

OPEN SOCIETY

SOROS FOUNDATIONS NETWORK NEWS
FALL | 2007

NEWS



Dream and Reality:
Searching for Racial Justice
in the United States

OPEN SOCIETY NEWS

FALL 2007

SOROS FOUNDATIONS NETWORK

OPEN SOCIETY INSTITUTE

CHAIRMAN

George Soros

PRESIDENT

Aryeh Neier

EXECUTIVE VICE PRESIDENT

Stewart J. Paperin

DIRECTOR OF PUBLIC AFFAIRS

Laura Silber

Open Society News

EDITOR

William Kramer

DESIGNER

Jeanne Criscola | Criscola Design

PHOTOGRAPHY

Getty Images: page 3 (Mike Simons); page 4 (Roberto Schmidt); page 7 (Paul Ellis/AFP); page 23 (Alex Wong)

Polaris: page 6 (Steve Liss)

AP/Wide World Photos: page 8 (Steve Yeater); page 14 (Chris Gardner); page 16 (Debra Reid); page 18 (Rogelio Solis)

Page 11, photo courtesy of JumpStart Productions.

Corbis: page 12 (Andrew Lichtenstein); page 21 (Brenda Ann Kenneally)

COVER PHOTOGRAPHY

Aurora Photos: Jonathan Lowenstein (front and back). FRONT: Student looks out window on final day of classes before moving to new school. Chicago, Illinois, 2000.

This newsletter describes charitable activities undertaken by OSI and other U.S.-based organizations in accordance with regulations applicable to 501(c)(3) organizations. It also describes activities carried out and funded by the Open Society Policy Center (a 501(c)(4) organization) or foreign entities financed by non-U.S.-sourced funding.

The Open Society Institute works to build vibrant and tolerant democracies whose governments are accountable to their citizens. To achieve its mission, OSI seeks to shape public policies that assure greater fairness in political, legal, and economic systems and safeguard fundamental rights. On a local level, OSI implements a range of initiatives to advance justice, education, public health, and independent media. At the same time, OSI builds alliances across borders and continents on issues such as corruption and freedom of information. OSI places a high priority on protecting and improving the lives of marginalized people and communities.

Investor and philanthropist George Soros in 1993 created OSI as a private operating and grantmaking foundation to support his foundations in Central and Eastern Europe and the former Soviet Union. Those foundations were established, starting in 1984, to help countries make the transition from communism. OSI has expanded the activities of the Soros foundations network to encompass the United States and more than 60 countries in Europe, Asia, Africa, and Latin America. Each Soros foundation relies on the expertise of boards composed of eminent citizens who determine individual agendas based on local priorities.

Open Society News, published by the Open Society Institute in New York, reports on programs and issues critical to advancing open society throughout the network and the world.

For additional information, see the Soros foundations network website at www.soros.org or contact the Open Society Institute, 400 West 59th Street, New York, NY 10019, USA; TEL (212) 548-0600; FAX (212) 548-4605; or email wkramer@sorosny.org

ISSN # 1706-9606

©2007 Open Society Institute

www.soros.org

EDITOR'S NOTE

Several decades have passed since the civil rights movement compelled people in the United States to confront pervasive, systematic racism. Yet race continues to influence many of the social and legal injustices that riddle our society. Most Americans express outrage and disgust toward blatant acts of racism, but such acts are less prevalent today.

Racism has adapted and evolved over time. Slavery and racial segregation systems like Jim Crow are gone, but the impact they have had on African Americans and people of color in the United States, particularly economically, are now reproduced through seemingly neutral processes and policies that yield unjust outcomes based on race. As a result, many Americans are living, working, and learning in environments that are just as separate and unequal as they were decades ago.

The accomplishments of the civil rights era were due to a combination of massive grassroots activism supported by unprecedented decisions from the federal government and the U.S. Supreme Court. Over the last 25 years, however, the growing influence of conservative politicians and ideology have worked to reduce the ability of public institutions such as government, courts, and schools to fight discrimination and foster diversity. As many of the stories in this issue of *Open Society News* show, advocates for racial justice are responding to this challenge by revising their use of traditional institutions and allies and developing new strategies for mobilizing the public and policymakers to challenge segregation.

The Open Society Institute is committed to supporting these activities and defending the policies that have furthered racial justice in the United States, but also acknowledges that much work remains. OSI, particularly its U.S. Justice Fund, is dedicated to revealing how racism currently works and helping people confront it—whether it be the unequal treatment blacks and whites receive in a supposedly neutral legal system; education and development policies that undermine access to good schools and housing for people of color, or a new tide of racially tinged xenophobia that seeks to deny rights and the possibility of citizenship to millions of hard-working undocumented immigrants.

TABLE OF CONTENTS

- 3 The Equality Myth
- 5 Young People of Color Find Little or No Justice in U.S. Juvenile Justice System
- 7 Prejudice Is Thicker than Water: Racial Profiling in America and Europe
- 10 Prosecutors Making the Punishment Fit the Crime
- 12 Time to End Over 20 Years of Cracked Justice
- 14 From Lynch Mob to Death Penalty
- 16 A New Fight to Get Voting Rights for All Americans
- 18 Locked Up, But Still Counted
- 20 Making Development a Source for Inclusion, Not Resegregation
- 22 How the Intent Doctrine Put a Deep Freeze on Racial Justice



The Equality Myth

Demonstrator holds an American flag during a march for racial justice after police killed an unarmed black man, Cincinnati, Ohio, 2001.

Ann Beeson, director of the Open Society Institute's U.S. Programs, provides an overview of how systems and policies continue to exclude many people of color from opportunities for advancement.

THE ARTICLES IN THIS ISSUE of *Open Society News* paint a stark picture of enduring inequality for people of color in America, particularly African Americans. Many Americans got a much-needed dose of this reality two years ago when Hurricane Katrina hit, as television news broadcast the faces of thousands of poor, mostly black people left stranded and helpless in New Orleans. But despite the inequities Katrina exposed, many Americans still seem unwilling or unable to commit to understanding and addressing the root causes of racial injustice. Reversing racism in America is no longer as straightforward as overturning blatant, segregationist Jim Crow laws. It requires an analysis of how a range of institutions, systems, and policies work together to exclude many people of color from realizing the American dream.

Let's start with where you live. If you're black, you are much more likely to live in a neighborhood with broken schools, no jobs, crumbling housing, and limited access to health care. Living in that neighborhood makes it more likely you will be funneled into the juvenile justice system for acting up in school due to zero tolerance policies, or stopped by the police just for

driving around the block or standing on the corner. If you're arrested and charged with a crime, you're unlikely to get the lenient deal that prosecutors often offer to rich white kids in the suburbs. When it comes to drug prosecution, if you're convicted of crack cocaine possession, you'll get the same sentence as someone possessing 100 times more powder cocaine—the substance often preferred by white drug users. And for certain crimes, studies show that you are significantly more likely to end up on death row than whites who commit the same crime, particularly if your victim is white. Due to flaws in the census, your presence in prison can unfairly boost the voting power of legislators and citizens in the town where the prison is located. Assuming you survive the criminal justice system and serve your time, you are likely to lose your right to vote. Criminal convictions are a significant contributor to an African American disenfranchisement rate that is seven times the national average.

Excessive reliance on jail time and prisons has given the United States the highest level of incarceration in the world. More than 2 million people are currently incarcerated in America, and another 4.2 million Americans

EXPLOITING RACIAL FEARS TO UNDERMINE IMMIGRATION REFORM

Maria Teresa Rojas

In the spring of 2007, the United States was immersed in a national debate that dominated the media and highlighted the increasing confusion and misunderstandings that Americans have about immigrants in

our society. The issue, on the surface, was comprehensive immigration reform. But the debate was just as much about race and irrational fears prompted by changing demographics in the United States.

White House backroom negotiations on immigration reform forced a compromise with a bipartisan group of U.S. Senators, resulting in a flawed bill that proved difficult to defend as a workable solution. The bill's collapse set back efforts to overhaul a dysfunctional immigration system and eliminated any hopes of providing legal status for the nation's 12 million un-

documented immigrants.

A defining feature of the debate was the way conservative extremists used race to sow divisions, even in minority communities. Anti-immigrant politicians, commentators, and radio talk show hosts depicted immigrants as a dangerous mass of Latinos, Asians, West Indians, and, of course, Muslims. They also portrayed immigrants as an economic threat to low-wage American workers, many of whom are African American and Latino. These efforts worked to amplify and distort the extent of the opposition, creating a comfort

living today have served time. If you are a black male, you have a one in three chance of being incarcerated at some point during your lifetime. Many have noted the parallels between slavery and incarceration as primary forms of social control over people of color.

But the lingering effects of our nation's legacy of slavery go far beyond the overrepresentation of African Americans in the criminal justice system. Zoning laws, land use policies, school boundaries, tax structures, and housing and transportation policies have all contributed to a subtle but growing resegregation. For example, federal mortgage subsidies by the Federal Housing Authority and the Veterans Administration helped fuel white flight by expanding homeownership almost exclusively in the form of white suburbs. These policies created social advantages that almost exclusively benefited whites.

Despite the overwhelmingly disproportionate impact of these systems and policies on communities of color, it is nearly impossible to obtain a remedy through litigation because there is usually no proof of intentional discrimination. The high hurdle for proving discrimination set by the U.S. Supreme Court's embrace of the "intent doctrine" distinguishes America from its democratic counterparts elsewhere in the world. Canada, South Africa, and the European Union have all rejected an intent requirement to prove racial discrimination.

Even more striking than the facts described in the following articles is how few Americans are aware of them. Because racism no longer has the face of the hooded, torch-carrying, noose-toting white mob, and the United States has a body of civil rights laws, it is easy to believe that skin color is no longer an impediment to the American dream. That's why we celebrate Martin Luther King Jr.'s birthday every year, right? Yet acknowledging King and the civil rights movement once a year has lulled many into thinking that America has resolved its racial justice issues.

The Open Society Institute's U.S. Programs and the many organizations we support are working to address this disconnect between perception and reality, and to forge creative new solutions to the threat persistent racial injustice poses to open society in America. The articles in this issue of *Open Society News* highlight in particular the exclusion of African Americans from the American dream. We are equally committed to addressing the exclusion experienced by other historically marginalized groups—including Latinos, Native Americans, immigrants, lesbian, gay, bisexual, and transgendered persons, women, and poor people. U.S. Programs will continue to support innovative solutions that acknowledge and redress each group's unique experience of exclusion while working to increase prosperity and opportunity for all Americans.

A woman participates in a rally for greater rights for immigrants in the United States, Miami, Florida, 2007.



zone for lawmakers to oppose the bill.

Immigrant advocates countered anti-immigrant fear mongering by focusing on policy and helping the large and diverse groups in the immigrant rights community develop a unified voice. Advocates mobilized the immigrant communities and tracked over 250,000 calls to Congress. More than 1 million Latinos participated in a petition drive for legalization. Alliances with the African American and faith communities also amplified calls for unity and positive reform. Yet the effective and continuing exploitation of racial and economic fears by anti-immigrant groups indicates that much work remains to be done.

With the collapse of the Senate bill, the U.S. government is conducting a new round of punitive enforcement actions and legislative proposals on health

care and other social policy issues that harm immigrants, and even naturalized citizens. In the absence of a coherent package of responsible reforms, the federal government, states, counties, and cities are creating an erratic patchwork of laws, some of which are increasing racial profiling and discrimination.

Immigrant rights advocates will have to confront this new wave of intolerant and cruel immigration policies. They must show the American public that immigrants are workers and families who make valuable commitments and contributions to our society. They will also need to challenge anti-immigrant policies with workable and politically viable counter-proposals. Recognizing the importance of increasing the number of new citizens and new voters, advocates are working to build the political power of immigrants,

especially in the Latino community, which represents the fastest growing group of new voters.

The Open Society Institute will contribute to these efforts by continuing and adapting the support it has given to the immigrant rights movement for the past 10 years. OSI will emphasize responding to punitive immigration laws and policies, restoring due process to all noncitizens, and helping change the immigration debate from one driven by racial fear and hatred into a rational discussion about immigration policies that provide human rights and social justice for all who live and work in the United States.

Maria Teresa Rojas is deputy director of the U.S. Justice Fund.

Young People of Color Find Little or No Justice in U.S. Juvenile Justice System

James Bell, executive director of the W. Hayward Burns Institute, examines the implications of the U.S. juvenile justice system's excessive confinement and incarceration of young people of color.

JAMES BELL

IN THE UNITED STATES, the number of juveniles in confinement is growing at an alarming rate. The rise is not due to more teens committing more crime: Juvenile crime has actually decreased significantly over the last two decades. Instead, the growing population of confined young people has been significantly fueled by increasing lengths of stay for minor offenses.

For reasons that cannot be justified by crime statistics alone, young people of color—adolescents between the ages of 12 and 20—are the majority of this growing population. Adolescence, color, and confinement have converged in a way that has led juveniles to be detained or incarcerated in numbers that should give pause to any civil society. Indeed, nationally, while African Americans represent 15 percent of those below the age of 18, they are 26 percent of all the young people arrested, 46 percent of those detained in juvenile jails, and 58 percent of all juveniles sent to adult prison.

While some believe that institutional racism is significantly responsible for minority overrepresentation in the juvenile justice system, only a few jurisdictions have examined their policies and practices to determine if they are race neutral. There is probably no deliberate, knowing racism in the majority of cases. Yet if one were to divide the juvenile justice system into phases or stages, there would be places where decisions such as where to patrol and who to arrest, charge, and prosecute widen the net for young people of color.

Assumptions by policymakers and the public about young people of color also contribute to their overrepresentation in the system. These beliefs hold that young people of color are prone to violence and criminal activity, they are not committed to school or working, and, worst of all, they expect to be incarcerated and therefore treat it like a rite of passage.

Such assumptions either ignore the structural realities of the U.S. economy or blindly accept pseudo-scientific racist social theories. Many young people of color in the juvenile justice system reflect what economist Jeremy Rifkin calls “economic irrelevance.” They are part of a growing segment of the population that has no access to the education and training that would give them the skills to participate in a modern, dynamic economy.

Economic disempowerment is compounded by racist theories about criminal predisposition among young people of color. These theories have

been used by some politicians to create a political climate in which U.S. congressional policy debates ignore the multiple factors that contribute to crime and instead focus almost exclusively on young people of color as “superpredators” who must be dealt with harshly.

The simplistic debate and the stereotyping about young people of color have prompted legislatures all over the country to enact laws that “get tough” on juveniles. Approximately 30 states now impose mandatory minimums for certain crimes, while 42 others afford youth less and less confidentiality while in juvenile court.

In addition to tougher sentencing, authorities are increasing the use of pretrial detention. While youth who are arrested for serious or violent crimes may be rightfully incarcerated in order to maintain public safety, criminal justice studies indicate that the vast majority of youth in detention are awaiting trial for nonviolent acts.

Each year, between 300,000 and 600,000 youth are detained in pretrial juvenile detention facilities. While some of these detained juveniles are captive for a matter of days, others spend weeks or months in detention before being released to their families and communities. Young people of color comprise 63 percent of the detained population though they only make up 34 percent of all youth in the United States. This phenomenon, known as disproportionate minority confinement, is measured by comparing the percentage of young people of color in the juvenile justice system with the percentage of young people of color in the general youth population in a particular jurisdiction.

In California, Connecticut, Louisiana, New Jersey, New Mexico, and New York, disproportionate minority confinement has helped make young people of color exceed 80 percent of the populations in these states’ juvenile justice systems.

Contributing to these growing numbers is the simple fact that those responsible for administering juvenile justice are not held accountable for the recidivism rates or life outcomes of young people. This lack of accountability results in policies and procedures that are based on very little correlation between young people who are detained and young people who are truly dangerous to the community.

“The official response to juvenile justice issues has increasingly become one of incarcerate first, provide services later.”



Young inmates in the yard of a juvenile detention facility, Laredo, Texas, 2003.

For jurisdictions that do gather data to inform their policies and practices, it is clear that young people of color are often incarcerated because they have high needs rather than because they pose a high threat. Yet the official response to juvenile justice issues has increasingly become one of incarcerate first, provide services later. Such convoluted thinking has even led to justifications for incarcerating young people because it is “in their best interest” and will get them the help and attention they need.

This approach is problematic on many levels. Incarceration should be used for young people who demonstrate a proven risk to public safety. It should not be seen as a benign process to receive services. Indeed, upper income families do not subject their sons and daughters to incarceration for help with education, health, or personal issues. Yet for poor young people and young people of color in America, detention is increasingly perceived as one of the few ways to effectively deliver social services. There is also the fact that once youth are detained, many do not receive any of the attention that is supposed to be part of the “corrections process.” Lack of funding and tough on crime attitudes have undercut notions of rehabilitation in many prisons and detention centers. Instead, growing numbers of youth are simply warehoused in large facilities that have little ability to positively change behavior or lives.

With OSI support, the Burns Institute has responded to the counterproductive and disproportionate confinement of young people of color by working to change policies, procedures, and practices in the juvenile justice system. Working with judges, parents, prosecutors, public defenders, police, political leaders, service providers, community groups, and young people, the institute analyzes existing data and determines the extent of disproportionate minority confinement in the community. The institute also uses the information it gathers to create a community profile compiled by youth and parents to reveal the community’s strengths and deficits and to assess the community’s existing services. Based on law enforcement data and community profiles, the institute makes recommendations to modify law enforcement policies, procedures, and practices that create racial disparities.

Reducing disproportionate minority confinement is a continuous and complicated process. Yet if such confinement is not challenged with passion, urgency, and leadership, American juvenile detention policies will continue to grow as a source of injustice for young people of color.

FOR MORE INFORMATION

To find out more about juvenile justice and detention issues, go to www.burnsinstitute.org

Prejudice Is Thicker than Water:

Racial Profiling in America and Europe



Police officers conducting outreach efforts after police raids in Muslim community in response to alleged kidnapping and execution plot, Birmingham, United Kingdom, 2007.

Two legal scholars and activists, Olivier De Schutter, professor at the Catholic University of Louvain and general secretary of the International Federation for Human Rights, and Reginald T. Shuford, senior staff attorney, American Civil Liberties Union Racial Justice Program, compare European and American varieties of racial and ethnic profiling.

1. What are the characteristics of racial profiling in the United States and Europe?

Reginald Shuford (RS): In 1999, the Oxford American Dictionary included a definition for racial profiling for the first time, presenting it as “an alleged police policy of stopping and searching vehicles driven by people from particular racial groups.” Recognizing racial profiling in a prestigious dictionary is a positive development. However, this definition is way too narrow. In the United States, racial profiling is manifested in many contexts beyond driving: flying, walking, shopping, hanging out with friends on the streets of one’s neighborhood. The phenomenon is so pervasive that another phrase captures its ubiquity: breathing while black or brown.

Racial profiling occurs in all jurisdictions and is practiced by every type of law enforcement agency, from small sheriff’s and police departments to larger state police, highway patrol, and federal agencies.

Olivier De Schutter (ODS): In the European Union, ethnic profiling takes two forms. The first is based on the use of racial, ethnic, national, or religious stereotypes by individual law enforcement officers. With the exception of the United Kingdom, the police have broad discretionary powers and do not have to obtain or provide information about the race or ethnicity of

the people they stop, thus it is hard to document the profiling practices of European police forces.

A second, “institutional” form of European ethnic profiling is when law enforcement agencies use criteria such as race, ethnicity, religion, or national origin to create profiles for screening public and private databases. German law enforcement used this type of profiling to investigate individuals after the September 11 attacks. However, the German Federal Constitutional Court ruled institutional profiling unconstitutional in 2006 because it was too random and not a response by authorities to a specific threat to public order or individual rights.

2. What are the historical roots and current factors behind racial profiling in the United States and Europe?

RS: Within African American communities, racial profiling, however labeled, has been around since the days of slavery, when monitoring the movements of blacks and slaves was the norm. Efforts at the state and local level in the “war on drugs” since the 1980s have morphed into a war on communities of color, particularly African American and Hispanic communities. African Americans and Hispanics have been targeted under the mistaken belief that they were more likely to be engaged in illegal drug use.



Demonstrator at a rally against racial profiling. “DWB” stands for “driving while black or brown,” Sacramento, California, 2000.

Yet, many studies have concluded that African Americans and Hispanics use drugs no more than anyone else relative to their percentage of the population, and transport drugs much less than their white counterparts.

With the terror attacks of September 11, 2001, the “War on Terror” extended the practice of racial profiling to encompass Muslims, South Asians, and those perceived to be of Arab or Middle Eastern descent, with many innocent people from those and other communities becoming casualties of ethnic and religious profiling.

ODS: Ethnic profiling is poorly documented in the EU and has only been brought to light following the attacks of September 11 and more recent advocacy efforts by the Open Society Justice Initiative. European ethnic profiling is likely rooted in anti-immigrant feelings and a lack of understanding about the real causes of criminal behavior, such as economic deprivation and social exclusion, as opposed to the imaginary causes, such as ethnicity or race. Stereotyping often forms the basis of police officers’ use of ethnic profiling and can lead to overrepresentation of certain groups in criminal statistics. This overrepresentation then tends to act as a self-fulfilling prophecy that reinforces the stereotypes.

3. How has racial profiling changed after September 11?

RS: In 1999, 81 percent of Americans believed that racial profiling was wrong. September 11 turned that on its head: 67 percent of Americans felt that racial profiling was a legitimate law enforcement tactic in the wake of the 9/11 attacks.

ODS: Most would agree that terrorism is so devastating that societies cannot afford to rely on after-the-fact efforts to investigate, prosecute, and punish the wrongdoers: terrorist acts must be prevented before they occur. Unfortunately, law enforcement authorities are increasingly using intelligence service techniques like profiling for conventional criminal investigations. These techniques place a heavy emphasis on targeting individuals simply because of their membership in certain communities or racial, ethnic, national, or religious groups.

4. What are the basic legal protections against racial profiling in the United States and Europe?

RS: The 14th Amendment of the U.S. Constitution provides, in part, that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” The 4th Amendment states that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”

The burden under the 14th Amendment is to prove intentional discrimination, which is a substantial hurdle. Police departments are becoming more adept and subtle in their practices. In a few situations, intent can be proved through statistics, but the analysis of the data must be sophisticated, specific, and reveal significant disparities. And the relevant data is often not available. Fourth Amendment protections have been weakened for some time now. Satisfying the requirements of the 14th and 4th amendments depends on the facts of the particular case, as well as the receptiveness of the judge hearing the matter.

ODS: The European Court of Human Rights has taken the position that under Article 14 of the European Convention on Human Rights, no difference in treatment based exclusively or decisively on a person’s ethnic origin can be justified in a democratic, pluralistic society that respects different cultures. Thus, using racial or ethnic characteristics as a basis for making law enforcement decisions is clearly discriminatory. It is not based on any proven correlation between race, ethnicity, religion, or national origin and propensity to commit crimes, and it runs counter to the principle that differences in treatment based only on ethnicity may not be justified. This same conclusion follows from the 1965 International Convention for the Elimination of All Forms of Racial Discrimination, which all EU-member states have ratified.

5. Are there official and NGO statistics on racial profiling? If yes, what have they revealed?

RS: Over 22 states, 4,000 cities, and 6,000 police departments collect statistics related to racial profiling. Many studies demonstrate that, while African American and Hispanic motorists have their vehicles stopped and searched disproportionately, they are found to be carrying contraband or breaking the law at a much lesser rate than their white counterparts. A major 2005 study released by the U.S. Bureau of Justice Statistics further revealed a troubling increase in the use of force by federal, state, and local law enforcement agencies, particularly against African Americans.

The most recent study by the Bureau of Justice Statistics released in May 2007 seeks to downplay the incidence of racial profiling by concluding that African Americans, Hispanics, and whites are stopped at virtually the same rate. Yet the report's data shows disparities in what happens after the stop. The report's authors tried to explain this by claiming that the racial differences in who gets searched, arrested, and/or has force used against them could be due to "countless other factors" not incorporated into the analysis. Despite the government's spin efforts, the Bureau of Justice report's final data makes it clear that African Americans and Hispanics remain more likely than whites to be searched, arrested, and ticketed, and to have force used against them in encounters with the police.

ODS: Information about ethnic profiling in the EU remains fragmentary and disputed. Researchers working with the Open Society Justice Initiative in Hungary in 2006 found that police stop and search Roma pedestrians in disproportionate numbers. A 2006 Justice Initiative report on Spain found widespread racial profiling and discriminatory conduct toward immigrants and ethnic minorities.

The United Kingdom provides the best data on ethnic profiling due to a 1984 law requiring police to record the self-defined ethnic or racial affiliation of anyone they stop. The latest annual report in 2005 indicated that British police stopped and searched a disproportionate number of ethnic minorities, particularly after September 11. Whether or not these stops and searches appeared consistent with patterns of recorded crime—and some argue they did—the simple fact that such ethnic profiling occurs can only serve to hinder crime prevention by increasing hostility and suspicion between police and ethnic communities.

6. How have governments and civil society groups in the United States and Europe responded to racial profiling?

RS: Notwithstanding the high burden of proof in racial profiling cases, a number of U.S. courts have found the existence of racial profiling in lawsuits before them and have ordered some combination of injunction against its practice, monetary damages for plaintiffs, or the suppression of evidence in criminal proceedings.

Many state and local jurisdictions have enacted legislation outlawing racial profiling while requiring data collection. Yet, repeated efforts to get federal racial profiling and data collection legislation enacted have not been successful.

ODS: Ethnic profiling has been challenged in the EU on the basis of rules prohibiting discrimination and rules protecting the right to privacy in the processing of personal data. The latter was used to challenge German authorities' counterterrorism efforts after September 11 that used institutionalized profiling based on ethnicity, race, nationality, and/or religion.

In England, the House of Lords determined that British customs officials had violated English race relations laws when they stopped Roma without justifiable cause at the Prague airport as they tried to board planes bound for the United Kingdom.

On the other hand, the Spanish Constitutional Court ruled in 2001 against an African American woman who was also a naturalized Spanish citizen. The woman claimed that it was only because she was black that

Spanish police asked for her passport (which she did not have with her when stopped). The court found that the officers, in compliance with the country's law on regulating foreigners, could use racial or ethnic characteristics as an indicator that a person might not be Spanish.

7. How can law enforcement effectively secure public safety without using aggressive tactics such as racial profiling in high crime neighborhoods?

RS: The alleged dichotomy between public safety and civil rights and liberties is a false and dangerous one. Public safety can be achieved through legitimate, tried-and-true law enforcement tactics that do not infringe upon the civil rights and liberties of ordinary citizens.

Most law enforcement experts concede that racial profiling is ineffective at identifying and preventing crime. Rather than targeting broad categories of people based upon their appearance, race, religion, or national origin, the police should concentrate on individuals engaged in objectively and identifiably suspicious behavior.

ODS: The view that ethnic profiling would constitute an asset in combating crime is short-sighted and mistaken. The costs of ethnic profiling are high and clearly outweigh any potential benefits. The UN Human Rights Council special rapporteur on human rights and counterterrorism recently concluded that ethnic profiling alienates the targeted communities whose cooperation is decisive in detecting and preventing criminal behavior. The resources used in ethnic profiling should be directed toward more effective crime prevention activities.

8. Are there any lessons that advocates against racial profiling in the United States and Europe can learn from each other?

RS: We should broaden our discussions and examinations of racial profiling to other countries in order to get a more accurate picture of how widespread the problem is. We should also incorporate human rights strategies in our fight against racial profiling. Finally, we should link all of our various advocacy efforts and educate the public on how all forms of profiling are ineffective and contrary to the fundamental principles upon which our respective democracies were built.

ODS: To paraphrase U.S. Supreme Court Justice Harry Blackmun: "In order to move beyond racism, we first must recognize it." A number of EU member states are reluctant to monitor police behavior regarding ethnic profiling, claiming that collecting such information could violate rules protecting citizens' privacy and personal data. Yet, collection of ethnic and racial data can be done without violating individual rights. The use of this data to monitor the police is crucial since ethnic profiling is both an institutionalized practice and a de facto behavior of law enforcement officials. A careful examination of monitoring practices in the United States would illuminate a debate that is only beginning in Europe.

FOR MORE INFORMATION

To find out more about racial profiling in the United States and Europe, go to www.aclu.org/racialjustice/racialprofiling and www.racialprofilinganalysis.neu.edu/background; for Europe, go to www.fidh.org

Prosecutors Making the Punishment Fit the Crime:

A Question of Race and Class

In this edited excerpt from her recently published book, *Arbitrary Justice: The Power of the American Prosecutor*, former Soros Senior Justice Fellow Angela Davis—currently a professor of law at American University's Washington College of Law—examines how the race and class of victims and defendants can distort the way prosecutors do their job.

ANGELA DAVIS

THE CASES OF James Robinson and Andrew Klepper illustrate how unfettered exercise of prosecutorial discretion is producing substantial race and class disparities in the American criminal justice system.

James Robinson, a poor, young African American man, was charged with felony murder in the District of Columbia in 1991. He was accused of robbing a man at gunpoint and killing him during the course of the robbery. Felony murder is one of the most serious forms of homicide, but there was nothing noteworthy or more heinous about this felony murder than any other. The only remarkable detail was that the victim was a young white college student from the Midwest. In 1991, the vast majority of the over 400 murder victims in the District of Columbia were young black men.

Andrew Klepper was a white middle-class teenager who lived in a Maryland suburb. When he was 15, he joined two friends from his prestigious high school in hiring a sex worker and inviting her to his house. The boys proceeded to beat her with a baseball bat, sodomize her with the handle and a large ink marker, and rob her of over \$2,000. Andrew was charged as an adult with a first-degree sex offense, conspiracy to commit a first-degree sex offense, armed robbery, and conspiracy to commit armed robbery. All of these charges except the armed robbery carry a maximum penalty of life in prison in the state of Maryland.

Robinson's case immediately attracted the attention of the press, undoubtedly because of the victim's status and the fact that the victim's family contacted a congressman from their state. Media attention and the involvement of the congressman assured that Robinson would be prosecuted expeditiously.

In the midst of the trial, Robinson's dedicated and experienced public defender was incapacitated by a stroke. The prosecutor opposed a motion for a mistrial despite the fact that Robinson was left with a young cocounsel who had never tried a jury case before. The judge appointed an attorney who had no prior knowledge of the case to assist the defense. Robinson was convicted of all counts and sentenced to life in prison.

In the Klepper case, the evidence of the defendant's guilt was overwhelming, including a confession by Klepper himself. Yet despite the evidence and brutality of the crimes, Klepper never served a day in prison.

The prosecutor offered him a deal that allowed him to plead guilty to less serious offenses. The prosecutor also agreed to support a five-year term of probation so that Klepper could participate in a six-to-eight week program in a secure treatment facility for troubled youth in Tennessee. As part of the agreement, Klepper would spend an additional 18 months at the facility before enrolling in a boarding school. Klepper's parents agreed to pay for the cost of the treatment.

It is common for first offenders to be offered deals that result in a probationary sentence, but rarely if they commit serious offenses like Klepper's. Identified as the leader of the assault and robbery who committed the most abusive acts, Klepper was the only one of the three boys to avoid imprisonment. One was detained in a juvenile facility and the other received a four-year sentence, even though he was not present during the sexual assault.

Did Klepper's social status, wealth, and possibly his race (as well as the victim's social status as a sex worker) influence the prosecutor's decision to offer him such a lenient plea bargain? It certainly may be reasonable to provide rehabilitative services for a juvenile first-time offender. But if Klepper was deserving of such help, then so are other young people charged with the same offenses.

The prosecutor might respond that he gave Klepper a break because his parents paid for an alternative that provided rehabilitative services and that he would have given a similar break to other similarly situated defendants, regardless of their race or socioeconomic background. The prosecutor might further argue that he is not responsible for the inequities in society. Why should Klepper be denied rehabilitative treatment because others in his situation cannot afford it?

But these arguments do not tell the whole story. Klepper's parents were well-educated professionals and hired a well-known criminal defense attorney. Klepper was a popular student at a good high school on his way to college. Could the prosecutor have agreed to the plea bargain because he looked at Klepper and his parents and saw a life with a bright future? Would the prosecutor have offered the same deal to a poor, African American male with no family support, no education, and no foreseeable future?



"Lady Justice" statue, United States

“Defendants without resources are no less deserving of rehabilitative treatment than their well-resourced counterparts.”

The reality is that the poor African American male would never be able to afford such services, so prosecutors are rarely compelled to confront these issues.

The prosecution's behavior in the Robinson case highlights how the race and class of the victim can unconsciously influence prosecutors. Many of the other Washington, D.C., homicide victims in 1991 were poor young black men who were killed under circumstances even more brutal than the victim in Robinson's case. Yet with Robinson, the attention of the media and the congressman compelled the prosecutor to reject a mistrial when a seasoned public defender fell ill, and to rush ahead with the trial.

Prosecutors should work hard to make sure that they are not unduly influenced by media attention, politics, or race and class issues that may not be consistent with the fair administration of justice. Cases highlighted by the media are not necessarily more serious than other cases involving the same type of crime, nor are the victims and their families necessarily

any more cooperative or interested in bringing the perpetrator of the crime to justice. Defendants without resources or prospects for the future are no less deserving of rehabilitative treatment instead of retributive justice than their well-resourced counterparts.

Much of the problem lies in the fact that prosecutors in the U.S. justice system have not been subject to enforceable standards or effective mechanisms of accountability. The result, even among committed, well-meaning prosecutors, is often arbitrary decision-making that produces tremendous disparities among similarly situated people, sometimes along race and/or class lines. White defendants, especially if they are wealthy, are less likely to go to prison than their poor and black or brown counterparts—even when the evidence of criminal behavior is equally compelling. The time has come to insist on prosecutor accountability and fairness. There must be public oversight of the decision-making process and appropriate reforms to assure equality and justice under law.

Time to End Over 20 Years of Cracked Justice



Woman sentenced to 20 years in prison for a first-time drug offense leaves prison early after pardon from New York Governor George Pataki, Bedford Hills, New York, 2000.

Open Society Institute Senior Policy Analyst Nkechi Taifa outlines the need to correct the flawed crack cocaine laws that have created decades of racially biased and unjust drug policy.

NKECHI TAIFA

TWO DEFENDANTS APPEAR before a federal judge on drug charges. One is charged with possession of five grams of crack cocaine; the other is charged with trafficking 500 grams of powder cocaine. Neither defendant has any prior convictions.

Who gets the longer sentence? The crack possessor or the powder trafficker?

The most likely answer is that both will get the same mandatory five-year sentence, despite the fact that the powder defendant had 100 times more cocaine than the crack defendant.

Such lopsided outcomes are the result of federal mandatory minimum cocaine sentencing laws that came with the launch of America's "war on drugs" over 20 years ago. Indeed, for more than two decades, street level crack cocaine users have been punished far more severely than the wholesale drug suppliers who provide the powdered cocaine from which crack is produced. This harsh punishment of crack users has had a devastating impact on communities of color.

In 2003, 81.4 percent of those convicted federally of crack cocaine offenses were African American. Although data show that whites are a larger percentage of U.S. crack cocaine users, federal "war on drugs" law enforcement and prosecutorial practices have targeted inner-city neighborhoods, resulting in an overwhelming number of arrests from these communities.

"These cases are the criminal justice equivalent to junk food," said Eric Sterling, a lawyer who drafted mandatory minimum sentencing statutes 21 years ago for the House Judiciary Crime Subcommittee. "And the federal courts and prisons have become obese with these small-scale prosecutions."

Sterling now works in coalition with the Open Society Policy Center's Justice Roundtable, along with the Sentencing Project, the American Civil

Liberties Union, and others, to educate the public and policymakers about such senseless and destructive sentencing policies. The Roundtable's campaign, "Time to Mend the Crack in Justice," has included letters to Congress, legislative briefings and reports, as well as testimony before the Inter-American Commission on Human Rights.

The junk food justice generated by crack sentencing laws stems from initial reactions more than two decades ago when the country was inundated with sensationalized news articles about crack cocaine. Crack was described as an "urban menace" which would spawn a generation of "crack babies" and an epidemic of violence. Although crack has unquestionably devastated already distressed communities, many of the claims made about the drug were unsubstantiated, and, in the words of the bipartisan U.S. Sentencing Commission, a congressional advisory agency, some assertions "were simply incorrect." However, the hyperbole was instrumental in the frenzied development of the sentencing laws. The rule that gives the same sentence to a powder possessor with 100 times more cocaine than a crack possessor was, in the words of a former congressional staffer, essentially "plucked out of a hat." In 1995, the Sentencing Commission unanimously stated that the 100-to-1 ratio was too great and had to be changed. Revising this one sentencing rule, the commission concluded, would reduce the sentencing gap between blacks and whites more "than any other single policy change." Both Congress and the Department of Justice disagreed, and the quantity disparities for powder and crack cocaine remain to this day.

Yet the evidence discrediting the flawed reasoning behind the quantity and sentencing formulas is overwhelming. Four comprehensive reports from the Sentencing Commission show that crack and powder cocaine are pharmacologically identical and have similar effects, differing only in their

“[Crack cocaine] cases are the criminal justice equivalent to junk food. And the federal courts and prisons have become obese with these small-scale prosecutions.”

manner of ingestion. Both forms of the drug are dangerous, but one is not more dangerous than the other. The term “crack baby” is now widely understood to be a misnomer, with research indicating that the negative effects of both prenatal crack and powder cocaine exposure are identical and significantly less severe than previously believed. And the HIV infection rate is nearly equal between crack smokers due to risky sexual practices and powder injectors due to risky needle sharing. Even if crack cocaine was more dangerous than powder cocaine, increased penalties ought not be justified on that basis. Crack cocaine originates from powder, thus applying a stiffer penalty for crack than its powder source makes little sense.

More than two decades of crack sentencing have neither abated nor reduced cocaine trafficking, and have done little to improve the quality of life in deteriorating neighborhoods. What it has done, however, is incarcerate massive numbers of low-level offenders, predominately African

Americans, and increasingly women, who are serving inordinately lengthy sentences at enormous cost to taxpayers and society. The daughter of Hamedah Hasan, a first-time offender who was pregnant when she was convicted for crack possession in 1993, will be a full-grown woman when Hamedah finishes her 27-year sentence.

Over 20 years of junk food crack prosecutions in U.S. federal courts is enough. The studies are complete. The research is compelling. The analysis is sound. Now is the time to mend the vast divides of racial injustice that reactionary and irrational crack laws have brought to the U.S. criminal justice system.

FOR MORE INFORMATION

To learn more about the impact of drug sentencing laws, go to www.opensocietypolicycenter.org; www.sentencingproject.org; and www.aclu.org/drugpolicy

TREATMENT PROGRAMS TEMPER RACIALLY SKEWED DRUG ENFORCEMENT IN MARYLAND

Justice Policy Institute Executive Director Jason Ziedenberg examines the results of racially biased drug enforcement policies in Maryland and how treatment can be more effective than incarceration.

Jason Ziedenberg

MARYLAND IS OFTEN characterized as a liberal “blue state” but, like every other state across America, Maryland spent the last two decades imprisoning more and more low-level, nonviolent, drug-involved individuals. And Maryland’s liberal leanings have not shielded it from the hard reality of racial injustice—nearly all of Maryland’s drug prisoners are African American.

Why are African Americans overwhelmingly over-represented in Maryland’s drug prisoner population? Answers are not found in differences in illegal drug use or drug sales. Research shows that whites and African Americans report using drugs and being drug dependent at virtually the same levels, and that white and African American youth sell drugs at nearly the same rate.

Some researchers suggest that policing practices,

like focusing on drug enforcement in minority communities, are the cause: more frequent drug arrests of individuals in one community lead individuals in that community to build the kind of criminal history that gets them sentenced to prison.

In 2003, Maryland’s Legislative Black Caucus commissioned a report by the Justice Policy Institute examining the impact of more stringent drug enforcement and longer drug sentences on African Americans. The report revealed that in the 1980s whites and African Americans were sent to prison for drug offenses at rates of 17 and 15 percent, respectively. Yet by 2003, changing police practices focusing on perceived “high drug use” minority communities had resulted in African Americans comprising two-thirds of all people arrested on drug charges and 9 out of every 10 people imprisoned in the state for drug offenses, despite the fact that African Americans are only one-third of Maryland’s population.

Racial disparities in drug treatment success rates are also a factor. Maryland’s Alcohol and Drug Abuse Administration (ADAA) found that while half of all white patients successfully completed treatment, less than a third of African American patients did so. The ADAA says that “environmental and social factors,” such as access to a job, private health care, and higher income play a role in differential success rates. Challenges in accessing treatment are compounded by differential treatment at the sentencing phase: Mary-

land’s sentencing commission has found that African American and Hispanic defendants convicted of drug offenses were likely to receive longer sentences than white defendants.

These troubling racial disparities, as well as recent opinion surveys showing that over two-thirds of Maryland voters view drug treatment as more effective than incarceration, have led to change. In 2004, Maryland’s Republican governor and Democratic legislature worked together to pass “treatment, not incarceration” legislation that sends people convicted of nonviolent drug offenses into treatment programs instead of jail or prison. Since then, Maryland has been one of 12 states where the prison population and drug imprisonment rates have fallen. After a rancorous debate in the 2007 legislative session, Maryland increased its treatment budget, and extended parole eligibility to people convicted of multiple drug offenses.

Still, Maryland has a long way to go: drug treatment advocates say the state needs at least \$30 million to meet the goal of “treatment on demand,” and policymakers have yet to revise the sentencing laws that drive racial disparity in Maryland’s prisons.

FOR MORE INFORMATION

To find out more about drug policy and sentencing issues in Maryland and beyond, go to www.soros.org/initiatives/baltimore/; and www.justicepolicy.org

From Lynch Mob to Death Penalty: A Continuum of American Racial Injustice

Theodore M. Shaw, director-counsel and president of the NAACP Legal Defense and Educational Fund, highlights the connections between lynching and the disproportionate use of capital punishment against African Americans as enduring and extreme forms of racial injustice in the United States.

THEODORE M. SHAW

AMERICA'S PAINFUL HISTORY of racial discrimination—acted out most horrifically in the form of lynchings—is one that Americans as individuals, and as a country, should be eager to move beyond. Unfortunately, reminders of that history persist today in the racially disparate use of the death penalty and the concentration of black death-row inmates in parts of the country where lynching was most prevalent.

Beginning in the Reconstruction era and peaking during the first two decades of the 20th century, blacks were terrorized by the threat of the lynch mob. According to statistics compiled by the Tuskegee Institute, between 1882 and 1968, nearly 3,500 African Americans were lynched. Hundreds, and at times even thousands, of people gathered to witness these lynchings; white spectators would cheer as blacks were tortured, burned, and ultimately hanged to reinforce notions of white supremacy and to punish people—especially men—perceived as threats to the established order.

One of the overlooked facts about lynching violence is that the victim was often taken directly from the hands of the police or from a jail cell—frequently with official complicity. Sometimes, the death penalty was used to “avoid” the spectacle of lynching. Take, for instance, the 1923 case of *Moore v. Dempsey*, which became a landmark Supreme Court ruling for African Americans. Twelve black sharecroppers were accused of killing five white men after a riot broke out when a black church was attacked. During the trial, a lynch mob surrounded the courthouse, promising that the defendants would be lynched if they were not sentenced to death. An all-white jury took less than eight minutes to consider the case of each defendant before pronouncing a guilty verdict; the judge, before the cheering crowd, sentenced each of the men to death. The NAACP hired a team of black and



white lawyers to appeal the case, which eventually rose all the way to the U.S. Supreme Court. The appeal was successful and the case was returned to a state court that freed all 12 men, while finding that trials overtly influenced by public mobs deprived citizens of the due process rights guaranteed to them by the 14th Amendment.

By the 1930s, legal and organizing efforts by the NAACP substantially reduced the number of lynchings, although violence against blacks did not entirely cease. Beginning in 1934, the number of lynchings significantly declined, and by the close of the civil rights movement in 1964, lynchings, according to Tuskegee Institute statistics, had ceased almost entirely.

But as lynching declined across the country, there were pockets of the South where the practice was continued and combined with the death penalty to act as symbols and instruments of white dominance and intimidation of African Americans. Mississippi, Georgia, Texas, Louisiana, and Alabama were the leading lynching states between 1930 and 1967, accounting for nearly half of the 174 victims nationwide. During this same period, these states were also leaders in the number of executions, with Georgia conducting 369 executions in this period, followed by Texas (305), Mississippi (272), Alabama (139), and Louisiana (135).

A recent statistical study found that the number of death sentences since 1970 has been higher in states with a history of lynchings, and that this connection was even stronger when only African American death sentences were analyzed. Indeed, since 1976, blacks—who comprise just 13 percent of the population—have been 34 percent of those executed. Nearly 60 percent of these blacks were executed for cases involving white victims.

Despite evidence that the past continues to affect the disparate ways in which whites and blacks are treated by the criminal justice system, the U.S. Supreme Court has erected a bar to defendants' claims of race discrimination that has had devastating effects on the lives of black defendants today.

In the 1987 case of *McCleskey v. Kemp*, the NAACP Legal Defense and Educational Fund, Inc. (LDF) presented the U.S. Supreme Court with statistical evidence showing that race played a pivotal role in Georgia's capital punishment system, a system that has executed record numbers of people in a state that also witnessed the second-highest number of lynchings of black Americans. In *McCleskey*, LDF introduced the landmark Baldus Study, which showed that black defendants were at disproportionate risk of receiving the death penalty, and blacks accused of killing white victims were more at risk of death than anyone else. Nevertheless, the Court disregarded evidence that discrimination infected the system as a whole, found no constitutional error, and demanded that a defendant show proof of discrimination in each particular case.

The death penalty remains an example of the extreme inequality in the U.S. justice system. In 2000, then governor George Ryan imposed a moratorium on the death penalty in Illinois, citing concerns over the fact that more death row inmates had been exonerated than executed since Illinois reinstated the death penalty in 1977. When Governor Ryan made his decision, 62 percent of those on death row were black, in a state with

“As lynching declined across the country, the practice was continued in pockets of the South and combined with the death penalty to act as symbols and instruments of white dominance of African Americans.”

a black population of 15 percent. Of the 18 persons who had been exonerated from Illinois' death row as of February 2007, 12 were black. A 2003 Maryland study ordered by Governor Parris Glendening concluded that defendants accused of killing white victims were significantly more likely to face the death penalty than those accused of killing black victims; this effect was even further exacerbated when the defendant was black. The study also detected racial bias in prosecutors' decisions to seek the death penalty. Similar death penalty studies in 2001 in North Carolina and New Jersey also found that the race of the victim had a significant effect on whether a defendant would be sentenced to death. A study of the death penalty in Pennsylvania, released in 1998, found that controlling for case differences, black defendants in Philadelphia were 3.9 times more likely to receive the death penalty than nonblack defendants. The racial combination most likely to result in a death sentence was a black defendant charged with killing a white victim.

Although the days of lynching may be behind us, the criminal justice system provides a constant reminder that our recent past continues to play out in the present in both subtle and overt ways. The death penalty stands out as the starkest example of the racial inequalities that course through the criminal justice system. In her memorable requiem to lynching victims, Billie Holiday sang that, “Southern trees bear strange fruit.” Racial disparity in the application of the death penalty is the cruel harvest of the history of lynching in the United States. This legacy of injustice indeed is a strange and bitter crop.

FOR MORE INFORMATION

To learn more about death penalty issues, go to www.naacpldf.org; and www.soros.org/initiatives/justice

Death penalty opponents protest against a scheduled execution, Dover, Delaware, 2005.



A New Fight To Get Voting Rights for All Americans

Deborah Goldberg, director of the Democracy Program at the New York University law school's Brennan Center for Justice, describes growing efforts to restore voting rights to Americans who have paid their debt to society and want to participate in American democracy.

DEBORAH GOLDBERG

"VOTING RIGHTS ARE ESSENTIAL to anybody," said Robert Jones, a college-educated, Navy veteran who works and lives in Kentucky with his young son. Despite his dedication and commitment to education, country, and family, Jones will never be able to exercise his essential democratic right to vote. This is because Kentucky, like Virginia, takes the vote away indefinitely from anybody convicted of a felony, even if, like Jones, they fully served their sentence years ago.

"Just because you've been convicted of a crime doesn't mean that you can't be rehabilitated or get yourself back together," continued Jones. "Particularly with myself, I feel like I've changed my life and I should be able to be a part of the election process."

Yet instead of offering a chance at civic redemption to those who have served their time, the governor of Kentucky recently made it harder for people with felony convictions to regain their fundamental voting rights.

In Kentucky, as in every other state that disenfranchises people after they serve their sentences, individuals can petition the governor for a pardon. In 2004, Kentucky's governor institutionalized additional administrative procedures and essay requirements to the pardon process that make it little short of a literacy test for voting. Both applications for pardons and approvals have steadily declined since the governor's order.

Kentucky and Virginia are the only states that require individualized grants of clemency before any person with a felony conviction can regain the right to vote. But their bans are part of a larger patchwork of state disenfranchisement laws that deny at least 5.3 million people the right to vote in a nation that often promotes itself as a beacon of democracy.

Formerly incarcerated artist Steve Nighthawk holds his niece in front of a voter registration billboard he designed, Reno, Nevada, 2004.

“State disenfranchisement laws in the United States deny at least 5.3 million people the right to vote in a nation that often promotes itself as a beacon of democracy.”

Approximately three-quarters of these disenfranchised citizens have served their sentences, been released from prison, and are living, working, and paying taxes in their communities. One in eight is a veteran like Jones. And as an African American, Jones is also a member of a group that has a 13 percent disenfranchisement rate, seven times the national average. Studies show that other communities of color, including Latinos, are also disproportionately affected by felony disenfranchisement.

Recently, the United Nations Human Rights Committee charged that U.S. disenfranchisement policies are discriminatory and violate international law. No European democracy indefinitely disenfranchises everyone with a felony conviction, as Kentucky and Virginia do. Seventeen European countries, as well as Australia, Canada, Israel, and New Zealand, guarantee every citizen the right to vote, even while incarcerated. In the United States, only Maine and Vermont allow prisoners to vote, as does Puerto Rico.

Between the extremes of blanket permanent disenfranchisement in Kentucky and Virginia and universal suffrage in Maine and Vermont is the crazy quilt of state laws affecting the voting rights of people with criminal records. In 34 states, people lose their right to vote not only while in prison but also while on probation or parole. In 8 states, the duration of disenfranchisement depends upon the nature of the offense or the number of convictions.

The inconsistency of state felony disenfranchisement laws and restoration procedures creates confusion among elections officials and citizens alike. In Wisconsin—where people convicted of felonies cannot vote while on parole or probation—there have been occasions when parolees or probationers who thought they had the right to vote were allowed to participate in elections by officials unaware of the law. Elsewhere, studies have shown that people in and out of government often believe that individuals with felony records are never eligible to vote, even when state law actually restores voting rights after incarceration or upon discharge from probation or parole. This misinformation leads to de facto disenfranchisement of untold numbers of eligible voters in addition to the millions disenfranchised by the law.

Americans on both sides of the aisle are increasingly recognizing that restoring the vote to citizens with felony convictions is good not only for democracy but also for public safety. Republican Jack Kemp is an outspoken advocate for voting rights: “I am . . . convinced the ability to fully participate as a productive citizen—including becoming a full voting member of society—reduces recidivism and is an incentive for prisoners to change their behavior for the good.” In a nation with embarrassingly low voter turnout, participation in the political process should be strongly encouraged. Moreover, voting connects people to their communities, which can help them avoid falling back into crime.

Since 1997, 18 states have acted to restore the vote to people with felony

convictions or to eliminate some of the problems with de facto disenfranchisement. Delaware, Florida, Iowa, Maryland, Nebraska, and New Mexico have ended universal lifetime disenfranchisement.

These changes reflect hard work by grassroots activists throughout the nation. With support from Open Society Institute grantees such as the American Civil Liberties Union, the Brennan Center, and the Sentencing Project, local coalitions are ratcheting up their efforts to promote voting rights restoration. These advocates are educating affected communities about their rights, promoting support for the issue in national and local media, and pressing for full compliance with laws that extend the franchise to at least some people with felony convictions.

In April 2007, Governor Charlie Crist, a Republican, and his cabinet changed the Rules of Executive Clemency in Florida, ending a voting ban that disenfranchised nearly a million people who had fully served their sentences. According to best estimates, the changes potentially restore voting rights to nearly 500,000 people with felony convictions. Simplifying the restoration procedures and securing voting rights for the other half million disenfranchised people unaffected by the new rules will be a challenge for the Florida Rights Restoration Coalition, which has been leading the fight for reform in that state.

In November 2006, citizens in Rhode Island passed a referendum amending that state’s constitution to restore voting rights to probationers and parolees. Now it will be the job of the Family Life Advocacy Center’s Rhode Island Right to Vote campaign, which led the re-enfranchisement effort, to inform the 15,000 affected eligible voters about their new rights and to encourage them to participate in the political process.

New York has recently seen major improvements in the administration of its felony disenfranchisement law, which deprives prisoners and parolees of the right to vote. After two studies in 2003 and 2005 documented persistent compliance problems among county elections boards, activists persuaded the State Board of Elections to implement mandatory education programs for local officials. In addition, the New York City Board of Elections has corrected information on its website and in telephone messages in accordance with advocates’ suggestions.

Throughout the nation, people with felony convictions, good government groups, faith-based organizations, and other members of broad-based coalitions are developing new strategies to expand the franchise. With more capacity and funding, these champions of universal suffrage will provide a new political voice in states that continue to silence their own citizens.

FOR MORE INFORMATION

To learn more about disenfranchisement issues, go to www.brennancenter.org; www.sentencingproject.org; and www.restorethevote.org

Locked Up, But Still Counted:

How Prison Populations Distort Democracy

Peter Wagner, a 2003–2005 Soros Justice Fellow and current executive director of the Prison Policy Initiative, examines how incarcerated populations are used to boost and distort the power of politicians in districts containing prisons.

PETER WAGNER

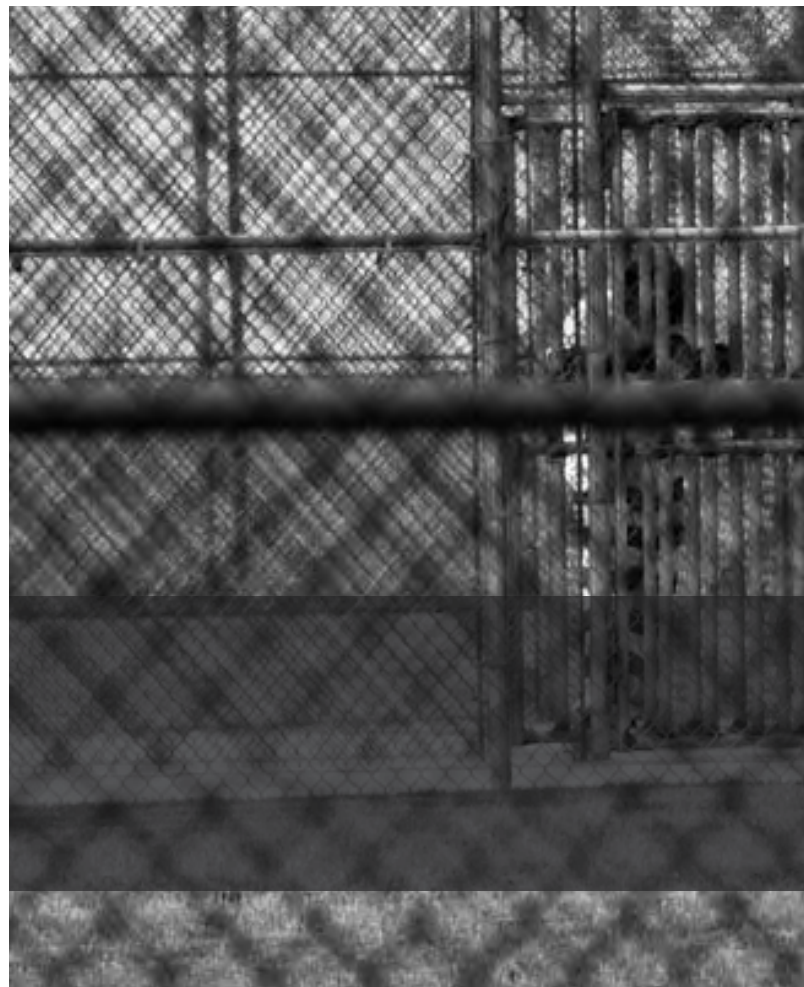
A 200-year-old glitch in the U.S. census is causing an increasingly serious problem for American democracy. Members of the booming U.S. prison population continue to be counted as residents of the city or town where the prison is located, even though they don't vote, pay taxes, or do anything else that would make them active citizens in the community outside the prison's walls.

This arrangement may have made sense to the founding fathers more than two centuries ago when there were few prisons and few uses for the census. By 2007, however, that has all changed. Almost 1 percent of the American adult population—and 3.6 percent of the black adult population—is temporarily behind bars, and the census has become a crucial tool for making important decisions ranging from where to build schools and hospitals to how to draw voting districts. The impact of counting people in prison in the wrong place is now simply too big to ignore. Increasingly, the practice of counting the prison population as residents in communities with prisons is distorting democracy at the state and municipal levels and fueling prison expansion projects at the expense of other forms of economic development.

According to a Prison Policy Initiative analysis of 2000 U.S. census data, there are 21 counties where at least 21 percent of the reported census population is actually composed of incarcerated people from outside the county. In 173 counties, more than half of the black population reported in the census is incarcerated. Fifty-six counties that were actually losing residents and in serious distress were recorded by the census as growing because they had opened prisons during the previous decade.

Along with distorting government priorities, crediting large portions of a population to the wrong communities makes drawing fair legislative districts impossible. Because people in prison cannot vote and remain legal residents where they lived prior to incarceration, counting them as residents in the district where they are imprisoned creates artificial populations that increase the voting strength of the prison district's real residents and dilute the voting strength of residents in other districts. In New York State, seven rural state senate districts with large prisons would not meet the U.S. Supreme Court's minimum population requirements without counting the prison population as local residents. Four of those prison-district senators sit on the powerful Codes Committee and oppose reforming the state's draconian Rockefeller drug laws, which boost the

state's prison population by mandating harsh penalties. The inflated populations of these senators' districts give them political power and little incentive to consider or pursue policies that might reduce the numbers of people sent to prison and the length of time they spend there. Republican New York State Senator Dale Volker, boasts that he is glad that the almost 9,000 people confined in his district cannot vote because "they would never vote for me."



In New York, the state legislature relied on 2000 census data to update district boundaries and wound up drawing one legislative district in which 7 percent of people were in prison. A similar situation in Texas resulted in one district where 1 out of every 8 people was in prison. In Montana, a district padded its population by 15 percent with a prison population imported from other parts of the state. This means that every group of 85 residents who live near the prison is given the same say over state affairs as 100 residents elsewhere in the state.

The most visible support for changing the way the Census Bureau counts people in prison is coming from urban areas like New York City and Chicago that see large percentages of their population sent off to remote prisons. Yet some of the strongest support for reform is coming from rural communities that have prisons and need Census data to draw legislative districts. Because county legislative districts tend to be small, a large prison can dominate the district and dilute the votes of residents elsewhere in the county. For example, the residents of St. Lawrence County, New York, who happen to live near a state prison have 25 percent more say over the future of their county than people who do not live next to the prison. Tired of how a prison distorted the county's districts, people in St. Lawrence County signed a petition to stop the inclusion of prison populations in local districts. After the petition effort failed, county voters used local elections to throw out most of the incumbents responsible for the prison population district gerrymandering.

Senator Eric Schneiderman, a Democrat from New York City, is leading the effort in the New York State Senate for reform. "We need to deal with

this, not just as a political issue, but as a moral issue," he recently told *City Limits*. He went on to explain why this issue matters in his district: "Working in the legislature, we look at poor communities, like the one I represent in Washington Heights: people tend to have fewer resources for their schools, fewer resources for transportation, less access to health care. Our constituents are told to get into the political process and fight for change, and yet the same state actors dilute their vote."

A relatively simple solution would be for the Census Bureau to collect home addresses rather than institutional addresses for people in prison in the next census. In the past, the bureau has updated its method of counting students, missionaries, overseas Americans, and other groups as changing demographics and changing needs for data demanded it. Yet the bureau moves slowly, and even though the 2010 census is three years away, time for reform is limited because the bureau has already begun planning the count. A number of states are taking steps to resolve the problem on their own. Bills are currently pending in New York and Illinois that would collect the home addresses of incarcerated people in those states and then adjust the federal census data when it arrives. This is not an ideal solution, but it is a viable option for some states and could alleviate the political distortions that come from counting transplanted prison populations as local residents.

FOR MORE INFORMATION

To learn more about the politics of prison populations, go to www.prisonpolicy.org. For more on OSI activities, visit the Gideon Project and Sentencing and Incarceration Alternatives project at www.soros.org/initiatives/justice.

Maximum security inmates peer through prison fences, Parchman, Mississippi, 2002.



“Inflated populations created by prisons increase representatives’ power; giving them little incentive to reduce the numbers of people sent to prison and the length of time they spend there.”

Making Development a Source for Inclusion, Not Resegregation

Executive director of Ohio State University's Kirwan Institute for the Study of Race and Ethnicity, John Powell, and Maya Wiley, director of the Center for Social Inclusion, describe the evolution of U.S. forms of segregation driven not by overt discrimination and racial intimidation, but by policies pursued by housing and development institutions.

FIVE DECADES AFTER THE IMPORTANT civil rights gains of the 1950s, the United States is undergoing subtle but substantial racial resegregation. It is not the segregation of "Whites Only" signs and Jim Crow laws. On the surface, the country is far too tolerant and demographically diverse for those kinds of ugly, blatant practices.

No, the resegregation of the United States is driven by the complex interaction of various institutions and policies that produce outcomes offensive to fundamental American values like equality and justice. This quiet, institutionally driven form of discrimination that has descended upon the country is known as structural racism.

Until recently, civil rights victories and a sense of increased tolerance had helped mask the realities of resegregation for many Americans. Then the levees failed in New Orleans. The rush of flood waters swept the faces of thousands of poor people—mostly black—onto TV screens across the world, challenging notions of a uniformly prosperous and inclusive America in which race was no longer significant.

Looking beyond the pain and anger prompted by the devastation in New Orleans, it becomes clear that neither overt racism nor personal choice can fully explain the concentrated, racially identifiable poverty that is thriving in America. Instead, a more convincing explanation for the growing number of segregated and marginalized communities like those in New Orleans can be found in the seemingly mundane policies and practices that constitute structural racism: zoning laws, land use policies, school boundaries, taxing structures, and the location of low income housing.

Take zoning and land use, for example. By 1990 two-thirds of the metropolitan population lived outside the central city in 168 American metropolitan areas, compared to 1950, when 60 percent lived in city centers. This shift was driven by federal mortgage subsidies implemented by the Federal Housing Authority and the Veterans Administration over the last 60 years that substantially expanded home ownership, although almost exclusively in the form of white suburbs. These emerging white suburbs began to adopt "exclusionary zoning" policies, which blocked the development of apartments and affordable housing.

White suburbanization has also meant that public resources and investments have flowed away from cities and toward suburbs. For example, fed-

eral transportation block grants of the 1980s generally turned into support for suburban commuters to get to city jobs.

Meanwhile, cities and their poor populations, particularly people of color, have been largely excluded from the benefits of these federal programs, and have suffered as more affluent, often white, city dwellers moved to the suburbs and the tax base for city schools and infrastructure shrank. The resulting resegregation of American society has created communities of color marked by high poverty rates, disinvestment, and exclusion from development policies and activities.

Structural racism has also hindered public school desegregation efforts. Communities made up almost exclusively of one racial group or another have reproduced racial segregation in public schools. By the 1990s school segregation had increased to the point that roughly 2 in 3 white or black students would have to transfer in order for metropolitan school districts to become fully integrated. The typical black student attends a school in which 7 in 10 students are poor, while the typical white student attends a school in which 3 in 10 students are poor.

Why have antidiscrimination laws not solved these problems? Despite significant legal victories like outlawing segregation in the schools, the policies of institutions such as housing authorities and business and financial organizations perpetuate segregation. *Brown v. Board of Education* was an important legal victory for the civil rights movement, but suburbanization and housing segregation have allowed whites to flee school integration by crossing the border from city to suburb, to a different school district. Over 50 years ago, the U.S. Supreme Court's *Brown v. Board of Education* ruling embraced the idea that school integration could help address blatant racism and segregation. Now, with its recent decision to limit voluntary school integration efforts in Washington State and Kentucky, the Court has demonstrated its waning interest in addressing the resegregation and racial disparities that structural racism has fostered in public schools.

Some have argued that despite setbacks in areas such as school integration, people of color have widely benefited from civil rights gains and that continued racial segregation is more of a class issue. But black poverty and white poverty look different. A white poor family with a \$15,000 income often has \$10,000 of asset wealth (home equity, stocks, and or bonds). A black



Children play in front of a house slated for affordable housing but eventually bought and sold by a private developer, Brooklyn, New York, 2000.

“The rush of flood waters swept the faces of thousands of poor people—mostly black—onto TV screens across the world, challenging notions of a uniformly prosperous and inclusive America in which race was no longer significant.”

poor family at the same income level usually has zero asset wealth. America’s history of racial discrimination against people of color and minor privileges extended to poor whites has resulted in differential poverty, not just identifiable classes. Simply put, whites have had more access to homeownership, housing, and other public investment than poor people of color.

Despite its seemingly entrenched nature, structural racism can be challenged. The Center for Social Inclusion (CSI) and the Kirwan Institute, both OSI grantees, have worked to help communities understand and challenge structural racism.

In Columbia, South Carolina, blacks have high rates of home and land ownership, particularly in rural areas. But environmental groups, concerned with the consumption of open space, have fought policies that appear to be weak at stopping sprawl, which could make it more difficult for the black community to produce sustainable economic opportunities in their neighborhoods. Working with black community leaders to promote a community planning vision and the policies necessary to carry it out, including environmental sustainability, CSI is supporting community-based participation and advocacy.

The Kirwan Institute is researching the impact of public housing policies in Baltimore and supports the American Civil Liberties Union’s landmark suit, *Thompson v. HUD*, on behalf of 14,000 other low-income families. The

families contested the city’s plan to demolish housing projects in the city and rebuild all units in the same segregated, economically depressed locations. According to the Kirwan Institute’s research, approximately 85 percent of America’s subsidized housing units are found in high poverty neighborhoods. One out of three housing units is in an “extreme high poverty” neighborhood.

A society that engages and uses its resources to invest in all of its communities is a fairer and richer society. All communities, including white communities, benefit from targeted investments to help segregated, marginalized communities. The emergence of structural racism will require advocates for racial justice to go beyond traditional legal defense and develop new strategies to secure opportunities for historically marginalized communities in America. By increasing understanding among community advocates, public officials, and civil society and business leaders about how seemingly benign institutions and policies produce discriminatory outcomes, advocates for racial justice can prevent structural racism from perpetuating the kind of suffering and injustice that “Whites Only” signs and Jim Crow laws once caused.

FOR MORE INFORMATION

To learn more about structural racism and how communities can respond to it, go to www.kirwaninstitute.org and www.centerforsocialinclusion.org

How the Intent Doctrine Put a Deep Freeze on Racial Justice

The president and the director of law and public policy at the Equal Justice Society, Eva Jefferson Paterson and Kimberly Thomas Rapp, review the emergence of the “intent doctrine” and its stifling effect on efforts to advance racial justice in the United States.

EVA JEFFERSON PATERSON AND KIMBERLY THOMAS RAPP

HOW CAPABLE IS THE AMERICAN legal system of righting the wrongs of discrimination and delivering racial justice? Not too long ago the courts, particularly the U.S. Supreme Court, played central roles as engines of racial progress by making decisions and supporting laws that confronted discrimination. Now, proving race discrimination in court has become very difficult—even for the most talented, creative, and aggressive litigators. Most recently, in 2007, the Supreme Court’s 5–4 decision in setting new limits on the use of race for voluntary integration efforts in Washington State and Kentucky further confirmed the Court’s unwillingness to take strong action against enduring segregation in America. Much of the reasoning that shaped the recent decision can be traced to a single Supreme Court ruling just over 30 years ago, *Washington v. Davis*.

The Supreme Court’s *Washington* decision in 1976 effectively gutted the power of the nation’s Constitution to protect Americans against discrimination. The Court held that plaintiffs alleging racial discrimination must show that the challenged government act was motivated by racially discriminatory intent. Known as the “intent doctrine,” the Court’s standard places an exceptionally high burden on victims of discrimination who seek redress under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution.

The fundamental principle that all people are entitled to equal protection under law is the heart of U.S. civil rights law. The 14th Amendment was part of a trilogy of laws passed after the Civil War to rid the nation of 200 years of systemic discrimination that deliberately denied the inherent equality of all human beings.

However, the Supreme Court limited the reach of the laws, particularly with the 1896 *Plessy v. Ferguson* decision that generated the “separate but equal” doctrine, which held that groups could be segregated as long as all had equal opportunities to pursue such basic needs as education, employment, and housing. For more than five decades, “separate” helped entrench and strengthen racial segregation in American society, especially in the South, while “equal” was never realized since minorities, particularly African Americans, did not have the same opportunities as whites did to obtain education, housing, and employment.

Increasing pressure for the United States to reconcile its denunciation of Nazism and Communism abroad with its maintenance of an oppressive racial caste system at home helped pave the way for the Supreme Court’s historic 1954 *Brown v. Board of Education* decision. With *Brown*, the Supreme Court held that “separate is inherently unequal.” The decision revitalized the heart of civil rights law by allowing for a broader interpretation of the 14th Amendment, and renewed the hope of achieving full racial equality.

At the same time, Congress passed groundbreaking legislation increasing legal protections and equitable remedies for those who had suffered discrimination. Laws on civil rights, equal pay, voting rights, fair housing, and the treatment of those with disabilities sought to place people on equal footing in employment, contracting, housing, voting, and public accommodations.

Just as this new era of progressive law began to take hold, changes in the composition of the Supreme Court in the 1970s triggered a regression that reverberates today. *Washington v. Davis* was decided shortly after two conservatives, Chief Justice Warren Burger and Associate Justice William Rehnquist, joined the court. Departing from previous decisions, the Court articulated the intent doctrine, requiring victims of discrimination to prove that a government actor actually intended to discriminate.

With this reasoning, the United States Supreme Court distinguished itself from its counterparts in most of the world’s Western-based legal systems. Canada has rejected intent as an element of discrimination, finding it to be an insuperable barrier to victims seeking a remedy. South African courts have also held that proving intent is not required to prove discrimination; instead, a plaintiff must demonstrate that the action was unfair. The European Union recently recognized that discrimination includes not only direct acts by someone knowingly discriminating against another, but also indirect acts that are not motivated by overt prejudice, but nonetheless have a discriminatory result. Additionally, international treaties such as the International Covenant on Civil and Political Rights prohibit all discrimination and guarantee equal protection against discrimination.

While the Supreme Court has taken little notice of international developments regarding intent, historically it has shown a tendency to consider



“Just as a new era of progressive law began to take hold, changes in the Supreme Court in the 1970s triggered a regression that continues to reverberate today.”

Affirmative action supporters rally outside the U.S. Supreme Court, Washington, D.C., 2003.

sociological research on discrimination when making decisions. Much of the strength for the arguments that won the *Brown* decision came from the litigation team's successful use of social psychology and research data.

Perhaps it is even more important now than in the days of *Brown* that social science evidence be used to analyze the many subtle forms of discrimination that have evolved over the last half century. These forms often reside in facially neutral institutional practices and policies that have a discriminatory impact. They also occur without the intent of evil-minded individual actors, as a result of subconscious stereotyping and group-biased decision-making at multiple levels in American society.

The key to restoring the power of American courts to confront contemporary forms of discrimination and racial injustice lies in overturning the intent doctrine. As long as it remains a central tenet of equal protection jurisprudence, all but the most overt discrimination will be left unchallenged.

The Equal Justice Society (EJS), an OSI grantee, has spent the last several years working with social scientists, legal advocates, communications experts, and activists to develop and execute innovative legal theories and strategies to counter the intent doctrine and eliminate the conservative bias of our legal system. Eliminating the intent doctrine is a long-term comprehensive strategy that requires deliberate coordination within and

between the legal and nonlegal fields. For example, EJS brought together social scientists and lawyers to discuss strategies for litigating intent in a housing discrimination case brought by Legal Services of Northern California on behalf of migrant workers. EJS also brought in social scientists to assist plaintiffs' lawyers in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection* in fashioning deposition questions that revealed implicit bias as an alternative to racial animus to prove discrimination. EJS has also sponsored interactive workshops for attorneys and summer associates to educate litigators and service-providers on the way racial discrimination actually occurs and is perpetuated within society. American legal history demonstrates that Supreme Court definitions of what does or does not constitute discrimination can endure for decades and then be quickly reversed. By methodically developing strategic, coordinated legal theories and bringing them into the courtroom, the classroom, and the halls of Congress, the Equal Justice Society aims to restore the potential of U.S. courts to dispense racial justice and fulfill the promise of the 14th Amendment for all Americans.

FOR MORE INFORMATION

More information about the intent doctrine and its impact on American law and society is available at www.equaljusticesociety.org



Elementary school students prepare their classroom for move to new school, Chicago, Illinois, 2000.



OPEN SOCIETY INSTITUTE

400 West 59th Street
New York, NY 10019 USA
www.soros.org

NON-PROFIT
ORGANIZATION
U.S. POSTAGE
PAID
NEW HAVEN, CT
PERMIT NO. 990

ADDRESS SERVICE REQUESTED