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JUSTICE on TRIAL



**Racial Disparities in the
American Criminal Justice System**

The disparate treatment of minorities in the American criminal justice system begins at the very first stage of that system: the investigation of suspected criminal activity by law enforcement agents. Police departments disproportionately target minorities as criminal suspects, skewing at the outset the racial composition of the population ultimately charged, convicted and incarcerated. And too often the police employ tactics against minorities that simply shock the conscience. The racial generalizations that inform policing strategies in America today undermine trust in the criminal justice system as a whole and perpetuate a vicious cycle of criminalization.

A. *Racial Profiling and the Assumptions that Drive It*

Some crimes are brought to the attention of the police by circumstances (e.g., a dead body) or by bystanders who witness it. But very often the police seek to uncover criminal activity by investigation. They patrol the streets looking for activity they think is suspicious, they stop cars for traffic violations in the hope of discovering more serious criminality¹ and they engage in undercover operations in an effort to uncover victimless crimes like drug trafficking and prostitution. Each of these police tactics involves the exercise of a substantial amount of discretion – the police decide who they consider suspicious, which cars to tail, what conduct warrants further investigation, and which neighborhoods are ripe for enforcement activity.

Unfortunately, that discretion is routinely exercised through the prism of race. The practice of racial profiling – that is, the identification of potential criminal suspects on the basis of skin color or accent – is pervasive.

For example, a growing body of statistical evidence demonstrates that black motorists are disproportionately stopped for minor traffic offenses because the police assume that they are more likely to be engaged in more serious criminal activity. This ironically labeled “driving while black” syndrome² has two deleterious effects. It causes a large number of innocent black drivers to be subjected to the hassle and humiliation of police questioning, and it results in a lopsided number of blacks being arrested for non-violent drug crimes that would not come to the attention of authorities but for the racially motivated traffic stop.

¹ The Supreme Court found the practice of pretextual traffic stops to be constitutional in *Whren v. United States*, 517 U.S. 806 (1996).

² For extensive discussion of the “driving while black” phenomenon, see Angela J. Davis, “Race, Cops, and Traffic Stops,” *51 U. Miami L. Rev.* 425 (1997); David A. Harris, “‘Driving While Black’ and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops,” *87 J. Crim. L. & Criminology* 544 (1997); David Harris, “The Stories, the Statistics, and the Law: Why ‘Driving While Black’ Matters,” *84 Minnesota L. Rev.* 265 (1999) (“Why ‘Driving While Black’ Matters”).

The practice is widespread:

- Under a federal court consent decree, traffic stops by the Maryland State Police on Interstate 95 were monitored. In the two year period from January 1995 to December 1997, 70 percent of the drivers stopped and searched by the police were black, while only 17.5 percent of overall drivers – as well as overall speeders – were black.³
- In Volusia County, Florida, in 1992, nearly 70 percent of those stopped on a particular interstate highway in Central Florida were black or Hispanic, although only 5 percent of the drivers on that highway were black or Hispanic.⁴ Moreover, minorities were detained for longer periods of time per stop than whites, and were 80 percent of those whose cars were searched after being stopped.⁵ The discriminatory treatment of minority drivers was duly noted by Volusia County Sergeant Dale Anderson, who asked a white motorist he had stopped how he was doing; the motorist responded “[N]ot very good,” to which Anderson responded, “Could be worse – could be black.”⁶
- A study of traffic stops on the New Jersey Turnpike found that 46 percent of those stopped were black, although only 13.5 percent of the cars on the road had a black driver or passenger and although there was no significant difference in the driving patterns of white and non-white motorists.⁷
- A Louisiana State Police Department training film specifically encouraged the Department’s officers to initiate pretextual traffic stops against “males of foreign nationalities, mainly Cubans, Colombians, Puerto Ricans, and other swarthy outlanders.”⁸
- In 1992, as part of a report by the ABC news program “20/20”, two cars, one filled with young black men, the other with young white men, navigated the same route, in the same car, at the same speed through the Los Angeles city streets on successive nights. The car filled with young black men was stopped by the police several times on their drive; the white group was not stopped once, despite observing police cars in their immediate area on no less than 16 separate occasions during the evening.⁹

³ David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (The New Press 1999) at 36 and n.66. See also “Why ‘Driving While Black’ Matters” at 280-81 and nn. 82-92.

⁴ *Id.* at 36-37, nn. 69-70. See also Marc Mauer, *Race to Incarcerate* (New York, The New Press 1999) (*Race to Incarcerate*), p. 129 and n. 13.

⁵ *Id.*

⁶ *Id.* at 37 and n. 71 (citing Jeff Brazil and Steve Berry, “Color of Driver Is Key to Stops in I-95 Videos,” *Orlando Sentinel*, August 23, 1992, p. A1).

⁷ *Id.* at 38.

⁸ *Id.* at 41 and n. 82. The training film is not only racist, it is inaccurate because Puerto Ricans are, of course, American citizens.

⁹ *Id.* at 25 and n. 29.

Even the United States government has facilitated racial profiling. The Volusia County highway interdiction program discussed above is part of a network of drug interdiction programs established and funded by federal authorities under the name “Operation Pipeline.” And it was the Drug Enforcement Agency that encouraged New Mexico state police to use a “cocaine courier profile” one element of which was that “[t]he vehicle occupants are usually resident aliens from Colombia.”¹⁰

Racial profiling is also carried out in forms other than pretextual traffic stops. Enforcement of the controlled substances laws, in general, seems premised on the bizarre perception that drug trafficking is exclusively a minority-owned business. Drug-courier profiles have regularly included race as an explicit element of suspicion. In sworn testimony, DEA agents have at various times in recent years stated their belief that most drug couriers are black females, and that being Hispanic or black was part of the profile they used to identify drug traffickers. In light of these perceptions, it is no surprise that a police officer working at the Memphis International Airport testified that approximately 75 percent of those stopped and questioned in the Airport were black, or that none of the three judges who arraigned felony cases in New York County could recall a single New York Port Authority drug interdiction case where the defendant was not black or Hispanic.¹¹

The immigration law context furnishes further evidence of widespread racial profiling. A recent study by the National Council of La Raza identified a pattern of selective enforcement of U.S. immigration laws by INS and local officials, whereby individuals of identifiably Hispanic origin – including many who were American citizens, legal permanent residents, or otherwise lawfully in the United States – were targeted by the authorities and subjected to interrogation, detention, or arrest for suspected immigration violations.

One of many examples of such targeting was “Operation Restoration” in Chandler, Arizona, a joint endeavor of the Chandler Police Department and the U.S. Border Patrol. According to a study conducted by the Arizona Attorney General’s office, local police and U.S. Border Patrol officials implementing Operation Endeavor “without a doubt . . . stopped, detained, and interrogated [Chandler residents] . . . purely because of the color of their skin.”¹² Similarly, in Katy, Texas, the INS and officers from the Katy Police Department conducted a joint operation whereby they stopped and detained cars driven by individuals of “Hispanic appearance,” conducted street sweeps in which Hispanics were the only ones targeted or questioned, and undertook searches of Hispanic residences.¹³

Overall, nearly three-quarters (73.5%) of all of those deported by the INS are of Mexican origin, according to INS statistics, even though Mexicans constitute less than half of all undocumented persons in the United States. Hispanics constitute approximately 60% of all

¹⁰ Gary Webb, “DWB; police stops motorists to check for drugs,” *Esquire*, April 1, 1999, p.126.

¹¹ *No Equal Justice* at 49-50 and nn.106-108, 110-111.

¹² National Council of La Raza, *The Mainstreaming of Hate: A Report on Latinos and Harassment, Hate Violence, and Law Enforcement Abuse in the 90’s* (1999) (*The Mainstreaming of Hate*), p.26.

¹³ *Id.* at 19.

undocumented persons, but well over 90% of those subjected to INS enforcement actions are Hispanic.¹⁴

Racial profiling is seemingly inconsistent with today's dominant law enforcement philosophy: community policing. But community policing is still a vague and elastic concept. At its best, community policing refers to a more diverse police force working with community institutions to prevent crime before it occurs. For example, Boston's anti-gang efforts have featured after-school programs for high-risk students and a constructive partnership between the police and crime prevention agencies. In places where the police have consciously integrated themselves into the fabric of the neighborhood, community policing deserves credit for helping to reduce crime rates.

But too often, community policing is just a label, a slogan to attract federal grants and favorable headlines. In some jurisdictions, community policing means little more than giving street level officers wide discretion to "clean up" the communities they patrol by whatever means seem expedient. Thus, community policing may come to mean "quality of life" policing, under which the police adopt a zero-tolerance approach to minor violations of law. Such an ends-justify-the-means approach invariably works to the detriment of – and is disproportionately targeted at – black and Hispanic populations. Professor David Cole has pointed out that such an enforcement strategy "relies heavily on inherently discretionary police judgments about which communities to target, which individuals to stop, and whether to use heavy-handed or light-handed treatment for routine infractions."¹⁵ According to Professor Angela Davis, "[t]he practical effect of this deference [to law enforcement discretion] is the assimilation of police officers' subjective beliefs, biases, hunches, and prejudices into law,"¹⁶ and the evidence suggests that such discretion is exercised to the detriment of America's minorities. As Harvard Law School Professor and African-American Charles Ogletree has observed, "If I'm dressed in a knit cap and hooded jacket, I'm probable cause."¹⁷

Professor Ogletree's comment is echoed in the practices of the New York City Police Department, which in the late 1990's began to aggressively "stop and frisk" city residents. "Stop and frisk" entails the practice of temporarily detaining, questioning and patting down pedestrians based on an articulable suspicion that the detainee is involved in criminal activity. While "stop and frisk" is constitutional, it has not traditionally been used as a free-standing law enforcement strategy because in such a regime the discretion to choose who to stop is virtually unconstrained.

Predictably, black and Hispanic New Yorkers were disproportionately targeted for "stop and frisk" pat-downs. A December 1999 report by the New York State Attorney General found that of the 175,000 "stops" engaged in by NYPD officers from January 1998 through March 1999, almost 84 percent were of blacks and Hispanics, despite the fact that those groups comprised less than half of the City's population; by contrast, only 13 percent of stops were of

¹⁴ 1996 Statistical Yearbook of the Immigration and Naturalization Service (1997).

¹⁵ *No Equal Justice* at 44-45.

¹⁶ Angela J. Davis, "Prosecution and Race: The Power and Privilege of Discretion," 67 *Fordham L. Rev.* 13, 27 (1998) ("Prosecution and Race").

¹⁷ Ellen Goodman, "Simpson Case Divides Us By Race," *Boston Globe*, July 10, 1994, p.73 (quoting Charles Ogletree).

white New Yorkers, a group that comprises 43 percent of the City’s population. Of the 10 police precincts with the most stops, seven were majority-black/Hispanic districts, and two of the majority-white districts were commercial districts whose census figures did not reflect the demographics for policing purposes, leaving only one majority-white precinct in the top 10. By contrast, of the 10 precincts with the lowest stop rates, all but two were majority-white.¹⁸ The Attorney General also identified racial disparity in stop rates within white neighborhoods – in precincts that were approximately 90 percent white, more than 53 percent of the total stops were of blacks and Hispanics.¹⁹ Thus, more stops occurred in majority-minority precincts, and more stops of minorities than of whites occurred even in majority-white neighborhoods.

The Attorney General also determined that stops of minorities were less likely to yield arrests than stops of white New Yorkers – the NYPD arrested one white New Yorker for every eight stops, one Hispanic New Yorker for every nine stops, and one black New Yorker for every 9.5 stops. The statistics were even more stark with respect to stops engaged in by the NYPD plainclothes Street Crimes Unit, which stopped 16.3 blacks and 14.5 Hispanics per arrest, but only 9.7 whites per arrest.²⁰ Given racially disparate overall stop rates, these statistics reveal that far more innocent minorities are subjected to stop and frisk tactics than innocent whites.

Some continue to defend racial and ethnic profiling by law enforcement as a rational response to patterns of criminal conduct. Such arguments rest implicitly or explicitly on two basic assumptions, each of which is flawed, pernicious, and divisive.

The first assumption is that minorities commit the majority of crimes, and that therefore it is a sensible use of police resources to focus on the behavior of those individuals. This attitude was epitomized by Carl Williams, Superintendent of the New Jersey State Police until his dismissal in March 1999, who stated in defense of racial profiling that “mostly minorities” traffic in marijuana and cocaine.²¹ Superintendent Williams’ assumption, shared by many, is flatly incorrect with respect to those crimes most commonly investigated through racial profiling – drug crimes.²² Blacks commit drug offenses at a rate proportional to their percentage of the United States population: Black Americans represent approximately 12 to 13 percent of the U.S.

¹⁸ *The New York City Police Department’s “Stop and Frisk” Practices: A Report to the People of New York From the Office of the Attorney General* (December 1999), pp. 94-100.

¹⁹ *Id.* at 106.

²⁰ *Id.* at 111, 117.

²¹ “Why ‘Driving While Black’ Matters” at 297. Superintendent Williams justified his statement by pointing out that when senior American officials went overseas to discuss the drug trade, they went to Mexico and not Ireland. *Id.*

²² There is some evidence that violent crime rates are higher in black neighborhoods, for reasons involving the correlation between violence and poverty, and the reality that blacks in the United States are disproportionately poor. *See generally, Race to Incarcerate* at 163-170. In any event, racial profiling and drug courier profiles are employed to uncover non-violent drug crimes, not assaults, and therefore derive no legitimacy from violent crime rate statistics.

population, and, according to the most recent federal statistics, 13 percent of all drug users.²³ And for the past 20 years, drug use rates among black youths has been consistently *lower* per capita than drug use rates among white youths.²⁴

Findings related to the “driving while black” phenomenon and other forms of racial profiling lead to the same conclusion. While black motorists were disproportionately stopped by Maryland State Police on I-95, the instances in which drugs were actually discovered in the stopped vehicles were the same per capita for black and white motorists. Similarly, a nationwide study by the United States Customs Service revealed that while over 43 percent of those subjected to searches as part of the Service’s drug interdiction efforts were black or Hispanic, the “hit rates” for those groups per capita were lower than for white Americans.²⁵ And a recent report by the congressional General Accounting Office contains additional evidence: while black female U.S. citizens were *nine times* more likely to be subjected to x-ray searches by U.S. Customs Officials than white female U.S. citizens, these black women were less than half as likely to be found carrying contraband as white females.²⁶

The baseless assumption that most criminals are members of minority races is accompanied by the second, equally flawed assumption that most minorities are criminals. The premise of racial profiling is that random checks of black or Hispanics are likely to yield an arrest for criminal activity. But there is no evidence to support that racist assumption. Even after being disproportionately targeted for stops and searches, most blacks and Hispanics are not arrested because the vast majority of those stopped are actually innocent of the conduct the police suspected they were engaged in. Less than 10 percent of all blacks are even arrested in a single year.²⁷ The vast majority of blacks and Hispanics – like the vast majority of whites – are law-abiding citizens.

For example, only nine of more than 1,000 stops in Volusia County, Florida in 1992, 70 percent of which were of black or Hispanic motorists, resulted in a ticket, much less criminal charges. And in Eagle County, Colorado, the Sheriff’s Department’s regular use of pretextual stops against minorities did not yield a single arrest for violation of the drug laws, although it did

²³ Substance Abuse and Mental Health Services National Administration, U. S. Department of Health & Human Services, “National Household Survey on Drug Abuse, Preliminary Results from 1997” (1999), pp. 13, 58, Table 1A. While involvement in drug trafficking is harder to measure, a National Institute of Justice Report indicates that drug users tend to purchase from members of their own racial or ethnic background. K. Jack Riley, “Crack, Powder Cocaine, and Heroin: Drug Purchase and Use Patterns in Six U.S. Cities,” National Institute of Justice, United States Department of Justice (December 1997), p.1.

²⁴ “Why ‘Driving While Black’ Matters” at 296 (*citing* National Institute on Drug Abuse, “Drug Use Among Racial/Ethnic Minorities” (1997), pp. 64-66; Bureau of Justice Statistics, U.S. Department of Justice, “Drugs, Crime, and the Justice System” (1992), p.28).

²⁵ *Id.* at 295-296 (*citing* U.S. Customs Service, “Personal Searches of Air Passengers Results: Positive and Negative, Fiscal Year 1998” (1998), p.1 (finding that 6.7% of whites, 6.3% of blacks, and 2.8% of Hispanics carried contraband)).

²⁶ U.S. General Accounting Office, *U.S. Customs Service: Better Targeting of Airline Passengers for Personal Searches Could Produce Better Results* (March 2000), p. 2.

²⁷ Statistical Abstract of the United States, Tables 12 and 358 (comparing 1997 statistics) (1999); *see also* “Developments in the Law – Race and the Criminal Process,” *101 Harv. L. Rev.* 1472, 1508 (1988).

result in a court settlement of \$800,000 in favor of the 400 black and Hispanic drivers who had been subjected to this offensive police tactic.²⁸

Pretextual traffic stops and other manifestations of racial profiling essentially treat race as evidence of crime, targeting certain segments of the population as potential criminal offenders solely by virtue of their race. Thus, through racial profiling, America's law enforcement officials not only "racialize" crime by assuming most crimes are committed by minorities, they also "criminalize" race. In so doing, they place the primary burden of law enforcement on the backs of innocent minorities who are the victims of racial and ethnic stereotyping. Innocent minorities are harassed more than innocent white Americans, and wrongdoing by minorities is punished more harshly than wrongdoing by whites. Such unfair treatment of minorities breeds distrust and disrespect for law enforcement in those communities.

The harms caused by racial profiling extend beyond racial division and distrust. In effect, racial profiling becomes a self-fulfilling prophecy. As noted by Professor David Harris, a leader in identifying the "driving while black" phenomenon:

Because police will look for drug crime among black drivers, they will find it disproportionately among black drivers. More blacks will be arrested, prosecuted, convicted, and jailed, thereby reinforcing the idea that blacks constitute the majority of drug offenders. This will provide a continuing motive and justification for stopping more black drivers as a rational way of using resources to catch the most criminals.²⁹

And, indeed, this prophecy has come to pass. Despite the fact that, as noted earlier, blacks are just 12 percent of the population and 13 percent of the drug users, and despite the fact that traffic stops and similar enforcement strategies yield equal arrest rates for minorities and whites alike, blacks are 38 percent of those arrested for drug offenses and 59 percent of those convicted of drug offenses.³⁰ Moreover, more frequent stops, and therefore arrests, of minorities will also result in longer average prison terms for minorities because patterns of disproportionate arrests generate more extensive criminal histories for minorities, which in turn influence sentencing outcomes.³¹

B. Violent Consequences of Race-Based Policing

Police tactics based on racial assumptions are not only unfair to minorities; they actually place minorities in physical danger. In recent months, several highly publicized police shootings appeared to result from the police acting on unjustified racial generalizations.

²⁸ *No Equal Justice* at 37-38 and n. 74.

²⁹ "Why 'Driving While Black' Matters" at 297.

³⁰ Bureau of Justice Statistics, United States Department of Justice, "Sourcebook of Criminal Justice Statistics 1997," at 338 (table 4.10), 422 (table 5.46). For further discussion of the war on drugs and its effect on minorities, see Chapter III.

³¹ "Why 'Driving While Black' Matters" at 303. See also "Prosecution and Race" at 36 (noting that "[r]ace . . . may affect the existence of a prior criminal record even in the absence of recidivist tendencies on the part of the suspect.")

Amadou Diallo was a young black man living in a predominantly minority neighborhood in New York City. On the night of February 4, 1999, Diallo was approached by four police officers as he stood by the front steps of his apartment building. He reached for his wallet to produce identification. The officers mistook this action as reaching for a weapon, and fired 41 gunshots, killing Diallo. Testifying in his own defense, one of the officers who had shot Diallo noted that “[t]he way he was peering up and down the block” had made the officers suspicious. “He stepped backward, back into the vestibule as we were approaching, like he didn’t want to be seen . . . and I’m trying to figure out what’s going on. You know – what’s this guy up to? I was getting a little leery, from the training, of my past experience of arrests, involving gun arrests.”³²

Soon after the officers who shot Amadou Diallo were acquitted of criminal charges, a 26 year-old black man named Patrick Dorismond was also killed by the police. On March 16, 2000, Dorismond was trying to hail a cab on a midtown Manhattan street corner when he was approached by three undercover police officers who, without apparent reason to believe that Dorismond was a drug dealer, tried to buy drugs from him. Dorismond became angry, and in the ensuing fight Dorismond was shot and killed by a bullet from the gun of one of the police officers. The first response of New York City’s Mayor Rudolph Giuliani was not to express regret for the tragic death, or to determine why the police, without apparent predicate, undertook a sting operation of a young black man minding his own business. Rather, Mayor Giuliani cited Dorismond’s police record – which consisted of stale unsubstantiated charges and two convictions for disorderly conduct – to support the conduct of police, despite the fact that Dorismond was doing nothing wrong when the police approached him.³³

Hispanics have also been the victims of violence associated with racial profiling. On April 25, 1997, a tortilla factory in Salt Lake City owned by Rafael Gomez, an American citizen, was the subject of a police raid in which 75 heavily-armed police officers brandished rifles and pistols, struck Gomez in the face with a rifle butt, pointed a gun at his six-year old son, ordered the 80 factory employees to lie down on the floor, and dragged Gomez’ secretary across a room by her hair. The raid, based on an anonymous tip, uncovered no illegal activity.³⁴

In each case the questions linger: Would Diallo’s actions have generated suspicion if he had not been black, and would the officers who shot him have seen a gun where there was only a wallet if he had been white? Would the officers who approached Dorismond simply have left him alone, or walked away from a fight, if he had not been of Haitian descent? Would an anonymous tip about a white business owner been treated like the tip that caused an armed raiding party to descend on Rafael Gomez?

³² Howard Chua-Eoan, “Black and Blue,” *Time*, March 6, 2000, p.26.

³³ See William K. Rashbaum, “Undercover Police in Manhattan Kill an Unarmed Man in a Scuffle,” *New York Times*, March 17, 2000, p. A1; Eric Lipton, “Giuliani Cites Criminal Past of Slain Man,” *New York Times*, March 20, 2000, p. B1. Mr. Giuliani failed to note that the police officer whose gun had discharged bullets into Mr. Dorismond’s chest also had a police record. Joyce Purnick, “Right to Know What the Mayor Finds Relevant,” *New York Times*, March 20, 2000, p. B1.

³⁴ *The Mainstreaming of Hate* at 20.

There is little doubt that these tragedies were the consequence of a law enforcement culture that encourages suspicion of minorities. The same assumptions that lead police to engage in disproportionate stops of minority drivers and minority pedestrians led police to assume the worst about Diallo, Dorismond and Gomez. These cases made headlines in the cities in which they occurred. Countless incidents that do not result in death or wildly unsuccessful police raids occur every day and escape public notice. But they contribute to a well-grounded fear among minorities that the police will assume the worst about them, and on a dark street corner that assumption can be fatal.

C. Race and Police Misconduct

The unequal treatment of minorities by law enforcement officials extends beyond the disproportionate use of police practices such as traffic stops and criminal profiles. Minority citizens are also the prime victims of police brutality and corruption. Such misconduct is unacceptable in any form, but it is doubly offensive when it flows from attitudes about race that are contrary to our commitment to equal justice and the rule of law.

Current events again provide evidence of race-motivated misconduct. At the very same time the acquittal of the NYPD officers in the Diallo case made headlines, authorities in Los Angeles were investigating a police corruption ring centered in the anti-gang unit of the Rampart division – a police station located in one of the city’s poorest neighborhoods. The investigation has already revealed that officers in that unit manufactured evidence and perjured themselves to produce convictions, thousands of which could be affected by the revelations; routinely engaged in police brutality to intimidate their victims; participated in the drug trade; and used the Immigration and Naturalization Service to deport antipolice witnesses, in violation of Los Angeles city policy.³⁵ As part of their abuse of the immigration laws, the officers allegedly compiled a list of more than 10,000 Hispanics whom they believed to be deportable, effectively placing an entire community under suspicion on the basis of its racial composition.


General patterns of misconduct similar to the LAPD scandal have been revealed in New York, where the Mollen Commission uncovered widespread brutality and corruption in the Bronx directed largely at blacks and Hispanics, and in Philadelphia, where similar patterns of misconduct were found to persist in the predominantly black neighborhood of North Philadelphia. To name these cities is not to ignore the breadth of police abuse and misconduct that occurs throughout the nation. Indeed, in a 1991 poll, 59 percent of respondents believed that police brutality is common in some or most communities in the United States, and 53 percent of respondents believed that police are more likely to use excessive force against black or Hispanic suspects than against white suspects.³⁶ One of the most publicized instances of brutality has

³⁵ In one shocking revelation, two Rampart Division officers shot admitted gang member Javier Francisco Ovando in the legs and then planted a rifle on him to make it appear as though he had attacked the officers. Ovando, who was paralyzed, was wheeled into his trial on a gurney, and was excoriated there by the judge for jeopardizing the lives of two hero policemen. Ovando received 23 years in jail for his non-offense. Adam Cohen, “Gangsta Cops,” *Time*, March 6, 2000, p. 32.

³⁶ *The Mainstreaming of Hate* at 15 and n.41. See also Julia Vitullo-Martin, “Fairness Not Simply A Matter of Black and White,” *Chicago Tribune*, November 13, 1999 (citing recent poll by the Joint Center for Political and Economic Studies indicating that 56% of whites agree that police are far more likely to harass and discriminate against blacks than against whites).

been the Abner Louima case, in which two current and one former New York police officers were recently convicted of attempting to cover up another officer's assault on Louima, a black New Yorker, whom the officer had beaten and sodomized with a broken broomstick.

Practices like racial profiling and the actions uncovered by the Mollen Commission and in the Rampart investigations are related. First, they all proceed in large part from the twin misperceptions that (1) blacks and Hispanics commit most crimes, and (2) most blacks and Hispanics commit crimes – misperceptions that have justified everything from pretextual traffic stops to the entirely unjustified beatings and abuse of innocent individuals.³⁷ Second, both profiling and police misconduct contribute to the belief – shared to one degree or another by Americans of all races and ethnicities – that the police do not treat black and Hispanic Americans in the same manner as they do white Americans, and that the promise of fair treatment enshrined in the Constitution have limited application when police confront a black or brown face.



³⁷ Indeed, many instances of police brutality against minorities begin with a misperception on the part of law enforcement officials – based purely on race -- that a particular individual of color is a criminal suspect. For instance, in 1988, Joe Morgan, the (black) Hall of Fame baseball player, was approached at Los Angeles International Airport by a police officer who said he was conducting a drug investigation. The officer's sole basis for approaching Morgan was that another black man who was a suspected drug dealer had stated that he was traveling with another man who "looked like himself" – i.e., black. When the officer asked Morgan for identification and accused him of traveling with a person suspected of selling drugs, and Morgan objected, the officer threw Morgan to the ground, handcuffed him, put his hand over Morgan's mouth and nose, and escorted him to an interrogation room, where Morgan was cleared of any wrongdoing. *No Equal Justice* at 24-25. Hispanics can point to similar experiences. In October 1994, in Lincoln, Nebraska, Francisco Renteria was escorting his mother home from a laundromat when he was accosted by University of Nebraska police dispatched to investigate a crime. Mistaking Renteria for the suspect, they fatally beat him, despite the fact that the only match between Renteria and the dispatcher's description of the suspect was that the suspect was a "Hispanic male." *The Mainstreaming of Hate* at 17.

RACE AND PROSECUTORIAL DISCRETION

Racial profiling and other enforcement strategies begin the insidious process by which minorities are disproportionately caught up in the criminal justice system. But such disparities do not end at the point a suspect is arrested. At every subsequent stage of the criminal process -- from the first plea negotiations with a prosecutor, to the imposition of a prison sentence by a judge -- the subtle biases and stereotypes that cause police officers to rely on racial profiling are compounded by the racially skewed decisions of other key actors. This chapter examines the role of the prosecutor in perpetuating racial inequality in our criminal justice system.

Prosecutors occupy a central role in American criminal justice. They represent the public in the solemn process of holding accountable those who violate society's rules. That task carries with it substantial unchecked discretion. The threshold decision of whether to bring charges against a suspect, and, if so, which charges are appropriate, is almost never subject to review by a court. The subsequent decision to enter into a plea agreement is reviewable at the margins because courts may reject plea agreements under certain circumstances. But in practice, prosecutors decide who will be granted the leniency that a plea bargain represents.

Prosecutorial discretion is most dramatically exercised in the area of sentencing. Traditionally, sentencing has been a judicial prerogative, but, as will be explained, the advent of mandatory minimum sentencing laws and sentencing guideline systems has shifted in large measure the power to determine punishment from judge to prosecutor. Even where judges retain ultimate authority to impose sentence, a prosecutor's sentencing recommendation will carry great weight. Prosecutors today enjoy more power over the fate of criminal defendants than at any time in our history.³⁸

Regrettably, the evidence is clear that prosecutorial discretion is systematically exercised to the disadvantage of black and Hispanic Americans. Prosecutors are not, by and large, bigoted. But as with police activity, prosecutorial judgment is shaped by a set of self-perpetuating racial assumptions.

A. *The Decision to Prosecute*

The first and most basic prosecutorial decision is whether to pursue a particular criminal case at all.³⁹ Prosecutors have the authority to decline prosecution altogether, or to authorize diversion, under which completion of drug treatment or community service results in the

³⁸ Bennett L. Gershman, "The New Prosecutors," 53 *U. Pitt. L. Rev.* 393, 448 (1992) ("The American prosecutor, owing to a variety of social and political factors, has emerged as the most pervasive and dominant force in criminal justice."). See also "Prosecution and Race" at 20-25 (noting the "extraordinary, almost unreviewable, discretion and power of prosecutors" and the necessity of such discretion, but also that "[t]he deficiency of prosecutorial discretion lies not in its existence, but in the randomness and arbitrariness of its application.").

³⁹ "Prosecution and Race" at 21-22 and nn. 28-33.

dismissal of the charges. But such displays of prosecutorial mercy appear to be exercised in a manner that disproportionately benefits whites.

In 1991 the *San Jose Mercury News* reviewed almost 700,000 criminal cases from California between 1981 and 1990 and uncovered statistically significant disparities at several different stages of the criminal justice process. Among the study's findings was that six percent of whites, as compared to only four percent of minorities, won "interest of justice" dismissals, in which prosecutors dropped a criminal case entirely. Moreover, the study found, 20 percent of white defendants charged with crimes providing for the option of diversion received that benefit, while only 14 percent of similarly situated blacks and 11 percent of similarly situated Hispanics were placed in such programs.⁴⁰

Related to the decision to decline prosecution is the decision to charge the defendant in state or federal court. This choice is presented when jurisdiction over the crime resides concurrently in state and federal court, as in many drug cases. The police may make an initial decision of whether to bring the evidence to state or federal prosecutors (a discretionary call that may itself be influenced by racial considerations), but the authority to determine that a defendant will be federally prosecuted rests with federal prosecutors. Typically they will decline to prosecute the defendant in federal court if the case does not seem "serious" enough or if the defendant does not seem to pose a significant threat to public safety. Obviously these are not scientific judgments – rather they are exercises of discretion informed by predictions, hunches and preconceptions, some of which are racially tinged.

The decision of whether to prosecute a drug case in federal court has important consequences for the defendant because federal sentences are notoriously harsher than state sentences. Parole was abolished in the federal criminal justice system in 1987, and federal drug convictions frequently result in lengthy, mandatory sentences. Moreover, if the prosecutor includes in the indictment charges carrying mandatory penalties and then refuses to permit a plea to other charges, the defendant has no opportunity to undergo drug treatment as an alternative to imprisonment, since federal law does not offer judges that option.

According to the United States Sentencing Commission, federal courts in 1990 sentenced drug traffickers to an average of 84 months in prison, without possibility of parole. By contrast, state courts in 1988 sentenced drug traffickers to an average *maximum* sentence of 66 months, resulting in an average time served of only 20 months.⁴¹ Thus, the decision of a federal prosecutor to prosecute a suspected drug offender, rather than letting the case proceed in state court, can result in a prison term that is years longer than the sentence that would likely accompany state prosecution.

That the prosecutorial decision to bring charges in federal court, or leave the case to the state system, is often exercised to the detriment of America's minorities is best demonstrated by statistics on crack cocaine prosecutions. In 1986 Congress enacted harsh mandatory minimum

⁴⁰ Christopher Schmitt, "Plea Bargaining Favors Whites, as Blacks, Hispanics Pay Price," *San Jose Mercury News*, December 8, 1991 (*Mercury News Report*), p. 1A.

⁴¹ United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (February 1995), p. 138 and nn. 186-188.

penalties for these offenses. From 1988-1994, hundreds of blacks and Hispanics – but no whites – are prosecuted by the United States Attorney’s office with jurisdiction over Los Angeles County and six surrounding counties.⁴² The absence of white crack defendants in federal court could not be ascribed to a lack of whites engaged in such conduct; during the 1986-1994 period, several hundred whites were prosecuted in California state court for crack offenses.⁴³

National statistics tell the same story: From 1992-1994, approximately 96.5 percent of all federal crack prosecutions were of non-whites. A 1992 U.S. Sentencing Commission Report determined that *only* minorities were prosecuted for crack offenses in over half of the federal judicial districts that handled crack cases. And during that period, in New York, Texas, California, and Pennsylvania combined, eight whites were convicted of crack offenses; the number of white crack defendants convicted in Denver, Boston, Chicago, Miami, Dallas and Los Angeles combined was zero, compared to thousands of convictions of black and Hispanic crack offenders.⁴⁴

These discrepancies are remarkable because the crack epidemic knew no racial bounds. Despite stereotypes perpetuated by the media and popular culture, government statistics show that more whites overall used crack than blacks. According to the National Institute on Drug Abuse, between 1991 and 1993 whites were twice as likely to have used crack nationwide than blacks and Hispanics combined. Crack use was somewhat more concentrated in minority communities, but in Los Angeles, for example, whites comprised more than 50 percent of those who had ever used crack, and about one-third of those who could be termed “frequent users.”⁴⁵

The exercise of prosecutorial discretion in favor of white crack defendants and against black crack defendants is illustrated by the parallel cases of two men – one white, the other black – charged with cocaine trafficking in Los Angeles. Stephen Green, a black man, was arrested with 70 grams of crack and sentenced in federal court to 10 years in prison – the mandatory minimum federal sentence for selling more than 50 grams of crack. Daniel Siemanowski, a white man, was arrested with 67 grams of crack, and was also therefore eligible for the 10-year mandatory sentence. But he was tried and convicted in state court, and received a jail sentence of less than a year.⁴⁶

Federal law enforcement authorities have disputed that the wide discrepancy in federal crack prosecutions reflects differential treatment based on race, arguing that authorities target high-volume traffickers of whatever race. But since it is empirically true that more whites than non-whites used crack during this period, this argument presumes that whites largely bought

⁴² Dan Weikel, “War on Crack Targets Minorities Over Whites,” *Los Angeles Times*, May 21, 1995, p. A1.

⁴³ *Id.*

⁴⁴ *Id.* See also United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policies* at xi (Blacks and Hispanics accounted for 95.4 percent of crack cocaine distribution offenses in 1993).

⁴⁵ *Id.*

⁴⁶ *Id.*

their crack from non-whites. Studies, however, suggest the contrary – that drug users tend to purchase their drugs from individuals of the same race as the user, and that drug *seller* racial breakdowns are similar to drug *user* racial breakdowns.⁴⁷ Of course some suburban residents drive into the inner city to buy drugs on the street, and of course those open-air street markets present an easy enforcement target for the police. But most drug deals occur behind closed doors, in offices and in private homes that the police don't patrol. Just because most of the dealers hawking crack vials on the street corner were not white in the late 1980's does not mean whites did not participate aggressively in the crack distribution network.

In any event, the reality is that many black defendants prosecuted in federal court are not high-volume traffickers. According to Los Angeles federal district judge J. Spencer Letts, “those high in the chain of drug distribution are seldom caught and seldom prosecuted.”⁴⁸ Instead, federal prosecutorial efforts have focused predominantly on low-volume dealers and low-level couriers who happen to be black and Hispanic.⁴⁹ U.S. District Court Judge Consuelo B. Marshall observes: “We do see a lot of these [crack] cases and one does ask why some are in state court and some are being prosecuted in federal court . . . and if it's not based on race, what's it based on?”⁵⁰

B. Plea Bargaining and Charging Decisions

Once a prosecutor decides to bring charges against an individual, plea negotiations present the next opportunity for a prosecutor to grant some degree of leniency to a defendant, or to insist on maximum punishment.⁵¹ Prosecutors have virtually unlimited discretion to enter into an agreement by which the defendant will plead guilty in exchange for the dismissal of certain charges or a reduced sentence, and once again the exercise of discretion is characterized by racially disparate results.⁵²

The *San Jose Mercury News* report discussed above revealed consistent discrepancies in the treatment of white and non-white criminal defendants at the pretrial negotiation stage of the criminal process. During 1989-1990, a white felony defendant with no criminal record stood a

⁴⁷ K. Jack Riley, “Crack, Powder Cocaine, and Heroin: Drug Purchase and Use Patterns in Six U.S. Cities,” National Institute of Justice, United States Department of Justice (December 1997), p.1. Director of National Drug Control Policy Barry McCaffrey has also observed that youths purchasing drugs tend to purchase from members of their own race. Patricia Davis and Pierre Thomas, “In Affluent Suburbs, Young Users and Sellers Abound,” *Washington Post*, December 14, 1997, p. A20.

⁴⁸ Weikel at A1.

⁴⁹ Data analyzed by the U.S. Sentencing Commission reveals that nationwide, more than 94.5 percent of federal crack defendants in 1992 were either low- or middle-volume dealers or couriers, and only 5.5 percent were high-volume dealers. U.S. Sentencing Commission, *Cocaine and Federal Sentencing Policy* at 172.

⁵⁰ Weikel at A1.

⁵¹ Most criminal cases end in a plea bargain. See Rebecca Hollander-Blumoff, “Getting to ‘Guilty’: Plea Bargaining as Negotiation,” 2 *Harv. Negotiation L. Rev.* 115, 117 n.7 (discussing studies showing that as much as 90 percent of all criminal cases end in plea bargains).

⁵² See “Prosecution and Race” at 23-25 and nn. 41-59 (discussing importance of, and prosecutorial discretion inherent in, charging decisions and plea bargaining).

33 percent chance of having the charge reduced to a misdemeanor or infraction, compared to 25 percent for a similarly situated black or Hispanic. Between 1981 and 1990, 50 percent of all whites who were arrested for burglary and had one prior offense had at least one other count dismissed, as compared to only 33 percent of similarly situated blacks and Hispanics. Blacks charged with a single offense received sentencing enhancements in 19 percent of the cases, whereas similarly situated whites received such enhancements in only 15 percent of the cases.⁵³

Over the course of 700,000 cases, these discrepancies establish a clear pattern of unfair treatment for thousands of black and Hispanic criminal defendants. The extent of disparate treatment in individual cases can be stark indeed. Consider the fates of two individuals – one black, one white (unnamed in the *Mercury News* report) – each charged with four criminal counts: three counts of burglary, and one count of receiving stolen property. Neither man had been to jail before. Neither had used a weapon in the offense. Drugs were involved in neither crime. Both men entered into plea bargains. But the black man was required to plead guilty to all four criminal charges and received an eight-year sentence. The white man was permitted to plead guilty to a single burglary charge and received a sentence of 16 months.⁵⁴

Statistics from other jurisdictions confirm that prosecutorial discretion may result in disparate treatment of minorities and whites. The State of Georgia has a “two strikes, you’re out” law, under which a life sentence may be imposed for a second felony offense. Under the Georgia scheme, the State’s district attorneys have unfettered discretion to seek this penalty. As of 1995, life imprisonment under the “two strikes” law had been imposed on 16 percent of eligible black defendants, while the same sentence had been imposed on only one percent of eligible white defendants. Consequently, 98.4 percent of those serving life sentences under Georgia’s “two strikes, you’re out” regime are black.⁵⁵

Statistics in federal court mirror the experiences in these states. A United States Sentencing Commission report found that, for comparable behavior, prosecutors offered white defendants plea bargains that permitted the imposition of sentences below what would otherwise be the statutory minimum more often than they offered such deals to blacks or Hispanic defendants.⁵⁶ Moreover, federal prosecutors have sole authority to grant a departure below the

⁵³ *Mercury News Report* at 1A.

⁵⁴ *Id.*

⁵⁵ *No Equal Justice* at 143. The Georgia Supreme Court initially held that these statistics presented a prima facie case of discrimination, and invalidated the “two strikes, you’re out” statute. *Stephens v. State*, 1995 WL 116292 (Ga. 1995). The court, however, reversed itself less than two weeks later upon being presented with a petition signed by all of Georgia’s 46 district attorneys claiming that the court’s approach, because it would apply to so many other areas of prosecution, such as the death penalty, would “paralyze the criminal justice system” in Georgia. *No Equal Justice* at 143 (citing *Stephens v. State*, 456 S.E.2d 560 (Ga. 1995)).

⁵⁶ *Race to Incarcerate* at 139. The Justice Department contends that these disparities were due to legally relevant case-processing factors. *Id.* (citing Dale Parent, et al., National Institute of Justice, *Mandatory Sentencing* (January 1997), at p.4).

mandatory minimum level based on substantial assistance to authorities, another means by which leniency may be offered to some defendants and not others.⁵⁷

C. Bail

Another turning point in the criminal justice process, one that can mean the difference between freedom and incarceration for criminal defendants, is the bail determination. While the decision to set bail is ultimately a judicial function, prosecutors play an important role in determining whether a criminal defendant will be released on bail or detained in jail prior to trial by recommending detention or release to the court.

A New York State study examined the extent to which black and Hispanic state criminal defendants were treated differently from similarly situated white criminal defendants with respect to pretrial detention, and concluded that statewide, minorities charged with felonies were detained more often than white defendants charged with felonies. Indeed, the study found that 10 percent of all minorities held in jail at felony indictment in New York City, and 33 percent of all minorities held in jail at felony indictment in the rest of New York State, would be released before arraignment if minorities were detained as often as comparably situated whites.⁵⁸

Another study reviewed bail determinations for criminal defendants in New Haven, Connecticut, and concluded that the bail rates set for black criminal defendants exceeded those set for similarly situated white criminal defendants. In short, the study concluded, lower bail rates could have been set for black defendants without incurring the risk of flight that bail rates are designed to avoid.⁵⁹ And federal statistics indicate that while non-Hispanics are likely to be released prior to trial in 66 percent of cases, Hispanics are likely to be released in only 26 percent of their cases.⁶⁰

Bail status not only determines whether the defendant is to be incarcerated before trial, it also bears on the likelihood of conviction. Although jurors are not supposed to know whether the defendant has been jailed before trial, they can often discern the defendant's bail status and are more likely to convict a defendant who has already been incarcerated.⁶¹ Here again, one racial disparity begets disparity further along in the justice system.

⁵⁷ 18 U.S.C. § 3553(e). Similarly, the federal sentencing guidelines require a prosecutor to certify substantial assistance before the court may depart below the applicable guideline range. United States Sentencing Guidelines, Section 5K1.1.

⁵⁸ Office of Justice Systems Analysis, New York State Division of Criminal Justice Services, "Disparities in Processing Felony Arrests in New York State, 1990-1992" (September 1995) (*New York Felony Study*), pp. v-vi, xi.

⁵⁹ Ian Ayres and Joel Waldfogel, "A Market Test for Race Discrimination in Bail Setting," *46 Stan. L. Rev.* 987 (1994).

⁶⁰ Bureau of Justice Statistics, United States Department of Justice, *Compendium of Federal Justice Statistics* (January 1999), p.25.

⁶¹ *See generally* Bail Reform Hearings, 1982: Hearings on S. 1554 Before the Subcomm. on

D. *The Death Penalty*

Thirty-eight states and the federal government authorize capital punishment. In each of those jurisdictions it is the prosecutor who makes the critical decision of whether or not to seek death. That decision is guided somewhat by statutory aggravating and mitigating factors, but many of these factors, such as the heinousness of the crime, are subjective. Judges and juries may eventually reject a prosecutor's request that the death penalty be imposed, but prosecutors alone decide whether death is an option.⁶²

The importance of race as a factor in the imposition of capital punishment is well documented. First, the evidence reveals disparity in the application of the death penalty depending on the race of the *victim*. Individuals charged with killing white victims are significantly more likely to receive the death penalty than individuals charged with killing non-white victims. Of numerous studies of death penalty outcomes reviewed by the congressional General Accounting Office (GAO), 82 percent found that imposition of the death penalty was more likely in the case of a white victim than in the case of a black victim.⁶³ One of the most thorough death penalty studies, conducted by Professors David Baldus, Charles Pulaski, and George Woodworth, found that defendants charged in Georgia with killing white victims were 4.3 times more likely to receive the death penalty than defendants charged with killing black victims.⁶⁴ The Baldus study also found that more than 50 percent of those sentenced to death for killing a white person would not have received the death penalty had they killed a black person.⁶⁵ According to the GAO, the effect of the victim's race on the sentencing outcome appears to be particularly pronounced at the earlier stages of the judicial process, such as the prosecutor's decision to charge the defendant with a capital offense and his decision to proceed to trial rather than plea bargain.⁶⁶

Second, while some of the evidence concerning the death penalty reveals that the race of the defendant alone does not result in unwarranted disparity,⁶⁷ other evidence is to the contrary. It is at least true that the race of the defendant, when *combined with the race of the victim*, yields significant disparities in the application of the death penalty. The Baldus study concluded that

Constitutional Rights of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1982) (statement of Professor Daniel Freed).

⁶² "Prosecution and Race" at 24 and nn. 49-51.

⁶³ U.S. General Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* (1990) (GAO Study), p. 5 (noting that "[t]his finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques.").

⁶⁴ David C. Baldus, Charles Pulaski, and George Woodworth, "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience," *Journal of Criminal Law and Criminology* 74 (fall 1983) (Baldus Study), pp. 661-753.

⁶⁵ *McCleskey v. Kemp*, 481 U.S. 279, 321 (1987) (Brennan, J., dissenting) (citing Baldus study)

⁶⁶ GAO Study at 5.

⁶⁷ The Baldus study concluded that black defendants were only 1.1 times more likely to receive the death penalty than white defendants. See also GAO Study at 6 ("The evidence for the influence of the race of defendant on death penalty outcomes was equivocal").

blacks who killed whites were sentenced to death 22 times more frequently than blacks who killed blacks, and seven times more frequently than whites who killed blacks. Again, this discrepancy appears in large part to be based on the exercise of prosecutorial discretion. Georgia prosecutors sought the death penalty in 70 percent of the cases involving black defendants and white victims, while seeking the death penalty in only 19 percent of the cases involving white defendants and black victims, and only 15 percent of the cases involving black defendants and black victims.⁶⁸

In short, black defendants charged with killing white victims were the group most likely to receive the death penalty. Until 1991, when Donald “Pee Wee” Gaskins, a white man, was executed in South Carolina for the murder of a black victim, no white person had been executed for the murder of a black person since the Supreme Court’s 1976 decision in *Furman v. Georgia* holding that capital punishment is not necessarily unconstitutional. In all, since 1976, only 11 whites have been executed for the murder of a black victim, while 145 blacks have been executed for the murder of a white victim,⁶⁹ and 80 percent of those currently on death row are there for killing a white person.⁷⁰ And the Baldus Study revealed that of the seven individuals executed in Georgia between 1976 and 1986, all were convicted of killing whites, and six of them were black, despite the fact that of all homicides in Georgia during that period, only 9.2 percent involved black defendants and white victims, and 60.7 percent involved black victims.⁷¹

Still other studies indicate that capital punishment is disproportionately applied on the basis of the race of the criminal defendant, irrespective of the race of the victim. Professors Baldus and Woodworth, co-authors of the groundbreaking Georgia study, conducted a statistical analysis of the death sentence in Philadelphia between 1983 and 1993, and concluded that for similar crimes, black defendants were almost four times more likely to receive the death penalty as white defendants, and that 38 percent of black defendants sentenced to death would not have been so sentenced had they been white.⁷²

Statistics on the imposition of the federal death penalty are similarly disturbing. In 1988, Congress enacted the first federal death penalty provision in the aftermath of *Furman*. The 1988 law authorized the death penalty for murders committed by those involved in certain drug trafficking activities under 21 U.S.C. §848.

From 1988 to 1994, 75 percent of those convicted of participating in a drug trafficking criminal enterprise under 21 U.S.C. §848 were white. However, of those who were the subjects

⁶⁸ *McCleskey v. Kemp*, 481 U.S. at 327 (Brennan, J., dissenting) (citing Baldus study).

⁶⁹ Death Penalty Information Center, “Race of Defendants Executed Since 1976,” DPIC website, www.essential.org/dpic, accessed March 15, 2000.

⁷⁰ David Cole, “Race, Life and Death,” *Washington Post*, January 11, 2000, p. A17.

⁷¹ *McCleskey v. Kemp*, 481 U.S. at 327 (Brennan, J., dissenting) (citing Baldus Study).


⁷² Richard C. Dieter, “the Death Penalty in Black & White: Who Lives, Who Dies, Who Decides,” Death Penalty Information Center (June 1998), p. 5 (citing Philadelphia study). See also David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Barbara Broffitt, “Racial Discrimination in the Post-*Furman* Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia,” 83 *Cornell L. Rev.* 1638 (1998).

of death penalty prosecutions under that law in the same period, 89 percent were Hispanic or black (33 out of 37) and only 11 percent (four out of 37) were white.⁷³ And, indeed, the first defendant scheduled to be executed under the 1988 law is Hispanic.

A congressional subcommittee studied the application of the 1988 law and concluded that “some of the death penalty prosecutions under [21 U.S.C. §848] have been against defendants who do not seem to fit the expected ‘drug kingpin’ profile,” including, in several cases, “young inner-city drug gang members and relatively small-time traffickers,” or individuals who committed murder at the behest of a higher-up who received a lesser sentence.⁷⁴

Under federal procedures, the personal written authorization of the Attorney General is required before a capital prosecution may proceed. Thus, the application of the federal death penalty involves the exercise of prosecutorial discretion at the highest levels of the United States Government. Nobody suggests that the current Attorney General or her predecessors who authorized federal death penalty prosecutions are or were motivated by impermissible racial factors. But this act of prosecutorial decision-making, like others at all levels of government, is subject to institutional and community pressures that may have racial overtones.

As an empirical matter, it is undeniable that prosecutors exercise their discretion in ways that have racially disproportionate impacts, even if their intent is race-neutral. Such unfairness may ultimately be more dangerous than explicitly racist behavior, since it is harder to detect (both by victim and perpetrator) and harder to eradicate than the blatant racism most Americans have learned to reject as immoral.⁷⁵ In any event, prosecutorial decision-making, in tandem with police tactics, contribute to the criminalization of race and the racialization of crime, a vicious cycle that is having a devastating effect on minority communities throughout the nation.



⁷³ Staff Report by the Subcommittee on Civil and Constitutional Rights, House Judiciary Committee, “Racial Disparities in Federal Death Penalty Prosecutions 1988-1994,” 103rd Congress, 2d Sess. (March 1994), p. 2. As the Staff Report noted, “[a]lthough the number of homicide cases in the pool that the U.S. Attorneys are choosing from is not known . . . the almost exclusive selection of minority defendants for the death penalty, and the sharp contrast between capital and non-capital prosecutions under [21 U.S.C. §848] indicate a degree of racial bias in the imposition of the federal death penalty that exceeds even pre-*Furman* levels.” *Id.*

⁷⁴ *Id.*

⁷⁵ See “Prosecution and Race” at 34.



Chapter III

Race, Sentencing and the “Tough on Crime” Movement

Sentencing is arguably the most important stage of the criminal justice system. While policing strategies help determine who will be subjected to the criminal process in the first place, and prosecutorial choices help determine who will be granted leniency from the full force of the law, sentencing is where those earlier decisions bear fruit.

No one who has ever visited a prison and seen human beings locked in cages like animals can ever be unmindful of the enormity of society’s decision to deprive one of its members of his or her liberty. The decision to sentence a convicted criminal to prison has, until recently, been viewed as a profound responsibility, one entrusted solely to impartial judges. Increasingly, however, sentencing has become mundane and mechanistic, a decision effectively controlled by legislators, prosecutors and sentencing commissioners. This change in the culture of sentencing has had disastrous consequences for minorities in the United States.

A. A Brief History of U.S. Sentencing Policy

In the late 18th and early 19th century, federal and state laws typically set mandatory penalties for violations of law. But more enlightened penological views soon gained favor, and judges were granted discretion to sentence offenders to a range of punishments depending upon the severity of the crime and the character of the defendant.

At several points in this century, most recently in the mid-1980’s, Congress and many state legislatures have enacted laws to deny judges sentencing discretion. These laws establish a minimum penalty that the judge must impose if the defendant is convicted of particular provisions of the criminal code. Mandatory sentencing laws are generally premised on the view that punishment and incapacitation, not rehabilitation, is the primary goal of the criminal justice system.

While they deprive judges of their traditional authority to impose just sentences, such mandatory minimum sentencing laws are not truly mandatory because they provide opportunities for prosecutors to grant exceptions to them. As described in the preceding chapter, prosecutors can choose to charge particular defendants with offenses that do not carry mandatory penalties or they can agree to a plea agreement in which the charges carrying mandatory penalties will be dismissed. And, as also noted earlier, under federal law only the prosecutors may grant a departure from mandatory penalties by certifying that the defendant has provided “substantial assistance” to law enforcement.

Mandatory minimum laws embody a dangerous combination. They provide the government with unreviewable discretion to target particular defendants or classes of defendants for harsh punishment. But they provide no opportunity for judges to exercise discretion on behalf of defendants in order to check prosecutorial discretion. In effect, they transfer the

sentencing decision from impartial judges to adversarial prosecutors, many of whom lack the experience that comes from years on the bench.

At the same time that mandatory sentencing laws came back into vogue in the mid-1980's, a separate movement to establish sentencing guidelines gained favor. Guidelines are a middle ground between unfettered judicial discretion and mandatory penalties. These laws, such as the Sentencing Reform Act of 1984 at the federal level, establish a centralized commission to set a presumptive sentencing range and to enumerate sentencing factors that a judge must consider. But they permit judges to depart upward or downward based on unusual factors in an individual case.

Interestingly, some supporters of civil rights championed mandatory sentencing and guideline sentencing as an antidote to perceived racial disparities in sentencing.⁷⁶ But the evidence is clear that minorities fare much worse under mandatory sentencing laws and guidelines than they did under a system favoring judicial discretion. By depriving judges of the ultimate authority to impose just sentences, mandatory sentencing laws and guidelines put sentencing on auto-pilot. Discretionary decisions of law enforcement agents and prosecutors engaged in what Justice Cardozo called "the competitive enterprise of ferreting out crime"⁷⁷ are more likely to disadvantage minorities than judicial discretion.

The mandatory sentencing movement reached its apex in the mid-1990's when Congress and many states adopted so-called "3 strikes, you're out" laws. Under these statutes, defendants with two prior criminal convictions can be sentenced to life in prison, even if their third "strike" is for relatively minor conduct. Some states, such as Georgia, have enacted even harsher "2 strikes" laws. But again, these mandatory laws are typically invoked by prosecutors who have substantial discretion in choosing which defendants to single out for grossly disproportionate punishments. Once the "3 strike" or "2 strike" statute is invoked, there is often nothing a judge can do to ameliorate the harsh punishment that the legislature has authorized the prosecutor to demand.

The final policy development that has transformed sentencing in the last two decades is the abolition of parole in the federal system and in many states. Indeterminate sentencing, in which parole boards exercised discretion to release defendants from prison based on rehabilitation and good behavior has been discarded in favor of "truth-in-sentencing." Sentencing is now generally mandatory, determinate and harsh, a volatile mix that has led to dramatically increased prison populations.

One reason sentencing has become uniformly harsher across the country is that the federal government, which previously led only by example, has in recent years established significant financial incentives for states to model their sentencing laws on the federal model.⁷⁸

⁷⁶ See generally Kate Stith & Steve Y. Koh, "The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines," 28 Wake Forest L. Rev. 223 (1993).

⁷⁷ Johnson v. United States, 333 U.S. 10 (1948).

⁷⁸ The Violent Crime Control Act of 1994 authorizes prison construction grants to states that "increase the average prison time actually served or the average percent of sentence served by persons convicted of a . . . violent crime." 42 USC § 13703 (2000). In the same vein, a bill recently passed by the House of Representatives

The federal criminal code is notoriously irrational and the federal sentencing system is a patchwork of overly simple mandatory minimums and overly complex sentencing guidelines. Nonetheless, many states have tailored their sentencing systems to congressional specifications, contributing to the headlong rush to incarcerate.

B. The Result of Tough-on Crime Sentencing Policies

Some politicians treat sentencing policy as an opportunity for demagoguery, but the combined effect of the various sentencing laws enacted in the past two decades is anything but rhetorical. In 1972, the populations of federal and state prisons combined were approximately 200,000. By 1997, the prison population approached 1.2 million, an increase of almost 500 percent. Similar developments at the local level led to an increase in the jail population from 130,000 to 567,000. Thus, America now houses some 2 million people in its federal and state prisons and local jails.⁷⁹

Prison and jail populations have not only swelled in the last 20 years, they have also changed in character. As a result of the nation's current "War on Drugs" which began in the early 1980's, an increasingly large percentage of those incarcerated are charged with or convicted of non-violent drug crimes.

Between 1980 and 1995, the number of state prison inmates who had committed drug crimes increased by more than 1000 percent. Whereas only one out of every 16 state inmates was a drug offender in 1980, one out of every four in 1995 was a drug offender. By the middle of the 1990's, 60 percent of federal prison inmates had been convicted of a drug offense, as opposed to 25 percent in 1980. If local and county jail inmate populations are included in the calculation, there are now some 400,000 federal and state prison inmates – almost a quarter of the overall inmate population -- serving time or awaiting trial for drug offenses.⁸⁰ Drug offenders accounted for more than 80 percent of the total growth in the federal inmate population – and 50 percent of the growth of the state prison population – from 1985 to 1995.⁸¹

The chances of receiving a prison sentence after being arrested for a drug offense increased by 447 percent between 1980 and 1992. The number of state prison drug sentences between 1985-1995 increased 331 percent, and represented more than half of the overall increase in state sentences meted out during that period. The effect of drug sentences on the federal system is even more pronounced. The number of federal drug sentences imposed between 1985 and 1995 increased 478 percent, and accounted for 74 percent of the total increase in federal

authorizes grants to states that enact mandatory minimum sentencing laws for certain gun crimes. See H.R. 4051 (passed House on April 13, 2000).

⁷⁹ *Race to Incarcerate* at 19-20.

⁸⁰ Marc Mauer, "The Crisis of the African-American Male and the Criminal Justice System," Written Testimony Before the U.S. Commission on Civil Rights, April 15-16, 1999 (Mauer Civil Rights Commission Testimony), p. 8 (*citing* data from the Bureau of Justice Statistics, U.S. Department of Justice).

⁸¹ Christopher J. Mumola & Allen J. Beck, "Prisoners in 1996," Bureau of Justice Statistics, United States Department of Justice (June 1997) (Mumola & Beck), p.11; *Race to Incarcerate* at 32.

sentences during that period.⁸² Similarly, the *length* of sentences for drug offenses dramatically increased: Drug offenders entering federal prison in 1986 served an average term of almost 30 months; drug offenders entering federal prison in 1997 were expected to serve an average term of more than twice that length, 66.2 months.⁸³

An overly punitive crime control strategy is unwise and ineffective for many reasons, most beyond the scope of this report. But one of the chief failings of undue reliance on imprisonment to solve social problems is that this approach results in serious racial disparities. The “tough on crime” movement of the past several decades have led to incarceration rates for minorities far out of proportion to their percentage of the U.S. population.

C. Racially Disparate Sentencing Outcomes

One of the most thorough studies of sentencing disparities was undertaken by the New York State Division of Criminal Justice Services, which studied felony sentencing outcomes in New York courts between 1990 and 1992.⁸⁴ The State concluded that one-third of minorities sentenced to prison would have received a shorter or non-incarcerative sentence if they had been treated like similarly situated white defendants. If probation-eligible blacks had been treated like their white counterparts, more than 8000 fewer black defendants would have received prison sentences in that two year period, resulting in a five percent decline in the percentage of blacks sentenced to prison as a percentage of the entire sentenced population.⁸⁵ In short, the study found, blacks are sentenced to prison more frequently than whites for the same conduct.

Other sentencing data is consistent with the New York findings. Nationwide, black males convicted of drug felonies in state courts are sentenced to prison 52 percent of the time, while white males are sentenced to prison only 34 percent of the time. The ratio for women is similar – 41 percent of black female felony drug offenders are sentenced to prison, as compared to 24 percent of white females. With respect to violent offenses, 74 percent of black male convicted felons serve prison time, as opposed to only 60 percent of white male convicted felons. With respect to all felonies, 58 percent of black male convicted felons, as opposed to 45 percent of white men, served prison sentences.⁸⁶

Some of these aggregate statistics do not control for a defendant’s prior criminal record, but even that is not a neutral basis for comparison because racial profiling, prosecutorial discretion and juvenile justice decision-making make minorities more likely to acquire a criminal record than their white counterparts. And at least one study that examined only defendants without criminal records found that Hispanics and blacks with no prior record were

⁸² *Race to Incarcerate* at 32-33, 151-52 (citing Allen J. Beck and Darrell K. Gilliard, “Prisoners in 1994,” Bureau of Justice Statistics, U.S. Department of Justice (August 1995), p.13).

⁸³ William J. Sabol & John McGready, “Time Served in Prison by Federal Offenders, 1986-1997,” Bureau of Justice Statistics, U.S. Department of Justice (June 1999), p.5, Table 2.

⁸⁴ See Chapter II, n.21.

⁸⁵ *New York Felony Study* at 43.

⁸⁶ Jodi M. Brown & Patrick A. Langan, “State Court Sentencing of Convicted Felons, 1994,” Bureau of Justice Statistics, U.S. Department of Justice (March 1998) (Brown & Langan), p. 24, table 2.10.

disproportionately likely to be sentenced to prison than white defendants with no prior record. Indeed, Hispanics were twice as likely as whites to draw a prison term as opposed to probation, a fine or time in a county jail.⁸⁷

Racial disparities can be found not only in the fact of incarceration, but in the length of prison or jail time served. According to a Justice Department review of state sentencing, whites who serve time for felony drug offenses serve shorter prison terms than their black counterparts: An average of 27 months for whites, and 46 months for blacks. These discrepancies are mirrored with regard to non-drug crimes. Whites serve a mean sentence of 79 months for violent felony offenses; blacks serve a mean prison sentence of 107 months for these offenses. Whites serve a mean sentence of 23 months for felony weapons offenses, blacks serve a mean sentence of 36 months for these offenses. Overall, whites serving state prison sentences for felony conduct nationwide in 1994 served a mean time of 40 months, as compared to 58 months for blacks.⁸⁸

D. Minority Incarceration Rates

The choice of legislatures to target drug crimes for “tough on crime” legislation has had a disproportionate impact on America’s minorities.⁸⁹ As the overall prison population has increased because of the war on drugs, so too has the percentage of minority Americans as a proportion of the overall prison (and drug offender) population. From 1970 to 1984, whites generally comprised approximately 60 percent of those admitted to state and federal facilities, and blacks around 40 percent. By 1991, these ratios had reversed, with blacks comprising 54 of prison admissions versus 42 percent for whites.⁹⁰ Other minority groups have also been affected by this trend: Hispanics represent the fastest growing category of prisoners, having grown 219 percent between 1985-1995.⁹¹ The percentage of Asian-Americans in prison has also grown; their percentage of the *federal* prison population increased by a factor of four from 1980 to 1999.⁹²

⁸⁷ *Mercury News Report* at 1A.

⁸⁸ Brown & Langan at 21, table 2.7.

⁸⁹ Anti-drug efforts in America have always had a racial tint. Indeed, while America has experienced an alternating tolerance and intolerance of drug use, during those periods where intolerance has been the norm, “drug use becomes associated . . . with the lower ranks of society, and often with ethnic and racial groups that are feared or despised by the middle class.” Daniel Kagan, “How America Lost its First Drug War,” *Insight* 8 (November 20, 1989). Thus, “[e]arlier in this century, although mainstream women were the model category of opiate users, images of Chinese opium smokers and opium dens were invoked by opponents of drug use” and led to the enactment of federal anti-drug legislation. Michael Tonry, “Race and the War on Drugs,” *1994 U. Chi. Legal Forum* 25, 39 (1994). And “imagery linking Mexicans to marihuana use was prominent in the anti-marihuana movements that culminated in the Marihuana Tax Act of 1937” and state anti-marijuana laws. *Id.* See generally David Musto, *The American Disease: Origins of Narcotic Control* (Oxford University Press, 1987). The current drug war, in which inner-city blacks have become the archetypal users of crack, the archetypal drug of today’s drug epidemic, is simply the latest chapter in this ongoing American story.

⁹⁰ Michael Tonry, “Racial Disparities Getting Worse in U.S. Prisons and Jails,” in Michael Tonry and Kathleen Hatlestad eds., *Sentencing Reform in Overcrowded Times* (Oxford University Press, 1997) (“*Tonry & Hatlestad*”), p. 223 (citing Bureau of Justice Statistics data).

⁹¹ Mumola & Beck at 9.

⁹² Jungwon Kim, “Lost Time,” *A.*, June/July 1999, p. 35 (citing Federal Bureau of Prisons Statistics).

The changing face of the U.S. prison population is due in large measure to the war on drugs: In 1985, the number of whites imprisoned in the state system actually exceeded the number of blacks. Between 1985 and 1995, while the number of white drug offenders in state prisons increased by 300 percent, the number of similarly situated black drug offenders increased by 700 percent, such that there are more than 50 percent more black drug offenders in the state system than white drug offenders.⁹³

Because the overall number of imprisoned drug offenders has increased, and the number of minorities as a percentage of that population has increased, far more minorities than whites are serving time for drug offenses as a percentage of their respective prison populations. As of 1991, 33 percent of all Hispanic state prison inmates, and 25 percent of all black state prison inmates, were serving time for drug crimes, as compared to only 12 percent of all white inmates.⁹⁴ By contrast, in 1986, only seven percent of black inmates, and eight percent of white inmates, had been convicted of drug crimes.⁹⁵ In other words, the chances are far better that an imprisoned black or Hispanic is serving time for a drug crime than it is that an imprisoned white is serving time for a drug crime.

Minorities are disproportionately disadvantaged by current drug policies. As we have seen, it is not because minorities commit more drug crimes, or use drugs at a higher rate, than white Americans. Drug use rates per capita among minority and white Americans are similar, a fact which, given the Nation's demographics, means that many more whites use drugs than do minorities. Moreover, as noted earlier, studies suggest that drug users tend to purchase their drugs from sellers of their own race.⁹⁶

Rather, the disproportionate effect of the war on drugs on minorities results from three factors: First, more arrests of minorities for drug crimes; second, overall increases in the severity of drug sentences over the past 20 years; and third, harsher treatment of those minority arrestees as compared to white drug crime arrestees. All three of these factors are direct results of the "tough on crime" movement.

As noted, while blacks constitute approximately 12 percent of the population, as well as a similar percentage of U.S. drug users, they constitute 38 percent of all drug arrestees.⁹⁷ Given the demographics of the United States, therefore, far more blacks than whites per capita are arrested for drugs, and overall increases in arrests affect more blacks per capita than whites. Indeed, by 1989, with the war on drugs in full force and overall drug arrests having tripled since 1980,⁹⁸ blacks were being arrested for drug crimes at a rate of 1600 per 100,000, while whites

⁹³ *Race to Incarcerate* at 152-153 (citing Mumola & Beck).

⁹⁴ Mauer Civil Rights Testimony at 8 (citing Bureau of Justice Statistics data).

⁹⁵ Michael Tonry, "Drug Policies Increasing Racial Disparities in U.S. Prisons, in *Tonry & Hatlestad* at 232.

⁹⁶ See Chapter I, n.23.

⁹⁷ *Id.*

⁹⁸ Marc Mauer & Tracy Huling, "One in Three Black Men is Ensnared in the Justice System," in *Tonry & Hatlestad* at 246.

were being arrested at one-fifth the frequency per capita -- 300 per 100,000.⁹⁹ The statistics in certain United States cities were even more eye-catching: In Columbus, Ohio, black males accounted for 11 percent of the total population, and for 90 percent of the drug arrests.¹⁰⁰ In Jacksonville, Florida, black males comprise 12 percent of the population, but 87 percent of drug arrests.¹⁰¹

Why were minorities the primary targets of law enforcement officials waging the war on drugs? Much of this discrepancy can be traced to practices such as racial profiling. The assumption that minorities are more likely to commit drug crimes and that most minorities commit such crimes will prompt a disproportionate number of investigations, and therefore, arrests of minorities. Drug arrests are easier to accomplish in impoverished inner-city neighborhoods than in stable middle-class neighborhoods, so the insistence of politicians on more arrests results in vastly more arrests of poor, inner-city blacks and Hispanics.¹⁰²

Blacks are not only targeted for drug arrests. They are also 59 percent of those *convicted* of drug offenses and, because they are less likely to strike a favorable plea bargain with a prosecutor, 74 percent of those *sentenced to prison* for a drug offense. Thus, blacks are disproportionately subject to the drug sentencing regimes adopted by Congress and state legislatures. And these sentencing regimes, across all levels of government, increasingly provide for more and longer prison sentences for drug offenders.

Mandatory minimums such as "three strikes" laws result in the extended incarceration of non-violent offenders who, in many cases, are merely drug addicts or low-level functionaries in the drug trade. Indeed, in the first two years after enactment of California's "three strikes, you're out" law, more life sentences had been imposed under that law for marijuana users than for murderers, rapists, and kidnappers combined.¹⁰³ An Urban Institute study examining 150,000 drug offenders incarcerated in state prisons in 1991 determined that 127,000 of these individuals -- 84 percent -- had no history of violent criminal activity, and half of the individuals had no criminal record at all.¹⁰⁴ Data from the federal system reveals the same trend. More than half of those sentenced to federal prison in 1992, after the enactment of mandatory minimum sentences for drug offenders, were drug traffickers; of those, 62 percent were considered "low-risk," based

⁹⁹ Michael Tonry, "Drug Policies Increasing Racial Disparities in U.S. Prisons," in *Tonry & Hatlestad* at 233, 235.

¹⁰⁰ Jerome G. Miller, *Search and Destroy: African-American Males in the Criminal Justice System* (Cambridge University Press 1996), p. 82 (citing Sam Vincent Meddis, "Is the Drug War Racist?" *USA Today*, July 23-25, 1993, p. 2A).

¹⁰¹ *Id.* (citing J.G. Miller, *Duval Jail Report*, filed with the United States District Court for the Middle District of Florida, Jacksonville, Florida, June 1993).

¹⁰² *Id.*

¹⁰³ *No Equal Justice* at 147 (citing Christopher Davis, Richard Estes, and Vincent Schiraldi, "Three Strikes": the New Apartheid," Report of the Center for Juvenile and Criminal Justice (March 1996)).

¹⁰⁴ *Race to Incarcerate* at 157 (citing James P. Lynch & William J. Sabol, *Did Getting Tough on Crime Pay?* (Urban Institute, 1997)).

on a lack of prior criminal histories.¹⁰⁵ Yet these low-risk traffickers were expected to serve an average of 51 months in prison, as compared to 17 months for similarly situated federal prisoners who had been sentenced prior to the enactment of mandatory minimums.¹⁰⁶

While three strikes laws and mandatory minimums limit judicial discretion to reduce prison sentences, they do not reduce prosecutorial discretion over charging and plea negotiations – decisions which will determine whether strict sentencing laws apply. For example, Georgia District Attorneys sought life sentences for 16 percent of black criminal defendants eligible for such sentences under the State’s “two strikes, you’re out law,” which provided for the imposition of a life sentence for a second drug offense. By contrast, Georgia prosecutors sought a life sentence in only one percent of the eligible cases involving white defendants. The result was that 98.4 of those serving life terms under the Georgia statute were black. Similarly, as of 1996, blacks made up 43 percent of Californians sentenced to prison under the State’s “three strikes you’re out” law, despite comprising only seven percent of the total State population.¹⁰⁷

Much of the discrepancy at the federal level is the result of differences in the federal sentencing of drug offenses involving crack and powder cocaine. These disparities, enacted into law as part of the Anti-Drug Abuse Act of 1986, arise from the different thresholds for the imposition of mandatory minimum prison sentences for crack and powder cocaine dealers. In short, federal law imposes mandatory 5-year federal prison sentences on anyone convicted of selling 5 grams or more of crack cocaine, and 10-year mandatory sentences for selling 50 grams or more of crack. But in order to receive the same mandatory 5- and 10-year sentences for selling powder cocaine, a defendant must be convicted of selling 500 and 5000 grams of powder cocaine.

Studies have shown that blacks and whites convicted of federal powder cocaine offenses go to jail for approximately the same length of time; so too do blacks and whites convicted of crack cocaine offenses. The problem is that, as we have seen, few whites are prosecuted for crack offenses in federal court, and are instead prosecuted in state systems that may not impose mandatory minimum penalties for crack offenses. Indeed, in 1993, 95.4 percent of those convicted for federal crack distribution offenses were black or Hispanic.¹⁰⁸ This despite the fact that, as discussed in Chapter II, the majority of crack users in the United States in that period were white.¹⁰⁹ By contrast, almost one third (32 percent) of those convicted of federal powder

¹⁰⁵ *Id.* at 156 (citing Miles D. Harer, “Do Guideline Sentences for Low-risk Traffickers Achieve Their Stated Purposes?” *Federal Sentencing Reporter* 7.1 (1994)).

¹⁰⁶ *Id.*

¹⁰⁷ *No Equal Justice* at 143, 148.

¹⁰⁸ See Chapter II, p. x, n. 7.

¹⁰⁹ *Id.* at pp. 3-4. See also United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (February 1995), p. xi.

cocaine distribution offenses in 1993 were white.¹¹⁰ The crack/powder sentencing disparity, combined with the almost-exclusive federal targeting of blacks and Hispanics for crack-related crimes, means that minorities in general serve longer sentences for similar drug crimes than do whites. Combined with the far greater drug arrest rates for blacks than whites, and the general reliance on mandatory minimums for drug crimes, these longer sentences ensure that federal prisons house a disproportionately large number of minorities.

The crack/powder cocaine divide has not escaped the attention of policymakers, although it has escaped resolution. In 1995, the United State Sentencing Commission recommended to Congress that the sentencing guidelines be altered to eliminate the differences in crack and cocaine sentencing thresholds, noting both the inequality inherent in these differences and the cynicism they engendered toward America's criminal justice system.¹¹¹ In response, President Clinton proposed, and Congress passed, legislation rejecting the Commission's proposed changes and concluding that "the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine."¹¹² The Commission has since revisited the issue and has recommended a reduction, not an elimination, in the current 100-to-1 disparity, noting again that "[t]he current penalty structure results in a perception of unfairness and inconsistency."¹¹³

E. The Lighter Side of Drug Policy

The federal and state policies enacted as part of the war on drugs suggest that America is of one mind when it comes to drug policy: Users and sellers of drugs should be punished, and the punishments should be severe. Yet this approach is in fact not the uniform response to drug-related activity. Indeed, when it comes to drug use in affluent, largely white communities, the model is rather different.

The experience of Milwaukee, Wisconsin, provides an example of the cynicism that often accompanies U.S. drug policy. The predominantly white suburbs that encircle Milwaukee have all passed marijuana possession ordinances, whereby an individual found in possession of marijuana is ticketed, as if for a parking offense, but not charged with a crime. The City of Milwaukee, by contrast, charges marijuana possession as a crime, having rejected a proposed marijuana possession ordinance in the mid-1980s. As a result of these discrepancies, the Wisconsin Correctional Service concluded, non-whites were being charged with drug offenses

¹¹⁰ United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (February 1995) at xi. Interestingly, Minnesota, whose sentencing regime includes a crack/powder divide similar to that appearing in federal law, had similar breakdowns: 96.6 of those charged with possession of crack cocaine were black, while 80 percent of those charged with possession of powder cocaine were white. *No Equal Justice* at 142. The Minnesota Supreme Court ultimately struck down the crack/powder divide on equal protection grounds. *State v. Russell*, 477 N.W.2d 886, 891 (Minn. 1991). The Minnesota legislature responded by increasing penalties for powder cocaine sales to equal those for crack sales.


¹¹¹ United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (February 1995) at 192 ("[S]entences appear to be harsher and more severe for racial minorities than others as a result of this law, and hence the perception of unfairness, inconsistency, and a lack of evenhandedness").

¹¹² Pub. L. No. 104-38, 109 Stat. 334 (October 30, 1995).

¹¹³ United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (April 1997), p.8.

13 times more frequently than whites.¹¹⁴ Moreover, authorities in the Milwaukee suburbs generally issued tickets to residents of those suburbs, but typically transported non-residents, including many blacks, downtown for criminal prosecution.¹¹⁵

Affluent predominantly white suburban communities have long recognized that the drug war need not be fought only on the incarceration front. Alternatives such as drug treatment and education are mainstays of white, middle-class efforts to eradicate the scourge of drugs from their neighborhoods. They are also, coincidentally, a more efficient and economical approach to fighting crime generally. The Rand Corporation has estimated that investing an additional \$1 million in drug treatment programs would reduce by fifteen times more serious crime than enacting more mandatory sentences for drug offenders.¹¹⁶ When it comes to the presence of drugs in inner-city areas populated by minorities, the response of policymakers is very different indeed.



¹¹⁴Jim Stingl, “Drug Laws Seen as Factor in Racial Crime Disparities,” *Milwaukee Journal Sentinel*, April 3, 1997, p. 1.

¹¹⁵*Id.*

¹¹⁶Jonathan P. Caulkins, et al., *Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers’ Money*, Rand, Santa Monica, 1997, p. xxiv.

In this era of mandatory sentencing laws and sentencing guidelines, judges have less authority to affect the outcome of criminal cases through the exercise of judicial discretion. Still, courts bear significant responsibility for the injustices suffered by minorities in our criminal system. In the face of the overwhelming racial disparities created by policing tactics, prosecutorial decision-making and unjust sentencing laws, courts have generally declined to examine or redress racial inequality in the criminal justice system, and have made it harder for litigants to expose such flaws.

The Supreme Court's consideration of capital punishment disparities in *McCleskey v. Kemp*¹¹⁷ exemplifies the judiciary's unwillingness to look behind the exercise of discretion by other criminal justice decision-makers. McCleskey, sentenced to death in Georgia, presented statistical evidence from the Baldus Study, discussed in Chapter II, that individuals charged with killing white victims were far more likely to be sentenced to death than individuals charged with killing black people. Had the victim in McCleskey's case been black instead of white, with all other factors remaining constant, there was a 59 percent chance he would have received a sentence other than death.¹¹⁸ Such statistical evidence raised serious doubts that the death penalty in Georgia was administered in a fair and racially neutral manner, as required by the Constitution.

By a 5-4 vote, the Court upheld McCleskey's death sentence. It found that while the statistical evidence cast doubt on the fairness of the Georgia death penalty in general, the evidence did not speak to whether capital punishment was unfairly applied to McCleskey himself. In order to justify overturning his death sentence, the Court held, McCleskey would need to demonstrate that his specific sentence was tainted by racial considerations, which he could not do. Responding to McCleskey's claim that his death sentence was arbitrary and therefore "cruel and unusual punishment," the Court found that although McCleskey's death sentence may have been arbitrary, the degree of arbitrariness was "constitutionally acceptable," given the discretion traditionally afforded prosecutors and juries in the seeking and imposing of the death penalty.

McCleskey "may be the single most important decision the Court has ever issued on the subject of race and crime"¹¹⁹ because it signaled the Court's unwillingness to confront statistical evidence of racial unfairness in the criminal justice process. The requirement that McCleskey and future defendants demonstrate that racial bias infected their case specifically is almost always an impossible test. In setting the bar so high, the Court declared, in effect, that systemic racial bias

¹¹⁷ 481 U.S. 279 (1987)

¹¹⁸ *McCleskey v. Kemp*, 481 U.S. at 325 (Brennan, J., dissenting) (citing Baldus study).

¹¹⁹ *No Equal Justice* at 137.

does not offend the Constitution. The Court candidly expressed concern that overturning McCleskey's sentence on the grounds he presented would have opened the door to challenges based on other statistical disparities in the criminal justice system. But that concern is our concern – the criminal justice system is awash in racial disparities. As Justice William Brennan's dissent stated, the Court's decision "seem[ed] to suggest a fear of too much justice."¹²⁰

The Court's reasoning in *McCleskey* and its "fear of too much justice" have been adopted in other cases where a law enforcement practice has been challenged on grounds of racial disproportionality. The Georgia Supreme Court, for example, having invalidated the State's "two strikes, you're out" law on the grounds that it was disproportionately applied to blacks, reversed itself two weeks later after receiving a brief signed by all 46 of the State's District Attorneys. In it, the District Attorneys contended that the Court's initial decision could undermine Georgia's entire criminal justice system, an implicit admission that charging and sentencing outcomes in Georgia are racially skewed. The State Supreme Court's decision reversing itself relied almost exclusively on *McCleskey*.¹²¹

In *United States v. Armstrong*,¹²² the Supreme Court raised the bar for challenging systemic racial bias even higher. In *McCleskey* the Supreme Court had held that a defendant claiming unfair sentencing or selective prosecution based on race must demonstrate that his case was handled differently from similar cases involving defendants (or in the case of the death penalty, victims) of other races. Of course much, if not all, of the information bearing on this question will be in the hands of law enforcement officials themselves. But in *Armstrong*, the Court put this information out of the reach of defendants.

Armstrong was prosecuted for a crack cocaine offense in Los Angeles. He sought to make an issue of the manifestly disparate treatment, discussed earlier, of white and black crack defendants in that jurisdiction. But the Court held that efforts to obtain records from the U.S. Attorney's office to prove selective enforcement could not proceed absent a threshold "colorable basis" for the charge of selective prosecution.¹²³ Of course, the government's files were necessary to make that colorable showing, but the Court held that a defense attorney's affidavit alleging the absence of federal prosecutions of white crack offenders was simply "hearsay."¹²⁴ Under the Catch-22 reasoning of *McCleskey* and *Armstrong*, claims of selective prosecution and other claims alleging bias in law enforcement practices remain "available in theory, but unattainable in practice."¹²⁵

As difficult to prove as selective prosecution is the claim that a prosecutor, in violation of the Sixth Amendment, used race-based peremptory challenges against prospective jurors. In

¹²⁰ *McCleskey v. Kemp*, 481 U.S. at 339 (Brennan, J., dissenting).

¹²¹ See Ch. II, n. 18.

¹²² 517 U.S. 456 (1996).

¹²³ *U.S. v. Armstrong*, 517 U.S. at 468.

¹²⁴ *Id.* at 470.

¹²⁵ *No Equal Justice* at 160.

Batson v. Kentucky,¹²⁶ the Supreme Court held that such race-based challenges violated the Constitution by denying a defendant equal protection of the law, but also held that mere statistical evidence of racial discrimination in the use of jury strikes was insufficient in the face of the prosecutor's post-hoc, non-racial explanations. In reversing a subsequent decision finding a prosecutorial rationale unconvincing, the Court noted that any racially-neutral explanation was sufficient as long as the trial judge believed it.¹²⁷ In such an environment, even a case where a prosecutor struck 20 of 21 prospective black jurors did not state a *Batson* claim where a racially-neutral, post-hoc rationalization was available to the prosecutor.¹²⁸ And such an explanation is always available: "If prosecutors exist who . . . cannot create a 'racially neutral' reason for discriminating on the basis of race, bar exams are too easy."¹²⁹

Judicially-created obstacles, based on a variety of legal doctrines, also prevent challenges to racially-tinged police tactics. For example, in *City of Los Angeles v. Lyons*,¹³⁰ the Supreme Court rejected the efforts of a black man to seek an injunction preventing the Los Angeles Police Department's use of chokeholds during routine traffic stops. Lyons had been pulled over by the police because his car had a burned-out taillight. After the police officers ordered Lyons out of the car, spread his legs, subjected him to a patdown search, they applied a chokehold on him that, among other things, permanently damaged his larynx and caused him to lose consciousness.

The Supreme Court held that Lyons lacked standing to obtain an injunction against the police procedure because he could not demonstrate that he would ever again be subjected to a chokehold by the LAPD under these circumstances. In so ruling, the court overlooked evidence that the LAPD had applied the chokehold on 975 occasions over 5 years, and that application of the chokehold had resulted in 16 deaths, 12 of which were of blacks.¹³¹ The Court also overlooked Lyons' claim that, as a black man, he faced a heightened risk of being subjected to the practice in the future – a claim that, given the prevalence of both racial profiling and police brutality against minorities, was hardly unreasonable. The Court set a standard that would make it nearly impossible for any black victim of police misconduct to prevail in seeking that such conduct be enjoined:

Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questioning, or (2) that the City ordered or authorized police officers to act in such a manner.¹³²

¹²⁶ 476 U.S. 679 (1986).

¹²⁷ *Purkett v. Elam*, 514 U.S. 765 (1995).

¹²⁸ *No Equal Justice* at 121.

¹²⁹ *Id.* at 122 (quoting Sheri Lynn Johnson, "The Language and Culture (Not to Say Race) of Peremptory Challenges," 35 *Wm. & Mary L. Rev.* 21, 59 (1993)).

¹³⁰ *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

¹³¹ *Id.* at 115-116 (Marshall, J., dissenting).

¹³² *Id.* at 105-106.

Other Supreme Court decisions regarding discriminatory police practices are discouraging as well. In both *O’Shea v. Littleton*¹³³ and *Rizzo v. Goode*,¹³⁴ the Court held that cases seeking to halt law enforcement discrimination could only proceed upon a showing by the plaintiffs that (1) the plaintiff would face a situation that would bring about the discriminatory treatment again, and (2) the discriminatory action would be certain to occur in that situation.¹³⁵ Where an officer has discretion to utilize a particular law enforcement tactic, it is virtually impossible to satisfy this standard. Since most police tactics are discretionary, they are shielded from judicial scrutiny.

The Court’s treatment of pretextual traffic stops further forecloses challenges to law enforcement practices that disproportionately burden blacks and Hispanics. In *Whren v. United States*¹³⁶, the Court held that a purely pretextual traffic stop, one based on no specific evidence of additional criminal activity, is perfectly permissible. Indeed, the Court held that even if a reasonable officer would not have stopped the car in question, the mere existence of a traffic offense constituted probable cause for the stop. As one judge wrote in a dissent criticizing such reasoning: “Given the ‘multitude of applicable traffic and equipment regulations’ in any jurisdiction, upholding a stop on the basis of a regulation seldom enforced opens the door to . . . arbitrary exercises of police discretion.”¹³⁷ In effect, by approving the unfettered exercise of police discretion in the enforcement of the traffic laws, the Court in *Whren* has put the “driving while black” syndrome beyond constitutional inquiry.¹³⁸

One very recent district court decision reaches a different conclusion about traffic stops and may present new opportunities for challenging racial profiling on constitutional grounds. In *Farm Labor Organizing Committee v. Ohio State Highway Patrol*, the court struck down the practice of asking drivers about their immigration status during routine traffic stops. The Court found that the practice was based on impermissible racial stereotyping.¹³⁹

Unfortunately, it is more customary for courts to uphold the exercise of police and prosecutorial discretion against challenges of racial unfairness, and in doing so courts often turn

¹³³ 414 U.S. 488 (1974).

¹³⁴ 423 U.S. 362 (1976).

¹³⁵ *O’Shea* involved allegations of a law enforcement conspiracy in Cairo, Illinois, to deprive minorities of their rights and freedoms in retaliation for their involvement in civil rights demonstrations and peaceful boycotts. *Rizzo* involved allegations of widespread police misconduct toward minorities directed at the Philadelphia police force, headed by the notorious then-Mayor Frank Rizzo.

¹³⁶ 517 U.S. 806 (1996).

¹³⁷ *United States v. Botero-Ospina*, 71 F.3d 783, 790 (10th Cir. 1995)(Seymour, C.J., dissenting)(citations omitted).

¹³⁸ For examples of cases upholding pretextual stops on the grounds used by the Supreme Court in *Whren*, see *United States v. Harvey*, 16 F.3d 109, 113 (6th Cir. 1994) (upholding a stop in which an arresting officer testified that he had stopped the car in part because “there were three young black male occupants in an old vehicle”) (Keith, J., dissenting); *United States v. Roberson*, 6 F.3d 1088, 1092 (5th Cir. 1993)(upholding a stop of a black motorist for changing lanes without signaling on an open stretch of highway).

¹³⁹ N.D. Ohio, No. 3:96CV7580 (April 20, 2000) (Carr, J.)

a blind eye to the manner in which police carry out their duties in minority communities. The Supreme Court's recent decision in *Illinois v. Wardlow*¹⁴⁰ is illustrative. There, the Court considered whether an individual's flight from the police, by itself, furnished a sufficient basis for an investigative stop of that individual. While the Court wisely declined to adopt the view that such flight always furnishes sufficient grounds for an investigative stop, it noted that flight from a police-patrolled area may by itself furnish grounds for a stop in certain circumstances, and upheld the stop and consequent conviction of Wardlow, a black man stopped in a high-crime Chicago neighborhood. The Court insisted that "[a]llowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business"¹⁴¹ It took Justice Stevens, concurring in the Court's unwillingness to adopt a bright line rule but dissenting from its upholding of Wardlow's conviction, to acknowledge the realities of minority life in America:

Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. For such a person, unprovoked flight is neither "aberrant" nor "abnormal." Moreover, these concerns and fears are known to the police officers themselves, and are validated by law enforcement investigations into their own practices. Accordingly, the evidence supporting the reasonableness of these beliefs is too pervasive to be dismissed as random or rare, and too persuasive to be disparaged as inconclusive or insufficient.¹⁴²

The courts have upheld not only the exercise of police and prosecutorial discretion; they also have upheld laws that cause discriminatory results, such as the powder/crack sentencing laws and guidelines. Numerous federal courts have been asked to review this sentencing disparity on equal protection grounds. These challenges have been consistently rejected by courts relying on the Supreme Court's holding in *McCleskey* that mere statistical disparities are insufficient to prove intentional discrimination against minorities.¹⁴³

The judiciary's use of evidentiary thresholds and procedural barriers to foreclose challenges to racially-based law enforcement has preserved and sustained a criminal process that provides, for too many Americans, "too little justice." Particularly disturbing is the courts' emphasis on intentional discrimination: "[t]he main problem with this intent-focused analysis is that it is backward-looking. Although perhaps adequate in combating straightforward and explicit discrimination as it existed in the past, it is totally deficient as a remedy for the more complex and systemic discrimination that African-Americans [and other minorities] currently experience."¹⁴⁴ The judicial decisions on race and the criminal justice system afford few

¹⁴⁰ 120 S. Ct. 673 (January 12, 2000).


¹⁴¹ *Id.* at 676.

¹⁴² *Id.* at 680-681 (Stevens, J., concurring in part and dissenting in part) (footnotes omitted).

¹⁴³ *See No Equal Justice* at 142 and n. 27 (citing cases).

¹⁴⁴ "Prosecution and Race" at 33.

remedies for anything but the most blatant (and generally outdated) forms of racial and ethnic discrimination.



RACE AND THE JUVENILE SYSTEM

The racial disparities that characterize criminal justice in America affect young people deeply, and cause minority youth to be over-represented at every stage of the juvenile justice system. But juvenile justice deserves separate consideration in this Report because it plays an especially destructive role in the lives of minority communities.

Juvenile justice was conceived as a way to intervene constructively in the lives of teenagers in order to steer them away from the adult criminal justice system. Juvenile courts were established throughout the United States in the early 1900's based on the recognition that children are different than adults; while children may violate the law, they remain uniquely suited to rehabilitation. It has long been recognized as counterproductive to label children as criminals, because the description becomes self-fulfilling. But for many black and Hispanic children, juvenile justice serves as a feeder system into adult courts and prisons. The mindless cycle by which so many blacks and Hispanics are branded as criminals begins in the juvenile justice system.

Racially skewed juvenile justice outcomes have dire implications, because the whole point of the juvenile justice system is to head off adult criminality. For example, one pillar of the juvenile justice system is the segregation of children from adult prisoners. Placing more black and Hispanic teenagers in adult prisons where they will come into contact with career criminals serves to incubate another generation of black and Hispanic criminals.

In the last decade, juvenile justice policy has increasingly blurred the distinctions between children and adults. Many states and the federal government have adopted laws that permit, encourage, or require youthful offenders to be tried as adults and ultimately transferred into adult prison populations. This ongoing erosion of the juvenile justice system we have known for a century is disastrous for juvenile offenders in general, but minority youths suffer most from this policy shift because they already bear the brunt of racially skewed law enforcement.

For example, minority youths are disproportionately targeted for arrest in the war on drugs. In Baltimore, Maryland, 18 white youths and 86 black youths were arrested for selling drugs in 1980. One decade later, juvenile drug sale arrests had increased more than 100 percent overall, and the almost 5-to-1 racial disparity that existed a decade earlier had become a 100-to-1 disparity: white youths were arrested 13 times for selling drugs in 1990 – *less* than in 1980 – while black youths were arrested 1304 times, an 1400 percent increase from 1980.¹⁴⁵

These figures reflect the broader national experience: From 1986 to 1991, arrests of white juveniles for drug offenses decreased 34 percent, while arrests of minority juveniles increased 78

¹⁴⁵ *No Equal Justice* at 145 (citing National Center on Institutions and Alternatives, *Hobbling a Generation: Young African-American Males in the Criminal Justice System of America's Cities: Baltimore, Maryland* (September 1992)).

percent.¹⁴⁶ All this despite data suggesting that drug use rates among white, black, and Hispanic youths are about the same, and that drug use has in fact been lower among black youths than white youths for the last couple of decades.¹⁴⁷ Similar disparities appear in relation to non-drug-related crimes. While a National Youth Survey found that the ratio of violent crimes committed by black and white male youths was approximately 3:2, the ratio of arrests for violent crimes between these two groups was approximately 4:1, according to data from the FBI.¹⁴⁸ In California, from 1996-1998, Hispanic youth were more than twice as likely, and black youth more than six times as likely, to be arrested for a violent offense than white youth.¹⁴⁹ In short, whatever the age of the offender, “black illegal activity is more likely to lead to attention by the criminal justice system.”¹⁵⁰

Over-representation of minority youths in the juvenile justice system increases after arrest. As a general matter, minority youths tend to be held at intake, detained prior to adjudication, have petitions filed, be adjudicated delinquent, and held in secure confinement facilities more frequently than their white counterparts.¹⁵¹ For example, in 1995, 15 percent of cases nationwide involving white juveniles resulted in detention, while 27 percent of cases involving black juveniles resulted in detention, even though whites comprised 52 percent, and blacks only 45 percent, of the entire juvenile caseload.¹⁵²

These conclusions based on national statistics were very recently reaffirmed in a report released by the Youth Law Center and prepared by researchers from the National Council on Crime and Delinquency. The report found substantial over-representation of minorities at all stages of the juvenile justice system, and noted that three out of every four youths admitted to adult prisons were minorities, despite the fact that the majority of juvenile arrests involved whites.¹⁵³

The experiences of individual states are equally dismaying. Disproportionate confinement of young Hispanics has been documented in each of the four states with the largest Hispanic youth populations – Arizona, Texas, New Mexico, and California. In Ohio in 1996, minorities represented 43 percent of the juveniles held in secure facilities, despite representing

¹⁴⁶ *Id* (citing American Bar Association, *The State of Criminal Justice* (February 1993)).

¹⁴⁷ “Why ‘Driving While Black’ Matters” at 295 and n. 132.

¹⁴⁸ *Race to Incarcerate* at 163-165.

¹⁴⁹ Mike Males & Dan Macallair, “The Color of Justice: An Analysis of Juvenile Adult Court Transfers in California,” Justice Policy Institute (February 2000) (*The Color of Justice*), pp. 3-4. Asian-Americans too were more likely to be arrested than whites for similar crimes. *Id.*

¹⁵⁰ *Race to Incarcerate* at 165.

¹⁵¹ See Carl Pope, “Racial Disparities in the Juvenile Justice System,” in *Tonry & Hatlestad* at 240-244 (surveying studies of race and the juvenile justice system and concluding that studies are “far more evident in the juvenile justice system than in the adult system”).

¹⁵² Andrew Blum, “Jail Time By the Book: Black Youths More Likely to Get Tough Sentences Than Whites, Study Shows,” *American Bar Association Journal*, May 1999, p.18

¹⁵³ Eileen Poe-Yamagata and Michael Jones, “And Justice for Some: Differential Treatment of Minority Youth in the Justice System (April 2000) at 1, 3.

only 14.3 percent of the overall state juvenile population.¹⁵⁴ Similarly, in Texas in 1996, minority youths represented 80 percent of those juveniles held in secure facilities, while representing only 50 percent of the overall state juvenile population.¹⁵⁵ A 1990 Florida study determined that “when juvenile offenders were alike in terms of age, gender, seriousness of the offense which promoted the current referral, and seriousness of their prior records, the probability of receiving the harshest disposition available at each of several processing stages was higher for minority youth than for white youth.”¹⁵⁶

Black, Hispanic, and Asian-American youths are far more likely to be transferred to adult courts, convicted in those courts, and incarcerated in youth or adult prison facilities than white youths. A recent study of Los Angeles County juvenile justice trends carried out by the Justice Policy Institute (JPI) is revealing. Under California law, an under-18 youth may be prosecuted either in juvenile court or adult court, and may be sentenced either to a prison term in a California Youth Authority (CYA) facility, from where he may be transferred to an adult facility at age 18, or given probation. The JPI study concluded that while minority youths are five times more likely than white youths to be transferred to a CYA facility by a juvenile court (a disturbing disparity in and of itself), they are 10 times more likely to be placed in CYA facilities by an adult criminal court. The study further found that although minority (black, Hispanic, and Asian) youths comprised 75 percent of California’s juvenile justice population, they comprised almost 95 percent of all cases found “unfit” for juvenile court and transferred to adult court. Cases involving Hispanic youth alone accounted for 59 percent of the cases deemed “unfit” for juvenile court. By contrast, cases involving white juveniles, who make up 24 percent of California’s overall juvenile population, were transferred to adult court only 5 percent of the time. Black, Hispanic and Asian youths in California are six, 12, and three times more likely, respectively, to be transferred to adult court.¹⁵⁷

The disproportionate number of minority transfers to adult court could not be explained by the commission of more, or more serious, crimes by minority youths. The JPI study found a 2.8-to-1 violent arrest ratio between minority and white youths – that is, for every white youth arrested for a felony, 2.8 minority youths were arrested. But after the felony arrest stage, the likelihood of minority youths being transferred to adult court as compared to white youths increased to 6.2-to-1. The ratio of adult court prison *sentences* increased even further: Minority youths arrested for violent crimes were seven times more likely overall to receive prison sentences from adult courts than white youths arrested for similar crimes. The numbers for black youth were particularly stark. As compared to a white youth who committed a violent crime, a black youth was 18.4 times more likely to be sentenced to prison by an adult court (Hispanics were 7.3 times more likely, and Asian-Americans 4.5 times more likely, than whites to be

¹⁵⁴ *The Color of Justice* at 2 (citing Donna Hamparian & Michael Leiber, *Disproportionate Confinement of Minority Juveniles in Secure Facilities: 1996 National Report* (Community Research Associates 1997) (“Hamparian & Leiber”), p.9).

¹⁵⁵ *Id.* (citing Hamparian and Leiber, at 9).

¹⁵⁶ *Id.* (citing Donna Bishop & Charles Frazier, “A Study of Race and Juvenile Processing in Florida,” Report Submitted to the Florida Supreme Court Racial and Ethnic Bias Study Commission (1990)).

¹⁵⁷ *The Color of Justice* at 3, 7.

sentenced to a CYA facility by an adult court).¹⁵⁸ The JPI report concludes that “the discriminatory treatment of minority youth arrestees accumulates within the justice system and accelerates measurably if the youth is transferred to adult court.”¹⁵⁹

The increasingly severe treatment of minority youths in the California justice system has dramatically changed the composition of the State juvenile prison population. Whereas white youths made up 30 percent of the CYA population in 1980, in 1998, they comprised 14 percent. In the next several years, Hispanic youths are expected to comprise 65 percent of the CYA population.

The trend is indeed continuing in California. On March 7, 2000, that state’s voters approved Proposition 21, the “Gang Violence and Youth Crime Prevention Act,” a measure first proposed during his term of office by former Republican Governor Pete Wilson and supported by current Democratic Governor Gray Davis. Proposition 21 permits prosecutors to charge youthful offenders as adults without obtaining the approval of a juvenile court judge, and imposes longer, sometimes mandatory, sentences on a broader range of crimes committed by juveniles. Membership in a gang, for example, carries with it a mandatory 6-month term. At the same time, Proposition 21 eliminates certain early intervention programs.

The consequences of Proposition 21 are staggering. California taxpayers have voted to spend an additional \$1 billion for prison construction at a moment when youth violence is declining throughout the state. They have also voted to incarcerate 15 and 16 year olds in adult prison, despite the fact that teenagers incarcerated in adult facilities are five times as likely to be raped, twice as likely to be beaten, and eight times as likely to commit suicide as adults in those facilities.¹⁶⁰ Given the demonstrable racial disparity in juvenile justice, there is little question that the impact of Proposition 21 will fall largely on minority youth. Hispanic and black youthful offenders will be more likely to be transferred to adult court, to be incarcerated in adult facilities, and to receive lengthy and/or mandatory prison terms than white offenders.

Several national trends parallel the California experience: “Tough on crime” juvenile justice policies are in vogue, and minority youths are the primary targets of these policies.

First, the overall under-18 population in state prisons is increasing. In 1985, 3400 youths were admitted to state prisons; by 1997, the number was 7400, more than double the prior total. This increase was more pronounced than the increase in arrests during that time. For every 1,000

¹⁵⁸ *Id.* at 4-7.

¹⁵⁹ *Id.* at 8.

¹⁶⁰ Evelyn Nieves, “California Proposal Toughens Penalties for Young Criminals,” *New York Times*, March 6, 2000, pp. A1, A15 (quoting Kathryn Dresslar, senior policy advocate at the Children’s Advocacy Institute, University of California, San Diego).

arrests for violent crimes by under-18's, 33 youths were incarcerated in 1997, as compared to 18 in 1985.¹⁶¹

Second, the number of cases transferred from juvenile courts to adult courts has increased 70 percent in a decade, from 7200 in 1985 to 12,300 in 1994.¹⁶² The prison terms served by these youths has also increased, from a mean minimum term in 1985 of 35 months to a mean minimum term in 1997 of 44 months.¹⁶³ Contrary to contentions that this development reflects a surge of violent criminal activity by America's youth, approximately two-thirds of the youths prosecuted in adult court in 1996 were charged with nonviolent offenses.¹⁶⁴ Yet overall, in 1998, nearly 18,000 youths spent time in adult prisons, and approximately 20 percent of these youths were mixed in with the adult population.¹⁶⁵

Third, minority youths make up the majority of those youths in the state prison system. In 1997, Hispanic and black youths made up 73 percent of the overall under-18 state prison population, a 10 percent increase from 1985 figures.¹⁶⁶

Fourth, the disparity between the numbers of minority and white youths in state prisons is increasing, especially for drug offenses. In 1985, the number of black youths held in state prisons for drug offenses was 1.5 times greater than the number of white youths imprisoned for the same offenses. By 1997, the number of black juvenile drug offenders in state prisons was over 5.3 times greater than the number of imprisoned white juvenile drug offenders.¹⁶⁷

Finally, minority youths are involved in an increasing number of the cases transferred from juvenile to adult court: the number of cases involving white youths that were transferred from juvenile to adult courts increased approximately 50 percent between 1985-1994; transferred cases involving black youth increased almost 100 percent, and are now approximately half of all transferred cases, despite the much smaller percentage of black youth in the overall juvenile population.¹⁶⁸ And cases involving black juveniles were almost twice as likely to be transferred

¹⁶¹ Kevin J. Strom, "Profile of State Prisoners under Age 18, 1985-97," Bureau of Justice Statistics, U.S. Department of Justice (February 2000) (Strom), pp.1, 4-5. Many of these youthful offenders are disabled, with such conditions as attention deficit hyperactivity disorder, learning disabilities, and post-traumatic stress disorder. Indeed, in Arizona, studies have identified 42 percent of all youthful offenders as disabled; similar studies have revealed 60 percent of youthful offenders in Maine and Florida to be disabled. Peter E. Leone and Sheri Meisel, "Improving Education Services for Students in Detention and Confinement Facilities," National Center on Education, Disability, and Juvenile Justice (December 20, 1999), p.2 and n. 20.

¹⁶² Jeffrey A. Butts, "Delinquency Cases Waived to Criminal Court, 1985-1994," Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice (February 1997) (Butts), p. 1.

¹⁶³ Strom at 7, Table 7.

¹⁶⁴ Mara Dodge, "Regrettable Regression in the Way We Treat Young Criminals," *Washington Post*, August 29, 1999, p. B02.

¹⁶⁵ *Id.*

¹⁶⁶ Strom at 3.

¹⁶⁷ Strom at 5, Table 5.

¹⁶⁸ Carol J. DeFrances & Kevin J. Strom, "Juveniles Prosecuted in State Criminal Courts," Bureau of Justice Statistics, U.S. Department of Justice (March 1997) p. 5, Table 5.

to adult criminal court as cases involving white juveniles, principally because of the relatively large number of transferred (nonviolent) drug cases involving black juveniles.¹⁶⁹

Ill-conceived efforts to facilitate the transfer of juveniles into the adult justice system have not been limited to the state level. For the past several years, Congress has considered legislation that would permit U.S. Attorneys to prosecute youths as adults for certain crimes, require states to take the same approach with respect to their juvenile offenders, and end the mandate that states collect data bearing on racial disparities in their juvenile systems. If such legislation is enacted, the federal government will be able to claim shared responsibility for the transformation of our juvenile justice system into the breeding ground for a class of young, disaffected career criminals.¹⁷⁰ This class will consist largely of minority youths, yet the federal legislation would discourage collection of information bearing on the racial disparities that characterize juvenile justice systems nationwide.

Federal policy toward juveniles already disproportionately impacts some minority groups. Because crimes committed on Indian reservations often fall within federal jurisdiction, Native American youths who engage in minor criminal conduct that ordinarily would be prosecuted in state court instead face federal prosecution and federal penalties that, as described, are often far harsher than those imposed in state court. For this reason, approximately 60 percent of youths in federal custody are Native American.¹⁷¹ Disabled children are also disadvantaged in the juvenile justice system because they may lose their statutory entitlement to individualized education programs upon being transferred to adult facilities.

Passage of the federal juvenile justice legislation currently under consideration will extend these disparities to other minority groups, and will serve as a self-fulfilling prophecy. The fear of crime by minority youths will lead to policies that breed crime by minority youths, and that will justify even more aggressive efforts to bring minorities under criminal justice control. Meanwhile, efforts to examine the race-based disparities that pervade juvenile justice in America languish.

¹⁶⁹ Butts at 2.

¹⁷⁰ The decision to funnel more juveniles into the adult prison system will make even more regrettable Congress' decision in the 1994 crime bill to deny Pell education grants to criminals, and will further ensure that these juveniles lack the tools necessary for integration into mainstream, law-abiding society.

¹⁷¹ Steven R. Donziger ed., *The Real War on Crime: The Report of the National Criminal Justice Commission (1997)*, p. 104.

THE CONSEQUENCES OF TOO LITTLE JUSTICE

Concerns about racial disparity in criminal justice are not new. Authors as diverse as public health scholar Deborah Prothrow-Stith and former New York City Judge Bruce Wright called attention to the problem a decade ago.¹⁷² But the crisis has grown dramatically worse in the years since the problem was first identified.

Today it is beyond debate that America's minorities are treated unfairly within the criminal justice system. Innocent minorities are detained and interrogated more often than innocent whites. Minorities who violate the law are more likely to be targeted for arrest, less likely to be offered leniency and are subject to harsher punishment when compared to similarly situated white offenders. Each successive measure of unequal treatment compounds the prior disparities. Meanwhile minority youths face similar inequities, and are therefore more likely than white youths to be transformed by government policies into career criminals.

There is a self-perpetuating, cyclical quality to the treatment of black and Hispanic Americans in the criminal justice system. Much of the unfairness visited upon these groups stems from the perceptions of criminal justice decision-makers that (1) most crimes are committed by minorities, and (2) most minorities commit crimes. Although empirically false, these perceptions cause a disproportionate share of law enforcement attention to be directed at minorities, which in turn leads to more arrests of blacks and Hispanics. Disproportionate arrests fuel prosecutorial and judicial decisions that disproportionately affect minorities and result in disproportionate incarceration rates and prison sentence lengths for those minorities. The accumulated effect is to create a prison population in which blacks and Hispanics increasingly predominate, which in turn lends credence to the misperceptions that justify racial profiling and "tough on crime" policies.

There are innumerable consequences to this vicious cycle of inequality -- for incarcerated minorities, for their families and communities, and for the continued legitimacy of the criminal justice system.

A. *The Lost Generation and Their Families*

The United States has the second highest incarceration rate in the world, behind only Russia. Two million people are housed in American prisons. Although they comprise less than a quarter of the U.S. population, black and Hispanic Americans make up approximately two-thirds of the total U.S. prison population. The percentage of prisoners who are black is four times that of the percentage of blacks in the U.S. population (49 percent to 12 percent); the percentage of prisoners who are Hispanic is almost twice that of the percentage of Hispanics in

¹⁷² Deborah Prothrow-Stith, Deadly Consequences (Harper Collins, 1991); Bruce Wright, Black Robes, White Justice (Lyle Stuart, Inc., 1987).

the U.S. population (17 percent to 10 percent).¹⁷³ In order to grasp the enormity of these facts, consider that:

- In 1995, almost one in three black males aged 20-29 was on any given day under some form of criminal supervision – either in prison or jail, or on probation or parole.¹⁷⁴
- As of 1995, one in fourteen adult black males was in prison or jail on any given day.¹⁷⁵
- A black male born in 1991 has a one in three chance of spending time in prison at some point in his life. A Hispanic male born in 1991 has a one in six chance of spending time in prison.¹⁷⁶
- There are more young black men under criminal supervision than there are in college.¹⁷⁷
- For every one black male that graduates from college, 100 black males are arrested.¹⁷⁸

These statistics confirm what is already evident to many: Black and Hispanic America have lost a generation of males to the criminal justice system. Statistical projections suggest that future generations of minority males will be lost unless our criminal justice polices are reformed.

The rate at which young minorities are relegated to lives of crime and incarceration serves to negate many of the hard-fought gains of the civil rights movement. During the last half of the 20th century, black Americans and other minorities struggled to win the right to equal opportunity in employment, housing, education and public accommodations. These rights are meaningless to hundreds of thousand of minority prisoners and are largely unavailable to hundreds of thousands of minority ex-convicts. The ability of minorities to enjoy the fruits of the civil rights struggle is compromised by the racial disparities of the criminal justice system.

Perhaps the most precious of the civil rights victories was the right to vote. In a democracy such as ours, the franchise is the fundamental engine of change, the primary means of ensuring the responsiveness of elected officials to public concerns. Yet in 46 states and the District of Columbia, convicted adults in prison are stripped of the right to vote. Thirty-two states also disenfranchise felons on parole, while 29 states disenfranchise felons on probation.

¹⁷³ Mauer Civil Rights Commission Testimony at 2 (*citing* Bureau of Justice Statistics data).

¹⁷⁴ *Id.* (*citing* Marc Mauer & Tracy Huling, “Young Black Americans and the Criminal Justice System: Five Years Later,” the Sentencing Project (October 1995)).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *No Equal Justice* at 141.

¹⁷⁸ *Id.* at 5 (*citing* Henry Louis Gates, Jr., “The Charmer,” *The New Yorker*, April 29/May 6 1996, p. 116).

And 14 states even disenfranchise for life ex-felons who have fully serve their prison terms.¹⁷⁹ Many of those who lose the right to vote are convicted of relatively minor, non-violent crimes. In some states, an offender who receives probation for a single sale of marijuana, or for shoplifting, may be permanently disenfranchised.

Because of the disproportionately high percentage of convicted black criminals, these laws have a disproportionate effect on blacks, renegeing on the guarantees of the Fourteenth Amendment and the Voting Rights Act. As a consequence of disenfranchisement laws, 1.4 million black men – 13 percent of the entire adult black male population – are denied the right to vote. In two states, 31 percent of all black men are permanently disenfranchised. In five states, approximately one in four men are currently disenfranchised. And given current rates of incarceration, in states with the most restrictive voting laws, 40 percent of black men are likely to be permanently disenfranchised in upcoming years.¹⁸⁰ Disenfranchisement laws furnish another example of the disproportionate and lingering effects of criminal justice policies on minorities.¹⁸¹

The massive incarceration of black and Hispanic males also has a destabilizing effect on their communities. It skews the male-female ratio in those communities, increases the likelihood that children will not be raised by both parents, and contributes to the fragmentation of inner city neighborhoods that renders the crime-race linkage a self-fulfilling prophecy. In too many communities involvement in the criminal justice system is so common that the criminal law has lost its stigmatizing effect. Jail can, and has, become a badge of honor through overuse of criminal sanctions.¹⁸²

These ripple effects of imprisonment on family and community are especially acute when the prisoner is a woman. Black women are incarcerated at a rate seven times greater than white women. The 417 percent increase in their incarceration rates between 1980 and 1995 is greater even than the increase for black men.¹⁸³ Three fourths of the women in prison in 1991 had children, and two-thirds had children under 18.¹⁸⁴ More mothers in prison therefore means fewer

¹⁷⁹ Jamie Fellner & Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, Human Rights Watch and The Sentencing Project (October 1998) (*Disenfranchisement Laws*), p.1.

¹⁸⁰ *Id.*

¹⁸¹ Felony convictions bring with them numerous other collateral consequences under state and/or federal law, such as ineligibility to serve in government jobs or hold government licenses; ineligibility to enlist in the armed forces; ineligibility for jury service; ineligibility for various kinds of professional licenses, and ineligibility for government benefits. See Office of the U.S. Pardon Attorney, Civil Disabilities of Convicted Felons: A State-by-State Survey (1996) at 7. Mere arrests can result in eviction from public housing. In the immigration context, a felony conviction, or even certain kinds of misdemeanor convictions, can lead to deportation. 8 U.S.C. § 1227(a)(2). And one study of the impact of imprisonment on future earnings concluded from a sample of youth incarcerated in 1979 that wages subsequent to release from prison declined 25 percent between 1979-1987. The study attributed some of this decline to recidivism, and some to the negative effects of the original incarceration. *Race to Incarcerate* at 182 (citing Freeman, "The Labor Market," in Wilson & Petersilia, eds., *Crime* (ICS Press, 1995), p.188)).

¹⁸² Mark Silk, "Solutions to Youth Crime Discussed: Black Prosecutors Look at Alternatives to Incarceration," *Atlanta Constitution*, July 26, 1994, p. C4 (quoting New York City Assistant District Attorney Rhonda Ferdinand).

¹⁸³ *Race to Incarcerate* at 185. One-third of female inmates were incarcerated for drug offenses. *Id.*

¹⁸⁴ *Id.*

mothers caring for their children, a trend that further exacerbates the deterioration of minority communities and family structures.

No community that loses one-third of its men and many of its women is strengthened by that development. A community that is already beset by economic and social problems of the magnitude facing inner city neighborhoods simply cannot afford this loss.

B. Effects on the Justice System Itself

The effects of racial disparities in the justice system extends beyond prisoners and prisoners' families. That inequality ultimately affects all Americans because it compromises the legitimacy of the system as a whole, undermines its effectiveness and fosters racial division.

Persistent inequality in the justice system gives minorities good reason to distrust the system, and to refuse to cooperate with it. Such lack of cooperation can take many forms, each of which has a corrosive effect on the system's strength and continued viability.

Cooperation of Victims and Witnesses. To be effective, police and prosecutors need the cooperation of those who are victimized by criminal conduct. Minorities are disproportionately victimized by crime. Black Americans are victimized by robbery at a rate 150 percent higher than whites. They are the victims of rape, aggravated assault, and armed robbery at a rate 25 percent greater than whites. And homicide is the leading cause of death among young black males.¹⁸⁵ It is in the interest of minority communities to support the fight against crime. Yet the perception that the criminal justice system is not on their side leads many black and Hispanic Americans – as well as other groups with historically tense relationships with the police, such as gays -- to not report criminal activity. This is as true, if not more so, for *witnesses* of crime as it is for victims of crime. Minorities are often reluctant to assist in a criminal investigation because they view law enforcement authorities as hostile, or at least indifferent, to their concerns.

In 1993, Isham Draughn was shot in the back of the head in Richmond, Virginia, in the back of the McDonalds where he worked as a security guard. He had been trying to make an arrest in the middle of an unruly crowd of several hundred. No member of the crowd came forward to assist the investigation.¹⁸⁶

In March 1996, Des Moines, Iowa police had to drop a murder investigation because no witnesses were willing to confirm the identity of the individual the police suspected of the murder. Reverend Keith Ratliff, president of the local NAACP, explained this lack of cooperation on the grounds that police officers were not viewed as “friends and co-workers in the inner city because of the historic treatment of minorities and poor whites.”¹⁸⁷

¹⁸⁵ *No Equal Justice* at 5 (citing John Hagan & Ruth Peterson, “Criminal Inequality in America,” in J. Hagan & R. Peterson, *Crime & Inequality* (Stanford Univ. Press, 1995)).

¹⁸⁶ *Id.* at 169 (citing Donald P. Baker, “Execution-Style Slaying in Richmond Spurs Gun Debate,” *Washington Post*, January 25, 1993, p. D3).

¹⁸⁷ *Id.* (citing Tom Alex, “Why Case Against Two Cousins Unraveled,” *Des Moines Register*, April 5, 1996, p.1).

In July 1997, 58 deaf and mute Mexicans were found living in virtual slavery in New York City. They had been smuggled into the United States, and then forced by their smugglers into a life of servitude, where they were beaten, raped, traded, and repelled by stun guns. Neighbors of the Mexicans witnessed some of the abuse, but did not alert law enforcement, in part because they were concerned that the police would turn the Mexicans over to INS, and in part because they did not think the police would take them seriously. One neighbor said, “[w]e speak with an accent, we can hardly make ourselves understood. They are not going to come here just because we call and complain about something that is happening to us.”¹⁸⁸

Fear of immigration-related law enforcement has a detrimental effect on the willingness of many Hispanics to cooperate with the police and other government agencies. There is little doubt that Hispanics communities are undercounted in the census, for example, because some residents fear identifying themselves to government authorities.

In short, out of hostility to, distrust of, or simply lack of faith in law enforcement, minorities may decline to participate in crime prevention and reporting, thereby weakening the justice system.¹⁸⁹ That syndrome has direct adverse consequences for minority communities which, after all, are beset by especially high rates of victimization.¹⁹⁰

That this distrust is shared by a large number of minorities in the United States has enormous implications for our democracy. But an equally ominous development is that cynicism about the fairness of the criminal justice system is spreading beyond minority communities to the country as a whole. A 1995 Gallup Poll found that 77 percent of black Americans and 45 percent of white Americans believe the criminal justice system generally treats blacks more harshly than whites, and a majority of both white and black Americans surveyed last year believe that racial profiling by the police is widespread in their communities.¹⁹¹ The criminal justice system faces a growing national crisis of confidence.

Minorities and the Jury System. The current Deputy Attorney General, Eric Holder, is black. He is also a former United States Attorney for the District of Columbia. Looking back on his years as a front-line prosecutor trying numerous cases before predominantly minority juries, Holder observed: “There are some folks who have been so seared by racism, so affected by what

¹⁸⁸ Joel Najar, “The Impact of Immigration Enforcement by Local Police on the Civil Rights of Latinos” (National Council of La Raza, July 29, 1998, on file with authors) at 10 (quoting Mirta Ojito, “Neighbors’ Response to Trouble is Silence,” *New York Times*, July 21, 1997, at B5).

¹⁸⁹ Jerome Miller, *Search and Destroy: African-American Males in the Criminal Justice System* (Cambridge University Press 1996), p. 127 (citing Benjamin A. Holden, “Harsh Judgment: Many Well-Off Blacks See Injustice at Work in King, Denny Cases,” *Wall Street Journal*, August 10, 1993, p. A1).

¹⁹⁰ See generally, Bureau of Justice Statistics, “Criminal Victimization 1998” (August 25, 1999).

¹⁹¹ *No Equal Justice* (citing 1995 poll); Kevin Robbins, “In Gallup Poll, Most Say They Believe Racial Profiling is Common,” *St. Louis Post Dispatch*, December 9, 1999, p. A4. See also Dan Barry and Marjorie Connelly, “Poll in New York Finds Many Think Police are Biased,” *New York Times*, March 16, 1999, p.A1 (stating that less than 25 percent of New Yorkers surveyed believe that police treat blacks and whites equally).

has happened to them because they are black, that even if you're the most credible, upfront black man or woman in law enforcement, you're never going to be able to reach them."¹⁹²

Perceptions of racial injustice manifest themselves in three ways when it comes to the issue of minorities as jurors. First, many minorities, when requested for jury duty, simply do not show up. In Chicago, 60 percent of residents of black neighborhoods did not even respond to calls for jury duty, as compared to eight percent of residents in white neighborhoods.¹⁹³ Given the constitutional guarantees of trial by a jury of a defendant's peers, the failure of minorities to appear for jury duty has enormous implications for minority *defendants* and for the legitimacy of the jury system.

Second, those minorities that do appear for jury duty may have such strong preconceptions about the justice system that they simply will not accept the testimony of police witnesses or the arguments of prosecutors. In some jurisdictions it may be difficult for a prosecutor to obtain a conviction predicated on uncorroborated police testimony. And even if jurors believe the prosecution's case, they may engage in the practice of jury nullification. Deputy Attorney General Holder recalls that when he served as a Washington, D.C. trial judge, it was not uncommon for drug possession prosecutions to result in hung juries because a single juror decided that "I just was not going to vote to send another young black man to prison" (Holder's words).¹⁹⁴ Jury nullification, which is also gaining legitimacy in civil rights scholarship,¹⁹⁵ is a troubling development for law enforcement officials.

The Moral Authority of the Law. We have seen how perceptions underlying racial inequality in our criminal justice system are self-fulfilling. The belief that minorities commit more crimes than whites, and that most blacks commit crimes, leads to an allocation of law enforcement resources that results in disproportionate arrests and convictions of minorities. These perceptions are self-fulfilling in another way: racial inequalities in law enforcement erode the moral authority of the criminal law in the eyes of minority citizens and may lead them to commit more crimes. As Professor David Cole has written: "[W]here people view criminal justice procedures as unfairly biased, they will be especially likely to consider the law illegitimate, and therefore less likely to comply with the law." In some minority communities,

¹⁹² *No Equal Justice* at 170 (citing Jeffrey Rosen, "One Angry Woman," *The New Yorker*, February 28/March 3 1997, pp. 54, 60).

¹⁹³ *Id.* at 170 and n.6. In explaining this phenomenon, Standish Wills, Chair of the Chicago Conference of Black Lawyers, stated: "[B]lack people, to a great extent, don't have a lot of faith in the criminal justice system." *Id.*

¹⁹⁴ *Id.* (citing Jeffrey Rosen, "One Angry Woman," *The New Yorker*, February 28/March 3 1997, pp. 54, 60).

¹⁹⁵ See, e.g., Paul Butler, "Racially Based Jury Nullification: Black Power in the Criminal Justice System," *105 Yale L.J.* 677 (1995). The reaction of minority jurors is undoubtedly further heightened by the fact that the overwhelming majority of prosecutors are white. For example, one study has shown that in the 38 states that have the death penalty, only 2 percent of all prosecutors are black or Hispanic, while 97.5 percent are white. Richard C. Dieter, "The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides," Death Penalty Information Center (June 1998), pp. 12-14.

the criminal law, “[r]ather than being viewed as the voice of the community’s mores . . . is likely to be perceived as the forcible imposition of one community’s values on another.”¹⁹⁶

C. Health and Economic Effects

Public Health Consequences. Often overlooked are the public health consequences of rising incarceration rates. As a result of prison overcrowding and the lack of suitable health care, tuberculosis spread rapidly in the early 1990s. In New York City, where a particularly virulent, multi-drug resistant form of the disease broke out, 80 percent of known cases were traced to prisons.¹⁹⁷ Moreover, the rate of HIV infection in the prison population is now 13 times that of the non-prison population.¹⁹⁸ Given the number of individuals incarcerated, and the constant interchanges between the prison and outside population, these developments signal a public health crisis that has dire consequences for prisoners and non-prisoners alike. And because minorities are disproportionately represented among prisoners, these public health effects are felt most sharply in minority communities.

Prisons vs. Schools. Rapid increases in incarceration rates require increased construction of facilities in which to house prisoners. More than half of the prisons in use today in the United States were built in the last twenty years. The Bureau of Prisons is the largest arm of the Justice Department.¹⁹⁹ The 1994 crime bill alone included \$8 billion in funding for new state prison construction. Funding for prison construction not only edges out funding for alternative crime-fighting strategies, such as prevention and treatment programs, it also edges out funding for many other priorities, within and outside the justice system. More money for prisons means less money for schools, libraries, youth athletic programs, literacy programs and many other programs that might do more to reduce crime than lengthy incarceration.

Minority communities, which are often important beneficiaries of social spending, therefore feel the sting of criminal justice twice. They are victimized by racially skewed enforcement strategies and then deprived of needed funding for schools and community development. Once again the system is self-perpetuating, because the paucity of quality education and jobs can bear directly on rates of criminality in minority communities.

Economic Implications. Racial disparities in the criminal justice system have a direct, adverse impact on the economic health of minority communities. Less directly, these disparities are a drag on the continued economic health of the nation as a whole. The United States is experiencing rapid demographic changes as the Hispanic, Asian and black populations grow more rapidly than the white population. Already, California is a "majority minority" state. Racial and ethnic minorities will necessarily constitute a larger share of the country's labor force

¹⁹⁶ *No Equal Justice* at 172, 175.

¹⁹⁷ *Race to Incarcerate* at 181 (citing Paul Farmer, “Cruel and Unusual: Drug-Resistant Tuberculosis as Punishment,” in Vivien Stern and Rachel Jones eds., *Sentenced to Die? The Problem of TB in Prisons in East and Central Europe and Central Asia* (Penal Reform International, 1999)).

¹⁹⁸ *Id.* at 182 (citing Dorothy E. Merianos, James W. Marquart and Kelly Dampousse, “Examining HIV-Related Knowledge among Adults and Its Consequences for Institutionalized Populations,” *Corrections Management Quarterly*, 1, 4 (1997), p. 85).

¹⁹⁹ *Id.* at 11.

as well. Future prosperity, not to mention the solvency of the Social Security and Medicare systems, increasingly is dependent on the productivity of the minority population. The challenge of maintaining productivity with a diminishing pool of skilled workers is exacerbated if huge numbers of minorities are removed from the workforce and incarcerated. As education and training programs in prisons are slashed, many of these prisoners will emerge without the skills they need to compete in a high-tech, global economy. That is both their problem – and ours.

D. Loss of National Ideals.

The final – and perhaps most important – consequence of a racially divided criminal justice system is the hardest to quantify. Our national self-image, against which we judge both ourselves and other nations around the world is of a land in which all people are created equal under God, and each is entitled to fair treatment before the law. We have often failed to live up to this goal, but have never given up the struggle to attain it. The inequities detailed in this report demonstrate that we have fallen short. The constitutional promise of equal protection under law has been broken.

Our failure to bridge the racial divide, and to meet the exacting standards set for us by the Founding Fathers, not only does damage to our own self-image; it also damages our role as leader in the fight for international human rights. In particular, many of the discriminatory practices that characterize the criminal justice system – from racial profiling to the crack/powder sentencing divide – may well constitute violations of the International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”),²⁰⁰ which condemns laws and practices that have invidious discriminatory impact, regardless of intent. The United States has declined to make the CERD self-executing, which means that in the absence of legislation granting the rights conferred by the Convention, CERD is without legal effect in the United States. The combination of the United States’ reluctance to confer the rights guaranteed by CERD on its own citizens, combined with its failure to eradicate practices which violate the guarantees therein, surely damage our government’s credibility when it seeks to lead the charge against racism and intolerance abroad.

²⁰⁰ International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature March 7, 1966, 660 U.N.T.S. 195 (entered into force January 4, 1969). 140 Cong. Rec. S7634-35 (June 24, 1994).

Chapter VII

RECOMMENDATIONS

If the American criminal justice system were a corporation, it would be found to violate the civil rights laws so extensively that it might well be shut down. But for several reasons, racial inequality in the criminal justice system cannot be eradicated easily.

First, there actually is no single American criminal justice system. The federal government, each state and many localities operate independent court systems, and there are thousands of discrete law enforcement agencies throughout the United States. Unlike some other civil rights battles, criminal justice reform is a state-by-state challenge.

Second, little or no *de jure* racial discrimination remains in the criminal law (although the different federal sentencing schemes for crack and powder cocaine comes close). Instead, racial disparities emerge from deeply rooted, self-fulfilling stereotypes and assumptions. A complex network of laws, policies, priorities and practices perpetuate the racially skewed outcomes described in this report. It is difficult enough to get to the source of the problem, much less change it.

Third, efforts to reform criminal justice policies are politically perilous – no office holder wants to be labeled “soft on crime,” and measures to make crime policy more rational and equitable are uniquely susceptible to such demagoguery. Crime rates have declined in recent years, a phenomenon that has more to do with demographics and the strength of the economy than the racially tainted policing strategies and sentencing initiatives of recent years.²⁰¹ But mayors, police chiefs, legislators – even Presidents – love to take credit for safer streets and are loath to tinker with a winning electoral formula.

Still, efforts to redress racial biases in criminal justice are beginning to take root, and a growing number of courageous politicians are willing to challenge criminal justice orthodoxy. For example:

- Racial profiling is under growing scrutiny. Legislation requiring police officers to compile racial statistics on traffic stops was debated in 20 state legislatures last year, and passed in Connecticut and North Carolina.²⁰²
- Flaws in the administration of the death penalty have led to calls for reform. Republican Governor George Ryan has announced a moratorium on executions in Illinois because of that State’s “shameful record of convicting innocent people and putting them on death row.” Meanwhile, legislation to improve capital punishment

²⁰¹ See generally *Race to Incarcerate* at 81-100 (discussing “the prison-crime connection”).

²⁰² Matthew Mosk, “Weeding Out Officers Who Single Out Drivers: Md. Senate Debates Anti-Profiling Bill,” *Washington Post*, April 6, 2000, at B01. Similar federal legislation has been introduced by Rep. Conyers (D-MI) with bipartisan support. See H.R. 1443, 106th Cong., 1st Sess. (April 15, 1999). See also Rep. Asa Hutchinson (R-AR), “What Actions Should Congress Take to Prevent Racial Profiling? Racial Profiling Endangers Justice,” *Roll Call*, February 7, 2000.

procedures, including better collection of data regarding racial disparities, commands bipartisan support in Congress.²⁰³

- Mandatory sentencing laws have been ameliorated in Michigan and Utah, and legislation to repeal federal laws has been introduced.²⁰⁴

The recommendations set forth below build on these encouraging trends. But even this ambitious agenda is too limited. Purging the criminal justice system of racial inequality requires a fundamental shift in crime and drug policy in the United States, and demands that policy makers and front line police officers abandon deeply ingrained racial stereotypes and assumptions.

Recommendation One:

Build Accountability into the Exercise of Discretion by Police and Prosecutors.

Just as racial disparity begins with discretionary decisions by front-line law enforcement personnel, so should remedies begin there.

We do not advocate that discretion be eliminated from the criminal justice system. That goal would be unattainable and unwise. Criminal laws are written in broad terms, and experienced law enforcement officials, both police and prosecutors, must retain the authority to apply the laws in individual cases with wisdom and common sense. A criminal justice system that did not delegate some discretion to those who enforce the laws would yield even harsher, less rational results than the current system. As our unfortunate experience with mandatory sentencing proves, discretion is a key ingredient of justice.

The problem with discretion in today's criminal justice system is that it is exercised without meaningful accountability. While law enforcement discretion must be preserved, the type of unchecked, unreviewable discretion that police and prosecutors currently wield breeds racial disparity and resentment.

²⁰³ The Innocence Protection Act is co-sponsored in the Senate by Sens. Patrick Leahy (D-VT) and Gordon Smith (R-OR) and in the House of Representatives by Reps. William Delahunt (D-MA) and Ray LaHood (R-IL) – to require additional procedural safeguards, such as the preservation of DNA evidence and post-conviction review of that evidence -- in order to avoid executing the innocent. See S.2073, 106th Cong., 2nd Sess. (February 10, 2000); H.R. 4167, 106th Cong., 2nd Sess. (April 4, 2000). Section 404 of these bills mandates the collection of statistics about racial outcomes in the imposition of the death penalty, including jury selection. Unfairness in the death penalty has also been highlighted recently by religious broadcaster Pat Robertson and columnist George Will. Associated Press, “Robertson Backs Death Penalty Moratorium,” *New York Times*, April 9, 2000, at A25; George Will, “Innocent on Death Row,” *Washington Post*, April 6, 2000, at A23.

²⁰⁴ See Time Magazine, *A Get-Tough Policy That Failed*, February 1, 1999. Legislation to repeal all federal mandatory minimums was introduced by Rep. Edwards (D-CA) in the 102nd Congress and by Rep. Washington (D-TX) on behalf of many members of the Congressional Black and Hispanic Caucuses in the 103rd Congress. In the current Congress, Rep. Waters (D-CA) has introduced legislation to repeal federal mandatory sentencing laws in drug cases. See H.R. 1681, 106th Cong, 1st Sess. (March 23, 1999).

A. *Improve Police Accountability.*

The credibility gap between minority Americans and front-line law enforcement is yawning, and it widens with every new report on racial profiling and every new account of police brutality. Closing this gap requires the following mechanisms to improve police accountability:

- The development of national standards for accrediting law enforcement agencies. No such national standard currently exists, leading to a patchwork of law enforcement guidelines throughout the nation. The national standards should include specific guidance on traffic stop procedures; the use of force; and interaction between police officers and multi-cultural communities. The standards should *expressly prohibit racial profiling of any kind*.
- Improved training of current and incoming police officers to bring police departments into compliance with the national standards.
- The passage of federal legislation requiring federal and state law enforcement officials to gather data on traffic stops and other interrogation situations associated with racial profiling, such as INS enforcement activities and airport/drug courier inquiries. Such data should be disseminated publicly.
- Expanded authority and resources for police oversight agencies such as the Civil Rights Division of the Justice Department to investigate and punish misconduct, including racial profiling, brutality and corruption.²⁰⁵

B. *Improve Prosecutorial Accountability.*

The improper exercise of prosecutorial discretion, like law enforcement discretion, has a disproportionate impact on minorities and should also be subjected to greater public scrutiny. We recommend passage of federal legislation requiring the collection and publication of data by each U.S. Attorney's office and each State prosecutor's office regarding the charging and sentencing practices and outcomes in those offices, and the racial impact of those outcomes. Thus, for each case, the prosecutor should be required to document the race of the victim and defendant, the basis for the initial charging decision, the basis for the prosecutor's bail recommendation, each plea offer made, accepted or rejected, and the basis for the prosecutor's sentencing recommendation.²⁰⁶

²⁰⁵ Many of the measures outlined above are included in H.R. 3981, the Law Enforcement Trust and Integrity Act of 2000, introduced by Rep. John Conyers (D-MI) on April 15, 2000. *See also* n.3, above (discussing legislative efforts to uncover racial profiling).

²⁰⁶ *See* "Prosecution and Race" at 54-56 (advocating racial impact studies of prosecutorial practices). It is important to note, however, that until the Supreme Court departs from its holding in *McCleskey* that discriminatory *intent* is necessary to invalidate discriminatory law enforcement practices, even in the face of statistical evidence of racially discriminatory effect, data collection will continue to have limited utility in the

Requiring the collection of such data would heighten prosecutors' sensitivity to the racial effects of their decisions. Publication of this data would enable the public to hold prosecutors accountable for the improper exercise of discretion. For example, requiring prosecutors to publish information regarding their charging practices would enable a criminal defendant alleging selective prosecution to surmount the discovery hurdles erected by the Supreme Court in *United States v. Armstrong*. And because 43 states hold popular elections for State Attorney General, and 95 percent of chief prosecutors are elected at the county and municipal level, publication of racial impact studies would also enhance electoral accountability for these public officials.²⁰⁷

Recommendation Two:

Improve the Diversity of Law Enforcement Personnel.

Much of the hostility between minority communities and the police can be traced to the under-representation of minorities in law enforcement. In too many neighborhoods, the police are seen as an occupying force rather than a community resource. Police departments and prosecutors' offices should redouble their efforts to recruit minorities. Police departments should encourage, and perhaps require, that officers live in the cities they patrol.

Diversification requires adequate funding and well-targeted recruitment efforts. We recommend that the federal government condition grant programs to state and local law enforcement agencies on efforts by those agencies to implement minority recruitment and hiring practices.

Recommendation Three:

Improve the Collection of Criminal Justice Data Relevant to Racial Disparities.

As in other areas of American life, we need to be more conscious of racial issues in criminal justice in order to achieve a color-blind criminal justice system eventually. The collection of racial data is essential to identify flaws in current policies and devise the means to redress them.

Many of the data sets generated by government agencies and private researchers concerning race and criminal justice take account of the experiences of African-Americans and whites, but do not include statistics on Hispanics, Asian-Americans or Native Americans. We

fight against discriminatory law enforcement practices. Congress could effectively overrule *McClesky* by passing a broad version of the Racial Justice Act that Senator Kennedy and others proposed in the early 1990's to address racial disparities in capital punishment. See generally 137 Cong. Rec. S 8263; 102nd Cong. 1st Sess. (June 20, 1991).

²⁰⁷ *Id.* at 57.

recommend that all major minority groups be included in future data collection efforts, at least where such empirical evidence would be statistically significant.

The juvenile justice system is one area in which the federal government already requires states to collect data regarding the disparate racial effects of their policies. The juvenile justice reform legislation now pending in Congress would eliminate this requirement. The data collection requirement in current law should not be repealed, and indeed should be expanded to address gaps in our understanding of the effect of juvenile justice policies on minority communities.

Recommendation Four:

Suspend Operation of the Death Penalty.

As currently implemented, capital punishment is a racist undertaking. The decision of who will live and who will die depends, in significant measure, on the race of the defendant and the race of the victim. This is due both to flawed procedures such as the appointment of incompetent lawyers for indigent defendants, as well as to racial attitudes and stereotypes that cannot be easily overcome.

The Leadership Conference on Civil Rights opposes capital punishment. But even those who do not believe that death penalty statutes should be repealed altogether should agree on the need for a nationwide moratorium on application of the death penalty while flaws in death penalty procedures are studied and remedies are proposed. During this period there should be a comprehensive review of the effects of race on capital sentencing outcomes.²⁰⁸

Recommendation Five:

Repeal Mandatory Minimum Sentencing Laws.

Although sometimes conceived as a means to combat unwarranted racial disparity in sentencing, mandatory minimum sentencing laws are, in fact, engines of racial injustice. They have filled America's prisons to the rafters with thousands of non-violent minority offenders. They deprive judges of the ability to consider mitigating circumstances about the offense or the offender, an exercise of judicial discretion that can help redress racial bias at earlier stages of the criminal justice system. Particularly egregious are "three strikes" or "two strikes" mandatory sentencing laws that impose long and irreducible prison terms for even the most minor criminal conduct. These demagogic policies have resulted in a mushrooming prison population and in the disproportionate incarceration of minorities.

²⁰⁸ See n. 3, above.

The repeal of mandatory minimum sentencing laws would be a significant step toward restoring balance and racial fairness to a criminal justice system that has increasingly come to view incarceration as an end in itself.

Recommendation Six:

Reform Sentencing Guideline Systems.

Were mandatory minimums sentencing laws to be repealed, sentencing in the federal system and many state systems would be carried out pursuant to sentencing guidelines. The problem is that the guideline systems are often based on and therefore infected by the racial disparities in current sentencing statutes.

For example, the disparate treatment of crack and powder cocaine offenders in the federal system has been carried over from the Controlled Substance Act to the sentencing guidelines manual. The 100-1 ratio between the amount of powder cocaine and the amount of crack cocaine needed to trigger the statutory mandatory penalty is found in the drug equivalency table in the guidelines as well. So even after the statute is changed, it is necessary to revisit and redress unfairness in the guidelines as well.

Few policies have contributed more to minority cynicism about the war on drugs than the crack/powder cocaine disparity. If anti-drug efforts are to have any credibility and force, especially in minority communities, these penalties must be equalized as the U.S. Sentencing Commission initially proposed.

Recommendation Seven:

Reject or Repeal Efforts to Transfer Juveniles into Adult Justice System.

Perhaps no criminal policy is more destructive to our nation than one that extends incarceration and punishment-based crime approaches to children. Laws that shun rehabilitation of youthful offenders in favor of their transfer into the adult criminal justice system are inconsistent with a century of U.S. juvenile justice policy and practice, are applied disproportionately to minority youth, and threaten to create a permanent underclass of undereducated, untrained, hardened criminals. Forty-three states have such laws on the books, and both Houses of Congress have passed crime legislation containing provisions that undermine the traditional goals of juvenile justice. These federal proposals should be abandoned, the recently enacted juvenile justice referendum in California should be reconsidered, and other laws that encourage treating non-violent juvenile offenders as adults should be repealed.

Recommendation Eight:

Improve The Quality of Indigent Defense Counsel in Criminal Cases.

Many of the racially disparate outcomes in the criminal justice system are attributable to inadequate lawyering. To be sure, there are some obstacles that even the finest lawyer cannot overcome, such as the combination of a mandatory sentencing law and an obstinate prosecutor. But other inequities can be exposed and perhaps reversed through aggressive advocacy by defense counsel.

Unfortunately, many minority defendants depend on indigent defense services provided by the state. The lawyers who perform this role are often very dedicated and hard-working, but under-compensated and overwhelmed with a caseload that precludes vigorous advocacy on behalf of individual defendants. The problem is not with the lawyer; the problem is with a system that inadequately funds this vitally important component of the criminal process.

We recommend a systematic review of indigent defense services in the United States in order to inject new resources and effect significant improvements. We support, for example, title II of the Leahy-Smith Innocence Protection Act (S. 2073)²⁰⁹ which would establish federal standards for the appointment of competent counsel in death penalty cases.

Recommendation Nine:

Repeal Felony Disenfranchisement Laws and Other Mandatory Collateral Consequences of Criminal Convictions.

Disenfranchisement laws are antithetical to democracy and disproportionately affect minorities, eroding the important gains of the civil rights era. They also violate international law – specifically, Article 25 of the International Covenant on Civil and Political Rights.²¹⁰ These laws should be abolished, and other collateral consequences of criminal convictions such as eviction from public housing and restrictions on student loans should be reviewed and, in any event, not mandatorily imposed. Criminal sentences, including collateral consequences such as disenfranchisement, should be tailored to the nature of the crime and the circumstances of the offender and should impose no more punishment than is necessary to achieve public safety, deterrence and rehabilitation.

²⁰⁹ See n. 3, above.

²¹⁰ Disenfranchisement Laws at 20-22.

Recommendation Ten:

Restore Balance to the National Drug Control Strategy.

As noted in Chapter 3, the massive increases in incarceration, including minority incarceration rates, are largely attributable to the war on drugs. Even if each of the criminal justice recommendations already proposed were adopted, we would be left with a national drug control strategy that seeks to combat drug abuse by locking up addicts. As we have seen, that policy has inevitable and disastrous consequences for minority communities.

Thirty years ago, during the Nixon Administration, there was recognition that drug abuse was a medical problem as well as a criminal justice challenge.²¹¹ Even at the height of the crack cocaine epidemic during the Bush Administration, there was lip service paid to the concept of a balanced drug strategy, one that dedicated substantial resources to treatment, prevention, education and research as a necessary complement to interdiction and law enforcement. But today, demand reduction efforts are on the back burner as Congress debates spending \$1.7 billion to fight drug traffickers in the Andean Region and the Clinton Administration proposes funding for 17 new prisons in fiscal year 2001.

The current strategy not only inspires racial disparities; it is also ineffective in achieving its goals. Even General Barry McCaffrey, Director of the Office of National Drug Control Policy, stated in 1997: “[I]f measured solely in terms of price and purity, cocaine, heroin, and marijuana prove to be more available than they were a decade ago.”²¹²

Fundamental critiques of the drug war are available elsewhere.²¹³ For purpose of this report, it suffices to say that the United States needs a more balanced drug strategy, one that adequately supports treatment, prevention, education, research and other efforts to reduce the demand for drugs. The current strategy places far too much reliance on the criminal justice system to solve a problem that is at least in part a public health problem. The result has been an experiment in mass incarceration that has devastated minority communities without discernable benefit.

Conclusion

Racial disparities in the criminal justice system are one manifestation of broader racial divisions in America. Many of the perceptions and prejudices that give rise to inequities in criminal justice are the same prejudices that have been with us since the founding of the Republic. Not until those underlying prejudices are shattered will true equality for all Americans, in all facets of life, have been achieved.

²¹¹ See Michael Massing, *The Fix* (Simon & Schuster, 1998).

²¹² Barry McCaffrey, *The National Drug Control Strategy* (Office of National Drug Control Policy, 1997), p.21.

²¹³ See, e.g., Elliot Currie, *Reckoning* (Hill and Wang, 1993); Massing, *The Fix*, supra.

The criminal justice arena is an especially critical battleground in the continued struggle for civil rights. Current disparities in criminal justice threaten fifty years of progress toward equality. The Leadership Conference on Civil Rights cannot tolerate an America in which over one million blacks and Hispanics are in prison, in which the juvenile justice system has become a conveyer belt carrying minority youths into careers of crime, and in which minorities are explicitly targeted by law enforcement because of the color of their skin or their ethnic heritage.

Criminal justice reform is a civil rights challenge that can no longer be ignored.