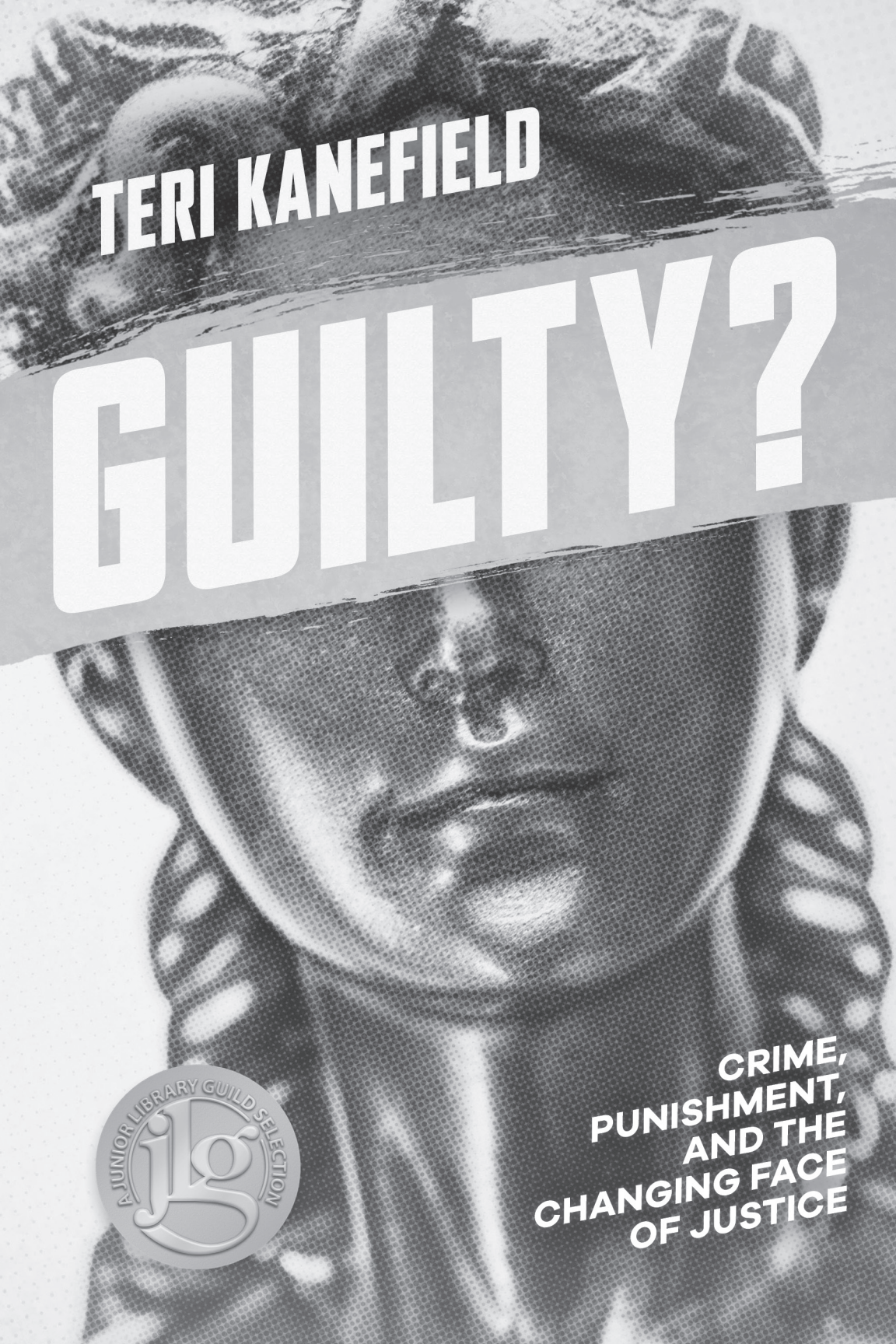
GUILTY?

TERI KANEFIELD


TERI KANEFIELD
GUILTY?
A JUNIOR LIBRARY GUILD SELECTION
CRIME, PUNISHMENT, AND THE CHANGING FACE OF JUSTICE

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PART II
PUNISHMENT

WHY WE PUNISH

If choosing what to criminalize is difficult and filled with moral pitfalls, punishment—particularly government-imposed punishment—is even more problematic.

James Rogers was sentenced to fifteen months in prison for walking out of the bank with the extra money the teller handed him by mistake. Prisoners are locked up, dressed in prisoner garb, and watched constantly. Think about fifteen months living under oppressive and humiliating conditions. "Going to prison is like dying with your eyes open," said Bernard Kerick, a disgraced New York Police commissioner who pleaded guilty to fraud and was sentenced to four years in prison.

The horrors of life behind bars have been documented by countless memoirs, and confirmed by guards: Inmates are attacked, often by one another, sometimes by guards. They are occasionally

given lengthy periods of solitary confinement. Imprisonment is hard on the convicted person's family and children, as well, often leading to the breakup of families. The California Research Bureau has pointed out that imprisonment harms the children of inmates:

> ***Children whose parents have been arrested and incarcerated . . . have experienced the trauma of sudden separation from their sole caregiver . . . The behavioral consequences can be severe . . . absent positive intervention—emotional withdrawal, failure in school, delinquency and risk of intergenerational incarceration.***

Of course, a prison sentence is supposed to hurt. Punishment is, after all, defined as the deliberate infliction of pain or loss for an offense, sin, or fault.

Elkton Federal Prison, interior.

Today in the United States, over six and a half million people are imprisoned or serving some form of supervised sentence, such as parole or probation. More than two million people in the U.S. are actually in prison.

Country	Rate Of Imprisonment Per 100,000 People	Number Of Prisoners
United States of America	655	2,121,600
El Salvador	617	39,642
Cuba	510	57,337
Rwanda	464	61,000
Russian Federation	389	563,166
Brazil	328	700,432
Iran	284	230,000
Chile	224	41,068
Saudi Arabia	197	61,000
United Kingdom	139	82,432
France	104	70,059
Libya	99	6,187
Switzerland	81	6,863
Germany	76	62,902
Syria	60	10,599
Japan	41	51,805

Other countries imprison a far lower percentage of people. America's percentage of citizen imprisonment is five times higher than Great Britain's, nine times higher than Germany's and Libya's, and thirteen times higher than Japan's.

The chart on the next page was compiled by the International Centre for Prison Studies in partnership with the University of Essex. The figures for the United States corresponds with the statistics given by the United States Department of Justice, which reports that 2,239,751 people were incarcerated in prisons and jails

in 2011. The population is approximately 314 million. The math works out to just over 700 people imprisoned per 100,000.

Sometimes punishment is permanent—as with the death sentence. Sometimes it lasts only a few days.

However, given the far-reaching pain of government-inflicted punishment and the consequences of imprisoning large numbers of people for the entire community, it is worth exploring *why* we punish those who commit crimes.

CHAPTER 7
RETRIBUTION

Retribution—the idea that punishment is about giving people what they deserve— has roots deep in ancient Middle Eastern civilization. A Mesopotamian king named Hammurabi wrote a criminal code embodying the theory of retribution. He wanted written laws for consistency throughout his realm, and he wanted to make sure people who committed crimes got what, in his opinion, they deserved.

A number of punishments from Hammurabi's code will no doubt strike the modern reader as either too harsh or not harsh enough. To take a few examples:

- If a son strikes his father, his hand shall be cut off.
- If a man hits a woman so that she loses her unborn child, he shall pay ten shekels for her loss.
- If anyone is caught committing robbery, he shall be put to death.

• If a man makes an accusation against a man and cannot prove it, the accuser shall be put to death.

By today's standards, a small fine for battering a woman and causing her to miscarry seems like too light a punishment for such violence. On the other hand, cutting off the hand of a son who strikes his father seems too harsh. Wouldn't a literal "eye for an eye" simply require the father to hit the son back? But in a culture that finds it acceptable for a father to strike his child—as many cultures did until fairly recently—the father hitting the son back would not restore the balance of justice. While sons were forbidden to strike their fathers, fathers were expected to discipline their sons by whipping them.

Punishment that fits the crime under the theory of retribution is not cruel because it is deserved.

The nineteenth-century German philosopher Immanuel Kant embraced a theory of strict retribution. He believed that a person guilty of a crime should get back exactly what he gave out. Under Kant's theory, failing to punish all wrongdoings creates an imbalance in the universe that endangers everyone's well-being: If people don't get what they deserve, the entire society loses its moral balance.

Punishment that fits the crime under Kant's theory is not cruel

because it serves a higher good.

Many of the problems in any criminal justice system, including the basic problem of deciding what behavior to punish, undermine the theory that people who are punished get what they deserve. What is morally wrong, like killing an innocent person, is not always criminalized. What is criminalized is not always dangerous or morally wrong. Sometimes the law itself is morally wrong, as in the laws requiring racial segregation. Retribution assumes that people get the punishment they deserve when they break a law, but if crimes are culturally determined, punishment does not necessarily fall on people who are bad.

Another problem is determining what constitutes just desserts. The ancient expression of retribution "an eye for an eye" means you get back exactly what you give out. But people in jail are getting back something different from what they gave out. A person who steals is put in jail. An eye for an eye would require that, literally, someone would steal from him. So a problem with retribution is deciding how much jail time or other punishment is the correct measure. How much time should someone spend in jail for petty theft? A few days? A few weeks? How about kidnapping? A few years? A lifetime? Any measure of punishment must be, to some extent, arbitrary and a matter of opinion.

Sometimes the likelihood of a person getting caught has nothing to do with the crime itself. For example, suppose one a person lives in a large house with a big yard and a tall fence, with the nearest neighbors a half mile away. Another person lives in a crowded city apartment with thin walls, and neighbors can hear everything that happens. If both commit a crime in their homes, the person in the crowded city apartment is more likely to get

caught because neighbors are likely to see or hear something. Rich people, then, can hide more easily. Also, as shown in the chapter on race, the law often falls more heavily on groups who are more likely to be discriminated against.

To take another example, people who are cleverer, or better liars, are less likely to get caught. One court-accepted way to measure human intelligence is with units called intelligence quotients, or IQ, which is derived through a test and formula. The test is a standardized test, and the results are factored with a person's age. IQ is generally categorized like this:

145 and over = genius
130–144 = gifted
115–129 = above average
85–114 = average
70–84 = below average
55–69 = challenged
40–54 = severely challenged

Early in the twentieth century, people with extremely low IQ were often believed to be threatening or dangerous. By the middle of the twentieth century, however, scientists and psychologists put forward convincing evidence that people with low intelligence were not more likely to commit crimes than other people.

It is generally accepted today among psychologists and scientists that low IQ rarely causes people to commit crimes.

However, statistics show that people with a low IQ are more likely to be arrested, charged, and convicted than people with a higher IQ. Less than 2 percent of the population has an IQ below 70, but between 12 and 20 percent of current death row inmates have an IQ below 70.

If a low IQ does not cause a person to commit crimes, why are so many more people with a low IQ facing the death penalty?

One answer offered by researchers is that people with lower intelligence are less able to withstand the pressure of being questioned by the police. It is easier to lead—or confuse—people with unusually low intelligence, so they are more likely to incriminate themselves, or say something incriminating even if they are not guilty.

In addition, people with a low IQ often have an incomplete or immature idea of cause and blame, so under the pressure of police interrogation or cross-examination they are more likely to confess to a crime they did not commit, or say things on the witness stand that may give the appearance of guilt. People with a low IQ may not be able to assist as well with their own defense or may not be aware of the intricacies of certain laws.

Retribution that falls more heavily on people who are mentally but not morally deficient cannot fairly restore balance.

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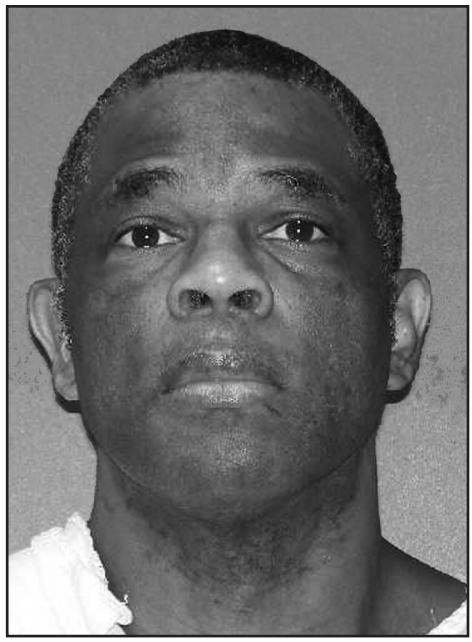
In 1994, when Marvin Wilson was thirty-two years old, an anonymous informer told the police that he was a drug dealer. When the informer was found dead, Marvin and another man, Terry Lewis, were arrested and charged with the murder. It was clear from other eyewitness accounts that the murderer had been either Marvin or Terry. There was no forensic or other evidence pointing to which of the two men actually had committed the murder.

Marvin had an IQ of 61 if you believed the defense, or about 73 if you believed the prosecution.

The question for the jury was which man had pulled the trigger. The jury decided Marvin was the murderer. The evidence against him was mostly the testimony of Terry's wife, who told the court she overheard Marvin confess to the crime.



Marvin Wilson after his arrest for murder.

A jury has a right to believe whomever they want, and in this case, the jury believed that Terry's wife was telling the truth and Marvin was lying.

As a result of her testimony, Terry was given life in prison.

Marvin was sentenced to die in the electric chair.

The United States Supreme Court has said that executing people with an IQ below 70 is unconstitutional because it is cruel to execute a person who may not have a complete understanding of right and wrong, and who might not even understand why he is dying. Texas law forbids the execution of anyone whose IQ is under 70. So the question of whether Marvin's IQ was above or below 70 was an important one—his very life depended on it.

Family members testified that Marvin showed serious mental limitations beginning in childhood. His cousin said, "The other kids in school would always call Marvin dummy." According to the defense, Marvin couldn't use a phone book, couldn't match his

socks, and didn't understand what a bank account was for. He had been known to fasten his belt to the point of nearly cutting off his circulation. When Marvin's son was born, Marvin began sucking his own thumb.

The prosecution argued that his intelligence was over 70 because the nature of his crime—murdering an informant—showed intelligence. The prosecution won.

Marvin Wilson was not able to file one of his appeals because he missed the deadline and the court refused to allow the appeal to be filed late. The court recognized that the fault lay with the lawyer representing Marvin, and also recognized that the result was harsh, particularly with a death penalty case. However, certain deadlines, according to the court, must be strictly enforced.

A prisoner who was able to read law books and understand the deadlines would have had one more chance to appeal.

Marvin died by lethal injection at 6:27 p.m. on August 7, 2012.

Marvin's case drew national attention because of the fear that he died not because he was guilty but because a more sophisticated accomplice was able to convince a jury that Marvin was the guilty one.

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At each stage along the process of arresting and convicting criminals, people have to make decisions, and each person—being human—is prone to make mistakes.

The process often starts when someone calls to report a crime. That person forms an opinion of what happened and relays that opinion to the police. Next, a dispatcher must decide whether to send a police officer. When the police arrive, they have to make decisions,

including whether to arrest someone, and if so, who. After an arrest, a prosecutor must make decisions, including how much priority to give each case.

Human beings have biases—inclinations toward certain ideas that may or may not be correct. For example, studies show that jurors take their tasks seriously, but even well-meaning jurors have biases. In the words of one psychologist who studied cases in which jurors reached decisions that were contrary to the evidence, "An individual views others as belonging to either their own group (the in-group) or another group (the out-group). Such distinctions are based on many dimensions, including race, religion, gender, age, ethnic background, occupation, and income."

At the conclusion of the murder trial of two boys accused of killing their parents, some jurors confided that they did not believe the boys had committed the murder because "the boys looked like nice young men."

Retribution requires that people get what they deserve, but in a system run by human beings, how can we be sure the people punished deserve it and those not punished deserve not to be punished? If the punishments meted out by the courts were not so harsh—if there was no death penalty, for example, and if nobody served long prison sentences, and if lives were not ruined and families not destroyed as a result of harsh punishments—the flaws in the criminal justice system would not matter so much. We would shrug and say, "People make mistakes. To err, after all, is human." But in our criminal justice system, a human error can result in the killing or imprisonment of an innocent person.

Just as we can never be sure everyone who has been punished got what he or she deserved, it is impossible to punish all wrongdoing.

Imagine what would happen if every single wrongdoing worthy of punishment was criminalized and every person who committed a crime was punished by the government. As matters stand, remember, one in thirty-four Americans is serving some form of sentence. Imagine how many prisons would need to be built if every single behavior deserving punishment was criminalized and every crime resulted in a conviction and punishment.

So, while the theory of retribution has a lot of commonsense appeal, it also has flaws and shortcomings. If we can never be sure that people walking free are less guilty than people in jail, it cannot be said that the criminal justice system gives people what they deserve and restores moral balance.

CHAPTER 8
DETERRENCE AND INCAPACITATION

Deterrence is the theory that people won't commit crimes—or they will be less likely to commit crimes—if they know they will be punished. Deterrence assumes, among other things, that people know what is legal and what is not. Just for a moment, imagine James Rogers at the bank. The teller puts down a large stack of money and James has a split second to decide what to do. People are in line behind him. The teller considers their transaction finished. What should he do? Should he pick up the money and leave? Or should he say, "Hey, I think you made a mistake!"

A great many people, even those who consider themselves to be honest, law-abiding citizens, might feel tempted to keep the money.

Deterrence assumes that something like this will go through

the mind of someone in that position: "It's really tempting to take all this money, but if I take it, I'll be violating that law that defines bank robbery as walking out of the bank with more than a thousand dollars belonging to the bank. So I'd better not do it."

The first problem with deterrence is that most people wouldn't know that taking advantage of a teller's mistake can be considered bank robbery with a penalty of prison time. Most people are likely to know that taking advantage of someone's mistake is not honest, but dishonesty is not necessarily criminal. Moreover, nobody could be expected to know that if the amount carried away is more than $1,000, the punishment becomes much harsher.

So a person might think, "I shouldn't keep this. It's wrong," but having no idea it was a felony with a prison sentence, he might keep it anyway, figuring, "It was the teller's mistake, not mine."

There's also a second problem with the theory of deterrence: It assumes everyone is able to make rational decisions.

Nicholas Horner, a husband and father, served as a soldier in combat in Iraq. As a result of his experiences in combat, he developed oped post-traumatic stress disorder (PTSD). He was discharged for PTSD with a 50 percent disability, which was later increased to 100 percent.

After he returned home, his family said he was changed. He was fearful and jumpy and inclined to violence. He asked to be put into a hospital because he was, in his words, a "walking shell," but the hospital wouldn't admit him.

Three weeks after he asked to be admitted to a hospital, he went on a rampage in his hometown and killed two innocent people and wounded another. The people he killed did nothing at all to provoke him. Later he was unable to recall the incident.

Above: Nick Horner in uniform.
Below: Nick Horner with his daughter.

His murder trial lasted six days. Much of the evidence concerned the harmful impact of his military service, which included two tours in Iraq and one in Kuwait. His lawyers wanted to put forward an insanity defense, but the court would not allow it when the diagnosis was PTSD. His lawyers, therefore, focused on his diagnosis of PTSD, hoping to convince the jury that he committed the violence because of the disorder. Succeeding on such a defense would have meant a conviction of second-degree murder instead of first-degree. The difference is that first-degree murder carries a possible death penalty, while second-degree murder means a maximum sentence of life in prison.

Under the law, what mattered was whether he knew what he did was wrong. The prosecution's argument was that he knew killing innocent people who hadn't provoked him was wrong, so, under the law, he was guilty of murder. He was sentenced to life in prison.

Two high school seniors at Columbine High School in Columbine Colorado brought guns to school on April 29, 1999. They went on a shooting rampage, killing twelve students and one teacher. They wounded twenty-one others. There have been other such massacres, some even bloodier, including the slaughter of children at Sandy Hook Elementary School in Connecticut on December 14, 2012.

Almost always, the shooter ends up dead, either because someone else killed him to end the rampage or because the shooter was on a suicide mission.

Investigations into the most horrific of crimes generally show

that the killers had deep-seated mental illnesses, such as sociopathy.

Sociopathy is a personality disorder. Sociopaths entirely lack the ability to take responsibility for their actions. They lack a sense of moral responsibility or social conscience. Frequently they are driven to act in antisocial ways and feel no remorse when they cause pain.

A psychopath has a similar disorder. Psychopaths have shallow emotions, including a lack of empathy for others. While not all psychopaths are criminals—many lead productive lives—some are aggressive and show no remorse for their actions.

Most mental illnesses can be treated, but according to Professor David Eagleman of the Baylor College of Medicine, there is no effective treatment for a psychopath. This is partly because a psychopath's brain is different from that of a nonpsychopathic person. The major difference is smaller size of the part of the brain that registers emotion. The condition is physical, and part of who the psychopath is. If a person has such a deep-seated mental illness that he does not experience normal emotions or think the way other people think, the threat of deterrence will not work. The boys who went on the shooting spree in Columbine knew they would die but didn't care. A person on a suicide mission doesn't care in the least if he faces harsh punishment. Thus deterrence is ineffective where we most need it.

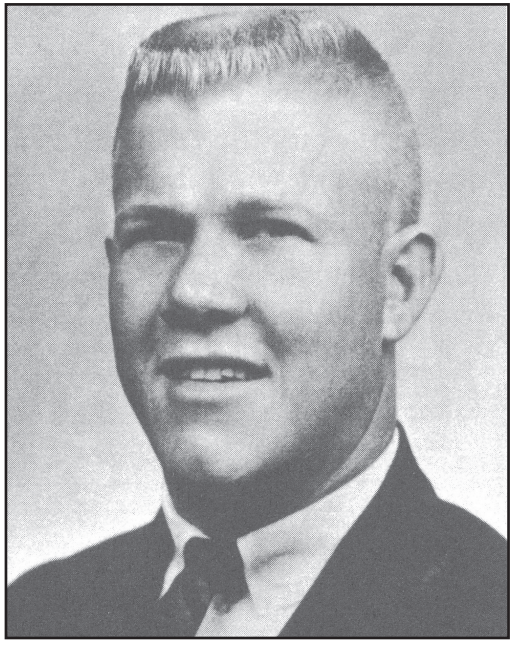
Charles Whitman was a twenty-five-year-old graduate student when he lugged a trunk of rifles up a tower on the campus of the University of Texas on August 1, 1966. He was a former marine, so, like Nicholas Horner, he'd honed his shooting skills in

the military. Charles went on a shooting rampage, killing fourteen students and terrifying the entire campus. During the weeks leading up to the killings, he'd been complaining of headaches and an altered mental state. Before climbing the tower, he wrote a suicide note that read:

> ***I do not really understand myself these days. I am supposed to be an average reasonable and intelligent young man. However lately (I cannot recall when it started) I have been a victim of many irrational thoughts . . . After my death, I wish that an autopsy would be performed on me to see if there was any visible physical disorder.***

An autopsy is a medical procedure done on a body after death, usually to determine the cause of death.

After Charles Whitman's death, an autopsy revealed that he had a brain tumor pressing against the part of the brain believed to be responsible for regulating emotions. By his own admission, his thinking had been disordered and irrational in the weeks leading to his killing spree.



Charles Whitman.

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A forty-year-old teacher in Virginia suddenly began exhibiting criminal behavior. He was convicted of child abuse and put into a rehabilitation program. He continued exhibiting criminal behavior in this program, however, so he was imprisoned. A brain scan revealed that he had a large brain tumor displacing the frontal lobe of his brain —the part of the brain that helps a person control his behavior.

People with damage to the frontal lobes of their brains understand that what they are doing is wrong, but they lack the ability to control themselves. The law recognizes insanity as a defense, but only if a person was unable to understand at the time that his or her behavior was wrong. Frontal lobe brain damage, therefore, often doesn't prevent a person from being convicted of a crime. In fact, one researcher estimated that up to 94 percent of people convicted of murder have some form of brain dysfunction.

For most people, the fear of public humiliation and shame is often enough to keep them from breaking laws. On the other hand, for the people most likely to commit violent crimes—those with serious brain disorders—deterrence simply doesn't work.

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In 1992 and 1993, two girls were murdered in separate incidents in California.

First, on June 30, 1992, Kimber Reynolds, eighteen years old, was out in Fresno having dessert with some friends. As she left the restaurant, two men came by on a motorbike and tried to grab her purse. She fought to hold on to it. One of her attackers, a man

named Joe Davis, shot her in the head and killed her.

Then, on October 1, 1993, twelve-year-old Polly Klaas of Petaluma, California, invited two friends for a slumber party. Late in the evening, a man entered her bedroom with a knife. He tied up her two friends and kidnapped Polly. Four thousand people helped search for her. Two months later, Richard Allen Davis (no relation to Joe Davis) was arrested for a routine parole violation on November 30, 1993. He was identified as Polly's kidnapper by his palm print. He confessed and led police to Polly's body. He said he strangled her from behind with a piece of cloth.

Richard Allen Davis was tried and found guilty and sentenced to death. He is still on death row at San Quentin State Prison in Marin County, California.

Kimber's father vowed to do something to prevent other senseless murders. What particularly enraged him was that both of the murderers—Joe Davis and Richard Allen Davis—had prior convictions and were out on parole when they committed murder.

He led a movement to pass tougher criminal laws to make sure that repeat offenders would not be able to continue committing crimes. The law he spearheaded was called Three Strikes. The idea was that after three strikes, you get life in prison. No exceptions.

California's Three Strikes law has been widely hailed as the toughest in the nation. In passing it, one lawmaker said the law not only was intended to keep dangerous criminals off the streets, but also was a move toward "zero tolerance" for crime. Three Strikes was widely supported by the public and politicians of both major parties. One rationale for tough laws is that deterrence requires harsh penalties. If a penalty is too low, a person may decide to take chances. Those opposed to the law said it was too extreme and

came from public panic rather than rational policymaking.

During the first five years after the law was passed, the crime rate in California dropped 26.9 percent, translating into 815,000 fewer crimes.

Murder Rates (per 1,000 people)

	California	New York	Nation As A Whole
1990	11.9	14.5	9.4
1995	11.2	8.5	8.2
2000	6.1	5.0	5.5
2005	6.9	4.5	5.6
2010	4.8	4.5	4.8
2011	4.8	3.9	4.7
2012	5.0	3.5	4.7
2013	4.5	3.3	4.5
2014	4.4	3.1	4.5

Given that the murder rate in California dropped approximately by half since the law was passed, Three Strikes seems to have succeeded in preventing crime. However, places that did not enact a Three Strikes law, such New York, had a similar drop in murder rates. In fact, New York City showed an even more dramatic drop in the murder rate during the same period, without passing the same sort of harsh law.

Even more startling, the overall murder rates across the entire United States dropped dramatically between 1990 and 2012. Though the murder rate in California did indeed go down, the murder rate went down everywhere in the country, and in places that did not enact Three Strikes laws, the murder rate went down even more.

How can that be?

Any answer must be based in speculation. When the national crime rate decreases steadily over a long period, figuring out precisely what is causing the drop is extremely difficult because there are so many different possible factors. What all of this suggests, though, is that harsh punishment does not necessarily deter crime.

Another facet of deterrence is the idea that prison will teach someone a lesson: Criminals will learn, from harsh punishment, that it is better not to commit crimes. But punishment won't help a person learn if he or she has something wrong with his or her brain and cannot learn.

Recidivism is the word to describe lapsing back into crime. A high recidivism rate means lots of people continue to commit crimes even after serving a prison sentence.

Statistics show that while the overall crime rate went down from 1990 to 2012, the recidivism rate in the United States remained high even after the tough laws were passed. Almost half of the prisoners released from prison committed a second crime and were sent back to prison. More than 43 percent of prisoners released in 2004 were back behind bars within three years.

Researchers and social scientists put forward various theories for why there are so many repeat offenders. One cites the high level of violence in prisons, including unprovoked attacks on inmates from guards, which can "harden" a criminal, making him more likely to commit future crimes. A man in prison is eighteen times more likely to experience violence (such as being attacked by another inmate or guard) than a man outside prison. A woman has a 27 percent higher chance of being attacked in prison than in the outside world.

The question raised is whether there's a point at which inflicting pain on people will make them more likely to commit violence later.

Other researchers conclude that people in prison, particularly those guilty of minor or petty offenses, learn from more experienced inmates how to commit different types of crimes. Further studies show that cutting off prisoners' ties to their families and communities hardens them and makes them resentful and more likely to commit crimes.

Additionally, a person released from prison can have extreme difficulty finding a respectable job. If he is convicted of a felony, he carries the stigma for life. Convictions are public information. Felonies—which are particularly serious crimes, such as murder, arson, and robbery—must be disclosed on job applications, so a felon will have a hard time finding work, possibly for the rest of his life. A person is more likely to commit additional crimes if denied a way to earn a living.

Most states restrict the rights of felons to vote in elections after they are released. Some states take away the right to vote for the remainder of the felon's life. Other states allow a person convicted of a felony to regain the right to vote depending on the nature of the crime and the length of time since the person's release from prison.

People who cannot work or vote, and are barred from participating in society in basic ways, will have even less incentive to follow rules—and thus the cycle continues. Harsh punishment, instead of reducing crime, might thus increase crime.

Hand in hand with deterrence is the theory of incapacitation, which says that the way to reduce crime is to put criminals

in jail so that they cannot commit any more crimes. Like other theories of punishment, this one appeals to common sense. A convicted criminal cannot be involved in further crimes against society if she is in jail.

Incapacitation has many of the same problems as deterrence, and there is much overlap in both justifications for punishment. In fact, one of the purposes of California's Three Strikes law and others like it was to incapacitate criminals. Kimber's father, after her murder, spearheaded the law precisely so that repeat offenders can't get out of jail and commit more crimes.

Keeping everyone who commits a single crime in jail for a long time might reduce the amount of crime. But keeping someone who commits a crime in jail in order to prevent her from committing another crime means the sentence depends on the probability that she will commit another crime rather than on the severity of what she already did. Suppose a person has kleptomania—a psychiatric condition in which the person impulsively steals. But suppose too that the person steals only very small items. Keeping a petty thief in jail to prevent additional crimes means the punishment would not fit the crime.

Moreover, the cost of imprisoning someone is about $40,000 per year, depending on the state, which means both deterrence and incapacitation cost taxpayers enormous amounts of money. This raises the question of whether any of the benefits are worth the cost.

In 2010, the California state auditor reported that as of 2008, the Three Strikes law cost the state of California an extra $19.2 billion because of how many more people California imprisoned as a result of the law. The $19.2 billion was in addition to the money

already being spent on prisons and law enforcement.

The United States, overall, spends $60 billion a year on prisons, parole, and probation. Critics of the tough-on-crime laws point out that the $60 billion for prisons takes money away from schools, medical care, and services for families in need. This is a lot of money to spend if harsh punishments have limited benefits and may, in fact, do more harm than good.

Remember that there can be consequences without harsh punishments like lengthy prison sentences or executions. Consequences that don't involve harsh punishment include community service (instead of jail time, a person works to benefit the community), forfeiture (any illegally obtained money is forfeited), and diversion (programs where crimes involving controlled substances. such as drugs, result in medical rehabilitation).

PART II
DUE PROCESS

WHAT IS
DUE PROCESS?

A person accused of a crime is innocent until proven guilty. You might assume that such a basic guarantee was written in the United States Constitution. As a matter of fact, it isn't. It isn't in the Declaration of Independence, nor any of our country's founding documents.

The concept of innocent until proven guilty has roots so deep in English common law that the framers of the Constitution may have taken the guarantee so much for granted that they just didn't include it.

The first ten amendments, also called the Bill of Rights, added in 1791, offer many of the personal freedoms we take for granted.

The Fourth Amendment guarantees the right to be free from unreasonable searches and seizures. The Fourth Amendment, though, doesn't explain what is meant by "reasonable."

The Fifth Amendment says a person may not be called to answer for a crime without first being indicted by a grand jury, and doesn't have to be a witness against himself—which means the right to remain silent. The Fifth Amendment also guarantees that a person cannot be deprived of life, liberty, or property without due process of law. The Fifth Amendment, however, does not explain what is meant by "due process of law."

The Sixth Amendment gives an accused person the right to a speedy trial by an impartial jury, and the right to confront witnesses and compel witnesses to court.

It's easy to think from all this that a person accused of a crime has a lot of rights and constitutional protections. Nothing to worry about.

There's one hitch. The Bill of Rights applies only to the federal government, and most crimes are prosecuted at the state and local levels.

Until the Civil War, states pretty much did whatever they wanted. Then the Thirteenth, Fourteenth, and Fifteenth Amendments were added to the Constitution abolishing slavery and restricting how states could treat people within their borders.

Section 1 of the Fourteenth Amendment requires states to give all citizens equal protection of the laws and due process of law before the government can deprive them of life, liberty, or property.

That's it. The Fourteenth Amendment says nothing about the right to a speedy trial, the right to remain silent, the right to a lawyer, or much of anything at all specific.

The Civil War did not end the debate about how much states should be allowed to decide for themselves how they wanted to

govern and live, and to what extent states must conform to national standards. For decades after the Civil War, the understanding was that each state could set its own standards and interpret for itself what is meant by equal protection and due process.

The problem was that throughout the country, African Americans and other minorities were not given due process or equal protection.

Then, in the 1950s, the United States Supreme Court began telling states what due process under the Fourteenth Amendment required—and criminal law has never been the same since.

CHAPTER 9
UNREASONABLE SEARCHES

On May 29, 1957, at 3:00 a.m., a bomb exploded on the front porch of a home in a suburb of Cleveland. The home belonged to Donald King, a man with ties to illegal gambling operations. During the investigation into the bombing, the police received an anonymous telephone tip that Virgil Ogletree, a key suspect in the bombing, was hiding in the home of a woman named Dolltree (Dolly) Mapp.

When the Cleveland police officers arrived at Dolly's house and rang the doorbell, she opened a window and asked what they wanted. One of the officers said they wanted to question her, but he wouldn't offer any details.

She told the police she wanted to call her lawyer. With the door still locked and the officers on her front porch, she called her lawyer.

Her lawyer was not available, but his partner, Walter Greene, told her not to let the police inside unless they had a search warrant and let her read it.

The police didn't have a warrant, so she wouldn't let them in. They remained outside on her porch for three hours, during which time four more officers arrived. Then one of the police officers kicked Dolly's front door and demanded to be let in. Dolly still refused to open the door, so one of the officers broke the glass in the door and reached inside to unlock it so the other officers could enter.

Walter Greene, Dolly's lawyer, arrived just in time to see the officers push their way into the house. Dolly, who was coming down the stairs, demanded their search warrant. One of the officers held up a piece of paper and said, "Here is the search warrant." Dolly asked to see it, but the officer refused.

Dolly grabbed the paper from the officer's hand and shoved it down the front of her dress. The officer seized her, reached into her dress, and grabbed the paper. He pulled her arm, twisted it back, and roughly handcuffed her to the bed. She cried out because he was hurting her.

Walter Greene tried to enter the home, but the officers would not let him in, and would not let him talk to Dolly.

The police officers searched the entire house, including rifling through private papers and photo albums. They found the suspect they were looking for, Virgil Ogletree. They also found a gun, several pornographic books, and evidence of illegal gambling. The police confiscated the items and arrested Dolly.

At the police station, the police questioned Virgil Ogletree but decided he had nothing to do with the bombing, so they let him go.

Dolly Mapp.

Dolly, however, was charged with possessing pornographic books and gambling paraphernalia. The gambling charge was a misdemeanor that was handled quickly. Dolly was brought to trial and was found not guilty.

Possession of pornography, however, was a serious offense in 1957 in Ohio. In fact, possession of pornography was a felony, and under Ohio law required more complicated procedures. Four months after her arrest, she was charged with possessing pornography. Initially she pleaded guilty, but she changed her plea to not guilty and demanded a jury trial.

The lawyer she hired to defend her, Alexander Kearns, filed a motion to suppress the evidence, arguing that evidence gotten without a valid search warrant should not be used against Dolly in court.

Under the law as it stood in 1957, the motion to suppress the evidence was bound to lose because the Fourth Amendment,

which guaranteed a person the right to be free from unreasonable searches and seizures, applied only to the federal government and the search had been done by local police.

Dolly's lawyer, of course, knew this. But he had to argue something in her defense. She'd been caught red-handed with the pornographic material in her house. She was the only adult living there, so the evidence was compelling. The only thing he could do was argue that the evidence against her had been gathered illegally and therefore should not be used in court.

The trial court denied the motion on the grounds that the evidence itself had not been taken from her person by force. Dolly was convicted of possessing pornography and sentenced to prison for at least one but not more than seven years.

She appealed to the Ohio Supreme Court, which, like the lower court, found that the evidence was admissible on the grounds that it had not been taken from Dolly's "person by the use of brutal or offensive force."

Her case went all the way to the United States Supreme Court. In its ruling in Dolly's case, the Court gave an interpretation of the Constitution that remains controversial to this day. The Supreme Court said that the specific protections given in the Fourth Amendment, including the right to be free from unreasonable searches and seizures, apply to the states as well as the federal government.

The problem was how to enforce the Fourteenth Amendment. What would prevent local governments, police departments, and courts from simply doing what they wanted and later simply saying, "Oops, we shouldn't have done that!"

The Supreme Court wanted there to be consequences if

police officers overstepped an individual's right to be free from unreasonable search and seizure. But who should—or could—monitor the police?

The Court therefore fashioned what has been called the *exclusionary rule*, which says that evidence procured in violation of a person's constitutional rights is inadmissible in court. If the police search a person without enough cause, and find evidence of guilt, the evidence is not admissible in court and the person cannot be convicted.

Some people thought that the Supreme Court—a federal institution—was reaching beyond the wording of the Constitution and fashioning an interpretation of the Constitution that the original framers didn't intend: according to many, the framers of the Constitution were interested in limiting the power and reach of the federal government to strengthen local governments.

Others agreed with the ruling, believing that the Fourteenth Amendment, which guarantees a person due process of the law, should not allow police to behave in the manner they did when they forcibly entered Dolly's house.

The exclusionary rule is controversial also because it means that actual evidence that might prove a person's guilt cannot be used in court. Opponents feel that this allows guilty people to walk away free simply because the police blundered. Those who support the rule say the most important consideration is making sure the police officers respect the Constitution, and the only real way to do that is not to allow illegally gathered evidence to be used in court.

Once the Supreme Court decided that the evidence against Dolly had been obtained by the police in violation of her constitutional rights, and once the Court applied the exclusionary,

there was no longer any evidence against her that could be used in court.

Without evidence, she could not be convicted.

Her conviction was therefore overturned, and she walked away free.

CHAPTER 10
THE RIGHT TO COUNSEL

Fifty-one-year-old Clarence Earl Gideon was arrested on June 3, 1961, and charged with burglarizing the Bay Harbor Poolroom in Panama City, Florida. The crime was a felony.

Clarence—a frail man with white hair—had a long criminal history, and had been in and out of prisons much of his life. He was first arrested at the age of fourteen for burglarizing a county store for clothes. He was caught the next day wearing the clothing he had stolen and was sent to a juvenile "reformatory." Later he said of all the prisons he'd been in, that was the worst, and he carried permanent scars from the whippings he received. He was released at age twenty-two, in the middle of the Great Depression. He found a job in a shoe factory, but he was arrested again for stealing government property and sentenced to three

years in federal prison. When he got out, he worked some more and saved a little money, which he sent to his parents to help them buy a house. He was arrested several more times over the years, each time for burglary.

At the time of his 1961 arrest, he'd been convicted of four felonies. Should he be convicted of burglarizing the Bay Harbor Poolroom, it would be his fifth.

Clarence pleaded not guilty.

He was brought to trial on August 4, 1961.The judge asked him if he was ready to go to trial and he said he was not.

"Why aren't you ready?" asked the judge.

"I have no counsel," said Clarence.

"Why do you not have counsel? Did you not know your trial was scheduled for today?"

Clarence said he knew the trial was scheduled for that day—but he had no counsel because he couldn't afford it. He demanded the court appoint him a lawyer.

The law as it stood in 1961, however, did not require a court-appointed lawyer for a person who could not afford one. The Sixth Amendment of the Constitution provides that criminal defendants have the right to counsel to assist in their defense, but it does not specifically say that a person who can't afford a lawyer will have one appointed free of charge.

Moreover, the Sixth Amendment, as mentioned, applied only to the federal government, and Clarence was in state court. Florida law required criminal defendants to be given a lawyer if they were being charged with a crime that could be punished with the death penalty.

Clarence Gideon, however, had the firm—and many at the time

believed irrational—belief that the United States Constitution entitled him to have a lawyer even if he couldn't afford one.

The judge denied Clarence's request for court-appointed counsel, and the trial went forward. The prosecution brought in two witnesses against Clarence. The first was Henry Cook of Panama City. Henry and Clarence knew each other. Henry testified that on the morning of June 3, he saw Clarence come out of the Bay Harbor Poolroom with a pint of wine in his hand, make a telephone call at the corner phone booth, wait, and then get into a taxi. After following Clarence to the corner, he went back to the poolroom and saw it had been broken into. The front was off the cigarette machine and the money box was on the pool table.

Clarence, representing himself, cross-examined Henry. He asked such questions as what Henry was doing outside the poolroom at five-thirty. Henry testified that he had been out all night dancing.

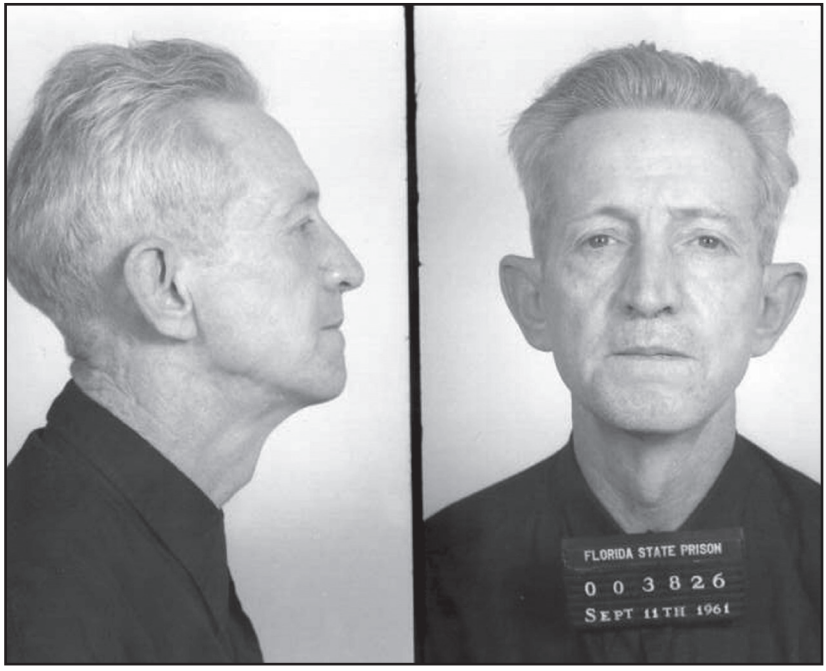
The other witness for the prosecution was Ira Strickland Jr., manager of the Bay Harbor Poolroom. Ira testified that he locked the place up at about twelve the night before. In the morning, he found that someone had smashed the window and broken into the cigarette machine and jukebox. The culprit had taken coins, but Ira didn't know how many.

Clarence called a few witnesses in his defense, including the police officer and his own landlady, who testified that he frequently left early in the morning to use the corner pay phone so he wouldn't wake the others in the house. She also testified that she had never seen him intoxicated.

Clarence then made a closing argument to the jury, stressing that he was innocent.

The jury found Clarence guilty.

The judge delayed sentencing him for three weeks to get a report on his past history. On August 25, without any further proceedings, the judge sentenced Clarence to the maximum sentence of five years in prison. Clarence was sent to the Florida state prison in Raiford, Florida.



Clarence Earl Gideon.

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Clarence went to prison with a furious and passionate belief that he was the victim of a great injustice inflicted upon him by the state of Florida.

While there, presumably with law books checked out from the prison library, he obtained a copy of the Supreme Court rules and handwrote his own appeal on lined paper provided by the prison.

"The question is very simple," he wrote to the Supreme Court. "I requested the court to appoint me [an] attorney and the court refused."

The Supreme Court agreed to hear Clarence's case, and immediately appointed a top constitutional lawyer to represent him.

On Monday, March 18, 1963, almost two years after Clarence's trial, the Supreme Court handed down its decision. In a case called *Gideon v. Wainwright*, the court decided that the Fourteenth Amendment—which guarantees due process but doesn't mention right to counsel—requires state courts to provide lawyers for criminal defendants who cannot afford their own.

This was, to say the least, a very controversial opinion. Many felt that the financial burden on states would be too great. Paying for lawyers for everyone who can't afford one would be enormously expensive. Critics of the opinion said taxpayers should not bear the burden of paying for lawyers to represent poor people. Those who hailed the decision as a step forward in securing personal liberty for all people felt that the system would not work if only the wealthy had lawyers.

Clarence's win in the Supreme Court did not mean he was free to walk out of prison. The ruling entitled him to a new trial, this time with a lawyer appointed by the court and paid for by the state of Florida.

To make sure Clarence had top-notch lawyers, the American Civil Liberties Union (ACLU) hired two lawyers to represent Clarence and sent them to Florida.

When everyone was gathered together in court, Clarence startled everyone by announcing that he didn't want the ACLU

lawyers. He wanted a local lawyer. And he knew who he wanted: W. Fred Turner.

The judge excused the ACLU lawyers and appointed W. Fred Turner. The trial was rescheduled to give Fred time to prepare for the trial.

Fred prepared by spending a full day nosing around Bay Harbor, talking to people, familiarizing himself with the Bay Harbor Poolroom.

The case came to trial on August 8, 1963.

Henry Cook, the witness who claimed to have seen Clarence walking from the poolroom the morning of July 3, once again took the witness stand.

Fred asked Henry how he came to be in front of the poolroom at 5:00 a.m. Henry said the friends he had been with all night dropped him off. Fred then asked why his friends dropped him off at the poolroom instead of his own home, which was a few blocks away.

Henry said his plan had been to hang out for two hours waiting for the pool hall to open at 7:00 am.

Fred next produced a surprise witness who hadn't been called the first time around: J. D. Henderson, owner of the Bay Harbor Poolroom.

According J. D. Henderson, Henry had been suspiciously hanging around the pool hall between 5:00 and 7:00 a.m. J. D. Henderson also testified that twelve bottles of cola, twelve cans of beer, five dollars from the cigarette machine, and sixty dollars from the juke box were stolen from the poolroom that night.

Henry's testimony, that he saw Clarence leave the poolroom with a fifth of wine, make a phone call, and get into a cab did not

account for what Clarence had done with all the beverages.

J. D. Henderson then testified that between eight and nine in the morning, Henry told him that he had been picked up by the police and questioned about the break-in. Henry also told J. D. that he had seen someone hanging around earlier, but he didn't know who it was. Then he said the person "looked like Clarence."

J. D. testified that sixty dollars had been stolen. When Clarence was arrested that morning, he had twenty-five dollars and twenty-eight cents, typical of his earnings from gambling.

In closing arguments, Clarence's lawyer presented his theory of the case: Henry Cook had been the one to break in and rob the poolroom. Henry saw Clarence make a phone call and get into a cab, so he pointed the finger at Clarence.

The jury was given their instructions: To convict Clarence, they had to believe beyond a reasonable doubt that he was guilty.

The jury deliberated for little more than an hour. They returned to the courtroom and announced their verdict.

Clarence Earl Gideon, they decided, was not guilty.

He walked out of the courtroom a free man.

As a result of Gideon's case, anyone accused of a crime but unable to afford a lawyer has a constitutional right to a court-appointed lawyer paid for by the government.

CHAPTER 11
CONVEYOR BELTS AND OBSTACLE COURSES

In 1933, in Florida, four African American men—Isiah Chambers, Jack Williamson, Charlie Davis, and Walter Woodward—were arrested and charged with murder. The police questioned them in Miami. They denied committing the murder. They were then questioned under harrowing circumstances: They were threatened with beatings and they were not allowed to sleep. Their family members were denied access to them. They were not allowed to talk to anyone except the police officers. At the end of a full week of such questioning, each them broke down and confessed.

Such stories were common, particularly in the segregated South, and particularly when the accused were African American men.

Then came the case of Ernesto Miranda.

On March 13, 1963, police in Phoenix, Arizona, suspected

Ernesto Miranda of kidnapping and attacking a ten-year-old girl. Miranda was interrogated for two hours by the police. At the end of the interrogation, he signed a confession admitting the crime. At trial, he claimed that he had not confessed voluntarily. He was found guilty based on his confession. His case went to the United States Supreme Court, which reversed Ernesto's conviction on the grounds that nobody had informed him of his right to remain silent, or his right to a lawyer.

The Supreme Court, in *Miranda v. Arizona*, ruled that citizens must be informed of their rights prior to being questioned by police, and any evidence or statement obtained prior to a suspect being read his or her rights is inadmissible in court.

This led to what are commonly called the Miranda rights, which are:

> ***You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford one, one will be appointed for you.***

The Court also made clear that there would be consequences if police officers failed to respect the rights of the accused. Any confessions or statements made by the defendant, for example, would not be admissible in court.

This ruling was highly controversial. The objection to decisions like *Miranda v. Arizona*, *Gideon v. Wainwright*, and *Mapp v. Ohio* is that it will become harder for the police to do their jobs, harder to extract confessions, and harder to obtain evidence. This, in turn, will make it harder to get criminals off the streets and into prison.

People who approve of the Supreme Court rulings in these

cases said it should be harder to put people in prison. They point to thFourth, Fifth, and Sixth Amendments to show that the founders of our nation were afraid of too much police control. They also believe that such cases offer protection to all citizens from unreasonable searches and from finding themselves in prison based on false accusation.

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These two conflicting views of the criminal justice system have been called the crime control model of criminal law and the due process model.

Under the crime control model, the ideal is perfect law and order. Preventing crime is the most important function of criminal law, because, according to this theory, without law and order, you can't have a free society and people can't feel secure. The crime control model assumes that crimes are committed by bad people who belong in jail, which in turn assumes that criminal laws represent absolute standards of right and wrong.

The crime control model values well-trained and efficient police squads that know how to investigate a crime scene, preserve evidence, question suspects, and efficiently figure out who most likely committed the crime so the culprit can be brought to justice.

A police department that frequently arrested people who were proven innocent would be considered an inefficient police department. A prosecutor who is continually losing the cases she brings to trial would be considered a bad prosecutor. People would wonder why she wasn't screening her cases better. People would wonder why the police weren't doing a better job with their investigations. Moreover, being arrested and charged with a crime

is a major disruption in people's lives, not to mention a source of humiliation and embarrassment. Bringing innocent people to trial harms the very people the criminal justice system is seeking to protect.

The ideal under the crime control model, therefore, is for police departments to develop such good investigating procedures that the innocent are quickly screened out and the only people arrested and brought to trial are those the police and prosecutors are fairly certain are guilty. This is also cost-effective: It is much easier and more efficient for police officers to get to the truth during pre-arrest investigations and questioning. Trials are expensive.

Plea bargains also make the system work even more efficiently. With a plea bargain, there is no trial at all—the accused agrees to plead guilty so that a trial can be avoided. There is a reason these are called plea bargains. Once a person has been charged with a crime, the prosecutor offers him or her a deal: If the accused will plead guilty, the prosecutor will lessen the charge and give a lighter punishment. Plea bargains lower the cost of bringing people to justice.

According to the Bureau of Justice and other estimates, 90 to 95 percent of all criminal cases are decided by means of a plea bargain.

Tough penalties help a prosecutor convince suspects to plead guilty. Most defendants accept a plea bargain partly because going to trial is perceived as risky. It is impossible to predict what witnesses will say, or what a jury will do. Moreover, the truth is not always easy to discover. Even eyewitness testimony can be unreliable—two eyewitnesses can see the same event differently. And of course, not all eyewitnesses are truthful. In short, the decision of any jury

and court depends on many factors that are out of the control of the accused.

Good surveillance also allows a police force to be more efficient. If, for example, police could see into homes and read private correspondence, they would be able to bring more lawbreakers to jail.

The efficiency required to imprison millions of people has been likened to an industrial assembly line, or conveyor belt, that quickly and effectively moves a product from beginning to end. The ideal of the crime control model, in fact, is a conveyor belt.

This very efficiency gives rise to objections to the crime control model. If, for example, the criminal justice system becomes so efficient and professional that a person charged with a crime and brought to court is most likely guilty, there might then be a presumption of guilt in the minds of the public and even the jurors. With plea bargains, there isn't even a trial with a jury: The person's guilt is, in a sense, decided by police and prosecutors.

People who favor the due process model are alarmed by the idea of a conveyor belt of justice. They don't want the police searching them too easily. They don't want to be surveiled while in their homes. They don't want the police intruding at all into their lives unless the police have good reason to do so. Many are also opposed to plea bargains. They want each person to have a jury trial, as guaranteed in the Constitution.

While the crime control method has been compared to a conveyor belt, the due process model has been compared to an obstacle course. The idea behind the due process model is to make it difficult, at each stage, for the government to deprive individuals of their property, their liberties, and their lives.

Courts are often called to weigh competing interests and theories. The need for crime control is therefore constantly balanced against the need for due process.