The Power and Effect of Scaring White, Suburban Voters: How Our Politicians, Criminal Justice System, and Supreme Court Use Societal Ills to *Create* Societal Ills

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The Power and Effect of Scaring White, Suburban Voters: How Our Politicians, Criminal Justice System, and Supreme Court Use Societal Ills to *Create* Societal Ills[1]

I. Introduction

This article is an all-encompassing essay on how societal factors, as well as the Criminal Justice System (hereafter "CJS") and the U.S. Supreme Court, contribute to the demise of certain communities. Yet it should be noted that not one of these factors by itself is the sole contributor. While the CJS certainly furthers the housing, employment, education, social welfare, and psychological problems that confront prisoners and their communities, it is not the only reason why these problems exist. Therefore, simply changing our CJS will not automatically solve the problems faced by most prisoners and their families. The purpose of this article is to bring attention to how all these factors, when taken as a whole, *contribute* to cultivating crime, and ensure that, once prisoners leave correctional facilities, they have little chance of becoming productive, law-abiding members of society. It does not suggest that criminals should not be punished for their crimes, or that victims should not receive some form of retribution for the pain and suffering they have endured. It makes no claim that most criminals did not make a deliberate choice to break the law, although many have limited ways of making a living before they enter our prisons and jails, and suffer stigmatic pressures to return to criminal acts when they leave. For some, the societal ills that exist in inner-cities cause them to turn to crime, and the CJS doesn't help. In fact, it actually worsens those ills for *all* those who live there, and extrapolating, worsens certain problems for society as a whole. Our CJS, our media, and our politicians, by striking fear into the hearts of those with political influence, make sure that our "criminals" never lose their criminal status, even after they have paid their debt to society. They

[1] My deepest thanks and appreciation goes to Professor Larry Ritchie, whose insight and guidance throughout this writing process has allowed me to achieve a greater sense of clarity about our Criminal Justice System, and to question what my role should be within it.

ensure that this "unsavory" element of our population keeps far away from our suburbs and our affluent communities.

Unfortunately, there are structures in place that set these communities up for failure. Indeed, current CJS policies, when combined with others, allow for more crime to exist. More crime then creates a greater need/demand from the CJS to reduce crime. Therefore, the very thing cultivating crime is the entity used to combat it.[2] Sadly, this theory of a vicious cycle is not unique. To many, the CJS has become a very racist institution – "one of the most racist institutions in the United States [and] one of the principal causes of racism elsewhere in society, since it provides legitimacy and cover to racist ideas and behaviors."[3] Yet the idea that our government is still intentionally targeting racial minorities in the twenty-first century is hard for many other people to accept. In fact, many times these assertions of institutional racism are dismissed as extreme or emotional, lacking of any hard proof. One critic has called these assertions "an insult to law enforcement and a prime example of the anti-police advocates' willingness to *rewrite reality*."[4] This is the reaction many citizens have when they are removed from the immediate impact of CJS policies. Indeed, those who are unaware of the policy implications might be a little confused at this assertion. Why would the CJS and the Supreme Court want to *contribute* to raising the crime and incarceration rates for a nation that is already the industrialized leader in criminalizing its citizens?[5] That is a question that has never been

[2] It is no wonder why there has been opposition to privately owned prisons. These private owners end up lobbying for the legislature to create unnecessarily "tough on crime" policies like Three Strikes Laws and mandatory minimums (both of which will be discussed in greater detail in section III), which do nothing but overcrowd prisons. In turn, the need for private prisons becomes even greater, making it very profitable for those in the business. In fact, it is a little surprising how *little* opposition there has been to this money making scheme in human trafficking. This topic will be furthered discussed in section II.C.

[3] Kenneth B. Nunn, The "Darden Dilemma": Should African Americans Prosecute Crimes?, 68 Fordham L. Rev. 1473, 1479-80 (2000).

[4] Heather MacDonald, Are Cops Racists? 19 (2003).

[5] According to the International Centre for Prison Studies, America leads at 762 persons per 100,000 of the national population; a rate of over 100 more than the next highest rate of the Russian Federation at 635 per 100,000. Int'l

answered by those in power. Blacks and Latinos are disproportionately stopped, searched, arrested, charged, convicted, and sentenced to incarceration. Their race is used as part of "drug courier profiles," and their communities are destroyed in an effort to criminalize low-level dealers and users, while their more affluent and white counterparts are left safely in their suburban homes. Minorities are less likely to use drugs than whites, yet minorities are the ones depicted by our media as the crack-heads, the crack-whores, and the ones who are in such need for their next fix that they will creep into your safe community and steal from you as you sleep. The crime rates of the inner-cities have been used by our media and our politicians to strike fear in our suburbs, and to influence middle- and upper-income citizens to vote for policies that are inherently, if not blatantly, racist in practice. The question of how our CJS and our Supreme Court can not only turn their heads from the blight of our inner-cities, but do their part in *contributing* to the plague needs to be answered, so that the public can make informed decisions at the polls. Perhaps if honesty can replace politics, we can begin to have some real debates on what is best for our society, and present a more unified front against our most pressing societal ills.

Part II demonstrates, through pure statistics, how our executive branch disproportionately targets young black and Latino males in every step of the process, from stops to sentencings. No matter what you might think about whether racial profiling really exists, if you read the following section with an open mind, you can decide for yourself whether the racial disparities seem justified. Part III *briefly* touches on some of our "tough on crime" policies that have emerged since President Nixon's term, including our failed yet persisting War on Drugs, our "presumptively reasonable" Sentencing Guidelines with their racist 100-to-1 crack versus

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Centre for Prison Studies, Prison Brief – Highest to Lowest Rates (December 6, 2007), available at http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/.

powder cocaine sentencing ratios,[6] our mandatory minimums that are primarily used for drug-related crimes, and our Three Strikes laws that release violent offenders in order to make room for our most nonviolent criminals to spend the rest of their lives in prison. The section concludes with a brief discussion on who is creating these policies and who they are manipulating for votes. Part IV skims the surface on some of the other societal problems that plague our inner-cities, including the current public housing crisis, education and economy of the inner-city. Part V discusses how incarceration and a criminal record can affect an individual's well-being, family, voting rights, entitlement to public assistance, opportunity for future employment, and potential for recidivism. Part VI demonstrates how high incarceration rates for members of certain communities can psychologically affect these communities, as well as affect their vulnerability to crime, and their local job markets. Part VII discusses how the Supreme Court's decisions have contributed to these societal problems, allowing them to exist by compromising our constitutional freedoms in the name of crime control and efficient law enforcement. Finally, Part VIII discusses some future implications of our Court's most recent Fourth Amendment decisions, suggests reform of the most flaccid constitutional remedy (the exclusionary rule), and calls for a more unified front against discrimination in law enforcement.

[6] Congress amended the Guidelines in 2007 to *slightly* reduce the discrepancy between the punishments for crack versus powder cocaine. As of November 1, 2007, Amendment 706 implemented a 2-level reduction for the base level for each crack offense. See U.S.S.G. § 2D1.1; U.S.S.G. app. C, amend. 706 (Supp. 2007). While that means that the ratio is no longer 100-to-1, the disparity remains in effect, against the advice of the United States Sentencing Commission. See Kimbrough v. United States, 128 S.Ct. 558, 569 (2007) (In 1995, the Commission proposed a 1-to-1 ratio for crack versus powder penalties, but Congress rejected the recommendation); see also United States Sentencing Commission, Report to the Congress: Cocaine and Federal Sentencing Policy 10 (May 2007) ("The Commission…views the amendment only as a partial remedy to some of the problems associated with the 100-to-1 drug quantity ratio. It is neither a permanent nor a complete solution to those problems. Any comprehensive solution requires appropriate legislative action by Congress.")

II. Disparities in Current Statistics

As mentioned above, it is well settled that racial disparities exist in our crime rates.[7] The $100,000 question is "Why?" Some do not ask the question; they just accept the idea that blacks and Latinos are more violent, more likely to use drugs, and generally more prone to criminal activity than are whites.[8] Others attempt to answer the question, and there is no shortage on the number of suggested answers, ranging from pure, blatant institutional racism,[9] to the media and politicians creating the image of "gun-toting black teenage gangs, ghetto crack houses where unspeakable horrors take place, and depraved black women who prostitute themselves to raise money for their crack,"[10] to police simply going after the more visible, easy targets (who happen to be poor minorities committing crime on inner-city streets instead of more affluent whites committing their crimes under the police's radar),[11] to certain segments of the population (namely middle- and upper-class whites) advocating for these racist "tough on crime" policies out of fear that these seedy characters will come after them next if they are not all locked up somewhere far, far away.[12] But before these policies and justifications are examined in greater detail, it is important to make clear just how all-encompassing these disparities are, from police

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[7] "[M]embers of Black communities…are disproportionately policed, arrested, prosecuted, and convicted." Margaret E. Finzen, Systems of Oppression: The Collateral Consequences of Incarceration and Their Effects on Black Communities, 12 Geo. J. on Poverty L. & Pol'y 299, 321 (2005); Kenneth B. Nunn, Race, Crime and the Pool of Surplus Criminality: Or Why the 'War on Drugs' Was a 'War on Blacks', 6 J. Gender Race & Just. 381, 400 (2002) ("A growing body of evidence suggests that Blacks are investigated and detained by the police more frequently than are other persons in the community"); see Jeffrey Fagan & Garth Davies, Street Stops and Broken Windows: Terry, Race, and Disorder in New York City, 28 Fordham Urb. L.J. 457, 477 (2000) (for disparities found in New York); David A. Harris, Profiles in Injustice: Why Racial Profiling Cannot Work 79, 80 (2003) (for disparities found in Maryland and New Jersey, respectively); and David Rudovsky, The Impact of the War on Drugs on Procedural Fairness and Racial Equality, 1994 U. Chi. Legal F. 237, 250-51 (1994) (for disparities found in Florida).

[8] See Benjamin D. Steiner & Victor Argothy, White Addiction: Racial Inequality, Racial Ideology, and the War on Drugs, 10 Temp. Pol. & Civ. Rts. L. Rev. 443, 459-60 (2001).

[9] John A. Powell & Eileen B. Hershenov, Hostage to the Drug War: The National Purse, the Constitution and the Black Community, 24 U.C. Davis L. Rev. 557, 611 (1991); Nunn (2000), *supra* note 3.

[10] Id.

[11] Fagan & Davies, *supra* note 7 at 458-59.

[12] See Michael Tonry, Thinking about Crime: Sense and Sensibility in American Penal Culture 54 (2004).

stops all the way to parole. The fact is, "[c]rime rates are highest in the most disadvantaged neighborhoods and policies that create more disadvantaged neighborhoods and making the existing ones worse are likely to be criminogenic."[13] So let's start at the beginning, at the first point of contact between law enforcement and the young men of the inner-cities: at police stops and searches.

A. Stops and Searches

The Supreme Court currently allows police officers to conduct Terry stops and searches, and now even arrest someone for *any* subjective reason. Courts will uphold such arbitrary and unwarranted police action, provided that the stop, search, and/or arrest *could have* had a lawful justification.[14] That makes it even easier for officers to disproportionately target and harass minorities based on an individual officer's racism or prejudice; and for the current time, they may do so with the Court's implicit approval.[15] At least one author has suggested that the Court has allowed for such "relaxed [] oversight of the police" due to the War on Drugs.[16] While that might be true, such relaxed oversight seems to be part of an ongoing series of decisions by the Court that gives almost *complete* deference to law enforcement, no matter the crime. Case by case, the Court has changed what had *once* been a balancing of competing interests (crime

[13] Michael Tonry, Malign Neglect – Race, Crime, and Punishment in America 41 (1995).
[14] Whren v. U.S., 517 U.S. 806 (1996) (for stops and searches), and Devenpeck v. Alford, 543 U.S. 146 (2004) (for arrests). I say "allows" here because the Court found it is not *un*constitutional for an officer to do so. If, for some miraculous reason, a local, state, and/or federal law (or established police department procedure, for that matter) *required* an officer to have a subjectively lawful reason for stopping, searching, and/or arresting a suspect, the officer would have to abide by that law/procedure. For example, California had to impose a six-month ban on consent searches after a study came out that showed blacks and Latinos were 2 to 3 times more likely to be searched for drugs. See Lawrence M. Solan & Peter M. Tiersma, Speaking of Crime: The Language of Criminal Justice 49-50 (2005).
[15] Certainly I do not mean to suggest the Court is condoning outright racism. Even in its Whren decision, the Court agreed with the petitioners that: "[T]he Constitution prohibits selective enforcement of the law based on considerations such as race." 517 U.S. at 813. The problem is, and will be discussed below, that the Court simply deflects these individual claims of racism to Fourteenth Amendment Equal Protection analysis, which makes it almost impossible to successfully make a racial discrimination claim, and therefore allows those police practices to continue to be seen as constitutionally permissible.
[16] Nunn (2002), *supra* note 7 at 402-03.

control on the one hand, and personal privacy, dignity and freedom from harassment on the other) into one "in which the judicial thumb apparently will be planted firmly on the law enforcement side of the scales."[17] In fact, when it comes to ordinary traffic stops, the Court has found no need to conduct a balancing test at all.[18] While this is slightly understandable, since "Judges, like the rest of us, want to trust our law enforcers,"[19] does the Court really need to lean that far on the side of law enforcement when innocent people are being targeted and harassed at alarming rates?[20] These loose constitutional standards have allowed some local police departments to revert back (or continue) to training their officers to *look* for a reason to stop minorities driving through their mostly-white suburban towns.[21]

The rates differ by state and on a national level, but the conclusion is always the same: blacks and Latinos are being stopped, searched, investigated, detained,[22] and subjected to police use of force[23] disproportionately for the percentage of the population they represent. This holds true even when the racial make-up of the neighborhood changes. For example, in New York City, in neighborhoods with low rates of minorities, "stops of blacks and Hispanics were well

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[17] U.S. v. Sharpe, 470 U.S. 675, 720 (1985) (Brennan, J., dissenting).
[18] Whren, 517 U.S. at 818.
[19] Morgan Cloud, Judges, 'Testilying,' and the Constitution, 69 S. Cal. L. Rev. 1341, 1378 (1996). "[I]f a judge scrutinizes an officer's state of mind carefully, the judge might be forced to conclude that the officer's testimony under oath is untrue. If evidence is suppressed for this reason, the judge is in effect calling the police officer a perjurer. I suggest that, for understandable reasons, many judges prefer not to be placed in that position." Id. at 1377.
[20] See Ira Glasser, American Drug Laws: The New Jim Crow, 63 Alb. L. Rev 703, 708-09 (2000) ("[A]long our highways innocent people of darker skin color are systematically stopped, searched, harassed, humiliated, and let go, as if letting them go remedied the violation."); Rudovsky, *supra* note 7 at 241, 245 (Those who are innocent generally will not complain to the police of the stop and search; nor are they likely to pursue a challenge in court). This leaves the exact number of those who are unjustifiably targeted because of their skin color unknown, and allows for many injustices to go unnoticed by the country at large (certainly by those segments of the population who have never experienced the humility of racial profiling; namely, white citizens). Furthermore, "misplaced faith in the effectiveness of racial profiling casts as illegitimate the complaints of those who bear its most direct burden: the many innocent individuals who are inconvenienced, humiliated, placed in mortal fear, and sometimes subjected to physical injury solely on the basis of their skin color or ethnic appearance." Lu-in Wang, Discrimination by Default: How Racism Becomes Routine 104 (2006).
[21] Tracey Maclin, Race and the Fourth Amendment, 51 Vand. L. Rev. 333, 344-45 (1998).
[22] Nunn (2002), *supra* note 7.
[23] See Matthew R. Durose & Christopher J. Mumola, Profile of Nonviolent Offenders Exiting State Prisons 1 (Oct. 2004), Bureau of Justice Statistics No. NCJ 207081.

above what their population percentage would predict,"[24] with blacks making up 25% of the population yet 50% of those stopped.[25] Not only that; whites were far *less* likely to be stopped proportionate to their representation (with a disparity of 43% of the population and only 13% of those stopped).[26] Nationally, between 33-50% of all young blacks reported being stopped by the police.[27] Compared to whites, blacks are five times more likely to be stopped; Hispanics are four times as likely.[28]

Could this all be the result of blacks and Latinos committing more than their fair share of crime in this country? Sure. But when you target, stop and search one in every two or three members of a racial/ethnic group, eventually you are going to find some who are guilty.[29] By searching hard for guilty minorities and hardly searching at all for their white counterparts, police can get the rates they are looking for, and thereby justify their search with those disproportionate rates. "This in turn helps to cement the public's image, and the police's image, of the gun-toting gangster or drug dealer as black or Latino. And this confirms the validity of the police focus on youth of color, which then goes around and around in the same kind of vicious cycle…"[30]

One study conducted on Interstate-95 in Florida highlights this disparate treatment. Of the cars police stopped on that highway half were searched. Seventy percent of the cars stopped

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[24] See Fagan & Davies, *supra* note 7 at 477.
[25] Michael K. Brown et al., Whitewashing Race: The Myth of a Color-Blind Society 149 (2003).
[26] Id. See Fagan & Davies, *supra* note 7 at 477.
[27] Katheryn K. Russel, The Color of Crime 39 (1998).
[28] Fagan & Davies, *supra* note 7 at 489.
[29] See Glasser, *supra* note 20 at 711-12; Brown et al., *supra* note 25 at 152 (By substantially limiting searches to black and Latinos, the police "ensure that most of the people arrested for transporting guns or drugs on the freeways are black or Latino.")
[30] Brown et al., *supra* note 25 at 151; see id. at 152 ("The vicious cycle of intensified surveillance, the generation of statistics that support stereotypical conceptions of race and offenses, and on to still more heightened surveillance has arguably worsened in recent years because of the increasing adoption of aggressive, often paramilitary police responses to drugs and gangs in the cities."); Wang, *supra* note 20 at 103-04 ("[T]he very statistical foundation on which racial profiling rests…is itself the product of racially biased law enforcement policies that create a self-fulfilling prophecy that falsely confirms a biased expectation equating race and criminality.")

were driven by blacks or Latinos, and were detained for twice the length of time as white cars. Eighty percent of the cars searched were those of blacks or Latinos, and yet blacks and Latinos comprised only 5% of the drivers on I-95.[31] How is it that, *at most*, 5% of the drivers[32] can make up 70-80% of those targeted for stops and searches, *especially* when *white* males are more likely than any other race or ethnicity to be guilty of a driving-related offense?[33] Disparate treatment, that's how. Unfortunately, even if it is racially motivated, the Supreme Court has said that that is okay to do[34] (unless it is an established "pattern" or policy of the police department to intentionally target drivers because of their race).[35]

Racial profiling can have debilitating effects on the lives of blacks and Latinos. One understandable consequence is that it creates "a strong disincentive for racial minorities to move into or travel through predominantly White areas" in order to avoid the hassle of being pulled over for DWB ("Driving While Black").[36] This "disincentive" could be a reason why minorities remain segregated into their own communities (although even then they are not safe from being cited for being a minority). Unfortunately, mostly-minority communities are susceptible to high rates of crime, which in turn gives the police justifications for stopping and searching those who look "suspicious" (a.k.a. not white). In short, there seems to be nowhere for minorities to hide from racial profiling. Blacks will either look "out of place" in an all-white neighborhood, or look suspicious in a high-crime (a.k.a. minority) neighborhood. Either way, police can always articulate a reason for pulling over minorities. But at least *something* productive has come from

[31] Rudovsky, *supra* note 7 at 250-51.
[32] That is assuming that every single black or Latino driver was stopped.
[33] Thomas H. Cohen & Brian A. Reaves, Felony Defendants in Large Urban Counties, 2002 4 (Feb. 2006), Bureau of Justice Statistics No. NCJ 210818.
[34] Whren, 517 U.S. 806 (1996).
[35] See Glasser, *supra* note 20 at 708.
[36] See Wang, *supra* note 20 at 105.

this, and that is that "young blacks and Latinos are now the most educated people in this country on the traffic code."[37]

B. Arrests and Indictments

Some might say that racial profiling should be allowed as long as it results in the arrest of the guilty parties. Unfortunately for them, it doesn't; stopping and searching more blacks and Latinos is not helping police "hit rates."[38] In fact, in 1997 and 1998, New York City's elite "Street Crimes Unit" conducted almost 40,000 stop and frisks (mostly on blacks and Latinos), which turned up *no* evidence of any kind.[39] And of about 60,000 stops made on the suspicion that the suspect was carrying a weapon, the hit rate was actually higher for whites than it was for blacks.[40] In fact, out of 1.3 million traffic stops and searches conducted each year in this country, almost *90%* of them produce no evidence of any kind.[41]

When officers do uncover evidence, the results do not support profiling minorities. For example, even though blacks and Latinos were 78% of those stopped and searched in New Jersey, *whites* were "*almost twice* as likely to be found with contraband as blacks, and *five times* as likely to be found with contraband as Latinos – clearly not what the advocates of racial profiling would predict."[42] Yet even when whites are almost twice as likely to have drugs on

[37] Glasser, *supra* note 20 at 708.
[38] See Wang, *supra* note 20 at 103-04. "Hit rates" are "the rates at which police actually find contraband or other evidence of crime when they perform stops and searches." Id. See also Glasser, *supra* note 20 at 80 (finding that out of the disproportionate rates of blacks stopped and searched, they still had the same rates as whites when it came to having evidence on them, "show[ing] clearly that racial profiling and high-discretion police tactics *were not uncovering* [differences between blacks and whites in criminal activity]."); Nunn (2002), *supra* note 7 at 394 (The disproportionate rates are "obscene in the absence of a strong showing that African Americans are responsible for a comparable percentage of crime in the United States.")
[39] See Anthony C. Thompson, Stopping the Usual Suspects: Race and the Fourth Amendment, 74 N.Y.U. L. Rev. 956, 958-59 (1999).
[40] Harris, *supra* note 7 at 82.
[41] Id. at 100.
[42] Id. at 80. Even the Bureau of Justice Statistics confirms this: when traffic stops do turn up evidence, it is more often from whites and their cars than blacks and their cars. Id. at 100.

them during these traffic stops, blacks are *still* twice as likely to be arrested.[43] In fact, blacks are more likely than whites to be arrested for the same crime, even when both groups have similar demeanors with the arresting officer,[44] and *especially* when the black person has had previous encounters with the police.[45] The disparities also increase depending on the crime and city: overall, blacks are four times more likely to be arrested than whites for drugs;[46] for at least 30 major cities, the rate goes up to 10 times as likely, and for mostly-white neighborhoods, it ranges from 13 to *43* times as likely.[47] Blacks are 61.2% of all robbery arrests, 54.7% of all homicide arrests, and 43.2% of all rape arrests (even though only 33.2% of all women who said they had been raped said they were raped by a black man).[48] And these same disparities persist when one looks at who is being indicted/charged with these crimes. In 2002, in the 75 largest urban counties, 43% of defendants charged with a felony were black, 31% were white, and 24% were Latino.[49] Of the approximate 1.2 million drug arrests each year, 80-90% of those *prosecuted* are black men.[50] So even if we are finding the guilty parties, we certainly are not charging them all the same. Unfortunately, the disparate treatment does not stop there; it continues to the next phase of the criminal justice process, with sentencing and incarceration.

C. Sentencing and Incarceration

One would hope that even with the disparities in place, our CJS would be keeping crime at bay, or at least using its financial resources wisely to fight the crime rate. While this paper focuses on the more indirect effects of our incarceration rate, it is easy to see how crime is costly

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[43] Durose & Mumola, supra note 23 at 1.
[44] See Marvin D. Free, Jr., African Americans and the Criminal Justice System 77-8 (1996).
[45] Id.
[46] Clarence Lusane, In Perpetual Motion: The Continuing Significance of Race and America's Drug Crisis, 1994 Chi. Legal F. 83, 99 (1994); Rudovsky, *supra* note 7 at 269.
[47] Lusane, *supra* note 46 at 99.
[48] James Waller, Face to Face: The Changing State of Racism Across America 158 (1998).
[49] Cohen & Reaves, *supra* note 33 at 4.
[50] Powell & Hershenov, *supra* note 9 at 568.

at its most basic level. For instance, as of 2004, the cost of running prisons in America was $60 billion a year.[51] "During the 1990s, at a time when state coffers were overflowing and state corrections budgets were growing rapidly, investments were made in *facilities* and *personnel*, not programs."[52] As a country we spend six times more money to imprison *nonviolent* offenders than we spend on childcare for 1.25 million children, and 50% more than we spend on welfare for 8.5 million people.[53] Starting in 1995, states began to spend more money to build prisons than on higher education.[52] With all that funding, it would seem as if incarceration is one of our nation's top priorities; and if the leader of the industrialized world is spending a large portion of its time and resources on its correctional institutions, one would assume that it is going to have one of the best and most effective crime control rates in the world.

For 50 years those assumptions might have been true: between 1920-1970, the U.S. rate of imprisonment stayed at 110 per 100,000, which prompted researchers to suggest the rate would remain the same even if society had to adjust the laws or sentences to react to variations in the rate.[54] Unfortunately, their theory proved false; by 2002, the rate had risen to 476 per 100,000;[55] as of 2005, 2,320,359 persons incarcerated in our prison system;[56] and as of mid-2007, the rate rose to a whopping 762 per 100,000.[57] Our country seems to have a fixation with locking people up instead of trying to help them,[58] which has resulted in at least 23 state and

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[51] Jeremy Travis, But They All Come Back: Facing the Challenges of Prisoner Reentry 24-25 (2005); Michael Jacobson, Downsizing Prisons 53 (2005).
[52] Id. at 107.
[53] Vincent Schiraldi & Jason Ziedenberg, The Punishing Decade: Prison and Jail Estimates at the Millennium 6 (May 2000), available at http://www.justicepolicy.org/downloads/punishingdecade.pdf.
[52] Id.
[54] Travis, *supra* note 51 at 21-22.
[55] Id. at 23.
[56] Paige M. Harrison & Allen J. Beck, Prisoners in 2005 1 (Nov. 2006), Bureau of Justice Statistics No. NCJ 215092.
[57] See Int'l Centre for Prison Studies, Prison Brief – Highest to Lowest Rates (December 6, 2007), available at http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/.
[58] See Travis, *supra* note 51 at 29 (some researchers attribute the rise in prison rates of 63% to increased rates of prison as the form of punishment).

federal prisons functioning above capacity.[59] Our incarceration rate is five times more than any other industrialized country, and seven to twelve times more than any other country in the world.[60] As will be discussed below, one of the main reasons for this dramatic increase in our incarceration rate has been our approach to the "War on Drugs." Indeed, one author suggests that in order to decrease the rate significantly, "we would have to radically restrict the use of imprisonment as the dominant weapon in the war against drugs."[61] And even though the incarceration rates are going up, crime rates have been stabilizing (and in some cases decreasing) in recent years, which indicates that we are using imprisonment as a far more *frequent* punishment than other sanctions. Something needs to change, because if the rates stay the same, "nearly 1 in 15 persons born in 2001 will be imprisoned during his or her lifetime."[62]

There has to be at least one rational explanation for why policymakers are not sprinting to make changes in our incarceration rates. Besides the obvious problems they cause, these incredibly high and disproportionate rates have lead to severe prison overcrowding and a high demand for outsourcing to private prisons. California, for instance, opened almost two-thirds of its 33 prisons in the 1980s and 1990s.[63] From 1987 to 1998, the number of private prisons constructed nationwide went from 3,100 to 116,626, "an increase of more than 35-fold" in just a little over a decade.[64] Perhaps one explanation for the legislature's inaction is the profit private citizens are making from the private prison industry, which currently totals $1 billion a year.[65] That kind of investment allows for more politics and less rationality to come into play in our CJS: indeed, many lobbyists on behalf of the private prison industry have been "quite

[59] Id. at 7.
[60] Tonry (2004), *supra* note 12 at 3.
[61] Id. at 37.
[62] Id. at 84.
[63] Angela Y. Davis, Are Prisons Obsolete? 15, 17 (2003).
[64] Jacobson, *supra* note 51 at 64.
[65] Id.

sophisticated in their dealings with state and federal legislatures to lobby for more business [i.e., more people to put in jail] and a greater market share [i.e., more people to put in jail]."[66]

Yet even with this good investment for those business-savvy individuals, a steadfast goal of putting more bodies in prison cells places a heavy strain on the states' budgets, which means a heavier strain on the taxpayers' pockets. For example, during 2002-2003 over half the states reduced their budgets for correctional facilities, with cuts varying from closing down, to reducing the capacity of their facilities, to reducing their staffs and/or eliminating educational programs.[67] Many have simply added to their overcrowding by forcing prisoners to double up in cells.[68] So while high incarceration rates can help a few private business owners, it certainly does not make sense for the well-being of the prisoners or the rest of the state.

And who are the recipients of this irrational "lock 'em up" policy? They are disproportionately minority males, of course! Blacks are (not surprisingly) *less* likely to receive probation, more likely to be sent to jail/prison, and more likely than whites to receive longer sentences.[69] By race, 1 in 3 black males, 1 in 6 Latino males, and 1 in 17 white males can expect to be incarcerated at some point in their lives.[70] Blacks make up only 13% of the national population,[71] yet as of 1991 our country imprisoned more blacks than it did whites.[72] In fact, blacks are now over *6.6 times more likely* than whites to be incarcerated,[73] with black *men 8*

[66] Id. at 65.
[67] Id. at 85.
[68] Id. at 86.
[69] Rosalyn D. Lee & Kenneth A. Rasinski, Five Grams of Coke: Racism, Moralism and White Public Opinion on Sanctions for First Time Possession, 17 Int'l J. Drug Pol'y 183-191, 183 (2006).
[70] Thomas P. Bonczar, Prevalence of Imprisonment in the U.S. Population, 1974-2001 1 (Aug. 2003), Bureau of Justice Statistics No. NCJ 197976.
[71] Glasser, *supra* note 20 at 718-19.
[72] Tonry (1995), *supra* note 13 at 59. In fact, black males comprise only 5% of the national population, yet *half* of those incarcerated. Powell & Hershenov, *supra* note 9 at 569.
[73] Schiraldi & Ziedenberg, *supra* note 53 at 5; see Tonry (1995), *supra* note 13 at 28 ("On any given day, blacks are six to seven times more likely than whites to be in jail or prison.")

times more likely than white men.[74] Broken down per 100,000 of the U.S. population, there are currently 3,145 black males incarcerated, versus 1,244 Latino males and 471 white males.[75] Perhaps the gravity of these numbers can be better understood as follows:

> The number of Black men deprived of freedom is now approaching numbers seen only in the worst days of slavery. Already, the nation is locking up the same number of African-American men as were enslaved in 1820. Assuming the average rate of imprisonment for the last decade continues, only fifteen years remain before the Black male inmate population will catch up with the number of male slaves on the eve of the Civil War.[76]

Indeed, by 1993, black men in America were being imprisoned at more than four times the rate of black men in South Africa.[77] As of 1992, there were more young black males in prisons than there were attending colleges.[78] Around the same time, minorities in New York City made up 95% of the city's jail population.[79] In fact, 80% of those imprisoned at Rikers Island come from just *seven* New York City neighborhoods.[80] And even now, *three in* four black men will go to prison in Washington, D.C.[81] Unfortunately, the disparities continue even when it comes to the length and severity of the sentences.[82]

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[74] Nunn (2002), *supra* note 7 at 381.
[75] U.S. Dept. of Justice, Bureau of Justice Statistics, Prison Statistics (Jan. 21, 2007), available at http://www.ojp.usdoj.gov/bjs/prisons.htm.
[76] Graham Boyd, Collateral Damage in the War on Drugs, 47 Vill. L. Rev. 839, 846 (2002).
[77] Ira Glasser & Loren Siegel, "When Constitutional Rights Seem Too Extravagant to Endure" *in* CRACK IN AMERICA 229-248, 229 (Craig Reinarman & Harry G. Levine, eds. 1997).
[78] Terry D. Johnson, Unbridled Discretion and Color Consciousness: Violating International Human Rights in the United States Criminal Justice System, 56 Rutgers L. Rev. 231, 233 (2003).
[79] Powell & Hershenov, *supra* note 9 at 611.
[80] Todd R. Clear, Backfire: When Incarceration Increases Crime 1-20, 9 (1996) *in* VERA INSTITUTE OF JUSTICE, THE UNINTENDED CONSEQUENCES OF INCARCERATION.
[81] Travis, *supra* note 51 at 122.
[82] See Travis, *supra* note 51 at 28 (Less than a decade after the "War on Drugs" was announced, sentences for drug offenses increased a fully year in length); see also Jacobson, *supra* note 51 at 12 (By the end of the 1990s, the average sentence was a full seven months longer than it was at the beginning of the decade); Nunn (2002), *supra* note 7 at 398 (Even when both blacks and whites are charged with the same crime, blacks are still receiving longer sentences and are less likely to receive a favorable plea deal).

The CJS's policy seems to be locking more people up for longer periods of time, no matter what effect it has on the prisoner or the rest of society.[83]

D. Parole

One method of transitioning offenders back into society has been parole. Going from living in an 8x10 cell with very little freedom to living in society is an unbelievably drastic and almost immediate change. Parolees (especially those convicted of violent crimes) should be subjected to certain conditions as part of their parole, in order to maintain order and safety in their lives and the lives of those with whom they interact.[84] The question is: when do those conditions cross the line from being necessary to becoming excessive? Conditions of parole are supposed to help the offender transition into a law-abiding life, not further punish the offender after his time has already been served. Unfortunately, researchers have found that the current parole system "has little effect on rearrest rates of released prisoners."[85] Over 90% of all parolees have at least one prior conviction on their record;[86] but perhaps these results are not showing the bigger picture of recidivism. The studies used do not compare parolees with their "unsupervised counterparts,"[87] and therefore cannot attest to the recidivism rate of prisoners who are released without parole supervision.[88] Maybe parolees have a high recidivism rate because it is easier to catch them. If that is the case, one would reasonably expect that the more dangerous criminals would be the ones placed on parole. Yet interestingly, more prisoners are released

[83] Travis, *supra* note 51 at 106 (Unfortunately for those who support longer sentences, the length of the sentence has been proven to have "no effect on the probability of rearrest.")
[84] Conditions include obeying the law, reporting to the parole officer when required, answering questions, not carrying a weapon without authorization, staying within the jurisdiction, notifying their parole officer of any change in address, staying gainfully employed, paying fines/restitution, handling family obligations, undergoing any relevant treatment, paying supervision fees, attending training programs and doing community service. Travis, *supra* note 51 at 47.
[85] Amy L. Solomon et al., Does Parole Work?: Analyzing the Impact of Postprison Supervision on Rearrest Outcomes 1 (March 2005), *Urban Institute*.
[86] Id. at 5.
[87] Id. at 1.
[88] See id. at 7 ("Rearrests [of parolees] do not measure how much actual reoffending has occurred, but how much criminal activity has been *detected*, and supervision increases the likelihood that criminal activity will be detected.")

without supervision when they have committed a violent crime, and more likely to be chosen for parole by the court or parole board when they have committed a drug offense.[89] Indeed, "the public safety impact of supervision is minimal and often nonexistent among the largest shares of the release cohort – male property, drug, and violent offenders."[90] In addition to allowing the more dangerous element of ex-offenders to go unsupervised upon release, we again have racial disparities in who we place on parole. In 1994, over 50% of parolees were black;[91] by 2001, the majority of those on parole were young black males of lower education.[92]

As will be discussed below, the CJS (with the Court's help) appears to have turned parole into yet another form of punishment and disparate treatment for certain segments of the population, giving parole officers and members of law enforcement "far more discretion and far less accountability" in supervising parolees than is necessary to achieve the stated purposes of parole.[93] If and when these parolees are caught violating the conditions of their parole, our CJS has become more and more willing to handle these violations with incarceration.[94] Obviously imprisonment did not have a deterrent effect the first time around, or these parolees would not have violated their parole. Yet curiously, jail time is often seen as the appropriate remedy for parole violations. "We now send as many people back to prison for parole violations each year as the total number of prison admissions in 1980."[95] Not surprisingly, the powerful discretion to grant or revoke parole is not used proportionately; in fact, it is "concentrated in relatively few neighborhoods."[96] For example, 3% of the blocks in Brooklyn made up 9% of the city's

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[89] Id. at 6.
[90] Id. at 15.
[91] Id. at 5.
[92] Richard Freeman, Can We Close the Revolving Door? Recidivism vs. Employment of Ex-Offenders in the U.S. 4 (May 2003), available at http://www.ssw.umich.edu/events/CASD/freeman.pdf.
[93] Travis, *supra* note 51 at 46.
[94] Id. at 33.
[95] Id. at 40.
[96] Id. at 282.

population, yet 26% of its parolees.[97] With only a certain segment of the prison population placed on parole, it can lead to disproportionate targeting of certain types of parolees of a certain race or ethnicity (i.e., black and Latino drug offenders from the inner-cities). Unfortunately, our CJS has swayed from attempting to help our offenders get back to a normal life towards a policy summarized by the President of American Probation and Parole Association as "tail-'em, nail-'em, jail-'em."[98]

Racial disparities are blatant, and they appear during every step of the process. At the very least, there should be outrage from those receiving the disparate treatment (and there is). But for how color-blind our society holds itself out to be, one would expect there to be outrage from *every* segment of the population at how our young minority males are being treated by our CJS. So why have the disparities only gotten worse over time, to the complete ignorance of most voters? That question will be addressed in the next section.

III. Policy Decisions Resulting in Oppression, Racism, and Classism

American policy-makers have "created a punishment system that no one would knowingly have chosen, but that we do not know how to change."[99] One can assume that no one would want to *intentionally* create policies that perpetuate crime, and if asked, most Americans probably would not come out in support of blatantly racist or classist policies.[100] But that does not diminish the fact that several CJS policies, which have received a vast amount of public

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[97] Id.

[98] See Kelly Virella, Trapped by the System: Parole in America, (2003), *in* PRISON NATION: THE WAREHOUSING OF AMERICA'S POOR 100-105, 101 (Tara Herivel & Paul Wright, eds. 2003).

[99] Tonry (2004), *supra* note 12 at 3.

[100] See Lawrence Bobo, James R. Kluegel & Ryan A. Smith, Laissez-Faire Racism: The Crystallization of a Kinder, Gentler, Antiblack Ideology 15-42, 25 (1997) *in* Racial Attitudes in the 1990s: Continuity and Change (Steven A. Tuch & Jack K. Martin, eds.) (citing "sharp differences in level[s] of support between racial principles and policy implementation").

support,[101] have been found to be extremely racist in implementation.[102] Lawmakers spout demands for justice and tough punishment for offenders while campaigning for votes, even if the laws they propose will do more damage than good. "Political courage is required…to propose or support repeal of tough laws,"[103] and that courage is lacking from most politicians. But that lack of courage comes with little personal consequence;[104] a politician is never going to be thrown out of office for being *too* tough on crime. To the contrary, "[p]oliticians who show that they are "doing something" about rising crime rates and lenient sentencing by creating such ["tough"] laws can reap significant electoral benefits;"[105] "enacting laws denying ex-offenders the rights and privileges of citizenship is a virtually cost-free exercise in symbolic politics."[106] These policies hinge on public reactions, and are therefore created by gauging how the policies will be received.[107] For the past twenty-five years or so, that has meant looking tough on crime, although this was not always the case. One author points to the 1970s as the time when

> [t]he belief in the individualization of justice, the potential for redemption, and the goal of rehabilitation was roundly characterized as tantamount to coddling criminals. In addition, concern for offenders' reintegration was seen as the idealistic view of social engineers who minimized the offenders' propensity to cause harm.[108]

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[101] For example in 1994, when many states were just beginning to implement Three Strikes Laws (a.k.a. Habitual-Offender Statutes), 81% of the population were found to be in favor of the policy. See Brandon K. Applegate et al., Assessing Public Support for Three-Strikes-and-You're Out Laws: Global versus Specific Attitudes, 42.4 Crime & Delinquency 517-534, 518 (1996). In general, the majority of the public has consistently felt that sentencing is too lenient, especially for violent crime. See Jullian V. Roberts, Public Opinion and Mandatory Sentencing, 30.4 Criminal Justice and Behavior 483-508, 486 (2003).

[102] See Lusane, *supra* note 46 at 103 ("It has been shown that the most obvious effect of a law enforcement-driven approach is to discriminate against certain groups, destroying communities and countless lives in the process, while making little of a dent into the hard-core users, high-level traffickers, the invisible drug-using suburbs, or those people who have determined that they have nothing to lose.")

[103] Tonry (2004), *supra* note 12 at 15.

[104] I say personal consequence because there are obviously consequences from these policies; my point is that the responsibility for the waste of public funds, as well as the destruction of "the lives and interests of offenders, their families, and their communities" are not placed on the backs of the politicians who create these destructive and wasteful consequences. See id.

[105] Roberts, *supra* note 101 at 487.

[106] Travis, *supra* note 51 at 70.

[107] See David Shichor & Dale K. Sechrest, Three Strikes and You're Out: Vengeance as Public Policy 181 (1996).

[108] Travis, *supra* note 51 at 17.

Until the mid-1970s, prisoner reintegration into society was in a "prominent place" of our CJS policy.[109] Since then, there has hardly been a politician who did not seize the opportunity to show our citizens how tough he or she is on crime; even America's "First Black President" Bill Clinton[110] created policies contributing to the demise of his inner-city constituents.[111] Unfortunately, the days of rehabilitation as our national CJS policy goal seem to be over. Instead, the public wants someone to pay for our nation's crime; but because there are so many different social, political and economic forces that contribute to this problem, it is difficult to find exactly who and what to blame. So instead, "broad-based anxieties are displaced onto blamable criminals [who typically are the poor and/or racial minorities]."[112] These anxieties are strong and invasive, which in turn allow for *extremely* over-generalized beliefs that the inner-city is full of criminals, and that all its residents need to be contained and isolated from the "decent" members of society.

Of course it is difficult to create effective CJS policies; the idea of anything close to *helping* those who commit crime might seem perverse to some. There probably are not many people who would intentionally reward criminal behavior, and we as a society want to set an example that crime will not be tolerated. Yet there is also a part of us that understands to a certain extent *why* some people commit crime, and understands that certain criminals cannot become the citizens we would like them to be without the help of others. This confliction is heavy; "[w]e are at once afraid and resentful of criminals and yet troubled by our understanding

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[109] Id. at xvii.
[110] President Clinton officially received this honorary title at the 2001 Congressional Black Caucus Annual Awards Dinner. See Marc Morano, Clinton Honored As 'First Black President' at Black Caucus Dinner, CNSNews.com (Oct. 1, 2001).
[111] President Clinton's 1994 Crime Bill, for example, used $16.8 billion to hire more police officers, add new prisons, expand the death penalty to 16 new crimes and eliminate Pell Grants for prisoners seeking higher education. See Jacobson, *supra* note 51 at 62.
[112] Tonry (2004), *supra* note 12 at 51-52.

of the miseries that shaped them."[113] Currently, our CJS seems to be focused on the fear and resentment, with our recent policies focused on locking people up. Unfortunately, these policies have just as certainly destroyed entire communities and created/increased an intense distrust of the CJS with their implementation. The first and probably most destructive policy has been the War on Drugs and the creation of the Sentencing Guidelines, so that is where we will start.

A. The War on Drugs and the Federal Sentencing Guidelines

There are different theories as to why President Nixon instituted the War on Drugs, and why each of his successors have added to its intensity; some say it was a targeted War on Blacks, while others believe it was a genuine response to the deleterious effects drugs had on our citizens. There was certainly strong public support for cracking down on drugs, with certain points in the 1980s and 1990s where Americans placed crime and drugs at the top of the list of our country's "most pressing problem[s]" (whereas today, only 2% of Americans believe that is still the case).[114] The public push for a crackdown on crack is not surprising; crack users and dealers were and continue to be the most visible offenders, and were and continue to be the ones portrayed by politicians[115] and the media alike as the cause of many societal ills.[116] In fact, during one year at the height of the War on Drugs, just six of the nation's major news sources ran over 1,000 stories about crack, all seeming to depict blacks as "the crack whore, the welfare queen, and the crack baby."[117] Yet curiously, a similar "orgy of media and political attention" did not occur in the late 1970s when middle- and upper-class whites were heavily using *powder*

[113] Tonry (1995), *supra* note 13 at 8.
[114] Id. at 34.
[115] See Steiner & Argothy, *supra* note 8 at 452 ("By evoking drug war myths of the past in formulating the contemporary crack war, senators evoked the specific threat of white contamination by "predatory, dark-skinned pimps."")
[116] Tonry (1995), *supra* note 13 at 106.
[117] Bryony J. Gagan, Ferguson v. City of Charleston, South Carolina: 'Fetal Abuse,' Drug Testing, and the Fourth Amendment, 53 Stan. L. Rev. 491, 496 (2000).

cocaine.[118] So why the different treatment? Well, it was easy to put the spotlight on the inner-cities; those of a different class, racial composition, and status, with "fewer bonds to conventional society, less to lose, and far fewer resources to cope with or shield themselves from drug-related problems."[119] Big drug busts, even if unsuccessfully deterrent in the long run, at least "briefly disrupt the drug markets and so win media and public approval."[120] It might have been to set an example for white children to "Just Say No," but it ended up destroying "the lives of black and Hispanic ghetto kids…in order to reinforce white kid's norms against drug use."[121] No matter the purported reason for its creation, it is agreed that the War on Drugs has been one of the most racist CJS policies in recent history.[122]

In reality, drug dealers are not deterred by prison. Many of them look at prison as "a cost of doing business and immediately resume drug deals upon their return from jail or prison. Those dealers who do not return are quickly replaced."[123] So those who bear the brunt of these strict enforcement policies are treated as expendable, both by the dealers who hire them and the CJS who sends them to spend most of their lives behind bars. In the meantime, the War on Drugs continues to spend tens of *billions* of dollars a year, after almost forty years, to have almost no impact on the drug market.

One of the biggest weapons in this proverbial war against drugs has been the United States Sentencing Guidelines and its 100-to-1 ratio difference in its punishment of crack versus

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[118] Craig Reinarman & Harry G. Levine, The Crack Addict: Politics and Media in the Crack Scare *in* CRACK IN AMERICA 18-51, 18 (Craig Reinarman & Harry G. Levine, eds. 1997).
[119] Id. at 19.
[120] Gagan, *supra* note 117.
[121] Tonry (1995), *supra* note 13 at 97.
[122] See Powell & Hershenov, *supra* note 9 at 599-600 (providing four major ways that the War on Drugs targets minorities: (1) it furthers the health problems already related to poverty; (2) by focusing on reacting to the problem instead of trying to prevent it, it depletes resources that could be used to improve the social, health, economic and education problems inherent in these communities; (3) it targets young inner-city minorities who have few alternatives for a "good life" besides the illegal drug market; and (4) after having *created* the problem, it makes sure to stop, search, arrest, convict, and incarcerate minorities for these crimes).
[123] Michael Z. Letwin, Report from the Front Line: The Bennett Plan, Street-Level Drug Enforcement in New York City and the Legalization Debate, 18 Hofstra L. Rev. 795, 805 (1990).

powder cocaine.[124] It is easy to say that crack is a more powerful drug; that it is more physiologically addictive, that it leads to more crime in order for users to support their habits and, thereby, makes it more dangerous to our society than powder cocaine. In reality, crack is 10% less potent, no more physiologically addictive, no more likely than powder cocaine to prompt users to commit crime to help support their habits, and therefore little justification for 100 times the punishment that powder cocaine requires.[125] With that argument discredited, the justification became that because crack is a diluted form of powder cocaine and therefore cheaper and more accessible to a broader group of people, and because it provides a quicker and more intense high and therefore has the potential for more *psychological* (not physiological) addiction, its use should be punished more severely.[126] So until November 1, 2007,[127] five grams of crack cocaine equated to a *minimum* felony sentence of five years imprisonment, while any other drug charge carried a *maximum* misdemeanor sentence of one year in jail.[128] Certainly cocaine is a dangerous drug, but there was no justifiable reason to create a policy that punished crack use at 100 times the rate than it does for powder cocaine use. Instead, it was an opportunity to severely punish the lower-class users and the low-level dealers, while allowing the more profitable dealers and affluent users to remain relatively untouched.[129] Through the

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[124] See 21 U.S.C. § 841(b)(1)(A)(iii)-(B)(iii) (2006).
[125] See Gerald Uelmen, Racial Disparity, 2 Uelmen & Haddox, Drug Abuse and the Law Sourcebook § 9:9 (2006); see also United States Sentencing Commission, Report to the Congress: Cocaine and Federal Sentencing Policy 2 (May 2007) (the policy "continues to come under almost universal criticism from representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups, and inaction in this area is of increasing concern to many, including the Commission.")
[126] Id.
[127] On November 1, 2007, Amendment 706 went into effect, which implemented a 2-level reduction for the base level for each crack offense. See U.S.S.G. § 2D1.1; U.S.S.G. app. C, amend. 706 (Supp. 2007).
[128] Id.; see Lusane, *supra* note 46 at 98 (where one expert called the crack-powder discrepancy "arbitrary, capricious, silly, and Alice in Wonderlandish.")
[129] See Steiner & Argothy, *supra* note 8 at 469 ("The War on Drugs as an investment in whiteness thus results not only in the runaway criminalizing of African American and Latino/a American illegal drug use but simultaneously results in the runaway, perhaps unintended, underenforcement of white, middle and upper class drug use. Yet such underenforcement is nowhere to be found in the political and media rhetoric of the drug war.") As one newspaper

implementation of the Guidelines, the CJS managed to lock up most of the black males living in these communities.[130]

As if the sentencing discrepancy was not enough, the CJS *still* had to go a step further by implementing the sentences in a blatantly racist manner.[131] Even though over 92% of the crack defendants have been black,[132] they make up only 38% of the reported crack users in America.[133] In comparison, whites make up only 4.1% of the crack defendants, yet 52% of its reported users.[134] Even the FBI and the National Institute for Drug Abuse found that blacks make up only 12% of the drug users in America,[135] yet "by 1991 blacks were four times as likely to be arrested as were whites on drug charges."[136] In fact, the typical cocaine user is "a white male high school graduate living in a small city or suburb."[137] Not only that, but the United States Sentencing Commission itself has estimated that 65% of all *crack* users are white, making it irrational to say that black crack use is the biggest cause of inner-city blight. If anything, its focus on the inner-city black crack user has actually played a major part in *furthering* the "crack crisis."[138] Even attorney Heather MacDonald, an advocate of racial profiling in certain contexts and a *clear* conservative, admits that

> [t]here's not a single narcotics officer who won't freely admit that there are cocaine buys going down in the men's bathrooms of Wall Street investment firms

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pointed out, "It is not being soft on crime to insist on parity in penalties for the use of what is essentially the same drug in different forms." See Lusane, *supra* note 46 at 98.

[130] Uelmen, *supra* note 125. Eighty-eight point three percent of convictions for crack were against black defendants, compared to 4.1% against whites.

[131] In fact, the disparities increase at each step of the process: 13% of drug users are black, yet they are 35% of those arrested, 55% of those convicted, and 74% of those imprisoned for drug possession. Glasser, *supra* note 20 at 718-19.

[132] Steiner & Argothy, *supra* note 8 at 827-28.

[133] Uelmen, *supra* note 125; see Boyd, *supra* note 76 at 846 ("In some states…Blacks make up 90% of drug prisoners and are up to fifty-seven times more likely than Whites to be incarcerated for drug crimes.")

[134] Id.

[135] Powell & Hershenov, *supra* note 9 at 568.

[136] Eva Bertram et al., Drug War Politics: The Price of Denial 38 (1996).

[137] Letwin, *supra* note 123 at 795-96 (1990); Powell & Hershenov, *supra* note 9 at 610; Rudovsky, *supra* note 7 at 269.

[138] Letwin, *supra* note 123 at 827-28.

> – though at a small fraction of the amount found on 129th Street. But that is not where community outrage…is directing the police, because they don't produce violence and street intimidation.[139]

While many recognize that blacks are not using drugs at a greater rate than whites, it is also unlikely that blacks are *dealing* at higher rates than whites. Since users typically purchase their drugs from people of similar race and income, it is likely that the same white users who are not being detected by the police are buying from white dealers who likewise stay under the radar.[140]

Yet logistically, going after black users seems to make sense; who better to target? It is much easier to arrest drug users and dealers on the streets of the inner-cities than it is inside the homes and businesses of the suburbs.[141] And by associating a separate drug (crack) with an already stigmatized group (blacks), politicians can exaggerate how dangerous the drug is with the general public none-the-wiser.[142] Politicians used the already declining conditions of the inner-city poor to suggest that those who were *in* trouble were actually the ones *causing* trouble; "that drug use was not a symptom of urban decay but one of its most important causes."[143] "[T]hey made social control rather than social welfare the organizing axis of public policy."[144] This power over the politically weak and the socially vulnerable is also easy to abuse; who is going to sympathize with a drug user or dealer claiming they were framed? Who is going to believe them? What politician is going to listen to a bunch of crack-heads arguing that they were

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[139] MacDonald, *supra* note 4 at 20.
[140] Nunn (2002), *supra* note 7 at 395.
[141] Finzen, *supra* note 7 at 303. SWAT teams are sent into black neighborhoods to do "drug sweeps," "closing off entire neighborhoods and indiscriminately detaining and arresting large numbers of individuals." See Johnson, *supra* note 78 at 265. At the same time, the officers leave white neighborhoods "relatively under-enforced, and thus, not transformed into paramilitary drug war zones as poor, disproportionately African American and Latino/a American communities are." Steiner & Argothy, *supra* note 8 at 455. "[W]hites are, in effect, kept out of the drug war." Id. In fact, a perfect example of the CJS shielding whites from the harsh Federal Guidelines is the fact that in Los Angeles from 1986-1995, not a *single* white person was convicted of using or dealing crack in federal court; instead, they were all charged in state court, where the sentence was up to eight years less than in federal. See Uelmen, *supra* note 125.
[142] Don C. Des Jarlais, Prospects for a Public Health Perspective on Psychoactive Drug Use, 90.3 Am. J. Public Health 335-337, 336 (March 2000).
[143] Reinarman & Levine, *supra* note 118 at 41.
[144] Id. at 37.

being punished too severely when compared to their white counterparts because the system politicians helped to create is racist? Even officers who might know of the abuse are afraid to expose the misconduct, leaving it to be "shielded from exposure by the traditional 'blue wall of silence.'"[145] Through selective exposure to the reality of our Nation's drug problem, public perception has become extremely racial; the public connects blacks to the "immorality of drugs" and its more illicit effects, while it views white drug abuse as private and health-related.[146]

The effect of the War has obviously not been the elimination of the drug trade; if anything, it has been to lock up hundreds of thousands of people,[147] to the point where prisons are at twice their capacity in order to house our Nation's poorest and our racial and ethnic minorities.[148] As of 2005, almost 1 in 5 state inmates were in prison for drug trafficking.[149] At the federal level, 55% of prisoners were in for drug-related offenses.[150] This creates an unbelievable financial burden on our taxpayers. The federal budget for drug enforcement alone[151] went from $1.65 to $18 billion in just 16 years,[152] with the DEA's budget increasing

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[145] Letwin, *supra* note 123 at 823-25; see Cloud, *supra* note 19 at 1352 ("The Mollen Commission recently stressed what participants in the criminal justice system already know: Most police officers are honest, most have idealistic reasons for becoming police officers, and most abhor corruption within their ranks. But the Commission also emphasized that even honest officers obey the code of silence that protects their dishonest colleagues."); id. at 1346 (For example, in 1995 in Philadelphia, 42 drug-related convictions were reversed on appeal due to "falsified police reports, illegal tactics and perjury by officers in one police district.")

[146] Steiner & Argothy, *supra* note 8 at 444.

[147] See Nunn (2002), *supra* note 7 at 393 ("Since the declaration of the War on Drugs in 1982, prison populations have more than tripled."); Frank O. Bowman, III, The Failure of the Federal Sentencing Guidelines: A Structural Analysis, 105 Colum. L. Rev. 1315, 1329 (2005) (from 1980 to 2002, the number of federal prisoners went up *600%*).

[148] See Powell & Hershenov, *supra* note 9 at 558-59 ("By now…it is clear that the war on drugs has not extinguished the drug trade. Rather, the real victims of this war are the minority poor and the Bill of Rights… In addition, in minority communities, there is a sense of loss of control and despair as the drug war consumes their neighborhoods."); see also Lusane, *supra* note 46 at 102 ("If there is a lesson to be learned from the most recent drug war disaster, it is that this is not a problem that can be arrested away. Going after low-level dealers and desperate addicts, both more visible in inner-city, low-income black neighborhoods, is not a war on drugs, but a war on particular communities.")

[149] Durose & Mumola, supra note 23 at 1.

[150] Harrison & Beck, *supra* note 56 at 10.

[151] Combine the enforcement and adjudication costs with what it takes to treat the health consequences and create prevention initiatives and that cost goes up to $36.4 billion for 2002. Office of Nat'l Drug Control Policy, The Economic Costs of Drug Abuse in the United States, 1992-2002 vi (Dec. 2004).

400% from 1981-1992.[153] This dramatic increase is due, in large part, to President George H. W. Bush, who spent more on the War on Drugs "than all other presidents since Nixon combined."[154] As of 12:15p.m. on October 6, 2008, our state and federal governments combined had spent $38,929,333,631 on the War on Drugs for the year.[155] One would hope that with this large of a budget, the War would at *least* have some deterrent effect on drug use; yet "criminalization has had little, if any, deterrent effect on crack abuse or trafficking."[156] Policymakers hinged their severe treatment towards crack use on the fact that crack is more psychologically addictive than powder cocaine, and therefore, if left untreated, can almost *guarantee* recidivism. Therefore, one would think that our CJS policy would be to rehabilitate crack users at the same time we are punishing them for their crimes. Yet we, as a nation, are actually *reducing* the percentage of our drug war funding on the health aspects, and *increasing* the percentage we spend on punishing these offenders.[157] We target the poor, who are already less likely to have adequate health care; we send them to longer sentencing terms, deny them

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[152] Glasser, *supra* note 20 at 718.
[153] Reinarman & Levine, *supra* note 118 at 21.
[154] Id.
[155] The time and date are not significant; it is merely the last time I checked the clock. See Drugsense.org, Drug War Clock (2007), available at http://www.drugsense.org/wodclock.htm/. I would like to thank Attorney George J. West for providing this link; it is just another testament to how well versed some people within the CJS are at the injustices of the War on Drugs. My hope is that one day every citizen can be a little more understanding of the War's devastating impacts, and that together we can make some *effective* drug control policies in this country.
[156] Letwin, *supra* note 123 at 827-28; see Bertram et al., *supra* note 136 at 13 ("Like the mythical sea serpent that Hercules battled, the drug trade is an elusive enemy: each time one head of the hydra is cut off, two more grown in its place. Often, attempts to suppress the trade in one locale simply encourage new recruits or veteran suppliers to set up operations elsewhere to meet the demand for their product.")
[157] Office of Nat'l Drug Control Policy, *supra* note 151 at ix; see Michelle Waul, Jeremy Travis & Amy L. Solomon, Background Paper: The Effect of Incarceration viii (2002), available at http://www.urban.org/UploadedPDF/410632_HHSConferenceBackground.pdf ("only 10 percent of state inmates in 1997 reported receiving professional substance abuse treatment, down from 25 percent in 1991. Of the soon-to-be-released population, 18 percent of those with a substance abuse problem received treatment while incarcerated."); Michael Tonry, Race and the War on Drugs, 1994 U. Chi. Legal F. 25, 25 (1994) (Our current funding is now split 70% for enforcement and 30% for treatment and educational programs); Joan Moore, Bearing the Burden: How Incarceration Weakens Inner-City Communities 67-90, 69 (1996) *in* THE UNINTENDED CONSEQUENCES OF INCARCERATION.("Government funds and services have dwindled…Drug treatment programs have a low priority in the so-called war on drugs. And government-funded community-based organizations have been disappearing since the late 1970s.")

adequate treatment programs, and then send them back out to recidivate once again. Not only that, we permanently ban those serving time on a drug-related offense from receiving any federal welfare benefits or food stamps, as well as deny them supplemental income and access to public housing.[158] What is most dangerous to the public is that many *violent* criminals are being released from prisons each year in order to make room for the insane number of nonviolent criminals being sentenced under the Guidelines.[159] With this nonsensical approach, why are we surprised at the results we are seeing?

Now of course, some might point out that the Federal Guidelines are now "advisory" instead of mandatory, and that judges could simply refuse to impose such disparate treatment on drug users.[160] But the Supreme Court, not even three years after it recognized the crack versus powder discrepancy and invalidated the mandatory nature of the Guidelines, noted that appellate courts may treat a within-the-Guidelines sentence as "presumptively reasonable."[161] Hopefully, we will start to see some changes, given that the ratio was *slightly* reduced in November of 2007. Sadly, for those who were punished under the 100-to-1 ratio, the damage is already done. As for the War on Drugs, it has been in place for over 30 years and has been an abysmal failure.[162] With any luck, the War on Drugs will soon come to an end. That way, we can cut our losses and start fresh with a more effective, logical policy towards drug abuse. For now, we can sit back and watch our tax dollars and our young minority males waste away, so our politicians can look "tough on crime."

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[158] Waul et al., *supra* note 157 at xxiii.
[159] See Lisa E. Cowart, Legislative Prerogative vs. Judicial Discretion: California's Three Strikes Law Takes a Hit, 47 DePaul L. Rev. 615, 640 (1998).
[160] See U.S. v. Booker, 543 U.S. 220, 245 (2005).
[161] See Rita v. U.S., 127 S.Ct. 2456 (2007).
[162] See Bertram et al., *supra* note 136 at 3 ("Despite convincing, publicly available evidence that the war on drugs has not addressed the nation's problems of drug abuse and addiction, the U.S. government has consistently refused to engage in a serious reevaluation of the strategy or a search for a different approach. What we face is a politics of denial.")

B. Mandatory Minimums

Each state, the District of Columbia, and the federal government have mandatory minimums, although their severity and starting points differ.[163] As of 1991, there were about 100 federal mandatory minimum sentences; *four* of which account for 94% of the cases imposing these sentences. The four used should come as no surprise: they are for manufacturing/distributing drugs, possessing drugs, importing/exporting drugs, and carrying a firearm during a drug/violent crime.[164] Given the fact that drugs are a factor in all four, and minorities are by *far* more susceptible to harsher drug penalties, one should not be bowled over that blacks are 21% more likely than whites to be sentenced under these mandatory minimums; Hispanics, 28% more likely.[165] The United States Sentencing Commission has acknowledged that the sentences are applied differently based on race.[166] Even Justice Kennedy has been quoted as saying that mandatory minimums are "unwise and unjust."[167] These sentences have been used to punish low-level offenders, thereby wasting even more judicial resources that could be better used to deal with higher level offenders.[168] Yet again, another race-based policy that has helped to contribute to the burst in prison rates since the 1980s.[169] Indeed, it is another policy from the 1980s where the government decided to increase the *length* of sentences for certain crimes. For violent crimes, it has doubled from 1984 to 1993; for drug-crimes and gun

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[163] See Cowart, *supra* note 159 at 634-35.
[164] U.S. Sentencing Commission, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 11 (Aug. 1991), available at http://www.ussc.gov/r_congress/MANMIN.pdfhttp://www.ussc.gov/r_congress/MANMIN.pdf.
[165] Lusane, *supra* note 46 at 97.
[166] See id.
[167] See Travis, *supra* note 51 at 4.
[168] Lusane, *supra* note 46 at 97.
[169] See id. at 96.

convictions, the length has tripled.[170] Hopefully, through honest discussions, our politicians can own up to how ineffective and racist these statutory minimum sentences can be.

C. Three Strikes Laws and Habitual-Offender Statutes

Finally, we have Three Strikes laws. Even when created for a good reason, the best-laid plans can go awry, and Three Strikes laws are a perfect example of that. The first of these laws was enacted in California, after a repeat offender abducted and murdered a little girl. At the time the bill was up for vote, more than 80% of Americans were in favor of it.[171] Unfortunately, it turned out to be "the latest in a string of fast-paced, punitive-oriented, heavily media-covered crime panaceas that periodically sweep the nation."[172] The law punishes a second-time violent or serious felon with double the time they received for their first offense. Once the offender gets convicted of a third felony, *no matter what the third felony is for*, the offender receives a prison sentence of 25 to life. Twenty-four states currently have some version of the law in place,[173] although most tend to be less severe than California's.[174] Even the federal government implemented its own version of the law, requiring life in prison for an offender's third violent felony.[175] Sadly, most states do not require that the third offense be a violent crime; in fact, Three Strikes laws are often used on *non*-serious or *non*violent third offenses.[176] Some ridiculous, yet illustrative examples include: a life sentence for stealing two packs of cigarettes; a

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[170] Ian Weinstein, Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing, 40 Am. Crim. L. Rev. 87, 106 (2003).
[171] Shichor & Sechrest, *supra* note 107 at 179; Applegate et al., *supra* note 101.
[172] Id.
[173] Jacobson, *supra* note 51 at 19.
[174] See Cowart, *supra* note 159 at 625. Rhode Island's Habitual Criminals law, for example, requires it to be your third felony after two previous *separate* felonies where the offender has served time in prison for it, and the sentence cannot exceed 25 years. R.I.G.L. § 12-19-21 (1988).
[175] 18 U.S.C.A. § 3359(c).
[176] On one count by the California Department of Corrections, of the 15,300 criminals who have been sentenced under the law, 85% of those convicted under the law were convicted of nonviolent crimes for their third offense. See Carl Ingram & Geoff Boucher, Serious Crime Falls in State's Major Cities, L.A. TIMES, March 13, 1996, at A3.

life sentence for stealing *one piece of pizza*; a 25-year sentence for stealing four cookies;[177] a 25-year sentence for stealing three golf clubs; and a 50 to life sentence for stealing $153 worth of videotapes.[178] The statute was enacted to keep violent, repeat offenders off the streets. Yet it has created such intense prison overcrowding that prisons have had to release the more "dangerous" element of our prison population to make room for our nonviolent, poor, and minority citizens.[179] This cannot be what the legislature intended. So why is it still in place?

D. The Policy-Makers

Even the most well-intentioned policies can be devastating to those it affects. So why aren't the people who are harmed by these policies taking a stand against them? Probably because they have either been disenfranchised from the political process altogether, or have very little political power to do anything about it. Why doesn't the rest of society take a stand against these injustices? The answer to this seems to be at least partially perception-based; those who have the power to change it do not seem to comprehend its full effects. At the most basic level, the legislature creates our CJS policy. Because our legislature is democratically elected, their power is going to depend on the demands of their voting constituency. The voting constituency are those with voting power and political pull (i.e., the middle- and upper- classes), which leaves the poor with little influence on how these policies are shaped. It is the ruling class that decides what "crime" is, how to punish violators, and which values to protect within the CJS;[180] all of which is "eminently political."[181] Yet the powerful oppressing the weak is nothing new; Justice Jackson found that "nothing opens the door to arbitrary action so effectively as to allow those

[177] See Cowart, *supra* note 159 at FN37.
[178] Michael C. Dorf, Megan's Law. Copyright, Free Speech Among Issues Before Supreme Court, CNN.com/Law Center, Oct. 8, 2002, available at http://archives.cnn.com/2002/LAW/10/08/findlaw.analysis.dorf.scotus/index.html.
[179] As of 1998, California's prisons were at 192% capacity, with some of its jails at over 200%. See Cowart, *supra* note 159 at 660.
[180] Paul Wright, "Victims' Rights" as a Stalking-horse for State Repression 60-64, 60, in *Prison Nation: The Warehousing of America's Poor* (Tara Herivel & Paul Wright, eds. 2003).
[181] Nunn (2002), *supra* note 7 at 385.

officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected."[182]

> What is defined as crime determines who is oppressed in American society and simultaneously legitimates that oppression. In this way, crime can mask racial oppression by allowing it to be represented as a legitimate response to wrongdoing. At the same time, labeling conduct that is associated with a particular racial group as criminal can create racial animosity toward that group.[183]

Although it is understandable that the middle- and upper- classes feel vulnerable to crime and want tougher punishments for criminals,[184] those who are shaping the policy are not the ones experiencing its biggest effects, nor are they in the greatest need of its protection. Those of higher income seem to be most fearful of crime, yet are the *least* likely group to be its victims.[185] It is the poor and the racial minorities in our country who are in need of *effective* CJS policies, yet they are the ones who "have little political power to control these circumstances."[186] When there is a large concentration of the poor living in one district, it can lead to "public disinvestment,"[187] with social isolation of these communities also meaning political isolation.[188] Even when the general public has supported policy changes to improve our inner-cities, the policies are still found to be "insufficient," never really having the impact needed to make a significant change.[189] And that holds true for most CJS policies. Many may not be intentionally

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[182] Railway Exp. Agency v. People of State of N.Y., 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).
[183] Id. at 384-85.
[184] Tonry (2004), *supra* note 12 at 54.
[185] Jeffry A. Will & John H. McGrath, Crime, Neighborhood Perceptions, and the Underclass: The Relationship Between Fear of Crime and Class Position, 23 J. Crim. Just. 163-176, 164 (1995); see Frank Clemente & Michael B. Kleiman, Fear of Crime in the Unite d States: A Multivariate Analysis, 56 Soc. Forces 519-531, 523 (1977) (While the opposite is true for property crimes, "individuals in the higher income level have the lowest rate of victimization [for crimes against the person]").
[186] Lusane, *supra* note 46 at 91.
[187] Brown et al., *supra* note 25 at 96; see Victor E. Kappeler, Richard D. Sluder & Geoffrey P. Alpert, Forces of Deviance: Understanding the Dark Side of Policing 7 (1998) ("Lower socioeconomic areas within most urban cities experience the greatest crime rates, generally contain a higher number of minorities, and receive fewer social services from the police.")
[188] Brown et al., *supra* note 25 at 96.
[189] Id.

racist or classist. Many may be well intentioned to reduce crime and to rehabilitate our offenders. But without a unified front and a better understanding of how these often-conflicting policies interact,[190] they will never be enough to make a *substantial* difference in our crime rates.

When citizens are educated on the issue, they are found to be far more willing to support treatment instead of imprisonment for those in need of rehabilitation.[191] But if the voting constituency has no firsthand knowledge of how the policies are affecting the inner-cities, they might innocently believe that harsh punishment and constant police supervision will work best at preventing crime. Unfortunately, "our attention and sympathy for crime victims varies according to how accustomed we are to seeing them – or, to be more precise, people like them – suffer crime and violence."[192] The general public's lack of empathy for how they will impact these communities is unintentionally doing more harm than good. "The police…are inclined to provide the protection their citizen-employers demand; otherwise…[they would be] subject to sharp criticism for their failure to protect the public."[193] Now, more than ever, the general public is demanding heavy police protection.

What is unfortunately not in high public demand right now is protection against Fourth Amendment intrusions. One author points out that "the first and last time in American history where the majority of the population vigorously supported the Fourth Amendment" was in the 18th century, when basically every American home was continuously searched for evidence

[190] See Steiner & Argothy, *supra* note 8 at 460 (a reason why many whites have such negative opinions of blacks (believing them to be incompetent, lazy, and prone to criminal activity) and Latinos (believing them to be less educated and "more prone to violence") is because many whites are "[u]naware of the ghettoizing effects of [CJS] policies," and therefore end up "reaffirm[ing] their own superior identities" by supporting the policies with a clear conscience).

[191] See Tonry (2004), *supra* note 12 at 36.

[192] Wang, *supra* note 20 at 92; see Lusane, *supra* note 46 at 94 (Viewpoints of the effectiveness and racial neutrality of CJS policies differ by race, with 70% of blacks versus 33% of whites believing in 1993 that laws needed to be less racially discriminatory).

[193] O.W. Wilson, Police Arrest Privileges in a Free Society: A Plea for Modernization 21-28, 25 (1962) *in* Police Power and Individual Freedom: The Quest for Balance (Claude R. Sowle, ed.).

proving violations of the Stamp Act.[194] "[I]t was because of the anger about that kind of intrusion that the Fourth Amendment was passed after the Revolution."[195] Now that most of us are not subjected to such intrusions, it makes it hard to demand for and defend the Fourth Amendment rights of those "whose rights are still commonly violated and always at risk."[196] Most Americans probably could not tell you what their Fourth Amendment rights are, yet certain communities are denied those rights each and every day. The time of vigorous protection of such rights by a majority of the population has passed; the need for it has not.

A lot of Americans think crime exists because criminals are bad people, or because we are being too soft on them in our criminal sanctions.[197] This kind of thinking is largely due to how crime is portrayed in the media. Sensationalism sells, which means that most of the crimes given media attention are either violent or drug-related. That, in turn, leads many citizens to believe that these crimes are occurring more frequently than they really are, that the sentences for these crimes are too lenient, and that the crime rate must be going up even when it is actually going down.[198] The media portrayal depends heavily on race, and its impact on the public's perception is quite evident. Even though the majority of drug users are white, 95% of respondents in a recent study envisioned a black person when asked to describe the average drug user.[199] In fact, viewers are twice as likely to believe that the offender in any given news story is black, even when no specific reference is made to the suspect's race.[200] Our society has managed to link young black males with crime so strongly over the last few decades that "it is

[194] Glasser, *supra* note 20 at 705-06.
[195] Id. at 706.
[196] Id.
[197] Tonry (2004), *supra* note 12 at 12-13.
[198] Id. at 34-35. In fact, "[t]he most intrusive laws and the cruelest penalties tend to be enacted *after* intolerance has reached its peak and when drug use is already falling." Tonry (1995), *supra* note 13 at 93.
[199] Steiner & Argothy, *supra* note 8 at 463.
[200] Ted Chiricos, Kelly Welch & Marc Gertz, Racial Typification of Crime and Support for Punitive Measures 42.2 Criminology 359-389, 363 (2004).

unnecessary to speak directly of race, because talking about crime *is* talking about race."[201] If change is going to come, our first step must be with honest perceptions of the problem, not with what will win Sweeps Week.

Perhaps sensationalism can be kept at a minimum, so that our CJS policies can stop going "in virtually the opposite directions [of those] advocated by academic and governmental experts and practitioners."[202] Perhaps with honesty we can begin to break down our racial prejudices, and allow each segment of society to contribute to the policies our elected officials make on our behalf. But in order to create the best CJS policies, we must first understand how other factors of life impact and interact with the system. It is only when we see the bigger picture that we can decide how to combat and prevent crime in America, and start rebuilding our inner-city communities.

IV. Other Factors that Affect the Inner-City

Treating crime as if it exists independent from housing, education and the economy will make "honest policymaking impossible."[203] "[O]ur imprisonment policies not only send people to prison, but they also create ripple effects that undermine our society's efforts to promote safety, child and family welfare, strong labor markets, safe and affordable housing, healthy individuals, civic participation, and vibrant neighborhoods."[204]

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[201] Melissa H. Barlow, Race and the Problem of Crime in 'Time' and 'Newsweek' Cover Stories, 1946 to 1995, 25.2 Social Justice 149-183, 151 (1998).
[202] Jacobson, *supra* note 51 at 27.
[203] Tonry (1995), *supra* note 13 at 41. How can we have effective policies when we constrict the lifestyles and opportunities of our ex-felons on the one hand, yet on the other expect them to make a living, support their families, obey the law, and generally rehabilitate themselves with no help from others? See Travis, *supra* note 51 at 250.
[204] Travis, *supra* note 51 at 86; see Marc Seitles, The Perpetuation of Residential Racial Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies, 14 J. Land Use & Envtl. Law 89, 103 (1996); see Kingsley & Pettit, *supra* note 209 at 2 ("[T]hose living in high-poverty areas at the end of the decade were still 3.4 times more likely to be receiving public assistance, 2.3 times more likely to lack a high school degree, and 2.6 times more likely to be unemployed than metropolitan residents on average.")

A. Housing

One of the most influential factors has been and continues to be the status of housing. It has been over fifty years since school segregation was declared illegal, and yet we still continue to live in a residentially segregated society, with African Americans continuing to be the most segregated group.[205] In fact, blacks are still found to be more likely to live in segregated neighborhoods,[206] less likely to be homeowners, and less likely to receive favorable terms on a mortgage than are whites.[207] Even when income is taken into account, poor blacks are still 27% more likely than poor whites to live in high-poverty census tracts.[208] While this might make for understandably safer, aesthetically pleasing suburbs for many whites and more affluent minorities, it has left the inner-cities to be breeding grounds for crime, social disorder, and deplorable conditions[209] with a severe lack of affordable housing for their residents,[210] leaving an increasing number of them to become homeless.[211] With fewer taxes to spend on social and civil institutions, the inner-city cannot afford to maintain its neighborhoods or demand more police

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[205] Brown et al., *supra* note 25 at 14.
[206] See Peter Dreier, The New Politics of Housing 63.1 J. Am. Planning Assoc. 5-27, 11 (1997) (As of 1997, 62% of blacks were living in areas with a 60% or higher black population, and 40% of Latinos were living in areas with a 60% or higher Latino population. For whites, at *least* 2/3rds lived in essentially all-white neighborhoods.)
[207] Id.
[208] Jacobson, *supra* note 51 at 62.
[209] See G. Thomas Kingsley & Kathryn L. S. Pettit, Concentrated Poverty: A Change in Course, 2 Neighborhood Change in Urban America 1-11, 2, 4, 10 (May 2003) (In 2000, 43% of adults in high-poverty neighborhoods did not have a high school degree; the residents were 3.4 times more likely to be receiving public assistance, 2 times more likely to have a female-headed household, and 2.6 times more likely to be unemployed than residents in other metropolitan areas); see also Richard D. Bingham & Zhongcai Zhang, The Economies of Central-City Neighborhoods 198, 207 (2001) (The authors found living in high-poverty neighborhoods in Ohio led to less economic stability, higher rates of unemployment, dilapidated housing, low-income housing, low education levels, discouraged workers, high dropout rates, and a high dependency on welfare); Catherine E. Ross, Neighborhood Disadvantage and Adult Depression, 41 J. Health & Soc. Behavior 177-187, 182 (2000).
[210] See Travis, *supra* note 51 at 222 ("In 1999, there were 39 affordable and available units for every 100 poor renters."); see also Letwin, *supra* note 123 at 810-11 (Inner-cities "suffer growing poverty and intolerable conditions in, and shortages of, housing, childcare facilities, schools, transportation and decent employment opportunities. Police abuse is epidemic.") As of 1998, 59% of public housing residents and 69% of blacks lived in high-poverty neighborhoods; that overconcentration has only furthered "a downward spiral of neighborhood distress and disinvestment." Margery Austin Turner, Moving Out of Poverty: Expanding Mobility and Choice through Tenant-Based Housing Assistance, 9.2 Housing Pol'y Debate 373-394, 374 (1998).
[211] Sue Books, Poverty and Schooling in the U.S. 47 (2004).

supervision. And with most community members working two to three jobs to support themselves and their family, there are not a lot of responsible adults around to keep an eye on the neighborhood children, or to look out for the neighborhood's property.[212] That leaves these communities extremely vulnerable to crime, causing many middle- and working-class minorities to leave the inner-cities for "better," safer neighborhoods, "thereby increasing the proportion of the truly disadvantaged individuals and families" that remain.[213]

So what can be done? One very basic and very helpful improvement would be to increase the tax base of these inner-city neighborhoods. To do so would allow these communities to combat crime and urban blight, improve their social and civic institutions, and perhaps finally have some influence on the policies that affect them so harshly. But increasing the tax base requires more money, and with the current job market of the inner-city being what it is (the status of which will be discussed later), a strong tax base will be a difficult thing to achieve for these residents. The most vital factor of a person's occupational status is their educational background, and for inner-city youth, that factor can be almost nonexistent.

B. Education

By now, the state of education in our inner-cities should be well-known, even to the general public. Public education requires state and city funds, and those funds require taxes to finance them. With the lack of more affluent residents living in these low-income communities and sending their children to the local schools, the institutions are under-funded at best. Indeed,

[212] See Katherin Ross Phillips, Parent Work and Child Well-Being in Low-Income Families 8 (June 2002), Urban Institute Occasional Paper No. 56 (the more time a parent spends at work, the less involved he or she is with his or her children).

[213] William J. Wilson, The Truly Disadvantaged 55 (1987). There is certainly reason for families moving to suburbia; "children of families who moved to suburban neighborhoods were much more likely to complete high school, take college-track courses, attend college, and enter the workforce than children from similar families who moved to neighborhoods within the central city." Turner, *supra* note 210 at 376.

"[a]lmost 9 of 10 intensely segregated minority schools also have concentrated poverty";[214] in fact, they are almost *six times* more likely to have concentrated poverty than a mostly-white school.[215] Some schools are so under-funded that the children have to use outhouses, or cannot meet graduation requirements because their school does not have the proper facilities.[216] Most have under- or unqualified teachers, limited course selection, limited classroom supplies, overcrowded classrooms, dilapidated facilities, and a sense of hopelessness from the faculty.[217] Unfortunately, the longer a child lives in poverty, the larger the impediment on his or her educational career,[218] and the less prepared the child will be to compete for a good job.[219]

As of 2001, only 1 in 2 black students graduated from high school. The rates for Native American and Latino students were about the same, and for minority males, the numbers are even lower.[220] Blacks and Latinos go to schools with high-poverty rates and low English proficiency.[221] They make up about 70% of the students in our 55 largest school systems,[222] yet only 15% of the total number of public school students in America.[223]

Parents with low levels of education are contributing to their children's levels of poverty,[224] which in turn correlates to the child's lack of participation in extracurricular

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[214] Gary Orfield et al., Losing Our Future: How Minority Youth Are Being Left Behind by the Graduation Rate Crisis 6-7 (2004), The Civil Rights Project at Harvard University.
[215] Jonathan Kozol, The Shame of the Nation 20 (2005).
[216] See Tamar Lewin & David M. Herszenhorn, *Money, Not Race, Fuels New Push to Buoy Schools*, NEW YORK TIMES.com, June 30, 2007, available at http://www.nytimes.com/2007/06/30/education/30race.html?ex=1340856000&en=5764effee64a9412&ei=5088&partner=rssnyt&emc=rss.
[217] See id. at 6-7; Henry A. Giroux, The Abandoned Generation 72 (2003).
[218] See Martin E. Orland, Demographics of Disadvantage *in* ACCESS TO KNOWLEDGE 43-58, 43 (John I. Goodlad & Pamela Keating, eds. 1994).
[219] U.S. Dept. of State, Initial Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination 18 (Sept. 2000), available at http://www.state.gov/www/global/human_rights/cerd_report/cerd_report.pdf.
[220] Orfield et al., *supra* note 214 at 2.
[221] Books, *supra* note 211 at 66.
[222] Id.
[223] Id. at 103.
[224] Austin Nicols, Understanding Changes in Child Poverty Over the Past Decade 2 (May 2006), Urban Inst. Assessing the New Federalism Discussion Paper No. 06-02.

activities[225] and enrollment in school.[226] Forty-three percent of adults living in high-poverty neighborhoods do not even have a high school diploma.[227] Sadly, that leads to communities with very limited job opportunities, limited incomes, and, thus, a hampered tax base from which to draw public funds. The result is yet another vicious cycle of the inner-city, this time with education. If inner-city children are going to have any chance at success, they must be allowed at least a *decent* education *somewhat* comparable to their suburban counterparts. "Rather than being regarded as hopelessly unfixable, urban public schools, particularly those that serve poor children, must be seen for what they are: the last and most enduring remnant of the social safety net for poor children in the United States."[228]

C. Economy

While the job market is difficult to begin with, the inner-city job market has a set of difficulties all to its own. Those living in high-poverty neighborhoods have become 2.6 times more likely to be unemployed than those living in other metropolitan areas.[229] When children have only one parent working multiple jobs, and see few, if any, neighborhood adults working steady jobs, joblessness can become a way of life for these children; one that will be hard for them *not* to mimic.[230] Parents become stressed at not being able to provide for their families,[231]

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[225] See Phillips, *supra* note 212 at viii.
[226] Orfield et al., *supra* note 214 at 6.
[227] See Kingsley & Pettit, *supra* note 209.
[228] Pedro Noguera, City Schools and the American Dream 7 (2003).
[229] Kingsley & Pettit, *supra* note 209 at 10.
[230] See William J. Wilson, *supra* note 213 at 57.
[231] It is imaginable that anyone would feel more stress under the circumstances: "low-income families are nearly twice as likely as middle-income families to report cutting or skipping meals or not being able to pay for food ("food insecurity"), half again as likely to miss rent, mortgage, or utility payments ("housing insecurity"), and twice as likely to lack health insurance as middle-income families. Low-income families are also more likely to put off needed medical care due to financial hardship." Gregory Acs & Austin Nichols, An Assessment of the Income and Expenses of America's Low-Income Families Using Survey Data from the National Survey of America's Families 7 (Sept. 2006).

which can lead some parents to become violent or abusive,[232] and children to be "almost twice as likely to be less involved in school and four times as likely to have high levels of behavioral and emotional problems."[233] Unfortunately, both the *number* of those in poverty and the *severity* of their poverty had increased by 2001. "Census data showed not only that more people became poor but also that the poor became poorer."[234] It should be no surprise by now that poverty rates are not the same for whites as they are for blacks and Latinos. In fact, black children have twice the poverty rate that white children have; Latinos have five times the rate.[235] The costs of childhood poverty add up to $500 billion *annually*, which equates to four percent of the annual gross domestic product in our country.[236] With a limited education and little chance for upward mobility, many inner-city residents see no way out. For those who do hold out for more legitimate job opportunities, their finances become far too difficult to manage by working even multiple minimum wage jobs. So to a lot of young people, it seems a lot easier (and a lot more lucrative) to get into the drug market rather than struggle in the job market.[237] And while this view of the future might seem bleak for any inner-city resident, it only gets worse for ex-offenders and their families.

V. The Invisible Statistics of Ex-Offenders

Ex-offenders can be barred from public housing, public assistance, public employment, voting, financial aid for higher education, and driving privileges. They can be deported, kept from seeing their children, kept from adopting children, required to register with the police each and every time they move; they can become socially isolated from family, friends and neighbors,

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[232] Kristin A. Moore & Sharon Vandivere, Stressful Family Lives: Child and Parent Well-Being 1 (June 2000), Urban Inst. Assessing the New Federalism Discussion Paper No. B-17.
[233] Id. at 3-4.
[234] Id. at 57-58.
[235] Nicols, *supra* note 224 at 10.
[236] Harry Holzer, The Economic Costs of Child Poverty: Testimony Before the U.S. House Committee on Ways and Means (Jan. 2007), available at http://www.urban.org/url.cfm?ID-901032.
[237] Letwin, *supra* note 123 at 814.

and labeled *and treated* as a deviant. What these consequences (which Jeremy Travis refers to as "invisible sanctions") do to these ex-offenders and their families are things the public does not really understand. "Nor can researchers adequately measure their effectiveness, impact, or even "implementation" through the myriad of private and public entities that are authorized to enforce these new rules."[238] Unfortunately, those who are making the rules are not bringing these issues to the public's attention.[239] What is vital is that these "invisible sanctions" *are* made visible to the public, and in an unbiased, truthful manner.[240] The first invisible sanction to consider is how detrimental incarceration can be to the prisoner's family.

A. Family Statistics

Those with family members incarcerated are much more likely to be of lower-income.[241] And with countless numbers of black fathers locked away, that leaves lower-income mothers by themselves to take care of their children. That can have a huge impact on the 1.5 million children who have a parent or close relative in prison.[242] Due to that added financial strain, 44% of those families reported receiving public assistance while the parent was in prison.[243] But sadly, the impact of a parent in prison is not just economic. "Children of incarcerated parents typically live in circumstances characterized by poverty, diminished access to resources, parental substance abuse and/or mental illness – conditions only exacerbated by the arrest and

[238] Travis, *supra* note 51 at 63-64.
[239] Id. at 64 ("Often they are added as riders to other major pieces of legislation and therefore are given scant attention in the public debate over the main event.")
[240] See id. at 75.
[241] Solomon et al. (March 2005), *supra* note 85 at 5.
[242] Id. at i; Marc Mauer, Lessons of the "Get Tough" Movement in the United States 6 (2004), available at http://www.sentencingproject.org/Admin/Documents/publications/inc_lessonsofgettough.pdf. That is 2% of all minor children and 7% of all black children. Travis, *supra* note 51 at 119. The number of children with incarcerated parents has gone up dramatically over the last decade or so, to the point where a parent in prison affects more children more than ever before. Waul et al., *supra* note 157 at xi. In fact, a 1991 study found that children are more likely to know someone who is imprisoned than someone who is a professional (like a lawyer or doctor). See Travis, *supra* note 51 at 293.
[243] Id. at xx.

incarceration of a parent."[244] They are more likely to be depressed, emotionally withdrawn, disruptive, of lower self-esteem, and more likely to commit criminal behavior in the future.[245] Even for infants, a parent in jail or prison can lead to a disruption in parental bonding and attachment issues,[246] especially if the imprisoned parent is the mother.[247] And with 62% of all state prisoners imprisoned more than 100 miles from their home,[248] a majority of these children will not even get to *see* their incarcerated parent during the length of their sentence. An incarcerated family member also has an impact on the rest of the family. A 2002 study found that these family members felt socially isolated from their community, were less likely to participate in civic life, and were less likely to have relationships with others.[249] "Incarceration thus weakens the family's role as a mechanism of social control."[250] Due to the crackdown on drugs and the poor economy of the inner-city, crack convictions have actually caused an increase in the drug's price, leading a lot of users to commit "intra-family theft and violence…and child abandonment by parents whose only focus is finding the next vial of crack."[251] Perhaps that is one of the reasons why the Adoption and Safe Families Act of 1997 prohibits certain ex-offenders from adopting or becoming foster parents.[252] Obviously, time in prison is not going to *improve* the prisoner's parenting skills and family stability, and maybe it shouldn't. But society

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[244] Waul et al., *supra* note 157 at ii. Although prison is generally not the *cause* of these living conditions, it certainly makes them worse for those children with a parent in prison. Id. at xi.
[245] Id. at xii; Travis, *supra* note 51 at 138.
[246] Id. at xiii.
[247] Moore, *supra* note 157 at 72. Unfortunately 2/3rds of the women currently incarcerated *are* mothers, so that makes for a lot of affected children. See Barlow, *supra* note 201 at 47.
[248] See Travis, *supra* note 51 at 132.
[249] See id. at 298.
[250] Id.
[251] Letwin, *supra* note 123 at 812; see Powell & Hershenov, *supra* note 9 at 561 (Some inner-city youth turn to drugs "as a means to escape the perceived absence of alternatives. Abuse can be inherently destructive. The nature and scope of the crisis, however, is due to drug prohibition. The inflated drug prices caused by prohibition contribute to crime, intra-family abuse and neglect, and health-threatening sex-for-crack transactions. As during alcohol Prohibition, profit in this trade, controlled by those living far from the inner-cities, is so lucrative that many neighborhoods have been reduced to combat zones for rival traffickers.")
[252] See Travis, *supra* note 51 at 69.

needs to be aware of how far the costs of crime extend beyond the prison walls and into aspects of the offender's life, which seems to be counterintuitive to helping the offender become a more productive member of society.

B. Deprival of Social and Civil Benefits

Certainly criminals should be punished for their crimes, and, of course, that should at least partially include disincentives for them to never commit crime again. But some of these invisible sanctions do not make much sense if they are being used as a disincentive. Many of the following sanctions are not known to the general public, which means that potential criminals will not be aware beforehand of what is at stake if they commit the crime. And if losing certain social and civic privileges cannot be used to deter people *before* they commit crime, it can only be used as an additional punishment *after* they have served their time in prison. Indeed, the following set of post-release punishments seem intent on ensuring that ex-offenders will never be able to improve their lives once they are released back into society. An easy way to ensure that permanent ex-con stigma is to guarantee that these men and women never have a hand in shaping public policy again.

1. Voting

It should be evident, by now, how important the political process is in shaping our CJS policies. One would think that those *subjected* to the policies should at least have a *hand* in shaping them, yet our policy is to exclude those subjected to the policies from having a say.[253] Currently, all but two states disenfranchise inmates; 32 states deny the right to parolees; 28 deny it to probationers; and 13 permanently bar felons the right to vote.[254] As of 2002, 1.4 million black men (13% of all black men), and 2% of the entire adult population were disenfranchised

[253] Id. at 257.
[254] See Finzen, *supra* note 7 at 307.

due to criminal convictions.[255] But what is the point of denying ex-felons the right to vote? One belief is that this disenfranchisement is a sort of "salt in the wound…a gratuitous and sometimes lifetime reminder that even though one's sentence has been served, all is not forgotten."[256] But maybe it is more than that. Maybe politicians realize that once people have been put through the system, they will have some constructive criticism for how it can be improved. Maybe this is a way to silence those critiques. Maybe it ensures that ex-offenders are not seen to be better politically-informed than the average citizen. Perhaps politicians see the ripple effect of allowing these disgruntled citizens another crack at the polls.

2. Financial aid

As discussed above, the education opportunities for inner-city residents and for lower-income citizens in general, are slim. One solution to that has been to provide low-income college applicants with financial aid, including Pell Grants. Impressively, in 1986, Pell Grants covered 98% of the costs involved with higher education; yet by 1998, it covered only 57% of the costs.[257] Even with such a dramatic decrease, Pell Grants can be vitally important for a low-income student to receive an education, *especially* if the student has a criminal record and therefore a much smaller chance of making it in the job market without a degree.[258] From 1998-2003, about 75,000 students were denied *any* financial aid because of a drug conviction on their record.[259] To be clear, denial of financial aid does not require any jail time to have been served; simply a *conviction* for possessing, buying, or selling pot will do. Interestingly, *no* other crime

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[255] Boyd, *supra* note 76 at 845; Travis, *supra* note 51 at 257; Finzen, *supra* note 7 at 307.
[256] Id.
[257] See Kathleen R. Sandy, The Discrimination Inherent in America's Drug War: Hidden Racism Revealed by Examining the Hysteria over Crack, 54 Ala. L. Rev. 665, 667 (2003).
[258] For a more detailed discussion of the difficulties ex-offenders face in the job market, see Part C. of this section below.
[259] Id.

carries with it an automatic denial of financial aid – not even murder or rape.[260] Put into perspective, however, higher education is probably going to be the least of the ex-offender's worries, especially if he or she has no place to live.

3. Housing

In 1996, President Clinton amended the Anti-Drug Abuse Act and implemented a "One Strike and You're Out" policy towards public housing. The policy allowed Public Housing Authorities the discretion and authority to evict *entire* families from public housing if a household member, guest, or anyone under their "control" commits criminal behavior or any "drug-related activity" (which does not need to be recent activity, nor does it need to result in a criminal conviction).[261] This policy caused a near *doubling* in the number of applicants denied public housing,[262] thereby exacerbating the public housing crisis even further. Losing public housing just because someone you know was doing something illegal on or around the public housing site is a pretty scary thought, especially when there are 4.1 million people at risk of losing a roof over their heads.[263] For ex-offenders to lose their housing, the effects are much more severe. Ten to 25% of prisoners become homeless within a year after they are released from prison, and 42% of those who enter homeless shelters after they are released from prison end up returning to prison within two years.[264] Even for those prisoners who were not receiving public housing benefits, the difficulties of getting a job and keeping stable relationships for many ex-offenders "become[s] insuperable," causing many to become homeless after they feel they have failed to integrate back into society.[265] Unfortunately, "studies have shown that ex-

[260] Id.
[261] See Travis, *supra* note 51 at 231.
[262] Id. at 232.
[263] See Michael Rosenfeld, Affirmative Action & Justice: A Philosophical & Constitutional Inquiry 12 (1991).
[264] Travis, *supra* note 51 at 240.
[265] Moore, *supra* note 157 at 75.

offenders who are unable to obtain adequate housing are more likely to re-offend."[266] One of the reasons for that is because without an address, it is extremely difficult to get and keep a job.

C. Jobs and the Culture of Crime

It is important to know that someone who has a job is less likely to do crime or enter an illegal job market than someone who is unemployed, especially if that job pays a sufficient wage.[267] That is why it is vital to our crime rates that there are jobs available for men and women upon release from incarceration. Unfortunately, even when ex-offenders do get a job, they still earn only *half* as much as those with similar socioeconomic status and no criminal record.[268] Research has shown a 10 to 30 percent decrease in the lifetime earnings of prisoners upon release from what their earnings would have been had they not been incarcerated,[269] and a 50% unemployment rate upon return to society.[270] This has a *devastating* impact on the 7% of the U.S. adult population and 12% of adult males who have a felony record as they try to reenter the community and sustain a living, and find themselves barred from "a long list of jobs."[271] Even parent prisoners, many of whom were financially stable *before* going to jail or prison,[272]

[266] Finzen, *supra* note 7 at 314.
[267] Travis, *supra* note 51 at 168.
[268] Id. at 34.
[269] Travis, *supra* note 51 at 291; James P. Lynch & William J. Sabol, Effects of Incarceration on Informal Social Control in Communities *in* IMRPISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION 135-164, 136 (Mary Pattillo, David Weiman & Bruce Western, eds. 2004).
[270] Paul Street, Color Blind: Prisons and the New American Racism *in* PRISON NATION: THE WAREHOUSING OF AMERICA'S POOR 30-40, 32-33 (Tara Herivel & Paul Wright, eds. 2003); see Clear, *supra* note 80 at 10 ("[E]x-offenders are more likely to be unemployed or underemployed, adding to the local unemployment rate and the chronic difficulties ex-convicts face in finding and retaining work. In short, the more the prison system grows, the more it contributes to the decay of neighborhoods outside its walls – inner-city locations already struggling with the strains of economic and social disorder.")
[271] Travis, *supra* note 51 at 164; Harry J. Holzer et al., Employment Barriers Facing Ex-Offenders 8 (May 2003), Urban Institute Reentry Roundtable Discussion Paper (ex-felons are barred from such jobs as those "requiring contact with children, certain health services occupations, and employment with firms providing security services); see Lusane, *supra* note 46 at 85 (citing a study which found that "while 50 percent of those incarcerated had a job before they entered prison, only 19 percent had jobs after they left prison.")
[272] Waul et al., *supra* note 157 at xx.

certainly are going to have trouble supporting their family once they return.[273] Preventing them from even getting hired, never mind for a decent wage, will simply strengthen the guarantee that released prisoners will either become homeless or start dealing drugs in order to support themselves. Most prisoners are young black males with little education; once they leave prison, they certainly are not left with many viable, "legitimate earning opportunities," no matter where they come from.[274] Blacks with criminal records have been found to have a 64% reduction in job offers, compared to a 50% reduction for all those with criminal records.[275] Perhaps this disproportionate lack of job offers for blacks with criminal records can be partially explained. Congress has required states to revoke or at least suspend drug felons' driver's licenses, or face losing 10% of their federal highway funds.[276] Since blacks are usually the ones convicted of drug-related offenses, they are the ones who lose their licenses, making it that much harder to get to the job they will probably never get anyway because of their record.

It is sad to see just how adverse employers are to hiring ex-offenders. One scholar at the Urban Institute points out that "[e]mployers will not touch anyone who has been tainted by the criminal-justice system."[277] While 90% of employees say they are willing to hire someone on welfare, and a similar number say they would hire someone without a high school diploma, with prior employment problems, or has been unemployed for a year, only 40% of employers say they

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[273] Id. at xxii ("Having a legitimate job [after a parent is released from incarceration] not only lowers the likelihood that a former prisoner will reoffend, but also provides an important means of stable support for their family. An important consequence of losing a parent to prison is the lost financial support that can place a child – typically already living in poverty – in even more dire circumstances.")
[274] Freeman, *supra* note 92 at 4.
[275] Travis, *supra* note 51 at 165.
[276] Id. at 69.
[277] Bertram et al., *supra* note 136 at 39; see Piehl, *supra* note 280 at 3 ("It is well known, and well documented, that prisoners have employment prospects and employment outcomes that are much worse than those of the rest of the population.")

would or probably would hire someone with a criminal record.[278] There are several reasons for the disparate treatment, but mostly it comes down to employers not wanting to take a "risk" on hiring an ex-convict.[279] If the potential employee is on parole, there might be time restrictions and intense surveillance that could interfere with work.[280] For those with drug-related histories, the risk of relapse might be more than the employer wants to handle.[281] Furthermore, most ex-offenders are generally lacking in the job skills and backgrounds employers are looking for, "even when trying to fill relative[ly] unskilled jobs."[282] While it might be understandable that individual employers do not want to take the risk in hiring employees with criminal records, the aggregate effect is to keep ex-convicts unemployed, and therefore more likely to re-offend.[283]

Certainly private employers cannot be forced to hire ex-convicts, but we as a society could create more opportunities for these men and women to do state work upon release, at least ensuring that they are receiving a stable, legitimate income. Unfortunately, when it comes to state employment, six states actually *bar* felons from holding any public employment once they have served their time.[284] Apparently, prisoners are not good enough to do state work once they have been released back into society. Yet they are certainly in high demand for remedial work *during* their incarceration, when it means that minimum wage, health insurance, workers'

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[278] See Travis, *supra* note 51 at 164; Holzer et al., *supra* note 271 at 11. Yet again, the disparity increases when race is factored in: one study found that while white offenders received about half as many job offers as white non-offenders, black offenders received only a third as many as their law-abiding counterparts. See id. at 12.

[279] Karen E. Needels, Go Directly to Jail and Do Not Collect?, 33.4 J. Research in Crime and Delinquency 471-496, 472 (Nov. 1996); Rob Atkinson & Knut A. Rostad, Can Inmates Become an Integral Part of the U.S. Workforce? 15 (May 2003), Urban Institute Reentry Roundtable Discussion Paper ("Companies feel that there may be a backlash against their products or services if it becomes widely known that they are produced by inmates [and presumably the same would apply for ex-offenders].")

[280] See Moore, *supra* note 157 at 72; Anne Piehl, Crime, Work, and Reentry 7 (May 2003), Urban Inst. Reentry Roundtable Discussion Paper.

[281] See Travis, *supra* note 51 at 175; Holzer et al., *supra* note 271 at 5 (75% of ex-offenders have had a substance abuse problem, 2-3% have HIV or AIDS, at least 15% have emotional disorders, and 18% have Hep C).

[282] Holzer et al., *supra* note 271 at 7.

[283] See Finzen, *supra* note 7 at 318.

[284] Id. at 308.

compensation and any sort of union need not apply to their labor.[285] Using prisoners to plow the fields, make license plates, and even construct military equipment for the Pentagon can help the state recover the costs of running its prisons.[286] Not only that – it can a great way to turn a profit;[287] a fact legislators have been quick to realize. Unfortunately, when the main purpose of prison labor is to turn a profit, "there is often little interest in whether such work has an impact on future criminal activities."[288] In fact, it can often interfere with any rehabilitative programs the prisoner could get involved with, thereby diminishing any chance at reducing recidivism at the expense of making money.[289] If anything, it guarantees the prisoner will be back in the future to do some more work for the state.

Once released from prison, "the need for cash is immediate."[290] Ex-offenders cannot wait to build up their resume, improve on their job skills, and wait for a well-paying job. They need cash, and their options are limited. Some might manage to rebuild their lives the "right" way. For many others, the illegal job market is too tempting *not* to join. In 1990, a young, less-educated black man could make $2,000 a month (tax free) selling drugs in D.C.; an income four times higher than what he could be making in the legal job market.[291] Fast money can be enticing to many inner-city youths, especially when they become pre-socialized to prison in their communities. "Every additional inmate released to the community increases the chances that community youth will learn directly about prison and become yet more persuaded that prison

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[285] Gordon Lafer, The Politics of Prison Labor *in* PRISON NATION 120-128, 122 (Tara Herivel & Paul Wright, eds. 2003) ("Prisoners don't merely make less than anyone else; they are also statutorily exempted from virtually every form of labor protection enacted during the past hundred years.")
[286] Paul Wright, Making a Buck Off the Prisoner's Back *in* PRISON NATION 111 (Tara Herivel & Paul Wright, eds. 2003); see Doris L. MacKenzie, What Works in Corrections 91 (2006).
[287] Profits from the private industry alone totaled $83 million in 1997. See Paul Wright, Making Slave Labor Fly *in* PRISON NATION 112-119, 113 (Tara Herivel & Paul Wright, eds. 2003).
[288] MacKenzie, *supra* note 286 at 92.
[289] See Joan Petersilla, When Prisoners Come Home 13 (2003).
[290] Needels, *supra* note 279.
[291] Powell & Hershenov, *supra* note 9 at 607.

lays in their own futures."[292] Unfortunately, "individuals who want to live law-abiding lives find themselves with no choice but to turn to illegal activity once again because all legitimate doors of public support are closed to them."[293] But for those ex-offenders who choose to join the illegal job market upon release, you can almost guarantee they will encounter the CJS again.

D. Recidivism

"In crafting public policies to improve the chances of successful reentry, we must confront this stubborn fact: under current conditions, most prisoners will fail to lead law-abiding lives when they return home."[294] Two-thirds of all prisoners recidivate, with 50% re-offending within three years, and 75-80% within ten years of being released.[295] According to one study, 7% of offenders commit 70% of the crimes in this country.[296] As for the inner-city, there might as well be a revolving door placed on the front of their local jails and prisons for the percentage of inmates going in and out of the system.[297] Recidivism is a powerful political tool: it can strike fear into the hearts of Americans, prompt ridiculously harsh policies such as California's Three Strikes law, and allow rehabilitative programs to be cut.[298] Of course many offenders recidivate, but we have to be careful when we use the term: rates of recidivism reflect the number of ex-offenders the CJS has decided to arrest, indict, convict, and sentence. It does not include the amount of crime committed by those who are never caught or forced through the CJS, and, therefore, cannot accurately tell us who actually contributes the most to our crime rates.[299] For those who do recidivate, the statistics are the same as they are in every other step of the process –

[292] Moore, *supra* note 157 at 76.
[293] Finzen, *supra* note 7 at 311.
[294] Travis, *supra* note 51 at 87.
[295] Freeman, *supra* note 92 at 2.
[296] See Clear, *supra* note 80 at 4.
[297] See Street, *supra* note 270 at 35.
[298] See Travis, *supra* note 51 at 87.
[299] See id. at 95.

lower-income, less-educated blacks have disproportionately higher rates.[300] One reason for the disparity might be the social circumstances of low-income, inner-city offenders; it has been found that the stronger the bonds to society, such as a stable family, employment, and religion, the lower the rates of re-offending.[301] For many inner-city offenders, the risk of recidivating is high. Their social bonds were fragile before they went to prison, and are not likely to improve once they return. Unfortunately, the interplay between the social conditions of the inner-city and the CJS do not just impact the individual ex-offender and his or her family; it impacts their entire community.

VI. The Criminal Justice System in the Inner-City

Ordinary life struggles can either bring a community together, or keep them apart. Dealing with crime and ex-offenders in an already struggling community can sometimes be too much for the community to handle. With little political force, these inner-city neighborhoods are left to their own devices to combat their abysmal crime rates and social disorder. Yet after a certain "tipping point" of crime has been reached, "the community's capacity to take collective action – to exercise informal social control – [weakens], leading to more crime."[302]

> A small number of communities in America's urban centers have experienced most acutely the collateral damage associated with our war on crime. In these neighborhoods, our criminal justice policies have penetrated deeply into community life, rearranging the rhythms of family life and the pathways of

[300] Freeman, *supra* note 92 at 8.
[301] Needels, *supra* note 279 at 473.
[302] Travis, *supra* note 51 at 298-99; see Waul et al., *supra* note 157 at xxvi (Researchers have suggested that when a certain rate of a high-poverty neighborhood becomes imprisoned and then returns to the neighborhood, it "may actually result in *higher* crime rates, as the neighborhood becomes increasingly unstable and less coercive means of social control are undermined."); Fagan & Davies, *supra* note 7 at 464-65 ("The theory suggests that there is a tipping point at which disorder trumps order by defeating the willingness of citizens to interact with the police and with each other to co-produce security. Accordingly, disorder invites more disorder in a contagious process that progressively breaks down community standards and also suggests to would-be criminals that crime will not be reported. Disorder ultimately invites criminal invasion.")

> individual development, and altering the networks and relationships that define a society.[303]

Unfortunately, social disorder allows for more crime.[304] It sends the message that the community has no control over the behavior of its community members, and provides opportunities for criminals to take advantage of already weakened social ties. In short, it is "the ideal soil for propagation of crime. It alienates people, weakens the informal social control, provides the safe haven for criminals, and makes citizens more vulnerable to crime. This is especially true for inner-city teens, who if left unsupervised have the largest potential for committing crime.[305] Unfortunately, a sense of helplessness in the inner-city community is not the end of the impact.

"Rehabilitating offenders and helping them succeed in the labor market has a potentially huge reach in dealing with poverty and social problems."[306] Mass amounts of young black men are leaving their communities to go to jail or prison, and become unable to spend money in their local economies. There is also a loss when it comes to productivity. In 2002, the loss created in our national gross domestic product was $128.6 billion.[307] Unfortunately the high-crime rates of these inner-cities can actually prejudice its law-abiding members in the job market. Employers are less likely to hire citizens from these communities, on the *assumption* that everyone from that

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[303] Id. at 279; see Waul et al., *supra* note 157 at xxiii ("Low-income communities also struggle with the impact of high incarceration and return rates on the service systems and social capital of particular neighborhoods. These conditions have consequences for all residents and produce harmful outcomes for children and families.")

[304] Yili Xu, Mora L. Fiedler & Karl H. Flaming, Discovering the Impact of Community Policing: The Broken Windows Thesis, Collective Efficacy, and Citizens' Judgment, 42 J. Res. in Crime and Delinquency 147-186,167 (2005).

[305] See Robert J. Sampson & William B. Groves, Community Structure and Crime: Testing Social Disorganization Theory, 94 Am. J. Soc. 774-802, 788-790 (1989) ("[T]he level of unsupervised teenage peer groups has the largest independent effect on [victimization rates of mugging, stranger violence, and total victimization]…[S]ingle-adult households provide increased opportunities for crime"); Henry G. Cisneros, Defensible Space: Deterring Crime and Building Community 15 (1995), *Cityscape* ("From the beginning, high rates of crime and juvenile delinquency were among the slums' most characteristic afflictions.")

[306] Solomon et al. (March 2005), *supra* note 85 at 5.

[307] Office of Nat'l Drug Control Policy, *supra* note 151 at x; see Amy L. Solomon et al., From Prison to Work 6 (Oct. 2004), Urban Inst. Reentry Roundtable Report (placing the figure somewhere in between $100 and $200 billion as of 1992).

neighborhood must be a criminal.[308] With discrimination coming from every angle and for every reason, it can lead a lot of inner-city residents to hold a great deal of distrust and resentment towards the CJS.

There are many factors that affect a community's perception of law enforcement. The most important of which: location, location, location. Public perceptions of the police and of the CJS differ depending on where people are living, their community's prior interactions with police, their belief that the officers will actually *help* instead of harass them in their hour of need, and presumably their belief that the police will help reduce crime in their neighborhood.[309] But for those whose experiences have led to a lack of faith in the system, such mistrust can "play a role in the success or failure of interactions with [the police department]," and whether those people will obey the law in the future.[310] As author Lu-in Wang recently described,

> Citizens' mistrust of the police stands in the way of the relationships with those citizens that the police need in order to make effective use of promising new police methods, such as community-oriented policing. That mistrust also leads jurors in criminal cases to disbelieve or dismiss – the testimony of police officers – often the most important, or even the only, witnesses for the prosecution – thereby frustrating the system's ability to keep real criminals off the streets.[311]

Another major factor is whether an individual is fearful of crime in their community, regardless of what the crime rate really is. In a study of twelve American cities, researchers found that those citizens who were afraid of crime in their neighborhood were less likely to be satisfied with their community police department, even if the crime rate in their community was comparatively low.[312] Yet another factor is any perceived racially disparate treatment of

[308] See Finzen, *supra* note 7 at 318.
[309] See Letwin, *supra* note 123 at 813-14 (Since many of these community members have family, friends or business connections with drug dealers and/or users, it is more difficult than with suburban white communities to get community members to cooperate with the police).
[310] Travis, *supra* note 51 at 294.
[311] Wang, *supra* note 20 at 106.
[312] See Steven K. Smith, Greg W. Steadman & Todd D. Minton, Criminal Victimization and Perceptions of Community Safety in 12 Cities, 1998 v (May 1999), Bureau of Justice Statistics No. NCJ 173940.

community members by the police. Unfortunately, this will depend on the race of the observer. For example, a minority living in a high-poverty neighborhood will be more likely to believe he or she could be subjected to more constant and more aggressive police tactics than white residents.[313] In comparison, white residents are more likely to be satisfied with local policing in these neighborhoods.[314] And this goes beyond the inner-cities. In general, "white citizens tend to view the police more positively than do minority citizens," while blacks are more likely to believe police are "more corrupt, more unfair, harsher, tougher, less friendly, and crueler."[315] Those found to have the *most* confidence in the CJS are males with higher incomes, more education, and positive personal experience with the System.[316] Those with distrust in the system (i.e., minorities) have actually been compelled "to counsel their children on how to act when stopped by the police," thereby "passing [that] distrust to the next generation."[317] And for those who have been through the CJS, their confidence in the system is (not surprisingly) quite low. In 2004, the Urban Institute took a poll of exiting prisoners about the police, the law, and the CJS. The following were their results:

> About half of the respondents reported that the police in their neighborhoods were racist (49 percent) and did not respond properly to crime victims' needs (53 percent). Most thought the police performed poorly at preventing crime (60 percent) and brutalized people in the neighborhood (62 percent). Along all these dimensions, men's views were far more negative than women's. These findings point to a widespread distrust of the police among the population of former prisoners.[318]

Those twelve cities were Chicago, IL, Kansas City, MO, Knoxville, TN, Madison, WI, New York, NY, Savannah, GA, Springfield, MA, Washington, DC, San Diego, CA, Spokane, WA, Los Angeles, CA, and Tucson, AZ.

[313] Fagan & Davies, *supra* note 7 at 457 (2000); see Thompson, *supra* note 39 at 1009 ("[T]he history of antagonistic relations between the police and individuals of color has fostered general uneasiness among people of color about contact with police officers.")

[314] Smith et al., *supra* note 312 at 25.

[315] Kappeler et al., *supra* note 187 at 6; see Harris, *supra* note 7 at 119 (where a 2000 Harris poll shows that 69% of whites, but only 36% of blacks believed the police treated people fairly, and 20% of whites, but almost 60% of blacks believed police treated one or more groups *un*fairly).

[316] American Bar Association, Perceptions of the U.S. Justice System 8 (Feb. 1999).

[317] Harris, *supra* note 7 at 147.

[318] See Travis, *supra* note 51 at 294.

Certainly, people sent to jail or prison are not going to be happy with the individuals who sent them there; but as you can see, prisoners are not the only ones who share a strained relationship with the police. When entire communities begin to distrust entire *branches* of government, it cannot be explained away as just bitterness from criminals.

But in order to get to a more conducive relationship, we will first have to take the hypocrisy out of the procedure.

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means-to declare that the Government may commit crimes in order to secure the conviction of a private criminal-would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.[319]

Secondly, we have to eliminate the disparate treatment minorities receive from law enforcement. Seventy-two percent of young black men feel that they have been racially targeted, 15% of which report experiencing eleven or more times.[320] As of 1996, blacks and Latinos were 70% more likely than whites to have face-to-face contact with police, and were also more likely to be handcuffed during the interaction.[321] It should be no shock that with minorities being treated differently than whites,[322] blacks have been found to be "more angry, unhappy, and upset about encounters with the police" than whites.[323] Take the hostility out of the encounters, and maybe we can get our inner-cities to work *with* the police to combat crime, instead of staying behind closed doors when the police come around.

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[319] Olmstead v. U.S., 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).
[320] See Harris, *supra* note 7 at 120.
[321] Lawrence A. Greenfeld, Police Use of Force: Collection of National Data iv (Nov. 1997), Bureau of Justice Statistics No. NCJ 165040.
[322] Kappeler et al., *supra* note 187 at 7 (research has proven this fact, and minorities recognize this reality).
[323] Id. at 6; see Durose & Mumola, supra note 23 at 3 (Blacks are less likely to believe the police acted properly during a traffic stop than Latinos or whites, and *far* less likely to believe the police acted properly if they were being suspected of wrong-doing).

VII. The Effect of Supreme Court Decisions

The idea of an independent judiciary comprised of lifetime appointed Justices is counter-majoritarian, but that is what makes our three branches of government so unique (at least in concept). Unfortunately, our judiciary has never been that independent; in fact, it has become quite political – a dangerous concept when you consider that nine (mostly white men) are interpreting the extent of our individual freedoms. The Warren Court gave suspects and defendants a lot of constitutional protection against government intrusion, but unfortunately, it was doing so as the crime rates in our country were rising. The Court's jurisprudence ended up causing a conservative backlash, with President Nixon realizing he could do well politically by attributing the rise in crime to the Supreme Court's 'liberal' decisions.[324] Unfortunately, from the mid-80's until a few years ago, Chief Justice William H. Rehnquist was "simply indifferent to the situation of African Americans."[325] And with the sharply divided Roberts Court now in place, it is now more important than ever that the impact and the motivations of the Court's decisions be made absolutely clear to the public. Otherwise, this counter-majoritarian process will continue to be used for the political agenda of the ruling party, and continue to deprive the political minority of their constitutionally guaranteed individual rights.

A. Competing Interests in Fourth Amendment Cases

The Fourth Amendment states that *each person* has the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,"[326] and in order for police action to constitute a search, it has to have violated an individual's reasonable

[324] See Mark Tushnet, A Court Divided: The Rehnquist Court and the Future of Constitutional Law 22 (2006). The effect of Nixon's War on Drugs on minority and low-income communities is recounted above.
[325] See id. at 23.
[326] U.S. Const. amend. IV.

expectation of privacy.[327] To some Justices, that right is guaranteed to each person, and cannot be compromised. For others, it appears to be negotiable, subject to a balancing test of the competing government interests involved and how much it will "impede" the efficiency of our law enforcement efforts. If the individual's constitutionally guaranteed right against unreasonable searches and seizures is "outweighed" by a greater societal interest, there is no need to do anything to protect it. Even when the individual's right tips the scale and the Court is forced to find a Fourth Amendment violation, the most the individual will typically receive for that violation is a published opinion saying so. As for a *remedy* for the violation, such as exclusion of the illegally seized evidence, the Court has found that it "is not a personal constitutional right but a remedy, which, like all remedies, must be sensitive to the costs and benefits of its imposition."[328]

As discussed below, the "balancing" done by the Court will inevitably depend on whether that individual has been found with incriminating evidence or not. If it is an "innocent" citizen whose rights are being violated, he or she might have a chance of *at least* having the Court declare there has been a violation. If the individual is seeking exclusion of incriminating evidence, and probable cause *could* have existed, "the only cases in which [the Court has] found it necessary actually to perform the 'balancing' analysis involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests…"[329] Better yet, if the individual is a *prisoner*, it is settled law that he has no reasonable expectation of privacy in his prison cell, and, therefore, no right to say that his privacy has been violated.[330] While there may be certain safety and sanction justifications for this last concept of

[327] See Katz v. U.S., 389 U.S. 347, 361 (1967) (Harlan, J., concurring).
[328] Illinois v. Gates, 462 U.S. 213, 257 (1983).
[329] Whren v. U.S., 517 U.S. 806, 818 (1996).
[330] Hudson v. Palmer, 468 U.S. 517, 526 (1984).

individual rights to privacy as it concerns prisoners *within the prison walls*, the Court took a sad turn in 2006 when it extended this lack of privacy to parolees, *wherever* they may be, and for *whatever* reason the law enforcement officer sees fit to invade that privacy.[331]

Yes, there needs to be some compromise between the competing interests. The question is whether it is a *balanced* compromise, and whether the interests should really vary depending on the guilt or innocence of the person involved. When the Warren Court incorporated the exclusionary rule into the Due Process clause of the Fourteenth Amendment in Mapp v. Ohio,[332] it appeared to be weighing these interests evenly. Today, the scales are on an uneven keel.[333] Hopefully, with more enlightened views of how these rulings impact certain communities, the Court can recalibrate its scales, and give individuals the Fourth Amendment rights to which they are entitled.

Many are petrified that upholding individual rights at the expense of "effective" law enforcement will allow all sorts of hoodlums and maniacs to run free. Stories of criminals

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[331] See Samson v. California, 126 S. Ct. 2193, 2199 (2006) ("[W]e conclude that petitioner did not have an expectation of privacy that society would recognize as legitimate.")

[332] 367 U.S. 643 (1961).

[333] For example, the Court in U.S. v. Payner found that "the District Court erred…when it concluded that "society's interest in deterring [bad faith] conduct by exclusion outweigh[s] society's interest in furnishing the trier of fact with all relevant evidence."" 447 U.S. 727, 736-37 (1980). In the decision, the Court held that federal courts do not have the authority to suppress evidence seized unlawfully from a third party not before the court, "even if the unlawful [] search was so outrageous as to offend the fundamental canons of decency and fairness." See id. at 737. See Rudovsky, *supra* note 7 at 240 ("The Court's decisions on Fourth Amendment issues have been sharply one-sided. The Court has deferred to virtually every police and prosecutorial demand to limit Fourth Amendment rights and to eliminate or ease judicial oversight of searches, seizures, and arrests."); Nadine Strossen, The Fourth Amendment in the Balance: Accurately Setting the Scales through the Least Intrusive Alternative Analysis, 63 N.Y.U. L. Rev. 1173, 1176 (1988) ("The Court does not accurately identify or compare the relevant competing concerns. It regularly undervalues the fourth amendment interests jeopardized by every search and seizure, while overvaluing the countervailing law enforcement interests."); Joseph D. Grano, Crime, Drugs, and the Fourth Amendment: A Reply to Professor Rudovsky, 1994 U. Chi. Legal F. 297, 312 (1994) ("…Justice Stewart's [Mendenhall] approach reflects the view that the police do nothing wrong under the Fourth Amendment when they take advantage of the moral or instinctive pressures that the individual may feel to cooperate."); Powell & Hershenov, *supra* note 9 at 582-83 (with the Court's Von Raab, Skinner and Sitz decisions, it ignored the requirement of individualized suspicion and allowed for an extremely loose balancing test in favor of law enforcement); id. at 585 ("The retreat from the Fourth Amendment in these profile, roadblock, street sweep, and bus interdiction cases have made all of us, but particularly African-Americans, fair game for police harassment whenever we leave our homes to travel, be it by plane, car, bus, train, or foot.")

recidivating after getting off on a technicality can make or break a political campaign. Comically, opponents of such remedies as the ever-dwindling exclusionary rule cite principles of justice and searches for the truth in their outrage at guilty people being freed due to shoddy police work. One such opponent, O.W. Wilson, wrote the following in the early 1960s:

> Negating police overzealousness by freeing guilty defendants violates the principle that the guilty should be adjudged guilty, punishes society rather than the policeman, rewards the guilty, and is a miscarriage of justice. Its effectiveness as a control of police abuse of authority has not been demonstrated.[334]

It is certainly understandable to be protective of law enforcement. They do a commendable, life-threatening job that many of us are not willing to do, and, for most of them, they are doing a great job. Furthermore, most officers do not *intend* to discriminate or be racist.[335]

> Law enforcement officers, like everyone else, are likely to have incorporated racial stereotypes into their perceptions and understandings of the world. Among these stereotypes are the assumptions that people of color are especially prone to deviant or criminal behavior. When officers are called on to make complicated and grave decisions under stressful, time-pressured conditions, they are likely to rely on these stereotypes in interpreting the behavior of others.[336]

But to become defensive, and not even willing to hear claims of corruption or prejudice from the police makes for a dangerous situation. It leads some to quickly write off legitimate claims of misconduct, sizing them up as simply being "anti-cop."[337] It is those who suggest that rights for the individual will "emasculate policing."[338] After more than

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[334] O.W. Wilson, *supra* note 193 at 27.
[335] Wang, *supra* note 20 at 47.
[336] Id.
[337] O.W. Wilson, *supra* note 193 at 38 (Sometime in the 1950s and 1960s our appellate courts started to believe that cops, not criminals, were part of the problems to be addressed by the criminal justice system. Even trial judges, who are down in the trenches *and who should know better*, frequently exhibit strong anti-cop biases.)
[338] MacDonald, *supra* note 4 at 16-17. In fact, one author suggests that instead of reforming our current laws and policies, we should simply "reexamine some of our "rights," particularly those that were created during the Supreme Court's activist period in the 1960s…[our scope of individual rights] should be based upon something more than a dogmatic hostility towards law enforcement or the agencies that engage in law enforcement. The law of criminal

30 years had passed since Miranda v. Arizona was decided, there were still people suggesting that the decision "may be the single most damaging blow inflicted on the nation's ability to fight crime in the last half century."[339] Miranda warnings, which probably take at the *most* 20-30 *seconds* to recite, have apparently "handcuffed the cops" to the point where it is now "time to consider removing those shackles and regulating police interrogation in less costly ways."[340] While there is some evidence of robberies, burglaries and larcenies going unpunished due to the rule, it has had "minimal impact" on the "dangerous" element – the murderers, rapists and violent criminals.[341] Not only that, it has no doubt helped every member of society with a television set understand their rights a little better.

These assertions of dangerous criminals wreaking havoc after being let back into the wild of society, and that *any* sort of police criticism means that people are "anti-cop," are implicitly suggesting that we do not think criminals should *ever* be released back into society, and that any advocating on their behalf is "a slap in the face to our cops."[342] It suggests that society does not think the guilty *deserve* the same privacy rights as law-abiding citizens do;[343] in fact, some have been forthright in saying just that.[344]

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procedure needs to regain the insight that constitutional liberties can be compatible with common sense." Grano, *supra* note 333 at 297-98.

[339] Paul G. Cassell & Richard Fowles, Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement, 50 Stan. L. Rev. 1055, 1132 (1998).

[340] Id.

[341] See Paul G. Cassell, Handcuffing the Cops: *Miranda*'s Harmful Effects on Law Enforcement Executive Summary 2 (August 1998), The Nat'l Center for Policy Analysis Policy Report No. 218.

[342] This same sort of defensiveness is tantamount to the Bush Administration suggesting that if a citizen is not "with" the country and in full fledge supporting its "War on Terror," he or she must automatically be "with" the terrorists and therefore anti-American and anti-freedom.

[343] See Strossen, *supra* note 333 at 1195 ("[B]ecause the individuals who assert fourth amendment rights in many cases are guilty of criminal conduct, the Court often concludes that the interest in sheltering evidence of their misconduct is slight [if not non-existent].")

[344] See Donald Dripps, The Case for the Contingent Exclusionary Rule, 38 Am. Crim. L. Rev. 1, 8 (2001) (stating that the "regrettable" consequence of protecting privacy is to "facilitat[e] the concealment of crimes.")

On the other side of the scale are our individual rights; the gravity of which cannot be ignored:

> The maintenance of interpersonal relationships is inextricably intertwined with concepts of privacy and autonomy. Privacy allows individuals to freely choose relationships and allows the individual to exert some degree of control over reputation and public identity. Respect for individuals also is related to privacy and the individual's feeling of self-worth. Society recognizes the individual's claim to existence through privacy, which allows the individual to personally recognize this claim. In this light, privacy is a condition for a generalized sense of humanity.[345]

One's sense of privacy may differ, but so does the opportunity to *have* privacy. Poor people living in the inner-city do not have the luxury of seclusion; their circumstances may make them incapable of fending off intruders.[346] But that is exactly why the privacy they *do* have is often *crucial* to their self-worth, respect, identity, and "generalized sense of humanity."

Perhaps there was a time when "the luxury of not challenging [principles of freedom from intrusive law enforcement mechanisms] was affordable, but today we can no longer indulge the simplistic assumption that unnecessary obstacles to successful law enforcement and criminal prosecution do not matter."[347] The Court is quick to *say* it is conducting a balancing test, and then eagerly deny exclusion of illegally obtained evidence at trial, on the justification that a 'fast and loose' application of the exclusionary rule will undermine respect for the courts, the law, and the CJS, or impede effective law enforcement.[348] One prime example of this unequal balancing test is the Whren v. United States decision.

[345] Robin Morris Collin & Robert William Collin, Are the Poor Entitled to Privacy?, 8 Harv. Blackletter J. 181-219 (1991).
[346] Id.
[347] Grano, *supra* note 333 at 304-05.
[348] See Strossen, *supra* note 333 at 1199.

B. *Whren* and Pretextual Searches

Until the 1960's, the Supreme Court "uncritically assumed" that the Fourth Amendment required that an officer have a legitimate motivation to stop and/or search someone or something.[349] As Justice Thurgood Marshall recognized in 1973, there will *always* be the possibility for a pretext as long as the individual officer's subjective motivations are not questioned. For that reason, Marshall argued that a "case-by-case adjudication will always be necessary to determine whether a full arrest was effected for purely legitimate reasons or, rather, as a pretext for searching the arrestee."[350] Unfortunately, Justice Marshall's comprehension of the risks of pretextual stops was not shared with the Rehnquist Court when they decided Whren v. United States. To them, "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[351] So in 1996, the Supreme Court made the decision that our judicial system would completely ignore racial targeting and pretextual stops during its Fourth Amendment analysis, provided that the officer, the prosecuting attorney, or the judge handling the case could furnish some *conceivably* lawful justification to explain the officer's racist or prejudiced conduct.[352] Unfortunately, "[b]y reducing the level of scrutiny applied to the police-citizen encounter, the 'could have' test inevitably reduces the level of care that will be used to scrutinize the accuracy of fact reporting."[353] As a consolation prize for denying petitioners' Fourth Amendment claim, the Court suggested instead that petitioners bring a claim of intentional discrimination during police stops and searches under the Equal Protection Clause.[354] But as discussed below, it is absurdly difficult to prove such a claim; so much so that it deters

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[349] George E. Dix, Subjective "Intent" as a Component of Fourth Amendment Reasonableness, 76 Miss. L.J. 373, 378-9 (2006).
[350] U.S. v. Robinson, 414 U.S. 218, 248 (1973) (Marshall, J., dissenting).
[351] Whren, 517 U.S. at 813.
[352] See Whren v. U.S., 517 U.S. 806, 813 (1996).
[353] Cloud, *supra* note 19 at 1378.
[354] Id.

many from even filing suit. Even if a claim is successful, a court decision stating that a person's Equal Protection was violated will do very little to remedy the situation, especially if that person is now incarcerated as a result of the violation.

It is difficult to prove to a court of law just how pervasive racial discrimination is in police practice; going by straight statistics does not provide the full picture. "[T]hose who are stopped and searched but found without drugs generally do not complain, and those who are found with drugs have little or no credibility in court to challenge the legality of the seizure and arrest."[355] Yet the proof is there: you have black men being pulled over by the police for driving too nice of a car, or driving an old car; for driving with other black men, or driving with a white woman; for driving early in the morning, or driving late at night; for driving too fast, or too slow; for driving in a poor, high-crime community, or driving in a nice neighborhood where there have been recent burglaries; for fitting the drug courier profile, or for simply forgetting to use a turn signal.[356] Thanks to Whren, all of these justifications have been found lawful, leaving blacks completely vulnerable to the subjective whims of police officers as to when, where, how and with whom they should be driving in order to avoid being found DWB.

Of course, the Court did not come right out and say that it is ok to stop and search someone solely because of their race or ethnicity. In fact, it has yet to explicitly state that race can be a factor in the officer's reasonable suspicion or probable cause determination, although it has implicitly done so.[357] But once it is allowable to use race as "a" factor, basic social science

[355] Rudovsky, *supra* note 7 at 241.
[356] See Russel, *supra* note 27 at 33 (describing just *some* of the man reasons why black men are pulled over by police).
[357] See U.S. v. Martinez-Fuerte, 428 U.S. 543, 563-64 (1976); U.S. v. Brignoni-Ponce, 422 U.S. 873, 885-87 (1975).

and behavioral principles say that it may quickly become "the" factor,[358] which would certainly constitute an Equal Protection violation.

C. *Washington v. Davis* – Proving Racial Discrimination by Police

Fourteenth Amendment analysis is certainly interesting; it requires equal protection under state action, yet allows for unbelievably unequal treatment based on race.[359] The Fourteenth Amendment has become the last stop for those who have suffered a Fourth Amendment violation due to racial/ethnic discrimination, and its potential for success is slim. Some cite the Court's focus on individual, intentional racism as part of the problem, suggesting that it takes the focus away from the "noninvidious, 'normal,' but no less problematic routes by which we perpetuate discrimination."[360]

> [M]any of the flaws in the legal model are the same flaws in thinking that contribute to discrimination itself. That is, the lens we use to detect discrimination distorts our perceptions of people and situations and leads us to discriminate. Together, these legal and social conceptions contribute to the institutionalization and entrenchment of discriminatory patterns by constructing discrimination in ways that make it hard to see, that dress it up as being acceptable or even desirable, or that resign us to living with a regrettable, but seemingly inevitable, state of affairs.[361]

Legal commentators argue that racial disparities should trigger heightened scrutiny, no matter the officer's subjective motivation, because "the injury of racial inequality exists irrespective of the decisionmakers' motives."[362] But even when faced with intentional racism, it is difficult for

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[358] Thompson, *supra* note 39 at 988.
[359] Maclin, *supra* note 21 at 1195 (the Court will not find a violation unless the petitioner can prove intent or a pattern of discrimination).
[360] Wang, *supra* note 20 at 23; see Brown et al., *supra* note 25 at 4.
[361] Id. at 22; see Strossen, *supra* note 333 at 1196 ("The Court's tendency to focus on individual fourth amendment litigants also causes it to neglect systematic evaluation of the collective harm to individual rights resulting from searches or seizures that are similar or identical to the one that gave rise to the case. This failure leads to significant undervaluation of the cost to individual rights of mass or random searches or seizures.")
[362] Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 319, 320 (1987); see Railway Exp. Agency, 336 U.S. at 112-13 (1949) (Jackson, J., concurring) (stating that "Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.")

most judges to make that finding,[363] especially if the judge has to find that the officer is *lying* about his or her race-neutral explanation.[364] If it is a guilty defendant bringing a claim, "the jury often sees the officers as merely 'doing their job' and sympathizes with them on the question of the officer's liability."[365] With the Court directing most claims of injustice to the Fourteenth Amendment, and creating a standard that makes certain most claimants will not succeed, the innocent will continue to be harassed, and the guilty will continue to be imprisoned. As Justice Marshall once wrote, if the Court is going to continue to ignore the more "sophisticated" methods of discrimination, "it cannot expect the victims of discrimination to respect political channels of seeking redress."[366]

D. *Samson* and Search of Parolees

The most recent Supreme Court decision that has chipped away Fourth Amendment protection for an entire segment of the population is Samson v. California. In September of 1996, California's prison system enacted an automatic condition on each prisoner's parole that allowed any law enforcement officer the *complete* discretion to stop and search the parolee "at any time of the night or day, with or without a search warrant or with or without cause."[367] Exactly six years later, petitioner Samson was walking down the street with a female companion and a child in a stroller when a police officer recognized him "from a prior contact." *Without*

[363] See note 14.
[364] See Thompson, *supra* note 39 at 1002 ("Given that officers will not likely admit, or will not be aware, that race prompted their actions, judges would be expected to detect when race is the predominant motivation in officers' behavior. At best, this seems difficult. Judges would face the prospect of labeling a police officer a liar by finding that despite her explanation, improper racial considerations dictated her conduct. Most judges would find such a situation extremely disturbing. Moreover, officers would realize that they only need to provide race-neutral explanations for their conduct to camouflage any cognizant reliance on race. Thus, instead of exposing the influence of race, prohibiting any reliance on race might encourage the officer to conceal the degree to which racial dynamics motivated her conduct.")
[365] Id. at 436.
[366] City of Mobile v. Bolden, 446 U.S. 55, 141 (1980) (Marshall, J., dissenting).
[367] Joint Appendix, Samson v. California, 2005 WL 3785110 at *11 (citing Cal. Penal Code § 3067).

verifying petitioner was on parole,[368] the officer approached Mr. Samson. After asking if petitioner had an outstanding parole warrant, the officer conducted a "parolee search" as he waited for backup.[369] The search was not conducted for officer safety; in fact, it was not prompted by *anything* the defendant was doing. "The sole reason for the search, according to [the officer], was that [he knew] the defendant was "on parole" [and wanted] "to make sure he's still obeying the laws.""[370] In 2006, the Supreme Court held that this conduct was in accordance with the state statute, and that both the state action and state statute were in accordance with the Fourth Amendment. For the first time in our modern history, the Court condoned a law enforcement practice where officers have the *absolute* discretion to randomly stop and search a citizen, outside the prison walls, with no required suspicion of criminal activity.[371] The Court justifies this condition of parole with the idea that parolees are still under the authority of the prison system, and therefore have little expectation of privacy as a condition of their sentence. It assumes that since a prisoner can be searched at random and without suspicion *within* the prison, that parolees should anticipate the same treatment *outside* of prison.[372] Therefore, any

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[368] Id. at *35. Somehow, the officer "recognized in [his] head [that petitioner] possibly had a [parolee at large] warrant." Id. at *37. It is pretty amazing how this officer can parole the streets and recognize every individual he comes in contact with, remember whether that individual is on parole, and know whether they have an outstanding parole warrant.

[369] Id. at *10.

[370] Id.

[371] While the Court in Samson compared their decision with the decision of U.S. v. Knights, 534 U.S. 112 (2001), where the Court allowed a warrantless search of a probationer's apartment as a condition of probation, the officers in that decision were still acting on reasonable suspicion; in Samson, there was no suspicion at all; in fact, the officer admitted that the couple searched were "just walking down the street." See Joint Appendix, Samson, 2005 WL 3785110 at *41. Apparently the Court found that on a "continuum" of punishments, "parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment." Samson, 126 S. Ct. at 2198. See id. at 2202-03 (Stevens, J., dissenting) (What the Court sanctions today is an unprecedented curtailment of liberty. Combining faulty syllogism with circular reasoning, the Court concludes that parolees have no more legitimate an expectation of privacy in their persons than do prisoners…"The suspicionless search is the very evil the Fourth Amendment was intended to stamp out.")

[372] Samson, 126 S. Ct. at 2206 (Stevens, J., dissenting). If the Court had not been so quick to dismiss the privacy interests involved, it would have found "[t]hat [the] balance is not the same in prison as it is out." Id. at 2207.

unjustified, public physical intrusions will not even invoke the parolee's privacy interests, never mind constitute a violation of those interests.

This 24 hour a day, 7 days a week, anyplace, anytime, any *reason* condition seems far more than necessary to keep parolees on the straight and narrow. It is questionable whether this policy is really going to *reduce* recidivism, or whether it will just contribute further to the vicious cycle already in place for low-income minorities. As for a general deterrent, the policy might actually worsen the situation for those *not* on parole. Seeing someone getting stopped and searched on a public street for no apparent reason is likely to *increase* the amount of distrust the community will have with local law enforcement, not enhance their compliance with the law. How are those community members to know that this seemingly random, unjustified pat-down is anything other than another instance of police harassment and/or racial targeting? The policy also seems counter-intuitive to rehabilitation. Instead, it seems to do nothing more than set these parolees up for failure, minimizing any chance they might have at turning their lives around once released. And for what? To make it just a *little* bit easier for the police to catch parolees recidivating?[373] Have criminals gotten so good at concealing their criminal activity that we need to give the police unlimited chances at catching them?[374] Unfortunately, "[w]ith the fear of crime almost as rampant as crime itself, the pressure to concede to law enforcement the

[373] Parole revocations can deprive liberty and due process to the same extent as incarceration, yet the process for revoking parole allows for more discretion and less scrutiny, and under Penn. Bd. of Probation v. Scott allows evidence obtained in violation of the Fourth Amendment to be used against the parolee. See Travis, *supra* note 51 at 51. Parole revocation "requires neither a criminal conviction nor proof that the parolee posed a public safety risk. When it comes time in America to "round up the usual suspects," it is relatively easy to round up large numbers of people on parole, charge them with violating the conditions of their supervision, and send them back to prison." Id. at 104.

[374] Apparently the Court believes this to be the case, since requiring officers to have even *reasonable suspicion* before stopping and searching a parolee "would give parolees greater opportunity to anticipate searches and conceal criminality." Samson, 126 S. Ct. at 2201.

investigatory tools it needs or wants will remain significant even in the absence of a war on drugs" or similar 'tough on crime' policy.[375]

Officers have now been given the green light to harass low-income parolees as they mind their business walking down the streets of their high-crime neighborhoods. And what will be the repercussions if the officer is wrong in his assumption that the suspect is a parolee? The officer in Samson got lucky that the petitioner was on parole, but what if the next suspect is a law-abiding citizen? Is there going to be another reasonableness standard for that mistake? Even if the police do take the time to target actual parolees, isn't it likely that they will just keep lists of parolees living in low-income, high-poverty, minority neighborhoods?[376] Indeed, such a scenario has already come to fruition: in 2002, the LAPD, claiming "the spate of violence was partly attributable to the increase in the number of returning prisoners," implemented "Operation Enough."[377]

> Carrying photographs of suspected parole violators, 250 police officers, working together with parole agents, descended upon the city's skid row area, a homeless encampment just east of downtown. This part of the city was home to about 2,000 parolees, the highest concentration of parolees in the state. On the first day of the sweep, 108 arrests were made, about 50 percent of them for parole violations.[378]

Racial targeting is not going to lessen with these policies; if anything, it is going to encourage the practice. And what will be the remedy for such unconstitutional practices? Most likely, it will not include the exclusionary rule.

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[375] Grano, *supra* note 333 at 305 (1994).
[376] It seems *highly* unlikely that the police will walk up and down Wall Street, randomly stopping people in the hope that one of them is on parole for a white-collar crime.
[377] See Travis, *supra* note 51 at 103.
[378] Id.

E. The Exclusionary Rule after *Mapp*

The exclusionary rule *used to* be about "securing obedience to the law in a manner which influenced the police [to follow it]."[379] People used to think it "unseemly that the government should with one hand forbid certain police conduct and yet, at the same time, attempt to convict accused persons through use of the fruits of the very conduct which is forbidden."[380] In fact, the right to redress from unreasonable searches and seizures was seen in the past as *inherent* in an individual's Fourth Amendment rights.[381] Now it appears as if less people (and fewer members of the Court) believe this to be true; instead, the judiciary seems to be concerned about whether the intrusion was "rational from a police perspective."[382] The current flaccidity of the exclusionary rule is a prime example of our uneven "balancing" of the interests involved.[383] Nevertheless, the hypocrisy of the situation remains:

> When the police themselves break the law and other agencies of government eagerly reach for the benefits which flow from the breach, it is difficult for the citizenry to believe that the government truly meant to forbid the conduct in the first place….It is corrosive of the vitally necessary trust in government if we all understand that "they" do not abide by the law which "they" assert. The conviction that all government is staffed by self-seeking hypocrites is easy to instill and difficult to erase.[384]

It is understandable why the exclusionary rule has lost all force when you have sentiments such as the following:

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[379] Monrad G. Paulsen, The Exclusionary Rule and Misconduct by the Police, *in* POLICE POWER AND INDIVIDUAL FREEDOM: THE QUEST FOR BALANCE 87-98 (Claude R. Sowle, ed. 1962).
[380] Id. at 90.
[381] See Brent D. Stratton, The Attenuation Exception to the Exclusionary Rule: A Study in Attenuated Principle and Dissipated Logic, 75 J. Crim. L. & Criminology 139, 155 (1984).
[382] Maclin, *supra* note 21 at 372-73.
[383] See Mass. v. Painten, 389 U.S. 560, 565 (1968) (White, J., dissenting) ("We might wish that policemen would not act with impure plots in mind, but I do not believe that wish a sufficient basis for excluding, in the supposed service of the Fourth Amendment, probative evidence obtained by actions – if not thoughts – entirely in accord with the Fourth Amendment and all other constitutional requirements. In addition, sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.")
[384] Id.

> The exclusionary rule is the ten-thousand-pound gorilla of our criminal justice system. Cops, prosecutors, and trial judges spend much of their time tiptoeing around the beast, hoping it is sleeping soundly. Like the mythical beast, it is wiser not to stir up the exclusionary rule, lest we suffer the consequences of a runaway train.…The exclusionary rule is bad law. It is demeaning, an insult, a slap in the face to our cops. Worse, it makes the truth irrelevant to the criminal justice system.[385]

Apparently, the Court believes that

> The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial. Yet a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime.[386]

Certain constitutional rights and remedies have been modified or adapted to fit with the times, while a select few seem to lose their force completely, remaining a mere shell of their original form. Unfortunately, the exclusionary rule falls into the latter group. Since its creation, the Supreme Court has carved out exceptions for grand jury proceedings,[387] parole hearings,[388] civil tax proceedings,[389] civil deportation proceedings,[390] habeas proceedings,[391] when the violation and the discovery of incriminating evidence is "so attenuated as to dissipate the taint,"[392] when the officer acted in objective good faith, executing a facially valid warrant later found to be deficient,[393] when the officer acted in objective good faith, relying on a statute later found to be unconstitutional,[394] when the officer acted in good faith, relying on a computer

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[385] Burton S. Katz, Justice Overruled: Unmasking the Criminal Justice System 36 (1997).
[386] Terry v. Ohio, 392 U.S. 1, 14-15 (1968).
[387] U.S. v. Calandra, 414 U.S. 338 (1974).
[388] Penn. Bd. of Probation v. Scott, 524 U.S. 357 (1998).
[389] U.S. v. Janis, 428 U.S. 433 (1976).
[390] INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).
[391] Stone v. Powell, 428 U.S. 465 (1976).
[392] Nardone v. U.S., 308 U.S. 338 (1939).
[393] U.S. v. Leon, 468 U.S. 897 (1984); Mass. v. Sheppard, 468 U.S. 981 (1984).
[394] Ill. v. Krull, 480 U.S. 340 (1987).

record later found to be in error,[395] when the defendant makes a statement outside his home, after the police have made an illegal entry into his home to arrest him,[396] and most recently, for knock-and-announce violations.[397] In addition, lower courts have also created exceptions for child protection hearings,[398] military discharge proceedings,[399] supervised release hearings,[400] and during sentencing.[401] The requirement that illegally seized evidence be excluded from trial is about as forceful as that pesky warrant requirement outlined in the Fourth Amendment of our Constitution.[402]

The rule is not seen as an individual remedy, but as a deterrent against unlawful police conduct. Of course, there is a certain point where the rule might help to deter *some* misconduct, but where many other officers simply give the *appearance* of propriety. In the year after Mapp was decided, suddenly officers were giving more detailed and specific justifications for their warrant requests; on the stand, they were

[395] Arizona v. Evans, 514 U.S. 1 (1995).
[396] N.Y. v. Harris, 495 U.S. 14 (1990).
[397] Hudson v. Michigan, 126 S. Ct. 2159 (2006).
[398] In re Diane P., 110 A.D.2d 354 (N.Y. 1985).
[399] Garrett v. Lehman, 751 F.2d 997 (9th Cir. 1985).
[400] U.S. v. Montez, 952 F.2d 854 (5th Cir. 1992).
[401] U.S. v. Tejada, 956 F.2d 1256 (2d Cir. 1992).
[402] Author Craig M. Bradley and Justice Antonin Scalia have listed over twenty exceptions to the Warrant Clause, leading to the conclusion that perhaps warrants are not necessary for searches, but when they are used, they must be specific. The listed exceptions are as follows: (1) exigency; (2) incidental to arrest; (3) officers *observe* a crime being committed; (4) auto exception; (5) border searches; (6) administrative searches of regulated businesses; (7) search incident to *non*arrest when there is probable cause *to* arrest; (8) boat boarding for document checks; (9) “welfare” searches; (10) inventory searches; (11) airport searches; (12) school searches; (13) searches of mobile homes (falling within the auto exception); (14) searching the offices of government employees; (15) searches *near* the border; (16) administrative searches; (17) Terry stops; (18) plain view/open field/prison “shakedowns” (which aren’t covered by the Fourth Amendment at all); (18) warrantless entry following arrest elsewhere; (19) consent; (20) driver’s license and vehicle registration checks; (21) searches at the courthouse doors; (22) standing doctrine (if you don’t have a lawful possessory interest in the vehicle searched/property seized, it doesn’t violate the Fourth Amendment). Craig M. Bradley, Two Models of the Fourth Amendment, 83 Mich. L. Rev. 1468, 1473-74 (1985); California v. Acevedo, 500 U.S. 565, 582-83 (1991) (Scalia, J., concurring in the judgment). In fact, during a recent visit Justice Scalia made to Roger Williams University School of Law, I asked him to explain how the Warrant Clause is still being enforced when there are so many exceptions to it. Justice Scalia responded by saying that a warrant is *never* required to conduct a search or seizure – the search or seizure need only be reasonably conducted.

giving dropsy testimony.[403] Yet that did not necessarily reflect a change in police practice. Those who were going to commit such obvious misconduct were going to do it no matter what; it was just that now, they had to lie about it on the stand. As an example, in 1986, the DEA implemented a program it created, known as "Operation Pipeline," for the purpose of cracking down on drug couriers on the highways. In the program, the DEA brought in 27,000 state troopers from 48 states, and taught them how to spot a car likely to be carrying drugs.[404] Although the DEA maintained that it did not use race as part of its Pipeline training, and indeed taught officers *not* to use race when deciding who to pull over, it later admitted to using race as "one of [] many factors."[405] In reality, racial profiling was evident all along in the Pipeline's results. In California, despite their own denials that race was used as part of the drug courier profile, state troopers were disproportionately targeting minorities, especially Latinos.[406] The New Jersey force was a little more subtle: in their circulated profile to be used in the program, they included a warning that said: "Do not form a pattern on your stops. Do not write the same summonses on all the vehicle stops you make. This will form a pattern and can latter [*sic*] be used as a defense in court."[407] While some are more covert than others, their different approaches all reach the same result – officers consistently use race in the decision of who to target.

The Court's suggestion that individual officers will not be deterred by the exclusionary rule is simply untrue. "Officers not only know when their evidence has been

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[403] See Harry M. Caldwell & Carol A. Chase, The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call to Examine the Rule in Light of Changing Judicial Understanding About Its Effects Outside the Courtroom, 78 Marq. L. Rev 45, 53 (1994).
[404] See Glasser, *supra* note 20 at 707.
[405] See Harris, *supra* note 7 at 49.
[406] See id. at 51.
[407] See Milton Heumann & Lance Cassak, Good Cop, Bad Cop: Racial Profiling and Competing Views of Justice 73 (2003).

suppressed; they also generally understand, while in court, *why* it has been suppressed."[408] In fact, "many of the officers observed that they had learned to be more careful in the context of warrantless searches."[409] Whether or not the officers really "learned" to be more careful with how they conduct the searches, or just careful to not get caught doing illegal searches, remains unclear. But the idea that excluding evidence is no longer necessary to serve as a deterrent is simply an excuse to justify unconstitutional conduct in the name of crime control. The Court appears unwilling to second-guess such exquisite police judgment, yet at the same time skeptical that the officers have the ability to even understand the consequences of their actions. Perhaps if the Court was a little more skeptical of police judgment, and a little more confident in the ability of law enforcement to understand the legal repercussions for their misconduct, we would have more balanced Fourth Amendment decisions.

VIII. Conclusion

So what is there to do next? How do we move forward when the future looks so bleak? First we must gauge the implications of the Court's most recent decisions and its stance on the Fourth Amendment. With a better understanding of what the future will entail for the CJS, we may then begin to take action as a society and demand reform for those policies that are really doing more harm than good. Perhaps presenting a more unified front against these injustices will signal to the Court that politics should no longer influence its decisions. At the very least it will

[408] Myron W. Orfield, Jr., The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers, 54 U. Chi. L. Rev. 1016, 1035 (1987).
[409] Id. at 1038. If it were really concerned with deterring police misconduct, it would realize that ex-post review of police conduct has not been that effective of a deterrent. What has been effective is ex-*ante* review, "by forcing investigatory officials to justify their action *before* the act," not after. Christopher Slobogin, The World Without a Fourth Amendment, 39 UCLA L. Rev. 1, 11-12 (1991).

lead to a more honest and open discussion of how our laws and Court decisions affect all of society, not just those behind bars.

The future of parole will likely be heavily influenced by the Samson decision. As of 2005, there were 784,408 prisoners on parole; just six states made up 46% of the total parolee population[410], and eleven states saw *double-digit* increases in their number of parolees.[411] Attention should be paid to the number of states who implement Samson's automatic condition of parole, and to the increased rates in recidivism among parolees. Currently, about 20% of those released from prison were released without any conditions.[412] It will be interesting to see if that will change due to the new, unbridled discretion allowed by Samson. As it is, by 2002, California parole agents were revoking the parole of about 70,000 parolees each year, for no other reason but a technical violation.[413] One can only imagine that the number of technical violations will continue to increase, until each California parolee has a brief vacation stay at home before returning to prison. In addition to the pure number of states implementing these conditions in their parole process, it might be interesting to look at *why* they believe they need such discretion, and whom they intend to target with the statute. There is a strong possibility that, with this new-founded power, the future of parole as a measure of easing offenders back into law-abiding society will almost cease to exist.

One essential piece of reform should be reinstituting the currently useless exclusionary rule. A lot is at stake when it comes to invasions of our Fourth Amendment rights; "[a]mong deprivations of rights, none is so effecting in cowing a population, crushing the spirit of the

[410] Lauren E. Glaze & Thomas P. Bonczar, Probation and Parole in the United States, 2005 1,3 (Nov. 2006), Bureau of Justice Statistics No. NCJ 215091 (Texas, California, Ohio, Michigan, Pennsylvania and Illinois).
[411] Id. at 2.
[412] Travis, *supra* note 51 at xxii.
[413] Jacobson, *supra* note 51 at 40.

individual and putting terror in every heart."[414] And since our law enforcement "are themselves the chief invaders," we must do our best to demand protection from our judiciary, since "there is no enforcement outside of court."[415] Critics (including members of the Court) make a big deal about the "costs" of implementing the exclusionary rule, as it was set out in Weeks v. United States, 232 U.S. 383 (1914). They say that it is letting criminals go free on a technicality. But what about the cost of implicit approval/acceptance of illegal and unconstitutional police work on the communities who experience the misconduct on a nearly daily basis? Wouldn't a remedy for a *constitutional violation* at the *very* least show those communities that such behavior will not be tolerated by our last line of constitutional defense? Would it not at least be a *starting* point in creating a more respectful relationship between law enforcement and these community members, possibly lessen the hostility between the two, and perhaps eventually allow the two to work *together* to reduce the crime rates in their neighborhoods?

The Court has three options: either (1) come out and say that the exclusionary rule no longer exists, and come up with a new remedy for the violations, (2) be honest in the fact that there *is* no constitutional remedy for a Fourth Amendment violation, or (3) really start applying the rule, *whenever* it applies, getting rid of the countless exceptions it has carved out of the rule. In order to create real reform, the Court should first be clear on what it is trying to deter (what does it consider wrongful police conduct?). Secondly, the Court should be open to looking at what would *effectively* deter that misconduct, not just what will look good to the general public. Whatever the Court decides to do, it needs to be realistic about what it is attempting to do with these rulings, and acknowledge how affective they have really been on maintaining and protecting our citizens' Fourth Amendment rights.

[414] Brinegar v. U.S., 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).
[415] Id. at 181.

We as a society are not *completely* susceptible to our elected officials and Supreme Court. It is not as if we cannot do anything about the amount of discretion we allow officers to have. Indeed, some police departments already require police to ask for consent to search, no matter if they have sufficient reasonable suspicion or probable cause to do so without consent.[416] Departments could also require their officers to write reports of every traffic stop, explaining their grounds for suspicion, which could make them "think twice" before making stops in the future.[417] Whatever the reform may be, a change in our method of law enforcement needs to occur before we can even *begin* to alleviate our crime rate and our social issues.

Unfortunately our current Criminal Justice System is setting up our poor, our minorities, and our "criminals" for failure, and making sure to use their failures as the justification for continuing to be "tough on crime." It appears as if "hundreds of thousands of people are [and will be] in prisons because they were in the wrong place at the wrong historical moment."[418] This is something that general society does not understand, and perhaps is not willing to accept. We want something and someone to blame, and when there is no easy answer, we tend to rely on our leaders to show us whom to blame. Yet there is not one thing or one group of people totally responsible for the demise of our inner-cities and racial minorities. Nor is the solution an easy, one-step process. What should be evident is that a decrease in our crime rate is not going to come from locking more people up. It certainly is not going to come from continuing our current approach towards the War on Drugs. And it cannot come simply from a change in our CJS policies. Where it should, and must, come from, are through societal changes in the communities where crime is most prevalent. It should come from *proportional* enforcement in the suburbs and the business districts, so that blacks do not feel mistrust and anger towards our

[416] Id. at 146.
[417] Id.
[418] Tonry (2004), *supra* note 12 at 10.

law enforcement for their selective treatment. It should come from better public housing, so that the homeless are not driven to crime in order to survive. It should come from deconcentration of poverty, so that there can be better police and community supervision, and better role models for our inner-city youth to look up to. It should come from better education, so that our inner-city communities have at least the chance to make a decent living, separate from a life of drugs, crime, and violence. It should come from our media and our politicians, so that our citizens understand the *real* situation of crime and its impacts on society. And it should come from our Supreme Court, so that our constitutionally-guaranteed rights are not subjected to the political whims of those in power.

When couched in terms of protecting personal privacy, dignity and humanity, instead of crack-heads, killers and rapists trying to escape punishment, our Fourth Amendment rights are something for which every citizen should be willing to fight. Every taxpayer should be disgusted at the fiscal impact these failed policies have on society, and should be motivated to demand change. Hopefully, we can start to have some honest discussions about how our ‘undesirables’ are and should be treated, and what place they should have in our society. And when our “color-blind” society can finally have an honest discussion about race and discrimination, perhaps a change can come. Until then, our inner-cities must wait for the rest of society to open their eyes to a situation they have helped create, and now choose to ignore.