

The Monkey and the Fish

A storm had temporarily stranded a monkey on an island. In a secure, protected place on the shore, while waiting for the raging waters to recede, he noticed a fish swimming against the current. It seemed obvious to the monkey that the fish was struggling and needed help. Being of kind heart, the monkey resolved to help the fish.

A tree precariously dangled over the very spot where the fish seemed to be struggling. At a considerable risk to himself, the monkey moved far out on a limb, reached down and snatched the fish from the threatening waters. Immediately scurrying back to the safety of his shelter, he carefully laid the fish on dry ground. For a few moments, the fish showed excitement, but soon settled into a peaceful rest. Joy and satisfaction swelled inside the monkey. He had successfully helped another creature.

The Senate Judiciary Committee recently reported favorably on two bills, S3096 and S3325 which both, to different extents, respectively lower the threshold amounts and increase penalties for manufacturing, distributing, or dispensing, or possessing with intent to manufacture, distribute, or dispense, both heroin mixtures containing another narcotic drug other than fentanyl and heroin mixtures containing fentanyl. At the conclusion of the hearing, the Judiciary Committee noted that these two bills would likely be combined, but it was not clear which bills' new thresholds and penalties would be adopted, or if a completely new version of the bills would be adopted that had different thresholds and penalties altogether.

What was clear from the Committee hearing, both the public testimony portions and statements made by members of the judiciary committee is contaminated and poisonous drugs are killing people and destroying lives at unprecedented rates, and something needs to be done in response to prevent further deaths and suffering. Judiciary Committee members repeatedly stressed that these proposed laws are not intended to target, or even impact people with substance use disorders, but rather are aimed at the for profit "dealers" who are preying upon such people. Various members of the public, some with lived experience, some people who lost loved ones to contaminated drugs, some professionals, and some people who spoke on behalf of harm reduction and social justice advocacy groups pleaded with the members of the Senate Judiciary Committee not to pass the laws. The people who testified noted that while these bills might have been introduced with proverbially 'good intentions' the unintended consequences of such laws could in fact exacerbate the current epidemic New Jersey, and the entire nation is facing.

Another concern voiced by those who testified was that the unintended consequences that would certainly accompany the passage of either version of the proposed bills would be borne primarily by minoritized people and the most vulnerable populations. More specifically, advocates noted that a Racial and Ethnic Impact Statement had been done with respect to either bill as expressly required by N.J.S.A. 2C:48B-2. This law was passed in in 2018, in direct response to 2016 study from the Sentencing Project found New Jersey has the highest racial disparity in the nation among black and white prisoners.¹ The report found that black people

¹ Nellis, A. (2016). The color of justice: Racial and ethnic disparity in state prisons. The Sentencing Project. <https://www.sentencingproject.org/reports/the-color-of-justice-2016-report/>

make up less than 15 percent of New Jersey's population but more than 60 percent of the state's prison population.² The report attributed racial disparity in incarceration rates to three factors: policies and practices like drug free school zone laws that disproportionately affect racial minorities, implicit bias within the justice system and among policy makers, and "structural disadvantages" in communities of color.³ The proposed bills undoubtedly have at least the potential to disproportionately impact Black and Brown people and thus, it seems extremely reasonable, and prudent, for the Racial and Ethnic Impact analysis to be performed with respect to these proposed bills. Moreover, it is required by law.

Unfortunately, as recently as October of 2021, New Jersey continues to have the highest rate of racial disparities in its prison population in the country, with Black residents incarcerated at a rate of 12.5 times that of whites, according to the new report by the Sentencing Project.⁴ Equally troubling, despite the passage of N.J.S.A. 2C:48B et seq., which mandates Racial and Ethnic Impact Statements be prepared in connection with criminal justice bills, only one such analysis has been performed and that was related to the Constitutional amendment to legalize marijuana.⁵ The failure of the Judiciary Committee to request such an analysis be performed with this bill only strengthens the protests of the public that while appearing to be well intentioned these laws have the potential to inflict disastrous, irreversible, albeit unintended consequences of the very people the laws supposedly seek to protect.⁶

According to the New Jersey State Police Drug Monitoring Initiative, during the 4th quarter of 2022:

- 30% of all drug-related arrests were for distribution.
- 70% of all drug-related arrests were for possession.

Three counties-- Camden, Essex, and Passaic, accounted for 32% of all drug-related arrests in the state and 20 municipalities accounted for 50% of all drug-related arrests. Newark, Patterson, Camden, Trenton, and Jersey City were the municipalities with the top five arresting municipalities. Arguably, these are the very communities that will be most directly impacted by the proposed bills, and thus the racial disparities in arrests and incarceration in New Jersey will only continue.

And as if the disproportionate incarceration rates were not dire enough, black people are also dying from the poisonous and contaminated drug supply at disproportionate rates as well. "About 28% of people who died of drug overdoses this year were Black, up from 13% in 2015, even though just 12% of New Jersey's population is Black. And people 55 and older represented

² Id.

³ Id.

⁴ Nellis, A. (2021). The color of justice: Racial and ethnic disparity in state prisons. The Sentencing Project. <https://www.sentencingproject.org/reports/the-color-of-justice-racial-and-ethnic-disparity-in-state-prisons-the-sentencing-project/>

⁵ Balcerzak, A. (2020, August 4). In two years, NJ wrote only one 'racial impact statement' to study criminal justice disparities. NorthJersey.com.

⁶ According to the Legislative findings contained in N.J.S.A. 2C:48B1, "Racial and ethnic community criminal justice and public safety impact statements are tools to guide policymakers in proactively assessing how proposed sentencing initiatives affect racial and ethnic disparities of adults and juveniles in the criminal justice system. Similar to fiscal and environmental impact statements, they provide legislators and State agency executives with a statistical analysis of the projected impact of policy changes before legislative deliberation or rule adoption."

31% of overdose deaths, up from 16% in 2015, data shows.”⁷ These law have the potential to increase racial inequities and more lives will be lost either to death or incarceration, notwithstanding the laudable goals and ‘good intentions’ of those advocating for these bills.

In addition to preparing the legally required Racial and Ethnic Impact Statement prior to passing either version or some combination of the proposed bills, New Jersey would be wise to look to other states which have attempted similar ‘well intentioned’ responses to dealing with for profit drug dealers and fentanyl. For example, Colorado lowered thresholds and increased penalties related to possession and distribution of fentanyl in 2022, and the legislatures already find themselves revising the law due to unintended consequences similar to the ones raised during public testimony before the New Jersey Senate Judiciary Committee. Colorado is considering changes related to the immunity provisions of the Good Samaritan Law and providing an affirmative defense provision to distinguish between people with substance use disorders who share drugs and high-level drug dealers who are selling drugs for profit.⁸

⁷ Difilippo, D. (2022, December 9). Overdose deaths dip, even as drug fatalities rise among older, Black residents. New Jersey Monitor.

⁸ Goodland, M. (2023, February 2). Colorado lawmakers try to address loopholes in last year's fentanyl bill. Coloradopolitics.com.