



Is a person who kills another in a bar brawl a greater threat to society than a business executive who refuses to cut into his profits to make his plant a safe place to work? By any measure of death and suffering the latter is by far a greater danger than the former.

—Jeffrey Reiman<sup>1</sup>

CHAPTER  
**8**



# Critical Approaches to Law and Crime

## Objectives

- Understand the difference between a consensus and conflict view of society, and the core themes of critical theories. **Pg. 170**
- Recognize how conflict among different interest groups shapes the content of the law and the operation of the criminal justice system. **Pgs. 171–173**
- Understand the evidence regarding the relationship between race, class, and criminal justice outcomes. **Pgs. 173–177**
- Know how radical criminologists explain the law, criminal justice system, and criminal behavior. **Pgs. 179–185**
- Recognize extensions of radical theory, including peacemaking criminology and critical realism. **Pgs. 185–186**
- Appreciate how gender may shape both criminal justice processing and theories of crime. **Pgs. 187–190**
- Link specific critical theories with their policy implications. **Pgs. 170–191**

## Introduction

Are the crimes of wealthy individuals and corporate leaders treated with kid gloves compared with typical street crimes? If so, why does this situation exist? How did marijuana come to be legalized in some states but not others? The theories in this chapter raise just such questions. Critical approaches to criminology discuss why certain acts are illegal while others are not. Furthermore, they note that the criminal justice system only targets certain laws and certain individuals for full enforcement. In seeking to understand the content of the law and the operation of the criminal justice system, critical approaches are quite different from the mainstream theories covered in previous chapters.

Critical theories gained popularity in the United States in part because of the social context of the 1960s and 1970s. Prior to that time, American criminology was dominated by anomie or strain theories of delinquency and crime. Criminologists such as Cloward and Ohlin argued that broad social reforms, including the reduction of poverty, were necessary to reduce crime. Support for their Mobilization for Youth program and the general “war on poverty” indicated that many agreed with their position. By the 1970s, however, the social context had changed dramatically. The political vision of a “great society” wilted under the reality of the Vietnam War, the Watergate scandal, prison riots, the shootings at Kent State University, and civil rights demonstrations. Criminologists saw that crimes of the powerful (e.g., Watergate, FBI violations of civil rights, crimes against blacks) were ignored, while violations of victimless crimes (e.g., marijuana use, vagrancy) were pursued vigorously. Arguments for increasing support for the poor gave way to the belief that an economic and political system that created these class differences was corrupt beyond saving.<sup>2</sup>

Labeling theory emerged from this context as a popular explanation of crime. Labeling theorists stated that crime was a social construction and that government intervention only made delinquency worse. Theories that emerged during the 1970s, however, were “much more explicit about the connection between the criminal justice system and the underlying economic order, sometimes condemning the state itself.”<sup>3</sup> Different commentators have referred to these theories as *critical criminology* or the *new criminology*. As will soon be noted, these general titles capture a very diverse body of theories, including conflict theory, Marxist/radical theory, and feminist criminology.

Despite this diversity, it is possible to identify a number of broad themes that tie these theories together:<sup>4</sup>

1. Inequality and power as central concepts: Power can be based on social class, race, gender, or other factors. The powerful will use their power to control the law and the operation of the criminal justice system.

2. Crime as a political concept: The law is not an objective, agreed-upon list of behaviors that cause the most social damage. Many acts by the powerful that cause damage are not considered criminal.
3. The criminal justice system as serving the interests of those in power: The criminal justice system targets those who lack power and ignores the crimes of those who have power.
4. The solution to crime as the creation of a more equitable society: Criminologists should work to foster social justice by supporting humane policies aimed at preventing harm.

In sum, the focus of critical criminology is much different than mainstream criminology. Until now, the theories discussed sought to explain why people engage in crime or why some neighborhoods are more prone to crime than others. The theories in this chapter focus more on the content of

the law (What is illegal?) and the actions of the criminal justice system (What laws are enforced?).

At the heart of critical theory is the belief that the law reflects the outcome of a struggle over power. Prior to this time, the popular view was that the law and its enforcement reflected societal consensus. In the **consensus model**, the law reflects

common agreement over the fundamental values held by society; that is, it reflects the interests of the vast majority and the “shared popular viewpoint” in society.<sup>5</sup> Certain acts are prohibited because society generally agrees that this is necessary. Norms against certain behaviors begin as folkways and mores and are eventually codified into law. Law is a mechanism to resolve conflicting interests and maintain order. Here, the state is a value-neutral entity. Lawmakers resolve conflicts peacefully, the police enforce the law, and the courts arbitrate. Any biases that arise are temporary and unintended.<sup>6</sup>

In the **conflict model**, the law is the result of a battle between people or groups that have different levels of power. Control over the state—including the law and the criminal justice system—is the principal prize in the perpetual conflict of society.<sup>7</sup> In that regard, conflict theorists see bias in the criminal justice system as conscious and intentional. Those in power use the legal system to maintain power and privilege; the law and the criminal justice system reflect the interests of those who won the power struggle. Furthermore, crime can directly result from the conflict between competing groups in society.

A host of theories assume that conflict is a natural part of social life. Early conflict theories tended to be pluralistic; that is, they portrayed conflict as a result of clashes among many groups. The pluralistic perspective is discussed in this chapter under **conflict theory**. In the 1970s, theories

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focused on one central conflict: the battle between the very wealthy and the rest of the population. This perspective can be considered Marxist or **radical theory**.

## Conflict Theory

George Vold produced the first criminology textbook that prominently featured the conflict perspective. Vold argued that the content and enforcement of the law was the result of the values and interests of those in power: “Those who produce legislative majorities win control over the police power and dominate the policies that decide who is likely to be involved in violation of the law.”<sup>8</sup> In the 1960s, a number of theorists, including William Chambliss, Richard Quinney, and Austin Turk heightened interest in how conflict shapes law.

### Conflict Theory and the Law

As with labeling theorists, conflict theorists argue that mainstream criminology focuses too much attention on why people break the law, while ignoring the reasons that certain acts are illegal. As William Chambliss put it, “Instead of asking, ‘Why do some people commit crimes and others do not?’ we ask ‘Why are some acts defined as criminal while others are not?’”<sup>9</sup> Their answer is that those with power and influence define the laws in a way that promotes their interests.

Within conflict theory, power is derived from a variety of sources. Power can come from membership in a more powerful group based on gender, social class, or race. In the United States, those who are white, male, and wealthy have more power than those who are poor, from a minority group, or female. Power is also equated with “resources,” which might include money, organization, or access to the media. There are multiple sources of power and many different groups.<sup>10</sup> The competition among these groups creates a society defined by a continual state of struggle and conflict.<sup>11</sup> Still, many conflict theorists acknowledge that there is a high degree of consensus for some crimes—particularly violent acts such as murder, rape, and robbery. Even here, it is crucial to recognize that there is disagreement over how particular physical acts are defined. If a corporation causes someone’s death by selling them an unsafe product or by polluting the air, is this “murder”?<sup>12</sup>

A substantial body of empirical evidence supports the conflict view of law. To be sure, research on public support for laws indicates a great deal of agreement among different segments of society for many crimes. There is also consensus on which crimes are more or less serious (violent crime vs. property crime, drug offenses).<sup>13</sup> Despite this agreement, a substantial amount of conflict also exists. Disagreements are apparent in laws regarding things like public order offenses (e.g., public drunkenness) and the regulation of consensual sex (e.g., prostitution).<sup>14</sup> Laws in these areas continue to evolve. Even where there is agreement on the law, there is conflict regarding how individuals who violate the law should be punished.

Few people would dispute the fact that political interest groups shape the criminal law in the United States. The power of interest groups is apparent in a diverse range of

issues, including abortion, gun control, drug laws, pollution laws, and the death penalty. Groups such as the National Rifle Association, the American Association of Retired People, the Marijuana Policy Project, and the National Right to Life pay individuals to lobby members of Congress to push for laws consistent with their values and interests. Indeed, there are over 12,000 *registered* lobbyists in Washington, DC, and perhaps as many as 100,000 people working on behalf of interest groups.<sup>15</sup> On a larger scale, conflicts arising from social movements (e.g., the civil rights movement), broad segments of society (e.g., the “religious right”), and political parties (e.g., Republicans versus Democrats) also influence the development of law.<sup>16</sup> **Theory in Action: From Killer Weed to Medical Drug—Conflict over Marijuana Law** examines how individuals, interest groups and social movements have changed marijuana laws over time.

### Conflict Theory and the Criminal Justice System

Those with power not only define the law to serve their interests, but also have an impact on the operation of the criminal justice system; that is, they have power over which laws are (or are not) enforced. Within the conflict framework, Austin Turk sought to understand crime through society’s authority relationships. He suggested that criminologists should focus primarily on the process of criminalization, or the assignment of criminal status to an individual.<sup>17</sup> In other words, whose behavior is targeted for enforcement? Like labeling theorists, he believes that criminalization may depend less on the particular behavior of people and more on their relationship with authority figures.

Turk devised a number of concepts intended to explain criminalization. **TABLE 8-1** outlines some of his more important ideas. For instance, consider Turk’s concepts of



**Demonstrators gather on the Colorado State Capitol grounds to protest against the National Rifle Association’s annual meeting, which took place after shootings at nearby Columbine High School. The debate over gun rights and gun control is an example conflict over the content of the law.**

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# THEORY IN ACTION

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## From Killer Weed to Medical Drug—Conflict over Marijuana Law

The consensus perspective suggests widespread agreement regarding the content of criminal laws. By and large, criminalization and penalties depend on degree of the harm caused by the act. Acts that are harmful to society become prohibited by law, and the most harmful acts have the most severe penalties. Much of the core of the legal code seems to conform to this logic. Homicide, for example, is treated more seriously than theft. Theories from the consensus perspective ask, “Why do some people violate the law?” In contrast, critical theories do not focus much on what causes crime. Instead they ask, “Why are some acts legal and others not?” In conflict theory, laws emerge from the battles among “moral entrepreneurs,” interest groups, political interests, and broad segments of society. The conflict over marijuana use features all of these parties.

Most societies divide mood-altering drugs into “good/acceptable” and “bad/deviant” categories. Often, these categories have more to do with history, culture, and conflict than the any measure of objective “harm” caused by the drug. It is not uncommon for drugs to become more or less accepted over time. In the United States, drugs such as caffeine, nicotine, and alcohol have a history of cultural acceptance. In contrast, during the past century, marijuana has largely been treated as a criminal substance. By most objective measures, alcohol and tobacco use cause much more direct harm (e.g., disease, death) to society than marijuana. How did marijuana come to be criminalized in the early 1900s, and why are some states now decriminalizing use of the drug?

Prior to 1900, most drugs were legal in the United States. Many over-the-counter cough syrups and “elixirs” contained cocaine, opium, or morphine. During this time, so-called “Indian hemp” from marijuana plants was used in many materials, and cannabis and hashish could be obtained legally at drug stores. The criminalization of most drugs (including alcohol) occurred throughout the early 1900s in the context of a general “temperance” movement. Influenced by religious doctrine and ideology, interest groups such as the Woman’s Christian Temperance Union and the Anti-Saloon League pushed for bans on alcohol and other mood-altering substances. Although individual states began criminalizing marijuana in the 1920s, most sources credit Harry Anslinger with creating a national anti-marijuana campaign. Anslinger, the first commissioner of the Federal Bureau of Narcotics, used a mass media campaign to exploit existing racial tensions and moral sentiments to create a panic over marijuana. In his “gore files,” he detailed (usually without any substantiation) gruesome crimes:

*An entire family was murdered by a youthful addict in Florida. When officers arrived at the home, they found*

*the youth staggering about in a human slaughterhouse. With an axe he had killed his father, mother, two brothers, and a sister. He seemed to be in a daze. . . . He had no recollection of having committed the multiple crimes. The officers knew him ordinarily as a sane, rather quiet young man; now he was pitifully crazed. They sought the reason. The boy said that he had been in the habit of smoking something which youthful friends called ‘muggles,’ a childish name for marijuana.*

Consistent with previous drug scares, Anslinger capitalized existing social tensions by singling out and scapegoating African Americans, Mexicans, musicians, and other “dangerous classes”:

*There are 100,000 total marijuana smokers in the US, and most are Negroes, Hispanics, Filipinos and entertainers. Their Satanic music, jazz and swing, result from marijuana usage. This marijuana causes white women to seek sexual relations with Negroes, entertainers and any others.”*

The social construction of marijuana as a “killer weed” is captured in the 1930s propaganda film *Reefer Madness*. Financed by a church group, the movie depicts marijuana as worse than opium or heroin—a drug that causes rape, homicide, and insanity. After testimony from Anslinger and others (but with little debate) Congress passed the Marijuana Tax Stamp Act of 1937, which effectively outlawed marijuana. Since the 1970s, the federal government has classified marijuana as a “schedule I” drug—a class of drugs with a “high potential for abuse” and “no medical benefit.”

Over time, attitudes toward and enforcement of marijuana laws have shifted substantially. From 1960 to the 1970s, “pot” became more popular among the affluent and middle classes. The more sinister exaggerations of marijuana effects were debunked, and many jurisdictions relaxed the punishments for possession of marijuana. *Reefer Madness* became a “cult” movie, used by legalization proponents to poke fun at government propaganda. In the 1980s, marijuana was lumped into the “war on drugs,” and the pendulum swung back towards strict enforcement. Efforts to decriminalize marijuana increased in the 1990s, with the “medical marijuana” movement. A diverse set of interest groups (e.g., patient advocacy groups, drug policy groups) succeeded in redefining marijuana as medicine. By the 2000s, it was clear that attitudes toward marijuana had softened in the public. The change is reflected in the HBO series *Weeds*, where the drug is portrayed as a staple of upper-class suburban life. In 2012, Colorado and Washington became the first states

to legalize the possession and sale of marijuana for recreational use since the Tax Act. Oregon, Alaska, and the District of Columbia followed suit in 2015. In each initiative, interest groups focused on the economic and social costs of incarceration, and the potential benefits of increase tax revenue. Laws were changed by direct-vote ballot measures rather than by legislative votes.

There is still a great deal of conflict regarding attitudes toward marijuana. Because the federal government and many states still view marijuana use as a serious crime, there is confusion regarding enforcement. As one example, banks and credit card companies, fearing federal trafficking laws, have been reluctant to deal with marijuana dispensaries in Colorado and Washington. Marijuana merchants, stuck carrying large amounts of cash, have fallen prey to armed robbery. Furthermore, because marijuana remains

organization and sophistication. Criminalization is more likely for an organized but unsophisticated norm resister (e.g., delinquent gang member) than for an organized and sophisticated person (e.g., Mafia member). Turk's theory has recently found some support in research that analyzes police–citizen encounters.<sup>18</sup> A study of data from police observations found that organization and sophistication of the police and suspects significantly predicted overt conflict (use of force).<sup>19</sup>

William Chambliss and Robert Seidman authored another influential conflict-oriented text. The starting point for their analysis was the assumption that as society becomes more complex, dispute resolution will move away from “reconciliation” and toward “rule enforcement.”<sup>20</sup> A complex society will therefore depend heavily on sanctioning (police action) to keep order among parties in conflict. In the United States, Chambliss pointed to the dominance of middle-class values. Thus, the middle class could impose its own standards and view of proper behavior upon others in society. Furthermore, the bureaucratic nature of the legal system meant that enforcement of the law would be biased against lower-class people. Bureaucratic agencies tend to maximize the rewards for and minimize the strains against the organization. As a result, police are expected to avoid enforcing crimes committed by the powerful (which might cause trouble) and focus on crimes of the poor. Those who lack power are less able to successfully resist enforcement.<sup>21</sup>

***Bureaucratic agencies tend to maximize the rewards for and minimize the strains against the organization.***

a schedule I drug, medical research about the benefits or hazards of medical marijuana is difficult. Perhaps the only certainty now is that conflict over this drug will continue in the near future.

**Sources:** Hari, J. (2015). *Chasing the scream: The first and last days of the drug war*. New York: Bloomsbury; Johnson, K. (2014, November 5). New marijuana initiatives loom as 3 win approval. *New York Times*, Retrieved July 6, 2015, from <http://www.nytimes.com/2014/11/06/us/politics/new-marijuana-initiatives-loom-as-3-win-approval.html>; Barcott, B. B., & Scherer, M. (2015, May). The highly divisive, curiously underfunded and strangely promising world of pot science. *Time*, 38-45; Lee, M. A. (2012). *Smoke signals: A social history of marijuana—medical, recreational and scientific*. New York: Simon and Schuster.

## Research on Race and Criminal Justice Processing

Conflict theory suggests that enforcement of laws will be biased against those who lack power. One way to test this proposition is to see whether the less powerful groups in society (e.g., racial minorities, the poor) receive harsher treatment from the criminal justice system. In other words, are black offenders more likely to be arrested, prosecuted, and imprisoned than white offenders? A simple inspection of arrest and prison statistics appears to support the conflict perspective. Minorities (especially African Americans) are overrepresented at every stage of the criminal justice system—from arrest to imprisonment. In 2012, white Americans were imprisoned at a rate of 463 per 100,000. African Americans had an imprisonment rate of 2,841 per 100,000; and Hispanics 1,158 per 100,000.<sup>22</sup> On the other hand, males are incarcerated at a dramatically higher rate than females—a finding that contradicts conflict theory because men have more power.

The fact that a particular group is overrepresented in the criminal justice system does not, however, definitively support or refute conflict theory. Many consensus theories predict that minorities or members of the lower class are more likely to be involved in serious forms of criminal behavior. Social disorganization theory (see Chapter 6), for example, predicts that because minorities often live in poverty-stricken, disorganized neighborhoods,

TABLE 8-1

## Factors Influencing Conflict Between Authority Figures and Law Violators

Factor	Relationship to the Likelihood of Conflict
Organization	Conflict is more likely when those engaging in crime are organized. (Gangs and syndicate criminals will likely be more resistant to authority.)
Sophistication	The probability of conflict increases when the law violator is less sophisticated (a street thug as opposed to a white-collar criminal).
Relative power of enforcers and resisters	Criminalization is more likely when enforcers (police, prosecutors) have substantially more power than resisters. However, some resisters who have little power may be passed over and seen as being “not worth the trouble.”
The correspondence of cultural and social norms	Cultural norms are “what is expected” (the letter of the law), whereas social norms refer to “what is actually being done” (how laws are actually enforced). When there is congruence between these sets of norms, criminalization is more likely.

Source: Turk, A. T. (1969). *Criminality and legal order*. Chicago: Rand McNally.

they are more likely to engage in crime. Conflict theory, on the other hand, would suggest that differences in arrest and imprisonment are not simply due to differences in criminal behavior. The key issue is whether **extra-legal factors** (e.g., race, class, and gender) have a substantial impact on criminal justice system decision making, regardless of **legal factors** such as offense seriousness and prior record.

At the least, it appears as though legal factors, particularly offense seriousness and prior record, are the strongest predictors of decisions made by the police, prosecutors, and judges.<sup>23</sup> This finding should not come as a shock to anyone. Common sense dictates that someone with prior felony convictions who is caught in the act of armed robbery has a greater risk of arrest and imprisonment than someone with no prior record who gets caught shoplifting. Still, an important issue is whether race, class, or other factors also matter. The vast majority of research in this area focuses on race. This research asks (sticking with the example), “Are a black and white shoplifter, each with similar criminal records, treated equally?”

Answering this type of question requires a multivariate analysis, which statistically controls for legal factors in order to examine factors such as race or class. That is the only way to find out whether the size of the black prison population is due to legitimate factors (e.g., more serious offenses, more severe prior record) or to discrimination.

The research examining race and the criminal justice system is extremely complex and often contradictory. Typically, a study examines official decision making within a jurisdiction, at a particular stage (e.g., arrest decisions, court decisions) of the criminal justice system. The most difficult decision makers to evaluate are the police. Police decisions typically occur on the streets, and there are no records of individuals who are let go without formal action. To overcome

this problem, a number of researchers have directly observed the behaviors of police.

Reiss’s 1966 observational study found that race in itself did not influence police decisions to arrest. Black suspects were more likely to be arrested because they were suspected of more serious crimes, were more hostile toward police, and were more likely to have complainants who demanded official action.<sup>24</sup> Later studies reached very similar conclusions. It is important to remember that hostility toward police does not arise in a vacuum; minority communities are subject to a stronger and often more aggressive police presence than other areas. Also, a few observational studies have found evidence of racial bias.<sup>25</sup> An important limitation of this type of research is that police might act differently—in a less biased manner—simply because they are being observed.

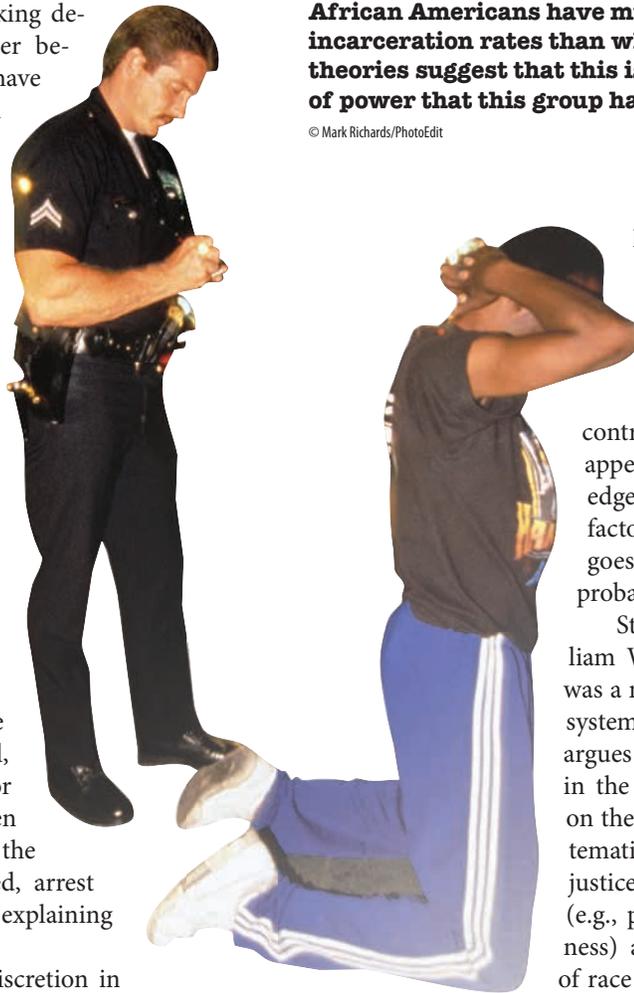
Over the past 30 years, **racial profiling** has become an extremely controversial issue. Many minorities believe that they are pulled over for traffic stops simply because of the color of their skin (i.e., “driving while black”). A great deal of evidence exists that indicates that African Americans are more likely to be stopped, to have their cars searched, and to be ticketed than would be expected given their numbers in the population.<sup>26</sup> Still, it is difficult to determine the cause of this difference. For example, it could reflect the fact that minorities are more likely to live in high crime areas that are heavily patrolled by police, to drive in areas where more traffic accidents occur, or to speed.<sup>27</sup> Recent research, using data from police stops and from surveys of the public on their interactions with police, finds evidence that race disparities cannot be entirely due to these factors.<sup>28</sup> Where does the weight of the evidence on the relationship between arrest and race lay? A meta-analysis of research conducted over the last 30 years found that “the most credible conclusion based on the evidence examined is that race does affect the likelihood of arrest.”<sup>29</sup>

After a person is arrested, tracking decision making becomes much easier because a paper trail exists. Scholars have examined whether race impacts bail decisions, prosecution decisions (whether to charge or release a suspect), and sentencing decisions (both sentence length and whether or not a person gets prison time). Once again, there are no simple answers. Instead, different studies yield different results. As a starting point, consider Alfred Blumstein's research comparing arrest rates to incarceration rates at a national level. If there were no bias in the criminal justice system, the percentage of blacks arrested should be roughly equal to the percentage of blacks incarcerated. In two separate studies, Blumstein found that a large portion (76–80%) of the racial disparity in incarceration rates was due to disparities in arrest rates.<sup>30,31</sup> Still, incarceration rates were higher for blacks than would be expected given their arrest rates. Furthermore, as the seriousness of the offense decreased, arrest disparities were less important for explaining disparities in black incarceration.

This finding suggests that as discretion in the criminal justice system increases, blacks find themselves at a disadvantage. In a replication of this study in a single jurisdiction (Pennsylvania), researchers concluded that race differences in arrests accounted for even less (70%) of the race differences in imprisonment. In other words, 30 percent of the racial differences in incarceration were not due to racial differences in offending. For drug crimes, where criminal justice system discretion is higher, racial differences in offending accounted for only 20 percent of racial differences in incarceration.<sup>32</sup>

Another approach is to track offenders within a jurisdiction. Joan Petersilia conducted a detailed study of the California criminal justice system based on Offender-Based Transaction Statistics (OBTS). She found that minority suspects were more likely than whites to be released after arrest. Yet, following a felony conviction, minority offenders were more likely than whites to receive a long prison sentence. These differences held even after controlling for prior record, offense seriousness, previous violence, and probation or parole status. Additional information from the Rand prisoner survey in California, Texas, and Michigan revealed that minorities are not overrepresented in the arrest population compared with the number of crimes that they actually commit, nor are they more likely to be arrested.<sup>33</sup>

An analysis of more than 11,000 California offenders convicted of assault, robbery, burglary, theft, forgery, or drug crimes revealed a similar pattern. Although black and



**African Americans have much higher arrest and incarceration rates than white Americans. Conflict theories suggest that this is due, in part, to the lack of power that this group has in American society.**

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Latino offenders were more likely to go to prison than white offenders, after legal factors (e.g., prior adult or juvenile history, use of a weapon) were controlled, race differences disappeared. In other words, knowledge of race, independent of legal factors, did not help predict who goes to prison versus who gets probation.<sup>34</sup>

Studies such as these led William Wilbanks to conclude that it was a myth that the criminal justice system is discriminatory. Wilbanks argues that although some persons in the system may make decisions on the basis of race, there is no systematic racial bias in the criminal justice system.<sup>35</sup> After other factors (e.g., prior record, offense seriousness) are held constant, the effect of race is minimal. Wilbanks's position, however, is by no means the final word on this subject. This body of research does not capture, for example, differences in police patrolling. In other words, police presence helps to determine who accumulates a prior record. In that sense, statistically controlling for prior record might mask racial bias in policing.<sup>36</sup> Furthermore, some studies do indeed find that racial bias exists and affects criminal justice decisions independent of legal factors.<sup>37</sup>

A final body of empirical research examines the relationship between the presence of a “threatening” social group and measures of punitiveness within a certain geographical area. The **racial threat hypothesis** suggests that increases in minority populations relative to the white population will provoke racial fear and prejudice and increase punitive criminal sanctions. This hypothesis has received some support in the literature.<sup>38</sup> Scholars have documented correlations between the percentage of black citizens and a diverse number of outcome measures, including lynching, the size of police forces, arrest rates, and sentencing practices.<sup>39,40</sup> For example, McGarrell tested a conflict model of incarceration rates in the United States for 1971, 1980, and 1988. He compared the effects of both social and structural variables and the crime rate. He determined that two variables (percentage of black population and the violent crime rate) were strong and consistent predictors of the incarceration rate.<sup>41</sup>

Critics note that “percentage of black citizens” is at best an indirect measure of threat—and one that does not capture

ethnicity. This is important because Hispanics now constitute the largest racial/ethnic minority in the United States. A recent study attempted to address both of these limitations. They discovered that the growth rate of the Hispanic population (the measure of “threat”) predicted public support for the use of ethnicity in criminal sentencing. Where the growth rate was high, people were more likely to agree that “Judges should be allowed to use an offender’s ethnicity when determining how severe his or her punishment sentence should be.”<sup>42</sup>

As should be clear from the preceding, the research on race and the criminal justice system is complex and often-times contradictory. On the broad question of whether the system is biased, there is no easy answer. Looking within certain categories of crime or punishment, however, sometimes yields a clear and disturbing picture.

## Race and the War on Drugs

Conflict theory appears to be particularly relevant to a discussion about the law, race, and the criminal justice system in the context of illicit drugs. The history of legislation against drug use in the United States is in many ways a story of linking particular drugs with a “dangerous” (and powerless) class of citizens. In an effort to portray these drugs as particularly bad, opium was linked to Chinese immigrants and marijuana to Mexicans.<sup>43</sup> In essence, the “drug of choice” of the less powerful group is criminalized; laws against the particular drug are then enthusiastically enforced.

David Cole summarizes the conflict argument regarding the most recognizable target in the war on drugs—crack cocaine.<sup>44</sup>

*Politicians impose the most serious criminal sanctions on conduct in which they and their constituents are least likely to engage. Thus, a predominantly white Congress has mandated prison sentences for the possession and distribution of crack cocaine 100 times more severe than the penalties for powder cocaine.*



**When crack cocaine spread rapidly through urban areas in the 1980s, legislators responded with harsh penalties for possessing or selling this drug. Critics suggest that the major causality of the War on Drugs has been racial minorities.**

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*African-Americans comprise more than 90% of those found guilty of crack cocaine crimes. By contrast, when white youth began smoking marijuana in large numbers in the 1960s and 1970s, state legislatures responded by reducing penalties. . . .*

There is little doubt that police targeted the sale and distribution of crack cocaine throughout the 1980s and 1990s. Not surprisingly, a shift in focus from powder cocaine and other drugs toward crack increased racial disparities in drug arrests. In the 1970s, African Americans accounted for roughly 20 percent of drug arrests. By the early 1990s, they made up 40 percent of all drug arrests.<sup>45</sup> It is important to recognize that competition over crack cocaine markets created spikes in violence in many minority communities. In part, increased arrests and prosecutions were a response to this violence. Criminologist Michael Tonry has argued, though, that the overall effect of the war on drugs on the black community was a foreseeable tragedy.<sup>46</sup>

*What was clear both then and now is that a program built around education, drug abuse treatment, and social programs designed to address the structural, social, and economic conditions that lead to crime and drug abuse would have a much less destructive impact on disadvantaged young blacks than would a program whose primary tactics were the arrest, prosecution, and lengthy incarceration of street-level sellers who are disproportionately black and Hispanic.*

There are clear signals that the drug war is winding down. Attitudes toward illicit drug use have shifted in American society. More than half of Americans now support the legalization of marijuana. Since 1990s, many states have legalized marijuana for medical use, and four states (Alaska, Oregon, Colorado, and Washington) and the District of Columbia have legalized recreational use. In this new landscape, the appetite for incarcerating drug offenders has waned among policymakers. At the federal level, these shifts are reflected in the Fair Sentencing Act of 2010, which reduced the so-called “crack multiplier” from 100:1 to 18:1, and eliminated a 5-year mandatory sentence for simple possession of crack cocaine.<sup>47</sup> To be sure, this change has been slow and uneven, and enforcement disparities persist. An ACLU report released in 2013 found that marijuana arrests continue to account for half of all drug arrests in the country. Despite equal usage of the drug, blacks are almost four times more likely to be arrested for marijuana use than whites.<sup>48</sup>

## Capital Sentencing and Race

Historically, race has also played a role in the imposition of the death penalty in the United States. In *Furman v. Georgia*, a number of the Supreme Court justices raised serious questions about discrimination and arbitrariness in the application of the death penalty. For example, Justice Douglas noted.<sup>49</sup>

*It would seem incontestable that the death penalty inflicted on one defendant is “unusual” if it discriminates against him by reason of his race, religion,*

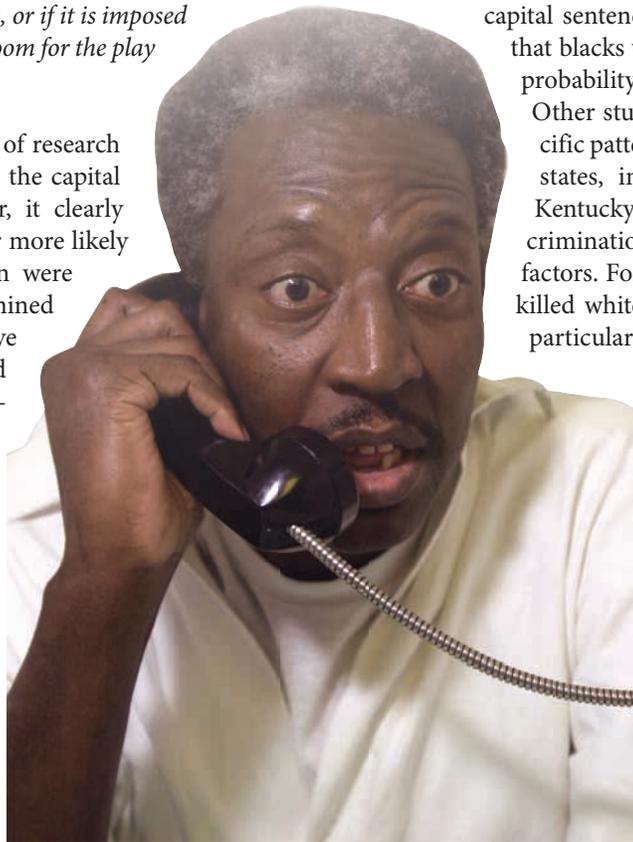
*wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.*

At that time, a massive body of research indicated that racial bias clouded the capital sentencing process. In particular, it clearly demonstrated that blacks were far more likely to receive a death sentence than were whites.<sup>50,51</sup> Also, it was determined that whites were more likely to have their death sentences commuted to a lesser sentence.<sup>52</sup> Other studies found that capital sentencing was not only based on the race of the killer, but also was determined by the race of the victim. For example, one study found that Philadelphia blacks charged with murdering whites were more likely to receive a death sentence than any other offender–victim race combination.<sup>53</sup> This pattern was also present in rape cases; blacks convicted of raping whites were 18 times more likely to receive a death sentence.<sup>54</sup>

The *Furman* case led to a ban on the death penalty for the crime of rape, but did not go so far as to rule the death penalty unconstitutional. Rather, it questioned the unbridled discretion at work in the capital sentencing process. In 1976, the Supreme Court (*Gregg v. Georgia*) approved a new Georgia system. The Supreme Court ruled that Georgia’s “guided discretion” statute provided adequate protection against the arbitrary and capricious application of the death penalty. In other words, the Supreme Court concluded that the Georgia process provided adequate protection against racial bias and other arbitrary, extra-legal influences.

The Georgia law had several significant features. First, it required a bifurcated trial. In the first phase of the trial, the jury addressed the issue of guilt or innocence. In the second or sentencing phase, the penalty was decided. Second, the law delimited specific aggravating (and later, mitigating) circumstances that juries would consider during the sentencing phase of the trial. The court eventually gave broad latitude to the defense regarding what could be introduced in mitigation. Third, the Georgia law required an automatic appeal of all death sentences to the state supreme court. The Court believed that these processes provided sufficient protection of the rights of the accused.

Unfortunately, research on capital sentencing conducted following *Gregg* indicates that race is still an important factor in the decision to execute. For example, studies of the



**Thomas Miller-El gained a stay of execution from the U.S. Supreme Court in 2002. He was granted a new trial because of alleged racial discrimination in his first trial. Research consistently reveals that individuals who kill white women are the most likely to receive the death penalty.**

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capital sentencing process in Florida revealed that blacks who kill whites have the greatest probability of receiving the death penalty.<sup>55</sup> Other studies found evidence of this specific pattern of discrimination in different states, including Texas, Maryland, and Kentucky.<sup>56–58</sup> This pattern of racial discrimination was not a function of other factors. For example, cases in which blacks killed whites were not more aggravated or particularly heinous homicides.<sup>59</sup>

This research evidence was the focus of an evaluation synthesis conducted by the U.S. General Accounting Office (GAO).<sup>60</sup> This analysis was required under The Anti-Drug Abuse Act of 1988. Specifically, this legislation called for a study of capital sentencing procedures to determine if the race of either the victim or the defendant influenced the capital sentencing process. The GAO uncovered 53 studies of capital sentencing. They excluded those that did not contain empirical data or were duplicative. As a result, 28 studies were judged methodologically sound. Based on their review, the GAO concluded that:<sup>61</sup>

- In 82 percent of the studies, the race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty (especially those who murdered whites).
- The influence of the victim’s race was found at all stages of the criminal justice system process. This evidence was stronger at the earlier stages of this process (e.g., prosecutorial decision to seek the death penalty or to proceed to trial rather than plea bargain) than in the later stages.
- Legally relevant variables (e.g., aggravating circumstances, prior record, culpability level, heinousness of the crime, and number of victims) were influential but did not fully explain the reasons for racial disparity in capital sentencing.

The GAO concluded that this evidence represented a strong race-of-victim influence over capital sentencing. Studies since the 1990s continue to find that the capital sentencing process is significantly influenced by race. Offenders who killed whites are more likely to be charged with a capital offense and to receive a death sentence, especially if they are black.<sup>62</sup>

The United States remains distinct from its Western European peers in its use of the death penalty. As with the drug

war, however, American attitudes toward the death penalty have softened somewhat in the past decade. A 2015 Pew Center Research poll found that 58 percent of Americans support the death penalty. This was a 40-year low and a sizable decline from peak support (78%) in 1996. There remain profound racial divides regarding support for executions. In the United States, blacks and Hispanics typically express support levels that are 25–30 percentage points lower than whites.<sup>63</sup> The overall decline and the race and ethnic divides in support quite possibly stem from concern over the possibility that an innocent person could be executed. Indeed, since the advent of DNA technology in the 1980s, 20 death row inmates have been exonerated.<sup>64</sup>

## Conflict Theory as an Explanation of Criminal Behavior

As noted earlier, the conflict explanation of the law and criminal justice system suggests that those who have power will make and enforce laws that are in their interests. Several sociologists, however, have extended conflict theory to explain criminal behavior. Criminal conduct may originate when a less powerful group adheres to its group norms while simultaneously violating those of another group. Basically, behavior that is valued in one group is denounced (and criminalized) by another. All the while, individuals believe they are acting appropriately.

Thorsten Sellin is most well known for developing this principle. Sellin was primarily concerned with the culture conflict faced by immigrants. He proposed that culture conflict was the result of the difference in norms between ethnic groups.<sup>65</sup> In complex societies like the United States, people from diverse ethnic, cultural, religious, and social backgrounds are living in close proximity to one another, yet they may not accept the values or divergent lifestyles of their neighbors. Moreover, in most social situations, each group has right and wrong ways of behaving. People are socially conditioned by these “conduct norms,”<sup>66</sup> but different groups have different norms. Culture conflict results when these groups meet.

Sellin defined **primary conflict** as that which may arise between an established culture and recent immigrants. Because immigrants bring divergent religious beliefs, norms, and values from their homeland, culture conflict is inevitable. What was considered appropriate conduct in the old country may be a crime in the new culture. To illustrate, Sellin cites the Sicilian father in New Jersey who murdered the youth responsible for seducing his daughter. The father expressed surprise at his arrest because he was merely defending his family’s honor in the traditional Sicilian fashion. Here, customary behavior in Sicilian society clashed with American definitions of legal behavior.

A more recent example of primary conflict is the use of “khat” among East African (e.g., Somalian, Ethiopian, Yemeni) immigrants. Khat is a stimulant that is legal and culturally accepted in East Africa and the Arabian Peninsula, but is illegal in the United States. Khat has created conflict between East African immigrant communities and

law enforcement.<sup>67</sup> Yet another example is the practice of circumcising females. Circumcision, which can include the removal of the clitoris, is still common in some cultures but has been denounced under American law.<sup>68</sup> In such situations, the norms of the dominant culture become the deciding factor in characterizing an action as crime.

**Secondary conflict** occurs within a single culture that has different subcultures, each with its own conduct norms. Here, Sellin anticipates the development of subcultural theories in criminology (see Chapter 6). Norm conflict can develop within a single culture when the norms of one subculture come into conflict with those of another. This theme is apparent in the study of 1,313 gangs conducted by Frederic Thrasher.<sup>69</sup> He reported the existence of a gang culture whose norms clashed with those of society. One dominant activity was orgiastic behavior: drinking, gambling, smoking, and sex. The values of the gang created an *esprit de corps* that carried over to all its activities. Similarly, Sutherland’s culture conflict theory stated that the different values present in segments of society could lead an individual to criminal behavior.<sup>70</sup>

Sellin considered conduct norms to be universal and common to all forms of society. His theory was criticized, however, for being too narrow in its focus on norms, not people. As history shows, migrant groups are seldom accepted, and this rejection often leads to anomie and resentment. However, as succeeding generations of immigrants are socialized by the dominant culture, family ties as well as old-world cultural norms weaken. In short, Sellin overlooked the fact that heterogeneity must develop in modern, complex societies.

George Vold turned the attention of conflict theory toward a class of crimes that were more directly related to political conflict:<sup>71</sup>

- Crimes resulting from political protest movements (e.g., disorderly conduct arrests from clashing with police)
- Crimes that arise from strife between management and labor unions (e.g., the use of illegal tactics to “break” unions, employee sabotage of factory equipment)
- Crimes that result from attempts to change or upset the caste system that enforces racial segregation (e.g., lynching)

In such situations, Vold argues, “criminality is the normal, natural response of normal, natural human beings struggling in understandably normal and natural situations for the maintenance of the way of life to which they stand committed.”<sup>72</sup> In this case, conflict directly produces criminal behavior. Furthermore, criminality depends on which side ultimately wins the conflict. Take, for example, the “Jim Crow” laws enforced by whites. These laws were passed by 19th-century legislatures of the southern states to segregate blacks and maintain a racial caste system. Blacks who violated these laws were seen as criminal; their churches were bombed and their leaders lynched. Ultimately, after the spread of civil rights, the white supremacists who enforced

these laws were seen as criminals. In a similar vein, individuals who are a direct threat to a government regime are often branded as dissidents or terrorists and jailed. As power shifts, such criminals may become leaders of a new government.

## A Critique of Conflict Theory

Within a certain realm of behavior, conflict theory appears to have some support, both as a theory of criminal behavior and as a theory of law. There is little disagreement that conflict is a central feature of democratic societies, nor is there argument against the idea that political groups attempt to shape the law in their favor. Conflict can (as in the case of labor strife or abortion protests) directly lead to criminal behavior. Early conflict theorists such as George Vold recognized that conflict theory should not be stretched to account for behaviors or laws that are outside of its scope. Chambliss, for example, points out that in many circumstances, there is no conflict whatsoever. There is wide public consensus that laws should prohibit crimes such as murder, assault, and rape.<sup>73</sup>

In that sense, conflict theory does not explain the core of the legal code, much of which seems to be agreed on and to benefit society as a whole. Furthermore, the vast amount of delinquent and criminal behavior is not political in nature, nor does it tend to pit one group against another. Rather, victimization studies clearly demonstrate that most crime occurs within the same groups. Minorities generally victimize other minorities; poor people generally victimize other poor people, and so forth. In this regard, conflict theory has been criticized for explaining too little. On the other hand, some have criticized conflict theory for not going far enough. In the 1970s, many conflict theorists shifted their attention toward one main source of conflict: the distribution of wealth.

## Radical Criminology

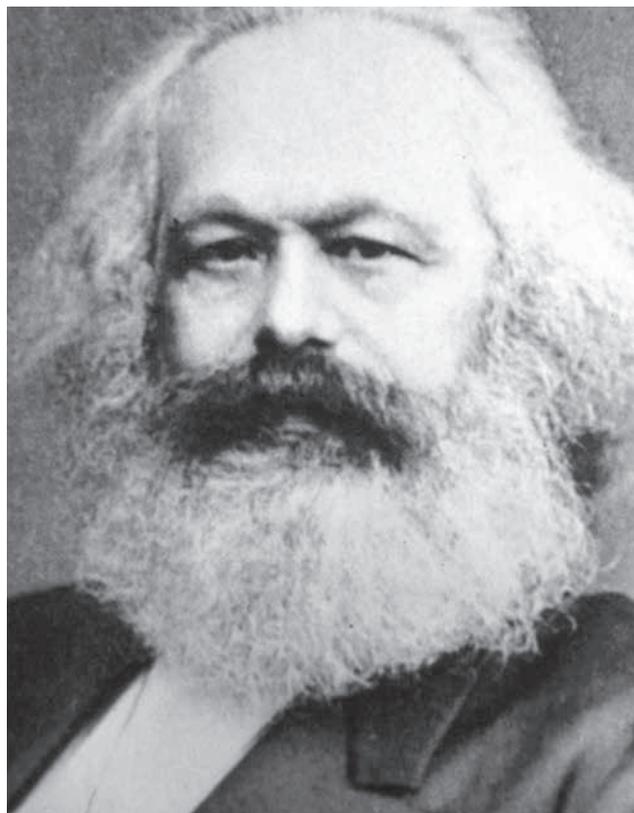
Over time, many conflict theorists came to believe that conflict results not from a struggle among many groups, but from a larger struggle between the very wealthy and the rest of society. Radical, or “Marxist” criminologists use Karl Marx’s theories of social structure to explain both (1) the nature and extent of crime in society and (2) the content and enforcement of the criminal law. Although Marx did not address the issue of crime in-depth, his ideas do spotlight the linkage between capitalism and criminality.

## Karl Marx and Crime

Marxist criminology focuses on the conflict among three socioeconomic classes:<sup>74</sup>

1. The **capitalists**, who own the means of production and exploit the surplus labor of others
2. The **bourgeoisie**, who hold salaried and management (i.e., middle-class) positions
3. The **proletariat**, who comprise the working class

Marxists view the enactment and enforcement of laws as an outgrowth of the conflicts created by the unequal distribution



**Karl Marx wrote extensively about the evils of capitalism. Although he wrote little about crime, his ideas are an integral part of modern radical theory.**

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of wealth, power, and control within a capitalist society. In short, the law enforces the ideology of the capitalist ruling class.

Marx’s critique of capitalism is relevant to the study of crime in several ways. Marx saw crime as largely a function of class conflict. The capitalist class owned the means of production: the use and distribution of tools, technical knowledge, and human labor. In addition, it profited from the creation of surplus value, or the value of commodities workers produce above what they are paid in wages.<sup>75</sup>

According to Marx, the capitalist economic system is supported by the **superstructure** of social institutions (e.g., law, education, and politics) that “lend legitimacy to both the class structure and the dominant set of economic relationships underpinning” the structure.<sup>76</sup> They were the foundation of the legal and political structures of the state. In this context, crime became an expression of the individual’s struggle against unjust social conditions. Criminals were part of the **lumpenproletariat**—the dispossessed, unorganized workers’ underclass. They did not contribute to the production of goods and services; instead, they made their livelihood from others who did work.<sup>77</sup> Criminal life was a natural reaction by those who were cut off from the fruits of capitalism and brutalized by under- or unemployment. Marx asserted that crime was a product of poverty and the conditions of inequality bred by capitalism. Because crime was the result of an unjust economic system, the only way to prevent crime was to change that system.

## Engels and the Social Revolution

Friedrich Engels, Marx's friend, sponsor, and collaborator, directly addressed the issue of crime. To Engels, crime was a form of revolt—too primitive and unorganized to succeed—waged against the dreadful oppression of the capitalist industrial system. Society was the original offender. It created crime by depriving unfortunates of a place at the “feast of life.” Engels believed that communism was the ultimate solution to crime:<sup>78</sup>

*To protect itself against crime, against direct acts of violence, society requires an extensive, complicated system of administrative and judicial bodies, which require an immense labor force. In communist society, we eliminate the contradiction between the individual man and all others, we counterpoise social peace to social war, and we put the ax to the root of crime. Crimes against property cease to their own accord where everyone receives what he needs to satisfy his natural and spiritual urges, where social gradations and distinctions cease to exist.*

## Bonger and Egoistic Capitalism

One of the first Marxist criminologists was Wilhelm Adrian Bonger. He expanded the definition of criminal behavior by viewing crime as an “immoral” act against a prevailing social structure. Bonger stated that unless the act injures the ruling class as well as the subject class, it was unlikely to be punished.<sup>79</sup>

Bonger believed that **altruism** was a defining characteristic of primitive societies: Production was for mutual consumption, not exchange; social solidarity was high. The problem with a capitalist society was that it transformed the basic nature of humankind. Capitalistic societies are characterized by **egoism**: Capitalists produce for themselves and attempt to build a surplus to create a profit. They are not interested in the needs of others. In this manner, capitalism builds social irresponsibility and creates a climate of motivation for crime.

Bonger also considered what he called rich men's crimes: Fraudulent bankruptcies, adulteration of food, stock market manipulations, land speculation, and the like. These types of crimes forced the masses to pay more than required for the necessities of life: “What an ordinary criminal does in a small way, they do on a gigantic scale; while the former injures a single person, or only a few, the latter brings misfortune to great numbers.”<sup>80</sup>

According to Bonger, the solution was to create a socialistic society. Socialism, he claimed, would cure many ills and allow the spirit of altruism to come forward and flourish.

***The problem with a capitalist society was that it transformed the basic nature of humankind.***

He noted, however, that crimes would still be committed by persons with medical or psychiatric problems. Bonger's writings—especially his focus on the crimes of the wealthy, and his suggestion that capitalism corrodes empathy for fellow citizens—are still reflected in modern radical theories. Bonger's central ideas were also put to a recent empirical test. Using a sample of nations, researchers found that more “capitalistic” countries had higher homicide rates. This relationship, however, did not appear to stem from the spread of egoism, as predicted by Bonger.<sup>81</sup>

## Rusche and Kirchheimer and Penal Systems

George Rusche and Otto Kirchheimer offered another early Marxist analysis of crime. They examined how criminal sanctions developed in a capitalist state. Until the rise of capitalism, they noted, punishments for criminal behavior were largely determined by one's ability or inability to pay a fine. Thus, they argued, it was only natural that punishments would become more severe as economic conditions worsened. For example, over 72,000 thieves were hanged in England during the reign of Henry VIII. However, when the potential of inmate labor power became apparent, convicts were transported to distant lands to provide more markets for the British Empire instead of being executed. Rusche and Kirchheimer regarded economic conditions as the central issue in penal policy:<sup>82</sup>

*The penal system of any given society is not an isolated phenomenon subject only to its own special laws. It is an integral part of the whole social system, and shares its aspirations and its defects. The crime rate can be influenced only if society can offer its members a certain measure of security and to guarantee a reasonable standard of living.*

Rusche and Kirchheimer argued that imprisonment served as a solution to economic problems after Western society moved from feudalism to capitalism. They concluded that the complex legal systems found in

capitalist societies provide only an illusion of security. They do not deal with the root problems of social inequality.

Rusche and Kirchheimer theorized that imprisonment served an important role in capitalist societies: the regulation of the labor force.<sup>83</sup> In essence, their argument implies that imprisonment should increase when surplus labor is high and decrease when there is a labor shortage. The research findings on this hypothesis are inconsistent. A multivariate analysis of time-series data on imprisonment in the United States from 1948 to 1981 found evidence of an effect of unemployment on prison admissions.<sup>84</sup> However, a historical analysis of the New York state prison system offered little support

to Rusche and Kirchheimer's claim that imprisonment is a consequence of the desire to exploit and train captive manufacturing labor.<sup>85</sup> A longitudinal study investigated the effect of unemployment rates on rates of pretrial jail incarceration in Florida and found no relationship between these variables at either the felony or misdemeanor levels.<sup>86</sup> This finding suggests that Rusche and Kirchheimer overstated this relationship. Pretrial incarceration was not used to control labor surpluses.

The Marxist influence has extended to modern criminology. Radical criminologists argue that the power of the capitalist state depends entirely on its ability to use the criminal justice system to maintain social order. The economic elite define and enforce the law to favor specific interests. The law reflects the unequal distribution of wealth in society and enforces the will of the ruling class. Moreover, they point out, the state is very selective about whom it punishes.

***The economic elite define and enforce the law to favor specific interests.***

## Richard Quinney: Class, Crime, and the State

Richard Quinney remains one of the most influential radical criminologists in the United States. Quinney's ideas have evolved substantially over time—from conflict theory in the 1960s to radical theory throughout the 1970s and 1980s, and finally to his most recent statements on peacemaking criminology. In his 1977 book, *Class, State, and Crime*, Quinney portrays the criminal justice system as the last supporting prop for a slowly decaying capitalist social order.<sup>87</sup> It controls a population that can no longer be restrained by employment or social services. Of particular interest is

Quinney's definition of criminal behavior (see [TABLE 8-2](#)).

Quinney ties together the work of Marx, Engels, Bonger, and others to characterize most forms of criminal behavior as the result of capitalism. Quinney describes several types

**TABLE 8-2**

### Richard Quinney's Typology of Crime

Type of Crime	Description
<i>Crimes of Domination</i>	
Crimes of control	Felonies and misdemeanors by law enforcement agents against persons accused of crimes (e.g., violations of the civil liberties of citizens).
Crimes of government	Actions by elected and appointed officials of the capitalist state to maintain political control over others (e.g., Watergate, Iran-Contra, warfare, political assassination).
Crimes of economic domination	Corporate crimes (e.g., price fixing, pollution, hazardous work conditions, marketing of unsafe products) that protect and further the accumulation of capital. Organized crime also seeks to perpetuate the capitalist system because it invests some of its profits from illegal goods and services in legitimate businesses.
Social injuries	Denial of basic human rights (e.g., sexism, racism, economic exploitation) that are not typically defined as crime.
<i>Crimes of Accommodation</i>	
Predatory crimes	Crimes such as burglary, robbery, and drug dealing that are produced out of a need to survive. These are reproductions of the capitalist system.
Personal crimes	Violent crimes (e.g., murder, rape, robbery) usually directed against members of the same class and pursued by those who have already been brutalized by the capitalist system.
Crimes of resistance	Crimes that are an expression of political consciousness (e.g., the sabotage of factory equipment) directed at the capitalist class.

Data from Richard Quinney, *Class, State, and Crime*, 2nd ed. (New York: Longman, 1980): 56–66.

of crime committed by capitalists in order to maintain their control over society. Consistent with radical theory, Quinney argues that law enforcement exists primarily to control members of the lower class. “Crimes of control” result when police violate the civil rights of others (e.g., police brutality). “Crimes of economic domination” include most forms of white-collar crime (e.g., price fixing, pollution). The capitalist elite also engage in socially injurious behavior, such as the denial of basic human rights (e.g., sexism, racism, economic exploitation), that are not defined as criminal. These denials are not defined as criminal because the capitalists control the definition of criminal behavior and are unlikely to pass laws against their interests.

Apart from crimes committed by capitalists, Quinney portrays crimes among the lower class as acts of survival. Because they are economically exploited, members of the lower class rob, steal, and burglarize in order to meet basic needs. Ironically, by exploiting other members of their class, these predatory offenders reproduce the capitalist system. He argues that acts of violence (murder, rape, assault) are a reaction to the brutality of the capitalist system. Ultimately, Quinney advocates the development of a socialist society to halt the abuses of the capitalist state.

## Radical Explanations of the Law and the Criminal Justice System

Quinney’s work clearly suggests that criminal law and the criminal justice system are used solely as tools to control the lower classes. Considered **instrumental Marxism**, this type of theory argues that the law and criminal justice system are always instruments to be used by the capitalist class.<sup>88</sup> The purpose of radical analyses within this perspective is to demonstrate the true purpose of the criminal law and the justice system. A major weakness of instrumental Marxist analysis is that there is a substantial body of law that appears to run against the interests of the capitalist class. Why, for example, would economic elites allow laws against pollution, price fixing, or false advertising?

**Structural Marxism** grants the government, at least in the short term, a degree of political autonomy. In other words, some laws may indeed run counter to the desires of the capitalist class. Furthermore, capitalists are not portrayed as a single homogenous group. Rather, some laws may serve the interests of particular factions of the capitalist elite, but not others.<sup>89</sup> In the long run, both perspectives argue that the content of the legal code and enforcement of the laws will benefit the economic elites. What is the evidence to support this position?

Jeffrey Reiman’s *The Rich Get Richer and the Poor Get Prison* is a classic treatise on this issue. Reiman argues that dangerous actions perpetrated by the wealthy are often not even defined as criminal. For example, studies estimate that over 12,000 Americans die from unnecessary surgeries each year. Countless more die from pollution, hazardous work conditions, and unsafe products. Even where these actions are defined as criminal, they are framed as actions that require regulatory oversight rather than criminal prosecution. To the extent that white-collar criminals convicted of acts

such as insider trading, embezzlement, and fraud are even sanctioned, their penalties pale in comparison to the typical sanctions for street crimes.

Reiman argues that at virtually every stage of the criminal justice system, the wealthy and middle-class members of society are weeded out, leaving predominantly poor individuals to fill U.S. prisons. Reiman highlights research that indicates that (1) the police are more likely to take formal action when the suspect is poor; (2) the wealthy are less likely to be formally charged for an offense; and (3) even when charged, the wealthy are often able to avoid punitive sanctioning.<sup>90</sup>

Moreover, crimes that are likely to be committed by wealthy individuals (e.g., insider trading, embezzlement, violations of occupational safety standards, bribery, consumer fraud) are viewed as less serious and are less likely to be enforced. Reiman highlights the savings and loan scandal in the 1980s, and corporate crime sagas of the 1990s (e.g., Enron, Arthur Anderson, Tyco). Where prison sentences were handed out for these crimes, they were very light compared with the typical sentence for a comparable street crime. For example, the savings and loan scandal in the 1980s cost



**Would more vigorous enforcement of the law reduce corporate and white collar crimes such as pollution?**

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American taxpayers over \$480 billion, but it led to only a handful of convictions of company executives. Of those convicted, most ended up serving between 1 and 4 years in prison.<sup>91</sup>

Recently, federal criminal prosecutions of white-collar offenders have actually *decreased*. Over the past decade, the Justice Department has been stung by legal setbacks in several high-profile cases. Furthermore, after the 9/11 terrorist attack, many white-collar investigation resources were diverted to fight terrorism. Between the mid 1990s and 2012, white-collar prosecutions, as a percent of total federal cases dropped from almost 18 percent to 9 percent.<sup>92</sup> Thus, despite dwarfing past corporate scandals in magnitude, the mortgage and credit crisis that led to the “Great Recession” of 2008 produced no prison sentences for Wall Street executives.

Instead of prison sentences, the Justice Department and federal regulatory agencies have focused on reaching settlements while demanding corporate reform. Banks and other financial firms, including JP Morgan Chase (\$31B), Bank of America (\$58B), and Citigroup (\$13B) have paid out over \$150 billion in fines, fees, and restitution for their role in the mortgage meltdown.<sup>93</sup>

The most recent trend in the prosecution of corporations is the use of deferred (DPA) or non-prosecution agreements (NPA). Here, corporations agree to certain conditions in exchange for avoiding criminal prosecution. This practice is explored in detail in **Theory in Action: Too Big to Jail? Conflict Theory and Corporate Crime**.

Critics point out that many of these settlements require no admission of wrongdoing, and that the fines are often a

# THEORY IN ACTION

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## Too Big to Jail? Conflict Theory and Corporate Crime

Conflict and radical theories seek to understand how power shapes the content of the law and the operation of the criminal justice system. Radical theories in particular point out how the wealthy elite use their power to stay above the law. In the book *Too Big to Fail: How Prosecutors Compromise with Corporations*, Brandon Garrett explores how difficult it can be to deter the criminal activities of powerful multinational corporations. Under U.S. federal law, corporations can be prosecuted for criminal conduct. With “no soul to be damned, and no body to kick,” however, a corporation can obviously not be jailed. Instead, criminal sanctions are limited to fines and/or disbarment from seeking government contracts. Over the past decade, there has been a spike in the amount of money collected through criminal fines. Most of the money was paid in a small number of blockbuster cases. Indeed, it seems as though the government has announced “record” fines almost yearly.

Many of these fines were the result of a new trend in the criminal pursuit of corporations—deferred (DPA) or non-prosecution agreements (NPA). In a typical arrangement, the prosecutor agrees to hold off (or end) prosecution if the corporation agrees to meet certain demands. The demands usually include payment of a criminal fine, cooperation with the investigation (including cases against individual

employees) ethics training for employees, and sometimes oversight from a third party. Deferred prosecution was developed, and is still used today, as method to reform criminal offenders. Individuals agree to stipulations, such as drug treatment, in order to avoid prosecution for their offense. In the 1990s, the U.S. corporate sentencing guidelines extended them in an effort to change corporate culture and encourage companies to admit their wrongdoing.

Why has there been a sharp increase in the use of DPA or NPA for corporate crime? There appear to be several reasons. Corporate crime can be difficult to prosecute, especially against huge multinational corporations that can mount an expensive and skilled defense, and drag the case out for years. In corporate prosecutions, notes Garrett, the federal government is David and the corporations are Goliath. Therefore, DPAs allow prosecutors to save scarce resources by relying on the corporation to investigate its own wrongdoing and to monitor its own compliance under new procedures or rules. Prosecutors can also request the corporation make an admission of wrongful behavior. This stands in contrast to civil suits, where companies pay a fine but admit to no wrongdoing. Another reason to prefer a DPA is the desire to avoid “collateral consequences” of a full prosecution for non-involved employees, shareholders, and even the

economy. In 2002, the successful prosecution of accounting firm Arthur Anderson led to unemployment for thousands of employees, most who had no involvement in crime. The case centered on the company's shredding of documents related to the auditing of Enron. Employees gathered outside the trial wearing shirts with the slogan, "I didn't shred, my kid needs to be fed."

Garrett notes, however, that DPAs and other corporate plea bargaining grant leniency to the most powerful individuals and corporations in the world and often ask little in return. In corporate crime, the "biggest fish" get the best deals. They plead to lesser crimes and get smaller fines. Compliance conditions that sound impressive turn out to be difficult to enforce. For example, while billion dollar fines may sound impressive, they amount to less than 1 percent of the corporation's market value, and are often a fraction of the profit made from the criminal offense. Garrett found that in two-thirds of DPAs, no individuals were punished. Individuals who were singled out for prosecution were lower level employees rather than corporate leaders.

Consider the pharmaceutical giant Pfizer. In 2009, as part of a DPA, the company paid a then record \$2.3 billion in civil and criminal fines for flagrantly illegal marketing activities, including bribing doctors to promote "off-label" use of drugs. Whistle-blower John Kopehinski, a former Pfizer employee, described a corporate culture driven by sales, where "if you didn't sell drugs illegally, you were not seen as a team player." In the "historic" settlement, Pfizer also agreed to an "expansive corporate integrity agreement" to detect and report future illegal conduct.

While the press releases from the government made this settlement sound like a victory, there is much to criticize. First, industry analysts suggest that the fines were

only a fraction of the profits gained from the illegal activity. Second, this was Pfizer's fourth DPA involving illegal marketing activities since 2002. Each of the previous DPAs had similar compliance stipulations that did not appear to have been effective. Finally, as with the previous DPAs, none of the senior executives who were alleged to have known about (and sometimes coordinated) the illegal activity were prosecuted as individuals. Indeed, the criminal prosecution of corporate executives is rare. Demonstrating the criminal intent of executives is difficult. Garrett notes that executives can invoke several variants of the "ostrich defense" (they were not aware of the criminal activity). Furthermore, with almost unlimited resources, they can outgun federal prosecutors at every stage of criminal justice proceedings.

There is little doubt that wealth and power influence the enforcement of law and criminal justice proceedings. The pursuit of corporate criminals often stands in stark contrast to the pursuit of street criminals. Do prosecutors worry about "collateral consequences" (e.g., will the offenders' children be cared for) when convicting a drug offender? Would a shoplifter commit more crimes if they were fined \$10 for stealing \$500 worth of goods from a store?

**Sources:** Garrett, B. L. (2014). *Too big to jail: How prosecutors compromise with corporations*. Cambridge, MA: Belknap Press; Rakoff, J. S. (2015, Feb 19). Justice deferred is justice denied. *The New York Review of Books*. Retrieved June 10, 2015, from <http://www.nybooks.com/articles/archives/2015/feb/19/justice-deferred-justice-denied/>; Harris, G. (2009, September 3). Pfizer to pay \$2.3 billion to settle inquiry over marketing. *The New York Times*. Retrieved June 10, 2015, from <http://www.nytimes.com/2009/09/03/business>

fraction of the profit gained from illicit activities. Instead of being framed as moral wrongs worthy of shame, corporations view these penalties as simply a "cost of doing business." The disparity between the treatment of white-collar and street crime helps to create the public image of an offender as a young, black, inner-city resident. Ironically, from a deterrence theory perspective, white-collar offenders would seem to be more vulnerable to criminal sanctions than street offenders. This is because many white-collar crimes are rational and involve cost-benefit calculations, and many white-collar offenders are people for whom prison would be particularly painful.

## Historical Support for Marxist Criminology

Many aspects of radical theory can be difficult to test. Historical analyses of the law and systems of formal control offer one method to examine Marxist theories. William Chambliss

uses such a historical analysis to support his theory. For example, he argues that the English vagrancy law of 1349 was enacted solely to provide a pool of cheap labor and to combat the collapse of the feudal system:<sup>94</sup>

*The law was clearly and consciously designed to serve the interests of the ruling class at the expense of the working class. The vagrancy laws were designed to alleviate a condition defined by the lawmakers as undesirable.*

The vagrancy law was later amended to protect the transportation of goods and to control recidivism by branding the letter "V" on the forehead of repeat offenders.<sup>95</sup> In this way, enforcement of the vagrancy law was adapted to meet changing social conditions. Although his study has been severely criticized, it remains a classic work in criminology.

Another example of how history has been used to support Marxist theory is Anthony Platt's study of the origins

and development of the juvenile court system in the United States.<sup>96</sup> To Platt, this system was formed to control immigrant youths and instill discipline. It was dominated by wealthy upper-class matrons who promulgated the values of the white, Anglo-Saxon, capitalist class:<sup>97</sup>

*The child saving movement was heavily influenced by middle-class women who extended their housewifely roles into public service and economic resources to advance the cause of child welfare. The child savers defended the importance of the home, of family life, and parental supervision. These institutions traditionally gave purpose to a woman's life.*

Platt charges that, under the guise of the child-saving movement, delinquency was invented to control the behavior of lower-class youths. The combination of a capitalist society (which creates a surplus labor pool) and the child labor laws (which prevent children from working) created a dangerous class that necessitated control. Platt argues that the juvenile courts were created largely to serve this purpose.

## A Radical Critique of “Traditional” Criminologists

Critical theorists have even subjected the discipline of criminology itself to scrutiny. They contend that mainstream criminology concentrates on the behavior of the offender, accepts the legal definitions of crime, and largely ignores the proposition that crime is created by political authority. Thus, criminologists serve as agents of the state who provide information that the government uses to manipulate and control those who threaten the system.<sup>98</sup>

Radical criminologists point out, for example, that most mainstream theories of crime are actually theories of street crime that largely ignore crimes of the affluent.<sup>99</sup> Consider, for example, Gottfredson and Hirschi's theory of low self-control. Most persons in a position of power have demonstrated enough self-control to accumulate the credentials (e.g., employment, education) to rise to their position. Robert Merton's modes of adaptation virtually require offenders to be poor (i.e., only the poor lack legitimate means for achieving success). Criminologists also lend legitimacy to the image of criminals as urban, poor, and non-white by relying on the FBI's Uniform Crime Report (UCR) data. The UCR does not track corporate or government crime.<sup>100</sup> Furthermore, despite recent attempts to remedy this situation, the UCR does not provide reliable information on other forms of white-collar crime.<sup>101</sup> Radical scholars urge mainstream criminologists to question this preoccupation with street crime and to scrutinize the political and social institutions that support the crimes of the powerful.

## A Critique of Radical Criminology

Radical criminology has been criticized on several grounds. First, there is the question of whether radical criminologists offer much that is new.<sup>102</sup> For example, like Durkheim, radical

criminologists assert that crime is normal and that diversity should be tolerated. Like labeling theorists, they emphasize rulemaking, not rulebreaking. In fact, some scholars argue that the only thing the radicals managed to do was to politicize traditional criminological theories.<sup>103</sup>

Second, some claim that radical criminologists have been unable to clearly define the ruling class.<sup>104</sup> Are the capitalists all powerful? Can they really decide exactly how the law is made and enforced? In some ways, radical criminologists portray crime policy as a conspiracy theory. Critics are also leery of radical theory's dependence on historical analysis, which is essentially someone's interpretation of historical events.<sup>105</sup>

Third, Criminologist Jackson Toby argues that the radicals provide an idealized view of the deviant as a rebel. This underdog mentality appears to excuse all lower-class criminality. He notes that crimes of the elite, however, do not legitimate other crimes. Toby also asserts that the radicals must acknowledge that imperfect justice is the product of an imperfect world: “What the radical criminologists refuse to recognize is that the political process in a reasonably open society is responsive (not perfectly) to public opinion.”<sup>106</sup>

Finally, radical criminologists must now contend with the failure of communism in the Soviet Union and Eastern Europe. Certainly, these states were not model Marxist societies; they were more bureaucratic and party dominated than Marx would have liked. However, they did represent an attempt to put Marxian theory into practice, and their demise supports the view that Marx's utopian vision of society is difficult, if not impossible, to carry out. Even more damaging is the fact that some capitalist countries (e.g., England, Japan) have relatively low crime rates. If capitalism is the sole cause of criminal behavior, how is this possible?

Does the failure of communism and the low crime rates of some capitalist countries mean that the radicals were wrong? Perhaps, but their work has forced criminologists to broaden their perspective. Criminal law *can* be used as a weapon to oppress the public, and it can be overextended in damaging and self-defeating ways. Radical theorists also deserve credit for highlighting the difference in sanctioning between crimes of the powerful and crimes of the poor. As discussed briefly earlier (and will be seen more clearly in Chapter 15), crimes of the powerful are far more destructive than street crime. Radical theorists also act as a conscience for the discipline of criminology. They remind criminologists not to allow their discipline to be co-opted by the status quo.

## Extensions of Radical Criminology

Interest in the more hard-line versions of Marxist and radical theories of crime peaked in the early 1980s and has declined thereafter. Since that time, there have been several attempts to reinvigorate radical theory. We explore three of these attempts—critical realism, market society capitalism, and peacemaking—in the next section.

### Critical Realism

Radical criminologists have always been concerned with praxis, or “action that is guided by theory and that has social

change as its goal,”<sup>107</sup> yet they also have been criticized for relying on a socialist revolution to solve social problems. Radical theories also tend to focus on criminal law, class conflict, and crimes of the powerful. Often, concern over street crime was virtually dismissed because it drew attention away from the “real” conflict. Where it was discussed, it was framed as a “proto-revolutionary” activity. From a policy perspective, this excluded radicals from the public conversation about how to reduce street crime. Instead, right-wing strategies that emphasized law and order and the use of surveillance and policing dominated the policy debate.

Critical realism (also called British realism, or left realism) emerged from British scholars as an attempt to maintain a critical stance while also treating street crime as an important issue. They argue that street crime is a serious problem for the working class and not a “proto-revolutionary activity” of the oppressed masses. Working-class people are victimized not only by the powerful classes in society, but also by the poor.<sup>108</sup> The British realists are critical of the policies developed by the government to deal with street crime. They question conservative crime policies that emphasize deterrence, military-style policing, and increasing use of prisons. As an alternative solution, left realists suggest the use of minimal policing and police accountability to local communities.<sup>109</sup> Specifically, minimal policing calls for maximum public initiation of police action, minimal coercion by the police, minimal police intervention, and maximum public access to the police.<sup>110</sup>

From a theory perspective, critical realists have proposed a “square of crime” that captures the main components involved in the construction of crime—the offender, the victim, the state, and the public. Robert Matthews describes this approach, in which “The role of theory is to reveal the underlying processes or determinants on which the complex realities of everyday life are built. Thus social theory is a primary concern of critical realism, but it has to be useful and useable. It is not an end in itself.”<sup>111</sup>

### Elliott Currie: The United States as a “Market Society”

The gist of radical theory is that capitalism causes crime. Elliott Currie suggests the following update: *Some forms of capitalism encourage crime.* Currie uses the concept of a market society to explain the difference.<sup>112</sup> A *market economy* is based on the principles of capitalism—and capitalism is an important aspect of the global economy. Many societies with capitalist economies nevertheless have relatively low crime rates (e.g., Japan, Great Britain). Currie refers to the economic and social arrangements in these countries as *compassionate capitalism*. In other words, the government curbs the free market by ensuring that economic inequality does not become too severe and provides strong safety nets for those who are not involved in the economy. In contrast, a **market society** involves the following:<sup>113</sup>

*[T]he spread of civilization in which the pursuit of personal economic gain becomes increasingly the dominant organizing principle of social life; a social formation in which market principles, instead*

*of being confined to some parts of the economy, and appropriately buffered and restrained by other social institutions and norms, come to suffuse the whole social fabric—and to undercut and overwhelm other principles, that have historically sustained individuals, families, and communities.*

In other words, a market society is a completely Darwinian society with a sink-or-swim mentality. There are few cushions against disabilities or misfortunes in the labor market. This central idea is very similar to Messner and Rosenfeld’s institutional anomie theory. In both cases, that adherence to a hard-core form of capitalism produces America’s high rates of violent crime. As a critical criminologist, however, Currie takes this central idea in a more radical direction.<sup>114</sup> He identifies seven mechanisms that link a market society to high rates of violence. The mechanisms are outlined in **TABLE 8-3**.

In particular, Currie points out that a market society tolerates high levels of inequality and poverty. The idea of having a strong safety net, with job training and relocation, child care, and universal health care, runs counter to the “every-one-for-themselves” mentality of a market society. Even the regulation of handguns is very limited, when compared with other advanced countries. These characteristics interfere with the childhood development (poverty), informal control (job relocations, lack of child care), and other buffers against high levels of crime. Thus, while Marxist radicals support a revolution to overthrow capitalism, Currie suggests that a softer, gentler capitalist society—allowing a little socialism to creep in might suffice.

### Criminology as Peacemaking

Another new direction in radical thought involves using criminology to promote a peaceful society. This approach draws on many religious traditions (e.g., Buddhism, Quakerism, Judaism) that see crime as a form of suffering from both the criminal’s and the victim’s perspective:<sup>115</sup>

*Crime is suffering passed on from one person to another; one kind of suffering becomes another; we have to suffer with the criminal to put an end to the suffering the criminal inflicts upon others. As long as we persist in trying to make the criminal suffer for us, the problem will get worse.*

One concrete example of a course of action is mediation. Mediation transforms criminal disputes into civil matters by bringing victims and offenders to the bargaining table. It attempts to offer forms of reconciliation that are constructive for both parties.<sup>116,117</sup> This approach also calls for the development of a “nonviolent criminology of compassion and service.”<sup>118</sup> This, Quinney suggests, runs counter to the interests of the criminal justice system, which he says is driven by violence:<sup>119</sup>

*It is a system that assumes that violence can be overcome by violence, evil by evil. Criminal justice at home and warfare abroad are of the same principle of violence. This principle sadly dominates much of our*

**TABLE 8-3****How a Market Society Breeds Violent Crime**

Premise	Explanation
1. A market society breeds violent crime by destroying livelihood.	In a market society, labor is always a cost to be reduced rather than a social institution valued in its own right. Benefits and wages are cut, and the number of working poor is high. A lack of stable or rewarding work breeds alienation and undercuts the idea of having a stake in society.
2. A market society has an inherent tendency toward extremes of inequality and material deprivation.	Income inequality in the United States is more dramatic than in other advanced countries. Poor children are more prevalent in the United States, and they are poorer than in other industrialized countries. Children living in poverty (especially extreme poverty) are more likely to be physically abused and neglected and less likely to develop intellectually.
3. A market society weakens public support.	A market society is opposed to the provision of public support that may inhibit violent crime. For example, while other countries provide nearly universal child care to working parents, the United States “allows” parents to take unpaid leave without getting fired for certain family emergencies.
4. A market society erodes informal social support.	Employers’ desire for a flexible workforce means that workers continuously move locations, uprooting them from their communities and families. This interferes with social organization and removes a source of social support.
5. A market society promotes a culture that exalts brutal individual competition and consumption.	A culture of materialism (or “hypermateralism”) emphasizes money, rather than other values, such as a job well done. In such a culture, throwing people out of a job is not considered bad, but rather good business practice.
6. A market society deregulates the technology of violence.	The virtual absence of national-level gun control distinguishes the United States from virtually every other advanced nation.
7. A market society weakens alternative political values and institutions.	The prevailing ideology (or myth) is that inequality and deprivation are simply the nature of things. Labor unions or political parties that address the needs of the poor or disenfranchised are weak or nonexistent.

Source: Currie, E. *Theoretical criminology*, Vol. 1, Issue 2, 147–172, © 1997 by Sage Publications. Reprinted by Permission of SAGE.

*criminology. Fortunately, more and more criminologists are realizing that this principle is fundamentally incompatible with a faith that seeks to express itself in compassion, forgiveness, and love.*

The warlike image of the criminal justice system, so this argument goes, contributes to the crime problem. Criminologists must seek to make peace by confronting such issues as homelessness, sexual assault, and the use of prisons.<sup>120</sup> The primary criticism of this perspective is that most of its proponents (though there are exceptions) reject any effort to scientifically study crime or crime control. Rather, it is simply a call to love thy neighbor. In that sense, peacemaking criminology no longer portends to be a theory of criminal behavior.<sup>121,122</sup>

## Feminist Criminology

Historically, females were largely ignored in criminology. Most empirical tests used data on males to explain male

offending; theories of crime explained why boys or men engaged in crime.<sup>123</sup> Until the last 40 years, only a handful of scholars directly addressed female criminality. Even here, the portrayal of female offenders was often blatantly sexist. In essence, because female offenders deviated from their “natural temperament” (e.g., warm, passive, caring), they were viewed as biologically or psychologically defective.<sup>124</sup> Over the past few decades, this situation has changed substantially. A major turning point was the women’s movement and the fight for gender equality. Among other things, this movement created a wave of female criminologists by paving the way for women to enter graduate school.<sup>125</sup>

As **TABLE 8-4** illustrates, the feminist perspective takes different forms.<sup>126</sup> Liberal feminists, who emphasize equal opportunity and the importance of sex-role socialization, had the most influence in the early days of the feminist movement. Critical (e.g., socialist and radical) feminists emphasize the structural inequality in power between men and women. This approach links male and female crime to patriarchy—a cultural arrangement where males exert dominance

TABLE 8-4

## Three Feminist Perspectives on Crime

Perspective	Description
Liberal feminism	Highlights problems arising from gender discrimination and stereotypical views concerning the traditional roles of women in society. It emphasizes the use of affirmative action and equal opportunity as major weapons of change. This perspective has been criticized as limited because it ignores class and race differences among women. It has also been characterized as less threatening because it does not strongly question “white, male, and/or capitalist privilege” and typically uses the traditional scientific, quantitative (positivist) methodology to study crime.
Socialist feminism	Views gender discrimination as a function of capitalist society, which fosters both social class divisions and patriarchy. The criminality of males and females varies in frequency and type because of the social relations of production (class) and reproduction (family). Patriarchal capitalism creates two groups: the powerful (males and capitalists) and the powerless (females and the working class). The opportunity to commit crime is limited by position in the social structure.
Radical feminism	Views the origins of patriarchy and subordination of women in male aggression and the control of female sexuality. For example, radical feminists have redefined rape as a crime of violence and male power, control, and domination rather than as a sexual crime.

Source: Simpson, S. S. (1989). Feminist theory, crime, and justice. *Criminology*, 27, 605–632.

over females through financial and physical power. In a patriarchal society, male behaviors are defined as “normal,” and male control of females is viewed as legitimate.<sup>127</sup>

In a now-classic article, Kathleen Daly and Meda Chesney-Lind outlined two central problems for a male-dominated criminology.<sup>128</sup> The **generalizability problem** suggests that (in part, because most criminology theorists are male) mainstream criminological theories may not be applicable to female offending. The **gender-ratio problem** speaks to the empirical observation that males account for the vast majority of delinquent and criminal offending. The key task before researchers is to identify factors that account for this gender difference.

## The Gender Ratio

There is little doubt that males are more prone to crime than females. UCR data from 2012 shows that males account for the vast majority of arrests made for homicide (89%), rape (99%), robbery (87%), and aggravated assault (77%). The gender difference is smaller for property crime, where males constituted roughly 63 percent of all those arrested.<sup>129</sup> The National Crime Victimization Survey reveals a similar pattern: Males account for roughly 80–85 percent of violent offenders identified by victims.<sup>130,131</sup> Self-report studies that measure serious forms of delinquency tell a similar story. The central issue for theorists is explaining male overrepresentation in criminal behavior. It is hard to overstate the importance of this issue. If, as many believe, the gender gap is due to environmental influence such as different parenting practices, the policy implications are enormous. Sticking with the example of parenting—if parents “parented” their boys as they do girls, male offending would be expected to decline

dramatically. Ironically, though, the first investigations into the gender ratio did not seek to explain its existence. Rather, they argued that the gender ratio was shrinking.

In 1975, two controversial works appeared. Freda Adler’s *Sisters in Crime* and Rita Simon’s *Women and Crime* argued that the women’s movement provided greater opportunities for females in both legitimate and illegitimate enterprises.<sup>132</sup> The assumption was that feminism would thus lead to a growth in the female crime rate. According to this “liberation hypothesis,” female offenders were now capable of committing the same offenses as men, and female criminality would approach that of males in both nature and volume.

Both Adler’s and Simon’s studies were criticized by feminists because they:<sup>133</sup>

*[P]roposed ideas about women’s criminality that were troubling to feminists because they were largely an outgrowth of the unexamined assumption that the emancipation of women resided solely in achieving legal and social equality with men in the public sphere. Although the books reached different conclusions, they touched a raw nerve by linking women’s crime to the women’s movement and to the goal of equality with men in the public sphere.*

In fact, while there is some evidence that the gender ratio has declined over time, analysis of crime statistics reveals that such changes have not been radical. Furthermore, there does not appear to be a large shift toward female offending in “male-oriented” crimes such as robbery. Indeed, the largest increases in female offending involve property crimes such as theft.<sup>134</sup> Evidence also suggests that recent gender-ratio declines in violent offending are due to sharp

decreases in male offending rather than in an increase in female offending.<sup>135</sup>

Overall, female involvement in crime remains far less than that of males. This pattern is not limited to street crime. Women convicted of white-collar crimes tend to be clerical workers, not managers or administrators, as with their male counterparts.<sup>136</sup> Female white-collar offenders are also more likely to act alone and to profit less from their offenses than males.

Over the past 20 years, several scholars have devised empirical tests to examine and explain the gender gap. Typically, these studies use variables from mainstream theories of crime (e.g., social learning and social control) to account for the difference in offending across genders. The assumption in this research is that male and female offending is caused by the same factors but that males are exposed to more risk factors than females. These investigations have yielded mixed results. Typically, researchers find that they can account for some, but not all, of the gender gap. Generally, social learning variables (e.g., delinquent peers, antisocial attitudes), social control variables (self-control, social bonds), and sex-role attitudes (e.g., traditional gender beliefs, masculinity) do the best job of explaining gender differences in offending.<sup>137–139</sup>

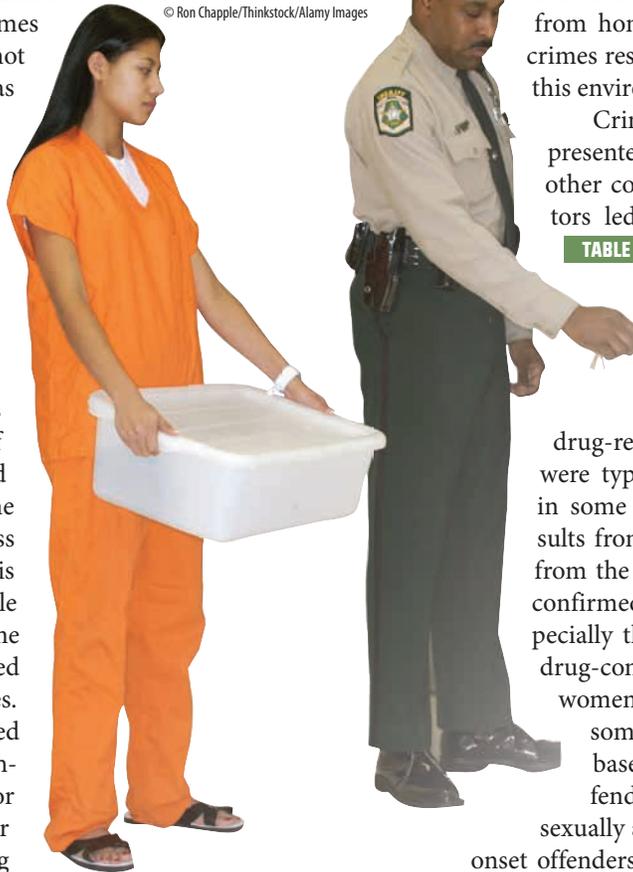
## The Generalizability Issue

Virtually all theories of crime, until recently, were created by men to account for male offending. An important question is whether such “male” theories can also explain female offending. The general finding is that variables derived from mainstream theories of crime also explain female offending.<sup>140</sup> Hirschi’s social bond theory (see Chapter 7) actually explains female offending better than male offending. More commonly, authors find little difference in how well theories predict offending across gender. Paul Mazerolle’s analysis of general strain theory (see Chapter 6) is a good example. Mazerolle found that, for the most part, measures of strain (e.g., negative life events, peer hassles) explain both male and female offending.<sup>141</sup>

The fact that mainstream theories can explain female offending does not necessarily mean that they offer a *complete* explanation. Feminist scholars point out that the male perspective may overlook factors that are unique to females. Past victimization in general, and in particular sexual

**Because females constitute less than 10% of all prisoners, most states have only one female prison.**

© Ron Chapple/Thinkstock/Alamy Images



victimization, is implicated in much female offending.<sup>142</sup> Studies on incarcerated girls reveal that between 40 percent and 73 percent had been sexually abused.<sup>143</sup> Importantly, abuse can lead to girls (and boys) running away from home. Prostitution, theft, and other crimes result from the attempt to survive in this environment.

Criminologist Kathleen Daly used presentence investigation reports and other court records to examine what factors led females to engage in crime.<sup>144</sup>

**TABLE 8-5** presents Daly’s typology of female offending.

Street women, for example, are those who have experienced high levels of abuse and are arrested primarily for prostitution, theft, and drug-related offenses. Battered women were typically arrested for harming (and in some cases, killing) their abusers. Results from a more recent study of women from the Baltimore City Detention Center confirmed several of Daly’s typologies, especially the harmed and harming women, drug-connected women, and battered women pathways. This study also found some support for distinctive pathways based on age of onset. Child onset offenders were more apt to have been sexually abused as children than were later onset offenders and were more heavily involved in drug dealing, property crime, and violence in adulthood. On the other hand, adolescent onset offenders were no more likely to have been sexually or physically abused as children.<sup>145</sup>

Over the past decade, criminologists have sought to “gender” mainstream theories of crime. In other words, they have tried to explain how theories such as social control, social learning, strain, and rational choice might explain female crime and the gender gap.<sup>146–147</sup> Heimer and De Coster use the feminist perspective to “gender” differential association theory. The authors believe that definitions favorable to law violation have different sources for males and females. Among males, pro-violence attitudes are learned when parents fail to correct their violent acts (e.g., “boys will be boys”). Females, because of their greater concern for interpersonal relationships, are more likely to learn violent attitudes when there is a breakdown of relationships in the family.<sup>148</sup>

Feminist explanations of female offending, such as Daly’s typology and Heimer and De Coster’s revision of differential association, represent an exciting new area in criminology. After much neglect, it appears as though the female perspective and feminist theory are gaining a voice within criminology. This relatively new area of criminology will continue to generate important insight into the gender gap, the issue of generalizability, and female (as well as male) offending in general.

TABLE 8-5

## A Typology of Female Offenders

Type of Offender	Description
Street women	Street women have experienced high levels of abuse, which is their primary reason for living on the street. This type of woman is likely to be arrested for prostitution, theft, or drug-related offenses.
Harmed-and-harming women	These offenders, abused and/or neglected as children, are labeled as “problem children.” They are more likely to be addicted to alcohol or drugs, have psychological problems, and engage in violent behavior.
Battered women	Battered women are currently in a relationship with an abusive partner. Often, they are in court for harming the person who is battering them.
Drug-connected women	This type of offender distributes drugs in conjunction with her boyfriend, husband, or family.
“Other” women	“Other” women are those who do not fit in other categories. They are more likely to be in court for crimes of greed, such as embezzlement or fraud, which are not committed to meet basic needs.

Data from Kathleen Daly, *Gender, Crime, and Punishment* (New Haven, CT: Yale University Press, 1994).

## Gender and the Criminal Justice System

What predictions would a feminist criminologist make on the relationship between gender and the law? A patriarchal society is by definition male dominated. Following the logic of other critical theories, those who lack power should have their behavior criminalized and should be singled out by the criminal justice system for punishment. Also, crimes against the less powerful should be given less priority. Disparities in the treatment of women in the criminal justice system have been studied by both conflict and radical theorists. Are persons treated equally under the law, or is gender a key indicator of how a case will be handled?

As with race and class, research on this area examines whether gender has an impact on criminal justice decision making independent of other factors. The general pattern found in this research is that if there is a gender effect, it benefits females.<sup>149</sup> In fact, Daly notes that gender decisions favoring women are found more often than race decisions favoring whites.<sup>150</sup> As with race, significant gender effects tend to be small and appear at different stages of processing.

The finding that females are treated more leniently within the criminal justice system was long ago tabbed the **chivalry hypothesis**. Because police, prosecutors, and judges are predominately male, they may have a chivalrous attitude toward women and be more inclined to treat them with leniency. Evidence suggesting the differential processing of women in the criminal justice system is mixed, however. Visher found that police make arrest decisions about

women based on the image the woman projects, not the type of offense (violent versus property). The officers were more likely to be chivalrous toward older, white females and to arrest their young, hostile, black counterparts.<sup>151</sup> A study of plea bargaining in Washington, DC, showed that women were less able to bargain and were more willing to plead guilty than men. In other words, they were not rewarded for pleading guilty with a lesser sentence.<sup>152</sup>

Even where females receive more lenient treatment, feminists are more inclined to regard this as paternalism. A paternalistic response, unlike a chivalrous response, could lead to leniency but also to a punitive response if it serves to keep women in a submissive role.<sup>153</sup> Bishop and Frazier’s examination of Florida delinquency processing suggests a degree of paternalism. For more serious offenses, boys were treated more harshly, and for most status offenses, there were no differences across gender. For contempt-of-court cases, which resulted largely from repeated attempts to run away from home, girls were more likely to be incarcerated than boys.<sup>154</sup>

Like conflict theorists, feminists have also highlighted certain crimes that were not enforced because women lacked power and status. Male violence against women, particularly nonstranger rape and battering of intimates, was traditionally not sanctioned or penalized by the state.<sup>155</sup> Only through sustained campaigning and activism have feminists managed to alter this situation. Terms such as date rape and marital rape, unheard of only a short time ago, are now part of the common vocabulary. Furthermore, intimate violence has been reframed as a crime of violence rather than a personal problem between intimates.



## Conclusion

Critical theories highlight the manner in which laws are made and enforced. Conflict, Marxist, and feminist theories of criminology often challenge the basis and legitimacy of the criminal justice system and of law enforcement. Collectively, they have changed the manner in which crime is studied, considered, and analyzed. They remind society that crime is not an objective behavior, but rather a politically constructed label. In

***They remind society that crime is not an objective behavior, but rather a politically constructed label.***

this sense, they have significantly broadened both the definition and the scope of criminology. Critical theories also challenge criminologists to explain crimes often neglected in the mainstream literature. Feminist theories call attention to female criminality and the male–female offending gap, and radical theories call attention to white-collar, government, and corporate crime. Critical analysis of the operation and nature of the criminal justice system must be continued if criminology is to have a beneficial impact on society.

# WRAP-UP

## CHAPTER SPOTLIGHT

Texture: © Malchev/Shutterstock; Police Tape: © SkillUp/Shutterstock

- Although critical (e.g., conflict, radical, feminist) theories of crime include a diverse body of theories, they share some commonality. In particular, they view crime as a political concept, where those in power shape both the content of the law and the operation of the criminal justice system.
- Conflict theory is based on a pluralistic view of power. There are many interest groups that shape the law. Conflict is primarily used to explain the law and the actions of criminal justice agents, but conflict can also explain some forms of criminal behavior (e.g., an abortion clinic bombing).
- Radical theory stems from the work of Karl Marx. Radical theorists emphasize the conflict between the wealthy elite and the working class. They point out that many harmful acts perpetrated by the wealthy are not defined as criminal. To the extent that such acts are defined as criminal, they are not strongly enforced. Those prosecuted for white-collar crimes rarely receive long prison sentences.
- A central empirical issue in radical theories is whether criminal justice decisions (e.g., the decisions to arrest and to prosecute) are related to race and class. This body of evidence is extensive, complex, and often contradictory. There is some evidence of racial disparity in criminal justice decision making. Racial disparity is most clear in the areas of illicit drug use and capital sentencing.
- Modern extensions of radical theory include Currie's concept of a "market society" as well as peacemaking criminology and left realism.
- Feminist scholars point out that most criminological theories were written by males and about male criminality. They question whether such theories apply to females. Furthermore, they point out that mainstream theory cannot adequately explain why males are more likely than females to engage in crime.
- As with race and class, researchers have studied whether gender has an effect on criminal justice processing. There is some evidence that females are treated more leniently by the system. For some acts (e.g., contempt of court cases arising from repeated run-aways), however, the reverse holds true.

## PUTTING IT ALL TOGETHER

Police Tape: © SkillUp/Shutterstock

1. Is the criminal justice system racist? What factors would you have to take into consideration to research this question?
2. Does American society operate under a consensus or a conflict model?
3. Describe the gender-ratio and generalizability problems.
4. What does Currie mean by a market society? How does a market society breed violence?
5. Think of a current scandal involving wealthy individuals or corporations engaging in crime. How might radical theorists explain this?

## KEY TERMS

Police Tape: © SkillUp/Shutterstock

**altruism** According to Bonger, altruism was a characteristic of primitive societies. In these societies, social solidarity was high, and individuals were more selfless and looked after one another's needs.

**bourgeoisie** Within Marxist theory, those who hold salaried and management positions.

**capitalists** Within Marxist theory, the owners of the means of production.

**chivalry hypothesis** The idea that females are treated leniently by the criminal justice system because police, prosecutors, and judges are predominately male and have a gracious attitude toward women.

**conflict model** The belief that the law is the result of a battle between people or groups that have different levels of power. Control over the state (including the law and the criminal justice system) is the principal prize in the perpetual conflict of society.

**conflict theory** Theory that emphasizes a pluralistic perspective: Multiple groups within a society wield different levels of power.

**consensus model** The belief that the law reflects common agreement over the fundamental values held by society.

**egoism** A lack of consideration for others. According to Bonger, capitalism encourages selfishness, greed, and insensitivity to others.

**extra-legal factors** Characteristics such as race, class, and gender that can affect criminal justice decision making.

**gender-ratio problem** A key issue for criminologists is to explain the empirical observation that males

account for the vast majority of delinquent and criminal offending.

**generalizability problem** Because most criminology theorists are male, mainstream criminological theories may not be applicable (i.e., may not generalize) to female offending.

**instrumental Marxism** This type of Marxist theory argues that the law and criminal justice system are always instruments to be used by the capitalist class.

**legal factors** Factors such as offense seriousness and prior record that play a role in criminal justice decision making.

**lumpenproletariat** Within Marxist theory, the dispossessed, unorganized workers.

**market society** A country (such as the United States) where the capitalist economy dominates all other spheres of life. This is a sink-or-swim society that does not provide a strong safety net for citizens.

**primary conflict** A concept from Thorsten Sellin's culture conflict theory. Primary conflict may arise between an established culture and a less powerful culture. For example, recent immigrants may conduct themselves based on codes from the old country that may be criminal in the dominant culture.

**proletariat** Within Marxist theory, the working class.  
**racial profiling** Racially biased law enforcement; targeting individuals for law enforcement based primarily on their race.

**racial threat hypothesis** The idea that as minority populations increase relative to the white

population, they will be viewed as a threat and punitive measures against them will increase.

**radical theory** Theoretical perspective that emphasizes conflict between the wealthy elite and the rest of society.

**secondary conflict** Concept from Thorsten Sellin's culture conflict theory. Secondary conflict occurs within a single culture that has different subcultures, each with its own conduct norms.

**structural Marxism** This type of Marxist analysis grants the government (at least in the short term) a degree of political autonomy. Some laws may run counter to the desires of the capitalists.

**superstructure** The system of social institutions (e.g., law, education, and politics) that lend legitimacy to capitalist arrangements.