



Sixth Edition

The **COLOR**
of **JUSTICE**

RACE, ETHNICITY, and
CRIME in AMERICA

Samuel Walker

Cassia Spohn

Miriam DeLone

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The Color of Justice

RACE, ETHNICITY, AND CRIME IN AMERICA

Sixth Edition

SAMUEL WALKER

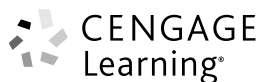
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Preface

Beginning with the highly publicized shooting of Michael Brown in Ferguson, Missouri, on August 9, 2014, the United States has been in the midst of a national crisis over policing and race. Deaths of African Americans at the hands of the police, followed by angry protests, have been regular occurrences. The situation took another dramatic turn in July 2016 with the deliberate assassination of police officers in Dallas, Texas, and Baton Rouge, Louisiana. The national crisis is not confined to the police. The refusal of grand juries in Ferguson and other cities to indict police officers on criminal charges has raised a related controversy over how the courts deal with racial issues. Additionally, the United States continues to stand alone internationally because of its enormous prison population, and what critics label the policy of “mass incarceration.”

Since the first edition of **The Color of Justice** 20 years ago, this book has addressed the key issues related to race, ethnicity, and crime. Over that period, there have been many changes. Crime dropped significantly across the country, although in the last year or two homicides have risen in a number of large cities. Immigration emerged as a national political controversy. Public opinion on imprisonment has also been changing. Beginning around 2009 the prison population began a small but notable decline, reversing the imprisonment boom that began in the 1970s. Finally, attitudes toward the death penalty have begun to change, and the number of executions has fallen. The sixth edition of **The Color of Justice** continues to provide the most up-to-date information on this continually changing subject. The book includes some information that became available only weeks before the manuscript went to the printer.

This edition of **The Color of Justice** continues to address the multiracial and multiethnic character of American society and even expands that coverage. There is a significantly growing body of information on the fastest-growing minority segment of the American population and the Hispanic and Latino communities, and this edition incorporated this new knowledge. The coverage of other racial and ethnic groups has also been expanded.

Finally, and particularly important, **The Color of Justice** continues to provide a critical perspective on all the controversial issues related to race, ethnicity, and criminal justice. Much of what appears in the news media is incomplete or even wrong. **The Color of Justice** will help readers gain a clear and fact-based understanding of the controversial issues of police shootings, racial profiling, patterns of criminal behavior and victimization, the prosecution of offenders, plea bargaining, and the death penalty. By the end of the book, readers will be able to knowledgeably discuss the difficult issues of racial or ethnic disparities in how people are treated and whether or not there are patterns of discrimination.

ORGANIZATION

This book is divided into eleven chapters. The organization is designed to guide students through a logical exploration of the subject, beginning with a discussion of the broader social context for race and ethnicity in American society and then moving to the different components of the criminal justice system: police, courts, corrections, the death penalty, and juvenile justice.

NEW TO THIS EDITION

For the sixth edition, we have significantly updated research and included the most current statistics available, particularly regarding Hispanic groups. We have also included material on some of the most important recent developments in the field—racial profiling in the context of homeland security, for instance, as well as hate crime legislation, the disproportionate attention given to crime victims according to race, minority youth victimization rates, the intersection of race and domestic violence, the impact of the financial crisis on the criminal justice system, and much more:

- Chapter 1, “Race, Ethnicity, and Crime,” has been revised to reflect changes in the state of the racial and ethnic composition of the United States and how those changes affect the criminal justice system.
- Chapter 2, “Victims and Offenders,” includes a reexamination of media depictions of crime victims, especially the race of victims, and also includes expanded discussions of environmental racism, immigration and crime, and additional theoretical perspectives on the causes of criminal violence and hate crime.
- Chapter 3, “Race, Ethnicity, Social Structure, and Crime,” features the most recent data on the social and economic status of African Americans, Hispanics, and white Americans. Particular attention is paid to the impact

of the economic recession that struck the nation in 2008 and the growing inequalities of income and wealth in America.

- Chapter 4, “Justice on the Street,” covers the national police crisis that began in 2014 and the public response. There is important new information of police shootings. Attention is given to the issue of procedural justice, one of the most important new concepts in policing. It also covers the recommendations of the 2015 President’s Task Force on 21st Century Policing. Finally, some of the promising innovations regarding police accountability designed to curb police misconduct are covered.
- Chapter 5, “The Courts,” includes new material reflecting recent research on the relationship between race/ethnicity, pretrial detention, and sentencing, as well as a discussion of the treatment of illegal immigrants in federal courts and expanded coverage of the ways in which race and ethnicity influence prosecutorial charging and plea bargaining decisions. It also includes a discussion of the Duke Lacrosse case and the case of the Jena Six.
- In Chapter 6, “Justice on the Bench,” there is expanded coverage of race and ethnicity in the jury selection process, with a focus on the 2010 report by the Equal Justice Initiative that documented disparities in eight southern states. There also is a new section on racial profiling in the courtroom, which examines the use of cultural stereotypes of the Hmong people.
- In Chapter 7, “Race and Sentencing,” there are new sections on sentencing illegal immigrants and Asian Americans in federal courts, as well as new material on Devah Pager’s work on the “mark of a criminal record” and a discussion of unconscious racial bias among judges. Chapter 7 also includes new research exploring the direct and indirect effects of race and ethnicity on sentencing in state and federal courts.
- Chapter 8, “The Color of Death,” covers the decline in the use of the death penalty. It also covers gendered racism in the use of the death penalty, updated material on Supreme Court decisions that affect the use of capital punishment, and a discussion of the racial justice acts that have been recently enacted. Also in Chapter 8 is a new section focusing on race and the probability of execution.
- Chapter 9, “Corrections in America,” addresses the issue of “mass incarceration.” There is updated information on federal and state incarceration, jail populations, and tribal jails. The chapter also provides updated information for international incarceration rates and prison gangs and presents new research that addresses the role of race in parole board decision making and in post-release hostility.
- Chapter 10, “Minority Youth and Crime,” includes a more extensive discussion of explanations for the higher violent victimization rate among racial and ethnic minority youth and new material on racial and ethnic disparities in arrests of juveniles; it also features a new section that discusses the victimization of African-American girls.

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SUPPLEMENTS

Cengage Learning provides a number of supplements to help instructors use *The Color of Justice: Race, Ethnicity, and Crime in America* in their courses and to aid students in preparing for exams. Supplements are available to qualified adopters. Please consult your local sales representative for details.

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RACE, ETHNICITY, AND CRIME: American's Continuing Crisis

LEARNING OBJECTIVES

After you have read this chapter:

1. You will understand the basic goals of the book as a whole.
2. You will have an understanding of how race and ethnicity are central to understanding crime and criminal justice in America.
3. You will be able to discuss recent trends in criminal justice, the current crime situation in America, emerging problems in the criminal justice system, and how all of these factors affect race, ethnicity, and justice.
4. You will be familiar with the difference between race and ethnicity. You will also understand whether or not these are really scientific categories, and how they are used by the U.S. Census Bureau and by criminal justice agencies.
5. You will understand the quality of commonly used criminal justice data (e.g., arrests) and whether they provide an accurate picture of what actually happens in the justice system.
6. You will be able to discuss the difference between disparities and discrimination with regard to race and ethnicity.

THE NATIONAL RACE CRISIS, 2014–2016

On August 9, 2014, police officer Darren Wilson of the Ferguson, Missouri, police department shot and killed Michel Brown, an unarmed 18-year-old African American. The shooting touched off protests, which eventually

escalated into looting and violence. Missouri authorities mobilized military equipment that only inflamed the protests. Sympathy demonstrations occurred around the country, and the events in Ferguson were carried live on cable television stations.

The tragic events in Ferguson touched off a two-year period of events that escalated into a national crisis over policing and race relations, to a degree not seen since the urban riots of the 1960s. The other events included:

- Three weeks before the shooting of Michael Brown, on July 17, 2014, New York City police officers arrested Eric Garner, an African American, on Long Island for selling illegal cigarettes. Officers sat on him and held him down, not responding to Garner's repeated cries, "I can't breathe!" Garner died of suffocation. The events were captured on a cell phone video, which was broadcast over national television.
- On April 4, 2015 in North Charleston, South Carolina, Walter Scott, a 50-year-old African American, was shot in the back and killed by a police officer as he was running away from the officer. The shooting was captured on a cell phone video and clearly showed the lack of any justification for the shooting.
- A week later, on April 12, 2015, Freddie Gray, a 25-year-old African American, died in a Baltimore police van of neck injuries. Scott's death touched off protests and then arson and looting. Six officers were indicted for crimes related to his death (although three were acquitted and charges were dropped against the other three).
- On the evening of June 17, 2015, Dylan Root, a 21-year-old avowed white racist, walked into the Emanuel African Methodist Episcopal Church, an African-American church, during a prayer meeting, opened fire, and shot and killed nine members of the church. Root later confessed that he hoped to start a "race war."

The sequence of events provoked a national race crisis. Civil rights activists protesting deaths at the hands of the police organized around the slogan "Black Lives Matter." President Barack Obama in December 2014 appointed a President's Commission of 21st Century Policing.¹ It was the first-ever presidential commission or task force devoted exclusively to the police. After a series of hearings around the country, the Commission's *Final Report* contained a sweeping set of recommendations for improving policing and addressing the police-race relations crisis.

In response to the Charleston, South Carolina, church shooting and Dylan Root's goal of starting a "race war," the state of South Carolina on July 10, 2015, removed the Confederate flag from in front of the state Capitol Building. For African Americans, the Confederate flag is a symbol of slavery. Soon after, Walmart announced that it would no longer sell items bearing the Confederate flag. Amazon.com and Ebay followed suit. And the four largest flag makers in the United States said they would no longer produce the flag.²

The Confederate flag controversy dramatized the significance of flags and other symbols in conveying social and political messages. Particularly important, when

a government agency displays a particular symbol, it conveys the message that the meaning behind that symbol is approved by the state of federal government.

Race, Ethnicity, and Justice in America

More than 100 years ago, the great African-American scholar W. E. B. Du Bois declared, “The problem of the twentieth century is the problem of the color line.”³ Racism and racial discrimination, he argued, were the central problems facing modern society.

As the events of 2014–2016 clearly indicate, issues of race and ethnicity continue to be volatile issues today. Criminal justice is one of major focal points of those issues. Nearly every problem in the criminal justice system involves matters of race and ethnicity: Who gets stopped by the police? Who gets arrested? Who goes to prison? Who gets the death penalty? Some of the bare facts of the administration illustrate these issues.

- In 2014, the incarceration rate for African-American males in state and federal prisons was six times the rate for white males (2,724 vs. 465 per 100,000 respectively). The incarceration rate for Hispanic American males was 2.3 times greater than that for non-Hispanic white males (1,091 vs. 465 per 100,000).⁴ There were also disparities in the incarceration of white and African-American females, but not as great as for males.
- The unemployment rate for African Americans in late 2014 was twice the figure for white Americans: 11.3 percent vs. 5.20 percent. The figure for Hispanic Americans was 7.4 percent.⁵ As we will explain later in this chapter, criminologists have always recognized unemployment as a risk factor for involvement in crime. Long-term or even periodic unemployment contributes to poverty and unstable families, both of which are also risk factors for crime.
- The National Congress of American Indians reported in 2013 that Native Americans and Alaska Natives are 2.5 times more likely to experience violent crime and “at least two times more likely to experience rape or sexual assault crimes” than other racial or ethnic groups.⁶
- The Innocence Project reported that as of January 2016, 336 people convicted of crimes had been exonerated by DNA evidence: 61 percent were African American; 31 percent non-Hispanic white; 7 percent Hispanic; and 0.5 percent Asian American.⁷

Public Attitudes about Race, Ethnicity, and Criminal Justice The American people are deeply divided along racial lines on issues of crime, race, and ethnicity. A 2016 Pew Research Center report found that blacks and whites were “worlds apart” in their view of race in America, including the criminal justice system. The survey found that 84 percent of African Americans believed that “blacks are treated less fairly than whites in this country ... in dealing with the police”, compared with 50 percent of white Americans. The divide was almost the same with respect to the courts, with 75 percent of African Americans believing that African

Americans were treated less fairly by the courts, compared with 43 percent of whites.⁸

Fear of crime is an extremely complex subject, and there is an important difference between actual victimization and the fear of crime. The National Crime Victimization Survey found that in 2014 African Americans were far more likely to be the victims of a “serious violent crime” (defined as rape, robbery, and aggravated assault) than whites or Hispanics (African Americans, 10.1 per 1,000; Hispanics, 8.3 per 1,000; whites, 7.0 per 1,000).⁹ Serious violent crimes are particularly destructive, inflicting far more personal and social harm than property crimes, in terms of personal injury and psychological trauma, and in creating fear of crime in the neighborhood.

Yet, fear of crime among whites has been politically very powerful for over 50 years. Fear of crime has been the driving force behind harsher criminal sentences and the enormous increase in the American prison population since the mid-1970s. Michelle Alexander has labeled this policy “mass incarceration.”¹⁰ In fact, the prison population continued to rise in the 1990s even though crime rates experienced a historic decline that has lasted for two decades in many cities (although a number of cities experienced significant increases in crime in 2015).¹¹

The subject of immigration and crime has been a particularly volatile political issue. Many Americans believe that immigrants, particularly undocumented immigrants, are involved in high rates of crime. Yet, as we will discuss later in this chapter, research has consistently found that immigrants have lower involvement in crime than nonimmigrants.

For many whites, “crime” is a political code word for fears of social change, and fears of racial change in particular. A study of community crime control efforts in Chicago, for example, found that neighborhood organizations usually were formed in response to perceived changes in the racial composition of their neighborhoods.¹²

In short, crime and fear of crime pervade virtually every aspect of American society, from the day-to-day lives of people in their neighborhoods to national politics.

IS DISCRIMINATION JUST A MYTH?

Some commentators argue that the criminal justice system is not racist and that allegations of systematic discrimination are based on myth. One of the most forceful advocates of this position is Heather MacDonald, a fellow at the Manhattan Institute. She argues that the primary cause of the high rate of incarceration of African Americans is involvement in criminal behavior, not discrimination by the criminal justice system.¹³

MacDonald’s argument helps to frame the issues we will examine in *The Color of Justice*. What are the facts regarding criminal behavior and the performance of the criminal justice system? Does discrimination exist? If so, how serious is it? Is it *systematic* discrimination, or not? If discrimination exists but is not systematic, how do we characterize it? What accounts for racial and ethnic disparities in

arrest rates and imprisonment rates? If discrimination does not exist at all, what accounts for the disparities in arrests and imprisonment?

In her article, “Is the Criminal-Justice System Racist?” MacDonald makes the following arguments:

- African Americans represent 81 percent of all homicide victims, and 90 percent of the offenders in those cases are also African Americans.¹⁴ Since murder is the crime most likely to result in incarceration (98 percent sentenced to prison; 2 percent to jail in 2009), MacDonald and others argue that this explains part of the imprisonment disparity.¹⁵
- African Americans represent 56 percent of all robbery arrests (2014 FBI data).¹⁶ Robbery is also a crime that usually results in incarceration (86 percent of all convicted offenders sentenced to either prison or jail in 2009), and this also contributes to the imprisonment disparity.¹⁷
- The National Crime Victimization Survey finds that victims’ reports of the race of robbers and offenders committing aggravated assault are roughly equal to the race of persons arrested for these crimes. This suggests that there is no discrimination in arrests for these crimes.¹⁸

MacDonald’s points are based on good criminological data, and for that reason they must be taken seriously. But are they the last word on the subject? After all, statistics can be interpreted in many different ways. One of the main issues we will deal with in this book is that “facts” do not speak for themselves. On all of the most important issues, there are often conflicting data and legitimate differences of opinion among experts about how data should be interpreted.

Marc Maurer, director of The Sentencing Project, argues that there are four important factors that contribute to racial disparities in the criminal justice system. They include: (1) disproportionate involvement in crime (which is MacDonald’s principal focus); (2) disparities in criminal justice processing (which she ignores, and which is a major focus of this book); (3) the “overlap of race and class effects” (which we discuss in detail in Chapter 3); and (4) “the impact of ‘race neutral policies’ of criminal justice agencies.” A “race neutral” policy, we should explain, is a policy that does not refer specifically to race or ethnicity, but which has a disparate effect on people of a certain race or ethnicity. An extreme example would be a police department that had a policy of stopping young men with very baggy pants. The effect would be many stops of young African-American men. (We will discuss this issue in more detail later.)¹⁹

There are some important issues that MacDonald ignores, and which present a very different picture. They include:

- With respect to drugs, the National Survey on Drug Use and Health found only slight differences in illicit drug use by race and ethnicity in 2013. Among people 12 years and older, 9.5 percent of whites had used an illicit drug in the previous 12 months, compared with 10.5 percent of African Americans, and 8.8 percent of Hispanics.²⁰ Yet, an ACLU report on marijuana arrests found that African Americans were 3.73 times more likely to be arrested for marijuana possession than whites.²¹ In addition to the pain and

suffering of an arrest itself, the collateral consequences of an arrest impose further harm, including inability to go to work while in jail, possible loss of that job, inability to get future jobs, and so on. The Sentencing Project points out that “a criminal conviction creates a barrier to securing steady employment, and those with felony drug convictions are disqualified from public assistance and public housing in many areas.”²²

- The Justice Department investigation of Ferguson, Missouri, found that the city was using the police department to generate revenue for the city’s budget, by pressuring it to make traffic stops. The city’s “law enforcement practices,” it found, “are shaped by the City’s focus on revenue rather than by public safety needs.” These practices, moreover, “both reflect and exacerbate existing racial bias, including racial stereotypes.”²³
- The fact that African Americans arrested for felonies are less likely to be prosecuted and less likely to be convicted at trial than whites may be explained by the fact that they may be arrested on weaker evidence. Joan Petersilia’s examination of racial disparities in the justice system found that the apparent “leniency” at the prosecution stage of the system occurred in part to correct for inappropriate arrest decisions.²⁴
- Perhaps most important, the higher rates of offending among African Americans and Latinos can be explained by inequalities in the American social system that are criminogenic: disparities in education, employment, health care, and so on. We will discuss the major theories of crime later in this chapter, and we will examine social and economic inequalities in detail in Chapter 3.

The issue of social and economic inequalities raises a point that is central to this book. *The Color of Justice* takes a big picture view of race, ethnicity, and crime, looking at all the social and economic factors that criminologists know to be risk factors in criminal behavior. What criminal justice agencies do is important, but it is only one part of the larger picture.

OBJECTIVES OF THE BOOK

Race, ethnicity, and criminal justice are in the news week after week. But what are the facts behind the headlines? *The Color of Justice* looks beyond today’s news events and the myths surrounding race, ethnicity, and criminal justice and provides an accurate picture of the situation.

First, *The Color of Justice* offers a *comprehensive treatment* of all the issues on crime and the administration of criminal justice, which no other book does. There are many excellent articles and books on particular topics (e.g., the death penalty, police use of deadly force), but none covers the full range of topics in a complete and critical fashion. As a result, there is usually no discussion of whether relatively more discrimination exists at one point in the justice system than at others. Our comprehensive approach allows us to link the different parts of the criminal justice system: connecting issues of arrest decisions by the police with

prosecutors' decisions to charge offenders. Is there discrimination at both points? How do they reinforce each other?

Second, *The Color of Justice* examines both race and ethnicity in criminal justice. As this chapter will explain later, race and ethnicity are not the same, and differences are very important to understanding how the criminal justice system works. Most criminal justice textbooks do a very poor job in their treatment of race and ethnicity.²⁵ Most do not identify race and ethnicity as a major issue, or clarify the difference between race and ethnicity. *The Color of Justice* makes race and ethnicity *central* to understanding criminal justice in America.

Additionally, this book covers all racial and ethnic groups. We have chosen to title this book *The Color of Justice* because it covers all people of color. Most other books focus entirely on African Americans. Coramae Richey Mann points out that “the available studies focus primarily on African Americans and neglect other racial minorities.”²⁶ Although research on Hispanic Americans has been growing in recent years, there are still major gaps in our knowledge. There is still little good research on Native Americans or Asian Americans. *The Color of Justice* includes material on all groups, including Native Americans and Asian Americans. Our examination highlights the significant differences between the experiences of various racial and ethnic groups with respect to crime and justice.

As we will learn, non-Hispanic whites, African Americans, and Hispanics have very different experiences with the police. The experience of Native Americans who live on reservations, where the nearest police officer may be many miles away, is completely different from that of most other Americans.

Third, *The Color of Justice* offers a *critical perspective* on the available evidence, something that few other books on the subject do. Is there systematic discrimination in the criminal justice system? Or are there simply disparities that can be explained by factors other than race or ethnicity? Can patterns of discrimination be explained better in terms of contextual discrimination? What does that term mean? If this pattern exists, where do we find it? How serious is it? What are the causes? Have any reforms succeeded in reducing disparities and discrimination? Data on arrests and sentencing, for example, are extremely complex. Interpreting traffic stop data to determine if there is racial profiling presents a major challenge for criminologists. Later in this chapter, we discuss the crucial distinction between disparities and discrimination.

Fourth, this book presents the best and most recent research on the relevant topics: the patterns of criminal behavior and victimization, police practices, court processing and sentencing, the death penalty, and prisons and other correctional programs. New research continually deepens our understanding of important issues, and this book stays current with the best new research.

Fifth, this book is up-to-date, incorporating important recent developments in criminal justice. As a result of the national police crisis of 2014–2016, we learned that the official FBI data on the number of persons shot and killed by the police every year count only about half of the actual number. The FBI data reported in 2014 that police shot and killed 444 people. Yet, the *Washington Post*, in a study using all available sources (e. g., news media accounts, social media), found that the annual figure is actually twice what the FBI reports: 986 in 2015.²⁷ Also, beginning in 2011, the American prison population began to decline for the

first time in 40 years.²⁸ The decline is still small, but compared with the explosion in imprisonment since the mid-1970s, it is a historic shift. *The Color of Justice* reports these and other recent changes, which have important implications for a complete and up-to-date picture of race, ethnicity, and crime in America.

Sixth, *The Color of Justice* takes a *contextual approach* to crime and criminal justice and emphasizes the unique historical, political, and economic circumstances of different crimes, different parts of the justice system, and the different experiences of each racial and ethnic group. Alfredo Mirandé, author of *Gringo Justice*, argues that historically “a double standard of justice” has existed, one for Anglo Americans and one for Chicanos. Marianne O. Nielsen, meanwhile, argues that the subject of Native Americans and criminal justice “cannot be understood without recognizing that it is just one of many interrelated issues that face native peoples today,” including “political power, land, economic development, [and] individual despair.”

Regional and local variations in crime and criminal justice also exist. Serious crime has fallen sharply over the past 15 years in New York City and San Diego, but not in Baltimore. The death penalty is most widely used in just a few states. In 2013, Texas (16), Florida (7), and Oklahoma (6) conducted 29 of the 39 executions in the entire country.²⁹ The federal sentencing guidelines prescribe very harsh sentences, while the Minnesota sentencing guidelines result in a very low incarceration rate. All of these variations complicate the overall picture of criminal justice in America.

Finally, building on the importance of contextual factors, *The Color of Justice* offers a contextual theory of race, ethnicity, and criminal justice. We have already rejected Heather MacDonald’s argument that the idea that the criminal justice system is racist a “myth.” We also argued that it is simplistic to say that the system is completely racist in every decision all the time. Our view is that racial and ethnic *disparities* exist throughout the criminal justice system (even after taking into account all the variations we have discussed). It is a mistake, however, to view disparities in particular parts of the criminal justice system in isolation from the larger criminal justice process. As Kimberly Kempf-Leonard persuasively argues in a review of 20 years of juvenile justice reform, an arrest can have “a cumulative effect that may grow like a downhill snowball to disadvantaged minority youths”; it can “create an inequity,” which “can influence decisions at subsequent stages” in the justice system.³⁰ Arrests and confinement of juveniles can affect later decisions when someone is an adult. The cumulative effects of disparities in policing, plea bargaining, sentencing, incarceration, and the use of community-based corrections result in a larger *pattern of injustice* based on race and ethnicity. Later in this chapter, we will explain in greater detail the important difference between disparities and discrimination.

THE COLORS OF AMERICA: RACIAL AND ETHNIC CATEGORIES

The United States is increasingly a multiracial, multiethnic society. In 2014, according to a mid-census estimate, the composition of the American population by households was 62.2 percent non-Hispanic white, 17.4 percent Hispanic,

	Percentage of the total U.S. population				
	White	African American	Hispanic	American Indian	Asian
1990	83.9	12.3	9.0	0.8	3.0
2000	82.1	12.9	11.4	0.9	4.1
2010	80.5	13.5	13.8	0.9	5.1
2020	79.0	14.0	16.3	1.0	6.1
2040	76.1	14.9	21.7	1.1	7.9

FIGURE 1.1 Changing Composition of the U.S. Population, by Race and Ethnicity, 1990–2040

SOURCE: Bureau of the Census, *Population Projections of the United States by Age, Sex, Race, and Hispanic Origin: 1995–2050* (Washington, DC: Department of Commerce, 1996), Table J, p. 13.

13.2 percent African American, 6 percent Asian or Pacific Islander, 1 percent Native American, and 2 percent who reported being of two or more races. By 2040, the census estimates that the population will be 76.1 percent non-Hispanic white, 21.7 percent Hispanic, 14.9 percent African American, and 7.9 percent Asian.³¹ These figures represent significant changes from 30 years ago, and demographers are predicting steady changes in the immediate future. As Figure 1.1 indicates, Hispanics and Asians are the two fastest-growing racial or ethnic groups in the United States, increasing from a combined 12 percent of the population in 1990 to an estimated 29.9 percent by the year 2040. As we will discuss later in a section on “The Geography of Justice,” racial and ethnic groups are unevenly distributed, with important effects on crime and justice.

The Official U.S. Census Categories

Race and ethnicity are extremely complex and controversial subjects, and we do not always have accurate data on important issues. The commonly used categories for race and ethnicity are those developed by the federal Office of Management and Budget (OMB) and are used by the U. S. Census Bureau and other government agencies.³² Unfortunately, these categories are extremely problematic and do not necessarily reflect the social reality of American life: the reality of how people define themselves; how they are defined by other people; and how they interact with other people on a day-to-day basis. Let’s sort our way through this complex issue.

It is very important to understand that *the census is based on self-reported identity*. Are you “African American” or “white”? For the census, it depends on what you tell the census. Are you “Hispanic” or not? It depends on your own self-identity and what you tell the census. The census allows people to identify themselves by race and ethnicity. A person can, for example, self-identify as “white” [race] and “Hispanic” [ethnicity], or as “American Indian” [race] and “Hispanic” [ethnicity]. A person can also identify himself or herself by race with no ethnic identification.

A Pew Center report, *Who’s Hispanic*, explains the self-reporting process used by the U.S. Census works through a series of questions and answers.

For example: “Q. My mom is from Chile and my dad is from Iowa. I was born in Des Moines. Am I Hispanic? A. You are if you say so.”³³

In short, a person who is very dark-skinned can tell the census that he or she is “white.” And that is how that person will be recorded in the census. Another person who is very light-skinned can tell the census that he or she is “African American,” and that is what the census will record.

Now let’s take a closer look at the different racial and ethnic classifications used by the U.S. Census.

Race

Traditionally, race has referred to the “major biological divisions of mankind,” as distinguished by color of skin, color and texture of hair, bodily proportions, and other physical features.³⁴ The traditional approach identifies three major racial groups: Caucasian, Negroid, and Mongoloid.

Anthropologists and sociologists, however, do not accept the traditional strict biological definition of race. Because of intermarriage and evolution over time, it is virtually impossible to find people who are entirely within one racial category. Also, scientists have not been able to determine meaningful differences in behavior, intelligence, or other capabilities among people who are commonly referred to as “white,” “black,” or “Asian.” J. Milton Yinger maintains that “we cannot accept the widespread belief that there are a few clearly distinct and nearly immutable races. Change and intermixture are continuous.”³⁵

Experts regard the concept of race as “primarily a social construct.” That is to say, groups define themselves and/or have labels applied to them by other groups. Traditionally, the politically and culturally dominant group in any society defines the labels that are applied to other groups. At times, however, subordinate groups assert themselves by developing their own labels. As we will discuss shortly, racial designations have changed over the centuries as a result of changes in both political power and racial attitudes. In short, the commonly used terms for different races are socially and politically constructed. This includes such terms as “colored,” “Negro,” and Oriental.” They have no scientific basis, however. Yinger argues that the critical categories for social analysis are the “socially visible ‘racial’ lines, based on beliefs about race and on administrative and political classifications, rather than genetic differences.”³⁶

The cultural designation of who is an African American in American history was driven by the racist “drop of blood” principle. It held that if a person is even of a slight African-American heritage—a great-grandfather, for example—that person was considered an African American. The principle was racist because it did not work the other way around: one “drop” of white blood did not make someone white.³⁷

The term *nonwhite* was once widely used and is still used by some people. The census now forbids the use of the term. “Nonwhite” implies that people in this category lack something important and are “less than” the majority or the ideal. In a subtle way it is demeaning, and the Association of MultiEthnic Americans and related groups are particularly concerned about the impact of classifications and labels on children.³⁸

A brief look at a few families highlights the problems with traditional racial categories. Many people have mixed ancestry. What, for example, is the “race” of the child whose father is African American and mother is of Irish–American descent? Or the child whose mother is Japanese American and whose father is of European background? Or the child whose maternal grandmother was Native American, paternal grandfather was English, and whose father is Hispanic? Many “white” Americans have some ancestors who were African American or Native American. Few African Americans have ancestries that are purely African.

The Different Census Categories of Race and Ethnicity The OMB has over the years revised the categories (and the names) used for some of the racial and ethnic groups. The current categories are (1) American Indian or Alaska Native; (2) Asian; (3) black or African American; (4) Hispanic or Latino; (5) Native Hawaiian or Other Pacific Islander; and (6) white. Previously, OMB used only the term black; the new category is black or African American. Persons may also identify themselves as Haitian or Negro. Previously, only the term Hispanic was used. The new guidelines use Hispanic or Latino. The OMB considered, but rejected, a proposal to use Native American and retained the old term American Indian.

The OMB defines a black or African–American person as anyone “having origins in any of the black racial groups of Africa.” It defines a white person as anyone “having origins in any of the original peoples of Europe, the Middle East, or North Africa.” Accordingly, a person who is from Morocco or Iran is classified as “white,” and someone from Nigeria or Tanzania is classified as “black.” (But, as we have pointed out, the choice of race is up to each individual.) The category of American Indians includes Alaska Natives and “original peoples of North and South America (including Central America).” Asian includes people from the Far East, Southeast Asia, or the Indian subcontinent. Pacific Islanders are no longer in the same category with Asians and are now included with Native Hawaiians in a separate category.³⁹

The OMB explains that the racial and ethnic categories it created “are not anthropologically or scientifically based.” Instead, they represent “a social–political construct and should not be interpreted as being primarily biological or genetic in reference.”⁴⁰

Ethnicity

Ethnicity is not the same as race. Ethnicity refers to differences between groups of people based on *cultural customs*, such as language, religion, foodways, music, family patterns, and other characteristics. Among white Americans, for example, there are distinct ethnic groups based primarily on country of origin: Irish Americans, Italian Americans, Polish Americans, and so on. Yinger uses a three–part definition of ethnicity: (1) The group is *perceived by others* to be different with respect to such factors as language, religion, race, ancestral homeland, and other cultural elements; (2) the group *perceives itself* to be different with respect to these factors; and (3) members of the group “*participate in shared activities* built around their (real or mythical) common origin and culture” [italics added].⁴¹

Box 1.1 Who Is “Juanita”?

With respect to race and ethnicity. Who or what am I? Am I white? Black? Latino? How would I know? Is it just what I say I am? Or is it what someone else calls me? Or what label the government places on me? These questions are fundamental to an intelligent discussion of race, ethnicity, and justice in America. We cannot begin to discuss whether or not there are inequalities or whether discrimination exists unless we have accurate data on how people of different races or ethnicities are treated in the justice system.

Many people mistakenly think the answers to these questions are easy. They are not. Consider, for example, the case of “Juanita,” as discussed in the report *Donde esta la justicia?* Her father is Puerto Rican and her mother is African American. How would she be classified if she were arrested? In Arizona, she would define her own race or ethnicity. In California, she would be counted as African American. In Michigan, she would be classified as Hispanic and then be assigned to a racial group. In Ohio, she would be recorded as biracial.

In short, we have a serious problem. This chapter is designed to help navigate our way through this very complex but very basic issue.

SOURCE: Adapted from Building Blocks for Youth, *Donde esta la justicia?* (East Lansing, MI: Michigan State University, 2002).

The terms Hispanic and Latino refer to ethnicity, not race. As we mentioned earlier, the U.S. Census is a self-report system, and a person may identify as Hispanic and then also as a member of a racial category. Someone, for example, can identify himself or herself as “white” and “Hispanic,” or “Native American” and “Hispanic.”

The census is a self-report system. The practices of criminal justice agencies, however, are mixed, and different agencies use their own systems of classification. Historically, most have classified Hispanics as white but have not also collected data on ethnic identity. As a result, most criminal justice data sets do not provide good longitudinal data on Hispanics. We will discuss this issue in more detail later.

The Hispanic American population is extremely diverse in several respects. Hispanics are divided among native-born Americans and foreign-born. Foreign-born may be naturalized citizens, permanent residents with a Green Card, immigrants with a visa, or undocumented. Hispanics often identify themselves primarily in terms of their country of origin. The Pew Hispanic Research Center found that in 2013, of the 53.9 million Hispanics in the United States, 64 percent were of Mexican background. (“Background” in this analysis does not mean immigrant; it includes people whose family arrived in the United States from Mexico two or three generations ago, but were from Mexico.) The next largest group was Puerto Ricans, who represented 9.5 percent of all Hispanics. People of Cuban and Salvadoran background were tied at 3.7 percent of all Hispanics.⁴²

Classifying Middle Eastern, Arab Americans, and Muslim Americans Arab Americans are an extremely diverse group. The Arab American Institute estimated that there are about 3.5 million people in the United States of Arab descent and describes them as an ethnicity. About 82 percent are U.S. citizens. The national origins of Arab Americans include Lebanon, Egypt, Syria, and other countries of

North Africa and southwestern Asia. The census classifies most Arab Americans as “Caucasian,” but that label does not adequately describe the diversity of the community. With respect to the physical features that are popularly (but incorrectly) used to define “race,” such as skin color or hair texture, Arab Americans are as diverse as are “white” and “black” Americans. The term *Arab Americans* is, in fact, a social construct that includes people of many different national origins, religions, and ethnicities.

Many people assume that Arab Americans are religiously all Muslim, but this is not true. Arab Americans include Muslim, Christian, Druze, and other religions. Even Christian Arabs are divided among Protestant, Catholic, and Greek Orthodox. In terms of national origins, Arab Americans trace their heritage to Lebanon, Syria, Iraq, Kuwait, Morocco, Algeria, and other countries. (Many people assume that Turkish people are Arabs. In fact, Turkish is a national identity, referring to people who are citizens of Turkey, and they consist of several different ethnic identities.) Finally, with regard to ethnicity, Arab Americans may be Kurds, Berbers, Armenian, Bedu, or members of other groups.⁴³

We do not know exactly how many Muslims there are in the United States because the U.S. Census does not collect data on religious affiliation. Religious affiliation is regarded as a highly personal and sensitive issue, about which the government should not collect information. There are, however, private surveys and estimates of religious affiliation and observance. Estimates of the total number of Muslims in the United States range from 1.3 million (the 2008 American Religious Identification Survey, a private and not a governmental survey) to 7 million (the Council on American-Islamic Relations). About 25 percent of all Muslims in the United States are converts, most of whom are African Americans. Malcolm X is probably the most famous person to have fallen in this category. Religious services are sometimes given in several languages: Urdu, Arabic, or English.⁴⁴

Problems with Traditional Racial and Ethnic Categories

Understanding the basic racial and ethnic categories used in the United States is only the beginning. We also need to look at some important problems associated with these categories.

Multiracial Americans Many Americans do not fit into the strict racial categories of race that have been traditionally used because they are multiracial or mixed-race. Beginning in 2000 the census allowed people to identify themselves as being of two or more races. In the 2010 census, 2.1 percent of all respondents identified themselves as multiracial.

The Pew Research Center challenges to Census Bureau’s 2.1 percent estimate. Their own survey estimated that the real figure was 6.9 percent. (The survey involved 21,224 adults. While far smaller than the census, the sample was large enough to make reliable estimates.) The Pew Survey reached the larger figure by asking questions the census does not. It asked people first, how they identified *themselves*. Then it asked about the respondent’s *parents* and whether they were of different races. Finally, it asked about the respondent’s *grandparents*. The survey found that 1.4 percent chose two or more races to describe themselves;

2.9 percent described their parents as of different races; and 2.6 percent described their grandparents as of different races (for a total of 6.9 percent).⁴⁵

Which figure is more accurate? In terms of self-identification in everyday life, the lower census estimate of 2.1 is more accurate. In terms of a more objective estimate of extended family identification, the PEW estimate is more accurate.

Being multiracial is in large part a matter of self-identity. The Association of MultiEthnic Americans (AMEA), which fought for the OMB changes that allow people to designate a multiracial or multiethnic identity, declares that “we believe that every child, every person who is multiethnic/multiracial has the same right as any other person to assert a personal identity that embraces the fullness and integrity of their actual ancestry, and that every multiethnic/multiracial family, whether biological or adoptive, has the same right to grow and develop as any other, and that our children have the right to love and respect each of their parents equally.”⁴⁶

The Uses of Racial and Ethnic Categories Classifying multiracial and multiethnic people are not abstract issues. Census estimates have very real personal, legal, and economic consequences.

An article in the *New Yorker* magazine highlighted the case of Susan Graham of Roswell, Georgia, who complained, “When I received my 1990 census form, I realized that there was no race category for my children.” She is white, and her husband is African American. She called the Census Bureau and was finally told that children should take the race of their mother. No rational reason was given about why the race of her husband, the children’s father, should be arbitrarily ignored. Then, when she enrolled the children in kindergarten, the school classified them as “black.” Thus, she pointed out, “My child has been white on the United States census, black at school, and multiracial at home—all at the same time.”⁴⁷

Whether a school counts a child as “black” or “white” has important consequences in terms of the school’s racial balance. Counting the child (and many others) as “white” might create the appearance that a problem of racial segregation in the school system exists. Counting many mixed-race children as “black” will make the school system appear racially integrated.

The 1965 Voting Rights Act outlaws voter disenfranchisement by “race or color.” If we want to know if a state or county discriminates against voters on the basis of race, we need accurate data on the voting age population in the jurisdiction. If the census undercounts African Americans in a particular country, for example, it would disguise possible discrimination in voting.

Preferred Labels within Groups Members of the major racial and ethnic groups are divided among themselves about which term they prefer. A 2013 Gallup Poll found that 17 percent prefer “African American,” 173 percent prefer “black,” and 65 percent say it “does not matter.” A 2012 report by the Pew Hispanic Center found complex patterns of self-identification among Hispanics. When asked, what is the first term they use to identify themselves, slightly more than half replied they use their country of origin (i.e., Mexico, Nicaragua). About one third (34 percent) prefer “Hispanic” and 13 percent prefer “Latino.”⁴⁸

FOCUS ON AN ISSUE*The Bell Curve Controversy: Race and IQ*

A national storm of controversy erupted in the fall of 1994 over a book titled *The Bell Curve* by Richard J. Herrnstein and Charles Murray.⁴⁹ The authors argue that success in life is determined largely by IQ: the smarter people succeed, whereas those with lower intelligence, as measured by standard IQ tests, fail and end up at the bottom of the social scale. The authors contend that those at the low end of the IQ scale do poorly in school and are more likely to be unemployed, receive welfare, and commit crime.

The Bell Curve is now over 20 years old, but the issue continues to resurface as some people continue to argue that some races or ethnic groups are inferior to whites of European descent. Let's sort our way through the myths and misunderstandings and get at the truth.

The most provocative and controversial parts of Herrnstein and Murray's thesis are the points that intelligence is inherited and that there are significant differences in intelligence between races. The authors cite data indicating that Asian Americans consistently score higher on IQ tests than white European Americans, who, in turn, score higher than African Americans. Herrnstein and Murray are very clear about the policy implications of their argument. They argue that because intelligence is mainly inherited, social programs designed to improve the performance of poor children, such as Head Start, are doomed to failure and should be abandoned.

The Bell Curve was attacked by psychologists, anthropologists, and sociologists.⁵⁰ Critics disputed the authors' assumptions that there is a genetic entity that constitutes "intelligence" that is

inherited, and also that IQ tests are a valid measure of intellectual capacity.

Critics also disputed the authors' handling of the evidence regarding intelligence tests, the impact of environmental factors as opposed to inherited factors, and the effect of programs such as Head Start. There is evidence, for example, that Head Start does improve IQ test scores in addition to children's later success in life.⁵¹

The authors of *The Color of Justice* reject Herrnstein and Murray's argument on the grounds that the vast majority of anthropologists and sociologists do not accept the idea of separate races as distinct biological entities. If there are no scientifically valid racial differences, the basic argument of *The Bell Curve* falls apart.

In response to the long controversy, the American Anthropological Association (AAA) in 1994 issued an official "Statement on 'Race' and Intelligence." It is important to note in this statement and the one cited in Box 1.3, the AAA places the word "race" in quotation marks as a way of indicating that the concept does not have any scientific validity. The AAA makes the following statement:

The American Anthropological Association (AAA) is deeply concerned by recent public discussions which imply that intelligence is biologically determined by race. Repeatedly challenged by scientists, nevertheless these ideas continue to be advanced. Such discussions distract public and scholarly attention from and diminish support for the collective challenge to ensure equal opportunities for all people, regardless of ethnicity or phenotypic variation.

(Continued)

Earlier AAA resolutions against racism (1961, 1969, 1971, 1972) have spoken to this concern. The AAA further resolves:

WHEREAS all human beings are members of one species, *Homo sapiens*, and

WHEREAS, differentiating species into biologically defined “races” has proven meaningless and unscientific as a way of explaining variation (whether in intelligence or other traits),

THEREFORE, the American Anthropological Association urges the academy, our political leaders and our communities to affirm, without distraction by mistaken claims of racially determined intelligence, the common stake in assuring equal opportunity, in respecting diversity and in securing a harmonious quality of life for all people.

The full AAA statement is available on the organizations website (<http://www.aaanet.org>).

Box 1.2 Donde está la justicia?

The term *Hispanic* has been used to refer to people of Spanish descent. The term refers, in part, to people with ties to nations where Spanish is the official language. The U.S. government and legal system historically have insisted on categorizing all Spanish-speaking people as Hispanic and treating them as a monolithic group, regardless of cultural differences.

The term *Latino*, however, generally refers to people with ties to the nations of Latin America and the Caribbean, including some nations where Spanish is not spoken such as Brazil. It also encompasses people born in the United States whose families immigrated to this country from Latin America in the recent past and those whose ancestors immigrated generations ago. Like the term Hispanic, the categorization Latino is a general one that does not recognize the diversity of ethnic subgroups (e.g., Puerto Rican, Dominican, Guatemalan, Peruvian, and Mexican).

SOURCE: Adapted from Francisco A. Villarruel and Nancy E. Walker, *Donde está la justicia? A Call to Action on Behalf of Latino and Latina Youth in the U.S. Justice System* (East Lansing, MI: Institute for Youth, Children, and Families, 2002).

Who Is the Minority? Who Is the Majority? The Problem with Labels The term *minorities* is widely used as a label for people of color. The United Nations defines minority groups as “those nondominant groups in a population—which possess and—wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population.” The noted sociologist Louis Wirth adds the element of discrimination to this definition: minorities are those who “are singled out from the others in the society in which they live for differential and unequal treatment, and who therefore regard themselves as objects of collective discrimination.”⁵²

Use of the term *minority* is increasingly criticized. It has a pejorative connotation, suggesting “less than” something else, which in this context means

less than some other groups. The new OMB guidelines for the Census Bureau and other federal agencies specifically “do *not* identify or designate certain population groups as ‘minority groups’.”⁵³ Many people today prefer to use the term *people of color*, instead of “minority” when referring to African Americans and Hispanics.

The changing American population makes the term *minority* inaccurate in some geographic areas. In California in 2014, for example, non-Hispanic whites were only 39 percent of the population, with almost as many, 38 percent, being Hispanic. Asians were 15 percent and African Americans were 5 percent of the population. In Texas, non-Hispanic whites were 44 percent of the population, with Hispanics 38 percent, African Americans 12 percent, and Asians 4 percent.⁵⁴ Some American cities are now majority African American or Latino. Miami, Florida, for example, was 69 percent Hispanic in 2015, while Los Angeles was 48 percent. The Pew Research Center reported that between 2000 and 2013, 78 counties across the country shifted from majority non-Hispanic white to where no racial or ethnic group was a majority, including Mecklenburg County, North Carolina, and Broward County, Florida.⁵⁵ Atlanta, Georgia, was 54 percent African American, and Detroit was 82 percent in 2015. In these situations, which group is the “majority” and which is the “minority”? From a national perspective, you get one answer. A local perspective gives you a different one.

Diversity within Racial and Ethnic Groups Another important complicating factor is the diversity that exists within racial and ethnic groups. As our previous discussion indicates, both the Latino and the Arab-American communities include people of very different national origins.

African Americans and African Immigrants. The African-American community, meanwhile, consists of people whose families have been in the United States for hundreds of years along with recent immigrants from Africa. In 2015, there were a record number of 3.8 million “black” immigrants in the United States, representing almost 9 percent of the “black” population. In the Miami, Florida, metropolitan area, “black” immigrants represented 34 percent of the “black” population. Some immigrants from Africa do not wish to be labeled African Americans because they identify themselves as Africans.⁵⁶

The Hispanic Community. The Hispanic community is extremely diverse. (See our earlier discussion above at pp. 16.) It includes native-born Americans and immigrants. Among the native born, some families have been in the United States for many generations, whereas others are first-generation Americans. Immigrants include both legal and unauthorized or undocumented persons. Some immigrants speak English fluently, others speak only their native language, and many are bilingual.

Native Americans and Alaska Natives. Native American and Alaska Native people numbered 5.2 million in 2010 and were divided among 566 tribal governments recognized by the Bureau of Indian Affairs (which does not necessarily include

all tribes), some of which have very different languages, cultural traditions, and tribal political institutions. About half, 2.9 million, identified themselves as multiracial. The Cherokee tribe is the largest, with 468,082 members according to the 2010 census. The second largest is the Navajo tribe, with 286,731 members. About one-third (31 percent) of Native Americans live on reservations or designated areas.⁵⁷

The census category of Asian, Native Hawaiian, and Pacific Islanders includes many diverse groups. For example, Asian Americans include many people of Chinese or Japanese origin whose families have been in the United States for generations and also many very recent immigrants. The economic status of these different groups is often very different. Many Native Hawaiians, meanwhile, are also well established economically, socially, and politically. Bureau of Justice Statistics (BJS) data on crime victimization, however, collapse these very different people into a single category. The National Council on Crime and Delinquency argues that it is important, where possible, to disaggregate the Asian-American population into its different components because some may have greater involvement with the justice system than the group as a whole.⁵⁸

Diversity has many impacts on criminal justice. A Vera Institute of Justice report on police relations with immigrant communities in New York City concluded that “immigrant groups are not monolithic, [but] are made up of ethnically, culturally, socio-economically, and often linguistically diverse subgroups . . .” This has important implications for criminal justice agencies. The report advised that police departments must “reach out to a variety of community representatives,” even within one racial or ethnic group.⁵⁹

Many recent arrivals to the United States do not fully understand our legal system. As some scholars put it, they do not share the “legal consciousness” that long-time American residents have.⁶⁰ This legal consciousness includes a sense of “inherent rights” and entitlements regarding the legal system. In practice, this includes a sense of your right to call the police if you have a problem, a right to be treated respectfully by the police and other officials, and a right to file a complaint against the police if you are not treated properly, and do so without a lawyer.

Not calling the police is an important issue for the criminal justice system. In communities with significant numbers of undocumented immigrants, there is a reluctance to call the police for fear that undocumented family or friends will be arrested or reported to immigration authorities. But not calling the police means that crime victims will not receive the benefit of police protection. This is particularly serious in the case of domestic violence incidents. Additionally, if the police are not called, the official crime rate will undercount the amount of actual crime.⁶¹

The Politics of Racial and Ethnic Labels There has always been great controversy over the proper term for different racial and ethnic groups. The term *African American*, for example, is relatively new and became widely used only in the 1980s. For many people, it has replaced *black* as the preferred designation, which replaced *Negro* in the 1960s. *Negro*, in turn, replaced *colored* in the late 1940s and 1950s. The leading African-American civil rights organization is the National Association

for the Advancement of Colored People (NAACP), which reflects the year of its founding, 1909. Ironically, *colored* replaced *African* much earlier. In short, we have come full circle in the past 150 years. As John Hope Franklin, the distinguished African-American historian, points out in the 1994 edition of his classic history of African Americans, *From Slavery to Freedom*, the subjects of his book have been referred to by “three distinct names . . . even during the lifetime of this book.”⁶²

The controversy over the proper label is *political* in the sense that it often involves a power struggle among groups. It is not just a matter of which label but *who chooses* the label. Eric R. Wolf argues that “the function of racial categories within industrial capitalism is exclusionary.”⁶³ The power to label another group is a form of control over that group. Labels, particularly unflattering ones, have historically been used to discriminate against different groups. Conversely, the power to reject the existing label and choose a new one is an assertion of power and autonomy.

The term *black* emerged as the preferred designation in the late 1960s as part of an assertion of pride in blackness and quest for power by African Americans themselves. The African-American community was making a political statement to the majority white community: This is how we choose to describe ourselves. In a similar fashion, the term *African American* emerged in the 1980s through a process of self-designation on the part of the African-American community. In this book, we use the term *African American*. It emerged as the preferred term by most spokespeople for the African-American community and was adopted by the OMB for the 2000 Census and continued for 2010 (and can be used along with *black*, *Negro*, and *Haitian*). It is also consistent with terms commonly used for other groups: Irish Americans, Polish Americans, and Chinese Americans, for example.

The term *black* is actually not appropriate as the label for a group for the simple reason that it refers to a color. In fact, people who identify themselves as African Americans come in a full range of colors, from the darkest black to essentially white. The term *white*, moreover, is as inaccurate as *black*. People who are commonly referred to as *white* have a wide range of skin colors, from very pale white to a dark olive or brown. The term *Caucasian* is a somewhat more accurate label for people generally referred to as *white* (but even its accuracy is disputed by some experts).⁶⁴

A similar controversy exists over the proper term for Hispanic Americans (see Box 1.3). Not everyone, including some leaders of the community itself, prefers this term. Some prefer *Latino*, and others use *Chicano*. A 2012 Pew Hispanic Center survey found that 33 percent prefer the term *Hispanic*, 14 percent prefer *Latino*, and half have no preference.⁶⁵ Many Hispanic Americans refer to themselves in terms of their country of origin. Many non-Hispanics incorrectly refer to Hispanics as Mexican Americans, ignoring the many people who have a different country of origin.

In this book, we use the term *Native Americans* to designate those people who have historically been referred to as American Indians. The term *Indians*, after all, originated through a misunderstanding, as the first European explorers of the Americas mistakenly thought they had landed in Asia.

Box 1.3 American Anthropological Association, Statement on “Race,” 1998 (excerpt)

In the United States, both scholars and the general public have been conditioned to viewing human races as natural and separate divisions within the human species based on visible physical differences. With the vast expansion of scientific knowledge in this century, however, it has become clear that human populations are not unambiguous, clearly demarcated, and biologically distinct groups. Evidence from the analysis of genetics (e.g., DNA) indicates that most physical variation, about 94%, lies within so-called racial groups. Conventional geographic “racial” groupings differ from one another only in about 6% of their genes. This means that there is greater variation within “racial” groups than between them. In neighboring populations, there is much overlapping of genes and their phenotypic (physical) expressions.

Throughout history whenever different groups have come into contact, they have interbred. The continued sharing of genetic materials has maintained all of humankind as a single species.

SOURCE: The full statement, along with other materials, can be found on the website of the American Anthropological Association (<http://www.aaanet.org>).

**PROBLEMS WITH CRIMINAL JUSTICE DATA
ON RACE AND ETHNICITY**

Case Study: How Many People Are Shot and Killed by the Police?

How many people do the police shoot and kill every year? In 2015, Americans discovered that we don’t really know. The major source has always been the official FBI Uniform Crime Report, which reported that 444 people had been killed by law enforcement officers in 2014.⁶⁶ Some major news media began investigating, compiling all such shootings reported in the media. (And it is unlikely that any police shooting goes completely unreported.) They found that the figure is *twice* the official FBI figure, that is, 984 in 2015, according to a pioneering national survey by the *Washington Post*.⁶⁷

The lack of good, official data on persons shot and killed by the police is a scandal. We have very detailed information about deaths from all forms of cancer and from traffic accidents, and we should have the same quality of data on police shootings. The problem is that the FBI system is a voluntary one, and many police departments do not submit their data.

Without reliable, detailed data, however, we cannot speak authoritatively about racial and ethnic disparities in shootings. How great are the disparities, relative to the local population? If we don’t have good population data, we cannot accurately answer that question. Are the disparities greater in some jurisdictions or regions? If so, why? Could reliable data help us to identify causal factors, for example, local crime rates or police department policies on deadly force? The lack of good data is central not just to this book but to the national issue of racial and ethnic justice in our society. Is there discrimination? If so, how much?

If so, have we made any progress in eliminating disparities and discrimination? Are there important differences among racial and ethnic groups? If so, how wide are the gaps?

Counting Race and Ethnicity in Criminal Justice Data

The FBI's Uniform Crime Reports (UCR) data on arrests use the categories of "white" and "black," with no category of Hispanic or other ethnic groups. It does report American Indian or Alaska Native and Asian or Pacific Islander as separate races. By including Hispanics as "white," the UCR overreports the number of arrests of non-Hispanic whites and gives us no data at all on Hispanic arrests.⁶⁸ The National Crime Victimization Survey (NCVS), on the other hand, does collect data on Hispanics and non-Hispanics, and it is a rich source of data on rates of victimization by race and ethnicity.⁶⁹

Because the NCVS uses a census-style self-identification system with regard to race and ethnicity, the following problem exists.⁷⁰ What if the NCVS calls the multiracial Graham household we discussed earlier (pp. 14). The NCVS reports data by household. Would their household be classified as "white" or "black"? It depends on which member of the family answers the phone and how that person self-identifies. What if one of their mixed-race children were the victim of a robbery? Would the victimization survey record that as a "white" or "black" victimization?

The BJS Police–Public Contact Survey, which is conducted in cooperation with the National Crime Victimization Survey and uses its technique, interviews people about their experience with the police and therefore contains data about race and ethnicity. The 2011 survey, for example, reports whether the police officer gave a reason for the stop and whether the respondent thought the stop was legitimate.⁷¹ Thus, unlike FBI data on arrests, it provides useful data on, for example, traffic stops of whites, African Americans, and Hispanics.

The Bureau of Justice Statistics National Prisoner Statistics (NPS) program reports data on white, black, and Hispanic prisoners as separate categories. The categories are exclusive, however, meaning that you are one or the other (unlike the Census in which someone can be white/Hispanic or Native American/Hispanic). The BJS report on *Prisoners in 2014*, however, explains that "not all NPS [data] provides information systems categorize race and Hispanic origin in this way." Thus, data from different states are not completely comparable. The report added that in 1991 "only a few states were able to provide information on Hispanic origin separately from race," and so we do not have any reliable data on Hispanic prisoners or imprisonment rate until about the late 1990s.⁷²

Official data on people under sentence of death use the National Prisoner Statistics data. In mid-2015, there were 2,959 people under sentence of death in the United States. Of those, 43 percent were white, 42 percent were black, 13 percent were Hispanic, and 2 percent were of other race or ethnicity.⁷³

Counting Hispanics as "white" has a major impact on official data and the resulting picture of the criminal justice system. Barry Holman analyzed how using a "white/black" classification system results in an overcount

of non-Hispanic whites in prison and an undercount of Hispanics. In 2009, 57.2 percent of all federal prisoners were “white.” But 32 percent were Hispanic, meaning that only about 25 percent were non-Hispanic whites (39 percent were African American), so if you only used the “white” category you would give a misleading picture of federal prisoners. In New Mexico, the misrepresentation was even worse. Official data indicated that 83 percent of prisoners were white, when in fact only 28.9 percent were non-Hispanic white and 54.1 percent were Hispanic.⁷⁴

The situation with regard to Native Americans is especially complex. Gary LaFree points out that they “fall under the jurisdiction of a complex combination of native and nonnative legal entities” that render the arrest data “problematic.”⁷⁵ Zoann K. Snyder-Joy characterizes the Native American justice system as “a jurisdictional maze” in which jurisdiction over various criminal acts is divided among federal, state, and tribal governments.⁷⁶ It is not clear, for example, that all tribal police agencies report arrest data to the FBI’s UCR system. Thus, Native American arrests are probably significantly undercounted.

Data on crime on Native American reservations (also referred to as Indian Country) are also seriously inadequate. The National Congress of American Indians argues that this is due to both the underreporting of crimes to tribal authorities and underreporting to federal authorities.

The reporting of race and ethnicity by state and local criminal justice agencies is not clear and probably varies considerably across the country. Does an arresting officer make his or her judgment about an arrested person? Or do officers ask the person (in which case it would be a reliable self-report)? Do other agencies rely solely on the documents they receive from other agencies (e.g., corrections officials relying on police or court documents related to a new prisoner)? Or do officials make their own judgments, without asking each person? They may be poorly trained and may rely on their own stereotypes about race and ethnicity.

In short, the official data reported by criminal justice agencies are very problematic, which creates tremendous difficulties when we try to assess the fate of different groups at the hands of the criminal justice system. The disparities that we know to exist today could be greater or smaller, depending on how people have been classified. We will need to be sensitive to these data problems as we discuss the various aspects of the criminal justice system in the chapters ahead.

In the end, be on guard whenever you see data on “white” and “black” or “nonwhite” people in the justice system. These data do not accurately reflect the reality of crime and justice in America.

THE CRIME AND IMMIGRATION CONTROVERSY

Immigration is a major political controversy in the United States today and has been for many years. The political debates include a number of proposals that many people find offensive and discriminatory. Let’s begin by sorting out the basic facts of immigration.

Sorting Out the Facts on Immigration

The 2010 Census reported that there were 40,000,000 foreign-born people in the United States, representing 13 percent of the U.S. population. The foreign-born population includes naturalized citizens, legal permanent residents, temporary migrants, humanitarian migrants (e.g., refugees), and undocumented migrants. Forty-four percent of all foreign-born were naturalized citizens by 2010.⁷⁷

Twenty-nine percent of the foreign-born were from Mexico (11.9 million people), and another 8 percent were from other Central American countries. The next largest country of origin was China, with 2.2 million people (or 5 percent of all of the foreign-born). Canada, with 0.8 million people, was the largest non-Central or South American or Asian country of origin, ranking eleventh among all countries.⁷⁸

There were an estimated 11,300,000 unauthorized or undocumented immigrants in 2014 (down from a peak of 12.3 before the recession of 2008), and the number had been stable for about five years. About half of the unauthorized immigrants, 5.6 million people, were from Mexico. That number had declined from a peak of 6.9 million in 2007, mainly because the recession that struck the United States in 2008 discouraged many people from migrating in search of jobs. There were also 1,300,000 unauthorized immigrants from Asia in 2014, 525,000 from Europe or Canada, and 190,000 from the Middle East.⁷⁹

Humanitarian migrants, or refugees, represent a special case. The U.S. State Department defines a refugee as “someone who has fled from his or her home country and cannot return because he or she has a well-founded fear of persecution based on religion, race, nationality, political opinion or membership in a particular social group.”⁸⁰ Since 1975, the United States has admitted over 3 million people as refugees. Because they are admitted under a formal State Department program, with elaborate procedures for determining the validity of their claims of persecution, refugees are in the country legally.

Hispanics and Asians have been the two fastest-growing racial/ethnic groups in America in recent decades, with Asians holding the lead since 2010. But there are significant differences in the sources of growth between the two groups. Most of the increase among Hispanics has been due to natural increase (measured in terms of births minus deaths). The growth among Asians, by contrast, has been more due to immigration.⁸¹

Box 1.4 A Note on “Generations”

There is a lot of confusion over the proper terms for different “generations” of Americans. Someone who immigrates to the United States is a “first-generation” American. His or her children are “second generation.” A separate issue involves citizenship. A “second-generation” person would be a “first-generation citizen,” unless of course his or her parents became naturalized, in which case the parents would be “first-generation citizens.” There is no such thing as a “second-generation immigrant”; only one generation can immigrate.

Immigration from Africa has changed the composition of the black population in the United States. By 2015, there were a record number of 3.8 million black immigrants, representing 8.7 percent of the entire black population. In the Miami, Florida, metropolitan area, for example, black immigrants represented 34 percent of the entire black population, while in New York City the figure was 28 percent.⁸²

Public Attitudes about Immigration Public opinion polls consistently indicate that Americans are very concerned about illegal immigration. A 2015 survey found that 50 percent of Americans felt that immigrants had made the U.S. economy worse, while 28 percent thought it made the economy better and 20 percent felt that it had “not much effect.” Fifty percent also felt that immigrants had made the crime problem worse, and only 7 percent felt it made crime conditions better. With respect to science and technology, however, 29 percent felt that immigrants made the United States better and only 12 percent felt that it made the United States worse. Half of Americans felt that immigrants made the United States better in terms of “food, music, and the arts,” while 11 percent felt they made the United States worse.⁸³

The Immigration and Crime Controversy

Although half of all Americans believe that immigration has an adverse impact on crime, research has consistently not supported that view. A 2015 report by the Cato Institute concluded that “with few exceptions, immigrants are less crime prone than natives or have no effect on crime rates.”⁸⁴

Researchers have used different methodologies to investigate immigration and crime. Butcher and Piehl studied the imprisonment rates for men between the ages 18 and 40 in 1980, 1990, and 2000. Using census data, they found that in each of those years, immigrants were less likely to be incarcerated than native-born Americans. Additionally, the gap widened in more recent years.⁸⁵ Graham C. Ousey and Charis E. Kubrin studied cities with populations greater than 100,000 between 1980 and 2000. They found that immigration negatively affected crime; cities that experienced increases in immigration experienced decreases in crime. It should be noted that the time period included both years of rising violent crime rates (1980s) and years of sharply falling crime rates (1993–2000).⁸⁶ Tim Wadsworth also found that between 1999 and 2000, cities that experienced the largest increases in immigration (of all types) had the largest decreases in homicide and robbery in the same time period. His study involved FBI UCR data for 459 cities with populations greater than 50,000 people. The period studied included the years of the great “crime drop,” when serious crime experienced a tremendous decline.⁸⁷

In short, public attitudes about the impact of immigration on crime are simply not supported by the evidence. All of the studies, including others not cited here, find less crime among immigrants than nonimmigrants.

How do we explain the negative impact of immigration on crime? Ousey and Kubrin suggest that recent immigrant families have lower rates of divorce

and single-parent households. Criminologists have long established that both of those factors are associated with higher rates of delinquency and crime. The 2009 Pew Hispanic Center report on young Hispanics, *Between Two Worlds*, found that immigrant Hispanics were less likely to be involved in a gang, or know someone who is, than American-born Hispanics. Young Hispanics are more likely to be incarcerated than young non-Hispanic whites, but only half are as likely to be incarcerated as young African Americans.⁸⁸

Problems with Immigration Enforcement

Immigration is covered by federal and not state or local law. Being an undocumented immigrant is also not a crime; it is a civil offense, not punishable by imprisonment. Immigrants who commit a crime, whether federal or state, can be deported immediately.

Some local law enforcement agencies engage in immigration enforcement. Under Section 287(g) of the 1996 immigration reform act, local police and sheriffs can establish written agreements with the federal Immigration Control and Enforcement (ICE) agency. The agreement specifies that local officers are trained in immigration enforcement and then authorized to cooperate with federal officials under their direction. Local offices are then authorized to question people about their immigration status, arrest suspects without a warrant for suspected immigration violations, and five other actions. A 2008 PERF report found that only 4 percent of local agencies had signed such an agreement, however. Some states have a rule that local police cannot enter into 287(g) agreements because officers in the state do not have authority to enforce federal civil laws.⁸⁹

Many people, including law enforcement leaders, believe that immigration enforcement invites discrimination by police officers. How would an officer, for example, suspect that a driver was an undocumented immigrant? There is no behavior that clearly suggests that a person is undocumented. The result would be traffic stops or street stops of people he believes are undocumented. But the officer would probably be wrong in many, if not most, cases, and that would involve discriminatory enforcement.

Immigration enforcement by local police also damages police-community relations, as members of the community will come to fear the police. (See our discussion of "Insecure Communities," pp. 26). Many police chiefs believe this would happen. In 2008, the Police Chiefs Executive Research Forum (PERF), a professional association of chiefs and top managers, issued a policy statement opposing immigration by local law enforcement.⁹⁰ Several chiefs pointed out that immigrants, both legal and unauthorized, are victims of crime. They are more likely to be paid in cash, which makes them easy prey for robbers. Because they fear being questioned about their immigration status, they are very reluctant to call the police and report the crime. Also, many immigrants are victims of domestic violence but do not call the police because they are afraid that they or other family or friends will be subject to immigration enforcement. Many immigrants are witnesses of crime but are reluctant to come forward to help the police. For all these reasons, the Police Foundation in 2009 concluded that local agencies

“should employ community–policing and problem–solving tactics to improve relations with immigrant communities and resolve tension caused by expanding immigration.”⁹¹

Police chiefs are also concerned that giving police officers responsibility for immigration enforcement will strain their resources and make it difficult to perform their basic responsibilities. This problem has become worse in the economic recession of 2008–2014, when police departments were unable to hire to replace retiring officers and in some cases have been forced to lay off officers. Local jails, moreover, often do not have the space to hold large numbers of unauthorized immigrants. (Remember, there are about 11.3 million undocumented immigrants across the country [2014 estimate], down from 12.2 a peak of 12.2 in 2007.) Local courts are also overburdened with cases, and they are facing cutbacks because of the recession. Iowa state courts, for example, were closed one day a week as a cost-saving measure. In short, many police chiefs fear that immigration enforcement could harm their traditional law enforcement mission. In 2009, the Police Foundation, after an extensive review, concluded that the various costs of participating in federal immigration enforcement “outweigh the benefits.”⁹²

“Insecure Communities”: The Impact of Immigration Enforcement on the Hispanic Community

A 2013 report found that immigration enforcement had an adverse effect on the attitudes of Hispanics toward law enforcement and public safety among Hispanic Americans.⁹³ The study was based on a telephone survey of 2004 Latinos in the Chicago, Houston, Los Angeles, and Phoenix metropolitan areas. The survey found that:

- 44 percent of Hispanics were less likely to contact the police if they were the victims of crime, because they were afraid that the responding officers would ask about their immigration status or the status of people they know.
- 45 percent of Hispanics were less likely to “voluntarily offer information about crimes, because the officer might ask about their immigration status.”
- 70 percent of undocumented immigrants said they were less likely to contact the police if they were the victims of a crime.
- 28 percent of U.S.–born Hispanics said they were less likely to contact the police if they were the victims of crime, because they were afraid the police would inquire about immigration status.

Not calling the police puts both individuals and communities at risk. It is well established in American policing that the police cannot serve the public alone. They depend on members of the public to report crimes, to provide information about criminal activity or disorder in their neighborhoods, and to serve as witnesses in criminal cases. The important role of citizens in working with the police is called the “co–production” of police services.⁹⁴ Co–production is one of the foundations of community policing, and the need to build good relations, trust, and cooperation. The victim of a domestic assault who does not call the police is

more likely to be assaulted again by the same person. Burglars and robbers will remain at large and be able to commit more crimes.

THE GEOGRAPHY OF RACIAL AND ETHNIC JUSTICE

The “geography of justice” in the United States with respect to race and ethnicity varies across the country. African Americans, Hispanics, Asians, and Native Americans are very unevenly distributed. The population of California was estimated to be 38 percent Hispanic in 2010, compared with 5 percent for Iowa and 1.3 percent for Maine. Mississippi was 37 percent African American in 2010, compared with less than one percent for Vermont and Montana. Asian Americans represented 57 percent of the population of Hawaii, 15 percent of California, and 9 percent of Nevada, the state with the third highest percentage. As a result, issues of race and ethnicity are far more salient in some areas compared with others.

One study concluded that “most communities lack true racial and ethnic diversity.”⁹⁵ In 1996, only 745 of the 3,142 counties or county equivalents had a white population that was below the national average. Only 21 metropolitan areas qualified as true “melting pots” (with the percentage of the white population below the national average and at least two minority groups with a greater percentage than the national average).

The uneven distribution of the major racial and ethnic groups is extremely important for criminal justice. Crime is primarily the responsibility of state and local governments. Thus, racial and ethnic issues are especially salient in those cities where racial minorities are heavily concentrated. For example, the context of policing is very different in Detroit, which is 82 percent African American, than in Minneapolis, where African Americans are only 18 percent of the population. Similarly, Hispanic issues are different in San Antonio, which is 59 percent Hispanic, than in many other cities where few Hispanics live.

These disparities illustrate the point we made earlier that in some areas the traditional “minority” has become the majority. This has important implications for criminal justice. Population concentration translates into votes, political power, and the ability to control police departments, sheriff’s departments, courts, and correctional agencies. Mayors, for example, appoint police chiefs. If a county is a majority African American or Hispanic, those groups are able to control the election of the sheriff. African Americans have served as mayors of most of the major cities: New York; Los Angeles; Chicago; Philadelphia; Detroit; Atlanta; Washington, DC; and others.

The concentration of African Americans in the Southeast has at least two important effects. This concentration gives this group a certain degree of political power that translates into elected African-American sheriffs and mayors. These officials, in turn, may appoint African-American police chiefs. By 2002, for instance, Mississippi had 950 elected African-American officials, more than any other state, including several elected sheriffs. As a result, criminal justice in Mississippi is vastly different from what it was in the segregation era.⁹⁶

The number of Hispanic elected officials, meanwhile, is growing rapidly. The National Latino Elected Officials Organization reported that there were 6,084 Hispanic elected officials in 2014, a 25 percent increase since 2004. Population growth leads to more voting and political power, particularly at the local level, and greater influence over criminal justice policy and practices.⁹⁷

DISPARITY VERSUS DISCRIMINATION

Perhaps the most difficult question we will encounter throughout this book is whether certain data indicate a pattern of racial or ethnic discrimination. Debates over discrimination are often unproductive because of confusion over the meaning of “discrimination.” It is, therefore, important to make two important distinctions. First, there is a significant difference between disparity and discrimination. Second, discrimination can take different forms and involve different degrees of seriousness. To help clarify this issue, Box 1.5 offers a schematic diagram of a disparity/discrimination continuum, which illustrates the various forms that each of the two can take.

Disparity

A disparity involves a *difference*, but one that does not necessarily involve discrimination. Look around your classroom. If you are in a conventional college program, almost all of the students will be relatively young (between the ages 18 and 25). This represents a disparity in age compared with the general population. There are no children, few middle-aged people, and probably no elderly students. This is not a result of discrimination, however. No law, policy or person keeps

Box 1.5 Discrimination–Disparity Continuum

Systematic Discrimination	Institutionalized Discrimination	Contextual Discrimination	Individual Acts of Discrimination	Pure Justice
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Definitions

Systematic discrimination—Discrimination at all stages of the criminal justice system, at all times, and at all places.

Institutionalized discrimination—Racial and ethnic disparities in outcomes that are the result of the application of racially neutral factors, such as prior criminal record, employment status, and demeanor.

Contextual discrimination—Discrimination found in particular contexts or circumstances (e.g., certain regions, particular crimes, or special victim–offender relationships).

Individual acts of discrimination—Discrimination that results from the acts of particular individuals but is not characteristic of entire agencies or the criminal justice system as a whole.

Pure justice—No racial or ethnic discrimination at all.

older people from enrolling in the class. Older groups are not enrolled in the class mainly because of the typical life course of most people, which involves attending college immediately after high school. The age disparity, therefore, is the result of factors other than discrimination.

The example of education illustrates the point that a disparity is a difference that can be explained by legitimate factors that are reasonable and do not raise any legal issues.

In criminal justice, there is a crucial distinction between legal and extralegal factors. *Legal factors* are those embodied in the law. They include the seriousness of the offense, aggravating or mitigating circumstances in a crime, or an offender's prior criminal record. The criminal law defines murder as a more serious crime than burglary by setting more severe punishments. The law reflects the accepted social norm that taking someone's life is far more serious than taking someone's property. Thus, sentencing most murderers to prison and the majority of burglars to probation is a legitimate, legally based difference, and not a case of discrimination.

Extralegal factors are those that have no legitimate legal basis. They include race, ethnicity, gender, social class, and lifestyle (e.g., clothing, grooming, and dress). Because they are not recognized in the law, they are not legitimate bases for decisions by criminal justice officials. It is not legitimate, for example, for the police to stop only African-American drivers for suspected crimes and to not stop white drivers. When that happens, we call it racial profiling. It is not legitimate for a judge to sentence all convicted male burglars to prison but place all convicted female burglars on probation, despite the fact that both groups had similar criminal records (a legal factor). In short, differences based on extra-legal factors constitute discrimination.

Discrimination

Discrimination involves a difference in outcome based on *differential treatment* of individuals or groups without reference to behavior, qualifications, or some other legal factor. Excluding women, African Americans, or Hispanics from juries is discrimination based on gender, race, or ethnicity, respectively. Sentencing all males to prison for possession of a gram of cocaine, while sentencing all women to probation for possessing the same amount of the drug, is discrimination.

Many debates over discrimination turn on the distinction between intent and result. Where there is a clear intent to treat groups of people differently, discrimination clearly exists. If a prosecutor clearly intended to exclude Hispanics from juries during jury selection—and there was evidence to support that—that would be intentional discrimination.

Many controversies, however, involve allegations of discrimination based on disparities in the results. The National Police–Public Contact Survey has consistently found racial disparities in traffic stops. In 2011, for example, 12.8 percent of African-American drivers were stopped by the police, compared with 10.4 percent of Hispanic drivers and 9.8 percent of white drivers.⁹⁸ Clearly, racial and ethnic disparities exist. The difficult question is whether these disparities constitute

discrimination in violation of the law. Several factors could explain the disparities. It is possible that African-American and Hispanic drivers speed, drive while drunk, or otherwise violate the law more often than whites. Or, given the higher rate of poverty among both African Americans and Hispanics, it is possible that they more often drive cars with expired license plates, broken tail lights, or other violations that would justify a traffic stop. But it is also possible that the police department in a city has an aggressive anticrime or antigang policy that involves a high rate of traffic stops. It is also possible that officers have unconscious biases regarding race, ethnicity, and crime and are more likely to see potential “danger” in drivers of color.⁹⁹

Courts have found discrimination on the basis of extreme disparities in outcomes in some cases. The most famous recent example is the 2013 decision in *Floyd v. New York City*, where a federal court found that the disparities in African Americans and Hispanics violated the Equal Protection Clause of the Fourteenth Amendment. (It needs to be said, however, that proving discrimination based on statistical disparities is extremely difficult and requires both extreme disparities and powerful statistical analyses.)¹⁰⁰

We should add that the word *discrimination* has at least two different meanings. One has a positive connotation. It is a compliment to say that someone has “discriminating taste” in music, food, or clothes. The person discriminates against bad food and bad music. Our choices in music, food, or clothes, however, are not covered by the law. The other meaning of *discrimination* has a negative connotation. When we say that someone “discriminates” against African Americans or Hispanics, we mean invidious distinctions based on negative judgments about an entire group of people. That is, someone treats Hispanics differently without any reference to a person’s qualifications (as in a job application) or conduct (as in an arrest). Acts that involve racial or ethnic discrimination in employment, housing, or the administration of justice are illegal.

The Problem of Unconscious Bias

Not all forms of bias are conscious. People often act on the basis of unconscious assumptions or stereotypes that are the result of their upbringing or are deeply embedded in American culture. This problem is particularly true with respect to race, ethnicity, and crime. Deeply embedded stereotypes that equate young African-American men with “crime” and “dangerousness” are widespread. Similarly deeply embedded stereotypes about Hispanics and “illegal immigrants” are also common. Unconscious stereotypes also operate in the other direction, for example, in equating females with no threat of danger. Lorie Fridell, who directs the Fair and Impartial Policing project, explained that in their training scenarios police recruits “are consistently under-vigilant with women—not finding the gun in the small of the back.” That is, they do not associate women with dangerousness and a threat to their safety.¹⁰¹

The President’s Task Force on 21st Century Policing strongly endorsed officer training on unconscious or implicit bias in order to avoid discriminatory actions by the police.¹⁰²

The Law of Discrimination

Discrimination occurs whenever people are treated differently in violation of a local, state, or federal law, or a constitutionally protected right. Several different parts of the American legal system make discrimination illegal. The Equal Protection Clause of the Fourteenth Amendment to the Constitution declares that “nor shall any state ... deny to any person within its jurisdiction the equal protection of the law.” If a state barred African Americans or women from serving on juries (as some states once did), it would be a violation of the Fourteenth Amendment.

A number of federal laws also forbid discrimination. The most important is Title VII of the 1964 Civil Rights Act, which holds that “It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or, privileges of employment, because of such individual’s race, color, religion, sex, or national origin” This law covers employment discrimination by private employers and government agencies, which would include police, court, and correctional agencies. Other federal laws prohibit other forms of discrimination, such as in housing (the 1968 Fair Housing Act), age (the 1967 Age Discrimination Act), or disability (the 1990 Americans with Disabilities Act).

State constitutions and laws also prohibit discrimination. The constitution of each of the 50 states has a provision similar to the Fourteenth Amendment guaranteeing equal protection of the laws. All states also have laws prohibiting discrimination in employment, housing, and other areas. Finally, cities have municipal ordinances that also make various forms of discrimination illegal.

When someone feels that he or she has been discriminated against on the basis of race, ethnicity, or other factor covered by the law, that person bears the burden of proving in court that the disparate treatment involved illegal discrimination. The person’s attorneys need to enlist experts in, for example, police policy and the law to prove that the disparities cannot be explained by legitimate factors.

The Discrimination–Disparity Continuum

To help clarify the debate over disparity versus discrimination, let us examine Box 1.5, which puts the different possible outcomes on a continuum.

Systematic discrimination means that discrimination occurs at all stages of the criminal justice system, in all places, and at all times. That is to say, there is discrimination in arrest, prosecution, and sentencing (stages); in all parts of the country (places); and without any significant variation over time. The clearest example of systematic discrimination involved the southeastern states prior to the Civil Rights Era of the 1950s and 1960s. There was systematic discrimination against African Americans in voting, employment, education, housing, and all phases of the criminal justice system.

Institutionalized discrimination involves disparities in outcomes that are based on an organization’s policies. Marc Maurer of the Sentencing Project lists this as one of the four major factors contributing to racial disparities in the criminal justice system.¹⁰³ One example would be the old police department employment