



1992

LOOKING BEYOND THE NUMBERS: AFRICAN AMERICANS AND CRIMINAL JUSTICE

Thelton E. Henderson

Follow this and additional works at: <http://digitalcommons.law.yale.edu/yjll>



Part of the [Law Commons](#)

Recommended Citation

Henderson, Thelton E. (1992) "LOOKING BEYOND THE NUMBERS: AFRICAN AMERICANS AND CRIMINAL JUSTICE,"
Yale Journal of Law and Liberation: Vol. 3: Iss. 1, Article 2.
Available at: <http://digitalcommons.law.yale.edu/yjll/vol3/iss1/2>

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Journal of Law and Liberation by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

LOOKING BEYOND THE NUMBERS: AFRICAN AMERICANS AND CRIMINAL JUSTICE

the Honorable Thelton E. Henderson†

No judge, and certainly no Black judge, can help but be distressed and depressed on sentencing day. I conduct sentencing on Monday afternoon. These are afternoons spent sitting in a courtroom filled with mostly *young Black males*, waiting to be sentenced. Unfortunately, Monday afternoons are the *one* time during the week when I take the bench in my courtroom and look out not upon the customary sea of white faces, but instead upon a room full of many faces not unlike my own.

My courtroom has not always had such a markedly split personality. Today, in the Reagan/Bush years I see different types of cases, and a decidedly different type of criminal defendant than I did when I first took the bench at the end of the Carter administration. Today the defendant is far more likely to be Black than just a decade ago. I have thought a great deal about this change, and I would like to share my thoughts with you.

My basic premise is that unemployment statistics are directly related to crime statistics. This should be no great revelation. I think our common sense tells us that this is so. Nonetheless, there is an influential body of social scientists who seriously question the relationship between the two, or who minimize the connection between labor market conditions and crime.¹ Indeed, it has become a part of the conservative litany to assert that only bleeding heart liberals believe that there is a relationship between unemployment and crime. In its most virulent form, it is an argument that Black criminal behavior is a genetic trait.

This argument is of strategic importance to the advancement of the conservative agenda. It allows those in power to dismiss a potent argument in favor of government-sponsored jobs programs: that they will decrease crime. In fact, there is powerful evidence which demonstrates the connection between poverty and crime. It is important for us to examine this evidence so that this link cannot be denied.

But poverty is not the only factor affecting the

complexion of my courtroom on sentencing day. There are undoubtedly numerous other factors — one that cannot be ignored is power. I submit to you that it is not just the crimes, but who is in power, who defines the crimes, and who enforces the laws which has, in part, created the situation which we are witnessing. I would like to discuss with you today the issues of power and poverty.

POPULAR PERCEPTIONS

It is safe to say that in the perception of the general public, *no* group is more associated with crime than young Black males. *The New Republic* published an article a few years back entitled "The Jeweler's Dilemma."² The article looked at the practice of certain jewelry store owners who install a buzzer system to control entry into their stores. The store owners simply do not open their doors for young Black males because they believe that *this is the group most likely to commit a robbery*. This practice was defended by, among others, a distinguished professor of economics from a leading university, who argued that, as a matter of simple economics, the practice made sense.

Jewelers and economists are hardly alone in their impressions. As a follow-up to *The New Republic* article, 20 cab drivers were interviewed in Washington, D.C. All but one of the drivers were Black. Half of them admitted to refusing to pick up young Black male passengers. *All* of them defended it as a rational decision based upon the greater likelihood of being robbed by Blacks. Said one driver — "It's not that I have anything against them, but young Black guys account for 80% of the crime in this city . . ." He went on to say that he never picks up Black youths at night.³

Now let's take a look at whether this pop-wisdom has any basis in fact.

— A study released at the end of 1990 shows that in California approximately *one-third* of African-American men in their twenties are behind bars, on parole, or

† District Judge, United States District Court, Northern District of California. Speech given at the National Forum for Black Public Administrators Oakland/San Francisco Bay Area Chapter Saturday, March 23, 1991.

1. See, e.g., James Q. Wilson, *Thinking About Crime*, 125-26, 140-43 (1983).

2. W. Williams, "The Jeweler's Dilemma", 195 *The New Republic* 18 (Nov. 10, 1986).

3. Crocker Coulson, "The Cabbie's Eye" in "The Jeweler's Dilemma," *The New Republic* at 21 (Nov. 10, 1986).



"Urban Altarpiece", 1992 Triptych (Detail) Mixed Media, 36" x 72" David A. Valentine

on probation.⁴

— In 1979, 456,000 Blacks in the age group 16-19 were arrested. That is 15% of all Blacks in the country between 16-19 years of age.

— A 1986 study revealed that nearly 7 in 10 Black males in California face at least one arrest in their early adult years. The comparable rate for whites is 3 in 10.

So does this mean that the jewelers are right? I think that we must be careful not to look blindly at these distressing figures. Statistics have little or no value without meaningful analysis.

AN EXAMINATION OF THE FACTS

First, it remains a fact that in both federal and state prisons, most inmates are white. Nonetheless, given the fact that just over 12% of the U.S. population is Black, the fact that 47% of the state prison population is Black provides little consolation.⁵

Another factor to consider is the sheer number of people in prison in this country. There are more people behind bars, per capita, in this country than in any other country on the face of the earth.⁶ Over the past ten years the prison population has approximately doubled.⁷ Black males in the U.S. are incarcerated at a rate four times higher than in South Africa.⁸ The explosion in this country's prison population has a greater effect on the Black community, because of its relatively smaller size, than on the white community.

LOOKING FOR CAUSES

At the outset I mentioned the issue of power — that is, who defines the crimes and who enforces the law. The types of crimes that are being prosecuted by the Department of Justice today are quite different than those I saw during the Carter administration. While today the conventional wisdom may be that crime, like inflation, will always increase, it is interesting to note that during the Carter years, there was a steady and substantial decrease in the number of criminal cases filed by the U.S. Attorney. Since 1981, criminal filings have steadily increased from 28,000 to 36,000 last year.⁹

Not only are there more criminal filings today, the cases brought are also of a different nature. The most marked example is drug cases. The number of drug cases brought by the U.S. Attorney has increased by 271% since 1979!¹⁰ Presidents Reagan and Bush have chosen to make the so-called "War on Drugs" a priority, while white collar criminals have had a comparative field

day. The War on Drugs has had a disparate impact upon the Black community. While African-Americans constitute only 15% of the drug using population, in 1989, over 40% of those arrested on drug-related charges were Black.¹¹ The recent administrations have chosen to wage the war on drugs upon communities of color in this country, and even in Latin America, rather than focus their efforts upon the white community whose seemingly insatiable appetite for drugs fuels that underground economy.

While the number of drug cases has skyrocketed, the number of white collar crime convictions in federal court has remained almost unchanged since 1980.¹² This is not because there is a shortage of white criminals — the Savings and Loan scandal reveals that fallacy. It is a matter of priorities. In certain areas, such as conservation, natural resources, and atomic energy control, the number of criminal filings has plummeted.¹³ And despite all of the media attention focused on the S & L and banking scandal, which will cost the taxpayers of this country 500 billion dollars, the number of banking related criminal filings actually decreased in 1990 compared with 1979.¹⁴ The net result is that today a larger proportion of crimes are being prosecuted in which the defendant has a substantial likelihood of being a person of color.

The second set of factors which I want to address underlying Black crime is unemployment, underemployment and poverty.

Even after considering the issue of power, I think that we must admit the sad fact that young African-American men are involved in crime to a disproportionately large extent. By no coincidence, they are also the group hardest hit by unemployment. Let's take a brief look at the unemployment rate for Black youth. While it is common knowledge that the unemployment rates for Black youth are astronomically high, it is less well appreciated that this is a very recent development that goes back only two decades. For example, in 1954, when I was just getting out of high school, rates of unemployment for Black and white youth were almost identical. In fact the white rate of unemployment was slightly higher, at the age level 16-17.

But, and this is a big but, while the white rate of unemployment has remained relatively constant over the past 20 years or so, the Black rate has soared. The national unemployment rate for Black male teenagers is now 32% — that's one in every three Black teens. For Blacks in their early 20's unemployment is nearly 18%. This is more than twice the comparable rates for whites.¹⁵ The overall Black unemployment rate in 1988

4. Andrea Ford, "Prison Life, Parole Touch High Level of Young Blacks," *Los Angeles Times*, A3, November 2, 1990.

5. Statistical Abstract of the U.S., U.S. Dept. of Commerce, Bureau of the Census, 12, 193 (1991).

6. Cameren Barr, "U.S.: World's Lock-'Em-Up Leader," *Christian Science Monitor*, 12, March 7, 1991.

7. *Supra* note 5 at 193.

8. *Supra* note 6 at 12.

9. *Statistical Report*, U.S. Department of Justice, U.S. Attorney's Office, Chart 8 (1990).

10. *Supra* note 9 at Chart 8.

11. Sam Vincent Meddis, "Black Imprisonment Highest in U.S.A.," *U.S.A. Today*, 2A (January 7, 1991).

12. *Supra* note 5 at 191.

13. *Supra* note 9, table 1. See also *Statistical Report*, U.S. Attorney's Office, 1979 (124 Atomic Energy Control criminal filings, 420 conservation and natural resources criminal filings); 1990 (4 atomic energy control criminal filings, 230 conservation and natural resources criminal filings).

14. *Supra* note 9, table 3.

15. *Los Angeles Times*, July 18, 1990.

was 10% while white unemployment was 4%. Blacks with educational levels equal to whites still suffered over twice the level of unemployment.¹⁶

Even Blacks who are employed have seen their incomes drop. The median Black family income has *decreased* from 1980 to 1988 to \$18,100, while the median white family income *increased* during that same period to \$32,274. Also, the percentage of Blacks living below the poverty line increased during the Reagan years to 33%, compared to 10% for whites.¹⁷ In other words, during the Reagan presidency, Black people got poorer, and white people got richer.

One explanation for this widening economic rift between the races is that changes in the labor market are having a much greater negative effect upon Black youth than upon white youth. While this nation once thrived and depended upon cheap young Black labor, the new generation of young Blacks faces for the first time both the rejection of their labor as well as the increasing irrelevance of the skills they bring to the labor market.

There is substantial evidence that when it comes to hiring, employers in the manufacturing sector of the economy tend to treat Black and white youth relatively equally, but that employers in retail establishments tend to treat the two races with striking dissimilarity. This distinction is important because of the shift from manufacturing to retail services between 1980 and 1988. During that time, while new jobs were created in retail trade and service, almost 1 million manufacturing jobs were lost in this country.¹⁸ This blue collar work has for many decades provided the major entry into the world of work for teenagers who were attempting to join the workforce without the skills, credentials, or qualifications required for white collar work. Irish, Italian, and other European immigrants often worked their way up the economic ladder starting with relatively well paying manufacturing jobs. However, since 1970, at the same time that many impediments to Blacks entering the workforce were being removed, literally thousands of plants have closed in this country, many of them in the Northeast and Midwest, in and around our major cities where millions of young Blacks reside. In California, for example, we have seen the closing of plants including the Los Angeles Goodyear and Firestone plants, the Ford Pico Rivera plant, and the GM Southgate plant, just to name a few.

Companies which close shop here often go in search of cheaper labor in other countries, such as Taiwan, Korea or Mexico — a development which affects white workers as well as Blacks. But when they don't leave the country, these "run-away shops" often relocate in suburbia or other areas of low Black population, dramatically and disproportionately affecting the employment prospects for Black youth. For example, between 1966 and 1976 Chicago had a net 16% *decrease* in

manufacturing firms, while the Chicago *suburbs* experienced a 41% *growth*. This translated directly into massive Black unemployment.

Last Tuesday the *New York Times* carried a front page article entitled "How Milwaukee Has Thrived While Leaving Blacks Behind."¹⁹ The article discusses Milwaukee's recovery from the recession of the early 80's, and its emergence as one of the economically healthiest cities in the nation. But Milwaukee's restructured economy resulted in greatly decreased numbers of manufacturing jobs, and greatly increased numbers of non-manufacturing jobs. The result has been that while Milwaukee's white population enjoys one of the lowest unemployment rates in the nation, the city's large and once prosperous Black community suffers staggering 20% unemployment. A UCLA professor is quoted as saying that "Milwaukee is a classic case of how a restructured economy has diminished the employment opportunities for Blacks and for Black males in particular."²⁰

Thus, the prospects for Black youth, already bleak, can only worsen as the private economy relocates from the metropolitan areas to places where Blacks are not, and shifts more and more from manufacturing to service sector jobs, such as finance and legal services, accounting, advertising, and data processing.

TECHNOLOGY

Technology is yet another factor which has taken an enormous toll in terms of jobs in both white collar and blue collar work. Automation is eliminating jobs in the office as well as on the factory floor. Microcomputers eliminate the need for copy typists, file clerks and other positions in routine office work which have traditionally provided entry level employment to Blacks. New advances in telecommunications and related technologies eliminate the need for telephone operators and certain reception functions, and cash machines eliminate jobs for tellers.

There is also a rapid change taking place in the skills required for entry level positions, especially in those sectors that might offer viable long-term careers. For example, New York City experienced a *net increase* of 167,000 jobs between 1977 and 1981.²¹ However, in the same period, minority unemployment *rose*. The major reason is that the increase in jobs was heavily concentrated in white-collar areas requiring administrative skills in finance and commerce. Black youths are often trapped in poor inner cities schools where they do not receive the education necessary for these jobs.

Finally, changing *patterns* of commercial activity in this country, especially across a range of retail sales organizations, are also closing off previously important avenues of entry into career work for young Blacks. The classic "department store" of earlier times was a labor

16. *Supra* note 5, 403 (unemployment with four years high school completed: Black, 11.2% / White, 4.6%; unemployment with four years college completed: Black 3.3% / White, 1.5%).

17. *Supra* note 5, 403, 465.

18. *Supra* note 5, 400.

19. Isabel Wilkerson, "How Milwaukee Has Thrived While Leaving Blacks Behind," *New York Times*, A1 (March 16, 1991).

20. *Id.*

21. There was a net increase of over one and one-half million jobs in the areas of finance, insurance, and real estate between 1980 and 1989. *Supra* note 5, 410.

intensive organization with multiple points of entry for unskilled young persons seeking careers with the firm. The present day large volume discount house has a quite different work force. At the top there is the relatively small group of managers and executives who are relatively well-trained and well-paid, who work full time, and who can look to a long-term career in the business. There is *almost nothing* in the middle. At the bottom there is a large pool of minimum wage, part-time, casually employed persons who have little chance of obtaining either significant job training or entry into a viable work career with the firm. Such jobs contribute little toward the mix of skills, experience and qualifications that employers are looking for in the new labor force of a service oriented economy.

ECONOMICS AND CRIME

Thus, the teenager attempting to enter the work force directly from the secondary school years is increasingly aware that there is little room in the labor force for those with limited education or experience. This is especially true for young Blacks.

With economic prospects so bleak — with disproportionately high Black unemployment, with *one in three* Blacks below the poverty line, with an ever growing gap between Black and white, with vanishing job opportunities, and with an economy being restructured in a way which leaves Black people out — it should be no wonder that many young Blacks turn to the drug economy. That same *New York Times* piece noted that the new Black unemployment in Milwaukee has been accompanied by a new and thriving drug trade. This underground economy often provides the only viable job opportunities for young Blacks — the only effective means for channelling capital from the white community into the Black community. It is important to remember that the money which fuels this multi-million dollar economy comes *not* from Blacks, but primarily from whites, who constitute the vast majority of drug users.²² Black people simply do not have that kind of money.

LOOKING FOR SOLUTIONS

Clearly the simplistic solution of throwing ever more young Black men into prison is no answer. So long as the economic prospects remain unchanged, young Blacks will opt for jobs in the drug economy. There can be no solution to Black crime without first addressing Black poverty. It is this latter reality to which I submit we must devote our energies. Further, we must take every chance we get to counter those in our local, state and federal governments who insist, usually by indirection, that Black teenage crime is an indication of some sort of racial character deficiency that more arrests, more jails, and longer sentences will eventually cure.

In the past few years, we've seen a number of proposals for the creation of "enterprise zones" in and

around the Black community. These would be areas designated to attract business through an array of tax breaks, low interest loans, and other incentives. While such zones may or may not provide part of the answer, I cannot believe that even in the best case they will be a panacea. In the first place, while the enterprise zones might attract U.S. businesses to the inner city, they do not address the problem of businesses which leave the country altogether to places where labor is cheaper than it will ever be in the States. Second, they do not address the problem of the changing nature of the U.S. economy. If Blacks do not have the qualities that employers are looking for in the restructured economy, the enterprise zone will not give them those qualities. Finally, in the end, the enterprise zone is at best a redistribution of unemployment from the cities to the suburbs as businesses are encouraged to relocate.

We are left with the conclusion that the private sector, in which Presidents Reagan and Bush have chosen to place their faith, as it is presently structured, *cannot* and *will not* absorb the steadily increasing numbers of unemployed Black youth. We are of necessity left only with the question of *how*, not *whether*, the public sector should respond to this problem.

What we have, in my opinion, is a forced choice. We can choose to pay out higher taxes for public-sector development of more and bigger prisons, larger police forces, with a little on the side for welfare benefits when the wage-earner is jailed, and the enormous social costs of increased crime and poverty — or we can choose to pay our taxes for public sector development of serious long-range and effective career employment paths. I believe that in the long run, this latter path will not only be more humane, but it will also be more cost-effective. And most important, it will lead to the creation of a better society for us all.

The first step we must take as a society is to realize that we are facing a crisis of historic proportions. I have tried to provide an outline of this crisis here today. This country has proven time and again its ability to respond heroically in the face of crisis. It is only unfortunate that situations must often reach crisis proportions before we respond to them.

Our experience in the great depression of the 1930's demonstrated that the public sector can adjust to and conquer massive unemployment. Franklin Delano Roosevelt and the New Deal administrations virtually restructured our economy *and* our society to provide food for the starving, jobs for the unemployed, and electricity for our rural areas. It was a massive effort — it was a successful effort. Most important, it was an effort which the country believed was right and necessary. In contrast to the characterization of Black people today, the country did not believe that the unemployed white population in the 1930's, by virtue of character deficiencies, was somehow deserving of its fate.

This, I believe is the key. During the great depression, white politicians and business-people could look at the homeless people in the streets and in the rail yards, look at the men in the bread lines and soup kitchens,

22. *Supra* note 11.

and look at the people on the unemployment lines, and say: "That could be me."

Today the situation is quite different. While it remains true that the vast majority of our nation's leaders are white, today's staggering poverty and unemployment are localized in the Black community. This situation provides an easy route for the majority population to fall back on essentialist and thinly veiled racist arguments and thereby deny our crisis. No longer do we hear "That could be me," but instead, "They just aren't like us."

As leaders in our communities, we must push for and demand the kind of significant and meaningful societal reforms that we know worked for unemployed whites in the 30's — jobs programs, education, worker retraining. We could rebuild our nation's crumbling infrastructure, rehabilitate our inner cities, and restore our public lands.

This is not a demand for special treatment — it is a demand for the *same* treatment which whites received when they suffered a similar crisis in the 1930s. Moreover, such a grand program would benefit not just African-Americans, but the entire society. Consider the staggering costs of incarceration. The United States spends 7 billion dollars each year to imprison Black males. That is 7 billion dollars to remove people from even potentially playing any productive role in society. We spend only *one-tenth* that much to educate Black men.²³

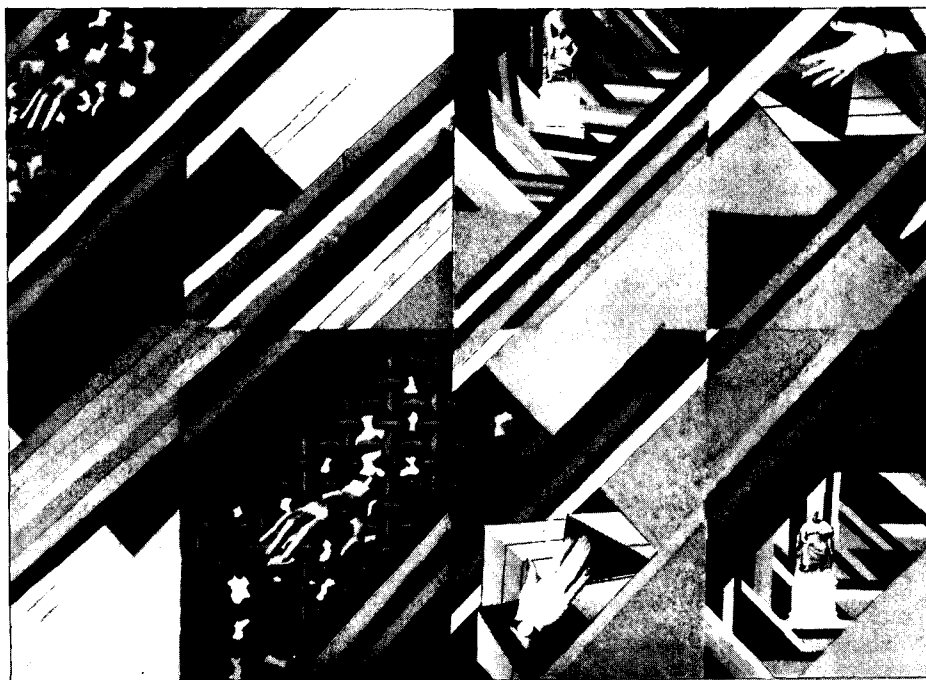
23. Chris Black, "Paying the High Price of Being the World's No.1 Jailer," *Boston Globe*, 67 (January 13, 1991).

For a fraction of the cost of our prison system we could retrain Black workers who have lost their jobs in the shrinking manufacturing sector so that they will have the skills for jobs in the growing sectors of our economy.

We must make it clear that what we do not spend for education today, we must spend many times over for incarceration tomorrow. What we do not spend for jobs programs today we must spend many times over tomorrow for police protection, welfare payments, and for the incalculable social costs of increased crime and poverty.

We are in much greater danger today than in the 60's when Bull Connor was putting cattle prods to young Black protestors — that made it easy to raise the national consciousness. But poverty is far more insidious than that. It cannot be personified; it does not unleash dogs and water cannons; and it does not say stupid things on national television. This makes our jobs all the more difficult.

So we must redouble our efforts. We must return to our communities believing that our local, state and federal governments have the solution that can place our Black youth back in the mainstream of our economy. We must raise the consciousness of our entire society so that we can focus our concerted energies at eradicating this problem once and for all.



New Haven Paradox

artist: David Valentine



artist: Joanne Mariner