

MAKING SENSE OF CRIMINAL JUSTICE POLICIES AND PRACTICES

THIRD EDITION

G. LARRY MAYS • RICK RUDDELL



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Making Sense
of
Criminal Justice



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Policies and Practices



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PREFACE



Have you ever taken a course where you felt like you knew less when you finished than when you started? How about the course where the instructor told you all of the theories, policies, or practices that did not work, but little of what does work? We've heard these complaints from students over the years, and this book in some ways is a response to those laments.

This book is designed for criminal justice and other social science courses that fall into one of two categories: (1) the capstone course (sometimes called senior seminar) and (2) policy-oriented courses. It is aimed at an upper-division undergraduate and graduate market, so at this point all of you taking this class should have completed a wide variety of foundational courses in your major.

The book is organized somewhat like an introductory textbook would be arranged, with the standard police/courts/corrections treatment. However, a quick glance at the table of contents will show you that we have chosen to focus on a range of issues that continue to confront the criminal justice system.

We're assuming that many of you will choose a career in the criminal justice field or in one of the areas allied with criminal justice. We acknowledge that this may not be true for some of you, and a group of you may never work in criminal justice. However, as "good citizens" and active consumers of justice processes and services, it is essential to understand what is working and what is not working in the criminal justice arena.

We approached this project with certain assumptions in mind, and we feel that you will understand the book better once you understand our assumptions. First, the administration of justice is an inherently political process, and the criminal justice system in the United States (and in other nations as well) is a part of the country's political system. All of the laws that are enacted and all of the policies developed have at their very core a political dimension.

Second, all of our worldviews are shaped by our experiences, morals, values, ethics, and a host of other factors. Whether you are a Democrat, Republican, or Independent—liberal or conservative—your values (and our values) color the picture we see of the world. In terms of this book, that means that there are not

necessarily “right” answers. In some cases the choices may be between good, better, and best. In other cases the choices may be between the lesser of evils.

The reality is that there may be many more questions than there are answers. Our desire is that you will be tolerant of the viewpoints of others and able to ask better questions than you considered in your first college classes. Even after asking good questions you will need to be willing to live with a certain degree of ambiguity in terms of the answers you might receive.

Third, there is an endless supply of issues or controversies that could be addressed in a book like this one. Many of the ones we’ve chosen provide fruitful areas of debate. Some we chose because we’re the ones writing the book. Others were suggested by some of our reviewers, including professors who have used this book in their courses. We take all the blame for what is missing and what may not be adequately explained. At the end of this section we will provide you with contact information. We would like to hear from you (as we so often hear from our students and former students) about your experiences with this book. In large measure, if this book is successful it will be because of you and not because of us.

Finally, a key assumption for us is that this course is one that will help you bring together bits and pieces of information that you have gleaned from your other classes. At this point it is not the instructor’s responsibility to help you make sense of the criminal justice system in the United States, it is your responsibility. Good luck.

NEW TO THIS EDITION

- All of the chapters have been thoroughly revised, and updated data on all topics available have been incorporated.
- The focus on evidence-based practices has been expanded throughout the text.
- There has been an expanded use of the due process and crime control models presented in Chapter 2 as an analytical tool throughout the book.
- There is a new Chapter 3 focusing on criminal justice policy and some of the tools of policy analysis (this includes material originally in Chapter 15 of the second edition but it has been expanded for this edition). The police use of force chapter (now Chapter 5) includes a discussion of several of the high-profile cases involving the shooting of racial minorities (particularly African Americans) by the police in several locations.
- The list of Critical Review Questions has been revised and expanded for each chapter.
- We have continued to include five suggested writing assignments for each chapter.
- A significant number of figures visually illustrating concepts discussed in the text have been added.
- The chapter dealing with the war on terrorism (now Chapter 15) has been reoriented from a focus on events following the attacks occurring on

September 11, 2001, to the questions surrounding privacy versus the expanded use of surveillance techniques by governments at all levels.

- Emerging issues related to violence toward women are introduced, such as untested sexual assault kits, the increasing number of women behind bars, and responding to sexual assaults on campus.

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Although only the authors' names appear on the cover of a book, preparing a manuscript is a team effort, and many people supported us as we finished this work. First, both authors would like to acknowledge the assistance of Steve Helba, our editor at Oxford University Press, for helping us shepherd this book through revision and production. Steve has been a tireless supporter and promoter of this book and we are truly grateful for his enthusiasm and encouragement. He was ably supported by his assistant editor Larissa Albright. Second, we also thank the reviewers who provided guidance in moving us from the second to the third edition, Jimmy Bell (Jackson State University), Sara Buck Doude (Georgia College & State University), John P. Hoffmann (Brigham Young University), Richard Hough (University of West Florida), Rebecca Loftus (Arizona State University), Philip Mulvey (Illinois State University), Sheryl Van Horne (Eastern University). In addition, we thank the editors and staff at Oxford University Press who assisted throughout the production process, including Elizabeth Bortka and Patricia Berube.

Larry Mays would also like to acknowledge his wife Brenda for her infinite patience while he is working on a book (especially since he swears that every one will be "the last one"). Rick Ruddell thanks his wife Renu for her love, unwavering support, and understanding for the time he spends researching and writing.

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Rick Ruddell, the Law Foundation of Saskatchewan Chair in Police Studies, joined the department of Justice Studies at the University of Regina in 2010. Prior to this

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CHAPTER 1



The Politics and Policy Dichotomy

INTRODUCTION

Why would a book about understanding the criminal justice system in the United States begin with a chapter on politics and policy? What do these two notions have to do with the operations of criminal justice agencies and the organizational environments within which criminal justice personnel function? The short answer is, everything.

Quite often people will say something like this: “We need to get politics out of the administration of justice in the United States.” Or perhaps they will say it this way: “Politics should play no role in the criminal justice system.” As we will see, politics is very much a part of the policymaking process in this country. In fact, the following section outlines the essential role that politics plays in every facet of policymaking, and this includes criminal justice policy.

THE ROLE OF POLITICS IN THE ADMINISTRATION OF JUSTICE

Most people have an idea of what *politics* means, or at least the use of the word conjures up certain images in the minds of virtually everyone. From the world of political science, Robert A. Dahl (1991, p. 1) has said that politics is “an unavoidable fact of human existence. Everyone is involved in some fashion at some time and in some kind of political system.” He added that a political system is “any persistent pattern of human relationships that involves, to a significant extent, control, influence, power, or authority” (Dahl, 1991, p. 4). Another political scientist gave politics a shorthand definition: Politics essentially is “who gets the cookies” (Sego, 1978).

Currently, a variety of definitions are available for the word *politics*. Some authors see politics as a struggle within society to see who gets certain benefits and who is excluded from those benefits. They also include the dimensions of power and influence in their definition (Bardes, Shelley & Schmidt, 2011).

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Other authors pose a related definition that politics is about resolving conflicts in a society and about who should receive different kinds of benefits (Sidlow & Henschen, 2008). Finally, another group of political scientists views politics as the way we decide who will govern and the types of policies resulting from that governance (Magleby, Light & Nemacheck, 2011).

In a democracy such as the United States, politics is all about decision making by the public, typically through their elected representatives. Therefore, to fully understand the critical role that politics plays in our form of government, and eventually the connection to the criminal justice system, it is best to think of a series of concentric circles illustrated in Figure 1.1 (see Levine, Musheno & Palumbo, 1986).

In the outermost circle is the **social system** of the United States. We could say that this circle represents all that we are as a nation. Moving inward, the next circle represents the nation's **political system**. This system is composed of all of the various forms and types of government at all levels. The political system includes mayors and town or city councils; county executives of many types and county courts or commissions; governors and state legislatures; and finally, the president of the United States and the U.S. Congress. Most of these groups and individuals are elected, and ultimately they answer to the electorate.

The next circle as we move inward is the nation's **legal system**. Within this domain legislative bodies are once again represented, along with courts and

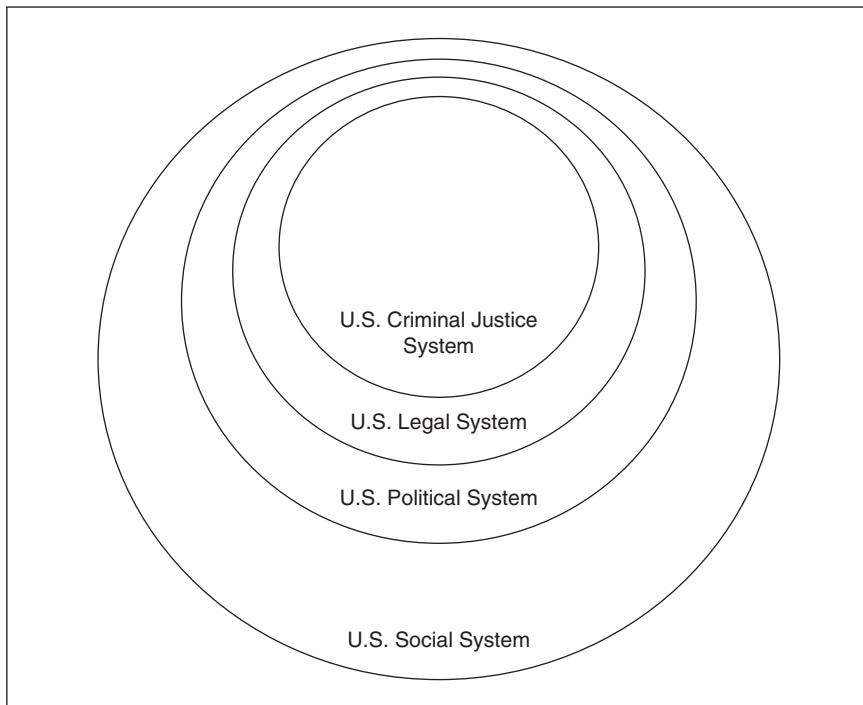


Figure 1.1 The U.S. Criminal Justice System as It Relates to Other U.S. Systems

other adjudicative forums. The legal system includes both the lawmakers and the law deciders.

The innermost circle is the **criminal justice system**. Traditionally, it is described as having three principal components: police, courts, and corrections. Law enforcement agencies operate at local (city and county), state, and federal levels. In 2013 there were 15,388 municipal police departments, sheriff's offices or state law enforcement agencies, and altogether they employed 724,690 full-time sworn officers (Burch, 2016, p. 9). There were an additional 120,000 full-time sworn federal personnel in 2008, the year for which most recent data were available (Reaves, 2012). The court system in reality is fifty-one court systems, those of the federal government and the states (Mays & Fidelie, 2017). Further, many jurisdictions also operate separate city and county courts. Finally, correctional agencies and organizations also operate at all three levels of government. Between 3,000 and 4,000 jails and other detention facilities represent local institutional corrections, with 1,719 state and 117 federal prisons rounding out the picture (Stephan, 2008; U.S. Government Accountability Office, 2012). There are also thousands of community-based correctional programs, including probation and parole agencies, group homes, and reintegration centers or halfway houses that provide support for prisoners returning to the community.

This means that the criminal justice system in the United States is part of the legal system. The legal system is part of the political system, and the political system is part of the larger social system of the nation (see Calvi & Coleman, 2008). Therefore, the illustration of the concentric circles demonstrates the connection between politics and the policymaking process and operations of the criminal justice system. Historically, most criminal justice activities were seen as local concerns, and they were influenced primarily by local politics. In the past four decades, state and federal governments have become increasingly involved in justice issues and systems. In the following chapters, we explore some of the implications of this trend and the reasons for these changes.

SOURCES OF LAW

In the United States, there are numerous sources of law, and fundamentally each source and type of law is an expression of policy. Although you have studied most of the sources and types of law in other courses, we briefly review these in this section to set the stage for the discussions that follow.

At the highest level in this country is **constitutional law**. We have the Constitution of the United States of America, and each of the fifty states has its own unique constitution. Article VI, Clause 2 of the U.S. Constitution declares that the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.” This means that every statute, executive action, and court decision at every level must square with the dictates of the Constitution.

The **Bill of Rights**, the first ten amendments to the Constitution, is of particular importance. The Fourth, Fifth, Sixth, and Eighth Amendments define

many of the protections specifically related to the criminal justice process and spell out the rights that citizens have. The protections provided by state constitutions often mirror the U.S. Constitution, and some states provide for even more extensive rights.

A second source of law in this country is **common law**. We inherited the common law traditions from England, and forty-nine of the fifty states (Louisiana is the exception since it operates under a code law, or Napoleonic Code, tradition), as well as the federal government, have legal systems that are influenced by common law. In England, the common law was unwritten, judge-made law based on local norms and customs. As the common law system of jurisprudence matured, court decisions were based on the decisions that had gone before, and the notion of precedent (or *stare decisis*) became a strong value in common law countries such as the United States.

It is important to remember that the common law is not static; it changes over time. For example, if college students decide as a rite of spring to run naked on the campus, they might be arrested and charged with common law lewdness even though there was no specific law prohibiting running naked. In practice, today most common law offenses have been incorporated into state and federal statutes.

Statutory law is what most people envision when they think of the concept of law. Legislatures enact criminal and civil statutes, as well as substantive and procedural statutes. Statutes are created by local, state, and federal lawmaking bodies. City councils and county commissions, state legislatures, and the U.S. Congress develop statutory laws as a series of written codes that are systematically compiled and published in regularly updated volumes. Most university and public libraries have copies of state codes, as well as the criminal and civil codes of the federal government. If you are not familiar with these volumes, now is a good time to take a trip to the library to thumb through them.

Case law, as a source of law, is related to both constitutional law and statutory law. Case law results from the decisions of state and federal appellate courts. In most instances, when these courts decide cases, the judges or justices issue written opinions that are published in volumes, which often are called “reports” or “reporters.” Although your college or university may not have a law school, your library still might have copies of some of the regional or federal reporting series, or you can find key cases through commercial legal services such as LEXIS/NEXIS® or Web sites such as findlaw.com.

Appellate courts are referred to as “collegial courts” because cases are decided by groups of judges rather than by a single judge as in the initial trials. When appellate judges hear cases, they must decide what the Constitution provides, what the relevant statutes say, and what all of this means. Therefore, case law clearly illustrates the notion of judicial interpretation and, to a very large extent, demonstrates the policymaking powers of judges. However, it is essential to emphasize that case law will apply only to the level of government for which the particular court has jurisdiction. This means that cases decided by a state court of last resort (e.g., a state’s supreme court) are binding only on the courts and citizens of that

particular state. By extension, cases decided by the U.S. Supreme Court apply to all federal courts, all state courts, and all U.S. citizens (and even non-citizens).

A final source of law and a clear source of policy in the United States is **administrative law**, sometimes called **regulatory law**. State administrative or regulatory agencies can be the source for some of these laws, but the most visible sources are the federal regulatory agencies. Most of these agencies are part of the “alphabet soup” of the federal government, and they include the Federal Communications Commission (FCC), the Federal Aviation Administration (FAA), the Interstate Commerce Commission (ICC), the Securities and Exchange Commission (SEC), the Food and Drug Administration (FDA), the Occupational Safety and Health Administration (OSHA), the Environmental Protection Agency (EPA), and many others. Altogether, these agencies have rulemaking powers that border on law creation. Bureaucrats working for these agencies can propose regulations that apply to individuals, businesses, and organizations and publish these proposed regulations in the *Federal Register*. After an appropriate period of publication, review, and comment, these regulations become regulatory laws unless challenged in court and overturned by a judge. Most people are not aware of the sheer volume of rules and regulations that are enacted each year by these unelected bureaucrats; Crews (2012, p. 2) noted that in 2011 alone, 3,807 final rules were added to the *Federal Register*, which increased the size of the *Register* to 81,247 pages. On December 31, 2016 the *Federal Register* was up to 95,894 pages (Crews, 2017).

It is essential for us to fully understand these sources of law and the roles they play in law and policymaking in our society. In the following section, we examine in greater detail how governmental processes create laws and otherwise define the operations of the criminal justice system.

PUBLIC POLICY AND THE POLICYMAKING PROCESS

Unlike the word *politics*, for which definitions abound, definitions for *policy* are a little more elusive. At its core, policy is a course of action or a direction established by one of the three branches of government—executive, legislative, or judicial—or by the permanent bureaucracy housed in administrative agencies. The *Bouvier Law Dictionary* defines *policy* as “The sum purpose that a legal rule or institution is intended to achieve . . . It is the purpose for which law is created or enforced” (Sheppard, 2012, p. 2076).

Oftentimes the policymaking process is depicted as a flowchart with neat paths moving from one decision point to the next. In reality, given that political and criminal justice agencies are human institutions, the process can best be described as fluid and ever-changing.

In a recent book on the public policy process Gerston (2015, pp. 7–14) says that public policymaking involves the following components:

- (1) policy issues—These include both substantive issues that represent major concerns by the public, and symbolic issues that call for quick fixes; in terms of

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criminal justice, substantive issues are represented by concerns such as homeland security, the death penalty, and shootings of citizens by the police; by contrast, symbolic issues may involve corruption by public officials that while concerning to citizens do not threaten to alter the political structure.

(2) actors—A variety of actors have an impact on criminal justice policymaking and these include high-ranking law enforcement officials, correctional administrators, and (as we have already mentioned) judges at various levels throughout the United States; typically frontline criminal justice personnel would not be considered to be in a policymaking role, but some could argue that in their day-to-day interactions with the public, police officers and assistant prosecuting attorneys become *de facto* policymakers.

(3) resources—This category can be divided into two components: first, there is the legislative allocation of resources necessary for all justice agencies to carry out their assigned tasks; second, there is the distribution of resources within agencies (what we might think of as budget line items) that determines what actual agency priorities are.

(4) public institutions—These are represented by the three major branches of government—legislative, executive, and judicial—at the local, state, and national levels; however, also included in this category are members of the permanent bureaucracy (cabinet departments and other executive agencies and their staffs), state and federal regulatory agencies, as well as public interest groups.

Taking all of these components into consideration we see that some issues are raised by the public (shootings by police officers, for example) and some are raised by politicians and other public figures. When there are calls for action, legislative and executive agencies typically respond by formulating plans (policies) to address public concerns. In this process there will be discussions of the resources necessary to implement the plan or plans that have been proposed. Finally, consideration should be given to evaluating the policy to determine its effectiveness or the desirability for policy modification (unfortunately, this step is not always done in public agencies).

Again, it is important to emphasize that the policymaking process for criminal justice agencies is not linear and it does not always proceed at a predictable pace or direction. Each step is subject to interruption and redirection as new issues are raised or as new problems are identified or redefined.

As this chapter demonstrates, policies arise from a number of governmental entities. These policies are developed through the political process, and their implementation and enforcement set criminal justice agencies on certain courses of action. In reading through this text (particularly Chapters 4–15), keep in mind the policy development, implementation, and enforcement processes. Ask yourself the following questions as you read each chapter:

1. What is the primary policy that is designed to address this problem?
2. When was the policy developed?
3. Who were the major players who favored or opposed the policy?
4. Has the policy been implemented as it was envisioned?

5. Has the policy achieved the desired effect(s)?
6. Have there been modifications to the policy?
7. Is the policy ineffective, and therefore in need of termination? Engaging in this exercise will help you make better sense of the sometimes chaotic world of criminal justice policies and processes.

POLITICS AND LEGISLATIVE PROCESSES AND FUNCTIONS

While legislatures operate outside of the domain normally associated with the criminal justice system, much of what legislative bodies do has an impact on day-to-day criminal justice operations. For example, legislatures enact both substantive and procedural laws. The laws created by legislatures give the criminal justice system and its personnel more procedural rules to follow and laws to enforce. As previously mentioned, legislatures enact civil laws and criminal laws. Within the category of criminal laws, offenses are designated as either felonies or misdemeanors. Legislative bodies can even make further distinctions by establishing different levels of felonies (first-, second-, and third-degree felonies, for example), and they can categorize misdemeanors by degrees or as petty misdemeanors or simply as misdemeanors.

Legislatures also are responsible for creating many types of courts, including new specialized courts such as gun courts, drug courts, and mental health courts (Mays & Fidelie, 2017). The exceptions to this statement, of course, are the so-called Article III courts of the United States. These courts are broadly described in Article III of the U.S. Constitution, and they provide the federal judiciary with some degree of independence from the other two branches of government.

Even in this realm, however, Congress can establish new federal court districts and can create new federal circuit courts of appeals.¹ Additionally, state legislatures and the U.S. Congress can modify the jurisdictions of courts from time to time. For example, at the state level, legislatures have removed some of the most serious offenses, such as murder, from the jurisdiction of the juvenile courts and have placed the jurisdiction for these cases in adult courts (Mays & Ruddell, 2012). In a few states, juvenile courts and adult courts have concurrent jurisdiction over certain offenses, which means that prosecutors can file charges in either juvenile or adult courts. Less serious crimes, such as traffic law violations, also may be removed from juvenile courts and placed in the adult courts that hear similar cases.

Finally, legislative bodies appropriate the funds that pay for the salaries, equipment, training, and other costs associated with operating criminal justice agencies. This is a major expenditure for most levels of government in the United States. For example, the Bureau of Justice Statistics reported that about \$260 billion was spent in the United States on justice system expenditures in 2010, and this was up from \$228 billion in 2007 (Kyckelhahn, 2011, 2014). It is interesting that in 2010 almost 2.5 million people worked in all facets of the criminal justice system in the United States. The majority of justice system employees

work for local (city and county) governments and most of them provide police protection. About one-third of the justice system personnel work for state governments and nearly 60 percent of them are employed in corrections. The remainder (11.6 percent) work for the federal government. Overall, nearly three-fourths of the justice system employees in the United States are in law enforcement-related duties (Kyckelhahn, 2014). All of these numbers indicate something of the magnitude of justice system expenditures in the United States, and legislative bodies are obligated to provide the funding necessary to meet the operational needs of police, court, and correctional agencies.

This section demonstrates that the U.S. legislatures at both the state and federal levels play a major role in defining criminal justice policy. Legislative bodies establish laws, as well as create regulatory agencies that exercise oversight of certain industries, such as transportation, aviation, and environmental protection, on behalf of the legislature (Calvi & Coleman, 2008). In addition, the legislative branch holds the purse strings for all aspects of the criminal justice system in the United States. The allocation of funding clearly is one way legislatures can define and redefine priorities and policies.

CRIMINAL JUSTICE POLICYMAKING

It is important to consider the connection between public policy and the political process. Hojnacki (2000, p. 6) says there are four characteristics of government activity that define public policy:

1. Only governmental entities and actors or agents of government can “make and implement public policy.”
2. Policies are deliberate acts “designed to achieve some predetermined goals and objectives.”
3. Policies involve what is done, not just what is intended (however, as we will see, there still can be a gap between what was intended and what was actually accomplished).
4. Policies should be consistent and predictable in their application and not left to the interpretation of individual governmental agents.

He adds that “[p]ublic policy is the product of the political system” and is “whatever the government chooses to do or not to do” (Hojnacki, 2000, pp. 6, 19).

Previously in this chapter we briefly discussed the public policymaking process; however, Levine, Musheno, and Palumbo (1986, pp. 8–9) list six stages of the policymaking process that are related to criminal justice (or any other public agencies, for that matter) in greater detail:

1. The first stage is *agenda setting*. This is where a problem becomes apparent enough that some governmental action seems warranted.
2. The second stage is *policy formulation*. Alternatives are developed for dealing with the problem, and compromises among the various actors and interests often are worked out.

3. The third stage involves *policy implementation*. Administrative agencies formulate specific programs or plans of action to tackle the problems.
4. *Policy impact* is the fourth stage of the policymaking process. Impact is concerned with the extent to which the policy that has been implemented addresses the initial problem.
5. *Policy evaluation* is the fifth stage in the process. Here there is an analysis of whether, or the extent to which the policy has achieved its goals.
6. The sixth and final stage is *termination*. A policy will be ended if it has not achieved the intended goals and objectives.

We could add feedback as an additional step and that could take us back to one of the previous stages (although not necessarily Stage 1).

To more fully appreciate the policymaking process, let us examine each of the six stages more carefully.² To do this, we take the specific example of driving while intoxicated (DWI) to illustrate what can happen. First, the problem is identified in the agenda-setting stage. This may happen as the result of various things, such as news media accounts of notorious cases. The public may show a growing concern, for instance, if someone has been arrested twenty times for DWI or a family is killed on Christmas Eve by a drunk driver. Some famous person also could be involved in these situations either as a victim or an offender, which Walker (2015) called “celebrated cases.” Additionally, **public interest groups** such as Mothers Against Drunk Driving (MADD) demand governmental action.

The second stage—policy formulation—typically takes place in the legislative arena. This may occur at the national, state, or local levels. However, all three branches of government (legislative, executive, and judicial) may be involved, and often the result is a new law or a modification to an existing law (making penalties for certain crimes more severe, for example). Box 1-1 discusses the importance of funding, budget formulation, and priorities that arise in the legislative process.

The policy-implementation stage can be problematic for a variety of reasons. For example, we must emphasize that laws do not necessarily change human behavior, and again, drunk driving is a good example. New laws and stiffer penalties may or may not reduce drunk driving. Even threatening repeat offenders with prison terms will not stop some people from driving while intoxicated. Furthermore, the agencies charged with implementing the laws (the police, for example) may modify the aims of the legislation to fit their own goals or missions, and resource limitations (such as money, personnel, and/or equipment) may make some laws or policies difficult to implement as originally envisioned.

To illustrate how funding can influence legislation, we return to our example of DWI. In the 1980s and 1990s, many states established blood-alcohol levels of 0.10 (0.10 grams per 210 liters of breath) as the legal benchmark for driving while intoxicated. The federal government, however, tied the granting of billions of dollars in federal highway funding to the stipulation that states must establish a blood alcohol level of 0.08 as the standard for intoxication. Although states could choose to maintain the 0.10 standard, they would suffer significant financial

BOX 1-1**The Money Game**

State legislatures and the U.S. Congress spend a lot of their time considering bills that are proposed by the executive branch of government (the governor or the president), as well as bills that are initiated by legislators themselves. Eventually, for most legislation, the question seems to be: What is this going to cost? As a result, every legislative body in the country has a budget or finance office that will provide some estimate on the price tag for a particular piece of legislation (for example, at the federal level the body that performs this function is the Congressional Budget Office).

The budgetary process involves politics like in every other stage of arriving at legislation. Legislators try to persuade one another that certain bills are worthy of passage and funding. In the process, there can be tradeoffs. In effect, one legislator says to another (or to others), "You vote for my bill, and I'll vote for yours." The result is a budgetary "Christmas tree" with something for everyone. However, this does not ensure that problems are approached in a systematic and comprehensive (or effective) manner. Much of the legislative process addresses matters in a piecemeal fashion, and therein lies some of the problems in dealing with a social issue such as crime. We may end up doing what is popular (most state legislators really like bricks-and-mortar projects such as new prisons) or politically expedient (such as punitive sentencing policies), not necessarily what is "best."

The most appealing pieces of legislation are the most likely to pass and to receive significant funding. In effect, the dollar amounts attached to particular bills say something about where these items fit in the executive or legislative (or both) list of priorities. Again, some legislation is very partisan (associated with one political party or the other), and some is bipartisan (supported by both political parties), but it is all political.

For the most part there is not much publicity about how funding is allocated, but there was a very public debate in 2017 about withholding federal grants going to sanctuary cities. Sanctuary cities limit their cooperation with federal agencies enforcing immigration laws, such as holding an undocumented immigrant for federal authorities. The Trump administration has threatened to withhold funding from cities that do not cooperate with them, and Attorney General Jeff Sessions says that "[t]his administration will not simply give away grant dollars to city governments that proudly violate the rule of law and protect criminal aliens at the expense of public safety" (cited in Jacobs, 2017). Chicago has sued the federal government over the threatened withholding of federal funds and a federal court in November 2017 ruled that the President's executive order that attempted to deny funds to sanctuary cities was unconstitutional.

consequences for not adopting the lower level. As a result, the 0.08 blood alcohol content is now the standard in all fifty states.

Again, the issue of drunk driving can be used to illustrate problems related to policy implementation (see Box 1-2). When we look at the problem of drunk driving, we clearly can see issues related to policy impact. Quite often politicians, members of the general public, and public interest groups such as MADD will ask, "Why don't the laws stop drunk driving?" The answers are as complex as

BOX 1-2**Why Good Ideas Go Bad or Bad Ideas Go Good**

There are many reasons why a particular policy may not be successful. The concept may be flawed from its inception, it may be poorly implemented (or not implemented at all), or the program or policy may suffer from lack of evaluation or follow-through. Of all of these, implementation is the most important factor. Briefly, let us consider the problems associated with poor implementation.

First, legislatures may ask criminal justice agencies to do the impossible. For instance, no law, policy, or program will stop some people from driving while intoxicated. If legislators think that adding fifty more state police or highway patrol officers will significantly reduce the DWI problem, they may be disappointed. Furthermore, there is no guarantee that an increase in the number of officers (without a specific legislative mandate) will result in an increased police presence on the highways. Some of these officers may be diverted to other equally pressing functions within the department.

Second, agencies may not know specifically what the legislative intent is for passing a bill. The legislature may enact a tough seat belt law (after receiving lobbying pressure from the insurance industry), but there may be no indication of whether officers should employ "active" enforcement (looking for motorists who are not wearing seat belts) or "passive" enforcement (merely citing motorists for seat belt violations when they are stopped for other infractions).

Finally, sometimes new laws are passed with no additional resources. New responsibilities may fall into the all-too-familiar "other duties as assigned" category, and as a result, there may be little implementation of the new law given employees' already busy schedules. This can be seen in some jurisdictions where judges regularly impose restitution orders on probationers, with the assumption that probation officers (POs) will be the enforcers. POs simply may ignore this part of the sentence because they are unwilling or unable to be collection agents.

By contrast, some ideas are politically appealing and are implemented very effectively. Nevertheless, that does not mean that such ideas will have the intended policy results. Let us look at a few examples.

First, consider gun control, a topic we examine more fully in Chapter 6. A quick search of one of the legal sites on the Internet reveals that the United States is a nation of gun laws. In fact, when all of the federal, state, and local laws are combined, the total is several thousand. How much impact have these laws had on violence related to firearms in the United States? The answer is probably very little. Several points seem especially relevant here:

- An estimated 310 million non-military firearms are in circulation in the United States. If no other firearms were manufactured or sold from this day forward, the existing stockpile of weapons would last into the twenty-second century.
- Most of the firearms owned in the United States are used very seldom, and nearly all are used legally.
- Most of the illegal use of firearms is by people who may not legally own or possess weapons in the first place.
- Most criminals obtain firearms through "straw purchases" (someone lawfully purchases a weapon for another person who cannot buy one legally; this practice is a violation of federal law), theft of weapons in burglaries, or black market sales.

(Continued)

BOX 1-2**Why Good Ideas Go Bad or Bad Ideas Go Good (*continued*)**

Additional laws and stepped-up enforcement by agencies such as the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) might have some impact on firearms and criminal activity (especially violence), but probably very little.³ In their examination of 172 studies of gun control, for example, Makarios and Pratt (2012) found that gun laws had only a weak effect on violence associated with firearms.

Second, consider get-tough sentencing, such as the three-strikes laws adopted by twenty-eight states and the federal government as of 2016 (Legal Match, 2016). We examine sentencing changes in Chapter 7, but for the moment let us look at the unintended consequences of these politically popular sentencing changes.

When the first “three strikes and you’re out” laws were passed by Washington and California, the assumption by the general public was that the aim was incapacitation of violent offenders. However, quite often these offenders are incarcerated for long periods of time for committing non-violent crimes. If we look at the sentencing records of states such as California, what we see is that persistent nonviolent offenders are receiving lengthy sentences (twenty-five years to life) under the three-strikes provision. This practice has resulted in 6,908 third-strikers imprisoned in California on March 31, 2016 (California Department of Corrections and Rehabilitation, 2016), and over 2,700 of them are imprisoned on non-violent offenses (Vargas-Edmond & Edmond Vargas, 2017). At an average cost of \$70,812 to house a California inmate in 2017 (Legislative Analyst’s Office, 2017), the direct costs of imprisoning these third-strike offenders are over \$490 million annually, and that cost will increase significantly as these prisoners age, as elderly prisoners require more expensive health care.

Therefore, on the one hand, the public may be no safer as a result of greatly enhanced sentences; on the other hand, a situation has been created where the scarce and expensive commodity of prison space has been filled with nonviolent property offenders (Kovandzic, Sloan & Vieraitis, 2004; Mays & Winfree, 2014). There is also the possibility that these very long sentences will result in injustice from the imposition of disproportionately harsh punishments.

On November 6, 2012, some eighteen years after the original legislation was enacted, California voters amended that state’s three-strikes law so that a serious or violent felony was required to be a third strike. In addition, the amended legislation also allows offenders already sentenced as third-strikers, but convicted of a minor offense as their third strike, to be resentenced. While prisoners have the ability to seek resentencing, California’s Supreme Court held that judges could refuse to shorten their sentences (Dolan, 2017). Thus, the public can sometimes play a role in amending criminal justice legislation, although it may take years before the impact of this amended legislation can be assessed, and newly enacted laws are often challenged in the courts.

These areas illustrate some of the difficulties associated with policy implementation. Some good policy ideas are poorly implemented or not implemented at all, and other policies of questionable value are implemented fully but with unintended consequences. In either case, the end result involves some dimension of policy failure.

the problem. Perhaps the best way to respond is through another series of questions. Has the law been fully implemented? Do the police have the resources (or the knowledge) to apprehend a significant proportion of drunk drivers? Are we making correct assumptions about human behavior? For example, does punishment really serve as a deterrent? Are we dealing with a driving problem or a drinking problem (alcoholism)? Asking these questions helps us develop a better appreciation for the difficulty in addressing many social problems.

Evaluation research increasingly has become a key component related to criminal justice policies (see Chapter 3). In fact, many of you taking this course may be required to take a research methods class, and you still are not sure why. Perhaps we can answer that for you now. A variety of answers help explain this question, but for our purposes, one use of research—program evaluation—is especially appropriate.

Evaluation often is mandated when state and federal governments give agencies money to implement a certain program. Evaluation research determines how the funds were used and the degree to which a program could be termed a success. However, it is important to emphasize that success is not the only criterion for program continuation. For example, we might have an anti-DWI program that does not seem to have much impact but continues because it is popular with politicians and the police. Often we find government programs outliving their initial mandate simply because they are politically popular. An illustration of a criminal justice program that continued to exist in the face of negative research findings is correctional boot camps for juveniles and adults. When boot camps began to appear in the early 1980s, a number of states jumped on the bandwagon to create such programs. Within a decade, research had demonstrated little efficacy of boot camps in reducing recidivism (Meade & Steiner, 2010). Nevertheless, they appealed to politicians and members of the general public who saw them as dispensing “real” punishment. Despite the fact that evaluations show little effectiveness, a few boot camps have persisted, but the number of offenders in these programs has substantially declined. In terms of juvenile boot camps, a review of the Census of Juvenile Residential Placement data showed that while there were 3,811 juveniles in these programs in 1997, that number decreased to 249 in the entire nation by 2015 (Sickmund, Sladky, Kang, & Puzzanchera, 2017). This brings us to the issue of program termination. We find with many criminal justice projects that programs may be ended because of, in spite of, or without careful evaluation (see Mears, 2017). As previously noted, some programs continue because they are politically or publicly popular. The Drug Abuse Resistance and Education (DARE) program comes to mind here. A number of evaluations, for example, have shown that this intervention is ineffective in reducing adolescent drug and alcohol use (see Rosenbaum, 2007), yet the U.S. Attorney General was promoting these programs in 2017 (see Chapter 3).

By the same token, effective or successful programs may not flourish because they do not have political support or constituencies that lobby for them. Prison industries programs come to mind as an example. Although prison industries can generate income and provide inmates with valuable work experience, the

public strongly believes that inmates are less deserving of such opportunities than the least deserving members of free society. In addition, some private companies oppose prison industries despite the fact that they provide inmates with jobs and save state governments money. One notable example is an office furniture company that protests that government contracts for furnishings often go to prison industries, and they believe that is unfair competition.

As we have noted, policies are made in a variety of ways. We previously pointed out that the “political” branches of government (the executive and the legislative branches) are explicitly in the business of policymaking. The president and state governors enact policies through cabinet-level officials, and they articulate their policy directions through the budget-making process. For example, during the presidency of Bill Clinton, one of the major national priorities was adding more law enforcement officers to state and local police agencies. The Justice Department created the Office of Community Oriented Policing Services (COPS) to aid in “advancing the practice of community policing in the nation’s state, local, territorial, and tribal law enforcement agencies” (COPS, 2016a). It was originally established to provide federal funding for 100,000 new police officers nationwide. Funding for these officers is one reason for the net increase in the number of U.S. police officers, especially at the local level: An examination of Bureau of Justice Statistics data, for instance, shows that the number of officers increased by over 50 percent between 1987 and 2007 (see Kyckelhahn, 2011), but that number remained stable between 2008 and 2012 (Banks, Hendrix, Hickman & Kyckelhahn, 2016). We return to the topic of community policing in Chapter 4.

Under Republican presidents Nixon, Ford, and Reagan, the federal government initiated and supported a “war on drugs” (actually a series of such “wars”). Money was poured into increased law enforcement efforts and, to a lesser extent, education and treatment programs. Again, these and various other anticrime programs illustrate the role the federal government has played in developing and articulating crime control policy.

Congress aids in the policy process by conducting hearings, passing legislation, and—as previously discussed—providing the funding to implement such programs. However, Congress can on its own initiative develop crime control policy as well. Members of the House of Representatives or the Senate may receive requests from justice agencies in their home states to aid in providing funding or new laws. For example, the ongoing debate over immigration reform has seen state and local law enforcement agencies along the United States–Mexico border lobbying members of Congress for help in “securing the border.” At times, the president and the Congress may be developing legislative proposals that are parallel to one another. In other instances, these two branches of government may create proposals that are in conflict—as occurred between the state of Arizona and the federal government in terms of controlling illegal immigration. This case ended up in the Supreme Court, and in the *Arizona et al. v. the United States* (2012) decision the Court sided with the federal government, although it upheld the ability of law enforcement to check on a person’s immigration status while enforcing other laws.

Although the executive and legislative branches most often are thought of in regard to the creation of policy, it is important to acknowledge once again that the judicial branch certainly has an impact on the policy process, as illustrated in the *Arizona et al. v. the United States* (2012) case. Several other Supreme Court rulings clearly illustrate this point in terms of the operations of justice systems. First, in *Blakely v. Washington* (2004), and in *United States v. Booker* and the companion case of *United States v. Fanfan* (2005), the Supreme Court ruled that the Federal Sentencing Guidelines, developed by the U.S. Sentencing Commission and enacted into law by the U.S. Congress, could not be imposed in a mandatory way on federal judges. Judges could use the guidelines in an advisory fashion, but the specific sentences could not be prescribed for federal judges. Congress could establish broad sentencing parameters, but judges had the ultimate authority to decide what a particular sentence should be.

Second, in the case of *Miller v. Alabama* (2012), the Supreme Court struck down the laws that enabled adult court judges to sentence persons who were not eighteen years of age at the time of their offense to sentences of life imprisonment without the possibility of parole for any offense, and the *Montgomery v. Louisiana* (2016) decision applied that decision to persons already sentenced. The Court had previously eliminated the juvenile death penalty in the *Roper v. Simmons* (2005) decision and made it unconstitutional to impose sentences of life without the possibility of parole for non-homicide offenses in the *Graham v. Florida* (2010) case (see Chapter 14). Third, in *Dorsey v. United States* (2012) and *Hill v. United States* (2012) the Supreme Court allowed more lenient sentences (under a 2010 federal law) for individuals currently convicted of, but not yet sentenced for, drug crimes involving crack cocaine. Without a doubt, these recent cases demonstrate the ability of the courts (and especially the Supreme Court) to have an effect on the policy process.

CONCLUSIONS

The criminal justice system in the United States is intimately linked to the political system. That is both a good news and a bad news situation. It is good news because criminal justice policy should reflect the popular will of the citizens. Criminal justice policy is influenced by political elites, politicians, public interest groups, the general public, business interests, and the news media. In some cases public opinion leads public policy, and in other cases it follows public policy; however, these policies should be openly debated and developed in an atmosphere that allows for public scrutiny and comments. This means that criminal justice policy is linked to the political processes and political agendas of a broad range of groups and individuals. The bad news about this is that sometimes ineffective policies such as the “war on drugs” and the “three strikes and you’re out” laws of the 1980s and 1990s have remained publicly and politically popular, although agency support for punitive practices seems to be waning as governments have become increasingly cash-strapped. However, this does not mean that they will have the impact that was envisioned for them. At best, some of

these policies might turn out to be ineffective. At worst, they might produce an opposite outcome from what originally was envisioned.

As you read the following chapters that address current issues in the criminal justice system, keep in mind the role politics plays in the development of policy. Each of these issues represents a major policy dimension within the criminal justice system, and each illustrates the ways in which politics can influence policies.

KEY TERMS

administrative law	criminal justice system	politics
<i>Arizona et al. v. the United States</i>	<i>Dorsey v. United States</i>	public interest groups
Bill of Rights	<i>Graham v. Florida</i>	regulatory law
<i>Blakely v. Washington</i>	<i>Hill v. United States</i>	<i>Roper v. Simmons</i>
case law	legal system	social system
common law	<i>Miller v. Alabama</i>	statutory law
constitutional law	<i>Montgomery v. Louisiana</i>	<i>United States v. Booker</i>
	political system	<i>United States v. Fanfan</i>

CRITICAL REVIEW QUESTIONS

1. A fellow student in one of your classes makes this statement: “Politics should have no place in the U.S. criminal justice system.” How do you respond and why?
2. What is the relationship between the political system and the criminal justice system in the United States?
3. Figure 1.1 in the chapter shows a set of concentric circles. Look at this illustration again and describe the essential idea that is being conveyed.
4. The fact that criminal justice processes are spread over three levels of government (local, state, and federal) and three branches of government (legislative, executive, and judicial) contributes to some sense of inefficiency. Why do we have a criminal justice system that is arranged in such a fragmented and decentralized way? What would be the “costs” associated with having a more efficient system? (You might want to revisit this question after you finish Chapter 16).
5. In many high school civics classes, students are taught that the legislative branch of government “makes the laws.” Is this an accurate statement? Why or why not?
6. What do we mean when we talk about public interest groups? Give examples of a public interest group and the issue or issues with which it is concerned.
7. What do we mean by the common law and how does it compare with modern statutory law? You might want to make lists of the features of each.
8. Is case law really “law”? Explain.
9. Are “politics” and “policy” two distinct notions or simply parts of something bigger? Explain your answer.
10. Make a list of the reasons why a new, tougher law aimed at curbing drunk driving might not be effective.

WRITING ASSIGNMENTS

1. There are a variety of definitions of the word *politics* both in the chapter and elsewhere. In 100 words or less provide a definition of this word as if you were trying to describe it to someone totally unfamiliar with politics.
2. Go to the Bureau of Justice Statistics homepage (bjs.ojp.usdoj.gov) and find the latest statistics on justice system employment and expenditures. In three short paragraphs explain what has been happening to employment and expenditures in (1) policing, (2) corrections, and (3) judicial and legal services.
3. Define the word *policy*. Explain the relationship between policy and the political processes in the United States.
4. List and explain the various sources of law in the United States.
5. In a one-page essay respond to this statement: “The criminal justice system in the United States is inherently designed to be inefficient.”

RECOMMENDED READINGS

Natasha A. Frost, Joshua Freilich, and Todd R. Clear, editors (2010). *Contemporary Issues in Criminal Justice Policy*. Belmont, CA: Wadsworth/Cengage. This book has twenty-four readings prepared for and presented at a meeting of the American Society of Criminology. Each reading also has a response essay. The papers address many of the issues contained in the book you are reading, and they reflect some of the best thinking and scholarship on many of the same issues we address.

Karim Ismaili, editor (2017). *U.S. Criminal Justice Policy*, 2nd ed. Burlington, MA: Jones & Bartlett. This reader begins with a discussion of public policy and the policymaking process in the United States. The fifteen readings deal with topics such as race and urban policing, procedural fairness in the courts, prisoner reentry, juvenile justice policy, homeland security, technology and crime, and human trafficking. This is a useful addition to the study and discussion of policy within the field of criminal justice.

Nancy E. Marion and Willard M. Oliver (2006). *The Public Policy of Criminal Justice*. Upper Saddle River, NJ: Prentice Hall. Marion and Oliver take a political science/public policy approach to examining criminal justice. In Chapter 3, they analyze the public policy process in depth, and in Chapters 4–7, they look at what each branch of government brings to the development of criminal justice policy. Three chapters in this book are particularly noteworthy: Chapter 8, which considers the influence of public opinion and the media; Chapter 9 on interest groups; and Chapter 14, which develops a case study of criminal justice policy.

CHAPTER 2



Crime Control versus Due Process

INTRODUCTION

A number of different models have been used to explain criminal justice operations in the United States. Two of the models that are frequently encountered in introductory criminal justice courses were proposed by **Herbert Packer**. In 1968, Packer published an insightful book, *The Limits of the Criminal Sanction*, which described the two models—crime control and due process. They are the focus of this chapter and should provide you with a clear way of making sense of criminal justice policies as you read the remainder of this book.

One of the first points to emphasize about Packer's models is that they are prototypes or ideal types. In other words, in the real world you might not find them in their purest form. They are abstractions of reality and not necessarily reality itself, just as a model train is an oversimplified representation of a real train.

Second, Packer himself was quick to emphasize that the two models do not represent the “is” versus the “ought to be,” or the “real” versus the “ideal.” They are not intended to be representations of the way a perfect criminal justice system would operate. They simply provide us with *two different viewpoints* for interpreting why the system operates the way it does and, in turn, the way criminal cases are processed.

These two views sometimes are characterized as “conservative” versus “liberal,” and it is these descriptions that provide a simple and usually correct labeling system (see Walker, 2015; Wylie-Marques, 2002). However, we cannot merely assume that the crime control model is conservative without question and that the due process model is liberal. That would present an oversimplification or a generalization that might be hard to defend. In reality, many criminal justice policies in the United States contain both conservative and liberal elements. They frequently serve multiple and, unfortunately, competing purposes (Tonry, 2017b). With these caveats in mind, let us turn to examining the features of Packer’s two models.

THE CRIME CONTROL MODEL

At the most basic level, the crime control model operates from a viewpoint that protecting the welfare of the majority of citizens is more important than the rights or liberties of any single individual. Public safety becomes a principal concern for advocates of the crime control model, and fundamentally they believe that if we are not safe as a society, then individuals are not safe either.

This means that the **crime control model** supports the suppression of crime in society. The police should be able to prevent some crimes; however, in the absence of crime prevention, they will respond in a reactive way to investigate crimes and to apprehend suspects. Such actions by the police and the vigorous prosecution of accused offenders are thought to promote the law's deterrent effect. In a sense, the efficiency of the crime control model should demonstrate to everyone the swift, sure, and accurate operation of the legal system and the punishment of offenders.

In terms of the criminal justice system, the crime control model relies heavily on the operations of the police and prosecutors. Law enforcement agencies often are characterized as the “thin blue line” that stands between civilization and anarchy. To the extent that this is true, the police carry the bulk of crime control responsibilities. Crime control, then, is predicated on the fact-finding and criminal investigative functions of law enforcement agencies and prosecutors at various levels in the United States. Adherents of the crime control model trust the police and prosecuting attorneys to do an adequate job of gathering evidence and screening for legal sufficiency in order that there can be an arrest and eventual conviction of people who violate the law.

One of the ironies of focusing on the police in the crime control model centers on the view that a significant amount of police time and a number of resources are devoted to crime fighting. As most students of criminal justice quickly learn in their first year of course work, the vast majority of the typical police officer's time is concentrated on order maintenance and public service. This leaves crime control as a relatively minor—though symbolically significant—part of the job.

The operations of the crime control model are built around notions such as efficiency, coupled with swift and final resolution of cases. Packer (1968, p. 159) stated, “There must then be a premium on speed and finality. Speed, in turn, depends on informality and on uniformity; finality depends on minimizing the occasions for challenge.” This “emphasis on speed favors plea bargaining, prosecutorial discretion, and mandatory sentencing in which occasions for legal challenge are minimized” (Wylie-Marques, 2002, p. 377). Therefore, similar types of cases are lumped together and are treated similarly. The result is that the crime control model operates much like an assembly line with “routine and stereotyped procedures” (Packer, 1968, p. 159). The notion of **assembly-line justice** is based on this characterization.

Assembly-line justice is a label applied to the rapid and routine handling of cases, particularly by the lower-level criminal courts in the United States. Mays and Fidelie (2017, p. 284) noted that “While these courts are sometimes called

courts of inferior jurisdiction, they are not inferior relative to the size of the caseload they carry. In fact, these lower level tribunals are the workhorses of most state court systems since they process the vast majority of civil and criminal cases filed.”

However, rapid and routine processing of cases is not only confined to the inferior courts but also apparent in most criminal justice operations. Welch (2002, p. 77) said that within the crime control model, assembly-line justice “stresses efficiency, reliability, and productivity, as measured by increases in arrests, convictions, and incarcerations.” In other words, like a factory assembly line, the justice assembly line aims at handling the maximum number of cases, in the shortest time possible, with the lowest expenditure of resources and, hopefully, a minimum number of mistakes.

One element that must be factored into assembly-line justice is the operation of the **courtroom work group** (Metcalf, 2016). The courtroom work group is composed of a changing cast of characters, but at its core are judges, prosecutors, and defense attorneys. This group pursues a number of organizational goals, among which are fostering cooperation and expediting case processing (see Neubauer & Fradella, 2017). The foundation of this approach is a shared understanding of the most appropriate sanction (“the going rate”) for a given offense within that court (Mays & Fidelie, 2017). This means that it is in the best interest of all members of the courtroom work group (although not necessarily the defendant) to limit case processing time as long as the proposed sanction is within the range of those normally imposed. Thus, through its interactions, the courtroom work group actually may facilitate the crime control model and promote assembly-line justice.

The final feature often associated with the crime control model is what Packer (1968, p. 160) considered a “**presumption of guilt**,” sometimes called **factual guilt**. In the criminal justice system, we are accustomed to hearing that a person is innocent unless and until the state can prove him or her guilty beyond a reasonable doubt. Nevertheless, the presumption of guilt assumes that the vast majority of defendants *are* guilty. If a person is innocent or if there is a problem with the case, it will be kicked off the assembly line by the agents responsible for quality control. Therefore, the presumption of guilt is a “prediction of outcome,” meaning that it is likely the person is guilty and will plead guilty or be found guilty. The farther the case progresses along the assembly line, the higher the level of guilt presumed by members of the news media, most agents of the criminal justice system, and even some potential jurors.

One way to understand factual guilt or the presumption of guilt is to examine a hypothetical case. Assume the police receive a burglar alarm call to an elementary school building late at night. A search of the building turns up a suspect hiding under a desk in one of the classrooms. It is safe to assume that a high level of factual guilt—that is, a presumption of guilt—attaches to such a person. The police believe (they would say they really “know”) that he is guilty. The prosecutor handling the case believes that the person is guilty, and if a jury hears the facts, they may agree that the suspect (now a defendant) is guilty as well. However, it is essential to emphasize here that even the person caught

in flagrante delicto (in other words, red-handed) has the right to insist on a trial and to make the state *prove* him or her guilty. As we will see later in this chapter, the practical effect of the presumption of guilt is to keep the assembly line moving through the use of plea bargaining.

As you read through the remainder of this book, ask yourself if the topics being presented and the policies being examined can be classified as crime control. (As a note of warning, some issues are much more easily classified than others.) Do they promote efficiency within the criminal justice system, along with the processing of offenders in a rapid and routine manner? Policies that on their surface are aimed at increased public safety are, by definition, crime control-oriented.

THE DUE PROCESS MODEL

Sheppard (2012, p. 895) says that due process of law involves the “Constitutional rights in life, liberty, and property interests that cannot be burdened without due cause or appropriate procedures. Due process of law is a fundamental aspect of the law, including not only the process by which law must be created and applied but also the scope within which certain laws must be made and enforced and beyond which laws ought to leave individuals to their own liberty.”

The concept of due process is found in the Fifth and Fourteenth Amendments to the U.S. Constitution. The Fifth Amendment says, in part, that “No person shall be . . . deprived of life, liberty, or property without due process of law,” and the Fourteenth Amendment specifies further that “No State . . . shall deprive any person of life, liberty, or property, without due process of law.” While the Constitution does not define *due process*, the Supreme Court consistently has emphasized that *due process* means “that which is fundamentally fair.”

Substantive due process provides that laws not only be fair but also promote some legitimate governmental purpose or function. By contrast, **procedural due process** defines the ways in which the government must go about applying laws in a just and evenhanded manner (see Kelly, 2002). Procedural due process involves rules governing admissions and confessions, and the proper admission of physical evidence. It also includes questions about the right to counsel, speedy trials, public trials, and trials by a jury of peers.

David Rottman (2011, p. 96), a staff member of the National Center for State Courts, says that in going about their business, courts must be concerned with procedural fairness for obvious reasons. Procedural fairness means that “The courts must by their actions generate a belief that court decisions should be adhered to even if the case outcome is not favorable. In short, they must be viewed by individual defendants as possessing legitimacy if they are to administer undesirable outcomes and still be obeyed.” Taken together, these two elements of due process mean that the federal, state, and local governments can, and often do, intrude into the lives of citizens in various ways, but that they must do so in a way that is fair.

The **due process model** is based on the protection of the individual accused of crime, as outlined in the Constitution of the United States, along with state constitutions and federal and state statutes. Due process is the idea that in enacting laws the government must pursue legitimate purposes (substantive due process) and it must do so in a fundamentally fair way (procedural due process).

This model is much more concerned with formal fact-finding procedures than is the crime control model. This fact finding typically occurs in the give-and-take of the criminal trial. It rejects (or at least minimizes) the goals of speed and efficiency in disposing a case and instead stresses getting at the truth. Efficiency and finality take a back seat to trying to eliminate errors. Packer (1968, p. 165) noted, “The aim of the process is at least as much to protect the factually innocent as it is to convict the factually guilty.” The sometimes-quoted phrase “It is better for ten guilty people to go free than for one innocent person to go to prison” illustrates some of the values associated with the due process model.

In terms of the two models we are considering here, Wylie-Marques (2002) said that the due process model is the opposite of the crime control model. However, Tonry (2017b, p. 8) disagrees and says that “crime prevention and due process are, of course, not opposites; both are essential in a civilized society.” To further muddy the waters Packer (1968) emphasized that the two models are not necessarily opposite, but simply different ways of viewing criminal justice processes. Whereas the roles of the police and prosecutors tend to dominate discussions of the crime control model, the courts—and especially the appellate courts—take center stage in the due process model.

Finally, while the crime control model operates on a presumption of guilt (or factual guilt), the due process model is based on the notion of **legal guilt**. Legal guilt (or the **presumption of innocence**) tells criminal justice officials how they are to proceed in processing a case, and it is not “a prediction of outcome” (Packer, 1968, p. 161). Saying that defendants are presumed innocent does not mean they likely are innocent or that it is possible they will be found innocent. It means that guilt is not to be assumed. Therefore, guilt can exist only when the state has proven the defendant guilty beyond a reasonable doubt and the jury has returned a verdict of guilty.

The due process model frequently is characterized as being supported by liberals. However, a more accurate characterization is that it is supported by civil libertarians, and not just those who belong to civil liberties groups. It stresses the fundamental fairness and procedural regularity with which the government should behave toward those individuals accused of criminal activity. In the end, due process protects not only those people charged with criminal activity, but also all of us.

THE PRACTICAL DIFFERENCES BETWEEN THE MODELS

Now we need to ask the question: So what? In other words, what difference does it make which model of the criminal process we prefer or which one may be in operation at any one time? Answering the “so what” question often is not that easy,

and in the end many leave this discussion largely unsatisfied. Nevertheless, we should examine the development of criminal justice policy in the United States since the 1960s, particularly in light of Packer's two models.

Many of you reading this chapter will immediately identify at a fundamental level with some or all of the tenets of either the crime control model or the due process model. This says something about your perspective or worldview. As you will see, you are not alone in holding a particular perspective. Quite often politicians, policymakers, and members of the general public will share your perspective. Yet, you should keep in mind that history has repeatedly demonstrated that what is popular is not always right, nor is what is right always popular.

For example, conservatives often stress the idea that people commit crimes as a result of rational choices, or their own free will. As a result, the response is that offenders should be held fully accountable for their acts, and they should be punished accordingly. By contrast, liberals may take the position that everyone in society is subject to a variety of influences, and none of us is totally a free moral agent. Therefore, we need to take into consideration the social, economic, psychological, and biological factors that influence people to engage in a variety of behaviors (including crime). These perspectives help people make sense of why individuals behave in certain ways—for example, why people commit crimes or why some people commit certain crimes. We often call these various perspectives *theories*, although that is sometimes a word from which students recoil. For our purposes in this text, it is important to remember that criminal justice policies in the United States frequently are enacted with one of these two theoretical viewpoints in mind.

Crime Control Model Policies

As mentioned previously, the crime control model is assumed by most people to represent a conservative orientation toward controlling law-violating behavior (Walker, 2015; Wylie-Marques, 2002), and the due process model illustrates a liberal (or civil liberties) view. If this is correct, what has been the dominant philosophy guiding criminal justice policy in the United States in recent years?

It is safe to say that since the late 1960s, the United States has been in a protracted period of enacting crime control policies (Tonry, 2017b). Richard Nixon used crime as a major political issue in his 1968 presidential campaign. Once elected, Nixon began his presidency promising to get tough on crime and to appoint federal judges who were conservative or who held a nonactivist orientation in their judicial decision making. This change was significant because before the 1960s, crime was largely considered a local matter and federal politicians had little interest in "street crime." Beckett and Sasson (2003) contend that the only way the federal government could get involved in fighting street crime was to increase drug enforcement.

One of the first pieces of legislation that passed under Richard Nixon's presidency was the Omnibus Crime Control and Safe Streets Act of 1968.⁴ This law provided substantial federal funding for state and local law enforcement agencies so they could better train and equip their officers through the Law Enforcement

Assistance Administration (Mabrey, 2005). This legislation also created the Law Enforcement Education Program (LEEP) that would pay part of the costs for police officers to attend college. As a result of the LEEP program, the number of colleges offering law enforcement (and later criminal justice) degrees—from the associate’s degree through the doctorate—increased from 184 to 1,070 within ten years (see Rydberg & Terrill, 2010). Some people have compared the impact of the LEEP program in the 1960s and 1970s to the GI Bill after World War II in spurring college attendance.

In case it seems that the crime control orientation has been linked only with Republican presidents (although this is largely true), during the presidency of Bill Clinton, two clear examples of crime control legislation were signed into law (Mabrey, 2005). In 1994, President Clinton signed the Violent Crime Control and Law Enforcement Act, and in 1996, he signed the Antiterrorism and Effective Death Penalty Act (AEDPA). These two laws expanded the death penalty in federal cases, as well as limited appeals by prison inmates. Furthermore, during Clinton’s eight-year presidency, the nation’s prison population soared by 673,000 inmates or by about 50 percent (Center on Juvenile and Criminal Justice, 2001), including a 56 percent increase in federal prisoners (Gramlich, 2017). Alexander (2016) says that “when Clinton left office in 2001, the United States had the highest rate of incarceration in the world” and that increase was largely due to imprisoning more African Americans.

Crime control policies have been manifested in other ways as well. For example, Richard Nixon’s “war on crime” of the 1960s and 1970s eventually gave way to a “war on drugs” waged by both Presidents Reagan and George H. W. Bush in the 1980s. Increasing amounts of federal money were poured into the interdiction and apprehension efforts of law enforcement agencies, especially those at the federal level. The Drug Enforcement Administration became the front-line agency in America’s “war on drugs,” and while some monies were earmarked for drug education and treatment, the lion’s share of funding went into law enforcement and suppression efforts.

The 1970s and 1980s also saw changes in state and federal sentencing policies. At this time, there was much debate over sentencing purposes in the United States. Both liberals and conservatives were dissatisfied with the system of **indeterminate sentences** that had been in place for nearly 100 years. This system, along with discretionary parole (as created by legislative bodies), gave state parole boards and correctional officials considerable discretion in how much time an offender would serve in prison (Tonry, 2017c). The work of people such as David Fogel (1975) and others provided the philosophical justification for the development of **determinate sentences**, and a number of states (led by Maine in 1976) moved to restrict or eliminate discretionary parole (see Tonry, 2017c). By eliminating parole, it was said to add **truth in sentencing**, so that offenders would serve most of their sentences, less any “good time” credits earned (Sabol, Rosich, Mallik-Kane, Kirk & Dubin, 2002; Steiner & Cain, 2017). The result was a movement toward not only determinate sentences but also more predictable sentencing through the use of **sentencing guidelines**. Sentencing guidelines provide

a prescriptive plan by which judges determine the appropriate sentence within a two-dimensional matrix, given the offender's present offense and criminal history. The guidelines typically are developed by a government commission and then enacted into law by the appropriate legislative body. The guidelines may be advisory or mandatory in which case they become binding on all judges within the particular jurisdiction (such as a state).

In the end, the results were more people incarcerated with longer average sentences for offenders, a goal that was supported by crime control model advocates (see DiIulio, 2001; Wright, 2004). For example, from year-end 2000 until year-end 2015, the number of people held in federal and state prisons increased from 1,394,200 to 1,526,800 (Carson & Anderson, 2016). This growth in inmate population occurred at the same time that the rates for most crimes were decreasing. Crime control advocates argued that the increase in incarceration resulted in the decrease in crime rates. Others have reported that imprisonment has only a minor impact on crime, and that the two trends sometimes operate independently of one another. Scholars such as Austin and Irwin (2011) argue that there are other explanations for the increase in imprisonment rates, such as changes in public opinion, partisan politics, political fragmentation, and the rise of the prison-industrial complex in the United States (see also Pfaff, 2017).

Although we will consider juvenile crime more fully in Chapter 14, it is important to note at this point that the crime control model also has influenced the operation of the juvenile justice system in the United States. Beginning in the early 1980s, several states instituted policy changes to get tough with what was perceived as a substantial juvenile crime wave (Bernard & Kurlychek, 2010). Among the measures that were enacted were lowering the age at which youths could be tried as adults from sixteen in many states to fifteen or even fourteen years. Also, the number of offenses that qualified for transfer was expanded (Heilbrun, DeMatteo, King & Filone, 2017). During this era many states legislatively excluded certain young offenders from juvenile courts and automatically transferred them to adult court jurisdiction. For example, many states now exclude juveniles who have committed offenses that call for life in prison, including homicides and other serious personal offenses such as rape, armed robbery, or kidnapping (Gardner, 2009).

In addition to making it easier to transfer teenagers to adult courts, state juvenile codes were also amended to transform juvenile sentences from indeterminate to determinate, and a small number of states implemented sentencing guidelines for juveniles that closely paralleled those of their adult counterparts (Mears, 2002). Juvenile court hearings became increasingly formal, and while many youths still were diverted from the formal system of adjudication, those who remained faced harsher penalties (Mays & Ruddell, 2012). Altogether these changes mark a trend similar to the decreasing emphasis on rehabilitation for adult offenders.

Illustrations of get-tough, crime control-oriented penalties imposed on juveniles involve adult prison sentences and lengthy sentences, including life

sentences (see Chapter 14). A number of states have developed what are called **blended sentences** (Brown & Sorensen, 2012). This approach allows for either juvenile sentences or adult sentences (including prison time) to be imposed on youths. For those youths who meet statutory age and offense criteria, adult penalties—including incarceration in the state's adult prisons—are very real possibilities. When Schaefer and Uggen (2016) looked at these policies, they found that states that had punitive adult sentencing were also likely to use these blended sentencing schemes. Occasionally, the response by crime control advocates when discussing these tough-on-crime policies is that “if you’re old enough to do the crime, you’re old enough to do the time” (Mays & Ruddell, 2012).

The ultimate sanction for any offender is the death penalty. In the case of *Furman v. Georgia* (1972), the U.S. Supreme Court ruled that the death penalty, as it was then imposed, was arbitrary and capricious. When Georgia and a number of other states rewrote their death penalty laws, a challenge was again mounted; however, the Supreme Court ruled in *Gregg v. Georgia* (1976) that the revised capital punishment statutes were constitutional. Every year since 1976, the Supreme Court has received challenges to the death penalty, and while the Court has issued rulings that have restricted the circumstances under which executions are imposed (and the people who should qualify for execution, including offenders who were juveniles at the time of the offense, see *Roper v. Simmons*, 2005), the Court has never shown an indication that it was willing to declare capital punishment, in and of itself, as a violation of the Eighth Amendment’s prohibition of cruel and unusual punishment.⁵ In 1996 Congress passed the AEDPA, which restricted the time limits and the bases for appeals by state and federal inmates. The restrictions imposed by AEDPA limit *habeas corpus* appeals by prisoners and also set time limits within which all appeals (including those arising in capital cases) must be filed.

Due Process Model Policies

After reviewing the previous section, it would be easy to conclude that after three decades of dominance by the crime control model, the due process model is dead or at least dying. Perhaps the response by Mark Twain to premature newspaper reports of his death is appropriate here: “The reports of my death have been greatly exaggerated.” In the same way, it is premature to report the death of the due process model in the criminal justice system in the United States.

Arguably, the golden era of the due process model was during the period when Earl Warren was Chief Justice of the U.S. Supreme Court (1953–1969). In the first half of the 1960s, the Warren Court issued rulings in such historic cases as *Mapp v. Ohio* (1961), *Escobedo v. Illinois* (1964), *Gideon v. Wainwright* (1963), and *Miranda v. Arizona* (1966).⁶ These decisions articulated or expanded the due process rights of adult criminal defendants, and similar rights also were extended to accused delinquents in decisions such as *Kent v. United States* (1966), *In re Gault* (1967), *In re Winship* (1970), and *Breed v. Jones* (1975).⁷ The “due process revolution” of the 1960s led right-wing groups such as the John Birch Society to begin an “Impeach Earl Warren” campaign.

While there have been criticisms of some of the procedural due process cases decided by the Supreme Court, a great deal of the Warren Court's legacy remains intact. In fact, among the three branches of government, the Supreme Court (even in its current, somewhat conservative, configuration) seems the most committed to notions of due process. For example, since the beginning of the 21st century, in the case of *Kyllo v. United States* (2001), the Supreme Court ruled that an exterior scan of a house with a thermal scanning device, to detect the heat signature of "grow lights" to allow the indoor cultivation of marijuana, constituted a search and required officers to obtain a search warrant. Also, in *Missouri v. Seibert* (2004), the Court held that it was unconstitutional for the police to interrogate a suspect without giving the *Miranda* warnings. In this case, the police deliberately did not give the *Miranda* warnings and questioned a suspect until a confession was obtained. Then they questioned the suspect again after giving *Miranda* warnings and tried to use the second confession.

Although the U.S. Supreme Court generally has retained a due process orientation, even with a fairly conservative plurality on the Court, there have been concerns in some states that the Court has retreated from the standards established during the Warren Court era. Therefore, some state supreme courts (and not just those of more "liberal" states) have taken the stand that the Court sets the *minimum* due process constitutional standards, but that state supreme courts can apply state constitutional provisions that establish even greater personal protections.⁸ This means that in areas such as Fourth Amendment search and seizure cases, state supreme courts may decide cases based on their state constitution that are more restrictive than decisions provided by the U.S. Supreme Court.

For example, Hayes (1999) said that there was a concern in some states that the U.S. Supreme Court "was retreating in its protection of individual rights." At the same time, the Supreme Court seemed to encourage "state courts to utilize state constitutions as the basis of their rulings concerning constitutional rights." Thus, in *State v. Gomez* (1997), the New Mexico Supreme Court did not support some warrantless searches by the police that might be permitted by the U.S. Supreme Court (Hayes 1999). In simplest terms, this demonstrates that the efficacy of the due process model does not depend solely on the U.S. Supreme Court and that other state and federal courts apply this model as well.

It is also important to ask what other evidence we might have today of the vitality of the due process model. At least three illustrations come to mind. First, as discussed, the use of determinate sentencing is a way to promote truth in sentencing. Several states have adopted sentencing guidelines with the explicit purpose of limiting or eliminating sentence disparities (see Mays, 2004). A review of court rulings over the past three decades demonstrates that similarly situated offenders often did not receive similar sentences. Under indeterminate sentencing schemes, judges were permitted to consider or ignore a wide array of factors in deciding on the appropriate sentence. Legislatures gave them that authority, and it was exercised with a great deal of discretion. Sentencing guidelines normally consider only two factors—present offense and criminal history—in determining the sentence. Under the determinate sentencing system, factors such as race,

gender, drug use, and employment history are supposed to be irrelevant, and sentence disparities should all but disappear. While human nature still plays a role in the sentencing process, most states with mandatory sentencing guidelines have found that the degree of disparity among cases has been reduced among various racial and ethnic groups and between males and females.⁹

Second, addressing disparity in the juvenile justice system has become an explicit priority of the Office of Juvenile Justice and Delinquency Prevention (OJJDP), a division of the U.S. Department of Justice. One of OJJDP's national priority goals is to identify, address, and remedy **disproportionate minority contact (DMC)** among juvenile offenders.¹⁰ State juvenile authorities are challenged to examine every stage of the processing of juvenile offenders to determine if African American, Hispanic, American Indian, and Pacific Islander youths (among others) are overrepresented at any stage of the handling of accused delinquents. For OJJDP's purposes, the population at risk includes those 10 to 17 years old.

To illustrate the challenge of DMC, Table 2.1 shows how African American youths are overrepresented in juvenile justice processes at virtually every stage, from arrest through adjudication and incarceration. Rovner (2016, p. 8) found that although youth incarceration dropped by 47 percent between 2003 and 2013, the rate of African American youths in secure confinement actually *increased* by 15 percent making the African American commitment rate four times greater than the white rate (p. 2). In Chapter 8, we address the topic of race and incarceration and the mistrust that many minority groups have of the criminal justice system. It has been speculated that ensuring just and fair outcomes in justice systems may actually increase the likelihood that citizens will follow the law (Rottman, 2011; Tyler, 2006).

Table 2.1 Youth Outcomes by Race, 2013

	AFRICAN AMERICAN JUVENILES	WHITE JUVENILES
Out of every 10,000 teenagers	738 arrests	322 arrests
Out of every 1,000 arrests	934 referrals to juvenile court	806 referrals to juvenile court
Out of every 1,000 arrests	217 diverted away from formal court processing	298 diverted away from formal court processing
Out of every 1,000 cases referred to juvenile court	249 detained prior to adjudication	186 detained prior to adjudication
Out of every 1,000 cases tried in juvenile court	511 adjudicated delinquent	518 adjudicated delinquent
Out of every 1,000 juveniles adjudicated delinquent	611 received probation	648 received probation
Out of every 1,000 juveniles adjudicated delinquent	272 commitments	228 commitments

Source: Rovner (2016)

Third, as a result of the identification of thousands of individuals wrongfully convicted or exonerated there has been increasing government support to prevent or correct errors and misconduct that led to these miscarriages of justice. Findley (2017, p. 61) describes how the federal government has engaged in “high-profile measures to recognize the reality of wrongful convictions, direct funding of innocence work, use of federal purse strings to shape criminal justice policy, setting an example through legislation on matters as diverse as access to postconviction DNA testing and compensating the wrongly convicted, and leadership on issues such as the problems with the forensic sciences.” Some states, including Texas, have taken significant steps to reduce wrongful convictions, which we cover in more detail in Chapter 10 (Innocence Project, 2017d).

CONCLUSIONS

Herbert Packer’s models of the criminal process give us two ways to view the processing of criminal cases in the United States. However, in a broader context, these models also tell us something about the development of criminal justice policies and the orientations of politicians and policymakers at all levels of government. In examining the underlying assumptions of the crime control and due process models, several conclusions become apparent.

First, it is difficult to find either the crime control model or the due process model in its purest form almost anywhere. The two models exist as something of hybrids in most jurisdictions across the United States. In fact, it probably is most accurate to think of the two models as existing along a continuum. Therefore, moving from one state or locality to another, from one level of government to another, or among the various branches of government will move us toward one end of the continuum or the other. Much of the content in the chapters that follow describes the political, social, and economic forces that move us from one end of the continuum to the other (see Goodman, Page, & Phelps, 2017).

Second, the U.S. Supreme Court clearly operated in the due process domain for much of the 1960s and even into the 1970s. At the same time, virtually every president elected since 1968 has had a more or less crime control orientation. Among these presidents, perhaps Jimmy Carter had the least overt law-and-order orientation, while Bill Clinton and Ronald Reagan seemed to be the most focused on crime control issues. Regardless of one’s political office or party affiliation, however, no politician wants to be labeled “soft on crime” (Pfaff, 2017).

Third, even today—with the crime control model still dominating state and federal policies—elements of the due process model can be found throughout the system, and there seems to be a growing interest in rehabilitating offenders, the number of state prisoners has been decreasing, several states are actively working toward bail reform, and the death penalty seems to be dying a slow death. Therefore, we are left to ask: Which model will hold sway in the next decade, and what social, political, or economic issues will cause a society to shift from one of these models or paradigms to another?

KEY TERMS

assembly-line justice	<i>Furman v. Georgia</i>	presumption of guilt
<i>Atkins v. Virginia</i>	<i>Gault, In re</i>	presumption of innocence
<i>Blakely v. Washington</i>	<i>Gideon v. Wainwright</i>	procedural due process
blended sentences	<i>Gregg v. Georgia</i>	sentencing guidelines
<i>Breed v. Jones</i>	<i>in flagrante delicto</i>	<i>State v. Gomez</i>
courtroom work group	indeterminate sentences	substantive due process
crime control model	<i>Kent v. United States</i>	truth in sentencing
determinate sentences	<i>Kyllo v. United States</i>	<i>United States v. Booker</i>
disproportionate minority contact (DMC)	legal guilt	<i>United States v. Fanfan</i>
due process model	<i>Mapp v. Ohio</i>	<i>Weeks v. United States</i>
<i>Escobedo v. Illinois</i>	<i>Miranda v. Arizona</i>	<i>Winship, In re</i>
factual guilt	<i>Missouri v. Seibert</i>	
	Packer, Herbert	

CRITICAL REVIEW QUESTIONS

1. Compare and contrast the various elements of Packer's two models of the criminal process. Where in the criminal justice system are we most likely to find the two different models at work? Explain.
2. Are politicians correct when they assume that the public demands increasingly harsher sanctions for criminal offenders? Is this a figment of the politicians' imaginations, or do they have substantial evidence of the punitive orientation of the public?
3. Why do most politicians, especially at the national level, seem to support a crime control orientation?
4. How do substantive due process and procedural due process differ? Which of these is more likely to be associated with the public's perception of technicalities in the processing of criminal cases?
5. Is crime policy really a concern of the federal government, or is it something of a symbolic issue? Aren't most crime problems (and their solutions) situated at the local level?
6. In which courts are you most likely to see assembly-line justice operating? Explain and give examples.
7. What is meant by the "courtroom work group," and what impact can this group have on criminal justice policies and practices?
8. What are the differences between indeterminate sentencing and determinate sentencing? Which (if either) of these is more consistent with the crime control model? Which with the due process model? Do sentencing guidelines fit with either of the two models? Explain.
9. Do we have any evidence that the death penalty serves as a deterrent to would-be killers? What has been the general trend since the mid-1970s in the rulings by the U.S. Supreme Court in regard to the death penalty?
10. In three or four paragraphs respond to the open-ended proposition that "the juvenile justice system in the United States is becoming more like the adult system as a result of . . ."

WRITING ASSIGNMENTS

1. Prepare a two-column sheet that contains the elements associated with the crime control model in one column and those associated with the due process model in the second column.
2. In two or three paragraphs compare and contrast indeterminate sentencing with determinate sentencing. What are the policy assumptions associated with each?
3. Prepare a written response to the notion that crime rates in the United States have gone down largely as a result of more people going to prison.
4. Go to the Bureau of Justice Statistics home page or the Death Penalty Information Center and look up the most recent figures on the death penalty. In a one-page essay explain (1) what has been happening to the number of people on death row in the United States in the past twenty years; (2) what has happened to the number of executions annually; and (3) what the numbers show about people released from death row as a result of having their convictions overturned or their sentences commuted.
5. As a wrap-up to this chapter (and to help you synthesize what you've read) prepare a one-page essay speculating on whether the crime control or the due process model will dominate in the next ten years. Explain your position.

RECOMMENDED READINGS

John P. Orth (2003). *Due Process of Law: A Brief History*. Lawrence, KS: University Press of Kansas. Orth says that his book was written to explain how the simple phrase "due process of law" has become so complicated and contested. Instead of beginning with the framers of the Constitution, Orth takes a hypothetical case approach based on the common law. The result is a highly readable book that addresses one of the most complex concepts in our legal system.

Herbert L. Packer (1968). *The Limits of the Criminal Sanction*. Stanford, CA: Stanford University Press. Although they are now over fifty years old, the materials discussed by Packer are still relevant today. In fact, this book has become a standard point of reference for many introductory textbooks in the field of criminal justice, and it remains one of the most influential works ever published on this topic. It provides the framework for this chapter, and it should be required reading for all students of criminal justice.

William J. Stuntz (2011). *The Collapse of American Criminal Justice*. Cambridge, MA: Harvard University Press. Stuntz provides a historical review of legislation intended to control crime with a focus on cultural wars (e.g., wars on prostitution and drugs and alcohol). He is critical of the due process revolution ushered in by the Warren Supreme Court and argues that its emphasis on procedures, and not equal protections, led to a legal environment that contributed to harsh punishments.

Franklin E. Zimring (2012). *The City That Became Safe: New York's Lessons for Urban Crime and its Control*. New York: Oxford University Press. While rates of police-reported crime dropped throughout the United States, Zimring shows that they dropped more in New York than in any other large metropolitan area. This book focuses on the role of the police in this change, and Zimring attributes the New York crime reduction to deploying more officers on the streets, new tactics, as well as changes in police management. Unlike many examples illustrated in our book, Zimring shows that the justice system can successfully reduce crime.

CHAPTER 3



Understanding Criminal Justice Policy

INTRODUCTION

All of us want a criminal justice system that treats victims and offenders in a fair and just manner, and is both cost-efficient and effective in reducing crime. An analysis of U.S. crime control strategies, however, shows that some of our policies are misguided, costly, or are ineffective in reducing crime. Mears (2017) has called our justice system out-of-control, and there are no shortages of examples. Between 1971 and 2017, for instance, U.S. taxpayers spent over a trillion dollars to wage a war on drugs (Coyne & Hall, 2017). Despite imprisoning millions of drug-law offenders since the 1970s research has shown that locking them up has not reduced drug use, nor has demand been lowered as the numbers of persons arrested for drug offenses and overdoses have not dropped (Pew Charitable Trusts, 2017). In fact, the *New York Times* estimated that around 64,000 people died from overdoses in 2016 (Katz, 2017), which is more than the number of Americans who will die in motor vehicle crashes and firearm homicides combined.

A question arising from those poor outcomes after a four-decades-long war on drugs is whether there are more effective ways to confront substance abuse problems, such as expanding the number of drug prevention programs, treatment programs for those with addictions, or specialized courts for drug offenders. All of those solutions are cheaper and less harmful than placing people in jail or prison for their involvement in drug-related crimes, especially since so few drug offenders get help behind bars. Once incarcerated, only 11.2 percent of the 1.5 million prison and jail inmates with an alcohol or drug problem actually received any professional addictions treatment (National Center on Addiction and Substance Abuse, 2010, p. 4).

One of the challenges that policymakers confront in their crime reduction efforts is that crime is a complex social problem that defies easy solutions (Walker, 2015). There is no shortage of ideas on how to reduce crime but there is sometimes a disconnection between what is proposed by lawmakers and the legislation that is eventually passed. Furthermore, the implementation of that policy

“on the streets” might not resemble what was originally intended by the legislators who passed the law, as the police, courtroom work group, and correctional officials have considerable discretion, and many reforms have been frustrated by staff inaction. Writing about reforming the courts, for example, Harris and Jesilow (2000, p. 187) say that “members of the courtroom workgroup will act to mediate or nullify legislative enactments that affect the operation of the courts.”

In the sections that follow we examine several issues related to criminal justice policy including the stakeholders involved in those processes and barriers to implementing rational policies. We also observe that even after some policies are implemented there are sometimes unintended consequences of these reforms that might make our efforts less effective, or even reduce our safety by increasing crime. Some of those negative results might be reduced if we base policy development on the outcomes of research and evaluation. Altogether, introducing rational criminal justice policies is an easy task to describe on paper, but is an incredibly difficult goal to achieve in the real world.

CHALLENGES TO RATIONAL CRIMINAL JUSTICE POLICIES

Many scholars have been critical of U.S. criminal justice policies that have turned out to be irrational, such as lengthy pre-trial incarceration for first-time nonviolent offenders, boot camps that provide no rehabilitation, lifelong imprisonment for youths under the age of eighteen who committed non-homicide offenses, third strikes for nonviolent offenses that result in twenty-five-year sentences, and sentencing some drug offenders to decades behind bars (Tonry, 2017a). Walker (2015, p. 22) observed that many criminal justice policies were a plague of nonsense and he argues that many of the ideas we have about offenders, crime, and criminal justice system operations are based on faulty assumptions, what he calls “resting on faith rather than facts.”

Sometimes we can’t even agree on what is a crime. Reiman and Leighton (2017) have questioned justice system priorities, where we vigorously pursue and prosecute offenders committing “crimes on the streets” (who are usually poor) while paying less attention to the persons and corporations who commit thefts such as price fixing that fleece the public, offenses that reduce the quality of our lives (such as the illegal dumping of toxic waste), or result in our deaths. Employees at General Motors (GM), for example, knew that the ignition switches on some of their vehicles were faulty for over a decade, but failed to fix the problem, which led to the deaths of at least 124 people and the injuries of another 275 (Stempel, 2017). Boudette (2017) notes that “GM paid \$900 million to settle a federal criminal investigation.” Although the people who were killed from this negligence were just as dead as somebody shot after a drunken argument, no GM executives were ever prosecuted or incarcerated. Given those findings, one might ask whether our justice system is rational and how our system evolved into its current state.

Mears (2010, pp. 20–33) described seven barriers to enacting rational criminal justice policies. As we noted in Chapter 1 the policymaking process is seldom

straightforward and once politicians get involved in turning a good idea about crime reduction into legislation there is always going to be some compromise. The need to compromise is not necessarily a bad thing as the checks and balances on government powers limit the ability of politicians to enact radical policies that might turn out to be harmful. In this section, the seven barriers to rational justice policies identified by Mears are briefly described and they include:

- the politicization of crime,
- false dichotomies,
- bad cases make bad policies,
- symbolic gestures,
- public opinion,
- swings between extremes, and
- limited production of policy research.

With respect to the politicization of crime, in Chapter 2 we described how Richard Nixon used the crime issue to increase his political support in the 1968 presidential campaign, and a half-century later, crime control is still a popular campaign issue for federal, state, and local politicians. One of the challenges of using crime control as a political issue is that controlling crime isn't a simple proposition and since the 1970s many Democrat and Republican politicians have been elected after campaigning on a "get tough on crime" agenda. This was also true in the 2016 presidential election as candidate Donald Trump was committed to a tough-on-crime agenda, and he expressed unwavering support for the police. Hillary Clinton, by contrast, promoted justice system reform, including ending **mass incarceration** (also called **mass imprisonment**). The United States has the second highest incarceration rate in the world and we imprison four to five times as many offenders per capita as most European nations (Walmsley, 2016), despite the fact that crime rates are generally similar between these nations, although murder rates in the United States are typically higher.

Wozniak (2016) observed that voters punish politicians who express ideas that seem "soft on crime" and the outcome of the 2016 presidential election suggests he was correct. One long-term outcome of implementing wars on crime and drugs, however, is that the justice system has lost the trust and confidence of citizens from most marginalized social groups, and taxpayers are stuck with paying for the tough-on-crime policies, which include an over-reliance on incarceration. Not only are our criminal justice policies too expensive for many jurisdictions to afford, but the overuse of imprisonment (and the security level of inmates placed within a prison) may actually contribute to higher levels of crime with some offenders once released (Gaes & Camp, 2009).

In terms of false dichotomies for policy decisions, Mears (2010, p. 22) defines this as an approach where politicians condense criminal justice policies into "either-or" choices, and he uses the example of using either punishment or rehabilitation to change offender behavior. Reliance upon only one of these options is a poor choice for policymakers interested in making positive reforms because there are varieties of offenders and not all of them will respond positively to a single approach, just

as we wouldn't expect that all people suffering from cancer would be cured by the same treatment. Thus, we need a range of options so we can divert some nonviolent, first-time offenders from the justice system altogether, or impose relatively "soft" sanctions on them so that their futures aren't harmed, while keeping the ability to levy harsh punishments on offenders who pose a high risk to public safety.

One of the problems that politicians must confront involves incidents where serious or extreme, but rarely occurring, crimes can lead to the enactment of bad policies. This is sometimes called "hard cases make bad law." These cases always receive considerable media attention and often the circumstances of the case or the offender lead to a lack of punishment or the case "falls through the cracks" of the system. Phrased another way, the justice system usually does a good job of dealing with average cases, but sometimes fails when it comes to exceptional cases that rarely occur. An example of a tough case is that of Willie Bosket, a fifteen-year-old who killed two New York subway passengers in 1978. Because he had not reached his sixteenth birthday, he could not be punished in an adult court and there was public outrage that he escaped severe punishment for his role in these murders. The public outrage from this case led to the revision of New York's juvenile justice code to lower the age where adult punishments could be imposed. One unforeseen outcome was that after the new juvenile justice legislation was introduced a large number of young persons, who were not involved in serious crimes, were receiving harsh punishments in adult courts (Singer, 1996).

Mears (2010) observed that legislators use policies he calls symbolic gestures to show the public they are being responsive to the crime problem. Often these policies are introduced soon after a widely publicized or high-profile case occurs. The USA PATRIOT Act, for example, was passed only forty-five days after the 9/11 attacks and few of the legislators who voted on the bill actually read the 342-page document. This is sometimes called a **knee-jerk reaction** of policy-makers to a celebrated case—when legislation is quickly passed to respond to an outrageous or rare case. Sometimes these laws are named after a crime victim, such as Megan's Law (that required sex offender registration information to be accessible to the public). Frank (2016) observed that "If a law has a first name, that is a bad sign," and that "Bills named after sympathetic victims are the worst form of knee-jerk lawmaking, but it's a surefire political vote-getting device."

Most symbolic gestures result in making punishments more severe for offenders and Mears observed that some of these sanctions are invisible to the public, what many scholars call **collateral consequences**. Collateral consequences are nonlegal sanctions such as restrictions on voting, access to occupations, as well as placing restrictions on firearms ownership, where offenders live, and their ability to access educational or social services, such as prohibiting persons convicted of some drug crimes from living in public housing. There are thousands of these laws throughout the country, and while some of them make sense—such as restricting sexual offenders from working with youths—some are less rational. Restricting sex offenders from living within 2,000 feet of a school, park, or day care center, for example, forces some of these people into homelessness (Carpenter, 2017). The unforeseen outcome, however, is that homelessness

decreases an ex-prisoner's likelihood of obtaining work, establishing relationships with nonoffenders, and may increase the social isolation of these offenders. These factors will increase their risk of re-offending (Grossi, 2017).

Many of the barriers to developing rational criminal justice policies described thus far are related to the impact of public opinion about crime and criminals on the behavior of politicians. The American public tends to be quite punitive toward offenders, and this can motivate legislators to continue their tough-on-crime campaign platforms, even during times of dropping crime rates. Public support for the death penalty, for example, has remained fairly constant for over seventy years: The Gallup organization started asking Americans about capital punishment in 1941 (59 percent favored the death penalty at that time) but that support was 60 percent in October 2016—although it had declined from a high of 80 percent support in 1994, which was at the peak of U.S. homicide rates (Gallup, 2017a). Politicians are reluctant to swim against the current of public opinion if they want to be re-elected. As a result, they are very sensitive to polls and if the public is tough on crime, they are more likely to express those sentiments in their campaigns.

The problem with political responsiveness to public opinion is that the American justice system is more political than almost any other nation. Most local and state judges, county sheriffs and district attorneys, for example, are elected officials whereas the justice systems in other nations are run by bureaucrats who tend to be isolated from public opinion. Pfaff (2017) argues that the leading cause of U.S. mass imprisonment is the increasingly powerful role that prosecutors have played since the 1980s. Since most district attorneys are elected, they must seek the approval of voters who, as noted above, are consistently punitive. As a result there are many rewards for seeking harsh punishments but almost no value to showing mercy. Another issue that increases the likelihood of harsh sanctions is that state taxpayers are stuck with the bill for decisions made by local prosecutors.

Elliott (1997, p. 294) says that politicians and the public are continually in search of a quick and easy solution to crime, or a “silver bullet.” By contrast, almost every criminologist proposes that effective crime reduction strategies must rely upon a broad range of interventions—to respond to a diverse range of offenders and the different circumstances that lead to crime. Mears (2010) contends that many jurisdictions are guilty of prioritizing interventions that focus on a single cause they believe underlies most crime, such as reducing illicit drug use, which in turn reduces street crime and the violence caused by competition for illicit drug markets. Alternatively, having only one primary response to crime, such as imprisoning offenders (without the alternative of rehabilitative options) could also be considered a single response or silver bullet.

Some scholars have observed that our responses to crime resemble a pendulum where shifts in justice system priorities occur. The most common example is the movement from a justice system that placed a greater priority on rehabilitation throughout the 1960s and early 1970s, but was replaced by the get-tough movement by the mid-1970s that resulted in mass imprisonment. Goodman, Page, and Phelps (2017, p.123) challenge the idea of a pendulum and argue that

metaphor is overly simplistic because policy reforms are the end result of political struggles that take place in the larger social context, and they observed that:

[e]conomics matter. Crime trends matter. Racial, ethnic, and gender inequality matter. Wars, depressions, moral panics about gruesome violence—they all matter. . . . People make them matter. And people make them matter in particular ways (and not others) in the face of opposition from other actors who have competing visions of crime, punishment, justice, rights, freedom, and a host of other ideologically inflected issues.

Their argument has an appeal because there are groups of stakeholders who are advocating for policy reform over the long-term: Mothers Against Drunk Driving, for example, has been advocating for tougher drunk driving laws since 1980. There are times when different ideas about justice may become more popular. When economic times are tough, for instance, placing offenders on probation may be seen by the public as more desirable than imprisoning them: In California, for example, it cost \$70,812 to house a state prisoner in 2016 (Legislative Analyst's Office 2017a), while probationers can be supervised for a fraction of that cost.

One issue underling the enactment of irrational criminal justice policies is that we have a limited understanding of “what works” in reducing re-offending or the factors that increase the effectiveness of the police, courts, and corrections. Mears (2010; 2017), an advocate for program evaluation, says that we have done a poor job of demonstrating why some programs are effective while others are not. He contends that a rational criminal justice system would be based on expanding the use of programs that are effective and eliminating ineffective programs. While that is a good idea in theory, it is very difficult to cut ineffective programs. For example, we have known since the mid-1990s that DARE (drug abuse resistance education) programs do not have the desired impact of reducing youthful drug use, but we still fund these programs as they are popular with the public, police, and schools. Programs such as DARE become almost “untouchable” and after learning about the dismal results of a 1994 evaluation the executive director for DARE programs said, “I don’t get it. It’s like kicking Santa Claus” (Marlow & Rhodes, 1994). While most federal funding to DARE programs was cut in the 1990s and 2000s, Attorney General Jeff Sessions has expressed a desire to revive the program (Ingraham, 2017).

One barrier that Mears (2010) did not address in his analysis was how vested interests impact justice system operations. When people’s paychecks depend on locking up offenders, they will resist reforms that threaten their livelihood. Gottschalk (2015b, paragraph 16) observed that:

Prison guards’ unions, state departments of corrections, law enforcement associations, the private corrections industry, and the financial firms that devise bonds and other mechanisms to fund prison infrastructure all stand in the way of a deep reduction in the incarcerated population.

Other stakeholders benefit from high imprisonment practices, including the rural towns that lobby for prison construction to replace lost agriculture and manufacturing jobs. The private correctional industry is often singled out as

the stakeholder with the most to lose by reforming high imprisonment policies (Gottschalk 2015b). Without the option of private correctional operations, state and the federal correctional systems would either have to expand their institutional capacities, or increase community-based correctional programs, as they did prior to the prison expansion of the mid-1970s. During that era probation and parole acted as a “safety valve” for prison overcrowding (Tonry, 2017a).

Other industries have an interest in keeping the status quo when it comes to high incarceration policies. Tonry (2017a) pointed out, for example, that pretrial detention is overused and is harmful to marginalized (e.g., poor and minority) populations. Advocacy organizations, such as the Prison Policy Initiative, contend that the number of jail inmates has increased substantially since the 1980s, when many accused were released on their own recognizance (Rabuy & Kopf, 2016). These organizations have argued that the bail industry has benefitted from those policy changes, and White (2017) reported that about \$14 billion in bail bonds are issued every year by 25,000 bail-bond companies. Although legislative reforms have been introduced in several state legislatures in 2017 and 2018 to reduce our reliance on cash bail for nonviolent offenders, there have been no sweeping changes. A number of organizations have said that this lack of change is due to lobbying from organizations such as the Professional Bail Agents of the United States (2017) who expressed the position that “[t]he bail industry is under attack!” That brings us back to the question of who gains and who loses when a new criminal justice program is introduced or an old one is eliminated or reformed. In addition to the challenge of stifled reforms, some changes can have unanticipated outcomes, and these are described in Box 3-1.

BOX 3-1

Unintended and Unforeseen Consequences of Criminal Justice Policy

Legislation intended to improve justice system operations sometimes has outcomes that were not considered or are unforeseen by the politicians and policy-makers who enacted the law. As we learn in the following chapters, some justice system reforms have not had their desired impacts. Prior to the introduction of the juvenile court in 1899, for example, youth cases were heard in adult courts, and mixing adults and children in the same jails, police lock-ups, and correctional facilities led to the abuse of some youths. After reformers created a separate juvenile justice system, it was believed these courts would act in their best interests. Later it was found that the due process protections of these children were sometimes disregarded and they were placed in reform schools and harshly punished. Some juveniles were placed in custody for years for status offenses (acts that were not illegal for adults to commit) such as truancy or failing to listen to their parents (Bernard & Kurlychek, 2010). In fact, Schwartz (1989) reported that some girls placed in custody for experimenting with their sexuality spent more time in these correctional facilities than some young men who had committed serious and violent offenses.

One way that politicians can increase justice system rationality is to allow newly enacted laws to expire after a set amount of time, such as a decade. This

practice, also called a **sunset provision** or **sunset clause**, requires legislators to take a thoughtful look at the legislation and determine if it achieved its goals, whether there were unanticipated or unforeseen consequences, and whether the law should be amended or allowed to expire. The federal government, for example, introduced an Assault Weapons Ban in 1994 and it expired in 2004. In the meantime, the law was evaluated to determine whether it was effective, and researchers generally found that the law had little effect on firearms violence (Cramer, 2016). One advantage of a sunset clause is that legislators are not required to vote on amending harmful or ineffective legislation and thus can avoid being labeled soft on crime.

RESEARCH AND CRIMINAL JUSTICE POLICY

In an ideal world, we would only introduce crime reduction policies based on research that has established their effectiveness (Walker, 2015). It has only been since the 1990s that policymakers became more interested in practices demonstrated by program evaluations or research to reduce crime and recidivism. A groundbreaking piece of criminal justice research was the Report to Congress produced by Larry Sherman and his colleagues (1997) that identified “what works” (programs that were effective in reducing crime). Their initial findings were discouraging because many of the programs we thought were effective—such as DARE, neighborhood watch, mandatory arrest policies for domestic violence offenders, correctional boot camps, shock probation (programs that add short jail terms to probationary sentences), house arrest with electronic monitoring, and summer jobs for at-risk youths—were not very effective in reducing crime.

Researchers have been building on the foundation that Sherman and his colleagues created, and as reported in the following chapters there has been considerable interest in **evidence-based practices (EBP)**. The term EBP became widely used by 2010, and interest has been growing since then. In policing, for example, EBP initiatives have been established throughout the globe since 2015, and these collaborations include university researchers, police officers, and policymakers. These initiatives resulted in the establishment of the *Cambridge Journal of Evidence-Based Policing*, which published its first issue in 2017; other journals that focus on criminal justice policy such as *Criminology & Public Policy* and *Criminal Justice Policy Review* were also introduced. Additionally, the National Institute of Justice and the Washington State Institute for Public Policy also disseminate information about effective or promising crime reduction programs, and these changes show the momentum that policy-based research and program evaluation has gained.

While nearly everybody would agree that it is a good idea to base policies on research that demonstrates their effectiveness, few governments actually fund evaluations of their programs. Because of our failure to support this research we do not know whether our crime reduction interventions are truly effective or, if they are effective, why they work. As a result, we continue to fund programs that make common

sense or “seem good on paper” but might not deliver meaningful results (Gendreau, Smith & Theriault, 2009). The problem goes beyond wasted taxpayer dollars as some programs fail to improve public safety. Furthermore, some practices might actually contribute to higher levels of crime, such as mixing low- and higher-risk offenders in correctional treatments, as the low-risk offenders might start to identify with and learn from their more sophisticated counterparts (Bonta & Andrews, 2017).

We are only starting to understand which programs are effective and whether there are specific types of offenders who might be more successful in reducing their likelihood of re-arrest after participating in treatment. Some offenders might be successful without any interventions, while our best efforts to help someone may be unsuccessful with offenders who are not fully committed to change. Moreover, we are learning that the skills of the staff delivering these programs is also a very important factor in a program’s success and that some personnel deliver interventions that are more likely to reduce recidivism (Viglione, Rudes & Taxman, 2017). One challenge of recidivism research is that we must wait years before we know whether an intervention has been successful (e.g., three years in the community is a standard waiting period to see whether an ex-prisoner has been re-arrested or convicted of committing another crime).

One challenge of introducing criminal justice interventions is that some do not transfer well to other jurisdictions. A program’s success may be due to several factors, including the leaders who champion the reform (some leaders may be more credible or dynamic), the support for the program (staffing and funding) and the organization’s history (for example, if there are frequent “reforms” staff members are likely to tire of the changes). In some cases, the people expected to deliver the program might not buy into the approach, and may only go through the motions rather than invest wholeheartedly in a program’s success. Other staff members may take a wait-and-see approach to determine whether agency leaders are serious about the reform. Some new programs, for example, are not supported with resources or new staff positions and nobody is really surprised when they fail. Last, organizations implementing new policies also require community stakeholders’ support, the co-operation of agencies that work with the same clients, and long-term support for the intervention. Given this lengthy list of requirements for successful implementation, a program that is successful in one place may be completely ineffective in another.

Sometimes a community’s characteristics may increase or decrease the success of a program’s implementation. Thus, the **Operation Ceasefire** approach that successfully reduced gang violence in Boston was less effective when introduced in Los Angeles. Researchers attributed the lack of success in Los Angeles to several reasons, including (a) its larger population and size and because it is a collection of cities (whereas Boston occupies a relatively small area); (b) the different gang dynamics in Los Angeles; and (c) the larger number of political barriers that law enforcement agencies who implemented the program in Los Angeles had to overcome, as numerous officials from different cities were involved rather than a single political jurisdiction (Tita, Riley, Ridgeway, Grammich, Abrahamse & Greenwood, 2010).

One aspect of policy research that has garnered recent interest is **cost-benefit analyses** where investigators examine the costs of an intervention (such as offering a three-week program to improve a prisoner’s employability) and then calculate the

benefits: did the ex-prisoners who received the program get a job, and did they have fewer arrests than those who did not participate? The Washington State Institute for Public Policy (2017) has taken a leadership role in these types of studies since 2000, and we use examples of their research throughout this book. One problem arises when we implement promising programs but try to do them “on the cheap” by failing to provide adequate supports. A hypothetical example is the three-week employability program for prisoners described above. While the original program used teachers and showed some success, some correctional systems might use correctional officers to deliver the program. While this approach might save money on salaries, if the correctional officers have poor instructional skills, their efforts may have less value, and the outcomes might be no change in employability once the prisoners are released. This is an issue of **program fidelity**, and we are learning that when we take shortcuts or fail to provide the appropriate resources to support the intervention, our efforts are less successful. Writing about the Los Angeles Operation Ceasefire intervention, the researchers cited a participant as saying “No one ever thought this was a bad idea. In fact, it makes sense. But departmental resources were never made available to implement the model in the intended way” (Tita et al., 2010, p. 49). Sadly, that lack of support is the case in many attempted replications of successful criminal justice interventions.

It is possible that new ideas for criminal justice reforms will come from other nations. Franko (2017) says that globalization has influenced justice systems in the same manner that it has influenced other aspects of our lives. For the most part, the United States exports more ideas about criminal justice ideas than it imports. And although many factors contribute to the spread of new crime control practices, one of the most important is success: If an approach is effective, it is more likely to be adopted by other jurisdictions. Some criminal justice policies thought to be effective at reducing recidivism and costs, such as correctional boot camps, were fads (Gendreau et al., 2009). They were popular for a short period of time but disappeared once research demonstrated these practices were ineffective, or actually increased recidivism. Thus, while we should be on the lookout for new crime reduction strategies, we must also formally evaluate these programs.

STAKEHOLDERS AND THEIR INFLUENCE

In our description of the barriers to implementing rational crime control policies, the issue of **stakeholders** emerges several times. That is because criminal justice policies are continually shifting and are influenced by a number of different groups whose members have a stake in a program’s outcomes, including victims and offenders, politicians, practitioners, advocacy groups, and scholars. When it comes to crime and justice issues, these groups are continuously advocating for reform (see Goodman et al., 2017). Some are supporters of the due process perspective while others advocate the crime control position. Although their goals may differ, these stakeholders are often very passionate, and some are reluctant to compromise or even thoughtfully consider alternatives that are different from their position. Box 3-2 provides descriptions of the stakeholders involved in the policy development process as identified by Hobbs and Hamerton (2014, pp. 4–6).

BOX 3-2**Stakeholders Participating in Policy Development**

Politicians introduce legislation consistent with their philosophies, which are based on their beliefs about offenders and the causes of crime. Conservatives tend to favor the crime-control model while most liberals prefer the due process model.

Public Officials are bureaucrats employed by local, state, and federal governments. These officials draft legislation and once that legislation is passed, they issue directives to agencies on how to interpret reforms. In European nations these bureaucrats have a great deal of influence on criminal justice reform, and this generally moderates extreme policy changes.

Criminal justice professionals and their representative organizations. The police, court officials, and correctional practitioners have often used their political influence to lobby for change. One very successful advocacy organization is the California Correctional Peace Officers Association, which has lobbied their state government to implement changes that financially benefitted their membership (see Page, 2013).

Penal reform groups often start as grassroots nonprofit organizations interested in reforming the justice system to moderate punishments: Families Against Mandatory Minimums, for example, strongly opposes mandatory sentences. Other reform organizations include the Sentencing Project and Vera Institute of Justice, and while these groups started with an interest in reforming corrections, they often address broader criminal justice reforms—in recognition that it is nearly impossible to make meaningful change when only addressing one element of the justice system.

Single Issue Groups. Some public interest groups are only interested in reforming one aspect of the justice system, and these include Mothers Against Drunk Driving (MADD) and the National Rifle Association (NRA).

Victims and those Lobbying on their Behalf. Crime victims have had a greater voice in the justice system since the 1990s, and a number of advocacy organizations, such as the National Center for Victims of Crime, emerged, and the federal government founded the Office of Crime Victims.

The General Public can influence criminal justice by voting for candidates that propose criminal justice reforms that are consistent with their beliefs. Voters in some states, such as California, are able to vote on different crime control measures such as Proposition 63, a law passed in 2016 that requires background checks for anyone buying ammunition.

The Media have influenced the public in the manner they present information about crime and justice as they tend to overreport examples of rare and serious offenses: this sensationalism may contribute to our stereotypes about crime and offenders, and increase our fear of crime.

Traditional and New Experts include academic researchers/scholars and research organizations—sometimes called “think tanks”—such as RAND (a corporation that produces evaluations on various aspects of the justice system). Some research organizations and academics have a bias and will openly support a conservative or liberal crime control agenda.

Multinational Private Firms That Provide Penal Services. Businesses such as Core-Civic (formerly the Corrections Corporation of America) supply correctional services to local, state, and federal governments. Because of the large profits these corporations can earn, they fund politicians who support high imprisonment policies.

International Institutions such as the United Nations promote crime control agendas, such as the abolition of capital punishment or ending human trafficking. Members of the Organization of American States (which includes the United States), also participate in establishing drug control policies in Latin, Central, and North America.

CONCLUSION

One of the biggest changes in criminal justice policy since the 1970s has been a movement away from attacking the **root causes of crime** to increasing the effectiveness of the police, courts, and corrections. Root causes refers to the economic and social factors that contribute to crime, such as concentrated poverty, high unemployment, a lack of safe and affordable housing, income inequality, inaccessible or underfunded social services, and dysfunctional family structures. These ideas are popular with **critical criminologists** and **social justice activists** who believe that ending these conditions would benefit everybody in society and also reduce crime. However, most of us doubt that such massive social change will occur anytime soon. As a result, policymakers have focused upon improving the effectiveness and efficiency of the police, courts, and correctional systems. This is also a difficult undertaking because there are so many barriers to rational criminal justice policies.

Since the release of the 1997 Report to Congress there has been an increase in determining “what works” in terms of crime reduction. This is an important step as Walker (2015) says that most of our ideas about reducing crime are based on assumptions that are wrong, including justice system operations. Crutchfield extends this observation when he argues that policies are enacted that do not consider our knowledge about offenders, including that they tend to age out of crime, offenders tend to be generalists who do not specialize in any one crime type (and many take advantage of opportunities without much planning), and that African American offenders are overrepresented in their involvement in violent crimes, although he also observes there are “unjustifiable, racialized practices in how the current criminal justice system operates” (Crutchfield, 2017, p. 353).

Although we do not know the future of any reforms of the justice system, the movement toward policy evaluation, best practices, evidence-based interventions, and cost-benefit analyses, will have a significant impact on criminal justice policies in the future. Nevertheless, policy development does not occur in isolation and Winfree and Abadinsky (2017) say that we should integrate theory, research, practice, and policy in developing our approaches to crime reduction. While a growing number of scholars, practitioners, and policy analysts are devoting their attention to increasing the success of interventions intended to change recidivism, applying that interest to the development of theories of offender behavior and organizational effectiveness has been less popular.

In the chapters that follow we examine issues related to law enforcement, justice (and especially as it relates to sentencing, race, ethnicity, and gender), consider the challenges of correcting law-violating behavior, and we end the book

with a discussion of how we will pursue public safety in the future. When considering these topics, we encourage you to think about the issues raised in the first three chapters of the book: how criminal justice policies are formed and introduced, how the crime control and due process models shape our thinking about crime, offenders, and justice, and who gains (and who loses) when we define and respond to crime.

KEY TERMS

collateral consequences	knee-jerk reaction	root causes of crime
cost-benefit analyses	mass incarceration (mass imprisonment)	social justice activists
critical criminologists	Operation Ceasefire	stakeholders
evidence-based practices (EBP)	program fidelity	sunset clause (or sunset provision)

CRITICAL REVIEW QUESTIONS

1. How does the involvement of money-making corporations influence crime control policies?
2. Why do tough cases make bad laws?
3. Why is it important to know “who benefits” when it comes to introducing or reforming crime control policies?
4. Discuss the pros and cons of allowing crime control legislation to sunset or expire.
5. How does your view about offenders shape your ideas about how to rehabilitate or punish them?
6. How did you develop your views about offenders and crime?
7. Explain why GM executives should be jailed for the injuries of 275 individuals and the deaths of another 124 persons (rather than paying a fine) for their negligence; or, alternatively, why a fine is an appropriate sanction.
8. Why (or why not) should professional organizations, such as police or correctional officer associations or unions, lobby for changes in the justice system?
9. How can we reduce the political influences in the criminal justice system (such as electing judges, prosecutors, and sheriffs)?
10. Describe the barriers to implementing rational crime control policies.

WRITING ASSIGNMENTS

1. Kulig and Cullen (2016) note that 86 percent of “named laws” are for white crime victims and ask “Where is Latisha’s Law?” Provide some reasons that while African Americans are disproportionately represented as victims of violent crimes, fewer laws are named after them.
2. Check the issues related to the crime control platforms for Hillary Clinton’s and Donald Trump’s 2016 campaigns (they are available online). Briefly describe how the issue of crime control affected the outcomes of the 2016 presidential election.

3. Describe why rational criminal justice reform is so difficult to achieve.
4. Provide some reasons why counties should pay some of the costs of sending their residents to state prisons. How would this change influence the use of punishment?
5. Explain why programs such as DARE remain popular although we have known since the mid-1990s that these programs have a limited effect on youths' alcohol or drug use.

RECOMMENDED READINGS

Philip Goodman, Joshua Page, and Michelle Phelps (2017). *Breaking the Pendulum: The Long Struggle Over Criminal Justice*. New York: Oxford. Changes in criminal justice policies are commonly described as a pendulum, where they shift over time. The authors focus on U.S. correctional policy and the shifts between punishment ("tough on criminals") and rehabilitation ("smart on crime") and argue that this description overly simplifies the process of penal change. They contend that change is shaped by powerful social forces such as economic conditions and social change, and are the end result of a struggle involving a diverse range of stakeholders who have different visions of sound correctional policies, and are continually advocating for change.

Daniel P. Mears (2017). *Out-of-Control Criminal Justice: The Systems Improvement Solution for More Safety, Justice, Accountability, and Efficiency*. New York: Cambridge University Press. Mears is widely regarded for his thoughtful analyses of American justice policy. This book presents an optimistic outlook for change and explains why U.S. criminal justice system interventions require continual evaluation and that ineffective policies ought to be discarded and strategies that are proven to reduce crime be expanded. Mears argues that justice systems should not only increase public safety, but they should also be accountable to the public.

John Pfaff (2017). *Locked In: The True Causes of Mass Incarceration—and How to Achieve Real Reform*. New York: Basic Books. Mass incarceration is a distinctively American problem, and many researchers focusing on the problem have identified the issues of racial bias, a war on drugs, and sentencing practices such as three-strikes or mandatory minimum sentences that create a demand for punishment that is fulfilled by groups who profit, such as correctional officer unions and private prison operators, or rural communities that replace closing factories with prisons (the "prison-industrial complex"). Pfaff argues, by contrast, that the source of mass imprisonment is unchecked prosecutorial powers, and these officials have played a more powerful role in the criminal justice system since the 1990s and are rewarded for being harsh on crime, while there are almost no rewards for showing mercy—and especially since the costs of punishment decisions made by county officials are borne almost entirely by state governments.

CHAPTER 4



The Search for a Guiding Philosophy of Policing

INTRODUCTION

Traditionally, in the United States the police have been characterized as performing three functions: order maintenance, public service, and law enforcement. Order maintenance focuses on maintaining community peace and civility. Order maintenance requires police to deal with loud music or noisy parties, barking dogs, and other activities that might disturb neighborhood tranquility. Public service is something of a catch-all, and it may involve a lost child, animals running loose, overgrown lots and abandoned cars, or even dented trash cans. Public service involves any action in which citizens do not know whom else to call about a particular problem. Law enforcement duties include issuing traffic citations, writing crime reports, and making misdemeanor and felony arrests. Other responsibilities could be added to the list, but fundamentally all police duties fall into one of these three categories. It is important to note at the outset, however, that many police activities are *reactive*—that is, the police are called into action after some event has taken place—rather than *proactive*, or occurring before a need arises.

Order maintenance was one of the first justifications for creating civilian law enforcement agencies. Along with public service, it continues to consume a great deal of police time and resources. Ironically, many police officers view their primary function as law enforcers. This perspective is reinforced by the amount of initial training devoted by recruits to law enforcement topics (often over 80 percent).

This image is perpetuated by some police departments, and the public has come to expect police officers to be crime fighters. In fact, the crime-fighting orientation attracts some people to policing, and the news and entertainment media seem to be fascinated with the crime-fighting image. This view is consistent with the crime control model (see Chapter 2). However, early research (Harris, 1973; Wilson, 1968) showed that police officers often spend less than 20 percent of their working hours devoted to law enforcement duties, even broadly defined. More recent studies have also shown that a majority of calls for service are for problems related to traffic, public order, or social services (Conover & Liederbach, 2015;

Johnson & Rhodes, 2009). Therefore, is it realistic to believe the police can have a significant effect on crime? We must acknowledge that there are crime-related factors (outside of government's reach) that may be beyond the ability of the police to address. Noted police scholar David Bayley (1994, p. 3) started his book on the futures of police with this provocative statement:

The police do not prevent crime. This is one of the best kept secrets of modern life. Experts know it, the police know it, but the public does not know it. Yet the police pretend that they are society's best defense against crime and continually argue that if they are given enough resources, particularly personnel, they will be able to protect communities against crime. This is a myth.

This observation may have seemed appropriate when Bayley wrote his book: The United States was at the peak of an epidemic of violence, and the traditional policing methods of the era, based almost entirely on reactive patrol, were not always the best use of police resources (Zimring, 2012). In the following pages we describe strategies that emerged to increase police efficacy, and these changes may have played an important role in crime prevention in some jurisdictions. In this chapter, we will examine some of the phases through which policing in the United States has passed. This will provide the foundation for our inquiry into the contemporary search for a model to guide policing. This search not only affects current approaches to policing, but also influences the nature of police work as we progress further into the twenty-first century. Crank, Kadleck, and Koski (2010) observe that the U.S. policing industry is searching for a new philosophy of policing, what they called the "next big thing."

THE EVOLUTION OF AMERICAN POLICING

Some observers have suggested that U.S. law enforcement agencies are relatively stagnant and are primarily oriented toward maintaining the status quo. They view police departments as highly resistant to change; for example, they say many departments make changes only when extreme conditions require them to do so. However, a quick review of policing in the United States shows that throughout history, sometimes very slowly, law enforcement agencies have adapted their methods to fit the times and changing demands placed on them by society. Box 4-1 provides an overview of the nature of police organizations in the United States.

It has been speculated that putting more cops on the street is a wise political move that is popular with the electorate regardless of whether the local politicians who make the hiring decisions are Democrats or Republicans. Some scholars have argued that the decision to employ more officers is driven by a jurisdiction's minority population, a higher degree of income inequality, or the jurisdiction's average income, as wealthier communities tend to spend more on policing. When researchers examine the factors associated with the ratio of officers to population, they generally find that higher levels of crimes reported to the police, and especially nonviolent offenses, are not consistently associated with deploying more police, suggesting that factors other than crime explain the differences (Carmichael & Kent, 2014).

Contrary to Bayley's (1994) observations that the police do not have a significant impact on crime is a growing body of evidence that suggests that police

BOX 4-1**Variations in the Police**

One of the challenges in describing police roles and practices is the wide variation within American policing, and the different strategies and priorities that have evolved throughout the nation. There are about 18,000 law enforcement organizations, and in 2013 the Bureau of Justice Statistics identified 12,326 municipal police departments, 3,012 sheriff's offices, 50 state law enforcement agencies (Burch, 2016, p. 9), and about 2,000 other agencies that enforce the law in transportation systems, public housing, parks, and schools or universities (Reaves, 2011, p. 2). These organizations have different political masters with a diverse range of agendas; as a result, each of these agencies may have slightly different priorities and ways of carrying out day-to-day operations. Even jurisdictions with very similar crime levels may deploy the police in significantly different manners.

Cordner (2011) notes that law enforcement agencies in the Northeast and South tend to have a higher number of officers per capita, whereas states on the West Coast tend to have fewer officers per capita. Figure 4.1 shows the number of officers per 1,000 residents in seven large cities obtained from the Federal Bureau of Investigation (2016, Table 78). One of the questions that police scholars routinely ask is what social, political, economic, and demographic factors account for these differences. Why, for example, does San Diego have one third as many officers per capita as New York, or Baltimore? If the police were deployed rationally, there would be more police per capita in places that had the highest levels of crime, but recent studies have shown that this is not the case.

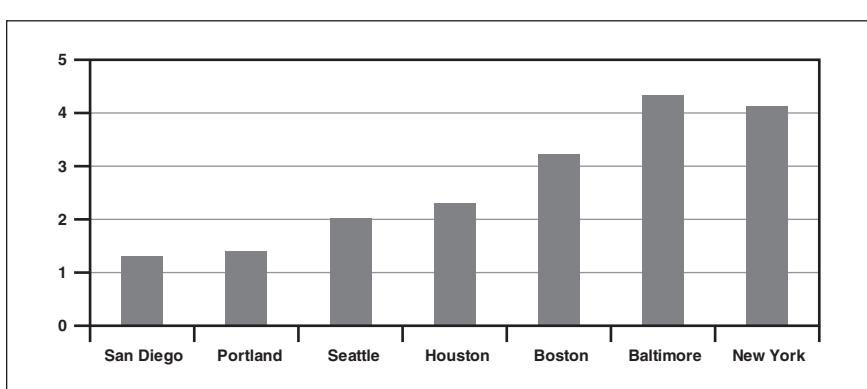


Figure 4.1 Sworn Officers per 1,000 Residents, 2016

SOURCE: Federal Bureau of Investigation (2016), Table 78

strength plays an important role in reducing crime. In his analyses of national crime trends Levitt (2004) speculated that increases in the number of officers on the streets accounted for 10 to 20 percent of the crime decline. Other scholars have found a similar crime reduction benefit in higher levels of police strength (Chalfin & McCrary, 2013; Lin, 2009). Chalfin and McCrary (2013) report that every dollar spent on more police will result in a crime control benefit of \$1.60. Like other issues

examined throughout this book, however, the way the “more police, less crime” relationship is studied has a big influence on the findings that are reported, and prior studies of this relationship have been criticized (Kovandzic et al., 2016). As we describe later in this chapter, however, the manner in which the police are deployed also plays a significant role in crime reduction. In other words, some strategies have more substantial crime control benefits than the traditional reactive patrol model.

STAGES OF POLICE DEVELOPMENT

The development of U.S. policing can be categorized into several stages. There are no exact lines of demarcation for these stages, and some observers have even objected to such a characterization. Nevertheless, we use several general periods or eras to describe the evolution of policing in this country.

First, according to Cole, Smith, and DeJong (2016), policing in the United States has gone through three stages of development: (1) the **political era**—1840s to 1920s, (2) the **professional era**—1920 to 1970, and (3) the **community policing era**—1970 to the present (see also Hartmann, 1988; Kelling & Moore, 1988; and Thurman, 2002a). We have added several additional stages to reflect recent changes.

The Political Era (1840s–1920s)

In the political era, major cities created police departments, which were developed alongside the emerging political machines of cities such as Boston, Chicago, and New York (Walker, 1998). To get a job as a police officer, a man (they were all men then) would approach his city councilman, alderman, or the local political ward boss and ask for appointment to the force. Uchida (2002, p. 92) noted that “police officers were recruited and selected by political leaders in a particular ward or precinct. Virtually no training was provided, and the officers’ responsibilities were learned on the job from veteran officers. New officers might be required to purchase their own uniforms and firearms, and often there was a lack of uniformity in both. Pay, while good for the times, was still meager, and corruption was ignored or tolerated.”

During the political era, the politicians took advantage of the police, but the police often tried to exploit the politicians as well. The politicians controlled the types of laws the police could enforce and the groups against whom they could enforce laws. Police ignored or gave tacit approval to certain types of vice-related crimes (such as prostitution) and, in return, politicians supplemented the income of the poorly paid officers. The two grew up together and practically were inseparable. It was as if *policing* and *politics* were the same word, with a slightly different pronunciation.

We addressed the issue of politics in criminal justice systems in Chapter 1, and the political era represents the worst of the marriage between the political and justice systems. This era was marked by police corruption and brutality, and districts had few legal restrictions and still fewer policy restrictions on what the police could do. As a result, “the lawlessness of the police . . . was one of the paramount issues in municipal politics in the late 1800s” (Uchida, 2002, p. 93). Because of the brutishness and poor quality of U.S. police services, there were calls for police reform during the Progressive Era (beginning in the late 1800s and extending into the early 1900s).

Reform Transition (Late 1800s–Early 1900s)

The Progressive Era brought about social changes, such as the first juvenile court, child labor laws, and compulsory school attendance laws. Social reformer Upton Sinclair wrote in his novel *The Jungle* about the poor quality of the U.S. food supply, and many cities experienced a surge in reforms. As a result, during this period police reformers such as Theodore Roosevelt (who was New York City's Police Commissioner prior to becoming President), **August Vollmer**, and **O. W. Wilson** started to have an impact on the way Americans viewed the police and how the police viewed themselves (Reppetto, 2010; Thurman, 2002a). This time of reform was a transitional period between the political era and the era of police professionalism that was to follow (Uchida, 2002).

The Professional Era (1920–1970)

The professional era of policing largely resulted from early police reform efforts by men such as Vollmer, Wilson, and **William Parker**. Vollmer's primary influence came about during his tenure as police chief in Berkeley, California. He pioneered the notion of college education for police officers and worked to develop a college-based policing program at the University of California. The professional era developed further with Wilson's days as police chief in Wichita, Kansas, and through his attempts to reform the Chicago Police Department. However, many mark the high point of the professional era as existing during Parker's tenure as police chief in Los Angeles, California, from 1950 to 1966 (Reppetto, 2010). Parker implemented a variety of innovations that increased the department's efficiency and public reputation. For example, to increase patrol presence and visibility, Parker moved the department to one-man patrol cars. He also instituted an extensive training program and rigorous recruit screening, and only one in ten applicants were accepted as LAPD officers. Throughout his career, Parker stressed reform and innovation (Johnson, 1981, pp. 119–121; LAPD, 2016).

The professional era of policing was marked by several distinctive features. First, departments began the creation or expansion of formal training for police officers. No longer did they rely upon veteran officers to train rookies on the job. Cadets finished a prescribed training period at the police academy before they were assigned to patrol. Second, while police officers clearly possessed human emotions, they were expected to perform their duties in a businesslike, dispassionate manner. Women and minority officers were also making some inroads in policing during this era and more were being hired into front-line policing roles.

Third, to reduce the corruption experienced by some departments, professional policing emphasized rotating officers through many different patrol beats and also rotating their assignments (especially in areas such as narcotics and vice). To reemphasize the issue of integrity by officers, larger departments created internal affairs divisions, and some cities established police commissions or civilian review boards.

Fourth, while professionalism influenced the ways in which the police dealt with a number of social issues, fundamentally police work remained overwhelmingly reactive in nature. Thus, rather than anticipating community needs and crime problems, uniform patrol officers and plain-clothes detectives dealt with one call for service after another throughout their shifts.

When combined, all of these factors, along with the increased use of patrol cars, insulated and isolated the police from the public they were sworn to serve. As a result, the police frequently lost touch with the values that the citizens cherished, such as the ability to approach an officer. In the end, the professional era suffered its greatest challenges from increasing crime rates, along with the civil rights movement, anti-Vietnam War protests, and the urban riots of the 1960s (Reppetto, 2012; Uchida, 2002).

Before leaving our discussion of the professional era of policing, we should note a factor that is often overlooked. The reform movement was simply one force within policing in the United States. Not all departments were reached by this movement, and not all embraced ideals such as high personnel qualifications, hiring women or minority officers, and preservice training prior to beginning police work. The fragmented nature of policing in the United States meant that the impact of reform also was fragmented. Some departments exhibited high levels of reform and professionalism, and others were mostly untouched by reform.

Days of Protest—Another Transition (Mid-1960s–Mid-1970s)

Cole, Smith, and DeJong (2016) characterize the 1970s as the beginning of the community policing era, but the late 1960s and early 1970s clearly were a time of transition from the preceding era. The period from about 1965 to 1975 saw an increase in social unrest in the United States. Minority groups—especially African Americans—lobbied for full participation in the nation’s political processes. Activists staged civil rights protests in many cities. In places like Selma and Birmingham, Alabama, these protests were broadcast on national television, with local police agencies often playing the parts of the villains. Demonstrations against the Vietnam War, draft card burning, and the assassination of Martin Luther King, Jr. brought the police into conflict with college students (and others) who took to the streets to express their displeasure over the nation’s state of affairs (Reppetto, 2012). The police were called upon to perform jobs they were not trained to do—deal with social unrest and act in a large-group, unified fashion—and often they failed in their missions. The major result of this era of protest and transition was a great deal of soul-searching by the police and by society in general. Eventually, there was forward movement by the police as agencies began to embrace the concept of professional public service.

During this era, questions were raised about the reactive nature of most police functions and the crime-fighting orientation that officers had carried over from the professional era. Groups within and outside of policing began to ask questions about what the police *could* do and what they *should* do. The result was the search for a new paradigm.

The Community Policing Era (1970s–2010)

Community policing did not originate as such. In fact, during the early 1970s, several movements began that eventually provided us with the concept of community policing. For instance, one of the earliest efforts began in Cincinnati, Ohio, and Boston, Massachusetts, with an approach called **team policing**. Team policing was designed to identify distinct neighborhoods and to assign a group of officers to patrol those

neighborhoods on an ongoing basis. The underlying philosophy was that the officers were to reconnect with the citizens they served. These teams of officers were to interact with the residents and business owners. They were expected to get out of their patrol cars and walk around often so they could speak to people and the public would feel comfortable approaching them. The team concept also was designed to help officers share information with each other about trouble spots in their patrol areas, and it was designed to flatten the hierarchical, military-style organizational pattern that had developed in police agencies during the professional era (Kelling & Moore, 1988).

One of the key elements to emerge from team policing was the importance of **police-community relations**. The idea was that officers should listen to citizens, not just talk to them (or sometimes at them). Departments approached community relations in various ways. As a result of team policing and similar efforts, some departments operated with the philosophy that community relations was the responsibility of every officer every day. Other agencies employed nonsworn personnel to act as “police service aides” while performing community relations functions, or they designated special community relations officers. Frequently, in these agencies, there was a clash of values between the “real” police, who were committed to crime fighting, and the community relations officers, who were seen as holding citizens’ hands to soothe whatever might be troubling them. An us-versus-them attitude prevailed in such departments. While there always has been some degree of tension within law enforcement concerning the importance of community relations, the soul-searching that has gone on over such concepts has caused agencies to examine their roles in interacting with the public they serve.

In addition to team policing, Herman Goldstein’s work on **problem-oriented policing** and the very influential article written by George Kelling and James Q. Wilson (1982) brought to the forefront the notion of community disorder and its impact on crime and other quality-of-life issues.¹¹ In their article Kelling and Wilson introduced the idea of **“broken windows.”** Champion (2005, p. 32) noted that *broken windows* is a term “used to describe the role of the police as maintainers of community order and safety and the view that police attention to disorder (low-level offenses such as drunkenness or prostitution) will prevent or forestall acts of more serious crime.”

Kelling and Wilson said that in a neighborhood with broken windows left unrepaired, the message is that no one cares. Fear and crime take over as citizens give up control of their neighborhoods to the elements of disorder. Therefore, to counter the forces of social disorganization, the police and neighborhood residents must band together and forge working relationships that help citizens “take back the streets.”

While the notion of order-maintenance policing is intuitively appealing, not everyone is an advocate of this approach. For example, Harcourt (2001, p. 6) says that this orientation adds to the severe penalties being administered by the criminal justice system. He summarizes his argument as follows: “The problem, in a nutshell, is that order-maintenance crackdowns permeate our streets and police station houses while severe sentencing laws pack our prisons. We are left with the worst of both worlds.”

The broken windows approach led to the introduction of **stop, question, and frisk** (SQF) practices, where suspicious-looking or -acting individuals on the streets

were stopped by the police, and frisked to ensure they were not armed. In New York about a quarter million individuals were stopped on the streets by the police every year, but the practice was ruled unconstitutional in 2013, and has fallen out of favor. Klahr and colleagues (2016, n.p.) observed how broken windows “is a story of our fascination with easy fixes and seductive theories. Once an idea like that takes hold, it’s nearly impossible to get the genie back in the bottle.” Walker (1998) noted that urban decay and social disorganization encouraged cooperation of police and politicians around the theme of community policing. The initial publicity on the community policing movement “seemed to promise everything: revitalized neighborhoods, reduced crime, and close police-community cooperation” (Walker, 1998, p. 238). However, the question remains whether community policing promised too much. Did the community policing movement prematurely raise the hopes of both the police and the community? We will examine this question in the following section.

Community Policing

Community policing has been described by some as a new approach to policing. It is, as we have mentioned elsewhere in this chapter, a different paradigm than that presented by the reform or professional eras in U.S. police history. While sometimes it is difficult to decide what is and what is not community policing, we can refer to the ten principles articulated by Kappeler and Gaines (2015) in Box 4-2 as being central to any community policing program. It is important to emphasize, however, that community policing is not a firmly established program or prescription for policing. It is much more an orientation toward delivering police services; thus, it can take many different forms depending on the community.

As we mentioned in the previous section, concepts such as team policing that existed from the mid-1960s through the mid-1970s laid the foundation for community policing. In fact, Cordner, Fraser, and Wexler (1991, p. 354) observed that while team policing and community policing (or **community-oriented policing**) “are similar in overall objective, they differ sharply in the ways they have been integrated into departments.”

However, while we can identify a number of precursors to community policing, it is difficult to trace the beginnings of this concept. One of the reasons is that community policing, as such, did not spring full-blown onto the policing scene. Instead, it developed over several decades in incremental steps. Nevertheless, by the 1980s several police departments across the United States had adopted the philosophy articulated by Robert Trojanowicz and his colleagues at Michigan State University under the label of community policing or community-oriented policing.

The current model of community policing, as described by the federal government’s Office of Community Oriented Policing Services (2016b), emphasizes community partnerships, the transformation of policing organizations, and the implementation of a problem-solving approach. Figure 4.2 shows how these strategies work together in the implementation of this model. In respect to community partnerships, the federal government acknowledges that police cannot stand alone in the fight against crime and that they have to build partnerships with other governmental as well as community organizations to identify crime problems. To carry out their tasks, police organizations must change their operational structures and

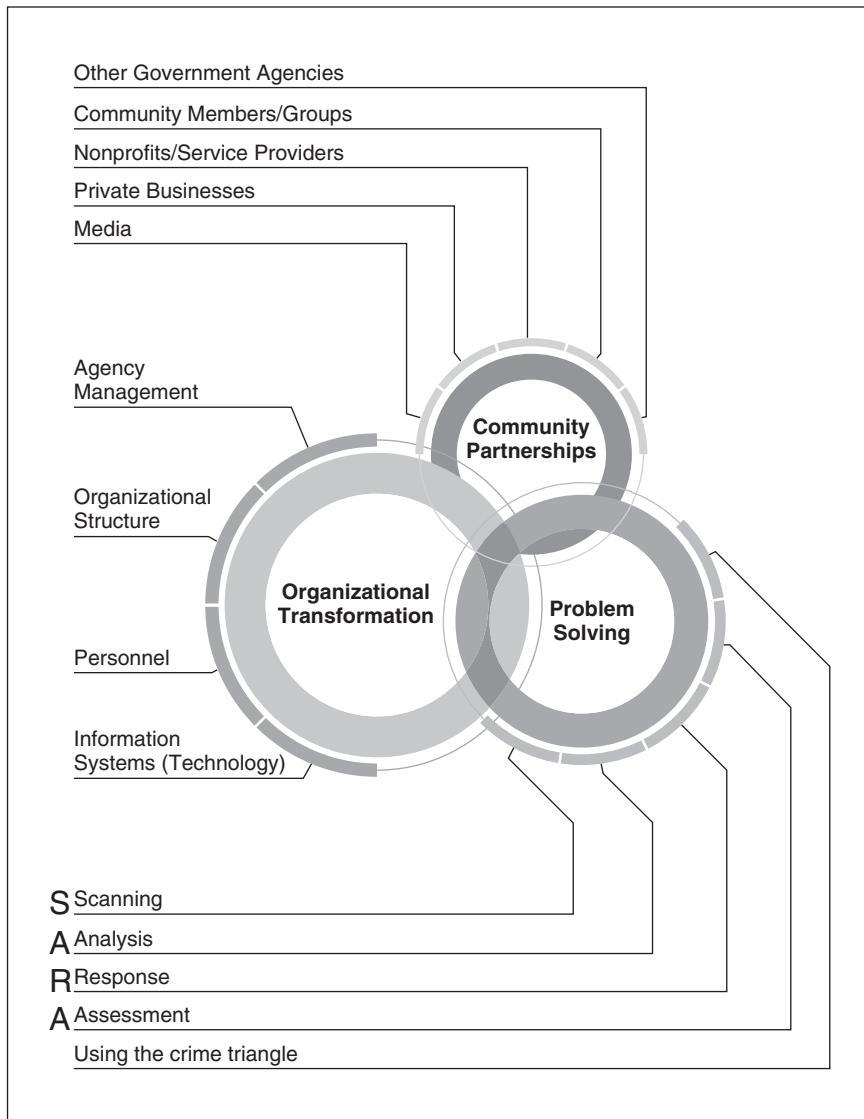
BOX 4-2**The Ten Principles of Community Policing**

1. Community policing is both a philosophy and an organizational strategy that allows the police and the community residents to work closely together in new ways to solve the problems of crime, reduce fear of crime, and improve neighborhood conditions.
2. Community policing's organizational strategy first demands that everyone in the department, including both civilian and sworn personnel, must investigate ways to translate the philosophy into practice.
3. To implement true community policing, police departments must also create and develop a new breed of line officer, the community policing officer, who acts as the direct link between the police and people in the community.
4. The community policing officer's broad role demands continuous, sustained contact with people in the community, so that together they can explore creative new solutions to local concerns involving crime, fear of crime, and community conditions with private citizens serving as unpaid volunteers.
5. Community policing implies a new contract between the police and the citizens it serves, one that offers the hope of overcoming widespread apathy; at the same time, it restrains any impulse to vigilantism.
6. Community policing adds a vital proactive element to the traditional reactive role of the police, resulting in full-spectrum police service.
7. Community policing stresses exploring new ways to protect and enhance the lives of those who are most vulnerable—juveniles, the elderly, minorities, the poor, the disabled, and the homeless.
8. Community policing promotes the judicious use of technology, but it also rests on the belief that nothing surpasses what dedicated human beings, talking and working together, can achieve.
9. Community policing must be a fully integrated approach that involves everyone in the department, with community policing officers as specialists in bridging the gap between the police and the people they serve.
10. Community policing provides decentralized, personalized police service to the community.

SOURCE: Kappeler & Gaines (2015, pp. 557–559).

priorities. Organizational transformation, however, rests upon the support of agency leaders and changes in organizational culture—which we have already described as a significant challenge in policing. The third component of the community-oriented policing model is the systematic problem-solving approach articulated by Goldstein (1990a & b). This model is based on SARA: Scanning (identifying problems), Analysis (researching the problem), crafting a Response (which may or may not involve the police), and Analyzing the success of the response.

Walker (1999) commented that, in some ways, community policing is a return to the early English roots of policing. This simply means that the community is expected to share an equal responsibility with the police for maintaining order and promoting public safety. However, one of the contemporary scholars of

**Figure 4.2 The Primary Elements of Community Policing**

SOURCE: Community Oriented Policing Services, Office of (2016b, p. 2)

community policing has asked this question: “Is community policing new wine, or is it old wine in new bottles?” (Thurman, 2002a, p. 270). Thus, it is important to examine community policing in an effort to understand the impact it has had both on how the police view themselves and how they are viewed by their communities.

Goldstein (2002, p. 102) maintained that in response to community policing, there have been increasing public expectations that “community policing will provide an instant solution not only for problems of crime, disorder, and racial tension, but for many of the other acute problems that plague our urban areas as well.” He warned that we should be patient even though we have not been able to develop the perfect

model of policing. In our pluralistic, changing society, the best we can hope for is that the police will be “committed to protecting and extending democratic values” that are consistent with the due process model (Goldstein, 2002, pp. 103 & 110).

Another element associated with community policing has been the introduction of larger numbers of nonsworn officials in police departments. The **civilianization** of the police has increased substantially in recent years, and their numbers increased by 55 percent between 1992 and 2012 while the number of sworn officers grew by 32 percent during the same era (Banks, Hendrix, Hickman & Kyckelhahn, 2016). Civilian employees in some jurisdictions, for example, now carry out many duties formerly done by sworn officers. Some of the motivation to increase the number of civilian employees is cost-related as they can be hired at a fraction of a sworn officer’s cost. Yet, the “us-versus-them” attitude between these two groups may develop within an organization, and in a survey of civilian employees in large departments, Skogan and Alderden (2011, p. 4) reported that a “large minority of civilian employees [perceive] that they are not fully accepted, have limited opportunities for advancement, and that their expertise and personal experiences and opinions are often dismissed by sworn personnel.”

Now that we have had over three decades’ worth of experience with community policing in the United States, what can we say about the effectiveness of this policing paradigm? First, neither community policing nor any other approach will solve all of the social problems presented to the police or ensure reduced crime through police-citizen interactions. Peter K. Manning (1992, p. 7) has said that “as long as police exercise authority and force in the name of the state, they will be feared and loathed by some segments of the community.”

Second, whatever the specific programs employed, no doubt community policing rhetoric has had an effect on police executives in the United States. For example, a report produced by the Bureau of Justice Statistics found that in 2013 over two-thirds (68 percent) of local police departments had a mission statement that described some aspect of community policing (Reaves, 2015, p. 8). Reaves also found that fewer of these organizations (32 percent) reported having problem-solving partnerships or agreements. With respect to training, 98 percent of new officers attended police academies that taught courses in community policing, and they received an average of forty-three hours of training in this approach, including instruction in cultural diversity, mediation, community partnership building, and problem-solving approaches (Reaves, 2016, p. 7). Thus, the general trend recently is toward more agencies, employing more officers adopting some form of community policing activities.

Third, community policing has become a priority of the federal government, and over a six-year period, Congress appropriated about \$9 billion to back various programs under the community policing label. Federal dollars were provided to fund up to 100,000 new state and local police positions in agencies around the country, as well as to improve problem solving, foster community interaction, encourage innovative policing programs, and develop new police technologies (Mabrey, 2005; Roth & Ryan, 2000). While departments have increased the number of personnel hired, depending how they were counted, the federal government never met the goal of putting another 100,000 officers “on the streets.” Furthermore,

the community partnerships that were supposed to have been developed remain somewhat elusive. In fact, Roth and Ryan (2000, p. 17) concluded that “true community partnerships, involving sharing power and decision making, are rare at this time, [and are] found in only a few of the flagship departments.”

Fourth, there is some evidence of crime reduction because of moving toward the community policing approach, especially as a result of the funding available from the federal Community Oriented Policing Services (COPS) program. Zhao and Thurman (2004, p. 1) examined grant awards made from 1995 to 2000 in 5,659 law enforcement agencies and found that “COPS hiring and innovative grant programs are related to significant reductions in local crime rates in cities with populations greater than 10,000 for both violent and nonviolent offenses”; cities with populations less than 10,000 did not experience significant crime reductions. However, a word of caution must be issued relative to possible contaminating factors in this and other evaluations of police operations. Although Zhao and Thurman used the mid-1990s as the baseline for their research, some cities had started to experience drops in crime rates as early as 1990. Additionally, New York City, which saw one of the biggest drops in crime rates, attributed the positive changes to implementation of the COMPSTAT program (an approach that directed police interventions based on neighborhood-level crime statistics), rather than community policing *per se*. In fact, Lyons (2003) reported that many people credited COMPSTAT with causing a “decade-long decline in New York City’s crime rate as authorities used technology to pinpoint problem areas and saturate troubled neighborhoods with cops” (see also McKay, 2003; for a slightly different view see Willis, Mastrofski & Weisburd, 2004).

It is important to note at this point that federal funding for the COPS program has decreased in recent years. This may be one indication of a decreased interest in the community policing model. Nevertheless, over its history the COPS program has expended more than \$14 billion to advance community policing and the most recent figures show over \$1.4 billion in 2,000 active grants (Community Oriented Policing Services, 2016c). As we noted in Chapter 1, the federal government can influence criminal justice agencies by providing grants. One of the challenges to these agencies, however, is that once the federal funding expires they might find it difficult to maintain the programs.

Fifth, any shift in the policing paradigm is likely to be met with skepticism and resistance by the police and by the public as well. Therefore, fundamental changes to the way policing services are delivered in the United States will require both time to plan the changes and to implement them. In fact, when looking at police departments of various sizes around the United States, we see that some have embraced the community policing concept, while others continue in the traditional, reactive manner of delivering police services. Furthermore, Pelfrey (2004) found that the concept has not been embraced by all of the officers even in agencies that supposedly have adopted community policing. Jenkins (2016, p. 228), for example, surveyed police officers from two urban departments and he found that while 71 percent thought that having community meetings to identify problems and solutions was a very important tactic, only about one-third had confidence in foot or bicycle patrols or that their department should represent the racial/ethnic makeup of the community.

Search for a New Philosophy of Policing (2010 to Present)

Since no single paradigm of policing can last forever, we must ask about the next model likely to come along. In recent years there have been an increasing number of attempts to forecast the future of policing, or to predict the “next big thing” in policing. Crank, Kadleck, and Koski (2010, p. 414) convened a group of fifteen police scholars to discuss the future of policing, and the investigators reported that none of these experts “foresaw a positive future for community policing.” The waning support for community policing was attributed to the decline in officer positions dedicated to this approach, federal budget cuts, a lack of positive results, poorly managed implementation, and resistance from police organizations that are still wedded to the professional policing model. Furthermore, the terrorist attacks of 9/11 changed the priorities of U.S. law enforcement, with the reallocation of federal, state, and local resources to manage potential terrorist threats, and a reduction in the focus on street crime. In this new policing environment, community policing in some places may have been sacrificed.

Despite that pessimism, the federal Office of Community Oriented Policing Services still exists and continues to disseminate information and funding for police agencies, and it is possible that reports of the death or decline of community policing in America are premature. In fact, as a result of a number of high-profile shooting deaths of unarmed citizens by the police—discussed further in Chapter 5—there have been increasing calls for greater interactions and closer cooperation between the police and the public they serve.

As with the other policing paradigms discussed in this chapter, community policing may be a model in transition. Maybe it is one more in a long line of different models that have been implemented by some police departments and rejected by others, but it could also prove the very model to be reinvigorated by today’s change-oriented police executives. These executives have experimented with a number of different strategies, and these approaches are briefly described in the following paragraphs.

Evidence-Based Policing

A current lack of broad acceptance or institutional support for community policing suggests that another guiding philosophy may gain traction to usurp the traditional professional policing model. We foresee a number of possible alternatives, although two seem poised to increase their acceptance: intelligence-led policing and strategies based on evidence-based practices (e.g., directing resources to places with high rates of crime, what most police officials and scholars call directed patrols of **hot spots**). Increasing the police presence in these locations is posited to have a crime reduction effect. But these proactive policing practices can take place only if they are informed by higher levels of information and intelligence that the police can use to base their practices.

There has been increasing attention paid to evidence-based practices, and what the research demonstrates as being effective in all criminal justice operations, including “what works” in policing. Lum, Koper, and Telep (2011, p. 20) have developed an evidence-based policing matrix that summarizes the results of

over 100 policing interventions, and found that “proactive, focused, place-based interventions are more likely to reduce crime and disorder.”

This perspective is supported by other reviews of the research literature. Telep and Weisburd (2012, p. 331) reported that the effectiveness of the police is increased when they focus upon “hot spots policing, problem-oriented policing (POP), focused deterrence approaches, directed patrol to reduce gun crime, and using DNA in property cases.” Ultimately, Lum and Koper (2017) say that almost two decades of evidence-based research has shown the limitations of the traditional reactive approach to policing, and the need to develop policing tactics based on research, analysis, and science.

Intelligence-Led Policing

As a result of dissatisfaction with the reactive form of policing, and in the wake of the 9/11 terrorist attacks, there were a number of calls for a different orientation toward the police mission, one based on objective analysis of data rather than hunches or reactions to high-profile, but rather unique, crime events. The **intelligence-led policing** movement (ILP) has gained advocates in the United States, the United Kingdom, and Canada, and it strives to make the police more proactive rather than reactive in their policies and operations. In this section we will examine what we know and what we don’t know about ILP.

Peterson (2005, p. vii) says that intelligence-led policing is “a collaborative enterprise based on improved intelligence operations and community-oriented policing and problem solving.” Ratcliffe (2016, p. 4), one of the major proponents of ILP, adds that it is an operational approach designed to “reduce crime through proactive policing targeted by criminal intelligence.” His full definition is that “intelligence-led policing is a business model and managerial philosophy where data analysis and crime intelligence are pivotal to an objective, decision-making framework that facilitates crime and problem reduction, disruption, and prevention through both strategic management and effective enforcement strategies that target prolific and serious offenders” (Ratcliffe, 2016, p. 4). Nevertheless, Ratcliffe notes that ILP has been developed and applied differently in different locations and that “a single unifying definition may prove elusive” (p. 4). Cope (2004) echoes some of these same sentiments in maintaining that there is not always a clear understanding of analysis or analytical tools within police organizations.

Essentially what ILP is designed to do is gather as much information as possible relating to law-violating behaviors (most would say this includes both domestic and international terrorism). Once this information (data) has been gathered it must be analyzed in a way that transforms raw information into usable intelligence. That does not mean that a single law enforcement agency must carry out those activities in isolation and the Department of Homeland Security (DHS) has provided financial support, training, staff support, and coordination for the development of a network of seventy-two **fusion centers** around the nation. Personnel in these fusion centers work for municipal and state governments and are responsible for gathering and receiving both local and federal information, analyzing this information to recognize potential threats, and disseminating threat information to other agencies. While the final chapter has yet to be written on

ILP, it is another approach designed to “reimagine” the policies and practices we associate with policing, not only in the United States but in other nations as well.

Thus, emerging research shows us that police strategies can lead to reduced crime, but increased police strength and directed activities are also contributing factors. In an influential statement Zimring (2012, p. 142) attributed the crime drop in New York to the emphasis on policing hot spots and “targeting of public drug markets for arrest, surveillance, and sustained attack.” He also contends that COMPSTAT contributed to decreased crime, as did a focus on police interventions to reduce the number of guns on the streets, although the evidence for these two strategies is less robust. Last, while political and police leaders in New York have maintained that police efforts to target quality-of-life offenses or “broken windows” resulted in the crime drop, Zimring (2012) observed that the evidence about that relationship has not been clearly established.

Mission-Based Policing

Consistent with the evidence-based research reported above, Crank, Irlbeck, Murray, and Sundermeier (2012, p. 104) argue that urban policing should focus on the permanent reduction of serious crime in high-crime areas. Their **mission-based policing** approach emphasizes the use of intelligence, a problem-oriented approach based on collaboration with urban planners, long-term community reinvestment, and a command structure that is more closely aligned with a military approach than traditional policing. As such, the model embraces elements of community policing, ILP, current research showing the efficacy of focused police interventions, and a management model that emphasizes high levels of accountability. The mission-based approach is also based on tackling the root causes of crime and the most serious offenses with an end goal of eliminating, rather than reducing crime. While these scholars have raised some important questions, their approach has not gained much traction in the scholarly literature.

Smart Policing

Smart policing (or the Smart Policing Initiative/SPI) is a crime reduction approach that was championed by the federal government in 2009. Similar to EBP or intelligence-based policing, this approach is based on developing responses to local crime problems using policing strategies previously identified as effective and affordable. Coldren, Huntoon and Medaris (2013, p. 278) observe that this approach is innovative, multidimensional, and “that focuses on the role of science and research in studying policing effectiveness.” Like EBP, smart policing encourages partnerships between the police and academic or government researchers. One factor that differentiates smart policing from other police interventions is that innovation is prioritized and some of the interventions that are introduced are experimental and are not based on research and evaluation.

While it is too early to determine which model will emerge as the “next big thing” in policing, a scan of the policing literature shows that there is growing academic interest in reinventing the police. Many of these strategies—such as COMPSTAT, EPB, intelligence-led policing or smart policing—are using up-to-date information on crime and intelligence about criminal behavior in deploying the

police to respond to at-risk places or populations. While these models are eagerly embraced by academic researchers, some police organizations and officers might not share this enthusiasm in transforming their existing practices. Willis and Mastrofski (2011) remind us that innovation in police organizations is not a straightforward process and is subject to a host of internal and external factors. One of the most powerful internal factors is how the police culture resists reform, but Braga and Dusseault (2017, p. 15) point out that interventions that are successful increase the motivation for change, and changing the culture is not “an insurmountable challenge.”

WOMEN IN POLICING

While the gender of police officers is not related to police responses to crime, it should be examined as a major policy consideration for a conspicuous reason: Since the 1970s the number of women working in law enforcement at all levels has greatly increased. This influx of female officers has had an impact on the way the police interact with the public and the way officers interact with one another.

It is important to note that the first female officers were hired in the early 1900s (National Center for Women and Policing, 2017). However, their responsibilities were often limited to working with juveniles, persons with mental illnesses, or serving as jail matrons. Thus, for much of our nation’s history, virtually all of the jobs in the criminal justice field were occupied by men. Now women are found working in every segment and every type of agency in criminal justice. To what extent is their presence felt? What difference has it made? We attempt to answer these questions.

One of the most difficult areas to discuss sufficiently in relation to gender and justice is the level of female employment in the criminal justice system. In reality, the data often simply are not available. However, we do know that women occupy a relatively small, but growing, percentage of the people employed by justice agencies in this nation, but there is some variance among jurisdictions. For instance, in 1987 women constituted 7.6 percent of the sworn officers in police departments in the United States. By 2016, this total had increased to 12.1 percent of all sworn officers, and 60 percent of civilian personnel (Federal Bureau of Investigation, 2017, Table 25). The FBI data show that the highest proportion of women officers worked in cities with one million or more residents (17.8 percent), while only eight percent of officers in nonmetropolitan counties were women. Prenzler and Sinclair (2013) noted that there are smaller percentages of women officers in the United States compared with other English-speaking common-law nations, such as Australia or Canada. Cordner and Cordner (2011) speculated that problems in the recruiting and retention of women officers had resulted in them being “stuck on a plateau” in respect to their representation in policing. In both local police departments and sheriff’s offices, a review of the FBI (2017) data shows that the percentage of women officers increases with the jurisdiction’s size: smaller jurisdictions typically deploy fewer sworn female officers or deputies.

In state law enforcement agencies, women generally are found in smaller numbers than in city or county policing, and Langton (2010, p. 3) observed that “From 1987 to 2007, state police departments also increased the percent of sworn officers

who were women, but at a slower rate than the local police departments. In 2007, 6.5 percent of state police officers were women, compared to 3.8 percent in 1987.”

With respect to federal law enforcement, in 2008, 15.5 percent of the sworn law enforcement personnel working for these organizations were women, but they tended to cluster in certain agencies. For example, 46 percent of the sworn personnel in the U.S. Administrative Office of Courts were female, along with 25 percent of the personnel in offices of inspector generals and 31.5 percent of the sworn employees in the Internal Revenue Service. By contrast, only 9.6 percent of the Drug Enforcement Administration’s sworn agents were female, and the Veterans Health Administration, U.S. Fish and Wildlife Service, U.S. Marshals Service, Bureau of Diplomatic Security, and U.S. Secret Service all reported fewer than 11 percent of their sworn personnel as being female (Reaves, 2012, pp. 7–8).

Nevertheless, we are left with a lingering question: Why do women represent fairly small percentages of employees in most criminal justice agencies? Several answers have been suggested.

First, traditionally there have been hiring impediments—physical requirements such as height, weight, and tests of strength—in law enforcement agencies, and these have created barriers to employment for many women. Second, related to the first impediment is the view held by male agency administrators that women may not be able to perform the work adequately (this especially seems to have been an issue in state police agencies). Donna Hale (2002, p. 1720) stated that especially in law enforcement, female numbers have remained low because of the “unwelcome reception women have received from the predominantly male members of the departments who believe women do not belong on patrol” (see Cordner & Cordner, 2011). Third, in many male-dominated work environments, both gender discrimination and sexual harassment (sometimes subtle and sometimes overt) have been conspicuous problems (Belknap, 2007; Shelley, Morabito & Tobin-Gurley, 2011). Organizational factors may also play a role in the prevalence of women officers and Schuck (2014, p. 54) found that:

Higher levels of female officer representation were associated with organizations that emphasize community policing; have higher education requirements, more incentives and benefits, no physical fitness screening criteria, and no collective bargaining rights; belong to the Commission on Accreditation for Law Enforcement Agencies; and serve larger and more racially ethnically diverse communities.

These factors tend to be associated with larger police organizations, and that is consistent with the FBI (2017) data on women in policing.

Moreover, while the pay and fringe benefits such as insurance and retirement are attractive, the nature of police employment may be undesirable to prospective female employees. For example, shift work and holiday work assignments are common in law enforcement. These situations often combine with family obligations and child-care responsibilities to make many police positions unattractive to females. Cordner and Cordner (2011) observed, for instance, that many police departments have been slow to implement family-friendly policies that might increase the recruitment and retention of women. Ward and Prenzler (2016, p. 243) suggest that removing barriers

to women's employment, such as all-male selection panels, flexible employment options (including part-time work), support officers, and anti-harassment policies will increase the number of women hired, and will be important in retaining them. Therefore, what are the answers to the question we posed concerning female employment in criminal justice? As usual, some of all of these elements generally are at work.

Finally, many of the workforce development surveys done in the past two decades have indicated that if justice agencies expect to fill all of their positions in the future, they will increasingly have to look to women (and minorities) to locate enough candidates to staff all of their openings. If women find these jobs attractive, they may find increased earnings potential as well as opportunities for career development and advancement.

POLICE APPROACHES IN THE FUTURE

At the start of this chapter we asked whether policing was in search of a new guiding philosophy. In the early 1990s, there was pessimism that the police had much of an impact on crime. Yet, there is a growing body of research showing that some of the crime decline after the mid-1990s was the result of increases in police strength (Chalfin & McCrary, 2013; Levitt, 2004; Lin, 2009) as well as changes in police strategies (Lum & Koper, 2017; Telep & Weisburd, 2012; Zimring, 2012). The Washington State Institute for Public Policy (2017a), for example, found that deploying an additional officer at targeted locations can provide a benefit of \$5.36 for each dollar spent. These observations raise some interesting questions: Is community policing going to wither away or will ILP or evidence-based strategies become the ultimate destination for the delivery of police services in the United States? Perhaps these approaches are merely additional stops along the road in the evolution of the police role. It is possible that a smart policing approach that incorporates elements of all of these models may gain acceptance.

Different scholars, policymakers, and practitioners answer questions about the policing philosophies in different ways. Some see community policing and a growing reliance on research and promotion of proactive strategies as fundamentally changing the way police officers perform their jobs, at least in urban America. These changes have become so institutionalized that we can never return to the reactive, call-chasing days of the professional policing era (see Peak & Glensor, 2012). When innovations are introduced, even ones supported by academic research, there are sometimes unanticipated or unpredictable consequences (Crutchfield, 2017; Willis & Mastrofski, 2011).

It is clear that policing is poised for a transformation. The sources of these changes may be from external events, such as 9/11, the budget crisis that has persisted since 2008, or from internal events, such as occur when charismatic leaders effect organizational changes that are copied by other agencies. The use of deadly force (discussed in the next chapter) may also energize community protests and legal actions that bring about changes in policing.

Regardless of the form of these changes, the police are better situated to adapt to changes today. Bayley (1998) has outlined six changes over the past several decades that have shaped American policing (see Box 4-3). While not all police

scholars would agree with his assessment, several of these changes are noteworthy. Within a very short period of time, for instance, the police have transformed themselves from a “blue-collar” occupation that was both “pale and male” to an increasingly sophisticated, professional, and diverse workforce. In a federal government study of police agencies, Reaves (2015) found that about one-third of the departments nationwide require some college credit for persons to be hired. This is unchanged from 2003 but almost triple the number in 1990. Some jurisdictions place a higher emphasis on college-trained officers and in Minnesota, for instance, all officers in that state must have a two-year degree before being hired (Hilal, Densley & Jones, 2017). In terms of diversity, the investigators found the percentage of female and minority officers also continues to grow.

Other scholars are not so optimistic; in fact, a few are downright pessimistic. They see approaches such as community policing facing a number of problems. First, to truly operate in a community policing fashion, a great deal of change may be required of the police. Second, some agencies have espoused a community policing philosophy but have never really embraced the concept. Third, particularly among line officers, an inherent resistance can be seen within the police occupational subculture. And finally, this trend may be viewed as a passing fad and an attempt by police executives and police agencies to co-opt the public as an ally (see Thurman, 2002b, p. 119). If this is the case, then community policing is nothing more than a public relations ploy with very little substance. In fact, Walker (1998, p. 239) concluded that after about a decade of development, “community policing programs increasingly became conventional anticrime and antidrug programs.” Thus, there remain serious questions about “whether community policing represented a new era in policing, as its advocates claimed, or whether it was simply the latest in a long line of overpublicized fads” (Walker, 1998, p. 239).

Most approaches to community policing have been fashioned on the philosophy of making the police more accessible to the community. One challenge that community policing was supposed to tackle was reducing the distance between the police and the communities they serve. Thomas and Burns (2005, p. 71) examined survey data from twelve cities and found that,

[d]espite intentions to improve police-minority relations, community policing most strongly and positively affects whites' perceptions of neighborhood police . . . [A]ctual tactics of community policing had a greater impact on white perceptions of the police than they did for Latino and African American views.

Thus, as the police search for a guiding philosophy, they must also struggle with the implementation of these goals and evaluate whether their actions have the desired effects.

In some cases, the use of community policing to build bridges with the community can become distorted, and Kraska and Kappeler (1997) were among the first police scholars to observe how some agencies used their federal community policing funds to deploy special weapons and tactics (SWAT) teams in full military apparel and gear to patrol communities in armored vehicles. Since that time there has been an increasing amount of commentary about **police militarization** by organizations such as the American Civil Liberties Union (2014), journalists (Balko, 2013), and scholars (Radil, Dezzani & McAden, 2017). While some police

BOX 4-3**Significant Changes in American Policing**

- The intellectual caliber of the police has risen dramatically.
- Senior police administrators are more ambitious for their organizations than they used to be.
- Standards of police conduct have risen.
- Police are remarkably more diverse in terms of race and gender than a generation ago.
- The work of the police has become more intellectually demanding, requiring an array of new specialized knowledge about technology, forensic analysis, and crime.
- Civilian review of the police discipline, once considered anathema, has gradually become accepted by the police.

SOURCE: Bayley (1998)

scholars do not support the notion that America's police forces are overly militarized (see McMichael, 2017), the fact remains that community policing has taken different forms—and that some departments might actually engage in “community policing” practices that alienate officers from their communities.

For community policing to work, there has to be a perceived need for change from the prevailing model of policing (still the professional model in many agencies). Furthermore, the public has to want the police to change, and this may include paying for the costs associated with a move toward community policing. Finally, the police must want to change their orientation and operations (see Thurman, 2002b, p. 120). Ultimately, then, community policing requires a buy-in by both the community and the police.

CONCLUSIONS

Anybody who doubts the increased sophistication of American policing has not had the opportunity to spend much time with officers lately. Bayley (1998) contended that chiefs are increasingly ambitious and wish to stamp their influence on their agencies. To do so, these executives are more frequently surrounding themselves with highly educated commanders who are versed in COMPSTAT, geographic information systems (GIS) to facilitate crime mapping, and crime and data analysis. Moreover, larger departments have automated everything from shift scheduling to vehicle maintenance. The values of higher education and being consumers of research are being transmitted to everybody in the organization, from patrol officers to personnel administrators, and officers who want to be promoted are investing in their formal and informal education.

Bayley (1998) speculated that forces external to police departments would shape the services delivered in the twenty-first century, and he was correct. The 9/11 attacks, the proliferation of Central American gangs in some places,

changes in crime patterns (for example, the emergence of identity theft and other Internet-based scams and offenses such as hacking), impact of social media, the high mortality rate from opioid drugs, and the civilian surveillance of the police using their cell phone cameras were all but unforeseeable a couple of decades ago. One can only guess what the future will bring. Regardless of the challenge, however, the police are better suited to respond to these problems than at any other time in the past two centuries, in part due to the value that many organizations place on professionalism, education, scientific knowledge, and diversity.

KEY TERMS

broken windows	mission-based policing	smart policing
civilianization	Parker, William	stop, question, and frisk
community-oriented policing	police-community relations	(SQF)
community policing	political era	team policing
community policing era	police militarization	Vollmer, August
fusion centers	problem-oriented policing	Wilson, O. W.
hot spots	professional era	
intelligence-led policing (ILP)	SARA	

CRITICAL REVIEW QUESTIONS

1. Traditionally, students have been taught that law enforcement, order maintenance, and public service are the three primary responsibilities of the police. As policing began to take shape in England, order maintenance was the primary responsibility. Did the ordering change in the United States in the twentieth century? Why? How?
2. As a nation, what would we gain and what would we lose by converting to a national police system? Do changing times (i.e., the issue of homeland security) justify us in rethinking the highly fragmented and decentralized policing system in the United States?
3. As a follow-up to Question 2, at least at the federal level, should all law enforcement functions be unified in one agency? Is this a good idea or not? Give examples based on current events.
4. List one major contribution to U.S. police reform that each of the following pioneers brought to police work: Theodore Roosevelt, August Vollmer, and O. W. Wilson.
5. What do we mean by the notion of “broken windows”? Is this really a shorthand term for a much more complex phenomenon? Can you link it to one theory (or more) used to explain crime?
6. Under the concept of community policing, who has to change the most—the public and its expectations of the police, or police personnel and their orientations toward the public?

7. Is *anyone* really doing community policing? Is *everyone* doing community policing? Explain.
8. What do we mean by intelligence-led policing? Is there a simple definition? What seems to have been the driving force (or forces) behind ILP?
9. Are the police becoming more “militarized”? What evidence do we have that this is or is not the case?

WRITING ASSIGNMENTS

1. Can the police become too ingrained in the life and values of the community? Watch the movie *Mississippi Burning* and write a short essay (one or two pages) on the dangers of the police reflecting the values of the community they serve.
2. Pick one of the historical stages of police development in the United States and explain why it had the greatest impact on the nature of policing.
3. Develop a three-column chart with the police functions of order maintenance, law enforcement, and public service. List at least five examples of the types of situations that officers would encounter in each column. Which seems to be the primary focus for most officers and why?
4. In two or three paragraphs respond to the following proposition: No matter what changes occur in policing in the United States, the basic response is still *reactive*.
5. Write a one-page essay supporting or opposing the notion that police officers in the United States should be required to have college degrees. What obstacles stand in the way of achieving such a goal?

RECOMMENDED READINGS

David R. Johnson (1981). *American Law Enforcement: A History*. St. Louis, MO: Forum Press.

Johnson presents a brief but very useful history of policing in the United States. He begins with policing during the colonial period and concludes with policing in the twentieth century. The book is organized around three topics (that also happen to coincide with the focus of the present book): (1) “the political framework within which policing developed,” (2) “reform,” and (3) “historical trends in the nature and extent of crime.”

Victor E. Kappeler and Larry K. Gaines (2015). *Community Policing: A Contemporary Perspective*, 7th ed. New York: Routledge. The authors do a thorough job of tracing the history of policing and connecting that history to the notion of community policing. However, they also deal with the contemporary context of community policing, and especially discuss the role of community policing in dealing with issues such as fear of crime, drugs, and special populations (for example, gangs and minority communities). The beginning of the text provides the ten principles of community policing discussed in this chapter.

Robert E. Worden and Sarah J. McLean (2017). *Mirage of Police Reform: Procedural Justice and Police Legitimacy*. Oakland, CA: University of California Press. Theories of policing have been moving toward practices related to procedural justice, where the fair and just treatment of citizens results in better support for the police. The authors’ research on the issue, however, found that citizens were more concerned about whether officers used their authority (e.g., in a search or use of force) rather than how officers interact with them, such as being polite and respectful in their interactions.

CHAPTER 5



Police and the Use of Force

INTRODUCTION

Over the past several years there have been a number of high-profile deaths of citizens at the hands of police officers. Many—although not all—of these involve fatal shootings by the police. Some of the individuals who were shot were armed, although in most of these controversial cases citizens were not armed. Virtually all of the shooting victims were African Americans, and most of the officers were white. Among these cases nine seem to have garnered the most national media attention (see Hobson, 2016; *New Orleans Times-Picayune*, 2016):

- July 17, 2014—Eric Garner died at the hands of New York City police officers who applied a chokehold in an effort to subdue and arrest him. No charges were filed against the officers.
- August 9, 2014—Michael Brown was shot and killed by a Ferguson, Missouri, police officer (who was not indicted by a grand jury) and days of protest and disorder followed.
- October 20, 2014—A Chicago police officer shot Laquan McDonald, a seventeen-year-old, who walked away from officers who wanted to question him about reported vehicle break-ins. Cases against the officers involved in this shooting were still being heard in 2018.
- November 23, 2014—in one of the most tragic cases, Cleveland, Ohio, officers shot and killed twelve-year-old Tamir Rice, who was in a public park holding a toy gun. Cleveland paid out \$6 million in a wrongful death suit but no criminal charges were filed against the officers.
- April 4, 2015—Walter Scott was stopped by North Charleston, South Carolina, officer Michael Slager for a broken tail light. Some type of confrontation ensued and Scott ran from the officer who fired eight times striking Scott in the back and killing him. In December 2016, a jury deadlocked in an 11–1 vote to convict Slager, and the judge declared a mistrial. In 2017, Slager was sentenced to 20 years for violating Scott's civil rights.

- April 12, 2015—Freddie Gray died as a result of injuries received while in the custody of Baltimore, Maryland, police officers. Gray was handcuffed and placed in a police van and during that time he sustained a spinal cord injury that resulted in his death. Six officers were indicted in this case: two were acquitted, a third trial resulted in a hung jury, and the remaining charges were dropped.
- July 10, 2015—Prairie View, Texas, officer Brian Encinia arrested Sandra Bland for assaulting an officer. Bland was later found dead in her jail cell and the coroner ruled that it was a suicide. The officer was fired and charged with perjury for statements made in reference to the original arrest, but there were no charges resulting from the death.
- July 5, 2016—two Baton Rouge, Louisiana, police officers attempted to arrest Alton Sterling for selling CDs outside a convenience store. At some point during the arrest one of the officers shot Sterling. Federal prosecutors did not have enough evidence to proceed with civil rights charges, and the state is investigating this case, but had not laid any charges by mid-2018.
- July 16, 2016—Falcon Heights, Minnesota, officer Jeronimo Yanez pulled over Philando Castile for a broken tail light. Castile told the officer he had a permit to carry a handgun and he was shot as he was reaching for his license. Yanez was acquitted of second-degree manslaughter in a jury trial.

It is important to emphasize three points as we begin this chapter. First, the fatal use of force by the police occurs relatively infrequently. Most police officers complete their entire careers without ever using deadly force. Second, the cases outlined above represent a small—and not necessarily representative—sample of the cases where the police use deadly force. Third, the use of body cameras, dash camera videos, and cell phone videos made by the public have made the issue of police deadly force a very visible and public policy issue.

BACKGROUND

In Chapter 2, we saw how the police play a role in the crime control model through the suppression of crime. In performing their jobs, particularly making arrests, they occasionally are required to use force. A few groups in society, especially crime control advocates, picture the police as something of a national defense force. Yet, unlike in Europe, where national police forces are the norm, U.S. policing is delivered in a fragmentary manner. For example, there were nearly 18,000 local and state law enforcement agencies in 2013 (Burch, 2016, p. 9). The services delivered by these agencies are driven by the agency's history, local political demands, the goals of the agency's leadership, and also by a community's values, norms, and demographic characteristics.

Historically, some police officers relied on the illegal use of force, and “street justice” (dispensing a beating instead of making an arrest) was regularly applied in some departments. Policing has progressed much since that time, and the use of force has become the exception rather than the norm. Still, Bittner (1990, p. 10) defined the *police* as society’s “or else” mechanism—that is, “the potential recourse to coercive means—including physical force—to achieve whatever end is required.” Burch (2016, p. 9) reports that there are some 725,000 local and state sworn officers in the United States, and in the course of their interactions with ordinary civilians and offenders,

the use of force is inevitable. We examine the extent of police use of force and the individual, contextual, and policy-related factors that influence this use.

The police are given authority that no one else in society possesses: the power to lawfully control the behavior of other citizens. This includes the potential to administer a whole range of force against other individuals. When it comes to the appropriate use of force, the International Association of Chiefs of Police (IACP) (2017, p. 1) said that “Officers shall use only the force that is objectively reasonable to effectively bring an incident under control” and they “shall only use force when no reasonably effective alternative appears to exist.” A Bureau of Justice Statistics report identified the following as a use of force, including to “shout, curse, threaten force, push or grab, hit or kick, use pepper spray” or “use an electroshock weapon . . . , point a gun, or use other force” (Hyland, Langton & Davis, 2015, p. 2). *Police force* (or the threat of force) also can include dog bites, yelling at a person or abusive language, and handcuffing (Eith & Durose, 2011; Hickman, 2006).

One factor that we need to emphasize is that, for the most part, we have an armed citizenry in the United States. In fact, citizens can own many of the same weapons as the police use. Occasionally, they have more lethal weapons than the police. We examine this issue further in Chapter 6. For the time being, it is important to note that while definitive numbers are difficult to come by, some authorities estimate that in 2009 there were over 300 million nonmilitary firearms in the United States (Horsley, 2016). Moreover, about 16.3 million Americans have permits to carry concealed weapons, and individuals in many states can “open carry” a firearm (Lott, 2017). This means that the typical home within the United States is more likely to have a firearm than not, and officers will commonly encounter civilians legally carrying firearms outside their homes. As a result, society provides the police with a variety of weapons with which to respond to chaotic and hostile situations.

In considering police use of force, there are three sets of factors to examine: personal, situational, and organizational. Personal factors include the characteristics of the officers and suspects, such as age, education, race, gender, and mental state (for example, intoxication or emotional disturbance). Situational factors include the time of day, the number of police officers present and the number of subjects being confronted, the circumstances surrounding the confrontation, and the presence of witnesses. Finally, the major organizational factors include the agency’s degree of policy restrictiveness, access to training, the climate or culture of the agency, and the degree to which administrators allow officers to exercise discretion in critical situations (see Lee & Vaughn, 2010). We address these factors in the following sections.

DEFINING THE TERMS

It is important to remember that the notion of force is much broader than the focus of this chapter. For instance, the mere presence of an officer and verbal commands issued by an officer may represent a minimal level of force. We are concerned here not only with use of force but also with the related issues of **abuse of authority, excessive force, and brutality (by police)**.

We already have provided two brief definitions of *force* utilized by the IACP and the Bureau of Justice Statistics, but what about the other terms? We are using police *abuse of authority* as the broadest term. Abuse of authority includes abuse

of force, as well as other unethical or illegal actions. This includes misuse of authority in a corrupt way (extortion, bribery, and kickbacks) or for personal gain (accepting gratuities or receiving discounts on food or other purchases). Carter (1994, p. 272) wrote that abuse of authority includes “any action by a police officer without regard to motive, intent, or malice that tends to injure, insult, trespass upon human dignity, manifest feelings of inferiority, and/or violate an inherent legal right of a member of the police constituency.” Practically every form of police misconduct falls under the umbrella of abuse of authority.

In terms of excessive force, it is important to remember that “Officers shall use only the force that is objectively reasonable to effectively bring an incident under control,” and they “shall only use force when no reasonably effective alternative appears to exist” (IACP, 2017, p. 2). The trouble is defining when the use of force becomes excessive, and the Office of Community Oriented Policing Services (2016) suggests that in examining police use of force, both “reasonable” and “necessary” elements must be considered. They added that “[t]he unnecessary use of force would be the application of force where there is no justification for its use, while an excessive use of force would be the application of more force than required where the use of force is necessary.”

Based on these definitions, the meaning of *police brutality* is excessive force that is deliberately designed to degrade or injure an individual. However, as Carter (1994) notes, while the word *brutality* is used in regard to a variety of police misconduct, it is a subjective concept in that it targets the motives of an officer rather than focusing on the officer’s actions. He believes that *use of force* may be a clearer, more precise term.

Once again, the police are authorized to use force in the line of duty, but this force must be *reasonable* and *necessary*. This legally means that it cannot be excessive. To the degree that police force is excessive, it becomes an abuse of authority and, like corruption, is a form of police misconduct.

The fact that police officers occasionally are accused of excessive force provides the backdrop to this chapter. Two factors are important to consider, however. First, research shows that the police use force in about 1.6 percent of the 43.9 million face-to-face contacts that they have with citizens every year (Hyland et al., 2015). This means that over 98 percent of the time, police officers do not utilize any force (other than their physical presence) in citizen encounters. Second, in only about 1.2 percent of cases excessive force was alleged (Hyland et al., 2015). Nevertheless, in every known use-of-force case, police officers are scrutinized by someone, and sometimes the public perceives that the use of force is unnecessary.

This chapter outlines the constraints placed on the police regarding the use of force. Consideration is given to the circumstances under which force may be used, the types of force employed by the police, and the recourse that citizens have against the police for excessive use of force.

POLICE AND CITIZEN INTERACTIONS

Citizens encounter police officers under various circumstances. A study by the Bureau of Justice Statistics¹² found that between 2002 and 2011 about 44 million people sixteen years of age or older had at least one face-to-face encounter with

police personnel (Hyland et al., 2015, p. 1). Nearly 56 percent of the people who had personal contact with the police did so in situations involving traffic stops or after a traffic accident. Another 29 percent or so encountered the police in the process of reporting a crime or requesting police assistance.

In terms of police-citizen contacts that involved force, between 2002 and 2011 about 715,000 people each year reported the use of force or the threatened use of force. This was roughly 1.6 percent of those who had contacts with the police that year and was down from 2.3 percent in 2005 (Eith & Durose 2011, p. 11). In many instances officers merely threatened to use force, but in some cases more than one type of force was employed. For instance, in three-fourths of the force encounters the officers shouted at the individual. By contrast, over half the time the suspect was pushed or shoved, and in just over one-quarter of the cases the officer pointed a gun at the person.

Three of the findings in the Eith and Durose (2011) report are noteworthy. First, nearly 22 percent of the citizens admitted that they had argued with, cursed, insulted, or threatened an officer. Approximately 12 percent said they had disobeyed or interfered with an officer, and 5 percent had resisted arrest, handcuffing, or being searched. Second, roughly three-fourths of the people experiencing police use of force believed that the amount of force employed was excessive. Third, a substantial number maintained that in their particular situation, the police had acted improperly. Taken together, these findings demonstrate that police relatively rarely use force and that the targets of the force may precipitate a use-of-force response (see Dunham & Alpert, 2002).¹³

One form of police use of force that involves subject provocation has been labeled “**suicide by cop (SBC)**.” These situations have started to occur with greater frequency, and they are beginning to gain nationwide attention from the news media, medical officials, and the police themselves. In some circumstances, suicidal individuals have placed themselves in situations—such as pointing a firearm at officers—where the police have few alternatives but to shoot.

It is difficult to determine how many cases of SBC occur each year, as these incidents often end in the suspect’s death, leaving researchers to determine whether the individual was suicidal or not. Additionally, some individuals might set out to provoke a confrontation with law enforcement with the intent of being shot, while others might become suicidal during their interactions with the police. As a result, the estimates of SBC vary greatly. Hutson and colleagues (1998) found that 11 percent of shootings were precipitated by the subject (see also Miller, 2006). Mohandie, Meloy, and Collins (2009) reported that 41 percent of their sample could be labeled SBC cases. Last, Vivian Lord (2014) reported that 28.5 percent of her sample showed suicidal intent, which was somewhat higher than reported in her previous research of SBC (Lord, 2012). Regardless of the study, these results show that a notable proportion of citizens killed every year by the police demonstrated some form of suicidal intent.

Such incidents are tragic for all parties, and the officers involved are forced to live with the consequences for the rest of their lives, and even justifiable shootings can contribute to “friction and mistrust between the police and the public” (de Similien & Okorafor, 2017, p. 21). These acts are also difficult to prevent, and Hutson and colleagues (1998) found that most of these incidents tended to occur

over a relatively short period of time and officers did not learn that the person was suicidal until after the event had transpired. These investigators found that many of the persons who were shot had written suicide notes, told others that they wanted to be shot by the police, or had previously engaged in suicidal behavior. Knowing that some individuals use the police to commit suicide is important in understanding the full picture of the use of force, and this factor should also be taken into consideration when reviewing the annual number of persons shot by the police.

In the following sections, we examine some of the individual, situational, and organizational factors associated with the use of force. We also consider the kinds of actions that police departments and the citizens they serve can undertake to minimize both unnecessary and excessive use of force by officers.

INFLUENCES ON THE USE OF FORCE

Essentially, five factors influence police officers' use of force: (1) local, state, and federal laws, (2) departmental policies, (3) training, (4) police practices (sometimes called the departmental culture), and (5) the characteristics of individual officers. We will consider each of these.

Laws

On most criminal justice issues, some form of law provides the basis for most policies, but laws are written in broader terms than are police departmental policies. When we address the use of force, it is important to recognize that criminal law, civil law, and constitutional law all influence when and how officers may use force.

When police officers use excessive force in apprehending and restraining suspects, they can be subject to charges under the criminal law. A good example of this involves the charges filed against some of the officers mentioned in the nine cases outlined at the beginning of the chapter. Although some were not indicted and some were acquitted, a few have been convicted of state or federal (civil rights) charges.

Perhaps as intimidating to many officers today is the threat of a civil (or civil rights) lawsuit. These suits may be brought in federal courts under 42 U.S.C. Section 1983 (Lee & Vaughn, 2010). These actions allege that government officials, including police officers, have violated the civil rights of someone "under color of law." Some of these suits ask for injunctive relief or a stipulation that an officer or agency not engage in a particular action. For example, some agencies were sued to prevent officers from using carotid chokeholds to subdue suspects resisting arrest. Also, civil rights suits have been filed in cases where asphyxiation deaths have resulted from officers "hog-tying" suspects with their hands and feet pulled behind them and placing them on their stomachs. Section 1983 suits may ask for actual and punitive monetary damages from officers, as well as from supervisors, the department, and the governmental entity, under the doctrine of *respondeat superior* or vicarious supervisory liability.¹⁴ Since the 1970s, successful Section 1983 lawsuits have transformed police department practices perhaps as much as any other legal factor. Departments now routinely train officers in this subject; in 2013,

81 percent of the police academies in the United States instructed police recruits in the area of excessive use of force (Reaves, 2016, p. 6).

The area of constitutional law has been prominent in the discussions of the police use of force because of one case: *Tennessee v. Garner* (1985).¹⁵ Prior to the Supreme Court's decision, twenty-three states statutorily incorporated the common law standard of the **fleeing felon rule**, and another twelve states allowed officers to use deadly force to apprehend certain fleeing felons (Mays & Taggart, 1985). The fleeing felon rule allowed police officers to use deadly force to apprehend a suspected felon who was trying to avoid apprehension.

The fleeing felon rule came from English common law where virtually all crimes were felonies and nearly all felonies called for the death penalty (Sheppard, 2012, p. 1090). Thus, anyone—a private citizen or law enforcement official—could use deadly force to apprehend a known fleeing felon. The English common law tradition was transplanted to the United States, and many states included statutory provisions that police officers could use deadly force to apprehend any fleeing felon. After the Supreme Court ruling in *Tennessee v. Garner*, the fleeing felon rule was held to be generally unconstitutional. Now police officers are authorized to use deadly force only where defense of life (their own or the lives of others) is an issue, or where they are attempting to apprehend a fleeing felon who has used or threatened to use deadly force.

A recent U.S. Supreme Court case—*Kingsley v. Hendrickson* (2015)—provides further guidance in this area. In this case a pretrial jail detainee was forcibly removed from his cell after refusing to comply with officers' orders. He filed suit under 42 U.S.C. Section 1983 and in a 5–4 decision the Supreme Court ruled that the appropriate standard for deciding these cases was that “the force purposely and knowingly used against [the person] was objectively unreasonable.” Thus, the Court rejected the subjective (state-of-mind) standard that had been applied in judging officers’ actions by some courts.

In summary, considerations of the police use of force must begin with the law. Laws at all levels provide broad standards of guidance for police actions. Criminal, civil, and constitutional laws all apply to police operations, and they provide the foundation for developing departmental policies.

Policies

One of the ways that departments can define acceptable or unacceptable officer conduct is through the use of policies. Alpert and Smith (2000, p. 173) wrote, “Conventional wisdom is that police agencies must exercise strict control over their officers” and “Creating complex policies, procedures and rules has become the customary method of controlling the discretion of police officers.” However, they warn that “police officials must identify which activities require strict control-oriented policies and which require only summary guidance” (Alpert & Smith, 2000, p. 184).

Today law enforcement agencies typically have extensive written policies that cover many of the situations officers will encounter. In fact, a federal government survey found that 95 percent of police departments had policies on deadly force and 90 percent had policies on nonlethal force (Hickman & Reaves, 2006). The same study found that less than 1 percent of all U.S. police officers worked

for departments that didn't have policies on deadly force—and these tended to be very small agencies. However, we should emphasize that officers still possess substantial discretion over when and how to act.

In this section when we talk about **policies**, we are referring to administrative regulations that are written by ranking agency officials, distributed to the employees on a regular basis, and published as general orders or in an administrative policies manual. Alpert and Smith (2000) maintain that a policy does not tell officers what to do in certain situations. Instead, “a policy is a guide to thinking” (p. 175). By contrast, procedures tell officers how to apply policies. Departments typically review new policies and procedures with officers, and when policies on topics such as the use of force are changed, administrators may schedule in-service training sessions to explain the new policies. Quite often, police policies—much like laws on which many of them are based—will define the disciplinary consequences for officers found to have violated departmental directives.

As we have mentioned, departmental policies on the use of force may mirror the broad guidelines established by state and federal laws. However, in most instances police policies and procedures on the use of force are much more restrictive and detailed than provided for by the law (see Blumberg, 1994).

We examine training further in one of the following sections; however, it is important to note that one way for policies to be widely disseminated to officers is during their basic academy training. Additionally, many departments require ongoing, in-service training for veteran officers, such as requalifying with their firearms each year. Therefore, as a reflection of the training program provided by law enforcement academies, agencies frequently have policies—at a minimum—in the areas of (1) the general use of force, (2) the use of firearms and other weapons in the line of duty, (3) regulations for officers being armed off duty, and (4) emergency vehicle operations. In the remainder of this section, we examine these areas and address the degree to which departmental policies can set the tone for operations in these critical areas.

Policies concerning the general use of force typically detail the circumstances under which officer use of force is permissible. Rules and procedures instruct officers on the amount of force that is allowable in each situation. Yet, policies on use of force that appear clear-cut in an academy classroom may be harder to implement when an officer is trying to restrain an uncooperative suspect and has to contend with fear, the possibility of being injured or killed, and the knowledge that help from fellow officers may be several minutes away. Officers or deputies working in rural areas, by contrast, might not have access to backup for much longer periods of time, and in some cases, might be the only law enforcement officer working in a small county when an incident occurs.

The following provides a typical general policy statement relating to the use of force:

This Department recognizes and respects the value and special integrity of each human life. In vesting Officers with the lawful authority to use force to protect the public welfare, a careful balancing of all human interests is required. Therefore, it is the policy of this Department that Officers will use only that force reasonably necessary to effectively bring an incident under control while protecting the lives of the Officer or other person.¹⁶

The use of **deadly force** particularly arises where the officer's life is in danger, when another person's life is in danger, and in order to apprehend a person who has used deadly force or who is attempting to use deadly force. Unfortunately, in police work, policies and procedures cannot cover every possible situation officers might encounter.

Nevertheless, policies must establish that officers are allowed to use force in performing their duties, but that such authority is granted with severe restrictions. In most instances, the policy may set forth what commonly is called the **use-of-force continuum**. This continuum provides a progression of options that officers need to consider when responding to suspects who are resisting. However, officers may enter the continuum at any point, depending on the circumstances with which they are confronted. Thus, if a suspect lunges at an officer with a knife, the officer does not have to begin at Level 1 of the continuum. In such circumstances, the appropriate response may be at Levels 4 through 7, or even Level 8 (deadly force). Box 5-1 presents the use-of-force continuum used by one police department.

Given the controversies over highly publicized police shootings between 2014 and 2017 a number of national organizations have developed different models intended to guide the use of force. The Police Executive Research Forum (2016) published a set of guiding principles that includes a closer focus on interactions between persons with mental illnesses and the police, and encounters with unarmed suspects. The International Association of Chiefs of Police (2017, p. 4) has also published guidelines on the use of force, and they discourage the use of deadly force for non-violent offenses, the use of warning shots, or shooting at or from moving vehicles, and prohibiting the use of chokeholds unless as a method of deadly force. One of the challenges for officers is that while these policies look good on paper they make less sense when they are confronting potentially dangerous individuals in highly stressful situations where officers fear being harmed. A Pew Research Center (Morin, Parker, Stepler & Mercer, 2017, p. 8) study of almost 8,000 police officers revealed that 84 percent worried about their personal safety at least some of the time, and 86 percent believed the public did not understand the risks they took on the job.

Therefore, can policies, in and of themselves, make a difference? The answer is that it depends. If departments have written policies that are regularly updated and clearly explained to the officers, and the policies actually are enforced, then policies should make a difference (see Alpert & Smith, 2000). To the degree that any one of these elements is missing, or officers choose to ignore them, the policies will be less than effective. Campaign Zero (2016), an advocacy organization

BOX 5-1

The Use-of-Force Continuum

Terrill and Paoline (2013) examined the use of force continuums used by 662 police departments and sheriff's offices and found that about 80 percent of agencies that responded to their study used some form of continuum, although there were many variations used throughout the nation. The following list, adapted from the Orlando Police Department (2014, p. 14) shows their response to resistance continuum, which illustrates their guidelines for using force:

Subject's Resistance	Employee's Response
Passive Resistance: Subject fails to obey verbal direction preventing the employee from taking lawful action.	Soft Control: Applies techniques that have a minimal potential for injury to the subject, including: physical control, chemical agents, and diversionary devices.
Active Resistance: The subject's actions are intended to facilitate an escape or prevent an arrest.	Hard Control: Applies techniques that could result in greater injury to the subject, and include: open and closed hand strikes, baton strikes, kicks, takedowns, K-9, and Taser.
Aggressive Resistance: The subject has battered, or is about to batter a person/employee and the subject's action is likely to cause injury.	Intensified Techniques: Those techniques necessary to overcome the actions of the suspect; short of deadly force.
Deadly Force Resistance: The subject's actions are likely to cause imminent danger of death or great bodily harm to the employee or another person.	Deadly Force: Employee's actions may result in death or great bodily harm to the subject, including the use of a firearm and may include application of other techniques and/or weapons.

The use-of-force continuum establishes progressive options available to officers. The level of force can range from verbal compliance, through pain compliance, to less-than-lethal, or even lethal, force. Much of the discussion on police use of force focuses on lethal force, for obvious reasons, but in one of the following sections, we examine less-than-lethal force as well.

The key in every situation is that officers must use *reasonable* force, and this acknowledges that anything beyond what is reasonable automatically becomes excessive force or, in the extreme, police brutality. The general standard for the use of force in the policies and procedures of most police departments is that officers may use a sufficient amount of force to overcome any resistance they encounter. Therefore, they may meet force with a slightly more than equal amount of force.

Police policies related to using firearms typically are very detailed today. For example, the following list provides an overview of the types of policies that departments may have on officers' use of firearms.

- Types of weapons (calibers, capacities, rifles or shotguns, and mechanical action—revolvers vs. semiautomatic pistols) allowed
- On-duty versus off-duty weapons and the permissibility of secondary or backup weapons
- Use of warning shots
- Shooting at, or from, vehicles
- Shooting dangerous or wounded animals
- Reporting weapons fired in the line of duty, including accidental discharges of weapons
- A schedule for firearms requalification and the consequences for failing to requalify

that disseminates information about the police use of force, examined the policies in 91 of the largest 100 U.S. departments. They found that officers in police departments with more restrictive use of force policies were less likely to be assaulted on the job, and they killed fewer civilians. Terrill and Paoline (2017) examined a large number of use of force incidents from a small number of agencies, and they found that officers in the departments with the most restrictive policies used force less often. These findings suggest that introducing more restrictive use of force policies may have some positive results.

So, how do officers feel about these policies? The Pew Research Center (Morin et al., 2017, p. 13) survey showed that almost three-quarters (73 percent) of the officers felt their department's use of force guidelines were about right. Ultimately, police departments are human institutions and policies are reflections of human frailties. Since no policy will be self-enforcing or foolproof, departments must include a significant training component to ensure that officers are fully informed of the policies and the consequences for not following them.

Training

Police officers first encounter discussions regarding the use of force in the police academy. As part of their training, they are taught to use physical force, including defensive tactics, restraint techniques for subduing aggressive subjects, use of the baton or other striking weapons, conducted energy devices (formally called CED; an example is the Taser), and use of mechanical restraint devices such as handcuffs.

We discuss **less-than-lethal force** in a subsequent section in this chapter; however, here it is important to note that less-than-lethal force is any measure of coercion that is designed to achieve compliance with the officer without deliberately placing the subject's life in danger. This type of force can be physical or chemical, and it may involve striking (impact) or stunning instruments. In terms of training for less-than-lethal force, a report by the Bureau of Justice Statistics found that nationwide, 99 percent of the police academies offered training in the use of defensive tactics and weapons, including firearms skills and (to a lesser extent) nonlethal weapons (Reaves, 2016, p. 5).

Academies routinely provide training in weapons retention, or how officers can keep from being disarmed during a scuffle. They also teach the use of pressure points, fighting techniques, and speed cuffing. Some of these techniques fall within the realm of what may be called "pain compliance" procedures. Pain compliance is meant to inflict enough discomfort in suspects that they will quit struggling and submit to the arresting officers.

Police recruits receive firearms training and learn not only techniques of firearms use, but also when and under what circumstances firearms use is permissible. They learn that part of the responsibility of being armed (some departments even require officers to be armed off duty) is being technically proficient or accurate. Exercising good decision-making skills in the process of choosing when to use force is equally important. The Bureau of Justice Statistics report on state and local law enforcement training found that about 80 percent of the police academies in the United States now provide realistic decision-making scenarios as a part of firearms training, and about two-thirds use computerized training (Reaves, 2016, pp. 5–6).

Training is one of the areas where police departments have been fairly diligent in addressing the skills and knowledge that new officers need to perform their jobs effectively. Reaves (2016, p. 4) reported that the average training academy lasted about twenty-one weeks, and that is supplemented by over 500 hours of field training.

Departmental Practice or Police Culture

In studying police practices in the United States, one of the elements sometimes overlooked is the influence of departmental practices or cultures that develop over time (Fyfe, 1982).¹⁷ The department culture can be influenced positively or negatively by departmental leadership, a commitment to “best practices,” the average level of experience, and a host of other variables. A brief example illustrates this.

Assume that the “Middleburg Police Department” has a policy that uniformed officers must wear their hats every time they exit the police vehicle or anytime they appear in public. The department has a written policy to this effect, and police cadets are made aware of this policy in the academy. In fact, while in the academy, recruits might receive demerits if they violate this policy. However, when the recruits graduate from the academy and begin working in patrol, they often are told by their field training officers (FTOs) not to worry about wearing their hats during the shift, and that they need to be worn only to and from the police station to make a showing for “the brass.” In short order, the rookie officers discover that none of their peers, FTOs, or supervisors wear their hats during the shift. Therefore, this example shows that no matter what the departmental policy says, in practice the departmental culture influences what the officers do.

Law enforcement’s organizational culture can be very powerful. The culture of a given agency can foster deviant behavior, or it can socialize new officers into a strict rule-abiding orientation. We cannot assume that the organizational culture is either all good or all bad in any particular agency. One of the challenges for police administrators is that a department’s organizational culture often makes it difficult to enact meaningful changes, at least in the short term. Many officers take a wait-and-see approach to determine whether organizational or policy changes are real and will be sustained over the long term.

The Characteristics of Individual Officers

In discussing the use of force, we cannot ignore the personal values and characteristics that individual officers possess. As we indicated at the beginning of the chapter, the use of force is related to three sets of factors: individual (those factors and values associated with the individual officer), situational (the circumstances in which officers are found), and organizational (training, policies, cultural values, and supervision). In this section we briefly examine individual characteristics to determine the degree to which they influence an officer’s use or misuse of force.

We know that the excessive use of force is rare, and a relatively small number of officers may shape the public’s perceptions of an entire police department. As a result, a great deal of the research on police use of force over the past four decades has focused on predicting or explaining which officers are most likely to use excessive force. While it would be helpful to forecast which officers were most likely to use excessive force, to date studies have not been able

to provide us with much predictive accuracy. The Pew Research Center (Morin et al., 2017, p. 25) survey of officers shows that male officers with fewer years on the job, white officers (compared with African American or Latino officers) and front-line officers (compared to administrators) were more likely to report being involved in violent encounters in the previous month. Many of these factors are related to time on the job and work assignments, as almost all officers start their careers in patrol, and they will be more likely to encounter dangerous suspects and situations in their first years on the job compared to police administrators who spend relatively little time interacting with suspects.

Nonetheless, some departments have started to implement what was formerly known as “**early warning systems**” but are more commonly called “**early intervention (EI) systems**” today (Kappeler, Sluder & Alpert, 1998; see also Dunham & Alpert 2015; Walker, Milligan & Berke, 2006). Box 5-2 illustrates some of the variables that might be included in an EI system.

Documentation of problem behaviors can help police departments determine whether an officer’s actions are aberrations or part of an ongoing pattern. Additionally, tracking the types of factors listed in Box 5-2 can help a department to recognize early in the process when officers may be in trouble in their personal lives and the ways this may spill over into the work environment. Dunham and

BOX 5-2

Problem Behaviors and Early Intervention Systems

Stephens (2011, p. 22) observed that there has been growing interest in creating an environment where officers “serve the public while staying within the framework of law, policy, procedures, training and organizational expectations for their behavior.” One way this goal can be reached is through early intervention systems designed to help police departments improve the job performance of their officers by tracking factors such as:

- the number of citizen complaints (external) against an officer and the results of investigations of complaints
- departmental (internal) complaints against an officer and the results of the investigations into these complaints
- patterns of misconduct for both citizen and departmental complaints
- the frequency with which an officer files resisting arrest or assault-on-an-officer charges
- the characteristics (race, age, gender) of people filing complaints against an officer
- the officer’s assignment areas (both geographical and the types of jobs performed by the officer)
- records of discipline and performance appraisals
- commendations and citations for exemplary work
- use of sick leave (especially indications of misuse of sick leave) and the officer’s off-duty behaviors, including relations with neighbors and home-life stressors (Kappeler et al., 1998).

Alpert (2015) say that EI systems are intended to be a problem-oriented approach to help officers improve their job performance, and they report that EI generally has been unopposed by police unions as their intent is to assist officers.

What these individual factors do not tell us is whether the use of force might be instrumental. That is, do some officers use force when they perceive themselves to be dispensers of justice? There may be circumstances in which officers feel that the formal criminal justice system will not remedy an injustice, so they will do so in an expression of “street corner justice.” By contrast, some officers simply may engage in excessive force out of anger, frustration, or an expression of some other emotion. In those circumstances the use of force is noninstrumental. Again, it is important to factor individual officer differences into any equation that considers police use of force.

In concluding this section, we want to reemphasize the role that officers' personal characteristics play in the use of force. These factors can include the personal moral and ethical values held by officers, but they can include personal and professional stressors as well. Some officers seem equipped to handle high levels of stress, but a significant number of life stressors can affect even the strongest, most emotionally stable officers.

HIGH-SPEED PURSUITS AS DEADLY FORCE

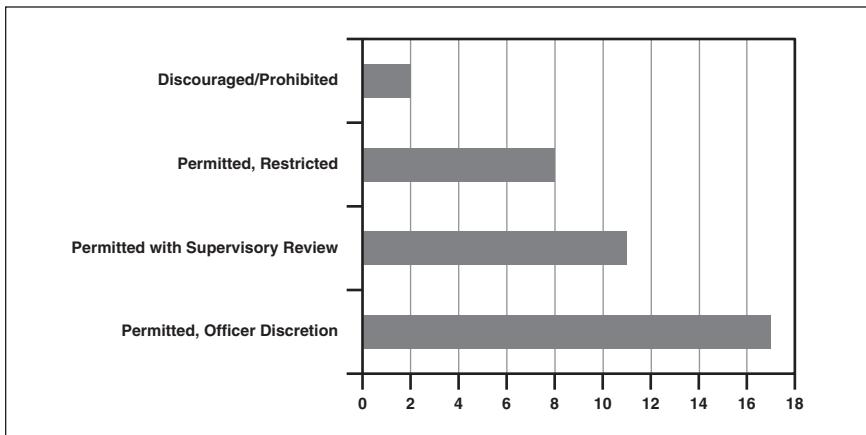
Typically, when the use of force by police officers is discussed, most of the focus is on firearms, batons, or flashlights, and restraint techniques such as the carotid chokehold. However, emergency use of the patrol vehicle—particularly in high-speed pursuits—clearly falls within the use of force arena (see Becknell, Mays & Giever, 1999). Furthermore, not only does the automobile become a potentially lethal weapon during a high-speed pursuit, but also the adrenalin-driven, emotional charge associated with a pursuit may lead to excessive use of force on apprehended suspects once the pursuit is terminated. Reaves (2017b, p. 1) found that pursuits are fairly common, and in 2012, he estimated there were about 68,000 of them and “from 1996 to 2015, an average of 355 persons (about one per day) were killed annually in pursuit-related crashes.”

Several studies have examined deaths resulting from police pursuits. Reaves (2017b, p. 6) reports that between 1995 and 2015 more than 7,000 deaths were the result of pursuits, and of that total:

[N]early two-thirds (65 percent) of pursuit-related fatalities involved occupants of the vehicles being pursued. . . . A third of those killed were occupants of a vehicle not involved in the pursuit (29 percent) or bystanders not in a vehicle (4 percent). Occupants of the pursuing police vehicle accounted for slightly more than 1 percent of the fatalities from 1996 to 2015.

These findings highlight the dangers to officers, and in 2016, 38 percent of all officers killed on the job died as a result of vehicle accidents, being struck by a vehicle, or in motorcycle crashes (FBI, 2017).

Policies on police pursuits vary from department to department. Reaves (2017b) found that the departments with the most restrictive policies had the

**Figure 5.1** Vehicle Pursuit Policies and Pursuits per 100 Officers, 2012

SOURCE: Reaves (2017b)

least number of pursuits. He classified vehicle pursuit policies based on officer discretion, and Figure 5.1 shows that the departments allowing the most officer discretion also had the greatest number of pursuits. The primary reasons for police pursuits deserve some attention and Reaves (2017b) reported that over two-thirds of pursuits were related to traffic offenses and “about one in five pursuits were initiated because someone in the vehicle being pursued was suspected of committing a nonviolent (12 percent) or violent (9 percent) felony.

We have addressed the issue of police emergency vehicle operations briefly in the sections on training and policy, but the U.S. Supreme Court also has dealt with this issue. In the case of *County of Sacramento v. Lewis* (1998), the Court held that the appropriate standard for judging officer actions during high-speed pursuits was conduct that “shocks the conscience,” not deliberate or reckless indifference. In what was viewed as a pro-police decision, the Court refused to rule against police high-speed pursuits, but instead set a relatively high standard for citizens to prove liability on the part of police officers and agencies. Lee and Vaughn (2010, p. 194) observe that in *Scott v. Harris* (2007), “the Supreme Court authorized police use of deadly force during a high-speed vehicle pursuit when a suspect endangered officers’ and innocent citizens’ lives.” A subsequent Supreme Court ruling that involved both a pursuit and police firing shots into a vehicle, *Plumhoff v. Rickard* (2014), upheld the prior pro-pursuit decisions.

Officers also may face liability under state **tort law**. Torts are civil wrongs, and they may provide appropriate remedies for individuals injured in police pursuits. However, states may claim sovereign immunity—which was the case in *County of Sacramento v. Lewis* (1998)—and this can keep them from being sued. This was the reason the plaintiffs in the *Lewis* case brought a Section 1983 civil rights action in federal court. Nevertheless, some states may waive sovereign immunity in situations involving the negligent operation of motor vehicles by public officials.¹⁸

Therefore, what can we conclude about the desirability of permitting or prohibiting police pursuits? A nationwide study of 436 police agencies, published in

the late 1990s, examined the areas of pursuit policy restrictiveness, training, and evaluations of pursuit situations. Similar to the Reaves (2017b) findings, the authors of this study concluded that as policy restrictiveness increased, the numbers of pursuits decreased. They also found that more thorough officer training and more systematic evaluations of pursuit situations by police agencies decreased the number of pursuits (Becknell et al., 1999, p. 105).

LESS-THAN-LETHAL FORCE

Given the controversy surrounding police use of lethal force, and the liability presented by such use of force for police departments, it is apparent why so many agencies have expanded the training and use of less-than-lethal force devices. However, it is important to note here that there may be a discrepancy in terminology. Many police officials talk in terms of less-than-lethal force, but a more accurate term may be **less lethal force**. This term recognizes that while officers may not intend death or serious bodily injury when they use physical, chemical, impact, or stun force, there is always the possibility that a suspect could die as a result of unforeseen circumstances. For instance, while CEDs such as Tasers have been used effectively many times by officers, a growing number of suspects have died in CED-related incidents (Wilkes, 2017).

The research literature has produced some mixed findings about the efficacy of these weapons and whether they reduce civilian injuries compared to using other less-than-lethal options, such as batons. The medical establishment initially supported the use of Tasers, as they were seen as a less harmful alternative to striking suspects with a nightstick or flashlight, or shooting them (Bleetman, Steyn & Lee, 2004; Bozeman, 2005; Clark, 2006) and several researchers found that using CEDs reduced injuries to suspects (Alpert et al., 2011; MacDonald, Kaminski & Smith, 2009; White & Ready, 2007). Despite this optimism, CEDs have been linked to a rising number of deaths.

Wilkes (2017, paragraph 5) reports that a minimum of 732 individuals had died after being Tasered by the police between 2001 and 2016, and he believes that total exceeds 800 persons. In 2016 White (2017) said that “45 citizens died as a result of police taserings.” These results are consistent with the research carried out by Amnesty International (2012), the human rights organization. Given those numbers of deaths, some researchers are calling for more careful study of the use of these weapons. Terrill and Paoline (2012), for example, analyzed 14,000 use-of-force incidents and found that when stun guns were used, in 41 percent of the cases citizens were injured, but when they were not used civilians were injured in only 29 percent of the incidents.

Like many other controversial issues described in this book, the use of CEDs has been the subject of litigation, but there is no national-level guidance about whether the use of these weapons represents excessive force. In May 2012, the U.S. Supreme Court refused to hear four cases that had been decided in lower courts. Denniston (2012, paragraph 3) reported that “the Court voted to leave intact a Ninth Circuit Court ruling declaring that it violates the Fourth Amendment to use a Taser to subdue a suspect, at least when the crime the police are investigating is not a serious one, the

suspect does not pose an immediate threat to the safety of officers or bystanders, and the suspect is not actively resisting arrest or attempting to evade arrest by fleeing.”

The previous sections on police shootings (Campaign Zero, 2016), pursuits (Reaves, 2017b) and less lethal use of force (Terrill & Paoline, 2017) show that departments with more restrictive policies tend to have fewer of these acts, and this issue should be examined more closely. Ultimately, we hope that such debates on police operations are settled on what the research demonstrates rather than political expediency based on speculation and anecdotal accounts of incidents.

POLICE OFFICER DEATHS

One way to fully appreciate police officer use of force is to examine the number of police officers killed in the line of duty each year (by firearms and other instruments as well) and the corresponding number of citizens killed by the police in the performance of their duties. We can be relatively confident when we discuss the numbers of police officers killed in the line of duty annually as a result of assaults because this is a figure that has been part of the FBI’s *Uniform Crime Reports* for decades. For instance, Table 5.1 shows the numbers of police officers killed annually over a seventeen-year period. These numbers range from a low of twenty-seven

Table 5.1 Police Officers Feloniously Killed in the Line of Duty, 2001–2017

YEAR	NUMBER OF OFFICERS KILLED
2001	70*
2002	56
2003	52
2004	57
2005	55
2006	48
2007	58
2008	41
2009	48
2010	56
2011	72
2012	47
2013	27
2014	51
2015	41
2016	66
2017	52
Total	897

* The seventy-two officers killed in the September 11, 2001, attacks on the World Trade Center are not included in this total.

Source: Federal Bureau of Investigation (2012, 2015, 2017).

in 2013 to a high of seventy-two in 2011. On average, four to five officers are killed per month, but the numbers increased in 2016, and seventeen officers died in pre-meditated ambushes (FBI, 2017). Are these numbers large or small? It probably depends to a great extent on your perception. Given that there are about 725,000 local and state law enforcement officers in the United States, the annual average of officers killed amounts to less than one tenth of 1 percent. Nevertheless, every law enforcement officer killed in the line of duty represents a significant sacrifice for the officer, his or her family, and the department the officer represents.

POLICE SHOOTINGS OF CIVILIANS

It seems reasonable that somehow the numbers of officers killed in the line of duty would be related to the numbers of citizens killed by the police, but there is not a logical relationship. In fact, two issues are apparent when comparing these two sets of numbers. First, the police kill a significantly higher number of citizens annually than the number of police officers killed in the line of duty.

Second, we do not have the same level of confidence about the numbers of citizens killed by the police as we have with the numbers of police officers killed. There are three official measures of civilians killed by the police: the National Vital Statistics System, Supplementary Homicide Report (SHR) data collected by the FBI, and the Death in Custody Reporting Program collected by the Bureau of Justice Statistics. The problem is that these three measures count deaths caused by legal intervention (also called justifiable homicide in the SHR), and undercount the true number of people killed by the police. As a result, newspapers such as the *Guardian* and *Washington Post* are now counting the number of people killed by the police (Klinger & Slocum, 2017). Figure 5.2 shows the numbers of persons

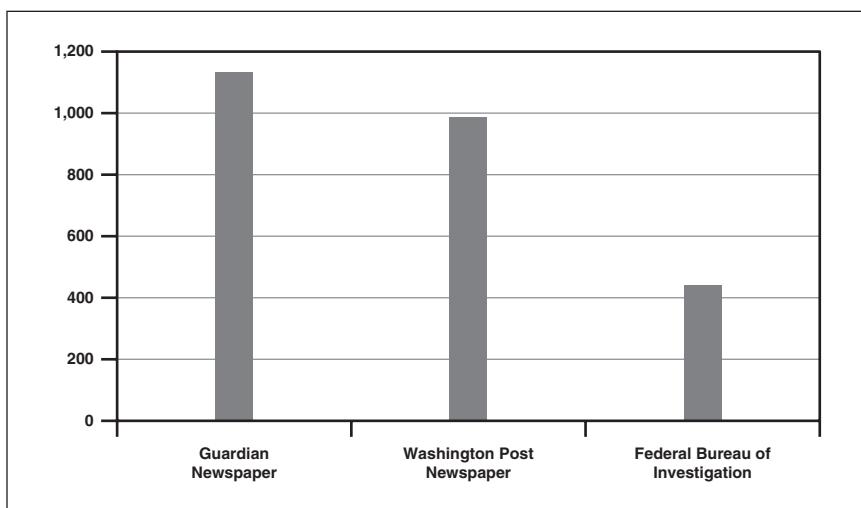


Figure 5.2 Police-Caused Deaths, 2015

SOURCES: Federal Bureau of Investigation (2016), Somashekhar & Rich (2016), and Swaine, Laughland, Lartey & McCarthy (2016)

killed by the police in 2015 using information from the Federal Bureau of Investigation (2016), the *Washington Post* (Somashekhar & Rich, 2016), and the *Guardian* (Swaine, Laughland, Lartey & McCarthy, 2016). As the newspaper totals are based on news reports of shootings (and since the names of the deceased are based on publications, they can be verified) they are considered more accurate than the official data. (One caveat to interpreting these results is that the *Guardian* data include persons killed by the police by all methods, including those killed by Tasers or struck by vehicles and not just those who were shot). As a result of the shortcomings of these data the Bureau of Justice Statistics has had to redesign its collection of data for arrest-related deaths (Banks, Ruddle, Kennedy & Planty, 2016).

As highlighted in the introduction to this chapter, one of the most controversial aspects of police shootings is the disproportionate number of African Americans killed. The U.S. Census (2015) reports that African Americans represented 13.3 percent and Hispanics accounted for 17.6 percent of the national population in 2015. Figure 5.3 shows that they continue to be over-represented in fatal shootings. Despite coming from different years and samples, and collected by various agencies, all suggest that about one-quarter of civilians killed by the police are African Americans. When it comes to the rate per million residents, Swaine, Laughland, Lartey, and McCarthy (2015) say that African Americans had the highest rate of being killed by the police (7.13 per million), which was followed by Latinos (3.48), Native Americans (3.4), Whites (2.91) and Asian/Pacific Islanders (1.34).

Yet it is difficult to make any conclusions based on those data alone, since we do not have the context in which these events occurred. One of the biggest challenges of trying to make sense of criminal justice in the United States is that accurate national-level statistics often don't exist for justice system operations. A lack of information prevents us from knowing whether any given issue is a rare event or a serious problem, or whether things are getting better or worse over time.

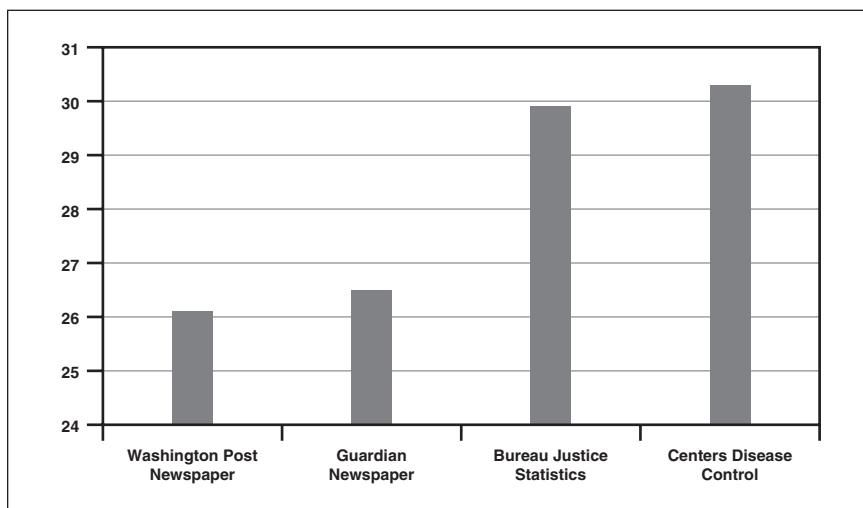


Figure 5.3 Percentage of African American Suspects Killed by Police

SOURCES: Burch (2011), Centers for Disease Control and Prevention (2017b) Somashekhar & Rich (2016), and Swaine, Laughland, Lartey & McCarthy (2016)

In terms of police shootings of citizens, for example, we noted earlier that the national-level data are incomplete. Given that there are about 18,000 law enforcement agencies in the United States, trying to establish how many people are killed each year by the police is a daunting task. Data from larger police departments, however, are often easier to obtain as these agencies have personnel who are charged with collecting and reporting these events, and that information can shed some light on the issue of police use of force.

Figure 5.4 shows the numbers of citizens wounded and killed in Los Angeles and New York from 1990 to 2015, and these results raise a number of questions. First, we have to remember that only a proportion of the use-of-lethal-force cases actually result in a civilian death. A closer look at statistics for each city shows that the proportion of citizens who were killed was considerably higher in Los Angeles compared to New York (46.9 percent vs. 33.6 percent respectively from 1990 to 2015). It is difficult to attribute this difference to a single cause, as these differences might be traced to officer training, access to emergency medical care, the type of firearms used by the police (e.g., whether handguns or rifles and shotguns were used in the shooting), the number of times these civilians were shot, and the number of officers involved in the shooting. Additionally, it has been speculated that about one-fifth of police-involved shootings occur when the officer is off duty, and we have little understanding of the circumstances that lead to that use of force.

A second interesting point is that in the twenty-six years shown in Figure 5.4, the number of police shootings decreased by two thirds (66.3 percent), from 184 in 1990 to 62 in 2015. Again, we can only guess about the causes for that decrease. First, this decrease closely resembles the crime drop of the same era, and it is possible that the police may have been in fewer situations that required a lethal use of force. Second, fewer shootings of civilians may be a result of better officer training or tactics, and perhaps officers were able to de-escalate situations before lethal force was required. Again, with only limited information, we raise more questions

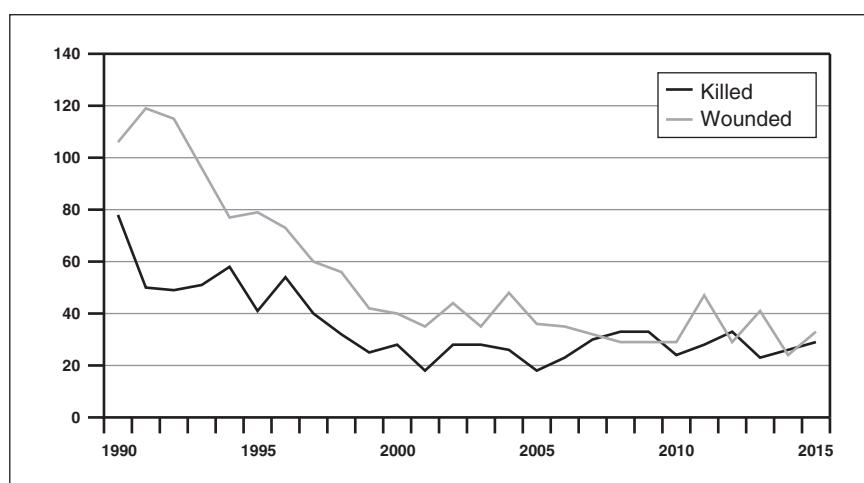


Figure 5.4 Police Shootings of Civilians, Los Angeles and New York, 1990–2015

SOURCES: Klinger (2012), Los Angeles Police Department (2012, 2016), New York City Police Department (2016)

BOX 5-3**New York City Police Department Use of Firearms**

Every year the NYPD produces a report detailing every instance where officer firearms are discharged. Such reports provide us with a greater understanding of the factors affecting the use of lethal force. The following table shows us the number of times firearms were discharged between 2012 and 2015:

CATEGORY	2012	2013	2014	2015
Adversarial Conflict	45	40	35	33
Animal Attack	24	19	18	15
Unintentional Discharge	21	12	18	15
Mistaken Identity	0	0	0	0
Unauthorized Use	6	2	4	2
Suicide Attempt (Officer)	9	8	4	2
Total	105	81	79	67

Notes: Unauthorized use refers to another person discharging an officer's firearm (e.g., a suspect or family member). Mistaken identity refers to events where NYPD officers shot at another law enforcement officer.

SOURCE: NYPD (2016, p. 13) *2015 Annual Firearms Discharge Report*

The results show us that in less than one-half of the cases is the use of lethal force directed at a suspect. Of the thirty-three times when deadly force was used in an adversarial conflict in 2015, the NYPD reported that eight suspects were shot and killed and twenty-five suspects were wounded. This shows us that civilian deaths represent only the “tip of the iceberg” in terms of overall police firearms use. It would be unwise to consider these statistics as representative of the entire nation, but this information does provide us with a snapshot of police firearms use in the nation’s largest police department.

that we can conclusively answer, although these issues are of importance to anybody with an interest in policing. Box 5-3 shows the use of firearms by the New York City Police Department, the largest local police agency in the country.

REMEDIES FOR UNAUTHORIZED USE OF FORCE

We have discussed several situations in which officers might use force in performing their duties, but what can or should be done when officers are not authorized to use force or where they use more force than is necessary? David Carter proposed a list of seven “differential containment strategies” by which departments can deal with police abuses of authority.

1. *Personnel selection*—the emphasis should be on factors such as “intelligence, honesty, stability, and reliability” instead of some of the traditional characteristics on which police departments have focused.

2. *Training*—there should be less emphasis on the historical crime-fighting orientation and a greater focus on the service duties and responsibilities actually carried out by police officers.
3. *Performance evaluations*—departments should place greater emphasis on evaluating the quality of service provided by police officers rather than simply quantifying the number of arrests, tickets written, and crime reports filed.
4. *Open complaint and internal investigation system*—there should be an easy mechanism for citizens to file complaints against police officers, and there should be a perception that complaints will be taken seriously and investigated fully.
5. *Public information/education*—the public should be adequately educated on the true nature of police work, including the situations under which officers are authorized to use force as well as the types of force that are appropriate in a given situation.
6. *Troubleshooting/preventive programs*—departments should develop early warning systems (see Dunham & Alpert, 2004), and they should respond to problematic officers with both treatment and punishment, not just punishment.
7. *Policies, procedures, and organizational control*—organizational guidelines should clearly spell out the nature of officer misconduct and provide officers and supervisors with directions on how to respond to misconduct most appropriately. (Carter, 1994, pp. 281–284)

Many of these strategies have been discussed in one form or another in this chapter. Most of these elements are internal to police agencies, but a few are external. Nevertheless, as Carter (1994) suggested, taken together all of these factors contribute to a more thorough approach to preventing and responding to abuses of authority, including the misuse of force.

CONCLUSIONS

Every year, many citizens will encounter the police in a variety of circumstances. For some, it will be through receiving a traffic ticket. For others, the encounter will be prompted by the citizen reporting a crime. For an additional group of people, the interactions will be based on police officers making arrests of persons suspected of having committed a crime. In over 98 percent of these cases, police officers will use little to no force and the situation will be resolved quickly and quietly. In other circumstances, the police may confront armed suspects, or they may meet with resistance in the process of trying to apprehend or arrest a suspected offender. How will the officers respond? One answer is that, in some cases, force will be necessary.

Applying the use-of-force continuum as an analytical device researchers have discovered some interesting results. For instance, in cases involving resisting suspects, officers escalated their responses (that is, moved up the use-of-force continuum) in about one of five situations. By contrast, when confronted with resisting suspects, officers deescalated them in three of four use-of-force situations (Terrill, 2005).

Most police officers seldom will have to use extreme force in the line of duty, and a relatively small number will ever have to use deadly force (Dunham & Alpert

2002, Morin et al., 2017). Although they remain unresolved, a few issues must be reviewed here. First, in many cases when the police have to use force, they are completely justified in the force they employ to apprehend and subdue suspects; force is called for and it is reasonably used. Second, a small number of officers use force frequently and, unfortunately, occasionally unjustifiably (see Christopher, 1994; Kappeler et al., 1998). Some departments act decisively to discipline or dismiss officers who seem to engage in excessive force, but other departments ignore or even reward officers who carry out their duties in an aggressive manner (see especially Kappeler et al., 1998). Finally, even when police officers act in a reasonable and justifiable way in using force, they are likely to be second-guessed and criticized, not only by those against whom force has been used, but also by the media, members of activist organizations as well as the general public.

KEY TERMS

abuse of authority	early warning systems	<i>Plumhoff v. Rickard</i>
brutality (by police)	excessive force	<i>Scott v. Harris</i>
<i>County of Sacramento v. Lewis</i>	fleeing felon rule	suicide by cop (SBC)
deadly force	<i>Kingsley v. Hendrickson</i>	<i>Tennessee v. Garner</i>
early intervention (EI) systems	less lethal force	tort law
	less-than-lethal force policies	use-of-force continuum

CRITICAL REVIEW QUESTIONS

1. In England, police officers are not routinely armed. Should the police in the United States be armed? Is our situation different from that of England and some other nations? How? Why?
2. Define the terms “abuse of authority,” “excessive force,” and “police brutality.” Which of these terms is the broadest and most encompassing? Which term (or terms) would be most useful in a study of police use of force?
3. How do you respond to the statement: “All brutality is excessive force, but not all excessive force is brutality”? Justify your answer.
4. When does reasonable force become excessive force? Is there an easy line of demarcation for the police and the public to recognize when force becomes excessive?
5. What are the most common ways in which the public encounters the police? When police officers interact with the public, what are some of the stressful factors that result in such interactions leading to the use of force?
6. Carefully examine the five influences on police use of force that were discussed in the chapter. Which of these is most likely to influence the use of force by officers? Why?
7. One social critic was quoted as saying the police in America have two trigger fingers, one for African Americans and another for whites. Is there any evidence to support such a contention, or is this merely political rhetoric?
8. Should police departments forbid all high-speed pursuits by officers? Why or why not? What would be the consequence of a “no pursuit” policy?

9. Why do a small number of officers account for the majority of complaints about the use of force in most departments? Why do some departments have a disproportionate number of use-of-force complaints? Are there operational factors, such as where an officer is deployed, that might influence the number of complaints?

WRITING ASSIGNMENTS

1. In one paragraph each define the following terms relative to police: (1) abuse of authority, (2) excessive force, and (3) brutality. Use (and cite) whatever sources you find helpful.
2. Do an Internet search for “suicide by cop.” In a one-page essay talk about the number of “hits” you got and the kinds of situations in which this is likely to occur.
3. Look at the five factors influencing police use of force that are discussed in the chapter. Pick the one you feel has the greatest potential to reduce cases of excessive force and explain why you think this is so.
4. One of the controversial restraint techniques used by some police departments in the 1980s and 1990s was the carotid chokehold. Do an Internet search and prepare a short essay (three or four paragraphs) explaining the controversy surrounding this technique.
5. After completing this chapter, develop a clear and concise statement (two or three paragraphs should be sufficient) explaining what it means to exert a *reasonable* amount of force.
6. Prepare a one-page essay supporting or opposing the following proposition:
As a result of the danger they pose, police departments should not engage in high-speed pursuits.

RECOMMENDED READINGS

Kevin R. Davis (2012). *Use of Force Investigations: A Manual for Law Enforcement*. Bloomington, IN: Responder Media. This book is written by a law enforcement officer and while it is primarily intended for a law enforcement audience it gives a thorough and thoughtful treatment of police use of force.

Victor Kappeler (2006). *Critical Issues in Police Civil Liability*, 4th ed. Long Grove, IL: Waveland Press. Kappeler is one of the authors frequently cited in this chapter. His book on police civil liability examines civil suits as a remedy for police misconduct. Chapter 4 focuses specifically on civil liability in cases involving excessive use of force.

David Klinger (2004). *Into the Kill Zone: A Cop's Eye View of Deadly Force*. San Francisco: Jossey-Bass. Klinger uses interviews with eighty police officers who have used deadly force, and the results from these interviews shed considerable insight into an officer's split-second decision-making process associated with the use of force. This book is well written and gives the reader considerable insight into perceptions of officers who have been involved in shootings—before, during, and after the event.

Michael J. Palmiotto, editor (2017). *Police Use of Force: Important Issues Facing the Police and the Communities They Serve*. Boca Raton, FL: CRC Press. This book contains eleven readings (four of which were written by the editor). The topics covered include a number discussed in this chapter such as: an historical overview of police force, the militarization of the police, nonlethal weapons, race and policing, as well as training and prevention.

CHAPTER 6



Gun Control

INTRODUCTION

The topic of gun control has been on the forefront of the political agenda in the United States for at least five decades. The debates become more politically charged after horrible crimes occur, and no place seems safe from mass murders, including students and staff in schools (the Sandy Hook killings in 2012), or universities (the Virginia Tech murders in 2007), going to a movie (the Aurora, Colorado theatre massacre in 2012), in night-spots (the 2016 shooting at the Pulse nightclub in Orlando) or the mass murder at a music concert in Las Vegas in 2017; even places of worship are not immune to these tragedies and a gunman killed 26 churchgoers in Sutherland Springs, Texas in October 2017.

Previously, events that precipitated calls for greater control of firearms occurred after the assassinations of political leaders such as President John F. Kennedy, Senator Robert Kennedy, or Reverend Martin Luther King Jr. in the 1960s. Whenever these crimes occur Americans collectively want to “do something” to reduce risks, but perspectives on gun control are very polarized: one group that believes that their right to bear arms should not be infringed, while others contend that firearms are responsible for unnecessary suffering and should be more tightly controlled or banned outright.

As an issue championed by conservative organizations such as the National Rifle Association (NRA) and other smaller and less powerful public interest groups, gun control results in regular efforts to lobby Congress to prevent further restrictions on private ownership of firearms. However, even some of the most ardent firearms enthusiasts recognize that firearms often are involved in the commission of crimes, particularly violent offenses. Therefore, the debate becomes one over whether private ownership of firearms *promotes* criminal activity or whether it *prevents* crimes. Liberals seem to pull one way and conservatives another. Both sides promise that laws can make a difference, but with thousands of gun laws already “on the books,” we need to ask: Is it really the laws that make a difference?

PERCEPTIONS OF THE GUN VIOLENCE PROBLEM

Almost everybody has an opinion about gun control, the relationship between guns and violence, and the best way to control the misuse of firearms. Unfortunately, many of our ideas are based on political rhetoric, anecdotal accounts of single incidents, or what we gather from the latest television newscasts. Most people do not have much in-depth knowledge about the history of gun control in the United States, how criminals obtain their guns, how often guns are used in crimes, and the defensive use of firearms. There is considerable debate about the types of legislation that best control firearms misuse or whether gun laws have much impact at all. This chapter provides an overview of firearms mortality and the sources of firearms legislation, and it addresses whether firearms legislation and police interventions are the best strategies for reducing gun violence.

A number of key issues prevail in the debates over firearms, their place in society, and how we should control their misuse. First, because this is an emotionally charged issue, advocates on many sides—liberals and conservatives, as well as groups that want either to place further restrictions on firearms or to oppose such legislation—often rely upon rhetoric rather than factual information about violent crime, the involvement of firearms in violent crime, or defensive gun use (Lott, 2016). Second, most of us learn about issues such as gun control from television, and a one or two-minute news segment does not enable us to learn much about the pros and cons of any policy-related issue. Third, a lot of our perceptions about crime and violence are misleading or wrong (see Walker, 2015). Kopel (2012) noted that the gun control debate has raged since the 1920s and shows no sign of being resolved.

Ruddell and Decker (2006) found that while many factors influence the public's perceptions about firearms misuse, the media are by far the worst culprits. Television news agencies, for instance, are often at fault for reducing complex policy issues, especially those about crime and justice, into a report that is only a few minutes long. In some cases, news more closely resembles entertainment, and Surette (2015, p. 20) observed that "We still look to news to provide a reliable record of what's real, but today's stew of journalism, entertainment and infotainment makes establishing what is real regarding crime and justice a haphazard process." Furthermore, the films and television programs that we view often sensationalize firearms use, and we watch youngsters with dangerous-looking weapons shooting them indiscriminately and causing all sorts of carnage. Yet, empirical evidence suggests that such events are rare.

In addition to the entertainment media, other groups are guilty of distorting our perceptions about firearms use. Different stakeholders including law enforcement officers and organizations, offer anecdotal accounts about youth or adult gun violence (for example, relating information about rare or sensational incidents as if those cases were normal). More troubling is that some scholars have deliberately distorted information about firearms use, or the types of firearms that some offenders are likely to use (Lott, 2016). Michael Bellesiles, for example, was alleged to have engaged in shoddy research by deliberately misrepresenting and fabricating data for his 2001 book, entitled *Arming America: The Origins of a National Gun Culture* (Hardy, 2010).

Ruddell and Decker (2006) also outlined how academic researchers distort information about juvenile firearms use by categorizing eighteen- to twenty-four-year-olds as “youths.” This practice persists: Saunders, Lee, Macpherson, Guan and Guttmann (2017) published an article in the *Canadian Medical Association Journal* that received considerable publicity as they reported “one youth was shot almost every day” and based on that study various advocacy groups called for strategies to reduce these firearms injuries (Weeks, 2017). However, the authors defined a youth as anybody twenty-four years of age and younger, and most of the people who were injured were from the ages of eighteen to twenty-four years. Moreover, Lilly (2017) reported their definition of firearm injuries included persons wounded by BB guns, airsoft guns (that fire plastic pellets), or paintball guns; none of which are considered firearms. When the data were reviewed, it was found that most of these injuries were from BB guns or pellet guns. When persons only seventeen and younger were counted as youths, and only injuries from real firearms were counted these events were rare. While we expect that filmmakers will sensationalize information to sell more movie tickets, it is disheartening when academic researchers distort their findings to support a political position or their own personal beliefs.

When all of the rhetoric is removed from discussions about firearms legislation, it basically boils down to two different types of interventions. Some scholars have called these the supply- or demand-side solutions to the problem. **Supply-side interventions** try to reduce the number of firearms (the number of legitimate firearms, certain types of firearms that are thought to be more dangerous, or the number of guns in the hands of unauthorized users, such as juveniles or felons). **Demand-side interventions**, by contrast, attempt to increase the “costs” of illegally using firearms, typically through enforcement or lengthy prison sentences. In addition, education-based programs that attempt to change perceptions about illegally carrying firearms would be considered demand-side interventions (see Papachristos, Meares & Fagan, 2005).

Numerous challenges arise when implementing either approach to firearms control, and liberals and conservatives are not likely to agree on a specific approach. First, the supply side is challenged by the large numbers of guns in circulation: the Congressional Research Service estimated there were about 310 million firearms within the United States in 2009 (Krouse, 2012) although Jervis (2016) reported there were only 265 million guns in the United States. Figure 6.1 shows that about two-fifths of survey respondents reported having a firearm in their home, and this total probably undercounts the true number, as some respondents do not think that it is socially desirable to report their gun ownership.

The demand-side argument, by contrast, is challenged by the fact that thousands of federal, state, and local laws already regulate the use of firearms—from their manufacture, importation, sale, and use, to their export.¹⁹ Despite the fact that there are so many laws, some are rarely enforced, and criminals (many of whom are not legally able to possess firearms in the first place) frequently do not abide by firearms laws. Some of these laws are very punitive—such as sentence enhancements for firearms involved in felonies or mandatory prison terms for unlawfully carrying concealed guns—but conservatives often ask: Since the existing laws are not enforced, why add more laws that are also unlikely to be enforced?

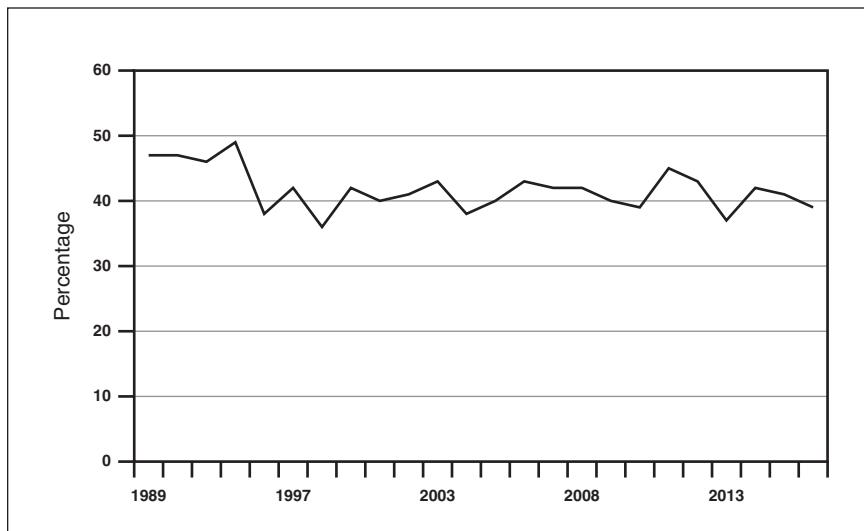


Figure 6.1 Percentage of Americans Reporting Having a Gun in Their Home, 1989–2016

SOURCE: Gallup (2017)

A central question in the debate over the effectiveness of firearms regulations is whether sweeping national or state legislation will reduce firearms deaths. Many who disagree with this approach argue that the best violence-reduction interventions are demand-side interventions, such as local police-based strategies to prevent unauthorized persons from possessing guns or to apprehend persons possessing firearms illegally (Koper, Woods & Isom, 2016). In some jurisdictions, such as Boston, the police, prosecutors, and federal law enforcement officials worked together to implement interventions, such as Operation Ceasefire, that reduced gun violence (Braga & Weisburd, 2015, see also Chapter 3). While both approaches have merit, they fall prey to the simplistic solutions that politicians often promote.

Many scholars, for example, argue that the most effective solutions to violence reduction are to fix longstanding social problems in areas of greatest disadvantage, such as the inner cities, where there is a disproportionate amount of violent crime. While firearms murders occur in all states, they are not distributed equally throughout the nation. The Crime Prevention Research Center (2017) reported that over two-thirds (68 percent) of all U.S. homicides are concentrated in 5 percent of the counties, and they seem to occur in places with long histories of concentrated poverty, few positive role models, high drug addiction rates, and other legal problems, such as elevated levels of gang involvement and the drug trade.

GUN VIOLENCE

Rates of civilian firearms ownership in the United States are higher than almost anywhere else in the world, and much attention has been drawn to the fact that firearms are the primary mechanism of injury in most homicides. According to data provided by the Centers for Disease Control and Prevention (CDC), approximately

38,000 Americans died from gunshot wounds in 2016, although less than one third of that total (11,000) involved homicides (Rhodan, 2017). The number of gun deaths has been increasing since 2014, and in 2017 accounts for about 12 deaths for every 100,000 persons (Centers for Disease Control and Prevention, 2017). Kochanek, Murphy, Xu and Tejada-Vera (2016) analyzed the 2014 mortality data and report that almost two-thirds of firearm deaths (63 percent) are a result of suicide, followed by homicide (about 32 percent) and relatively low numbers of accidental firearms fatalities (1 percent). In addition, about one percent of gun deaths are related to police legal interventions (that is, when the police kill a suspect, although see Chapter 5 for a discussion of the accuracy of these data), and less than one percent of these deaths where the cause was undetermined (Kochanek et al., 2016, p. 87).

Moreover, many additional persons are hospitalized each year for firearms-related injuries. Miller (2012), a researcher with the Pacific Institute for Research and Evaluation (PIRE), estimated there were 73,505 admissions to hospitals for gunshot injuries in 2010, including those treated and released the same day. Because of the large number of deaths and unintentional injuries, the total costs to society are high. The PIRE estimated that \$174 billion was spent to repair the harm of firearms injuries and deaths in 2010, and when those data were updated to account for higher costs the total rose \$229 billion (Follman, Lurie, Lee & West, 2015). That total included costs to the justice system, as well as intangible costs such as reductions of quality of life and missed work.

How you calculate the costs of firearms injuries makes a difference in the research outcomes. Sarabeth Spitzer and her colleagues (2017) did not include intangible costs when they developed their estimate for the annual cost of firearms injuries, and that total was \$6.61 billion, nor did Gani, Sakran and Canner (2017) who estimated the annual cost was \$2.8 billion. These different totals show the challenge for those trying to understand gun violence as scholars looking at the same data can develop such different estimates depending on how they define the problem.

To avoid further complicating the issue, we focus on the use of guns in crimes, where violent crime occurs, and the types of gun control legislation and police interventions that are successful at reducing gun violence. Altogether, slightly more than two-thirds of all murders involve firearms, and this percentage has been fairly consistent for decades, even though overall homicide rates decreased by over one half nationwide between 1980 and 2015. Federal Bureau of Investigation (FBI) data reveal that the percentage of guns used in murders ranged from a low of 55 percent in 1964 to a high of 73 percent in 2016 (FBI, 2016, 2017).

Handguns are used in most firearms homicides. In the late 1970s, approximately 70 percent of all homicides involved handguns. This increased to over 80 percent in the early 1990s and decreased to 64.7 percent in 2016 (FBI, 2017, Expanded Homicide Table 12). Given these findings, some people ask why we don't regulate handguns more stringently. There are already a large number of laws that have been enacted to restrict the ability of some persons to own firearms, and carrying concealed handguns has been the subject of legislation since the early 1800s (Cramer & Burnett, 2012)—although Kopel (2012) notes that the movement to ban handguns gained traction in the 1920s. Yet, while the people who want to ban handguns are vocal, they account for a relatively small

proportion of the population. A 2016 Gallup Poll showed 23 percent believed that handgun ownership should be banned and that total had dropped from about 40 percent of respondents in Gallup Polls from the early 1990s (Gallup, 2017b). Despite a lack of support for banning handguns, a 2017 Gallup poll revealed that 54 percent of Americans were somewhat or very dissatisfied with the nation's laws or policies on guns and of those respondents 37 percent of respondents wanted stricter gun laws (Gallup, 2017b).

It is likely that most people realize that no matter what laws we enact, there are still over 300 million firearms in circulation, and they have a service life of 100 years or more. Moreover, we have had very little success in banning goods or services that are desirable or are part of long traditions, such as the ban on alcohol during Prohibition. As a result, short of outright bans and confiscation, the sheer number of firearms within the United States means that there will always be a supply of these weapons.

Emerging technologies, such as the ability to manufacture firearms components using relatively inexpensive 3D printers, might also frustrate firearms regulators. O'Neill (2012, p. 1) observed that "3-D printing technology may decentralize the manufacturing process for firearms, giving an individual the ability to download the CAD design for a weapon and 'print' an unregistered, untraceable gun." Despite the fact 3D technology has been available for almost a decade most printed guns are crude and not very reliable (e.g., single-shot firearms made of plastic). But Jacobs and Haberman (2017, p. 146) observe "production will inevitably increase as technology improves and cost falls. However, at least in the short term, 3D printed guns will not compete successfully with traditionally manufactured guns in terms of reliability, quality, and cost."

Many liberals note that in some European nations, where it is difficult to purchase guns, rates of firearms homicide are less than in the United States. Conservatives, by contrast, generally point out that rates of violent crime (including firearms crimes) increased in places such as Australia and Great Britain after the civilian use of firearms was greatly restricted throughout the 1980s and 1990s. Malcolm (2012) summarized the research, saying that "strict gun laws in Great Britain and Australia haven't made their people noticeably safer, nor have they prevented massacres." Newspaper accounts from Great Britain report that the London police confronted a 42 percent increase in gun crimes in 2016 and 2017 (Camber, 2017) and the rates of gun crime for the entire nation increased by 13 percent from the previous year (Office for National Statistics, 2017).

While the number of firearms circulating within the United States has increased substantially, the number of homicides actually decreased. From 1980 to 2016, for instance, the homicide rate dropped by almost one half (from 10.2 to 5.3 per 100,000 residents; see FBI, 2016; 2017), but during that time the stock of guns increased by several million each year. A review of the Bureau of Alcohol, Tobacco, Firearms and Explosives (2016) manufacturing statistics shows that in 2014, for example, the number of firearms increased by 12.2 million (the total of manufactured and imported guns less exported guns). The fact that the number of firearms in circulation increased during times of decreasing homicide rates suggests that guns represent only one factor in the complex homicide equation.

FIREARMS LEGISLATION

To fully understand firearms violence and the use of legislation to reduce gun crime, we need to provide a short history of firearms legislation and the significant local, state, and federal laws that have been enacted in attempts to reduce firearms violence. Central to any discussion of legislation is the presence of the Second Amendment's protection for civilian firearm ownership. This amendment provides that:

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

There has been some dispute about the intent of the Second Amendment and the constitutionality of gun laws were first challenged in the Supreme Court in 1822 when the Court held that laws enacted to restrict the concealed carry of firearms were unconstitutional (*Bliss v. Commonwealth*). A review of early firearms legislation suggests that most laws in the 1800s made it illegal to carry concealed firearms. By contrast, little attention was placed on defining persons who should not own firearms or on attempts to reduce firearms availability—strategies that are most common today.

For most of the nineteenth century, few state or local laws that restricted firearms ownership were enacted. Guns were sold in hardware and retail stores and through the mail, and there were no broad restrictions on purchases. In fact, sub-machine guns were available through mail-order catalogs in the 1920s and early 1930s, although they were very expensive for an average wage earner. During the early part of the twentieth century, the number of firearms crimes increased in some cities, and popular support grew to restrict the availability of firearms in some places. For example, in response to an increase in gun violence in New York in 1910, the city enacted the Sullivan Law in 1911 that made handgun ownership subject to a license. Since that time, New Yorkers have been restricted from owning handguns. Kopel (2012) notes, however, that many gun control laws enacted in the 1920s might have been a consequence of an increasing fear of a 1917 Russian-style revolution, which also led to gun control in other nations.

Part of the increase in violence in the early twentieth century was a consequence of the Volstead Act in 1919, which made the sale of alcohol illegal and marked the start of Prohibition. Competition for control over illicit production and distribution of alcohol increased organized crime, and several atrocities, such as the St. Valentine's Day massacre, prompted legislators to increase the number of controls on firearms. As discussed in Chapter 3, high profile cases often spur new legislation. Likewise, particularly outrageous crimes seem to lead to the enactment of gun control legislation, after which legislators can report to the electorate that they have taken a meaningful step to reduce future firearms crimes although we speculate that most people do not know or have forgotten why many of these laws were introduced in the first place.

Perhaps the most important gun control legislation within the United States was the 1934 National Firearms Act (NFA). The NFA mandated federal registration of machine guns, short-barreled rifles or shotguns, and silencers. This

legislation also made transfers of these firearms subject to a \$200 tax, a significant amount of money when a typical wage earner made only a few dollars per day. As each user is taxed when the firearm is transferred, the cost of these firearms increases, creating an economic barrier to ownership. This act was noteworthy as it was the first time that the federal government became involved in gun control.

The NFA spawned several local and state firearms laws, and the number of these laws gradually increased over time. The second major piece of federal gun control legislation was the 1968 Gun Control Act (GCA), enacted after the assassinations of President John F. Kennedy, Senator Robert Kennedy, and civil rights leader Martin Luther King Jr. This provides another example of a legislative response to celebrated cases. The GCA established higher age limits on firearms purchases and made certain categories of persons ineligible to purchase firearms, including felons, fugitives from justice, persons with a mental illness, those addicted to alcohol or drugs, illegal aliens, and dishonorably discharged military personnel. In addition, federal law prohibited the interstate purchase of firearms, and such transactions had to be completed by federally licensed firearms dealers.

Despite these restrictions, ineligible persons met few obstacles in purchasing firearms from gun dealers. In 1993, the Handgun Control and Violence Prevention Act was enacted to make it more difficult for unauthorized persons to buy guns from licensed dealers. This act—also known as the **Brady Bill**—is another example of legislation being introduced after a celebrated case. James Brady was wounded in John Hinckley's assassination attempt on President Ronald Reagan in 1981. Brady's wife, the late Sarah Brady, campaigned extensively for the enactment of tougher firearms laws and established the Brady Campaign to Prevent Gun Violence.

The introduction of the Brady Bill promised to reduce the number of firearms purchased by ineligible persons in retail sales. First enacted in 1993 to regulate the purchase of handguns, the legislation was made permanent on November 30, 1998, and it was extended to all cartridge firearms. A federal government study reported that from March 1, 1994, until December 31, 2014, more than 180 million persons had been screened and there were about 2.8 million denials, or 1.6 percent of applications (Karberg, Frandsen, Durso, Buskirk & Lee, 2016, p. 1). According to this research, most of those ineligible purchasers were felons or persons who had been convicted of domestic violence misdemeanor offenses, although a smaller proportion of persons were refused due to drug or alcohol addiction and mental illness.

There are a number of challenges associated with laws requiring background checks. First, in most states firearms purchases from non-dealers (e.g., if a person buys a gun from a friend or relative) do not require background checks; some have called this the **gun show loophole**, as some unlicensed dealers sell firearms at gun shows. Second, some individuals will purchase guns from licensed dealers for other people who are ineligible to own firearms, which is called a **straw purchase** (e.g., if a person buys a gun for a friend or relative who is restricted from ownership due to a felony conviction).

The success of the Brady Campaign to Prevent Gun Violence in developing broad political support for gun control legislation underscores the role of public interest groups in introducing gun control legislation—or arguing against such laws.

There are dozens of interest groups advocating for tougher gun control legislation, ranging from grassroots movements such as the Coalition to Stop Gun Violence to those operated by public health advocates, like the Violence Policy Center. Most of these groups wage publicity campaigns using social media and most of them provide campaign funding or support to legislators who share their views.

No discussion of interest groups would be complete without an examination of the NRA—one of the oldest, largest, and most influential of the political advocacy groups in the United States. With 5 million members and an operational budget over \$250 million per year, the NRA has a significant political influence (Musa, 2016). In order to manage its political activities, the organization created the Institute for Legislative Action (ILA), and they disseminate information about pending state or federal firearms legislation. The key activities of the NRA-ILA are to provide campaign donations (1) to support state or federal candidates who support the NRA's political agenda, (2) to mobilize the membership to vote for politicians who share the NRA's goals and ideals and (3) lobbying, and in 2014 the NRA lobbied for 102 House and Senate Bills (Musa, 2016, p. 3). While other groups champion the Second Amendment, the NRA is the most well known and professionally organized. In the past the organization has given tacit support for some gun control legislation but the organization has adopted a more "hard-line" resistance to any gun control in recent years.

Finally, the manufacturers of firearms have developed a greater political presence over the past several decades. These firms have a vested interest in the status quo and they lobby state and federal politicians to resist more firearms restrictions, as these could harm profits. Fear of further gun laws during the Obama administration actually increased gun sales and Pane (2017) observes that after the election of President Trump, who opposes firearm restrictions and has addressed the NRA at their conventions, gun sales have dropped. Some gun manufacturers, such as Ruger and Smith & Wesson, have supported certain facets of gun control legislation in the past, but these companies have suffered from a backlash, as hard-core Second Amendment supporters boycotted their products. As a result, most firearms corporations today provide financial support for the mainstream interest groups, such as the NRA.

At the broadest level, firearms laws attempt to control the types of firearms that can be possessed, who can possess them, and how they should be used. The following pages outline whether these strategies are effective at reducing violent crime.

Regulating the Types of Firearms

Some firearms are thought to represent a greater risk to public safety than others. The federal government's enactment of the NFA in 1934 placed restrictions on fully automatic firearms, such as submachine guns, and in many states ordinary citizens cannot possess these types of firearms (fully automatic firearms shoot more than one round when the trigger is pulled, whereas semiautomatic guns require the trigger to be pulled for each shot). ATF statistics show that there are only about 250,000 fully automatic firearms legally registered to civilians in the United States. Federal legislation in the 1980s froze the number of these firearms, and no new fully automatic

firearms have been transferred to civilian ownership since that time. The net effect is to create scarcity, and most of these guns now sell for \$10,000 or more, well out of the reach of most people. In any case, such registered firearms have rarely been involved in crimes, a fact confirmed by the ATF Director in congressional testimony (Committee on the Judiciary, 1986). Although newer national-level information about the misuse of these guns is not available, the Office of the Attorney General (2017, p. 5) in California reported that only one fully automatic gun was used in a crime in 2016 and they found the gun was malfunctioning and was not fully automatic by design.

One unintended consequence of making a type of firearm difficult-to-obtain is that some persons will use their ingenuity to skirt an existing law. The shooter in the 2017 Las Vegas mass murder, for instance, used a device called a bump stock, which enables a user to fire a semi-automatic firearm as rapidly as a machine gun. Although using this stock to adapt a firearm was not illegal (except in California), this case brought the issue of such modifications to the public's attention. Massachusetts banned these stocks in November, 2018, and other state legislators are considering similar bans. A question many people are asking, however, is whether members of the public should be able to own a so-called assault weapon, and whether federal legislation should attempt to regulate these guns.

The federal assault weapons ban that was enacted in 1994 was allowed to sunset in 2004. This legislation placed restrictions on the importation and sale of military-style firearms. **Assault weapons** are typically dangerous-looking semiautomatic weapons that fire center-fire cartridges in military calibers. (Popular assault weapons include the AK-47 and AR-15 rifles.) These firearms were thought to be at high risk of use in crimes, but unlike depictions in the movies or on television, they rarely have been encountered in criminal offenses, although they have proven to be the gun of choice in a number of mass shootings carried out between 2012 and 2018. Assault weapons were used in less than 1 percent of crimes before the ban, and a federal government study found that the law had little overall impact on violent crime reduction (see Koper, Woods & Roth, 2004). Although assault weapons are rarely used in crimes they do enable a shooter to produce a large volume of fire that can result in devastating injuries. The shooter who killed twenty-six children and adults at the Sandy Hook elementary school in 2012, for example, fired 156 rounds in less than five minutes (Studdert, Donohue & Mello, 2017). As a result of the risks these guns pose, seven states and the District of Columbia have placed restrictions on the sales of these firearms and the Supreme Court upheld those laws in 2016 (Hurley, 2016).

Handguns are the firearms used most often in violent crimes, and many legislators would like to restrict inexpensive handguns, called **Saturday-night specials (SNS)**. Although definitions of these firearms differ, they typically chamber less powerful ammunition, have short barrels, and are inexpensive and often unreliable. Some states, such as California and Massachusetts, have also placed various safety restrictions on the types of firearms that can be imported into those states, and this has the effect of limiting the number of SNS that are sold, at least in legal sales. One potential problem with restricting inexpensive and inaccurate firearms that fire less powerful cartridges is that they may be replaced with more powerful or sophisticated firearms. Ruddell and Mays (2003) found that juveniles who do

not have legal access to handguns frequently “sawed off” the barrel and stock of a more powerful rifle or shotgun as an alternative. Thus, the offender would have a gun that is more lethal than a SNS. This is a good example of a **substitution effect**, where the ban of one object causes offenders to replace it with something else.

Some states have proposed to limit crime by focusing on restricting ammunition rather than guns. Mozaffarian, Hemenway, and Ludwig (2013) proposed that high taxes be imposed on both firearms and ammunition to regulate their use and make it more costly to shoot. In 2016 California enacted legislation requiring ammunition to be purchased in person (to restrict online sales), eliminating out-of-state ammunition sales, and requiring background checks for buying ammunition (Sabalow, 2017). As a result of this law it is likely that offenders will either get a friend or associate to make a straw purchase of ammunition, or import ammunition from other states. As a result, this legislation will create a new illegal market that will be difficult to control.

Legislating Access to Firearms

If regulating the different types of firearms that are available or increasing the cost of ammunition does not seem to be effective in reducing the numbers of firearms crimes, another logical step is to regulate who can own firearms. The 1968 Gun Control Act was intended to prevent firearms access by persons with mental illness, long-term alcohol or drug users, felons, or other persons who might pose a risk to public safety. Given the mental health problems of the shooters who committed the mass slayings at the Aurora, Colorado, movie theatre, Sandy Hook school in Newtown, Connecticut, or at Virginia Tech, or at the Baptist church in Sutherland, Texas there has been more attention placed on screening the mental health of persons buying firearms (Swanson, 2013).

While most of us agree that selling firearms to a person with a serious mental illness is not a sound practice, like other policy-related issues we discuss there are a number of complicating factors. First, most people who have mental health problems are not dangerous. For example, should a person who was treated for depression as a college student be restricted from owning a firearm later in life? Rozel and Mulvey (2017, p. 461) observe that “Any intervention focusing on the link between mental illness and violence will have limited impact on overall gun violence. The amount of violence in general, and gun violence in particular, involving mentally ill individuals is so small that focusing on this aspect of the problem is largely a distraction.” Similar challenges exist for persons who are alcohol or drug dependent when it comes to the issue of restricting their ability to own a gun.

Earlier we reported there had been over 2.8 million denials of firearms purchases from licensed dealers (Karberg et al., 2016). We do not know how many of these persons represented a threat to public safety. In Jacobs's (2002, p. 113) analysis of the Brady Bill's impact, he noted that while “many rejected purchasers would not have committed gun crimes, [m]any were not left unarmed since they already owned one or more guns. Still other rejected purchasers would have obtained a gun in the secondary or black market.” Like much of the firearms research there are mixed findings regarding the impact of background checks

on firearms violence and mortality. Sen and Panjamapirom (2012) found that states with more extensive background checks had fewer firearms homicides and suicides. In their meta-analysis of firearms research and violence, by contrast, Makarios and Pratt (2012) found that background checks had a very small impact on firearms violence. Lee and colleagues (2017) used a similar research strategy, but considered more studies and they also found a weak relationship between states with more rigorous background checks and fewer firearm homicides.

Even if a state's background check is rigorous, there are no guarantees that gun dealers necessarily follow federal or state regulations. Koper (2002, p. 154) noted that dealers "may engage actively in illegal gun sales, either by selling directly to prohibited users or by colluding with unlicensed, street dealers," or they may engage in "actions that are illegal or otherwise negligent or unethical." So, while state databases that are very comprehensive may be implemented, their effectiveness may be attenuated by unethical dealers or by ineligible persons who obtain firearms through straw purchases.

In addition, the case of the person who killed the churchgoers in Sutherland, Texas, shows that some people "fall through the cracks" of the background check system as this shooter legally purchased the firearms used in these murders. These purchases, however, should have been denied because his prior criminal history of domestic violence and mental health problems. But, as these prior offenses were not properly documented, his background check was approved. Recognition of this shortcoming has led federal authorities to obtain orders to seize firearms from persons who should have been disqualified, and in December 2017, *USA Today* reports that over 4,000 cases had been identified in the previous year (Johnson, 2017).

Another important factor to consider is the ability of motivated persons to purchase firearms on the secondary market. The secondary market (also called the **gray market**) includes guns purchased from nonfederal firearms licensed dealers, firearms borrowed from friends or associates, and those obtained through residential or commercial burglaries. Moreover, some guns in high-crime areas are used by multiple offenders; what are called community guns. These guns are shared between groups of people and Hermann, Marimow, and Williams (2017) describe how one handgun was used in multiple crimes, including a number of shootings. They quote a police officer as saying that "guns in high-crime areas are not disposable commodities" and tend to stay within a group even after they've been used in crimes (Hermann et al., 2017, paragraph 15).

Perhaps the best way to learn about these firearms is by asking offenders how they obtain and use guns. Analyses of interviews with incarcerated offenders, for instance, suggested that overall, few offenders bought their guns through legitimate firearms dealers; nearly 80 percent of offenders obtained their firearms through friends, family, or illegal (street) sources (Harlow, 2001; May & Jarjoura, 2006). Chestnut and colleagues (2016), for example, interviewed jail inmates who had been incarcerated on firearms offenses, and they found that most obtained guns from friends, family members, and associates (their social networks). Over one-half of these guns were purchased while about one-eighth were gifts and less than four percent of these guns were purchased from a federally licensed dealer.

Controlling Firearms Use

The third strategy for firearms control is to restrict how firearms may be used. Each jurisdiction has enacted laws that promote responsible firearms use. These regulations are often common sense and stipulate that recreational users such as hunters cannot discharge firearms in public places, at night, or if their actions place others at risk (such as hunting at night or firing a firearm near a highway). Most citizens abide by these rules, and the law is not controversial. Yet, some states have placed restrictions on firearms to reduce access to unauthorized users. These are the so-called safe storage or **child access prevention (CAP) laws**. To promote these policies, some police departments give away gun safety devices, such as trigger locks that make firearms temporarily inoperable; new firearms often are sold with a trigger lock.

Safe storage of firearms seeks to restrict access to unauthorized users, such as children or offenders who might steal firearms. While few people would advocate toddlers and youngsters handling firearms without adult supervision, these laws become controversial as they make law-abiding citizens legally accountable if unauthorized users cause harm with their firearms. Moreover, opponents of gun control legislation argue that locking up firearms effectively disarms a person who would use a firearm for self-defense (Makarios & Pratt, 2012).

Over half of the states currently have some type of safe storage or child access prevention legislation. Despite the fact that such laws have some public support, empirical studies have not found them to be effective at reducing unintentional deaths (Kalesan, Mobily, Keiser, Fagan & Galea, 2016), although DeSimone, Markowitz, and Xu (2012) reported that these laws did reduce non-fatal injuries. Although child access prevention laws seem to be a common-sense approach to firearms safety, Jacobs (2002, p. 195) has observed that “[m]ost gun owners are already safety conscious, but those who are currently blasé about loaded weapons in the home may not be easily persuaded to change their behavior.” This observation seems particularly crucial in light of the fact that unintentional firearms fatalities have dropped so significantly during the past two decades. It is also possible that mandatory hunter-safety training in most states is responsible for making recreational firearms users more safety conscious.

Thus, we have addressed the efficacy of three types of legislation to reduce the access of firearms to offenders: restricting the types of firearms that are available, restricting who can possess firearms, and placing restrictions on the use of firearms, including child access prevention or safe storage laws. While many of these legislative initiatives are conceptually appealing, they are limited by the following factors:

1. The cumulative stock of about 310 million firearms (with a service life of 100 years) ensures a long-term supply on the legitimate and illegitimate markets regardless of what laws are enacted.
2. New technologies, such as 3D printing, have the potential to shift the manufacture of firearms from corporations to individuals, thus frustrating gun control legislation.

3. Restricting one type of firearm that appears to be more dangerous than others will have no long-term effect on violence reduction.
4. Rules on safe storage or the responsible use of firearms will have little effect because they tend to be followed by responsible, law-abiding persons in the first place.
5. Conducting background checks may make a short-term contribution to violence reduction or suicide and may limit access of firearms to persons with mental illness but probably will not have a long-term effect on keeping firearms out of the hands of offender populations.
6. A substantial secondary market of firearms exists, and these guns are regularly bought, sold, and traded by legitimate gun owners and persons who are restricted from legally owning firearms.

EFFECTIVENESS OF GUN CONTROL LEGISLATION

A number of public health scholars have become involved in the study of firearms violence. The language of those in this discipline is somewhat different than that of the criminal justice literature, and their strategies are often based on **harm reduction**. Many of their recommendations for reducing firearms violence target supply-side strategies, making it more difficult to obtain firearms, reducing the number of guns in circulation, or restricting certain types of firearms. Mozafarian, Hemenway, and Ludwig (2013, p. 552) also advocated for educational campaigns, mandatory firearm-safety courses, minimum age requirements for firearms use, locking devices on firearms, and getting physicians to counsel individuals about safe gun-handling practices. These scholars have also called for changes in our societal attitudes toward responsible gun use and suggested that changes are needed in the way violence is depicted.

Persons utilizing the public health perspective often argue that more guns in circulation cause more firearms murders. However, these observations are inconsistent with the facts reported about the numbers of firearms increasing at the same time as firearms homicides are decreasing. Gary Kleck (1997), for instance, found that rural areas in the United States that typically have the highest rates of firearms ownership have comparatively low rates of firearms crime. Kleck (2015) contends that most studies finding that more guns lead to more crime are methodologically weak, and sound research does not support that relationship.

Nevertheless, many advocates of the public health model suggest that firearms laws enacted to screen potential firearms purchases are responsible for some of the decreases in firearms violence (Azrael, 2002). Others believe that the widespread availability of firearms within the United States serves as a deterrent to crime, especially offenses such as “hot burglaries,” which occur when occupied homes are burglarized. Finally, a number of scholars have examined the relationship between carrying concealed weapons and violence reduction. John Lott (2016), for example, contends that citizens legally carrying concealed firearms serve as a deterrent to street crime, and common sense suggests the presence of 16.3 million Americans with carry permits would deter

some offenses (see Lott, 2017). Donohue, Aneja and Weber (2017) challenge that finding and say that violent crime actually increases after right-to-carry laws are introduced. It is possible that the mixed findings reported in different studies of gun violence are the product of other economic and social conditions. In his analysis of the relationships between firearms and violent crime, Lang (2013) observed that “something other than marginal changes in firearm levels impacts criminal activity.”

What is troubling is that these debates about the effectiveness of gun control legislation, carrying concealed weapons, or defensive gun use often hinge upon the way that a study was conducted, the data that were examined, the variables included in the analyses, the statistical methods used, the era considered in the study, and the interpretation of the results. Scholars looking at the same data sometimes come to very different conclusions. In respect to defensive gun use by civilians, for example, scholars have produced estimates that range from tens of thousands to several million times per year, with the official National Crime Victimization Survey reporting about 108,000 cases a year (Cramer & Burnett, 2012). Given that the NCVS is the most conservative measure, it is safe to consider their estimate as the “floor”; the actual number is most likely much higher.

While there are thousands of local, state, and national firearms laws, a CDC study found that gun control legislation generally did not have a significant impact on violence rates (Hahn et al., 2003). Research carried out by the National Academy of Sciences (NAS), released the year after the CDC publication, reported that there was an association between firearms ownership rates and violence and that illegally obtained firearms are associated with crime (Wellford, Pepper & Petrie, 2004). But answers to more complex questions about the effectiveness of firearms legislation are difficult to explain because we simply do not have enough information; in some cases, we have no data at all. Furthermore, in the NAS study, Wellford and his colleagues suggested that even when we do have the data and use appropriate research methods, there may be other factors that influence gun violence that researchers have overlooked or that we simply cannot measure. Even estimating the number of guns within the nation is problematic as many people are reluctant to disclose to researchers whether they own one or more firearms. Thus, it is difficult to make sweeping conclusions about the effectiveness of gun control legislation even when unbiased results are published.

Given that there are so many firearms in circulation, and that the number increased during periods of decreasing murder rates, other factors must influence gun violence. Violence reduction policies have focused on two dimensions of firearms control: first, supply-side interventions to keep firearms from persons who are not authorized to possess them and, second, reduction of the numbers of illegally carried firearms by lowering demand through law enforcement interventions and punitive sentences. This is the focus of both legislation and police interventions to reduce firearms misuse. One type of legislation, the “stand your ground” law, which was intended on reducing violence, might actually contribute to higher levels of gun crime, as highlighted in Box 6-1.

BOX 6-1**Do “Stand Your Ground” Laws Increase Homicides?**

Although most of our discussion about guns has focused on reducing gun violence over one-half of states have some form of “stand your ground” laws, which reduce the requirement to retreat prior to using deadly force. Stand your ground laws extend the **castle doctrine**—where individuals are able to use deadly force to protect themselves from harm in their home—to public places. The castle doctrine is named for the English common law principle that a “man’s home is his castle” and people should not be prosecuted if they use force to defend themselves from intruders who physically threaten them in their home. Florida was the first state to enact such legislation in 2005 and these laws are controversial as some believe that they increase the use of deadly force and opponents of these laws call them a “license to kill” (Stockdale, 2016). By contrast, supporters of these laws believe they deter crime.

Researchers studying this issue have reported mixed results. Chamlin (2014) did not find an increase in homicides after these laws were passed, but some researchers found an increase (Cheng & Hoekstra, 2013; Humphreys, Gasparin & Wiebe, 2017; McClellan & Tekin, 2016). One limitation of these studies, however, is that they examined all homicides and they did not focus specifically on cases where defendants used a “stand your ground” defense. By contrast, a *Tampa Bay Times* study of 200 shootings found the law has “allowed drug dealers to avoid murder charges and gang members to walk free” and “in nearly a third of the cases the *Times* analyzed, defendants initiated the fight, shot an unarmed person or pursued their victim—and still went free” (Hundley, Taylor, Martin & Humburg, 2012).

Like other criminal justice legislation, “stand your ground” laws may have had some unintended consequences. While the law was intended to protect ordinary persons from being victimized, offenders who are carrying out crimes have successfully used this defense to avoid prosecution, and some individuals have shot and killed persons who were retreating from confrontations. The *Tampa Bay Times* reporters cite a Florida police chief who said, “We’re seeing a good law that’s being abused” (Hundley et al., 2012).

POLICE INTERVENTIONS TO REDUCE ILLEGAL GUN USE

If the police can reduce the numbers of persons who are not legally allowed to possess firearms or those who are carrying firearms illegally (for example, concealed carrying of firearms without a permit), there should be a reduction in violence. After all, these individuals are likely to be at higher risk of firearms crimes, and they are the target of most gun control legislation. Two early groundbreaking experiments used uniformed police patrols to reduce the number of illegally carried firearms in high-risk Kansas City (Sherman, Shaw & Rogan, 1995) and Indianapolis neighborhoods (McGarrell, Chermak & Weiss, 1999). These experiments demonstrated that violent crime could be reduced through targeted police interventions.

As we noted before, there are places of high risk of violence within the United States, and interventions that target these neighborhoods should be the most

successful in decreasing violence. Unfortunately, frequently these neighborhoods are also the places of highest disadvantage, and often they are populated with high percentages of minority-group members. As we discuss elsewhere, there is already considerable concern over police interventions in these communities, and introducing “stop and frisk” programs to reduce the number of guns would have little community support because they would be seen as placing community members under further law enforcement scrutiny. In addition to stop and frisk strategies, police interventions often focus on target groups at highest risk, such as gang members.

The meta-analyses conducted by Makarios and Pratt (2012) found that police interventions had higher rates of success than legislation. There are a number of examples of successful programs, including Boston’s Operation Ceasefire, which has had long-term success in reducing gun violence. This intervention is specifically targeted at reducing violence associated with youth and gang crime and is called **focused deterrence** or **pulling levers** (Braga, 2012). Using this focused deterrence approach to reduce gun violence Braga and Weisburd (2015, p. 56) describe a framework that involves:

- selecting a particular crime problem, such as gun violence
- forming an interagency enforcement group, typically including police, probation and parole agencies, state and federal prosecutors, and sometimes federal enforcement agencies
- conducting research, usually relying heavily on the field experience of front-line police officers to identify key offenders—and frequently groups of offenders, such as street gangs and drug crews—and the contexts of their behavior
- framing a special enforcement operation that is directed at these offenders and groups of offenders and is designed to substantially influence that context, for example by using any and all legal tools (or levers) to sanction groups, such as crack crews, whose members commit serious violence
- matching these enforcement operations with parallel efforts to direct services and the moral voices of affected communities to the same offenders and groups
- communicating directly and repeatedly with offenders and groups to let them know (a) they are under particular scrutiny, (b) which acts (such as shootings) will receive special attention, (c) when such attention has, in fact, been given to particular offenders and groups, and (d) what they can do to avoid enforcement action.

The cornerstone of this approach is cooperative enforcement strategies between prosecutors and law enforcement officers from municipal and federal agencies, and these stakeholders solicit the help of community-based groups. Ultimately, the focused deterrence approach emphasized intensive short-term, targeted interventions at individuals or gangs who were violence prone.

One program that directs enforcement at gangs and guns is **Project Safe Neighborhoods** (PSN), a federally sponsored gun enforcement program that has received a significant amount of federal funding since it was introduced in 2001. This program has used lessons learned from the Operation Ceasefire program, as well as **Project Exile**, an enforcement program targeting felons who illegally possess or carry firearms, felons with drugs and firearms, as well as domestic

violence cases where firearms are involved. Possession of firearms in such circumstances is a federal offense, and a cornerstone of the approach is that the resources of the federal government can be used to prosecute and incarcerate these offenders for lengthy prison terms.

Makarios and Pratt (2012) examined the success of police interventions on reducing gun violence and found that these approaches had a larger crime control effect than firearms legislation, although they were second to probation-oriented strategies. These probation-focused activities included increasing the supervision of youth gun probationers. In addition to enhanced supervision, however, Makarios and Pratt (2012, p. 226) noted that “Line workers and probation officers are also responsible for providing positive supports such as education, job searches, drug treatment programming, counseling, and organized recreation.” Some police interventions may be more effective as they specifically target gun violence.

There has been growing interest in smart policing in recent years. These are law enforcement interventions that are developed using the crime data from a jurisdiction that use effective, efficient, and economical approaches based on scientific evidence. With respect to reducing gun violence, nine large cities implemented strategies that shared five common approaches:

- targeting persistent gun violence hot spots
- targeting prolific offenders in persistent hot spots
- employing new technologies and advanced crime analysis
- engaging a wide range of collaborative partners
- conducting advanced problem analysis (Braga, Webster, White & Saizow, 2014, p. ii).

The outcomes of these interventions were encouraging and most sites reported reductions in violent crime by about one-fifth.

CONCLUSIONS

Even though homicide rates have decreased by more than half since 1980, many Americans remain fearful of violent crime. Yet an individual’s risk of victimization drops significantly if he or she is not involved in crime, does not associate with offenders, or does not engage in risky activities. One problem that policymakers must confront is that violence is not distributed evenly throughout the nation. Most suburban and rural counties generally have violent crime or homicide rates similar to European nations, even though gun ownership rates are relatively high in these areas. Violence is concentrated in America’s inner cities, and until fundamental changes occur in the structure of these communities, they will keep American violence and murder rates elevated. This is a perennial problem and Sanburn and Johnson (2017) report that homicides have increased throughout 2015 and 2016 in some large U.S. cities. As a result, sweeping gun control legislation will have little effect. The people who abide by the regulations are not typically the people who are at risk of involvement in firearms crimes.

It is unlikely that urban America will undergo any type of economic restructuring, so police interventions present the most effective approach to reducing

gun violence in high-risk neighborhoods. There is a growing body of evidence to suggest that police interventions based on focused deterrence will reduce crime (Braga & Weisburd, 2015; Makarios & Pratt, 2012). However, the police cannot maintain that effectiveness if forced to operate in isolation. As a result, integrated approaches to removing firearms from the street seem to be an important step in the right direction—with local, state, and federal authorities working with community organizations and stakeholders to reduce violence.

Nevertheless, despite the relative success of these different firearms intervention initiatives, perhaps long-term changes in public perceptions will be the most successful way to reduce firearms crimes over time. Sherman (2001) observed that public attitudes toward illegally carrying concealed weapons need to change, which is a cornerstone of the demand-side approach; this is also endorsed by members of the public health approach (Mozaffarian et al., 2013). Sherman advocates using sentencing policies as a starting point for changing public perceptions about the seriousness of firearms offenses. Through stricter punishments for offenders, we may be able to reduce illegally carried firearms in a manner similar to the way driving while intoxicated has been discouraged since the 1980s.

Many of our ideas about crime and violence, including our notions about the types of guns that criminals use, where they obtain these firearms, and how to prevent offenders from getting guns, come from the media. Most often, the entertainment and news media are guilty of simplifying complex subjects into television reports that last less than a few minutes. One problem with this approach is that overly simplistic notions about crime and justice distract the public and policymakers from the complex economic, cultural, and structural conditions that contribute to violent crime within the United States. Persons interested in studying gun control will find a fruitful topic to learn about criminal justice policy, the role of interest groups in influencing policy development, and the difficulty of establishing a debate based on what the research reveals about gun crimes, rather than political rhetoric. In addition, an examination of legislative and police interventions to reduce gun crimes suggests that they historically have been introduced with little underlying theoretical knowledge about crime or without examining the success or failure of similar policies, or there were problems with the implementation of new laws. As a result, many criminal justice interventions, including gun control legislation, fall far short of expectations.

KEY TERMS

assault weapons	focused deterrence	Saturday-night
<i>Bliss v. Commonwealth</i>	gray market	special (SNS)
Brady Bill	gun show loophole	straw purchase
castle doctrine	harm reduction	substitution effect
child access prevention laws	Project Exile	supply-side
demand-side interventions	Project Safe Neighborhoods	interventions
	pulling levers	

CRITICAL REVIEW QUESTIONS

1. Compare and contrast the liberal and conservative positions on gun control. How are these positions supported in the media?
2. How do stakeholders and interest groups become involved in policy debates about gun control? Should these organizations be allowed to make contributions to political campaigns?
3. What would you suggest is the most effective strategy to reduce firearms violence: federal or state legislation, or changing police activities?
4. How would 3D printers, which enable almost anybody who owns that technology to build firearms, frustrate existing gun control legislation?
5. Do “stand your ground” laws result in more gun violence? Why or why not?
6. Should we regulate certain types of firearms, such as assault weapons, solely because they “look dangerous”?
7. Can you provide an example where a criminal justice policy or practice has resulted in unanticipated results that made the problem worse?
8. There is increasing evidence that police interventions focusing on deterring high-risk offenders in high-risk neighborhoods serve as a successful crime control strategy. Can you foresee any unintended consequences of these practices?
9. What is the best way to keep firearms out of the hands of unauthorized users (e.g., juveniles, persons with mental illness, or felons)?
10. Discuss why “celebrated cases” (such as political assassinations or school shootings) often lead to increasing gun control legislation.

WRITING ASSIGNMENTS

1. Briefly describe the problem of gun violence in urban America. Should we attack the carrying of illegal firearms in these neighborhoods or instead tackle the root causes of crime, such as addictions, economic conditions, and a lack of positive role models?
2. Provide arguments why laws that allow individuals to purchase only one gun per month or imposing a ten-day waiting period might contribute to lower rates of gun violence.
3. Obtain information about gun crimes in England through their Home Office website. What are the long-term trends? Are firearms offenses increasing or decreasing in that nation?
4. Develop a two-page essay responding to the following proposition: Legislation enacted immediately after massacres or school shootings has a higher likelihood of unanticipated consequences.
5. Identify and describe one reform to the justice system that would reduce the number of gun crimes.

RECOMMENDED READINGS

James B. Jacobs (2002). *Can Gun Control Work?* New York: Oxford University Press. While this book is a bit dated, Jacobs provides a comprehensive and common-sense interpretation of gun laws and their effectiveness. He examines the disconnect between laws

“on the books” and how they are enforced and interpreted and finds that while designating legislation is comparatively easy, new laws often fail in their implementation.

John R. Lott (2016). *The War on Guns: Arming Yourself Against Gun Control Lies*. Washington, DC: Regnery Publishing. This book provides an overview of issues related to guns and gun control and specifically targets misinformation. Lott challenges a number of commonly held assumptions, such as more guns in circulation results in more crime, and the effectiveness of various gun control laws, including background checks and bans on assault weapons or large capacity magazines.

Daniel W. Webster and Jon S. Vernick, editors (2013). *Reducing Gun Violence in America: Informing Policy with Evidence and Analysis*. Baltimore, MD: Johns Hopkins University Press. The contributors to this volume provide an up-to-date overview of the problem of gun violence and make a number of recommendations for change. Most of these scholars advance a public health orientation, advocate a harm-reduction approach, and support restrictions on firearms that many conservatives would oppose.

CHAPTER 7



Sentencing

INTRODUCTION

One of the most significant changes in U.S. criminal justice systems operations during the past forty years has been the increased use of incarceration. Between 1920 and 1970, prison populations were said to be self-regulating; When admissions increased, officials used parole to release equal numbers of inmates. Based on these observations, Alfred Blumstein and Jacqueline Cohen (1973) proposed that prison populations balanced themselves and that a stability of punishment existed. They argued that stability was remarkable given the large number of social changes during these five decades. While crime rates increased and decreased, federal and state prison populations remained much the same.

In the mid-1970s, however, the use of imprisonment started to increase dramatically, despite the fact that crime rates were relatively stable at that time (Savelsberg, 1994). The growth in both prison and jail incarceration only started to plateau and then began a slow decrease in 2008 (see Figure 7.2). At the end of 2015, American prisons and jails held 670 inmates per 100,000 residents (Kaeble & Glaze, 2016). To put this in perspective, the United States has the world's highest incarceration rate (Walmsley, 2016). Figure 7.1 shows the incarceration rate in the G7 nations. For the United States, we present totals for both the total correctional population and if there were no drug offenders behind bars.

A question that emerges after reviewing Figure 7.1 is why do Americans use prisons and jails at four or five times the per capita rate as other industrialized nations? With the exception of homicide, property and minor crime rates in most European nations are about the same as those in the United States (Lynch & Pridemore, 2011, p. 6); in some countries, crime rates are actually higher than those in the United States (see Aebi et al., 2017). The simple answer to the question we posed is that we sentence more people to prison, and we hold them longer. However, the reasons for the increased use of punishment are complex. First, we undertook a war on drugs, and then we instituted a series of sentencing schemes that made it easier to imprison offenders for longer time periods. Furthermore, we lowered the

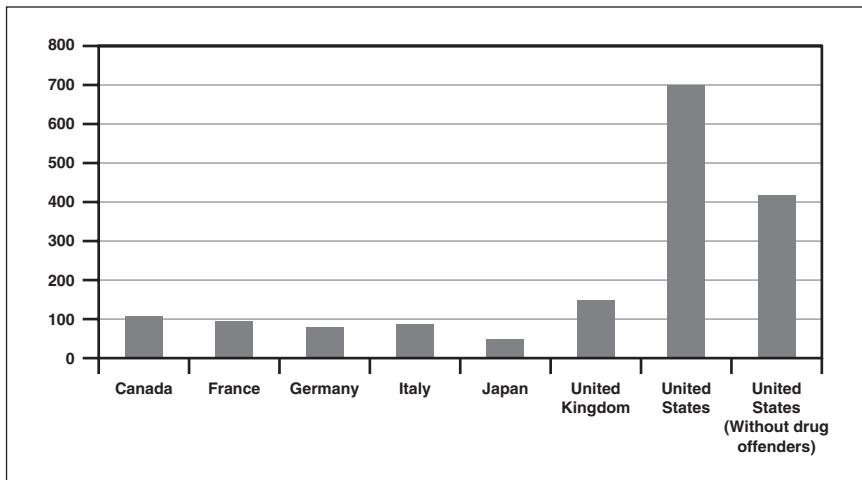


Figure 7.1 Imprisonment Rates in the G7 Nations per 100,000 Residents (2015)

SOURCE: Walmsley (2016)

threshold for prison admissions, and in some states we admit offenders to prisons for offenses that would not be considered very serious in other developed nations. In this chapter we examine the factors that led to mass imprisonment.

MASS IMPRISONMENT

Earlier we mentioned that imprisonment rates were fairly stable until the mid-1970s when they started rising and this increase persisted when crime rates were decreasing. Figure 7.2 shows the imprisonment rate continued to grow until 2008 as the rates of reported violent crime (e.g., homicide, robbery, rape, and aggravated assault) started to decrease in the early 1990s. From a policy perspective, we might question whether it is a good use of scarce resources to continue to increase the use of imprisonment for fifteen years after violent crime started to decrease. If prison does reduce crime by incapacitating potential offenders, its use is good public policy, but if it does not reduce crime, or it contributes to increased recidivism, then it is a poor investment.

In Chapters 1 and 2, we discussed how the federal government provided financial support for states to conduct a war on drugs. This war has focused primarily on suppression and enforcement, and comparatively little has been invested in treatment. States are now spending more on prison alternatives for drug offenders, a topic we address more fully in Chapters 11 and 12. So, how much of an impact has the drug war had on overall imprisonment rates? While Blumstein and Beck (1999) said that the incarceration of these offenders had a powerful effect on imprisonment, Pfaff (2017) encourages us to take a closer look at the actual numbers. On December 31, 2014, 15.7 percent of all state prison inmates were held on drug-related offenses and in the federal system 50.1 percent

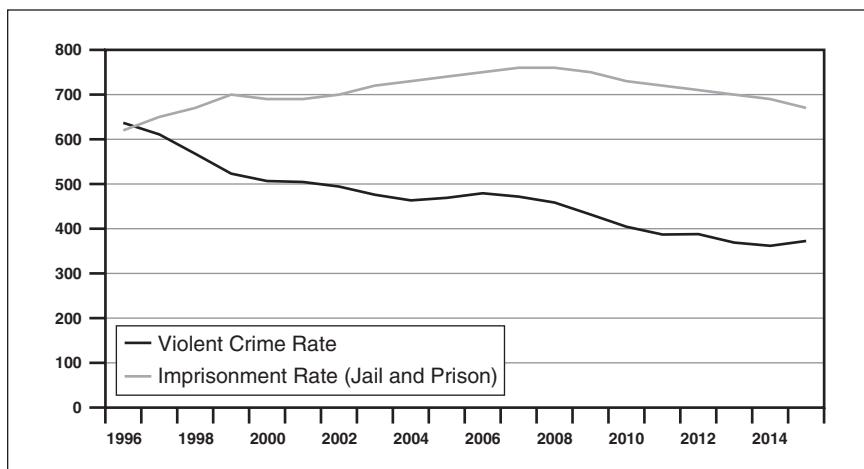


Figure 7.2 Imprisonment and Violent Crime Rates, 1996 to 2016

SOURCE: Carson & Anderson (2016); Federal Bureau of Investigation (2015, Table 1)

of all prisoners were drug offenders (Carson & Anderson, 2016). If we subtracted all of these drug offenders from the total number of jail and prison inmates, there would still be 1.33 million inmates sentenced or held on violent, public order, and property crimes (the estimate of jail inmates is based on Wagner and Rabuy's 2017 research). Even after subtracting all of the drug offenders behind bars, we would still have an imprisonment rate of 417 per 100,000 residents, or about three times England's incarceration rate (see Figure 7.1). As a result, the war on drugs—which has not had much of an impact on drug use in the United States—has had an effect on imprisonment, but this is only part of the story.

One question that follows from this analysis is what makes Americans so punitive? Prison used to be reserved for the most serious offenders, criminals who had repeatedly failed to rehabilitate themselves. In the 1950s and 1960s, someone who had been to prison was considered to be a very bad person. This has changed. Bonczar (2003, p. 1) reported that “if incarceration rates go unchanged, 6.6 percent of U.S. residents born in 2001 will go to prison at some time during their lifetime.” Since Bonczar made that prediction, imprisonment rates have decreased slightly, but this still means that at some point, prison will become a more or less normal event in the lives of some groups. Moreover, changes in incarceration have not affected all social or racial groups in the same way.

African Americans and Latinos, for example, are at much higher risk of imprisonment than whites. Brame, Bushway, Paternoster, and Turner (2014) estimated that almost half (49 percent) of African American males will be arrested by their twenty-third birthday, while 38 percent of white males will have been arrested by that age. Moreover, the imprisonment of women, once very rare, also has increased significantly over the past several decades. While the number of males imprisoned was basically unchanged between 2005 and 2015 (.05 percent growth), the number of women increased by 3.6 percent (Carson & Anderson, 2016).

GETTING TOUGH

If the public believed that getting tough on crime was undesirable, we probably would not have been incarcerating over 2.1 million persons in jails and prisons on December 31, 2015 (Kaeble & Glaze, 2016). In what follows, we examine the mechanisms that legislators and policymakers used to show they were tough on crime. Like many of the policy shifts described in this chapter, the increased use of imprisonment can be attributed to political factors irrespective of crime levels (Perkinson, 2010; Pfaff, 2017; Tonry, 2011). One important question that we ask throughout this book is whether punishment by itself is the best response to crime. If we believe that drug abusers should be placed in prison, for instance, why do so few of them receive any sort of meaningful drug treatment while they are incarcerated?

About 11 percent of the general U.S. population has a drug or alcohol problem, but we know that offenders are generally at higher risk of addiction. In a Bureau of Justice Statistics study, Bronson, Stroop, Zimmer and Berzofsky (2017, p. 1) reported that “more than half (58 percent) of state prisoners and two-thirds (63 percent) of sentenced jail inmates met the criteria for drug dependence or abuse. Yet, only a small portion of them ever receive drug treatment (Belenko & Houser, 2012). Bronson and colleagues (2017, p. 13) found that only 28.5 percent of state prisoners and 22.2 percent of jail inmates received any substance abuse treatment after admission.

Program participation, however, does not equal successful program completion, and we do not have any national-level data on how many prisoners withdraw or fail to complete their addictions treatment or only put forth a half-hearted attempt. At some point, we lost confidence in rehabilitating offenders. Most **penologists** (researchers who study the use of punishment and corrections) believe that two 1970s reports that questioned the effectiveness of rehabilitation, and pessimistically suggested that very little worked, were the nails in the coffin of prison rehabilitation programs (see Lipton, Martinson & Wilks, 1975; Martinson, 1974). Legislators seized the notion that correctional rehabilitation was not effective and argued we should return to punishment philosophies that emphasized deterrence, retribution, and incapacitation.

Such a philosophical shift was supported by politicians who based their election campaigns on being tough on crime. Prior to 1968, for instance, crime was seen primarily as a local problem. Politicians and policymakers struck gold when they discovered that criminal bashing made good political sense. After all, what politician wants to be labeled soft on crime? Like many other ideas about crime and justice, our notions about offenders were shaped by television programs and movies that portrayed crime and criminals as out of control. Gallup polls conducted between 1950 and 2000 found that the number of people who reported that crime or drugs were the biggest problems facing America increased, especially after the 1970s. Yet, in a series of seven Gallup polls carried out in 2017, only 1 to 3 percent of respondents said that crime and violence were the most important problems facing the nation (Gallup, 2017c). This shows that public perceptions about policy issues do change over time.

Public perceptions about policy issues, however, can be inaccurate and Figure 7.3 shows the results of Gallup polls conducted between 2001 and 2016 about

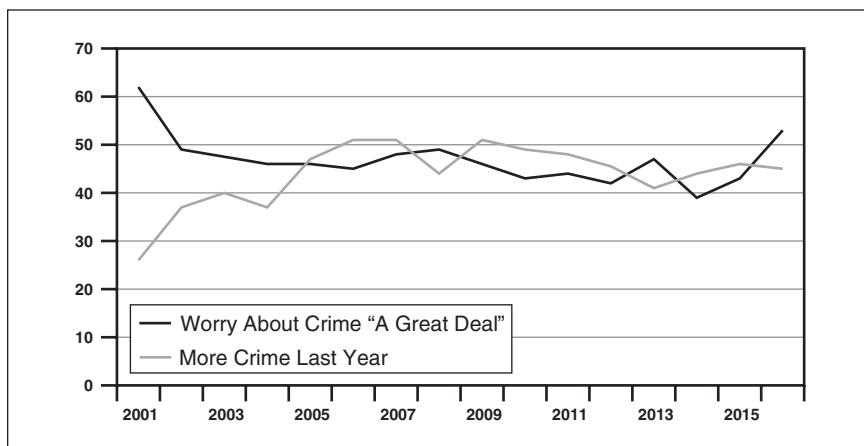


Figure 7.3 Perceptions of Crime and Worry About Crime, 2001–2016

SOURCE: Gallup (2017c)

the issue of crime. The public consistently reports that there “is more crime in the U.S. than there was a year ago” even when crime is decreasing. Figure 7.3 shows that 45 percent of respondents believed there was more crime in 2016 than there was in 2015, which was fairly consistent with results from the previous decade. About the same percentage of the public worried about crime a great deal. The problem with those perceptions is that violent crime rates started declining in 1993 and have dropped since that time, although there was a slight increase in 2015 and 2016 driven by violence in big cities. As a result, there is a disconnection between what the public believes and what actually occurs in respect to crime for the past two decades. These mistaken perceptions might account for support for tough-on-crime policies.

Clearly, some criminals need to be incapacitated, but many policymakers, activist groups, and penologists question whether we need to incarcerate over 2.1 million persons. Most would agree that **career criminals**, offenders who engage in crimes that place victims at high risk (such as armed robbery) and those who commit many crimes in a given year, should be in prison. These offenders have a significant negative impact upon a community, both economically and in terms of citizen fear of crime. It is much less expensive to incarcerate offenders who do several residential burglaries a week rather than let them continue their crimes in the community. Locking up offenders who are committing a large number of offenses or serious offenses is the principle behind **selective incapacitation**. Some have suggested that today’s use of incarceration, by contrast, can best be described as mass imprisonment, or the wholesale incapacitation of offender populations (Eason, 2017).

Unfortunately, the notion of selective incapacitation is based on the likelihood of an offender re-offending, and we have not been able to reliably predict who will continue to commit crimes. Sentencing an offender who would not commit any future crimes to a lengthy prison term is wasteful and expensive. But who are high-risk offenders, how much punishment do they require, and how much of a burden does this place on taxpayers? The example in Box 7-1 outlines

BOX 7-1**People v. J.I.A.: Forty-Two Years Behind Bars Before Parole Eligibility**

J.I.A. was fourteen years of age when he committed a number of violent sexual and robbery offenses, and he was sentenced, at eighteen years of age, to fifty years to life plus two consecutive life terms, making him eligible for parole at age seventy. A California appellate court reviewed his sentence and reduced the sentence to make him eligible for parole at age fifty-six. If nothing changes he will serve thirty-eight years in prison before he can apply for parole.

We regularly mete out lengthy sentences such as this, but we do not really know whether these offenders are amenable to rehabilitation, the public does not know the true direct and indirect costs of housing these offenders, and it is even more difficult to accurately assess imprisonment's benefits. Obviously, we cannot tolerate anybody who sexually assaults and robs innocent persons, but would this offender commit further offenses if he received appropriate treatment while imprisoned and proper support once released to the community? In other words, what are the potential financial costs and the benefits we receive when we impose lengthy prison terms on offenders?

In 2017, it cost \$70,812 to hold an adult offender in a California prison (Legislative Analyst's Office, 2017a) and even if we did not account for inflation, it would cost the state taxpayers nearly \$3 million to hold J.I.A. in prison until his parole eligibility date (and there are no guarantees that he will be released). Translated into different terms, each California taxpayer paid over \$4,100 in state taxes in 2012 (Tax Foundation 2016), and it takes over 17 of them to cover J.I.A.'s imprisonment. Moreover, there are also indirect costs of imprisonment, which makes it more expensive, and they are described in Chapter 12. Are we getting a good return on our investment? While it is comparatively easy to estimate the costs, it is much harder to weigh the benefits.

the costs of imprisoning a teenaged offender who was convicted of committing a series of violent crimes.

Do our justice systems have alternatives to relying on mass imprisonment? Recidivism rates were high as offenders who were on parole committed new offenses. In a Bureau of Justice Statistics study of inmates released from prison in thirty states in 2005, Durose, Cooper, and Snider (2014, p. 1) found that within three years of their release 67.8 percent of them were rearrested for a new offense and within five years 76.6 percent had been rearrested. Although this says nothing about how many were reincarcerated, it does show something of the difficulty that many individuals released from prison have of reintegrating back into free society.

A national-level study conducted by the Pew Charitable Trusts (2011, p. 11) that followed over a half-million parolees released from prison in 2004 found that 43.3 percent of them were returned to custody for technical violations or new offenses within three years (although that rate decreased to 40 percent if California was excluded from their analyses). Obviously, these numbers demonstrate that prisons were failing to have the desired effect of reducing future crime. Given these statistics, policymakers began implementing a number of different strategies to sanction offenders.

INDETERMINATE TO DETERMINATE SENTENCING

For most of the twentieth century, both state and federal governments relied on **indeterminate sentencing** systems. These systems were built on nineteenth-century notions pioneered by reformers such as Zebulon Brockway, who strongly believed in the ability of penitentiaries and reformatories to bring about rehabilitation. As a result of their efforts, governments adopted sentencing arrangements whereby the legislature established the minimum and the maximum range for an offense and the judge imposed the sentence, but the actual time served would be determined by a parole board (upon successful rehabilitation).

Indeterminate sentencing was established on the notion that offenders could work toward rehabilitation and that their prison stay would be reduced if they demonstrated positive changes. If inmates completed educational or life-skills programs, were involved in prison work, and conducted themselves in a positive way within a correctional institution, they could be released earlier than if they made less rehabilitative progress. Thus, inmates who were motivated to work toward rehabilitative goals were rewarded with early releases on parole. Inmates who had no rehabilitative goals or were disciplinary problems, by contrast, would stay in prison longer.

Indeterminate sentencing was based on meting out a variable term of imprisonment. An individual convicted of burglary, for instance, might be sentenced for a term of one to ten years. In some places, the inmate was eligible for parole at some percentage of the lower range. In the case of a burglar who was sentenced in a number of states in the 1970s, for instance, he or she would have been eligible for parole after serving two-thirds to three-quarters of the one year. While few offenders were released from prison at the lower limit, indeterminate sentences gave inmates a positive goal to work toward.

Rehabilitative philosophies are strongly tied to the notion of **individualized justice**. Each offender was seen to have strengths and weaknesses, and these issues were to be considered by a judge prior to sentencing. For the judge to understand the offender's circumstances, a probation officer often would conduct a **presentence investigation**. The probation officer's report detailed the individual's involvement in the offense, his or her social history, previous contacts with the justice system, and amenability for rehabilitation. Often the potential for rehabilitation was based on the individual's education, prior work history, involvement in substance abuse, as well as their family and community supports. Those with more education and job experiences might be perceived by middle-class probation officers and judges as being more amenable to treatment. Thus, it is likely that sentencing based on these **extralegal factors** (factors that have no bearing on the offense itself, such as race, class, or gender) discriminated against offenders with little prior work experience, poor educational histories, or were otherwise different from the probation officers.

Pre-sentence reports also outlined the aggravating and mitigating factors about the offense and offender. **Aggravating factors** include whether the offender was paid to commit the crime, if he or she took a leadership role in the offense, if the offense was particularly cruel, or if the victim was vulnerable (such as an infant or senior citizen). A greater number of aggravating factors enhanced the sentence severity.

While most of us would probably agree that aggravating factors should be weighed carefully at sentencing, there is less agreement about whether mitigating factors should also be considered (see Roberts, 2011). **Mitigating factors** include whether the crime was the person's first offense, if the offender was under duress at the time of the crime, if the individual assisted the police, or if their involvement in the offense was peripheral. Again, most of us would support sentence severity reductions for a first-time offender, one who is immature, or one who did not play a central role in the crime. Nevertheless, should a person's good character or reputation, his or her rehabilitation potential, an honorable discharge from the armed services, or the ability to make restitution be considered by a judge as factors that reduce the sentence severity? Moreover, should a judge consider factors such as attitude or remorse that may be difficult to accurately evaluate (Roberts, 2011)? One important question that we have to ask is: Who benefits most from weighing these mitigating factors prior to sentencing?

In the 1970s, many states phased out indeterminate sentencing in favor of sentences that were fixed, or **determinate sentencing**. In some jurisdictions, parole was abandoned altogether. For instance, federal parole was abolished for offenders sentenced after November 1, 1987. If we use the burglary offender mentioned previously, a determinate sentence might be fixed at four years. Most jurisdictions have the ability to grant **good time credits** for inmates who obey the institutional rules, thus providing an incentive for good behavior. In the U.S. Bureau of Prisons, for example, an inmate can earn up to fifty-four days per year (a 15 percent discount) for good conduct.

To better understand why determinate sentences may actually reduce inmates' motivation to rehabilitate themselves, we use the example of two persons sentenced to the same term of incarceration in a federal prison on the same day, for the same offense. One prisoner completes a university degree program, is actively engaged in the prison's work program, and participates in Alcoholics Anonymous. The other inmate, by contrast, spends all his free time watching television and is only marginally engaged in some institutional chores a few hours a week. Assuming that both earn the fifty-four days of good time credit, they will be released on the same day. Some might suggest that the inmate who is more actively engaged in rehabilitation should be discharged sooner. This is one of the difficulties with many of the mandatory-minimum sentences handed down today: There is little incentive for prisoners to improve their knowledge, skills, or abilities while incarcerated.

A second challenge that determinate sentences present is that once inmates are released after serving their entire sentence (what is often called "maxed out"), the justice system has no control over their conduct within the community. If prisoners are released early, by contrast, the parole system has more influence over their behavior, including their place of residence, curfews, and with whom they associate. Parolees must also submit to searches initiated by the police or a parole officer, as well as drug or alcohol testing when requested. If parolees violate their conditions of release, they can be returned to prison on a **technical violation**, such as a failure to abide by their parole conditions (for example, a curfew violation or possessing a firearm). Thus, the prison system still can exert some

BOX 7-2**Should Prisoners Receive a State-Funded College Education?**

Most students reading this chapter fund their college educations with part- or full-time jobs, and many will have sizeable student loans to repay after they graduate. Until Congress passed the 1993 Violent Crime Control and Law Enforcement Act and the Higher Education Reauthorization Act of 1994, federal and state prisoners had access to Pell Grants that helped pay for their college education while incarcerated. These acts greatly decreased prisoners' ability to access higher education. One question we can ask is: does limiting a prisoner's ability to attend college classes uphold or reduce public safety?

A growing body of research shows that prison inmates who participate in education have lower recidivism rates. Lois Davis and colleagues (2013, p. xvi) examined fifty-eight studies of correctional education, and found that "inmates who participated in correctional education programs had 43 percent lower odds of recidivating than inmates who did not." College educated prisoners also have lower recidivism rates (Kim & Clark, 2013; Lockwood et al., 2012). As a result of research showing these benefits the Second Chance Act, which was signed into law in 2008, provides federal support for state and local governments in their efforts to reduce recidivism.

In recent years there has been increased interest in giving prisoners the opportunity to enroll in college classes, and this has been facilitated by university-prison partnerships, such as the John Jay College of Criminal Justice Prison to College Pipeline program that provides access to college for prisoners, or the Bard Prison Initiative, that was started in 1999 and has awarded hundreds of degrees to inmates and ex-prisoners. Spencer (2016) notes, however, that earning a degree behind bars is not an easy proposition, and after five years the John Jay program had only graduated one ex-prisoner.

Earlier we asked whether taxpayers should pay for prisoners to attend college. Like many of the other issues that we raise, there are no easy answers to these questions. But if these prisoners earn a degree, obtain a job, and pay taxes for the rest of their working lives, is this not ultimately a good investment for society?

control over offenders while they are reintegrating into the community, a difficult and stressful time for many ex-prisoners. Box 7-2 addresses the correctional treatment issue of providing college educations for prison inmates.

PROSECUTORS AND PLEA BARGAINING

Whatever sentencing scheme is at work, there are two factors that must be considered when we anticipate the sentencing outcomes: the role of the prosecuting attorney and the impact of plea bargaining. Court observers for decades have identified the prosecuting attorney as perhaps the most powerful individual in the criminal justice system, and prosecutors have a number of strategies at their disposal to be tough on crime (Cole, 2004; Pfaff, 2017).

First, the prosecutor has the ultimate decision over whether to prosecute a case or not. Often case files are returned to investigating officers with a notation

that there is not sufficient evidence to go forward with the case, until new, more compelling evidence is found that effectively ends the case. In some cases the prosecutor might have enough evidence to pursue a case, but might choose not to go forward in court as prosecution might not be in the interests of justice: there are twenty-one states, for instance, that have laws prohibiting adultery (Rhode, 2016).

Second, the prosecutor can decide to move the case along but determines the nature of the charges. In other words, the prosecutor can decide if the charge is a felony or a misdemeanor, whether there will be multiple counts for the same type of crime (that is burglaries or robberies, for example), and whether there will be multiple charges for different crimes arising out of the same set of circumstances. The evidence suggests prosecutors are getting tougher: Pfaff (2017) examined U.S. sentencing trends and found that the proportion of arrests ending in felony charges increased from one of three in 1994, to two of three arrests by 2010. These considerations have strategic importance for the prosecutor's office, since they all have implications for the plea bargaining process, which is the third device at the prosecutor's disposal. In most instances the defense attorney approaches to prosecutor to determine whether there is willingness to strike a deal in exchange for a guilty plea. The deal may involve charges, counts, or the sentence, but it ultimately concerns some form of leniency. If the prosecutor has structured the charges in the most favorable way for the state, the final offer to the defendant may not be substantially different than the outcome from a trial.

The reason that outcomes often are similar is what is generally referred to as the "going rate" (see Walker, 2015). Judges, prosecutors, and defense attorneys have a shared, collective sense about what a case is worth, based on similar cases that they have seen before. This means that it is relatively easy to reach a consensus about what constitutes a "reasonable" deal for the defendant. Thus, partially as a result of caseload pressures but mostly as a result of the going rate, a very high percentage of criminal cases (98 percent for felony defendants in the largest seventy-five counties) in most jurisdictions are resolved through guilty pleas, with or without explicit plea bargaining (Reaves, 2013, p. 24). However, prosecutors are free to file whatever charges they wish, and in some cases they "overcharge" defendants (charging them with the offense that has the greatest penalty) to pressure them into accepting plea bargains (Covey, 2007/2008). As a result, some innocent defendants will plead guilty to a crime they did not commit to avoid a trial that might result in financial ruin and an onerous sentence if found guilty (see Rakoff, 2014).

One of the factors that makes the American criminal justice system distinct from other nations is that prosecutors are elected officials in forty-six states. Pfaff (2017) questions whether giving politicians so much unchecked discretionary power is desirable, especially since they rely upon voters to keep their jobs. Given the political role of prosecutors, district attorneys who wish to remain on the job must convince the public they are tough on crime. Moreover, they must also establish close relationships with the police, whom they require for endorsements; and these relationships may increase misconduct of both parties (Harris, 2012).

For the most part the tough-on-crime agenda has been successful for prosecutors, but there has been some opposition to this position. Sklansky (2017, p. 674) reports how a number of high-profile prosecutors in Baltimore, Chicago,

and New York, as well as smaller counties in Louisiana, Mississippi, and Texas, have lost their positions since 2013 to reformist prosecutors who promised “more thoughtful and less punitive criminal justice policies, or more meaningful oversight of the police.” Sklansky questions whether we may be entering new era that rejects tough-on-crime policies, but he does not predict any significant changes in the foreseeable future. Lopez (2017, paragraph 4) describes how a liberal lawyer in Philadelphia “who had sued law enforcement and government agencies more than seventy-five times” was elected as District Attorney in November, 2017 with three-quarters of the vote, despite “opposition from the criminal justice establishment” (paragraph 7). Many reformers believe that the key to changing harsh prosecution policies is removing tough-on-crime prosecutors from office.

Elected prosecutors (and judges) are distinctive to the United States, and Tonry (2012, p. iii) noted that in “every developed country except the United States prosecutors are nonpartisan, apolitical civil servants” who are “evenhanded, dispassionate and objective.” One question that emerges from that observation is whether appointing prosecutors on the basis of ensuring just and fair outcomes and being smart on crime results in lower rates of punishment and fewer miscarriages of justice.

SENTENCING GUIDELINES

During the 1980s, many politicians believed that sentencing was overly influenced by judges who were perceived to be soft on crime. A second problem was the recognition of racial disparities (an issue we address at length in Chapter 8). To restrict judges from considering mitigating factors and to promote race- and gender-neutral sentences, various types of sentencing guidelines were enacted.

In 1980, Minnesota developed guidelines that prescribed sentences for judges (Barkow, 2011). Since Minnesota introduced the first sentencing commission in 1980, at least twenty-one other states and the District of Columbia have established sentencing commissions (or advisory commissions), although several of these state commissions are now defunct. Most of these commissions have established sentencing guidelines: Some had voluntary guidelines and the rest were mandatory (see Kauder & Ostrom, 2008). These sentencing guidelines outline a range of possible sentences for offenders based on their prior criminal record and the seriousness of the current offense. Using these schemes, serious current offenses and a greater number of prior convictions result in longer sentences.

Following the example of the states to adopt sentencing guidelines, in 1984 the U.S. Congress passed the Sentencing Reform Act. The federal sentencing guidelines, which took effect on November 1, 1987, were very much like those in the handful of states that had implemented **guided sentences**. However, the federal sentencing guidelines differed in one critical way. In most states, the determinate or presumptive sentences provided for under sentencing guidelines all but eliminated parole and replaced it with good time credits. Good time credits allowed some reduction in the sentence based on the inmate’s good behavior and participation in programming activities. There is some variation nationwide in the amount of good time credits that can be earned, and the federal Bureau of Prisons provides for a 15 percent discount. In his analyses of good time credits in twenty-nine states,

O’Hear (2012, p. 200) found that the norm “seems to be in the range of ten to twenty days per month, or a reduction in sentence length of twenty-five to forty percent.” And while prison officials can reduce these good time credits for misconduct, Steiner and Cain (2017) found that only 6 percent of rule violations resulted in the loss of these credits, and these sanctions were imposed on less than one in five inmates.

Sentencing guidelines provide a number of possible sanctions, but the range tends to be narrowly defined. Judges do have some discretion to depart from these guidelines, but they are often required to justify those departures, at least prior to the *United States v. Booker* (2005) and *United States v. Fanfan* (2005) decisions. Sentencing guidelines effectively restrict a judge’s ability to base decisions on an individual’s strengths or weaknesses—most often mitigating factors. State judges, many of whom are elected, who hand down sentences lower than the guidelines, too frequently risk the negative attention of voters who are unlikely to distinguish between being smart and being soft on crime.

The net effect of sentencing guidelines is that they limit judges’ discretion, and they were called into question by a series of Supreme Court cases, including *Blakely v. Washington* (2004) and the *Booker* and *Fanfan* (2005) decisions. These cases challenged the factors that judges can consider when imposing sentences and whether federal judges have to adhere to sentencing guidelines. In the *Blakely* case, the Court found that a sentencing judge cannot consider facts (such as aggravating factors) that were not confessed to by the defendant or decided by a jury. In the *Booker* and *Fanfan* cases, the Court found that federal sentencing guidelines are advisory rather than strictly defined criminal sanctions (U.S. Sentencing Commission, 2011b).

These three decisions return discretion to sentencing judges, something that had been advocated by many scholars and jurists. It was thought that these decisions would result in less disparity, yet research conducted by Ulmer, Light, and Kramer (2011, p. 1073) found that “race/ethnic/gender disparity in sentence length decisions is generally comparable with pre-2003 levels” and that “African American males’ odds of imprisonment have increased significantly.” Thus, while sentencing guidelines incorporating judicial discretion were intended to decrease the disparity based on an offender’s demographic characteristics (e.g., a person’s gender, race or ethnicity), they actually had the opposite effect.

MANDATORY MINIMUM SENTENCES

There is some debate about whether mandatory minimum sentences, truth-in-sentencing guidelines, and three-strikes legislation actually created overcrowded prisons, as most of these initiatives were introduced a decade or two after the largest increase in imprisonment use in the mid-1970s (Sorensen & Stemen, 2002). Still, these sentencing systems are currently used, and some are very controversial. In the following sections, we review these sentencing practices.

Mandatory minimum sentences are among the most contentious of sentencing schemes because they impose a fixed penalty on an offender, and judges cannot consider mitigating factors. While mandatory minimum sentences are most commonly associated with drug offenses today, these sentencing practices started as responses to local crime problems. An early example of mandatory minimum

sentences was the 1975 Massachusetts Bartley-Fox firearms law that called for a prison sentence of one year for persons illegally carrying a concealed firearm. Since that time, the use of mandatory minimum sentences has grown substantially. With respect to the federal government, for example, there are several hundred crimes that have mandatory sanctions, and they include offenses related to child pornography, firearms, and drugs. A report by the U.S. Sentencing Commission (2017) reveals that over one-fifth of federal offenders sentenced in 2016 were convicted of crimes with mandatory minimum sentences and their average sentence was over nine years. Altogether, 55.7 percent of all federal prisoners had been convicted of offenses that had a mandatory minimum punishment and over two-thirds of these prisoners were drug offenders (U.S. Sentencing Commission, 2017).

Perhaps the most controversial aspect of these laws pertains to the penalties for drug possession, sale, or manufacture (Families Against Mandatory Minimums, 2013). For instance, on December 31, 2014, 15.7 percent of all state offenders and over half of all federal prisoners (50.1 percent) were incarcerated on drug-related offenses (Carson & Anderson, 2016). The penalties that are imposed on these offenders can be very severe. Motivans (2017, p. 22) reported that in 2013–2014 the average federal prison sentence for all felony drug offenses was seventy-seven months, compared with the average murder sentence of 153 months for federal offenders. By contrast, the average state sentence for drug crimes was forty months versus 373 months for murder in the largest urban counties in 2009 (Reaves, 2013, p. 30).

Are lengthy sentences for drug offenses an inappropriate punishment? The relationship between substance abuse and illegal behavior has long been established. For instance, self-report studies reveal that in 2002, 68 percent of jail inmates reported symptoms consistent with alcohol or drug dependency (Karberg & James, 2005). Those results are similar to the findings reported by Bronson et al. (2017, p. 1), who found that 58 percent of state prison and 63 percent of jail inmates met the criteria for substance dependency or abuse.

Karberg and James (2005) also found that over half of the convicted jail inmates were under the influence of drugs or alcohol at the time of their offense, and 16 percent committed crimes to obtain drugs. Perhaps the most violent offenses are associated with the distribution of illicit drugs. Street-level dealers, for instance, report being robbed, and these acts often result in violent retaliation because these dealers have no legal recourse (Jacobs, 2000; see also Berg & Loeber, 2015). Property crimes, such as residential burglary, are also committed to support an individual's drug addictions. Drug use also results in countless other tragedies, from child abuse and neglect to car crashes. Addiction costs, in losses due to crime, health problems, and lost productivity, are significant, and the National Institute on Drug Abuse (2017) reports the total costs to society are \$740 billion each year.

Some types of drugs—such as crack cocaine—were thought to be associated with higher rates of crime and violence (Bennett, Holloway & Farrington, 2008). To deter crack users and sellers, the federal government imposed a sentence differential for regular powder cocaine to crack cocaine of 100:1. This means that a person apprehended with 1 gram of crack cocaine would receive a sentence equal to having 100 grams of powder cocaine. As crack cocaine was predominately a drug of choice for African Americans, the penalties they received were unusually harsh.

One problem with this sentencing differential is that crack cocaine and powder cocaine are chemically indistinguishable; they are essentially the same drug, but different forms are used by African Americans and whites (Berndt, 2003).

The United States Sentencing Commission (2002) determined that crack might neither have contributed to violence in the levels that were initially feared nor resulted in long-term handicaps for children born to crack users. Moreover, they acknowledged that the sentencing differential affected minority drug users more than non-minority users who used powder cocaine. As a result, in both 1995 and 2002, they recommended the sentencing differential be reduced. While federal legislators can enact tough-on-crime bills quickly, it often takes them longer to remedy the harm that some laws impose: It took fifteen years from the first recommendation before there was action on reducing the disparity between the sentences for crack and powder cocaine. In 2010 Congress passed and the president signed the Fair Sentencing Act. One provision of this act was that the sentencing disparity was reduced from 100:1 to 18:1. In 2012 the Supreme Court heard the case of *Dorsey v. United States*, in which it was asked to decide whether individuals convicted under the old law, but not yet sentenced, could also receive more lenient sentences. By a 5–4 vote the Court said that the new law should be used in sentencing those convicted for crack cocaine offenses.

One of the problems with mandatory minimum sentences is that they are not imposed uniformly, and prosecutorial discretion can lead to differential outcomes for offenders whose cases are similar (U.S. Sentencing Commission, 2011b). In a study of mandatory minimum sentences in Oregon, Merritt, Fain and Turner (2006, p. 10) found that prosecutors circumvented this legislation; they observed that “new laws, although mandatory, could not ensure either certainty or severity in sentencing.” This brings us back to the problem of getting criminal justice officials to implement policies in the way that they were intended. Historically, it has been difficult to get officials within the criminal justice system to change established practices.

A shortcoming of mandatory minimum sentencing is that different offenders who commit the same offense will sometimes be treated very differently, as one receives the mandatory minimum sentence while the other receives a lesser sanction because the prosecutors filed lesser charges. Thus, Barker (2006, p. 39) noted how Oregon prosecutors’ decisions about who would be charged under the mandatory minimum guidelines were inconsistent: “What is troubling here is the major strain on uniformity, fairness, proportionality, and equal protection—basic principles of modern justice.” As Michael Tonry (2006, p. 46) observed, “[M]andatory minimums always produce widespread injustices because they always produce circumvention and seldom significantly augment community safety and welfare.”

Research has demonstrated that mandatory minimum sentences have often been implemented in an inconsistent manner (Cano & Spohn, 2012; U.S. Sentencing Commission, 2011b), and this can produce unanticipated and even unjust results (see Tonry, 2006). In recognition of the problems associated with mandatory minimum sentences, in August 2013 Attorney General Eric Holder directed federal prosecutors to avoid pursuing these sentences for nonviolent offenders, particularly low-level drug offenders (Levine & Ingram, 2013). With respect to state laws, Families Against Mandatory Minimums (2017) reported

that twenty-eight states had moderated their mandatory minimum sanctions between 2002 and 2017, although most of these reforms occurred after 2010. It will take years, however, before we can see whether there has been any meaningful change in the actual imprisonment rates for these offenders.

One of the challenges that we have outlined throughout this book is that new policies, justice system reforms, and other interventions often “look good on paper,” but they can be very difficult to implement in a fair and just manner. Three-strikes legislation, for example, was intended to incarcerate the worst of offenders, but in some states, many people are sentenced to lengthy prison terms based on nonviolent offenses.

THREE-STRIKES LEGISLATION

Many people believed that three-strikes legislation was an innovative practice when these laws were enacted in the 1990s. However, most jurisdictions already had some form of sentencing program for habitual offenders, and the first of them were enacted over a century ago. We always have recognized the need to sanction the serious repeat offender, but Washington State was the first to label its sentencing program as “three strikes” when it was introduced in 1993. The intent of three-strikes legislation is to provide a long-term sentence option for repeat offenders, typically those who had been convicted of three serious felonies. Perhaps the only difference between three strikes and previous habitual offender laws was its catchy title.

Other jurisdictions were quick to enact similar legislation, and Nicholson-Crotty (2009, p. 200) noted that “Washington adopted the first of these policies in 1993, but prior to the elections in the next year twenty-four additional states and the federal government had also adopted [them].” Although some states rarely use this sanction, in California it had been used extensively and on September 30, 2016, there were 6,931 inmates with three strikes in California prisons (California Department of Corrections and Rehabilitation, 2016). Again, the controversy surrounding such legislation comes not from its existence, but its application. Critics of these policies are concerned that this sanction is not applied evenly throughout the state as a relatively small number of counties impose the sanction at a higher rate (Males, 2011). Moreover, while these laws were enacted to control the worst offenders, a review of the offenses that resulted in a third strike shows that thirty-nine percent were nonviolent offenders including those convicted of drug possession and drunk driving (California Department of Corrections and Rehabilitation, 2016). In California the prosecutor has the discretion to pursue cases as third strikes and some offenses, known as **wobblers**, can be filed as either misdemeanors or felonies. In the 2003 case of *Ewing v. California*, the U.S. Supreme Court upheld prosecutors’ ability to consider these crimes as an offender’s third strike. In the *Ewing* case, a repeat offender received a sentence of twenty-five-years-to-life for the theft of three golf clubs, worth \$399 apiece. This offense could have been prosecuted as a misdemeanor, but the prosecutor filed the charge as a felony, which led to the lengthy sentence. As in the 1980 Texas case

of *Rummel v. Estelle*, the Supreme Court did not consider Gary Ewing's lengthy sentence to be cruel and unusual.²⁰

Other problems have been identified with the application of repeat-offender sentences. For instance, should an offense committed as a juvenile be counted as a strike, even though juveniles do not always have the right to a jury trial? Further, should a significant lapse of time between offenses restrict the prosecutor from pursuing a third strike? Last, should judges have the ability to ignore an offender's prior strikes? One additional concern about imposing a lengthy prison term on a third-strike offender relates to our understanding of the life course and the commission of crime. In most cases, offenders commit fewer crimes as they age and presumably establish more positive bonds with the community, the process that criminologists call **aging out**. If we are imposing lengthy sentences on older offenders, are we incarcerating them at a time when they pose less risk to society (Blumstein & Piquero, 2007; Crutchfield, 2017)? Males (2011, p. 6), for example, reported that the median age of California third-strikers admitted to prison was forty-three years of age.

Serious and repeat offenders always have posed a challenge for justice systems. Supporters of three-strikes-type legislation argue that high-risk or high-rate offenders create a significant public risk. The problem is that it is hard to differentiate between high- and low-risk offenders when we do not have the "tools" to predict future criminal behavior. If we incarcerate an offender who is a low risk to society, this represents a significant taxpayer burden. In California it cost \$70,812 in 2017 to house one prisoner, so imposing a twenty-five-year sentence costs nearly \$1.8 million (without factoring in inflation) for a single prisoner. Advocacy groups, such as the Sentencing Project, argue that such sentences are destructive to the individual and are bizarre and counterproductive (Mauer, 2016, p. 452).

A ten-year evaluation of three-strikes policies was conducted by the California Legislative Analyst's Office (LAO) in 2005, and their report outlined how this legislation had significant impacts on California's courts and corrections systems; some unanticipated. Third-strike offenders have increased the number of jury trials in some jurisdictions, increased the percentage of pretrial jail detainees, and contributed to prison overcrowding. Still, the LAO found that the introduction of this legislation did not have the effect on correctional populations that was initially forecast. The influence on crime rates is more difficult to evaluate, and the LAO could not find a significant difference in the crime rates in counties that had the highest rates of third-strike sentences versus those from the counties with the lowest rates of these sentences. Datta (2017) examined the long-term impacts of California's three-strikes law on crime, and found that the crime reduction effect was small, and the punishment costs were not justified by the expense.

Evaluation studies are important, as criminal justice policies should be based on what the research demonstrates to be effective or sound policy. Unfortunately, that assumption is naive, and one of the troubles we repeatedly encounter is that some policies that are not very sound are replicated because there is strong public support for them. Over the past decade, however, there was growing dissatisfaction with the three-strikes policy. In November 2012 Californians voted to repeal parts of their three-strikes legislation that make it difficult for

less serious offenders to be sentenced to lengthy prison terms. A 2014 California ballot measure made it easier to reduce sentences for some prisoners convicted of non-violent crimes, but a 2017 Supreme Court decision ruled that law did not apply to three-strikers (Dolan, 2017). One of the issues that we will address in the following chapters is the public's role in crime control policy: Should experts make the decisions about appropriate interventions, or should the public?

TRUTH-IN-SENTENCING

Somewhat consistent with the mandatory minimum sentences described above, the federal government has funded prison construction in states that hold offenders who have committed violent Uniform Crime Reports Part 1 offenses (murder, attempted murder, aggravated assault, and rape) until they have served at least 85 percent of their sentences. These truth-in-sentencing laws (TIS) were adopted in over half of the states and the District of Columbia. While these sentencing plans targeted violent offenders, the people we fear the most, one unanticipated outcome is similar to the problem of three-strikes legislation mentioned previously: Some offenders, even though they committed violent crimes, pose minimal risk of reoffending. Durose, Cooper, and Snyder (2014) found from 2005 to 2010 in the thirty states they examined that offenders charged with violent crimes were much less likely to recidivate after release than were property or drug offenders. However, it is unlikely that there would be much political or public support for releasing these offenders, and while not advocating the release of all persons convicted of violent crimes, we have to acknowledge that some may be at comparatively low risk to reoffend.

As with other offenders, those who have a stake in the community and benefit from community support in the form of jobs, a safe and affordable place to stay, and a supportive family are more likely to do well upon release. Contrast those offenders with gang members who are released from prison with few supports, few prosocial associates, and a marginal or nonexistent employment history. Even for those who have the best of intentions to succeed, these conditions make the chance of a successful community reentry difficult, an issue we explore further in Chapter 11.

Although TIS came long after the biggest increases in the use of imprisonment, such practices support and maintain high imprisonment policies. It is important to understand that TIS programs undermine the use of individualized justice. In addition, TIS programs tie participating states into a long-term imprisonment program that has significant ongoing costs. While construction of a single prison cell is an expensive undertaking, the annual cost of placing an inmate in the cell is much greater over the long term. One of the problems facing criminal justice administrators is that crime control policies are often implemented without any evidence of their effectiveness. The field of corrections, for instance, has been prone to “quackery” (interventions with little basis in research), such as chain gangs or boot camps (Latessa, Cullen & Gendreau, 2002). Another weakness is that few justice system interventions are formally evaluated (Mears, 2017). As a result, even though there is a move toward evidence-based practice, our knowledge about what actually works is only now starting to increase.²¹

Federal assistance for TIS programs provides important insights into the political support for high-incarceration policies. Yet, Nicholson-Crotty (2012) observed that some states refused federal funding for TIS, and he attributed these decisions to political partisanship. It is obvious that there is broad political support for tough sanctions on offenders, but where does this political support come from? Some have questioned why the United States, a nation founded on the concept of liberty, would have the world's highest imprisonment rate (Christianson, 1998). Ultimately, like many of the issues we discuss, there is no single cause, but high imprisonment rates are a result of a complex interplay of our fear of crime and punitive values that are inflamed, rather than moderated, by American political processes.

Box 7-3

Sentencing: Urban and Rural Differences

We have all heard that some courts within one's state mete out harsher punishments than others and researchers call these outcomes **justice by geography**. Keller and Pearce (2016) reported in the *New York Times* that imprisonment rates in the nation's largest cities had slowed or decreased but the number of new prison admissions from rural America has been steadily increasing since 2000.

Not only are more individuals being sent to prison, but sentences in some rural courts are very harsh. Keller and Pearce (2016) provided an example of the actual sentences for three individuals sentenced to prison in Dearborn County, Indiana, and the punishments those offenders would have received in different cities. Dearborn County has about 50,000 residents and Keller and Pearce observed that they sent more people to prison than San Francisco (which has a population of almost 900,000 residents). When asked about the harsh punishments, the district attorney told the reporters that "I am proud of the fact that we send more people to jail than other counties."

INDIVIDUAL (AGE) AND OFFENSE:	SCOTT H. (36 YRS)	DAKOTA F. (22 YRS)	DONNIE G. (41 YRS)
	SOLD 6.8 GRAMS OF HEROIN	ADMITTED TO 10 BURGLARIES	SOLD 15 OXYCODONE PILLS
Likely Sentence in Brooklyn	0 to 3 years	4 to 7 years	Drug treatment
Likely sentence in Cincinnati	2 to 5 years	4 to 5 years	Up to 6 months
Likely sentence in San Francisco	0 to 3 years	2 to 4 years	Drug treatment
Actual sentence in Dearborn County	35 years	31.5 years	12 years

Source: Keller & Pearce (2016)

Several researchers have taken a closer look at the increase in rural residents admitted to prison. Oliver (2017) calculated the rates of new prison admissions in 726 counties from 2000 to 2013, and Figure 7.4 shows the increase in prison

admissions from rural (non-metro) counties and the decrease from metropolitan counties. While annual prison admissions from urban areas decreased for both African Americans and whites, and admissions dropped for rura. African Americans, there was a significant increase in the rate of prison admissions for rural whites. Like many other outcomes described in this book, there are some differences among the states. Eason, Zucker and Wildeman (2017) examined imprisonment in urban and rural Arkansas counties, and they found that African American prison admissions were more than two times higher in rural counties (2,500 per 100,000 residents) than in urban communities (1,100 per 100,000 residents). These findings suggest that the issue of justice by geography be more closely examined.

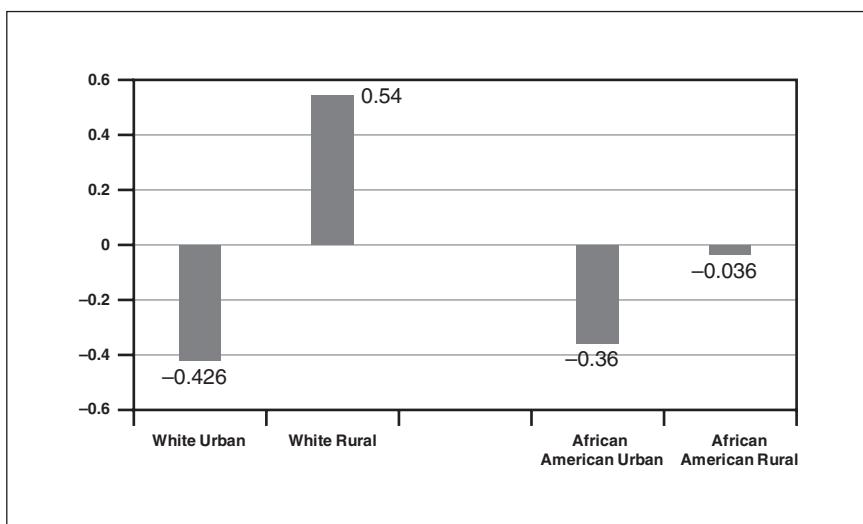


Figure 7.4 Prison Admission Rate Change, 2000 to 2013: White and African American Populations, Urban and Rural

SOURCE: Oliver (2017)

CONCLUSIONS

To achieve a fivefold increase in the incarceration rate, we placed more people in prison and sentenced them to longer terms. Abandoning rehabilitation as a legitimate correctional purpose was the primary philosophical reason behind the increased use of incarceration starting in the 1970s. We lost confidence in the ability of prisoners to reform themselves; instead, governments changed the primary correctional goal to the mass imprisonment of unruly or dangerous groups, with little emphasis on changing their attitudes or behaviors. The primary correctional goals became efficiency and incapacitation (Feeley & Simon, 1992). This change could occur only with the support of politicians who wanted to get tough on crime and, in some cases, increase their political capital at offenders' expense.

The United States locks up more people per capita than any other first-world nation (Walmsley, 2016). Yet, with the exception of homicide, most industrialized

nations have property and violent crime rates very similar to America (Aebi et al., 2017). Advocates of the crime control perspective believe that incarceration is a good investment; by incapacitating offenders, they cannot commit further crimes on the street. Yet, supporters of the due process perspective are apt to argue that sentences for some crimes, such as possession of crack cocaine, are patently unfair. Thus, some have maintained that our policing strategies, drug policies, and imprisonment practices have a disproportionate impact on African Americans (Tonry, 2011).

While we have painted a somewhat discouraging picture of American sentencing policy, there has been a broad reform of justice system practices, and the incarceration rate has been slowly dropping. The Sentencing Project (2017), for example, reported that Texas closed four prisons and “since 2011, at least twenty-two states have closed or announced closures of 100 state prisons and juvenile justice facilities, resulting in the elimination of over 50,000 state prison beds and an estimated cost savings of over \$390 million.” These recent, although modest, downturns in correctional populations suggest that the tide may have turned in terms of harsh sentencing practices.

A number of scholars have argued that one reason our justice systems are so punitive is that the United States is more democratic (LaFree, 2002). In many European nations, by contrast, politicians are shielded from public support for punishment by powerful justice-system bureaucracies that have rejected tough-on-crime practices (Savelsberg, 1994; Sutton, 2004). In addition, governments in many developed nations have strong federal and centralized bureaucracies that control the use of punishment, in contrast to the United States, which has strong local and state-level governments. Moreover, prosecutors, who are local politicians, can enhance their political capital by advocating for tough sentences that are ultimately paid for by state taxpayers (Pfaff, 2017).

This discussion raises an important criminal justice policy question: Should governments rely upon the professional knowledge of career bureaucrats with extensive knowledge about crime and responses to crime, or should we let politicians make decisions about criminal justice agency operations? The disadvantage of the latter is that politicians typically operate from short-term orientations and cannot afford to support practices that are perceived to be soft on crime, even if these policies have demonstrated effectiveness. One additional issue that emerges from our examination of sentencing is that we do not have very much information about sentencing practices, and if researchers lack this basic information we cannot make very thoughtful comments about the operations of our justice system.

KEY TERMS

aging out	good time credits	penologists
aggravating factors	guided sentences	presentence investigation
career criminals	indeterminate sentencing	selective incapacitation
determinate sentencing	individualized justice	technical violation
extralegal factors	mitigating factors	wobblers

CRITICAL REVIEW QUESTIONS

1. The imprisonment rate in the United States is four to six times that of other first-world nations. Do you believe that other nations are less punitive because they are less democratic? Should the people of a nation dictate criminal justice policies, or should bureaucrats who better understand the crime problem be responsible for these practices?
2. Do the people working in both public and private corrections have a stake in maintaining high incarceration rates? Explain.
3. The U.S. Sentencing Commission has repeatedly found that the 100:1 sentencing ratio of crack cocaine to powder cocaine is harmful and biased, yet only recently did politicians reduce the legal disparities. Why do you believe Congress failed to act on these recommendations for almost two decades?
4. Compare and contrast the costs of imprisoning an inmate for one year in your state with tuition and housing costs at your college/university. Which costs more? Why?
5. In the 2012 California election, voters reduced the severity of the three-strikes legislation. Should the public decide punishment severity, or should such decisions be made by experts who have more knowledge about the costs and benefits of punishment? (Would your answer change if the question were about economic policy, such as inflation control, rather than punishment?)
6. What do we mean by “career criminals”? Is this label based on the volume of crime, the frequency with which crimes are committed, or the danger to the public? Explain.
7. As a society, if we have to choose between *individualized justice* and *equity*, which should we choose and why?
8. In sentencing, what kinds of factors should be considered *legal factors* and what kinds should be considered *extralegal factors*? Are both relevant to the punishment issue or not? Explain.
9. One theory explains that punitive criminal justice policies are a result of governments wanting to demonstrate policy success. What are the strengths and weaknesses of this argument?
10. Not only are there differences in the use of imprisonment in different nations, but there is also considerable variation among states. At year-end 2015 North Dakota had an imprisonment rate of 233 per 100,000 residents in the population, while neighboring South Dakota had an imprisonment rate of 414 (Carson & Anderson, 2016, p. 9). Rates of crime in both states are similar, and economic, demographic, and social factors are nearly identical. Given these facts, why is South Dakota more punitive?

WRITING ASSIGNMENTS

1. Go to the Bureau of Justice Statistics website and access one of the most recent documents on the numbers of prisoners in the United States. After scanning this document prepare a one-page essay on the five most significant facts or trends you observed.

2. List and discuss three examples of tough-on-crime policies that have emerged in the United States since 1980.
3. In two or three paragraphs develop a working definition of “career criminals.” Use any resources available to you. Did you find consistent definitions or not? Explain.
4. Develop a two-column chart to explain the differences between indeterminate sentences and determinate sentences.
5. Do a little Internet detective work to find the sentencing system used by your state and whether (and at what rate) good time credits are awarded. Prepare a brief “executive summary” that could explain your state’s sentencing system to a group of high school students.

RECOMMENDED READINGS

- Arie Freiburg and Karen Gelb, editors (2013). *Penal Populism, Sentencing Councils, and Sentencing Policy*. New York: Routledge. This book includes a series of readings dealing with the Minnesota sentencing guidelines and the United States Sentencing Commission. However, it provides a comparative perspective by discussing sentencing in New Zealand, England, New South Wales, and Scotland.
- Joan Petersilia and Kevin R. Reitz (2012). *The Oxford Handbook of Sentencing and Corrections*. New York: Oxford University Press. This is principally an edited reference work covering sentencing and corrections. Nevertheless, it has ten articles that deal directly with sentencing issues such as proportionality, severity, restorative justice, and indeterminate sentencing.
- John F. Pfaff (2017). *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform*. New York: Basic Books. Pfaff provides a critical look at prison populations, and avoids explanations for mass imprisonment based on the number of drug offenders behind bars or the ability of private prison operators to lobby for more imprisonment, or even mandatory sentences. Instead he attributes imprisonment increases to prosecutors, who have much to gain by being tough on crime, and a lot to lose by arguing for mitigated punishments. Pfaff does not see much change until prosecutorial powers are changed.
- Michael Tonry, editor (2011). *Why Punish, How Much? A Reader*. New York: Oxford University Press. In this edited book, Tonry includes several historical essays in addition to the contemporary contributions of influential scholars to shed light on the use of punishment. This book will appeal to readers interested in punishment theories and how our notions of offenders shape the sort of punishments that a society will impose on wrongdoers. The contributors also address how ideas of punishment have become fashionable during different historical eras.

CHAPTER 8



Race, Ethnicity, and Justice

INTRODUCTION

Some of the biggest news stories from 2014 to 2017 were related to the deaths of Michael Brown, Eric Garner, and Freddy Gray, who were unarmed African American men killed in confrontations with police officers. Although the issues of race, ethnicity, and justice have been at the forefront of discussions about the American criminal justice system since the 1990s, the recent attention being placed on these issues shows little sign of decreasing, and led to the founding of the Black Lives Matter movement. One question that we need to ask is whether our interests about the issue of race and justice will result in any long-term changes in the operations of justice systems.

The United States has been grappling with race, discrimination, equality, and justice issues for over a century. Emblazoned across the front of the U.S. Supreme Court building, for example, is the phrase “Equal Justice Under Law.” However, the concept of equality can be elusive in our justice system. Various legally relevant factors (such as one’s present charge and criminal history) and extralegal factors (income, employment status, or gender) can influence the fairness of justice a person might receive. A key extralegal factor is race (along with ethnicity), and as Neubauer (2001, p. 153) noted, “[I]n debating crime, all roads eventually lead to issues of race.” In fact, he also stated, “For many Americans, fear of crime is an expression of racial fears.” In the criminal justice system, some policies are applied in a way that creates disparity, and some individual actors in the system may engage in actions that disadvantage certain groups.

Therefore, no discussion of the issues facing the criminal justice system in the United States would be complete without addressing the role that race and ethnicity play in policymaking and everyday decision making. Much of our discussion is framed by the debate over whether the criminal justice system is racist or not. For some people, this is an issue that was settled long ago, and Lynch and Patterson (1996, p. viii) wrote, “We have spent some time examining the issue of racial bias in the criminal justice system, and we believe that the evidence unfortunately

weighs in favor of the idea that the system is biased.” Since that time, few scholars have countered that claim and after arrest, juvenile detention, and prison statistics are released each year we have seen very little reduction in the over-representation of minority group members in the justice system, and the tensions surrounding this overrepresentation have been growing (Peterson, 2017).

A few things will become clear to you as you read this chapter. First, we cannot ignore that race and ethnicity have an impact on criminal justice system operations. They are significant factors in the processing of criminal cases in the United States and Mauer (2017, para. 32) says that “racial and ethnic disparities in incarceration have been well documented in many Western nations, including the United States, the United Kingdom, and Canada, and similar disproportionate representation can be seen among Aboriginal people in Australia and Maoris in New Zealand.” Second, however, it is much less clear why this is the case and what can be done about it. Various arguments are offered, and we explore decision making throughout the criminal justice system. At each of the six decision points described in the following pages there are several choices that actors within the system can make that shape the outcomes for a suspect or offender. One of the challenges of identifying practices that may disadvantage different racial or ethnic groups is that the discretion that is exercised at each of these points is very subtle and often lacks transparency. This makes it difficult to make clear statements about the actual source of any disadvantage.

DECISION MAKING IN THE CRIMINAL JUSTICE SYSTEM

As we consider the influence of race and ethnicity on criminal justice procedures, six steps in the processing of suspected offenders serve as our key points of focus: (1) arrest, (2) juvenile detention and incarceration, (3) prosecution, (4) adjudication, (5) sentencing, and (6) punishment.

Arrest

In 2016, law enforcement agencies made almost 10.7 million arrests for all crimes except traffic offenses (FBI, 2017, Table 18). Of the 8.2 million individuals arrested where race or ethnicity was noted, almost 5.9 million (69.6 percent) were white, 2.2 million (26.9 percent) were African American, and the remaining represented American Indian or Alaska Natives (2.0 percent), Asian (1.2 percent), and other races including Native Hawaiians (0.3 percent) (FBI, 2017, Table 21A). These percentages compare with national population figures that show that in 2016, 61.3 percent of the U.S. population was white, about 13.3 percent was African American, Latinos accounted for 17.8 percent and other races constituted the remainder (U.S. Census Bureau, 2017d).

When examining the eight crimes comprising the Part I Index offenses, it is apparent that significant differences occur in the rates of commission of crimes by race. For example, for murder and nonnegligent manslaughter, 44.7 percent of the arrests nationally were of white suspects and 52.6 percent were African Americans. Whites were arrested more than twice as often as African

Americans for rape (67.6 percent vs. 29.1 percent). These numbers closely parallel those for aggravated assault, where 62.8 percent of those arrested were white and 33.3 percent were African American. By contrast, African Americans were arrested more often for robbery than were whites (54.5 percent vs. 43.4 percent). For Part I Index property crimes, whites outnumber African Americans in all four categories: Whites represented 68.4 percent of those arrested for burglary, 69.0 percent of the larceny-theft arrests, 66.0 percent of the motor vehicle theft arrests, and 72.0 percent of the arson arrests (FBI, 2017, Table 21A).

After examining U.S. arrest statistics, Brame, Bushway, Paternoster and Turner (2014) estimated that almost one-half (49 percent) of African American males will be arrested by their twenty-third birthday, while 38 percent of white males will have been arrested by that age. Why is this the case? Ulmer, Painter-Davis, and Tinik (2016, p. 643) provide several reasons: First, minorities might have a greater involvement in crime, but second, discretionary decisions of the justice system produce disparities that disadvantage African Americans and Latinos. A third possible explanation is that minority group members are overrepresented in impoverished communities where they are more likely to come into contact with the police (e.g., poor neighborhoods with high numbers of 911 calls or “hot spots”), and those interactions result in confrontations and arrests. This explanation has been called the **deployment hypothesis** (Engel, Smith & Cullen, 2012).

In regard to the first explanation, some scholars have taken the controversial view that minorities commit crimes because they are somehow biologically predisposed to do so or perhaps that they are intellectually inferior to non-minorities (see Herrnstein & Murray, 1994). While there is no credible scientific evidence to support this notion, it nevertheless periodically resurfaces to a new wave of praise or condemnation. Fox (2017, p. 23), for example, describes the recent interest in better understanding the relationships between biosocial factors and involvement in crime—called the biosocial perspective—the fastest growing line of research in criminology. However, there has been very little discussion of race or ethnicity in these explanations and Vaughn (2016) says that the potential harms of these studies need to be considered when carrying out this research.

Other explanations offered to account for the propensity to commit crimes suggest that because of cultural or structural influences, minorities simply commit more crimes. Structural influences refer to community conditions, such as high rates of poverty, income inequality, and unemployment. Some minority communities have a high percentage of female-headed households and high rates of unemployment, few positive role models, and many families are receiving some type of government assistance. These indicators of economic distresses, as well the proportion of young males in the population, are associated with violent crime (Stucky, Payton & Ottensmann, 2016). While we can do relatively little to change demographic factors, Crutchfield (2012, p. 24) says that “these differences in criminal involvement will persist until the United States gets serious about inequalities in education, labor market participation, housing, and income.”

In addition to economic or structural conditions, cultural values might push some youths toward crime. Bellair and McNulty (2005, p. 1158), for example,

investigated the relationships between race and violence and, in particular, the over-involvement of African American youths in violent crime compared with their white counterparts. They found that:

1. Community and family contexts are predictive of ability, achievement, and violence.
2. African American children more than whites must contend with distressed environments that inhibit healthy child development.
3. The relative exposure of African Americans over whites to disadvantaged community structures explains the greater involvement in violence among African American adolescents.

However, it is often difficult to separate the cultural characteristics from the structural factors such as poverty. In such neighborhoods, violating the law may be more common and more commonly accepted.

Stewart and Simons (2006) examined the cultural characteristics of African American adolescents and reported that Elijah Anderson's (1999) "code of the street" explains some violent delinquency. Anderson (1999) proposed that in neighborhoods with high levels of social disorganization and disadvantage, an antisocial or oppositional culture emerges that rejects mainstream values. By adopting the code of the street, neighborhood residents—especially young males—embrace an inflated sense of manhood and involvement in criminal behaviors that ultimately lead to violence. Consistent with Anderson's observations, Matsuda, Melde, Taylor, Freng, and Esbensen (2013) found that gang members were predisposed to commit violent offenses because they held attitudes and beliefs consistent with the code of the street. African Americans who more strongly adhered to beliefs about the code of the street were also more likely to be arrested and convicted, and these effects were magnified in neighborhoods where these beliefs were more deeply rooted (Mears, Stewart, Warren & Simons, 2017, p. 217).

Other neighborhood-level factors might also determine the way the police are deployed. Over time, the police start to refer to the neighborhoods where they make lots of arrests as high-crime areas, and this perception may shape their behaviors, such as their patrol priorities. Additionally, certain neighborhoods, principally those in which minorities disproportionately live, call for police services more often than neighborhoods with higher levels of informal social control (where neighbors feel comfortable resolving disputes without calling the police). Despite the fact that residents in neighborhoods with a high percentage of minority residents often mistrust the police and their ability to solve their problems, they often have few alternatives. Thus, Schaible and Hughes (2012, p. 245) observed that "residents of disadvantaged neighborhoods tend to rely on police for assistance as much as, if not more than, people elsewhere." Yet the well-publicized police shootings of unarmed African Americans taking place after 2014 may have reduced the number of 911 calls originating from neighborhoods with high black populations (Desmond, Papachristos & Kirk, 2016).

Since many cities design their police patrol beats in a way to equalize the calls for service, the end result is that the police agencies place proportionately more officers in minority neighborhoods (in response to the high numbers of

calls), and once the officers are in the neighborhoods they make arrests. Engel, Smith, and Cullen (2012, p. 601) called this the “deployment hypothesis, which argues that as a result of differential police deployment patterns, officers are likely to have increased contact with minority citizens and thus have more opportunities to detect criminal conduct” and researchers have found support for this explanation (Briggs & Keimig, 2016).

The disproportionate distribution of police services in minority neighborhoods results in the perspective commonly held that the police simply target minorities, particularly young minority males, for arrest. Research conducted by Mitchell and Caudy (2015) on why drug arrests were disproportionately made up of African Americans found that disparities could not be explained by differences in drug use, engagement in crime, or police deployment, and their conclusion was that racial bias was responsible for these outcomes. The viewpoint often articulated by some minority group members is, “Even if you have not done anything, they will arrest you for something.” This especially has been alleged in relation to traffic stops; as a result, questions of **racial profiling** have been raised in regard to the official policies of some police departments, or the unofficial practices of individual officers.

Most Americans are concerned about racial profiling, and Ekins (2016, p. 3) reported that 65 percent of survey respondents believed “police commonly stop motorists and pedestrians of certain racial or ethnic backgrounds because the officer believes that these groups are more likely than others to commit certain types of crimes.” Ekin’s survey revealed that African Americans had the highest opposition to racial profiling (77 percent), followed by Latinos (62 percent), and whites (62 percent). However, is it important to define *racial profiling* and to distinguish between racial profiling and simply good police work if this is possible. Lange, Johnson, and Voas (2005, p. 194) said that racial profiling is that idea that “some racial or ethnic groups are being stopped at a rate disproportionate to their representation in the local population.” If the stops are based on some objective factor—such as evidence that a crime has been committed—then the police actions are legitimate, but if pedestrian or traffic stops are based on subjective factors—merely having a suspicion based on race or behavior—that may be another matter altogether (Lange, Johnson & Voas, 2005).

Research suggests that the context in which a traffic stop takes place is important in understanding what actually occurs. Novak and Chamlin (2012) called this a “**race-out-of-place**” effect, where citations were more likely to be given to white drivers in predominately African American communities, while African American drivers were more likely to be cited in white neighborhoods. What can we conclude from the research on the rate at which African Americans are stopped by the police in discretionary traffic stops? First, regardless of whether there is unfairness in stopping motorists, there certainly is the perception of unfairness (Higgins & Gabbidon, 2012; Lundman & Kaufman, 2003).

Second, while some researchers find that racial profiling does occur, a number of them warn that we must develop baseline data to properly do the research, and appropriate benchmarks are needed for judging police actions. After reviewing thirteen studies of racial profiling, Engel, Calnon, and Bernard (2002, p. 250) said that “the problem with interpreting these findings is that the mere

presence of disparity in the aggregate race of stops does not, in itself, demonstrate racial prejudice, any more than racial disparity in prison populations demonstrates racial prejudice by sentencing judges.” Like many other issues we have addressed, the data collected about traffic stops does not provide us with the entire picture about whether officers are biased when they stop a vehicle. McLean and Rojek (2016, p. 460) report that most studies find that African American drivers are stopped more often than their white counterparts. These scholars noted that some researchers analyzing traffic stop data do not fully consider the representation of racial-ethnic groups in the jurisdiction’s population (and their representation as drivers), the extent to which different racial or ethnic groups abide by traffic regulations, and the representation of ethnic or racial groups on roads where there are a high number of traffic stops. Failing to consider any of these four issues will impact the findings that researchers will produce.

A position taken by some to explain disproportionality is that the criminal justice system is racist because it exists within a larger American culture that is racist. Reasons, Conley, and Debro (2002, p. 181) claimed that police practices result from the prejudices of individual officers and the institutional racism that pervades both the criminal justice system and American society. If this is true, then criminal justice system actors are not overtly racists; they merely reflect the racial values held by the large society. Engel, Calnon, and Bernard (2002, p. 249) countered that the controversy surrounding this area is “overwhelmed by the unsupported assumption that all race-based decision making by the police is motivated by individual officers’ racial prejudice.” We will return to some of these points later in the chapter when we explore the programs and policies that may address racial discrimination and racism in the criminal justice system, including “stop, question, and frisk” practices, described in Box 8-1.

BOX 8-1

Stop, Question, and Frisk: Race, Justice, and Police Effectiveness

Stop, Question, and Frisk (SQF) is a controversial practice that was a cornerstone of the New York Police Department’s (NYPD) crime control strategy for over a decade but has fallen out of favor. Police officers routinely stopped persons on the street whom they suspected of wrongdoing. These suspects are temporarily detained, asked to provide identification or information, and routinely “patted down” to determine if they are carrying weapons. The NYPD has made the data collected on these encounters available to the public starting in 2002, and Figure 8.1 shows about 5.1 million persons were frisked until the end of 2016 (New York Civil Liberties Union, 2017) although Rosenfeld and Fornango (2014) contend these official statistics most likely undercount the true number of these interactions.

Stopping and frisking suspects is not a new practice and was upheld by the Supreme Court in the *Terry v. Ohio* (1968) decision. Five subsequent Supreme Court decisions affirmed *Terry* and broadened police powers to detain and search suspects (Lachman, La Vigne & Matthews, 2012). Advocates of the crime control perspective would probably say that SQF is a good crime control strategy and the inconvenience of temporary detention is outweighed by the crime reduction

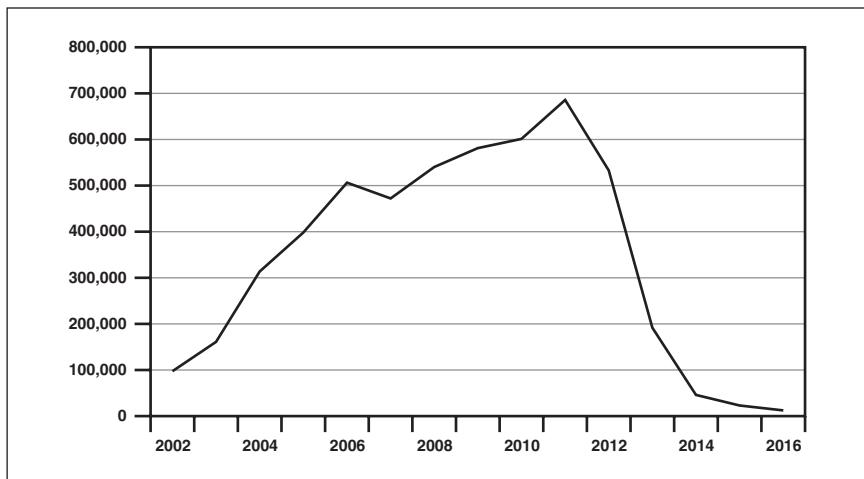


Figure 8.1 Stop, Question, and Frisk in New York City: 2002 to 2016

SOURCE: New York Civil Liberties Union (2017)

benefit of such practices. Supporters of the due process perspective, by contrast, would argue that this practice unnecessarily deprives individuals of their freedom (even temporarily), is racially biased, and places individuals in potentially confrontational situations with the police.

One factor that increases the controversy surrounding stop, question, and frisk is the percentages of nonwhites who are detained, and the NYPD data showed that between 2003 and 2016, 54 percent were African Americans, 31 percent were Latinos, and whites accounted for 11 percent; and between 2003 and 2011 over one-half of these detainees were fourteen to twenty-four years of age (New York Civil Liberties Union, 2017). African Americans and Latinos in the city population, by contrast, accounted for slightly more than half of the New York population (24 and 29.1 percent respectively in 2015; see U.S. Census Bureau, 2016). Thus, both groups are over-represented in these interactions, and white residents of New York, who make up about 43 percent of the population, represented only about one in ten suspects who were stopped, questioned, and frisked.

In August 2013 a federal judge ruled that NYPD SQF practices violated the constitutional rights of minorities, and appointed a federal monitor to oversee police practices. While stopping persons suspected of criminal activity is a legal and necessary option for the police, these interactions typically result in few arrests. This raises the question of whether SQF is an effective crime control tool. Rosenfeld and Fornango (2017) examined the SQF data and reported that between 2006 and 2011, the number of stops per 1,000 population was associated with a decline in property and violent crime. However, these researchers questioned the effectiveness of SQF and asked “Would NYPD officers have been just as effective in reducing crime through their sheer visibility, without stopping, questioning, and frisking hundreds of thousands of suspects?” and “Would a strategy of making fewer stops of higher quality that resulted in far more arrests have been just as effective?” (Rosenfeld & Fornango, 2017, p. 18). The data do not answer those questions, but given the massive decrease in police stops starting in 2014, it creates a natural experiment, and if crime does increase, it suggests SQF is an effective crime reduction strategy.

(Continued)

BOX 8-1**Stop, Question, and Frisk: Race, Justice, and Police Effectiveness**
(continued)

Nonwhites already perceive the police as having less legitimacy than do white Americans, and the fact that African Americans and Hispanics in New York are overwhelmingly affected by SQF practices may intensify those feelings. It has been argued that reducing legitimacy in the justice system can contribute to higher levels of crime. Tyler and Fagan (2012, p. 35) observed that most people stopped by the police accept those interactions if they are justifiable, but also found that "people focus upon police disrespect or rudeness, on unneeded harassment, or on actions that are unrelated to legitimate policing functions, such as dumping the contents of backpacks onto the street."

Tom Tyler (2006) has long drawn our attention to the proposition that persons who view the justice system as being legitimate will be more likely to follow the law. Unnever and Gabbidon (2011) extended that notion in their explanation for African American offending. They contend that African Americans in the United States have experienced a long history of discrimination and racism (which has been accompanied by harmful racial stereotypes) and those perceptions have reduced their attachment to predominately white institutions such as educational systems and labor markets. When these feelings are combined with perceptions that the justice system is illegitimate, it is said to contribute to higher rates of African American offending (Unnever & Gabbidon, 2011). Yet, Worden and McLean (2017) found that the relationship between fair treatment by the police and law abiding behavior is not as clear as some researchers believe.

Juvenile Detention and Incarceration

Much of the evidence we have on minority detention and incarceration comes from the juvenile justice system and the Office of Juvenile Justice and Delinquency Prevention's (OJJDP) focus on disproportionate minority contact (DMC). Studies of DMC reveal that minority group members are represented in greater numbers at every point in the juvenile justice system, including short-term detention and incarceration, than their percentages in the general population would predict (OJJDP, 2012). Reducing DMC has been a priority of the federal government, and since 1988 federal funding for juvenile justice has been tied to state initiatives to reduce the overrepresentation of minority groups in juvenile justice systems. The problem is that thirty years after those federal expectations were established, we have not made much headway in reducing DMC (Jones, 2016).

We will consider issues relating to juvenile offenders at much greater length in Chapter 14. However, it is crucial to note now that the same forces that affect juvenile arrestees can be in play for adults as well. On the juvenile side of the ledger the evidence demonstrates that minority youths have higher arrest rates, and Brame and colleagues (2014, p. 471) found that 22 percent of white males are arrested by their eighteenth birthday in the United States, but for African American males that increased to 30 percent. Of these arrestees, minority youths are also disproportionately detained awaiting court processing (see, for example,

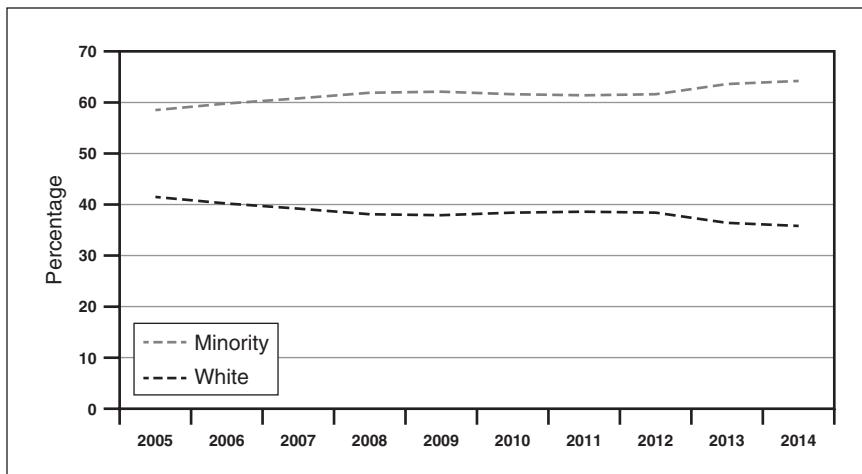


Figure 8.2 Percentage of Minority and White Juveniles in Detention, 2005–2014

SOURCE: Sickmund, Sladky & Kang (2015)

McCoy, Walker & Rodney, 2012; OJJDP, 2012). Figure 8.2, for instance, shows the proportions of white and minority youths who were detained while awaiting their court dates from 2005 to 2014. In the ten years for which we have data, the proportion of white youths decreased from 41.5 to 35.8 percent, while minority youths increased from 58.5 to 64.2 percent, which is more than twice their representation in the population (Sickmund, Sladky & Kang, 2015).

Again, we can ask, why are minority juveniles (and their adult counterparts) detained at rates higher than those for nonminorities? Moreover, these patterns seem resistant to change, or are getting worse—as is the case for juveniles. Several explanations seem plausible. First, an individual's lack of employment or the family's economic status may make judges reluctant to extend bail to minorities, and financial hardships may keep some minority group members from making bail. Gebreyes (2017), describes, for example, how a 16 year-old African American from New York was held awaiting trial for three years because his family could not come up with \$3,000 in bail; maintaining his innocence the entire time, his charges were ultimately dropped. In this kind of situation, it is not race *per se* that keeps minorities detained awaiting court action; it is socioeconomic status. However, as social scientists have noted for a long time, in the United States, race and socioeconomic status or class are highly correlated (see D'Alessio & Stolzenberg, 2002; Neubauer, 2001).

Second, other sociodemographic factors may serve as surrogates for race. For instance, the neighborhood in which an individual lives may be considered in pretrial release decisions. For juveniles, family dynamics, such as the number of parents in the home, the age of the parent(s), and the number of siblings, may play a role. Family stability and structure also may be considered. These various elements may have nothing whatsoever to do with race, but taken together, once again they may be highly correlated with race. McCoy, Walker, and Rodney (2012), for instance, found that youths from nontraditional family structures were slightly more likely to be detained.

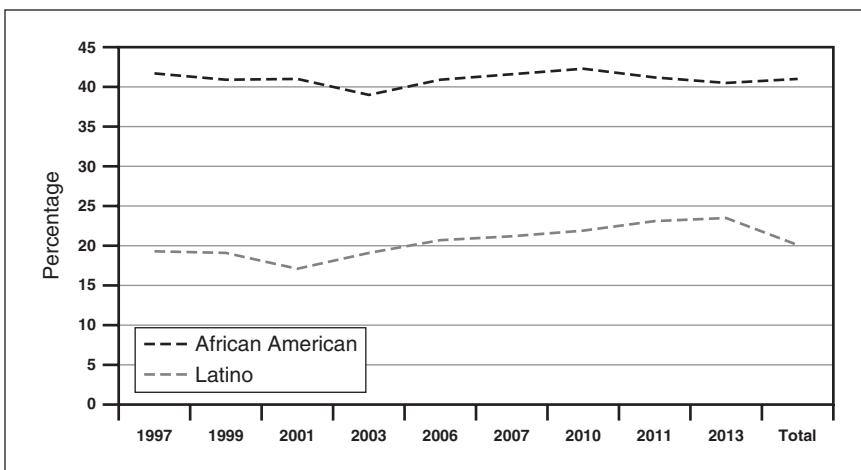


Figure 8.3 Percentage of African American and Hispanic Youths Committed to Custody, 1997–2013

SOURCE: Sickmund, Sladky, Kang & Puzzanchera (2015)

Third, prior criminal record—a legally relevant variable—clearly is very important for judges when they are making release decisions. Maggard (2015) found that the best predictors of detention were offense seriousness and a youth's prior criminal history. Figure 8.3 shows the proportion of African American and Hispanic youths incarcerated from 1997 to 2013, and one finding is that the percentage of these youths has actually been fairly stable over time and the proportions of African American and Latino youths were about the same in 1997 (61 percent) as in 2013 (61.1 percent).

In all likelihood, several of these explanations are at work in the detention decision-making process as well as the decision to sentence youths to custodial placements. The end result is that minority group members potentially find themselves at substantial disadvantages when dealing with criminal justice system agents and organizations. Being placed in custody as a juvenile might also make it more likely that the person will be incarcerated if convicted of a crime as an adult.

Prosecution

The Vera Institute of Justice (2012) conducted a study of prosecutors and the decision-making process that occurs when prosecuting cases. Their researchers found that prosecutors weighed two factors: (1) an initial screening where the prosecutor asks, "Can I prove the case?" (e.g., does the evidence support a conviction); and as the case progresses, (2) "Should I prove the case?" given the severity of the offense, the defendant's criminal history, fairness to the victim and suspect, and contextual factors, such as resource constraints. These findings confirm what we already knew about the wide range of discretion available to prosecutors, and how their decision making relates to two kinds of factors when they are considering whether to prosecute a case and what the appropriate charges should be. The two factors are those that are legally relevant and those that are extralegal.

Legal factors include the current charge and the suspect's criminal history. These are objective criteria that have a legal basis. By contrast, extralegal factors

include everything else, such as the suspect's race, ethnicity, employment status, drug or alcohol use history, education, and income. While such elements might be considered at sentencing as mitigating or aggravating circumstances, they should not play a role in determining whether criminal charges should be filed or what the charges should be.

In terms of criminal prosecutions, it is difficult to know whether, or to what extent, various factors (such as race) may enter into the decision to file charges (see Cole, 2004). Prosecutors' charging decisions are virtually without review from any other authority, and most prosecutors would be able to articulate sufficient legal justifications for charging decisions that could nullify questions about whether extralegal variables played a role in the decision-making process. Therefore, individuals accusing a prosecutor of acting in a discriminatory way would have to prove that a systematic pattern of charging minorities existed in situations where non-minorities have not been charged. For example, in the Supreme Court case of *United States v. Armstrong*, (1996), a criminal defendant convicted of selling crack cocaine appealed his conviction on the basis that because he was African American he had been targeted for prosecution. The notion that a certain person or identifiable group of persons has been selected for prosecution while others similarly situated were not charged is known as **selective prosecution**.

In its opinion in the *Armstrong* case, the Supreme Court held that the burden of establishing a defense of selective prosecution rests with the party making the assertion. This means that unless prosecutors overtly act in a racially biased manner (see the next section on adjudication), it is difficult to identify and correct race-based decision making at this point in the system. Therefore, in most instances, prosecutors still operate with a great deal of unchecked and unreviewable discretion. Kutateladze, Lynn, and Liang (2012, p. 3) identified a number of decision points that determine a defendant's outcomes, and they included:

- Initial screening—when a reviewing prosecutor decides whether to accept a case for prosecution and, in some instances, how to charge the offense;
- Pretrial release or bail procedure—whether a defendant is held in detention while the case is pending and whether a defendant is offered or awarded bail;
- Dismissal—whether a case or charge is dismissed at any point after initial screening by a prosecutor or judge;
- Charge reduction—whether the seriousness or the number of charges is reduced at any point after initial screening;
- Guilty plea—whether a defendant pleads guilty; and
- Sentencing—whether a prosecutor's decision affects the length or nature of a convicted person's penalty.

The prosecutor's discretion comes into play at all of these decision points, and because most of these choices are made behind closed doors our only way to gauge whether a case has been influenced by race is to examine the outcomes. Several scholars have carried out meta-analyses (where the data from different studies are considered to produce a single finding) on the relationships between prosecutors and race. Kutateladze, Lynn, and Liang (2012, p. 17) examined thirty-four studies that had been published in peer-reviewed journals and reported that

“defendants’ or victims’ race directly or indirectly influence case outcomes, even when a host of other legal and extra-legal factors are taken into account.” Wu (2016, p. 437) considered twenty-six studies of prosecutorial decision making in a meta-analysis and he found that “minority offenders face greater odds of being charged or fully prosecuted than white offenders.” Such findings reinforce the perceptions that there are considerable challenges that must be overcome to provide a justice system that lives up to the standard of “Equal Justice Under Law.”

Adjudication

Trials are relatively rare events in the justice system, and Reaves (2013, p. 24) reported that in the nation’s seventy-five largest counties, of all defendants arraigned in state courts, only 2 percent actually went to trial. Of the cases that went to trial, most were for homicides, rapes, and robberies; trials for property or drug crimes were rare. Most people charged with criminal offenses come from the lower socioeconomic strata and are aided by public defenders. One of the challenges for all defendants is that indigent defense is poorly funded in most jurisdictions and that public defenders are often inexperienced and overworked (Laird, 2017). Because legislators are unwilling to better fund indigent defense, public defenders are also under-resourced and this contributes to injustices such as wrongful convictions (Factor, 2017). As minority group members are among the poorest defendants, they may have little access to justice in some places.

The few cases that actually come to trial often involve a wide range of actors with varying motives. Race and ethnicity certainly could play a role in the way lawyers and judges conduct themselves during a trial, and may also influence the outcomes. This would seem to be most critical in jury selection. The **venire** is the pool of potential jurors called for any criminal case and in most states individuals are identified for potential jury service from voter registration lists. We know from various sources that minorities are less likely to be registered to vote (for a number of reasons, including the disenfranchisement of persons with felony convictions) than are nonminorities (see Eisenberg, 2012). This means that minorities may have a reduced potential for jury service based on this factor alone. To address this deficiency, some states have started to supplement voter rolls with lists of licensed drivers.

Furthermore, prosecutors may be wary of minorities serving on juries, particularly when there is a minority defendant. The **voir dire**, or the process of jury empanelment, allows attorneys for both sides to question prospective jurors about their backgrounds and attitudes toward certain issues. If a prospective juror seems to be problematic, the attorneys can request that the judge excuse that individual from jury service.

Attorneys have two different methods whereby they can excuse or “strike” a potential juror. They can request that the person be dismissed “for cause” (prejudice or prejudging the defendant or case). In addition to challenges for cause, attorneys are given a limited number of peremptory challenges. The number of **peremptory challenges** may vary from jurisdiction to jurisdiction and potentially from case to case, depending on the amount of pretrial publicity or notoriety involved. In addition, the severity of the possible sanction may influence the

number of challenges. In California, for instance, attorneys in capital cases have twice as many peremptory challenges as they do in other felony cases.

Peremptory challenges can be used by attorneys without a stated cause and may result from some uneasiness on the attorney's part or a "gut hunch" about how a person might perceive a case or might vote. It is the peremptory challenges that have presented the greatest problems racially in criminal cases. For instance, the U.S. Supreme Court was called upon to decide the case of *Batson v. Kentucky*, (1986), in which a prosecuting attorney used peremptory challenges to remove all African Americans from a jury pool in a trial involving an African American defendant.²² In the *Batson* case, the Supreme Court ruled that since juries should represent a cross-section of the community, prosecutors could not use their peremptory challenges in a racially discriminatory way. In 2016 the Supreme Court reiterated in *Foster v. Chatman* that removing jurors from the jury pool based on race was unconstitutional.

Thirteen articles in a special issue of the *Iowa Law Review* in 2012 examined the impact of *Batson* twenty-five years after that decision. Similar to outcomes described about other Supreme Court decisions in this book, many of the contributors reported how members of the courtroom work group found ways to circumvent the spirit of the Court's decision. As a result the reform failed to live up to both the expectations and the intent of the Supreme Court, and Eisenberg, Hritz, Royer, and Blume (2017) found that members of courtroom work groups continue to discriminate based on race.

Sentencing

We addressed the complex issue of sentencing in Chapter 7. In that chapter we described several of the changes in sentencing practices that have occurred in the past three decades, including the change from indeterminate to determinate sentences in many jurisdictions. In addition, many states introduced mandatory minimum sentences, three-strikes laws, as well as truth-in-sentencing schemes. Last, over half of the states and the federal government implemented sentencing guidelines. Ulmer, Painter-Davis and Tinik (2016, p. 643) observed that "sentencing policy structures, such as mandatory minimums or features of sentencing guidelines, encode racial, and ethnic disparity into sentencing by emphasizing punishment criteria that differentially impact blacks and Hispanics, especially males." One of the challenges for policymakers interested in reducing sentencing disparities is that these factors are often very subtle and difficult for researchers to identify.

Most policymakers and practitioners would agree that the net effect of changes in sentencing practices was that sanctions for offenders became more severe. Like many of the issues we have addressed, however, there is less agreement on the motivations for these changes. The reasons for "tough on crime" policies that make the United States a leader in harsh punishments are complex and relate to an interplay of public opinion, cultural values (including racism and a desire for retribution), and political opportunism (Muenster & Trone, 2016; Pfaff, 2017; Tonry, 2011).

Yet another rationale for changing sentencing practices was to standardize sentencing and reduce disparities, especially on the basis of gender and race. These disparities were thought to be a result of individualized justice, which was

the guiding principle of indeterminate sentencing. For a large part of the twentieth century most states and the U.S. government relied on indeterminate sentences imposed by a judge, and the actual time served would be determined by a parole board that assessed the offender's rehabilitative success. Using this approach, judges can explicitly or implicitly consider factors such as race or ethnicity, work history, family status, and drug and alcohol use. They also possess a tremendous amount of discretion in deciding the final sentence to be imposed (Kim, Cano, Kim & Spohn, 2016). For example, most sentencing laws allow judges to choose between probation and prison, even for very serious crimes such as murder.

This broad discretion has allowed judges to tailor individualized sentences, but it has also allowed judges to impose sentences that vary tremendously. In reality, individualized sentences can lead to **sentencing disparity**, and often disparity works to the disadvantage of minority group members. Champion (2005, p. 229) said that sentencing disparity exists when there is “[i]nconsistency in the sentencing of convicted offenders, in which those committing similar crimes under similar circumstances are given widely disparate sentences by the same judge, usually on the basis of gender, race, ethnicity, or socioeconomic factors.” Sentencing disparity also can exist where different judges give similarly situated offenders different sentences. Research shows that these disparities exist today and Franklin (2017, p. 1) carried out a review of thirty-four studies of sentencing and found that “relative to white offenders, those who are African American, Latina/o, and Native American often receive harsher sentences, while those who are Asian often receive similar or more lenient sentences” but Franklin also explained that these were not universal findings, and there are differences between jurisdictions.

This brings us to the question of how we can reduce sentencing disparities. In the previous chapter we noted that in 1980, Minnesota developed sentencing guidelines that prescribed the sentences judges should impose, and shortly thereafter, half of the states and the District of Columbia established sentencing commissions. Instead of sentencing based on an individual's strengths and weaknesses and potential for reform, sentences were instead guided by the seriousness of the offense and the offender's criminal history.

The intent of sentencing guidelines was to increase consistency, yet there are several factors that might result in disparities. Minority group members, for instance, might have more extensive criminal histories (see Brame et al., 2014). If (and this is a big “if”) minorities have committed more crimes and more serious crimes, then these are legally relevant factors that should explain the more severe sentences imposed by judges. However, if we control for the current offense and criminal history, and minorities still are receiving more severe sanctions, then some other factors are at work (see Bales & Piquero, 2012; Franklin, 2017). If this is the case, how can the system respond in a more racially neutral way?

Most of the research that has evaluated whether sentencing guidelines have reduced racial disparities has examined the impact of federal legislation. In 2007, for example, the U.S. Supreme Court decided that departing from the sentencing range established by the Federal Sentencing Guidelines was reasonable (*Gall v. United States* [2007]; *Kimbrough v. United States* [2007]; and *Rita v. United States* [2007]), which supported the Court's earlier *Booker* and *Fanfan* (2005) decisions. The chair

of the U.S. Sentencing Commission, reported, however, that racial disparities actually increased after the *Booker* and *Fanfan* decisions (Pryor, 2017). Researchers who examined the impact of these decisions also found that while the sentence severity was reduced (Kim et al., 2016) racial disparities did not decrease (Fischman & Schanzenbach, 2012) or increased for some groups (Ulmer, Light & Kramer, 2011).

A judge's or probation officer's personal biases also factor into the sentencing equation. For instance, judges come to the bench with all of the prejudices and predispositions that affect the rest of society. Judges may hold certain views, either positive or negative, about different racial or ethnic groups, and these views may influence their decisions. Closely related to the prejudices held by judges are those held by probation officers. These perspectives become relevant at the point of preparing presentence disposition reports (see Chapter 7). While race may not enter the picture directly, probation officers (who typically hold college degrees) may bring middle-class perceptions and sensibilities into assessing whether a particular individual deserves a probationary or custodial sentence. Petersilia (1997) cited one study that found that judges accepted probation officers' recommendations between 66 and 95 percent of the time while Freiburger and Hilinski (2011) found judges accepted their recommendations in over three-quarters (76.7 percent) of the cases they examined and when judges didn't accept the recommendations, the sentences imposed were generally harsher. Leiber, Beaudry-Cyr, Peck, and Mack (2017) also found a high degree of agreement between recommendations and sentences. Altogether, these studies suggest that biases held by probation officers may also influence the severity of sentences imposed.

Punishment

The final area in the criminal justice system where race has played a role involves the actual punishments received (following sentencing) and the sentences served. This area deals with probation, jail or prison terms, the offender's access to rehabilitative programming while in custody, and the possibility of early release through good time credits or parole. To begin with, what evidence do we have that African Americans and other minority groups are disadvantaged in the imposition of punishments? One of the challenges in carrying out national-level analyses is the lack of recent national level indicators of the proportion of felony defendants before the courts (the latest BJS data were from 2006; see Rosenmerkel, Durose & Farole, 2009) and while we know that African Americans and Latinos are overrepresented in the largest counties (Reaves, 2013) that tells us little about conditions in the rest of the nation.

A key measure of punishment disparity is revealed when we look at the percentage of convicted offenders placed on probation. Kaeble and Bonczar (2016) report that at year-end 2015, almost 3.8 million offenders were on probation in this country. Of that number, over half (55 percent) were white, 30 percent were African American, 13 percent were Latino, and 2 percent represented other racial groups, and those proportions have been relatively stable for a decade (Kaeble & Bonczar, 2016). While African Americans were more likely to receive probation than their numbers in the general population, they still were less likely to receive probation than were whites. One of the problems with such descriptive statistics,

however, is that we do not know enough about the individual case characteristics to determine whether there is some element of bias involved.

Overall, the numbers show that whites still constitute the majority of those convicted of felonies in the United States, and they lead African Americans in all categories of felony convictions except for murder, robbery, and weapons offenses (Reaves, 2013; Rosenmerkel et al., 2009, p. 17). Nevertheless, as the previous figures indicate, African Americans especially are overrepresented in felony sentences handed down and the number of felons sentenced to prison. In fact, of the 1.5 million inmates serving one year or more in prison on December 31, 2015, 35.4 percent were African American, 33.8 percent were white, and 21.6 percent were Latino (those totals did not include “other” races or persons designated as being of more than one race; see Carson & Anderson, 2016, p. 6). Figure 8.4 shows the rate per 100,000 residents for federal and state imprisonment on December 31, 2015.

At the most extreme end of the criminal justice system punishment scale is capital punishment. Here, again, the numbers on race are very interesting. On April 1, 2017, there were 2,843 inmates on death row in the United States. Forty-two percent were white, 41 percent were African American, 13 percent were Latino, and 3 percent were of other races (Death Penalty Information Center, 2017). Of the 1,465 individuals executed between 1976 and 2016, 55.7 percent were white, 34.4 percent were African American, 8.3 percent were Latino, and 1.6 percent were of other races (Death Penalty Information Center, 2017, p. 1). Both the number of offenders on death row and the number executed show that minorities, and especially African Americans, are again overrepresented at the extreme end of the punishment continuum.

Taken together, the statistics reported above strongly suggest that African Americans are disadvantaged in terms of the punishments meted out relative to their white counterparts. This may be a function of some of the disparities in the sentencing process discussed previously. But what about decisions made in prison once the sentence has been imposed? There also may be administrative considerations that affect the granting of good time credits or parole in a racially disparate manner.

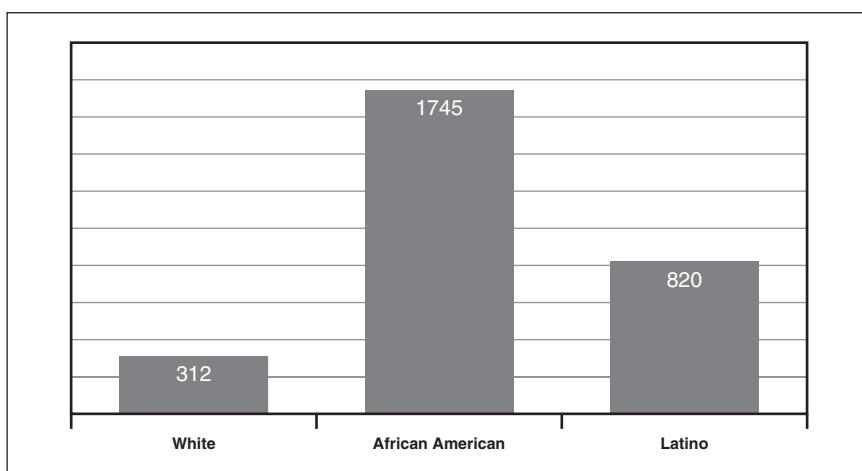


Figure 8.4 Imprisonment Rate per 100,000 U.S. Residents by Race, Dec. 31, 2015

SOURCE: Carson & Anderson (2016)

Venkatesh (2012) argues that racial discrimination is often subtle and difficult to detect. For example, when we look at U.S. prison populations at the end of 2015, we reported that about 35.4 percent were African American, which is about twice their representation in the general population. When researchers examine only the end result (the inmate population) they do not take into account all the variables that led to that outcome, and that lack of information contributes to an incomplete picture. Frase (2013, p. 267), for example, observed that the proportion of prison inmates of different races can be a result of the following factors:

1. The type, frequency, severity, and/or location of criminal behavior,
2. Reporting of crime to the police,
3. Police decisions to investigate and arrest,
4. Pretrial detention decisions,
5. Victim cooperation with investigation and prosecution,
6. Prosecutorial screening and initial charging decisions,
7. Post-filing charge revisions and plea bargaining,
8. Defendants' ability to mount an effective defense or propose alternatives to pretrial detention, custodial sentencing, or revocation of release,
9. Criminal and sentencing laws and guidelines, and
10. Post-sentencing policies and practices such as probation revocation, the award of good conduct credits, and the granting and revocation of post-prison release (parole).

Given all of those decision points and variables, it is very difficult to determine at which point racial bias might come into play. As even the best research examines only one or two of those decision points, it is difficult to make conclusive statements about where racial bias occurs in the system, and the degree it plays in disparate outcomes, and these issues are highlighted in Box 8-2.

BOX 8-2

Explaining Disproportionate Representation: Punishing Race

Michael Tonry is well regarded for his analyses of justice system operations, and he has developed three reasons for the over-representation of African Americans in prison. First, Tonry (2011, p. ix) observed that the characteristics of people who commit crimes are consistent across racial groups, and they include "disadvantaged childhoods, child abuse, unstable home lives, bad educations, lack of employable skills, and drug and alcohol dependence." Since members of minority groups are more likely to suffer from these adversities than are whites, these factors will result in more crimes committed by members of these groups. This, in turn, will bring these individuals to the attention of justice systems at a higher rate than for whites.

Second, law enforcement strategies and sentencing practices have a disproportionate impact upon African Americans. Tonry argues that the wars on crime and drugs have led to the creation of law enforcement practices such as racial profiling and prioritizing drug arrests in inner-city neighborhoods that lead to high arrest rates of African Americans. Furthermore, it has long been acknowledged that sentencing practices that equated possession of 1 gram of crack cocaine to 100 grams of powder cocaine at sentencing have had a significant negative impact

(Continued)

BOX 8-2**Explaining Disproportionate Representation: Punishing Race**
(continued)

upon African Americans, and possession of five grams of cocaine triggered a five year mandatory minimum sentence. After the 100-to-1 crack cocaine law was enacted in 1986, it was recognized that this legislation would have a disproportionate impact on African Americans (U.S. Sentencing Commission, 1995), but the law did not change until the Fair Sentencing Act of 2010, when the ratio dropped from 100-to-1 to 18-to-1. Since this change was enacted, the U.S. Sentencing Commission (2015) reported that fewer crack cocaine offenders were being prosecuted and once convicted, these offenders received less severe punishments.

Third, Tonry (2011, p. ix) observed that “policymakers in the past twenty years have enacted laws (e.g., three-strikes, truth-in-sentencing, and mandatory-minimum sentencing laws) that require prison sentences of historically unprecedented lengths for crimes for which black Americans are disproportionately likely to be arrested and convicted.” Offenders committing crimes such as robbery, which as we noted earlier are disproportionately committed by African Americans, found themselves facing prison terms measured in decades once convicted.

Explaining our eagerness to punish these groups so severely is a complicated undertaking that involves an interplay of cultural values as well as social and political factors. Tonry (2011) argues that legislators gained political capital by being tough on crimes committed by African Americans. Being tough on crime and especially on members of minority groups was consistent with white America’s stereotypes, and we supported harsh punishments. Last, policies based on getting tough were consistent with our notions of moralism, and they were implemented by a justice system that is more politicized than in other nations: you were either “for criminals or against them,” and as such there was no middle ground and little empathy for offenders.

Tonry maintains that whites are generally unaware of these issues and are unlikely to perceive that justice systems are biased. Urbina and Espinoza Alvarez (2018) observed that we tend to be indifferent to “the stranger, the outsider, and the other,” while Feld (1999, p. 6) said that the public is often hostile toward “other people’s children” and especially impoverished youths or members of minority groups. As Tonry (2011, p. 10) observed, “If their own children had been sent to prison in large numbers and had their later prospects for living satisfying lives greatly reduced, white voters might have felt differently.”

CONCLUSIONS

Now that we have examined some of the evidence concerning the various processing stages in the criminal justice system and the effect of race at each stage, what can we conclude? Do legally relevant or extralegal factors dominate criminal justice policies and decision making? Does the criminal justice system act in a racist manner? Are decisions generally made in a racially neutral way? Do we find overt racism, or is it much more subtle and covert, but systemic? Answers to some of these questions should be fairly obvious at this point, but there are some places where the answers are still elusive. For example, racially discriminatory actions may be taken by individual police officers, prosecutors, probation officers, and judges. These actions may have rippling effects throughout the rest of the criminal justice system.

By the same token, it may be difficult to separate the actions of individuals from institutionalized policies (such as sentencing systems and drug laws) that have racially disparate effects. However, whether we are dealing with the actions and attitudes of individuals or the policies of agencies and organizations, one fact seems inescapable: Race remains a major issue in the processing of criminal cases in the United States.

Many scholars and advocacy groups have drawn our attention to the lack of progress in reducing DMC for juveniles and adults. Research has continued to show that contemporary law enforcement, prosecutorial, and sentencing practices have a disproportionately harsh impact on members of minority groups, and these were highlighted throughout this chapter. As a result, a criminal record and admission to jail or prison is a fact of life for many Americans of color. The labels that are attached to these offenders create significant barriers to engaging in legitimate occupations and create a number of collateral consequences (e.g., voter disenfranchisement, limits on access to housing and funding for education) that contribute to further missed opportunities and lost lives.

KEY TERMS

<i>Batson v. Kentucky</i>	peremptory challenges	<i>Terry v. Ohio</i>
deployment hypothesis	racial profiling	<i>United States v. Armstrong</i>
<i>Foster v. Chatman</i>	race-out-of-place	venire
<i>Gall v. United States</i>	<i>Rita v. United States</i>	<i>voir dire</i>
<i>Kimbrough v. United States</i>	selective prosecution	
legal factors	sentencing disparity	

CRITICAL REVIEW QUESTIONS

1. Is the criminal justice system in the United States (or in other nations as well) racist, or are we dealing with a few individual racists who happen to work in the system? Explain your answer.
2. Carry out an online search and see how many definitions you can find for the word *race* as it relates to sociodemographics (*not* related to running). Is there consistency in these definitions?
3. Engage in the same exercise as in Question 2, but look for meanings of *ethnicity*.
4. Are *race* and *ethnicity* the same, related, or different concepts?
5. Look at the explanations about why the police arrest some groups more than others. Which one seems to have the most evidence to support it?
6. How do you react to the widely cited concept of “driving while black”? Have you, your friends, or your classmates been subjected to this?
7. Provide some reasons why movements such as Black Lives Matter emerge.
8. Jeffrey Reiman and Paul Leighton (2017) long have maintained that “the rich get richer and the poor get prison.” Is it possible to support such an assertion? How could you counter it?
9. Will sentencing guidelines (and/or parole guidelines) solve one of the major problems of racial disparity in the criminal justice system? Why or why not?

10. What impact will hiring more minorities throughout the criminal justice system have on attitudes of racism and actions of racial discrimination?
11. Will anything, short of eliminating the death penalty, reduce the racial disparity that seems inherent in capital punishment? Explain.

WRITING ASSIGNMENTS

1. There are recurring sentiments in the criminal justice literature that the real problem with racism is not so much individual racism on the part of criminal justice personnel, but of institutional racism. Develop a short essay defining institutional racism and providing examples that might show up in criminal justice processes.
2. Develop a working definition of “racial profiling” that would help police officers perform their duties in a nondiscriminatory way.
3. In a one-page essay compare and contrast the concepts of “discretion” and “discrimination.” Explain whether discretion is a positive concept, a negative concept, or a neutral concept.
4. Explain “disproportionate minority contact,” including the decision points in the criminal justice process where this may be a concern.
5. In two or three paragraphs explain why race is such a crucial factor in the jury selection process.

RECOMMENDED READINGS

Michael Tonry (2011). *Punishing Race: A Continuing American Dilemma*. New York: Oxford University Press. Tonry is well regarded for his analyses of U.S. justice practices, and in particular the relationships between race and justice. This book provides an overview of how tough-on-crime policies have resulted in the over-representation of members of racial minorities in the justice system. Tonry traces the source of these policies as a result of the intersection of political, social, and social-psychological factors.

James D. Unnever and Shaun L. Gabbidon (2011). *A Theory of African American Offending: Race, Racism, and Crime*. New York: Routledge. These scholars developed a theoretical explanation for high rates of African American offending. They start with a description of the racial discrimination, stereotypes, and injustices experienced by African Americans, and they propose that these conditions have contributed to a reduced attachment to white institutions and a loss of perceived legitimacy in the justice system. Perceptions that the system is unjust are worsened by wars on drugs and crime, as well as use of the death penalty, which has had a disproportionate impact upon African Americans. This cynicism toward the system, in turn, contributes to higher rates of offending. Central to their theory is that the long-term experience of racism can contribute to higher levels of offending.

Martin Guevara Urbina, and Sofia Espinoza Alvarez editors (2018). *Hispanics in the U.S. Criminal Justice System: Ethnicity, Ideology, and Social Control*, 2nd edition. Springfield, IL: Charles C. Thomas. Hispanics have become the largest ethnic minority in the United States, and this edited book examines the interactions of Latinas and Latinos with law enforcement as well as the judicial and penal systems. Throughout this book, a key theme is that issues of race, ethnicity, gender, and class have been overlooked and undervalued in our understanding of justice systems.

CHAPTER 9



Gender and Justice

INTRODUCTION

A quick glance at the news shows that the issue of gender is very much at timely topic these days as women and men are coming forward to report cases of sexual harassment and sexual assault. But what role, if any, does gender play in criminal cases? Are men and women treated differently? Do women fare better, worse, or the same as men; and if there are differences in treatment, why do these exist?

Much like the issues of race and ethnicity, the role that gender plays in the administration of justice is fascinating and complex. Easy answers are not readily available, but to more fully understand gender's significance in the administration of justice, we examine both offenders and victims. This helps us understand better what we do and do not know about how gender factors into the criminal law's application.

WOMEN AS OFFENDERS IN THE CRIMINAL JUSTICE SYSTEM

In 2016 females made up 50.8 percent of the total U.S. population and 52.9 percent of the population eighteen years of age and older (U.S. Census Bureau, 2017a). In 2006 (the most recent year for which we have data), females represented 17 percent of those convicted of any felony and only 11 percent of those convicted for violent felonies, figures that are unchanged since 2002 (Rosenmerkel, Durose & Farole, 2009). These national statistics are consistent with the proportion of felony defendants in the seventy-five largest counties, which was also 17 percent in 2009 (Reaves, 2013).

Unlike men, women are most likely to be arrested, prosecuted for, and convicted of property crimes, especially larceny and fraud (Rosenmerkel et al., 2009, p. 17). The literature on offenders in the criminal justice system shows that it is a man's world. Men commit and are arrested, tried, convicted, and incarcerated for the majority of crimes in the United States and most industrialized countries. In respect to homicide, for instance, Agha's (2009) study of forty-eight countries revealed that the

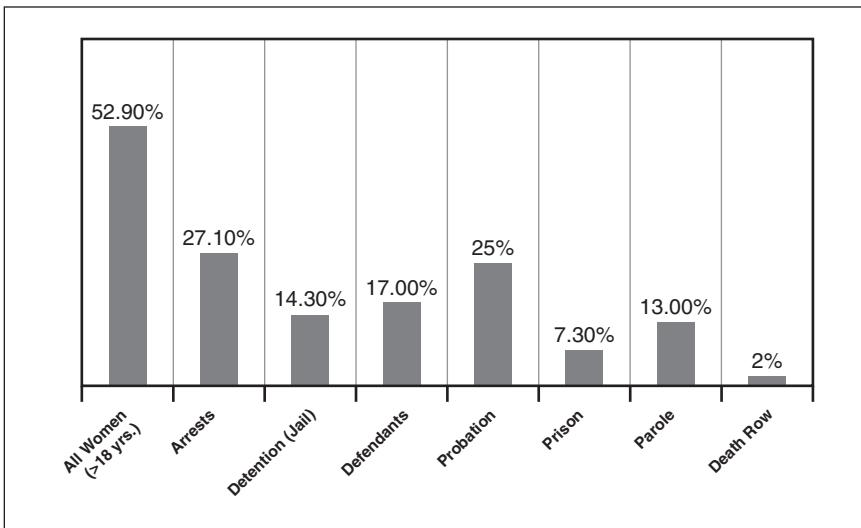


Figure 9.1 Proportion of Women at Different Points in the Justice System, 2015

SOURCES: Carson & Anderson (2016), Death Penalty Information Center (2017), FBI (2016), Kaeble & Bonczar (2016), Minton & Zeng (2016), Reaves (2013) and U.S. Census Bureau (2017a)

average homicide rate for men was over ten times that of women. As Silvestri and Crowther-Dowey (2008, p. 26) note “The overriding consensus within criminology remains that while women do commit a broad range of offenses they commit less crime than men and are less dangerous and violent than their male counterparts. Women are less likely to be recidivists or professional criminals, and are less likely to be involved in violent or sexual crime. Men outnumber women across all major crime categories.” In fact, in examining offense patterns in twenty-seven nations, Simon (2002, p. 1717) found that women’s involvement “in criminal activities across nations is much smaller than would be expected by their approximately 50 percent or so representation in the population of nations around the world.”

Traditionally, it was assumed that at virtually every processing stage in the criminal justice system, women composed between 10 and 25 percent of the population, and this is shown in Figure 9.1. Some have called this differential involvement in crime between females and males the **gender gap**, and as offense seriousness increases, the size of this gap also increases as women are less likely to be involved in violent crimes. Figure 9.1 presents the percentage of women involved at all stages of the justice system. In this section we examine some of the numbers that reflect on women as criminal offenders.

Arrests

One measure of the involvement of women in the criminal process is the number of arrests of female suspects annually.²³ In 2015, over 6.7 million adults (where gender was reported) were arrested in the United States for all crimes, excluding traffic offenses. Of those arrests, the Federal Bureau of Investigation ([FBI], 2016, Table 33) reports 1.8 million (27.1 percent) were females. Therefore, one of our first observations about crime and gender is that females are vastly underrepresented among

arrestees. However, to fully understand the picture of female offenders in the United States, we must go beyond the aggregate numbers to look at the specific offenses for which women are arrested. To do this, we use the benchmark of 27.1 percent (the percentage of female arrestees) to see which crimes result in higher numbers of female arrests.

First, in terms of the *Uniform Crime Reports* Part I crime index, females account for 3.5 percent of the arrests for violent or personal crimes and 18.96 percent of the arrests for property crimes.²⁴ The only Part I offense category for which women are arrested at a higher-than-the-benchmark rate is larceny-theft, where they account for 388,520 (or 43.2 percent) of all the arrests.

Second, there are some interesting arrest numbers beyond the Part I index offenses. For example, the crime for which women constitute the highest percentage of arrestees is prostitution and commercialized vice (20,179 arrests or 64 percent). This is followed by embezzlement (6,154 arrests, 50.2 percent) and fraud (39,618 arrests, 38.7 percent). The remaining categories (in descending order) where women are arrested at higher-than-our-benchmark percentages are forgery and counterfeiting (35.3 percent), liquor law violations (29 percent), offenses against the family and children (28.7 percent), disorderly conduct (28.2 percent), and other assaults (28.1 percent). Taken together, arrests for prostitution, embezzlement, fraud, and larceny-theft account for 20.4 percent of all female arrests, and larceny-theft and fraud represent the bulk of those arrests (428,138 or 19.2 percent of all female arrests). One area where the percentages are not as high as those previously mentioned is drug violations. Women constituted only 22.6 percent of the persons arrested for drug crimes in 2015, but this accounted for 257,999 persons arrested, or about 11.5 percent of all female arrests. This was second only to larceny-theft for the largest single category of female arrests.

Third, while media sources sensationalize women who kill, in reality relatively few women are ever charged with murder. The FBI reported that in 2015, only 11.5 percent of the arrests for murder and nonnegligent manslaughter nationwide were of women. A study conducted by Cooper and Smith (2011, p. 10) for the Bureau of Justice Statistics showed that between 1980 and 2008 the largest group of targets for these women were infants, which was followed by intimate partners, family members, and elders.

Dugan, Nagin, and Rosenfeld (2003) found that intimate partner homicides dropped between 1976 and 1996, as services for domestic violence victims became more prevalent. One unanticipated outcome of their study, however, was that the biggest decrease in murder victims was for males. While the intention of developing more comprehensive domestic violence services was to reduce women's victimization, these programs actually decreased the murder rate of men (Reckdenwald & Parker, 2012). It is possible that since women have better access to resources, they are now able to escape intolerable or abusive situations without resorting to violence.

These arrest numbers highlight several features concerning the crimes women commit. First, women are arrested much less frequently than are men. We will explore some of the reasons for this shortly. Second, the crimes for which women are arrested overwhelmingly are property and nonviolent crimes

and they may be related to their economic status. Casey-Acevedo, Bakken, and Welton (2002, p. 1723) suggested that many women who commit crimes do so to support themselves and their dependent children. Therefore, these women largely commit property crimes as a result of their “economic vulnerability, increased opportunities to commit ‘female’ crimes, increased formalization of law enforcement, and trends in female drug dependency.” Third, three of the crimes for which women frequently are arrested (drug violations, prostitution, and commercialized vice), may be related to their status as abuse victims.

During the 1970s, several scholars, including Freda Adler (1975), challenged our ideas about women’s role in crime. The thought was that as women gained greater freedom, autonomy, and social status, their offending patterns would change and become more like their male counterparts. However, the most recent nationwide arrest figures demonstrate that women continue to be arrested for the same types of crimes they always have (FBI, 2016). Even though Adler’s prediction that female criminality would converge with male offending did not come true, Hartman and Sundt (2011, p. 206) observed that the real importance of her work was to “bring gender and women to the forefront of our thinking.”

Again, except for a few categories, women are substantially underrepresented in arrest statistics in the United States. However, three notions need to be introduced at this point. These are concepts that may explain variations in arrest figures by gender. The first concept is **chivalry**. Scholars who support this approach contend that under most circumstances, criminal justice system actors are more lenient in their treatment of females who break the law (Pollock, 2002; Winfree & Abadinsky, 2017). There may be various reasons that chivalry operates in criminal justice processes. Police officers, prosecutors, judges, and probation officers may see female offenders as not totally responsible for their actions. Romain and Freiburger (2016, p. 193) say this approach “is based on stereotypical notions of femininity—women as irresponsible and passive—that are reinscribed by males in positions of power.” If this is true, criminal justice system agents may hold males more culpable than females.

However, there can be notable exceptions to the idea of chivalry, and this concept must be tempered by the perspective that the criminal justice system’s response may change based on whether a female’s behaviors square with society’s expected gender roles (Fagan, 2002, p. 766). For example, some observers maintain that when females commit distinctly male-like crimes (for example, murder, sexual offending, or robbery), the criminal justice system is likely to respond harshly. Romain and Freiburger (2016, p. 195) call this the **evil woman hypothesis**. Furthermore, members of sexual minorities such as transgendered persons, lesbians, or bisexual women also may receive harsher punishments (see, especially, Belknap, 2007). Thus, women who commit “feminine” crimes are the beneficiaries of chivalry, while women who commit “masculine” offenses may not be treated so benevolently. Gartner (2011, p. 370), for instance, observed that women who display contrition, vulnerability, deference, and sobriety may also be seen as less deserving of severe sanctions, as are middle-class and white women.

The countervailing force to chivalry in the criminal justice system is **paternalism**. Some scholars argue that females are treated more harshly by a

justice system based on **patriarchy** or male privilege than males (see Belknap, 2007; Franklin & Fearn, 2008). Dworkin (2005) said that paternalism “is the interference of a state or an individual with another person, against their will, and justified by a claim that the person interfered with will be better off or protected from harm.”

Paternalism often manifests itself in conservative policies designed to protect groups such as juveniles and females. Relative to criminal justice policies and procedures, paternalism means that the system acts in the best interests of those who are presumed incapable of acting in their own best interest. In the past, as a result of paternalistic attitudes juvenile females who ran away from home or who were suspected of sexual promiscuity were incarcerated “for their own good,” and would sometimes serve longer sentences than males who had committed serious and violent crimes.

A third factor related to women’s differential treatment is **pragmatism**, where prosecutors and judges take into account the impact upon a family of incarcerating a mother (Gartner, 2011). For example, in most cases adult females are the primary caretakers for dependent children. In fact, a study by the Bureau of Justice Statistics found that in 2007 roughly six of ten female prison inmates were mothers with 147,000 dependent children under the age of eighteen (Glaze & Maruschak, 2008). This meant there are about 2.6 million children under the age of eighteen who have at least one parent behind bars (Kristof, 2016) and over 5.1 million children having experienced at least one parent in jail or prison (Annie E. Casey Foundation, 2016, p. 5). Therefore, if they are arrested and incarcerated for any length of time, their children may have to live with other relatives, placed in foster homes, or put up for adoption. In their study of incarcerated parents Glaze and Maruschak reported that the grandparents of children of imprisoned mothers often became the primary caretakers, which was followed by other parents, or family members, although about one in nine of these children ended up in foster care. Thus, sanctions for some offenders might be moderated if judges look at the social and economic impacts of a woman’s incarceration on county or state services. Box 9-1 summarizes some of the research dealing with the paths by which women find their way into crime.

BOX 9-1

Women’s Pathways to Crime

Many of the scholars who have studied women’s criminality have observed that females have different pathways to involvement in crime compared with males, and this results in differential involvement in crime. As a result female offenders require specialized interventions and rehabilitative strategies compared to those developed for male offenders. Interest in this approach has increased in the past decade, and the pathways that have been identified are often a consequence of the research methods used to examine the circumstances of women offenders, such as interviews of women prisoners compared to statistical studies. Like other theories of criminality that are in their developmental stages, the literature on women’s pathways to crime is quite diverse and hasn’t always been supported by research. Brennan and colleagues (2012, pp. 1484–1485) identified five prototypical pathways of female offenders, and their work is summarized as follows.

(Continued)

BOX 9-1**Women's Pathways to Crime (continued)**

Normal or situational female offender: These women have few risk factors and a later onset of criminal behavior and present relatively minor histories of property or drug offenses. Also, these women are less likely to have histories of early abuse or school problems and are unlikely to have serious psychological problems.

Adolescent limited pathway: A less serious temporary pattern of involvement in delinquency and minor offenses with an onset in the mid-adolescent years that escalates through the teenage years but then decreases by early adulthood. Some of these young women, however, can become further entangled in delinquency or crime if they become substance abusers.

Victimized, socially withdrawn, and depressed pathway: These women have experienced early abuse and trauma, which in turn can lead to "social withdrawal, mistrust, hostility, depression, drug abuse, and crime."

Chronic serious offenders: This pathway often starts with early physical and **sexual abuse**, and these women often present behavioral challenges as children, display low levels of self-control, are involved in problems at school, and experience family conflict. These conditions lead to delinquent behavior and the display of aggressiveness and hostility; these girls and women often engage in ongoing crime.

Socialized offenders and socially marginalized groups: These women are described as being "poor, marginalized, and uneducated," and they may have been raised in disorganized families, have experienced ineffective parenting, or were socialized in deprived settings or exposed to alternative subcultures.

Like other examples we have presented, the findings from the pathways research shows that there is no one "true type" of female offender and that we should be careful not to make broad generalizations about women or their involvement in crime (see Joosen et al., 2016 for another version of the pathways models). Perhaps more importantly, given the diversity of the pathways identified by these researchers, we have to acknowledge that no single intervention will work with all of these offenders.

Detention

In comparison with males, at year-end 2015 females made up only about 99,100 (just over 14 percent) of the nation's 693,300 jail inmates; this was up from almost 71,000 in 2000. Much of this increase in women's incarceration has come from sparsely populated rural counties and Swavola, Riley and Subramanian (2016, p. 7) reported that "Between 1970 and 2014, the number increased from approximately 1,700 to 51,600." Although the numbers by gender were not reported, at year-end 2015, 60 percent of the nation's jail inmates were in pretrial status and 40 percent had been convicted of an offense (Minton & Zeng, 2016). As the last national-level description of offenses was carried out in 2002, we do not have a very good idea of the offenses that led to these women's incarceration. In 2002, only 17 percent were held on violent crimes, while about one-third of inmates (32 percent) were incarcerated for property offenses, 29 percent for drug crimes, and about one-fifth (21 percent) for public order offenses (James, 2004, p. 2).²⁵

Many of these women are in jail for technical violations of their probation (Swavola et al., 2016) or because they could not make bail.

While jail inmates tend to be poor and suffer from health and addiction related problems women tend to have more challenges to overcome. In their study of sentenced jail inmates, Bronson, Stroop, Zimmer and Berzofsky (2017, p. 3) found that a higher proportion of women were dependent on drugs or were drug abusers compared to male jail inmates (72.3 and 61.8 percent respectively). A greater number of these women, compared with male inmates, had used drugs in the month before their arrest (59.7 and 53.7 percent respectively) and more reported having used drugs at the time of their offense (45.5 and 35.8 percent respectively). Additionally, these women were more likely than male prisoners to have been regular users of cocaine or crack, methamphetamine, or heroin (Bronson et al., 2017).

Compared with male jail inmates, women inmates also tend to have higher rates of psychological and physical health problems. In their national-level study Bronson, Maruschak, and Berzofsky (2015, p. 5) reported that 9.3 percent of the general population has a disability, but one-half of female jail inmates reported having at least one disability (49 percent) compared with 39 percent of males. Some of those disabilities are related to mental health problems, and while about 5 percent of Americans had serious psychological distress, Bronson and Berzofsky (2017, p. 3) found that almost one-third (32.3 percent) of female jail inmates had serious psychological distress and over two-thirds (67.9 percent) had histories of mental health problems. Last, over two-thirds (66.6 percent) of female jail inmates reported suffering from chronic health conditions, and one-fifth (20.1 percent) had previously had an infectious disease (Maruschak & Berzofsky, 2015, p. 5) and these totals were much higher than reported by male inmates.

Given those findings and the fact that most of these women are nonviolent offenders, we must ask the question: Even with relatively small percentages, why are these women being held in jail? For the most part, the answer is not that they represent a danger to themselves or to society (although some do); they are there because they cannot make bail prior to trial. Moreover, women of color are often the ones who pay the bail of their partners or relatives accused of committing crimes (Bryan, Allen, Lytle Hernandez & Dooley-Sammuli, 2017).

A review of the literature shows that many of the detained women suffer double or even triple degrees of social marginalization: They are female, they are minorities, and they are poor. These combined disadvantages have been called **intersectionality**, and Paik (2017, p. 5) says this occurs when race, class, and gender “identities overlap, crossing over into one another in various ways,” and that “[a]ny analysis of crime that looks at racial, class, or gender disparities should take account of these intersecting identities.”

Prosecution and Adjudication

As elsewhere in the criminal process, women are vastly underrepresented in the prosecution and adjudication of suspected offenders. At least four explanations are possible for this underrepresentation.

First, it is likely that females simply commit fewer crimes. They may be socialized by their families and by society generally to behave in certain ways, and

delinquency and criminality are viewed as distinctly “unfeminine.” Bottcher (2001, p. 923) offered five factors that contribute culturally to the differences between males and females in regard to delinquency:

1. Youths tend to belong to highly sex-segregated friendship groups, and the nature of these groups supports or restrains delinquent behavior.
2. Males are exposed to more crime-prone daily activities than are females.
3. Males tend to play the dominant role in practically all adolescent activities.
4. The transition into adulthood is different for males and females (with females generally assuming adult-like roles sooner).
5. There tends to be less social support for female delinquency than for male delinquency.

Second, as Fagan (2002, p. 764) reminds us, “gender is likely the strongest predictor of criminal involvement,” but we may not know why. However, at least in regard to violent crimes, it is possible that not only culture plays a role but also biology. For instance, testosterone levels in males may contribute to their aggressive behavior. No matter how controversial this sounds, some researchers believe that women may be wired differently biologically, and these differences help restrain them from lives of crime.²⁶ There has been increased interest in better understanding the role of biological factors in the study of antisocial and criminal behavior in recent years (see for example: Choy, Raine, Venables & Farrington, 2017). In Chapter 14 we describe how our knowledge of adolescent brain development, which is a neurological factor, led to the Supreme Court decisions that mitigated punishment severity for youths convicted of serious crimes. However, one of the problems we encounter is that social scientists generally have little understanding about biology, and many fear that a renewed focus on biological or genetic factors might increase discriminatory or racist practices. Regardless of these fears, it is likely that biological research will inform our understanding of criminality in the future, including the gender gap in crimes committed by women and men.

Third, as we previously have discussed, the justice system may respond in much different ways to women and men who commit crimes. While criminal justice personnel may be less chivalrous today than in the past, we cannot discount the presence of chivalry and the lower levels of suspicion associated with females (Smith, Makarios & Alpert, 2006). Finally, as female students are quick to point out in class, women may be cleverer than the men, and they do not get caught as quickly or as often.

Criminal Sanctions

In terms of correctional sanctions, at year-end 2015, over 4.65 million Americans were on probation, and women represented 1.16 million of them. Their percentage of the probation population increased from 22 percent in 2000 to 25 percent in 2015 (Kaeble & Bonczar, 2016).

Relative to prison inmate populations, Carson and Anderson (2016) reported 1,526,800 persons in prison at year-end 2015. Women represented 111,495 of these inmates, or 7.3 percent nationwide. It is noteworthy that the female

prison population nationwide continues to increase at a rate faster than that of males. In fact, from 2005 to 2015 the number of women in federal and state prisons increased an average of 0.5 percent compared with an average increase of 0.2 percent for men. Nevertheless, men were almost fourteen times more likely to be sent to prison than were women (Carson & Anderson, 2016, p. 8). Bonczar (2003) noted, for instance, that if incarceration rates are unchanged, women born in 2001 have a 1.8 percent chance of going to prison, while men have an 11.3 percent likelihood that they will be imprisoned in their lifetime.

What seems to be driving the increases in women's prison populations? Figure 9.2 shows the percentage of women prisoners held in state facilities by the most serious offense. Like the statistics for jail incarceration, women are less likely to be imprisoned for violent crimes than their male counterparts, but more likely to be imprisoned for property or drug offenses (Carson & Anderson, 2016, p. 14). At year-end 2014 there were about 31,000 women imprisoned in state and federal prisoners for drug crimes (Carson & Anderson, 2016).

A report by the Women's Prison Association said that "despite their roles as relative minor players in the drug trade, women—disproportionate numbers of them African American and Latina—have been 'caught in the net' of increasingly punitive policing, prosecutorial, and sentencing policies" (Frost, Green & Pranis, 2006, pp. 23–24). Calhoun and her colleagues (2010, p. 27) support this view: "The increase of the number of women in the nation's prison population largely has been due to incarceration for drug-related offenses." While drug use does not automatically translate into criminality, Greene (2002, p. 1729) emphasized that conservative policy changes witnessed by "[h]arsher drug laws and mandatory

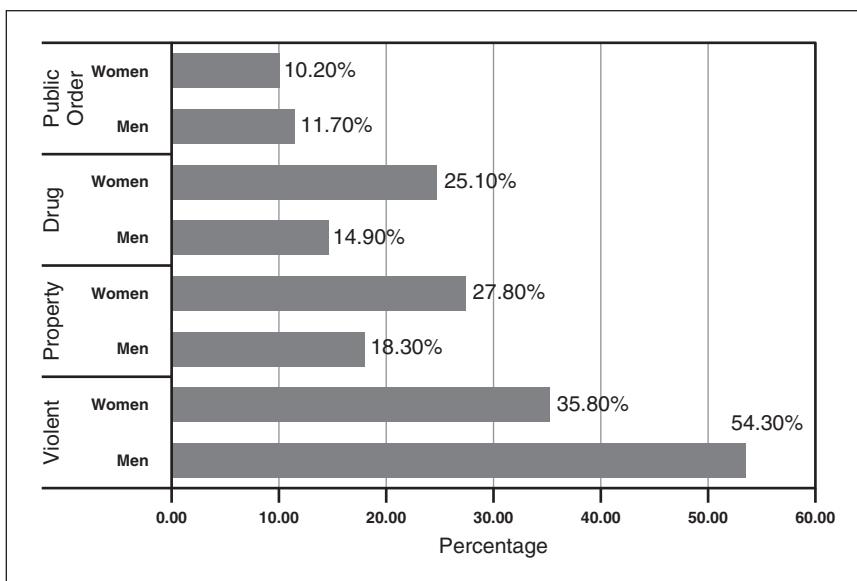


Figure 9.2 Most Serious Offense: State Prisoners on Dec. 31, 2014

SOURCE: Carson & Anderson (2016)

sentences have increased the number of incarcerated women so sharply that some experts have referred to the War on Drugs as a ‘war on women.’” This means that much of the female inmate population increase is not the result of increased criminality, but instead it has resulted from policy changes, especially drug-control policies (Harmon & Bopp, 2016).

To better understand female offenders, we need to describe the types of women sent to prison and to look at what kind of life awaits them once they arrive. First, we should acknowledge that there is not an equal likelihood of all women going to prison. Building on our discussion of race and ethnicity from Chapter 8, it should be apparent that minority females are overrepresented in U.S. prison populations.²⁷ In fact, the typical female prison inmate is a racial or ethnic minority, age twenty-four to twenty-nine years. In 2015 females were most commonly incarcerated for violent crimes (35.87 percent), property crimes (27.89 percent), and drug offenses (25.1 percent). Many were raised in single-parent homes, and they likely were the victims of sexual abuse and/or they witnessed violence in their homes growing up. These women often are high-school dropouts who use drugs, may have engaged in prostitution, and report (60 to 80 percent of the time) having been the victims of some sort of abuse as adults (Carson & Sabol, 2016; Greene, 2002, p. 1729). This population presents a number of challenges, and females arrive in prison with different needs than their male counterparts (Brennan et al., 2012; Wright et al., 2012). As we will see shortly, prisons are not always successful at meeting these needs.

After examining the profile of the women in prison, we need to turn our attention to the prisons where these women are held. For the most part in the United States female inmates are housed in exclusively female prisons. Like many of the prisons where men serve their sentences, women’s prisons frequently are crowded and typically suffer from tight budgets. Female inmates are more likely than their male counterparts to live in dormitory units, but both groups of inmates have a variety of treatment needs that prisons may not be able to address. The bright side of the picture for female inmates is that women serve shorter sentences on average than men, and the level of violence is much less in women’s prisons than in those for men (Mays & Winfree, 2014).

One problem faced by male and female prison inmates alike is sexual abuse. National level studies of sexual victimization carried out by the Bureau of Justice Statistics show that rates of inmate-on-inmate sexual victimization is higher in women’s prisons (6.9 percent reported being victimized) whereas 1.7 percent of male prisoners reported being victimized (Beck, Berzofsky, Caspar & Krebs, 2013, p. 17). Those researchers also found that staff sexual misconduct was almost the same against male and female prisoners (2.4 and 2.3 percent respectively). At times, sexual relationships may appear consensual; however, whenever one person is in a higher position of power and authority than another, the issue of consent becomes problematic.

Women also are present in the nation’s parole population, but again in fairly small percentages. At year-end 2015 there were about 870,500 people on parole in the United States. Of these parolees, just over 113,000 (13 percent) were women, and this percentage has remained relatively constant since 2000 (Kaeble & Bonczar, 2016, p. 7).

Finally, a relatively small number of women have received capital sentences in recent years. On July 1, 2017, there were 2,843 inmates on death row in the United States, and fifty-three of them (approximately 1.9 percent) were female (Death Penalty Information Center, 2017). Between 1977, when the Supreme Court authorized executions under newly rewritten capital statutes, and July 1, 2017, there were 1,465 executions in the United States, and 16 (1.1 percent) of these were women (Death Penalty Information Center, 2017).

A brief summary seems in order to provide some perspective on the criminal sanctions given to female offenders in this country. For instance, although they represent 52.9 percent of the adult population, women represent approximately 14 percent of the nation's jail inmate population, 25 percent of the adult probation population, 7.3 percent of the prison inmates, 13 percent of those on parole, and less than 2 percent of the inmates on death row. This means that women are vastly underrepresented in all of these sanctions, are most likely to receive probation, and are least likely to receive a capital sentence. Nevertheless, although women are underrepresented in the arrest, detention, prosecution/adjudication, and criminal sanctions numbers, this does not necessarily mean that they are treated fairly or equitably by the justice system, relative to men. The next section explores some of the challenges facing female offenders.

Treatment and Rehabilitation Resources

While women remain a small percentage of those individuals under some form of correctional sanctioning in the United States, two questions remain: Do they receive a proportionate amount of the dollars and programs allocated to correcting criminal offenders; in other words, do they receive their fair share? Furthermore, do they receive the types of gender-responsive rehabilitative or treatment resources they need to address the problems that confront them and their pathways to crime?

As noted previously, women represent about 14 percent of the nation's jail population and 7.3 percent of the prison population. Taking the total of persons under correctional supervision into account, women constitute 202,600 of 2,145,100 inmates (9.4 percent) of the nation's correctional population (Kaeble & Glaze, 2016, p. 15). As we will see in the next section, women often come into the criminal justice system with distinctive physical and psychological needs. To what extent do the nation's prisons and jails address these needs? We will briefly explore the issues of (a) medical and psychological services, (b) drug and alcohol treatment, (c) job training, and (d) family-related issues.

Individuals who are admitted to jails and prisons have generally lived on the margins of society; most tend to have poor medical care histories, and many have chronic physical and mental health conditions (Bronson & Berzofsky, 2017; Bronson et al., 2015; Maruschak & Berzofsky, 2015). Women obviously have distinctive medical needs compared to men. Past research has indicated that jails and prisons do an inadequate job of meeting these physical needs, particularly in the areas of reproductive health (Guthrie, 2011). As a result, many states have been the targets of lawsuits by female inmates dealing with the issue of medical care. Schlanger's (2003) survey of large jails and prison systems, for example, found that the number one source of correctional litigation was medical issues,

and a lack of adequate health care contributed to the *Brown v. Plata* (2011) decision of the Supreme Court that forced California to reduce prison overcrowding.

Additionally, a number of female inmates enter the correctional system with sexually transmitted infections, including HIV/AIDS, typically contracted through heterosexual contacts, intravenous drug use, or both. In this area, the difference between male and female inmates may be more a difference of degree (that is, a higher percentage of females with these problems) than a difference of kind. In fact, Maruschak and Bronson (2017, p. 4) reported that at year-end 2015, 1.3 percent of female state and federal prisoners were HIV positive (down from 2.1 percent in 2007, see Maruschak, 2012), compared with 1.3 percent of male prisoners. Access to life-saving medications have reduced the death rate from HIV in prisons, and Maruschak and Bronson report that in 2015 only one woman died from AIDS.

One challenge is unique to female inmates, however: Every year pregnant females come into local, state, and federal correctional facilities and pregnancies behind bars present special problems. There is a lack of current statistics that describe the scope of this challenge, but Maruschak (2009, p. 1) reported that about 5 percent of women jail inmates were pregnant at the time of admission as were 4 percent of women admitted to state prisons, and 3 percent of women federal prisoners (Maruschak, 2008). Applying these estimates to the number of female admissions in 2015 suggests there were 2,899 pregnant women admitted to prisons. If 5 percent of the women in jail on December 31, 2015 were pregnant, that would add another 4,955 women, and together our estimate suggests there are about 8,000 pregnant women behind bars²⁸ on any given day in U.S. jails and prisons.

One very controversial issue about women giving birth in jail or prison is the practice of shackling women who are delivering their babies. In many jurisdictions women are shackled (with handcuffs or ankle restraints) to their beds while in labor, delivering their baby, or post-partum. The practice has been described as dehumanizing and degrading for these women and may interfere with medical care. While the practice is forbidden in the federal Bureau of Prisons, the U.S. Marshals Service and Immigration and Customs Enforcement, it is still followed in many state prison systems and jails, although states have different regulations on the circumstances when restraints can be used (Thomas & Lanterman, 2017). Another controversial challenge is what to do after a baby is born, and whether the inmate mother should raise the infant. In many instances, newborns as young as two days old are taken from their mothers and given to other family members. If a family placement is not possible, these children are sent to foster homes or placed for adoption. Some prisons, by contrast, offer comprehensive programs for infants and their mothers, and the babies can stay with their mother for several years (Campbell & Carlson, 2012), although Haney (2013) found that despite their good intentions to provide a nurturing environment, some of these programs perpetuate coercive controls over the inmates.

Most large correctional facilities have a general medical staff on duty on a regular basis. Others have them on call. Few facilities have medical specialists such as obstetricians or gynecologists on staff; thus, their visits are on an as-needed basis and are much more sporadic. There are two key challenges in

correctional health care for women. First, women's medical treatment is often based on models developed for male prisoners, and women typically require more care. Second, lack of proper preventive care contributes to long-term illness or the unnecessary transmission of disease to correctional and community populations. The same also may be true of psychological or psychiatric services for women, a significant number of whom have suffered physical, mental, and sexual abuse prior to incarceration (Lynch et al., 2012).

As we have mentioned, the "war on drugs" in the United States has had a major impact on the general incarceration rates (Harmon & Bopp, 2016), and this may have disproportionately affected women. A number of these incarcerated females also have conspicuous drug- and alcohol-use histories (Bronson, Stroop, Zimmer & Berzofsky, 2017). Many times females report a greater prevalence of substance abuse than their male counterparts in jails: 72.3 percent versus 61.8 percent and for state prisoners (69.2 percent for females and 56.9 percent for males) (Bronson et al., 2017). Some of this substance abuse may result from being involved with males who also are heavily involved in drug and alcohol use. Some of it may be attributable to past problems with physical and sexual abuse; substance abuse may be a form of self-medication to deal with the associated post-traumatic stress. Whatever the cause for incarceration, jails and prisons need to provide adequate treatment for both the male and female inmates.

What is our record on providing a range of rehabilitative interventions to state and federal inmates in the United States? Kruttschnitt (2016, p. 19) observes that "treatment programs for women in prison are scant, generally poorly evaluated, and largely focused on substance abuse." Even when it comes to drug and alcohol treatment, these programs are too few and greatly underfunded. Practices that deny women access to gender-informed rehabilitative programs in corrections limit the success of these women when they re-enter society (Gobeil, Blanchette & Stewart, 2016). The issue of offender rehabilitation in corrections is addressed in Chapters 11 and 12.

Job training, particularly in prisons, is essential given the fact that many women will leave prison to resume their roles as primary caregivers and bread-winners for their dependent children. In the past, women's job training programs have been severely lacking, and where they did exist often they were stereotypical (Pollock, 2002). Therefore, women have been taught domestic skills, such as cooking and sewing, and not job skills that would allow them to be financially self-supporting for themselves and their children. While women offenders have participated in prison industries programs, such as those offered through the Federal Bureau of Prisons, research shows that this has little effect on their recidivism once released and Richmond (2014) contends that more research must be done in order to determine the types of programs that are effective in reducing recidivism.

Family-related issues are especially critical for incarcerated females. We often ask in class: What happens to the children when Dad goes to prison? The answer typically is that Mom keeps the children. The follow-up question is, then: What happens to the children when Mom goes to prison? The answer is obviously more complicated. In most instances grandparents or other relatives take over child

care, and the children of about one in nine state prisoners are placed in foster care or some other type of temporary living arrangement (Glaze & Maruschak, 2008). Regardless of who takes care of them, studies have found the children of incarcerated parents have a higher risk of involvement in the justice system, psychological problems or antisocial behavior, and poor educational achievement (Martin, 2017).

Maintaining relationships with imprisoned individuals is often expensive and difficult to manage for family members (Rabuy & Kopf, 2015). Contact by phone can be expensive, as most prisons subscribe to expensive phone call systems (Goldman, 2012). Visits might also be rare due to the fact that most states have only one women's facility, and it might be located a significant distance from the urban areas that are home to most family members. In the end, incarceration makes the difficult job of parenting even more challenging.²⁹ While maintaining contact can be frustrating and expensive, it might be a good investment, as research shows that receiving visits in prison contributes to lower recidivism rates (Duwe & Clark, 2013; Mears, Cochran, Siennick & Bales, 2012). Box 9-2 provides an overview of the ways in which correctional programs can treat female offenders more effectively.

BOX 9-2

Gender-Responsive Correctional Programs

Historically, correctional administrators paid little attention to gender differences when developing rehabilitative programs, meaning women often received the same types of interventions as men. One of the outcomes of the research examining the pathways to women's crime was an increasing acknowledgment that effective correctional programming must take into account women's unique circumstances. These gender-responsive strategies acknowledge the factors that lead to women's involvement in crime, which Wright and Cullen (2012, p. 1613) summarized as "victimization, mental health problems, marginalization, relationship difficulties and substance abuse." As a result interventions for women must respond to their unmet needs, and we must acknowledge the relatively low risks that most women offenders pose.

While we address the issue of assessing risk, need, and offender responsivity at more length in Chapter 11, we present Bloom, Owen, and Covington's (2003, pp. 76–84) six guiding principles of implementing successful gender-responsive programs:

- 1. Acknowledge that gender makes a difference:** Correctional programming for women cannot be based on models developed for males, as these groups have different pathways to criminal involvement, have different needs, require different approaches to supervision, and pose different risks.
- 2. Create an environment based on safety, respect, and dignity:** Most female offenders are admitted to jail or prison with histories of emotional, physical, and sexual abuse, and they require a safe and supportive environment that reduces the possibility of further victimization.
- 3. Develop policies, practices, and programs that are relational and promote healthy connections to children, family, significant others, and the community:** Focusing upon developing healthy relationships is a key to overcoming adversities such as discrimination, isolation, and victimization as well as problems with substance abuse and mental health.

4. Address substance abuse, trauma, and mental health issues through comprehensive, integrated, and culturally relevant services and appropriate supervision: Effective correctional programs cannot exist in a vacuum, and they should be based on interventions that rely upon well-trained staff members who provide a safe environment and who implement programs that lead to a safe and seamless transition to the community.
5. Provide women with opportunities to improve their socioeconomic conditions: Most of the women admitted to correctional facilities have lived on society's margins and have poor work histories. As a result they require skills training and vocational support in order to develop a career that provides them with a living wage once returned to the community.
6. Establish a system of community supervision and reentry with comprehensive collaborative services: The transition from institution to the community can be very difficult unless agencies support the efforts of ex-prisoners to find shelter, meet their basic needs, reunite with children, as well as access to transportation and employment.

While it is relatively easy to develop these "wish lists," it is more difficult to get agencies to coordinate these services in a holistic manner. This difficulty is increased in two ways. First, during tough economic times interventions for offenders must compete against programs for more sympathetic groups, such as children or senior citizens. Second, many of these women must also confront the collateral consequences of imprisonment, where they may be denied welfare benefits, federal housing, as well as access to many types of jobs.

WOMEN AS CRIME VICTIMS

In addition to women being offenders processed by the criminal justice system, we must also consider women as victims within the same system. Although most women victimized by crime do not become criminal offenders, some do. In this section, we briefly explore the victimization of women and the responses to that victimization by agents of the criminal justice system.

First, it is important to acknowledge that just as is the case with offenders, men are more frequently crime victims than are women. Second, the victimization encountered by women may be different in both type and degree from men's. We focus on physical, sexual, and emotional victimization and address the fact that for some women, victimization begins early in childhood and continues well into their adult lives. The terms **child endangerment** and **child maltreatment** often are used in regard to the phenomenon we commonly call child abuse. Child endangerment exists when parents or guardians place a child in jeopardy physically, emotionally, or sexually. The Centers for Disease Control and Prevention (2016) defines child maltreatment as "Any act or series of acts of commission or omission by a parent or other caregiver that results in harm, potential for harm, or threat of harm to a child." At the least serious level, we have various forms of neglect, including **physical neglect**, **emotional neglect**, and **educational neglect**. At the more serious level, there is **physical abuse**, sexual abuse, and **emotional abuse**, for example. While not all cases are reported, we know that in 2015 there

were almost 700,000 cases where children were victims of abuse and almost 1,600 of them died as a result of maltreatment (Child Welfare Information Gateway, 2017, p. 2) These numbers give us a measure of the scope of abuse and neglect of youngsters, and some of this abuse carries over into adulthood.

Beyond the various forms of neglect and abuse that they suffer as children, females also are the victims of both traditional criminal victimization and **domestic violence or intimate partner violence** as adults. In terms of violent criminal victimization, the National Crime Victimization Survey estimated that 20.8 of every 1,000 women experienced a violent crime in 2016, and 7.5 of every 1,000 women experienced a serious violent crime (Morgan & Kena, 2017, p. 9). Applying that estimate to the entire population of women in the United States in 2016 suggests that a substantial number of women were victims of violence. This rate of violent victimization is somewhat lower than that of men, who were victimized at the rate of 21.4 for every 1,000 men. The differences in victimization rates can be explained in several ways.

When it comes to homicide, 21.3 percent of all homicide victims were women in 2016 (FBI, 2017). Some women are at higher risk of being murdered, and Figure 9.3 shows the results of a Centers for Disease Control and Prevention study. Those researchers found African Americans are at the highest risk of victimization (4.4 murders per 100,000 residents), which was almost three times the rate of white women (1.5 murders per 100,000 residents) (Petrosky et al., 2017). Of these homicides—where the relationship between the offender and victim was known—over one-half (55.3 percent) were committed by current or former intimate partners.

The higher male rates of victimization raise the question of why this occurs. In most instances women take precautions that prevent victimization, and they

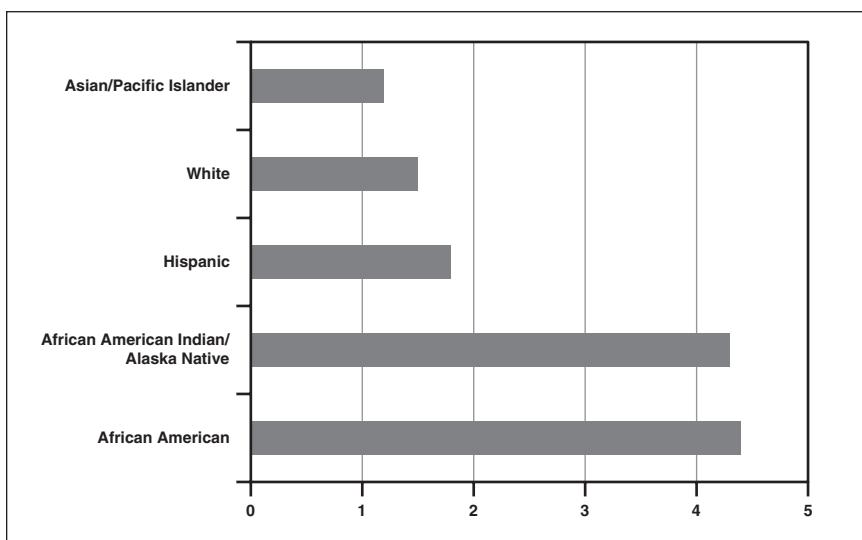


Figure 9.3 Women's Murder Victimization Rate per 100,000 U.S. Residents, 2003 to 2014

SOURCE: Petrosky et al. (2017)

act much more cautiously than men. Either by nature or by socialization, women tend to be more careful or risk averse than men. Additionally, since they do not engage in as much criminal activity as men, women limit their exposure, thereby reducing their vulnerability, to many types of crimes. Furthermore, even in some risky lifestyles (such as gang activity), females tend to be the beneficiaries of less violent treatment (Peterson, Miller & Esbensen, 2001). Last, victimization rates may differ because they are not reported to the police, and many acts of domestic violence, stalking, and rape—where the victims are overwhelmingly women—are often unreported. Morgan and Kena (2017, p. 7) found that less than one-quarter (22.9 percent) of rape or sexual assaults and only 49.1 percent of domestic violence incidents were reported to the police. We examine some of the reasons for these differences in the following pages.

In addition to traditional or conventional criminal victimization, women uniquely are at risk for rape/sexual assault and intimate partner abuse. Franklin and Franklin (2009) identified gender differences in terms of perceptions of victimization, and Dobbs (2002) speculated that the general fear of crime that women have really is a fear of sexual assault. As we have previously mentioned, some of these assaults occur before women turn eighteen years of age (even at preschool ages), but some also occur after age eighteen. In most instances, the offender is someone known to the female, and research carried out in the National Crime Victimization Survey reported that 80 percent of rapes or sexual assaults of eighteen- to twenty-four-year-old non-students were committed by non-strangers (Sinozich & Langton, 2014). These non-strangers include casual acquaintances, intimate partners and relatives.

We do not have reliable figures on the number of rapes committed each year. Rape and sexual assault are among the UCR Part I Index offenses that are least likely to be reported to the police, and there are a variety of explanations for the low reporting rates. A key factor is the embarrassment felt by the victim and the perceived potential for unwanted publicity. In 2017 the political, media, business, and entertainment industries were rocked by a series of scandals due to the victimization of women by men in powerful positions. This led to the Me Too movement and the 2017 *Time Magazine* persons of the year were the Silence Breakers; women and men who reported their victimization even though their stories often raised uncomfortable scrutiny of their personal lives.

Another issue that might affect rates of reporting sexual violence is the relationship between the victim and the offender (see Johnson, 2002; Schwartz et al., 2001) and the potential for ongoing relationships or contacts. There also can be concerns over being believed, as well as the fear of retaliation by the offender if the offense is reported. Finally, many women are reluctant to go through the criminal justice process because of what faces them at a trial. RAINN (2017), an interest group that calls itself the nation's largest anti-sexual violence organization, reports that of 1,000 rapes, only 310 are reported to police, and of those offenses, 57 individuals were arrested, 11 cases were referred to prosecutors, and only 6 offenders will be incarcerated. Given those statistics, it is understandable why so few people report their victimization.

Consistent with the findings reported above, interviews with victims of sexual assaults conducted by Cohn and colleagues (2013, pp. 466–467) revealed that three factors were related to the likelihood of reporting these offenses to the police: victims did not want others to know about the offense, some victims did not consider the rape as a crime, and others were concerned about the responses of the justice system. In their study of victims of sexual violence, Ceelen, Dorn, van Huis and Reinjnders (2016, p. 12) found that “those who had used alcohol or drugs, who were assaulted by an intimate partner, and who did not suffer injuries seem to be at a higher risk for non-reporting.”

It is possible that a victim’s perceptions of hostility from the justice system have a basis in reality in both the investigation of a crime and in court appearances. For example, several scholars have identified the notion of **intra-female gender hostility**, which has been described as when women are hostile toward or have a lack of sympathy for female crime victims. Wentz and Archbold (2012) identified this trait in their study of police officers, while Batchelder, Koski, and Byxbe (2004) found support for this proposition in their study of simulated jury deliberations. While this hostility may not manifest itself in actual investigations or trials, it once again demonstrates the types of obstacles women face in obtaining justice when they are crime victims.

Although we do not know how many people suffer from intimate partner violence (which is also known as domestic or family violence), we do know this is a crime that is substantially underreported and that it is a crime with a high percentage of female victims (Reaves, 2017a). Sometimes the intimate partner abuse suffered by women is psychological, but it can be physical and sometimes it is sexual. However, no matter what form the abuse takes, the result is “harm to the victim, and [it is] a demonstration of control over the victim by the offender” (Dobbs, 2002, p. 1727). It is possible that increased awareness of violence toward women, the expansion in the services available for domestic abuse victims, as well as the more powerful roles that women play in society today have reduced levels of intimate partner violence. In her report for the Bureau of Justice Statistics, Shannan Catalano (2012a, p. 1) reported that intimate partner violence rates had decreased by almost two-thirds (64 percent) between 1994 and 2010. The most extreme forms of intimate partner violence result in death, and Cooper and Smith (2011, p. 10) observed that “Female murder victims (41.5 percent) were almost six times more likely than male murder victims (7.1 percent) to have been killed by an intimate [partner].”

Another crime where women are victimized at higher rates than males is stalking. According to Catalano (2012b, p. 3) there are about 3.3 million stalking cases every year, and most of the victims are female. Rugala, McNamara, and Wattendorf (2004, p. 9) say this offense is characterized by a “pattern of harassing behaviors intended to frighten, intimidate, terrorize, or injure another person,” and an increasing amount of this behavior now takes place online. In response to these offenses, every state has enacted legislation to sanction these offenders, yet we have little idea of how often perpetrators are charged, or what happens to them if convicted. However, we do know that stalking reduces the quality of life for many women, it has serious long-term consequences for a number of victims, and it ultimately ends in the murder of some women.

When examining male and female crime victims, three conclusions can be drawn. First, there are different victimization patterns. For most crimes, women are significantly less likely to be victimized than men. However, for the crimes of rape and sexual assault, they are much more likely to be victimized (see National Crime Victimization Survey, 2011). Second, women are much more likely than men to be victimized by someone they know. This especially is true of intimate partner violence. In some instances, women who have been abused over a long period of time finally retaliate and kill their victimizer. Third, no matter what the likelihood of victimization actually is, women seem much more fearful of crime than are men.

It is important to note a final sense of victimization often encountered by women: Women who are victims of physical and sexual assaults, such as rape and domestic violence, often express an added sense of victimization by the criminal justice system. Although states now have laws that prevent attorneys from questioning a woman's past sexual history, rape cases often hinge on the degree to which the victim may have "provoked" the crime against her.

In terms of domestic violence, Reaves (2017a, p. 1) estimates that about 1.3 million nonfatal domestic violence victimizations occur each year, although only about 56 percent are reported to the police. Figure 9.4 shows the reasons provided by victims why these offenses are not reported for all types of victimization (e.g., serious violence versus a simple assault).

In her qualitative study of victims of intimate partner violence, Leisenring (2012) found that some women were dissatisfied with the police responses to their calls for help, and their experiences with the police influenced whether they would rely upon the justice system if victimized again. Some, for instance, may be treated in an uncaring way by police officers and court workers, and there may be instances in which prosecutors refuse to take their cases. Furthermore, since many jurisdictions now have mandatory arrest policies, some women might be charged with domestic violence offenses if they attempt to defend themselves, which is another unintended consequence of laws that are designed to protect

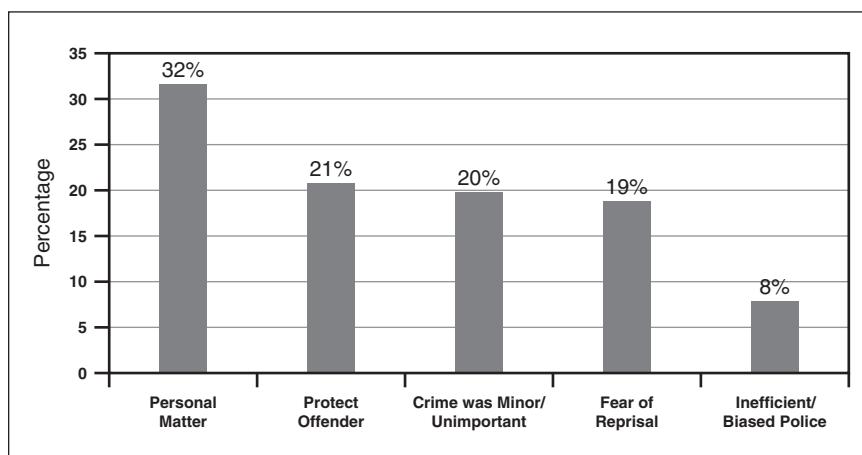


Figure 9.4 Reasons For Not Reporting Domestic Violence Offenses to the Police

SOURCE: Reaves (2017a)

them. In response to that challenge, Hirschel and Buzawa (2012) reported that thirty-four states had enacted legislation that directs police to identify and arrest the primary aggressor. Altogether, women's experiences with the justice system may contribute to feelings that they are on trial and thus suffer a double sense of victimization, once by the offender and again by the criminal justice system. Box 9-3 addresses the issue of sexual assaults that occur on college campuses.

Box 9-3

Campus Sexual Assaults: Can Justice Be Served Outside the Criminal Justice System?

There is growing publicity about campus sexual assaults (CSA), the impact those crimes have on the survivors, and the best way to reduce the number of these crimes. Some researchers have said that there is a campus rape culture, where sexual violence is supported or tolerated (Jozkowski & Wiersma-Mosley, 2017) while Stewart (2016) claims that a **moral panic**, inflamed by activists, may be occurring where "blame for a real or perceived problem is attached to a specified group of wrongdoers," and the "threat posed by this group is exaggerated, often wildly, beyond the threat that these wrongdoers actually pose." The wrongdoers in these cases are male students. As a result of the threats these men pose, college administrators tasked with protecting students have been developing several CSA reduction strategies that fall outside the criminal justice system.

Like other issues we have addressed, there is a shortage of accurate information about the scope of campus sexual assaults. Fedina, Holmes, and Backes (2016, pp. 11–12) summarized the findings from thirty-four studies of college women and they found that between 0.5 and 8.4 percent of students reported being raped, 1.8 to 34 percent had been subject to unwanted sexual contact (e.g., unwanted kissing, fondling, or other sexual touching), and 1.8 to 14.2 percent had reported being raped while incapacitated, such as being under the influence of alcohol. Perkins and Warner (2017) also examined the research and found higher estimates of sexual violence. Although many campus violence studies have significant limitations—such as relying upon small samples and having no consistent definitions of sexual violence—the problem is serious and significant. If 2 percent of college women were raped in 2016, there would be almost one-quarter million victims, based on 11.7 million women attending U.S. colleges and universities in 2016 (see National Center for Education Statistics 2017), and that total does not count any male victims.

A growing number of colleges and universities have developed protocols whereby victims of sexual violence can access campus judicial systems if they do not want to formally report their victimization to the police or if such efforts were unsuccessful (Konradi, 2017). Writing about campus sexual assault Gialopos (2017, p. 141) says that in the past "sexual violence was handled informally" by college officials and "administrators were often likely to quietly sweep sexual violence under the rug, thereby silencing its victims." Failing to punish sexual offenders re-victimizes survivors and some of them withdrew from their studies rather than having to run into the person who harmed them. Moreover, by failing to formally sanction these offenders, they were free to victimize other women.

Sexual offending is one of the most under-reported crimes (Morgan & Kena, 2017). For students reluctant to report their victimization to the police, the investigation of these acts and sanctioning offenders was carried out by the campus judicial systems. A challenge for campus administrators is these judicial systems were set up to manage noncriminal acts such as cheating, and they were never

intended to investigate serious and violent crimes and punish offenders. As a result, campus sexual assault victims have reported being re-victimized by the process, and especially when no meaningful sanctions are imposed on the accused. Dozens of students accused of committing these crimes, by contrast, have sued universities after receiving some punishment because they contend that the judicial systems offered few due process protections.

Konradi (2017) asks the question of whether justice can be served on campus, and like many other issues we have confronted, there are no simple answers. While the criminal justice system is set up to investigate serious offenses, determine the guilt of the accused, and punish wrongdoers, many survivors are reluctant to formally report their victimization. Most of the persons accused of serious crimes, by contrast, want the protections of the justice system. This returns us to the question we posed in the title: Can justice be served outside the justice system?

SEXUAL IDENTITY, SEXUAL ORIENTATION, AND CRIME

We do not have any way of knowing the numbers of people within the lesbian, gay, bisexual, transgender, and queer (LGBTQ) community that commit crimes, since there is no system for accounting this dimension of offender demographics. However, several researchers have estimated their prevalence at different points in the justice system. Ilan Meyer and colleagues (2017) used data from the National Inmate Survey to estimate the percentage of sexual minorities in American jails and prisons. Their definition of sexual minorities included those who identify as being gay, lesbian, or bisexual, or who reported having sex with persons of the same gender (but who do not identify as being gay, bisexual, or lesbian) prior to their admission to the facility. The results, presented in Figure 9.5

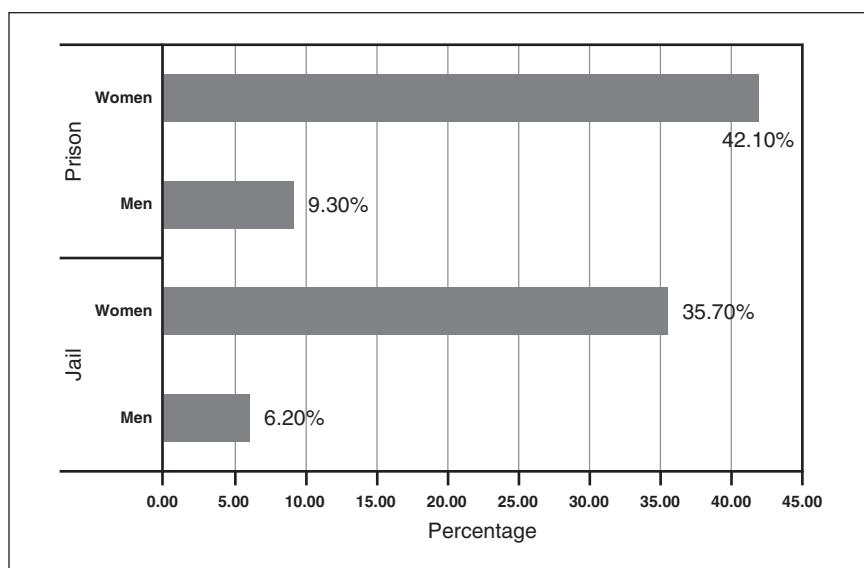


Figure 9.5 Percentages of Inmate Sexual Minorities

SOURCE: Meyer et al. (2017)

show that slightly less than one in ten men and over one-third of women behind bars are sexual minorities (Meyer et al., 2017, p. 234).

With respect to victimization, while some events like the shooting at the Pulse nightclub in Orlando, Florida in 2016, gain national and international attention, we probably do not have a very accurate count of the crimes committed against members of the LGBTQ community since many victimizations are unreported (Marzullo & Libman, 2009). However, we do have some measure of LGBTQ victimization as a result of the Uniform Crime Reports category of hate crimes. A **hate crime** (or bias-motivated crime) can be defined as occurring “when the perpetrator of the crime intentionally selects the victim because of who the victim is” (Marzullo & Libman, 2009, p. 2). The federal Hate Crime Statistics Act, 28 U.S.C. Sect. 534 defines hate crimes as “crimes that manifest evidence of prejudice based on race, gender or gender identity, religion, disability, sexual orientation, or ethnicity” (Wilson, 2014, p. 1).

Although the focus of this section is on hate crimes based on sexual orientation, Figure 9.6 shows the different categories, based on victims’ perceptions from 2011 to 2015 (Masucci & Langton, 2017, p. 2). This figure shows hate crimes based on sexual orientation followed issues of race, ethnicity, gender, association (the persons with whom the victim were associating when the crime occurred). In addition to those five categories, individuals were also victimized based on their religion or disability.

In a 2017 report the Bureau of Justice Statistics found that victims’ perceptions of hate crime motivation based on sexual orientation increased from 15.4 percent in 2007 to 22.1 percent in 2017 (Masucci & Langton, 2017, p. 13). Figure 9.7 shows the perceptions for sexual orientation, gender, and race. This figure shows that while the number of hate crimes based on race have been decreasing the number of offenses associated with gender and sexual orientation

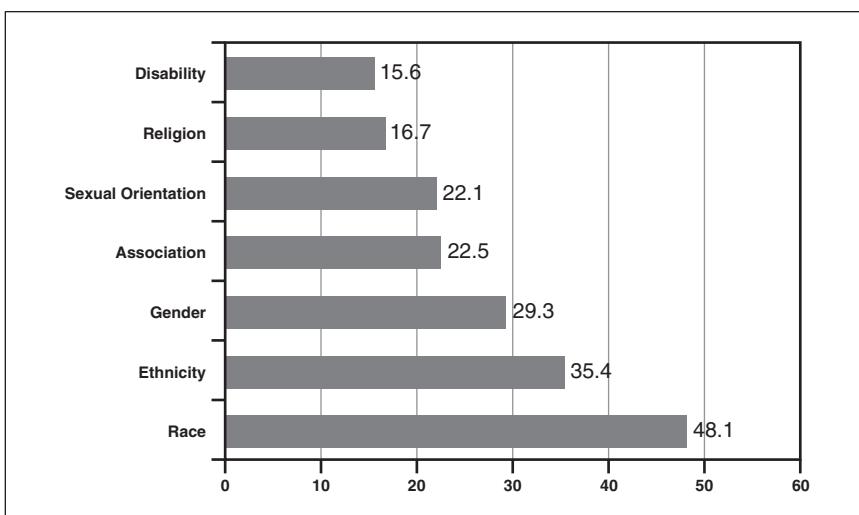
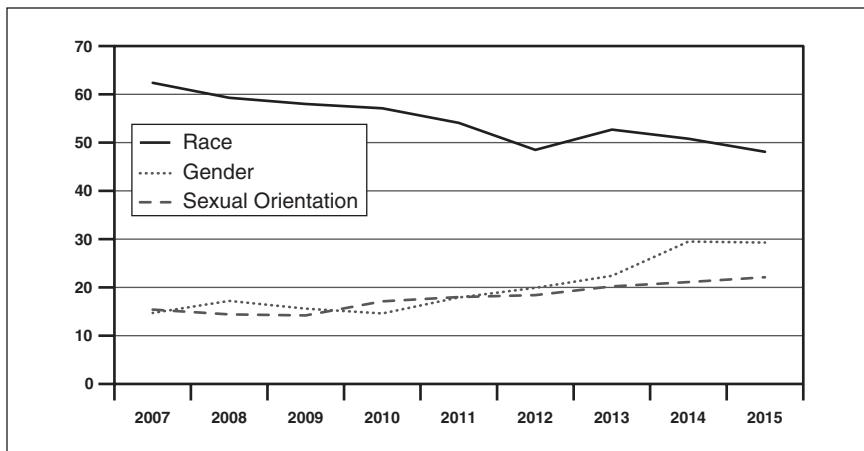


Figure 9.6 Victims’ perceptions of bias in hate crime victimizations (Percentages), 2011–2015

SOURCE: Masucci & Langton (2017)

**Figure 9.7** Victims' Perceptions of Bias in Hate Crime Victimization, 2007–2015

SOURCE: Masucci & Langton (2017)

have been increasing. Like other issues related to victimization, rates of reporting vary and many victims do not report their victimization to the police, and the national statistics reported may hide very high rates in some places. For example, an article published in the *New York Times* found that LGBTQ individuals were twice as likely as African Americans to be victims of hate crimes and that they lead all other minority groups in rates of victimization (Park & Mykhalshyn, 2016).

There are a number of possible explanations for the victimization levels and lack of reporting. First, much like victims of rape, members of the LGBTQ community may fear the public stigma of victimization as well as possible retaliation by the perpetrator. Second, some people have suggested that as society has become more tolerant of LGBTQ individuals and relationships the opposition has increased and become more violent from those opposed to people with different sexual orientations or identifications (see Park & Mykhalshyn, 2016). Whatever the justifications for such attacks the criminal justice system will be called upon to respond to victims of sexual identity/orientation threats and violence.

CONCLUSIONS

Women occupy a number of roles relative to criminal justice processes in the United States. They are offenders and victims; and as we have noted elsewhere they are agents of criminal justice. None of these roles can be ignored by the serious student of criminal justice.

In terms of their offending patterns, while there have been some changes over the years, women typically are charged with and convicted of crimes such as larceny, fraud, and embezzlement. The biggest change in the past few decades has been the significant number of females appearing in jail and prison populations who have been charged with or convicted of drug-related offenses as a result of policy changes rather than an increase in their actual involvement in crime (Harmon & Boppre, 2016). Several scholars have also identified an increasing

number of girls charged with violent offenses, and there is some evidence to suggest that their behaviors are being criminalized so that parents can place them in treatment, a topic we address in Chapter 14.

Perhaps the victimization of females—especially in sexual assaults and domestic violence—is the area that attracts the most public attention. Clearly, women are victimized by property crimes just like men, but when they are victims of personal crimes, there seems to be an additional component of vulnerability and victimization involved in their cases. Added to this, however, is a lack of sensitivity by justice system agents in responding to female crime victims. Women frequently express a sense of double victimization as a result of the way they are treated by justice system personnel.

Finally, the victimization of members of the LGBTQ community is becoming more obvious and noteworthy. These offenses may be classified as hate crimes and they are increasingly appearing in the national reporting data on crime victimization.

KEY TERMS

child endangerment	gender gap	patriarchy
child maltreatment	hate crime	physical abuse
chivalry	intersectionality	physical neglect
domestic violence	intimate partner abuse	pragmatism
educational neglect	intra-female gender	prenatal substance abuse
emotional abuse	hostility	sexual abuse
emotional neglect	moral panic	
evil woman hypothesis	paternalism	

CRITICAL REVIEW QUESTIONS

1. Can you think of any criminological theories that could help explain why women do (or do not) commit crimes? Would these theories apply generally or just to certain crimes?
2. Why would the police be more likely or less likely to arrest female suspects? Would the suspect's age make a difference?
3. Is there any evidence that a “new” female offender (more male-like in offense patterns) has emerged in the past twenty years? Have you seen reports in the newspaper or on television that seem to support this notion?
4. Could sexual orientation make a difference in how offenders are treated? In other words, are bisexuals or lesbians treated more like male suspects? Explain your answer.
5. Is the small number of women in jails and prisons good news or bad news? To what extent are their programming needs being met? Explain.
6. The movement toward determinate sentences (especially with sentencing guidelines) seems to have narrowed the gap between male and female sentences. In handing down sentences, which value—*individualism* (tailoring the sentence to the person) or *equity* (gearing the sentence to the offense)—seems more important to you?

7. To what extent should “domestic violence” be allowed as a defense in murder cases? Should it be treated like self-defense, would it simply be a mitigating factor in decreasing the level of punishment, or should it be considered at all?
8. Some people take the view that “prisons are prisons.” This would imply that what is good for men in prison is also good for women. Do you subscribe to this view or not?
9. Is crime victimization linked to female criminality? What evidence can you find one way or the other?
10. How can we distinguish a criminal victimization that is a hate crime from a normal, conventional type of victimization? Is it always easy to tell the difference, or is there a large degree of subjectivity in the classification process?

WRITING ASSIGNMENTS

1. In a one- or two-page essay respond to the following proposition: When it comes to violating the law, there should be no difference in the way men and women are treated.
2. Based on your reading in this chapter (and other sources you may find) develop a definition for *chivalry* and *paternalism*. Are there dangers in criminal justice systems based on both of these concepts? Explain.
3. Examine the numbers associated with women and drug crimes. In two or three paragraphs develop a statement that explains the factors that seem to be at work here.
4. What is meant by “double victimization”? Is this a legitimate concern for the criminal justice system? If it is, what can be done about it?
5. In a brief essay answer the following questions: How do we define a hate crime? What elements will be associated with hate crimes and what distinguishes these offenses from other types of criminal victimization?

RECOMMENDED READINGS

Meda Chesney-Lind and Lisa Pasko (2013). *The Female Offender: Girls, Women and Crime*, 3rd edition. Thousand Oaks, CA: Sage. Although Chesney-Lind and Pasko examine female offenders, much of the focus of this book is on girls’ delinquency, including their involvement in gangs. The authors provide a critical examination of how juvenile justice systems respond to the special needs of these young women. The book includes chapters on women offending and correctional interventions for these offenders and concludes with a chapter that focuses on evidence-based practices for this population.

Elaine Gunnison, Frances P. Bernat, and Lynne Goodstein (2016). *Women, Crime, and Justice: Balancing the Scales*. Malden, MA: Wiley Blackwell. The authors provide an overview of women and crime, especially the crimes they commit and the punishments they receive. They also address the roles that women play as agents of the criminal justice system.

Satyanshu Mukherjee and Jocelynne A. Scutt, editors (2015). *Women and Crime*. New York: Routledge. This reader contains nine entries that deal with women as both perpetrators and victims of crime. It also provides an international perspective on the issue of gender and crime.

CHAPTER 10



Wrongful Convictions

INTRODUCTION

Since the 1990s we have heard how many offenders have been released from prison or death row as their convictions were found to be wrongful. These prisoners were not released on so-called technicalities but in most cases were completely exonerated, typically after DNA evidence confirmed their innocence. Such cases are troubling for advocates of both the crime control and due process models. For those who believe in crime control, the fact that an innocent person has been imprisoned means that the guilty party is still free and could be committing more crimes. Persons who support the due process model are equally horrified by the prosecution, conviction, and sentencing of an innocent person. Members of both groups probably would agree that these convictions shape our perceptions of justice, or injustice.

Overall, these errors have destructive effects on the innocent person who was wrongfully convicted, including the stigma of being labeled as an offender and the damage that a criminal conviction has on one's relationships and employment. In many cases, individuals who were exonerated try to remedy the harm by filing lawsuits after their release, but even if they are successful, it is impossible to retrieve the years lost to imprisonment. The Innocence Project (2017c) reports, for example, that the average time served by the 353 people exonerated effective December 2017 was fourteen years. Not only were innocent people released from prison, but 152 perpetrators were identified as a result of these investigations, and that group was responsible for at least another 147 violent crimes.

While every miscarriage of justice represents an individual tragedy, these errors also cast disrepute on the entire criminal justice system, and they are symbolic of failure. In this chapter we examine how wrongful convictions occur, the effects of these incidents, and who is responsible. In addition, we outline how criminal justice systems can reduce these errors.

MISCARRIAGES OF JUSTICE

Wrongful convictions are not a new phenomenon and the earliest North American examples are the Salem Witch trials in the colonial era that resulted in the executions of innocent women (Acker, 2017). Edwin Borchard (1932) documented the problem of wrongful convictions in the early 1900s, and Radelet, Bedau, and Putnam (1992) found that 416 Americans were exonerated on homicide charges between 1900 and 1991. Gross, Jacoby, Matheson, Montgomery, and Patel (2005) identified 340 exonerations that occurred between 1989 and 2003, and those only included persons who had been convicted of rape or homicide.

Given such findings, one might wonder how many other individuals were also wrongfully convicted of offenses. We know that these miscarriages of justice happen, but don't have a very good understanding of how often they occur. The most comprehensive list of exonerations is produced by the National Registry of Exonerations (NRE), and as of mid-2017, they had identified approximately 2,100 exonerations and about 150 cases are added each year to that total (NRE, 2017a). One must use the NRE data with some caution, however, as a person could be exonerated, but still be factually guilty (Acker, 2017).

The effects on the individual who has been wrongfully convicted and imprisoned are devastating. Adrian Grounds (2005) conducted a study of persons who were wrongfully convicted, sentenced to prison, and then exonerated. In many cases, costly trials forced these individuals and their families into bankruptcy. All members of Grounds' sample were stigmatized by the prison experience, all underwent some elements of **prisonization** (taking on some of the institutional values of the penitentiary), others were physically victimized while incarcerated, and many experienced destructive effects on their marriages and family relationships (see also DeShay, 2016).

Even release from prison does not result in happy endings; these exonerated offenders generally had difficulty adjusting to their new lives. Most of the persons investigated in Grounds' (2005) study had a high incidence of **post-traumatic stress disorder (PTSD)**—when one suffers from the emotional and psychological consequences of a stressful experience, such as witnessing a violent crime. In addition to the types of deprivation that anybody experiences during long-term incarceration, these exonerated ex-prisoners also harbored strong feelings of injustice. Altogether those feelings made it difficult for these individuals to find employment or repair the harm that their convictions had on their family lives (Scott, 2010). Furthermore, even when these individuals had been exonerated, they often felt stigmatized by their convictions.

Ironically, in most cases prisoners who are exonerated may not qualify for community-based reintegration programs or other supportive counseling that would ease the transition from prison to community. These former prisoners often receive no apology and some receive no compensation, although the Innocence Project (2017a) reports that thirty-two states, the federal government, and the District of Columbia have legislation that authorizes compensation for persons who have been wrongfully convicted.

Wrongful convictions are not a challenge distinctive to the United States. In recent years, there have been a number of sensational cases in many common-law English speaking nations, such as Australia, Canada, and Great Britain. Other

countries, however, have been quicker to adopt safeguards to reduce the harm of these errors. Great Britain, for instance, created a government-operated investigative body, the Criminal Cases Review Commission (CCRC), in 1995, to formally investigate alleged cases of wrongful conviction and to refer possible cases to the Court of Appeal recommending further review. In Canada, the Criminal Conviction Review Group accepts applications to review cases for miscarriages of justice although few are submitted since applicants must first exhaust their appeals. The Department of Justice (2016) in Canada reported that in the 2015–2016 fiscal year, only seven applications were received for the entire nation of 35 million people.

Justice systems in the United States have resisted similar safeguards, although twenty-nine prosecutor's offices established **conviction integrity units** by 2016 and that number had doubled since 2013 (National Registry of Exonerations, 2017b). Moreover, there is some capacity for appellate courts to provide post-conviction review, although not all **indigent defendants** have access to these courts due to shortcomings in public defender services. As a result, a number of **innocence projects** have been established to investigate wrongful convictions and to educate the public about these miscarriages of justice. Typically these projects are operated by law schools, and they rely upon professors and student volunteers to review and investigate cases. Some journalism programs have also offered courses where students conduct similar investigations and Eastern Kentucky University's College of Justice and Safety offers an Innocence Project externship where graduate students work with state agencies to review convictions.

SCOPE OF THE PROBLEM

Garrett (2011) reported that the number of DNA exonerations has increased significantly since the first one occurred in 1989. Figure 10.1 shows the trend in U.S. DNA exonerations based on data obtained from the National Registry of

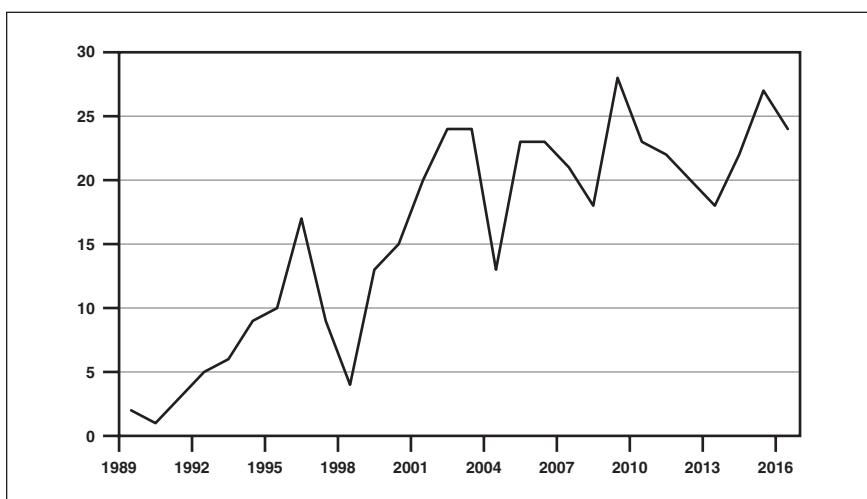


Figure 10.1 Annual DNA Exonerations, January 1, 1989–December 31, 2016

SOURCE: National Registry of Exonerations (2017a)

Exonerations (non-DNA exonerations are not included in that total although in some of these cases DNA was only one of the factors considered in the exoneration). Most of these 444 persons were convicted of murder or sexual assault and sentenced to death or lengthy prison terms.

The number of individuals who are exonerated is only the tip of the iceberg, and thousands of people are thought to be wrongfully convicted each year. Researchers have attempted to estimate the rate at which these miscarriages of justice occur by using the perceptions of justice system officials—including prosecutors, state attorneys general, defense attorneys, sheriffs, police chiefs, and judges—about wrongful convictions. Zalman (2017a, p. 6) summarizes the wrongful conviction research and based on that review estimates there were errors in 2 to 5 percent of all homicide and serious sexual assault cases, and about 1 percent of all felons may be wrongfully convicted.

Put another way, three separate studies have found that justice system officials believe that about one in 100 cases results in a wrongful conviction. Applying that estimate to individuals punished for serious offenses suggests that a very large number of persons have been wrongfully convicted. In 2015, for example, Carson and Anderson (2016, p. 10) reported that 608,300 persons were admitted to a state or federal prison and applying the 1 percent estimate would result in 6,080 wrongfully convicted individuals imprisoned in 2015 alone and that total does not include those sentenced to probation or jail terms.

Although this estimate is troubling, it probably undercounts the true number of innocent persons punished due to miscarriages of justice. The officials who made these estimates have a significant stake in the justice system and are likely to have a great deal of faith in the system. This observation is reinforced by the findings of the three studies, as the police and prosecutors typically had the greatest confidence in the system. Defense attorneys, by contrast, reported higher estimates of such errors, and Smith, Zalman, and Kiger (2011) reported that defense attorneys were more likely to report that reforms were necessary, as compared to police officers, prosecutors, or judges.

Moreover, all of the estimates reported above are based on felonies and Acker (2017) says that the assembly-line processing of misdemeanor cases may result in higher rates of wrongful convictions. Gross (2015) contends that some individuals charged with minor offenses they did not commit are incarcerated in jail and will plead guilty in return for their release as they cannot afford bail. Faced with staying in custody until their court date months into the future, it is less disruptive to their lives to plead guilty and receive probation in a plea bargain. One of the problems with those decisions, however, is these individuals now have a criminal record, which may create additional challenges in their lives, such as barriers to employment, attending school, or making them ineligible to live in public housing.

Mistakes are inevitable in any human endeavor, and Norris, Bonventre, Redlich, Acker and Lowe (2017) reported that most wrongful convictions can be traced to three causes: (1) eyewitness misidentification, (2) false confessions and incriminating statements, and (3) unvalidated or improper forensic science (also called poor forensic science or “junk science”). Furthermore, we add two additional categories based on the observations of the Innocence Project (2017c):

jailhouse (incentivized) informants and the misconduct of justice system officials, including police, prosecutors, and crime lab personnel (Garrett, 2011). Underlying all five causes is the ineffective assistance of counsel, since good lawyering can overcome many of these problems. The following section explores the failures within justice systems and offers some suggestions about ways to respond to the challenge of wrongful convictions.

EYEWITNESS MISIDENTIFICATION

The testimony of a witness to a crime has long been regarded as one of the most reliable methods of establishing guilt or innocence. However, the use of DNA evidence since it was first used to overturn a conviction in 1989 has cast considerable doubt about the reliability of eyewitness evidence. The Innocence Project (2017b) observed that in about 70 percent of the cases of false convictions that were overturned using DNA evidence, eyewitness misidentification played a role in the conviction. Their findings confirmed the results of earlier studies finding that eyewitness misidentification is the primary cause of wrongful convictions (Huff, Rattner & Sagarin, 1996; Radelet et al., 1992). Although these findings are troubling when we examine the sources of such error, they are entirely understandable.

Olson (2002, p. 76) observed that crimes are often traumatic events, and this sometimes distorts an individual's perceptions, especially as the length of time between the offense and witness identification lengthens. Moreover, eyewitnesses can be influenced by media publicity, prosecutors, or even other witnesses (Tuttle, Lindsay & Wells, 2005). Evans, Schreiber Compo, and Russano (2009) found that alcohol and drug use is often associated with crimes, and their survey of law enforcement officers revealed that witnesses are commonly under the influence, further reducing their ability to accurately remember events or correctly identify a suspect. Even the way police interview eyewitnesses or the manner in which they are shown photographs of potential suspects can influence a witness's or victim's perceptions (Willmott & Sherretts, 2016).

Few eyewitnesses to crimes act maliciously, but many have made errors in identifying the persons responsible for these offenses. In a commonly cited example, a Florida rape victim positively identified her assailant as Wilton Dedge at two trials. In addition to the eyewitness testimony, prosecutors also used the testimony of a discredited dog handler and a jailhouse informer to help convict him (Torres, 2017). In both trials, Dedge was found guilty and sentenced to prison. DNA evidence later exonerated the man, but only after he had spent twenty-two years in prison. Even though DNA evidence conclusively proved he was innocent in 2001, Dedge remained in prison until 2004 (Garrett, 2011). Upon release, the state of Florida offered Dedge \$200,000 in compensation for his twenty-two-year term of incarceration. Not surprisingly, he filed a lawsuit for a substantially greater amount, and the legislature awarded him \$2 million in December 2005. Perhaps inconsistent with the aims of justice, compensation is not awarded automatically in most jurisdictions.

Several strategies can reduce the mistakes that eyewitnesses make. Garrett (2011) observed that to reduce the number of false convictions, New Jersey instituted a series of reforms, including making it mandatory that police lineups or identification of suspect photographs are administered in a "double-blind" fashion (where the

officer does not know the suspect's identity, and the witness is aware that the officer does not know the suspect's identity), and these interviews must be electronically recorded. Some of these reforms lack political support, and Carmichael and Kent (2017) found that states with Republican governors and large African American populations were less likely to enact measures that would reduce wrongful convictions.

FALSE CONFESSIONS AND INCRIMINATING STATEMENTS

When somebody confesses to being involved in a crime, it is compelling evidence of guilt. The problem is that people who confess to a crime, and are later convicted, are regularly released from prison due to DNA or other evidence that exonerates them (Innocence Project, 2017b). Gudjonsson (2012, p. 690) also observed that an individual's statements "allegedly given to others (e.g., cell mates, family, friends, acquaintances, undercover police officers) and may be denied during subsequent interrogation but still result in a conviction." Why would people confess to the police about their involvement in a crime if they are innocent? The truth is that statements sometimes are coerced from suspects, who later recant these confessions. The Innocence Project (2017b) found that about 16 percent of the persons exonerated by DNA evidence had made false confessions and their observations are consistent with the outcomes of legal research (Leo & Cutler, 2016). Unfortunately, the original confession has a powerful effect on a judge or jury, and these suspects are often convicted of serious offenses—primarily on the basis of recanted confessions.

Almost a century ago Bouchard (1932) identified the problem of false confessions. In the past suspects were routinely subjected to the **third degree**, where police officers used intimidation, threats of violence, assaults, or other forms of coercion in interviews to obtain confessions. These practices have largely disappeared, and due process protections, such as those guaranteed by the *Escobedo v. Illinois* (1964) and *Miranda v. Arizona* (1966) decisions, give suspects the opportunity to seek the assistance of counsel when interrogated by police—at least in theory.

Kassin (2012, p. 432) reported that false confessions are common in criminal justice, corporate, and military settings, and he noted that language barriers and racial backgrounds (e.g., African Americans are more likely to make false confessions) contribute to miscarriages of justice. Research has also shown that a number of groups are particularly at risk of making false confessions, including persons with mental illnesses and juveniles (Drizin & Leo, 2004). Individuals with fetal alcohol spectrum disorders (FASD) or persons who are easily manipulated are also at higher risk of confessing to crimes they did not commit (Greenspan & Driscoll, 2016). Last, those with addiction problems may also be at a greater risk than non-addicted persons to make false confessions. Such findings are not surprising as members of these groups may be easier to intimidate, are vulnerable to pressure, and may confess just to please investigators.

A series of reports by the *Washington Post* revealed that suspects charged with serious crimes were often subjected to overzealous police interrogations that violated their constitutional rights (Witt, 2001). Some of the suspects cited

in this study were questioned by teams of investigators for eleven to thirty-eight hours. Witt (2001) reported that requests to see an attorney or family members were denied and suspects were not allowed to sleep; and fatigue contributes to poor-decision making (Frenda et al., 2016). Garrett (2011) reported similar findings in his analysis of persons who had been wrongfully convicted on the basis of self-incriminating statements and confessions.

Investigators can “wear down” some suspects, and individuals may confess in order to be left alone, to stop the interrogation, to go to sleep, or because they have been promised that the punishments for the offense will be reduced if they confess. Many suspects, for example, believe that as soon as they confess, the interrogation will stop and they will be allowed to go home. Forrest, Wadkins, and Miller (2002, p. 28) reported that “physiological factors such as intoxication, [drug] withdrawal, and sleep deprivation also affect the likelihood that a suspect will make a false confession.” These factors can also play a major role in eliciting wrongful confessions from juveniles due to their immaturity (Cleary, 2017).

During lengthy interrogations, some investigators come to believe in their suspect’s guilt. The police have considerable discretion in the manner by which they conduct an interrogation. For example, they can lie or manipulate suspects to obtain a confession. Officers might overstate the quality of their evidence (for example, “Your fingerprints are all over the gun,” even though the fingerprints may not be a conclusive match, or the gun hadn’t yet been fingerprinted). Officers also employ a number of other strategies to convince suspects to confess, including establishing rapport, encouraging confession to reduce guilty feelings, continually questioning the individual’s version of an event (to exploit inconsistencies), and encouraging suspects to mitigate their responsibility by telling “their side of the story.”

Once investigators are convinced of the suspect’s guilt, a condition called confirmatory bias is said to exist. **Confirmatory bias** (also called tunnel vision) occurs when the police or prosecutors believe so strongly in the suspect’s guilt that they do not consider other options (or suspects). Rossmo (2009, p. 84) says that tunnel vision is “generally seen as a negative or undesirable process, as it refers to the narrow-minded pursuit of evidence that supports a decision that has already been made while ignoring evidence that might contradict that initial decision.” The problem is that once convinced of a suspect’s guilt, the investigators sometimes try to explain away evidence inconsistent with that conclusion which makes it less likely that other suspects are considered.

Scholars who examine the problem of false confessions overwhelmingly support the videotaping of the entire interrogation so that other investigators, as well as the judge and jury, can verify the conduct and demeanor of both the suspect and police (Leo, 2013). Several states already require that police interrogations be recorded to reduce the risk of abusive interrogations and confirmatory bias. Moreover, these changes increase the likelihood that the suspect’s rights will be upheld. Videotaping the interviews of suspects seems like an easy-to-implement, low-cost remedy to a significant problem.

INCENTIVIZED INFORMANTS

District attorneys sometimes use the testimony of criminals to prosecute a case. In return for their testimony, these persons may be given money or granted a reduced sentence, immunity from prosecution, and the freedom to continue criminal activity (Taslitz, 2011). Other persons approach the police or prosecutors with knowledge about an offense or offender. Sometimes their knowledge of a crime comes from involvement in the offense (directly or indirectly) or knowledge gleaned from the suspects or their associates. In other cases, testimony is based on statements made by the suspect, typically repeated by somebody who shares the same jail cell or lives in the same housing unit within a jail. These jailhouse confessions are the currency used by the informant or **jailhouse snitch** to get out of trouble. Garrett (2011) estimated that about one-fifth (21 percent) of exonerees were convicted on the basis of the testimony of false informants, while the Innocence Project (2017e) reported that informants played a role in 15 percent of wrongful convictions of persons later exonerated.

The testimony of jailhouse snitches and criminal informants has led to numerous wrongful convictions. While there is a long tradition of using these informants in criminal cases, most people feel slightly uncomfortable with the prospect of these offenders giving testimony. Furthermore, using informants may have a corrosive effect on our feelings about the legitimacy of the justice system. Natapoff (2009, p. 3) observed that relying upon informants “exacerbates some of the worst features of the U.S. justice system. The practice is clandestine and unregulated, inviting inaccuracy, crime and sometimes corruption.”

Jailhouse snitches often testify that they overheard the defendant admit guilt. In return for their testimony, they have received less severe punishments, or immunity from prosecution, and some have been given cash payments (Innocence Project, 2017b). The problem is that their testimony is sometimes based on lies, and some individuals have testified against several defendants in return for some incentive, such as a reduced sentence. Two cases are especially outrageous—those of John Hall (who testified against five murder defendants in different cases) and Leslie Vernon White (who testified against three separate murder defendants and one burglary defendant after serving only thirty-six days in jail). Realistically, one might question how many murder suspects or defendants would actually “confess” to a cell mate about their involvement in an offense. Unfortunately, such cases could not go forward without the prosecutor’s approval.

The prosecutor’s dilemma is that informers are essential to gaining convictions in criminal conspiracies, such as gangs or organized crime. By contrast, some prosecutors might not be as discriminating about the legitimacy of the testimony as they should (Natapoff, 2009). Trott (1996, pp. 1383–1385) provided a series of guidelines for use of this evidence but warned prosecutors that “criminals are likely to say and do almost anything to get what they want, especially when what they want is to get out of trouble with the law.” Likewise, he observed that “ordinary decent people are predisposed to dislike, distrust, and frequently despise criminals who ‘sell out’ and become prosecution witnesses.”

Perhaps the greatest hazard of using the testimony of a snitch occurs in capital cases. Warden (2005) outlined how snitch witnesses were the foremost cause of wrongful convictions in capital cases since the 1970s. In some of these trials, the snitches were in a unique position to relate incriminating evidence, as they were actually responsible for the murders! Altogether, the use of snitches involves a significant challenge for ethical prosecutors, given their need to convict offenders without compromising justice. As a result, Roth (2016, p. 746) says that “informant testimony should be the new frontier of the innocence movement.” Legislators are listening to these concerns and in June 2017 Texas enacted laws to reduce the number of wrongful convictions, including placing regulations on the use of jailhouse informants that requires prosecutors to be more accountable and to make the use of snitches more transparent (Innocence Project, 2017d).

UNVALIDATED OR IMPROPER FORENSIC SCIENCE

The introduction of the *CSI: Crime Scene Investigation* television series in 2000 changed the public’s perceptions about wrongful convictions, the likelihood they could be reduced, and the correct wrongdoer arrested. To a large extent, DNA evidence has reduced the chance of an offender being wrongfully convicted in cases where such evidence has been collected at a crime scene. By the time these series ended in 2016 the public had learned these television programs had overstated the contributions of scientific evidence obtained at crime scenes. Not all crime scenes, for example, produce usable evidence. For instance, Scheck (2006) observed that only 5 to 10 percent of serious felonies have usable biological evidence. In their analyses of evidence recovered from crime scenes, Peterson, Sommers, Baskin, and Johnson (2010) found that biological evidence was most likely to be obtained in violent crimes such as rape (53.5 percent) and homicide (38.3 percent) but was rare in aggravated assault (4 percent), burglary (1 percent), or robbery cases (1 percent).

Even when police find biological evidence, there is no guarantee it will be tested in a crime lab. Campbell, Feeney, Fehler-Cabral, Shaw, and Horsford (2015) estimated there were about 200,000 untested **sexual assault kits** (SAK, also called **rape kits**) in the evidence storage units of U.S. police departments and sheriff’s offices. This biological evidence from the survivors of sexual violence was collected but never analyzed, and some of these samples have been in storage for decades. Spohn (2016) says that not testing this evidence has resulted in offenders escaping prosecution for their offenses and reflects our mixed feelings toward punishing the perpetrators of sexual violence.

The speed at which television investigations are conducted is also misrepresented—a fact that confuses and disappoints the families of victims who are accustomed to the speedy and successful resolution of cases on *CSI* (Box 10-1). It typically takes months for routine tests to be conducted and big-city departments may have thousands of open murder investigations going back decades and thousands of current investigations of serious felonies. The labs where they send their samples may be backlogged. In their study of all publicly funded crime laboratories in the United States, Durose and Burch (2016, p. 2) report these labs

received about 3.8 million requests to examine evidence (e.g., controlled substances, DNA, or firearms) but there was also a backlog of 570,100 requests.

As a result of this high demand on crime labs it takes some time before requests are fulfilled and a study of local, state, and federal crime labs found that only half of DNA cases are completed within sixty-seven days. Figure 10.2 shows the median number of days it takes to examine blood alcohol content, documents, drugs, fingerprints, and firearms ballistics. Waiting several months makes the complex job of criminal investigation even more difficult because of the lengthy time it takes to exclude a suspect. Moreover, we can only guess how many persons have languished in custody awaiting DNA or other forensic test results that would exonerate them.

BOX 10-1

The Impact of *CSI* on Justice: Is there a “*CSI* Effect”?

Programs such as *CSI* that feature forensic science are popular with viewers; however, because most of the crimes that these actors encounter are solved within an hour, this distorts the public’s expectations, what some have called the “*CSI* effect.” Watching these programs may make it more difficult for the police as the public may have unrealistic expectations about obtaining an arrest (Huey, 2010) and prosecutors may find it harder to try their cases as juror expectations might also be biased after viewing these programs. Research about the *CSI* effect is mixed and some scholars found that watching crime-related entertainment television influences a potential juror’s perceptions of crime, while others did not. Hawkins and Scherr (2017), for example, observed that students who were regular viewers of programs such as *CSI* were skeptical of the forensic evidence used at a mock trial. One of the difficulties in carrying out research on the *CSI* effect is that a person participating in an experiment might have different perceptions toward the fictional offense and offender compared to actual jurors who must face the person accused of committing a crime.

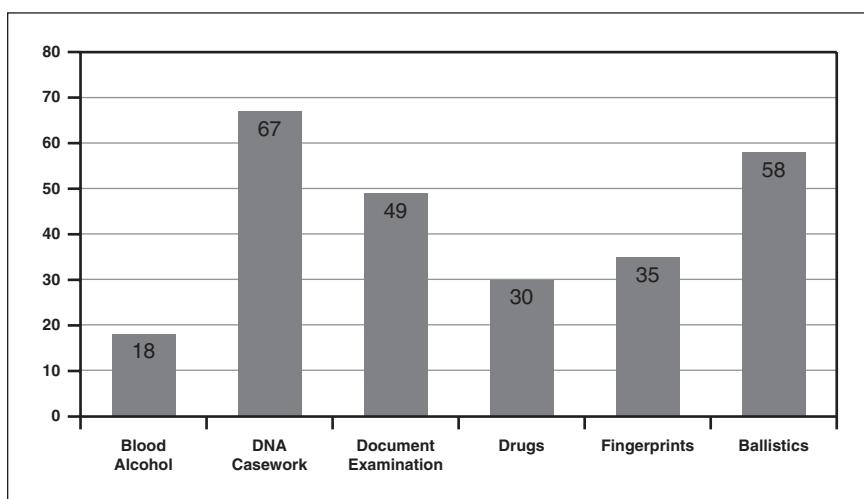


Figure 10.2 Median Number of Days for Forensic Testing

SOURCE: Project Foresight (2015)

There has been increasing criticism about the usefulness of obscure or unproven scientific tests in criminal cases, the skills and professionalism of the persons conducting analyses, and the funding that agencies receive to carry out these tests. While these factors may increase the possibility of wrongful convictions, the use of DNA evidence has contributed to hundreds of convictions being overturned, including 159 death row inmates (Death Penalty Information Center, 2017).

Defense attorneys, scholars, and advocates for the due process model have become increasingly skeptical of forensic science and whether fingerprints, tool markings, or ballistics evidence are as conclusive as many of us believe. One of the problems is that physical evidence recovered from crime scenes may be difficult to interpret. Bullets are damaged when they hit bones (or other objects), fingerprints are frequently smudged (or only partial fingerprints exist), and the impact marks from one blunt object might not differ significantly from those left by other tools. As a result, the effectiveness of scientific evidence to bring suspects to justice often depends on the skills of the persons who are analyzing and interpreting the results. In some places, overworked, unethical, or incompetent scientists might overstate the conclusiveness of their evidence.

In addition to operational problems within crime labs, there is concern over **junk science**, especially when technicians give testimony that has little or no basis in the scientific literature (President's Council of Advisors on Science and Technology, 2016). Examples of junk science include the use of ear prints or lip prints being used to convict defendants as there is little scientific basis that such physical characteristics are unique to any individual (McRoberts & Possley, 2006). Bite mark evidence has been used for years even though there is some debate over whether interpretations of this evidence are accurate (Moriarty, 2010). Last, some have questioned whether the marks left by tools or cartridge cases from firearms are as distinctive as we sometimes believe. Comparisons are often open to interpretation by the people conducting the analyses. As a result, defendants may risk being convicted on the basis of “evidence” that is not scientifically sound (National Academy of Sciences, 2009; President's Council of Advisors on Science and Technology, 2016).

In addition to junk science, evidence may be mishandled, misplaced, or stolen—not unlikely given that some evidence rooms or labs process thousands of pieces of evidence each month. Furthermore, some crime labs may be less professional than others. The Houston and San Francisco crime labs, for example, were singled out as examples of troubled organizations due to allegations of misconduct, wrongdoing, and falsification of test results (Jamison, 2010; Khanna & McVicker, 2005). Yet, even the laboratories analyzing samples for the highest profile U.S. law enforcement agencies have been criticized and Hsu (2015) notes that “nearly an entire unit of FBI forensic examiners overstated testimony about hair matches for decades” and “twenty-six of twenty-eight FBI examiners gave flawed testimony or reports in at least 90 percent of the 500 criminal cases reviewed so far.”

Sloppy laboratory or police procedures also enable offenders to escape justice. While this can happen in any human endeavor, the stakes in the justice system are very high when mistakes occur. If laboratory tests are not conducted appropriately, for example, a guilty person might go free. Police also lose evidence that might lead to the conviction of offenders. Corwin (2003) described

a **cold case** (an unsolved case that may have been put aside for months or years) in which the police had unintentionally thrown out DNA evidence from a 1965 murder. Though the detectives had identified a suspect, the lack of evidence has made it impossible—short of getting a confession—to arrest the suspect.

Before criticizing hard-working and diligent laboratory staff and police officers, however, one has to acknowledge the complexity of their jobs and the difficulty of properly storing, inventorying, and sorting through hundreds of pieces of evidence in thousands of crimes that may have been committed before they were born. One of the hazards of criminal justice operations is that the misconduct or incompetence of a few employees can cast disrepute upon an entire organization. That is one of the reasons why background checks for justice organizations and training for new employees are much more comprehensive than they were several decades ago. After all, if it was your evidence they were examining, and you were innocent, you would want the lab to employ the most honest, ethical, professional, and well-trained staff.

DiFonzo (2005) and Scheck (2006) have been critical that crime labs are closely tied to police departments or district attorneys' offices; they argue that these labs should be independent. The need for independence was also a key recommendation in the National Academy of Sciences (NAS) 2009 review of forensic science. The problems associated with crime labs led to the formation of the President's Council of Advisors on Science and Technology (2016), who produced a report that was very critical of the state of forensic science, and especially with the examination of bite marks, fingerprints, marks left by firearms and footware, and the analysis of biological materials such as hair. The Council recommended that analyses of evidence that had not been validated by science should not be admitted at trial; a recommendation rejected by the Department of Justice (Weedn, 2017).

MISCONDUCT

There are over a million persons employed by the police, prosecutors' offices, and crime labs. Even if only a fraction of a percent of these officials engaged in misconduct, the ramifications in terms of wrongful convictions could be substantial. On November 22, 2013, Annie Dookhan, a chemist who worked in a lab that conducted analyses for Massachusetts law enforcement agencies, was sentenced to prison for mishandling evidence and obstructing justice. Dookhan served three years in prison but her actions touched the lives of thousands of people and in April 2017 the Massachusetts Supreme Judicial Court dismissed 21,587 drug cases that she analyzed (American Civil Liberties Union, 2017b). While there is no exact total of the costs for her misconduct it was projected to cost the state over \$100 million (Estes & Allen, 2012).

The problem with dishonest or incompetent crime lab staff members is that juries of ordinary persons rely upon these experts to interpret the results of scientific analyses, and if their information is biased, incorrect, or unreliable, jurors cannot make meaningful decisions about the guilt or innocence of defendants. Moreover, the prosecutor or police may be misled into pursuing the wrong

suspect if a technician, scientist, or analyst gives investigators the results they want to hear rather than the truth.

Some prosecutors also engage in misconduct. While the prosecutor's role is to seek justice, several factors make this search more difficult, including the prosecutor's status as an elected official. In a social climate characterized by fear of crime, there may be little tolerance of failure to obtain a conviction—especially in the case of violent offenses (Pfaff, 2017). We all have an interest in sentencing guilty offenders, but winning a case due to some type of misconduct actually reduces public safety by eroding confidence in the justice system. Caldwell (2017, p. 43) carried out a study of prosecutorial misconduct and he found it was "a real and prevalent problem, is often unaddressed, and almost never results in any sort of deterrent consequences."

A number of factors keep us from understanding how often these acts occur. The large number of prosecuting attorneys employed throughout the nation ensures that even if a relatively small percentage of them engage in unethical conduct, it will have a significant impact on the number of wrongful convictions in a given year. The independent nature of the prosecutor's job also makes it relatively easy to engage in misconduct. Prosecutors have considerable discretion, and their day-to-day activities, such as plea negotiations, have little public visibility. About 98 percent of defendants enter a plea of guilty and their cases never go to trial. Anecdotal accounts suggest that some defendants have pleaded guilty to crimes they did not commit to avoid trials, which could be financially ruinous and could result in harsh sentences. Cases that are heard at trial, by contrast, are transparent; the public can see what occurs and there is an official record of the proceedings.

Prosecutors also enjoy immunity from lawsuits. Johns (2005, pp. 120–135) argued that extending this immunity to prosecutors is harmful because it denies victims a remedy, hinders the development of constitutional law, and obstructs the implementation of structural remedies to systemic problems. Johns found that immunity is unnecessary to protect honest prosecutors, and it introduces unnecessary complexity and confusion into the law. Perhaps most importantly, a greater number of layers of oversight, including access to civil remedies, may further discourage unethical or malicious behavior. It is unlikely that prosecutors will be held more accountable for their actions in the near future, since in the *Connick v. Thompson* (2011) case, the Supreme Court overturned a lower court's decision to award several wrongfully convicted individuals damages due to the actions of attorneys working within a prosecutor's office. McClelland (2012) believes this decision will further reduce prosecutorial accountability.

The United States is the only nation that elects chief prosecutors or district attorneys. There are some advantages to this approach, such as voters' ability to remove incompetent prosecutors and to ensure that community standards of justice are upheld. Yet, there are some disadvantages as well. Because prosecutors are elected officials, some critics have suggested that they have much to lose by being merciful (Pfaff, 2017). Fairfax (2012) notes that the entire justice system is currently reforming to be "smart on crime" via crime prevention and by relying upon evidence-based interventions, although prosecutors have not generally been a part of those reforms. The electorate may perceive being "soft on crime" (even when it

is smart to do so) as failure. This contrasts with the low-visibility roles of prosecutors in other nations, where the position is seldom a pathway to a political career.

While acknowledging that prosecutorial misconduct exists, we also have to recognize that prosecutors have an inherently difficult job. In some cases, a district attorney may supervise hundreds of attorneys, and job turnover in most prosecutors' offices is high, as experienced assistant district attorneys move to private practice after gaining a year or two of experience. Additionally, prosecutors must sift through sometimes conflicting information, confusing evidence, and faulty recollections on the part of both victims and witnesses. They must base their decisions to prosecute on evidence that may be analyzed by incompetent technicians or provided by police officers who might be engaging in some type of misconduct. Weinberg (2003) noted that even when ethical district attorneys follow all the rules, they still might convict the wrong person. Consistent with that observation, Gershowitz and Killinger (2011) observed that errors made by prosecutors, including mistakes that appear to be misconduct, could be a consequence of excessive caseloads.

INEFFECTIVE ASSISTANCE OF COUNSEL

Many of the factors that lead to wrongful convictions are ultimately a consequence of ineffective representation of counsel. There is no shortage of accounts of attorneys who represented their clients while intoxicated, slept during capital trials, inadequately represented a client, or encouraged innocent defendants to plead guilty. These situations are symptomatic of the lack of funding for indigent defense. The landmark *Gideon v. Wainwright* (1963) decision held that indigent defendants should receive state-funded counsel in non-capital felony cases. Over five decades since the *Gideon* decision, however, indigent defense is still lacking and some persons charged with serious crimes are not adequately represented (Lefstein, 2011). The most significant challenge is that in most places, funding for indigent defense is rationed: The number of attorneys and their budgets are fixed, but the number of defendants continues to grow along with the complexity of their cases. Herberman and Kyckelhahn (2014, p. 1) report that state funding for indigent defense decreased between 2008 and 2012, although in most states these costs are shared between local governments and the state.

Because of the lack of attorneys and high caseloads, in many cases public defenders will meet their clients only a few minutes before their court appearances. Lefstein (2011, p. 17) reported that public defenders in a Rhode Island community "were handling, on average, 1,517 misdemeanor cases and 239 felonies, or a total of 1,756 cases per year. Few defendants proceed to trial, and one reason is that public defenders do not have the resources to conduct a comprehensive examination of the case or the ability to hire experts or investigators to evaluate the state's evidence." Dividing that workload into a standard 262 day work-year suggests those public defenders were handling almost six misdemeanor cases and one felony case a day, and that does not include time off for professional development, sick leave or any other duties unrelated to directly serving clients.

Few defendants can afford a "dream team" of highly skilled attorneys and mounting a defense on a serious charge would bankrupt most people. As a result,

some defendants are encouraged by their public defenders to take plea bargains, even for crimes they did not commit. Advocates of the due process model argue that providing adequate counsel is a serious challenge for American justice systems. Many offenders perceive that public defenders are incompetent, but in some cases, their participation in the local courtroom work group enables them to provide effective representation.

The most significant barriers to providing effective indigent counsel occur in poor counties, where these services must compete for scarce budget dollars with other community services. Overtaxed citizens and overburdened county commissioners have little sympathy for funding such programs. In one Mississippi case, for instance, the cost of a capital murder trial for two transients approached \$1 million, threatening to bankrupt the entire county (American Bar Association, 2004b). Such cases underscore the importance of providing indigent defense funded by the state, with its deeper pockets, rather than by individual counties. Box 10-2 highlights the efforts different agencies are taking to reduce the number of wrongly convicted individuals.

Box 10-2

Efforts to Reduce Wrongful Convictions

Many jurisdictions are taking steps to reduce the number of wrongful convictions and Zalman (2017a, pp. 4–5) summarizes some current reforms, including:

- State laws giving inmates access to DNA evidence;
- Federal grants assisting post-conviction DNA searches;
- More states enacting exoneree compensation laws;
- Increased compensation for wrongfully convicted federal prisoners, from US\$5,000 to US\$50,000;
- More states and police departments requiring that interrogations be videotaped;
- A third of police departments adopting error-reducing lineup techniques;
- More programs to provide better defense attorney services;
- A National Academy of Sciences report reviewing many problems in forensic science;
- Creation of the National Commission on Forensic Science;
- Expansion of forensic laboratory accreditation and proficiency testing;
- A National Institute of Justice (NIJ)-funded study to identify causes of wrongful indictments or false convictions;
- Prosecutors creating conviction review units to review possible wrongful convictions;
- The NIJ Sentinel Events Initiative—examining underlying causes of wrongful convictions; and
- More than US\$12 million in Bureau of Justice Assistance grants since 2009 to various innocence organizations to represent likely innocent prisoners in post-conviction proceedings.

A number of public interest groups and organizations have become involved in the issue of wrongful convictions. The first organization devoted solely to overcoming miscarriages of justice was the Innocence Project, which was founded in 1992, and the following organizations have been established since then: National Registry of Exonerations, Quattrone Center for the Fair Administration of Justice at the University of Pennsylvania Law School, Center for Prosecutor Integrity, Measures for Justice, and both the Police Executive Research Forum and International Association of Chiefs of Police have taken steps to reduce miscarriages of justice that originate with policing (see Zalman, 2017a, p. 5).

CONCLUSIONS

Like other aspects of the criminal justice system, there are a number of direct and indirect costs associated with wrongful convictions. In terms of direct costs, jurisdictions are paying out millions of dollars in compensation and awards from litigation to persons who have been exonerated. In addition, the persons who had committed the offenses for which the wrong person was convicted might continue to commit crimes, and the Innocence Project (2017c) reports that 152 actual perpetrators have been brought to justice because of their investigations. As a result, wrongful convictions contribute to a reduction in public safety. Further, costly trials were held to convict the innocent. Last, the state has covered the cost of imprisoning each wrongfully convicted person for an average of fourteen years, including the higher costs of death row for some inmates. Thus, in addition to being a significant financial drain on the community and state, the harm of the original crime was compounded by the state, and wrongful convictions have ruined the lives of tens of thousands of innocent persons, and their families over the past century.

Yet, the indirect costs of wrongful convictions might be more significant in the long run. Sullivan (2004, p. 191) observed that a growing loss of public confidence in the criminal justice system has happened, whereby “police, prosecutors, defense lawyers, and the courts all end up diminished in the public eye as a result of these exonerations, and tremendous distrust arises between criminal justice professionals and the public.” Such events have a powerful effect on the officials involved in these cases, and it extends to witnesses (including the victims’ families) who are required to testify at the trials of the actual offenders. A single wrongful conviction can have significant long-term repercussions throughout the entire state justice system.

When examining the problem of wrongful convictions, a number of scholars have observed that there is no single cause. Sometimes several factors interact to produce a miscarriage of justice. Cordner (2012, p. 316) noted that preventing wrongful convictions “requires recognition that the failure is systemic, involving all actors (to different degrees) in the criminal justice system.” Acker (2017, p. 13) also agrees that we should look beyond a single cause and he observed that wrongful convictions “almost always result from a complex web of interrelated actions occurring within and outside the justice system.”

Good lawyering can help to overcome most causes of wrongful convictions. The effectiveness of jailhouse snitch evidence, for instance, may be challenged by a prepared attorney. Further, sloppy forensic evidence might be overcome when a defense attorney arranges for a parallel series of forensic analyses to be conducted. While reducing prosecutorial misconduct may be more challenging, bringing individual cases of misconduct to the attention of state bar associations may result in a long-term change in the culture of an office. In addition, since prosecutors are elected officials, publicizing the direct and indirect costs of wrongful convictions may also change local prosecutorial practices.

Because there are multiple causes throughout the entire justice system, reducing the number of wrongful convictions is not a simple task. Over the years, scholars as well as state and federal commissions have made numerous recommendations to reduce the likelihood of wrongful convictions and the list of reforms provided by Zalman (2017b) shows that there is a willingness to work toward a justice system that limits wrongful convictions. Findley (2017, p. 61), for example, highlights a number of measures the federal government has taken to support the innocence movement, including providing funding for innocence programs, easing access to post-conviction DNA testing, compensating the wrongfully convicted, and highlighting the shortcomings of forensic science. There is some worry, however, that these efforts will stall as the Justice Department disbanded the National Commission on Forensic Science (Gurman, 2017).

While not a political or procedural reform, Garrett (2011, p. 262) is critical of the lack of involvement of the federal courts, whom he describes as “remaining on the sidelines” and not taking an active role in efforts to strengthen criminal procedures that increase the reliability and accuracy of evidence used in trials. Regardless of who makes recommendations for changes, most relate to providing higher levels of funding for the police, prosecution, crime labs, and defense attorneys. Given the current financial situation, it is unlikely that providing more money to reduce wrongful convictions will be politically popular.

While supporters of the due process model may be satisfied with Blackstone’s decree that it is “better to let ten guilty men go free than convict an innocent man,” a public that is fearful of crime is unlikely to support proposals that might result in the release of any suspects who are thought to be guilty. Instead, we have to focus on providing a justice system that works as impartially as possible, provides effective counsel for defendants, works quickly to redress the errors that happen in any human endeavor, and automatically compensates the person who is wrongfully convicted. Such measures would go a long way in enhancing the faith and legitimacy of criminal justice systems in the United States.

KEY TERMS

cold case	innocence projects	prisonization
confirmatory bias	jailhouse snitch	sexual assault kits (rape kits)
<i>Connick v. Thompson</i>	junk science	third degree
conviction integrity units	post-traumatic stress	
indigent defendants	disorder (PTSD)	

CRITICAL REVIEW QUESTIONS

1. How would supporters of the crime control model explain the problem of wrongful convictions?
2. Should a person who has been wrongfully convicted receive compensation for going to prison? If so, who should pay? How much should they be compensated?
3. Tyler (2006) argued that people are more likely to follow the law if they perceive that it is legitimate and fair. Can you relate Tyler's theory to the problem of wrongful convictions?
4. Provide some possible reasons why several hundred thousand sexual assault kits were never analyzed.
5. How do television programs such as *CSI* influence our perceptions of criminal investigations?
6. The U.S. Supreme Court in the *Herrera v. Collins* (1993) decision found that the introduction of new exculpatory evidence (evidence that is favorable to the defendant in a trial) was not a sufficient reason for the Court to stop a sentence of death. Do you agree with their position?
7. John Pfaff (2017), in his book *Locked In: The True Causes of Mass Incarceration* argued that the political nature of the prosecutor's role contributes to mass imprisonment policies. As a result, many believe prosecutors should not be elected but should be civil servants like they are in other nations. What are the advantages and disadvantages of each approach?
8. What are some of the ways in which we could reduce wrongful convictions? Which seem the easiest to implement? Which seem most effective?
9. Reducing wrongful convictions is an expensive proposition because it would require reforms throughout the entire criminal justice system. Can you think of some unanticipated consequences of these reforms?
10. How can we ensure the integrity and honesty of officials working in the justice system so that they will not engage in unethical conduct that results in wrongful convictions?

WRITING ASSIGNMENTS

1. Briefly describe the causes of wrongful convictions listed in this chapter and then explain why good lawyering will overcome these challenges.
2. Go to the Innocence Project website and see if you can find the number of persons exonerated broken down by racial groups. Does your research show a disproportionate representation of members of minority groups, or are the numbers consistent with the proportion of prison inmates by race?
3. Provide arguments using either the crime control or due process perspective concerning why wrongful convictions are harmful to the justice system and reduce public safety.
4. Develop a two-page essay responding to the following proposition: Money should be automatically paid to persons who were wrongfully convicted by the prosecutor's office that convicted the individual.
5. Identify and describe one reform to the justice system that would reduce the number of wrongful convictions.

RECOMMENDED READINGS

- Brandon L. Garrett (2011). *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*. Cambridge, MA: Harvard University Press. Garrett reports the results of his analyses of the first 250 individuals exonerated by the Innocence Project. He provides a review of the main causes of wrongful convictions and offers a series of recommendations for reforming the criminal justice system to reduce these miscarriages of justice.
- President's Council of Advisors on Science and Technology (2016). *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods*. Washington, DC: Author. This report highlights the findings of a study of forensic science methods, and the authors find the validity of some forensic methods used to identify offenders is lacking. The report was praised by the National Association of Criminal Defense Lawyers but condemned by the National District Attorneys Association as biased.
- Marvin Zalman and Julia Carrano, editors (2014). *Wrongful Conviction and Criminal Justice Reform: Making Justice*. New York: Routledge. Zalman is a leading scholar in the field of wrongful convictions, and he and Carrano have assembled a group of expert contributors who examine wrongful convictions in sixteen chapters addressing topics from conducting investigations to compensating exonerees.

CHAPTER 11



What Are the Alternatives to Incarceration?

INTRODUCTION

If there are practical limits (such as state budgets) to the number of persons that we can imprison, the key questions are: Can we keep more of these offenders in the community, and what would be the effect on public safety? At year-end 2015, there were almost 3.8 million probationers in the United States, and 57 percent of them were felons (Kaeble & Bonczar, 2016). There is both good and bad news associated with these statistics. The good news is that the number of persons entering probation has been decreasing since 2006, but the bad news is that the proportion of them who had been convicted or plead guilty to felonies had increased from 50 percent in 2005 to 57 percent on December 31, 2015 (Kaeble & Bonczar, 2016). Additionally, of these 3.8 million probationers, 20 percent, or about 760,000, had been charged with violent offenses and the proportion of violent offenders increased 2 percent since 2005 (Kaeble & Bonczar, 2016).

Policymakers are sometimes critical of how community sentences are supervised because many probationers commit more crimes, do not abide by their conditions of release, or simply disappear. The Kaeble and Bonczar (2016, p. 4) report, for example, shows that in any given year about sixteen of every 100 probationers fail, with either a new offense or a technical violation, or they abscond (disappear). Given those results, how can we make probationers take their sentences seriously?

Alternatively, some critics have suggested that we create barriers to probation supervision that make it more likely that offenders will fail. Some states, for example, do not limit the length of probationary sentences, and in Georgia, over one-third of probationers (37 percent) were serving more than ten years and 75 percent were serving more than five years (Georgia Council on Criminal Justice Reform, 2016, p. 23). Extending probation over such long period of time raises the likelihood a probationer will eventually commit a technical violation. Moreover, most jurisdictions charge probationers a fee to provide supervision, and these costs can add up. Researchers found that probationers in Texas were sometimes responsible for administration and supervision fees, restitution, court costs,

fines, and supervision fees that ranged from \$25 to \$60 per month (Ruhland, Robey, Corbett & Reltz, 2017). When these researchers interviewed probation officers, they found that some spent over half their time collecting fees, and considered themselves “glorified bill collectors” (Ruhland et al., 2017, p. 9). While paying a \$60 fee is not much of a problem for a high-income earner it may seem insurmountable to someone on a limited income.

SUPERVISING OFFENDERS IN THE COMMUNITY

Since the 2008 financial crisis there has been increased attention on supervising offenders in the community, as locking them up has become too costly for many jurisdictions. Community-based supervision, however, is not a simple undertaking. Many offenders, for example, have some type of special need, such as substance abuse or mental illness problems, or they have been convicted of crimes such as domestic violence that might warrant a specialized type of intervention. Some jurisdictions have responded to these populations by developing problem-solving courts that have a rehabilitative orientation; examples include drug, gun, driving under the influence, or mental health courts. Intended primarily for non-violent misdemeanor defendants, these courts typically are characterized by a specialized docket, one judge who hears all such cases, and a diversionary orientation.

The common element of specialized courts and the community-based interventions that support them is that they use the criminal justice system’s coercive power to increase the likelihood that offenders will comply with their treatment. Although many of us may be uncomfortable with coercing somebody into treatment, some offenders are resistant to change. How does a court official or probation officer, for example, deal with clients who are not complying with their treatment? Lutze, Johnson, Clear, Latessa and Slate (2012, p. 54) noted that “it is the power to coerce and to treat that makes community corrections such an important process to get right.” One question that must be asked, however, is this: When do we know when we are on the right track?

For instance, we have gotten tough with probationers and, since the 1980s, have developed **intermediate sanctions** that straddle the gap between ordinary probation and jail or prison. Intermediate sanctions include day reporting centers, electronic monitoring or house arrest, and intensive supervised probation. Each of these approaches has made offenders more accountable and has increased the intensity of community supervision (e.g., more face-to-face contact with probation officers, more frequent drug testing, or mandatory participation in treatment). Some jurisdictions have developed community-based alternatives for serious or repeat offenders who would otherwise go to jail or prison, but for the most part these intermediate sanctions have increased the stakes for offenders without providing them with much additional support.

Like other criminal justice interventions described throughout this book, intermediate sanctions have led to several unanticipated outcomes. For instance, boot camps were a short-term fad, and publicly operated adult camps have almost disappeared. By contrast, some critics have suggested that offenders placed in intensive supervised probation are the same persons who would have been placed

on regular probation in earlier times and that we really have not reduced jail or prison incarceration as much as we intended.

Another challenge also faces American communities: In 2015, 641,027 prison inmates returned to the community and almost three-quarters were paroled (Carson & Anderson, 2016). Travis (2013) said that the **Iron Law of Imprisonment** dictates that with the exception of inmates who are executed (only a few dozen a year) or who die in prison, most return home. Some parolees have poor records of community success, and many new prison admissions are for technical violations of parole, such as failing to report to the parole officer or testing positive for alcohol or drugs. Other parolees are involved in serious or violent offenses, and this creates considerable public concerns. The challenge of paroling prisoners is twofold. We seldom adequately prepare prison inmates for release, and we do not provide enough community support for them once they have returned home.

While there is widespread agreement that we need to do more for these offenders, there is less agreement on who will pay for the rehabilitative or vocational programs they require. As a result, both probation and parole officers are often overworked and have few resources to support offenders' attempts to live crime-free in the community (Lutze, 2014). Nevertheless, there is also considerable optimism that investing in these interventions will pay significant public safety dividends, especially if these interventions are based on our knowledge of "what works" with offenders (Taxman, 2012). The following sections describe community-based interventions, including specialized courts, drug diversion programs, intermediate sanctions, community-based jail programs, and parole.

SPECIALIZED COURTS

Courts always have had to deal with special-needs offenders who pose challenges for local justice systems. Starting in the late 1980s, several courts were established that handled just one type of offender. The rationale behind this approach was that members of the courtroom work group would become experts in dealing with these offenders, including understanding their special needs and community resources they can access. In addition to developing expertise and providing supervision to some offenders, Jaros (2014, p. 1506) observed that these courts have offered "drug treatment, psychological counseling, parenting classes, domestic violence workshops, and even job training programs."

Drug and mental health courts were the first specialized courts, which are also known as **problem-solving courts**. Over time, other specialized courts emerged in different jurisdictions to deal with gamblers or the homeless. Some courts deal with specific offenses such as failure to provide child support, domestic violence, driving while intoxicated, and prostitution. A national study carried out by the Bureau of Justice Statistics found there were 3,052 problem-solving courts in the United States (Strong, Rantala & Kyckelhahn, 2016). The BJS researchers report that most of these (1,330 or 44 percent) were drug courts, followed by mental health courts (11 percent), family (9 percent) and youth specialty courts (8 percent), and another 13 percent were related to driving while intoxicated (DWI)—either DWI or hybrid DWI/drug courts.

In addition to working with a narrowly defined group of offenders or offenses, specialized courts blend treatment and the court's coercive power to get offenders to comply with their probation conditions. The goal is to craft interventions for an offender that reduces the likelihood of relapse (in the case of drug or alcohol use) or recidivism. Shaffer (2004, p. 988) described the limitations with traditional courts: "It is pointless and an inefficient use of resources to simply send addicts, the mentally ill, and others with ongoing behavioral issues through a revolving door of incarceration and release." Probationers are typically required to make frequent court appearances so that judges can monitor compliance with probation conditions. Offenders have a powerful incentive to participate, as these courts can arrange to expunge conviction records if they meet the treatment requirements. A cornerstone of specialized courts is the coordinated nature of services and a unified or consistent message from the participating agencies that the participant will be held accountable.

Research generally has shown that specialized courts are a good return on investment for each dollar spent in reduced crime and criminal justice costs. A cost-benefit analysis conducted by the Washington State Institute for Public Policy (2017a) showed that each dollar spent on mental health courts reduced costs by \$5.53, which was followed by reentry courts (\$3.44) and drug courts (\$2.83). Simply establishing specialized courts does not guarantee their success, and there appear to be some cautions. First, the success of these programs, such as mental health courts, rests on the availability of community resources and the ability of probation or court staff to monitor the individual's progress. In other words, the court has to have the resources to support proper offender supervision and treatment. Second, the fact that some specialized courts are successful does not mean that all will remain faithful to the model, and Shaffer's (2011) research on drug courts shows that their effectiveness rests upon staffing, the type and intensity of the interventions, and the populations served by the court. As a result, not all specialized courts will produce the same benefits, and some might actually increase recidivism. Third, some legal scholars have criticized the lack of due process protections for defendants in these courts. Clarke and Neuhard (2004, p. 29) outlined several concerns about problem-solving courts, including the possibility of **net widening**, where defendants who might have received ordinary short-term probation before these courts existed are now subject to additional interventions that might last a year or longer in a specialized court.

As the number of problem-solving courts expands, there is a possibility that their rehabilitative philosophy might be co-opted. In some cases, criminal justice programs or interventions lose their rehabilitative focus and become more punitive; a notable example is the juvenile court, a topic we address more comprehensively in Chapter 14. Nolan (2003, p. 1563) observed, "As with the formerly dominant rehabilitative ideal, the distinction between punishment and treatment withers away." Consequently, while these courts appear to offer very promising benefits in terms of cost savings and reduced recidivism, long-term evaluations are required to determine if there are approaches that are more effective within this broad classification of courts. One form of specialized court that has received considerable recent attention is **veterans' treatment courts** (VTCs), which are described in Box 11-1.

BOX 11-1**Veterans' Treatment Courts (VTCs)**

The Bureau of Labor Statistics (2017a) reported that "about 4.6 million veterans, or about 22 percent of the total, had a service-connected disability." A growing number of these men and women had served in Afghanistan and Iraq, and an increasing number of them have been arrested (White, Mulvey, Fox & Choate, 2012). There is some evidence suggesting these veterans experience other adversities as well, such as an increased likelihood of homelessness, substance abuse, and psychological challenges related to post-traumatic stress disorder (PTSD). Moreover, veterans serving in the Middle East were more likely to have experienced traumatic brain injuries than in other wars, given the prevalence of roadside bombs and their devastating effects.

While combat veterans from past wars and conflicts experienced similar negative effects, there is more awareness today of the short- and long-term psychological effects of experiencing combat and the hardships associated with their deployments. Snowden, Oh, Salas-Wright, Vaughn, and King (2017) found that veterans had higher rates of substance abuse and a greater likelihood of being arrested than nonveterans. The Bureau of Justice Statistics has tracked the population of veterans in state and federal prisons starting in the 1990s and those researchers found that "In 2011–12, an estimated 181,500 veterans (8 percent of all inmates in state and federal prison and local jail excluding military-operated facilities) were serving time in correctional facilities" although that total was about one percent less than the incarcerated veteran population in 2004 (Bronson, Carson, Noonan & Berzofsky, 2015, p. 1).

Pratt (2010, p. 47) noted that some veterans coming before the courts had been successful in getting the harshness of their sentences mitigated based on their service while others have used PTSD "to prove a defense of insanity, unconsciousness, diminished capacity, or self defense." Yet defense strategies by themselves are not effective in responding to the special challenges that these offenders pose, and in response, a growing number of specialized VTCs have been established to provide a treatment-oriented approach to working with this population. One hundred and thirty-three VTCs have been established throughout the nation and most were founded between 2011 and 2012 (Strong et al., 2016).

Like many other newly established criminal justice interventions, there is a lack of information about their long-term effectiveness. Erickson (2016, p. 221) reports that while these programs are beneficial to veterans some prosecutors restrict the number of potential participants (e.g., to those who were charged with minor offenses or veterans who had served in combat zones or hazardous duty areas). Erickson reports mixed results in terms of the effectiveness of some of the VTCs he examined but overall found them to be somewhat beneficial. Hartley and Baldwin's (2016) study showed similar findings and VTC participants were slightly more successful than other participants. These studies suggest that long-term evaluations of VTCs are required. As the popularity of these courts increases, it is likely that they will attract broad-based funding, and that might enable them to provide better services. Given the sacrifices these men and women have made on behalf of this nation, it seems like the least we can do to support their efforts to live crime-free.

DRUG DIVERSION PROGRAMS

One consequence of the large drug offender population in U.S. jails and prisons has been an interest in programs that divert drug offenders who participate in treatment from incarceration. This community-based approach responds to several significant challenges. First, 15.7 percent of all state prison inmates were incarcerated on drug-related offenses on December 31, 2014 (3.5 percent were sentenced on drug possession offenses while 12.2 were sentenced on trafficking and other drug related crimes), and 49.5 percent of all federal prisoners were drug offenders on September 30, 2015 (Carson & Anderson, 2016). Furthermore, approximately one quarter (24 percent) of all sentenced jail inmates were held on drug possession or trafficking crimes in 2002 (the last year for which we have information; see James 2004). Last, Kaeble and Bonczar (2016) reported that 25 percent of probationers on December 31, 2015, had been convicted of drug law violations. While these numbers are high, they do represent a decrease from previous years, as the proportion of drug offenders in both federal and state prisons has decreased.

The number of persons under some form of correctional supervision for drug offenses is significant. Extrapolating the total sentenced jail and prison population from the statistics above, we estimate that 362,223 persons are incarcerated on drug-related offenses in American jails or prisons and another 976,000 drug offenders are on probation. In addition, substance abuse is a contributing factor in the arrest of many other violent or property offenders (e.g., about two-thirds of arrestees are under the influence of alcohol or drugs). The problem is that few of these offenders get any treatment. The Pew Charitable Trusts (2015a, p. 8) reported that “In 2010, roughly 65 percent of incarcerated adults in jails or prisons met the medical criteria for a substance use disorder” although only 12.1 percent of jail and prison inmates participated in some form of treatment in 2013 and this includes self-help groups such as Alcoholics Anonymous (Pew Charitable Trusts 2015b, p. 4). When it comes to formal treatment, the National Center on Addiction and Substance Abuse (2010, p. ii) estimated that about 11 percent of inmates received these services.

Carson and Anderson (2016, p. 3) describe how several states are introducing interventions to reduce the number of nonviolent and drug offenders behind bars and observed that “states adopted diversionary techniques, including specialty courts, substance abuse treatment facilities, and reentry programs to decrease prison populations and reduce recidivism.” There are a growing number of policymakers, academics, and practitioners who have questioned the wisdom of imprisoning so many drug offenders and then providing few treatment opportunities. A cost-benefit analysis conducted by the Washington State Institute for Public Policy (2017a) showed that every dollar spent on a program for drug offenders that includes both incarceration and community treatment resulted in a saving of \$13.91, while an intensive drug treatment program during incarceration had a benefit of \$10.15 for each dollar spent. When it came to outpatient treatment in the community, there was a \$13.45 benefit for each dollar invested (Washington State Institute for Public Policy, 2017a). Given those potential savings, more jurisdictions are offering interventions that divert offenders from incarceration because community-based treatment is considerably cheaper than

treatment while incarcerated and allows probationers to remain at home and continue to work or attend school.

A focus on reducing the punishments for drug offenders has gained more ground in recent years, and the National Governors Association (2011) observed that many states have made it easier to divert drug offenders from prison, and some have “rolled back” sentencing schemes that mandated severe prison sentences for some drug offenders, such as New York’s Rockefeller drug laws introduced in the 1970s. One of the largest diversionary programs for drug offenders was a two-fold approach that was introduced after California voters approved the **Proposition 36** and **Proposition 47** ballot initiatives. Proposition 36 came into effect in 2001 and provided community-based treatment for nonviolent offenders convicted of drug crimes. Proposition 47 was introduced in 2014 and enabled offenders previously convicted of nonviolent felonies such as drug possession (as well as some property crimes with a loss of less than \$950) to apply for resentencing. Together, these initiatives diverted thousands of individuals from jails and prisons, and enabled California to reduce their jail (Tafoya, Bird, Nguyen & Grattet, 2017) and prison populations (Public Policy Institute of California, 2017). Although some of these efforts were undertaken by well-intentioned stakeholders, the Supreme Court’s *Brown v. Plata* (2011) decision required California to reduce prison crowding, so officials there had a forced choice between expanding prison beds or returning prisoners to the community.

The introduction of community-based drug programs in California to reduce incarceration was not as smooth or problem-free as anticipated. One of the challenges of implementing a state-wide reform is that some counties will have positive outcomes while others will not. Despite that observation, evaluations of Proposition 36 have generally been positive and Anglin, Nosyk, Jaffe, Urada and Evans (2013) found the state saved \$2,317 for each offender who participated. Because Proposition 47 has only been in effect for a few years, we cannot properly evaluate its long-term impacts, although it has fulfilled the goal of reducing prison populations. The important question, however, is the success of these ex-prisoners in their return to the community, although Males (2017) reports that while crime rates in Los Angeles have increased, the overall California crime rate dropped between 2010 (before Proposition 47 was introduced) and 2016.

ENHANCED PROBATION

Several approaches have been introduced since the 1990s to increase community supervision levels, including intensive supervised probation, home arrest (typically coupled with electronic monitoring [EM]), day reporting centers, and boot camps. While the use of intensive supervised probation with specialized populations has increased, adult boot camps have virtually disappeared. These intermediate sanctions provide more formal control or supervision, but we question whether these interventions have the desired results in terms of reduced recidivism and increased long-term public safety. In most places, these programs increased the supervision or surveillance of probationers or parolees but did not support them in the community with more resources or treatment.

There has been a longstanding tension between the enforcement activities (e.g., holding offenders accountable) and offender rehabilitation in the guiding philosophies of probation services (Lutze et al., 2012). The practice of probation has undergone a profound transformation. Historically, probation officers were trained in social work, and their role was to help clients. Over time, however, the philosophy of most probation departments shifted from rehabilitation to public safety or risk management (see Lutze, 2014). Matz and Kim (2017) call the process of abandoning a social work orientation in favor of an enforcement role **mission distortion** and this may be enhanced when probation and police officers work in partnerships. In many jurisdictions probation officers wear body armor, they are armed, and may coordinate their activities with the police. It may be difficult for probationers to understand how an armed probation officer wearing a bullet-resistant vest standing at their front door is supposed to help them. In contrast, some probationers may be more likely to abide by probation conditions when confronted by these interventions.

One way that probation departments “ratcheted up” levels of control and supervision for offenders was to develop specialized caseloads that enabled officers to closely supervise probationers. A higher level of supervision and control is the cornerstone of **intensive supervised probation (ISP)**. A probation officer might supervise several hundred offenders on a generalized caseload. ISP caseloads, by contrast, are smaller: an officer might supervise fifty or fewer offenders. Examples of specialized caseloads associated with ISP include domestic violence and sex offenders, and some jurisdictions have officers dedicated to managing caseloads of DUI offenders. Tonry (2017a, p. 8) says that evaluations of intermediate sanctions such as ISP “consistently showed judges used new tougher community sanctions mostly to impose harsher punishments on people who previously were sentenced to ordinary probation” and because of these sanctions “more, not fewer, people wound up in prisons and corrections costs went up, not down.” Consistent with that observation, Hyatt and Barnes (2017) found that ISP increased levels of control and that an enforcement orientation increased the number of offenders absconding and their technical violations compared to regular probationers.

Other intermediate sanctions closely akin to ISP are EM and house arrest programs and these sanctions are often coupled together. These programs are intended to keep offenders in the community who would otherwise go to jail or prison. Participants wear a device that transmits a signal to a monitoring center if they stray too far from a base (generally a device attached to their home phone), although most probationers attend school or work while in EM programs. This model of supervision is becoming more popular and the Pew Charitable Trusts (2016, p. 1) reported the number of persons monitored increased by 140 percent between 2005 and 2015.

Despite the growth in these monitored populations there are a number of challenges for the individual and the justice system. In most jurisdictions, adult probationers pay for the monitoring, which can cost up to \$25 per day. As a result, the poor and homeless cannot normally participate in EM programs. Moreover, individuals in these programs who cannot pay the fees are returned to custody. Another challenge when we are evaluating the success of EM is that while we know probationers are at home, we do not have much control over their activities: Home arrestees could be selling drugs out their front door.

Research on EM has produced mixed results. One study showed that high-risk offenders, in particular sex offenders, were more successful than lower-risk offenders (Finn & Muirhead-Steves, 2002), and probationers in a Florida study were less likely to reoffend, abscond, or have a technical violation than a control group (Padgett, Bales & Blomberg, 2006). Cost-benefit analyses of EM programs show these interventions are promising. The Washington State Institute for Public Policy (2017a) reported that a \$1,138 investment in EM for probationers produced a \$14,861 benefit, or about \$13 for each dollar in program costs. One caution about those statistics, however, is that it is relatively easy to determine the costs but more difficult to accurately calculate the benefits, as some of these probationers or parolees would not reoffend if they were participating in a regular probation program.

One challenge to probation departments, and particularly to ISP and EM, is that some participants have no meaningful activities to occupy their time. As a result, some jurisdictions have established **day reporting centers (DRCs)** that offer probationers rehabilitative programs during the day. The Nevada Department of Public Safety (2017, p. 3) describes some of these services as “job search assistance, GED preparation, and cognitive skills programming to include courses in substance abuse prevention, anger management, parenting, employment preparation and domestic violence.” DRC are intended to enhance public safety by providing high levels of daytime supervision combined with rehabilitative opportunities.

Day reporting programs are intended for chronic, nonviolent, and drug offenders and can serve probationers and parolees. Brunet (2002, pp. 138–139) offered three reasons for implementing DRCs: (1) intensive surveillance will deter criminal behavior, (2) rehabilitative services will prevent offender recidivism, and (3) intermediate sanctions are cost-effective alternatives to incarceration. The Nevada Department of Public Safety (2017, p. 5) says that the daily cost to incarcerate an offender was \$58.46 while a DRC cost \$14.67. Most DRCs provide high supervision levels, and participants generally have to abide by curfews, are subject to drug tests, and have frequent (even daily) contact with their probation officers.

Because there is no national-level census of community-based programs it is difficult to estimate how many DRCs exist and whether they provide services to probationers, parolees, or both. Results of studies that evaluated the success of these programs are mixed. In a comprehensive study, Boyle, Ragusa-Salerno, Lanterman, and Fleisch Marcus (2013) found that parolees involved in a DRC program fared no better than parolees placed on traditional parole supervision. It is likely that the leadership or staff involved in the operation, the populations served, and the agency’s resources influence the effectiveness of DRCs. Few programs are evaluated, and this can create significant problems because anecdotal accounts of “what works” might be different than research that examines the short- and long-term success of different programs and the characteristics of offenders who succeed or fail. Even when we do evaluate programs, there are often shortcomings in the methods used to investigate these interventions (Huebner, 2013). There also seems to be comparatively little academic interest in DRCs, unlike another alternative to jail or prison incarceration, the boot camp.

Boot camps (also known as **shock incarceration**) emerged as intermediate correctional programs in the early 1980s. The first camps were modeled on

military training and emphasized drill, strict rules, and physically demanding challenges that engaged the participants from dawn to dusk. Boot camps were enthusiastically received by policymakers and the public, especially given television images of tough drill instructors whose expectations were reinforced with yelling and screaming. Typically, candidates were young, male, first-time drug or property offenders who were sentenced to short terms in a boot camp (often ten to sixteen weeks), followed by a period of community supervision on probation, rather than longer jail or prison sentences. Boot camp administrators generally screened their candidates, and participation in these programs was voluntary.

While boot camps were popular, research showed that they did not reduce jail populations, costs, or recidivism (Parent, 2003). Although newer-generation boot camps that had a stronger rehabilitative component (e.g., substance abuse treatment and educational or vocational programs) were developed, it was too late to save this approach. Like other fads based on “common sense” described throughout this book, the short-term enthusiasm for this approach was dampened once research showed it was ineffective (Gendreau, Smith & Theriault, 2009). Mitchell (2014, p. 2105), observed that the “moral to the history of boot camps is obvious: proceed with caution” and that “policymakers latched onto the latest criminal justice fad. A more reasonable approach would have been to fund and carefully evaluate a handful of boot camp demonstration projects before endorsing them.”

REDUCING JAIL POPULATIONS

Many U.S. jails are overcrowded and sheriffs in cash-strapped counties are grappling with the costs of holding inmates prior to their trials, and for periods of incarceration less than one year. This section addresses the issue of reducing jail crowding by two methods: (1) reforming bail practices, and (2) responding to the challenges of handling special-needs inmates by developing alternatives to incarceration. The sheriffs operating overcrowded jails are placed in the position of either reducing the number of inmates or a costly jail expansion. Jails are busy places: Minton and Zeng (2016, p. 1) reported that there were about 10.9 million jail admissions in 2015 and at year-end 2015 there were 693,300 jail inmates, and of that total most (434,600 or 63 percent) had not been convicted of a crime.

Of the unconvicted jail inmates, many are unable to make bail, and there is a growing controversy about the fairness of incarcerating the poor for extended periods of time while awaiting court dates after being accused of committing minor offenses. Rhee (2017) provides an example of a Chicago jail inmate accused of stealing a phone and a watch, and whose bail was set at \$2,500. As he was unable to obtain \$250 to make bail he was incarcerated for seven months and during that time lost both his part-time jobs. Like many inmates who serve lengthy pretrial detentions, his case was eventually dismissed. Other unconvicted inmates who were serving lengthy periods of pretrial incarceration have lost the custody of their children and some have been victimized while in custody by other prisoners.

Writing about conditions in New York City, Pinto (2015) observed that “only one in ten defendants is able to pay (bail) at arraignment . . . [and] . . . Even when bail is set comparatively low—at \$500 or less, as it is in one-third of

nonfelony cases—only 15 percent of defendants are able to come up with the money to avoid jail.” Of these indigent jail inmates, high proportions are African Americans or Latinos. Given the low risks that many of these jail inmates pose—and the high costs of imprisoning them—many state legislators are proposing to reform the bail system.

Although there are numerous organizations advocating for bail reform, such as the American Civil Liberties Union and the Pretrial Justice Institute, there is significant opposition from the bail bond industry (Professional Bail Agents of the United States, 2017; Stevenson & Mayson, 2017). As noted in Chapter 3, decreasing the use of cash bail will reduce profits for the 25,000 companies that underwrite bail (White, 2017). As a result, they are making significant campaign contributions to politicians friendly to their industry. Wiggins (2017) observed that Maryland state legislators, who are confronting the bail reform issue, have received more contributions from the bail industry than legislators in any other state. This brings us back to the question posed in Chapter 3: Who wins and who loses when the justice system is reformed?

The prospect of bail reform is a complex undertaking, as even those accused of minor offenses may represent a significant risk to our safety. As a result, policymakers who are working toward reforming the justice system must balance issues such as costs, fairness to the poor, the harms that can be created by the justice system (e.g., when people lose their jobs because they are incarcerated and cannot make bail), and the public risk these individuals pose. A similar set of considerations must also be made when it comes to developing community-based alternatives to jail incarceration.

While reforming the bail system might take years, some organizations are soliciting money from the public to help impoverished jail inmates make bail. One such organization is National Bail Out (2017), and their website claims to have helped almost 200 persons to make bail through the contributions of over 13,000 people. Although crowdfunding applications such as GoFundMe restrict donations to fund bail or fines, other organizations, such as Appolition, have created apps that automatically direct a portion of an individual’s bank or credit card purchases to funds used to help indigent jail inmates make bail. These initiatives have been called a way that “ordinary people can harness technology to make the world a little less terrible” (Knibbs, 2017). One interesting question is whether publicly supported donations to fund bail will survive over the long-term or will be another in a long list of fads that emerge in the criminal justice field?

Supervising jail inmates in the community can save taxpayer dollars and enables individuals to maintain their employment and support their families. Figure 11.1 shows that the population of jail offenders in the community has decreased somewhat over time. Given the financial crises that most counties are experiencing, these decreases are difficult to explain. It is possible, for instance, that there are fewer “good candidates” for community-based alternatives. Another possible reason is that funding shortfalls do not enable sheriffs to provide these alternatives.

These community-based alternatives to incarceration take a number of forms, and Table 11.1 shows the percentage of jail inmates in different types of programs. Of these groups, one of the largest is pretrial supervision. Pretrial

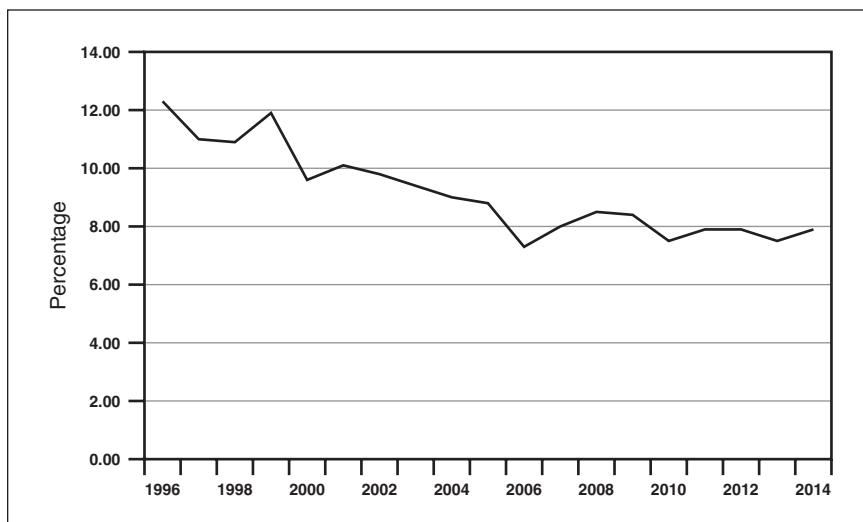


Figure 11.1 Percentage of Jail Inmates Supervised Outside of a Jail Facility, 1996–2014
SOURCE: Minton (2011), Minton & Zeng (2016)

Table 11.1 Jail Inmates Supervised Outside the Facility, 2013

Weekend programs	18.4%
Electronic monitoring	20.2%
Home detention	2.2%
Day reporting	6.2%
Community service	23.3%
Pretrial supervision	12.7%
Other work programs	9.0%
Treatment programs	3.4%
Other	4.5%

Source: Minton & Golinelli (2014)

supervision reduces jail crowding by releasing detainees who have positive social supports and are likely to show up for their court dates. Jail employees working in these units gather information about defendants (including criminal history information from other jurisdictions) and determine whether there are family or community resources not considered by the judge (such as a stable residence). A foundation of most pretrial programs is that risk assessments are undertaken to determine whether the defendant is a good candidate for release. With respect to costs, Oppenheim (2017) estimates it costs up to \$100 per day to jail an individual while supervising that defendant using pretrial services costs \$2.50.

Once sentenced to a term of less than one year, one alternative sentencing option is the **weekend** or intermittent jail program. Designed for offenders who

work or go to school during the week, these programs incarcerate offenders during the weekends, typically admitting inmates Friday afternoon and releasing them Monday morning, until their sentences are complete. These programs are popular with inmates, but they pose challenges for jail staff because of the frequent admissions and discharges and the difficulty of placing these inmates in appropriate housing units each weekend. Despite these difficulties, weekender incarceration is an example of a “win-win” approach: Offenders keep their jobs and are held accountable for their actions.

Some sheriff’s departments offer community service programs where unemployed inmates carry out community service during the day (such as road maintenance, county chores, or collecting litter) and go home every evening. These programs operate much like a DRC, but they lack a rehabilitative component. Inmates who require comprehensive treatment may be given a **furlough** (a temporary release) from the jail to participate in residential drug or alcohol treatment.

Inmates released from jail also have to confront the same set of collateral consequences as parolees, and this can make their re-entry more challenging. The number of these collateral consequences differs by state, although Ewald (2012, p. 213) identified these as the most prevalent: restrictions on jury service, holding office, voting rights, loss of gun rights, driver’s license eligibility, Temporary Assistance to Needy Families (TANF) eligibility, public availability of criminal records, and employment restrictions (see Box 11-2). Ewald’s (2012) analyses showed that Southern states, on average, imposed more of these consequences on offenders.

BOX 11-2

Collateral Consequences of a Criminal Conviction

There are a number of obstacles faced by ex-prisoners or persons with criminal records that make it more difficult for them to return to society or pursue legitimate opportunities. The label of collateral consequences has been applied to civil laws or policies that restrict the activities or access to resources for ex-inmates or convicted felons. Chin (2017, pp. 1–2) observed that collateral consequences:

Affect many areas of life. Some criminal convictions can lead to loss of civil status; a citizen may lose the right to vote, serve on a jury, or hold office; a noncitizen may be deported or become ineligible to naturalize. A conviction may make a person ineligible for public benefits, such as the ability to live in public housing or hold a driver’s license. Criminal convictions affect employment; laws prohibit hiring of people with convictions as peace officers or in the health care industry. A criminal conviction can also make a person ineligible for a license or permit necessary to be employed or to do business, or cause forfeiture of a pension. Criminal convictions can also affect family relations, such as the ability to have custody or visitation of one’s child.

Sex offenders often have additional restrictions placed on them, including where they can reside (e.g., near schools or playgrounds). Sex offenders who are assessed as being dangerous to the public might also be confined in secure settings beyond their prison release date through **civil commitments**.

Collateral consequences are intended to deter potential criminals from engaging in crime or to reduce the likelihood of committing similar offenses once convicted. Some collateral consequences make sense, such as making sex offenders ineligible to work with children. By contrast, employers in most states can deny jobs to persons who were arrested for an offense but were never convicted. Like other justice policies we have described, there is the possibility of unanticipated consequences when we enact laws intended to increase our safety or engage in reforming the justice system (Crutchfield, 2017). For instance, we can create so many employment barriers and restrictions to receiving social services (such as TANF or accessing housing) that illegal or illegitimate opportunities such as selling drugs become more appealing (or are seen as the only option). Furthermore, research has demonstrated that tightening residency conditions on sexual offenders may result in these individuals moving more often, which could destabilize their community reentry and make reoffending more likely (Huebner et al., 2014; see also Carpenter, 2017). Thus, policymakers must be very careful that the reforms they introduce will not decrease public safety, and they must carefully monitor and evaluate the outcomes of legislation they enact.

PAROLE

Another significant challenge confronting community corrections officials is the release of prison inmates into the community. In 2015, 641,000 offenders were released from federal or state prisons (Carson & Anderson, 2016). The following pages outline the barriers that these ex-prisoners face and interventions that have been developed to reduce their recidivism. One of the barriers to successful community reintegration is longer prison sentences, as long-term institutionalization may decrease the ex-offender's ability to make a smooth re-entry. Between 1990 and 2009 the length of prison sentences increased by 37 percent for violent offenders, 36 percent for drug offenders, and 24 percent for property crime offenders (Pew Charitable Trusts, 2012b, p. 3). Moreover, the average time served in the federal prison system increased from 17.9 to 37.5 months between 1988 and 2012 (Pew Charitable Trusts 2015b).

Carson and Anderson (2016, p. 11) found that about 72 percent of prisoners who were released in 2015 were on some form of community supervision. The fact that offenders are released before serving their entire prison term is distressing to advocates of the crime control model. Many believe that offenders should serve their entire sentence. Yet, paroling offenders provides correctional authorities with a certain amount of control over these ex-prisoners after they are released to the community. The possibility of parole gives prison inmates a positive goal to work toward, and correctional officers have more control over the inmates' behavior while they are in custody, as good conduct earns them an earlier release. Once paroled, these offenders are subject to supervision by law enforcement and parole officers. By contrast, when prisoners are released with no time remaining on their sentences, we have no legal authority to supervise their community conduct.

Therefore, one of parole's strengths is that it increases the amount of formal social control while offenders are reentering society. This is a difficult time, given that many long-term prisoners suffer from **institutionalization** or prisonization. They have become so conditioned to the prison's formal and informal rules that they find it difficult to live in free society. Moreover, the skills that inmates develop to survive in prison, such as aggressiveness, often do not translate successfully into the community upon release. Last, most prisoners have very little positive social capital, such as the informal networks that would enable them to find jobs or housing (Hattery & Smith, 2010). The fact that some prisoners would rather serve all of their sentence prior to release, because they view it too difficult to succeed on parole, speaks volumes about the temptations they confront.

One weakness of the parole system is that we have done a poor job of preparing prisoners for their transition back into the community. We often discharge inmates with little more than a bus ticket and several hundred dollars (or less) to re-establish their lives. If offenders have a place to stay, a job to keep them busy, and a positive support mechanism at home, they are more likely to succeed, but this is seldom the case. Most often, offenders return to the same neighborhoods, the same peers with whom they associated prior to their incarceration, and a lack of legitimate opportunities. Many of these offenders become trapped in the same destructive behaviors and relationships that led them to prison in the first place. As a result, many return to prison: Carson and Anderson (2016, p. 11) reported that almost 27 percent of all admissions to prisons in 2015 were people who had violated their parole conditions or had been charged with a new offense.

Over the past decade, there has been increasing interest in prisoner reentry and the barriers they face that might increase their likelihood of recidivism. Even something as simple as having credentials upon release—such as a Social Security card or government identification, current driver's license, and bank card—can increase the success of community reentry. At least in theory, advocates of both the crime control and the due process philosophies support better methods of prisoner reentry.

Crime control model advocates value public safety, and there is an intuitive appeal to the notion that one's community will be safer if ex-prisoners have a smooth transition when they return to the community and are given enough resources so that they do not engage in illicit activities to finance themselves. Supporters of the due process perspective are generally in agreement that planned transitions from prison to the community provide better outcomes for ex-inmates, their families, and the community. While everybody seems to support smooth prisoner reentry, there is seldom enough funding for programs that provide vocational opportunities, social skills development, and subsidized housing for ex-offenders. Although such interventions are not cheap, they represent a fraction of incarceration costs, and if they prevent parolees from committing crimes, they are a good investment in public safety.

In an influential statement about reforming community corrections, Lutze, Johnson, Clear, Latessa, and Slate (2012) observed that mass imprisonment policies are unsustainable and we require different approaches to supervising

probationers and parolees in the community, a sentiment echoed by Cullen, Lero Jonson, and Mears (2017), who also call for reinventing community corrections. By adhering to evidence-based approaches to offender rehabilitation, providing enough resources to community-based agencies, and nurturing qualified and motivated community corrections officers, much of the risk of managing these offenders in the community can be reduced. While this “kinder and gentler” approach might not be accepted by all proponents of the crime control model, the proper application of community corrections might result in greater public safety at less cost than imprisonment. Recent surveys show that the public is supportive of rehabilitation rather than a strict focus on punishment, so it might be an ideal time to “stop dreaming and take action” (Lutze et al. 2012, p. 55).

CONCLUSIONS

There is a practical limit to how many people we can imprison. In the United States, incarceration rates are four or five times greater than in other first-world democratic nations. Given the financial crisis that started in 2008, many jurisdictions can no longer afford to maintain mass imprisonment policies (Cullen, Lero Jonson & Mears, 2017). While there are alternatives to imprisonment, our investments in those programs have lagged behind spending on jails and prisons. We spent an average of \$33,274 to hold each state prisoner in 2015 (Mai & Subramanian, 2017) and \$31,977 for each federal prisoner (Department of Justice, 2016a), but when it comes to returning them to the community many prisoners receive little preparation or supervision once released, and our best hope is that they do not reoffend.

The corrections field has been prone to developing offender rehabilitation programs based on fads. Gendreau, Smith, and Theriault (2009, p. 386) compiled a list of programs that they have labeled **correctional quackery**, and examples include:

Acupuncture, the-angel-in-you therapy, aura focus, diets, drama therapies, ecumenical Christianity, finger painting, healing lodges, heart mapping, horticulture, a variety of humiliation strategies (e.g., diaper baby treatment, dunce cap, cross dressing, John TV, sandwich board justice, Uncle Miltie treatment), no frills prisons, pet therapy, plastic surgery, yoga . . . brain injury reality, cooking/baking, dog sledding, handwriting, interior decorating in prisons (e.g., pink and teddy bear décor), classical music and ritualized tapping.

These rehabilitative programs often emerge as a result of a stakeholder’s “common sense” notions of offender behavior, and in some cases the approach might appear to be effective; if publicized by the media the program might be copied elsewhere. One clear example is the boot camp, which was a popular but ineffective correctional strategy (Mitchell, 2014).

In many cases, there is no theoretical foundation for the intervention, and evaluations are seldom undertaken; a program seems to work, and other places adopt it. These programs eventually draw the attention of scholars, a series of

studies are conducted and articles written about the intervention, and eventually evaluations are conducted. By the time these evaluations are finished, the programs are sometimes found to be ineffective or fail to produce the desired results. Some interventions, such as scared straight programs (where youthful offenders are exposed to prisoners) may actually be more harmful to the participants than doing nothing (Petrosino, Turpin-Petrosino, Hollis-Peel & Lavenberg, 2013). Yet, even when presented with evidence of a program's ineffectiveness, some agencies will continue to fund these interventions (Gendreau et al., 2009). In the meantime, agencies have invested time, energy, and funding in ineffective approaches, and ultimately these programs slowly disappear as enthusiasm and support wane. Lee and Stohr (2012) remind us, however, that we have to be careful not to stifle innovation.

It is plausible that in some cases, programs fail because they were not properly implemented, and success is often linked to political support, inspired leadership, funding, and the presence of community agencies and stakeholders that supported the intervention. Goldkamp (2003, p. 200) observed that the sustainability of interventions depends heavily on funding, leadership, and enthusiasm. Community characteristics also may be responsible for successes that cannot be replicated in other jurisdictions because some places or agencies might have a greater willingness to make significant changes or participate in reforms. For that reason, Bond and Gebo (2014, p. 384) noted that a key element of program implementation is to understand the contextual factors, including local actors, political arrangements, and historical elements.

Clearly we need more effective community correctional interventions, although policymakers have been reluctant to fund such approaches, often preferring to spend taxpayers' money on prison expansion. A review of the literature indicates several shortfalls with existing community corrections programs. First, specialized courts and probation programs require strong community-based resources to support probationers. Second, there is a need for integrated prison-community programs for inmates to increase their parole success. Thus, treatment should start in prison and extend into the community. Third, community-based interventions for probationers and parolees must be integrated through the efforts of the police, courts, and corrections as well as community organizations providing social services, health care, welfare, and education. Fourth, interventions must be based on what the research demonstrates about the effectiveness of a particular program, rather than fads. Last, we should dismantle legal barriers, such as collateral consequences, that make it difficult for ex-prisoners to reenter the community.

Reducing barriers to community reintegration is an important step in enhancing the likelihood that an offender will get a job, go to school, and secure short-term housing. There has been significant interest in community reentry, not only from liberals who have advocated for increased rehabilitation but also from conservatives who understand that an ex-offender's failure in the community means increased crime. These are not new observations and over a century ago President Theodore Roosevelt (1913, p. 6) pointed out that "The period

immediately following the prison period is the most crucial for the convict,” and, “The state spends a considerable sum on his imprisonment; surely it can wisely spend something on his after-prison period to prevent his being again a charge on the state.” What is discouraging is that we have made so little progress in supporting the prisoners re-entering society since Roosevelt identified this problem.

KEY TERMS

<i>Brown v. Plata</i>	intensive supervised probation (ISP)	Proposition 36
civil commitment	intermediate sanctions	Proposition 47
correctional quackery	Iron Law of Imprisonment	shock incarceration
day reporting centers (DRCs)	mission distortion	veterans' treatment courts
furlough	net widening	(VTCs)
institutionalization	problem-solving courts	weekend (incarceration programs)

CRITICAL REVIEW QUESTIONS

1. Define “alternatives to incarceration.” Use any resources available to you.
2. Develop a list of alternatives to incarceration. Do these fit along a continuum from least restrictive to most restrictive? Explain.
3. You are given the task of reducing your state’s correctional population by 10 percent by diverting offenders away from prison or releasing prison inmates to parole. What approach would you take? Provide a rationale for your choice. What community services would help your offenders? What types of offenders would you target in your interventions?
4. How do specialized courts differ from traditional courts? Do an Internet search for “therapeutic jurisprudence” to see how this concept is associated with specialized courts.
5. Provide examples of fads in the field of criminal justice, including corrections. Why do justice systems seem prone to fads?
6. What is “net widening”? How does this relate to intermediate sanctions such as electronic monitoring?
7. How do voluntary and coerced forms of treatment differ? Are there offenders for whom coerced treatment might be more successful?
8. Provide some reasons why boot camps failed to decrease recidivism, reduce jail or prison populations, or save taxpayer dollars.
9. Some researchers claim that intermediate sanctions have had a more symbolic than substantive impact. Is it important for justice systems to have symbolic success?
10. Provide examples of collateral consequences. Some of these consequences are controversial. For example, how does restricting an ex-felon from voting enhance public safety?

WRITING ASSIGNMENTS

1. Explain the “Iron Law of Corrections.” What makes this principle so ironclad?
2. In most textbooks (especially ones on juvenile justice), the concept of net widening is presented as a negative policy outcome. Could it be a positive? Why or why not?
3. What are we trying to achieve with intensive supervision programs for probationers and parolees? Are ISP programs simply designed to catch more wrongdoing?
4. Explain the notion of collateral consequences of incarceration. Are these “hidden costs”?
5. Of the collateral consequences highlighted in Box 11-2, which of these do you feel creates the greatest barrier to prisoner re-entry into the community?

RECOMMENDED READINGS

Shannon M. Barton-Bellessa (2012). *Encyclopedia of Community Corrections*. Thousand Oaks, CA: Sage. This book has over 150 entries written by over 100 contributors (many of whom were cited in this chapter) about issues pertaining to community corrections and alternatives to incarceration. What separates this encyclopedia from other corrections or justice system compendiums is the focus upon community sanctions, and it serves as a desk reference that provides an overview of topics from “A to Z” in community corrections, from the beginning of probation and parole in the 1800s to today’s evidence-based practices.

Angela J. Hattery and Earl Smith (2010). *Prisoner Reentry and Social Capital: The Long Road to Reintegration*. Lanham, MD: Lexington Books. This book identifies the challenges of community reentry and also highlights the special challenges that drug, sexual, and female offenders confront. Of special interest is the examination of social capital, whereby those ex-offenders with better pro-social networks may be more successful in their community reintegration. This book is strengthened by the use of information gleaned by interviews with ex-prisoners who shared their perceptions about reentering the community.

Faith E. Lutze (2014). *The Professional Lives of Community Corrections Officers*. Thousand Oaks, CA: Sage Publications. While almost all of our analysis has focused on offenders, the roles and responsibilities of officials working in probation and parole are often overlooked. These workers, however, play a key role in offender rehabilitation. Lutze examines the distinctive nature of this work, and the challenges probation and parole officers must overcome. Of special interest in this book is the key role of community corrections workers in improving offender outcomes.

CHAPTER 12



Putting the Brakes on Correctional Populations

INTRODUCTION

Previous chapters outlined how Americans support tough-on-crime policies: sentencing offenders to longer terms of incarceration, developing tough community-based probation programs, and strictly enforcing parole conditions for ex-prisoners who return to the community. The sheer number of probationers and parolees, and the limited supervision in some jurisdictions, has led some supporters of the crime control model to advocate tougher sanctions for the 4.65 million persons who were on probation or parole at year-end 2015 (Kaeble & Glaze, 2016). What are the answers to problems of crime? Should we maintain the high imprisonment policies that some have called mass imprisonment? Or are these practices too costly given budget constraints? In other words, should justice be limited by budgets? And what are the short- and long-term costs and benefits of high imprisonment practices on individuals, families, and communities?

In this chapter, we examine these questions, including the **opportunity costs** of prison expenditures (how governments could spend those funds if they were not spent to punish offenders). Although the costs of imprisoning offenders are high, almost everybody agrees that some offenders must be incarcerated for public safety because they are too dangerous to remain in the community. The challenge is that tax dollars are becoming increasingly limited, which affects the number of offenders we can incarcerate. Corrections populations were more or less stable between the 1940s and the mid-1970s but have increased ever since, as shown in Figure 12.1. Many of the offenders who accounted for this growth are not violent criminals, and policymakers have expressed doubts whether these offenders should serve lengthy prison terms (Pew Charitable Trusts, 2012b).

Like other issues in this book, maintaining high levels of imprisonment presents a choice between two equally unappealing outcomes. At year-end 2015, we housed almost 1.4 million offenders in federal or state prisons and about 621,100 persons in local jails (Kaeble & Glaze, 2016). Correctional populations grew nearly five-fold since the 1970s, although they have been slowly declining

in recent years. Carson and Anderson (2016, p. 2) reported that federal and state prison populations peaked in 2010, and in 2014–2015 the “number of state and federal prisoners who were sentenced to more than one year declined by 30,900, a 2 percent decrease.” While the numbers showed a slight decrease, the U.S. imprisonment rate per 100,000 residents dropped by 13 percent between 2007 and 2015 (Gelb & Stevenson, 2017).

Those national averages, however, mask variations within the fifty states: While Maine, for example, had a 13.6 percent decrease in its correctional population, North Dakota’s prison population grew by 11.2 percent (Carson & Anderson, 2016, p. 7). Moreover, while state prison populations have decreased somewhat since 2010 (see Figure 12.1), the number of inmates within the federal Bureau of Prisons (BOP) has been fluctuating. The BOP population grew by an average of 1.4 percent per year from 2005 to 2014, but decreased 6.6 percent in 2014 and 2015 (Carson & Anderson, 2016, p. 6).

Support for mass imprisonment seems to be eroding, in part because of the budget crisis that started in 2008, but there is also a growing discontent with practices seen as unfair and unjust. Reilly (2016), for example, described how an Arkansas woman was jailed for thirty-five days for bouncing a \$29 check, and most of us would agree this is a waste of the justice system’s time and resources. Examples of such egregious cases may be shifting public opinion about the use of incarceration. Siegel (2016) summarized the information collected from more than fifty surveys about attitudes toward criminal justice reform. She found that attitudes toward harsh punishments have softened and more Americans express support for prevention, rehabilitation, and reintegration in 2014–2016 than in the past (Siegel, 2016, p. 1). There also seems to be growing opposition to mass imprisonment practices and we examine the issue from several perspectives. First, we consider the relationships between imprisonment and crime: If we lock

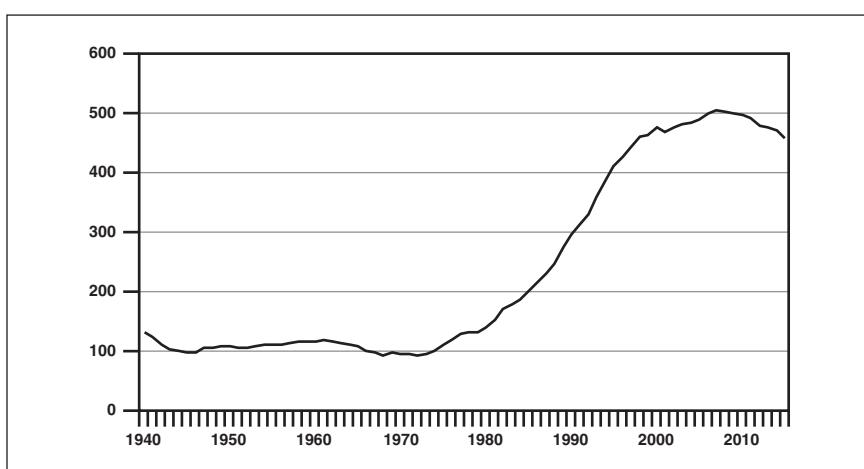


Figure 12.1 U.S. Federal and State Imprisonment Rate, 1940–2015

SOURCE: Carson & Anderson (2016) and Maguire (2013)

BOX 12-1**The Caging of America**

In his comparison of national imprisonment rates Roy Walmsley (2016, p. 1) reported that “more than half of all countries and territories (55 percent) have rates below 150 per 100,000” residents but in the United States there were 698 inmates for every 100,000 Americans. When we talk about mass imprisonment, and millions of people being locked up, it is sometimes difficult to visualize the scope of imprisonment. Adam Gopnik (2012), writing for the *New Yorker*, placed these numbers in perspective:

More than half of all black men without a high-school diploma go to prison at some time in their lives. Mass incarceration on a scale almost unexampled in human history is a fundamental fact of our country today—perhaps the fundamental fact, as slavery was the fundamental fact of 1850. In truth, there are more black men in the grip of the criminal-justice system—in prison, on probation, or on parole—than were in slavery then. Over all, there are now more people under “correctional supervision” in America—more than six million—than were in the Gulag Archipelago under Stalin at its height.

Kaeble and Glaze (2016, p. 1) reported that one in every thirty-seven adults in the United States is under some form of correctional supervision: 2.7 percent of adults are on probation or parole or are held in jails or prisons. In a Bureau of Justice Statistics report, Bonczar (2003, p. 1) noted that “6.6 percent of U.S. residents born in 2001 will go to prison at some time during their lifetime: About one in three black males, one in six Hispanic males, and one in seventeen white males.” Like other figures reported throughout this book, there are some regional differences. Muller and Wildeman (2016, p. 1502) updated the Bureau of Justice Statistics results and found the risk of state imprisonment was highest for black males in the Midwest, in Florida, and the Northeast. Latino males, by contrast, had the highest risk of imprisonment in the Western states, Northeast, and Texas (Muller & Wildeman, 2016). Given those numbers, prison has become an everyday experience in the lives of many American families.

up more offenders, how much will crime decrease? We also examine rising correctional costs and how state governments have responded to these challenges. Box 12-1 describes some of the characteristics of mass imprisonment.

IMPRISONMENT AND CRIME CONTROL

Imprisonment is an important component of criminal justice systems. While there is widespread agreement that some imprisonment is necessary, the problem arises when we debate how many people should be incarcerated. Historically, states tried to balance public safety against fiscal responsibility. We know that there are budget limits to incarceration, but the problem becomes more complex when debating the types of offenders we should imprison, how much time they ought to serve, and the rehabilitative programs (if any) they might receive. Although it is difficult to reach consensus on these issues, public policy analysts have tried to evaluate the short- and

long-term consequences of these policies. It has been argued that mass incarceration has serious negative consequences on individuals, families, and communities (Clear & Frost, 2014), and some scholars have reported that these practices might actually increase criminality (Frost & Gross, 2012; Wakefield & Wildeman, 2011).

Researchers have started to place more importance on measuring imprisonment's costs and benefits. In the next paragraphs we argue that while it is a relatively straightforward task to calculate the direct costs of placing an offender in prison, it is difficult to determine imprisonment's indirect costs or the benefits in terms of reduced crime that stem from incarcerating someone. In an early cost-benefit analysis, Zedlewski (1987) estimated that for every one dollar taxpayers invested in prisons, they saved \$17.20 in crime-related costs. Zedlewski based his analysis on the proposition that incarcerated offenders would each commit 187 crimes per year if they lived in the community and each crime committed cost \$2,300. However, would all of those offenders really commit over three crimes a week, and what are the actual economic costs of these offenses? Moreover, it is difficult to accurately predict the likelihood of recidivism for different types of prisoners. First-time offenders convicted of a violent offense might never commit another crime in their lifetime, while a heroin-addicted property offender might commit 100 residential burglaries a year. A number of scholars have examined Zedlewski's work and have found that his calculations of the benefits of imprisonment were overly optimistic (Abrams, 2013).

Because of the difficulty in correctly predicting those assumptions, cost-benefit analyses are often criticized, although they do represent a positive step in terms of trying to allocate taxpayer dollars in a rational manner. There can be little dispute that incarcerating 1.4 million offenders in federal and state prisons lowers crime. The important question is whether there would have been a similar decrease if we locked up only one million offenders or as Weisberg (2016) questions, can we shrink the prison population without growing crime? Alternatively, if we admitted more offenders but gave them shorter prison terms, would the deterrent effect of prison increase or decrease (see Durlauf & Nagin, 2011)? Thus, to conduct an effective cost-benefit analysis of imprisonment, we have to understand prison population dynamics (the annual number of admissions and the sentence length served) as well as the direct and indirect costs and benefits of imprisoning different types of offenders. The Washington State Institute for Public Policy (2017b), for example, estimated that providing early releases for low risk offenders had a greater cost savings than releasing moderate or high risk offenders.

Prison is a costly intervention, and most of us believe it should be saved for serious and violent offenders. It appears as though governments are paying attention to public opinion. The proportion of violent offenders in state prison systems, for instance, was 53 percent at the end of 2014, which was up from 47.2 percent in 1997 while the proportion of drug offenders decreased from 20.7 to 15.7 percent on December 31, 2014 (Bureau of Justice Statistics, 2000; Carson & Anderson, 2016). Yet, drug offenders represented almost half (49.5 percent) of the Federal Bureau of Prisons population on September 30, 2015 (Carson & Anderson, 2016).

As noted in Chapter 3, cost-benefit studies outline the economic costs and benefits of different policy alternatives and some researchers argue they should

be undertaken for all social programs, including the use of imprisonment (Cohen, 2016). If we are going to consider building or closing prisons, it is important that policymakers and the public know the social and economic implications of their decisions, including whether there is a crime-reduction benefit. One important concept, often overlooked in criminal justice research is the question of **diminishing marginal returns**. Applying diminishing returns to corrections suggests that the more incarceration is increased, the less the incremental benefit. Thus, there is a greater benefit in crime reduction at the start of an imprisonment boom, but this decreases as the worst offenders (e.g., those who commit the most offenses) are taken off the streets. Altogether, taking an economic view of sentencing and corrections makes sense given scarce resources. Another factor overlooked in studies of corrections is the **incarceration probability**, or the likelihood of a person found guilty being sent to prison. Durlauf and Nagin (2011) questioned whether sentencing a greater number of offenders to shorter prison terms is a more effective crime control strategy than sentencing fewer offenders to longer prison terms. Durlauf and Nagin believe that increasing the likelihood of incarceration has a greater deterrent effect, which is an approach used in some European nations. Incapacitating serious and violent offenders for the longest terms might also provide the greatest economic returns.

A number of studies have demonstrated diminishing returns on imprisoning offenders, using county (Lofstrom & Raphael, 2013), state (Johnson & Raphael, 2012), and national-level analyses (Liedka, Piehl & Useem, 2006). Yet, one criticism of any economic analysis of crime and punishment is the difficulty of accurately evaluating all of the costs and benefits. For example, it is relatively easy to estimate the direct or tangible economic cost of a gunshot wound—the hospitalization costs, days of work lost, police investigation, and courts- and corrections-related costs if the shooter is apprehended. But do we also consider the intangible costs, such as the victim's pain and suffering, lost productivity, and the psychological stress that such injuries place on individuals and their families? Scholars such as Michael Tonry (2015) are critical of the accuracy of these indirect costs as they are so difficult to calculate: how do you put a price, for example, on fear of being victimized again?

Another problem of these studies is methodological. Most analyses are based on a limited number of variables, and many other factors may contribute to crime and recidivism that are not considered. Like with the gun control data described in Chapter 6, researchers sometimes use the same data and reach different conclusions. As a result, one needs to be a careful consumer of research.

THE DIRECT COSTS OF INCARCERATION

Prisons and jails have always had to compete against other state and local programs for scarce budget dollars. While criminal justice students overwhelmingly support this spending because it may affect their future careers, taxpayers are not so easily convinced, especially when given the choice between spending on prisons or funding health care, roads, law enforcement, parks and recreation, and education. A review of economic trends since the 1940s shows that there is about

one economic recession every five years, and while most of those downturns have been short term—lasting only about a year or so—the recession that started in 2008 continues to have an impact on crime and justice spending a decade later, forcing policymakers to consider practices such as diversion from custody and early release practices that were unthinkable a decade ago (Phelps & Pager, 2016).

As correctional populations increase, so do the operating costs of correctional facilities. In 2012, the total outlay for corrections alone was over \$80 billion (Kyckelhahn, 2015). In 2015 it cost an average of \$31,977 to hold an inmate in a federal prison for a year (Department of Justice, 2016a), although the state costs vary greatly across the nation. Most people are outraged that it costs as much to incarcerate an inmate as it does to enroll a student in a private college. The trouble is that only a fraction of the actual price tag goes for direct inmate services, such as medical care, food, and utilities. In addition, most of the inmate-related expenditures are a result of constitutional guarantees to provide appropriate care. The Legislative Analyst's Office (2017a) for instance, reported that in 2016 it cost California taxpayers \$21,582 in health-care costs for each prisoner which pushed the cost of imprisonment to \$70,812 per year in that state. Of the remaining outlays, most are for staffing, and it is difficult to reduce these costs. A foundation of effective correctional programs is having a well-educated, professional, and competent workforce (Latessa, 2003) that is motivated to participate in correctional rehabilitation and reintegration (Schaefer, 2017). By decreasing salaries, it is difficult to recruit and retain higher-skilled employees.

There are also special-needs populations that are very costly to house, and strategies to release these offenders with appropriate community supervision make good fiscal sense. For example, female prisoners with children pose a double cost when we incarcerate the mother and place her children in foster care. Moreover, elderly inmates—typically defined as persons over fifty-five years of age—can have health-care costs many times higher than those of other inmates (Psick, Simon, Brown & Ahalt, 2017). Last, persons with mental illness or serious health problems pose considerable challenges to correctional systems. When these special-needs populations have been imprisoned for nonviolent offenses, it seems reasonable to develop parole strategies for them that provide appropriate levels of community supervision.

Elderly prisoners represent a special case. The increasing use of mandatory minimum sentences and three-strikes or habitual offender sentencing enhancements has resulted in high populations of elderly inmates in some prison systems. For instance, Bureau of Justice Statistics data show that 3 percent of the U.S. prison population was over the age of fifty-five years in 1993 (Carson & Sabol, 2016) but that had increased to 10.6 percent by December 31, 2105 (Carson & Anderson, 2016); an increase of 253 percent. Our knowledge of offender behavior suggests that this group has a comparatively lower recidivism risk than their younger counterparts (Crutchfield, 2017). While few would advocate the wholesale release of inmates based on age alone, it seems feasible to release elderly inmates convicted of nonviolent crimes if suitable community alternatives and supports exist (Cartwright, 2016).

The figures we outline here represent the direct government expenditures for imprisonment. Governments operate within fixed budgets, and by spending

money on corrections, those funds cannot be used for other programs, which is the principle of opportunity cost. When correctional spending increases, there are fewer dollars for prevention programs such as early intervention, mentoring, or community-based services for troubled youths, such as Functional Family Therapy or Aggression Replacement Training, which have been shown to be cost-effective strategies for reducing youth involvement in crime (Washington State Institute for Public Policy, 2017a).

While the overall cost of state incarceration was over \$80 billion in 2012 (Kyckelhahn, 2015), each taxpayer contributed about \$551 per year to keep jail inmates and offenders imprisoned (based on an estimated 145 million individual tax returns filed in 2012; see Collins, 2012). Due to the high costs of punishing offenders, there is a growing interest in investing money that would be spent on corrections to support programs proven to reduce the recidivism of offenders who pose the highest risk of recidivism, and provide them with effective supervision, which is the concept of **justice reinvestment (JR)** (the term justice reinvestment initiative or JRI is also commonly used); these initiatives are highlighted in Box 12-2.

BOX 12-2

Justice Reinvestment

Brown (2013, p. 318) reported that “corrections spending makes up the fourth largest state expenditure (behind only transportation, education, and health).” With tight budgets, taxpayers and legislators alike have realized that high imprisonment policies are costly and that dollars spent on corrections are not available for other interventions that might have a greater success in crime reduction, such as rehabilitative programs that reduce the likelihood of recidivism. The problem is that it is difficult to convince skeptical and increasingly disgruntled taxpayers of the long-term benefits of investing in social programs such as housing and employment opportunities for offenders, especially when we are reluctant to invest in similar programs for nonoffenders.

One emerging strategy that might enable us to reduce our reliance upon incarceration without putting more demands on taxpayers is justice reinvestment (JR). According to Fox, Albertson, and Warburton (2011, p. 122) “JR proposes moving funds spent on punishment of offenders to programs designed to tackle the underlying problems which gave rise to the criminal behavior.” Such reinvestment incorporates the results of evidence-based practices of interventions shown to be effective in reducing recidivism and cost-benefit analyses. Lachman and Neusteter (2012, p. 2) noted that the JR model involves a five-step process that includes:

- Collecting and analyzing data to identify key criminal justice population drivers,
- Developing and implementing alternative strategies to enhance public safety and reduce costs,
- Implementing these strategies,
- Documenting costs and potential savings, and
- Assessing the impact of reinvestment strategies.

JR programs are becoming increasingly popular and have received funding from the federal government through the Bureau of Justice Assistance, and the

Council of State Governments actively promotes the concept on their website. These programs are very popular with advocacy organizations and university researchers, and are intended to be long-term solutions to the challenge of high imprisonment rates.

A number of states have introduced JR programs, but O'Hear (2016) observed that the application of these programs "does not live up to the theory," and "the reinvestment piece has been particularly problematic." This is a long-term problem when it comes to trying to reduce our reliance on institutionalizing individuals as we can always find the funds to operate mental health facilities, jails, and prisons but when it comes to providing community supports for people released from these facilities we often fail to fund these activities. Michael Tonry (2017a, p. 14) observed that "community punishments could accomplish much that is good. For that to happen on a large scale, policymakers must be prepared in the short term to reduce prison populations substantially, and recycle much of the savings, or appropriate new funds for community punishments on a scale that so far seems unimaginable."

INDIRECT COSTS OF INCARCERATION

One cannot debate mass imprisonment policies without fully understanding the impact of imprisonment on individuals, families, and communities. The criminal justice system has been used to respond to long-term social problems, such as addictions, populations of persons with mental illnesses, and homelessness. In some cases, criminal justice interventions have destructive effects on the persons involved with these systems. Consider that once people have been placed in prison, they often face considerable challenges in making a successful reentry into society.

Cherney and Fitzgerald (2016) observe that obtaining employment is a foundation of successful community reintegration. Ex-prisoners, especially during times of high unemployment, may be effectively blocked from legitimate job opportunities (Decker, Ortiz, Spohn & Hedberg, 2015). Few employers are willing to hire persons with criminal records, and even fewer will hire an ex-inmate (Harris & Keller, 2005). Even when an ex-prisoner is offered work, it is typically an entry-level, low-paying, or undesirable job with limited opportunities (Bumiller, 2015). If parolees cannot work toward well-paying jobs, their chances of long-term success are very limited. One of the cornerstones of success in job markets is **social capital**, the relationships and trust we build through positive social networks. Ex-prisoners with more extensive social networks of pro-social family, friends, and associates usually have a better chance at finding a job and overcoming barriers to community reintegration (Cherney & Fitzgerald, 2016). It is difficult for prisoners to accumulate social capital when they are incarcerated, and this is a good reason for transitioning offenders into community halfway houses. Such placements allow prisoners a safe setting in which they can build legitimate employment, educational, and social networks, although this approach does not work with every offender.

Prisoners are often optimistic about their chances for legitimate employment and being successful in their re-entry prior to their release. Unfortunately, their

previous criminal convictions, substance use, and the stigma associated with imprisonment make it difficult for them to reintegrate successfully into society (Decker et al., 2015). Thus, while incarceration can have a positive short-term effect on reducing crime, we also have to understand that punishment reduces a person's access to legitimate opportunities. The more barriers we construct to community reintegration, the more likely the individual will return to jail or prison.

Other individual-level incarceration costs must also be considered. The FBI reported approximately 10.7 million arrests in 2016 (FBI, 2017, Table 18). Most arrestees pass through jails or juvenile halls, and these individuals often have high rates of communicable diseases, such as HIV/AIDS, tuberculosis, or hepatitis. Close confinement within these facilities results in higher transmission rates of these communicable diseases. One problem that many jurisdictions are confronting is that correctional medical services did not increase with the rising number of inmates, and this led to rationed health care. A survey carried out by the U.S. Department of Health and Human Services found there was considerable variation in the delivery of health assessment and treatment for emergency and chronic conditions in state prisons, and some states have few opportunities for inmates to obtain correctional health care (Chari, Simon & De Frances, 2016). As a result, health-related problems that originate in corrections are sometimes spread to the community.

Other inmates are physically or sexually victimized while incarcerated and return to the community suffering from physical and psychological injuries, such as post-traumatic stress disorder (PTSD). Prins (2014) found that the prevalence rates of prison inmates suffering from PTSD were many times higher than the rate in community populations. Moreover, a national survey carried out by the Bureau of Justice Statistics found that "about one in seven state and federal prisoners (14 percent) and one in four jail inmates (26 percent) reported experiences that met the threshold for serious psychological distress" (Bronson & Berzofsky, 2017). While prisoners are not sympathetic populations, the abuse occurring within a correctional facility may have a long-term effect on the individual (Armour, 2012). If inmates are victimized in jail or prison, it is likely they will be more angry and unsettled when returned to the community, further jeopardizing our safety. Hochstetler, Murphy, and Simons (2004) found that some prisoners who had been abused in prison exhibited symptoms of PTSD and depression. These investigators speculated that prison violence may have a powerful impact on individuals as they are forced to live with their attackers. Altogether, jail or prison inmates can return to the community with more physical and psychological problems than when they were admitted and taxpayers will ultimately assume the long-term burden of paying for these injuries in increased health care or reduced public safety.

Incarceration can have significant costs to families, neighborhoods, and communities. Placing an individual behind bars can have a destructive effect on family relationships. A term of incarceration often strains family finances because paying for collect calls, making visits to prisons (often located in rural areas away from the inner cities, which are home to many offenders), and providing even modest financial support to a prisoner can cause significant financial

stress (deVuono-powell, Schweidler, Walters & Zohrabi, 2015; Sugie, 2012). As Harner, Wyant, and Da Silva (2017) note “prison ain’t free like everyone thinks” and prisoners are often responsible for paying for some of their health care costs, and women offenders especially can be disadvantaged by these policies as they often require more health care than their male counterparts.

Several scholars have tried to estimate indirect imprisonment costs. Grinstead and colleagues (2001) found that wives of prison inmates spent an average of \$292 per month to support their relationships. This includes travel for visits, postage, depositing money into the inmate’s account, and telephone charges (most inmates can only make expensive collect calls). Meares (2004, p. 297) outlined how one family, with an annual income of less than \$20,000, spent \$12,680 supporting a relative in prison. A report prepared for the Ella Baker Center confirms the high costs borne by the prisoner’s families and they found one-third of them went into debt to maintain contact (duVuono-Powell et al., 2015).

The problem is that the money spent to keep a prison relationship viable is not available to the family and is ultimately funneled away from the community. By supporting imprisoned family members, a family places itself at greater risk of poverty (Sugie, 2012). While this may appear to be a short-sighted practice, it also represents their hope of a better future for the family. Maintaining family relationships can reduce prison misconduct and recidivism once the inmate is released (De Claire & Dixon, 2017). As a result, a family’s investment in supporting a prisoner pays dividends in long-term public safety.

Other indirect costs of imprisonment are difficult to estimate. Some scholars argue that imprisoning a parent decreases the ability of the remaining parent or caregiver to supervise children and this may lead to a number of negative consequences. Wakefield and Wildeman (2011) found that parental incarceration was associated with a higher likelihood of mental health and behavioral problems in children. Imprisonment of women can have a destructive impact on a family and many prisoners are mothers (Richie, 2002; see also Chapter 9). If family members are unable to provide a home for these children, they may end up in state care, further increasing imprisonment costs.

While parental incarceration might have negative consequences, Turanovic, Rodriguez, and Pratt (2012) remind us that some parents might not have been very involved in their children’s lives prior to their incarceration. Moreover, it is possible that a term of incarceration will “interrupt” the criminal career of offenders and make them realize the costs of their addictions or lifestyle choices. As a result, imprisoning an out-of-control offender may help the family in the long term if the individual learns from the experience.

Individual- and family-level effects of incarceration are also transferred to the community. Imprisonment rates are not distributed randomly throughout the nation, and historically most offenders came from a relatively small number of inner-city neighborhoods (Clear & Frost, 2014). Much has changed in respect to prison admissions between 2006 and 2014. In a report for the *New York Times*, Keller and Pearce (2016) found the highest number of new state prison admissions were now coming from counties of less than 100,000 persons, the number

of new prison admissions dropped in counties with more than 300,000 residents, and the biggest increase in prison admissions were whites from rural counties (see Oliver, 2017).

Piehl, Useem, and DiIulio (1999, p. 14) contend the deterrent value of imprisonment decreases when it is seen as commonplace. Consistent with our earlier observations, over-involvement of the justice system in some communities also may undermine the legitimacy of government and law. Taking a similar perspective, Lynch and Sabol (2004, p. 267) outlined the relationships between high incarceration rates and community functioning and say that “Mass incarceration disrupts patterns of social interaction, weakens community social organization, and decreases the stigma of imprisonment; its longer-run effects may be to reduce its effectiveness.”

These scholars raise interesting questions about the true costs of mass imprisonment policies. When calculating the costs of imprisoning somebody we also have to consider how the stigma of imprisonment prevents them from pursuing legitimate opportunities, the relationships between prison and community health, and the harmful effects of placing family members in prison. Not everybody agrees about the extent of these costs, but it is important to acknowledge (1) the human costs in terms of lost opportunities; (2) the indirect economic costs of high imprisonment policies; and (3) the risk that mass imprisonment may erode trust in and legitimacy of criminal justice systems.

So what is the total indirect cost of imprisonment? McLaughlin, Pettus-Davis, Brown, Veeh, and Renn (2016, p. 1) estimated that for every dollar spent on corrections, there are ten dollars in social costs “borne by families, children, and community members who have committed no crime.” While it is very difficult to produce an accurate estimate, conducting these analyses is important because it forces us to think of the true costs of imprisoning an individual and whether there are less expensive alternatives that will not reduce public safety.

REHABILITATING PRISONERS

While correctional rehabilitation has been on the back burner of penal policies for several decades, there are indications that public support for rehabilitation has increased. Recent surveys reveal that the public may support rehabilitation more than policymakers might believe (Pew Charitable Trusts, 2012a). The concept of rehabilitation should be an “easy sell.” Advocates of the crime control model, for instance, support lower recidivism rates because they translate into greater public safety. However, there is little confidence in the actual delivery of correctional treatment, despite the fact that in the past decade, research has clearly outlined the steps to developing effective correctional rehabilitative programs. Adopting these policies in eras of fiscal constraints is problematic, although the question of “where will the money come from?” can be answered by employing justice reinvestment initiatives.

In Chapter 11, we discussed how community-based programs have been driven by simplistic notions that we can make significant changes in people’s

attitudes, values, or goals in a short time by somehow breaking them down in a boot camp or “scared straight” program and then building them up again. Institutional correctional programs have been somewhat less vulnerable to these fads, but prison administrators are also guilty of developing programs without a sound theoretical foundation. In fact, the cornerstones of effective correctional programs are fairly straightforward, and research has consistently demonstrated the effectiveness of the correctional rehabilitation models based on the Risk, Needs, and Responsivity (RNR) approach. The key features of the model outlined by Andrews and Bonta (2017, pp. 177–178) are as follows:

- Risk: Match the level of service to the risk level of the cases. Work with moderate- and higher-risk offenders.
- Need: Identify criminogenic needs and target them in treatment. Move criminogenic needs in the direction of strengths.
- General Responsivity: Employ behavioral, social learning, and cognitive-behavioral and skill-building strategies.
- Specific Responsivity: Adapt the style and mode of service according to the setting of service and the relevant characteristics of individual offenders, such as their strengths, motivations, preferences, personality, age, gender, ethnicity, and cultural identifications.

Using the RNR approach, service delivery starts with an assessment of the offender’s risk and services to higher-risk offenders are prioritized. Low risk prisoners may receive no specific treatment, as prior studies have shown that mixing these individuals with higher-risk offenders may actually contribute to recidivism (Bonta & Andrews, 2007).

Risk is determined by assessing the static risk factors, which are things that cannot be changed, such as the prisoner’s age or offense history, as well as the prisoner’s dynamic risk factors (e.g., things that can be changed, such as education level). These dynamic factors are then targeted for intervention, and Ruddell and Ortiz (2018) summarized them as follows:

- (a) employment/education (a lack of job experiences as well as conflict with supervisors and co-workers); (b) family/marital relationships (whether offenders have positive relationships and their attachment to family members); (c) substance abuse; (d) community functioning (which includes unstable residential histories, debt, the lack of a bank account, and a poorly maintained residence); (e) personal/emotional functioning (the individual’s coping skills, hostility toward others, interpersonal skills, impulsivity, and conflict resolution); (f) associates (having mostly criminal friends and acquaintances, being socially isolated and unattached to community groups), and; (g) attitude (which includes the negative values that an offender holds toward the justice system, as well as placing little value on rehabilitation, basic life skills or employment).

As noted above, interventions based upon the RNR approach must be responsive to the offender’s circumstances and needs. A single treatment approach may not be successful with both male and female offenders, or prisoners from different ethnic or racial groups. In addition, offenders differ in terms of their strengths,

weaknesses, and motivations to change (Bonta & Andrews, 2007). Taking these factors into account while implementing an offender's rehabilitative plan will contribute to lower recidivism rates.

Although evidence-based interventions have been shown to reduce recidivism, spending on rehabilitation represents a small fraction of overall correctional budgets. In the Florida Department of Corrections, for example, only 1.7 percent of the budget was earmarked for rehabilitation (Office of Program Policy Analysis and Government Accountability, 2007). The Legislative Analyst's Office (2017a) in California found that rehabilitation programming accounted for \$2,437 of the average \$70,812 (or 3.4 percent) cost of imprisoning an offender. Even before the 2008 recession, many offenders received modest amounts of treatment (Phelps, 2011). Petersilia (2011, p. 53) reported that when she participated in an advisory panel for the California Department of Corrections and Rehabilitation, "50 percent of all prisoners released the year before had not participated in a single program." Thus, even though a rehabilitative program may theoretically exist in a prison, a small proportion of offenders may actually participate in the intervention, or finish the program once enrolled.

Another problem is that we have a pretty good idea of "what works," but it is sometimes difficult to translate these good intentions into effective treatment programs (Lin, 2000). An implementation challenge in correctional institutions is that changing the culture to one that encourages rehabilitation requires the support of front-line correctional officers, the positive leadership of correctional managers, appropriate funding, and the support of community stakeholders, such as employers and inmates' families. Further, the inmates have to be convinced that these interventions are going to result in meaningful change in order for them to become fully involved in these programs. Altogether, this is a complex proposition, and programs often fail if one or more of these elements are missing.

While there are many barriers to developing effective rehabilitative programs, the end product is essentially "win-win." Every year, about 640,000 ex-prisoners return to the community, and it is in everyone's interest if they move into our neighborhoods less damaged than when they were admitted to prison. U.S. recidivism rates are at relatively high levels and about four in ten prisoners are returned to prison for violating their parole conditions, or for a new offense (Pew Charitable Trusts, 2011; U.S. Sentencing Commission, 2016). Effective correctional interventions, however, can produce significant long-term cost benefits in crime reduction (Washington State Institute for Public Policy, 2017a). Last, it is plausible that correctional officers' cynicism is reduced when inmates are discharged and are not readmitted. There is much to be gained and little to lose by introducing evidence-based correctional treatment; however, like other criminal justice challenges, political and financial support are required if these interventions will be successful. Yet, prison systems are often resistant to change, and Box 12-3 describes how the Supreme Court forced a significant change in California correctional practices. The following sections outline suggestions for another policy alternative: cutting correctional populations without compromising public safety.

BOX 12-3**Cruel and Unusual Punishment**

As noted in Chapters 1 and 2, the police, courts, and corrections are often at the mercy of both internal and external forces. For the most part, the forces with the greatest impact on corrections in the past years have been external, including state budget limits. Another important factor is the influence of the courts on correctional operations. Prisoners and advocacy organizations have launched lawsuits in the federal courts pertaining to unconstitutional practices such as unnecessary strip searches (upon admission to jails); a lack of attention to inmates' basic needs, including health care; and correctional overcrowding that constitutes cruel and unusual punishment. That litigation has forced correctional systems to spend billions of dollars to meet prisoners' basic needs.

Perhaps one of the most important recent rulings on prisoners' rights was the *Brown v. Plata* (2011) decision, in which the Supreme Court found that overcrowding in California's prison system violated the prisoners' constitutional rights. In delivering the majority opinion, Justice Kennedy wrote that "Crowding creates unsafe and unsanitary conditions that hamper effective delivery of medical and mental health care. It also promotes unrest and violence and causes prisoners with latent mental illnesses to worsen and develop overt symptoms." To remedy overcrowding the state was given two years to reduce the inmate population by 33,000 prisoners and the Legislative Analyst's Office (2017b, p. 5) reported the state decreased the correctional population by 33,700 inmates and 47,000 parolees by 2016. In his dissent the late Justice Scalia was critical of the federal courts' role, calling the decision a "radical injunction," and arguing that it "takes federal courts wildly beyond their institutional capacity." In a separate dissent Justice Alito wrote that the decision of the majority "present[ed] an inherent risk to the safety of the public," and the majority was "gambling with the safety of the people of California," and that the Court's decision might "lead to a grim roster of victims." So what impact did the decrease of 80,700 inmates and parolees have on the state's crime rate? Violent crime increased by 8.4 percent and property crime grew by 6.6 percent in 2014–2015 (Public Policy Institute of California, 2016), but Males (2017) reports that there was a decrease in Part I crimes statewide when comparing 2010 and 2016, although crime increased in Los Angeles during that era. It is difficult to link a rise in crime to a single factor such as the release of prisoners, and we have to remember there was a similar uptick in homicide in the nation's biggest cities between 2014 and 2015 (Sanburn & Johnson, 2017).

PRIVATIZATION

One of the few things that critics and supporters of high imprisonment policies agree upon is that incarceration within the United States is a big industry. Mass imprisonment has raised the total national price tag for incarceration in 2012 to \$80 billion (Kyckelhahn, 2015). As old prisons became crowded, new industries emerged that supplied fixtures to refurbish them. Further, private corporations that specialized in the planning, construction, and leasing of new prisons were able to make lucrative, long-term arrangements with cash-strapped counties and states to finance and construct jails and prisons.

One way that some jurisdictions reduced their incarceration costs was to privatize some or all of their correctional programs. There is considerable debate about the merits of correctional privatization and whether these operations contribute to higher imprisonment rates. This debate has been carried out at the highest levels of government and while President Obama took steps to reduce the federal use of private prison beds to hold immigration detainees, President Trump reversed that decision (Surowiecki, 2016). There are significant numbers of inmates in privately operated facilities; according to Carson and Sabol (2016, p. 16), in 2015 about 8 percent of the state and federal prison populations were incarcerated in private facilities (almost 125,000 prisoners). Moreover, “private companies operate approximately three-fifths of state and federal community-based correctional facilities for adults;” “31 percent of juveniles placed in residential housing,” and the “operations and management of correctional services and treatments” (Lindsey, Mears & Cochran, 2016, p. 309). Whether one believes that private corrections are a desirable practice, they will remain an important element of corrections for the foreseeable future.

Supporters of privatization argue that corporations can operate detention centers, jails, or prisons more effectively and efficiently than can governments. Private operators also promise they can decrease recidivism. One of the problems with privatization, however, is that state prisons already operate relatively efficiently, and there are only a few ways to save money. First, staffing is a major correctional cost, and private operators can hire less-qualified staff and reduce benefits, although in some contracts these firms are required to pay employees the prevailing wages for the jurisdiction. Second, these firms can sometimes operate institutions with fewer staff by building facilities that make it easier to supervise and control inmates and by taking advantage of technology to replace correctional officer positions. Third, these operators can negotiate to hold low-risk inmates, such as prisoners with no history of violence or escapes, and inmates with fewer medical problems. By taking the least problematic and healthiest inmates (which is called **creaming** or **skimming**) the private operator can reduce costs (Burkhardt, 2017).

Private corporations have established a firm toehold in managing state and federal prisons. There is acknowledgement that these firms can do some things more effectively—from developing quick responses to prison crowding (including the construction of new facilities and the ability to transfer inmates to different jurisdictions) to providing food service or health care within a publicly operated facility. Kim and Price (2014, p. 269) examined the growth of private prisons and found that “once prison privatization has been adopted, the matter of private prisons tends to become a routinized government operation.” One of the gaps in our knowledge about private corrections is a lack of sound research that has fully evaluated both the efficiencies and recidivism associated with these operations (Gaes, 2012; Lindsey et al., 2016). One of the challenges of these comparative analyses is that it is sometimes difficult to accurately measure and evaluate the costs and benefits of private and public services because of differences in accounting.

There are some correctional operations that seem well suited to private operators. Short-term inmates, such as immigration detainees held pending deportation, might be an ideal population as they are generally noncriminal persons

who are held for only a few days or weeks. The numbers of detainees in these facilities is large and Human Rights Watch (2017) reported at least 400,000 persons pass through these facilities every year. Yet, the American Civil Liberties Union of Georgia (2012) has found that conditions in these detention facilities can be compromised by a corporation's profit motive and Human Rights Watch (2017) has been critical of the health care some detainees receive.

When private firms operate prisons, they are responsible for the supervision of more sophisticated offenders, and the services these prisoners require are much greater than those of jail inmates or immigration detainees. However, program evaluations typically find that recidivism rates in these institutions are about the same as in government-operated facilities (Gaes, 2012). Similar to other controversies in criminal justice, the privatization issue suffers from limited credible research and cost-benefit analyses (Lindsey et al., 2016). As a result, most of the debate over correctional privatization is based on arguments summarized by Gerald Gaes and presented in Box 12-4.

BOX 12-4

The Pros and Cons of Privatization

Gaes (2012, pp. 27–29) has identified arguments for and against correctional privatization, and they are summarized as follows:

Arguments favoring privatization:

- Private firms bear risk, unlike public management, thus increasing cost efficiency.
- Competition among private firms lowers costs.
- Incentives for government-managed institutions are structured so as to increase rather than conserve money.
- Private prisons are more accountable to governments.
- Private prisons are responsive to market pressures to win new contracts, making them more accountable.
- Private companies save money at the operation stage. The main savings come from reducing labor costs, both through lower wages and through more efficient use of labor.
- Because they are not bound by civil service rules in managing their personnel, private prisons use roughly one-third the administrative personnel of government prisons, and they use incentives to reduce sick time and overtime expenditures.
- Private firms are free from many bureaucratic purchasing rules and can often buy supplies at lower cost than the government.
- Private prisons are more accountable because their contract can be terminated.

Arguments against privatization are:

- Government contracts actually increase expenditures because of hidden contract costs.

(Continued)

BOX 12-4**The Pros and Cons of Privatization (continued)**

- Private firms cut corners to make a profit, resulting in inexperienced staff or poor-quality goods and services.
- Corruption can increase costs and lower quality.
- Private firms may abandon their contracts if they cannot make a profit, leaving the government at risk.
- The initial bids of firms are lowball offers. Private firms will either raise prices later, once they have a foothold in the market, or will fail to deliver quality services because the original negotiated price was too low.
- Private firms may lobby for preferential treatment.
- Private firms may influence substantive criminal justice legislation by supporting tough-on-crime candidates and advocating tougher sentencing.
- Fear of stock price drops may make private prisons conceal their problems.

CONCLUSIONS

Prison reformers have much to be optimistic about. Decreasing crime rates have caused Americans to reconsider whether we have reached the upper limits of punishing offenders. National imprisonment rates have decreased 13 percent between 2007 and 2015, and this represents the first major reduction in prison populations in decades. These decreases are being driven by budget crises and court decisions such as the *Brown v. Plata* (2011) case, which led to the release of 33,700 California prisoners. Also, Californians voted to repeal parts of their “three-strikes” legislation that now makes it difficult for less serious offenders to be sentenced to lengthy prison terms. It is possible that voters in other states will push for similar legislative changes.

Although there have been some positive occurrences, conditions in some prison systems are unsettled, and there have been increases in the numbers of homicides and suicides (Noonan, 2016) and sexual assaults (Beck, 2015). Moreover, correctional systems have had little luck in managing prison gangs (Skarbek, 2014). And while the federal and state governments are advocating practices such as reinvesting funds from imprisonment to supporting offenders in the community, there has been relatively little progress with justice reinvestment (O’Hear, 2016; Tonry, 2017a).

As of year-end 2015, the actual numbers of persons held in jails and prisons are continuing to show modest decreases. Putting the brakes on correctional populations can be traced to a number of legal and legislative factors mentioned above. We question whether these initiatives would have been enacted without the growing public support for correctional rehabilitation and the recognition that by preparing inmates to return to the community, we not only save taxpayer dollars (in terms of lower recidivism rates) but also increase public safety.

As Clear and Frost (2014, p. xv) note, “sweeping criminal justice reform and the end of mass incarceration sound appealing until one is faced with the hard reality that serious and violent offenders will absolutely have to be part of the plan as well.” As a result, a key question that remains to be answered is whether we can help those prison inmates make positive changes that will increase our long-term safety while holding them accountable for the crimes they committed.

KEY TERMS

<i>Brown v. Plata</i>	diminishing marginal	justice reinvestment
creaming (skimming)	returns	opportunity costs
	incarceration probability	social capital

CRITICAL REVIEW QUESTIONS

1. Discuss the impact of a five-year term of imprisonment on a mother, a 20 year-old gang member, a middle-class wage earner, and an elderly man. Does a term of imprisonment have the same effect on these different persons?
2. What are imprisonment’s effects on families and communities?
3. What are the opportunity costs of imprisonment? If you were directed to cut your state’s correctional budget by one half and invest these funds in programs to reduce prison admissions, what types of programs would you prioritize?
4. Piehl, Useem, and DiJulio (1999, p. 14) observed that “prison may lose its value as a penalty if it is seen as commonplace.” Do you agree or disagree with this statement? Explain.
5. Should budget limits be a factor in determining how much incarceration should be used? Why or why not?
6. One way to measure privatization’s effectiveness is to examine the numbers of persons held in these facilities. Another method is to review the stock market performance of corporations that hold inmates. What are the long-term earnings and stock value of CoreCivic (formerly the Corrections Corporation of America)?
7. It has been speculated that the increased use of imprisonment resulted in a significant benefit in crime control, but this effect decreased as imprisonment increased. Discuss the concept of diminishing marginal returns as it relates to imprisonment.
8. If tough on crime policies are increased, and more prison beds are required, who will benefit? Who loses?
9. Do you believe that a poor family’s financial support of a prisoner is a good investment?

WRITING ASSIGNMENTS

1. Look up the number of arrests from the FBI’s *Uniform Crime Reports* for 2012–2017. Compare those to the number of jail and prison inmates (available on the Bureau of Justice Statistics website). In two or three paragraphs explain what the numbers and trends mean to you.

2. Some people say that criminal justice policies affecting minority populations are simply a reflection of the larger racial problems that we have as a society. Pick three correctional policy areas and explain why they do or do not illustrate racially differential effects.
3. Go to the website for your state's corrections department (or as an alternative to the U.S. Bureau of Prisons website) and see if you can find the number of prisoners currently being housed and the department's annual budget. Can you determine the average cost per inmate by dividing the budget by the number of inmates? Why or why not? Explain.
4. In a one-page essay discuss the merits of publishing the costs of imprisoning offenders when they are sentenced. Do you think this would sway public opinion about harsh sentences?
5. Develop a one- or two-page essay responding to the following proposition: Money should be diverted from prisons and invested in community-based correctional alternatives.

RECOMMENDED READINGS

Joshua Page (2013). *The Toughest Beat: Politics, Punishment, and the Prison Officers Union in California*. New York: Oxford University Press. California has the largest state prison system, and Page describes some of the forces that contributed to its growth. Unlike most studies of the political, historical, and social factors that lead to high imprisonment rates, this book describes how the California Correctional Peace Officers' Association (CCPOA), the union for prison officers, gained political power and used that power to advocate for mass imprisonment policies.

Jeffrey Reiman and Paul Leighton (2016). *The Rich Get Richer and the Poor Get Prison*, 11th ed. New York: Routledge. The authors outline how the poor always have been disadvantaged when it comes to their interactions with criminal justice systems. Reiman and Leighton argue that crime is functional and that occupational, workplace, and environmental crimes go unpunished even though they result in as many harms as street crime.

David Skarbek (2014). *The Social Order of the Underworld: How Prison Gangs Govern the American Penal System*. New York: Oxford University Press. This book addresses how prison gangs govern prison life and the importance of understanding the existence of informal and unofficial rules and routines. Although outsiders believe gang activities are detrimental, Skarbek observes that prison gang activities are rational from the prisoner's perspective. A strength of this book is the focus on the underground nature of gang activities.

CHAPTER 13



The Death Penalty: Dying a Slow Death?

INTRODUCTION

One of the most controversial sanctions that can be imposed is the death penalty. Once widely used, capital punishment has fallen out of favor, both within the United States and throughout the world. Amnesty International (2017, p. 8) reported that “172 of the 193 member states of the United Nations were execution-free in 2016.” The United States is one of the few industrialized countries where offenders are sentenced to death for ordinary crimes.³⁰ Amnesty International (2017, pp. 4–5) observed there were at least 1,032 executions in the world in 2016; the global leaders were Iran (567), Saudi Arabia (154), Iraq (88), and Egypt (44). That total did not include China or North Korea, and those nations are estimated to execute thousands of persons each year, but their statistics on executions are considered “state secrets.”

There were twenty-three executions in the United States in 2017, which was down from a peak of ninety-eight in 1999 (Snell, 2017). Despite the relatively low number, the issue of capital punishment is very controversial, and because arguments over the death penalty can become so emotional, it is sometimes difficult to separate facts from myths about the issue. This chapter explores the use of capital punishment within the United States, recent controversies about the application of the sanction, and the social and political factors that have led to the reduced number of executions. Finally, we speculate about the death penalty’s future. Like Walker (2015), we avoid the emotionally charged issue of whether the death penalty is morally correct and instead focus on the question of whether it is an effective criminal justice policy.

THE CURRENT STATE OF THE DEATH PENALTY

There are only several dozen executions every year, yet there is considerable diversity in the use of this sanction. The death penalty was authorized in thirty-one states and by the federal government in 2017. The remaining states have abolished executions, and several states that still allow executions are taking steps

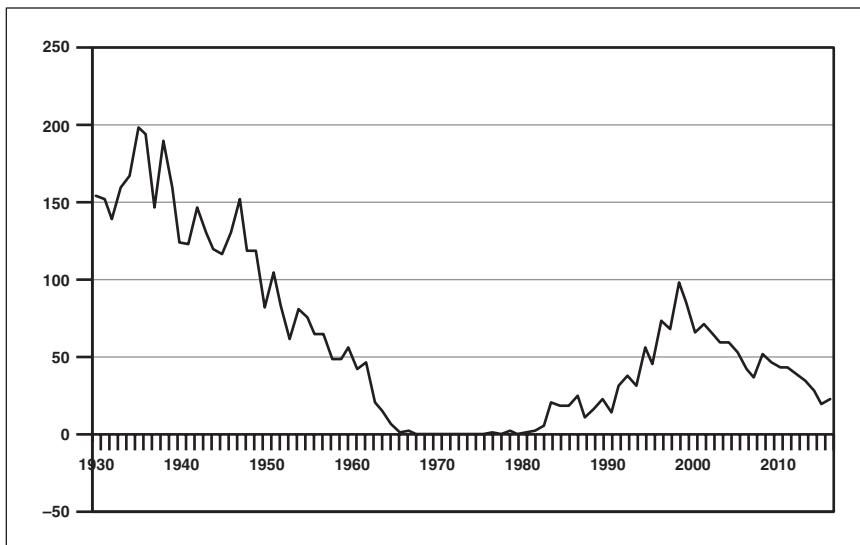
to end this practice. Some states have long histories of abolition: Wisconsin, for instance, stopped using the death penalty in 1853 and Hawaii has never carried out an execution since it became a state in 1959.

While practices vary throughout the country, there can also be differences in the use of the death penalty within a single state. Steiker (2002, p. 8) noted that “Dallas County (Dallas) and Harris County (Houston), two counties with strikingly similar demographics and crime rates, have very different death sentencing rates, with Dallas County returning eleven death verdicts per 1,000 homicides, while Harris County returns nineteen death verdicts per 1,000 homicides.” Death sentences in Harris County have been dropping, however, and the *Houston Chronicle* (2016, p. 47) reported that fifty-three death sentences were imposed between 1998 and 2003, but that number fell to ten between 2010 and 2016 (and none after 2014). The analysis conducted by the *Houston Chronicle* (2016, p. 2) showed that only 16 of the 3,143 U.S. counties (or county equivalents) imposed more than five death sentences in a five-year era. Of those counties, five were from California, four were in Florida, two each were from Alabama and Texas, with single counties in Arizona, Louisiana, and Nevada.

Such variation in the use of punishment between different counties is not unusual. Research in California has shown that there are significant differences between the rates of juveniles transferred to adult courts (Males, 2016) or adults prosecuted for three-strike offenses (Sutton, 2013), even in counties where crime rates are very similar. Garland (2010, p. 289) believes that county politics drive these differences, leading us to question whether political considerations should shape the use of the death penalty. Males (2016) found, for example, that Republican district attorneys were more punitive than their Democrat counterparts when it came to the harsh treatment of youths.

In most states where capital punishment is still authorized, executions rarely occur. Between 1976 and the end of 2017 the Death Penalty Information Center (DPIC) (2017a, p. 3) reported that Texas, Oklahoma, and Virginia accounted for 53 percent of the nation’s 1,465 executions. The federal government also imposes the death penalty. The execution of Timothy McVeigh in 2001 (for his role in bombing the A. P. Murrah federal building in Oklahoma in 1995) was the first time a federal prisoner had been executed since 1961, and two more have been carried out since then (DPIC, 2017a).

Since the 1930s, the number of persons legally executed in each decade has generally decreased and Thompson (2017) says that the “death penalty is dying.” Figure 13.1 reveals that legal executions have a U-shaped distribution, and they increased throughout the 1930s, decreased, and then stopped altogether during the 1970s (due to the *Furman v. Georgia* case that resulted in a national moratorium on the death penalty). After the death penalty was restored in 1976 the number of executions grew each year. The peak in the recent era occurred in 1999 with ninety-eight executions but this decreased to twenty executions in 2016 (Snell, 2017). Death sentences are rarely imposed today and the DPIC (2017a, p. 3) reports they decreased from 295 sentences in 1998 to 31 in 2016. Executions are even less likely to be carried out and of the 8,466 offenders sentenced to death from 1973 to 2013, 1,359 were actually executed and 2,979 remained on death row. Of the individuals not executed

**Figure 13.1 U.S. Executions, 1930–2017**

SOURCE: Death Penalty Information Center (2017a)

or living on death row, the sentences of 3,194 were successfully appealed or overturned, 509 died on death row, and the sentences of 392 were commuted (reasons for the remaining thirty-three removals are unknown) (Snell, 2014).

Supporters and opponents of the death penalty tend to hold their positions passionately. Not surprisingly, persons who want to retain the death penalty tend to support the crime control model, and they propose that due process protections, such as appellate review of death penalty cases, be restricted and the process streamlined. Executions, they argue, are an effective method of deterring crime, and they point to studies finding that one execution can save lives by making potential murderers more reluctant to kill. Furthermore, capital punishment is the ultimate form of incapacitation, as it effectively removes the offender from ever returning to society as well as saving lives in prison. The death penalty, supporters argue, is also a powerful symbol of crime denunciation.

Opponents of the death penalty argue that the sanction is more expensive than life imprisonment (once the cost of death penalty trials, death row housing, and appeals are considered) and that the sentences have been imposed on minorities in a disproportionate manner. Moreover, they contend the penalty is applied arbitrarily because some serial killers are not executed, but individuals who commit a single murder sometimes are. In some cases offenders who were involved in a felony murder, although they did not directly cause the death of a victim (e.g., were driving the getaway car from a robbery where the victim was shot), have been executed for their role in the offense. Further, they argue that killing a person for a crime they did not commit is the ultimate justice system failure. Opponents also refer to social science research showing that the death penalty has no deterrent value. In fact, as we will see, some researchers have suggested that legal executions might actually increase homicides.

CAPITAL PUNISHMENT IN AMERICA: EVOLVING CONDITIONS AND PRACTICES

Estimates of the number of executions carried out in the United States since the colonial days range from 15,787 (Wilson, 2017) to 19,000 (Bohm, 2012). Executions were relatively rare events until the 1800s. Prior to the introduction of the penitentiary in the early 1800s, the range of punishments for offenders was limited. Offenders convicted of most felonies could be sentenced to death, but historians observe that legally sanctioned executions were rare. In a historical review of early colonial law in Virginia, for instance, Nancy King (2003, p. 949) pointed to many practical and procedural barriers to executing an offender: "Given the opportunities for derailment along the way, only an unusual case ended in execution." While advocates of the crime control model lament the fact that persons sentenced to death have many protections today, there were actually a greater number of legal and extralegal barriers two centuries ago, including appeals and many offenders were granted reprieves, which were known as receiving the **benefit of clergy** (King, 2003). Unlike **executive clemency** today, when political officials, such as the President or a state governor, can pardon offenders or **commute** their sentence (which means to reduce the severity of the sanction), pardons were commonly granted to condemned offenders.

As a result of these legal barriers to executions, only the worst offenders ever reached court, and few were actually punished. It has been suggested that penitentiaries were established because juries were unlikely to convict an offender if the only sanction available was death (Garland, 2010). Moreover, in an influential statement Elias (1939/2000) speculated that the use of capital punishment decreased because of the changing values of human life (see Box 13-1).

Despite these social and legal changes, capital punishment did not always occur as a result of official sanctions, and from the time of the colonial era extending to the mid-twentieth century, it was not unusual for vigilante executions such as lynchings to occur, and this practice was prevalent in early America and persisted in the South into the 1950s. Like many other criminal justice issues discussed in this book, the estimates of the actual numbers of lynchings vary greatly: The Equal Justice Initiative (2017) documented 4,084 cases in twelve Southern states that happened between 1877 and 1950, while Bohm (2012, p. 4) estimated that about 10,000 Americans were lynched. Often lynching had a racial component, and it was administered for minor transgressions and some victims were not even accused of committing crimes (Equal Justice Initiative, 2017). While African Americans were often the victims of such executions in the South, other minority groups, such as Chinese laborers, were also lynched on the West Coast. In most cases, the guilt of these persons was not established, but in all cases, these illegal executions tarnished the history of American justice systems.

With respect to legal executions, the Supreme Court in the 1972 *Furman v. Georgia* decision found that executions were being applied in an arbitrary and capricious manner and directed states to develop procedures to reduce the discretion of judges and juries in recommending the death penalty. Until states had

corrected these procedures, there was a halt to executions for several years. In the *Gregg v. Georgia* decision in 1976, the Court found that states had developed mechanisms to ensure that capital punishment was not applied in a capricious manner. These changes included (1) considering mitigating and aggravating circumstances and (2) instituting a two-level (**bifurcated**) trial process with a determination of guilt and a subsequent penalty phase. Also, in most states, there is an automatic appellate review of capital cases.

Earlier we presented the findings in Figure 13.1 that showed a U-shaped distribution in the use of capital punishment from the 1930s to 2016. One limitation of considering only the number of executions is that the population of the United States has more than doubled since the 1930s. As a result we calculated the rate of executions per 10 million U.S. residents for each decade using a strategy developed by Shepherd (2005). Figure 13.2 displays the rate of executions, and these results reinforce our earlier observations about how the use of this sanction has fallen out of favor (the figure for the 2010s includes all executions occurring between 2010 and 2017). From the 1930s until the 2000s, the rate of U.S. executions decreased by six-sevenths.

One of the best predictors of the number of persons who are executed is the number of death sentences imposed. Figure 13.3 shows the change in the number of these sanctions imposed each year from January 1, 1985, to December 31, 2016. The greatest number of death sentences were imposed at the height of the violence epidemic starting in the mid-1980s and persisting until 1993–1994; the number has decreased along with homicide rates. The Death Penalty Information Center (2017a) reported that thirty-one sentences were imposed in 2016 which was down 90 percent since 1996.

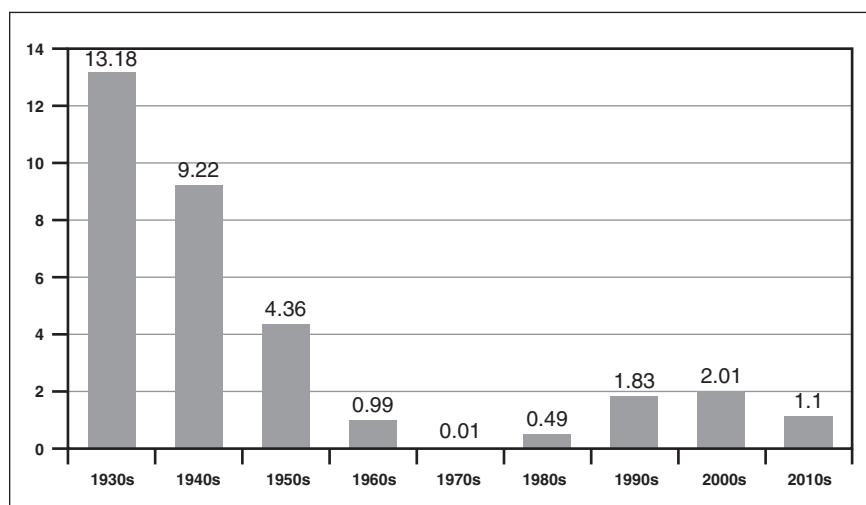


Figure 13.2 Executions per 10 Million U.S. Residents, 1930 to 2017

SOURCES: Snell (2017) and U.S. Census Bureau (2017c)

**Figure 13.3 Death Sentences Imposed, United States: 1985–2016**

SOURCE: Death Penalty Information Center (2017a)

SUPPORT FOR THE DEATH PENALTY

Our views about the death penalty are shaped by its use throughout history and our exposure to ideas about punishment. In respect to its history, capital punishment was imported to the colonies from Britain and other European nations, where executions were often a form of entertainment. Like their European counterparts, legal executions in the United States were public spectacles and entire communities gathered to witness sentences being carried out (Banner, 2002). These executions included denunciation and repentance and had a strong educational function about public laws and norms. The Gallup organization has tracked public opinion about capital punishment since the 1930s, and they reported that 59 percent of respondents supported executions in 1936. While support for capital punishment has fluctuated over time, the public support for the death penalty in 2016 was the same as it was in 1936.

Supporters and foes of capital punishment are often guilty of selectively using data consistent with their positions and ignoring other poll data in their arguments. Figure 13.4 shows public opinion data from 1953 to 2016 to demonstrate the long-term trend in support for the death penalty. Although our attitudes shift over time, the highest levels of support for the death penalty occurred during the same time that U.S. homicide and violence rates were the highest. One question for which we have no sound answer is why favor for the death penalty persists even though homicide rates are at their lowest levels in almost five decades. Garland (2010) argues that politicians are guilty of inflaming the public's mood in support of capital punishment.

Moore (2004, p. 1), a Gallup Poll researcher, observed that survey responses about capital punishment are shaped by how questions are asked, and a “large majority supports the death penalty if no alternative is specified.” By contrast, if a

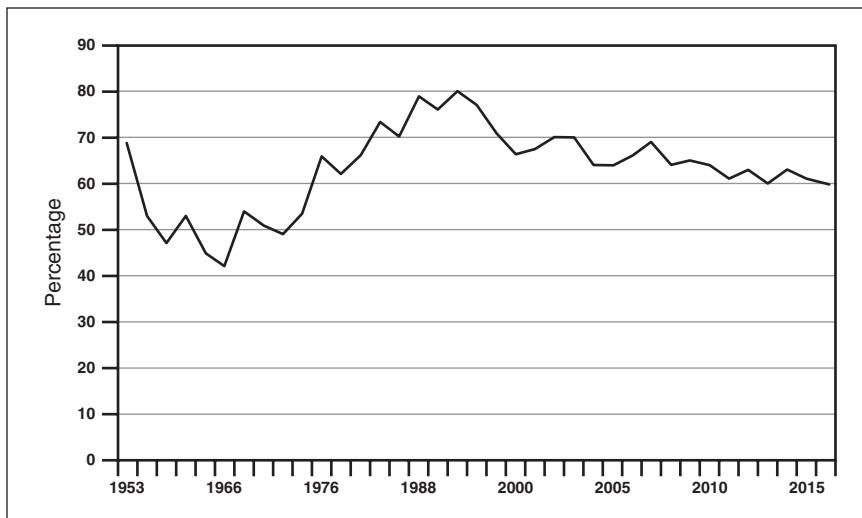


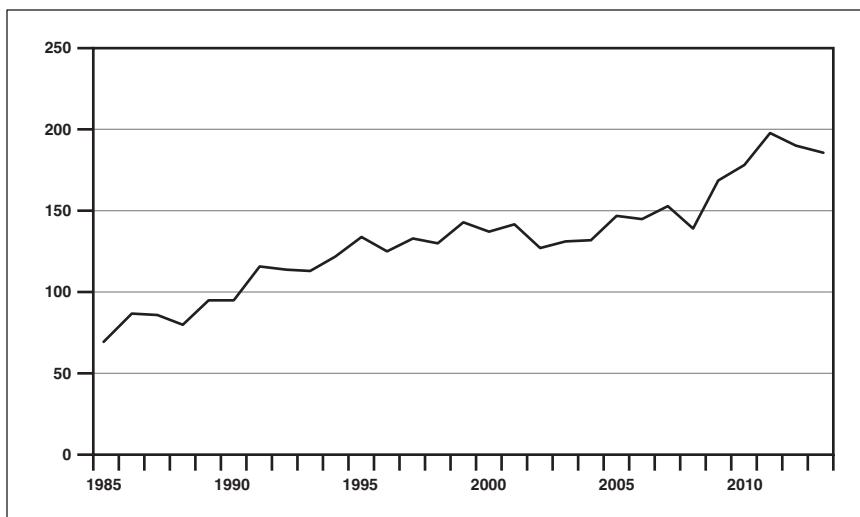
Figure 13.4 Support for the Death Penalty, Gallup Polls, United States: 1953–2016
SOURCE: Gallup (2017a)

respondent is given the choice between the death penalty and sentencing an offender to **life in prison without the possibility of parole (LWOP)**, support for executions decreases to approximately 50 percent. Even when researchers from other survey organizations ask the same question, responses can differ and Oliphant (2016) reports that a Pew survey in 2016 showed 49 percent support for the death penalty, while the Gallup results for the same year revealed a 60 percent support.

One has to interpret poll results carefully, as responses may depend on how a question is asked as well as the types of questions that precede survey items related to capital punishment. In addition, survey results are increasingly influenced by who participates, and younger people who do not have land line phones may be excluded from some samples. As a result, there could be a greater proportion of older, more conservative respondents in some national-level studies. The race, class, and gender of a respondent also influences responses, and whites, males, and Republicans are more supportive of capital punishment (Oliphant, 2016). Last, public support for executions may be influenced by highly visible or particularly horrible crimes—or egregious cases of wrongful conviction—and after these acts occur there can be a shift in public attitudes.

THE DEATH PENALTY TODAY

The DPIC (2017a) reported that on April 1, 2017, 2,843 state and federal inmates were on death row and many of these condemned inmates (60.60 percent) resided in only five states (Alabama, California, Florida, Pennsylvania, and Texas). The number of condemned offenders awaiting execution increased significantly until 2000 and then gradually declined. The biggest increase in the number of condemned offenders occurred at about the same time the state and federal imprisonment rate

**Figure 13.5 Average Months from Sentence to Execution, United States: 1985–2013**

SOURCE: Snell (2014)

had its largest increase in the 1980s. Thus, it is possible that capital punishment and the use of imprisonment are driven by the same punitive values.

The length of time inmates spend on death row prior to their execution has increased. Prisoners executed in 2013, for instance, served approximately 186 months before being executed (Snell, 2014); this was up sixty-one months from 2000 (see Figure 13.5). Like other examples presented in this book, there is some variation across the nation: in Texas, for example, the time between sentencing and execution is much less than in California, where there has not been an execution between 2006 and 2018. The six California inmates executed between 2000 and 2006 served an average of 260 months (21.66 years) before their sentences were carried out (California Department of Corrections and Rehabilitation [CDCR], 2016a). Although California had not executed any prisoners since 2006, 185 inmates were added to the death row population between January 1, 2007, and December 1, 2017 (CDCR, 2016; CDCR, 2017). This has resulted in an overcrowded death row.

Why does it take so long to carry out the execution once an offender has been sentenced? This is a complex question, and it relates to the time it takes for these cases to be reviewed by higher courts. Most states have an automatic review of their death sentences whereby the case is examined by an appellate court to ensure that the conviction and sentence were just and fair. These reviews are intended to ensure that a person has not been wrongfully convicted, an important consideration given that twenty death row inmates were exonerated using DNA evidence between 1993 and 2017 (Innocence Project, 2017b). In addition, the DPIC (2017a, p. 2) documented that 158 persons sentenced to death were wrongfully convicted and released from death row. In any case, these appeals

are typically lengthy processes, especially if the condemned inmate opposes the sentence.

No discussion of the death penalty would be complete without an examination of the demographic characteristics of the individuals executed between 1976 and 2017. The DPIC (2017a, p. 1) noted that 55.7 percent of the executed prisoners were white, 34.3 percent were African American, Latinos accounted for 8.3 percent, and the remainder (1.6 percent) were classified as “other” or their race was unknown. Consistent with our discussion in Chapter 8 on racial disparities, African Americans are overrepresented on American death rows while Latinos are slightly under-represented given their prevalence in the national population. With respect to those remaining on death row, whites and African Americans account for 42 and 41 percent each, Latinos account for 13 percent, and “others” (3 percent).

Women are vastly underrepresented on death row: they accounted for 53 offenders, or less than 2 percent, of the total death row population on July 1, 2017 (DPIC, 2017a). They are also underrepresented given their involvement in homicides, and the Federal Bureau of Investigation (FBI) reported that 12.6 percent of persons arrested for involvement in murders in 2016 were women (of the known offenders; see FBI, 2017, Expanded Homicide Data Table 2). However, women are overrepresented on California’s death row. Although California accounts for approximately 10 percent of the national population, it had 22 women on death row in December 2017, or 41 percent of the nation’s female death row inmates (California Department of Corrections and Rehabilitation, 2017). Only seven states had more than one woman on death row on July 1, 2017, demonstrating that the sentence is unlikely to be imposed on women offenders in most jurisdictions (NAACP, 2017).

A growing body of scholarship suggests that the decision to impose the death penalty is not associated with the offender’s race, but rather the victim’s race. Pierce and Radelet (2005) examined California death sentences between 1973 and 2003 and found that the death penalty was more likely to be imposed when the victim was white, after controlling for aggravating factors (such as multiple victims). In a follow-up study these researchers found that the odds of imposing a death sentence were 97 percent higher in Louisiana when the victim was white compared to African American victims (Pierce & Radelet, 2011). Similar findings were reported in studies of death sentences in Connecticut (Donohue, 2011) and Washington State (Beckett & Evans, 2016).

Like the results of other studies reported in previous chapters the research methods investigators use may influence their findings. Jennings, Richards, Smith, Bjerregaard, and Fogel (2014), for example, reported that when they used a more sophisticated analysis, a victim’s race was not a significant factor in the imposition of the death penalty. Furthermore, the DPIC (2017a, p. 2) described the 307 cases where an individual was executed for interracial murders: 287 of these cases were of an African American defendant who killed a white victim, while the twenty remaining cases involved a white offender and an African American victim (effective to the end of 2017). These findings should motivate scholars to more closely examine the victim-offender relationship in all punishment decisions, as it suggests that some victims are more important than others.

BOX 13-1**Making Executions More Civilized**

For most of the past 2,000 years executions were public events. The methods used were often barbaric, and sometimes the bodies of the condemned were publically displayed for months after the execution. In England, for instance, condemned offenders would be paraded from Newgate Prison, where they were jailed, to the place of execution at Tyburn, some two miles away. This journey typically took several hours, and by the time the prisoners arrived at Tyburn, there would sometimes be upwards of 30,000 people of all ages attending the event. By the 1870s executions in Great Britain were conducted within prisons and closed to the public. In America, public executions were also well attended, and the last legal public execution in the United States occurred in Owensboro, Kentucky, in 1936 before a crowd of about 20,000 people.

Although executions are currently conducted behind closed doors, the victim's and condemned inmate's families, members of the media, justice system officials, and other observers often attend. Johnson, McGunigall-Smith, and Callahan (2013, p. 30) describe how executions today are carefully choreographed by the prison staff and that the sterility of the execution is intended to overcome the reality of the "extreme exercise of state power."

Execution methods today are more humane than in earlier times. Snell (2014, p. 4) noted that there were five approved methods of execution: lethal injection (thirty-five states), electrocution (eight states), lethal gas (three states), hanging (three states), and firing squads (two states). Lethal injection was intended to be the most humane execution method; however some inmates are reputed to have been awake but unable to move or speak when the deadly medications were injected. These issues were raised in the British medical journal *The Lancet* in October 2005. By mid-year 2006, executions were halted until questions about the constitutionality of the punishment (whether it was cruel and unusual) were addressed by the Supreme Court. The Court, in the *Baze v. Rees* (2008) decision, held that lethal injection was a constitutionally appropriate method of execution. A 2014 execution in Oklahoma, however, was described as "botched" after a combination of failures; the drugs were an untested mixture and the needle was not properly inserted into a vein. As a result, the execution took forty-three minutes and during that time the condemned inmate was observed to be writhing in pain, convulsing, and attempting to talk (Berman, 2014).

Lethal injection remains a controversial execution method for the medical professionals carrying out these death sentences. The American Board of Anesthesiologists has voted to sanction members participating in executions (Stein, 2010) and other professional organizations discourage members from participating, including the American Medical Association, the American Nurses Association, and the American Society of Anesthesiologists (DPIC, 2017b).

Drug companies are also refusing to sell the medications needed for executions to prison systems. Mukherjee (2017) reports that "more than twenty European and American companies like drug giant Pfizer have moved to ensure their products aren't used for capital punishment, putting a massive squeeze on states that conduct executions." Because the drugs used for executions are increasingly difficult to purchase, Alabama, Mississippi, and Oklahoma have authorized the use of nitrogen gas, which is supposed to be a more humane method of execution, although no executions have been carried out using this method (Associated Press, 2017).

CAPITAL PUNISHMENT POLICY

Since 1994 the number of death sentences being imposed has decreased from 327 to thirty-one in 2016 (DPIC, 2017a; Snell, 2014). Some prisoners were removed from death row because they were wrongfully convicted or after their sentences were commuted (typically to life imprisonment). In an example of a wholesale change, former Illinois Governor George Ryan commuted the sentences of all 167 offenders on death row and pardoned four others in 2003 (CNN, 2017a). In 2013, forty-five condemned inmates were removed from death row because appellate courts overturned their convictions or sentences (Snell, 2014).

There are some plausible reasons why the application of the death penalty has decreased. The DPIC (2006, pp. 3–7) attributed this decline to several reasons including (1) the number of innocent death row inmates released in the past few decades; (2) racial bias; (3) arbitrariness; (4) costs; (5) the sanction’s effectiveness; (6) Supreme Court decisions, such as *Roper v. Simmons*; (7) new voices opposing the death penalty, including police officials, prosecutors, and judges; and (8) international developments. The following paragraphs outline these issues.

Many citizens have lost confidence in the justice system’s ability to impose the death penalty on the correct person. Unnever and Cullen (2005) found that respondents to national polls believe that innocent persons have been executed, and this belief has reduced support for capital punishment. When asked specifically about the likelihood of executing innocent persons, 71 percent of respondents in a 2015 poll believed there was some risk that innocent persons would be executed (Pew Research Center, 2015a). Regardless of one’s position on the death penalty, we have to acknowledge that the justice system makes mistakes: 353 prison inmates have been exonerated by December 2017 (Innocence Project, 2017b), twenty death row prisoners were exonerated using DNA evidence, and another 160 condemned inmates were wrongfully convicted (DPIC, 2017a). These exonerations have contributed to a decreased confidence in the justice system’s ability to ensure just and fair outcomes. Zalman, Larson, and Smith (2012) found, for example, that a majority of respondents (both proponents and opponents of the death penalty) believed that wrongful convictions occurred with such frequency that system-wide reforms were required.

A second reason for the decreased use of the death penalty is the belief that there is racial bias in these sentences. African Americans are overrepresented on death row, and studies have demonstrated that the victim’s race has a significant impact on the sentence imposed (Beckett & Evans, 2016; Donahue, 2011; Pierce & Radelet, 2011). Moreover, attorneys, researchers, and advocacy organizations suggest that there is a great deal of arbitrariness in the death penalty’s imposition. The DPIC (2006, p. 5) noted that “defendants guilty of multiple murders were spared a death sentence, while mentally ill defendants and those guilty of far less egregious offenses were executed.”

While the actual cost of an execution is almost insignificant, the due process protections that we have established for offenders are very costly—but also necessary, given the high number of exonerations and wrongful convictions

of condemned prisoners. A *Los Angeles Times* article reported that executing thirteen offenders in California between 1978 and 2006 cost the state \$5 billion (Ulloa, 2016). The DPIC (2013) cited examples of research conducted in California, Kansas, Maryland, Nevada, New York, Tennessee, and Washington State showing that executing offenders is more expensive than LWOP sentences. The problem is that it is difficult to fully trust organizations or public interest groups that have a stated agenda because their analyses may be biased or they may be selectively reporting results from research.

It is difficult to find comprehensive and unbiased data about the true costs of imposing the death penalty versus keeping people in prison for the rest of their lives. Accurate comparisons must include court costs (which are far greater in capital cases), the costs of post-conviction appeals, and housing the inmates—either on death row prior to their execution or serving their natural lives imprisoned (see Kaplan, Collins & Mayhew, 2016 for a comprehensive review of these costs). Additionally, not all studies take into account the impact of inflation or life expectancy of prison inmates in their estimates, or the increasing costs of imprisonment as these offenders age. Regardless of whether one supports the death penalty or LWOP, both options are costly propositions for the state, although research based on accurate information is necessary so that policymakers can make sound decisions about the future of capital punishment.

Another justification for the death penalty is that it deters other citizens from killing. This has been the subject of many studies, and the investigators typically report contradictory results. One of the earliest studies was conducted by Isaac Ehrlich (1975), who concluded that each legal execution deterred eight other murders. Ehrlich's study was strongly criticized by criminologists due to his optimistic predictions. Despite these criticisms, the study is still cited, and advocates of the crime control model are quick to use such studies as support for capital punishment.

There have been several dozen follow-up studies of whether capital punishment deters crime and the results are difficult to summarize as they are often mixed. Some show that capital punishment deters future murders, while others have shown that after a governor commutes a death penalty, murders will increase. Other studies revealed that a **brutalization effect** exists, where increases in the number of legal executions were associated with higher numbers of murders. Chalfin, Haviland and Raphael (2013) are critical of studies examining the deterrent effects of capital punishment and they called these studies “inconclusive as a whole, and in many cases uninformative.”

Nagin and Pepper (2012, p. 2), in their report for the prestigious National Academies of Science, provided a comprehensive analysis of the capital punishment deterrence research and found that most research examining the relationship between executions and crime is flawed. They concluded that:

Research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates. Therefore, the committee recommends that these studies not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide.

It is difficult to fully explain any complex human behavior, such as the deterrent effect of capital punishment using statistical tests and Fagan (2005, p. 18) argues that “omissions and errors are so egregious that this work falls well within the unfortunate category of junk science.” One of the difficulties in deterrence research is that there are almost unlimited causal factors associated with a given behavior (such as murder) and statistical procedures enable us to consider only a few explanatory variables, so it is hard to determine any clear cause and effect relationship.

Inconsistent research results can confuse the issues and complicate the decision-making process for policymakers. Thinking back to other criminal justice interventions we have reviewed, these results are entirely predictable. Interventions in one place might be successful if they are consistent with a state’s cultural, historical, political, social, or economic characteristics. Additionally, interventions that might have been effective in the 1980s or 1990s might have an entirely different impact several decades later. One hazard in debates over capital punishment is that advocates or opponents will often use the data and results that best support their position, regardless of a study’s limitations. Some of these tenuous research findings, however, may have influenced legal decisions about who is executed.

Several Supreme Court decisions have reduced the number of defendants at risk for being executed. The Supreme Court’s *Atkins v. Virginia* (2002) decision made it unlawful to execute offenders with developmental disabilities. In 2005, the *Roper v. Simmons* decision extended these protections to persons under the age of eighteen at the time of the offense. The justification for such restrictions is that these offenders are not responsible, mature, or sophisticated enough to be held fully accountable. It is plausible that death penalty abolitionists are attempting to whittle down the number of persons who may be put to death. This was evidenced in the 2008 *Kennedy v. Louisiana* decision that made it unconstitutional to execute nonhomicide offenders. Opponents of the death penalty have recently focused their attention to the issue of intellectual disabilities and the *Moore v. Texas* decision in 2017 found that offenders with diminished mental capacities should not be executed.

While organizations such as the ACLU have always opposed the death penalty, there is an increasing opposition to the death penalty from some surprising sources. The DPIC (2017c) described how judges and prosecutors are increasingly apt to oppose capital punishment, including current and former Supreme Court justices. Justices Stephen Breyer and Ruth Bader Ginsberg in their dissent in the *Glossip v. Gross* (2015) case (where the Court found the use of lethal injection constitutional) wrote that capital punishment suffered from “three constitutional defects (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty’s penological purpose.” In addition, retired Justice Sandra Day O’Connor remarked that innocent persons had been executed (Editorial, 2001). There is some question of whether these officials are leading or following public opinion, but such statements reflect an increasing doubt about whether capital punishment is sound criminal justice policy.

BOX 13-2**Should International Practices Influence U.S. Justice Policies?**

Several scholars have called punitive U.S. crime control policies an example of **American exceptionalism**, where harsh punishments that are seldom used in developed nations such as the reliance upon mass imprisonment and capital punishment are standard practices (Ferguson, 2014). Statements in the *Roper v. Simmons* (2005) decision, that cited international practices led to debate about whether the policies or practices of other nations should shape U.S. justice policies. In his dissent, the late Justice Scalia observed that “the basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand. . . . To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decision-making” (2005). This is an important observation, as Justice Scalia framed his dissent by the fact that we often reject the legal practices of other nations if they do not conform to U.S. legal customs.

Tushnet (2006, p. 1267) criticized the adoption of legal practices and norms from other nations, noting that:

In foreign law you can find anything you want. If you don’t find it in the decisions of France or Italy, it’s in the decisions of Somalia or Japan or Indonesia or wherever. . . . It allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent . . . and use that to determine the meaning of the Constitution.

This raises several questions: Should a nation be autonomous in its criminal justice policy? Should Americans be concerned about the types of criminal justice interventions in other nations? Alternatively, can you think of examples where other nations have adopted U.S. criminal justice practices?

One issue that deserves special attention is the increased international opposition to capital punishment, which is presented in Box 13-2. An example of the globalization of social control is the coupling of punishment practices and membership in international federations, trading relationships, or treaties. The European Union, for instance, excludes membership to nations retaining use of the death penalty. If the European Union can limit membership to nations that have abolished capital punishment, we question whether similar arrangements also could be extended to trading partners.

CONCLUSIONS

Although rarely imposed or used today, the death penalty will continue to be a controversial crime control sanction. Public support for capital punishment has remained more or less constant since the 1930s. As is true for other criminal justice policies, a racial imbalance exists in support for the death penalty and white survey respondents generally support capital punishment while African Americans tend to oppose the sanction (Oliphant, 2016). There is also a considerable gap between academic scholars, who almost always are abolitionists, and the general public, who typically support capital punishment.

Should criminal justice system operational policies, including capital punishment, be based on public opinion, or should unelected bureaucrats make these decisions based on what the research demonstrates about crime and justice, as occurs in Canada or Europe? In Canada, for example, the last execution took place in 1962 and capital punishment has been banned since 1976. While the Canadian homicide rate is about one-third of U.S. levels (1.7 and 4.9 per 100,000 residents respectively), there is as much support for the death penalty in Canada (58 percent of respondents in a 2016 poll) as in the United States (Anderson & Coletto, 2016). In other words, if Canadian criminal justice policies were driven by public opinion, that nation would likely have the death penalty, despite having much lower murder rates.

One of the limitations of the death penalty debate is that policymakers lack a comprehensive body of sound research about capital punishment to properly inform their decisions. For instance, we do not have a very good idea about the actual costs and benefits of executing offenders, including the deterrence effect (if any) of an execution. Sunstein and Vermeule (2005) argued that policymakers are remiss if executions do have a life-saving deterrent effect and they fail to take action. Yet, if executions have a brutalizing effect, then capital punishment actually reduces public safety. The National Academies of Science found that most of the research done to date on the deterrent effects of capital punishment has not been rigorous enough to inform policy development (Nagin & Pepper, 2012) a finding supported by other scholars (Chalfin, Haviland & Raphael, 2013).

While it is nearly impossible to predict future criminal justice policy the use of the death penalty will mostly likely continue to diminish. A decreasing number of offenders will be sentenced to death and few of them will actually be executed. This prediction, however, hinges upon a variety of factors, including homicide and violent crime rates. Murder rates are currently at a five-decade low, and if they are stable, there may be less public demand for harsh sanctions. Yet, there has been an uptick in the national murder rate, and it increased 10.8 percent between 2014 and 2015, and another 7.8 percent in 2016, with these increases generally taking place in the largest cities (Friedman, Grawert & Cullen, 2017). As we have seen throughout this book, public opinion in the United States can have a significant effect on criminal justice policy. If public support for the death penalty increases along with the murder rate, there will be more political support for the punishment. Changes in public mood are sensitive to many factors; outrageous crimes or terrorist acts, such as the 9/11 attacks, can transform or sway public opinion, political priorities, and criminal justice policy at the same time.

KEY TERMS

American exceptionalism	brutalization effect	life in prison without the possibility of parole (LWOP)
<i>Baze v. Rees</i>	commute	
benefit of clergy	executive clemency	
bifurcated	<i>Glossip v. Gross</i>	<i>Moore v. Texas</i>
	<i>Kennedy v. Louisiana</i>	

CRITICAL REVIEW QUESTIONS

1. Given your knowledge of criminal behavior and the factors that lead to murders, do you think that a state execution has a deterrent or brutalization effect?
2. If executions deter murderers, explain why the homicide rate in Wisconsin in 2015 was 4.2 per 100,000 residents, while the homicide rate for Texas was 4.8 per 100,000 residents for the same year, given that Wisconsin abolished capital punishment in 1853 and Texas has had one of the nation's highest execution rates.
3. Do you think that public officials such as prosecutors have used executions to enhance their political status? If so, is this ethical or unethical?
4. What is your prediction about the future of capital punishment in the United States? Is it likely to increase or decrease?
5. Is the disproportionate use of capital punishment on African Americans cause for concern, especially in light of studies showing that offenders convicted of killing whites are more likely to be sentenced to death than those killing Latinos or African Americans?
6. Should the federal government impose a sentence of death on an offender in a state that has abolished capital punishment? Why, or why not?
7. Southern states generally imprison and execute more offenders than their Northern counterparts. Provide some reasons why Southern states are more punitive.
8. Executions have been transformed from public spectacles to events that are subdued and sterile. Do you think that these changing practices make executions more tolerable for the public?
9. Some offenders convicted of felony murder have been executed even though they did not actually commit the homicide (e.g., where an offender was involved in a robbery but did not directly harm the victim). Do you think this is a just and fair sanction for these offenders?
10. Should medical professionals, who are expected to preserve life, participate in executions?

WRITING ASSIGNMENTS

1. Offenders in some counties are sometimes subject to much harsher punishments than in neighboring counties with similar crime rates. Do you think that these inconsistencies are consistent with justice?
2. Gallup polls show that support for the death penalty was 59 percent in 1936 and 60 percent in 2016, although homicide rates have dropped considerably in the past eight decades. List some reasons why support for executing offenders has been so stable.
3. In three or four paragraphs, describe why (a) capital punishment is a desirable criminal justice practice, or (b) capital punishment has no place in a civilized society.
4. In three or four paragraphs, provide an argument why laws and practices in other nations should inform U.S. criminal justice policy.
5. Provide a list of the reasons for supporting capital punishment. Of these factors, which do you think is the most compelling reason for executing offenders?

RECOMMENDED READINGS

Robert M. Bohm (2017). *Deathquest: An Introduction to the Theory and Practice of Capital Punishment in the United States*, 5th ed. New York: Routledge. Many of the issues addressed in this chapter (e.g., the contemporary use of capital punishment, public opinion, the evolution of different methods of execution, the legality of the death penalty, and whether executions deter homicides) are addressed in Bohm's book, but in far greater detail. Bohm also provides an overview of the history of capital punishment and a comprehensive examination of the Supreme Court's decisions relating to capital punishment.

David Garland (2010). *Peculiar Institution: America's Death Penalty in an Age of Abolition*. Cambridge, MA: Harvard University Press. Garland is one of the most respected scholars when it comes to explaining the use of punishment, from imprisonment to the death penalty. He calls the death penalty a "deeply troubled institution" and provides a sophisticated analysis of the history of capital punishment in America and how social, cultural, and political forces have influenced the use of capital punishment, legal decisions, as well as its abolition in some states.

Equal Justice Initiative (2017). *Lynching in America: Confronting the Legacy of Racial Terror*, 3rd edition. Montgomery AL: Author. (This book is available online at: <https://lynchinginamerica.eji.org/report/>). Although the focus of this chapter was on legal executions, there were thousands of illegal executions or lynchings that occurred in the United States until these crimes ended in the 1950s. The authors contend that lynching was used to maintain racial control and that many victims were not even accused of any crime. In order to fully understand the use of capital punishments, it is important to acknowledge the factors contributing to these acts.

Robert Johnson (2005). *Death Work: A Study of the Modern Execution Process*, 2nd edition. Belmont, CA: Wadsworth. This book is based on Johnson's research on death rows, including interviews with and observations of condemned inmates and correctional officers. Johnson paints modern death row life as inhumane, but regardless of your position on the death penalty, by reading this book you will gain considerable insight into how death row inmates live.

CHAPTER 14



Responding to Youth Crime

INTRODUCTION

Juveniles tend to be overrepresented in their crime involvement compared with other age groups; although, most of their offenses are minor property or public order offenses, such as larceny, vandalism, or disorderly conduct.³¹ Throughout the 1980s and early 1990s, however, a disturbing number of serious and violent juvenile offenses had legislators in every state advocating for increased sanctions for youthful offenders. Academic researchers and some policy analysts looked at demographic statistics indicating that the juvenile population in the early years of the twenty-first century would be at the highest levels ever. These scholars predicted that if only a small percentage of these juveniles were involved in serious offenses, there would be a “bloodbath” perpetrated by “the young and the ruthless” (Fox, 1992) or “superpredators” (Bennett, DiJulio & Walters, 1996).

Newspaper and television reports prominently featured such predictions, and given our knowledge about gang-involved juveniles, school shootings, and some high-profile violent cases, we were willing to believe the worst. At the time that Fox (1992) made his forecast, violent juvenile crime had been increasing for almost ten years, and he had reason to be pessimistic. In 1993, at the height of the juvenile murder epidemic, there were 3,790 juvenile arrests for homicide (Snyder, 2005, p. 1). However, juvenile arrests for violence dropped in the following years and have decreased or remained stable ever since. The latest Federal Bureau of Investigation (FBI) data show that 682 persons under eighteen years of age were arrested for murder in 2016 (FBI, 2017, Homicide Data Table 20).³² In terms of serious crimes committed by juveniles, we seem to be experiencing a respite, which is good news after the high violence rates of the 1980s and early 1990s. But patterns of violence can change along with increases in gang membership, involvement in other crimes (such as drug sales), and whether crime-involved youths have access to firearms, which they are legally prohibited from possessing. Friedman, Grawert, and Cullen (2017) reported that between 2015 and 2017 the number of murders increased in America’s largest cities and while there is

no evidence suggesting juveniles are responsible for this trend, increased violent crime may shape the public's support for harsher punishments.

This chapter examines juvenile involvement in crime and finds that serious juvenile crime has decreased since the 1990s and we provide some possible reasons for this. Further, we examine the different ways that policymakers frame juvenile justice problems and describe the three models for responding to juvenile crime, including evidence-based strategies for reducing youth crime. While acknowledging that many juveniles engage in crime, we find that most of it is minor and a very small proportion of juveniles are ever involved in serious or violent offenses.

YOUTH CRIME TRENDS

In an **Office of Juvenile Justice and Delinquency Prevention** (OJJDP) study of juvenile arrests, Hockenberry and Puzzanchera (2017) reported that juvenile courts handled about 975,000 delinquency cases in 2014. While this number might seem high, it must be placed in context. For instance, some youths are arrested more than once in a given year, so this total reflects a smaller number of actual delinquents. Furthermore, the number of children under the age of eighteen during that same year was estimated to be 73.6 million (Puzzanchera, Sladky & Kang, 2016). However, youngsters are rarely arrested, and youths between the ages of twelve and seventeen are at the highest risk for delinquency. In 2014, there were an estimated 25 million youths between those ages, a number exceeding the post-World War II Baby Boomer population (Puzzanchera et al., 2016).

Arrests represent one measure of crime involvement, but we need to interpret these statistics carefully. Some youths taken into custody are later found to be innocent. Furthermore, juveniles tend to commit crimes in groups, so a single offense can result in the arrest of several youths. Therefore, arrest data reflect an imprecise measure; however, since these data have been collected for several decades, they provide an important benchmark of juvenile crime involvement, especially when they are contrasted against victimization data or crime statistics.

Juvenile arrests reflect involvement in a broad range of offenses. Most delinquent acts that youths commit are relatively minor, such as larceny, vandalism, and **public order offenses**. Violent crimes, including minor assaults (such as schoolyard fights that result in no injuries), accounted for about one-quarter (27 percent) of all delinquency cases in U.S. juvenile courts in 2014 (Hockenberry & Puzzanchera, 2017). Of the nearly 975,000 juvenile court cases in 2014, Hockenberry and Puzzanchera (2017, p. 7) reported that less than a third (299,300) were index offenses (e.g., homicide, rape, robbery, aggravated assault, burglary, larceny, motor vehicle theft, or arson), and most of those were property crimes. The rest were acts that we would typically expect juveniles to engage in—troublesome, destructive, or senseless, expensive to the community (such as vandalism), and often associated with some type of risky behavior, yet not overly threatening.

Some believe that we have overreacted to minor delinquency, and a number of individuals and organizations contend there is a **school-to-prison pipeline**, which criminalizes minor offenses that take place at school (see Box 14-1). These observers believe that in prior eras, these minor cases would have been informally

BOX 14-1**Is There a School-to-Prison Pipeline?**

The American Civil Liberties Union (2017, para. 1) contends there is a school-to-prison pipeline, where some students—mostly those of color, but also poor students, members of sexual minorities, and those with disabilities—find their way into the juvenile justice system through minor infractions of school rules. Mallett (2016) observes that **zero tolerance policies** (such as mandatory expulsions and arrests for acts occurring at school) and placing police officers in schools may increase the likelihood that behaviors such as theft, bullying, and substance use are now criminalized. Once young people enter the juvenile justice system it is difficult for many to leave, and entry into the juvenile justice system is often a good predictor of school failure and an adult criminal record (Owens, 2017). As a result, committing relatively minor offenses at school can result in lifelong disadvantages for students if they are referred to the juvenile court.

A national study carried out by the American Bar Association shows minority youths are disproportionately represented in suspensions, expulsions, and arrests in schools (Redfield & Nance, 2016). School administrators are often placed in a difficult position where they are required to provide a safe place for learning and they cannot ignore aggressive and disruptive behaviors. Are there alternatives to involving the police and the juvenile court? Mallett (2016) contends that instead of relying on zero tolerance policies school authorities should instead work toward crime prevention and if a crime occurs, these acts should be managed using strategies that do not involve the justice system.

Where a school is located might play a significant role in how youths are treated. Singer (2014) found that acting-out and delinquent youths in affluent suburban schools are treated compassionately by school and justice system officials. As a result, arrests are less likely to happen in suburban schools compared to schools in poor areas. Savelberg (2015) says that while inner city youths can get caught up in zero tolerance policies, suburban youths are treated to maximum tolerance. Like almost every other issue we have identified, Redfield and Nance (2016, p. 12) observe “the school-to-prison pipeline is a complex problem with no easy or simple solution.

handled by the school authorities, but such acts are now criminalized and the students referred to juvenile courts.

Despite the fact that most youths engage in minor offenses, our perceptions about juvenile crime generally come from television. In the past few decades, there has been considerable focus on school shootings, such as the Sandy Hook Elementary School tragedy, where twenty children and six adults were murdered in December 2012. But apart from the well-publicized murders in Newtown, Connecticut, or in Florida in 2018, students are generally safer at school today than they were decades ago. In terms of murder, for instance, during the 2013–2014 school year twenty-six homicides occurred on school property, on the way to or from school, or at school-sponsored events, and twelve of those victims were five to eighteen years old (National Center for Education Statistics, 2017, p. v). While even one murder is too many, these school homicides typically represent about 1 percent of all 1,053 murders of school age youths.

Reductions in the number of school shootings are parallel with other declines in youth violence. Of the approximately 975,000 delinquency cases before the courts in 2014, 57,100 were for violent index offenses, such as homicide, aggravated assault, rape, and robbery (Hockenberry & Puzzanchera, 2017). These are the crimes that most concern us because they pose the greatest threat to our safety. Furthermore, these offenses are likely to be reported in the media since as MacRae (2016) observed in her study of newspaper accounts many believe “if it bleeds, it leads.” The problem is that television news reports greatly increase citizens’ fear of crime (Roche, Pickett & Gertz, 2016; Weitzer & Kubrin, 2004). Gidel, Freeman, and Procopio (2006) report that people who watched more crime-oriented television misperceived juvenile crime levels and a case’s pretrial publicity can increase a viewer’s support for harsher punishments (Staggs & Landreville, 2017).

Because serious offenses pose the greatest threats to community safety, we take a closer look at these crimes. There were a total of 17,250 murders in the United States in 2016 and 682 juveniles were arrested for involvement in these offenses (FBI, 2017 Homicide Data Tables 1 and 20). One encouraging fact is that the total numbers of arrests for homicide and other serious offenses has dropped. Figure 14.1 shows the arrest rate of persons less than eighteen years of age, per 100,000 juveniles, arrested for violent crimes (homicide, rape, aggravated assault, and robbery) between 1960 and 2014.

Juveniles always have been overrepresented in terms of their involvement in crime. Figure 14.1 shows that in the 1980s and until the early 1990s, youth crime increased dramatically, and many jurisdictions reported significant increases in aggravated assaults, firearms crimes, robberies, and homicides. Many of these offenses were related to gangs and changes in the drug markets, and most murders were concentrated in the inner-cities. McCorkle and Miethe (2003) argued that the gang problem was overstated in some places, but we cannot discount

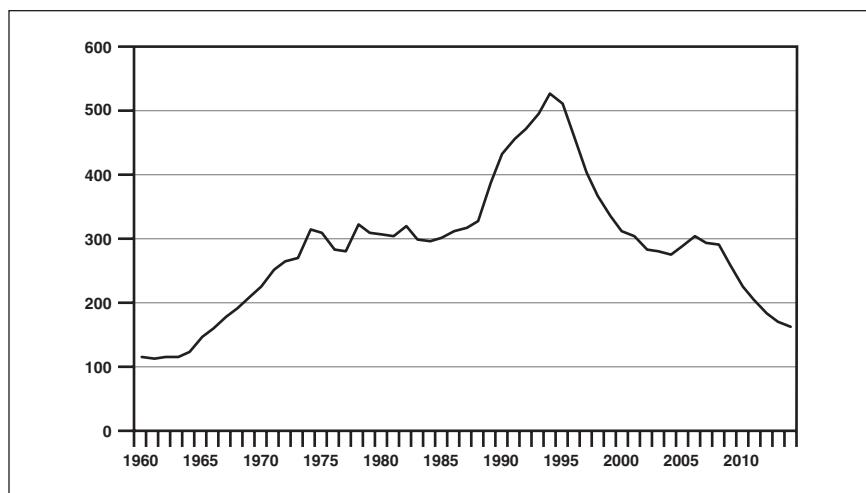
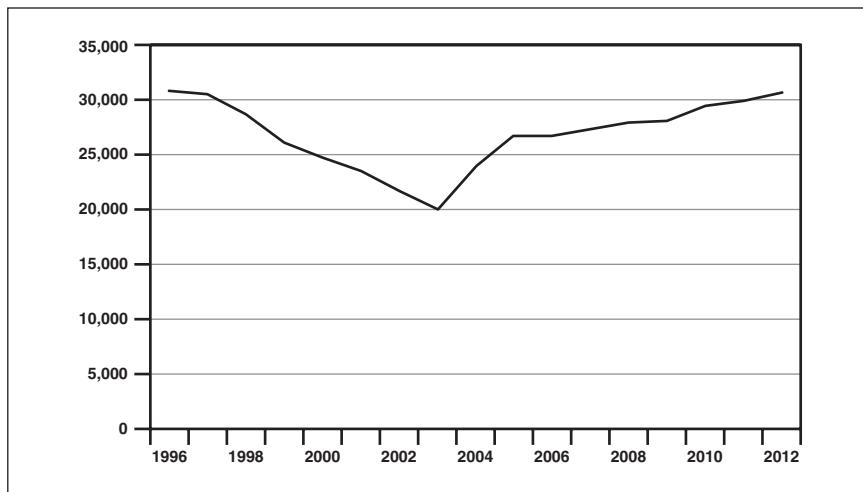


Figure 14.1 Violent Crime Arrest Rates per 100,000 Juveniles, 1960–2014

SOURCE: Males & Bernier (2017)

**Figure 14.2 Number of U.S. Youth Gangs, 1996–2012**

SOURCE: National Gang Center (2017)

the increases in violence when adolescent aggression, firearms availability, thefts, rivalry within drug markets, and gangs intersect (Gordon et al., 2014; Tigri, Reid, Turner & Devinney, 2016). For instance, the FBI (2016) attributed 604 murders to juvenile gang activity in 2015 (information on gang activity was not reported in the 2017 FBI statistics).

Gang activities vary throughout the nation. Figure 14.2 shows the prevalence of youth gangs from 1996 to 2012 as reported by the National Gang Center in its survey of U.S. law enforcement agencies (2012 was the final year for the survey). For the most part, gang populations varied only slightly during that period and there were about the same numbers of gang members in 1996 (846,500) as 2012 (850,000). In 2012, these agencies reported that 57.3 percent of the gang populations were from large cities, 24.4 percent were from suburban counties, while smaller cities had 15.6 percent, and 2.7 percent were from rural counties (National Gang Center, 2017).

EXPLAINING THE YOUTH CRIME DROP

Youth arrests for homicide peaked in 1993 and then decreased substantially, but it is difficult to attribute this drop to any one intervention or cause. Several scholars have tried to identify the reasons for the crime drop that occurred in the 1990s, and there has been no shortage of theories for these changes. Baumer and Wolff (2012, p. 14) identified the following arguments for the crime drop:

Economic shifts, changes in the quantity and quality of policing and punishment practices, public and personal security efforts, the stabilization of drug markets, increases in immigration, changes in abortion laws, regulations of and changes in lead gas exposure, increased video gaming, rising civility and self-control, transformations of family arrangements, reduced alcohol consumption and increased use of psychiatric pharmaceutical therapies.

Berg, Baumer, Rosenfeld, and Loeber (2016, pp. 392–393) attributed the youth crime declines throughout the 1990s to improving economic conditions, constraints on antisocial behaviors, a greater use of policing and incarceration, and increased security and changes in drug markets. Given those observations, it is unlikely that any one factor led to changes in crime rates; probably a number of different factors contributed.

The 2016 FBI arrest data show there were 736 juvenile homicide arrests (FBI, 2017, Homicide Data Table 2). Of that total, most (92.5 percent) arrestees were male, and African American youths were overrepresented in these arrests (61 percent) compared to their representation in the national population, which was 16.4 percent of all persons ages ten to seventeen years in 2016 (Puzzanchera, Sladky & Kang, 2017). Homicide also tends to involve older youths, and of the juvenile arrestees in 2016, slightly more than half (52.2 percent) were under the age of seventeen, while seventeen-year-olds alone accounted for the remaining murders.

One finding that emerged from our review of youth crime was that the proportion of the murders committed by different racial groups has changed over time. A review of OJJDP *Statistical Briefing Book* (2015) data reveals that when juvenile murder arrests peaked in 1993, the murder arrest rates for African American youths were almost nine times greater than white juveniles (51.5 and 5.8 per 100,000 persons less than seventeen years respectively). The African American arrest rate for murder has dropped to 7.9 in 2014, an 84.6 percent decrease. Arrest rates of white youths for murder decreased from a high of 6.1 per 100,000 in 1994 to 1.2 per 100,000 in 2014; an 80 percent drop.

With respect to gender differences, juvenile court data show an increasing involvement of girls in crime. Hockenbury and Puzzanchera (2017, p. 12) found that girls accounted for 28 percent of all juvenile court cases and the arrest rates for girls have been increasing somewhat. Many scholars are concerned that the arrest rates of girls is higher than it should be due to the criminalization of minor “acting out” behaviors. Feld (2009) argues that in the past it was easier to place female status offenders outside the home. **Status offenses** include acts that are unlawful depending on one’s age, such as disobeying curfew laws, smoking, gambling, drinking, engaging in sexual activities, and running away from home. Such laws are intended to protect juveniles from behaviors that are inconsistent with their short- and long-term best interests. Legislative changes in the 1960s and 1970s, however, made it more difficult to make these placements, so behavior that would otherwise be dealt with informally (e.g., a family dispute where a girl strikes or pushes another family member) now ends in an arrest for a domestic violence assault.

Stevens, Morash, and Chesney-Lind (2011) also attributed changes in girls’ arrest rates to schools’ zero-tolerance practices, where infractions are now processed formally, and found that young African American girls are more vulnerable to these practices. In a 2016 interview, Professor Meda Chesney-Lind, a highly regarded expert in issues related to girls’ delinquency, said the police are “treating status offenses like more serious offenses” and these children are sometimes receiving biased treatment by the police and juvenile court judges (Levintova, 2016).

Thus, while crime has dropped, it has not dropped at the same rate in all places, and different races and both males and females contribute to arrest

statistics in dissimilar ways. These facts make it hard to make sweeping generalizations about juvenile crime. Such observations also support a point made throughout this book about the complex array of factors that we must consider in explaining social problems, and it reinforces our position that responses to crime or delinquency defy simple “one-size-fits-all” approaches.

CYCLES OF JUVENILE JUSTICE

Societies always have had a certain amount of juvenile crime. The public and legislators who represent us, however, often are conflicted about whether we should punish youths harshly (especially those involved in violent crimes) or whether we should recognize juveniles’ ability to make significant rehabilitative changes in their lives. There is tension between acting in the “**best interests of the child**” and upholding public safety. Starting in the 1980s, this balance shifted toward public safety, and the sanctions for juveniles involved in crimes increased throughout the United States.

In an important statement about juvenile crime, Bernard and Kurlychek (2010, pp. 10–32) identified five facts about youth crime that have remained constant over time. For instance, juveniles and especially young males, commit more crime per capita than other age groups. This involvement in crime is a function of adolescent development, role experimentation, and the risk taking that naturally occurs. Models for Change (2014, p. 6) observes, for example, that “Adolescent brains are hard-wired to seek pleasure, social rewards, and peer approval, yet are still developing the circuits needed to weigh risks and rewards, regulate their emotions, and make complicated decisions in times of pressure.” Altogether, this youthful experimentation, a rush to assume adult roles, and the perception of invincibility can lead to countless negative consequences, from teenage pregnancies, running away from home, drug and alcohol use, unintentional injuries and sometimes, involvement in crime.

A growing body of research has demonstrated that there is a biological basis to risky, destructive, and delinquent behaviors. The American Bar Association (2004a, p. 1) reported that “The evidence now is strong that the brain does not cease to mature until the early twenties in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable.” Brain development research shows that the parts of the brain responsible for higher-level thinking do not fully develop until we are over twenty years of age (American Medical Association, 2009; American Psychological Association, 2009). This evidence from neurological studies shows a biological basis for the poor decision making that often ends in crime and delinquency (Harp, 2017).

The biological basis for mitigating the sentences of juveniles transferred to adult courts was addressed in the *Roper v. Simons* (2005), *Graham v. Florida* (2010), *Miller v. Alabama* (2012), and *Montgomery v. Louisiana* (2016) Supreme Court decisions that placed limits on the punishment of youthful offenders. In these decisions the Court found that adolescents are different from adults, in part because their brains have not fully developed. Benekos and Merlo (2016, p. 3) observed that the Court’s decisions on juvenile justice throughout the 1960s and 1970s

“concluded ‘children are people’ and ‘deserve special protections’ whereas the decisions since *Roper v. Simmons* (2005) reflect the belief that ‘children are different.’”

A second important observation about youth crime is that there are laws that only juveniles must obey, and disobeying them results in status offenses (Bernard & Kurlychek, 2010). Some status offenders who came to the juvenile court’s attention decades ago received sanctions that today appear very onerous. Advocates for juveniles were concerned about these youngsters’ treatment. Prior to the mid-1960s, for instance, there were no constitutional due process protections for juveniles. Thus, some youths were incarcerated in training schools for months or even years for status offenses. Yet, some juveniles who had been involved in serious or violent offenses may have served less time in custody (Schwartz, 1989).

A series of Supreme Court decisions in the 1960s and 1970s extended many constitutional protections to juvenile defendants.³³ Altogether, these decisions were labeled a **due process revolution** in the juvenile court (Feld, 1999). At the core of these decisions was the recognition that youths were being treated in conditions closely akin to punishment, and they needed the representation of counsel to ensure fairness. A half-century after the *In re Gault* decision that extended due process protections to youths, however, Feld (2017) reports that the due process revolution has failed to live up to the reformers’ expectations.

Bernard and Kurlychek (2010) also observed that juveniles are punished less severely than adults who commit the same crimes. For the past century we have acknowledged that juveniles have less ability to consider the consequences of their behaviors and this is one reason why we restrict them from engaging in adult behaviors. As a result, the mitigation of consequences for juveniles has been an important principle of juvenile justice in the past century.

The fourth component of Bernard and Kurlychek’s (2010, p. 21) analysis was that the public believes that the “current group of juveniles commit more frequent and serious crime than juveniles in the past.” In some cases, these assessments have been correct: The juvenile crime wave from the mid-1980s to 1993 is a good example. At that time, the juvenile crime rates of the 1970s were looked upon favorably, just as Americans in the 1950s longingly looked back to the previous decades. Taking this retrospective view of crime, however, distorts our perceptions about the current crime problem: Some juveniles in the 1950s were involved in horrible crimes, just as some youths will be involved in serious offenses this year.

Bernard and Kurlychek’s (2010) last observation about juvenile crime is that the public believes that juvenile justice practices are responsible for juvenile crime increases. When juveniles were treated harshly by the justice system, reformers believed these penalties increased juvenile crime. In eras when rehabilitative goals drove juvenile justice interventions, some policymakers believed that juveniles re-offended because the sanctions were not tough enough. Bernard and Kurlychek (2010) identify three eras where policies shifted from tough-on-crime interventions to more rehabilitative approaches. The one constant aspect of juvenile justice is that these cycles of reform and change are repeated. Different assumptions about juveniles and their involvement in crime underlie the rehabilitative and punitive approaches to youth justice. If policymakers perceive juvenile crime as an entirely predictable outcome of adolescent development,

interventions are likely to be based on rehabilitation, providing youths with education, life skills, or counseling so they will not repeat their mistakes. Politicians who believe that juveniles are sophisticated offenders are likely to advocate tough sanctions, including lengthy incarceration, to incapacitate or deter these youths.

MODELS FOR REDUCING YOUTH CRIME

Many of the debates about juvenile justice speak to the balance between the youth's best interests and public safety. At the broadest level, these two positions form endpoints of a continuum that extends from **nonintervention** (doing nothing) to life imprisonment in state prisons. Many jurisdictions have adopted elements of each model, and while most policymakers would agree that several options are necessary, there often is considerable disagreement over what to do with youths who commit serious or violent offenses. The following pages summarize some of the key factors defining the noninterventionist, rehabilitative, and crime control models. While juvenile codes typically incorporate elements of each model, it is important that our interventions are consistent, just, and fair. As a result, extralegal factors such as race, gender, or geography should not influence juvenile dispositions.

Noninterventionist Model

The noninterventionist model assumes that labeling youths as offenders reinforces their perceptions of themselves as delinquents, and this label may influence their future behavior. Labeling theory was very popular in the 1950s and 1960s, and this approach still guides some juvenile justice interventions. There is an intuitive appeal to the notion that contact with justice systems may change young peoples' impressions of themselves, especially after being arrested and interacting with the police, probation officials, or juvenile court judges. An impressionable youth who has been classified as a delinquent, outsider, or offender might adopt that label (Kroska, Lee & Carr, 2017). Such definitions are reinforced if fellow students, peers, and even family members treat the young person in a different manner after the contact with the juvenile justice system. Ultimately, labeling theories propose that the end result of this process is that juveniles increase their delinquent behaviors.

There has been a renewed interest in the impact of labeling on a youth's behavior and researchers have found that juvenile justice interventions can be criminogenic (see Sullivan, Piquero & Cullen, 2012). The principle underlying this approach is to do as little as possible in terms of intervening in the life of the delinquent and trust that over the long term the young person will assume law-abiding behaviors; a practice that happens in affluent suburbs (Singer, 2014). However, it is very difficult to do nothing when confronted with a crime, or any other problem. Our natural inclination is to act when confronted by somebody's wrongdoing. In addition, despite our best intentions, a small percentage of youths who "receive a break" will continue to engage in delinquent behavior.

One program that emerged from the noninterventionist model is **juvenile diversion**. Diversion programs keep youths from entering the formal juvenile justice systems. Designed primarily for minor offenders, diversion programs are operated by various agencies and they usually involve informal interventions

where youngsters are expected to receive counseling, perform community service work, and abide by other conditions, such as writing a letter of apology to a victim or abiding by a curfew. Butts (2016, p. 983) observed that “diversion provides a legal response of less severity than would otherwise be justified, but it requires the youth to participate in some form of alternative.” In some jurisdictions diversion programs are operated by the police, juvenile probation agencies, or nonprofit community-based organizations.

The **deinstitutionalization of status offenders** (DSO) also has been associated with the noninterventionist model. In most jurisdictions, status offenders are seen as children in need of assistance or guidance, and they are referred to community agencies to get this help. The challenge of both diversion programs and working with status offenders is that some youths fail to abide by the program’s conditions and end up in juvenile courts for violating their informal probation conditions. As a result, it is not the status offense, *per se*, that led to placing a youth in custody, but the violation of his or her court order (Arthur & Waugh, 2009). Girls seem to be especially more vulnerable to placement in the juvenile justice system after their initial involvement in status offenses (Davis, 2017).

While not a noninterventionist program in its truest sense, one approach that defines juvenile crime as a community problem, rather than a failure of the individual, is restorative justice (RJ). First used in Australia and New Zealand, RJ practices reject the criminal justice philosophy of blame and focus on the offense. Zehr (2014) observed that conventional responses to crime have not worked because they are based on abstract principles that do not make sense to youths. Their court appearances often do not have a lasting impact on youths, do not give victims a voice, and do not really hold juveniles accountable, especially for minor offenses that result in probationary dispositions. According to this perspective, one of the most important predictors of success is juveniles’ willingness to accept responsibility for their offenses and to take some meaningful steps to repair the harm they caused.

Although the methods vary somewhat in different places, RJ is based on bringing victims and offenders together, and the victims are given the opportunity to confront offenders in a safe and supportive environment (Zehr, 2014). A variety of approaches have been developed, and they go by different names, such as family group conferencing, conferencing, victim-offender mediation, or community justice forums. In addition to victims and offenders, other community members may attend, including persons who have an interest in the case and lay volunteers. In some cases, teachers, therapists, or other professionals may participate, but often family members or other persons who are significant in the lives of the youths attend.

While RJ interventions can be used for all offenders, they typically involve young persons and research has demonstrated that these interventions are effective (Bouffard, Cooper & Bergseth, 2016; Wong, Bouchard, Gravel, Bouchard & Morselli, 2016). Sherman and Strang (2012, p. 217) have called RJ a cost-effective intervention that is the “most evidence-based strategy in corrections,” and they have argued that “the evidence is more than sufficient to implement it widely.” Moreover, this approach also provides crime victims greater involvement in the process compared to traditional court-based sentencing that historically excluded them. While most RJ interventions are targeted for nonviolent offenders,

Sherman and Strang (2012, p. 239) report that research has shown that the approach works best for the most serious crimes and criminals. While research may demonstrate that such approaches are effective, it may be difficult to sell legislators on these approaches, which many believe to be soft on crime.

Rehabilitation Model

As Bernard and Kurlychek (2010) note, the original juvenile court was founded upon a rehabilitative model. Although states took different approaches, the child's rehabilitation was the court's main objective, and public safety was a secondary concern. Because youths were seen as being treated and not punished, early juvenile court supporters believed there was no need for due process protections, and they rarely had the assistance of attorneys. The nonconfrontational, informal, and confidential nature of these courts led to abuses and injustices, especially given the large percentage of status offenders held in juvenile institutions (see Schwartz, 1989).

In Chapter 7, we discussed how policymakers withdrew support for the rehabilitation of adult offenders in the 1970s. Yet, there is still optimism that troubled youths can be reformed because they are considered more amenable to change than are adults. Whether legislators believe that delinquents can be rehabilitated, the public generally supports the efforts of the youth justice system to reform these youths. Table 14.1 shows the results from seven different studies examining the public's perceptions toward juvenile rehabilitation originally reported by Mays and Ruddell (2012) and adapted by including five additional studies. Of the survey questions, public support for rehabilitation was overwhelming, and the average support for rehabilitation for these nineteen items was 76.9 percent.

While most Americans support juvenile rehabilitation, including interventions for those who have committed violent crimes, these perceptions are also balanced by an equally high percentage of respondents who believe that delinquents should be held accountable for their offenses (Mays & Ruddell, 2012). Juvenile programs have generally been guided by optimism, or what Bernard and Kurlychek (2010) called reformers' good intentions. Often there is a significant difference between reformers' intentions and juvenile justice system performance. Programs developed for youths struggle when agencies are operated by unskilled or unmotivated staff, or when they do not receive the financial or political support required to properly carry out any rehabilitative programs.

Minority youths may receive fewer opportunities to access rehabilitative programs. Fader, Kurlychek, and Morgan (2014) studied the outcomes for youths from different racial or ethnic groups and they found that a youth's race influences where he or she is placed in custody. White youths, for example, are more likely to be placed in smaller and more rehabilitative-oriented facilities than minority youths, who are more apt to be sentenced to programs that place a greater priority on physical programming. Fader, Kurlychek, and Morgan (2014) also found that facilities placing a higher priority on physical regimen and security offered fewer educational, mental health, or counseling activities. Cochran and Mears (2015) reported similar results in their study of sentencing outcomes for Florida youths. These findings reinforce the notion that some youths may have less access to interventions that would help them to decrease their likelihood of future delinquency.

Table 14.1 Public Support for Juvenile Rehabilitation

SOURCE	POLL YEAR	SURVEY ITEM	PERCENTAGE SUPPORTING REHABILITATION
GBA Strategies (2017)	2017	Provide financial incentives for states and municipalities to invest in alternatives to youth incarceration such as intensive rehabilitation, education, job training, community services, and programs that provide youths the opportunity to repair harm to victims and communities.	90.0
GBA Strategies (2016)	2016	[Same question as above]	89.0
Baker, Cleary, Pickett, and Gertz (2016)	2009	Support for child saving	73.0
Pew Charitable Trusts (2014)	2014	[Agreement with statement:] Getting juvenile offenders the treatment, counseling, and supervision they need to make it less likely that they will commit another crime, even if that means they spend no more time in a juvenile corrections facility.	75.0
	2014	[Agreement with statement:] We should save our expensive juvenile corrections facilities for more serious juvenile offenders and create alternatives for less serious juvenile offenders that cost less.	90.0
GBA Strategies (2011)	2011	When it comes to youths who have committed crimes, the best thing for society is to rehabilitate them so they can become productive members of society.	77.0
Piquero, Cullen, Unnever, Piquero, and Gordon (2010)	2005	Juvenile offenders can benefit more from rehabilitative treatment than adult offenders.	77.2
		Juvenile offenders are more likely to become adult criminals if they are sent to a jail than if they get rehabilitation in juvenile facilities.	74.2
Applegate, King-Davis, and Cullen (2009)	2002	Importance of juvenile sentencing goal of rehabilitation (respondents selecting important and extremely important).	94.7
Krisberg and Marchionna (2007)	2007	Rehabilitative services and treatment for incarcerated youths can help prevent future crimes.	89.0

(Continued)

Table 14.1 Public Support for Juvenile Rehabilitation

SOURCE	POLL YEAR	SURVEY ITEM	PERCENTAGE SUPPORTING REHABILITATION
		Considering taxpayer resources, spending on enhanced rehabilitation services for youths in the juvenile justice system will save tax dollars in the long run.	81.0
Mears, Hay, Gertz, and Mancini (2007)	2006	Violent juveniles can be rehabilitated.	64.0
Nagin, Piquero, Scott, and Steinberg (2006)	2005	Willingness to pay at least \$50 in additional taxes for juvenile rehabilitation.	72.3
		Willingness to pay \$75 for a home visitation program (to reduce delinquency).	65.0
Moon, Sundt, Cullen, and Wright (2000)	1998	It is a good idea to provide treatment for juvenile offenders who are supervised by the courts and live in the community.	89.0
		It is a good idea to provide treatment for juvenile offenders who are in prison.	94.8
		It is important to try and rehabilitate juvenile offenders who have committed crimes and are now in the correctional system.	94.6
		Rehabilitative programs should be available even for juvenile offenders who have been involved in a lot of crime.	76.4

Source: Adapted from Mays & Ruddell (2012). Polls after 2011 were added to the existing table.

Crime Control Model

The juvenile crime wave that began in the mid-1980s forced policymakers to confront the fact that relying upon rehabilitative strategies did not always serve public safety and that some juveniles need to be incapacitated. One of the subtle changes that occurred over time is that public safety became a primary goal of many juvenile justice systems. In California, for instance, the term “safety” or “protection” of the public is repeated twice in the first sentence of that state’s juvenile code. Getting tough on juvenile offenders had a popular appeal, especially when gang activities increased, youths became involved in the distribution of crack cocaine and other drugs, and juvenile assaults and murders increased.

Juvenile justice systems that rely upon one extreme of the rehabilitation-punishment continuum inevitably will make mistakes. In states that emphasize public safety, youths who would otherwise be good candidates for rehabilitation

may serve lengthy prison terms. By contrast, in states where juvenile codes emphasize treatment or rehabilitative interventions, there are bound to be failures and some youths who were given a second chance will commit serious or violent offenses. In the end, many jurisdictions are unwilling to trust in rehabilitation and have chosen to err on the side of public safety, which is the safest goal politically.

There is no dispute that legislators enacted a series of laws that resulted in tougher sanctions for juvenile offenders. First, almost every jurisdiction made it easier to transfer juveniles to adult court (Mulvey & Schubert, 2012) or file cases directly in adult courts for serious youthful offenders, bypassing the juvenile courts (Justice Policy Institute, 2017). Second, there was a shift from rehabilitative programming to more punitive sanctions, and many secure juvenile facilities constructed during this era closely resembled adult prisons. Third, we introduced a series of sanctions such as boot camps and intensive supervised probation that emphasized getting tough on juvenile crime. Last, some of states enacted blended sentences where youths could receive a disposition in a juvenile court and then be sentenced in an adult court if they did not abide by the conditions of their disposition. Altogether, these interventions made it easier to hold youthful offenders more accountable for their delinquency.

Transfers to adult court are intended to place juveniles at risk of more serious sanctions. Almost every state eased its ability to transfer youths to adult court, and transfers increased along with the violent juvenile crime wave of the 1980s and early 1990s (Mays & Ruddell, 2012). As youth violence rates decreased, so did the number of cases transferred, and this is shown in Figure 14.3. Between 1985 and 2013 almost 250,000 juveniles were transferred to juvenile courts (National Center for Juvenile Justice, 2017). However, this does not count juveniles whose cases were directly filed by prosecutors in adult courts, or cases that were excluded from juvenile court jurisdiction through legislation. Furthermore, in New York and North Carolina, any arrestee or defendant over sixteen years of age automatically appears in an adult court. As a result, the number of transfers shown in Figure 14.3 represents only the “tip of the iceberg.”

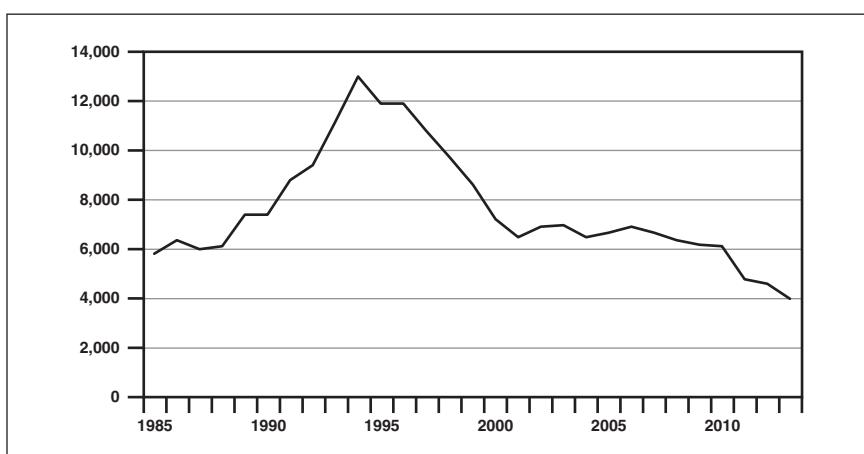


Figure 14.3 Juvenile Transfers to Adult Courts, 1985–2013

SOURCE: National Center for Juvenile Justice (2017)

There are some restrictions on the punishments that can be meted out to persons who committed their offenses prior to their eighteenth birthdays, and in four landmark decisions, the U.S. Supreme Court established these limits. In *Roper v. Simmons* (2005) the Court held that the death penalty was unconstitutional for persons who were under the age of eighteen at the time of their offense. The ability to sanction youths was further eroded when the Court, in *Graham v. Florida* (2010), forbade sentences of life without the possibility of parole for offenders younger than eighteen years who had been convicted of a non-homicide offense. In *Miller v. Alabama* (2012), the Court found that no offender younger than eighteen could be sentenced to life without the possibility of parole and the *Montgomery v. Louisiana* (2016) decision clarified the law in regards to accessing parole for prisoners convicted of crimes committed as a youth.

While the Supreme Court establishes formal legal guidelines, judges have found ways to circumvent these decisions. In California, for instance, young persons can be sentenced to terms of imprisonment that will extend beyond their life expectancy, such as the 120-year sentence imposed in 2010 for a sixteen-year-old who wounded three people in a gang-related shooting. That offender's sentence was upheld by a higher court (Mosher, 2011), but legislation enacted in 2013 gives these offenders the ability to have their sentences reviewed after serving at least fifteen years in prison.

In addition to transferring youths to adult courts, a review of the census of residential placement data shows that juvenile incarceration peaked in 1999 and has decreased in each subsequent census. Figure 14.4 shows the trend for males and females in detention from 2005 to 2014. Although detention populations have decreased it is important to note that many young people are placed in psychiatric facilities, privately operated institutions, group homes, and wilderness camps; and, they are not reported in the youth incarceration statistics. As a result, we do not know the true number of youths held in out-of-home placements.

Incarcerating youths is an expensive proposition and the operational costs are typically several times higher than imprisoning adults. These high costs are a result of higher staff-to-resident ratios and the greater number of rehabilitative programs offered compared to adult corrections. The Justice Policy Institute (2015) reported the average cost in the United States was \$401 per day to keep a youth incarcerated in the most expensive placements (whereas it cost \$194 per day to hold an adult in a state prison, see Legislative Analyst's Office, 2017). It is more costly in some parts of the nation and in California, for instance, Washburn (2017) reported that the cost of holding a juvenile offender in a state facility in 2016–2017 was \$271,318, or over \$740 per day. As a result of these high costs, most of us would probably agree that these spaces should be reserved for youths who pose the most significant public safety risks. Yet, a review of the 2015 Census of Juvenile Residential Placement data shows that only slightly more than one third (37.7 percent) of incarcerated youths were being held for violent offenses (Sickmund, Sladky, Kang & Puzzanchera, 2017).

Because youth incarceration is so expensive some jurisdictions are charging parents for the costs of detaining their children; even when those youngsters have not been convicted of any offense. Prior to stopping this practice in 2017,

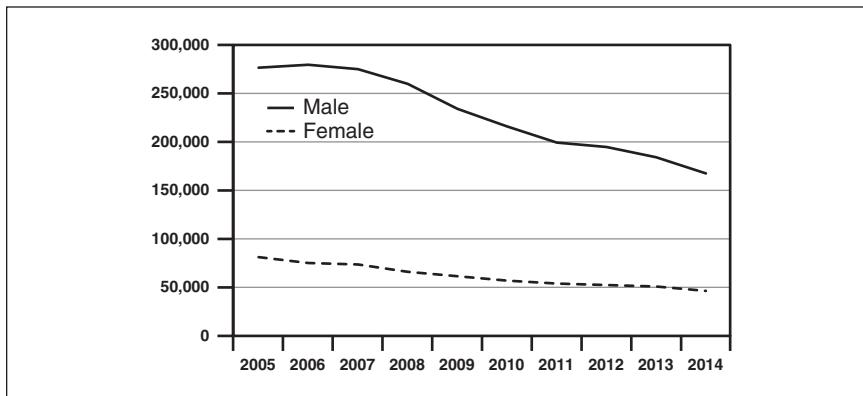


Figure 14.4 Juveniles in Detention, 2005 to 2014

SOURCE: Sickmund, Sladky & Kang (2017)

California counties billed families for administrative fees including legal representation, detention, and probation. The family of an average youth involved in Sacramento County's juvenile justice system for eighteen months could be billed \$5,640 for receiving legal services, detention, electronic monitoring, probation supervision and drug testing (Campos-Bui & Selbin, 2017, p. 1). We know that most youths who appear in juvenile courts come from poor families, and these researchers provided examples of county governments hounding impoverished parents and grandparents living on Social Security for money to pay these fees. Hager (2017) reports that in 19 states, the state juvenile justice departments could bill families for their youth's incarceration, and in 28 other states, counties were allowed to invoice families for other costs related to their child's delinquency.

Every year thousands of persons younger than age eighteen are placed in adult jails and prisons. Some of them reside in New York or North Carolina, where they are considered adults at seventeen (although legislators in both states are planning on raising the upper limit of juvenile jurisdiction to eighteen by 2019). Minton and Zeng (2016, p. 4) reported that on December 31, 2015, about 3,500 persons younger than eighteen were held in adult jails, which was down from 7,600 in 2010. Furthermore, on December 31, 2015, there were approximately 1,000 persons younger than eighteen in state prisons (Carson & Anderson, 2016, p. 32). It has long been recognized that mixing young persons with adult offenders can have potentially disastrous consequences for youths in terms of having a **criminogenic** effect (pushing them further into crime) and putting them at high risk of victimization. As a result, many state prison systems do not place prisoners younger than eighteen in the general population, and they operate separate facilities for these inmates.

EVIDENCE-BASED INTERVENTIONS

Historically, many of the programs that were developed to intervene in the lives of juvenile or adult offenders were based on stereotypes about offenders or the "gut feelings" of correctional administrators or politicians (Latessa, Cullen &

Gendreau, 2002). The trouble with that approach, however well intentioned, is that intervening in the lives of offenders is costly and some interventions were ineffective or the way they were implemented was actually criminogenic. Ineffective interventions fail both the juvenile and society and the stakes for implementing successful interventions are high. Cohen and Piquero (2009, p. 25) estimated that saving one high-risk fourteen-year-old from a life of crime would result in \$2.6 to \$3.5 million in savings in terms of harm to victims, the costs to justice systems, and lost opportunities. A follow up study in the United Kingdom found that each male chronic offender will cost each taxpayer \$1,185 (Piquero, Jennings & Farrington, 2013).

As noted in Chapter 3, evidence-based practices rest on the idea that interventions with offenders should be validated by research or program evaluations to determine whether they are effective. To better understand the effectiveness of different rehabilitative approaches, several **meta-analyses** (a form of research that examines the effects reported in a large number of studies) have been conducted. Liberman and Husseman (2017, p. 5) carried out a meta-analysis of juvenile programs and reported there were “four basic characteristics of effective juvenile justice services—the type of service, the quality of service delivery, the service dosage, and the risk level of youth receiving the service.” These findings reinforce the idea that changing human behavior is a complex undertaking.

Many successful evidence-based practices fall within a system of **graduated sanctions**, which is a strategy based upon the incremental response of justice systems to juvenile crime. Graduated sanctions focus on a model of measured, consistent, and proportional punishments for delinquent behavior. As the seriousness and frequency of a youth’s delinquency increase, so do the measures taken in response. These sanctions are often guided by risk assessments and sentencing guidelines that take into account the offense’s seriousness and the juvenile’s recidivism risk. Most jurisdictions also assess the juvenile’s needs and strengths and use this information, along with the risk assessments, to develop case plans that form the basis for a youth’s rehabilitation.

Although developing juvenile justice programs based on what the evidence says about the effectiveness of these interventions is a good practice, policymakers should not automatically disregard emerging programs because they have not been fully evaluated. Butts (2016, p. 988) reminds us that our knowledge of best practices is underdeveloped because:

Researchers do not have the resources required to test sufficient numbers of programs with the rigorous methods needed to pronounce them as reliable and effective. The field is not even close to developing, testing, and refining enough effective programs, and it is certainly a long way from having a full and balanced menu of juvenile justice interventions.

Moreover, even if researchers identify effective, promising, and cost-effective strategies to reduce juvenile offending, such as those presented in Box 14-2, there are challenges to the successful implementation of these interventions.

BOX 14-2

Washington State Institute for Public Policy (WSIPP) Cost Benefit Analyses

As noted in Chapter 3, WSIPP has been at the forefront of carrying out cost-benefit analyses of health, social service, and criminal justice programs. These analyses are related to evidence-based practices as researchers determine which programs provide the best benefit for each dollar spent. The WSIPP (2017c) calculated the cost-effectiveness of twenty-nine juvenile justice programs, and the ten most effective (in terms of having the best return on investment) were:

PROGRAM	COST	TOTAL BENEFITS
Family-based therapy	\$1,688	\$34,691
Functional family therapy (Youths in state institutions)	\$3,427	\$32,150
Education and employment training	\$855	\$26,708
Functional family therapy (Youths on probation)	\$3,427	\$22,316
Mentoring	\$3,260	\$21,283
Aggression replacement training (Youths in state institutions)	\$1,584	\$17,190
Group homes (family-teaching model)	\$22,101	\$37,510
Wilderness experience programs	\$6,388	\$19,442
Cognitive behavioral therapy	\$390	\$11,146
Aggression replacement training (Youths on probation)	\$1,585	\$17,190

SOURCE: Washington State Institute for Public Policy (2017c)

These successful programs demonstrate a number of common themes. Of the ten programs reported above seven are short-term interventions delivered by therapists. Family-based therapy, for example, has been described as a “therapeutic model for families of children with behavioral diagnoses and co-occurring disorders such as substance abuse and delinquency,” that consists of “parent training group classes that cover various parenting and family therapy modules typically over twenty one- to two-hour sessions with a therapist” (WSIPP, 2017c). Once these sessions are finished there is often a planned follow-up or aftercare with the family which are sometimes called **wraparound services**.

CONCLUSIONS

One of the challenges policymakers have to overcome is that some youths fall outside our expectations of normal delinquents. These youths have committed horrible crimes, have engaged in serious felonies, or have been given opportunities to reform themselves but they still engage in crime. While our review of crime statistics shows that violent juvenile offending has decreased since 1993,

the actions of a relatively small number of these individuals contribute to citizen fear, and they absorb an inordinate amount of our attention and resources.

Juvenile courts were founded in 1899 to respond to youth crime using a rehabilitative approach. Almost 120 years later most states had passed through cycles where they had invested heavily in interventions that were punitive and prioritized public safety over rehabilitation. Our analysis of public opinion toward juvenile rehabilitation, however, suggests the public overwhelmingly supports rehabilitative initiatives, even with serious and violent offenders. There also appears to be an increased confidence in the ability of evidence-based interventions to reduce recidivism. Economic factors may also change our attitudes toward a reliance on harsh punishments. The budget crisis that started in 2008 has forced legislators to search for “smart on crime” solutions such as keeping delinquent youths in the community rather than being “tough on crime,” by incarcerating them at an average cost of \$401 per day (Justice Policy Institute, 2015).

The future of juvenile justice is not without significant challenges. One of the biggest challenges confronting juvenile justice in the twenty-first century is disproportionate minority contact (DMC). The federal government, through the OJJDP (2012, p. 1), has noted that “in most jurisdictions, disproportionate juvenile minority representation is not limited only to secure detention and confinement; it is evident at nearly all contact points on the juvenile justice system continuum” and that “Contributing factors to DMC are multiple and complex [so] reducing DMC requires comprehensive and multipronged strategies that include programmatic and systems change efforts.” As noted in Chapter 1, the federal government has increased state-level interest in reducing DMC by providing funding for these initiatives, but this incentive has not reduced DMC (see Chapter 8).

In addition to DMC, this chapter highlighted various challenges that juvenile justice systems must still overcome, including inadequate access to counsel, the lack of effective rehabilitation in some jurisdictions, and the fact that harsh sanctions are still meted out to some juveniles. An additional issue that will be confronted in the near future is responding to research showing that human brains are not fully developed until we are in our twenties, and this has some policymakers considering whether the cases of young adults ought to be managed in juvenile courts. An article in the *New York Times* (2017), for example, notes that Connecticut legislators were considering increasing the upper age of juvenile court jurisdiction from eighteen to twenty-one.

Perhaps what has been missing for the last several decades is an optimism that it is worthwhile to invest in youths. Crime dropped at about the same time that birth rates to teenagers decreased to their lowest historical levels (Hamilton & Mathews, 2016); illicit drug use by youths in 2015, other than marijuana, was less than it was in 1991; and alcohol use is also at historic lows (National Institute on Drug Abuse, 2016). In addition, television reports have recently focused on the positive activities of youths, including their involvement in family, faith-based, educational, and community activities. American youths are certainly doing their part, and politicians should strengthen opportunities within the workforce for long-term employment, health coverage, education, and access to support, guidance, and assistance when juveniles make mistakes—as we all have.

KEY TERMS

best interests of the child	juvenile diversion	public order offenses
criminogenic	nonintervention	<i>Roper v. Simons</i>
due process revolution	meta-analyses	school-to-prison pipeline
deinstitutionalization	<i>Miller v. Alabama</i>	status offenses
of status offenders	<i>Montgomery v. Louisiana</i>	wraparound services
(DSO)	Office of Juvenile Justice	zero tolerance policies
<i>Graham v. Florida</i>	and Delinquency	
graduated sanctions	Prevention (OJJDP)	

CRITICAL REVIEW QUESTIONS

1. Barry Feld (1999) argued that the juvenile court should be abolished and replaced with adult courts that mitigate punishments for minors. Is this a progressive step forward or a step back in time? Who would benefit from such a change? Who would oppose it?
2. In the *Roper v. Simmons* (2005) case, the juvenile death penalty was found to be unconstitutional. Do you agree with this decision? Do you think that the death penalty deters adolescents from engaging in capital crimes? Why or why not?
3. Despite the fact that homicides on school property have decreased, there still remains considerable fear of school shootings. Why do these fears persist during times of decreasing crime? How do the media influence the way we think about justice or juveniles?
4. What is the most appropriate type of sanction for a juvenile murderer? Should we sentence fifteen-year-olds, who are neither mature nor responsible enough to drive a car, to a term of life imprisonment because their crimes are mature or sophisticated?
5. Single egregious offenses committed by juveniles have resulted in sweeping changes in the New York and Missouri juvenile justice systems. Why would policymakers be so easily influenced by a single case, however tragic, to change legislation for all juvenile offenders?
6. Disproportionate minority contact has been a pervasive problem for the juvenile justice system. What factors might one consider before trying to resolve this problem?
7. The noninterventionist model suggests that doing nothing in response to minor delinquency might be the best response. What are the pros and cons of following this approach?
8. Judges have found ways to circumvent Supreme Court decisions (e.g., sentencing a non-homicide juvenile offender, who was sixteen years old when the crime was committed, to a term of 120 years imprisonment after the Supreme Court ruled that it was unconstitutional to sentence a juvenile non-homicide offender to a term of life imprisonment). Should judges abide by the spirit of the Court's decisions or should they be bound only by the written law?

9. What do we mean by evidence-based policies? Is this a new idea or a repackaged old idea? What other practices does the chapter mention that are related to evidence-based policies?
10. There is considerable evidence to suggest that youths in rural communities are treated more harshly than their urban counterparts. What factors might be responsible for these differences in justice by geography?

WRITING ASSIGNMENTS

1. In three or four paragraphs respond to the following statement: It is easier to punish “other people’s children” (e.g., members of minority groups, or other “outsiders”) and that if juvenile justice practices had a disproportionate impact upon white children they would be quickly changed.
2. Develop a list of at least five factors that make juvenile justice policies difficult to implement. Provide brief supporting examples or illustrations of each. Of those factors, which do you think is most important?
3. Describe why graduated sanctions are a sensible manner of responding to juvenile delinquency.
4. Table 14.1 shows the public support for juvenile rehabilitation. Should public opinion shape juvenile justice policy or should decisions be made by bureaucrats based on what the evidence shows about reducing juvenile crime?
5. Recent research has shown that the parts of the brain that are responsible for making sound decisions are not fully developed until individuals are in their twenties. Given this finding, do you think that the age of juvenile responsibility should be increased from eighteen to twenty years?

RECOMMENDED READINGS

- Richard J. Bonnie, Robert L. Johnson, Betty M. Chemers, and Julie Schuck (editors) (2013). *Reforming Juvenile Justice: A Developmental Approach*. Washington, DC: National Academies Press. This book (which can be downloaded free of charge) presents a comprehensive overview of the need to reform youth justice systems based on our current knowledge of adolescent development. The editors recommend that the goal of juvenile justice systems return to a focus on supporting the prosocial development of youth.
- G. Larry Mays and Rick Ruddell (2012). *Do the Crime, Do the Time: Juvenile Criminals and Adult Justice in the American Court System*. Santa Barbara, CA: Praeger. Mays and Ruddell describe the influence of public opinion, political forces, and Supreme Court decisions on juvenile justice policy in the United States, especially in terms of youths transferred to adult courts.
- Simon I. Singer (2014). *America's Safest City: Delinquency and Modernity in Suburbia*. New York: New York University Press. Singer shifts our attention from youth crime in urban areas to crimes happening in the suburbs, an area overlooked by most scholars. While youths in these places may report being just as involved in teenage risk-taking and minor crime as their urban counterparts, they benefit from access to rich opportunities and arrests are rare. Instead of zero tolerance these youths are treated with maximum tolerance (Savelsberg, 2015).

CHAPTER 15



Security versus Liberty in the Twenty-First Century

INTRODUCTION

On the morning of September 11, 2001, the notion of *public safety* for the United States suddenly was shattered. It changed for those of us living in this country and, to a significant extent, it changed globally as well. This chapter will touch on issues relating to domestic terrorism, global terrorism, threats to our daily lives, and the question of how much freedom and privacy we are willing to trade to feel safer. We consider a number of major pieces of federal legislation spanning the past several decades, as well as the now well-established notion of homeland security. As a part of homeland security, we discuss the major policy initiatives related to the reorganization of federal law enforcement and intelligence functions that have occurred. Finally, we examine the balance between due process and crime control, particularly in regard to the civil liberties treasured by Americans. Of all of the chapters in this book, this one most clearly demonstrates the contemporary clash between the due process and crime control models and even the ways we define these concepts. Furthermore, it is the most speculative chapter. It is likely to leave you with more questions than answers.

FEDERAL LEGISLATION

In some ways, when we examine contemporary criminal justice in a post-9/11 world, the temptation is to begin with passage of the **USA PATRIOT Act** (or simply the **PATRIOT Act**). However, there are two major pieces of federal legislation that predate the **PATRIOT Act** and in many ways set the stage for this legislation.

The Foreign Intelligence Surveillance Act

As a result of covert activities by governmental agents and agencies in the 1960s and 1970s, including spying on dissident political groups, Congress enacted the 1978 **Foreign Intelligence Surveillance Act (FISA)**. Surveillance for national security intelligence purposes could continue without regular court oversight, but only with the approval of a secret federal tribunal known as the

Foreign Intelligence Surveillance Court (FISC) which “decides whether to approve wiretaps, data collection, and government requests to monitor suspected terrorists and spies” (Yan, 2017).

In simplest terms, the FISA defined the circumstances under which people and organizations who were suspected of espionage against the United States government or who were engaged in terrorist activities in, or directed against, the United States could be investigated (Bazan, 2004).

To initiate an investigation under the FISA, a person (or group) had to be suspected of espionage or terrorism against the United States. At the beginning FISA mandated that the primary purpose of any electronic surveillance must be related to the gathering of foreign intelligence. With passage of the PATRIOT Act foreign intelligence gathering had only to be a significant part of any investigation.

In the years subsequent to passage of the FISA, it has become apparent that the Act’s provisions also can be used in cases involving what are known as “predicate offenses.” Therefore, electronic surveillance is allowed for a long list of offenses, including treason, riots, malicious mischief, bribery of public officials, violations of trade secret protections, and money laundering (Doyle, 2002a).

The creation of FISC is one of the major provisions of the FISA—and one almost unknown by the general public. This court reviews, but cannot deny, surveillance warrant requests by federal law enforcement agencies such as the Federal Bureau of Investigation (FBI) directed at foreign intelligence agents suspected of operating in the United States. When an agency files a request for a surveillance warrant, a FISC judge must establish that the investigation’s target is a foreign power or an agent of a foreign power and that the location is one likely to be used by the target of the surveillance. The warrants issued by the FISC—formally known as delayed notice warrants—are not public records and the subject of the search need not be notified until after the search is completed. These often are called **“sneak and peek” searches**, which allow law enforcement authorities to search a home or office while the occupants are absent without notifying the people that they are a target of a search. Witmer-Rich (2014) is critical of the covert nature of these searches and says that some of them are staged to look like burglaries; most individuals are not notified of these searches until a month or so later.

The premise of these searches is that authorities may uncover evidence of terrorist activities, and they do not want the suspects to know they are under investigation. Sneak and peek searches differ from traditional criminal law enforcement searches in that the element of notice is absent. Although originally intended for combatting espionage and terrorism, these searches are rarely used for those purposes. The Administrative Office of the United States Courts (2016, p. 3) reports that 9,256 of these warrants were requested in 2015 and only 22 were denied (that total does not count applications for extensions). Of these warrants, 77 percent were drug-related offenses, and the next largest categories were cases of fraud (6 percent), sex crimes (3 percent) and extortion/racketeering (2 percent); only 76 cases (less than 1 percent) were related to terrorism (Administrative Office of the United States Courts, 2016).

Given that the FISA was in place, why were intelligence and law enforcement officials not able to preempt the 9/11 attacks? At least two answers can be given. First, although the FISA seemed to give federal agencies a great deal of authority

to investigate individuals and groups thought to be engaged in espionage and terrorism, the definition of terrorism provided by FISA was so narrow that the activities of the men who engaged in the 9/11 attacks could not be investigated by the Central Intelligence Agency (CIA) or the FBI. The attackers were receiving aid from a group (**al Qaeda**), but not a foreign government.

Second, this is another case where a policy was in place but the implementation was lacking. The congressional investigations held after the 9/11 attacks found that information on the attackers had been received, but federal law enforcement agencies were totally unprepared to process, analyze, and act upon it. There especially seemed to be a gap between the functions of the CIA and the FBI.

The Antiterrorism and Effective Death Penalty Act

In Chapter 2, we discussed the impact of the **Antiterrorism and Effective Death Penalty Act (AEDPA)** (Public Law 104-132) on *habeas corpus* appeals for prisoners. This act was passed in the wake of the 1995 bombing of the Murrah Federal Building in Oklahoma City and the World Trade Center bombing in 1993. It had been introduced in Congress five weeks prior to the Oklahoma City bombing (as the Omnibus Counterterrorism Act of 1995). Beall (1998) noted that one week after the Oklahoma bombing, the act was again presented to the Senate, but a Republican-backed bill was introduced a day later, and was affirmed, but stalled in the House of Representatives. The AEDPA eventually passed one year after the Oklahoma City attack.

One of the legislation's cornerstones was to give the federal government the ability to disrupt funding to terrorist nations and organizations (Peed, 2005). The AEDPA also restricted U.S. aid to nations that provided support or funding to terrorist organizations. Peed (2005) also noted how the act made it possible for U.S. citizens who were harmed by terrorist acts to sue for compensation. Finally, the act enabled the government to deport legal residents of the United States—even those who had committed no crimes—with classified information that the defendants were not able to review (Beall, 1998). Human Rights Watch (2016), an advocacy organization, is critical of the 1996 laws as they have “subjected hundreds of thousands of people to arbitrary detention, fast-track deportations, and family separation,” and that most of the individuals who were detained or deported were legal residents of the United States.

Although the act addressed issues related to terrorism, in reality, the greatest impact of the AEDPA was on imposition of the death penalty and setting limits on the time in which prisoners under capital sentences could file *habeas corpus* appeals in federal courts (Scalia, 2002). The result of this legislation has been a drastic reduction in the number of civil rights claims and Caplan (2015) observed that “This law gutted the federal writ of *habeas corpus*, which a federal court can use to order the release of someone wrongly imprisoned.” As a result, Hartung (2014) contends that the AEDPA has greatly reduced the ability of wrongfully convicted prisoners to access the courts.

The USA PATRIOT Act

In response to the 9/11 attacks, on October 26, 2001, Congress passed and President George W. Bush signed the Uniting and Strengthening America by

Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Public Law 107-56). This bill, with such an unwieldy title, simply is referred to as the very patriotic-sounding USA PATRIOT Act.

Almost from the beginning, questions have been raised about what the PATRIOT Act was intended to do. For example, although the bill passed by votes of 99–1 in the Senate and 357–66 in the House of Representatives, most of the members of Congress admitted that they had not read all of the 342-page document (ACLU, 2017a). In this section, we examine the impact the PATRIOT Act has had on criminal justice processes and civil liberties in the United States.

First, we need to begin by trying to answer the question of “what is terrorism?” Fortunately or unfortunately there is a wide range of definitions. For example, even within the federal government there are at least three different definitions (see Zalman, 2017):

- The calculated use of unlawful violence or threat of unlawful violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological (U.S. Department of Defense)
- The unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives (Federal Bureau of Investigation)
- Premeditated, politically-motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents, usually intended to influence an audience (U.S. State Department)

These three definitions provide some common elements. However, there is an ongoing debate over whether terrorism represents a true ideology or whether it is a tactic employed by persons and groups of various ideologies.

In addressing the issue of terrorism, the PATRIOT Act broadened the definition of terrorism that had been established in the FISA. Under the PATRIOT Act, Sections 411 and 808 modified and expanded the definitions of terrorism that already existed in federal statutes. In particular, Section 411 identified terrorist activities as those acts designed:

- i. to commit or incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;
- ii. to prepare or plan a terrorist activity;
- iii. to gather information on potential targets for terrorist activity;
- iv. to solicit funds or other things of value for (aa) a terrorist activity; (bb) a terrorist organization.

For law enforcement and intelligence agencies to carry out their mandates under the PATRIOT Act, Section 214 of the bill provided expanded authority under the FISA to engage in electronic surveillance, including the use of pen registers and trap and trace devices. Federal law defined a **pen register** as “a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic

communication is transmitted" (18 U.S.C. Sect. 3127 [3]). Sheppard (2012, p. 2709) says that a pen register is a "program or machine that detects, decodes, and records information from telephone calls, emails, or other communications, and that stores information regarding the number, address, and identity of the parties communicating." Likewise, a **trap and trace device** is a device or process that captures the incoming electronic or other impulses that identify the originating number or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication (18 U.S.C. Sect. 3127 [4]).

Pen registers and trap and trace devices originally were instruments used to detect the numbers called to or from telephones. Now, however, equipment is available that lets law enforcement authorities capture the URLs or Internet addresses accessed by computers (ACLU, 2005). The PATRIOT Act also permitted the FBI to require "doctors, libraries, bookstores, universities, and [I]nternet service providers" to surrender information on their customers and clients at government request (ACLU, 2005). Additionally, Section 206 of the Act permitted "roving surveillance." These are "court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity" (Doyle, 2002b, p. 3).

Second, Section 802 of the PATRIOT Act for the first time created the federal crime of **domestic terrorism**. According to the PATRIOT Act, domestic terrorism means activities that:

- (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
- (B) appear to be intended—
 - i. to intimidate or coerce a civilian population;
 - ii. to influence the policy of government by intimidation or coercion; or
 - iii. to affect the conduct of government by mass destruction, assassination, or kidnapping; and
- (C) occur primarily within the territorial jurisdiction of the United States.

In addition to these changes, the PATRIOT Act created a group of new federal crimes, such as:

terror attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering, for conducting the affairs of an enterprise which affects interstate or foreign commerce through the patterned commission of terrorist offenses, and for fraudulent charitable solicitation (Doyle, 2002b, p. 5).

In reality, most of these offenses existed in one form or another, but the PATRIOT Act supplemented the federal laws that already existed, and generally it expanded the penalties for these offenses (Doyle, 2002b).

Third, two particular provisions of the PATRIOT Act seem crucial to criminal justice operations (Doyle, 2002b). One of these aspects was an increased emphasis on cooperation between those agencies whose responsibilities primarily were law enforcement and those agencies devoted to the intelligence gathering and analysis. Legal, operational, and traditional barriers had been erected

between federal law enforcement and intelligence agencies, and between federal agencies, on the one hand, and state and local agencies, on the other hand. This made information sharing problematic, and the intelligence failures related to the 9/11 attacks painfully illustrated the disjointed nature of law enforcement and intelligence related to terrorism. The other provision of note arising out of the PATRIOT Act was the one relating to **money laundering**, as it relates both to terrorism and to traditional criminal activities. A key assumption was that to trace the activity, agencies had to have the capacity to “follow the money.” Doyle (2002b, p. 3) noted, “In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime.”

One hypothesis was that groups within the United States were receiving funds from multinational organizations such as al Qaeda and potentially from foreign governments such as Iraq, Iran, and Libya to carry out acts of terrorism against the United States. The PATRIOT Act gave the treasury secretary the regulatory authority to ensure that financial institutions in the United States were not being utilized for the purpose of laundering money that might be used by domestic and international terrorists. It is crucial to note that this provision of the PATRIOT Act goes beyond the realm of terrorism, and this is an issue we will return to later in the chapter.

Finally, out of the passage of the PATRIOT Act came a sense that defense of the territory of the United States was essential, and the current structural arrangements within the federal government (and among the federal, state, and local agencies) was totally inadequate. Therefore, President George W. Bush proposed the creation of a cabinet-level **Department of Homeland Security (DHS)** with a secretary who would report directly to the president. This proposal became a reality on November 25, 2002, when President George W. Bush signed the Homeland Security Act, which created the DHS. The result was not only a heightened focus on homeland security but also a massive reorganization of federal criminal justice agencies.

HOMELAND SECURITY

There are varying definitions of **homeland security** and, as with many social science concepts, the definition often springs from the person or group doing the defining. White (2014, p. 303) said that “Homeland security simply means keeping the country safe.” It is important to recognize that this notion has had an impact on the criminal justice system in the United States in two very distinct ways. First, as a policy matter, there has been a general diversion of funds from crime-fighting efforts at all levels of government to provide additional funding to fight the global “war on terror” and to provide increases in **national security**. For example, recent budget figures show that the federal government has allocated billions of dollars in funding to state and local agencies for homeland security functions (including grants, training, and technical assistance). The overall growth in the DHS budget has been phenomenal: in fiscal year (FY) 2002 the budget was \$9 billion, in FY 2004 it doubled to \$18 billion, and in FY 2017 the request was for \$40.6 billion (DHS 2017a).

Furthermore, additional funding has been devoted to medical responses to biological, chemical, nuclear, and radiological threats, bio-defense strategies, and potential public health crises. Finally, appropriations have increased for border and transportation security, and airline security (DHS, 2017a). Some of this money represents new dollars made available by Congress, but much of it has been diverted from other domestic priorities or is the result of deficit spending.

Similar to our discussion about funding criminal justice operations in previous chapters, there is a limited amount of money for government spending, and increases for one program often are at the expense of others. This is the principle of opportunity cost: In other words, a dollar spent by the government on one program is not being spent to fund some other program. But do Americans support the continued war on terrorism? A 2017 Gallup poll found that 85 percent of Americans thought that preventing terrorism was the most important foreign policy goal of the federal government (Gallup, 2017e). Many Americans are still fearful and a March 2016 Gallup poll showed that 48 percent of respondents worried a great deal about terrorism (McCarthy, 2016).

Our fears of terrorism are balanced by concerns over infringements of our privacy and a Gallup poll conducted in 2011 noted that 71 percent of Americans endorsed taking steps to prevent terrorism, but not if it violates civil liberties (Gallup, 2013). The 2013 revelations of widespread domestic spying by Edward Snowden, an employee of firms that contracted with the National Security Agency, created considerable concern in Washington and abroad (Gellman & Markon, 2013). A Gallup poll conducted after Snowden's revelations showed that while support for surveillance of suspected terrorists was high (75 percent), 58 percent of Americans did not support spying on ordinary Americans (Peterson, 2013).

The one issue that most Americans agree upon is concern over terrorist acts. Gallup (2017d) has been collecting information from surveys on different aspects of terrorism since the 1990s. Their poll results show that concerns spiked after the 2001 attacks, and Figure 15.1 reveals that a relatively high proportion of those

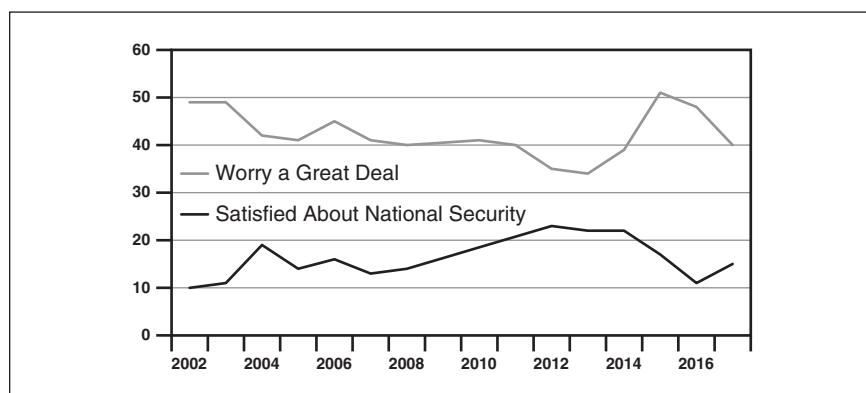


Figure 15.1 Percentage of Americans Expressing a Great Deal of Worry About Terrorism and Those Very Satisfied with the Nation's Security, 2002 to 2017

SOURCE: Gallup (2017d). Note: Several missing cases were replaced with the mean of prior and subsequent years.

surveyed between 2002 and 2017 had a “great deal of worry” about the possibility of future terrorist attacks. The second issue shown in that figure is the result of a survey question asking respondents about their satisfaction with the nation’s security from terrorism. In 2017 about two-fifths of Americans expressed a great deal of worry about terrorism and only 15 percent said they were very satisfied about the nation’s security from terrorism. Interestingly, a June 2015 Gallup poll revealed that 30 percent of Americans believed that the government should take steps to prevent terrorism, even if those steps violated their basic civil liberties.

Second, the principle of homeland security has been translated into a federal policy that has created the DHS. This department was not established as an entirely new entity; instead, there were major shifts in agency locations and structures to staff the new department. The following discussion will highlight some of these changes.³⁴

One of the first changes that occurred as a result of the Homeland Security Act was the creation of an Office of Inspector General (these exist in virtually every federal government agency) and the transfer of parts or all of twenty-two other existing agencies and 180,000 employees into the DHS. For example, one of the most-often-transferred agencies in the federal government, the U.S. Coast Guard, and the Transportation Security Administration were shifted from the Transportation Department to the DHS.³⁵

Additionally, the Secret Service, the Federal Law Enforcement Training Centers, and most of the Customs Service were moved from the Treasury Department to the DHS. The Bureau of Alcohol, Tobacco, and Firearms (now called the Bureau of Alcohol, Tobacco, Firearms, and Explosives) had its law enforcement responsibilities transferred from the Treasury Department to the DHS also. The Immigration and Naturalization Service ceased to be as such; its functions were moved from the Justice Department to the DHS and were divided into the Bureau of Immigration and Customs Enforcement (BICE) and the Bureau of Citizenship and Immigration Services (BCIS). Finally, the Federal Protective Services, which had the security responsibilities for many federal buildings, was relocated to the DHS from the General Services Administration. These changes established the DHS as the largest federal employer of armed and sworn officers with arrest powers at 45.5 percent, slightly ahead of the Justice Department with 33.1 percent (Reaves, 2012). In order to carry out their duties, the DHS employs over 240,000 personnel (DHS, 2017), and about one-quarter of them are sworn law enforcement officers.

One non-law enforcement agency that was transferred into the DHS was the Federal Emergency Management Agency (FEMA). The slow response to the Hurricane Katrina disaster in New Orleans in August 2005 has been blamed, in part, on the placement of this agency in the DHS; because it was not an independent agency, it was less responsive to emergencies. When a reporter from the Public Broadcasting Service (PBS) (2006) asked FEMA director Michael Chertoff about the relationship between FEMA and DHS in February 2006, he remarked:

Had FEMA not been part of DHS, things would have been worse. . . . So I think the answer here is not to pull apart what has been put together but is to complete the job of integration that will give us the department that the Congress expected.

So, should FEMA be located in the DHS, another cabinet-level agency, or exist as an independent entity? In the end, whether situating FEMA in the DHS is a good strategy or not, it is important to acknowledge that unintended consequences sometimes occur when even the best-laid-out plans are implemented.

The massive restructuring of federal agencies has clear implications for criminal justice students. There are increased employment opportunities with certain agencies (notably those in the DHS), and some of the agencies that students traditionally would have sought employment with (such as BATF and INS) now have been moved or had their missions redefined.

SECURITY VERSUS PRIVACY AND LIBERTY

In practical terms, what have the policy changes following 9/11 meant in terms of increased public security for both citizens and noncitizens living in the United States, and what have been the costs in terms of civil liberties? These are significant questions, and in this section, we will grapple with them. We already have some sense of how security and liberty are being balanced.

Several groups and organizations have been especially critical of the USA PATRIOT Act. One of these organizations—the American Library Association—might be a surprise to some of you (see Box 15-2). Another—the **American Civil Liberties Union (ACLU)**—probably is not a surprise. The ACLU has been very disturbed by the broad sweep of the PATRIOT Act. On its website, the ACLU provides a one-page document, entitled “The USA PATRIOT Act and Government Actions That Threaten Our Civil Liberties.” In this statement of the ACLU’s official stance, the organization says that the PATRIOT Act threatens rights under the:

- *First Amendment*—especially rights related to freedom of religion, speech, assembly, and the press;
- *Fourth Amendment*—protections against unreasonable searches and seizures abridged by the surveillance procedures allowed under the PATRIOT Act;
- *Fifth Amendment*—violations of the due process clause relating to life, liberty, and property;
- *Sixth Amendment*—provisions concerning speedy public trials by impartial juries, notice of the accusations, confrontation and cross-examination of accusers, and assistance of counsel (especially in regard to people held as suspected terrorists and those labeled “**enemy combatants**”);³⁶
- *Eighth Amendment*—protections against excessive bail (or, more properly, preventive detention or the refusal to set bail) and cruel and unusual punishment; and
- *Fourteenth Amendment*—due process and equal protection provisions for citizens and noncitizens alike under U.S. law.

Specifically, concerns under the First Amendment have been expressed that the PATRIOT Act will be used to target individuals who belong to certain religious groups (Muslims) and individuals who assemble and speak out against unpopular government policies, such as the war in Afghanistan, risk being labeled somehow as threats to national security. Fourth Amendment concerns have been raised as a

result of expanded federal powers to obtain warrants with less than probable cause (through the FISC) and as a result of expanded surveillance powers related to communications and other personal transactions, such as library and medical records. The Sixth and Eighth Amendment protections concern groups such as the ACLU, and that is especially evident in the cases involving both U.S. citizens and those detained under the “enemy combatant” status. Box 15-1 discusses some of the cases that have highlighted constitutional concerns by the ACLU and other organizations.

BOX 15-1

The Legal War on Terrorism

There is no end to the legal controversies surrounding the avowed “war on global terrorism” subsequent to the 9/11 attacks. This war has resulted in several challenges to policies regarding the response of the United States, and we briefly address four of the prominent cases that are related to this issue.

Clearly, the case against Saddam Hussein was of interest to many in the United States and around the world. On November 5, 2006, Hussein was sentenced to death for his role in the murder of 148 Iraqis. His execution, on December 30, 2006, drew condemnations from human rights organizations such as Amnesty International and Human Rights Watch.

The second significant case involves José Padilla, a U.S. citizen arrested in Chicago as a suspect in a plot involving a so-called radioactive dirty bomb. Padilla was brought to New York for detention as a result of a grand jury investigation into al Qaeda activities related to the 9/11 attacks. The criminal case against Padilla seemed marginal, but prior to the case proceeding further, President Bush issued an order to then-secretary of defense Rumsfeld that Padilla be declared an enemy combatant and that he be transferred to military custody. This case eventually reached the U.S. Supreme Court, where, by a 5–4 vote, the justices upheld Padilla’s rejected *habeas corpus* assertion that Secretary Rumsfeld was his nominal custodian and asserted that the petition must be filed against the actual custodian, who was the military brig commander in South Carolina. At the present time, the president’s power as commander-in-chief to designate someone as an enemy combatant has not been overruled or redefined (*Rumsfeld v. Padilla* 2004).

A third case that made national and international headlines for months involved Zacarias Moussaoui, the so-called twentieth hijacker related to the 9/11 attacks. In Moussaoui’s case, unlike some others related to the legal war on terrorism, the U.S. government filed criminal charges and brought Moussaoui to trial in the federal district court for the Eastern District of Virginia. There was some question concerning Moussaoui’s mental state and his fitness to stand trial, but the government was able to convince the court of Moussaoui’s competency. The U.S. attorney sought the death penalty for Moussaoui’s role in planning the 9/11 attacks, and he eventually pleaded guilty to conspiracy (1) to commit acts of terrorism, (2) to use weapons of mass destruction (commercial airliners), (3) to destroy aircraft, (4) to aircraft piracy, (5) to murder federal government employees, and (6) to the destruction of property. Each of the first four charges carried the potential of the death penalty. In the first phase of the sentencing portion of Moussaoui’s case, the jury decided that he was eligible for the death penalty. However, in the second phase of sentencing, jury members decided not to impose death but rather a lengthy prison sentence (CNN, 2017b).

In some ways, Moussaoui's trial is interesting because he was the only person charged in the United States with the 9/11 attacks (though a number of Germans were charged and imprisoned in 2003 for their roles in assisting with the plot). Furthermore, his case was processed within the normal arena of federal criminal law, unlike others designated "enemy combatants."

There were a number of legal challenges to antiterrorism practices during the presidency of George W. Bush, and while his successor, Barack Obama, was critical of many of Bush's policies, the war on terror (including the use of drone strikes by the CIA against the leaders of al Qaeda in several countries and the detention of enemy combatants at Guantánamo Bay, Cuba) has continued along much the same course. With respect to drone strikes, for example, CNN reports that the number of these attacks increased substantially during the Obama presidency (Moore, 2017) although there is also growing international opposition to the practice, especially given the number of civilians and children killed by these remotely controlled aircraft.

The fourth group of cases involves detainees at the U.S. military base at Guantánamo Bay. These cases present the most interesting dimension of the legal war on terror because all of the individuals involved were taken into custody on foreign soil (most in Afghanistan), turned over to U.S. military and intelligence officials, and declared enemy combatants but not prisoners of war. If the "prisoner of war" designation had been used, then international rules, such as the Geneva Convention, would apply. Originally, the United States detained 779 prisoners at the base in Cuba, but most have been transferred to other countries and as of the end of 2017, only forty-one remain (Rosenberg, 2017). As it now stands, most of these people have not been charged with anything, and they are not being accorded the normal constitutional protections that would be provided to criminal defendants (such as Zacarias Moussaoui). Regardless of how one feels about the treatment of these detainees, there is growing concern about the costs of operating this base, and the ACLU (2017e) reported that it cost about \$11 million dollars to hold a prisoner for a year in this facility.

Perhaps the case that best illustrates the plight of the Guantánamo Bay detainees is that of Salim Ahmed Hamdan. Hamdan was captured by U.S. forces in the invasion of Afghanistan and admitted to having served as Osama bin Laden's driver for a time. He was finally charged with conspiracy to commit terrorism, and his case was to be heard before a special military tribunal constituted to hear the enemy combatant cases. On June 29, 2006, Hamdan's case reached the U.S. Supreme Court, which in a 5–3 decision (Chief Justice Roberts did not participate) ruled that the Bush administration did not have the authority it claimed to have and that the military tribunals established to hear these cases were not legal under the Uniform Code of Military Justice or the Geneva Convention (*Hamdan v. Rumsfeld* 2006). While some conservatives saw this decision as a setback, civil libertarians suggested that this ruling could be seen as a "democracy-forcing decision" (Balkin, 2006).

During his presidency George W. Bush pursued a broad-scale war on global terrorism, but some of that administration's policies did not withstand legal scrutiny. Since Bush left office in 2009, the government's policies in the fight against terrorism have remained largely unchanged, but the legal challenges have decreased.

The ACLU maintains that the PATRIOT Act was passed in haste with little discussion and debate and with most members of Congress never having read the bill (ACLU, 2005). In the ACLU's view, there has been a dangerous rejoining of international intelligence gathering with domestic law enforcement duties. In effect, the PATRIOT Act has given almost unchecked authority to the executive branch of government to do what it thinks is necessary to provide domestic security. The ACLU said:

(Continued)

BOX 15-1**The Legal War on Terrorism (continued)**

In short, not only has the Bush administration undermined judicial oversight of government spying on citizens by pushing the Patriot Act into law, but it is also undermining another crucial check and balance on surveillance powers: accountability to Congress and the public. (ACLU, 2005, p. 4).

More recently, during the first term of Barack Obama, in the case of *Holder v. Humanitarian Law Project* (2010), the U.S. Supreme Court in a 6–3 decision upheld one of the most controversial aspects of the PATRIOT Act, the so-called material support provision. This law was originally enacted in 1996 and was incorporated into the PATRIOT Act. It was designed to prevent financial contributions to designated terrorist organizations, but it was expanded to include training, advice, and other nonfinancial assistance as well. In upholding this provision, the Supreme Court held that it did not violate the First Amendment protections of free speech and free association.

In 2014 the U.S. Supreme Court ruled on two cases in which it unanimously said the police must have a warrant in order to search a cell phone (*Riley v. California* [2014] and *United States v. Wurie* [2014]). While these two cases dealt with conventional crimes, it seems likely that the ruling applies to cases of terrorism and probably covers tablets and laptop computers as well (Liptak, 2014). Despite those cases, the issue of accessing information from cell phones has not been fully resolved, and on November 29, 2017 the Supreme Court heard the case of *Carpenter v. United States* (2017). The key issue the Court is considering is whether the seizure and search of historical cell phone records (about the location of a cell phone when a crime occurred) without a warrant is permitted by the Fourth Amendment. Kerr (2017) contends this decision will be important as the Court will have to establish a “framework for how the Fourth Amendment applies to many other forms of surveillance, such as visual surveillance, obtaining traditional phone records, obtaining e-mail transactional records [and] obtaining credit card records.”

BOX 15-2**The American Library Association's Position on Privacy**

Largely in response to the federal government’s efforts to combat terrorism through legislation, and especially in regard to the gathering of various types of information on private citizens, the American Library Association (ALA) passed the following resolution in 2003:

WHEREAS, The American Library Association's Policy on Governmental Intimidation opposes any use of governmental prerogatives that lead to the intimidation of the individual or the citizenry from the exercise of free expression; and

WHEREAS, the ALA Interpretation on Privacy describes the impact of freedom of inquiry on privacy or when privacy is compromised; and

WHEREAS, In matters of national security and the preservation of our nation, the concept of Terrorism Information Awareness (formerly called Total Information Awareness) as defined by the Defense Advanced Research Projects Administration (DARPA), may be used in making key national security decisions; and

WHEREAS, It is the responsibility of the federal government to protect its citizens from government sanctioned invasion of privacy; and

WHEREAS, Personally identifiable information compiled in a database by a government agency should be governed by the Privacy Act; and

WHEREAS, The Terrorism Information Awareness Program (TIAP) has the potential to build a large database of personally identifiable information; now, therefore, be it

RESOLVED, That the American Library Association urges the Congress of the United States to take action to terminate the Terrorism Information Awareness Program; and, be it further

RESOLVED, That the American Library Association urges the Defense Advanced Research Projects Administration (DARPA) to comply with all provisions of the Privacy Act; and, be it further

RESOLVED, That copies of this resolution be transmitted to the President of the United States, the Vice President of the United States, the appropriate committees of the United States Congress, the Secretary of Defense, and other entities as appropriate.

SOURCE: American Library Association (2003).

With the reauthorization of the PATRIOT Act in 2011, the ALA maintains its concern over Section 215 (the so-called library provision). In fact, this was one of the key items on its 2012 national legislative agenda (ALA, 2012). Section 215 can also be used to collect information about suspects from businesses. In a report published in the *Washington Times* about Section 215, Ybarra (2015) observes that “FBI agents can’t point to any major terrorism cases they’ve cracked thanks to the key snooping powers in the PATRIOT Act.” The ALA (2017) continues to advocate for individual privacy and limiting government surveillance and has a website devoted to that issue.

Many of these privacy-related concerns came to a head when Congress reauthorized the PATRIOT Act in 2006. The Act was originally supposed to sunset on December 31, 2005, but the legislation was extended for several months to allow for more debate. Civil libertarians questioned four controversial elements of the act (the government’s ability to access business records, roving wiretaps, “sneak and peek” warrants, and national security letters). Opposition to the act came from an unlikely alliance of Democrats, civil libertarians, conservative groups (which generally oppose more government), and legal scholars. There was a broad opposition to the government’s expanded powers, and hundreds of town councils, counties, and cities denounced the act.

In 2011 President Obama proposed a reauthorization of most of the PATRIOT Act’s provisions and there was a failed attempt by Republicans in Congress to completely reauthorize the act. As a result of a failure to agree, a number of the act’s provisions expired on June 1, 2015. However, Congress did pass the USA Freedom Act which restored many parts of the PATRIOT Act (Nelson, 2015). The major change was an amendment to Section 215 which removed the authority from the National Security Agency to collect mass amounts of phone data. Nevertheless, NSA can request authority to gather phone data on targeted individuals from federal courts.

Critics believe that the PATRIOT Act has provided too much governmental authority in the quest for public safety. Although at the time of the first renewal the attorney general assured Congress that the federal government has never used the powers granted it to obtain private information from bookstores, libraries, and medical records, nevertheless a number of civil liberties groups and individuals have raised privacy concerns. Supporters of the act, such as former FBI Director James Comey (2006, p. 404), argued that “much of what is in the Act is so smart, so ordinary, so constitutional, so lawful that nobody would oppose it.”

From a policy perspective, the one noteworthy feature is that as time has passed, legislators seem less pressured to enact or reauthorize legislation. The AEDPA was introduced only one week after the Oklahoma City bombing (Beall, 1998); the PATRIOT Act was enacted only a few weeks after the 9/11 tragedy. But even with several years to consider the full impact of the legislation, politicians seemed hesitant to completely scrap the act. As a result, adding sunset clauses to hastily enacted legislation might be a powerful tool to ensure more thoughtful debate when there is less urgency. Three provisions of the PATRIOT Act—roving wiretaps, searches of library records, and the so-called lone wolf provision aimed at individuals not affiliated with groups who engage in terrorist acts—were scheduled to sunset on December 31, 2009, and eventually all three were reauthorized. Defining the boundaries of our privacy and government surveillance is an ongoing issue and on December 31, 2017 FISA requirements about monitoring emails and phone calls of non-U.S. residents expired, but was reauthorized and will remain in force until December 31, 2023.

Will the USA PATRIOT Act and other pieces of federal legislation undermine the fundamental civil liberties of American citizens and others living in this country? Perhaps a more basic question to ask is: What are we willing to trade in exchange for our safety? (While these questions largely remain unanswered for the time being, some of the answers are being played out in the courts.) The following section examines a few of the legal issues and the court cases that may provide us with greater understanding and insights in the future.

TECHNOLOGY AND THE DEBATE OVER PRIVACY

Zmud, Wagner, Moran and George (2016, p. 11) defined privacy as “the capability of individuals to determine for themselves when, how, and to what extent information about them is communicated to others.” While most of us do not spend much time thinking about our privacy, government agencies have been using several tools that may infringe upon our privacy as we have little say on how our information is collected and used (e.g., shared with other organizations or agencies from other nations). In some cases the legal system provides little guidance about limits on the government’s ability to carry out surveillance. Moreover, our use of the Internet enables individuals, corporations, and governments to track our online behavior (“digital footprint”), and this can impact our future well-being and reputation for years. Government agencies might also use this information in their investigations of criminal cases, espionage or terrorism. These technological innovations are detailed in the following paragraphs.

Video Surveillance

After the bombings on the London Underground (subway) and on a double-decker bus in July 2005, police agencies all over England moved quickly to identify the suicide bombers directly involved and to apprehend any others who might have supported them. When the bombers were identified within days and a group of individuals was taken into custody after the incident, many in the United States asked how the police in England could move so quickly. The answer is closed-circuit television (CCTV) cameras. Visitors to London often are struck by the pervasiveness of video surveillance in the city, especially related to the transportation network. Greenwood (2016) writes that there are six million CCTV cameras in the United Kingdom, or one for every ten people. In fact, governments all over Europe are following London's example.

How about the United States? To many Americans constant video surveillance smacks of "Big Brother" in George Orwell's book *1984*. Civil liberties groups are particularly concerned about the government snooping on average citizens going about their normal routines. CCTV cameras, for example, are currently used by all large U.S. police departments, these cameras are installed in most police vehicles, and a growing number of departments are requiring their officers to wear body cameras. In addition to CCTV operated by government agencies, Ratcliffe (2011, p. 7) reported that CCTV is present in about three-quarters of small businesses such as "banks, casinos, convenience stores, and shopping malls." While we do not know how often we are captured on television, residents in big cities are estimated to be on seventy-five different cameras every day (Poindexter, 2017). There is little or no oversight on how the information collected by these commercial cameras is used, and we do not know whether the employees of these companies are using the cameras in a professional manner or what happens to our images once they are collected by these businesses.

Figure 15.2 shows that almost one-half of Americans (49 percent) in a Pew Research Center (2015b) poll said that the government had not gone far enough

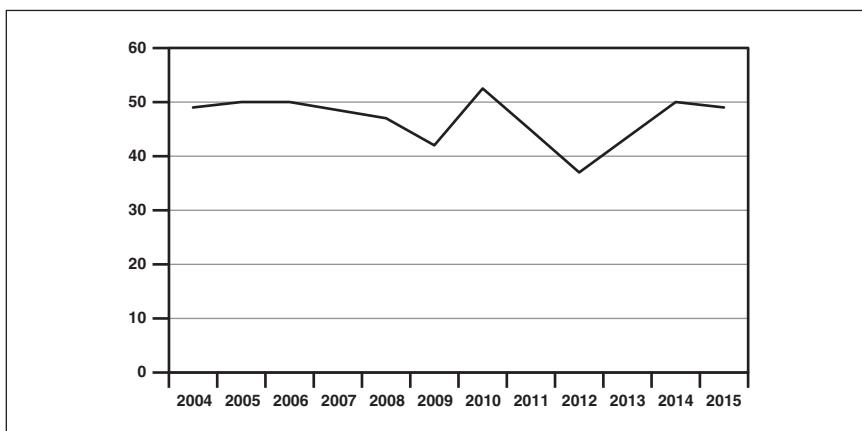


Figure 15.2 Percentage of Americans Reporting the Government had Not Gone Far Enough to Protect Country, 2004 to 2015

SOURCE: Pew Research Center (2015) Note: Several missing cases were replaced with the mean of prior and subsequent years.

to adequately protect the country. What do you think? Would you be willing to have less privacy in order to have greater security?

Police Technologies

The findings presented in Figure 15.2 reveal that more Americans would like to see the government taking more steps to protect us. In response to those fears, the police are using several tools that enhance their ability monitor our behavior and movements. The following applications are currently used by U.S. police departments in the investigation of criminal and terrorist activities:

- Facial recognition software that enables officers to compare photographs of someone they encounter with existing databases (e.g., driver's license pictures, or mug shots of arrestees). Garvie, Bedoya, and Frankle (2016) found that U.S. law enforcement agencies in at least twenty-six states can access a database containing driver's license and identification photos of 117 million adults, but there are virtually no regulations on how this information can be used and who can carry out searches using this technology.
- License-plate readers (LPR) are able to scan hundreds of license plates per hour and alert officers to stolen or uninsured vehicles, or vehicles belonging to persons of interest. Although LPR are typically mounted on patrol vehicles they can also be placed on stationary objects such as street lights or buildings. Thus, the police can track a specific vehicle's movements over time (e.g., how often that vehicle passes by a mobile or stationary LPR).
- Some streetlights have the ability to record video images or conversations and transmit these materials using wireless technology. Devices such as sensors mounted on streetlights have also been used to collect information on traffic flow, air quality, parking availability, and the location of gunshots (Alvarez, Duarte, AlRadwan, Sit & Ratti, 2017).
- Stingray technology simulates a cell tower that enables officers to connect with all nearby cell phones. This allows the police to identify people with cell phones who are present at a specific location, such as a crime-scene or a protest, and the content of some communications, such as text messages, may also be intercepted. Bates (2017, p. 1) is critical of these warrantless searches, especially if they can reveal an individual's web browsing history and messages sent and received.
- Some software applications are developed to predict where crimes will occur and some programs can carry out data mining (examining the relationships between hundreds of different variables, including information about individuals). Although relatively new to policing, these applications have been used by corporations for years to predict consumer behavior (such as what items individuals will buy and whether they will make their payments on time). Issues of privacy arise when individuals' identities emerge after these analyses are conducted, and this information is used to predict an individual's behavior.
- The analysis of data is the foundation of predictive policing, and while prior technologies such as COMPSTAT focused on "hot spots," Ferguson (2017a) says police are now focusing on "hot people," individuals who are at risk of being involved in violent crimes, such as gang members or people whose

friends are engaging in crimes. After identifying these high risk people some police departments are intervening in their lives by meeting with them and trying to develop strategies to reduce their risks of criminal behavior.

- Unmanned aerial vehicles, or **drones**, are being used by a growing number of police departments due to their improved reliability and decreased costs. Drones are used for traffic accident reconstruction, search and rescue operations, surveillance, and the largest drones are used by the military as platforms to launch weapons. Feeney (2016, p. 13) is concerned that their use is largely unregulated by law, and he argues that states should “pass drone policies that protect privacy while increasing police transparency and accountability.”
- Big Data. Both predictive policing and data mining are related to the issue of Big Data policing, where databases about our behaviors are collected from a range of private and public databases, merged together, and interpreted by the police. Ferguson (2017b) describes how police departments have embraced these approaches in times of budget cutbacks.

Although most people support the police using technology to reduce crime and terrorism there are concerns about how much data they are collecting and how they are using that information.

Fusion Centers

One of the technological applications that has been offered to fight terrorism in the United States and to provide greater homeland security is that of fusion centers. The seventy-eight fusion centers throughout the United States were established by the Homeland Security Department and Justice Department to facilitate the sharing of information among intelligence and federal, state, municipal law and tribal enforcement agencies (as well as the military) and some private sector partners. The Homeland Security Department (2017b) reports these centers “provide comprehensive and appropriate access, analysis, and dissemination that no other single partner can offer.”

The concern with fusion center operations is that sharing information from foreign and domestic intelligence agencies and traditional law enforcement—as well as nongovernment agencies—has the potential to affect the civil liberties of American citizens. Carter, Carter, Chermak, and McGarrell (2017, p. 14) summarized several privacy-related questions associated with fusion centers, including (a) Who can access information collected by these centers? (b) How is the information collected by these agencies shared and used? and (c) How are nongovernment agencies (such as banks, schools, and public health agencies) involved in this data collection, and to what extent do their employees have access to sensitive information? Like the issue of video surveillance and analysis of personal data addressed above, many civil libertarians and privacy advocates are concerned that these powerful tools allow the government to engage in all types of mischief in its quest for homeland security. Bates (2017, p. 16) observes that “police technology will continue to become more expansive and powerful, and the longer it takes legislatures and courts to produce a legal framework capable of keeping up with technology and ensuring that constitutional rights are protected, the more threatening the surveillance state will become.”

THE CHANGING LEGAL ENVIRONMENT

Some observers (see, for example, Baker & Gregware, 2009) believe that the courts and the legal process in the United States have fundamentally changed. Traditionally, the struggle for control over the courts has been between citizens and the professionals who work in the courts. However, beginning with the 9/11 attacks, the executive branch of the federal government has moved decisively to expand its powers over court processes in the name of the war on terror. Baker and Gregware (2009, p. 474) said, “This expanded executive authority comes at the expense of the citizen’s ability to oversee the process and the court professionals’ ability to control the courts.”

As we outlined before in the chapter, mechanisms have existed for some time that allow the government to conduct surveillance of citizens for intelligence purposes. However, two particular aspects of the legal environment have changed. First, there is increased secrecy not only in the gathering of intelligence data but also in adjudicating legal claims relating to the intelligence function. The United States now has the FISC to hear requests for surveillance warrants. There also is a secret federal appeals court to hear cases that are in dispute within the FISC. All of this operates out of the public view based on the executive branch’s assertion that “in order to protect us from terrorists, it must have secrecy so that potential terrorists will not know what it knows” (Baker & Gregware, 2009, p. 486).

The second change in the legal environment related to the war on terrorism is the lowering of standards related to search and seizure. Federal authorities now can obtain search warrants on less than probable cause if they can convince the FISC that a target of an investigation is suspected of terrorist activities or connections. The PATRIOT Act and other federal legislation give authorities access to a wide variety of personal information as well. Finally, search and seizure principles such as notice are abridged by the “sneak and peek” searches that now have been authorized.

Third, the PATRIOT Act now allows for (and even encourages) the commingling of functions that traditionally existed separately as criminal and intelligence investigations (Baker & Gregware, 2009). There has always been something of a legal or operational wall between criminal investigations and intelligence gathering, but federal law enforcement officials have recognized that the authority they now possess is a powerful tool in the fight against conventional crime. Therefore, the distinction between what is a purely criminal issue and what relates to the intelligence function is getting harder to discern. Should law enforcement be using extraordinary powers to pursue “ordinary” criminals?

In a Nevada criminal case, FBI agents used provisions of the PATRIOT Act to monitor the activities of a strip club owner who was allegedly involved in political corruption. As of 2011 there had been 400 individuals convicted of violations under the PATRIOT Act, but only thirty-nine of them had convictions related to terrorism (ACLU, 2017d). It would seem that this is not its intended use, and this is another reason why various civil liberties groups are concerned about the reach of the act.

Finally, the designation of a group of people as “enemy combatants” has taken the United States into largely uncharted legal waters. As the federal courts

continue to address the issues surrounding enemy combatants (such as in the *Hamdan v. Rumsfeld* case), we will begin to get better definitions concerning the executive branch's powers to carry out its duties in responding to threats, both foreign and domestic. For the time being, however, concerns have been expressed—particularly by due process advocates—over the degree to which the Constitution applies in the war on terror.

CONCLUSIONS

It is not an exaggeration to say that the balance between safety and liberty may present the greatest challenge to American government today. The criminal justice system is one arena where this dynamic tension is manifested. State and local law enforcement agencies are being asked to shoulder significant responsibilities for providing homeland security. Training and federal dollars are being directed to these agencies as first responders to any terrorist attack (or even a natural disaster).

When considering the due process and crime control perspectives, one of the most significant legislative issues emerging after the terrorist attacks in 1993, 1995, and 2001 is that the laws intended to crack down on terrorists have instead been used to investigate ordinary criminals, and this has resulted in some unintended consequences. Two sweeping outcomes of the AEDPA, for example, have eased the government's ability to deport legal residents who committed minor crimes, and the law made it difficult for wrongfully convicted prisoners to access the federal courts to seek their freedom (Caplan, 2015; Hartung, 2014). There is also some evidence that the PATRIOT Act is more likely to be used to investigate regular criminals rather than spies or terrorists (ACLU, 2017c). Last, only 1 percent of sneak and peek warrants in 2015 were used to investigate terrorists, while over three-quarters (77 percent) of them were used to investigate drug offenders (Administrative Office of the United States Courts, 2016).

One of the biggest challenges to law enforcement engaged in anti-terrorism activities in recent years is the rise of **lone wolf terrorism**, which is “political violence perpetrated by individuals who act alone; who do not belong to an organized terrorist group or network; who act without the direct influence of a leader or hierarchy; and whose tactics and methods are conceived and directed by the individual without any direct outside command or direction” (Hamm & Spaaij, 2015). Cases of terrorists acting alone include the 2016 mass murder at Orlando’s Pulse nightclub, the 2017 attacks in New York City where an offender used a U-Haul truck to run over bikers, and another wounded several people with a pipe bomb. Byman (2017) notes that terrorist acts carried out by a single individual have been taking place for over a century and questions whether these crimes can ever be stopped. As these individuals seldom associate with other terrorists, enhanced surveillance will do little to stop them.

Members of the various New York City Police departments and the New York City Fire Department found themselves on the front lines of disaster response on Tuesday, September 11, 2001. Other agencies around the country have had to respond to actual events, but more often to heightened security alerts that put agency personnel in a defensive posture for days at a time. Furthermore, a number of the

nation's criminal justice personnel who belong to the National Guard and Reserves have been called to active duty to serve in Kuwait, Iraq, and Afghanistan, as well as stateside assignments. These responses have put increasing stresses on the nation's domestic law enforcement agencies and this, in turn, creates stresses within the entire criminal justice system. The final question facing us, then, is how long these agencies and their personnel can stand under such stresses.

KEY TERMS

al Qaeda	enemy combatants	lone wolf terrorism
American Civil Liberties Union (ACLU)	Foreign Intelligence Surveillance Act (FISA)	money laundering
Antiterrorism and Effective Death Penalty Act (AEDPA)	Foreign Intelligence Surveillance Court (FISC)	national security pen register
Department of Homeland Security (DHS)	<i>Hamdan v. Rumsfeld</i>	<i>Rumsfeld v. Padilla</i>
domestic terrorism	<i>Holder v. Humanitarian Law Project</i>	“sneak and peek” searches
drone	homeland security	trap and trace device
		USA PATRIOT Act

CRITICAL REVIEW QUESTIONS

1. Is the global war on terrorism related to criminal justice processes in the United States? If so, how?
2. Do an Internet search for the Foreign Intelligence Surveillance Act and the USA PATRIOT Act. How many “hits” did you get for each? What does that tell you about the interest in and concerns with these laws?
3. Divide up into groups of three or four students and discuss the following proposition: “The USA PATRIOT Act has (or has not) made the U.S. public safer.”
4. What do we mean by “sneak and peek” searches? How do these searches alter the fundamental elements traditionally associated with the Fourth Amendment?
5. What is meant by “domestic terrorism,” and is it related in any way to the war on global terrorism? Can you think of (or find) the names of any organizations that might be classified as “domestic terrorism” groups?
6. Are some groups potentially labeled as domestic terrorists merely exercising their First Amendment rights? Can you think of any groups in our nation’s history that might have been given this label? Explain your answer and the position you have taken.
7. Are youth street gangs “domestic terrorists” as you understand this notion? Could they be called this? Why or why not?
8. Look at some of the agencies reorganized under the DHS. Why was the FBI not included? Are there organizational problems associated with moving these agencies around? In other words, has the massive federal reorganization made us safer? (Hint: Look back at Chapter 1 on politics and policy.)

9. What are some of the significant legal changes that have occurred as a result of our war on terrorism? Do these changes present threats to the privacy and security of the average citizen of the United States, or are they directed only at international terrorists? How can we know for sure?
10. Is it possible that we will have to surrender some freedoms in order to be safer? Are there any examples already in place that you can think of? And after such surrender, how can we check to see if we really are safer?

WRITING ASSIGNMENTS

1. Do an online search for the Foreign Intelligence Surveillance Court. In two or three paragraphs explain what you learned about the court's jurisdiction and the number of judges sitting on this court.
2. Compare and contrast international terrorism and domestic terrorism. Are there elements of both that are similar or different? Explain.
3. Prepare a one-page summary highlighting the changes in the numbers of prisoner *habeas corpus* petitions before and after the Antiterrorism and Effective Death Penalty Act of 1996.
4. Prepare a one-page summary based on evidence that you can find addressing how the war on terrorism has changed (or remained the same) from the Bush to Trump presidencies.
5. Prepare a two- or three-paragraph summary outlining the types of information that should or should not be accessible to the government as part of the war on terrorism.

RECOMMENDED READINGS

Marcus Ranum (2004). *The Myth of Homeland Security*. Indianapolis: Wiley. You may feel better or worse, depending on your orientation toward this topic, after reading this book.

Ranum's work is not a college textbook but one written for a general audience. He spends a great deal of time talking about what is wrong with the federal government's efforts in addressing homeland security and deals with the mythology and politics that surround this area. The bottom line for Ranum is that, unfortunately, some areas of our lives cannot be made much more secure (without altering our ways of life) and that much of what passes for the government's homeland security efforts is really an illusion.

Gershon Shafir, Everard Meade, and William J. Aceves, editors (2013). *Lessons and Legacies of the War on Terror: From Moral Panic to Permanent War*. New York: Routledge. This edited volume contains entries from eight contributors. It uses as an analytical framework the notion of a "political moral panic," and it examines the ways in which governments have responded to terrorism in the wake of the 9/11 attacks.

Jonathan R. White (2017). *Terrorism and Homeland Security*, 9th ed. Boston, MA: Cengage Learning. This book represents an effort to deal in a comprehensive way (sixteen chapters) with the evolving face of terrorism. White begins by addressing definitional issues and some of the religious, historical, and political factors related to terrorism. He next deals with terrorism as an international problem. Finally, he turns to America's problem of homegrown or domestic terrorism and the struggle we face as a nation in providing homeland defense.

CHAPTER 16



Making Sense of Criminal Justice

INTRODUCTION

Deivering criminal justice interventions that are just and fair, as well as effective and efficient, poses numerous challenges. This is a fact that you can appreciate after reading the first fifteen chapters of this book. The tasks are made more difficult given the incredible complexities of the justice systems that operate at all levels in the United States. For example, almost 1 million law enforcement officers work within about 18,000 federal, state, and local agencies, and over 20,000 judges sit in over 3,000 courts, interpreting the laws of fifty states, multitudes of local entities, and the federal government, as well as processing criminal cases filed by some 27,000 prosecutors. Each actor within the criminal justice system is likely to have his or her own priorities and slightly different views about justice and the reasons why criminals commit offenses. These actors will confront offenders and the public in ways that are shaped, at least in part, by their organization's history, the training and supervision they received, the community's culture, and their own values and beliefs. With all of these variables, there is relatively little uniformity.

At times, the system seems likely to collapse under its own weight. Every year there are estimated to be 240 million 911 calls (National Emergency Number Association, 2017), and some 14 million arrestees are processed through juvenile halls and adult jails—and these suspects appear before increasingly busy judges to have their “day in court.” Over 2.1 million Americans can be found in jails and prisons while you are reading this paragraph, either awaiting an appearance before a judge or having been sentenced—and over 5,000 of these inmates will die in jail or prison (most of natural causes) this year. Almost 4.7 million additional offenders are serving sentences of probation or parole in the community. To accommodate these crushing workloads, each organization has developed its own approach to dispensing justice, with varying degrees of fairness, professionalism, and respect for the Constitution.

LOOKING FORWARD

We started this book with two chapters that outlined various ways of looking at justice systems, and here we will provide a short review. First, it is impossible to disentangle politics from the operations of criminal justice systems because all law enforcement agencies, courts, and correctional systems depend on governments and political acts and actors for most of their revenues. Second, the activities of each element of our justice systems (police, courts, and corrections) are shaped by constitutional requirements; federal, state, and local laws; and organizational policies. We have outlined numerous examples in which interventions that make a lot of “common sense” failed after they were introduced. In some cases, elected or appointed officials attempt to reform the operations of different agencies, and these efforts generally produce mixed results because the people who work within organizations often are resistant to change.

Second, we have to acknowledge how different stakeholders influence justice system operations. Politicians levy taxes to fund police, court, and correctional agencies, but citizen advisory panels, local business owners, employee associations (or unions) of officers or deputies, federal or state inspectors, and other regulatory bodies all influence the managers of agencies. Moreover, a number of public interest groups have a powerful influence on the way justice is dispensed. The National Rifle Association (NRA), for instance, actively supports and funds politicians who advance its political agenda. The American Civil Liberties Union (ACLU) is able to muster significant legal resources to challenge legislation or policies that they perceive as unjust. Some of these interest groups have lots of money and millions of members and hence have powerful voices.

The media also have a role in shaping justice policies. If you doubt their influence, see what happens when the local newspaper writes over 100 articles about problems within an organization (as happened at the Houston Police Department Crime Lab), or when every television station in America continuously replays a film clip of a daytime traffic stop where the driver of the vehicle is shot by police (as occurred with the Philando Castile incident in 2016). But even entertainment television is responsible for influencing the way we perceive the world. Sarah Britto (2015) found that people who watched more crime-related television were more fearful of crime and had less accurate knowledge about the justice system. Moreover, Britto reported that watching crime-related dramas also increased respondents’ support for the police and caused them to express more punitive values (such as support for the death penalty).

Perhaps more importantly, litigation has also fashioned the way justice is dispensed in America. The Supreme Court has a key role in determining the boundaries of individual rights that suspects, arrestees, and prisoners enjoy. While few police officers actually fear any of the nine Supreme Court justices, they dread the possibility of letting a murderer walk free because they did not conduct a proper interrogation or search. Workers within justice systems are equally apprehensive that they will lose their home in a lawsuit because they acted with deliberate indifference, and supervisors are fearful of being held accountable when their subordinates were

not properly trained to conduct their duties or because of a split-second decision that they made under pressure, having had little time to weigh different options.

While all of these challenges create immeasurable stress for agency administrators, they also act to constrain the unethical or illegal activities of people working within criminal justice organizations. This is important in protecting us from overzealous law enforcement officers, prosecutorial misconduct, incompetent or biased judges, or correctional officers who engage in some form of wrongdoing.

Sometimes college professors and members of advocacy organizations are critical of people who work within criminal justice agencies. But, police officers or deputies, court staff members, and correctional officers often confront situations that have little possibility of a “win-win” outcome. We do not always give these employees the resources or information they need to carry out their duties (see Box 16-1). We expect much of these employees, their pay is frequently meager, and these front-line workers are at high risk of being injured on the job, either physically or psychologically. Paying higher salaries and recruiting better-prepared employees in the past few decades has gone a long way in improving the quality of the police and correctional officers, and we speculate this trend will continue.

Given these realities, one way we can better understand criminal justice operations is Packer’s due process and crime control models (introduced in Chapter 2). We noted that neither of these models exists in a true form and that the operations of justice organizations will fall somewhere between these two ends of a continuum. The most conservative of agencies, for instance, has to respect the due process protections provided by the Constitution to suspects or offenders. By contrast, even the most liberal organization and vocal civil libertarian would acknowledge that the harsh intervention of the justice system is needed in some cases to protect public safety.

Box 16-1

Can We Make Sense of Criminal Justice with Incomplete Information?

Throughout this book we have lamented the fact that the information we need to make sense of criminal justice is almost always incomplete and official government statistics about crime and justice often takes years before it is published, and the information we need is sometimes unavailable. This matters because policymakers need accurate and timely information in order to develop the most effective responses to crime. As a result, some of the observations researchers make about crime and justice issues may be flawed.

Most of the data we need to make sound decisions about responding to crime take several years before they are released; consequently, we will not know how many Americans were murdered in 2018 until 2020. The Bureau of Justice Statistics (2017c) describes the hurdles they have to overcome in order to collect and publish their reports, including agencies that do not submit information on time (or do not submit any data as all submissions are voluntary), cleaning and verifying the data, analyzing the information and then verifying the findings. Sometimes agencies reduce the amount of information they report about crime and the FBI (2017b) reported that it discontinued 74 of the 127 tables (58.3 percent) previously published

in the *Uniform Crime Report*. We question how we can make sense of criminal justice without access to the most basic information about arrest or offense trends?

Writing for the Marshall Project, Meagher (2016) identified thirteen areas where criminal justice data were unreliable or unavailable. One of the most embarrassing shortcomings of criminal justice statistics was exposed by *Washington Post* and *Guardian* newspaper reporters who found that FBI homicide statistics undercounted the number of people killed by police by about 60 percent (see Chapter 5). If we can't get these statistics correct, it makes us wonder what other statistics lack validity? One of the biggest challenges for agencies such as the Bureau of Justice Statistics or the Federal Bureau of Investigation is they rely upon thousands of organizations for information, and submitting data is voluntary. While complying with requests to produce information about crime and justice system operations is commonly carried out by larger agencies, many small or rural police departments, sheriff's offices, jails, and court operations do not submit any information, giving us an incomplete picture of the crime problem, or how we respond to crime.

LINGERING AND EMERGING POLICY ISSUES

Throughout this text we have dealt with many policy issues that have been addressed by the police, courts, and correctional agencies over the past several decades. However, there seem to be a cluster of concerns that are both currently pressing and do not seem amenable to easy resolution. In this section we will highlight three of these policy areas—one for each of the three major components of the criminal justice system.

Police

As the most visible part of the justice system, the police can be a lightning rod for dissatisfaction with the entire system. In Chapter 5 we discussed the issue of police use of force. The deaths of unarmed civilians by the police, and especially African Americans, have added to tensions between the police and the public. The *Guardian* newspaper tracked deaths related to police interventions (their list includes shootings, deaths by Taser, and other causes) in 2015, and found that although minorities account for 37.4 percent of the U.S. population, 53.6 percent of the unarmed persons killed by police were non-whites, and most of them were African American (Swaine, Laughland, Lartey & McCarthy, 2016).³⁷

The controversy over deaths related to the police use of force was one of the drivers leading to the President's Task Force on 21st Century Policing (2015, p. 5) and a key point identified in their report was "the distrust that exists between too many police departments and too many communities—the sense that in a country where our basic principle is equality under the law, too many individuals, particularly young people of color, do not feel as though they are being treated fairly." Increasing trust and legitimacy is seen as a key step in getting us to obey the law (Tyler, 2006) although Worden and McLean (2017) found that relationship is not as clear as some propose.

It is important to acknowledge that other police operations have resulted in tensions between the police and minority populations including practices such

as stop, question, and frisk (SQF) that New York courts ruled unconstitutional in 2013 (New York Civil Liberties Union, 2017, see also Chapter 8). King (2017) argues that since SQF ended, police in New York must meet arrest quotas that result in officers “rounding up people, particularly teenage children, for crimes they know good and well they didn’t commit—locking them away sometimes for days, weeks, months, or even years at a time—then simply dismissing the charges.” King contends that the practice was widespread, and the district attorney, the New York Police Department’s leadership and the mayor were aware of these occurrences, and have done nothing to stop them. Does King (2017) have a credible argument? He points to the dismissal of 900,000 criminal cases, and the fact that the NYPD paid \$75 million to the persons whose cases were dismissed (Annese, 2017).

Taken together, the police shootings of unarmed African Americans or police practices that are thought to discriminate against members of minority groups have reduced the trust and confidence of African Americans, and this is reflected in the results of national polls. Figure 16.1 shows the results of national-level Gallup polls carried out between 2012–2014 and 2015–2017 (Norman, 2017). The fact that less than one-third of African Americans believe they can trust the police is troubling. In fact, a prominent Yale law professor and member of the President’s Task Force on 21st Century Policing, Tracey Meares (2017) contends that “policing as we know it must be abolished before it can be transformed,” and she adds, “Can’t we rightly object when the policing provided to us fails our communities?” (see also: Vitale, 2017)

Increasing hostility toward the police, including protests and a number of ambush murders of officers between 2014 and 2017 has led many officers to believe there is a “war on cops” (Nix, Wolfe & Campbell, 2017). When the general public was asked about this issue in a national survey in 2016, 61 percent of respondents said there was a war on police (Ekins, 2017). In response to this anti-police hostility **de-policing** has occurred, where some police officers and agencies have carried out less proactive policing. The notion behind de-policing is that officers become less aggressive or diligent in doing their jobs for fear of

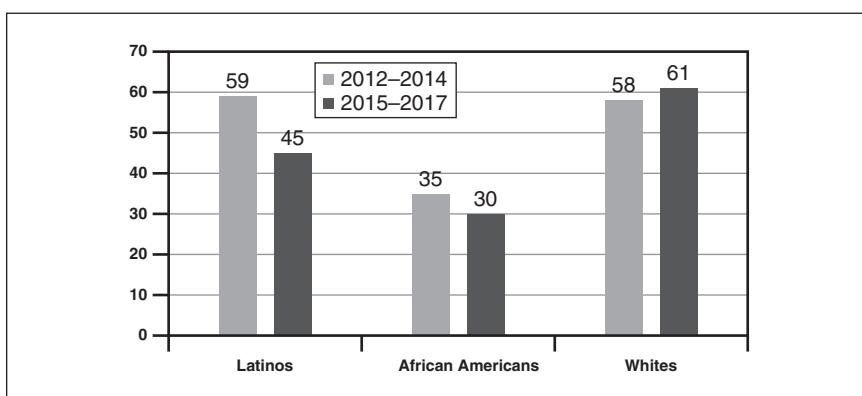


Figure 16.1 Percentage of Respondents Expressing a Great Deal or Quite a Lot of Confidence in Law Enforcement

SOURCE: Norman (2017)

provoking confrontations or community protests (Balko, 2017). The degree to which this is occurring remains to be established. Nevertheless, if it is happening then the public may be less safe than it was before.

Given these observations there is an overwhelming concern with holding the police accountable for their actions, especially in cases involving the use of force (both lethal and nonlethal) (Walker, 2017). Campaign Zero (2017), an activist organization, has identified ten steps to enhance police accountability, and they are summarized as follows:

1. End broken windows policing especially where it concerns minor criminal acts committed by persons with mental illnesses
2. Increase community oversight of the police including expanding civilian complaints offices
3. Limit the use of force through policy changes
4. Independently investigate and prosecute cases where excessive use of force is alleged
5. Increase the number of police officers who reflect the communities they serve
6. Use body-worn cameras and ban officers from confiscating cell phones or recording devices from civilians who are filming the police
7. Increase officer training
8. End for-profit policing (e.g., using tickets to generate revenue) and limit or ban asset forfeiture
9. Decrease police militarization where military weapons are provided to the police by the government
10. Remove barriers to misconduct investigations and civilian oversight, and keep officers' disciplinary histories accessible to other police departments

While some of these recommendations are controversial, these ten factors form a good starting point for discussions about increasing police accountability. In fact, these goals are somewhat consistent with the public's notions of police reform. In her national survey Ekins's (2017, p. 51) respondents said that the police should receive more training, they wanted more officers to have body-worn cameras, and supported the external investigation of agencies (for misconduct). Those respondents also opposed civil asset forfeiture, the use of military weapons by the police, racial profiling, and using traffic stops to search for drugs (Ekins, 2017).

Altogether, it appears citizens are divided in their support for the police, and much of this division is according to one's racial or ethnic background. These perceptions are based on issues such as police misconduct, operational practices (such as SQF), and how members of minority groups are treated by the police, including the shooting of unarmed civilians. Repairing this divide will require a long-term effort, and officers will have to believe that these changes are important.

COURTS

Perhaps the single major issue facing the courts is one over which they have only partial control: sentencing. Nationwide we have been in a protracted period of growth in prison populations. This has only started to slow since 2008, but as Oliver (2017) points out, prison admissions in urban areas are decreasing while

new prison admissions from rural America are growing. Thus, the national-level statistics hide some differences in sentencing practices throughout the nation.

Much of what has driven the increase in prison populations involves changes in sentencing policies, not *increases* in crime rates (which largely have been stable or *decreasing*). These changes have included sentence enhancements (for drug, gang, or firearms-related crimes), determinate sentencing, sentencing guidelines, and presumptive and mandatory minimum sentences. The National Research Council (2014) found that the increased imprisonment rate was due to increasing both the likelihood of being imprisoned and longer sentences. Regardless of the mechanisms that resulted in mass incarceration, Tonry (2016, p. ix) says that “Meaningful change will occur only when legislators throughout the country repeal the laws that produced mass incarceration...and enact laws authorizing the release of people now in prison who should not and need not be there.” Tonry is skeptical that these reforms will occur anytime soon, as he observes that only one state has repealed tough on crime laws.

A report issued by the Brennan Center for Justice at New York University School of Law made several recommendations to address the growth of prison populations (Eisen, Austin, Cullen, Frank & Chettiar, 2016). One recommendation was that judges should have the flexibility to craft individualized sentences rather than placing them in the straightjackets that often result from sentencing guidelines. Furthermore, legislative bodies should consider reducing prison sentences for “aggravated assault, murder, nonviolent weapons offense, robbery, serious burglary, serious drug trafficking, and sexual abuse” by 25 percent (Williams, 2016, para. 10).

The Brennan Center report ended with two significant conclusions. First, prison rates can be reduced without negatively affecting crime rates. In fact, they found that twenty-seven states had reduced both their prison populations and their crime rates. Second, Eisen et al. (2016) maintained that large numbers of prisoners serving time for serious, violent crimes could be released “with little risk to public safety.” These prisoners had served enough time that they had aged out of their most crime-prone years and were less likely to recidivate (see Crutchfield, 2017).

As noted in Chapter 7, reducing sentence severity will not occur unless prosecutors ease their tough-on-crime policies (Pfaff, 2017). While there is some evidence to suggest that tough-on-crime incumbent prosecutors are starting to lose elections in 2016-2017 to reformist challengers, it is unlikely that harsh punishments will become less popular unless there are credible alternatives, such as community-based options that can demonstrate reduced recidivism. Moreover, it has been proposed that because cities or counties do not pay any of the actual costs of imposing harsh punishments, states may have to “provide financial incentives to locales to keep offenders in their home environs” (Cullen, Lero Jonson & Mears, 2017, p. 30). De-politicizing the prosecutor’s role, or having local jurisdictions bear a greater cost when harsh sentences are imposed, might reduce sentence severity, but both of these options are unlikely to occur anytime soon.

One of the issues ripe for change is the lack of state-funded counsel for poor defendants. Laird (2017) reminds us that defendants who rely upon public defenders are disadvantaged because their attorneys have high caseloads, their offices

are underfunded, and many of these lawyers are inexperienced. These problems were present prior to the 2008 recession and may be worse today as cash-strapped cities and counties look for ways to reduce costs. These shortcomings are magnified in rural counties and Forsman (2017), writing about Nevada, observes that “everybody knows the problem exists” (para. 12) and “the consequences are real and devastating for people sitting in rural jails, most of whom only see their lawyers a few minutes before a hearing or whose lawyer may shove a life-changing plea agreement at them on a case that hasn’t even been investigated” (para. 14). Because criminal defendants are not a sympathetic group, there is little political willingness to extend funding for public defenders, but as we learned in Chapter 10, good lawyering is the best way to prevent miscarriages of justice.

Corrections

Clearly prison populations and sentencing policies are intimately linked. However, before we leave this section it is important to consider further the number of inmates that we want to incarcerate, and how many we actually can afford to keep behind bars. As we noted in Chapter 12 (and again in this chapter), over half of the states have taken measures to reduce their prison and jail populations in the last decade. Since the 1980s it has become increasingly apparent that prison bedspace is a limited and expensive commodity. We cannot possibly afford to lock up everyone we might want to. Therefore, policies must be considered that address what has come to be called “right sizing” of inmates populations.

Eisen et al. (2016) said that 212,000 prisoners (about 14 percent of the U.S. prison population) had served long sentences and likely had aged out of their likelihood to commit crimes. Additionally, these researchers also report that 576,000 prisoners (39 percent of the U.S. prison population) had been incarcerated for offenses unrelated to public safety. Thus, pursuing policies that reduce prison populations substantially could protect public safety and reduce the economic burdens, particularly for cash-strapped states.

At the same time as a call to reduce prison populations there has been a growing movement to reduce the number of jail inmates through bail reform, a topic addressed below. Many have called into question the justice of holding high populations of nonviolent poor offenders for months who cannot make bail only to dismiss their sentences. Others are jailed because they are poor. Zuckerman (2017) describes how sixty-seven African Americans were in a Montgomery, Alabama, courtroom, and “not a single one of them [was] accused of a crime. They were in all in jail because they owed money to the city of Montgomery for unpaid traffic tickets.” Such examples have led to a movement to curtail the use of jail incarceration, by advocacy organizations such as the American Civil Liberties Union and the Southern Poverty Law Center, who argue that jail beds should be saved for people representing a greater risk to public safety.

While most of the focus on corrections in this book has been on mass imprisonment practices, there is an increased interest in developing strategies to reduce the number of probationers. Kaeble and Bonczar (2016, p. 1) found there are almost 4 million probationers—about 2 million offenders are placed on probation each year,

and about the same number of persons exit probation. When probation was first introduced, it was an alternative to incarceration where offenders would be supervised in the community. Probation conditions, however, have become more punitive, and by imposing fees and court costs on the probationer, as well as strict conditions, many of them have difficulty abiding by their probation conditions. Jacobson, Schiraldi, Daly, and Hotez (2017, pp. 1–2) contend that this “contributes to a revolving door in which individuals who cannot meet those obligations cycle back and forth between probation and incarceration without necessarily improving public safety.”

Some scholars are proposing that probationary sentences could be dropped by one-half, and point to New York City as an example (Jacobson et al., 2017). Decreasing our reliance upon probation will not be easy, given that over one-half of these offenders are felons and about one-fifth of them were convicted of violent offenses (Kaeble & Bonczar, 2016). As we noted in Chapter 11, however, community corrections agencies are often underfunded and lack the community resources—such as addictions services—that many offenders need to succeed. As a result, it may be a more effective strategy to work with fewer probationers, but provide them with more supports.

Altogether, several scholars and advocacy organizations have made persuasive arguments for reducing the use of probation and placing fewer individuals in jails or prisons. Reducing the use of punishments is not an easy proposition and we have to be careful that the solutions to high imprisonment policies are based on practices that evidence has demonstrated to be effective, or in other words, policies that make sense.

DO VESTED INTERESTS STIFLE CRIMINAL JUSTICE REFORM?

In the first chapter we posed a number of questions for readers to reflect upon as they read through this book, including how and why criminal justice policies are used to respond to social problems that we have defined as crimes, how different justice system interventions were developed and introduced, and whether these interventions were effective. In Chapter 3 we also asked readers to consider who wins and who loses from the application of these different policies. By now you will have a better understanding of the complexity of the justice system and why most crime reduction solutions do not fall into neatly defined “black and white” categories.

Most examples of justice system interventions presented in the previous chapters involved some aspect of reforming the justice system to make it more effective or efficient or less harmful. But some agency operations fail to make sense, such as continuing to deliver D.A.R.E. programs decades after research showed they were ineffective at reducing youth substance abuse. One question we ask is why some ineffective programs and policies persist while promising interventions or alternatives are never introduced?

This brings us to the issue of vested interests within the justice system and the ability of some stakeholders to frustrate or resist reforms. While the D.A.R.E. example reflects a major program, front line police, courts, and correctional officials are

often guilty of thwarting changes they see as inconsistent with their philosophies or their self interests. For example, it is not likely that the twenty-one correctional sergeants working for the California Department of Corrections and Rehabilitation, who made over \$200,000 in 2015, are interested in supporting alternatives to imprisonment (according to the *Sacramento Bee* [2017], the highest paid sergeant that year received \$305,000). When officers' mortgage payments depend on their salary, they are likely to oppose politicians calling for lower imprisonment rates and Page (2013) describes how California corrections workers have engaged in a three-decade long public relations and political campaign to maintain their status and pay.

When it comes to policies that lead to high imprisonment rates, Wagner and Rabuy (2017) encourage us to follow the money; in other words, find out who benefits. Many of the strongest supporters of solutions that rely upon the justice system to solve social problems are business owners. White (2017) observes that for-profit bail businesses are only operated in two nations, the Philippines and the United States. Our guess is that none of the 25,000 owners of U.S. bail bond companies support the bail reform campaigns emerging throughout the nation. In order to represent their interests in state legislatures bail companies pay lobbyists and contribute to political campaigns. Margulies (2016, paragraph 8) also describes how large private prison systems, such as CoreCivic (formerly the Corrections Corporation of America) "used its resources to support, among other things, additional adult and juvenile prisons and detention centers and to oppose a bill that would have outlawed private prisons entirely."

Many local and county governments also benefit from using the justice system to pay for their operations. Dieterle (2017, paragraph 3) describes how "numerous Colorado towns generate anywhere from 30 percent to 90 percent of their yearly revenue from tickets and court fees" [and] "multiple towns in South Carolina rely on traffic fines for more than 60 percent of their annual budget." Funding civic operations through fines and court costs occurs throughout the nation and this is informally known as taxation by citation. A report analyzing policing in St. Louis County carried out by the Police Executive Research Forum (2015, p. 2) after the Michael Brown shooting said that:

policing priorities are driven not by the public safety needs of the community, but rather by the goal of generating large portions of the operating revenue for the local government. This is a grossly inappropriate mission for the police, often carried out at the direction of local elected officials.

In response to the report criticizing the overuse of traffic enforcement the state of Missouri restricted the proportion of operating revenues that governments could use from tickets and court fees. Figure 16.2 shows the decreased number of tickets issued in Ferguson, Missouri, from 2007 to 2016. The population of this city was about 20,000 residents, so in 2013 and 2014 the city issued almost one ticket for every person. During the same ten-year period, revenues from fines and forfeitures dropped from over \$2 million in 2014 to about \$600,000 in 2016 (City of Ferguson, 2017, p. 68). While issuing fewer tickets is undoubtedly popular, the number of traffic accidents increased by 25 percent the following year (City of Ferguson, 2017, p. 82). Another unanticipated outcome of the policy

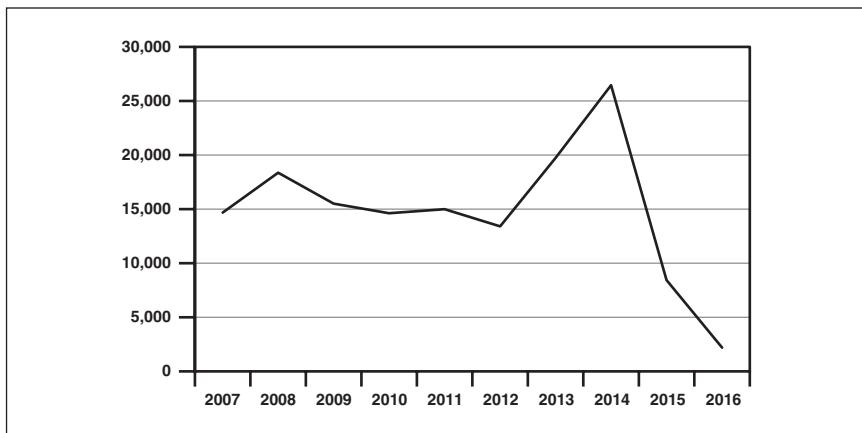


Figure 16.2 Traffic Tickets Issued, Ferguson, MO: 2007 to 2016

SOURCE: City of Ferguson (2017)

change restricting ticket revenues was that a number of smaller Missouri police agencies disbanded and cities were forced to contract with larger police departments for police services (Schremp, Hahn & Fowler, 2015).

So what does all this mean? When it comes to making sense of criminal justice, and the factors that influence justice policy reform, we have to take into account the vested interests of the stakeholders, and acknowledge that many have much to lose if reforms occur.

CRIMINAL JUSTICE IN THE TWENTY-FIRST CENTURY

Personnel working within the police, courts, and corrections will have to adapt to a number of significant changes in the future. These adjustments will be a result of social and demographic changes, such as the growing number of aging Americans who are showing up in jails and prisons (in addition to those who are growing old in these facilities), the shifts in the racial and ethnic composition of the population, and a large population of Americans born between 1981 to 1997 (CNN, 2017c).

There are also external forces that law enforcement must confront, and some of them are unanticipated, such as the possibility of terrorism, natural disasters (such as Hurricane Harvey that devastated Houston in 2017), or public health disasters, such as the possibility of a **pandemic** (an epidemic that extends beyond the borders of one nation, such as the 1918 influenza pandemic that killed between 50 and 100 million people). The breakdown in social order witnessed in New Orleans, after Hurricane Katrina in 2005, might be multiplied in any of the scenarios above. Nassim Taleb (2010) suggested that these rare and unforeseen or unanticipated major disasters should be understood as **black swan events** (see also Griffin & Stitt, 2010).

The one constant in the administration of justice is change—although sometimes these changes are dubbed **old wine in new bottles**, meaning that while the packaging has changed, there might not be a significant shift in the way things are done. Community-oriented policing, for instance, is a return to policing styles that were popular more than 100 years ago, which featured officers

who had a comprehensive knowledge of their communities, the people who lived there, and the problems that some of these individuals caused. However, technology has had a significant impact on the activities of justice professionals.

Crime mapping, for instance, was used in New York City as early as 1900, and police used pins in city maps to depict crimes. Crime analysis was a more sophisticated approach that built on mapping and emerged at about the same time (Santos, 2013). The computerized COMPSTAT information systems we have today are technically much more advanced, but the principles of mapping crimes remain the same. Technology has influenced almost every other dimension of criminal justice. Prior to the invention of the telephone—and radios in patrol cars—police officers rarely went to someone’s residence. Now, it seems as though everybody has a cellular phone and can be in almost instant communication with the police. In fact, about one third of all 240 million calls to 911 for assistance are from portable phones (National Emergency Number Association, 2017). This change has reduced the time it takes for a victim or witness to call for assistance.

Anybody who has recently done a ride-along with the police in a large agency probably has a good understanding of the influence of technology on law enforcement. Most patrol cars have on board computers that enable the officers to conduct driver’s license or criminal records checks, and some have a running tally of calls for service for the shift, visually show the dispatcher’s communication with other units, and display whether other agencies are “in the field” and available to provide aid. Such communication enables dispatchers and officers to make far better decisions about using resources, but better forms of communication will not replace the ability of officers to de-escalate a volatile situation or use their presence to calm a distraught person. Thus, police departments will still rely upon getting the best people for the job, but the officers will require more training as the complexity of their jobs increases.

Future police administrators and civil libertarians will have to carefully weigh the costs and benefits of introducing new technologies that are intended to make us safer. In the last chapter, we addressed how we have to balance our freedoms and safety when law enforcers have access to more sophisticated methods to listen to our conversations, monitor our email, or observe us from long distances, including the use of unmanned drones. As our ability to use more sophisticated surveillance methods increases, there can be unforeseen and negative consequences, such as hackers stealing these technologies and using them to invade the privacy of others (Goodman, 2015).

While nobody looks forward to the security screening at airports, backscatter x-ray technology allows security staffs to remotely scan ticketholders for prohibited items. Critics of the technology, however, contend that these x-rays produce such a clear image that airport screeners virtually strip search the passengers (who can be seen nude in the images). Less controversial applications of technology may include less intrusive methods of testing for narcotics, explosives, and radiation. Such testing instruments will increase safety, and because of the potential government demand for these devices, it is likely that corporations will develop them.

Additionally, as computers become less expensive and more powerful, the applications for law enforcement will increase, especially as they relate to record-keeping,

detection, and analysis of information. For instance, earlier it was noted that most big city police departments are using license plate recognition programs, and some scholars have outlined how scanners will be able to recognize faces and better identify persons through biometric methods such as iris scans. Moreover, there has been considerable interest in predictive policing using software to determine the likelihood of crimes occurring in specific locations (Haberman & Ratcliffe, 2012) and the use of big data (Ferguson, 2017). As the price of these technologies decreases it is likely they will be adopted by more law enforcement agencies.

We discussed in Chapter 5 how less-than-lethal weapons such as the Taser are being used by many police departments, as well as in jails and prisons. These tools add some “distance” to stopping unlawful or disruptive behavior, and officers do not have to use their batons to disarm or disable uncooperative suspects (which may result in more severe injuries). Although these weapons are described as less-lethal, reporters from Reuters documented 1,005 uses of conducted energy devices between 1983 and 2017 that resulted in the suspects’ deaths, with most happening after 2000 (Eisler, Smith & Szep, 2017).

Scientists are currently working on other nonlethal and less-lethal methods to incapacitate offenders, and there has been speculation for years that devices that transmit microwaves that make people feel ill may be effective for crowd control. Some of these weapons, however, may have long-lasting affects, and *The Guardian* (2017) reports that staff members working in the U.S. embassy in Cuba may have been permanently harmed by a sonic weapon used on them during the summer of 2017. Not all of this technology is directed at stopping humans: Scientists are experimenting with tools that emit an electronic pulse that disables a car’s engine to stop vehicle pursuits (National Institute of Justice, 2017).

Just like law enforcement, however, offenders also respond to changing technological and economic conditions. While technology has increased the ability of law enforcement to respond to offenses, criminals are also using computers to defraud victims and sell stolen goods on Internet auction sites. By selling stolen goods online, they bypass “fences” and reap bigger profits. A rapidly emerging crime is the distribution and sale of counterfeit items, which could be a trillion dollar global business (Chaudhry & Zimmerman, 2013). While law enforcement has confronted counterfeit money for years, some offenders are distributing items that might result in deaths, such as fake prescription medications (Koczwara & Dressman, 2017) or counterfeit parts used on commercial and military aircraft (Chaudhry & Zimmerman, 2013). Offenders also have the ability to use cryptocurrencies such as Bitcoin or Ethereum to transfer funds among organized crime groups or terrorists (United Nations Office on Drugs and Crime, 2017).

Other offenders are switching from high-risk and low-return offenses such as bank robbery to high-return and low-risk crimes such as identity theft. Identity theft is much more lucrative, and even if the offender is caught, the penalties are not as severe as those for violent crimes such as bank robbery. In a federal study of identity thefts Harrell (2015) found that in 2014, 7 percent of Americans sixteen years and older (about 17.6 million people) were victims of identity theft. Although identity thefts do not typically involve hostile encounters between victims and offenders, these crimes can have a significant impact upon victims, and “about a third

(32 percent) spent a month or more resolving problems and 36 percent reported moderate or severe emotional distress as a result of the incident" (Harrell, 2015, p. 1).

Changes in drug markets also influence the types of crimes offenders are likely to commit and the justice system's responses. Offenders in need of "quick cash" to buy drugs such as crack cocaine are likely to engage in higher rates of robbery (Baumer et al., 1998). One significant change that law enforcement has had to confront is the spread of methamphetamine from the West and Midwest to other regions of the country. In addition to changes in the rates of crime and violence in some rural areas, illegal drug use also has an impact on community social services, including family service agencies, addiction treatment services, and schools (as these agencies have to respond to the problems of addiction) (Gizzi & Gerkin, 2010). Another emerging drug problem is the large number of individuals who are dying from overdoses of opioids (see Box 16-2).

Box 16-2

Opioid Overdoses: Criminal Justice or Public Health Problem?

One of the issues raised throughout this book is whether serious social problems should be tackled by the justice system, or whether other agencies or systems are better able to respond to these challenges. One emerging issue that first responders are confronting is the rapid growth in opioid overdose deaths—drugs that include morphine, oxycodone, heroin, methadone or fentanyl—since 2000; the *New York Times* said that 64,000 Americans died from these overdoses in 2016 and fentanyl deaths had increased by 540 percent in three years (Katz, 2017). Phrased another way almost six times the number of people murdered using firearms died from opioid overdoses (in 2016 there were 10,970 murders involving guns; see FBI 2017, Table 12).

Policymakers can choose different responses to lower the number of opioid deaths, including using criminal justice interventions or treating the issue as a health-related problem. One difference between the two approaches is that public health officials try to reduce demand by providing supports to individuals with addiction problems and deterring potential users through education. Moreover, health departments would train first responders such as paramedics and police officers how to administer drugs that counter the effects of opioids (in Vancouver, Canada, these kits are also distributed to "street people" who are often the first to encounter overdose victims).

By contrast, the justice system can also be used to control drug use by making arrests of opioid dealers and attempting to control the flow of these drugs onto the streets, which is a more reactive approach. Some U.S. jurisdictions are treating overdose deaths as homicides so the police can pursue the arrests of dealers. In an example described in the *Los Angeles Times*, Virginia officers found that one bad batch of heroin sold by a single dealer was attributed to six deaths, and the police are now pursuing arrests and this approach "was born partly out of desperation as they seek new ways to combat an epidemic that shows no signs of abating" (Wilber, 2016).

Like most of the other issues addressed in the previous fifteen chapters, there are no easy answers to this problem. But given the lack of success in a war on drugs that has lasted two generations, it may be prudent to search for new solutions to old problems, and perhaps the best solution to a problem defined as a crime is not through the justice system.

Criminal justice system responses to crime will also have to account for the changes in the demographic characteristics of the U.S. population. Not only are Americans growing older, but the population is more diverse (Urbina & Espinoza Alvarez, 2018). There is increasing attention, for instance, to the ways immigration patterns have influenced street gangs. It has been proposed that if immigrant populations feel marginalized or otherwise cut off from legitimate sources of employment, they may be more likely to engage in street crime and join gangs. In some cases, members are affiliated with gangs before they come to the United States. This is not just a contemporary problem, since gangs have traditionally formed along racial or ethnic lines. European police departments are also contending with emerging gang problems and how immigration can be associated with gang membership, similar to the challenges confronted by American law enforcement agencies.

One significant change that we often fail to acknowledge is the growing size of private justice agencies. Although technically not a formal part of the criminal justice system, private police, security officers, and corporate investigators support the activities of public law enforcement agencies. The total number of persons employed in these organizations exceeds the number of sworn public law enforcement officers (Bureau of Labor Statistics, 2017b). To reduce their losses to organized offenders—and to keep consumer prices low—some corporations actively engage in the surveillance of persons living in the community and share their information with law enforcement agencies. While these efforts expand law enforcement's ability to respond to serious offenders, these persons are less formally accountable than those who work in government-funded agencies. Corporations want to provide a safe and profitable environment, and people want to be safe when purchasing goods and services. One of the challenges that ordinary citizens face, however, is that we seldom know when we are under surveillance by these corporations. While the asset protection and security staff are generally professional, we are at some risk of being victimized by these employees. One way that citizens can hold these corporations more accountable is to launch civil litigation if they have been harmed.

Box 16-3 provides a synopsis of some of the unresolved issues facing us in the future. While there is no end of possibilities, we have chosen to briefly summarize some of the concerns that seem ongoing.

BOX 16-3

The Future: Challenges and Possibilities

The fact that the Federal Bureau of Investigation has a "Futurist in Residence" and there is a group of academics and police executives called the Police Futurists suggest that organizations are taking an active role in trying to forecast law enforcement's future. Who would have predicted prior to September 2001 that there would be a major terrorist attack on the United States whose implications would affect the entire nation? Moreover, how many law enforcement leaders could have foreseen the time, energy, and resources that have been devoted to antiterrorism efforts, which have often come at the expense of street law enforcement? In addition, who could have predicted the social breakdown that occurred in New Orleans only days after Hurricane Katrina ravaged the Gulf Coast in August

2005? Law enforcement was required to take a leadership role in confronting these challenges.

Changes in technology, the demographic and social characteristics of the population, the health of our economic system, the findings from research and evaluation, and the possibility of external or natural threats will all influence justice system activities. Most large agencies have long-term strategic plans that attempt to evaluate these changes and challenges. Some of them conduct exercises where participants are confronted with scenarios that might seem improbable (e.g., how would a state prison respond to fallout from a nearby nuclear detonation or a prison pandemic?). In most cases, this planning is done to forecast budgets and to predict departmental needs (for example, the need to hire more staff, the construction of offices, detention facilities, and staffing requirements) decades into the future, but another objective is to plan to manage otherwise unforeseen disasters.

Crank, Kadlec, and Koski (2010) suggested that police agencies were waiting for the “next big thing.” While they were referring to a policing philosophy that would drive future practices, such a question also applies to all justice systems. What theories of crime and criminal justice, for instance, will shape the future of policing or the management of courts and corrections? Will evidence-based practices continue to drive change in the priorities, funding, and operations of justice systems? Crank and colleagues noted that in many cases leaders are so preoccupied with the day-to-day management of their agencies that predicting the future has little appeal. This attitude, however, may result in missed opportunities that make their agencies less responsive to the rapidly changing external environment and public safety.

CONCLUSIONS

This book has attempted to make sense of criminal justice in the United States. This task is made all the more difficult by the sheer size and diversity of criminal justice agencies. Each jurisdiction within the nation has overlapping levels of criminal justice enforcement, prosecution, and correctional control. While these agencies share more commonalities than differences, each has a slightly different character and focus. These agencies must respond to many controversial, problematic, or threatening issues, and we have addressed dozens of these challenges throughout this text—from the disproportionate processing of minority group members to wrongful convictions and the police use of force. We examined these issues from numerous perspectives and found that there are no easy answers to many of these challenges.

To assist in our examination of criminal justice policies and practices, we introduced Packer’s (1968) concept of two competing models within justice systems: the crime control and due process models. While this approach is over five decades old, it is still a useful tool in analyzing justice system operations (Kraska & Brent, 2010). Earlier in the text, we introduced several alternative ways to examine criminal justice policy. One important thing to consider is that there are many ways of interpreting the world, and the one that seems best to you will probably determine the way you perceive offenses, offenders, and criminal justice policies. We encourage each of you to go beyond looking at the world using only one approach and to see if others have merit or make sense to you.

Often people want “black and white” answers to complex problems—and responding to crime is an inherently complex challenge—but easy solutions seldom exist. Instead, policy formation often rests on complex negotiations between different stakeholders that result in policies that may be far different than the ones that were originally conceived. The police, court officials, and correctional staff members who are supposed to implement these laws or policies are frequently left with a poor policy that is seldom evaluated, and sometimes interest disappears with the next funding cycle or election. As a result, employees of criminal justice systems tend to be cynical about each new change or reform, and they typically take a “wait and see” attitude to decide whether these reforms will last. This presents another challenge of policy implementation.

In some cases, shifting cultural values and beliefs may influence offenders’ behavior more than criminal justice systems. Changing attitudes toward drunk driving from acceptance to intolerance for these acts probably have had a more positive effect in terms of reducing this behavior than police checkpoints or harsher penalties. In addition, some of the most effective solutions to crime and justice problems may lie outside justice systems. It is possible that some social service interventions may have a greater role in crime prevention than adding more police, court, or correctional staff to already distressed local, state, and federal budgets (Kleiman, 2009). These are potential alternatives, but are Americans willing to tolerate the intrusions of public health nurses and teachers into the lives of at-risk families in the name of future crime prevention?

We have outlined numerous controversies in criminal justice. Identification is the first consideration in problem-solving, and we are making progress in dealing with some of the most difficult challenges, such as disproportionate minority contact, “driving while black,” the differential treatment of women, how to respond to juveniles, and the police use of force. In all of these issues, we can see the tension between the due process and crime control approaches. By scrutinizing the activities of the police, courts, and corrections, advocates of both positions will work toward a healthy balance between civil liberties and crime control. Many challenges remain, and students reading this text will have the opportunity to confront these problems working within criminal justice systems. You will have the advantage of having much more insight into justice system operations than your counterparts a generation ago.

KEY TERMS

black swan events
de-policing

old wine in new bottles
pandemic

CRITICAL REVIEW QUESTIONS

1. Why is there such a lack of uniformity in criminal justice policies and practices from one jurisdiction to another? Is this a good thing or a bad thing?
2. What are some of advantages and disadvantages of having police officers wear body cameras? Do the advantages outweigh the disadvantages or not?

3. Do news reports of events such as mass shootings provide potential solutions to such problems, or do they merely mask the underlying causes? Explain your response.
4. Place yourself in the role of a “police futurist.” What do you think will be the biggest challenges to law enforcement in the next decade?
5. Can you think of ways that private forms of social control (such as corporate security and loss prevention) reduce the privacy in your day-to-day activities?
6. Where do you obtain your knowledge about sexual offenders? Do all sex offenders pose the same level of risk? Do media accounts about sex offenders mention that they have one of the lowest recidivism rates of all offenders?
7. How do our cultural values and beliefs shape the law-abiding behavior of individuals? We used the example of driving while intoxicated, but can you think of other issues where people’s attitudes toward offenses have changed over time?
8. Can you think of ways that crime can be reduced without using the criminal justice system? (Hint: Are speed bumps a more efficient manner of slowing speeders than traffic enforcement officers?)
9. What do you think that scholars and social commentators mean by “social isolation”? Do you believe that social isolation has caused us to be more fearful and insecure about crime?
10. In what ways can technology aid efforts at crime prevention and control? Develop a list of current and emerging technologies that hold promise for effective future criminal justice policies and practices.

WRITING ASSIGNMENTS

1. In two or three paragraphs explain why you think either the crime control model or the due process model seems to dominate criminal justice policies and practices in the United States today.
2. Develop a list of at least five factors that make criminal justice agencies (or any type of governmental bureaucracy) resistant to change. Provide brief supporting examples or illustrations of each.
3. In the debate over banning assault-style weapons, what are some of the groups that line up on each side of the issue? What is at stake for each of these groups? (You may want to do an Internet search for “gun control” to see the types of groups and organizations involved in the debate.)
4. Are media portrayals of criminal justice operations accurate or not? What effect have television shows like *CSI* had on the public’s perceptions and expectations of justice system agents?
5. In three or four paragraphs respond to the following statement: The criminal justice system in the United States is racist in that it is a reflection of a larger society that is racist.

RECOMMENDED READINGS

Robert M. Bohm and Jeffery T. Walker (2012). *Demystifying Crime and Criminal Justice*, 2nd edition. New York: Oxford University Press. Bohm and Walker are two well-established criminal justice scholars and in this book they take on a number of myths that exist

about crime and the ways in which we punish criminals in the United States. Their principal aim in this book is to get readers to think critically about the generally accepted beliefs that are perpetuated by the news media, entertainment outlets (TV and the movies), and even those that are passed on from one person to another. The fundamental conclusion of this book is that much of what people “know” about crime and justice is wrong or only partially true.

Sharon Dolovich and Alexandra Natapoff (2017). *The New Criminal Justice Thinking*. New York: NYU Press. The contributors in this edited book challenge readers to reconsider justice system operations. A diverse range of topics are considered, from police use of force to high imprisonment practices, but the common theme is that we need to find new ways of looking at these problems. The contributors look at both the positive and harmful effects of our justice policies using four dimensions: human experiences with the justice system, the full range of sanctions, the relationships between crime and poverty, and how the justice system is used to manage social status and power.

Mark A. R. Kleiman (2009). *When Brute Force Fails: How to Have Less Crime and Less Punishment*. Princeton, NJ: Princeton University Press. Kleiman takes a critical look at criminal justice agency operations, stating that Americans have relied upon policies that have resulted in high levels of crime and punishment. He believes that we should spend less attention on punishing offenders and instead focus on reducing crime. Some of these crime control strategies fall outside changes in policing, courts, or corrections and instead focus on bolstering social services that have been shown to be effective in long-term crime reduction.

William J. Stuntz (2011). *The Collapse of American Criminal Justice*. Cambridge, MA: Belknap Press. Stuntz contends that contemporary criminal justice practices focus on punishment to the detriment of reducing crime. He believes the increase in punitive justice practices is a consequence of a move away from local democracy to centralized control of justice operations by state and federal governments as well as too much law and political influences. Stuntz believes we should use punishment sparingly and only for the most serious wrongdoers.



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Notes

1. This was last done when Congress split the U.S. Court of Appeals for the Fifth Circuit, which extended from Florida to Texas, and established the new U.S. Court of Appeals for the Eleventh Circuit, comprising Alabama, Georgia, and Florida. Texas, Louisiana, and Mississippi remain in the Fifth Circuit. There also has been discussion about dividing the Ninth Circuit (considered by many to be the most liberal of the circuits), which currently includes Arizona, California, Nevada, Oregon, Washington, Idaho, and Montana.
2. Much of this discussion is based on the framework developed by Levine, Musheno and Palumbo (1986, pp. 8–18).
3. ATF has gone through a history of reorganization and redefinition. Originally, it was called the Treasury Department's Alcohol Tax Unit (ATU) when it was created during Prohibition. During the late twentieth century, the name was changed to add firearms enforcement to the agency's mandate. In the wake of the 9/11 attacks on New York and Washington many of ATF's responsibilities were transferred to the Justice Department, and "explosives" was officially added to the list of agency duties.
4. In reality, the Omnibus Crime Control and Safe Streets Act had been proposed, but not passed, during the end of Lyndon Johnson's presidency.
5. While the Supreme Court has never ruled that capital punishment is unconstitutional *per se*, recent cases have illustrated the Court's increasingly restrictive view of who should be eligible for the death penalty. Cases such as *Atkins v. Virginia* (2002) and *Roper v. Simmons* (2005) have held that capital punishment should not be imposed on individuals with developmental disabilities or on people who were under the age of eighteen when they committed their crimes.
6. *Mapp v. Ohio* extended the exclusionary rule first articulated in *Weeks v. United States* (1914) to the states. *Escobedo v. Illinois* and *Miranda v. Arizona* addressed the right to counsel during police custodial interrogations, and *Gideon v. Wainwright* extended the right to counsel to state felony defendants in noncapital cases.
7. *Kent* was concerned with the right to a transfer hearing for juveniles who faced trial as adults, as well as the right to counsel during transfer hearings. *In re Gault* addressed a wide range of due process issues such as the notification of charges, the right to confront and cross-examine accusing witnesses, protection against self-incrimination, and the right to counsel during delinquency adjudications. Some of these decisions spilled

- over from the 1960s into the 1970s during a period when Warren Burger, a “strict constructionist,” was Chief Justice of the Supreme Court.
8. A hard-and-fast rule that certain state supreme courts are liberal or conservative is somewhat difficult to establish. However, on issues like privacy, the medical use of marijuana, same-sex marriages, and the right to die, supreme courts in California, Connecticut, Hawaii, New York, and Oregon have developed reputations for being more liberal than supreme courts in many other states.
 9. However, see the Supreme Court cases of *Blakely v. Washington* (2005) and *United States v. Booker* and *United States v. Fanfan* (2005) striking down the mandatory nature of the federal sentencing guidelines based on the degree of departure allowed to judges in imposing sentences.
 10. This is a concept to which we will return in Chapter 8, in our analysis of race, ethnicity and crime.
 11. Not everyone accepts Kelling and Wilson’s assumptions about the history of the police in carrying out their order maintenance functions. See, for example, Walker (1984).
 12. This section is largely based on a Bureau of Justice Statistics report entitled *Contacts Between Police and the Public, 2008* (Eith & Durose, 2011).
 13. In a study by the Bureau of Justice Statistics, Hickman (2006, p. 2) reported that citizen complaints about use of force in large law enforcement agencies were “6.6 per 100 full-time sworn officers responding to calls for service” and that rates tended to be higher in large municipal police departments. This study also revealed that approximately 8 percent of cases (where the results were known) resulted in disciplinary actions against the officers. Hickman, however, suggests that the number of citizen complaints is often a function of the agency’s characteristics. Law enforcement agencies that make it easy to file a complaint, for instance, will likely have a greater volume of citizen complaints.
 14. Sheppard (2012, p. 2445) says that this is the legal doctrine under which the employer is held liable for the acts of employees who are acting within the scope of their employment.
 15. The *Tennessee v. Garner* case arose out of a call to the Memphis, Tennessee, police department reporting a suspected burglary. When officers arrived at the scene, fifteen-year-old Edward Garner fled from the home and was ordered to halt by officers. When he attempted to scale a fence to escape, one of the officers fired a shot that hit Garner in the head, killing him. In this case, the Supreme Court was asked to decide whether the longstanding fleeing felon rule was still constitutionally permissible.
 16. Use of force policies from the largest 91 U.S. police departments can be accessed at <http://useofforceproject.org/database/>.
 17. Although somewhat dated at this point, the books *Police in Trouble* by James Ahern (1972) and *The Ambivalent Force* by Abraham Blumberg and Elaine Niederhoffer (1985) provide timeless and insightful views of the nature and influence of police organizational culture. A more recent book that explores this topic thoroughly is *Understanding Police Culture* by John Crank (2004).
 18. See, for example, *New Mexico Statutes Annotated*, Section 41–4–5.
 19. There is some dispute about the actual number of firearms laws within the United States. Ludwig and Cook (2003) have challenged the commonly cited number of 20,000 firearms laws, but no researchers have ever counted all of them.
 20. William James Rummel appealed a life sentence after being convicted of three non-violent felonies (using a credit card in an \$80 case of fraud, forging a \$28.36 check, and obtaining \$120.75 by false pretenses). The U.S. Supreme Court found that since

- Rummel had the opportunity to apply for parole after twelve years, the life sentence was not cruel or unusual.
21. There has been more recent emphasis on “what works,” including an annual conference on research and evaluation sponsored by the National Institute of Justice, the introduction of the journal *Criminology & Public Policy*, and much more scholarly attention paid to policy-oriented and evaluation research.
 22. In *Batson*, an African American defendant was charged with second-degree burglary and receiving stolen goods. During the *voir dire* process, the judge excused a number of potential jurors for cause and then allowed both the prosecutor and the defense attorney to exercise their peremptory challenges. The prosecutor used his peremptory challenges to remove the four remaining African Americans from the jury pool. Defense counsel challenged this move, but the trial judge ruled that attorneys were allowed to use peremptory exclusions any way they wanted to. The U.S. Supreme Court, in a 7–2 vote, held that “racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try,” but also it harms those excluded from jury duty. Therefore, peremptory challenges cannot be used to exclude a “suspect category” group (based on race, ethnicity, or gender, for example) from jury service.
 23. This section largely is based on the most recent complete edition of the *Uniform Crime Reports* (FBI, 2017).
 24. The violent crimes are murder, forcible rape, robbery, and aggravated assault. The property crimes are burglary, larceny-theft, motor vehicle theft, and arson (FBI, 2017).
 25. The Bureau of Justice Statistics reports cited do not separate population figures by race and gender. Therefore, it is difficult to know what percentage of the female population is white, African American, or other. Additionally, the report detailing the profile of jail inmates has not been updated since 2004.
 26. For an extended discussion of this topic, see Rowe (2001).
 27. It is very difficult and not methodologically correct to talk about the “average” prison inmate. This discussion draws from the demographic information available to outline the most prevalent categories in order to arrive at a “profile” for female inmates (see Greene, 2002).
 28. Our estimates were based on state and federal prison admission data for 2015 obtained from the Bureau of Justice Statistics (<https://www.bjs.gov/index.cfm?ty=nps>) and the jail data were obtained from Minton and Zeng (2016).
 29. Some nations have retained capital punishment for crimes against the state (such as treason) or crimes against humanity (such as genocide).
 30. On issues such as this one that is facing women generally, see Belknap (2007) and Pollock (2002).
 31. In our discussion, we define juveniles as persons less than eighteen years of age, although not all states use this age limit.
 32. Not all law enforcement agencies report their data to the FBI.
 33. The main cases were *Kent v. United States*, *In re Gault*, *In re Winship*, *McKeiver v. Pennsylvania*, *Breed v. Jones*, and *Schall v. Martin*. The Court extended a series of due process protections for youths, but stopped short of giving juveniles the same rights as adults, such as a jury trial.
 34. Much of this material is based on Reaves and Bauer (2003; see also Reaves, 2012). Additional materials and current information also can be located on the DHS website (DHS, 2017a).
 35. At different times in our nation’s history, the Coast Guard has been in the Treasury, Defense (Navy), and Transportation Departments (U.S. Coast Guard, 2017).

36. The term “enemy combatant” traditionally has been applied to members of the armed forces of one nation against which another is at war (“Detention of Enemy Combatants Act,” 109th Congress, 1st Session, H.R. 1076, March 3, 2005), but this application has been broadened.
37. While it is troubling to have situations where police officers shoot unarmed citizens, it is also troubling when officers shoot individuals armed with fake or replica guns. In 2015 there were forty-three shootings of people who were armed with fake guns (Sullivan, Jenkins, Tate, Courtney & Houston, 2016). Many of these cases involved split second decisions by police officers—in less than ideal lighting conditions—who were confronting what they believed to be armed suspects who had realistic looking rifles or handguns. Some of these cases clearly involved suicide-by-cop intentions. Others involved the wrong person in the wrong place at the wrong time. The outcomes of such cases are emotionally devastating for victims’ families and police officers as well.

To deal with such situations as these and to prevent future tragedies, there has been a movement nationwide by a number of groups to make fake guns less realistic looking. However, several manufacturers of these guns (especially BB and pellet guns) have resisted such efforts and they have been supported by the National Rifle Association and other firearms advocacy groups. To date no policy resolution seems imminent.



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