

# Hot Topics in Criminal Justice: The Death Penalty

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# The U.S. and the Death Penalty

- Common penalty when Constitution drafted
- Found unconstitutional (“cruel and unusual”) in 1976 because irrationally arbitrary
- New death penalty statutes control jury discretion by specifying “aggravators” (e.g., prior crimes, dangerous) and “mitigators” (e.g., mental disability, youth)
- Today 33 states have the penalty
- May only execute “worst of worst.” Unconstitutional to execute:
  - those charged with non-homicide crimes
  - juveniles
  - people with mental retardation

# Is the Death Penalty Justified?

- Among Western countries, only the U.S. has the death penalty. Why?
- Purposes of punishment
  - General deterrence
    - Studies are mixed
  - Individual prevention (specific deterrence, incapacitation)
    - LWOP as a (more popular) alternative
  - Retribution
- American “exceptionalism” (racism, anti-elitism, democratic history, individualism)

# The Death Penalty in Operation (Florida as a case study)

- Florida has over 400 people on death row
- Florida has at least 22 exonerees
- Why?
  - False confessions
  - Inaccurate eyewitness IDs
  - Incompetent labs
  - Adversarialism
  - Inadequate defense support

# The Death Penalty in Florida, Continued

- Most people convicted of capital murder committed a homicide.
- But are they the “worst of the worst”?
  - The effect of judicial elections
  - Jury confusion
  - The double-edge nature of mental disability
  - Ineffective assistance of counsel
  - The end of clemency
  - Racial bias? (cf. McKlesky and Justice Powell)

# The Economics of the Death Penalty

- Death penalty cases represent 3-5% of all criminal cases but 50% of state supreme court dockets
- In Florida, death sentence costs roughly \$2.5 million more than a life sentence of 40 years
- In California, death sentences may cost the state \$250 million extra annually
- Prosecution of non-capital cases suffer

# Reference

Christopher Slobogin, *The Death Penalty in Florida*, 1 *Elon Law Review* 17-63 (2009), available at <http://ssrn.com/abstract=1296013>

# Hot Topics in Criminal Justice: The Insanity Defense

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# Famous Cases

- Daniel M'Naghten
- John Hinckley
- Andrea Yates
- Cases in which the defense did not get raised or was raised and failed
  - Jeffrey Dahmer
  - Sam Berkowitz (Son of Sam)
  - Charles Manson
  - Ted Kaczynski (the Unabomber)

# Current Status of Insanity Defense

- Five states have abolished it
- Since Hinckley acquittal many others have narrowed it or switched the burden of proof
- The defense is raised in only about .5% of all felony cases
- In cases where the prosecutor contests the insanity plea, it succeeds roughly 25% of time
- People found insane are hospitalized, usually longer than their sentence would have been

# Rationale for the Defense

- Retribution: The insane are not blameworthy?
  - The lemon squeezer to Yates
- Deterrence: The insane are not deterrable?
  - Pickpockets, Yates and Hinckley
- Individual prevention. The insane need treatment
  - Perhaps 15% of prison population has serious mental disorder
- Individual prevention. The insane are dangerous
  - People with mental illness are no more dangerous than general population, much less prison population
- Safety valve
  - Consider Lorena Bobbitt

# Modern Insanity Tests

Serious mental disease (not a “personality disorder”) that causes:

- Lack of intent (*mens rea*)
  - Most people with mental illness intend the crime
  - But consider Eric Clark
- Inability to know/appreciate act was wrong
  - Consider Yates, M’Naghten, airplane assassin, psychopaths
- Inability to control behavior (irresistible impulse)
  - Consider command hallucinations/Hinckley/pedophiles
- Crime (the product test)

# The Outer Edges of Insanity

- Vietnam/Iraqi veteran syndrome
  - Automatism?
- Battered woman syndrome
  - Self-defense? Provocation?
- Drug-induced psychosis
  - Voluntarily stopping meds?
- Brain trauma (Phineas Gage)
  - Should brain defects be relevant? (cf. psychopaths)
- Genes and biology
  - XYY chromosomal abnormality; the Mobley case
- Brainwashing (Patti Hearst)
  - "Terrorists"

# References



Christopher Slobogin

## *Minding Justice: Laws that Deprive People with Mental Disability of Life and Liberty*

Harvard University Press, 2006

Chapter 2

# Hot Topics in Criminal Justice: Preventive Detention

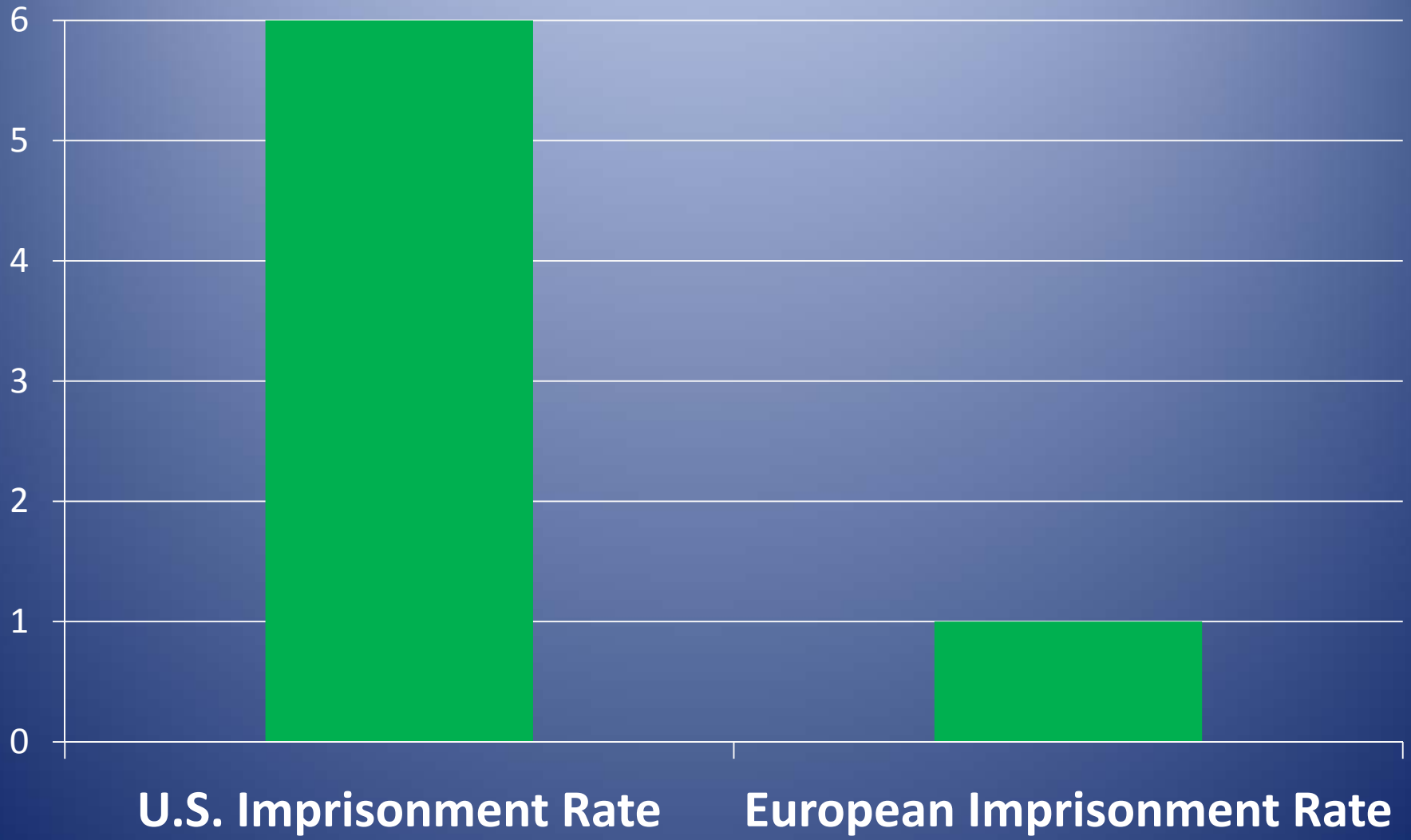
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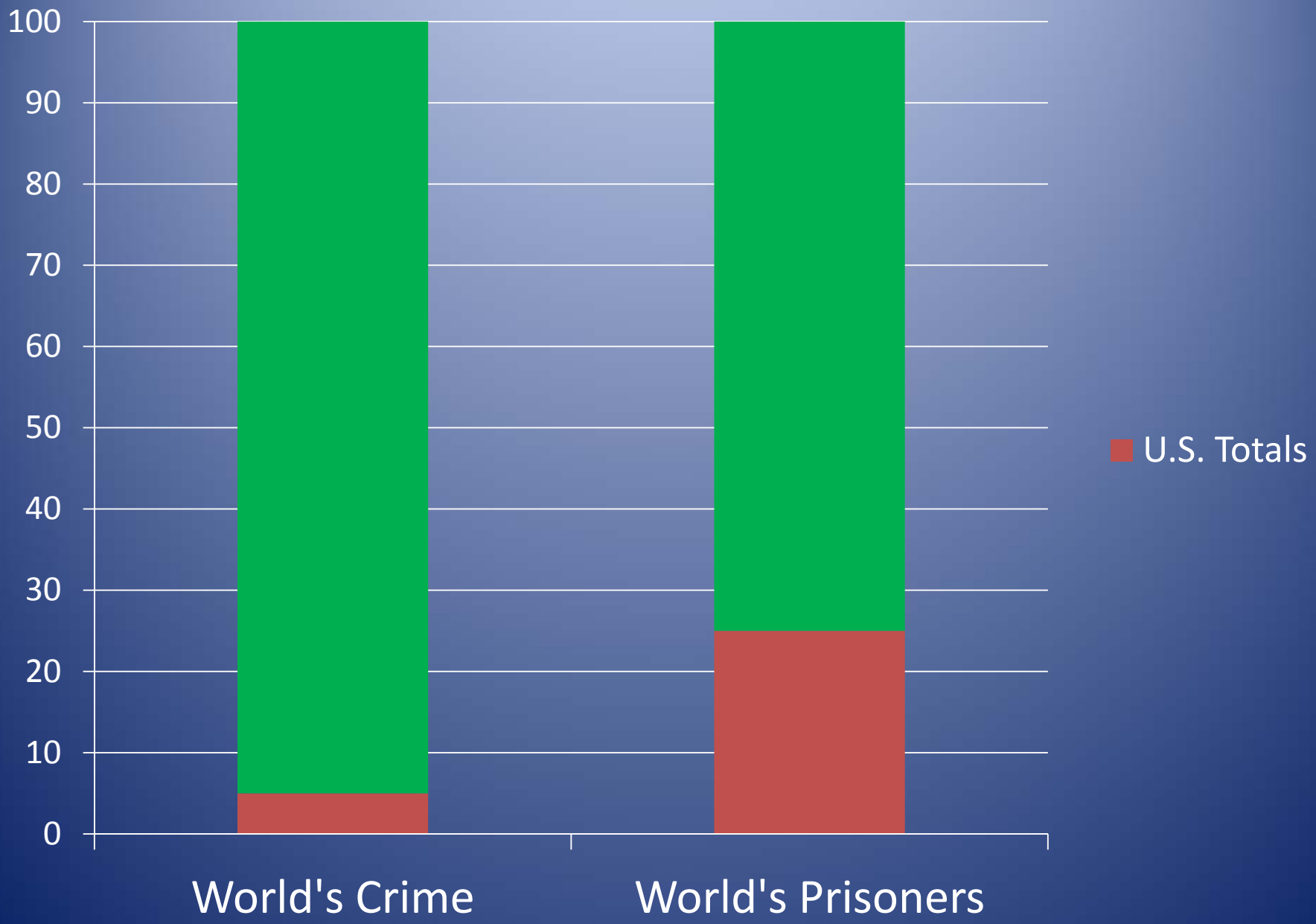
# U.S. Imprisonment Rates

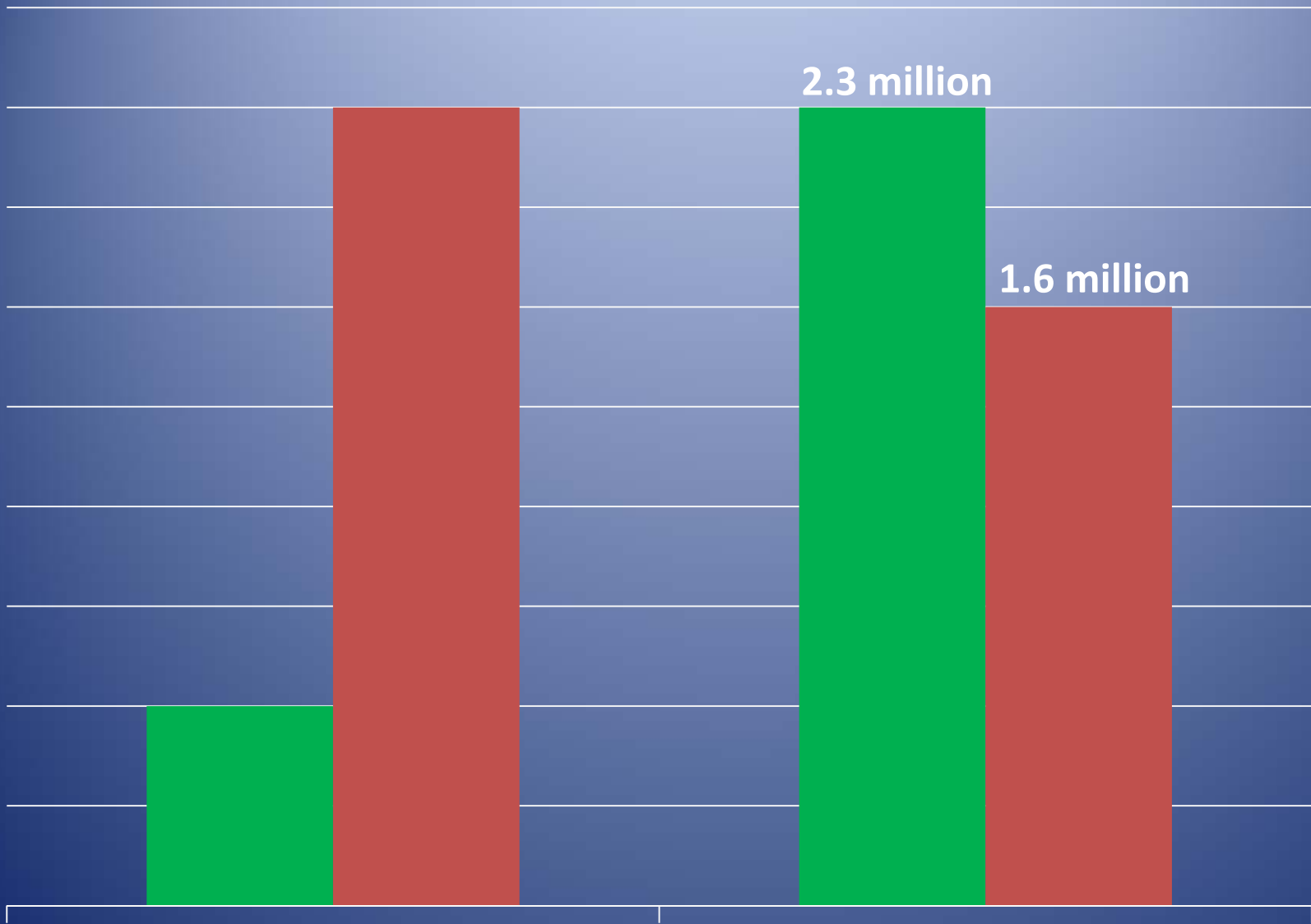
1973: 96 per 100,000

Today: **567** per 100,000





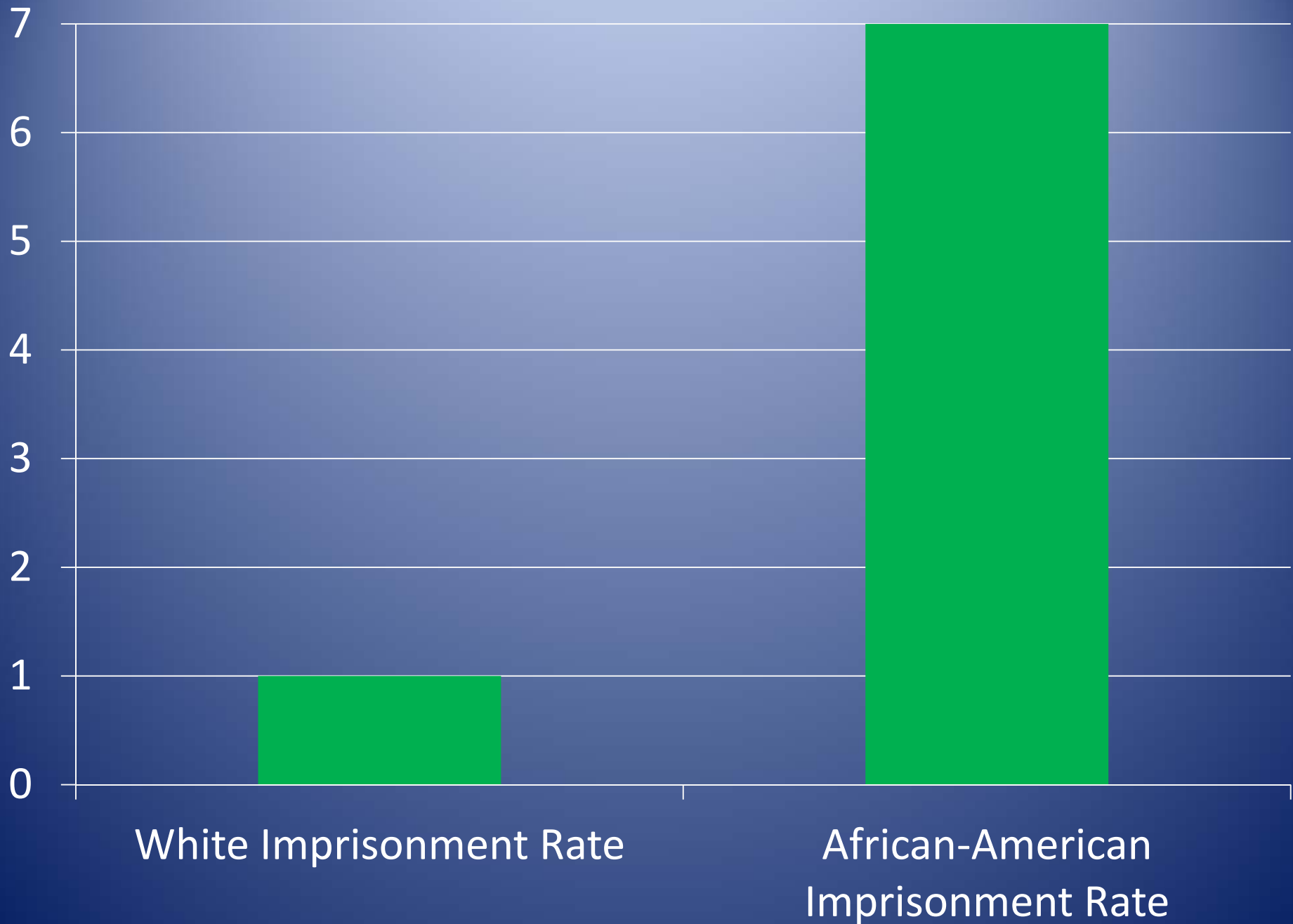




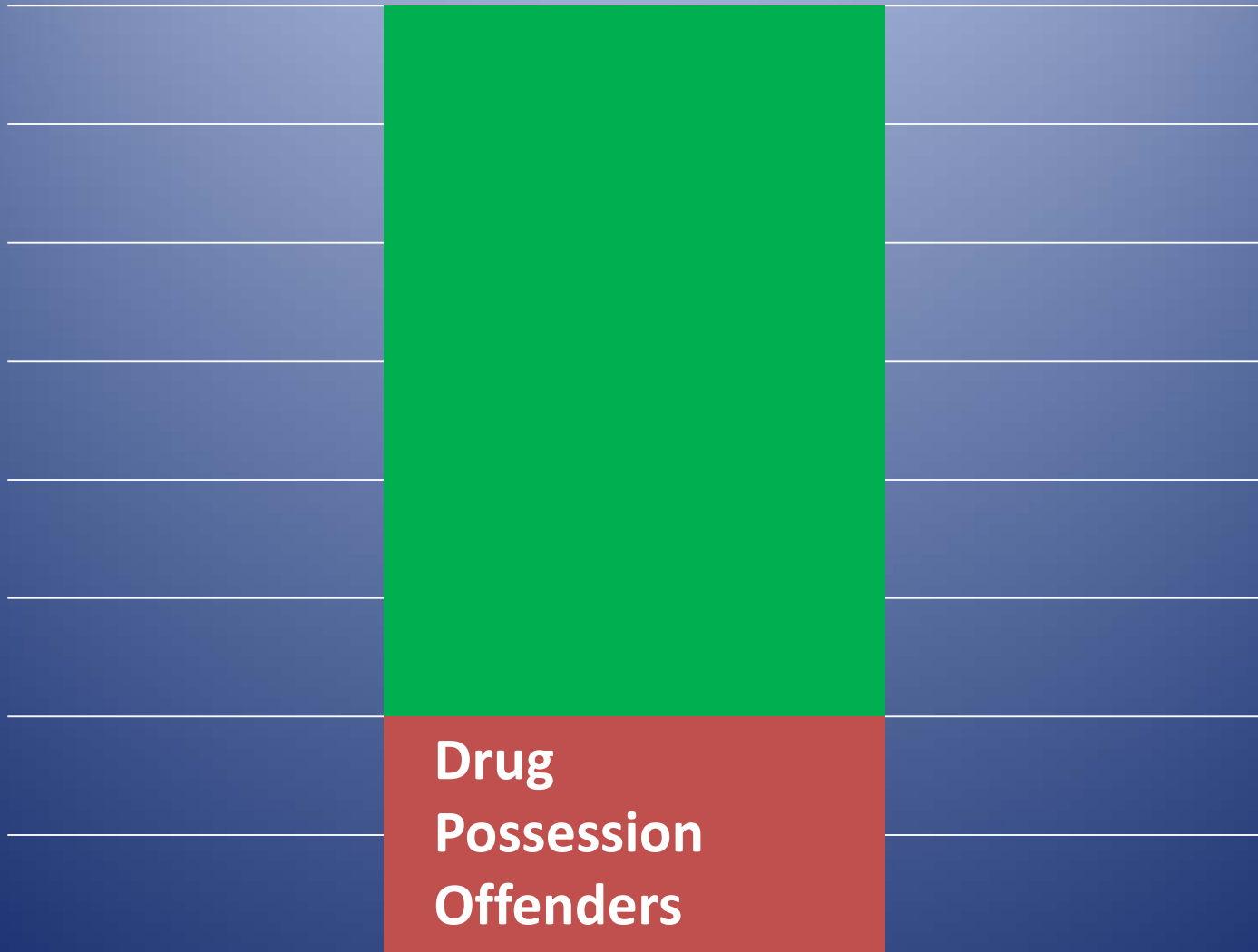
U.S. - China Population

U.S. - China Prison  
Population

■ U.S.  
■ China



# Offenders in Prison



Year	Prisoner-years per murder
1910	10
1923	8
1933	11
1943	20
1953	23
1963	25
1973	10
1983	21
1993	38
<b>2003</b>	<b>85</b>

# Preventive Detention Schemes

- Part of sentencing
  - Indeterminate sentencing
  - Trend is toward determinate sentencing
- Separate from criminal justice system
  - Commitment of insane, non-criminal mentally ill
  - Post-sentence commitment (sexual predator statutes)
  - Quarantine
  - Enemy combatants

# Main Objections to Preventive Detention Within Criminal System

- Inability to predict antisocial behavior
  - Compare ability to define, assess and calibrate culpability
- Abuses of discretion by parole board
  - Compare prosecutorial decision-making
- Ineffective and costly treatment programs
  - Compare recidivism under determinate regimes/ general v. selective incapacitation
- Insufficient deterrence
  - Consider deterrent effect of uncertainty



# Main Objections to Preventive Detention Outside Criminal System

- Post-sentence commitment is “unjust”
  - It constitutes “double punishment”
  - It confines a person for what he might do in future, not what he has done
- Supreme Court’s response (*Hendricks, 1997*)
  - Post-sentence commitment is not “punishment” because focused on incapacitation, not retribution
  - Society is entitled to protect itself, as long as there is strong proof of risk and person is “dangerous beyond control”

# Important Proof Issues

- What is strong proof of risk? (relevant to both types of preventive detention)
  - 90%, 75%, 51% or 10%?
  - Predictions often based on “actuarial” risk assessments that include “static” factors (e.g., age, gender) or factors not related to desert (employment, anger)
  - Compare to “clinical” prediction (Dr. Grigson)
- What is “dangerous beyond control”? (relevant to preventive detention outside the criminal system)
  - Cannot be “ordinary recidivist”
  - Serious mental illness?
  - Pedophile?
  - Enemy combatant; contagious person?

# References



Christopher Slobogin

## *Minding Justice: Laws that Deprive People with Mental Disability of Life and Liberty*

Harvard University Press, 2006

Chapters 4, 5 and 6

# Hot Topics in Criminal Justice: Surveillance

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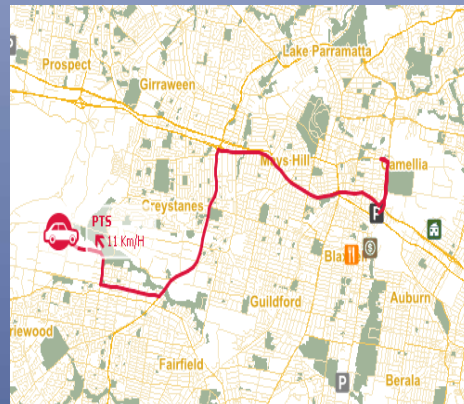


Illustration of Calls

City	Area	Area Code	Area Name	Area Type	Area Code	Area Name	Area Type	Area Code	Area Name	Area Type
1	1000	1000	1000	1000	1000	1000	1000	1000	1000	1000
2	1000	1000	1000	1000	1000	1000	1000	1000	1000	1000
3	1000	1000	1000	1000	1000	1000	1000	1000	1000	1000
4	1000	1000	1000	1000	1000	1000	1000	1000	1000	1000
5	1000	1000	1000	1000	1000	1000	1000	1000	1000	1000
6	1000	1000	1000	1000	1000	1000	1000	1000	1000	1000
7	1000	1000	1000	1000	1000	1000	1000	1000	1000	1000
8	1000	1000	1000	1000	1000	1000	1000	1000	1000	1000
9	1000	1000	1000	1000	1000	1000	1000	1000	1000	1000
10	1000	1000	1000	1000	1000	1000	1000	1000	1000	1000

Area	Area Code	Area Name	Area Type	Area Code	Area Name	Area Type
1000	1000	1000	1000	1000	1000	1000
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1000	1000	1000	1000	1000	1000	1000
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1000	1000	1000	1000	1000	1000	1000



# The Fourth Amendment

The right of the people to be secure in their houses, persons, papers and effects against unreasonable searches and seizures shall not be violated

Warrants shall be based on probable cause and state with particularity the place to be searched and the persons or things to be seized

Most searches require probable cause ( ~ 50%), and many non-exigent searches require a warrant

Physical Searches

Virtual Searches

Search =

A police action that infringes “an expectation of privacy that society is prepared to recognize as reasonable”

*Katz v. United States* (1967)



# Search Doctrines

- Knowing exposure
- General public use
- Contraband-specific
- Assumption of risk

# Knowing Exposure Doctrine

*Katz*: “What a person knowingly exposes to the public even in his own home or office, is not a subject of Fourth Amendment protection.”

*Knotts (1983):*

“A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”

*Ciraolo & Dow Chemical (1986), Riley (1989):*

no expectation of privacy w/r/t aerial viewing of the curtilage

“any member of the public in navigable airspace” could have seen what the police saw

[and so could anyone in a double-decker bus!]





*United States v. Jones,*

132 S.Ct. 945 (2012)



Channel 01



Channel 01 - 15:05:34, 12 July 2006

Channel 02



Channel 02 - 15:05:34, 12 July 2006

Channel 03



Channel 03 - 15:05:34, 12 July 2006

Channel 04



Channel 04 - 15:05:34, 12 July 2006

Channel 05



Channel 05 - 15:05:34, 12 July 2006

Channel 06



Channel 06 - 15:05:34, 12 July 2006

Channel 07

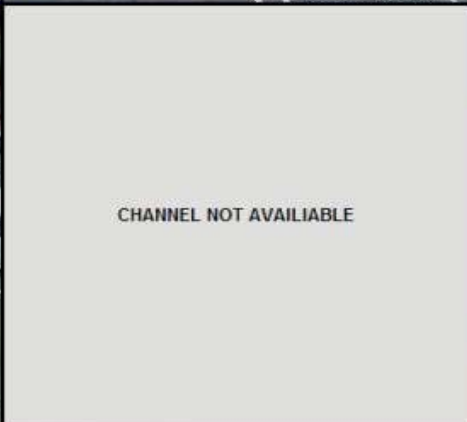


Channel 07 - 15:05:34, 12 July 2006

Channel 08



Channel 08 - 15:05:34, 12 July 2006



**SurveillizCam**

Scheduler: Off

SpyEverywhere: **Running**

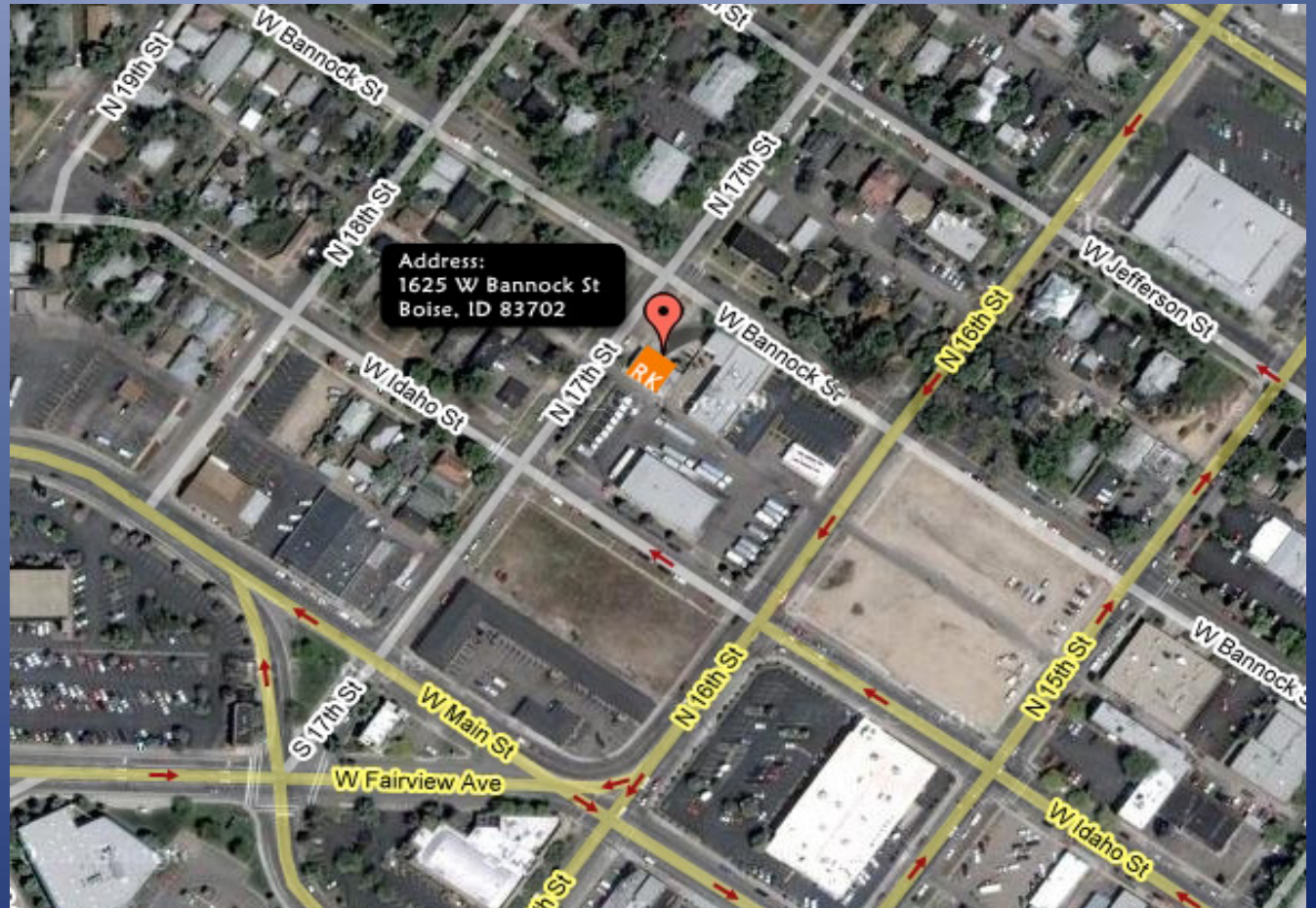
SpyCenter: **Connected**

Control panel with various icons:

- Window management icons (single, double, four, six, eight panes).
- Refresh icon.
- Settings icon (wrench and screwdriver).
- Time display: 21:00:00 Day.
- REC (Recording) icon.
- Zoom in icon (magnifying glass).
- Zoom out icon (magnifying glass with minus sign).
- Volume icon.

1	2	3	4
5	6	7	8
9	10	11	12
13	14	15	16









# General Public Use Doctrine

## *Dow Chemical* (1986)

- \$22,000 map-making camera is “generally available to the public”

## *Kyllo* (2001)

- \$10,000 thermal imaging device is not in “general public use”



Fifty dollars at Walmart!!



\$200-\$4000 on Ebay!

# Sophisticated Technology

May be used if it replicates what the naked eye could see from a lawful vantage point

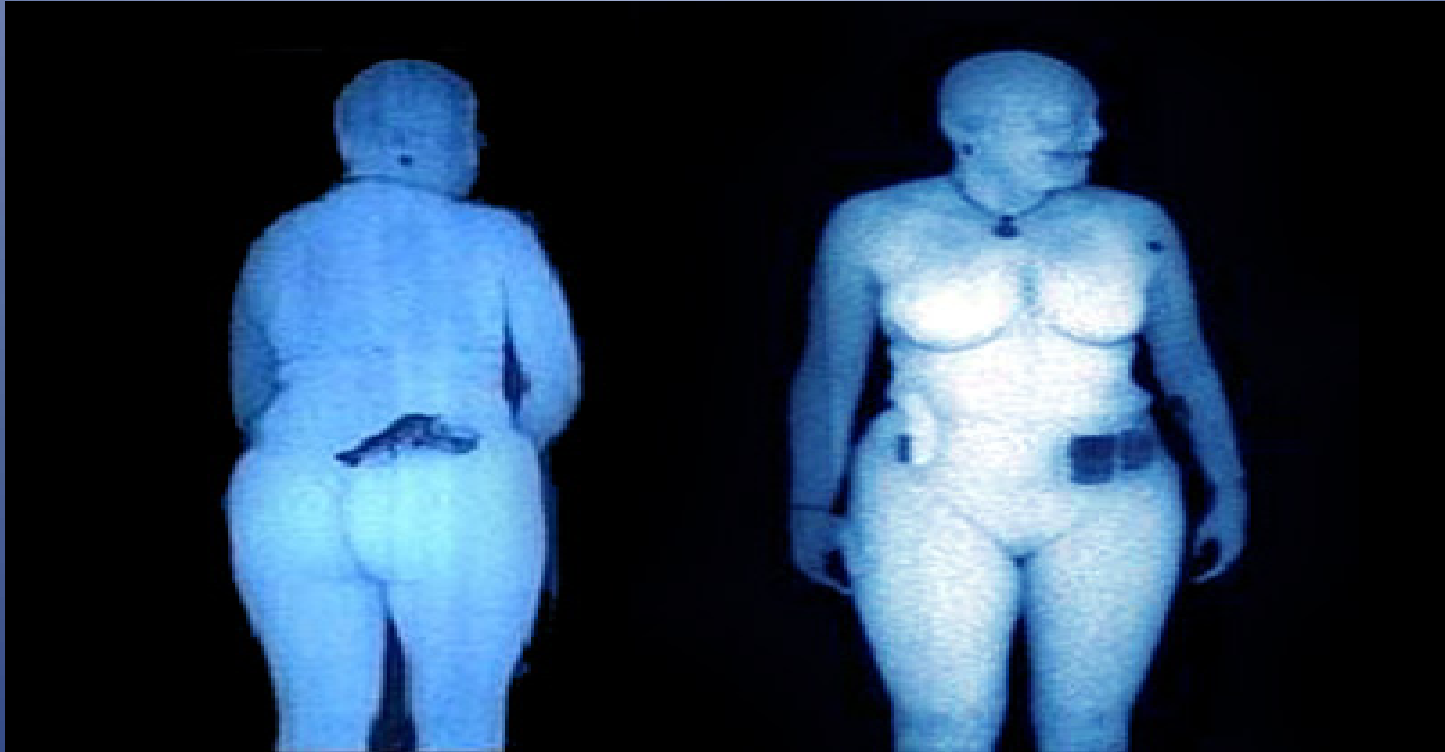


# Contraband-specific Doctrine



*Place v. United States* (1983):  
“government conduct that can reveal whether an item is contraband and no other arguably private fact compromises no legitimate privacy interest.”

# Mechanical Dogs?



Florida v. Jardines (2013)?

# Assumption of Risk

## *Miller (1976):*

an individual “takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government . . . even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.”

## *Smith (1979):*

The defendant “assumed the risk that the phone company would reveal to police the numbers he dialed.”

# The Information Age

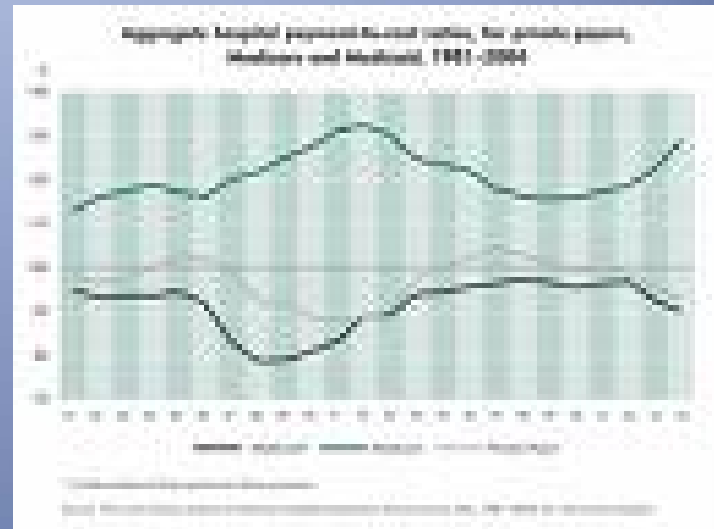
Quantity of world's data has doubled every year  
for the past 15 years

Computing power has increased even faster

*Government Accountability Office (2003)*



Store receipts



Hospital charts



Tax records

A screenshot of a bank records interface, likely from a website or application. The interface is green and white, with a table of transactions. The table has columns for date, description, amount, and balance. The data is organized into a grid with alternating row colors.

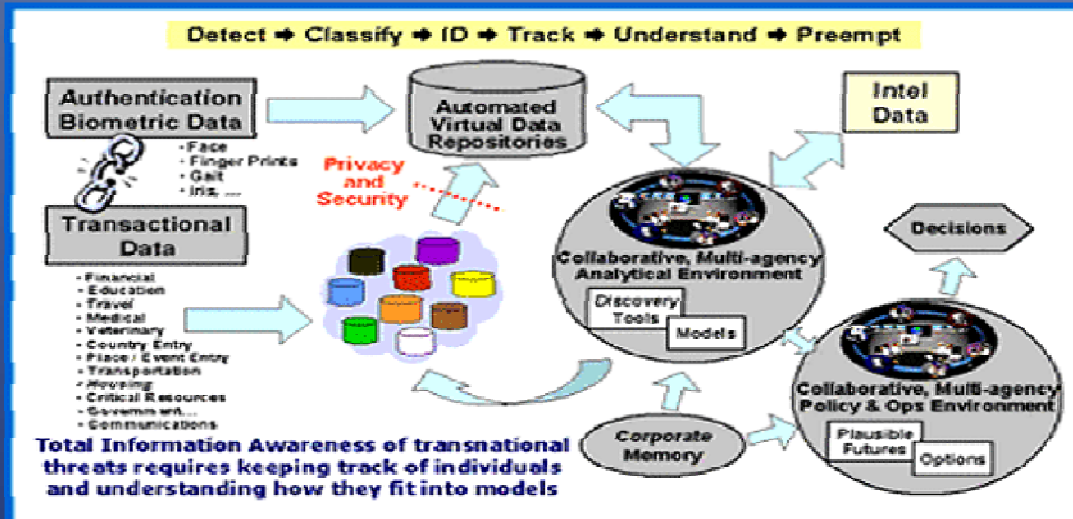
Date	Description	Amount	Balance
1/1/2004	...	...	...
1/2/2004	...	...	...
1/3/2004	...	...	...
1/4/2004	...	...	...
1/5/2004	...	...	...
1/6/2004	...	...	...
1/7/2004	...	...	...
1/8/2004	...	...	...
1/9/2004	...	...	...
1/10/2004	...	...	...
1/11/2004	...	...	...
1/12/2004	...	...	...
1/13/2004	...	...	...
1/14/2004	...	...	...
1/15/2004	...	...	...
1/16/2004	...	...	...
1/17/2004	...	...	...
1/18/2004	...	...	...
1/19/2004	...	...	...
1/20/2004	...	...	...
1/21/2004	...	...	...
1/22/2004	...	...	...
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1/24/2004	...	...	...
1/25/2004	...	...	...
1/26/2004	...	...	...
1/27/2004	...	...	...
1/28/2004	...	...	...
1/29/2004	...	...	...
1/30/2004	...	...	...
1/31/2004	...	...	...

Bank records



# Government Programs

- REVEAL: 16 government and private databases
- MATRIX: “tens of billions of data records . . . in mere seconds”
- TOTAL INFORMATION AWARENESS





So What's Your Point?

“I've got nothing to hide”

# Intrusiveness Ratings (N > 200)

<u>Scenario</u> (scenarios in white regulated by 4 <sup>th</sup> A.)	<u>Intrusiveness Rating</u>	<u>Confidence Interval (<math>\pm</math>)</u>
<b>1. Roadblock (suspicion or localized problem)</b>	<b>35.4</b>	<b>3.4</b>
2. Public camera surveillance (overt)	53.0	8.0
3. Beeper on car	63.4	5.0
<b>4. Frisk (reasonable suspicion)</b>	<b>68.0</b>	<b>3.1</b>
5. Using an x-ray device on the street	68.6	3.7
6. Recording street conversation	70.6	2.5
<b>7. Search of a car (probable cause)</b>	<b>72.4</b>	<b>4.0</b>
8. Accessing ISP logs	77.1	7.5
9. Perusing bank records	79.5	3.1
<b>10. Search of bedroom (probable cause)</b>	<b>85.2</b>	<b>2.4</b>

# Abuses



- “Us Accused of Spying on Those Who Disagree with Bush Policies” (2008)
- “Spying on Pacifists, Environmentalists and Nuns” (2008)
- “Watchdog Says FBI Broke Law, Made Up Phony Terrorist Threats to Obtain Records” (2010)

- Mission Creep
  - TIA and illegal immigrants
  - Fusion centers and credit reports
  - Public camera surveillance and “flawed consumers”
- Mistakes
  - No Fly lists
  - FBI interviews & material witness detentions  
(*ACLU, 2005*)



# Less Tangible Effects of Virtual Searches:

If you've got nothing to hide:

Why do you have curtains?

Can I see your credit card bills for the last year?

Then you don't have a life!

**ARRESTED?**  
 Robbery • Drugs • Sexual Assault • Theft  
**"REMAIN SILENT!"**  
 Your First Line of Defense.  
**Alan Cohen**  
 Criminal Defense  
**713-623-4828**  
 1425 West Loop South, Suite 202 • Houston, TX 77027



"Meet the new head of security."

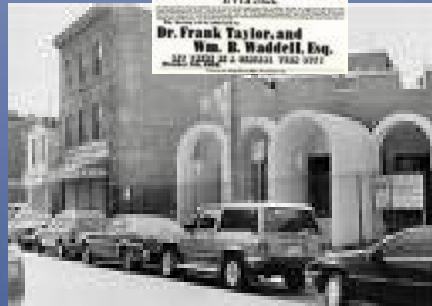


**UNION MEETING.**



**RADNOR HALL.**  
 On Saturday Even'g Oct. 11th:

Dr. Frank Taylor, and  
 Wm. B. Waddell, Esq.  
 2021 2021 2021 2021 2021 2021



**PSYCHIATRIC  
 HELP \$4**

**THE DOCTOR  
 IS IN**





# Freedom to Roam and Think

Walking and strolling and wandering . . . have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. . . .

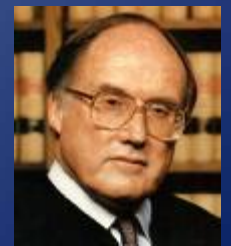
*Justice William Douglas (1972)*



Suppose . . .

There would be an uneasiness, and I think a justified uneasiness, if those who patronized the bar felt that their names were being taken down and filed for future reference . . .

*Justice William Rehnquist (1974)*







# A Technologically-Sensitive Fourth Amendment

- Definition of search
  - Current test: a police action that infringes a reasonable expectation of privacy
  - New test: police looking for something
- But a search only needs to be “reasonable”
  - Targeted searches (Abdullah): proportionality—the justification for a search  $\approx$  its intrusiveness
  - General searches (TIA): political process—search programs must apply to all (including legislators)

# Reference



Christopher Slobogin

*Privacy at Risk: The New Government Surveillance and  
the Fourth Amendment*

University of Chicago Press, 2007

# Hot Topics in Criminal Justice: Interrogation

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# The Need for Confessions

- Only necessary to convict in perhaps 10% to 20% of cases
- Sometimes interrogation useful to
  - identify accomplices
  - “clear” other crimes
  - discover threats
- Typical interrogation: 20 to 30 minutes, no threats, pressure or tricks

# A History of Interrogation Regulation

- 1700s: Right to remain silent developed in reaction to Inquisition & political persecution
- 1800s: Right applied to “street criminals”
- 1930s-60s: Supreme Court cases prohibiting “coercion” (Brown, Lynumn, Spano, Leyra)
- 1966: Miranda: warnings requirement
  - You have the right to remain silent; Anything you say can be used against you; You have the right to state-paid counsel before and during interrogation
  - [You have right to cut off questioning at any time by asserting rights to counsel or silence]
  - Confession is not admissible if warnings are not given or if statements are the product of compulsion, cajolery or trickery



# Supreme Court's Subsequent Interpretation of Miranda

- Warnings need not be “perfect”
  - “Statements can be used against you or . . . for you”
  - Prysock, Eagan, Powell
- Sometimes warnings need not be given at all
  - When “public safety” would be threatened
  - Booking
- Warnings usually immunize police
  - Butler, Spring, Mathiason, Frazier
  - Trickery is not coercion (xerox and “eyepoint” cases)
- Assertion of rights does not end questioning
  - Must invoke rights unequivocally (Berghuis, Davis)
  - Easy for police to reinitiate (Mosely, Bradshaw)

# Do Police Techniques Cause False Confessions?

- Drizin & Leo identified approximately 120 exoneration cases involving false confessions
- Most involve people with retardation or juveniles
  - These individuals are “suggestible” (Perske case)
  - May not understand warnings ( $\leq 70$  IQ = no understanding; 70-90 IQ = several impaired understanding)
- Some involve non-disabled adults
  - Ambiguity about effect of remaining silent (Rogers study: even college students are confused)
  - Maximization/minimization techniques (Russano study: 18% of “innocents” exposed to techniques confessed)
  - Prolonged interrogation ( $> 6$  hours)

# Torture

- Prohibited under international law (Geneva Convention; Torture Convention)
- What is torture/degrading treatment?
  - U.S. Army Manual: Forcing person to stand naked; beating or shocking; deprivation of necessary food
  - Waterboarding?
  - Torture Memo (2002): Only torture if severe pain and “severe jeopardy” or failure/dysfunction of bodily organs
  - Obama administration: all of these techniques prohibited
- But should they be banned for “terrorists” who may have information that can avert another 9/11?
  - Is torture necessary?
  - The dangers of “mission creep”
  - Israel’s approach: prohibit but allow a “necessity” defense



# Reference

Christopher Slobogin  
*Lying and Confessing*

39 Texas Tech Law Review 1275 (2007)

available at <http://ssrn.com/abstract=992847>

# Hot Topics in Criminal Justice: Juvenile Justice

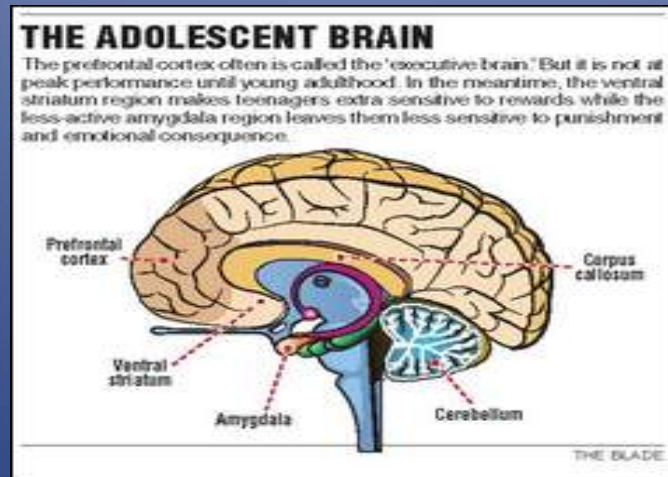
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# How Are Juveniles Different Than Adults? Behavioral Science

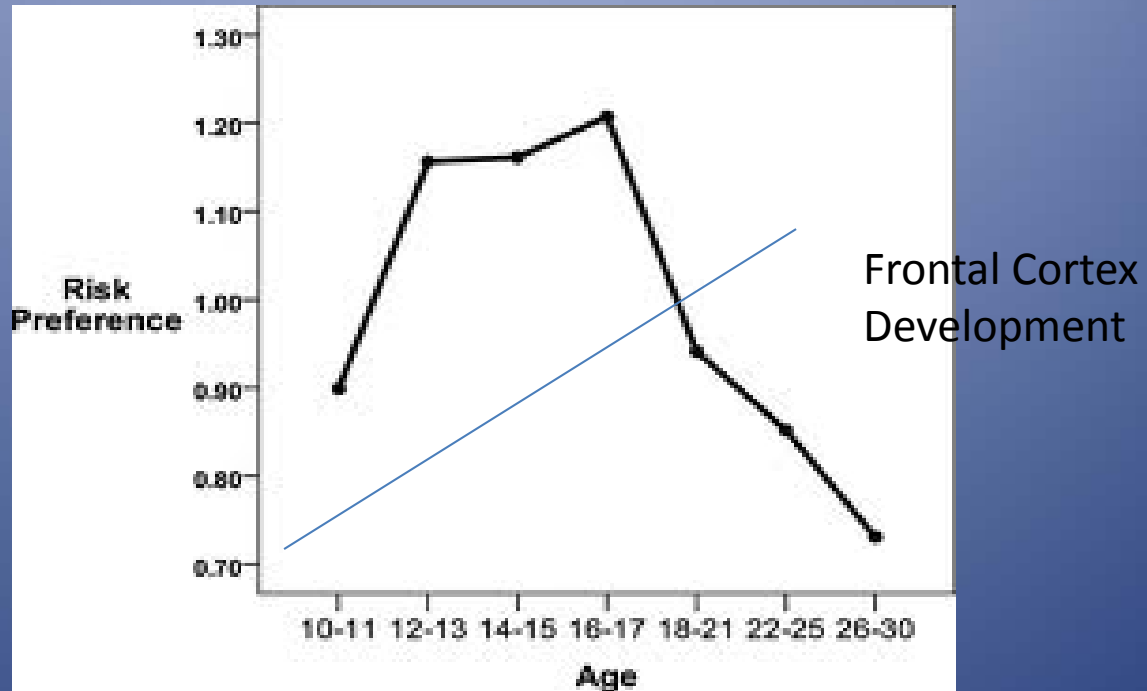
- More focused on short-term consequences
  - “I take things one day at a time and don’t worry about the future”
- Less risk averse
  - “I like doing things that are frightening”
- More impulsive
  - “I do things without thinking”
- More heavily influenced by peers
  - “It’s better to go along with the crowd than make people angry or disgusted with you.”
- Have fewer stakes in life
  - “I have little to lose”

# How Are Juveniles Different Than Adults? Brain Science

- Brain research. During adolescence
  - Limbic system's sensation-seeking is at its height
  - The frontal cortex is still developing through “synaptic pruning” and myelination (which makes the brain more efficient)



# The End Result





# The Four Models of Juvenile Justice

- Rehabilitative Model
- Adult Retribution Model
- Diminished Retribution Model
- Individual Prevention Model

# Rehabilitation Model: Juveniles as Blameless

- Jane Addams (1935): “The child was brought before the judge with no one to prosecute him and with no one to defend him—the judge and all concerned were merely trying to find out what could be done on his behavior. The element of conflict was absolutely eliminated and with it, all notion of punishment.”
- Judge Ben Lindsey (1909): “Our laws against crime were as inapplicable to children as they would be to idiots.”

# Rehabilitation Model: Wide-ranging Jurisdiction

- Juvenile court had jurisdiction over not just regular crimes but “status offenses”
  - Truancy, chronic disobedience, “incorrigibility”
  - Judge Lindsey: “Is the child . . . given to playing ‘hookey’ from school, or ‘bumming’ and running away, showing an entire lack of ambition or desire to work and settle down to regular habits?”
  - Judge Julian Mack: “Why is it not the duty of the state, instead of asking merely whether a boy or girl has committed a special offense, to find out what he is, physically, morally . . .?”
- Disposition: “guarded sanctuaries” aimed at protecting inmates from “idleness, indulgence and luxuries”

# Adult Retribution Model

- 1950s-1970s: Reaction against rehabilitative model (by both conservatives and liberals)
- Since 1979:
  - Transfer to adult court has increased 70%; 1 in 4 transferred
  - States with automatic transfer have doubled to 31
  - 13 states have lowered maximum juvenile ct. age to 15 or 16 and many allow transfer of children 12 and above
- Rationale
  - Juvenile crime is increasing (wrong)
  - Juvenile offenders are “criminals who happen to be young, not children who happen to be criminal”

# Diminished Retribution Model

- ABA Juvenile Justice Standards (1980)
  - Juveniles are less culpable than adults
  - Sanctions should be “fixed” and “proportionate” to the seriousness of the offense”
  - Maximum sentence of 3 years
- More recent version (2000s)
  - Adult procedures
  - Sentence discounts (10-20%)
  - Transfer limited to most serious offenders
- Supreme Court endorsement (Roper, Graham, Miller & Jackson)

# Individual Prevention Model

- Prevention, not punishment, is the goal
- Difference from retributive models
  - Pre-teens not subject to punishment may be subject to intervention (life-course persistent offenders)
  - Adolescents who commit serious offenses might be subject only to community intervention (Multi-systemic Therapy)
  - No transfer (prevention can be handled in juvenile system)
- Difference from rehabilitative model
  - Juveniles are not “innocent”
  - Status offenses probably not a basis for jurisdiction
  - Intervention rarely involves isolation from community
- Roper, etc., consistent with this model as well

# Procedure in Juvenile Court

- Judge Mack: Seated at a desk, with the child at this side, where he can on occasion put his arm around his shoulders and draw the lad to him, the judge . . . will gain immensely in the effectiveness of his work.”
- “Adultification” of juvenile process
  - Gault (1967): Rights to counsel, confrontation, remain silent
  - J.D.B.: Age is relevant to coercion analysis in interrogation
  - T.L.O.: Kids have adult 4<sup>th</sup> Amendment rights except in schools
- Is the adult procedural model a good idea?
  - Do adult procedures make system more punitive?
  - If preventive treatment is the goal, are adversarial procedures necessary?
  - Is formal process more likely to produce accurate outcomes?
  - Is formal process more likely to produce fair outcomes?

# Reference



Christopher Slobogin & Mark R. Fondacaro

*Juveniles at Risk: A Plea for Preventive Justice*

Oxford University Press, 2011



# The 4<sup>th</sup> Amendment Exclusionary Rule

- Arguments Against Exclusion
  - Guilty people go free
  - Hurts prosecutor, not police
  - Does not protect innocent (cf. DWB; data-mining)
- Arguments for Exclusion
  - Guilty people would avoid discovery under any good alternative as well
  - Damages either over-deter or don't deter enough
  - Prosecutors influence police training and practice
  - Exclusion better protects judicial integrity



# Preventive Detention of People with Mental Illness

- Must be dangerous to others or to self
- Is danger to self enough?
  - Compare suicide; cigarette smoking
  - Many states also require “incompetency to make treatment decisions”
- What is incompetency?
  - Inability to understand risks and benefits (and?)
  - Inability to give non-delusional reasons for refusal of treatment
  - Should it vary with type of treatment/refusal or consent?
  - People with schizophrenia are often competent (MacArthur study)

# Special Needs Doctrine

The warrant and probable cause requirements may be suspended “in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.”

*New Jersey v. T.L.O.* (1985)

# “Special needs” programs

## New York ferry searches:

“Preventing or deterring large-scale terrorist attacks present problems that are distinct from standard law enforcement needs and indeed go well beyond them”

## DNA sampling of prisoners:

the state “is not trying to determine that a particular individual has engaged in some specific wrongdoing”

