Addressing Racial Disparities in Incarceration

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Abstract

This article reviews the current trends and impact of mass incarceration on communities of color, with a focus on criminal justice policy and practice contributors to racial disparity. The impact of these disproportionate incarceration rates on public safety, offenders, and communities are discussed. Recommendations for criminal justice and other policy reforms to reduce unwarranted racial disparities are offered.

Keywords

mass incarceration, criminal justice policy and practice and racial disparity

While the nation has recognized the significance of having the first African American man as President, clearly societal issues of race are still very prevalent in the United States in the 21st century. What is striking about the discussion of race is how frequently national attention to these issues is focused on race and the criminal justice system. Consider some of the key events in this regard: the 1992 police beating of motorist Rodney King in Los Angeles; the high profile criminal trial of O.J. Simpson; and the arrest and charges of racial profiling of Harvard professor Henry Louis Gates in 2009.

However people may view the justice issues in these situations, they represent moments in our national life in which it becomes clear that longstanding

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differences in how we perceive the criminal justice system are still very evident today and, in many ways, continue to define the racial divide in the country. For these reasons, as well as ongoing concerns regarding public safety and the impact of incarceration on communities of color, it is critical to examine the contours and widespread effects of imprisonment trends of recent decades.

This essay will overview the following:

- Mass incarceration's current trends and its impact on communities of color;
- Criminal justice system policy and practice contributors to racial disparities;
- The impact of disproportionate rates of incarceration on public safety, offenders, and communities;
- Recommendations for reform to reduce unwarranted racial disparities in the criminal justice system.

Overview of Racial Disparity in the Criminal Justice System

In 1954, the year of the historic *Brown v. Board of Education* decision, about 100,000 African Americans were incarcerated in America's prisons and jails. Following that decision, there has been a half century of enhanced opportunity for many people for whom it had previously been denied, and significant numbers of people of color have gained leadership positions in society. Yet, despite this sustained progress, within the criminal justice system, the figure of 100,000 incarcerated African Americans has now escalated to nearly 900,000.

The scale of these developments can be seen most vividly in research findings from the Department of Justice. If current trends continue, 1 of every 3 African American males born today can expect to go to prison in his lifetime, as can 1 of every 6 Latino males, compared to 1 in 17 White males. For women, the overall figures are considerably lower, but the racial/ethnic disparities are similar: 1 of every 18 African American females, 1 of every 45 Hispanic females, and 1 of every 111 White females can expect to spend time in prison (Bonczar, 2003). [Note: Criminal justice data on other racial groups, including Native Americans and Asians/Pacific Islanders, is generally very scarce and, therefore, this analysis generally focuses on trends regarding African Americans and Latinos. Available data, though, documents that Native Americans are incarcerated at more than twice the rate of Whites, while Asian Americans/Pacific

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Islanders have the lowest incarceration rate of any racial/ethnic group (Hartney & Vuong, 2009).]

High rates of criminal justice control can be documented not only by racial/ethnic group but even more so in combination with age, since younger people have higher rates of involvement in the justice system. Thus, 1 in 13 African American males in the age group 30 to 39 is incarcerated in a state or federal prison on any given day and additional numbers are in local jails (West & Sabol, 2010).

Communities of color are disproportionately affected not only by incarceration but also through higher rates of victimization as well. Data for 2009 (the most recent available) show that African Americans are considerably more likely than Whites to be victims of violent crime. This includes rates of victimization for robbery more than three times those of Whites as well as more than double the rate of aggravated assault. Hispanics are victimized at a rate about 15% higher than Whites but less than African Americans (Truman & Rand, 2010).

In theory, a variety of factors may be responsible for the high rates of incarceration of minority groups in the United States. These might include the relative degree of involvement in crime, disparate law enforcement practices, sentencing and parole policies and practices, and biased decision making. Below, I assess the relative contributions of each of these factors.

Crime and Arrest Rates

Measuring relative rates of involvement in criminal activity is a complicated task. Since most crimes are either unreported or do not result in an arrest, there is no overall measurement of the number of crimes committed or the demographics of those engaged in criminal behavior. This is even more significant in "victimless" crimes such as a drug-selling transactions between consenting adults.

To develop a rough estimate of these dynamics, we can begin by examining arrest rates. The main drawback of this method is that arrests may reflect law enforcement behavior in addition to involvement in crime. Particularly in the case of drug offenses, this may not represent an accurate measure of the criminally involved population. Nevertheless, an examination of arrest data compiled by the FBI in its annual Uniform Crime Reports (categorized by race, but not ethnicity) reveals that African Americans constituted 30% of persons arrested for a property offense in 2009 and 39% of those arrested for a violent offense (Federal Bureau of Investigation, 2009), clearly disproportionate to the 12% Black share of the overall national population.

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Further analysis of these data indicates that what may appear to be at first a racial effect is, in fact, much more so a question of social class. In one study of "extremely disadvantaged" neighborhoods, for example, researchers at Ohio State University found that rates of violence were considerably higher in such neighborhoods, regardless of race. The authors concluded that "it is these differences in disadvantage that explain the overwhelming portion of the difference in crime, especially criminal violence, between White and African American communities" (Krivo & Peterson, 1995, p. 642).

Examining rates of incarceration overall, a series of studies by leading criminologists have attempted to quantify the degree to which disparities in imprisonment reflect involvement in crime, as measured by arrest rates. An early study by Blumstein (1993) examined the prison population in 1979, in which he followed up with the same methodology for the 1991 inmate population. More recently, Michael Tonry and Matthew Melewski analyzed these issues for the 2004 prison population (Tonry & Melewski, 2008). What we see over time from these studies is a steadily declining proportion of the prison population that can be explained by disproportionate arrests. Blumstein's study of the 1979 population concluded that 80% of the racial disparity was accounted for by greater involvement in crime, as measured by arrest rates. This figure was reduced to 76% for the 1991 population and then significantly declined to 61% in the Tonry and Melewski study. Much of the change noted in these studies appears to be an effect of the growing proportion of offenders incarcerated for a drug offense since the 1970s and, in turn, reflects disproportionate law enforcement and sentencing practices that adversely affect African Americans.

While these national studies are instructive, they nevertheless represent the cumulative experience of 50 states and the District of Columbia. Research has demonstrated that there may be great variation in how crimes are prosecuted across jurisdictions and in the degree to which this affects racial disparities. A study of incarceration disparities in the 1980s found broad variation in the degree to which racial disparities in arrest explained disparities in incarceration. While national data showed that arrest rates accounted for 89.5% of the racial disparity in imprisonment in one study, in the northeast states, this only explained 69% of the disparity. Furthermore, in other states, fewer African Americans were incarcerated than would have been predicted by using arrest data (Crutchfield, Bridges, & Pitchford, 1994). Even within states, county-level data may prove similarly broad ranging.

While this essay focuses on disparities in the adult criminal justice system, it should be noted that similar, and often more extreme, racial/ethnic disparities pertain in the juvenile justice system as well. A comprehensive review of

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data on race and ethnicity in the juvenile system concluded that "disparity is most pronounced at the beginning stages of involvement with the juvenile justice system. When racial/ethnic differences are found, they tend to accumulate as youth are processed through the system" (Poe-Yamagata & Jones, 2000, p. 1).

Racial Disparity as a Function of Criminal Justice Decision making

While differential involvement in crime (as measured by arrests) explains a significant portion of high rates of African American imprisonment, so, too, do policy and practice decisions contribute to these outcomes. This does not suggest that such decisions are necessarily a function of conscious racism by actors in the system, but they frequently may include unconscious bias in the use of discretion, allocation of resources, or public policy decision making.

Examinations of case processing over time also demonstrate that racial disparities in the justice system are cumulative. That is, disproportionate processing at one stage often contributes to widening disparities at succeeding points. For example, defendants who are detained in jail prior to trial are more likely to be convicted and receive lengthier prison terms than defendants released on bond (Schnake, Jones, & Brooker, 2010). The following is an overview of ways in which racial disparity has been documented at various stages of the criminal justice system.

Law Enforcement Practices

In recent years, considerable media and policy maker attention has been focused on law enforcement practices and their possible contributions to racial disparity. Beginning with high profile media accounts of racial profiling by state troopers on the New Jersey Turnpike in the 1990s, much public discussion has focused on the extent to which individual officers or agencies systematically detain or arrest persons of color on the basis of race. Litigation in a variety of jurisdictions has resulted in court orders for law enforcement agencies to engage in oversight and data collection of traffic stops and other police activity to ensure that police officers are not engaging in unwarranted profiling.

Data from the Bureau of Justice Statistics demonstrate that it is not necessarily traffic or pedestrian stops in themselves that are the focal point for disparate practices. As of 2005, national data indicate that White, Black, and Hispanic drivers were stopped by police at similar rates. But of those drivers who were stopped, African American motorists were more than 2.5 times as likely as

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Whites to be searched by police and Hispanics more than double the rate (Durose, Smith, & Langan, 2007).

Prosecution

There is no stage of the criminal justice system at which there are so little data on case processing outcomes as at the prosecutorial level. Because prosecutors operate at a city or county level and generally have no obligation to report data to a statewide agency, there is broad variation in the manner, comprehensiveness, and efficiency by which data are compiled. This is particularly critical to an examination of racial disparity for two reasons. First, since more than 90% of guilty verdicts are a result of a negotiated plea rather than a trial, the influence of the prosecutor on ultimate case outcomes is often far more significant than that of the judge. Second, because these negotiations essentially take place "behind closed doors," there is little means by which to evaluate the fairness or effectiveness of this decision making. To say this is not to suggest that most prosecutors engage in biased behavior, whether conscious or not, but it does mean that it is very difficult to assess the degree to which such practices exist or to make comparisons across prosecutors' offices regarding such issues. And as such notorious cases as the Tulia, Texas, drug prosecutions of the late 1990s illustrate, a case in which nearly a third of the African American male population in a small town was charged with drug selling, only to see many of the convictions later reversed, this discretion can have disastrous consequences.

At the extremes, prosecutorial misconduct, even extending to death penalty cases, can produce disturbing miscarriages of justice. An investigation by *Chicago Tribune* reporters (Armstrong & Possley, 1999) concluded that "… prosecutors across the country have violated their oaths and the law, committing the worse kinds of deception in the most serious of cases … They have prosecuted black men, hiding evidence the real killers were white … They do it to win" (p. C1).

While relatively few studies have been conducted on prosecutorial decision making, there is evidence that such practices may contribute to racial disparities within the justice system. A 1991 study of federal mandatory sentencing conducted by the U.S. Sentencing Commission, for example, found that for cases in which case factors suggested that a charge could be brought that carried a mandatory penalty, prosecutors were more likely to offer White defendants a negotiated plea below the mandatory minimum than African American or Latino defendants (United States Sentencing Commission, 1991).

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Sentencing

In contrast to the prosecution function, a broad range of scholarship has examined the intersection of race and sentencing over several decades. In broad terms, the evidence indicates the following:

- There is strong evidence that race plays a role in the determination of which homicide cases result in a death sentence, whereby cases with White victims are considerably more likely to receive a death sentence (Baldus & Woodworth, 2004).
- In noncapital cases, race is often found to contribute to disparities in sentencing, but most often in combination with variables such as gender and employment (Spohn, 2000).
- Racial disparities at the sentencing stage are not necessarily a function of judicial bias but can often result from "race neutral" sentencing policies with skewed racial effects. This can be seen in the experience with many drug policies and habitual offender statutes (Crow & Johnson, 2008).

Research since the 1980s has demonstrated that offender/victim dynamics produce strong racially based outcomes in death penalty cases. Beginning with a study by David Baldus, the focus of the *McCleskey* case before the U.S. Supreme Court in 1987 (*McCleskey v. Kemp*, 1987), these studies have consistently shown that persons who kill Whites are about four times as likely to receive a death sentence as those who kill African Americans. These findings are not necessarily a function only of the sentencing decision but may also reflect prosecutorial discretion in how cases are charged. Notably, the Supreme Court has generally rejected claims of racial bias in such cases, ruling that while the data may show overall patterns of racial effects, such findings do not necessarily demonstrate racial bias in an individual case.

In noncapital cases, a comprehensive review of current research by sentencing scholar Cassia Spohn finds that

> … race and ethnicity do play an important role in contemporary sentencing decisions. Black and Hispanic offenders sentenced in State and Federal courts face significantly greater odds of incarceration than similarly situated white offenders. In some jurisdictions, they also may receive longer sentences or differential benefits from guideline departures than their white counterparts. (p. 458).

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In recent decades, a significant contributor to racial disparities has been the set of policies adopted under the framework of the "war on drugs." Such sentencing policies as mandatory minimums and school zone drug enhancements, while theoretically race neutral, in practice have significant racial effects. This is a combined function of law enforcement and prosecutorial practices. Since the escalation of the war on drugs in the mid-1980s, there has been a trend of both increased drug arrests and prosecutions accompanied by significant racial and ethnic disparities. At the stage of law enforcement, the number of drug arrests nearly tripled from a level of 581,000 in 1980 to 1,663,000 by 2009. Along with that came a dramatic escalation in the number of incarcerated drug offenders, rising from about 41,000 persons in prison or jail in 1980 to nearly 500,000 by 2003 (Mauer & King, 2007).

Racial disparities in the prosecution of the drug war can be seen initially in arrest rates. African Americans constituted 21% of drug arrests in 1980, then rose to 36% in 1992 (Mauer, 2006), before declining to 34% by 2009 (Federal Bureau of Investigation, 2009), but still disproportionate to their share of the national population. While there are no comprehensive data on the number of people committing drug offenses, government surveys have consistently shown that African Americans use drugs at roughly the same proportions as Whites and Latinos. Therefore, all things being equal, one would expect that arrest rates for drug possession would reflect these trends. But since many drug arrests are for sales offenses, it is also necessary to investigate potential racial disparities in this area. There are little data on drug selling activity by race, but at least one study of drug selling behavior in six cities published by the National Institute of Justice indicates that "respondents were most likely to report using a main source who was of their own racial or ethnic background" (Riley, 1997, p. 1).

Racial disparities in drug arrests then translate into disparities in sentencing that are exacerbated by the proliferation of mandatory sentencing policies adopted since the 1980s, laws that are frequently applied to drug offenses. Overall, this has resulted in African Americans and Latinos constituting 65% of drug offenders in state prisons in 2008 (West and Sabol, 2010).

Among the sentencing policies that most dramatically reveal the dynamics of these developments are the federal policies adopted by Congress in 1986 and 1988 governing two forms of cocaine, powder and crack. Under these statutes, a 100:1 drug quantity disparity was established between offenses of powder cocaine and crack cocaine. Thus, selling 500 grams of powder cocaine triggered a mandatory 5-year prison term, while for crack cocaine, sale or possession of just 5 grams resulted in the same 5-year sentence. The racial impact of these laws was a function of the vast disparity in arrests, with African Americans

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constituting about 80% of persons charged with a crack cocaine offense, while powder cocaine offenders were much more likely to be White or Latino. The sentencing disparity was reduced by Congress in 2010, raising the threshold for crack cocaine to 28 grams, while leaving the powder cocaine quantity at 500 grams.

Other sentencing policies have been observed to produce unwarranted racial disparities as well. School zone drug laws adopted by many states have as their stated objective the goal of deterring drug selling to school children and aim to do so by applying enhanced penalties to offenses committed within a certain geographical range—often 500 or 1,000 feet—of a school. As written, though, many of these statutes apply much more broadly, such as including drug sales between two adults during nonschool hours.

The racial effects of these policies result from the implications of housing patterns. Since urban areas are much more densely populated than rural or suburban areas, it is more likely that any given drug offense will take place within a school zone district. And since persons of color disproportionately reside in urban areas, a drug offense committed by an African American or Latino person will be more likely to incur these enhanced penalties. In New Jersey, for example, 96% of all persons incarcerated under these laws in 2005 were African American or Latino (New Jersey Commission to Review Criminal Sentencing, 2007). Recognizing this disparity, the state legislature restored sentencing discretion to judges in such cases in 2010.

Sentencing policies that enhance penalties based on an offender's prior record likewise produce disproportionate racial effects even though they are race neutral on the surface. This is a result of minorities being more likely to have a prior record, whether due to greater involvement in criminal behavior or disparate processing by the justice system. While such enhancements have long been a consideration at sentencing, the recent proliferation of "three strikes" and habitual offender laws that greatly enhance such punishments has magnified the impact of such considerations.

In the case of Alexander Leviner in 1998, (*U.S. v. Leviner*, 1998) Federal District Judge Nancy Gertner imposed a below-guideline sentence for an African American man convicted of being a felon in possession of a firearm. Under federal sentencing guidelines, Leviner's sentencing range was 4 to 6 years in prison, based on the offense conviction and his prior record. But Judge Gertner noted that most of his prior convictions were the result of traffic stops by Boston police. Given the history of racial profiling by law enforcement agencies, Judge Gertner reasoned that such practices essentially contributed to Leviner's prior record, and as a result she imposed a lesser sentence of 2.5 years.

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Implications of Racial Disparity in Incarceration

While it may seem obvious to many that disproportionate rates of incarceration of minorities are problematic, others may believe that such outcomes are merely the result of criminal activity and are therefore necessary to promote public safety. But given the current scale of incarceration, there are several reasons why these issues should be of concern to all Americans.

First, there is a growing consensus that the extreme rate of incarceration in the United States is unsustainable. Across the country, political leaders concerned with severe fiscal constraints are recognizing that the cost of corrections is impinging on state support for higher education and other vital services. In California, for example, in 2010 Governor Schwarzenegger announced that he would advocate for a constitutional amendment prohibiting the percentage of the state budget earmarked for prisons from exceeding what is set aside for the public university system (Steinhauer, 2010).

One presumed goal of mass incarceration, to reduce crime, is increasingly subject to diminishing returns. With a surge of incarcerated drug offenders since the mid-1980s, there is now a growing population in prison for which there is little effect on public safety due to the fact that incarcerated low-level drug sellers are routinely replaced on the street.

Extreme racial disparities in the use of imprisonment result in communities of color being disproportionately affected by the collateral effects of incarceration. These include family stress and dissolution, neighborhoods experiencing high mobility of residents cycling in and out of prison, and growing numbers of people with limited employment prospects. Incarceration has been demonstrated to reduce African American male wage earnings by 44% by the age of 48 (The Pew Charitable Trusts, 2010).

Emerging research also suggests that highly disproportionate rates of incarceration contribute to concerns regarding the perceived legitimacy of the criminal justice system. Research by Lawrence D. Bobo and Victor Thompson shows that perceived bias in the criminal justice system translates into a "crisis of legitimacy" (Bobo & Thompson, 2006, p. 463). When asked whether drug laws are "enforced fairly on all would be drug users," 79.4% of White respondents answered affirmatively but only 33.7% of African American respondents did so. As a result of such perceptions, when asked whether they believed that the police would take seriously a complaint about a home burglary, only 35% of Blacks expected such a response, compared to 60% of Whites. Such an outcome should be of concern to all since law enforcement agencies can only operate successfully if they have the cooperation and support of the community. If such trust erodes, then public safety is inevitably compromised.

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Recommendations

Highly disproportionate rates of imprisonment have produced significant social strains on communities of color and have been of questionable benefit in enhancing public safety. Policy makers should consider adopting policies and practices that can reduce unnecessarily high rates of incarceration while also helping to promote public safety. These include the following:

Level the playing field. The overlap between issues of race and class is profound in the criminal justice system, and lack of access to resources is a significant contributor to disproportionate rates of incarceration. This includes such disadvantages as inadequate defense services for indigent defendants and limited access to treatment programs. By providing credible sentencing options for the courts, greater numbers of defendants could be sentenced to community supervision, thereby avoiding costly incarceration while permitting offenders to maintain ties with family and community.

Invest in high school completion. A growing body of evidence demonstrates that there is a dramatic difference in the risk of incarceration for persons who do not complete high school. Research by Bruce Western and Becky Pettit shows that 68% of African American male high school dropouts had served time in prison by the age of 34 (Western & Pettit, 2010). Thus, along with other societal interests in promoting high school completion is the significant impact such outcomes can produce in helping to reduce disproportionate rates of imprisonment, which is critical as well.

Adopt racial impact statement legislation. Similar to fiscal or environmental impact statements, racial impact statement policies require consideration of any undue racial effects of sentencing or other criminal justice legislation prior to adoption. As utilized in Connecticut and Iowa, legislators are provided with an assessment of the racial/ethnic impact of proposed sentencing legislation (Mauer, 2009a). If the analysis indicates that the policy would produce a disproportionate effect, policy makers are not precluded from adopting the legislation but have the opportunity to consider alternative means of achieving public safety goals without exacerbating racial disparities in imprisonment.

Reorient the "war on drugs". Despite a notable shift in the public climate toward support for treatment and prevention for substance abuse, along with the expansion of drug courts and similar measures, the number of drug offenders in prison has not declined and dramatic racial disparities persist. This is due to a combination of circumstances: limited community-based options for treatment; mandatory sentencing laws that result in excessive prison terms for lower-level cases; and the failure of some drug court programs to target prison-bound offenders.

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Reversing these policies and adopting harm reduction models would produce more compassionate, and less costly, outcomes.

Adopt and implement racial fairness policy goals and commissions. Several states have adopted racial equity goals and structures that recognize the interrelated set of decisions that cumulatively produce racial disparities in imprisonment. In Wisconsin, Governor Jim Doyle established a commission in 2007 (Mauer, 2009a) that produced a comprehensive assessment of racial disparities in the criminal justice system, and in 2010 the state of Delaware issued a declaration to "promote racial and ethnic fairness in the criminal justice system" (Delaware Criminal Justice Council, 2010), including providing grant incentives for applicants in compliance with the declaration. Such practices convey high-level support for constructive change at the state and local level.

Examine policy and practice decisions for undue racial impact. Through its Juvenile Detention and Alternatives Initiative, the Annie E. Casey Foundation incorporates a requirement that participating jurisdictions strive to not only reduce their detained population but to do so in a way that reduces racial disparity as well. In Multnomah County (Portland), Oregon, for example, the establishment of alternatives to detention achieved both these objectives. In the adult system, local officials in Hennepin County, Minnesota, recognized that several of the risk factors used to develop recommendations for pretrial release of defendants were highly correlated with race but had no predictive value regarding failure to appear in court. As a result, the scoring system was revised to reflect evidence-based analysis that would not produce unwarranted racial disparities (The Sentencing Project, 2008).

Conclusion

In examining the policies and practices that have produced a world record–level of incarceration, along with a dramatic scale of imprisonment for African Americans in particular, it is now clear that these outcomes are a result of a complex set of factors. Most significantly, policy decisions over the past four decades have created a severe imbalance in the national approach to public safety. While crime control initiatives have traditionally incorporated a mix of criminal justice responses along with preventive measures, the national approach to these issues is now weighted heavily toward the criminal justice system at the expense of policies that could help strengthen the capacity of families and communities to establish behavioral norms and enhance opportunity.

Within the criminal justice system the most significant change in recent decades was the inception of the war on drugs in the 1980s. The set of policies

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and practices enshrined within that initiative contributed substantially to the burgeoning prison population, accompanied by dramatic racial and ethnic disparities. These disparities are not a function of greater involvement in drug use or the drug trade but rather resulted from discretionary decision making by law enforcement agencies as well as enactment of harsh sentencing policies by both state and federal lawmakers.

Reversing these trends is not a simple matter and will require a shift in the political environment on two levels. In regard to criminal justice policy, this will necessitate a reconsideration of the value of mass incarceration in producing public safety and developing means of strengthening the capacity of community-based corrections systems to supervise offenders and provide comprehensive services. The broader agenda for reform will require a public policy climate that recognizes the need for a comprehensive approach to public safety, one that is not overly reliant on criminal justice sanctions.

Despite the rather grim data reported in this analysis, there are some reasons for cautious optimism. In recent years, policy makers across the political spectrum have become increasingly receptive to a range of sentencing and drug policy reform measures that hold the promise of producing greater public safety benefits at less cost. In regard to racial disparity in the criminal justice system, there are some signs of possible change as well. A recent analysis of persons incarcerated for drug offenses demonstrates a significant decline in the number of African Americans in the first decade of the 21st century (Mauer, 2009b). While it is too early to assess all the contributing factors to this trend, it does suggest that there may be constructive responses to the problems identified in this essay. The challenge for both policy makers and the public is to build on these developments and to think creatively about ways of enhancing both public safety and racial justice.

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Bio

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