

Justice for All? Challenging Racial Disparities in the Criminal Justice System

By Marc Mauer

There are many indicators of the profound impact of disproportionate rates of incarceration in communities of color. Perhaps the most stark among these are the data generated by the U.S. Department of Justice that project that if current trends continue, one of every three black males born today will go to prison in his lifetime, as will one of every six Latino males. (Rates of incarceration for women overall are lower than for men, but similar racial/ethnic disparities pertain.) Regardless of what one views as the causes of this situation, it should be deeply disturbing to all Americans that these figures represent the future for a generation of children growing up today.

This article will first present an overview of the factors that contribute to racial disparity in the justice system, and then it will recommend changes in policy and practice that could reduce these disparities without compromising public safety.

In order to develop policies and practices to reduce unwarranted racial disparities in the criminal justice system, it is necessary to assess the factors that have produced the current record levels of incarceration and racial/ethnic disparity. These are clearly complicated issues, but four areas of analysis are key:

- Disproportionate crime rates
- Disparities in criminal justice processing
- Overlap of race and class effects
- Impact of “race neutral” policies

Disproportionate Crime Rates

A series of studies conducted during

the past thirty years has examined the degree to which disproportionate rates of incarceration for African Americans are related to greater involvement in crime. Examining national data for 1979, criminologist Alfred Blumstein concluded that 80 percent of racial disparity could be explained by greater involvement in crime, although a subsequent study reduced this figure to 76 percent for the 1991 prison population. (Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 751 (1993).) But a similar analysis of 2004 imprisonment data by sentencing scholar Michael Tonry now finds that only 61 percent of the black incarceration rate is explained by disproportionate engagement in criminal behavior. (Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUSTICE 1 (2008).) Thus, nearly 40 percent of the racial disparity in incarceration today cannot be explained by differential offending patterns.

In addition, the national-level data may obscure variation among the states. A 1994 state-based assessment of these issues found broad variation in the extent to which higher crime rates among African Americans explained disproportionate imprisonment. (Robert D. Crutchfield, George S. Bridges & Susan R. Pitchford, *Analytical and Aggregation Biases in Analyses of Imprisonment: Reconciling Discrepancies in Studies of Racial Disparity*, 31 J. RES. CRIME & DELINQ. 166, 179 (1994).) Thus, while greater involvement in some crimes is related

to higher rates of incarceration for African Americans, the weight of the evidence to date suggests that a significant proportion of the disparities is not a function of disproportionate criminal behavior.

Disparities in Criminal Justice Processing

Despite changes in leadership and growing attention to issues of racial and ethnic disparity in recent years, these disparities in criminal justice decision making still persist at every level of the criminal justice system. This does not necessarily suggest that these outcomes represent conscious efforts to discriminate, but they nonetheless contribute to excessive rates of imprisonment for some groups.

Disparities in processing have been seen most prominently in the area of law enforcement, with documentation of widespread racial profiling in recent years. National surveys conducted by the U.S. Department of Justice find that while African Americans may be subject to traffic stops by police at similar rates to whites, they are three times as likely to be searched after being stopped.

Disparate practices of law enforcement related to the “war on drugs” have been well documented in many jurisdictions and, in combination with sentencing policies, represent the most significant contributor to disproportionate rates of incarceration. This effect has come about through two overlapping trends. First, the escalation of the drug war has produced a remarkable rise in the number of people in prisons and jails either awaiting trial

or serving time for a drug offense—increasing from 40,000 in 1980 to 500,000 today. Second, a general law enforcement emphasis on drug-related policing in communities of color has resulted in African Americans being prosecuted for drug offenses far out of proportion to the degree that they use or sell drugs. In 2005, African Americans represented 14 percent of current drug users, yet they constituted 33.9 percent of persons arrested for a drug offense and 53 percent of persons sentenced to prison for a drug offense.

Evidence of racial profiling by law enforcement does not suggest by any means that all agencies or all officers engage in such behaviors. In fact, in recent years, many police agencies have initiated training and oversight measures designed to prevent and identify such practices. Nevertheless, such behaviors still persist to some degree and clearly thwart efforts to promote racial justice.

Overlap of Race and Class Effects

Disparities in the criminal justice system are in part a function of the interrelationship between race and class and reflect the disadvantages faced by low-income defendants. This can be seen most prominently in regard to the quality of defense counsel. While many public defenders and appointed counsel provide high-quality legal support, in far too many jurisdictions the defense bar is characterized by high caseloads, poor training, and inadequate resources. In an assessment of this situation, the American Bar Association concluded that “too often the lawyers who provide defense services are inexperienced, fail to maintain adequate client contact, and furnish services that are simply not competent.” (ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR RACIAL JUSTICE*, (2004).)

The limited availability of private resources disadvantages low-income

people in other ways as well. For example, in considering whether a defendant will be released from jail prior to trial, owning a telephone is one factor used in making a recommendation so that the court can stay in contact with the defendant. But for persons who do not own a phone, this seemingly innocuous requirement becomes an obstacle to pretrial release.

At the sentencing stage, low-income substance abusers are also disadvantaged compared to defendants with resources. Given the general shortage of treatment programs, a defendant who has private insurance to cover the cost of treatment is in a much better position to make an argument for a nonincarcerative sentence than one who depends on publicly funded treatment programs.

Impact of “Race Neutral” Policies

Sentencing and related criminal justice policies that are ostensibly “race neutral” have in fact been seen over many years to have clear racial effects that could have been anticipated by legislators prior to enactment. Research on the development of punitive sentencing policies sheds light on the relationship between harsh sanctions and public perceptions of race. Criminologist Ted Chiricos and colleagues found that among whites, support for harsh sentencing policies was correlated with the degree to which a particular crime was perceived to be a “black” crime. (Ted Chiricos, Kelly Welch & Marc Gertz, *Racial Typification of Crime and Support for Punitive Measures*, 42 *CRIMINOLOGY* 359, 374 (2004).)

The federal crack cocaine sentencing laws of the 1980s have received significant attention due to their highly disproportionate racial outcomes, but other policies have produced similar effects. For example, a number of states and the federal government have adopted “school zone” drug laws that penalize drug offenses that take place within a certain dis-

tance of a school more harshly than other drug crimes.

The racial effect of these laws is an outgrowth of housing patterns. Because urban areas are more densely populated than suburban or rural areas, city residents are much more likely to be within a short distance of a school than are residents of suburban or rural areas. And because African Americans are more likely to live in urban neighborhoods than are whites, blacks convicted of a drug offense are subject to harsher penalties than whites committing a similar offense in a less-populated area. A state commission analysis of a school zone drug law in New Jersey, for example, documented that 96 percent of the persons serving prison time for such offenses were African American or Latino. (NEW JERSEY COMM’N TO REVIEW CRIMINAL SENTENCING, *REPORT ON NEW JERSEY’S DRUG FREE ZONE CRIMES AND PROPOSALS FOR REFORM 23* (2005).)

Recommendations for Policies and Practices

As indicated above, racial and ethnic disparities in the criminal justice system result from a complex set of policies and practices that may vary among jurisdictions. If we are committed to reducing unwarranted disparities in the system, it will require coordinated efforts among criminal justice leaders, policymakers, and community groups. Following are recommendations for initiatives that can begin to address these issues.

Shift the Focus of Drug Policies and Practice State and federal policymakers should shift the focus of drug policies in ways that would be more effective in addressing substance abuse and would also reduce racial and ethnic disparities in incarceration. In broad terms, this should incorporate a shift in resources and focus to produce a more appropriate balance between law enforcement strategies and demand reduction approaches emphasizing prevention and treatment. Specific policy initiatives that would support

these goals include enhancing public health models of community-based treatment that do not rely on the criminal justice system to provide services; identifying models of drug offender diversion in the court system that effectively target prison-bound defendants; repealing mandatory sentencing laws at the federal and state level to permit judges to impose sentences based on the specifics of the offender and the offense; and expanding substance abuse treatment options in prisons and providing sentence-reduction incentives for successful participation.

Provide Equal Access to Justice

Federal and state policy initiatives can aid in “leveling the playing field” by promoting equal access to justice. Such measures should incorporate adequate support for indigent defense services and provide a broader range and availability of community-based sentencing options.

These and similar initiatives clearly involve an expansion of resources in the court system and community. While these will impose additional short-term costs, they can be offset through appropriate reductions in the number and duration of prison sentences, long-term benefits of treatment and job placement services, and positive outcomes achieved by enhancing family and community stability.

Adopt Racial Impact Statements to Project Unanticipated Consequences of Criminal Justice Policies

Just as fiscal and environmental impact statements have become

standard processes in many areas of public policy, so too can racial impact statements be used to assess the projected impact of new initiatives prior to their enactment. In 2008, Iowa and Connecticut each enacted such legislation, which calls for policymakers to receive an analysis of the anticipated effect of proposed sentencing legislation on the racial/ethnic composition of the state’s prison population. If a disproportionate effect is projected, this does not preclude the legislative body from enacting the law if it is believed to be necessary for public safety, but it does provide an opportunity for discussion of racial disparities in such a way that alternative policies can be considered when appropriate.

A similar policy is currently in use in Minnesota, where the Sentencing Guidelines Commission regularly produces such analyses. Policies designed to produce racial impact statements should be adopted by legislative action or through the internal operations of a sentencing commission in all state and federal jurisdictions.

Assess the Racial Impact of Current Criminal Justice Decision Making

The Justice Integrity Act, first introduced in Congress in 2008, is designed to establish a process whereby any unwarranted disparities in federal prosecution can be analyzed and responded to when appropriate. Under the proposed bill, the attorney general would designate ten U.S. attorney offices as sites in

which to set up task forces composed of representatives of the criminal justice system and the community. The task forces would be charged with reviewing and analyzing data on prosecutorial practices and developing initiatives designed to promote the twin goals of maintaining public safety and reducing disparity. Such a process would clearly be applicable to state justice systems as well.

Conclusion

While reasonable people may disagree about the causes of racial disparities in the criminal justice system, all Americans should be troubled by the extent to which incarceration has become a fixture in the life cycle of so many racial and ethnic minorities. The impact of such dramatic rates of imprisonment has profound consequences for children growing up in these neighborhoods, mounting fiscal burdens, and reductions in public support for vital services.

These developments also contribute to eroding trust in the justice system in communities of color—an outcome that is clearly counterproductive to public safety goals. It is long past time for the nation to commit itself to a comprehensive assessment of the causes and remedies for addressing these issues.

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