

CRIME CONTROL AND SOCIAL JUSTICE

THE DELICATE BALANCE

**Edited by Darnell F. Hawkins,
Samuel L. Myers, Jr., and Randolph N. Stone**

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Preface

This book has been a long time in the making. Some of the chapters were initially solicited more than six years ago. Such a lengthy delay is not uncommon in the world of edited book publishing; however, it does increase the probability that contributed work will be dated when finally published. We are convinced that the passage of time has actually contributed to the salience and importance of most contributions to this volume. The themes and issues explored in the present volume are topics of perennial concern and debate. Yet, many significant and widely publicized events and developments that have occurred since the mid-1990s, when this project was conceived, have no doubt heightened scholarly and public interest in the problems examined by contributors to the volume. These include (1) several instances since 1995 of hate crime and lethal violence aimed at African Americans, Asian Americans, Jews, and Latinos; (2) repeated use of deadly force by the police against African Americans in several major American cities and resulting protests and violence; (3) continuing debate regarding the fairness of the death penalty amid a resumption of federal executions and accelerated state executions; (4) a debate on the merits of racial profiling that became a campaign issue in the 2000 presidential election and continues to affect race relations and perceptions of racial justice; and (5) a peaking of the nation's incarceration "binge" with more than 2 million persons currently being detained in the nation's prisons, jails, and juvenile facilities.

The title of the volume represents our belief that the "get tough on crime" policies enacted in the United States during the last three decades of the twentieth century pose a significant challenge to the nation's ongoing struggle for social justice and human and civil rights. It also reflects our belief that crime and criminal victimization are themselves social ills that also threaten basic human

rights. Particularly in a society that continues to be characterized by much racial, ethnic, and socioeconomic inequality, the balancing of the goals of controlling crime and assuring social justice is extremely difficult and poses distinct challenges for communities of people of color. In a post-civil rights America, that task is also increasingly more complex. This volume probes various dimensions of this multifaceted set of social problems. As intended, its chapters represent a diversity of disciplinary views, including contributions from criminologists, economists, geographers, legal scholars, political scientists, and sociologists. All have provided insightful and informative reflections on the volume's overall theme—balancing crime control and social justice.

Furthermore, at the beginning of an era that may come to be known best for unprecedented global efforts to fight terrorism, they remind us of the delicate balance in protecting both our physical safety and our democratic ideals.

We thank the authors and the publisher for their patience as this project unfolded. We are grateful to Martha Jacob of the University of Illinois at Chicago for her editorial assistance in reviewing earlier and final drafts of the manuscript. We also acknowledge the clerical assistance provided the editors by Mildred McGinnis of the University of Illinois at Chicago and by Judy Leahy of the University of Minnesota.

Introduction

Samuel L. Myers, Jr.

Is it just to incarcerate disproportionate numbers of African-American males? Is it fair to deny innocent children strong, stable families by punishing drug and other nonviolent offenders with imprisonment? The United States spends large sums of money on crime control, which ultimately results in greater proportions of nonwhite than white youth being arrested, prosecuted, convicted, and imprisoned. Is this equitable, when social expenditures could focus instead on improved schooling, education, training, and employment opportunities? What is "just" about a criminal justice system that tries a 14-year-old Mexican-American youth—an unarmed accomplice to a robbery in which a store clerk was murdered—as an adult, convicts him, and sentences him to 25 years to life in a California prison while it tries a 14-year-old Anglo—who took his father's gun and murdered his mother over a dispute about cookies—in juvenile court and sentences him to a juvenile detention facility from which he will be eligible for parole before he reaches maturity?

What is just? What is fair? What is equitable? These questions occupy many of the chapters in this volume. And rightfully so, because such sentences do occur within the criminal "justice" system. It is appropriate to ask whether this system is fair or just.

But analysts often disagree over what constitutes fairness, what makes for social justice. Should a justice system be deemed fair if all persons are treated the same, as is the objective of sentencing guidelines that would extend the same prison terms to all persons convicted of identical offenses with the same level of culpability? Or, perhaps, is it fair if each person has the same opportunities to enter or avoid entry into the system—even if once in the system they are treated according to different rules or criteria? The chapters in this volume do not re-

solve these issues of fairness or justice. But they do offer an alternative lens through which a policy analyst might view the outcomes of crime control.

In addition to asking whether the system is fair or just, it seems reasonable also to ask whether it is efficient. Does crime control really control crime? Doesn't society ultimately pay a price for pulling large numbers of black, Hispanic, and other disadvantaged youth out of the labor force and into the prisons and jails? Do the costs of incarceration go far beyond the social goals of deterrence, incapacitation, or rehabilitation? Could sentencing reforms that seek to increase penalties for drug offenses or for repeat offenders have adverse social consequences? Could attempts to shift young violent offenders into the adult criminal justice system contribute to increased harm either to the children themselves or to society in general?

Put differently, if one had the choice between two systems that shared the same measures of fairness or justice but differed substantially in how well they worked, how efficiently they operated, how costly they were, and how many adverse social impacts arose, which would one prefer? It might be important to know whether, for example, punishment by incarceration really does what it is supposed to do. Alternative policies, such as employment policies or improved schooling, might be examined to see if they do the job just as well, perhaps even less expensively.

The variety in this volume will help the reader to appreciate the underlying tension between the goals of equity and the goals of efficiency within the criminal justice system. The chapters in Part I, "From Cradle to Grave," present this contrast most starkly. These essays deal with the political economy of criminal justice policy from diverse perspectives. Barry Krisberg's "The End of the Juvenile Court: Prospects for Our Children" and Harold Votey and Llad Phillips's "Crime, Youth, and the Labor Market: Are We Any Closer to Answers?" review prior research. William Sabol and James Lynch's innovative econometric analysis in "Assessing the Longer-run Consequences of Incarceration: Effects on Families and Employment," Nolan Jones's review of legislation in "Three Strikes and You're Out: A Symbolic Crime Policy?" and Todd Clear and Dina Rose's theoretical discourse in "Individual Sentencing Practices and Aggregate Social Problems" examine this tension between equity and efficiency in criminal justice policies, while exposing important unintended consequences of punitive criminal justice policies.

For example, Todd Clear and Dina Rose suggest that a concentration of imprisoned persons—often poor, disadvantaged, and minority—from specific census tracts or neighborhoods can contribute to the weakening of informal mechanisms of social control. That is, crime control that decimates local communities or neighborhoods is not really efficient. They cite statistics on a single block in East New York where \$3 million is spent annually on processing citizens through the criminal justice system. This results in a critical form of disinvestment in the community and carries adverse consequences. They suggest that crime policies should include social investments in high crime areas, in order to return

some of the money spent on crime control to a community. Implicit in this critique is the unfairness of spending huge sums of money on crime control in very well defined places—largely to pay the salaries of criminal justice workers who do not live in those places—and leaving those places no social capital to sustain themselves.

Another example of this tension between equity and efficiency can be seen in Votey and Phillips's essay. They note that while little has changed in the past thirty years since their pioneering research showed that improved employment opportunities reduce crime among youth, there are substantive differences in how these factors work for white and for nonwhite young people. Votey and Phillips, whether intentionally or not, have exposed the folly of a race-neutral employment policy as a crime-fighting tool. A policy that fails to appreciate the differences in the labor force participation rates and employment experiences of young African-American males (who are often discouraged workers when they are out of the labor market) and white males (who are often in school when they are out of the labor market) may be ineffective. But a policy that focuses specifically on African-American males who are out of the labor market at the expense of, say, African-American males who are looking for work or unemployed seems on its face to be both discriminatory and unfair. Why should the tax dollars go to those who have withdrawn from the market completely, rather than to those who keep trying to find a job? The classic analysis by Votey and Phillips, though, suggests that a dollar spent on reducing unemployment rates among young black males will have a smaller impact on crime rates than would an identical expenditure on increasing labor force participation rates. In short, asking whether a system of punishment via incarceration achieves goals of reducing crime or deterring criminals also requires that we ask whether some people are disproportionately affected by these policies.

Part II, "Gangs, Drug Law Enforcement, Racial Profiling, and Social Justice," makes more explicit the racial dimensions of the efficiency-equity trade-off. African Americans—in particular, African-American males—are disproportionately found in the criminal justice system. From arrest to release on parole, blacks are many more times likely to be entrapped in the criminal justice system than are whites. Policies such as sentencing reforms that abolished parole or created determinate sentencing have had ambivalent impacts on overall racial disproportionality. Consider parole. Reforms underway promise to improve how prisoner reentry into communities is managed. With the abolition of parole in many communities, concerns have arisen about the large numbers of ex-offenders who are being returned to their neighborhoods with little support or accountability. Will attempts to reinvent post-prison management systems reduce or increase racial disparities? How will we know? How will we measure and detect possible racial bias in managing prisoner reentry?

Most clearly indicative of the pull between the norms of social justice and the dictates of law enforcement efficiency is the broad problem of racial profiling, so brilliantly detailed in Angela Davis's "Race, Cops, and Traffic Stops." After

reviewing and critiquing the constitutional issues and case law underlying racially biased methods of conducting traffic stops, Davis provides insightful documentation on the real costs associated with violation of the rights of innocents. One can paraphrase her conclusions in these stark economic terms: While police often justify their use of racial profiling (either explicit or through the use of markers that have racially disparate impacts) as efficient law enforcement, there are substantial secondary costs to victims of profiling. Innocent African Americans stopped for no reason other than that they are African Americans—or that they match markers that are highly correlated with race—often suffer indignities, embarrassment, humiliation, and psychological and emotional damage that far outweigh the putative benefits of increased apprehension of drug dealers. Thus, the issue concerns not only the fairness of racial profiling pitted against its efficiency in traffic stops, but also whether appropriate account has been taken of all relevant direct and indirect costs of profiling.

Nearly the same issues arise in racial profiling in the U.S. Customs Service, with the added nuance that probable-cause expectations need not be met, as Lee E. Ross and Simon Adetona Akindes discuss in their chapter, "In Search of Probable Cause: U.S. Customs, Racial Profiling, and the Fourth Amendment." Research in this area poses this substantive dilemma: Law enforcement personnel never know what they will find when they begin a search. The authors contend that the U.S. Customs Service often engages in a practice of "looking and searching for reasons to search further." What matters here is not so much whether searches occur at all or whether race is used to create markers for initiating searches. What matters is the extent of searches, especially in light of the special provisions that deem the standards for Fourth Amendment protections to be, in the authors' words, "somewhat relaxed in comparison with other enforcement agencies." What matters is that ultimately persons of color are far more likely than others to be subjected to the most humiliating and most intrusive of searches.

Other examples of racial profiling include efforts to target likely gang members or initiatives designed to provide tightened airport security. Stacey Leyton in "The New Blacklists: The Threat to Civil Liberties Posed by Gang Databases" reviews the explosive growth in the use of gang databases at the state and federal levels. While these computerized sources of information on alleged gang members promise to increase the speed of detection and apprehension of suspected members of criminal enterprises, they also pose significant problems of fairness. Leyton contends that information contained in these databases is often inaccurate and that the criteria for inclusion go far beyond those mandated by various state penal codes. Old information may not be purged, updates are not consistently conducted, and the standards for data entry are not consistent, according to Leyton. Other policy concerns are related to the fact that markers used in the creation of the databases—such as dress, mannerisms, symbols, or tattoos—are not restricted to members of gangs. They often are more generically related to inner-city or racial minority group membership. The effect, then,

is that racial minority group members are overrepresented in gang databases, which are, in essence, blacklists.

Leyton's conclusions contrast with those of Marjorie S. Zatz and Richard P. Krecker, Jr.'s "Anti-gang Initiatives as Racialized Policy." Because the war on gangs appears to be race neutral, one must look carefully at the actors within the system to determine whether racially disparate outcomes can be attributed to particular anti-gang policies. Anti-gang initiatives can have discriminatory impacts, according to Zatz and Krecker, *if they are implemented*. How these disparate impacts come about requires an understanding of the actions, attitudes, and perceptions of many stakeholders within the criminal justice system. Zatz and Krecker interview judges, prosecutors, defense counsel, and probation officers. They point out that anti-crime policies would have a racially disparate impact on persons of color, *if they were followed*. The Zatz-Krecker interviews, however, seem to suggest that the racialized anti-gang policies, in Arizona at least, *were not followed*. The reader is left with this contrast between the Leyton and the Zatz-Krecker chapters: Gang designations disproportionately target juveniles of color for arrest and apprehension, but within the criminal justice system, gang designations are often ignored. What this suggests is that racial bias within any one part of the system can lead to racially unequal outcomes even if the outcomes are not directly tainted by racial bias.

Thus, the tension between efficiency and equity arises indirectly. If anti-gang policies have the potential for generating racially disparate outcomes, but policy makers do not act on these policies, is the outcome any more just? And, if the policy is enforced at only one point along the way—say, by police engaged in apprehension and arrests—is the policy any more or less efficient because at subsequent points the policy is ignored?

Two empirical studies in Part II highlight the conflict between findings in this area. Cassia Spohn and Jeffrey Spears, after reviewing much of the often ambiguous literature on race and sentencing, show that there is no consistent impact of race or ethnicity on drug sentences in three cities chosen for study. After controlling for seriousness of offense, type of drug, and other legally relevant factors, blacks are not more likely to be sentenced to prison or more likely to receive long prison sentences than whites. Hispanics, however, do seem to be disadvantaged. Spohn and Spears conclude that drug punishments may not necessarily be more severe and/or discriminatory for blacks than for whites once they enter the system.

Tracey Meares, in "Simple Solutions? The Complexity of Public Attitudes Related to Drug Law Enforcement," looks not at whether blacks are more likely to be sentenced or to receive longer sentences than whites but instead at attitudes that might affect sentencing policies. Meares examines attitudes toward the legalization of marijuana and toward the harshness of sentences. A "get tough on drug offenders" position is deemed one that both favors harsh sentences and opposes legalizing marijuana. The majority of African Americans, like other Americans, favor the get-tough position, according to Meares's results. However,

substantially more blacks than whites hold ambivalent views of drug policies, a point that Meares suggests may result from the greater involvement of blacks in the criminal justice system.

Taken together, then, these two empirical analyses suggest that there is substantial support even among African Americans for tough drug punishments even if there may be racially disparate impacts—impacts that may well be “explained” by blacks’ greater risk of exposure to drugs in their communities. The question that then evokes the efficiency-equity tension is: Can racially disparate outcomes that appear to be unfair on their face be justified by differential exposure or harm to communities? As Meares concludes, this type of conflict of values—equity versus efficiency—often leads African Americans to be ambivalent about criminal justice policies that have disparate impacts on their communities.

Part III, “Emerging and Critical Perspectives on Crime Control and Social Justice,” includes chapters that force us to reflect on the “delicate balance,” challenging any notion of justice or fairness based on grounds of efficiency. William Chambliss, in his introduction to “Drug War Politics: Racism, Corruption, and Alienation,” brings up a familiar scenario. A young black male is arrested after an illegal search that is both demeaning and conducted with unnecessary roughness. The illegality and the punitiveness of the search reveal its unfairness. The fact that the search culminated in an arrest, presumably with sufficient evidence for conviction, suggests to the police officer that it was both efficient and justified. It is as though the end justifies the means. Chambliss provides this additional perspective:

Current law enforcement policies that concentrate on policing the ghetto not only produce widespread disrespect for the legal system, but they also reinforce the belief that ethnic cleansing is a white conspiracy. This belief is further reinforced by widespread corruption of the law enforcement system that is an inevitable offshoot of the war on drugs. (Chambliss, p. 304)

Although the war on drugs has not succeeded in reducing the production and consumption of illicit drugs, according to Chambliss it has succeeded in “legitimizing the creation of a virtual police state in the ghettos of our cities.” It has also contributed to police corruption and violence, Chambliss writes. These conclusions may indicate that many additional costs are associated with racially disparate administration of drug control policies. There are fundamental costs, alluded to by Chambliss, related to the very support and legitimacy of the criminal justice system.

David Greenberg, in “‘Justice’ and Criminal Justice,” makes the connection between efficiency and notions of justice most clearly. He points out that for some, justice is efficiency. He states, “[C]riminal justice sanctions are often justified on the basis of claims about the technical efficiency of these measures in preventing crime.” But, he also notes that another highly prevalent concept of justice is one that “inflicts costs or pains on wrongdoers.” Research summarized

by Greenberg supports the notion that the level of punishment advocated by many exceeds the level of punishment necessary for optimal deterrence or law enforcement. But perceptions vary by race, with the vast majority of African Americans believing that the criminal justice system is racially biased, while the vast majority of whites disagrees with these conclusions. Greenberg contends, though, that the voluminous evidence showing that racial discrimination in the criminal justice system is not the sole cause of the overrepresentation of blacks demands a new theoretical perspective on the "justice" in criminal justice. We need a better understanding of how racially disparate outcomes may exist without specific race or class bias or, in Greenberg's words, "strong racial or class agendas." This is particularly important in the current era, when overt, explicit forms of racism seem to have diminished even though the racial disproportionality in the prisons and the entire criminal justice system seems to rise unabated. Clues can be found in Greenberg's cogent discussions of the evolution of racial profiling and related criminal justice practices that appear on their face to be race neutral but in fact have racially disparate impacts. Greenberg points to "unconscious stereotyping" and perceptions about justice to help us to better understand racialized patterns of law enforcement.

Richard Quinney, in "Criminology as Moral Philosophy, Criminologist as Witness," forces the reader to return to these unanswered questions: What is fair? What is just? Quinney surveys alternative conceptualizations of justice, from the prophetic to Marxist, capitalist, Buddhist, and socialist humanism perspectives. Pitting the idea of justice that supports and sustains the ruling class against that which supports each individual's self-interest, Quinney forces us to look at how various notions of justice compel us to accept or reject alternative forms of punishment. He offers a peace agenda that calls upon criminologists to be witnesses to the pain and suffering of the oppressed as a prelude to seeking justice.

The "witnessing" approach that Quinney advocates might be regarded by some as passive. Two penultimate chapters unabashedly offer action agendas for approaching justice in the criminal justice world. Wilson Palacios, Chinita Heard, and Dorothy Taylor, in "At a Crossroad: Affirmative Action and Criminology," modestly offer a proposal for expanded affirmative action in law enforcement and legal professions. They note that the continued underrepresentation of African Americans among lawyers and other legal professionals and, in many jurisdictions, among police and sheriff's officers implicates the system that leaves African Americans overrepresented among those arrested, convicted, and incarcerated. Paul Butler goes much further in "Affirmative Action and the Criminal Law." He calls for affirmative action to redress directly the overrepresentation of African Americans in the criminal justice system. This would entail racially representative juries' direct efforts to change punishments that disproportionately imprison blacks and other people of color. His cogent argument stems from the belief that political expediency or public opinion is not the norm for measuring whether a policy is just or fair. Thus, readers who contend that

this proposal—or any other form of affirmative action—is poor public policy because of the difficulties of obtaining significant public support will find little sympathy from Professor Butler.

The final and concluding chapter in this volume is “On the Horns of a Dilemma: Criminal Wrongs, Civil Rights, and the Administration of Justice in African-American Communities,” by Professor Darnell F. Hawkins. This chapter uses critical race theory and other methods to demonstrate that public perceptions and opinions about the overall state of conditions faced by African Americans influence the degree to which racial disparities in the criminal justice system are seen as evidence of racism. Within the context of the previous chapters that reveal the tension between equity and efficiency and the balancing between crime control and social justice, this chapter shows that how (and whether) we see this tension depends on how factual claims about the causes of racial disparities are processed. Are the racial disparities due to racial discrimination or racism? Or, are the racial disparities due to other factors such as differences in underlying criminality, or social and economic conditions? Hawkins shows that the balance between admission of the role of discrimination and racism and conclusions that the disparities arise from other sources has shifted over the years.

An admission that the source of racial disparities in the criminal justice system lies in racial discrimination or racism is an admission of a social justice and equity root of the disparity. A claim that the source of racial disparities in the criminal justice system lies in the inherent criminality of African Americans or is rooted in the devastating social and economic fabric of the lives of African Americans, is a claim that the root of the disparity lies outside of criminal justice unfairness or inequity. Such a claim could easily escalate to an efficiency issue.

These chapters do not ask the reader to agree with the various notions of fairness or justice embraced herein, nor with the specific policies advocated. Rather, they force the reader to reassess the balance between the efficiency goals of criminal justice policies and their equity implications.

This volume will challenge and perhaps even provoke readers. When one thinks of the rationales often provided for racial profiling or for disparate sentences for crack cocaine and powdered cocaine, one will have to think simultaneously of the equity and the efficiency goals of criminal justice. Do we seek to use racial markers because we believe that the cost of securing justice—borne by us all—is lower when such markers are employed? Do we distinguish among different types of drugs because we believe that some drugs have greater social costs than others do? And, if we do embrace these cost-effectiveness criteria in making criminal justice decisions, do we also embrace the unintended costs, the secondary or spillover costs associated with these policies? Do we account for the costs of foregone justice and unfairness at all? Or, do we see justice and fairness—particularly as it relates to racially disparate outcomes—to be something quite different? Are justice and fairness part of our social calculus in seeking criminal “justice”?

Such is the delicate balance that the chapters in this volume seek.

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Part I

**From Cradle to Grave: Families, Youths,
and the Political Economy of Contemporary
Criminal Justice Policy**
