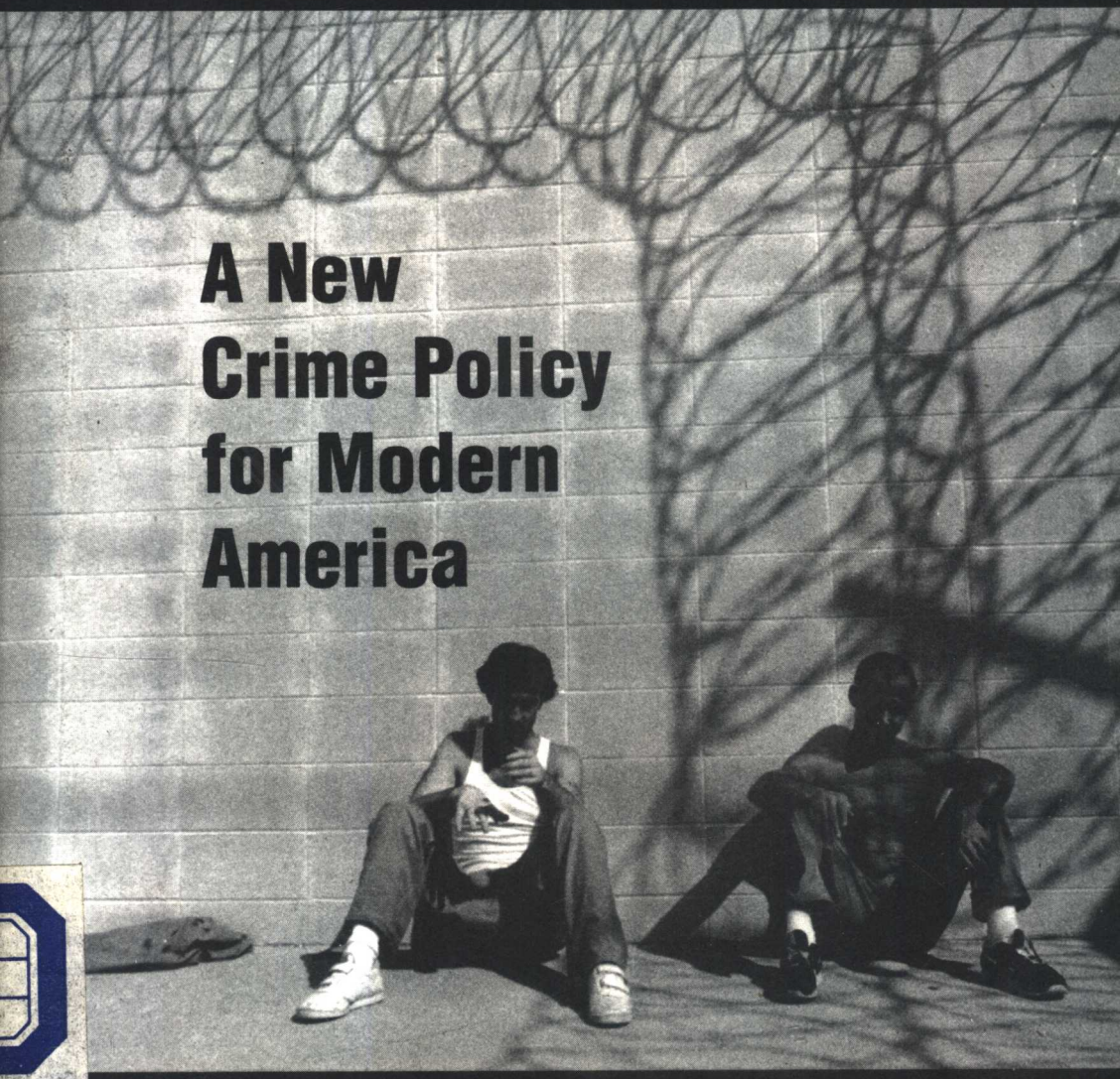
MINIMIZING HARM

A New Crime Policy for Modern America



edited by Edward L. Rubin

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Westview Press
A Member of the Perseus Books Group

Published in 1999 in the United States of America by Westview Press, 5500 Central Avenue, Boulder, Colorado 80301-2877, and in the United Kingdom by Westview Press, 12 Hid's Copse Road, Cumnor Hill, Oxford OX2 9JJ

Library of Congress Cataloging-in-Publication Data
Minimizing harm : a new crime policy for modern America / edited by Edward L. Rubin; contributors, John J. Dilulio Jr ... [et al.].
p. cm.
Includes bibliographical references.
ISBN 0-8133-3536-1
1. Crime prevention—United States. 2. Crime—United States—Public opinion. 3. Public opinion—United States. I. Rubin, Edward L., 1948– . II. Dilulio, John J.
HV7431.M56 1999
364.4'0973—dc21 98-27899
CIP

The paper used in this publication meets the requirements of the American National Standard of Permanence of Paper for Printed Library Materials Z39.48-1984.

10 9 8 7 6 5 4 3 2 1

Preface and Acknowledgments

This book has an interesting history, but that history is part of the book itself, and it is recounted in the Introduction.

Ordinarily, one does not think of a book's origins as being part of its substance, but that is the result of a somewhat old-fashioned theory of knowledge. It is widely recognized these days that one's conclusions depend, at least in part, upon one's context; this is sometimes called the social construction of reality. In the case of this book, the connection between process and substance is more specific. The book is about social policy; unlike most such books, it does not present optimal policy recommendations, but rather the best policy recommendations that are viable in the particular political context of the present day. To frame such recommendations, the authors not only drew upon their own knowledge and analysis but also placed themselves in the context of elected and appointed officials to whom their recommendations are addressed. They met with these officials, took their advice about the design of the project, met with the crime victims' groups that are creating so much of the political climate on this issue, and then presented their conclusions to both groups. That is the reason why the origins and substance of the book are intertwined. The hope is that the recommendations it advances can be used by real-world officials in formulating crime policy in America.

I would like to thank the many people who helped me organize this project. The California Policy Seminar, a program of the University of California, provided the funding; Andres Jimenez and Holly Brown were the seminar administrators who shepherded the original proposal through the process and organized all my meetings with California State officials; Joan Lichterman was the indefatigable editor who prepared the entire manuscript for publication. A number of officials took time from busy schedules to meet with me and the authors of the studies in this book; I particularly want to thank Craig Brown, Greg Harding, Craig Cornett, Elisabeth Kersten, Jim Lewis, Melissa Nappan, and David Panush. Sharon English of the California Office of Prevention and Victim's Services provided invaluable help in contacting crime victims' groups; I want to thank her and also the many representatives of these groups who overcame their initial doubts about Berkeley to meet with us.

My colleagues were of enormous help to me, as they have been throughout my entire career. Franklin Zimring not only contributed one of the book's principal studies but also helped greatly in reviewing my contribution and preparing the entire work for publication. Malcolm Feeley, my coauthor on *Judicial Policy Making and the Modern State*, also helped me with all aspects of the project. Jerome Skolnick agreed to contribute his study on short notice, after the topic of narcotics was identified as a critical concern by the state officials and crime victims' groups. My assistant, Sheila John, was assiduous and infinitely tolerant in transforming thirteen separate contributions into a single manuscript.

Although it is not traditional to acknowledge abstract entities, I also want to thank the University of California. It is truly a great institution, a public university that provides the very best quality education at a price (taking tuition and financial aid into account) that every citizen of California can afford. Perhaps the reason that Californians seem more fun-loving and present-oriented than other Americans—apart from the climate—is that they don't need to save large sums of money to provide their children with an absolutely first-rate education. The university also supports world-leading research in every academic field, and this book is the product of that support. Financial and administrative support came from a university-wide program, and intellectual participation and support came from the vast reservoir of talent in my own department, Boalt Hall School of Law. This is primarily a work of social science, not law, but Boalt Hall has a unique, interdisciplinary program—Jurisprudence and Social Policy—that the university established twenty years ago. Zimring, Feeley, and Skolnick are all members of this program, and the latter two would not have been my colleagues without it.

Finally, it is certainly traditional to end by thanking one's family for tolerating the author as he or she struggled to complete the book. I am as intolerable at home as most people are, but I can't attribute my irritability to this book, which has been a pleasure to work on from beginning to end. So, although it is a bit of an aside, I would simply like to thank my family—Ilene, Greg, Tim, Juliette, and Alex—for being my family.

Edward L. Rubin

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Introduction: Minimizing Harm as a Solution to the Crime Policy Conundrum

EDWARD L. RUBIN

"That's the effect of living backwards," the Queen said kindly . . . "For instance, now," she went on, . . . "there's the King's Messenger. He's in prison now, being punished: and the trial doesn't even begin till next Wednesday: and of course the crime comes last of all."
"Suppose he never commits the crime?" said Alice.
"That would be all the better, wouldn't it?' the Queen said . . .
Alice felt there was no denying that. "Of course it would be all the better," she said: "but it wouldn't be all the better his being punished."
"You're wrong there, at any rate," said the Queen. "Were you ever punished?"
"Only for faults," said Alice.
"And you were all the better for it, I know!" the Queen said triumphantly.
"Yes, but then I had done the things I was punished for," said Alice: "that makes all the difference."
"But if you hadn't done them," the Queen said, "that would have been better still; better, and better, and better!"

—**Lewis Carroll, *Through the Looking Glass***

This book represents an effort by a number of leading criminologists to articulate a pragmatic crime policy for America—a policy that combines academic insights about crime prevention with the realities of contemporary politics. It consists of four principal studies, focusing on public attitudes toward crime, prevention, alternative sanctions, and drug policy, plus two commentaries on each paper. Taken collectively, the studies outline a coherent policy that centers on minimizing harm, as opposed to retribution, eliminating crime, or solving the social problems that gener-

ate criminal behavior. The commentaries provide ramifications of—and in some cases, disagreements with—the principal studies. But the general theme is clear: Even in today's politically charged environment, minimizing harm is a pragmatic and effective approach to crime policy in America. Policymakers need not succumb to the naive belief that more prisons and harsher punishments are, as Carroll's White Queen believes, better, and better, and better.

The Conundrum of Crime Policy Analysis

In terms of its impact on people's lives and the level of concern that it engenders crime may be the leading social problem in the United States today. Its impact is felt at both the individual and the collective levels. For individuals, crime affects most aspects of their daily lives: where they choose to live, where they shop, where they go to the movies, and where they walk or drive. It determines whether they feel safe in their homes or going to and from their place and work and, more subtly but perhaps more profoundly, the extent to which they perceive themselves as members of a neighborhood or a community. It causes property loss, trauma, injury, or death for the individuals who are its victims, and in its severe forms, grief and trauma for the victim's family, friends, and workmates.

At the collective level, the crime rate often determines the value of homes, the location of businesses, the extent of tourism, and indeed, the entire pattern of local commerce and development. Expenditures to prevent, deter, or punish crime now make up large portions of state and local budgets, and the geometric increase in these expenditures during the last decade has begun cutting into other governmental services and threatening the fiscal stability of many jurisdictions. Crime prevention efforts, in their turn, produce profound effects on people's attitudes in neighborhoods where crime is prevalent, and, at the individual level again, on the lives of those whose family members have been apprehended and incarcerated.

The amount of concern about crime is fully commensurate with its effects. Crime has become a major issue in national, state, and local elections. Politicians vie with each other to define more crimes, impose harsher sentences, and render the conditions of those sentences increasingly severe. In popular culture, crime now functions as our collective bête noire, the way Communism did in the 1950s. Just as the villains of many 1950s science fiction movies (cold-eyed aliens who conquered earth and took over people's bodies) were projections of our fear of Communism (Sontag 1986), the villains of contemporary films are drug lords or psychopathic serial killers—more obvious, perhaps, but just as emblematic of our deepest fears.

It is to be expected, of course, that the level of concern about crime would be roughly proportional to its social impact. One explanation for this relationship is the obvious one—the effects of crime are real and apparent. At the same time, the relationship functions in reverse: Public concern creates, or constructs, crime as a social problem. Income distribution was more unequal in the thirteenth century than in the twentieth, but only during the latter period do people's political attitudes lead them to perceive this inequality as a social problem; differences in religious beliefs are much greater in the twentieth century than they were in the thirteenth, but this no longer seems to be a problem for the people of most Western nations. Concern with crime is not only a response to crime itself but also a product of independent forces, such as many Americans' dismay about increasing social permissiveness, their smoldering dissatisfaction with their economic situation, and the continued disaggregation of local communities brought about by urban blight, mobility, television, VCRs, and the Internet. Overarching all these factors is race, America's most tragic issue. The criminal is a convenient proxy for minority groups that have won civil rights in the last forty years but continue to be objects of fear and loathing, in Hunter Thompson's phrase (Thompson 1982). This is not to suggest that concern with crime is imaginary but rather that this concern is generated by both real and symbolic forces. Anyone who treats the public's current attitudes toward crime as a direct reflection of the crime rate will severely underestimate the depth and the complexity with which these forces operate.

The interaction between the social impact of crime and people' s concern about it creates a severe problem for public policymakers. All our prescriptive theories about public policy are based on a model of rational analysis. The classic formula is to define the problem, list the alternative responses, select the most effective response, and implement it as the solution (Patton and Sauicki 1986, 26–38; Stokey and Zeckhauser 1978, 5–6). Doubts about the abilities of human decisionmakers to process so much information have led observers such as Charles Lindblom (1959), Herbert Simon (1957), and Oliver Williamson (1985), to propose incremental or heuristic approaches, which Simon characterizes as "bounded rationality." The concerns of the citizenry, however, do not appear in either formulation; the decisionmaker is supposed to devise a policy on the basis of the problem as defined and the data as presented, using a process of rational analysis, whether bounded or comprehensive.

Scholars have not ignored the effects of citizen attitudes on public policymakers, of course. Political scientists have studied the electoral process at every level of government, the manner in which interest groups influence the chief executive, lobby the legislature, and capture administrative agencies, the efforts of elected officials to secure votes by

campaigning or doing favors for constituents, and the general sensitivity of politicians at all levels to public opinion polls. But this work has been essentially descriptive, not prescriptive in nature; it focuses on the way government officials are observed to behave, not the way that they ought to behave in formulating and implementing public policy. When scholars produce prescriptive work they generally ignore these phenomena and address their recommendations to hypothetical, rational decisionmakers who are free from political influences when reaching their decisions.

To be sure, the depth of the opposition between descriptive and prescriptive discourse depends upon one's model of elected representatives, whether one views them as implementing the mandate of their constituents, or whether one views them as trustees selected by their constituents but deciding on the basis of their own best judgment (Burke 1949, 115; Pitkin 1967, 144–167). If they are trustees, then their task is to carry out the entire policymaking process, including the definition of the problem, according to their individual assessment of the situation, and any post-election influence is necessarily disruptive. If they are supposed to obey a public mandate, they should look to their constituents for the definition of the problem to be solved but should still proceed to solve it by a rational, apolitical process. Administrative agents are generally supposed to function as trustees, and those in independent agencies are explicitly expected to do so; that is the whole point of their independence. Whichever model one adopts, however, it seems clear that political influence is antithetical to our prescriptive theories of public policymaking; once politics takes over, recommendations based on rational policy analysis seem to be precluded.

If rational policymaking occurs in the space left clear of political influence, the size of that space will be of great concern to academic public policy analysts. Their general position, more frequently assumed than argued for, is that there remain some areas in which government officials can function as rational decisionmakers, using instrumental reason to devise the best solution to a given problem. In recent years, public choice analysis has come to the lugubrious conclusion, on the basis of its analysis of public officials' motivations (Ferejohn 1974; Fiorina 1974; Fiorina 1977; Mayhew 1974), that there is no space at all for rational decisionmaking. But even if one adopts the more plausible idea that these officials are sometimes motivated to act in the public's interest, rather than their own (Fenno 1973; Kingdon 1989; Rubin 1991), they must still live in a real world of political pressure and interest group activity. These can vary in their intensity, but they are never absent and rarely insignificant.

There are few areas where the conflict between rational policy analysis and political reality has been more intense than in crime policy. The public has translated its concern about crime into a demand for increased

criminalization, longer sentences, and harsher prison conditions. Policy analysts are virtually unanimous in their belief that these are often ineffective and excessively expensive measures and that other strategies would achieve the agreed-upon goal in a more effective manner. For example, virtually all observers agree that incarcerating small-time drug dealers is a waste of funds and prison space; these people are employees, not sociopaths, and when they are arrested someone else inevitably takes their job. Similarly, enhanced sentencing provisions, like the "three strikes and you're out" laws for repeat offenders, garner enormous popular support, and elected officials have responded by enacting these provisions with unprecedented alacrity. But it is widely agreed among crime policy analysts that criminal behavior is very powerfully correlated with age across gender, social groups, geographic areas, and types of crime; indeed, this is one of the strongest correlations in all of social science (Blumstein and Cohen 1978; Blumstein and Cohen 1979; Gotfredson and Hirschi 1990; Matza 1964; Tittle 1980). Incarceration is expensive, and the incarceration of the elderly is particularly so because of their increasing health care needs. The result of the public demand for increased sentences is thus the expenditure of extensive social resources on a population that crime policy analysts regard as posing relatively low risks of committing crime (Zimring and Hawkins 1991). To put the matter most starkly (and ignoring civil liberties considerations for the moment) most criminologists would regard a "two strikes and you're out till you're forty" law as much more effective than the current three-strikes provisions.

This is the conundrum of crime policy analysis. On the one hand, the entire conceptual framework of policy analysis depends on the ability of public decisionmakers to respond to rational arguments, to adopt strategies that achieve a given social goal in the most effective and efficient manner possible. On the other hand, the audience for these recommendations consists of real-world government officials, subject to the forces of popular opinion, and the populace has exerted enormous pressure upon these officials that seems to preclude any independent exercise of judgment. This leaves academic policy analysts with two equally unattractive options. The first is to abandon the aspiration of rational analysis and either recommend political strategies to these officials or work in the small interstices of crime policy that for the time being have escaped public notice. The second is to continue using their existing methodology and address rational decisionmakers who no longer exist in the real world of American politics.

Surprisingly, current social science methodology offers no solution to this distressing, but far from uncommon, conundrum. Despite the pioneering work of Aaron Wildavsky (Wildavsky 1979), there is no established theory that combines descriptive and prescriptive discourse. It is

easy enough to find models, based on public choice or related, less monovalent theories, to describe the way that citizen concern is expressed and that elected and appointed officials respond to it. It is equally easy to find models for the rational analysis of public policy problems. But there is no comprehensive model that tells policy analysts how to address real-world decisionmakers who must operate in the midst of demanding, highly charged political environment. Without such a model, however, no realistic and yet meaningful policy analysis of crime can be articulated.

The chapters and comments in this volume are designed to provide a solution that combines prescriptive and descriptive discourse. They offer recommendations, but these recommendations are not rational abstractions addressed to hypothetical policymakers who operate without political constraints. Rather, they are directed to real decisionmakers, in the real political environment. The general theme of the book, that crime policy should strive to minimize harm, is not a radical departure from existing policy, but it represents both a different substantive emphasis and a different way of characterizing those elements of crime policy that remain unchanged. Neither a new emphasis nor a new characterization may appear as valuable as a dramatic new solution, but dramatic solutions belong to the realm of abstract prescriptive theory, divorced from the descriptive discourse that captures the political reality of public decisionmakers. It is in the more subtle, incremental variations upon existing policy that the joinder of the two discourses resides.

The next section of this introduction discusses the conceptual approach to public policy that allows for prescriptive discourse to be combined with a descriptively accurate account of public policymakers. This is followed by a section that discusses the way this approach was implemented in generating the studies and comments that make up this volume. The last section discusses the results and summarizes the chapters that follow.

The Unification of Descriptive and Prescriptive Discourse

Everyone recognizes that public policy analysis is a multivalent process. Even the most reductionist methodology, cost-benefit analysis, involves an assessment of both the costs of government programs and the benefits that they confer. Devotees of this methodology, in their effort to place both costs and benefits within a common monetary metric, often restrict the range of the program's consequences, but the concepts open out into a potentially vast realm of social considerations. The costs of a regulatory program are not only the size of the budgetary appropriation necessary to implement it but also whatever disadvantages result from its implementation. Thus, many critics of social welfare programs believe that

these programs decrease the willingness of the recipients to accept available low-wage employment, a deadweight loss that is measurable in economic terms. The benefits of a regulatory program will generally be even more far-reaching. Welfare, it is argued, not only improves the economic well-being of the recipients by an amount roughly equal to its total cost less the cost of administration but also yields measurable economic benefits by decreasing the crime rate and the demands on public health facilities.

Moreover, policy analysts often recognize other factors that are beyond the reach of cost-benefit analysis in its entirety. A recent criticism of welfare programs, for example, is that they encourage teenage pregnancy. Some people find teenage pregnancy undesirable per se, others emphasize its deleterious impact on other values, arguing that immature, unprepared parents have children who are less likely to lead successful lives. Claus Offe argues that the welfare state subverts the capitalist economy by decreasing people's general motivation to strive for economic rewards (Offe 1984). The analogous arguments in favor of welfare are that it is undesirable, per se, to permit American citizens to suffer from indigence and that indigence leads to a variety of other social problems. Moreover, it is virtually a consensus position among historians and political scientists that the modern welfare state defused revolutionary Marxism and preserved liberal democracy.

Thus, policy analysis involves an enormous range of considerations operating at different levels of generality and with different degrees of precision. These considerations must be balanced against one another, whether by cost-benefit analysis, "softer" sociologically oriented methods, or, to use Lindblom's phrase, just "muddling through" (Lindblom 1959). There is no reason the concerns of the citizenry should not be added to this already complex mixture. After all, people's satisfaction with their government is a positive good for them, a consumption product in economic terms. It is vague and difficult to measure, of course, but so are the effects of social welfare programs on political legitimacy, or the impact of environmental policies on future generations. There is no a priori reason to exclude this one factor from consideration, particularly since so many closely allied considerations, such as the motivation, loyalty, and demoralization of the populace are willingly factored in to the analysis.

The reluctance to include citizen concerns among the relevant factors for policy analysis probably stems from the overlap between these concerns and outright political influence. There is, however, a subtle but essential distinction between the two. Political influence stands outside policy analysis and operates as a constraint on it, limiting its scope of operation. Citizen concerns, on the other hand, can be regarded as an ele-

ment of policy analysis, one of the many considerations that must be balanced against each other in order to devise a realistic course of action. The distinction may seem to be a mere matter of terminology, and a suspect terminology at that, since decisionmakers may be all too eager to clothe their subservience to politics in the raiment of public policy. But describing citizen concern as an element of policy as opposed to brute political influence yields results that can be operationalized in real-world terms. It means that the policymaker must think comprehensively, balancing optimal policy and citizen concerns in fashioning a single program that will be both beneficial and acceptable. It also means that the public policy analyst must incorporate this same range of considerations into any recommendation. In contrast, describing citizen concerns as merely politics implies an irreconcilable conflict between these concerns and rational decisionmaking, a conflict that seems to compel policymakers to choose between self-destruction or supine surrender, while academic analysts stand on the sidelines, wringing their hands and bewailing the decline of civic virtue.

This balancing process is illustrated by a familiar story about Franklin Roosevelt and the first social security act. Roosevelt's advisors urged him to fund the benefits out of general taxes, rather than employee contributions, using arguments that have become staples of public finance literature (Musgrave and Musgrave 1989). "[T]hose taxes were never a problem of economics," Roosevelt responded. "They are politics all the way through. We put those payroll contributions there so as to give the contributors a legal, moral, and political right to collect their pensions and their unemployment benefits. With those taxes in there, no damn politician can ever scrap my social security program." (Leuchtenberg 1963, 132–133; Perkins 1946, 188–189, 282–285; Schlesinger 1959, 308–309). Roosevelt's advisors were playing the standard role of policy analysts, informing him about the most efficient and rational way to implement a stated goal. When Roosevelt responded that the issue was "politics all the way through," he did not mean that he was responding solely to the demands of the electorate. Social security, after all, was based on his genuine beliefs about the good of the country. What he did, however, was to compromise between optimal policy and citizen attitudes, blending the two into a coherent program that met his goals and achieved long-term acceptability. His social security plan was a combination of politics and policy, "all the way through."

The process of incorporating citizen concerns into public policy analysis not only requires compromise with those concerns but also emphasizes the importance of the way public policies are characterized. This can be readily dismissed as mere symbolism, or window dressing—the very antithesis of true policymaking. In fact, it possesses both theoretical