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THE ETHICS OF CRIMINAL JUSTICE POLICY MAKING

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Policy making on criminal justice issues, including crime control, takes place at many 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).

Justifying Policy Choices

In considering how particular policies are justified, Frederic Reamer (1986: 224) identifies three grounds, which he calls *ideological*, *empirical*, and *ethical*. Justifications made on **ideological** grounds maintain that certain policies are desirable because they fit a set of assumptions, which 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 child care might draw on research evidence that shows that mothers who are able to take advantage of child care are more likely to seek work, and therefore less likely to want assistance for their dependent children. In contrast to the ideological or empirical, 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 examines specific criminal justice policies, focuses on the ethical issues that are implicated in those policies, and explores 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 that are 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.

Ethical Policy Making

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).

There is no scope here 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 against drugs or the threat of “superpredators,” there is a tendency for politicians and others to react viscerally, instinctively, and instantly rather than following 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.

Moral Panics and Morality Policy Making

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. In revisiting

his theory in later years, Cohen has suggested that in the information society, social networks enable moral panics to be constructed and transmitted with ease and speed. In his view, the subjects of corporate crime, state crime, and environmental crime are strong contenders for future moral panics, but the most important subject is likely to be immigration and associated topics such as border controls, refugees, and migrants generally (2011: 240, 242).

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 and his colleagues agree that the media are a powerful force for shaping public consciousness about controversial issues. However, they also argue that typically moral panics about law and order have their origin in statements by the police and judges that are then taken up and elaborated on by the media. (Hall et al. were writing about the situation in England.) Also, Hall and his colleagues go further by arguing that the definition of a moral panic includes the notion of an irrational response to that panic that is 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

CASE STUDY 9.1

AN EXAMPLE OF UNETHICAL POLICY MAKING?

Legislation enacted in 1986 shaped the war against 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), and 50 grams meant a 10-year mandatory minimum sentence. In contrast, an offender found guilty of possession of **powder cocaine** (the type commonly used by middle- and upper-class whites) would be liable for a mandatory minimum sentence of only five years if the amount of cocaine exceeded or equaled 500 grams. The legislation therefore penalized crack cocaine 100 times more severely than powder cocaine. 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."

(See the discussion on "Ending Mass Imprisonment?" regarding the Fair Sentencing Act of 2010, which finally reduced the sentencing disparity between crack and powder cocaine.)

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 antidrug movement, 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, non-rational response to public fears and concerns? If it was the latter, then, arguably, legislators in this case promoted and enacted legislation that reflected an unethical decision-making process (see Case Study 9.1).

As discussed in this chapter, specifically in relation to the war against drugs and 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).

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 the resulting narrative 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 such as 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).

Rationale for Morality Policy Making

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 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 that 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

Penal policies since the late 1970s have resulted in mass imprisonment and have turned the United States into what scholars have termed “the carceral state” (Gottschalk 2015: 1). On December 31, 2016, there were an estimated 1,505,400 state and federal prisoners (down more than 1% from year-end 2015), and the total state and federal incarceration rate was 450 per 100,000 population (Carson 2018: 1), down from a peak of about 1,615,500 in 2009. The rush to incarcerate increased the rate of imprisonment from 230 per 100,000 in 1979 to 4,508 per 100,000 for U.S. residents of all ages, and 582 per 100,000 for U.S. residents age 18 or older, in 2016 (p. 1). In 2016, the adult male imprisonment rate was 847 per 100,000 (Carson 2018: 9). There are wide variations in the rate of imprisonment among the states. For example, Louisiana has a rate of 777 per 100,000, Mississippi 610, and Texas 569, compared to Minnesota 196 and Rhode Island 204 (Carson 2018: 9).

As of December 31, 2016, about 2.5% of all Black males residing in the United States were incarcerated, and Black males, age 18 to 19, were 11.8 times more likely to be imprisoned than white males of the same age. The imprisonment rate for Black females (96 per 100,000) was almost double that for white females (49 per 100,000), and among

females age 18 to 19, Black females were 3.1 times more likely than white females and 2.2 times more likely than Hispanic females to be incarcerated in 2016 (Carson 2018: 13). At year-end 2016, the total correctional population, including those on probation and parole, was estimated at 6,613,500—that is, about 1 in 38 adults in the country was under some form of correctional supervision (Kaeble and Cowhig 2018: 1).

How does the U.S. incarceration rate compare with worldwide imprisonment rates? The 11th edition of the World Prison Population List covering rates of imprisonment at the end of October 2015 revealed that the United States had the second-highest prison population rate worldwide, comprising 698 per 100,000 persons, following the Seychelles with 799 per 100,000 (Walmsley 2015: 1). This compares to the Russian Federation at 445 per 100,000; a median rate for Europe of 84; Canada at 106; Oceania, including Australia and New Zealand, at 155; Japan at 48; England and Wales at 148; and a world prison population rate overall of 144 per 100,000 (pp. 1–3). U.S. justice and crime control policies locate the country well beyond rates of incarceration experienced in the rest of the industrialized world.

A full discussion of the suggested explanations for this extraordinary and, in worldwide terms, unique rush to incarcerate is beyond the scope of this book, but numerous factors appear to have played a part. One important element has been what is called “penal populism,” as political leaders have adopted policies and programs they believe reflect a punitive turn in public opinion about punishing offenders (see the “Public Opinion About Punishment Policies” section in this chapter). The mass incarceration of persons has taken place in spite of the fact that crime, especially violent and property crime, has been on the decline since the early 1990s (Clear and Frost 2014: 11), and falling crime rates have been reflected in public opinion polls that indicate less concern about crime and more about national security or the economy.

Changes in crime rates are generally agreed to have had little effect on incarceration rates; for example, the last crime peak occurred in 1994, but despite falling crime rates since then, the incarceration rates increased by two-thirds (Clear and Frost 2014: 36). Crime rates do not therefore correlate with punishment. However, rational arguments notwithstanding, punitive justice policies continued to be formulated and implemented long after the crime rate had stabilized, well into the period when crime was diminishing.

In the United States, crime is heavily politicized, is sensationalized by the media, frames the exercise of much political and executive action, is subject to powerful vested interests such as prison unions and the corporate owners

of private prisons whose economic future is tied to a massive prison system, and has created a culture of fear, causing Simon (2007) to state that “the American elite are governing through crime” (p. 4). Scholars have identified the ideology of neoliberalism¹ as fostering punitive punishment policies, and some regard mass incarceration as a natural development of increasing public indifference or even hostility toward those who commit crimes (Pratt 2001: 304). In general, many agree that the **carceral state** is the product of a complex range of historical, institutional, and political events and that no single factor can explain its development (Gottschalk 2015: 10, 14).

In terms of justice policy making, 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 questions, “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?” (p. 2).

Race and Crime Control Policies

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 rights, welfare fraud, busing, and affirmative action. As Tonry puts it, “crime was given a black face”—most specifically in regard to 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 victims' 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 (2011: 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 battle against 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).

Today, young Black males who have dropped out of high school have an incarceration rate that is almost 50 times the national average, and 68% of Black high school dropouts have served time in prison by the age of 34, compared to one-third of white high school dropouts (Gottschalk 2015: 122).

Mass Incarceration as the New “Jim Crow”

In her analysis of the mass incarceration policy, Michelle Alexander sees mass incarceration as “a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow” (2010: 4).² Contending that the war against

drugs (see also Chapter 4) was not launched to combat increased use of crack cocaine but to perpetuate a “racial caste system” in the same way as slavery and Jim Crow laws, Alexander states that mass incarceration functions to lock “people of color into a permanent second-class citizenship” (p. 3). (Chapter 3 discusses how police interactions with Black juveniles and adults can be perceived to operate in the same way, and Chapter 2 shows how police racial profiling in the form of vehicle stops and “stop and frisk” is seen by Blacks as consigning them to a lower level of citizenship.)

Alexander regards the antidrug movement as being concerned with race in that it provided a mechanism for the Reagan administration to “crack down on the racially defined ‘others’—the undeserving” (p. 49). She explains how the war intensified at the same time as inner-city communities were undergoing an economic collapse, with declining employment opportunities, and how residents turned to drug dealing, specifically in crack cocaine, from around 1985 to earn income (p. 51). According to Alexander, mass imprisonment policies have functioned to create a Black undercaste through a network of laws, policies, customs, and institutions that collectively comprise and represent the policy of mass imprisonment, with the aim of ensuring the permanent subordinate status of that group (p. 13).

In a review of the historical trajectory of imprisonment in the United States, Campbell, Vogel, and Williams (2015: 199) found that “race was and remained an important predictor of higher incarceration” even though the weight and importance of other factors varied over time. Specifically, race was especially important as a driving force for public and political demands for greater rates of incarceration and in sustaining those demands even after rates of violent crime had declined. This was especially the case where the context was politically conservative. The researchers explicitly endorse Alexander’s argument as to the central place that race continues to play in any explanation of punishment in the U.S.

Ending Mass Imprisonment?

The notion of “justice reinvestment” first developed in 2003 argued that a reduction in the numbers of persons incarcerated would allow the savings from that reduction to be invested in social and support services and infrastructure in neighborhoods where crime rates are high. This approach would be preferred, it was suggested, over punitive policies focused on incarceration. A Justice Reinvestment Initiative (JRI) was subsequently funded by the federal government and incorporated a process to review and improve state crime policies (O’Hear 2016: 1).

While more than half of the states have participated in the JRI, most extensively California, some have failed to adopt any reinvestment policies and others have devoted only a minor part of savings toward reinvestment. Moreover, states have tended to focus on nonviolent offenders and on technical parole and probation violations. This means that the bulk of offenders who do not fall into such categories have been largely ignored, and therefore incarceration rates remain largely unaffected by the JRI (O’Hear 2016: 2).

State proposals to cut prison 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.³ 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. The U.S. Supreme Court has ruled that California’s overcrowded prisons violate the constitutional prohibition against cruel and unusual punishment (Liptak 2011). The state was ordered to reduce its prison population to 110,000, a figure that was still 137.5% of prison capacity. By year-end 2016, the number of inmates in California prisons was 130,390 (Carson 2018: 6), but the figure had been as high as 175,512 prior to the Supreme Court decision (Sabol, Couture, and Harrison 2007: 14).

In 2010, the **Fair Sentencing Act** reformed drug sentencing by repealing the five-year mandatory sentence for first-time offenders and for repeat offenders with less than 28 grams of cocaine, thereby reducing the sentencing disparity between crack and powder cocaine from 100 to 1 to 18 to 1 (Aviram 2015: 82).

In Alabama, prosecutors have been empowered to send more offenders to boot camps or place them in community corrections. As well, minor drug possessions have been reclassified as lower-level felonies that do not qualify for incarceration, and the number of parole officers has been increased. Alabama spent an average of \$17,285 for each inmate in 2010, while the expenditure for New York was \$60,076 for each of its almost 60,000 inmates in 2010 (Henrichson and Delaney 2012).

Scholars such as Beckett (2018: 244), reviewing the changes in criminal justice policy since the advent of mass imprisonment, have agreed generally that advocates of carceral reform have tended to focus on those convicted of nonviolent crimes or to “non, non, nons,” meaning “nonserious, nonrepeat, and nonviolent offenders.” She suggests there is now an inclination toward seeing only offenders charged with less serious offenses—the “low-hanging fruit” of the incarcerated population—as

deserving of reform. Reform advocates have in effect categorized those incarcerated into categories of those guilty of violent and those guilty of nonviolent crime, with only the latter being worthy of consideration for reform. This perspective has meant that states have continued to expand the sentence of life without parole while at the same time legislating community sentences for drug and nonviolent offenses. It is questionable whether an approach that focuses only on the “low-hanging fruit” will ever seriously reduce incarceration numbers, especially when violent-crime offenders spend so much more time behind bars than do the roughly 60% of persons convicted of less serious offenses (in 2009, drug and property offenders were estimated to spend an average of two to three years incarcerated, as compared to 7.1 years for violent-crime offenders; Beckett 2018: 245).

In her analysis of the new discourse on “cost, frugality and prudence” concerning corrections, Aviram (2015: 4) traces concern about correctional costs to the financial crisis of 2008, when the country went into recession, unemployment was high, mortgages were being foreclosed, and there was a high level of anxiety about the economy. She argues that this new discourse is now to be found in political campaigns and public conversations about corrections generally and that it endorses nonpunitive criminal justice policies that are made viable politically as a measure of fiscal prudence rather than as expressions of any belief in rehabilitation (p. 58). So, for example, it has now become possible to condemn the costs and inefficiency of capital punishment and argue for its abolition without appearing to be “soft on crime.” Instead, the new code word for nonpunitive policies is “smart on crime” (p. 84). Similarly, Clear and Frost (2014: 3) confidently believe that “a combination of political shifts, accumulating empirical evidence and fiscal pressures” have replaced the discourse of being tough on crime, with a belief that the penal system cannot be sustained in its present form.

Nevertheless, as Gottschalk (2015: 8) points out, this does not mean that mass imprisonment will soon end, because there remain substantial justice policy differences between the political right and left, and, as Simon (2014: 3) observes, many of the laws and policies that produced the carceral state remain in place, along with the public mindset about criminality. While there has been a reduction in the rate of imprisonment since 2009, when the prison population reached its peak (1,615,487)—between 2009 and 2016, the total inmate population fell by 7.0%—there has been no major contraction of the prison population (Carson 2018: 3). Given that most corrections costs are fixed in the form of salaries, the only viable path toward reducing spending on corrections is to lay off staff and shut down

prisons and jails (Gottschalk 2015: 9). However, corrections has become a major employer—1 in 8 state employees works in corrections—and powerful corrections unions would strongly resist such measures (p. 32). In addition, arguments that focus on reducing the costs of imprisonment provide some political leaders with an incentive not to reduce the prison population but to create more private prisons, which are supposedly more cost-effective than state prisons, or to exploit prisoners as cheap labor (p. 19).

Reducing the prison population would require fundamental changes in the length of sentences. States have tended to follow the U.S. Sentencing Commission guidelines, which are only advisory and which, until recently, set (by international standards) very lengthy sentences. In fact, length of stay in prison has doubled since 1972, and the rate at which persons are sent to prison for felonies has changed from 25% in 1972 to 75% today (Clear and Frost 2014: 162). The Sentencing Commission gives prominence to retribution and minimizing racial disparities rather than to rehabilitation and has consistently recommended more severe punishments in the form of longer prison sentences for offenses. However, the commission has begun to question the value of the punitive sentences it recommends and in a 2011 report concluded that federal mandatory minimum sentences are “excessively severe” and are not applied in a consistent manner. In April 2014, it voted to reduce the guideline punishment for some drug-trafficking offenses and to make the change take effect retroactively (Gottschalk 2015: 132). The effect of the decision referred to as “Drugs Minus Two” was that most drug-trafficking offenses were decreased in value by two levels, reducing eligible prisoner sentences by an average of about two years. Most reductions were not automatic, and on average those eligible had already served 8½ years instead of 10½ (Horowitz 2015; The Marshall Project 2015). About 50,000 federal drug offenders were eligible for reduced sentences (Gottschalk 2015: 132). Two-thirds were first sent to halfway houses before being released on supervised release, while the one-third foreign citizens were slated for deportation (Horowitz 2015).

Many states now view the justice system as a revenue generator and want police and the courts to generate increasingly more fines and forfeitures.⁴ This means they have a vested interest in maintaining prisons for those who cannot pay (Gottschalk 2015: 34). States rent out their empty beds in prisons to other states or to the federal prison system, and it is now common for inmates to be required to pay for meals, lodging, and medical visits, as well as inflated charges for telephone calls (p. 36). In 2015, the Federal Communications Commission (FCC) capped rates for local and in-state long-distance calls in jail

or prison by up to 50% (Federal Communications Commission 2015).

Some also contend that states overuse prisons because, for those working in the justice system at the local level, sending persons to prison costs nothing because the state pays the costs involved. The annual cost of the state correctional systems is about \$50 billion. For example, Jonson, Lero, Eck, and Cullen argue that “by completely subsidizing prison use, states incentivize local overuse of prisons” (2015: 452). Prosecutors and judges have unlimited scope to incarcerate and to give effect to punitive public opinion because they do not have to pay attention to the cost of a day in prison—local counties do not pay for state prisons (they are paid for by individuals through tax revenue). Options to change this so as to incentive downsizing of correctional populations include charging counties for prison use, capping the number of prison days that counties may use each year, and dividing a state’s correctional budget among the counties on a per capita basis so that counties who exceed their allocation must pay for extra prison days out of local revenue sources (Jonson et al. 2015: 457–463).

Elderly Inmates

A new major area of concern is the elderly prison population, the fastest-growing subpopulation of inmates at state and federal levels. According to the Bureau of Justice Statistics, between 1999 and 2008, the number of incarcerated persons age 55 and older increased by 76% (from 43,300 to 76,400), compared to an increase of 18% in the entire prison population over that period (Aviram 2015: 123). Estimates of the cost of an elderly inmate range from \$60,000 to \$72,000 a year, compared to around \$20,000 for younger inmates, because older inmates experience both physical and mental health problems due to low socioeconomic backgrounds, less education, and a greater likelihood of suffering the effects of sustained substance abuse. At year-end 2016, a 10th (11%) of prisoners sentenced to more than one year in state or federal prison were age 55 older (Carson 2018: 13).

States have responded to the issue of elderly inmates by incarcerating them in special low-security housing, supervised by a reduced number of correctional staff, or by geriatric parole releases into the community, using electronic detention (Aviram 2015: 127, 129). It should be noted, however, that while releasing elderly prisoners with significant health needs will save the states some money, the costs will likely be displaced to Medicaid, Medicare, and other public programs funded in part by the states (Gottschalk 2015: 27).

PUBLIC OPINION ABOUT PUNISHMENT POLICIES

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 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 emphasize 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.

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 DiIulio (in Cullen, Fisher, and Applegate 2000: 2) has argued 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 “Prison and Amenities” Closer Look box addresses one aspect of this issue—amenities in prison.

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.

Public Attitudes Toward Crime

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 9.1). 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 and his colleagues (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.

A CLOSER LOOK

PRISON AND AMENITIES

Amenities for Inmates

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 weightlifting equipment, televisions, radios, and “good” food (Banks 2005: 137). In Maricopa County, Arizona, former sheriff Joe Arpaia’s policies of housing inmates in tents without air conditioning in the more-than-110-degree-Fahrenheit 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, coffee pots, 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 in short supply will have to respond to.

Placing telephone calls from prison to wives, husbands, and relatives used to be an inexpensive process, and until the 1990s, inmates could place and receive calls at rates similar to those charged outside. This might be considered a basic amenity for all inmates. Now, however, the prison telephone system has been turned over to private enterprise and is a \$1.2 billion-a-year industry. Companies in this business commonly set rates and fees greatly in excess of those charged by commercial providers to persons outside prisons. After a series of complaints, the FCC commenced an investigation. The practice is for phone companies to pay hundreds of millions of dollars (\$460 million in 2013) in concession fees to state and local correctional systems for exclusive contracts to control the telephone services offered in prisons. According to the FCC, the fees, which are legal, are used to fund a range of prison costs, from inmate welfare to salaries, and some end up in the revenue funds of the state concerned. Prison and jail officials have fiercely opposed eliminating the fees. In one case, a company fee for using its prison phone service included a charge for processing the bill and another charge if the bill was paid over the telephone (T. Williams 2015).

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)

Michael Tonry (2010: 288) notes that research has revealed that white Americans, “especially politically

conservative and fundamentalist Protestant white Americans, tend to support harsh punishments, including the death penalty,” whereas Blacks support harsh punishments at much lower rates. He attributes this support to “measures of racial animus and resentment” that significantly influence whites’ punitive attitudes (p. 288) and links these attitudes to research that has found that white resentment about the integration of Blacks under civil rights programs has translated into support for the crime-control policies that have criminalized large numbers of Blacks.

Surveys have revealed wide public support for punitive punishment policies between the 1970s and mid-1990s, when crime was rising. Reductions in the level of violent crime since the 1990s (according to FBI data, a decline of 35%, and for property crime, a decline of 25%) have been reflected in public opinion surveys conducted between 1994 and 2013, which show a decline in support for punitive punishment policies, such as tough judicial sentencing, capital punishment, and spending on law enforcement (Ramirez 2013: 1007). A significant new factor influencing public opinion has been the tendency of public officials and the news media to link terrorism with opinions about criminal justice. For example, associations have been made between terrorism, transnational crime, drug trafficking, and street violence (the so-called “lone wolf” terrorist), which have inspired greater public fear (p. 1007). While a majority of Americans supported “get tough” sentencing policies in the 1990s, support for this policy declined from 85% in 1994 to 62% by 2012 (p. 1011). While support for capital punishment depends on the form of the question posed, the Gallup poll that asks respondents only whether they favor or oppose the death penalty still shows a decline since 1994 from 80% in favor to 63% in 2012; in fact, support has been in the 60% range since 2004 (p. 1012). As to whether the death penalty should be imposed more frequently, while

in 1994 64% believed it should be imposed more often, this support declined to 38% before 9/11. After 9/11, support rose to 47% but by 2011 had fallen to 40%. When given the choice of the death sentence or life imprisonment without parole (LWOP), a majority of those polled between 1985 and 1999 preferred the death sentence, but by 2011, the position had reversed, with 48% supporting the death penalty and 50% supporting LWOP.

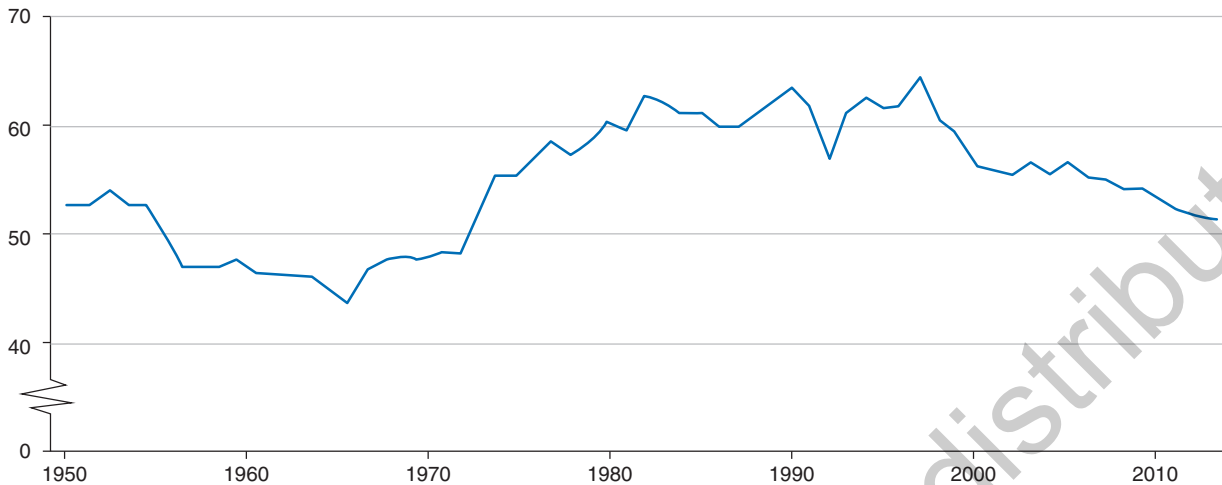
In 1999, when asked about attacking social problems or deterring crime with more law enforcement and more prisons and judges, 61% opted to challenge social problems and 32% wanted more crime control, but by 2004, 57% favored attacking social problems and 39% were in support of more crime control. In 1994, in regard to spending on drug abuse, 52% thought too little was being spent on drug rehabilitation, but by 2012, this had fallen to 45%. A significant variation appears in public opinion on the question of whether too much or too little was being spent on halting the rising crime rate. In 2004, 75% thought too little, but by 2012, this had fallen to 59%. The “about right” response scored only 16% in 1994 and had risen to 33% by 2012 (Ramirez 2013: 1018). A similar public perspective is shown by the question of spending on law enforcement: in 1994, 63% thought too little was being spent, but by 2012, this had fallen to 49%.

TABLE 9.1 ■ 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 polls reported in Flanagan and Caulfield (1984: 42); 1982 Gallup poll reported in “Public Backs Wholesale Prison Reform” (1982: 16); 1986 and 1995 Cincinnati polls reported in Cullen et al. (1990: 9) and in Sundt et al. (1998: 435); 1996 Ohio poll reported in Applegate, Cullen, and Fisher (1997); 1995 and 1996 national polls reported in Maguire and Pastore (1997: 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.”

FIGURE 9.1 ■ Percentage of U.S. Population Supporting Punitive Punishment, 1951–2013

Source: Ramirez, M. D. 2014. "Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies." *The Sentencing Project*. Washington, DC: Sentencing Project Research and Advocacy Reform.

Overall, while a majority of Americans continue to support punitive crime policies, this support has waned since the punitive years between 1970 and 1994, and there has been a consistent decline in support across specific punitive policies such as the death penalty and sentencing.

Public Participation in Sentencing Offenders

Should there be public participation in the sentencing of offenders, and if so, what form might it take? In his summary of the arguments for public involvement in sentencing, Julian Roberts (2014: 228) notes three alternative positions: (a) allow public views to determine sentencing policy and practice, (b) permit some public input into sentencing but keep control of policy within a professional system relying on judges, and (c) do not permit any public participation in sentencing decisions.

In favor of some form of public participation, it is claimed that community involvement in sentencing will ensure greater compliance with the law, because if the criminal law functions according to the wishes of the community, this will build confidence in the system and therefore greater compliance with the law. Problems with this view include the fact that, as noted earlier, the public lacks sophistication in their sentencing responses; in addition, this argument lacks empirical validity (Roberts 2014: 232). While it may be correct that confidence would increase if the community saw the systems imposing punishments that mirror their views, it is argued that this is not sufficient justification to allow *all* punishments to be determined in this way.

If public opinion is to be measured and incorporated into policy, one issue is whether this should be "mass" opinion or more educated opinion. If the decision is for mass opinion, this will mean "unprincipled and capricious sentencing," but if people are educated about the system and about sentencing, the group whose views are sought will not be representative of the public (Roberts 2014: 238).

It is possible to have direct community engagement in the sentencing process. As already noted, one approach is through sentencing guidelines, and another is by using lay decision-makers in the determination of sentences. A further possibility is through juries who decide both guilt and sentence. However, when juries sentence in death penalty cases, they have already been screened to be "death qualified," so they are no longer truly representative of the community. In addition, studies have shown that in capital cases, jurors tend to vote in favor of execution and are non-responsive to mitigation (Roberts 2014: 242). In a small number of U.S. states, juries sentence offenders in non-capital cases, and research comparing their sentencing with that of a judge reveals the jury sentencing to be more variable and that juries impose significantly longer sentences. One problem for jury sentencing is that the members of a jury would inevitably deliver one-off decisions because they have no knowledge of sentences imposed for similar offenses in the past. This means there would be an absence of consistency and proportionality in sentencing. Far better, it is argued, to leave sentencing decisions to professional judges who have accumulated sentencing knowledge over long periods (p. 243).

Most recently, debates about public participation in justice policy making have centered on the notion that there is a disconnect between policy makers and the public. Some argue that so-called penal populism (the idea that punitive justice policies reflect the will of the public) is misconceived and that a proper engagement between the public and policy makers would result in different policies. The form that such an engagement might take is problematic, but it includes putting issues before a jury as discussed above and forms of restorative justice that would produce punitive outcomes (Bennett 2016: 124; Brooks 2016: 155). Those advocating greater public participation in justice policy making are generally in agreement that “the assumption of an automatic punitiveness among the general public is overstated” and that the key issue is a lack of democracy (Copson 2016: 166). The value of results from surveys and opinion polls that commonly measure public opinion on justice issues is therefore questioned, because they capture views at a particular moment in time and are not in any way the outcome of adequate public deliberation and debate (Turner 2016: 224). This discussion has shown that ethical decision-making is often sacrificed in the interests of expediency and under pressure from cost/benefit analysis, as is common in the case of morality policy making—such as that regarding punishment, moral panics, and ideological stances—as quick fixes 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, privatizing prisons, and crimmigration.

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 Sen. 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 against 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.

“Three-Strikes” Legislation as Criminal Justice Policy

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 the legislative branch (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 victims’ 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.

Content and Operation of Three-Strikes Laws

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 strikable 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 five 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 ranged 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 had been 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). In 2010, the California state auditor reported on the fiscal impact of three strikes, finding that “striker inmates . . . were sentenced on average to an additional nine years of incarceration” and that “these additional years represent \$19.2 billion in additional costs over the duration of the sentences of current striker inmates” (Aviram 2015: 143).

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.

Criticisms of Three Strikes

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 had apparently never been 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).

Three Strikes and Penal Ideology

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 such as “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).

Three-Strikes Laws and Public Opinion

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 3–1 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

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, but while Nixon had specifically declared a *global war* on drugs, Reagan shifted the focus of the war to *domestic* concerns, namely “big-time organized crime and the drug racketeers who are poisoning our young people” (quoted in Moore 2015: 201). While Nixon considered drug users to be victims, Reagan did not and drew little distinction between traffickers and users (p. 203). Both Democrats and Republicans promoted and supported the initiative—the latter in an effort to win back the “Reagan Democrats” of the South captured by Reagan under the so-called Southern Strategy (Alexander 2010: 55).

Not until 1986 and 1988 was actual drug abuse legislation 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).

Crime-Control Politics and the War on Drugs

In her discussion of the origins of this war, Moore (2015: 145) traces its genesis to the politics of crime control, arguing that the federal government of the 1970s wanted to enlarge its role in crime control—normally a matter for the states—and that in seeking a rationale for this, it seized upon a purported drug problem that would justify federal action to criminalize drug abuse. Under the Nixon administration, the 1970 Comprehensive Drug Abuse Prevention and Control Act introduced a classification system for licit and illicit drugs and, based on this, criminalized drug distribution, possession, and use (p. 145). The 1970 act set a mandatory minimum sentence of 10 years for some drug-trafficking offenses and up to 25 years for dangerous drug offenders (p. 147). It also empowered police to forcibly enter homes to search for drugs—the so-called “no-knock” warrant (p. 150).

Drug classification powers under the 1970 act were vested in the attorney general, ensuring that future drug policies would be framed as issues of crime control rather than as issues of prevention and treatment. From this starting point, U.S. drug policy has consistently focused on the supply side and not on the demand for illicit drugs.

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 five 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 to only a five-year mandatory minimum if the amount equaled or exceeded 500 grams. The legislation therefore extended the reach of antidrug laws to users as well as traffickers. As well, the act provided that owners of buildings where crack-related offenses occurred were liable on conviction to a sentence of 20 years’ imprisonment, and judges were prohibited from ordering probation for a drug offense (Moore

2015: 148). In this legislation, drug abuse was presented as a national security issue, and the drug war 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 that 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 anti-drug 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. Nevertheless, the Clinton administration continued to promote the war against drugs with the enactment of the 1994 Violent Crime Control and Enforcement Act that established the “three strikes and you’re out” provision that imposes life imprisonment on conviction for a third felony (Moore 2015: 148). Importantly, the 1994 act enabled the designation of areas as drug and violent crime “emergency areas,” in which federal and local law enforcement could pool their resources and target specific, usually Black, neighborhoods (p. 150). These joint task forces have figured significantly in the militarization of policing throughout the country (see Chapter 2 on police militarization). Alexander argues that the 1994 law enabled the Democrats to show they had finally seized the law-and-order issue from the Republicans (2010: 56).

Fighting the War on Drugs: Prosecutions and Incentives

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% in 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 were brought into account, the total expenditure on the drug war would amount to approximately \$100 billion every year (p. 215). Huge cash grants were made available to the states under the federal Byrne Program, and in some states, 90% of such grants have funded specialized drug units and task forces, most of which are militarized

(Alexander 2010: 73). (See Chapter 2 on police militarization and federal support for weapons and equipment for law enforcement to conduct the fight.) Incentives to states, and especially to law enforcement, to promote the war also included the power to seize cash and assets of drug offenders and retain them for their own use. According to a report commissioned by the Justice Department, drug task forces seized over \$1 billion in assets between 1988 and 1992 (pp. 78–79).

Drugs and Incarceration

In 2015, an estimated 15.2% of prisoners were held for drug law violations in state facilities. This compares to violent offenders, who constituted about half of all inmates in state prisons (54.5%; Carson 2018: 18). 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). In 2015, of the 89,000 women serving sentences in state prisons, 21,900, or 24.9%, were serving sentences imposed for drug offenses (Carson 2018: 18). As Alexander (2010: 60) points out, while in the public mind the war on drugs was aimed at drug lords and big-time dealers, in practice, a majority of drug arrests were for possession, with only 1 out of 5 arrests being for selling drugs. Arrests for possession of marijuana accounted for almost 80% of the growth in drug arrests in the 1990s. Between 1980 and 2005, the number of annual arrests for drug offenses more than tripled (p. 72). 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 were repealed following the determination that they had little or no effect on drug use or crime in New York (Bush-Baskette 1999: 221), and in 2009, the New York State legislature enacted a drug reform package that essentially gutted what remained of the Rockefeller drug laws (Gottschalk 2015: 168).

As well as increasing the size of the inmate population generally, the war against 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 drug war on incarcerating drug offenders and in a move toward a more treatment-oriented approach, the voters of California approved a proposition in November 2000 by a large majority 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 three 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). By 2004, the Justice Policy Institute was advising states that survey research had revealed that in general, providing substance abuse offenders with treatment was more cost-effective than incarceration (McVay, Schiraldi, and Ziedenberg 2004).

Larry Gaines and Peter Kraska (1997), in their critique of the drug war, argue 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. (p. 4)

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;

A CLOSER LOOK

LIGHTER SENTENCES FOR CRACK COCAINE CASES

Under a 1986 law, first-time offenders convicted of selling 5 grams of crack cocaine received the same five-year mandatory prison sentence as dealers of 500 grams of powder cocaine. African Americans account for about 80% of federal crack cocaine convictions (crack cocaine is much cheaper than powder cocaine), and sentencing guidelines set lighter sentences for selling powder cocaine, a substance popular with whites and Hispanics. This divergence in sentencing provoked criticism that the judicial system is explicitly racially biased in such cases. Consistent pressure in Congress to revise the law ensued, and on April 7, 2008, the Supreme Court addressed this long-standing issue. With a 7–2 margin, the Court ruled that judges can impose lighter sentences for crack cocaine and ecstasy cases than are specified in the federal guidelines.

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 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 the prison term of 19 to 22 years called for under the guidelines as excessive. The Supreme Court did not agree with the appeal court that reducing the sentence to 15 years amounted to “an abuse of discretion.”

The Fair Sentencing Act of 2010 later reduced the disparities between those sentenced for crack and powder cocaine offenses, thereby reducing the ratio of the mandatory prison term from 100:1 to about 18:1. On June 30, 2011, the commission voted for retroactive application of the Fair Sentencing Act of 2010.

Sources: Mikkelsen, Randall. 2007, December 10. “Supreme Court Allows Lighter Crack Cocaine Terms.”

see the “Lighter Sentences Now Possible for Crack Cocaine Cases” Closer Look box.)

Enthusiasm for the fight against drugs appears to have started to wane from the mid-1990s; for example, in 2009, Minneapolis became the first major city to disband its special drug unit as a cost-saving measure. Thirty-one states, the District of Columbia, and the U.S. territories of Guam and Puerto Rico now allow the use of cannabis for medical use. The recreational use of cannabis is decriminalized in 13 states and legalized in 9 others as well as in the District of Columbia, and many now give a low degree of priority to enforcing marijuana laws (National Conference of State Legislatures 2018). The war on drugs is no longer the paramount force driving the rate of incarceration: from 2000 to 2008, offenses involving violence constituted 60% of the growth in the size of the state prison population, and in this period, the number of sentenced drug offenders declined by 8%.

Nevertheless, at the federal level, the well-entrenched Drug Enforcement Administration continues to conduct the war against drugs, and in 2011, drug charges were the primary reason for the incarceration of almost half of all federal prisoners (Gottschalk 2015: 128–129). States continue to show reluctance in enacting truly reformist penal legislation. For example, in 2012, Massachusetts enacted what the then-governor described as “balanced” penal reform. The legislation comprised a harsh new three-strikes law and some minimal reductions in drug-related

punishments at a time when the state’s prisons were operating at almost 150% of capacity (p. 167).

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 anti-drug movement 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 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 eight 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. In the United States, there now exists 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 public, politicians, and the media had begun to express a sense of crisis about sex offenders, sexual predators, child rapists, and pedophiles. “Sex offense” came to mean a criminal act involving a pedophile, despite the wide range of acts that constituted sex offenses; many laws penalized a variety of acts termed *sex offenses*. These ranged from making obscene telephone calls to urinating in public to consensual sex between teenagers and to the rape and murder of a child (Gottschalk 2015: 197). In Washington State, any offense committed “for the purpose of sexual gratification” requires registration and notification. In California, a conviction for “lewd

and lascivious conduct” or committing the misdemeanor of indecent exposure has a similar effect. In New York, there are 36 sex offenses, several of which require no actual sexual conduct (Clear and Frost 2014: 96). Federal interest in sex crimes accelerated, and the federal government began to organize joint operations with state and local law enforcement to pursue them, including the Project Safe Childhood, started in 2006, that was aimed at investigating and prosecuting Internet-based crimes against children (Gottschalk 2015: 199).

Laws, Prosecutions, and Punishments

This concern was translated into punitive legislation in some states, despite the fact that data showed that rates of rape and sexual assault were falling rapidly. 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, such as family ties, diminished capacity, and educational or vocational skills (Bibas 2004: 295–296).

Between 1993 and 2000, convictions for sex offenses increased by 400%. Between 10% and 20% of state prisoners are now serving sentences for sex offenses, and in some states, the rate is almost 30% and sentence lengths have exploded (Gottschalk 2015: 199). In 2010, the Ninth Circuit Court of Appeals ruled that a life sentence imposed on a Washington man with a previous sex offense conviction who briefly touched a five-year-old girl between her legs as she was riding down a slide in a play area was not grossly disproportionate, and in 2010, Oklahoma legislators approved a bill that would permit the execution of repeat offenders who sexually abuse children. The bill effectively ignored the Supreme Court decision in *Kennedy v. Louisiana* in 2008 that held unconstitutional the imposition of the death penalty in the case of child rape (p. 199).

In addition, penalties for possessing child pornography⁵ have been increased, creating in some cases what amount to life sentences, as mandatory minimum sentences can be imposed for each illegal image possessed—an Arizona teacher with no previous convictions received a

sentence of 200 years for possessing 20 images of children judged to be pornographic (Gottschalk 2015: 200).

Registration, Surveillance, and Monitoring of Sex Offenders

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).

The 2006 act was upheld by the U.S. Supreme Court in the *Comstock* decision, with the Court indicating that state and federal authorities had “virtually unfettered power to preventatively detain sex offenders” (quoted in Gottschalk 2015: 203). The Adam Walsh Act, ostensibly aimed at violent sex offenders, explicitly provides that nothing in the law requires a person to have actually been convicted of such a crime for civil commitment to be invoked (p. 203).

The federal government has increasingly involved itself in the punishment of sexual predators and, in 1994, included in the Jacob Wetterling Act 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 (Lynch 2002: 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 nine-year-old Jessica Lunsford, requires the lifetime GPS monitoring of sex offenders. Most recently, at least 30 states have imposed

restrictions on places of residence and employment of all sex offenders, regardless of the seriousness of the crime, and have designated large parts of some localities as off-limits to them. One effect of this has been that there is virtually no lawful place of residence for sex offenders in the city of San Francisco (Gottschalk 2015: 209).

The Adam Walsh Act now requires that juvenile sex offenders, 14 years or older, be automatically registered as sex offenders for life with a minimum period of registration of 25 years. This requirement constitutes a significant constraint to a juvenile's efforts to reintegrate into society following release and appears to contradict judicial rulings that acknowledge that juveniles lack the moral capacity of adults (Evans, Lytle, and Sample 2015: 151–152).

While other countries also require registration of sex offenders, the United States is exceptional in the wide scope of its registration requirements. For example, it is common in other countries to provide for only short registration periods and for the information to be limited to law enforcement and not made available on the Internet. These countries have determined that onerous registration requirements do not enhance public safety but rather promote forms of vigilante violence and adverse public reactions that constrain the reintegration of sex offenders into society (Gottschalk 2015: 205).

Research studies reveal that community attitudes toward sex offenders are more negative than attitudes toward offenders in general. The victims' rights movement, with its strong links to prosecutors, has been a forceful advocate of severe penalties for sex offenders (Gottschalk 2015: 197). 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).

Policy making on sex offending has been driven by a media focus on sexual predators who have committed the most heinous crimes. Lesser crimes have been subsumed to the most heinous. This concentration on isolated sex crimes committed by strangers has ignored the fact that most sexual offenses are committed by family members and family friends (Wright 2015b: 2–3). Policy makers have disregarded empirically strong evidence about who

commits sex crimes and rates of sex offender recidivism in favor of punitive and simplistic policies (Wright 2015b: 5).

The data on recidivism suggests that sex offenders do not have higher recidivism rates than other offenders (Evans et al. 2015: 154). A 2002 study by the Department of Justice found that of 272,111 former prisoners, 67.5% were rearrested within three years of release. Rapists were among those with the lowest recidivism rate—46%—and the rate for other sex assault offenders was 41.4%. These rates compare to those for robbers at 70.2%, burglars at 74%, and individuals possessing and selling stolen property at 72.4% (F. Williams 2015: 31). In addition, policy makers have consistently argued that treating sex offenders is ineffective because it does not prevent them from reoffending. Generally, studies have shown that treatment, however, can be effective for some offenders, especially for those who seek voluntary treatment, and that treatment reduces recidivism (F. Williams 2015: 37).

Civil Commitment

The group termed *sexually violent predators* 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 “States Detain Sex Offenders After Prison” Closer Look box). 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. In 1997 in the *Hendricks* case, the U.S. Supreme Court upheld civil commitment laws that were “nonpunitive.” Civil commitment has been used to commit persons with no prior record of sex offenses. They have been certified to be “sexually dangerous,” and offenders serving sentences for crimes such as possession of child pornography or making obscene telephone calls have also been civilly committed (Gottschalk 2015: 210).

As discussed earlier, the moral panic about sexual predators and violent sexual predators (which, according to Gottschalk [2015: 196], has “uncanny parallels with the war on drugs”) has employed three distinct mechanisms in the overall response to this criminality—namely, impose harsher sentences, require that sex offenders be registered and that the community be advised of their whereabouts, and impose indefinite civil commitment of those sex offenders who have completed their sentences. As of 2012, about 725,000 persons were registered as sex offenders in the United States, that is, about 1 in 500 persons, constituting approximately double the number from 10 years before (p. 205). At least 17 states require that registration be for life, and in a number of states, all sex offenders, regardless of the nature of their crime, are listed in publicly

accessible registries that give details of place of residence, email addresses, place of employment, and vehicle license plate number (p. 207).

Sexual Predators: A Moral Panic

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 “cyberpredator” “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

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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). Davey and Goodnough estimated the cost to taxpayers at four times the cost of keeping them in prison (p. 1). In 2007, the authors reported that slightly fewer than 3,000 sex offenders had been committed since the law passed in 1990. Of those, only 81 had been fully discharged from commitment because they were considered ready. Another 115 were released due to “legal technicalities, court ruling, terminal illness or old age” (p. 1). In 2015, the number of pedophiles, rapists, and other sexual offenders who were being held indefinitely in civil commitment centers in 20 states was 5,400 (The Marshall Project 2016).

The U.S. Supreme Court has upheld such laws 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 residents 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 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 were not the most violent, according to an investigation of existing programs by the *New York Times*. They discovered that committed offenders included exhibitionists, while some rapists were not included, and some were beyond the age where they were considered dangerous. They found, for example, that one confined person was a 102-year-old man in Wisconsin who had memory loss and poor hearing. The average annual cost per person in 2007 was \$41,845. In 2017 in New York State, the cost of housing 231 sex offenders at the Central New York Psychiatric Center in Marcy was estimated at \$175,000 each (Ronison and Bandler 2017).

Source: Davey, Monica and Abby Goodnough. 2007. “Doubts Rise as States Detain Sex Offenders After Prison.” *The New York Times*, March 4.

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.

In his discussion of Megan’s Law, Jonathan Simon (2000: 15) points out that 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 points out 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.⁶ 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).

Juvenile 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 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.”

Internet Sexual Solicitation

Most recently, media and political attention has been directed at the use of the Internet for sexual purposes. It is beyond the scope of this chapter to fully examine this complex issue, but concern has focused generally on

adults who employ the Internet as a means of securing sexual gratification through conduct that includes cybersex, voyeurism, exhibitionism, and role play. Some adults also use the Internet with the aim of meeting and having sexual relationships with children. It is this conduct that has become a media stereotype and arguably achieved the status of a moral panic, with claims that adults are “stalking” the Internet to sexually solicit children (Jewkes 2010: 9; Wright 2015b: 81).

Policies designed to combat Internet sexual solicitation include “sting” operations where law enforcement use entrapment to identify online offenders before they can attempt to sexually assault children. Federal assistance has been provided to Internet Crimes Against Children (ICAC) task forces in learning how to conduct sting operations.

Public awareness of sting operations was greatly increased between 2004 and 2007 when the cable channel MSNBC conducted and televised sting operations that identified adult males seeking to develop online relationships with fictional juveniles. In reality, the fictional juveniles were adult members of an online advocacy group. Following a meeting between the predatory male and the fictional juvenile, law enforcement would arrest the former at an agreed location. The show, called *To Catch a Predator*, attracted an average audience of 11 million but was castigated by a federal judge as having “crossed the line from responsible journalism to irresponsible and reckless intrusion into law enforcement” (Wright 2015a: 95–96).

Generally, there is an absence of empirical data on the incidence of Internet sexual solicitation because of the difficulties involved in conceptualizing the activities that could be said to amount to solicitation, the anonymity of the Internet itself, the wide range of self-reported youth victims identified in studies (ranging from 6.5% to 21% of those surveyed), and other methodological challenges. Studies have shown that those soliciting youth use a variety of techniques, some aiming for rapid sexual gratification while others engage in lengthy “grooming” of their victims. Youth surveys have shown only low rates of sexual outcomes (Schulz, Bergen, Schuhmann, Hoyer, and Santtila 2016: 166–169).

CAPITAL PUNISHMENT

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 concentrates 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.

The Supreme Court, the States, and the Death Penalty

In 1972, the Supreme Court in *Furman v. Georgia* struck down the death penalty in the 35 states that then imposed capital punishment. Some four years later, as a result of three other cases, the Supreme Court authorized capital punishment, as 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 had occurred in the state of Texas. Between 1976 and 2018, out of a total of 1,483 executions in the U.S., 555 occurred in Texas and another 112 in Oklahoma (Death Penalty Information Center n.d.d), comprising 37.5% and 7.5% of the total, respectively, and together 45% of all executions. 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 *Stanford v. Kentucky* (1989), the Supreme Court found that the execution of offenders age 16 and 17 years was sanctioned by the Constitution. 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.

State Policies on Capital Punishment

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 19 aggravating circumstances in Alabama, Delaware has 22 special circumstances, and Kansas has 7 "homicide situations" (Culver 1999: 294; Death Penalty Information Center n.d.a). 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 have had to 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). The situation up until 2008 is aptly summarized by Bedau, writing in 1996:

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).

As noted earlier, 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 age 16 and 17 years was sanctioned by the Constitution. Since the Supreme Court's decision in 2005 in *Roper v. Simmons*, the execution of juvenile offenders who were under the age of 18 years when their crimes were committed is no longer permitted.

Following the wrongful conviction movement that led to hundreds of post-conviction exonerations, the public narrative began to shift when long-accepted assumptions about eyewitness testimony, confessions, and aggressive adversarial practices were brought into question. In 2007, when Attorney General Alberto Gonzales moved to limit the time death row inmates could spend pursuing appeals before being executed, concerns were raised (Death Penalty Information Center n.d.c). For example, Senators Leahy and Spector wrote the attorney general to ask about the inclusion of adequate protections for indigent defendants and request a delay to ensure that "the new regulations included specific and clear representation guidelines."

In 2018, Amnesty International reported that 106 countries have now abolished the death penalty—more than half of the total of 195 nation states. Amnesty reported there had been at least 1,032 executions in 23

A CLOSER LOOK

RETENTIONIST AND ABOLITIONIST COUNTRIES ON THE DEATH PENALTY IN 2017

- Abolition countries, having abolished it for all crimes: 106 countries
- Abolitionist for ordinary crimes only, while retaining it for only exceptional crimes, such as under military law: 7 countries
- Abolitionist in practice, having not imposed it during the last 10 years, having made an international commitment not to impose it, or having a policy or established practice of not conducting executions: 29 countries
- Totally abolitionist in law or practice: 142 countries
- Retentionist countries who retain it for all crimes: 57 countries

Source: Amnesty International 2016.

A CLOSER LOOK

THE UNITED STATES AND THE DEATH PENALTY

Why does the United States retain the death penalty in the face of a worldwide abolitionist trend? Many commentators, including Zimring (2003), have pointed out that the U.S. federal system of government allows each state to make its own choice concerning the retention or otherwise of the death penalty, and most executions are performed in a very few states. Consequently, to speak of the United States as a retentionist nation is somewhat misleading. Zimring argues that the attention given to victims of homicide means that the death penalty amounts to a policy response to murder that represents an “undertaking of government to serve the needs of individual citizens for justice and psychological healing” (2003: 49).

The latest data on the death penalty in the U.S. reveal that at year-end 2017, 30 states and the federal government had laws authorizing the death penalty, while 3 states had a gubernatorial moratorium (Death Penalty Information Center n.d.f). There were 2,814 prisoners held under sentence of death at year-end 2016, nearly half of them in California, Florida, and Texas. In 2016, for the sixteenth consecutive year, the number of prisoners under sentence of death decreased. Twenty prisoners were executed in 2016, the lowest number since 1991, when 14 were executed (Davis and Snell 2018: 2).

In his analysis of the American death penalty, David Garland argues that it is necessary to view the death penalty as being situated in a “complex field of institutional arrangements, social practices and cultural forms” that he calls the “capital punishment complex” (2010: 14). The American form of capital punishment has adapted over time and, according to Garland, has evolved into “an assemblage of practices, discourses, rituals and representations” following the demands of society and the various forces that influence its operation (p. 19).

Like other commentators on this topic, Garland sees links and commonalities between the death penalty and lynching:⁷

- Executions are concentrated in the South.
- The death penalty is a subject of local politics and populism expressed in the election process at various levels and for various offices.
- The death penalty disproportionately targets poor Blacks who commit crimes against white victims.
- The death penalty is energized by heinous crimes and racial hatreds, and it continues to provide drama (Garland 2010: 35).

Garland argues that many of the social forces that prompted lynching also promote capital punishment (2010: 35). Accordingly, the death penalty in the United States has some uniquely American features, including the link between capital punishment, the justice system, and due process. The due-process protections granted to condemned prisoners by the U.S. Supreme Court mean that the average time spent on death row in the United States is lengthy—in 2007, it was 12 years (p. 45).

Another uniquely American feature, according to Garland, is that “the death penalty is depicted as a vital expression of local community sentiment, as moral outrage authentically expressed, as collective choice, and community justice” (2010: 62). The election of judges, prosecutors, and police chiefs by a popular vote in many states ensures that community views on punishment generally are transmitted to law enforcement and operationalized in its policies and operations. Advocacy for the death penalty signifies being “tough on law and order” generally (pp. 121, 162, 246).

Unlike European nations, the U.S. federal government lacks the centralized control of justice policy that would enable the abolition of the death penalty. Instead, the death penalty is continuously litigated as a constitutional issue, with the outcome, as Garland (2010: 191) explains, that the rulings of the Supreme Court “enhance the perceived lawfulness and legitimacy of capital punishment and thus act as a force for its conservation.” Regional differences between the South⁸ in terms of the incidence of executions (and the history of slavery, racism, and lynching) and the remainder of the country also provide explanations of U.S. divergence from the mainstream.

In summary, Garland contends that historical and cultural legacies, institutional structures, deeply rooted democratic forms and practices, and a shift to a victim-centric law-and-order politics, operating collectively, have created constraints to the total abolition of capital punishment throughout the United States. The “capital punishment complex” in the United States now exists independently of any association with crime control, instead serving various partisan and political interests as well as those of the media. Because it exists in a form peculiar to the United States, it is resistant to arguments that have brought about its total abolition in other nations. Accordingly, Garland concludes, capital punishment is an assured element of contemporary U.S. culture (2010: 286).

different countries in 2016 and 993 in 2017, a decrease of 39% compared with 2015. This figure takes no account of executions occurring in China, where no official data

are available but where Amnesty puts the total in the thousands and greater than the rest of the world combined. Four countries conducted 84% of executions in 2017, down 2%:

Iran (more than 507), Iraq (more than 125), Saudi Arabia (more than 146), and Pakistan (more than 60). In 2016, the United States ranked seventh in conducting executions (20), but it ranked eighth in 2017 (23).

Public Opinion on Capital Punishment

In a comprehensive review of public support for capital punishment, Cullen and colleagues (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 (p. 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 is actually innocent (pp. 11–12). It is interesting to note that in the two 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). Similarly, a 2010 poll by Lake Research Partners found that "a clear majority of voters (61%) would choose a punishment other than the death penalty for murder (Death Penalty Information Center n.d.b).

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 (Cullen et al. 2000: 21). The obvious conclusion is that legislators appear to be a significant barrier to substituting alternatives for capital punishment. It is important to note 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). As of April 1, 2018, Blacks constituted 34.3%, Hispanics 8.2%, whites 55.8%, Native Americans 1.09%, and Asians 7% of executions in the U.S. (National Association for the Advancement of Colored People 2018: 6).
2. 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. At year-end 2016, among prisoners under sentence of death, a total of 55% were white and 42% were Black (Davis and Snell 2018: 2). Miscarriages of justice occur and the innocent are executed. Of cases resulting in execution since 1976, 76% of murder victims were white even though only 50% of murder victims nationally are white (Death Penalty Information Center n.d.b).

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 since the advent of DNA testing in 1985. In one case in 1989, a prisoner spent 12 years in a Texas prison and came within three 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,” as well as evidence pointing to a different suspect, which the police ignored (p. 88). See Figure 9.2 for DNA and non-DNA exonerations.

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 five 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

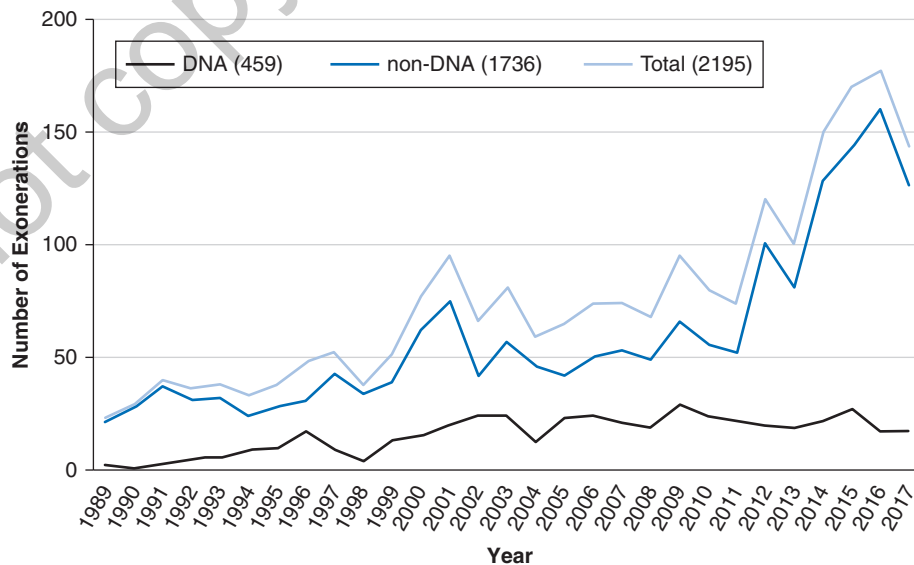
despite the efforts of the states and the courts to devise legal formulas and procedural rules . . . the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. . . . Experience has taught us that the Constitutional goal of eliminating arbitrariness and discrimination 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

FIGURE 9.2 ■ Exonerations by Year: DNA and non-DNA



Source: National Registry of Exonerations 2018.

(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 6, 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* (1972), 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.

A CLOSER LOOK

DEATH BY LETHAL INJECTION: DEGRADING TO HUMAN DIGNITY?

In the case of *Baze v. Rees* (2008), the U.S. Supreme Court affirmed a particular method of lethal injection for capital punishment. The case concerned the use of a “cocktail” of three drugs in Kentucky—the same one used by virtually all states. The first drug brings unconsciousness, the second paralyzes the muscles, and the third kills by stopping the heart. The third drug is “excruciatingly painful” (Oliver 2015: 95).

It was claimed that the use of the drugs violated the Eighth Amendment’s prohibition of cruel and unusual punishment because the drugs carried a risk of inflicting unnecessary pain. The Court found the method to be humane and constitutional and said that an “isolated mishap alone” did not violate the Constitution. It also stated

that the first drug in a multidrug cocktail must render the inmate unconscious. Otherwise, there is a “substantial, constitutionally unacceptable risk” that the inmate will suffer a painful suffocation. The Court said that a future challenge to the lethal injection protocol would have to show that the protocol presents “a substantial risk of serious harm” or an “objectively intolerable risk of harm” and that there exists a feasible alternative that can be operationalized that “would significantly reduce a substantial risk of serious pain” (Gee 2011: 217).

Since 2008, there has been a change in circumstances because of drug shortages. One of the three drugs, the first in the cocktail that renders the prisoner unconscious, pentobarbital, is no longer made by its European

pharmaceutical manufacturer, Lundbeck, now Akorn, which will no longer sell drugs that are to be used in conducting executions (Jolly 2011). As a result, states have been forced to revise their lethal drug injection protocols. According to the Death Penalty Information Center (n.d.e), eight states have used a single drug and six more have announced plans to do so but have yet to carry out any executions. Fourteen states have used phenobarbital (commonly used to euthanize animals), with five more planning to do so. Ten states have used or plan to use compounding pharmacies to secure drugs. The unavailability in full of the previous cocktail of drugs has effectively halted executions in several states. States that have tried to use non-FDA-approved drug suppliers have had their drugs seized.

It has been argued that using untested cocktails of drugs in executions calls into question the humanity of using lethal injections to kill persons. Moreover, using untested lethal injection methods ought to be regulated in the same way as human subjects' research, because these methods of execution in effect constitute experimentation on human beings. Regulation is therefore required to ensure that executions using lethal injections are conducted with the minimum degree of suffering (Salk 2015: 284).

One of the first executions using a new combination of drugs occurred in 2014 in Ohio, but the prisoner, Dennis McGuire, was heard making gasping, snorting, and choking sounds during the death process. Witnesses say that he was rendered unconscious but then started moving and gasping a few minutes later. In terms of the Supreme Court decision, it is problematic to state that he was rendered unconscious and therefore could not experience pain. In July 2013, Joseph Wood died in Arizona after nearly two hours, following 15 injections of midazolam and hydromorphone, 15 times the amount mandated in the state's execution protocol. Witnesses said that Wood gulped and gasped during this process more than 600 times (Dart 2014).

The sanitizing of death through elaborate regimes of killing by lethal injection is intended to inflict a "clean death" and was said by Chief Justice Roberts to preserve the dignity of the procedure because the second drug prevents involuntary seizures or convulsions during the period of unconsciousness. However, Justice Ginsburg argued that once the second drug that brings paralysis is injected, it is impractical to further monitor the prisoner's consciousness without additional equipment and training, and that there would be no explicit indication if the prisoner was in fact suffering pain. In other words, when the prisoner is paralyzed, it is not possible to tell visually if he or she is conscious.

In spite of this, the evidence shows that in a number of states, the so-called consciousness check is performed not by a medical professional but by prison staff.

A study of postmortems of prisoners executed by lethal injection found that "prisoners may have been capable of

feeling pain in almost 90% of cases and may have actually been conscious when they were put to death." The muscle relaxant component of the drug cocktail effectively masked the ability of the prisoner to indicate he or she was experiencing pain (Oliver 2015: 99).

In April 2015, the Supreme Court heard oral arguments in the case of *Glossip v. Gross* concerning the constitutionality of using the drug midazolam to bring unconsciousness in executions. The plaintiffs, all inmates on Oklahoma's death row, argued that midazolam has no pain-relieving properties and "cannot reliably produce a deep, comatose unconsciousness" to ensure the inmate doesn't experience "intense and needless pain and suffering" when the paralytic and heart-stopping drugs are injected (Howe 2015). In June 2015, the U.S. Supreme Court ruled in this case that the claimants had failed to meet the test that use of the drug did not entail a substantial risk of severe pain and had not identified an available and preferable method of execution that would overcome the alleged deficiencies of the drug midazolam (Liptak 2015).

One response to the issues posed by the lethal injection method has been to adopt alternative methods. Rather than go back to hanging or electrocution, the state of Utah passed a law that would make it the only state in the country to carry out a death sentence by firing squad if there is a shortage of execution drugs. The sponsor of the law argued that death by firing squad was a more humane form of execution because a team of trained marksmen would ensure that death was speedy and not long-drawn-out, as has occurred with the lethal injection method. Others disagreed, arguing that firing squads amounted to revisiting and reinventing the Wild West days of the state and would be condemned internationally. Similar legislation has been introduced in Arkansas.

In February 2018, Alabama attempted to execute Doyle Hamm, age 60, who was suffering from terminal cranial and lymphatic cancer. His lawyer had warned that his physical condition rendered his veins unusable for lethal injection. In a failed execution reported to have been "horribly botched," executioners repeatedly punctured Hamm's legs and groin over more than two and a half hours in unsuccessful attempts to insert an IV line.

In March 2018, Oklahoma announced it planned to replace execution through lethal injection with nitrogen gas asphyxiation due to "the well-documented fact that states across the country are struggling to find the proper drugs to perform executions by lethal injection" (Death Penalty Information Center 2018b).

In February 2018, it was reported that Missouri had carried out 17 executions between 2014 and 2017 using pentobarbital that it had secretly obtained from a pharmacy that the Food and Drug Administration had classified as "high risk" because of repeated serious health violations (Death Penalty Information Center 2018a).

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.

THE "CRIMINALIZATION" OF IMMIGRATION

In the United States and in some European states, immigration policy and law have become increasingly complex and contentious. The ethical correctness of policies such as those applied to asylum seekers and economic migrants has been questioned. Philosophers, especially scholars of political philosophy, have until quite recently focused largely on highly abstract immigration issues such as the circumstances under which states are entitled to refuse admission to outsiders—the "open borders" question—and whether they may ethically expel them from

within their borders and for what reasons. Only recently have scholars adopted a more applied perspective and addressed issues such as the ethics of deportation, immigrant misconduct, detention for the purpose of deportation or prosecution, and the legal status of undocumented immigrants who have resided in a state for many years but who entered without permission (Reed-Sandoval 2016: 21; Sager 2016: 7, 8).

Given the scope and complexity of U.S. immigration policy, this text will not engage with highly abstract questions about the ethics of immigration generally. Instead, the following discussion focuses on an issue of special concern to criminal justice and criminal justice ethics, namely, what numerous scholars have termed the "criminalization" of immigration, or "cimmigration" in the United States. The relevant legal and historical background, the causes and effect of cimmigration, the ethical and legal issues involved, and the overall effectiveness of the changes in immigration policy that have occurred since the 1980s will be reviewed.

Illegal Immigration: Background and Consequences

The historical account of immigration into the United States reveals that it was not until 1929 that unlawful entry into the country was criminalized, making it a misdemeanor punishable by up to a year in prison to enter the country without permission. While there were few prosecutions for this offense, the institution of criminal penalties effectively changed public discourse about immigration. Up until then immigrants, had been treated as either "legitimate" immigrants or "illegitimate" or "ineligible" immigrants, but the application of criminal punishment to immigrants introduced for the first time the notion of "illegal immigration." (McLeod 2012: 117).

From 1952 until the 1980s, the immigration regime was generally liberal. Criminal enforcement was not common, and exceptions and waivers were possible. In 1965, quotas that had previously applied to immigrants from different countries were abolished, resulting in unauthorized immigration from Mexico and Central America, often comprising poor migrants, exacerbating economic and racial anxieties (McLeod 2012: 118).

In the 1980s and subsequently, the immigration regime became harsher when the **Immigration and Nationality Act** was reviewed to more closely integrate immigration and criminal law. The war on drugs, in particular, spurred changes that sought to permanently establish an integrated approach to federal immigration enforcement and local crime control. Thus, Miller notes:

As the criminal justice system created punishments that “got tough” on all convicted drug offenders, immigration law adopted harsh consequences for convicted non-citizen drug offenders. Under immigration reforms enacted in 1996, these so-called “criminal aliens” could be detained and deported—often retroactively—and denied relief from either, regardless of particular mitigating circumstances. (2005: 82)

Until the late 1980s, deporting noncitizens with criminal contact was generally limited to cases of crimes of “moral turpitude,” drug trafficking, and specific weapons offenses. Rarely were permanent residents deported, and relief from deportation was available. As well, criminal punishments for violations of immigration law were limited. However, the situation changed when the Anti-Drug Abuse Act of 1988 enacted the first **mandatory immigration detention** law requiring the detention of noncitizens who had committed felonies, pending removal proceedings (Miller 2005: 82).

The criminalization of immigration continued its expansion. For example, in 1986, legislation for the first time criminalized employers who showed a pattern or practice of knowingly hiring undocumented migrants. Since 1990, marrying to evade immigration laws, voting in a federal election as a noncitizen, and falsely claiming citizenship to obtain a benefit or employment have been criminalized and can result in both incarceration and deportation. The criminal penalty for unlawfully reentering the United States after deportation was increased from two years to a maximum of 10 or 20 years (Stumpf 2006: 384).

In 1988, the law created a category of deportable crimes, called *aggravated felonies*, limited to murder, federal drug trafficking and illicit trafficking of firearms, and other destructive devices. In 1994, as well as revising and expanding the definition of aggravated felony to include 16 different crimes, federal judges were empowered to order deportation based on a criminal conviction when imposing sentence, rather than through the previously separate civil immigration process. In 1989, only 7,338 criminal removals occurred, but by 1995 that number had increased to 32,285 (McLeod 2012: 120).

In 1996, the Effective Death Penalty Act and Illegal Immigration Reform and Immigrant Responsibility Act greatly expanded the list of aggravated felonies for which a person could be deported to include more than 30 offense types, including simple battery,⁹ theft, filing a false tax return, and failing to appear in court. Offenses that some states classify as misdemeanors, such as consensual intercourse between a 17-year-old and a 16-year-old, are also

included (Silverman 2016: 116). Additionally, the power given to immigration adjudicators to waive deportation for any crime included within the list of aggravated felonies was abolished. New provisions included special removal procedures for “terrorist aliens” and the abolition of federal habeas corpus review for all “criminal aliens.” Criminal penalties for a broad range of immigration-related offenses were increased, and federal courts were empowered to order deportation when imposing a sentence for a deportable criminal offense, even for offenses carrying only a sentence of probation. Other measures included a “criminal alien identification system” to track noncitizens with convictions and the deputization of local law enforcement officers to police immigration violations (McLeod 2012: 121).

The 1994 Crime Bill provided funding for the deportation of “criminal aliens,” mobilizing the U.S. Marshals Service and establishing the foundation for the later immigration enforcement practices and procedures of Immigration and Customs Enforcement (ICE), an agency of the Department of Homeland Security (DHS). Federal spending on immigration detention and deportation has more than doubled since 2006 and now runs at \$2.8 billion annually (Eisen 2018: 144).

Immigration and terrorism became linked after 9/11, exerting more pressure on migrants as immigration control and criminal law joined forces to combat terrorism. Immigration law, rather than criminal law, came to be the preferred tool to detain or deport persons alleged to be involved in terrorism, because it allowed actions such as detention that would have been much more constrained using the criminal law (Stumpf 2006: 385).

In 2005, **Operation Streamline**, a joint operation by the Departments of Justice and Homeland Security in the Southwest, resulted in increased immigrant prosecutions as border patrol officers referred undocumented immigrants to the Department of Justice for prosecution. This initiative reversed the previous practice of “expedited removal,” also known as “catch and release,” which allowed for deportation without a formal court hearing. Prior to this operation, most persons apprehended after crossing the U.S.–Mexico border were granted a voluntary return, an administrative act with no criminal penalty (Abrego, Coleman, Martinez, Menjivar, and Slack 2017: 701).

This shift toward prosecution demonstrated the shift to criminalization; previously, undocumented aliens had been dealt with under civil and not criminal law. Border crossers were now prosecuted in group trials and convicted of the misdemeanor of illegal entry. Any further entry would result in a charge of aggravated felony with the possibility of up to two years’ incarceration (American Immigration Council 2015: 16). Research has shown that

the increased number of noncitizens incarcerated in federal prisons is attributable to enforcement of the offense of reentering the country (American Immigration Council 2015: 17).

Following this program, Customs and Border Protection (CBP) has worked with federal prosecutors to prosecute the undocumented for misdemeanor and felony illegal entry (Eisen 2018: 150). By 2013, the number of prosecutions for illegal entry and reentry had reached 100,000 and constituted more than half of all federal prosecutions (Eisen 2018: 152).

Today, while being merely present in the U.S. without authorization is a civil violation of immigration law, not a crime, the act of illegal entry is a federal crime, as is reentering without permission after a prior deportation. Sentences for illegal reentry can be as high as 20 years for those with prior criminal convictions (Eagly 2016: 258).

The Nature of Crimmigration

The merger or convergence over time of the immigration and criminal law regimes has been termed *crimmigration* and has occurred on several fronts:

1. An increased overlap between criminal law and immigration law, as criminal prosecutors now regularly process cases that were previously considered civil and not criminal, and as states have sought to apply state criminal laws to immigrants. Criminal consequences have been attached to violations of immigration law where previously only civil fines were imposed, and the number of immigration offenses has been greatly expanded along with increased fines and prison sentences.
2. An association between immigration enforcement and criminal law enforcement, both federal and local, resulting in the involvement of local law enforcement in civil immigration cases and the detention of immigrants in prisons, jails, and detention centers as law enforcement has been mapped onto immigration frameworks.
3. The introduction of criminal procedures into the prosecution of immigration violations, for example, law enforcement increasingly using minor immigration violations to leverage cooperation in federal criminal, particularly terrorism-related, investigations, and the introduction of criminal law enforcement strategies, including preventive detention and plea bargaining, into immigration practice.
4. “A growing body of ‘crimmigration’ law that has reimagined noncitizens as criminals and security risks while immigration law enforcement has increasingly adopted the securitized approach of criminal law enforcement” (American Immigration Council 2015: 4).
5. Basing immigration decisions on an immigrant’s criminal law contact. For example, a criminal conviction has become grounds for deporting a person previously given permission to remain in the country, and a criminal conviction can render an otherwise qualified person ineligible for naturalization.
6. Prioritizing immigration enforcement over other immigration functions. For example, for the period 1908 through 1986 as a whole, about 7% of all deportations were on crime-related post-entry grounds, but by the early 1990s, this proportion had reached 50% of all deportations (Legomsky 2007: 476–500; McLeod 2012: 113–115; Stumpf 2006: 368).

These shifts to criminalization suggest that official discourse now regards “crime fighting” as a prime function and duty of the immigration regime. As Morales puts it,

the regime’s emphasis on regulating “migration through crime” is most clearly expressed in the criminalization of the act of migration itself. The attitude of nearly all the actors in the regime proceeds from the premise that the work they do helps to control crime—not civil infractions; criminalization lends heft and meaning to the work of regulating migration. The prior presumption that such infractions sounded in civil law has been fully reversed. (2014: 1273)

The Effect of Crimmigration

In 2010, the U.S. Supreme Court in *Padilla v. Kentucky* summarized the outcome of the changes in immigration law as follows:

The landscape of federal immigration law has changed dramatically. . . . While once there was only a narrow class of deportable [criminal] offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The “drastic measure” of deportation . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes.

The enforcement of immigration law through mandatory deportation has not been accompanied by the protections afforded to accused persons by the Constitution and criminal law. The reason is that the courts have for more than 100 years consistently declared that deportation is not a punishment and that, therefore, criminal procedural protections do not apply in deportation proceedings (Legomsky 2007: 471).

The association between the war on drugs and illegal immigration rendered illegal aliens criminal aliens who were then regarded as a threat to public safety (Miller 2005: 118). During the period from 1990 until 2010, immigration offenses became the most common federally prosecuted crimes in the United States (McLeod 2012: 107). Immigration of any kind, even lawful immigration, has become an activity presumed to be harmful to the country, and crimmigration has effectively sidelined major policy issues in immigration, such as the issue of labor migration (Chacon 2012: 649; Morales 2014: 1261).

Between 2005 and 2009, federal immigration arrests increased at an average annual rate of 23%. Immigration offenses (46%) were the most common of all arrest offenses in 2009, followed by drug (17%) and supervision (13%) violations. Until 2011, most immigration prosecutions were for misdemeanor illegal entry, with the second-highest category being for felony reentry. However, beginning in 2011, there were more felony than misdemeanor prosecutions. The increase in reentry prosecutions shows that the policy of prosecuting immigrants does not deter determined migrants (Chacon 2012: 636–637).

Justifications for Crimmigration

Justifications for the changes in immigration policy and law have included claims about “efficient resource allocation, political palatability, informational advantage, trespass, contract violation, and punishment,” which collectively “seek to justify criminal law administration as a proxy immigration regulatory regime” (McLeod 2012: 109). In reality, it is argued that crimmigration is an outcome of “the ambivalent social, political, and psychological place of immigration in the U.S. national imagination,” or more specifically, “economic unease and racial anxiety” (McLeod 2012: 110).

Race has long played a role in immigration policy making. Exclusion laws were first aimed at Asians, then at Southern and Eastern Europeans, and then Mexicans (Sharpless 2016: 702). Only in 1965 did Congress abolish the national-origins quota system and prohibit race as a factor in immigration decision-making. McLeod points out that “anxiety about immigration still registers in coded though profoundly racialized terms” (2012: 162).

Sharpless contends that harsh criminal and immigration law enforcement practices should be seen as associated forms of social control over marginalized citizens and non-citizen immigrants. She argues that these are designed to perpetuate racial inequality and sustain white dominance (2016: 735).

Worldwide, “migrants from many poor states are increasingly being portrayed as threats to security—economic, cultural, as well as physical, rather than as individuals fleeing insecurity in a home state—or as economic migrants whose uncontrolled entry will destabilize wealthy economies” (Lenard 2016: 90). In the United States, economic fears associated with immigration often focus on federal public benefits supposedly enjoyed by undocumented immigrants, despite the fact that the 1996 legislation gave undocumented immigrants only limited access to federal public benefits—including loans, licenses, food aid, housing assistance, and postsecondary education. Other claims relate to the undocumented taking away jobs from citizens and depressing their wages (McLeod 2012: 167).

Fear of crime by migrants, both authorized and unauthorized, has long been associated with immigration into the United States. Four of the last five major congressional immigration reform efforts have focused on illegal immigration. Associating illegal immigration with criminality has been reflected in numerous public polls, and statements by local and national political leaders often reinforce this perception (Legomsky 2007: 504, 507). Since 9/11, policy makers and politicians have routinely cited the duty of the government to protect against the risk of future criminal activity as justification for mandatory detention before deportation (Miller 2005: 119). However, this justification of migrant criminality has been termed “a myth . . . sometimes tinged with (or even steeped in) racism or nativism” (Chacon 2012: 629, 630).

Data concerning immigrant crime have consistently revealed that immigrants are less likely than native-born persons to be incarcerated. According to data from the 2010 American Community Survey analyzed by the American Immigration Council (2015: 1), about 1.6% of immigrant males age 18 to 39 are imprisoned compared to 3.3% of native-born males in the same age range. Moreover, this disparity has existed since at least 1980. Other studies have indicated that the immigration–crime association is negative (Ousey and Kubrin 2017: 63) and that, for property crimes, immigration has had a consistently negative effect. For violent crimes, immigration has had no effect on assault and a negative effect on robbery and murder. In metropolitan areas, immigration does not cause crime to increase and may even reduce it through revitalizing inner-city neighborhoods (Adelman, Williams Reid, Markle, Weiss, and Jaret 2017: 52).

Stumpf has suggested that crimmigration may have evolved through public distrust and lack of confidence in the capacity of the state to control both crime and immigration, because “imposing increasingly harsh sentences and using deportation as a means of expressing moral outrage is attractive from a political standpoint, regardless of its efficacy in controlling crime or unauthorized immigration” (2006: 413).

The Morality of Crimmigration

The historic and contemporary focus on immigrant criminality claims that immigrants cause harm to citizens through their criminal actions. Criminalization might then be justified, in principle, as being necessary to prevent such harms because a state has a moral duty to its citizens to prevent such harms (Spena 2017: 354, 373).

The harms of immigration could also include a “national culture/identity being swamped by other cultures and national identities,” “overburdening the state welfare system . . . especially in the case of poor and unskilled foreigners,” and disadvantaging citizens when immigrants compete with them for employment and accept lower wages (Spena 2017: 363, 364). However, it is argued that such claims of harm are morally justifiable only if there is empirical evidence of actual harm, that is, a reasonable expectation of harm, as opposed to only a risk of such harm occurring (Spena 2017: 366, 368).¹⁰ Where there is no such evidence and no reasonable expectation of harm, criminalization would not be morally justified.

Aliverti argues that criminalization “represents an excessive and unjustified imposition of pain on those subject to it since they are in most cases also liable to expulsion from the country” (2017: 385). This pain refers to the punishment of incarceration, which is often the consequence of criminality (p. 389).

“Criminal Aliens”

The term *criminal aliens* is now explicitly used by ICE in its Criminal Alien Program, which is intended to combat illegal immigration, including immigration of those who have “committed acts that constitute a chargeable criminal offence” and “pose a threat to public safety or national security” (National Immigration Forum 2018).

However, in documenting its enforcement actions for 2016, the Department of Homeland Security (Baker 2017: 9) reported that only about 40% of all aliens removed in 2016 had a prior criminal conviction, and the types of crime were 35% immigration offenses, 17% related to dangerous drugs, 13% traffic offenses, and 10% assault.

McLeod (2012: 165) criticizes the routine conflation of “criminal aliens,” as a class of criminally involved persons to be removed, and “illegals,” or undocumented immigrants, when only a small proportion of the latter have contact with law enforcement. Political and other discourses that conflate these categories seek to simplify the complexity of U.S. immigration as it has developed over time so that the category “criminal alien” is viewed as responsible for the problems faced by the immigration regime.

Detention Centers

The practice of placing more and more immigrants in detention is an outcome of the increased enforcement of immigration laws in the 1980s and the abandonment of the “catch and release” policy (Sharpless 2016: 713–714).¹¹ Persons seized within 100 kilometers of the U.S.–Mexico border for the first time are usually formally removed and deported back to Mexico quite rapidly and therefore are not placed in detention, unless immigration officers, in the exercise of their discretion, decide otherwise (Abrego et al. 2017: 700).

If detention is ordered, federal immigration detention centers controlled by ICE accommodate migrants who entered the U.S. illegally, including children. These facilities are not called prisons but “administrative detention facilities” (Eisen 2018: 138). The Trump administration introduced a zero-tolerance policy of prosecuting all persons entering the country illegally and separating children from their accompanying parents and placing them in shelters run by nongovernmental organizations supervised by the Office of Refugee Resettlement, part of the Department of Health and Human Services. The rationale for this policy was said to be to deter illegal immigration across the southern border (“Trump Signs Memo” 2018). A huge media frenzy and civil protests ensued by midyear 2018, resulting in the president reversing the family separation policy (Andone 2018). An estimated 2,700 children were taken from their parents between October 2017 and May 2018, and a federal judge ordered the U.S. government to reunify more than 2,500 children. The government failed to meet the deadline, having reunited only 1,442 children (Associated Press 2018).

In 2010, funding was allocated to the Department of Homeland Security to “maintain a level of not less than 33,400 detention beds,” the first time this designation had been issued.¹² Between 2001 and 2011, immigrants passing through ICE detention more than doubled, from 204,459 to 429,247, and by 2015, almost 500,000 undocumented immigrants were being held in detention. There is now an extensive system of more than 200 detention facilities (Eisen 2018: 153). About 62% of detention facilities are managed by private companies that also manage private prisons.

A CLOSER LOOK THE DETENTION PROCESS

According to Marouf, the detention process operates as follows:

When a noncitizen is apprehended for an immigration violation, an officer with the Department of Homeland Security (DHS) makes the initial determination about whether to detain the individual. If a decision is made to detain, the officer must then determine the appropriate custody classification level. If a decision is made to release, the officer must decide what conditions, if any, should be required. Options include releasing the person on her own recognizance, under an order of supervision, upon payment of a bond, or into an electronic monitoring program. (2017: 2144)

ICE applies a nonbinding risk assessment tool in making decisions concerning whether an immigrant is a flight risk or a danger to the community. Relevant factors in risk assessment include criminal history (without differentiating older from more recent convictions and taking no account of rehabilitation), outstanding warrants, and gang affiliations; and, for flight risk, an intake interview, ties to the community, family, residence, employment, substance abuse, and immigration history and whether or not the person has legal representation (Marouf 2017: 2144). Where there is no specific recommendation to release, ICE is likely to detain rather than release on bond (p. 2145). The legal requirement that ICE maintain not less than 34,000 detainee beds appears to operate as a disincentive to release and as a driver of decision-making.

It is possible to challenge a decision to detain or the amount of a bond to secure release on bond by seeking a hearing before an immigration judge, but the onus is on the applicant to show that he or she is not a flight risk or a danger to the community. Decisions concerning the amount of a bond can be further challenged before the Board of Immigration Appeals.

The law imposes restrictions on granting bonds by imposing what is termed “mandatory detention” for categories of persons who the law stipulates “shall be taken into custody.” While ICE interprets “custody” as meaning “detention,” many scholars argue that it could encompass other forms of custody, such as house arrest and electronic monitoring (Marouf 2017: 2146).

Categories of persons for whom mandatory detention applies include those convicted of “crimes involving moral turpitude” (a term that includes crimes involving theft or fraud and domestic violence), aggravated felonies, controlled-substance convictions, firearms offenses, and other crimes, including shoplifting with a one-year sentence and possession of more than 1 ounce of marijuana.

Before February 2018, two court circuits required that persons subject to mandatory detention be granted a bond hearing after 180 days in detention, whereas other circuits had adopted a case-by-case approach for establishing when a detention had become unreasonably prolonged. This situation contrasts with that applying in the criminal context, where detention release decisions are routinely made within hours or days of arrest (Marouf 2017: 2148). However, in February 2018, the Supreme Court ruled that there was no right to apply for a bond hearing every six months and that the administration had unrestricted discretion to determine the duration of any detention.

Generally, detention may continue without limit where the administration is able to show that there exists a “significant likelihood” that the detainee will be removed “in the reasonably foreseeable future” (Silverman 2016: 109). Lengthy periods in detention are not only costly but are psychologically harmful to those detained (Silverman 2016: 110).

The average daily cost of immigration detention is now more than \$5 million per day, with much of that cost going to the private companies that now operate 73% of immigration detention beds (Marouf 2017: 2149).

Detention centers are commonly located in the remoter parts of the country and away from metropolitan areas where immigration attorneys are located. The experience of detention can be likened to that of an incarcerated inmate. The conditions of immigration detention include holding detainees with criminal inmates in the same facilities, shackling and solitary confinement, and lack of access to proper nutrition, exercise, and basic healthcare. More than 100 deaths in immigration detention have been reported due to lack of medical services and suicide (Torrey 2015: 881).

In removal proceedings, almost half of detainees have no legal representation, but in Texas, where a quarter of the nation’s immigration detainees are located, 83% to 90% of detainees are unrepresented (Marouf 2017: 2151).

Marouf argues that ICE makes little use of alternatives to detention and in practice regards only electronic monitoring as an adequate alternative to detention (2017: 2155). For example, release on bond could be used more widely; during 2015, 86% of persons released on bond by an immigration judge appeared at their hearings. Despite this, historically, only 10% of challenges to refusals to issue a bond have been successful (p. 2158).

Critics of crimmigration argue that immigration detainees have no Miranda rights, no right of access to counsel, no judicial reviews of their detention, and no right to receive visitors. This absence of protection and rights has been described as morally wrong (Silverman 2016: 114)

In 2016, more than 408,000 persons were seized by border patrol agents, and about 350,000 were placed in detention to await an immigration judge's decision that they either be deported or permitted to stay in the country.

Often persons are detained for periods ranging from months to well over a year. According to the American Civil Liberties Union (Takei, Tan, and Lin 2016: 1), by the summer of 2016, the daily detainee population had reached record high levels, with the average daily detainee population exceeding 37,000. Of this population, about 73% were being held in facilities run by private corporations, about 15% in county jails that mix civil immigration detainees with prisoners charged with criminal offenses, and 12% in federally owned facilities. Children have increasingly been placed in immigration detention, most notably in two large "family residential centers" in Texas administered by private corporations (Marouf 2017: 2143).

The Effectiveness of Crimmigration

In assessing the effectiveness of crimmigration policy, McLeod (2012: 130) argues that crimmigration fails on several grounds: (1) instead of focusing on claims to enter and remain in the country and deciding such claims on the merits, the immigration regime views these issues only through the lens of a migrant's contact with the criminal law; (2) resources are directed toward policing a population with low rates of violent-crime commission who are already subject to removal from the country; and (3) crimmigration perpetuates a crime-centered framework for immigration that brings with it incarceration and harsh punishment.

Crimmigration has made even *lawful* permanent residents who have been granted the right to live and work in the country indefinitely subject to removal if they have any criminal contact. Since 1996, more than 87,000

lawful permanent residents have faced deportation from the United States as a result of criminal convictions that have included minor public-order violations (McLeod 2012: 132). In 2014, ICE reported that 85% of removals comprised persons with a criminal conviction. However, one-quarter of that category comprised those with misdemeanor convictions carrying a maximum sentence of one year (Marouf 2017: 2156).

McLeod suggests that consuming resources¹³ by prosecuting and then imprisoning undocumented immigrants and deporting them at the conclusion of their sentence is problematic because this population is already deportable without criminalization (2012: 147). While it is claimed that incarceration serves as a deterrent to others who might chose to migrate or represents appropriate retribution for violation of the law, it is questionable whether sentences are harsh enough to deter those willing to risk death to cross the border. Imposing harsher sentences sufficient to deter would presumably involve imposing very lengthy terms of imprisonment and consequent costs to the country and would be difficult to justify on grounds of proportionality (McLeod 2012: 147). One survey found that only 23% of respondents who had entered the United States from Mexico without authorization indicated they would never try to reenter the United States (Abrego et al. 2017: 700).

Overall, it is apparent that, as Chacon (2010: 1571) puts it, "immigration enforcement has morphed from a small and border-centered endeavor into a huge effort involving a network of law enforcement agencies operating throughout the country." She argues that the resources now allocated to the criminal enforcement of migration violation are disproportionate and out of balance with resource allocation within the justice system, effectively crowding out other investments in the system. Also, criminalization has reinforced unconstitutional racial profiling practices (Chacon 2012: 649–650).

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 such as 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 approach to 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, a war against 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: 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.

Over the years, a cluster of laws, policies, programs, internal orders, and operational manuals have created a framework of harsher immigration law and practices whose complexity is unmatched by almost any other legal regime. The history of immigration into the U.S. reveals that racial, economic, and public safety fears have always coalesced around migration, especially when the country was facing economic and political challenges. The focus of immigration law and practice has shifted from the decision whether or not to permit a person to immigrate to the enforcement of immigration laws through prosecutions, incarceration, and detention pending deportation. The justification for this policy change is unclear, but it has greatly increased the costs to the U.S. of an immigration system that now regards unauthorized migrants as criminal aliens. Questions about the morality, rationale, and effectiveness of criminalization are yet to be fully addressed.

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. Discuss the ethics of crimmigration policy using the example of family separation.

WEB RESOURCES

Center for Criminal Justice Policy Research: <https://cssh.northeastern.edu/sccj/research/centers/>

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>

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

Justice Policy Institute: <http://www.justicepolicy.org/research/index.html>

PolicyLink, "Leadership for Policy": <http://www.policylink.org/>

Prison Policy Initiative: <http://www.prisonpolicy.org/reports.html>

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://ojp.gov/about/ocr/pdfs/vawafaqs.pdf>

“What Is Crimmigration Law?” (Hernandez 2017): <https://www.americanbar.org/publications/insights-on-law-and-society/2017/spring2017/what-is-crimmigration-law.html>

NOTES

- Gottschalk (2015: 11) explains neoliberalism as “an ideology and package of policies that deify low taxes, macroeconomic stabilization (through low inflation and low public debt), financial and trade deregulation, privatization of public assets and services, and a retrenchment of the welfare state. . . . The neoliberal agenda shuns . . . a comprehensive safety net, and strong labor unions.” The role of government in solving economic and social problems is also questioned.
- The so-called Jim Crow laws were state and local laws that enforced racial segregation following the Reconstruction period (from about 1863 to 1877) and continued in force until about 1965. The 1954 decision of the U.S. Supreme Court in *Brown v. Board of Education* is generally taken to mark the end of segregation and of the Jim Crow laws, but in spite of the Supreme Court decision, five southern states enacted almost 50 new Jim Crow laws in the years following that decision. The Jim Crow laws were modeled on the Black Codes of 1800 to 1866 that had previously restricted the rights of Blacks (Alexander 2010: 34–35, 37). The 1964 Civil Rights Act finally ended the Jim Crow laws and their successor laws.
- For a comprehensive discussion of suggested reforms and of reforms already being implemented across the United States, see American Civil Liberties Union 2011.
- In some counties in Texas, civil forfeitures provide almost 40% of the police budget, and in 2012, the federal government is reported to have seized about \$4.2 billion in assets (Gottschalk 2015: 36).
- Gottschalk (2015: 200) notes that the crime of possession of child pornography has been conflated in the public mind with child abuse “despite weak or inconsistent evidence about the likelihood that people who possess child pornography also sexually abuse children.” In 2012, the U.S. Sentencing Commission issued a report calling for a review of the harsh mandatory minimum sentences for possession and receipt of child pornography, but the U.S. Department of Justice has opposed any move to change the law (p. 213).
- On 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 mandated a registry of first-degree murderers commencing January 2012 in a law called Andreas’s Law; in Maine, a registry of drunken drivers was proposed; and in Virginia, dangerous dogs are already registered (“Andreas’s Law” 2011). Proponents argue that people have a right to know about potentially dangerous persons living in the community.
- There is some evidence that state officials in the United States associated lynching with hanging and “frontier justice,” and as a result, alternative methods of execution were explored (Garland 2010: 119).
- Public hanging continued in Kentucky and Missouri up to the 1930s, and southern states allowed the death sentence for rape, robbery, burglary, and arson up to the 1960s, even when the rest of the country had restricted it to first-degree murder (Garland 2010: 124).
- In one case, Mary Ann Gehris was convicted in Georgia of battery for pulling another woman’s hair. She received a one-year suspended sentence, but the conviction rendered her a violent aggravated felon and therefore deportable and ineligible for relief (McLeod 2012: 149).
- The harm principle has generally been applied in decisions about criminalization. Until quite recently, the principle was understood as applying when conduct causes or risks harm to others.

Now there appears to be differing interpretations of the principle. The first argues that criminalization is justified only when a type of conduct is harmful to others. The second view is that criminalization is justified if, and only if, criminalization will efficiently prevent harm to others (Hoskins 2017: 1).

11. In April 2018, the Trump administration announced an end to “catch and release” practices so that all unauthorized immigrants would be placed in detention while their cases were being processed.
12. For the fiscal year 2018, Congress provided funding for 44,000 detention beds (U.S. House of Representatives, Committee on Appropriations 2017).
13. The federal government spends about \$1.84 billion annually, or approximately \$159 a day per detained noncitizen (Sharpless 2016: 714).

It was said that military facilities, among other sites, were being considered for use as additional detention facilities (“Trump Signs Memo” 2018).



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