

## **DE-COUPLING RACE, CRIME, AND PUNISHMENT**

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It is an honor and a challenge to speak before such a distinguished body of scholars, practitioners, thinkers and law enforcement researchers and officials. I hope I can step out of my own perch in the Ivory Tower and help to identify a problem that I believe is worthy of all our attention and concerted focus. Before doing so I want to thank Director John Laud for the invitation and honor of speaking before you this afternoon.

It is frequently said that we live in the post-racial era. If Jim Crow racism and the subsequent struggles over civil rights defined earlier eras in the American experience, then our time is said to be defined by tolerance, a commitment to diversity, and finally moving beyond race as a line of division and inequality in American society. National survey data show, in fact, that substantial numbers of Americans believe in the post-racial narrative, including an overwhelming majority of white Americans who say we are already a racially egalitarian society and nearly a third of African Americans themselves. Yet, there is at least one domain that remains a glaring exception to this narrative of hope and progress and it involves the heavy over-representation of minorities, especially African Americans, among those in our jails and prisons. The main message of my remarks today is to underscore the importance of continuing to undertake the necessary research and policy-based efforts that will be required in order to genuinely and finally de-couple

what remains a very troubled nexus of race, crime, and punishment that still defines the American social landscape. Indeed, part of the reason that I bring you this message today is that I worry that we are all becoming complacent in the routinization of new, subtle, and in-direct ways that an degree or element of racial bias is built into the operation of our law enforcement system.

It is not possible to understand the continuing linkage of race, crime, and punishment without taking note of the more “tough on crime”, and punishment focused tenor of law and social policy. Indeed, for more than 30 years now America has pursued a deeply punitive, anti-crime social policy. This trend has proceeded under many broad labels: the drive to restore law and order to our streets, to get tough on crime, to wage a war on drugs, to take decision-making authority from anyone who might be seen as “soft on crime.” The policy tools attached to these variously labeled phenomena include aggressive stop and frisk practices, zero-tolerance and broken-windows style law enforcement, mandatory minimum sentences, truth in sentencing guidelines mandating that high proportions of a jail or prison terms actually be served, sentencing enhancements for various offenses, crack versus powder cocaine sentencing differentials, the federalization of many of what were once only state criminal offenses, trying juveniles as adults, three strikes and you’re out provisions, and more expansive availability of the death penalty, to name only the most high profile changes.

This punitive turn has produced an epic expansion in our reliance as a society upon jails and prisons as the response to crime. In 1980 some just over 2

million people were under some form of criminal justice supervision. By 2009 the adult correctional population—identifying those on probation, parole, or in a jail or prison, exceeded 7.2 million and continued to grow (though at a slower rate).

By taking 1980 as a starting point these comparisons are somewhat misleading. It suggests or implies that that this is a steady secular trend that is, perhaps, directly responsive to something about the actual level or nature or underlying crime. That would be a mistaken interpretation. Indeed, that trend we see from 1980 forward is a rather sharp departure from a many decade long steady state of much lower rates of incarceration in the U.S. If we go back to the 1920s the number of incarcerated men fluctuated between about 180 and 275,000 individuals for most of the 1925 through 1970 period. The sharp rise is really a post-1980 occurrence. As such, the changing trend corresponds much more to changes in the emphasis and tenor of social policy than to the nature or levels of crime itself. Indeed, the incarceration trend continues upward even in recent periods of declines in overall crime.

This trend or transformation has led many social scientists to speak of “mass incarceration.” Legal scholar and sociologist David Garland defined the mass imprisonment society as having two features: first, a “rate of imprisonment that is markedly above the historical and comparative norm for societies of this type,” and second, “the social concentration of imprisonment effects,” such that incarceration “ceases to be incarceration of individual offenders and becomes the systematic imprisonment of whole groups of the population.” Thus, we tend to incarcerate our

own citizens at a rate roughly 5-times that of the UK at the low-end for comparable industrialized nations and a rate of roughly 12-times more as compared to Japan.

Indeed, within a decade it was already clear that the punitive turn was falling more heavily on some segments of the population than others. As distinguished criminologist Alfred Blumstein documented, the black incarceration rate nearly tripled between 1980 and 2000 and is now over eight times that for non-Hispanic whites. Indeed, fully 2 percent of the black population was incarcerated in 1999 and one in ten black males in their twenties were under some form of criminal justice supervision. This change has reached such a level that a black male born in 1990 faced almost one in three lifetime odds of ending up in jail or prison as compared to well under one in ten life-time chances for non-Hispanic white males. This is not merely a story of mass incarceration: it is one, I submit, of racialized mass incarceration.

This trend has been so steady and arguably extreme that the U.S. is now the world's leader at incarcerating its own citizens. As the highly publicized title of a 2008 Pew Charitable Trust report put it: 1 in 100 Americans is now behind bars. This declaration *is* shocking and was surely emphasized by the report authors in order to jar us as a nation into considering the enormity of the waste of dollars and of human lives that the new mass incarceration society entails (The Pew Center on the States. One in 100: Behind Bars in America 2008", February 2008).

But we know something else, the rise of mass incarceration has fallen with radically severe disproportionality on African American communities, especially

low-income black communities. It is true that 1 in 100 Americans are now behind bars and that 1 in 31 Americans are under some form of criminal justice supervision (if you include those also on probation and on parole). That latter figure stands at a thoroughly depressing 1 in 18 for black Americans. 1 in 18!

But it gets even worse. We are at a point where fully 1 in 15 black men are in jail or prison and when 1 in 9 black men between the ages of 20 and 34 is in jail or prison.

University of California sociologist Loic Wacquant has labeled the modern era a new or 4<sup>th</sup> state of racial oppression. In the wake of the successive collapse of slavery, then of Jim Crow, and then of ghetto segregation as mechanisms of black oppression and white supremacy, we get what he calls the carceral state, or what legal scholar Michelle Alexander labels as the “The New Jim Crow,” and public policy scholar Michael Tonry calls “punishing race.”

Having invoked such strong terminology let me first be clear by what I am not arguing. I am **not** arguing that deliberate or overt and explicit racial discrimination in the criminal justice is the main problem. Not at all. Indeed, in his pivotal book Race, Crime, and the Law Harvard legal scholar Randall Kennedy rightly argues that : “the administration of criminal law has changed substantially for the better over the past half century and that there is reason to believe that, properly guided, it can be improved even more. Today there are more formal and informal protections against racial bias than ever before, both in terms of the protections accorded blacks against criminality and the treatment accorded to black

suspects, defendants, and convicts.” No, the point is not that direct racial bias and discrimination are the problem. The nature of the law and law enforcement as well as the make-up of law enforcement personnel have all changed too greatly and for the good to offer this simplistic an analysis. There are too many committed and energetic police and law enforcement officials around the country struggling to do the right thing to settle for such an analysis.

However, this does not mean that new and troubling forms of racial bias are not at work, or that the time for vigilance has passed. A complete and rigorous analysis of all the factors at work here are beyond the scope of what my brief remarks this afternoon can meaningfully cover. However, what I would stress is that racialized mass incarceration is a product of the interplay of key economic, political, and cultural factors. Thus, the intensification of patterns of relative joblessness, poverty, family breakdown and poor schooling in many urban black communities, on the one hand, coincided or combined with a number of other legal and policy changes involved with the punitive turn in the criminal justice system to bring us to where we are today. The end result, particularly as a consequence of the pursuit of the so called “War on Drugs,” has been the greatly disproportionate incarceration of low income, urban blacks, especially poorly educated black men.

To try to be a little more concrete consider the following scenario: If public policy and law makers tell police to focus efforts on battling drug consumption and, in particular, to aggressively focus on the trade and consumption of crack cocaine, then this is how law enforcement will come to target it’s efforts. Such targeted

efforts can, in fact, come to operate in ways that come to be strongly racially disproportionate in effect. The best social survey information we have suggests that there is little difference between blacks and whites in the frequency of illegal drug consumption, a pattern confirmed as well by data on emergency room admissions for drug overdoses and the like. Yet, African Americans are far more likely to be arrested and then formally jailed for drug use. How does such a disparity arise, especially in an era of less overt racial discrimination?

Carefully designed field research by sociologist Katherine Beckett and her colleagues has yielded some of the most compelling evidence on just how substantial and institutionalized more subtle and in-direct forms racial bias can become in actual law enforcement practice. Specifically, she and her colleagues argue that the highly racialized discourse and politics that led to the War on Drugs has become institutionalized in street-level law enforcement practices. To wit, police selectively focus their attention on enforcement and arrests on the public space drug trade in crack among blacks and Latinos, large part because public officials and broader social discourse identify crack consumption as the key problem to be focused on. Their own systematic observation of known drugs-trading locations showed that police are more likely to pursue black and Latino suspects in the area than the white ones. As Beckett and colleagues explain: “our findings indicate that the majority of those who deliver methamphetamine, ecstasy, powder cocaine, and heroin in Seattle are white; blacks are the majority of those delivering only one drug: crack. Yet 64 percent of those arrested one of these five drugs is black.... Predominantly white outdoor drug markets received far less

attention than racially diverse markets located downtown... The overrepresentation of blacks and under-representation of whites among those arrested for delivery of illegal narcotics does not appear to be explicable in race-neutral terms.” Hence, even though no one set out to produce racially disparate outcomes it nonetheless happens.

A similar type of bias on the basis of race has been shown in examinations of stop and frisk data. For example, as the New York Times reported just last month: “Blacks and Latinos were nine times as likely as whites to be stopped by the police in New York City in 2009, but, once stopped, were no more likely to be arrested.” Again, the level of disparity in police supervision and intrusion on individuals is extreme. “According to the 2009 raw data ...nearly 490,000 blacks and Latinos were stopped by the police on the streets last year, compared with 53,000 whites. But once stopped, the arrest rates were virtually the same. Whites were arrested in slightly more than 6 percent of the stops, blacks in slightly fewer than 6 percent. About 1.7 percent of whites who were stopped were found to have a weapon, while 1.1 percent of blacks were found with one.” A major assessment of traffic stops by the Los Angeles police department carried out by economist and legal scholar Ian Ayres showed similar results. Ayres found blacks three times as likely as whites to be stopped, but actually less likely on any given stop to receive a citation. As the report concludes, so many blacks are subject to such frequent stops that they nonetheless remain twice as likely overall to get citations. But one cannot avoid the conclusion that many of these stops are not warranted and reflect the routinization of an element of racial bias.

I want to stress several points about the problem of racialized mass incarceration.

First, the incarceration is so extreme and so biased on the basis of class and race that prison has become an ordinary life experience for poorly educated blacks, in a manner not characteristic of any other segment of American society. My Harvard colleague and sociologist Bruce Western in his book Punishment and Inequality in America compared rates of incarceration for two generations of men, those born in the five years immediately following World War II and those born during the height of the Vietnam war era (1965 to 1969). Black men in the post World War II generation who did not graduate from high school had a less than 1 in 5 chance of going to jail or prison by the time they were age thirty. Similar black men born in the Vietnam era, however, had a 3 in 5 chance of spending some time in prison by the time they reached age thirty. That is nearly, 60% of poorly educated black men in this more recent cohort were destined for jail or prison -- a figure that is sure to be worse for the most recent cohorts of poor and poorly educated black men.

This now means that exposure to jail and prison is a more common experience for a generation of poor blacks than is membership, say, in a labor union, service in the military, or receipt of a variety of government benefits. As Western writes:

“The criminal justice system has become so pervasive that we should count prisons and jails among the key institutions that shape the life course of

recent birth cohorts of African American men. By the end of the 1990s, black men with little schooling were more likely to be in prison or jail than to be in a labor union or enrolled in a government welfare or training program. Black men born in the late 1960s were more likely, by 1999, to have served time in state or federal prison than to have obtained a four-year degree or served in the military. For noncollege black men, a prison record had become twice as common as military service." (2006, p. 31).

There are many other effects to which we may point as consequences of racialized mass incarceration. It is clear that a criminal record diminishes the employment prospects for an individual. We now have strong field experiment data carried out by sociologist Devah Pager showing that this effect is especially destructive of the future employment prospects of black men. The loss of the right to vote as well as access to other federal and state programs and benefits increasingly attaches to a felony conviction. As a consequence, we are potentially creating more and more people with tenuous claim to full citizenship or prospects for viable self-support once they paid their debt to society via a jail or prison sentence. Indeed, some scholars are increasingly worried that the level of incarceration is at a point where it begins to de-stabilize families and communities and, in turn, become directly criminogenic. That is, there are a series of interconnected social and political effects to the current reach of the state of racialized mass incarceration about which we should be concerned.

Second, this circumstance has implications for the health of our legal system and for American democracy writ large. As Alfred Blumstein observed, “There is a large disproportionate representation of minorities, especially Blacks, involved in all aspects of the criminal justice system; and this disproportionality alone, regardless of its legitimacy, conveys a profound sense of unfairness to the overrepresented groups.” This condition raises questions about the fairness and equity of our legal system and processes. A number of the national surveys I have conducted reveal enormous disparities between blacks and whites in the level of confidence they have in police, in prosecutors, and in the court. These differences are in the 50-plus percentage point range, with, for example, 79% of whites in national surveys “a lot” or “some” confidence that judges will treat blacks and whites fairly whereas only 28% of blacks expressed a similar outlook.

This cynicism about the criminal justice system among blacks is potentially quite consequential. Via a series of experiments embedded within national surveys we have shown that blacks are far more likely than whites to be ready to engage in jury nullification. This tendency is particularly strong among those who believe the war on drugs is a racially biased policy and is greatly enhanced under those experimental conditions when a hypothetical black defendant alleges racial bias by the police. Whether the scenario we posed in our experiments involved a non-violent drug related arrest or an attempted murder charge, when the experimental condition mentioned a potential for racial bias on the part of the police the level of willingness to engage in jury nullification among blacks rose by approximately 20 percentage points.

Third, and quite independent of the racial dimension of the problem, the growth in state expenditures on jails and prisons has far outstripped the growth in all other state expenditures with the one exception of Medicaid. In particular, the growth in spending on corrections has absolutely dwarfed growth in spending on higher education. The Pew Charitable Trust report estimates that, on average, it costs \$29,000 a year per inmate (The Pew Center on the States. "One in 31: The Long Reach of American Corrections," March 2009). In 2007 we spent \$49 billion on corrections (jails, prisons, and supervision of those on parole and probation). That figure is 4 times what it had been a decade earlier and reflects growth over the decade of more than 127% in inflation adjusted dollars. Over the same time period spending on higher education on average rose by only 21% (1/6<sup>th</sup> the growth seen in prison expenditures). Moreover, according to the Pew Report, in some states, such as Connecticut, Vermont, Michigan, Delaware, and Oregon corrections spending actually exceeded spending on higher education. As the New York Times wrote in an editorial following the release of the Pew Report: "These statistics point to a terrible waste of money and lives" (New York Times, 2008. "Prison Nation" March 10, 2008).

In this era of profoundly constrained state budgets it requires no great leap of logic or exercise in higher order econometric analysis to conclude that scarce state dollars are surely better invested in early childhood education programs and meaningful access to higher education than in building, staffing, and filling more prison cells with inmates.

The time has arrived to both get smart on crime and to re-dedicate ourselves to de-coupling the connection between race, crime, and punishment. The get tough, punitive agenda has both arguably failed as a crime fighting strategy and, tragically, runs the risk of deepening racial division and inequality in America rather than healing these old wounds. We must recognize that the crime reduction benefits of incarceration exist but are limited. Indeed, the best and most defensible estimates suggest that only between as little as 5 and perhaps as much as 10 to 15% of the decline in crime rates seen over the last decade and half can be attributed to the incapacitation and deterrence effects of the new mass incarceration society. Rather, it was a combination of changing population age distributions, stabilization of the crack cocaine markets, the stigmatization of crack use, and a shift to community policing strategies that makes a police presence more visible which probably all contributed more substantially to this decline in crime than did the growth in the number of those incarcerated or the increase in the severity of terms of incarceration.

We should instead be focused on reducing the number of prison admissions, reducing the length of prison stays for those not involved in violent crime, and increasing the pressure on local and state government officials to evaluate and intervene to change any policing strategy or adjudication practice that is producing clearly racial disparate rates of official scrutiny, arrest, and incarceration.

The rise in incarceration has largely been driven by social policy changes not by changes in the amount or severity of the crime problem. If policy change

produced racialized mass incarceration policy change can also do much to change things. In terms of high level goals for our criminal justice system, policy analysts Henry Ruth and Kevin Reitz argue that crime policy should be formulated and routinely evaluated against five key ambitions: (1) the reduction of crime, (2) the reduction of public fear; (3) justice for victims, offenders, and the larger public; (4) law and law enforcement practices that foster perceived legitimacy within all relevant communities; and (5) avoidance of the extension of law beyond those actions truly necessary to address serious harms faced by society. With respect to the mass incarceration trend, specifically with regard to race, they propose that we require that changes in punishment laws be preceded by systematic and thorough assessment of the racial and ethnic changes that may result from a change. Practices and policies that will foreseeably result in racially disproportionate outcomes need to be very carefully scrutinized and problematized as to whether they appropriate serve a compelling and legitimate law enforcement need.

As I reflect on the evident punitiveness trend and state of racialized mass incarceration one could but despair that it would never have gone on for so long or reached such extreme levels had those being swept up into the criminal justice not been largely black, poor, and poorly educated. To now exist in a circumstance when going to jail or prison looks like the normal life expectation for poor black men; when we as a society are investing relatively more aggressively in jails, prison, and state supervision apparatus than we are in higher education; and where the evidence of a quite marginal crime reduction pay-off to mass incarceration mounts, we must renew a commitment to do research that identifies the ways that bias still

operates, that assesses other, more appropriate lines of effective response to real issues of violent crime and community and individual endangerment.

For the first time in more than 30 years state prison populations showed a slight decline (The Pew Center on the States. "Prison Count 2010." April 2010). But the federal prison population continued to grow. And the heavily disproportionate incarceration of minorities, especially poor blacks, for low level drug offenses continues largely unabated.

Scholar and policy analyst John Dilluio, once an advocate for the more punitive response to crime, changed his own emphasis a decade ago, calling for a shift in priorities. IN particular, he called for reform in our drug laws and greater emphasis on prevention and alternatives to incarceration. Small steps have already been taken in these directions. Those efforts and the research needed to support them need to be accelerated.

Writing at the dawn of the 20<sup>th</sup> century the distinguished sociologist W. E. B. DU Bois bemoaned the extent to which crime had come to define the black presence in the urban north (yes, a full century ago). Although I should immediately note that Du Bois was writing at a time when the magnitudes of the racial gap were far, far smaller than are today. Nonetheless, Du Bois declared: "There is a widespread feeling that something is wrong with a race that is responsible for so much crime, and that strong remedies are called for... Indeed to the minds of many this is the real Negro problem." Even in this day, of course, Du Bois rejected this analysis and called for a focus on social context and opportunities available to blacks.

Reflecting back on Du Bois's observation, however, should call to mind for us the deep irony of the current situation. I opened by treating the linkage of race, crime, and punishment as the great exception to the narrative of a post-racial American. I want to conclude with a simple illustration of how mass incarceration reinforces racial inequality and division. In our national surveys we asked respondents whether they had a close friend or relative who was "currently incarcerated." We found that only one out of ten whites said "yes" in response to this question. In contrast, full half of African Americans responded "yes". Even more striking is that among the lowest education and income whites we still find just one in five—20%—responding yes to the question about a friend or relative currently incarcerated. However, that number is nearly 60% among low education/low income blacks. Perhaps even more striking is that while fewer than 5% of high education and high income whites say yes, nearly 1 in 3 of the very highest status blacks say yes. That is, the rate of such exposure to the criminal justice system among the most well-off blacks exceeds that among the most disadvantaged whites.

America can and should do better than this. The time to re-affirm a commitment to de-coupling the intertwining of race, crime and punishment is here. I am at once inspired and confident that gatherings like this one that bring together the right mix of scholars, policy makers, researchers, and law enforcement officials, can move us in the right direction. On the basis of shared good will, and drawing on the deep expertise, knowledge, and skill possessed by folks all of you assembled

here today, we can make the needed progress on this urgently important issue.

Thank you very much.

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