

INEQUALITY IN SENTENCING: IS RACE A FACTOR IN THE CRIMINAL JUSTICE SYSTEM?*

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In 1862 Frederick Douglass said these words:

Justice is often painted with bandaged eyes, she is described in forensic eloquence as utterly blind to wealth or poverty, high or low, white or black, but a mask of iron however thick could never blind American justice when a black man happens to be on trial It is not so much the business of his enemies to prove him guilty, as it is the business of himself to prove his innocence. The reasonable doubt which is usually interposed to save the life and liberty of a white man charged with [a] crime, seldom has any force or effect when a colored man is accused of [a] crime.¹

Frederick Douglass' somber assessment of the significance of race in the criminal justice system made more than a century ago, in many ways is appropriate still. Although there is much discussion and occasional celebration of racial progress in many aspects of American life, the same cannot be said concerning racial progress in the American criminal justice system. Racial disparity and racial prejudice continue to corrupt the criminal justice system, the level of despair there far outdistancing the level of hope. I implore each of you to read one of the most exhaustive and compelling analyses of race in the criminal justice system concerning issues of racial discrimination in . . . *Developments in the Law—Race and the Criminal Process*.² I believe that many of you here are lawyers and law students [and] I will be giving you many cites of articles and case law that bolster my remarks to you today.

In order however, to look toward solutions to the problems of race in the criminal justice system, we must first look to history to

* Keynote Address given at *Law & Inequality Journal Symposium: Inequality in Sentencing* (Mar. 6, 1998).

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1. *Symposium on the Black Lawyer in America Today*, HARV. L. SCH. BULL. 6, 57 (Feb. 1971) (quoting Douglass).

2. 101 HARV. L. REV. 1472 (1988).

fill us in on why we are now in the state we are in. It is not a new phenomenon that people of color have been more severely punished for violat[ing] the law than White Americans, which can be traced back through history. I will give you several examples, "An Act . . . against stealing Hogs," provide[d] a penalty of twenty-five lashes on a bare back or a ten pound fine for White offenders, while non-Whites, slave and free, would receive thirty-nine lashes, with no chance of paying a fine; this was a law passed in 1809 in Virginia. In 1697, Pennsylvania passed death sentence legislation for Black men who raped White women and castrated them for attempted rape. White men who committed the same offense would be fined, whipped, or imprisoned for one year.

During reconstruction, Southern legislatures sought to maintain control of freed slaves by passing criminal laws directed at Blacks that treated petty offenses as felonies, and as a result, Southern prisons swelled and became, for the first time, predominantly Black. The prison population in Georgia alone tripled within two years. Prior to the Civil Rights era, Congress repeatedly imposed severe criminal sanctions on addictive substances once they became popular among people of color. For example, media accounts and inaccurate data influenced public opinion about opium smoking . . . [and] led to the passage of the 1909 Smoking Opium Exclusion Act, which produced outright hostility and ambivalence towards the Chinese with the concern that opium smoking would spread to White America.³

The Harrison Act of 1914 was the first federal law to prohibit distribution of cocaine and it too was passed on the heels of overblown media accounts depicting cocaine addicted Black prostitutes and criminals in the cities.⁴ In later years cocaine became associated with jazz musicians (Black America's only form of original music) and Hollywood entertainers. Cocaine then became known as the "rich man's drug" and in the early 1960s and 1970s, cocaine began to move into mainstream society. In the 1980s, cocaine became the drug of choice. Let me digress here a moment and bring you up to date . . . [on] the current state of drug use in America. Nearly four out of every ten Americans over the age of twelve years old, about seventy-two million Americans, have utilized controlled substances. Every day it is estimated that 100,000 people are arrested on drug-related charges and at least ten million Americans require drug treatment programs. The

3. See the S.F. POST, Mar. 1, 1879.

4. See generally, David Musto, *America's First Cocaine Epidemic*, WILSON Q., Summer 1989, at 59, 64.

ten million Americans require drug treatment programs. The United States is about 5% of the world's population; yet, we consume 50% of all drugs produced in the world. Further, according to the Department of Health and Human Services, the greatest number of crack cocaine users are White, approximately 2.4 million or 64.4%, compared with 1 million Blacks or 26.6% and 400,000 Hispanics or 9.2%. Let me repeat that the majority of crack cocaine users are White.

Even with the wide spread use of powder cocaine, no new drug laws were enacted to further criminalize or penalize powder cocaine possession. It is clear that as long as powder cocaine was a popular amusement among young, White professionals, law enforcement policy prohibiting cocaine possession was weakly enforced. Now here we are today, with a one hundred to one ratio enhancement[] in the crack cocaine statute on the federal level, which has largely been viewed as a Black problem in America when it is really an American problem. Many Blacks and Hispanics are tried and jailed under this statute even though they make up a smaller percentage of crack users than Whites, primarily due to selective enforcement in the inner cities and prosecutors turning a blind eye to obvious racial disparities.

The national strategy focuses on enforcement when it should focus on prevention; it focuses on police when it should focus on parents; it focuses on funding for federal programs when it should focus on federal funding for local programs; it focuses on incarceration when it should focus on drug treatment programs; it focuses on the adult in the street when it should focus on the child in the home and school. The so-called war on drugs has been aimed at the small trafficker and user and the brunt of law enforcement has been directed at the inner city, against the poor Black and Hispanic population. So we see history repeat[] itself.

To date there have been almost fifty cases in the country that have discussed the penalties between crack and powder cocaine. Only four have held the law unconstitutional and only those four judges have rule[d] that the sentences are unfair and discriminatory. Three of those cases were federal cases and one was a state court case here in Minnesota, which I presided over in 1990. The case was . . . *State of Minnesota v. Gerard Russell*.⁵ The Minnesota Supreme Court upheld that decision in 1991 in a six to one decision written by retired Supreme Court Justice Rosalie

5. Hennepin County District Court No. 8967067, Dec. 27, 1990.

Wahl.⁶ The court concluded that a state law punishing crack cocaine at a ten to three ratio to powder cocaine violated the equal protection guarantees of the Minnesota State Constitution. The court further concluded that because crack cocaine users charged were predominately Black, the impact of an enhanced penalty would adversely affect them and the discriminatory impact was sufficient to strike down the enhanced crack cocaine penalty. Both powder and crack cocaine penalties were equalized that same year legislatively.

The first federal case was *United States v. Walls*, decided January 26, 1994 by Judge Oberdorfer in Washington D.C.⁷ The Court stated that crack cocaine mandatory minimums were cruel and unusual punishment as applied to two defendants who played a minor role in [a] drug operation and who were drug addicts. The government did not appeal. [T]he next case was *United States v. Clary*,⁸ decided by Judge Clyde Cahill in the Eastern District of Missouri, which stated that the statute was unconstitutional on equal protection grounds and applied a strict scrutiny analysis very similar to the *Russell*⁹ case. This case was later reversed by the Eighth Circuit Court of Appeals.¹⁰ I urge each of you to read Judge Cahill's opinion for the historical detail and analysis which was the most comprehensive I have ever seen.

The next case was *United States v. Shepard*, which dealt with a sentencing manipulation and sentencing entrapment issue, where the police officer asked the defendant to cook the powder cocaine solely for the purpose of arresting [her] and getting the increased penalty applied.¹¹ The Judge, . . . Harold H. Greene of Washington D.C., . . . stated that the police officer's conduct shocked the conscience of the court. The last case [was] *United States v. Ricky Davis*, decided by Judge Forrester in the Northern District of Georgia in Atlanta.¹² The court there held that the statute was facially ambiguous: powder cocaine and crack cocaine being [of] the same substance [and] having the same molecular structure, weight and melting point. . . . [The court] concluded that the physical form of the same drug has no rational relationship to any legislative intent to impose increase[d] penalties.

6. See *State v. Russell*, 477 N.W.2d 886 (Minn. 1991).

7. 841 F. Supp. 24 (D.D.C. 1994).

8. 846 F. Supp. 768 (E.D.Mo. 1994).

9. 477 N.W.2d 886.

10. See 34 F.3d 709 (8th Cir. 1994).

11. 875 F. Supp. 105 (D.D.C. 1994).

12. 864 F. Supp. 1303.

Each of these cases used differing means of analysis to correct a grievous wrong done by the creation of laws, which effectively discriminate against people of color. The Federal Sentencing Guidelines Commission agreed and recommended . . . [that] Congress . . . equalize the penalties. That has yet to be done.

This fight to make sure that the laws . . . we enact are not based on racial hysteria and politicians' desire to get elected is still before us today. We cannot bury our heads when it comes to facing the fact that racism still exists and sometimes finds itself inside the criminal justice system. And we must be diligent in our efforts to stop it.

Frederick Douglass also said that "Peace between races is not to be secured by degrading one race and exalting another, by giving power to one race and withholding it from another, but by maintaining a state of equal justice for all."¹³ I hope each of you will put you[r] legal minds at work to maintain equal justice for all.

Thank you.

13. Citation omitted.

