

The Penetration of the Criminal Justice System
Into Communities of Color:

A Leadership Challenge for the Legal Profession

Address by

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Chief Judge Kaye, Mr. Craco, distinguished guests, fellow members of the bar:

I am truly honored to be joining you at this third *Convocation on the Face of the Profession: Leadership of the Bar*. I am particularly honored to be asked to deliver these remarks at the end of the first day of your deliberations.

On this particular occasion, when we come together to reflect upon the leadership challenges facing the legal community, I would like to express my admiration and gratitude to Chief Judge Kaye for her inspired leadership. We are so fortunate, as New Yorkers, to have had Judith Kaye as our Chief Judge. She can justifiably look back on her tenure and count an impressive list of enduring accomplishments. I am particularly grateful for her advocacy of the concept of problem-solving courts. This new approach to the administration of justice fundamentally alters the function of the courts in our society, the role of judges in resolving disputes, and the impact of the law in promoting justice. In this new approach, the courts are empowered to pursue a kind of justice that is deep and lasting -- justice that does more than resolve the legal issues in a case, but seeks to address the problems that gave rise to the dispute, conflict, or crime. As members of the Bar -- and as New Yorkers -- we should applaud Chief Judge Kaye for promoting and nurturing this new vision of justice.

This evening I would like to share some reflections on what I consider the most single important leadership challenge facing the legal community today -- the nexus between our criminal justice system and our pursuit of racial justice. One of the most gratifying attributes of the legal profession is our willingness to engage the issues of justice. We debate the meaning of our Constitution's guarantee of equal protection of the law. We take seriously allegations of racial disparities in the operations of our criminal justice system. We recognize the importance of developing a profession that better reflects the racial, religious, national, and ethnic diversity of our country. We celebrate the legal profession's contributions to the abolition of Jim Crow laws and the establishment of statutory protections for women and minority groups. We are justifiably proud of the legal profession's contributions to America's pursuit of racial justice.

Yet every student of American history knows that the relationships between minority communities and the criminal justice system are very complicated -- replete with distrust, patterns of discrimination and racial violence. We need only remember such iconic events as the racially defined reactions to the acquittal of O.J. Simpson, or the urban riots of the 1960s, to portray the depth of this divide. More recently, we witnessed the uproar over the shooting of Sean Bell, an African-American man killed by police officers last year in connection with an undercover investigation at a night club in Queens. In my view, some of the anger expressed by the African-American community following incidents such as the Sean Bell shooting reflects more than the realization that another black man has died in a police shooting. In a broader sense, this anger is fueled by an overarching concern about the interactions between the criminal justice system, writ large, and minority communities generally, and the African-American community in particular.

I hope to persuade you tonight that we have entered a new and disturbing era in the relationship between minority communities and our system of laws, one that is fundamentally different from our past, and fundamentally more difficult to change. In this modern era, the criminal justice system has penetrated more deeply into communities of color, in ways that threaten to undermine the legitimacy of the entire rule of law.

This new reality is characterized by two phenomena. First, we have entered an era scholars are calling “the era of mass incarceration,” with historically high rates of imprisonment that fall especially hard on the African-American community, distorting every dimension of community life. Second, because we currently enjoy low crime rates (notwithstanding the recent increases in violence across the country), it is more difficult to question the wisdom of these aggressive crime policies because advocates of those policies claim they are responsible for our low level of crime. If these assertions are true, then the challenge we face is to develop a framework for engaging in thoughtful and constructive debates that lead New York State to a new set of criminal justice policies that keep our crime rates low, while reducing our reliance on the criminal justice system, especially on imprisonment, and enhancing respect for the rule of law. If we can achieve these goals, we will have advanced, rather than impeded, our nation’s pursuit of racial justice.

Let’s unpack these assertions.

To understand the magnitude of the incarceration phenomenon in America today, I ask you to consider a simple statistic: since the early 1970’s, we have more than quadrupled the rate of incarceration in America. A generation ago, we held about 110 people in prison for every 100,000 inhabitants; today, we incarcerate about 486 people per 100,000. The rise in the prison population has been a constant fact of American life. Every year since 1972, we have added to the nation’s prison population. In times of economic expansion, in times of recession; in times of war, in times of peace; when crime rates were going up, when crime rates were going down – every year we have expanded our prison population. [Note that New York’s prison population has been going down, but not by much.] America now enjoys the dubious distinction of having the highest rate of incarceration in the world.

As this audience certainly knows, the fourfold increase in incarceration rates in America has not been spread uniformly across the American population. Rather, the increased number of individuals – mostly men – sent to our nation’s prisons have come from a small number of communities in urban America, mostly communities of color. These communities are already struggling with socioeconomic disadvantage and the challenges of poor schools, inadequate health care, high crime rates, and weak labor markets. These same communities are now losing large numbers of young men – and a much smaller number of young women – who are being arrested, incarcerated, and returned home by the criminal justice system record levels. This year, we expect that about 650,000 individuals, or about 1,700 a day – 90 percent of them men — will be released from our

state and federal prisons and returned home. This is four times the number who made a similar journey a short twenty-five years ago.

The consequences for these communities – African-American communities in particular – are profound. Today, more than 10 percent of African-American men between the ages of 25 and 29 years old are in prison, compared with 2.4 percent of Hispanic men and 1.2 percent of white men. Assuming no changes in incarceration rates, nearly one in three African-American men – and one in six Hispanic men -- will be sentenced to serve at least a year in prison at some point in their lives.

Much of this disparity can be attributed to the nation's "war on drugs." Between 1980 and 2001, the incarceration rate for most serious crimes – murder, sexual assault, robbery, burglary and assault – rose significantly, but not dramatically, increasing between 66 and 361 percent. Over the same period of time, the incarceration rate for drug offenses grew well over 900 percent. Most of that growth, beginning in the mid-1980s when the crack epidemic exploded upon the streets of urban America, can be traced to the rise in African-Americans imprisoned for drug offenses. Beginning in 1987, the number of blacks admitted to prison for drug offenses skyrocketed, nearly quadrupling in three years, so that by 2000 it had reached a level 26 times the level in 1983. By contrast, over the same period, the number of whites admitted for drug offenses simply doubled, and the number of Hispanics only increased by about half.

The community level consequences of the era of mass incarceration are profound. According to research conducted in East New York, Brooklyn, on the blocks experiencing the highest rates of incarceration, one in eight men between the ages of 16 and 44 will be arrested and sent to jail or prison each year. According to a study published in Chicago by the North Lawndale Employment Network, approximately 70 percent of the men in North Lawndale have a criminal record. Clearly, in neighborhoods such as these, growing up male most likely involves one or more experiences in the criminal justice system.

Another way of looking at this new reality is to ask how much we are paying for the incarceration of the men from these blocks. My colleagues Todd Clear, Eric Cadora and Charles Swartz estimate that the taxpayers of New York State are spending \$3 million a year to incarcerate the men arrested on that block in East New York, and other blocks like it. We spend over \$60 million a year to incarcerate men drawn from the 75th Precinct in Brooklyn. Certainly we could find better ways to spend those dollars to reduce crime rates and produce justice.

A third way to understand this sobering new social reality is to examine the ripple effects on the relationships between young men and young women in these communities. Donald Braman, an anthropologist who examined the impact of mass incarceration on family and community life in Washington, D.C., described what he calls a "gender imbalance" – simply put, a shortage of men, both in a quantitative sense (there are fewer men compared to women) and in the qualitative sense (many of the men who are

available are less “marketable,” to use a crass metric, because of their involvement in the criminal justice system).

According to Braman’s analysis, 10 percent of the women in Washington live in neighborhoods with *extremely high* rates of incarceration, where more than 12 percent of the men are behind bars. In these neighborhoods, there are fewer than 62 men for every 100 women. We have very little understanding of the implications of this new reality – but we can imagine the impact on dating relationships, the notion of growing up male, on patterns of family formation, on the levels of female-headed households, on the relationships between women and the workplace, on the accumulation of family wealth.

The high rates of incarceration in minority communities are accompanied by high rates of law enforcement activity. Let’s take three different types of activity – arrests for low level drug offenses, “stop and frisk” activities, and revocations for parole violations. In a recent article in the *Journal of Criminology and Public Policy*, three scholars documented increases in arrests for the offense of criminal possession of marijuana in the fifth degree, known as smoking marijuana in public view (221.10 NYPL). From 1980 to the early 1990s, the New York City Police Department made about 1,000 arrests for this offense per year. Starting in 1994, however, these arrests began to increase dramatically, reaching a peak of 51,000 in 2000, and then dropping to levels around 40,000 per year. By 2000, this became this most common misdemeanor arrest, accounting for 15% of all adult arrests in New York City. From the perspective of impact on minority communities, it is noteworthy that slightly over half the arrests in 2000 (52%) were African-American, when the population was 23% African-American; 32% were Hispanic, when the population was 25% Hispanic. Even more troubling, in terms of the fairness of criminal justice processing, is that, even after controlling for prior arrests and convictions, Black defendants were more likely to be detained at arraignment, found guilty, and sentenced to jail, as compared to their white counterparts.

The police practice of “stop and frisk” presents another case study of the penetration of the criminal justice system into communities of color. You may recall that in 1999 then-Attorney General Spitzer conducted a study of “stop and frisk” practices following the public uproar around the police shooting death of Amadou Diallo. The Attorney General’s report found that, although African-Americans made up only a quarter (25.6%) of the population of New York City, half (50.6%) of the people stopped by the police were black. Hispanics comprised a quarter (23.7%) of the population, but a third (33%) of all stops. Put differently, African-Americans were over six times more likely to be stopped and frisked than whites, and Hispanics were over four times more likely. The researchers conducting the analysis then controlled for location of the stop (e.g., the police precinct) and crime rates in those precincts, and still found that minorities were subjected to police stops at significantly higher rates than whites.

A third criminal justice practice has added to the high levels of law enforcement activities in communities of color. We have many more of our fellow Americans now under criminal justice supervision than ever before. In 1980, for example, there were 220,000 individuals under supervision by parole agencies in this country. By 2000, that number

had reached 725,000, an all-time high. Over this same period, the nature of supervision has changed, as we now watch people more closely, impose more conditions on their liberty, and send them back to prison more frequently for violating their conditions of supervision. We now use new technologies such as drug tests and electronic bracelets to keep tabs on people. We impose curfews more frequently. We take fewer risks with parolees, and as a consequence, are much more likely to cite them for parole violations and send them back to prison. Consider these statistics: in 1980, state prisons admitted approximately 27,000 parole violators; in 2000, those same states admitted approximately 203,000 parole violators, a remarkable seven-fold increase.

I have touched upon only a few indicia of the high level of penetration of the criminal justice system into communities of color. We could add others, such as the exclusion of drug offenders from public housing, the denial of voting rights to probationers and parolees, or the fact that eight percent of all minor African-American children have a parent in prison today. We could expand our frame to include the numbers of children in foster care due to parental incarceration, the pipeline between prisons, jails, and homeless shelters, or the practices of suspending students from public schools for minor rules infractions.

As leaders of the legal and criminal justice communities, it is incumbent on us to ask whether these realities square with our notions of justice, comport with our sense of fairness, and withstand the test of effectiveness. Many of these practices are defended by arguments that they contributed to our nation's declining crime rates and are now necessary to keep crime rates low. These are very important public policy questions. The research, admittedly incomplete, does not provide much support for these assertions. For example, the consensus among research scientists is that the rise in incarceration in America only explains about a quarter of the drop in violent crime rates. An analysis of the increase in arrests for smoking marijuana in public found no correlation with the crime decline in New York City. A study by the RAND Corporation in the 1980s found that intensive supervision did not reduce crime. A more recent study by the Urban Institute found that individuals placed on parole supervision were just as likely to recidivate as those who were released from prison with no supervision.

We need to create an open discussion within the criminal justice policy community about the future direction of our system of law enforcement and criminal justice. We need to examine the costs and benefits of each law enforcement and criminal justice policy, and weigh each policy against alternatives, particularly those that do not perpetuate the system's penetration of communities of color. We need to move beyond a narrow examination of the issue of police use of force, as important as that issue undeniably is. We need to move beyond a statistical analysis of the racial disparities in the operations of the criminal justice system, as important as this analysis undeniably is. We need to examine the criminal justice system as experienced in the lives of those who are subject to the rule of law, particularly those who experience the enforcement of the law most acutely. If the lived experience of an African-American male, growing up in urban America, is that he is frequently subjected to stops and frisks that are not justified, then

our system of laws had lost a measure of legitimacy. If the high rates of incarceration and reentry are damaging an entire community's ability to raise its children, keep families together, accumulate wealth, and sustain the dream that the next generation will be better off than today's, then our system of justice has lost its way.

When considering these issues, I am reminded of a sobering assessment once made by Dr. Manning Maribel, the prominent scholar of African-American history at Columbia University. He said we have now entered the fourth chapter of the African experience on the American continent. The first chapter was slavery; the second was Jim Crow; the third was residential segregation in the North; the fourth is the era of mass incarceration. Of the four, this fourth chapter may be the hardest to reverse. Unless we take a hard look at the state of justice in our country, we face the distinct possibility that the era of mass incarceration will become a permanent part of the American landscape. The war on drugs continues without victory in sight. Even though we now experience the lowest crime rates in a generation, we have not witnessed a peace dividend through lower rates of incarceration. Instead, with the exception of a few states, including New York, the growth of America's prison population continues unabated. I fear that we have mixed our historical disdain for the criminal as the "other," with our deeply ingrained racist stereotypes, a mix then compounded by our fear of crime, with the result that the issue of mass incarceration, and the penetration of the law enforcement and justice systems in communities of color, seem to be far removed from our political discourse.

I hope that the individuals assembled in this room – leaders of the bar, leaders of civic life in New York, leaders of our state government – can use their influence and intelligence to help New York chart a different course. If we can do this, the nation will follow our lead.