

## September 11 and the Criminal Justice System



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Not long ago, I was talking with a friend who works for a national women's organization. We were bemoaning the state of the world these days, and she was saying that her organization has now started to shift its thinking in the wake of recent federal policy. Her organization now is looking at the political scene to try to prevent things from getting worse rather than making any advances. I reassured her that we had been doing that for twenty-five years now in criminal justice.

From the political context in which we work, the United States has in recent years become the world leader in rates of incarceration. We have some two million people behind bars in this country. This is about six times the number of people locked up as there were just thirty years ago. If you look at international comparisons, we lock up our citizens at about five to eight times the rate of other industrialized nations and use our prison system, certainly the death penalty, to a degree that is really unimaginable among other democratic nations. They look at our policies with a great deal of horror. We know also that, at current rates, an African-American male born today in the United States stands a 29 percent chance of doing time in prison at some point in his life. So, essentially, three of every ten African-American males born today can expect to go prison for at least a year, if current trends continue. We also know that the prison expansion has been fueled by the "get tough" movement—and more recently by the war on drugs—to the point where today nearly a quarter of the two million people behind bars are locked up for drug offenses. This is about ten times the figure of just twenty years ago—a remarkable change in a relatively short period of time.

That's the bad news, but there has been some recent good news. Over the last several years, many of us have noticed some openings in the debate, discussion, and understanding of these issues. Certainly we've seen it in the area of the death penalty. For example, governors in two states, Illinois and Maryland, have declared a moratorium

on the use of the death penalty. Much more media and legislative attention has been given to the issue. There is much greater skepticism about the wisdom of mandatory sentencing and much greater receptivity to alternative ways of sentencing people, particularly drug offenders. We have seen an expansion of drug courts to divert people into treatment. In California and other states, voters have approved ballot proposals aimed at diverting drug offenders into treatment rather than prison. There are some very encouraging signs, or at least a moderation of what some of those trends have been like for three decades.

### THE IMPACT OF INTERNATIONAL AND DOMESTIC TERRORISM

How have September 11 (and other incidents, such as the sniper experience in Washington, D.C.) affected these modest openings for reform? In broad terms, there have been three possible effects. In some areas, the effects of September 11 were not as bad as we had feared they might be, in others progress has halted, and in still others unanticipated opportunities have emerged.

First, there are areas of impacts that are not as bad as they might have been. If we look at what goes on in the courtrooms—in day-to-day sentencing and processing of people charged with crimes—some of us had feared, in the first months after September 11, that further assaults would be made on the Constitution in the name of fighting terrorism. We had been concerned that new and harmful policies and practices would filter down to so-called ordinary defendants in the courtrooms, not just those suspected of terrorism.

By and large, that fear has not been borne out. If you are an average burglary defendant in the courtroom, you may or may not get an adequate defense. You may or may not get a reasonable sentence. But we haven't seen the sort of stripping away of basic constitutional rights in the way that we have in the so-called war against terrorism. Some defense attorneys will say that this may be true for most burglars, but if your client happens to be a burglar of Middle Eastern descent, he may want to look for a quick plea bargain rather than taking the case to a jury.

There are exceptions: The seventeen-year-old sniper suspect Lee Boyd Malvo was snatched away from federal authorities and taken to Virginia, where he temporarily was not allowed an attorney to represent him. This enabled the police to question him for seven hours without an attorney. When Malvo's guardian showed up at the jail to counsel him, he was told, "Please leave your business card and we'll get back to you." So all of these protections are very fragile and can be attacked or thrown out pretty quickly in certain circumstances.

The second area is framed by issues where we have collectively made progress for some time but where the momentum has slowed down dramatically. The most

obvious example is racial profiling. Over recent years, we have documentation, originally on the New Jersey Turnpike and then elsewhere, of police activity consciously designed to profile African-Americans and other groups. These practices have been struck down in many cases by courts or legislative actions. In some of the more thoughtful police departments, there have been internal changes designed to control racial profiling.

Now, after September 11, racial profiling is often justified in the name of fighting terrorism. But the sniper case shows all the harmful results of racial profiling—not just necessarily what it does to the individuals who are unjustly stopped or accused but to public safety in general. In the sniper case, all of us were looking out for a middle-aged white guy. We don't know how much this distorted direction that was given to us by the so-called profile experts on television led people to dismiss other information, other evidence that might have helped the police do something more quickly. Right now we certainly don't see a lot of activity on Capitol Hill or in many state legislatures—even though there had been quite a bit of momentum until recently.

Another area where momentum has slowed is progress on challenging the death penalty. There had been a very significant opening or questioning of death penalty attitudes for nearly the first time in a generation. We had seen public support declining a fairly good extent in opinion polls and the moratorium movement gaining some momentum. There was a slowing down of the machinery of death in many places around the country. Now, in many cases, certainly since September 11 and as illustrated in the Washington sniper case, there has been a rush to kill. There was the spectacle of Lee Boyd Malvo with prosecutors jockeying about where he was going to be tried, with the main rationale for each state being efficiency in how quickly a death penalty could be produced. Maryland does not execute juveniles and, therefore, that was given as a primary reason why the case should be turned over to Virginia, to see if they could execute Malvo as quickly as possible. Disturbingly, there was no discussion of why Maryland, and indeed a majority of the states, do not have a death penalty for juveniles. The reason is that most of the civilized world believes that this is an uncivilized thing to do. The United States is in the company of about a half-dozen nations in allowing execution of juveniles. Those nations include Syria, Iran, and Nigeria. They hardly are models of respect for human rights. Yet the assumption in the Malvo case was that the goal should be to execute and that we should welcome the most efficient way to do this—before we know anything whatsoever about who this seventeen-year-old is, not to mention questions of guilt and innocence.

The third area is that of unexpected opportunities. One example of this is the prison system. September 11 contributed to exacerbating the fiscal crisis in many states, and many states are dealing with very difficult issues as they try to balance their budgets and assess their priorities. Some governors' offices and state legislatures are

beginning a real reconsideration of the wisdom of continuing to expand prison building forever. Prisons are very expensive budget items in the states. But the last thirty years of unprecedented prison expansion has taken place in both good economic times and bad. The bad economic times have never slowed construction. This is really the first time in a generation that we are seeing a debate about the wisdom of building more prisons.

This debate has come about for a couple of reasons. First, there is the fiscal crisis. It is a very real dollars-and-cents issue. Second, we saw declining crime rates for much of the past decade, and along with that came a little less emotion and politicizing of the issue (though this may change, because crime has risen in recent years). We haven't seen quite as many candidates running on a "get tough" platform as we might have seen ten or fifteen years ago. There has been a little less political hay to be made of these issues. Third, there is a greater understanding and acceptance of alternative measures for dealing with crime, starting with community policing and going through drug treatment for convicted offenders, with many things in between.

Many of the kinds of options, other than prison, that we have been talking about are beginning to take hold in many communities. So this gives policymakers something constructive that they can point to, rather than continued prison expansion. It is also true that, for every state that is reconsidering prison expansion, there is another state that is cutting funds for drug treatment, drug courts, alternative sentencing, and similar programs. We haven't won that battle, but at least there is a battle to be fought and there is potential for progress.

## REACTIVE RESPONSES AND OVERKILL

A comparison of September 11 to the sniper case tells us something about how we address social problems. In both cases, the response was incredibly reactive; it was overkill. It refused to deal with what, in a former time, we used to think of as root causes, a concept that is now out of fashion. Following September 11, the response was more bombs and more wars and whatever it took to make all of that happen. There is certainly no discussion about national priorities. There was certainly no discussion about national energy policy and the demand for oil and whether that might or might not have some connection. Just a zeal to engage in war and retaliation as our primary and sole response.

When it came to the sniper case, there were very similar kinds of thinking. We had a race to execute as the sole goal of what needed to happen in the case. The snipers needed to be punished; there needed to be consequences. But nothing we do is going to bring back the lives of the ten people who were killed. This rush to execute was about prosecutors jockeying for political attention.

Much of what is not being discussed is the problem of guns. There are lunatics in all sorts of civilized countries, but when lunatics don't have access to high-powered weapons, they don't end up killing lots of people. This remains the only industrialized country with enormous numbers of guns in the population.

Every time we have one of these events—whether it's Columbine or snipers—we have a discussion about gun control for about twenty minutes, which then fades as we quickly move into the punishment phase. There is no forward thinking, nothing about trying to prevent the next incidents. As long as there are this many guns around, we know we can almost predict that there will be more incidents. We don't know exactly what they will look like, but they happen with great regularity.

### WHAT STRATEGY DO WE PURSUE?

So, where do we take all of this? What does it mean in terms of our strategy? These are difficult times; there are no easy answers. In two broad areas we need to be thinking about our message and our messengers.

In terms of our message, what do we want to try to communicate? We need to broaden our message and broaden the critique of the policies. My recent book, *Invisible Punishment*, is an edited collection of essays in which various scholars consider the collateral consequences of imprisonment: how a prison and jail system of two million affects not only people locked up, but their families and communities—in particular, the low-income communities that are most affected by these policies. Increasingly, we are seeing enormous ripple effects of our imprisonment policies.

We have had an enormous increase in the number of women incarcerated in the last two decades—at a far greater rate of increase than for men. As a result, on any given day about a quarter million children have a mother behind bars. If we look at the race of children who have a parent in prison, one of every fourteen African-American children today has a parent who is locked up. We can only begin to project some of the resulting impacts over the next generation. In some communities, enormous numbers of people are cycling in and out of the prison system, back in the community. The recycling affects the whole fabric and stability of those communities—in terms, for example, of marriage and family formation, community leadership, and the role models we see in these neighborhoods.

These ripple effects are very significant. Some of them we can quantify. We can measure how many people are going through these systems. In other ways, we can only speculate about the impact because we have never had a situation like this before, where the prison-state has become such an integral part of our public policy and affected this many people. We need to examine these consequences. We need to examine the impact of the drug war and ask whether it is helping or hurting policy on general substance abuse.

We know that some four million Americans were not able to vote in the November 2002 election, as a result of losing their voting rights because of a felony conviction. So we are talking about questions of democracy as well. We need to broaden the prison discussion so that the issue is not just how much time John Smith, convicted of burglary, should spend in prison. We need a broader discussion about how John Smith became a burglar. What are our sentencing options? And how do we prevent the next John Smith from ending up in the courtroom next week?

We also need to question policymakers who argue that the public is demanding present policy. The public is concerned, legitimately, about crime. The public wants to do something about crime. But I am not convinced that the public *only* wants to build prisons as a means of dealing with that problem. There is a great deal of public opinion data and other experiences that show us the public is much more receptive to broader analysis and critique.

When we turn from the message to the messengers, we need to think beyond the sort of traditional reformers—in two ways. One is toward people working in the system every day—the police, the prison wardens, the prosecutors, the judges—many of whom, if only privately, are very concerned about the direction policy is going. Many prison wardens will tell you that half the people in prison wouldn't need to be there if we had some other options available for them. And many police chiefs recognize that just arresting people from now until forever is not the solution to our crime problem.

We need different approaches and we need to open opportunities for those voices to get out there. It is a very different kind of message when it is coming from a police chief than when it is from the director of the American Civil Liberties Union.

We also need to mobilize the people most affected by present policies—people living in low-income minority communities. I speak of offenders, former offenders, and their families. They have very little political power and influence in this society. Their numbers are increasing very substantially, and they have voices, roles, and messages that need to be communicated. We need to figure out who those messengers are and what their messages should be. For example, when it comes to mandatory sentencing, there are horror stories but also heartwarming stories. There are people who have been sent away for many years as a result of harsh drug policies, but families and communities have been organizing to try to get them out to call their cases to public attention. A modest number of cases have had some success.

#### MORE CONSTRUCTIVE WAYS OF PROMOTING PUBLIC SAFETY

To conclude, the issues are challenging. The case for more incarceration is much thinner all the time, and there is a growing body of research and growing public receptiv-

ity to doing things in different ways. What we need to do now is coordinate the various issues. How do economic changes, social structures, family formation, and crime all fit together? With an understanding of the interrelatedness of the issue, we can collectively begin to develop solutions and policies that look to much more constructive ways of promoting public safety and building strong families and communities.

#### BIBLIOGRAPHY

- P. M. Harrison and J. C. Karberg. *Prison and Jail Inmates at Midyear 2002*, Bureau of Justice Statistics, Washington, D.C., 2003.
- Marc Mauer, "Comparative International Rates of Incarceration: An Examination of Causes and Trends," presented to the U.S. Commission on Civil Rights, The Sentencing Project, Washington, D.C., June 20, 2003.
- , *Race to Incarcerate* (New York: New Press, 1999).
- , with Meda Chesney-Lind, *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (New York: New Press, 2002).
- Josh White and Susan Schmidt, "Ashcroft May Hear Sniper Evidence Today; Decision on Venue for First Prosecution Nears; Alabama May Have Edge," *Washington Post*, November 5, 2002.

