

The Criminal Justice System

"America Behind Bars: The International Uses of Incarceration, 1992-1993." By Marc Mauer. 27 pp. Washington, D.C.: The Sentencing Project. September, 1994.

"ACLU Final Analysis of Major Civil Liberties Abuses in the Crime Bill." By Nkechi Taifa. 17 pp. New York: American Civil Liberties Union. September 13, 1994.

"Crime & Prisons." By the Prison Law Project of the National Lawyers' Guild. 16 pp. San Francisco: National Lawyers' Guild. Fall, 1994.

By David Gilbert, 12/3/94

The mega-hypocrisy at the heart of American politics was on particularly garish display in November's election. 'Kick those immigrants out of our schools and hospitals' was a rallying cry for descendants of transAtlantic immigrants who have grown rich from the brazen theft of the northern half of Mexico (in the War of 1846-8) and from the merciless exploitation of generations of Mexicano/a labor. The same forces who sanctimoniously preached "law and order" made Oliver North a viable candidate for U.S. Senator and brought in legislation shielding correctional officials who break the law. "Reformers" from both political parties insisted that welfare recipients either work or go hungry--at the same time that the Federal Reserve hiked up interest rates to make sure that unemployment doesn't fall much below 6 percent. All the politicians raged about tax money for welfare, with the main program (Aid to Families with Dependent Children) running at \$22 billion a year; but none of them was so impolite as to mention the \$500 billion the Savings & Loans bankers have cost us or the \$290 billion a year we are paying out--mainly to financial funds and wealthy individuals--just for the interest on a national debt that ballooned out of all proportion while Reagan and Bush played Santa Claus to the super-rich. The

economy would do far more to reduce crime than all the punitive and costly measures that have flowed from the change of focus.) This climate is fraught with the particular danger that precious civil liberties, vital to all members of society, will be sacrificed on the altar of this cultivated hysteria.

There is a monumental fraud at the heart of the current anti-crime campaign: Harsher sentences and more lock-ups are fool's gold; they have already been tried and have proven to be dismal failures. Over the past twenty years, the U.S. went on an unprecedented binge of quadrupling the number of persons in prison, along with a vengeful return to the death penalty. This approach hasn't brought any noticeable improvement. The politicians, whose main 1994 selling point was 'it's time for a change,' are simply serving up more of the same old sorry soup. Meanwhile, anyone who offered even a hint of another approach--for example Surgeon General Joycelyn Elders' suggestion for just a study about decriminalizing drugs--has been howled off the public stage. Lesser-known people with valuable experience in programs that actually work--offering opportunities for higher education, strengthening family ties, alternatives to incarceration for nonviolent offenders, restorative justice, etc.--can't get heard at all.

Three different reports published in September bring some relevant data and needed elements of rationality into the discussion of criminal justice.

"America Behind Bars," by Marc Mauer, was issued by The Sentencing Project, the most authoritative source for international data on incarceration. On a typical day in 1993, America had

about 1.3 million persons behind bars. The maintenance costs alone--without even considering expensive prison construction--are about \$26.8 billion a year. The prison population doubled from 1980 to 1991. Contrary to the common misperception, this wasn't mainly due to rising violence. 84 percent of the increase in new court commitments was for nonviolent crimes (drug, property, and public order offenses).

The current U.S. incarceration rate of 519 persons per 100,000 population (surpassed among major countries only by Russia since its recent economic breakdown) is about five to eight times that of other industrialized nations. While the U.S. does have a lot more violence, our imprisonment rates are also much higher when the crime rates are comparable to other countries, as with many property offenses. The stark difference in prison population seems to be driven largely by the U.S. penchant for longer sentences. (From inside prison I have to wonder whether subjecting so many young men to such dehumanizing conditions for drug and property offenses is in turn a significant factor promoting subsequent violence.) As to why some countries are more punitive than others, Mauer cites research that suggests the greater a society's tolerance of inequality, the more extreme its scale of punishment. In other words, the more pronounced the polarization of wealth and status, the more severe the penalties for those deemed to be criminals.

The incarceration rate for African Americans is 1,947/100,000, more than six times the rates for whites. (Mauer doesn't give any breakdown by income, which is also relevant.) Black males in the U.S. are imprisoned at more than four times the rate that

Black males were under apartheid in South Africa--3,833 versus 851 per 100,000. One in four young Black men is under some sort of control of the criminal justice system (including probation and parole), while the 583,000 behind bars outnumber the 537,000 enrolled in higher education.

Imprisonment has surprisingly little impact on curbing crime. "America Behind Bars" lists a few of the reasons: 1) Only a small percent of crimes are reported and many of those aren't solved; 2) there is a replacement effect, especially with drugs, as new sellers emerge to fill the economic slots that have been vacated; 3) crime rates are independently and heavily influenced by demographics--i.e., the number of males in the 15 to 18 year-old group.

The Sentencing Project's list of recommendations is very brief, and therefore superficial. Nonetheless, their indictment of current policies is clear: Two decades of steadily increasing rates of incarceration have not resulted in an American feeling safer from crime; serious reconsideration of such policies is way overdue.

The American Civil Liberties Union (ACLU) is the most prominent and venerable organization devoted to defending our constitutional rights. "The ACLU Final Analysis of Major Civil Liberties Abuses in the Crime Bill," by Nkechi Taifa, was issued on 9/13/94, the same day that President Clinton signed this federal bill into law. The report mentions how ACLU lobbying succeeded in modifying or attenuating some of the most harmful proposals. Nonetheless, the final result "is a civil liberties nightmare come true."

Here are some of the more troubling new measures: 1) Up

to ten years in additional sentence time are added to certain crimes if committed by a member of a "gang" (defined so broadly that it could be used against political groups accused of anti-government violence). 2) Juveniles as young as 13 years old may now be tried as adults for violent crimes. 2) Non-permanent resident aliens convicted of aggravated felonies are now to be deported without a hearing, thus eliminating the constitutional right to due process. 4) The severe increase in penalties for passport and visa violations could prove very harmful to those legitimately seeking political asylum. 5) Material support for "terrorist" activities has been criminalized. (Experience shows that the government is completely subjective and political about which violent actions it labels as "terrorist.")

There are a number of new provisions that change the rules of evidence and undercut the presumption of innocence for those accused of sexual offenses. The community sorely needs real protection from the terrible damage done by sexual predators. But, there is still a problem with provisions that will lead to more convictions of innocent defendants, already a significant ^{reality} ~~problem~~. (When there have been retrospective DNA tests of men convicted of rape, one third were proven innocent.) Once installed in this arena, the encroachment on civil liberties may get expanded. Also, these sensationalist steps geared toward the sinister stranger divert attention and resources away from the core problem: the vast majority of sexual abuse is committed by family, friends, and acquaintances. The new law provides no funds to expand the now rare treatment programs, such as the one in Vermont's prisons, with proven success at dramatically reducing

repeat offenses.

Thus, this crime law is definitely not about stopping crime. Another example is the elimination of the Pell Grants that funded college education for prisoners--the program with the most striking positive results. Numerous studies have shown that the average of 50 to 70 percent recidivism (repeat offenses after prison) can be reduced to 15 to 30 percent through higher education while incarcerated.

The new law includes the largest expansion ever of the federal death penalty to more than 50 offenses, including crimes that don't involve murder. Yet, extensive evidence shows that such executions, which are morally and financially costly, offer no deterrence. (During the 1980s, death penalty states averaged an annual rate of 7.5 homicides per 100,000 population, while state without the death penalty averaged 7.4.) The Racial Justice Act was eliminated from the bill, despite undeniable data that the death penalty is applied in an extremely discriminatory way (and there is a companion, gross disparity based on income level).

Another fulsome example of racism is the staggering 100 to 1 sentencing difference between the crack and powder forms of cocaine. Although experts have testified that there is no medical distinction, possession of over five grams of crack is a felony with a mandatory sentence of five years for a first offense; the same amount of powder cocaine is a misdemeanor that doesn't require jail time. In 1992, 91.3 percent of those sentenced federally for crack offenses were African-American, while only 3 percent were white.

The law's famous "three strikes" provision mandates a sentence

of life without parole after three serious felonies (including some nonviolent drug offenses). The "truth in sentencing" section makes aid to the states contingent on their ensuring that convicts do more time, with the goal that violent offenders serve at least 85 percent of their sentences. Of course these mandates will lead to a mushrooming of prison populations way beyond what the funds for new construction can handle, which forebodes such severe overcrowding as to lead to Dickensian conditions. Perhaps anticipating such prospective horror, this law makes it harder for prisoners to sue for VIIIth Amendment (cruel and unusual punishment) violations and strips a sizable segment of the courts' jurisdiction over such conditions.

Only a token amount of funds was allocated for "prevention programs," and that pittance is on the chopping block for the next Congress. Overall, the law follows the failed Reagan/Bush approach of investing "scarce resources in more prisons and longer sentences without a concomitant reduction in crime or increase in public safety." "[T]hese policies have also fostered a criminal justice system devoid of 'justice'--one which is pervaded with racism and class bias, from arrest to imprisonment."

The National Lawyers' Guild, a radical lawyers' organization, offers more in the way of political analysis in their "Crimes & Prisons." Although released in the fall of 1994, this collection is comprised of essays written over the course of the past few years. (Unfortunately, the Guild doesn't date them.) Steve Whitman's two articles are particularly incisive in exposing the underlying racism. For example, Black people are four times more likely than white people to be arrested for drugs, even though

the two groups use illegal drugs at about the same rate. Citing earlier Sentencing Project data that about one in twelve ^(adult) Black men is behind bars, Whitman goes deeper by raising the devastating impact on the Black community as a whole. He also is clear about how prisons are actually part of the problem, contributing to the crime cycle: "[V]irtually all experts agree that prisons cause people to become even more embedded in a life of crime." "[P]risoners rejoin their communities from prisons...where conditions encourage violence and criminality."

Luke Hiken's piece underscores that the skyrocketing increase in incarceration over the past twenty years has accompanied the biggest shift of wealth from the poor to the rich in the history of this country. He, like Whitman, challenges us to look at the definitions of crime. The various banking scandals in high places have cost the public far more than all the property crimes on the streets. The truly destructive acts of denying people health care, housing, and education are rewarded rather than prosecuted. The battering of women by their partners--which happens to about 12 million women a year in the U.S.--is hardly ever considered a crime. As Judy Greenspan's essay points out, when women strike back and kill their batterers, the sentences for murder are often harsher than men's. Greenspan also calls attention to the alarming, disproportional increase in women prisoners, fueled by mandatory sentencing for drug-related offenses.

We could give countless of other examples. How many Americans are aware that 100,000 people die each year from occupational-related diseases, four times the number of murder victims? Where is the public outrage demanding that justice be exacted on the

industry and agribusiness executives responsible for those hazards? What about the grand scale drug trafficking by U.S. intelligence agencies? or the government's unwillingness to enforce environmental laws against lead pollution because they might impinge on landlords' and urban industrialists' profits? These actions are truly worthy of condemnation. But instead, it is the children most damaged by these policies who will be publicly reviled and brutally punished as "despicable criminals."

As useful as all three of these studies are, none tries to present an overview of the causes and cures for crime. None delves into the prevailing moral values and consumer culture of capitalist society. None mentions how the shortcomings of the 1960s "War on Poverty"--which was designed primarily to coopt and control people rather than empower them--has provided grist for the mill of right-wing attacks against "social programs." (Indeed the direction for real solutions is not in the expansion of government bureaucracy but rather in more power, resources, and initiatives for the oppressed communities themselves.)

Finally, none of these short papers takes on the formidable task of formulating an alternative strategy for effective policies against crime. This challenge can not be met briefly or narrowly. That job would have to start at the foundation: why there is a dearth of positive alternatives for youths in certain neighborhoods; why social resources are poured into lucrative military contracts, debt payments to the rich, police and prisons rather than into improving education, providing jobs, building low-cost housing. Society would have to be awakened that the starting point for any serious anti-crime program must be the

strictest standards and enforcement on those with the most power and prestige. The complexity of the drug problem would have to be engaged--why prohibition is a failure (although very profitable for major vested interests); how to take the profit out and also how to stop the promotion of drugs (including ads for tobacco and alcohol); what type of mass education, community initiatives, and individual therapies actually work. For the range of crimes, there would need to be much more thorough study and development of the now isolated programs that have had significant success in prevention and in reducing recidivism.

Taken together these three reports do, however, provide an illuminating critiques of the current political juggernaut which, while totally counterproductive in terms of its professed goal, works brilliantly as a campaign to make "criminals" scapegoats for a failing economy. As Steve Whitman puts it:

In reality the "war on crime" and the "war on drugs" have been wars on Black and Latino people. The main purpose of these wars has not been to fight crime (since they could never succeed) but to distract us from fighting against the conditions in society which create and perpetuate crime--racism, sexism, poverty, homelessness, and despair.