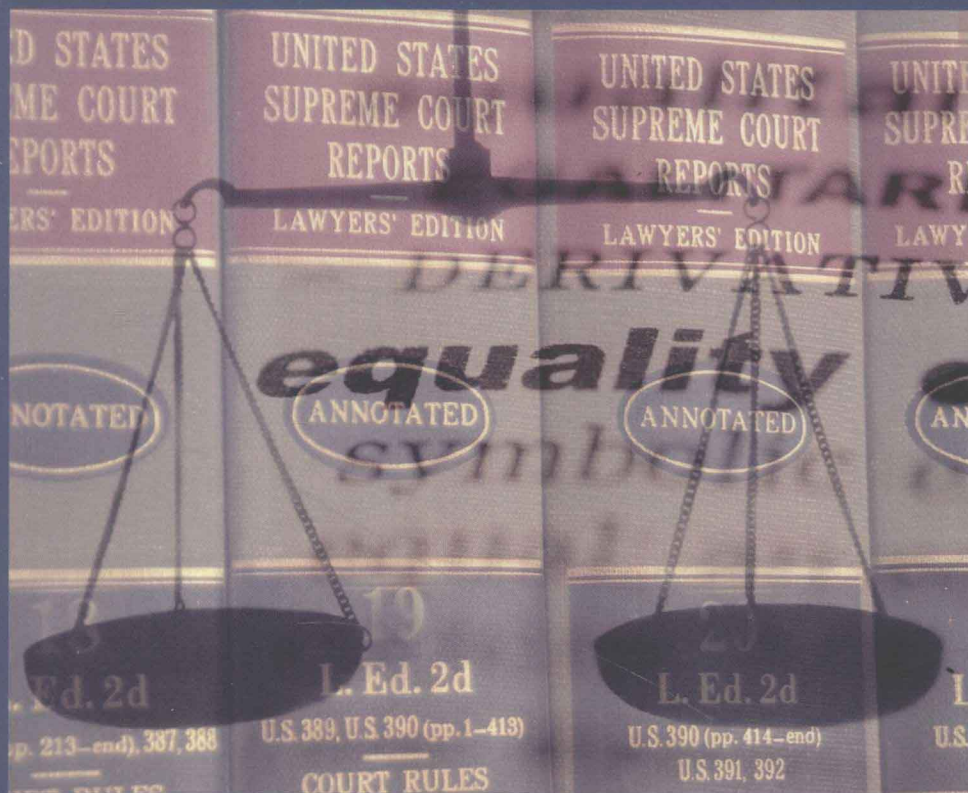


# TAKING SIDES



## Clashing Views in Public Policy, Justice, and the Law

Marie Natoli

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See inside front cover for details

# TAKING SIDES

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Clashing Views in  
**Public Policy, Justice,  
and the Law**

Selected, Edited, and with Introductions by

**Marie D. Natoli**  
*Emmanuel College*



**Contemporary  
Learning Series**

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*To my two best friends—Kathy and Jonathan—and  
to all of my students—past, present, and future—in  
hopes that they will work at ridding this society  
and the world of injustice.*

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Cover Acknowledgment  
Maggie Lytle

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# Preface

**T**he nineteenth-century philosopher John Stuart Mill, in his work entitled *On Liberty*, provided a poignant definition of “the free and open market place of ideas.” Wrote Mill,

If all mankind minus one were of one opinion, and only one man were of the contrary opinion, mankind would be no more justified in silencing that one man, than he, if he had the power, would be justified in silencing mankind.

Conflicting ideas and the respect for differences of opinion are critical to the political, economic, and social health of a democracy. Perhaps it is only one person who has seen the “truth.” Perhaps s/he is wrong, or what s/he sees is only part of the truth. Perhaps, however, even misperceptions may *lead* to the discernment of the truth. The point is that not only the preservation of, but also the *encouragement* of, conflicting views is paramount to a society’s health and well-being. In a democracy, there can never be too many points of view.

This is important for all to see. It is especially important for students to see this. Oftentimes, students will assume the veracity of a statement “because it is written down,” or “because it is in a book or an article,” or because a learned professor had proclaimed it so.

The Taking Sides volumes are devoted to exposing students not only to substantive information contained in any one volume, but more pervasively, the Taking Sides volumes aim to have students become habituated to seeking and evaluating both sides of an issue. Indeed, the Taking Sides volumes are devoted to “the free and open market place of ideas.” So, in the Taking Sides volumes, substance and process blend.

The purpose of this new Taking Sides volume on public policy, justice, and the law is to explore areas and issues in the public policy arena in which the law may have created, ignored, or perpetuated injustices in society. Only when injustices are discerned can public policy efforts be made to write a wrong. And only when wrongs are eliminated can we say that justice truly exists.

**Plan of the Book** Each issue has an issue *introduction* so that the “yes” and “no” selections will have a context. Following each issue is a “Postscript” that will highlight salient points stemming from the “yes” and “no” selections. All of this material is intended for you to *think about the issue* and form your own conclusions based upon what you have read here and through other readings. *Suggested further readings* will be included with each “Postscript.” Appropriate Internet site addresses (URLs) are included on the *On the Internet* page at the beginning of each part opening. At the back of the book will be a list of contributors, their credentials, and their affiliations. It is always important to know *who* wrote something before drawing your own conclusions about the validity of that person’s views.

**A Word to the Instructor** An *Instructor's Manual With Test Questions* (multiple choice and essay) is available through the publisher for the instructors using *Taking Sides* in the classroom. A general guidebook, *Using Taking Sides in the Classroom*, that discusses methods and techniques for integrating the pro-con approach into any classroom setting, is also available. An online version of *Using Taking Sides in the Classroom* and a correspondence service for *Taking Sides* adopters can be found at <http://www.mhcls.com/usingsides/>.

*Taking Sides: Clashing Views in Public Policy, Justice, and the Law* is only one title in the *Taking Sides* series. If you are interested in seeing the table of contents for any of the other titles, please visit the *Taking Sides* Web site at <http://www.mhcls.com/takingsides/>.

**Acknowledgments** I am grateful to all of my family, friends, and colleagues who have supported me in this endeavor. I have been “pontificating” for quite some time about injustices in society (indeed, I even went to law school to try to better understand this problem!) and appreciate the urging of students to write a work on the subject. I am also grateful to Larry Loepke of McGrawHill Contemporary Learning Series for having seen the worth of such a volume. And a very special thank you goes to Nichole Altman for her patience with an absent-minded professor and for her editing efforts in this work. Without Nichole, this volume would not be here.

**Marie D. Natoli**  
*Emmanuel College*





# Introduction

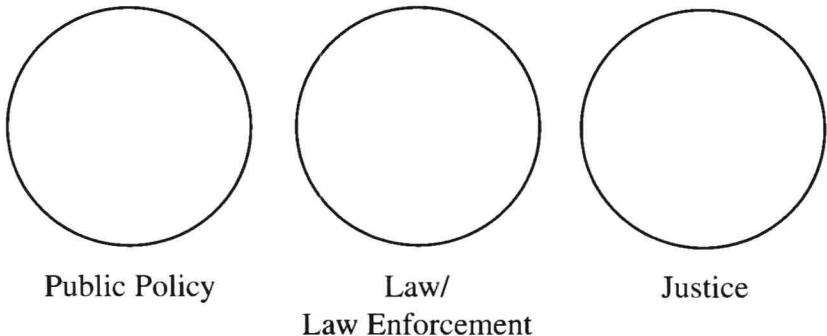
## The Relationship of Public Policy, Justice, and the Law

**T**here is an inextricable link among public policy, justice, and law. It would be impossible to include in this volume all the areas that warrant discussion. This volume will focus upon several of the most controversial public policy areas that raise the question of whether or not the law/law enforcement have created, ignored, or perpetuated injustice. A word regarding terminology is necessary. "Law" as it is being used in this volume includes not only "rules" that have been made by legislatures, or that have been delineated by court decisions and actions of the executive and regulatory agencies. "Law" for the purposes of this volume also includes the judicial and law enforcement processes.

If we were to envision "public policy," "law," and "justice" as three circles we can then determine what the relationship among these circles is in a particular society and what they should be in a *just* society (figure 1). The sets of relationships might not be the same. The purpose of this volume is to explore the dynamics among these circles and to determine if a more equitable alignment might be not only in the interests of society, but especially in the interests of its people.

To view the circles as separate entities with no overlap is erroneous. While it is true that in a particular society "justice" may stand alone, it is impossible for "public policy" and "law" to do so. Not all public policy is created by laws enacted by legislative bodies, but a great deal of it is. So, in the hypothetical, we might visualize that overlap as in which some portion of

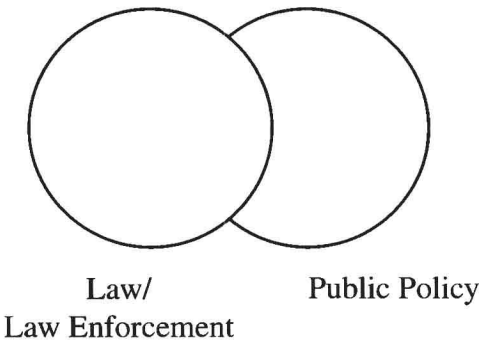
**Figure 1**



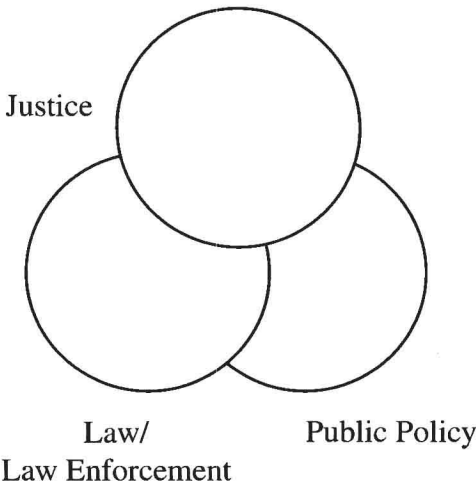
public policy (arbitrarily depicted in figure 2) is created by legislatively enacted law, while other portions of public policy have been created by other forces and factors, such as court rulings, executive actions, and regulatory agency actions. The thrust of this volume is to determine how the “justice” circle fits in. Figure 3 shows one hypothetical.

In this hypothetical depiction, some parts of public policy and law/law enforcement would be “just,” but not all. This illustration is meant to portray just one variation on many possible relationships among the three.

**Figure 2**



**Figure 3**



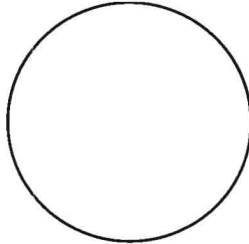
## Public Policy

In the above configuration, it is clear that only parts of the law and public policy are just, while many parts are not. The ideal goal of a society that espouses equality and justice under the law would have the justice circle completely aligned with the law circle as well as the public policy circle, because no law or public policy should be unjust. For illustrative purposes, imagine figures 4 and 5, in which the “law/law enforcement” circle and the “justice” circles align so completely that it is impossible to distinguish between the two, as do the “public policy” and “justice” circles.

Thus, the “law/law enforcement” circle fully aligns with justice, as does the “public policy” circle.

In no society is public policy created in a vacuum. Rather, it is the product of a society’s values, culture, norms, and demands. The U.S. political culture has long roots in the protestant work ethic that demands hard work to achieve success and presumes that those who are successful must have worked

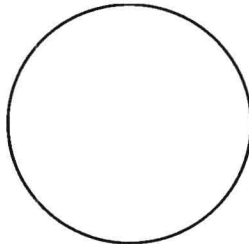
**Figure 4**



Law/Law Enforcement and Justice

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**Figure 5**



Public Policy and Justice

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hard. There are long roots, too, in social darwinism, which applies “survival of the fittest” to a society and is a “logical” corollary to the protestant work ethic. Those who have not done well are those who didn’t work hard, and they deserve nothing from those who have. Much of U.S. policy stems from this combination of beliefs, for those who promulgate the law are elected by constituents who embody these views.

Many years ago, Marc Ryan wrote a seminal work entitled *Blaming the Victim*, in which he talks about the poor in society upon whom is placed the blame—and typically the shame—for their plight. Ryan argues, however, that the poor are victims of society and its policies. Much of this Taking Sides volume will be viewing the issue of just how much justice is meted out to those on the bottom of the socioeconomic ladder.

We must be wary of labels. Because “public policy” is thus labeled does not mean it is necessarily in the best interests of the public. Before appropriate policy should be enacted, certain steps are necessary. First, there should be the proper identification of the problem, and this should occur before the problem becomes a crisis.

Misidentification of a problem leads to the adoption of inadequate or totally inappropriate public policy. Then, various “solutions” to the problem should be carefully scrutinized to make sure that not only is the adopted solution the appropriate one, but to insure that the adoption of a “solution” does not lead to other, or worse, problems. One example of this, as will be seen in this volume, may have been the adoption of the Federal Sentencing Guidelines.

## **The Law**

Much as public policy, laws are not created in a vacuum. The same can be said of law enforcement. Public policy, law, and law enforcement reflect a society’s values, culture, norms, and demands. What is appropriate at one point in time may not be so at another. People’s views and demands change, and these changes impact the way in which the legislature behaves and which law enforcement agencies treat society and societal issues. Thus, there is a *dynamic* among law and public policy. This dynamic has an impact upon whether the practices of a society are just or unjust.

People’s demands affect how law enforcement officials work. Simply stated, when people are frightened, they are not only happy to have law enforcement agents working on their behalf, they often demand it. If this results in the denial of individual (or group) rights, if a society comes down on the side of “crime control” rather than individual (or group) rights, is justice being served?

## **Justice**

It is in the nature of most individuals’ political socialization to assume that laws, by virtue of being laws, must be just. This fallacy typically results in a lack of questioning of “the way things are.” “Why can’t I do x?” or “Why

must I do y?" someone might ask. And the reflexive response will most likely be "Because it's the law." Relatedly, we might assume that because a public policy exists, it must be the correct policy.

Periodically, some are brave enough to question the relationship among public policy, laws, and justice. One of the most eloquent statements questioning this relationship came to us from the Rev. Martin Luther King, Jr.'s "Letter from a Birmingham Jail." King's advocacy of civil disobedience is not new. But his message is powerful, and the distinctions he makes between just and unjust laws can help us as we explore the topics in this volume.

King wrote, "Some may well ask 'How can you advocate obeying some laws while disobeying others?'" This is certainly a dilemma for any thinking person. King's answer hinges on the distinction between just and unjust laws. Indeed, King suggests that "an unjust law is no law at all."

As did King, we must keep in mind that laws are created by humans, and humans can make mistakes. It is also possible that humans may intentionally create unjust laws. There is no doubt that southern legislatures intentionally codified rampant segregation statutes that took decades to be declared unconstitutional. And even the Supreme Court rendered decisions that had the effect of upholding segregation statutes, such as in *Plessey v. Ferguson* (1896), in which the Court held that "separate but equal facilities" were constitutional. Fifty-eight years elapsed before the Court was willing to see the folly and injustice of that holding, as *Brown v. Board of Education* proclaimed that "separate but equal is inherently unequal."

Moreover, it is possible that well-intentioned laws may have unjust results. By way of example, the federal food stamp program enacted under President Lyndon Johnson's administration initially allowed the poor to purchase \$100 worth of food stamps for a "mere" \$12, not realizing that in some parts of the country, the poor often didn't have \$12 all at once, if at all. So it is important to be open to questioning the validity of laws in any society. As King noted, "Injustice anywhere is a threat to justice everywhere."

King presents very clear distinctions between "just" and "unjust" laws. Just laws uphold human dignity; unjust laws degrade it. Just laws are enacted by a majority, but both the majority and the minority obey these laws. Individuals must have a role in enacting the laws that affect them. Laws must not only be just on their face but just in their application. And here is where our cases enter, both in terms of illustrating the Rev. King's perspectives and in demonstrating that public policy is a reflection of the moment in society.

## **Application of These Concepts**

Part I of this volume deals with how minorities fare under various aspects of the law/law enforcement system and public policy. By virtue of being a "process," it would appear that the judicial process would be uniform.

The authors of articles in Issue 1, "Does the Judicial Process Result in Racial Discrimination?" have divergent perspectives. Does the process result in discrimination, or is it simply the case that minorities engage in more criminal

behavior? If it is the former, then the Rev. King's perspective on facially neutral policies would be applicable.

Issue 2 presents us with the scenario of whether circumstances set the scene for law enforcement. Although the articles in Issue 2 were written pre-9/11 and are principally dealing with African-Americans, the topic is all the more poignant following the events of September 11, 2001 and the government's and public response to the profiling of individuals. Again the issue is one of crime control versus individual rights.

Issue 3 presents an example of Rev. King's statement of a law (in this case, a procedure) that is just on its face, but unjust in its application. Plea bargaining is available to everyone, but if the reality is that minorities and the indigent are more likely to plea bargain for lack of adequate defense, then the process is unjust in its application.

The same is true of Issue 4. Federal sentencing guidelines apply to *everyone*, but if minorities tend to commit particular *types* of crimes that have been correlated with a definitive sentence, minorities will suffer disproportionately. The "guidelines," designed to result in equality, may have had the opposite effect.

Relatedly, Issue 5, dealing with mandatory minimum sentences, reflects a policy designed to remove judicial discretion from the equation. But if this "equality" cannot take extenuating circumstances into consideration, has "justice" been served?

Part II, which deals with gender issues, is not confined to women, since, as we will see, Issue 6 deals with whether "affirmative action" programs, designed to address minority grievances coming out of the past, are in the present hurting others, especially white males.

Issues 7 and 9 return us to the issue of equalizing punishment, but raises compelling questions about whether women, who are often the victims, should be treated comparably by the judicial system. If women want equality, why not across the board?

This is also true of Issue 8, an economic issue. Women have fought a political battle for equality with men. Yet if this is the goal, why should women expect to be taken in special consideration when it comes to facially neutral policies (in this case, the privatization of social security)?

Part III brings us to the contemporary and very controversial issue of sexual orientation and its so many related issues.

Issue 10 can and should be applied to other minorities. Are hate crimes a "special" kind of crime that should be met differently by society? Or is "a crime a crime," regardless of whom the victim is?

Issue 11 brings us to the cultural values that contribute to public policy and justice. If a society espouses true equality, how can it deny basic rights to everyone in that society? By way of background, it is wise to be reminded of a 1967 Supreme Court case, *Loving v. Virginia*, in which the Supreme Court invalidated a state law that prohibited interracial marriages. A compelling argument in the case was that it is a basic human right to be able to go to sleep at night next to the person one loves. This case continued the "right to privacy" many believe to be implicit in the U.S. Constitution and elucidated in

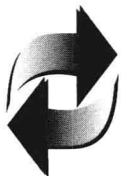
case law in *Griswold v. Connecticut* (1965), in which the Supreme Court invalidated a state law that prohibited the dissemination of information regarding birth control. The phrase that emerged from that case was, “What is more private than the marital bedroom?”

Issue 12 is a logical extension of Issue 11. If society were to grant gays and lesbians the right to marry—and even if not—should individuals of a sexual orientation that is a minority be denied the rights that the majority have—in this case, adoption? The arguments flare on both sides, based upon what might be the effects on an adopted child by an individual or couple who is/are homosexual.

Part IV deals with socio-economics public policies, law, and justice. We return to some of the former issues. Can those who are indigent receive the same treatment in the courts as those who are more affluent? Can they afford the “expert witnesses” who might aid their case? Reflect back on Part I, Issue 3, that of plea bargaining.

Part V brings us to educational issues. Education is the key to a person’s future. That said, are all children in the United States afforded the same opportunities, or are we in a vicious circle in which the poor, who live in neighborhoods with typically lower-quality schools, will have their children receive an inferior education? What, then, shall we do? Do we require schools to “measure up,” as the No Child Left Behind Act would warrant?

The last sentence ended with a question mark. This is what the Taking Sides volumes are all about. We *must* leave you with questions about which to think.



## **Policy Library**

Policy Library provides numerous documents concerning social and policy issues from a diversity of sources, including international research organization.

<http://www.policylibrary.com/US/index.html>

## **New American Studies**

New American Studies Web provides Internet links for a range of issues in American studies and is particularly useful for studies in race and minority issues.

<http://www.georgetown.edu/crossroads/asw>

## **Office of the High Commissioner for Human Rights**

This site provides up-to-date information on the activities of the Working Group on Minorities, along with information on legal standards and procedures available for the protection and promotion of minority rights, especially at the international level.

<http://www.unhchr.ch/minorities/>

## **Supreme Court Collection**

Supreme Court Collection is crucial for researching key decisions of the Supreme Court.

<http://supct.law.cornell.edu/supct/inex.html>



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## PART 1 RACE 1

### Issue 1. Does the Judicial Process Result in Racial Discrimination? 2

**YES:** Ron Stewart, from "African American Males' Reported Involvement in the Criminal Justice System: A Descriptive Analysis," *Journal of African American Men* (Fall 2000) 4

**NO:** Stewart J. D'Alessio and Lisa Stolzenberg, from "Race and the Probability of Arrest," *Social Forces* (June 2003) 15

Author Ron Stewart's work is a case study of the black male population in Buffalo, New York. Stewart explores not only the pattern of black male incarceration, but focuses on the experiences and perceptions of black males in relation to the U.S. criminal justice system and the local police department. D'Alessio and Stolzenberg challenge the typically held view that racial discrimination by police is the reason for the very high rate of male African-American incarceration. The authors also criticize the use of social factors—especially poverty, economic inequality, social disruption, segregation and family structure—to explain the differences in crime patterns between the races.

### Issue 2. Is Racial Profiling Necessary to Law Enforcement? 22

**YES:** Heather Mac Donald, from "The Myth of Racial Profiling," *City Journal* (Spring 2001) 24

**NO:** Richard G. Schott, from "The Role of Race in Law Enforcement: Racial Profiling or Legitimate Use?" (Federal Bureau of Investigation, 2001) 36

Author Heather Mac Donald reviews and disputes the allegations of police profiling and explores the daily demands on police officers. Mac Donald also discusses the justification for using race in investigating crime. Richard G. Schott draws the distinctions between legitimate "stops" versus those based upon racial characteristics. Scott includes an overview of Constitutional protections aimed at preventing police profiling and points to the need for proper police training.

### Issue 3. Is Plea Bargaining Fair? 42

**YES:** Timothy Sandefur, from "In Defense of Plea Bargaining: The Practice Is Flawed, but not Unconstitutional," *Regulation* (Fall 2003) 44

**NO: Mike McConville and Chester Mirsky**, from "Guilty Plea Courts: A Social Disciplinary Model of Criminal Justice," *Social Problems* (May 1995) 51

Timothy Sandefur argues that, while plea bargaining can be abused, it is not necessarily unconstitutional, and that to the extent that flaws exist, they can be remedies. McConville and Mirsky argue that plea bargains form a system of imposing control and discipline upon vulnerable groups in society.

#### **Issue 4. Do Minorities Receive Tougher Sentencing? 72**

**YES: Norm R. Allen, Jr.**, from "Reforming the Incarceration Nation," *Free Inquiry* (Summer 2001) 74

**NO: Stephen Klein, Joan Petersilia, and Susan Turner**, from "Race and Imprisonment Decisions in California?" *Science* (February 16, 1990) 80

Norm R. Allen argues that there are two standards of justice in the United States—legal and social—and that the disparity between the two works against minorities. Stephen Klein, Joan Petersilia and Susan Turner argue that myths occur regarding racial discrimination because the word "discrimination" is mistakenly used in place of "disparity," and that the courts are not engaging in sentencing discrimination.

#### **Issue 5. Are Mandatory Minimum Sentences Fair and Effective? 91**

**YES: David Risley**, from "Mandatory Minimum Sentences: An Overview," *Drug Watch International* (May 2000) 93

**NO: Carl M. Cannon**, from "America: All Locked Up," *National Journal* (August 15, 1998) 100

David Risley argues that the purpose of mandatory minimum sentences is to ensure that serious drug crimes are met with significant punishment and that they have been successful toward this end. Carl M. Cannon argues that, while increased prison sentences may make citizens feel safer, the damage done to prisoners' families is a high price for society to pay.

## **PART 2 GENDER 115**

#### **Issue 6. Is Affirmative Action Reverse Discrimination? 116**

**YES: Fred L. Pincus**, from "The Social Construction of Reverse Discrimination: The Impact of Affirmative Action on Whites," *Journal of Intergroup Relations* (Winter 2001/2002) 118

**NO: Charles Murray**, from "Affirmative Racism: How Preferential Treatment Works Against Blacks," *The New Republic* (December 31, 1984) 123

Professor Fred L. Pincus argues that "reverse discrimination" (i.e., discrimination against whites and especially white males) is the result of affirmative action because affirmative action gives them fewer *opportunities*. Charles Murray argues that whites are not adversely affected by affirmative action because those minorities who are hired are qualified and would be hired even if affirmative action programs were not in existence.



**Issue 7. Is Mandatory Minimum Sentencing Fair to Women? 134**

**YES:** **Ilene H. Nagel and Barry L. Johnson**, from "The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders Under the United States Sentencing Guidelines," *Journal of Criminal Law and Criminology* (Summer 1994) 136

**NO:** **Shimica Gaskins**, from "'Women of Circumstance'—The Effects of Mandatory Minimum Sentencing on Women Minimally Involved in Drug Crimes," *American Criminal Law Review* (Fall 2004) 141

Nagel and Johnson argue that recent social and historical events have resulted in race, gender, and class discrimination. They argue that the current emphasis is on the crime committed, rather than who committed the crime. Gaskins argues that women suffer disproportionately by virtue of being caught in the circumstance of serving as conspirators to males in drug conspiracy. She further argues that such "trapped" women should be given preferential treatment because of their role as mothers.

**Issue 8. Would Privatization of Social Security Be Detrimental to Women? 152**

**YES:** **National Organization for Women (NOW)**, from "Viewpoint: A Foolish Bargain for Women," *National NOW Times* (Spring 2005) 154

**NO:** **Ekaterina Shirley and Peter Spiegler**, from "The Benefits of Social Security Privatization for Women," *Cato Institute* (July 12, 2005) 157

The National Organization for Women (NOW) argues that the privatization of Social Security will be detrimental to women. Women rely upon current Social Security benefits and would fare poorly under privatization. Authors Shirley and Spiegler argue that women will do very well under the privatization of Social Security because the current Social Security system is detrimental to women.

**Issue 9. Does Gender Affect Criminal Sentencing? 167**

**YES:** **Cathy Young**, from "License to Kill: Men and Women, Crime and Punishment," *Reason Foundation* (July 2004) 169

**NO:** **Barbara Cruikshank**, from "Feminism and Punishment," *Signs* (Summer 1999) 172

Cathy Young cites judicial leniency toward women, arguing that women do indeed receive lesser sentences for the same crime. Through the issue of capital punishment, Barbara Cruikshank explores the dilemmas posed by feminist thinking that would argue for equality vs. special consideration for women. If there is to be equality of the sexes, gender cannot be considered in sentencing.

**PART 3 SEXUAL ORIENTATION 179****Issue 10. Is Hate Crime Legislation Constitutional? 180**

**YES:** **Elena Grigera**, from "Hate Crimes: State and Federal Response to Bias-Motivated Violence," *Corrections Today* (August 1999) 182