

CRIMINAL JUSTICE

RACE AND CRIMINAL JUSTICE

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INTRODUCTION

Over 30 years of “get tough” solutions to crime in the United States have produced the world’s largest prison population and incarceration rate, over 60% of whom are people of color. A large proportion of today’s prisoners are victims of the failed “War on Drugs,” which pulled in thousands of people convicted of low-level offenses for long, mandatory sentences. Workplace raids and other enforcement campaigns by Immigration and Customs Enforcement (ICE), as well as the mandatory detention provisions of the 1996 immigration laws, have spurred an escalating use of detention for immigrants awaiting civil immigration hearings, contributing to our jails and prisons swelling beyond capacity. In addition, the treatment of children and adolescents in the justice system has become increasingly punitive, with enforcement and detention policies and practices that draw youth of color into the system at an alarming rate.

Perhaps the most devastating result of these policies has been the disruption of many families in low-income communities of color around the U.S. For instance, there is a large and still growing number of children under the age of 18 who have a parent in prison, up nearly 14% between 1997 (1.4 million children) and 2004 (1.7 million). The next administration and Congress must begin to remedy the array of consequences that have resulted from pursuing a variety of unsound criminal justice policies during the past three decades.

There is a dire need to identify and address the drivers of racial and ethnic disparity and to support rational solutions such as the implementation of racial impact statements; curtailing “crack down” law enforcement campaigns such as those used to implement the drug war and immigration raids that, in their effect, target and criminalize people of color; elimination of mandatory detention of immigrants; elimination of mandatory minimum sentencing laws; and provision of support and resources for individuals returning to the community from custody and for their families.

20TH CENTURY PROBLEMS

In 1972, the U.S. prison and jail population stood at about 300,000 and had remained relatively stable during the previous 50 years, settling at a rate of about 160 per 100,000 by the early 1970s. Since then the prison and jail population has increased more than six-fold, now totaling 2.3 million people nationally.¹ The U.S. rate of incarceration is the highest in the world, and about five to eight times that of other industrialized nations.

The rise in incarceration was driven in large part by growing public fears about crime and the unfortunate convergence of opinion from some social scientists and policymakers from both sides of the aisle that rehabilitation does not work. This ideological shift was quickly followed by changes in state and federal crime policy dominated by reduced judicial discretion and enhanced use of fixed-length prison sentences that were long and much more frequently applied.²

The late 1980s and early 1990s witnessed a rising juvenile crime problem that was accompanied by the nearly immediate popularity of harsh policy responses, including various gang suppression techniques that claimed

¹Sabol, W., and Couture, H. (2008). Prison Inmates at Midyear 2007. Bureau of Justice Statistics, Washington, D.C.; Sabol, W., and Minton, T. (2008). Jail Inmates at Midyear, 2007. Bureau of Justice Statistics, Washington, D.C.

²Greene, Judith. “Getting Tough On Crime: The History And Political Context Of Sentencing Reform Developments Leading To The Passage Of The 1994 Crime Act.” in *Sentencing and Society: International Perspectives*, eds. Cyrus Tata and Neil Hutton. Hampshire, England: Ashgate Publishing, Ltd.

to address the so-called emerging breed of especially violent juveniles, or superpredators, that media and policy-makers frequently warned about during this period. Though juvenile crime never escalated to the predicted levels and has been going down for some time now, these policies remain. Not surprisingly, their impact on youth of color has been especially severe.

The shift in the treatment of drug offenses was especially apparent and a direct result of the set of policies collectively dubbed the “War on Drugs.” From 1980 to 2003, the number of adults sentenced to prison for drug crimes rose from 41,100 to 493,800.³ Perhaps the most drastic policy has been the harsh penalty adopted for federal crack cocaine offenses, based on the 100-to-1 disparity in the quantity of powder cocaine versus crack cocaine required to trigger a five-year mandatory minimum sentence. More than 80% of persons charged with crack offenses are Black, while those charged with powder cocaine offenses are more likely to be white or Latino. This, along with other racially punitive crime policies, is part of the shift toward the criminal justice system becoming the “policy of choice” for responding to problems in low-income communities of color, rather than addressing socioeconomic disadvantages that contribute to crime.

Immigrant detainees are currently the fastest growing segment of prisoners in federal custody. Whereas in 1994, 5,500 detainees were housed in the custody of the Immigration and Naturalization Service (INS), this figure had jumped to 19,500 by 2001.⁴ A massive build-up of detention bed capacity through contracts with private prison companies in the summer of 2006 allowed ICE detention capacity to explode.⁵ Steady increases in contracting have raised the total to about 33,000 today. Immigrants arrive in detention in a variety of ways, but while they await their civil immigration hearing, they languish in prison and jail for months at a time, only to be deported in many cases and subsequently barred from returning to the country. Currently, more than 10 percent of the federal prison population is comprised of people convicted of immigration offenses, typically those who arrived in the country to obtain employment. Today, incarceration is used indiscriminately to deal with a great variety of social problems that would be better addressed through other means, such as substance abuse treatment for the health problem of drug addiction. The next administration and Congress will be challenged and obligated to not only reform these policies but also resolve the problems they have created. In this essay, we offer specific solutions to remedy them.

21ST CENTURY SOLUTIONS

The American justice system is overrepresented by racial and ethnic minorities at each decision point. Racial and ethnic disparity begins with mass arrest policies that characterize the drug war. While there is a clear need for improvements in many areas of the criminal justice system, this section proposes specific reforms for problems in the areas of law enforcement, prosecution and sentencing, the appropriate use of incarceration, support for reentry programs and services, remedying collateral consequences, and the reunification of incarcerated parents with their children.

End Racially Disparate Enforcement, Prosecution, Sentencing and Immigrant Detention Practices.

One area of reform that is necessary is to end law enforcement campaigns, prosecution and sentencing policies and practices that result in racial and ethnic disparity. The most egregious example of this, noted above, is the 100:1 drug quantity difference for applying mandatory sentences for crack versus powder cocaine offenses. Two recent victories should serve as momentum for continued work toward revising sentence structures. In 2007, the United States Sentencing Commission (USSC) lowered the sentencing guidelines for crack cocaine offenses and recommended that Congress address the lengthy mandatory minimum sentences for these offenses. The U.S. Supreme Court ruled that judges may consider the excessive nature of penalties for crack cocaine offenses for the purposes of sentencing defendants below the recommended sentencing guidelines. And, Congress has four bipartisan crack sentencing reform bills pending, including legislation in the Senate and House of Representatives

³King, R. (2008). *Disparity by Geography: The War on Drugs in America's Cities*. Washington, D.C.: The Sentencing Project.

⁴Miller, Teresa A. (2001). *The Impact of Mass Incarceration on Immigration Policy*. In (Mauer, Marc and Chesney-Lind, Meda). *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (pp 214-238). New York: The New Press.

⁵Greene, J. and Patel, S. (2008). *The Immigrant Gold Rush: The Profit Motive behind Immigrant Detention*. Submitted to the U.N. Rapporteur on the Rights of Migrants.

that would equalize penalties for crack and powder cocaine offenses without increasing mandatory sentences.

At the federal level, much work remains, however, and it should focus on correcting the inequity in crack cocaine penalties. The mandatory sentencing structure still in place results in average sentences for crack cocaine offenses that are three years longer than those for powder cocaine. Black defendants have a 20% greater chance of being sentenced to prison than white drug defendants do. Incarceration is used too frequently to treat what is often a drug addiction. We support efforts to resolve these problems in the community with substance abuse treatment so that lives, families, and communities are not needlessly disrupted by lengthy stays in prison.

Research on drug enforcement strategies at the local level provides many examples of how the drug war is waged in communities of color. A 2004 study by University of Washington Professor Katherine Beckett found that several police practices explain racial disparity in drug arrests, including a law enforcement focus on crack offenders, and the priority placed on outdoor drug venues. She documented that these practices are not determined by race-neutral factors such as crime rates or community complaints.⁶

There are numerous other examples of prosecution and sentence structures that negatively impact persons of color. For instance, drug-free zones were originally designed to keep drug sales from occurring on school property. It has recently been demonstrated that the broad enactment of drug-free zones soon blanketed entire cities where people of color reside with overlapping drug-free zones, which caused racial disparities to increase.

More than a decade ago researchers at Northeastern University examined Boston police records for cocaine cases handled in the Dorchester District Court and found that while roughly 80 percent of all drug arrests took place within a school zone, only 15 percent of white defendants were charged with an eligible offense (distribution or possession with intent) compared to 52 percent of non-white defendants. When researchers interviewed police officers about their charging practices, they were told repeatedly, “it has to do with whether it’s a good kid or a bad kid.”⁷

Immigrants have increasingly become embroiled in the criminal justice system through Immigration and Customs Enforcement (ICE) raids. Arrests in worksite raids have jumped by 481 percent since 1994.⁸ The terrorist attacks of September 11, 2001 easily allowed for the practice of ICE raids and other means of detaining scores of immigrants to expand once the issue was framed as a threat to national security.⁹

While youth crime in the United States remains near the lowest levels seen in the past three decades, public concern and media coverage of gang activity have skyrocketed since 2000. The public face of the gang problem is young men of color, but whites make up a large portion of gang membership, though reports conflict about exact figures.¹⁰ White gang youth closely resemble Black and Latino counterparts on measures of delinquency and gang involvement, yet even though they are virtually absent from most law enforcement and media accounts of the problem.

Black and Latino communities bear the cost of failed gang enforcement initiatives. For example, the Los Angeles district attorney’s office found that close to half of Black males between the ages of 21 and 24 had been entered in the county’s gang database even though no one could credibly argue that all of these young men were current gang members. Communities of color suffer not only from the imposition of aggressive police tactics that can resemble martial law, but also from the failure of such tactics to make their neighborhoods more peaceful.¹¹

⁶Beckett, Katherine. “Race and Drug Law Enforcement in Seattle,” available online at: <http://www.soc.washington.edu/users/kbeckett/Enforcement.pdf>.

⁷Greene, J., Pranis, K., and Ziedenberg, J. (2006). *Disparity by Design: How Drug-Free Zone Laws Impact Racial Disparity—and Fail to Protect Youth*. Washington, D.C.: Justice Policy Institute.

⁸Bacon, David. “Railroading Immigrants.” *The Nation*, October 6, 2008.

⁹Thompson, S. G. (2008). *Speech: Latinas and their Families in Detention: The Growing Intersection of Immigration Law and Criminal Law*. William and Mary Journal of Women and the Law, 14, 1-20.

¹⁰Law enforcement sources report that over 90 percent of gang members are nonwhite, but youth survey data show that whites account for 40 percent of adolescent gang members.

¹¹Greene, Judith, and Kevin Pranis. (2007) *“Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public Safety Strategies*. Washington, D.C.: Justice Policy Institute.

Address Collateral Consequences of Imprisonment.

A variety of collateral sanctions were enacted by Congress in the 1990s for those convicted of drug offenses. One is the lifetime termination of access to welfare and food stamp benefits for individuals with felony drug convictions. The result is that individuals coming out of custody are now at a great disadvantage in attempting to remain crime-free. We advocate for the elimination of restrictions on access to welfare benefits, residence in public housing and student loans for higher education.

People with felony convictions are also subject to the effects of felony disenfranchisement laws that restrict the right to vote for an estimated 5.3 million persons. These laws apply not only to people in prison, but in 35 states also to persons on probation and/or parole, and in 11 states, even for people who have completed their sentence. Of the total disenfranchised population, four million are living in the community excluded from the ballot box. Not surprisingly, the racial disparities of the criminal justice system translate into disenfranchisement as well, with one in eight Black males now ineligible to vote.¹²

Federal law, via the Second Chance Act, now mandates that child welfare agencies and prisons work together to create a protocol for improved child-parent relationships for families with a parent in prison. Specifically, they should pursue efforts to maintain the parent-child relationship during incarceration, offer programs that allow parents to improve their parenting skills and support parental involvement in their child's future decisions.

In addition, an exception for parents in prison should be made to the Adoption and Safe Families Act (ASFA) mandate to sever parental rights if a child has been in foster care for 15 months out of any 22-month period. In present form, this mandate automatically terminates parental rights for incarcerated parents. This law disproportionately affects incarcerated mothers, since mothers are more likely than incarcerated fathers to have their children placed in foster care when they go to prison. It is estimated that 10-20% of incarcerated women have children in foster care.¹³

As approximately 700,000 people exit from prison each year, plans should be firmly in place to provide the communities to which they are returning with adequate resources and support. Resources should also be in place to support the individuals who are reentering society so that they have the best possible chance to reclaim a positive life.

ACTION NOW

1. Implement racial impact statements.

Just as policymakers routinely require fiscal or environmental impact statements for proposed changes that may have unanticipated impacts, so too should lawmakers be required to prepare a racial impact statement prior to the adoption of any legislation that might affect the size of the prison population. Such statements, developed by analyzing current crime and sentencing data, would project the relative racial composition of new prison sentences. With hindsight, we can now see that Congress should have conducted such an analysis prior to consideration of the crack cocaine mandatory sentencing laws in 1986. Had it done so, perhaps documentation of the anticipated racial impact might have caused lawmakers to consider the intolerable level of disparity it would produce. Both Iowa and Connecticut enacted racial impact statement requirements in 2008, and Minnesota's Sentencing Guidelines Commission already forecasts the impact of sentence structures on different racial and ethnic populations. Congress should now follow their lead for federal legislation as well. Racial impact forecasting would focus attention on "race-neutral" policies such as drug-free zones and zero-tolerance policies. Implementing racial impact statements in the area of sentencing is only a first step. The expansion of racial impact assessments across a whole spectrum of criminal justice-related issues could become a key tool to consciously consider and reduce racial disparities.

¹²Human Rights Watch/The Sentencing Project (1998). *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*. Washington, D.C.: Human Rights Watch/The Sentencing Project.

¹³Hagey, K. (2008). *Dodging ASFA's Hammer*. New York City: Child Welfare Watch.

2. Abolish Mandatory Detention of Immigrants.

The United States should end the policy of mandatory detention and should reexamine whether the use of detention is necessary and proportional. As long as the law requires the mandatory detention of immigrants without due process rights, the country will continue to see growth in prisons, jails and private contract facilities, increasingly driven by profit-making motives, as well as by anti-immigrant hysteria. Effective alternatives to detention have proven their worth.¹⁴ They should be fully implemented throughout the country.

3. Support people in reentry and the communities where they return.

In 2008, Congress passed the Second Chance Act, landmark legislation designed to establish model programs to enhance the reentry prospects for people returning to the community from prison and jail. While the act was passed with broad bipartisan support, Congress failed to provide the necessary funding that is critical for efforts to expand and enhance reentry initiatives across the nation.

Second, federal restrictions on access to welfare, public housing and student loans provide no demonstrable benefits to the public and, in fact, run counter to the community's interest in promoting public safety. Such blanket denials of public benefits serve no rational purpose and should be repealed by Congress and state legislative bodies.

Third, while the Constitution grants states the power to establish voting qualifications, Congress may set standards for federal elections. Currently, as a result of varying state policies, one's ability to vote for national leadership is dependent on the state of residence. Legislation introduced in the Senate by Senator Russ Feingold and the House of Representatives by Representative John Conyers would permit non-incarcerated persons to vote in federal elections, even if prohibited from voting in state elections.

Finally, support and services should be provided to children of incarcerated parents. These services should go beyond mentoring and include visiting support and subsidized guardianship (outside of the child welfare system) for caregivers. Moreover, parents should not have their parental rights automatically terminated because of their incarceration.

4. Make racial equity a standard for all criminal justice policy and practices.

Many current policies and practices related to law enforcement and criminal justice, especially those that aggravate racial disparities, need reexamination, reform or repeal. Making racial equity a defined, conscious and enforceable standard for actions and outcomes at every step in the criminal justice system would aid in identifying and eliminating bias—whether the increased militarized police presence in public schools in communities of color, racial profiling by law enforcement, restrictions on due process and fair treatment for people of color and immigrants, lack of access to quality legal representation for people with low incomes or the racially disproportionate application of the death penalty. Where disparities persist, law enforcement agencies and criminal justice entities should be required to produce, with public input, concrete goals, plans and timetables for eliminating them.

CONCLUSION

Crime is a local problem. A national strategy should promote public safety through empowering communities to engage in solving problems while supporting racial equity. Research now documents that taxpayers spend as much as a million dollars a year for incarceration in some urban areas; meanwhile, schools, health care institutions and treatment programs in these same areas are woefully underfunded.

It is impossible to design solutions to the myriad problems within the criminal justice system without talking about race. The harsh criminal justice policies that have dominated the past 30 years have contributed to the overrepresentation of people of color in the criminal justice system. We must compel the next administration and Congress to enact policies that support both public safety and racial fairness.

¹⁴Sullivan, Eileen, Felinda Mottino, Ajay Khashu, and Moira O'Neil. (2000) "Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program." New York: Vera Institute of Justice.