How the Criminal Justice System Educates Citizens

By

BENJAMIN JUSTICE

and

TRACEY L. MEARES

There are at least two central pathways through which the modern democratic state interacts with citizens: public school systems and criminal justice systems. Rarely are criminal justice systems thought to serve the educational function that public school systems are specifically designed to provide. Yet for an increasing number of Americans, the criminal justice system plays a powerful and pervasive role in providing a civic education, in anticitizenry, that is the reverse of the education that public schools are supposed to offer. We deploy curriculum theory to analyze three primary processes of the criminal justice system—jury service, incarceration, and policing—and demonstrate the operation of two parallel curricula within them: a symbolic, overt curriculum rooted in positive civic conceptions of fairness and democracy; and a hidden curriculum, rooted in empty or negative conceptions of certain citizens and their relationship to the state.

Keywords: criminal justice; education; curriculum; civic; citizen

There are at least two central pathways through which the modern democratic state interacts with citizens: public school systems and criminal justice systems. Public school systems are supported by the state at all levels of government to make good citizens—people who are effective participants in the social, political, ideological, and economic spheres of our society. Criminal justice systems, on the other hand, are supported at all levels of government to encourage and enforce compliance with the law, judge alleged breaches, and punish offenses. Insofar as the modern, democratic

Benjamin Justice is an associate professor of education and history at Rutgers, the State University of New Jersey. He is an award-winning author of numerous works on the history of education in the United States, including The War That Wasn’t: Religious Conflict and Compromise in the Common Schools of New York, 1865–1900 (SUNY Press 2005) and (as editor) The Founding Fathers, Education, and the Great Contest (Palgrave-MacMillan 2013).

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state is defined as a political entity with a monopoly on the legitimate use of violence, constituted and codified by law, the criminal justice system would appear on its surface to be quite distinct from public schools in its societal role. Rarely are criminal justice systems thought to serve the educational function that public school systems are specifically designed to provide. Yet for an increasing number of Americans, the criminal justice system plays a powerful and pervasive role in providing a formal education in what it means to be a citizen. In this article, we lay out a theoretical framework for understanding why this is so.

That various aspects of the criminal justice system socialize citizens is not a new idea. Writing over three decades ago and exploring how people learn about the law, Tapp and Levine (1980) explained that while law learning presents characteristics of a universal developmental cognitive process, legal socialization also is interactive and dynamic. Legal learning, they argued, takes place outside of schools. The extent to which one knows law depends on her or his opportunity to access and participate in formal legal contexts such as jury service and other forms of the administration of justice. Encounters with legal authorities, including, and especially, police, also matter (Fagan and Tyler 2005). Legal learning, then, is centrally contextual and a function of how people live (Engel 2008). Explaining how people acquire legal fluency without actually studying the text of the laws to which they abide is a critical aspect of understanding how people learn to be citizens, for a key aspect of participating in a polity as citizen is playing by the rules.

Why people play by the rules, however, is a question best explained by a deeper phenomenon. Pioneered by Tom Tyler and others, the social psychological concept of legitimacy provides insight. We use the term “legitimacy,” like these researchers, in a positive empirical sense. For us, legitimacy is the “property that a rule or an authority has when others feel obligated to voluntarily defer to that rule or authority. A legitimate authority is one that is regarded by people as entitled to have its rules and decisions accepted and followed by others” (National Research Council 2004, 297). A robust body of social science evidence demonstrates that people are more likely to voluntarily obey the law when they believe that authorities have the right to tell them what to do (Tyler 2007; Braga et al. 2007). Research into legal socialization is important because it helps to explain how people form beliefs about legitimacy of the state, which is a fundamental component of civic identity in a democracy (Fagan and Tyler 2005; Piquero et al. 2005).

Tracey L. Meares is the Walton Hale Hamilton Professor of Law at Yale University where she has taught since 2007. Prior to joining the Yale Law School faculty, she was Max Pam Professor and director of the Center for Studies in Criminal Justice at The University of Chicago Law School as well as senior research fellow at the American Bar Foundation. She has served on the Committee on Law and Justice, a National Research Council Standing Committee of the National Academy of Sciences, and she was recently appointed to the United States Attorney General’s Science Advisory Board for the Department of Justice. Her teaching and research interests focus on criminal procedure and criminal law policy with a particular emphasis on empirical investigation of these topics.
Legal socialization brings to mind, of course, those who experience the criminal justice system. A number of scholars (including those in this volume) have attempted to understand the social effects of the rising “carceral state,” in which an alarmingly large and growing percentage of Americans—especially African American males—find themselves in a custodial underclass. For example, Weaver and Lerman (2010) ask “how and in what ways encounters with the criminal justice system influence citizens’ political attitudes and behaviors.” Analyzing two national datasets on adolescent and family health and well-being, Weaver and Lerman conclude that “criminal justice contact weakens attachment to the political process and heightens negative perceptions of government” (2010, 817). In this way, the criminal justice system appears to be a site of negative “civic education.”

Weaver and Lerman’s (2010) use of the word “education” is as striking as their findings. Scholars who study the socialization of the criminal justice system generally like the words “learning” and, of course, “socialization” but not the word “education.” Rather than describing these admittedly educational experiences in any systematic way, studies tend to focus on individual experience and aggregate effects of particular policies and procedures. The avoidance of framing experience with the criminal justice system as educational is consistent with what historians of education in the United States have long noted: Americans of the late nineteenth and twentieth centuries strongly associate education with schooling, and schooling, in turn, with a specific “grammar” that defined what was considered a real school: school buildings designed like egg crates, containing classrooms with twenty to thirty same-age children and one teacher, learning the same thing at the same pace, in the same way. We find both the reduction of schooling to a specific set of institutional norms and the reduction of education to schooling to be misleading and unduly restrictive. Education, unlike socialization, is systematic, sustained, purposeful, and directional. It has intended and unintended consequences that shape its participants in specific ways. The difference between “socialization” and “education” is not semantic, but substantive.

A benefit of viewing the criminal justice system as an educational system is that we can bring a large body of theory and research to bear on the problematic relationship between the state and the citizen that Weaver and Lerman, along with others, have identified. But our reasoning is deductive: we are less interested in cautiously extrapolating from data on experience and effects, which we see as the end of a process, than we are in understanding and interpreting the process itself. Thinking in terms of education, as opposed to mere socialization, allows us to explore the coherence and range of experiences provided by the criminal justice apparatus and to consider them as systematic, sustained, targeted, and purposeful. In short, we argue from the front end of the process what other scholars are finding from the tail: the criminal justice system provides a curriculum in civic education—not as an analogy, but as an actuality. And it is an education that is the reverse of the education that public schools are supposed to provide. It is an education in anticitizenry.1

To make our argument, we begin with some definitions. We first explain what we mean when we use the terms “education,” and “curriculum.” We apply the
latter—curriculum theory—to three of the primary processes of criminal justice systems: adjudication, punishment, and policing. With respect to each, we demonstrate the manner in which the criminal justice system offers individuals an education in their proper role as citizens. Adjudication, through the jury system, ostensibly offers Americans an educative experience: an overt curriculum in active citizenship that is egalitarian and democratic. In practice, however, the jury system is at best an empty symbol and at worst, a subtle lesson in who is or is not a real citizen. Similarly, punishment—primarily through imprisonment—functions explicitly as an educative process both for the individual and the broader society that is intended to reinforce the positive values of a democratic society. In practice, however, the meting out of punishment in the American criminal justice system offers Americans race- and class-based lessons on who is a citizen deserving of fairness and justice and who constitutes a group of dangerous others deserving of severe punishment, monitoring, and virtual branding. Policing, in contrast to punishment, is a function of the criminal justice system that has only recently been thought of as having a direct impact on people’s behavior. As with the other facets of the criminal justice system, however, policing plays a salient role in dictating the relationship between the citizen and the state. Increasingly, that relationship is one that can be considered legitimate only for a subset of American society. Taken together, we conclude, these facets of the criminal justice system provide Americans with a powerful and coherent set of messages and experiences that define who is a citizen, and who is a problem.

Education and Curriculum

In 1971, historian Lawrence Cremin (1970, xii) argued in the first volume of his trilogy, *American Education*, that education was “the deliberate, systematic, and sustained effort to transmit or evoke knowledge, attitudes, values, skills, and sensibilities.” Notably, his definition of education traveled well beyond schools as the technology to achieve these goals. Following Cremin, educational historians have documented the myriad ways in which colonial Americans learned to read and write; how slaves transmitted culture; how militaries, churches, workplaces, museums, popular magazines, prisons, and major events have educated Americans generally and specifically with respect to their appropriate roles in the polity.

The cynosure of this expansive definition, for Cremin at least, was the classical Greek concept of *paidiea*. For the Greeks, *paidiea* was all the knowledge of what it meant to be a citizen as well as all the various ways in which it was transmitted to future citizens. Classicist Werner Jaeger (1945, xiv) explained it as the “deliberate endeavor to educate each new generation of individuals so as to make them in its own image.” As Americans developed their own, historically exceptional, democracy, Cremin (1970) concluded, they too developed a unique *paidiea*, which over the course of the nineteenth century they increasingly (but not exclusively) lodged in public institutions—especially schools.

Like Cremin we employ the idea of *paidiea* when we say that the criminal justice system is simply another path for nation-states to achieve the goals of
(re)producing citizens and civil society. It is a process that does not cleanly separate education from context, because education is of as well as for creating context. Unlike Cremin, however, we are not sanguine about the nature of that path. While the criminal justice system, like the public schooling system, educates people about their relationship to the state, it does so in a society in which there is no single standard of civic identity. The Greeks imagined paidiea as a universal concept among citizens, in a context in which most people were not citizens, but slaves. In America, the rise of formal education through state institutions that were ostensibly egalitarian actually served to define civic boundaries between insiders and outsiders in a space where these concepts were contested—with race, gender, and to a lesser degree social class being the primary markers of a civic hierarchy. Even if we accept that the Greeks did have a coherent paidiea, where educational processes aligned to the ideal of a common civic identity, we cannot accept that such coherence has ever existed in the United States of America (e.g., Moss 2009; Anderson 1988; Justice 2009). When we turn from schools to criminal justice, the collapse of local democratic control over the criminal justice system in the late twentieth century also problematizes a comparison between Athenian and American justice.2

Our particular concern is with the core of the educational experience: the curriculum. The word curriculum comes from Latin, meaning race course. In the early twentieth century, educational theorists used the word curriculum to describe a course of structured experiences that students would pass through on their way toward the transformative ends of their formal education. Insofar as public schools existed to turn children into citizens, the curriculum of schools has been at the center of political struggles (usually more symbolic than substantive) over what good citizenship means. While these struggles have reflected deep divides and varied agendas, nearly all protagonists in the curriculum wars in the last century have shared the positive belief that the overt curriculum of schools will improve the individual, and, thus, directly, or indirectly, benefit the state by making good citizens (Schiro 2008). Curriculum, in its most utopian conception, sought to help students answer the question what is most worth knowing as a vehicle for becoming someone who is most worth being (Bobbit 1918).

Utopians aside, any curriculum for the purpose of civic education presupposes that life outside of the race course is insufficient to achieve the curriculum’s goals. Schools add value. All modern states provide schooling at public expense for this reason. James Madison, Thomas Jefferson, and other members of the Revolutionary political intelligencia argued that schooling would be necessary not only to make people more virtuous and smarter, but also to make them more homogeneous (e.g., Rush 1786). In our own time, Putnam (2001) has used human capital theory to explain in detail what the Founding Fathers believed: the modern nation-state depends on a shared sense of identity that is, at heart, a fiction. States need citizens; systems of mass education produce them (Boli, Ramirez, and Meyer 1985). Not surprisingly, culture wars over the overt content of a public school education have been an endemic feature of public school systems since their emergence in the mid-nineteenth century, reflecting competing visions of what good citizenship entails.
What is a good citizen? To answer this, we approach the question in relationship to a healthy democracy. Whether we view democracy in relation to the republican, constitutional forms of government, as James Madison did; or as a mode of associated living, as John Dewey (1916) did; or both, as Amy Gutmann (1999) and others do, most democratic theorists agree that good citizenship begins with a sense of legitimacy (though they might not use that term): a shared allegiance to the larger sociopolitical construct that forms the basis of prosocial behaviors. Such behaviors include obeying the law, participating in formal civic duties such as serving on a jury and voting, voluntary participation in civic groups and events, service to others, and staying informed. Good citizens are economically productive and personally responsible. They recognize the reasonable claims of subgroups different from their own to equal opportunities for civic life. Finally, as Gutmann has argued, good citizens value and engage in deliberation with other citizens. In the popular imagination, the curriculum of the public school imparts the traits of the good citizen to all comers.

The reality has been different. During the late 1960s, scholars highlighted the historically negative function of the formal public school curriculum in making good citizens, assailing the most blatant forms of prejudice and oppression in public education. They found, for example, pervasive racism and sexism in the supposedly purely academic curriculum of history and science classes; they uncovered deeply gendered and raced tracking in vocational education programs built, historically, on flimsy intelligence tests. If learning the official public school curriculum was a racetrack to financial opportunity, personal growth, tolerance, and political engagement, it was not designed to treat all runners equally. Indeed, for many students—especially nonwhites—it was a race right back to where they started, or worse. In our own time, many of the most egregious anticivic messages in the overt curriculum have been corrected or muted, though some still remain (Loewen 2008).

Researchers also found more subtle forms of education in schools than the formal curriculum. In his groundbreaking book, Life in Classrooms (1968), sociologist Philip Jackson turned the idea of curriculum on its head, looking from a student's perspective at what was most worth knowing during the daily grind of public school. Jackson detailed an underground race course for students to navigate full of, in Giroux and Penna's (1979, 22) words, “unstated norms, values and beliefs that are transmitted to students through the underlying structure of meaning in both the formal content as well as the social relations of school and classroom life.” For Jackson (1968), the behaviors necessary for crowd management, the dynamics of winning praise (or attracting scorn), and the student's relationship to those in power dominated life in schools for students and teachers composed a “hidden curriculum,” which is separate, distinct, and often contradictory to the overt curriculum that educators in schools intend to impart.

The sources and mechanisms of overt and hidden curricula are different. The overt curriculum may be found in educational code, state standards, curriculum guides, school catalogues, syllabi, textbooks, and lesson plans. It bears the characteristics of a contract or statute: a formal, written statement of what the school is supposed to teach. The overt curriculum claims to be impartial and universal.
It presupposes that the knowledge and skills it imparts are the ones most worth having, and that all students are to be treated equally as this information is imparted to them. To the extent that divergences of opportunity (otherwise known as tracks) are offered, scientific measures of individual needs and abilities determines placement in them—that or students’ free choices. Although the overt curriculum usually is the result of democratic deliberation and compromise, it nevertheless claims a single standard of citizenship for all participants. Anyone who sees the race through to its finish should, by the logic of the design, be transformed into a full civic being. Variations with any other civic being are the fault of some other aspect of schooling or of the individual student.

The hidden curriculum may be found in adult/student and student/student interactions, in the enforcement of school discipline policies and behavior codes, in the deeply buried assumptions and narratives of history textbooks, in a school’s choice of mascot, in who gets to sit where in the cafeteria, or the musical selections at the prom. Community context is a major factor. In one classic study, Anyon (1980) found that despite having the same overt curriculum, fifth-grade students in five different New Jersey elementary schools were trained differently in how to relate to it. In two working-class neighborhood schools, the teachers and students emphasized mechanical and procedural learning, with little decision-making or choice. In the middle-class schools, teachers and students emphasized getting the right answer and getting a good grade, while in the professional and executive-elite neighborhood schools, teachers and students engaged in creative thinking, independent learning, and sharpening intellectual skills. In another vein, numerous studies have shown that officially neutral zero-tolerance policies for school violence reduction are disproportionately enforced on males, ethnic minorities, and the poor (e.g., Casella 2003; Verdugo 2002). Still other scholars have noted strong variance in compatibility between school culture (including the overt social studies curriculum) and home culture and historical experience, especially for students of color (e.g., Epstein 1998; Barton and Levstik 1998). Alongside what schools say they teach is another curriculum that includes lessons about who matters, or does not, and whether the overt school curriculum, and the republic for which it stands, is legitimate or arbitrary, liberating or oppressive.

The hidden curriculum has no overt, publicly debated logic. Instead it is usually the result of school culture, which itself reflects the institutional demands highlighted by Jackson (1968), or the unstated prejudices and assumptions of the community, faculty and administration, and broader society. Importantly, in settings where there is strong congruence between the school’s overt curriculum and its constituent students, teachers, and community, the hidden and overt curriculum can work together in mutually reinforcing ways—teaching students the necessary habits of democratic living, such as toleration, deliberation, and fairness. In other settings, however, where students and their families do not conform to mainstream civic identity, or where the school faculty and administration do not belong to the community they serve, the hidden curriculum can serve to reinforce antidemocratic behaviors, manufacture failure, and encourage alienation (e.g., Eckstein 1984). Whether a school’s overt civics curriculum reflects an
academic approach to learning about democracy or a comprehensive, problem-solving approach (and here there is significant debate among scholars), the hidden curriculum of schooling can offer daily counterproductive lessons in how not to be a citizen, especially for those groups of children who have been historically marginalized. At its worst, the hidden curriculum of the public school can offer lessons in who is deserving of arbitrary or harsh punishments; whose gender or color or social class is a liability; whose history does not count; and whose language, customs, and values are of no consequence.

The school curriculum is not the only source of civic education, of course. Research shows that extracurricular activities potentially have a more powerful effect than curricular ones for inculcating desirable civic skills and dispositions (Murphy 2004; Youniss, McClellan, and Yates 1997). Outside of school, students learn through social context (neighborhood institutions, family, home life, peers) and through mass media, including television, the Web, and video gaming. Nevertheless, children still find the public school curriculum to be the primary source of education provided by the state, about the state, both overtly and because the school experience is itself a primary contact point. For a significant and growing segment of the American population, however, there is a second contact point with the state that also offers lessons on what it means to be a citizen: the criminal justice system.

The Overt and Hidden Curricula of Justice

Through overt and hidden curricula, the criminal justice system educates citizens on the proper relationship they should have with the state. While the overt curriculum is framed as educative in a positive sense—encouraging or changing behavior to align with the democratic goals of the state—the hidden curriculum of the criminal justice system manages and promotes education that is the positive image’s photographic negative. To make this argument, we shall draw generally on the theoretical framework offered by legal socialization, which explains how people learn about the law, legal systems, their government, and their appropriate role with respect to each through actual experiences. More specifically, we draw on the concepts of legitimacy and procedural justice, as research into these ideas documents the psychological links people tend to draw between characteristics of legal practices and of interactions that citizens have with legal authorities and their conclusions that laws, systems, or authorities are fair.

Lind and Tyler (1988) explain that when making judgments regarding the legitimacy of state authorities, people look to indicia of procedural justice in their actions. These scholars tell us that people care a great deal about being able to participate in official decisions, being listened to, and having their views considered by authorities. They also value the neutrality of the decision-making process. In particular, people expect decisions to be based on objective information. Perhaps the most important facet of socially grounded procedural justice is quality of treatment. People desire to be treated politely and with dignity. These
characteristics of procedural justice support people’s beliefs about legitimacy of important state functions, including the criminal justice system and public schools.

The reason people care about procedural justice is that it provides them with important informational signals that they view as relevant to their identities. People tend to seek a favorable social identity within the groups to which they belong. People also seek a favorable social status for their group vis-à-vis other groups. The relationship that people have, or potentially have, with governmental authorities provides them with critical information about their individual- and group-based status. We use these criteria here to evaluate messages the criminal justice system consistently conveys to certain groups through its everyday operation. We can then determine the extent to which the everyday operation, laden with hidden curriculum, supports or detracts from the overt education in democracy the system purports to project.

We contend that the state consistently educates by producing two distinct sets of messages that function as overt and hidden curricula. The former reinforces perceptions of procedural justice for those who, in reality, rarely experience the hidden curriculum firsthand. The latter, hidden curriculum, is inconsistent with procedural justice, and the consequence is that the objects of this education—those people who most often run its course—are discouraged from attributing legitimacy to laws, legal systems, and regimes. That is to say, those experiencing the hidden curriculum are bombarded with messages that they are not citizens belonging to the group of the whole in charge of governing, but are a class of problem people to be excluded, monitored, and surveilled, treated harshly and punished arbitrarily. Those citizens whose experiences with the system are primarily with its overt curriculum (one of democracy and fairness) are encouraged to accord the system high legitimacy as long as they accept (or remain ignorant of) the hidden curriculum for others. What remains is to explain how component parts of the system convey consistent messages of inclusion and vilification.

**Juries and jury service**

Other than voting, jury service likely is considered by most to be the paradigmatic example of civic duty (Amar 1995; Amar and Amar 1996). It is simultaneously a right and a duty—a duality that is reinforced by public school textbooks and court-sponsored tutoring sessions that each potential juror receives upon reporting for duty. Historically, the American jury system evolved out of English common law, where juries were designed to serve as a check on the overweening power of elites. During the early nineteenth century, however, where civic discourse in the United States insisted that the government belonged to the people, the jury actually supported judicial power as opposed to existing merely to check it. Jury service came to be viewed as an educational opportunity, whereby each citizen learned the workings of the law and received training in the pursuit of justice. And consistent with this idea, participation on a jury became an important right to promote and protect independent of the defendant’s right (or not) to adjudication by jury. In his appraisal of American democracy, de Tocqueville
(1835, 262) cast the jury as an *école gratuïté* or “free school” that is “always open, where each juror comes to be instructed in his rights, and where he enters into daily communication with the most instructed and most enlightened members of the elevated classes, where the laws are taught to him in a practical manner and are put within reach of his intelligence.” Participation in a jury, de Tocqueville believed, was a most effective way to teach people how to lead, an overt curriculum in democratic citizenship.

We can easily imagine a world in which the hidden curriculum of jury service lines up with major points of the overt curriculum that we just laid out. In that Tocquevillian ideal, jury service is quite regular; indeed, jury adjudication of criminal offenses prior to punishment would be the norm, as opposed to the exception, thereby enhancing our commitment to the availability of citizen-based checks on the state’s power to deprive a person of liberty. Widespread availability of criminal jury trials not only would support the official narrative regarding protection of defendants’ rights, but common and frequent jury service also would promote and protect the right of citizens to participate in the particularized enforcement of criminal laws adopted in their name by their legislative representatives. The reality of jury service could not be more different.

Jury service is extremely rare. Approximately 90 percent of felony criminal cases in state courts are adjudicated by guilty plea, and of the remaining 10 percent, one-third are processed through bench trials (Reaves 2006). Of course, even a rare, though relatively regular, practice could adequately reinforce the explicit curriculum provided that the practice conformed to its stated dictates. But, for several reasons, this country’s history with respect to de Tocqueville’s free school is not one of wide availability—especially for racial and language minorities. The wide discretion afforded to litigators generally, and prosecutors in particular means that peremptory challenges can be used to exclude almost any potential petit juror for any reason.

Since its 1986 decision in *Batson v. Kentucky*, the Supreme Court has attempted to build a framework to prevent prosecutors from illegitimately excluding jurors on the basis of race (and gender and language). But this framework has been widely criticized because it relies on a criminal defendant to assert a claim on behalf of the excluded juror, when in reality the interests of the juror, who simply wants to participate, may not align with the interests of the defendant, who may well want to exclude that juror if he does not think she will be sympathetic to his plight. Relying on criminal defendants to protect juror interests all but denies the overt curriculum of juries, which is that juries should be vital locations of democratic participation for citizens as opposed to merely mechanisms for achieving potential acquittals. Additionally, felony disenfranchisement practices help to ensure that jury pools do not reflect the demographic representation of African American men in any given locale before a single peremptory challenge is exercised at trial. Every state except Maine and Vermont prohibits felons who are serving time in prison from voting and, therefore, from jury service. Additionally, a large number of states extend these prohibitions for periods beyond the prison term such that approximately one in eight African American men nationally are ineligible to vote or to serve on a jury (King 2008).
Comparing the official and overt curriculum with the hidden curriculum that flows from actual practices suggests that the jury system offers an empty symbol of civic education at best, and a consistently racist civic education at worst. The disproportionate exclusion and inclusion of various groups in society in this cherished (if impotent) form of civic education sends a clear message that some people are worthy citizens whose opinions and judgments are valued, while other citizens’ views do not count. Because the exclusions are seemingly systematic and have been shown over time to be quite significant in number, the actual practice of jury service in far too many locales conveys the message regarding what valued citizens look like (or not). The procedural justice literature tells us that this state of affairs is extremely problematic in at least three ways. First, jury service exclusion results in a diminution of a meaningful opportunity to participate and have one’s voice heard on a critical civic matter that, at least in the case of a person of color, may well disproportionately impact members of the group (Butler 1995). Second, the basis for exclusion is obviously rife with decision-making bias. For example, one could imagine teenagers feeling unfairly excluded from jury service, yet there are also objective facts that support the exclusion of youths from adult felony trials. Race- (and gender- and language-) based exclusions cannot be similarly justified. Finally, the experience of being excluded, even if done politely, surely conveys a message that is inconsistent with promoting the citizen’s dignity and the legal system’s concern for her rights. Taken alone, the hidden curriculum of juries might seem to be small potatoes—an unfortunate consequence of broader social problems in an otherwise antiquated and underutilized social institution. When seen in conjunction with punishment and policing, however, the lesson is more disturbing.

Punishment

The punishment of breaches in U.S. criminal law today rests almost exclusively on the practice of incarceration. Historically, locking people up as a punishment emerged in tandem with the development of enlightenment republicanism across Western Europe and in the slave republic of the United States. Incarceration as punishment represented a concordance of educative purposes. It taught the leniency of the state, offering a humane alternative to the spectacle of medieval punishments of the body—grotesque mutilations and executions that had viewed punishment primarily through the theory of deterrence through fear. Additionally, social reformers framed the prison as an educative institution that might save offenders from lives of crime: the penitentiary, later a reformatory, and even later, as one enthusiastic Progressive-era observer dubbed San Quentin, a “college of morals” (Fisher 1994–1995; Justice 2000). Time for penitence and reflection, hard work, and the development of human capital through vocational, religious, and academic programs have been supposed over the last two centuries to effect a profound change in the inmate. Moreover, in a society where the citizen was defined by his freedom, and the government of the people enjoyed high legitimacy by its own definition, time behind bars became the optimal form of punishment. While the reformatory ideal has receded in recent decades, some
prisons remain sites for job training, GED instruction, and basic health and counseling services. More importantly, imprisonment, by design, was intended to have a positive civic education function.

It goes almost without saying that the lived experience of imprisonment exposes participants to a hidden curriculum (Jacobs 1977). Prison life is characterized by treatment of inmates in discord with the principles of procedural justice. Inmates are subject to rules that they do not participate in articulating and that may seem to them to have no rhyme nor reason other than the fact that the rules—any rules—make life easier for those who administer them. Prisoners, then, experience neither voice nor quality decision-making. Additionally, prisoners often are treated harshly by correctional officers, who themselves, somewhat ironically, feel powerless to change prison organization (Kalinich, Stojkovoc, and Klofas 1988).

Who actually goes to prison, for how long, and why provides further lessons in citizenship, as do the broader social effects of incarceration. Sentencing at both the state and federal levels used to be an enterprise dominated by discretionary decision-making of each relevant justice system actor (Stuntz 2011). Legislators tend to specify wide sentencing ranges for offenses, so prosecutors charging criminal cases possessed great latitude to recommend an appropriate punishment disposition to the sentencing judge. Similarly, so long as the judge selected a sentence within the very broad statutory range, her ultimate selections were insulated from appellate review if and when she sentenced differently two offenders with similar criminal histories who had committed the exact same offense. Parole boards, too, had enormous discretion to set the term of an individual offender’s time behind bars based on the board’s own sense of rehabilitative ideals at the individual level, institutional concerns such as overcrowding and distribution of programming, or just plain caprice.

Indeterminate sentencing, as it was called, came under broad attack from the Left and the Right in the 1980s and 1990s. Those on the left claimed that indeterminate sentencing allowed judges to heap more prison time on blacks than whites even when members of both groups committed identical offenses. Those on the right voiced a different concern. First, they worried that sentences, especially for white-collar offenders, simply were not harsh enough. Felony offenders deserved liberty deprivation, not fines, these retributivist reformers claimed. This group asserted a second concern grounded in libertarian ideals as opposed to “get tough” ones. Some retributivists argued that the rehabilitative ideal led to “net-widening”—bringing more people into the system for “treatment” to prevent future crime as opposed to punishing offenders for their crimes. Looking to Kant as their guide, these reformers contended it was better to look retrospectively at an offenders past crimes and do our best to treat everyone the same rather than attempt to make predictions regarding an offender’s future acts and reform him (Stith and Koh 1993).

Sentencing guidelines purport to achieve the reform goals of both the Left and the Right. By using a grid to specify appropriate punishments for crimes based on the offense adjudicated, in combination with an offender’s criminal history, guidelines regulated what prosecutors and judges made up in the past through their
(mostly unguided) discretion. Commissions promulgate guidelines with reference to goals of deterrence, incapacitation, and retribution, all with the understanding that punishment is a positive social policy consistent with the rights of individuals and the common good (United States Sentencing Commission 2012). This is the overt curriculum of punishment. People who have transgressed society's norms ought to be punished and in the same way. Their liberty should be specifically exacted from them, no more and no less, based on the particular harm they imposed on society. The grid is like a liberty price-chart—scientific and exact, based on neutral facts, dispensed fairly usually after the judge consults a detailed presentence report. Articulated in this way, a guideline-based sentencing regime seemingly is very much consistent with the values of procedural justice people value and consistent with promoting an appropriate role for a citizen.

But this way of thinking about the sentencing revolution ignores the hidden curriculum of punishment. Sentencing guidelines, along with mandatory legis-lated punishment, has put prosecutors in the driver's seat at sentencing and has left judges with very little power to soften the blow. Retributivism, combined with deterrence but without the ameliorative language of rehabilitation, has fueled a get-tough approach to crime that has fed the skyrocketing U.S. incarceration rate (Stuntz 2011). It is perhaps true that the guideline revolution has helped to soften individual-level racial disparities in sentencing; but note that focusing on disparities often results in our losing sight of the fact that millions of people are incarcerated in this country at orders of magnitude higher than any other country's level of imprisonment regardless of race or ethnicity of those behind bars (Forman 2012). Additionally, the retributive turn that laid the foundation for sentencing reform has led to sentences that are much longer on average than sentences for similar offenses in other countries (Tonry 1997).

And, importantly, punishment is not confined to prison. Grid-based sentencing has not resulted in a world in which people pay the price for offending and then are reintegrated into the communities that they left (Braithwaite 1989). Almost any prison sentence is in fact an economic death sentence—especially for poorly educated felons—that results in a completely different life trajectory for those who have been to prison compared to those who have not been in prison. An interlocking chain of public laws and private employment practices links a single felony conviction of any length to a lifetime of punishment (Western 2006). And there are serious implications for the families of those incarcerated as well (Braman 2007; Wildeman and Muller, forthcoming; Wildeman, Schnittker, and Turney 2012).

For all but the wealthy, a breach of the law results in a permanent change in civic status. If the hidden and overt curricula were aligned appropriately and universally dispensed, prison sentences could potentially teach the value and community-wide celebration of liberty to which each citizen is entitled. Consider a historical contrast. In this country's history, most African Americans, as slaves, were excluded from prisons, because they did not own liberty as persons that the state could deprive them of. They were instead chattel property to be punished privately by those who owned them. State punishment of enslaved people was designed to coerce and terrorize, while compromising the ability of the offender...
to work only when absolutely necessary. Whippings, brandings, mutilation, and shackled work tasks were the norm; prison terms were not (Stroud 1827). Against this background, universal imprisonment is a republican punishment. The disjunction between the hidden curriculum of our punishment practices and overt ideals that we espouse teaches not inclusion but its opposite. Those who are punished are not merely removed temporarily from civic society but are branded as exemplars of anticitizenry.

**Police**

In contrast to both juries and imprisonment, policing is not explicitly grounded in education. Police are variously referred to as counselors, priests, and even street corner politicians, but, excepting school resource officers, rarely are they considered teachers. Because interactions with police officers are among the most common sites of official action that people have with the state, they obviously play a key role in shaping an individual’s civic identity.5

The overt curriculum of policing may be somewhat more subtle than those of the jury or punishment, but its foundation lies in the Constitution. Police officers are empowered to constrain our liberty interests and intrude on our privacy interests, but only in ways carefully limited by law, especially certain constitutional amendments. For example, the Fourth Amendment specifies that stops, arrests, and searches are justified only when police have good reasons—that is, facts on which to rely, interpreted against the background of an officer’s experiences, that cause that officer to conclude that the person about to be seized probably has or is about to commit a crime, or that the place to be searched is probably involved in a crime. This legal regime, taught to kids in civics classes, is designed to convey concern for rights. People’s interests in autonomy, privacy, and bodily integrity ought not be subject to the whim of an individual police officer. We are a government of laws designed to restrain state power against the individual. The fact that law authorizes, circumscribes, and shapes police activity is what distinguishes police from vigilantes.

The overt curriculum of policing is not grounded entirely on law, however. The reasons why police might be curtailing freedoms in the first place are also important. Prominent among these reasons is that we expect police to fight crime and to help residents of neighborhoods and communities to be safe. Interestingly, this motivator of police activity is of relatively recent vintage. The conventional wisdom, at least from the 1960s until the mid-1990s, was that police had very little impact on crime rates. The idea that police could do little to impact crime became entrenched among scholars following the 1967 ground-breaking report of the President’s Commission on Crime, *The Challenge of Crime in a Free Society*. That report detailed the relationship between so-called root causes and crime. If crime were rooted in poverty and deprivation, what could police do to stop it? Police could and should be responders for justice reasons, in that offenders obviously should be called to account for their behavior. But no one thought that having police investigate offenses retrospectively necessarily led to lower crime rates.
Today we have a different view of the capacity of policing agencies to influence crime. Many credit New York City’s dramatic reduction in crime over the last couple of decades to police activity, especially aggressive police activity in the form of “stop-and-frisk” and “broken windows” policing, which has brought many, many people into contact with cops on the street. In New York City these encounters number in the hundreds of thousands. Imagine a world in which New York City residents’ experiences with being stopped were consistent with an overt curriculum emphasizing rights: that everyone be treated as a valued citizen. In that world, the message conveyed to those stopped might be, “We are working for your good and especially for the good of those who live in high crime communities. We are fighting crime while respecting your freedom and autonomy. Our goal is to maximize freedom, your freedom from crime and predation and your freedom from the arbitrary power of the state.” Instead, in certain areas of New York City, the hidden curriculum of such policing strategies sends the opposite message, showing certain citizens clear signals that they are a special, dangerous, and undesirable class.

New York City is a poignant case study of the ways in which maximized freedom is not consistently conveyed to the citizens of the city. Last year more than 680,000 people were stopped and frisked in New York City. Approximately 10 percent of these encounters resulted in arrest or summons, which raises questions about the reasonableness of the officer’s basis for the encounter in the first place. Additionally, and incredibly, New York City police officers recover weapons in fewer than 2 percent of encounters (Jones-Brown, Gill, and Trone 2010).

Jeff Fagan and his colleagues have researched in great detail the extent to which there is racial disparity among those stopped and frisked in New York City, but for our purposes, one statistic stands out. In 2009, Fagan estimated that in the highest-crime areas of the city, 80 percent of young African American men between the ages of 18 and 24 had been stopped at least once by police within the last year (Fagan et al. 2009). It is difficult to reconcile the overt curriculum of discretion and restraint with these numbers, for if practice and law were reconciled, we would have to believe that the police reasonably believed that 80 percent of African American youth residing in these areas had committed or were about to commit a crime. This conclusion seems exceedingly problematic, even given the fact that the New York City neighborhoods exhibiting the highest stop and frisk rates are also those exhibiting the highest rates of violent crime.

The overt curriculum of policing, grounded in the Fourth Amendment, complicates the facts on the street in that jurisprudence encourages anyone observing a person stopped by police on the street to say to himself, “I wonder what she did?” Such thought processes ultimately brand the person stopped in public as a criminal (Colb 1996). The fact that nothing in the overt curriculum of policing requires police to treat those who they stop with dignity and respect—numerous complaints about incivility suggest that police do not—compounds the problem that police practice is incongruent with procedural justice principles. Poor, urban-dwelling people of color bear the brunt not only of privacy and autonomy intrusions, but also of the constant stream of official messaging they could easily interpret—and appear to interpret—as insulting.
Conclusion

Curriculum is not civic destiny. We do not mean to suggest that people who interact with the criminal justice system necessarily learn the alarmingly negative lessons on citizenship that it offers, just as kids do not learn all that the public schools offer in their overt and hidden curricula. Curriculum theorists note that what is actually learned, the “covert curriculum,” depends in part on the degree and frequency of exposure, and on individual and community resilience. Acts perceived as unjust have the potential to incite radicalization, resistance, and solidarity, as well as anger, insecurity, and despair.

Nevertheless, viewing the criminal justice system in educational terms suggests that political leaders and policy-makers are not likely to make any significant headway engendering positive civic identity in the populous by making incremental changes to the overt curriculum of the American criminal justice system. Like the old adage about fishing lures (that they are designed primarily to attract the fishermen who buy them), changes in overt law and policy might look good to those for whom the system has legitimacy. But for those who swim in an environment saturated with negative messages about the criminal justice system, the lessons of lived experience with the hidden curriculum are pervasive and consistent. Instead, policy-makers must consider the consonance between their policies and the lessons that people actually learn about what is most worth knowing about being an American citizen. Fairness in policing (as opposed to increased procedural lawfulness) would be one example (Meares, Tyler, and Gardner, forthcoming). Reinvigorating the role of juries in criminal trials that affect their own communities would be another. The list goes on.

But even for policy-makers and scholars who are aware of the socializing effects of various aspects of the criminal system, our second observation is that isolated changes to the overt or hidden curriculum are not likely to succeed more than incrementally on their own. Instead, those interested in strengthening the American polity—that is, in reinforcing positive civic identity for all Americans, as opposed to perpetuating the notion of a dangerous class of anticitzens—should view the entire criminal justice system as an educative institution whose goals cannot be effectively achieved without a consistent curriculum designed to increase civic capacity.

Our third and final lesson from curriculum theory is that the hidden curriculum flourishes in those contexts where democracy is dislocated. In high-performing public and private schools, teachers and students work together toward common goals that honor the social contract among the school, the student, the family, and the community; punishment is appropriate and merciful, and offers forgiveness; interpersonal interactions encourage success and reaffirm belonging; trust is endemic. Absent a confluence of interests, the accountability of those with authority to those under it, and a fundamental sense of legitimacy, the hidden curriculum eats away at the overt.

In The Collapse of American Criminal Justice, William Stuntz (2011) makes a similar observation about the criminal justice system. While racism has, in some measure, driven the tragic overincarceration of America, it has been the
evisceration of democratic local control over adjudication and policing that has enabled the outrage to go unchecked. The erosion of jury trials, the dislocation of democratic oversight of crime and punishment in cities to the surrounding suburbs, and the creation of harsh mandatory sentencing laws have also empowered citizens to judge, police, and punish imagined others, and have given prosecutors too much power, and too much incentive, to punish. Americans have created a massive institutional machinery that intends to make society more just by addressing very real crime problems, but it is one that (re)produces the idea of dangerous others—anticitizens—in its daily grind.

Despite their differences, the public school system and the criminal justice system should, in a republican democracy, share the same fundamental goal: to enhance the common weal through a state apparatus of, and for, all the people. Any reasonable administration of justice must not, by its existence, undermine the relationship between citizen and state.

Notes

1. We contend that this civic education teaches lessons to all citizens (a form of paidiea)—not only to those who are “othered” into a dangerous class of anticitizen but also to those who are encouraged to accept this othering of their fellow citizens as legitimate. For the purposes of this article, however, our focus is primarily on the former effect.

2. It is worth noting the important connection that Athenians, like Americans, made between punishment and civic cohesion, however. See Allen (2000).

3. Researchers such as Weaver and Lerman (2010) have proposed the “noncitizen” as an alternative framework. We see this moniker as being more appropriate to undocumented immigrants, who are more or less framed as being an invisible threat to white jobs, rather than a visible and dangerous class marked by race, class, and gender, and who are subject to an overlapping, but different, set of laws, institutions, and officials.

4. Note that a defendant’s right to refuse a jury potentially is inconsistent with a citizen’s right to serve on a jury, just as a defendant’s right to refuse counsel is potentially inconsistent with a citizen’s right to participate in a full, fair, and effective adjudication of a criminal offense. For an explication of these ideas and the notion of a public-regarding jurisprudence in constitutional criminal procedure, see Meares (2003).

5. They are not the only sites, as work by Roberts (2002), Soss (2000), and Mettler (2005) shows.

6. From a lecture that Jeffrey Fagan gave at Loyola University in April 2013.

References


