

CIVIL RIGHTS AND THE CRIMINAL JUSTICE SYSTEM

CLINT BOLICK*

I. SUGGESTIONS FOR ACTION

We must not make the same mistakes concerning issues of race and crime that we have made in other areas of civil rights law, for if we do, it will exacerbate already serious problems.

My perspective is colored, however, by a particularly vivid personal and up-close experience. A few years ago, I had what was perhaps my greatest experience of Murphy's Law¹ in action. I attended a meeting with some clients, plaintiffs in a school-choice proceeding in South-Central Los Angeles, at the time and place where the riots began. On April 29, 1992, when a colleague from the Institute for Justice and I went to South-Central to have this meeting, we were there just as the riots were breaking out.² Our meeting took place after an attack on our automobile, which we barely escaped, and two blocks from where Reginald Denny was being beaten.³ The shopping center in which the meeting took place was burned to the ground that night. For me, it was a very transformative and palpable experience, as I witnessed for the first and, I hope, the last time in my life, a complete breakdown in the social order in the United States.

From that experience, I was left with a number of very strong images and lessons. The first is probably the most obvious: the racial divide in America remains very great. My colleague and I

* Vice President and Director of Litigation, Institute for Justice, Washington, D.C.

1. See ARTHUR BLOCH, MURPHY'S LAW AND OTHER REASONS WHY THINGS GO WRONG 11 (1977) ("If anything can go wrong, it will.").

2. See Amy Wallace & David Ferrell, *Verdicts Greeted with Outrage and Disbelief*, LOS ANGELES TIMES, Apr. 30, 1992, at A1 (describing the outbreak of riots in Los Angeles after the announcement that a jury had acquitted the police officers accused of criminal wrongdoing in the beating of black motorist Rodney King).

3. These events occurred at the corner of Florence and Normandie in Los Angeles, California. For an account of the beating of Reginald Denny, see *After the Riots: The Search for Answers*, LOS ANGELES TIMES, May 7, 1992, at A9.

were the victims of lynch-mob violence because we were the wrong color in the wrong place at the wrong time, and that is not the first or last time that will happen in America. The second lesson was that one of the burdens suffered by people in low-income and minority communities is that sometimes when they call the police, they do not come. The retreat of the police from South-Central Los Angeles that night was one of the most brazen derelictions of duty that I have ever witnessed.⁴ Finally, and most problematically, I learned that support for the rule of law is beginning to break down very severely in some communities.

This latter phenomenon is perhaps the most serious crisis in America today. It is reflected in numerous troublesome ways. First and foremost is the serious proliferation of violent crime in many inner cities, stoked by the emergence and explosive growth of what John DiIulio calls juvenile "superpredators,"⁵ and by the terrifying fact that, in some jurisdictions in the United States, criminals have a greater arsenal than the police have.⁶ A second manifestation is the broad perception by many minorities that law enforcement and the judicial system are hostile occupying forces in their own communities.⁷ Finally, there has been an increasing phenomenon of race-based nullification of verdicts in serious criminal trials. Although the stereotype is that blacks nullify guilty verdicts in favor of black

4. See Rich Connell & Jim Newton, *Officer Faulted on Riots Rejects Gates' Criticism*, LOS ANGELES TIMES, May 21, 1992, at A1 (reporting that a field supervisor, faulted by Los Angeles Police Chief Daryl Gates for the poor police response to the Los Angeles riots, blamed Police Chief Gates for the lack of preparedness); Penelope McMillan, *Riot Aftermath: Getting Back to Business*, LOS ANGELES TIMES, May 5, 1992, at A4 (reporting on videotape evidence of police retreat during Los Angeles riots); Penelope McMillan, *Riot Victims Who Sue Police Face Tough Task*, LOS ANGELES TIMES, July 13, 1992, at B1 (reporting that victims of violence blamed police for their failure to warn them about or protect them against the mob violence, but that suits against the Los Angeles Police Department were unlikely to succeed due to immunity laws and the lack of a constitutional right to protection).

5. See John J. DiIulio, Jr., *Moral Poverty: The Coming of the Super-Predators Should Scare Us Into Wanting to Get to the Root Causes of Crime a Lot Faster*, CHI. TRIB., Dec. 15, 1995, at 31.

6. See Gary A. Warner, *Police Struggle for Firepower: Officers Fear Being Outgunned by Criminals' Increasingly Exotic Arsenals*, ORANGE COUNTY REG., Feb. 19, 1989, at A1.

7. This perception was depicted very vividly a few years ago in the book *The Bonfire of the Vanities*. See TOM WOLFE, *THE BONFIRE OF THE VANITIES* (1987). See also Maria Puente, *Poll: Blacks' Confidence in Police Plummets*, USA TODAY, Mar. 21, 1995, 3A (reporting on a poll commissioned by USA Today, the Cable News Network, and the Gallup polling organization, showing that blacks' "confidence in police and the justice system has dropped significantly in the past two years").

criminal defendants who appear to be guilty,⁸ this nullification happens on both sides of the racial divide.⁹

II. PITFALLS TO AVOID

For all of these reasons, the rule of law is in jeopardy, and permeating this crisis are issues of race and crime. The outlines of what I consider to be the appropriate policy response are as follows.

First is what we emphatically should not do. Crime is one area that we must keep absolutely off limits to concepts of affirmative action.¹⁰ We must not advocate a change in legal rules in the absence of a dispositive showing that a rule was adopted for discriminatory purposes. Statistical disparities alone should not justify rule changes. For instance, some have argued, as in *McCleskey v. Kemp*,¹¹ that capital punishment should be ruled unconstitutional because of its adverse racial impact;¹² more recently, some have argued that stiffer sentences for crack cocaine, as opposed to cocaine powder, should be ruled unconstitutional because of their adverse statistical impact on minorities.¹³ As a policy matter, both these issues are open to

8. The O.J. Simpson criminal trial brought this concept to the forefront of American debate.

9. I count among the very possible situations of jury nullification the prosecution of the police officers by the Simi Valley jury in which they acquitted the officers for the brutal beating of Rodney King. Compare Benjamin A. Holden, Laurie P. Cohen, & Eleena de Lisser, *Color Blinded? Race Seems to Play an Increasing Role in Many Jury Verdicts*, WALL ST. J., Oct. 4, 1995, at A1 with Stephen J. Sansweet, *LAPD Officers are Acquitted in King Beating*, WALL ST. J., Apr. 30, 1992, at A14.

10. For a general critique of race-based affirmative action, see CLINT BOLICK, *THE AFFIRMATIVE ACTION FRAUD: CAN WE RESTORE THE AMERICAN CIVIL RIGHTS VISION?* (1996).

11. 481 U.S. 279 (1987). In *McCleskey*, the defendant argued that the capital sentencing process in Georgia, the State in which the defendant was convicted, was administered in a racially discriminatory manner in violation of his constitutional rights. See *id.* at 286. He relied on a statistical study (known as the Baldus study) done by Professors David C. Baldus, Charles Pulaski, and George Woodworth, which concluded that there existed a disparity in the imposition of the death penalty in Georgia, based on the race of the murder victim and the race of the defendant. See *id.* Justice Powell, writing for the majority, rejected the defendant's argument, see *id.* at 297, 299, because he failed to prove "the existence of purposeful discrimination" that "had a discriminatory effect on him." *Id.* at 292.

12. See, e.g., Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1394-95 (1988). See also *The Supreme Court, 1986 Term—Leading Cases*, 101 HARV. L. REV. 149, 158-59 (1987).

13. See *U.S. v. Armstrong*, 116 S. Ct. 1480, 1486, 1489 (1996) (holding that a defendant must show not only statistical disparity, but also that similarly situated persons of other races were not prosecuted); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995); Knoll D. Lowney, *Smoked Not Snorted: Is Racism*

serious debate, but we would be making a grave error if we introduced into the law the idea that any rule with severe racial impact should be declared unconstitutional.

We should not allow affirmative action into the arena of criminal law for several reasons. First, at least in theory, affirmative action is about expanding opportunities that benefit society. That emphatically is not the case in the criminal context. Advocates of affirmative action in criminal law are essentially asking for lower standards of behavior or punishment. Such lower standards would hurt all of us in society and, in many if not all instances, would lead to the release of guilty individuals. Second, and related to the first, is that, unlike other areas of the law where courts allow the use of statistics to show a violation of the law, criminal law is replete with protections to ensure that justice will be secured in individual instances. Consequently, there is no need for the additional protection of eviscerating rules that have an adverse racial impact.

Finally, in this area as in many other areas, statistical disparities unfortunately do not always tell us very much about racism but often are telling a story about other underlying social problems. For example, the National Urban League reports that by the year 2000, 76% of black children will be born to one-parent families.¹⁴ Also, in most urban areas in the United States today, the graduation rate from public high schools is less than 50%, and it is substantially less than 50% for minorities.¹⁵ Both of these figures have an incredibly high correlation with later criminalization and criminal behavior. As with all forms of affirmative action, forging policy on the basis of racial disparities ends up treating symptoms while leaving the underlying problems unsolved.

III. SUGGESTIONS FOR ACTION

I recommend three courses of action. First, to restore support for the rule of law, we must radically devolve law enforcement

Inherent in Our Crack Cocaine Laws?, 45 WASH. U. J. URB. & CONTEMP. L. 121, 123 (1994).

14. See NATIONAL URBAN LEAGUE, *THE STATE OF BLACK AMERICA* 1995, at 107 (1995).

15. See NATIONAL CENTER ON EDUCATION & THE ECONOMY, *AMERICA'S CHOICE: HIGH SKILLS OR LOW WAGES! THE REPORT OF THE COMMISSION ON THE SKILLS OF THE AMERICAN WORKFORCE* 47 (1990); Paul T. Hill, *A Cure for Urban Schools: They Must Become Community Ventures for Raising Children*, SEATTLE-POST INTELLIGENCER, Dec. 5, 1993, at J1.

and criminal justice to the community level. This means community policing similar to what Charleston Police Chief Ruben Greenberg has done,¹⁶ but it also means more than that. It means breaking up large police departments and court systems and decentralizing them, just as we ought to do with large urban school districts, and for the very same reasons. It means taking and placing power and responsibility into the hands of those who have the greatest stake in preserving order in the community, namely, the community itself. We have not been nearly radical enough in exploring those kinds of solutions.

Second, we need to reorient the focus of civil rights in this context from the criminal to the victim. If minorities are disproportionately arrested for crimes, they are also perhaps even more disproportionately the victims of crimes.¹⁷ It is, after all, the primary purpose of government to guarantee personal security, and that is the foremost civil right. We should no longer allow left-wing advocacy groups to define the terms of the debate in a manner that elevates the so-called civil rights of criminals over the far more fundamental civil rights of their victims.

Finally, all of this should occur within a broader program of empowerment. Again, consider the issue of graduation rates. In Milwaukee, whose school voucher program I have defended before the Wisconsin Supreme Court,¹⁸ the statistics are quite amazing. So many youths drop out of the Milwaukee public schools that the aggregate graduation rate is only 35%.¹⁹ Blacks graduate at an even lower 28% rate.²⁰ Private schools, in contrast, have a very high retention and graduation rate. For example, at Messmer High School, a private high school whose

16. For a description of Chief Greenberg's program, see Reuben M. Greenberg, *Race, the Criminal Justice System, and Community-Oriented Policing*, 20 HARV. J.L. & PUB. POL'Y 397, 401-04 (1997).

17. See BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1995, at 206 tbl.322 (1995). For example, in this country blacks are arrested for almost 58% of all murders, *see id.*, and are victims of murder in almost 51% of cases. *See id.* at 202. However, blacks make up only slightly more than 12% of the population. *See id.* at 14.

18. *See State of Wisconsin v. Jackson*, 546 N.W. 2d 140 (Wis. 1996); *Davis v. Grover*, 480 N.W. 2d 460 (Wis. 1992).

19. *See Milwaukee Public Schools Office of Research and Assessment, Internal Statistics* (on file with the editors of this journal) (showing that of freshmen who entered high school in 1992, only 35% of them graduated in 1996).

20. *See id.*

student population is comparable to the Milwaukee public schools in terms of race and family income, the graduation rate is 98%. It is notable that 45% of Messmer's students receive voucher aid.²¹ Likewise, after four years the voucher program has greatly raised the standardized test scores of voucher students.²² This shows we can do something about these problems. We should remove regulatory barriers to entrepreneurial opportunities in the inner city that impede job creation.²³ Moreover, we should also empower community organizations, including religious organizations, by allowing them to participate in the delivery of social services, including education. The crisis in the inner city is not just one of poverty or crime but of values. If we do these things, perhaps we can begin narrowing the racial statistical disparities that we see in the criminal context while helping to restore support for the rule of law in which we all have an enormous stake.

In conclusion, my experience in South-Central Los Angeles left me with an even greater sense of urgency about problems of opportunity. We should not only worry about these problems when they seep out into the suburbs. These problems do not just affect some Americans, they affect all Americans; and they demand not soothing pabulum, not racial scapegoating, but aggressive, constructive, and systematic action. We need to get serious, we need to get radical, and we need to get to work.

21. See Telephone Interview by A. Louise Oliver with Daniel M. McKinley, Executive Director, PAVE (Partners Advancing Values in Education) (Feb. 4, 1997). PAVE is the longest-running Milwaukee voucher program; according to McKinley, 140 of Messmer's 310 students receive PAVE vouchers. See *id.* For a discussion of voucher schools, see Robert Camuto, *Public Money and Private Lessons: An Experiment in Choice Puts a City in the Spotlight*, RELIGION & PUB. EDUC. 325 (1990).

22. See *Study Shows Voucher Pupils Thriving in Private Schools*, N.Y. TIMES, Aug. 13, 1996, at A8 (reporting that "voucher students in their third year [in the program] scored an average of 3 percentage points higher on standardized reading tests and 5 points higher on math tests" while students in their fourth year scored "nearly 5 points higher in reading" and 11 points higher in math).

23. See BOLICK, *supra* note 10, at 133-43.