

# Undergraduate Education in Law and Psychology

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In 1981, Larry Wrightsman received a grant from the Exxon Foundation that relieved him of his teaching and administrative responsibilities for a year and enabled him to do two things that shaped undergraduate education in law and psychology. He developed a new undergraduate course in that field and sat in on classes at the University of Kansas Law School. Undoubtedly, the latter informed the former, and these two experiences jointly contributed to the first edition of Wrightsman's seminal textbook, *Psychology and the Legal System*, published in 1987.

Wrightsmen was not the first to author a textbook in psychology and law. That distinction belongs to Katherine Ellison and Robert Buckhout, coauthors of *Psychology and Criminal Justice*, published in 1981. Nor is he the only person to write a well-received textbook in this field. Other praiseworthy examples are *Psychology and Law* by Curt Bartol and Anne Bartol (third edition, 2003); *Forensic and Legal Psychology* by Mark Costanzo and Daniel Krauss (2012); *Forensic Psychology and Law* by Ronald Roesch, Patricia Zapf, and Stephen Hart (2010); and Wrightsman's text with coauthor Sol Fulero, entitled *Forensic Psychology* (third edition, 2009). But *Psychology and the Legal System* is the longest lived, best-selling, and arguably most influential text read by students in law and psychology courses across the country. We have coauthored recent editions of the textbook; the eighth edition was published in 2014.

We use this chapter to consider Larry Wrightsman's considerable contributions to undergraduate education in law and psychology. We trace growth in the field that has occurred contemporaneously with subsequent editions of Wrightsman's text.

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We then describe the important organizing framework featured in every edition of *Psychology and the Legal System*, namely the broad psychological and philosophical issues that Wrightsman termed “dilemmas” at the intersection of the two fields—and we drill down on two of them: rights of individuals versus the common good, and equality versus discretion. We illustrate the evolution of these two themes and provide exemplars from various editions of the textbook. In particular, we comment on the psychological science, case law, and legal policies relevant to those issues. One of our objectives is to use Wrightsman’s significant contribution as a vehicle for examining ongoing and vibrant debates in the field of psychology and law. Another is to illustrate how the two disciplines have independently and jointly examined topics of broad societal concern and provided complementary perspectives on their resolution.

## Growth of a Discipline

In 1988, Murray Levine, a contemporary of Wrightsman’s and prominent figure in the nascent field of psychology and law, reviewed the first edition of *Psychology and the Legal System* (Levine, 1988). He stated that a discipline comes of age when textbooks that convey the field’s collected wisdom become available, and he correctly forecast that publication of Wrightsman’s text would stimulate more courses in psychology and law at the undergraduate level. Indeed, *Psychology and the Legal System* has played an integral part in the discipline’s development by providing undergraduate students, some of whom go on to be productive and prominent scholars and practitioners, with their first exposure to the field. Not only has the textbook been sustained through eight editions but sales have increased with each subsequent edition. Though we lack data on the number of undergraduate offerings and textbook adoptions in the early years of the field’s development, we know that by the mid-1990s, more than 200 colleges and universities were offering courses in legal psychology for which Wrightsman’s text had been adopted (Fulero et al., 1999). A decade later, the sixth edition of *Psychology and the Legal System*, published in 2007, sold more than 13,000 copies. As textbook publishing moves into the digital marketplace, traditional sales will be displaced by digital books and individual chapter downloads from publishers’ Web sites, and interactive course Web sites into which textbooks will be fully integrated. The textbook, now entitled “*Wrightsmans Psychology and the Legal System*,” will continue its position of prominence and appear on such a platform (<http://www.cengagesites.com/academic/?site=5232>) in 2014 (Tim Matray, personal communication, November 5, 2012).

Looking beyond Wrightsman’s text, another way to track the growth of the field is to ask whether an undergraduate survey course is being offered in the top universities and colleges in the country. In 1999, Fulero et al. determined that among universities whose psychology departments had a doctoral program ranked among the top 25 in the USA, 60 % listed at least one formal undergraduate course in psychology and law and 16 % offered more than one such course. Almost all of these

departments also offered other courses that touched on legal issues, including those that focused on crime, law, legal policy, equity, or dispute resolution. At the time, there were fewer offerings in psychology and law at highly ranked liberal arts colleges across the country (i.e., only 2 of the 10 schools ranked highest by *U.S. News and World Report* included a course in the undergraduate curriculum), perhaps because no one among the faculty at these schools was qualified or available to teach such a course.

We recently updated these figures and determined that 52 % of the 25 highest ranked departments for graduate study in psychology currently offer an undergraduate course in psychology and law and 25 % offer at least two courses. (Harvard University takes top honors in offering several, including, in addition to “Law and Psychology”: “Free will, responsibility and law”; “The insanity defense”; “Censorship of obscene, blasphemous, incendiary materials: Legal, ethical, and policy issues”; and “Psychopaths and psychopathology: Legal and psychological issues.”) Course offerings at the ten highest ranked liberal arts colleges are still few and far between, although undergraduates at Claremont McKenna College are able to take both “Psychology and law” and “Social psychology and the legal system.”

We suspect that even in the absence of dedicated courses, large numbers of undergraduates are exposed to topics in psychology and law through other psychology courses. As an example, social psychology courses often include coverage of aggression and violence, prejudice and stereotyping that can lead to hate crimes, deception detection, and juror and jury decision making. The topics of eyewitness and false memory are common ingredients of coursework in cognitive psychology. It is routine to teach developmental and clinical material that is important in various kinds of forensic evaluation. For example, courses on psychological assessment may include topics such as malingering and defensiveness. Other questions such as why defendants waive *Miranda* rights or provide false confessions are among those that may be covered in psychology courses which include some focus on criminal behavior.

Another measure of the state of undergraduate education in psychology and law comes indirectly from the burgeoning numbers of students pursuing graduate study in the field. The Web site of the American Psychology-Law Society ([www.ap-ls.org](http://www.ap-ls.org)) lists 20 universities that offer Ph.D.s in psychology and law, 6 that offer Psy.D. degrees, 10 that feature joint J.D./Ph.D. programs, and 19 that offer M.A. degrees. The typical applicant to these programs has been exposed to some coursework in psychology and law at the undergraduate level, has gleaned hands-on experience by working as an undergraduate research assistant, and may have volunteered in a community setting with a connection to the legal system (e.g., a residential treatment facility, court-annexed program, or domestic violence shelter). The American Psychology-Law Society now sponsors an award for the best undergraduate paper in psychology and law, and its Web site describes resources and techniques for teaching undergraduates—both indicia of the important role of undergraduate education in the discipline. Some portion of this vitality stems from the fact that instructors have had access to Wrightsman’s trusted and balanced texts for 25 years and have used them to introduce thousands of undergraduate students to the discipline.

## Wrightsmen's Dilemmas Serve as an Organizing Framework

Professor Wrightsman's distinctive organizing framework appeared in the first edition of *Psychology and the Legal System* and has survived through the seven editions that followed. Included in the framework are four psychological and philosophical themes that arise at the intersection of the two fields. These themes unify many of the research findings, policy decisions, and judicial holdings that are detailed in the texts. Wrightsman termed them "dilemmas." They include (1) discovering the truth versus resolving conflicts; (2) science versus the law as a source of decisions; (3) the rights of individuals versus the common good; and (4) equality versus discretion. According to Kipling Williams, who reviewed the second edition of *Psychology and the Legal System* (published in 1991), "[t]he dilemmas are thorny and intriguing and, as a group, offer a coherent theme that nicely envelopes many issues throughout the text" (Williams, 1992, p. 302). We explore these four dilemmas in this chapter, including both the psychological and legal issues they raise. This exploration provides the occasional opportunity to consider how the evidence and thinking regarding these dilemmas has changed over the course of 25 years and eight editions of the text.

### *Discovering the Truth Versus Resolving Conflicts*

Why do individuals, institutions, and organizations rely on a legal system to handle disagreements and disputes they cannot resolve for themselves? What are their goals and objectives? And what principle should direct those resolutions: a search for the truth or an attempt to resolve irreconcilable differences? Naïve observers of the legal system may assume that its purpose is to determine the truth underlying a factual or philosophical dispute. But as Wrightsman and subsequent authors have pointed out, the truth is subjective and elusive, and subjectivity and ambiguity are likely to be a cause of the dispute in the first place. Had the parties been able to reconcile themselves to one version of the "truth," there would have been no dispute. More seasoned observers of the legal process understand that an important objective is to provide social stability by resolving conflicts. This perspective is embodied in the words of Supreme Court Justice Louis Brandeis, who once wrote that "it is more important that the applicable rule of law be settled than [that] it be settled right" (*Burnet v. Coronado Oil and Gas Co.*, 1932, p. 447).

Discussion in *Psychology and the Legal System* of the preference for dispute resolution at the sake of discerning an illusory truth leads directly to coverage of the adversary system and the associated incentives for advocates to uncover and present all information favorable to their side of a dispute. It provides an opportunity to consider notions of, and psychological research findings related to, both procedural justice and restorative justice, a novel perspective on dispute resolution. It explains why plea bargaining and settlement negotiations are mainstays of our legal system.

Coverage of these issues allows an assessment of bargaining strategies, satisficing, the role of remorse, efficiency concerns, and the social science findings relevant to those topics.

### ***Science Versus the Law as a Source of Decisions***

Turning to another dilemma, one can ask whether scientific research findings or legal precedents provide the more satisfying and defensible source of knowledge for making decisions about important societal concerns. In reality, the options should not be drawn quite that starkly because legislators, policy makers, and judges sometimes—though less often than psychologists might wish—consider findings and recommendations of psychological scientists and practitioners in formulating their decisions. But the options associated with this dilemma present a number of sharp contrasts between the two disciplines. Wrightsman and the authors of more recent editions of *Psychology and the Legal System* outline these contrasts in the introductory chapter of the text and refer to them again at various points in the books.

One obvious distinction is that psychology, as an empirical science based on experimentation and observation, deals in probabilistic information whereas the law, reliant upon the principle of *stare decisis* and analyses of how prior judgments inform later decisions, uses absolutes. As a result of these different emphases, the law sometimes asks questions of psychologists that they are ill equipped to answer. For example, in cases where there is concern about a defendant's future risk of harming others, lawyers, judges, probation officers, or parole boards may need to make an either/or determination on some aspect of this issue that will inform decisions about treatment, incarceration, and release. Not infrequently, psychologists are asked to weigh in on these choices. But the need for an absolute, either/or response makes many psychologists uncomfortable, and some are adamant that their skills do not permit such a conclusion. Psychologists prefer to deal in likelihoods and probabilities. When students understand these differences, they are better able to evaluate the contributions and limitations of psychologists who conduct assessments in forensic settings and who share their findings with courts and boards.

### **The Rights of Individuals Versus the Common Good**

Identifying this first of the two major dilemmas, Wrightsman wrote in his first edition that the USA is one of the most individualistic societies in the world. Liberty is identified as a core value in the Declaration of Independence, and embedded in the Constitution and Bill of Rights. At the same time, however, citizens value public safety. In addition, there is a cost to society that would result from allowing people unlimited freedom to engage in risky behavior. Whether the harm would result to other citizens or to the risk takers who might harm themselves, the consequences to

society could be both frightening and unaffordable. So the conflict between the rights of the individual to behave as he or she chooses versus the needs of our citizens to be safe and free from unnecessary costs constitutes a difficult and ongoing tension.

Wrightsmen cited several examples of regulations or policy decisions that illustrate this conflict. Why do we require the use of seat belts for those who drive cars? Why do a number of states prohibit first cousins from marrying? Why would a school prohibit a student whose sister was diagnosed with the AIDS virus from attending school? These three questions were used in the first edition of *Psychology and the Legal System* to illustrate the core conflict between individual rights versus the common good.

An analysis of each example begins with the individual rights that are involved. The right to choose how to behave may seem straightforward when it does not involve the potential to harm others. So the example of seat belts, for instance, is less complex than the question of whether first cousins should be allowed to marry. In the latter instance, there is a risk of having children who would be affected by a genetic disorder resulting from two recessive parental genes, which related individuals are more likely to share. It is also less complex than the question of whether a child who may transmit a life-threatening virus should be allowed to attend school with other children and potentially place them at risk. (Knowledge about how AIDS is transmitted, as well as how to intervene effectively in order to contain the virus, has increased considerably since the first edition was published in 1987.)

But the example of seat belts contains the risk of potential harm to self. Those who do not use seat belts when driving are at greater risk for death or serious injury in an accident. Costs to society from such accidents can include lost wages, higher insurance premiums, and disability payments to the injured individual or that person's dependents. The good of the larger society, in other words, can be adversely affected even by behavior that risks harming the individual actor but no other citizens.

### ***U.S. Supreme Court Decisions Concerning Individual Rights and the Common Good***

The emphasis on the rights of individuals versus the common good may be seen in two broad themes characterizing the decisions of the United States Supreme Court in the area of criminal justice. During the tenure of Earl Warren as Chief Justice (1953–1969), the Court's decision making had a noteworthy "due process" flavor; the rights of the accused were, in many respects, valued more than the enforcement of laws with flawed due process. For example, the Court held in *Gideon v. Wainwright* (1963) that states must provide indigent defendants with a defense attorney at state expense. This decision meant that no criminal defendants would lack an attorney to represent them. In one of the most famous cases in American criminal jurisprudence, the Court also held, in *Miranda v. Arizona* (1966), that defendants in custody must be informed of their Fifth and Sixth Amendment rights before police can question them and use their responses as incriminating evidence.

Following the retirement of Chief Justice Warren in 1969, President Nixon nominated Warren Burger as the next Chief Justice. This began an era in which, as Wrightsman described in his first edition, the priority on individual rights was superseded by an emphasis on the rights of victims, which he termed “crime control.” In retrospect, from our current perspective in 2015, it is probably more accurate to say that the Burger Court shifted from a clear emphasis on individual rights under Warren to a greater balance between individual rights and crime control. Certainly many of the Burger Court’s decisions reflected conclusions that seem more consistent with crime control. Requiring drivers at an accident scene to provide personal information did not violate the Fifth Amendment right to avoid self incrimination (*California v. Byers*, 1971), nor did evidence that an individual refused a field sobriety test (*South Dakota v. Neville*, 1983). Unanimity was not required for a state jury to convict (*Apodaca v. Oregon*, 1972). States could ban sexual images of minors even when they did not meet obscenity standards (*New York v. Ferber*, 1982). Government agent involvement in a criminal conspiracy did not constitute entrapment (*U.S. v. Russell*, 1973). Prosecutors could threaten criminal defendants with even more serious charges in the attempt to persuade them to plead guilty (*Borderkircher v. Hayes*, 1978). A verdict of Not Guilty by Reason of Insanity created a rebuttable presumption of ongoing dangerousness sufficient to justify continued involuntary hospitalization (*Jones v. United States*, 1983). Capital punishment was constitutional if the sentencing decision was made in consideration of evidence about the specific defendant, rather than automatically assigned based upon conviction for a certain kind of offense (*Gregg v. Georgia*, 1976; *Woodson v. North Carolina*, 1976). Each of these decisions could be fairly described as prioritizing public safety, victims’ rights, and crime control over the rights of individual defendants. Each of them was also made prior to the publication of the first edition of *Psychology and the Legal System*, allowing Wrightsman to describe them in detail as representative of the era in which public safety and victims’ rights were prioritized.

Other decisions made by the United States Supreme Court during the Burger era, however, demonstrated that Wrightsman’s hypothesized conflict between crime control and individual rights had not shifted entirely toward the former. Capital punishment was deemed cruel and unusual when administered as an automatic sentence associated with a given kind of offense (*Furman v. Georgia*, 1972); it was another 4 years before the Court held (under *Gregg* and *Woodson*) that capital punishment assigned through an individualized consideration of the convicted defendant did pass Constitutional muster. In a subsequent series of decisions, the Court further narrowed the applicability of the death penalty. Capital punishment for the offense of rape was deemed excessive and, hence, cruel and unusual (*Coker v. Georgia*, 1977). The Eighth Amendment requires that applicable mitigating evidence be presented at capital sentencing (*Lockett v. Ohio*, 1978). Information obtained for another purpose (in this case, an evaluation of the defendant’s competence to stand trial), for which notification of Fifth and Sixth Amendment protections had not been provided to the defendant, was deemed inadmissible at capital sentencing (*Estelle v. Smith*, 1981). It is noteworthy that each of these decisions

was associated with capital punishment. One might wonder whether this kind of sentence constituted the exception to Wrightsman's broader hypothesis that the Court, and our larger society, was more public safety-oriented during this period.

The Court did issue some other decisions that were more consistent with a defendant rights perspective. Juveniles charged with adult offenses could be convicted only if each element of the offense was proven beyond a reasonable doubt (*In re Winship*, 1970). Defendants could not be confined indefinitely as incompetent to stand trial (*Jackson v. Indiana*, 1972), and were also entitled to wear street clothing rather than jail garb during a trial (*Doyle v. Ohio*, 1976), have access to counsel during police interrogation after indictment (*Brewer v. Williams*, 1977) and at a lineup after indictment (*Moore v. Illinois*, 1977), and remain silent following the administration of *Miranda* warnings and not have this silence used as evidence against them (*Doyle v. Ohio*, 1976). Prosecutors could not use peremptory challenges to exclude potential jurors based on race (*Batson v. Kentucky*, 1986). However, these may be seen as nuances within the broader trend that Wrightsman outlined in the first edition. The prevailing emphasis during the Warren years was defendant rights; this shifted significantly during the Burger years. But this reminds us that Wrightsman's identification of these broad trends was done with full awareness that there were exceptions to the trends even within those eras.

The trend in the direction of greater emphasis on crime control continued in the Supreme Court decisions following the 1986 appointment of William Rehnquist as Chief Justice, a position he kept until his death in 2005. As states such as California passed sentencing laws mandating life incarceration for the third felony conviction ("three strikes" laws), the Rehnquist Court upheld the constitutional basis of such laws (*Ewing v. California*, 2003; *Lockyer v. Andrade*, 2003). The Court also restricted the appellate rights of death-sentenced individuals who exhausted their appeals and then subsequently produced new evidence (*Herrera v. Collins*, 1993), and more generally upheld the constitutionality of the death penalty (*McCleskey v. Kemp*, 1987), discussed in the second and third editions of *Psychology and the Legal System*. The Rehnquist Court did have the opportunity to limit the *Miranda* rights notification process, but instead held that the current process was appropriate (*Dickerson v. United States*, 2000).

It might be assumed that the Supreme Court, under Chief Justice Roberts (2005-present), might continue the trend of emphasizing crime control over the rights of individual defendants. The reality, as judged by the Court's decisions during the last 10 years, has been somewhat more complex—just as we saw exceptions to the broad distinction Wrightsman identified in his first edition between defendant rights and public safety, there continue to be decisions which remind us that such an observation should be used in combination with a nuanced approach to legal decision making. To be sure, the Court has decided the occasional case in a direction that clearly prioritizes crime control. For example, in *Leal Garcia v. Texas* (2011), the Court held that a stay of execution need not be issued in the case of a Mexican citizen convicted of a capital offense in the USA when that citizen was never advised of his Vienna Convention right to contact his consulate. The International Court of Justice had found that the USA had violated this right by failing to inform Mr. Garcia that he could, under international law, contact his consulate.



However, the Court also issued a series of decisions about adolescent offenders holding that they may not, due to developmental immaturity, receive the same criminal sanctions as adults even when committing comparable offenses. In *Roper v. Simmons* (2005), the Court held that adolescents younger than 18 who commit capital offenses are not eligible for the death penalty. In the case of *Graham v. Florida* (2010), the court extended the Roper decision to indicate that adolescents who committed non-homicide offenses could not receive a sentence of life incarceration without the possibility of parole. Finally, the Court addressed the question of whether adolescents who commit homicide offenses could receive an automatic sentence of life without parole upon conviction, deciding in *Miller v. Alabama* (2012; described in the eighth edition of the text) that such a sentence could not be assigned automatically for a homicide conviction and must (if assigned) be based on an individualized determination of the youth's culpability and other considerations. Each of these decisions was substantially influenced by the growing body of scientific evidence documenting the differences between adolescence and adulthood in relevant areas such as impulse control, peer influence, perspective-taking, and sense of time (Scott & Steinberg, 2008; Steinberg, 2009). Wrightsman's emphasis on scientific evidence as an important contributor to legal decision making, clearly visible throughout all five editions of *Psychology and the Legal System* which he wrote, was quite apparent in the Court's decisions in these cases involving adolescence.

Identifying the conflict between individual rights and crime control provided a useful lens through which to consider the law and our larger society. We now turn to the second major conflict identified by Wrightsman: equality versus discretion.

## Equality Versus Discretion

Balancing the desire for equal treatment under the law and acknowledgment that every case presents unique circumstances relevant to fair disposition creates tension and conflicts. These two priorities—equality and discretion—are both desirable and often mutually exclusive. They form the core concern of the second of Wrightsman's major dilemmas: since one cannot simultaneously maximize both equal treatment and individualized justice, which should prevail and when? What are the broader consequences, in terms of fairness and *perceptions of* fairness, for preferring one priority over the other?

The first edition of *Psychology and the Legal System* described situations in which equality has prevailed—when rich and powerful people are treated harshly by the legal system despite their obvious resources, for example. It detailed the cases of Patty Hearst, heiress to a publishing fortune, who was convicted and imprisoned for armed robbery of a bank, and Vice-President Spiro Agnew, who was forced to resign after pleading no contest to a charge of tax fraud. Since publication of the first edition, many governmental and corporate bigwigs have been caught up in scandals of their own making and in the resultant legal consequences, providing an ongoing source of examples for the textbook. These cases show that regardless of

status, wealth, or standing, all people are expected to abide by the same laws and, if they violate those laws, be subjected to the same penalties and loss of freedoms as the average citizen.

To illustrate the importance of discretion, the first edition of the text asked students to consider two seemingly similar cases that involved murders of husbands at the hands of their wives. In both instances, the women had been long-suffering victims of domestic violence who had sustained injuries serious enough to require hospitalizations. They both killed their husbands as they slept. Both women claimed self-defense. (In cases involving domestic violence, the requirement that the act of self-defense must be proportionate to an immediate threat has occasionally been modified to encompass a victim's subjective belief that she was in imminent danger of death or great bodily harm [Slobogin, 2010].) But here the stories diverge. Joan Hodges, a 51-year-old mother and grandmother who shot her husband of 33 years as he lay sleeping, was convicted of voluntary manslaughter. By contrast, Francine Hughes, a 30-year old mother of three, who doused her husband's bed with gasoline and ignited it, killing him and burning down her house, and who drove to the county jail to turn herself in, was acquitted. (The latter formed the background for the movie *The Burning Bed*, starring Farrah Fawcett as Francine Hughes.)

Wrightsmen used these examples to underscore the fact that two equally desirable values—equality and discretion—invite comparisons and contrasts and reveal contradictions and inconsistencies. The domestic violence cases which seem similar on the surface may have had distinctive circumstances that allowed jurors, in their discretion, to reach different verdicts. Wrightsmen suggested that one may have been a desperate response to 20 years of physical abuse while the other may have been an impulsive quest for freedom from a contractual obligation. Regardless of the *precise* reasons for the apparently disparate verdicts, they illustrate how the circumstances of each case can call for particularized justice and how, in this equation, equality as a priority is given less attention.

In addition to their discussion of jurors' discretion, the texts ponder the value of discretion manifest in the actions of other legal players. Discretion is vested in police officers deciding who to stop, frisk, and arrest, and in prosecutors opting to charge some arrestees and not others, choosing which charges to file against those who are indicted, and also deciding which charges to dismiss. Prison officials have discretionary authority to award or deny "good time," grant furloughs, and move prisoners into and out of treatment programs. Probation officers make discretionary sentencing recommendations in presentence investigative reports and decisions concerning probationers' actions, and parole boards decide which inmates to release and under what conditions. Governors are granted discretion in the decision whether to commute a death sentence to a life term.

The impact of discretionary judgment is perhaps most apparent in the sentences imposed by judges on convicted offenders, and the topic of sentencing disparity has occupied a central focus in coverage of the equality/discretion dilemma through subsequent editions of *Psychology and the Legal System*. In part, this choice reflects the availability of social science data: because this process is highly visible and results are recorded in accessible ways, researchers have examined sentencing

patterns over time and across jurisdiction to determine what factors—legal, psychological, and philosophical—drive judges' choices.

Sentencing options include probation, fines, suspended sentences, restitution, community service, and incarceration, and the harshness of those sentences has varied among locations, over time, and across different judges. Because the majority of crimes are adjudicated in state courts, sentencing options are typically determined by state legislatures and arguably reflect the sentiment of the populace. As a result, offenders sentenced in a part of the country with more lax ideologies will receive milder sanctions than offenders who commit the identical crime but are sentenced in states and regions with stricter laws.

The first edition of *Psychology and the Legal System* illustrated this disparity in the sentences imposed on Vietnam War protestors who resisted the draft in the late 1960s and early 1970s. Penalties at the time included prison time and probation. In Oregon, of 33 convicted draft evaders, more than half were put on probation and none received a prison sentence of more than 3 years. By contrast, in the southern district of Texas, “a region that bristled with strong patriotic sentiments” (p. 16), none of 16 convicted draft evaders were given probation and 14 received the maximum sentence allowed by law, 5 years imprisonment. In the same part of the country and during the same period, all convicted draft dodgers in Mississippi were given the maximum of 5 years.

Disparity in judicial sentencing has also waxed and waned over time, reflecting changing societal preferences for treating criminals who committed similar crimes in equivalent ways and, alternatively, for recognizing the impact of individual and group characteristics and the need for personalized sanctions. As priorities have changed, sentencing schemes have also changed and now many variants in sentencing laws exist in this country. But that has not always been the case.

### ***When Rehabilitation Was Paramount: Indeterminate Sentencing***

Between the mid-nineteenth and mid-twentieth centuries, both the states and the federal government embraced indeterminate sentencing policies based on fundamental ideals of individualization and rehabilitative potential. The Model Penal Code, developed in the 1950s, listed these three goals as essential considerations in sentencing: “to prevent the commission of offenses; to promote the correction and rehabilitation of offenders; to safeguard offenders against excessive, disproportionate or arbitrary punishment.”

Indeterminate sentencing plans allowed for tailored dispositions depending on the nature of the crime, impact on the victim, and characteristics of the offender. At every stage in the process—from legislatures setting maximum sentences through parole boards determining release dates—officials were granted broad authority to consider the treatment needs of offenders and the risks to public safety these offenders posed. In addition to prioritizing rehabilitation and public safety, these laws put decision-making authority in the hands of authorities who were closest to the

offender and had the best knowledge of his or her circumstances (Tonry, 1996). Such sentencing schemes were influenced in part by psychological explanations of criminality, including the mental health problems experienced by offenders.

Under indeterminate sentencing laws, offenders were subject to an extensive range of potential punishments and imprisonment possibilities with actual release date to be determined at a later time. Against this backdrop of broadly defined statutory limits, judges were granted significant authority to impose sentences that they deemed appropriate to the offender and the crime, and these outcomes were largely unreviewable. But by the early 1970s, after decades of relatively unfettered discretion, critics alleged that uncertainty and disparity in sentence severity had resulted and that limitations in judges' discretion were long overdue (Frankel, 1972).

### ***When Punishment Was Paramount: Determinate Sentencing***

Sentencing priorities began to shift in the mid-1970s as public confidence in the criminal justice system began to wane and these disparities in outcomes collided with rapidly rising crime rates and questions about the effectiveness of rehabilitation. Some of the disparities resulted from differences in the attitudes and values of judges and parole boards and were linked to extralegal factors such as defendants' gender, race/ethnicity, and socioeconomic status (Peterson & Hagan, 1982; Wheeler, Weisburd, & Bode, 1982). Rising crime rates and the resultant "tough on crime" rhetoric adopted by many legislators refocused public attention on the need to punish criminals at levels commensurate with the perceived severity of their offenses. Concerns about treatment effectiveness, characterized at their most extreme by the widely held perception that imprisonment does nothing to rehabilitate inmates (von Hirsch & Hanrahan, 1981), further diminished preferences for indeterminate sentencing.

Reacting to increasingly vocal calls for incapacitation and "just deserts" punishment, ten states adopted determinate sentencing laws between 1976 and 1984 and all abolished parole (Marvell & Moody, 2002). Under these laws, which granted judges only very limited discretion, offenders were sentenced to a set term of imprisonment rather than to a range of years, and there was no opportunity for early release by a parole board. Other states followed, and by the mid-1980s, every state in the USA except one had enacted at least one mandatory penalty law (Shane-Dubow, Brown, & Olsen, 1985), though these laws differed in important ways. As a result, there was a veritable patchwork of sentencing laws in place across the country during the last quarter of the twentieth century, though most were intended to ensure predictability in sentencing, eliminate disparities, and provide certain and "just" punishments.

The federal government also transitioned to a determinate sentencing system when Congress passed the Sentencing Reform Act of 1984. The Act created the U.S. Sentencing Commission (first described in the third edition of *Psychology and the Legal System*, published in 1994), an independent expert panel responsible for

devising a new sentencing scheme. The objectives of the Commission were decidedly different from those of the American Law Institute's Model Penal Code of the 1950s. The first three goals were: (a) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (b) to afford adequate deterrence to criminal conduct; and (c) to protect the public from further crimes of the defendant. The so-called Federal Sentencing Guidelines, which went into effect in November of 1987, allowed judges to take into account the nature of the offense and the offender's criminal record, and required them to impose a sentence within a range in which minimums and maximums were predetermined. For example, the sentencing range for a convicted armed bank robber with no prior convictions was 46–57 months.

But many judges balked at the rigidity of these requirements, complaining that the Guidelines restricted their ability to attend to the particular characteristics of a defendant and his or her situation, and to determine a sentence that took those features into account. As a result, deviations from the Guidelines were not uncommon. But the opportunity to deviate led predictably to unequal dispositions. Thus, although an objective of the Guidelines was to reduce unwarranted disparities based on offenders' extralegal characteristics, evaluations of sentencing data demonstrate that such disparities continued into the 1990s. For example, Mustard (2001) examined the sentences imposed on more than 77,000 federal offenders between 1991 and 1994 and found disparities involving race, gender, and ethnicity. After controlling for a large number of other variables, Mustard determined that the average sentence for a White defendant was 32.1 months, whereas Hispanics were sentenced, on average, to 54.1 months, and African American defendants received sentences that averaged 64.1 months. Black defendants were more likely than others to receive a harsher penalty than specified by the Guidelines.

In the mid-1980s, in response to public outcry over the crack epidemic and fear of AIDS being spread by illegal drug use, Congress also passed a series of laws requiring mandatory minimum sentences for the distribution or import of crack, powder cocaine, and other abused substances based on the quantity of drugs involved, rather than the offenders' level of culpable involvement. This action was mirrored in state laws, which also have mandatory punishments for drug possession. In fact, most mandatory penalty laws enacted in the 1980s and 1990s concerned drug crimes and these laws are responsible for incarcerating hundreds of thousands of low-level, nonviolent drug offenders who are now serving lengthy prison sentences with no possibility of parole (Mascharka, 2001), although President Obama in 2015 called for leniency for these offenders.

Some states have embraced these harsh drug sentencing schemes more fervently than others. The federal government and the states of California, New York, and Michigan have been singled out for their particularly harsh sentencing structures. The third edition of *Psychology and the Legal System* described a prototypical case from Michigan. The case involved Ronald Harmelin, who appealed his sentence of life without parole handed down as part of Michigan's tough antidrug laws, to the United States Supreme Court (*Harmelin v. Michigan*, 1991). Harmelin argued that as a first time offender selling only small amounts of cocaine to friends, his life

sentence was significantly disproportionate to the severity of his offense. He argued further that mandatory sentencing statutes deny judges any ability to consider mitigating factors, so his sanction constituted cruel and unusual punishment under the Eighth Amendment. But by a 5-4 vote, the Court turned aside Harmelin's appeal. Writing for the majority, Justice Anthony Kennedy underscored that states have discretion to impose whatever prison terms they believe are legitimate, regardless of whether state-to-state variations will result and offenders be treated differently in different jurisdictions. According to Justice Kennedy, only at the extremes (for example, a life sentence for shoplifting), are severe mandatory punishments unconstitutional. Importantly, Justice Kennedy factored social science data on drug-related arrest rates into his decision. These data showed that in Detroit in 1988, 51 % of male arrestees and 71 % of female arrestees tested positive for cocaine. Recognizing a connection between cocaine use and crime, Justice Kennedy determined that Michigan's harsh antidrug law that made no allowance for mitigating factors was rational and constitutional.

Mandatory sentencing laws take other forms as well. Some impose incremental penalties on convicted offenders who meet certain criteria such as using a firearm in the commission of a felony. Others mandate significant penalty enhancements for offenders with prior convictions. The first "three strikes" law was passed in Washington State in 1993, and California's infamous statute was enacted by referendum in 1994. By 1996, approximately half of the states and the federal government had some version of a three-strikes law (Chen, 2008). These laws, described in the fourth edition of *Psychology and the Legal System* published in 1998, typically impose life sentences or allow for parole only after a specified, lengthy term of incarceration for offenders convicted of a third felony and whose first and second felonies had been serious. Proponents claim that these laws reduce crime rates because they deter or incapacitate the most dangerous felons and ensure that recidivists actually serve out their terms. Importantly, they also claim that three-strikes laws reduce judicial discretion and limit the probability that parole boards release violent offenders back into the community (Kovandzic, Sloan, & Vieraitis, 2004).

But empirical analyses of the impact of California's three-strikes law reveal no appreciable drop in crime rates, nor enhancement in public safety (Kovandzic et al., 2004; Tonry, 2009). Why? Criminals rarely contemplate the possibility that they will be caught, and the law targets offenders who are past the peak age of offending and are committing fewer crimes. (It takes some time to amass the first two strikes.) Similar conclusions have been reached concerning the deterrent effects of mandatory sanctions in drug crimes (Blumstein, 1994; Tonry, 2009). Drug offenders are particularly insensitive to the deterrent possibility of mandatory sanctions and will risk arrest, imprisonment, injury, and even death to reap the economic gains of drug trafficking.

Nor have mandatory sentencing laws reduced disparities in outcomes of comparable cases, because restricting judicial discretion has simply broadened prosecutors' discretion. Some prosecutors, believing that mandatory penalties are too severe in certain cases, either agree to dismiss charges subject to the penalty or not file those charges in the first instance. Other prosecutors make different choices. The

fourth edition of *Psychology and the Legal System* acknowledged this reality in quoting prominent law professor Susan Estrich: “Discretion in the criminal justice system is like toothpaste in the tube. Squeeze it at one end and you end up with more somewhere else. Take away judges’ discretion and prosecutors get more” (p. 16).

Finally, mandatory penalty laws have had a number of unintended consequences. As described in the fourth edition, more than half of third strikes have fallen on offenders who commit, as their third-strike crime, a nonviolent offense such as marijuana possession or petty theft (Legislative Analyst’s Office, 2005). The text describes the cases of two California men with multiple prior convictions, one of whom was sentenced in 1995 to 25 years to life in prison for stealing a piece of pizza and the other who received the same sentence for shoplifting two packs of cigarettes. According to Professor Franklin Zimring of the University of California at Berkeley, “We’re worried about Willie Horton, and we lock up the Three Stooges” (Butterfield, 1996, p. A8). In 2012, Californians voted overwhelmingly in favor of a ballot measure to revise the three-strikes law and require that a third strike be imposed only for a serious or violent felony.

Other societal costs associated with mandatory sentencing laws include both direct and indirect fiscal impacts on state and local governments. The Legislative Analyst’s Office estimates that additional operating costs resulting from California’s three-strikes laws total \$500 million annually. A significant contributor is the growing and aging prison population—and costs are expected to increase as the “three-strikes” population continues to age. In addition, some data suggest that three-strikes laws are applied in a racially discriminatory fashion (Legislative Analyst’s Office, 2005).

### ***Recent Reforms in Sentencing Policies***

There have been significant reforms of mandatory sentencing policies in recent years, particularly for drug crimes and in states that had some of the harshest penalties (Mauer, 2011). New York has scaled back the so-called Rockefeller Drug Laws, originally adopted in 1973, that served as a blueprint for other severe penalties for drug offenses. Michigan reformed its “650 Lifer” law that mandated a life sentence for anyone, including a first time offender, convicted of selling 650 g of cocaine or heroin. Californians voted in 2000 to endorse treatment as an alternative to incarceration for low-level drug offenders. Consistent with these decisions and as noted previously, appellate courts have deemed as unconstitutional state laws that mandate life sentences without parole for juvenile offenders (e.g., *Miller v. Alabama*, 2012). In recent years, federal sentencing policies have become somewhat less punitive as well.

Two landmark U.S. Supreme Court decisions of the mid-2000s, introduced in the sixth edition, significantly altered the landscape regarding mandatory sentencing schemes in this country. In *Blakely v. Washington* (2004), the majority held that any fact that increases the penalty beyond the maximum prescribed by Washington State’s sentencing guidelines must be determined by a jury. Dissenters forecast the

diminution in legislators' ability to establish uniform sentencing guidelines and the eventual demise of determinate sentencing schemes (Berman & Chanenson, 2006). But the furor surrounding this case was quickly overshadowed by the Court's consideration in the following term of how *Blakely* applied to the U.S. Sentencing Guidelines. In *U.S. v. Booker* (2005), the Court applied the *Blakely* requirement that a jury must determine any fact that increases a defendant's penalty beyond the statutory maximum and ruled that the guidelines were thus not binding on judges, but merely advisory. According to the majority, district court judges are required to "impose a sentence sufficient, but not greater than necessary, to accomplish the goals of sentencing." The decision explicitly directs judges to consider "the nature and circumstances of the offense, the history and characteristics of the defendant, the sentencing range established by the Guidelines, and the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."

To the extent that judges believed that previously mandated sentences for a particular combination of offense seriousness and offender criminal history were excessively punitive, their sentences post-*Booker* should show downward departures from the sentencing guidelines. In fact, downward deviations doubled between 2003 (2 years prior to the *Booker* decision in which downward departures occurred in 7.5 % of cases) and 2009 (4 years post-*Booker* in which 15.9 % of cases had downward deviations (Berman & Hofer, 2009).

Has the opportunity for judges to exercise broader discretion resulted in an increase in "unwarranted sentence disparities" among similarly situated defendants? Using data from the U.S. Sentencing Commission and examining trends over four periods since 2002, Ulmer, Light, and Kramer (2011) found that although there are substantial interdistrict variations in sentencing patterns and in the frequency of Guideline deviations, those disparities have not increased in the wake of *Booker*. Nor has there been any increase in disparities based on extralegal factors such as gender, race, and ethnicity since judges have been granted more discretion. In fact, differential sentencing as a function of gender and race decreased slightly between 2002–2003 and 2005–2008. Another consistent finding is that judges are sentencing drug offenders to shorter prison terms than prior to *Booker*, a reflection of their belief that Guideline sentences for drug crimes were overly harsh. Finally, it is worth noting that since they have been untethered from mandated guidelines, judges have been able to use a variety of rationally based indicators to inform their sentencing decisions. So, for example, an offender's employment status, family and community ties, drug and alcohol dependence, and mental and emotional wellbeing are mentioned in a larger proportion of cases post-*Booker* than prior to *Booker* (Hofer, 2007).

## Conclusion

Sentencing priorities and practices have vacillated over the past 25 years as societal concerns about crime and public safety and beliefs about the effectiveness of treatment and punishment options have waxed and waned. Other criminal justice



policies and legal decisions have also changed in important ways over the last two decades. Those who read any particular edition of Wrightsman's textbook will learn about these changing patterns and about the nature of sentencing laws in effect at the time of publication. But a 28-year, 8-edition overview reveals that in his initial formulation of core dilemmas, Wrightsman established a durable and compelling framework that is useful in raising critical questions, encouraging analytic thinking, and demonstrating the value of empirical research to address complex legal issues.

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