ESSAYS

AS FREEDOM ADVANCES: THE PARADOX OF SEVERITY IN AMERICAN CRIMINAL JUSTICE

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INTRODUCTION

According to the Enlightenment philosopher Montesquieu, "as freedom advances, the severity of the penal law decreases." Montesquieu's notion is in the United States Constitution's Eighth Amendment, a provision that reflects a Montesquieuian faith that punishments acceptable today will become cruel and unusual tomorrow.

Yet the United States in the year 2000 presents a serious challenge to Montesquieu's notion of the progress of freedom. The United States is simultaneously a leader of the "free world" and of the incarcerated world. We celebrate and export our commitment to free markets, civil rights, and civil liberties, yet we are also a world leader in incarceration and the death penalty. The last thirty years have seen an unprecedented increase in incarceration in the United States, and the number of persons executed each year has climbed steadily since the Supreme Court resurrected the death penalty in 1976. In our treatment of crime, we could not be more different from other "free" countries with which we generally associate ourselves. What explains this paradox? Was Montesquieu wrong? This essay examines the uneasy coincidence of freedom and severity in American criminal justice.

Explaining social facts must always be a tentative undertaking, nowhere more so than in the sphere of criminal justice. Everything about our lives is over-determined, and therefore singling out one or more causes for a social phenomenon is notoriously difficult and inevitably reductive. In addition, social scientists have limited ability to conduct controlled experiments and are therefore left to draw infer-

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1 Quoted in WILLIAM BRADFORD, AN ENQUIRY HOW FAR THE PUNISHMENT OF DEATH IS NECESSARY IN PENNSYLVANIA 20 (Philadelphia, T. Dobson 1793). Cf. 2 MONTEESQUIEU, THE SPIRIT OF THE LAWS bk. VI, pt. 9, at 81 (Thomas Nugent trans., Hafner Publ'g Co. 1949) (1748) ("It would be an easy matter to prove that in all, or almost all, the governments of Europe, penalties have increased or diminished in proportion as those governments favoured or discouraged liberty.")

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ences from comparisons of groups, individuals, or regions that differ in so many ways that one can never be sure that unexamined factors are not playing important roles. In some sense, then, the social scientist's work is closer to the interpretation of a work of literature than to the experimental testing of the hard sciences.

This is especially true of the study of crime and criminal justice. Despite years of trying, the field of criminology has generated only the roughest measures of the determinants of criminal behavior, for example, or of the factors that guide the exercise of police discretion. Even the best studies are ultimately unable to "prove" causation. The most we can ask is that they help us reflect upon social phenomena that may ultimately be unknowable.

Respecting these limits, this essay, based not on original empirical work but on a review of the relevant literature, does not attempt to "prove" any particular cause for the severity of the American criminal justice system. My aim is more limited: to raise questions that I believe we should be asking about current criminal justice policy. After setting forth the facts that establish our world leadership in criminal justice severity, I first offer reasons to doubt some of the most common explanations for that severity—namely, that it is a proportional response to a society that is simply more law-breaking than others and that our very preoccupation with liberty (and its correlative, license) ironically leads to a heavy reliance on incarceration. I suggest instead that in order to understand our policies of mass incarceration, and especially the vehemence with which we have pursued those policies over the last thirty years, one must pay attention to the demographics of the criminal justice system. As all of us are (often all too vaguely) aware, African-Americans are vastly over-represented in the nation's prisons and jails. Blacks comprise 12% of the general population but about half of those behind bars. This disparity has increased remarkably over the last half century. In 1950, when segregation was legal, blacks were only 30% of those admitted to prison; by 1988, they comprised over 50%. It is almost as if the civil rights revolution passed the criminal justice system by.

Virtually every criminologist who has addressed the issue concurs that much of the racial disparity in incarceration can be explained by higher offending rates among minorities. At the same time, how-

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2 In 1997, there were 578,000 white inmates and 584,400 black inmates in the nation's prisons. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1999 506 tbl.6.30 (2000) (figures reported to the nearest hundred). When jails are included, there were 871,500 white inmates and 816,600 black inmates. Id. at 497 tbl.6.20.

3 See MARC MAUER, RACE TO INCARCERATE 121 (1999); PATRICK LANGAN, U.S. DEP'T OF JUSTICE, RACE OF PRISONERS ADMITTED TO STATE AND FEDERAL INSTITUTIONS, 1926-86, at 5 (1991); see also MARGARET WERNER CAHALAN, U.S. DEP'T OF JUSTICE, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850-1984 65 (1986) (34% of prison inmates were black in 1950).

4 See, e.g., MICHAEL TONRY, MALIGN NEGLECT 79 (1995) [hereinafter TONRY, MALIGN
ever, criminologists also concur that some of the disparity cannot be so explained and may well be the result of discrimination. Assessing how much of the disparity is due to discrimination and how much is simply a disparate effect of neutral policies is obviously an important undertaking. But the ultimate point of this essay is to suggest that we move beyond that debate. Even assuming that all of the disparity in incarceration could be explained by higher rates of criminal conduct among blacks and Hispanics—a claim no reputable criminologist makes—I maintain that our current policies are tainted by racial discrimination and need to be radically reassessed.

I. THE FACTS

There can be little doubt that the United States is a world leader in penal severity. Within the next year our incarcerated population will surpass 2,000,000. The United States boasts 5% of the world's population but 25% of the world's population behind bars. We boast the highest per capita incarceration rate in the world, and our rate is five times higher than that of the next highest Western nation.

We have reached this dubious leadership position only in the past two decades. During the first seventy years of the twentieth century, the United States' per capita incarceration rate was basically flat, so much so that leading criminologists theorized that the nation's incarceration rate would always be constant. Indeed, it appears that in every society that keeps data, some ethnic or racial minorities are disproportionately represented in the incarcerated population and that higher offending rates among those minorities play a significant role in the disparities. See Michael Tonry, Ethnicity, Crime, and Immigration, in 21 CRIME & JUSTICE, supra, at 1, 11-19 (hereinafter Tonry, Ethnicity). Indeed, Tonry concludes that racial disparities, far from being unique to the United States, "are endemic to heterogeneous developed countries in which some groups are substantially less successful economically and socially than the majority population." Id. at 19.


See MAYER, supra note 3, at 21-23 tbl.2-1, fig.2-3 (indicating a U.S. incarceration rate of 600 per 100,000 in 1995).

See id. at 17 fig.2-1 (indicating an incarceration rate between roughly 80 and 140 persons per 100,000 for each year from 1925 to 1970).

See, e.g., Alfred Blumstein & Jacqueline Cohen, A Theory of the Stability of Punishment, 64 J.
1940s and 1960s, the prison population actually fell. Since the mid-1970s, however, the incarcerated population has mushroomed. The prison population alone, not counting jails, grew from 196,000 in 1972 to over 1.16 million in 1997. The incarceration rate—the number of persons incarcerated as a proportion of the total population—increased by approximately 300% during that same period. In the 1990s alone, we added over half a million persons to the nation's prisons and jails. That is roughly twenty-three times higher than the average growth per decade from 1920 through 1970.

The sentences we impose on criminals are also increasingly severe, as the popularity of such criminal justice "reforms" as mandatory minimum sentences, truth-in-sentencing laws, three-strikes-and-you're-out provisions, and the abolition of parole reflect. The sentences we impose are generally far harsher than those of countries with which we generally compare ourselves. No other Western country routinely imposes sentences of longer than two years on its criminal offenders. In 1991, however, 39% of state prisoners in the United States were serving sentences of ten years or longer. In 1994, the average prison sentence imposed on felony defendants in the nation's seventy-five largest counties was sixty-seven months—over five and one-half years. The disparities between the United States and other industrialized nations are greatest with respect to property and drug crimes, for which we incarcerate "more and for longer periods of time than other similar nations." Three of every five new inmates added to the prison system in the past decade were incarcerated for a nonviolent drug or property crime. In the federal prison system, three quarters of the rise in prison population from 1985 to 1995 was attributable to drug offenses. Today, over half of all state and fed-

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11 MAUER, supra note 3, at 17 fig.2-1.
12 Id. at 19. Prisons house people convicted and sentenced to serve a year or more incarceration. Jails incarcerate defendants awaiting trial and persons sentenced to less than a year. The nation's jail population has generally been about half the prison population.
13 Id. at 16-19.
14 ZIEDEenberg & SCHIRALDI, supra note 5.
15 Id.
17 Id.
20 MAUER, supra note 3, at 34.
21 Id.
eral inmates are serving time for nonviolent crimes. But the disparities are not limited to nonviolent crime. Perhaps the most dramatic sign of the relative severity of our penal system is our continuing embrace of the death penalty. In 1999, Russia, our lone rival on the incarceration front, commuted the death sentences of all of the over 700 people on its death row. In the same year, we executed ninety-eight people—more than in any year since the death penalty was reinstated here in 1976. Currently, 3,682 people remain on death row. A record number of nations—105—have abolished the death penalty, including all of Western Europe, and the United Nations Commission on Human Rights has called for a moratorium. Meanwhile, the only legislation Congress has enacted in recent years on the death penalty, the Orwellian-entitled Antiterrorism and Effective Death Penalty Act, sought to make the execution process more efficient.

Only five countries other than the United States are known to have executed a juvenile offender in the 1990s: Iran, Nigeria, Yemen, Saudi Arabia, and Pakistan. We have executed fourteen juvenile offenders since 1990, and another seventy-four juvenile offenders are on death row. We are the only country in the world other than Somalia that has failed to ratify the Convention on the Rights of the Child, which prohibits the execution of persons who committed their crimes while under eighteen years of age. (Somalia has an excuse, as it has no functioning government.)

Why is it, then, that on issues of criminal punishment, we tend to be grouped not with Western Europe, but with countries like Iran, Yemen, and the republics of the former Soviet Union?

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22 Id. at 81.
25 Death Penalty Information Center, Size of Death Row by Year, at http://www.deathpenaltyinfo.org/DRowInfo.html (last visit Nov. 13, 2000).
26 Dieter, supra note 23.
29 Dieter, supra note 23.
32 Barbara Crossette, Tying Down Gulliver with Those Pesky Treaties, N.Y. TIMES, Aug. 8, 1999 (Week in Review).
33 See CENTRAL INTELLIGENCE AGENCY, WORLD FACTBOOK 444 (1999).
II. QUESTIONING THE STANDARD EXPLANATIONS

Two standard (and related) explanations are often advanced for the severity of our criminal justice system, neither of which withstands scrutiny. The first maintains that we have higher incarceration rates because we have higher crime rates. The second claim contends that incarceration is in a sense the price of liberty, because freedom begets license, license begets offending, and offending requires incarceration. Of course, in some iterations the second claim reduces to the first, to the extent that it ultimately rests on higher offending; but, as we shall see, there are more interesting variants of this claim. I will address each in turn.

A. Crime and Incarceration

The fact that the United States locks up a larger proportion of its citizens than any other nation does not necessarily mean that we are more severe than other nations; we may simply be more criminal than other nations, and our response may be proportional to our larger crime problem. There is, however, reason to doubt this explanation. Crime rates are notoriously difficult to compare across national borders, because there is no uniformity in criminal laws, criminal justice system record-keeping, or criminal case processing. One can avoid some of these problems by instead comparing rates of victimization, based on random surveys of citizens in different countries. With the (possibly quite significant) exception of homicide, the United States' victimization rates are about average among Western countries. England, Wales, the Netherlands, Switzerland, Scotland, Canada, and France all have higher rates of victimization than we do. Moreover, many Western nations experienced increases in crime rates equivalent to ours in the 1970s and 1980s, without coming close to matching our increases in incarceration.

Victimization rates, however, are arguably over-inclusive as a standard of comparison because they include many minor crimes that rarely lead to incarceration. At the same time, victimization rates are under-inclusive because they do not include victimless crimes. In 1988, Alfred Blumstein compared the ratio of prisoners per murder and prisoners per robbery in a number of nations and found that the United States was on this scale less punitive than England/Wales, Singapore, and Australia, among others. Although this study is subject to the weaknesses of cross-national comparisons based on reported

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54 See Tonry, Ethnicity, supra note 4, at 4-11.
55 MAUER, supra note 3, at 26-27. In 1995, the U.S. crime victimization rate was 24%. Id.
56 Tonry, supra note 16, at 3.
arrest and conviction rates, it nonetheless suggests that part of our incarceration problem may well be attributable to a greater incidence here of serious violent crime.

Homicide rates are generally considered least likely to be skewed by reporting and definitional variations, and homicide rates in the United States are starkly higher than that of most other nations. In 1996, for example, our per capita homicide rate was more than double that of the next highest Western nation. We had 7.4 homicides per 100,000 persons, while Finland was second with 3.1 homicides per 100,000. England, Norway, Japan, Ireland, and Denmark were all around 1 homicide per 100,000. Homicide rates, however, cannot explain the full extent of the differences in incarceration, as the vast majority of America's prisoners are serving time for crimes other than homicide. Indeed, as noted above, three-fifths of new inmates are incarcerated for nonviolent offenses. It is possible that these homicide rate differentials might have a disproportionate effect on general concerns about public safety and crime and therefore may contribute indirectly to the severity of our criminal laws. They may also help to explain our continuing commitment to the death penalty in the face of its rejection by most of the Western world. But as large as the homicide disparities are, they do not explain the severity that pervades our criminal justice system, even where homicide is not at issue.

Nor do homicide rates or crime rates generally explain the unprecedented rise in incarceration that we have experienced since the mid-1970s. Criminologists have long studied the relationship between crime rates and incarceration rates and have consistently found little direct nexus between the two. For example, the United States incarceration rate has increased steadily since 1972. Yet over that period, crime rates rose in the 1970s, declined from 1980 to 1984, rose again from 1984 to 1991, and have fallen since 1991. America's homicide rate was the same in 1995 as 1970, despite the fact that over that period the prison population grew by about one million persons.

Nor is there evidence that increased incarceration rates or increased prison terms will have much effect on crime rates. Because a more frequent offender is more likely to be caught and incarcerated

58 MAUER, supra note 3, at 28 tbl.2-5.
59 See generally FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM 3-20 (1997) (arguing that it is lethal violence, not crime generally, that drives the politics of crime in the United States).
61 MAUER, supra note 3, at 8; see also Tonry, supra note 16, at 11-12 (noting that from 1971 to 1996, the incarceration rate steadily increased, while violent crime and property crime rates fluctuated).
62 MAUER, supra note 3, at 84.
than a less frequent offender, offending rates among incarcerated offenders tend to be higher than among those who remain free. Consequently, increasing the incarceration rate of offenders will have diminishing marginal returns in terms of incapacitation.\(^3\) Moreover, a remarkably small percentage of crime ever leads to incarceration—about \(3\%\)—and thus marginal differences in sentence lengths are unlikely to have much impact on crime generally.\(^4\) The National Research Council of the National Academy of Sciences has found that a tripling of the time served per violent crime from 1975 to 1989 had no clear impact on violent crime.\(^5\)

Thus, the severity of our criminal justice system cannot be attributed to higher criminal offending rates in the United States.

**B. The Price of Liberty?**

A second and more interesting explanation for our astronomical incarceration rate takes the form of a direct challenge to Montesquieu. It is precisely because we are a free country, this argument goes, that we are driven to employ such harsh penalties. By one version of this theory, freedom breeds license, which breeds criminal behavior, and then demands punishment. Put differently, the price of liberty is not so much eternal vigilance as mass incarceration. William Bennett, among others, argues that we have lost our sense of morals in our commitment to freedom and that this moral failing has led to our crime problem.\(^6\) But as the discussion above illustrates, that account is difficult to square with the findings that our incarceration rates have mushroomed while crime rates have fluctuated and that they have not stopped climbing even as crime rates have experienced a sustained decline. A study by Alfred Blumstein and Allen Beck analyzing the prison boom between 1980 and 1996 concluded that only 12% of the increase in state prison growth could be attributed to increased levels of offending (measured by arrests).\(^7\) The remaining 88% of the growth, according to Blumstein and Beck, is attributable to increases in the imposition of sanctions after arrest.\(^8\) A greater likelihood that an arrest would lead to a prison commit-

\(^{10}\) See generally William J. Bennett et al., *Body Count* (1996).


\(^{12}\) *Id.*
ment accounted for over half of the sanctions-related increase, and the imposition of longer sentences accounted for approximately one-third of it.\(^4\)

Another study suggests a somewhat less direct relationship between liberty and mass incarceration that does not require the intermediate step of establishing that liberty leads to higher offending rates. On this view, as liberalism and diversity threaten people's sense of social cohesion around a set of clear moral values, people will be more inclined to favor more harshly punitive measures. Tom Tyler and Robert Boeckmann interviewed California voters to determine the source of public support for a "three-strikes-and-you're-out" referendum initiative adopted in 1994.\(^5\) They found that support for the initiative, and for punitive criminal justice measures more generally, was not principally motivated by fear of crime or concern about how the courts were responding to it, but rather by a concern about threats to the "moral cohesion" of the community.\(^6\) Those most likely to support punitive measures were those most likely to feel that we have experienced a decline in morality and discipline within the family and the community.\(^7\) This sense of moral cohesion may be threatened by perceptions of increasing diversity even without higher offending rates, because diversity suggests that some in the community have different values and beliefs than others.\(^8\) From that perspective, punitive measures are favored, at least by some, as an attempt to restore a sense of moral order in increasingly diverse societies.\(^9\)

Still another version of the freedom-begets-incarceration theory argues that the incarceration boom is a response to judicial decisions that have, from the public's perspective, overprotected the constitutional liberties of criminal defendants. When courts reverse criminal convictions for constitutional violations, they are often criticized for being soft on crime. The percentage of the U.S. public that says the courts are too lenient on criminals is extremely high. Every year since 1983, at least 79% of Americans have said that the courts are too lenient on criminals.\(^10\) Frustrated politicians cannot override judicial outcomes because the courts' decisions are generally based on

\(^4\) Id. More precisely, Blumstein and Beck found 51% attributable to the more frequent decision to incarcerate and 37% to the increase in time served by those incarcerated.


\(^6\) Id. at 252-258.

\(^7\) Id.

\(^8\) Id. at 256.

\(^9\) See also TOM R. TYLER ET AL., SOCIAL JUSTICE IN A DIVERSE SOCIETY 108 (1997) (noting simultaneous increase in social liberalism and punitiveness in American society and surmising that "increasing social liberalism may actually encourage punitiveness because people may feel that it is increasingly important to show that there are some limits by strongly enforcing the few remaining social rules").

\(^10\) BUREAU OF JUSTICE STATISTICS, SOURCEBOOK 1998, supra note 18, at 128.
the Constitution. What frustrated legislatures can do is increase
criminal sentences. And so we get “three-strikes-and-you’re-out” and
similar initiatives.

This rationale is also difficult to square with the facts, however.
The Supreme Court, under Chief Justice Earl Warren in the 1960s,
substantially expanded criminal defendants' rights. Since then, how-
ever, the Court has consistently limited those rights. The Rehnquist
Court in particular has been ever-vigilant in its effort to trim criminal
defendants' constitutional rights, sometimes by directly curtailing or
overruling Warren Court precedents, but more often by restricting
defendants' ability to have their claims heard in federal court on ha-
beas corpus. 56 Unless the American public has a memory for Su-
preme Court criminal procedure decisions that it lacks for virtually all
other history, it seems unlikely that the incarceration boom can be
attributed to a rights-inspired reaction.

It is true that public perceptions of judicial lenience toward
criminal defendants remain high, irrespective of the reality on the
ground. But this public perception is not an adequate explanation
for the recent rise in incarceration because the American public's
“dissatisfaction with the leniency of the courts appears to be a chronic
condition.” 57 Public dissatisfaction with perceived leniency in crimi-
nal justice in the United States has been high both during periods of
increasing incarceration and during periods of decreasing incarcera-
tion. In addition, other countries experience similar public percep-
tions about the leniency of their criminal justice systems, without it
resulting in astronomical incarceration rates. 58 And as Tyler and Bo-
beckmann found in their study of the California “three-strikes” initia-
tive, support for punitive criminal justice measures is not driven prin-
cipally by concerns about courts failing to respond sufficiently harshly
to crime, but by a broader sense that the moral fabric of society is
threatened.

III. COMPLETING THE PICTURE: WHO IS INCARCERATED?

In order to understand more fully the severity of the American
criminal justice system, we need to consider another set of facts: who

56 See, e.g., Teague v. Lane, 489 U.S. 288 (1989) (plurality opinion stating, with limited ex-
ceptions, that a habeas petitioner cannot rely on “new rules” of criminal law); McCleskey v.
Zant, 499 U.S. 467 (1991) (holding that a claim not raised in a petitioner's prior habeas peti-
tion is barred in a subsequent petition unless he can show cause for failure to raise the claim in
the earlier petition and that inability to raise the claim in the subsequent petition will result in
prejudice or miscarriage of justice); see also David Cole, See No Evil, Hear No Evil, THE NATION,
Oct. 9, 2000, at 30 (reviewing Rehnquist Court’s record on criminal justice).
57 ZIMRING & HAWKINS, supra note 40, at 129.
58 See, e.g., Jane B. Brott & Anthony Doob, Fear, Victimization, and Attitudes to Sentencing the
Courts, and the Police, CAN. J. CRIMINOLOGY 275 (July 1997) (reporting on high public dissatis-
faction with the leniency of the Canadian criminal justice system).
is being incarcerated. The answer is deeply disturbing. In the 1950s, when segregation was legal and most of the Bill of Rights provisions did not apply to state criminal law enforcement, blacks made up 30% of the nation's prison population. Yet today blacks are more than half of those behind bars, even though they comprise only 12% of the general population. The lifetime chance of a black person going to state or federal prison is nearly seven times that of a white person. On any given day, one in three young black men between the ages of twenty and twenty-nine are in prison or jail or on probation or parole. And perhaps most alarmingly for the future, at current trends, more than one of every four black males born in the United States today will be sentenced to at least a year of prison time during his life.

Much of the increase in black incarceration has occurred while commission of violent crime by blacks has dropped. From 1970 to 1996, the percentage of blacks in prison increased by 25% while the black proportion of violent crime arrests fell by 20%. The principal reason is the war on drugs, which has been waged predominantly against minorities. From 1980 to 1995, the number of drug arrests nationwide nearly tripled. The chance of receiving a prison sentence from a drug arrest increased by 447% from 1980 to 1992. As a result, the number of persons in custody in state correctional institutions for drug offenses leapt from 19,000 in 1980 to 186,000 in 1993, an increase of 879%. The proportion of prisoners serving time for drugs during that time rose from one in sixteen in 1980 to almost one in four in 1993. And these burdens have not been equally shared: from 1985 to 1995, during the height of the drug war, black men's per capita incarceration rate increased at nearly nine times the increase among white men.

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59 See supra notes 2-3.
60 Id.
61 Thomas Bonczar & Allen J. Beck, Bureau of Justice Statistics, Criminal Offender Statistics, at http://www.ojp.usdoj.gov/bjs/crimoff.htm (last modified Oct. 20, 2000). Blacks have a 16.2% chance of prison time, while whites have a 2.5% chance. Id.
62 MAUER, supra note 3, at 124-25.
63 Bonczar & Beck, supra note 61. The analogous figure for white males is roughly one in twenty. Id.
64 Tonry, supra note 16, at 18.
65 MAUER, supra note 3, at 143-45. In 1980 there were 581,000 arrests for drug offenses; in 1995 there were 1,476,000. Id.
66 Id. at 151.
68 Id.
69 White men were incarcerated at a rate of 528 per 100,000 in 1985 and at a rate of 919 per 100,000 in 1995, an increase of approximately 400 per 100,000. But black men saw their incarceration rate rise over the same period from 3,544 per 100,000 to 6,926 per 100,000, an increase of nearly 3,400 per 100,000. Tonry, supra note 16, at 19.
Minorities are disproportionately affected at every stage of the drug prosecution process. The much-criticized but still extant 100-1 disparity in federally authorized sentences for possession of the same amounts of crack and powder cocaine is only the tip of the iceberg.\(^7\) The United States Public Health Service estimates, from self-report surveys, that blacks are about 14% of the nation's illegal drug users. Yet they are 35% of those arrested for drug possession, 55% of those convicted for drug possession, and 74% of those sentenced to prison for drug possession.\(^7\) From 1986 to 1991, the number of white drug offenders in state prisons increased by 110%, but the number of imprisoned black drug offenders grew by 465%.\(^7\) Among juveniles during the same period, drug arrests of minorities increased by 78%, while arrests of non-minority juveniles decreased by 34%.\(^7\) Racial disparities in the area of drug crimes have a long history, of course, but they increased exponentially during the war on drugs. From 1965 to 1980, blacks were generally twice as likely as whites to get arrested for drug offenses; by the end of the 1980s, however, blacks were five times more likely to be arrested for drug offenses.\(^7\)

These demographics suggest another explanation for the severity of our criminal justice system: we can afford to be so punitive only because the burdens of our tough-on-crime policies do not fall equally on the majority, but disproportionately on a disempowered minority group. The point can be made with a simple thought experiment. Reverse the figures for a moment and imagine that at current trends, one in four white male babies born today could expect to be sentenced to a year or more of prison during his lifetime. Or that for every one white man who graduated college each year, one hundred were arrested. Imagine, too, that these figures could be fully explained by higher offending rates among white men. It is simply inconceivable that such a world would have the same politics of crime as we have. It is virtually certain that the situation instead would be treated as a major social crisis demanding substantial reforms. Politicians and the public would be calling for alternatives to incarceration—education, job training, and early intervention to help stop children from falling into a life of crime—rather than more mandatory minimums, more prisons, and more executions. This is not to suggest that racial disparities are the only explanation for the severity of our system, but it is to suggest that they may be a necessary if not sufficient condition.

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\(^7\) David Cole, No Equal Justice 142-43 (1999).

\(^7\) Marc Mauer & Tracy Huling, Sentencing Project, Young Black Americans and the Criminal Justice System: Five Years Later 12 (1995).


An important study by Professors David Greenberg and Valerie West supports the conclusion that race may play a significant role in the severity of our criminal justice system. Greenberg and West examined differences in incarceration rates among the fifty states in 1971, 1981, and 1991. Although most discussions of incarceration, like this essay, focus on national rates, the nation’s incarceration rate is actually determined not by federal policy, but rather by the independent policies of the fifty states. Ninety percent of criminal prosecution is carried out by the states, and state incarceration rates vary greatly. Greenberg and West used regression analyses to identify the relative effects of various factors on state incarceration rates, including urbanization, violent crime rates, determinate sentencing, and race. Not surprisingly, they found that violent crime rates play an important role in determining incarceration rates. But they also found that “[b]y 1990, the size of a state’s black population was a stronger predictor of its prison population, holding other factors constant, than its violent crime rate.” Moreover, race “continues to predict imprisonment even when violent crime rates and narcotics arrests are controlled.”

The point is also illustrated by comparing today’s war on drugs to the nation’s response when a large number of young white people became involved with drugs in the 1960s. Prior to the 1960s, laws criminalizing marijuana possession were harsh but were prosecuted predominantly against nonwhite defendants. In the 1960s, many white high school and college students experimented with marijuana, and an increasing number found themselves in trouble with the law. What was the national response? Every state and the federal government decreased the penalties associated with marijuana possession; thirteen states decriminalized possession of small amounts altogether. Today’s war on drugs, disproportionately targeted at minorities, could not be more different. There are, of course, differences between the culture of the 1960s and the culture of the 1980s and 1990s, as well as differences between the drugs focused upon. Still, the most striking difference is in the race of those affected.

Marc Mauer has similarly pointed to the difference in how the American criminal justice system treats drug possession, a nonviolent

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76 Sampson & Lauritsen, supra note 4, at 318.
77 At midyear 1999, for example, Minnesota had a per capita incarceration rate of 121 per 100,000 residents, the lowest in the nation, while Louisiana had the highest rate, 763 per 100,000. ALLEN J. BECK, U.S. DEP’T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 1999 (Apr. 2000), available at http://www.ojp.usdoj.gov/bjs/pub/asci/pjim99.txt.
78 Greenberg & West, supra note 75, at 44.
79 Id.
80 See COLE, supra note 70, at 152-53.
offense associated in the public eye with blacks and Hispanics, and driving while intoxicated, an offense that causes at least as much harm each year but that is often committed by whites. As of 1990, drunk driving and illegal drug use were responsible for approximately the same number of fatalities per year—about 20,000. In the 1980s, states cracked down on both drunk driving and drug use. Yet the typical sentence for driving while intoxicated is two days for a first offense, and two to ten days for a second, while typical sentences for possession of drugs (other than marijuana) are up to five years for a first offense, and one to ten years for a second. The vast majority of those arrested for drunk driving are white males—78% in 1990.

Interestingly, both the marijuana possession and driving while intoxicated examples are crimes not only engaged in by many whites, but engaged in by many upper- and middle-class whites. As a result, these are the types of offenses that those who make policy and enact criminal laws are most likely to imagine themselves or others in their social circles committing. Thus, policy makers cannot distinguish the “offenders” as “them” on either racial or class-based grounds. Is it merely coincidental, then, that these offenses are dealt with substantially more leniently than those thought to be committed primarily by blacks?

Tyler and Boeckmann’s work on diversity and support for punitive criminal justice policies bolsters the thesis that racial factors play a critical role in fueling and sustaining our current policies of mass incarceration. People are generally (and perhaps naturally) more concerned with injustice when it is directed toward members of their own social group. In World War II, for example, three groups of Americans—German Americans, Italian Americans, and Japanese Americans—had ties of descendancy to the countries with which we were at war, but only the Japanese Americans, those most likely to be viewed as different or “other,” were interned. To the extent that the white majority does not identify with blacks, its concern about the effects of incarcerating large numbers of blacks will be diminished, and it may simultaneously perceive greater threats to the community’s “moral cohesion” from blacks than from whites.

This unfortunate fact of social psychology is exacerbated by a second fact: that a common tactic for reconciling apparently unjust out-

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81 See MAUER, supra note 3, at 134-35. In 1998, 86.9% of those arrested for driving under the influence of alcohol were white, while 10.5% were black. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES 1998, at 228 tbl.43 (1999), available at http://www.fbi.gov/ucr/98cius.htm.
82 Id.
83 Id.
comes is to dehumanize and stereotype the "victims." This is most evident in the treatment of enemies during wartime but may also apply in less extreme forms to white majority attitudes toward blacks today. To the extent that blacks are stereotypically identified as "criminals," their punishment is more likely to be seen as deserved. In a circular sense, then, the racial disparities in criminal justice are in some sense self-justifying. The fact that blacks are disproportionately incarcerated leads the white majority to associate blacks with crime, which in turn may cause the majority to be less concerned with the fact that blacks are disproportionately incarcerated.

Race may also play a role in another explanation often advanced for the increased severity of our criminal justice system: a loss of faith in rehabilitation. Rehabilitation, with its belief in the redemptive possibilities of punishment and treatment, was a watchword of criminal justice policy in the 1940s, '50s, and '60s. As late as 1968, a Harris poll found that 48% of the public thought rehabilitation was the primary purpose of imprisonment and 72% thought it should be prison's primary purpose. But liberals and conservatives alike attacked the concept of rehabilitation in the 1960s and 1970s, and the accepted wisdom since the 1970s has been that rehabilitation does not work. The abandonment of rehabilitation contributes to increasingly severe sentences for two reasons. First, if one no longer believes that criminals can be rehabilitated, there is little reason not to impose long prison terms. Second, the loss of faith in rehabilitation led to the imposition of determinate sentences set by legislatures, rather than indeterminate sentences with flexibility for judges and/or parole boards to consider individual progress toward rehabilitation. Legislatures tend to be harsher than judges and parole boards because they set sentences in the abstract, without the particularities of a human life before them to mitigate their wrath.

The abandonment of rehabilitation coincided with the forging of a link between crime and race in the national political culture. The late 1960s and early 1970s saw riots in many urban centers, reinforcing a sense that blacks were criminally inclined. Barry Goldwater and Richard Nixon both used crime as a wedge issue against the Democrats, hoping thereby to align the Democrats with blacks and to at-

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85 SeeTYLER ET AL., supra note 54, at 218-19.
86 MAUER, supra note 3, at 44.
87 SeeAlfred Blumstein, supra note 37, at 237 (citing "the decline in faith in the effectiveness of rehabilitative correctional programs" as a significant factor in America's dramatic prison growth from 1970 to 1985).
88 Cf.Edward Zamble & Kerry L. Kalm, General and Specific Measures of Public Attitudes Towards Sentencing, 22 CAN. J. BEHAV. SCI. 327 (1990). People tend to judge the criminal justice system as too lenient in the abstract; but when asked to make sentencing decisions based on specific scenarios, they generally reached decisions very similar to those made by the criminal justice system. Id.
tract white voters to the Republican Party.\footnote{See Tonry, \textit{supra} note 16, at 4; MAUER, \textit{supra} note 3, at 47 (arguing that the "law and order" message conveyed by Goldwater and Nixon, while a response to urban unrest and antiwar protests, served also as a subtle message to whites concerned with supposedly rising black crime rates).} The Bush campaign's use of the infamous Willie Horton story in the 1988 Presidential race continued this trend.\footnote{See generally DAVID ANDERSON, CRIME AND THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGED AMERICAN JUSTICE (1995).}

That these events are not mere coincidence is supported by intuition. To give up on rehabilitation is to reject the propositions that people can be redeemed and that no one is as bad as the worst thing he ever did. It is much easier to give up on those ideas, and indeed may only be possible to give up on those ideas, with respect to people with whom one does not identify.\footnote{See TYLER ET AL., \textit{supra} note 54, at 205.} Those with whom we identify are always capable of redemption. Racial divisions permit the white majority to disregard or discount the equal humanity of racial minorities. Thus, the American public's abandonment of rehabilitation may be closely tied to the fact that the white majority fears, scapegoats, and does not identify with, the increasingly minority-dominated prison population.

IV. WHEN ALL ELSE FAILS: STRONG ARM METHODS

Racial disparities in criminal justice may also explain our incarceration rates in a less direct but equally disturbing way.\footnote{This section sketches ideas developed much more fully in COLE, \textit{supra} note 70.} From policing tactics to jury selection to appointment of counsel, our criminal justice system is built on double standards that disadvantage minorities. The privileged among us enjoy fairly substantial constitutional protection from unreasonable searches and seizures, for example. But a series of doctrines ensure that the same protections are not extended to minorities and the poor. "Consent" searches and encounters, pretextual traffic stops, drug courier profile stops, and stop-and-frisks justified by flight in a high-crime area all make it extremely easy for the police to stop and search citizens without individualized suspicion. As recent revelations about racial profiling have consistently shown, when the police are free to act without having to justify their actions with specific reasons, they often resort to racial stereotypes and target minorities, particularly young black men.\footnote{See generally id. at 16-62.}

Jury selection rules have also long tolerated racial discrimination. The all-white jury has been a staple of American criminal justice for most of our history. The Supreme Court declared racial discrimination in the identification of eligible jurors for a jury venire unconsti-
tutional as early as 1880, in Strauder v. West Virginia,94 but for fifty years thereafter, the Court tolerated discriminatory practices as long as they were not overtly set out in law.95 Beginning in 1935, the Court began to take more seriously challenges to the practice of racial exclusion from jury pools, but all-white juries persisted, largely because the Court expressly permitted prosecutors to use race as a basis for "peremptory strikes" until 1986.96 And even today, while the Court condemns race-based peremptory strikes, it has created a toothless standard that makes it virtually impossible to establish that a prosecutor has engaged in race-based strikes.97

And while all defendants facing the possibility of incarceration have a formal right to counsel, the substance of that right has been all but eviscerated by the Court's failure to demand that counsel be competent in any real sense. The Court has set the standard for "effective assistance of counsel" so low that virtually anyone with a law degree will suffice, no matter how inexperienced, unprepared, or incompetent. Thus, lawyers have been deemed to have provided constitutionally "effective assistance" where they have slept through parts of the trial, where they have used drugs during the trial, where a lawyer fresh out of law school who had never before tried a criminal case was appointed to handle a death penalty case, and where a lawyer drank alcohol at every break during trial, drank in the evenings, and was arrested for driving under the influence on his way in to court one morning.98 With the constitutional standard so low, states have little incentive to allocate sufficient funding to counsel for the poor. As a result, we "discount" the cost of rights by ensuring that the poor are for the most part assigned overburdened, underpaid, and often incompetent lawyers.99

Taken together, these rules create a system-wide double standard under which minorities and the poor, and especially poor minorities, are routinely denied the constitutional protections that privileged whites enjoy. This lesson is not lost on minorities, who consistently express far less faith in the fairness of the criminal justice system than do whites.100 When we adopt a strategy built on double standards, we forfeit one of the criminal justice system's most important tools: its own legitimacy. Common sense tells us, and sociological studies con-

94 100 U.S. 303 (1880).
96 See COLE, supra note 70, at 115-20. In 1986, the Supreme Court decided Batson v. Kentucky, 476 U.S. 79 (1986). Batson held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." Id. at 89.
97 COLE, supra note 70, at 120-23.
98 See id. at 78-79.
99 Id. at 81-86.
100 See id. at 170-71 & nn.8-11.
firm, that belief in legitimacy is critical to any system of laws. If people believe the system is fair, they are more likely to internalize its rules and to cooperate with law enforcement in myriad ways. As Tom Tyler has found, “studies suggest that people who experience procedural justice when they deal with authorities are more likely to view those authorities as legitimate, to accept their decisions, and to obey social rules.”\footnote{TYLER ET AL., supra note 54, at 176 (emphasis added).} If, by contrast, people lose that faith, they have less incentive to play by the rules, and the state is left to the strong-arm tactics of incarceration. Thus, the United States’ heavy reliance on incarceration may well be in part a consequence of the moral bankruptcy of a criminal justice system built on double standards.

CONCLUSION

Tracing the disproportionate minority representation in the nation’s jails and prisons to the disparities in how our criminal justice system treats minorities and the poor is extremely difficult. As noted above, most who have tried to do so have concluded that much (although not all) of the disparity at the end of the line is attributable not to discriminatory procedures but to higher rates of offending by blacks and Hispanics. But that conclusion, even if accurate, does not permit us to avoid the question of race. Even if all the disparities in incarceration could be fully explained by higher offending rates among minorities, our current reliance on mass incarceration would be tainted by racial discrimination. When state legislatures today choose to increase prison sentences, build more prisons, or expand the death penalty, they know that minority groups, and particularly blacks, will bear the brunt of their actions. Moreover, support for punitive measures may be driven by fears borne of diversity, specifically the fear that “they” do not share our moral values. Unless we would maintain the same tough-on-crime stance in the face of results imposing on the majority the burden now imposed on blacks and Hispanics, we cannot claim to have a fair and just criminal justice system. The fact that the majority does not share equally in the burdens of the criminal justice system, while by no means the only reason for our incarceration rates, cannot be discounted in assessing why the United States has one of the most severe criminal justice systems in the world.

The United States in the year 2000 turns Montesquieu on his head. As freedom advances, so too does the severity of the penal law. We can only begin to try to explain the American paradox of freedom and incarceration by considering our failure to live up to yet another constitutional ideal: equal protection of the law. Our leadership in both freedom and incarceration may be not so much a
paradox as a reflection that we live in two worlds: one, the privileged white world, in which there is substantial freedom and comparatively low incarceration; and another, the world of poor minorities, in which there is much less freedom and mass incarceration. Rather than refuting Montesquieu, we have simply been unwilling to extend his maxim equally to all of our citizens.