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URBAN CRIMINAL JUSTICE: NO FAIRER THAN THE LARGER SOCIETY

JoAnne Page*

Discussion of whether urban criminal justice is or appears fair serves as a Rorschach test identifying the attitudes, the life experience, and often the race of the answerer. Responses to this question cover a full range. A survey conducted by the National Opinion Research Center in 1988 found that 82% of those surveyed believed that courts do not deal harshly enough with criminals. On the other hand, in a Washington Post-ABC poll conducted on the day after the Rodney King verdict, 89% of the black and 43% of the white people surveyed felt that black people do not receive equal treatment in the criminal justice system.¹ On Friday, October 30, 1992, New York *Newsday* covered the results of the recent Crown Heights verdict by a mostly black and Latino jury and headed its front page with the bald statement: "Crown Heights Jury: Cops Lied." That issue featured an editorial by Gail Collins entitled, "City's Terrible Truth at Work: People Don't Believe the Police."²

Some feel that the system discriminates against victims in favor of defendants; others feel that the discrimination is against the defendant. Some view the criminal justice system as part of a genocidal conspiracy against persons of color. Others, including professionals who work within the criminal justice system, look at the many decent, well-meaning people who work within that system and define the system as fair. As horrendous as the human impact of criminal justice processing can be, the persons working daily in that system tend to describe themselves as doing the best that they can, considering the constraints within which they must work. I submit that the fairness of the criminal justice system can only be judged if those constraints also come under examination. All too often, such constraints are considered to be outside the frame of reference of the discussion. Assessment of fairness begins by treating these constraints as truths that are beyond the pale of examination. To the contrary, they need to be the

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1. Ruth Marcus, *Racial Bias Widely Seen in Criminal Justice System; Research Often Supports Black Perceptions*, WASH. POST, May 12, 1992, at A4.

2. Gail Collins, *City's Terrible Truth at Work: People Don't Believe the Police*, NEWSDAY, Oct. 30, 1992, at 4. In this case, a black defendant was acquitted of killing a Jewish man in a bias motivated attack.

very starting place of any discussion about the fairness of the criminal justice system.

There is a story that my father tells about a man who, day after day for many years, left his factory job pushing a wheelbarrow full of sand. The security guards were certain that he was stealing something, but their careful searching of the sand always yielded nothing but sand. Finally, when he retired, they asked him, "What was it that you were stealing for so many years?" He replied, "Wheelbarrows."

This Essay reflects my personal perspective on this question, drawn from twenty years of working in prisons, in courts, in alternatives to incarceration, and now, as Executive Director of The Fortune Society. I believe that the key to assessing the fairness of the criminal justice system is to examine it, not in isolation, but within a larger social context. It is necessary to see the wheelbarrow itself, rather than to simply sift through its contents. The criminal justice system is part of the larger society, shares its values and is shaped by its allocation of resources. The criminal justice system is consistent with the values of that larger society: It treats the lives of poor people and people of color as being of inferior worth, skewing its intervention toward control and punishment rather than toward nurturance and inclusion.

The urban criminal justice system primarily prosecutes crimes of the poor. State and local courts with proportionately the lowest resources handle the greatest number of cases and concentrate on street crime. In the past several years, we have seen a shift in focus as increased enforcement activity has been directed against drug offenses. Again, the drug offenses that are targeted are the offenses of the poor. Street corner dealers are arrested. The dealers who work on Wall Street remain largely undisturbed.

Urban criminal justice must be examined within the context of the urban environment. In fact, criminal justice involvement is almost a rite of passage for many inner city youth. Marc Maur of the Sentencing Project looked at the fatalism among many poor youngsters in high crime areas and their expectation of incarceration and stated, "it has just become part of the life cycle. Going to prison has become as inevitable for these kids as going to college is for middle-class kids."³ The limited opportunities for legitimate sources of income available to inner city youth reinforce this sense of fatalism. The unemployment rate among teenagers in urban poverty areas hovers around 50%, and black teenagers have the highest unemployment rate of any group in

3. Fox Butterfield, *Studies Find a Family Link to Criminality*, N.Y. TIMES, Jan. 31, 1992, at A1.

the country.⁴ The incomes in New York City's poorest neighborhoods in 1985 were roughly half those of the city average.⁵

The daily atmosphere of violence that these young people live with further distances them from inclusion in the larger society and discourages any hope that the future may hold possibilities other than being killed or incarcerated. Black males suffer tragically high rates of death through violence. Violent crime rates are higher in general against blacks than against whites, and higher against the unemployed than against the employed.

Individuals who come through the criminal justice system are usually drawn from the communities that provide the most victims of violent crimes. Society has chosen to invest little in the way of health care and education for these individuals. For instance, 50% to 70% of the inmates in New York City read below the fifth grade level and are considered functionally illiterate. There is a clear correlation between high rates of high school graduation in most states, and their low rates of prisoners per 1000 members of the population.⁶ According to Harold Hodgkinson, "[t]he correlation between high school dropout and prisoner rates is a trifle higher than the correlation between smoking and lung cancer."⁷ Primarily, the criminal justice system targets a population that is poor and neglected and that has received little investment or attention, except in terms of control and punishment, or when perceived as a threat to the larger society.

Examination of the fairness of the criminal justice system must start at or before the point of arrest. The decision of where to deploy police officers offers enormous discretion. This discretion has been used unevenly in enforcement of anti-drug laws. A policy of targeting low level drug users and sellers in minority communities has resulted in a skyrocketing both of arrests and of incarceration for drug sale and possession. In New York State from 1983 to 1989, for example, the number of new inmates serving state time for sale or possession of drugs increased over 600%. Over 90% of these individuals were black or Latino.

Yet, studies by the Federal Bureau of Investigation and by the Na-

4. Seth Mydans, *The Young Face of Inner City Unemployment*, N.Y. TIMES, Mar. 22, 1992, § 1, at 1.

5. For more information, see RYAN WHITE COMPREHENSIVE AIDS RESOURCE EMERGENCY ACT tit. 1 (Med. and Health Res. Ass'n of New York City, Inc., Social, Housing, and Nutrition Services, July 29, 1991).

6. HAROLD L. HODGKINSON, INSTITUTE FOR EDUCATIONAL LEADERSHIP, INC./ CENTER FOR DEMOGRAPHIC POLICY, *THE SAME CLIENT: THE DEMOGRAPHICS OF EDUCATION AND SERVICE DELIVERY SYSTEMS* 15-16 (1989).

7. *Id.* at 15.

tional Institute for Drug Abuse examining drug use patterns in 1988 both concluded that only 12% of the nation's drug users are black.⁸ Drug czar William Bennett stated "[t]he typical cocaine user is white, male, a high school graduate employed full time"⁹ However, overwhelmingly, those arrested for drug offenses have been black and Latino. One reason for this pattern, quite simply, is the ease of arresting these black and Latino offenders. As Commander Charles Ramsey, supervisor of the Chicago Police Department's narcotics division, said, "[t]here's as much cocaine in the Sears Tower or in the stock exchange as there is in the black community. . . . But those guys are harder to catch."¹⁰

The issue of police brutality adds to the sense of unfairness in the criminal justice process. When I worked as a defense attorney at the Legal Aid Society in Brooklyn, I quickly learned to recognize the paperwork pattern usually connected with police brutality. The court papers would show a charge for a low level offense such as disorderly conduct or obstructing government administration. In addition to that underlying charge, which provided the justification for the arrest, there would be a charge of resisting arrest and a charge of assault. The person alleged to have been injured would be the police officer, and the injury would be to his hands or arms. I quickly learned that such a pattern of arrest charges in a police complaint meant that the defendant whom I would interview at arraignment would be badly beaten.

Cases of clear police brutality were infrequent. The way in which these cases were handled, however, amplified their impact and exacerbated the sense of terrible helplessness and unfairness that they fostered. Clear cases of police brutality were taken in stride by all but a few attorneys and judges. The cases were treated as unremarkable and as part of the day-to-day operation of the system. Attorneys learned which police officers routinely brought their arrestees in badly beaten. The prosecutor's office in Brooklyn at that time simply prosecuted these victims of police brutality according to the charges on the complaint. The overwhelming temptation for the defendant, who in these cases was very much the victim, was simply to plead guilty, to take a minor conviction, and to let the matter drop.

Three cases stand out in my memory, in which all of the victims were black. One was a middle-aged man who had left school as a child to help support his family, and who prided himself on his solid

8. Ron Harris, *Blacks Feel Brunt of Drug War*, L.A. TIMES, Apr. 22, 1990, at A1.

9. *Id.*

10. *Id.*

work history and the educated children whom he had raised. He had no previous contact with the criminal law. In the case that I handled, he had been pulled over for speeding, had been dragged out of the car and viciously beaten in front of his family, and then had been charged with attempted murder. He finally pled guilty to speeding, refused to pursue action against the officers who had beaten him, and was so terrified of further police contact that I had to send a messenger to the police station to reclaim his wallet.

The second case that I remember involved a young girl of about sixteen who had tried to enter a subway station with a student pass that did not permit entry at that time in that place. The police officer beat her around the head, kidneys and shoulders with his fists and radio, pressing her against the rails that separated the area around the token booth from the subway platform one flight down. His violence drew a crowd of strangers, including two nurses who were so horrified by what they saw that they filed a complaint at the police station.

The police officer had a reputation for this type of behavior. The witnesses to the incident were impeccable, and the girl was a soft-spoken, model student. After I clearly explained the nature of the case to both the judge and the prosecutor, the prosecutor went to his supervisor to see if he could dismiss the case. His supervisors ordered full prosecution of the case. After months of adjournment, the case went to trial and was quickly decided in favor of the defendant. Despite complaints by the two nurses, there was no action by the Civilian Complaint Review Board. The girl had nightmares throughout the months that the case dragged on and left the incident behind her only when she went away to college. If she had not been so vulnerable, so savagely attacked, and so utterly believable, the case might have ended with her conviction on a minor offense.

The third case of police brutality involved a young man who had a history of burglaries and who was arrested in a basement during the course of commission of another burglary. Before the police placed him under arrest, they entertained themselves by torturing him. They beat him, kicked him, and stabbed him several times in the buttocks. I offered to refer him to an attorney willing to represent him civilly and without charge on this case, but he told me that he preferred to let it drop since the police knew him and would make him pay for any action he took the next time that they saw him. He saw the beating as one of the risks of the life that he was leading: painful, but not at all remarkable.

What was striking about these three incidents was how routinely they were treated, with no outrage and no sanction. My years at

Legal Aid enabled me to witness the professional work of many fair police officers, as well as the damaging work of a handful who were savage. The word "unfairness," in my mind, describes a system where savagery is allowed to flourish uninterrupted and where people are protected by otherwise well-meaning individuals who look the other way and simply do their jobs. Dr. Karl Menninger said:

It [the criminal justice system] is a creaking, groaning monster through whose heartless jaws thousands of American citizens grind daily, to be maimed and embittered so that they emerge implacable enemies of the social order and confirmed in their criminality.

What happens to those labeled "criminals" is a crime in itself, not because it is cruel, stupid and stultifying — which it is — but because it defeats its own purpose. It is not socially protective but self-destructive. The crime of punishment is that punishment aggravates crime. Quick and appropriate punishments are required — not a spirit of vengeance.¹¹

The behavior of the criminal justice system can be likened to that of an abusive family. The pattern of abuse in such a family begins with a series of threats. The threats occur in one instance after another. Then, in one situation not noticeably different from the rest, the child is savagely beaten. The net result for an abused child is a sense of helplessness and of hopelessness, a sense that he or she is never safe from attack and that his or her actions have nothing to do with causing or preventing the beating that occurs.

This same sense of fatalism can be seen in individuals socialized in the criminal justice system. The system threatens much, but in the initial stages of a case it produces little more than repeated visits to court, and perhaps a slap on the wrist or probation upon conviction of a minor offense. Then, finally, for essentially the same behavior that had elicited only a threat before, there is a powerful and savage response of years of incarceration.

This is seen most clearly in arrests of drug addicted defendants on substance abuse charges. When first arrested for drug use or possession, these defendants are given felony pleas which result in probation. Then, when arrested on these charges again, they face mandatory incarceration as second felony offenders. In these cases, the courts function as a predicate mill, creating individuals whose incarceration in state prison is mandated by law.

Punishment begins upon arrest. It continues as persons unable to afford bail remain incarcerated in pre-trial detention without having

11. Karl Menninger, *Society Shoots Itself in the Foot*, 25 FORTUNE NEWS 1,3 (1992).

been found guilty of any crimes. Despite all societal claims of innocence until proven guilty, some of the worst conditions that defendants face are those occurring in the court pens prior to arraignment. These conditions, which have been documented extensively by the Correctional Association, include open toilets, overcrowding, and lack of access to health care.

The first time that an indigent defendant meets his or her court-appointed lawyer is upon emerging from those pens into the court arraignment part. During the years that I worked for the Legal Aid Society as a criminal defense attorney, I was very much aware of the qualitative difference in legal assistance provided to indigent defendants and to well-heeled defendants who could hire attorneys who were both skilled and had the time to devote fully to their cases. I also have had occasion to participate in the defense of white collar defendants. These defendants had the resources to hire top counsel and to pay them sufficiently so that the amount of time devoted to the cases was determined by the needs of the defense case and not by the caseload of the attorney. If the system were fair, this type of legal representation would be available to all defendants, indigent or wealthy.

Fairness in criminal representation can occur only if a defense attorney has an opportunity to devote sufficient time and attention to both the client and the facts of the case. Within the context of a criminal justice system that appoints overburdened defense attorneys to represent indigent defendants, my clients were treated fairly because I fought for them. Within a larger context of what constitutes fair representation of a person without resources who is facing serious charges and the potential loss of years of freedom, the representation received by my average client, as well as those of other court-appointed or "retained on the spur of the moment from the courthouse lobby" lawyers, was shamefully inadequate and anything but fair.

I was good at what I did, and I did my best, but the clients whom I represented were interviewed for a handful of minutes in the pens behind the courtroom. Their bail applications, and in many cases the plea bargaining leading to their sentencing, were handled on the fly. Little information was available other than the clients' accounts of what had happened, the very basic information as to charges provided in the court papers, and the minimal information communicated by the prosecutor. Defense attorneys for the poor routinely handle so many cases that they have little opportunity to do research, and most of their writing is limited to the production of boiler-plate motions for discovery.

For indigent defendants in our urban court systems, decisions critical to their future occur with inadequate information and insufficient time, despite the best intentions of the persons defending them. The resources to provide effective advocacy in each case are simply not there. In less than three years at Legal Aid, I represented close to three thousand people. Caseloads for Legal Aid attorneys are now significantly higher than they were during my tenure.

As the workload of the criminal justice system has increased and the resources devoted to that system have proportionately decreased, the caseload and workload pressures have increased disproportionately throughout the system. As the volume of human lives going through the system increases, fairness decreases, and the system becomes more and more of a machine, grinding one person up and proceeding to the next without the time to look at each human being and his or her case.

Our model of criminal justice is based on the assurances of fairness embodied in the right to a trial. However, fewer than 5% of New York City's felony defendants and fewer than 1% of those facing misdemeanor charges ever go to trial.¹² The overwhelming majority of cases are disposed of through plea bargaining. The plea bargaining process is one that happens primarily at the judge's bench, with the defendant being the only one excluded from the discussion. With the development of the N-Parts to handle narcotics cases, there is tremendous pressure on defense attorneys and defendants to take pleas.¹³ Moreover, these pleas are taken upon very scanty information with the threat that if a plea is not taken immediately, the sentence that the defendant will receive will be harsher at the next offer. The volume of cases is so heavy that most proceedings last four minutes or less.¹⁴ Decisions that are made in the blink of an eye can stigmatize the defendant and result in years of incarceration.

In drug cases particularly, the harsh effect of mandatory sentencing laws has a disproportionate impact on persons of color. As the Correctional Association documents, "prison seems to be used instead of drug treatment for blacks, particularly when compared to use of drug treatment instead of prison for whites. Whites account for only 7% of drug offenders incarcerated in New York, but occupy 47% of New

12. Shaun Assael & Julia A. Lobbia, *New York's 10 Worst Judges*, VILLAGE VOICE, Sept. 15, 1992, at 38-41.

13. Note, however, that the Bronx District Attorney's Office has recently implemented a complete bar on post-indictment plea bargaining. Martin Fox, *Next Six Weeks Seen Critical in Bronx Courts; No Impact Yet from Bar on Plea Bargaining*, N.Y. L.J., Jan. 4, 1993, at 1.

14. Assael & Lobbia, *supra* note 12, at 38-41.

York State-funded drug treatment slots.”¹⁵ Mandatory sentencing laws tie judges’ hands and limit them so that they impose state prison sentences in many non-violent cases — that is, in cases where they would otherwise choose to sentence defendants to supervision within the community. These laws have, since 1980, increased the average term in prison for approximately half the prisoners in New York State.¹⁶ While defendants facing mandatory sentencing receive years of incarceration, lower-level offenders are pushed through the system without much chance of effective intervention. New York City probation officers now have caseloads ranging from 150 to 200. Many of those on probation have taken pleas to felonies, and if their substance abuse and other problems are not addressed, will face mandatory state incarceration upon their almost inevitable rearrest.

The atmosphere of the courts and the processing of misdemeanor and felony cases shows the lack of value with which defendants are treated. Judges face pressures similar to the defense attorneys. They are evaluated on their ability to move cases and to clear their calendars. The number of dispositions reached is a criterion for determining how effective they are as judges. For judges who care, sitting in a criminal court part can be a heart-rending grind of case after case after case. Locked into limited time frames, they are allowed little time to look at the human beings who are standing before them and whose immediate futures are in their hands. Judges often feel that they have few options. Even more distressing are the mandatory sentencing cases where, regardless of the human consequences, there appears to be only one option: incarceration. By working with the district attorney’s office and with the judge, and providing these individuals an opportunity to prove themselves under community supervision, The Fortune Society has been successful in obtaining non-prison sentences for individuals who otherwise certainly would have been incarcerated for years.

There is often little qualitative difference between these cases and the others that proceeded them and resulted in incarceration as a matter of routine. Most frequently, the non-incarceration outcome is not caused by any real difference in the nature of the cases or in the nature of the defendants, but is simply the result of someone paying attention, stopping to see the human being, and putting into effect a means of intervention that stops the normal grinding of the machin-

15. THE CORRECTIONAL ASSOCIATION OF NEW YORK, FACT SHEET ON BLACKS IN PRISON (Mar. 1991).

16. Selwyn Raab, *New York State to Install 3,000 More Prison Beds*, N.Y. TIMES, Dec. 8, 1991, § 1, at 52.

ery. Fairness calls for this type of consideration for all defendants, not just those who are reached by the small number of alternative to incarceration interventions that occur in a sea of routine prison dispositions.

Prisons and jails, by their very natures, are institutions where fairness extends only so far as an individual can protect himself. These institutions are places where violence is commonplace and where the authorities, by and large, simply let the system continue to grind. They are institutions where appeals to authority when one is being abused provide no protection, but instead yield greater abuse. They are institutions where, if someone is at risk because of vulnerability, the response is often to place that person in a twenty-three hour lock-up. They are institutions that take individuals who are functioning poorly prior to incarceration, and further damage their ability to function in the larger society. They are institutions where violence is commonplace and where the unimaginable becomes part of daily living.

One of my earliest and most memorable prison experiences took place when I was in college and doing volunteer work at Green Haven Correctional Facility with an ex-offender agency. As we walked into the prison, we were told that an inmate had been beaten to death by guards in the hospital wing. I was stunned and disbelieving, and I and some of the other volunteers proceeded to obtain accounts that we could pass on for investigation. What shocked me most was not so much the allegations, but the degree to which they were believed by the inmates and the ex-offenders with whom I was working. What shocked them most was my difficulty in believing that this incident had occurred as described. They were more surprised at my reaction than they were by the allegations. I have reached a point where I would no longer be shocked, and that in itself is a damning indictment of a system in which the horrible is commonplace. A gallows humor develops to protect criminal justice professionals from the human pain that surrounds them.

For twenty-five years, The Fortune Society has worked with ex-offenders upon their release from prison and tried to help them heal the damage that incarceration has done. To take an individual and place him or her in a setting as savage and as inhuman as our state prisons, is not fair but brutal. We, as a society, do it as a matter of routine. Often, we do it by default because of lack of time or the absence of other readily available alternatives. Seen within a larger context, we incarcerate so readily because, as a society, we do not truly value the people we send to prison or the communities from

which they come. We have chosen to spend our dollars on building steel cages rather than on building schools and jobs and productive citizens. There is no fairness in a choice to damage and destroy so many lives. The criminal justice system that so thoughtlessly and routinely processes people into those cages cannot, within the larger societal context, be a fair one.

