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The Ethics of Criminal Justice Policy Making

❖ The Ethics of Policy Making

Policy making on criminal justice issues, including crime control, takes place at many different levels in society, ranging from the local community that introduces a neighborhood watch program to the formulation of strategies at the national level after debate in Congress. Policy makers at these different levels must make choices and analyze options, and in determining the approach to follow, they should take into account any ethical aspects involved in their plans and proposals. The policy-making process involves predicting certain future conditions assuming an uninterrupted flow of events, projecting the future implications of a particular course of action, identifying a preferred outcome from a set of available choices, generating a program or policy that will result in the preferred outcome, and creating an adequate monitoring system (Meehan 1990: 41).

In considering how particular policies are justified, Frederic Reamer (1986: 224) identifies three grounds, which he calls "ideological," "empirical," and "ethical." Policy made on *ideological* grounds argues that certain policies are desirable because they fit a set of assumptions that may be based on religious beliefs, practice, or even basic intuition. For example, an argument that spending on social services should be decreased may be founded on the ideological assumption that, historically, America has stressed minimum government intervention in the lives of citizens. *Empirical* grounds relate to science and research and to what is known from that research about the likely outcome of a particular policy. For example, a policy concerned with subsidizing childcare might draw on research evidence that shows that mothers who are able to take advantage of childcare are more likely to seek work, and therefore less likely to want assistance for their dependent children. In contrast to these grounds, those based on *ethical* grounds rely on conclusions drawn from an analysis of what is "right and wrong" or "good or bad" in a moral sense. For example, empirical or research evidence may show that paying subsidies to ailing corporations is less costly than allowing them to fail. Some would argue, however, that it would be ethically wrong for the government to intervene in the workings of a private enterprise in such a fashion. The critical difference between ethical and ideological grounds is that policy making on ethical grounds requires a calculated, philosophical analysis of the morality on which the policy is based. This is not true for ideological grounds.

This chapter will examine some specific criminal justice policies, focus on the ethical issues that are implicated in those policies, and explore the way those ethical implications have been addressed and debated. Of course, criminal justice strategies are not formulated in a vacuum. They take account of ideologies and politics current at the time and, in many cases, are presumed to be giving effect to social movements and public concerns. Policy makers are subjected to many influences in their analysis of policy issues and in their decision making. For example, elected politicians react to the media, to their constituents, and to the many lobby groups that operate on

both sides of all policy issues. Ethical issues, therefore, arise within a pattern of influences, and sometimes the ethical correctness of a particular course of action is used to support an argument that a particular policy action should be followed.

There are at least two ways of thinking about the ethics of criminal justice policy making:

- First, there is the general issue, applicable to all policy making, that those designing policies should *act ethically* in formulating their plans and projects (Fischer and Forester 1987: 24; Heineman, Bluhm, Peterson, and Kearney 1997: 67).
- Second, specifically in relation to policy making on punishment, it is arguable that punishment itself is a *morality policy* (certainly capital punishment is such a policy) and that making policy about punishment therefore involves ethics (Studlar 2001: 39).

This is not the place for an extended discussion of ethical policy making, but Charles Anderson (1987) notes that policy analysis “involves a clarification and ordering of values and any policy analysis inevitably rests on some conception of desirable public purpose,” and that “policy analysis that ignores the moral dimensions of public choice and public service is an inadequate pedagogy” (p. 23).

The reasons advanced for the absence of ethical policy making include a reliance on cost-benefit analysis, which tends to be the primary method of policy analysis (Amy 1987: 46). As Rosemarie Tong (1986: 14) explains, cost-benefit analysis comprises several stages, including defining goals, determining the various methods of achieving those goals, determining costs and benefits of the various methods, comparing and ranking the costs and benefits of the various alternatives, and taking account of major uncertainties. In government, some argue that policy makers are prevented from making ethical decisions by a kind of machismo that sees any concern for ethical issues as a sign of political weakness, that is, as an unwillingness to make “tough” policy decisions (Amy 1987: 58). Others argue that “unethical” policy making includes reacting to events and issues that create “moral panics” by making ad hoc, capricious, and arbitrary policies that are not reasoned and not rational. In contrast to unethical policy making of this kind, an ethical piece of policy would involve a reasoned and considered analysis of a particular issue and a rational and informed approach. Where moral panics arise, such as occurred in the War on Drugs or the threat of “superpredators,” there is a tendency for politicians and others to react viscerally, instinctively, and instantly rather than follow a reasoned and informed policy approach. In fact, many people would think that if politicians did not react instinctively to moral panics, they would be failing to “get tough” on crime and criminals.

The term *moral panic* was coined by Stanley Cohen (1972) in his work *Folk Devils and Moral Panics*. Cohen described moral panics in terms of the emergence of a condition, event, or group of persons that becomes defined as a threat to the values and interests of society. It is presented in a stylized and stereotypical fashion by the mass media, and groups of experts and “right-thinking people” take moral positions, make judgments, and suggest how the threat should be coped with. Cohen noted that the condition that produced the moral panic then either disappears or becomes more visible. Cohen’s argument was that moral panics are generated by the media or special interest groups that use the media to publicize their concerns.

A second theory of moral panic was developed by Erich Goode and Nachman Ben-Yehuda (1994) who proposed an “elite-engineered model.” This theory is further developed by Stuart Hall, Charles Critcher, Tony Jefferson, John Clarke, and Brian Roberts (1978) in their well-known work *Policing the Crisis: Mugging, the State, and Law and Order*. Hall agreed that the media were a powerful force for shaping public consciousness about controversial issues. However, he also argued that typically, moral panics about law and order had their origin in statements by the police and judges that were then taken up and elaborated on by the media. (Hall et al. were writing about the situation in England.) Also, Hall et al. went further by arguing that the definition of a moral panic included the notion of an irrational response to that panic that was out of all proportion to the actual threat offered. This is in contrast to Cohen’s (1972) view that moral panics are a product of “cultural strain and ambiguity.”

A third theory advanced by Goode and Ben-Yehuda (1994) stresses the level of popular participation in moral panics; this is termed the *grassroots model*. According to this theory, moral panics are founded on genuine public concern, which is picked up and promoted by the media. In this theory, there is a shift of attention away from politicians and toward the opinions of the general public. It treats moral panic as a cultural phenomenon, as does Stuart Scheingold who, in *The Politics of Law and Order* (1984), argued that moral panics about street crime had little to do with actual crime, being more concerned about the pervasive presence of violence in contemporary American society.

Theories about moral panic show that the term is problematic, but it has come to represent a situation where, generally speaking, public reaction to an event is disproportionate to the actual problem faced. In other words, there may be a problem, such as street crime, but there is an overreaction about how it should be addressed in terms of crime control.

There is a link between moral panics and morality policy making. Moral panics are often responded to in the form of policy changes and, ultimately, legislation that contains and reflects those policy changes. Clearly, there is a decision-making process by legislators and others that involves policy assessment and analysis and a consideration of policy options to deal with the moral panic. It is during this policy process that irrational, arbitrary, and therefore unethical policy making can occur. Moral panics and morality policy making together form the organizing framework for this discussion on ethics in criminal justice policy making.

Consider the War on Drugs, which resulted from public, media, and political concern about drug dealing and drug consumption. Responding to this concern, Congress passed legislation that launched a War on Drugs. Was this legislation the result of rational, thorough, and informed debate, or did it originate as an instinctive, nonrational response to public fears and concerns? If the latter, then, arguably, legislators in this case promoted and enacted legislation that reflected an unethical decision-making process (see Case Study 7.1).

As discussed in this chapter, specifically in relation to the War on Drugs and the three-strikes legislation, policy choices sometimes have a disproportionate impact on minorities. The association between crime, minorities (especially blacks), and criminal justice policy making is underpinned by a substantial body of research that reveals that negative racial stereotypes and collective racial resentment are positively correlated with criminal justice punishment policies favoring punitiveness (Tonry 2011: 7).

In his insightful study of the impact of crime control policies on blacks, Michael Tonry (2011) asks why policy makers and legislators adopted policies that targeted offenses for which blacks were especially likely to be arrested, and why those policies were not changed once their racially biased outcomes became known. Tonry identifies what he refers to as the Republican "Southern Strategy" during the late 1980s as a "major precipitator of the severity of modern criminal justice policies and the unfair burdens they place on black Americans" (p. 2). He argues that this strategy sought to weaken traditional support of whites in the South for Democratic candidates by employing public fears and stereotypes and by focusing on issues such as crime, state's rights, welfare fraud, busing, and affirmative action. As Tonry puts it, "Crime was given a black face"—most specifically in street violence and crack cocaine, where zealous law enforcement greatly impacted blacks (p. 2).

Tonry (2011) points out a second reason underpinning this policy making as one that maintains the culture of racial dominance previously enforced through the practice of slavery. He suggests the third reason is the negative stereotyping that links blacks to crime and thus to policies of retribution and incapacitation. He lists other factors weighing against blacks in criminal justice policy making that count explicitly or implicitly toward bias, including the influence of evangelical Protestantism, which promotes the notion that criminality is morally wrong and criminals are incapable of redemption; political movements that adopt black and white positions with no middle ground, especially in relation to the now almost constant focus on victim's rights that bars any consideration of the circumstances of the offender; and the peculiarly American practice of electing judges and prosecutors who are influenced by public

notions of punitiveness, thereby politicizing the justice system (p. 10). Tonry provides startling data on the rise in the black imprisonment rate: In 1960, blacks made up 36% of inmates, and the black imprisonment rate was 661:100,000; civil rights reforms and reform of the law might have been expected to change those figures, and in fact by 1970, the overall black imprisonment rate was 593 (p. 5). However, this figure increased dramatically from 593 in 1970 to 2,661 in 2006. As Tonry points out, the enormous rise in the prison population is largely a product of the War on Drugs, and for blacks, its effect was wholly disproportionate (p. 27). Given that black street-level drug dealers are easy targets for police arrest, police choose to arrest more blacks, and thus more blacks are imprisoned. However, in policy terms, arresting street-level offenders for drug offenses has almost no effect on drug availability. Such are the rewards of selling drugs, especially in locales such as the inner cities where there are almost no licit employment opportunities available and one jailed dealer is rapidly replaced by another (p. 55).

Case Study 7.1 An Example Of Unethical Policy Making?

Legislation enacted in 1986 shaped the War on Drugs by prescribing mandatory minimum penalties for drug trafficking based on the amount of drugs involved and by making a distinction between possession of cocaine and possession of crack cocaine. A penalty was imposed of a minimum of 25 years imprisonment for possession of 5 or more grams of *crack cocaine* (the form of cocaine for which African Americans are disproportionately arrested). In contrast, an offender found guilty of possession of *powder cocaine* (the type commonly used by middle- and upper-class whites) would only be liable for a mandatory minimum sentence of 5 years if the amount of cocaine exceeded or equaled 500 grams. The legislation was firmly aimed at social control and included provisions that eliminated probation and parole for certain drug offenders and allowed for the forfeiture of assets. Fundamentally, drug abuse had been perceived and defined as a national security issue for the United States, and the War on Drugs was portrayed as a matter of national survival. After 1986, however, media and public attention drifted away from the issue of drug abuse.

By the mid-1990s, three out of four persons doing time for drug offenses were African American, and in the federal courts, 94% of persons tried for drug offenses were African American. In 1995, the U.S. Sentencing Commission urged that there be parity in penalties for the different forms of cocaine, explaining that there was no rational basis for this differentiation in sentencing (Glassner 1999: 136). The commission's recommendations had never before been refused, but the White House and Congress aggressively opposed these recommendations, which were struck down in the House of Representatives by a vote of 332 to 83. Rather than give equity to African Americans charged with drug offenses, the White House and Congress preferred to avoid being labeled as "soft on drugs."

❖ Morality Policy

In formulating criminal justice policy on issues of morality (morality policy making), policy makers should act ethically, undertake formal policy analysis, and avoid promoting ad hoc, arbitrary, and irrational policy solutions. However, studies have shown that policy making on issues seen as moral fails to follow this ethical approach to policy making. *Morality policies* are policies that are viewed and constructed by the media, politicians, and sections of the public as involving moral and ethical issues. For example, what should be the policy on capital punishment? What should be the policy on abortion? Thus, the creation of morality policy depends on how an issue is framed and not on its intrinsic content.

Morality policies share common features: They are driven by public opinion, media coverage, lobbying by interest groups, the political concerns of elected officials, and sometimes ideology. Unlike other policy issues, morality policies are considered easy to understand and require no special expertise for opinions and views to be expressed (Glick and Hutchinson 2001: 56). As Meier puts it, everyone is an "expert" on morality (in Mooney 2001: 116). In designing and legislating policy on morality issues,

Members of Congress and their staff use more information about constituents' personal experiences and other emotive information than technical policy analysis, they seek out less information, and they use the information they receive more selectively than when they are designing nonmorality policy (Goggin and Mooney 2001: 131).

As Christopher Mooney (2001: 3–5) points out, morality policy involves a debate in which one party portrays the issue as one of morality and uses moral arguments in support of its view. It is the perceptions of the parties that make a particular policy a morality policy, and in such policies, moral judgment relies more on feelings than on reason. The death penalty is a classic instance of a morality policy, because prohibiting the death penalty has the effect of validating a particular value about the sanctity of human life. Issues like the death penalty inevitably invite a higher degree of public participation, because democratic theory argues that such policies must incorporate the views of the people (p. 10). It is common for advocacy groups to contest morality policies. Generally, they claim to be supporting some public interest rather than promoting any personal gain. Policy making on issues that call for morality policy usually involves less formal policy analysis than policy making for nonmorality policy (p. 13).

Mooney (2001) argues that the United States has a preoccupation with morality policy and suggests that the reasons for this relate to

1. the high adherence to religions in American society, promoting the likelihood of clashes on fundamental values, which are often based in religion;
2. the heterogeneity of society that encourages a clash of values; and
3. the fact that, in contrast to other democratic states, in the United States, "there is a seemingly endless array of alternative venues in which morality policy advocates can pursue political satisfaction" (p. 16).

Those who rely on their intuition to guide their thinking on a particular issue usually take a moral position. However, the danger in following only our intuition is discussed by Jonathan Baron (1998: 18), who points out that while most people take stands on public issues on the basis of intuition about what they consider is right, this approach usually results in only a partial understanding of the issue. Moral panics can sometimes be generated by specific events and lead to instant legislation or policy making. Examples of moral panics include movements to condemn pedophiles, the enactment of mandatory minimum legislation, the War on Drugs, and what to do about "juvenile predators." Another way of understanding policy emanating from moral panics is to see them as the expressive side of policy making in the sense that, as well as doing things, such policies transmit values and intentions. For example, advertisements urging people not to drink and drive reinforce values of sobriety, and capital punishment expresses toughness on criminals (Maynard-Moody and Stull 1987: 249–250). These policies, in fact, are designed to send a message and are intentionally expressive. Of course, not all policy making in criminal justice is expressive, but punishment policy often involves employing the rhetoric engendered by moral panics. This serves to shift policy away from rational, calculating models of policy making toward the expressive forms of policy.

Penal policies over the past 2 decades have resulted in mass imprisonment. For example, by the beginning of 2008, a total of 2,319,258 people were locked up in federal or state prisons and

jails, making the rate of incarceration 1 in every 99.1 adults (The Pew Center on the States 2008: 5). The rush to incarcerate has increased the rate of imprisonment from 230 per 100,000 in 1979 to 601 in 1995 (Harrison and Beck 2006: 2) and to 750 per 100,000 by the end of 2007 (p. 35). The Pew Center on the States (2008: 6) revealed incarceration rates by age per 100,000 as follows: In 2007, of all men 18 or older, 1 in 54 were in prison. Disaggregated by race, the numbers were as follows: 1 in 106 white men, 1 in 36 Hispanic men, and 1 in 15 black men; further, of black men aged 20 to 34, 1 in 9 were in prison. To these figures must be added 4,162,536 persons on probation and 784,408 on parole, giving a total for jail, prison, probation, and parole of 7,056,000 (Glaze and Bonczar 2006: 1). David Garland (2001) points out that "mass imprisonment was not a policy that was proposed, researched, costed, debated and democratically agreed [to]" (p. 2). As he notes, in contrast to the rational and informed policy making of the past in, for example, the New Deal and the Great Society, "mass imprisonment emerged as the overdetermined outcome of a converging series of policies and decisions." Pointing to the war against drugs, mandatory sentencing, truth in sentencing, and the development of private prisons, Garland emphasizes that these measures did not form a rational and coherent program. Rather, America has drifted into a situation where mass imprisonment has been accepted as the sole method of crime control. He asks the question, "What does it mean for the United States to be a mass imprisonment society and what are the implications?" For example, "What limits are there to this process and can they be reversed?" and "What is the social impact on communities and neighborhoods?" The financial cost of the mass imprisonment policies is finally being recognized as an issue in state capitols, causing legislators and policy makers to rethink "tough on crime" policies that have led to overcrowded prisons and inflated corrections budgets. The cost of incarcerating state inmates rose from \$12 billion in 1988 to more than \$50 billion by 2008. State proposals to cut costs include policy changes such as reducing sentences for lower level offenders, placing some offenders in alternative penalty programs, and giving judges more discretion in sentencing.¹ In Texas, which began to implement new sentencing policies in 2005, the state has increased funding of drug treatment programs and used probation for drug abusers and minor offenders saving more than \$2 billion that would otherwise have been spent on building new prisons. In relation to California, the U.S. Supreme Court has recently ruled that its overcrowded prisons violate the constitutional prohibition against cruel and unusual punishment (Liptak 2011). The state has been ordered to reduce its prison population to 110,000, a figure that is still 137.5% of prison capacity. There are currently about 140,000 inmates, but the figure has been as high as 160,000.

❖ Public Opinion About Punishment

Should public opinion be the determinant of sentencing and correctional policies? Is it ethical for morality policies, in particular, to be formulated solely on the basis of what is perceived to be public opinion on a particular issue? Some argue that public opinion on crime control and punishment fluctuates in response to certain events, such as urban turmoil and escalating crime rates. The alternative view expressed by others, including Scheingold (1984) and Katherine Beckett (1997), is that public opinion does not become shaped by the events of the day but is fashioned and manipulated by politicians and the media. Beckett, for example, investigated how the timing of shifts in public opinion converged with politicians undertaking initiatives such as calling for a "war" on a problem or introducing legislation and with media attention focused on an issue. She concludes that changes in public opinion about crime control and drugs most often follow increases in political initiatives and media coverage that emphasizes these issues rather than changes in events in the wider environment. In other words, she suggests that political initiatives and media coverage create moral panics that result in morality policy making.

¹For a comprehensive discussion of suggested reforms and of reforms already being implemented across the United States, see ACLU 2011.

Since the mid-1970s, there has been a fundamental shift in the ideology of punishment, because punitive approaches and the new penology have supplanted the rehabilitative model. Many believe the reasons for this transformation to be complex, but some offer the simple explanation that these new punitive policies merely represent the wishes of the public. For example, John Dilulio (in Cullen, Fisher, and Applegate 2000: 2) argues that citizens have become fed up with crime rates and with offenders victimizing them, and have concluded rationally that more offenders should be locked up for longer periods of time. In this style of thinking, getting tough on crime is a manifestation of democracy at work. The discussion of prison and amenities in the following Closer Look box addresses one aspect of this issue, amenities in prison.

A Closer Look

Prison and Amenities

What standards and conditions should be applied to imprisonment? The topic of what level of amenities should be supplied to prisoners resurfaces in the media periodically. Those politicians who wish to demonstrate a tough on crime approach protest that prisoners are provided access to weight-lifting equipment, televisions, radios, and "good" food (Banks 2005: 137). In Maricopa County, Arizona, Sheriff Joe Arpa's policies of housing inmates in tents without air conditioning in the more than 110° F summer weather, clothing inmates in pink underwear and striped uniforms, having chain gangs for both men and women, and providing basic and unappealing food such as bologna on dry bread exemplify this attitude. Such politicians argue that if prisoners have standards of incarceration that are superior to the standard of living of the man on the street, then they cannot be said to be suffering punishment. The media fuel this debate by reporting that prisons are "holiday resorts" where prisoners enjoy extravagant amenities and conditions. In response to this political discourse, the No Frills Prison Act was passed in 1996; it bans televisions, coffeepots, and hot plates in the cells of federal prisoners. It also prohibits computers, electronic instruments, certain movies rated above PG, and unmonitored phone calls (Lenz 2002).

The underpinning assumption to this legislation is that a deterrent effect will be achieved "by making a sentence more punitive, that is, making the inmate suffer more" (Banks 2005: 138). Thus, it is assumed that an inmate will be "less inclined to reoffend knowing the harsh conditions in prison." The problem is that there is no existing research that can support this assumption. Some have argued that state costs are saved to the prison system and to the taxpayers through this approach, but again this is not supported given that the 31 states that allow inmates televisions in their cells do not pay for them (prisoners or their relatives pay for them), and cablevision is paid for out of profits from the prison commissary, vending machines, and long-distance telephone charges (Finn 1996: 6–7).

Interestingly, prison administrators are often in favor of permitting amenities in the prisons, because staff rely heavily on a system of rewards and punishments to maintain control in their institutions (Lenz 2002: 506). They recognize that keeping inmates busy provides important benefits to inmate order and inmate activities. In other words, bored and unhappy prisoners are more likely to cause security problems that staff, who are in short supply, will have to respond to.

As Francis Cullen, Bonnie Fisher, and Brandon Applegate (2000: 3) point out, policy making based on what citizens want is unfortunately constrained by the ignorance of the public on many aspects of crime and crime control. Researchers have discovered that in most areas of crime control, there is a widespread lack of knowledge, and this is particularly true for sentencing, where, for example, it is unclear whether citizens are aware of the existence of sanctions other than imprisonment and of the content of community-based sanctions.

Research has established that public punitive attitudes about crime do not fluctuate as might be expected as crime rates rise and fall, but instead that punitiveness and favoring harsher penalties remain constant.

The views of the public on crime are often investigated through telephone surveys that ask only a limited number of questions about a major policy issue such as capital punishment. However, it is clear that the opinions of the public on crime control often change if multiple questions rather than a single question are used (see Table 7.1). For example, respondents tend to express a less punitive attitude when they are given detailed information about the nature of the offender and his or her criminal offenses. This is also the case if they are given a list of potential sentencing options, including noncustodial sentencing options, to apply to actual offenders. This contrasts with answering broadly worded questions about unspecified criminals (Cullen et al. 2000: 7). In a review of surveys concerning public opinion on crime control and sentencing, Cullen et al. (pp. 8–9) developed seven main conclusions:

1. Generally, the public is punitive toward crime.
2. However, their punitiveness is “mushy”; that is, even when they express a punitive opinion, people tend to be flexible enough to consider a range of sentencing options if provided with adequate information.
3. Members of the public must be given a good reason not to be punitive and are prepared to moderate their punitive attitudes.
4. Violent crime divides the punitive from the nonpunitive, because citizens are reluctant not to incarcerate dangerous offenders. However, they are prepared to consider a wide range of sentencing options for nonviolent offenders.
5. Despite attacks on rehabilitation and the treatment of offenders, the public continues to believe in rehabilitation as a goal of corrections.
6. There is strong support for child saving, that is, for the rehabilitation of youthful offenders and for interventions that attempt to divert children at risk away from criminality.
7. The central tendency of the public is to be punitive and progressive—to desire a response to offenders that is balanced and that includes the objectives of achieving justice, protecting society, and reforming offenders.

Research demonstrates widespread support among the public for locking up offenders. As Warr writes,

Americans overwhelmingly regard imprisonment as the most appropriate form of punishment for most crimes. Although the proportion who prefer prison increases with the seriousness of the crime, imprisonment is by far the most commonly chosen penalty across crimes (in Cullen et al. 2000: 28).

In one survey in 1994, researchers assessed the extent to which public opinion about sentencing was consistent with the punishments specified in the Federal Sentencing Guidelines. They found that respondents favored imprisonment, although rarely for more than several years, with the median sentence being 3 years and the mean sentence 7.2 years (Cullen et al. 2000: 30). These results broadly mirrored the sentencing guidelines overall, but there were wide variations in individual opinions about sentences. Warr (in Cullen et al. 2000: 34) asked respondents to indicate their goals of punishment and concluded from the results that there was no single dominant determinant of punishment among the public; that persons commonly invoked more than one

Table 7.1

Public Preferences for the Main Goal of Imprisonment, 1968–1996 (Percentage Agreeing With Each Goal Reported).

Main Emphasis of Prison Should Be	Harris		Gallup	Cincinnati		Ohio	National	
	1968	1982	1982	1986	1995	1996	1995	1996
Rehabilitation	73.0	44.0	59.0	54.7	32.6	41.1	26.1	48.4
Punishment	7.0	19.0	30.0	5.7	27.2	20.3	—	14.6
Protect society	12.0	32.0	—	35.3	36.8	31.9	—	—
Punish and put away	—	—	—	—	—	—	58.2	—
Crime prevention/ Deterrence	—	—	—	—	—	—	—	33.1
Not sure/Don't know/Other	9.0	5.0	11.0	4.3	2.5	6.7	13.4	3.9

SOURCE: Cullen et al. 2000. Reprinted by permission of the University of Chicago Press.

NOTE: 1968 and 1982 Harris polls reported in Flanagan and Caulfield (1984, p. 42); 1982 Gallup poll reported in "Public Backs Wholesale Prison Reform" (1982, p. 16); 1986 and 1995 Cincinnati polls reported in Cullen et al. (1990, p. 9) and in Sundt et al. (1998, p. 435); 1996 Ohio poll reported in Applegate, Cullen, and Fisher (1997); 1995 and 1996 national polls reported in Maguire and Pastore (1997, pp. 154–155).

The Harris, Cincinnati, and Ohio polls asked: "What do you think should be the main emphasis in most prisons—punishing the individual convicted of a crime, trying to rehabilitate the individual so that he might become a productive citizen, or protecting society from future crimes he might commit?" The Gallup poll asked whether it was "more important to punish [men in prison] for their crimes, or more important to get them started on the right road" (which was categorized as "rehabilitation"). The 1995 national poll asked whether the government needs to "make a greater effort" to "rehabilitate" or "punish and put away criminals who commit violent crimes." The 1996 national poll asked what should be the main goal "once people who commit crimes are in prison."

theory of punishment, such as just deserts, rehabilitation, or deterrence; and that no one theory dominated public thinking on this issue.

This discussion has shown that ethical decision making is often sacrificed in the interests of expediency and under pressure from cost–benefit analysis. In the case of morality policy making, such as that regarding punishment, moral panics, and ideological stances prevail over rational, reasoned, and ethical decision making. The lack of an ethical focus in criminal justice policy making will be illustrated through an analysis of several criminal justice policy issues. These are mandatory minimum sentencing, the War on Drugs, truth in sentencing, predators and superpredators, capital punishment, and privatizing prisons.

❖ Mandatory Minimum Sentencing

The development of policies fixing minimum terms of imprisonment for certain offenses or types of offenders exemplifies the expansion of punitive policies in the criminal justice system. In the 1970s and 1980s, a movement developed away from rehabilitative philosophies that had previously guided criminal justice policy makers toward a more punitive approach involving the

creation of a set of policies intended to punish offenders, enhance the status of victims, and placate public fears about crime and criminals. Before this period, crime had not registered in the public mind as a significant issue, and most attribute the emergence of crime as a serious political issue to charges made by Republican Senator Barry Goldwater, who ran for president in 1964 against Lyndon Johnson. Goldwater criticized Johnson for rising crime rates and accused the president of being "soft on crime" (Robinson 2002: 34). Legislation enacted as part of the War on Drugs, as well as habitual felony laws made initially in Washington and California to punish violent felony offenders, are high-profile instances of this new punitive approach toward criminals and crime.

Habitual felony laws, commonly known as *three-strikes legislation*, began in 1993 when an initiative was placed on the ballot in Washington State mandating the punishment of life imprisonment without parole for offenders convicted for a third time of specified violent or serious felonies (Austin and Irwin 2001: 184). This initiative was promoted by those concerned about the death of a woman murdered by a convicted rapist who had recently been released from prison. Additional impetus was provided by the kidnapping and murder of Polly Klaas in California by a former inmate with an extensive record of violence. Both Washington and California voters, and later those in other states, passed three-strikes ballot proposals, and by 1997, 24 other states and the federal government had enacted mandatory minimum sentencing legislation.

In California, the three strikes legislation was drafted independently of government and became law with no significant influence from either the executive or legislative branches (Zimring, Hawkins, and Kamin 2001: 3). In the view of Franklin Zimring, Gordon Hawkins, and Sam Kamin, the legislation "was an extreme example of a populist preemption of criminal justice policy-making" (p. 3). According to these authors, the legislation was heavily promoted by victim's associations, the Prison Guard Union, and the National Rifle Association (p. 11). In relation to victims, they suggest that issues of penal policy, at least in California, have become a contest in which the voter decides a penal issue by choosing between offenders and their victims. There is an assumption that anything bad for offenders must benefit victims; thus, "no punishment seems too extreme if anything that hurts offenders benefits victims" (p. 224). This simplification of policy making on criminal punishment renders expert advice, analysis, and assessment unnecessary and irrelevant in the eyes of the public. In policy terms, the proponents of this type of legislation argue that deterrence will be achieved if severe and certain punishment is imposed on habitual offenders; that is, the offender, aware that the next conviction will result in life imprisonment, will carefully consider the consequences of committing a further offense.

Many argue that this is an unrealistic expectation and bad policy making, because it relies not only on offenders being informed of the consequences of further offenses but also on a high probability of their arrest and conviction. It assumes, too, that all offenders make rational, calculating decisions about their future actions, carefully weighing risks and making choices in an informed and measured manner (Austin and Irwin 2001: 185). Proponents of three-strikes legislation also argue that its outcome, incapacitation, has the effect of targeting habitual criminals who must, in their view, be permanently isolated from society. In other words, it is argued that habitual offenders can be identified, and the assumption is made that a habitual offender will continue to offend over time. In fact, studies have shown the difficulty of accurately identifying the so-called habitual offender. Also, the argument ignores the fact that most criminal careers do not continue beyond a certain age. These major policy considerations, however, were ignored, and the initiative proceeded as a morality policy based on a moral panic about habitual violent offenders.

Most legislation imposing three strikes includes the definition of offenses for which a mandatory minimum can be imposed, the number of strikes needed to qualify for the ultimate sanction, and definitions of the ultimate sanction. For example, in California, any felony qualifies as "a strike" if the offender has one prior felony conviction appearing on a list of strikeable offenses, or if the offender has two prior felony convictions from that list. In the first case, two

strikes will result in a mandatory sentence—that is, twice that for the offense involved—and in the second case, the sanction is a mandatory life sentence with no parole for 25 years (Austin and Irwin 2001: 187). The California law is one of the most severe in the country, first, because it provides for a wide number of felonies constituting strikes, and second, because in California, the third strike can be any felony whatsoever, as opposed to a violent felony, a provision found in no other state's law.

In California, this legislation was predicted to more than double the prison population within 5 years; however, those estimates were later adjusted downward. Nevertheless, between the years 1994 and 1998, the total number of cases sentenced to California prisons under the three-strikes law was 45,207 (Austin and Irwin 2001: 197). The types of crimes committed by those subject to three strikes range from an offender who attempted to steal a parked truck, held the owner at bay with a knife, fled on the freeway, and was finally placed under arrest and sentenced to 27 years to life with a minimum of 22.95 years, to an offender who received a sentence of 27 years to life for attempting to sell stolen batteries to a retailer, where the value of the batteries was \$90 (p. 208). In another case in California, a judge ordered the release of a man who was sentenced to 25 years to life for attempting to break into a soup kitchen because he was hungry. He had two prior robbery convictions to support drug addictions, but neither had involved violence or injury to anyone (Cathcart 2010).

The disproportionate punishments imposed in these sample cases highlight the unethical nature of the legislation. According to James Austin and John Irwin (2001: 207), the research data show that in California, most inmates who receive second- and third-strike sentences are not violent or habitual offenders. The courts and prosecutors have generally attempted to find ways to avoid imposing these lengthy sentences, and this has assisted in ameliorating the effect of the legislation (p. 213). As a result, the impact has not been nearly as severe as projected. In effect, bad policy making has been countered by administrative action by the courts and prosecutors.

David Shichor (2000: 1) argues that three-strikes laws have a number of adverse implications. For example, he points to the situation under the California law that gives prosecutors the right to decide whether the third-strike offense should be charged as a felony or a misdemeanor. Also noted is that despite its claims to establish a higher level of uniformity in sentencing, the legislation has actually increased punishment disparities both in individual cases and within jurisdictions, because punishment policies are shaped by the local district attorneys. For example, by May 1997, Los Angeles County, which contained 29% of the state's population, accounted for 41% of three-strikes prison admissions, whereas San Francisco County, with 5.3% of the population, made up only 0.5% of such admissions (p. 15). Shichor (p. 16) notes that the effect of the legislation was to shift power relationships in sentencing away from the courts and in favor of politically motivated prosecutors. This effect was apparently never considered in the policy making that led to the legislation.

Another criticism leveled at the legislation is its reinforcement of the race bias in punishment by its concentration on street crimes and drug offenses. Gilbert Geis (1996) complains that three-strikes laws fail to meet standards of equal justice for like kinds of criminal wrongdoing, because these laws omit white-collar crimes and demonstrate "the strong and ugly strains of race, class, and ethnic bias that have produced these laws" (p. 261). In an important article on penal ideology, Malcolm Feeley and Jonathan Simon (1992) contrast this new trend in penology, a component of which is three-strikes legislation, with the old penology that focused on individuals and individual-based theories of punishment. They emphasize that the new penology is concerned with aspects like "dangerousness" rather than with the question of how to treat and punish an individual offender. Certain groups within society are identified as "career criminals" or "habitual offenders" and are selected for special surveillance, management, and incapacitation. As Stuart Henry and Dragan Milovanovic (1996: 114) put it, this new penology operates on utilitarian considerations rather than moral ones. Shichor (1999: 424) argues that these changes in punishment ideology have flowed from the pessimism experienced since the 1970s about the ability of the criminal justice system to turn offenders into law-abiding citizens. Feeley

and Simon argue that penology is now directed toward managing a population of criminals considered to be permanently dangerous and incapable of reform or of being rehabilitated. In this sense, therefore, the labeling of a criminal class through this criminal justice policy parallels the depiction of an underclass, that is, a marginal, unemployable population lacking education and skills.

Shichor (1999: 425) explains that in theory, three-strikes legislation is meant to target violent and dangerous offenders for selective incapacitation. He relates the concept of controlling dangerous offenders to a sociocultural position that encourages the emergence of moral panics. That is, a public perception develops, is reinforced, and is perhaps even engendered by the mass media that dangerous offenders pose a threat to society and the moral order (see Cohen and Young 1973). Where such expressive arguments are advanced, moral considerations about punishment and retribution may tend to overshadow any empirical evidence as to the likely effects of implementing a particular criminal justice policy (Vergari 2001: 202). Mass values, therefore, may override reasoned policy analysis (Heineman et al. 1997: 54).

Does the public support three-strikes laws? In referenda in Washington and California in 1993, the first three-strikes statute was approved in Washington by a 3 to 1 margin and in California by a margin of 72% for and 28% against (Cullen et al. 2000: 38). Similarly, a *Time*/CNN poll conducted in 1994 reported that 81% of adults favored mandatory life imprisonment for persons convicted of a third serious crime. Nevertheless, it is arguable that citizens do not always wish to apply three strikes to every offender who would be eligible for life without parole, because in studies where concrete cases are rated, there is some variation in the impact of prior record on sentencing preferences (p. 39). For example, in a study in 1995 in Cincinnati, where specific offenses were included as three-strikes offenses, the respondents were asked to select a sentence from a range of no punishment and probation to life in prison with and without parole. Only 16.9% chose a life sentence. The results overall suggest that the public can hold views that appear to be incompatible, because while they favor three strikes, they do not believe that the principle should be applied indiscriminately to specific offenders under specific circumstances.

❖ The War on Drugs

There are four distinct periods in the history of the so-called War on Drugs. In 1972, President Nixon declared the initial war on crime and drugs, and in 1973 created the Drug Enforcement Agency (Robinson 2002: 163). In 1982, President Reagan also declared a "War on Drugs." Both "wars" aimed to reduce individual drug use, stop the flow of drugs into the United States, and reduce drug-related crime. However, it was not until 1986 and 1988 that actual drug abuse legislation was enacted at the federal level. This moved the focus away from major drug dealers and treatment to users and street-level dealers, with an emphasis on those using and dealing crack cocaine (Bush-Baskette 1999: 212). The legislation enacted in 1986 and 1988 came about through an intense media focus on drugs, beginning in 1984 with media accounts about cocaine in California. By the 1986 congressional elections, at least 1,000 newspaper stories had appeared nationally on the issue of crack cocaine, and documentary-style programs representing cocaine use and sales as a national epidemic appeared on television as cocaine, and especially crack cocaine, became campaign issues in the election (p. 213).

The Anti-Drug Abuse Act of 1986 provided mandatory minimum penalties for drug trafficking based on the quantity of drugs involved, and it differentiated between possession of cocaine and possession of crack cocaine. A mandatory minimum of 5 years with a maximum of 20 years was prescribed for those convicted of possessing 5 or more grams of crack cocaine, whereas an offender found guilty of possessing powder cocaine would be liable only to a 5-year mandatory minimum if the amount equaled or exceeded 500 grams. In this legislation, drug abuse was presented as a national security issue, and the War on Drugs was depicted as necessary for the survival of the United States. In contrast to 1986, the issue of drug control

waned in 1987 as the media and public turned their attention to other issues; in fact, one poll in 1987 reported only 3% to 5% of the public considered drugs to be the most pressing social problem (Bush-Baskette 1999: 214). In 1988, another presidential election brought drugs back as a high-profile issue, and about 1.5 weeks before the election, another antidrug abuse act was passed. This 1988 act included more funding for treatment and prevention, although most of it was still directed toward law enforcement, punishment, and increased penalties for certain crack cocaine offenses. By 1990, media attention to the issue had normalized, and the National Drug Control Strategy of 1991 lacked the intense focus on crack and cocaine of previous years.

The increased and more punitive response to drug abuse over this period has enormously impacted the extent of drug prosecutions and incarceration rates for drug offenses. Prosecution efforts were stepped up, and between 1982 and 1988, there was a 52.17% increase in the number of convictions for drug offenses and an increase of 48.48% of those incarcerated for drug offenses (Bush-Baskette 1999: 215). Federal spending on the "drug war" amounted to \$13.2 billion in 1995, two thirds of which was used for law enforcement. If all the costs of incarcerating drug offenders are brought into account, the total expenditure on the War on Drugs would amount to approximately \$100 billion every year (p. 215). In 2004, an estimated 333,000 prisoners were held for drug law violations, 21% of whom were held in state facilities, making up 21% of state inmates and 55% of federal inmates (Mumola and Karberg 2006: 4).

The figures for female offenders are even more startling. In 1986, 26% of federal female prisoners were incarcerated for drug offenses; by 1991, this figure had risen to 63.9%. In addition, there were significant increases in the mean sentence length for drug offenders. Whereas the mean sentence in 1982 was 54.6 months, by 1991, it had increased to 85.7 months (Bush-Baskette 1999: 220). By 2004, the figures were 82,800 for women incarcerated in state prisons for drug offenses and 9,100 in federal prisons (Mumola and Karberg 2006: 11).

Copying the federal government, most states enacted similar drug legislation; New York, in particular, became well known for its legislation, enacting the severe "Rockefeller drug laws" in 1973. These imposed mandatory sentences requiring that a convicted offender in possession of 4 ounces of heroin or cocaine, or attempting to sell 2 ounces of heroin or cocaine, receive a mandatory 15 years to life in prison. Some major components of the Rockefeller laws have been repealed following the determination that they had little or no effect on drug use or crime in New York (Bush-Baskette 1999: 221).

As well as increasing the size of the inmate population generally, the War on Drugs has had the effect of disproportionately incarcerating African American men and women. At the state level, there was an 828% increase in the number of African American women incarcerated for drug offenses between 1986 and 1991, whereas the rate for white women was 241% (Bush-Baskette 1999: 222). For the same period, there was an increase of 429% for African American men.

In a reaction to the overwhelming focus of the War on Drugs on incarcerating drug offenders, and in a move toward a more treatment-oriented approach, in November 2000, the voters of California approved by a large majority a proposition that would provide drug treatment instead of prison for first- and second-time drug offenders who were not charged with other crimes. This law was expected to divert 36,000 offenders each year away from prison and into treatment programs (Spohn 2002: 250). In a similar shift toward treatment for drug offenders, in June 2000, the chief judge of New York State ordered the commencement of a program that would require nearly all nonviolent criminals who were drug addicts to be offered a treatment option instead of jail time. The objective was to radically reduce the number of repeat drug offenders coming before the courts and the inmate population in the state (Finkelstein 2000).

In February 2001, legislation was introduced into the U.S. Senate calling for \$2.7 billion in spending over 3 years to increase the extent of drug treatment programs in prisons. However, the legislation also proposed more severe sentencing guidelines for those committing drug offenses in the presence of minors or who used children in drug trafficking (Spohn 2002: 250).

Larry Gaines and Peter Kraska (1997: 4), in their critique of the War on Drugs, claim that waging war on drugs—as if the drugs themselves constitute our “drug problem”—allows us to overlook the underlying reasons why people abuse these substances. . . . The language of ideology fools us into thinking that we’re waging war against drugs themselves, not real people.

In an attempt to correct the sentencing disparities created by the crack cocaine laws, in December 2007, the Supreme Court ruled that judges could hand down lighter punishments in crack cocaine and ecstasy cases than those specified by federal guidelines and that they could depart from sentencing guidelines in cases involving ecstasy distribution (*Gall v. United States* 2007; *Kimbrough v. United States* 2007). (See the following Closer Look box.)

A Closer Look

Lighter Sentences Possible for Crack Cocaine Cases

Under a 1986 law, first-time offenders convicted of selling 5 grams of crack cocaine receive the same 5-year mandatory prison sentence as dealers of 500 grams of powder cocaine. African Americans account for about 80% of federal crack cocaine convictions, and sentencing guidelines set lighter sentences for selling powder cocaine, a substance popular with whites and Hispanics. This divergence in sentencing has provoked criticism that the judicial system is explicitly racially biased in such cases. There has been consistent pressure in Congress to revise the law, but lawmakers have seemed reluctant to take action for fear of appearing to be “soft on crime,” especially on drug offenses.

On April 7, 2008, the Supreme Court addressed this long-standing issue and ruled that judges can impose lighter sentences for crack cocaine and ecstasy cases than are specified in the federal guidelines. The ruling was made by a decisive 7 to 2 margin and comes a day before the U.S. Sentencing Commission is to determine whether or not to make retroactive a reduction in recommended crack-cocaine penalties.

The Supreme Court had already decided in 2005 that federal sentencing guidelines were not mandatory and that sentencing judges could therefore apply their discretion in sentencing drug offenders. This most recent ruling involved an African American who received a 15-year prison term for selling crack and powder cocaine, as well as for possessing a firearm, in Virginia. The trial judge rejected as excessive the prison term of 19 to 22 years called for under the guidelines. The Supreme Court did not agree with the appeal court that reducing the sentence to 15 years amounted to “an abuse of discretion.”

SOURCE: Mikkelsen 2007.

The War on Drugs is a prime example of morality policy making. The media framed the drug issue as a moral panic, and this was followed by a series of political actions that resulted in the production of an unethical, discriminatory policy that has made a huge contribution to the development of mass imprisonment in the United States. The War on Drugs demonstrates the perils that can be caused by singling out one subject of criminal activity for special punitive treatment.

❖ Truth in Sentencing

The new, more punitive penology, together with widespread public concerns about “lies in sentencing,” resulted in the enactment of so-called truth-in-sentencing laws. The concern with truth

in sentencing relates to offenders being sentenced to prison for substantial periods but being released on parole, in some cases after serving less than one half of their sentences. For example, an article in Alabama's *Birmingham News* from July 2000 referred to two cases—the first involving brothers sentenced to 40 years for kidnapping and rape who were released on parole after serving less than half their sentences, and the second involving a woman sentenced to 25 years for murder and eligible for parole after only 8 years imprisonment (in Spohn 2002: 252).

The policy intent of truth in sentencing was to ensure that a substantial period of a prison sentence was actually served. Through legislation, the federal government set the standard at 85% of the sentence imposed. It is significant that these laws were enacted following the passage of the 1994 Crime Act, which authorized and appropriated grants of nearly \$10 billion to the states to build and expand correctional facilities. To be eligible for federal funding, states must require those convicted of violent crimes to serve at least 85% of the court-imposed sentence. By 1999, 27 states and the District of Columbia had adopted laws that met the federal standard, and 13 other states required offenders to serve from 50% to 75% of the sentence imposed (Spohn 2002: 253). Data from states that followed the federal model showed that the average time served by violent offenders increased between 1993 and 1997, as would be expected because of the minimum period of custody required.

Truth-in-sentencing policy and legislation follow the model of mandatory minimum sentencing by basing themselves on the belief that habitual offenders are responsible for a disproportionate amount of crime committed and that incarcerating them for lengthy periods will reduce the crime rate. Joan Petersilia (1999: 497) notes that to satisfy the 85% test, states have limited the powers of parole boards to fix release dates and of prison administrators to award "good time." The effect of truth-in-sentencing policy has therefore been not only to effectively eliminate parole but also to eliminate most "good time." In ethical terms, the conjunction between this policy and the availability of federal funds to construct more prisons is significant. Even if the states had misgivings in policy terms about truth in sentencing, they seemed unable to resist the offer of federal funding. Perhaps this is a good example of the maxim, "If you build it, they will come."

❖ Predators and Superpredators

Sexual Predators

During the 1990s, sex offenders emerged as a distinct and dangerous criminal class, associated with a belief that children are more vulnerable to sexual abuse and molestation. There now exists in this country a set of assumptions that sexual abuse is pervasive, that it constitutes an issue of immense scope, that child molesters are compulsive individuals, and that their pathologies are resistant to rehabilitation or cure. In addition, it is assumed that sexual molestation generates a cycle of abuse, because the original molestation so affects the victim that he or she will ultimately commit the same act against children of the next generation (Jenkins 1998: 1–2).

Philip Jenkins (1998) has explored the history of child abuse and the moral panics connected with child abuse for the period from 1890 until the emergence of the "sexual predator" in the 1990s. He has shown how, over that period, concern about the sexual offender has fluctuated with a series of peaks and dips in the social construction of this issue. The first so-called sexual pervert was identified as deviant and dangerous in the early 1900s, but at the end of the 19th century, sexual perversion was considered akin to defectiveness and degeneracy, and those viewed as perverts could be sterilized to prevent their defective genes being passed on. Policies of that nature for perverts were applied in the 1930s. Later, conceptions about deviancy changed away from biological explanations toward the psychiatric model, and laws were passed requiring indefinite confinement of those considered to be sexual psychopaths. These offenders were evaluated and treated by psychiatrists in mental institutions. Commencing in the late 1950s and continuing until the 1970s, the restrictive measures previously adopted were eased. Formal legal intervention was now seen as counterproductive, because it was inconsistent with greater

sensitivity in the courts about racial issues in sex crime prosecutions and procedural rights. During this liberal period, questions were asked about the appropriateness of even criminalizing deviant sexual acts.

The ebb and flow of the social response to sex crimes continued. By the 1980s, there was a surge in concern about sex offenses, because feminist activism brought the issue of rape and pornography to the forefront and emphasized the subjugation of women and children. Concern expressed by feminists about women and children as victims of violence fed into a conservative atmosphere that advocated getting tough on crime. Sex offenders became a group highlighted for policy making. As well, Christian fundamentalists linked homosexuality, nontraditional sexual relationships, and the sexual violation of children. By the 1990s, the general public, politicians, and the media had begun to express a sense of crisis about sex offenders and sexual predators. This concern was translated into legislation in some states. For example, in 1994, California enacted a law imposing a 25-year sentence with 15 years minimum before eligibility for parole for those convicted of specified sex crimes. In 1996, California enacted a nonvoluntary chemical castration punishment for child molesters that was mandatory following a second conviction and applicable to a first offense if it met certain criteria (Lynch 2002: 532). In 2003, Congress passed the PROTECT Bill (known as Amber Alert) that created a national system of notification of child kidnappings. By an amendment to this bill, Congress also changed the sentencing guidelines for crimes involving pornography, sexual abuse, child sex, and child kidnapping and trafficking by eliminating downward sentencing departures that would serve to reduce sentences, including family ties, diminished capacity, and educational or vocational skills (Bibas 2004: 295–296).

Apart from incarceration for their offenses, convicted sex offenders are now subject to a range of identification and surveillance strategies in most states; these laws are often referred to as “Megan’s Laws.” Although there are variations in different states, the basic format is that specified sex offenders are required to register certain information with local law enforcement, either for several years or even for the rest of their lives. Specific offenders may also be required to have their particulars, such as information about their address, provided to certain community groups and members of the public, such as schools and child care facilities (Lynch 2002: 533). Much of this information, as well as the criminal histories of sexual offenders, is now available on the Internet. In the latest federal iteration of sex offender registration laws, the Adam Walsh Child Protection Act, passed in July 2006, classifies sex offenders into three tiers: Tier I and II offenders must keep their registration up to date for 15 and 30 years, respectively, and Tier III offenders must register for their lifetime (Grubestic and Murray 2010: 670).

Research studies reveal that community attitudes toward sex offenders are more negative than attitudes toward offenders in general. Nevertheless, those working with sex offenders such as probation officers and psychologists show a more positive attitude. It seems that sex offender stereotypes depicted in the media heavily influence attitudes (Willis, Levenson, and Ward 2010: 548). Studies also indicate that community support for protective measures taken against sex offenders is high probably because of media influences that consistently portray them as unpredictable, evil, dangerous, and inevitable recidivists. Significantly, one study based on interviews with U.S. politicians indicated the media as their primary source of information about sex crimes and that their legislative proposals were shaped by that source (p. 552).

There is another group known as *sexually violent predators* who are subject to even more restriction after release from prison. They may be detained in locked facilities for indefinite periods subject only to a periodic review (see the Closer Look box on the following page). Even though this gives the appearance of continuing a term of imprisonment that has supposedly terminated, this form of detention is labeled *civil commitment* rather than criminal punishment. A further step is that some states have authorized capital punishment as a sentence for specified child molesters (Lynch 2002: 533). For example, in Louisiana, the aggravated rape of a person under 12 is a capital offense. The federal government has increasingly involved itself in the punishment of sexual predators and, in 1994, included in a crime bill the requirement that funds made available for federal crime fighting be withheld from those states that did not have

sex offender registration systems. Naturally, this legislation spawned registration programs, and by 1996, 49 states had registration systems in place. Moreover, in 1996, further legislation was enacted providing for the nationwide tracking of convicted sexual predators in a database maintained by the FBI (p. 535). In at least a dozen states, policy makers are now linking intense supervision of sex offenders with constant GPS monitoring of their location (Lyons 2006). For example, in Florida, a 2005 law called the Jessica Lunsford Act after the abduction and murder of 9-year-old Jessica Lunsford requires the lifetime GPS monitoring of sex offenders.

A Closer Look

States Detain Sex Offenders After Prison

New York State considers itself at the forefront of a growing national movement to confine sex offenders after their prison terms have expired using a civil commitment law. These programs have been criticized for not meeting their stated goal of “treating the worst criminals until they no longer pose a threat” (Davey and Goodnough 2007: 1). The number of pedophiles, rapists, and other sexual offenders who are being held indefinitely in special treatment centers in 19 states is estimated at 2,700 with a cost to taxpayers at 4 times the cost of keeping them in prison. Slightly less than 3,000 sex offenders have been committed since the law was passed in 1990. Of those, only 81 have been fully discharged from commitment because they are considered ready. Another 115 have been released due to “legal technicalities, court ruling, terminal illness or old age” (p. 1). Texas and Arizona have released an additional 189 and 68, respectively, under supervision or conditions.

Such laws have been upheld by the U.S. Supreme Court on the understanding that offenders will receive treatment in confinement and that it is not a second punishment. However, only a fraction of sexual offenders committed under this legislation “have ever completed the treatment to the point where they could be released free and clear” (Davey and Goodnough 2007: 1). The programs are expensive and unproven, and although they are resident in the programs, patients often accept their lawyers’ advice and fail to show up for sessions that require them to confess all their crimes, even those unknown by police. Instead, they spend their time gardening, watching TV, or playing video games.

President Bush has signed a law that offers money to states that commit sex offenders to such facilities following their prison sentences. The sex offenders selected for such commitment, according to a *New York Times* investigation of existing programs, have not been the most violent. They discovered that committed offenders included exhibitionists, while some rapists were not included, and some were beyond the age where they are considered dangerous. They found, for example, that one confined person was a 102-year-old man in Wisconsin who had memory losses and poor hearing. The average annual cost per person is \$41,845.

SOURCE: Davey and Goodnough 2007.

In her analysis of the debates in Congress during the formulation of sex offender legislation, Mona Lynch (2002: 543) highlights the language of the legislators on sex offenders that has tended to stress the gender of these offenders (always described as male) and their characterization as “stranger” and “outsider.” This characterization was made despite the fact that only about 3% of sexual abuse offenses against children and about 6% of child murders are committed by strangers. In fact, most children who are sexually abused, neglected, or killed suffer that abuse at the hands of someone in the family (p. 546). When the legislators

discussed the Internet and child pornography, they constructed the child sexual predator as a “cyber-predator” “stalking children on the Internet” (p. 547). This enabled some to characterize all material appearing on the Internet as contaminating to children and even to adults, perhaps fulfilling a different agenda than that promoted during debate.

Another aspect of the moral panic engendered by this crime, which is actually very broadly defined, was the legislators’ insistence on constructing the sexual predator as uniquely threatening, as compared to an ordinary felon. Speakers referred to unspecified scientific studies showing that those who commit sexual violence against children have the highest rate of recidivism and are unable to exercise any self-control (Lynch 2002: 546). As Lynch puts it, the debates revealed a sense of apprehension by speakers who considered that “the very fiber of traditional family units is under siege by sex offenders” (p. 549). Speakers used language suggesting that families were doing all they could to keep their children safe from pedophiles cruising the Internet and that children had to be protected from inherently vicious child predators.

It is clear that there is a strong current of emotion rather than rationality in the discourse on child predators, which emphasizes risk, danger, and the need to impose punitive measures to manage such monsters. A more rational approach would be for legislators to pursue the predominant group of child abusers—those who offend within families—and develop relevant and rational sentencing policy rather than merely focusing on the stranger pedophiles, who constitute a much smaller group of offenders. Lynch (2002: 558) argues that these emotional reactions reflect issues surrounding sexuality, the family, and gender roles, and they appear to be manifestations of a theme that calls for protecting the “idealized version” of the family from harm.

Jonathan Simon (2000: 15) points out in a discussion of Megan’s Law that the use of the terms *predatory* and *prey* connotes forms of danger that are nonhuman. He observes also that this language links with terms such as *monster* to define sexual predators as nonhuman and therefore unworthy of any treatment consistent with human dignity. He notes that Megan’s Law contains no provision for the treatment of sexual offenders, its aim being one of surveillance, control, and a long-term continuation of punishment. This process of dehumanizing sex offenders and emphasizing the needs and situation of the victim to the exclusion of everything else has the effect of rendering sexual predators “beyond humanity.” They become a species apart from the rest of us, and this legitimizes the kind of legislation embodied in Megan’s Law.² Jenkins (1998) suggests that moral panics on issues such as sexual predators are a cover for a different agenda. In the case of campaigns to protect children, the agenda often involves attempting to reestablish control over those children and the weakened family, perhaps through political or social change. In other words, as he puts it, “preventing sexual acts against the young can be a way of regulating sexual acts by that population” (p. 225).

Superpredators

Tonry (2001: 168) argues that repressive crime policies reflect cyclical patterns of increased intolerance for crime and criminals and that a series of moral panics amplified and expounded by the mass media has interacted with each cyclical period. The moral panics and patterns exacerbate the effects of each other and together establish an environment that welcomes symbolic and expressive crime control policies that pay little attention to their direct or collateral effects. During the 1990s, another moral panic emerged, this time in the form of grave public concern about violence, youth, and so-called superpredators. The campaign against

²On May 21, 2011, the *New York Times* (Goode 2011) reported that lawmakers were pushing for online registries, like those for sex offenders, for persons convicted of a variety of offenses, from arson and drunk driving to animal abuse. In Illinois, members of the legislature are considering a registry of first-degree murderers; in Maine, of drunken drivers; and in Virginia, dangerous dogs are already registered. Proponents argue that people have a right to know about potentially dangerous persons living in the community.

superpredators is well illustrated in the following passage from *Body Count* by William Bennett, John DiIulio, and John Walters (1999):

America is now home to thickening ranks of juvenile "super-predators"—radically impulsive, brutally remorseless youngsters, including ever more pre-teenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs and create communal disorders. They do not fear the stigma of arrest, the pains of imprisonment or the pangs of conscience (p. 27).

This rhetoric was based on an increase in violence committed by and against youth during the late 1980s and early 1990s. Those predicting the coming wave of superpredators projected this increase in juvenile violence as continuing in a straight line into the future. Although it was correct to say that all forms of youth violence had increased significantly in this period, research indicates that this violence remained located in the group most victimized over time, namely, young African American men (Moore and Tonry 1998: 7). Among the explanations advanced for this increase in violence was the notion that youth violence was associated with the epidemic of crack cocaine use and an increased supply of lethal weapons to youth. Philip Cook and John Laub (1998: 27), in their study of youth violence, dismissed notions of superpredators; they found that there was a clear indication of increased gun availability during the so-called epidemic and that every category of homicide and other violent crimes showed an increase in gun use.

The supposed epidemic never eventuated, and statistical data showed that arrests for juveniles for violent crimes, especially juveniles aged 10 to 14, actually declined in 1995 (Brownstein 2000: 122), and that the number of arrests of juveniles for violent crimes had declined by 23% between 1973 and 1995 (p. 128). Significantly, on January 31, 1998, DiIulio published a letter in the *Washington Post* newspaper retracting his earlier statements:

I have written a number of articles in major newspapers and journals and have testified in Congress, to correct the misperception that a large fraction of juvenile offenders are "super-predators." Also, I have been on record for more than two years now in opposition to efforts to incarcerate violent juveniles in adult facilities (in Brownstein 2000: 128).

Among the consequences of this particular moral panic has been the movement to have juveniles tried as adults, the call for juveniles older than 16 to be made subject to the death penalty, the call for more punitive punishments for juvenile crime, and moves to ensure that juveniles who "commit the crime, do the time."

❖ Capital Punishment

I have already suggested that the subject of punishment generally is a morality issue. Capital punishment, as a form of punishment, is clearly the preeminent morality issue within the category of punishment. The following discussion will concentrate on the moral arguments advanced about capital punishment, including arguments that are often deployed as part of a policy debate on the subject.

In terms of legal authorization for this particular form of punishment, according to Ernest van den Haag (1985), one of the foremost advocates of capital punishment, the Constitution authorizes the death penalty in the Fifth Amendment when it states that "no person shall be deprived of life, liberty, or property, without due process of law." He argues that the Constitution authorizes deprivation of life provided that due process of law is made available. A contrary view, however, is expressed by one of the leading proponents of the abolition of capital punishment, Hugo Bedau (1997), who does not see the Constitution as authorizing the death penalty but as presenting the government with a choice to either repeal the death penalty or carry it out in accordance with the requirements of due process. Whatever may be the correct position on legal

authorization, the fact is that in policy terms the decision about whether capital punishment is on the statute books rests with each state. It follows that states that have no capital punishment provision have made a conscious policy decision, perhaps on moral grounds, to prohibit this particular punishment. Equally, those states that retain or have reintroduced capital punishment have made a similar decision in favor of this punishment.

In 1972, the Supreme Court in *Furman v. Georgia* struck down the death penalty in the 35 states that then imposed capital punishment. Some 4 years later, as a result of three other cases, the Supreme Court authorized capital punishment so long as certain procedural guidelines protecting the accused were adhered to. In response to that ruling, by 1975, 27 states had revised their capital punishment statutes, and by the end of 1997, 29 states in all parts of the country had executed inmates by various means (Culver 1999: 287). Five states accounted for 65% of all executions between 1977 and 1997, and one third of all executions have occurred in the state of Texas. In contrast to the attachment that Texas obviously has to the death penalty, the history of Oregon shows how policy on this issue can change. The death penalty was abolished in Oregon in 1913, restored in 1930, rejected in 1964, and then readopted in 1978 and 1984.

In policy terms, following the Supreme Court's rulings, states have a degree of flexibility in deciding which homicide offenses can be charged as capital offenses. Most states set out a number of special circumstances or aggravating factors that operate to define a murder as capital. For example, there are 18 aggravating circumstances in Alabama, Delaware has 22 special circumstances, and Kansas has 7 "homicide situations" (Culver 1999: 294). This considerable variation in factors and circumstances reflects the policy debate in some states about capital punishment, a debate that, in the view of Jonathan Simon and Christina Spaulding (1999: 96), can be characterized by "populist punitiveness" and as reflecting the extent to which punishment has been democratized at the political level. In a climate where politicians must beware of being accused of being soft on crime, few elected officials within or outside the criminal justice system are prepared to argue against the death penalty (Culver 1999: 289). As Bedau (1996) puts it,

It is now widely assumed that no political candidate in the United States can hope to run for President, governor, or other high elected office if he or she can successfully be targeted as "soft on crime"; the candidate's position on the death penalty has become the litmus test. . . . The death penalty has become part of partisan political campaigning in a manner impossible to have predicted a generation ago (p. 50).

John Culver (1999) notes that concerns may arise when the capital punishment debate involves the judiciary because of the likelihood that judicial independence will be compromised by weighing its views to accord with public opinion on the death penalty. In Tennessee, a justice of the Tennessee Supreme Court became the first appellate judge in that state to be defeated in an election for a continuation of her term due largely to her support for the majority opinion in a rape/murder conviction where the death sentence was overturned (p. 289). Being tough on crime and supporting capital punishment until recently included being tough on juveniles, because the Supreme Court held in *Stanford v. Kentucky* (1989) that the execution of offenders aged 16 and 17 years is sanctioned by the Constitution. A. James (2001: 184) argues that executing juvenile offenders not only is contrary to fundamental principles of American justice but also violates customary international law. It should be noted that since 1990, only seven countries have reportedly executed juveniles. In 2005, the Supreme Court revisited the issue of the death penalty for juvenile offenders and decided in *Roper v. Simmons* that the Eighth and Fourteenth Amendments of the Constitution forbid the execution of offenders who were under the age of 18 years when their crimes were committed.

During the last 35 years, the number of countries that have abolished the death penalty (abolitionists) has grown more than threefold, numbering at year-end 2001 75 totally abolitionist countries, 14 abolitionist for ordinary crimes, while 105 states have retained the death penalty (Hood 2002: 13). Moreover, as of December 2001, some 34 countries had abolished the death

penalty de facto by not implementing it, despite it being a punishment option. There are now only 71 countries that have executed anyone in the last 10 years, and apart from the United States, Cuba, Guyana, and some island states of the Caribbean, these countries are all located in the Middle East, Asia, or Africa.

Public Opinion on Capital Punishment

In a comprehensive review of public support for capital punishment, Cullen et al. (2000: 10) note that Americans are most often polled on their attitude to this form of punishment, and that when asked if they support it for convicted murderers, about 7 in 10 respondents reply in the affirmative. This level has remained constant since the early 1970s. However, if respondents are asked not only if they support the death penalty but also whether they would choose the death penalty or life imprisonment without parole, support for capital punishment declines markedly (Cullen et al. 2000: 10). Polling data also reveal that citizens may advocate capital punishment even when the innocent are executed. For example, a Gallup Poll found that 57% of respondents continued to support capital punishment even when asked to take into account that 1 out of 100 people sentenced to death was actually innocent (pp. 11–12). It is interesting to note that in the 2 decades preceding the 1970s, support for capital punishment was much lower, amounting to 61% in 1936 and 68% in 1953 and declining to 45% in 1965. In 1966, more Americans opposed the death penalty (47%) than favored it (42%) (p. 13). Explanations for this change in the public view include the rising crime rate of the 1960s and fear of crime generated by the politicization of crime, the emergence of racial conflicts, the introduction of tough policies on crime appealing to underlying racist attitudes, a general lack of confidence in the criminal justice system, and a general move away from social causes of offending toward individualistic explanations of crime that emphasize free choice (p. 13).

As to people's motives for supporting the death penalty, research indicates that deterrence and retribution figure highly as justification, along with the notion that it is unfair for taxpayers to keep convicted murderers in prison for life. However, the largest percentage of supporters (74% in one poll) justified the death penalty on the basis that "it removes all possibility that the convicted person can kill again" (Cullen et al. 2000: 19).

Some polls have analyzed how views on the death penalty would be affected if the option of life without parole were available. They have reported that the percentage favoring capital punishment would significantly decline from 71% to 52% (Cullen et al. 2000: 19). Thus, the regular polling showing continued support on this issue gives rise to the possibility that the public may not prefer it to other sentencing options and that people should be asked if they support the death penalty or "other alternative sentences." It is noteworthy that support for an alternative to capital punishment becomes especially strong when respondents are offered the choice of a sentence of life without parole with restitution to the victim. This option was favored by 60.7%, compared to 31.6% favoring the death penalty (p. 20). As for those who design the laws, a 1991 survey of New York legislators found that even with the option of life imprisonment without parole and restitution, 58% still preferred the death penalty. In the same survey, it was noted that legislators misconceived the views of the public, reporting that among their constituents they believed 73% would support the death penalty over the alternative of life imprisonment (p. 21). The obvious conclusion is that legislators appear to be a significant barrier to substituting alternatives for capital punishment. It is worth noting that although many Americans continue to support the death penalty, the ability to use DNA to ascertain with certainty the identity of perpetrators and the growing number of persons found to be innocent after years on death row based on DNA evidence has begun to influence the public discourse about the legitimacy of this form of penalty.

What impact does religion have on support for the death penalty? Polls show that 61% of Americans believe that religion is a "very important" part of their lives (Cullen et al. 2000: 24) and that 96% of Americans say they believe in God. One study found that white fundamentalists

(those with fundamentalist religious membership or beliefs) are most supportive of capital punishment, whereas African American fundamentalists are less supportive. Research suggests that religious fundamentalism and biblical literalism are positively related to punitive attitudes, including retribution for crime, support for tough criminal legislation and harsh sentencing, and favoring more severe treatment of juvenile offenders (p. 25).

What are the moral arguments usually advanced against capital punishment in policy debates? The core moral arguments against capital punishment are usually formulated as follows (Bedau 1997; van den Haag 1985):

1. The death penalty has been distributed in a discriminatory manner because African American or poorer defendants are more likely to be executed than equally guilty others, especially when the victim is white (Russell-Brown 1998: 134).
2. Miscarriages of justice occur and the innocent are executed.
3. The death penalty expresses a desire for vengeance—a motive too volatile and indifferent to the concept of justice to be maintained in a civilized society.
4. Capital punishment is considered to be degrading to human dignity and inconsistent with the principle of the sanctity of life.
5. It is morally wrong to authorize the killing of some criminals when there is an adequate alternative punishment of imprisonment.

Each of these arguments will now be considered:

1. The death penalty has been distributed in a discriminatory manner because African American or poorer defendants are more likely to be executed than equally guilty others, especially when the victim is white (Russell-Brown 1998: 134).

Samuel Walker, Cassia Spohn, and Miriam DeLone (2000: 231) make a case for the existence of racial disparity in the application of the death penalty, pointing to the fact that although African Americans make up only 10% to 12% of the population, they are disproportionately represented among those sentenced to death and executed. In addition, they suggest there is compelling evidence that those who murder whites—and particularly African Americans who murder whites—are disproportionately sentenced to death.

2. Miscarriages of justice occur and the innocent are executed.

The American Bar Association (ABA) has urged the appointment of experienced, competent, and adequately compensated trial counsel for death penalty cases and has lobbied for the adoption of its *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*. These guidelines call for the appointment of two experienced attorneys at each stage of a capital case, such appointment to be made by an authority capable of identifying lawyers who possess the necessary professional skills. Clearly, the ABA believes that standard professional qualifications are insufficient for capital cases. No state has fully embraced the ABA recommended system, and it is a notorious fact that unqualified and undercompensated lawyers continue to represent capital clients. In spite of these deficiencies, in 1996, the federal Antiterrorism and Effective Death Penalty Act undermined the ability of death row inmates to use federal habeas corpus procedures to have their cases reviewed in federal courts. It also removed federal funding for postconviction defender organizations that provided legal representation for many prisoners contesting their sentences (Sarat 1999: 9).

The process involved in appealing capital cases varies from state to state, but according to Herbert Haines (1996: 56–57), the process is typically as follows: Death sentences are automatically appealed to the highest state court, with appeals in this first round being limited to the trial record and to procedural errors. If the state court affirms the conviction, the prisoner

can appeal to the U.S. Supreme Court for review, but the Supreme Court generally agrees to hear only 2% to 3% of these appeals. If a request for a review is denied, a second cycle of appeals can be brought, in this case not limited to the trial record. These appeals are filed in the lower court, then in the higher state courts, and finally again in the U.S. Supreme Court. During this round of appeals, an inmate is able to argue that he or she was provided with an incompetent defense or, for example, that there is newly discovered evidence showing innocence. If, after these two rounds of appeals, the prisoner is still under sentence of death, he or she can file for a federal habeas corpus review, during which alleged violations of constitutional rights can be raised. Habeas corpus proceedings work their way through the federal system from the district court to the circuit court of appeals and finally again to the U.S. Supreme Court.

There has been concern about miscarriages of justice in capital cases since at least the 1820s, and in 1987, Bedau and Radelet (in Haines 1996: 88) argued that some 350 persons had been wrongly convicted of potentially capital offenses between 1900 and 1985. There is further evidence in the form of a congressional subcommittee report that at least 45 death sentences were in error in the period 1976 to 1993, and numerous incidents of wrongful convictions have come to the attention of the courts and the media in the last decade since the advent of DNA testing. In one case in 1989, a prisoner spent 12 years in a Texas prison and came within 3 days of lethal injection before his conviction was overturned. The court ruled that the prosecutors had used perjured testimony and had knowingly suppressed evidence to obtain a conviction for killing a police officer. In another case, an African American school custodian was wrongly convicted of the rape and murder of a 16-year-old white girl. The errors comprised forensic evidence suggesting the crime was committed by a white man, which was never mentioned to the jury and was "misplaced," and evidence pointing to a different suspect, which the police ignored (Haines 1996: 88).

Those in favor of capital punishment characterize these cases as indicating how well the criminal justice system's procedural safeguards work, but this tends to ignore the fact that not only is the convicted person deprived of years of freedom while waiting on death row, but he or she must also deal with the mental consequences of waiting to be put to death. The activities of the Innocence Project, particularly in DNA testing, have continued to reveal errors and cases of innocence. In *United States v. Quinones* (2002), Judge Rakoff argued that the use of capital punishment is unconstitutional, because there is no longer any certainty of a person's guilt in a capital offense. He contended that advances in DNA testing render capital punishment problematic, because DNA testing is able to prove absolutely that some condemned persons are actually innocent. In 2004, Congress passed the Justice for All Act establishing federal prisoners' access to DNA evidence for a minimum of 5 years following their conviction. The act allocates funds to deal with a reported backlog of 350,000 untested DNA samples in rape cases (Sarat 2005: 45).

After many years of hearing death penalty cases, in February 1984, Justice Harry Blackmun of the Supreme Court announced, "From this day forward I no longer shall tinker with the machinery of death." He did not reject the death penalty because of its violence, but rather focused on the procedures applying to death sentences, explaining that

despite the efforts of the states and the courts to devise legal formulas and procedural rules . . . the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. . . . Experience has taught us that the Constitutional goal of eliminating arbitrariness and discrimination from the administration of death . . . can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing (in Sarat 1999: 7–8).

For all intents and purposes, therefore, Justice Blackmun concluded that the death penalty cannot be administered in accordance with the Constitution and that no procedural rules or regulations can save it from its deficiencies.

3. The death penalty expresses a desire for vengeance—a motive too volatile and indifferent to the concept of justice to be maintained in a civilized society.

The notion that revenge can stand as a motive for official policy on punishment is entirely inconsistent with a rational system of justice conducted by the state on behalf of society (Bedau 1999: 50). Proponents of the death penalty tend to suggest that they favor its application, not for revenge but for retribution. Those against the death penalty respond that if we are to support capital punishment for murder under this retributive principle, we should equally require rapists to be raped and torturers to be tortured, forms of punishment any civilized society would be reluctant to carry out. In addition, they argue that the extreme punishment of life in prison without parole can be imposed for murder, and this in itself is retributive. As explained in Chapter 3, in 1972 and 1976, the U.S. Supreme Court stated that it considers retribution “a legitimate justification for capital punishment” (*Furman v. Georgia* 1972; *Gregg v. Georgia* 1976).

4. Capital punishment is considered to be degrading to human dignity and inconsistent with the principle of the sanctity of life.

The argument is that human life, having infinite value, should be respected and protected, and that even murderers’ lives should be valued in the same way. Advocates of this position are absolutists and would be against capital punishment no matter which arguments are put forward about the conduct of a particular murderer. Bedau (1999: 42) suggests that abolitionists who rely on this argument should insist that the burden of argument lies on those who favor the death sentence. In other words, for the purposes of assessing punishment, society ought to assume that everyone’s life is valuable and that all our lives have equal value.

Associated with the value of life argument is the view that we are morally forbidden to take the life of a murderer, because he or she has an inalienable right to life that is violated by sentencing a person to death and executing that person. This argument is normative, and again Bedau (1999) suggests that the burden of argument should be on those who would kill through capital punishment to justify that killing. The notion that this form of punishment violates the fundamental right to life has been endorsed by the Council of Europe and the European Union, which have declared that “the death penalty has no legitimate place in the penal systems of modern civilized societies, and that its application may well be compared with torture and be seen as inhuman and degrading punishment” (Hood 2001: 331).

In relation to human dignity, Bedau (1997) has extended Justice Brennan’s concurring opinion in *Furman v. Georgia*, in which the justice identified four principles explaining why the death penalty was an affront to human dignity. The principles expounded in that dissenting decision are that a punishment must not by its severity be degrading to human dignity, that a punishment must never be inflicted in a wholly arbitrary fashion, that a severe punishment must not be unacceptable to contemporary society, and that the unnecessary infliction of suffering is also offensive to human dignity. Bedau supplements these principles by suggesting that it is also an affront to the dignity of a person to be forced to undergo harm at the hands of another when entirely at his or her mercy, as is always the case with legal punishment. He further suggests that it offends a person’s dignity when the person imposing punishment is free to arbitrarily choose which offenders are to be punished very severely, when all deserve the same severe punishment if any do. Finally, he proposes that it is offensive to the dignity of a person to be subjected to such a punishment.

5. It is morally wrong to authorize the killing of some criminals when there is an adequate alternative punishment of imprisonment.

Bedau (1997) argues that to do so would be an affront to human dignity. Associated with this argument is that which insists there is no convincing evidence that the rate of murder is consistently lower when the death penalty can be invoked and enforced. The death penalty has not proved to be a more effective deterrent than the alternative sanction of life in prison without parole, and it therefore constitutes an irrational burden within a rational system of

criminal justice (Hood 2001: 332). Finally, as Beccaria (in Hood 2001: 332) noted as early as 1764, the death penalty is counterproductive in terms of its moral message, because it legitimizes the very behavior—killing—that the law seeks to repress. Its effect, therefore, is to undermine the legitimacy and moral authority of the entire criminal justice system.

In policy terms, as we have seen, retribution, as opposed to rehabilitation, is now cited as the appropriate justification for punishment, and the intuitive anger felt toward criminals, often now labeled as monsters and predators, can be seen expressed in the notion of capital punishment as an abstract policy. Showing one's support for the death penalty is a symbolic act announcing that one is a supporter of a tough on crime policy approach and favors holding criminals morally responsible for their actions. In the political arena, it seems highly unlikely that there will be any widespread movement toward abolition, but abolitionists have recently been comforted by the Supreme Court's decision prohibiting the death penalty when the prisoner can be shown to be mentally challenged or under 18 years of age. Abolitionists must rely on the Supreme Court to continue this approach of eroding the death penalty by stages as has happened in the case of executing juvenile offenders.

❖ Private Prisons

For many years, certain institutions concerned with offenders have been de facto privatized, because juvenile institutional facilities and adult community facilities were contracted out early on to the private sector. For example, in Massachusetts, juvenile institutions changed from being a network of state-run institutions in 1969 to a series of community-based programs and facilities by 1974. The Massachusetts Division of Youth Services operates all community-based facilities through private contractors (Logan 1990: 15).

Charles Logan (1990) defines *private prisons* as "those that are privately owned, operated, or managed, under contract to government" (p. 13), and Shichor (1995) regards them as "prisons or other institutions of confinement (jails, immigration and nationalization service facilities, detention centers, and secured juvenile justice facilities) operated and managed by private corporations for profit" (p. 2). Adult community facilities managed and operated by private contractors include shelters and halfway houses, while institutional facilities include detention and diagnostic centers and training schools (p. 14). In addition, the Immigration and Naturalization Service has for many years contracted facilities to detain illegal aliens awaiting deportation. The most recent form of privatization has been the contracting of adult confinement facilities. By mid-1989, about a dozen private companies were running almost two dozen adult confinement institutions in about one dozen states (p. 20). Prison privatization has spread to other countries, including the United Kingdom, Australia, and Canada, and is being actively promoted in South Africa.

The proponents of prison privatization tend to justify their support by advancing pragmatic, rational arguments that emphasize the supposed economic benefit of contracting. Those against privatization stress the ethical and moral implications. This discussion will confine itself to the ethical implications, which fall broadly into four categories of questions:

1. Is it appropriate for imprisonment to be administered by anyone other than the state and its employees?
2. Is the profit motive compatible with the task of imprisoning offenders?
3. Does the existence of private prisons, in effect, create a demand for imprisonment that needs to be satisfied by greater levels of imprisonment than would otherwise be the case?
4. How do private prisons cope with the issue of use of deadly force?

These questions will now be considered:

1. Is it appropriate for imprisonment to be administered by anyone other than the state and its employees?

A core issue in the ethical debate about private prisons is the role of the state in administering punishment. As Richard Lippke (1997) puts it,

Punishment has been seen as a state function in order to limit if not eliminate the influence of private interests over the detection, trial, and sanctioning of law breakers—in short, to ensure that all individuals are treated equally before the law (p. 26).

As already explained in Chapter 5, a legal punishment is defined as that which is imposed and administered by an authority established by the legal system against which the offense has been committed. Punishment involves the state, because the legal rules that constitute offenses are created by a legislature that operates in the name of the state. Theories concerning the relationship between the individual and the state involve the notion of the social contract. Thomas Hobbes argued that individuals freely transfer their rights to a powerful authority, the head of the state, who is thereby enabled to ensure that those individuals keep their promises and contracts. In exchange for this surrender of rights, the head of the state provides security and protection for citizens. John Locke argued along somewhat similar lines that individuals give up their political power to secure order, but he maintained that this power remains with those individuals who collectively constitute society. The task of the state is to protect individuals, but if the state fails in this task, individuals have the right to dissolve the state. In other words, Locke argued that the transfer of powers to the state operates conditionally on the state maintaining the life and liberty of its citizens (Shichor 1995: 47).

Classical liberal thinking argues that in spite of this social contract, political power remains with the individuals who have delegated their powers to the state and that therefore ultimate power remains in the hands of the people. Consistent with this approach is the ideal of the “minimal state,” which sees the state using a restricted coercive power. Robert Nozick (1974: ix) argues that this coercive power is limited, for example, for the purpose of citizens giving aid to others or for the purpose of prohibiting activities for the good or protection of people. The notion of privatization stresses the role of the state as minimal, and in fact questions the very principle of a state monopoly on crime control and punishment.

Opposed to classical liberal philosophy is the view that the state has the sole right to use legal coercive power (Weber 1964). Max Weber argued that offenders violate laws, and those laws are created by representatives of the state, and in fact in themselves constitute the state. Therefore, it is the state that possesses sole authority to use coercive force for punishment, because its sovereignty, based on the supremacy of the rule of law, has been violated by the criminal act (Reisig and Pratt 2000: 214). John Rawls supports this view, arguing that in a liberal society, coercive agencies must be under the control of the state, because rational individuals would not endorse a political system that allows coercive force to be used privately. However, he sees the state as having the right to delegate lower level functions of the state to private contractors if it serves the interests of society (in Reisig and Pratt 2000: 214).

Related to this debate is the constitutional question of whether, and to what extent, the state may delegate to private entities the power of punishing lawbreakers. On this issue, in 1986, the ABA criticized private prisons, expressing the view that “incarceration is an inherent function of the government and that the government should not abdicate this responsibility by turning over prison operation to private industry” (in Shichor 1995: 52). The ABA therefore takes the position that there is a principle that prevents the state from delegating the administration and control of punishment to private contractors and that the scale of delegation of state authority is irrelevant.

Those who argue in favor of privatization point to the fact that the state has the power to delegate its functions and has done so for many years in the field of punishment through juvenile

programs and institutions and adult correctional programs. However, it can also be argued that the prison, as a total institution with almost complete control over inmates' lives, is in a special position in the field of punishment. In other words, the high level of coercion exercised by the state militates against any extensive delegation of its power to punish.

Associated with this issue of state delegation is the specific issue of the quasi-judicial functions exercised by prison administrations. There are a number of stages and issues in the process of imprisonment that give rise to quasi-judicial duties. For example, the term of imprisonment may depend on parole decisions, and the computation of good time and of release dates relies on administration reports about the conduct of inmates. Also, disciplinary action may have to be taken against inmates, and generally reports about inmate behavior are significant in the decision-making process. Those who favor privatization argue that proper government oversight and monitoring can ensure that these substantive and due process issues can be properly addressed. However, this tends to ignore the fact that the administration and staff of private prisons owe a duty to the company that employs them and may give loyalty and allegiance to the company rather than to a set of rules imposed by the state responsible for a particular private prison.

Opponents of privatization raise the issue of the symbolism surrounding punishment in the form of the uniform and insignia of correctional staff and the judiciary that express the public nature of punishment. Supporters of privatization argue, on the other hand, that symbolism is less important than substance and that those working in corrections are not elected by the people or politically appointed and are seen as symbols of the state's role in punishment only by virtue of their jobs (Shichor 1995: 55).

2. Is the profit motive compatible with the task of imprisoning offenders?

Those against the privatization of prisons find it a cause of concern that private corporations are attempting to make a profit on the punishment of people by running prisons. Shichor (1995: 259) argues that the government ought not to create such opportunities for private profit, but DiIulio (1990) does not think the profit motive amounts to a moral issue in the debate. The American Civil Liberties Union has argued that "the profit motive is incompatible with doing justice" (in Logan 1990: 72). This position essentially questions whether a private corporation is likely to put its own interests and welfare ahead of the interests of justice when it views the profit motive as crucial and therefore argues its incompatibility with the interests of justice. Historically, the prison system, however, has profited from the use of prison labor employed by private contractors and, particularly in the southern states, leasing out prisoners to corporations was a standard feature of the prison system. In this sense, therefore, profit and incarceration have a long tradition of association, and it makes little sense to suggest that the entire task of managing prisoners is somehow more morally objectionable than profiteering from the labor of inmates.

3. Does the existence of private prisons in effect create a demand for imprisonment that needs to be satisfied by greater levels of imprisonment than would otherwise be the case?

The argument here is that the corporations running private prisons may seek to influence policy makers and administrators through lobbying and associated activities to ensure that private prisons continue to be built and that they continue to profit from a high rate of incarceration. Originally, privatization was seen as a solution to the immense overcrowding caused by a deliberate policy of incapacitation and was intended to be a supplement to the existing prison system. The argument against privatization is that expanding the state's resources to punish will increase state control and that large numbers of people who would otherwise not be incarcerated will come under state control. In other words, an expansion of the prison system will be self-perpetuating; if prisons are built, they will be filled (Shichor 1995: 61).

Some now see corporate involvement in crime control, that is, the involvement of private industry in crime control generally, and in particular, the continuation of high incarceration rates, as part of an evolving criminal justice industrial complex. In states like New York, where prisons have been constructed in rural areas, they provide in some cases almost the only form of local employment and have replaced dying local industries (Christie 2000: 137). There is a powerful political and economic argument (often made by correctional unions) that these prisons must be supported as a source of employment and local economic activity. While unions may make this argument, it is easy to see how private corporations running prisons can ally themselves with such views and advocate them themselves. As Nils Christie (pp. 140–141) points out, the prison industry absorbs a large part of the workforce, and he estimates that the crime control industry employed 4% of the entire labor force in 1999. As of January 1998, 60 prisons were being constructed, and in 1997, 31 new institutions were opened in 15 different jurisdictions. Between 1988 and 1995, Texas added 90,000 state beds in prisons at a cost of \$2.3 billion (Merlo and Benekos 2000: 97). In June 1993, some 20,000 adult prisoners were confined in private correctional facilities, making up a 1.5% market share of the prison population; by the end of 1997, the number of prisoners in private facilities had grown to almost 80,000, with a market share of 5.9% (p. 98). By year-end 2005, there were 107,447 federal and state prisoners in private facilities across the nation, up 7% from 2004 (Harrison and Beck 2006: 6). Almost half of those inmates (51,823) were held in private prisons in southern states, and of those, more than 17,500 were held in Texas.

Robert J. Lilly and Paul Knepper (1992: 175) have analyzed the characteristics of this criminal justice industrial complex and have shown that participants in the field of corrections have a close working relationship; that there is an overlap between the interests of corporations, unions, and agencies, for example, in terms of influence and the transfer of personnel (many employed in private prisons as guards and administrators were formerly public employees in the same field); that this complex operates with little public scrutiny; and that the participants define themselves as acting in the public interest by referring to their role in the punishment of law breakers.

4. How do private prisons cope with the issue of use of deadly force?

Chapter 6 discussed the legal position on the use of force by prison guards, pointing out that there are severe restrictions on its use. Those opposed to private prisons argue that, as a sensitive and complex issue, the use of force by employees of private companies against inmates raises questions about the legitimacy of any exercise of force by those employees. Some believe that private companies will try to cut costs through inadequate staffing and training of private prison staff and that this will result in a greater willingness to use force to maintain order (Shichor 1995: 102). It is unrealistic to argue that private prison staff should be prohibited from using any force, because this might endanger their own safety and is not a realistic option. If it were to be prohibited, this would presumably mean that state employees would have to be located in the prison and called on for the use of force when needed. This, however, would defeat the purpose of privatization and add significantly to the organizational problems within the prison. Another suggestion is that private staff should be able to use nondeadly force under a set of rules reserving the use of deadly force for government employees. Again, however, common sense suggests that this would be unworkable in practice. This issue has only recently become significant, because private companies have only lately become involved in managing maximum security prisons and housing offenders considered violent (Harding 1998: 635). The private sector was able to compete for the management of a maximum security prison for the first time in 1990 when bids were requested for a federal detention center in Kansas, and as of December 1996, private contractors were operating seven maximum security prisons (see Case Study 7.2).

Case Study 7.2 Private Prisons—A Good Policy Choice?

Report to the Attorney General: Inspection and Review of the Northeast Ohio Correctional Center

On November 25, 1998, the Department of Justice concluded a report to the U.S. Attorney General reviewing the management and operations of the Northeast Ohio Correctional Center in Youngstown, Ohio, owned and operated by the Corrections Corporation of America (CCA).

The report cited “fundamental breakdowns attributable to the institution and corporate management in meeting their most basic security missions” (p. 19). Among the major events that occurred at Youngstown prison were the following:

- The escape of six inmates
- Two homicides, including one that took place between known enemies in the high-security unit
- The stabbing of approximately 17 inmates as well as many other serious assaults on staff and inmates
- The discovery of numerous homemade weapons—30 were discovered in the first 2 months of operation
- The facility being forced to operate under full or partial lockdown to prevent further incidents

Among the particular issues of concern noted in the report was the absence of experienced midlevel managers and uniformed supervisors. Many persons placed in supervisory and senior positions lacked the experience and training required. For example, among the 30 sergeants, 16 had no prior correctional experience, and among the 9 lieutenants, 2 had no prior correctional experience.

The practical arrangements for monitoring CCA performance at Youngstown involved the Department of Corrections hiring a consultant firm to monitor the contract to CCA on a less than full time basis. No contract monitors were placed on site. However, finally, an experienced deputy warden was placed at the facility for monitoring purposes.

The report indicates that within 2 weeks of the arrival of the first inmates at the facility, serious disturbances occurred due in some cases to missing personal property of inmates, causing inmates to make threats to staff. One incident involved a supervisor ordering three canisters of gas to be dropped in each housing unit, causing the inmates to pour water on them, place garbage cans over them, and throw them into the showers. Inmates began making weapons, and two inmates were stabbed within a month.

SOURCE: U.S. Department of Justice 1998.

❖ Disenfranchising Inmates of Their Voting Rights

According to the Sentencing Project (2008: 1), by 2008, all states other than Maine and Vermont prohibited inmates from casting a vote while incarcerated for a felony. The Sentencing Project estimates that “5.3 million Americans, or 1 in 41 adults, have currently or permanently lost their voting rights as a result of a felony conviction.” The organization points out that 13% or 1.4 million African American men are disenfranchised at a rate 7 times the national average and that 676,730 women are ineligible to vote based on a felony conviction. Two million white Americans (Hispanic and non-Hispanic) are disenfranchised, and 1 in 4 African American men

are permanently disenfranchised in five states that deny the vote to ex-offenders. Felons on parole may not vote in 33 states, and in 29 of these felony probationers are also excluded. Seven states disenfranchise categories of ex-offenders or disqualify them for specified periods of time after which they may seek restoration of their right, and six states permanently disqualify ex-offenders (Kleinig and Murtagh 2005: 217–218). It is estimated that on the basis of present incarceration rates, some 40% of African American males will come to be permanently disenfranchised in the states that exercise that option. Significantly, in the 2000 presidential elections, Florida contained an estimated 600,000 ex-offenders who could not vote. Disenfranchisement has an ancient history and in modern times reflects the Common Law notion of attainder, under which offenders could lose all their civil rights (p. 218). Under the U.S. Constitution, the Fourteenth Amendment provided for disenfranchisement for “participation in rebellion, or other crime” (p. 219). The Supreme Court in 1974 interpreted the reference to other crime to allow disenfranchisement for any crime.

What justifies the notion of disenfranchising felons? For example, although many would consider the right to vote a crucial activity in a democracy, only 51.3% of those eligible to vote actually voted in the 2000 presidential elections (Kleinig and Murtagh 2005: 219). Arguments that are used to support disenfranchisement include these:

- *The social contract argument.* The idea here is that the felon rejects established authority and has rejected the constraints of the social contract. Given that attitude, such a person ought not to be allowed to participate in the electoral process (p. 220). Even if this argument is accepted, it does not necessarily justify a perpetual prohibition extending beyond imprisonment.
- *So-called electoral purity.* The Alabama Supreme Court in a case in 1884 cited the importance of the “purity of the ballot box” (p. 222). The idea here is that only worthy persons are fit to cast a vote, that allowing convicted felons or ex-felons to participate would undermine the electoral process, and that adverse consequences could flow from allowing felons to participate. For example, it might call into question the legitimacy of the outcome (p. 224).

John Kleinig and Kevin Murtagh (2005: 227) argue that there may be some offenses that justify disenfranchisement, such as electoral offenses and offenses representing a rejection of the state’s authority, that is, offenses committed by those on death row or sentenced to life imprisonment. They suggest, however, that there should be no automatic presumption of forfeiture during a period of imprisonment. They offer three arguments in favor of prisoners having the right to vote:

- Voting would encourage prisoners to take a more active role in society as they reintegrate back into it.
- Ethically, it can be argued that those affected by decisions ought to have some say in the making of those decisions. For example, the concerns of prisoners and their interest in events affecting the prison system are not currently considered.
- If prisoners were able to vote, politicians would need to take account of their concerns, and they might reveal the serious deficiencies that exist in penal policy and practice. (pp. 229–230)

Several questions are raised by this issue. For example, is disenfranchisement part of the punishment for the crime, or is it a civil sanction that is a consequence of the crime? Is it morally justifiable as a policy and practice, especially when the contemporary effect is to disenfranchise significant numbers of African Americans? Conversely, can we really argue that the franchise is such a crucial attribute of democracy when only slightly more than half of those eligible to vote

actually voted in the year 2000? Can there be any justification for disenfranchising anyone permanently and if so under what circumstances?

Recently, policy changes in a number of states have introduced reforms so that during the period 1997 through 2010, an estimated 800,000 persons have regained the right to vote. Public opinion surveys now show that 8 in 10 Americans support voting rights for those who have completed their sentence, and almost two thirds support voting rights for those on parole or probation (Porter 2010: 3–4). Some states have simply repealed the lifetime disenfranchisement laws—for example, Iowa (2005) and Maryland (2002, 2007)—while others have opted to restore rights to those on probation—for example, Connecticut (2001) and Rhode Island (2006). Many have introduced streamlined restoration processes.

The following Closer Look box gives an example of an additional ethical consideration for the treatment of prisoners.

A Closer Look

Cutting Prison Time for Organ Donors: Is This Ethical?

South Carolina legislators are considering a law that would allow prisoners to donate organs or bone marrow in exchange for a reduced sentence. Questions about the ethics of this proposal include a comment from the executive director of Donate Life South Carolina who is reported to have said, “It really muddies the water about motive. We want to keep it a truly altruistic act.” Given the coercive environment of the prison and the reward for donating organs is this not akin to selling body parts?

SOURCE: Adcox 2007.

Summary

Policy making in criminal justice usually takes the form of policies and legislation relating to crime control. Justifications for particular policies might be ideological, empirical, or ethical. Those based on ethical grounds result from an analysis of what is “right and wrong” or “good or bad” in a moral sense for a particular issue. Ethics fits into criminal justice policy making in two forms. First, there is a general issue in policy making that those who formulate policies should act ethically; second, there is an ethical responsibility in making policies about subjects like punishment. As Tonry notes, a “legislator or governor who proposes or enacts policy changes he knows will not achieve their purported aims and will, if enacted, cause new injustices, because he hopes it will help him get reelected, is behaving unethically” (2006: 53). This kind of policy making can be termed *morality policy making*. Most policy making results from a cost–benefit analysis that does not include ethical models. A policy that is considered unethical would include reacting to events by formulating irrational, capricious, and arbitrary policies. In the criminal justice policy field, it is possible to link the existence of moral panics and morality policy making. A moral panic occurs when an event arises that is defined as a threat to the values of society—for example, the sale and consumption of drugs or the existence of sexual predators. These events are promoted by the media and engender public concern and political action, usually in the form of legislation. It is here that morality policy and moral panics produce unethical legislation. For example, the present situation of mass imprisonment is not the result of a democratically agreed on and analytically constructed policy but has emerged from a set of converging policies and decisions that do not form a rational and coherent response.

The views of the public about crime and crime control are also linked to moral panics. Surveys show that the public has a general tendency toward punitive measures, and that Americans regard imprisonment as the most appropriate form of punishment for most crimes. There has been steady support for capital punishment since the 1970s, and those seeking public elective office are expected by the public to support the continuation of this form of punishment. Political and media attention to certain categories of crime has resulted in mandatory minimum sentencing, the War on Drugs, truth-in-sentencing laws, and legislation designed to combat sexual predators and superpredators. Capital punishment is a major issue of morality policy, and the ethical arguments for and against capital punishment are discussed in this chapter.

A significant criminal justice policy issue is the development of private prisons. This raises a set of questions involving ethical issues, such as, Should imprisonment be administered by anyone other than the state? Is the profit motive compatible with the state's right to punish through imprisonment? Does the existence of private prisons fuel a demand for further and greater levels of imprisonment? How do private prisons resolve ethical issues concerned with the use of force? These issues are also considered in this chapter.

Discussion Questions

1. Why is ethics important in criminal justice policy making? How do unethical and ethical policy-making decisions differ?
2. Explain the consequences that have resulted from one policy choice in the field of criminal justice, choosing from the following: the War on Drugs, truth in sentencing, sexual predators.
3. Discuss the ethics of the California law that gives prosecutors the right to decide whether the third-strike offense should be charged as a felony or a misdemeanor while providing no oversight of prosecutor charging decisions.
4. Outline the moral arguments against capital punishment.
5. How important is public opinion in criminal justice policy making? Explain by referencing two examples.
6. Why is it considered unethical by some for the state to abdicate its responsibility for the administration of prisons to private companies?
7. Comment on the ethics of prisoner disenfranchisement in light of the fact, for example, that if such disenfranchisement is permanent, more than 40% of the African American male population will have no say in the policies and laws that have a significant effect on them.

Web Resources

Center for Criminal Justice Policy Research. http://www.cj.neu.edu/center_for_criminal_justice_policy_research/index.php

Common Sense for Drug Policy. <http://www.csdp.org>

Criminal Justice Policy Coalition (also includes information on internships). <http://www.cjpc.org>

Criminal Justice Policy Foundation. <http://www.cjpf.org>

Department of Defense Task Force on Domestic Violence: www.dtic.mil/domesticviolence/

Families Against Mandatory Sentencing: <http://www.famm.org>

Federal Prison Policy Project: <http://www.fppp.org>

Justice Policy Institute: <http://www.justicepolicy.org/article.php?list=type&type=109>

The Justice Project: <http://www.thejusticeproject.org>

PolicyLink (Leadership for Policy): <http://www.policylink.org/Research/Leadership/>

The Sentencing Project: <http://www.sentencingproject.org>

Stanford Criminal Justice Center: <http://www.law.stanford.edu/program/centers/scjc/>

Violence Against Women Online Resources: <http://www.vaw.umn.edu>; <http://www.ojp.usdoj.gov/vawo/>