
RUTGERS LAW REVIEW

VOLUME 66

Summer 2014

NUMBER 4

WHEN THE LAW IS GUILTY: CONFRONTING THE MASS INCARCERATION CRISIS IN THE UNITED STATES

INTRODUCTION

*Laura Cohen**

It was not supposed to happen to Eric Campbell. The youngest child of a loving Jamaican-American family, he was doing everything right. Although his Brooklyn neighborhood could be rough, he was a good student and talented musician who earned extra money babysitting for his fourth-grade teacher's young daughter. When Eric was fifteen, however, his mother died suddenly, leaving him and the rest of his family bereft and unanchored. Eric started hanging out in a local park at night, and it was there that everything changed. One evening, he and his best friend were recruited by an older youth to help commit a grocery store robbery. Eric was the lookout and, as he stood nervously on the street, shots rang out inside the store. The store owner had been killed, and the three boys ultimately were convicted of his murder. Eric was sentenced to serve seven years to life in the New York State prison system. After serving fourteen years of that sentence, he was released on parole shortly before his thirtieth birthday.

The harrowing story of those fourteen years was the center point of the *Rutgers Law Review's* extraordinary March 2014 symposium, "*When the Law is Guilty: Confronting the Mass Incarceration Crisis in the United States.*" Holding the audience in thrall, Eric conveyed a fifteen-year-old boy's confusion and utter lack of understanding

* Clinical Professor of Law, Justice Virginia Long Scholar, and Director, Criminal and Youth Justice Clinic, Rutgers School of Law–Newark. I am grateful to the Rutgers Law Review 2013-2014 Editor-in-Chief, Evan Miller, and Symposium Editors, Gwyneth O'Neill and Lisa Perri, for their vision, enthusiasm, and hard work in planning and presenting this symposium.

during his police interrogation and trial. He vividly described his fears upon entering prison, the brutality that reigned within each facility, and the turf battles that defined relationships between guards and inmates and among the inmates themselves. He told of the torture that is solitary confinement, and of the emotional fortitude that helped him survive his only stint in “the hole.” And he spoke passionately of his determination to educate himself, to continue to make music, to maintain his humanity, and to leave prison intellectually and emotionally whole. As he eloquently stated, he had to teach himself to be the man he wanted to be, rather than the man the system was teaching him to become.

Eric Campbell’s experience is a microcosm of the tragedy, and the travesty, of America’s love affair with incarceration. At the end of 2012, 2.2 million people were doing time in adult prisons or jails throughout the United States.¹ In the thirty years from 1979 to 2009, the number of state and federal inmates increased almost 430 percent.² The federal prison population grew most dramatically during that time, an alarming 721 percent since 1980.³ Similarly, children are incarcerated at appalling rates. In 2011, 61,423 minors were being held in the nation’s juvenile pre-trial detention and long-term placement facilities.⁴

Making these statistics even more stunning are the disparities and inequalities they embody. Roughly sixty percent of incarcerated adults are members of racial and ethnic minorities.⁵ Black men are more than five times as likely to serve time as white men; black women are two- and- one-half times as likely to be incarcerated as their white counterparts.⁶ No fewer than one in three black men will be locked up at some point in their lives, compared to roughly one in

1. HUMAN RIGHTS WATCH, NATION BEHIND BARS: A HUMAN RIGHTS SOLUTION 5 (2014) (citation omitted).

2. *Id.* Fortunately, these numbers continue to decline after peaking in the early 2000s. LAUREN E. GLAZE & ERIN J. HERBERMAN, U.S. DEP’T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012 2 (2013), available at <http://www.bjs.gov/content/pub/pdf/cpus12.pdf>.

3. HUMAN RIGHTS WATCH, *supra* note 1, at 5.

4. M. SICKMUND ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, CENSUS OF JUVENILES IN RESIDENTIAL PLACEMENT: 1997 – 2011 (2013), available at <http://www.ojjdp.gov/ojstatbb/ezacjrp/asp/display.asp>. Like adult incarceration rates, juvenile residential placements have plummeted 41% since 1995. ANNIE E. CASEY FOUNDATION, FACT SHEET: YOUTH INCARCERATION IN THE UNITED STATES (2013), available at <http://www.aecf.org/m/resourcedoc/aecf-YouthIncarcerationInfographic-2013.pdf>.

5. THE SENTENCING PROJECT, FACTS ABOUT PRISONS AND PEOPLE IN PRISONS (2014), available at http://sentencingproject.org/doc/publications/inc_Facts%20About%20Prisons.pdf.

6. *Id.*

six Latino men and one in seventeen whites.⁷ Not surprisingly, juvenile incarceration rates are similar to those of adults; black youths are 4.6 times as likely to be incarcerated as white youths, while Native Americans are incarcerated more than three times as frequently, and Latinos, almost twice as often.⁸ These differences are rooted not in higher crime rates in minority communities, but instead, in history, policies, and practices that fail to afford people of color anything approaching equal treatment.

Although crime has declined at a historic pace since the 1990s—in New York City, homicides have dropped eighty percent since their mid-1980’s peak—America continues to be the incarceration capital of the world.⁹ Other industrialized countries share remarkably similar incarceration rates, hovering at around 100 people per 100,000.¹⁰ The United States, in contrast, locks up 738 out of 100,000, almost twice as many as Ukraine, more than three times as many as Libya, more than six times as many as China, and more than *twenty times* as many as India.¹¹ To put it in the starkest possible light, the United States is home to five percent of the world’s total population but twenty-five percent of the planet’s incarcerated people.¹² This is not due to a greater frequency of violent crime; on the contrary, more than half of U.S. prisoners are held on non-violent offenses or probation and parole violations.¹³ Instead, American incarceration is driven by draconian charging and sentencing policies, including disproportionately long sentences (particularly for drug offenses), mandatory incarceration and minimum terms, continued reliance on incarceration rather than probation or other community-based alternatives, and the elimination or reduction of indeterminate sentencing, parole, and “good time” allowances.¹⁴ Of

7. *Id.*

8. *Unbalanced Juvenile Justice*, THE W. HAYWOOD BURNS INST., <http://data.burnsinstitute.org/about> (last visited Nov. 13, 2014).

9. See Ritchie King, *217 Years of Homicide in New York*, QUARTZ (Dec. 31, 2013), qz.com/162289/.

10. CHRISTOPHER HARTNEY, U.S. RATES OF INCARCERATION: A GLOBAL PERSPECTIVE 2 (2006), *available at* http://www.nccdglobal.org/sites/default/files/publication_pdf/factsheet-us-incarceration.pdf.

11. *Id.*

12. *America’s Overcrowded Prisons: One Nation, Behind Bars*, THE ECONOMIST (Aug. 17, 2013), <http://www.economist.com/news/leaders/21583680-eric-holders-ideas-locking-up-fewer-americans-are-welcome-do-not-go-far-enough-one>.

13. THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 2 (2013), *available at* http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf.

14. HUMAN RIGHTS WATCH, *supra* note 1, at 5 (citing Alfred Blumstein and A.J. Beck, *Population Growth in U.S. Prisons, 1980–1996*, in 26 PRISONS 17-61 (1999)).

particular concern are the 159,000 people, or approximately 11% of the nation's prison population, who are serving life sentences, including nearly 50,000—a small city—who will die behind bars with no possibility of parole release.¹⁵ A substantial number of these prisoners were sentenced for crimes they committed while juveniles.¹⁶

The human costs of these policies are staggering. Entire swaths of American society have been taken out of the workforce, the educational system, and the voting pool. In some of the poorest communities of color, incarceration is the rule rather than the exception; as Michelle Alexander writes, “Many offenders are tracked for prison at early ages, labeled as criminals in their teen years, and then shuttled from their decrepit, underfunded inner city schools to brand-new, high-tech prisons.”¹⁷ Families are torn apart; one in ten black men in their thirties are in prison or jail every day, leaving generations of children without physically-present fathers or male role models.¹⁸ Incarcerated people are subjected to daily verbal and physical violence, exacerbating already existing mental health problems and creating new ones. Those who suffer periods of solitary confinement, as many inmates do, emerge with post-traumatic stress disorder and other physical and psychological disorders.

Recidivism rates, too, confound: a recent study of inmates released from prisons in thirty states in 2005 revealed that 67.8% were arrested for a new crime within three years and 76.6% were arrested within five years.¹⁹ And this failure, for it cannot be called anything else, comes at an unconscionably high price. In the past two decades, state corrections expenditures have quadrupled, reaching \$39 billion in 2011.²⁰ The annual per inmate price tag equals that of the most expensive private university in some states.²¹

In short, the mass incarceration of millions of Americans is a

15. *Id.* (citing ASHLEY NELLIS, THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA (2013), available at http://www.sentencingproject.org/detail/news.cfm?news_id=1636&id=167).

16. *Id.*

17. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 150 (The New Press 2010).

18. *Racial Disparity*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=122> (last visited Nov. 13, 2014).

19. MATTHEW R. DUROSE, ET AL., U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010 1 (2014), available at <http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.

20. CHRISTIAN HENDRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 2, 8 (2012), available at http://www.vera.org/sites/default/files/resources/downloads/Price_of_Prisons_updated_version_072512.pdf.

21. *Id.* at 10.

crisis of our own making, with profound social, political, and economic repercussions. *When the Law is Guilty* confronted this crisis head-on, as both a call to arms and a search for solutions. In addition to Eric Campbell, leading scholars, practitioners, and advocates shared their experiences and insights, including Professor Frank Askin of Rutgers School of Law-Newark; U.S. District Court Judge Mark Bennett of the Northern District of Iowa; Dr. Todd Clear, Provost of Rutgers University-Newark and a noted criminal justice scholar; Hon. Michael Corriero, Executive Director of the New York Center for Juvenile Justice and the former presiding judge of the New York State Supreme Court's Manhattan Youth Part; Norris Henderson, Executive Director of Voice of the Ex-Offender (V.O.T.E.), who was wrongfully incarcerated for 27 years; Rick Jones, Executive Director of the Neighborhood Defender Service of Harlem; Professor David Mills of Stanford Law School; Professor Mark Osler of the University of St. Thomas School of Law; Alexander Shalom, Senior Staff Attorney, ACLU of New Jersey; Vincent Warren, Executive Director of the Center for Constitutional Rights; and Professor Ellen C. Yaroshefsky of Cardozo Law School.

The symposium spawned three articles and a student note, published in this issue, which not only are valuable contributions to the scholarly literature on mass incarceration but also offer innovative and pragmatic proposals for reform. In *A Slow Motion Lynching? The War on Drugs, Mass Incarceration, Doing Kimbrough Justice, and a Response to Two Third Circuit Judges*, Judge Bennett, who has sat on the federal bench for over twenty years, takes aim at federal sentencing in cases involving crack cocaine, which as he notes, involve "almost exclusively black men."²² Because crack is less expensive than powder cocaine, it is most popular in poor neighborhoods. As a result, the overwhelming majority (nearly eighty-three percent) of federal defendants charged with crack-related offenses in 2012 were black, and ninety-two percent of these were men.²³

The significance of these numbers lies in the Sentencing Reform Act of 1984 (SRA)²⁴ and the Anti-Drug Abuse Act of 1986 (ADAA),²⁵ which included harsh mandatory minimum sentences for first-time drug offenders. Among these was a devastating 100:1 weight ratio of powder to crack cocaine for sentencing determinations, even though

22. Mark W. Bennett, *A Slow Motion Lynching? The War of Drugs, mass Incarceration, Doing Kimbrough Justice, and a Response to Two Third Circuit Judges*, 66 RUTGERS L. REV. 873, 876 (2014).

23. *Id.* at 882.

24. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984). These provisions were amended by the Fair Sentencing Act of 2010, which reduced the ratio to 18:1.

25. Anti-Drug Abuse Act of 1986, Pub. L. 99-570, 100 Stat. 3207 (1986).

crack has never been found to be more harmful than powder.²⁶ The SRA also created the United States Sentencing Commission, which, in turn, issued the then-mandatory federal Sentencing Guidelines in 1987.²⁷ The Guidelines severely curtailed courts' sentencing discretion and incorporated the 100:1 cocaine-to-crack ratio, rendering judges powerless to depart from sentences that they believed to be disproportionate to an offender's involvement in a crime or the harm caused by his or her actions. Thus, because most of those convicted of crack possession or sale are black,²⁸ and because federal law mandates significantly harsher sentences for defendants who possess crack than for those who possess powder cocaine, the ADA and the Guidelines have contributed directly and significantly to the gross racial disparities in sentencing.

As Bennett reminds us, these disparities have malignant effects. While he stops short of directly analogizing current sentencing laws to the lynchings that occurred in the American South following the Civil War, he writes that "both actions have strong racial overtones; both share a lack of public outcry; both share tacit public complicity; both share governmental complicity; both share devastating effects on families, children, and neighborhoods; and both have been accomplished largely at the hands of those unknown—at least to the general public."²⁹

In the wake of the United States Supreme Court's decision in *Booker v. United States*, in which the Court held the mandatory sentencing guidelines to be unconstitutional, federal defendants began to urge judges to exercise their newly-recovered discretion and depart from the now-advisory guidelines.³⁰ Among the grounds for such variances are "policy disagreements" with guideline ranges as they apply to particular offenses or defendants.³¹

Judge Bennett suggests that, in their failure to exercise their "policy disagreement" authority more frequently, courts may have become complicit in perpetuating mass incarceration.³² His article examines his own decisions to grant guideline variances in two cases

26. *Id.* at § 1302, 100 Stat. at 3207-15.

27. Sentencing Reform Act §217(a), 98 Stat. at 2017. In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that mandatory sentencing guidelines violated the Sixth Amendment and declared that the federal guidelines henceforth would be advisory in nature.

28. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 2013 tbl.34 (2014), available at <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table34.pdf>.

29. Bennett, *supra* note 22, at 876.

30. See *Booker*, 543 U.S. at 220.

31. Bennett, *supra* note 22, at 877.

32. *Id.* at 892-98.

that ultimately were affirmed by the Supreme Court,³³ and champions the application of what he dubs “*Kimbrough* justice.”³⁴ In *Kimbrough v. United States*, the Supreme Court held that sentencing judges had discretion to vary from the 100:1 cocaine-to-crack ratio when failure to do so would result in a sentence “greater than necessary” to achieve the goals of the SRA.³⁵ According to Judge Bennett, “*Kimbrough* justice” means making good use of that discretion.³⁶

Although the Fair Sentencing Act of 2010 reduced the cocaine-to-crack ratio to 18:1,³⁷ Judge Bennett argues that the formula remains irrational and devoid of scientific support, and will continue to disproportionately affect black defendants.³⁸ Thus, notwithstanding the warnings of commentators, including two Third Circuit judges, that widespread “policy disagreement” departures may generate greater sentencing disparity or Congressional backlash, Judge Bennett writes, “I have wrestled with this for years and ultimately concluded, only for myself, that while I do create disparity when doing ‘*Kimbrough* justice’, it is not unwarranted disparity.”³⁹

Professor Osler’s fascinating piece, *1986: AIDS, Crack, and C. Everett Koop*, also examines the devastation wrought by crack sentencing laws, but through a different lens.⁴⁰ He tracks the parallel histories of the AIDS and crack epidemics, both of which emerged in the early 1980s and generated similar fears among the American public.⁴¹ AIDS patients and crack users were viewed as social outcasts and moral miscreants, undeserving of governmental largesse or support.⁴² In 1986, however, the paths of the two crises diverted.⁴³ The appointment of C. Everett Koop as the United States Surgeon General, the growing activism and political effectiveness of gay rights organizations like Act Up, and the tragic death of young, white Ryan White re-cast AIDS as a medical problem, deserving of substantial federal research dollars and generating compassion

33. See *Spears v. United States*, 555 U.S. 261 (2009) (applying a 20:1 cocaine to crack ratio rather than 100:1); *Pepper v. United States*, 131 S. Ct. 1229 (2011) (considering post-conviction rehabilitation efforts when case was reversed and remanded for new sentence).

34. Bennett, *supra* note 22, at 877.

35. *Kimbrough v. United States*, 552 U.S. 85, 110 (2007) (citing 18 U.S.C. § 3553(a) (2006)).

36. Bennett, *supra* note 22, at 877.

37. Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372 (2010).

38. Bennett, *supra* note 22, at 900-02.

39. *Id.* at 907.

40. Mark Osler, *1986: AIDS, Crack, and C. Everett Koop*, 66 RUTGERS L. REV. 851, 851 (2014).

41. *Id.* at 851-69.

42. *Id.* at 854-55, 860-63.

43. *Id.* at 851.

rather than scorn.⁴⁴ Less than 20 years later, highly effective drug therapies and prevention strategies have turned the disease into a largely manageable chronic condition rather than a death sentence.⁴⁵

The political response to crack, too, was shaped by the tragic death of a young man, but in markedly different ways. Len Bias, an African-American college basketball star, died of a cocaine overdose in his dorm room shortly after being named the first-round draft pick of the Boston Celtics.⁴⁶ The news media mistakenly reported that he had been smoking crack, “ratcheting up” fears about the drug to “a near-fever pitch.”⁴⁷ Congress, acting swiftly and without deliberation, enacted the ADAA and its draconian crack provisions, and state legislatures soon followed suit.⁴⁸ The war on drugs, and the consequent crisis of mass incarceration, ensued.

Osler does not suggest that a medical response would have stemmed the tide of crack. He posits, however, that the Koop strategy of “fighting the disease, not people” could be adapted to combat the market forces that drive the crack trade, like cash flow and product accessibility.⁴⁹ Indiscriminate incarceration of street-level users and dealers would play no role in such a strategy.

Alexander Shalom offers an entirely different, but equally valuable, scheme for reducing mass incarceration: bail reform.⁵⁰ Pre-trial detainees, who are held in municipal and county jails, constitute roughly twenty percent of the 2.2 million incarcerated people in the United States.⁵¹ Many remain locked up for several years awaiting trial, incurring the same economic and human costs that attend a prison sentence.⁵² Often, people fall into this pre-trial purgatory not because they are dangerous, or charged with a serious offense, or have a warrant history, but simply because they lack the financial resources to post even a modest bail.⁵³ Thus, as Shalom makes clear, pre-trial detention targets the poor rather than the dangerous, disproportionately affects black and Latino defendants, and contributes significantly to the disparities in post-conviction incarceration.⁵⁴

Focusing on his work in New Jersey, Shalom proposes moving

44. *Id.* at 855-57.

45. *Id.* at 857.

46. *Id.* at 861-62.

47. *Id.* at 862.

48. *Id.* at 862-63.

49. *Id.* at 856 (internal quotation marks omitted).

50. See generally Alexander Shalom, *Bail Reform as a Mass Incarceration Reduction Technique*, 66 RUTGERS L. REV. 921 (2014).

51. LAUREN E. GLAZE & ERIN J. HERBERMAN, *supra* note 2, at 4.

52. Shalom, *supra* note 50, at 924.

53. *Id.* at 923-24.

54. *Id.* at 923-27.

from a “resource-based” to a “risk-based” system of pre-trial release.⁵⁵ Such a system would rely on the use of “evidence-based, transparent risk assessment and . . . reduce reliance on financial considerations.”⁵⁶ Somewhat controversially (as Shalom acknowledges), a risk-based system also would permit preventative detention, which is not explicitly authorized by many state criminal codes, including New Jersey’s.⁵⁷ Shalom suggests, however, that high bails operate as a form of preventative detention but do not necessarily target the most dangerous defendants.⁵⁸ Under a risk-based system, the decision to detain would be based on more rational and transparent safety considerations, and so, significantly reduce jail populations.⁵⁹

Finally, Greg Jones’s note, *Over-Criminalization and the Need for a Crime Paradigm*, explores the problem of over-criminalization and its impact on mass incarceration.⁶⁰ Jones focuses on the lack of a mens rea requirement in many federal criminal provisions, particularly regulatory crimes, and examines the work of a Congressional task force charged with analyzing the issue.⁶¹

The symposium gave rise to a number of concrete reform proposals. These include, among others, the elimination or reduction of mandatory minimum sentences; elimination of racial disparities in charging, pre-trial detention, and sentencing; increased judicial sentencing discretion; improved access to high quality defense representation; ensuring proportionality in punishment through legislative or regulatory amendments, particularly with regard to drug crimes and “three strikes” laws; prohibition of adult prosecutions of juvenile offenders; removal of juveniles from adult prisons and jails; improved policing and elimination of unconstitutional “stop and frisk” practices; and bail reform. Fortunately, a national consensus is growing around many of these measures, and the country may be poised for change. In fact, the last three years have witnessed modest declines in state and federal prison populations,⁶² and, thanks to the extraordinary success of the Annie E. Casey Foundation’s Juvenile Detention Alternatives Initiative, the number of youth in juvenile custody has fallen

55. *Id.* at 926.

56. *Id.* at 924.

57. *Id.* at 926-27.

58. *Id.* at 923-24.

59. *Id.* at 926.

60. See generally Gregory Jones, Note, *Over-Criminalization and the Need for a Crime Paradigm*, 66 RUTGERS L. REV. 931 (2014).

61. *Id.*

62. THE SENTENCING PROJECT, U.S. PRISON POPULATION DECLINES FOR THIRD CONSECUTIVE YEAR (Dec. 19, 2013), http://www.sentencingproject.org/detail/news.cfm?news_id=1720.

dramatically, reaching a 35-year low in 2010.⁶³

In many ways, Eric Campbell has defied the odds. He has faced many barriers since his release, and his murder conviction will forever be an anvil around his neck. Yet, today he is a successful songwriter and music producer, and the proud father of two young daughters. His prison experience shaped but does not define him. Most of the 2.2 million people who remain behind bars will not be so lucky.

63. Annie E. Casey Foundation, *Youth Confinement Rate at a 35-Year Low*, THE ANNIE E. CASEY FOUND. (Feb. 5, 2013), <http://www.aecf.org/blog/confinement-rate-at-a-35-year-low>.