

Examining Aspects of Obama's Criminal Justice Legacy

By

Abiodun Raufu

Department of Administration of Justice
Texas Southern University

Abstract

This paper is primarily a theoretical discussion of some aspects of the criminal justice legacy of Barack Obama's two-term presidency and its impact on minorities. The historic 2008 electoral victory of the first black US president was widely expected to usher the dawn of a post-racial America. Instead, race relations worsened. Some critics complained that there was no significant reduction in black-white disparity in probable arrest, court actions and imprisonment during Obama presidency and that whatever he achieved was too little and too late to reform the U.S. criminal justice system. Protagonists however argue that undue expectations failed to take account of deeply entrenched racism, racially toxic political environment and limitations on presidential powers which the Obama administration had to contend with. The two major criminal justice legislation of his administration were the 2009 Hate Crimes Prevention Act and the 2010 Fair Sentencing Act. Due to partisan politics, he could not get several critical bills passed into law due to stiff opposition from the Republican Party-dominated legislature. But many of those initiatives have become the cornerstone of the ongoing bipartisan criminal justice reform.

Keywords: *criminal justice legacy, colorblind ideology, racial disparities, Obama, racial bias*

Introduction

There is consensus that the greatest impact of Obama's two-term presidency was in nursing the U.S. economy back to good health after his predecessor lost power in the midst of an economic recession. Having inherited a sick economy in the aftermath of the 2007-2008 global economic crisis, the Obama administration introduced a wide-ranging economic stimulus package that brought the economic back to life and ensured a sustained economic prosperity which continued after he left power in 2016 (Hung, 2012). His signature health care initiative more known as Obamacare was also a landmark of his legacy as it enabled millions of long-suffering poor Americans to have access to health insurance coverage (Banks, 2017).

There is however less agreement about his criminal justice achievements. One major criticism of the ex-president is that he could have been a transformative

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leader for social justice if he had tackle headlong the racial disparity in the U.S. criminal justice system rather than carefully skirting around it (Dyson, 2016). Such criticism, however, failed to take account of Obama's personal style, the limitations which he had to grapple with, including a fiercely hostile legislature and a polarized environment which required tact rather than haste. Obama became president at a time when disproportionate minority contact with the criminal justice system and over-representation of blacks in the US prison system were some of the major race and crime issues of the milieu.

Expectedly, there were high hopes that the 2008 electoral victory represented an opportunity to address some of these critical issues. But it turned out that the situation was far more complicated than envisioned. According to Ostertag & Armaline (2011, p.280), while the election of the first black US president revealed a real desire among the American electorate for social change, it did not represent enough basis for Obama to translate many of his ideas into a reality without first embarking on the "dismantling of racism's institutional (structural) manifestations." It soon became obvious that fixing racism require far more than a black face in the White House.

While racial tension has always been a source of social conflict in America's history and successive administrations have paid lip-service to racial equality, the 1960s Civil Rights Movement brought substantial gains. One constant feature of America's history is how a period of racial progress is soon followed by another period of racial regression (Delgado, 2002). The Civil Rights' gains were soon eroded by the advent of the punitive era which began in the mid-1970s. The excuse was the increase in crime rates was believed to be drug-fueled. The war on drug soon ensued. The punitive policy, however, became a vicious tool to criminalize blacks even when there was no evidence to suggest that they commit crimes more than whites.

A major fallout of the punitive era which spans about three decades was the sharp increase in the disproportionate minority contact with the criminal justice system. Blacks were unfairly targeted through over-policing, differential treatment in prosecution and sentencing arising from a deep-seated perception of blacks as criminally minded and threatening (Tittle, 1994). Prison population soared with the over-representation of blacks who constituted only 13 percent of the US general population but disproportionately accounted for about 40 percent of inmates in state and federal prisons.

Successive administrations starting from the 1970s well into the 1990s enacted several ruthless drug laws which were used as a basis to incarcerate scores of blacks with severe consequences to the black community. Richard Nixon administration initiated the 1972 Drug Abuse Office and Treatment Act and the Heroin Trafficking Act of 1973. In 1979, the Comprehensive Drug Abuse and Control Act was passed during the Jimmy Carter administration widening the scope and use of mandatory sentencing for drug use (Mallicoat & Gardiner, 2014). President Ronald Reagan added the Comprehensive Crime Control Act of 1984, which increased sentences

for violent career criminals with a new U.S. sentencing commission, new rules for civil assets forfeiture and enlarged the scope of the federal death penalty (Visher, 2016). Reagan also introduced the Anti-Drug Abuse Act of 1986 ostensibly to deal with the crack cocaine epidemic. But the legislation is better known for its controversial 100-1 sentencing disparity between crack and powder cocaine. Among black drug users, the relatively cheaper crack was the drug of choice, while white drug users preferred powder cocaine. The law prescribed a five-year minimum sentence without parole for possession of five grams of crack cocaine commonly used by blacks. Curiously, it imposed the same five-year sentence for possession of 500 grams of powder cocaine used more by whites even when there is no scientific evidence of any pharmacological difference between the two drugs (Gest, 2001; Visher, 2016). The legislation also introduced a mandatory minimum sentence for drug offenses and removed discretionary power from judges. Reagan added the 1988 Omnibus Drug Act which imposed stiffer punishment for drug use and trafficking as well as increased punishment for money laundering and introducing seizure of assets emanating from the drug trade.

There was to be no let up for minorities when the Republican Party lost the presidency to the Democratic Party in 1993. Bill Clinton succeeded Reagan but his wide-ranging 1994 Violent Crime Control and Law Enforcement Act, regarded as the largest crime law in American history (Mallicoat & Gardiner, 2014) only added more pressure on the black community through discriminatory implementation. Clinton was to also introduce the Comprehensive Methamphetamine Control Act of 1996, while George W. Bush who succeeded him initiated the Combat Methamphetamine Act of 2005. The cumulative effect of these drug laws was the aggressive policing of poor black neighborhoods where drug trade tended to be conducted in the open and the consequent disproportionate incarceration of black youths whose criminality was no worse than their white counterparts (Tonry, 1995).

Theoretical Framework

Some scholars have suggested that a major factor that hindered Obama from doing more than he did in the realm of criminal justice reform is entrenched racial discrimination. This is seen as a deliberate attempt by the dominant racial group to protect its privileges and prevent black encroachment to its values, economic and political interests. A pertinent theoretical perspective that has been developed to explain the oppression of minorities in the United States is the racial threat theory. Derived from the conflict perspective in criminology, the racial threat theory situates racial discrimination within the context of the competition for scarce resources and the attempt by the dominant group in the society to protect its privileges against a threatening minority population (Blalock, 1967; Stults & Swagar, 2018). Racial threat theory explains how the dominant white majority use social control mechanism of the state to exclude minorities from economic and political opportunities. The power of coercion is exercised through the various

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agencies and institutions in the criminal justice system and excesses such as police killing of unarmed blacks is a derivative of this objective (Jacobs & O'Brien, 1998). The criminal justice system while paying lip-service to neutrality, fairness and equality operate to serve the interests of those who hold the levers of political and economic power in the society.

Racial threat theory is generally conceptualized around three main hypotheses in explaining the history of unremitting disproportionate minority contact with the criminal justice system in the United States. These are political threat hypothesis, economic threat hypothesis and the threat of black crime hypothesis (Eitle, D'Alessio & Stolzenberg, 2002). The first explains different ways in blacks are excluded from the political space which includes imprisonment and felon disenfranchisement. (King & Erickson, 2016; Fletcher, 2018). Regarding economic threat, blacks are demonized and prevented from having access to economic opportunities through different kind of subterfuge. The demonization of blacks through biased media reporting has reinforced the threat of black crime and some of the negative stereotypes about black people (Eitle, D'Alessio & Stolzenberg, 2002).

The threat of black crime revolves around the way social control is deployed relative to the size of the black population and the likelihood that a black individual will be arrested on suspicion of a violent criminal offense. Using data covering 2000-2006 from the Florida Department of Corrections, Feldmeyer and his colleagues (2015) reported that Black defendants in Florida were more likely to be sentenced to prison and given longer sentences in counties that have growing black population. This was because black defendants were targeted for effects of racial threat and the resulting disadvantages in criminal sentencing. This partly explains why black-on-white crime tend to result in higher black arrest than black-on-black arrest, while white-on-black arrest does not tend lead to corresponding arrest level compared to black-on-white arrest (Eitle, D'Alessio & Stolzenberg, 2002).

There is perhaps no clearer illustration of the injustice of the U.S. criminal justice system as two similar cases but with different outcomes which occurred in Mississippi. A white mother forgot her daughter in a hot car which led to the death of the girl and a black father in another part of Mississippi also forgot his daughter in a car causing her death (Konstantinides, 2016). The two incidents occurred two weeks apart, but the black father was indicted and charged with manslaughter, while the White mother was allowed to go free. Similar incidents, different treatment.

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Unlike his predecessors from Nixon to George W. Bush. whose major criminal justice challenges revolved around enacting get tough laws to deal with crime and the scorched earth war on drugs, both of which unfairly targeted blacks and other minorities, the crime narratives had begun to change at the beginning of Obama's presidency. The social and political context of the crime situation during the

Obama era presented a different kind of challenge. By 2008, crime rates had fallen, and the drug war could no longer be a convenient excuse for black incarceration. Between 1992 and 2011, violent crime rate fell from 757.7 per 100,000 US residents to 386.3 per 100,000, a substantial reduction of about 49 percent (Mallicoat & Gardiner, 2014).

The punitive policy had run its full course just as there was a consensus that the crime policy had created more problems than solutions and that its handmaiden, mass incarceration, was no longer sustainable (Clear & Frost, 2014). A paradigm shift in criminal justice reform was required to alleviate the collateral consequences that three decades of mass incarceration had inflicted on the society. The costs of incarcerating an individual for a year reached approximately \$30,000 per year as state and federal governments grappled with huge budget deficits (Gottlieb, 2017). Obama articulated his main criminal justice challenge as the need to develop a strategy to reduce the \$80 billion annual budget being spent on incarceration. He was also concerned about formulating effective reentry programs for inmates coming out of prison yearly as well as developing sound policies that will reduce the 2.2 million inmate population and cut down the number of people (estimated at over 11 million) caught up in the revolving door of US jails annually (Obama, 2017).

Between hope and reality

Obama's campaign message was anchored on hope. This resonated with the public and may have been responsible for euphoric expectations of sweeping changes at both international and domestic fronts (Atwater, 2007). Some segments of the black community had high hopes that Obama will serve as a change agent for human rights and racial equality. Initial euphoria surrounding Obama's historic election suggested the likelihood of improved race relations as 71 percent of Americans of all color regarded his victory bode well for a post-racial America (Gallup, 2008; Stolberg & Connelly, 2009). But it soon turned out to be a hasty conclusion because a major unintended consequence of the Obama era was a sharp increase in racial polarization (Wise, 2013; McDermott, 2014; Schmidt & Axt, 2016). This was symbolized by the rise in the number of blacks-police confrontation often on the back of unceasing police killing of unarmed black men by mostly white police officers who often were not held accountable for their actions.

It has been argued for instance that some whites perceived Obama's presidency as a symbol of black progress and a threat to white privilege that was to be resisted as part of the overall group identity (Norton & Sommers, 2011). Added to the mix was the changing racial and ethnic demography which aroused anxiety among some Whites who associated the rapid social change with the social policy of the Obama presidency. The anger arising from perceived group threat was thus vented through increased antagonistic political behavior designed to keep Obama in check

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through sabotage of his policies and actions (Parker, 2016; Skinner & Cheadle, 2016).

Obama's singular most important criminal justice legislation is arguably the 2010 Fair Sentencing Act. The Act reduced the sentencing disparity between crack cocaine and powder cocaine from 100: 1 ratio to 18:1. As a result, several drug offenders who were mostly blacks were able to get a retroactive reduction in their sentences (Gabbidon & Greene, 2013). Obama will also be remembered for the 2009 Hate Crimes Prevention Act which protects individuals from hate crime based on race, color, gender, sexual orientation, national origin, religion and disability and has since been adopted in various forms by more than 45 states (Pezzella & Fetzer, 2017).

If Obama was less successful in getting the legislature to pass some of his bills into law, he employed other means to implement some of his criminal justice initiatives. For instance, he instructed federal prosecutors to exercise greater flexibility in charging low-level non-violent offenders. In pursuance of his decarceration policy, Obama initiated moves to shrink the private prison industry which has been blamed for promoting the policy of mass incarceration. By the time Obama was exiting office in 2016, more than 100,000 American offenders were being held in private prisons located in 29 states and their annual revenue hovered around \$5 billion (Eisen, 2017). The Trump administration has since reversed this policy along with other Obama's initiatives in alignment with his law and order agenda which criminal justice scholars expect to lead to higher incarceration of blacks.

Under Obama, decriminalization of marijuana was encouraged across the country with an increasing number of states legalizing marijuana, while a few others approved its use for medical purposes. Diversion of a certain class of offenders to drug treatment and mental health courts also increased. The Obama administration also actively encouraged courts to take into consideration the defendants' ability to pay in charging court fees, fines, and bail. Obama released more non-violent drug offenders in federal prison than all previous presidents combined (Washington Post, 2017)

Instructively, most of the pardoned offenders were minorities (Horwitz, 2017). He is also the first sitting president to visit a federal prison in a symbolic gesture meant to focus attention on prison over-population and the collateral consequences of mass incarceration. Obama also ensured the nomination of liberal-oriented individuals into the Supreme Court and lower federal lower courts to influence the direction of the criminal justice system. It is a measure of how successful he was in this respect that the Supreme Court during his presidency was considered the most liberal in recent US history (Sinozich, 2017). He also organized several White House conferences to divert attention to criminal justice reform (Marion & Oliver, 2012). He also introduced ideas such as My Brother's Keeper initiative, a mentoring program to assist disadvantaged young people of color and vulnerable kids to ensure they get a healthy start in life.

Black-white racial disparities under Obama

Even with all these, it has been argued that the situation of blacks and other minorities in the criminal justice system did not change significantly in the Obama years (Glaude, 2016). In 2008 when Obama became president, state, and federal offender population was made up of 38 percent blacks, whites accounted for 34 percent and Hispanics 20 percent inmates. Black males were incarcerated at a rate six and a half times higher than for white males. The incarceration rate per 100,000 persons in the U.S. general population by race was 3,161 black males and 149 black females; 487 for white males and 50 for white females; while for Hispanics, it was 1,200 for males and 75 for females (Sabol, West & Cooper, 2009). By 2015 year-end and seven years into Obama's two-term presidency, imprisonment rate per 100,000 persons of US general population stood at 2,613 for black men, 103 for black women; 457 for white men, 52 for white women; while it was 1,043 for Hispanic men and 63 for Hispanic women. This shows that the incarceration rate for black men is five times more than the rate for white men during the Obama era (The Sentencing Project, 2017).

The incarceration rate for black females (103 per 100,000 black female population) was about twice as much as the rate for white females (52 per 100,000). Among all age groups, the incarceration rate for black females was between 1.5 and 4.0 higher than the rate for white females and between 1.1 and 2.0 higher compared to Hispanic females (Carson & Anderson, 2016). This shows that between 2008 and 2015, the incarceration rate of black men dropped from six and half times to five times more than the rate for white men.

Again, the relentless targeting of people of color by the White-dominated police departments did not really reduce during the Obama years. In 2011, 87 percent of the victims of the 97,296 street stops conducted under the New York Police Department's (NYPD) stop and frisk program were Blacks or Hispanics, yet nine of 10 people stopped were innocent (New York Civil Liberties Union, 2012). Neighborhoods with large concentrations of minorities were often targeted just as Blacks and Hispanics constituted over 90 percent of victims of police stops in 33 precincts and accounted for 50 percent of stops in 70 of 76 precincts where stop and frisk took place. Blacks and Hispanic youths between the age of 14 and 24 accounted for only 4.7 percent of New York city population but constituted 41.6 percent of the stops. It is also instructive to note that while blacks and Hispanics make up 23 percent and 29 percent of the population of New York respectively, they constituted 52 percent of the four million stop and frisk searches conducted by NYPD between 2004 and 2012. This contrasts with the number of whites who experienced fewer stops and frisking but were more likely to be in possession of weapons than minorities (Sommers & Marotta, 2014).

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Previous studies also demonstrated that while whites were more likely than Blacks to be in possession of illegal drugs like marijuana, cocaine, and LSD, blacks were more likely to be arrested for drug possession than whites (Knafo, 2013). For instance, 10 percent of blacks and 10 percent of Hispanics were found to use cocaine, while whites used the same substance at twice the rate for both blacks and Hispanics. Nonetheless, yet blacks and Hispanics were arrested and convicted at higher rates than Whites for cocaine possession (Substance Abuse and Mental Health Services Administration, 2011). The consequence was that blacks were jailed for drug-related offenses at rates that far exceeded their general population and blacks were to be found in comparatively higher number among drug offenders' population among those convicted of drug crimes (Chin, 2012).

The Ferguson and Baltimore riots which occurred during the Obama presidency also symbolized the state of race relations during the Obama presidency and the frustration over the ex-president's inability to bring radical transformation to a country long troubled by racial distrust. The underlying factors that precipitated the race-inspired riots in Ferguson, Missouri in 2014 and Baltimore, Maryland in 2015 indicated deep-seated anger over differential treatment based on skin color. The immediate causes of the riots were the killing of Michael Brown, an unarmed black teenager by a White police officer in Ferguson and the death of Freddie Gray, a Black man who died of fatal injury in Baltimore while being transported in a police vehicle. But the two events were fueled by decades of oppressive discrimination and violation of constitutional rights by White-dominated police departments against the Black communities in the two cities (Ferguson Report, Department of Justice, 2015; Baltimore Report, Department of Justice, 2016; Potterf & Pohl, 2018). In Ferguson, Blacks constituted 67 percent of the population. But they accounted for 97 percent of total arrests, 88 percent of the use of force and 85 percent of the vehicles stopped between 2012 and 2014 and 92 percent of cases with warrants in 2013.

The situation was not much different in Baltimore. The Department of Justice report (2016) showed that between 2010 and 2016, the Baltimore Police Department targeted the city's Black residents through disproportionate rates of arrests, stops, searches and excessive use of force. Blacks constituted only 60 percent of the city's driving age population and 27 percent of the driving age of the outskirts of Baltimore but made up 82 percent of all vehicle stops. Yet Whites accounted for 50 percent more contraband than Blacks during pedestrian stops and were found twice as much to have contraband in their possession than Blacks during vehicle stop search.

Obama (2017) is however adamant that he would have had more success in the area of criminal justice reform if the Republican Party dominated legislature had not thwarted some of his criminal justice initiatives. Two of such failed bills suffices. For instance, he was unable to get the legislature to pass the Smarter Sentencing Act that was meant to reduce sentences for a class of nonviolent drug offenses from 20 years to 10 years, 10 years to five years and five years to two years. Nor could he get his 2015 Sentencing Reform and Corrections bill to become a law.

That bill was meant to reduce mandatory minimum prison sentences for thousands of nonviolent drug offenders and made the sentencing changes in the FSA retroactive but for which Obama could not gather enough legislative support (Obama, 2017).

Colorblind ideology vs race conscious ideology

There are two divergent schools of thought on Obama's criminal justice legacy and its effects on the minority community. On the one hand are antagonists who argue that he did far too little and too late for the African American community. Some of Obama's harshest critics among black scholars (Harris, 2012; Dyson, 2016; Glaude, 2016) have argued that Obama didn't do enough to help blacks partly because there wasn't enough pressure from the black community. They also fault his admonishment about black responsibility which they contended placed the burden of discrimination on blacks while absolving whites of discriminatory practices.

Glaude (2016) implied that The Black Lives Matter movement probably did more for blacks. He wondered why a black man sat at the White House while the Black Lives Matter movement became the champion of black dignity, a development which Harris (2012) contended was curious but unsurprising given that the president never identified with black cause when he was seeking the presidency. Gillion (2016) has also observed that Obama's colorblind ideology can be seen in his public speeches in which he mentioned the word race far less than any other post-Second World War Democratic president. To critics, this is a vivid demonstration of a refusal to acknowledge the trauma of institutionalized and structured discrimination that minorities face in the United States on daily basis.

On the other side of the spectrum, sympathizers contend that Obama could not have done more for the black community given the constraints of his office and the hostile political environment in which he had to operate (Butler, 2010; Alexander, 2012). The high expectation that Obama's presidency could serve as a fulcrum for a drastic change in the black-white disparity in the criminal justice system is probably misplaced. Restrictions imposed by the statutory limitations on presidential powers and entrenched structural racism of more than 250 years will require more than having a black man becoming the US president for the first time (Winant, 2015). Obama the pragmatist is simply not the radical leader some blacks wanted him to be (Atwater, 2007). Finley & Esposito (2011) concluded that expectations of Obama as a transformative leader for human rights agenda is misplaced and hampered by his personal style, ambition, the threats he inherited and had to cope with during much of his presidency.

As president, Obama could set the tone on criminal justice reform. But there were limitations, made worse by the Republican Party domination of the legislature for much of his presidency (Wakefield & Wildeman, 2013; Wakefield, Lee &

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Wildeman, 2016). In addition, the racially polarizing environment of the milieu required tact rather than impulsivity (Dyson, 2016). Given the situation, Obama's ability to get anything done will arguably require transcendence above race to avoid any appearance that might lead to a perception that he had a black agenda (Johnson, 2016).

The danger in subscribing to a colorblind political philosophy, however, is that Obama had to make conscious efforts to avoid race-targeting policies and exercise caution not to overtly acknowledge existing structural racial discrimination (Johnson, 2016). It was therefore inevitable that Obama found it difficult to address the race issue frontally, eliciting a feeling of abandonment among blacks and other minorities who had hoped that his presidency would redress much of the racial disparity in the criminal justice system. Unsurprisingly, Obama's colorblind posture was interpreted by many as insensitivity to the plight of minorities (Winant, 2015).

Limitations

This paper is essentially a theoretical analysis of some aspects of Obama's criminal justice legacy within the context of the strength, weaknesses, opportunities and threats (SWOT) that affected criminal justice decision making by the Obama administration. There are different aspects of governance during the Obama presidency that requires further analysis. Again, the ex-president will probably in a not too distant future publish a book that could yield deeper insight into the underlying factors that were responsible for the political and cultural dynamics of his time as president.

Down the line, it will be interesting to compare his legacies against both his predecessor and his successor in properly situating his achievements in the area of criminal justice. More research may also be required in terms of the role of the media in framing the criminal justice issues during the Obama presidency vis-à-vis the media role during the Bush era and the unfolding Trump presidency.

Conclusion

Obama will probably be remembered more for bringing economic prosperity to the United States in the aftermath of the global recession which blighted the record of his predecessor. His two-term presidency witnessed sustained economic growth which continued to the end of his presidency. His signature health reform better known as Obamacare also brought succor to millions of poor Americans who hitherto had no health insurance. His criminal justice legacy however elicits less consensus. Yet Obama's criminal justice legacy cannot be fully assessed without taking into consideration the political environment in which he operated and the entrenched obstacles that dogged his eight-year presidency.

Cognizance must be taken of the formidable opposition of the Republican Party-dominated legislature which thwarted several of his criminal justice reform. With

the benefit of hindsight, Obama's cautious disposition appeared to be an inevitable consequence of the polarizing environment in which he had to operate. Boldness would probably have elicited greater resistance from the establishment. While his two major criminal justice legislation were the 2010 Fair Sentencing Act, Hate Crimes Prevention Act of 2009, Obama's criminal justice legacy must be seen beyond those two laws.

To circumvent the obstruction from the legislature, he engaged in widespread use of executive orders to get things done. He granted clemency to many non-violent drug offenders many of whom were blacks. He emphasized rehabilitation over punishment during his presidency and encouraged the use of diversion courts to ensure that the future of low-level offenders is not mortgaged by criminal record. He also hastened the process of decarceration by taking measures to reduce the number of private prisons in the country. Surely, Obama did not bring about a drastic transformation of the U.S. criminal justice system. It is safe to say however that several of the initiatives that he could not get passed into law are the bedrock of the criminal justice reform which has been garnering bipartisan support since his exit from power.

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