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HAIR MICROSCOPY REVIEW PROJECT

AN HISTORIC BREAKTHROUGH
FOR LAW ENFORCEMENT
AND A DAUNTING
CHALLENGE FOR THE
DEFENSE BAR

**ELIMINATING RACIAL
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Racial Disparities

The Answer Lies Within

By Darryl A. Stallworth

There is a moment in the lives of many individuals when the light comes on and things begin to make sense. All problems and fears seem less daunting. Oprah describes it as the “Aha moment.” It is when people realize, as Gandhi professed, “You must be the change you wish to see in the world.”

Editor’s Note: As noted in this month’s NACDL News, NACDL partnered with several other organizations to sponsor a conference in October 2012 focusing on racial disparities in the criminal justice system. NACDL asked attendees to provide reflections and put forth recommendations that might lead to the reduction or elimination of disparities. The practical solutions in these seven articles provide a road map for reform. Read the NACDL report at <http://www.nacdl.org/reports/eliminatedisparity>.

Similarly, eliminating racial disparities in the criminal justice system can be achieved by recognizing the power we all possess to get rid of personal biases and structural racism in the criminal justice system. In essence, every police officer, prosecutor, defense attorney, lawyer, judge, juror, and community member has to do more, care more, and be more understanding and willingly acknowledge the biases everyone possesses.

In October 2012 NACDL and other organizations sponsored a conference entitled *Criminal Justice in the 21st Century: Eliminating Racial and Ethnic Disparities in the Criminal Justice System*. The people who attended came to the table acknowledging that racial and ethnic disparities in the criminal justice system exist. They were willing to listen to potential solutions to solve the problem. Every workshop provided an in-depth look at the wheels of justice, and participants were committed to ensuring that the wheels turned fairly for all.

Day One of the conference began with a lively *Town Hall Meeting* and discussion about issues that have an impact on the racial makeup of the criminal justice system such as societal and economic factors, racial bias, and policing, including *stop and frisk* — a practice that for many is the point of entry to the system. Although the panelists cited several solutions, it essentially boiled down to ensuring that everyone methodically works to fix the institution and structures that ensure the disparities are a mainstay.

Day Two included informative and sometimes heated discussions regarding plea bargains, charging, diversion, pretrial incarceration, and jury selection. Prevalent in all these workshops was the message that bearers of justice in the criminal justice system will do what is right depending on what they believe the law allows — or more importantly what they believe the

law requires — them to do. One could sense a deep subtle conflict in what is required versus what is right.

As the conference concluded on Day Three with discussions on pretrial, litigation sentencing and community justice, participants were reminded of the importance of having people of high moral fiber in positions of leadership, willing to go the extra mile to ensure that disparities are addressed throughout the system. In particular, having community-based policing would go a long way in helping citizens become stakeholders in their cities.

What is the answer? Do we really want to know? The answer has been avoided — perhaps consciously — because accepting the answer means society has to implement it. People have to actually get off their rear ends and make it work. People might have to change their jobs, lose their jobs, or be ridiculed and ostracized. Others have discovered the answer too, but they are not willing to change because of the benefits of maintaining the status quo. This is that defining moment in history when people put up or shut up, talk the talk or walk the walk. Everyone deserves it, including the generations that follow.

The conference report — *Criminal Justice in the 21st Century: Eliminating Racial and Ethnic Disparities in the Criminal Justice System* — offers a blueprint for what all individuals can do to affect the system and ensure equity in a system that has thus far proven otherwise.

“If you are not part of the solution, you are part of the problem,” Eldridge Cleaver was once quoted as saying. I contend that we are at a time in our country that we have the power to be part of the solution. Now we must get to work. ■

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Reducing Racial Disparities Through Structural Criminal Justice Reforms

By Vanita Gupta and Kara Dansky

I. Introduction

After a century of stability, the last 40 years have witnessed an American penal system dominated by unrelenting growth; mass incarceration has been aggressively implemented at almost every stage of the justice process. Under this punitive regime, penal reform faced an impenetrable wall of resistance, and the consequences are well documented: a five-fold increase in the size of the penal system, which reflects horrific racial and ethnic disparities, at tremendous social and financial cost to the country.

For decades, the culture of incarceration and punitiveness undermined most reform efforts. Today, however, these dynamics are shifting: in nearly every state, lawmakers are considering proposals to contain correctional costs, scrutinizing proposals for further growth, and opening the door for consideration of strategies to reduce their correctional populations that were out of the question just a few years ago. This shift represents an extraordinary opportunity.

It must be noted at the outset that any proposal to tackle criminal justice reform must account for the extreme racial disparities that have come to characterize it. But tackling this issue can be challenging. Conversations about racial bias in the criminal justice system can make even well-intentioned stakeholders defensive and unwilling to investigate unconscious or structural racism. There is a difference between institutional or structural racism and personal bias and/or prejudice of criminal justice actors. When discussing race and racism in the criminal justice system, it is important to acknowledge the many ways systems, policies, and practices operate to disadvantage specific groups of people irrespective of the intent of system actors.

One of the chief drivers of mass incarceration and racial disproportion is the system of incentives that encourage officials to pursue punitive policies and practices. For example, the funding structures of certain federal grant programs create incentives for police to make arrests for low-level, nonviolent drug crimes and petty misdemeanors, especially in minority neighborhoods. Similarly, a 1994 federal crime bill provided \$8 billion for state prison construction, in part conditioned on enactment of laws that increased length of stay in prison. Performance measures for prosecutors and probation officers often encourage practices that *increase* unnecessary supervision and keep people — especially people of color — trapped in a cycle of correctional control. Structural reforms are needed to reverse this trend.

One method of reducing racial disparities in the criminal justice system is to reduce the disproportionate number of African Americans and Latinos that enter the system. One suggestion put forth at NACDL's October 2012 racial disparities conference, a suggestion perhaps made tongue in cheek, is to increase the number of white individuals arrested so as to “even the playing field” and motivate culture change within police departments. Another, perhaps more productive, approach, is to advocate for repeal and/or reform of policies and practices that drive racial disparities and cause disproportionate harm to vulnerable communities of color.

Several states have undertaken efforts to reduce their corrections populations, but unfortunately, many of these efforts failed to take sufficient advantage of today's opportunity to enact meaningful reforms. For example, Texas and Kansas both enacted corrections reform measures in 2007 by bringing together groups of lawmakers who were genuinely interested in reducing corrections costs, but who could not muster the political will to make the changes needed to meet their goals. In Texas, the prison population has increased, from 171,790 at the end of 2007, to 172,224 in 2011, and is projected to increase further. The corrections population of Kansas stood at 8,539 in 2008, and then grew to 9,051 in 2010 and 9,327 in 2011. The only states that have seen sustained reductions in their corrections populations are New York and New Jersey, both of which have done the hard work of making meaningful changes in their policing and sentencing practices. Recently, California and Michigan have both shown significant reductions in their correctional populations, and states like Colorado and Washington show promise as well.

There are really only two ways to meaningfully cut correc-

tions populations and costs: reduce the number of people entering the system and reduce the amount of time they spend there. The bulk of this article is devoted to laying out a policy agenda that will enable jurisdictions to repeal and/or reform policies and practices that drive racial disparities and cause disproportionate harm to vulnerable communities of color.

II. Proposed Policy Prescriptions

A. Reducing Entry Into the System

1. Reducing Arrests

Arrests often lead to incarceration, are marked by extreme racial disparities, and have collateral consequences, regardless of whether they result in conviction. Arrests also can and do serve as pretexts for searching incident to arrest, which can further exacerbate racial inequality in policing. One way to reduce arrests is to encourage the adoption of state laws favoring citations over arrest. For example, in 2011, Kentucky passed a law requiring police officers to issue a citation instead of making an arrest for many misdemeanors. Preliminary data suggest that arrests are down nine percent since the law took effect. New York City and Seattle have also successfully adopted policies to reduce felony arrests.

2. Reducing Felony Filings

Much of the prison boom of the 1990s-2000s was caused by a sharp increase in the proportion of arrests that resulted in the filing of a felony charge. Specifically, felony filings increased by 37.4 percent between 1994 and 2008, and that increase was accompanied by a nearly identical 40 percent increase in prison admissions. This presents a challenge for reform because prosecutors have virtually unlimited discretion in deciding whether to bring charges and which charges to bring. Some proposals to address this problem include prosecutorial guidelines, transparency requirements, and performance standards that reward success in matching charge at filing with charge at conviction rather than number of convictions. This is an area that is ripe for further development.

3. Eliminating Unnecessary Pretrial Detention

On any given day, 60 percent of the U.S. jail population is composed of people who have not been convicted and are awaiting resolution of their charge. Moreover, as states embark on efforts to reduce their prison populations, many find that their “reforms” actually just shift correctional populations out of state prisons and into county jails. In addition to putting an additional strain on county budgets, this practice does nothing to reduce unnecessary overall incarceration. Shifting prison populations into county jails is not the way to reduce the national correctional populations. In 2011, Kentucky enacted a new law mandating that certain defendants be placed on pretrial release on their own recognizance or on unsecured bond, subject to appropriate conditions. Kentucky’s efforts at pretrial reform are a positive step and could be used as a model for other jurisdictions wishing to reduce their correctional populations through pretrial and bail reform.

4. Reclassifying Crimes

Nationally, people convicted of drug-related crimes comprise approximately one quarter of the incarcerated population; the “war on drugs” has been a colossal failure, by any measure. Diverting drug offenders from prison by reclassifying simple possession of drugs to misdemeanor status and diverting minor drug sellers to probation instead of prison would

reduce admissions to prison substantially. For example, sentences for drug offenses meted out by New York City judges fell from 8,614 in 1998 to 2,224 in 2011. In 1999 the state prison population peaked at 72,899, up from about 22,000 in 1980. Between 1999 and 2012, the New York State prison population fell by 30 percent.

5. Eliminating Mandatory Minimums

Many people are sentenced under mandatory penalty schemes that leave the judge no option other than lengthy prison terms. Eliminating mandatory penalties would likely have the most impact on reducing average sentence length among people convicted of relevant offenses. In the 1980s, Michigan had one of the harshest mandatory minimum sentencing schemes in the nation, including a law that mandated life in prison without parole for certain drug crimes. Between 1996 and 2010, Michigan adopted a series of reforms to eliminate some of the most stringent mandatory penalties. The Michigan story demonstrates that with enough will, reform of mandatory minimum schemes is possible.

6. Eliminating Revocations

Nationally, around 250,000 of the people who enter prison arrive having been revoked from parole, many due to violations of supervision rules, not new crimes. Reducing the rate of rules violators going to prison is a high-priority avenue for many states to decrease admissions to prison. For example, in August 1999, New Jersey’s prison population hit an all-time high of 31,962, up from just 5,886 in 1980. But starting in the early 2000s, parole officers were given new supervision tools: risk-assessment instruments and use of day reporting and electronic monitoring to respond to rule breaking by people on parole. This policy change played a role in reducing New Jersey’s prison population by 19 percent between 1999 and 2009.

B. Reducing the Length of Time Spent in the System

1. Increasing Opportunities for Earned Discharge off Probation and Parole

One way to improve probation and parole outcomes is to provide opportunities for low-risk individuals to earn their time off supervision. Earned discharge programs reduce the amount of time individuals are required to serve on active supervision by a unit of time for each month the individual is in full compliance with the conditions of supervision. This provides probation and parole officers with greater flexibility to focus on moderate and high-risk individuals. In the 2012 legislative session, Maryland passed a bill requiring the Department of Public Safety and Correctional Services to establish a program for implementing earned compliance credits in order to reduce periods of active supervision. The bill went into effect January 2013.

2. Increasing Opportunities to Earn Release From Prison

Earning release from prison has become increasingly difficult in the last several decades because states have reduced opportunities for parole and good time. Returning to sensible parole and good time policies would have a significant impact on prison populations. For example, in 1995, Mississippi eliminated parole, and prison expenditures grew by 155 percent. After years of wrangling, Mississippi legislators restored parole eligibility to certain inmates. Between April 2009 and August 2009, 3,100 inmates were released early, with virtually no public

notice and no controversy. Cost savings for Mississippi taxpayers due to this rollback were estimated at \$200 million.

3. Eliminating Recidivism Statutes

Recidivist statutes should be eliminated or reduced. These statutes increase penalties for people with previous felony convictions, and often the enhancement is sizeable. Eliminating these sentence enhancements would not affect a large number of people, but because the enhancements are typically fairly extreme, the impact on prison populations can be meaningful. One recent dramatic example is the change in California's notorious Three Strikes law. In the 2012 elections, California voters limited the state's Three Strikes law by removing the possibility of a life sentence for most nonviolent third strikes. This change in the law is projected to reduce California's bloated prison system by at least 3,000 inmates and to save the state between \$150 million and \$200 million.

III. Conclusion

Society will not be able to fully address race disparity in the criminal justice system until it attacks the legal and structural mechanisms that incarcerate so many for so long. Now is the time to pursue reforms that will break the nation's crippling addiction to incarceration and other forms of correctional control — an addiction that harms everyone, but is most devastating to the disproportionate number of people of color victimized by it. ■

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Prosecution and Race: Understanding the Impacts Of Prosecutorial Discretion

By *Whitney Tymas*

For decades, scholars have sought to understand why the United States incarcerates African Americans and Latinos at such enormous rates, compared to their Caucasian counterparts. In exploring whether these dispari-

ties can be attributed to racial bias, most empirical studies have examined the dynamics of decision-making by police, judges, and juries. A significant void exists in research addressing one of the most critical, yet least understood, areas of criminal justice: prosecutorial discretion.¹ It is not surprising, then, that there has been scant research into the relationship between prosecutorial discretion and race. And while increasing numbers of prosecutors embrace problem-solving and innovative approaches to their work, most prosecutors' offices lack performance measures to help them assess the efficacy of such approaches along a range of criteria, including racial parity.²

It is hardly a new concept that prosecutors might be responsible for at least some of the racial inequality that pervades the criminal justice system.³ Yet problems related to the faulty exercise of prosecutorial discretion have appeared intractable, as judicial deference to prosecutorial decisions and the high burden of proof placed on defendants to demonstrate claims of selective prosecution have rendered legal solutions unrealistic.⁴ Moreover, even the most conscientious prosecutors seeking to address the issue of biased prosecutorial decision-making have lacked the tools for evaluating the performance of their own offices. Many (perhaps most) of the nation's approximately 2,300 state and local prosecutors' offices are working within the pressure cooker of low budgets, high case loads, poor data-management capabilities, and intense public scrutiny. For these reasons, most are severely limited in their ability to assess themselves by any measure beyond the crude yardstick of conviction rates and sentence lengths — standards that fail to shed light on fairness, equity, and community safety.

New Efforts by Prosecutors to Combat Bias, Improve Accountability, And Promote Public Safety

The Prosecution and Racial Justice Program (PRJ) at the Vera Institute of Justice is an unprecedented effort to partner with prosecutors to develop, identify, and address racial disparities in case outcomes. PRJ assists prosecutors in collecting and analyzing data at key discretion points in the prosecutorial process — including initial case screening, charging, plea offers, and final disposition. The first step in helping prosecutors improve their internal processes is to present them with an accurate picture of what is actually happening in their offices. To accomplish this, PRJ researchers analyze voluminous data to see whether the prosecutors who are processing cases, in the aggregate, are exercising discretion in a racially neutral way. This is done using multivariate statistical techniques that control for a wide variety of factors and reveal whether, all things being equal, race is driving case outcomes. Following data collection, analysis, and reporting, PRJ helps its partners integrate findings into management policies that reduce the risk of biased decision-making. These policies may relate to training, technology, supervision, staffing, or other management concerns. The goal of the program is to help reduce racial disparity in the criminal justice system by educating prosecutors about the cumulative impact of their daily decisions on case outcomes.

The need for this internal auditing process is critical. Tensions and animosities can exist between prosecutors and the general public, often for historically valid reasons. Prosecutors can be confused and frustrated by what they perceive as a lack of support by the communities they are sworn

to serve, particularly in the context of violent crime. They may look outward and complain that witnesses will not come forward, victims will not testify, and therefore even the most meritorious cases cannot be prosecuted successfully — translating to less justice and safety for everyone. PRJ helps prosecutors focus inward and recognize that carefully examining their own decision-making processes and developing solutions to address disparities will increase their accountability to the communities that may trust them least, leading to better public safety outcomes. By inviting PJR in to audit their offices, prosecutors take the chance that the research will produce troubling findings. Yet, those courageous enough to open their doors to PRJ also recognize that there are great benefits associated with getting in front of the toxic issue of racial bias and addressing it head-on.

Notes

1. With support from the National Institute of Justice, the Vera Institute of Justice undertook research to better understand how prosecutors make decisions throughout the processing of a case. Bruce Frederick & Don Stemen, *The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making* (2012); available at <http://www.vera.org>.

2. In 2003, the American Prosecutors Research Institute (APRI), the research and development arm of the National District Attorney's Association, took an important first step by developing a prosecutorial performance measurement framework. The measures developed by APRI were tested in two jurisdictions; however, the full potential of this work was never fully realized, and APRI is no longer in existence. See E.M. Nugent-Borakove, L.M. Budzilowicz, & G. Rainville, *Performance Measures for Prosecutors: Findings From the Application of Performance Measures in Two Prosecutors' Offices*, A Report of the Prosecution Performance Measurement Project, American Prosecutors Research Institute (2007).

3. See generally Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13 (1998), stating: "Few, if any, prosecutors intentionally or even consciously make decisions based on race. However, the many race neutral decisions that prosecutors make at the charging and plea bargaining stages of the process may be the result of unconscious and deeply internalized biases that have a racially disparate, and thus harmful, effect."

4. The Supreme Court has ruled that, in order to prove selective prosecution based on race, a defendant must prove that similarly situated whites could have been, but were not, prosecuted. *Wayte v. United States*, 470 U.S. 598, 609 (1985); *United States v. Armstrong*, 517 U.S. 456, 470 (1996). Additionally, in order to obtain evidence to support such a claim, a defendant must show discriminatory intent on the part of the prosecutor simply to obtain materials in discovery. ■

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The Role of the Defender in a Racially Disparate System

By Jonathan Rapping

I visited D.C. Superior Court for the first time in 1993 when, as a law student and intern investigator with the D.C. Public Defender Service, I watched first appearance hearings. I was surprised to see that every defendant charged that day was African American, despite the fact that Washington, D.C., had a significant White population. I would soon become a public defender in the city and for the next 11 years serve an almost exclusively Black clientele. Despite the clear racial disparity in the system, the people responsible for ensuring it ran smoothly seemed desensitized to the disparate treatment of so many residents. Judges, prosecutors, police, and probation officers — many of whom were Black and most of whom I assumed to be progressive on issues of race outside the criminal justice context — appeared numb to the racial imbalance that defined the process. While very few engaged in explicit racism, all helped fuel a system in which the color of one's skin helped explain whether he was charged, convicted, and punished.

Social scientists have studied implicit racial bias, the subconscious association of race and crime, and its tendency to make well-intentioned people behave in ways that produce racist outcomes. Implicit racial bias impacts the way police investigate crime and interpret the information they rely upon to justify arrests. It affects how prosecutors evaluate evidence they rely upon to make charging decisions, bail recommendations, and plea offers. It shapes the way jurors process evidence at trial and whether they interpret a given fact as evidence of guilt or subject to innocent explanation. And it influences how judges rule on motions and levy sentences. Throughout the entire criminal justice process, implicit racial bias drives decision makers to respond in ways that perpetuate racial disparities.

Criminal defense lawyers frequently find themselves fighting to force the system to live up to its most cherished ideals, and among them racial justice certainly ranks high. Because they represent so many clients of color in a system fraught with implicit racial bias, they must develop a strategy to counter this subversive force. Such a strategy must include three prongs: self-awareness, education, and resistance.

The first prong, self-awareness, requires making sure criminal defense lawyers do not come to accept the notion that race implies criminality, for this way of thinking or feeling affects the people who defend the accused as much as it affects others in the system. When defenders spend every day working in a system that constantly bombards them with the message that there is a strong correlation between crime and race, even the most conscientious defender will be influenced. Because defense lawyers cannot effectively fight against a force they have come to accept, they must learn to recognize, and fight to resist, these impulses. Through training and mentoring, each defender must teach other defenders to do the same.

Having done this, the next task is to educate others in the system about implicit racial bias so that they can become aware of it in themselves. Implicit racial bias, for example, causes police to disproportionately target and arrest people of color. It drives prosecutors to consider race when making charging and plea decisions. It influences how jurors evaluate evidence. And it affects how judges make sentencing decisions. Because even the best-intentioned individuals are

Addressing Racial Disparity in The Criminal Justice System Through Holistic Defense

By Robin Steinberg

Racial disparity in the criminal justice system is a problem with which public defenders are intimately familiar. They see it every day in courthouses across the country where people of color from low income communities line the crowded hallways, fill the courtroom benches, and sit at the defense table in staggering and disproportionate numbers. Public defenders cannot eliminate racial disparity in the criminal justice system because racial disparity is the result of larger social, political, and economic issues and decisions that were made long before the police put cuffs on their clients, and long before defenders met the clients at their first court appearance. But defenders can — and should — provide public defender services that properly address the discriminatory laws and practices they see. The Bronx Defenders' model of holistic defense, guided by four "pillars" outlined in this article, combats racial disparity in the criminal justice system by enhancing the quality and meaning of individual representation for each client; providing civil legal services that improve life outcomes, in addition to case outcomes; creating structural mechanisms that capture important client and community data; and empowering attorneys, clients, and community members to advocate for a fairer criminal justice system.

Of course, public defenders strongly believe in the right to counsel for poor people of *all* races and ethnicities who are accused of crimes. The core of what they do is defend anyone, anywhere, charged with anything. But America's criminal justice system is not race neutral. It is impossible to ignore the fact that nearly all of The Bronx Defenders' 30,000 clients per year are African American or Latino¹ and that nationwide, 1 in 3 Black males, 1 in 6 Hispanic males, and 1 in 17 White males are expected to go to prison during their lifetime.² Mass incarceration is only part of the problem; in 21st-century America, a release from prison does not guarantee real freedom. As a result of a criminal record — or even just an arrest — clients suffer crippling collateral consequences. They face deportation and the loss of their children, jobs, employment licenses, public housing, and public benefits.³ Since the mid-1990s, draconian laws and the increased availability of criminal history information have contributed to the expansion of these collateral consequences.⁴ In this context, it is easy to understand why civil rights advocate and Ohio State Law Professor Michelle Alexander called the criminal justice system a "gateway" into a new "racial caste."⁵ While the Supreme Court decision *Padilla v. Kentucky* has made public defenders responsible for advising their clients about the consequences of a plea,⁶ more drastic measures are necessary.

Four Pillars

Holistic defense chips away at this "racial caste" system by responding to the legal and nonlegal challenges that clients face. The model is comprised of four pillars: *Pillar One* — seamless access to legal and nonlegal services that meet client needs; *Pillar Two* — dynamic, interdisciplinary communication; *Pillar Three* — advocates with an interdisciplinary skill set; and *Pillar Four* — a robust understanding of, and connection to, the community served. All four pillars must be met for

affected, defenders must consider ways to make other actors aware of how they might perpetuate racial disparity, and work to persuade them to resist these impulses. Defense attorneys have several ways to educate others about this bias: voir dire, motions practice, use of experts at trial, jury instructions, and sentencing advocacy.

During voir dire defense counsel should work to make jurors aware of the problem of race bias and identify those jurors who appreciate its influence. Through motions practice defense counsel might educate the judge about how bias can influence police officers and ask the judge to consider it when relevant. Counsel should consider using expert testimony to educate jurors about implicit racial bias. When relevant, they should consider crafting an instruction that explains the dangers of race bias and provide guidance on being conscious about it. And the advocate can discuss how this phenomenon influences judges at sentencing along with statistics that highlight relevant racial disparities when available.

At every step of the process the lawyer will face the likelihood of being shut down when attempting to introduce this social science. But by raising the issue, the lawyer is educating the judge, who plays a critical role in addressing racial disparity in the criminal justice system.

However, despite the lawyer's best efforts, getting others to acknowledge their biases or to admit that there is racism in the system over which they have stewardship will be difficult. It is during these times that the advocate can feel hopeless, even complicit, and may consider giving up and leaving the system. It is for these moments that the third prong is important — resistance. Criminal defense attorneys must provide inspiration and support to colleagues who are feeling beaten down. For there is value in being the one voice in the courtroom reminding others of the injustice in the system. With enough of these voices, spreading throughout the criminal justice system, consciousness will slowly be raised.

The Talmud tells the story of a just man who came to Sodom to preach against wrongdoing. No one listened. Many laughed at him. But he continued. One day a child asked him why he went on preaching when it was obvious no one was listening. He responded, "In the beginning I thought I could change the world. Today I know I cannot. If I still shout today, if I still scream, it is to prevent the world from ultimately changing me."

Criminal defense lawyers must remain acutely aware of the injustices in the system that plague their clients. Defenders must develop strategies for educating others about these injustices and enlisting help to undo them. And when that fails, defenders must resist the desire to succumb to the status quo and keep working for a more just tomorrow. ■

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an office to be considered truly “holistic”; however, it is an aspirational model, and public defender offices can start by incorporating one or two pillars into their practice.⁷

Seamless access to legal and nonlegal services (Pillar One) is crucial for clients from historically disenfranchised Black and Latino communities, who have been denied access to services for far too long, leading to instability, poverty, and criminal justice involvement. By offering criminal defense, family defense, and civil legal services under the same roof, The Bronx Defenders places an emphasis on “seamless” access: defenders do not want to create another obstacle for clients, who spend their lives navigating one indifferent bureaucracy after the next, trying to get assistance for themselves and their families.

Interdisciplinary teams are also an essential part of the holistic defense model. Each team includes criminal attorneys, civil attorneys, social workers, civil legal advocates, and parent advocates, who all work together, in constant communication, to provide a wide array of services for each client (Pillar Two). In addition to in-house services, advocates have strong partnerships with Bronx shelters, churches, and social service organizations, allowing advocates to quickly and easily obtain the best shelter placement for a newly homeless client, or secure the most compassionate therapist for a client with mental health needs.

Moreover, all attorneys and advocates receive interdisciplinary training, which enables them to work more effectively as a team and to provide the best representation for each client (Pillar Three). For example, during intake, attorneys are trained to ask not just about the names of the witnesses or the search warrant, but also about the client’s immigration status, children, public benefits, police misconduct, mental health, employment, housing, and student loans.⁸ Depending on a client’s needs, a criminal attorney will refer him to the appropriate civil attorney or advocate on her team; civil attorneys, social workers, legal advocates, and parent advocates help clients secure public benefits, recover their employment licenses, comply with services mandated by the court, and stay in the country with their families. With the support of advocates who can quickly identify clients’ issues and find support, services and representation, clients are able to properly access services that they should have received long ago.⁹

Holistic defense is founded on the belief that race, class, and inequality matter in public defense (Pillar Four). Holistic defenders are trained to view a client within the larger context of his family, community and society, looking beyond individual “case” needs of clients to help them obtain the services that they desperately need. Regular community events, intake, and a 24-hour hotline keep advocates indelibly connected to the South Bronx, and enable them to collect data on the most pressing needs of the community and how to respond to those needs. Holistic defenders also lead “Know Your Rights” workshops at local schools, churches, and community centers, and volunteer at annual Bronx Defenders community events such as the Community Block Party and the Thanksgiving Dinner. They provide support for Community Legal Intake, which has an open-door policy five days per week, 9 a.m. – 6 p.m.,¹⁰ and take turns “on-call” for the 24-hour hotline.¹¹ With these experiences, attorneys are able to provide more relevant, effective and compassionate representation for clients, and collect data on the needs of the community.

Community Impact

With this data from clients and community members, The Bronx Defenders can develop a strategic plan for advocacy that incorporates myriad tactics, including organizing, policy advocacy, citywide coalition-building, direct advocacy with legislators, and impact litigation. All initiatives rely heavily on

the involvement and support of all advocates, who forge a personal and team connection to the community and motivate their clients to participate in The Bronx Defenders’ events and projects. Client leadership is crucial to the implementation of the holistic defense model: when clients learn how to advocate for themselves and their communities, they can improve their own lives and make powerful systemic changes.

Reform happens slowly, but over time advocates have seen the impact of the holistic defense model on criminal justice issues that disproportionately affect African Americans and Latinos. In 2009, members of The Bronx Defenders were part of a broad coalition that achieved significant reform of New York’s discriminatory Rockefeller Drug Laws; advocates mobilized clients, advised politicians on drafts of legislation, met with Bronx-based lawmakers, and afterward, monitored the implementation of the drug laws. Advocates at The Bronx Defenders also played an important role in ending prison gerrymandering in New York State — enabling incarcerated people to make their votes count in their home communities (majority Black and Latino), instead of upstate (mostly White). In July 2012, Gov. Cuomo signed into law a bill that The Bronx Defenders was instrumental in proposing and advocating for, which allows nonprofit organizations to post bail up to \$2,000 for poor people charged with misdemeanors.¹² This bill is a great step toward pretrial justice for poor, minority communities, as 89 percent of all people held for misdemeanors on bail amounts of \$1,000 or less are Black or Latino.¹³ Earlier in 2012, The Bronx Defenders settled a class action lawsuit against the City of New York, which was charging clients and other city residents, mostly Blacks and Latinos, with violating New York State loitering laws after the laws had been deemed unconstitutional. The city agreed to pay \$15 million to around 20,000 people in the settlement.¹⁴

Throughout 2012, advocates mobilized clients and community members in an effort to end racially discriminatory police practices in New York, including “stop-and-frisk.”¹⁵ As Steering Committee members of the citywide advocacy campaign Communities United for Police Reform (CPR), advocates at The Bronx Defenders helped marshal support for the New York City Council’s passage of the Community Safety Act. The Bronx Defenders also co-litigated *Ligon v. City of New York*, a class action lawsuit that successfully challenged the NYPD’s practice of carrying out stops and frisks in New York City apartment buildings.¹⁶

Empowering Clients and Advocates

The Bronx Defenders model of holistic defense maintains its absolute commitment to individual client representation while enabling defenders to think more broadly about the large-scale problems and obstacles clients, and their communities, face every day. By engaging in the client community in productive and meaningful ways, holistic defense is the best public defender model to address issues of racial disparity and inequality in the criminal justice system. It creates better advocates, captures relevant data and client stories about larger systemic problems, connects clients to services, and inspires advocates and clients alike to get involved in movements for systemic change. The model enables and empowers clients and advocates to be powerful voices for criminal justice reform, and therefore an effective opponent of the “racial caste” system that threatens the administration of justice in the United States.

Notes

1. Of clients who reported race and ethnicity on our intake forms, over 90 percent were Black and Hispanic. (Bronx Defenders Internal Client Data, January 2011-Present).

2. See Thomas P. Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, at 1. (August 2003). The "War on Drugs," launched in the late 1960s, has contributed greatly to mandatory minimum sentencing and mass imprisonment, particularly of poor Black and Latino communities. There are scores of books and article on this topic. See, for example, Marc Mauer & Meda Chesney-Lind, Introduction in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 10-11 (Marc Mauer & Meda Chesney-Lind, eds., 2002.) Mauer and Chesney-Lind also report that today, nearly 80 percent of inmates in state prison for drug offenses are African American or Latino (6). See also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDEDNESS* 53-58 (2012). See also Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 262-270 (2002).

3. For an overview of these collateral consequences and their impact on people in criminal proceedings, see, for example, *INVISIBLE PUNISHMENT* (Marc Mauer & Meda Chesney-Lind, eds., 2002.). See also Robin Steinberg, *Heeding Gideon's Call in the 21st Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASHINGTON AND LEE L. REV. 961 (2013). See also several articles by McGregor Smyth, including: *From 'Collateral' to 'Integral': The Seismic Evolution of Padilla v. Kentucky and Its Impact on Penalties Beyond Deportation*. 54 HOWARD L.J. 795 (2011) and 'Collateral' No More: *The Practical Imperative for Holistic Defense in a Post-Padilla World ... Or, How to Achieve Consistently Better Results for Clients*, 31 ST. LOUIS U. PUB. L. REV. 139 (2011). See also Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Re-entry into Criminal Defense Lawyering*, 31 FORDHAM URBAN L.J. 1067 (2003).

4. *Ibid.* See also McGregor Smyth, *From Arrest to Reintegration: A Model for Mitigating Collateral Consequences of Criminal Proceedings*, 24 CRIM. JUST. 42 (Fall 2009); Kathleen M. Olivares, Velmer S. Burton, Jr. & Francis T. Cullen, *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROBATION 10 (September, 1996).

5. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDEDNESS* 12 (2010). "Like Jim Crow (and slavery), mass incarceration operates as a tightly networked system of laws, policies, customs, and institutions that operate collectively to ensure the subordinate status of a group defined largely by race." *Id.* at 13.

6. 130 S.Ct. 147.

7. I discuss the holistic defense model and the four pillars at length in a recent article: Robin Steinberg, *Heeding Gideon's Call in the 21st Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961 (2013). See also Holistic Defense, www.holisticdefense.org (last visited Nov. 28, 2012) and The Bronx Defenders, www.bronxdefenders.org (last visited Nov. 28, 2012).

8. Our arraignment checklist serves as a useful guide for attorneys: The Bronx Defenders Arraignment Checklist. Updated March 2012.

9. Client satisfaction surveys and life outcomes are just two indicators that show that holistic advocacy is making a difference for clients. In our most recent client survey, we interviewed 132 clients at random, charged with a wide array of crimes. Eighty-four percent of clients interviewed said that the services they received at The Bronx Defenders were "Excellent" or "Good." Ninety-one percent of clients said they would want The Bronx Defenders to represent them again [Internal Survey, Summer 2012]. In 2010, 87 percent of the hundreds of plea consults given by our immigration attorneys resulted in an immigration-positive outcome in the criminal case. [Internal Case data 2010. Also cited in McGregor Smyth, 'Collateral' No More: *The Practical Imperative for Holistic Defense in a Post-Padilla World ... Or, How to Achieve Consistently Better Results for Clients*, 31 ST. LOUIS U. PUB. L. REV. 139, 154 (2011).] Last year, we prevented the eviction of over 150 families with more than 400 household mem-

bers, and we prevented over 100 deportations, affecting over 200 family members. Fifty-two clients obtained legal immigration status. We also preserved jobs and employment licenses for over 100 clients who are heads of their households, and obtained health insurance for more than 70 families. [Civil Action Practice. Internal Case Data for 2011].

10. We serve approximately 1,500 Bronx residents per year through intake. Community intake also ensures "seamless" access to services for community members who are often told by other offices to "come back later" or to "make an appointment." Robin Steinberg, *Heeding Gideon's Call in the 21st Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961 (2013). See also Holistic Defense, www.holisticdefense.org (last visited Nov. 28, 2012) and The Bronx Defenders, www.bronxdefenders.org (last visited Nov. 28, 2012).

11. The hotline enables The Bronx Defenders to provide pretrial representation in the event of an arrest or the removal of a child by the Administration for Children's Services.

12. NY INS § 6805. See also Cindy Rodriguez, *Charities to Play Bail Bondsman Role*, WNYC News (July 23, 2012), <http://www.wnyc.org/articles/wnyc-news/2012/jul/23/charities-now-allowed-post-bail-poor-new-york-state/>.

13. New York City Department of Correction Data cited in Human Rights Watch, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City*, 48-9 (December 2010).

14. See William Glaberson, *Long Fight Ends Over Arrests for Loitering*, N.Y. TIMES, Feb. 7, 2012. http://www.nytimes.com/2012/02/08/nyregion/new-york-settles-suit-on-illegal-arrests-for-loitering.html?_r=1. See also Ailsa Chang, *City to Award \$15M to New Yorkers Unlawfully Arrested for Loitering*, WNYC News Blog, Feb. 7, 2012.

15. *Id.*

16. According to the New York Civil Liberties Union (NYCLU), in the first nine months of 2012, New Yorkers were stopped by the police 443,422 times. Eighty-seven percent of people stopped were Black or Latino. Eighty-nine percent were totally innocent. See NYCLU 'Stop and Frisk Data': <http://www.nyclu.org/content/stop-and-frisk-data> (last visited Nov. 28, 2012).

17. The lawsuit was filed on March 28, 2012, in the Southern District of New York. The NYCLU, LatinoJustice PRLDEF, and Shearman & Sterling LLP are co-counsel with The Bronx Defenders. We completed a preliminary injunction hearing in November 2012. According to the NYCLU, police officers made 329,446 stops on suspicion of trespassing between 2006 and 2010, 12 percent of all stops. Only 7.5 percent of trespass stops resulted in arrest. See *Class Action Lawsuit Challenges NYPD Patrols of Private Apartment Buildings* (March 28, 2012): <http://www.nyclu.org/news/class-action-lawsuit-challenges-nypd-patrols-of-private-apartment-buildings>. ■

About the Author

Robin Steinberg is the Founder and Executive Director of The Bronx Defenders. She has experience in every aspect of public defense — from representing individual clients to creating a nonprofit organization. Steinberg advocates nationally and internationally for holistic representation and the community defender movement.



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Eliminating Racial Disparities in The Criminal Justice System

By Deborah Peterson Small

On March 30, 1908, Green Cottenham was arrested by the Shelby County, Ala., sheriff and charged with vagrancy. After three days in the county jail, the 22-year-old African American was sentenced to an unspecified term of hard labor. The next day, he was handed over to a unit of U.S. Steel Corporation and put to work with hundreds of other convicts in the notorious Pratt Mines complex on the outskirts of Birmingham. Four months later, he was still at the coal mines when tuberculosis killed him.

Slavery by Another Name
by Douglas Blackmon

The Past Is the Present

There is a direct and almost continuous line between the earliest development of U.S. criminal justice policies — particularly but not exclusively in the South — specifically designed to disproportionately target Blacks, and current criminal justice laws and policies that similarly target Blacks for disproportionate punishment for nonviolent offenses. Crack cocaine sentencing laws and stop-and-frisk practices have become the most extreme examples of racially biased law enforcement that generates gross racial disparities in the criminal justice system.

Consider this scenario. It is Oct. 15, 1912. A young Truman Martin is walking down the road near his home outside Jackson, Miss. It is a warm night and Truman is munching on a pork chop sandwich he was given by the daughter of the local pastor he met the night before at a church benefit. His private reverie is broken when he hears a voice behind him call out, “Hey boy, what’s that you got in your hand?” He turns around and sees two White men rapidly approaching him. Before he can run, they have grabbed him and asked him who he works for. Truman tells them he does not have a job; he is a student at the school for Negroes established by his church. They ask his age, and he tells them he is 15 soon to be 16. They ask where he got the pork chop, and he says a friend gave it to him. They ask, “What friend?” He tells them he cannot say. The men reply they do not believe him. They claim he stole a pig from a nearby plantation and is eating part of the evidence.

Truman is arrested and charged with theft — specifically, stealing a pig, a not uncommon occurrence for young Black males in this part of the state. To support the state’s burgeoning convict leasing industry, in 1876 the Mississippi Legislature voted to increase penalties for petty crimes deemed more likely to be committed by Black people. Under the so-called “Pig Laws,” anyone found guilty of stealing a farm animal or any other piece of property worth more than \$10 could be charged with grand larceny and sentenced to up to five years in prison. That this kind of theft was often a desperate attempt to find food made no difference in determining punishment.

A dramatic increase in criminal convictions of Black people for mostly nonviolent offenses followed enactment of the new laws. Their punishments were long sentences served on convict labor gangs throughout the South. Black men were ordered to work in mines, sawmills, railroad camps, and cotton fields. Black women, children, and the disabled

were sent to lumber companies and plantations.

Irrespective of jurisdictional differences, these laws and their enforcement served a common purpose — to justify the inhumane treatment, disproportionate punishment, economic exploitation, and political disenfranchisement of Black people.

One could reasonably argue so-called “quality of life” policing practices that today target low-income minority youth for arrest for minor offenses such as marijuana possession and trespass are the modern-day equivalent of the Pig Laws in generating the following outcomes:

- ❖ reduced economic competitiveness by Blacks;
- ❖ reinforced cultural narratives regarding Black criminality and inferiority;
- ❖ social justification of incarceration and/or rehabilitation (lock them up or fix them); and
- ❖ protection of White political dominance (through disenfranchisement laws).

The Best and Worst of Times

It appears that my worst fears have been realized: we have made progress in everything yet nothing has changed.

Derrick A. Bell

After four years, it still amazes me that the United States has an African American president. I am still filled with an inexplicable feeling of pride and accomplishment whenever I see the Black First Family and realize the most powerful leader of the world is a man of African descent. Yet that feeling of pride turns to despair every time I confront the continuing reality of the disproportionate and negative affect of the criminal justice system on poor Black and Brown communities.

Over the last several decades, a significant portion of African Americans experienced real economic, political, and social progress — they have been freed of *de jure* discrimination, afforded more educational opportunities, and witnessed the diminution and social stigmatization of overt racial prejudice. For another group of African Americans commonly referred to as the urban poor, the experience has been vastly different. For this group race discrimination, while not enshrined in law, is painfully manifest in the form of inferior schools and housing — opportunities for meaningful employment have become more elusive and overt racial prejudice is justified in pursuit of “public safety.”

The fundamental paradox is that today while evidence of racial progress is everywhere, racial disparities in criminal justice have never been greater. Nearly one in three young Black men has some level of criminal justice involvement: he is either locked up, on probation or parole, or awaiting trial. As American society enters the 21st century, the nation’s legacy of racial, ethnic, and socioeconomic inequality continues to be reflected in crime and punishment, and in ways not strikingly different from centuries past.

The ‘War on Drugs’ — Racism on Steroids

The “war on drugs” has been the primary tool in maintaining today’s racial caste system. Since the war on drugs began approximately 30 years ago, the U.S. penal population has almost sextupled, going from around 300,000 to two million; more than half of these incarcerations were for drug convictions. Today, about half of a million people are in jail

or prison for a drug offense — more than a tenfold increase from 1980. As a result, the United States has the highest incarceration rate in the world by far. The incarceration rate has skyrocketed despite the fact that the rate of violent crimes has steadily declined to historic lows.

The discriminatory results of the drug war are clear. Three-fourths of the individuals imprisoned for drug offenses are Black or Latino. In seven states, 80 percent to 90 percent of imprisoned drug offenders are Black. Such disparities cannot be explained by disproportionate use of drugs by African Americans; Blacks do not use drugs more than any other group, and some studies have even found that they use them less.

The war on drugs has led to a steady erosion of basic civil liberties — justifying intrusive stops that invade privacy; sentencing schemes that transferred power from judges to prosecutors to impose harsh prison terms on low-level drug users and sellers; and postconviction sanctions that permanently stigmatize anyone convicted of a drug crime and create almost insurmountable barriers to civic engagement and personal achievement. Because of the magnitude and scope of the problem, significant policy change is needed to both recalibrate criminal justice priorities away from its obsessive focus on enforcing drug laws and to address the disproportionate impact of drug law enforcement on Black and Latino communities.

How This Relates to Racial Disparities

The fate of millions of people — indeed the future of the Black community itself — may depend on the willingness of those who care about racial justice to re-examine their basic assumptions about the role of the criminal justice system in our society.

Michelle Alexander

Michelle Alexander advances the theory that the criminal justice system continues to be utilized as a tool (in application if not intent) to limit Black competition and opportunities for advancement while reinforcing White male supremacy and control.

One of the reasons it has been such an effective tool is rooted in the deeply ingrained cultural belief that people forfeit their right to equal rights and equal treatment if they are engaged in criminality. After a person is labeled a criminal, society and laws allow that person's social, economic, and political status to be reduced to the status of former slaves. Therefore, it is not surprising to find a systemic bias to affixing that label most often on the descendants of people held in legal captivity.

Conviction of a crime then and now has served as the basis for *institutionalizing* disproportionate punishment and inhumane treatment of Black people. Some examples include, but are not limited to:

- ❖ sentencing schemes that mandate long prison terms regardless of level of culpability or type of offense (e.g., mandatory minimums for drug possession);
- ❖ postconviction sanctions that impose permanent barriers to achievement and civic participation; and
- ❖ solitary confinement, shackling, inadequate health care, prison rape, and lack of programming and services.

How one views a problem greatly influences the strategies one adopts to address it. The mass criminalization of

people of color, particularly Black and Latino youth, resulting in the aptly named “school to prison pipeline,” has created a continuing crisis for Black Americans. It is one of the most important civil and human rights issues confronting society.

In many ways our work resembles the role played by the great Liberator — Harriet Tubman. We have become good at rescuing people, sometimes in groups, most often one at a time. Yet slavery as an institution would never have been abolished by helping slaves escape individually. It took the committed advocacy of abolitionists like Frederick Douglass who made it clear the country could never fulfill its potential while it harbored a slavocracy in its midst. Today, the prison industrial complex in all its manifestations poses as much danger to participatory democracy and equal justice as chattel slavery and segregation.

The costs to communities of color have been steep. The costs include but are not limited to economic, social, political, psychological, and educational harms that have been aptly quantified by a wide range of academics, policy analysts, and social commentators. The challenge is to determine what can and will be done about them.

For the past decade, the majority of progressive criminal justice reformers have focused on reducing the justice system's reliance on incarceration and punishment by promoting alternatives in the form of specialized courts (e.g., drug courts and mental health courts); human services (e.g., job training, drug treatment and life skills development); and sentencing reform and expanded re-entry programs and services. Most of these efforts have been admirable and represent sincere, concerted attempts to “right-size” the justice system and reduce racial disparities.

However well intentioned, these efforts have failed in two important aspects. They have failed to substantially reduce racial disparities in the criminal justice system — even when the prison population is effectively reduced (e.g., New York). Blacks and Latinos continue to be substantially overrepresented among those arrested, convicted, sentenced, and incarcerated.

Moreover, these efforts have failed to shift the prevailing paradigm that continues to take an exceptionalist view towards Black criminality. Black drug use is interpreted as evidence of group social pathology that needs to be corrected and/or rehabilitated. White drug use is the result of individual aberrant behavior that is deserving of compassion, not condemnation. The White drug seller is rebellious and entrepreneurial; the Black drug seller is lazy and predatory. Neither is true, but it is also beside the point.

To change the trajectory for communities and the country, the United States needs to do two essential things:

- ❖ redefine the role and purpose of the criminal justice system such that it is no longer used to address essentially social and/or public health problems; and
- ❖ empower traditionally marginalized groups and/or communities to effectively impact criminal justice policy and hold leaders accountable for ensuring their needs are met and interests are protected.

Accomplishing these things means confronting head-on the need to deconstruct decades of propaganda and misinformation regarding Black violence and criminality. It means constructing an alternative paradigm whose primary focus is directed towards system (institutional) change, community empowerment, and individual transformation

simultaneously. It also means expanding the role and amplifying the voices of affected community leaders. Community empowerment begins with a commitment to supporting leadership development and democratic processes that elicit and celebrate the contributions of all stakeholders.

All approaches should be explored, including strategies for mass resistance and direct action that force people in power to address the crisis of mass criminalization in poor Black and Latino communities.

The words of Dr. Martin Luther King, Jr. — in which he laments liberal supporters who criticize his use of confrontational tactics such as mass demonstrations and willingness to disobey court injunctions against such administrations — support this view. King's famous *Letter From a Birmingham Jail* has lost none of its eloquence — or its relevance — over time:

I must confess that over the last few years I have been gravely disappointed with the White moderate. I have almost reached the regrettable conclusion that the Negro's greatest stumbling block in his stride towards freedom is not the White Citizens Councilor or the Ku Klux Klaner, *but the white moderate who is more devoted to "order" than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice; who constantly says, "I agree with you in the goal that you seek but I can't agree with your methods of direct action"; who paternalistically feels that he can set the timetable for another man's freedom; who lives by the myth of time and who constantly advised the Negro to wait until a "more convenient season."* Shallow understanding from people of good will is more frustrating than absolute misunderstanding from people of ill will. Lukewarm acceptance is much more bewildering than outright rejection.

I had hoped that the White moderate would understand that law and order exist for the purpose of establishing justice, and that when they fail to do this they become dangerously structured dams that block the flow of social progress. [Emphasis added.]

The legal community should incorporate an expanded view of the role and capacity of progressive lawyers to be social engineers of new criminal justice policies where the emphasis is on justice — not the crimes. Charles Hamilton Houston, the great legal academic and strategist, stated:

A lawyer's either a social engineer or ... a parasite on society. ... A social engineer [is] a highly skilled, perceptive, sensitive lawyer who [understands] the Constitution of the United States and [knows] how to explore its uses in the solving of problems of local communities and in bettering conditions of the underprivileged citizens.

The words of James Baldwin are prophetic:

I know what the world has done to my brother and how narrowly he has survived it. And I know, which is much worse, and *this is the crime of which I accuse my country and my countrymen, and for which neither I nor time nor history will ever forgive them, that they have destroyed and are destroying hundreds of thou-*

sands of lives and do not know it and do not want to know it. One can be, indeed one must strive to become, tough and philosophical concerning destruction and death, for this is what most of mankind has been best at since we have heard of man. (But remember: most of mankind is not all mankind.) But it is not permissible that the authors of devastation should also be innocent. It is the innocence which constitutes the crime. [Emphasis added.]

The Fire Next Time
by James Baldwin ■

About the Author

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Using Economics and Science To End Mass Incarceration

By Inimai Chettiar

New York City has an end-of-year ritual almost as avidly watched as the ball descending in Times Square. It is the announcement, usually by the mayor, of the drop in the city's crime rate. New York had 419 homicides in 2012 — the fewest since the city began counting in 1963. (In the first six months of 2013, homicides totaled 156, down 25 percent compared to the same period last year.) "The essence of civilization is that you can walk down the street without having to look over your shoulder," said Mayor Michael Bloomberg.

New Yorkers are as proud of their safe city as they are of the Yankees. When the 2012 numbers were revealed, editorial writers were poised and ready. Many applauded the low total and then attacked critics of the New York Police Department's controversial stop-and-frisk policy. The initiative detains people who have not been accused of breaking any law, but rather are suspected of having committed or are "about to commit" an illegal act. For example, the *Daily News*, extending the city's peak homicide number of 2,245 in 1990 and matching it against the actual annual murder totals in the ensuing 22 years, wrote that the city was "spared 30,300 fatalities." The *News* proclaimed:

[T]he department's relentless critics see the cops not as protectors of life and limb, but as civil rights cowboys. They portray the NYPD's program of stopping, questioning and sometimes frisking people who are suspected of criminality as rife with abuse. ... They are dangerously misguided. They should imagine that 30,300 of the people around them had perished in bloodshed. And then they should give thanks for all the NYPD has done.

30,300 Lives Saved
NEW YORK DAILY NEWS, Dec. 30, 2012

Without realizing it, the *News* did the *last* thing the criminal justice system needs these days: data manipulation to propel ideological jabs.

U.S. District Court Judge Shira Scheindlin has since ruled the city's stop-and-frisk policy unconstitutional. Perhaps stop-and-frisk has played a role in lowering the homicide rate. With 1.63 million stops between 2010 and 2012, it is a safe bet that at least a few murders were prevented, if for no other reason than a potential assailant was distracted from completing their intended act. The policy casts such a wide and sweeping net that it is bound to inadvertently stop would-be murderers.

But there is no evidence that the policy has been the primary force actually *causing* the "spared 30,300 fatalities." If there were the sort of one-to-one correspondence the *News* implies, then one would expect that as the number of stop-and-frisks grew by about 600 percent between 2002 and 2011, the number of people shot (a more useful measure of violence) would decline accordingly. It did not. The annual total was relatively consistent throughout, never varying more than 10 percent during the entire period.

What makes the *News* editorial truly disheartening is not the loose arithmetic or the lack of understanding the difference between causation and correlation, but rather its polarizing emotionalism. The language is especially inopportune because, for the first time in five decades, there is an opportunity for a bipartisan consensus on criminal justice policy. Now, finally, after spending at least \$2 trillion fighting crime since 1970 (or about 13 percent of current U.S. GDP), pragmatism is starting to drive the debate, instead of raw emotion. In a time of constrained budgets from Washington, D.C., to the smallest hamlet, it has simply grown too expensive to perpetuate a system in which incarceration is the primary means of crime control.

Diminishing Returns

There is a growing mountain of evidence that there are less expensive and equally effective alternatives to tossing humans into steel cages. Incarceration is doubtless necessary for some, and has a deterrent effect on others. It is difficult to determine the ideal level of detention — sufficient for punishment and maximum deterrence, but no more. However, it is a certainty that the nation has long since passed the point of diminishing returns. There is also now the possibility of starting to treat the worst stain on the body politic since slavery: the system's appalling racial inequities. The fact that one in three Black males will spend some portion of his life in confinement is widely acknowledged, but also widely ignored. Mass incarceration has completely depressed the economic earnings and political power of communities of color by keeping swarms of men of color fenced out of economic prosperity because of a criminal record or a prison sentence.

Elected officials know something is out of line when they are forced to choose between funding prisons or funding schools. That is not hyperbole: The U.S. spends an average of \$11,000 per year per pupil in public elementary and secondary schools and about \$31,000 per year per inmate. (In 2007, Connecticut, Delaware, Michigan, Oregon and Vermont spent more on corrections than higher education.) If "education is the investment our generation makes in the future," as Mitt Romney once said, one does not need a Harvard MBA to recognize it is time to rebalance the portfolio.

Ending mass incarceration is not only a racial justice issue; it is also an economic one. Viewing the problem through both lenses will bring more clarity of solutions and help advocates form coalitions with those who may not be primarily driven by the injustice of racial inequality. The late Professor Derrick Bell identified this phenomenon years ago with his theory of "interest convergence." Often, those who wield power do not yield because it

may be morally correct; they do it out of self-interest. Appeals to "justice" or "fairness" are not likely to fuel reform when the majority is content that they can let their kids play outside without fear of getting shot. For example, it was not morality that led Texas to overhaul its criminal justice system in 2007; it was simple math. As the state was running record deficits, the Department of Corrections requested an additional \$2 billion for prison construction to house more inmates.

"We moved the issue from one of being soft on criminals to one of being smart over the use of money," Texas state House Representative Jerry Madden told the London newspaper *The Observer*. As the Republican chairman of the Corrections Committee, Madden was a key architect in changing the state's approach to criminal justice. "If you are keeping people in prison who do not need to be there, then that is a waste of taxpayers' money. We call it the department of corrections, so we should try our best to correct people, not just incarcerate them."

The nation will be paying the tab for its 40-year "tough on crime" policy for generations. The same children whose parents were relieved that they could safely play outside will be less wealthy, and their children less wealthy, because of senseless policies such as the "War on Drugs."

Impact on Economic Growth

When depression in lifetime earnings is considered, and its disproportionate effect on people of color, restoring the economic earning potential of those touched by the criminal justice system is no easy feat. For instance, a study by the Council on Economic and Policy Priorities found the higher unemployment of the formerly incarcerated cost the economy \$65 billion in lost productivity in 2008 alone, even accounting for the fact that formerly incarcerated individuals earn far less than people with identical skills without a record. The number is roughly equivalent to Florida's state budget.

The Pew Center on the States conducted a similar study. The numbers are stunning when race is taken into account, especially considering that as the huge prison population declines, the ranks of the formerly incarcerated swell. Before serving time, about two-thirds of male prisoners were employed and were their children's primary means of economic support. As it is, about 1 in 9 African American children, 1 in 28 Hispanic children, and 1 in 57 White children have an incarcerated parent.

Presumably, after formerly incarcerated individuals have paid the penalty of separation from society for their transgressions, they should have the same opportunities as everyone else. That is not the case, of course. By age 48, the typical former inmate will earn a total of \$179,000 less than if he had never been behind bars, *not* including earnings lost while behind bars. The earnings reductions are sufficiently substantial to reverberate through the *entire* community of employed Black and Latino men. Total earnings of all Latino males are reduced by six percent because of incarceration and nine percent for all Black males. An admittedly hyperbolic way of looking at it is this: every working Black male takes nearly a 10 percent pay cut because of the lost wages of his previously incarcerated brethren.

At least 14 other states have followed Texas' lead in enacting some type of reform to reduce reliance on prisons. These measures generally passed with little partisan rancor. Money, or more precisely, the lack of it, has led the nation to rethink whether mass incarceration is a benefit or a cost to the country. As of 2011, 1 in every 33 adults was under some form of judicial supervision (imprisonment, probation or parole), but the incarcerated accounted for only 30 percent of the total, according to the Council of State Governments. As states seek to curb their correc-

tions costs — the second-fastest growing portion of budgets after Medicaid — by either releasing more prisoners or not confining them in the first place, or both, the ranks of the “walking convicted” will only grow.

These reforms enacted in states merely chip away at the edges of the incarcerated population. This movement is a divisive change in course from previous legislation that actually increased the population, but can serve to be stronger. As long as leading Democrats stay silent or do not advocate for the cause, what states will enact as seemingly “bipartisan” reforms will in actuality be much further to the right than the compromise that could have been struck had leaders on the left engaged in the political process.

Benefits Versus Costs

Policymakers must be especially rational and clear-eyed when allocating resources. First and foremost, lawmakers should take up reforms that are proven to deliver more benefits than costs — in terms of their fiscal, economic, public safety, and societal impacts. The exclusive focus on cost savings to the state is misguided; legislatures should replace that lens with one that analyzes “return on investment.” Is government spending money on programs that actually achieve their intended goals? Legislators are often misled by what is commonly considered the gold standard for measuring programs for the formerly incarcerated: recidivism rates. Stanford Law School Prof. Joan Petersilia, former president of the American Society of Criminology and co-chair of California’s Expert Panel on Rehabilitation Programs, spoke at a National Institute of Justice conference last June. She noted, “We need to urge that when we start measuring performance, we aren’t just talking about recidivism. ... I can get that down. Let’s just decide we are going to let people fail three or four times and not [incarcerate] them. I can get your arrest rates down. I can get a lot of things down.”

Washington State has been a leader in this area. Faced with the possibility of opening three new prisons by 2030, state legislators directed the Washington State Institute for Public Policy (WSIPP) to explore less expensive, proven alternatives that produce societal and economic benefits that outweigh their costs. They reviewed more than 500 studies in the United States and overseas, and, as a result of their findings, the state enacted a variety of reforms. But the WSIPP continues to monitor programs, providing robust analysis. For instance, in July 2011 the WSIPP evaluated a program for juveniles on probation known as Family Functional Therapy (FFT). The program costs about \$3,200 per participant and immediately saves taxpayers about \$8,500, primarily due to reduced juvenile crime. But the benefits do not end there. There are labor market and health care gains because of increased high school graduation rates. Overall, the net present value savings for each person in the program is \$34,500. “The internal rate of return on investment is an astounding 641 percent. [W]hen we performed a risk analysis of our estimated bottom line for FFT, we found that the program has a 99 percent chance of producing benefits that exceed costs,” the WSIPP wrote.

Sadly, not every state is as foresighted. Kansas, which passed reform measures in 2003 and 2007, has now backtracked. Faced with severe budget shortfalls, offender drug treatment services were slashed by more than 60 percent in 2010, purportedly saving \$7 million. Yet, in January, the state reopened a prison with a \$4 million annual budget. Even Texas’s prison population has begun to creep back up.

Results-Oriented Reforms

As is true with all tragedies, they are far easier to create than repair. Lawmakers must move away from laws based in fear that

are ineffective in crime control (have little benefit) and create more problems (have high “costs” to communities and the country). The most recent innovation — “social impact bonds” allow private sector investors to receive higher rates of return dependent upon positive outcomes instead of finances — is promising, but untested. But there is already a valuable lesson in this experiment: government dollars can be powerful motivators to steer criminal justice actors towards positive outcomes. “Results-oriented” funding policies condition dollars on meeting performance outcomes. They can hold criminal justice agencies and actors accountable to producing results that reduce crime without unnecessarily locking people up. By enacting such policies across the board, state legislatures and the federal government can begin to curb mass incarceration — the greatest civil rights crisis of our time — while equalizing the ghastly racial disparities in the system. By demanding solutions that actually work to solve the identified problem, the country can move forward while guarding against repeating mistakes of the past. ■

About the Author

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