

dita “cifra dourada”, visando à penalização de atos dos poderosos, provavelmente se converterá em medida meramente simbólica, conclusão que se extrai das recentes experiências de movimentação da máquina penal contra indivíduos que não se enquadram no estereótipo delinquential clássico. Por outro lado, não se pode desconsiderar a hipótese de que a criminalização do abuso de autoridade seja utilizada como instrumento de *lawfare* (criminalização por falta de cobertura), promovendo a perseguição apenas daquelas autoridades que não demonstrem adesão ideológica ao projeto autoritário de encarceramento em massa encampado pela cúpula do Poder Judiciário brasileiro e pelo Ministério Público.

A democratização do sistema de Justiça, assim, demanda muito mais que a edição de uma norma penal. Há que se repensar a seleção dos magistrados e promotores, a ausência de participação social e de ouvidorias externas nessas instituições, a implementação de cotas nos concursos de ingresso e promoção, o estabelecimento de formas de responsabilização político-criminal e publicização das decisões etc.⁽¹⁾

O IBCCRIM sedia a Plataforma Justa, que se propõe a coletar dados e avaliar as distorções havidas no sistema de Justiça no que diz respeito à representatividade, ao orçamento e ao teor das decisões. Nesse diapasão, a partir dos dados de 2018, a Plataforma identificou que, nos Tribunais Estaduais, a probabilidade de um homem branco tornar-se desembargador é 33,5 vezes maior que a possibilidade de uma mulher negra alçar a esse cargo. Dentre os juízes de primeira instância, 48,3% são homens brancos e 31,8% são mulheres brancas, sendo que apenas 11,8% dos juízes declaram-se como homens negros e 6,6% das juízas são mulheres negras.

No que toca aos dados orçamentários do sistema de justiça, a situação de falta de transparência e distorção acerca de prioridades também é evidente. Tomando-se por exemplo o Estado de São Paulo, verificou-se que, em 2018, 5,14% de todo o orçamento estadual foi destinado ao Tribunal de Justiça, sendo um montante superior à soma do orçamento destinado às áreas de assistência social, habitação, saneamento, direitos e cidadania, trabalho, ciência e tecnologia, ambiental, comunicação, esportes e energia.⁽²⁾ Do orçamento do TJSP, 79% foi destinado exclusivamente ao pagamento de pessoal. Nesse diapasão, a plataforma revela que as remunerações de

juízes e promotores no Estado superam em muito, na média, o teto constitucional.

Assim, o déficit democrático do sistema de Justiça é um problema muito mais complexo e que demanda propostas estruturais mais amplas do que a criminalização simbólica de algumas condutas, no sentido de desconstituição da cultura que alça as “castas judiciárias” a um estamento acima da regência da lei.

Se as investidas anteriores de endurecimento penal com vistas à mudança da cultura jurídica no país não foram bem-sucedidas, a repetição dessa fórmula não deverá contribuir significativamente para uma mudança estrutural e efetivação do sistema processual penal acusatório no país. Por outro lado, não se pode negar que o debate sobre as mais diversas formas de abuso de autoridade, ainda que pela via ilusória da edição de uma lei penal, aponta para o reconhecimento da lesividade desse tipo de conduta abusiva praticada por quem historicamente se comporta como se estivesse acima da lei. O reconhecimento da falta de controle das autoridades reforça o quanto precisa ser combatido o elitismo e o autoritarismo presentes sobretudo nas carreiras jurídicas, visando à efetivação de leis já existentes que protegem e garantem o respeito às prerrogativas profissionais e os direitos fundamentais dos cidadãos e cidadãs. A nova Lei de Abuso de Autoridade, assim, está muito longe de promover uma “revolução democrática da Justiça”, conforme preconizada por Boaventura de Souza Santos.⁽³⁾ Contudo, o debate sobre a imposição de limites às autoridades e às práticas palacianas que marcam a cultura jurídica brasileira é urgente, o que se demonstra pela reação das corporações do sistema de Justiça contra o debate legislativo sobre o tema, no afã da manutenção de seus privilégios e de sua recusa em submeter-se à regência do ordenamento jurídico.

Notas

- (1) Dentre essas medidas, a criação de ouvidorias externas do sistema de justiça e a criação de responsabilidade político-criminal para a criminalização de novas condutas encontram-se propostas nas “16 medidas contra o encarceramento em massa” do Ibccrim, Pastoral Carcerária, AJD e CEDD/UnB. Disponível em: https://www.ibccrim.org.br/docs/2017/16MEDIDAS_Caderno.pdf.
- (2) Os dados podem ser conferidos em justa.org.br.
- (3) SANTOS, Boaventura de Souza. *Por uma revolução democrática da Justiça*. 3. ed. São Paulo: Cortez, 2011.

An intersectional approach to understanding the challenges facing incarcerated women

Jamelia N. Morgan

Introduction: Mass Incarceration

Any discussion on women in prisons must reckon with the fact that we are in a period of mass incarceration, or more accurately race and class-based incarceration. The rates of incarceration are unprecedented in the course of human history. The United States with just 5% of the world’s population holds 25% of those who are imprisoned.

Women are the fastest growing segment of the incarcerated here in the United States. Many of us are familiar with the data. One in 56 women will experience incarceration in their lives – that is, one in 111 white women, one in 18 Black women, one in 31 Latina women. Our

nation incarcerates nearly a third of all women in prison, according to a 2014 report by the International Center for Prison Studies. As I will discuss in this short essay, many these incarcerated women are living with disabilities and women with disabilities represent the vast majority of incarcerated women.

Disability and Incarcerated Women

As many as 80% of incarcerated women meet the criteria for at least one lifetime psychiatric disability. Nearly 73% of incarcerated women in state institutions and 47% in federal institutions report using drugs regularly prior to incarceration. Incarcerated women have

higher rates of disability than the general population: 12% of women in the general population have symptoms of a mental disorder, or psychiatric disability, a term I will use in this essay instead of mental illness or disorder, compared to 73% of women in state prison, 61% in federal prison, and 75% in local jails. There are gender disparities in the prevalence rates of disability in prison: Seventy-three percent of women in state prisons have psychiatric disabilities versus 55% of men, and 75% of women in local jails reported having mental health problems versus 63% of men. According to one study, 65.5% of women have a history of diagnosed mental disabilities and 20% reported experiencing serious distress in the past 30 days. For men, approximately 34% reported a history of diagnosed mental disabilities and 14% reported experiencing serious distress in the past 30 days. According to another study, incarcerated women reported higher rates of PTSD than war veterans. Although it is likely that gender norms against disclosing psychiatric disabilities likely influence the number of men willing to report experiencing mental health problems in prison, as in many cases doing so could render them more vulnerable to violence and abuse in the carceral setting, the evidence of gender disparities is persuasive.

Physical Disability and Women

Incarcerated women are more likely than men to report having a physical disability. In a 2015 U.S. Department of Justice report, about 40% of women and 31% of men in prison and 49% of women and 39% of men in jail reported a disability.

The report defined disability as including hearing, vision, cognitive, and ambulatory disabilities. It also included disabilities that provide challenges with self-care and independent living, which refers to the ability to navigate daily life schedules, activities, and events without assistance.

Systemic Failures:

Despite these significant numbers, there is evidence that prisons and jails are routinely failing to meet the needs of women with disabilities.

Real Stories:

- Michelle Kindoll experienced multiple strokes while confined in a Northern Kentucky jail. Rather than treating her properly, Kindoll, then 43 years old, was placed in an isolated cell for a period spanning several days. While confined she suffered multiple strokes, but medical staff ignored her symptoms, which included a numb leg, curling arm and slurred speech, according to a federal lawsuit. Instead, jail officials labeled Kindoll of being disruptive.
- Following amputation surgery, Martinique Stoudemire contracted MRSA, a serious bacterial infection. Prison policy required that Stoudemire be quarantined in a segregation unit due to her infection, and she was quarantined in the segregation unit at Huron Valley Women's Facility. Stoudemire stated that prison officials managing the Huron Valley Women's Facility held her in solitary confinement for two weeks with limited medical assistance and absolutely no contact with a prison doctor. She alleged that she received "extremely poor medical care while in segregation," and that the "cells were not equipped to accommodate" her disability. Specifically, she alleged that she "was never provided with any assistive devices that might have

allowed her to safely move between her bed, wheelchair, toilet, and shower," and that "[t]here was no call button, so Stoudemire had to shout when she needed assistance." Stoudemire was also "forced to crawl from her bed to the toilet." On one occasion, she defecated on herself when staff failed to respond to her requests for assistance. During her two weeks in segregation, Stoudemire "received only one shower . . . and was required to dress her wounds herself, which put her at risk of infection." The Michigan Department of Corrections settled the suit with Stoudemire in May 2016, awarding her over \$200,000 for the harm caused.

- Erika Rocha spent her 35th birthday confined in California Institution for Women in Chino Valley. The women in her tier threw her a Tinker Bell party to celebrate. A few months later on April 14, Rocha's body was discovered hanging in her 10-by-15-foot cell. Rocha's parole hearing had been scheduled for the next day. According to investigative reporters, stories like Erika's have become far too common at California Institution for Women, a facility known for its surge in suicides and suicide attempts in the last few years. Six women have died by suicide at the prison since the start of 2013, and there have been 73 suicide attempts, according to the California Department of Corrections. Prisoner-rights advocates say the number of attempts is likely higher. The suicide rate at CIW, as reported by the Department of Corrections, is five times the state average, and four to five times the national average for all female inmates in state prisons.

How do we understand the failure to meet the needs of incarcerated women with disabilities or the erasure of women with disabilities from the reforms to end mass incarceration and end the mistreatment of women in prison?

Disability & Incarcerated Women in Historical Context

To understand the treatment of incarcerated women with disabilities today, we have to understand disability in historical context. For most of human history, disability was viewed as illness, deformity, or deviation from a medicalized norm. Disability was viewed as an ailment to be cured and an attribute that rendered one abnormal and less than the ideal able body or mind. To understand this conception of disability – the medical model of disability – you have to understand the racial origins of this concept of disability.

During the period of eugenics when pseudo-science was used to justify the superiority of the white race, the idea of disability was that it distorted the ideal or normalized white body. Under the racist logics of eugenics, disability corrupted the purity of the white race. Disability in bodies and minds was linked to (for the purposes of our conversation on incarcerated women) immorality/sin, deviance, criminality, and sexual promiscuity. Where disability (today what would be labeled as cognitive or developmental, physical or psychiatric) was identified it was often linked to immorality, criminality and/or sexual promiscuity and in turn used to institutionalize people with disabilities including women. In short, disability linked with criminality, linked with sexual promiscuity, and linked with immorality resulted in institutionalization. Once institutionalized, women with disabilities were then forcibly sterilized on the grounds that the state had an interest in preventing women from reproducing children with "undesirable traits" who were presumed to be public charges and strain the public fisc.

In 1927, the Supreme Court sanctioned forcible sterilizations in

Buck v. Bell, a test case for the Virginia Eugenic Sterilization Act (passed in 1924). Officials at the Virginia Colony for the Epileptic and Feeble-minded argued in the Supreme Court that the state of Virginia had the right to forcibly sterilize a young white woman named Carrie Buck. Carrie, like her mother Emma committed to the Colony an asylum, where women labeled as “feeble-minded,” “immoral,” and “sexually promiscuous” were forcibly sterilized. Carrie’s 4-year-old daughter was forcibly removed from her on account of her commitment to the institution. Historians have since discovered that Carrie Buck did not have an intellectual disability and became pregnant as a result of a forcible rape. Despite these facts, the Supreme Court upheld the Act in an 8-to-1 decision. Carrie Buck became the first person forcibly sterilized under the new law. In a notorious line, Justice Oliver Wendell Holmes wrote, “Three generations of imbeciles is enough.”

Based on the legacies of eugenics logics, Black and Indigenous women were sterilized at alarming rates well into the 1970s. In one case of thousands of identified forcible sterilizations, the Eugenics Commission of North Carolina sterilized Nial Ruth Cox, at the age of eighteen. Cox reported that officials had threatened to discontinue her family’s welfare payments if she refused to submit to surgical sterilization. Notably, the North Carolina state eugenics program targeted young Black women deemed to be “promiscuous” or “feeble-minded”, epileptics, and women who had been deemed by social workers to have undesirable traits. Similar programs targeted Native American women. A 1976 study by the U.S. General Accounting Office found that Indian Health Service regions sterilized 3,406 Native American women without their permission between 1973 and 1976. The GAO found that 36 women under age 21 had been forcibly sterilized during this period despite a court-ordered moratorium on sterilizations of women younger than 21.

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This brief history gives us a glimpse into how to contextualize the mistreatment of incarcerated women and incarcerated women with disabilities. The laws in several states continue to shackle pregnant women during childbirth and post-partum. Though states and the federal system are now passing laws to prohibit the inhumane and degrading practice, the practice can be viewed in historical context as part of efforts to control, subjugate, and restrict the reproductive freedoms of women labeled criminal, and labeled as immoral. Moreover, though we no longer explicitly criminalize disability we indirectly criminalize disabilities by incarcerating survivors of abuse who are experiencing or have experienced trauma or substance use dependencies (instead of providing alternatives to incarceration), by locking women in solitary instead of providing mental health treatment and support, or by failing to provide accommodations for policies and practices, such as through

trauma informed care, in a way that recognizes the unique needs of women in prison. Disability therefore offers an appropriate lens for understanding how women get into prison and how they respond to harsh prison conditions. The lens of disability provides a pathway for more humane treatment in spaces that were not designed to provide mental health treatment and medical care.

Intersectionality

I offer these grim statistics to provide a framework for understanding the problem of mass incarceration in American and, particularly, the plight of women and women with disabilities. Recent improvements in advocacy efforts notwithstanding, single-axis framework continues to dominate prison reform and advocacy. The dominant conception of mass incarceration is that it occurs along a single axis (e.g., racial subordination, as explained so eloquently by Michelle Alexander in *The New Jim Crow*). In this framework, the injustice of mass incarceration tends to be viewed from the lens of low-income, cis-gender Black men (a group that is certainly experiencing the brutal harms of mass incarceration). However, this erases the experiences of women and women with disabilities. As a result, these groups are often marginalized in U.S. prison reform advocacy.

Effective approaches aimed at removing barriers and ensuring equal access for incarcerated women with disabilities must adopt an intersectional lens. Intersectional approaches reflect the reality that disadvantage and exclusion are based on the interaction of multiple identities and social structures. An intersectional lens recognizes that women with disabilities have a diversity of lived experiences and possess multiple identities that may intersect and overlap to compound the forms of marginalization and oppression they experience while incarcerated. Women with disabilities identify as members of historically marginalized racial minority groups. They also identify as lesbian, bisexual, transgender, or gender non-conforming. Reforms that address the challenges facing women with disabilities must provide intersectional solutions that acknowledge the many ways that these women may be marginalized in prisons and jails nationwide. Only through such holistic and intersectional efforts can we truly begin to dismantle mass incarceration in America.

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