountable to no one. Inmates tend to react to these things by rioting, as they did in the New Mexico Santa Fe riot of 1980.

PRIVATIZED CORRECTIONS

The privatization movement in corrections has its roots in the history of 19th century prison labor, and there have been five models of prison labor: the lease, the contract, the piece-piece, the state account, and state use (Shichor & Gilbert 2001). The first three models are private systems, and the last two are public systems. Starting with the last two, the state account system allowed whatever prisoners made or built to be sold on the open market, with the money going back into the state treasury, or state accounts. The state account system ended with the 1929 Hawes-Cooper Act in response to demands from labor unions. The state use system, which many states currently use, requires whatever inmates make or build to only be sold or used among other government facilities. For example, the common stereotype of inmates making license plates for a state's department of motor vehicles is a state use system. The private lease and contract systems were common in the 19th century, and have involved the hat making, shoemaking, barrel making, lumber milling, turpentine making, tobacco farming, and sugar cane industries, to name a few. In a lease arrangement (more commonly used in the South with black inmates), inmates were farmed-out to corporations during the day and went back to sleep in their prison cells at night. For example, chain gangs are a type of lease system when inmates do more than just clean roadways. In a contract arrangement (more commonly used in the North with white inmates), a warden with extra cell space or a corporation that has built a secure dormitory offers to take inmates in from overcrowded facilities (usually at a cost of $30 per day) and requires work out of those inmates enough to turn a profit (usually $40 a day). The piece-piece system is a variation of a lease or contract arrangement where a corporation agrees to buy certain prisoner-made goods at a certain price per item. For example, the federal UNICOR system in the Bureau of Prisons is a piece-piece system in which federal inmates help guarantee continued delivery of low-priced machine or wire parts.

Modern privatization follows the contract model, and almost 200 private prisons exist in 32 states (Texas, California, Florida, and Colorado are heavily privatized). The market is dominated by three big corporations - Prison Realty Trust, Corrections Corporation of America, and Wackenhut Corrections Corporation - which together account for over half of the private prison population. Ten other corporations are involved in the private prison industry. About 6% of the state prisoner population are housed in private prisons, and about 11% of the federal prisoner population are housed in private prisons. Private prisons are typically well-staffed and well-equipped, and have an extraordinary safety record. Critics argue that if they were allowed to engage in "cherry-picking" the most well-behaved inmates, they too could have well-run prisons. Australia and England make extensive use of private prisons.

Privatization is a rapidly growing phenomenon. It is a rather revolutionary phenomenon if you consider that since prisons have been around, they have always been the sole prerogative of the sovereign (the state). The question is whether the state should delegate its powers (like it does with postage stamps and mail service) to private enterprise. Privatization, in the broadest sense, is the transfer of assets or service from the tax-supported and politicized public sector to the entrepreneurial initiative and competitive markets of the private sector. It is assumed (and sometimes proven) that the private sector exacts a toll from the inefficient for poor performance, compels the service provider or asset owner to concern himself with the wishes of customers, and spurs a dynamic, never-ending pursuit of excellence -- all without any of the political baggage that haunts the public sector as elements of its very nature.

The first private prison-for-profit was established in 1975 when RCA contracted with the state of Pennsylvania to open a training school for delinquents in Weaversville. Numerous studies by the National Institute of Justice over how well-run these private prisons are have tended to be fairly positive. Academics (like Ira Robbins) on the other hand, tend to be critical of privatization. The following table tries to summarize most of the main arguments:

<table>
<thead>
<tr>
<th>Arguments in favor of Privatization</th>
<th>Arguments against Privatization</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) it costs less than a regular prison</td>
<td>(1) there is no guarantee standards will be upheld</td>
</tr>
</tbody>
</table>
(2) it motivates the employee work force
(3) it creates a safer environment
(4) it enables inmates to make a profit and pay into restitution funds for victims
(5) it raises more taxes for the state

(2) no one will maintain security if employees go on strike
(3) the public will have regular access to the facility
(4) there would be different inmate disciplinary procedures
(5) the company would be able to refuse certain inmates
(6) the company could go bankrupt
(7) the company could increase their fees to the state

It is sometimes said there are three (3) models of privatization: (1) the Correctional Industries model -- which is where a private company sets up a labor shop inside the prison and the state charges the companies for inmate labor; (2) the Employer model -- which is where state prisons provide the space, but companies own and operate a prison-based business; (3) the Customer model -- which is where a company contracts with a state prison to provide a finished product at an agreed-upon price. Some of the most commonly privatized services in corrections include: Medical services, Mental health services, staff training, vocational training, food services, canteen and commissary, and recreational services. Construction of a correctional facility by and for a private company is somewhat rare, although it does happen. Most privatization involves taking over existing state facilities.

WOMEN IN PRISON

Only about 6% of the inmate population are women, and this percentage has remained relatively stable for years, although there have been steady increases since 1980. The United States has 53 prisons women and 29 coed facilities. The coed facilities present less problems than one would expect, a phenomenon some experts attribute to the "softening" effect women have on male inmates. The living conditions at a women's prison are somewhat more pleasant, but there is often a shortage of programs. Women's prisons are usually less security-conscious. Neither the inmate code nor the hidden economy is well-developed. Rather than form gangs, women tend to create pseudofamilies, in which they adopt various family roles -- father, mother, daughter, sister -- in a type of half serious, half play-acting set of relationships. Some of these roles, but not all of them, involve homosexual relationships.

About 80% of women in prison are mothers, and about 25% of women in prison get pregnant during their prison experience. States vary on their policies for how long a newborn infant can remain with their mother, and a small number of states have provided in-house nurseries allowing for lengthy stays. In most places, however, the policy is a newborn must be placed with a family member or social service agency within three weeks.

PRISONER RIGHTS

Courts held to a hands-off policy with respect to prisons until Cooper v. Pate (1964) which gave inmates the right to sue for guard brutality, inhumane conditions, inadequate nutrition and medical care, theft of personal property, and denial of basic rights. Constitutional rights have been slow in coming for inmates. The most gains have been with their First Amendment rights (speech, mail, religion), but these are generally constrained by the courts in allowing for normal penological practice. Their Fourth Amendment rights (search, privacy) are severely constricted. Their Fifth Amendment rights are practically non-existent. Their Eighth Amendment rights (cruel & unusual punishment) are activated when prison officials violate a deliberate indifference standard, from Estelle v. Gamble (1976), which essentially means ignoring serious medical problems or conditions that make up wanton and unnecessary infliction of pain. Their Fourteenth Amendment rights include minimal due process in disciplinary hearings (Wolff v. McDonnell 1974), and at least some equal protection from racial segregation, at least during periods when racial violence is not on the verge of happening. On average, there are over 20,000 inmate lawsuits a year, but few are successful, with only one usually reaching the Supreme Court every four years. Many people find the subject of prisoners' rights and correctional law very interesting.
Penology as a science emerged in the early 20th Century out of what used to be called the field of criminal hygiene. Nobody uses that outmoded term "criminal hygiene" anymore, but it had to do with how convicted criminals could be best dealt with to enhance their rehabilitation. Probably the closest thing to it today is the notion of correctional administration and treatment (especially psychological treatment), but even this notion lacks the thrust of penology (as a subfield of criminology) toward applying selected theories of criminology to what works best at handling inmates. Penology is also essentially about disparities between the "real" and the "ideal" at least in terms of its association with the penal reform movement started by people such as Enoch Wines (1867), Zebulon Brockway (1901), and Harry Elmer Barnes (1926). In the hands of historians, like Blomberg (2000), penology is also about the study of "intended" and "unintended" consequences of having a penal system, where "penal" in this context means a punishment or control system guided by some systematic and enlightened philosophy of punishment or at least the common sense principles of human behavior.

Brockway used to call the way prisons were run before the reformatory movement atrocious and examples of the "old penology" because there was no individualized treatment. The "new penology" of reformers like Wines and Brockway aimed at no less than the "cure" of crime, delinquency, and insanity through a case-by-case approach. Brockway would say that punishment was not the true goal of corrections; the protection of society is the true goal, and this leads to prevention, or the protection of those exposed to criminal activity. Hence, penology becomes the science of figuring out how to run a prison in a dignified manner that represents a societal concern for preventing the individual offender from ever wanting to commit a crime again as well as how, as a society, we can do our part to prevent being at least partially responsible for producing offenders in the first place and in the second place, prevent exposing ourselves to less protection by not caring about how bad the offender is treated in captivity.

Prison administration for the 21st Century, according to John DiIulio (Governing Prisons: A Comparative Study of Correctional Management New York: Free Press 1987), will be a return to the old penology in a phenomenon he calls the "new old penology". It goes like this: from 1900-1940 there was a focus on prison administration; from 1940-1990 there was a focus on inmate life (mostly due to the interests of vast numbers of sociologists holding academic positions in criminal justice); from 1990-on there will be a resurgence of interest in prison administration. DiIulio argues that "new" research has shown that administrative factors are causally related to inmate life factors; for example:

| Management style (authoritarian or participative) | Disorder (disciplinary problems, riots) |
| Per-capita spending | Amenity (clean cells, good food) |
| Inmate-staff ratios | Services (work, education) |
| Employee Training |

There are six (6) principles of good management under the "new penology":

1. focus on results, not on process
2. professional, non-custodial staff need to come to think of themselves as C.O.'s first
3. management by walking around (MBWA)
4. openness/alliances with key politicians, judges, journalists, reformers
5. consult staff before "doing anything for inmates"
6. modify/restructure the organization only if absolutely necessary, but leave well enough alone

This is a tall order for the top administration of a correctional facility. The head of each prison, generally appointed by the commissioner of corrections, is a warden, director, or superintendent (which is the preferred title). This person is responsible for the entire operation of the organization and is more often than not a political appointee.
At least one typology indicates there are four (4) types of wardens:

(1) flies --- who come & go
(2) fatalists -- who also stay briefly, but they complain a lot that it's hopeless
(3) foot soldiers -- those who rose up the ranks; inherited the job from a fly or fatalist
(4) founders -- serves a longer length of time and tries to leave behind some lasting legacy

One of the most critical problems facing wardens today is satisfying old court orders & preventing new ones. Many prisons across the country have been declared unconstitutional for one reason or another, and are operating under a consent decree, federal court order, or a "master" system. Federal court intervention in the management of a prison has catastrophic consequences for the ability to exercise autonomy in the application of administrative science, even if what is being applied is the "new penology."

The hands-off doctrine of the federal courts ended with Cooper v. Pate 378 U.S. 546 (1964) when it was determined that state inmates could bring lawsuits against prison officials under Title 42, Section 1983 of the Civil Rights Act. The volume and growth of so-called "Section 1983" lawsuits has been astronomical. In 1996, for example, over 64,000 such suits were filed, most with help of inmates who have made law a prison career, or so-called "jailhouse lawyers". There has also been an explosion of conditions of confinement lawsuits ranging from serious issues over things like vermin-infested food, insect infestation, and lead paint poisoning to the frivolous lawsuits over things like too little dessert at mealtime, no access to lottery tickets, tattooing, pornography, voting, clothing, and air quality. Although there is a trend to treat air quality (second-hand smoke) suits as serious, there is no easy way to separate serious from frivolous as the courts appear to handle each case on an ad hoc basis.

Another critical area is overcrowding with its associated gang problems, security risks, and forced early release programs. Overcrowding is defined as: (1) high density (many bodies); (2) low resources (little to do); and (3) limited control (to escape unpleasant encounters). From a practical policy standpoint, the only controllable factors here are (2) and (3), and they are perceived as the solution to overcrowding. The solution usually takes the form of what is called "unit management" or sometimes "functional unit management". No new space is needed. The idea is to organizationally break up the spaces that already exist in the prison (perhaps at the cellhouse level) and create "miniprisons" with their own administrative staff. This, of course, adds to the proliferation of executive titles and has other problems, but it does help allocate scarce resources and ensure more control over quality of inmate-staff contact (through log books and the like).

INTERNET RESOURCES
ACLU Prisons Page
Corrections MegaLinks
Florida Report on Prison Gangs
Prison Activist Groups
Prisoners-dot-com: The Voice of the Imprisoned
Prof. Logan's Privatization page
Street Gang Dynamics
Stop Prisoner Rape
The Other Side of the Wall
WebCam for Maricopa County Jail
Yahoo's Full Coverage of Prison Issues

PRINTED RESOURCES
Unit 14

AN OVERVIEW OF JUVENILE JUSTICE

The chief problem in any community cursed with crime is not the punishment of criminals, but the preventing of the young from being trained to crime (WEB DuBois)
The juvenile justice system in America is based on approximately 4,000 juvenile courts which specialize in the problems of youth and operate with a philosophy (of rehabilitation) that even the worst delinquent is not to be considered a criminal, or bad person, but instead an erring or sick child who needs help. Some 2.8 million juveniles are arrested for crimes by police annually, but only about 1.8 million are processed as delinquents by the courts. Numerous others are dealt with in a variety of ways, as the following list illustrates:

- **delinquents** - a term applied to the annual number (1.8 million) arrested and convicted of criminal offenses, usually of a serious or chronic nature, and are sentenced with probation (54%), prison (28%), fine (13%), or conditional release (5%)
- **status offenders** - a term for (2.2 million) youth who are annually caught doing something wrong only because it's outlawed for a young person to do that (on account of the status of being young), with runaway, truancy, and curfew violations being the most common offenses, and they are channeled directly by police into a separate subsystem of group homes and shelters, and labeled PINS (persons in need of supervision), CHIPS (children in need of protection and services), or MINS (minors in need of supervision) by the court or child protective agency
- **abused and neglected** - a term for (3.3 million) youth who are annually involved in reports of child abuse and neglect to a state child protective agency, and 1.1 million confirmed cases are channeled directly by social workers into a separate subsystem of temporary foster home placements, with social workers evaluating the child's upbringing and fitness of parents
- **dependent** - a term for (0.8 million) unemancipated youth who are annually put up for adoption or made a ward of the state on account of parental abandonment (750,000), discarded as infants in public places (125), orphaned because of parental accident (400), unclaimed at the hospital (31,000), or left for dead in attempted infanticide (600), and are channeled directly by police into a separate subsystem of orphanages, private foundation homes, and state homes for girls and boys

The juvenile justice system can be defined as all government or government-funded agencies that investigate, supervise, adjudicate, care for, confine, or treat youth who are subject to the jurisdiction of the juvenile court. There are some unique aspects of juvenile court jurisdiction, however. For one thing, most state juvenile courts will gladly prosecute federal laws or the laws of another state on behalf of another jurisdiction. This runs contrary to the principle that nobody should enforce another jurisdiction's laws. The juvenile justice system is also encapsulated with many non-governmental social workers, psychologists, and behavioral scientists because a large number of staff are needed to handle the enormous workload. There is also notable variation between states and even at the county level in the various ways problems are dealt with. The most common theme is jurisdiction by age, in what is called the age of majority (the age at which one is considered an adult). 39 states set that age at the 18th birthday, 8 states (Texas, Louisiana, Georgia, South Carolina, Illinois, Missouri, Michigan, Massachusetts) set it at 17, and 3 states (New York, North Carolina, Connecticut) set it at 16. When a child reaches the age of majority in a state, they come under adult criminal court jurisdiction.

Juvenile court jurisdiction also varies by whether it is exclusive, original, or concurrent. Exclusive means that the court only has statutory authority over certain kinds of crimes, usually of a minor nature or involving status offenses. In such places, serious crimes like murder are automatically handled by an adult criminal court, no matter how young the offender. Original means that the juvenile court must serve as the first place for a hearing on the issue - no matter what kind of case it is - before it goes before an administrative law tribunal, a court of civil law, or a court of criminal law. Processing of complaints against parents, for example, must begin at the juvenile court level in such jurisdictions. Concurrent means that juvenile court proceedings occur side-by-side, or simultaneously with other hearings, tribunals, or case processing. In such places, it is indeed possible for a juvenile to be charged twice for the same thing - once in juvenile court and once in adult court.

All 50 states, the District of Columbia, and the federal government have made provisions for waivers to adult court, and established a minimum age of transfer (no minimum age in 17 states, age 10 in 3, age 12 in 3, age 13 in 6, age 14 in 17, and ages 15-17 in the rest). In most cases, the practice is called discretionary waiver or direct file, where the prosecutor files a motion, evidence is presented for and against a waiver,
and the judge decides whether the offender should be tried as a juvenile or adult. In other cases, the practice is called mandatory waiver, and if the offense is serious enough (typically murder), the prosecutor doesn't even have to file a motion, but can try the juvenile offender in adult court. Some states have set up a presumption scheme in favor of waiver (for crimes bordering on the seriousness of murder). Only 35 states allow reverse waiver, which is like a process of appeal to review the original judge's decision to waive to adult court. However, most states abide by the once an adult/always an adult doctrine, which means once convicted as an adult (or even tried as an adult in 4 states - California, Delaware, Idaho, Mississippi), all subsequent criminal charges require adult criminal court handling. Punishments are always more severe as an adult than as a juvenile.

THE HISTORY OF JUVENILE JUSTICE

In America, the ideas of childhood, adolescence, and juvenile delinquency are fairly recent concepts. In fact, the history of juvenile justice in America is a modern parallel to the English Poor Laws that go back to the Black Plague in the middle ages, with the establishment of almshouses and workhouses. Prior to the 19th century in America, young people above the age of five were considered mature, and looked upon as miniature adults or property. Society had the notion of "infants" and "toddlers", but not any notion of childhood. When children got into trouble, and their family gave up hope, one of three punishments took place: (1) the apprenticeship system - where middle and upper class children were bound out to a skilled craftsman to be used as assistants; (2) the binding-out system - where poor children were bound out to any responsible adult to be used any way needed; and (3) church discipline - where church officials administered floggings, whippings, beatings, and brandings. These were considered the equivalent of punishments that a fully-grown adult would receive.

This all changed with the industrial revolution. The early 1800's saw factory life replacing family life, and children became displaced factory workers - leaving their homes at an early age, traveling around the country looking for factory jobs. As you can imagine, this created a whole host of social problems, such as vagrancy, drunkenness, and crime committed by children. Added to this was the problem of mass immigration to the United States. State governments responded by creating the so-called Houses of Refuge. The first house of refuge was established in New York City in 1825. Their primary objective was to reform poor, wayward children and turn them into hard-working, productive members of the community. The house of refuge philosophy caught on and became quite popular. Before long, a new conception of youth came into being - an idea that families held all along - that children required special guidance and molding, that there was something special about the time of life between age 5 and 21. This age period became seen as the devil's playground - a time when humans are most corruptible, but still young enough to be redeemed and worth correcting.

Houses of refuge were widely used. Children could be easily placed there on the word of a constable or by order of any city alderman. They were kept there for indeterminate periods of time. Some got out when they were 18, but most didn't get out until they were 21. It was common for craftsmen to operate shops inside them. In return for making shoes and furniture, the inmates were paid 10 to 14 cents a day. Discipline was a matter carried out by state employees who worked inside, or older trustees.

Shortly after the House of Refuge movement, another fad or fashion took hold. Around 1830, the practice of placing out was established. This was the forced placement of inner city children to farms out West or in the Midwest. Children of poor immigrants were the main focus, their parents seen as incapable of ever providing a decent parental relationship. While a few placements were treated as family by their rural caretakers, most were abused and exploited as farm hands, and practically none ever saw their real families again. This practice signified a growing concern for family factors, although some experts claim it signified a idealization and mystification of rural life.

In 1841, the practice of probation was invented by a Boston shoemaker, John Augustus. He bailed out a number of young offenders he saw as redeemable, took them back home to their parents, and had one of his volunteers (from the Boston Children's Aid Society) regularly visit the home and keep an eye out for
lawbreaking. The probation movement was self-funded by philanthropic foundations until about 1899 when states started picking up the tab and got into authorizing the appointment of probation officers.

After the Civil War (late 1800s), state and city governments created a variety of custodial institutions. These were nothing more than holding pens for the many truant and vagrant children roaming the country after the war. They were called Reform Schools, Industrial Schools, or Training Schools. Some of them housed girls in the same institutions as boys, but others had strict gender segregation. Despite what the general name was for this kind of institution, they were administered in one of two ways - as a cottage reformatory - or as an institutional reformatory. Those that were cottage administered were less overcrowded, with no more than 20-40 youth living with some adult role models in a housing unit. Those that were institutionally based resembled a large maximum security prison, and housed as many as 500 youth in a cellblock living unit. Parents would often show up at the gates of these institutions, and turn their children over to authorities for being "incorrigible." There were few opportunities to learn a trade since these kind of institutions focused more on providing a formal education. The educational curriculum was quite unique and moralistic, however. Feminists who have studied the period make a lot out of the so-called chastity movement that started within such institutions.

In 1899, the Juvenile Court was invented in Chicago by passage of the Juvenile Court Act. This date and place is generally regarded as the birth of juvenile justice and the birth of the concept of juvenile delinquency. A group of reformers known as the "child savers" were the advocates of this new institution, and they represented a variety of philanthropic and civic organizations. They had an idealistic belief in the effectiveness of the criminal justice system - police, courts, and corrections - to supervise children and also provide legal safeguards. Specifically, two legal concepts became important, as follows:

<table>
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<tr>
<th>Parense patriae (the state as parent) - a legal philosophy and doctrine established in the case of Ex parte Crouse (1838) when a father challenged the Philadelphia House of Refuge's right to hold his daughter who had been committed there by the mother. The Pennsylvania Supreme Court stated that such placement was not punishment but benevolence, no due process claim could be made by the father, and that the father had no standing anyway because the state had a legal obligation to step in whenever the parents are irresponsible. A related concept is In Loco Parentis established in State v. Pendergrass (1837) where the North Carolina Supreme Court said a teacher is the substitute of a parent, and can administer moderate punishment if not inflicted out of malice or bad passion.</th>
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<td>Due process (legal safeguards) - a legal philosophy protecting the rights of anyone coming in contact with authorities, established first for juveniles in the case of People v. Turner (1870) were a youth committed to Chicago's House of Refuge against both his parent's wishes was found to be indeed experiencing punishment and not being helped by his placement. The Illinois Supreme Court stated that there should be some kind of court order that spells out how such youth are to be protected, controlled, and reformed.</td>
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Establishment of juvenile courts, like the one in Chicago during 1899, caught on across America as a ready-made solution to these legal considerations. By 1925, all but two states had juvenile courts (many are known by names other than "juvenile" - family or probate, for example). With few exceptions (Chicago's court established jurisdiction over anyone delinquent, dependent, or neglected under the age of 16), they all followed the Chicago model, which was popularized as the "best interests of the child" model, or a "focus on the whole child" model. The essential features of this model are as follows:

- a special judge who presides over juvenile proceedings, not one who oversees adult cases
- informality, with proceedings held in offices instead of courtrooms, where possible
- closed courtrooms, if used, that are not open to the public, like trials
- separate records of juvenile cases, kept separate from adult cases, and closed upon maturity
- probation to be used as the main punishment, whenever possible
An interesting legal question came up in 1905 with the case of Commonwealth v. Fisher, where the Pennsylvania Supreme Court ruled that parens patriae always trumps due process in juvenile justice. When the state acts under its parens patriae powers, no due process protections are necessary. No treatment plans are necessary, and it is assumed anything the government does to a child in custody is obviously better than what the parents could provide. The Fisher case set the tone for juvenile justice up until the 1960s.

An activist U.S. Supreme Court in the 1960s significantly altered the tone and shape of juvenile justice. At least four cases are worth reviewing, as follows:

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<th>Case</th>
<th>Description</th>
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<td>Kent v. U.S. (1966)</td>
<td>The first full-scale examination of the juvenile justice system brought on by the case of a 16-year old rapist who was transferred to adult criminal court. Justices ruled that such waivers or transfers should be accompanied by a special hearing, the assistance of counsel, access to records by such counsel, and a written statement of reasons for the transfer.</td>
</tr>
<tr>
<td>In re Gault (1967)</td>
<td>A landmark case on the failure of the juvenile justice system involving a 15-year old adjudicated delinquent on the word of an Arizona sheriff's deputy sentenced to 6 years for an offense (telephone harassment) that carried a 2-month penalty if committed by an adult. Justices ruled that juveniles deserve the right against self-incrimination (Miranda), adequate notice of charges, the right to confront and cross-examine accusers, assistance of counsel, and the rights of sworn testimony and appeal. Juvenile justice became less informal and more formal and adversarial after this.</td>
</tr>
<tr>
<td>In re Winship (1970)</td>
<td>A seminal case that made juvenile justice more like adult justice by changing the standard of proof from preponderance of the evidence to beyond a reasonable doubt. It only applies when the juvenile faces imprisonment as a possible penalty that each and every fact must be proven beyond a reasonable doubt. For status offenses, evidence that would not ordinarily be admitted under adult standards (such as hearsay) would be admissible.</td>
</tr>
<tr>
<td>McKeiver v. Pennsylvania (1971)</td>
<td>A seminal case that slowed down the granting of due process rights to juveniles by denying them the right to a trial by jury. Justices reasoning that bench trials were adequate and that America was not yet ready to abandon the philosophy of juvenile justice as a less-than fully adversarial process.</td>
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AN OVERVIEW OF JUVENILE DELINQUENCY

Juvenile delinquency is widespread, so widespread, one can talk about it being a normal part of growing up, in the sense that rebellion and anti-adult behavior is normal. Each generation engages in it with such a regular, creative fervor, that you would think we know something about it by now. Some of those regularities include the following:

- boys more than girls are involved in delinquency, by about a fairly stable 4-1 ratio, although the ratio is much closer for runaway behavior (1:1), embezzlement (1:1), forgery (2:1), and larceny-theft (3:1) (Chesney-Lind & Sheldon 1991)
- nonwhite males (40%) constitute the largest group of delinquents, followed by white males (22%), nonwhite females (18%), and white females (10%), with estimates not equal to a hundred because of statistical variation (Wolfgang, Figlio, & Sellin 1972)
- age tends to produce a curvilinear pattern, with delinquency beginning in early adolescence (11-12), peaking in the mid-teens (15-16), and decreasing in later years (19-20), whereas an "aging out" effect normally takes place by age 24 (Jessor & Jessor 1977)
- victimization is significant among young people, as 12-17 year olds are two to three times more likely to become a victim of violence by a friend or acquaintance (66% of the time as opposed to 34% of the time by a stranger) as those over age 18 (Snyder & Sickmund 1999)
- peer influence is a factor, and in fact, delinquency is a group phenomenon where solo offending is very rare (Shaw & McKay 1942)
poverty is a factor, whereas lower class youth are over represented among those who commit more serious offenses, like felony assault and robbery (Elliott & Huizinga 1983)

economy and demographics are long-term factors where it's always the case that when the economy is doing good, we see terrible increases in juvenile crime while adult crime goes down in a good economy (one reason why juvenile delinquency is sometimes called a crime of affluence), and it's always true that juvenile crime rates go up and down in proportion to "baby booms" and boomlets (Gurr 1977)

THE SYSTEM RESPONSE

It is vital to know how the system operates, and it is a very big system indeed. The first thing I would recommend is for students to familiarize themselves with much of the VOCABULARY involved. A good glossary of terms for juvenile justice can be found on the Internet, one in Utah at http://www.hsdyc.state.ut.us/terms.htm and another (mine). Students need to know that juveniles are never "arrested" but instead receive "intake" or screening. Likewise, juvenile defendants are never "convicted", but instead "adjudicated." Parole is called "aftercare", etc.

It is also vital to know the STEPS to the juvenile justice process, and these generally appear as case flow diagrams which can be found in a number of places, but specifically by searching the website for OJJDP (Office of Juvenile Justice and Delinquency Prevention). It is generally agreed upon that there are ten basic steps to all procedures: (1) intake and screening; (2) detention; (3) probation; (4) record-keeping; (5) psychological services; (6) protective services; (7) medical services; (8) volunteer services; (9) court services; and (10) parole or aftercare.

A vast CORRECTIONAL apparatus exists in juvenile justice. There are short-term facilities (detention centers), as well as shelters and reception and diagnostic centers. Long-term facilities include training schools, ranches, forestry camps, boot camps, farms, halfway houses, and group homes. There are more of the latter than the former. In addition, there are numerous private institutions and a number of psychiatric hospitals and treatment centers. The correctional landscape of juvenile justice is quite different from the correctional system in the adult world. While most facilities are small, America contains about 70 large facilities for juveniles.

Juveniles usually enter the system via police contact. About 85% of delinquency cases involve a police referral. 10% of cases involve parents who have their child declared ungovernable. The remainder of cases are the work of teachers, neighbors, and business owners using the juvenile justice system to rid themselves of a troublemaker. There are many avenues of entry. The POLICE RESPONSE involves several options:

- warn and release ("move along" or "go home")
- release after filling out an interview card (aka "field investigation" or "field contact")
- station adjustment (a good talking to down at the police station)
- refer to parents (with a good talking to the parents)
- release to parents with a referral to some community agency
- refer to some diversionary program operated by the police or community agency
- issue a misdemeanor citation (requiring a later appearance in court)
- detain, transport, and schedule an appearance before juvenile court

There have been many sociological studies of police response. The majority tell us that about 66% of police contacts involve the non-arrest options, station adjustment being quite common. Other studies indicate that arrest is only used 15% of the time. There has been significant research interest in the determinants of arrest. Most studies find that black males are the most likely group to be arrested, but then, that is the group most likely to be involved in serious offending. Females are surprisingly likely to be arrested for minor offenses, however, some studies indicate that if the female cries, has children to care for, and claims, for example, they were led astray by men, police officers show some discretion. Experts argue over whether police officers hold paternalistic and chivalrous attitudes toward female offenders, or whether
we have entered an age marked by the end of chivalry where police arrest females just as frequently as males.

The factors that can influence a police response are many. Early sociological studies made much of the "demeanor hypothesis" - the idea that how the offender behaves or carries himself (demeanor) determines the police response; i.e., whether or not they flunk the "attitude test". The most important factor in recent studies has been offense seriousness; i.e., a felony merits an arrest, and cannot be overlooked. Police departments develop their own style of policing juveniles, and many make use of community sentiments and/or the wishes of complainants in this day and age of community policing. Police regularly read Miranda rights to juveniles they process, and they don't have to have a parent present to do so since the case of \textit{Fare v. Michael} (1979) allowed juvenile to waive their own rights. Police can also exercise something called preventive detention (if the offense is serious and the person is deemed a danger to themselves or others) under the ruling in \textit{Schall v. Martin} (1984). Federal guidelines require a juvenile so detained in a lockup normally designed for adults to not exceed six hours and be in a separate area out of sight and sound of adult inmates.

The COURT RESPONSE begins with intake screening, of course, and traditionally, this has been done by probation officers although there is some current controversy over what the educational qualifications ought to be for someone who does intake. Social workers are used in some jurisdictions as well as paralegals from the prosecutor's office in other jurisdictions. During the intake period, a parent or guardian is interviewed, criminal backgrounds are checked, the complaint is reviewed for legal sufficiency (grounds to continue), and appropriateness for diversion or treatment is determined. Whether or not detention is appropriate before a formal court appearance is also determined. The court response involves several options:

- dismissal of the charges
- informal supervision or "informal probation"
- referral to a social service agency
- formal petition for an adjudication with juvenile court

Intake personnel are usually influenced heavily by prior offenses (if any). There should be a determination of the pattern of delinquency being displayed by the youth. In some jurisdictions, intake personnel have their hands tied by prior-record criteria. In such cases, automatic waivers to adult criminal court may kick in. Separate hearings are usually required, however, to go over the waiver's appropriateness, but the process varies by jurisdiction, in some cases being based on the absence of good juvenile treatment programs in the local area, and in other cases, not even involving a judge, but prosecutorial discretion. A standard finding in the criminal justice literature is that transfers to the adult system have no deterrent effect, and often make the person more likely to commit crime in the future once released (Bishop et. al. 1996). There are few good national estimates on how frequently adult waivers are used, but a modest estimate would be about 5% of all cases.

The adjudication hearing is the equivalent of a trial, with all the trappings of a trial, such as pretrial motions, subpoenas, and plea bargaining. The same rules of evidence and procedure used in the adult system apply to juvenile adjudications. Jurisdictions vary over the qualifications of the hearing officer. In some places, it doesn't have to be a judge, but can be any lawyer empowered to hear juvenile cases, sometimes called a referee, court master, commissioner, or mediator (in places that have embraced restorative justice). Also, some places allow jury trials, even though juveniles have no right to a jury trial. The vast majority of adjudications go "uncontested" which means, like an arraignment, the offender pleads guilty (accepting a preset plea bargain). The most common dispositions are dismissal of charges and informal probation (with the understanding that the offender will voluntarily do something to redeem themself). In some places, parental responsibility laws kick in, and one or both parents are the ones facing punishment. However, this practice has been mostly replaced by parenting classes.
The prevailing sentiment of juvenile justice is to get as many "uncontested" adjudications as possible. Some states use TEEN COURTS as a way to do this. Someone qualifies for teen court by admitting the charges against them, but allows the teen court to understand the circumstances and settle on the punishment. There are three varieties of teen courts: (1) the youth advocate model where youth serve as attorneys and an adult as judge; (2) the youth judge model where a youth serves as judge and adults serve as attorneys; (3) the tribunal model where three or more youth serve as judges; and (4) the peer jury model, where jurors question the defendant directly. The youth advocate model is probably the most commonly used. The most frequent disposition is community service, but teen courts come up with rather unique methods of victim apology as well as rely strongly upon restitution (monetary cash payments) for harm done.

When incarceration is the disposition (usually mandated by statutory sentencing guidelines), an indeterminate sentence is the norm. This means a stretch in the number of years making up the sentence, say 1-3 years, with parole eligibility sometime after a year and a half. If the offender is old enough, a blended sentence may be used, which means that some of the time will be spent in a juvenile facility and some of the time will be spent in an adult facility. The disposition hearing is a separate hearing from the adjudication hearing. If state juvenile facilities are overcrowded, the juvenile court can simply commit the youth to the state for later placement in a facility, effectively making it the state's problem. Disposition hearings requires the filing of a presentence investigation report (PSI) which is completed by a probation officer or investigator with the prosecutor's office.

The CORRECTIONAL RESPONSE can be described as involving institutions which are either "open" or "closed", with the open institutions being community-based to some degree. Community-based corrections has been the emphasis of juvenile justice ever since the Juvenile Justice and Delinquency Prevention Act of 1974 started the decarceration or deinstitutionalization movement as well as a concern over disproportionate minority confinement. National statistics do not clearly differentiate between types of institutions, but it is clear that more detention facilities exist than training schools. Detention centers are supposed to be short-term facilities, and indeed that is true since the average length of stay is longer in training schools.

Detention centers tend to be jail-like structures located in rural areas. Some are private, and most are well-run. They hold a variety of youth, including status offenders, boot-strapped status offenders (technical violators of a court order), and in some cases, those awaiting trial. There are few treatment programs, however, with medical and educational services only being available. There are studies of detention centers that show high rates of attempted suicide, suicide, self-mutilation, and self-destructive behavior, but not significantly higher than that found in the typical jail population. Some private detention centers are more "open" than closed, relying more upon staff rather than walls and fences.

Training schools tend to look like the grounds of a high school, some are even co-ed, and they are either secure or semisecure facilities; i.e., closed institutions. State-of-the-art perimeter security is likely to be found, although all such correctional institutions for juveniles are staffed at a much greater ratio than for adult correctional facilities. There are about 70 maximum security facilities for juveniles across America, and each state has at least one. The average training school holds about 50 residents, and the large-scale ones hold 800 residents or so. Youth placed in such facilities must first go through a reception and diagnostic center. There are a variety of treatment programs, such as counseling, education, vocational training, peer group activities, and GED completion is often a condition of release. There are reports that healthcare and injury prevention are slack, however. 75% of all training schools are state-run facilities, and most are overcrowded. Inmate rape and abuse are believed to be common.

Wilderness programs based on the Outward Bound model of mountain climbing, backpacking, and mountain biking can be found in some places, and promise incarcerated youth a physically and emotionally challenging experience. Studies of such programs parallel the results from evaluations of boot camps and Scared Straight-like programs - there are brief positive effects on self-esteem and desire not to reoffend, but over time, the effect is diminished, and can have backlash effects, which mean even worse offending.
Group homes, halfway houses, foster homes, and day treatment centers are the primary "open" facilities in juvenile corrections. They usually allow the residents to go out during the day but require them to come in at night. Escapes, reoffending, and technical violations are common. Many such places are used as part of an aftercare plan for inmates who have worked their way up a point or honor system from training schools or detention centers. There is little sound research on the effectiveness of such institutions. It can safely be said, in summarizing the literature, that there are few juvenile justice responses that have been found to reduce delinquency.

REHABILITATION OF JUVENILE DELINQUENTS

Many scholars believe that in order to consider the possibility of what works and doesn’t work with the control or prevention of juvenile crime or in juvenile justice, you must research the heck out of it, considering things like the recidivism rate as per the measurement of current re-arrests, reconvictions, new adjudications, and return to secure confinement rates. However, there are other ways of approaching the topic using some simple concepts like "control" as follows (but it should be noted that the word "control" has different connotations in criminal justice and criminology):

The "control" of juvenile delinquency can be defined as "the apprehension and incarceration of juvenile offenders, especially chronic recidivists, who are believed important to be isolated and limited in their opportunities to re-offend" (Champion 2004). Control is often thought of as a basic way of life in the strategy of selective incarcerative (an idea based in part, on the idea that incarceration by itself is of limited value). Probation is, likewise, seen as of limited value (Champion 2004). Some programs "work" however. For example, the Perry Preschool Project (1962) was put into operation (Berrueta-Clement et al. 1984) with over 70 percent of participated children, from the local area, who apparently had no foreseeable future and only 16 percent who were arrested for some type of criminal act. Second, the juvenile justice system stages of processing, sentencing, and correction, which are similar to a modern (adult) criminal justice, consist of an integral organization of juvenile offenders within a network made up of law enforcement agencies, prosecution and the courts; corrections, probation, and parole services; and public and private community-based treatment programs that provide youths with diverse services.

With this in mind, it should be further considered that there is no particular juvenile court system accepted by all states…instead each state created their own “one state system(s).” In addition, each state further separated their juvenile justice system into either a juvenile or family court structure at the county level with either a local probation office, a state correctional agency, or a private service provider. Regardless of which system a state may choose, according to Champion (2004), they all have a common foundation that categorizes each one of them from being confused with a criminal court for adult offenders, including:

- limited jurisdiction (up to age 17 in most states)
- informal proceedings
- focus on offenders (not their crime)
- indeterminate sentences, and
- confidentiality

Whatever reason the reader may choose to answer the age-old question of “what works and doesn’t work with the control or prevention of juvenile crime or in juvenile justice,” you still can’t ignore the classic “Crime Control Model” which theorizes that one of the best ways of controlling juvenile delinquency is to incapacitate juvenile offenders, either through some secure incarceration or through an intensive supervision program operated by a community-based agency or organization. Such a "control" perspective also has a strong emphasis on the common criminal justice program that emphasizes containment of dangerous offenders and societal protection as a way of controlling delinquency by devastating juvenile offenders through secure confinement and/or a through concentrated supervision program operated of community-based agencies…within their community.
INTERNET RESOURCES
American Bar Association's Juvenile Justice web
California Youth Authority
Center on Juvenile and Criminal Justice
Children, Youth, and Family Consortium
Children's Defense Fund
Coalition for Juvenile Justice
Florida Department of Juvenile Justice
Glossary of Terms in Juvenile Justice
Infanticide, Dependency, and Justice
Juvenile Information Network
Juvenile Justice Clearinghouse
Juvenile Justice MegaLinks
National Council of Juvenile and Family Court Judges
OJJDP report on female juvenile offenders
Trying Juveniles as Adults

PRINTED RESOURCES

Unit 15

FUNDAMENTALS OF CRIMINAL LAW
"Laws were made to be broken" (John Wilson)

There's more truth to the above quotation than you think. Criminal law is only a small part of the entire field of law, and one of the most recent, inconsistent, and undeveloped areas of law. A long time ago, tribal societies handled their differences in private. Some modern societies still do, like the civil law systems of France or Germany. The decisions over what was wrong and what was right were left in the hands of the people. Things like folkways, mores, customs, and norms took care of most problems.
By contrast, everything about criminal law in America today (defining, classifying, grading, prohibiting, and punishing) is in the hands of the legislature or law-making body for each jurisdiction. Crimes are "owned" by the state, prosecuted by the state in its own name, and the only thing separating a civil wrong from a criminal wrong is a fine line that exists only because the legislature says it exists.

To be fair, the government says it's doing it because of a duty or obligation to protect certain basic, underlying "societal interests" that cannot be taken care of by citizens themselves, who should be free to enjoy other, more sublime pursuits. This paternalistic stance is a rather rudimentary form of the idea of social contract. The idea of a social contract is very significant, but not without its critics. For example, some say it is a relatively weak philosophical position that doesn't benefit minorities very well (e.g., majority rule: minority right). It's in direct opposition to the idea of natural law, which among other things, holds that there are certain universal elements to morality and individual conscience that don't necessarily require the coercive power of the state or government to intervene in human affairs. Natural law also has its critics. For example, it unfortunately doesn't provide much guidance for rule-making and it doesn't benefit women very well (e.g., woman as caretaker to man). The Constitution of the United States is largely written in terms of natural law which acts as a check on social contract-oriented judge-made law which by its paternalistic nature is designed for the betterment of society. Sometimes, the way this combination works is called positive law since it moves society forward in a positive, betterment-oriented direction. However, there are differences in tone, as follows:

<table>
<thead>
<tr>
<th>Examples of Natural Law and Positive Law</th>
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<tbody>
<tr>
<td>Natural Law</td>
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<tr>
<td>Congress shall make no law ...</td>
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<tr>
<td>prohibiting the freedom of speech or</td>
</tr>
<tr>
<td>other forms of personal expression.</td>
</tr>
</tbody>
</table>

The best way to understand the "societal interests" that law serves is to look at the classification of statutory law system. Statutory law (sometimes called the written or codified law) is anything which takes the common law (the precedent-setting aspect of positive law) and turns it into something for which there is a need to have something written down. Written-down statutory law is essentially what gives the state or government power to intervene in human affairs, since the process of writing something down replaces any unspoken oral traditions or customs. This remarkably consistent scheme varies little from jurisdiction to jurisdiction, and (with the possible exception newly emerging crime categories) has been around since the 16th Century and seems to have some utility.

<table>
<thead>
<tr>
<th>A Typical Statutory Law Scheme</th>
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<tbody>
<tr>
<td>Crimes against the state</td>
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<td>Crimes against persons</td>
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<td>Crimes against habitation</td>
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<td>Crimes against property</td>
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<tr>
<td>Crimes against public order</td>
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<tr>
<td>Crimes against administration of justice</td>
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</tbody>
</table>
It should be apparent by now that ALL CRIME IS AN INJURY AGAINST SOCIETY. Indeed, there doesn't even have to be a victim (victimless crimes) or someone to complain (consensual sex acts). Society as a whole, via its legislatures, has presumably made a collective judgment that certain behaviors are harmful to certain "societal interests." This bring us to the most important characteristic of Criminal Law, as follows:

**CRIMINAL LAW IS DISTINGUISHED FROM ALL OTHER KINDS OF LAW BECAUSE IT CARRIES WITH IT THE MORAL CONDEMNATION OF ALL OF SOCIETY.**

The essence of criminal law is its common punishment (Hart 1958). No matter what the offense, from felony to misdemeanor to infraction or violation, the reaction expresses the moral contempt of society. Even for a minor traffic violation, there's always the slightest hint that one has injured society and broken the collective, agreed-upon rules. No matter how many times a parent scolds a child by saying "what would society think," it doesn't carry the same force as when it's carried by official reaction.

The concept of crime is closely tied to the idea of criminal law, but not in any simplistic way. The connections are best expressed in two ancient principles.

<table>
<thead>
<tr>
<th><strong>nullum crimen sine poena</strong></th>
<th>&lt;==&gt;</th>
<th>no crime without punishment</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>nulla poena sine lege</strong></td>
<td>&lt;==&gt;</td>
<td>no punishment without law</td>
</tr>
</tbody>
</table>

It would be an immense oversimplification to say something like "Crime is what the criminal law is all about." The reasons are twofold. First of all, the criminal law is not just about crime. To be sure, it defines crime and its elements, but it also attempts to create a positive incentive for conformity, in providing the impetus for voluntary, positive, moral action, or as Samaha (1999) puts it, "a last resort as a method of social control." It's useful to think of criminal law as a set of both proscriptive (prohibited) AND prescriptive (preferred) rules for conduct. This is best understood by the oxymoron "crimes of omission" and here's some examples of these prescriptive rules:

- Failure to remain at the scene of an accident
- Failure to aid a police officer when requested to do so
- Failure to report a death or location of a corpse
- Failure to provide adequate food, clothing, shelter, medical care, supervision, etc., for a child
- Failure to come to the assistance, or to summon police, for a crime victim (Good Samaritan laws)
- Failure to leave the area when told by a public official to do so
- Failure to properly identify yourself when lawfully asked to do so
- Failure to submit to a breathalyzer (or other) test when lawfully required
- Failure to obey an order of a court

Although the above are technically crimes, it's best not to think of them too long as crimes. They are moral or ethical commitments best conceived of as the law behind the law (Gardner & Anderson 1996). They are supposed to compel people to conform to a higher standard of conduct which is prescribed, not
proscribed by the criminal law. They are omissions, and in the religious sense, they are failures to do good
(the alternate religious term being sins). They are what tie all societies together since every society has
some concept of sin. Hence, it is more correct to say criminal law is about crime and sin. But, there's
more; as seen next, the criminal law also has some unique functions toward human nature, almost as if it
tries to positively direct it toward some ideal of perfection.

The human nature connection has to do with the second reason why crime and criminal law are not the
same, which is because crime is all about blameworthiness, culpability, and a whole bunch of other
concepts to be explained later. "Breaking the law" may involve a moral lapse, accident, or mistake. "Crime"
ordinarily involves something deeper which is unjustifiable and inexcusable. Sometimes the distinction is
made by saying that the criminal law is amoral (a set of impersonal, rational rules) and that crime always
involves morality. Another way of saying this is that a person accused of crime is being tried for being a
certain kind of person. So-called status offenses, like vagrancy and curfew violation, make it clear that
certain stations or conditions in life are criminal in themselves. The status of "criminal" is supposed to be
reserved for the worst outcasts from society, and the status of outcast cannot be achieved without the help
of the criminal law.

To better understand the way criminal law manipulates statuses and roles in society, it is probably a good
idea to understand the way the law classifies things. The oldest way of classifying crime is to make three
(3) distinctions:

1. Crimes "mala in se" -- Acts which are wrong in themselves. Anything wrong under Natural Law
and virtually every act proscribed under Common Law is mala in se. The conduct is unlawful
because the transaction or contact between people is unnatural or immoral. Examples include
murder, rape, burglary, and so forth.
2. Crimes "mala prohibita" -- Acts which are wrong because prohibited. Anything that interferes
with Positive Law and much of Statutory Law is mala prohibita. The conduct is unlawful because
it infringes on other's rights or just because it is prohibited. Examples include drunk driving,
gambling, and so forth.
3. Crimes "distinguished from torts" -- Most crimes are also torts, the technical term for civil wrongs
which are redressed by damages. Victims can sue criminals in tort action, and double jeopardy
does not prohibit tort and criminal action for the same conduct. Tort Law grew out of Criminal
Law, and involves the concepts of fault and liability but does not carry the social condemnation of
Criminal Law. That's why a different standard of proof (preponderance of the evidence) exists for
torts, whereas crime requires proving moral certainty or beyond a reasonable doubt. Examples
include libel, slander, trespass, wrongful death, and so forth.

Another way of classifying crime is to focus on the potential penalties imposed:

1. Capital Felonies -- Crimes which are punishable by death, or in states without the death penalty,
life imprisonment without parole. An example would be aggravated murder.
2. Felonies -- Broadly defined, crimes which are punishable by a year or more in a prison.
    Historically, a serious crime involving forfeiture of all worldly possessions, imprisonment, and/or
death. Another definition is an infamous crime, one which by its nature or character indicates a
depavity in perpetration or intent to pervert justice and propagate falsehood that forever destroys
the accused's credibility. Examples include murder, manslaughter, rape, larceny, robbery, arson,
sodomy, mayhem, and in the case of infamous crime, anything involving falsehood, like treason,
forgery, perjury, or bribery.
3. Gross Misdemeanors -- Broadly defined, misdemeanors are crimes punishable by jail sentences,
fines, or both. A gross misdemeanor is a very great, or high, misdemeanor, typically carrying a
sentence of close to a year in jail. They often involve moral turpitude, which by their commission
imply a base, vile, or depraved nature regarding the private and social duties which a person owes
to others or to society in general. It implies something is immoral in itself. Examples include
obscenity, profanity, and solicitation. The doctrine of merger requires that if a misdemeanor is part
of a felony, the less important crime ceases to have an independent existence and is merged into
the felony, but this does not apply to lesser included offenses common in plea bargaining nor 
prosecutorial overcharging common in creating the impression of multiple counts which are really 
multiple degrees of the same offense.

4. Ordinary Misdemeanors -- Misdemeanors that typically carry sentences in the 90- to 180-day 
range. An example would include drunk driving, but varies by jurisdiction. The higher the 
misdemeanor, the more substantial the right to a jury trial.

5. Petty Misdemeanors -- Relatively minor misdemeanors that typically carry sentences in the 30-day 
range. An example would include public drunkenness, but varies by jurisdiction. It has only been 
since 1972 that people accused of minor misdemeanors have had the right to representation by 
counsel.

6. Infractions (or violations) -- Typically these are traffic offenses or the breaking of municipal 
ordinances which are punishable only by suspension of privileges (Administrative Law) or fines 
(Quasi-Criminal Law). Technically, they are not even crimes since they do not result in a record of 
criminal conviction in most jurisdictions. However, it is possible to be jailed on a violation if the 
city in question has a municipal court. Such a court can impose a fine, but they cannot imprison 
for failure to pay the fine, only for failure to comply with a court order. A municipality is also not 
a legitimate law-making body. Only state legislatures are. Municipalities are corporations 
approved by state legislatures, and they serve at the whim of the state legislature unless they have 
established home rule. Municipalities are the only corporations allowed to charter their municipal 
ordinances as their bylaws. Most ordinances do not state the penalties, but some do (Chamelin 

The best way of classifying crime is to use a jurisprudential approach. Jurisprudence has many meanings, 
but generally refers to the science or philosophy of law as a whole. This method elucidates many of the 
more advanced concepts in criminal law. According to at least one legal scholar (Hall, 1949), any crime has 
7 elements, which I will first list, and then go into detail by number. By definition, a crime consists of all 
the elements which make up the following sentence:

1. legally proscribed (the concept of Legality)
2. human conduct (the concept of Actus Reus)
3. causative (the concept of Causation)
4. of a given harm (the concept of Social Harm)
5. which coincides with (the concept of Concurrence)
6. a blameworthy frame of mind (the concept of Mens Rea)
7. for which punishment is provided. (the concept of Punishment)

(#1) The concept of legality combines the two principles we learned earlier, and says there can be no 
crime without law. There must be public respect for the law, for the office if not the office-holders (which 
is the concept of legitimacy). Laws not based on societal norms are unlikely to gain general compliance. 
America's experiment with Prohibition from 1920-1933 is an example. If the principle of legality is 
maintained, governments can inflict pain on its citizens because it will be seen that those who are punished 
are those who deserved to be punished from a societal standpoint. So how does a government go about 
creating legality?

The answer is that there are at least three (3) ways, two of which are derived from the writings of 
classical thinkers like Jeremy Bentham and Max Weber, and another derived from an unknown, mysterious 
source.

1. Cognoscibility (Bentham) -- This term describes a cognitive state when the law is so precise and 
easy-to-understand that citizens can easily advise themselves on what they can and cannot do. 
Now, Bentham believed in utility being more of an ultimate value than justice (truly a positive law 
thorist in this regard), but the basic idea is similar to the theme of the old TV show, Beretta 
"Don't do the Crime if you Can't do the Time." If the laws are selectively few in number and the 
punishments are carefully calculated, standardized, and well-known, then people will "know" that
the law is fair and just across the land. That's legality. No loopholes, no exceptions, no travesties of justice. Everyone gets a fair deal.

2. **Rational-Legal Authority** (Weber) -- This is the opposite of *kadi* justice, where a bunch of judges, jurors, pundits, or other experts make up the law on a case by case basis. The essence of rational-legal authority is that there is a system of abstract rules applied to concrete cases. There's a reason or logic behind every legal decision. No personalities involved. No appeals to tradition. Just stone-cold professionals (kind of like the old TV show, *Dragnet* "Just the Facts") working diligently toward ever-increasing rationalization of the machinery of justice.

3. **Rule of Law** (unknown origin) -- Welcome to the fuzziest concept of all in criminal law. Lawyers claim to have an instinct for it, and it's said that only people who go to law school can ever understand it (Fletcher 1996). There's not much to go on with dictionaries or encyclopedias, except for something extremely brief like "a principle, guide or norm that decisions should be made by the application of known principles, sometimes called the supremacy of law" (West 1984). That definition is a sham, and this lofty concept deserves better; so here goes. Rule of Law connotes Law with a capital L. There's no word for the meaning of law with a capital L in the English language. Other cultures have words like Recht (German), Droit (French), Pravo (Russian), Derecho (Spanish), and Mishpat (Hebrew). The closest English equivalent would be "Right", a term that appears in the translation of some important philosophical works, like Hegel's *Philosophy of Right*. It denotes a vision of government based on ideal law, and was, ironically, referred to quite extensively in German history with the notion of a *Rechtsstaat*. Americans are more familiar with it as the idea of constitutional safeguards against arbitrary abuse of power.

(#2) The concept of Actus Reus (a phrase meaning evil or bad deed) is derived from an old Latin phrase, and in many ways, is what separates criminology from theology because as much as we might like to, those of us who work with criminals all the time cannot be concerned with, nor inclined to punish, bad thoughts. Government is not concerned with evil unless it is manifested in behavior. Religion is concerned with evil as manifested in thought.

| actus non facit reum nisi mens sit rea: | an act does not make a person guilty unless the mind is guilty |

It is important to understand the legal definition of "behavior." An involuntary jerk of the knee while having your reflexes checked is behavior, but not legal behavior. Psychologists also talk about being able to condition someone to do something, like make them brush their hair back while speaking, without their knowing about it. This is also not behavior in the legal sense. The word in social science that comes closest to the legal definition of behavior is "action." Action is always conscious, voluntary, and purposive behavior. There's a line in Shakespeare's *Hamlet* where the gravedigger ponders Ophelia’s drowning, and asks "Did the water come to Ophelia or did Ophelia come to the water." The difference is one of accidental death vs. suicide. Or take guns, for instance, as with the question "Does the finger pull the trigger or does the trigger pull the finger." To take another example, lawyers would claim there's a good deal of difference between someone thrusting their sword into someone who is standing still, and someone holding their sword outstretched while the victim comes running into it. The "action" you see, is different in each case and for each party to the crime, and although you and I may think it's splitting hairs, it's quite an important part of legal reasoning.

There are certain criminal offenses where the act alone is all that's necessary to convict someone. These are called strict liability crimes (as opposed to true crimes which require both body and mind). Examples of strict liability include weapon offenses, traffic offenses, drug & alcohol offenses, public health laws, corporate crime, and littering. There's no need to prove an accompanying mental state because the criminal law imposes liability without fault. Notice I said without fault, not without blame. Such laws came about during the 1930s to better protect the public and workers from unsafe products and unsafe working conditions. The tradeoff in this arrangement is that strict liability offenses are usually only punishable by a fine, certain time periods for adjudicating the punishment, and various restrictions on non-sentencing.
factors as well as the right to appeal. Minimal social stigma is supposed to attach, but some have argued that this is the most controversial area of criminal law (Simons 1997).

There's more. From a legal point of view "communication" is a form of action. A whole set of laws exist for what are called inchoate crimes (incomplete crimes), such as conspiracy, attempt, possession, solicitation, terrorist threats, assault, sexual harassment, inciting to riot, aiding and abetting, and being an accomplice or accessory. Once again, mental state is largely irrelevant because the criminal statutes have usually described the behavior so well that the principle of vicarious liability applies. Anybody who participates in the planning, design, or coverup of a crime is subject to the same penalties as a person who actually carries it out. This is a controversial area, and in all fairness, some statutes require a combination of communication (words) and conduct (deeds), but then again, once you open the door to combinations, evidence of bad thoughts may even be admissible. The closest term we have for when wicked thoughts are assumed to apply to the act (and the intent) is malice. Malice is among the many things which can be inferred from other evidence and imputed to a defendant. It may be more a concept of folk law than anything else.

(#3) The concept of Causation is one of the more advanced concepts in criminal law. An act by itself is not punishable in itself because it's assumed to be the cause of something else, the effect, or social harm that the criminal law is presumably more concerned with, and all crimes are cause and effect relationships. Establishing a cause-and-effect relationship is no simple matter with legal reasoning, or for that matter in any social science. Suppose, for example, you beat up somebody, knocked them unconscious, and threw them in a dumpster. You walk off, and a few minutes later, a garbage truck comes down the alley, empties the dumpster, and crushes the poor fellow to death. Who killed him? You or the garbage truck driver? (Other examples: hospital infections, surgery complications, being run over, bitten by a dog, exposure to elements, struck by lightning).

The most important types of causes in Criminal Law are "causes in fact" (also called direct causes), proximate causes (also called legal causes), intervening causes, and superceding causes. Each of these have special rules or tests designed for them:

<table>
<thead>
<tr>
<th>Type of Causation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Direct cause</td>
<td>The &quot;but for&quot; test -- The accused's act will be the cause in fact of a result if, but for the accused's act, the result would not have occurred.</td>
</tr>
<tr>
<td>Proximate cause</td>
<td>The &quot;foreseeability&quot; test -- If it is foreseeable that the resulting harm might occur, then the person doing the original criminal act is responsible for the consequences.</td>
</tr>
<tr>
<td>Intervening cause</td>
<td>The general rule is that the accused will remain responsible for the original criminal act even if there are intervening causes between the actus reus and actual injury.</td>
</tr>
<tr>
<td>Superceding cause</td>
<td>The general rule is that the chain of causation is broken, and the accused is not responsible, if there is a superceding cause so unforeseen and unpredictable that it would not be fair to hold the original actor to blame.</td>
</tr>
</tbody>
</table>

As an example, let's take the concept of intervening cause. It is perhaps the most common type of cause learned by lawyers. One of the legal tests for causation turns on whether an intervening act was "abnormal" or not. If something is abnormal, the result of an act would be X, but if the act was not abnormal, then the result would be Y. However, in legal reasoning, there are differences between abnormal, "not abnormal," clumsy as that phrase is, and "normal." It has to do with the difference between opposites and negations. In English, an antonym is usually the same as an opposite, but often there's a spectrum of some phenomena (e.g., short to tall) where the antonym is NOT the opposite. Many adjectives have both an antonym and a negation. The antonym of "tall," for instance, is "short" because it's at the other extreme of the height spectrum from "tall." But the negative of "tall" is not "short." Many people, after all, are neither short nor tall, but somewhere in the middle. The negative of tall includes both the short and the ones in the middle. Thus, "not tall" means something different from "short." Furthermore, "abnormal," doesn't quite mean "not normal" since there are things in-between normal and abnormal.
Likewise, "not unhappy" is not the same as "happy." Fortunately, "illegal" pretty much means "not legal" under most forms of legal reasoning, although many lawyers would argue there are shades in-between.

(4) The concept of social harm is a fairly undeveloped concept in criminal law, and it's what separates criminology from victimology. The criminal law exists for a public purpose, not private purposes. The criminal law is not concerned with the protection or vindication of individual victims, but rather society as a whole. The general rule has always been if a victim wants compensation, they should sue the offender after the state gets done with them. The problem, of course, is that most offenders are broke. There has been a trend in recent years to incorporate more victim assistance, compensation, and restitution in the plea bargaining stage of criminal justice. The additional problem is that there are a whole set of laws called victimless crimes, such as sodomy, fornication, adultery, cohabitation, obscenity, fortune-telling, dueling, loan-sharking, gambling, drunkenness, and drug use, where only some of the American people believe society is the victim. The law is not supposed to cave in to public opinion, but take the examples of abortion or drug legalization, and you begin to see what the problems are from not clearly articulating social harm. Progress on the victimology front is fine, but there are more serious "law and order" problems that can only be addressed by development of this concept.

It's conceivable that development of the concept is stifled because of a one-sided focus on street crime at the expense of Suite crime. While the average take of a street robber may be $25, American citizens won't recover from the effects of white-collar crimes like the Savings & Loan bailout until Social Security runs out.

(5) The concept of concurrence requires that any act (actus reus) causing social harm must coincide, or be accompanied, with a criminal state of mind (mens rea). Both act and intent must concur in point of time. It's part of a basic formula in criminal law:

| ACT + INTENT + RESULT = CRIME - DEFENSES |

There must exist a fusion, a coming together of act and intent. Normally, the intent comes first in time, leading to the carrying out of the act. For example, it is not murder to accidentally shoot someone and rejoice afterwards because mens rea follows actus reus. Another example: suppose your friend tells you to meet her at her house, and if she's late, to go ahead and break the lock on the door. OK, you do that, and once inside, you decide to steal her VCR. You have not committed burglary because your intent to steal came after breaking and entering. There is no specific length of time that the intent must exist prior to the act, only that they come together concurrently.

The legal requirement of concurrence is usually taken care of by proving Motive. Intent and motive are not the same thing. In criminal law, motive is that which leads or tempts the mind to indulge in a criminal act, such as an impulse, incentive, or reason for committing the crime. Intent is the mind being fully aware of the consequences. Many criminal statutes require intent as an element of the crime, but motive is never stated as an essential element of a crime in any criminal statute. Motive can be used to assist in establishing intent, but more likely, motive is introduced as a piece of evidence, often circumstantial, admitted along with evidence of opportunity, to impress the judge or jury. The presence of motive is evidence tending to presume guilt, and the absence of motive is evidence tending to presume innocence.

(6) The concept of mens rea (a phrase meaning evil or bad mind) is a well-developed concept, and perhaps the most complex and confusing concept in criminal law. Several problems contribute to this complexity. All 50 states are free to establish their own precedent which results in disparate requirements of intent for similar crimes, there are distinctly different common law and Model Penal Code (MPC) definitions of mens rea, the notion of blameworthiness is not precisely attached to certain types of mens rea and indeed may be more useful in defenses to crime, and finally, to successfully prosecute a case, a different type of mens rea may be needed to help establish the actus reus, concurrence, or other circumstance element stated in the criminal statute.
The best way to understand mens rea (often mislabeled Intent) is to realize that it is always invisible. You can't really prove intent like you can with motive. You also can't really blame someone for their motive (it's understandable), only for their intent. Intent is different for every person and for every case, and it's impossible as well as futile to get inside the "mind" of each and every criminal offender. Confessions are the closest thing to direct evidence of mens rea, and even then, they must be corroborated. Therefore, the criminal law has established certain objective tests for inferring the subjective mental state (intent) of criminal offenders. To do this requires certain assumptions about responsibility, and by adding in the rules for inferring intent, called determining culpability, we arrive at a way to attach blameworthiness.

**BLAMEWORTHINESS = RESPONSIBILITY + CULPABILITY**

Let's take the assumptions about responsibility first. It's easy. This is a given in criminal law. The entire criminal justice system operates on the assumption of free will. Much to the chagrin of psychologists, sociologists, and sociobiologists who have argued for years that human behavior is determined by forces beyond individual control, the criminal justice system assumes that every human being possesses free will and makes choices that they must be responsible for. Notice I didn't say "accountable for" because we haven't yet reached the point where we can attach blame. The free will assumption has been called the theoretical underpinning of criminal law. It's important to understand the theory before making any assessment of it.

Without getting into philosophical notions of Justice, there are two down-to-earth reasons for the free will assumption. One is that the system could not operate efficiently if we took the time to closely examine the psychological makeup of each and every individual. The second reason is that there is a whole other side to the justice system, called defenses, which offer more than enough safeguards, along with things like the presumption of innocence until proven guilty, to justify an assumption that crime is always a behavior that is freely chosen. Now all this doesn't mean that judges and lawyers don't believe in the influence of genetic, psychological, or environmental influences on human behavior. It just means that, for purposes of having a workable operating assumption, we have carved out criminal behavior from the dimension of all human behavior and decreed that this thing we call crime shall be considered as freely chosen from now on.

Traditionally, this stance has been softened somewhat by mutually agreed-upon recognitions. Notice I didn't say "exceptions." There are no exceptions to the free will assumption. However, there are the "Three I's" of Insanity, Infancy, and Involuntary. The criminal law "recognizes" to varying degrees that insane people, extremely young people, and those with certain involuntary "medical" conditions should NOT be assumed to be responsible for their actions. These are best understood as special defenses that get to the idea of voluntariness of acts, or volition (the ability to exercise free will). Insanity and infancy are fairly self-explanatory, but the following is a list of involuntary "medical" conditions: reflexive behavior, unconscious behavior, behavior while asleep (sleepwalking), convulsive behavior (epilepsy), and involuntary intoxication (drugged against your will).

Now we're ready to take up the notion of culpability (faulting or blaming someone for the way their "mind" works). That definition I've provided in parentheses should stop and give you pause as to what precarious ground we're on with concepts like mental fault. Let's start with the common law approaches and then look at the MPC approach, both in tabular form. Most lawyers are trained in the common law approach because the MPC method is fairly recent and hasn't caught on as much as it should.

At common law, basic distinctions are made between at least six (6) different types of intent: General Intent, Specific Intent, Strict Liability, Transferred Liability, Constructive Liability, and Scienter. All crimes contain general intent, but some crimes only contain specific intent or involve other forms of intent.

| General intent | The kind of intent which a judge or jury can easily infer or presume from the act itself. The intended result doesn't matter. The prosecution need not establish why the crime occurred. It must be shown, however, that the defendant had an "awareness" of |
a criminal act being committed. Battery is a good example because the extent of injuries or why the fight started doesn't matter.

**Specific intent**
The kind of intent that legislatures have put in the language of the criminal statute. Usually requires a particular result beyond the act itself, such as "with purpose to defraud an insurance company" in the crime of arson for profit. Requires prosecution to prove additional elements and cannot be presumed by a judge or jury.

**Strict Liability intent**
Involves regulatory crimes where intent doesn't matter at all. Intent is not an element of the crime. It is immaterial whether the accused acted in good faith or knew they were violating the law. The prosecution doesn't have to prove the defendant knew their mail order package contained drugs or child pornography, for example.

**Transferred Liability intent**
Involves cases where the accused intended to harm one victim but instead harmed another. Relieves prosecution of the need to prove chain of events leading to harm. Basis of felony-murder rule.

**Constructive intent**
Involves cases where the accused should have known their behavior created a high or unreasonable risk of injury. Also called criminal negligence, and replaces any specific intent contained in statute, thereby constructing or converting an innocent act to a crime.

**Scienter**
A requirement in some statutes that the accused had some additional degree of knowledge beyond knowing a possible criminal act was being committing. Examples include knowing that the victim is a law enforcement officer, knowing that the materials were stolen property, or knowing that the hitchhiker was an escaped fugitive.

Somewhat simpler and easier-to-understand is the MPC approach. Not all states use these words, and where known, I've worked the synonymous word into the definition and indicated it by quotation marks. They are arranged from the highest degree of mental fault to the lowest.

**Purposely**
When a person's conscious objective is to engage in a particular act or accomplish a particular result. They are behaving "intentionally" with respect to the attendant circumstances they are aware of or believe to exist at the time. Requires prosecution to show what was going thru the accused's mind at the time.

**Knowingly**
When a person knows the nature of their conduct will necessarily lead to a particular result. It means "willfully" carrying out a design or plan as a conscious exercise of their will. Requires prosecution to show what was going thru the accused's mind at the time.

**Recklessly**
When a person consciously disregards a substantial and unjustifiable risk that grossly deviates from a standard of care that a reasonable person would follow under the circumstances. Requires prosecution to show what was going thru the accused's mind at the time AND show what a reasonable person would do under the circumstances.

**Negligently**
When a person fails to be aware of a substantial and unjustifiable risk that dangerous circumstances exist or a prohibited result will follow. Such failure is also a substantial deviation from the standard of care that a reasonable person would follow under the circumstances. Requires prosecution to show what a reasonable person would do under the circumstances.

(#7) The concept of Punishment in Criminal Law must satisfy at least 4 criteria. Any penalty imposed must be:

1. painful and unpleasant
2. prescribed by the law
3. administered intentionally
4. administered by the state

In addition, it would be nice if punishment had a philosophical rationale, like retribution, incapacitation, deterrence, or rehabilitation. These are sometimes referred to as the goals of criminal law, and it would be an amazing feat of civilization if we could finally settle on one or the other. Here's a brief synopsis of the leading contenders:

<table>
<thead>
<tr>
<th>Goal</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Retribution</td>
<td>Assumes that criminals deserve to be punished, mostly by long prison terms, as legal revenge for their harm to society. The modern &quot;just deserts&quot; approach considers it proper to punish because they deserve it and the state has gone to the trouble of prescribing a punishment for them.</td>
</tr>
<tr>
<td>Incapacitation</td>
<td>Attempts to make it theoretically impossible, either thru incarceration, execution, castration, mutilation, banishment, or other means, for criminals to prey any further upon society.</td>
</tr>
<tr>
<td>Deterrence</td>
<td>Assumes that fearful penalties, mostly involving swift restraint, harsh conditions, and certain guilt, will prevent people from choosing to engage in crime. Specific deterrence focuses on individual criminals, and general deterrence focuses on potential criminals.</td>
</tr>
<tr>
<td>Rehabilitation</td>
<td>Emphasizes the possibility of change, mostly involving treatment programs, that has as an end result the ideal of being able to convert criminals into noncriminals.</td>
</tr>
</tbody>
</table>

It is also useful to have a range of penalties, and a systematic way of sentencing similar cases to similar penalties in that range. Here's the range as it currently exists in most advanced societies:

<table>
<thead>
<tr>
<th>Penalty</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Death Penalty</td>
<td>Lethal injection, electrocution, exposure to lethal gas, hanging, or other method.</td>
</tr>
<tr>
<td>Incarceration</td>
<td>Physical confinement in a prison, jail, or other locked-up facility.</td>
</tr>
<tr>
<td>Probation</td>
<td>A set of specific rules of conduct while in the community, and supervision of compliance with those rules.</td>
</tr>
<tr>
<td>Split Sentence</td>
<td>A brief period of shocking confinement followed by a period of probation.</td>
</tr>
<tr>
<td>Restitution</td>
<td>Making the offender provide financial repayment or other services for losses incurred by the victim.</td>
</tr>
<tr>
<td>Community Service</td>
<td>Making the offender perform public service work, like picking up trash.</td>
</tr>
<tr>
<td>Fines</td>
<td>Economic penalties requiring the payment of fixed sums of money.</td>
</tr>
</tbody>
</table>

INTERNET RESOURCES
Dr. O'Connor's Mega-Guide to the Study of Law
Dr. Tavel's MegaLaw Page
Legal Dictionary

PRINTED RESOURCES
CYBERCRIME, CYBERLAW, AND CYBERCRIMINALS

“Cyberspace is not outer space. If you break the law, you will be found and you will be stopped.” (Deborah Majoras)

Cybercrime has many definitions (see Wall 2001 for a typical, academic essay over definitional issues), but most experts believe it is the wave of the future, and it's here to stay, not just a passing fad. With over one trillion dollars moved electronically every week, the Internet is where the money is. The rates of cybercrime are skyrocketing. The annual "take" by theft-oriented cybercriminals is estimated as high as $100 billion, and 97% of offenses go undetected (Bennett & Hess 2001). Then, there are those who just abuse the Internet and computer systems -- hackers or hooligans, whatever you want to call them -- but cybercriminals nonetheless. Their shenanigans are often detected, resulting in an average cost of $104,000 per incident in damage, labor, and lost productivity (Brown et al. 2001). In addition, there's corporate espionage (pdf), which some experts say is the real problem, with annual losses of proprietary information in the $60 million range. Toss in organized crime, terrorism, infowar, embezzlement, extortion, and a variety of other ways to offend or harm with computers, and it's anybody's guess what the real cost is.

Criminological theory is weak in this area, but there are many typologies. There are things that are criminally wrong, deliberately wrong, accidentally wrong, wrong for all the right reasons, and just plain annoying. Legal systems everywhere are busy studying ways of passing new laws dealing with Internet misbehavior, so the arena has become a sort of "test-bed" or "mini-society" where all sorts of moral panics play out. This ethereal realm we call CYBERSPACE is intriguing and full of potential. Barney (2000), for example, finds it full of hope for democracy. Others see imminent danger. Two examples of danger are black economy and Internet addiction.

The "black" or "shadow" economy refers to a growing cyber-economy of criminals who are making money at online crime. The concept implies an evolution from hacking and virus writing for fun to creating malicious code for profit. For instance, when malware services are sold online using the same kinds of development methods and guarantees given by legitimate software vendors, one has a black economy. In fact, currently there are plenty of Trojan creation sites out of Russia, Germany and the Eastern bloc where one can purchase kits and support for malware in yearly contracts. It's something of a
cottage industry now, but just wait. One can buy compromised computers, or botnets, for spam runs or to perpetrate denial of service attacks. One of the most successful of these was the massive Storm Botnet of 2007, which tricked millions of victims into opening emails about dead people from a storm in Europe, and where the perpetrators obtained control (and put up for sale) about 8% of the world Internet. There are places where one can pay others to infect your enemies with spyware and Trojans (like a denial of service attack for $100), and, additionally, there is the emerging industry of digital espionage services, the growing cyber-extortion field, and the stolen credit-card market. It's a wonder why anyone still bothers committing traditional crime nowadays when cybercrime is so much easier.

The danger of "Internet Addiction" (being an "onlineaholic" or having the non-insurable diagnosis of "Internet addiction disorder") is insidious and personal. In a world of news feeds, instant messaging, email, and games, Blackberry devices might as well be called "Crackberry" devices because of their addictive potential (like cell phones). I personally feel that Internet addiction is indeed a disorder as destructive as any obsessive disorder, although I would be hard-pressed to describe the forensic or clinical outlines of it. Specialists estimate that 6 percent to 10 percent of Internet users develop a dependency, at least according to some experts (e.g., Dr. Hilarie Cash, head of Seattle-based Internet/Computer Addiction Services; Dr. Kimberly S. Young, head of the Center for Online Addiction in Bradford, Pa.; & Dr. Maressa Hecht Orzack, the director of the Computer Addiction Study Center at McLean Hospital in Belmont, Mass., and an assistant professor at Harvard Medical School; but in contrast, Sara Kiesler, professor of computer science and human-computer interaction at Carnegie Mellon University calls it a "fad illness"). However, I think the following can be modestly stated -- Internet addiction exacts a toll on health and family life; it aggravates pre-existing disorders; it can lead to further addictions such as gambling or pornography; and it can lead to cybercrime. The "hook" involves the ever-present hope of escape that the Internet offers to people who are longing for something. Whether or not cybercriminals are addicted or not is a question that has not been adequately addressed by academics.

THE DEFINITION OF CYBER

First of all, anytime you use the prefix cyber-, you're talking about something somebody is doing online. In other words, there has to be a modem or networking involved somehow. Motion is always involved. Anything related to the Internet falls under the cyber category when online. Besides being a prefix, it's also a verb, not a noun. So plugging in some 3D game and donning your goggles to go "cyber" doesn't count. There's always action, motivation, movement, and interaction when you cyber. It's impossible to just be cyber. There's no steady state of being cyber. To cyber means that you are constantly exchanging information, lots of information, and you are constantly using technology to the max. You are doing both at the same time -- exchange of information technology is to cyber. It's an activity unique to the Information or Knowledge Age we are entering, and by its very nature, it involves sharing or giving away things.

Cyber activity is very different from the use of computers for traditional activities where the purpose is to "stash" or "store" something and keep it from prying eyes. Many criminologists don't grasp this distinction, and would argue that theft is theft regardless of the medium used. However, I would argue that cyber theft is substantially different, and cyberterrorism is substantially different from terrorism. Cybercrime is also substantially different from computer crime. It's like the difference between people who use computers for all they can be versus people who use computers as a tool like a typewriter. In each case, the motivation might be the same, but the action or movement is different. One could even argue that the motivation is different. Our criminal law simply hasn't got enough concepts to grasp the element of mens rea when it comes to cybercrime. For example, there are different kinds of glee, elation, and glory involved in cyberspace that don't exist in the real world. There is an excess of information, not a deficit or "coverup" of information. Nor are the concepts of white-collar crime of any use, because you're dealing with something more revolutionary than just trying to make money -- you're dealing with cyberspace and technoculture, two concepts that are essential to any definition of cyber.

THE NATURE OF CYBERSPACE
Cyberspace is a bioelectronic ecosystem that exists anywhere there are phones, coaxial cables, fiber optic lines, or electromagnetic waves (Dyson 1994). Nobody’s really sure how big the Internet is (see CAIDA’s map of Internet for a map), but 135 countries have access, 54 world cities are the major hosts, and 72 million people logon every day. You should get the idea that cyberspace is pretty big, in fact, bigger than anything that’s ever happened before in human history, and it’s constantly growing, tripling in size every year. There are 13 main servers, numbered A thru M -- known as "root" servers -- which control all traffic on the Internet, and all but three of them are controlled by the US government, US companies, and/or located on US soil. Notice I didn’t say "owned" by the government. Those 13 computers are in private hands, but they contain government-approved, master lists of the 260 or so Internet suffixes, such as ".com" and ".org." The master lists serve as the Internet’s master directories and tell Web browsers and e-mail programs how to direct traffic. Internet users around the world interact with them every day, likely without knowing it. If the U.S. government wanted to, it could render a policy decision that in one stroke could make all Web sites ending in a specific suffix essentially unreachable, or it could, if it wanted to, use two of the 13 root servers for cyberwar purposes, especially regarding the two that are still in US military hands. Donated money keeps the 13 root servers operating (list available at www.root-servers.org), but today, because of anycast (cloning) technology, the functions of those servers have been replicated to more than 100 non-legacy root servers around the world, providing some level of security through redundancy. The locations of the 13 root servers are not necessarily secret, but nondescript. No signs or markers point the way to them. They could look like any office building on the outside, but there is high security and Network Operations Centers (NOC) near them. Not having any security at all visible from the outside is called "security through obscurity" and it’s the main form of security for root servers.

The history is that in 1998, the Commerce Department selected a private organization with international board members (ICANN, at www.icann.org, for the Internet Corporation for Assigned Names and Numbers) to decide what goes on those lists. Related ("Who governs the Internet") groups of significant note include IANA, or the Internet Assigned Numbers Authority, and the RFC-Editor Webpage, both of which are important repositories of information, and challengers to ICANN such as the UN-related initiative, IGF (Internet Governance Forum, or those who are helping ICANN work toward privatehood such as NTIA, or the National Telecommunications and Information Administration. The US Commerce Dept., however, has kept veto power and stringent reporting control over anything ICANN decides or does, but Commerce indicated it would let go of control eventually, and maybe turn control over to an international organization such as something like the U.N. International Telecommunication Union, but in 2005, the U.S. reversed itself and said something like it would never cede control of the 13 main servers. The U.S. government does, however, endorse having foreign governments manage their own country-code suffixes, such as “.fr” for France.

In late 2006, it appeared that ICANN, or the Internet Corporation for Assigned Names and Numbers, would be getting more autonomy because the US government pledged to cede control of the net at some unspecified future point within the next three years. ICANN is the private, non-profit, guardian of the underlying architecture of the net, overseeing allocation of domain names and the addressing system that
links domain names to the numbers computers understand. Observers have always said it is excessively controlled (i.e., bossed around) by the US government. For example, in early 2006, ICANN came up with the idea of establishing an .xxx domain to move all the world's pornography there, but the US government nixed the idea. With less US government control, ICANN hopes to one day achieve its goal of becoming a true "multi-stake holder organization."

<table>
<thead>
<tr>
<th>Countries with the Most Hosts:</th>
<th>Fastest Internet Growing Countries:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. USA</td>
<td>1. China</td>
</tr>
<tr>
<td>2. Japan</td>
<td>2. Brazil</td>
</tr>
<tr>
<td>3. Canada</td>
<td>3. Iceland</td>
</tr>
<tr>
<td>4. Germany</td>
<td>4. Romania</td>
</tr>
<tr>
<td>5. UK</td>
<td>5. Poland</td>
</tr>
<tr>
<td>6. Italy</td>
<td>6. Argentina</td>
</tr>
<tr>
<td>7. Netherlands</td>
<td>7. Taiwan</td>
</tr>
<tr>
<td>8. Taiwan</td>
<td>8. Hong Kong</td>
</tr>
<tr>
<td>9. Australia</td>
<td>9. Canada</td>
</tr>
<tr>
<td>10. France</td>
<td>10. Portugal</td>
</tr>
</tbody>
</table>

Hence, cyberspace has a certain "hippie" or free space connotation. The thinking goes like this: although humans created cyberspace, and are continually expanding it, the real inhabitants are data, information, ideas, and knowledge. This is what is meant by the Information or Knowledge Age. The real estate, or property, is intellectual and public. No one "owns" it, or operates it with any central authority. Politically, it makes governments obsolete. Economically, it can be replicated at zero cost, and unlike an industrial economy where you can only consume so many widgets, the average person in an information economy taps into all the world's knowledge and consumes information as fast as they can. Humans can only benefit from this new medium if they exercise their freedom.

Technoculture is best explained by reference to the CYBERPUNK movement that began in the mid-80s. Hackers, crackers, and phreaks made up the cyberpunk movement. Hackers could make magical things happen with computers, crackers would break into computer systems simply for the pleasure of it, and phreaks would do similar things with telephone systems. Other groups that joined the movement later were cypherpunks, who popularized cryptography to get over on "the System", and ravers, who used computer music, art, and designer drugs at massive all-night dance parties and love-fests in empty warehouses. Literature that glorifies cyberspace and the people on it is called cyberpunk literature. Here's a link to an online Dictionary of Cyberpunk Slang. Technoculture is opposed to monoculture, the latter term being what hackers call the market dominance of Microsoft.

THE CHALLENGES OF CYBERLAW

A computer hooked up to the Internet is a publishing company, telephone, television, library, megaphone, and more all rolled into one. This means that any administration of justice for suspected evil-doing with computers is covered by the First Amendment (freedom of speech) as much as the Fourth Amendment (freedom from search and seizure). The traditional approach in this legal area involves thinking in terms of certain protected zones or spheres of privacy. No one's really sure where Internet freedom is protected in the Constitution. Cyberspace isn't really a zone or sphere. Nobody really owns it, nobody considers it "home," reasonable people shouldn't expect privacy from it, but not too many people want the government or anybody else sniffing, snooping, or regulating every part of this special place. Those are the First Amendment issues. The Fourth Amendment issues, such as those contained in the Personal Privacy Act (PPA) and Title III of the Electronics Communications Privacy Act (ECPA), involve people, not places, but the distinction between wiretapping unread mail (which law enforcement can freely do) and wiretapping previously read mail (which requires consent via Acceptable Use Policies) is less than perfect. When computer forensics specialists seize and search a hard drive for all its contents, the only Fourth Amendment issues they're concerned about are privileged relationships, work product, documentary materials, and/or whether or not the data was intended for publication or dissemination. It seems like we are not only criminalizing a special place, but the person-based activity of having too much fun (with computers).
The other challenging legal question is when does Internet activity involve actus reus. In cyberspace, as in virtual reality, it's the impression that what one is experiencing is real. It doesn't require tactile sensation to be virtually raped in a chat room, but the consequences or trauma can be just as real. People can get married in cyberspace, obtain college degrees, and do other things that have real consequences. Plagiarism and copyright infringement is rampant on the web, and companies regularly install cookies and engage in data mining. A lot of Internet content is inappropriate for children. Just how many crimes are possible to commit in cyberspace is difficult to determine, and to prove some harmful action took place. Computer impressions, symbols, and persona do not make for anything more than conspiracy and inchoate offense charges. When AI (Artificial Intelligence) systems come online, it will prove difficult who had the thought first -- the person or the machine.

Then, there's the whole problem of jurisdiction. Where exactly does cyberspace begin and end? In general, a government's jurisdiction extends to those individuals who reside within its borders or to transactions or events which occur within those borders. The Internet, like space, doesn't have any borders. A few states have been daring, claiming that the flow of commerce, or financial stream, across their Internet nodes gives them jurisdiction. However, it's unlikely that any state authority would issue a warrant for an overseas offender who has less than minimal physical contact with U.S. soil. The minimal contact requirement usually governs transborder technology-related commerce (International Shoe Co. v. Washington 1945). International law enforcement compacts also require dual criminality, which means that investigative cooperation only exists if the offense has similar meaning in both nations. Sometimes, it's better to prosecute overseas, sometimes locally, sometimes federally, and this leads to a lot of disparities and inequities in the justice system.

What and when to seize are also baffling issues. Reactive response to hard drives have become a pattern in law enforcement because they conveniently record voyages in cyberspace. However, it might be easier, and more proactive, to monitor bulletin boards, websites, posts, emails, finger and Usenet. The computer's role should determine if the machine itself is to be seized or simply searched onsite. If the computer was used to commit a crime, the entire system should be seized. If the computer was used to store information about a crime, the hard drive, printer, and printout should be seized. Other situations might call for a quick copy of the hard drive and all floppies. The independent component doctrine requires that probable cause elements be present before any peripheral devices are seized. Getting ISPs to turn over their log files in a timely fashion, and getting upstream carriers to cooperate, are additional problems.

It must be remembered that this is an area, along with drugs, that helped develop the practice of no-knock warrants. Judges apparently felt that hackers could install time-delay devices or hot keys to permit quick disposal of evidence. A time-delay device destroys evidence if the keyboard is not accessed for awhile, and a hot key program erases data when a certain keystroke combination is depressed. Courts have also dealt with the time element for when a computer search warrant keeps from going stale, which is 3-6 months, the latter being the time when an unread message becomes a stored message, for legal purposes (Becker 2000).

Cyberspace law is a patchwork of loosely-articulated protections, liberally punctuated with loopholes and exceptions. Consider, for example, that there is privacy protection for bank records but not for medical records; protection for videotape rentals, but not magazine subscriptions; credit record protection, but not insurance records. New business practices and new technological developments often make good laws quickly obsolete. It's no wonder that cyberspace is the perfect breeding ground for crime because cyberlaw is such a mess. 48 states have some version of the Computer Fraud and Abuse Act (Title 18, Section 1030 of the Federal Criminal Code). This act was passed into law by Congress in 1986, and has been amended at least five times to touch up the language, including Patriot Act revisions. There's also the Economic Espionage Act (Title 18, Section Chapter 90). Most cybercrime is prosecuted at the federal level under either of these two acts. Let's take a look at these two laws.

*Computer Fraud and Misuse Act:* "Whoever knowingly accesses a computer without permission...to obtain information...defined as harmful to national defense, foreign relations...,
or injury to the United States, intentionally accesses the financial record of a financial institution, any computer of any department or agency of the U.S., any protected computer involved in interstate or foreign communication, any nonpublic computer that conducts affairs for the government...with intent to defraud, extort, or cause damage...shall be punished by fine and imprisonment for five to twenty years."

**Economic Espionage Act of 1996**: "Whoever intentionally or knowingly steals, copies, receives, or conspires to benefit any foreign instrumentality by converting any trade secret related to interstate or foreign commerce shall be subject to criminal and civil forfeiture of all property used or derived from the offense as well a fine from $500,000 to $5,000,000 and imprisonment from ten to fifteen years."

State laws tend to be written as theft or fraud statutes, the evils being stealing and undermining confidence. You might want to review the common law elements of theft and fraud law if you're unfamiliar with these offenses. CardCops, a company that tracks and stings fraudulent (stolen) credit card use over the Internet, estimates online fraud at ten times the rate of real world fraud. EscrowFraud.com estimates that 99% of web sites a seller of something on the Internet tries to "steer" you toward is "fake." Virtual returns of merchandise are almost as costly as virtual purchases, and so-called carders regularly post sniffed credit card numbers in chat rooms and on web sites. In the long run, it's the perception of dangerousness that hurts e-commerce, but in the short run, it's the speed of offenders and the slowness of law enforcement that is of concern. The typical state-level cybercrime statute is long, often longer than federal code, and the wording is extremely general, but a short example might be as follows:

**Typical State Cybercrime Statute (circa 2000)**: "A person commits computer theft or fraud when they knowingly and without authorization access or cause to be accessed any computer or network for obtaining goods, services or information with the intent to permanently deprive the owner of possession or use."

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**THE NATURE AND VARIETY OF CYBERCRIME**

Not everything computer-related is cybercrime, and not everything computer-related is computer crime. A person using a stolen telephone code to make free calls, even though the number is processed by a computer, is engaging in toll fraud, not computer crime. A person who embezzles $200 from the ATM of a company they work for still commits embezzlement, not cybercrime. The use of computers as incidental to another offense is not cybercrime. There are plenty of laws on the books already to classify many types of cybercrime. One way to do this involves thinking along the lines of asset forfeiture, or whether computers make up the fruits or instrumentalities of crime. This is a classification of cybercrime with the computer as target and computer as tool.

**Computer as Target**: This kind of activity is the wrongful taking of information or the causing of damage to information. Targeting a computer just to obtain unauthorized access is the hallmark of hacking, and the most serious criminal offense here is theft of information, followed by maliciousness, mischief, and wayward adventuring. Bypassing a password protected website to avoid payment would be theft of services, and foreign intelligence break-ins would be espionage. These are all familiar types of crimes, but hacking is typically done in furtherance of a larger scheme since the hacker wants to exploit all computational and encryption capabilities of a hacked system in order to weave through related computer systems. The activity can range from large-scale disruption to elegant hacking. DNS rerouting and denial of service attacks are the most disruptive. Subtle changes to a web page are elegant. Hackers also generally collect password lists, credit card info, proprietary corporate info, and warez (pirated commercial software). A list of specific offenses in this category might include:

- Arson (targeting a computer center for damage by fire)
- Extortion (threatening to damage a computer to obtain money)
• Burglary (break-ins to steal computer parts)
• Conspiracy (people agreeing to commit an illegal act on computer)
• Espionage/Sabotage (stealing secrets or destroying competitors records)
• Forgery (issuing false documents or information via computer)
• Larceny/Theft (theft of computer parts)
• Malicious destruction of property (destroying computer hardware or software)
• Murder (tampering with computerized life-sustaining equipment)
• Receiving stolen property (accepting known stolen good or services via computer)

**Computer as Tool:** This kind of activity involves modification of a traditional crime by using the Internet in some way. The traditional analogue here is fraud. It can something as simple as the online illegal sale of prescription drugs or something as sophisticated as cyberstalking. Pedophiles also use the Internet to exchange child pornography, pose as a child, and lure victims into real life kidnappings. Laws governing fraud apply with equal force regardless if the activity is online or offline, but a few special regulations apply at the federal level:

• Internet fraud (false advertising, credit card fraud, wire fraud, money laundering)
• Online child pornography; child luring (sexual exploitation; transportation for sexual activity)
• Internet sale of prescription drugs & controlled substances (smuggling; drug control laws)
• Internet sale of firearms (firearms control laws)
• Internet gambling (interstate wagering laws; lottery laws; illegal gambling businesses)
• Internet sale of alcohol (liquor trafficking)
• Online securities fraud (securities act violations)
• Software piracy & Intellectual Property theft (copyright infringement; trade secrets)
• Counterfeiting (use of computer to make duplicates or phonies)
• Cyberbullying (posting rumors or someone's altered private messages/photos online)

**INSIDERS AND OUTSIDERS**

Another way of classifying cybercrime is to use a location-based approach that distinguishes between insiders and outsiders. This is the approach the FBI uses (see Director Freeh's testimony 2000), which is also based on an evaluation of societal costs and the capabilities of law enforcement. It is also the approach one is most likely to encounter in the published, scholarly literature (e.g. Nykodym, Taylor & Vilela 2005). Such efforts are merely categorizations and are merely descriptive, but the geographic profiling of hackers has been a law enforcement pastime for quite some time (Taylor 1991), as has criminal profiling in general (Nykodym et al. 2005). Opinions differ over the most effective form of the profiling process, but it's somewhat true that the rest of the country usually follows the lead of the FBI on such matters. If one were to visit the now-defunct National Infrastructure Protection Center (now an office in DHS with many parts of it split into InfraGard and I3P), one could have seen how the problems of joint efforts reflect a changing set of priorities and emphases, but one could also easily see how about half the tips relate to insiders (using e-mail safely within your organization) and half to outsiders (cyberprotests by foreign nationals).

**Insider Threats:** The disgruntled insider is the principle source of computer crime. As much as 75% of computer crimes are done by employees (note that this figure doesn't include virus or worm writing, which is primarily done by outsiders and is rarely counted as a computer crime). This makes cybercrime against business the number one type of cybercrime, and it's growing, with the estimated loss to business running about $500 million per year, in the form of crimes like theft of proprietary information, theft of customer databases, and theft of product databases. Their average age of an insider offender is 29, and they generally hold managerial or professional positions (USDOJ CCIPS data of 2003 puts the age profile like this -- 34% are between 20-29, 36% between 30-35, and 27% over 35). Older offenders generally do more damage. The FBI regards disgruntled employees as motivated by a perception of unfair treatment by management or snubs by co-workers. Another fraction of incidents are caused by blunders, errors, or omissions. The FBI regards the insiders here as incompetent, inquisitive, or unintentional. The difference appears to be in the
intent to disrupt. Crimes involving the computer only incidentally are treated as traditional crimes -- theft, for example, if an employee tampers with the payroll system (called "data-diddling"). However, even the FBI is continually surprised, when under the plain view doctrine, they investigate an insider threat and find examples of child pornography, organized crime connections, and even recreational hacking. Employees often waste a lot of company time using their network access to surf, shop, or engage in other instances of lost productivity. It makes sense to profile the typical computer abuser. Every organization has them, and here are some of the signs:

- missing computer supplies when the employee is around
- missing software when the employee is around
- numerous logon sessions, some attempts under different name
- sloppy password management
- unusual interest in computer system printout
- mixes personal equipment with company equipment

Insider profiling (Nykodym et al. 2005) aims to help organizations understand the types of people that are likely to commit net abuse and/or cybercrime. Some common characteristics of such people include: not showing fear from having managers around; inclination to break the rules; and perhaps a keen sports fan (in the case of net abuse by online gambling at work). Such persons are usually fairly secretive, hard to communicate with, and quiet at work. Workplace cybercrime committed by managers at work tends to adhere to the same profile, yet the amount of money "take" at work is higher. Mid-or low-level employees, who commit the majority of cybercrimes at work, tend to have more restricted access and subsequently a lower "take." However, alliances between a manager and employee at work can be a difficult case to investigate (detect and stop) because they are working on different levels of a hierarchy and have more ways to hide the crime.

Insider cybercrime is generally divided into four (4) main categories (Nykodym et al. 2005): (1) espionage; (2) theft; (3) sabotage; and (4) personal abuse of the organizational network. The espionage-oriented offender is similar to the outsider cybercriminal (discussed below), and generally is after confidential or sensitive information, and usually is part of the management team, sometimes the higher management (very senior) team. Depending upon the race structure of the organization, the cybercriminal would be white or black, but they are usually secretive individuals who do not want to look different, and always try to blend in among others. Theft-oriented cybercriminals are motivated by their own gain (despite what they might say about hate or revenge) with their only goal the selling or using of valuable information for money. Such criminals are usually very comfortable with their position in the organization, and they tend to be young (either male or female) and still, relatively low in the organization's hierarchy. The sabotage-oriented cybercriminal is like the espionage-oriented type (in being influenced by a competitor), but saboteurs are not necessarily employed by the organization, but consist usually of subcontractors, part-timers, and the like, who also usually have one things in common -- they have personal motives, like revenge for some mistreatment they perceive, like a layoff or missed promotional opportunity. Age, race, and sex variation is quite diverse with this type.

**Outsider Threats:** Hackers are the most common group in this category. Their typical age is between 14 and 19, and they are generally part of the cyberpunk subculture. Hacking for illicit financial gain has been increasing, and less-skilled "script kiddies" (using point-and-click software instead of programming) are increasing in number. Distributed Denial of Service Attacks are also increasing, which plant a tool such as Trinoo, Tribal Flood Net (TFN), TFN2K, or Stacheldraht (German for barbed wire) on a number of unwitting victim systems. Then when the hacker sends the command, the victim systems in turn begin sending messages against the real target system. 2001 was also the Year of the Virus, and several large-scale hacks were accompanied by viruses released in the wild, which led authorities to suspect that hackers and virus writers were uniting. The FBI uses the following typology to classify outsider threats:

- industrial espionage - theft of proprietary information or trade secrets
- terrorism - attempts to influence or disrupt U.S. policy
• national intelligence - attempts by foreign governments to steal economic, political, or military secrets
• infowarfare - cyber attacks by anyone on the nation's infrastructure to disrupt economic or military operations

Industrial espionage is a very high-stakes game which the U.S. plays along with everyone else. There is a 1996 Anti-Economic Espionage law that defines "trade secret" quite broadly, but arrests usually involve sting operations conducted against foreign nationals attempting to bribe somebody. It's the perfect example of an exception to the insider-outsider typology because sometimes, the crime originates with an employee who is in a position to sell trade secrets, and other times, the employee is tempted by an outsider.

Terrorists are known to use information technology to formulate plans, raise funds, spread propaganda, and to communicate securely. For example, Ramzi Yousef, mastermind of the first World Trade Center attack, stored detailed plans to destroy United States airliners on encrypted files in his laptop computer. Osami bin Laden was known to use steganography for his network's communications. A website that was known as the Muslim Hacker's Club listed tips for things such as hacking the Pentagon. A hacker known as DoctorNuker has been defacing websites for the last five years with anti-American, anti-Israeli, and pro-Bin Laden propaganda. Other than by using computers to communicate and coordinate, few examples exist of cyberterrorism, or politically motivated attacks on computer systems. In fact, it is advantageous to a terrorist group to keep the Internet working, as a means of communication and outlet for propaganda. The main tools of terrorism remain guns and bombs, not computers. There are a few instances of cyberterrorism, however, such as the 1998 attack on Sri Lankan servers by the Internet Black Tigers, or the Mexican Zapatista movement of the same year, which eventually teamed up with protesters of the World Trade Organization. We have yet to see a significant instance of "cyber terrorism" with respect to widespread disruption of critical infrastructures. However, the FBI and many others, are concerned about the growth of something called hactivism, which is a word that combines hacking and activism. These are politically motivated attacks, but they may also be a form of electronic civil disobedience. Such attacks are usually elegant. For example, the Zapatistas target the URLs of companies they think don't support human rights. The attack is nothing more than adding the phrase "human_rights" to the end of the URL. The page returns a display that says "human rights not found on this server", which is also found in the server logs. They don't actually flood the server, just enough times to make sure it's noticed in the server logs.

Foreign intelligence services have adapted to using cyber tools as part of their information gathering and espionage tradecraft. In a case dubbed "the Cuckoo's Egg," between 1986 and 1989 a ring of West German hackers penetrated numerous military, scientific, and industry computers in the United States, Western Europe, and Japan, stealing passwords, programs, and other information which they sold to the Soviet KGB. Significantly, this was over a decade ago -- ancient history in Internet years.

Infowarfare usually involves foreign military forces against another foreign military force. We know that several nations are already developing information warfare doctrine, programs, and capabilities for use against each other and the United States. China and Taiwan have been at infowar for years. Foreign nations develop such programs because they feel they cannot defeat the United States in a head-to-head military encounter and believe that information technology is our Achilles Heel.

**CYBEREXTORTION**

Cyberextortion is an outsider threat designed to obtain money, products, or favorable considerations from an organization or an organization's individual employees using illegal means of persuasion related to a computer intrusion or threatened computer intrusion that would make it impossible or difficult for that organization to do business. The method of attack is most typically a Denial of Service (DoS) although theft of data or public ridicule (web defacement) are also common. The crime takes advantage of the tendency for most businesses to NOT want their infrastructure vulnerability made public. The target is typically a company that is involved heavily in e-commerce, and there is some tendency for targets to be companies that outsource their help desk function to places like India and Pakistan. Not much is known
about cyberextortionists, but a research study at Carnegie Mellon promises to shed some light on the subject.

This crime is a good example of a transnational crime. While it can occur within the boundaries of a single nation (Japanese businesses, for example, tend to be cyberextorted by Japanese criminals), it is more commonly found in the form of Russian or Eastern European hackers, hired or coerced by some organized crime group into finding American and European companies to break into. Banking organizations are a particular target. The Bank victim is threatened with having all or most of their customer's PIN numbers placed on the Internet somewhere, and a surprising number of victims "pay up" rather than report the problem to law enforcement. Cyberextortion, in its organized crime variety, also represents an interesting division of labor among criminals since the hackers do specialized, technical work and their "handlers" do specialized, nontechnical work.

A TYPOLOGY OF HACKERS

At the heart of cybercrime are the hackers. These people are the ones with the skills to commit the crimes, and an interesting way to look at them is to focus upon the lifestyles and personalities of hackers. Take it for what it's worth. None of these personality characteristics have been validated by any empirical tests. The first typology comes from Maxfield (1985):

- **Pioneers** -- those who are fascinated by evolving technology and explore it without knowing exactly what they are going to find
- **Scamps** -- hackers with a sense of fun who intend no overt harm
- **Explorers** -- hackers motivated by a delight in breaking into computer systems. The more geographically distant, or more secure the target it, the greater the delight
- **Game players** -- those who enjoy defeating software or system protection, with hacking seen as a sort of game itself
- **Vandals** -- those who cause damage for no apparent gain
- **Addicts** -- nerds who are literally addicted to hacking and computer technology

A second typology (Coutourie 1989) describes the relationship of a hacker to their computer:

- **Playpen** -- in which the computer is seen as a toy
- **Fairyland** -- where cyberspace is an unreal world where wrong cannot be done
- **Land of opportunity** -- where there's nothing wrong with exploiting a vulnerable system
- **Tool box** -- in which the computer is just a way to get other things done
- **Cookie jar** -- with the computer as a place to go borrow things now and again
- **War game** -- where hostile feelings are vented against machines rather than people

There have been no attempts (that I know of) to apply these typologies to real-life case studies, although allow me to give you some cases, and let you see if you can apply anything yourselves:

<table>
<thead>
<tr>
<th>Case Studies of Hackers</th>
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<tr>
<td><strong>&quot;Captain Crunch&quot;</strong></td>
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<tr>
<td><strong>Kevin Mitnick</strong></td>
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<td><strong>Kevin Poulsen</strong></td>
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spent some years in prison, and is now a computer security journalist.

<table>
<thead>
<tr>
<th>Name</th>
<th>Description</th>
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<tbody>
<tr>
<td>&quot;Mafiaboy&quot;</td>
<td>In 2000, this Canadian boy launched denial-of-service attacks on CNN, Yahoo, and other major websites. He ended up under house arrest and was restricted from using the Internet.</td>
</tr>
<tr>
<td>Onel DeGuzman</td>
<td>In 2000, this Filipino computer science student unleashed the “ILOVEYOU” virus on the Net. He went unpunished because the Philippines had no law covering the crime.</td>
</tr>
</tbody>
</table>

INTERNET RESOURCES

Center for Strategic & International Studies (CSIS)
Cyberbullying Research, News, and Events
Cybercrime, Justice, Law and Society
Cybercrimes.net
Cyberpunk Top 100 Sites
Cyberspace and the American Dream
Cyberterrorism: How Real is the Threat?
DHS National Infrastructure Protection Center
InfoSec and InfoWar Portal
Institute for Advanced Study of Information Warfare
MSNBC's Hacker Diaries
National Cybercrime Training Partnership
National Strategy to Secure Cyberspace
Navy Postgraduate School White Paper on Cyberterror (pdf)
Prof. Rob Kling's Social Informatics web page
Reality Bites: Cyberterrorism and Terrorist Use of the Internet
SocioSite: Power, Conflict, War, CyberWar, Cyberterrorism
The Zapatista Social Netwar in Mexico
U.S. Dept. of Justice Cybercrime Section
What is CyberTerrorism?
White House National Strategy to Secure Cyberspace

PRINTED RESOURCES

Arquilla, J. & D. Ronfeldt. (2001). *Networks and netwars*. Santa Monica: RAND.
Dyson, Esther et al. (1994). Cyberspace and the American dream. EFF [article website]
Pollitt, M. (n.d.) "Cyberterrorism: Fact or fancy?"

Unit 17

AN OVERVIEW OF MORALITY AND ETHICAL SYSTEMS
"Out of the crooked timber of humanity, no straight thing was ever made" (Immanuel Kant)
What is morality? A good definition is provided by Gert (1998) who says that "morality is an informal public system applying to all rational persons, governing behavior that affects others, and has the lessening of evil or harm as its goal." The two essential parts of this definition are that morality applies to all rational persons and that morality provides a system of governing behavior, which is also called a code of conduct. The object of morality being good over evil is NOT an essential part of the definition, although some (e.g. Warnock 1971 and theologians in general) would disagree and argue that the object, or purpose of morality always matters. When you attach an ultimate object or purpose to morality, you have entered the realm of APPLIED ETHICS. Criminal justice ethics is an applied ethics (as well as a professional ethics), and in criminal justice ethics, we often substitute the words "right and wrong" for "good and evil." With an applied ethics, we are usually concerned with the outcomes of decision-making or judgments that incorporate some pre-given duties or values (Pollock 2004). With ethics in general (I hesitate to call it pure ethics), we suspend judgment about the ultimate purpose of morality to better get at the role of morality in formulating ethical systems.

THE NORMATIVE APPROACH TO ETHICS

Again, the important parts of the definition are that morality is public and morality affects others. This idea that morality is public and applies to all rational persons is called the "normative" (as opposed to the descriptive) approach. You may or may not remember that the word "normative" derives from the sociological term "norm," and "norms" are those parts of our culture which contain the mostly unspoken, yet commonly shared expectations about appropriate and inappropriate behavior. Norms are the building blocks of social group formation (and what a sociologist might say holds society together), since, within limits, norms define the boundaries of what constitutes conformity and what constitutes deviance. Remember, norms are expectations not behaviors. Norms are the mental expectations that people share about the acceptable range of behaviors, not the behaviors themselves.

The normative approach to morality is also called MORAL SKEPTICISM, which denies that there is an objective basis to truth, honest differences of opinion are possible, and there are multiple ethical theories each deserving of separate study. If you make too much out of the part of this which says that there is no truth (and nothing is inherently wrong), then that is called MORAL NIHILISM. No academic expert that I know of advocates moral nihilism. Skepticism is a less extreme position than nihilism, and in many ways, skepticism is just keeping an open mind. For those interested in learning more about moral skepticism and the possibility that good, evil, right, and wrong can never be known for certain, read Mackie (1977).

THE DESCRIPTIVE APPROACH TO ETHICS

On the other hand, if one follows the "descriptive" approach to morality, instead of the normative approach, this is called MORAL RELATIVISM because what you would be doing is describing either a person, society, or standard, and comparing or "relating" it to all other persons, societies, or standards. There are different varieties of moral relativism. A focus on individual persons and whether or not they live by their own principles is called MORAL SUBJECTIVISM. A focus on any particular society or culture as the dominant one which should serve as a guide for the rest of the world is called MORAL ABSOLUTISM, which also refers to the idea that there exists just one moral principle from which all others derive. Most moral relativists hold to the idea of MORAL OBJECTIVISM, which is that there exist a set of fundamental moral principles (perhaps as many as ten or so) that are not so fundamental as to be overridden by other moral principles in cases of conflict. When analyzing societies via the descriptive approach, it is important to make sure you are describing morality, and not the laws, customs, etiquette, and folkways of a people. Moral does not mean legal. Laws and customs, it is true, affect others, but in searching for morality, we are looking for the fundamental rules of behavior that transcend person, place, and time. Some examples might include: Do not kill innocent people; Do not torment others for fun; Do not cause unnecessary pain or suffering; Do not cheat or steal; Do not deprive another of their freedom; Do good whenever possible; Keep your promises; Tell the truth; Help other people; and Seek justice in all things. A sociologist might call these fundamental principles "mores," and an anthropologist might call them "proverbs," but the correct, philosophical term for them is "morality" or moral principles. They are the basis for ethical systems.
THE INTEGRITY OF ETHICAL SYSTEMS

The phrase "ethical system" refers to when you have worked out such a clear, coherent, and consistent set of moral principles that they not only don't conflict in most situations, but it can be said they not only tell you what to do, but what you need to be. It's fine to just develop moral principles that one can put in a rule book and say dutiful behavior consists of following those rules, but it's a bigger and better thing to say that you are personally affected by those moral principles, and that they serve as a guide for the whole kind of person you're trying to be. We sometimes refer to this state as when a person achieves "integrity," gets their values together, or lives a "virtuous" life. In philosophical terms, it's called "virtue" or "moral character." An ethical system is a system precisely because the moral principles or rules it puts forward have significant and practical meaning for our character, our personalities, and our everyday life. It's not simply that we feel emotional about our morals as a nice set of virtues to strive toward; that would be called having an ASPIRATIONAL ETHICS, or believing in things so high and mighty that the best we can do is aspire to its calling and hope to be like that one day. Moral character is likewise not too concerned with REGULATORY ETHICS, which set a minimum standard for common morality, like Thou Shalt Not .... Instead, the trick is to come up with something above the ordinary, not too high and mighty, and prescriptive as well as proscriptive.

A Note on Criminal Justice Codes of Ethics

Every criminal justice profession and association has "codes" of ethics, "canons" of professional responsibility, "statements" of values, "principles" of conduct, "standards" of practice, and "oaths" of office, along with "pledges", "vows", "maxims", "credos", "prayers", "tenets", and "declarations". Some are directed to God; others to superiors or the profession; and still others to society as a whole. Some are regulatory and others are aspirational; but they all make promises that people commit to keeping as a standard of performance. If a code of ethics must exist for criminal justice, it should set a standard above ordinary morality. Otherwise, there's no need for a code of ethics at all. This is especially relevant when dealing with unscrupulous characters, where it's going to take more than just a commitment to being an ordinary, decent human being. Further, it's going to take being a user of the code, not just being a promiser. Such a code would lead to unmistakable integrity, and living up to the principles would not be difficult, puzzling, or impossible. Nothing the moral character in criminal justice does would come as a surprise to anyone. They would conduct themselves, as August Vollmer once said, in ways that make it impossible for anyone to make a joke about them. And even if all the political leaders turn out to be a bunch of bunglers, and even if all society becomes a Sodom and Gomorrah, this becomes no excuse for the moral character in criminal justice to abandon or revise their ethical system. Their commitment to an ethical way of life is unconditional. After all, the true test of character is keeping your faith in the face of adversity.

THE MISTAKES OF COMMON MORALITY

Not to put too fine a point on it, but it should be clear that ethics is about rising above what is normal and common. The choice is between believing in what you are or believing in what you can be. "Does your ethical system fit your life, or does your life fit your ethical system? Did you begin with your interests, desires, and prejudices and then justify them with tailor-made ethics? Or, did you try to live your life based on your ethical beliefs?" (Halberstam 1993). If it all fits too neatly and conveniently into what you believe already, then you practice a form of common morality known as PSYCHOLOGICAL EGOISM, which is characterized by self-serving ethics and the idea that they've got it all figured out by being "realistic." Let's take a look at some mistakes of common morality that consist of well-worn clichés which provide bad advice to live by.

- What goes around comes around -- The fact of the matter is that this never happens; it's wishful thinking; and bad things happen to good people all the time, and vice versa; there are no guarantees in ethics.
• *All's fair in love and war* -- The truth is just the opposite of this saying; as there's no better time for fairness than during these critical times of life; ethics is not about justifying unethical behavior.

• *There are two sides to every issue* -- This saying reflects a basic lack of inner conviction, and there's nothing more important, especially with moral issues, than taking a stand and having the courage to accept responsibility.

• *It's best to be morally neutral* -- There really is no neutrality on moral issues since somebody, somewhere probably feels that what you think is a good moral choice is the most immoral thing ever; ethics is conflict.

• *You can't teach someone moral values* -- The problem here involves giving up any effort at trying; there's always teaching by example and opportunities for responsibility; ethics is about growth and maturity.

• *All people are the same underneath* -- Like its counterpart saying, All religions are the same, this is a false and demeaning statement that reflects misunderstanding; ethics is about diversity and understanding.

• *Just follow your conscience* -- There is no magical source of morality like a conscience to rely on; there's only the hard work of figuring out what you should do, and doing it because you ought to; ethics isn't easy.

**THE ROLE OF ETHICAL DILEMMAS**

People have usually fallen into a bad ethical system not because they had bad parents, bad teachers, and no religious upbringing (these things certainly matter), but typically because they have experienced one or more significant life events we call ETHICAL DILEMMAS. An ethical dilemma involves a decision-making opportunity in which there seems like there is no right choice to make. These “damned-if-I-do; damned-if-I-don’t” situations are extremely important shapers of life, which along with ETHICAL ISSUES (the same as social issues), pretty much determine a person's ethical system. Ethical dilemmas tend to involve behavioral choices (not just opinions) where the resolution or decision affects others as well as the self. Not everyone resolves ethical dilemmas the same way, or in a moral way, and this diversity is called ETHICAL PLURALITY. From a theoretical point of view, plurality exists because there is a large divide between the theories of decision-making and the theories of moral development. From a practical point of view, plurality exists because few people agree on everything that constitutes right or wrong.

**THE SPECIAL MORAL DEMANDS OF CRIMINAL JUSTICE**

The field of criminal justice comes close to being a field which claims to have reached agreement on everything that constitutes right and wrong. Criminal justice also claims a type of legitimacy such that citizens are obligated to obey it, not just forced to do so (Leighton & Reiman 2001). The force of this obligation is the RULE OF LAW, and it works when people realize that the power behind this force comes from the public trust, not some source of private power. However, law is not the same as morality, and disagreements, diversity, and ethical plurality are bound to exist. As far as possible, a criminal justice system must accommodate all the diverse ethical systems that exist among the citizenry. It cannot impose the values of some citizens upon others, and when it comes to “justice,” we must recognize that there are many types of justice (Crank 2003). The accommodation of ethical plurality is the first special challenge or demand faced by those who work in criminal justice.

People "obey" authority (not just comply with the second-best strictness of clear-cut rules) because they have reasons to believe that they "owe" obedience and are not just being pushed around. Each law should protect something of value to every citizen. When punishment is needed, the law should also provide for the most morally acceptable PUNISHMENT possible. The role of criminal justice as the final arbiter of punishment makes for another special challenge or demand.

Criminal justice also faces a third demand -- social justice. The simple fact is that criminal justice cannot be more just than the society it protects (Reiman 2001). If injustice prevails within a society, the options for criminal justice are limited. For example, if there is widespread social or economic injustice, then the
criminal justice system will become nothing more than a "clean-up" detail that is trying to rectify the underlying problems of social injustice. Nonetheless, criminal justice THEORY has always risen to this challenge, especially theory using a more philosophical approach. Those familiar with criminology will know that there is a long tradition of theory with a reform agenda, the most notable example being the so-called "classical" school. Theory is lacking in criminal justice, however, but a number of recent books address the subject (Braithwaite & Petit 1990; Duffee 1990; Kraska 2004). Theory in social justice (or distributive justice) has a longer history, and there are several most well-known books on that subject (Hobhouse 1922; Rawls 1971; Elster 1992; Miller 1999), as well as a growing interest in global justice.

ETHICAL SYSTEMS AS MORAL THEORIES OR PHILOSOPHIES

There are many criteria for evaluating whether an ethical system merits the status of "theory" or "philosophy." Surely, there are "theories" that we think we all have, as when we say "I have a theory about that," but when something consistently provides us with a reasoned guide to good judgment and decision-making, we're talking about theory with a capital T. Philosophies are sets of principles or beliefs that constitute a worldview (or paradigm) which allow us to understand how the world is constructed and how we ought to live in it. For practical purposes, theory and philosophy are interchangeable terms in criminal justice. Harris (1986: 33) defines a MORAL THEORY as "a systematic ordering of internally consistent moral principles that are consistent with generally held beliefs and possess a type of moral common sense." Baelz (1977 further adds that moral theories have the following characteristics:

- **They are prescriptive, not proscriptive.** In other words, they tell us what to do by spelling out the positive things we ought to do, not by denouncing the negative things we do.
- **They are authoritative.** They are not subject to debate because once completely formed, the framework or paradigm of a moral philosophy is beyond question.
- **They are logically impartial or universal.** They apply to everyone and are not based on favoritism or egoism. Relativism has no place in a fully developed ethical framework.

INTERNET RESOURCES

- **A Glossary of Ethical Terminology**
- **CritCrim.org**
- **Encyclopedia Article on Moral Skepticism**
- **Ethics Resource Center**
- **Institute for Criminal Justice Ethics**
- **Institute for Global Communications**
- **Gregg Barak’s Internet Home of Criminology**
- **Lecture Note on Moral Skepticism and Moral Relativism**
- **Markkula Center for Applied Ethics & Decision Making site**
- **Prof. Bernard Gert's Homepage at Dartmouth College**
- **The Generalized Structure of Ethical Dilemmas**

PRINTED RESOURCES
