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THE FAILURE OF THE “GET TOUGH” CRIME POLICY

Elaine R. Jones*

While we as a nation have recently focused our attention on the high level of violent crime, violence has been a constant in the lives of poor black children and their parents each and every day. Like the children of Sarajevo, young black kids must take “safe” routes to school; they must pass through metal detectors; they must walk by armed security officers to arrive at their classrooms unharmed. The death toll for black youths has been staggering as our streets have turned into killing fields. Homicide has become the leading cause of death not only for our young black males, but for our young black females as well.¹

It is with this sobering understanding that I testified before Congress regarding the 1994 Crime Bill. Simply put, I testified as the Director of a civil rights organization which is concerned for our children. Violence is killing them, and Congress must join the rest of us in finding an effective way to stop it.

I. THE FAILURE OF THE “GET TOUGH” POLICY

Over the past thirteen years we have tried to solve the problem of violent crime through the use of stiffer penalties. As a result of these efforts, the United States now has the highest rate of incarceration in the world² with a prison population growth rate that is ten times greater than that of the general population.³ Consequently, our prison population has nearly quadrupled in less than fifteen years. The National Council on Crime and Delinquency estimates that over 1.1 million Americans are now in prison, which is more than three-and-a-half times the number in 1980, when there were approximately 330,000 people in prison.⁴ Prison terms have increased along with the rate of incarceration. In the federal prison system alone, mandatory sentencing guidelines have increased length of incarceration by a range of between 4,000 and 6,000 prison-years.

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1. Young black males are 11 times more likely to die by homicide than young white males. The ratio for young black females to their white counterparts is 4-to-1. See American Psychological Association, *Youth and Violence* 13 (1993).

2. In 1990 the rate of incarceration in the United States was 455 per 100,000. South Africa was a distant second with 311 per 100,000. In contrast, rates of incarceration for most nations of Europe and Asia are in the range of 34 to 117 per 100,000. See Marc Mauer, *Americans Behind Bars: One year later*, OVERCROWDED TIMES, Apr. 1992, at 6.

3. Michael N. Castle, *Intermediate Sanctions and Public Opinion*, OVERCROWDED TIMES, May 1991, at 13.

4. *1,133,000 American Prisoners by 1994*, OVERCROWDED TIMES, May 1990, at 1. To place this rise in the prison population in even greater perspective, the inmate population in 1972 was only a little over 196,000. See Tan C. Proband, *48,334 More Prisoners in 1991*, OVERCROWDED TIMES, Aug. 1992, at 1.

The costs associated with this “get tough” policy have been astronomical. Seven years ago, prison construction costs were averaging \$42,000 per bed, and costs were as high as \$116,000 in some states.⁵ We can safely bet that building costs have risen since that time.⁶ After construction comes maintenance, which now costs on average \$23,000 per inmate annually, and *three times* that amount if the inmate is in maximum security.⁷ All told, national governmental expenditures grew twenty-one percent in the last decade, but prison expenditures grew by almost sixty-five percent.⁸ Today we spend over \$20 billion each year on incarceration.

This huge investment in prisons should cause us to ask some obvious questions at this juncture: What do we have to show for the approach we have been taking? By quadrupling the number of persons in prison since 1980, have we dropped the violent crime rate by four-fold? Marked against its stated purpose—to reduce violent criminal activity and promote the integrity of people and their property—the crime policy of the last thirteen years has been markedly unsuccessful. The rate of violent crime—homicide, sexual battery, robbery, and aggravated assault—actually *increased* during the 1980s, growing by nearly thirty-three percent between 1982 and 1991.⁹

Sadly, the only measurable effect of the crime policy over the last thirteen years is the disproportionate impact of incarceration on the African American community. For example, “from 1968 to 1981, the per capita arrest rate for black juveniles lagged behind that of white juveniles for drug violations, according to FBI statistics.”¹⁰ With the advent, however, of the crime policy’s “war on drugs,” arrest rates changed dramatically. “In 1985, the numbers just exploded: arrests of black youths for drug-related offenses skyrocketed. Paradoxically, white youth arrest rates during the same period fell significantly—22%—even though federal agencies reported that the drug *use* rate by white teenagers was actually higher than for black youths.”¹¹

Dramatic changes in arrest rates were seen throughout the country. In Baltimore, while fifteen white juveniles and eighty-six African American juveniles had been arrested in 1981 for selling drugs, in 1991, two *fewer* whites were arrested while 1,304 blacks were arrested.¹² Indeed, for adults in Baltimore, “of the 12,956 arrests for ‘drug abuse violations’ in 1991, 11,107 (86%) were African Americans.”¹³ Consider this:

5. Castle, *supra* note 3, at 13.

6. For example, Pennsylvania is now committed to spending \$1.3 billion to add 10,000 cells by 1995. See Joseph D. Lehman, *Solving Pennsylvania's Prison Problem*, OVERCROWDED TIMES, Aug. 1992, at 3.

7. Ann Blackman, et al., *Lock 'Em Up and Throw Away the Key*, TIME MAG., Feb. 7, 1994, at 56.

8. Castle, *supra* note 3, at 13.

9. FBI, *Uniform Crime Reports* (1991).

10. Ron Harris, *Hand of Punishment Falls Heavily on Black Youths*, L.A. TIMES, Aug. 24, 1993, at 7.

11. *Id.*

12. Jerome G. Miller, *Search and Destroy: The Plight of African American Males in the Criminal Justice System*, Sept. 1992, at 23.

13. *Id.* at 14.

In Columbus, Ohio, where African American males make up only 8% of the population, they comprised almost 90% of the drug arrests. In Jacksonville, Florida, 87% of those arrested on drug charges were African American males even though they made up only 12% of the county's population. In New York, 92% of the drug arrests were of African Americans and Hispanics. These patterns were repeated across the nation and were soon reflected in incarceration rates.¹⁴

The impact of the so-called "war on drugs" becomes even more alarming when placed in the context of history and as we look toward the future. At the height of the Jim Crow era, African American males comprised only five percent of the general population but an alarming twenty-one percent of the prison population. Those were the good old days. In 1991, while black males had inched up to six percent of the nation's population, they comprised almost half (forty-nine percent) of the prison population.¹⁵ This extraordinary incarceration rate for African Americans in the United States is *four times* higher than for blacks in South Africa.¹⁶

Compelling evidence strongly suggests that unless we move away from today's policies, these numbers will continue to grow. A 1992 survey of African American males aged fifteen to thirty-five in Washington, D.C., showed that while forty-two percent were presently under the supervision of the criminal justice system on any given day, the lifetime risk rose to between eighty and ninety percent.¹⁷

II. THE REAL SOLUTIONS OFFERED BY THE 1994 CRIME ACT

We in the African American community know better than most that the nation needs to find some effective solution to the problem of violent crime. I would probably not be writing this if the "get tough" policies of the last thirteen years had worked. The fact of the matter is, however, they have not. We cannot afford to continue to invest billions of dollars in a crime policy that has already failed us. We must try something new.

Let us start with the children. It is today's fourteen-year-olds who will be committing the bulk of violent crime by the year 2000.¹⁸ Rather than wait for them to commit their third felony and then lock them up forever, we need an approach that gets to these youths *now*—before prison and before they cause anyone harm. The crime prevention programs in the 1994 Crime Act are a welcome step in the right direction since they seek to intervene early in these

14. *Id.*

15. *Id.* at 6.

16. Marc Mauer, *Americans Behind Bars: A Comparison of International Rates of Incarceration*, SENTENCING PROJECT, Jan. 1991, at 3 ("Black males in the United States are incarcerated at a rate of four times that of Black males in South Africa, 3,109 per 100,000 to 729 per 100,000.").

17. Miller, *supra* note 12, at 4.

18. The percentage of violent crimes committed by persons 25 or under is 50.8%; the percentage of murders committed in the same age category is over 54%. See *Crime in the United States*, 16, 227 (1992). Thus, those persons who will be 25 years old in the year 2000 are under 18 today. Significantly, children under the age of 13 today will be committing over 30% of the violent crime and 31% of the murders by 2000. *Id.* (citing crime statistics for persons 20 years old and under).

children's lives by, *inter alia*, focusing on crime-prevention through the implementation of "safe schools" and creating alternatives to incarceration for first-time youthful offenders. I shall briefly address each in turn.

The crime prevention programs in H.R. 3315 utilize the fact that when children are in school they are, for the most part, a captive audience. There is thus no better chance to teach violent crime prevention in the classroom. Towards this end, the bill allocates \$300 million for the creation of "safe schools."¹⁹ Under this provision, those schools plagued by violence will not only receive funds for metal detectors and high-tech security, but also for the development of programs that: (1) counsel youth away from crime and substance abuse; (2) teach youth methods of de-escalating tension and anger before violence erupts; (3) counsel victims of school crimes; and (4) seek to create alternatives to gang membership for youth.

The "safe schools" measure will hopefully be successful in deterring most youth from violent crime. For youth that continue on the path leading to violence and become first-time offenders, we must have an effective way to reach them before it is too late. Under the old crime policy, we have two choices. We can either put them behind bars or we can let them go. Both of these choices are mutually unsatisfactory. What is needed are non-incarceration alternatives that give these youth another chance while at the same time providing a structured environment for them.

Towards that end, H.R. 3315 creates a substantial number of alternatives to incarceration, including: (1) day fines; (2) house arrests; (3) electronic monitoring; (4) intensive probation supervision; (5) defense-based sentencing; (6) day reporting clinics; (7) victim-offender reconciliation; (8) shock incarceration; and (9) substance abuse treatment.²⁰ Under this provision, priority is given to first-time offenders, juveniles, and females.²¹ While the Senate bill proposed some funds for these measures, H.R. 3315 invested over twice as much money (\$1.35 billion) in non-incarceration alternatives. Such a substantial investment in the *future* of our youth is made possible by the savings accrued by H.R. 3315's refusal to spend more money on prisons.²²

H.R. 3315 offered a fresh approach to tackling the problem of violent crime by seeking to cut the "supply" of young people who would be prone to violent criminal behavior in a decade from now. The old "get tough" crime policy does nothing to stop the rising flood of violent crime; it merely reacts when a violent crime occurs. By contrast, H.R. 3315 is proactive. The actual violent crime rate would begin to drop in the year 2000 and would continue to drop *if* we cut the "supply" of those persons who are currently on track to be the violent criminals of tomorrow.

19. See H.R. 3315, Tit. III, subtit. A.

20. See H.R. 3315, Tit. IV, subtit. D.

21. *Id.*

22. For example, instead of investing in more programs to help children before they become juvenile delinquents, the Senate bill allocates \$500 million to build new prisons *only* for juveniles.

III. THE RACIAL JUSTICE ACT WOULD HAVE RESTORED CONFIDENCE IN OUR SYSTEM OF JUSTICE

In addition to concentrating upon new approaches to the crime problem, H.R. 3315 also sought to restore public confidence in the criminal justice system by confronting instances of racial bias and discrimination that still exist within the system. In that vein, H.R. 3315 called for: the passage of the Racial Justice Act;²³ the eradication of procedural barriers to proving racial bias in capital cases;²⁴ and the elimination of mandatory minimums and crack cocaine disparities.²⁵ I believe all these provisions must be passed since "discrimination on account of race in the administration of justice strikes at the core concerns of the Fourteenth Amendment and at the fundamental values of our society and legal system."²⁶ Here, however, I will concentrate on the Racial Justice Act, which was unfortunately eliminated from the 1994 Crime Bill.

H.R. 3315 called for passage of a Racial Justice Act that would effectively overturn the Supreme Court's decision in *McClesky v. Kemp*.²⁷ The *McClesky* decision foreclosed any judicial remedy to racial discrimination in the charging and imposition of capital sentencing that was based upon statistical evidence, no matter how strong that evidence might be.

The NAACP Legal Defense and Educational Fund has testified about the importance of the Racial Justice Act.²⁸ Suffice it to say, however, that *McClesky* calls for congressional action. The Supreme Court did not question the validity of statistical studies demonstrating that racial bias played a significant role in Georgia capital sentencing decisions. Nevertheless, the Court held that the disparities were tolerable, unless the condemned person met the totally impracticable burden of showing that some particular decision-maker in his or her case had acted with deliberate and subjective intent to discriminate. In reaching this decision, the Court ignored its own prior understanding—as well as the prior understanding of Congress—that racially discriminatory effects resulting from rarely visible subjective decision making are just as pernicious and as much a denial of equal protection as when they result from motivations that are entirely racially transparent.

The Racial Justice Act would have removed *McClesky*'s crippling burden of proof by permitting the use of statistical evidence to establish a prima facie case of race discrimination. This is certainly not a new concept; it has been used effectively for years in the employment discrimination context.²⁹ This standard of proof balances the needs of the State to be protected against frivolous claims with the right of the defendant to challenge pernicious racial discrimination.

23. See H.R. 3315, Tit. VI, subtit. A.

24. See H.R. 3115, Tit. VI, subtit. B.

25. See H.R. 3315, Tit. VI, subtit. C-E.

26. *Rose v. Mitchell*, 443 U.S. 545, 564 (1979).

27. 481 U.S. 279 (1987).

28. See *Hearings on H.R. 4618 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 195 (1990) (statement of Richard H. Burr, Assistant Counsel, NAACP Legal Defense & Educational Fund, Inc.).

29. See, e.g., *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

IV. CONCLUSION

The old crime policy has not worked, and the time has come to try new approaches. The crime prevention programs found in the 1994 Crime Act offer a good, solid beginning. More needs to be done, however, and Congress should begin by passing the Racial Justice Act. Congress must realize that reliance on a “get tough” crime policy does not solve crime—new solutions must be found.

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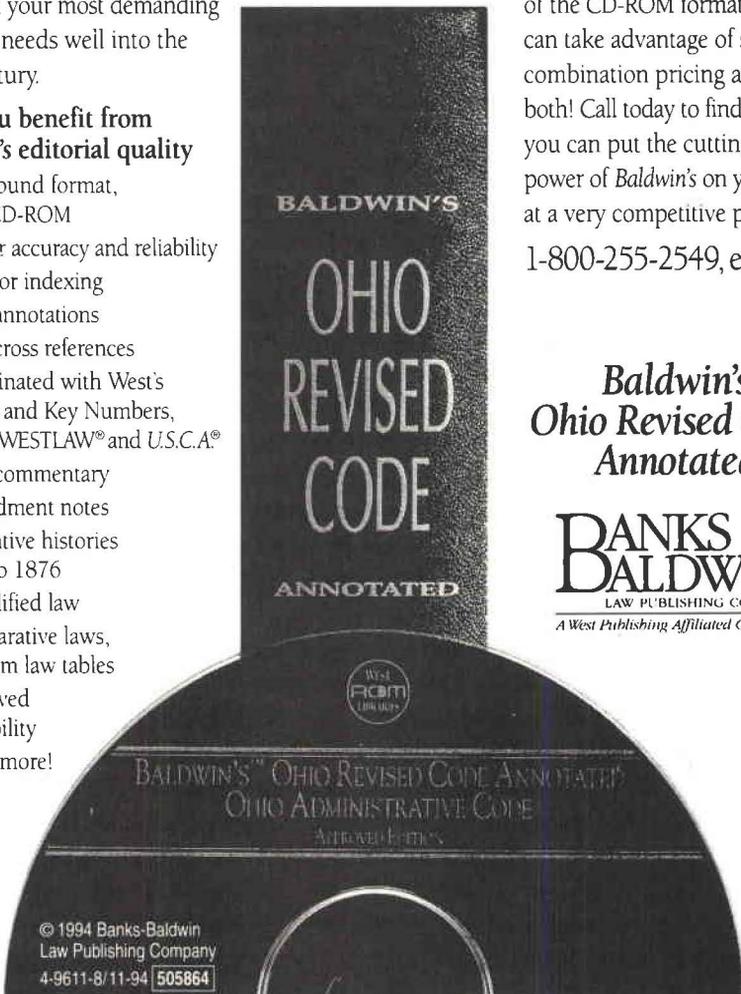
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