

**A CLOSING KEYNOTE: A COMMENT ON MASS  
INCARCERATION IN THE UNITED STATES**

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It is my privilege to be able to make the closing keynote for this excellent symposium. In doing so, I acknowledge the comprehensive presentations that have been made, and I do not pretend to add to the issues already covered. Rather, let me take this opportunity to discuss some of the overarching themes that I see as critical to any progressive change in the criminal justice system.

This symposium has focused on sentencing and punishment, practices that come at the end of a much larger and complex system. In examining what works and what does not work at this stage, we should consider the enormous implications of the DNA revolution. As we have seen over the past fifteen years, as a result of over 225 DNA exonerations of persons convicted of the most serious crimes,<sup>1</sup> the major methods of proof that we have used for years to convict criminal defendants—confessions, eyewitness identifications, jail-house informants, forensic evidence—turn out to be much more questionable than even the most cynical of us thought they were before.<sup>2</sup> In other words, there is no certainty in the world of criminal justice, and we ought to approach sentencing and punishment issues with a sense of humility and skepticism.

As we distill the sentencing and punishment issues, we are confronted with a relatively new phenomenon in America: the era of mass incarceration. Over the last thirty-five years there has been a virtual explosion in the nation's prison population. In coming to terms with the causes and consequences of this development, I am reminded of the famous speech of President Eisenhower as he left the White House in 1960. He prophetically warned about the dangers of

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1 See Innocence Project, Browse the Profiles, <http://www.innocenceproject.org/know/Browse-Profiles.php> (last visited Nov. 5, 2008) (listing specific cases).

2 See BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000).

the “military-industrial complex,” and specifically the incestuous connections between the military and private industry. With billions of dollars and many lives at stake, Eisenhower recognized the dangers that these relationships posed to our democracy. There are striking parallels in our criminal justice system. As the system expands (almost without a foreseeable stopping point), we have developed a prison-law-enforcement-industrial complex. Indeed, the system has grown at an exponential rate, billions of dollars of public money are being spent, and much of this is in the private sector. As a result, hundreds of thousands of persons are dependent for their livelihood on the policing, prosecution, and punishment of criminal suspects.

There was a recent article in *The New York Times* concerning the plan of the Governor of New York to close two or three state prisons in New York State.<sup>3</sup> One would think that the ability of a state to *close* prisons that are no longer needed would be seen as an unqualified good: fewer prisoners, fewer taxpayer dollars, and more resources for other public programs. But this is not so in the era of mass incarceration. The article focused on the largely negative reaction of persons who lived in those rural communities in New York State that housed the prisons. As a result of economic displacement, many persons in these communities are dependent on prisons for their jobs and economic security.

A similar story emerges in California where the correctional officers union, probably the most powerful union in the state, has consistently supported measures that will add prisoners to the system and has resisted reforms that would limit criminal sanctions.<sup>4</sup> A recent study projects that prison operating costs in the United States will increase by \$2.5 to \$5 billion a year by 2011.<sup>5</sup> Any efforts to limit incarceration rates will have to overcome these social and economic forces.

I mentioned that mass incarceration is a recent phenomenon. For the first two-thirds of the twentieth century, our incarceration rate was comparable to that of Western Europe and Japan.<sup>6</sup> We incarcerated at the rate of 100 persons for every 100,000 in our popula-

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3 Fernanda Santos, *Plan to Close Prisons Stirs Anxiety in Rural Towns*, N.Y. TIMES, Jan. 27, 2008, at A25.

4 *See* California Correctional Peace Officers Association, <http://www.ccpoa.org>.

5 PEW CHARITABLE TRUSTS, PUBLIC SAFETY, PUBLIC SPENDING: FORECASTING AMERICA'S PRISON POPULATION 2007–2011, at 1 (2007), <http://www.pewcenteronthestates.org/uploadedFiles/Public%20Safety%20Public%20Spending.pdf>.

6 Jason DeParle, *The American Prison Nightmare*, N.Y. REV. OF BOOKS, Apr. 12, 2007, at 33.

tion.<sup>7</sup> When I started practicing in Pennsylvania in 1967, there were five state prisons with a total population of about 5,700 inmates. Today, Pennsylvania has over twenty state prisons and over 46,000 prisoners.<sup>8</sup> Nationwide, we incarcerate at a rate eight times that of 1970,<sup>9</sup> with approximately 760 out of every 100,000 persons in prison.<sup>10</sup> With 5% of the world's population, we have 25% of the prisoners.<sup>11</sup> And for those of you who like to do cross-disciplinary analysis, that is about the same percentage in terms of our carbon footprint.

We now incarcerate at a rate ten times that of Western Europe and Japan.<sup>12</sup> There are 2.3 million people in prison<sup>13</sup> and another 5 million on parole and probation supervision,<sup>14</sup> yet only 20% are incarcerated for violent crimes.<sup>15</sup> Thirty-one percent are in prison on drug violations alone and 32% on burglaries and other non-violent offenses.<sup>16</sup> And to make matters worse in terms of the growth of the population, there is a recent report from the Pew Foundation with a very careful study of incarceration rates that predicts that over the next ten years, absent some significant change in policy, the increase in population will continue apace.<sup>17</sup>

The causes of the mass incarceration are not difficult to identify. In the last thirty years, we have enacted many laws that directly cause longer sentences: mandatory minimums, recidivist statutes, and sentencing guidelines. Further, most states have made parole far more difficult and have returned parole violators (even those who have not committed new crimes) much more easily.

In addition, we incarcerate, for lack of any alternatives, hundreds of thousands of persons with serious mental health problems. Recall that in the 1950s and the 1960s, concerned over the terrible conditions in large institutions that warehoused the mentally ill, we emp-

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7 *Id.*

8 William DiMascio, *Hold On—The Battle Is Not Over*, CORRECTIONAL FORUM (Pa. Prison Soc'y, Phila., Pa.), Winter 2007, at 15.

9 JFA INST., UNLOCKING AMERICA: WHY AND HOW TO REDUCE AMERICA'S PRISON POPULATION 1 (2007), available at <http://www.jfa-associates.com/publications/srs/UnlockingAmerica.pdf>.

10 BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS: ONLINE, at tbl.6.13.2007 (2008) [hereinafter ONLINE SOURCEBOOK], <http://www.albany.edu/sourcebook/>.

11 Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, at A1.

12 PEW CHARITABLE TRUSTS, *supra* note 5, at 1.

13 ONLINE SOURCEBOOK, *supra* note 10, at tbl.6.13.2007.

14 *Id.*

15 *Id.* at tbl.6.19.

16 *Id.*

17 PEW CHARITABLE TRUSTS, *supra* note 5, at 10.

tied many of those hospitals and promised community treatment. But we never provided anywhere near the kinds of resources necessary for community treatment and, as a result, those persons without services, programs, or medication (and sometimes even a place to live) wind up all too often in jails and prisons.<sup>18</sup> Today in any local jail, and in many prisons, you will find a significant number of seriously mentally ill persons, often on minor charges, as these places serve as the default catchment areas for the mentally ill.

And then there is the War on Drugs. Between 1980 and 2005, drug arrests in this country quadrupled and there was close to a 500% greater chance that a person arrested on drugs in 2005 would be imprisoned as a result of that arrest.<sup>19</sup> In 1980, we incarcerated 40,000 people for drug offenses.<sup>20</sup> In 2005, it was well over 500,000 people, many of whom were convicted of relatively small amounts of drugs, and stunningly, a large number are there on marijuana offenses only.<sup>21</sup>

Equally distressing is the correlation between race and drugs. There has been an ongoing debate in this country as to whether or not we over-incarcerate minorities. By the numbers, we surely do. In the 1950s, when we lived in a society where racial segregation was mandated by law in some states, 30% of the prison population nationwide was African American.<sup>22</sup> Today, close to 50% of our prison population is African American out of an overall African American population of 12%.<sup>23</sup> African Americans are seven times more likely to go to prison than whites; one-third of black males between ages 20 and 29 are either in prison or under supervision on probation and

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18 Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Problem* (Univ. of Chi. Law Sch. John M. Olin Program in Law & Econ. Working Papers, Paper No. 335, 2007), available at [http://papers.ssrn.com/so13/papers.cfm?abstract\\_id=970341](http://papers.ssrn.com/so13/papers.cfm?abstract_id=970341).

19 RYAN S. KING, THE SENTENCING PROJECT, DISPARITY BY GEOGRAPHY: THE WAR ON DRUGS IN AMERICA'S CITIES 1, 4 (2008), available at [http://www.sentencingproject.org/Admin/Documents/publications/dp\\_drugarrestreport.pdf](http://www.sentencingproject.org/Admin/Documents/publications/dp_drugarrestreport.pdf).

20 *Id.*

21 *Id.* at 33.

22 See also Stephen Bright, *The Failure to Achieve Fairness: Race and Poverty Continue to Influence Who Dies*, 11 U. PA. J. CONST. L. 23 (2008); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969 (2008).

23 MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 3 (2007), available at [http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Crd\\_stateratesofinbyraceandethnicity.pdf](http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Crd_stateratesofinbyraceandethnicity.pdf). African Americans are incarcerated at nearly six times the rate of whites; Hispanics are incarcerated at nearly two times the rate of whites. *Id.*

parole; and if the same trend continues, one in every three black males born today will serve some time in prison during his lifetime.<sup>24</sup>

Of course, where minorities commit more crimes there may well be disproportionate numbers in arrests and incarceration. And sadly, for some crimes, including violent crime, there has been disproportionate criminal conduct by minorities.

However, there is no legitimate debate regarding racial bias in the War on Drugs. There, the disproportionate number of minorities is so large and the empirical data so compelling, there can be no denying the saliency of this factor.

In 1980, African Americans were nearly twice as likely to be arrested for drug offenses than whites, with 684 arrests per 100,000 as opposed to 387 white arrests.<sup>25</sup> By 2003, the disparity had grown to a black drug arrest rate 238% higher than whites (2,221 per 100,000, as opposed to a white rate of 684 per 100,000).<sup>26</sup> African Americans use and possess drugs at about the same rate as other people in this country. They represent 14% of those who use and possess drugs, yet African Americans make up 35% of all those arrested for drugs and 70% of all those incarcerated.<sup>27</sup>

Professor Harry Levine of the City University of New York has studied the incidences of marijuana arrests in New York City for the past ten years. From 1997 to 2006, there were 360,000 arrests in New York City for small amounts of marijuana. This represented a ten-fold increase from the previous decade. Fifty-five percent of those arrested were African Americans, 30% were Latino, and only 15% were whites. This is an over-arrest rate of minorities of more than 5 to 1.<sup>28</sup>

It is difficult to deny that some of these policies are deliberately targeted at African Americans. But even those policies and practices that appear to be neutral on their face are often enforced in a man-

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24 THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, at 8 (2003), available at [www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf).

25 KING, *supra* note 19, at 10.

26 *Id.*

27 HUMAN RIGHTS WATCH, TARGETING BLACKS: DRUG LAW ENFORCEMENT AND RACE IN THE UNITED STATES (2008), available at <http://www.hrw.org/reports/2008/us0508/us0508webwcover.pdf>; Jeffrey Fagan & Mukul Bakhshi, *New Frameworks for Racial Equality in the Criminal Law*, 39 COLUM. HUM. RTS. L. REV. 1, 5-6 (2007).

28 Harry G. Levine, Professor, Dep't of Sociology at Queens Coll. and the Graduate Ctr. of the City Univ. of N.Y., Regarding Pending and Proposed Legislation to Collect DNA from All People Convicted of a Misdemeanor in New York State, and also Regarding New York City's Epidemic of Marijuana Possession Arrests, Testimony at the Hearings of New York State Assembly on Codes and Corrections (May 31, 2007), available at [http://www.aclu-md.org/aLegislative/Docs/Testimony-Harry\\_G\\_Levine.pdf](http://www.aclu-md.org/aLegislative/Docs/Testimony-Harry_G_Levine.pdf).

ner that results in large numbers of minorities being subjected to the drug laws. It's where we put our police officers. It's where we get the complaints. It's how we use undercover officials. If we used undercover officers and confidential informants to make buys on college campuses as often as we did in the largely African American and Hispanic sections of our cities, we would have a much different population in our jails and prisons. But we do not do that because *they are our children*.

Professor David Cole raised a key question on this issue when he asked: If the rates of incarcerations of whites in this country approached anywhere what they are for African Americans, would we continue the same policies, for example, the policy on the War on Drugs?<sup>29</sup> Among other factors, Cole pointed to the 1960s, a period marked by widespread experimentation with marijuana by many young whites when, in the face of this large growth in drug use, every state *reduced* the penalties for marijuana. Why? *It was us*, not them.

Fast forward to the crack cocaine fear of the 1980s when Congress enacted the 100 to 1 ratio (in terms of punishment) for crack as compared to powdered cocaine, knowing full well that crack cocaine was a popular black person's drug, while powdered cocaine was largely a white person's drug. This legislation punished the typical black defendant 100 times as harshly as his white counterpart for virtually identical offenses.

Why are the penalties for driving under the influence so modest as compared to almost all other crimes? In most jurisdictions, first time drunk drivers are either offered probation in a pre-trial diversionary program or some other non-incarceration sentence. On successive convictions short jail sentences will be imposed, but it takes a number of convictions before one faces serious state time. All of this reflects a sensible gradual approach. Yet despite the fact that DUI is a highly dangerous crime, and alcohol abuse results in far more damage than drug abuse, the punishment for drug possession (with the ever present charge of "intent to distribute"), even for first time offenders, is often a mandatory minimum prison sentence.

Why is that? With DUI, once again, *it is us*. It is our parents, our children, our friends. And so we treat them a lot more rationally than we treat drug offenders. We would not tolerate a system under which so many of our children, brothers, and sisters would go to prison. We would put more money into education. We would put

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<sup>29</sup> David Cole, *As Freedom Advances: The Paradox of Severity in American Criminal Justice*, 3 U. PA. J. CONST. L. 455 (2001).

more money into treatment. We would put more money into other programs that we know could work as alternatives to incarceration.

The U.S. Supreme Court does not want to face the issue of racial bias in criminal justice. According to the Court, it is not unconstitutional to execute persons even where statistical evidence demonstrates racial discrimination in the prosecution of these cases;<sup>30</sup> there is no right to discovery to determine whether a prosecutor is deliberately involved in discrimination in who they choose to prosecute for crack cocaine;<sup>31</sup> and racial profiling that results in arrests is not unreasonable under the Fourth Amendment.<sup>32</sup> But once we send you to prison, any racial bias is illegal. Consider the irony of *Johnson v. California*<sup>33</sup> in which the Court, quite correctly in my view, ruled that a state could not racially segregate prisoners without showing a compelling state interest. I am not diminishing the importance of integrated prisons, but that is the one area when the Court steps in and says that when the state tries to segregate people in prison, there is a serious constitutional problem. By contrast, the Court has no problem with racial bias in the investigation and prosecution of criminal cases.

Permit me to sketch out a few proposals for reforms. First and foremost, we have to begin to dismantle the system of mandatory minimum sentences (particularly in drug enforcement) and many of the three-strikes and other recidivist laws.

We have to make sure that there are adequate and humane conditions of confinement and that prisoners have access to courts. That requires some significant changes in the PLRA. It is also going to require more lawyers representing people in prisons.

We have to think seriously about the War on Drugs, with a focus on decriminalization. Drug enforcement policies, from arrest through imprisonment, are probably the most failed programs that we have had in this country since Prohibition. We didn't reduce smoking in this country by sending people to prison. We reduced smoking in this country by 40% by education and by other non-punitive measures.

Aside from reforms regarding our extraordinarily long sentences, we also have to think seriously about our parole system. One of the reasons we have such high numbers of people in prison is that parole boards are afraid to release prisoners for fear of criticism if someone

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<sup>30</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987).

<sup>31</sup> *United States v. Armstrong*, 517 U.S. 456 (1996).

<sup>32</sup> *Whren v. United States*, 517 U.S. 806 (1996).

<sup>33</sup> 543 U.S. 499 (2005).

commits a high-profile crime after release. In addition, there are large numbers of people going back to prisons not because they have committed new crimes, but simply because of technical violations of probation and parole.

We ought to be serious about rehabilitation and reentry. There are reentry projects that work. We had a pilot project in Philadelphia over the past five years to provide some training in the local jail to people we knew were getting out within six months, or eight months, to get them job-ready. At release, we linked the prisoner to a reentry partner, community organizations on the outside who were responsible for meeting the person at the prison gate, making sure they had a place to live, and getting them a job. The return rate of the persons who were part of that program was about 20%, while the average return rate in Philadelphia has been close to 60%.

And finally, if we are going to have a system of life sentences, there must be some attention paid to clemency procedures. In the 1970s in Pennsylvania, the norm was that people with life sentences got out after twenty or twenty-five years absent some serious troubles in prison. Over 90% of them never returned to the prison system. Today in Pennsylvania (and elsewhere), unless you are about to die, nobody is released. We have close to 4,000 lifers in prison in Pennsylvania, and almost every one of them will die in prison.

I urge you to think big. We ought to be doing more than just tinkering at the edges.