

Chapter 14

Racial Disparities in the American Criminal Justice System

by Ronald Weich and Carlos Angulo*

Introduction

In many ways, the United States has made significant progress over the last half century toward the objective of ensuring equal treatment under law for all citizens. But in one critical arena — criminal justice — racial inequality is growing, not receding. Our criminal laws, while facially neutral, are enforced in a manner that is massively and pervasively biased. The injustices of the criminal justice system threaten to render irrelevant 50 years of hard-fought civil rights progress.

- In 1964 Congress passed the Civil Rights Act prohibiting discrimination in employment. Yet today, three out of every ten African American males born in the United States will serve time in prison, a status that renders their prospects for legitimate employment bleak and often bars them from obtaining professional licenses.

- In 1965 Congress passed the Voting Rights Act. Yet today, 31% of all black men in Alabama and Florida are permanently disenfranchised as a result of felony convictions. Nationally, 1.4 million black men have lost the right to vote under these laws.
- In 1968 Congress passed the Fair Housing Act. Yet today, the current housing for approximately 2 million Americans — two-thirds of them African American or Hispanic — is a prison or jail cell.
- Our civil rights laws abolished Jim Crow laws and other vestiges of segregation and guaranteed minority citizens the right to travel and utilize public accommodations freely. Yet today, racial profiling and police brutality make such travel hazardous to the dignity and health of law-abiding black and Hispanic citizens.

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The system by which lawbreakers are apprehended and punished is one of the pillars of any democracy. But for that system to remain viable, the public must be confident that at every stage of the process — from the initial investigation of a crime by the police officer walking a beat to prosecution and punishment — individuals in like circumstances are treated alike, consistent with the Constitution’s guarantees of equal treatment under the law.

Today, our criminal justice system strays far from this ideal. Blacks, Hispanics and other minorities are victimized by disproportionate targeting and unfair treatment by police and other front-line law enforcement officials; by racially skewed charging and plea bargaining decisions of prosecutors; by discriminatory sentencing practices; and by the failure of judges, elected officials, and other criminal justice policymakers to redress the inequities that become more glaring every day.

Racial disparities affect both innocent and guilty minority citizens. There is obvious reason to be outraged by the fact that innocent minority citizens are detained by the police on the street and in their cars far more than whites. But there must also be outrage about the disparate treatment of minority citizens who have violated the law. A defendant surrenders many civil rights upon conviction, but equal protection of the laws is not one of them.

The unequal treatment of minorities in our criminal justice system manifests itself in a mushrooming prison population that is overwhelmingly black and Hispanic; in the decay of minority communities that have given up an entire generation of young men to prison; and in a widely held belief among black and Hispanic Americans that the criminal justice system is deserving neither of trust nor of support.

Enforcement of criminal laws based on racial generalizations is not rational: The majority of crimes are not committed by minori-

ties, and most minorities are not criminals — indeed, less than 10% of all black Americans are even arrested in a given year. Yet the unequal targeting and treatment of minorities at every stage of the criminal justice process — from arrest to sentencing — reinforces the perception that drives the inequality in the first place, with the unfairness at every successive stage of the process compounding the effects of earlier injustices. The result is a vicious cycle that has evolved into a self-fulfilling prophecy: More minority arrests and convictions perpetuate the belief that minorities commit more crimes, which in turn leads to racial profiling and more minority arrests.

Racial disparity in the criminal justice system may be the most profound civil rights crisis facing America in the new century. It undermines the progress we have made over the past five decades in ensuring equal treatment under the law and calls into doubt our national faith in the rule of law.

This chapter examines the systematically unequal treatment of black and Hispanic Americans and other minorities as compared to their similarly situated white counterparts within the criminal justice system. But it does not propose less public safety or ineffective law enforcement. The issue is not whether to be *tough* on crime, but rather whether to be *fair* and *smart* in the course of being tough on crime. *There is no contradiction between effective law enforcement and the promotion of civil rights.*

I. Race and the Police

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.

There is no reason to believe that overt racism or bigotry is more prevalent among police officers than among other professionals. To be sure, there have been highly publicized instances of such bigotry, such as the annual “Good Ol’ Boys Roundup” for law enforcement personnel in eastern Tennessee, which, when investigated in 1995, was found to feature a Redneck of the Year contest, performances in blackface, the wearing of masks in the likeness of Martin Luther King, Jr., with a bullet hole in the face, and the display of a banner entitled “Nigger Check Point.” But such blatant prejudice is always roundly condemned when it comes to light. In contrast, the racial generalizations that inform policing strategies in America today are subtle, deeply rooted, and difficult to eradicate.

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 criminality, and they engage in undercover operations in an effort to uncover crimes, like drug trafficking and prostitution, without complaining witnesses. 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” syndrome¹ 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 nonviolent drug crimes that would not come to the attention of authorities but for the racially motivated traffic stop.

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% of the drivers stopped and searched by the police were black, while only 17.5% of overall drivers — as well as overall speeders — were black.²
- In Volusia County, Florida, in 1992, nearly 70% of those stopped on a particular Interstate highway in central Florida were black or Hispanic, although only 5% of the drivers on that highway were black or Hispanic. Moreover, minorities were detained for longer periods of time per stop than whites, and were 80% of those whose cars were searched after being stopped.³
- A study of traffic stops on the New Jersey Turnpike found that 46% of those stopped were black, although only 13.5%

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.⁴

- 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 Los Angeles streets on successive nights. The car filled with young black men was stopped by the police several times; the white group was not stopped once, despite observing police cars in their immediate area at least 16 times during the evening.⁵

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.”⁶

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 the Immigration and Naturalization Service (INS) and local officials, whereby individuals of identifiable 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 Po-

lice 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.”⁷ 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.⁸

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 such places, 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.”⁹ 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,”¹⁰ and the evidence suggests that such discretion is exercised to the detriment of America’s minorities.

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.¹¹ Superintendent Williams’ assumption, shared by many, is flatly incorrect with respect to those crimes most commonly investigated through racial profiling — drug crimes.¹² Blacks commit drug offenses at a rate proportional to their percentage of the U.S. population: black Americans represent approximately 12 to 13% of the U.S. population, and, according to the most recent federal statistics, 13% of all drug users.¹³ And for the past 20 years, drug use rates among black youths have been consistently *lower* per capita than drug use rates among white youths.¹⁴

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 U.S. Customs Service revealed that while over 43% 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.¹⁵ And according to the congressional General Accounting Office (GAO), 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.¹⁶

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.*¹⁷

And, indeed, this prophecy has come to pass. Despite the fact that, as noted earlier, blacks are just 12% of the population and 13% 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% of those arrested for drug offenses and 59% of those convicted of drug offenses.¹⁸ 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.¹⁹

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 years, several highly publicized police shootings appeared to result from the police acting on unjustified racial generalizations.

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.

On March 16, 2000, soon after the officers who shot Amadou Diallo were acquitted of criminal charges, a 26-year-old black man named Patrick 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 the police.²⁰

Hispanics have also been the victims of violence associated with racial profiling. On April 25, 1997, a factory in Salt Lake City owned by an American citizen, Rafael Gomez, 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 employ-

ees 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.²¹

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 Dorismond 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?

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 racially based traffic stops and profiling. 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.

In Los Angeles, authorities uncovered massive police corruption centered in the anti-gang unit of the Rampart division — a police station located in one of the city's poorest neighborhoods. The investigation 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 anti-police witnesses, in violation of Los Angeles city policy.²² 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 Los Angeles 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 country. Indeed, in a nationwide poll, 59% of respondents believed that police brutality is common in some or most communities in the United States, and 53% of respondents believed that police are more likely to use excessive force against black or Hispanic suspects than against white suspects.²³

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.²⁴ 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 has limited application when police confront a black or brown face.

II. 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.

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.²⁵

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.²⁶ Prosecutors have the authority to decline prosecution altogether, or to authorize diversion, under which completion of drug treatment or community service results in the 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 6% of whites, as compared to only 4% of minorities, won "interest of justice" dismissals, in which prosecutors dropped a criminal case entirely. Moreover, the study

found, 20% of white defendants charged with crimes providing for the option of diversion received that benefit, while only 14% of similarly situated blacks and 11% of similarly situated Hispanics were placed in such programs.²⁷

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. Federal parole was abolished 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 U.S. 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.²⁸

That the prosecutorial decision to bring charges in federal, rather than state, court is often exercised to the detriment of minorities is best demonstrated by statistics on crack cocaine prosecutions. In 1986 Congress enacted especially harsh mandatory minimum penalties for these offenses. From 1988 to 1994, hundreds of blacks and Hispanics — but no whites — were prosecuted by the United States Attorney's office with jurisdiction over Los Angeles County and six surrounding counties.²⁹ 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.³⁰

National statistics tell the same story: From 1992 to 1994, approximately 96.5% 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.³¹

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 as blacks and Hispanics combined. Crack use was somewhat more concentrated in minority communities, but in Los Angeles, for example, whites com-

prised more than 50% of those who had ever used crack and about one-third of those who could be termed “frequent users.”³²

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.” U.S. District Court Judge Consuelo B. Marshall has observed: “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?”³³

The crack/powder cocaine sentencing divide remains unresolved. In 1995, the U.S. 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 engender in minority communities.³⁴ Nonetheless, President Clinton proposed, and Congress passed, legislation rejecting the Commission's proposed changes.³⁵ 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.”³⁶ Congress has never acted on this recommendation.

B. Charging Decisions and Plea Bargaining

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.³⁷ Prosecutors have virtually unlimited discretion to enter into an agreement by which the defendant will plead guilty in ex-

change for the dismissal of certain charges or a reduced sentence, and once again the exercise of discretion is characterized by racially disparate results.³⁸

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 33% chance of having the charge reduced to a misdemeanor or infraction, compared to 25% for a similarly situated black or Hispanic. Between 1981 and 1990, 50% 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% of similarly situated blacks and Hispanics. Blacks charged with a single offense received sentencing enhancements in 19% of the cases, whereas similarly situated whites received such enhancements in only 15% of the cases.³⁹

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 drug 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% of eligible black defendants, while the same sentence had been imposed on only 1% of eligible white defendants. Consequently, 98.4% of those serving life sentences under Georgia’s “two strikes, you’re out” law are black.⁴⁰

Statistics in federal court mirror the experiences in these states. A U.S. 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.⁴¹

C. Bail

Another turning point in the criminal justice process, one that can mean the difference between freedom and incarceration for criminal defendants, is 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.

A New York State study examined the extent to which black and Hispanic 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% of all minorities held in jail at felony indictment in New York City, and 33% 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.⁴²

Another study reviewed bail determinations for criminal defendants in New Haven, Connecticut, and concluded that the bail rates set for black defendants exceeded those set for similarly situated white 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.⁴³ And federal statistics indicate that while non-Hispanics are likely to be released prior to trial in 66% of cases, Hispanics are likely to be released only 26% of the time.⁴⁴

Bail status not only determines whether the defendant is to be incarcerated before trial, it also bears on the likelihood of con-

viction. 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.⁴⁵ Here again, one racial disparity begets disparity further along in the justice system.

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.⁴⁶

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 GAO, 82% 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.⁴⁷ 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.⁴⁸ The Baldus study also found that more than 50% of those sentenced to death for killing a white person would not

have received the death penalty had they killed a black person.⁴⁹

Second, while some of the evidence concerning the death penalty reveals that the race of the defendant alone does not result in unwarranted disparity,⁵⁰ 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 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 to hinge on the exercise of prosecutorial discretion. Georgia prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims, while seeking the death penalty in only 19% of the cases involving white defendants and black victims and only 15% of the cases involving black defendants and black victims.⁵¹

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% of those convicted under 21 U.S.C. § 848 were white. However, of those who were the subject of death penalty prosecutions under that law in the same period, 89% were Hispanic or black (33 out of 37) and only 11% (4 out of 37) were white.⁵²

It appears that race explicitly influences the administration of capital punishment in some jurisdictions. The recent case of *Saldano v. Texas* presents an astonishing example of race-based sentencing and the self-perpetuating nature of racial disparities in the criminal justice system. At the capital sentencing hearings for Saldano and other defendants, Texas prosecutors relied upon

the expert opinion of a psychiatrist who, according to the Texas Court of Criminal Appeals:

[T]estified about statistical factors which have been identified as increasing the probability of future dangerousness. He noted that African Americans and Hispanics are over-represented in prisons compared to their representation outside of prison [and] testified that because appellant is Hispanic, this was a factor weighing in the favor of future dangerousness.⁵³

The Texas courts found that this testimony was not fundamental error and upheld Saldano's death sentence, but the U.S. Supreme Court vacated the judgment after Texas conceded error.⁵⁴

It is undeniable that prosecutors exercise their discretion in capital and noncapital cases in ways that cause racially disproportionate outcomes. Even if *Saldano* is an aberration and most cases do not involve explicit racism, 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.⁵⁵

III. Race and Sentencing

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.

A. Brief History of U.S. Sentencing Policy

In the late 18th and early 19th century, federal and state legislators 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-1980s, 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 under 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. 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. 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.⁵⁶

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-1980s, 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.⁵⁷ 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 inflexible guideline systems put sentencing on autopilot.

The mandatory sentencing movement reached its apex in the mid-1990s 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.

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 three decades is anything but rhetorical. In 1972, the population of federal and state prisons combined was approximately 200,000. By 1997, the prison population approached 1.2 million, an increase of almost 500%. 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.⁵⁸

Prison and jail populations have not only swelled in the last 30 years, they have also changed in character. As a result of the nation’s current “War on Drugs,” which began in the early 1980s, an increasingly large percentage of those incarcerated have been charged with or convicted of nonviolent drug crimes.

Between 1980 and 1995, the number of state prisoners locked up for drug crimes increased by more than 1000%. Whereas only 1 out of every 16 state inmates was a drug offender in 1980, 1 out of every 4 in 1995 was a drug offender. By the middle of the 1990s,

60% of federal prison inmates had been convicted of a drug offense, as opposed to 25% 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.⁵⁹ Drug offenders accounted for more than 80% of the total growth in the federal inmate population — and 50% of the growth of the state prison population — from 1985 to 1995.⁶⁰

An overly punitive crime control strategy is unwise and ineffective for many reasons, most beyond the scope of this chapter. 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 occurred in the New York courts between 1990 and 1992.⁶¹ State researchers concluded that one-third of minorities sentenced to prison would have received a shorter or nonincarcerative sentence if they had been treated like similarly situated white defendants. If probation-eligible blacks had been treated like their white counterparts, more than 8,000 fewer black defendants would have received prison sentences in that period, resulting in a 5% decline in the percentage of blacks sentenced to prison.⁶² Nationwide, black males convicted of drug felonies in state courts are sentenced to prison 52% of the time, while white males are sentenced to prison only 34% of the time.⁶³

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 nondrug crimes. Whites serve a mean sentence of 79 months for violent felony offenses; blacks serve a mean 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 in state prisons nationwide in 1994 served a mean time of 40 months, as compared to 58 months for blacks.⁶⁴

D. Minority Incarceration Rates

The choice of legislatures to lengthen drug sentences, combined with drug enforcement tactics, has had a disproportionate impact on America’s minorities.⁶⁵ As the overall prison population has increased because of the war on drugs, so too has the minority proportion of the overall prison (and drug offender) population. From 1970 to 1984, whites generally comprised approximately 60% of those admitted to state and federal facilities and blacks around 40%. By 1991, these ratios had reversed, with blacks comprising 54% of prison admissions versus 42% for whites.⁶⁶

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%, the number of similarly situated black drug offenders increased by 700%, such that there are

more than 50% more black drug offenders in the state system than white drug offenders.⁶⁷

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% of all Hispanic state prison inmates, and 25% of all black state prison inmates, were serving time for drug crimes, as compared to only 12% of all white inmates.⁶⁸

Minorities are disproportionately disadvantaged by current drug policies not because they commit more drug crimes, or use drugs at a higher rate, than white Americans. 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.

As noted, while blacks constitute approximately 12% of the population, as well as a similar percentage of U.S. drug users, they constitute 38% of all drug arrestees.⁶⁹ 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 1980,⁷⁰ blacks were being arrested for drug crimes at a rate of 1600 per 100,000, while whites were being arrested at one-fifth the frequency per capita — 300 per 100,000.⁷¹ The statistics in certain U.S. cities were even more eye-catching: In Columbus, Ohio, black males accounted for 11% of the total population, and for 90% of the drug arrests.⁷² In Jacksonville, Florida, black males comprised 12% of the population, but 87% of drug arrests.⁷³

Why are minorities the primary targets of 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.⁷⁴

Blacks are not only targeted for drug arrests. They are also 59% of those *convicted* of drug offenses and, because they are less likely to strike a favorable plea bargain with a prosecutor, 74% 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 nonviolent 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.⁷⁵ An Urban Institute study examining 150,000 drug offenders incarcerated in state prisons in 1991 determined that 127,000 of these individuals — 84% — had no history of violent criminal activity, and half of the individuals had no criminal record at all.⁷⁶

IV. Willful Judicial Blindness

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 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*⁷⁷ 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 earlier, 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% chance he would have received a sentence other than death.⁷⁸

By a 5 to 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 own sentence was tainted by racial considerations, which he could not do.

McCleskey "may be the single most important decision the Court has ever issued on the subject of race and crime"⁷⁹ because it

signaled the Court's unwillingness to confront statistical evidence of racial unfairness in the criminal justice process. The requirement that a defendant demonstrate that racial bias infected his case specifically is almost always an impossible test. In setting the bar so high, the Court declared, in effect, that systemic racial bias 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 stated in dissent, the Court's decision "seem[ed] to suggest a fear of too much justice."⁸⁰

The Court's reasoning in *McCleskey* has been adopted in other cases where law enforcement practices were challenged on grounds of racial disproportionality. The Georgia Supreme Court, for example, having invalidated the state's "two strikes, you're out" law because 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. 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*.⁸¹

The Supreme Court raised the bar for challenging systemic racial bias even higher in *United States v. Armstrong*.⁸² 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 of the information

bearing on this question will be in the hands of law enforcement officials themselves. 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. 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."⁸³ 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."⁸⁴

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*,⁸⁵ the Supreme Court declined to issue an injunction preventing the Los Angeles Police Department (LAPD) from using 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 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 ap-

plied 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.⁸⁶

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*,⁸⁷ the Court upheld a purely pretextual traffic stop, one based on no specific evidence of additional criminal activity. 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."⁸⁸

The judiciary's use of evidentiary thresholds and procedural barriers to foreclose challenges to racially based law enforcement has sustained a criminal process that provides, for too many Americans, "too little justice." The courts afford few remedies for anything but the most blatant (and generally outdated) forms of racial and ethnic discrimination.

V. Race and the Juvenile Justice System

The racial disparities that characterize criminal justice in America affect young people deeply, and cause minority youth to be overrepresented at every stage of the juvenile justice system. Juvenile justice deserves separate consideration in this chapter 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 1900s based on the recognition that children are different from 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.

Because the whole point of the juvenile justice system is to head off adult criminality, a pillar of that system is the segregation of children from adult prisoners. 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. Minority youth suffer most from this policy shift because they already bear the brunt of racially skewed law enforcement.

For example, black teenagers 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% 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, a 1400% increase from 1980.⁸⁹

These figures reflect the broader national experience: From 1986 to 1991, arrests of white juveniles for drug offenses decreased 34%, while arrests of minority juveniles increased 78%.⁹⁰ All this despite data suggest-

ing 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 many years.⁹¹ Similar disparities appear in relation to non-drug-related crimes.⁹²

Overrepresentation of minority youths in the juvenile justice system increases after arrest. As a general matter, minority youths tend to be held at intake, be detained prior to adjudication, have petitions filed, be adjudicated delinquent, and be held in secure confinement facilities more frequently than their white counterparts.⁹³ For example, in 1995, 15% of cases nationwide involving white juveniles resulted in detention, while 27% of cases involving black juveniles resulted in detention, even though whites comprised 52%, and blacks only 45% of the entire juvenile caseload.⁹⁴

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% of the juveniles held in secure facilities, despite representing only 14.3% of the overall state juvenile population.⁹⁵ Similarly, in Texas in 1996, minority youths represented 80% of those juveniles held in secure facilities, while representing only 50% of the overall state juvenile population. 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.”⁹⁶

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 study of Los Ange-

les County juvenile justice trends carried out by the Justice Policy Institute (JPI) is revealing. Under California law, an under-18 youth may be prosecuted in either juvenile court or adult court, may either be sentenced to a prison term in a California Youth Authority (CYA) facility and then perhaps 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 ten times more likely to be placed in CYA facilities by an adult criminal court. The study found that although minority youths comprised 75% of California's juvenile justice population, they comprised almost 95% of all cases found "unfit" for juvenile court and transferred to adult court.⁹⁷

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, 3,400 youths were admitted to state prisons; by 1997, the number was 7,400, more than double the prior total. This increase was more pronounced than the increase in arrests during that time. For every 1,000 arrests for violent crimes by under-18s, 33 youths were incarcerated in 1997, as compared to 18 in 1985.⁹⁸

Second, the number of cases transferred from juvenile courts to adult courts has increased 70% in a decade, from 7,200 in 1985 to 12,300 in 1994.⁹⁹ The prison terms served by these youths have also increased, from a mean minimum term in 1985 of 35 months to a mean minimum term in 1997 of 44 months.¹⁰⁰ 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.¹⁰¹ Yet overall, in 1998, nearly 18,000 youths spent time in adult prisons, and approximately 20% of these youths were mixed in with the adult population.¹⁰²

Third, minority youths make up the majority of those youths in the state prison system. In 1997, Hispanic and black youths made up 73% of the overall under-18 state prison population, a 10% increase from 1985 figures.¹⁰³

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.¹⁰⁴

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% between 1985 and 1994; transferred cases involving black youth increased almost 100% and are now approximately half of all transferred cases, despite the much smaller percentage of black youth in the overall juvenile population.¹⁰⁵ And cases involving black juveniles were almost twice as likely to be transferred to adult criminal court as cases involving white juveniles, principally because of the relatively large number of transferred (nonviolent) drug cases involving black juveniles.¹⁰⁶

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% of youths in federal custody are Native American.¹⁰⁷ 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.

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.

VI. The Consequences of too Little Justice

Concerns about racial disparity in criminal justice are not new.¹⁰⁸ 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 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 com-

mit 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 for 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

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% to 12%); the percentage of prisoners who are Hispanic is almost twice that of the percentage of Hispanics in the U.S. population (17% to 10%).¹⁰⁹ In order to grasp the enormity of these facts, consider that:

- Almost one in three black males aged 20-29 is on any given day under some form of criminal supervision — either in prison or jail, or on probation or parole.¹¹⁰
- As of 1995, 1 in 14 adult black males was in prison or jail on any given day.¹¹¹

- 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.¹¹²
- For every 1 black male who graduates from college, 100 black males are arrested.¹¹³

Black and Hispanic America have lost a generation of young men to the criminal justice system. Statistical projections suggest that future generations of minority males will be lost unless our criminal justice policies are reformed.

The rate at which young minorities are relegated to lives of incarceration and its consequences 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. 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. And 14 states even disenfranchise for life ex-felons who have fully served their prison terms.¹¹⁴ Many of those who lose the right to vote are convicted of relatively minor, nonviolent crimes. In some states, an offender who receives probation for a single sale of mari-

juana, 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, reneging on the guarantees of the 14th Amendment and the Voting Rights Act. As a consequence of disenfranchisement laws, 1.4 million black men — 13% of the entire adult black male population — are denied the right to vote. In two states, 31% 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% of black men are likely to be permanently disenfranchised in upcoming years.¹¹⁵ Disenfranchisement laws furnish another example of the disproportionate and lingering effects of criminal justice policies on minorities.¹¹⁶

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 many communities involvement in the criminal justice system is so common that the criminal law has lost its stigmatizing effect. Jail can become a badge of honor through overuse of criminal sanctions.¹¹⁷

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 that of white women. The 417% increase in their incarceration rates between 1980 and 1995 is greater even than the increase for black men. Three-fourths of the women in prison in 1991 were mothers, and two-thirds had children under 18.¹¹⁸ More

women in prison therefore means fewer mothers caring for their children, a trend that further exacerbates the deterioration of minority communities and family structures.

B. Effects on the Justice System Itself

The effects of racial disparities in the justice system extend 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.

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% higher than that for whites. They are the victims of rape, aggravated assault, and armed robbery at a rate 25% greater than that for whites. And homicide is the leading cause of death among young black males.¹¹⁹ 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 underreport criminal activity. This is true as much 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 indifferent to their concerns.

The perception of racial injustice manifests itself in important ways when minorities are asked to serve as jurors. First, many minorities, when summoned for jury duty, simply do not appear. In Chicago, 60% of residents of black neighborhoods did not even respond to calls for jury duty, as compared to 8% of residents in white neighborhoods.¹²⁰ 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.

Those minorities who 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 is difficult 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).¹²¹ Jury nullification, which is also gaining legitimacy in civil rights scholarship,¹²² is a troubling development for law enforcement officials.

C. Health and Economic Effects

The health consequences of rising incarceration rates are often overlooked. As a result of prison overcrowding and the lack of appropriate correctional 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% of known cases were traced to prisons.¹²³ Moreover, the rate of HIV infection in the prison population is now 13

times that of the nonprison population.¹²⁴ 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 nonprisoners alike. And because minorities are disproportionately represented among prisoners, these public health effects are felt most sharply in minority communities.

Overuse of incarceration also has significant economic consequences. 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 20 years. The Bureau of Prisons is the largest arm of the Justice Department.¹²⁵ 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 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.

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 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 chapter demonstrate that we have fallen short.

VII. Recommendations

There are several reasons why 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 come 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 chapter. 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.¹²⁶ 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. The recommendations set forth below build on these encouraging trends.

A. 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.

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 multicultural 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 encounters 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.

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 regard-

ing the charging and sentencing practices and outcomes in those offices and the racial impact of those outcomes.¹²⁷

B. Improve the Diversity of Law Enforcement Personnel

Much of the hostility between minority communities and the police can be traced to the underrepresentation 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.

C. 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 recommend that all major minority groups be included in future data

collection efforts, at least where such empirical evidence would be statistically significant.

D. Suspend Operation of the Death Penalty

As capital punishment is currently implemented, 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.

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.

E. 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 nonviolent 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 mushroom-

ing prison population and in the disproportionate incarceration of minorities.

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.

F. Reform Sentencing Guideline Systems

Were mandatory minimum 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-to-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 will be necessary to revisit and redress unfairness in the guidelines.

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

Perhaps no criminal justice 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. Laws that encourage treating nonviolent juvenile offenders as adults should be repealed.

H. 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 hardworking, but undercompensated and overwhelmed with a caseload that precludes vigorous advocacy on behalf of individual defendants. The problem here is a system that inadequately funds this vitally important component of the criminal process.

There should be a systematic review of indigent defense services in the United States in order to inject new resources and effect significant improvements.

I. 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 inter-

national law — specifically, Article 25 of the International Covenant on Civil and Political Rights.¹²⁸ 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.

J. Restore Balance to the National Drug Control Strategy

As noted above, 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.¹²⁹ Even at the height of the crack cocaine epidemic during the first Bush Administration, there was lip service paid to the concept of a balanced drug strategy, one that dedicated substan-

tial 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.

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.

VIII. 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.

The criminal justice arena is an especially critical battleground in the continued struggle for civil rights. Current disparities in criminal justice threaten 50 years of progress toward equality. Criminal justice reform is a civil rights challenge that can no longer be ignored.

Endnotes

¹ For extensive discussion of the “driving while black” phenomenon, see Angela J. Davis, “Race, Cops, and Traffic Stops,” 51 *University of Miami Law Review* 425 (1997); David A. Harris, “‘Driving While Black’ and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops,” 87 *Journal of Criminal Law and Criminology* 544 (1997); David Harris, “The Stories, the Statistics, and the Law: Why ‘Driving While Black’ Matters,” 84 *Minnesota Law Review* 265 (1999) (“Why ‘Driving While Black’ Matters”).

² David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System*, at 36 and n. 66 (The New Press 1999) (“No Equal Justice”). See also “Why ‘Driving While Black’ Matters” at 280-81 and nn. 82-92.

³ *No Equal Justice* at 36-37, nn. 69-70. See also Marc Mauer, *Race to Incarcerate*, at 129 and n. 13 (New York, The New Press 1999) (“Race to Incarcerate”).

⁴ *No Equal Justice* at 38.

⁵ *No Equal Justice* at 25 and n. 29.

⁶ Gary Webb, “DWB; Police Stops Motorists To Check for Drugs,” *Esquire*, at 126 (Apr. 1, 1999).

⁷ 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*, at 26 (1999) (“The Mainstreaming of Hate”).

⁸ *Id.* at 19.

⁹ *No Equal Justice* at 44-45.

¹⁰ Angela J. Davis, “Prosecution and Race: The Power and Privilege of Discretion,” 67 *Fordham Law Review* 13, 27 (1998) (“Prosecution and Race”).

¹¹ Why ‘Driving While Black’ Matters at 297.

¹² There is 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 nonviolent drug crimes, not assaults, and therefore derive no legitimacy from violent crime rate statistics.

¹³ Substance Abuse and Mental Health Services National Administration, U.S. Department of Health and Human Services, “National Household Survey on Drug Abuse, Preliminary Results from 1997,” at 13, 58, Table 1A (1999). 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, National Institute of Justice, U.S.

Department of Justice, "Crack, Powder Cocaine, and Heroin: Drug Purchase and Use Patterns in Six U.S. Cities," at 1 (Dec. 1997).

¹⁴ Why 'Driving While Black' Matters at 296 (citing National Institute on Drug Abuse, "Drug Use Among Racial/Ethnic Minorities," at 64-66 (1997); Bureau of Justice Statistics, U.S. Department of Justice, "Drugs, Crime, and the Justice System," at 28 (1992)).

¹⁵ *Id.* at 295-296 (citing U.S. Customs Service, "Personal Searches of Air Passengers Results: Positive and Negative, Fiscal Year 1998," at 1 (1998) (finding that 6.7% of whites, 6.3% of blacks, and 2.8% of Hispanics carried contraband)).

¹⁶ U.S. General Accounting Office, *U.S. Customs Service: Better Targeting of Airline Passengers for Personal Searches Could Produce Better Results*, at 2 (Mar. 2000).

¹⁷ Why 'Driving While Black' Matters at 297.

¹⁸ Bureau of Justice Statistics, U.S. Department of Justice, *Sourcebook of Criminal Justice Statistics 1997*, at 338 (table 4.10), 422 (table 5.46).

¹⁹ 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").

²⁰ See William K. Rashbaum, "Undercover Police in Manhattan Kill an Unarmed Man in a Scuffle," *The New York Times*, Mar. 17, 2000, at A1; Eric Lipton, "Giuliani Cites Criminal Past of Slain Man," *The New York Times*, Mar. 20, 2000, at B1.

²¹ *The Mainstreaming of Hate* at 20.

²² Adam Cohen, "Gangsta Cops," *Time*, at 32 (Mar. 6, 2000).

²³ *The Mainstreaming of Hate* at 15 and n.41. See also Julia Vitullo-Martin, "Fairness Not Simply A Matter of Black and White," *The Chicago Tribune*, Nov. 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).

²⁴ Indeed, many instances of police brutality against minorities begin with a race-based misperception that an individual is a criminal suspect. In 1988, for instance, Hall of Fame baseball player Joe Morgan was approached by a police officer at an airport. 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 someone who "looked like himself" — i.e., black. When Morgan objected to the officer's accusation, the officer threw Morgan to the ground, handcuffed him, put his hand over Morgan's mouth and nose. Of course Morgan was eventually cleared of any wrongdoing. *No Equal Justice* at 24-25. Hispanics can point to similar experiences. See *The Mainstreaming of Hate* at 17.

²⁵ Bennett L. Gershman, "The New Prosecutors," 53 *University of Pittsburgh Law Review* 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.

²⁶ Prosecution and Race at 21-22 and nn. 28-33.

²⁷ Christopher Schmitt, "Plea Bargaining Favors Whites, as Blacks, Hispanics Pay Price," *The San Jose Mercury News*, Dec. 8, 1991, at 1A ("Mercury News Report").

²⁸ U.S. Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy*, at 138 and nn. 186-188 (Feb. 1995) ("Cocaine and Federal Sentencing Policy").

²⁹ Dan Weikel, "War on Crack Targets Minorities over Whites," *The Los Angeles Times*, May 21, 1995, at A1 ("Weikel").

³⁰ *Id.*

³¹ *Id.* See also *Cocaine and Federal Sentencing Policies* at xi (Blacks and Hispanics accounted for 95.4% of crack cocaine distribution offenses in 1993).

³² *Id.*

³³ Weikel at A1. Data analyzed by the U.S. Sentencing Commission reveals that nationwide, more than 94.5% of federal crack defendants in 1992 were either low- or middle-volume dealers or couriers, and only 5.5% were high-volume dealers. *Cocaine and Federal Sentencing Policy* at 172.

³⁴ *Cocaine and Federal Sentencing Policy* 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”).

³⁵ Public Law No. 104-38, 109 Stat. 334 (Oct. 30, 1995).

³⁶ *Cocaine and Federal Sentencing Policy* at 8.

³⁷ Most criminal cases end in a plea bargain. See Rebecca Hollander-Blumoff, “Getting to ‘Guilty’: Plea Bargaining as Negotiation,” 2 *Harvard Negotiation Law Review* 115, 117 n. 7 (1997) (discussing studies showing that as much as 90% of all criminal cases end in plea bargains).

³⁸ See *Prosecution and Race* at 23-25 and nn. 41-59 (discussing importance of, and prosecutorial discretion inherent in, charging decisions and plea bargaining).

³⁹ *Mercury News Report* at 1A.

⁴⁰ *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 (Georgia 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 (Georgia 1995)).

⁴¹ *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*, at 4 (Jan. 1997)).

⁴² Office of Justice Systems Analysis, New York State Division of Criminal Justice Services, “Disparities in Processing Felony Arrests in New York State, 1990-1992,” at v-vi, xi (Sept. 1995) (“New York Felony Study”).

⁴³ Ian Ayres and Joel Waldfogel, “A Market Test for Race Discrimination in Bail Setting,” 46 *Stanford Law Review* 987 (1994).

⁴⁴ Bureau of Justice Statistics, U.S. Department of Justice, *Compendium of Federal Justice Statistics*, at 25 (Jan. 1999).

⁴⁵ See generally *Bail Reform Hearings, 1982: Hearings on S. 1554 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 97th Congress, 1st Session* (1982) (statement of Professor Daniel Freed).

⁴⁶ *Prosecution and Race* at 24 and nn. 49-51.

⁴⁷ U.S. General Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities*, at 5 (1990) (“GAO Study”) (noting that “[t]his finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques.”).

⁴⁸ David C. Baldus, Charles Pulaski, and George Woodworth, “Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience,” 74 *Journal of Criminal Law and Criminology* 661-753 (1983) (“Baldus Study”).

⁴⁹ *McCleskey v. Kemp*, 481 U.S.C. § 279, 321 (1987) (Brennan, J., dissenting) (citing Baldus study).

⁵⁰ 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”).

⁵¹ *McCleskey v. Kemp*, 481 U.S.C. § 327 (Brennan, J., dissenting) (*citing* Baldus study).

⁵² 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 Session, at 2 (Mar. 1994). 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.*

⁵³ *See* Prosecution and Race at 34.

⁵⁴ *Saldano v. Texas*, No. 72-556 (Texas Ct. Cr. App. Sept. 15, 1999), at 9.

⁵⁵ *Saldano v. Texas*, No. 98-8119 (June 5, 2000).

⁵⁶ 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.

⁵⁷ *See generally* Kate Stith and Steve Y. Koh, “The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines,” 28 *Wake Forest Law Review* 223 (1993).

⁵⁸ *Race to Incarcerate* at 19-20.

⁵⁹ Marc Mauer, “The Crisis of the African-American Male and the Criminal Justice System,” Written Testimony Before the U.S. Commission on Civil Rights, at 8 (Apr. 15-16, 1999) (“Mauer Civil Rights Commission Testimony”) (*citing* data from the Bureau of Justice Statistics, U.S. Department of Justice).

⁶⁰ Christopher J. Mumola and Allen J. Beck, Bureau of Justice Statistics, U.S. Department of Justice, “Prisoners in 1996,” at 11 (June 1997) (“Mumola and Beck”); *Race to Incarcerate* at 32.

⁶¹ *See* Chapter II, n. 58 (*citing* New York Felony Study).

⁶² New York Felony Study at 43.

⁶³ Jodi M. Brown and Patrick A. Langan, Bureau of Justice Statistics, U.S. Department of Justice, “State Court Sentencing of Convicted Felons, 1994,” at 24, table 2.10 (Mar. 1998) (“Brown and Langan”).

⁶⁴ Brown and Langan at 21, table 2.7.

⁶⁵ Anti-drug efforts in America have always had a racial tint. During periods of intense intolerance, “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*, at 8 (Nov. 20, 1989). “Earlier 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.” Michael Tonry, “Race and the War on Drugs,” 1994 *University of Chicago Legal Forum* 25, 39 (1994). And “imagery linking Mexicans to marijuana use was prominent in the anti-marijuana movements that culminated in the Marijuana Tax Act of 1937.” *Id.* *See generally* David Musto, *The American Disease: Origins of Narcotic Control* (Oxford University Press 1987).

⁶⁶ Michael Tonry, “Racial Disparities Getting Worse in U.S. Prisons and Jails,” in Michael Tonry and Kathleen Hatlestad, *Sentencing Reform in Overcrowded Times* (Oxford University Press 1997) (“Tonry and Hatlestad”).

⁶⁷ *Race to Incarcerate* at 152-153 (citing Mumola and Beck).

⁶⁸ Mauer Civil Rights Testimony at 8 (citing Bureau of Justice Statistics data).

⁶⁹ *Id.*

⁷⁰ Marc Mauer and Tracy Huling, "One in Three Black Men Is Ensnared in the Justice System," in Tonry and Hatlestad at 246.

⁷¹ Michael Tonry, "Drug Policies Increasing Racial Disparities in U.S. Prisons," in Tonry and Hatlestad at 233, 235.

⁷² Jerome G. Miller, *Search and Destroy: African-American Males in the Criminal Justice System*, at 82 (Cambridge University Press 1996) (citing Sam Vincent Meddis, "Is the Drug War Racist?" *USA Today*, July 23-25, 1993, at 2A).

⁷³ *Id.* (citing J.G. Miller, *Duval Jail Report*, filed with the U.S. District Court for the Middle District of Florida, Jacksonville, Florida, June 1993).

⁷⁴ *Id.*

⁷⁵ *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 (Mar. 1996)).

⁷⁶ *Race to Incarcerate* at 157 (citing James P. Lynch and William J. Sabol, *Did Getting Tough on Crime Pay?* (Urban Institute 1997)).

⁷⁷ 481 U.S.C. § 279 (1987)

⁷⁸ *McCleskey v. Kemp*, 481 U.S.C. § at 325 (Brennan, J., dissenting) (citing Baldus study).

⁷⁹ *No Equal Justice* at 137.

⁸⁰ *McCleskey v. Kemp*, 481 U.S.C. § at 339 (Brennan, J., dissenting).

⁸¹ See Ch. II, n. 55.

⁸² 517 U.S.C. § 456 (1996).

⁸³ *United States v. Armstrong*, 517 U.S.C. § at 468, 470.

⁸⁴ *No Equal Justice* at 160.

⁸⁵ *Los Angeles v. Lyons*, 461 U.S.C. § 95 (1983).

⁸⁶ *Id.* at 115-116 (Marshall, J., dissenting).

⁸⁷ 517 U.S.C. § 806 (1996).

⁸⁸ *United States v. Botero-Ospina*, 71 Federal Reporter 3d 783, 790 (10th Circuit 1995) (Seymour, C.J., dissenting) (citations omitted). For other examples of cases upholding pretextual stops, see *United States v. Harvey*, 16 Federal Reporter 3d 109, 113 (6th Circuit 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 Federal Reporter 3d 1088, 1092 (5th Circuit 1993) (upholding a stop of a black motorist for changing lanes without signaling on an open stretch of highway).

⁸⁹ *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* (Sept. 1992)).

⁹⁰ *Id.* (citing American Bar Association, *The State of Criminal Justice* (Feb. 1993)).

⁹¹ "Why 'Driving While Black' Matters" at 295 and n. 132.

⁹² *Race to Incarcerate* at 163-165.

⁹³ See Carl Pope, "Racial Disparities in the Juvenile Justice System," in Tonry and 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").

⁹⁴ Andrew Blum, "Jail Time by the Book: Black Youths More Likely to Get Tough Sentences than Whites, Study Shows," *American Bar Association Journal*, at 18 (May 1999).

⁹⁵ *The Color of Justice* at 2 (citing Donna Hamparian and Michael Leiber, *Disproportionate Confinement of Minority Juveniles in Secure Facilities: 1996 National Report*, at 9 (Community Research Associates 1997) ("Hamparian and Leiber")).

⁹⁶ *Id.* (citing Donna Bishop and 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)).

⁹⁷ *The Color of Justice* at 3, 7.

⁹⁸ Kevin J. Strom, Bureau of Justice Statistics, U.S. Department of Justice, "Profile of State Prisoners under Age 18, 1985-97," at 1, 4-5 (Feb. 2000) ("Strom").

⁹⁹ Jeffrey A. Butts, Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, "Delinquency Cases Waived to Criminal Court, 1985-1994," at 1 (Feb. 1997) ("Butts").

¹⁰⁰ Strom at 7, Table 7.

¹⁰¹ Mara Dodge, "Regrettable Regression in the Way We Treat Young Criminals," *The Washington Post*, Aug. 29, 1999, at B02.

¹⁰² *Id.*

¹⁰³ Strom at 3.

¹⁰⁴ Strom at 5, Table 5.

¹⁰⁵ Carol J. DeFrances and Kevin J. Strom, Bureau of Justice Statistics, U.S. Department of Justice, "Juveniles Prosecuted in State Criminal Courts," at 5, Table 5 (Mar. 1997).

¹⁰⁶ Butts at 2.

¹⁰⁷ *The Real War on Crime: The Report of the National Criminal Justice Commission*, at 104 (Steven R. Donziger ed., 1997).

¹⁰⁸ Deborah Prothrow-Stith, *Deadly Consequences* (Harper Collins 1991); Bruce Wright, *Black Robes, White Justice* (Lyle Stuart, Inc. 1987).

¹⁰⁹ Mauer Civil Rights Commission Testimony at 2 (citing Bureau of Justice Statistics data).

¹¹⁰ *Id.* (citing Marc Mauer and Tracy Huling, The Sentencing Project, "Young Black Americans and the Criminal Justice System: Five Years Later" (Oct. 1995)).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 5 (citing Henry Louis Gates, Jr., "The Charmer," *The New Yorker*, at 116 (Apr. 29/May 6, 1996)).

¹¹⁴ Jamie Fellner and Marc Mauer, Human Rights Watch and The Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, at 1 (Oct. 1998) ("Disenfranchisement Laws").

¹¹⁵ *Id.*

¹¹⁶ 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," at 7 (1996). Mere arrests can result in eviction from public housing.

¹¹⁷ Mark Silk, "Solutions to Youth Crime Discussed: Black Prosecutors Look at Alternatives to Incarceration," *The Atlanta Constitution*, July 26, 1994, at C4 (quoting New York City Assistant District Attorney Rhonda Ferdinand).

¹¹⁸ *Race to Incarcerate* at 185.

¹¹⁹ *No Equal Justice* at 5 (citing John Hagan and Ruth Peterson, "Criminal Inequality in America," in J. Hagan and R. Peterson, *Crime and Inequality* (Stanford University Press 1995)).

¹²⁰ *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.*

¹²¹ *Id.* (citing Jeffrey Rosen, "One Angry Woman," *The New Yorker*, Feb. 28/Mar. 3, 1997, at 54, 60).

¹²² See, e.g., Paul Butler, "Racially Based Jury Nullification: Black Power in the Criminal Justice System," 105 *Yale Law Journal* 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% of all prosecutors are black or Hispanic, while 97.5% are white. Richard C. Dieter, Death Penalty Information Center, "The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides," at 12-14 (June 1998).

¹²³ *Race to Incarcerate* at 181 (citing Paul Farmer, "Cruel and Unusual: Drug-Resistant Tuberculosis as Punishment," in *Sentenced to Die? The Problem of TB in Prisons in East and Central Europe and Central Asia* (Vivien Stern and Rachel Jones eds., Penal Reform International 1999)).

¹²⁴ *Id.* at 182 (citing Dorothy E. Merianos, James W. Marquart, and Kelly Damphousse, "Examining HIV-Related Knowledge among Adults and Its Consequences for Institutionalized Populations," 1, 4 *Corrections Management Quarterly* 85 (1997)).

¹²⁵ *Id.* at 11.

¹²⁶ See generally *Race to Incarcerate* at 81-100 (discussing "the prison-crime connection").

¹²⁷ See *Prosecution and Race* at 54-56 (advocating racial impact studies of prosecutorial practices). But until the Supreme Court departs from its holding in *McCleskey* that discriminatory intent is necessary to invalidate discriminatory law enforcement practices, mere evidence of racially discriminatory effect will continue to have limited utility in the fight against discriminatory law enforcement practices. Congress could effectively overrule *McCleskey* by passing a broad version of the Racial Justice Act that Senator Kennedy and others proposed in the early 1990s to address racial disparities in capital punishment. See generally 137 Congressional Record S. 8263; 102nd Congress 1st Session (June 20, 1991).

¹²⁸ *Disenfranchisement Laws* at 20-22.

¹²⁹ See Michael Massing, *The Fix* (Simon & Schuster 1998).