David Cook

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The Racialized Construction of Crime and Labeling of Criminals

In 1886, the US Supreme Court ruled that a law that was race-neutral on its face but was enacted or enforced in a prejudicial manner violated the equal protection clause of the 14th Amendment to the US Constitution. At issue was a California Statute that said that laundry services in San Francisco could not operate out of wooden buildings without a permit. The pretended purpose was public safety. So, why only San Francisco? And how coincidental was it that 95 percent of all laundries in San Francisco were run out of wooden buildings, that no permit was ever issued to a Chinese applicant, and that 80 percent of white applicants were granted a permit (Yick Wo v. Hopkins 1886)? While our "race-neutral" laws now are not so overtly written to discriminate against group or another, many or our criminal statutes are indeed still written and enforced in such a way as to produce this effect. But in 1987, 101 years later, the same court backpedaled and ruled that defendants must establish that their own cases, analyzed in a vacuum, were indeed administered in a racially biased manner in order to obtain relief (McCleskey v. Kemp, 1987). New York University legal scholar Anthony Adams called it the *Dred Scott* decision of our time. Justice Lewis F. Powell, who wrote the majority opinion, told a reporter after he retired that if he could change his vote in just one case, that it would be

McCleskey v. Kemp.

What effect has rulings like this had? Why would Powell have changed his mind?

One cannot escape the appalling numbers. More that two million Americans are in prisons and jails around the country. More than twice as many more are on parole or probation. Nearly two thirds of them are black. America's noble ideals of freedom, equality under the law, and the American Dream are utterly incompatible with the truth. America has the highest incarceration rate in the world, but still has the highest rate of violent crime in the industrialized world. The overwhelming majority are poor black men. More black men go to prison than college.

New Orleans has the embarrassing distinction of the highest murder rate in the United States and the highest incarceration rate in the world. But, while one would think, or at least hope, that jailing violent criminals would be the priority, nearly two-thirds of New Orleans jailed residents are being held for the pettiest of crimes, like public drunkenness (Big Jails... 2). Nineteen out of 20 criminal defendants in the Orleans Parish criminal-justice system are indigent. One might just jump to the conclusion that poor people commit essentially all the crime and that they deserve to be there. However, social forces act to direct criminal justice resources at the poor, but in such a way that makes the problem persistent. A never-ending run of research shows that the poor are in a number of ways at a huge disadvantage when confronted with the adversarial nature of the criminal justice system compared to the rich. As we cannot intelligently discuss poverty without discussing race, minorities, especially blacks, take it disproportionately in the teeth. The best way to analyze the situation is to show how the macro-social force of entrenched racism has lead to a the construction of criminal statues that treat crimes

committed predominantly by blacks more stringently than crimes committed mostly by whites; and how the day-to-day enforcement of these statutes further corners poor black men into a system that allow people of means the ability to more effectively tackle and even avoid system; and because of the way society decides what is or is not a criminal act and the corresponding punishment, once convicted, sends more poor black to prison and for longer sentences.

The trend of taking sentencing decisions out of the courtroom has led to non-serious offenders spending a disproportionate length of time behind bars, while some who commit very serious crimes get out much sooner than they should if we assume that the more serious the crime the harsher the punishment. To be sure that we understand what we mean by "more serious," we need to decide what factors make a crime more or less serious. The three criteria that can most consistently measure the "seriousness" of a crime are the magnitude of loss to the victim; whether it is a crime against the person of the victim or a crime against the property of the victim, whether there even is a victim; and whether the harm to the victim is actual or merely perceived.

We likely agree in principle that the gravity of harm should govern the severity of the penalty. But instead, the severity of punishment is highly racialized. Research has found that in murder cases the race of the victim and the offender as well as the proportion of a given state's black population have more influence over sentencing than the prevalence of violent crime. A 1992 analysis of studies found that those who murdered a white victim were more likely to be sentenced to death than those who murdered blacks. (Mauer 79)

Mandatory minimums

Even if this racial disparity didn't exist at the sentencing stage, sentencing policies are engineered to favor the wealthy and back the poor into a corner. It is not that there is a sentence for the poor and the sentence for the rich exactly, but the crimes most widely attributed to the poor tend to have the stiffest sentences. Crimes that are more widely attributed to the upper classes have weaker sentences. This effect is so strong that the sentence for a crime will change based on whom the public perceives to be the most likely perpetrator of the crime (Mauer 83).

Three-strikes laws

The political popularity of "three-strikes" laws isn't necessarily logical. The "three-strikes" phrase is clearly a cultural reference to baseball, and the notion that we write laws to fit nicely with clichés and slogans is scary. If we were going to do something because it is effective, why not two strikes, or four, or five considered? Now that we have indeed adopted three-strikes legislation in many jurisdictions, what did we get for it? In California, a state whose courts are curiously characterized as "making racially equitable sentencing decisions", (Mauer 80) 44 percent of three-strike defendants are black, even though 31 percent of nation's prison population and 7 percent of the US population is black (Mauer 89).

School-zone drug laws

Another example of how racial dynamics play out in drug policy is the proliferation of school-zone drug laws. Supposedly created to protect children by enhancing penalties for drug violations committed near schools, these laws usually

punish people for activities that have nothing to do with children and are in no way a threat to children. A drug sale made between two consenting adults at 3:00 AM near a school will be treated as if they had sold meth to a second grader. How race comes into this is a matter of geography. Because more urbanized areas fall inside school zones and urbanized areas have higher black populations, blacks are more likely to be affected by a school-zone drug law when they are arrested than their white counterparts in the suburbs where there is greater physical distance between schools. An analysis of arrests for school zone transactions in Chicago found that 99% of cases involved African American and Latino defendants (Mauer 84).

In the time that I've been volunteering at the Orleans Public Defenders, I've only encountered one defendant who was charged with a drug crime involving the school's own drug law. In this case, a married black couple were pulled over by police at 11:45 PM. The wife, who was driving, refused to stop, and when she did stop, they were both arrested. Police searched the car, and allegedly found Xanax, oxycontin and marijuana. Considering the time of day and the ambiguity of whether the pursuit began or ended within 1000 feet of a school, the judge found no probable cause for the school-zone drug law violation. Even though in this case the probable cause hearing served its purpose in thwarting the overly aggressive application of the law by police, the fact that the police included the school-zone drug law in the charges raises concerns that the law is enforced outside the scope of its ostensible intention.

Prosecutorial Decisions

Decisions whether to prosecute or not, and what charges to file seem to be heavily

influenced by the socioeconomic status of the defendant. There is a widely perceived and real tendency for prosecutors to go easy on defendants who commit crimes of the upper classes, while at the same time throwing the book every day at seemingly lesser crimes committed by those with less wealth and influence. The savings and loan crisis of the 1980s led to more than half a trillion dollars in losses to taxpayers to cover the claims against the long since bankrupt Federal Savings and Loan Insurance Corporation. For some depositors their losses exceeded the insurance coverage; these losses were beyond the 500 billion. While some of the losses can be attributed to regulatory changes that put savings and loan associations at a competitive disadvantage with other financial institutions, it is estimated that that one third to one half can be attributed to criminal conduct by S and L executives. The scary part of the narrative is that a shoplifter is more likely to be prosecuted for stealing a purse than an S and L executive who plunders the institution into bankruptcy. (Reiman 141) This phenomenon does not just apply to prosecution decisions regarding high-class crimes vs. low class crimes. When people are arrested for equally serious offenses, and when taking into account prior criminal records, poor people are more likely to be prosecuted than their wealthier counterparts (119).

Pretrial Release

Once arrested and charged, access to pretrial release favors the wealthy over the poor. When bail is set, the severity of the crime and a defendant's prior record is supposed to be taken into account. The poor are more likely to be arrested, charged, convicted and sentenced artificially inflates a poor defendant's rap sheet. Further, crimes that are committed by the poor are treated as more serious than crimes committed by the wealthy.

It would logically follow that the consideration for and amount of bail would favor the wealthy because the bail amounts set for the wealthy would likely be lower than the bail amounts set for the poor. And of course the obvious factor of wealth affects being able to pay bail period.

Legal counsel

When Clarence Earl Gideon was charged with burglary, he was too poor to afford an attorney. He asked the judge to appoint an attorney for him, and the judge refused. He filed a handwritten appeal to the U.S. Supreme Court asking that his case be heard. In 1963, the court ruled that the state was obligated to provide an attorney to indigent defendants if the state intended to take the way person's liberty (Gideon vs. Wainwright 1963). In 1972, the U.S. Supreme Court ruled that defense counsel must be appointed in any case in which a defendant faced even possible incarceration (Argersinger vs. Hamlin, 1973). Louisiana has miserably failed in keeping this promise by burying attorneys in unmanageable caseloads. In 1993, the Louisiana Supreme Court ruled that attorneys who had 70 or more pending cases were by default ineffective (State vs. Peart 1993). Still, Orleans Parish Public Defenders attorneys represent between 170 and 250 clients at a time—94% of all criminal defendants in Orleans Parish courts.

This situation puts immense pressure on OPD to encourage plea bargains when they may not be appropriate. While the public's perception of plea bargaining is that the defendant gets a better deal than he deserves, innocent defendants end up accepting a conviction because they can get out of jail quicker than if they fought the charges. This starts the ball rolling for future arrests that may be triggered by a traffic stop and the

stigma of having a prior.

Beyond this, public defenders tend to have less experienced attorneys because they aren't paid as well and have case loads that more experienced attorneys won't tolerate. Prosecutors can pick and choose their cases, while the defenders are stuck having the cases pick them. Overworked public defenders have less time to do legal research, investigate cases and generally prepare cases.

Arrest

Socioeconomic status and race also play a part in whether a person is arrested in the first place. Contrary to the public's perception that the poor and especially the black poor commit most of the crime, this mostly comes from lopsided media coverage of the police's side of the story. For a newsroom, crime reporting is cheap, and to editors, the show-don't-tell elements of violence and race are highly sensational. When I was the opinion editor of The (Sacramento) Express, I was once assigned to shadow Ryan Lillis, a crime reporter at The Sacramento Bee. I suddenly got a real education about what kinds of stories readers followed. Lillis showed me a spreadsheet that tracked the readership on sacbee.com. The crime stories get overwhelmingly the most hits. That morning's story alone had more than 10,000 hits while the entire opinion section got only 910. The media, intentionally or not, over attribute crime to poor black men. But self-reporting surveys conclude crime is even wider spread among the middle and upper classes. A study of 180 white male youths in which 55% of the group was middle class they admitted to 67% of breaking and entering, 70% of the vandalism, and nearly 90% of the armed robberies and the entire sample. But poor blacks are for more likely to be

arrested because the police will often seek an alternative to arrest for the middle and upper classes but not for the poor (Reiman 118).

Deployment of Resources

One's likelihood of being arrested is also connected to the magnitude of police presence. There is a tendency for the police to heavily patrol poor neighborhoods based on their perception that that's where all the crime is. Of course, with their overwhelming presence and poor neighborhoods, or any given place for that matter, there would likely be more arrests there. This reinforces the sense that crime is concentrated in poor neighborhoods. As an example of how this doesn't necessarily line up with reality, I once wrote a story about college students crowding up the streets in and around a large park across the street from where in new parking garage was being built. College administrators were encouraging students to park at light-rail station parking lots because the park had the highest rate of violent crime in the city. This fact shocked people. William Land Park is surrounded by multimillion-dollar mansions, has an 18-hole golf course and a large zoo (Cook 8). You never see much in the way of police there; however, four miles south of William Land Park in a poor black neighborhood called Meadowview, the police are as conspicuous as a blond hair on an Indian.

Social construction of drug scares

The concept of deviancy socially constructed. Deviancy is not about the deviant act, but about the audience and its perception of the deviant. Suppose you were to ask someone the question: "Is it deviant to drink alcohol?" A few factors need to be taken

into consideration. If you are in a nightclub, then not drinking alcohol is deviant. If you are in California, and you are behind the wheel, then it is very deviant, so much so that DUI is the most commonly prosecuted crime in California. However, I have only encountered one defendant in New Orleans who has been charged with DUI. One might joke that in New Orleans if you are drinking behind the wheel, the cop would only want to know what flavor your daiquiri is. In most places in California, drinking in public is deviant. In New Orleans, making a fuss of drinking in public is deviant.

Historically the public's perception of the drug user of any given drug has driven the design of drug legislation. American drug policy has been more about controlling minorities than about solving any actual problem. And the first half of the 20th century marijuana was seen as the drug of choice for Mexicans and blacks. The marijuana tax act of 1937 set the penalty for first time marijuana possession at 2 to 5 years in prison. But by the 1960s marijuana was now seen as the drug of choice for white college students, and that penalties were reduced for possession of small amounts.

This racial effect can be seen most distinctly in the contrast of powder cocaine vs. crack cocaine drug laws. Crack cocaine emerged in the 1980s in poor urban neighborhoods. Even though crack cocaine is merely powder cocaine that's been cut with baking soda and formed into rocks, there is a huge disparity in the penalties for the possession and sale of the two forms of the same drug. Five grams of crack has a mandatory minimum of five years in prison, but it takes possession of 500 grams of powder cocaine to get this penalty. Eighty-five percent of crack cocaine arrests and prosecutions have involved black defendants (Mauer 83).

A persistent tradition of racism and discrimination in the United States has

produced ever widening systemic political and economic inequality that disfavors blacks. This trend has been most evident in the administration of justice. Mandatory minimum sentences, school-zone drug laws, racially biased prosecutorial decisions, money and power connected access to pretrial release, overwhelmed indigent legal services, heavy handed police practices, racially targeted deployment of law enforcement resources, and the social construction of crime have focused the punitive nature of our legal system against already disadvantaged racial minorities.

Works Cited

Argersinger vs. Hamlin, 407 US 25, (1972)

Big Jails and Big Costs: The individual and collective costs of over-incarceration in New Orleans. New Orleans: Safe Streets-Strong Communities. Nov. 2006

Cook, David E. "Parking Structure Completion Date Approaches." *The Express* [Sacramento, CA] 16 Nov. 2006: 8. Print.

Gideon vs. Wainwright, 372 US 335 (1963)

Individual and Collective Costs of Over-Incarceration in New Orleans, The. New Orleans: Safe Streets – Strong Communities, 2006. Print.

Liptak, Adam. "New Look at Death Sentences and Race." *New York Times*. 29 Apr. 2008. Web.

Mauer, Marc. "Race, Class, and the Development of Criminal Justice Policy." Review of Policy Research.

Reiman, Jeffrey H. *The Rich Get Richer and the Poor Get Prison: Ideology, Class, and Criminal Justice*. Boston: Pearson/Allyn & Bacon, 2007. Print.

Reinarman, Craig. "The Social Construction of Drug Scares." *Constructions of Deviance - Social Power, Context, and Interaction - 5th (Fifth) Edition*. Eds. Peter and Patricia Adler. n.p.: Wadsworth, 2006. 155-165. Print.

State vs. Peart, 621 So. 2d 780 (La. 1993)

Who Pays the Price of Orleans Parish's Broken Indigent Defense System? A Summary of Investigative Findings. New Orleans: Safe Streets-Strong Communities. n.d.

Yick Wo v. Hopkins 118 US 356 (1886)