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LEGISLATING RACIAL FAIRNESS IN CRIMINAL JUSTICE

Olatunde C.A. Johnson*

I. INTRODUCTION

Twenty years ago, in *McCleskey v. Kemp,* the Supreme Court rejected a capital defendant's claim that statistical evidence of racial discrimination in the administration of Georgia's death penalty system constituted a violation of the Eighth and Fourteenth Amendments. Yet, even as *McCleskey* effectively bars constitutional challenges to racial disparities in the criminal justice system where invidious bias is difficult to establish, the Court invites advocates to pursue legislation as a remedy to racial disparities. Indeed, the *McCleskey* Court offers as a rationale for its ruling the judiciary's institutional incompetence to remedy these disparities, holding that "McCleskey's arguments are best presented to the legislative bodies" and that "it is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes."2

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2. *Id.* at 319 (stating that legislatures—the elected representatives of the people—are "constituted to respond to the will and consequently the moral values of the people" and are also better qualified to weigh and "evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts") (citations omitted).
Putting aside the question of whether the Court's concerns about institutional competence are sincere, the Court has raised similar concerns in other constitutional cases involving racial disparate impact claims. For instance, in *Washington v. Davis*—the Court's first clear holding that violations of the Fourteenth Amendment require proof of intentional discrimination—the Court held that rules affecting disparate impact "should await legislative prescription." Similarly, in *Administrator of Massachusetts v. Feeney*, the Court established a standard for proving intentional discrimination approaching malice, and again directed disparate impact claims to legislatures, stating that "[t]he calculus of effects, the manner in which a particular law reverberates in a society is a legislative and not a judicial responsibility."

Thus, the Court has repeatedly argued that the legislature is the appropriate venue for addressing disparate impact claims. The problem, of course, is that advocates turn to courts precisely because legislatures are seen as unresponsive. The legislature may be unwilling to critically examine the death penalty or other criminal justice issues because of a weak constituency militating in favor of reform and political pressures to expand rather than curtail criminal justice penalties. Even when public sentiment may drift away from favoring harsh punishments—as, for instance, in recent polls that show declining support for incarceration for non-violent drug offenders—legislatures may be slow to act because the constituency

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4. *Id.* at 248 (approving the disparate impact rule that existed in Title VII of the 1964 Civil Rights Act, which forbids race and gender discrimination in employment).
6. The Court defined intent to require more than awareness of the impact or even reckless disregard of foreseeable impact, requiring instead that "the decision-maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279.
7. *Id.* at 272.
favoring reform is diffuse, while the constituency favoring tougher penal laws is well-organized and vocal. A central theory justifying judicial review is that legislatures are often unresponsive to issues affecting racial minorities, and, by some accounts, the United States' relatively harsh criminal justice policies (as compared to other Western democracies) are in part a result of the confluence of race with criminal justice. David Garland, for instance, casts punitive responses as resulting from the "criminology of the other," the meting of harsh punishments to perceived social outcasts—at this time in history largely poor blacks—who "lack political power and are widely regarded as dangerous and undeserving."

Skepticism about legislatures leads the dissent in McCleskey to take issue with the majority's deference and resort to institutional competence arguments. Justice Blackmun acknowledges that constitutional intervention should be "sparingly employed," but argued that "[i]t is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life."

prosecution for certain categories of nonviolent drug offenders) [hereinafter Thinking About Crime].

9. See Thinking About Crime, supra note 8, at 18 (arguing that "tough on crime" voters, while few, may provide the victory margins in elections, and that "the existence of a few percent who will always oppose candidates who appear 'soft' on crime or likely to 'coddle' offenders can immobilize legislatures").


12. McCleskey v. Kemp, 481 U.S. 279, 342–43 (1987) (Blackmun, J., dissenting). Justice Blackmun quotes Alexander Bickle as saying: "It is a premise we deduce not merely from the fact of a written constitution but from the history of the race, and ultimately as a moral judgment of the good society, that government should serve not only what we conceive from time to time to be our immediate material needs but also certain enduring values. This in part is what is meant by government under law." Id. (quoting Alexander Bickle, The Least Dangerous Branch 24 (Bobbs-Merrill Co. 1962)).

13. Id. at 343 (Blackmun, J., dissenting). Justice Blackmun continued: "Our commitment to these values requires fidelity to them even when there is temptation to ignore them. Such temptation is especially apt to arise in criminal matters, for those granted constitutional protection in this context are those whom society finds most menacing and opprobrious. Even less sympathetic are
Yet after the *McCleskey v. Kemp* decision, advocates took the majority up on its charge by pursuing a federal legislative effort to enact a Racial Justice Act, which ultimately did not succeed. Part I of this Article will look specifically at these attempts to address racial fairness in the death penalty post-*McCleskey*. This Part recounts the unsuccessful efforts to pass a federal Racial Justice Act. It also considers the successful passage in Kentucky of the only state Racial Justice Act, which though a testament to the possibility of legislative reform to directly address racial bias in the administration of the death penalty, has, by many accounts, been of limited practical utility. Advocates have made more headway in death penalty reform in recent years by emphasizing the potential for error in the death penalty, specifically relying on high-profile examples of prisoners sentenced to death who are later found innocent. As a result, some advocates see more promise in building on such innocence arguments and deemphasizing racial strategies. While this can be seen as a flight from racial disparity arguments, this Part argues that the legislative gains achieved here inure to capital defendants—who include African Americans and other minorities—and suggest the possibility of achieving reforms even on an issue as bound up with race as the death penalty.14

Part II looks at recent legislative efforts at both the federal and state levels to address racial disparities in criminal justice in areas other than the death penalty. Specifically, efforts to address racial disparities in drug sentencing, which are fueling high incarceration rates for African Americans and increasingly Latinos, will be examined. This Part will consider the current effort to reduce the disparity in federal sentences between powder cocaine and crack cocaine as well as initiatives by states to provide alternative sentences for low-level drug offenders. This Part will also consider emerging efforts to encourage states to adopt racial impact statements, which, like fiscal impact statements, would make explicit the consequences of criminal justice legislation on minority groups. As some commentators have noted, the most promising interventions are taking place at the state level. This Part suggests that advocates

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who traditionally work on civil rights issues should increase attention to the states as a locus of criminal justice reform.

Part III looks at the broader strategic question of how, in death penalty and sentencing contexts, advocates should think about employing arguments about racial disparity to secure legislative criminal justice reform. After all, as is explained in Part II, many of the reforms in the death penalty area and in drug sentencing appear not to be the result of explicitly invoking race. Moreover, arguments that depend on highlighting the overrepresentation of minority groups—noting for instance that one in nine young black males is in prison or in jail—may, because of antipathy or indifference to minorities, do little to promote change. I argue that whether or not criminal justice policy is inextricably linked to racial attitudes, as a matter of strategic policy advocacy, race need not always be explicitly invoked in advocating for criminal justice reforms that benefit African Americans and other minorities. For instance, advocates seeking to reform drug laws “enlist[ ] race” to reveal the unfairness of current drug policy while also pursuing broader strategies that reveal the toll current approaches to drug policy takes on the broader community.

Before proceeding, some points on the meaning of “racial fairness” are worth mentioning. The data in McCleskey v. Kemp pointed to bias in the administration of the death penalty as determined by the race of the victim. Much of the ensuing data that David Baldus and others have produced examines additional state systems for evidence of race-of-defendant or race-of-victim bias. As

16. Lani Guinier & Gerald Torres, The Miner’s Canary: Enlisting Race, Resisting Power, Transforming Democracy 54 (2002). Guinier and Torres argue that race should be deployed for social justice change but that it is critical to move from race-based critiques to “articulate a larger social justice critique” ultimately directed to broader institutional change. Id.
17. See McCleskey, 481 U.S. at 287 (discussing evidence from David Baldus’ study showing that defendants charged with killing white victims were 4.3 times as likely to receive the death penalty as defendants charged with killing blacks).
this Symposium shows, however, questions of racial fairness in the
death penalty concern not only bias or discrimination. They also
encompass race-neutral practices that produce racial disparity in the
criminal justice system relative to rates of crime commission, as well
as the mere fact of minority overrepresentation relative to minority
percentages in the population. The causal factors that produce racial
disparities and overrepresentation in the criminal justice system are
complex, as discussed by several of the authors in this Symposium
and touched on in Part III. In using the admittedly broad term
"racial fairness," I mean to examine not just legislative approaches to
eradicating bias in the criminal justice system, but also approaches
that implicitly or explicitly address racial disparities and
overrepresentation.

II. RACIAL FAIRNESS IN THE ADMINISTRATION OF CAPITAL
PUNISHMENT

There has been little success in establishing meaningful
legislation to address racial disparity in the administration of the
dead penalty. This is not because civil rights and death penalty
advocates have not tried. As described below, the major effort in the
late 1980s and early 1990s to pass federal legislation addressing
racial disparities in the death penalty was unsuccessful, falling
victim to the then-prevailing political mood at the federal level
favoring more punitive crime legislation. Kentucky is the one state
that has enacted legislation to address racial disparities in the death
penalty. While Kentucky's Racial Justice Act should give advocates
hope for the possibility of reform at the state level, it is less clear
whether the legislation has been implemented successfully.

A. Federal Racial Justice Act

Shortly after the McCleskey decision, advocates began an
effort that culminated in the introduction of the Racial Justice Act
(RJA) in Congress in 1988.19 The Act drew from disparity approaches
in other areas of civil rights law, such as in employment and jury

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Rev. 1411, 1425-26 (reviewing studies from several states finding that
defendants with white victims are at a "significantly higher risk of being
sentenced to death and executed than are defendants whose victims are black,
Asian or Hispanic").

selection, in which one can use statistics to prompt a shifting of the burden of proof from plaintiff to defendant. In particular, the Act would have allowed defendants to challenge capital sentences by presenting proof that race played a statistically significant role in capital sentencing in the defendant's particular jurisdiction. This evidence could show that race played a role either in terms of the defendant or victim's race. After making such a showing, the burden would then shift to the state or federal prosecutor to demonstrate that racial disparities were "clearly and convincingly" explained by nondiscriminatory factors. The bill also originally would have required data collection by all state and federal law enforcement jurisdictions on capital criminal prosecutions.

The bill did not pass in 1988, but eventually passed the House in 1990 as part of a larger crime bill (the Comprehensive Crime Control Act of 1990), though it was ultimately dropped in conference with the Senate. A version of the RJA failed to pass in either the House or the Senate in 1991. In 1994, a version of the

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20. See Don Edwards & John Conyers, Jr., *The Racial Justice Act—A Simple Matter of Justice*, 20 U. Dayton L. Rev. 699, 704 (1995) (noting that the RJA "adopts evidentiary procedures similar to those employed against racial discrimination in other civil rights laws"). At the time the RJA was first introduced, it was well established that plaintiffs in Title VII employment cases, for instance, could use statistical evidence to establish a prima facie case of employment discrimination. See Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 337–40 (1977). After the Supreme Court made the standard in Title VII disparate impact cases more difficult for plaintiffs, see Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989) (Blackmun, J., concurring) (stating that "a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack"), Congress in 1991 codified the disparate impact standard. See Pub. L. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e-2(k) (2007)). In addition, the Supreme Court has allowed the use of evidence of statistical disparity to establish a prima facie case of racial discrimination in jury selection, see Castaneda v. Partida, 430 U.S. 482, 494 (1977), as well as the use of peremptory strikes, Batson v. Kentucky, 476 U.S. 79, 93–95 (1986).

21. See H.R. 4442 § 3(a).

22. Id. § 3(c) (describing the federal prosecutor's burden as to "establish by clear and convincing evidence that identifiable and pertinent nondiscriminatory factors persuasively explain the observable racial disparities comprising the disproportion").

23. Id. § 4(a).


RJA passed the House (narrowly, by a vote of 217 to 212). However, in the end, after a bitter fight, the RJA foundered in the conference committee and was not included in President Clinton's 1994 Crime Bill, which among other things expanded the federal death penalty and increased penalties for certain non-capital crimes.

In some sense, the RJA came closer than one might have imagined. After a six year effort, it passed the House and was initially included in conference committees with the Senate Bill. It faced virulent opposition in both Houses, however, and received at best lukewarm support from the Clinton Administration. Congressional opponents focused their arguments on the use of statistics to prove discrimination in individual cases. They took issue, as the majority did in McCleskey, with the idea that statistical disparities could point to racial discrimination, arguing that individual trials would be hampered by “statistical jousting,” as one Senator put it, between prosecutors and the defense. The larger claim really was that the RJA would so encumber the administration of the death penalty that it would, as another congressional opponent

(introduced by Sen. Kennedy); S.1241, 102d Cong. (1991) (adopting motion to strike RJA); id. (noting that the RJA was rejected by the House on a vote of 223 to 191).


put it, "make the death penalty virtually unenforceable in every jurisdiction where it is currently carried out."\textsuperscript{31}

Shortly after the struggle to pass the RJA, Democrats, who had been the main supporters of the bill, lost control of the Congress and did not regain control of both Houses until January 2007.\textsuperscript{32} Even with the Democrats now in control of Congress—though with narrow majorities—there is no serious effort by advocates to revive the federal Racial Justice Act. As I discuss later, part of the reason is likely that advocates are gaining more traction on the death penalty at the state level and are making headway not by emphasizing racial disparity, but innocence.

B. Kentucky's Racial Justice Act

One state did pass a Racial Justice Act that was loosely modeled on the federal Racial Justice Act: Kentucky. The effort to pass a Racial Justice Act in Kentucky began in 1992 with the work of Kentucky-based advocates who had been involved in the national effort to pass the federal Racial Justice Act.\textsuperscript{34} Kentucky's Racial Justice Act (KRJA) was ultimately passed in 1998 (versions were defeated in 1994 and 1996).\textsuperscript{35} The Act allows a defendant to present, at a pre-trial conference, statistical or other evidence showing that race was a "significant factor in decisions to seek the sentence of death in the Commonwealth at the time the death sentence was sought."\textsuperscript{36} A judge should then conduct a hearing on the claim, at

\begin{itemize}
  \item \textsuperscript{31} 140 Cong. Rec. S5521 (May 11, 1994) (statement of Sen. Dole).
  \item \textsuperscript{33} The Senate of the 110th Congress consists of forty-nine Democrats and forty-nine Republicans; the two independents caucus with Democrats to give Democrats leadership and the majority. See U.S. Senate, Party Division in the Senate, 1789-Present, http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm (last visited Sept. 12, 2007); see also Democrats Claim Majority, supra note 32. The House of Representatives of the 110th House consists of 232 Democrats and 201 Republicans. See U.S. House of Representatives, Congressional Profile Sources, http://clerk.house.gov/member_info/cong.html (last visited Sept. 12, 2007).
  \item \textsuperscript{34} Interview with Diann Rust-Tierney, Executive Dir., Nat'l Coal. Abolish Death Penalty, (Feb. 14, 2007) (on file with the author).
  \item \textsuperscript{35} See Arnold, supra note 30, at 102.
  \item \textsuperscript{36} Ky. Rev. Stat. Ann. § 532.300(2).  
\end{itemize}
which point the defendant must "state with particularity how the evidence supports a claim that racial considerations played a significant part in the decision to seek a death sentence in his or her case." The defendant bears the burden of proving by clear and convincing evidence that race was the basis of the State's decision to seek the death penalty. The State can offer rebuttal evidence. If the court finds that the State sought the death penalty on the basis of race, the court must forbid the seeking of a death sentence in that case. The Kentucky Racial Justice Act is weaker than the federal RJA, which had a less burdensome standard of proof for defendants and which sought to address discrimination by prosecutors and juries.

A confluence of factors probably made passage of the Act possible in Kentucky. Most strikingly, all the blacks on Kentucky's death row had been convicted of murdering whites. When the Kentucky General Assembly commissioned a study in 1992 on race bias in the death penalty, it found that race was a factor in Kentucky capital sentencing, demonstrating in particular that "blacks accused of killing whites had a higher average probability of being charged with capital crimes (by the prosecutor) and sentenced to die (by the jury) than other homicide offenders." The data found that racial bias was likely occurring at the level of prosecutorial discretion and jury sentencing decisions. Also relevant to the KRJA's passage were the strong grassroots and religious organizations on the ground and a few vocal legislative supporters who were able to capitalize on this data and secure legislative reform. Moreover, Kentucky does not

37. Id. § 532.300(4).
38. Id. § 532.300(5).
39. Id.
40. Id. § 532.300(4); see also Arnold, supra note 30, at 103.
41. Arnold, supra note 30, at 104.
44. Interview with Diann Rust-Tierney, supra note 34.
vigorously employ the death penalty, executing two people since 1976.\textsuperscript{45}

Despite its success in passing, the actual effect of the KRJA is difficult to assess. The defendant has to meet a tough "clear and convincing" evidence standard and must prove that racial bias played a role in his particular case; it is unclear how often defendants have had success in satisfying this standard. (These pre-trial decisions usually are not reported.) A September 2002 survey of public defenders found that only four of the sixty-four public defenders who returned the survey reported using the KRJA in a case, though those who had used it experienced some success in changing the state's charging decisions.\textsuperscript{46} When asked why they did not use the KRJA more often, the public defenders cite lack of awareness of the Act, lack of resources to litigate KRJA claims, the difficulty of compiling statistical and other information necessary to prove discrimination, and unwillingness to raise claims of racial discrimination because of feared backlash by prosecutors' offices or by judges.\textsuperscript{47}

Even without documented successful cases, the mere existence of the KRJA could have a powerful effect in shaping prosecutorial behavior.\textsuperscript{48} The 2002 survey by the Kentucky Department of Public Advocacy found that some public defenders reported that it may reduce bias in the system and was having a positive effect on prosecutorial behavior.\textsuperscript{49} However, others felt that the KRJA either had no effect or was even leading to increased use of

\begin{footnotes}
\begin{itemize}
\item \textsuperscript{47} Id. at 18.
\item \textsuperscript{48} See \textsuperscript{id} at 17 (documenting responses by public defenders that the Act "forces prosecutors to examine their reason for seeking death"); \textsuperscript{id} at 19 (reporting statement of public defender that "[t]he threat of being exposed as racist has caused prosecutors to be more careful when deciding to seek the death penalty, thereby negating the need to raise the defense provided by the Act").
\item \textsuperscript{49} See \textsuperscript{id} at 16 (documenting public defenders' observations that the Act encourages prosecutors to modify their procedures and describing instances wherein prosecutors either withdrew the death penalty or were compelled to account for decisions to seek it).
\end{itemize}
\end{footnotes}
the death penalty.\textsuperscript{50} For instance, several defenders reported that the KRJA was compelling prosecutors to invoke the death penalty in every eligible case.\textsuperscript{51} One public defender reported that the KRJA might have caused the prosecutor to seek the death penalty in a case involving three black defendants accused of killing a black victim.\textsuperscript{52} At least one set of informal interviews of prosecutors and judges suggested that the KRJA has had little impact.\textsuperscript{53} These practitioners report seeing few cases raising the KRJA, and a long-time prosecutor said that the KRJA had little impact on the functioning of their office.\textsuperscript{54} In sum, the actual effect of the KRJA is hard to assess.

While racial justice acts have had limited success at the state and federal level,\textsuperscript{55} it should be noted that there are other legislative efforts to address racial disparity in the administration of the death penalty. For instance, when New York legislatively enacted a death penalty in 1995, it included proportionality review that explicitly allows judicial review of death sentences for racial bias.\textsuperscript{56}

\textsuperscript{50} See id.; see also id. at 18 (documenting responses that the effect of the Act was simply symbolic).
\textsuperscript{51} See id. at 16–17 (documenting public defenders’ observations that prosecutors have either sought, or reportedly sought, death notices in every eligible case and citing two public defenders’ responses that the Act has caused prosecutors to seek death in more cases).
\textsuperscript{52} See id. at 17 (documenting one public defender’s recollection that prosecutor Tim Kaltenbach sought the death penalty for three black defendants accused of killing a black victim on the grounds that “not to seek death would devalue” the victim’s life because of his race).
\textsuperscript{54} Id.
\textsuperscript{55} Several other states have introduced Racial Justice Act bills, but these efforts have failed so far. See American Bar Ass’n, State Racial Bias Legislation, http://www.abanet.org/moratorium/4thReport/AppendixJ.xls (last visited Sept. 12, 2007) (listing failed efforts in Georgia, Mississippi, and North Carolina).
\textsuperscript{56} See N.Y. Crim. Proc. Law § 470.30.3(b) (McKinney Supp. 2007) (requiring proportionality review including, upon the request of the defendant, a review of “whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases by virtue of the race of the defendant or a victim of the crime for which the defendant was convicted”); see also N.Y. Jud. L. § 211-a (McKinney 2005) (requiring the Court of Appeals to create a database of death eligible homicides “with the purpose of assisting the court . . . in determining . . . whether a particular sentence of death is disproportionate or excessive”). New York’s death penalty statute has been declared unconstitutional on other grounds.
C. Emerging Legislation to Reform the Death Penalty

Although there is little in the way of legislation specifically addressing racial disparity in the administration of the death penalty, the last ten years have seen both a general erosion of public support for capital punishment as well as emergent legislative initiatives to address death penalty reform more broadly. The decline in public support for capital punishment since the mid-1990s is attributed by many advocates and commentators to increasing public concern about the fairness of the death penalty in the wake of death sentences for individuals later found to be innocent. Coincident with this change in public sentiment, the past ten years have seen significant movement at the state level by political branches to reform or critically examine the death penalty.

Illinois became the first state to impose a moratorium on the death penalty in 2000, although it did so not through an act of the legislature, but through the Governor’s initiative (Governor Ryan eventually commuted all death sentences). In 2006, the New Jersey legislature became the first legislature to enact a moratorium, and it is now considering abolishing the death penalty upon the recommendation of the legislatively appointed panel to study the death penalty. According to the Death Penalty Information Center, several states are currently considering legislation to repeal capital

by the state’s highest court, People v. Lavalle, 817 N.E.2d 341, 365 (N.Y. 2004) (finding jury instructions defective under the state constitution), but there are some efforts to reenact a new, more limited death penalty bill. See James T. Madore & Melissa Mansfield, Full Plate for Lawmakers, Newsday, June 21, 2007, at A22 (stating that although the Republican-controlled Senate passed a bill reinstating the death penalty, it was expected to be defeated in the Democrat-dominated Assembly).


punishment or impose a moratorium on executions (to be sure, some of these efforts are further along than others).  

Arguments about racial fairness are not altogether missing from the current climate of legislative reform and moratoria efforts. In Maryland, for instance, evidence of racial bias in the imposition of the death penalty featured prominently in a temporary moratorium that the Governor placed on the death penalty in 2002 and has played a role in recent legislative attempts to reinstate the moratorium or abolish or limit the death penalty. Yet, for the most part, reform arguments are being crafted around concerns about the potential of wrongful execution of the innocent. Even as some commentators question the extent to which the innocence framing can drive broader reforms such as narrowing or even abolishing the death penalty, the relative success of the innocence approach in raising broader questions about the fairness of the capital justice system should lead one to question the role of race-based arguments going forward.

While there has been progress on reforming the death penalty at the state level, fewer reforms have been achieved at the federal level. As a general matter, Congress has not been a particularly hospitable place for those seeking to limit the death penalty.  


61. See Charles S. Lanier & James R. Acker, Capital Punishment, The Moratorium Movement and Empirical Questions: Looking Beyond Innocence, Race and Bad Lawyering in Death Penalty Cases, 10 Psychol. Pub. Pol'y & L. 577, 580 (2004). In May 2002, then-Governor Parris Glendening halted executions pending a two-year study on examining the “effects of racial and jurisdictional factors on the imposition of the death penalty.” Id. The new Governor, however, lifted the moratorium shortly after the report was issued in January 2003. Id.


63. See Lanier & Acker, supra note 63, at 578 (arguing that a “narrow focus” on issues such as innocence and race discrimination in capital punishment “falls short of the mark and risks producing recommendations for change that at best are incomplete and at worst are merely cosmetic”).
penalty or reform harsh sentencing laws. Indeed, in the 1994 Crime Bill and 1996 Anti-Terrorism and Effective Death Penalty Act, Congress expanded the death penalty and restricted access to habeas corpus. And commentators have argued that Congress is likely to be institutionally less responsive to progressive criminal justice reform than are states. The innocence movement has not left Congress wholly untouched, however. In 2004, Congress enacted the Innocence Protection Act, which provided defendants access to post-conviction DNA testing and also increased funding for states to improve the quality of representation in capital cases.

III. RACIAL FAIRNESS AND SENTENCING REFORM

Beyond the death penalty, this Symposium shows there is a range of possible intervention points to address significant racial disparities in arrest, prosecution, and incarceration. For the purposes of this discussion, I will focus on legislative efforts to reform drug sentencing. While minorities, particularly black men, are overrepresented as compared to their levels in the general population for a wide variety of offender categories, incarceration for drug offenses has been driving the increase in incarceration for both whites and nonwhites since 1980. It is also the area in which racial disparities might be the least well explained simply by higher rates of minority commission.


67. See Western, supra note 15, at 50 (stating that nearly half (45%) of the increase in the overall state prison population is explained by the rising incarceration of drug offenders).

68. See id. (noting that high rates of homicide among black men fully explain the parallel high rates of imprisonment for murder; for less serious offenses, however, race differences in incarceration are not well-explained by high crime rates); see also Michael Tonry, Malign Neglect: Race, Crime, and Punishment in America 49 (1995) (arguing that the "near consensus" of scholars and policy analysts is that most of the disparity in black punishment rates result not from racial bias, but from higher levels of blacks offending and that "[d]rug
The factors behind greater minority incarceration are complex. Blacks are more likely to be criminalized because of drug use and simple possession than their white counterparts even though many studies point to similar levels of drug use. This could lead one to assume that African Americans and Latinos are more involved in drug distribution than their white counterparts thus accounting for justifiably higher levels of minority incarceration for possession and distribution. But the picture is not that straightforward. Minority arrest and eventual prosecution and incarceration rates are likely influenced by decisions about enforcement, and, as Jeffrey Fagan’s data shows, by the concentration of specific forms of policing activity—like high stop and search rates—in predominantly minority communities. For instance, a recent study of racial disparities in arrests for drug distribution in Seattle, Washington found that disparities were explained not by higher levels of minority involvement in drug delivery networks, but by law enforcement focus on crack cocaine distribution and outdoor drug markets, as well as the targeting of police efforts to predominantly minority communities. Similarly, the relationship between crime rates and law enforcement is the conspicuous exception; blacks are arrested and confined in numbers grossly out of line with their use or sale of drugs; see also id. at 65–68 (describing researcher Alfred Blumstein’s work showing that differential racial arrest patterns explain much of the disproportion in incarceration rates). Much of this assumes the reliability of arrests as an indicator of racial crime pattern. See id. at 71–72 (finding no evidence of systemic police bias, and that arrests are a reasonable reflection of the involvement of racial groups in serious crime); but see id. at 105–107 (describing how and why drug policing practices tend to concentrate on low-income, minority neighborhoods).

69. See Western, supra note 15, at 46, 55 (noting that “[b]lacks and whites use drugs at similar levels, but the police have arrested proportionately more blacks than whites”).

70. See Jeffrey Fagan et al., Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods, 30 Fordham Urb. L.J. 1551, 1556 (2003) (finding that an increase in New York City’s incarceration rate is in part “attributable to aggressive enforcement of drug laws, especially street-level enforcement resulting in large numbers of felony arrests of retail drug sellers”).

71. See generally Katherine Beckett et al., Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests, 44 Criminology 105, 122 (2006) (finding that law enforcement “made more than twenty-five times more drug delivery arrests in the census tract encompassing [the] racially diverse downtown than in the census tracts encompassing the predominantly white Capitol Hill drug market” even though “the magnitude of the downtown drug market [did] not appear to explain the difference between the arrest rates in the two areas”); see also Thinking About Crime, supra note 8, at 104–105 (arguing
incarceration rates are complex. Researchers like Bruce Western have shown that the growth in minority incarceration rates between 1980 and 2000 are not well explained by higher rates of minority crime commission. Western explains the growth in imprisonment as related to significant increases in the use of imprisonment (as opposed to probation or diversion) for those convicted of crime, increases in the length of sentences, and increases in the prosecution and incarceration of drug offenders.

To address the problem of racial disparities in incarceration rates, advocates have focused on efforts to reform drug sentencing at the federal level. Over the years, these efforts have largely stalled, but they may have renewed momentum given recent changes in the composition of Congress and the May 2007 report of the U.S. Sentencing Commission, which recommends narrowing the crack and powder cocaine sentencing disparity. More substantial headway has been made at the state level towards alternatives to incarceration for nonviolent drug offenders. Below I describe the status of some of these efforts.

A. Federal Level

Notwithstanding the fact that state prosecutions are the primary engine for high minority incarceration rates, the federal government's one hundred to one disparity in sentencing between powder cocaine and crack cocaine and the War on Drugs initiated in the mid-1980s arguably set the tone through the late 1980s and 1990s for increased prosecution and tougher sentencing for drug crimes nationwide. For that reason, advocates have long focused on that police focus their drug enforcement activities on disadvantaged minority communities because drug markets are more visible, undercover work is easier, and it takes less police work to produce a single arrest).

72. Western, supra note 15, at 50 ("Poor and minority men were much less involved in crime in 2000 than twenty years earlier, matching declines in crime in the population as a whole. Although disadvantaged men became much more law-abiding, their chances of going to prison rose to historically high levels.").

73. Id.

74. See infra note 80 and accompanying text.

75. See generally Ted Gest, Crime & Politics: Big Government's Erratic Campaign for Law and Order 109–131 (2001) (tracing the evolution of the federal government's anti-drug policies over the course of the 20th century and describing the factors that contributed to the development of the nation's crack and cocaine policy and the federal war on drugs); Sean Nicholson-Crotty &
remedying racial disparity in federal cocaine sentencing.76 While the one hundred to one disparity in sentencing between crack cocaine and powder cocaine has been the focus of concerted advocacy, little headway has been made in changing the trigger amounts. Several Senate Republicans have introduced a bill in the 110th Senate that would minimize the disparity by raising the amounts that trigger mandatory minimums for crack cocaine and lowering them for powder cocaine.77 Versions of this bill have been introduced in prior years.78 Representative Charles Rangel (D-NY) has introduced a bill in the House of Representatives of the 110th Congress that would equalize the trigger amounts for crack and powder forms of cocaine.79 The Sentencing Commission recently recommended that Congress reduce the sentencing disparity between crack and powder cocaine—a recommendation that it had made three times prior (1995, 1997, and 2002).80

Kenneth J. Meier, Crime and Punishment: The Politics of Federal Criminal Justice Sanctions, 56 Pol. Res. Q. 119, 121 (2003) (citing studies finding that "the federal government not only reflects the national zeal for 'law and order' policies but in fact drives the process"). But cf. Western, supra note 15, at 60 ("National politics illustrate the hardening of Republican crime policy, but governors and state legislators led the effort to rebuild the penal system.").


77. See Drug Sentencing Reform Act of 2007, S. 1383, 110th Cong. § 101 (2007) (bill would increase the triggering quantity to 20 grams of crack cocaine for a five year sentence and 200 grams for a ten year sentence).


Given the stark racial impact of the crack/powder cocaine sentencing disparities, the absence of strong justifications for the degree of disparity in the treatment of the two forms of cocaine, and the degree of mobilization for reform on the issue, Congress’s failure to act on the issue reveals the difficulty in obtaining criminal justice reform at the federal level. At the same time, many advocates and congressional members are expressing optimism that some reform legislation could move this congressional session.

B. The Promise of States

Any progress that has been made in reforming drug laws has occurred at the state level. Relatively few (thirteen) states distinguish between crack and powder cocaine in sentencing schemes. So emphasis at the state level is less on reforming explicit sentencing disparities than in providing alternatives to or eliminating statutory mandatory minimum penalties. Over the last ten years, many states have reformed their drug laws in ways that may begin to have an impact on racial disparity and more broadly on incarceration rates. Louisiana, Washington, Connecticut, Mississippi, North Dakota, Arkansas, California, Idaho, Oregon, and Texas are among those that have passed laws lessening sentences for non-violent or first-time drug offenders, mandating drug treatment in lieu of incarceration for drug possession, or repealing mandatory minimums.


81. Sentencing Commission 2007 Report, supra note 80, at 7–8 (discussing reasons why the current penalty scheme for crack cocaine is unwarranted and unfair).


83. Sentencing Commission 2007 Report, supra note 80, at 98–99 (only thirteen states distinguish between crack and powder cocaine, and no state in 2007 has a one hundred to one drug quantity ratio).

In some cases, the racial impact of the mandatory minimums and various sentencing provisions may have been a factor in fueling these reforms. Other concerns, however, may be playing an even greater role.

Advocates and commentators have documented state reforms that have been driven largely by fiscal pressures caused by increasing rates of incarceration and longer sentences. Another contributing factor is the declining crime rate in the 1990s. And public opinion has changed on the question of mandatory sentences and incarceration for drug crimes in ways that may not be purely the result of perceived fiscal pressures, but of a perception that current drug policies are ineffective.

There have been some notable efforts to reform drug penalties where racial disparity arguments played a prominent role. Two years ago, New York State enacted reforms to the Rockefeller-era drug laws that lower sentences for low-level drug dealers, and racial disparity helped fuel the reform efforts in a central way. (Many advocates, however, remain unhappy with the extent of the reforms.) Connecticut, one of the few states that explicitly distinguished between crack and powder cocaine in its sentencing

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85. See King & Mauer, supra note 84, at 1, 2; see also Barkow, supra note 65, at 1290.

86. See King & Mauer, supra note 84, at 1.

87. King and Mauer also credit the popularity of initiatives such as drug courts and “growing public and policymaker awareness of the limits of incarceration.” Id. See also Open Soc’y Inst., Changing Public Attitudes Toward the Criminal Justice System 5–6 (2002) (presenting 2001 survey documenting that a plurality (45%) favor judicial discretion for nonviolent drug crimes over mandatory sentencing (38%) in contrast to a 1995 survey in which 55% indicated that mandatory sentencing is a good idea, and linking this change to the public’s view that policies focusing on incapacitation through long sentences as opposed to rehabilitation are less effective).

88. For instance, the Correctional Association of New York, a non-profit organization that advocates for criminal justice reform, has urged repeal of the Rockefeller Drug laws. It argues that recent changes to the law “do not amount to real reform” because mandatory minimums remain in place, the sentences “remain unduly long,” and sentences are still linked to the amount of drugs in the person’s possession rather than the “person’s actual role in the drug transaction.” Campaign to Repeal the Rockefeller Drug Laws (Corr. Ass’n N.Y., New York, N.Y.), Feb. 2006, at 1–2, available at http://www.correctionalassociation.org/PPP/publications/repeal_2006.pdf.
scheme, passed legislation in 2005 to address disparities in state penalties for crack versus powder cocaine—a disparity with a tremendous impact on African Americans and Latinos.\(^8\) The legislation was the result of a multi-year advocacy campaign by criminal justice and civil rights groups.\(^9\) While the legislation ultimately required raising the penalties for powder cocaine,\(^9\) many advocates see it as a victory.\(^9\) Advocates attribute their success to effective organizing of black and Latino communities most affected by the sentencing disparities, mobilizing minority and progressive Connecticut legislators, and illuminating the human and long-term impacts of Connecticut's drug policies on other communities not directly affected.\(^9\)

In sum, there is reason to be optimistic about the possibility of additional progress on drug sentencing reform at the state level. Even if this reform cannot all be credited to a change in norms about racial fairness in criminal punishment, racial and ethnic minorities stand to benefit.

C. Racial Impact Statements?

An emergent approach to addressing racial disparities in sentencing seeks to require state legislators to consider the racial impacts of their legislation. Michael Tonry has long recommended that sentencing legislation be analyzed for any differential racial effect.\(^9\) The criminal justice reform advocacy group, The Sentencing

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89. The Governor, Jodi Rell, initially vetoed legislation that would have set the mandatory minimum trigger at twenty-eight grams for both crack and powder cocaine. Christopher Keating, *Rell Vetoes Crack Change, Opposes Balancing Cocaine Sentencing*, Hartford Courant, June 3, 2005, at B1. After her veto, the compromise legislation resulted in equalizing the mandatory minimum trigger for crack and cocaine by setting it at about one-half ounces (roughly fourteen grams). *See* Conn. Gen. Stat. Ann. § 21a-278a (West 2006).


94. *Thinking About Crime, supra* note 8, at 221 (proposing "requiring all proposals for sentencing legislation to be accompanied by or subjected to impact
Project, has recently launched an effort to get states to require racial impact assessments prior to the adoption of new sentencing legislation. Working with The Sentencing Project, a state legislator in Oregon earlier in 2007 introduced legislation that would require the Oregon Criminal Justice Commission to submit a racial and ethnic statement prior to a legislative hearing on any legislation "that could change the state's prison population."

The success of such an effort implicitly depends on the idea that consciousness of a law's harmful effects on a racial and ethnic group might alter the behavior of legislatures; that is, it may lead them to adopt less racially harmful legislation. It is not entirely baseless to assume that even if much criminal justice policy is motivated by legislative indifference to minorities, that once the harm is made explicit, it will be politically difficult for legislatures to adopt such measures. At the same time, as I suggest below, it is easy for arguments about racial disparity in the criminal context to be interpreted as merely the result of higher levels of criminality in minority communities and not as also requiring examination of existing approaches to criminal justice.

IV. LOOKING AHEAD: CONFRONTING THE POLITICS OF RACIAL DISPARITY

In the context of the death penalty, advocates for the most part appear to have deemphasized legislative efforts at either the state or the federal level to address racial bias in the administration of the death penalty. As a practical matter, much of the reform on death penalty questions stems from concerns about innocence and the general unfairness of the death penalty. With the exception of a

analyses that project their differential effects . . . for nationality and ethnic groups”); see also Tonry, supra note 68, at 41-42.

95. For instance, the Sentencing Project is suggesting the development of a racial/ethnic impact statement in Oregon, where African Americans represent 10% of the prison population despite making up only 1.6% of the population at large. Sentencing Project, Proposal May Chase Racism from Prisons (Feb. 24, 2007), http://www.sentencingproject.org/NewsDetails.aspx?NewsID=380.


97. See Olatunde C. A. Johnson, Disparity Rules, 107 Colum. L. Rev. 374, 385 (2007) (arguing that providing data on racial disparities “would not . . . be sufficient to counter policies motivated by racial hostility [but it] might help to unsettle at least those policies that persist because of a lack of regard for minority groups”).
few states, concern about racial disparities has been less of the driving force in public debates about the continuing role of the death penalty.

On criminal justice issues such as sentencing, however, concerns about racial disparity in incarceration rates would seem likely to play a larger role in fueling reforms. After all, much of the racial disparity in the rates of incarceration stems from drug sentencing policy and, more specifically, from state and federal policies encouraging incarceration of relatively low-level drug offenders. Yet contrary to what may be expected, here it may be that other factors—state budget woes in 2000 and 2001, declining crime rates in the 1990s, and increasing public skepticism about incarcerating low-level drug offenders—were stimulating reform. 98

More broadly, I want to suggest that there are limitations in framing questions of criminal justice around racial disparity. For one, where strong political support still remains for “tough” sentencing policy, racial disparity arguments risk driving increased penalties for crimes committed by non-minorities. This problem emerged in the crack/powder cocaine debate, where some federal legislative proposals required increasing penalties for cocaine in order to make decreasing penalties for crack politically palatable. 99 Connecticut exemplifies this trade-off in having equalized its crack/powder cocaine sentencing disparity by raising mandatory minimum penalties for cocaine. 100 As a practical political matter, these may be compromises that advocates of eliminating sentencing disparities will want to accept. The point is simply that the “racial disparity” frame may be inadequate in addressing the broader norms and values that fuel penal and sentencing policy choices.

A related limitation in framing racial disparity in criminal justice as primarily a narrative about race is that American crime

98. See Mauer, supra note 84, at 51; see also King & Mauer, supra note 84, at 1–3 (attributing recent criminal justice reforms to declining crime rates, creation of new programs and initiatives, and greater public awareness of the limits of incarceration); Barkow, supra note 65, at 1290 (observing that many states confronting budgetary pressures have explored ways to reduce sentencing); Michael Tonry, Obsolescence and Imminence in Penal Theory and Policy, 105 Colum. L. Rev. 1233, 1257 (2005) (arguing that “[a]lthough racial disparities have worsened, concern about them has abated and is no longer a major pressure on the shaping of sentencing and penal policies”).

99. See supra note 77 and accompanying text.
100. See supra note 89 and accompanying text.
policies are fully understood only in the context of an American style of criminal justice policy, which, at least since 1970, has been more punitive and more severe than those of other Western industrialized democracies.\textsuperscript{101} Current rates of incarceration in America are high by historical standards and are five to twelve times higher than those of Western European countries—a difference that cannot be explained solely by higher crime rates in the United States.\textsuperscript{102} To some extent, placing primary emphasis on racial disparity risks shifting attention away from the broader problem of America's approach to criminal justice, specifically, what is arguably an over-reliance on incarceration.

Theories abound as to why America, particularly since 1970, has seen increasing rates of incarceration. The immediate cause is most certainly longer sentences for most crimes at both the state and federal levels. Also important is the increased emphasis on drug crimes, which results in both harsher penalties for those crimes and increased law enforcement resources directed at drug crimes.\textsuperscript{103} Focusing attention simply on the overrepresentation of African Americans may divert attention or unduly emphasize strategies that more broadly seek to challenge the United States' reliance on incarceration, especially as a response to drug use.\textsuperscript{104}

\textsuperscript{101} Thinking About Crime, \textit{supra} note 8, at 26.

\textsuperscript{102} \textit{See id.} at 21–22, 26–27, 33 ("American imprisonment rates did not rise [between 1960 and 1993] because crime rose. They rose because American politicians \textit{wanted} them to rise.") (emphasis in original). The comparative picture is not easy to disentangle. Countries define particular crimes differently, as Tonry acknowledges, making it difficult to compare across categories. \textit{See id.} at 29. Also, the higher actual rate of violent crime in the United States as compared to other industrialized countries may explain the imprisonment trend: violent crime may help establish the political climate that fuels a desire for incarceration.

\textsuperscript{103} According to commentators like Michael Tonry, the long drug sentences of the 1980s and 1990s are part of a predictable cycle of oscillation in concerns about drug use, with the latest cycle reflecting hostility and "emotional overreaction" to crime and drug use. \textit{Id.} at 64; \textit{see also id.} at 21–61 (collecting theories that seek to explain America's relatively high incarceration rates); James Whitman, \textit{Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe} 56–58 (2003).

\textsuperscript{104} \textit{Cf.} Guinier & Torres, \textit{supra} note 16, at 276 (discussing the need for criminal justice reform strategies that begin by exposing the racial dimension, but that place issues of mass incarceration "into a larger context" so that "its racial dimension [does not] overshadow all else").
Moreover, in a context in which disproportionate harms to minorities are tolerated precisely because they are seen as less deserving of public sympathy, emphasizing racial disparity may simply reaffirm stereotypes about black criminality, deviance, or "otherness" and do little to generate public action.\textsuperscript{105} Emphasis on racial disparities might be ineffective in securing change because of lack of political will to address the plight of minorities. The same factors that fuel disparities in the first place—at minimum, an indifference to the way in which public policies concentrate harm on minority groups—make it hard to change the policies that produce those disparities. Congress's adoption of the initial crack/powder cocaine sentencing disparity as well as its failure to correct those disparities can be seen in those terms. Continued production of data about racial disparities in incarceration rates or the racial impact of criminal justice policy might help cement images of black criminality and fail to generate sympathy or genuine efforts at change.\textsuperscript{106} As Glenn Loury puts it: "[d]ramatic racial disparity in imprisonment rates does not occasion more public angst . . . because this circumstance does not strike the typical American observer at the cognitive level as being counterintuitive."\textsuperscript{107}

On the other hand, confronting race and racial discrimination may be essential to challenging increasing rates of incarceration precisely because race is central to comprehending American penal policy. As a matter of empirics, understanding America's incarceration growth since 1970 may be inseparable from the question of America's incarceration of minorities, particularly of black Americans. The United States' level of incarceration today would be closer to that of other industrialized countries if it were not for the incarceration of blacks.\textsuperscript{108} As a matter of political economy, the

\textsuperscript{105} See Glenn Loury, The Anatomy of Racial Inequality 81 (2002) (discussing indifference to harms that disproportionately affect minorities); see also Garland, supra note 11, at 132 (discussing lack of political will to address issues affecting those perceived as "dangerous and undeserving"); Thinking About Crime, supra note 8, at 197 (arguing that "most offenders come from poor disadvantaged backgrounds and no powerful interest groups exist to promote or protect their interests").

\textsuperscript{106} See infra note 111 and accompanying text (discussing studies that show how attitudes about crime are tightly linked with racial attitudes).

\textsuperscript{107} Loury, supra note 105, at 81.

mechanisms that produce and sustain current high levels of incarceration may be comprehensible only by understanding their racial dimension. Structurally, one might understand high minority incarceration rates as a continuation of historic forms of social control over African Americans. Social policies favoring high levels of incarceration might be more politically palatable or tolerable when those being incarcerated are part of a disfavored racial group. More punitive social policies might be fueled by conceptions of African-American criminality or by more general animus toward African Americans or other minorities. For instance, leading theories link the increase in incarceration rates to a law-and-order politics that began in the 1970s, a shift that might be explained not only by a real rise in crime in the 1960s, but also by conscious efforts by political elites to use crime to increase opposition to the civil rights movement as well as the increased receptivity of working class whites to law and order politics. Vesla Weaver argues that powerful elites

109. See generally Loïc Wacquant, Deadly Symbiosis: When Ghetto and Prison Meet and Mesh, 3 Punishment Soc'y 95, 97 (2001) (situating mass incarceration as part of a historical pattern of state domination of blacks and arguing that the upsurge in black incarceration since the 1970s is “a result of the obsolescence of the ghetto as a device for caste control and the correlative need for substitute apparatus for keeping [unskilled] African-Americans . . . in a subordinate and confined position in physical, social, and symbolic space”).

110. See Garland, supra note 11, at 132.

111. See, e.g., Mark Peffely & Jon Hurwitz, The Racial Components of “Race-Neutral” Crime Policy Attitudes, 23 Pol. Psychol. 59, 61–63 (2002) (describing research showing that racial attitudes and stereotypes can influence ostensibly “race-neutral” policy; that crime has become “racialized”; and presenting several survey studies correlating measures of negative racial attitude with increased support for capital punishment); see also id. at 67–68 (finding in a study that white support for punitive crime measures such as the death penalty and stiffer prison sentences are “strongly rooted in beliefs about blacks, particularly reactions to black criminals,” but noting that race is not the only factor in shaping whites’ views on crime); Soss et al., supra note 14, at 400; Katherine Beckett, Making Crime Pay: Law and Order in Contemporary American Politics 84–85 (Michael Tonry & Norval Morris eds., 1997) (describing studies showing that beliefs about crime are correlated with racial attitudes and concluding that “opposition to racial and social reform” is crucial in accounting for white support for law and order policies).

112. See Beckett, supra note 111, at 32, 41–42 (discussing how the crime issue was framed in the 1960s by conservative elites and Republican Party efforts to cleave working-class whites from the Democratic Party through an emphasis on racially charged issues like crime); see also Western, supra note 15, at 53 (arguing that the “social turbulence of the 1960s—a volatile mixture of rising crime, social protest, and the erosion of white privilege—sharpened the punitive
constructed the "crime issue and its attendant racial inflection [as] a counterproject to civil rights advances, preempting the threat of further disruption to the status quo."\textsuperscript{113}

Whether or not race is central to understanding the mechanisms behind America's high levels of incarceration, it is less clear how and when arguments about race can be used to generate reforms and whether the sought-after reforms should be broad criminal justice ones or those that address racial disparity more directly. As indicated above, some efforts to reform drug sentencing and capital punishment rely little on racial arguments. Yet some successful recent strategies rely explicitly on racial arguments, though doing so in strategic ways. The advocacy effort to reform drug laws in Connecticut, for instance, employed arguments about racial fairness and core human rights to organize in communities of color, but then relied on arguments about fiscal and social impact that appealed to a broader set of potential allies, including suburban voters and political elites.\textsuperscript{114} Connecticut advocates also engaged a broader group of advocates beyond the small core of those committed to criminal justice.\textsuperscript{115}

These successful examples illustrate that there is more complexity in public attitudes about crime and criminal justice than is revealed by the United States' reliance on capital punishment, high incarceration rates, and its relatively punitive social policy. As some commentators have noted, even where public opinion studies

\textsuperscript{113} Weaverr, supra note 108, at 11.

\textsuperscript{114} Greene, supra note 90, at 7, 8, 15–16. Lani Guinier and Gerald Torres might describe such a strategy as "enlisting race." See Guinier & Torres, supra note 16, at 146–150.

\textsuperscript{115} Greene, supra note 90, at 10.
have documented the extent of public receptivity to punitive policies, punitive attitudes often exist alongside support for prevention and rehabilitation programs.\textsuperscript{116} To the extent this is true, there is room to change public attitudes and policies by providing accounts of the racial unfairness often generated by current criminal justice policy, demonstrating the social and fiscal costs of current approaches, and presenting alternatives.

V. CONCLUSION

\textit{McCleskey} is troubling in part because of its rejection of the judiciary's role in remedying racial unfairness in criminal justice in a climate in which the barriers to legislative reform seem persistent and daunting. At the same time, even had \textit{McCleskey} proved a success, advocates seeking meaningful reforms would likely have had to build coalitions, alter public opinion, and effectively engage legislatures, which suggests that the choice between courts and legislatures for those seeking social reform is not a simple either/or. At least at the state level, the past ten years provide some reason for optimism. In part because of effective work by criminal justice reform groups, public attitudes around the death penalty have changed dramatically. Surveys document increased support for alternatives to incarceration, particularly for nonviolent offenders, and progressive legislation is gaining traction in many states. While promising, this tinkers at the edges of the social and institutional structures that sustain America's high incarceration rates and its attendant racial disparities. With more than two million individuals in prison or jail, and more than twelve percent of black men represented therein,\textsuperscript{117} much remains to be done.

\begin{footnotesize}
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\item[116.] See Beckett, \textit{supra} note 111, at 107–108; see also Thinking About Crime, \textit{supra} note 8, at 16–18 (arguing, based on recent surveys and studies, that the public "holds complicated views about punishment that are neither monolithically nor single-mindedly punitive," but that politicians are reluctant to make changes).
\item[117.] Western, \textit{supra} note 15, at 3 (stating that the 12% of black men were of those "aged twenty-five to twenty-nine").
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