Supplement to Accompany

A Basic Introduction to Criminal Justice

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Table of Contents

Chapter 1. Criminal Justice: An Overview

Supplement 1.1. The United States Supreme Court Recognizes Both Retribution and Deterrence As Punishment Philosophies, Even in the Case of Capital Punishment

Gregg v. Georgia
428 U.S. 153, 183-184 (1976), cases and citations omitted

The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.

In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.

The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy — of self-help, vigilante justice, and lynch law.

Retribution is no longer the dominant objective of the criminal law, but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men. Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.

Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate. The results simply have been inconclusive. As one opponent of capital punishment has said:

"[A]fter all possible inquiry, including the probing of all possible methods of inquiry, we do not know, and for systematic and easily visible reasons cannot know, what the truth about this 'deterrent' effect may be. . . .

The inescapable flaw is . . . that social conditions in any state are not constant through time, and that social conditions are not the same in any two states. If an effect were observed (and the observed effects, one way or another, are not large) then one could not at all tell whether any of this effect is attributable to the presence or absence of capital punishment. A 'scientific' — that is to say, a soundly based — conclusion is simply impossible, and no methodological path out of this tangle suggests itself."

Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view. We may nevertheless assume safely that there are

murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate.

The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts. Indeed, many of the post-*Furman* statutes reflect just such a responsible effort to define those crimes and those criminals for which capital punishment is most probably an effective deterrent.

In sum, we cannot say that the judgment of the Georgia legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.

Supplement 1.2. Is the Threat of Punishment a Deterrent to College Students?[1]

In a study of deterrence, "undergraduate students enrolled in a large urban public university were asked to consider a hypothetical situation in which they had been drinking at a bar (and thought they might be impaired as a result) and had to decide whether to drive home. They were to assume that they had to be at work at 8 AM the following day; they could have someone drive them home, but if they did, they would have to return early the next morning to get their cars.

"The respondents were asked to note, on a scale of 0 to 100, the certainty that if they drove home under the conditions stated in the hypothetical situation, they would be apprehended and subsequently convicted of driving while impaired. The respondents were assigned randomly to groups, with one group told the penalty would be a one-month driver's license suspension and the other told it would be a 12-month suspension. These penalties represent the minimum and maximum provided for first offenses in some states. The students were then asked to indicate, on a scale of 0 to 100, the likelihood that they would drive drunk under the stated circumstances. Finally, they were asked to consider whether they were certain that if they drove home under the stated circumstances, they would not be arrested. With all of this taken into account, how likely was it that they would drive?

On the basis of their answers to these questions, the respondents were placed in one of three categories:

- *Acute conformists* (persons who would not drive drunk even if there was no threat of punishment)

- *Deterrable respondents* (those who could be deterred by punishment), and

- *Incorrigible respondents* (those who paid no attention to the threat of punishment and were more likely than not to drive under the hypothetical conditions).

Respondents were also categorized by the degree to which they acted impulsively (this was based on their answers to six questions). They were asked how often they had driven when they thought they were under the influence of alcohol; whether they had ever been arrested for drunk driving; and whether they, a relative, or a close friend had been involved in a drunk-driving accident. Finally, the respondents were categorized by scores on questions designed to elicit measures of self- and social disapproval.

According to this study, 38 percent of college students appeared not to be responsive to the state sanctions for driving while incapacitated. The respondents categorized as *acute conformists* conformed because of extralegal factors; that is, they were more influenced by self- and social disapproval, especially self-disapproval. Among those categorized as *deterrable*

[1]This selection is quoted from Sue Titus Reid, *Crime and Criminology*, 15th ed. (New York: Wolters Kluwer, 2018), p. 55. The referenced research is from Greg Pogarsky, "Identifying 'Deterrable' Offenders: Implications for Research on Deterrence," *Justice Quarterly* 19(3) (September 2002): 431-452.

respondents, the severity of the sanction was a greater deterrent than the certainty of sanction, thus questioning the traditional findings concerning certainty and severity."[2]

[2]Ibid., p. 448.

Supplement 1.3. Is There Empirical Evidence to Support Deterrence Theory?

Numerous researchers have attempted to measure whether there is empirical evidence that people are deterred by punishment. Two researchers who analyzed the studies reported these three conclusions:

> "1. The marginal deterrent effect of increasing already lengthy prison sentences is modest at best.
>
> 2. Increasing the visibility of the police by hiring more officers and by allocating existing officers in ways that heighten the perceived risk of apprehension consistently seem to have substantial marginal deterrent effects.
>
> 3. The experience of imprisonment compared with noncustodial sanctions such as probation, sometimes called specific deterrence, does not seem to prevent reoffending. Instead, the evidence suggests the possibility of a criminogenic effect from imprisonment."[1]

[1]Steven N. Durlauf and Daniel S. Nagin, "Imprisonment and Crime: Can Both Be Reduced?," *Criminology & Public Policy* 10(1) (February 2011): 13-54; quoted text is on p. 14.

Supplement 1.4. The U.S. Supreme Court, in a Unanimous Decision, Upheld a Right to Privacy When Cell Phones Are Subjected to Searches

Riley v. California; United States v. Wurie
573 U.S. 373 (2014), cases and citations omitted

The opinion was delivered by Chief Justice John Roberts.

These two cases raise a common question: whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. . . . [The Court reviewed key cases on the issue of the reasonableness of searches and what constitutes exigent circumstances to search without a warrant.]

These cases require us to decide how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy. A smart phone of the sort taken from Riley was unheard of ten years ago; a significant majority of American adults now own such phones. Even less sophisticated phones like Wurie's, which have already faded in popularity since Wurie was arrested in 2007, have been around for less than 15 years. Both phones were based on technology nearly inconceivable just a few decades ago, when [two precedent cases discussed earlier] were decided.

Absent more precise guidance from the founding era, we generally determine whether to exempt a given type of search from the warrant requirement "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." [The Court distinguished the search in the two cases from those in the precedent cases it cited earlier, dealing primarily with a warrantless search permitted for an officer to look for weapons.] . . .

Digital data stored on a cell phone itself cannot be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Law enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon—say, to determine whether there is a razor blade hidden between the phone and its case. Once an officer has secured a phone and eliminated any potential physical threats, however, data on the phone can endanger no one. . . .

The United States and California both suggest that a search of cell phone data might help ensure officer safety in more indirect ways, for example by alerting officers that confederates of the arrestee are headed to the scene. [The Court acknowledged that could be the case, but no evidence was offered to suggest that it occurred in these cases, and if it did, the issue could have been addressed through] "case-specific exceptions to the warrant requirement, such as the one for exigent circumstances." . . .

The United States and California focus primarily on the second [prior case] rationale: preventing the destruction of evidence. Both Riley and Wurie concede that officers could have seized and secured their cell phones to prevent destruction of evidence while seeking a warrant.

That is a sensible concession. And once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone.

The United States and California argue that information on a cell phone may nevertheless be vulnerable to two types of evidence destruction unique to digital data—remote wiping and data encryption. . . . [The Court stated there was no evidence these were issues at the arrest stage, and the police could prevent the possibility by disconnecting the phones from their networks either by turning them off or by removing their batteries. If the officers think encryption is a possibility,] they can leave a phone powered on and place it in an enclosure that isolates the phone from radio waves. . . .

[To assert that the search of a cell phone is like the search of other physical items] is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse [objects in the precedent cases the Court cited previously]. A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom.

Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. . . .

One of the most notable distinguishing features of modern cell phones is their immense storage capacity. Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy. . . .

[The Court discussed the storage capacity of smart phones and how they differ from other items that one could carry around physically.]

We expect that the gulf between physical practicability and digital capacity will only continue to widen in the future.

The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.

Finally, there is an element of pervasiveness that characterizes cell phones but not physical records. Prior to the digital age, people did not typically carry a cache of sensitive

personal information with them as they went about their day. Now it is the person who is not carrying a cell phone with all that it contains, who is the exception. . . . A decade ago police officers searching an arrestee might have occasionally stumbled across a highly personal item such as a diary. . . . Today, by contrast, . . . many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate.

[The Court talked about the searches on the Internet that are on personal phones as well as the "apps" that are there to facilitate those searches. Cell phones are also used to access data stored elsewhere. The Court discussed in detail and rejected the proposed methods for police to use before searching phones and continued as follows:]

We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. Privacy comes at a cost. . . .

Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life." The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.

Supplement 1.5. May Police Obtain the Extensive Cell Phone Records of a Suspect?

Carpenter v. United States
138 S. Ct. 2210 (2018), cases and citations omitted

Chief Justice John Roberts delivered the opinion of the Court.

[The opinion states the issue, noted in the text, and continues with extensive information on the extent of information concerning a person's activities that may be ascertained from cell phone records.]

There are 396 million cell phone service accounts in the United States — for a Nation of 326 million people. Cell phones perform their wide and growing variety of functions by connecting to a set of radio antennas called "cell sites." Although cell sites are usually mounted on a tower, they can also be found on light posts, flagpoles, church steeples, or the sides of buildings. Cell sites typically have several directional antennas that divide the covered area into sectors.

Cell phones continuously scan their environment looking for the best signal, which generally comes from the closest cell site. Most modern devices, such as smartphones, tap into the wireless network several times a minute whenever their signal is on, even if the owner is not using one of the phone's features. Each time the phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI). The precision of this information depends on the size of the geographic area covered by the cell site. The greater the concentration of cell sites, the smaller the coverage area. As data usage from cell phones has increased, wireless carriers have installed more cell sites to handle the traffic. That has led to increasingly compact coverage areas, especially in urban areas.

Wireless carriers collect and store CSLI for their own business purposes. . . . In addition, wireless carriers often sell aggregated location records to data brokers, without individual identifying information of the sort at issue here. While carriers have long retained CSLI for the start and end of incoming calls, in recent years phone companies have also collected location information from the transmission of text messages and routine data connections. Accordingly, modern cell phones generate increasingly vast amounts of increasingly precise CSLI. . . .

[The Court details the facts in this case, which involved the arrest of four men suspected of robberies. One of the suspects stated that they and 15 identified others had robbed nine stores in Michigan and Ohio.]

Based on that information, the prosecutors applied for court orders under the Stored Communications Act to obtain cell phone records. . . . That statute . . . permits the Government to compel the disclosure of certain telecommunications records when it "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation." Federal Magistrate Judges [issued orders to compel wireless carriers to release information concerning Carpenter's ingoing and outgoing messages.] Altogether the Government obtained 12,898 location points cataloging Carpenter's movements—an average of 101 data points per day.

Carpenter was charged with six counts of robbery and an additional six counts of carrying a firearm during a federal crime of violence. . . . [That information and expert testimony] placed Carpenter's phone near four of the charged robberies. . . . Carpenter was convicted on all but one of the firearm counts and sentenced to more than 100 years in prison.

The Court of Appeals for the Sixth Circuit affirmed. The court held that Carpenter lacked a reasonable expectation of privacy in the location information collected by the FBI because he had shared that information with his wireless carriers. . . .

[The opinion discussed the history of the Fourth Amendment as it affects a right to privacy, but the Court noted that times have changed since the adoption of that and other amendments.] As technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to "assure[ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." . . .

[The Court discussed its precedents concerning a reasonable expectation of privacy with regard to one's physical location and movements and then focused on those decisions that draw a line "between what a person keeps to himself and what he shares with others," which is called the third-party doctrine.]

We have previously held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties. That remains true "even if the information is revealed on the assumption that it will be used only for a limited purpose." As a result, the Government is typically free to obtain such information from the recipient without triggering Fourth Amendment protections. . . . [The Court discusses the history of the third-party doctrine with regard to privacy and notes that times have changed and that, like its decision involving placing a GPS on a car, the information the government can secure from cell phones] is detailed, encyclopedic, and effortlessly compiled. . . . [This distinguishes the cell phone data from that secured in precedent cases involving the third-party doctrine, and the Court declines to extend those cases to this unique situation.]

Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology as in [the case involving attaching a GPS to a person's car] or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter's wireless carriers was the product of such a search. . . .

Our decision today is a narrow one. We do not express a view on matters not before us: real-time CSLI or "tower dumps" (a download of information on all the devices that connected to a particular cell site during a particular interval). We do not disturb the application of [prior cases concerning the third-party doctrine] or call into question conventional surveillance techniques and tools, such as security cameras. Nor do we address other business records that might incidentally reveal location information. Further, our opinion does not consider other collection techniques involving foreign affairs or national security. As Justice Frankfurter noted

when considering new innovations in airplanes and radios, the Court must tread carefully in such cases, to ensure that we do not "embarrass the future." . . .

[The Court recognizes that there may be some cases in which orders compelling the production of information will not require probable cause.] We hold only that a warrant is required in the rare case where the suspect has a legitimate privacy interest in records held by a third party. . . . [The Court suggested some situations in which probable cause and thus a warrant would not be required for the production of documents. Examples mentioned are] the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence. . . .

As Justice Brandeis explained in his famous dissent [in a previous case], the Court is obligated—as "[s]ubtler and more far-reaching means of invading privacy have become available to the Government" to ensure that the "progress of science" does not erode Fourth Amendment protections. Here the progress of science has afforded law enforcement a powerful new tool to carry out its important responsibilities. At the same time, this tool risks Government encroachment of the sort the Framers, "after consulting the lessons of history," drafted the Fourth Amendment to prevent.

We decline to grant the state unrestricted access to a wireless carrier's database of physical location information. In light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection. The Government's acquisition of the cell-site records here was a search under that Amendment.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Justice Kennedy wrote a dissenting opinion, joined by Justices Thomas and Alito. Justice Thomas wrote a dissenting opinion. Justice Alito wrote a dissenting opinion, joined by Justice Thomas. Justice Gorsuch wrote a dissenting opinion.

Supplement 1.6. Proving Intent in AIDS Transmission Cases

The difficulty of proving intent, along with the issue of causation, has been raised in the cases of persons who know they have AIDS (acquired immune deficiency syndrome) or are HIV (human immunodeficiency virus) positive and have sexual relations without disclosing to their partners that they have the virus or the disease. A Michigan case upheld that state's statute providing that sexual penetration by a person who knows that he or she is HIV positive or has AIDS and does not inform partners of that condition is guilty of a felony. The statute was not considered overbroad, said the court, because it only requires the general intent to commit the wrongful act. The court made the analogy to driving a car while under the influence of a controlled substance. The driver may not intend to harm anyone, but the general intent to do so is implicit in that reckless and irresponsible act.[1]

A Maryland appellate court, however, held that, in the case of an appellant who, because of his HIV status was told to use condoms before having sex, the state could not assume from his sex act without the use of condoms that he had the requisite intent for attempted second-degree murder and assault with attempt to murder when he raped three women without using condoms. Note, however, that attempted murder is a more serious felony than the felony of sexual penetration and thus could reasonably be required to have a higher intent requirement.[2]

Intent may not be required in some cases, such as those in which people are held responsible for the criminal acts of others. For example, the owner of a bar might be charged with a crime if one of his or her employees serves liquor to an underage or intoxicated patron, who then drives negligently and injures or kills another or damages the property of another. Nor is actual knowledge that a crime is being committed required of all persons charged with crimes. To illustrate, sexual intercourse with a person under the legal age of consent may be defined as a crime even though the alleged victim consented to the act. Historically, the law presumed that young women must be protected and thus could not legally consent to sex. In recent years, some of these laws have been revised, with the age of consent changing, the statutes being extended to males as victims and females as offenders, and so on.

[1]*People v. Jensen*, 586 N.W.2d 748 (Mich. App. 1998). The statute is Mich. Comp. Laws Serv., Section 333.5210 (2018).
[2]*Smallwood v. State*, 680 A.2d 512 (Md. 1996).

Chapter 2. Crime, Offenders, and Victims

Supplement 2.1. Offenses Included in the National Incident-Based Reporting System (NIBRS)

In 2018, the FBI listed the following offense categories for which the agency collected extensive crime data in the NIBRS. The most recently added offenses are listed in bold.

Animal Cruelty

Arson

Assault Offenses — Aggravated Assault, Simple Assault, Intimidation

Bribery

Burglary/Breaking and Entering

Counterfeiting/Forgery

Destruction/Damage/Vandalism of Property

Drug/Narcotic Offenses — Drug/Narcotic Offenses, Drug Equipment Violations

Embezzlement

Extortion/Blackmail

Fraud Offenses — False Pretenses/Swindle/Confidence Game, Credit Card/Automatic Teller Machine Fraud, Impersonation, Welfare Fraud, Wire Fraud

Gambling Offenses — Betting/Wagering, Operating/Promoting/Assisting Gambling, Gambling Equipment Violations, Sports Tampering

Hacking/Computer Invasion

Homicide Offenses — Murder and Nonnegligent Manslaughter, Negligent Manslaughter, Justifiable Homicide (not a crime)

Human Trafficking Offenses: Commercial Sex Acts, Involuntary Servitude

Identity Theft

Kidnapping/Abduction

Larceny/Theft Offenses — Pocket-Picking, Purse-Snatching, Shoplifting, Theft from Building, Theft from Coin-Operated Machine or Device, Theft from Motor Vehicle, Theft of Motor Vehicle Parts or Accessories, All Other Larceny

Motor Vehicle Theft

Pornography/Obscene Material

Prostitution Offenses — Prostitution, Assisting or Promoting Prostitution

Robbery

Sex Offenses, Rape, Sodomy, Sexual Assault with an Object, Fondling

Sex Offenses, Non-Forcible — Incest, Statutory Rape

Stolen Property Offenses

Weapon Law Violations

For the following offenses, the FBI collected only arrest data:

Bad Checks

Curfew/Loitering/Vagrancy Violations

Disorderly Conduct

Driving Under the Influence

Drunkenness

Family Offenses, Nonviolent

Liquor Law Violations

Peeping Tom

Trespass of Real Property

All Other Offenses

Note: The FBI no longer includes Runaway Offenses.

Source: Federal Bureau of Investigation, "NIBRS: Quick Facts," https://www.fbi.gov/about-us, accessed August 4, 2018.

Supplement 2.2. *Uniform Crime Reports*: Part II Offenses

"Other assaults (simple)—Assaults and attempted assaults where no weapon was used or no serious or aggravated injury resulted to the victim. Stalking, intimidation, coercion, and hazing are included.

Forgery and counterfeiting—The altering, copying, or imitating of something, without authority or right, with the intent to deceive or defraud by passing the copy or thing altered or imitated as that which is original or genuine; or the selling, buying, or possession of an altered, copied, or imitated thing with the intent to deceive or defraud. Attempts are included.

Fraud—The intentional perversion of the truth for the purpose of inducing another person or other entity in reliance upon it to part with something of value or to surrender a legal right. Fraudulent conversion and obtaining of money or property by false pretenses. Confidence games and bad checks, except forgeries and counterfeiting, are included.

Embezzlement—The unlawful misappropriation or misapplication by an offender to his/her own use or purpose of money, property, or some other thing of value entrusted to his/her care, custody, or control.

Stolen property—Buying, receiving, possessing, selling, concealing, or transporting any property with the knowledge that it has been unlawfully taken, as by burglary, embezzlement, fraud, larceny, robbery, etc. Attempts are included.

Vandalism—To willfully or maliciously destroy, injure, disfigure, or deface any public or private property, real or personal, without the consent of the owner or person having custody or control by cutting, tearing, breaking, marking, painting, drawing, covering with filth, or any other such means as may be specified by local law. Attempts are included.

Weapons: carrying, possessing, etc.**—**The violation of laws or ordinances prohibiting the manufacture, sale, purchase, transportation, possession, concealment, or use of firearms, cutting instruments, explosives, incendiary devices, or other deadly weapons. Attempts are included.

Prostitution and commercialized vice—The unlawful promotion of or participation in sexual activities for profit, including attempts. To solicit customers or transport persons for prostitution purposes; to own, manage, or operate a dwelling or other establishment for the purpose of providing a place where prostitution is performed; or to otherwise assist or promote prostitution.

Sex offenses (except forcible rape, prostitution, and commercialized vice)—Offenses against chastity, common decency, morals, and the like. Incest, indecent exposure, and statutory rape are included. Attempts are included.

Drug abuse violations—The violation of laws prohibiting the production, distribution, and/or use of certain controlled substances. The unlawful cultivation, manufacture, distribution, sale, purchase, use, possession, transportation, or importation of any controlled drug or narcotic substance. Arrests for violations of state and local laws, specifically those relating to the unlawful possession, sale, use, growing, manufacturing, and making of narcotic drugs. The following drug categories are specified: opium or cocaine and their derivatives (morphine,

heroin, codeine); marijuana; synthetic narcotics manufactured narcotics that can cause true addiction (demerol, methadone); and dangerous nonnarcotic drugs (barbiturates, benzedrine).

Gambling—To unlawfully bet or wager money or something else of value; assist, promote, or operate a game of chance for money or some other stake; possess or transmit wagering information; manufacture, sell, purchase, possess, or transport gambling equipment, devices, or goods; or tamper with the outcome of a sporting event or contest to gain a gambling advantage.

Offenses against the family and children—Unlawful nonviolent acts by a family member (or legal guardian) that threaten the physical, mental, or economic well-being or morals of another family member and that are not classifiable as other offenses, such as Assault or Sex Offenses. Attempts are included.

Driving under the influence—Driving or operating a motor vehicle or common carrier while mentally or physically impaired as the result of consuming an alcoholic beverage or using a drug or narcotic.

Liquor laws—The violation of state or local laws or ordinances prohibiting the manufacture, sale, purchase, transportation, possession, or use of alcoholic beverages, not including driving under the influence and drunkenness. Federal violations are excluded.

Drunkenness—To drink alcoholic beverages to the extent that one's mental faculties and physical coordination are substantially impaired. Driving under the influence is excluded.

Disorderly conduct—Any behavior that tends to disturb the public peace or decorum, scandalize the community, or shock the public sense of morality.

Vagrancy—The violation of a court order, regulation, ordinance, or law requiring the withdrawal of persons from the streets or other specified areas; prohibiting persons from remaining in an area or place in an idle or aimless manner; or prohibiting persons from going from place to place without visible means of support.

All other offenses—All violations of state or local laws not specifically identified as Part I or Part II offenses, except traffic violations.

Suspicion—Arrested for no specific offense and released without formal charges being placed.

Curfew and loitering laws (persons under age 18)—Violations by juveniles of local curfew or loitering ordinances.

Runaways (persons under age 18)—Limited to juveniles taken into protective custody under the provision of local statutes."

Note: The FBI no longer collects data on runaways.

Source: Federal Bureau of Investigation, "About Us," *Crime in the United States: Uniform Crime Reports 2014* (November 2014), https://www.fbi.gov/, accessed January 5, 2015.

Supplement 2.3. 2017 Hate Crime Data Released by the FBI

- 7,175 reported hate crimes, involving 8,437 offenses
- 7,106 single-bias incidents, involving 8,126 offenses, 8,493 victims, and 6,307 known offenders
- 69 multiple-bias incidents, involving 311 offenses, 335 victims, and 63 known offenders

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Source: Federal Bureau of Investigation, *Uniform Crime Reports: Crime in the United States, Hate Crime Statistics 2017* (September 2018), https://ucr.fbi.gov, accessed November 30, 2018.

Supplement 2.4. Crimes Cleared by Arrest or Exceptional Means in 2017

Crimes	Percent Cleared
Violent Crimes	
Murder and Nonnegligent Manslaughter	61.6
Aggravated Assault	53.3
Rape (Revised definition)	34.5
Robbery	29.7
Property Crimes	
Larceny-Theft	19.2
Motor Vehicle Theft	13.7
Burglary	13.5

Source: Federal Bureau of Investigation, *Uniform Crime Reports: Crime in the United States, 2017*, https://ucr.fbi.gov, accessed November 30, 2018.

Supplement 2.5. Percent of Arrests for Drug Abuse Violations, 2017

Offenses	Percent
Sale/Manufacturing	
Heroin or cocaine and their derivatives	5.2
Marijuana	3.7
Synthetic or manufactured drugs	1.6
Other dangerous nonnarcotic drugs	4.0
Total	14.6
Possession	
Heroin or cocaine and their derivatives	20.6
Marijuana	36.7
Synthetic or manufactured drugs	4.8
Other dangerous nonnarcotic drugs	23.3
Total	85.4

Source: Federal Bureau of Investigation, *Crime in the United States, Uniform Crime Reports, 2017* (September 2018), https://ucr.fbi.gov/, accessed November 30, 2018).

Supplement 2.6. The Fear of Crime and Citizens' Reactions

The fear of violent crime by strangers, who often pick their victims randomly, led U.S. Supreme Court Chief Justice Warren E. Burger to refer in 1981 to the "reign of terror in American cities." One privately funded study of crime concluded that same year that "the fear of crime is slowly paralyzing American society."[1] These comments were made long before such terrorist acts as the 1995 bombing of the federal building in Oklahoma City and the acts of September 11, 2001.

The fear of crime may not always be realistic in terms of the probability that crimes will occur, but fear leads to lifestyle changes for some people, as noted after 9/11, when many people cancelled flights and refused to book new ones. The fear of crime may be particularly strong with elderly persons. A purse snatching may have a far more serious effect on an elderly person than it would have on a younger victim. The elderly are more likely to be injured seriously in any altercation with an assailant. Such direct contact may be much more frightening to an elderly person, and the loss of money may be more serious to a person living on a fixed income. For many elderly, the fear of crime leads to significant lifestyle changes; some even refuse to leave their dwellings.

Women may also adjust their lifestyles to decrease their chances of becoming crime victims. They may be advised by police and others to do so. In various cities, police have reported that a high percentage of forcible rapes are committed against female victims who may have been insufficiently attentive to their own safety—walking alone at night, hitchhiking, sleeping in apartments with unlocked doors or windows, or going out with someone they met at a bar. Other women, because of their fear of crime, may avoid going to places they would like to go in order to reduce the probability that they will be victimized, thereby depriving themselves of a lifestyle they prefer. For them, one cost of crime is diminished personal freedom.

Women and the elderly are not the only ones who make lifestyle changes as a result of a concern with crime. Many people install expensive burglar alarm systems or move to another, hopefully safer, neighborhood. Others refrain from going out at night or from traveling to certain areas. As two scholars concluded: "Left unchecked, [fear] can destroy the fabric of civilized society, causing us to become suspicious of each other, locking ourselves in our homes and offices, and relinquishing our streets to predators."[2]

Our fear of crime has been enhanced by the events of 9/11, which made it clear that thousands of innocent people can be subject to catastrophic injury, property damage, and even death. The reach of those terrorist acts, along with the bombing of the federal building in Oklahoma City, school shootings, and numerous other highly publicized criminal acts, has resulted in increased security not only at airports and in large cities and at major events but also in schools. The inconvenience and time consumption of some of these security measures (such as long waits at airports) provide constant reminders that we are all subject to random violence.

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[1] "The Curse of Violent Crime: A Pervasive Fear of Robbery and Mayhem Threatens the Way America Lives," *Time* (March 23, 1981), p. 16.

[2] Hubert Williams and Anthony M. Pate, "Returning to First Principles: Reducing the Fear of Crime in Newark," *Crime & Delinquency* 33 (January 1987): 53.

Supplement 2.7. Special Focus on Terrorism

The Oklahoma City bombing on April 19, 1995, constituted the worst act of terrorism on U.S. soil to that date, killing 168 people, including 19 children who were in a day care center in the federal building. The terrorist acts of September 11, 2001, referred to simply as 9/11, resulted in the deaths of approximately 3,000 people and could have been much more extensive. These and other terrorist acts led states and the federal government to enact legislation and mobilize their forces in an effort to prevent further attacks. Chapter 3 of the text discusses some of the legislation and agencies resulting from reactions to those attacks.

Numerous terrorist attacks have occurred throughout the world in recent years. In January 2015, then FBI director, James B. Comey Jr., spoke before the International Conference on Cyber Security held at Fordham University in New York. After paying respects to the two recently murdered New York City police officers, whose assassinations constitute a form of terrorism, Director Comey told his audience that they were attending "one of the most important gatherings of people who care about cyber security." He then spoke of the emphasis that the FBI places on cyber security as he delved into some recent events, such as the "Sony [Pictures Entertainment] hack perpetrated by the North Koreans." Comey was referring to the hacking and threats that occurred in late 2014 over Sony's plan to release on Christmas Day its movie *The Interview*, a comedy focusing on a plan to assassinate the North Korean leader, Kim Jong-un. The hackers threatened violence at any theater that showed the film. Sony initially withdrew the film, leading to concerns about free speech. The film was eventually released online and shown in some theaters, but the experience showed the potential damage of cyber security in the ranks of terrorism.[3]

The FBI now lists terrorism as its number one focus, and the agency emphasizes that *reaction* to terrorist acts is not sufficient. Preemptive investigations prior to these acts are imperative, and the agency focuses on an intelligence-driven approach in its efforts to prevent terrorist acts. According to the FBI website in 2015, "In the 10 years since 9/11, the Bureau has transformed itself from an organization that uses intelligence to one that is defined by it." In that regard, the agency established the Directorate of Intelligence (DI) in 2005 to manage its intelligence activities.[4]

[3]James B. Comey Jr., Federal Bureau of Investigation, "Speeches," (January 7, 2015), www.fbi.com, accessed January 10, 2015.
[4]Federal Bureau of Investigation, http://www.fbi.gov/accessed January 10, 2015.

Supplement 2.8. Special Focus on White Collar Crime

For years criminologists have suggested that white collar crime should be given more attention by social scientists as well as by the government. The term was introduced in the chapter text and it was noted that these crimes are not counted in the *UCR*'s crime data. In fact, in many cases of white collar crime there is no prosecution in criminal courts. If any formal action is taken, it occurs within administrative agencies.

In recent years, a greater emphasis has been placed on some white collar crimes, and the FBI and the DOJ have targeted such crimes as the following:

- money laundering
- securities and commodities fraud
- bank fraud
- embezzlement
- environmental crimes
- fraud against the government
- health care fraud
- election law violations
- copyright violations
- telemarketing fraud
- organized crime
- financial fraud

Some of the targets of federal law enforcement officials have involved massive schemes.

Supplement 2.9. Federal Stalking Statute, USCS, Title 18, Section 2261A (2019). Stalking

Whoever—

(1) travels in interstate or foreign commerce or is present within the special maritime and territorial jurisdiction of the United States, or enters or leaves Indian country, with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, and in the course of, or as a result of, such travel or presence engages in conduct that—

(A) places that person in reasonable fear of the death of, or serious bodily injury to—

(i) that person;

(ii) an immediate family member (as defined in [another statute] ...) of that person; or

(iii) a spouse or intimate partner of that person; or

(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of subparagraph (A); or

(2) with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that—

(A) places that person in reasonable fear of the death of or serious bodily injury to a person described in clause (i), (ii), or (iii) of paragraph (1)(A); or

(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of paragraph (1)(A), shall be punished as provided in [the statute]. . . .

Supplement 2.10. Stalking on a Campus

In an analysis of the problems of stalking on college and university campuses, investigators found that slightly over 13 percent of the students reported being stalking victims. The researchers noted that few colleges and universities had policies concerning the awareness and prevention of this crime. They found that three factors were often characteristics of stalking victims: living alone, dating, and going to bars. The researchers concluded that victimization by stalking "is a price of going to college that students should not have to bear or, if experienced, should not have to bear alone and without the support of institutional officials."[1]

At the University of Missouri–Kansas City, a stalked professor received the following comments via e-mails:

- "I keep having homicidal fantasies that me [sic] keep me up at night around you."
- "Am I in the backseat of your car ready to slit your carotid artery? Am I in the closet at your house in . . .? Am I underneath your car ready to cut your achilles heal? Are your lug nuts secure on your car?"
- "I don't deal with anger and irritation well . . . people who cross me wind up living to regret it. Want to be on my list?"
- "I seriously want to hurt you, you know that?"
- " . . . you may yourself tied to your own bed in your own home begging for mercy. Or having your tongue cut out and your spinal cord cut paralyzing you for life so that you can never walk or speak again. Who knows what the universe has in store for you. If someone invades your home and cuts out your tongue . . . not my fault. Wishful thinking."[2]

[1]Bonnie S. Fisher et al., "Being Pursued: Stalking Victimization in a National Study of College Women," *Criminology & Public Policy* 1(2) (March 2002): 257-308; quotation is on p. 299.
[2]"Former Student Pleads Guilty to Cyberstallking University of Missouri-Kansas City Instructor," Federal Bureau of Investigation (August 15, 2014), https://www.fbi.gov, accessed July 12, 2016.

Chapter 3. The Emergence and Structure of Police Systems

Supplement 3.1. England Moves toward a Formal Policing System

The text discusses the development of the watch system of policing under Edward I in England. In 1326, Edward II supplemented the system by creating an office of justice of the peace. The justices were appointed by the king, and their initial function was to assist the shire-reeve with policing the counties. Later the justices assumed judicial functions. As the central government took on greater responsibility for law enforcement in England, the constables lost their independence as officials of the pledge system and were under the authority of the justices, who were assisted by volunteers.

Constables performed functions such as supervising night watchmen, taking charge of prisoners, serving summonses, and executing warrants. The justices performed judicial functions, thus beginning the separation of the duties of the police from those of the judiciary. This distinction between the police functions of the constable and the judicial responsibilities of the justices, with the constables reporting to the justices, remained the pattern in England for the next 500 years.

The mutual pledge system began to decline, however, as many citizens failed to perform their law enforcement functions within the system. The early police officials were not popular with citizens; nor were they effective. Citizens were dissatisfied with the watch system and its inability to maintain order and prevent crime. English life was characterized by rising crime and an increase in the number and severity of public riots. Public drunkenness was a serious problem, resulting in an increase in violent street crimes and thefts. The government responded by improving city lighting and increasing the number of watchmen and the punishment for all crimes. But the watchmen were not able to control the frequent riots that occurred; neither could they protect citizens and their possessions. The public responded by refraining from entering the streets at night without a private guard and by arming themselves. The rich moved to safer areas, creating the residential segregation characteristic of contemporary society.[1]

[1]Jonathan Rubinstein, *City Police* (New York: Ballantine Books, 1973), p. 5.

Supplement 3.2. The 2005 Killing of Jean Charles de Menezes Led to Intense Criticism of the British Police

In 2005, London police fired seven shots and killed Brazilian electrician Jean Charles de Menezes, who was boarding a subway train. Police said they thought the victim was involved in the London underground bombing that killed 52 people the previous day. In 2007, after an investigation of this shooting, the police were charged with "a serious lack of planning, chaotic communication and a failure to correctly identify a suspect." London's acting police commissioner apologized, stating that the shooting was a terrible mistake, but added, "It is important to remember that no police officer set out that day to shoot an innocent man." An official inquest that lasted 7 weeks and included testimony of 100 witnesses ended with a jury verdict that Scotland Yard was not correct in its assessment that the shooting of de Menezes was lawful. In 2009, the de Menezes family settled with the Metropolitan Police Service for the cost of their attorney fees and a financial judgment in exchange for dropping all legal action.[1]

[1]"The World: London Jury Faults Police in Shooting," *Los Angeles Times* (November 2, 2007), p. 3; "De Menezes Family Settles," *The Guardian* (London) (November 24, 2009), p. 5.

Supplement 3.3. Vigilantism in the Air

27Passengers say they will take action; pilots have encouraged them to do so if necessary. Another 9/11 (referring to the terrorist attacks on U.S. soil on September 11, 2001) will not happen on my flight! That appears to be the reaction of some pilots and passengers after the 9/11 attacks. The would-be shoe bomber found that out the hard way.

Richard Reid, 29, a British citizen, boarded a flight from Paris to Miami with 196 other people in December 2001. Reid had plastic explosives concealed in his shoe. When Reid attempted to light a fuse protruding from his shoe, passengers overpowered him. At his trial Reid entered a guilty plea, stating that he hated the United States and was a follower of Osama bin Laden. On January 30, 2003, when Reid, who had converted to Islam, was to be sentenced, he yelled at the judge, "You will be judged by Allah! Your government has sponsored the torture of Muslims in Iraq and Turkey and Jordan and Syria with their money and weapons." In part, federal judge William Young responded as follows:

> We are not afraid of any of your terrorist co-conspirators, Mr. Reid. We are Americans. We have been through the fire before. You are a terrorist. You are not a soldier in any war. To give you that reference, to call you a soldier gives you far too much stature. . . .
>
> You hate our freedom. Our individual freedom. Our individual freedom to live as we choose, to come and go as we choose, to believe or not believe as we individually choose.
>
> Here, in this society, the very winds carry freedom. They carry it from sea to shining sea. It is because we prize individual freedom so much that you are here in this beautiful courtroom. . . .
>
> See that flag, Mr. Reid? That's the flag of the United States of America. That flag will fly there long after this is all forgotten. That flag stands for freedom. You know it always will.[1]

Reid was sentenced to the maximum term for his crime: life in prison. The issue of vigilantism, however, goes far beyond this case and raises the question that, if airline passengers are willing to take physical action against suspected terrorists, what might the results be? For example, in September 2002, passengers aboard a Southwest Airlines flight from Phoenix to Salt Lake City beat and kicked to death a young man who charged the cockpit door.[2] Subsequent to the 9/11 terrorist attacks, cockpit doors were made more secure and, along with other security precautions, they are locked during flights. In addition, U.S. air marshals fly on many planes for added security. This measure, as demonstrated in the next example, may reduce the need for (and possible problems from) passenger vigilantism.

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[1] Quoted in "At Sentencing, Judge Lets Shoe Bomber Know What American Stands For," *St. Louis Post-Dispatch* (April 17, 2003), p. 2.

[2] The information on the Southwest flight comes from "Should Plane Cockpit Doors Be Locked?," *The Straits Times* (Singapore) (December 31, 2002), pp. 1, 2.

On April 28, 2010, Derek Michael Stansberry, 27, a U.S. citizen from Riverview, Florida, was arrested by federal authorities after a flight from Paris to Atlanta, on which he was a passenger, was diverted to Bangor, Maine. Stansberry, who apparently had no criminal record, was charged with interference with the flight crew, giving false information, and making threats. The accused was alleged to have passed a note to a flight attendant, indicating that he had a fake passport. She gave the note to a U.S. air marshal, who moved Stansberry to the back of the plane, where he allegedly told the marshal that he was carrying dynamite in his boots and in his laptop. The marshal took the boots and laptop and built a bunker around them to reduce any effect of an explosion. After the plane landed, Stansberry was taken into federal custody. All crew members and passengers were deplaned, and the plane was searched. No explosives were found, but initial reports were that officials found traces of explosives on the suspect's boots and luggage. Stansberry, a decorated U.S. veteran of the Afghanistan and Iraq wars, was reportedly under the influence of sleeping pills.[3]

Stansberry was charged with conveying false information, interfering with a flight attendant, and making threats. He was found not guilty by reason of insanity. The federal judge ruled that the defendant had a brief psychotic break resulting from a lack of sleep, dehydration, the use of body-building substances, and stress. Stansberry was released by the judge, who ruled that he was no longer a threat.[4]

[3] "Delta Flight 273 Passenger Charged with Interfering with Flight Crew and Making False Bomb Threats on Aircraft," Federal Bureau of Investigation Press Release (April 28, 2010), http://boston.fbi.gov/dojpressrel/pressrel10/bs042810.htm, retrieved March 3, 2011.
[4] "Federal Judge Finds Florida Man Was Suffering from Psychotic Break When Flight Was Diverted," *Bangor Daily News* (Maine) (August 23, 2011), no p.n., accessed July 4, 2014.

Supplement 3.4. Policing Background in Texas: The Texas Rangers

In 1835, the Texas Rangers, a group of uneducated and untrained men, were recruited and given authority to protect the Texas border from the Mexicans. After Texas was admitted to the Union, the Rangers were retained, along with their primary duty of patrolling the southern border of Texas. The Texas Rangers became the first state-supported police organization in the United States. As police functions expanded, the role of the Texas Rangers was enlarged, as was their training.

Recently, the Texas Department of Public Safety website indicated that the Texas Ranger Division had primary responsibility for "major incident crime investigations, unsolved crime/serial crime investigations, public corruption investigations, officer involved shooting investigations, and border security operations." The division consisted of the following:

- 213 full time employees, including
- 150 commissioned Rangers and
- 63 support personnel[1]

A recent web page of the Texas Ranger Hall of Fame and Museum described modern Texas Rangers in part as follows:

> "Today's Rangers are selected from the Department of Public Safety. No recruiting has ever been necessary. It is not unusual for more than 100 officers to apply for a single opening. . . .
>
> In addition to their high educational level, modern Rangers have the advantage of state-of-the-art weaponry and other equipment. . . .
>
> Today's Rangers travel by car, airplane or helicopter and occasionally by horse. Rangers are not issued uniforms, they dress as they need to. A Ranger in Dallas might wear a suit and tie while a Ranger assigned to a rural area would likely choose Western wear. During normal everyday activity, Rangers are still expected to wear western boots and have their badges pinned to their shirts.
>
> As Walter Prescott Webb wrote in his 1935 history of the Rangers, they '*are what they are because their enemies have been what they were. The Rangers had to be superior to survive. Their enemies were pretty good ... (the Rangers) had to be better....*'
>
> That's the way it was, and that's the way it still is."[2]

[1]Texas Department of Public Safety, "Texas Rangers," http://www.txdps.state.tx.us/TexasRangers/, accessed January 6, 2015.

[2] Texas Ranger Hall of Fame and Museum, "Ranger History in Brief Form, Part II," http://www.texasranger.org/history/BriefHistory2.htm, emphasis in the original, accessed January 5, 2015.

Supplement 3.5. United States Department of Homeland Security Operational and Support Components: 2018

"A listing of all Operational and Support Components with websites or webpages on DHS.gov that currently make up the Department of Homeland Security.

U.S. Citizenship and Immigration Services (USCIS)

(http://www.uscis.gov/)

U.S. Citizenship and Immigration Services (USCIS) administers the nation's lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honoring our values.

[Note: In 2015, this commentary read as follows: The USCIS "secures America's promise as a nation of immigrants by providing accurate and useful information to our customers, granting immigration and citizenship benefits, promoting an awareness and understanding of citizenship, and ensuring the integrity of our immigration system."]

U.S. Customs and Border Protection (CBP)

(http://www.cbp.gov/)

The U.S. Customs and Border Protection (CBP) is one of the Department of Homeland Security's largest and most complex components, with a priority mission of keeping terrorists and their weapons out of the U.S. It also has a responsibility for securing and facilitating trade and travel while enforcing hundreds of U.S. regulations, including immigration and drug laws.

United States Coast Guard

(http://www.tsa.gov/)

The United States Coast Guard is one of the five armed forces of the United States and the only military organization within the Department of Homeland Security. The Coast Guard protects the maritime economy and the environment, defends our maritime borders, and saves those in peril.

Federal Emergency Management Agency (FEMA)

(http://www.fema.gov/)

The Federal Emergency Management Agency (FEMA) supports our citizens and first responders to ensure that as a nation we work together to build, sustain, and improve our capability to prepare for, protect against, respond to, recover from, and mitigate all hazards.

Federal Law Enforcement Training Center (FLETC)

(http://www.fletc.gov/)

The Federal Law Enforcement Training Center (FLETC) provides career long training to law enforcement professionals to help them fulfill their responsibilities safely and proficiently.

United States Immigration and Customs Enforcement (ICE)

(http://www.ice.gov/)

The United States Immigration and Customs Enforcement (ICD) promotes homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade, and immigration.

Transportation Security Administration (TSA)

(http://www.tsa.gov/)

The Transportation Security Administration (TSA) protects the nation's transportation systems to ensure freedom of movement for people and commerce.

United States Secret Service (USSS)

(http://www.secretservice.gov/)

The United States Secret Service (USSS) safeguards the nation's financial infrastructure and payment systems to preserve the integrity of the economy, and protects national leaders, visiting heads of state and government, designated sites, and National Special Security Events.

Management Directorate

(/directorate-management)

The Management Directorate is responsible for Department budget [sic] and appropriations, expenditure of funds, accounting and finance, procurement; human resources, information technology systems; facilities, property, equipment, and other material resources, and the identification and tracking of performance measurements relating to the responsibilities of the Department.

National Protection and Programs Directorate (NPPD)

(/national-protection-and-programs-directorate)

The goal of the National Protection and Programs Directorate is to advance the Department's risk-reduction mission. Reducing risk requires an integrated approach that encompasses both physical and virtual threats and their associated human elements.

Science and Technology Directorate (S&T)

(https://www.dhs.gov/science-and-technology)

The Science and Technology Directorate (S&T) is the primary research and development

arm of the Department. It provides federal, state and local officials with the technology and capabilities to protect the homeland.

Countering Weapons of Mass Destruction Office

(/countering-weapons-mass-destruction-office)

The mission of the Countering Weapons of Mass Destruction (WMD) Office is to counter attempts by terrorists or other threat actors to carry out an attack against the United States or its interests using a weapon of mass destruction.

Office of Intelligence and Analysis (I&A)

(/office-intelligence-and-analysis)

The Office of Intelligence and Analysis equips the Homeland Security Enterprise with the timely intelligence and information it needs to keep the homeland safe, secure, and resilient.

Office of Operations Coordination

(/office-operations-coordination)

The Office of Operations and Coordination and Planning provides information daily to the Secretary of Homeland Security, senior leaders, and the homeland security enterprise to enable decision-making; oversees the National Operations Center; and leads the Department's Continuity of Operations and Government Programs to enable continuation of primary mission essential functions in the event of a degraded or crisis operating environment.

[The following three components, listed in 2015, were omitted in the most recent reorganization of the agency:]

The **Office of Health Affairs (OAH)** coordinates all medical activities of the Department of Homeland Security to ensure appropriate preparation for and response to incidents having medical significance.

The **Office of Policy** is the primary policy formulation and coordination component for the Department of Homeland Security. It provides a centralized, coordinated focus to the development of Department-wide, long-range planning to protect the United States.

The **Domestic Nuclear Detection Office (DNDO)** works to enhance the nuclear detection efforts of federal, state, territorial, tribal, and local governments, and the private sector and to ensure a coordinated response to such threats."[1]

[1] U.S. Department of Homeland Security, "Operational and Support Components," https://www.dhs.gov/operational-and-support-components, last published date: March 7, 2018, accessed August 19, 2018.

Supplement 3.6. State Attempts to Control Immigration

Arizona's immigration statute, which became law on July 29, 2010, illustrates one state's attempts to control immigration. The statute, referred to as the Support Our Law Enforcement and Safe Neighborhoods Act (also referred to as S.B. 1070), resulted in national and international negative reaction, including strong criticism from President Barack Obama, who stated that the statute threatened "to undermine basic notions of fairness that we cherish as Americans, as well as the trust between police and our communities that is so crucial to keeping us safe."[1]

Among other provisions, the Arizona statute permitted law enforcement authorities to question and detain any person suspected of being in the country illegally. Failure to carry one's immigration documents was a state misdemeanor,[2] but in reality, this provision provided for a state penalty for anyone who failed to observe a federal law. The law was highly controversial, and lawsuits were filed quickly, including one by the Obama administration on July 6, 2010. The federal government's argument was that the state statute violated the Supremacy Clause of the U.S. Constitution because it usurped federal authority regarding immigration laws. On July 28, 2010, Judge Susan Bolton of the federal District Court of Arizona issued a preliminary injunction against the enforcement of the four most controversial portions of the statute. Judge Bolton permitted the remaining sections of the law to go into effect on July 29, 2010, as scheduled. The Ninth Circuit Court of Appeals affirmed. The U.S. Supreme Court affirmed in part (holding that two of the sections were preempted but that one—the "show me your papers" section—should not have been enjoined until the state court had an opportunity to construe it) and remanded, stating in part, as follows:

> The National Government has significant power to regulate immigration. With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation's meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civil discourse. Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law.

In his dissenting opinion, Justice Antonin Scalia stated that the decision deprived Arizona of its "inherent power to exclude persons from its territory . . . who have no right to be there."[3] In September 2012, federal judge Bolton paved the way for the "show me your papers" provision to take effect when she declined to bar the provision. Judge Bolton held that the provision could be challenged "as interpreted and applied after it goes into effect."[4]

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[1] "Arizona Enacts Stringent Law on Immigration," *New York Times* (April 24, 2010), p. 1.
[2] Ibid. The Arizona legislation is Senate Bill 1070, signed by the governor on April 23, 2010.
[3] *United States v. Arizona,* 703 F. Supp. 2d 980 (D. Ariz. 2010), *affirmed by and remanded by* 641 F.3d 339 (9th Cir. 2011), *affirmed in part and reversed in part, and remanded by Arizona v. United States,* 567 U.S. 387 (2012). The preliminary injunction covered Ariz. Rev. Stat., Sections 11-1051(B), 13-1509, 13-2928(C), and 13-388(A)(5) (2010).
[4] "Arizona Immigration Law Survives Ruling," *New York Times* (September 7, 2012), p. 20.

Supplement 3.7. Types of Private Security Systems

Private security may be *proprietary* or *contractual*. In a proprietary system, organizations or individuals have their own private investigators and security personnel. For those who cannot afford this approach or who choose not to do so, contracts may be made with professional agencies to provide private security. Regardless of the type of system, a variety of components exist, including security managers, uniformed officers, undercover agents, and electronic specialists or equipment.

The oldest and largest of the firms providing investigative and security services is Pinkerton's, Inc., founded in 1850 in Chicago by Allan Pinkerton. After a number of changes in its company, in 2014, Pinkerton's relocated its global headquarters to Ann Arbor, Michigan.[1]

Pinkerton was the first detective on the Chicago Police Department. Local, state, and federal agencies, as well as private companies and individuals have employed the services of Pinkerton's. "The term 'private eye' had its source in the unblinking eye that was Pinkerton's trademark for many years."[2]

The most frequently used private security programs are alarm systems; increasing numbers of systems are being installed in private residences and in businesses. Fire and burglar alarm systems are most common, but alarm companies also install access control systems, fixed security equipment, and perimeter security systems. The most sophisticated systems monitor covered premises constantly for increased protection and may be extensive and expensive. In recent years, cameras and remote controls have proliferated.

Private security is also provided by armored vehicles with armed guards for transporting precious jewels, money, and other valuables. Courier services provide fast delivery of valuables and papers that must be transported quickly and safely. Private security services may be employed for emptying cash machines, delivering money from businesses to bank drops after hours, and engaging in many other activities for which business persons or private citizens feel a need for added security. Other services include security training courses, screening of personnel for businesses, technical countersurveillance to determine whether bugging devices have been installed, security consultation, and drug detection. Some people who want access to their valuables after regular banking hours use private security vaults.

[1] Pinkerton Global Headquarters, http://www.pinkerton.com/an-arbor-MI-hq, accessed January 5, 2015.
[2] James S. Kakalik and Sorrel Wildhorn, *The Private Police: Security and Danger* (New York: Crane Russak, 1977), p. 68.

Chapter 4. Policing in Modern Society

Supplement 4.1. The Importance of Hiring Female and Minority Officers

In recent years, the presence of women and racial and ethnic minorities in policing has increased, although most sworn law enforcement personnel are white males, and most of the nonsworn employees are white women.

Women and minority officers face problems in policing as well as during the recruiting process. Early studies of minority police officers emphasized their role conflicts. For example, an earlier scholarly analysis revealed some evidence that African American offenders expected African American officers to give them a break. If the officers were lenient, this, along with many other actions, resulted in criticism from white peers.[1]

Clearly, the hiring and promotion of minority officers should be a priority. Hiring and promoting women should also be a focus of police departments. Women have made progress in policing since the first woman became a police officer on April 1, 1908, when Lola Baldwin was hired in Portland, Oregon.[2] But they still do not represent significant numbers in police departments, having made only slight gains in the past two decades according to the most recent BJS report, which stated that approximately 100,000 women were state and federal sworn officers in law enforcement agencies at the time. The FBI was 19 percent female; the federal Bureau of Prisons (BOP) was 14 percent; but the highest percentage in federal agencies was the Offices of Inspectors General (25 percent). Women constituted an average of 18 percent of full-time sworn officers in local police departments that employed more than 2,000 sworn officers. In contrast, women represented only 6 percent of all sworn officers nationwide in local police departments that employed between one and ten full-time sworn officers and 4 percent of those in small sheriff's offices.[3]

A 2016 BJS report about law enforcement training academies (2011 to 2013) noted that 86 percent of those who began a basic training program completed that program successfully and that approximately one in seven of the recruits were women and one in three were minorities.[4]

Female police officers report problems both on and off the job. With regard to the latter, some female police officers say they are not accepted as friends by male officers in after-hours social activities. Some female officers report that they have experienced rejection by male colleagues and even by the public whom they serve. Critics have argued that women cannot

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[1]Nicholas Alex, *Black in Blue: A Study of the Negro Policeman* (New York: Appleton-Century-Crofts, 1969).
[2]"Female Police Chiefs, a Novelty No More," *New York Times* (April 6, 2008), http://www.nytimes.com/2008/04/06/nyregion/nyregionspecial2/06Rpolice.html?scp=18sq=female, accessed November 9, 2010.
[3]Lynn Langton, Bureau of Justice Statistics, *Women in Law Enforcement, 1987-2008* (June 2010), pp. 1, 2, http://www.bjs.gov/content/pub/pdf/wle8708.pdf, accessed December 25, 2013.
[4]Brian A. Reaves, BJS, "State and Local Law Enforcement Training Academies, 2013" (July 2016), https://www.bjs.gov/content/pub/pdf/slleta13.pdf, July 9, 2017.

handle the physical aspects of policing, but physical differences between men and women do not in themselves mean that women are less capable than men.[5]

One scholar referred to what she called the "culturally mandated patterns governing male/female interaction" in policing and concluded: "In sum, a woman officer faces barriers and handicaps that are built into both the formal and informal work structures." Although the "most blatant barriers" that kept women from being recruited as police officers for years have fallen, and the numbers of women in policing are increasing, there are still barriers to advancement.[6]

Some social scientists maintain that research supports the allegation that "police women do experience unique workplace stressors, including sex discrimination, language harassment, lack of role models and mentors, and the demands of emotional work to respond to these difficulties."[7]

Other women might argue that these issues in no way distinguish female police officers from women in many other professions.

In a provocative analysis of women and policing and in reflecting upon her own career, a retired division chief with the Miami-Dade (Florida) Police Department concluded as follows:

> Law enforcement remains a highly masculine profession. In order for law enforcement to truly represent the diversity of communities served . . . there must be a concerted effort to increase the percentage of women officers from the current 12 percent. In other occupations, 46.3 percent are women [citation omitted]. The integration of women into command levels will demonstrate to future promotional candidates that their departments have a commitment to diversity.[8]

There have been some efforts to promote women and minorities to upper-level policing, but only 2 to 3 percent of the nation's estimated 18,000 police chiefs are women although women have occupied some of the top positions in law enforcement in the nation's capital, such as in the Drug Enforcement Administration, Secret Service, D.C. Metropolitan Police

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[5]Nancy L. Herrington, "Female Cops—1992," in *Critical Issues in Policing: Contemporary Readings*, 3d ed., ed. Roger G. Dunham and Geoffrey P. Alpert (Prospect Heights, IL: Waveland Press, 1997), pp. 385-390; quotations are on p. 388.

[6]Susan E. Martin, "Women Officers on the Move," in *Critical Issues in Policing: Contemporary Readings*, 5th ed., ed. Roger G. Dunham and Geoffrey P. Alpert (Long Grove, IL: Waveland Press, 2005), pp. 350-371; quotations are on pp. 362, 368.

[7]Merry Morash et al., "Workplace Problems in Police Departments and Methods of Coping: Women at the Intersection," in *Rethinking Gender, Crime, and Justice*, ed. Claire M. Renzetti et al. (Los Angeles: Roxbury, 2006), pp. 213-227; quotation is on p. 216.

[8]Karin Montejo, "Women in Police Command Positions," in *Critical Issues in Policing*, 6th ed., eds. Roger G. Dunham and Geoffrey P. Alpert (Long Grove, IL: Waveland Press, 2010), pp. 387-404; quotation is on p. 400.

Department, U.S. Park Police, the FBI's Washington Field Office, and the Amtrak Police Department.[9]

In July 2016, the American Bar Association published an article entitled, "Would Hiring More Female Cops Reduce Police Brutality?" The ABA referred to an article in the *Washington Post* that cited data showing that male police officers more often than female police officers are cited for excessive use of force, costing cities from 2½ to 5½ times more money inpayments for lawsuits on the topic.[10]

[9]"Top Cop Reflects on Being a Rarety," *Dallas Morning News* (November 27, 2013), p. 1B; "30 Years of Lessons," *Dallas Morning News* (August 6, 2013), p. 13; "Women in Top Cop Ranks in D.C.," *USA Today* (August 14, 2013), p. 2.

[10]Debra Cassens Weiss, "Would Hiring More Female Cops Reduce Police Brutality?," *American Bar Association Journal* (July 20, 2016), http://www.abajournal.com, accessed January 3, 2017.

Supplement 4.2. The 1967 President's Commission Made Recommendations on Police Training

The President's Commission recommended that police training include instruction on "subjects that prepare recruits to exercise discretion properly and to understand the community, the role of the police, and what the criminal justice system can and cannot do." The commission recommended "an absolute minimum of 400 hours of classroom work spread over a four- to- six-month period so that it can be combined with carefully selected and supervised field training." In-service training at least once a year, along with incentives for officers to continue their education, should be provided. In 1973, the National Advisory Commission on Criminal Justice Standards and Goals put police training into perspective with some harsh comments: "Perhaps no other profession has such lax standards or is allowed to operate without firm controls and without licensing."[1]

In 1981, the U.S. Commission on Civil Rights emphasized the need for formal police training and concluded that most of the examined programs "do not give sufficient priority to on-the-job field training, programs in human relations, and preparation for the social service function of police officers, including intervening in family-related disturbances." The commission found that in many jurisdictions even firearms training was inadequate and "subject to the ambiguities found in statutes and departmental policies." Because of this ambiguity, the commission concluded that it is imperative that police training expose recruits to situations in which the use of firearms might or might not be appropriate. Alternatives to deadly force should also be demonstrated. Finally, the Civil Rights Commission recommended that police receive training in the social services they are expected to perform.[2]

[1]The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (U.S. Government Printing Office, 1969), pp. 112-113. Recent analyses of this report can be found in an entire journal devoted to the topic of the "President's Crime Commission: Past and Future," *Criminology & Public Policy* 17(2) (May 2018).

[2]The U.S. Commission on Civil Rights, *Who Is Guarding the Guardians? A Report on Police Practices* (Washington, D.C.: U.S. Government Printing Office, October 1981), p. 155.

Supplement 4.3. The U.S. Supreme Court Rules on the Importance of Police Training

In 1989, the U.S. Supreme Court emphasized the importance of police training.

City of Canton, Ohio v. Harris
489 U.S. 378 (1989), footnotes and citations omitted

In this case, we are asked to determine if a municipality can ever be liable . . . for constitutional violations resulting from its failure to train municipal employees. We hold that, under certain circumstances, such liability is permitted. . . .

In April 1978, respondent Geraldine Harris was arrested by officers of the Canton Police Department. Harris was brought to the police station in a patrol wagon.

When she arrived at the station, Harris was found sitting on the floor of the wagon. She was asked if she needed medical attention, and responded with an incoherent remark. After she was brought inside the station for processing, Mrs. Harris slumped to the floor on two occasions. Eventually, the police officers left Mrs. Harris lying on the floor to prevent her from falling again. No medical attention was ever summoned for Mrs. Harris. After about an hour, Mrs. Harris was released from custody, and taken by an ambulance (provided by her family) to a nearby hospital. There, Mrs. Harris was diagnosed as suffering from several emotional ailments; she was hospitalized for one week, and received subsequent outpatient treatment for an additional year.

Some time later, Mrs. Harris commenced this action alleging many state law and constitutional claims against the city of Canton and its officials. Among these claims was one seeking to hold the city liable . . . for its violation of Mrs. Harris' right, under the Due Process Clause of the Fourteenth Amendment, to receive necessary medical attention while in police custody. . . .

We hold today that the inadequacy of police training may serve as the basis for liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. . . .

Moreover, for liability to attach in this circumstance the identified deficiency in a city's training program must be closely related to the ultimate injury. Thus in the case at hand, respondent must still prove that the deficiency in training actually caused the police officers' indifference to her medical needs. Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect? Predicting how a hypothetically well-trained officer would have acted under the circumstances may not be an easy task for the factfinder, particularly since matters of judgment may be involved, and since officers who are well-trained are not free from error and perhaps might react very much like the untrained officer in similar circumstances. But judge and jury, doing their respective jobs, will be adequate to the task.

Supplement 4.4. The U.S. Supreme Court Upholds a Controversial Case on Police Stops

In *Atwater v. City of Lago Vista*, the police stopped Gail Atwater, who was driving her two children, ages 4 and 6, home from soccer practice in a town near Austin, Texas, in 1997. The children were not wearing seat belts, which were required by law. The officer had stopped Atwater on a prior occasion, thinking her son was not wearing a seat belt, but he was. Atwater alleged that when she was stopped this second time, and arrested, the officer yelled at her, frightening her children. A friend took the children home, but Atwater was handcuffed and taken to the police station, where she was booked, photographed, and kept for about one hour before she was released on a $310 bond. The case was settled by a $50 fine, the maximum permitted. Atwater sued the arresting officer, the police chief, and the city. The defendants won a summary judgment at the trial court level, and that was upheld by the Fifth U.S. Circuit Court of Appeals. The U.S. Supreme Court affirmed, holding that the officer's actions were reasonable.

The U.S. Supreme Court acknowledged that "Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the city can raise against it specific to her case." The Court agreed that Atwater suffered "gratuitous humiliations imposed by a police officer who was [at best] exercising extremely poor judgment." But the U.S. Supreme Court recognized the problems involved with a scenario in which "every discretionary judgment in the field be converted into an occasion for Constitutional review." And if changes are to be made concerning the authority of the police to arrest for minor offenses, those changes should be made by legislators and police officials, not by the courts. The Supreme Court noted that even Atwater's attorney did not cite examples of any other "comparably foolish" arrests. The Court concluded that "the country is not confronting anything like an epidemic of unnecessary minor-offense arrests." Accordingly, the U.S. Supreme Court concluded:

> [W]e confirm today what our prior cases have intimated. . . . The standard of probable cause applies to all areas, without the need to balance the interests and circumstances involved in particular situations. If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.[1]

[1] *Atwater v. City of Lago Vista*, 533 U.S. 924 (2001).

Supplement 4.5. Pretextual Stops Are Reasonable in Some Circumstances

In *Whren v. United States*, the initial stop was made by District of Columbia Metropolitan Police plainclothes vice-squad officers, who were traveling in an unmarked car in an area known for high levels of illegal drug trafficking. The officers observed two young African American males in a dark Nissan Pathfinder truck waiting for an unusually long time at a stop sign, with the driver looking into the lap of his passenger. When the officers made a U-turn to follow the vehicle, the driver turned without signaling and took off at what the officers considered an unreasonable speed. The officers overtook the truck when it was stopped behind traffic at a signal. One officer got out, approached the truck, and told the driver to put the vehicle in park. The officer observed the passenger holding two large plastic bags of what appeared to be crack cocaine. The driver and the passenger were arrested, and quantities of various illegal drugs were seized. Each man was charged with four counts of violating federal drug laws. On appeal, the petitioners

> challenged the legality of the stop and the resulting seizure of the drugs. They argued that the stop had not been justified by probable cause to believe, or even reasonable suspicion, that the petitioners were engaged in illegal drug-dealing activity; and that [the officer's] asserted ground for approaching the vehicle—to give the driver a warning concerning traffic violations—was pretextual.[1]

The defense further argued that if police are permitted to search in such situations, they might harass persons (such as, in this case, minorities) whom they otherwise could not stop for lack of reasonable suspicion that a violation had occurred. The U.S. Supreme Court examined the issue of whether police must tell drivers detained for alleged traffic violations that they are free to leave before they ask them for permission to search their vehicles. In *Ohio v. Robinette*, the justices held that "sweet-talking" drivers into consenting to a vehicle search is permitted and that police are not required to tell the drivers that they are free to leave and thus are not required to consent to the search. Drivers should know enough to resist pressure from police. This might be questioned when it is understood that the officer does have the power to write a ticket for the alleged traffic violation.[2]

[1] *Whren v. United States*, 517 U.S. 806 (1996).
[2] *Ohio v. Robinette*, 519 U.S. 33 (1996).

Supplement 4.6. Police Stops Not Based on Suspicion of Law Violations May Be Permitted in Some Cases

The case of *Indianapolis v. Edmond* was brought by motorists in Indianapolis, Indiana, who asked the federal court to prohibit police from stopping them for the purpose of detecting illegal drugs. In *Edmond*, while police were checking driver's licenses and vehicle registrations, other officers circled the vehicles with their canines to search for illegal drugs. Although the U.S. Supreme Court refused to uphold this practice, in which police admitted that the primary purpose was to detect motorists with illegal drugs, the Court did not answer the question of whether it would be permissible to make suspicionless stops if drug offenses were a secondary purpose.[1]

The U.S. Supreme Court distinguished *Edmond* from an earlier case in which the Court had held that police may make suspicionless stops of motorists to check for drivers under the influence of alcohol. In *Michigan Department of State Police v. Sitz*, the Court emphasized that the police stops in question were brief and for the purpose of enabling officers to detect and remove drunk drivers from the highways, a purpose that, according to the majority's ruling, was clearly aimed at protecting public safety. In contrast, according to Justice Sandra Day O'Connor, who wrote the majority opinion in *Edmond*, the stops in that case were "ultimately indistinguishable from the general interest in crime control."[2]

In *Illinois v. Lidster*, the U.S. Supreme Court again entertained the issue of when the police may stop motorists about whom they have no reason to suspect illegal acts. One week after a fatal hit-and-run accident, police stopped all motorists at the same intersection at the same late hour and handed them a flier describing the accident and requesting information concerning any witnesses to it. One driver nearly hit the officer with his car and was given a sobriety test, arrested for drunk driving, tried, and convicted. The roadblock did not uncover any additional witnesses, but a local television station's coverage of the roadblock did produce a witness who was able to identify a suspect. This might suggest that television coverage would suffice and that such police roadblocks are ineffective as well as intrusive. But the U.S. Supreme Court upheld the roadblock, ruling that it is constitutional for the police to establish "information-seeking checkpoints" in their efforts to combat crime.[3]

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[1] *Indianapolis v. Edmond*, 531 U.S. 32 (2000).

[2] *Indianapolis v. Edmond*, 531 U.S. 32 (2000), referring to *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990). See also *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), permitting suspicionless stops of motorists for the purpose of intercepting illegal immigrants.

[3] *Illinois v. Lidster*, 540 U.S. 419 (2004).

Supplement 4.7. Racial Profiling: An Early Example

Police in New Jersey were accused of racial profiling after they shot three unarmed men during a traffic stop in April 1998. The white officers had stopped a van carrying African American and Latino men and subsequently claimed that they had stopped the van because their supervisors had taught them that minorities were more likely than others to be involved in drug offenses. The officers claimed that they shot the men in self-defense. An investigation revealed that New Jersey state troopers were engaging in racial profiling in many of their stops and that they treated African Americans and other minorities in a discriminatory manner. State officials and the DOJ entered into a consent agreement, which included the provision of an independent monitor to report on whether troopers were following the terms of the agreement.[1]

The New Jersey troopers involved in the shooting of the three unarmed men were permitted to plead guilty to misdemeanor charges of obstructing the investigation and lying about the facts shortly after the incident. They avoided prison time and were fined $280 each. The officers had already lost their jobs. The judge noted that one of the officers had been involved in a previous shooting and had returned to work too quickly and without adequate counseling. The judge also noted that the men were following the policies they had been taught. To the officers, the judge said, "You are victims not only of your own actions but of the system which employed you." Both officers signed statements that they would never again seek employment in law enforcement.[2]

In 2005, New Jersey began requiring all police officers in the state, along with some civilians, to take a half-day training course designed to eliminate racial profiling. In 2007, the DOJ removed the federal monitoring of the New Jersey state troopers.[3]

In 2001, the DOJ released a study (conducted by the BJS and mandated by a 1994 law requiring the publication of data on police use of force) of approximately 80,000 U.S. residents, age 16 and over. The study reported that African American motorists are more likely than white motorists to be stopped by police, to be stopped more than once in the same year, to be given a ticket, to be handcuffed, to be subjected to a search of the person and of the vehicle, to be subjected to force, and to be arrested. The BJS emphasized that the data could reflect actual violations rather than profiling and thus did not *prove* racial profiling.[4]

According to the most recently published survey (October 2013, based on 2011 data) by BJS on contacts between the police and the public, 26 percent of the U.S. population had some contact with police during the 12 months prior to the survey. The highlights of that survey are reproduced in **Supplement 4.8**.

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[1] "New Jersey Enters into Consent Decree on Racial Issues in Highway Stops," *Criminal Law Reporter* 66 (January 5, 2000), p. 251.
[2] "New Jersey Troopers Avoid Jail in Case That Highlighted Profiling," *New York Times* (January 15, 2002), p. 1.
[3] "Fighting Profiling: Training for All Cops," *New Jersey Lawyer* 14(27) (July 4, 2005): 39; "Uninformed Consent," *New York Times* (September 23, 2007), p. 15.
[4] Bureau of Justice Statistics, *Contacts Between Police and the Public: Findings from the 1999 National Survey* (Washington, D.C.: U.S. Department of Justice, 2001), reported in "Survey Shows Harsher Treatment of Minorities in Traffic Stops," *Criminal Justice Newsletter* 31(8) (March 14, 2001), p. 4.

An analysis of policing by criminologist Geoffrey P. Alpert and his colleagues found evidence to support the belief that police are more likely to be suspicious toward minority suspects, as compared to nonminority suspects. However, they concluded that minority status does not influence police in their decision to *stop and question* suspects. Rather, police may form opinions prior to making initial stops but they do not usually make those stops until after they see a *clearer prompt*, such as a traffic violation or other illegal act. These researchers emphasized the need to "distinguish between officers who use race as a guide in decision making and those officers who use race as a discriminatory tool."[5] Alpert and Michael R. Smith concluded that careful research on racial profiling and discrimination is difficult, complex, and expensive and that the status of such research "leaves courts and policy makers ill equipped to reach reliable conclusions about the possible unequal treatment of minorities by the police."[6]

Alpert and others described the issue of racial profiling as "one of the most difficult issues facing contemporary American society," but concluded from their research in Miami, Florida, that the results are mixed. They did not find evidence of racial profiling in police initial stops but did find some disparate treatment of minorities once the stop had been made.[7]

Noted criminologist Jerome H. Skolnick responded to this study by Alpert et al. by noting that the Miami-Dade Police Department invited these well-qualified researchers to conduct the study and asking why the department wanted the study (was a lawsuit threatened?) and whether it was possible that police officers overcompensated and stopped more whites because they knew they were being observed. Whatever the reason, the department got an exemplary report.[8]

Other criminologists have concluded from their research that "young black and Hispanic males are at increased risk for citations, searches, arrests, and uses of force after other extralegal and legal characteristics are controlled." But minority drivers are no more likely than white drivers to be violating drug possession or other criminal laws.[9]

In Texas, an analysis of millions of traffic stops during a two-year period revealed that minorities were far more likely than whites to be stopped and searched but were not more likely to be carrying illegal items, such as drugs. In response to these findings, the state enacted legislation requiring that every law enforcement agency adopt a policy defining and giving examples of racial profiling, which is prohibited. The statute requires officers to collect and the agency to keep race data records of all traffic stops.[10]

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[5] Geoffrey P. Alpert et al., "Police Suspicion and Discretionary Decision Making During Citizen Stops," *Criminology* 43(2) (February 2005): 407-434; quotation is on p. 427.

[6] Michael R. Smith and Geoffrey P. Alpert, "Searching for Directions: Courts, Social Science, and Adjudication of Racial Profiling Claims," *Justice Quarterly* 19(4) (December 2002): 673-703; quotation is on p. 699.

[7] Geoffrey P. Alpert et al., "Investigating Racial Profiling by the Miami-Dade Department: A Multimethod Approach," *Criminology & Public Policy* 6(1) (February 2007): 25-56; quotation is on p. 25.

[8] Jerome H. Skolnick, "Reaction Essay: Racial Profiling—Then and Now," *Criminology & Public Policy* 6(1) (February 2007): 65-70. This entire issue is devoted to issues in racial profiling.

[9] Robin Shepard Engel and Jennifer M. Calnon, "Examining the Influence of Drivers' Characteristics During Traffic Stops with Police: Results from a National Sample," *Justice Quarterly* 21(1) (March 2004): 49-90; quotation is on p. 49.

[10] "Study in Texas Sees Race Bias in Searches," *New York Times* (February 25, 2005), p. 14. The statute is codified at Tex. Code Crim. Proc., Article 2.132 (2018).

Ethnicity is also a prohibited reason for police stops. The Ninth Circuit Court of Appeals refused to follow a 25-year-old U.S. Supreme Court decision ruling that racial appearance was an appropriate factor for deciding whether a person should be stopped by police. According to the court, "Hispanic appearance is, in general, of such little probative value that it may not be considered as a relevant factor where particularized or individualized suspicion is required." The case of *United States v. Montero-Camargo* involved three Mexicans who were stopped by the U.S. Border Patrol about 115 miles east of San Diego. The agents, responding to a tip, gave five factors they considered in their decision to stop the suspects, one of which was their Hispanic appearance. The U.S. Supreme Court refused to review the case, thus permitting the decision to stand.[11]

[11] *United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000), *cert. denied*, 531 U.S. 889 (2000).

Supplement 4.8. Highlights of Police Behavior during Traffic and Street Stops

According to the most recent publication of the Bureau of Justice Statistics (BJS) regarding police contacts in the United States, 62.9 million residents age 16 or older had some contact with the police, with almost one-half (49 percent) of those contacts initiated by the police. The highlights of those contacts are as follows:

- "Relatively more black drivers (13 percent) than white (10 percent) and Hispanic (10 percent) drivers were pulled over in a traffic stop. . . . There were no statistical differences in the race or Hispanic origin of persons involved in street stops.

- Persons involved in street stops were less likely (71 percent) than drivers in traffic stops (88 percent) to believe that the police behaved improperly.

- Of those involved in traffic and street stops, a smaller percentage of blacks than whites believed the police behaved properly during the stop.

- Drivers pulled over by an officer of the same race or ethnicity were more likely (83 percent) than drivers pulled over by an officer of a different race or ethnicity (74 percent) to believe that the reason for the traffic stop was legitimate.

- White drivers were both ticketed and searched at lower rates than black and Hispanic drivers.

- Across race and Hispanic origin, persons who were searched during traffic stops were less likely than persons who were not searched to believe the police behaved properly during the stop.

- About 1 percent of drivers pulled over in traffic stops had physical force used against them by police. Of these drivers, 55 percent believed that police behaved properly during the stop.

- About 6 in 10 persons . . . involved in street stops believed they were stopped for a legitimate reason.

- About 19 percent of persons involved in street stops were searched or frisked by police. The majority of persons who were searched or frisked did not believe the police had a legitimate reason for the search."[1]

[1] Lynn Langton and Matthew Durose, Bureau of Justice Statistics, *Police Behavior During Traffic and Street Stops, 2011* (September 2013), p. 1, https://www.bjs.gov/content/pub/pdf/pbtss11.pdf, accessed August 31, 2018.

Supplement 4.9. The *Lawson* Case and the Abuse of Police Discretion to Stop and Question

Thirty-six-year-old Edward Lawson—tall, black, muscular, and long-haired—walked almost everywhere he went. Lawson was stopped by police approximately 15 times between March 1975 and January 1977. Police in California were relying on a California statute that prohibited a person from loitering or wandering

> upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer to do so, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.[1]

Each time he was stopped, Lawson refused to identify himself. He was arrested five of the times he was stopped, convicted once, and spent several weeks in jail. The *Lawson* case illustrates the tension between the police claim that in order to combat crime they must be able to stop and question people who look suspicious and the right of citizens to be free from unreasonable intrusions into their privacy.

Lawson appealed his convictions to the U.S. Supreme Court, which reversed them on the grounds that the statute under which he was convicted was vague. The problem with the California statute was not the initial police stop. According to the Court, "[a]lthough the initial detention is justified, the State fails to establish standards by which the officers may determine whether the suspect has complied with the subsequent identification requirement." The U.S. Supreme Court held that giving a police officer such discretion "confers on police a virtually unrestrained power to arrest and charge persons with a violation" and therefore "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials against particular groups deemed to merit their displeasure.'"[2]

[1] Cal. Penal Code, Section 647(e) (1977).
[2] *Kolender et al. v. Lawson*, 461 U.S. 352, 361, 369 (1983).

Supplement 4.10. The U.S. Supreme Court Looks at the Totality of the Circumstances When Deciding Whether a Stop and Frisk Is Justified

The case of *United States v. Arvizu* involved a border patrol agent. Agent Clinton Stoddard was working at a checkpoint about 30 miles north of a border town when he was notified that a magnetic sensor had been triggered on a back road near his location. Stoddard concluded that a motorist might be trying to avoid the main road checkpoint because he or she was smuggling illegal drugs or immigrants. Stoddard drove to the road in question and pulled over to get a good look at an oncoming minivan as it passed him. Based on his observations and his knowledge, he concluded that the driver might be smuggling. Stoddard's suspicions were based on a number of factors:

- The car was a minivan, a type of car often used by smugglers.
- The car was on a back road often used by smugglers.
- The time was during shift changes, when detection might be interrupted.
- The driver slowed down sharply as he approached Stoddard's car, did not look at Stoddard, and appeared stiff and rigid.
- Three children in the minivan waved mechanically, as if they might have been told to do so.
- The knees of the children were unusually high, as if they might have their feet resting on objects.
- There were no picnic grounds in the area, so it was unlikely the family was on an outing for recreational purposes.[1]

Stoddard signaled the van to pull over and asked for permission to search the car. He was granted permission; he found 130 pounds of marijuana. At his trial, Arvizu petitioned the court to exclude the marijuana. The court refused, but the Ninth Circuit Court of Appeals reversed, stating, among other comments, that if every strange act of a child "could contribute to a finding of reasonable suspicion, the vast majority of American parents might be stopped regularly." The U.S. Supreme Court reversed, holding that the totality of the circumstances and the agent's experience should be considered in making a determination whether the officer had reason to pull over a car and request permission to search it. According to a unanimous Supreme Court: "This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'"[2]

[1] *United States v. Arvizu*, 534 U.S. 266 (2002).
[2] *United States v. Arvizu*, 534 U.S. 266 (2002).

Supplement 4.11. Police Stops When Suspects Begin to Flee

A key case involving a police stop of a suspect who tried to flee is *Illinois v. Wardlow*,[1] decided in 2000 by a unanimous U.S. Supreme Court. The Court held that under some circumstances, the flight of a person who sees a law enforcement officer provides reasonable grounds for the officer to stop and search. But the justices disagreed on how the facts of the Chicago case should be analyzed in light of that principle. In *Wardlow*, the suspect fled when he saw several police cars in an area of the city known for heavy trafficking in illegal narcotics. One officer chased Wardlow down an alley and found that he was carrying a loaded gun. In a controversial 5-to-4 decision, Chief Justice William H. Rehnquist, writing for the majority, concluded that in an area of that type, an unprovoked flight constituted grounds for a stop and search. According to Rehnquist, "[t]he determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." Rehnquist also stated, "Headlong flight—wherever it occurs—is the consummate act of evasion; it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." Justice John Paul Stevens stated in his dissenting opinion that the facts did not justify the search.

> Among some citizens, particularly minorities and those resident in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence.[2]

[1] *Illinois v. Wardlow*, 528 U.S. 119 (2000).
[2] *Illinois v. Wardlow*, 528 U.S. 119 (2000), Stevens, J., dissenting.

Supplement 4.12. The Establishment of Probable Cause

The first case, *Illinois v. Gates*, provides a fact pattern that was considered sufficient to establish probable cause; the second, *Florida v. J.L.*, includes a set of facts that were not considered sufficient to support a finding of probable cause.[1]

In *Gates*, the police received an anonymous letter alleging that two specified people, a husband and his wife, were engaging in illegal drug sales and that on May 3, 1978, the wife would drive their car to Florida. The letter stated that the husband would fly to Florida to drive the car to Illinois with the trunk loaded with drugs and that the couple had about $100,000 worth of drugs in the basement of their Illinois home.

After receiving this information, a police detective secured the couple's address. The officer found that the husband had a reservation to fly to Florida on May 5, 1978. The flight was put under surveillance, which disclosed that the suspect took the flight. It was confirmed that he spent the night in a motel room registered to his wife and that the next morning he left in a car with a woman. The license plate of the car was registered to the husband suspect. The couple was driving north on an interstate highway used frequently for traffic to Illinois.

The police detective in possession of these facts signed a statement under oath concerning the facts and submitted that statement to a judge, who issued a search warrant for the couple's house and automobile. The police were waiting for them when they returned to their Illinois home. Upon searching the house and car, the police found drugs, which the state attempted to use against the couple at trial. The couple's motion to have the evidence suppressed at trial was successful, and the Illinois Supreme Court upheld the lower court on this issue.

The U.S. Supreme Court disagreed and looked at the totality of the circumstances, holding that, in this case, independent police verification of the allegations from the anonymous source provided sufficient information on which a magistrate could have probable cause to issue the warrants. The Supreme Court emphasized that probable cause is a fluid concept based on probabilities, not certainties. All of the circumstances under which information is secured must be considered and weighed in determining whether probable cause exists for issuing a warrant.

In contrast, in *Florida v. J.L.*, the U.S. Supreme Court ruled against the use of an informant's report as sufficient to establish probable cause. The case involved an anonymous call to the Miami-Dade, Florida police, who were told that a young African American male, wearing a plaid shirt and carrying a gun, was standing at a particular bus stop. Police went to the location and found three African American males, one of whom was wearing a plaid shirt. That young man made no suspicious or threatening movements; no gun was obvious. The police had no reason, except for the anonymous tip, to suspect any of the three young men of illegal activity. The police frisked all three suspects and found a gun in the pocket of J.L., who was wearing the plaid shirt. J.L. was only 15—a juvenile—so his name was kept confidential. He was charged with possessing a firearm while under the age of 18 and carrying a concealed weapon. The trial court granted the defendant's motion to exclude the gun, an intermediate

[1] *Illinois v. Gates*, 462 U.S. 213 (1983); *Florida v. J.L.*, 529 U.S. 266 (2000).

appellate court reversed, the Florida Supreme Court upheld the trial court. Florida sought review in the U.S. Supreme Court because other courts had held that such evidence is admissible. The U.S. Supreme Court agreed to hear the case to settle the dispute.

The U.S. Supreme Court referred to its holding in *Terry v. Ohio*, discussed in the text, noting the differences between the two cases. In *J.L.*, the officers did not observe any behavior that was suspicious. They had no reason, other than the anonymous tip, to believe that any of these young men were armed and dangerous. According to the Supreme Court, the anonymous tip alone was not sufficient to warrant the search, and thus the evidence secured by means of that illegal search was properly excluded from trial. Police may not search for weapons without reasonable suspicion, as established in *Terry*.

Supplement 4.13. May the Police Prevent a Person from Entering His or Her Own Home? The Case of *Illinois v. McArthur*

In *Illinois v. McArthur*,[1] the U.S. Supreme Court approved the decision of police to prevent Charles McArthur from reentering his home after police received a tip from McArthur's wife, Tera McArthur, that "Chuck has dope in there." Tera McArthur had summoned the police to keep the peace while she removed her personal belongings from the trailer in which she had lived with her husband. After she finished, Tera told police about the drugs. By that time, Charles McArthur was on the porch. Police asked him for permission to search the trailer; he refused. Police then told McArthur that he could not reenter the trailer unless he was accompanied by a police officer. Approximately two hours later, the police entered the trailer with a search warrant, found less than 2.5 grams of marijuana, and arrested McArthur.

McArthur moved to have the drugs excluded as evidence, arguing that they were seized during an improper search. The trial court granted the motion; the U.S. Supreme Court ruled 8 to 1 that the seizure was proper. The Court held that the restriction on McArthur's freedom to return unaccompanied to the inside of the trailer was reasonable because

- The police had probable cause to believe that illegal drugs were inside the trailer.
- The police had good reason to fear that McArthur might destroy the drugs if he reentered the trailer unaccompanied.
- The police made reasonable efforts to reconcile the need to protect McArthur's right to privacy while maintaining good law enforcement.
- The police limited the restraint to a reasonable time period, approximately two hours.

[1] *Illinois v. McArthur*, 531 U.S. 326 (2001).

Supplement 4.14. Warrantless Home Searches When Occupants Disagree About Consent

A critical issue with regard to search and seizure in the home is whether police may enter a home to search without a warrant if one occupant consents and another does not. This scenario might be expected to occur in circumstances involving domestic disputes as illustrated by the facts in the following two cases, one of which permits the search and one of which does not. Note the factual differences carefully.

In 2014, Justice Samuel Alito, writing for the U.S. Supreme Court in *Fernandez v. California*,[1] distinguished that case from the Court's 2006 decision in *Georgia v. Randolph*. In so doing, Justice Alito emphasized a very important principle of legal interpretation: The unique facts of a case are critical to an understanding of a court's holding in the case.

> Our cases firmly establish that police officers may search jointly occupied premises if one of the occupants consents. . . . In *Georgia v. Randolph*, we recognized a narrow exception to this rule, holding that the consent of one occupant is insufficient when another occupant is present and objects to the search. In this case we consider whether *Randolph* applies if the objecting occupant is absent when another occupant consents.[2]

In the 2006 case, Scott Randolph and his wife, Janet, who lived in Americus, Georgia, were separated, and she went to her parents' home in Canada, taking their son with her. She returned over a month later, and the record was not clear whether she was there for purposes of attempting reconciliation with her husband or to remove possessions. She called police to tell them that her husband had taken their son. When the police arrived, she told them her husband was a cocaine user and that his habit had caused financial problems. The husband returned shortly thereafter, and told the police that he had removed the son because he feared that his wife would take him out of the country again, and that he was not a drug abuser but that his wife had problems with alcohol and other drugs. One officer went with the wife to retrieve the son. When they returned, she again told the officer that her husband had drug problems and that there was evidence of drugs in the house. The officer asked for permission to search the home. The husband refused. The wife consented and directed the officers to her husband's room. The police found evidence of drugs. One officer left to get an evidence bag from his car and to call his supervisor, who told him to get a search warrant before continuing the search. When the officer returned to the house, the wife revoked her consent to a search. Both of the Randolphs were taken to the police station, and the police returned to the house with a search warrant, found more evidence, and arrested the husband for drug offenses. He was indicted for cocaine possession. His motion to suppress the evidence was denied on the grounds that the wife had common access to the property and thus had the legal ability to consent. Randolph was convicted and appealed. The U.S. Supreme Court ruled that the evidence relating to the husband should have been suppressed.

In 2014, however, the U.S. Supreme Court ruled that the evidence from the objecting suspect of a co-occupied home could be admitted. Walter Fernandez, a suspect in another

[1] *Fernandez v. California*, 571 U.S. 292 (2014).
[2] *Georgia v. Randolph*, 547 U.S. 103 (2006).

crime, which was thought to involve gang members, was seen running into an apartment, and within minutes police heard screams coming from that building. Police called for backup and then knocked on the apartment door, which was opened by a woman holding a baby. She appeared to have been injured, with fresh wounds, including blood on her shirt and hand. When asked if anyone else was in the apartment, she responded that only her 4-year-old son was in there with her. Officers asked her to step outside the apartment so they could conduct a protective sweep. At that point, Fernandez appeared in only boxer shorts and informed police they had no right to enter.

Officers suspected that Fernandez had assaulted the woman. They removed him from the apartment and placed him under arrest. He was identified by another victim as the one who had attacked him in the other crime in the area that police were investigating. Police then took Fernandez to the station for booking. They returned to the house about an hour later, told the female occupant that they had Fernandez under arrest and he was being held, and asked for permission to search the premises. She gave oral and written consent to the search, which was conducted and resulted in evidence of criminal activity. The jury found that the woman's consent was not coerced, and that was not an issue on the appeal.

The U.S. Supreme Court upheld the search, noting that the *Randolph* exception was just that, an exception to the general rule that one occupant can consent for others. In *Randolph*, the objecting occupant was present and voiced his objection. Justice Alito quoted the following portion of *Randolph* as crucial to explaining the holding in *Fernandez*:

> The Court reiterated the proposition that a person who shares a residence with others assumes the risk that "any one of them may admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another." But the Court held that "a physically present inhabitant's express refusal of consent to a police search [of his home] is dispositive as to him, regardless of the consent of a fellow occupant."

Justice Alito emphasized that if the injured woman were not permitted to give police consent to search the premises without the consent of Fernandez, that would "show disrespect for her independence. Having beaten [Roxanne] Rojas, petitioner would bar her from controlling access to her own home until such time as he chose to relent. The Fourth Amendment does not give him that power."

Supplement 4.15. Police Searches of Passengers and Containers When a Driver Is Stopped and Arrested

In *Wyoming v. Houghton*,[1] a police officer stopped an automobile when he noted that the driver was speeding and the car had a defective brake light. When he approached the car, the officer saw a hypodermic syringe in the driver's shirt pocket. The driver, David Young, and his two female passengers, both also in the front seat, were told to wait in the car under the surveillance of two backup officers, while the first officer went to his car to get gloves. When he returned, he asked Young to get out of the car and put the syringe on top of it. He inquired why Young had a syringe. Young responded that he used it to take drugs. At that point, the two passengers were ordered to exit the vehicle, and the police searched the car for contraband. They found a purse on the back seat, and one of the passengers, Sandra K. Houghton, the respondent in this case, admitted that it was hers. The purse contained Houghton's driver's license with her correct identification. When questioned before this search, Houghton had told the officer that she was Sandra James and that she had no identification. When asked why she had lied, Houghton told the officer she did that "in case things went bad."[2]

A thorough search of the purse revealed a brown pouch and a black wallet-type container. Houghton denied that she owned the former but admitted ownership of the latter. Officers found illegal drugs, drug paraphernalia, and a syringe in each. Houghton stated that she did not know how the contraband got into her purse. The officer noticed fresh needle marks on Houghton's arms and arrested her for felony possession of methamphetamine in a liquid amount greater than three-tenths of a gram. Her motion to have the contraband excluded was denied; she was convicted. A divided Wyoming Supreme Court reversed the conviction, stating that the officer should have known that the purse did not belong to the driver, and there was no probable cause to search the possessions of the passengers. Thus, the evidence against Houghton should have been excluded, as the search violated the Fourth and Fourteenth Amendments. By a 6-to-3 vote, the U.S. Supreme Court reversed, holding that the police had probable cause to search the car and thus were permitted to search the appellee's belongings that might have contained the items for which the police were searching.[3]

In *Maryland v. Pringle*, the U.S. Supreme Court considered the following fact pattern. The appellant was a passenger in the front seat of a car; another passenger was in the back seat. The police had probable cause to stop the driver of the car because he was speeding. The driver and the passengers consented to a search, during which the police found cocaine in the back seat armrest and a significant amount of cash in the glove compartment. None of the occupants claimed possession of the drugs or the cash. All three occupants of the car were arrested and charged with possession of illegal drugs. Joseph Pringle argued successfully to a Maryland appellate court that the police did not have probable cause to arrest him, and thus the illegal drugs and questionable cash should not have been admitted as evidence against him, although he acknowledged that those items were his property. The U.S. Supreme Court disagreed and held that the arrest was proper. According to the Court, a reasonable officer could have thought any

[1] *Wyoming v. Houghton*, 526 U.S. 295 (1999).
[2] *Wyoming v. Houghton*, 526 U.S. 295 (1999).
[3] *Wyoming v. Houghton*, 526 U.S. 295 (1999).

or all of the car's occupants were responsible for the contraband; thus, the officers had probable cause to arrest all three occupants.[4]

[4] *Maryland v. Pringle*, 540 U.S. 366 (2003).

Supplement 4.16. Person Searches Must Be Reasonable

The following excerpt from a U.S. Supreme Court decision illustrates several issues concerning search and seizure of a person.

Safford Unified School District #1 v. Redding
557 U.S. 364 (2009), cases and citations omitted

The issue here is whether a 13-year-old student's Fourth Amendment right was violated when she was subjected to a search of her bra and underpants by school officials acting on reasonable suspicion that she had brought forbidden prescription and over-the-counter drugs to school. Because there were no reasons to suspect the drugs presented a danger or were concealed in her underwear, we hold that the search did violate the Constitution, but because there is reason to question the clarity with which the right was established, the official who ordered the unconstitutional search is entitled to qualified immunity from liability.

The events immediately prior to the search in question began in 13-year-old Savana Redding's math class at Safford Middle School one October day in 2003. The assistant principal of the school, Kerry Wilson, came into the room and asked Savana to go to his office. There, he showed her a day planner, unzipped and open flat on his desk, in which there were several knives, lighters, a permanent marker, and a cigarette. Wilson asked Savana whether the planner was hers; she said it was, but that a few days before she had lent it to her friend, Marissa Glines. Savana stated that none of the items in the planner belonged to her.

Wilson then showed Savana four white prescription-strength ibuprofen 400-mg pills, and one over-the-counter blue naproxen 200-mg pill, all used for pain and inflammation but banned under school rules without advance permission. He asked Savana if she knew anything about the pills. Savana answered that she did not. Wilson then told Savana that he had received a report that she was giving these pills to fellow students; Savana denied it and agreed to let Wilson search her belongings. Helen Romero, an administrative assistant, came into the office, and together with Wilson they searched Savana's backpack, finding nothing.

At that point, Wilson instructed Romero to take Savana to the school nurse's office to search her clothes for pills. Romero and the nurse, Peggy Schwallier, asked Savana to remove her jacket, socks, and shoes, leaving her in stretch pants and a T-shirt (both without pockets), which she was then asked to remove. Finally, Savana was told to pull her bra out and to the side and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree. No pills were found. . . .

[T]he school's policies strictly prohibit the nonmedical use, possession, or sale of any drug on school grounds, including "[a]ny prescription or over-the-counter drug, except those for which permission to use in school has been granted pursuant to Board policy." A week before Savana was searched, another student, Jordan Romero (no relation of the school's administrative assistant), told the principal and Assistant Principal Wilson that "certain students were bringing drugs and weapons on campus," and that he had been sick after taking some pills that "he got from a classmate." On the morning of October 8, the same boy handed Wilson a white pill that

he said Marissa Glines had given him. He told Wilson that students were planning to take the pills at lunch.

Wilson learned from Peggy Schwallier, the school nurse, that the pill was Ibuprofen 400 mg, available only by prescription. Wilson then called Marissa out of class. Outside the classroom, Marissa's teacher handed Wilson the day planner, found within Marissa's reach, containing various contraband items. Wilson escorted Marissa back to his office.

In the presence of Helen Romero, Wilson requested Marissa to turn out her pockets and open her wallet. Marissa produced a blue pill, several white ones, and a razor blade. Wilson asked where the blue pill came from, and Marissa answered, "I guess it slipped in when *she* gave me the IBU 400s." When Wilson asked whom she meant, Marissa replied, "Savana Redding." Wilson then enquired about the day planner and its contents; Marissa denied knowing anything about them. Wilson did not ask Marissa any followup questions to determine whether there was any likelihood that Savana presently had pills: neither asking when Marissa received the pills from Savana nor where Savana might be hiding them.

Schwallier did not immediately recognize the blue pill, but information provided through a poison control hotline indicated that the pill was a 200-mg dose of an anti-inflammatory drug, generically called naproxen, available over the counter. At Wilson's direction, Marissa was then subjected to a search of her bra and underpants by Romero and Schwallier, as Savana was later on. The search revealed no additional pills.

It was at this juncture that Wilson called Savana into his office and showed her the day planner. Their conversation established that Savana and Marissa were on friendly terms: while she denied knowledge of the contraband, Savana admitted that the day planner was hers and that she had lent it to Marissa. Wilson had other reports of their friendship from staff members, who had identified Savana and Marissa as part of an unusually rowdy group at the school's opening dance in August, during which alcohol and cigarettes were found in the girls' bathroom. Wilson had reason to connect the girls with this contraband, for Wilson knew that Jordan Romero had told the principal that before the dance, he had been at a party at Savana's house where alcohol was served. Marissa's statement that the pills came from Savana was thus sufficiently plausible to warrant suspicion that Savana was involved in pill distribution.

This suspicion of Wilson's was enough to justify a search of Savana's backpack and outer clothing. If a student is reasonably suspected of giving out contraband pills, she is reasonably suspected of carrying them on her person and in the carryall that has become an item of student uniform in most places today. If Wilson's reasonable suspicion of pill distribution were not understood to support searches of outer clothes and backpack, it would not justify any search worth making. And the look into Savana's bag, in her presence and in the relative privacy of Wilson's office, was not excessively intrusive, any more than Romero's subsequent search of her outer clothing. . . .

Savana's subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating. . . .

The indignity of the search does not, of course, outlaw it, but it does implicate the rule of

reasonableness . . . that "the search as actually conducted [be] reasonably related in scope to the circumstances which justified the interference in the first place." The scope will be permissible, that is, when it is "not excessively intrusive in light of the age and sex of the student and the nature of the infraction."

Here, the content of the suspicion failed to match the degree of intrusion. Wilson knew beforehand that the pills were prescription-strength ibuprofen and over-the-counter naproxen, common pain relievers equivalent to two Advil, or one Aleve. He must have been aware of the nature and limited threat of the specific drugs he was searching for, and while just about anything can be taken in quantities that will do real harm, Wilson had no reason to suspect that large amounts of the drugs were being passed around, or that individual students were receiving great numbers of pills.

Nor could Wilson have suspected that Savana was hiding common painkillers in her underwear. . . .

In sum, what was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear. We think that the combination of these deficiencies was fatal to finding the search reasonable.

Supplement 4.16.1. Without a Search Warrant, May Blood Be Legally Drawn from an Unconscious Defendant?

The text notes that in January 2019, the U.S. Supreme Court heard oral arguments on the case of *State v. Mitchell*,[1] which involved the issue of whether the constitution permits the warrantless search of the blood of an unconscious individual suspected of driving while intoxicated.

In this case, a law enforcement officer received a report that an individual who appeared to be very drunk had gotten into a vehicle and driven away. The officer located the suspect wandering near a lake. He was obviously drunk, could barely stand up, and was slurring his speech. The officer thought a field sobriety test would not be helpful and might even be dangerous; so he administered a preliminary breath test. That test revealed a blood alcohol concentration (BAC) three times the legal limit in that state. The officer then arrested Gerald Mitchell and drove him to the police station to administer a more reliable breath test with a more efficient instrument. By the time the officer arrived at the police station, Mitchell was too lethargic for the test, and the officer drove him to a hospital. During that drive Mitchell lost consciousness. His blood was drawn; he was arrested and charged with two provisions of the statute prohibiting driving under the influence. When the defendant moved to suppress the results of the tests taken at the hospital, the state defended that they had the legal right to administer those tests based on the state's implied consent law. Mitchell's motion to suppress was denied by the trial court and he was convicted. The Wisconsin Supreme Court upheld the lower court's decision.

The Supreme Court's plurality opinion discusses its precedent cases concerning implied consent laws with regard to operating a motor vehicle while under the influence of a controlled substance. The U.S. Supreme Court vacated and remanded the case with a 5-4 decision. Justice Alito wrote the plurality opinion, in which Justices Roberts, Breyer, and Kavanaugh joined. Justice Thomas joined in the decision but for another reason.

Mitchell v. Wisconsin
139 S.Ct. 2525 (2019), cases and citations omitted

[W]e granted certiorari to decide "[w]hether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement." [The Court then discussed implied-consent laws and the precedent cases interpreting them, followed by the facts of the case, which are briefly outlined in the introduction above.] . . .

The Fourth Amendment guards the "right of the people to be secure in their persons . . . against unreasonable searches" and provides that "no Warrants shall issue, but upon probable cause." A blood draw is a search of the person, so we must determine if its administration here without a warrant was reasonable. Though we have held that a warrant is normally required, we have also "made it clear that there are exceptions to the warrant requirement ." . . . [The Court indicates that it is not deciding) whether the exigent-circumstances exception covers the specific

1 *State v. Mitchell*, 914 N.W. 2d 151 (Wisc. 2018), *reversed*, *remanded*, *Mitchell v. Wisconsin*, 139 S.Ct. 2525 (June 27, 2019).

facts of this case. Instead, we address how the exception bears on the category of cases encompassed by the question on which we granted certiorari—those involving unconscious drivers. In those cases, the need for a blood test is compelling, and an officer's duty to attend to more pressing needs may leave no time to seek a warrant.

The importance of the needs served by BAC testing is hard to overstate. The bottom line is that BAC tests are needed for enforcing laws that save lives. . . . BAC tests are crucial links in a chain on which vital interests hang. And when a breath test is unavailable to advance those aims, a blood test becomes essential. [The opinion goes into detail explaining those conclusions and explains how each crucial precedent applies. Yet, the Court emphasizes that when a drunk driver comes to the attention of police officers, those officers are faced with numerous priorities to which they must attend.]

In sum, all these rival priorities would put officers, who must often engage in a form of triage, to a dilemma. It would force them to choose between prioritizing a warrant application, to the detriment of critical health and safety needs, and delaying the warrant application, and thus the BAC test, to the detriment of its evidentiary value and all the compelling interests served by BAC limits. This is just the kind of scenario for which the exigency rule was born—just the kind of grim dilemma it lives to dissolve.

Mitchell objects that a warrantless search is unnecessary in cases involving unconscious drivers because warrants these days can be obtained faster and more easily." . . .

[W]ith better technology, the time required has shrunk, but it has not disappeared. In the emergency scenarios created by unconscious drivers, forcing police to put off other tasks for even a relatively short period of time may have terrible collateral costs . That is just what it means for these situations to be emergencies. . . .

[Under the facts of this case, in most instances, when blood is drawn without police first securing a warrant, it will not offend the Fourth Amendment.] We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties. Because Mitchell did not have a chance to attempt to make that showing, a remand for that purpose is necessary.

The judgment of the Supreme Court of Wisconsin is vacated, and the case is remanded for further proceedings."

Justice Thomas concurring in the judgment

[Justice Thomas stated that although the Court's plurality opinion's presumption "will rarely be rebutted, it will nevertheless burden both officers and courts who must attempt to apply it."

[Justice Thomas would apply the *per se* rule.] . . . Under that rule, the natural metabolization of alcohol in the blood stream "creates an exigency once police have probable cause to believe the driver is drunk," regardless of whether the driver is conscious.

The Court has consistently held that police officers may perform searches without a warrant when destruction of evidence is a risk. The rule should be no different in drunk-driving cases. Because the plurality instead adopts a rule more likely to confuse than clarify, I concur only in the judgment.

Justice Sotomayor, dissenting, in which Justices Ginsburg and Kagan joined.

The plurality's decision rests on the false premise that today's holding is necessary to spare law enforcement from a choice between attending to emergency situations and securing evidence used to enforce state drunk-driving laws. Not so. To be sure, drunk driving poses significant dangers that Wisconsin and other States must be able to curb. But the question here is narrow: What must police do before ordering a blood draw of a person suspected of drunk driving who has become unconscious? Under the Fourth Amendment, the answer is clear: If there is time, get a warrant .

The State of Wisconsin conceded in the state courts that it had time to get a warrant to draw Gerald Mitchell's blood, and that should be the end of the matter . . . .

Justice Gorsuch, dissenting

[Justice Gorsuch wrote a brief dissent, stating he would not have granted certiorari in this case, arguing that] "the application of the exigent circumstances doctrine in this area poses complex and difficult questions that neither the parties nor the courts below discussed. Rather than proceeding solely by self-direction, I would have dismissed this case as improvidently granted and waited for a case presenting the exigent circumstances question."

Supplement 4.17. A Sample of Cases Interpreting *Miranda*

In *Davis v. United States*, the Court voted 5 to 4 to uphold the conviction of a defendant for murdering a fellow serviceman on naval grounds. After he received the *Miranda* warnings, Davis signed a waiver of his right to counsel and began talking. Later, he stated, "Maybe I should see a lawyer." At that point, officers stopped questioning Davis about the crime and began inquiring whether he wanted counsel. Davis said he did not wish to speak with an attorney, and interrogation resumed. Davis's statements were used against him, and he was convicted. On appeal, the Supreme Court upheld the admission of this evidence, stating that it was not willing to go beyond previous cases and hold that police may not question a suspect who *might* want an attorney. The suspect must *request* an attorney.[1] This case is not to be confused with the Court's previous holding in *Edwards v. Arizona,* that once a suspect has invoked the right to counsel, the police must cease interrogation.[2]

In 2002, in *Dickerson v. United States*,[3] the U.S. Supreme Court reaffirmed *Miranda*, with Chief Justice William H. Rehnquist writing the opinion and calling *Miranda* a part of American culture. *Dickerson* involved a 1968 congressional statute,[4] which provided that, in determining whether a confession is voluntary, courts should weigh several factors, only one of which is whether the *Miranda* warning was given. The issue before the Supreme Court in the *Dickerson* case was whether the federal statute was an unconstitutional attempt by Congress to overrule *Miranda*. It had been assumed that *Miranda* established an irrebuttable presumption that a confession is not voluntary if it is made prior to the giving of the *Miranda* warning. The argument was that the U.S. Constitution does not require this presumption; thus, Congress has the power to reverse the rule by statute, which it did in the 1968 law. Federal prosecutors had made little or no effort to enforce this statute until the *Dickerson* case.

In *Dickerson*, the U.S. Supreme Court ruled that the *Miranda* rule is constitutional; it rests on the principles of due process as guaranteed by the Fourteenth Amendment and the Fifth Amendment's privilege against self-incrimination. Thus, Congress did not have the power to reverse the requirement by statute. Reversal would have required a constitutional amendment.

Dickerson did not answer all of the *Miranda* questions, but during its 2003-2004 term, the U.S. Supreme Court decided three cases involving the issue of whether police may question suspects first and then issue the *Miranda* warning after those suspects have confessed. The case of *Missouri v. Seibert* involved Patrice Seibert, whose son, Jonathan, age 12 and suffering from cerebral palsy, died in his sleep in their mobile home. Seibert was concerned that she would be charged with child neglect when authorities discovered that Jonathan had bedsores. In her presence, Seibert's two teenage sons and two of their friends conspired to burn the dwelling and thus destroy any evidence of neglect. The boys proposed to leave Donald Rector, a developmentally disabled teen who lived with the Seiberts, in the home to make it appear that Jonathan had not been left alone. Two of the boys, including Darian, one of Seibert's sons, set the fire, in which Donald died. Five days later, when Seibert was sleeping in the waiting room at the hospital in which Darian was being treated for burns, police interrogators awakened her

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[1] *Davis v. United States*, 512 U.S. 452 (1994).
[2] *Edwards v. Arizona*, 451 U.S. 477 (1981); *see also Minnick v. Arizona*, 498 U.S. 146 (1990).
[3] *Dickerson v. United States*, 530 U.S. 428 (2000).
[4] USCS, Chapter 18, Section 3501 (2019).

and questioned her about the fire, using repeatedly the phrase, "Donald was also to die in his sleep." The interrogators said they were instructed to question the suspect and get a confession before giving her the *Miranda* warnings. Seibert confessed, was tried, and convicted. The U.S. Supreme Court held that questioning a suspect first tended to thwart the purpose of the *Miranda* warning and thus the confession violated Seibert's constitutional rights.[5]

In the second case, *United States v. Fellers*, John Fellers was convicted of drug charges. The police had gone to Fellers's home, told him they were there to discuss his involvement in drug distribution, and asked to talk with him. Fellers invited the police into his home, after which they told him that a grand jury had indicted him on drug charges and that they had a warrant for his arrest. The police named four of the persons with whom the indictment stated Fellers had conspired. Fellers told the officers that he knew the four and had used drugs with them. Fellers was arrested and taken to the county jail, where he was given his *Miranda* warning for the first time. Fellers then repeated his earlier statement. He petitioned the judge to exclude these statements from his trial. The statements made at his home were excluded. Those made at the jail were admitted and he was convicted. On appeal, Fellers argued that the jailhouse statements should have been excluded as the "forbidden fruits" (evidence obtained as the result of an illegal search or an illegal interrogation) of the statements made in his home in violation of his constitutional rights. The U.S. Supreme Court found that the police had deliberately elicited the statements from Fellers at his home, in violation of his Sixth Amendment right to counsel. The Court remanded the case for factual determinations.[6]

The third case, *United States v. Patane*, involved the use of physical evidence secured before the police gave the *Miranda* warning. Colorado Springs, Colorado police went to the home of Samuel Patane, a felon accused of violating a domestic restraining order, to arrest him. After Patane was arrested and handcuffed, one officer began reading him the *Miranda* warning, but Patane stopped the officer. When the police later asked him about a gun, Patane told them where it could be found. That weapon, secured from Patane before he had heard his full *Miranda* rights, was admitted at his trial. Patane was convicted of being in possession of a firearm, which is illegal for felons. The U.S. Supreme Court held that the fruits of an unwarned but voluntary statement from a suspect may be admitted against that person at trial.[7]

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[5] *Missouri v. Seibert*, 2002 Mo. App. LEXIS 401 (Mo. Ct. App. 2001), *aff'd*, 542 U.S. 600 (2004).
[6] *United States v. Fellers*, 285 F.3d 721 (8th Cir. 2002), *rev'd, remanded*, 540 U.S. 519 (2004), *and aff'd in part and remanded in part*, 397 F.3d 1090 (8th Cir. 2005), *cert. denied*, 546 U.S. 933 (2005).
[7] *United States v. Patane*, 304 F.3d 1013 (10th Cir. 2002), *rev'd, remanded*, 542 U.S. 630 (2004).

Chapter 5. Problems and Issues in Policing

Supplement 5.1. Earlier Studies of How Police Allocate Their Work Time

In a classic and often cited study, James Q. Wilson sampled calls to the Syracuse (New York) Police Department in 1966 and found that only 10.3 percent of those calls related to law enforcement, compared with 30.1 percent for order maintenance. Requests for services dealing with accidents, illnesses, and lost or found persons or property constituted 37.5 percent (the largest category of calls), whereas 22.1 percent of the calls were for information.[1]

In another classic study, also frequently cited since its 1971 publication, Albert J. Reiss Jr. analyzed calls to the Chicago Police Department. His findings were similar to those of Wilson in one respect: 30 percent of the calls were for noncriminal matters. But Reiss found that 58 percent of the calls were related to law enforcement matters.[2] In 1980, Richard J. Lundman published the results of his study of police activities in five jurisdictions. Lundman found law enforcement to be the most frequent category of functions in which police engaged, consuming slightly less than one-third of all police time.[3]

The inconsistent findings of these studies may be attributed to the different methodology used for assessing police time allocation. Wilson and Reiss analyzed calls made to police departments; Lundman observed officers on patrol. Perhaps a more important variable in explaining the difference lies in the failure to specify which activities would be included in each category.

Carefully defined, narrow categories may produce a more accurate picture of police time allocation. Eric J. Scott categorized more than 26,000 calls to police departments. According to Scott's 1981 publication, 21 percent of the calls were for information, 17 percent concerned nonviolent crimes, 12 percent were for assistance, 22 percent were for public nuisances, 9 percent were for traffic problems, 8 percent were citizens offering information, and 7 percent were concerned with interpersonal conflict. Other categories were violent crimes (representing only 2 percent of the calls), medical assistance, dependent persons, and calls regarding internal operations. Each of the categories was subdivided into more specific categories. For example, the category *assistance* included animal problems, property checks, escorts and transports, utility problems, property discoveries, assistance to motorists, fires, alarms, crank calls, unspecified requests, and other.[4]

According to Scott, the failure of other investigators to define each category carefully was a serious problem because "the addition or subtraction of a particular call from some categories can cause a large change in the percentage of calls attributable to that category."[5] Scott

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[1]James Q. Wilson, *Varieties of Police Behavior: The Management of Law and Order in Eight Communities* (Cambridge, MA: Harvard University Press, 1968), p. 19.
[2]Albert J. Reiss Jr., *The Police and the Public* (New Haven, CN: Yale University Press, 1971), pp. 63, 64, 71.
[3]Richard J. Lundman, "Police Patrol Work: A Comparative Perspective," in *Police Behavior: A Sociological Perspective*, ed. Richard J. Lundman (New York: Oxford University Press, 1980), p. 55.
[4]Eric J. Scott, *Calls for Service: Citizen Demand and Initial Police Performance*, National Institute of Justice (Washington, D.C.: U.S. Department of Justice, July 1981), pp. 24-30.
[5]Ibid., p. 27.

was concerned with the problem of coding calls as *crime* or *noncrime*. Many police activities involve a little of each and cannot be coded accurately into two discrete categories. As a result, the various studies are not comparable, as it is not possible to determine how specific types of calls in the various studies were coded.

Supplement 5.2. The Pro Bono Work to Empower and Represent Act of 2018

In September 2018, President Donald J. Trump signed the so-called Power Bill, which is based on the assumption that domestic violence victims will be more empowered if they are adequately represented in court proceedings pertaining to the violence they have suffered in a domestic relationship. Some of the findings of that bill are as follows:

Sec. 2. FINDINGS.

(1) Extremely high rates of domestic violence, dating violence, sexual assault, and stalking exist at the local, State, tribal, and national levels and such violence or behavior harms the most vulnerable members of our society.

(2) According to a study commissioned by the Department of Justice, nearly 25 percent of women suffer from domestic violence during their lifetime.

(3) Proactive efforts should be made available in all forums to provide pro bono legal services and eliminate the violence that destroys lives and shatters families.

(4) A variety of factors cause domestic violence, dating violence, sexual assault, and stalking, and a variety of solutions at the local, State, and national levels are necessary to combat such violence or behavior.

(5) According to the National Network to End Domestic Violence, which conducted a census including almost 1,700 assistance programs, over the course of 1 day in September 2014, more than 10,000 requests for services, including legal representation, were not met.

(6) Pro bono assistance can help fill this need by providing not only legal representation, but also access to emergency shelter, transportation, and children.

(7) Research and studies have demonstrated that the provision of legal assistance to victims of domestic violence, dating violence, sexual assault, and stalking reduces the probability of such violence or behavior reoccurring in the future and can help survivors move forward.

(8) Legal representation increases the possibility of successfully obtaining a protective order against an attacker, which prevents further mental and physical injury to a victim and his or her family, as demonstrated by a study that found that 83 percent of victims represented by an attorney were able to obtain a protective order, whereas only 32 percent of victims without an attorney were able to do so.

(9) The American Bar Association Model Rules include commentary stating that "every lawyer regardless of professional prominence or professional workload, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer."

(10) As leaders in their legal communities, judges in district courts should encourage lawyers to provide pro bono resources in an effort to help victims of such violence or behavior escape the cycle of abuse.

(11) A dedicated army of pro bono attorneys focused on this mission will inspire others to devote efforts to this cause and will raise awareness of the scourge of domestic violence, dating violence, sexual assault, and stalking throughout the country.

(12) Communities, by providing awareness of pro bono legal services and assistance to survivors of domestic violence, dating violence, sexual assault, and stalking, will empower those survivors to move forward with their lives.[1]

[1]The Pro bono Work to Empower and Represent Act of 2018, S. 717 (2018).

Supplement 5.3. Legal Issues Concerning Police Decisions in the Cases of Mentally Challenged Persons

City & County of San Francisco v. Sheehan, decided by the U.S. Supreme Court in 2015, involved a civil lawsuit filed by a mentally challenged woman who alleged that the city and county had failed to accommodate her mental challenges.

City and County of San Francisco v. Sheehan
135 S. Ct. 1765 (2015), cases and citations omitted

We granted certiorari to consider two questions relating to the manner in which San Francisco police officers arrested a woman who was suffering from a mental illness and had become violent. After reviewing the parties' submissions, we dismiss the first question as improvidently granted. We decide the second question and hold that the officers are entitled to qualified immunity because they did not violate any clearly established Fourth Amendment rights. . . . [The Court discusses the facts of the case.]

In August 2008, Sheehan [the mentally ill person] lived in a group home for people dealing with mental illness. Although she shared common areas of the building with others, she had a private room. On August 7, Heath Hodge, a social worker who supervised the counseling staff in the building, attempted to visit Sheehan to conduct a welfare check. Hodge was concerned because Sheehan had stopped taking her medication, no longer spoke with her psychiatrist, and reportedly was no longer changing her clothes or eating.

Hodge knocked on Sheehan's door but received no answer. He then used a key to enter her room and found Sheehan on her bed. Initially, she would not respond to questions. But she then sprang up, reportedly yelling, "Get out of here! You don't have a warrant! I have a knife, and I'll kill you if I have to." Hodge left without seeing whether she actually had a knife, and Sheehan slammed the door shut behind him.

Sheehan, Hodge realized, required "some sort of intervention," but he also knew that he would need help. Hodge took steps to clear the building of other people and completed an application to have Sheehan detained for temporary evaluation and treatment [in accordance with the law] authorizing temporary detention of someone who "as a result of a mental health disorder, is a danger to others, or to himself or herself, or gravely disabled"). On that application, Hodge checked off boxes indicating that Sheehan was a "threat to others" and "gravely disabled," but he did not mark that she was a danger to herself. He telephoned the police and asked for help to take Sheehan to a secure facility.

[After the officers arrived, they] went to Sheehan's room, knocked on her door, announced who they were, and told Sheehan that "we want to help you." When Sheehan did not answer, the officers used Hodge's key to enter the room. Sheehan reacted violently. She grabbed a kitchen knife with an approximately 5-inch blade and began approaching the officers, yelling something along the lines of "I am going to kill you. I don't need help. Get out." . . . The officers—who did not have their weapons drawn—retreated and Sheehan closed the door. . . . [The officers called for backup and had a choice: wait for them or use forced entry. They thought the situation dangerous, so they chose forced entry. They pushed the door in, prepared to

use pepper spray, which they did when Sheehan refused to drop the knife she was holding. Even after being pepper sprayed, Sheehan did not drop the knife, so an officer shot her twice. She survived. She was subsequently prosecuted for assault with a deadly weapon, making criminal threats, and assault on a police officer. She was acquitted of making threats, the jury could not reach a verdict on the other charges; the prosecutor did not recharge. Sheehan then sued the city on the grounds that the officers did not accommodate her mental disability and thus violated the Americans with Disabilities Act (ADA). Title II of the ADA requires that] "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

Whether the statutory language . . . applies to arrests is an important question that would benefit from briefing and an adversary presentation. [The parties to this lawsuit did not brief the issue, so the Court refused to decide the question of whether the ADA applies to arrests. Also, the issue of whether a public entity can be held liable under Title II for an arrest by its officers had not been decided by the Court, and it declined to do so here.]

The second question presented is whether [the officers] can be held personally liable for the injuries that Sheehan suffered. We conclude they are entitled to qualified immunity. . . .

[The Court states that the officers' opening the door to the room was reasonable the first time.]

The real question, then, is whether, despite these dangerous circumstances, the officers violated the Fourth Amendment when they decided to reopen Sheehan's door rather than attempting to accommodate her disability. [The Court notes that the parties did not brief this issue; the Court could decide it anyway but would not do so. The dissent would have dismissed both issues as improvidently granted.]

Supplement 5.4. Stress in Policing

In recent years, increasing attention has been given to stress and its effects on people in various occupations and professions. A variety of harmful physical results occur when individuals do not handle stress successfully. Although all people may be affected in some way by on-the-job stress, studies have found evidence of particularly high stress rates in some jobs; policing has been called the most stressful.

Attention to the stressors of policing is evident in such books as *CopShock: Surviving Posttraumatic Stress Disorder (PTSD),* written by a member of the American Academy of Experts in Traumatic Stress. The book recounts the experiences of officers who have felt stress, talks about how to deal with the results of stress, and provides resources on the topic.[1]

Another book, *Managing Police Stress,* was written by a former police officer who shot and killed a suspect in self-defense. Subsequently, the officer had a heart attack while on duty, thus enduring another stressing event that can affect any professional. The book is based on the material from the officer's two days of seminars on police stress.[2]

Some police departments have developed stress reduction programs. An example is one sponsored by the National Institute of Justice: "Program for the Reduction of Stress for New York City Police Officers and Their Families," which expanded a previous program that was developed after 21 officers in that city committed suicide in 1994 and 1995. The purpose was to establish a volunteer peer support program. The program involves, among other techniques, the following:

- The use of volunteer peer support officers
- The creation of a database of mental health clinicians trained on issues experienced by police personnel and their families
- The establishment of a 24-hour help line
- Interagency and public-private collaborations[3]

Another stressor in policing is the fear of the police and their families that the officers may be injured or killed in the line of duty. Although most officers are never victimized by the violence of others, the *possibility* of such violence is greater for them than for people in most, if not all, other professions.

One manifestation of stress among police is suicide. The police chief of a large city (whose own son killed a police officer and was then killed by police) said that officer suicide is the most difficult aspect of his job. After three officer suicides in 18 months, the chief implemented a new mental health policy for his department. According to a research professor

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[1]Allen R. Kates, *CopShock: Surviving Posttraumatic Stress Disorder (PTSD)* (Tucson, AZ: Holbrook Street Press, 1999).
[2]Wayne D. Ford, *Managing Police Stress* (Walnut Creek, CA: The Management Advantage, 1988).
[3]W. W. Genet, National Institute of Justice, *Program for the Reduction of Stress for New York City Police Officers and Their Families, Final Report*, http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=185845, accessed March 6, 2011.

who has studied police suicides for over 25 years and who formerly served as a state trooper, 140 to 150 officers take their own lives each year in the United States.[4]

Stress in policing changes with time, and perhaps the greatest fear among police today, especially in large cities, is terrorism. The demands placed on law enforcement by the 9/11 terrorist attacks created significant problems for law enforcement officers. The FBI and many local law enforcement departments reassigned officers from their usual jobs to counterterrorism task forces. Some officers were required to leave their jobs and serve in the war in Iraq. Others were killed in the 9/11 terrorist attacks; many retired. Police departments were required to answer and to investigate many calls concerning substances that might contain deadly anthrax or that might in some other way be related to suspected terrorists. Local departments located in cities with airports faced the need to provide those facilities with added security.

A little over a month after the 9/11 terrorist attacks, officials expressed concern that the diversion of FBI agents to counterterrorism task forces and a deemphasis on drug-related offenses and bank robberies placed increasing pressure on local departments to provide law enforcement in these areas. Most departments were already facing budget problems, which escalated after 9/11 and deepened during the years of subsequent economic downturn. Even the canine patrol was overworked in many cities, with the added calls for bomb checks.

Crime prevention may suffer, but local departments must do their part in assisting federal officials to prevent terrorism, and departments acted quickly after 9/11. A big issue for local police departments in their fight against terrorism is funding, much of which comes from the federal Department of Homeland Security (DHS), which has been strained and, in some cases, cut.[5]

In addition to federal cuts, many local departments have experienced budget cuts, some of which resulted in layoffs. By 2011, many states were also facing extreme budget cuts and public sector employees, such as police, were affected. Some jurisdictions opted for layoffs, and others imposed salary or pension cuts. One cost-saving measure that might be unexpected, however, is the use of volunteers. On March 2, 2011, the *New York Times* published an article entitled, "Police Departments in Crisis Turn to Volunteers." The article described the process of using volunteers to process such activities as:

- Checking out burglar alarms in Colorado Springs, Colorado
- Processing crime scenes in Mesa, Arizona
- Collecting evidence, searching for missing persons and stolen vehicles, interviewing witnesses, and investigating cold cases in Fresno, California.[6]

The media ran articles on state budgets and how the cuts might affect public employees, suggesting that many local and state politicians had courted public employees by offering hefty salaries and benefits in the past, and now those commitments were draining city and state budgets. By December 2013, in Desert Hot Springs, California, officials were claiming that

[4]"Officer Suicides Prompt Chief to Ramp up Counseling," *Dallas Morning News* (November 19, 2011), p. 1B.
[5]"In N.Y., Anti-Terrorism Cuts Called 'Knife in the Back,'" *Los Angeles Times* (June 2, 2006), p. 18.
[6]"Police Departments in Crisis Turn to Volunteers," *New York Times* (March 2, 2011), p. 13.

police pensions and salaries were driving that city into bankruptcy, adding that it is not that the police do not deserve the salaries—rather, "We can't pay them."[7]

[7]David von Drehle, "The Other Financial Crisis," *Time* (June 28, 2010): 26; "Police Salaries and Pensions Push California City to Brink," *New York Times* (December 28, 2013), p. 1.

Supplement 5.5. The Police Subculture

One way of handling dilemmas, role conflicts, and stress is to withdraw into a more comfortable situation. If sufficient numbers of a group do so, a subgroup, or subculture, forms. The subculture has values and expectations that distinguish it from the dominant culture and creates solidarity among its members.

Police can become isolated from people who might be their friends if it were not because of the officers' authority and responsibility to regulate their daily lives. Traffic violations and laws regulating the use of alcohol and other drugs are examples. It would be difficult to form a close relationship with someone who was expected to enforce traffic or other laws that you might violate from time to time. Thus, many police confine their personal lives to their own families and other police and their families.

Earlier studies suggested that police were a homogeneous group who formed subcultures and manifested a distinct personality type. They were said to be authoritarian, cynical, punitive, rigid, physically aggressive, assertive, and impulsive risk takers.[1] Police were viewed as people who looked for negatives and who stereotyped situations, making quick judgments whenever they thought crime was involved. Such attitudes may lead to violence.

It was assumed that the best way to alleviate police cynicism was to increase their professionalism, but some studies reported that, although "commitment to a professional ideology reduces cynicism among police," the relationship between these two variables was more complex than earlier researchers had thought.[2] Thus, it is necessary to look more carefully at the dimensions of each of the variables: cynicism and professionalism.

Some evidence indicates that police officers become less cynical as their length of service increases.[3] Taken as a whole, research on police cynicism underscores the importance of looking carefully at all variables that might account for cynicism and analyzing them in their full complexity. It is not sufficient to find cynicism and professionalism (or any other trait) among police officers or chiefs and draw the conclusion that the relationship is a simple one. However, professionalism is important in policing, as it is in other occupations and professions.

Another factor that is evidence of a police subculture is known as the *blue code of silence*, which means that police will not testify against each other or even report any improper behavior. This code is reflected in at least one of the elements that criminologists have identified as characterizing police culture: bravery, autonomy, and secrecy. "The police subculture stresses these sentiments and teaches new officers the value of adopting these attitudes—and the consequence of not conforming." It is further advocated that the police subculture is dominated by two cultural themes: the need for solidarity and the isolation of police from the rest of society.

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[1]See Arthur Niederhoffer, *Behind the Shield: The Police in Urban Society* (Garden City, NY: Doubleday, 1969).
[2]Eric D. Poole and Robert M. Regoli, "An Examination of the Effects of Professionalism on Cynicism Among Police," *Social Science Journal* 16 (October 1979): 64.
[3]Dennis Jay Wiechman, "Police Cynicism Toward the Judicial Process," *Journal of Police Science and Administration* 7 (September 1979): 340-345.

Supplement 5.6. Earlier Commissions Studied Corruption in the New York Police Department

Two earlier commissions revealed the extent of corruption in the New York Police Department. Each is summarized briefly.

The Knapp Commission and Its Aftermath

In 1970, in response to allegations of corruption in New York City, Mayor John V. Lindsay issued an executive order establishing the Knapp Commission. The 1972 commission's report disclosed widespread police corruption. Rookies were initiated into the system quickly, many became corrupt, and some grew cynical. The commission found that police were involved with organized crime (the most lucrative form of corruption); payoffs from citizens, especially for traffic citations; and the acceptance of money for overlooking violations of licensing ordinances.[1]

New York Police Department officials contend that only a very small percentage of police officers are involved in corruption. They say that undercover tests of integrity, whereby some officers are assigned to make secret reports on the behavior of other officers, have eliminated most corruption. Others contend that corruption has not been eliminated in the NYPD or any other police department; they hold that it is inevitable. According to one authority,

> corruption is endemic to policing. The very nature of the police function is bound to subject officers to tempting offers. . . . Solutions, so far, seem inadequate and certainly are not likely to produce permanent results.[2]

The Mollen Commission

In the fall of 1993, the Mollen Commission, headed by former judge Milton Mollen, began a study of police corruption in New York City. The final report of the commission, issued in July 1994, concluded that corruption was less common in New York City than it was during the Knapp Commission study but that its nature had changed. In 1994, more officers sought opportunities to move beyond bribery to violating other laws. Some officers stole routinely from drug dealers after stopping them for traffic violations, and some used violence to carry out their thefts. The commission found that corruption flourished in some parts of New York City because of opportunities but also because the police culture placed a greater emphasis on loyalty than on integrity. The majority of New York City's officers were not involved in corruption, but they feared reporting those who were.[3]

The Mollen Commission's 1994 conclusion that the NYPD could not police itself and needed an independent commission to do so was followed in 1995 with the origination of the Mayor's Commission to Combat Police Corruption. This commission consists of six

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[1]*The Knapp Commission Report on Police Corruption* (New York: Braziller, 1972).
[2]Herman Goldstein, *Policing a Free Society* (Cambridge, MA: Ballinger, 1977), p. 218.
[3]"Police Corruption in New York Found Rarer but More Virulent," *Criminal Justice Newsletter* 25 (July 15, 1994): 1-2.

commissioners, all lawyers, who serve without pay, and four staff lawyers. This commission conducts audits on the NYPD and analyzes its anticorruption strategies.[4]

By far the most shocking incident of police misconduct in the NYPD is more recent. In April 2006, a jury convicted two highly decorated former NYPD detectives of eight murders and other charges associated with their links to organized crime. Louis Eppolito, 57, and Stephen Caracappa, 64, allegedly engaged in what one prosecutor called "the bloodiest, most violent betrayal of the badge this city has ever seen." Both were convicted and sentenced to the maximum: life in prison without the possibility of parole.[5]

Subsequently, despite overwhelming evidence that Caracappa and Eppolito were guilty of conspiring to take part in at least eight murders for the Mafia, the trial judge reversed these convictions for a technical reason. The **statute of limitations** (five years) had expired for conspiracy. He left open the possibility that both men could be tried on a drug indictment and Eppolito could be tried on a money laundering indictment. In September 2008, the lower court judge's decision was reversed and the convictions of the two retired NYPD detectives were reinstated by a federal appeals court. The U.S. Supreme Court denied their appeal.[6]

In 2009, Bernard B. Kerik, former New York police commissioner and nominee to head the Department of Homeland Security, entered federal prison after he pleaded guilty to eight felonies, including tax fraud and lying to White House officials after his nomination. Kerik was charged with accepting renovations to his New York apartment from a construction firm that allegedly had ties to organized crime. He was described by federal prosecutors "as a corrupt official who sought to trade his authority for lavish benefits."[7] Kerik was released from prison in May 2013 to serve the remainder of his federal sentence under house arrest. In October 2013, he began three years of probation and became an advocate for sentence reform.

The New York City police department again made negative headlines in 2014, this time with alleged disability fraud, as retired police officers constituted most of the 106 police and firefighters who were charged with fraud leading to enhanced pensions. Prosecutors alleged that many of the defendants were leading normal lives, some even holding jobs in private security, landscaping, construction, and so on, while claiming to have become disabled as the result of their work on and after 9/11. Prosecutors estimated that the charged retirees collected over $21 million total. Over 50 suspects entered guilty pleas to Social Security fraud charges by June 7, 2014, and in August and September 2014, two former NYPD officers entered guilty pleas to charges that they were leaders in the fraud scheme. Joseph Esposito was ordered to repay $733,000, and John Minerva was ordered to repay $315,000. Both men received reduced prison sentences in exchange for agreeing to testify against other defendants in the massive fraud case.[8]

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[4]"New York: Manhattan: New Anticorruption Chief," *New York Times* (June 3, 2005), p. 4.
[5]"Police Officers Were Hitmen for the Mafia," *Daily Telegraph* (Australia) (April 8, 2006), p. 22.
[6]*United States v. Eppolito*, 543 F.3d 25 (2d Cir. 2008), *cert. denied*, *Eppolito v. United States*, and *Caracappa v. United States*, 555 U.S. 1148 (2009).
[7]"Kerik Gets 4 Years in Prison for Tax Fraud and Lies," *New York Times* (February 19, 2010), p. 17.
[8]"Six More Arraigned in Disability Fraud," *New York Times* (January 10, 2014), p. 19; "NYC Scheme Ring Leaders Plead Guilty as OIG Issues Disability Fraud Report," Office of the Inspector General, http://oig.ssa.gov/newsroom/blog/sept23-post, accessed December 23, 2014.

Allegations of corruption and other forms of misconduct have also arisen in other police departments, with the frequency and magnitude, along with media attention, greater in large departments. **Supplement 5.7** discusses the Rampart corruption scandal in the Los Angeles Police Department (LAPD).

Supplement 5.7. The Los Angeles Police Department Under Scrutiny

In September 1999, an officer of the Los Angeles Police Department (LAPD) was apprehended for stealing cocaine from an evidence room. This incident led to criminal allegations against the officer, Rafael Perez, and an investigation that resulted in the firing of numerous officers in the Rampart Division of the LAPD. The report on what came to be known as the Rampart corruption scandal was issued in March 2000 and included a list of 108 recommendations for changes. The department was criticized for a lack of training and supervision of officers, a lack of attention to citizen complaints, a "startling lack" of internal auditing, a "near universal ignorance" of the department's policies concerning the use of informants, and the framing and shooting of innocent persons. The 350-page report concluded that mediocrity flourished within the LAPD, with internal policies often ignored by officers and others. The report began with an investigation of the anti-gang unit but was expanded to include other units.[1]

In February 2000, Perez was sentenced to five years in prison for stealing cocaine. Part of his plea bargain was that he would not be charged with other crimes to which he admitted, such as framing innocent persons by planting evidence on them and lying about these cases in court hearings, but that plea bargain did not prohibit federal prosecutors from charging Perez with any *federal* crimes he may have committed, which they did. In April 2001, Perez was released after serving only part of his five-year state sentence after the judge ruled that he had met the terms of his plea agreement and that he had been treated unfairly by being incarcerated in jail rather than in prison. Prison time, in contrast to jail time, may result in obtaining more days off a sentence for good behavior.

In his federal case, Perez was sentenced to two years in prison for violating the civil rights of Javier Francisco Ovando, a former gang member who was paralyzed from the waist down after being shot by Perez and officer Nino Durden, who then planted a gun on Ovando and claimed that he had threatened them. In April 2001, Durden pleaded guilty to federal civil rights charges and possessing the illicit weapon he used to frame Ovando. He was sentenced to five years in prison.

The Rampart scandal in the LAPD led to the resignation of Chief Bernard Parks and the appointment of a new police chief in October 2002. William J. Bratton had formerly served as the police commissioner in New York City and prior to that, in Boston.

By April 2005, after the completion of yet another investigation, the city had settled almost all of the 200 civil suits filed in the wake of the Rampart scandal and paid almost $70 million to plaintiffs, with the largest settlement going to Ovando, mentioned earlier. The city attorney stated, "This marks the end of an unfortunate and dark chapter in our city's history." Chief Bratton said he hoped the closing of the Rampart scandal would lead to a cleaner and more diverse and respected LAPD.[2]

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[1]"Los Angeles Police's Report Cites Vast Command Lapses," *New York Times* (March 2, 2000), p. 14; "LAPD Issues Self-Critical Report, but Others Seek Outside Control," *Criminal Justice Newsletter* 30 (March 20, 2000): 2.
[2]"Los Angeles Paying Victims $70 Million for Police Graft," *New York Times* (April 1, 2005), p. 19.

In February 2006, a Los Angeles jury awarded $5 million plus interest and attorney fees to each of three LAPD officers accused in the Rampart corruption scandal. The federal jury concluded that Sergeant Edward Ortiz, Officer Paul Harper, and former Sergeant Brian Liddy were victims of false arrest and malicious prosecution, thus violating their civil rights. A federal appellate court upheld the verdict in 2008. One of the defense attorneys said that the LAPD "frequently throws officers under the bus" when there is a political crisis and that it is time for people to understand that "officers are not expendable." All three officers had been acquitted of corruption-related charges in April 2000.[3]

In the summer of 2009, Chief Bratton announced his plans to retire from the LAPD and join a private security firm. In 2014, as noted in the text, Bratton returned to New York City as police commissioner, a position from which he later retired.

In 2013, the U.S. Department of Justice ended the 12 years of federal monitoring of the LAPD in the aftermath of the Rampart corruption scandal. During the monitoring period, the department was required to install video cameras and voice-monitoring equipment in its police cars. In 2014, officers were charged with tampering in efforts to render the equipment ineffective. According to the media, "[o]fficers must be made to understand that sabotage will not be tolerated, and that the department's leaders intend to continue on the road to enlightened, reformed policing."[4]

[3] "Three Cops Get $15 Million in Rampart Scandal," *UPI Release* (February 10, 2006); "Rampart Officers' Civil Award Upheld," *Los Angeles Times* (July 15, 2008), p. 1B. The case is *Harper v. City of Los Angeles*, 533 F.3d 1010 (9th Cir. 2008).

[4] "An LAPD Disconnect," *Los Angeles Times* (home edition) (April 9, 2014), p. 12.

Supplement 5.8. The U.S. Supreme Court Rules in a Police Use of Force Case: Justice Sotomayor Dissents

In April 2018, the U.S. Supreme Court ruled in a per curiam opinion (no justice is listed as authoring the Court's opinion) that a police officer had qualified immunity to use deadly force in the fact pattern summarized in the following excerpt from the dissenting opinion of Justice Sonya Sotomayor.

Kisela v. Hughes
138 S. Ct. 1148, 1155 (2018), cases and citations omitted.

Justice Sotomayor, dissenting.

Officer Andrew Kisela shot Amy Hughes while she was speaking with her roommate, Sharon Chadwick, outside of their home. The record . . . shows that at the time of the shooting: Hughes stood stationary about six feet away from Chadwick. Hughes was nowhere near the officers, had committed no illegal act, was suspected of no crime, and did not raise the knife in the direction of Chadwick or anyone else. Faced with these facts, the two other responding officers held their fire, and one testified that he "wanted to continue trying verbal command[s] and see if that would work." But not Kisela. He thought it necessary to use deadly force, and so, without giving a warning that he would open fire, he shot Hughes four times, leaving her seriously injured.

If the account of Kisela's conduct sounds unreasonable, that is because it was. And yet, the Court today insulates that conduct from liability under the doctrine of qualified immunity, holding that Kisela violated no "clearly established" law. I disagree. Viewing the facts in the light most favorable to Hughes, as the Court must at summary judgment, a jury could find that Kisela violated Hughes' clearly established Fourth Amendment rights by needlessly resorting to lethal force. In holding otherwise, the Court misapprehends the facts and misapplies the law, effectively treating qualified immunity as an absolute shield. I therefore respectfully dissent. . . . [The opinion summarizes the law of summary judgment, which is not relevant to our discussion.]

Police officers are not entitled to qualified immunity if "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" . . . [The opinion briefly reviews this doctrine, along with case citations. The justice concludes there was no Fourth Amendment violation and cites her reasons as follows.]

First, Hughes committed no crime and was not suspected of committing a crime. The officers were responding to a "check welfare" call, which reported no criminal activity, and the officers did not observe any illegal activity while at the scene. The mere fact that Hughes held a kitchen knife down at her side with the blade pointed away from Chadwick hardly elevates the situation to one that justifies deadly force.

Second, a jury could reasonably conclude that Hughes presented no immediate or objective threat to Chadwick or the other officers. It is true that Kisela had received a report that a woman matching Hughes' description had been acting erratically. But the police

themselves never witnessed any erratic conduct. Instead . . . the record evidence of what the police encountered paints a calmer picture. . . .

Third, Hughes did not resist or evade arrest. Based on this record, there is significant doubt as to whether she was aware of the officers' presence at all, and evidence suggests that Hughes did not hear the officers' swift commands to drop the knife.

Fourth, the record suggests that Kisela could have, but failed to, use less intrusive means before deploying deadly force. . . . That two officers on the scene, presented with the same circumstances as Kisela, did not use deadly force reveals just how unnecessary and unreasonable it was for Kisela to fire four shots at Hughes.

Taken together, the foregoing facts would permit a jury to conclude that Kisela acted outside the bounds of the Fourth Amendment by shooting Hughes four times. . . . [The opinion reviews the cases on which the Court relied for its decision.]

In sum, precedent existing at the time of the shooting clearly established the unconstitutionality of Kisela's conduct. The majority's decision, no matter how much it says otherwise, ultimately rests on a faulty premise: that those cases are not identical to this one. But that is not the law, for our cases have never required a factually identical case to satisfy the "clearly established" standard. It is enough that governing law places "the constitutionality of the officer's conduct beyond debate." Because, taking the facts in the light most favorable to Hughes, it is "beyond debate" that Kisela's use of deadly force was objectively unreasonable, he was not entitled to summary judgment on the basis of qualified immunity. . . .

[The] decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished. Because there is nothing right or just under the law about this, I respectfully dissent.

Supplement 5.9. Courts Analyses of High-Speed Vehicle Chases

In *Jackson v. Brister*, police were summoned to a bank in which a customer was attempting to cash a forged check. When the customer saw the police, she fled the bank in her car, followed by the police. The high-speed chase ended when the customer's car hit another car, killing the driver. The driver's estate sued for civil damages, and the Mississippi Supreme Court ruled that the usual immunity provided to police for civil damages does not apply when officers act recklessly in disregard for human life. The police department policy permits such pursuits only when the officer knows the suspect has committed a felony and that it is reasonable to assume that the suspect is more dangerous to the community than is the risk of a high-speed chase. In this case, the officers could have gotten the license plate number, tracked down the suspect, and arrested her (i.e., the high-speed chase was not necessary).[1]

In 2007, in rejecting a civil claim against police by an injured motorist who became a quadriplegic after his speeding vehicle was pursued by police, the U.S. Supreme Court acknowledged that, although such pursuits are dangerous, in some cases they may be necessary to ensure the safety of others, such as bystanders.[2] In 2014, in *Plumhoff v. Rickard*, the Supreme Court upheld police immunity from liability to the family of a man killed in a high-speed chase, which occurred in Arkansas in 2004. The driver whose conduct led to the chase, Donald Rickard, was stopped by police because his vehicle had only one functioning headlight. Officers asked Rickard if he had been drinking, and he said no. They asked him to produce his driver's license; he refused and appeared nervous, so police instructed him to exit the vehicle. Rather than doing so, Rickard sped away, and police chased him and were soon joined by five other police cruisers. The officers were unsuccessful in their attempt to stop Rickard's vehicle by use of a "rolling roadblock." The cars were described as weaving in and out of traffic, reaching speeds of over 100 m.p.h. and passing more than two dozen other vehicles. Eventually, Rickard's car made contact with a cruiser after Rickard turned into a parking lot. Rickard attempted to drive his vehicle out of the area even when it was flush with a police cruiser. At that point, officers fired three shots into Rickard's vehicle. Rickard reversed his car and managed to flee, at which point they fired 12 shots at the vehicle. Rickard lost control of his car, which crashed into a building. He and his passenger were both killed as the result of the crash and the shots fired by the officers.

The U.S. Supreme Court upheld the officers' use of force. In deciding the reasonableness of their use of force (among other legal issues) under the Fourth Amendment, the Court emphasized that the reasonableness issue must be determined "from the perspective 'of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'" The Court continued as follows:

> We thus "allo[w] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." . . . Rickard's outrageously reckless driving posed a grave public safety risk. . . . Under the circumstances at the moment when the shots were fired, all that a

[1] *City of Jackson v. Brister*, 838 So. 2d 274 (Miss. 2003).
[2] *Scott v. Harris*, 550 U.S. 372 (2007).

reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road. . . . [Thus,] the police acted reasonably in using deadly force to end that risk.

[With regard to the argument that 15 shots were unreasonable, the Court said that] it stands to reason that, if police are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended. . . . [I]f lethal force is justified, officers are taught to keep shooting until the threat is over.[3]

[3]*Plumhoff v. Rickard*, 572 U.S. 765 (2014).

Supplement 5.10. The End of the Exclusionary Rule?

In 2009, the U.S. Supreme Court revisited the exclusionary rule. The opinion in *Herring v. United States*, excerpted here, written by Chief Justice John Roberts, details the relevant facts and the holding of the case.

Herring v. United States
555 U.S. 135 (2009), cases and citations omitted

The Fourth Amendment forbids "unreasonable searches and seizures," and this usually requires the police to have probable cause or a warrant before making an arrest. What if an officer reasonably believes there is an outstanding arrest warrant, but that belief turns out to be wrong because of a negligent bookkeeping error by another police employee? The parties here agree that the ensuing arrest is still a violation of the Fourth Amendment, but dispute whether contraband found during a search incident to that arrest must be excluded in a later prosecution. Our cases establish that such suppression is not an automatic consequence of a Fourth Amendment violation. Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct. Here the error was the result of isolated negligence attenuated from the arrest. We hold that in these circumstances the jury should not be barred from considering all the evidence.

On July 7, 2004, Investigator Mark Anderson learned that Bennie Dean Herring had driven to the Coffee County Sheriff's Department to retrieve something from his impounded truck. Herring was no stranger to law enforcement, and Anderson asked the county's warrant clerk, Sandy Pope, to check for any outstanding warrants for Herring's arrest. When she found none, Anderson asked Pope to check with Sharon Morgan, her counterpart in neighboring Dale County. After checking Dale County's computer database, Morgan replied that there was an active arrest warrant for Herring's failure to appear on a felony charge. Pope relayed the information to Anderson and asked Morgan to fax over a copy of the warrant as confirmation. Anderson and a deputy followed Herring as he left the impound lot, pulled him over, and arrested him. A search incident to the arrest revealed methamphetamine in Herring's pocket, and a pistol (which as a felon he could not possess) in his vehicle. There had, however, been a mistake about the warrant. . . .

The fact that a Fourth Amendment violation occurred—i.e., that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies. Indeed, exclusion "has always been our last resort, not our first impulse," and our precedents establish important principles that constrain application of the exclusionary rule.

First, the exclusionary rule is not an individual right and applies only where it "'result[s] in appreciable deterrence.'" We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation. Instead we have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future.

In addition, the benefits of deterrence must outweigh the costs. "We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence." . . . The principal cost of applying the rule is, of course, letting guilty and

possibly dangerous defendants go free—something that "offends basic concepts of the criminal justice system." "[T]he rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application." [The Court discussed the precedent cases concerning the exclusionary rule.] . . .

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.

We do not suggest that all recordkeeping errors by the police are immune from the exclusionary rule. In this case, however, the conduct at issue was not so objectively culpable as to require exclusion. . . . If the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation. . . .

We conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not "pay its way."

Supplement 5.11. The U.S. Supreme Court Continues Its Holdings Regarding the Exclusionary Rule

In 2016, the U.S. Supreme Court decided another case involving the exclusionary rule. The excerpt below discusses the history of the rule and explains the instant case. The excerpt from the Court's opinion is followed by excerpts from one of the two dissents.

Utah v. Strieff
136 S. Ct. 2056 (2016), cases and citations omitted[1]

Thomas, J., delivered the opinion of the Court.

To enforce the Fourth Amendment's prohibition against "unreasonable searches and seizures," this Court has at times required courts to exclude evidence obtained by unconstitutional police conduct. But the Court has also held that, even when there is a Fourth Amendment violation, this exclusionary rule does not apply when the costs of exclusion outweigh its deterrent benefits. In some cases, for example, the link between the unconstitutional conduct and the discovery of the evidence is too attenuated to justify suppression. The question in this case is whether this attenuation doctrine applies when an officer makes an unconstitutional investigatory stop; learns during that stop that the suspect is subject to a valid arrest warrant; and proceeds to arrest the suspect and seize incriminating evidence during a search incident to an arrest. We hold that the evidence the officer seized as part of the search incident to arrest is admissible because the officer's discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest. . . .

Under the Court's precedents, the exclusionary rule encompasses both the "primary evidence obtained as a direct result of an illegal search or seizure" and, relevant here, "evidence later discovered and found to be derivative of an illegality," the so-called "fruit of the poisonous tree." But the significant costs of this rule have led us to deem it "applicable only . . . where its deterrence benefits outweigh its substantial social costs." . . .

We have accordingly recognized several exceptions to the rule. Three of these exceptions involve the causal relationship between the unconstitutional act and the discovery of evidence. First, the independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source. Second, the inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source. This, and at issue here, is the attenuation doctrine: Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening

[1]For a discussion of the implications of this case, described by the author as the "only major decision where the conservatives prevailed in an ideologically divided case" during the 2015-2016 U.S. Supreme Court term, see an article by esteemed law dean and professor Erwin Chemerinsky, "Chemerinsky: Has the Supreme Court Dealt a Blow to the Fourth Amendment?," *American Bar Association Journal* (August 2, 2016), http://www.abajournal.com, accessed August 4, 2016.

circumstance, so that "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." . . .

In this case, the warrant was valid, it predated Officer Fackrell's investigation, and it was entirely unconnected with the stop. And once Officer Fackrell discovered the warrant, he had an obligation to arrest Strieff. . . . Officer Fackrell's arrest of Strieff thus was a ministerial act that was independently compelled by the pre-existing warrant. And once Officer Fackrell was authorized to arrest Strieff, it was undisputedly lawful to search Strieff as an incident of his arrest to protect Officer Fackrell's safety. . . .

Officer Fackrell was at most negligent. In stopping Strieff, Officer Fackrell made two good-faith mistakes. First, he had not observed what time Strieff entered the suspected drug house, so he did not know how long Strieff had been there. Officer Fackrell thus lacked a sufficient basis to conclude that Strieff was a short-term visitor who may have been consummating a drug transaction. Second, because he lacked confirmation that Strieff was a short-term visitor, Officer Fackrell should have asked Strieff whether he would speak with him, instead of demanding that Strieff do so. Officer Fackrell's stated purpose was to "find out what was going on [in] the house." Nothing prevented him from approaching Strieff simply to ask. . . .

While Officer Fackrell's decision to initiate the stop was mistaken, his conduct thereafter was lawful. The officer's decision to run the warrant check was a "negligently burdensome precautio[n]" for officer safety. And Officer Fackrell's actual search of Strieff was a lawful search incident to arrest.

Moreover, there is no indication that this unlawful stop was part of any systemic or recurrent police misconduct. To the contrary, all the evidence suggests that the stop was an isolated instance of negligence that occurred in connection with a bona fide investigation of a suspected drug house. Officer Fackrell saw Strieff leave a suspected drug house. And his suspicion about the house was based on an anonymous tip and his personal observations.

Applying these factors, we hold that the evidence discovered on Strieff's person was admissible because the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant. Although the illegal stop was close in time to Strieff's arrest, that consideration is outweighed by two factors supporting the State. The outstanding arrest warrant for Strieff's arrest is a critical intervening circumstance that is wholly independent of the illegal stop. The discovery of that warrant broke the causal chain between the unconstitutional stop and the discovery of evidence by compelling Officer Fackrell to arrest Strieff. And, it is especially significant that there is no evidence that Officer Fackrell's illegal stop reflected flagrantly unlawful police conduct. . . .

We hold that the evidence Officer Fackrell seized as part of his search incident to arrest is admissible because his discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to arrest.

Sotomayor, J., filed a dissent, joined in part, by Ginsburg, J.

The Court today holds that the discovery of a warrant for an unpaid parking ticket will forgive a police officer's violation of your Fourth Amendment rights. Do not be soothed by the

opinion's technical language: This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong. If the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the warrant. Because the Fourth Amendment should prohibit, not permit, such misconduct, I dissent. . . .

It is tempting in a case like this, where illegal conduct by an officer uncovers illegal conduct by a civilian, to forgive the officer. After all, his instincts, although unconstitutional, were correct. But a basic principle lies at the heart of the Fourth Amendment. Two wrongs don't make a right. . . . [Justice Sotomayor describes the "fruit of the poisonous tree" doctrine.]

This "exclusionary rule" removed an incentive for officers to search us without proper justification. It also keeps courts from being "made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. When court admit only lawfully obtained evidence, they encourage "those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system." But when courts admit illegally obtained evidence as well, they reward "manifest neglect if not an open defiance of the prohibitions of the Constitution." . . .

Most striking about the Court's opinion is its insistence that the event here was "isolated," with "no indication that this unlawful stop was part of any systemic or recurrent police misconduct." Respectfully, nothing about this case is isolated.

Outstanding warrants are surprisingly common. . . . [The justice presents data on the thousands of such warrants, cites DOJ investigations of specific departments in which police engage in illegal stops and searches, and then continues:] The Justice Department analyzed these warrant-checked stops and reported that "approximately 93% of the stops would have been considered unsupported by articulated reasonable suspicion."

I do not doubt that most officers act in "good faith" and do not set out to break the law. That does not mean these stops are "isolated instance[s] of negligence," however. Many are the product of institutionalized training procedures. The New York City Police Department long trained officers to, in the words of a District Judge, "stop and question first, develop reasonable suspicion later." . . . [In the next section, the justice states as follows:]

Writing only for myself, and drawing on my professional experiences, I would add that unlawful "stops" have severe consequences much greater than the inconvenience suggested by the name. This Court has given officers an array of instruments to probe and examine you. When we condone officers' use of these devices without adequate cause, we give them reason to target pedestrians in an arbitrary manner. We also risk treating members of our communities as second-class citizens.

Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more. This Court has allowed an officer to stop you for whatever reason he wants—as long as he can point to a

pretextual justification after the fact. That justification must provide specific reasons why the officer suspected you were breaking the law, but it may factor in your ethnicity, where you live, what you were wearing, and how you behaved [she cites a case upholding each category]. The officer does not even need to know which law you might have broken so long as he can later point to any possible infraction—even one that is minor, unrelated, or ambiguous.

The indignity of the stop is not limited to an officer telling you that you look like a criminal. The officer may next ask for your "consent" to inspect your bag or purse without telling you that you can decline. Regardless of your answer, he may order you to stand "helpless, perhaps facing a wall with [your] hands raised." If the officer thinks you might be dangerous, he may then "frisk" you for weapons. This involves more than just a pat down. As onlookers pass by, the officer may "feel with sensitive fingers every portion of [your] body. A thorough search [may] be made of [your] arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet."

The officer's control over you does not end with the stop. If the officer chooses, he may handcuff you and take you to jail for doing nothing more than speeding, jaywalking, or "driving [your] pickup truck . . . with [your] 3-year-old son and 5-year-old daughter . . . without [your] seatbelt fastened." At the jail, he can fingerprint you, swab DNA from the inside of your mouth, and force you to "shower with a delousing agent" while you "lift [your] tongue, hold out [your] arms, turn around, and lift [your] genitals." Even if you are innocent, you will now join the 65 million Americans with an arrest record and experience the "civil death" of discrimination by employers, landlords, and whoever else conducts a background check. And, of course, if you fail to pay bail or appear in court, a judge will issue a warrant to render you "arrestable on sight" in the future. . . .

We must not pretend that the countless people who are routinely targeted by police are "isolated." They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but. I dissent.

Supplement 15.12. Recent U.S. Supreme Court Cases on Affirmative Action

In 2003, the U.S. Supreme Court decided two cases (involving university admissions) that may also be applicable to hiring police. Both cases concerned admissions policies at the University of Michigan. One involved a law school admissions policy; the second involved undergraduate admissions. The law school admissions policy was upheld; the undergraduate policy was rejected.

In the undergraduate case, *Gratz v. Bollinger*, the University of Michigan used a 150-point scale for admissions. An applicant needed 100 points for guaranteed admission. Applicants from underrepresented minority groups were given 20 points for that fact alone. The U.S. Supreme Court ruled that using race as an admissions factor in that way—that is, using a mechanical formula—is unconstitutional.[1] The law school, however, used race as only one factor among others, such as grade point average, score on the law school admission test, teacher recommendations, alumni connections, and personal essays. In *Grutter v. Bollinger*, the U.S. Supreme Court upheld this practice.[2] Although one could argue that both systems are race-conscious and that the real differences are only symbolic, some legal scholars believe that the important difference is public perception.

Justice Sandra Day O'Connor, who wrote the majority opinion upholding the University of Michigan Law School's policy (and who also voted in the majority rejecting the undergraduate admission policy), stated the importance of affirmative action in this comment: "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." According to Justice O'Connor (who also stated that she hoped affirmative action would not be necessary in 25 years), the law school policy represents a "highly individualized, holistic review of each applicant's file" and does not use race in a "mechanical way." But the policy utilizing race must be narrowly tailored so that race is used only as a *plus* factor.

The importance of diversity in many areas of life was emphasized by the members of over 300 organizations who signed 60 briefs submitted to the U.S. Supreme Court in support of the University of Michigan affirmative action policies prior to the hearing of those cases. The briefs provided compelling reasons to uphold affirmative action. For example, one submitted by the military (including General Norman Schwarzkopf, who commanded the allied forces during the Persian Gulf War) insisted that the United States cannot be properly defended without diversity in the troops. Businesses (such as Coca-Cola, General Electric, and Microsoft) included in their statements that diversity in education admissions is crucial to their recruiting of a diverse workforce, which they believe is necessary for their significant contributions to the international marketplace. According to the comments of the senior vice president and general counsel at Merck, a pharmaceutical company, "[d]iversity creates stronger companies. . . . The work we do directly impacts patients of all types around the globe. Understanding people is essential to our success."[3]

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[1] *Gratz v. Bollinger*, 539 U.S. 244 (2003).
[2] *Grutter v. Bollinger*, 539 U.S. 306 (2003).
[3] "300 Groups File Briefs to Support the University of Michigan in an Affirmative Action Case," *New York Times* (February 18, 2003), p. 14.

In his dissent in the law school admission case, Justice Clarence Thomas, the only African American on the Court, stated the following:

> I believe blacks can achieve in every avenue of American life without the meddling of university administrators. Because I wish to see all students succeed whatever their color, I share, in some respect, the sympathies of those who sponsor the type of discrimination advanced by the University of Michigan Law School. The Constitution does not, however, tolerate institutional devotion to the status quo in admissions policies when such devotion ripens into racial discrimination.[4]

In 2009, the U.S. Supreme Court decided another affirmative action case that might affect police department recruitment, hiring, and promotions. In *Ricci v. DeStefano*,[5] the Court reversed a decision by the lower federal appellate court, which had ruled on a decision by the city of New Haven, Connecticut, to refuse to certify the results of an objective test given to firefighters for promotion when only white employees earned sufficient scores for promotion. The Court held that Title VII of the Civil Rights Act of 1964,[6] which prohibits employment decisions based on race, color, religion, sex, and national origin, was violated. In a 5-to-4 decision, the Supreme Court ruled that the city had no acceptable defense for such action. Writing for the majority, which decided the case solely on the basis of the statute and did not reach the issue of whether the practice violates the Equal Protection Clause of the Fourteenth Amendment, Justice Anthony M. Kennedy stated the following:

> We conclude that race-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute. The respondents, we further determine, cannot meet that threshold standard. As a result, the City's action in discarding the tests was a violation of Title VII. In light of our ruling under the statutes, we need not reach the question whether respondents' actions may have violated the Equal Protection Clause.[7]

In 2014, the U.S. Supreme Court decided *Schuette v. Coalition to Defend Affirmative Action*, which dealt with the constitutionality of the actions by Michigan voters after the Court decided *Gratz* and *Grutter*, the two cases discussed above. The voters passed Proposal 2, which prohibits the use of race-based preference as part of a college or university admissions process. The Court upheld the right of the citizen to vote to prohibit the use of race as a factor in such admissions. In 2013, the Supreme Court had held that the use of race in admissions is permitted provided certain restrictions are followed. In *Fisher v. University of Texas*, the Court remanded the case to lower court for strict scrutiny of how the university was using race as a factor in admissions.[8]

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[4]*Grutter v. Bollinger*, 539 U.S. 306 (2003).
[5]*Ricci v. DeStefano*, 557 U.S. 557 (2009).
[6]*Ricci v. DeStefano*, 557 U.S. 557 (2009).
[7]*Ricci v. DeStefano*, 557 U.S. 557 (2009).
[8]*Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014); *Fisher v. University of Texas*, 570 U.S. 297 (2013).

These recent decisions by the U.S. Supreme Court may have an impact on police hiring. Clearly, some form of affirmative action is still considered constitutional; a mechanical system is not acceptable. There is also a practical issue: If minorities believe that their representation in a given police force will be too small, they may not apply. The number of woman and minorities in policing has improved but remains low.

Future court decisions may also have an impact of affirmative action hiring and admissions to college and universities. For example, Asian-American students have sued Harvard University alleging that the university's affirmative action policies discriminate against them by scoring them lower than white applicants on the "personal ratings" score. The U.S. Department of Justice is investigating the allergations.[9]

Politically, however, affirmative action in hiring and in school admissions may be in jeopardy. In July 2018, President Donald J. Trump's administration "scrapped Obama-era guidance on race-based admissions policies-just as conservatives see a fresh opening to end affirmative action through a changing Supreme Court."[10]

More states may also take action to reduce or eliminate or even enhance or return affirmative action to hiring (or college admissions). For example, in April 2019, the Washington state legislature entertained initiative 1-1000, which would permit employers to use hiring and recruitment goals (but not quotas) to "bring minority candidates into state jobs, education, and contracting, loosening restrictions enacted in a separate 1998 initiative that banned government discrimination or preferential treatment based on factors like race or gender." The initiative would also include "disability, ethnicity, national origin, age, and honorably discharged veteran status, provided other qualifications were considered."[11]

In contrast, it has been suggested that that the spring 2019 indictments of over 50 celebrities for allegedly using bribes to gain admission for their children into prestigious colleges and universities could lead to others to push for the abolition of all forms of special admissions. Recent Pew Research Center polls showed that 73 percent of Americans and over 60 percent of black and Hispanics respondents do not support affirmative action in college admission decisions.[12]

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[9]Lorelei Laird, "Justice Department Intervenes In Support of Asian-American Students Suing Harvard," *American Bar Association Journal* (September 2, 2018), http://www.abajournal.com, accessed September 20, 2018. See also Regina Fairfax, "Harvard's Radical Diversity Is Worth Investing In—and Defending." *American Bar Association Journal* (September 4, 2018), http://www.abajournal.com, accessed September 7, 2018. The case at issue is *Students for Fair Admissions v. President & Fellows of Harvard College Harvard Corp*., 346 F. Supp. 3d 174 (U.S. Dist. Ct. Dist. Ma., September 28, 2018).

[10]Benjamin Wermund. "Affirmative Action Guidelines Dropped by Trump Administration," *Politico* (July 5, 2018), https://wwwpolitico.com/story/2018/07/03/trump-end-obama-affirmative-action-692610, accessed July 5, 2018.

[11]Affirmative Action Initiative Reaches Washington Legislature," Associated Press State & Local (April 18, 2019), https://advance.lexis.com, accessed April 21, 2019.

[12]"An End to Affirmative Action? Why the College Admissions Scandal Could Fulfill Critics' Wish to Scrap Race-Based Program," *Newsweek* 172(11) (April 12, 2019), Global Edition, p. 1, https://advance.lexis.com, accessed April 21, 2019.

Chapter 6. Criminal Court Systems

Supplement 6.1. A Jurisdictional Dispute: The Case of Michael Skakel

The subject of jurisdiction arose in a highly publicized case in January 2000, after Michael Skakel, a nephew of the late Senator Robert F. Kennedy, was arrested and charged with the murder of Martha Moxley, age 14, almost 25 years earlier. Skakel, a neighbor and friend of Moxley's, was 15 at the time of her murder, which would have given the juvenile court jurisdiction over him. That jurisdiction would have ended when Skakel reached 21. The defense argued that no court had jurisdiction over Skakel in the year 2000. The prosecutor argued that the adult criminal court had jurisdiction because Skakel was 39 at the time of his arrest and thus beyond the jurisdiction of the juvenile court. After hearing arguments from the prosecution and the defense on the jurisdictional issue, the trial judge ruled that the adult criminal court had jurisdiction to try Skakel.

In June 2002, Skakel was convicted of Moxley's murder; he was sentenced to 20 years to life in prison, and the U.S. Supreme Court refused to hear his appeal.[1] In January 2009, Skakel's attorneys filed a motion in federal court alleging, among other claims, that the prosecution failed to disclose to the defense documents that would have implicated other persons and thus aided Skakel in his defense. In March 2010, that court denied the motion for a new trial.[2] Skakel later won his appeal on the grounds of ineffective assistance of counsel and was released on $1.2 million bail. The decision to grant Skakel a new trial was upheld in May 2018, and in January 2019, the U.S. Supreme Court declined to hear an appeal on the issue; thus, Skakel could be retried. As of this writing, the prosecution had not announced whether it would do so. A brief excerpt from the decision by the Connecticut Supreme Court holding that Skakel is entitled to a new trial is included.

Skakel v. Commissioner of Correction

188 A.3d 1 (Conn. 2018), cases and citations omitted, *cert. denied*, *Connecticut v. Skakel, 2019* 2019 U.S. LEXIS 505 (U.S. Jan. 7, 2019).

The sole issue now before us in this appeal by the respondent, the Commissioner of Correction, is whether the habeas court properly concluded that the petitioner, Michael Skakel, is entitled to a new trial because counsel in his murder case, Michael Sherman, rendered ineffective assistance by failing to obtain certain readily available evidence that Sherman should have known was potentially critical to the petitioner's alibi defense, that is, the testimony of a disinterested alibi witness whom the habeas court found to be highly credible. Because we agree with the habeas court both that Sherman's failure to secure that evidence was constitutionally inexcusable and that that deficiency undermines confidence in the reliability of the petitioner's conviction—a conviction founded on a case, aptly characterized by the habeas court as far from overwhelming, that was devoid of any forensic evidence or eyewitness testimony linking the petitioner to the crime—we affirm the judgment of the habeas court ordering a new trial.

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[1] *State v. Skakel*, 888 A.2d 985 (Conn. 2006), *cert. denied*, 549 U.S. 1030 (2006).
[2] *Skakel v. State*, 991 A.2d 414 (Conn. 2010).

Skakel sued talk show host Nancy Grace, Time Warner Inc., and others, alleging that they slandered him on national television when they reported that DNA evidence found on a tree at the victim's house and introduced at trial connected Skakel to the Moxley murder. That case was settled out of court for undisclosed terms.

Supplement 6.2. The United States Supreme Court

The following information comes from a brochure available years ago at the U.S. Supreme Court, describing some of what one might expect to see and hear during oral argument before the Court.

The U.S. Supreme Court

General Procedures

‘‘Welcome to the Supreme Court of the United States.

This is your Supreme Court and we hope you find your visit here enjoyable, interesting, and informative. However, we do ask you to recognize our restrictions and requirements for visitors. In order to maintain the atmosphere one might expect in the nation’s highest court, we would appreciate your cooperation. Please refrain from smoking and restrict food and beverages to the cafeteria, snack bar, and vending machine alcove.

Be as quiet as possible. There are Court employees working in their offices near the public areas of the building who would appreciate not being disturbed.

Oral Argument

You are right about to attend an oral argument. A case selected for argument usually involves interpretations of the U.S. Constitution or federal law. At least four Justices have selected the case as being of such importance that the Supreme Court must resolve the legal issues.

An attorney for each side of a case will have an opportunity to make a presentation to the Court and answer questions posed by the Justices. Prior to the argument each side has submitted a legal brief—a written legal argument outlining each party’s points of law. The Justices have read these briefs prior to the argument and are thoroughly familiar with the case, its facts, and the legal positions that each party is advocating.

Beginning the first Monday in October, the Court is scheduled to hear up to four one-hour arguments a day, three days a week, in two-week intervals (with longer breaks in December and February), concluding the oral argument portion of the term in late April. Typically, two arguments are held in the mornings beginning at 10 A.M. and two in the afternoons beginning at 1 P.M. on Monday, Tuesday, and Wednesday. In the recesses between argument sessions, the Justices are busy writing opinions, deciding which cases to hear in the future, and reading the briefs for the next argument session. They grant review in approximately 100-120 of the more than 7,000 petitions filed with the Court each term. No one knows exactly when a decision will be handed down by the Court in an argued case, nor is there a set time period in which the Justices must reach a decision. However, all cases argued during a term of Court are decided before the summer recess begins, usually by the end of June.

During an argument week, the Justices meet in a private conference, closed even to staff, to discuss the cases and to take a preliminary vote on each case. If the Chief Justice is in the majority on a case decision, he decides to write it himself or he may assign that duty to another

Justice in the majority. If the Chief Justice is in the minority, the Justice in the majority who has the most seniority assumes the assignment duty.

Draft opinions are privately circulated among the Justices until a final draft is agreed upon. When a final decision has been reached, the Justice who wrote the opinion announces the decision in a Court session and may deliver a summary of the Court's reasoning. Meanwhile, the Public Information Office releases the full text of the opinion to the public and news media.

Participants in the Courtroom

Justices: The Justices enter the Courtroom through three entrances behind the Bench. The Chief Justice and two senior Associate Justices enter through the center, and three Associate Justices enter through each side. They also sit on the Bench in order of seniority with the Chief Justice in the middle, and the others alternating from left to right, ending with the most junior Associate Justice on the far right, as you reach the Bench.

Clerk: The Clerk of the Supreme Court or his representative sits to the left of the Bench. His responsibilities in the Courtroom include providing the Justices with materials about the case if the Justices desire additional documents and notifying the appropriate Court personnel when an opinion can be released to the public. He also swears in new members of the Supreme Court Bar.

Marshal: The Marshal or his representative sits to the right side of the Bench. His roles are to call the Court to order, maintain decorum in the Courtroom, tape the audio portions of argument, and time the oral presentations so that attorneys do not exceed their one-half hour limitations.

Marshal's Aides: Marshal's aides are seated behind the Justices. They often carry messages to the Justices or convey messages from a Justice to a member or his or her staff.

Attorneys: The attorneys scheduled to argue cases are seated at the tables facing the Bench. The arguing attorney will stand behind the lectern immediately in front of the Chief Justice. On the lectern there are two lights. When the white light goes on, the attorney has five minutes remaining to argue. The red light indicates that the attorney has used all the allotted time.

Others: Attorneys who are admitted as members of the Supreme Court Bar may be seated in the chairs just beyond the bronze railing. Any member of the Supreme Court Bar may attend any argument, space permitting.

Law Clerks: Each Justice has the option of employing up to four law clerks as assistants. These clerks are law school graduates who have previously clerked for a federal judge on a lower court. The clerks often listen to oral arguments. They are seated in the chairs flanking the Courtroom on the right.

Special Guests: Guests of Justices are seated in the benches to the right of the bench and are seated in order of the seniority of the Justice who invited them. The row of black chairs in front of the guest section is reserved for retired Justices and officers of the Court, such as the Reporter of Decisions or the Librarian, who attend oral arguments from time to time.

News Media Members of the Supreme Court press corps sit to the left of the Bench in the benches and chairs facing the guest section. The press enter the Courtroom from the hallway on the left.''

Supplement 6.3. Judge Sonia Sotomayor Becomes the First Hispanic U.S. Supreme Court Justice

In 2009, Judge Sonia Sotomayor of the U.S. Court of Appeals for the Second Circuit took her seat as an associate justice of the U.S. Supreme Court. The "child with dreams," who grew up in the housing projects of the East Bronx, was diagnosed with diabetes at age 8, lost her father at age 9, and graduated from Princeton University and Yale Law School, became the first Hispanic and the third woman to sit on the High Court. By 2014, after completing five years on the Court, Justice Sotomayor had obviously become comfortable in her position, frequently asking questions and making comments during oral arguments. Some described her as the "people's justice," as crowds who attended Court sessions admired her and her autobiography had become a best seller. The *New York Times* described her as a "kind of folk hero to the adoring crowds who attend her public appearances by the thousands."

Justice Sotomayor, like the other justices, has her critics, and like most of the recent appointees to the U.S. Supreme Court, faced them during her confirmation hearings. She was questioned about having been quoted as saying that she would "hope that a wise Latina woman with the richness of her experience would more often than not reach a better conclusion than a white male who has not lived that life." During her confirmation hearings, Justice Sotomayor referred to the remark as a "rhetorical flourish that fell flat." Despite the controversy engendered by this and other comments, the justice, who as a child "never dreamed that I would live this moment" (referring to her nomination to the U.S. Supreme Court), has shown no hesitation to tangle with other justices as she speaks out (and votes) on controversial cases before the U.S. Supreme Court.[1]

[1]Summarized from "Obama Nominates Hispanic Judge for Supreme Court," *New York Times* (May 27, 2009), p. 1; "Sotomayor Finds Her Voice Among Justices," *New York Times* (May 7, 2014), p. 1.

Supplement 6.4. Woodward's Life after Release

The text refers to the case of Louise Woodward, an *au pair* convicted of second-degree murder in the death of a child in her care. The trial judge reduced that charge to manslaughter and sentenced Woodward to time served, and she was released from prison after serving only 279 days. Woodward returned to her home in England, and in 2002, she received a law degree from London's South Bank University. Subsequently, she won a coveted place on the Legal Practice course at the Manchester Metropolitan University, becoming "the first convicted killer to be allowed on such a top course." Some of the students were furious when they discovered her identity. One said, "Louise is a convicted killer who uses a different name. Nobody told us she was on the course. We all found out by accident and were speechless." The student continued, "She may have paid her debt in America for what she did, but many of us still find it goes against the grain to have her sitting alongside us, on probably the best law course you can get."[1]

In the fall of 2004, Woodward gave interviews to several media stations in the United States. She proclaimed her innocence, stating that she was haunted by Matthew's death. She said that she did not know what had happened to him; she only knew what had not happened—she had not shaken him violently. In March 2005, Woodward quit her job as a lawyer to become a dance instructor. In 2007, she argued that recent scientific evidence would exonerate her and thus she should be able to present that evidence to the court. In support of her position, a professional paper written by the prosecution's star expert on shaken baby syndrome stated, "There is certainly, in retrospect, reasonable doubt."[2] The court was not convinced, and Woodward's conviction was upheld. In January 2014, Woodward and her husband welcomed a baby girl, Holly.

Matthew Eappen's family moved from the home in which Matthew died. The parents and brother were joined by two more children. The Eappens won a civil case that prohibited Woodward from profiting financially by telling her story of the case.

[1] "Killer Nanny Is Training to Be Legal Eagle," *Daily Star* (February 1, 2003), p. 27.
[2] "Killer Nanny Reinvents Self as Dance Teacher in England," *Boston Herald* (June 3, 2008), p. 6.

Supplement 6.5. A Tribute to a Retiring Trial Judge

Judge Belvin Perry, chief judge in Orange County (Orlando, Florida), presided over the high-profile trial and acquittal of a Florida woman in the despicable death of her young child, Caylee Anthony. In the summer of 2014, Judge Perry retired and expressed his hope that he would be remembered for more than presiding over the Casey Anthony trial. The defendant's acquittal shocked the criminal justice system and the nation, but the professional demeanor of the judge did not go unnoticed.

One journalist proclaimed that the judge "deftly" presided "over the grotesque mix of tragedy and entertainment that was the Casey Anthony Trial." But more important than his handling of that trial was his career built on a crusade for criminal justice systems to take care of the homeless, the mentally ill, struggling veterans, and the wrongfully convicted.

> It was commitment that took Perry far beyond the sanctity of his courtroom. To the streets of Orlando and to prison cells throughout the state. . . .
>
> Some judges emerge from high-profile trials looking like laughing stocks. Perry emerged a pro. He knew the rules and indulged no nonsense. . . . [M]emorable leaders don't simply excel in their chosen fields; they excel beyond them.
>
> And Perry went beyond his courtroom and even entire judicial circuit to pursue the kind of justice that far too many ignore.[1]

[1]Scott Maxwell, Columnist, "Perry Went Beyond His Courtroom to Make a Difference," *Orlando Sentinel* (Florida) (July 13, 2014), p. 1B.

Supplement 6.6. Code of Conduct for U.S. Judges

The five canons of the code of conduct for U.S. federal judges were originally adopted in 1973 and subsequently amended, with significant changes adopted in March 2009, effective July 1, 2009. The full code contains subheads and commentary. The canons are as follows:

Canon 1

"A judge should uphold the integrity and independence of the judiciary.

Canon 2

A judge should avoid impropriety and the appearance of impropriety in all activities.

Canon 3

A judge should perform the duties of the office fairly, impartially and diligently.

Canon 4

A judge may engage in extrajudicial activities that are consistent with the obligations of judicial office.

Canon 5

A judge should refrain from political activity."[1]

[1]Administrative Office of the United States Courts, *Code of Conduct for U.S. Judges* (commentary omitted), http://www.uscourts.gov/, accessed September 20, 2018.

Supplement 6.7. Diversity in the Legal Profession

The American Bar Association adopted a diversity commission report at its 2010 midwinter meeting. That report, *Diversity in the Legal Profession: The Next Steps*, emphasized that diversity initiatives in the legal profession must be "inclusive, not pigeon-holing lawyers into affinity groups by discrete racial and ethnic categories, gender, sexual orientation or disability." The report alleges that achieving diversity is not a "quick-fix, short-term goal" but, rather, "an ongoing campaign." The profession must make efforts to change educational systems from preschool through post-graduate education and achieve a legal profession "in which all lawyers have the opportunity to achieve all of which they are capable."

The report asserts four broad rationales for diversity:

- "Lawyers and judges have a unique responsibility for sustaining democracy
- The profession must be diverse to thrive in a global and domestically inclusive business environment
- Diversity is critical if the profession wishes to maintain a societal leadership role
- Changing demographics in society compel the profession to change its own demographics"[1]

[1]American Bar Association press release (February 4, 2010), referring to the ABA's publication by the ABA Presidential Diversity Initiative, *Diversity in the Legal Profession: The Next Steps: Report and Recommendations* (April 2010), http://www.americanbar.org, accessed July 16, 2014.

Supplement 6.8. A Tennessee Judge Convicted of Multiple Sexual Assaults

The case of *United States v. Lanier* involved allegations that Judge David Lanier sexually assaulted five women in his judicial chambers. Judge Lanier had presided over the divorce and custody hearings of one of the complainants. It was alleged that when the woman interviewed for a secretarial position at the courthouse in which he worked, Judge Lanier suggested to her that he might have to reexamine her daughter's custody case. The woman charged that as she left the interview, the judge "grabbed her, sexually assaulted her, and finally committed oral rape."[1]

Judge Lanier was convicted in 1992 and served two years of his 22-year sentence before a federal appeals court released him on his own recognizance after its decision that the statute did not apply to the facts of his case. After the U.S. Supreme Court heard the case, ruled that the statute in question applied, and sent the case back to the lower court, that court ordered Judge Lanier to appear for a hearing. He did not appear; the court issued a warrant for his arrest and subsequently dismissed his appeal. The judge was located and arrested two months later in Mexico, where he was living under an assumed name. In December 1997, he entered a plea of guilty to eluding arrest to avoid prison. The judge was handed a 25-year prison sentence.

[1]*United States v. Lanier*, 520 U.S. 259 (1997). The statute at issue was USCS, Article 18, Section 242. The lower court case is at 73 F.3d 1380 (6th Cir. 1996).

Chapter 7. Prosecution, Defense, and Pretrial Procedures

Supplement 7.1. A Brief Background on Lawyering As a Profession

Lawyers have created controversy historically throughout the world. One of William Shakespeare's characters in *Henry VI* exclaimed, "The first thing we do, let's kill all the lawyers." English poet John Keats said, "I think we may class the lawyer in the natural history of monsters." According to a popular news magazine, lawyers have been "charged with the practice of witchcraft, demagoguery, corrupting justice, hypocrisy, charging outrageous fees, pleading unjust causes, and misusing language."[1]

During the seventeenth century, the American colonies operated under a legal system without lawyers. Lawyers were so distrusted and scorned that most people handled their own cases. The Puritans preferred to keep law and religion as one. Their law was the Bible, and many of their criminal laws were taken verbatim from that source. In Massachusetts, it was illegal for a lawyer to take a fee for his work. For 70 years after Pennsylvania was settled, the colony had no lawyers.[2]

As legal matters became more complicated, people began to recognize the need for experts trained in law, and the legal profession developed into one of power and wealth. In the 50 years before the American Revolution, the profession flourished. Of the 55 men who served in the Continental Congress, 31 were lawyers, as were 25 of the original signers of the Declaration of Independence.

Between 1830 and 1870, as a result of the rejection of anything English and out of fear of a legal aristocracy, the American bar fell into disfavor again. During this frontier era, with its dislike for specialists, practicing law was considered a natural right. Michigan and Indiana permitted any male voter of good moral character to practice law. After 1870, there was a move toward professionalism, which resulted in the improvement of legal education, along with higher law school admission standards, the licensing of lawyers, and the beginning of a strong bar association.[3]

The public view of lawyers improved in the United States, and in the 1900s, public opinion polls revealed that, generally, lawyers were accorded high prestige.[4] By 1975, however, a Louis Harris public opinion poll found that "the public had more confidence in garbage collectors than in lawyers, or doctors or teachers."[5]

The image of the legal profession in the United States was tarnished by the criminal activities of high-level politicians during the administration of President Richard M. Nixon. Prosecution of some of those politicians in the Watergate scandal led to prison terms. (The

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[1]Quoted in "Those #*X!!! Lawyers," *Time* (April 10, 1978), p. 66.
[2]Alexis de Tocqueville, "The Temper of the Legal Profession in the United States," in *Before the Law: An Introduction to the Legal Process*, ed. John J. Bonsignore et al. (Boston: Houghton Mifflin, 1974), p. 151.
[3]James Willard Hurst, *Growth of American Law* (Boston: Little, Brown, 1950), p. 6.
[4]See Peter H. Rossi, "Occupational Prestige in the United States, 1925-1963," *American Journal of Sociology* 70 (November 1964): 286-302.
[5]Baily Morris, "Lawyers' Images of Yesteryear Are Crumbling Fast," *Washington Star* (September 13, 1976), p. 1A.

Watergate scandal was so called because of the illegal entrance into the offices of the Democratic National Headquarters in Washington, D.C.'s Watergate, a building containing condominiums as well as offices and businesses.) Many of the people involved in Watergate were attorneys. In addition to violating the law and the ethics of the legal profession, they violated the ethical principles of many Americans. According to one writer, the result was that "the pedestal on which lawyers traditionally have been placed is crumbling faster than at any other time in history."[6]

In 2018, among other recently charged lawyers, President Donald J. Trump's former lawyer, Michael Cohen, entered a guilty plea to lying to Congress and was sentenced to three years in prison. Former Pennsylvania attorney general Kathleen Kane began serving a 23-month prison term for perjury and obstruction of justice.

Attacks on lawyers have also come from within the legal profession. The 1977 criticisms by U.S. Supreme Court Chief Justice Warren Burger were widely publicized. Burger warned that society was moving toward excessive litigation, and he predicted that if we did not stop that trend and devise "substitutes for the courtroom process . . . we may well be on our way to a society overrun by hordes of lawyers hungry as locusts competing with each other, and brigades of judges in numbers never before contemplated." Justice Burger recognized the great contribution lawyers had made in the United States but warned that "unrestrained, they can aggravate the problem."[7]

A lack of understanding of the adversary system may influence the public's image of lawyers, especially of those who practice criminal law. The public's image of justice may be confused with the attorney's obligation to protect the adversary system. On one occasion, a federal judge drove Supreme Court Justice Oliver Wendell Holmes in a horse-drawn carriage to a session of the U.S. Supreme Court. The judge said, "Well, sir, good-bye. Do justice." Justice Holmes turned and scowled, "That is not my job. My job is to play the game according to the rules."[8]

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[6]Ibid.
[7]"Burger Warns About a Society Overrun by Lawyers," *New York Times* (May 28, 1977), p. 1.
[8]Whitney North Seymour Jr., *Why Justice Fails* (New York: Morrow, 1973), p. 7.

Supplement 7.2. The Development of Prosecution Systems in the United States

Formal prosecutions are a modern phenomenon. In the American colonies, although an attorney general or a prosecutor had the authority to initiate prosecutions, many criminal prosecutions were left to the alleged victims. There was considerable abuse of the system, with some victims initiating criminal prosecutions to pressure a suspect to make financial settlements with them. Because the penalties for many criminal offenses were severe, it was not uncommon for the accused to settle financially—thus, in effect, buying freedom from criminal prosecution.

Such abuses led to the exercise of the power of public prosecution by the colonial attorney general. Soon it became evident that one attorney general and one colonial court could not handle all the prosecutions in a colony. Gradually, a system developed by which prosecutors in each county brought local prosecutions in the emerging county courts. These county prosecutors were viewed as local and autonomous, not as arms of the colonial government.[1]

Public prosecution systems differed from colony to colony. Some distinguished between violations of state statutes and violations of local ordinances and had a separate prosecution system for each.

In the United States today, prosecution systems may be categorized as local, state, or federal. *Local prosecution systems* exist at the rural, suburban, and urban levels. The advantages of rural prosecution are numerous. Generally, small towns and rural areas have lower crime rates, and case processing may be more informal. Caseloads are lighter, so rural district attorneys may have more time to prepare cases. Most prosecutors are acquainted with the other lawyers, judges, and court personnel on a professional as well as a social level. Cases are usually handled individually, and most personnel, from the judge to the probation officer, may give each case considerable attention.

In rural areas, most cases are settled by guilty pleas. Since rural judges and juries tend to give harsher sentences, defense attorneys are less likely to advise their clients to go to trial, and more defendants are willing to plead guilty without a trial. Rural prosecutors handle a different type of population and different kinds of cases than do urban prosecutors. Violent crimes, such as armed robbery or murder, are rare.

One disadvantage of rural prosecution is that salaries are low; many prosecutors maintain a private law practice in order to survive financially. Another disadvantage is that many rural prosecutors must function without a full-time staff, adequate office equipment, or resources to investigate crimes. Criminal justice systems may be affected, too: When the sole prosecutor has an unexpected illness or emergency, the court cannot process cases. Also, in small villages, the police chief (or his or her designate) may prosecute misdemeanors.

The second type of local prosecution system is *suburban prosecution*. Suburban prosecutors usually have more funds and resources than those in rural offices. Land

[1]See Abraham S. Goldstein, "Prosecution: History of the Public Prosecutor," in *Encyclopedia of Crime and Justice*, vol. 3, ed. Sanford H. Kadish (New York: Macmillan, 1983), pp. 1286-1289.

development, population increases, and growth in the tax base in suburban areas provide greater resources for their criminal justice systems.[2]

The third type of local prosecution system is *urban prosecution*, which is more complex than rural and suburban prosecution because the volume of crimes is higher in most large urban areas and the types of crime include the more serious violent personal crimes, such as armed robbery and murder. Caseloads are also heavier. Some urban prosecutors are so busy that they may not see the files of cases involving less serious offenses until a few minutes before they arrive in court to prosecute these cases.

Generally, the salaries of urban prosecutors are not competitive with those of attorneys in private practice, and for that reason, it may be difficult to attract highly qualified attorneys to prosecution. Some attorneys who do become prosecutors may not stay long because of low salaries or job burnout or because they view the job as only a training ground. On the positive side, most salaries for urban prosecutors are higher than those in suburban and rural areas. Offices are better equipped and better staffed, and some attorneys find the variety in the types of crime prosecuted in large cities to be a challenge not found in other areas of legal work, particularly in rural and suburban venues.

Urban prosecution offices may include programs that are not available in smaller offices. In recent years, many urban prosecution offices have added programs for crime victims and witnesses. Special prosecutors may be trained to work with adult rape victims, as well as with children who are victims of sexual and other forms of abuse.

A second major type of prosecution occurs at the *state* level. These systems differ from state to state, but most are headed by a state attorney general, usually an elected official, who is the chief prosecutor for the state. The state attorney general has jurisdiction throughout the state for prosecuting violations of state statutes, although some of that responsibility may be delegated to local levels. The attorney general may issue opinions on the constitutionality of state statutes. He or she may appoint assistant attorney generals.

As noted in the text, prosecutions in the United States also occur at the federal level (U.S. Department of Justice, DOJ), and those would only involve federal crimes. In 2018, the DOJ stated as its mission as follows:

> To enforce the laws and defend the interests of the United States according to the law, to ensure public safety against threats foreign and domestic; to provide leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.[3]

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[2]Joan E. Jacoby, *The American Prosecutor: A Search for Identity* (Lexington, MA: D.C. Heath, 1980), pp. 55-61, 64-65, 71-74, 275, 277, 278.

[3]"Our Mission Statement," U.S. Department of Justice, https://www.justice.gov/about, accessed September 28, 2018.

Supplement 7.3. Community Prosecution

Like community-oriented policing, community prosecution focuses on problem solving. The National District Attorney's Association (NDAA) defines it as "a grass-roots approach to justice" in that it involves citizens as well as prosecutors, along with law enforcement and other government agencies involved in a problem approach to prosecution. The NDAA views community prosecution as involving the following five operational elements:

- "A proactive approach to crime;
- A defined target area;
- An emphasis on problem-solving, public safety, and quality of life issues;
- Partnerships between the prosecutor, the community, law enforcement, and others to address crime and disorder; and
- Use of varied enforcement methods."[1]

[1]M. Elaine Nugent, National District Attorney's Association, "What Does It Mean to Practice Community Prosecution?" (February 2006), p. 1, http://www.ndaa.org, accessed January 12, 2015.

Supplement 7.4. The Duke Lacrosse Prosecution

The prosecution of three white Duke lacrosse players for allegedly raping a black woman ended in a decision for the players and the disbarring of the prosecutor, Mike Nifong. Nifong, who was running for reelection in the spring of 2006, filed rape charges against the three young men despite the fact that one of the students submitted evidence that he was not at the party at the time the alleged acts occurred. The issue was a highly charged one because of the racial factor as well as for other reasons. The media got involved, with some journalists and others suggesting that the prosecution of these three Duke players may have been politically motivated by Nifong, who was reelected.

All three defendants retained private attorneys, and as the evidence began to unfold and become public, legal authorities suggested that Nifong was too personally involved in prosecuting the case and recommended that a special prosecutor be appointed or that all charges be dropped. In the fall of 2006, Nifong dropped the rape charges but left standing the lesser sexual offense and kidnapping charges. Under intense pressure, Nifong recused himself in early 2007 and faced ethics and other professional violations for which he was disbarred. He was also fined and sentenced to jail for one day. In April 2007, officials dropped all charges against the three defendants. An independent prosecutor appointed to investigate the case found all three defendants innocent in what he referred to as a "tragic rush to accuse" the players. He criticized Nifong for prosecuting them. The three players settled with Duke for an undisclosed financial amount and went elsewhere to finish their college degrees.

In 2010, one of the players, Reade Seligmann, 24, graduated from Brown University with the intent to enter law school and, upon graduation, represent innocent defendants who have been convicted. The media described him in these words: "Four years later, the scared kid from [New Jersey] . . . who was falsely charged in the notorious Duke lacrosse rape case is gone, replaced with a confident young man already working to change the legal system."[1] In 2014, after serving as a law clerk, Seligmann joined a law firm.

The woman who made the false allegations, Crystal Gail Mangum, 31, with assistance, wrote a book about her experiences, *The Last Dance for Grace: The Crystal Mangum Story*, published in 2008, in which she maintained that she was assaulted. Kevin Finnerty, the father of one of the accused, said, "We view this as a desperate attempt by a desperate person to profit from a fictitious situation. . . . The three boys are moving on with their lives. Obviously this woman is not."[2]

In February 2010, Mangum was arrested and faced charges of attempted first-degree murder, five counts of first-degree arson, three counts of misdemeanor child abuse, resisting arrest, identity theft, communicating threats, assault and battery, and injury to personal property after she was accused of attacking her boyfriend. Her 9-year-old child called police. In 2013,

[1]"Ex-Duke Player Now Focuses on Exonerating Others," *The Star-Ledger* (Newark, NJ) (May 30, 2010), p. 1.
[2]"Accuser Writes Book," *Newsday* (New York) (October 24, 2008), p. 23.

Mangum was convicted of second-degree murder in the death of her boyfriend. She was sentenced to from 14 to 18 years in prison.[3]

The Duke players brought civil charges against Nifong, the police, the lab personnel involved in the case, and the city for pursuing the prosecution of a weak case for political reasons. The suit referred to the prosecution of the three players as "one of the most chilling episodes of premeditated police, prosecutorial and scientific misconduct in modern American history."[4] In 2014, the civil suits were settled with a contribution to an organization that represents defendants who are allegedly wrongfully convicted. Also in 2014, noted author William D. Cohen published a book about the case, *The Price of Silence: The Duke Lacrosse Scandal, the Power of the Elite, and the Corruption of Our Great Universities.*

[3]"Duke Accuser Faces Attempted Murder Charge," *Buffalo News* (February 19, 2010), p. 8; "Duke Lacrosse Accuser Convicted of Murder," *Dallas Morning News* (April 23, 2013), p. 4.
[4]"Seligman, Other Former Duke Lacrosse Players Sue Nifong," *University Wire* (October 10, 2007), n.p.; "Duke Guy's Dramatic Comeback: Beat 'Rape' Smear," *New York Post* (April 25, 2010), p. 24.

Supplement 7.5. Legal Issues Regarding False Prosecution

In 1996, the U.S. Supreme Court decided an important case on prosecutorial discretion. In *United States v. Armstrong*, the Court held that the defendant, who alleged racial bias regarding a prosecutorial decision, must show that similarly situated persons of other races were not prosecuted. At issue in this case was the fact that African Americans were more frequently prosecuted for crack cocaine possession, while whites were more frequently prosecuted for powder cocaine possession. In the federal system, the penalty for possession of the less expensive crack cocaine was 100 times that of the penalty for possession of powder cocaine. In *Armstrong*, African American defendants argued that this penalty differential, in effect, constituted racial disparity. The U.S. Supreme Court held that the defendants in *Armstrong* had not met the requirements for proving race discrimination—that is, they did not prove that actual racial bias had occurred.[1]

In an earlier case involving alleged prosecutorial discrimination, the U.S. Supreme Court said, "The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation."[2] In May 2007, the U.S. Sentencing Commission recommended to Congress that the sentencing guidelines for violation of the crack cocaine laws be lowered. Since Congress did not reject that recommendation by November, as provided by law, it became effective, and the changes reduced the average sentence from ten years and one month to eight years and ten months. The Sentencing Commission voted to make those changes retroactive, which has led to a request by many defendants to have their sentences reexamined. Also in 2007, the U.S. Supreme Court held, in a case involving sentencing for crack cocaine, that the federal sentencing guidelines are not mandatory. In *Kimbrough v. United States*, the Court stated that "the cocaine Guidelines, like all other Guidelines, are advisory only." According to the Court, when judges look at all the factors that are to be considered in sentencing, they "may consider the disparity between the Guidelines' treatment of crack and powder cocaine offenses."[3]

President Barack Obama declared in 2009 that the crack/powder cocaine sentencing differential "is wrong and should be completely eliminated." That statement, combined with the fact that Congress was considering several bills on the issue, led The Sentencing Project to conclude that "the likelihood of legislative reform . . . is the strongest it has ever been."[4] In March 2010, the U.S. Senate passed the Fair Sentencing Act of 2010; in July the U.S. House of Representatives passed the bill. Among other provisions, the new act lowered the 100-to-1 ratio between crack and powder cocaine sentencing to 18 to 1 and eliminated the five-year minimum sentence for simple possession of crack cocaine.[5]

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[1]*United States v. Armstrong*, 517 U.S. 456 (1996).
[2]*Oyler v. Boles*, 368 U.S. 448, 456 (1962).
[3]*Kimbrough v. United States*, 552 U.S. 85 (2007).
[4]Quoted on The Sentencing Project Website, http://www.sentencingproject.org/, accessed March 14, 2011.
[5]The Fair Sentencing Act of 2010, Public Law 111-220 (2010).

Supplement 7.6. The Evolution of the Right to Appointed Counsel

The right to appointed counsel (i.e., counsel provided at government expense) has not always been recognized in the United States. In 1932, in *Powell v. Alabama,* the U.S. Supreme Court gave limited recognition to the right.[1] In *Powell,* a state case, nine African American youths were charged with the rape of two white Alabama women. Eight of the defendants were convicted and sentenced to death. Several issues were raised on appeal; two of them pertained to the lack of counsel.

In *Powell,* the U.S. Supreme Court focused on the issue of whether appointed counsel should have been provided for defendants because they could not have afforded to retain counsel even if they had been given the opportunity to do so. In discussing the right to counsel, the Supreme Court emphasized that the right to be heard in a criminal case would have little meaning unless accompanied by a right to counsel. The Court held that there was a right to appointed counsel but limited that right to the facts of the case. *Powell* was a death penalty case that involved special circumstances: defendants who were young, poor, of low mentality, and not literate. At the time *Powell* was decided, almost half the states already provided appointed counsel in capital cases. In federal trials, appointed counsel was provided by a congressional statute.

In a 1938 *federal* case, the U.S. Supreme Court held that there is a right to appointed as well as to retained counsel and that this right is not limited to capital cases.[2] In 1942, the Supreme Court declined to apply that right to appointed counsel to *state* cases. In *Betts v. Brady,* the Supreme Court established a fundamental fairness test involving special circumstances. The defendant in that case was an indigent adult of average intelligence and capable, according to the Court, of understanding the proceedings. Thus, the Court held that an indigent defendant in a state trial would be entitled to appointed counsel in a noncapital case only where it could be shown that circumstances necessitated appointed counsel for the defendant to receive a fair trial.[3] *Betts v. Brady* was a controversial case, but it remained the law until 1963, when it was overruled, as the following discussion explains.

On January 8, 1962, the U.S. Supreme Court received a large envelope containing a printed request in pencil from Florida inmate number 003826, Clarence Earl Gideon, a pauper who had been in and out of prison most of his life. Gideon was not a violent man, but he had committed several nonviolent crimes. In this case, he was charged with breaking and entering a poolroom with the intent to commit a misdemeanor, a felony under Florida law. Gideon asked the state to appoint an attorney for him. The trial judge responded that he was sorry but that the laws of Florida did not provide for appointed counsel except in capital cases. Gideon responded, "The United States Supreme Court says I am entitled to be represented by counsel." Gideon conducted his own defense. He was convicted and sentenced to five years in the state prison.

Gideon appealed to the U.S. Supreme Court, which agreed to hear the case and appointed a prestigious Washington, D.C., law firm to provide his defense. The result was one of the few

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[1] *Powell v. Alabama*, 287 U.S. 45 (1932).
[2] *Johnson v. Zerbst*, 304 U.S. 458 (1938).
[3] *Betts v. Brady*, 316 U.S. 455 (1942), *overruled by Gideon v. Wainwright*, 372 U.S. 335 (1963).

occasions in which the Supreme Court has overruled an earlier decision by name. In *Gideon v. Wainwright*, the Court reversed the conviction and overruled its holding in *Betts v. Brady*, applying the right to appointed counsel to state cases. According to the Court:

> In our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. . . . [The Court quoted *Powell*:] "He [the defendant] lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."[4]

Gideon was convicted of a felony; consequently, his case extended the right to appointed counsel only to felony cases. In 1972, the U.S. Supreme Court held that the right to appointed counsel also extends to misdemeanors for which a conviction might result in the "actual deprivation of a person's liberty." In *Argersinger v. Hamlin*, the Supreme Court held that, without a "knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony unless he was represented by counsel at his trial."[5]

In 1979, the U.S. Supreme Court clarified *Argersinger* in *Scott v. Illinois*. Scott was fined but not given a prison sentence, although the statute under which he was convicted for shoplifting provided for either punishment. In ruling that Scott was not entitled to appointed counsel, the Supreme Court emphasized the difference between actual imprisonment and any other form of punishment.[6]

Gideon, *Argersinger*, and *Scott* concern the right to appointed counsel at trial. In 1967, the U.S. Supreme Court held that the Sixth Amendment right to counsel applies during "critical stages" in criminal proceedings.[7] The right applies when the court begins adversarial judicial proceedings, and it is not necessary for the defendant to ask for an attorney. At the stage when the right to counsel begins, if an attorney is not provided, any further judicial proceedings are improper and will result in the reversal of a conviction.

In 2002, the U.S. Supreme Court extended the right to appointed counsel in a case in which the defendant was not actually incarcerated but, rather, received a suspended sentence. In *Alabama v. Shelton*, the defendant, LaReed Shelton, who represented himself, was convicted of a third-degree assault, a misdemeanor, for his role in a fight occurring after a traffic accident. Shelton was told repeatedly that in representing himself he might commit errors that would harm his case, but he was never told that he had a right to an appointed attorney. After his conviction, the court sentenced Shelton to 30 days in the county prison; however, the sentence was suspended, and Shelton was placed on unsupervised probation for two years, ordered to pay restitution, and fined. Shelton appealed to the Alabama Supreme Court, which held that because he did not have appointed counsel his suspended jail sentence was inappropriate. The U.S.

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[4]*Gideon v. Wainwright*, 372 U.S. 335 (1963).
[5]*Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).
[6]*Scott v. Illinois*, 440 U.S. 367 (1979).
[7]*United States v. Wade*, 388 U.S. 218 (1967).

Supreme Court agreed, noting that Shelton could not be incarcerated since he was not provided appointed counsel at his trial. Thus, even a suspended jail sentence was not permitted as any revocation of Shelton's probation could result in jailing him. Justice Ruth Bader Ginsburg wrote the opinion for the majority in this 5-to-4 decision, stating as follows:

> Deprived of counsel when tried, convicted, and sentenced, and unable to challenge the original judgment at a subsequent probation revocation hearing, a defendant in Shelton's circumstances faces incarceration on a conviction that has never been subjected to the crucible of meaningful adversarial testing. The Sixth Amendment does not countenance this result.[8]

The U.S. Supreme Court has held that the right to appointed counsel applies to most but not all pretrial stages and to some but not all appeals. States may extend constitutional rights beyond those mandated by U.S. Supreme Court interpretations of the federal Constitution, and some have done so.

[8]*Alabama v. Shelton*, 535 U.S. 654 (2002).

Supplement 7.7. The Right to Retain an Attorney of One's Choice

Some defendants prefer to retain (hire) their own defense counsel, and they must do so if they are not eligible for an attorney provided at public expense. The right to counsel includes the right to retain an attorney of one's choice. In June 2006, the U.S. Supreme Court reversed the conviction of a defendant who was refused the right to retain his preferred attorney. In *United States v. Gonzalez-Lopez*, the defendant, Cuauhtemoc Gonzalez-Lopez, who was charged with marijuana possession in the eastern federal district court in St. Louis, initially retained a local attorney but subsequently retained Joseph H. Low IV, an experienced California defense attorney who had recently secured a favorable plea bargain in the same court.

When lawyers, such as Low, are not already admitted to practice before the court in which their client is scheduled to be tried, they must request the judge to admit them provisionally to try the case. Normally, such a request is granted, but in this case, issues of procedural impropriety on the part of Low led the trial judge to revoke his temporary provision. Low was unsuccessful in his appeal of that decision, and Gonzalez-Lopez was represented by other counsel. Low was denied permission to assist and was, in fact, ordered not to sit at counsel table and to have no contact with the defendant during the proceedings.

The defendant was convicted and sentenced to 24 years in prison. U.S. Supreme Court justices agreed that the trial judge should have granted the motion for Low to represent Gonzalez-Lopez, but they disagreed on what remedy should be provided as a result of this error. The justices split 5 to 4, with the majority holding that, even though the trial was fair, the right to defense counsel includes the right of a defendant to retain the attorney of his or her choice. The Court held that the right to counsel is so important that when defendants are, in effect, denied the opportunity to retain the attorney of their choice, any convictions must be reversed and the defendants granted a new trial in which they are represented by the attorneys they choose to retain.[1]

[1]*United States v. Gonzalez-Lopez*, 2006 U.S. LEXIS 5165 (2006).

Supplement 7.8. What Constitutes Ineffective Assistance of Counsel?

Federal courts have wrestled with the issue of what constitutes ineffective assistance of counsel. This discussion considers some examples.

Massachusetts Senator Edward M. Kennedy, in his comments in March 2003 recognizing the fortieth anniversary of the *Gideon* decision (discussed in the text), referred to two cases involving the issue of effective assistance of counsel.

In August 2002, Wallace M. Fugate III was executed in Georgia. Fugate, who had no prior record when he was charged with the capital murder of his former wife, was represented by lawyers who, according to Senator Kennedy, admitted that they were not familiar with "the most basic criminal and death penalty precedents. They did not ask for plea negotiations or request funds for an investigator. They filed only three motions, none exceeding two pages in length." They did not present any mitigating circumstances, and the sentencing hearing lasted only 27 minutes.[1]

Senator Kennedy cited a second case, in which the U.S. Supreme Court refused to hold that an appellant had received ineffective assistance of counsel. According to Kennedy, in *Bell v. Cone* the Supreme Court upheld "the performance of a lawyer who failed to interview witnesses, present mitigating evidence or even plead for his client's life at the sentencing hearing." The senator continued:

> The [U.S. Supreme] Court's constitutional jurisprudence on this fundamental issue has now deteriorated to the point that it is unclear whether a defendant is "prejudiced" when a defense lawyer sleeps through substantial portions of his capital trial. In 2000, a panel of the 5th U.S. Circuit Court of Appeals ruled in *Burdine v. Johnson* that he is not. Fortunately, that ruling was overturned by the full 5th Circuit. But five of the judges dissented.[2]

The *Burdine* case cited in the quotation involved the appeal of Calvin Jerold Burdine. After spending 16 years on death row for his conviction in a 1984 murder, Burdine filed a writ of habeas corpus, claiming that he should be released from prison because he was prejudiced at his trial when his attorney fell asleep. The Fifth Circuit Court of Appeals agreed with Burdine and ordered a new trial. The U.S. Supreme Court refused to hear the case of the Texas sleeping counsel, thus allowing the Fifth Circuit decision to stand. A federal district court ordered Burdine released from death row after the prosecution failed to meet the deadline for procedures concerning a new trial, but a federal appellate court reversed.[3]

Burdine remained in prison, awaiting a new trial, which was scheduled for March 2003. However, in June 2003, the prosecution offered and the defense accepted a plea bargain that will

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[1]Edward M. Kennedy, "Sen. Kennedy: Georgia Case Mocks *Gideon* Promise," *Fulton County Daily Report* 3(25) (March 25, 2003): n.p. The case is *Wallace M. Fugate III v. Head*, 261 F.3d 1206 (11th Cir. 2001), *cert. denied*, 535 U.S. 1104 (2002).

[2]Kennedy, ibid.

[3]*Burdine v. Johnson*, 66 F. Supp. 2d 854 (S.D. Tex. 1999), *stay denied, motion granted, in part, denied, in part*, 87 F. Supp. 2d 711 (S.D. Tex. 2000), *vacated, remanded*, 231 F.3d 950 (5th Cir. 2000), *and on reh'g, aff'd*, 262 F.3d 326 (5th Cir. 2001), *cert. denied*, 535 U.S. 1120 (2002).

keep Burdine off death row, but he will spend most, if not all, of the rest of his life in prison. Under the terms of the agreement, Burdine pleaded guilty to aggravated assault with a deadly weapon, felony possession of a weapon, and capital murder. He was given a life sentence for each charge, with the sentences running consecutively.[4]

In 2002, the U.S. Supreme Court upheld the conviction and death sentence of a man whose appeal was based on his argument that his assistance of counsel was ineffective because his court-appointed lawyer had, in an earlier case, represented the individual claiming to be the victim in this case. A bitterly divided Supreme Court held 5 to 4 in *Mickens v. Taylor* that the appellant did not show that he was prejudiced in the case.[5]

Recall that showing prejudice is one of the *Strickland* requirements. This requirement was illustrated in a recent case in which a state court held ineffective assistance of counsel and released the petitioner from prison. Recall from our earlier discussion of jurisdiction the example of Michael Skakel, who was in his teens when the murder of which he was accused occurred; he was 42 when tried for that murder. Skakel had served 12 years of his sentence of 20 years to life when he was released on bail in the fall of 2013 after the Superior Court of Connecticut held that he was entitled to a new trial because his attorney, Michael "Micky" Sherman, did not give him effective assistance of counsel. Sherman, a well-known legal commentator on television, was cited for numerous acts that led the court to conclude that he did not provide competent assistance to Skakel:

> Against this evidence, defense counsel was in a myriad of ways ineffective. The defense of a serious felony prosecution requires attention to detail, an energetic investigation and a coherent plan of defense capably executed. Trial counsel's failures in each of these areas of representation were significant and, ultimately, fatal to a constitutionally adequate defense. As a consequence of trial counsel's failures as stated, the state procured a judgment of conviction that lacks reliability. Although defense counsel's errors of judgment and execution are not the fault of the state, a defendant's constitutional right to adequate representation cannot be overshadowed by the inconvenience and financial and emotional cost of a new trial.[6]

In 2001, in *Glover v. United States*, the Court stated, "Authority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice." To the contrary, ruled the justices, "our jurisprudence suggests that any significant jail time has Sixth Amendment [which establishes the right to counsel] significance." *Glover* involved a defendant who argued on appeal to the U.S. Supreme Court that he had ineffective counsel for the following reason. The federal sentencing guidelines provide for a grouping of specified crimes, and that grouping results in a shorter sentence. Paul Glover's crimes were not grouped together, placing him in a sentencing range between 78 and 97 months in prison. Had his crimes been grouped, his sentence would have been in the range of 63 to 78. The result was that his sentence was 6 to 21 months longer than it would have been otherwise. He appealed unsuccessfully to the lower

[4]"Burdine Pleads Guilty, Gets Three Consecutive Life Sentences," *Texas Lawyer* 19(16) (June 23, 2003): 8.
[5]*Mickens v. Taylor*, 535 U.S. 162 (2002).
[6]*Skakel v. Warden*, 2013 Conn. Super. LEXIS 2284 (2013).

federal courts, with both courts refusing to reach the issue of ineffective assistance of counsel on the grounds that an increase of 6 to 21 months was not sufficiently significant to constitute prejudice to Glover. The U.S. Supreme Court disagreed; the case was reversed and remanded to the lower federal court, which sent it back to the district (trial) court, which scheduled a new sentencing hearing.[7]

In 2002, the U.S. Supreme Court upheld the death sentence of a Tennessee death row inmate, Gary Cone, who argued that he received a death sentence rather than life in prison because his attorney did not give him effective assistance of counsel. Cone was convicted of brutally murdering an elderly couple in their home. The previous day, Cone had robbed a jewelry store and shot a bystander and a law enforcement officer who attempted to apprehend him. Cone alleged that, because his attorney did not present mitigating evidence during the sentencing hearing, did not put him on the stand to testify, and did not present a final argument in the case, his representation constituted ineffective assistance of counsel. It was also noted that Cone's attorney was treated for mental illness and subsequently committed suicide.

The U.S. Supreme Court held that Cone's allegations against his attorney were too minor to constitute ineffective assistance of counsel; indeed, the defense counsel may have had strategic reasons for the choices he had made in representing Cone. The Court emphasized the *Strickland* test, which requires the appellant to prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" and that counsel's representation "fell below an objective standard of representation." Cone's case failed to meet those tests.[8]

In 2003, the U.S. Supreme Court decided, by a 7-to-2 vote in *Wiggins v. Smith*, that the failure of Kevin Wiggins's trial lawyer to conduct a "reasonable investigation" into his client's social background denied Wiggins his right to effective assistance of counsel.[9]

Writing for the majority in *Wiggins*, Justice Sandra Day O'Connor pointed out that the *Strickland* case requires an appellant to show that the attorney's behavior prejudiced the client's defense. According to *Strickland*, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Justice O'Connor continued with these words:

> The mitigating evidence counsel failed to discover and present in this case is powerful. As Selvog [a licensed social worker] reported based on his conversations with Wiggins and members of his family, Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care. The time Wiggins spent homeless, along with his diminished mental capacities, further augment his mitigation case. Petitioner thus has the kind of troubled history we

[7]*Glover v. United States*, 532 U.S. 109 (2001), on *remand, remanded*, 2001 U.S. App. LEXIS 4258 (7th Cir. 2001), on *remand, summary judgment granted*, 149 F. Supp. 2d 371 (N.D. Ill. 2001).
[8]*Bell v. Cone*, 535 U.S. 685 (2002).
[9]*Wiggins v. Smith*, 539 U.S. 510 (2003).

> have declared relevant to assessing a defendant's moral culpability. [As stated in a precedent case,] "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse."[10]

In 2005, in *Rompilla v. Beard*, the U.S. Supreme Court reversed the death penalty sentence of Ronald Rompilla. The Pennsylvania case, decided by a 5-to-4 vote, involved public defenders who did not search the records (located in the same courthouse) of their client's rape conviction 14 years earlier despite the fact that the prosecution had informed the defense that they planned to use that case as evidence of the defendant's prior act of violence, an aggravating factor supporting the death penalty. According to Justice David Souter, who wrote the majority opinion, "no reasonable lawyer would forgo examination of the file" under the circumstances. The file indicated that Rompilla was of limited mental capacity, was an abused child, and most probably suffered from fetal alcohol syndrome and schizophrenia. Subsequent investigations by Rompilla's appellate lawyers uncovered evidence that the father locked Rompilla and his brother in a small dog pen that was "filthy and excrement filled," that the brothers went to school in rags, and that Rompilla dropped out of school in the ninth grade. According to Justice Souter, a competent lawyer would have uncovered this information and presented it to the jury; such information might have resulted in a result different from the death penalty.[11]

Rompilla v. Beard was cited with approval by the U.S. Supreme Court in 2009 in *Porter v. McCollum*, in which all nine justices voted to reverse the appellant's death penalty because his attorney failed to present mitigating factors at the sentencing hearing. The Court cited such factors as an abusive childhood and the appellant's mental instability resulting from his combat service.[12]

In 2010, in *Wood v. Allen*, the U.S. Supreme Court held that the appellant did not have ineffective assistance of counsel when his attorney did not call an expert witness to testify about the defendant's borderline mental retardation. According to the Court, the attorney made a strategic decision that, under the facts of that case, did not prejudice his client.[13]

In 2010, the Court considered how much mitigating evidence the defense must offer at a death penalty sentencing hearing. In *Bobby v. van Hook*, the Court held that defense counsel is not required to uncover and present *all* mitigating evidence. Indeed, at some point, the evidence can become merely cumulative. Of importance, however, was the fact that in this case no evidence was presented to show that the appellant had been prejudiced by his counsel's decision not to present further evidence.[14]

One final case is important in that it represents a departure from the U.S. Supreme Court's emphasis on following rules and meeting deadlines. In 2012, the Court decided the case

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[10]*Wiggins v. Smith*, 539 U.S. 510 (20013).
[11]*Rompilla v. Beard*, 545 U.S. 374 (2005); "Justices Overturn a Death Sentence, Citing an Inadequate Defense Counsel," *New York Times*, Late Edition-Final (June 21, 2005), p. 16.
[12]*Porter v. McCollum*, 558 U.S. 30 (2009).
[13]*Wood v. Allen*, 558 U.S. 290 (2010).
[14]*Bobby v. van Hook*, 558 U.S. 4 (2010).

of Cory R. Maples, who through no fault of his, missed a critical court deadline. The deadline notices were sent to his attorneys in New York, but they had left the firm, and the unopened mail was sent back to the Alabama trial court, which filed it and did not tell Maples. The attorneys had not informed their client of their move. The U.S. Supreme Court held that these facts constituted extraordinary circumstances. The Court cited with approval an earlier case in which a one-year deadline was missed by an appellant who argued that his lawyer had abandoned him. In that case, *Holland v. Florida*, the Court held that although an attorney's missing a deadline is not always sufficient to establish a reason to excuse missing a statutory deadline, it may be sufficient in some cases.[15]

In 2012, the U.S. Supreme Court upheld the application of effective assistance of counsel in plea bargaining.[16]

[15] *Maples v. Thomas*, 565 U.S. 266 (2012). The cited case is *Holland v. Florida*, 560 U.S. 631 (2010).
[16] See *Lafler v. Cooper*, 566 U.S. 156 (2012), and *Missouri v. Frye*, 566 U.S. 134 (2012).

Supplement 7.9. Lack of Adequate Defense Assistance in New York: The Lawsuit and the Settlement

As noted in the text, defendants in criminal cases who cannot afford attorneys must be provided counsel at the government's expense. In New York, this responsibility was left to counties. Nineteen plaintiffs filed a lawsuit claiming that they were in effect denied their right to counsel in the five represented counties. The lawsuit carried the name of one of the plaintiffs, Kimberly Hurrell-Harring. On May 6, 2010, the New York Court of Appeals decided that Ms. Hurrell-Harring and her co-litigants should be able to present their arguments at trial. Following are some of that court's arguments.

Hurrell-Harring v. New York
930 N.E.2d 217 (N.Y. 2010), citations and footnotes omitted

Plaintiffs in this action, defendants in various criminal prosecutions ongoing at the time of the action's commencement . . . contend that this arrangement, involving what is in essence a costly, largely unfunded and politically unpopular mandate upon local government, has functioned to deprive them and other similarly indigent defendants . . . of constitutionally and statutorily guaranteed representational rights. . . .

In addition to the foregoing allegations of outright non-representation, the complaint contains allegations to the effect that although lawyers were eventually nominally appointed for plaintiffs, they were unavailable to their clients—that they conferred with them little, if at all, were often completely unresponsive to their urgent inquiries and requests from jail, sometimes for months on end, waived important rights without consulting them, and ultimately appeared to do little more on their behalf than act as conduits for plea offers, some of which purportedly were highly unfavorable. It is repeatedly alleged that counsel missed court appearances, and that when they did appear they were not prepared to proceed, often because they were entirely new to the case, the matters having previously been handled by other similarly unprepared counsel. There are also allegations that the counsel appointed for at least one of the plaintiffs was seriously conflicted and thus unqualified to undertake the representation. . . .

[The court emphasized the importance of counsel at arraignment and during the period between arraignment and trial,] when a case must be factually developed and researched, decisions respecting Grand Jury testimony made, plea negotiations conducted, and pre-trial motions filed. Indeed, it is clear that "to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." . . .

Similarly, while variously interpretable, the numerous allegations to the effect that counsel, although appointed, were uncommunicative, made virtually no efforts on their nominal clients' behalf during the very critical period subsequent to arraignment, and, indeed, waived important rights without authorization from their clients, may be reasonably understood to allege non-representation rather than ineffective representation.

Actual representation assumes a certain basic representational relationship. The allegations here, however, raise serious questions as to whether any such relationship may be really said to have existed between many of the plaintiffs and their putative attorneys and

cumulatively may be understood to raise the distinct possibility that merely nominal attorney-client pairings occur . . . with a fair degree regularity, allegedly because of inadequate funding and staffing of indigent defense providers. . . .

[The court notes that a remedy might be expensive but that courts have held that lack of funds is not an acceptable reason to deny a constitutional right.]

Assuming the allegations of the complaint to be true, there is considerable risk that indigent defendants are, with a fair degree of regularity, being denied constitutionally mandated counsel. . . . Wrongful conviction, the ultimate sign of a criminal justice system's breakdown and failure, has been documented in too many cases. Wrongful convictions, however, are not the only injustices that command our present concern. . . . [T]he absence of representation at critical stages is capable of causing grave and irreparable injury to persons who will not be convicted. *Gideon*'s guarantee to the assistance of counsel does not turn upon a defendant's guilt or innocence, and neither can the availability of a remedy for its denial.

The day before the trial was to begin, the parties reached a settlement agreement, which included the following major provisions:

- "Ensures that every poor criminal defendant will have a lawyer at the first court appearance, where bail often is set and pleas taken;
- Requires New York to hire sufficient lawyers, investigators and support staff to ensure that all poor criminal defendants have lawyers with the time and support necessary to vigorously represent the defendant;
- Provides for the setting of caseload standards that will substantially limit the number of cases any lawyer can carry, thereby ensuring that poor criminal defendants get a real defense.

· Requires New York to spend $4 million over the next two years to increase attorney communications with poor criminal defendants, promote the use of investigators and experts, and improve the qualifications, training and supervision of lawyers representing indigent defendants;

· Mandates the creation of eligibility standards for representation, thus allowing more New Yorkers to access public defense services;

· Strengthens the Office of Indigent Legal Services as a state-level oversight entity tasked with ensuring the constitutional provision of public defense services and commits New York to provide the office with the resources it needs to develop plans and implement and monitor reforms mandated by the settlement; and

· Provides that the plaintiffs will receive detailed reports allowing them to monitor compliance with the agreement and, if necessary, return to court to enforce it."[1]

[1]"Settlement Begins Historic Reformation of Public Defense in New York State," New York Civil Liberties Union (October 21, 2014), http://www.nyclu.org, accessed August 6, 2016.

Supplement 7.10. Types of Defense Systems for Indigents

Three models are used for organizing the provision of defense counsel for indigent defendants:

- Public defender systems
- Assigned counsel systems
- Contract attorney systems

Public Defender Systems. Most public defender systems are public law firms with the mission of providing counsel in criminal cases for defendants who cannot afford to retain private counsel. Most public defender systems are located in metropolitan areas. They are supported publicly and administered by an attorney, usually called the *public defender*. Like prosecutors, public defenders have the advantage of specializing in criminal cases. This increases their expertise and efficiency, but it may contribute to professional burnout. Like prosecutors, many public defenders work with tremendous caseloads, leaving them insufficient time to devote to any particular case. In addition, inadequate budgets result in a lack of support staff and equipment.

Better recruitment and more intensive training of attorneys would improve public defender programs. Training programs should include an emphasis on efficiency and ethical standards, as well as negotiation and trial skills. If the office does not have a formal training program, efforts might be made to assign new personnel to a more experienced attorney for a period of observation or to contract with private agencies or other public defender offices for training programs.

Lawsuits are challenging inadequate funding and the absence of state-funded public defender systems, focusing on the need for states to fund these systems rather than depend on localities to do so. New York, for example, relies on local public defender offices and legal aid societies consisting of court-appointed private attorneys. Attorneys in New York challenged those systems, arguing that they denied fundamental fairness to indigent defendants. A lawsuit was brought on behalf of Kimberly Hurrell-Harring, who argued that her public defender did little other than suggest that she plead guilty to felony charges, and 19 other plaintiffs. In May 2010, the state's highest appellate court held that the case could proceed, while the state's governor, David Patterson, stated that New York's indigent defense system was "a disgrace."[1] The case and its resolution were discussed in **Supplement 7.9**.

In 2014, New York's chief judge, in his state of the judiciary, addressed the issue of New York's indigent defense systems with a first-in-the-nation program. Third-year law students are now permitted to take the February bar rather than wait for the July bar. They may opt to spend their entire semester of that last year of law school working in the Pro Bono Scholars Program. According to Judge Jonathan Lippman, this program would address the oversupply of lawyers as well as enhance the defense of the poor. Students receive law school credit while working on indigent defense cases under the guidance of licensed and experienced attorneys. They will

[1]"Court Rules That Suit on Public Defender System Can Proceed," *New York Times* (May 7, 2010), p. 18.

finish that semester having met the state bar's requirement of 50 hours of pro bono work.

Every case in which ineffective assistance of counsel is alleged must be decided on its unique facts. For example, in 2009, the U.S. Supreme Court considered the issue of whether a defendant was denied his right to a speedy trial after his trial was delayed because he had six different attorneys appointed to defend him. The Supreme Court held that the issue had to be analyzed in light of all the circumstances. In *Vermont v. Brillon*, the Court held that due to the fact that the defendant dismissed some of his attorneys and was thus responsible for some of the delay, the public defender system was not responsible for his denial of a speedy trial.[2]

Assigned Counsel Systems. The second method of providing counsel for indigents is an *assigned counsel* program. Under this model, attorneys are assigned to defend specific indigent defendants. Normally, assignments are made by the judge scheduled to preside over the trial, but some jurisdictions have moved to a more formal and organized system in an attempt to coordinate assignments throughout a jurisdiction. Most assignments are made from lists of attorneys who have volunteered to participate in the program, although in some jurisdictions, all attorneys are expected to participate in the assigned counsel program. A minority of jurisdictions have some procedures for assessing the qualifications of attorneys who participate in assigned counsel cases, but the majority have no qualifications beyond a license to practice law. Most areas that have assigned counsel systems do not have formal provisions for removing names from the list of participating attorneys.

Assigned counsel are paid on a fee schedule determined by state statute or by local bar regulations. These fees are usually too low to attract a sufficient number of lawyers, and in recent years, overall funding has been a problem. Most states have faced budget shortfalls, with many cutting their budgets, including staff as well as programs.

In general, the money received by assigned counsel is less than the average fees paid to private defense attorneys and in many jurisdictions is considerably less. Some systems have maximum fees that can be paid per case, making it impossible for assigned counsel to be paid an adequate fee for all hours worked in a complicated case.

Contract Attorneys. The third model of providing appointed counsel is the *contract system,* which is not used widely. Most of the counties that utilize this method are small (fewer than 50,000 people). In the contract system, a bar association, a private law firm, or an individual attorney contracts with a jurisdiction to provide legal assistance for indigent defendants. But the pay is not usually high enough to attract many attorneys, and some of the cases (such as death penalty cases) require legal skills and experience that are not common to all defense attorneys.

There have been some improvements in legal aid at the federal level. The Justice for All Act of 2004 contains a provision known as the Innocence Protection Act. This act includes grants to states to improve the quality of legal representation in capital cases.[3]

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[2]Jonathan Lippman, Chief Judge of the State of New York, New York State Unified Court System, "The State of the Judiciary 2014" (February 11, 2014), http://www.nycourts.gov/ctapps/soj2014.pdf, accessed July 19, 2014.
[3]Justice for All Act of 2004, Public Law 108-405 (2007).

Supplement 7.11. The Bail System

The bail system developed for practical reasons. It began in England, probably before 1000, when judges traveled from one jurisdiction to another to hold court sessions. Often it was difficult for them to get to a particular place; consequently, it was necessary to devise a way of detaining the accused before the judges arrived. The bail system developed because the detention facilities were recognized as horrible places of confinement and were expensive.

An opportunity to make money in the bail system resulted in the development of the bail bond system. In return for a fee, the bail bondsperson posts bond for the defendant. If the defendant does not appear at trial, the bond money must theoretically be forfeited to the court. In reality, the forfeiture provision is rarely enforced; however, since some bondspersons post bond without having the money available, some jurisdictions require them to prove that they can pay the forfeiture, should that be necessary. Abuses of the bail bond system led to alternative methods for pretrial release, as defined in the following table.

Methods of Pretrial Release in State Courts

Type of release	Defendant	Financial liability for failure to appear	Liable party
Financial			
Surety bond	Pays fee (usually 10% of bail amount) plus collateral if required, to commercial bail agent.	Full bail amount	Bail agent
Deposit bond	Posts deposit (usually 10% of bail amount) with court, which is usually refunded at successful completion of case.	Full bail amount	Defendant
Full cash bond	Posts full bail amount with court.	Full bail amount	Defendant
Property bond	Posts property title as collateral with court.	Full bail amount	Defendant
Non-financial			
Release on recognizance (ROR)	Signs written agreement to appear in court (includes citation releases by law enforcement).	None	N/A
Conditional (supervised) release	Agrees to comply with specific conditions such as regular reporting or drug use monitoring.	None	N/A
Unsecured bond	Has a bail amount set, but no payment is required to secure release.	Full bail amount	Defendant
Emergency release	Released as part of a court order to relieve jail crowding.	None	N/A

Source: Thomas H. Cohen and Brian A. Reaves, Bureau of Justice Statistics, *Special Report: Pretrial Release of Felony Defendants in State Courts* (November 2007), p. 3, http:/www.bjs.gov/content/pub/pdf/prfdsc.pdf, accessed 12 January 2015.

Supplement 7.12. The Importance of Plea Bargaining

The reasons for allowing plea bargaining, as well as some of the prosecutorial activities permissible in the process, were articulated by the U.S. Supreme Court in *Bordenkircher v. Hayes*,[1] decided in 1978. This case involved a defendant who was indicted by a grand jury on the charge of uttering a forged instrument (passing a hot check), an offense carrying a prison term of two to ten years. After the defendant's arraignment on the charge, the prosecutor offered to recommend a five-year sentence if the defendant would plead guilty to the indictment. If the defendant did not plead guilty, the prosecutor said that he would return to the grand jury and ask for an indictment under the Kentucky Habitual Criminal Act (since repealed). Conviction under that act would have resulted in a life term in prison because the defendant had two prior felony convictions

Defendant Hayes did not plead guilty. The prosecutor secured the indictment under the Habitual Criminal Act. The jury found Hayes guilty of uttering a forged instrument and, in a separate proceeding, found that he had two prior felony convictions. As required by statute, upon conviction under that act, Hayes was sentenced to life in prison. The U.S. Supreme Court noted the need for plea bargaining; acknowledged that it is not a right; and held that, although one may not be punished for exercising constitutional rights, the give-and-take of plea bargaining leaves the defendant free to accept or reject an offer. "To hold that the prosecutor's desire to induce a guilty plea is an 'unjustifiable standard,' which, like race or religion, may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself." Four justices dissented in *Bordenkircher*, arguing that the facts of the case constituted prosecutorial vindictiveness, which the U.S. Supreme Court had held was impermissible.

[1]*Bordenkircher v. Hayes*, 434 U.S. 357, 360-365 (1978).

Chapter 8. Trial, Sentencing, and Appeal

Supplement 8.1. The Right to a Speedy Trial in Vermont

The Vermont constitution provides, in part: "[I]n all prosecutions for criminal offenses, a person hath a right to . . . a speedy public trial by an impartial jury."[1]

In *Vermont v. Brillon*, decided by the U.S. Supreme Court in 2009, the federal court had jurisdiction because the Vermont courts invoked the federal rather than the state constitution. The U.S. Supreme Court looked at its precedent, noting that the Court had refused to establish a specific number of days during which a trial must take place. Rather, precedent established a balancing test involving such factors as the following:

- Length of delay
- Reason for the delay
- Defendant's assertion of his right
- Prejudice to the defendant[2]

In *Brillon*, the Vermont Supreme Court held that the defendant was denied a speedy trial under the federal statute. The U.S. Supreme Court reversed. Included here is part of the rationale from the opinion of Justice Ruth Bader Ginsburg. The excerpt includes the relevant facts of the case.

Vermont v. Brillon
556 U.S. 81 (2009), cases and citations omitted

Michael Brillon . . . was arrested in July 2001 on felony domestic assault and habitual offender charges. Nearly three years later, in June 2004, he was tried by jury, found guilty as charged, and sentenced to 12 to 20 years in prison. . . .

During the time between Brillon's arrest and his trial, at least six different attorneys were appointed to represent him. Brillon "fired" the first. . . . His third lawyer . . . was allowed to withdraw when he reported that Brillon had threatened his life. The Vermont Supreme Court charged against Brillon the delays associated with those periods, but charged against the State periods in which assigned counsel failed "to move the case forward."

We hold that the Vermont Supreme Court erred in ranking assigned counsel essentially as state actors in the criminal justice system. Assigned counsel, just as retained counsel, act on behalf of their clients, and delays sought by counsel are ordinarily attributable to the defendants they represent. For a total of some six months of the time that elapsed between Brillon's arrest and his trial, Brillon lacked an attorney. The State may be charged with those months if the gaps resulted from the trial court's failure to appoint replacement counsel with dispatch. Similarly, the State may bear responsibility if there is "a breakdown in the public defender

[1]Vt. Const., Chapter I, Article 10.
[2]*Barker v. Wingo*, 407 U.S. 514 (1972).

system." But, as the Vermont Supreme Court acknowledged, the record does not establish any such institutional breakdown.

[Justice Ginsburg detailed every action of the proceedings and then stated as follows:]

Primarily at issue here is the reason for the delay. . . . [Justice Ginsburg discussed the court's need to balance reasons.] Deliberate delay "to hamper the defense" weighs heavily against the prosecution. . . . "[M]ore neutral reason[s] such as negligence or overcrowded courts" weigh less heavily "but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant."

In contrast, delay caused by the defense weighs against the defendant. . . . [D]efendants may have incentives to employ delay as a "defense tactic"; delay may "work to the accused's advantage" because "witnesses may become unavailable or their memories may fade" over time. . . .

Most of the delay that the Vermont Supreme Court attributed to the State must therefore be attributed to Brillon as delays caused by his counsel . . . all of whom requested delays and continuances. Their "inability or unwillingness . . . to move the case forward" may not be attributed to the State simply because they are assigned counsel.

A contrary conclusion could encourage appointed counsel to delay proceedings by seeking unreasonable continuances, hoping thereby for a dismissal of the indictment on speedy-trial grounds. . . . We see no justification for treating defendants' speedy-trial claims differently based on whether their counsel is privately retained or publicly assigned.

Supplement 8.2. Should Unanimity Apply to State As Well As to Federal Jury Verdicts?

In 1972, the U.S. Supreme Court held that the Sixth Amendment (see Appendix A) requires that all jury trials in the federal system must be decided by a unanimous vote. In March 2019, the Supreme Court agreed to consider whether that rule should be applied to all state trials. This recent case, *Ramos v. Louisiana*,[1] was brought by Evangelisto Ramos, who was convicted of second-degree murder and sentenced to life in prison by a 10-2 jury vote. Ramos acknowledged that he had sex with the deceased the night before she was murdered but he did not kill her. He testified that as he left her house, he saw her enter a car with two other men. The victim's body was found in a trash can in a wooded area in New Orleans.

At the time of the trial, Louisiana was only one of two states (the other was Oregon) that permitted nonunanimous verdicts in criminal cases that did not involve charges of first-degree murder. Louisiana voters subsequently changed their constitution to require unanimous verdicts in all criminal cases, but the change was not retroactive and thus did not pertain to the *Ramos* case.

The American Bar Association passed a resolution in 2018 urging all states to require that jury verdicts be unanimous in all criminal cases. Subsequently the ABA filed an amicus ("friend of the court") brief with the U.S. Supreme Court urging the Court to reconsider its 1972 decision, *Apodaca v. Oregon*,[2] which interpreted the Sixth Amendment as requiring unanimous juries in federal cases, but the Court did not hold that requirement applies to the states through the Fourteenth Amendment. In March 2019, the Supreme Court agreed to reconsider the issue.

[1] *State v. Ramos*, 231 So.3d 44 (La. Ct. App. 4th Dist, 2017), cert. granted, *Ramos v. Louisiana*, 2019 U.S. LEXIS 1833 (U.S. Mar. 18, 2019).
[2] *Apodaca v. Oregon*, 406 U.S. 404 (1972).

Supplement 8.3. Race and Jury Selection: The *Batson* Rule

Batson v. Kentucky
476 U.S. 79 (1986), citations and footnotes omitted

[In this case, the U.S. Supreme Court held that it is unconstitutional to exclude African Americans from juries when there is evidence that the exclusion is based on race.]

Petitioner, a black man, was indicted in Kentucky on charges of second-degree burglary and receipt of stolen goods. The prosecutor used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected. . . .

Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure. . . .

The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors. . . . Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. A person's race simply "is unrelated to his fitness as a juror.". . .

The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. . . .

Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges "for any reason at all, as long as that reason is related to his view concerning the outcome" of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.

[The Court discussed procedures for contesting the peremptory challenges and concluded that the conviction in this case should be reversed.]

Supplement 8.4. The Elimination of Blacks from a Jury: A Successful Challenge

In 2003, the U.S. Supreme Court again considered the issue of jury selection and racial bias. The case involved a Texas death row inmate, Thomas Miller-El, an African American, who was within one week of his scheduled execution when the U.S. Supreme Court agreed to review his case. Miller-El argued that his conviction was a violation of his constitutional rights because the prosecution eliminated 10 of 11 African Americans from the jury pool. The prosecution claimed that it did so because those potential jurors had indicated that they would hesitate to impose the death penalty. Miller-El presented compelling evidence of a larger pattern of racial discrimination in jury selection in that county. His motion to strike the jury (prior to his conviction) had been rejected, and he was convicted by a jury with only one African American juror. He was sentenced to death. Miller-El's appeal was rejected by the lower appellate courts, and he petitioned the U.S. Supreme Court to hear his case.

In *Miller-El v. Cockrell*, the U.S. Supreme Court held that Miller-El should have been granted a hearing by the federal circuit court of appeals. The Court told the lower federal court to rethink its "dismissive and strained interpretation of the proof in the case and to give more serious consideration to the significant evidence pointing to unconstitutional discrimination against black jurors during the jury selection process." Instead of following the orders of the U.S. Supreme Court, however, the Fifth Circuit gave no relief and quoted extensively from the one dissenting vote in the U.S. Supreme Court's decision, that of Justice Clarence Thomas.[1]

In a subsequent appeal to the U.S. Supreme Court, Miller-El was again successful. In June 2005, the Supreme Court detailed the various tactics and "trickery" that the prosecution had used to exclude African Americans from Miller-El's jury. The tactics included asking different questions of whites and of African Americans (in an apparent attempt to encourage African Americans to disqualify themselves by stating opposition to the death penalty), as well as shuffling the jury pool when too many African Americans appeared in the front of the panel. The Court stated that the prosecution's explanation of its use of its peremptory challenges to exclude African Americans because they were opposed to the death penalty "reeks of afterthought." The dissent argued that the prosecution's position was "eminently reasonable."[2] In 2008, Miller-El agreed to plead guilty to murder and aggravated robbery in exchange for the prosecution's agreement not to seek the death penalty against him.

[1]*Miller-El. v. Cockrell*, 537 U.S. 322 (2003).
[2]*Miller-El v. Dretke*, 545 U.S. 231 (2005).

Supplement 8.5. Jury Selection and Sexual Orientation

The Ninth Circuit decision in *SmithKline Beecham v. Abbott Laboratories,* a civil case, raised the issue of jury selection and sexual orientation. When a lawyer for Abbott Laboratories used a peremptory challenge to strike a juror, an opposing lawyer objected, stating that the potential juror "is or appears to be, could be, homosexual." According to that lawyer, the case involved AIDS medications and "the incidence of AIDS in the homosexual community is well known, particularly gay men." The judge cited several problems, including the issue of whether *Batson* applies to sexual orientation and how one could tell who is and who is not gay. California bars peremptory challenges based on sexual orientation, but this is a federal case in that state. The Ninth Circuit panel held that it was improper for the attorney to use a peremptory challenge to exclude that potential juror, thus implying that *Batson* does apply to sexual orientation. The full Ninth Circuit refused to hear the case. Here is an excerpt:

SmithKline Beecham v. Abbott Laboratories
740 F.3d 471 (9th Cir. 2014), *rehearing en banc denied,* 759 F.3d 990 (9th Cir. 2014), cases and citations omitted

The central question in this appeal arises out of a lawsuit . . . that contains antitrust, contract, and unfair trade practice (UTPA) claims. The dispute relates to a licensing agreement and the pricing of HIV medications, the latter being a subject of considerable controversy in the gay community. . . .

During jury selection, Abbott used its first peremptory strike against the only self-identified gay member [the man referred to his "partner" several times and used the masculine pronoun] of the venire [jury pool]. . . .

This appeal's central question is whether equal protection prohibits discrimination based on sexual orientation in jury selection. We must first decide whether classifications based on sexual orientation are subject to a standard higher than rational basis review. We hold that such classifications are subject to heightened scrutiny. We also hold that equal protection prohibits peremptory strikes based on sexual orientation and remand for a new trial.

Supplement 8.6. Defendants Must Observe Proper Behavior During Court Proceedings

Illinois v. Allen involved a defendant who appealed his conviction for armed robbery on the grounds that he had been improperly excluded from his trial. At the beginning of the trial, William Allen insisted on being his own lawyer, rejecting the services of his court-appointed counsel. Defendants have the right to refuse counsel, but generally, attorneys will be appointed and available for defendants who choose to exercise that right. In the *Allen* case, when the defendant began questioning prospective jurors, the judge interrupted him and asked him to confine his questions to the matters relating to their qualifications. Allen responded in an abusive and disrespectful manner. The judge asked appointed counsel to proceed with the examination of prospective jurors. Allen continued to talk, "proclaiming that the appointed attorney was not going to act as his lawyer. He terminated his remarks by saying, 'When I go out for lunchtime, you're [the judge] going to be a corpse here.'"[1]

Allen took a file from his court-appointed attorney, tore it, and threw it on the floor. The judge warned Allen that he would remove him from the trial if he continued in this manner, but the warning did not deter the defendant. Allen was removed from the courtroom, and the examination of the potential jurors continued in his absence. Later, Allen was returned to the court but was removed again after another outburst. During the presentation of the state's case, Allen was occasionally taken to the courtroom for identification, but he used vile and abusive language in responding to a question from the judge. After assuring the court that he would behave, Allen was permitted to be in the courtroom while his attorney presented the case for the defense.

Justice Hugo Black delivered the opinion for the U.S. Supreme Court, which upheld the right of the trial judge to exclude Allen from his own trial. Justice Black pointed out that the trial judge had three constitutionally permissible options in this case. He could have cited Allen for contempt of court, excluded him from the trial, or bound and gagged him and left him in the courtroom. Each option was discussed, with the Court noting the possible prejudicial effect that binding and gagging the defendant might have had on the jury.

> Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.[2]

The U.S. Supreme Court noted that another problem with gagging is that this procedure prevents the defendant from meaningful contact with his attorney. For that reason, the Court refused to hold that the state must use this method in lieu of excluding the defendant from the trial. Furthermore, the Court emphasized the importance of maintaining decorum in the courtroom and concluded that

[1]*Illinois v. Allen*, 397 U.S. 337 (1970).
[2]*Illinois v. Allen*, 397 U. S. 337 (1970).

if our courts are to remain what the Founders intended, the citadels of justice, their proceedings cannot and must not be infected with the sort of scurrilous, abusive language and conduct paraded before the Illinois trial judge in this case.[3]

[3]*Illinois v. Allen*, 397 U. S. 337 (1970).

Supplement 8.7. Prison Sentence Cut by Ten Years: Justice or Convenience?

A Houston, Texas, federal judge agreed to a sentence reduction for Jeffrey Skilling in 2013 after Skilling's attorneys and federal prosecutors agreed to a plea deal. In exchange for having his sentence cut from 24 to 14 years, Skilling accepted his convictions on 19 federal charges, including insider trading, conspiracy, and securities fraud, and he agreed that the $40 million forfeited in the case would be distributed to his crime victims.[1]

Skilling was the chief executive officer of energy giant Enron Corporation (once the seventh largest company on the Fortune 500), who, along with Kenneth L. Lay, Enron's founder, and others were convicted of numerous federal crimes that led to the company's downfall. Almost 5,000 people lost their jobs in the bankruptcy that resulted in the loss of $2 billion in pension plans, and $60 billion in market value.

Skilling's conviction for conspiracy to commit honest services fraud was before the U.S. Supreme Court in 2010. The Court held that the statute that prohibits schemes "to deprive another of the intangible right of honest services" covers only bribery and kickback schemes, and Skilling was not charged with those crimes and it was an error to extend the statute beyond those crimes. According to the Court, "[t]he government did not, at any time, allege that Skilling solicited or accepted side payments from a third party in exchange for making these misrepresentations. . . . It is therefore clear that, as we read [the statute], Skilling did not commit honest-services fraud." Skilling maintained that he did not intend to deprive anyone of honest services but was only trying to improve the value of Enron's stock.[2]

The Supreme Court vacated Skilling's conviction, did not express an opinion on whether the errors were harmful, and sent the case back to the lower court to determine whether the errors were harmless or prejudicial. Skilling was released from a minimum-security prison in Alabama in 2018.

This decision can be viewed as leniency in a case in which the defendant deserved a longer sentence, or it could be viewed as a reasonable way to end the extensive litigation that could be expected to continue.

Kenneth L. Lay died before he was sentenced. According to the rules of criminal procedure, his conviction was vacated as he could not appeal.

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[1]"Skilling Sentenced to 24 Years," *New York Times* (October 24, 20016), p. 1B: "Ex-Enron CEO Jeff Skilling's Sentence Reduced to 14 Years: He'll Leave Prison in 2020," ABC Evening News (June 22, 2013).
[2]*United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009), *aff'd in part and vacated in part, remanded, Skilling v. United States*, 561 U.S. 358 (2010). The statute at issue is codified at USCS, Title 18, Sections 371, 1343, and 1346 (2019).

Supplement 8.8. The Case Against Long Mandatory Minimum Sentences

U.S. Supreme Court Associate Justice Anthony M. Kennedy, speaking before the annual meeting of the American Bar Association (ABA) in August 2003, called for that organization to review the nation's use of long mandatory sentences. Justice Kennedy noted that the United States

- has the highest rates of incarceration in the world.
- spends approximately $40 billion a year incarcerating inmates.
- has an African American inmate population that constitutes approximately 40 percent of all of the inmates in the country.[1]

Justice Kennedy said that in many cases mandatory minimum sentences "are unwise and unjust." He compared the cost of incarceration to the cost of education, with these poignant words:

> When it costs so much more to incarcerate a prisoner than to educate a child, we should take special care to ensure that we are not incarcerating too many persons for too long. . . . It requires one with more expertise in the area than I possess to offer a complete analysis, but it does seem justified to say this: Our resources are misspent, our punishments too severe, our sentences too long.[2]

In response to Kennedy's challenge to revisit the federal sentencing guidelines, which, according to him, should be revised downward, the ABA appointed the Justice Kennedy Commission. In August 2004, the ABA adopted some of the recommendations of the Kennedy Commission, "including repealing mandatory sentencing laws, and employing 'guided discretion' sentencing systems 'to avoid unwarranted and inequitable disparities in sentencing among like offenses and offenders, but permit courts to consider unique characteristics of offenses and offenders that may warrant an increase or decrease in a sentence.'" The ABA also adopted resolutions that would require law enforcement agencies to implement policies to eradicate ethnic and racial profiling, establish standards permitting inmates to request reductions of their sentences when exceptional circumstances occur, implement policies to ensure safe correctional facilities, and design programs to assist inmates with the problems of returning to society after incarceration.[3]

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[1]"ABA Creates Kennedy Commission on Sentencing and Prison Policies," *Criminal Justice Newsletter* (November 3, 2003), p. 6.
[2]Ibid.
[3]"ABA Passes Resolutions Dealing with Sentencing Guidelines," *Wisconsin Law Journal* (August 18, 2004), n.p.

Supplement 8.9. Important U.S. Supreme Court Decisions on Sentencing: A Selection

In 2004, the U.S. Supreme Court decided the case of *Blakely v. Washington*, which raised the issue of whether the Supreme Court's decision in *Ring v. Arizona* applies to noncapital cases. In *Ring*, the Supreme Court held that the aggravating circumstances used to make a defendant eligible for a capital sentence must be decided by a jury, not by a judge. Likewise, mitigating circumstances must be decided by a jury.[1]

In *Blakely*, the U.S. Supreme Court faced the question of whether *Ring* applies to noncapital sentences for which state legislation requires the consideration of aggravating and mitigating circumstances. *Blakely* also raised issues concerning sentencing guidelines. The case came from Washington State, which provided by statute that, for a variety of reasons, a trial judge may increase a sentence up to the statutory maximum. Blakely was sentenced to 90 months in prison after his conviction for kidnapping his wife. Kidnapping in Washington was a felony and could result in a sentence of up to 120 months. According to the sentencing guidelines of that state, given the circumstances of Blakely's crime, he should have received a 53-month sentence, but the judge increased that to 90 months after finding evidence of domestic violence and deliberate cruelty. The judge based those findings on evidence presented during a special sentencing hearing, in which the standard of proof was *a preponderance of the evidence* rather than the *beyond a reasonable doubt* standard of proof required during the trial phase. Blakely appealed, arguing that the latter standard should apply and that a jury should make the decision. The Washington appellate court rejected those arguments. The U.S. Supreme Court reversed, stating that it was adhering to its 2000 precedent case of *United States v. Apprendi*, in which the Court had ruled that *any* fact (other than a prior conviction) that could be used to enhance a sentence must be submitted to the jury and found to be true beyond a reasonable doubt.[2]

In 2004, the U.S. Supreme Court decided two cases that involved issues left unresolved by *Blakely*: (1) whether the defendant's Sixth Amendment rights are violated if a trial judge alone conducts fact finding at the sentencing hearing, and (2) whether the federal sentencing guidelines were still viable.

The first case involved a defendant, Freddie J. Booker, who was convicted of possessing and distributing crack cocaine. The amount of cocaine found on Booker when he was arrested (92.5 grams), combined with his 23 prior convictions, would, under the federal sentencing guidelines in effect at that time, have resulted in a sentence of slightly less than 22 years. However, at the time of his arrest, Booker told police that in the previous few months he had sold 20 ounces of cocaine. At the sentencing hearing, the trial judge added that amount to the 92.5 grams. The judge also added an obstruction of justice conviction based on his own determination that Booker had committed perjury at the trial. The result of these add-ons was a 30-year sentence, which was reversed by the court of appeals.[3]

The second case involved Ducan Fanfan, who was convicted of conspiracy to distribute at least 500 grams of powder cocaine. At the sentencing hearing, the prosecution offered

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[1]*Ring v. Arizona*, 534 U.S. 1103 (2002).
[2]*Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Apprendi*, 530 U.S. 466 (2000).
[3]*United States v. Booker*, 375 F.3d 508 (7th Cir. 2004).

evidence that Fanfan also dealt in crack cocaine, which carried a longer sentence. Initially, the federal trial judge sentenced Fanfan to 16 years in prison; however, based on *Blakely*, decided four days previously, the judge gave the defendant only a 6½-year sentence. That sentence was based on the amount of drugs involved in the jury decision. In agreeing to review the case, the U.S. Supreme Court bypassed the First Circuit Court of Appeals in Boston and accepted the case directly from the trial decision.[4]

In January 2005, the U.S. Supreme Court handed down its decisions in both *United States v. Booker* and *United States v. Fanfan*, with a 5-to-4 vote in each case. Justice John Paul Stevens, writing for the majority in one opinion, emphasized that the right to a trial by jury guaranteed by the Sixth Amendment (see Appendix A) is violated when a sentence is based on facts determined by the judge but not the jury. The second opinion, written by Justice Stephen G. Breyer, reduced the federal sentencing guidelines to an advisory role. According to Breyer, "[t]he district courts, while not bound to apply the guidelines, must consult those guidelines and take them into account when sentencing." But Breyer noted that Congress could act to change the federal sentencing guidelines when he said, "The ball now lies in Congress' court. The national legislature is equipped to devise and install, long-term, the sentencing system compatible with the Constitution, that Congress judges best for the federal system of justice."[5]

In November 2006, the U.S. Supreme Court accepted two cases on the issue of the role of federal sentencing guidelines after *Booker*. In *Rita v. United States*, the U.S. Supreme Court held that federal appellate courts may *presume* that a trial court's sentence within the federal guidelines is reasonable. Victor Rita argued unsuccessfully that the guidelines were unreasonable in his case because of health, his fear of being abused in prison, and his distinguished military service.[6]

In *Claiborne v. United States*, the appellant was sentenced to 15 months in prison for his conviction of possession with intent to distribute crack cocaine. This sentence was significantly shorter than that of the federal sentencing guidelines and was challenged by prosecutors. The appellant was murdered before the U.S. Supreme Court announced its decision, and the Court vacated the case.[7]

In *Gall v. United States*, the U.S. Supreme Court upheld a trial judge's decision to put the defendant on probation after his guilty plea to conspiracy to distribute MDMA (Ecstasy), a felony, despite the fact that the federal sentencing guidelines provide for a prison sentence for that offense. Among other reasons for the downward departure (i.e., lighter sentence), the judge cited the defendant's youth and the fact that he was a college student with a limited prior criminal record, showed remorse, and cooperated with the government.[8]

In *Kimbrough v. United States*, the U.S. Supreme Court considered whether a sentence that falls outside the sentencing guidelines "is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses." The Court

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[4]*United States v. Fanfan*, 2004 U.S. Dist. LEXIS 18593 (D. Me. 2004).
[5]*United States v. Fanfan* and *United States v. Booker*, 543 U.S. 220 (2005).
[6]*Rita v. United States*, 551 U.S. 338 (2007).
[7]*Claiborne v. United States*, 551 U.S. 87 (2007).
[8]*Gall v. United States.* 552 U.S. 38 (2007).

held that "under *Booker*, the cocaine Guidelines, like all other Guidelines, are advisory only" and the lower federal court "erred in holding the crack/powder disparity effectively mandatory."[9]

In 2009, in *Spears v. United States*, the U.S. Supreme Court confirmed that in the federal system, trial judges may hand down a more lenient sentence than the federal sentencing guidelines provide for conviction of crack cocaine violations.[10]

An earlier U.S. Supreme Court decision concerned the issue of the role of judges in sentencing. *Shepard v. United States* was decided in 2005 and involved a defendant who had previously entered guilty pleas to four burglaries, but his plea agreement did not contain the necessary details of those crimes. The federal statute under which Shepard entered a guilty plea to being a felon in possession of a firearm, the Armed Career Criminal Act (ACCA), permits enhanced penalties for offenders who are convicted of specified prior violent felonies. This provision includes burglaries but only if they are committed within a building or an enclosed space, such as a house. The burglary of a car or a boat does not meet the requirement for an enhanced penalty. Since Shepard's plea agreement did not note the required details of his burglary, and the district court ruled that the prosecutor did not present other evidence showing that Shepard's prior burglaries counted, the judge imposed a three-year sentence. The appellate court ruled that the trial judge should have looked at police reports to obtain the needed information, and, in effect, ordered the lower court to impose the 15-year mandatory minimum sentence.

The U.S. Supreme Court reversed the decision of the appellate court, ruling by a 5-to-4 vote that *Apprendi* and other recent cases limit trial judges to official court documents when they consider the nature of prior offenses for purposes of enhancing a sentence. Thus, it was inappropriate to go beyond Shepard's plea agreement to determine whether his prior burglaries met the requirements for an enhanced sentence under the ACCA.[11]

The U.S. Supreme Court has also considered state sentencing cases. *Cunningham v. California* involved a state statute that provided for three categories of sentences for the continuous sexual abuse of a child: a lower term (6 years); a middle term (12 years); and an upper term (16 years). The trial judge found six aggravating circumstances and imposed the upper term of 16 years. The U.S. Supreme Court ruled that the finding of aggravating circumstances must be by the jury, not the judge, using the standard of beyond a reasonable doubt.[12]

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[9]*Kimbrough v. United States*, 552 U.S. 85 (2007).
[10]*Spears v. United States*, 555 U.S. 261 (2009).
[11]*Shepard v. United States*, 544 U.S. 13 (2005).
[12]*Cunningham v. California*, 549 U.S. 270 (2007). The relevant California statutes are Cal. Penal Code, Part I, Title 9, Chapter 5, Sections 288.5(1) and Part 2, Title 7, Chapters 4, 5, Article 1, Section 1170(b) (2018).

Supplement 8.10. Capital Punishment in the United States: A Brief History

In 1972, in *Furman v. Georgia*, the U.S. Supreme Court held that, although capital punishment is not per se unconstitutional, it is unconstitutional when in its application it involves discrimination caused by arbitrary and capricious administration of the sentence. *Furman* invalidated most capital punishment statutes in existence at the time, but the Supreme Court left the door open for new legislation providing for capital punishment if it is applied without violating defendants' constitutional rights.[1]

By 1976, 36 states had responded with new capital punishment statutes, although some of those were challenged in the courts. In 1977, the constitutional issues were satisfied in the case of the Utah statute, and Gary Gilmore became the first person executed since 1967. In May 1979, after a long and complicated legal battle, John Spenkelink, convicted of murdering a man with a hatchet, was the first inmate to die involuntarily of capital punishment in the United States since 1967 (Gilmore refused to appeal his sentence and asked that it be carried out). Spenkelink was executed in Old Sparky, Florida's electric chair.

One of the issues regarding capital punishment is the method of execution. The issue of execution by electrocution arose frequently in Florida. In 1999, the U.S. Supreme Court agreed to decide whether electrocution as the *only* method of capital punishment in Florida constituted cruel and unusual punishment. In January 2000, the Florida legislature enacted a new statute, which provides that inmates under a death sentence may choose between electrocution and lethal injection. The Supreme Court dismissed the Florida appeal because the issue, which came from a death row inmate who would be able to choose lethal injection, was moot.[2]

In 2018, Tennessee executed Edmund Zagorski by electric chair. Zagorski was convicted of killing two men whom he lured into the woods with the promise of selling them drugs. He shot the victims, slit their throats, and stole money from their trucks. Zagorski, who had spent 34 years on death row, during which he filed 22 appeals, chose electrocution over lethal injection because he thought the method would kill him more quickly and he would suffer less pain. The state initially denied that request on the grounds that it was filed too late and the state had not prepared the electric chair for use. The initial execution date was delayed for the state to make those preparations. The U.S. Supreme Court refused to grant a stay of execution, with Justice Sonja Sotomayer dissenting. Zagorski was executed in November 2018.[3]

In April 2008, the U.S. Supreme Court upheld the use of lethal injection in a Kentucky case brought by two inmates who raised the issue of whether there is a probability that proper procedures would not be followed, resulting in sufficient pain to the inmate to constitute cruel and unusual punishment. According to Chief Justice John Roberts, who wrote the opinion for the majority, "the Constitution does not demand the avoidance of all risk of pain in carrying out executions." Justice Clarence Thomas, who wrote a concurring opinion, stated that a method of

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[1]*Furman v. Georgia*, 408 U.S. 238 (1972).
[2]*Provenzano v. Moore*, 744 So. 2d 413 (Fla. 1999), *cert. denied*, 528 U.S. 1182 (2000); *Bryan v. Moore*, 528 U.S. 960 (1999), *cert. dismissed*, 528 U.S. 1133 (2000).
[3]Summarized by the author from various news stories. The denial of a stay of execution is recorded in *Zagorski v. Haslam*, 139 S.Ct. 20 (November 1, 2018).

execution constitutes cruel and unusual punishment in violation of the Eighth Amendment (see Appendix A) "only if it is deliberately designed to inflict pain."[4]

The U.S. Supreme Court has also considered the issue of whether it is constitutional to execute mentally challenged persons. In 2002, the U.S. Supreme Court held that it is unconstitutional to execute a mentally retarded (but not necessarily mentally ill) person. *Atkins v. Virginia* involved a man who was sentenced to death for a murder he committed when he was 18. Daryl R. Atkins has an IQ of 59. The U.S. Supreme Court left it to the states to determine when a person is mentally retarded and did not provide much guidance for making that determination.[5]

In 2007, in *Panetti v. Quarterman*, the U.S. Supreme Court held that it would be cruel and unusual punishment to execute a mentally challenged murderer who, due to psychotic delusions, did not have a rational understanding of why he was to be executed. According to the Court, the lower court should have considered the defendant's allegation that he suffered from a "severe, documented mental illness that is the source of gross delusions preventing him from comprehending the meaning and purpose of the punishment to which he has been sentenced." The U.S. Supreme Court held that this information should have been considered during the sentencing phase. The appellant/death row inmate in this case, Scott Panetti, killed his in-laws in the presence of his wife and daughter. He served as his own defense counsel, dressed in a cowboy costume with a purple bandana. He attempted to call 200 witnesses, including Jesus Christ, the Pope, and former and deceased president John F. Kennedy. Panetti was scheduled to die in December 2014, but a panel of three judges of the Fifth Circuit Court of Appeals issued a stay to allow time for arguments on the legal issues concerning executing mentally challenged persons.[6]

In 2013, John Ferguson, diagnosed as a paranoid schizophrenic, aggressive, and delusional, was executed in Florida after his attorneys failed to convince the U.S. Supreme Court that their client, who had been mentally challenged for decades, was not competent to be executed. The State of Florida argued successfully that the inmate knew that he committed murder and that he was to be put to death; thus, he was competent.[7]

Florida's statute permitted the execution of a person who scored 70 or higher on an IQ test, but one of its inmates on death row, Freddie Lee Hall, scored between 71 and 80 on his tests. In 2014, the U.S. Supreme Court, referring now to intellectual disability rather than mental retardation, held that the rule was too rigid and "creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional."[8]

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[4]*Baze v. Rees*, 553 U.S. 35 (2008). The statute is Ky. Rev. Stat. 431.220 (2007).
[5]*Atkins v. Virginia*, 536 U.S. 304 (2002).
[6]*Panetti v. Quarterman*, 551 U.S. 930 (2007), *stay granted, Panetti v. Stephens*, 2014 U.S. App. LEXIS 22673 (5th Cir. 2014).
[7]Death Penalty Information Center, "Upcoming Execution: Florida's Narrow Interpretation of Mental Competency Leads to New Date," http://www.deathpenaltyinfo.org, accessed July 22, 2014.
[8]*Hall v. Florida*, 572 U.S. 701 (2014). The Florida Statute is Fla. Stats, Section 921.127 (2018).
[8]*Delgado v. State*, 2015 Fla. LEXIS 871 (April 23, 2015).

On April 23, 2015, however, the Florida Supreme Court reversed the death penalty conviction of Humberto Delgado Jr. and sentenced him to life in prison without parole. According to the court, the death penalty was not proportionate in this case. The court carefully analyzed the testimonies of the six medical experts, all of whom diagnosed Humberto "with some form of bipolar disorder." The court concluded that although this case was not "one of the most aggravated" of the cases it had decided on the proportionality issue, it was also not one of the "least mitigation." But a careful comparison of the facts of Delgado's case with those of other death penalty cases decided by the Florida Supreme Court indicates that Delgado's death sentence was disproportionate to his crime.[9]

In February 2019, the U.S. Supreme Court extended its holding in *Panetti*, discussed earlier, to death row inmates suffering from dementia. In *Madison v. Alabama*,[9] the Supreme Court considered two questions. First, the Court decided that the Eighth Amendment does not preclude executing one whose dementia left him without the ability to remember his crime. This is because "a person lacking such memory may still be able to form a rational understanding of the reasons for his death sentence." The second question was whether the Eighth Amendment's prohibition against cruel and unusual punishment applies "similarly to a prisoner suffering from dementia as to one experiencing psychotic delusions," and that issue, the Court held "we think so, because either condition may-or, then again, may not-impede the requisite comprehension of his punishment." Whether this ruling applies to Madison was left to the state court to determine.

The crime for which one is convicted also figures into the constitutionality of the death penalty. In 2008, the U.S. Supreme Court held that capital punishment constitutes cruel and unusual punishment when imposed on a defendant found guilty of the rape but not the murder of a child. The Court had previously held that the rape but not the murder of an adult woman did not warrant the death penalty, but in *Kennedy v. Louisiana*, the Court extended the Eighth Amendment prohibition against cruel and unusual punishment to an offender who rapes but does not murder a child.[10]

Another issue in death penalty cases relates to the drugs used in lethal injections. In recent years, jurisdictions have had difficulty obtaining the cocktail of drugs they use for executions; some have therefore changed drugs. Inmates have demanded to know which drugs are to be used. And in an Oklahoma execution, the first of two scheduled for that day in April 2014, was halted when the inmate, already declared unconscious, yelled, "man" and "something's wrong." He died of a heart attack. One editorial referred to the situation as a "state-sponsored horror," and Oklahoma officials vowed to examine all of the procedures associated with their executions. A subsequent investigation found no problems with the execution procedures and drugs.[11]

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[9]*Madison v. Alabama*, 139 S.Ct. 718 (2019).

[10]*Kennedy v. Louisiana*, 554 U.S. 407 (2008). The previous case, involving the rape of an adult woman, was *Coker v. Georgia*, 433 U.S. 584 (1977).

[11]"Inmate Dies After Execution Is Interrupted," *New York Times* (April 30, 2014), p. 12; "State-Sponsored Horror in Oklahoma," *New York Times* (May 1, 2014), p. 20; "Oklahoma Vows Review in Botched Execution," *New York Times* (May 1, 2014), p. 1.

On April 29, 2015, the U.S. Supreme Court heard oral arguments on the issue of whether the execution of Oklahoma inmates is cruel and unusual punishment when the drug midazolam is part of the three-drug cocktail used in lethal injections in that state. Midazolam is the first drug to be administered in the execution process in Oklahoma. This drug was not a factor in the *Baze* case mentioned earlier. Midazolam does not relieve pain or induce sleep; thus, it cannot relieve the pain that will be induced by the second and third drugs used in Oklahoma executions. The drug is not approved by the Federal Drug Administration (FDA) for use as a general anesthesia. During oral arguments, the justices appeared bitterly divided over whether the Court should reverse the lower courts that permitted the use of midazolam. The Court held that the inmates who challenged the use of the drug were not entitled to relief. Justice Breyer dissented and called for a full briefing on the issue of whether capital punishment per se constitutes cruel and unusual punishment. He stated, "I believe it highly likely that the death penalty violates the Eighth Amendment."[12]

In opinions filed in 2018, in cases in which the U.S. Supreme Court refused to hear capital punishment cases from Florida, Justice Breyer's concerns about the possibility that the death penalty constitutes cruel and unusual punishment were challenged by Justice Clarence Thomas, concurring in the Court's refusal to hear the case of *Reynolds v. Florida*. According to Thomas:

> As I have elsewhere explained, "it is clear that the Eighth Amendment does not prohibit the death penalty. The only thing 'cruel and unusual' in this case was petitioner's brutal murder of three innocent victims."[13]

U.S. Supreme Court death penalty decisions in the spring of 2019 continue to show the bitter divide on the Supreme Court concerning the issue of capital punishment. For example, in *Bucklew v. Precythe*,[14] decided on April 1, 2019, the Supreme Court rejected the claim of an inmate who argued that lethal injection was unconstitutional as applied to him due to his unusual medical conditions, a rare congenital disease known as cavernous hemangioma, which causes "tumors filled with bloods vessels" to grow throughout his body. Russell Bucklew claimed that lethal injection would cause these tumors to hemorrhage, causing severe pain. In a 5-4 decision, the Supreme Court rejected the view.

The Court's opinion, written by Justice Gorsuch and joined in by Chief Justice Roberts and Justices Thomas, Alito, and Kavanaugh (Justice Thomas and Kavanaugh also filed concurring opinions), presented the view that the Court's precedents require that an inmate making such a claim as Bucklew must present an alternate execution method and show that it is feasible and would result in less pain. The majority also emphasized that the death penalty was in practice at the time the Constitution was adopted, and though the people could change it, the Court had no license to do so. The opinion discussed the history of the Court's treatment of issues regarding the death penalty, especially with regard to execution methods, concluding that there is no constitutional guarantee that a method will be pain free. As he discussed the arguments of the appellate and of the dissent, Justice Gorsuch used such language as "rehash the same argument,"

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[12]*Glossip v. Gross*, 135 S. Ct. 2726 (2015).
[13]*Reynolds v. Florida*, 586 U.S. ___ (2018).
[14]*Bucklew v. Precythe*, 139 S.Ct. 1112 (2019).

and “fail to respect the force of our precedents–or to grapple with the understanding of the Constitution on which” they rest.

In the dissent, Justices Breyer and Sotomayer (joined in part by Justices Ginsberg and Kagan) concluded that Bucklew had “easily established a genuine issue of material fact regarding whether an execution by lethal injection would subject him to impermissible suffering.” They rejected the argument that precedent required him to establish a less painful alternative method. They emphasized that the Court has “repeatedly held that the Eighth Amendment is not a static prohibition that proscribes the same things that it proscribed in the 18th century. Rather, it forbids punishments that would be considered cruel and unusual today.” These justices conclude that is may be that “there simply is no constitutional way to implement the death penalty.

Supplement 8.11. The U.S. Supreme Court Upholds Three-Strikes Legislation

Ewing v. California
538 U.S. 11 (2003), cases and citations omitted

In this case we decide whether the Eighth Amendment prohibits the State of California from sentencing a repeat felon to a prison term of 25 years to life under the State's "Three Strikes and You're Out" law. . . .

For many years, most States have had laws providing for enhanced sentencing of repeat offenders . . . [but between 1993 and 1995 the current three-strikes legislation approach began]. These laws responded to widespread public concerns about crime by targeting the class of offenders who pose the greatest threat to public safety: career criminals. . . . Throughout the States, legislatures enacting three strikes laws made a deliberate policy choice that individuals who have repeatedly engaged in serious or violent criminal behavior, and whose conduct has not been deterred by more conventional approaches to punishment, must be isolated from society in order to protect the public safety. . . .

When the California Legislature enacted the three strikes laws, it made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime. Nothing in the Eighth Amendment prohibits California from making that choice. . . .

Recidivism is a serious public safety concern in California and throughout the Nation. . . .

The State's interest in deterring crime also lends some support to the three strikes law. We have long viewed both incapacitation and deterrence as rationales for recidivism

statutes. . . .

Ewing's sentence is justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record. . . . The State of California "was entitled to place upon [Ewing] the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State." . . .

We hold that Ewing's sentence of 25 years to life in prison, imposed for the offense of felony grand theft under the three strikes law, is not grossly disproportionate and therefore does not violate the Eighth Amendment's prohibition on cruel and unusual punishments.

Supplement 8.12. 2015 National Drug Control Strategy

On October 21, 2015, President Barack Obama made this statement in introducing his 2015 National Drug Control Strategy:

> We're partnering with communities to prevent drug use, reduce overdose deaths, help people get treatment. And under the Affordable Care Act, more health plans have to cover substance abuse disorders. The budget that I sent Congress would invest in things like state overdose prevention programs, preparing more first responders to save more lives, and expanding medication assisted treatment programs.

The White House explained:

> The Obama Administration's first National Drug Control Strategy, published in 2010, charted a new course in efforts to reduce illicit drug use and its consequences in the United States. Science has shown that a substance use disorder is not a moral failing but rather a disease of the brain that can be prevented and treated. Informed by this basic understanding, the annual Strategies that followed have promoted a balance of evidence-based public health and safety initiatives. The 2015 Strategy focuses on seven core areas:
>
> - Preventing drug use in our communities;
> - Seeking early intervention opportunities in health care;
> - Integrating treatment for substance use disorders into health care and supporting recovery;
> - Breaking the cycle of drug use, crime, and incarceration;
> - Disrupting domestic drug trafficking and production;
> - Strengthening international partnerships; and
> - Improving information systems to better address drug use and its consequences.

The Strategy emphasized the administration's commitment to confronting the prescription drug misuse and heroin epidemic. In 2010, the President's first National Drug Control Strategy emphasized the need for action to address opioid use disorders and overdose, while ensuring that individuals with pain receive safe, effective treatment. The next year, the White House released its national Prescription Drug Abuse Prevention Plan to outline goals for addressing prescription drug abuse and overdose. The President's Fiscal Year 2016 budget included $133 million in new investments aimed at addressing the opioid epidemic, including expanding state-level prescription drug overdose prevention strategies, medication-assisted treatment programs, and access to the overdose-reversal drug naloxone.

Beyond its function as a guide for shaping federal policy, the Strategy is a useful resource

for anyone interested in learning what is being done—and what other work can be done—to stop drug production and trafficking, prevent drug use, and provide care for those who are addicted. For parents, teachers, community leaders, law enforcement officers, elected officials, ordinary citizens, and others concerned about the health and safety of our young people, the Strategy is a valuable tool that not only informs but also can serve as a catalyst to spark positive change.[1]

[1]2015 National Control Drug Strategy, The White House, https://www.thewhitehouse.org, accessed July 21, 2016.

Supplement 8.13. Presidential Executive Order Establishing the President's Commission on Combating Drug Addiction and the Opioid Crisis

On March 29, 2017, President Donald J. Trump signed a presidential executive order establishing a commission on combating drug addiction and the opioid crisis. Portions of that order are reproduced here.

> By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:
>
> Section 1. Policy. It shall be the policy of the executive branch to combat the scourge of drug abuse, addiction, and overdose (drug addiction), including opioid abuse, addiction, and overdose (opioid crisis). This public health crisis was responsible for more than 50,000 deaths in 2015 alone, most of which involved an opioid, and has caused families and communities across America to endure significant pain, suffering, and financial harm. . . .
>
> Sec. 4. Mission of Commission. The mission of the Commission shall be to study the scope and effectiveness of the Federal response to drug addiction and the opioid crisis described in Section 1 of this order and to make recommendations to the President for improving that response. The Commission shall:
>
> (a) identify and describe the availability and accessibility of drug addiction and the opioid crisis;
>
> (b) assess the availability and accessibility of drug addiction treatment services and overdose reversal throughout the country and identify areas that are underserved;
>
> (c) identify and report on best practices for addiction prevention, including healthcare provider education and evaluation of prescription practices, and the use and effectiveness of State prescription drug monitoring programs;
>
> (d) review the literature evaluating the effectiveness of educational messages for youth and adults with respect to prescription and illicit opioids;
>
> (e) identify and evaluate existing Federal programs to prevent and treat drug addiction for their scope and effectiveness, and make recommendations for improving these programs; and
>
> (f) make recommendations to the President for improving the Federal response to drug addiction and the opioid crisis.[1]

[1]The White House Press Office, "Presidential Executive Order Establishing the President's Commission on Combating Drug Addiction and the Opioid Crisis" (March 29, 2017), https://www.whitehouse.gov, accessed July 7, 2017.

Supplement 8.14. In 2017, U.S. Attorney General Jeff Sessions Issued an Order Concerning Sentencing Policies

The Trump White House Sentencing Policy

Office of the Attorney General
Washington, D. C. 20530
May 10, 2017

MEMORANDUM FOR ALL FEDERAL PROSECUTORS

FROM: THE ATTORNEY GENERAL

SUBJECT: Department Charging and Sentencing Policy

This memorandum establishes charging and sentencing policy for the Department of Justice. Our responsibility is to fulfill our role in a way that accords with the law, advances public safety, and promotes respect for our legal system. It is of the utmost importance to enforce the law fairly and consistently. Charging and sentencing recommendations are crucial responsibilities for any federal prosecutor. The directives I am setting forth below are simple but important. They place great confidence in our prosecutors and supervisors to apply them in a thoughtful and disciplined manner, with the goal of achieving just and consistent results in federal cases.

First, it is a core principle that prosecutors should charge and pursue the most serious, readily provable offense. This policy affirms our responsibility to enforce the law, is moral and just, and produces consistency. This policy fully utilizes the tools Congress has given us. By definition, the most serious offenses are those that carry the most substantial guidelines sentence, including mandatory minimum sentences.

There will be circumstances in which good judgment would lead a prosecutor to conclude that a strict application of the above charging policy is not warranted. In that case, prosecutors should carefully consider whether an exception may be justified. Consistent with longstanding Department of Justice policy, any decision to vary from the policy must be approved by a United States Attorney or Assistant Attorney General, or a supervisor designated by the United States Attorney or Assistant Attorney General, and the reasons must be documented in the file.

Second, prosecutors must disclose to the sentencing court all facts that impact the sentencing guidelines or mandatory minimum sentences, and should in all cases seek a reasonable sentence under the factors in 18 U.S.C. § 3553. In most cases, recommending a sentence within the advisory guideline range will be appropriate. Recommendations for sentencing departures or variances require supervisory approval, and the reasoning must be documented in the file.

Any inconsistent previous policy of the Department of Justice relating to these matters is rescinded, effective today.[1]

Each United States Attorney and Assistant Attorney General is responsible for ensuring that this policy is followed, and that any deviations from the core principle are justified by unusual facts.

I have directed the Deputy Attorney General to oversee implementation of this policy and to issue any clarification and guidance he deems appropriate for its just and consistent application.

Working with integrity and professionalism, attorneys who implement this policy will meet the high standards required of the Department of Justice for charging and sentencing.

Chapter 9. The History and Structure of Confinement

Supplement 9.1. The First London Gaol

Built shortly after the Norman Conquest in 1066, the Fleet Prison was the first London facility constructed solely for the purpose of holding prisoners. It was called the Gaol of London until 1188, when that name was taken over by the Newgate Prison and the original gaol became known as the Fleet Prison. The early gaol was built of stone and surrounded by a moat, typical of many structures in those days, serving the dual purpose of keeping the inmates in and outsiders out.[1]

The primary purpose of this first London jail was the detention of suspects awaiting trial, after which they were punished elsewhere. One exception was debtors, who were held until their debts were paid. On occasion, jail inmates were permitted to leave the institution for limited periods, although a fee generally was charged for this privilege. Early physical conditions in the Fleet Prison were better than those in most English institutions, which is "not saying much since the state of the early English prisons was generally quite deplorable." Over time, conditions deteriorated, and "soon the Fleet had the reputation of being one of the worst in all the country."

The Fleet Prison was burned in 1666, soon rebuilt, destroyed over 100 years later, rebuilt again, and closed in 1842. "The Fleet Prison was demolished some four years later, thus ending the career of one of the oldest English institutions, the original Gaol of London."

[1]Paraphrased from J. M. Moynahan, "The Original Gaol of London," *American Jails* 1 (Winter 1988): 88.

Supplement 9.2. The Contributions of Europeans to the Reformatory Movement

We look to the works of Captain Alexander Maconochie, a Scotsman, and Sir Walter Crofton, an Irishman, for the beginnings of a reformatory movement. Maconochie began the movement in 1840, when he was placed in charge of the British penal colony on Norfolk Island, off the coast of Australia. England used Norfolk Island for the worst offenders, who had been transported from England to mainland Australia, where they committed further crimes. Previously, England had transported its offenders to the American colonies, but after the American Revolution, that was no longer an option.

Maconochie was critical of the transportation conditions offenders faced. They were chained together and, in some cases, had only standing room on the ships. Fevers and diseases were rampant, food was meager, sanitary conditions were nonexistent, and homosexual rape and other forms of violence were common.

Upon his arrival at Norfolk, Maconochie began to implement his reformation philosophy. He emphasized that he was not lenient and that society had a right to punish those who broke its laws, but that

> [w]e have no right to cast them away altogether. Even their physical suffering should be in moderation, and the moral pain framed so as, if possible, to reform, and not necessarily to pervert them. The iron should enter both soul and body, but not so utterly to sear and harden them.[1]

Maconochie's reform program was characterized by his advocacy of the indeterminate sentence and his belief that inmates should work, improve their conduct, and learn frugality of living before they were released. While in prison, inmates should work for everything they received. Their work earned them the required number of *marks*. When they were qualified by discipline to do so, they should work in small groups of about six or seven, with all of the offenders answerable for the behavior of the entire group, as well as of each member. Before they were released, while still required to earn their daily tally of marks, offenders should be given a proprietary interest in their labor. They should be subjected to less rigorous discipline in order to be prepared to live in society without the supervision of prison officials.

Maconochie was never given the authority that he thought he would have when he went to Norfolk. His ideas were controversial and not greatly appreciated by the British authorities, but he made many changes in the penal colony, which was a more humane place when he left.

Maconochie described his accomplishments as follows: “I found a turbulent, brutal hell, and left it a peaceful, well-ordered community.” Evidence proved him right, but controversy over his methods and philosophies led to his recall in 1844:

> He was replaced by Major Childs, an incompetent who sought to carry out instructions to restore the previous evil methods in place of Maconochie's

[1]Quoted in John Vincent Barry, “Alexander Maconochie,” in *Pioneers in Criminology*, 2d enlarged ed., ed. Hermann Mannheim (Montclair, NJ: Patterson Smith, 1972), p. 90.

reforms. This led, on 1 July 1846, to a revolt by some of the convicts, and four of the penal staff were murdered.[2]

Sir Walter Crofton, a disciple of Maconochie, applied Maconochie's reform ideas to Irish prisons, where he served as chair of the board of directors. The Irish system was recognized for its emphasis on

- a reward system for good behavior;
- a small prison administrator/inmate ratio;
- gradual release from restrictions prior to release from prison; and
- supervised parole after release and revocation and reincarceration for those who violated the strict regulations imposed on releasees.[3]

[2]Ibid., pp. 91, 95-97. For a more recent account of Maconochie's contributions, see Norval Morris, *Maconochie's Gentlemen: The Story of Norfolk Island and the Roots of Modern Prison Reform* (New York: Oxford University Press, 2002).
[3]Barry, "Alexander Maconochie," pp. 99-100.

Supplement 9.3. California's San Quentin Prison

San Quentin, located in San Quentin Village, California (close to Oakland and San Francisco), was built in the 1850s on land purchased for $10,000. In 1934, its death row was constructed to handle 68 inmates, but by April 1, 2018, 722 condemned men were confined there. All California state executions are carried out in San Quentin, but the state's 22 females on death row are housed in the largest prison for women in that state, the Central California Women's Facility, a medium-security prison located in Chowchilla.[1]

In 1984, a federal court ruled that the San Quentin facility was unfit because of needed repairs. Approximately $35 million was spent on renovation and, for the first time, inmates had hot running water in their cells. A study completed in 2001 recommended closing San Quentin because of the cost of repairs needed to make the facility more secure as well as more accommodating to its inmates. Before his recall in 2003, California's governor, Gray Davis, proposed building a new death row facility at San Quentin. This unit would have cost approximately $220 million, and the need to get approval for that expenditure came at a time when the state faced a multibillion-dollar shortfall in its budget, resulting in cuts in many state programs and institutions. San Quentin is the third oldest prison in the United States, following the New York prisons at Auburn and Sing Sing.[2]

In 2004, the *New York Times* featured San Quentin on its front page, stating that California's death row had grown sufficiently that the state was preparing to spend $220 million to build a new one next door. The article noted, however, that the prison is on an expensive piece of property with a spectacular view. Opponents were increasing their attempts to block the expansion, based on the value of the real estate and the views, urging that the new death row be built elsewhere. By April 2005, the environmental impact statements, along with the legal analysis of the issue of moving death row, were complete. The conclusion was that San Quentin is the only place to build the new death row facility because that state's law requires that all male death row inmates be confined in that prison and that all executions occur there.[3]

By January 2009, California's budget problems led the state to freeze most construction projects, including the $356 million death row complex at San Quentin. A fight concerning the legality of the method of lethal injection in California was continuing, thus rendering a completed new execution chamber at San Quentin unusable. Executions in the state had been

[1]Death Penalty Information Center, http://www.deathpenaltyinfo.org, accessed October 13, 2018.
[2]"Fabled Prison's Uncertain Fate," *New York Post* (August 12, 2001), p. 26; "San Quentin Village Fights to Save Neighborhood Prison," *Corrections Professional* 6(21) (July 27, 2001): n.p.; "New Life for Death Row in Marin," *San Francisco Chronicle* (April 26, 2002), p. 1; "California's Death Row Opened for Governor," *Corrections Professional* 8 (11) (March 3, 2003): n.p.; "Federal Judge Tours New San Quentin Execution Chamber," *San Jose (California) Mercury News* (February 8, 2011), n.p.
[3]"San Quentin Debate: Death Row vs. Bay Views," *New York Times* (December 18, 2004), p. 1; "Death Row Can't Be Moved, Report Says," *Marin (California) Independent Journal* (April 15, 2005), n.p.; "All About Marin; Midgen Scoffs at Cost of New Death Row," *Marin (California) Independent Journal* (March 29, 2007), n.p.

on hold for three years pending the resolution of the legal dispute.[4] In 2010, the state built a new lethal-injection facility at a cost of almost $900,000. The labor was done by inmates.[5]

As noted in Chapter 8 of the text, the new governor of California has placed a moratorium on executions in California.

[4]"State to Pay Some Delinquent Bills," *San Francisco Chronicle* (January 17, 2009), p. 4; "Court Rejects New Rules for Death Penalty," *Los Angeles Times* (November 22, 2008), p. 5B.
[5]"Federal Judge Tours San Quentin Execution Chamber."

Supplement 9.4. The U.S. Supreme Court Looks at a Supermax Prison

In its unanimous decision in *Wilkinson v. Austin*, the U.S. Supreme Court made the following observations, among others, about life in the Ohio supermax prison.

Wilkinson v. Austin
545 U.S. 209 (2005), footnotes and citations omitted

Conditions at OSP are more restrictive than any other form of incarceration in Ohio, including conditions on its death row or in its administrative control units. The latter are themselves a highly restrictive form of solitary confinement. In the OSP almost every aspect of an inmate's life is controlled and monitored. Inmates must remain in their cells, which measure 7 by 14 feet, for 23 hours per day. A light remains on in the cell at all times, though it is sometimes dimmed, and an inmate who attempts to shield the light to sleep is subject to further discipline. During the one hour per day that an inmate may leave his cell, access is limited to one of two indoor recreation cells.

Incarceration at OSP is synonymous with extreme isolation. In contrast to any other Ohio prison, including any segregation unit, OSP cells have solid metal doors with metal strips along their sides and bottoms which prevent conversation or communication with other inmates. All meals are taken alone in the inmate's cell instead of in a common eating area. Opportunities for visitation are rare and in all events are conducted through glass walls. It is fair to say OSP inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact.

Aside from the severity of the conditions, placement at OSP is for an indefinite period of time, limited only by an inmate's sentence. For an inmate serving a life sentence, there is no indication how long he may be incarcerated at OSP once assigned there. Inmates otherwise eligible for parole lose their eligibility while incarcerated at OSP.

Supplement 9.5. Provisions for Incarcerated Parents and Their Children

The Federal Bureau of Prisons (BOP) has some provisions for pregnant inmates who give birth, described in part as follows:

> The BOP offers a community residential program called Mothers and Infants Nurturing Together (MINT) for women who are pregnant at the time of commitment. The MINT program is based in a residential reentry center and promotes bonding and enhanced parenting skills for low-risk female inmates who are pregnant. Women are eligible to enter the program if they are in their last three months of pregnancy, have less than five years remaining to serve on their sentence, and are eligible for furlough. Prior to the birth, the mother must make arrangements for a custodian to take care of the child. Institution and MINT staff and community social service agencies may aid the inmate in finding an appropriate placement for the child. The inmate or a guardian must assume financial responsibility for the child's medical care while residing at MINT. The mother has three months to bond with the newborn child before returning to an institution to complete her sentence. In select MINT programs, the inmate may stay for an additional period of bonding with the child. The decision to refer an inmate to the MINT program is at the discretion of the inmate's unit team.[1]

The federal prison system also has programs for mothers and their older children. In December 2014, the BOP's federal prison camp in Danbury, Connecticut, held a Mommy and Me Tea, which involved 12 inmate mothers and their 19 children at which the warden offered the words of the late Princess Diana of Wales, "A Mother's arms are more comforting than anyone else's." Prison officials encouraged the inmates to present their children with gifts made especially for them by their mothers. Prior to greeting their children, the inmate mothers participated in parenting classes that included instruction on personal growth and development.[2]

A few prisons provide programs for inmate fathers and their children. The Louisiana State Penitentiary at Angola, which has a special visiting area for most visitors (called the "shack"), permits fathers, grandfathers, uncles, and male cousins to visit with their children, grandchildren, and so on, outside during a whole day of activities, including amusement rides, and balloon-twisting clowns. All may dine on hamburgers, hot dogs, and the trimmings.[3] This prison is the state's only maximum-security facility, and over 50 percent of the inmates are serving life sentences and not expected to be released.

In November 2014, the BOP held a daddy-daughter dance for federal inmates and their children. According to the BOP:

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[1]Federal Bureau of Prisons, http://www.bop.gov, accessed January 12, 2015.
[2]Federal Bureau of Prisons, "FPC Danbury's Mommy and Me Tea: Female Offenders Participate in a Positive Event with Their Children," http://www.bop.gov/resources/news/20141208_mommy-me_tea.jsp, accessed January 12, 2015.
[3]"Fathers in Angola Get to Spend a Precious Day with Their Children," *Times-Picayune* (New Orleans) (September 10, 2006), p. 1.

This event is an example of the Bureau's latest efforts to reach out to the children and families of offenders in their care, to renew relationships and strengthen bonds. The Bureau's mission to help offenders return to their communities as productive law abiding citizens does not end at the prison walls; connections to families and children are critical aspects of reentry, along with employment, housing and medical care.[4]

[4]Federal Bureau of Prisons, "Bureau of Prisons Holds Daddy-Daughter Dance," http://www.bop.gov/resources/news20141105_daddy_daughter_dance.jsp, accessed January 12, 2015.

Supplement 9.6. The Function of Jails

The Bureau of Justice Statistics describes the function of jails as follows:

"Jails are correctional facilities that confine persons before or after adjudication and are usually operated by local law enforcement authorities. Jail sentences are usually for 1 year or less. Jails also:

- receive individuals pending arraignment and hold them awaiting trial, conviction, or sentencing
- remit probation, parole, and bail-bond violators and absconders
- temporarily detain juveniles pending transfer to juvenile authorities
- hold mentally ill persons pending transfer to appropriate mental health facilities
- hold individuals for the military, for protective custody, for contempt, and for the courts as witnesses
- release inmates to the community upon completion of sentence
- transfer inmates to federal, state, or other authorities
- house inmates for federal, state, or other authorities because of facilities crowding
- sometimes operate community-based programs as alternatives to incarceration."[1]

[1]Bureau of Justice Statistics, "Local Jail Inmates and Jail Facilities," https://www.bjs.gov/, accessed October 15, 2018.

Supplement 9.7. The October 15, 2018 Report of the State of California to the Three-Judge Court Concerning the State's Prison Populations and Other Issues

OCTOBER 15, 2018 UPDATE TO THE THREE-JUDGE COURT

On February 10, 2014, the Three-Judge Court extended the deadline to achieve the court-ordered reduction in the in-state adult institution population to 137.5% of design capacity to February 28, 2016. (ECF Nos. 2766/5060 & 2767/5061.) This report is CDCR's 57th report submitted since the Court issued its population-reduction order, and the 45th report submitted since February 2015, when Defendants informed the Court that the population was below the court-ordered reduction. (ECF No. 2838/5278, filed February 17, 2015.) It has now been more than three years since Defendants have been in full compliance with the population-reduction order. As of October 10, 2018, the State's prison population is 136.0% of design capacity.

A. Update on durability:

As previously reported, Proposition 57, the State's durable remedy that enacts many of the Court-ordered reforms as well as expands credit earning increases and opportunities, was approved by voters in November 2016. As a result of Proposition 57, the addition of infill capacity, and several prior measures, Defendants have been able to reduce the number of inmates housed in out-of-state facilities by over 7,000 since February 10, 2014 while maintaining full compliance with the population-reduction order.

On May 1, 2018, final regulations for Proposition 57 were approved and made permanent. The final regulations can be found at: https://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/NCDR/2017NCR/17-05/Adopted-Regulations-Effective-May-1-2018.pdf.

The regulations include:

1. Increased credit earning opportunities for all inmates except the condemned and those serving life without parole.

   1,506 inmates released in August earned credit authorized by Proposition 57 towards their advanced release date. These inmates earned an estimated average of 122.2 days of additional credit.[1]

2. Nonviolent offender parole process.

   CDCR began referring inmates to the Board for this process on July 1, 2017, pursuant to the emergency regulations promulgated on April 13, 2017. From July 1, 2017 through September 30, 2018, 8,832 referrals were made to the Board. As of September 30, 2018, 6,903 referrals have been reviewed on the merits, with 1,468 inmates approved for release and 5,435 denied. Many referrals are pending review, including the 30-day

[1] This number does not include inmates released from fire camps.

period for written input from inmates, victims, and prosecutors and the Board's jurisdictional review process.

B. Update on Other Measures Defendants Continue to Implement:

1. Contracting for additional in-state capacity in county jails, community correctional facilities, private prison(s), and reduction of out-of-state beds:

Defendants have reduced the population in CDCR's 34 institutions by transferring inmates to in-state facilities.

a. Private Prison (California City):

The current population of California City is approximately 2,433 inmates.

b. Community correctional facilities (CCFs) and modified community correctional facilities (MCCFs):

The State currently has contracted for 4,218 MCCF beds that are in various stages of activation and transfer.

c. County jails:

The State continues to evaluate the need for additional in-state jail bed contracts to house CDCR inmates.

d. Reduction of inmates housed out-of-state:

On February 10, 2014, the Court ordered Defendants to "explore ways to attempt to reduce the number of inmates housed in out-of-state facilities to the extent feasible." Since that time, the State has reduced the out-of-state inmate population to 1,577, including closing the Oklahoma and Mississippi out-of-state facilities.

2. Parole process for medically incapacitated inmates:

The State continues to work closely with the Receiver's Office to implement this measure. The Receiver's Office is continuing to review inmates and is sending completed recommendations to CDCR. Recommendations received from the Receiver's office are reviewed by DAI and referred to the Board for a hearing. As of October 9, 2018, the Board has held 130 medical parole hearings under the revised procedures. An additional 29 were scheduled, but were postponed, continued, or cancelled.

3. Parole process for inmates 60 years of age or older having served at least 25 years:

The Board continues to schedule eligible inmates for hearings who were not already in the Board's hearing cycle, including inmates sentenced to determinate terms. From February 11, 2014 through September 30, 2018, the Board held 2,963 hearings for inmates eligible for elderly parole, resulting in 806 grants, 1,909 denials, 248 stipulations to unsuitability, and there currently are no split votes that require further review by the

full Board. An additional 1,394 hearings were scheduled during this time period but were waived, postponed, continued, or cancelled.

As discussed in prior reports, the State enacted Assembly Bill 1448 on October 11, 2017, authorizing an elderly parole program for inmates age 60 or older who have served at least 25 years of incarceration. The State will continue to implement the Court-ordered elderly parole process until this matter is terminated or the February 10, 2014 Order is modified.

4. Reentry programs:

Contracts for the San Diego, San Francisco, Los Angeles, Kern County, and Butte County reentry programs are in place. The State continues to review and refer eligible inmates for placement consideration. As of October 10, 2018, 636 inmates are housed in reentry facilities.

5. Expanded alternative custody program:

The State's expanded alternative custody program for females, Custody to Community Transitional Reentry Program (CCTRP), provides female inmates with a range of rehabilitative services that assist with alcohol and drug recovery, employment, education, housing, family reunification, and social support. Female inmates in the CCTRP are housed at facilities located in San Diego, Santa Fe Springs (LA), Bakersfield, and Stockton. As of October 10, 2018, 383 female inmates are participating in the CCTRP.

Chapter 10. Life in Prison

Supplement 10.1. Enforcing Inmate Rights through Civil Cases

In September 1971, the bloodiest prison uprising in U.S. history to date took place in New York State's Attica prison. Inmates were angry about their living conditions and the food they were served. They asked for improved educational programs, higher pay for prison work, and more minority correctional officers (COs). The inmates took control of the prison for four days, after which COs, armed with pistols and shotguns, ascended the prison's roofs and towers and fired 2,000 rounds of ammunition. When the riot ended, 32 inmates and 11 COs were dead; many more were wounded. Inmates who survived claimed that COs had tortured and brutalized them. Finally, in February 2000, some of the surviving victims had an opportunity to tell a judge what had happened to them. The inmates testified regarding the issue of whether the $8 million the state had offered to settle the remaining claims was a reasonable and fair provision.[1] The money was distributed in December 2000.

This was not the first civil suit in the Attica case. In 1989, a New York court awarded a total of $1.3 million in seven lawsuits brought by inmates or their estates for injuries caused in the Attica prison riots and their aftermath. These awards were granted to inmates who did not take part in the riots but were subjected to excessive force by authorities attempting to regain control of the prison. Police efforts (the governor had sent in 500 members of the National Guard during that uprising) were described by a state investigating committee as constituting the "bloodiest encounter between Americans since the Civil War." Individual damage awards ranged from $35,000 to $473,000.[2]

In 1997, a federal judge awarded one former Attica inmate $4 million for injuries sustained when he was beaten and tortured by COs during the 1971 Attica riot. The suit, first filed in 1974, alleged that Frank Smith was "forced to walk over broken glass, beaten with batons, locked in his cell for four days, . . . [and] made to lie on a picnic table [naked] for hours with a football under his chin." During that time, officers "struck his testicles with batons" and burned his body with cigarettes while threatening to kill him or castrate him if he allowed the ball to roll away. Mr. Smith commented after the verdict: "The jury has sent a message that people everywhere need to be treated like humans, not animals." The principal attorney for Mr. Smith, Elizabeth Fink, had spent her entire career representing inmates who were incarcerated at Attica at the time of the uprising.[3] In observance of the thirtieth anniversary of the Attica riot, Court TV produced a documentary, *Ghosts of Attica*, which featured Elizabeth Fink and her paralegal, former inmate Frank Smith. Also, in September 2001, Fink alleged that the conditions that precipitated the Attica riot still existed in many U.S. prisons.[4] Smith died of cancer in 2005.

In a 2003 case, a Texas jury awarded $4 million to a former inmate who alleged that a CO at the prison camp in which she was incarcerated had slammed her up against a wall in a

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[1] "Ex-Inmates Hurt at Attica Tell the Judge Their Tales," *New York Times* (February 15, 2000), p. 27.
[2] "Court Awards $1.3 Million to Inmates Injured at Attica," *New York Times* (October 26, 1989), p. 14.
[3] "Ex-Attica Inmate Wins $4 Million in Suit over Reprisals After 1971 Uprising," *New York Times* (June 6, 1997), p. 20.
[4] UPI news release (September 7, 2001).

supply room (where she was summoned for a drug test) and raped her. The victim kept the clothing she was wearing at the time of the attack, and the semen stains provided incriminating evidence when she turned them over to authorities after she was released from the camp. She testified that, as she was being raped, the officer, Michael Miller, asked, "Do you think you're the first? This happens all the time." After hearing the evidence, the jury took only 30 minutes to reach its verdict.[5]

Allegations of brutality, even sexual abuse, are not limited to charges by female inmates against male officers. In January 2003, a male inmate of a Las Vegas correctional center filed a lawsuit asking $3 million in damages and alleging that a female officer forced him to become a sex slave. Ryan Layman claimed that between November 2000 and January 2001 he was forced to submit to sexual relations with CO Jennifer Burkley on numerous occasions. Burkley and another officer pleaded guilty to having sex with an inmate, a misdemeanor. Both were accused of performing oral sex on jailed teens. They were each sentenced to two years' probation. When she was sentenced, Burkley said, "It was wrong. . . . It should never have happened."[6]

[5] "Rape Victim Wins Suit Against CO," *Corrections Professional* 8(19) (June 20, 2003): n.p.
[6] "Lawsuits Increasingly Allege Sexual Assault by Female COs," *Corrections Professional* 8(14) (April 11, 2003): n.p.

Supplement 10.2. Examples of Cases in which the U.S. Supreme Court Has Found Specific Prison Practices to Be Unconstitutional

In 1991, in *Wilson v. Seiter*, the Court held that, "if the pain inflicted is not formally meted out as punishment by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify." The Court interpreted the Constitution to require that, when inmates question prison conditions, they must show a negative state of mind of officials in order to win their cases. Specifically, they must prove that prison officials harbored *deliberate indifference*. Dissenters noted correctly that in many cases this standard would be difficult if not impossible to prove.[1]

In 1994, the U.S. Supreme Court applied a subjective rather than an objective standard to determine whether prison officials have the required state of mind to constitute deliberate indifference. *Farmer v. Brennan* involved an inmate who was biologically male but had some characteristics of a woman. He alleged that he was raped by another inmate after he was incarcerated in an all-male prison. He argued that placing a transsexual in an all-male population constituted deliberate indifference to his safety. Officials should have known of the risks involved because a reasonable person (the objective standard) would have known that. The Supreme Court rejected the objective standard, stating that prison officials may be held liable for unsafe prison conditions only if they "know that inmates face a substantial risk of serious harm and disregard that risk by failing to take reasonable measures to abate it."[2]

In 1992, in *Hudson v. McMillian*, the U.S. Supreme Court held that inmates may bring actions for cruel and unusual punishment against prison officials who engage in physical force that results in injuries, even if those injuries are not significant. Justice Sandra Day O'Connor wrote the majority opinion, in which she stated, "When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated."[3]

In 2006, in *Beard v. Banks*, the U.S. Supreme Court decided a Pennsylvania case in which inmates alleged that their First Amendment rights were violated by a prison regulation prohibiting their access to newspapers, magazines, and personal photographs. The prohibition applied to inmates who were in the most restrictive level of the long-term segregation unit, which housed 40 inmates classified as dangerous or disruptive. Inmates housed in this unit began in the most restrictive level, Level 2, but they could progress to Level 1 with good behavior, and in that level, inmates were permitted some papers and magazines. Ronald Banks, a Level-2 inmate, had a subscription to the *Christian Science Monitor* and he brought this action after one of his copies of the paper was seized. Prison officials claimed that the deprivation was necessary to promote better discipline among inmates whose behavior was so disruptive that they had already been denied most privileges. The Court determined that the reasons presented for the prohibition were sufficient and that Banks had not successfully refuted them.[4]

The First Amendment right to freedom of religion applies to inmates to some extent. Inmates have a First Amendment right to practice the religion of their choice, but this does not

[1]*Wilson v. Seiter*, 501 U.S. 294 (1991).
[2]*Farmer v. Brennan*, 511 U.S. 895 (1994).
[3]*Hudson v. McMillian*, 503 U.S. 1 (1992).
[4]*Beard v. Banks*, 548 U.S. 521 (2006).

mean they have the right of access to any items normally needed for that practice. A recent example comes from a 2012 decision by the Fifth Circuit Court of Appeals involving a Texas case.

Courtney Royal, who is also known as "Vampsh (sic) Black Sheep League of Doom Gardamun Family Circle Master Vampire High Priest," is incarcerated for a life sentence and serving his time at a facility in Gatesville, Texas. He was convicted of several charges related to aggravated assaults and robberies. Royal presented his case pro se (on his own), arguing that he is entitled to "religious items, food diets, and service; spiritual advisor; black Bible; and rugs, rode, [and] beads." It was his position that he practiced the religion of Vampirism and was being denied the specified items, and that constitutes a violation of his constitutional rights. The courts denied his claim as a frivolous appeal.[5]

In 2015, the U.S. Supreme Court decided a First Amendment issue from an inmate who claimed that the prison's refusal to permit him to grow a beard violated his constitutional right to practice his religion. Gregory Holt (also known as Abdul Maalik Muhammad) argued that growing a beard is one of the fundamentalist beliefs of his Muslim religion. The Arkansas Department of Correction, where he was incarcerated, had a grooming policy that permitted a trimmed mustache but prohibited any other facial hair with the exception of quarter-inch beards "for a diagnosed dermatological problem." The lower federal court held that this policy is "the least restrictive means of furthering a compelling penological interest." The U.S. Supreme Court held that the Arkansas policy violated that provision and that it

> substantially burdens petitioner's religious exercise. Although we do not question the importance of the Department's interests in stopping the flow of contraband and facilitating prisoner identification, we do doubt whether the prohibition against petitioner's beard furthers its compelling interest about contraband. And we conclude that the Department has failed to show that its policy is the least restrictive means of furthering its compelling interests.[6]

The case was brought under the federal statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA), which requires prisons to use the least restrictive alternative when infringing religious rights to enforce security measures.[7]

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[5]"Court Says Lawsuit of 'Vampsh Black Sheep League of Doom Gardamun Family Circle Master Vampire High Priest' Is Frivolous," CNN Wire (June 9, 2012). The case is *Royal v. Grounds*, 2012 U.S. App. LEXIS 11478 (5th Cir. Tex. 2012).

[6]*Holt v. Hobbs*, 509 Fed. Appx. 561 (8th Cir. 2013), *reversed and remanded*, 134 S. Ct. 853 (2015).

[7]The Religious Land Use and Institutionalized Persons Act (RLUIPA) is codified at USCS, Article 42, Section 2000cc-1(a)(1)-(2) (2019).

Supplement 10.3. Recent Acts of Brutality at Riker's Island[1]

In June 2013, ten current and retired employees of the Rikers Island jail were indicted in connection with an alleged beating of an inmate and a cover-up of the beating the previous July. Allegedly, one officer issued an order to "kick the inmate's teeth in," and that was followed by a serious beating in which the inmate was "repeatedly kicked with his body in a fetal position, covering his head." The inmate, Jahmal Lightfoot, suffered injuries, including a broken nose and fractured eye sockets. Officers were responding to an inmate slashing, which had resulted in security measures such as strip searches and the use of screening devices in a hunt for weapons. Rikers Island facilities were the venues of other uprisings in August and again in December of 2013, with the media reporting injuries to guards and inmates, gang involvement, and, overall, a 200 percent increase in inmate slashings and stabbings in recent years.[2]

By 2015, although the population was down (slightly over 10,000), violence was up, with 9,424 assaults, the five-year high. Stabbings were also up, with a total of 108. In January 2016, a group of teen inmates beat five correctional officers. Smuggling of contraband by correctional officers and others continued, with one officer in November 2015 smuggling 16 packages of marijuana and scalpel blades.[3]

In June 2016, five correctional officers were convicted by a jury on charges of first-degree attempted gang assault, attempted assault in the first degree, assault in the second degree, falsifying business records, and official misconduct for beating Lightfoot, after which Mr. Lightfoot was transferred to a prison. He was released in 2014. The officers, an assistant chief for security and two captains, received sentences ranging from four and a half years to six and a half years. In addition to these officers, one officer was acquitted. Three more officers were convicted after a bench trial. The charges were attempted gang assault, attempted assault, assault, falsifying business records, offering a false instrument for filing, and official misconduct in office. According to the prosecutor:

> These convictions . . . close a chapter in Rikers Island's sad, brutal history. They send a clear message that a uniform and a badge do not absolve anyone from committing a crime, and that even an inmate deserves to be treated like a human being.[4]

During the first six months of 2016, Rikers Island inmates committed 394 assaults on correctional officers, and in August 2016, the FBI issued a statement that prison gangs targeted

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[1]This selection is from Sue Titus Reid, *Crime and Criminology*, 15th ed. (New York: Wolters Kluwer, 2018), p. 420.
[2]"10 Charged in Beating of Inmate at Rikers," *New York Times* (July 27, 2013), p. 25; "Rikers Riot 101 Melee Leads to Tear Gas Training for Guards," *Daily News* (New York) (August 28, 2013); "Nation Digest," *St. Louis Post-Dispatch* (December 1, 2013), p. 16; "Inside Rikers Island: A Look at Violence and Corruption in the Complex," Pix11 (February 9, 2016), http://pix.11.com, accessed August 14, 2016.
[3]"5 Rikers Officers Convicted in Beating of Inmate," *New York Times* (June 8, 2016), http://www.nytimes.com; "3 More Correction Officers Convicted in Beating of Rikers Island Inmate," PIX11 (June 10, 2016), http://pix11.com, both accessed August 15, 2016; "Rikers Officer Pleads Guilty in Cover-Up of 2012 Beating," *New York Times* (September 21, 2016), p. 22; Prison Guards Are Charged in '13 Beating of an Inmate," *New York Times* (September 22, 2016), p. 25.
[4]"Prison Gang Targeted White Guards in 'Black August' Plan," *New York Post* (August 14, 2016), http://www.nypost.com, accessed August 14, 2016.

white guards in what was referred to as "Black August." In September 2016, officer Byron Taylor, 32, pleaded guilty to covering up the fatal beating of inmate Ronald Spear in 2012. Taylor helped hold down the inmate while another officer kicked him in the head. Also that month, five of the officers involved in a 2013 beating were indicted for civil rights violations and fraud in pulling off 56-year-old Kevin Moore's dreadlocks and breaking his ribs and facial bones. In December 2016, a former correctional officer, Brian Coll, was convicted of several counts in the beating and death.[5]

In 2017, New York mayor Bill De Blasio announced a ten-year plan to close Rikers Island and move jailed inmates to smaller jails in the various boroughs. In August 2018, the mayor issued a new release with this information concerning closing the Rikers Island jail and replacing that facility with

> four modern, community-based jails through the City . . . . The innovative plan envisions facilities that will be fully integrated into the surrounding neighborhoods with community space, ground-floor retail and parking. The planned facilities will also provide a safer environment to work and will allow people in jail to remain closer to their loved ones, as well as offer quality health, education, visitation and recreational services that will help people reintegrate once they return to their communities.[6]

[5] "Officer Beaten to Death by Inmate," *Dallas Morning News* (July 16, 2015), p. 3; "Female Prison Officer Killed by Male Inmate," *Dallas Morning News* (July 17, 2016), p. 3B; "A Conviction in a Death at Rikers," *New York Times* (December 16, 2016), p. 27.

[6] "De Blasio Administration Unveils Plans for Borough-Based Jails to Replace Facilities on Rikers Island," Targeted News Service (August 15, 2018), https://advance.lexis.com, accessed January 2, 2019.

Supplement 10.4. Female COs in Male Prisons

Several court cases have established the right of women to work in correctional institutions for men and have affected their hiring and promotion, but these changes have occurred only relatively recently. In 1997, for example, in order to settle a lawsuit, Arkansas hired 400 more female COs to work in the state's prisons for men.[1] In 1995, a federal court held that the U.S. Constitution does not prohibit the viewing of a male inmate by a female CO. Thus, women may work in men's prisons even when those jobs involve monitoring nude male inmates. The court stated:

> How odd it would be to find in the Eighth Amendment a right not to be seen by the other sex. Physicians and nurses of one sex routinely examine the other. In exotic places such as California people regularly sit in saunas and hot tubs with unclothed strangers. . . . Women reporters routinely enter locker rooms after games. How could an imposition that male athletes tolerate be deemed cruel and unusual punishment?[2]

There have, however, been problems between male and female COs, with female COs reporting acts of sexual harassment or other behaviors that constitute a hostile work environment. In 2003, a federal judge in Boston, Massachusetts, awarded damages and attorney fees to two female COs who alleged that male officers in their work environment (the jail and house of correction operated by the Franklin County Sheriff's Office) had created a hostile working environment. The women also alleged that they were retaliated against after they made complaints about the sexually harassing situation.[3]

[1]"Female Guards at Men's Prisons," *Orlando Sentinel* (June 20, 1997), p. 10.
[2]*Johnson v. Phelan*, 69 F.3d 144 (7th Cir. 1995), *cert. denied*, 519 U.S. 1006 (1996).
[3]*Brissette v. Franklin County Sheriff's Office,* 235 F. Supp. 2d 63 (D. Mass. 2003).

Supplement 10.5. Studies of Clemmer's Prisonization Concept

Stanton Wheeler found strong support for Clemmer's position on prisonization in his study at the Washington State Reformatory. Wheeler found that the degree to which inmates became involved in prisonization varied by the length of time the inmate was in prison. Inmates were more receptive to the larger, institutional values during the first and the last six months of incarceration, but during their middle period of incarceration, they were more receptive to the values of the inmate subculture.[1]

In comparing the prisonization of male and female inmates, researchers have questioned the Wheeler hypothesis. Geoffrey P. Alpert and others found that, although time spent in prison was related significantly to prisonization among female inmates, this was not the case among male inmates. In their study of inmates in the Washington State prison system, these researchers found that other variables were also predictive of prisonization. Among the women, attitudes toward race and the police were significant. Among the men, age was a significant variable, as were attitudes toward law and the judicial system.[2]

[1]Stanton Wheeler, "Socialization in Correctional Communities," *American Sociological Review* 26 (October 1961): 697-712.

[2]Geoffrey P. Alpert et al., "A Comparative Look at Prisonization: Sex and Prison Culture," *Quarterly Journal of Corrections* 1 (Summer 1977): 29-34.

Supplement 10.6. Research on the Importation and Deprivation Models to Explain the Inmate Subculture

Charles W. Thomas conducted research on the deprivation and importation models at a maximum-security prison for men. Thomas's research was designed to show the importance of both importation and deprivation variables. According to Thomas, when an inmate arrives at prison, both the formal organization and the inmate society compete for his allegiance; these two represent conflicting processes of socialization. Thomas called the efforts of the formal organization *resocialization* and those of the inmate society *prisonization*. The success of one requires the failure of the other. The prison is not a closed system.

Thomas maintained that, in explaining the inmate culture, one must examine all of the following factors: preprison experiences, both criminal and noncriminal; expectations of prison staff and fellow inmates; quality of the inmate's contacts with persons or groups outside the walls; postprison expectations; and the immediate problems of adjustment that the inmate faces. Thomas found that, the greater the degree of similarity between preprison activities and prison subculture values and attitudes, "the greater the receptivity to the influences of prisonization." Thomas also found that inmates from the lower social class were more likely to become highly prisonized, as compared with those from the upper social class. Those who had the highest degree of contact with the outside world had the lowest degree of prisonization, and those having a higher degree of prisonization were among inmates who had the bleakest postprison expectations.[1]

Other researchers have concurred with one or the other of the models. In his study of race relations in a maximum-security prison for men, Leo Carroll found support for the importation model, although he concluded that it needed refinement. Carroll criticized the deprivation model as diverting attention from important factors within prison, such as racial violence.[2]

Support for both the importation and the deprivation models was found in studies of prisons in other countries by Ronald L. Akers and his collaborators, who suggested that inmate adaptation to prison life can only be explained by an *integrative* approach.[3] This approach was summarized by Charles Thomas as follows:

> The existence of collective solutions in the inmate culture and social structure is based on the common problems of adjustment to the institution, while the content of those solutions and the tendency to become prisonized are imported from the larger society.[4]

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[1]Charles W. Thomas, "Prisonization or Resocialization: A Study of External Factors Associated with the Impact of Imprisonment," *Journal of Research in Crime and Delinquency* 10 (January 1975): 13-21.
[2]Leo Carroll, "Race and Three Forms of Prisoner Power Confrontations, Censoriousness, and the Corruption of Authority," in *Contemporary Corrections: Social Control and Conflict*, ed. C. Ronald Huff (Beverly Hills, CA: Sage Publications, 1977), pp. 40-41, 50-51.
[3]Ronald L. Akers et al., "Prisonization in Five Countries: Type of Prison and Inmate Characteristics," *Criminology* 14 (February 1977): 538.
[4]Charles W. Thomas, quoted in Akers et al., ibid., p. 548.

Studies of jail inmates are also important in determining whether the inmate subculture is imported into the institution or results from adaptations to the institutional setting. Findings from these studies support both the importation and the deprivation theories.[5]

[5]See James Garofalo and Richard D. Clark, "The Inmate Subculture in Jails," *Criminal Justice and Behavior* 12 (December 1985): 431.

Supplement 10.7. Prison Gangs

The following excerpt from a California case explains the seriousness with which prison officials in that state view prison gangs and how the state's administrative process handles them.

Dawkins v. McGrath
2009 U.S. Dist. LEXIS 118152 (E.D. Cal. 2009), footnotes and citations omitted

California prisons consider prison gangs to be the most disruptive of any prison group to the day-to-day management of a prison system, and have determined that gangs present a serious threat to the safety and security of California prisons. In response to this concern, an inmate gang investigator (IGI) for each institution works to identify gang members or affiliates. Before an inmate is identified as a gang member or associate, the IGI must have three or more independent sources of information "indicative of association with validated gang members or associates." Such information may include a statement from another inmate, an inmate's own admission, tattoos, written materials, photographs, observation by staff, and information from other agencies. The regulations provide that the IGI unit can consider statements from informants only if their information is independently corroborated or the informant is otherwise known as reliable.

Once the prison determines that an inmate is a member or associate of a prison gang, the inmate is routinely transferred to administrative segregation and considered for placement in the SHU [Security Housing Unit]. The SHU is the prison's method of dealing with inmates who commit serious disciplinary violations or who become affiliated with a prison gang. When an IGI believes there is sufficient information to validate an inmate as a gang member, he prepares a "validation package" for submission to the Special Services Unit in Sacramento. The inmate is then brought to the office of the IGI, told he is suspected of being a gang affiliate, and provided with a copy of a form summarizing the evidence that was relied upon to determine whether the inmate is a gang affiliate. . . .

The inmate is given the opportunity to present his views to the IGI and to contest the allegation that he is a gang affiliate, but is not allowed to present evidence, examine witnesses or obtain assistance. If the IGI decides to continue with the validation process after meeting with the inmate, he submits the validation package to the Special Services Unit . . . [which] will validate the inmate as a gang member or associate if the information in the package appears to be in order.

Once an inmate has been validated as a gang member and placed in the SHU, he must be free of any gang activity for at least six years before he may be considered for release. However, if an inmate chooses to "debrief" — admit his gang affiliation, identify other gang members, and reveal all he knows about gang structure—he will be released from the SHU at the end of the debriefing process. [The court discusses the periodic review of an inmate's status and then discusses the details of this particular case.]

Supplement 10.8. Court Cases Concerned with Female Inmates' Medical Needs

In a 1996 case, *Women Prisoners of the District of Columbia Department of Corrections v. District of Columbia*, a federal court of appeals held that the district court had gone too far in its orders for the plaintiffs in a class action suit. The court noted that, if all prisons were required to provide *identical* programs for men and women, prison administrators might not provide programs at all, especially with budget problems in most prisons. The court held, however, that using physical restraints on women during the third trimester of pregnancy, sexual harassment by correctional officers, lack of adequate fire safety provisions, and the quality of the general living conditions at the institution in question constituted cruel and unusual punishment and thus must be changed. But, with regard to programs and work opportunities, the court emphasized that there is no constitutional right to these programs; some are available only for women, some only for men. This is not unconstitutional, especially given the differences in the sizes of the institutions involved. A specific program provided for men but not for women does not in and of itself violate equal protection. But on remand, numerous orders were made concerning the medical and other treatment of female inmates.[1]

The medical care system in California has also been under attack both in general and with regard to female inmates. In 2006, the state began an overhaul of its medical system. The federal receiver described the corrections pharmacy system as a "logistical train wreck" and the medical system in the San Quentin prison as "too troubled, too decrepit and too overcrowded for fixing." The following year the receiver reported that several deaths in the California system were preventable and that it could take five to ten years to bring the state's medical system into constitutional compliance.[2]

In recent years, California's female inmates have made progress in the medical treatment provided by the state's prison system. The state has enacted several statutes designed to aid convicted female inmates during their pregnancies. The first one applies prior to incarceration. The Pregnant and Parenting Women's Alternative Sentencing Program Act contains sentencing alternatives to prison for convicted pregnant women, provided they have not been convicted of violent or other serious acts, such as burglary.[3]

For incarcerated women, the California Penal Code contains a provision that pregnant inmates may receive the services of a physician of their choice to determine whether they are pregnant. For the examination, the warden must adopt "reasonable rules and regulations with regard to the conduct of examinations to effectuate this determination." Pregnant inmates are entitled to a determination of the services they need to maintain the inmate's health and that of her fetus. The inmate is entitled to her choice of physicians for prenatal care although she must

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[1]*Women Prisoners of the District of Columbia Department of Corrections v. District of Columbia*, 899 F. Supp. 659 (D.D.C. 1995), *vacated, in part, remanded*, 93 F.3d 910 (D.C. Cir. 1996), *cert. denied,* 520 U.S. 1196 (1997), *on remand*, 968 F. Supp. 744 (D.D.C. 1997).

[2]"Report: State Prison Health Care Woes Deeper Than Expected," *Inside Bay Area* (California) (July 6, 2006), n.p.; "Troubled Medical System at San Quentin Faces Reform," *Marin Independent Journal* (California) (July 7, 2006), n.p.; "Using Muscle to Improve Health Care for Prisoners," *New York Times*, (late edition) (August 27, 2007), p. 12; "Prison Health Czar Shown the Door," *San Jose Mercury News* (California) (January 24, 2008), p. 2.

[3]Pregnant and Parenting Women's Alternative Sentencing Program Act, Cal. Penal Code, Title 1174 (2018).

pay for any services by a physician who is not provided by the institution. These provisions of the state statute must be posted in a place available to all female inmates.[4]

Pregnant inmates must be provided adequate prenatal care, including a nutritious diet, a dental cleaning, necessary vitamins as recommended by a doctor, and education on childbirth and infant care.[5] When a California inmate is transported to the hospital to give birth, she must be taken in the "least restrictive way possible, consistent with the legitimate security needs of each inmate." Once the inmate is, in the judgment of the attending physician, in active labor, she "shall not be shackled by the wrists, ankles, or both, unless deemed necessary for the safety and security of the inmate, the staff, and the public."[6]

Female inmates have also challenged jurisdictions that retain the shackling of pregnant inmates.[7] In March 2010 (effective June 10, 2010), the governor of Washington signed into law a bill limiting restraints on pregnant women or youth in correctional facilities and specifically during the third trimester of pregnancy. Restraints may be used only in "extraordinary circumstances" (defined as the inmate's possible escape or endangerment of the inmate to herself, medical personnel, or other persons). In those cases, medical personnel must state in writing the reasons for the restraints and the type of restraints, which must be the least restrictive available. No restraints are permitted while the pregnant woman or youth is in labor or childbirth. When restraints are permitted, they must be the least restrictive ones reasonable under the circumstances.[8]

In April 2019, a federal judge issued a temporary injunction in a Northern District of California case in which female inmates alleged that 2:30 a.m. pill calls and breakfast at 4 a.m., along with noisy maintenance overnight in the jails constitutes cruel and unusual punisdhment.[9]

Finally, recall that the text in Chapter 9 noted the federal law enacted in December 2018 concerning, among other practices, the shackling of pregnant female inmates. That statute, however, applies only to federal institutions.

[4]Cal. Penal Code, Section 3406 (2018).
[5]Cal. Penal Code, Section 3424 (2018).
[6]Cal. Penal Code, Section 5007.7 (2018).
[7]See, for example, *Nelson v. Correctional Medical Services*, 583 F.3d 522 (8th Cir. 2009).
[8]Wash. Rev. Code Ann., Section 70.48.500 (2018).
[9]Amanda Robert, "Federal Judge Sides with Female Inmate Who Filed Class Action Suit over Widespread Sleep Deprivation," American Bar Association Journal (April 24, 2019), www.abajournal.com accessed April 25, 2019.

Supplement 10.9. Does Solitary Confinement in Prison Constitute Cruel and Unusual Punishment?

In October 2018, the U.S. Supreme Court refused to review two cases concerning the issue of solitary confinement in prisons. Justice Sonia Sotomayor agreed with the Court's decision "because of arguments unmade and facts underdeveloped below." But she wrote a statement to express her concern about the practice. Here is a portion of her statement.

Apodaca et al. v. Raemisch et al.*; *Lowe v. Raemisch et al.
2018 U.S. LEXIS 5854 (2018), cases and citations omitted

Opinion

The petitions for writs of certiorari are denied

Concur

Statement of Justice Sotomayor—respecting the denial of certiorari.

A punishment need not leave physical scars to be cruel and unusual. As far back as 1890, this Court expressed concerns about the mental anguish caused by solitary confinement. These petitions address one aspect of what a prisoner subjected to solitary confinement may experience: the denial of even a moment in daylight for months or years. . . . [T]he issue raises deeply troubling concern.

Under then-operative Colorado Department of Corrections (CDOC) regulations, prisoners like Apodaca, Vigil, and Lowe were allowed out of their cells five days per week, for at least "one hour of recreation in a designated exercise area." That "designated exercise area" was also about 90 square feet in size, but "oddly shaped" and "empty except for a chin-up bar." As the prior district court described it:

> It has two vertical 'windows,' approximately five feet by six inches in size, which are not glassed but instead are covered with metal grates. The grates have holes approximately the size of a quarter that open to the outside. The inmate can see through the holes, can sometimes feel a breeze, and can sometimes feel the warmth of the sun. This is his only exposure of any kind to fresh air.

During their time at CSP, Apodaca, Vigil, and Lowe were denied any out-of-cell exercise other than the prescribed hour in that room for between 11 and 25 months. . . . [She cites a 1979 lower federal court judge.]

[I]n the absence of "an adequate justification" from the State, "it was cruel and unusual punishment for a prisoner to be confined for a period of years without opportunity to go outside except for occasional court appearance, attorney interviews, and hospital appointments." And while [the judge] acknowledged that various security concerns . . . could "justify not permitting plaintiffs to mingle with the general prison population," he observed that those generalized concerns did "not explain why other exercise arrangements were not made." That same inquiry remains essential today, given the vitality . . . of the basic human need at issue. It should be

clear by now that our Constitution does not permit such a total deprivation in the absence of a particularly compelling interest.

Two justices of this Court have recently called attention to the broader Eighth Amendment concerns raised by long-term solitary confinement. Those writings came in cases involving capital prisoners, but it is important to remember that the issue sweeps much more broadly: whereas fewer than 3,000 prisoners are on death row, a recent study estimated that 80,000 to 100,000 people were held in some form of solitary confinement. The Eighth Amendment protects them all.

Lowe himself . . . was convicted of second-degree burglary and introduction of contraband—and he evidently spent 11 years in solitary confinement. It is hard to see how those 11 years could have prepared him for the day in July 2015 when he "was released from solitary confinement directly to the streets." . . . [W]e do know that solitary confinement imprints on those that it clutches a wide range of psychological scars.

[The opinion notes that Colorado has made changes in its solitary confinement system.] These changes cannot undo what petitioners, and others similarly situated, have experienced, but they are nevertheless steps toward a more humane system.

Supplement 10.10. Summary of *Ashker v. Governor of California* Settlement Terms

The Center for Constitutional Rights summarized the long settlement. Only the introductory paragraphs and a list of the main points are reproduced here. The interested reader can find the entire summary at https://ccrjustice.org, accessed October 24, 2018.

"When *Ashker v. Governor v. of California*[1] was first filed as a class action in 2012, thousands of prisoners across the state of California languished in prolonged solitary confinement in Security Housing Units (SHU). At Pelican Bay State Prison alone, more than 500 prisoners had been held in the SHU for over 10 years, and 78 prisoners had been there for more than 20 years. They were warehoused in cramped, windowless concrete cells for almost 24 hours a day with no phone calls, infrequent visits through plexiglass preventing physical contact, meager rehabilitative opportunities, and no opportunity for normal social interaction with other prisoners. Their indefinite and prolonged confinement in this torturous isolation was based not on any actual misconduct but on vague and tenuous allegations of affiliation with a gang. Prisoners were routinely placed in prolonged solitary confinement for simply appearing on a list of gang members found in another prisoner's cell, or possessing allegedly gang-related artwork and tattoos.

In 2015, the plaintiffs agreed to a far-reaching settlement that fundamentally alters all aspects of this cruel and unconstitutional regime. The agreement will dramatically reduce the current solitary confinement population and should have a lasting impact on the population going forward; end the practice of isolating prisoners who have not violated prison rules; cap the length of time a prisoner can spend in solitary confinement at Pelican Bay; and provide a restrictive but not isolating alternative for the minority of prisoners who continue to violate prison rules on behalf of a gang.

1. The settlement transforms California's use of solitary confinement from a status-based system to a behavior-based system. . . .

2. Validated gang affiliates who are found guilty of a SHU-eligible offense will enter a quicker two-year SHU step-down program for return to general population after serving their determinate SHU term. . . .

3. California will review *all* current gang-validated SHU prisoners *within one year* to determine whether they should be released from solitary under the settlement terms. It is estimated by CFCR that the vast majority of such prisoners will be released to general population. In addition, virtually all of those prisoners who have spent more than 10 years in solitary will be immediately released to a general-population setting, even if they have committed recent serious misconduct. . . .

4. California will create a few Restricted Custody General Population Unit (RCGP) as a secure alternative to solitary confinement. . . .

[1]*Ashker v. Governor of California*, 2014 U.S. Dist. LEXIS 575347 (N.D. Cal. 2014).

[The inmates in the RCGP unit will be given more freedom and have access to some programs.]

Three categories of prisoners will be sent to the RCCP: first, those who repeatedly violate prison rules while in the step-down program or refuse to take part in step-down programming; second, those who have spent over 10 continuous years in some form of solitary confinement and have recently committed a SHU-eligible offense; and third, prisoners against whom there is a substantial threat to their personal safety that limits their ability to be released into general-population units.

5. Very prolonged solitary confinement will be severely limited and those confined provided significantly more out-of-cell time. . . .

6. Prisoner representatives will work with plaintiffs' counsel and the magistrate judge to monitor implementation of the settlement. . . .

The settlement also requires re-training of California correctional staff, and prohibits any retaliation for prisoners' past and future involvement in the litigation of settlement monitoring.

The monitoring process under the settlement will be in effect for 24 months, with the opportunity to seek additional 12-month extensions upon a showing of continuing constitutional violations."

Supplement 10.11. The Prison Rape Elimination Act

The Prison Rape Elimination Act is designed to reduce the extensive problems resulting from prison rape. This section relates some of the major findings as well as the provisions of the law, the purpose of which is to "provide for the analysis of the incidence and effects of prison rape in Federal, State, and local institutions and to provide information, resources, recommendations, and funding to protect individuals from prison rape."[1]

"Section 15601. Findings

Congress makes the following findings: . . .

(2) Insufficient research has been conducted and insufficient data reported on the extent of prison rape. . . . [The estimates are that over 1 million inmates have been assaulted during the past 20 years.]

(3) Inmates with mental illnesses are at increased risk of sexual victimization. America's jails and prisons house more mentally ill individuals than all of the Nation's psychiatric hospitals combined. As many as 16 percent of inmates in State prisons and jails and 7 percent of Federal inmates, suffer from mental illness.

(4) Young first-time offenders are at increased risk of sexual victimization. Juveniles are 5 times more likely to be sexually assaulted in adult rather than juvenile facilities—often within the first 48 hours of incarceration.

(5) Most prison staff are not adequately trained or prepared to prevent, report, or treat inmate sexual assaults.

(6) Prison rape often goes unreported, and inmate victims often receive inadequate treatment for the severe physical and psychological effects of sexual assault—if they receive treatment at all.

(7) HIV and AIDS are major public health problems within America's correctional facilities. . . . Prison rape undermines the public health by contributing to the spread of these diseases, and often giving a potential death sentence to its victims.

(8) Prison rape endangers the public safety by making brutalized inmates more likely to commit crimes when they are released. . . .

(9) The frequently interracial character of prison sexual assaults significantly exacerbates interracial tensions. . . .

(10) Prison rape increases the level of homicides and other violence against inmates and staff, and the risk of insurrections and riots.

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[1]The Prison Rape Elimination ACT (PREA) of 2003, Public Law 108-79, is codified ay USCS, Title 42, Sections 15601 *et seq*. (2019).

(11) Victims of prison rape suffer severe physical and psychological effects that hinder their ability to integrate into the community and maintain stable employment upon their release from prison. They are thus more likely to become homeless and/or require government assistance. . . .

Section 15602. Purposes

The purposes of this Act are to—

(1) establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States;

(2) make the prevention of prison rape a top priority in each prison system;

(3) develop and implement national standards for the detention, prevention, reduction, and punishment of prison rape;

(4) increase the available data and information on the incidence of prison rape, consequently improving the management and administration of correctional facilities;

(5) standardize the definitions used for collecting data on the incidence of prison rape;

(6) increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape;

(7) protect the Eighth Amendment rights of Federal, State, and local prisoners;

(8) increase the efficiency and effectiveness of Federal expenditures through grant programs such as those dealing with health care; mental health care; disease prevention; crime prevention, investigation, and prosecution; prison construction, maintenance, and operation; race relations; poverty; unemployment; and homelessness; and

(9) reduce the costs that prison rape imposes on interstate commerce."

Supplement 10.12. Mentally Ill Offender Treatment and Crime Reduction Act

The Mentally Ill Offender Treatment and Crime Reduction Act became law in the fall of 2004 and is designed to improve the correctional systems' work with mentally ill inmates. This section states its purpose.[1]

"SEC. 3. PURPOSE.

The purpose of this Act is to increase public safety by facilitating collaboration among the criminal justice, juvenile justice, mental health treatment, and substance abuse systems. Such collaboration is needed to—

(1) protect public safety by intervening with adult and juvenile offenders with mental illness or co-occurring mental illness and substance abuse disorders;

(2) provide courts, including existing and new mental health courts, with appropriate mental health and substance abuse treatment options;

(3) maximize the use of alternatives to prosecution through graduated sanctions in appropriate cases involving nonviolent offenders with mental illness;

(4) promote adequate training for criminal justice system personnel about mental illness and substance abuse disorders and the appropriate responses to people with such illnesses;

(5) promote adequate training for mental health and substance abuse treatment personnel about criminal offenders with mental illness or co-occurring substance abuse disorders and the appropriate response to such offenders in the criminal justice system;

(6) promote communication among adult or juvenile justice personnel, mental health and co-occurring mental illness and substance abuse disorders treatment personnel, nonviolent offenders with mental illness or co-occurring mental illness and substance abuse disorders, and support services such as housing, job placement, community, faith-based, and crime victims organizations; and

(7) promote communication, collaboration, and intergovernmental partnerships among municipal, county, and State elected officials with respect to mentally ill offenders."

[1]The Mentally Ill Offender Treatment and Crime Reduction Act of 2004, Public Law 108-414 (2004).

Supplement 10.13. Selected Examples of Prison Violence

South Carolina

In April 2017, seven inmates were killed and 17 were seriously injured when a dispute over territory and money broke out in the Lee Correctional Institution, a maximum-security prison 40 miles east of Columbia. The inmates, armed with homemade knives, rioted for over seven hours. This "worst prison riot in a quarter-century" at a prison with a history of recent violent acts, occurred in an institution with staff shortages due to low pay and bad morale, according to prison officials. According to the corrections director, "his No. 1 security threat is cell phones, which give inmates unfettered communication, allowing them to commit crimes inside and outside of prison. According to the official, the riot started "as a gang war over territory, money and illegal items such as cellphones."[1]

Four mentally ill inmates were strangled by two other inmates at South Carolina's Kirkland Correctional Institution on April 7, 2017. Inmate Denver Simmons, 35, called the Associated Press in June 2017 and confessed to the killings, stating that he and Jacob Theophilus Philip, 25, could not endure spending life in prison, so they murdered other inmates, thinking they would be given the death penalty. According to Simmons, "[t]he more people you kill, the more chance they're gonna give it to you." He did acknowledge, however, that it was not likely they would be sentenced to death. More realistically, he said, he would spend ten years or so in solitary confinement and probably be assessed another four life sentences. He was already serving two life sentences. Simmons and Philip picked their victims in terms of those who trusted them and would be easy to kill.[2]

Alabama

In the William C. Holman Correctional Facility in March 2016, when an officer intervened in an inmate fight on a Friday afternoon, the officer and subsequently the warden were knifed. Inmates left their cells, crowded the halls, and set fires. On Monday, one inmate stabbed another, and 100 inmates barricaded themselves in a dorm, shouting six demands, including the "release [of] all inmates who have spent excessive time" in the facility and compensation "for mental pain and physical abuse" that they suffered during incarceration.[3]

Disturbances continued through 2016. Three inmates were reportedly stabbed in August, and in October one inmate was hanged (an apparent suicide) and another was stabbed.

In 2014, the Southern Poverty Law Center published a scathing report after its investigation of the Alabama prison system, finding overcrowding, inadequate facilities, lack of reasonable medical care, and so on. According to that report:

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[1] "Prison Violence Spurs Call for More Oversight," *Dallas Morning News* (April 18, 2018), p. 11.
[2] "Inmate Details 4 Prison Killings: 'We Did It for Nothing,'" *Dallas Morning News* (June 28, 2017), p. 7; "South Carolina Inmates Are Charged with Strangling 4 Other Prisoners," *New York Times* (April 9, 2017), p. 17.
[3] "Alabama Prisoners Demand Compensation for 'Mental Pain and Physical Abuse,'" *Think Progress* (March 15, 2016), http://thinkprogress.org, accessed August 14, 2016.

> A conviction does not open the door for a state to engage in cruelty. Whenever Alabama determines a person must be incarcerated, it must accept the legal—and moral—responsibility that comes from imprisoning a human being.[4]

At the time of these riots, the Alabama prison system was operating at 182.3 percent of its capacity.

In October 2016, the U.S. Department of Justice (DOL) opened an investigation into the men's prison in Alabama. In April 2019, the DOJ issued a report in which it stated the following among other findings.

> There is reasonable cause to believe that the Alabama Department of Correction (ADOC) has violated and is continuing to violate the Eighth Amendment rights of prisoners housed in men's prisons by failing to protect them from prisoner-on-prisoner violence; prisoner-on-prisoner sexual abuse, and by failing to provide safe conditions, and that such violations are pursuant to a pattern or practice of resistance to the full enjoyment of rights secured by the Eighth Amendment. The violations are severe, systemic, and exacerbated by serious deficiencies in staffing and supervision; overcrowding; ineffective housing and classification protocols; inadequate incident reporting; inability to control the flow of contraband into and within the prisons, including illegal drugs and weapons; ineffective prison management and training; insufficient maintenance and cleaning of facilities; the use of segregation and solitary confinement to both punish and protect victims of violence and/or sexual abuse; and a high level of violence that is too common, cruel, and od an unusual nature, and pervasive.
>
> Our investigation revealed that an excessive amount of violence, sexual abuse, and prisoner deaths occur within Alabama's prisons on a regular basis.[5]

Texas

In the spring of 2008, in the Federal Correctional Institution in Three Rivers, Texas (between San Antonio and Corpus Christi) two gangs began fighting in the facilities that housed 1,160 men. Twenty-two inmates were injured; one was killed. A previous incident occurred at a federal detention center in Houston; nine inmates and three staff were injured. According to one inmate lawyer, the nature of federal prisons is changing; they are no longer nonviolent and many inmates believe they must join gangs for protection. Lack of staff is an issue in controlling such outbursts. In the previous five years, the Three Rivers facility had lost 15 of its 125 correctional officers due to budget cuts.[6]

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[4]"Cruel Confinement: Abuse, Discrimination and Death within Alabama's Prisons," Southern Poverty Law Center (2014), http://www.splcenter.org, accessed August 14, 2016.
[5]United States Department of Justice Civil Rights Division, United States Attorney's Offices for the Northern, Middle, and Southern Districts of Alabama, *Investigation of Alabama's State Prisons for Men* (April 2, 2019, https://wwwjustice.gov/crt/case-document/file/1149971/download, accessed April 3, 2019.
[6]"Gang Fights in Prison Injure 22 and Kill One," *New York Times* (March 29, 2008), p. 9.

In September 2007, two Texas inmates at the maximum-security prison in Huntsville killed a correctional officer in an escape attempt. The inmates overpowered Susan Canfield, who was on horseback watching the inmates as they worked in the fields. They took her gun, stole a truck, and ran over her as she tried to stop them. John Ray Falk, 40, was apprehended within an hour. He has been in prison since 1986, convicted of murder. Jerry Martin, 37, was serving 50 years for attempted murder. He was apprehended a few hours later. Both men had good disciplinary records in the prison and thus were permitted to work in the fields under minimum security. Falk and Martin were charged with capital murder, as killing a correctional officer falls within the Texas statute covering that crime.[7]

On December 13, 2000, seven dangerous inmates escaped from a Texas maximum-security prison. They were not captured until January 2001, when four of the seven were arrested in Colorado, where a fifth inmate killed himself after officers arrived. The other two escapees were captured later. The inmates were charged with, among other crimes, killing a law enforcement officer. All were convicted and sentenced to death. As of May 3, 2019, four had been executed.

California

Numerous acts of inmate violence have been reported in California prisons in recent years. One occurred in the California Institution for Men in Chino, California, in 2009. The prison held 5,877 inmates (almost twice its rated capacity) when inmates rioted, resulting in injuries to approximately 250 of them. Some injuries were serious, resulting in hospitalization. Approximately 700 inmates were moved to other California prisons after one building was burned beyond use. Numerous factors in addition to overcrowding, such as an outbreak of the swine flu, were thought to have contributed to inmate unrest.

The Chino prison was described in 2008 as "beyond poor condition." At the time of the 2009 riot, some inmates were housed in cages in the halls; others were in bunk beds stacked in the common areas. The prison expert who presented a report to the federal judges stated that the Chino prison "was not fit for housing human beings."[8]

Massachusetts

Prison violence also involves injuries and deaths to other inmates, as illustrated by the killing of defrocked priest John J. Geoghan in August 2003 in a Massachusetts state prison. Geoghan, who was accused of molesting children for decades, admitted to engaging in sexual acts with three boys. The inmate accused of Geoghan's murder allegedly wrote a letter to a newspaper in which he stated that he had been sexually abused when he was a child. He apologized to Geoghan's sister for murdering her brother. The letter was signed, "Regretfully but sincerely, Joseph L. Druce." Subsequently, Druce entered a plea of not guilty to beating and strangling Geoghan.[9] In March 2006, Druce was convicted and sentenced to life without parole.

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[7]"Prison Escapes: Myth and Mayhem," *Houston Chronicle* (October 1, 2007), p. 1.
[8]"California Prison Rocked by Riot Has Long-Troubled History, Records Indicate," *New York Times* (August 11, 2009), p. 10.
[9]"Embattled Prisons Chief Takes Leave," *Chicago Tribune* (December 3, 2003), p. 20.

Ohio

In March 1995, Jason Robb, an inmate in the Southern Ohio Correctional Facility, who had been accused of helping lead a 1993 riot that resulted in the deaths of nine inmates and one correctional officer, was convicted of killing the officer and one inmate. Robb was convicted of six of the seven charges against him, including aggravated murder and kidnapping. The riot began on Easter Sunday, when a fight broke out as inmates returned from the recreation yard to their cellblocks. It lasted 11 days. Inmates surrendered after they agreed with prison officials on 21 issues, including numerous improvements in prison conditions. Officials agreed that inmates would not be subjected to retaliations by correctional officers, although it was made clear that those who committed crimes, such as murder, would be subject to prosecution. It was not until ten years later, in May 2003, that the last of the four inmates charged in the death of Officer Robert Vallendingham was convicted. For the second time, a jury found James Were, 46, guilty of kidnapping and two counts of aggravated murder, one for plotting the death of the officer and the second for killing him during the kidnapping. Were's first conviction was overturned by the Ohio Supreme Court.

West Virginia

Inmates wielding homemade weapons took correctional officers hostage and seized control of the West Virginia Penitentiary in 1986. Three inmates were killed, 16 hostages were taken, and the prison was held by inmates for 43 hours. Officers taken hostage were forced to watch inmates brutalize, torture, and then kill inmates thought to be snitches. The body of one inmate, a convicted murderer and child molester, was dragged up and down a cellblock as other inmates spat on him. The riot was triggered by inmate anger regarding restrictions on contact visits with family and friends and the cancellation of a Christmas open house.

The West Virginia Penitentiary had been placed under federal court order in 1983 after the court found unconstitutional conditions, including maggot-infested food and raw sewage in living areas. The prison at that time was overcrowded, and officials were ordered to reduce the population.

Chapter 11. Community Corrections, Probation, and Parole

Supplement 11.1. The Obama Administration's 2014 National Drug Control Strategy

"The Obama Administration's inaugural National Drug Control Strategy, published in 2010, charted a new course in our efforts to reduce illicit drug use and its consequences in the United States—an approach that rejects the false choice between an enforcement-centric 'war on drugs' and drug legalization. Science has shown that drug addiction is not a moral failing but rather a disease of the brain that can be prevented and treated. Informed by this basic understanding, the three *Strategies* that followed promoted a balance of evidence-based public health and safety initiatives focusing on key areas such as substance abuse prevention, treatment, and recovery.

The 2014 National Drug Control Strategy, released on July 9 [2014], builds on the foundation laid down by the Administration's previous four *Strategies* and serves as the Nation's blueprint for reducing drug use and its consequences. Continuing our collaborative, balanced, and science-based approach, the new Strategy provides a review of the progress we have made over the past four years. It also looks ahead to our continuing efforts to reform, rebalance, and renew our national drug control policy to address the public health and safety challenges of the 21st century.

In support of this *Strategy*, the President requested $25.6 billion in Fiscal Year 2015. Federal funding for public health programs that address substance use has increased every year, and the portion of the Nation's drug budget spent on drug treatment and prevention efforts—43 percent—has grown to its highest level in over 12 years. The $10.9 billion request for treatment and prevention is now nearly 20 percent higher than the $9.2 billion requested for Federally-funded domestic drug law enforcement and incarceration.

The President's Plan to Reform Drug Policy

1) PREVENT drug use before it ever begins through education

2) EXPAND access to treatment for Americans struggling with addiction

3) REFORM our criminal justice system to break the cycle of drug use, crime, and incarceration while protecting public safety

4) SUPPORT Americans in recovery by lifting the stigma associated with those suffering or in recovery from substance use disorders"[1]

[1] "2014 National Drug Control Strategy," Office of National Drug Control Policy, http://www.whitehouse.gov/ondcp/national-drug-control-strategy, accessed August 6, 2014.

Supplement 11.2. The Obama Administration's 2015 National Drug Control Strategy

On October 21, 2015, President Barack Obama made this statement in introducing his 2015 National Drug Control Strategy:

> We're partnering with communities to prevent drug use, reduce overdose deaths, help people get treatment. And under the Affordable Care Act, more health plans have to cover substance abuse disorders. The budget that I sent Congress would invest in things like state overdose prevention programs, preparing more first responders to save more lives, and expanding medication assisted treatment programs.

The White House explained:

> The Obama Administration's first National Drug Control Strategy, published in 2010, charted a new course in efforts to reduce illicit drug use and its consequences in the United States. Science has shown that a substance use disorder is not a moral failing but rather a disease of the brain that can be prevented and treated. Informed by this basic understanding, the annual Strategies that followed have promoted a balance of evidence-based public health and safety initiatives. The 2015 Strategy focuses on seven core areas:
>
> - Preventing drug use in our communities;
> - Seeking early intervention opportunities in health care;
> - Integrating treatment for substance use disorders into health care and supporting recovery;
> - Breaking the cycle of drug use, crime, and incarceration;
> - Disrupting domestic drug trafficking and production;
> - Strengthening international partnerships; and
> - Improving information systems to better address drug use and its consequences.

The Strategy emphasized the administration's commitment to confronting the prescription drug misuse and heroin epidemic. In 2010, the President's first National Drug Control Strategy emphasized the need for action to address opioid use disorders and overdose, while ensuring that individuals with pain receive safe, effective treatment. The next year, the White House released its national Prescription Drug Abuse Prevention Plan to outline goals for addressing prescription drug abuse and overdose. The President's Fiscal Year 2016 budget included $133 million in new investments aimed at addressing the opioid epidemic, including expanding state-level prescription drug overdose prevention strategies, medication-assisted treatment programs, and access to the overdose-reversal drug naloxone.

Beyond its function as a guide for shaping Federal policy, the Strategy is a useful resource for anyone interested in learning what is being done—and what other work can be done—to stop drug production and trafficking, prevent drug use, and provide care for those who

are addicted. For parents, teachers, community leaders, law enforcement officers, elected officials, ordinary citizens, and others concerned about the health and safety of our young people, the Strategy is a valuable tool that not only informs but also can serve as a catalyst to spark positive change.[1]

[1]2015 National Control Drug Strategy, The White House, https://www.thewhitehouse.org, accessed July 21, 2016.

Supplement 11.3. President Trump's Executive Order Concerning the Opioid Crisis

On March 29, 2017, President Donald J. Trump signed a presidential executive order establishing a commission on combating drug addiction and the opioid crisis. Portions of that order are reproduced here.

> By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:
>
> Section 1. Policy. It shall be the policy of the executive branch to combat the scourge of drug abuse, addiction, and overdose (drug addiction), including opioid abuse, addiction, and overdose (opioid crisis). This public health crisis was responsible for more than 50,000 deaths in 2015 alone, most of which involved an opioid, and has caused families and communities across America to endure significant pain, suffering, and financial harm. . . .
>
> Sec. 4. Mission of Commission. The mission of the Commission shall be to study the scope and effectiveness of the Federal response to drug addiction and the opioid crisis described in Section 1 of this order and to make recommendations to the President for improving that response. The Commission shall:
>
> (a) identify and describe the availability and accessibility of drug addiction and the opioid crisis;
>
> (b) assess the availability and accessibility of drug addiction treatment services and overdose reversal throughout the country and identify areas that are underserved;
>
> (c) identify and report on best practices for addiction prevention, including healthcare provider education and evaluation of prescription practices, and the use and effectiveness of State prescription drug monitoring programs;
>
> (d) review the literature evaluating the effectiveness of educational messages for youth and adults with respect to prescription and illicit opioids;
>
> (e) identify and evaluate existing Federal programs to prevent and treat drug addiction for their scope and effectiveness, and make recommendations for improving these programs; and
>
> (f) make recommendations to the President for improving the Federal response to drug addiction and the opioid crisis.[1]

[1]The White House Press Office, "Presidential Executive Order Establishing the President's Commission on Combating Drug Addiction and the Opioid Crisis" (March 29, 2017), https://www.whitehouse.gov, accessed July 7, 2017.

Supplement 11.4. Treatment of Minor Drug Offenders: The California Approach

One of the recent and boldest treatment approaches for substance abuse is found in California, which provides treatment rather than punishment for first- and second-time nonviolent minor drug offenders. The California statute, in part, states as follows:

> (a) Notwithstanding any other provision of law, and except as provided in subdivision (b), any person convicted of a nonviolent drug possession offense shall receive probation. As a condition of probation the court shall require participation in and completion of an appropriate drug treatment program. The court may also impose, as a condition of probation, participation in vocational training, family counseling, literacy training and/or community service. A court may not impose incarceration as an additional condition of probation. Aside from the limitations imposed in this subdivision, the trial court is not otherwise limited in the type of probation conditions it may impose. Probation shall be imposed by suspending the imposition of sentence.
>
> In addition to any fine assessed under other provisions of law, the trial judge may require any person convicted of a nonviolent drug possession offense who is reasonably able to do so to contribute to the cost of his or her own placement in a drug treatment program.[1]

The statute specifies the types of offenders who are excluded from this statute. Unfortunately, funding has been a problem.

[1] Possession of Controlled Substances; Probation; Exceptions, Cal. Penal Code, Section 1210.1 (2018).

Supplement 11.5. Furlough and Work Release Programs

A *furlough* involves permitting the inmate to leave the institution for a specified purpose other than work or study. The offender may be given a furlough to visit a sick relative, to attend a family funeral, or to look for a job. The leave is temporary and is granted for a short period of time. The inmate may be accompanied by security personnel. The first furlough program was introduced in 1918 by legislation in Mississippi.

In *work release* programs, inmates are released from incarceration to work or to attend school. They may participate in work study, take courses at an educational institution, or work at jobs in the community. Work release is also referred to by other names, such as the following: day parole, outmate program, day work, daylight parole, free labor, intermittent jailing, and work furlough.

The first work release law, the Huber Law, was enacted in Wisconsin in 1913. The next statute, in North Carolina, was not enacted until 1957. A few states passed laws providing for work release or furloughs before 1965, but most of the programs in existence today were established by state laws after the passage of the 1965 federal law, the Prisoner Rehabilitation Act.

Statutes vary regarding who decides which inmates are placed on work release and whether inmates may retain any or all of the money they earn. Most legislation permits states to contract with other political subdivisions for housing of inmates who cannot find work near their institutions of incarceration. Some provide halfway houses or work release centers, and some use county jails. Generally, inmates may not work in areas where there is a surplus of labor. They must be paid the same as others doing the same jobs. If a union is involved, it must be consulted, and the releasee may not work during a labor dispute.

Furlough and work release programs are important for several reasons. Work release programs enable offenders to engage in positive contacts with the community, assuming, of course, that the work placement is satisfactory. The programs permit offenders to provide some support for themselves and their families. This can eliminate the self-concept of failure that may be the result of the loss of the supporter role, which is so important in American society. Through work release, the offender may obtain more satisfying jobs than the prison could provide.

Work release and furlough programs provide a transition for the incarcerated inmate from a closely supervised way of life in prison to a more independent life within society. These programs give the community a transition period to accept offenders back into society, and they have permitted some states to close one or more correctional facilities, thus decreasing the cost to taxpayers.

Problems with work release involve the process of selecting the participants, finding sufficient jobs for them, gaining community acceptance, and ensuring that inmates do not commit crimes while they are on release. There is no guarantee, of course, that offenders placed on furlough or work release will not commit crimes; in fact, the possibility that they will do so has led to community action to eliminate these methods of early release in some jurisdictions.

However, many U.S. correctional systems have retained work release and educational release programs. In some of these programs, inmates are required to pay room and board, to help support their families, to pay fines and costs, or to contribute to victims' compensation funds.

Work release programs are used less today than in previous times in some jurisdictions. For example, in 1994, over 27,000 New York inmates participated in work release programs compared to less than 2,500 in 2010.[1]

[1]Drop the Rock, "Put People Before Prisons," http://www.droptherock.org/?p=147, accessed April 20, 2011.

Supplement 11.6. Prerelease Programs

Before release, all inmates should have an opportunity to participate in prerelease programs. It is unreasonable to expect that the difficulties inmates face can be resolved without any assistance from counselors and other professionals.

Prerelease centers are one avenue for preparing inmates who have serious adjustment problems but who are being released because they have completed their terms. In a residential environment that provides more supervision than offenders would have under probation or parole but less than they experience in prison, releasees may be able to make the adjustment to freedom gradually enough to succeed upon final release. In these cases, for a specified period before their release, inmates are transferred to prerelease facilities to finish their terms. The housing facility alone, however, is not sufficient for most inmates. Ideally, those facilities would provide the full range of services needed to prepare inmates for release, including meaningful work opportunities.

Above all, programs should be targeted to individual needs. Researchers who reviewed the literature in the reentry field and conducted research on their own concluded that there is "substantial evidence that appropriate treatment does work when targeted to the specific needs of offenders."[1]

Consider the unusual case of an inmate who spent 35 years in prison for stealing a television. When he was released in 2006, 61-year-old Junior Allen could not prove he existed. In an effort to get a birth certificate, he applied in Georgia, where he was living with his sister. He was told he had to go to Alabama, where he was born. He went to Alabama and was told he should go to Georgia. Allen just wanted to get a driver's license, and after 35 years in prison, he probably had no concept of what had happened to bureaucracy since he entered prison after stealing a black-and-white television from inside a house with an unlocked door. He had left the television in the woods, and his footprints were traced by police, who quickly arrested him. State records claimed that he had assaulted the 87-year-old woman who lived in the house, but he was never charged with assault. His conviction for second-degree burglary carried a life sentence; today, it would only be three and a half years in that jurisdiction.[2] Aftercare services for this former inmate might be rather simple—if you showed him how to cut through bureaucratic tape.

[1]James A. Wilson and Robert C. Davis, "Good Intentions Meet Hard Realities: An Evaluation of the Project Greenlight Reentry Program," *Criminology & Public Policy* 5(2) (May 2006): 303-338, quotation is on p. 331.
[2]"Man Who Spent 35 Years in Prison for Stealing TV Finds Freedom Frustrating," *Conway Daily* (New Hampshire) (July 2, 2005), p. 4.

Supplement 11.7. Second Chance Act of 2007

The stated purposes of the federal Second Chance Act of 2007 (signed into law in 2008 and subsequently reauthorized) are as follows:

> (1) to break the cycle of criminal recidivism, increase public safety, and help States, local units of government, and Indian Tribes, better address the growing population of criminal offenders who return to their communities and commit new crimes;
>
> (2) to rebuild ties between offenders and their families, while the offenders are incarcerated and after reentry into the community, to promote stable families and communities;
>
> (3) to encourage the development and support of, and to expand the availability of, evidence-based programs that enhance public safety and reduce recidivism, such as substance abuse treatment, alternatives to incarceration, and comprehensive reentry services;
>
> (4) to protect the public and promote law-abiding conduct by providing necessary services to offenders, while the offenders are incarcerated and after reentry into the community, in a manner that does not confer luxuries or privileges upon such offenders;
>
> (5) to assist offenders reentering the community from incarceration to establish a self-sustaining and law-abiding life by providing sufficient transitional services for as short of a period as practicable, not to exceed one year, unless a longer period is specifically determined to be necessary by a medical or other appropriate treatment professional; and
>
> (6) to provide offenders in prisons, jails, or juvenile facilities with educational, literacy, vocational, and job placement services to facilitate re-entry into the community.[1]

[1]Second Chance Act of 2007, 110 Public Law 199 (2008).

Supplement 11.8. Probation Conditions

The purpose of probation is to assist offenders in making social adjustments and in reintegrating into society as law-abiding citizens without compromising public safety. Thus, the policy is to impose restrictions on the probationer's freedom. Restrictions differ from jurisdiction to jurisdiction, but some are common to all.

It is customary to require probationers to report to an officer periodically at specified times and places; the officer may also visit the client. Probationers may change residence only with the permission of the supervising officer. They must work (or attend school or engage in some other approved activity) and any changes must be approved by the supervising officer or the court.

Most probationers are required to submit periodic reports of their activities and progress. They are not permitted to use nonprescription drugs and may be restricted (or prohibited) in the use of alcoholic beverages and forbidden to frequent bars or similar places. They may be required to submit to periodic drug testing if the facts of their cases suggest drug violations, and they may be required to participate in substance abuse programs. Substance abuse is a serious problem among probationers and treatment combined with probation rather than incarceration is cost effective. For example, one year after Arizona provided for probation rather than incarceration for nonviolent drug offenders, that state's supreme court issued a report estimating savings of $2.6 million. The court also reported that 77.5 percent of the probationers in substance abuse treatment programs tested negative for drug use. We do not know, however, the long-term effects of such treatment. Further evidence of the cost effectiveness of a treatment/probation approach rather than incarceration comes from reports concerning California's substance abuse treatment rather than incarceration program for first- and second-time nonviolent drug offenders. It was estimated that the program saved the state $1.5 billion in the first five years, but in 2011, the state's legislature eliminated funding for the program, which costs an average of $3,000 a year per inmate, compared to $49,000 for incarceration. The eligible offenders can still be spared prison, but the drug treatment programs previously provided will no longer be available.[1]

Among other requirements placed on probationers is that generally they are not permitted to own, possess, use, sell, or have deadly weapons or firearms under their control. Their personal associations are restricted. In some jurisdictions, probationers are not permitted to drive an automobile; in others, driving is permitted only with prior permission of the supervising officer. Normally, probationers may not leave the county or state without permission, which is granted infrequently and only for extraordinary reasons. They are required to refrain from violating laws, and they must cooperate with their probation officers. Courts may impose curfews or restrictions on where probationers may live as well as on their civil rights. For example, usually, probationers are not permitted to marry, engage in business, or sign any contracts without the permission of their probation officers.

[1]"Prop. 36 Saved California $1.4 Billion in First Five Years," Drug Policy Alliance, http://www.drugpolicy.org/, accessed August 7, 2014.

Probation conditions must comply with state and federal statutory and constitutional provisions as interpreted by courts. Although courts have traditionally taken a hands-off policy toward the imposition of probation conditions, in recent years, they have rejected some restrictions as constituting improper restraints on probationers' constitutional rights.

Several cases are illustrative. A federal court in Illinois held that it was reasonable for a court to order a probationer to get a paying job rather than become a missionary. The probationer had been ordered to pay restitution and fines after conviction of a series of religious scams.[2]

A federal court in New York held that it is unconstitutional to require a convicted drunk driver to attend Alcoholics Anonymous (AA) meetings while on probation. The court noted the spiritual and religious nature of AA meetings and held that requiring one to attend them violated the probationer's First Amendment rights (see Appendix A). The case was affirmed on appeal, and the U.S. Supreme Court refused to review it.[3]

In a Wisconsin case, the state supreme court held that the trial judge did not abuse discretion in his decision that, as a condition of probation, the father of nine children must agree not to father any more children unless he could prove that he could support them. The Wisconsin Supreme Court gave its reasons, along with the factual allegations, in the following brief excerpt. The state court twice denied a reconsideration, and the U.S. Supreme Court declined to hear the case.

State v. Oakley

629 N.W.2d 200 (Wis. 2001), *cert. denied*, *Oakley v. Wisconsin*, 537 U.S. 813 (2002), cases and citations omitted

We conclude that in light of Oakley's ongoing victimization of his nine children and extraordinarily troubling record manifesting his disregard for the law, this anomalous condition—imposed on a convicted felon facing the far more restrictive and punitive sanction of prison—is not overly broad and is reasonably related to Oakley's rehabilitation. Simply put, because Oakley was convicted of intentionally refusing to pay child support—a felony in Wisconsin—and could have been imprisoned for six years, which would have eliminated his right to procreate altogether during those six years, this probation condition, which infringes on his right to procreate during his term of probation, is not invalid under these facts. Accordingly, we hold that the circuit court did not erroneously exercise its discretion.

A case in which an appellate court did not approve of a probation condition is that of *United States v. Sofsky*, which involved a defendant who entered a guilty plea to receiving more than 1,000 still and moving pictures of child pornography over the Internet. One of his probation conditions was that he could not access the Internet without the permission of his probation officer. The appellate court concluded that the probation condition exceeded "even

[2]*United States v. Myers*, 864 F. Supp. 794 (N.D. Ill. 1994).

[3]*Warner v. Orange County Department of Probation*, 870 F. Supp. 69 (S.D.N.Y. 1994), *aff'd,* 115 F.3d 1068 (2d Cir. 1996), *cert. denied,* 528 U.S. 1003 (1999).

the broad discretion of the sentencing judge with respect to conditions of supervised release, and must be substantially modified." In a separate action, the court also rejected Sofsky's appeal of his conviction. The U.S. Supreme Court refused to review the decision.[4]

Probation conditions must be reasonably related to the offense for which the individual is on probation. For example, an order requiring that a probationer "make every attempt to avoid being in contact with children" was held reasonable in a case involving an offender who was convicted of a sex crime against a 12-year-old. The court held that the condition fell within the statutory provision "as the court, in its discretion, deems reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so." It also met the provision that the court has discretion to require a defendant to "[s]atisfy any other conditions reasonably related to his [or her] rehabilitation."[5]

A probation order designed solely to embarrass or humiliate an offender should not be upheld. A California judge "whose penchant for innovative sentencing made him a media darling"[6] ordered an offender to wear a T-shirt proclaiming, "I am on felony probation for theft." That condition was held to be a violation of the offender's right to privacy. The appellate court noted that the statute provides that one purpose of probation is rehabilitation, but the requirement in question was designed to expose the offender to public ridicule and humiliation, which would hinder rehabilitation. Furthermore, the order would have made it impossible for the offender to fulfill another probation condition, which was to get a job. The court stated that the questionable probation order

> could adversely affect [the probationer's] ability to carry on activities having no possible relationship to the offense for which he was convicted or to future criminality. . . . The condition was unreasonably overbroad and as such was invalid.[7]

Likewise, requiring that an offender convicted of aggravated battery erect a large sign on his property stating, "WARNING! A violent felon lives here: Enter at your own risk," was held to be unreasonable. The condition might hinder the offender's rehabilitation as well as cause psychological problems for him and for the innocent members of his family. The sign was viewed as a "drastic departure" from the state's sentencing provisions.[8] Warnings might be appropriate, however, in some cases, such as those involving sex offenders, as noted in the text.

Finally, an issue arises concerning prohibiting a probationer from engaging in an activity such as drinking alcohol, which is legal for other adults. One California court upheld abstention from alcohol as a probation condition, noting that, when a probationer is required to abstain from conduct that is otherwise legal, the requirement must be "reasonably related to the underlying crime or to future criminality." The court cited data linking alcohol use and crime, concluding,

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[4]*United States v. Sofsky*, 287 F.3d 122 (2d Cir. 2002), *supplemental opinion*, 2002 U.S. App. LEXIS 5296 (2d Cir. 2002), *cert. denied*, *Sofsky v. United States*, 537 U.S. 1167 (2003).
[5]*People v. Griffith*, 657 N.Y.S.2d 823 (App. Div. 3d Dept. 1997).
[6]Stephanie B. Goldberg, "No Baby, No Jail: Creative Sentencing Has Gone Overboard, a California Court Rules," *American Bar Association Journal* 78 (October 1992): 90.
[7]*People v. Hackler*, 13 Cal. App. 4th 1049 (5th Dist. 1993).
[8]*People v. Meyer*, 680 N.E.2d 315 (Ill. 1997).

"It is well-documented that the use of alcohol lessens self-control and thus may create a situation where the user has reduced ability to stay away from drugs." The probationer in this case had been placed on probation for three years after a guilty plea to simple possession of methamphetamine and possession of the substance for sale.[9]

[9]*People (California) v. Beal*, 70 Cal. Rptr. 2d 80 (Cal. App. 4th Dist. 1997), *review denied*, 1998 Cal. LEXIS 2172 (Cal. 1998).

Supplement 11.9. Released Murderer Committed Additional Violent Crimes

In December 1969, Reginald McFadden and three other men were accused of killing a 60-year-old woman during a burglary. McFadden was convicted and sentenced to life without parole, but after he served 24 years in prison, the Pennsylvania Board of Parole voted 4 to 1 to recommend clemency to the state's governor, who agreed and commuted the sentence. The parole board, however, had required that McFadden spend two years in a halfway-house program. Due to mistakes in paperwork and a long delay by the governor's office in signing the appropriate papers, McFadden did not enter a halfway house; nor did he receive any other type of supervised release.

After his release from the Pennsylvania prison, McFadden moved to New York, and by October 1994, he was back in custody, charged with kidnapping, beating, and raping a 55-year-old woman. On March 27, 1995, he was indicted for the murder of Robert Silk, who was abducted from his home and killed. He was convicted of these crimes and sentenced to prison.

In 1997, McFadden sued the Pennsylvania Department of Corrections for $1.05 million in damages, claiming that through "gross negligence" they had failed to rehabilitate him, thus causing the crimes he committed after his release. His case was dismissed, but later in the year, it led to the passage of Senate legislation limiting frivolous lawsuits filed by inmates. Pennsylvania's attorney general, in praising the bill, noted that the state was sued an average of 90 times a week, and many of those lawsuits were filed by inmates.[1]

After McFadden's rape conviction, the victim, Jeremy Brown, made a public statement. Brown described herself as the "only living victim" of the defendant. She promised to work to change the state's parole law. Brown spoke angrily about the trial in which McFadden served as his own attorney: "I think it is perfectly ludicrous that I was tortured by this man for five hours and then to have to sit there and answer his ridiculous questions. . . . I think it's crazy."[2]

When he was sentenced in 1996, McFadden told the judge he was proud that he was the symbol of "everything that is wrong with society" and that he would take the life of the judge "as quick as you can blink your eye. . . . Think about that." In a sentencing the previous year, McFadden told the judge not to give him any mercy. "If I was sitting where you are at, I wouldn't show you a bit of mercy."[3]

In 1997, Pennsylvania voters amended the state's constitution to require that the Board of Pardons must have a unanimous vote before sending a request for clemency to the governor. The vote also changed the composition of the board, which now must include a crime victim.[4]

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[1] "Pennsylvania Attorney General Fisher Applauds Legislation Limiting Frivolous Lawsuits," *PR Newswire*, State and Regional News (June 4, 1997).
[2] "Rape Victim Takes Spotlight and Aims It at Parole System," *New York Times* (August 25, 1995), p. 1.
[3] "Why We Need the Death Penalty," *The Record* (Bergen Record Corp. April 15, 1996), p. 16.
[4] "A Chance for the 'Teen Lifers'; High Court to Rule on Constitutionality of Life Sentences for Those Under 18," *Philadelphia Inquirer* (June 25, 2012), p. 1.

Supplement 11.10. Constitutional Issues in Probation and Parole

Some of the constitutional issues that govern probation and parole are the same as those that govern other aspects of criminal justice systems and were discussed earlier in the text. Examples are the rights to privacy, due process, equal protection, and to be free of cruel and unusual punishment. Other constitutional issues, such as search and seizure and the Americans with Disabilities Act, are discussed here.

Search and Seizure

In general, law enforcement officials may not search and seize without probable cause. There are exceptions and particularly with regard to probationers.

In 1987, in *Griffin v. Wisconsin*, the U.S. Supreme Court held that probation officers who suspect their clients of probation violations may search their homes (without a warrant) for evidence of such.[1]

In 1998, the California Supreme Court ruled that law enforcement officers may search the person or property of a parolee without reasonable suspicion and that any evidence of a crime may be used against the parolee at a subsequent trial for that crime. In *People v. Reyes*, an anonymous phone call tipped Rudolph Reyes's parole officer that Reyes

- Was using methamphetamine.
- Had lost his job because his employer suspected that he was stealing.
- Had made a false report to police that his home had been burglarized.
- Had threatened his wife with a gun.

The parole officer asked police to visit Reyes's home. When they did, they saw Reyes exiting a shed on his property. Reyes did not appear to be under the influence of drugs; however, after the police conversed with the parole officer by phone, they conducted a search of the shed and found methamphetamine. After Reyes was charged with illegal drug possession, he moved to suppress the evidence because, he argued, it was seized illegally. The motion was denied, the evidence was admitted, and Reyes was convicted. On appeal, he argued that the drug evidence should have been suppressed because the police did not have reasonable suspicion, as required by previous cases, to search his shed. The court of appeals ruled that the drug evidence should have been suppressed. The California Supreme Court reversed and held that reasonable suspicion is no longer required for a search and seizure of the property of a parolee. The court concluded:

> Because of society's interest both in assuring the parolee corrects his behavior and in protecting its citizens against dangerous criminals, a search pursuant to a parole condition, without reasonable suspicion, does not intrude on a

[1]*Griffin v. Wisconsin*, 483 U.S. 868 (1987).

> reasonable expectation of privacy, that is, an expectation that society is willing to recognize as legitimate.

The court emphasized that its decision did not mean that all searches are reasonable. For example, a search might be unreasonable if it were "made too often, or at an unreasonable hour, or if unreasonably prolonged, or for other reasons establishing arbitrary or oppressive conduct by the searching officer." In addition, a search that is made at the "whim or caprice" of an officer or one that is motivated by "personal animosity toward the parolee" is not reasonable; such a search would constitute a "form of harassment." The U.S. Supreme Court refused to review the case.[2]

In 2001, in *United States v. Knights*, the U.S. Supreme Court held that the Fourth Amendment's protection against unreasonable searches and seizures is limited in the case of probationers but that the warrantless search of a probationer's home by law enforcement officers in this case was constitutional because it was based on reasonable suspicion. The probationer (Knights) had signed a statement that he understood that he could be subjected to a search "at anytime [sic], with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." Right above Knights's signature was a capitalized statement that the undersigned had received a copy of the document. In the excerpt that follows, the U.S. Supreme Court explains its reasoning.

United States v. Knights
534 U.S. 112 (2001), cases and citations omitted

[W]e conclude that the search of Knights was reasonable under our general Fourth Amendment approach of "examining the totality of the circumstances."

The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." . . .

The judge who sentenced Knights to probation determined that it was necessary to condition the probation on Knights's acceptance of the search provision. It was reasonable to conclude that the search condition would further the two primary goals of probation — rehabilitation and protecting society from future criminal violations. The probation order clearly expressed the search condition and Knights was unambiguously informed of it. The probation condition thus significantly diminished Knights's reasonable expectation of privacy. . . .

The State has a dual concern with a probationer. On the one hand is the hope that he will successfully complete probation and be reintegrated back into the community. On the other is the concern, quite justified, that he will be more likely to engage in criminal conduct than an ordinary member of the community. The view of the Court of Appeals in this case would require the State to shut its eyes to the latter concern and concentrate only on the former. But we hold that the Fourth Amendment does not put the State to such a choice. Its interest in apprehending violators of the criminal law, thereby protecting potential victims of criminal

[2]*People v. Reyes*, 968 P.2d 445 (Cal. 1998), *cert. denied*, 526 U.S. 1092 (1999).

enterprise, may therefore justifiably focus on probationers in a way that it does not on the ordinary citizen.

We hold that the balance of these considerations requires no more than reasonable suspicion to conduct a search of this probationer's house. The degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable. Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term "probable cause," a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable. . . .

The District Court found, and Knights concedes, that the search in this case was supported by reasonable suspicion. We therefore hold that the warrantless search of Knights, supported by reasonable suspicion and authorized by a condition of probation, was reasonable within the meaning of the Fourth Amendment.

The Ninth Circuit was not to be significantly deterred by the U.S. Supreme Court's reversal of its decision in *Knights*. In 2003, the court held unconstitutional the search of a parolee's home without a warrant and without reasonable suspicion. The case involved a parolee who had signed a "Fourth waiver," which gave permission for parole officers to search his home. The FBI agent who conducted the parole search admitted that he did not expect to find any evidence of criminal activity and nothing to connect the parolee to an unsolved robbery that occurred two years previously. But he thought the pressure might entice the parolee to confess to that robbery. In less than two hours, the parolee confessed. In the case of *United States v. Crawford*, a panel of the Ninth Circuit stated as follows:

> We hold that the search of Crawford's home without any reasonable suspicion, although pursuant to a parole condition authorizing such searches, violated the Fourth Amendment. Because Crawford's confession resulted from the suspicionless search of his residence, we reverse the district court's decision denying his motion to suppress and remand to allow him to withdraw his guilty plea.

The entire court of the Ninth Circuit agreed to hear this case and reached a different decision. The full court affirmed Crawford's conviction but remanded the case for resentencing. The U.S. Supreme Court refused to review the case.[3]

In 2006, the U.S. Supreme Court upheld the search of a California parolee in a case in which the parole officer had no reason to suspect the parolee of committing a parole violation or a crime but decided to search him under a California statute that permitted this search based solely on the person's status as a parolee. In *Samson v. California*, the parolee had, in accordance with the California law, signed a waiver to "agree . . . to be subject to search or

[3]*United States v. Crawford*, 323 F.3d 700 (9th Cir. 2003), *vacated, reh'g, en banc, granted*, 2003 U.S. App. LEXIS 18402 (9th Cir. 2003), *and different results reached on reh'g, remanded*, 372 F.3d 1048 (9th Cir. 2004), *cert. denied*, 543 U.S. 1057 (2005).

seizure by a parole officer or other peace officer . . . , with or without a search warrant and with or without cause." Donald Curtis Samson was searched without cause; illegal drugs were found. Samson was charged with drug possession, and the trial judge refused his motion to suppress the evidence. He was convicted and sentenced to seven years in prison. The U.S. Supreme Court upheld the search by a 6-to-3 vote, with extensive references to *Knights*, excerpted above. According to Justice Clarence Thomas, who wrote the opinion for the Court in *Sampson*, in reference to prior cases, the state has a substantial interest in supervising persons on parole because those individuals "are more likely to commit future criminal offenses" and the Fourth Amendment "does not render the States powerless to address these concerns effectively." Justice John Paul Stevens wrote a dissenting opinion, in which Justices David H. Souter and Stephen G. Breyer joined.[4]

The Americans with Disabilities Act (ADA)

A second area of constitutional issues concerning probation and parole is that of the Americans with Disabilities Act (ADA). In 2002, in a California case, the Ninth Circuit Court of Appeals ruled that the ADA applies to parole decisions. The case of *Thompson v. Davis* involved two inmates incarcerated in Vacaville, California, and serving terms of 15 years to life for second-degree murder. The appellants argued that the Board of Prison Terms had not recommended them for parole because they were drug addicts. Past drug addiction is considered a disability under the ADA. The federal court found that the appellants, who had received substance abuse treatment while in prison, had been drug-free for many years, one since 1984 and the other since 1990. Both had been eligible for parole release since 1993. The Ninth Circuit ruled that the appellants met the conditions of the ADA and concluded the following:

> Since a parole board may not deny African-Americans consideration for parole because of their race, and since Congress thinks that discriminating against a disabled person is like discriminating against an African-American, the parole board may not deny a disabled person parole because of his disability.[5]

The case was sent back to the district court to determine whether the paroles were denied because of the inmates' former drug addiction or for some other reason. The U.S. Supreme Court refused to review the case, thus permitting the Ninth Circuit decision to stand.

[4]*Samson v. California,* 547 U.S. 843 (2006), case citations omitted. The California statute in question is Cal. Penal Code, Section 3067(a) (2018).
[5]*Thompson v. Davis,* 295 F.3d 890 (9th Cir. 2002), *cert. denied,* 538 U.S. 921 (2003).

Supplement 11.11. Due Process and Parole and Probation Revocation: The Supreme Court Responds

Mempa v. Rhay[1]

A probationer is entitled to be represented by appointed counsel at a combined revocation and sentencing hearing. This is because sentencing is a stage of the actual criminal proceeding, "where substantial rights of a criminal accused may be affected."

Morrissey v. Brewer[2]

Before parole can be revoked, the parolee is entitled to two hearings. The first is a preliminary hearing at the time of arrest and detention and is for the purpose of determining whether there is probable cause to believe that parole has been violated. The second hearing is a more comprehensive hearing, which must occur before making a decision to revoke parole.

Minimum due process requirements at that second hearing are:

1. Written notice of the alleged violations of parole

2. Disclosure to the parolee of the evidence of violation

3. Opportunity to be heard in person to present evidence as well as witnesses

4. Right to confront and cross-examine adverse witnesses unless good cause can be shown for not allowing this confrontation

5. Right to judgment by a detached and neutral hearing body

6. Written statement of the reason for revoking parole and of the evidence used in arriving at that decision

The Court did not decide whether retained or appointed counsel is required at a parole revocation hearing.

Gagnon v. Scarpelli[3]

The minimum due process requirements enumerated in *Morrissey v. Brewer* apply to revocation of probation. A probationer is entitled to the two hearings before revocation.

The Court considered the issue of whether counsel is required and held that there is no constitutional right to counsel at revocation hearings and that the right to counsel should be determined on a case-by-case basis. The Court left the matter of counsel to the discretion of parole and probation authorities and indicated in part that an attorney should be present when

[1] *Mempa v. Rhay*, 389 U.S. 128 (1967).
[2] *Morrissey v. Brewer*, 408 U.S. 471 (1972).
[3] *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

required for fundamental fairness. An example is a situation in which the parolee or probationer is unable to communicate effectively.

Bearden v. Georgia[4]

The state may not revoke probation in the case of an indigent who has failed to pay a fine and restitution, unless there is a determination that the probationer has not made a bona fide effort to pay or that there were not adequate alternative forms of punishment. "Only if alternative measures are not adequate to meet that state's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay."

Black v. Romano[5]

The Due Process Clause generally does not require a sentencing court to indicate that it considered alternatives to incarceration before revoking probation. This case did not involve the indigency issue regarding failure to pay a fine and restitution, as did the *Bearden* case.

[4] *Bearden v. Georgia*, 461 U.S. 660 (1983).
[5] *Black v. Romano*, 471 U.S. 606 (1985).

Supplement 11.12. Sex Offender Registration Laws: A Brief History

The following excerpt from a Florida case, *United States v. Powers*, provides information on the history of sex offender registration laws.[1]

United States v. Powers
544 F. Supp. 2d 1331 (M.D. Fla. 2008), *vacated, remanded,* 562 F.3d 1342 (11th Cir. 2009),
cases and citations omitted

It is beyond question that sexual victimization, particularly of children, is a major problem in this country. As a result of the significant media attention this problem has received in recent decades, the horrific crimes suffered by children such as Jacob Wetterling, Adam Walsh, Megan Kanka, and Polly Klaas, weigh heavily on America's collective conscience. In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act ("the Wetterling Act") to promote the adoption of sex offender registration laws by all states. In 1996 the Wetterling Act was amended by Megan's Law, which made the receipt of federal funding for state law enforcement dependent upon the creation of sex offender registration programs. Every state had enacted some variation of Megan's Law by 1997.

On July 27, 2006, Congress enacted the Adam Walsh Child Protection and Safety Act of 2006 ("the Adam Walsh Act"), which included the Sex Offender Registration and Notification Act ("SORNA"). The Adam Walsh Act is applicable to each state, the District of Columbia, Native American tribal territory, and other United States territories. Each jurisdiction is required to substantially implement the requirements of SORNA by July 27, 2009, or risk a reduction in federal grants. In addition to creating a national registry, SORNA imposes registration requirements on individuals who fall under SORNA's definition of a "sex offender" and includes criminal penalties for those who fail to register. SORNA provides, *inter alia* [among other things], that a sex offender convicted under a state statute who fails to register or fails to verify his or her registration and also engages in interstate travel can be prosecuted and is subject to a sentence of up to ten years' imprisonment.

[The court discussed the facts of the case, which involved a sex offender who failed to register when he moved to Florida, thus violating the Florida sex registration statute. As a result, he was also charged with violating the federal statute, which he claimed on appeal was unconstitutional as it violated the Commerce Clause of the U.S. Constitution. On his first appeal, he was successful, as noted in this brief excerpt.]

The Adam Walsh Act was enacted with a commendable goal—to protect the public from sex offenders. However, a worthy cause is not enough to transform a state concern (sex offender registration) into a federal crime. If an individual's mere unrelated travel in interstate commerce is sufficient to establish a Commerce Clause nexus with purely local conduct, then virtually all criminal activity would be subject to the power of the federal government. Surely our founding fathers did not contemplate such a broad view of federalism. Accordingly, the Court finds that the adoption of the statute under which Defendant is charged violates Congress'

[1]In addition to *Powers*, see *United States v. Ambert*, 561 F.3d 1202 (11th Cir. 2009).

power under the Commerce Clause and is, therefore, unconstitutional.

[The court ordered the appellant released. On appeal, the Eleventh Circuit held that the SORNA does not violate the power of Congress under the Commerce Clause, vacated the lower court's decision, and ordered that court to reinstate the indictment. Here is the Eleventh Circuit's rationale, quoting one of its previous cases:]

The requirement that sex offenders register is necessary to track those offenders who move from jurisdiction to jurisdiction.[2]

[2]*United States v. Ambert*, 561 F.3d 1202 (11th Cir. 2009).

Supplement 11.13. A Legal Issue with the Federal Sex Offender Registration Law[1]

The federal Sex Offender Registration and Notification Act (SORNA) makes "knowingly failing to register or update a registration" by a sex offender a federal crime.[2] A conflict of lower federal courts' interpretation of the statute led to a decision by the U.S. Supreme Court. Two Kansas City metropolitan area residents, both of whom were convicted sex offenders prior to the enactment of SORNA, were nevertheless required by that statute to register as sex offenders. Both men left their homes, went to the Kansas City International Airport, flew to the Philippines to live, and did not continue to update their sex offender registrations in Kansas. Before moving to the Philippines, one man had resided in Missouri within the jurisdiction of the Eighth Circuit Court of Appeals; the other had resided in Kansas within the jurisdiction of the Tenth Circuit Court of Appeals. The Eighth Circuit ruled that a sex offender's failure to register in the jurisdiction he had left did not violate SORNA.[3] The Tenth Circuit held that it did. The U.S. Supreme Court heard the Tenth Circuit case and reversed. Following is a brief excerpt from the opinion.

Nichols v. United States
136 S. Ct. 1113 (2016), cases and citations omitted

Lester Ray Nichols, a registered sex offender living in the Kansas City area, moved to the Philippines without notifying Kansas authorities of his change in residence. For that omission Nichols was convicted of failing to update his sex-offender registration, in violation of 18 U.S.C. Section 2250(a). We must decide whether federal law required Nichols to update his registration in Kansas to reflect his departure from the State. . . .

[The Court briefly discusses the development of federal law regarding requiring sex offenders to register and then states the current law:]

> A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in *at least 1 jurisdiction involved pursuant to subsection (a)* and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. (emphasis added).

Subsection (a), in turn, provides: "A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." A sex offender is required to notify only one "jurisdiction involved"; that jurisdiction must then notify a list of interested parties, including the other jurisdictions. The question presented in this case is whether the State a sex offender leaves—that is, the State where he formerly resided—qualifies as an "involved" jurisdiction. . . .

[Nichols complied with the requirements until he left the country. He was arrested in Manila, escorted back to the United States by U.S. authorities, charged with one count of

[1]This section first appeared in Supplement 15.10 of Sue Titus Reid, *Crime and Criminology*, 15th ed. (New York: Wolters Kluwer, 2018).
[2]See 18 USCS, Section 2250(1)(3) (2019).
[3]See *United States v. Lunsford*, 725 F.3d 859 (8th Cir. 2013).

"knowingly fail[ing] to register or update a registration as required by [SORNA]" and . . . conditionally pleaded guilty, reserving his right to appeal the denial of his motion.]

The Tenth Circuit affirmed. [The Court notes that the Eighth Circuit] held that defendant had no obligation to update his registration in Missouri because a sex offender is required "to 'keep the registration current' in the jurisdiction where he 'resides,' not a jurisdiction where he 'resided.'" We granted certiorari to resolve the split.

[The Court notes that the Philippines is not a "jurisdiction" under SORNA, notes that SORNA does not require offenders to "deregister" when they leave their jurisdictions, and that if the drafters of the statute thought that was a requirement, they could have said so.] . . .

SORNA's plain text . . . therefore did not require Nichols to update his registration in Kansas once he no longer resided there. . . .

Congress has recently criminalized the "knowin[g] fail[ure] to provide information required by [SONRA] relating to intended travel in foreign commerce." . . . Both parties agree that the new law captures Nichols's conduct.

The judgment of the Court of Appeals for the Tenth Circuit is reversed.

As noted in the above excerpt, the United States now has a statute covering the registration of sex offenders who plan to travel abroad.[4]

[4]International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders, USCS, Title 18, Section 2250(b) (2019).

Supplement 11.14. A Challenge to the Housing Restrictions of California's Sex Offender Registration Law[1]

California's Jessica's Law, enacted by means of a voter initiative in 2006, prohibits registered sex offenders from living within 2,000 feet of a school or park, among other provisions. According to a study, that left 0.7 percent of multifamily dwellings in compliance. Four San Diego County parolees challenged the provision. These litigants were "living in the alley behind the parole office, in the bed of the ... San Diego River, in vehicles or in noncompliant homes" although all of them had other places to live with family or friends, but those residences were noncompliant. The sex offenders are required to register their living locations, and when one of the litigants was hospitalized, he was arrested for failure to register that living address.[2]

Following is an excerpt from the opinion of the case in which the California Supreme Court found the blanket requirement unconstitutional.

In re Taylor
343 P.3d 867 (Cal. 2015), cases and citations omitted

The United States Supreme Court has emphasized that consideration of as-applied challenges, as opposed to broad facial challenges, "is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments. . . . [I]t is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop. '[I]t would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation.' For this reason, '[a]s-applied challenges are the basic building blocks of constitutional adjudication.'" . . .

[T]he record [in this case] establishes that the residency restrictions have prevented paroled sex offenders as a class from residing in large areas of the county . . . . The exclusionary restrictions may also impact the ability of some petitioners to live and associate with family members. They face disruption of family life because, although the restrictions do not expressly prohibit them from living with family members, if the family members' residence is not in a compliant location, petitioners cannot live there.

The record further reflects that blanket enforcement of the residency restrictions has had other serious implications for all registered sex offenders on parole in San Diego County. Medical treatment, psychological counseling, drug and alcohol dependency services, and other rehabilitative social services available to parolees are generally located in the densely populated areas of the county. Relegated to less populated areas of the County, registered sex offender parolees can be cut off from access to public transportation, medical care, and other social services to which they are entitled, as well as reasonable opportunities for employment. The trial court specifically found that the residency restrictions place burdens on petitioners and

[1]This section first appeared in Supplement 15.11 of Sue Titus Reid, *Crime and Criminology*, 15th ed. (New York: Wolters Kluwer, 2018).
[2]Lorelei Laird, "A Place to Call Home: Courts Are Reconsidering Residency Restrictions for Sex Offenders," *American Bar Association Journal* 101(7) (July 2015), p. 15.

similarly situated sex offenders on parole in the county that "are disruptive in a way that hinders their treatment, jeopardizes their health and undercuts their ability to find and maintain employment, significantly undermining any effort at rehabilitation." . . .

Perhaps most disturbing, the record reflects that blanket enforcement [of the statute] has led to greatly increased homelessness among registered sex offenders on parole in the county. . . . The trial court specifically found that blanket enforcement of the residency restrictions in the County has "result[ed] in large groups of parolees having to sleep in alleys and riverbeds, a circumstance that did not exist prior to Jessica's Law."

The increased incidence of homelessness has in turn hampered the surveillance and supervision of such parolees, thereby thwarting the legitimate governmental objective behind the registration statute to which the residency restrictions attach; that of protecting the public from sex offenders. The trial court took judicial notice of the final report issued in October 2010 by the CDCR Task Force, a multidisciplinary group comprised of CDCR staff, law enforcement personnel, and other outside participants charged with making recommendations to the CDCR on various sex offender issues. The Task Force's final report concluded that the Jessica's Law's residency restrictions failed to improve public safety, and instead compromised the effective monitoring and supervision of sex offender parolees, placing the public at greater risk. A specific finding was made that "[h]omeless sex offenders put the public at risk. These offenders are unstable and more difficult to supervise for a myriad of reasons." The report further found that homelessness among sex offender parolees weakens GPS tracking, making it more difficult to monitor such parolees and less effective overall. CDCR has conceded in its briefs before this court that "[t]he evidence . . . demonstrates that the dramatic increase in homelessness has a profound impact on public safety," and that "there is no dispute that the residency restriction[s] [have] significant and serious consequences that were not foreseen when it was enacted."

Last, the trial court agreed with petitioners that the manner in which CDCR has been implementing the residence restrictions in San Diego County has subjected them to arbitrary and oppressive official enforcement action, thereby contributing to the law's unintended, unforeseen, and socially deleterious effects. . . .

The authorities we have cited above explain that all parolees retain certain basic rights and liberty interests, and enjoy a measure of constitutional protection against the arbitrary, oppressive and unreasonable curtailment of "the core values of unqualified liberty" even while they remain in the constructive legal custody of state prison authorities until officially discharged from parole. We conclude the evidentiary record below establishes that blanket enforcement of Jessica's Law's mandatory residency restrictions against registered sex offenders on parole in San Diego County impedes those basic, albeit limited, constitutional rights. Furthermore, [the statute], as applied and enforced in that county, cannot survive rational basis scrutiny because it has hampered efforts to monitor, supervise, and rehabilitate such parolees in the interests of public safety, and as such, bears no rational relationship to advancing the state's legitimate goal of protecting children from sexual predators.

[The court noted that CDCR has the authority in individual cases to impose housing restrictions] as long as they are based on, and supported by, the particularized circumstances of each individual parolee.

Supplement 11.15. May Registered Sex Offenders be Prevented from Using Social Media?

In 2017, the U.S. Supreme Court considered whether registered sex offenders in North Carolina could be prohibited from using websites that minors could access. Lester Packingham contended that the statute violated his First Amendment free speech rights.

Packingham v. North Carolina
137 S. Ct. 1730 (2017), cases and citations omitted

In 2008, North Carolina enacted a statute making it a felony for a registered sex offender to gain access to a number of websites, including commonplace social media websites like Facebook and Twitter. The question presented is whether that law is permissible under the First Amendment's Free Speech Clause, applicable to the States under the Due Process Clause of the Fourteenth Amendment.

North Carolina law makes it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." . . .

The statute includes two express exemptions. The statutory bar does not extend to websites that "[p]rovid[e] only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform." The law also does not encompass websites that have as their "primary purpose the facilitation of commercial transactions involving goods or services between [their] members or visitors."

According to sources cited to the Court, [the statute] applies to about 20,000 people in North Carolina and the State has prosecuted over 1,000 people for violating it. . . .

[Petitioner was convicted as a 21-year-old for having sex with a 13-year-old girl and is] required to register as a sex offender, a status that can endure for 30 years or more. As a registered sex offender, petitioner was barred under [the statute] from gaining access to commercial social networking sites.

In 2010, a state court dismissed a traffic ticket against petitioner. In response, he logged on to Facebook.com and posted the following statement on his personal profile:

> "Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court cost, no nothing spent. . . . Praise be to GOD, WOW! Thanks JESUS.!"

[Petitioner was arrested and indicted for violating the statute regarding commonplace social media. It was not alleged that he contacted a minor] or committed any other illicit act—on the Internet.

[The North Carolina Supreme Court upheld the constitutionality of the statute.] The [U.S. Supreme] Court granted certiorari, and now reverses.

[The Court discussed the growing importance of the Internet, especially Facebook, for

communicating about ideas and gaining and supplying information. The Court discussed the importance of preventing crimes, especially against children, and noted that the statute at issue could bar the petitioner's use of "websites as varied as Amazon.com, Washingtonpost.com, and Wedmd.com." It noted that the state could have more specific statutes than this one but] the statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens. . . . By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to "become a town crier with a voice that resonates farther than it could from any soapbox."

In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences. Even convicted criminals—and in some instances, especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives. [The Court stated that the law was overly broad.] . . .

It is well established that, as a general rule, the Government "may not suppress lawful speech as the means to suppress unlawful speech." That is what North Carolina has done here. Its law must be held invalid.

Supplement 11.16. Is it Constitutional to Require Registered Sex Offenders Living in the Community to Wear GPS Monitors?

In 2016, the Seventh Circuit considered the constitutionality of requiring GPS monitors for registered sex offenders permitted to live within the community. Following is an excerpt from the case.

Belleau v. Wall
811 F.3d 929 (7th Cir. 2016), cases and citations omitted

In 1992, the plaintiff, who was then 48 years old, was convicted in a Wisconsin state court of having sexually assaulted a boy repeatedly for five years beginning when the boy was eight years old. . . . Oddly, he was given only a year in jail and probation for these assaults, but before the period of probation expired he was convicted of having in 1988 sexually assaulted a nine-year-old girl. Sentenced to 10 years in prison for that crime, he was paroled after 6 years. But his parole was revoked a year later after he admitted that he had had sexual fantasies about two girls, one four years old and the other five, and that he had "groomed" them for sexual activities and would have molested them had he had the opportunity to do so.

Scheduled to be released from prison in 2005, instead he was civilly committed . . . as a "sexually violent person," after a civil trial in which he was found to be "dangerous because he . . . suffers from a mental disorder that makes it likely that [he] will engage in one or more acts of sexual violence." He was released in 2010 on the basis of the opinion of a psychologist that he was no longer more likely than not to commit further sexual assaults. But in 2006 Wisconsin had enacted a law requiring that persons released from civil commitment for sexual offenses wear a GPS monitoring device 24 hours a day for the rest of their lives. The statute applied to any sex offender released from civil commitment on or after the first day of 2008 and thus applied (and continues to apply) to the plaintiff. And therefore ever since his release from civil commitment he has been forced to wear an ankle bracelet that contains a GPS monitoring device. . . .

[The plaintiff claims these requirements violate his Fourth Amendment rights and constitute unconstitutional *ex post facto laws*, which are] laws that either punish people for conduct made criminal only after they engaged in it or increase the punishment above the maximum authorized for their crime when they committed it. . . .

Anyone who drives a car is familiar with GPS technology, which enables the driver to determine his geographical location, usually within a few meters. The GPS ankle bracelet . . . likewise determines the geographical location of the person wearing it, within an error range of no more than 30 meters. The most common use of such monitors is to keep track of persons on probation or parole; the device that Wisconsin uses is advertised specifically for those purposes. But such devices are also used by some parents to keep track of their kids or elderly relatives and by some hikers and mountain climbers to make sure they know where they are at all times or to track their speed.

The type of anklet worn by the plaintiff is waterproof to a depth of fifteen feet, so one can bathe or shower while wearing it. It must however be plugged into a wall outlet for an hour

each day (while being worn) in order to recharge it. There are no restrictions on where the person wearing the anklet can travel, as long as he has access to an electrical outlet. Should he move away from Wisconsin, he ceases having to wear it. . . .

When the ankleted person is wearing trousers the anklet is visible only if he sits down and his trousers hike up several inches and as a result no longer cover it. The plaintiff complains that when this happens in the presence of other people and they spot the anklet, his privacy is invaded, in violation of the Fourth Amendment, because the viewers assume that he is a criminal and shun him. Of course the Fourth Amendment does not mention privacy or create any right of privacy. It requires that searches be reasonable but does not require a warrant or other formality designed to balance investigative need against a desire for privacy; the only reference to warrants is a prohibition of general warrants. And although the Supreme Court has read into the amendment a qualified protection against invasions of privacy, its recent decision . . . indicates that electronic monitoring of sex offenders is permitted if reasonable. . . .

Having to wear a GPS anklet monitor is less restrictive, and less invasive of privacy, than being in jail or prison, or for that matter civilly committed, which realistically is a form of imprisonment. The plaintiff argues that because he is not on bail, parole, probation, or supervised release, and so is free of the usual restrictions on the freedom of a person accused or convicted of a crime, there is no lawful basis for requiring him to wear the anklet monitor. But this misses two points. The first is the nature of the crimes he committed—sexual molestation of prepubescent children. In other words the plaintiff is a pedophile. . . .

The plaintiff . . . is about to turn 73, . . . and he argues that he has "aged out" of pedophilic acts. There is evidence that the arrest rate of pedophiles declines with age, and from this it can be inferred that pedophilic acts probably decline with age as well, though there are no reliable statistics on the acts, as distinct from the arrests for engaging in the acts. There is no reason to think that the acts decline to zero. Most men continue to be sexually active into their 70s, and many remain so in their 80s and even 90s. And even if not physically capable of the common forms of male sexual activity, older men can still molest and grope young children. . . .

[The court discusses the opinions of experts and the statistical evidence of recidivism but also notes the high underreporting of sex crimes and concludes that even if we consider the figures]

[T]he plaintiff can't be thought just a harmless old guy. . . . The Supreme Court . . . remarked on "the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is 'frightening and high.'" "When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." . . .

In short, the plaintiff cannot be certified as harmless merely because he no longer is under any of the more familiar kinds of post-imprisonment restriction. . . . Assuming that the anklet would . . . deter . . . , requiring that it be worn is a nontrivial protection for potential victims of child molestation. . . .

[The court notes that sex offenders' residence addresses and criminal records are made public.] . . .

So the plaintiff's privacy has already been severely curtailed as a result of his criminal activities, and he makes no challenge to that loss of privacy. The additional loss from the fact that occasionally his trouser leg hitches up and reveals an anklet monitor that may cause someone who spots it to guess that this is a person who has committed a sex crime must be slight.

For it's not as if the Department of Corrections were following the plaintiff around, peeking through his bedroom window, trailing him as he walks to the drug store or the local Starbucks, videotaping his every move, and through such snooping learning . . . "whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband." The fruits of such surveillance techniques would be infringements of privacy that the Supreme Court deems serious. But nothing of that kind is involved in this case, quite apart from the fact that persons who have demonstrated a compulsion to commit very serious crimes and have been civilly determined to have a more likely than not chance of reoffending must expect to have a diminished right of privacy as a result of the risk of their recidivating. . . .

[E]very night the Department of Corrections makes a map of every anklet wearer's whereabouts that day so that should he be present at a place where a sex crime has been committed, or be hanging around school playgrounds or otherwise showing an abnormal interest in children not his own, the police will be alerted to the need to conduct an investigation. . . .

The plaintiff's argument that his monitoring violates the Fourth Amendment is further weakened when we consider the concession by his lawyer at oral argument that the Wisconsin legislature could, without violating the Fourth Amendment, make lifetime wearing of the anklet monitor a mandatory condition of supervised release for anyone convicted of sexual molestation of a child. . . .

It's untrue that "the GPS device burdens liberty . . . by its continuous surveillance of the offender's activities"; it just identifies locations; it doesn't reveal what the wearer of the device is doing at any of the locations. And its "burden" must in any event be balanced against the gain to society from requiring that the anklet monitor be worn. It is because of the need for such balancing that persons convicted of crimes, especially very serious crimes such as sexual offenses against minors, and especially very serious crimes that have high rates of recidivism such as sex crimes, have a diminished *reasonable* constitutionally protected expectation of privacy. . . .

The plaintiff argues that monitoring a person's movements requires a search warrant. That's absurd. The test is reasonableness, not satisfying a magistrate. Consider a neighborhood in which illegal drug dealing is common. There will be an enhanced police presence in the neighborhood and, probably more important, several former or present drug dealers whom the police have enlisted as undercover agents. The result will be surveillance of the drug scene. No one (unless it's the plaintiff's lawyer in this case) thinks that such surveillance requires a warrant. . . .

It would be particularly odd to think that *all* searches require a warrant just because most of them invade privacy to a greater or lesser extent. The terms of supervised release, probation, and parole often authorize searches by probation officers without the officers' having to obtain warrants, and the Supreme Court has held that such warrantless searches do not violate the Fourth Amendment as long as they are reasonable. The "search" conducted in this case via the anklet monitor is less intrusive than a conventional search. Such monitoring of sex offenders is permissible if it satisfies the reasonableness test applied in parolee and special-needs cases. . . .

We conclude that there was no violation of the Fourth Amendment, and so we turn to whether the GPS monitoring statute is an ex post facto law, as it took effect after the plaintiff had committed the crimes for which he had been convicted. A statute is an ex post facto law only if it imposes punishment. The monitoring law is not punishment; it is prevention. . . . [I]t was not ex post facto punishment because the aim was not to enhance the sentences for his crimes but to prevent him from continuing to molest children. . . . So, if civil commitment is not punishment, as the Supreme Court has ruled, then *a fortiori* neither is having to wear an ankle monitor. . . .

Having to wear the monitor is a bother, an inconvenience, an annoyance, but no more is punishment than being stopped by a police officer on the highway and asked to show your driver's license is punishment, or being placed on a sex offender registry held by the Supreme Court . . . not to be punishment. . . . [T]he aim of requiring a person who has psychiatric compulsion to abuse children sexually to wear a GPS monitor is not to shame him, but to discourage him from yielding to his sexual compulsion, by increasing the likelihood that if he does he'll be arrested because the Department of Corrections will have incontestable evidence that he was at the place where and at the time when a sexual offense was reported to have occurred. . . .

And though no one doubts the propriety of parole supervision of sex criminals though it diminishes parolees' privacy, a study by the National Institute of Justice finds that GPS monitoring of sex criminals has a greater effect in reducing recidivism than traditional parole supervision does.

Supplement 11.17. The U.S. Supreme Court on Sex Offender Laws

In June 2019, the U.S. Supreme Court issued two cases concerning sex offender laws. The text chapter was already in its final stages of production; thus, those two cases are added in this supplement. The first case, *Gundy v. United States*, was decided by a 5-3 vote. The case involved a Maryland defendant, Herman Gundy, who was convicted in 2005 of raping an 11-year-old girl. He served seven years in prison prior to his release in Maryland, but in 2012 he was arrested in New York for failure to register there as a sex offender as required by the federal Sex Offender Registration and Notification Act (SORNA), which is discussed in the text. SORNA was enacted in 2007. Its purpose is stated by Justice Kagan, who wrote the opinion for the majority in *Gundy*, which is excerpted below.

Gundy argued that Congress exceeded its nondelegation power in enacting a provision of the statute that permits the U.S. attorney general to determine the applicability of SORNA to sex offenders whose convictions were prior to the enactment of the statute. The attorney general issued a rule that SORNA applies in full to all pre-Act offenders. Thus, Gundy was required to register as a sex offender when he moved to New York. The U.S. Supreme Court upheld the lower federal courts in their decision that the provision does not violate the U.S. Constitution's provision that Congress cannot delegate its legislative powers. The excerpt below explains the Court's position, in which Justice Kagan was joined by Justices Ginsburg, Breyer, and Sotomayor. Justice Alito filed an opinion concurring in the judgment. Justice Gorsuch filed a dissenting opinion, joined by Chief Justice Roberts and Justice Thomas. Justice Kavanaugh did not participate in the decision as he had not yet joined the Court when oral arguments were heard.

Gundy v. United States
588 U.S.___ (2019), cases and citations omitted

The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government. This case requires us to decide whether . . . SORNA . . . violates that doctrine. We hold that it does not. . . .

Congress has sought, for the past quarter century, to combat sex crimes and crimes against children through sex-offender registration schemes. . . . [The court reviews those statutes, which are noted in the text, along with indications that all states had enacted sex-offender registration statutes.] But the state statutes varied along many dimensions, and Congress came to realize that their "loopholes and deficiencies" had allowed over 100,000 sex offenders (about 20% of the total) to escape registration. In 2006, to address those failings, Congress enacted SORNA.

SORNA makes "more uniform and effective" the prior "patchwork" of sex offender registration systems. The Act's express "purpose" is "to protect the public from sex offenders and offenders against children" by "establish[ing] a comprehensive national system for [their] registration. To that end, SORNA covers more sex offenders, and imposes more onerous registration requirements, that most States had before. The Act also backs up those requirements with new criminal penalties. Any person required to register under SORNA who knowingly fails

to do so (and who travels in interstate commerce) may be imprisoned for up to ten years. [The opinion explains how the system works and notes the facts of Gundy's case]. . . .

Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." Accompanying that assignment of power to Congress is a bar on its further delegation. Congress, this Court explained early on, may not transfer to another branch "powers which are strictly and exclusively legislation." But the Constitution does not "deny[] to the Congress the necessary resources of flexibility and practicality [that enable it] to perform its function[s]" Congress may "obtain[] the assistance of its coordinate Branches"—and in particular, may confer substantial discretion on executive agencies to implement and enforce the laws. . . .

[A] nondelegation inquiry always begins (and often almost ends) with statutory interpretation. The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion. [The Court engages in a lengthy explanation of why it takes the position that the Congressional delegation of authority in this case does not violate the nondelegation provision of the Constitution.]

Indeed, if SORNA's delegation is unconstitutional, then most of Government is unconstitutional-dependent as Congress is on the need to give discretion to executive officials to implement its programs. Consider again this Court's long-time recognition : "Congress simply cannot do its job absent an ability to delegate power under broad general directives." . . . "[S]ome judgments. . .must be left to the officers executing the law." . . . "[A] certain degree of discretion[] inheres in most executive" action. Among the judgments often left to executive officials are ones involving feasibility. . . .

It is wisdom and humility alike that this Court has always upheld such "necessities of government." . . . We therefore affirm the judgment of the Court of Appeals.

Justice Gorsuch, dissenting

The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty. Yet the statute before us scrambles that design. It purports to endow the nation's chief prosecutor with the power to write his own criminal code governing the lives of a halfmillion citizens. Yes, those affected are some of the least popular among us. But if a single executive branch official can write laws restricting the liberty of this group of persons, what does that mean for the next? . . .

[Justice Gorsuch' long opinion concludes that a response to the issue should be withheld until the Court has all nine members voting, concluding] In a future case with a full panel, I remain hopeful that the Court may yet recognize that while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write his own criminal code. This is "delegation running riot."

The second case concerning registered sex offenders, decided by the U.S. Supreme Court at the closing of its term in June 2019, involved Andre Haymond, who was convicted of possessing child pornography, for which the statute provided for a term of zero to 10 years. Haymond served 38 months and was released with a supervision requirement. During that time, he was again apprehended with what appeared to be child pornography. After a judge concluded by a preponderance of the evidence that Haymond had downloaded child pornography, he sentenced him to the mandatory five year prison term. The issue before the Court was whether Haymond was entitled to have his sentence determined by a jury, with the burden of proof standard of beyond a reasonable doubt. Justice Gorsuch delivered the Court's opinion, joined by Justices Sotomayor and Kagan.

United States v. Haymond
558 U.S. ___(2019), cases and citations omitted

Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty. That promise stands as one of the Constitution's most vital protections against arbitrary government. Yet in this case a congressional statute compelled a federal judge to send a man to prison for a minimum of five years without empaneling a jury of his peers or requiring the government to prove his guilt beyond a reasonable doubt. As applied here, we do not hesitate to hold that the statute violates the Fifth and Sixth Amendments. . . .

Together with the right to vote, those who wrote our Constitution considered the right to trial by jury "the heart and lungs, the mainspring and the center wheel" of our liberties, without which "the body must die; the watch must run down; the government must become arbitrary." Just as the right to vote sought to preserve the people's authority over their government's executive and legislative functions, the right to a jury trial sought to preserve the people's authority over its judicial functions.

Toward that end, the Framers adopted the Sixth Amendment's promise that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury." In the Fifth Amendment, they added that no one may be deprived of liberty without "due process of law." Together, these pillars of the Bill of Rights ensure that the government must prove to a jury every criminal charge beyond a reasonable doubt, an ancient rule that has "extend[ed] down centuries. . . . [The opinion discusses the precedent cases and the parties' arguments and concludes as follows.]

We decline to tangle with the parties' competing remedial arguments today. ... [W]e believe the wiser course lies in returning the case to the court of appeals for it to have the opportunity to address the government's remedial argument in the first instance, including any question concerning whether that argument was adequately preserved in this case.

The judgment of the court of appeals is vacated, and the case is remanded for further proceedings.

Justice Alito, dissenting

. . . When a person is indicted and faces the threat of prison and supervised release, his unconstitutional liberty hangs in the balance. . . . "If a defendant faces punishment beyond that

provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the conviction are heightened." . . .

[C]onvictions have consequences. "[G]iven a valid conviction, the criminal defendant [may be] constitutionally deprived of his liberty." To this end, "[s]upervised release is 'a form of postconfinement monitoring' that permits a defendant a kind of conditional liberty by allowing him to serve part of his sentence outside of prison.". . . Convicts like respondent on supervised release thus enjoy only conditional liberty. He most certainly was not "a free man." This means, then, that "[r]evocation" of supervised release "deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of . . . conditional liberty." . . .

Today's decision is based in part on an opinion that is unpardonably vague and suggestive in dangerous ways. It is not grounded on any plausible interpretation of the original meaning of the Sixth Amendment, and it is contradicted by precedents that are unceremoniously overruled. It represents one particular view about crime and punishment that is ascendant in some quarters today but is not required by the Constitution. If the Court eventually takes the trip that this opinion proposes, the consequences will be far reaching and unfortunate.

For these reasons, I respectfully dissent.

Supplement 11.18. A Judge's Effort to Keep One Felon from Prison[1]

The excerpt below illustrates the efforts of one judge to ease the severe penalties of today's sentencing structures and collateral consequences. The senior district judge of Brooklyn, New York, deemed the harsh collateral consequences to be much too severe and, in this case, sentenced the defendant to probation, six months' home confinement, and 100 hours of community service. The judge's explanation of the legal issues regarding the federal sentencing guidelines, and much of the history of collateral consequences, is omitted. The portions of the 42-page opinion included here are for the purpose of emphasizing the severe collateral consequences imposed on felons. This defendant was a student planning to be a teacher and principal. She was asked by friends to bring two suitcases into the country; the suitcases had drugs in the handles. Clearly, she violated the law and could have been incarcerated in federal prison had the judge, who accepted her plea, not shown mercy.

United States v. Nesbeth
188 F. Supp. 3d 179 (E.D.N.Y. 2016), cases and citations omitted

Chevelle Nesbeth was convicted by a jury of importation of cocaine and possession of cocaine with intent to distribute. Her advisory guidelines sentencing range was 33-41 months. Nonetheless, I rendered a non-incarceratory sentence today in part because of a number of statutory and regulatory collateral consequences she will face as a convicted felon. . . .

I am writing this opinion because from my research and experience over two decades as a district judge, sufficient attention has not been paid at sentencing . . . to the collateral consequences facing a convicted defendant. And I believe that judges should consider such consequences in rendering a lawful sentence.

There is a broad range of collateral consequences that serve no useful function other than to further punish criminal defendants after they have completed their court-imposed sentences. Many—under both federal and state law—attach automatically upon a defendant's conviction.

The effects of these collateral consequences can be devastating. . . . [They] "amount to a form of 'civi[l] death' and send the unequivocal message that 'they' are no longer part of 'us.'" . . .

The notion of "civil death" —or "the loss of rights . . . by a person who has been outlawed or convicted of a serious crime" appeared in American penal systems in the colonial era, derived from the heritage of English common law. . . . In the United States, civil death has never been imposed by common law; it has always been a creature of statute.

The concept of civil death persisted into the twentieth century as an "integral part of criminal punishment." . . . [The judge discussed the history of civil death in the United States and noted that some states enacted measures to abolish it.] . . .

Today, the collateral consequences of a felony conviction form a new civil death.

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[1]This discussion first appeared in Supplement 15.14 of Sue Titus Reid, *Crime and Criminology*, 15th ed. (New York: Wolters Kluwer, 2018).

Convicted felons now suffer restrictions in broad ranging aspects of life that touch upon economic, political, and social rights. In some ways, "modern civil death is harsher and more severe" than traditional civil death because there are now more public benefits to lose, and more professions in which a license or permit or ability to obtain a government contract is a necessity. . . . [The judge quoted an author who compared the loss of rights by felons to those of blacks during Jim Crow laws. He then discussed current attempts to mitigate the problems of felons.]

President Barack Obama, for one, has taken steps by executive order to help felons rehabilitate and reintegrate into society. For example, he has ordered federal agencies to "ban the box," i.e., not ask prospective employees about their criminal histories early in the application process. Additionally, the President has voiced his support for the Sentencing Reform and Corrections Act of 2015, which has received bipartisan support in the Senate. If passed, this bill would, among other things, require the Bureau of Prisons to implement recidivism-reduction programming, expand safety-valve eligibility, and permit a sentencing judge to avoid mandatory minimums in certain circumstances.

Other examples include the Department of Justice's National Institute of Justice's funding of a comprehensive study on the collateral consequences of criminal convictions. The study—which was conducted by the American Bar Association's Criminal Justice Section—has catalogued tens of thousands of statutes and regulations that impose collateral consequences at both the federal and state levels. . . .

[The judge refers to another judge, citing a defendant who could not get employment] due to an offense she had committed seventeen years prior. He explained that he had sentenced the defendant "to five years of probation supervision, not to a lifetime of unemployment." [That judge expunged the defendant's record.] If [that decision] is affirmed on appeal, Ms. Nesbeth might—if she could show the "extreme circumstances" necessary for expungement—be a candidate for this form of relief at some future time. [On August 11, 2016, that decision was not upheld; thus, this approach would not have been available to this defendant.]

In recent years, the organized bar has again made substantial efforts to alleviate the detrimental effects of collateral consequences. . . .

Notwithstanding these various efforts at reform, felony convictions continue to expose individuals to a wide range of collateral consequences imposed by law that affect virtually every aspect of their lives. . . .

[T]here are nationwide nearly 50,000 federal and state statutes and regulations that impose penalties, disabilities, or disadvantages on convicted felons. . . . District courts have no discretion to decide whether many of these collateral consequences should apply to particular offenders. . . .

The range of subject matter that collateral consequences cover can be particularly disruptive to an ex-convict's efforts at rehabilitation and reintegration into society. As examples, under federal law alone, a felony conviction may render an individual ineligible for public housing, section 8 vouchers, Social Security Act benefits, supplemental nutritional benefits, student loans, the Hope Scholarship tax credit, and Legal Services Corporation

representation in public-housing eviction proceedings. Moreover, in addition to the general reluctance of private employers to hire ex-convicts, felony convictions disqualify individuals from holding various positions.

Oftentimes, the inability to obtain housing and procure employment results in further disastrous consequences, such as losing child custody or going homeless. In this way, the statutory and regulatory scheme contributes heavily to many ex-convicts becoming recidivists and restarting the criminal cycle. [The judge discussed other collateral benefits, such as the right to vote and serve on a jury, with the latter disproportionately impacting blacks. The judge then discussed the legal issues regarding his sentence and the collateral consequences that would affect Ms. Nesbeth should she be an incarcerated felon.] . . .

There is no question that Ms. Nesbeth has been convicted of serious crimes . . . . [S]he brought into the country . . . 602 grams [of cocaine.] Her criminal conduct is inexcusable.

While visiting Jamaica at the behest of a boyfriend, she was given two suitcases by friends, who had purchased her return airline ticket, and was asked to bring them to an individual upon her arrival to the United States. . . . [T]he drugs were in the suitcases' handles. Ms. Nesbeth "m[et] the profile of a courier," and there was a clear basis for the jury to reject her claim that she did not know she was bringing drugs into the country, and to render its guilty verdict. . . . [The judge discussed the defendant's background; she was born in Jamaica and was left there with her father when her mother went to the United States. She later moved to be with and continued to live with her mother and became a U.S. citizen.] She has been enrolled in college since 2013, and has helped to support herself as a nail technician at a children's spa. . . . [S]he worked as a counselor at a facility that provides services to children in lower-income areas, and during the summers of 2010 through 2012, she held seasonal employment as a parks maintenance worker. [Ms. Nesbeth, age 20, has received food stamps through SNAP and was raised in a lower-income family. She expected to graduate from college in 2017, owes thousands of dollars in student loans, and changed her major from education to sociology after her conviction.]

"The defendant reported on illegal drug use," and to her mother's knowledge, her daughter "has never used illegal drugs, consumed alcohol, or required substance abuse treatment." [The defendant spent one night in jail after her arrest and complied with all court orders after her release. The judge discussed the collateral consequences that would affect the defendant, including the inability to get a passport, revocation of her driver's license for a period, inability to get certain Social Security benefits, inability to work in child care or engage in pharmaceutical work, enlist in the army, engage in hospice work, possess a firearm, adopt a child or provide foster care, serve on a jury and vote, and many others. The judge discussed the law and its implication for this defendant and then noted her] efforts at rehabilitation while she has been at liberty for approximately the past year and a half. Faced with the prospect of never achieving her goal as a school principal, she has persevered with her education by changing her major to sociology, and is on target to graduate next year. This is consistent with her personal characteristics of a strong work ethic, her desire to be of service to young children, and her ability to rise above the low-income community in which she was raised. . . .

[The judge concluded that the defendant's] likely inability to pursue a teaching career and her goal of becoming a principal has compelled me to conclude that she has been sufficiently punished and that jail is not necessary to render a punishment that is sufficient but not greater than necessary to meet the ends of sentencing. . . . Each case must, of course, be separately considered. . . .

I have imposed a one-year term of probation. In fixing this term, I have also considered the collateral consequences Ms. Nesbeth would have faced with a longer term of probation, such as the curtailment of her right to vote and the inability to visit her father and grandmother in Jamaica because of the loss of her passport during her probationary term.

Moreover, in addition to the requisite conditions of probation, I have imposed two special conditions: (1) a period of six months' home confinement—when Ms. Nesbeth is not working or going to school—to drive home the point that even though I have not put her in prison, I consider her crime to be serious; (2) 100 hours of community service in the hope that the Probation Department will find a vehicle for Ms. Nesbeth, as an object lesson, to counsel young people as to how their lives can be destroyed if they succumb to the temptation to commit a crime, regardless of their circumstances.

Chapter 12. Juvenile Justice Systems

Supplement 12.1. Statutory Definition of Juvenile Delinquent

The New Hampshire Safety and Welfare statute concerning delinquent and minor children (defined as under 17 until a 2014 amendment, which changed the age to under 18, effective July 1, 2015) is presented here as an example of the philosophy of processing alleged youthful offenders through the juvenile rather than the adult criminal courts. The state provides that its statutes regarding juveniles "shall be liberally interpreted, construed and administered to effectuate the following purposes and policies":

> I. To encourage the wholesome moral, mental, emotional, and physical development . . . by providing the protection, care, treatment, counseling, supervision, and rehabilitative resources [for each minor under its jurisdiction.]
>
> II. Consistent with the protection of the public interest, to promote the minor's acceptance of personal responsibility for delinquent acts committed by the minor, encourage the minor to understand and appreciate the personal consequences of such acts, and provide a minor who has committed delinquent acts with counseling, supervision, treatment, and rehabilitation and make parents aware of the extent if any to which they may have contributed to the delinquency and make them accountable for their role in its resolution.
>
> III. To achieve the foregoing purposes and policies, whenever possible, by keeping a minor in contact with the home community and in a family environment by preserving the unity of the family and separating the minor and parents only when it is clearly necessary for the minor's welfare or the interests of public safety and when it can be clearly shown that a change in custody and control will plainly better the minor.
>
> IV. To provide effective judicial procedures through which the provisions of this chapter are executed and enforced and which recognize and enforce the constitutional and other rights of the parties and assures them a fair hearing.[1]

New Hampshire defines a *delinquent* as follows:

> a person who has committed an offense before reaching the age of 18 years which would be a felony or misdemeanor under the criminal code of this state if committed by an adult, and is expressly found to be in need of counseling, supervision, treatment, or rehabilitation as a consequence thereof.[2]

[1]New Hampshire Rev. Stat. Ann. 169-B:1 (2018).
[2]New Hampshire Rev. Stat. Ann. 169-B:2 (2018).

Supplement 12.2. Selected Examples of Violent Crimes by Juveniles

On April 20, 1999, two students, Eric Harris and Dylan Klebold, went on a shooting spree in their high school in Littleton, Colorado. This massacre resulted in the deaths of 12 students and a teacher and injuries to two dozen others. In December of that year, tapes made by Harris and Klebold were released, revealing their anger and their plans to kill up to 250 people. The "tapes are a macabre documentary of the meticulous planning for the attack, which the two youths called retaliation for years of taunting that they said friends and relatives had inflicted on them because of an unwillingness to dress and act as others wanted." Their anger had built to the point that they could no longer cope.[1] Shortly after the twentieth anniversary of this massacre, another shooting occurred at a nearly Colorado high school. The shooting at Highlands Ranch, Colorado, is discussed in the text on page 304.

Other examples include the July 2014 arrest of three teens, one of whom (Alex Rios) was 18, who were charged in New Mexico with using bricks, cinder blocks, and a mental fence pole to beat two homeless men to the point of nonrecognition. It was alleged that the youths may have been terrorizing homeless persons for months. That same month, two Texas juveniles were charged with digging a grave and luring Ivan Mejia to a wooded area and strangling him, allegedly because of a dispute over a girl. In June 2014, seven teens were charged with luring other teens in upstate New York to a place where they were beaten. The three boys and four girls, ages 14 to 17, then allegedly showed the videos to other teens. In 2013, a Colorado judge sentenced Austin Sigg, 18 (17 at the time of the crimes), to life in prison for murdering and dismembering 10-year-old Jessica Ridgeway. And in the Chicago area, a 14-year-old girl faced murder charges in the death of an 11-year-old, who was stabbed over 30 times in her suburban Mundelein home.[2]

[1]"Student Killers' Tapes Filled with Rage," *New York Times* (December 14, 1999), p. 19.
[2]"3 Teens Targeted Homeless, Police Say," *Dallas Morning News* (July 22, 2014), p. 3; "Prosecutors: Teens Dug Grave Before Killing," *Dallas Morning News* (July 22, 2014), p. 4B; "7 Teens Arrested After Videotaped Attacks," *Dallas Morning News* (June 17, 2014), p. 4; "Teen Who Killed, Cut Up Girls Gets Life Sentence," *Dallas Morning News* (November 20, 2013); "Illinois: Girl, 14, Is Charged with Murder of 11-Year-Old," *New York Times* (January 23, 2014), p. 19.

Supplement 12.3. The Constitutional Rights of Juveniles

The U.S. Supreme Court has held that the U.S. Constitution extends some but not all of the rights of adult criminal defendants to juveniles. In most situations, juveniles have a right to counsel (and to have counsel appointed if they cannot afford private defense counsel), the right not to be tried twice for the same offense, and the right to have the allegations against them proved by the same standard—beyond a reasonable doubt—that is used in an adult criminal trial. They do not have a federally recognized constitutional right to a trial by jury, although some state statutes provide for one.

The U.S. Supreme Court has not decided the issue of whether juveniles have the right to a public trial, but it has held that the media may not be punished criminally for publishing the name of a juvenile delinquent when they obtain the name by lawful means.[1] Some states have statutes permitting the media to attend juvenile hearings. Others leave the decision to the discretion of the judge or prohibit the media entirely.

The issue of whether juveniles have a federal constitutional right to a speedy trial has not been decided, but many states have provided by statute for limitations on the period of time the state may take to process a juvenile case.[2]

Juveniles' constitutional rights have been recognized in a limited number of cases decided by the U.S. Supreme Court, beginning in 1966 with *Kent v. United States*. Technically, this case does not apply to juvenile courts in other jurisdictions because it involved the interpretation of a District of Columbia statute. The case is important, however, because it signaled the beginning of the movement to infuse juvenile court proceedings with some due process elements.[3]

Morris A. Kent Jr., a 16-year-old, was arrested and charged with rape, six counts of housebreaking, and robbery. In accordance with a Washington, D.C., statute, the juvenile court waived its jurisdiction over Kent, who was transferred to the adult criminal court for further proceedings. (This process is discussed at length in the text.) Kent requested a hearing on the issue of whether he should be transferred to the adult court, and his attorney requested the social service file used by the court in the transfer decision. Both requests were denied.

Although the D.C. statute required a full investigation prior to the waiver of a juvenile from the jurisdiction of the juvenile court to that of the adult criminal court, the juvenile court judge did not state any findings of facts in Kent's case; nor did he give reasons for his decision to transfer Kent to the adult criminal court, which might lead one to think a full investigation did not occur.

Kent was indicted by a grand jury and tried in an adult criminal court. A jury found him not guilty by reason of insanity on the rape charge and guilty on the other charges. He was sentenced to serve from 5 to 15 years on each count, for a total of 30 to 90 years in prison. Kent

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[1]*Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979).
[2]See, for example, *Commonwealth v. Dallenbach*, 729 A.2d 1218 (Pa. Super. 1999), and *In re Benjamin L.*, 708 N.E.2d 156 (N.Y. 1999).
[3]*Kent v. United States*, 383 U.S. 541 (1966).

appealed. The first appellate court affirmed; the U.S. Supreme Court reversed, holding that juvenile courts need latitude for decision making. The Court affirmed the doctrine of *parens patriae* but concluded that it does not constitute "an invitation to procedural arbitrariness." The Court suggested that the "original laudable purpose of juvenile courts" had been eroded and that there "may be grounds for concern that the child receives the worst of both worlds; that he gets neither the protection accorded to adults nor the solicitous care and regenerative treatment postulated for children."[4]

The first juvenile case from a state court to be heard by the U.S. Supreme Court was *In re Gault*. On June 8, 1964, 15-year-old Gerald Gault and a friend were taken into custody in Arizona after a Mrs. Cook complained that two boys were making lewd phone calls to her. Gault's parents were not notified that their son was in police custody. When they returned home from work that evening and found that Gerald was not there, they sent his brother to look for him and were told that he was in police custody.

Gault's parents were not shown the petition that was filed the next day. At the first hearing, attended by Gerald and his mother, Mrs. Cook did not testify; no written record was made of the proceedings. At the second hearing, Mrs. Gault asked for Mrs. Cook, but the judge said that Mrs. Cook's presence was not necessary. The judge's decision was to commit Gerald to the state industrial school until his majority. When the judge was asked on what basis he adjudicated Gerald delinquent, he said he was not sure of the exact section of the code. The section of the Arizona Criminal Code that escaped his memory defined as a misdemeanant a person who "in the presence or hearing of any woman or child . . . uses vulgar, abusive, or obscene language." For this offense, a 15-year-old boy was committed to a state institution until his majority. The maximum legal penalty for an adult was a fine of $5 to $50 or imprisonment for a maximum of two months. In contrast to an accused juvenile, an adult charged with this crime would be afforded due process at the trial.

The case was appealed to the U.S. Supreme Court, which reversed. Justice Abe Fortas delivered the opinion for the majority. Counsel had raised six basic rights: notice of the charges, right to counsel, right to confrontation and cross-examination, privilege against self-incrimination, right to a transcript, and right to appellate review. The Supreme Court ruled on the first four of these issues. The Court limited the extension of procedural safeguards in juvenile courts to those proceedings that might result in the commitment of juveniles to an institution in which their freedom would be curtailed. Justice Fortas excluded from the Supreme Court's decision the pre-adjudication and the post-adjudication, or dispositional, stages. Justice Fortas reviewed the humanitarian philosophy of juvenile courts but concluded that courts designed to act in the best interests of the child had become courts in which procedures frequently were arbitrary and unfair.[5]

In *Gault*, the U.S. Supreme Court explained the importance of due process and of the procedural rules that protect it, especially the right to counsel. The Supreme Court compared procedure in law to the scientific method in science. The Court noted that Gault was "committed to an institution where he may be restrained of liberty for years." Calling the

[4]*Kent v. United States*, 383 U.S. 541 (1966).
[5]*In re Gault*, 387 U.S. 1 (1967).

institution an industrial school made no difference. The fact was that the juvenile's world became "a building with whitewashed walls, regimented routine and institutional hours. . . . peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide." In light of the seriousness of this confinement, it would be "extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court."[6]

Despite the *Gault* ruling that juveniles have a right to counsel, an American Bar Association (ABA) study of the Maryland juvenile justice system concluded that "the spirit and promise" of the case "had been largely unfilled." Among other findings, the report stated the following:

1. Many juveniles waive their right to counsel because no one has sufficiently explained the importance of that right to them.

2. Those juveniles who are represented by counsel are often represented by less-than-ideal counsel, characterized by a lack of preparation and advocacy. "At least 90 percent of detained youth did not even know their public defender's name."

3. Most public defenders who represent juveniles spend very little time with their clients.

This ABA study concluded that "the majority of youth in detention are incarcerated without effective representation" and that youth are routinely detained in secure facilities for the purpose of punishment. The ABA recommended that juveniles not be permitted to waive their right to counsel until they speak with counsel. There should also be increased training and greater resources for defense counsel who represent juveniles; oversight and monitoring of juvenile court actions to avoid disparate treatment of minorities, youth with educational needs, and those who are mentally challenged; and an end to the "misuse and abuse of secure detention."[7]

The U.S. Supreme Court has considered other constitutional rights for juveniles. In 1970, in *In re Winship*, the Supreme Court faced the issue of whether juvenile court proceedings require the same standard of proof as that of adult criminal courts or whether a lesser standard can be used. The Court applied the adult criminal court standard, concluding that "the observance of the standard of proof beyond a reasonable doubt will not compel the States to abandon or displace any of the substantive benefits of the juvenile process."[8]

In 1971, in *McKeiver v. Pennsylvania*, the U.S. Supreme Court refused to extend the right to a trial by jury to juvenile court proceedings. The Supreme Court emphasized that the underlying reason for its decisions in *Gault* and *Winship* was the principle of fundamental fairness. When the issue is one of fact finding, elements of due process must be present. But a jury is not a "necessary component of accurate fact-finding." The Supreme Court concluded

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[6]*In re Gault*, 387 U.S. 2 (1967).
[7]American Bar Association, *Maryland: An Assessment of Access to Counsel and Quality of Representation in Delinquency*, an 81-page report summarized in "ABA Finds Right to Lawyer Is 'an Unfilled Promise,'" *Criminal Justice Newsletter* (November 17, 2003), p. 2.
[8]*In re Winship*, 397 U.S. 358 (1970), quoting *In re Gault.*

that unlike adult criminal courts, juvenile courts should not become full adversary systems. The Court left open the possibility for state courts to experiment, *inviting* them to try trial by jury in juvenile proceedings but refusing to require them to do so.[9]

In 1975, in *Breed v. Jones*, the U.S. Supreme Court held that the constitutional provision that defendants may not be tried twice for the same offense applies to juveniles. Breed, 17, was apprehended for committing acts while armed with a deadly weapon. He was adjudicated in the juvenile court, which found the allegations to be true. At the hearing to determine disposition, the court indicated that it intended to find Breed "not . . . amenable to the care, treatment and training program available through the facilities of the juvenile court," as required by the statute. Breed was transferred to criminal court, where he was tried and found guilty of robbery in the first degree. Breed argued on appeal that the transfer after a hearing and decision on the facts in juvenile court subjected him to two trials on the same offense. The U.S. Supreme Court agreed.[10]

In 1984, in *Schall v. Martin*, the U.S. Supreme Court upheld the New York statute that permitted preventive detention of juveniles. The Supreme Court held that preventive detention fulfills the legitimate state interest of protecting society and juveniles by detaining those who might be dangerous to society or to themselves. The Court reiterated its belief in the doctrines of fundamental fairness and *parens patriae*, stating that it was trying to strike a balance between the juvenile's right to freedom pending trial and the right of society to be protected. The juveniles in this case were apprehended for serious crimes. According to the U.S. Supreme Court, the period of preventive detention was brief and followed proper procedural safeguards. Three justices disagreed with the Supreme Court's decision.[11]

In 1994, the California Supreme Court interpreted *Schall v. Martin* as not requiring that juveniles be granted a probable cause hearing within 48 hours after arrest, as is required for adults. The California court recognized significant differences in the detention of juveniles as compared with adults, noting that in many cases, detention is in the juvenile's best interest. The court cited specific sections in the California statute that provide adequate safeguards for detained juveniles. For example, a juvenile may not be detained for more than 24 hours without written review and approval. The U.S. Supreme Court refused to hear the case, thus leaving the California decision intact.[12]

In 1992, in *United States v. R.L.C.*, the U.S. Supreme Court held that juveniles may not be punished more harshly in sentencing than they would have been had they been charged and convicted of the same crime as an adult.[13] And in 2004, the U.S. Supreme Court considered whether juveniles must be given the *Miranda* warning before the police question them at the police station. In *Yarborough v. Alvarado*, the Los Angeles police questioned a 17-year-old suspect at police headquarters without giving him the *Miranda* warning. The police argued that the warning was not necessary because the suspect was free to leave. The Ninth Circuit Court of Appeals had ruled in the suspect's favor, holding that a person his age would not feel free to

[9]*McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).
[10]*Breed v. Jones*, 421 U.S. 519 (1975).
[11]*Schall v. Martin*, 467 U.S. 519 (1975).
[12]*Alfredo A. v. Superior Court*, 849 P.2d 1330 (Cal. 1994), *cert. denied*, 513 U.S. 822 (1994).
[13]*United States v. R.L.C.*, 503 U.S. 291 (1992).

leave the police station. The U.S. Supreme Court reversed, holding that under the facts of the case, when the police questioned the appellant, he was not in police custody for purposes of the *Miranda* warning; he was free to leave. Alvarado was suspected of being involved with a group of teens who were at a mall the night a murder occurred there. About a month after the shooting, the officer in charge of the investigation left word at Alvarado's house and called his mother at work, stating that she would like to talk with their son. The parents took Alvarado to the sheriff's office and waited in the lobby while the officers interviewed him for about two hours; the *Miranda* warning was not given.[14]

The issue of whether the *Miranda* case applies to juveniles was considered in 1971, when the U.S. Supreme Court stated in a footnote that, although it had not ruled that *Miranda* applies to juveniles, it was assuming that its principles were applicable to the proceedings despite the Court's holding that the juvenile is not entitled to all procedures applicable to criminal trials. Most courts ruling on the question have held that *Miranda* applies to juvenile cases.[15]

In 2011, the U.S. Supreme Court held that the *Miranda* warning must be given to juveniles if they are considered to be "in custody" when questioned by law enforcement authorities. "It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave," wrote Justice Sonia Sotomayor for the majority. "Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child's age properly informs the *Miranda* custody analysis." The case of *J.D.B. v. North Carolina* involved police questioning of a 13-year-old suspected of home break-ins. The suspect was taken from his classroom to a closed-door conference room. He was not given a *Miranda* warning, permitted to call his legal guardian (his grandmother), or told that he was free to leave. After initially denying involvement, the suspect eventually confessed to the alleged crimes. He was adjudicated delinquent.[16]

The issue also arises over whether juveniles may waive their *Miranda* rights. Some courts have refused to accept a juvenile waiver without parental guidance. Others have held that children may not waive complicated legal rights. As mentioned in the text, in the discussion of the quality of legal assistance provided for juveniles, the American Bar Association recommends that courts should not recognize a juvenile's waiver of the right to counsel unless that juvenile had the assistance of counsel in making the waiver decision.

The importance of properly trained attorneys for juveniles is underscored by the National Juvenile Defender Center, which emphasizes that adequate counsel for juveniles requires that attorneys understand "the advances in neuroscience and research on adolescent development" showing that

> youth are less likely than adults to understand and anticipate the future consequences of their decisions and actions. Recent progress in brain imaging provides physical evidence to show that regions of the brain controlling decision-

[14]*Yarborough v. Alvarado*, 541 U.S. 652 (2004).
[15]For the U.S. Supreme Court's decision, see *McKiever v. Pennsylvania*, 403 U.S. 528 (1971). For a state example, see *State v. Whatley*, 320 So. 2d 123 (La. 1975).
[16]*J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011).

making and impulse regulation are the last to mature. The effects of this decision-making calculus are amplified in times of stress and anxiety. Experts find that youth are able to make much better decisions when informed and unhurried than when they are under stress or the influence of peers or authority. . . . Without appropriate guidance, youth are unlikely to understand rights they are regularly asked to waive, let alone the consequences of waiving them.[17]

[17]National Juvenile Defender Center, "Juvenile Defense Attorneys: A Critical Protection Against Injustice: The Importance of Skilled Juvenile Defenders to Upholding the Due Process Rights of Youth," p. 3, http://www.njdc.info/, accessed January 2, 2015.

Supplement 12.4. Juvenile Indigent Defense Action Network (JIDAN)

The Juvenile Indigent Defense Action Network (JIDAN), supported by the Models for Change, was begun in 2008 for the purpose of improving defense representation for indigent delinquents. JIDAN focuses on issues and the exchange of ideas and strategies across jurisdictions and the sharing of research-based information on the reform of juvenile justice systems. JIDAN emphasizes that although juveniles have a recognized constitutional right to legal representation when they are accused of committing delinquent and criminal acts, this representation is often not timely or adequate. Public defenders have high caseloads and may not be properly trained and have the experience required for juvenile cases. JIDAN is focusing on justice systems in Pennsylvania, Illinois, Louisiana, and Washington in its efforts to improve legal representation for juveniles.

JIDAN posted the following comments on its website:

> In the intervening decades since the *Gault* decision, report after report has revealed troubling gaps in the access to and quality of legal representation for indigent children across the country, showing that many children go through the justice system without the benefit of counsel, and the quality of representation children receive is, at best, uneven.
>
> Across the country, effective juvenile representation is impeded by insidious systemic barriers. The juvenile defense bar is cripplingly under-funded, with staggering caseloads, low morale, inadequate access to experts, investigative resources, training, supervision, and support staff, and lack of pay parity with adult criminal defense attorneys or with juvenile prosecutors.
>
> The need for highly competent, well-resourced defense counsel for every child accused of a crime has never been greater. Juvenile defense attorneys are a critical shield against unfairness and serve as a crucial counterweight in an adversarial system that can lead to harmful outcomes for young clients.[1]

[1]Models for Change: Systems Reform in Juvenile Justice, Juvenile Indigent Defense Action Network, "Improving Access to and Quality of Counsel Representing Youth in Delinquency Proceedings," http://www.modelsforchange.net/about/Action-networks/Juvenile/indigent-defense.html, accessed August 20, 2014.

Supplement 12.5. Juvenile Curfews

Constitutional issues have arisen in recent years with the imposition of curfews in an attempt to reduce crime by keeping juveniles who are not accompanied by an adult off the streets after specified hours. One example of this trend is a Dallas, Texas, ordinance, which provided that youths under 17 must be off the streets from 11 P.M. to 6 A.M. During those hours, juveniles could not be in public places or establishments. There were some exceptions: youths who are running errands for their parents or other adults; returning from school, civic, or religious functions; passing time on sidewalks in front of their homes; or exercising First Amendment rights. Violations may result in a fine not to exceed $500 for each offense.

In 1993, the U.S. Court of Appeals for the Fifth Circuit upheld the Dallas ordinance, emphasizing that the ordinance was narrowly tailored to further the city's compelling interest in reducing and preventing juvenile crime and victimization. The U.S. Supreme Court declined to hear the case, thus allowing the decision of the Fifth Circuit to stand.[1]

In 2009, Dallas enacted a day curfew, prohibiting children 16 and under from being on the streets during the hours when schools are in session (9 A.M. to 2:30 P.M.). The city council passed the ordinance in response to an increase in property crimes committed during those hours, which were attributed to school age children who were not attending school at the time. Both Dallas curfew ordinances are subject to city council review every three years.

Some curfews are more restrictive on times, and some extend beyond the streets, for example, including shopping malls. Some curfews have been held unconstitutional. In 1997, a federal appellate court in California held that the San Diego ordinance, which made it illegal for minors to "loiter, idle, wander, stroll or play" after 10 P.M., was unconstitutional.[2]

What distinguishes these cases? Why are some curfew ordinances constitutional and others not? Portions of a decision upholding the Charlottesville, Virginia, ordinance are included here to help us understand. The opinion is lengthy and involves numerous constitutional issues. Only a few are included here.

Schleifer v. City of Charlottesville

159 F.3d 843 (4th Cir. 1998), *cert. denied*, 562 U.S. 1018 (1999), cases and citations omitted

This appeal involves a challenge to the constitutionality of a juvenile nocturnal curfew ordinance enacted by the City of Charlottesville. The district court held that the ordinance did not violate the constitutional rights of minors, their parents, or other affected parties and declined to enjoin its enforcement. We agree that the ordinance is constitutional and affirm the judgment of the district court. . . .

[The court discussed the purposes of the curfew ordinance.]

Effective March 1, 1997, the ordinance generally prohibits minors, defined as unemancipated persons under seventeen, from remaining in any public place, motor vehicle, or

[1] *Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993), *cert. denied*, 511 U.S. 1127 (1994).
[2] "Council Oks Daytime Curfew," *Dallas Morning News* (May 14, 2009), p. 1.

establishment within city limits during curfew hours. The curfew takes effect at 12:01 A.M. on Monday through Friday, at 1:00 A.M. on Saturday and Sunday, and lifts at 5:00 A.M. each morning.

The ordinance does not restrict minors' activities that fall under one of its eight enumerated exceptions. Minors may participate in any activity during curfew hours if they are accompanied by a parent; they may run errands at a parent's direction provided that they possess a signed note. The ordinance allows minors to undertake employment, or attend supervised activities sponsored by school, civic, religious, or other public organizations. The ordinance exempts minors who are engaged in interstate travel, are on the sidewalk abutting their parents' residence, or are involved in an emergency. Finally, the ordinance does not affect minors who are "exercising First Amendment rights protected by the United States Constitution, such as the free exercise of religion, freedom of speech and the right of assembly."

The ordinance sets forth a scheme of warnings and penalties for minors who violate it. For a first violation, a minor receives a verbal warning, followed by a written warning to the minor and the minor's parents. For subsequent violations, the minor is charged with a Class 4 misdemeanor. The ordinance also makes it unlawful for certain other individuals, including parents, knowingly to encourage a minor to violate the ordinance . . . .

The San Diego curfew applied to all minors under the age of eighteen, began at 10:00 P.M., and extended until "daylight immediately following." It contained four exceptions: (1) when a minor is accompanied by a parent or other qualified adult; (2) when a minor is on an emergency errand for his parent; (3) when a minor is returning from a school-sponsored activity; and (4) when a minor is engaged in employment.

By contrast, Charlottesville's curfew applies only to minors less than seventeen years of age, does not begin until midnight on weekdays and 1:00 A.M. on weekends, lifts at 5:00 A.M., each morning, and contains no fewer than eight detailed exceptions. . . . [Those were named earlier in the opinion.]

The Charlottesville ordinance carefully mirrors the Dallas curfew ordinance. . . .

The Charlottesville curfew serves not only to head off crimes before they occur, but also to protect a particularly vulnerable population from being lured into participating in such activity. Contrary to the dissent's protestation, we do not hold that every such curfew ordinance would pass constitutional muster. The means adopted by a municipality must bear a substantial relationship to significant governmental interests; the restrictiveness of those means remains the subject of judicial review. As the district court noted, however, the curfew law in Charlottesville is "among the most modest and lenient of the myriad curfew laws implemented nationwide." Charlottesville's curfew, compared to those in other cities, is indeed a mild regulation: it covers a limited age group during only a few hours of the night. Its various exceptions enable minors to participate in necessary or worthwhile activities during th[ese] times. We hold that Charlottesville's juvenile curfew ordinance comfortably satisfies constitutional standards.

Accordingly, we affirm the judgment of the district court. We do so in the belief that

communities possess constitutional latitude in devising solutions to the persistent problem of juvenile crime.

The U.S. Supreme Court refused to hear this case; thus, the decision stands.

A separate issue from the constitutionality of juvenile curfews is whether we *should* have them. One study of the effects of juvenile curfews led the researchers to conclude that the preventive effect of such ordinances "appeared to be small."[3]

[3]David McDowall et al., "The Impact of Youth Curfew Laws on Juvenile Crime Rates," *Crime & Delinquency* 46 (January 2000): 76-92; quotation is on p. 76.

Supplement 12.6. Court Processing for Truant Juveniles

Prior to September 1, 2015, Texas had a strict truancy law under which child violators who met the criteria were handcuffed and taken to the police station and punished. House Bill 2398 requires school systems to use the intervention of families and school systems to deal with truant children rather than involve local police. Under the new law, students who are truant from school are no longer processed under the criminal justice system and thus will not be incarcerated in adult prisons for being truant from school.

The prior Texas laws were based on the assumption that punishing juvenile truants through the criminal justice system would deter youth from skipping school. Children were ordered to pay fines and, in some cases, jailed. It was feared that decriminalizing truancy would lead to greater truancy, but a study two years after the new statute went into effect showed that was not the case; in fact, there was a slight increase in school attendance. "Despite some critics' predictions, shifting to school-based preventive measures did not wreak havoc on the public education system in Texas. The sky did not fall."[1]

There are other ways to handle truancy. The Truancy Intervention Project (TIP), in effect for over 25 years in Georgia, had experienced success with young students, with lawyers and others working pro bono to help the youngsters remain in school and stay out of courtrooms. Unfortunately, the organization suffered financial setbacks for program support during the economic downturn of recent years.[2]

[1]"Decriminalizing Truancy in Texas Gets an A+," *Dallas Morning News* (March 28, 2017), p. 12.
[2]Terry Carter, "Absent Funds: Anti-Truancy Program's Success Stunted by a Lack of Cash," *American Bar Association Journal* 103(6) (June 2017), pp. 34-35; quotation is on p. 35.

Supplement 12.7. Deinstitutionalization of Juveniles

As early as 1973, the National Advisory Commission on Criminal Justice Standards and Goals advocated that, when possible, juvenile delinquents should be diverted from institutionalization. The commission concluded as follows:

> The failure of major juvenile and youth institutions to reduce crime is incontestable. Recidivism rates, imprecise as they may be, are notoriously high. The younger the person when entering an institution, the longer he is institutionalized, and the farther he progresses into the criminal justice system, the greater his chance of failure.[1]

The advisory commission emphasized that these institutions are places of punishment, and they do not have a significant effect on deterrence. They remove juveniles from society temporarily. In that sense, society is protected, but the changes in the offender during that incarceration are negative, not positive. The institutions are isolated geographically, which hinders delivery of services from the outside, decreases visits from families and friends, reduces opportunities for home furloughs, and limits the availability of staff. Many institutions have outlasted their functions. Because of their architecture, the institutions are inflexible at a time when flexibility is needed. They were built to house too many people for maximum treatment success. The large numbers have resulted in an excessive emphasis on security and control. The advisory commission maintained that these institutions were dehumanizing and that they created an unhealthy need for dependence.

According to the advisory commission, the traditional juvenile correctional institution must change. It should not continue to warehouse failures and release them back into society without improvement. It must share a major responsibility for the successful reintegration of those juveniles into society; however, as institutions change their goals, the public must be involved in the planning, goals, and the programs, as well as in the efforts toward reintegration into the community. Most important, the public must give full acceptance to these institutional and community programs for juveniles. The advisory commission concluded its discussion of juvenile corrections by saying, "It is no surprise that institutions have not been successful in reducing crime. The mystery is that they have not contributed even more to increasing crime."[2]

Dissatisfaction with closed institutions led to several movements. One is diversion. Another is community corrections. A third movement, related to diversion and community corrections, is deinstitutionalization. This movement began with an emphasis on probation, foster homes, and community treatment centers for juveniles. The establishment of the California Youth Authority in the early 1960s and the closing of juvenile institutions in Massachusetts in 1970 and 1971 gave impetus to the movement.

What caused this movement toward deinstitutionalization for juveniles? Some say it started in the early 1960s, when the government began granting money to localities to improve conditions in the processing and treatment of delinquency. Others say it emerged when social

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[1]The National Advisory Commission on Criminal Justice Standards and Goals, Corrections (Washington, D.C.: U.S. Government Printing Office, 1973), p. 350.
[2]*Ibid.*, pp. 350-352.

scientists began to assume the role of clinicians and became involved in policy decision making at local and federal levels. Still others point to the interest of lawyers in the 1960s and 1970s in reforming juvenile courts. Some scholars take the position that the movement came primarily from a desire to save the costs of constructing new facilities and repairing existing ones.

Whatever the reasons, it is clear that this movement is unlike most others in the field. It involves a major change: abandoning the large institution and replacing it with a different concept of corrections. The era of the large institution may be over, with some jurisdictions abolishing them. An example is that of Massachusetts.

In 1969, Jerome G. Miller took charge of the Department of Youth Services in Massachusetts. At first, he attempted to reform the system; however, "after fifteen months of bureaucratic blockades, open warfare with state legislators, and sabotage by entrenched employees, Miller abandoned reform and elected revolution."[3] Between 1969 and 1973 Miller closed the state's juvenile institutions, placing juveniles in community-based facilities.

A team of social scientists from Harvard University evaluated the Massachusetts experiment with deinstitutionalization. In the early stages of evaluation, the researchers guardedly concluded that the experiment was a success. In 1977, the tentative conclusions were questioned. The recidivism rates of the youth had not increased or decreased; therefore, it might be concluded that deinstitutionalization, though no better, was no worse than institutionalization and was certainly more humane. However, the evaluators reported a crisis in the reaction of the public, the courts, and the police.[4]

Empirical studies of the Massachusetts system conducted in the 1980s to determine the success of deinstitutionalization were contradictory, but in 1998, a researcher who looked at the Massachusetts situation concluded:

> Twenty-five years later, the fight remains a good one, and the cause remains just. Our strategies did not go far enough, but they went farther than anyone thought. Their failure was largely not a failure of will but rather a failure of our own political naiveté, the general community's faith in its own compassion, and everyone's readiness to assume responsibility for our young people. Let us hope we have learned these lessons well.[5]

In evaluating deinstitutionalization, we must raise the issue of whether the negative effects of institutionalization, at least to some extent, will crop up in community treatment centers or other forms of handling juveniles. If juveniles who already have a strong orientation toward crime are confined together, they may continue to infect and teach each other.

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[3]*Time* (August 30, 1976), p. 63.
[4]Alden D. Miller et al., "The Aftermath of Extreme Tactics in Juvenile Justice Reform: A Crisis Four Years Later," in *Corrections and Punishment*, ed. David F. Greenberg, *Sage Criminal Justice System Annuals* (Beverly Hills, CA: Sage Publications, 1977), p. 245.
[5]Yitzhak Bakal, "Reflections: A Quarter Century of Reform in Massachusetts Youth Corrections," *Crime & Delinquency* 44 (January 1998): 110-116; quotation is on p. 116.

In the years since the controversial deinstitutionalization of juvenile institutions in Massachusetts, some jurisdictions have downsized their juvenile facilities or changed the mission or direction of those institutions, as we have already seen. The key, however, is to ensure that when placing juveniles in the community, we do not commit some of the same mistakes we have made when they are institutionalized. One authority, in arguing that we should "celebrate the success, but keep on working," said:

> What comes next—what *must* come next for all of the states that have been part of the recent reforms—is the critical piece of ensuring that adequate community-based alternatives have been put into place and that they are appropriately addressing the needs of the diverted youth. The biggest threat to the deincarceration movement is the failure of the alternatives we have all supported.[6]

[6]Deborah Fowler, "Deincarceration: Celebrate the Successes, But Keep on Working," National Council on Crime & Delinquency (April 14, 2014), http://www.nccdglobal.org/blog/deinceceration-celebrate-the-success-but-keep-on-working, accessed January 4, 2015.

Supplement 12.8. Sex Registration Laws and Juveniles

Recall Chapter 11's discussion of requirements that released offenders who have been convicted of sex crimes must register with law enforcement officials in the communities in which they live. In some jurisdictions, these registration laws extend to juvenile sex offenders, who may, like adult offenders, be required to register for life. The application of sex offender registration laws to juveniles has been challenged in the courts. In 2009, the Illinois Supreme Court upheld that state's sex offender registration law as applied to juveniles. The issue involved whether juveniles are denied due process when they are assessed what is essentially an adult penalty but decided by a juvenile court, in which they do not have a constitutional right to a jury trial. The case arose after a judge ruled in several cases that juvenile sex offenders were not required to register. The state attorney asked the court to order the judge to require that the juveniles register in accordance with the Illinois Sex Offender Registration Act. The state supreme court did so, holding that the registration act is not punishment and that the clear language of the statute requires those adjudicated as juvenile sex offenders to register.[1]

The Illinois Sex Offender Registration Act provides for two registries: one, which is public, applies to persons age 17 and over. The other, which is available only to law enforcement and schools, applies to offenders under age 17. In 2006, the Illinois legislature passed a bill to ease the requirement for registration of juvenile sex offenders when they reach age 17. Under the current law, they are treated as adults at that age; under the proposed law, the decision whether to treat them as adults for purposes of registration would be left to the judge, who would be required to consider ten specified factors (e.g., age, relationship between the victim and the offender, and nature of the sex offense). The governor vetoed the bill.[2]

Not all applications of sex registration laws to juveniles have been upheld. In 1999, the Alabama Court of Criminal Appeals held that Alabama's law was unconstitutional as applied to juveniles by a 1998 amendment, which required that juveniles who were adjudicated on the basis of certain enumerated acts must declare their intention to reside in a specific location before they could be released from custody. The juvenile's offense history, fingerprints, and a photograph were to be provided to law enforcement officials in the designated area. In larger cities, this information is distributed on fliers, which are sent to residences within a specified distance of schools, day-care centers, other places that care for children, and all schools within three miles of the offender's declared residence. The court ruled that the statute's provision that an adult may return to a home that has a minor, but a juvenile may not do so (although an exception may be made for a juvenile offender who is the parent of the minor in the designated home), violated the juvenile's right to equal protection. Furthermore, the court ruled that the statute violated the *ex post facto* rights of all juveniles who had committed their acts before the statute was amended to include them.[3]

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[1]*People ex rel. Birkett v. Konetski*, 2009 Ill. LEXIS 389 (Ill. 2009).
[2]"Governor Vetoes Bill on Registration Duty of Juvenile Sex Offenders," *Chicago Daily Law Bulletin* (July 7, 2006), p. 10003. The Illinois Sex Offender Registration Act is codified at Ill. Comp. Stat. Ann., Chapter 730, Section 150/1 et seq. (2019).
[3]*State v. C. M.*, 746 So. 2d 410 (Ala. Crim. App. 1999).

Supplement 12.9. Juveniles May Not Be Executed

In 2005, the U.S. Supreme Court decided the case of Christopher Simmons, 27, who was 17 when he committed murder. In 1993, Simmons solicited friends to assist him in committing a robbery, tying up the victim, and throwing her off a bridge. He boasted that they would get away with the crime because they were juveniles. One of his friends (age 15 and thus not eligible for the death penalty) agreed. The two broke into the home of Shirley Crook to commit burglary. Crook was home and recognized Simmons from an automobile accident in which both had been involved. Crook, age 46 and scantily clad, was bound and gagged, and her arms were taped behind her back. She was driven around in a minivan and, when she tried to escape, beaten before she was pushed off a railroad trestle, still conscious. Her body was later found in the river by fishermen.

Simmons was convicted of murder and sentenced to death. The Missouri Supreme Court initially upheld the conviction and the sentence but subsequently held that imposing the death penalty on a person who was 17 when the murder was committed constitutes cruel and unusual punishment. The court imposed a life sentence. The State of Missouri asked the U.S. Supreme Court to reverse. The Court agreed to review the case.

Eight states and numerous individuals, including former U.S. president Jimmy Carter and Soviet president Mikhail S. Gorbachev, along with organizations such as the American Bar Association and the American Medical Association (arguing that the brains of 16- and 17-year-olds are not fully developed in the areas that regulate decision making) and over 30 religious organizations, filed briefs with the U.S. Supreme Court, asking the Court to declare that executing a person for a murder committed as a juvenile is unconstitutional.[1]

The U.S. Supreme Court decided *Roper v. Simmons* in March 2005, holding that the execution of persons who committed their capital crimes when they were 16 or 17 is unconstitutional. Portions of the opinion follow:

Roper v. Simmons
453 U.S. 551 (2005), cases and citations omitted

The State sought the death penalty. As aggravating factors, the State submitted that the murder was committed for the purpose of receiving money; was committed for the purpose of avoiding, interfering with, or preventing lawful arrest of the defendant; and involved depravity of mind and was outrageously and wantonly vile, horrible, and inhumane. The State called Shirley Crook's husband, daughter, and two sisters, who presented moving evidence of the devastation her death had brought to their lives.

In mitigation Simmons' attorneys first called an officer of the Missouri juvenile justice system, who testified that Simmons had no prior convictions and that no previous charges had been filed against him. Simmons' mother, father, two younger half brothers, a neighbor, and a friend took the stand to tell the jurors of the close relationships they had formed with Simmons and to plead for mercy on his behalf. Simmons' mother, in particular, testified to the

[1]"Dozens of Nations Weigh In on Death Penalty Case," *New York Times* (July 20, 2004), p. 1.

responsibility Simmons demonstrated in taking care of his two younger half brothers and of his grandmother and to his capacity to show love for them.

During closing arguments, both the prosecutor and defense counsel addressed Simmons' age, which the trial judge had instructed the jurors they could consider as a mitigating factor. Defense counsel reminded the jurors that juveniles of Simmons' age cannot drink, serve on juries, or even see certain movies, because "the legislatures have wisely decided that

individuals of a certain age aren't responsible enough."

Defense counsel argued that Simmons' age should make "a huge difference to [the jurors] in deciding just exactly what sort of punishment to make."

. . .

The jury recommended the death penalty after finding the State had proved each of the three aggravating factors submitted to it. Accepting the jury's recommendation, the trial judge imposed the death penalty. . . . The prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. . . .

[The Supreme Court reviewed its precedent cases involving capital punishment of juveniles, along with those involving executing the mentally challenged. The Court then distinguished between the maturity levels of adults and juveniles and continued:]

Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* [friends of the court briefs] cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." . .

It has been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment.

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.

These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. . . .

Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. . . .

Over time, from one generation to the next, the Constitution has come to earn the high respect and even . . . the veneration of the American people. The document sets forth, and rests upon, innovative principles original to the American experience, such as federalism; a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity. Not the least of the reasons we honor the Constitution, then, is because we know it to be our own. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.

The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. The judgment of the Missouri Supreme Court setting aside the sentence of death imposed upon Christopher Simmons is affirmed.

It is so ordered.