Opening Statement  

MASS INCARCERATION: FINDING OUR WAY BACK TO NORMAL

RON MARMER
Chair, Section of Litigation

It hasn’t always been this way. From the 1920s to the early 1970s, the average incarceration rate in America was around 100 per 100,000. In 1925, the rate was 119. We hit 200 only one year (1939). In 1974, it was 153. By the mid-1970s America changed course, with a vengeance. By 2006, our rate was 750 per 100,000—an increase of almost 500 percent in 30 years. In 2008, when inmates in local jails were added to the count, we reached an astonishing 1 in 100 adults behind bars.

Even those numbers tell only part of the story. They report how many adults per 100,000 are in prison at any point in time. But consider what those incarceration rates mean over a lifetime. For a Latino man born between 1945 and 1949, his lifetime chance of incarceration is 2.8 percent. For the next generation born between 1975 and 1979, the lifetime risk of incarceration is 12.2 percent, a 430 percent increase. For African American males, the older man born between 1945 and 1949 has a lifetime chance of incarceration of 10.4 percent, but the next generation’s lifetime chance is 26.8 percent.

Put another way, for all African American men born between 1975 and 1979, their lifetime chance of spending at least a year in prison is 1 in 4. At current rates, African American men have been projected to face a lifetime chance of imprisonment of 1 in 3. An African American man born between 1975 and 1979 who dropped out of high school has a lifetime chance of incarceration of a whopping 68 percent. For a provocative look at mass incarceration and race, you may want to read Michelle Alexander’s book The New Jim Crow: Mass Incarceration in the Age of Colorblindness.

The number of arrests also is Shocking. In 2008, there were 14 million arrests. A recent study reports that by age 23, the number of young people arrested for crimes other than a minor traffic offense has increased to 30.2 percent.

The reach of the criminal justice system extends even farther. For every person in prison, America has two more people on parole, probation, or some related form of control. In actual numbers, that means we have a total of more than 7 million people behind bars or subject to some kind of control that can land them behind bars. That is larger than the combined populations of Los Angeles and Chicago. If everyone in jail lived in one city, it would be the second largest metropolis in America, one of the many insights in Ernest Drucker’s book A Plague of Prisons: The Epidemiology of Mass Incarceration in America. In just under 200 pages, Drucker presents a clear, stark assessment of mass incarceration, using the tools of epidemiology.

A faint glimmer of hope comes from a recent decline in the prison population. One report shows that at the start of 2010, a slight decrease in state prisoners was offset by an increase in federal prisoners. Another report shows that at the end of 2010, the total prison population declined by 9,228. It was, sadly, historic to see any national decline. Even at year-end 2010, we had 7.1 million people behind bars or under some form of adult correctional supervision. That is 1 in 33 adults.

When the ABA House of Delegates considered these issues in 2009, the ABA called for a “national study of the state of criminal justice in the United States” to develop recommendations on how to fix this horribly broken system. Legislation calling for a bipartisan national commission has stalled in Congress. It is beyond belief that, as a nation, we have refused even to convene a bipartisan group to tackle the problem.

In December 2011, the ABA Section of Litigation co-sponsored a symposium at Yale Law School with the Arthur Liman Public Interest Program and the John Jay College of Criminal Justice. The symposium brought together federal judges, state court chief justices, prosecutors, defense counsel, officials from departments of corrections, leading academics, and representatives from organizations as diverse as the NAACP, ACLU, Heritage Foundation, and Cato Institute. In a series of candid conversations, participants searched for solutions, drawn from
programs adopted in cities and states across the nation.

The symposium highlighted Rhode Island’s efforts to confront the problem of burgeoning incarceration rates by participating in a “justice reinvestment” initiative. Working with the Justice Center of the Council of State Governments, Rhode Island sought to reduce its prison population, and take some of the money saved to reinvest into strategies that increase public safety. Equipped with specific statistical data on what changes would produce how many fewer prison-demic colleagues called that rationale into question. From 2008 to 2009, Rhode Island had the steepest percentage decline in prison population: 9.2 percent. Rhode Island’s experience can provide a blueprint for other states.

Yet another encouraging lesson from the symposium is that the politics cut across what many might expect. For example, we learned that when business leaders were asked to consider sentencing standards, they expected to see some evidence that there really is a bang for the buck. The usual answer, of course, is to point to declining rates of crime as proof that mass incarceration, whatever else one might think of it, has worked. Our academic colleagues called that rationale into question. Although the United States has become the world leader in incarceration, it has not produced significantly less crime than in countries with small fractions of our incarceration rates. As it turns out, crime rates ebb and flow in many countries, including Canada, in patterns similar to our own, but no other country has responded with incarceration rates even remotely approaching ours.

One thoughtful proposal urged this simple principle: when confronting any social issue, the criminal law should be the tool of last resort. Judged by that test, how many laws would pass muster?

As anyone who has witnessed the events of even the last three years knows, we often respond to the most recent headlines with some blunt instruments. Let’s look at this illustration borrowed from the literature of regulation and suppose that a bad business practice occurs in 1 out of 100 companies; the bad business practice produces $50 million of injury; and a regulatory and monitoring system could detect and prevent the injury at a cost of only $1 million per company. The math is pretty compelling, for only $1 million of regulation and monitoring we can prevent $50 million worth of injury. The problem, of course, is that if we impose $1 million of costs on 100 companies, the total cost is $100 million to prevent $50 million worth of harm. In the wisdom of the aphorism, is the cure worse than the disease?

Consider a different example drawn from recent newspaper accounts and familiar in kind to all of us. A county prosecutor recently testified before his state legislature to urge longer prison sentences for persons who have killed innocent victims while driving drunk. It was an all too familiar logic: (1) drunk driving is bad; (2) we still have drunk drivers killing people; and therefore (3) we should impose harsher prison sentences. We can all agree with the first two points, that drunk driving is bad and that we still have too many drunk drivers killing people. But before we embrace the third point, that the logical next step is to impose harsher sentences, we have to pause and consider what we are trying to accomplish.

The county prosecutor’s flawed syllogism suggests that the best way to reduce the number of drunk driving deaths is by keeping the drunk drivers in prison for more years. There is some common sense to the notion that we ought to be able to discourage bad behavior by making it more costly. And whatever else one can say about prisons, if a drunk driver is in prison, we know that he won’t be driving drunk and killing anyone else. Indeed, the county prosecutor’s argument packs a potent one-two punch, satisfying our desire to mete out harsh punishment as a matter of justice—the drunk driver killed someone—and our desire to make the streets safer through social policy.

But the rhetorical appeal of the argument tempts us to ignore another question: are harsher prison sentences the most effective way to reduce drunk driving deaths? What if it turns out—and I am not claiming this will be the case—that for the same amount of money we spend keeping drunk drivers in prison for more years, we could come up with a different program that reduces drunk driving deaths by, say, ten fewer deaths per year? You can imagine all kinds of alternatives: house arrest, monitoring bracelets, 12-step programs. The question is whether we would be satisfied by reducing the number of deaths, even if that meant we dealt less harshly with the guy who killed an innocent child when he got behind the wheel drunk.

As a nation, we have become addicted to incarceration. We have convinced ourselves that the best way to control any kind of behavior is to criminalize it. And if that doesn’t work, we will increase the penalties, and then increase them again. Like other addictions, this one is wreaking havoc in our lives. For more than a hundred years, America didn’t behave this way. In the mid-1970s, we made some disastrous choices that have taken a terrible toll. What we have come to think of as normal is anything but.

We often respond to the most recent headlines with some blunt instruments.