Discrimination in the Criminal Justice System
The facts, public preferences, expert opinions
The Kentucky Council of Churches, 67th Annual Assembly
Lakeside Presbyterian Church, Lakeside Park, KY

Ed Monahan
Public Advocate
October 24-25, 2014
Department of Public Advocacy
Kentucky’s statewide public defense system
Context and complexity
Disparity

Racial Disparity
• “...Exists when the proportion of a racial or ethnic group within the control of the system is greater than the proportion of such groups in the general population.”

Illegitimate Racial Disparity
• “Illegitimate....racial disparity in the criminal justice system results from dissimilar treatment of similarly situated people based on race.”

Reference


Marc Mauer
The Sentencing Project
Facts in Kentucky

African Americans are:
___% of the population (2011)
___% of all arrests (2011)
___% of all arrests for serious crimes (2011)
___% of prison population (2013)
___% of the confined juvenile population (2010)
Facts in Kentucky

African Americans are:

8% of the population (2011)

___% of all arrests (2011)

___% of all arrests for serious crimes (2011)

___% of prison population (2013)

___% of the confined juvenile population (2010)
Facts in Kentucky

African Americans are:

8% of the population (2011)

13.6% of all arrests (2011)

___% of all arrests for serious crimes (2011)

___% of prison population (2013)

___% of the confined juvenile population (2010)
Facts in Kentucky

African Americans are:

- **8%** of the population (2011)
- **13.6%** of all arrests (2011)
- **14.2%** of all arrests for serious crimes (2011)

___% of prison population (2013)

___% of the confined juvenile population (2010)
Facts in Kentucky

African Americans are:

8% of the population (2011)

13.6% of all arrests (2011)

14.2% of all arrests for serious crimes (2011)

24% of prison population (2013)

___% of the confined juvenile population (2010)
Facts in Kentucky

African Americans are

- **8%** of the population (2011)
- **13.6%** of all arrests (2011)
- **14.2%** of all arrests for serious crimes (2011)
- **24%** of prison population (March 2013)
- **31.7%** of the confined juvenile population (2010)
Trends

• Crime rate in US and KY
• Violent crime rate in US and KY
• Incarceration in US and KY
<table>
<thead>
<tr>
<th></th>
<th>US Total Crime Rate</th>
<th>US Violent Crime Rate</th>
<th>KY Total Crime Rate</th>
<th>KY Violent Crime Rate</th>
<th>US Incarceration Rate</th>
<th>KY Incarceration Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>-38%</td>
<td>-31%</td>
<td>-6%</td>
<td>-27%</td>
<td>139%</td>
<td>281%</td>
<td></td>
</tr>
</tbody>
</table>
$22,038 per inmate
In 1971, President Richard Nixon declared a “War On Drugs.”

1984: Sentencing Reform Act (SRA)

Sources: Justice Policy Institute Report: The Punishing Decade, & U.S. Bureau of Justice Statistics
INCARCERATION RATES BY RACE & ETHNICITY, 2010

(Number of people incarcerated per 100,000 people in that group)

<table>
<thead>
<tr>
<th>Race</th>
<th>Rate</th>
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<tbody>
<tr>
<td>WHITE</td>
<td>380</td>
</tr>
<tr>
<td>LATINO</td>
<td>966</td>
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<tr>
<td>BLACK</td>
<td>2,207</td>
</tr>
</tbody>
</table>

What you think
Is justice blind to race?
What do people think?

The NCSC Sentencing Attitudes Survey: A Report on the Findings
Princeton Survey Research Associates International for the National Center for State Courts
July 2006
Public Preferences for Dealing with Crime

The National Center for State Courts (NCSC) Sentencing Attitudes Survey obtained telephone interviews with a nationally representative sample of 1,502 adults living in the continental United States in telephone households. The survey was conducted by Princeton Survey Research Associates International (PSRAI). Interviews were done in English and Spanish by Princeton Data Source, LLC from March 6 to April 9, 2006. Statistical results are weighted to correct known demographic discrepancies. For results based on the total sample, the overall margin of sampling error is ± 3.1%.
Rehabilitation Seen as Important, Prisons Not Up to the Task

B. Attitudes Toward Rehabilitation

Which describes your views about efforts to rehabilitate offenders

- Little can be done: 16%
- Don’t know: 5%
- Many can turn their lives around: 79%
Perceptions of Bias Against Lower Income and Minority Offenders

C. Perceptions of Bias in Sentencing
% who think each group is treated worse

- Hispanics: 40%
- Non-English speakers: 43%
- African-Americans: 46%
- Low-income people: 60%
Broad Support for Alternative Sentencing of Non-Violent Offenders

D. Support for Alternative Sentencing in Non-Violent Cases
*How frequently should it be used instead of prison?*

- Often: 51%
- Sometimes: 37%
- Hardly ever / Never: 10%
- Don’t know: 2%
High Support for Sentencing Reform

G. Public’s Top Sentencing Reform Priorities
% who say each goal is “very important”

- Put more non-violent offenders in treatment/job programs: 61%
- Ensure fairness/equality for all groups: 69%
- Keep violent offenders in prison longer: 72%
- Make sure punishment fits crime: 81%
Why is there discrimination?

• Marc Mauer, The Sentencing Project
• The Law
• The American Bar Association
• The League of Women Voters of KY
• Michelle Alexander, *The New Jim Crow*
• George C. Wright
• Gerald A. Neal
• Right on Crime
Commonly identified causes of racial disparity in the criminal justice system

Marc Mauer, The Sentencing Project

- Higher crime rates
- Inequitable access to resources
- Legislative decisions
- The war on drugs
- Three strikes legislation
- Overreliance on incarceration
- Overt racial bias
Crime and Arrest Rates

Arrests reflect law enforcement behavior in addition to involvement in crime.

Marc Mauer, The Sentencing Project
Differences in Disadvantage

“...differences in disadvantage that explain the overwhelming portion of the difference in crime, especially criminal violence, between White and African American communities.” (Krivo & Peterson, 1995, p. 642)
Racial Disparity as a Function of Criminal Justice Decision Making

- Decisions frequently may include unconscious bias in the use of discretion, allocation of resources, or public policy decision making.
- Examinations of case processing over time also demonstrate that racial disparities in the justice system are cumulative. That is, disproportionate processing at one stage often contributes to widening disparities at succeeding points.
- For example, defendants who are detained in jail prior to trial are more likely to be convicted and receive lengthier prison terms than defendants released on bond (Schnake, Jones, & Brooker, 2010).

Marc Mauer, Addressing Racial Disparities in Incarceration
Ways in which Racial Disparity has been Documented at Various Stages of the Criminal Justice System

- Law Enforcement Practices
- Prosecution
- Sentencing

The “State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause... the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.” A state criminal defendant has a right to a hearing to establish a prima facie case of purposeful racial discrimination that violates Fourteenth Amendment Equal Protection Clause based on the prosecution's use of peremptory challenges to strike members of the defendant's race from the jury venire. Once the defendant has made the prima facie showing, the prosecution must show a neutral explanation for those challenges. Batson “is an explicit and substantial break with prior precedent” because it “overruled [a] portion of Swain.”

The death penalty sentencing of Warren McCleskey for armed robbery and murder was upheld.

The Court said the "racially disproportionate impact" in Georgia death penalty indicated by a comprehensive scientific study was not enough to overturn the guilty verdict without showing a "racially discriminatory purpose."
In a *New York Times* comment eight days after the decision, Anthony Lewis charged that the Supreme Court had “effectively condoned the expression of racism in a profound aspect of our law.”

Civil rights advocate and law professor Michelle Alexander criticized the decision

McClesky v Kemp has immunized the criminal justice system from judicial scrutiny for racial bias. It has made it virtually impossible to challenge any aspect, criminal justice process, for racial bias in the absence of proof of intentional discrimination, conscious, deliberate bias ... Evidence of conscious intentional bias is almost impossible to come by in the absence of some kind of admission. But the U.S. Supreme Court has said that the courthouse doors are closed to claims of racial bias in the absence of that kind of evidence, which has really immunized the entire criminal justice system from judicial and to a large extent public scrutiny of the severe racial disparities and forms of racial discrimination that go on every day unchecked by our courts and our legal process.

Michelle Alexander, appearing with Bryan Stevenson and Bill Moyers (2 April 2, 2010) Bill Moyers Journal
• Justice Lewis Powell, when asked by his biographer if he wanted to change his vote in any case, replied, "Yes, McCleskey v. Kemp."

Liptak, Adam (2008-04-29)

• In a survey by the Los Angeles Times among liberal legal scholars, McCleskey was named one of the worst Supreme Court decisions since World War II

Expungement

- A felony conviction is an economic death sentence.
- Persons convicted of a felony have lifelong problems finding employment even if they do not re-offend for years.
- They face many other significant collateral consequences. Expungement of felony convictions, once certain conditions are met, enables former offenders to be more productive citizens, pay taxes and meet family obligations as it helps them obtain and maintain employment.
- Most experts know and ex-offenders experience that finding a job is critical to successful reintegration and reduction of recidivism.
collateral consequences

Most collateral consequences operate in a way that makes it more difficult to be a productive member of society. Collateral consequences influence employment, occupational certification and licensing; business licensing; govern program participation, loans, grants, and benefits; education; housing; domestic rights; civic participation; registration and notification requirements; residency restrictions and motor vehicle licensing. The collateral consequences of being a felon make getting a good job harder, limit the way to higher education, to working in a profession, to beginning a business, and to qualifying for government aid to those who might be starting their life over again.
number of Kentuckians eligible for class D felony expungement?
number of Kentuckians eligible for class D felony expungement?

94,645
• Prof. Linda Sorenson Ewald, Co-Chair, Louis D. Brandeis School of Law at the University of Louisville, Louisville, KY;
• Prof. Michael J. Z. Mannheimer, Co-Chair, Northern Kentucky University Salmon P. Chase College of Law, Highland Heights, KY;
• Hon. Michael Bowling, Steptoe & Johnson PLLC, Middlesboro, KY;
• Prof. Allison Connelly, University of Kentucky College of Law, Lexington, KY;
• Hon. Martin E. Johnstone, Kentucky Supreme Court (Retired), Prospect, KY;
• Hon. James Keller, Kentucky Supreme Court (Retired), Lexington, KY;
• Frank Hampton Moore, Jr., Cole & Moore, P.S.C., Bowling Green, KY; and
• Marcia Milby Ridings, Hamm, Milby & Ridings, London, KY.
The ABA Report found an error rate of 63%
major deficiencies in Kentucky that undermine the integrity and reliability of our state's system

Reforms are recommended in twelve key areas:
1. the collection, preservation, and testing of DNA and other types of evidence;
2. law enforcement identifications and interrogations;
3. crime laboratories and medical examiner offices;
4. prosecutorial professionalism;
5. defense services;
6. the direct appeal process;
7. state post-conviction proceedings;
8. clemency;
9. jury instructions;
10. judicial independence;
11. treatment of racial and ethnic minorities; and
12. mental retardation and mental illness.
Kentucky is one of four states that permanently disenfranchise all persons with felony convictions even after they have completed their full sentence.

Kentucky has the third highest rate of disenfranchisement in the country. One out of every 14 Kentucky residents is disenfranchised, a rate almost three times the national rate.

Kentucky has the second highest African American disenfranchisement rate in the country with more than one of every five African Americans ineligible to vote, nearly triple the national rate.
LWV

180,984 Kentuckians have completed felony sentence
The New Jim Crow
Mass Incarceration in the Age of Colorblindness
(2010)

Michelle Alexander
Michelle Alexander

“Mass incarceration is, metaphorically, the New Jim Crow and all who care about social justice should fully commit themselves to dismantling this new racial caste system.”
From 1890 to 1920 “racial discriminations existed on practically every front in Kentucky. It seems as if the vast majority of whites within the state and elsewhere agreed that blacks were ‘different,’ which meant ‘inferior.’” Id. at 44.
We could proclaim that race has nothing to do with our Kentucky criminal justice system. We could argue that race is never inappropriately used in the prosecution of a capital case in our Commonwealth. But we know, especially when we consider the historical context and the relevant studies, the reality is quite different. Race is a multifaceted, complicated, complex problem in our Kentucky criminal justice system, which prides itself on fair process and reliable results no matter who you are or what you look like. We do not like to think about race, talk about race, or tackle what we have to do to eliminate racial discrimination in our criminal justice system. But we must. We must or we are doomed to the ignoble past.
Recommendations for reform to reduce unwarranted racial disparities in the criminal justice system

There are two goals: public safety and reducing illegitimate racial disparities

They are not competing goals

Level the playing field

The overlap between issues of race and class is profound in the criminal justice system, and lack of access to resources is a significant contributor to disproportionate rates of incarceration. This includes such disadvantages as inadequate defense services for indigent defendants and limited access to treatment programs. By providing credible sentencing options for the courts, greater numbers of defendants could be sentenced to community supervision, thereby avoiding costly incarceration while permitting offenders to maintain ties with family and community.

Invest in high school completion

A growing body of evidence demonstrates that there is a dramatic difference in the risk of incarceration for persons who do not complete high school. Research by Bruce Western and Becky Pettit shows that 68% of African American male high school dropouts had served time in prison by the age of 34 (Western & Pettit, 2010). Thus, along with other societal interests in promoting high school completion is the significant impact such outcomes can produce in helping to reduce disproportionate rates of imprisonment, which is critical as well.

Adopt racial impact statement legislation

Similar to fiscal or environmental impact statements, racial impact statement policies require consideration of any undue racial effects of sentencing or other criminal justice legislation prior to adoption. As utilized in Connecticut and Iowa, legislators are provided with an assessment of the racial/ethnic impact of proposed sentencing legislation (Mauer, 2009a). If the analysis indicates that the policy would produce a disproportionate effect, policy makers are not precluded from adopting the legislation but have the opportunity to consider alternative means of achieving public safety goals without exacerbating racial disparities in imprisonment.

Reorient the “war on drugs”

Despite a notable shift in the public climate toward support for treatment and prevention for substance abuse, along with the expansion of drug courts and similar measures, the number of drug offenders in prison has not declined and dramatic racial disparities persist. This is due to a combination of circumstances: limited community-based options for treatment; mandatory sentencing laws that result in excessive prison terms for lower-level cases; and the failure of some drug court programs to target prison-bound offenders.

Examine policy and practice decisions for undue racial impact

Through its Juvenile Detention and Alternatives Initiative, the Annie E. Casey Foundation incorporates a requirement that participating jurisdictions strive to not only reduce their detained population but to do so in a way that reduces racial disparity as well. In Multnomah County (Portland), Oregon, for example, the establishment of alternatives to detention achieved both these objectives. In the adult system, local officials in Hennepin County, Minnesota, recognized that several of the risk factors used to develop recommendations for pretrial release of defendants were highly correlated with race but had no predictive value regarding failure to appear in court. As a result, the scoring system was revised to reflect evidence-based analysis that would not produce unwarranted racial disparities (The Sentencing Project, 2008).

ENDING MASS INCARCERATION: SOCIAL INTERVENTIONS THAT WORK

• Early Childhood Education
• Juvenile Justice Investment
• Community Investment
• Potential for Reducing Criminal Justice Involvement
There are evidence-based responses to these facts that demonstrate these disparities can change

• Reducing racial disparity in the criminal justice system is possible through progressive re-entry programs, which reduce recidivism and costs through pre-release planning and assistance with substance abuse and mental health treatment, employment, housing and health care assistance.

• What is needed for the change: a decision that we will do things to make the changes, collaboration, data driven responses at the community level, persistence?

Ending racial caste in America
shift from civil rights to human rights

“...lay down our racial bribes, join hands with people of all colors who are not content to wait for change to trickle down, and say to those who would stand in our way: Accept all of us or none of us.”
Calling for passage by the 2014 Kentucky General Assembly of a bill to promote human rights in the criminal justice system

• Automatic restoration of voting rights for ex-felons who have completed their sentence (HB 70 in 2014 is such a measure);

• Expunging convictions for Class D felons (HB 64 in 2013 is such a measure);

• Reducing mass incarceration by making low level misdemeanors a violation (HB 395 in 2013 is such a measure) and by making low level felonies a misdemeanor;

• Implementing the American Bar Association Kentucky Death Penalty Assessment Team’s recommendations in its December 7, 2011 Report, _Evaluating Fairness and Accuracy in State Death Penalty Systems: The Kentucky Death Penalty Assessment Report_ (SB 86 in 2013 is such a measure)
Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association's House of Delegates

San Francisco - Monday, August 12, 2013
Until justice is blind to color, until education is unaware of race, until opportunity is unconcerned with the color of men's skins, emancipation will be a proclamation but not a fact.

(Lyndon B. Johnson)
Provisions of proposed KY felon expungement bills bipartisan and straightforward

HB 64:
✓ Allows a person to ask a court to expunge a felony conviction 5 years after completion of the entire sentence;
✓ Provides it will be longer than 5 years because the sentence has to be fully completed which includes the serving the length of the sentence, payment of all fines and fees and completion of the entire time on probation or parole;
✓ Only applies to persons who do not have other felony or misdemeanor convictions;
✓ Does not apply to a sex offense or an offense committed against a child;
✓ Provides the prosecutor and any victim the right to present evidence to the judge considering expungement;
✓ Allows inspection of expunged criminal records where required by federal or state law or regulation.

Senator Jimmy Higdon filed SB 107 in 2014. It would allow expungement 10 years after the time of adjudication.
Bipartisan Coalition for Criminal Justice Reform Debuts

by Christopher Hooks Published on Thursday, September 18, 2014, at 10:51 CST

“To keep the cause of criminal justice reform advancing, advocates are launching the “Texas Smart-on-Crime Coalition.” In it, the left-leaning Texas Criminal Justice Coalition and right-leaning Texas Public Policy Foundation stand united. So do the big-money Texas Association of Business, and the central Texas branch of the non-profit Goodwill Industries. The launch event featured both Terri Burke, the head of the Texas ACLU, and Edna Staudt, a Republican justice of the peace from law-and-order Williamson County.”
Kentucky Chamber supports fiscally responsible policies that utilize tax dollars wisely

Recommendations
Corrections

Continue full implementation of 2011 sentencing-reform legislation to control the growth in corrections costs and carefully consider legislative efforts to increase penalties that will result in higher corrections cost. Continue this positive trend in more appropriate use of expensive corrections resources with full implementation of 2014 juvenile justice legislation. The General Assembly should also continue reviewing the Kentucky Penal Code with the goal of creating more alternatives to incarceration for low-level, non-violent crimes and focus on jail time for more serious offenses. Potential areas for review recently identified by the Kentucky Department of Public Advocacy include:

- Alternative sentencing for flagrant non-support instead of imprisonment for a felony
- Modification of the persistent felony offender statute
- Increasing the dollar amount for the felony theft limit
- Presuming parole for eligible low-risk offenders
- Adoption of a “clear and convincing” standard for pretrial release
- Creation of a “gross misdemeanor” classification for low-level felonies
Pat Nolan, Director of the Center for Criminal Justice Reform at the American Conservative Union Foundation
Parole Rate of Inmates with the **LOWEST** evidence-based, validated risk assessment level score, January 2013 - August 2014

**$18 million waste**
WASTE: Low risk inmates in jails

Arnold Foundation, *Pretrial Criminal Justice Research* (November 2013)
“Justice is often painted with bandaged eyes. She is described in forensic eloquence as utterly blind to wealth or poverty, high or low, black or white, but a mask of iron, however thick, could never blind American justice when a black man happens to be on trial.”
Questions

• What is the value of a restorative justice approach with offenders as they enter the justice pipeline?
• What would restorative justice look like for a society that has discriminated in such systemic ways?
• How should we address the needs of people of color in a more wholesale way, including people who have already suffered unfairly?