

ADDRESSING CRIMINAL JUSTICE CHALLENGES DURING A TRUMP ADMINISTRATION

Ralph Richard Banks[†]

My father was fond of aphorisms, some of which seem especially pertinent now, in the aftermath of the presidential election. One of his favorites: If you are not part of the solution, you are part of the problem. And his soothing observation in the face of great disappointment: circumstances are smarter than the man. These words I hear still in the resonant all-will-be-well voice of my dad, a man now dead more than a quarter century.

In this new political landscape, finding my father's sense of equanimity has not been easy. Trump's victory rattled my sense of our nation. Whatever the calculations that led so many voters to cast a reality television star as our nation's leader, the campaign season and its culmination left me feeling that, in an evening, our national identity had shifted—that our nation had, at worst, embraced racism and, at best, acquiesced to it. I worried about not only Trump's policies, but also his use of the bully pulpit to shape policy debate, to move people to accept or endorse government positions that I think we should resist. How, under Trump, can the ideal of justice be pursued?

Consider three criminal justice challenges. First, we have far too many people in jails and prisons. We have 5% of the earth's population, yet 25% of its prisoners.¹ The costs of this misguided policy, in both dollars spent and human potential lost, are monumental, burdening not simply those who are incarcerated but also their families and communities.² A second problem, epitomized by police shootings of unarmed African Americans, is police mistreatment of civilians, too often with impunity.³ Third, we are a nation awash in guns and the

[†] Jackson Eli Reynolds Professor of Law at Stanford Law School. Thanks to Jennifer Eberhardt, James Forman, Deborah Rhode, Shirin Sinnar, David Sklansky, and Ginny Smith for helpful comments, reactions, and editorial suggestions.

1. NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATE: EXPLORING CAUSES AND CONSEQUENCES 2 (Jeremy Travis et al. eds., 2014).

2. *See, e.g.*, TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE (2007); MARY PATILLO ET AL., IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION (Mary Patillo et al. eds., 2004).

3. Even the most egregious instances of misconduct—for example, the South Carolina

violence they enable.⁴ Although crime rates have declined nationally in recent decades, my sense is that gun violence and fear continues to rend the social fabric in many of our most disadvantaged communities, with the South and West sides of Chicago being the most conspicuous examples.⁵ Because these three problems are intertwined and mutually reinforcing, addressing one will often diminish the others as well.⁶

Young lawyers can bring their litigation skills to bear on these problems. Civil rights laws do not enforce themselves; they require the energy and vision of lawyers who are willing to fight to hold the police accountable. In addition to securing damages for plaintiffs, civil rights litigation can also spur police departments toward approaches that reduce violent crime rather than simply respond to it. Although the guns rights lobby has produced, over the past few decades, constitutional hostility to gun control legislation, we should not abandon the effort to get guns off the streets.

Criminal defense attracts many progressive law students, and for good reason. Confronting and resisting state power on behalf of an individual is noble work, a necessary check on a system that remains too riddled with error and caprice. In a nation that incarcerates far too many people, progressive students might feel allergic to the prosecutor's office. Some progressive legal scholars even question whether people committed to racial justice should become prosecutors.⁷ But what's the alternative? To leave prosecutors' offices staffed only with lawyers who are eager to put as many people as possible in prison, with no concern for the consequences of their decisions for disadvantaged communities? We need prosecutors who are sensitive to both the ravages of crime and the unintended effects of overly punitive policies, and who understand that mercy is an essential element of justice.

As with civil rights lawyers, prosecutors and defense lawyers should see their roles in terms of how they shape the system and social landscape more broadly. They need to think creatively about how to support policies—for example, restorative justice programs or other alternatives to incarceration—that

police officer who shot Walter Scott in the back as he ran away to avoid being taken to jail for unpaid child support—would have passed without notice were it not for the cell phone video of a passerby on his way to work that Spring morning.

4. *Guns in the US: The statistics behind the violence*, BBC News (Jan. 5, 2016), <http://www.bbc.com/news/world-us-canada-34996604> (recounting the sobering facts of gun ownership and violence in the United States. There are thought to be more than 300 million guns in the country. In 2015, 13286 people were killed by guns, with another 26,819 injured.).

5. While discussions of mass incarceration often accord primacy to the war on drugs, we should be clear that our nation's prisons are mostly populated by people who have committed violent crimes. JAMES FORMAN, *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 228-29 (forthcoming 2017).

6. For example, mass incarceration may undermine the community stability that lessens the likelihood of gun violence, and gun violence may promote fear and a coarsening of attitudes and thereby increase the likelihood of police mistreatment of community members.

7. PAUL BUTLER, *LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE* 101-23 (2009).

bolster the social fabric and reduce violence.

Whether civil rights lawyer, defense lawyer or prosecutor, it's important to remember that where you are most needed is not necessarily where you might be the most comfortable. You may be able to add the most value precisely in the place where people like you are unlikely to go, environments where you may not, initially at least, be comfortable. You can do good work even when—perhaps especially when—the setting is one in which you will feel challenged.

For these reasons, students who have wanted to work in the United States Department of Justice should not necessarily abandon that aspiration due to the results of the presidential election. You may be able to do good work in a Trump Administration even if you are not a Trump supporter! While some positions might require one to maintain strict adherence to the President's policy, other positions may offer young lawyers the discretion to execute or create policy in ways that senior officials could not possibly hope to micromanage. While the federal government under Trump might seem inhospitable, do not let that perception, or even reality, dissuade you. In assessing the possibilities, be realistic about what you can accomplish, but don't be hopeless.

There are myriad other ways to shape criminal justice policy. Many localities, for example, have created civilian police review boards or police commissions that are sometimes empowered to review and reform law enforcement policies and practices. Even in jurisdictions that haven't taken those steps, city councils oversee municipal police departments. A mayor or city council will invariably have the power to hire and fire the city police chief. These democratic institutions, in which lawyers are especially well suited to participate, can thus be an impetus for reform.⁸ Winning elective office at the local level (or helping someone else to do so) or being appointed to a police commission is a realistic hope for even a recent law school graduate. These institutions are well placed to address each of our three criminal justice challenges. Departments built around a traditional model of policing will need to be nudged to enact the community building and violence reduction initiatives that should be a part of the agenda of any urban police force.

Those who shy away from such public roles might instead shape policy through research and advocacy organizations by becoming staff, board members, donors, or volunteers. These organizations can shape policy through creating resources for policymakers and through influencing public understanding of

8. Take the example of Ferguson, Missouri, a city at the center of the discussion on the excessive use of police force. Through democratic institutions like mayoral and city council elections, the people of Ferguson have the ability to replace the City Manager and Police Chief and thus the power to alter the composition of the police department. Walter Star, *The People of Ferguson Have the Power to FIRE the ENTIRE Police Force*, DAILY KOS (Aug. 19, 2014), <http://www.dailykos.com/story/2014/8/19/1323089/-The-People-of-Ferguson-Have-the-Power-To-FIRE-the-Entire-Police-Force>. But Black turnout for local elections is only 6%, half of overall turnout. *Id.* A lawyer can help increase accountability in situations like this both by running for office and by engaging in efforts to reincorporate disenfranchised voters.

issues, thus making it possible for citizens to hold their elected officials accountable.

As essential as it is to reform the criminal justice system itself, we also must remember that the criminal justice system reflects enduring injustices and broader socioeconomic developments within American society. Mass incarceration, violent crime, and persistent police abuses are all fostered by racial and economic inequality, enduring problems that, far from abating, have in some ways become worse in recent decades. Segregation is the linchpin of these mutually reinforcing structures of injustice. The physical segregation of people represents a segregation of resources, one that compounds inequality and makes African Americans disproportionately disadvantaged.

During the last few decades, as the number of those incarcerated has grown, so too has our society become more unequal. Deindustrialization and globalization have undermined the employment prospects of those without advanced education. While the elite have thrived, less educated workers have struggled to find a place in the new economy.⁹ Some jobs have been mechanized, while others have moved overseas, where labor costs are lower.¹⁰ These shifts in our economy are inevitable; the problem is that our educational system has failed to prepare people for the good jobs, leaving too many Americans only equipped for low paying service sector jobs. Those who are already disadvantaged are least likely to get the necessary education to find a place in the new economy.¹¹ They are thus both the most likely to turn to crime and the most vulnerable to the policing and prosecutorial excesses that have bolstered our incarceration rate. The criminal justice system is where we channel those who have no other place in American society.

One way to lessen the effects of the criminal justice system is to bolster the educational and training programs that can create alternatives to crime and incarceration. Education expands horizons, broadening one's sense of life's possibilities, and enhancing one's ability to interact well with others.¹² More concretely, education also makes people more employable, which makes profit-oriented criminal activity less enticing.¹³ Lawyers might be involved with educational programs at many points in a student's life. Improving primary and

9. Catherine Rampell, *College Graduates Fare Well in Job Market, Even Through Recession*, N.Y. Times (May 3, 2013), <http://www.nytimes.com/2013/05/04/business/college-graduates-fare-well-in-jobs-market-even-through-recession.html>; David Autor, *The Polarization of Job Opportunities in the U.S. Labor Market: Implications for Employment and Earnings*, 23 COMMUNITY INVESTMENTS 11 (2011).

10. Autor, *supra* note 9.

11. The changing labor market coupled with a failing educational system has for decades burdened African Americans. But now it is hitting whites hard as well. The 2016 presidential election is but one expression of the widespread and justified anxiety of less educated workers who increasingly are worried about their place in a changing economic landscape.

12. Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence From Prison Inmates, Arrests, and Self-Reports*, 94 AM. ECON. REV. 155, 156 (2004).

13. *Id.* at 155.

secondary education or addressing the learning disabilities and socio-emotional challenges that stunt academic achievement, for example, all lessen the likelihood of turning to violence and becoming enmeshed in the criminal justice system.

In addition to enabling people to avoid jail, education can help those who have been convicted not to return after having been incarcerated. Most prisoners will be released, and it is in all of our interests that they be able to reintegrate productively into society. Education within the prison can help to make that possible.¹⁴ Lawyers are well situated to provide education for inmates, as many will be interested in the legal system. And, of course, reentry programs may provide essential job training or social support or attempt to change policies, such as occupational licensing requirements, that impede reintegration. Lawyers could serve existing organizations through board membership, financial support, or pro bono legal assistance, or they may want to start new organizations where effective non-profits do not already exist.

The sorts of criminal justice efforts that I have discussed will provide experiences that can pay more diffuse dividends in moving our nation forward. Some people know little of what our criminal justice system has wrought or of the violence that still blights many neighborhoods. Others are disinclined to care about these problems because they don't imagine its victims as people like them. And, of course, not knowing and not caring may each reinforce the other.

In response, take what you learn—whether as a city council member, teacher of inmates, or civil rights lawyer—and share it with others. Use your own experience and what it has taught you, to address either the deficit of awareness or that of empathy. Educate the public, tell the stories that make clear what a colossal waste of talent and potential we have allowed. Through your stories, push back against the vitriol of Trump, by offering a better and truer image of our nation and its ideals. Simultaneously acknowledge our problems and affirm our capacity to address them.

Our narratives about crime and punishment need to highlight both the particularity and the universality of the black experience. African Americans are most associated with the problems of the criminal justice challenges system, yet those problems burden people of all races, and indeed undermine the well-being and stability of our nation as a whole.

These are but some of the many ways a young lawyer can be part of the solution. As for the current circumstances being “smarter than the man,” my father would note that our criminal justice problems predate Trump, and would continue to bedevil us even under a Clinton Administration. For better or worse, with criminal prohibitions, sentencing, incarceration and policing all being a

14. Michelle Chen, *Prison Education Reduces Recidivism by Over 40 Percent. Why Aren't We Funding More of It?*, THE NATION (Aug. 17, 2015), <https://www.thenation.com/article/prison-education-reduces-recidivism-by-over-40-percent-why-arent-we-funding-more-of-it/>.

matter of state and local law,¹⁵ the President has less power to shape the criminal justice landscape than most people imagine. And certainly less influence than the President, for better or worse, enjoys in other policy areas.

I remain worried about life under a Trump administration. Being my father's son, I also remain optimistic, at least with respect to our criminal justice challenges: Trump may not appreciably exacerbate our criminal justice problems, yet his election may strengthen all of our resolve to address them. My hope is that Trump's ascendance will galvanize progressive reform efforts that endure far beyond his presidency and outlast whatever the damage of a Trump administration.

15. NAT'L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 38 (Jeremy Travis et al. eds. 2014).