

RACISM IN THE CRIMINAL JUSTICE SYSTEM: PROBLEMS AND SUGGESTIONS

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Incarcerated citizens are citizens with rights. Yet too often their treatment, like that of many people accused or convicted of crimes, is inconsistent with their guaranteed liberties. Especially if they are black, they can be shut away in a prison warehouse, at great cost to the state, leaving behind families that must fend for themselves. Chief Greenberg was concerned that people's doors had been broken during arrests and that someone—landlords, for instance—had to pay for those doors.¹ A door is easy to repair, compared to a broken family. In calculating the human cost of our criminal justice system, we must consider the families that are disrupted when someone goes to jail—or when parole is denied.

That consideration informs this Article. First, I discuss some evidence that racism lingers in our criminal justice system. Second, I make a small suggestion for improvement, and in so doing I appeal to those who respect the traditions of liberty and the common law.

There is persistent racism in this country. Although there may be no magic solution to the problem as a whole, the criminal justice system itself aggravates race relations today. So long as it remains unchanged, civil unrest is likely to recur. Consider the riots in the federal prisons when Congress voted down the recommendation of the United States Sentencing Commission on cocaine.² If nothing else, those uprisings document serious problems within the federal prisons. But more, they suggest that we can expect further disturbances.

How should the government respond? Having expected a

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1. See Reuben M. Greenberg, *Race, The Criminal Justice System, and Community-Oriented Policing*, 20 HARV. J.L. & PUB. POL'Y 397, 403 (1997).

2. See, e.g., Kevin Johnson, *Rioting Inmates Locked Away—Violence Follows Cocaine-Law Vote*, USA TODAY, Oct. 23, 1995, at 02A.

more libertarian sentiment from a Federalist symposium, I was surprised to read Clint Bolick's statement that the job of guaranteeing personal security is that of government.³ Surely some Federalists understand that infringements of security can be used to justify massive increases in the power of the government? Surely some Federalists believe that, ultimately, government itself is more to be feared than any single criminal—that guarding liberty is the most important purpose of government?

None of this is to imply that victims do not have rights, or that the rights of criminals should trump the rights of victims. But victims have a powerful guarantee that their rights will be vindicated: via the state. Elected representatives see to the prosecution of criminals, marshaling for that purpose all the power of the state. What do the defendants have? They have the Bill of Rights: fair trial, due process, equal protection. These rights stand between citizens accused of crime and the government seeking to deprive them of liberty. Yet when racial animus operates on the side of government, those rights are insufficient protection.

Georgia law mandates a life sentence for any second offense involving illicit drugs.⁴ Although the provision does not apply to every illicit drug, for those within its scope the life sentence is mandatory.⁵ Nonetheless, prosecutors in Georgia have managed to exercise what I have to call discriminatory discretion. Blacks make up 98.4% of those serving life sentences under the provision.⁶ Figures like that challenge any notion that equal protection is more than a formal aspiration in this country. Of course, statistics like these from Georgia are not conclusive evidence of systemic racism. They do make a prima facie case, however, especially in combination with other data available today.

Consider the people we incarcerate for illicit drug use. In 1990, 12.1% of the population was black.⁷ Several studies have

3. See Clint Bolick, *Civil Rights and the Criminal Justice System*, 20 HARV. J.L. & PUB. POL'Y 391, 395 (1997).

4. See GA. CODE ANN. SECTION 16-13-30(D) (1992).

5. See *id.*

6. See David Cole, *Justice Is Not Blind to Race*, CONN. L. TRIB., Jan. 8, 1996, at 26.

7. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, GENERAL POPULATION CHARACTERISTICS U.S. 3 (1992).

borne out what Professor Gross has written,⁸ that the use of drugs is about the same for each race.⁹ Therefore, blacks should constitute 12.1% of drug users; in fact the figure is 13%.¹⁰ But of all people arrested for drug possession, 35% are black.¹¹ Fifty-five percent of people convicted for drug possession in this country are black, and 74% of people who go to prison for possession of drugs are black.¹² Those figures simply do not describe a color-blind system, and no one should be surprised at the racial tension in situations like the one Mr. Bolick encountered during the Los Angeles riot.¹³

You may now be thinking that if blacks choose to violate the law more often than whites, they will naturally be over-represented in the prisons. Yet that argument depends on equality in the definition of crime, and this country lacks such equality. If Congress defines crimes to affect one group of people more harshly than another, then the results will be just as discriminatory as if the crime were defined equitably but enforced in a discriminatory manner.

Consider the situation with crack and powder cocaine. It has been established that there is no difference in physiological effect between the two.¹⁴ Moreover, when injected intravenously, powder cocaine is just as dangerous as crack.¹⁵ Nevertheless, under the federal sentencing guidelines, there is a 100:1 disparity between the sentences for crack and for powder cocaine.¹⁶ The mandatory minimum prison sentence for possession of five grams of crack is five years, but the same sentence for powder cocaine requires possession of 500 grams.¹⁷ In other words, spending \$575 on crack will buy a minimum sentence of five years in prison. To get the same sentence for

8. See Samuel R. Gross, *Crime, Politics, and Race*, 20 HARV. J.L. & PUB. POL'Y 405, 414 (1997).

9. See, e.g., ROBERT L. FLEWELLING, J. VALLEY RACHAL, & MARY ELLEN MARSDEN, SOCIOECONOMIC AND DEMOGRAPHIC CORRELATES OF DRUG AND ALCOHOL USE 79 (1992).

10. See Marc Mauer, *The Drug War's Unequal Justice*, THE DRUG POL'Y LETTER, Winter 1996, at 11.

11. See *id.*

12. See *id.*

13. See Bolick, *supra* note 3, at 391, 391.

14. See U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, at v (1995).

15. See *id.* at 182 n.2.

16. See *id.* at 126.

17. See *id.*

powder cocaine, you would have to spend \$53,500.¹⁸ Why this disparity in punishment? Assuming (purely for the sake of argument) that crack can be more dangerous in general, is it 100 times more dangerous? If not, then perhaps the disparity in sentencing exists because of a disparity in patterns of use? Consider that race correlates strongly to use of crack, with the highest prevalence among blacks.¹⁹ Indeed, of all people convicted in federal court for crack cocaine distribution in 1993, 88.3% were black,²⁰ and 7.1% were Hispanic.²¹ The government has chosen to penalize the use of one form of a drug, favored by blacks, 100 times more harshly than another form of that same drug favored by whites. What could be a clearer demonstration of racism?

Obviously, the discriminatory sentencing guidelines for crack and powder cocaine must be repealed.²² Such a move would go part of the way toward promoting racial harmony and equal justice under the law, but I suggest another measure to accompany it. As promised, it is sensitive to the Federalist appreciation for the traditions of the common law.

During the twelfth century, the English developed the jury *de medietate linguae*.²³ This practice provided for the protection of foreign merchants doing business in England.²⁴ Whenever a foreign merchant came into court, as plaintiff or defendant, the jury comprised six local and six foreign members.²⁵ The rule was subject to constraints of practicality (if six foreign merchants could not be found, then the remainder could be English merchants), and it was not available in capital cases.²⁶ However, it did point to a principle of balance.

Something like the ancient English practice would clearly

18. This figure is calculated by assuming an average street price of \$114.99 per gram for crack, and \$107 per gram for powder cocaine. *See id.* at 173.

19. *See* FLEWELLING, *supra* note 9, at 22.

20. U.S. SENTENCING COMM'N, *supra* note 14, at 156.

21. *See id.* at 192.

22. The action of Congress and the Clinton administration last year to override the Sentencing Commission's recommendation to end the disparate treatment of crack and powder cocaine is particularly disappointing. *See* Johnson, *supra* note 2.

23. *See* WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 189 (New York, James Cockcroft & Company 1875).

24. "Foreign" here refers to merchants who were not English, not just merchants from a different shire or town. *See id.*

25. *See id.*

26. *See id.*

improve our own criminal system. For instance, we could have a civilian review board made up of six minority and six nonminority members. This idea should appeal to fiscal conservatives, whom I expect to oppose the high costs implicit in abolishing parole. Where, after all, will the state house the prisoners it does not parole, if not in new prisons? Alternatively, how else will privately-run prisons be paid for than with tax money?

The merits of this suggestion aside, clearly the criminal justice system in this country suffers from racism. We will not solve it by pretending the problem does not exist.

