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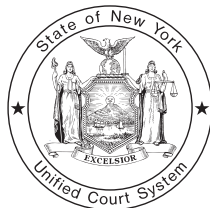
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Mass Incarceration and The Effect On The Community


Spring 2016

Race to Incarcerate: The Causes and Consequences of Mass Incarceration

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Race to Incarcerate: The Causes and Consequences of Mass Incarceration

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Race to Incarcerate: The Causes and Consequences of Mass Incarceration

Marc Mauer*

Good morning and thank you so much for having me here. I appreciate the kind introduction; I have come to appreciate the importance of getting the introduction right. When my book “Race to Incarcerate” was first published, I was giving a talk in one of the book stores in Washington [, D.C.] and a newsletter went out promoting the talk, saying “Marc Mauer will speak about his new book ‘Race to Incinerate.’” Those issues are important as well, but I think we are going to talk about prison issues today if that’s ok with you.

It is a pleasure to be here for a number of reasons. Over the years, I have been happy to work with and watch the work of people in corrections, people in the advocacy community, and practitioners in Rhode Island and have been so impressed at the leadership [and] creativity employed here. It gives me ideas about what we can talk about in terms of addressing mass incarceration, what practitioners can do, and what policy makers should be paying attention to. I am hoping to learn from you as well as the day goes on. I am impressed as well [with] the variety of perspectives and positions that are here today. You may think it’s an easy thing to pull together all these different constituencies in the state, but there are not many law schools that have been able to pull off an event like this.

This convening comes at a very important time. I think it is increasingly clear that we are at a moment when the opportunity for criminal justice reform is probably greater than it has been in

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several decades. I just came from speaking at a summit event in Washington billed as a bipartisan summit on criminal justice reform. It was cosponsored by the ACLU and the Koch Brothers, so we are now living in a different world.

What I want to do this morning is talk about three main issues. First, what are the policies and practices that have produced mass incarceration over the past four decades? Second, what is the impact of mass incarceration on public safety and communities? And third, where do we need to go from here if we to address these issues in a fundamental way?

Let me say that I will be speaking primarily about national trends, which may or may not always apply to Rhode Island. But mass incarceration has been an American phenomenon and I think that most of what we will be looking at, to one degree or another, is probably very relevant to your situation.

If we want to think about the big picture of mass incarceration, we have to go back to 1973, the year when the prison population first began its historic rise. Let's imagine that we are back in 1973. Richard Nixon is President. And let's imagine that President Nixon comes on national television and here is what he says: "My fellow Americans, we have a serious problem of crime in this country, but I have a plan for dealing with it. Here's my plan. First we are going to build a million new prison cells and fill them as quickly as possible. Second, because we know that crime disproportionately takes place in minority communities, we are going to reserve 60% of those cells for blacks and Latinos. And third, we are going to put 3,000 people on death row and start to execute them as quickly as possible. That's my plan for dealing with crime."

What would have been the response to such a speech by an American President? Well, I think there would have been great outrage by civil rights and civil liberties organizations. We would have seen editorials in leading newspapers decrying this barbaric plan of building a million prison cells, killing people, locking up people of color in large numbers. I think there would have been great outrage. Well, Richard Nixon never made such a speech, but this is precisely what our criminal justice policy has produced over the last four decades. Let me show you what that looks like.

To start off . . . This is a picture of the prison population in the United States for a period of about fifty years, 1925 to 1972. And

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what we see here is a relatively steady number of people in state and federal prison. It goes up a little bit during the depression years, down a little during World War II, but no dramatic changes and we end 1972 with about 200,000 people in state or federal prison.

And then this is where we go. Indeed, we have added more than a million people to our system since then. We have a rise that was totally unpredicted, unprecedented over the last four decades. To put some context on that, a comparison of international rates of incarceration shows that the United States has come to lock up a greater portion of its citizens than any other nation on Earth. If we compare ourselves to other industrialized nations, we lock up our citizens at five to eight times the rate of those other countries. Whatever you may believe are the causes of this disparity in incarceration, it strikes me as a very profound problem that a society that prides itself on its democratic traditions, the wealthiest society in the world, has somehow come to be the world's largest incarcerator. There's something wrong with this picture.

This increase in the justice system is not confined to state and federal prisons. Here we have state prisons, jails, parole and probation. The criminal justice system overall has expanded at an incredible rate over these last four decades.

We know that incarceration does not cut across the population evenly, Bryan [Stevenson] referenced those figures from the Justice Department study, that if current trends continue one of every three black males born today can expect to go to prison in his lifetime, one in every six Latino males, one of every seventeen white males. The figures for women overall are lower, but we see racial, ethnic disparities there as well.

The challenge, the big question for us, is where does this dramatic change come from? One might think if we have about seven times as many people in prison today as we did four decades ago, maybe we have seven times as much crime and that is what explains it. "You do the crime, you do the time," that's why we lock up so many people now. If we go back to the early years of the prison buildup, there is a bit of truth in that explanation. There was a rise of crime from the mid-60s to the mid-70s. Part of this was due to the Baby Boom generation coming into the high crime rate years, part of this was increasing urbanization, which

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is often associated with crime, as well as other factors. So, we had an initial rise in crime rates that probably contributed to some of this increase, beginning in the 1970s.

But we know, beginning in 1980, the increase in the prison population has been a function of changes in policy, not changes in crime rate. The changes in policy essentially have been changes in sentencing policy, decisions made at a federal, state, and local level to send more people to prison and to keep them there for longer periods of time. Some of you may be familiar with the groundbreaking report produced by the National Research Council last year, looking at the causes and consequences of incarceration. Essentially, their analysis concluded that half the increase since 1980 resulted from an increased likelihood of a prison sentence upon arrest and half from an increase in time served in prison. If you break it down by decades, the 1980s was the decade of the “war on drugs” being formally launched, where we see the increase was primarily due to greater admissions to prison. It became far more likely, certainly for a drug offense, to be sentenced to prison. In the 1990s, the cause has shifted to an era where the amount of time a person served in prison began to increase dramatically. This was due to policies such as “Truth in Sentencing” to extend the time in prison and cutbacks in parole release in many states. In the 2000s we have seen somewhat of a moderation in these trends.

So what do these changes in sentencing policy look like? Well, they are very complicated and they vary depending on where you look. Broadly speaking it is the era of mandatory minimums, policies like “Three Strikes and You Are Out,” habitual offender laws, and the “Truth in Sentencing,” cutbacks in parole. Every state has adopted some form of mandatory sentencing, although it varies in the extent to which it is applied. The federal system has probably been the leader in this regard, and particularly for drug offenses.

One of the more extreme cases we have seen in recent years is a federal case in Utah, a man named Weldon Angelos in the early 2000s. Weldon Angelos was a 24-year-old music producer, and he was also a mid-level marijuana seller. On three separate occasions, he sold about \$300 worth of marijuana to an undercover agent. During the course of these transactions, he possessed a weapon, a gun that was stuck in his sock in his shoe. [He] never

used or threatened to use the gun, but it was visible to the undercover officer. So he's got three counts of selling marijuana and he is in possession of a weapon while he does it. For the first count because of the quantity of drugs, the judge had no recourse but to sentence him to five years in prison on a mandatory sentencing charge. For the second and third counts he is now a convicted drug offender based on the first conviction, and he's a convicted drug offender in possession of a weapon while committing a new drug transaction. So on the second and third counts he gets 25 years and 25 years. So Weldon Angelos is serving 55 years in prison for about \$1000 worth of marijuana sales. The sentencing judge in this case, Paul Cassell, a self-described conservative Republican, was essentially begging the defense attorneys to give him something to work with so he wouldn't be obligated to impose this 55-year sentence, but that's what mandatory sentencing is. Lawmakers did not want judges to have any discretion to get around these cases and there was nothing to work with. That's where Weldon Angelos is today.

About half the states adopted some form of three strikes policy in the mid-1990s. Typically, upon your third serious conviction, you could get a life sentence. The policy adopted in California was by far the most extreme. In California your first two strikes had to be serious or violent as defined in the statute, but your third felony could be any felony in the state of California. So there was a challenge to the policy that went to the U.S. Supreme Court in 2003, and the question was did the policy represent "cruel and unusual punishment?" There were two cases. In the first case the man's third strike involved stealing three golf clubs from a sporting goods store. He had on some baggy pants, he took the golf clubs, stuck them in his pants, walked out of the store, and was immediately apprehended. The second man's case involved stealing \$153 worth of video tapes from a Kmart store on two separate occasions. The Court looked at these cases and rejected the argument about being "cruel and unusual." Essentially, they concluded that if this is what the legislators in California believe is necessary to deal with the crime problem then we don't want to second guess them on that, and will defer to their judgment about whether this is a reasonable way to deal with a crime problem. So the golf club thief is serving a sentence of 25 to life, and the videotape thief is serving a sentence

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of 50 to life in California prisons. Now, I do not mean to suggest that most people in prison are there for stealing golf clubs and videotapes. We all know that there are many people who have committed very serious that have harmed the public and individuals, but this is one of just many ways in which the extremes, the restrictiveness of our sentencing policy has produced results that I think can only be described as bizarre, not to mention counterproductive.

We know that beginning in the 1980s, the most significant change in the system for a period of about 20 years was what we call the “war on drugs.” Here’s a brief overview. We see that in 1980 about 41,000 people were in prison or jail, either serving time or awaiting trial for a drug offense; today that figure is nearly 500,000 people behind bars for a drug offense. We have more people behind bars for drug offense today than the entire prison and jail population back in 1980. We know that the composition of the people serving time for drug offenses is very disproportionate, about 60% African American or Latino, far out of proportion to the extent that those groups use or sell drugs. These disparities are produced by a mix of law enforcement strategies, sentencing policies, and prosecutorial decision-making.

In other areas of sentencing we see results that can only be described as extreme, particularly the imposition of long term sentences. Over a period of years, the use of life imprisonment has become a defining feature of the American prison system, to the point today where one of every nine people in prison is serving a life sentence, nearly 160,000 people. Of this group, about a third are serving life without the possibility of parole. Even for those who have the possibility of parole, in far too many states Governors or Parole Boards are now adopting policies where they say that “life means life.” So the sentencing judge may have believed that when this person was sentenced to life with the possibility of parole, that the person might be eligible for parole in 15, 20, or 30 years, but now the parole board is saying “no, that is not our policy.” This is very contradictory to what everyone in the courtroom believed was happening on the day of sentencing.

Population increases in other parts of the system are not necessarily a result of changes in policy, but changes in practice. We can see this particularly in probation and parole systems around the country, in large part due to the increased numbers of

people going to prison on a parole or probation revocation. In 1980, one of every six people admitted to prison came in on a violation; that proportion is now doubled to one of every three people admitted to prison. About 29,000 people entered prison on a violation in 1980; today that figure is 232,000. Some of them are for new charges, some of them for technical violations, but in many cases we can see the impact of decision making by practitioners.

One development that may seem odd in looking at these figures is that beginning in the 1980s and continuing today there has been a great deal of creativity in many courtrooms and communities in developing alternatives to incarceration. Before 1980, in most courtrooms on the day of sentencing, a judge had a choice between prison or probation and not much in between. Over the course of several decades, I am sure that there is no court in America that does not have some type of community service program, some type of restitution to victims programs, and in many cases, much more creative initiatives such as drug courts and mental health courts. This has all been very encouraging, as courts and communities are responding to the perceived needs in the court room. But what is difficult to understand is if we had such an expansion of alternatives to incarceration, how can we explain the trends in the prison population, which have continued to go up for nearly four decades now? It seems to me that there are three possible explanations. One is that the development of alternatives has varied quite a bit from state to state and even localities within a state. Depending on how these alternatives are established may tell us a good deal.

A second possible explanation is that it is possible that without these alternatives, the rise of the prison population would have been even more dramatic than it already is. It is hard to imagine, but perhaps that would have taken place if we didn't have this creativity.

A third part of the explanation is that as we've seen this flowering of new programs, many of them have been well-intended but are not necessarily are serving as alternatives to incarceration. We see this in far too many drug and other specialty courts, as well as in diversion programs. The criteria for admission to many alternatives to incarceration programs are often on the low end of the scale, so there are many programs set

up for first time offenders, nonviolent offenders, young offenders, and the like. This is understandable in many respects, based on an idea of helping people change their lives before they get too deep into the system. There is certainly a need to do that, and some programs do this well so that it becomes the last contact that the person has with the system. But if we want to see if alternatives to incarceration can really have an impact on the prison population, then we also need to extend the categories of people—the criteria—in terms of who we are admitting into the programs. We know from a good deal of research that the more we work with higher risk people, who have a higher chance of incarceration, the more the benefits there are to the community. If we can stop what might be a budding criminal career, if we can help people to turn around who have a greater likelihood of committing harm, we can make a big difference. It doesn't mean that it is easy to do this, but we need to be very clear about how we target our interventions and what we are trying to accomplish.

This has been an overview of the development of changes in policy explaining where mass incarceration comes from, but what has been the impact of mass incarceration? There are some people who will look at the experience of the last 15 or 20 years, a time when crime rates have been declining around the country while the prison population has continued its rise, and will conclude that “Well, it looks like it works, the prison population went up, crime went down. It may be unfortunate that we have two million people behind bars, but that's just what we needed to do in order to control crime.” So what do we know about that? First, we know that prison does have some effect on crime. Each of us can think of a particularly high profile case of serious violence and the person behind bars today makes us all, at least a little bit, safer. But as we look at the research on what the impact of prison is on crime it turns out that that impact is much more modest than one might initially think.

Here is the conclusion of the report from the National Research Council last year where they say the growth in incarceration rates reduce crime but that the magnitude of the crime reduction remains highly uncertain and the evidence suggests it is unlikely to have been large. In many ways, this seems counterintuitive. Whether or not you're a proponent of mass incarceration, one might think that if we had two million

people behind bars, if we lead the world in incarceration, we should be the safest country on Earth. But with so many people incarcerated, why have we not seen even a greater effect on crime? There are a number of factors that help to explain this.

First, we are well past the point of diminishing returns, in terms of what we get out of incarceration as a public safety strategy. If we had a prison system of 100 beds, and we had to prioritize who is incarcerated in those 100 beds, I assume that most of us would say, "Well, let's look at people convicted of murder, rape, and armed robbery and we'll use the prison cells to keep those people behind bars for a long period of time." But if we have a prison system of a million beds, we no longer have to be very selective, since there is more than enough space for all of the people convicted of murder, rape and robbery. Now we have got enormous amounts of space for drug offenders of various levels. We don't have to lock up just the high-rate burglars, we can lock up low-rate burglars if we want. What we have done through the expansion of the system is that each successive person going to prison, each incremental jump in incarceration rate means that we often have increasingly less serious people going behind bars and therefore in terms of the impact on public safety, on crime commission, we have been getting a diminishing impact for quite some period of time.

A second factor is what criminologists would call the "replacement" effect. Think about two offenders we send to prison. Offender A is a serial rapist who is terrorizing a neighborhood. The police finally catch the person, take him to court, he is convicted, and sent off to prison. In this case we put one person in prison, and we have clearly had an impact on crime, at least in that particular neighborhood. Offender B is a kid on the street corner selling drugs. The police come by, do a drug sweep, catch him in the act of selling drugs, take him to court, he is convicted, and maybe sentenced to prison for five years on a mandatory drug charge. Just as in the case of the serial rapist, we have now sent one person to prison, but what have we done for public safety? If we go back to that street corner where he was picked up selling drugs, how long do you think it is going to take for somebody else to step up to that corner and try to meet the demand for drugs in that community? I think it is going to take about 20 minutes in most neighborhoods. If there is a demand for

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drugs, there is a virtually endless supply of people willing to step up and try to make a little bit of money. We know there is always an endless supply based on the numbers of drug offenders who have been convicted and sent to prison over the last thirty years.

So in this case we have also increased the prison population but we haven't necessarily done anything about the drug problem on that street corner. In a sense we have created a new job opportunity, for somebody else to step up to that street corner. But we have also done something else when we send that person to prison. Conservatively speaking, it costs about \$25,000 to keep a person behind bars, and considerably more in some states. A five-year prison sentence for that street corner drug seller means that we as tax payers have just committed to spending \$125,000 to keep him locked up.

Now suppose I was the mayor of this particular town where he was picked up and I come and have a meeting of the residents of the community and I say to them "You know, you have got a drug problem in your community. We need to do something about it. I am going to give you \$125,000 and you tell me what you want to do with that money to deal with the drug problem." Well, what would people come up with? I think that we would hear a broad range of ideas. Some people would want a law enforcement officer on the street corner 24/7 to deter people from selling drugs, others would want more treatment programs, and some people would want summer jobs for their kids in high school. We could have a pretty vigorous conversation about what might bring safety to that community. But it is hard to imagine any neighborhood in America saying they want to spend that entire amount of money locking up one person for five years and then pat themselves on the back for what a good job they did in dealing with the drug problem in this neighborhood. Now we never say this in the courtroom. We don't say, "I'm sending you to prison for five years and I'm glad the tax payers are coming up with \$125,000 to make this possible." But we are doing this tens of thousands of times, over and over again, without asking any questions about the range of ways that we might approach this issue.

The third factor that I think tells us something about the limited impact on public safety of these sentencing policies that we have adopted has to do with the nature of deterrence. Deterrence has always been one goal of the justice system, and it

certainly produces a degree of deterrence. What too many lawmakers have become confused about, and much of the public too, is research over many decades tells us that deterrence is much more a function of the certainty of punishment, rather than the severity of punishment. That is, if we can increase the odds that someone will be apprehended—whether it is a shoplifting, or a murder—then at least some people will think twice about it. But if we merely increase the amount of punishment that we are going to impose for people who don't think they are going to be caught anyway there is very little effect. We can think of how this plays out in our daily lives. We are out driving on the highway, it is a holiday weekend; I don't know about you, but I occasionally go over the speed limit by a little bit or so. If there are a lot of state troopers on the highway that day I am going to slow down a little bit to below the speed limit, because the certainty of apprehension and punishment has just increased due to a greater law enforcement presence. But if the state legislature last year increased the penalties for speeding, first of all I don't know what the penalty is, how much the fine is, and secondly I am not normally planning to get caught. If I inch over the speed limit I am not really worried about that.

I work in Washington, and I go to hearings on Capitol Hill and you hear policy makers of both parties—less now than it used to be—say, “We are going to send a message to these offenders that if you so such and such, we are going to punish you. We are going to increase the penalty.” It is not clear who is listening to the message and it is not clear that the message is really getting across very well.

So we see that prison has some effect on public safety. That effect it is more limited than many people believe, and it is certainly one of diminishing returns. But we also see a variety of other effects.

None are more significant than the profound racial and ethnic disparities in the system. Today, nearly 60% of the prison population is African American or Latino. The intersection of race, poverty and social class is most profound among black male high school drop outs. By the age of 34, 70% of this group have already been to prison. So if you are a black male who drops out of high school it is almost a guaranteed admission to your state or federal prison system.

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How do we explain these profound disparities? It is a complicated question. At first glance, it seems like race. Yes, there is greater involvement in certain crimes among people of color. But among African Americans, we don't have to dig very deep to see that what might appear to be a racial effect is essentially one of socio-economics. What we are looking at is concentrated poverty and the disadvantages that come along with that, along with growing inequality that takes place during this time period. We see what is often called the impact of race-neutral sentencing policies. Such policies have no explicit intent to have a disproportionate racial effect, but in practice and ways that we could have predicted, absolutely have a racial effect. We see it certainly in the drug war, such as the crack-cocaine, powder-cocaine sentencing disparities at the federal level, where 80% of the people charged with crack offenses receiving higher sentences than powder offenses, were African American. In 2010, Congress narrowed, but did not eliminate, that disparity. But it goes much deeper than that.

Every state also has a set of policies of school zone drug laws. These come from the very defensible goal that we do not want drug dealers selling drugs to our kids on the playground at lunchtime. It turns out that that is already illegal, even before we had school zone drug laws, but again legislators wanted to show how tough they could be. So we now have penalties that enhance the punishment for crimes committed in or near a school zone. Now, why would this have a racial effect? If you think about geography, in urban areas which are densely populated, the school zone laws typically extend 500 feet, 1,000 feet, sometimes as much as a half mile. So in a densely populated urban neighborhood almost every block may be within a defined school zone. You can have a drug transaction between consenting adults that may take place several blocks from a school where the two parties do not even know that there is a school. Yet, technically, they are within the school zone and could be charged with higher penalties for the offense. So we see much greater likelihood of a drug transaction in an urban area being a school zone offense compared to suburban or rural areas. People of color are more likely to live in urban areas and, therefore, the same offense in one neighborhood is treated very differently than in another. New Jersey had a very huge disparity in their application of the school zone. A study

conducted a few years ago found that 95% of the people charged with a school zone offense were African American or Latino. As a result of that finding the legislature revised the policy substantially.

We see as well the impact of implicit bias among policy makers and practitioners in the system. And just to be clear, this is not to say that everyone who works in the justice system is a racist. We all grew up in America, we all grew up with the history of what Bryan has just reminded us this morning. We all carry elements of that bias within us and it is not necessarily conscious all of the time, but it affects how we make decisions and what policies result from that.

As practitioners do their job and establish policies and practices we need to be very careful that such implicit bias doesn't carry over into how we make decisions and allocate resources. Here are some examples of what that looks like.

The Annie E. Casey Foundation has done well-regarded work on reducing juvenile detention over many years. In one of the jurisdictions they worked with, Multnomah County (Portland, Oregon), they examined the risk assessment criteria being used to determine which kids needed to be detained and which could be sent home. One of the criterion was: does the young person have a "good family structure"? Now, some of us were fortunate enough to be born into a good family structure, but that was pure luck for us. Many people are not so fortunate. As they reviewed this they changed their criterion from "good family structure" to asking whether there was a "responsible adult" who could look after the young person. The "responsible adult" might be a teacher, a minister, a baseball coach, or someone else. When they changed that they had a dramatic rise in the number of kids of color who were not viewed now as needing to be behind bars. It was a very simple change, but very profound.

A study of the juvenile justice system in a northwest state examined reports submitted by probation officers in terms of recommending to a judge what the sentence should be for a particular juvenile. The study looked at the narrative portions of the probation officers report, essentially the assessment of the young person. What they found was that when they looked at the white kids, they tended to be described as having environmental problems; they were not getting along with their family, they were

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not doing well in school, they were truant, getting into fights, and things like that. The African American kids were more likely to be defined as having antisocial personalities. Now what is the implication here? Well, if you are having problems with your family or school, there are things that we can try to do about that. We can get teachers and counselors and tutors and social workers to try to deal with your anger and try to deal with these relationships and help you get through it. If you have an antisocial personality, there is not much that we can do about that. We cannot give you a new personality, and so therefore decision makers may say, "Well, for reasons of public safety, we cannot allow this kid to be out on the streets." Not necessarily anything conscious, but a reflection of the bias that we may bring to these issues.

So, where do we go from here? I think there are some very good opportunities now. Let me just sketch out a bit of the direction I think we should go and what this political moment looks like. Sentencing reform, not just because I am the Director of the Sentencing Project, but because I think it really is critical, this is what got us here and this is what we need to do if we want to change it. There is a range of things that we need to do at both the federal level and the state level regarding who goes to prison and how long they stay there.

In regard to the range of alternatives to incarceration, as I have discussed, we need to get more creative and ask ourselves difficult questions about the goals of our policies and programs. What we are trying to accomplish and how we will know if we are doing so?

I would also say we need to level the playing field. In far too many cases we have two systems of justice, one for the rich and one for the poor. And while we made great strides in recent decades those disparities are all too prevalent. It may be the role of money bail determining release, the quality of your defense attorney, or your ability to access treatment programs.

We also need to realign our approach to public safety. Some of you may be familiar with research done some years ago by people doing geomapping, where they describe what they term as "million dollar blocks." Initially this was done in Brooklyn, New York, where it was determined that that in many densely populated blocks taxpayers were spending a million dollars a year

to incarcerate people just from that one block. So whenever people say, “Well, money is tight, there is nothing that we can do,” we need to recognize that we have already made a decision to spend a million dollars on each of these blocks on public safety. It does not mean that we should necessarily open the prison gates and tell all the people from those blocks that they can go home, but it does raise questions about how we allocate resources for public safety.

We have a lot of challenges, but I think that the political environment is beginning to change. I probably realized this five years or so ago when I received a dinner invitation to meet with a small group of people to talk about what we should do about our prison system. Surprisingly, the invitation came to me from Newt Gingrich. Those of you who know me know that I am not the sort of person who thinks that he is going to get invited to dinner by Newt Gingrich very often, but I went to the dinner. There were a few of us “liberal” types there, but many of the people in the room were household names on the conservative right. Gingrich, Grover Norquist, Michael Steele, at the time head of the Republican National Committee, and a number of others. We had this very free flowing, very intriguing conversation over three hours of dinner about drug policy and federal, state, and local partnerships and relationships, how to spend money and how to know what is working and what is not. I do not want to suggest that we agreed on everything and I do not want to suggest that we solved all of the world’s problems, but it was a very eye-opening event. Out of that and other developments you may be familiar with, there is now an organization called “Right on Crime,” which is essentially a high profile group of self-identified right-wing people who have a statement of principles that says that there are too many people in prison.

I should say that it is not only right-wing conservatives, we ha[d] an Attorney General, Eric Holder, who in a major speech to the American Bar Association said, “We have too many Americans in too many prisons serving far too long in prison.” We are in a moment now, where for some fifteen years we have had an explosion of interest in reentry programming and initiatives going on in every state around reentry. We are still learning what that means. We have a range of challenges to the collateral consequences that have erected even more substantial barriers to reentry for people coming home from prison, we are beginning to

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recognize that. At the same time, we do not want to lose sight of the scale of the problem. It took us 40 years of harsh policy to build up mass incarceration, and I hope that it doesn't take 40 years to undo it. We are not going to address it just by a program here and there or a new drug treatment initiative. It has got to be much more substantial.

Let me just close with an image Bryan referenced in the terminology that was raised in the 90s of "super-predators." This came from a small group of high profile commentators who published op-eds in the Wall Street Journal, testified in Congress, and warned of a coming crime wave. They were not very good social scientists, and shortly after they made predictions, crime rates started to come down. They came down faster for juveniles than adults and they came down equally for white, black and Latino kids. So they really didn't know what they were talking about, but nonetheless it was very damaging.

But think for a moment, suppose we had reason to believe that there was a coming generation of high rate offenders. They were basically talking about five-year-old black boys, and ten years later they would become these "super-predators." Suppose we had reason to believe that in ten years we would be facing this crime wave. What would we do about that?

It seems to me that we have two choices. One would be to start to build prisons as quickly as possible to make sure we have enough space to lock them all up when they turn 15 or 16. The other way approach would be to say the good news is that we have a ten-year window of opportunity. So what can we do with their families and communities to create opportunity to address their disadvantages, so that we could at least moderate the scale of the problem. If it's my kid that we are talking about it is pretty clear which approach I am going to take. I want to do everything I can to intervene, to improve my kid's prospects in life. But when we think of it as someone else's kid, that is when we start to break down, that is when we start to think about punishment. So I think our job is to consider how we can create a community and a discussion where we are talking about everyone's kids as if they were our kids. If we can do that then I think that we are on a much better path.

Thank you again for having me here, and thank you for all your work.

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RACE TO INCARCERATE

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PRESENTATION

THE SENTENCING PROJECT
RESEARCH AND ADVOCACY FOR REFORM

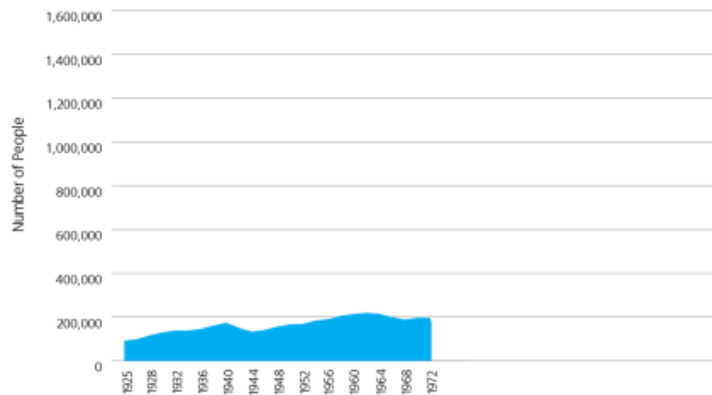
The Causes and Consequences of Mass Incarceration

Marc Mauer
The Sentencing Project

Sounding the Alarm on Mass Incarceration
Roger Williams University School of Law Symposium
March 27, 2015

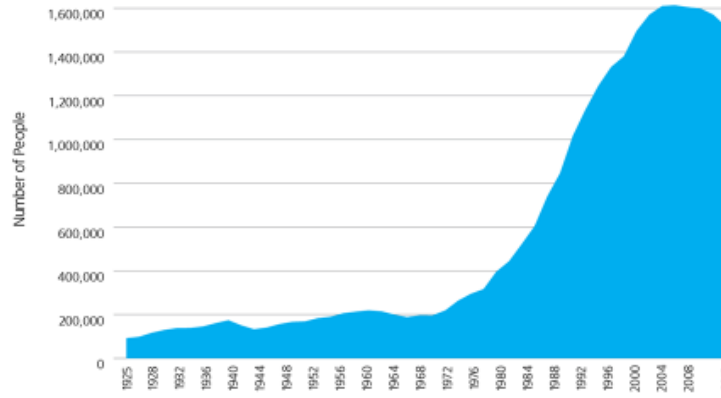
THE SENTENCING PROJECT
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State and Federal Prison Population, 1925-1972



Source: Bureau of Justice Statistics Prisoners Series.

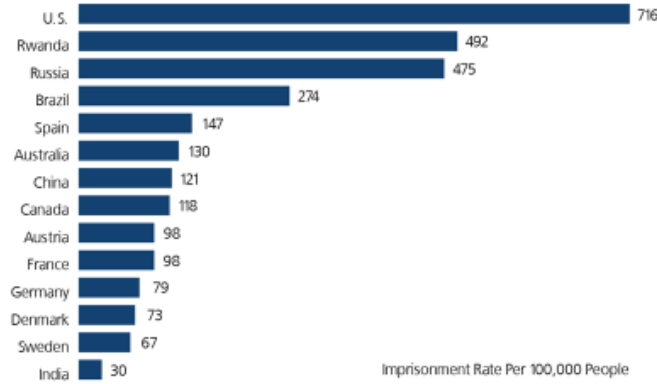
THE SENTENCING PROJECT
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State and Federal Prison Population, 1925-2013



Source: Bureau of Justice Statistics Prisoners Series.

2

THE SENTENCING PROJECT
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International Rates of Incarceration

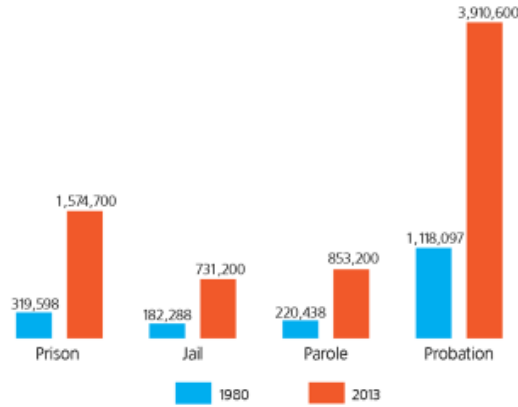


Source: Walksley, R. (2013). *World Population List, 10th Ed.* Essex: International Centre for Prison Studies.

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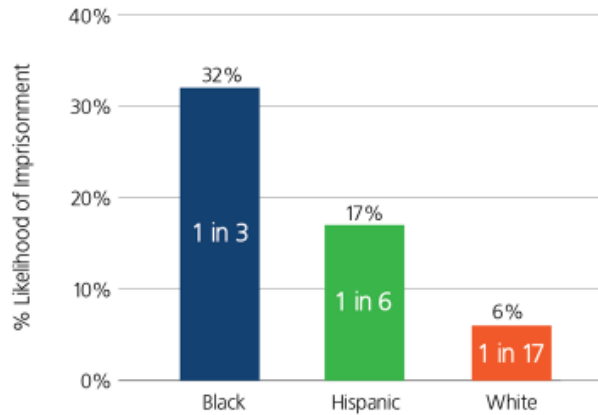
Population Under Control of the U.S. Corrections System, 1980 & 2013



Source: Glaze, L. E. and Herberman, E.J. (2014). *Correctional Populations in the United States, 2013*. Washington, D.C.: Bureau of Justice Statistics; *Corrections: Key Facts at a Glance*. Washington, D.C.: Bureau of Justice Statistics.

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Lifetime Likelihood of Imprisonment for Males Born in 2001



Source: Bonczar, T. (2003). *Prevalence of Imprisonment in the U.S. Population, 1974-2001*. Washington, D.C.: Bureau of Justice Statistics

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Rise in Incarceration in State Prisons, 1980-2010

Changes in Policy, Not Crime

- 49% increased likelihood of prison sentence per arrest
- 51% increase in time served in prison

— National Research Council

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Changes in Sentencing Policy

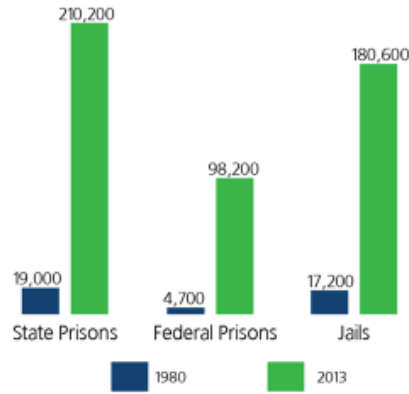
- Mandatory minimums
- “Three strikes” and habitual offender policies
- “Truth in sentencing” and cutbacks on parole

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Rising Incarceration of Drug Offenders, 1980 & 2013

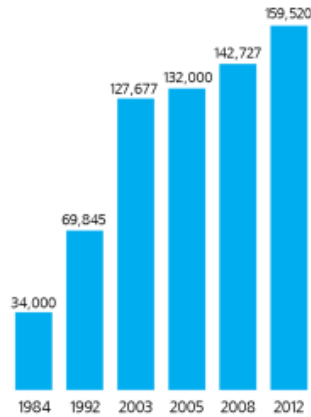
- 1980: 41,000 individuals
- 2013: 489,000 individuals



Sources: Carson, E.A. (2014). Prisoners in 2013. Washington, D.C.: Bureau of Justice Statistics; Mauer, M. and King, R. (2007). A 25-Year Quagmire: The War on Drugs and its Impact on American Society. Washington, D.C.: The Sentencing Project; Glaze, L. E. and Herberman, E.J. (2014). Correctional Populations in the United States, 2013. Washington, D.C.: Bureau of Justice Statistics.

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Rise in Life Sentences, 1984-2012

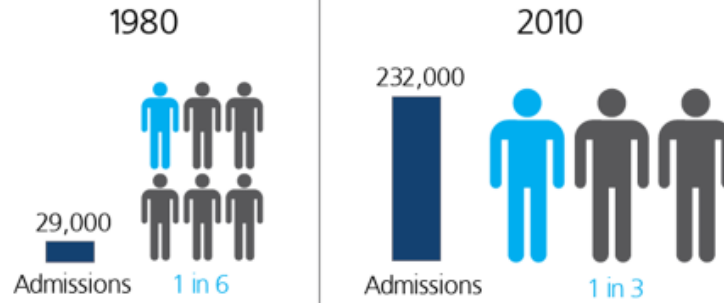


- One of every nine prisoners today is serving a life sentence

Source: Nellis, A. (2013). Life Goes On: The Historic Rise in Life Sentences in America. Washington, D.C.: The Sentencing Project.

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Impact of Probation and Parole Revocations on Prison Admissions



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Impact of Mass Incarceration on Public Safety

“...the growth in incarceration rates reduced crime, **but the magnitude of the crime reduction remains highly uncertain and the evidence suggests it was unlikely to have been large.**”

— National Research Council

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RACE TO INCARCERATE

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Understanding the Limited Impact of Incarceration on Crime

- Diminishing returns
- “Replacement” effect
- Deterrence a function of certainty, not severity

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Mass Incarceration and Racial Disparity

- Prison population:
 - 36% African American
 - 22% Latino
- Black male high school dropouts:
 - 70% imprisoned by age 34

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Factors Contributing to Racial Disparity

- Greater involvement in certain crimes, related to socioeconomic disadvantage
- “Race neutral” sentencing policy impact
- Implicit bias

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Reversing Mass Incarceration

- Sentencing reform
- Expand range of alternative sentencing and alternatives to revocation
- “Level the playing field”
- Realign approach to public safety

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The New York Times | <https://nyti.ms/1Kr6Ebi>

SundayReview | OPINION

How to Lock Up Fewer People

By MARC MAUER and DAVID COLE MAY 23, 2015

WHEN Hillary Rodham Clinton, Ted Cruz, Eric H. Holder Jr., Jeb Bush, George Soros, Marco Rubio and Charles G. Koch all agree that we must end mass incarceration, it is clear that times have changed. Not long ago, most politicians believed the only tenable stance on crime was to be tougher than the next guy.

Today, nearly everyone acknowledges that our criminal justice system needs fixing, and politicians across the spectrum call for reducing prison sentences for low-level drug crimes and other nonviolent offenses. But this consensus glosses over the real challenges to ending mass incarceration. Even if we released everyone imprisoned for drugs tomorrow, the United States would still have 1.7 million people behind bars, and an incarceration rate four times that of many Western European nations.

Mass incarceration can be ended. But that won't happen unless we confront the true scale of the problem.

A hard-nosed skeptic would tell you that fully half the people in state prisons are serving time for violent offenses. And most drug offenders behind bars are not kids

caught smoking a joint, but dealers, many with multiple prior convictions. We already have about 3,000 drug courts diverting those who need it to treatment rather than prison. Recidivism remains astonishingly high for those we release from prison, so releasing more poses real risks. And criminal law is primarily enforced by the states, not the federal government, so this is not a problem the next president can solve.

To move beyond symbolic sound bites to real progress, we need to address each of these objections in turn.

It's true that half the people in state prisons are there for a violent crime, but not all individuals convicted of violent crimes are alike. They range from serial killers to minor players in a robbery and battered spouses who struck back at their abusers. If we are going to end mass incarceration, we need to recognize that the excessively long sentences we impose for most violent crimes are not necessary, cost-effective or just.

We could cut sentences for violent crimes by half in most instances without significantly undermining deterrence or increasing the threat of repeat offending. Studies have found that longer sentences do not have appreciably greater deterrent effects; many serious crimes are committed by people under the influence of alcohol or drugs, who are not necessarily thinking of the consequences of their actions, and certainly are not affected by the difference between a 15-year and a 30-year sentence.

For the same conduct, we impose sentences on average twice as long as those the British impose, four times longer than the Dutch, and five to 10 times longer than the French. One of every nine people in prison in the United States is serving a life sentence. And some states have also radically restricted parole at the back end. As a result, many inmates are held long past the time they might pose any threat to public safety.

Offenders "age out" of crime — so the 25-year-old who commits an armed robbery generally poses much less risk to public safety by the age of 35 or 40. Yet nearly 250,000 inmates today are over 50. Every year we keep older offenders in prison produces diminishing returns for public safety. For years, states have been radically restricting parole; we need to make it more readily available. And by

eliminating unnecessary parole conditions for low-risk offenders, we can conserve resources to provide appropriate community-based programming and supervision to higher-risk parolees.

It's true that most individuals incarcerated for a drug offense were sellers, not just users. But as a result of mandatory sentencing laws, judges often cannot make reasonable distinctions between drug kingpins and street-corner pawns. We ought to empower judges to recognize the difference, and to reduce punishment for run-of-the-mill offenders, who are often pursuing one of the few economic opportunities available to them in destitute communities. The single most important thing we can do is provide meaningful work opportunities to the most disadvantaged.

There are already drug courts in many American communities, and studies show they can reduce substance abuse without incarceration. But the criteria for diversion are often unduly narrow, and they screen out substantial numbers of drug users who could benefit from treatment. Equally important, we should not limit our response to those who have been arrested. Part of winding down the "war on drugs" will require making treatment options more widely available, before individuals enter the criminal justice system.

Recidivism is also a serious obstacle to reform. Two-thirds of released prisoners are rearrested within three years, and half are reincarcerated. But many of the returns to prison are for conduct that violates technical parole requirements, but does not harm others. And much of the problem is that the scale and cost of prison construction have left limited resources for rehabilitation, making it difficult for offenders to find the employment that is necessary to staying straight. So we need to lock up fewer people on the front end as well as enhance reintegration and reduce collateral consequences that impede rehabilitation on the back end.

Criminal justice is administered largely at the state level; 90 percent of those incarcerated are in state and local facilities. This means mass incarceration needs to be dismantled one state at a time. Some states are already making substantial progress. New Jersey, California and New York have all reduced their prison populations by about 25 percent in recent years, with no increase in crime. That should be good news for other states, which would reap substantial savings — in

budgetary and human terms — if they followed suit. While the federal government cannot solve this problem alone, it can lead both by example and by providing financial incentives that encourage reform.

Ending mass incarceration will not be easy. Opposition will come from rural community leaders who see prisons as economic development, legislators who still respond emotionally to the “crime of the week” and prosecutors who measure success by convictions and incarcerations, rather than by resolving conflict. But the recent tragic police shootings of young black men have, for the moment, focused our attention on the imperative for reform. And state budgetary crises have led many to question the vast resources we devote to holding too many people under lock and key.

Today, at long last, a consensus for reform is emerging. The facts that no other Western European nation even comes close to our incarceration rates, and that all have lower homicide rates, show that there are better ways to address crime. The marked disparities in whom we choose to lock up pose one of the nation’s most urgent civil rights challenges. But we will not begin to make real progress until we face up to the full dimensions of the task.

Marc Mauer is executive director of the Sentencing Project. David Cole is a professor of law and public policy at Georgetown University.

A version of this op-ed appears in print on May 24, 2015, on Page SR6 of the New York edition with the headline: How to Lock Up Fewer People.

Addressing Racial Disparities in Incarceration

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Marc Mauer¹

Abstract

This article reviews the current trends and impact of mass incarceration on communities of color, with a focus on criminal justice policy and practice contributors to racial disparity. The impact of these disproportionate incarceration rates on public safety, offenders, and communities are discussed. Recommendations for criminal justice and other policy reforms to reduce unwarranted racial disparities are offered.

Keywords

mass incarceration, criminal justice policy and practice and racial disparity

While the nation has recognized the significance of having the first African American man as President, clearly societal issues of race are still very prevalent in the United States in the 21st century. What is striking about the discussion of race is how frequently national attention to these issues is focused on race and the criminal justice system. Consider some of the key events in this regard: the 1992 police beating of motorist Rodney King in Los Angeles; the high profile criminal trial of O.J. Simpson; and the arrest and charges of racial profiling of Harvard professor Henry Louis Gates in 2009.

However people may view the justice issues in these situations, they represent moments in our national life in which it becomes clear that longstanding

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differences in how we perceive the criminal justice system are still very evident today and, in many ways, continue to define the racial divide in the country. For these reasons, as well as ongoing concerns regarding public safety and the impact of incarceration on communities of color, it is critical to examine the contours and widespread effects of imprisonment trends of recent decades.

This essay will overview the following:

- Mass incarceration's current trends and its impact on communities of color;
- Criminal justice system policy and practice contributors to racial disparities;
- The impact of disproportionate rates of incarceration on public safety, offenders, and communities;
- Recommendations for reform to reduce unwarranted racial disparities in the criminal justice system.

Overview of Racial Disparity in the Criminal Justice System

In 1954, the year of the historic *Brown v. Board of Education* decision, about 100,000 African Americans were incarcerated in America's prisons and jails. Following that decision, there has been a half century of enhanced opportunity for many people for whom it had previously been denied, and significant numbers of people of color have gained leadership positions in society. Yet, despite this sustained progress, within the criminal justice system, the figure of 100,000 incarcerated African Americans has now escalated to nearly 900,000.

The scale of these developments can be seen most vividly in research findings from the Department of Justice. If current trends continue, 1 of every 3 African American males born today can expect to go to prison in his lifetime, as can 1 of every 6 Latino males, compared to 1 in 17 White males. For women, the overall figures are considerably lower, but the racial/ethnic disparities are similar: 1 of every 18 African American females, 1 of every 45 Hispanic females, and 1 of every 111 White females can expect to spend time in prison (Bonczar, 2003). [Note: Criminal justice data on other racial groups, including Native Americans and Asians/Pacific Islanders, is generally very scarce and, therefore, this analysis generally focuses on trends regarding African Americans and Latinos. Available data, though, documents that Native Americans are incarcerated at more than twice the rate of Whites, while Asian Americans/Pacific

Islanders have the lowest incarceration rate of any racial/ethnic group (Hartney & Vuong, 2009).]

High rates of criminal justice control can be documented not only by racial/ethnic group but even more so in combination with age, since younger people have higher rates of involvement in the justice system. Thus, 1 in 13 African American males in the age group 30 to 39 is incarcerated in a state or federal prison on any given day and additional numbers are in local jails (West & Sabol, 2010).

Communities of color are disproportionately affected not only by incarceration but also through higher rates of victimization as well. Data for 2009 (the most recent available) show that African Americans are considerably more likely than Whites to be victims of violent crime. This includes rates of victimization for robbery more than three times those of Whites as well as more than double the rate of aggravated assault. Hispanics are victimized at a rate about 15% higher than Whites but less than African Americans (Truman & Rand, 2010).

In theory, a variety of factors may be responsible for the high rates of incarceration of minority groups in the United States. These might include the relative degree of involvement in crime, disparate law enforcement practices, sentencing and parole policies and practices, and biased decision making. Below, I assess the relative contributions of each of these factors.

Crime and Arrest Rates

Measuring relative rates of involvement in criminal activity is a complicated task. Since most crimes are either unreported or do not result in an arrest, there is no overall measurement of the number of crimes committed or the demographics of those engaged in criminal behavior. This is even more significant in “victimless” crimes such as a drug-selling transactions between consenting adults.

To develop a rough estimate of these dynamics, we can begin by examining arrest rates. The main drawback of this method is that arrests may reflect law enforcement behavior in addition to involvement in crime. Particularly in the case of drug offenses, this may not represent an accurate measure of the criminally involved population. Nevertheless, an examination of arrest data compiled by the FBI in its annual Uniform Crime Reports (categorized by race, but not ethnicity) reveals that African Americans constituted 30% of persons arrested for a property offense in 2009 and 39% of those arrested for a violent offense (Federal Bureau of Investigation, 2009), clearly disproportionate to the 12% Black share of the overall national population.

Further analysis of these data indicates that what may appear to be at first a racial effect is, in fact, much more so a question of social class. In one study of “extremely disadvantaged” neighborhoods, for example, researchers at Ohio State University found that rates of violence were considerably higher in such neighborhoods, regardless of race. The authors concluded that “it is these differences in disadvantage that explain the overwhelming portion of the difference in crime, especially criminal violence, between White and African American communities” (Krivo & Peterson, 1995, p. 642).

Examining rates of incarceration overall, a series of studies by leading criminologists have attempted to quantify the degree to which disparities in imprisonment reflect involvement in crime, as measured by arrest rates. An early study by Blumstein (1993) examined the prison population in 1979, in which he followed up with the same methodology for the 1991 inmate population. More recently, Michael Tonry and Matthew Melewski analyzed these issues for the 2004 prison population (Tonry & Melewski, 2008). What we see over time from these studies is a steadily declining proportion of the prison population that can be explained by disproportionate arrests. Blumstein’s study of the 1979 population concluded that 80% of the racial disparity was accounted for by greater involvement in crime, as measured by arrest rates. This figure was reduced to 76% for the 1991 population and then significantly declined to 61% in the Tonry and Melewski study. Much of the change noted in these studies appears to be an effect of the growing proportion of offenders incarcerated for a drug offense since the 1970s and, in turn, reflects disproportionate law enforcement and sentencing practices that adversely affect African Americans.

While these national studies are instructive, they nevertheless represent the cumulative experience of 50 states and the District of Columbia. Research has demonstrated that there may be great variation in how crimes are prosecuted across jurisdictions and in the degree to which this affects racial disparities. A study of incarceration disparities in the 1980s found broad variation in the degree to which racial disparities in arrest explained disparities in incarceration. While national data showed that arrest rates accounted for 89.5% of the racial disparity in imprisonment in one study, in the northeast states, this only explained 69% of the disparity. Furthermore, in other states, fewer African Americans were incarcerated than would have been predicted by using arrest data (Crutchfield, Bridges, & Pitchford, 1994). Even within states, county-level data may prove similarly broad ranging.

While this essay focuses on disparities in the adult criminal justice system, it should be noted that similar, and often more extreme, racial/ethnic disparities pertain in the juvenile justice system as well. A comprehensive review of

data on race and ethnicity in the juvenile system concluded that “disparity is most pronounced at the beginning stages of involvement with the juvenile justice system. When racial/ethnic differences are found, they tend to accumulate as youth are processed through the system” (Poe-Yamagata & Jones, 2000, p. 1).

Racial Disparity as a Function of Criminal Justice Decision making

While differential involvement in crime (as measured by arrests) explains a significant portion of high rates of African American imprisonment, so, too, do policy and practice decisions contribute to these outcomes. This does not suggest that such decisions are necessarily a function of conscious racism by actors in the system, but they frequently may include unconscious bias in the use of discretion, allocation of resources, or public policy decision making.

Examinations of case processing over time also demonstrate that racial disparities in the justice system are cumulative. That is, disproportionate processing at one stage often contributes to widening disparities at succeeding points. For example, defendants who are detained in jail prior to trial are more likely to be convicted and receive lengthier prison terms than defendants released on bond (Schnake, Jones, & Brooker, 2010). The following is an overview of ways in which racial disparity has been documented at various stages of the criminal justice system.

Law Enforcement Practices

In recent years, considerable media and policy maker attention has been focused on law enforcement practices and their possible contributions to racial disparity. Beginning with high profile media accounts of racial profiling by state troopers on the New Jersey Turnpike in the 1990s, much public discussion has focused on the extent to which individual officers or agencies systematically detain or arrest persons of color on the basis of race. Litigation in a variety of jurisdictions has resulted in court orders for law enforcement agencies to engage in oversight and data collection of traffic stops and other police activity to ensure that police officers are not engaging in unwarranted profiling.

Data from the Bureau of Justice Statistics demonstrate that it is not necessarily traffic or pedestrian stops in themselves that are the focal point for disparate practices. As of 2005, national data indicate that White, Black, and Hispanic drivers were stopped by police at similar rates. But of those drivers who were stopped, African American motorists were more than 2.5 times as likely as

Whites to be searched by police and Hispanics more than double the rate (Durose, Smith, & Langan, 2007).

Prosecution

There is no stage of the criminal justice system at which there are so little data on case processing outcomes as at the prosecutorial level. Because prosecutors operate at a city or county level and generally have no obligation to report data to a statewide agency, there is broad variation in the manner, comprehensiveness, and efficiency by which data are compiled. This is particularly critical to an examination of racial disparity for two reasons. First, since more than 90% of guilty verdicts are a result of a negotiated plea rather than a trial, the influence of the prosecutor on ultimate case outcomes is often far more significant than that of the judge. Second, because these negotiations essentially take place "behind closed doors," there is little means by which to evaluate the fairness or effectiveness of this decision making. To say this is not to suggest that most prosecutors engage in biased behavior, whether conscious or not, but it does mean that it is very difficult to assess the degree to which such practices exist or to make comparisons across prosecutors' offices regarding such issues. And as such notorious cases as the Tulia, Texas, drug prosecutions of the late 1990s illustrate, a case in which nearly a third of the African American male population in a small town was charged with drug selling, only to see many of the convictions later reversed, this discretion can have disastrous consequences.

At the extremes, prosecutorial misconduct, even extending to death penalty cases, can produce disturbing miscarriages of justice. An investigation by *Chicago Tribune* reporters (Armstrong & Possley, 1999) concluded that "... prosecutors across the country have violated their oaths and the law, committing the worse kinds of deception in the most serious of cases ... They have prosecuted black men, hiding evidence the real killers were white ... They do it to win" (p. C1).

While relatively few studies have been conducted on prosecutorial decision making, there is evidence that such practices may contribute to racial disparities within the justice system. A 1991 study of federal mandatory sentencing conducted by the U.S. Sentencing Commission, for example, found that for cases in which case factors suggested that a charge could be brought that carried a mandatory penalty, prosecutors were more likely to offer White defendants a negotiated plea below the mandatory minimum than African American or Latino defendants (United States Sentencing Commission, 1991).

Sentencing

In contrast to the prosecution function, a broad range of scholarship has examined the intersection of race and sentencing over several decades. In broad terms, the evidence indicates the following:

- There is strong evidence that race plays a role in the determination of which homicide cases result in a death sentence, whereby cases with White victims are considerably more likely to receive a death sentence (Baldus & Woodworth, 2004).
- In noncapital cases, race is often found to contribute to disparities in sentencing, but most often in combination with variables such as gender and employment (Spohn, 2000).
- Racial disparities at the sentencing stage are not necessarily a function of judicial bias but can often result from “race neutral” sentencing policies with skewed racial effects. This can be seen in the experience with many drug policies and habitual offender statutes (Crow & Johnson, 2008).

Research since the 1980s has demonstrated that offender/victim dynamics produce strong racially based outcomes in death penalty cases. Beginning with a study by David Baldus, the focus of the *McCleskey* case before the U.S. Supreme Court in 1987 (*McCleskey v. Kemp*, 1987), these studies have consistently shown that persons who kill Whites are about four times as likely to receive a death sentence as those who kill African Americans. These findings are not necessarily a function only of the sentencing decision but may also reflect prosecutorial discretion in how cases are charged. Notably, the Supreme Court has generally rejected claims of racial bias in such cases, ruling that while the data may show overall patterns of racial effects, such findings do not necessarily demonstrate racial bias in an individual case.

In noncapital cases, a comprehensive review of current research by sentencing scholar Cassia Spohn finds that

... race and ethnicity do play an important role in contemporary sentencing decisions. Black and Hispanic offenders sentenced in State and Federal courts face significantly greater odds of incarceration than similarly situated white offenders. In some jurisdictions, they also may receive longer sentences or differential benefits from guideline departures than their white counterparts. (p. 458).

In recent decades, a significant contributor to racial disparities has been the set of policies adopted under the framework of the “war on drugs.” Such sentencing policies as mandatory minimums and school zone drug enhancements, while theoretically race neutral, in practice have significant racial effects. This is a combined function of law enforcement and prosecutorial practices. Since the escalation of the war on drugs in the mid-1980s, there has been a trend of both increased drug arrests and prosecutions accompanied by significant racial and ethnic disparities. At the stage of law enforcement, the number of drug arrests nearly tripled from a level of 581,000 in 1980 to 1,663,000 by 2009. Along with that came a dramatic escalation in the number of incarcerated drug offenders, rising from about 41,000 persons in prison or jail in 1980 to nearly 500,000 by 2003 (Mauer & King, 2007).

Racial disparities in the prosecution of the drug war can be seen initially in arrest rates. African Americans constituted 21% of drug arrests in 1980, then rose to 36% in 1992 (Mauer, 2006), before declining to 34% by 2009 (Federal Bureau of Investigation, 2009), but still disproportionate to their share of the national population. While there are no comprehensive data on the number of people committing drug offenses, government surveys have consistently shown that African Americans use drugs at roughly the same proportions as Whites and Latinos. Therefore, all things being equal, one would expect that arrest rates for drug possession would reflect these trends. But since many drug arrests are for sales offenses, it is also necessary to investigate potential racial disparities in this area. There are little data on drug selling activity by race, but at least one study of drug selling behavior in six cities published by the National Institute of Justice indicates that “respondents were most likely to report using a main source who was of their own racial or ethnic background” (Riley, 1997, p. 1).

Racial disparities in drug arrests then translate into disparities in sentencing that are exacerbated by the proliferation of mandatory sentencing policies adopted since the 1980s, laws that are frequently applied to drug offenses. Overall, this has resulted in African Americans and Latinos constituting 65% of drug offenders in state prisons in 2008 (West and Sabol, 2010).

Among the sentencing policies that most dramatically reveal the dynamics of these developments are the federal policies adopted by Congress in 1986 and 1988 governing two forms of cocaine, powder and crack. Under these statutes, a 100:1 drug quantity disparity was established between offenses of powder cocaine and crack cocaine. Thus, selling 500 grams of powder cocaine triggered a mandatory 5-year prison term, while for crack cocaine, sale or possession of just 5 grams resulted in the same 5-year sentence. The racial impact of these laws was a function of the vast disparity in arrests, with African Americans

constituting about 80% of persons charged with a crack cocaine offense, while powder cocaine offenders were much more likely to be White or Latino. The sentencing disparity was reduced by Congress in 2010, raising the threshold for crack cocaine to 28 grams, while leaving the powder cocaine quantity at 500 grams.

Other sentencing policies have been observed to produce unwarranted racial disparities as well. School zone drug laws adopted by many states have as their stated objective the goal of deterring drug selling to school children and aim to do so by applying enhanced penalties to offenses committed within a certain geographical range—often 500 or 1,000 feet—of a school. As written, though, many of these statutes apply much more broadly, such as including drug sales between two adults during nonschool hours.

The racial effects of these policies result from the implications of housing patterns. Since urban areas are much more densely populated than rural or suburban areas, it is more likely that any given drug offense will take place within a school zone district. And since persons of color disproportionately reside in urban areas, a drug offense committed by an African American or Latino person will be more likely to incur these enhanced penalties. In New Jersey, for example, 96% of all persons incarcerated under these laws in 2005 were African American or Latino (New Jersey Commission to Review Criminal Sentencing, 2007). Recognizing this disparity, the state legislature restored sentencing discretion to judges in such cases in 2010.

Sentencing policies that enhance penalties based on an offender's prior record likewise produce disproportionate racial effects even though they are race neutral on the surface. This is a result of minorities being more likely to have a prior record, whether due to greater involvement in criminal behavior or disparate processing by the justice system. While such enhancements have long been a consideration at sentencing, the recent proliferation of "three strikes" and habitual offender laws that greatly enhance such punishments has magnified the impact of such considerations.

In the case of Alexander Leviner in 1998, (*U.S. v. Leviner*, 1998) Federal District Judge Nancy Gertner imposed a below-guideline sentence for an African American man convicted of being a felon in possession of a firearm. Under federal sentencing guidelines, Leviner's sentencing range was 4 to 6 years in prison, based on the offense conviction and his prior record. But Judge Gertner noted that most of his prior convictions were the result of traffic stops by Boston police. Given the history of racial profiling by law enforcement agencies, Judge Gertner reasoned that such practices essentially contributed to Leviner's prior record, and as a result she imposed a lesser sentence of 2.5 years.

Implications of Racial Disparity in Incarceration

While it may seem obvious to many that disproportionate rates of incarceration of minorities are problematic, others may believe that such outcomes are merely the result of criminal activity and are therefore necessary to promote public safety. But given the current scale of incarceration, there are several reasons why these issues should be of concern to all Americans.

First, there is a growing consensus that the extreme rate of incarceration in the United States is unsustainable. Across the country, political leaders concerned with severe fiscal constraints are recognizing that the cost of corrections is impinging on state support for higher education and other vital services. In California, for example, in 2010 Governor Schwarzenegger announced that he would advocate for a constitutional amendment prohibiting the percentage of the state budget earmarked for prisons from exceeding what is set aside for the public university system (Steinhauer, 2010).

One presumed goal of mass incarceration, to reduce crime, is increasingly subject to diminishing returns. With a surge of incarcerated drug offenders since the mid-1980s, there is now a growing population in prison for which there is little effect on public safety due to the fact that incarcerated low-level drug sellers are routinely replaced on the street.

Extreme racial disparities in the use of imprisonment result in communities of color being disproportionately affected by the collateral effects of incarceration. These include family stress and dissolution, neighborhoods experiencing high mobility of residents cycling in and out of prison, and growing numbers of people with limited employment prospects. Incarceration has been demonstrated to reduce African American male wage earnings by 44% by the age of 48 (The Pew Charitable Trusts, 2010).

Emerging research also suggests that highly disproportionate rates of incarceration contribute to concerns regarding the perceived legitimacy of the criminal justice system. Research by Lawrence D. Bobo and Victor Thompson shows that perceived bias in the criminal justice system translates into a "crisis of legitimacy" (Bobo & Thompson, 2006, p. 463). When asked whether drug laws are "enforced fairly on all would be drug users," 79.4% of White respondents answered affirmatively but only 33.7% of African American respondents did so. As a result of such perceptions, when asked whether they believed that the police would take seriously a complaint about a home burglary, only 35% of Blacks expected such a response, compared to 60% of Whites. Such an outcome should be of concern to all since law enforcement agencies can only operate successfully if they have the cooperation and support of the community. If such trust erodes, then public safety is inevitably compromised.

Recommendations

Highly disproportionate rates of imprisonment have produced significant social strains on communities of color and have been of questionable benefit in enhancing public safety. Policy makers should consider adopting policies and practices that can reduce unnecessarily high rates of incarceration while also helping to promote public safety. These include the following:

Level the playing field. The overlap between issues of race and class is profound in the criminal justice system, and lack of access to resources is a significant contributor to disproportionate rates of incarceration. This includes such disadvantages as inadequate defense services for indigent defendants and limited access to treatment programs. By providing credible sentencing options for the courts, greater numbers of defendants could be sentenced to community supervision, thereby avoiding costly incarceration while permitting offenders to maintain ties with family and community.

Invest in high school completion. A growing body of evidence demonstrates that there is a dramatic difference in the risk of incarceration for persons who do not complete high school. Research by Bruce Western and Becky Pettit shows that 68% of African American male high school dropouts had served time in prison by the age of 34 (Western & Pettit, 2010). Thus, along with other societal interests in promoting high school completion is the significant impact such outcomes can produce in helping to reduce disproportionate rates of imprisonment, which is critical as well.

Adopt racial impact statement legislation. Similar to fiscal or environmental impact statements, racial impact statement policies require consideration of any undue racial effects of sentencing or other criminal justice legislation prior to adoption. As utilized in Connecticut and Iowa, legislators are provided with an assessment of the racial/ethnic impact of proposed sentencing legislation (Mauer, 2009a). If the analysis indicates that the policy would produce a disproportionate effect, policy makers are not precluded from adopting the legislation but have the opportunity to consider alternative means of achieving public safety goals without exacerbating racial disparities in imprisonment.

Reorient the “war on drugs”. Despite a notable shift in the public climate toward support for treatment and prevention for substance abuse, along with the expansion of drug courts and similar measures, the number of drug offenders in prison has not declined and dramatic racial disparities persist. This is due to a combination of circumstances: limited community-based options for treatment; mandatory sentencing laws that result in excessive prison terms for lower-level cases; and the failure of some drug court programs to target prison-bound offenders.

Reversing these policies and adopting harm reduction models would produce more compassionate, and less costly, outcomes.

Adopt and implement racial fairness policy goals and commissions. Several states have adopted racial equity goals and structures that recognize the interrelated set of decisions that cumulatively produce racial disparities in imprisonment. In Wisconsin, Governor Jim Doyle established a commission in 2007 (Mauer, 2009a) that produced a comprehensive assessment of racial disparities in the criminal justice system, and in 2010 the state of Delaware issued a declaration to “promote racial and ethnic fairness in the criminal justice system” (Delaware Criminal Justice Council, 2010), including providing grant incentives for applicants in compliance with the declaration. Such practices convey high-level support for constructive change at the state and local level.

Examine policy and practice decisions for undue racial impact. Through its Juvenile Detention and Alternatives Initiative, the Annie E. Casey Foundation incorporates a requirement that participating jurisdictions strive to not only reduce their detained population but to do so in a way that reduces racial disparity as well. In Multnomah County (Portland), Oregon, for example, the establishment of alternatives to detention achieved both these objectives. In the adult system, local officials in Hennepin County, Minnesota, recognized that several of the risk factors used to develop recommendations for pretrial release of defendants were highly correlated with race but had no predictive value regarding failure to appear in court. As a result, the scoring system was revised to reflect evidence-based analysis that would not produce unwarranted racial disparities (The Sentencing Project, 2008).

Conclusion

In examining the policies and practices that have produced a world record-level of incarceration, along with a dramatic scale of imprisonment for African Americans in particular, it is now clear that these outcomes are a result of a complex set of factors. Most significantly, policy decisions over the past four decades have created a severe imbalance in the national approach to public safety. While crime control initiatives have traditionally incorporated a mix of criminal justice responses along with preventive measures, the national approach to these issues is now weighted heavily toward the criminal justice system at the expense of policies that could help strengthen the capacity of families and communities to establish behavioral norms and enhance opportunity.

Within the criminal justice system the most significant change in recent decades was the inception of the war on drugs in the 1980s. The set of policies

and practices enshrined within that initiative contributed substantially to the burgeoning prison population, accompanied by dramatic racial and ethnic disparities. These disparities are not a function of greater involvement in drug use or the drug trade but rather resulted from discretionary decision making by law enforcement agencies as well as enactment of harsh sentencing policies by both state and federal lawmakers.

Reversing these trends is not a simple matter and will require a shift in the political environment on two levels. In regard to criminal justice policy, this will necessitate a reconsideration of the value of mass incarceration in producing public safety and developing means of strengthening the capacity of community-based corrections systems to supervise offenders and provide comprehensive services. The broader agenda for reform will require a public policy climate that recognizes the need for a comprehensive approach to public safety, one that is not overly reliant on criminal justice sanctions.

Despite the rather grim data reported in this analysis, there are some reasons for cautious optimism. In recent years, policy makers across the political spectrum have become increasingly receptive to a range of sentencing and drug policy reform measures that hold the promise of producing greater public safety benefits at less cost. In regard to racial disparity in the criminal justice system, there are some signs of possible change as well. A recent analysis of persons incarcerated for drug offenses demonstrates a significant decline in the number of African Americans in the first decade of the 21st century (Mauer, 2009b). While it is too early to assess all the contributing factors to this trend, it does suggest that there may be constructive responses to the problems identified in this essay. The challenge for both policy makers and the public is to build on these developments and to think creatively about ways of enhancing both public safety and racial justice.

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Bio

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BLACK LIVES MATTER: ELIMINATING RACIAL INEQUITY IN THE CRIMINAL JUSTICE SYSTEM



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Cover photo by Brendan Smialowski of Getty Images showing Congressional staff during a walkout at the Capitol in December 2014.

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EXECUTIVE SUMMARY

“Every time you see me, you want to mess with me,” Eric Garner told the group of approaching New York City police officers. As they wrestled him to the ground to arrest him for selling untaxed loose cigarettes, an officer placed Garner in a chokehold and maintained his grip despite Garner’s pleas for air. One hour later, Garner was pronounced dead. The unarmed black man’s death and the white officer’s non-indictment despite videotape evidence have heightened concerns about police practices and accountability. In the wake of the fatal police shooting of unarmed teenager Michael Brown in Ferguson, Missouri, and that officer’s non-indictment, a growing number of Americans are outraged and demanding change.

“Black lives matter” has become a rallying cry in light of evidence that the criminal justice system is failing to uphold this basic truth. Official data, although woefully inadequate,¹ show that over half of those killed by police in recent years have been black or Latino.² Officers involved in these killings are rarely indicted, much less convicted, for excessive use of force.³ And official responses to recent protests have spurred further controversy: militarized police forces disrupted public assemblies in Ferguson,⁴ and New York City’s police union blamed pro-reform politicians and nonviolent protesters for the killing of two officers by a mentally unstable man.⁵

The criminal justice system’s high volume of contact with people of color is a major cause of African Americans’ disproportionate rate of fatal police encounters, as well as of broader perceptions of injustice in many communities. This briefing paper identifies four key features of the justice system that contribute to its disparate racial impact, and presents recent best practices for targeting these inequities drawn from adult and juvenile justice systems around the country. In many cases, these practices have produced demonstrable results.

Policing is by no means the only stage of the justice system that produces racial disparity. Disadvantage accumulating at each step of the process contributes to blacks and Latinos comprising 56% of the incarcerated population, yet only 30% of the U.S. population.⁶ The roots of this

disparity precede criminal justice contact: conditions of socioeconomic inequality contribute to higher rates of some violent and property crimes among people of color. But four features of the justice system exacerbate this underlying inequality, and jurisdictions around the country have addressed each one through recent reforms.

1. Many ostensibly race-neutral policies and laws have a disparate racial impact.

Police policies such as “broken windows” and stop, question, and frisk have disproportionately impacted young men of color. Prosecutorial policies, such as plea bargain guidelines that disadvantage blacks and Latinos compound these disparities, as do sentencing laws that dictate harsher punishments for crimes for which people of color are disproportionately arrested.

One reform to address this source of disparity in policing is the significant retrenchment of “stop and frisk” in New York City after a court ruled that the policy violated the constitutional rights of blacks and Latinos. Recent legislation reducing the sentencing disparity between the use and distribution of crack versus powder cocaine in California, Missouri, and at the federal level are examples of efforts to tackle sentencing inequalities.

2. Criminal justice practitioners' use of discretion is – often unintentionally – influenced by racial bias.

Racial disparities in traffic stops have diminished on a nationwide basis in recent years, but persist in many jurisdictions. Police officers are more likely to stop black and Hispanic drivers for investigative reasons. Once pulled over, people of color are more likely than whites to be searched, and blacks are more likely than whites to be arrested. In jurisdictions like Ferguson, these patterns hold even though police have a higher “contraband hit rate” when searching white versus black drivers. Prosecutors and judges also often treat blacks and Hispanics more harshly in their charging and sentencing decisions.

The Vera Institute of Justice’s work with prosecutors’ offices around the country is one initiative addressing bias in charging decisions by monitoring outcomes and increasing accountability. Similarly, judges in Dorchester, Massachusetts, have worked with police and prosecutors to develop guidelines to reduce racial disparities in charging enhancements for people arrested for drug crimes in a school zone.

3. Key segments of the criminal justice system are underfunded, putting blacks and Latinos – who are disproportionately low-income – at a disadvantage.

Most states inadequately fund their indigent defense programs. Pretrial release often requires money bond, which can be prohibitive to low-income individuals and increases the pressure on them to accept less favorable plea deals. Many parole and probation systems offer supervision with little support. Public drug treatment programs are also underfunded, thereby limiting treatment and sentencing alternatives for low-income individuals.

New Jersey’s recently overhauled bail laws, which will increase nonmonetary release options, is an effort to create a more even playing field for low-income individuals. In Illinois, the expansion of alternative community programs has helped to nearly halve reliance on secure detention for youth.

4. Criminal justice policies exacerbate socioeconomic inequalities by imposing collateral consequences on those with criminal records and by diverting public spending.

A criminal conviction creates a barrier to securing steady employment, and those with felony drug convictions are disqualified from public assistance and public housing in many areas. In addition, allocating public resources to punitive programs comes at the expense of investments in crime prevention and drug treatment programs. Because of their higher rates of incarceration and poverty, people of color are disproportionately affected by these policy choices.

A key development in this area is California’s reclassification of a number of low-level offenses from felonies to misdemeanors under Proposition 47 in 2014. This initiative is intended to reduce prison admissions and to spare many low-level offenders the collateral consequences of a felony conviction. The law also redirects a portion of state prison savings – estimated to be \$150-\$250 million annually – to crime prevention and drug treatment programs.

Recent high-profile killings by police officers demonstrate the need for better police practices and improved accountability. They also underscore the need for revising policies that place people of color under greater police scrutiny and that lead to their disadvantage throughout the criminal justice system. To address this crisis of confidence, especially among people of color, criminal justice practitioners and policymakers should seize this opportunity to adopt and expand upon existing best practices for promoting racial equity at all levels of the justice system.

This briefing paper is organized as follows: Section I examines racial disparities in policing in Ferguson, Missouri, and New York City. Section II compares these patterns with nationwide trends and relates them to disparate outcomes at later stages of the criminal justice process. Section III examines the causes of blacks’ and Latinos’ overrepresentation in the justice system,



New York City, December 13, 2014: People march in the National March Against Police Violence, which was organized by National Action Network, through the streets of Manhattan on December 13, 2014 in New York City. The march coincided with a march in Washington, D.C. and came on the heels of two grand jury decisions not to indict white police officers in the deaths of two unarmed black men. Photo by Andrew Burton, Getty Images.

including differential crime rates and the four sources of inequities in the justice system. Section IV presents best practices from around the country for reducing racial disparities created by these four sources. Section V explores strategies for implementation and evaluation. Section VI concludes by reviewing recent achievements and highlighting the need for further reforms.

This report largely focuses on the experiences of African Americans / blacks, Latinos / Hispanics, and whites in the justice system. These are the populations for whom the most research and data are available. Nationwide data and research that include Asian Americans and American Indians are more limited: reports often aggregate these groups into one category, labeled “other.” Existing research suggests that many of the trends described in this report hold for American Indians, for sub-groups of Asian Americans, and for other communities of color.⁷

I. UNEVEN POLICING IN FERGUSON AND NEW YORK CITY

Black and white Americans experience different policing practices. They encounter the police at different rates and for different reasons, and they are treated differently during these encounters.

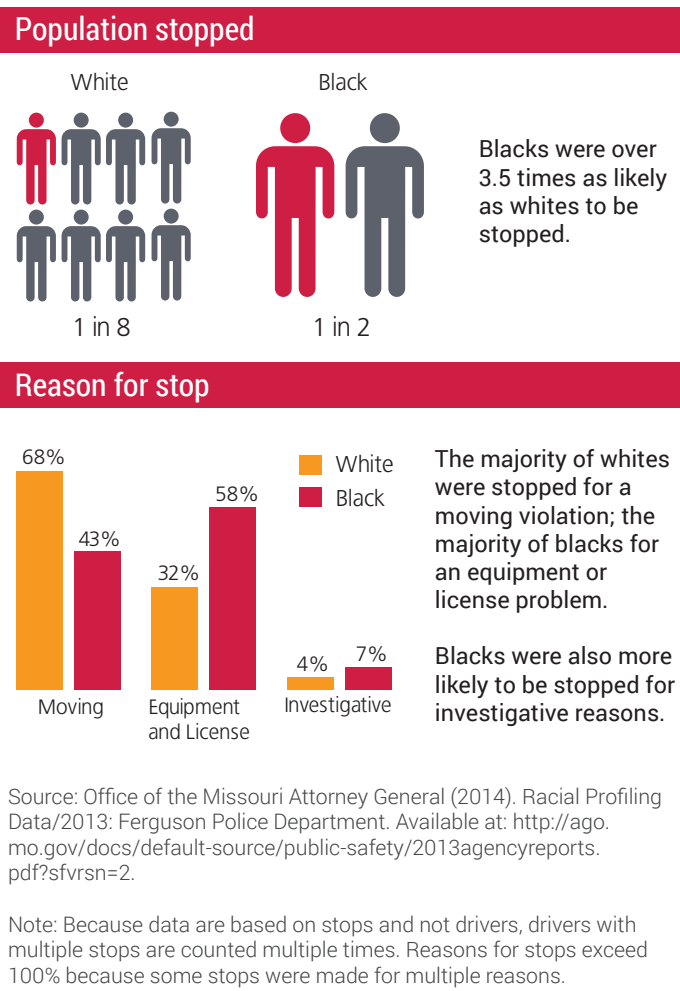
Officers' racially biased use of discretion – either intentional or unintentional – is one cause of racial disparities in police contact that are not explained by differences in crime rates. Another cause is formal police policies such as “stop and frisk” and “broken windows” policing. Designed to target minor violations with the rationale of circumventing serious crimes, these policies place people of color under greater scrutiny. Officer Darren Wilson stopped Michael Brown for jaywalking. Officer Daniel Pantaleo and his colleagues approached Eric Garner for selling untaxed cigarettes. Disproportionate police contact with people of color in these two very different jurisdictions set the context for these tragic deaths.

FERGUSON, MISSOURI

A suburb of St. Louis, Missouri, Ferguson had a population of just over 21,000 in 2013. Though African Americans comprised 63% of the city's driving-age population in that year, they accounted for 86% of drivers stopped by Ferguson police.⁸ That amounted to almost one stop for every two black adults in Ferguson, versus just over one stop for every eight white adults.

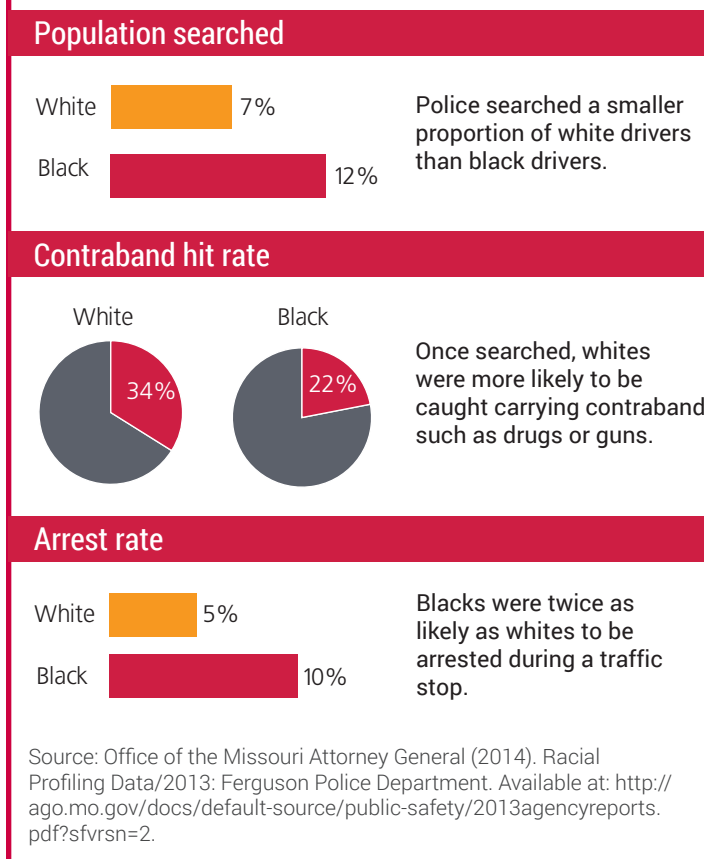
Ferguson police cited various reasons for stopping black and white drivers. The majority of white drivers (68%) were stopped for a moving violation while the majority of black drivers (57%) were stopped for a license or equipment problem (41% and 16%, respectively). Research has shown that although blacks are more

Figure 1. Ferguson traffic stops, 2013: Population stopped and reason for stop



likely than whites to have vehicle code violations, this difference does not account for their disproportionate rates of stops for non-moving violations.⁹ Investigative stops – one of the most discretionary reasons for traffic stops – accounted for 7% of stops among black drivers in Ferguson, compared to 4% of stops among white drivers.

Figure 2. Ferguson traffic stops: Population searched, contraband hit rate, and arrest rate, 2013



After making a stop, Ferguson police searched 12% of black drivers in contrast to 7% of white drivers. Despite – or as a result of – the high rate of stops and searches for black drivers, police had a lower “contraband hit rate” when searching black drivers compared to white drivers. They found contraband – primarily drugs and sometimes weapons – on 22% of black drivers who were searched and on 34% of white drivers who were searched.

Yet blacks were twice as likely as whites to be arrested during a traffic stop (10% versus 5%). Two factors account for this disparity. First, by searching such a high proportion of black drivers, officers found contraband on a similar share of black drivers as white drivers (but on a smaller proportion of black drivers that they searched). The more influential factor, though, was that black drivers were more likely to have arrest warrants

compared to their white counterparts. Black drivers were more likely to have these warrants in part because of unpaid fines related to their disproportionate exposure to traffic enforcement.

Municipalities such as Ferguson may have a fiscal incentive to focus law enforcement efforts on traffic violations and petty offenses. Court fines and fees have become a major source of revenue for certain municipal governments in St. Louis County – primarily those serving largely black populations with a high poverty rate.¹⁰ Court fines and forfeitures accounted for 20% of Ferguson’s operating revenue in 2013.¹¹ To ensure collection of these court fines and fees, these municipalities have issued a high rate of arrest warrants. Ferguson outpaced all other cities in the region with more than 1,500 warrants per 1,000 people in 2013 – about four times the rate for the city of St. Louis.¹²

In the aftermath of protests in late summer 2014, the city of Ferguson announced reforms to cap the amount of revenue generated from such tickets.¹³ But that promise was short-lived. In December 2014, Ferguson’s finance director announced plans to increase revenues from fines to fill a budget deficit from its most recent fiscal year.¹⁴

NEW YORK CITY

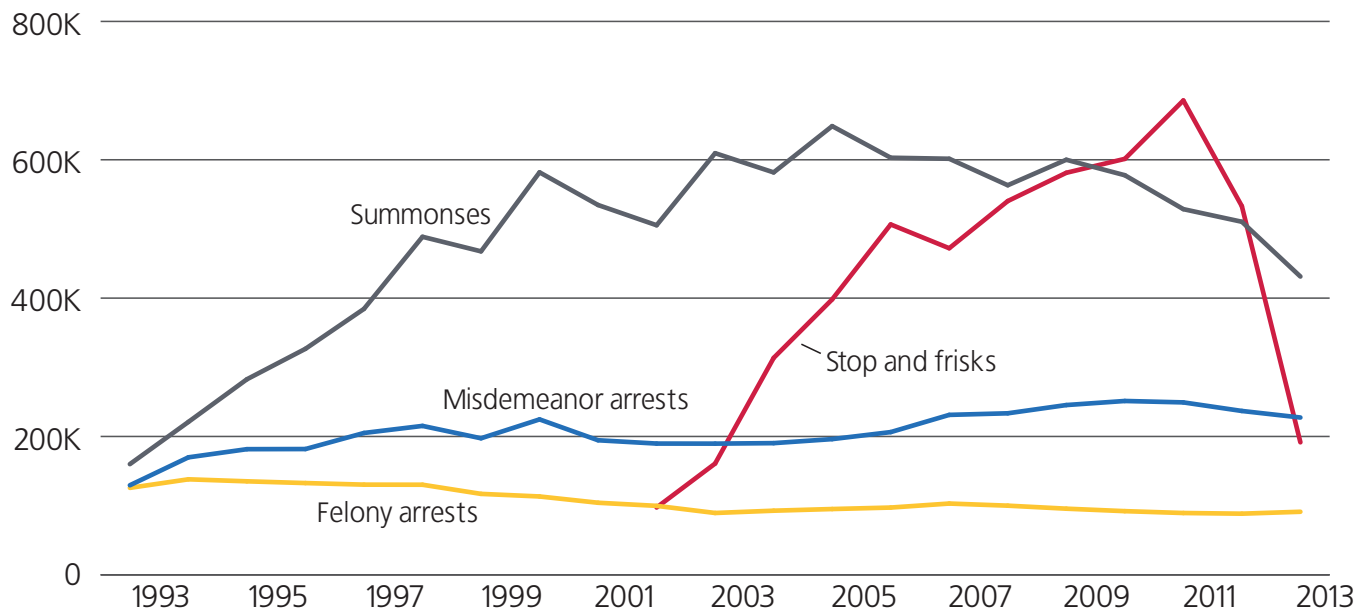
Policing in New York City took a dramatic turn in the 1990s under mayor Rudy Giuliani, with the launch of order-maintenance strategies known as “broken windows” and “quality of life” policing. These approaches seek to promote public safety by clamping down on petty offenses and neighborhood disorder.¹⁵ With Michael

Officer Darren Wilson stopped Michael Brown for jaywalking. Officer Daniel Pantaleo and his colleagues approached Eric Garner for selling untaxed cigarettes. Disproportionate police contact with people of color in these two very different jurisdictions set the context for these tragic deaths.

Bloomberg as mayor (2002-2013) and Raymond Kelly as police commissioner, the police also embarked on a campaign to stop, question, and frisk primarily male residents of neighborhoods populated by low-income people of color – areas thought to have higher crime rates. Many of these “stop and frisk” encounters were initiated

with little legitimate rationale: officers noted “furtive movements” as the reason for 44% of stops between 2003 and 2013.¹⁶ While deemphasizing felony arrests,¹⁷ these policies dramatically increased the volume of arrests

Figure 3. Summonses, misdemeanor arrests, stop and frisks, and felony arrests since 1993



Source: Ryley, S., Bult, L., & Gregorian, D. (2014). Exclusive: Daily News Analysis Finds Racial Summons for Minor Violations in 'Broken Windows' Policing. *New York Daily News*. Available at: <http://www.nydailynews.com/new-york/summons-broken-windows-racial-disparity-garner-article-1.1890567>.

Note: Stop and frisks are shown beginning in 2002, the year in which these data became readily available.

for misdemeanor offenses, of summonses for violations of the administrative code (such as public consumption of alcohol, disorderly conduct, and bicycling on the sidewalk), and of investigative police encounters with innocent people.

Men of color have borne the brunt of these policies. Men have been over four times as likely as women to be arrested for a misdemeanor in New York City since 1980.¹⁸ Between 2001 and 2013, 51% of the city's population over age 16 was black or Hispanic. Yet during that period, 82% of those arrested for misdemeanors were black or Hispanic, as were 81% of those who received summonses.¹⁹ The racial composition of stop and frisks was similar.²⁰

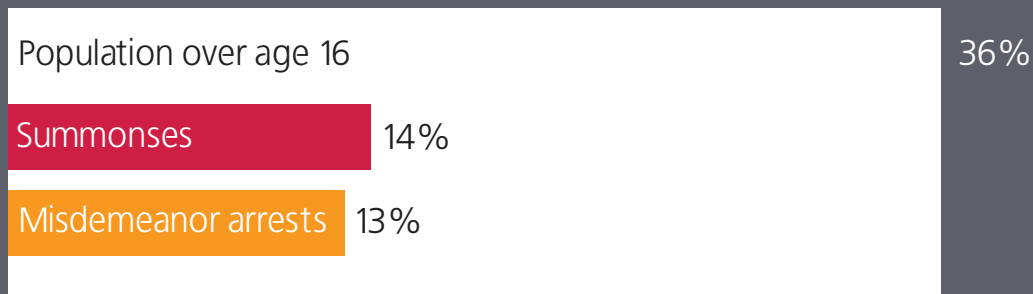
Commissioner William Bratton played a crucial role in implementing "broken windows" policies when he led the city's transit police in 1990 and during his first tenure as police commissioner under Mayor Rudy Giuliani, from 1994 to 1996. Now reappointed, Bratton and Mayor Bill de Blasio remain committed to this style of order-maintenance policing, with Bratton touting its efficacy and explaining that its racial disparities result from targeting communities and populations with higher violent crime rates.²¹ In response to the outcry following Garner's

death, Bratton has announced plans to retrain officers on appropriate use of force during these encounters.

Yet research shows that order-maintenance strategies have had only a modest impact on serious crime rates. New York City experienced a dramatic crime drop during its period of rising misdemeanor arrests and summonses: the city's homicide rate declined by 73% between 1990 and 2000.²² But this was not unique; other large cities including Seattle and San Diego have achieved similar reductions in crime since their crack-era crime peaks.²³ Although an early study found that New York City precincts with higher levels of misdemeanor arrests experienced greater drops in serious crimes,²⁴ a flawed research design makes this conclusion unreliable²⁵ and few other studies have reached the same conclusion.²⁶ More recent studies have found that high misdemeanor arrest volume,²⁷ high summons volume,²⁸ and other factors,²⁹ have had only a modest association or no association at all³⁰ with the city's violent crime drop. "Stop and frisk" activity has also been shown to have no impact on precincts' robbery and burglary rates.³¹ Therefore, while order-maintenance policing demands a substantial share of public funds, there is limited evidence to support its efficacy and great cause for concern about its impact.³²

Figure 4. Racial composition of New York City population, summonses, and misdemeanor arrests, 2001-2013

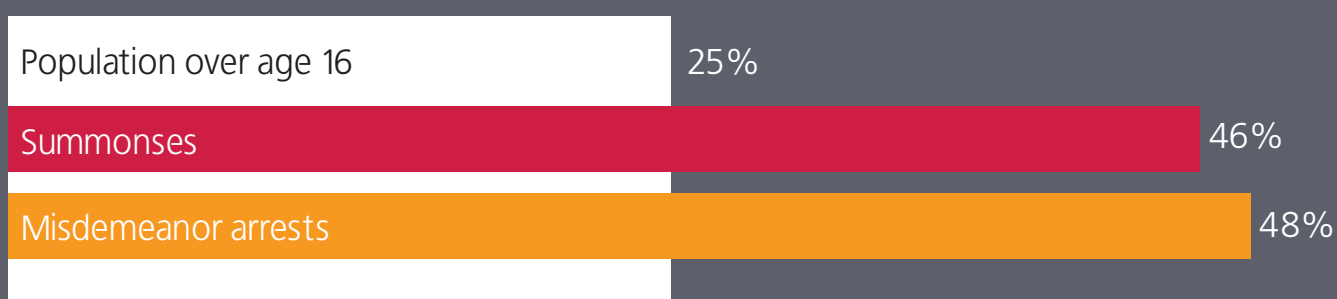
White



Latino



Black



Source: Data retrieved from Chauhan, P., Fera, A. G., Welsh, M. B., Balazon, E., & Misshula, E. (2014). Trends in Misdemeanor Arrests in New York. New York, NY: John Jay College of Criminal Justice. Available at: http://www.jjay.cuny.edu/web_images/10_28_14_TOCFINAL.pdf (pp. 25–7); Ryley, S., Bult, L., & Gregorian, D. (2014). Exclusive: Daily News Analysis Finds Racial Summons for Minor Violations in ‘Broken Windows’ Policing. *New York Daily News*. Available at: <http://www.nydailynews.com/new-york/summons-broken-windows-racial-disparity-garner-article-1.1890567>.

Note: Summons and misdemeanor arrest data are based on incidents rather than individuals: individuals with multiple arrests and summonses are counted multiple times. Summons data did not include age breakdown and are drawn from approximately 30% of cases that provided race information.

II. A CASCADE OF RACIAL DISPARITIES THROUGHOUT THE CRIMINAL JUSTICE SYSTEM

Compared to nationwide trends, Ferguson’s and New York’s racial disparities in policing are in some ways representative and in others anomalous.

In recent years, nearly equal proportions of blacks, whites, and Latinos in the United States have reported being stopped by the police while on foot or in their cars.³³ But the causes and outcomes of these stops still differ by race, and staggering racial disparities in rates of police stops persist in certain jurisdictions.³⁴ These disparities snowball as individuals traverse the criminal justice system.

Blacks were 31% more likely and Hispanics were 6% more likely than whites to report a recent traffic stop in 2011, although in other recent years a similar proportion of blacks, Latinos, and whites have reported experiencing these stops.³⁵ Ferguson and New York are two of many jurisdictions where traffic and pedestrian stops still differ significantly by race. A recent investigation of the rates at which the Boston Police Department observed, stopped, interrogated, frisked, or searched individuals *without* making an arrest found that blacks comprised 63% of these police-civilian encounters between 2007 and 2010, although they made up 24% of the city’s population.³⁶ Similar trends have led approximately 20 cities across the country to enter into consent decrees or memoranda of understanding with the Department of Justice to reduce excessive force and/or protect the public’s civil rights, and several other cities are currently under investigation.³⁷

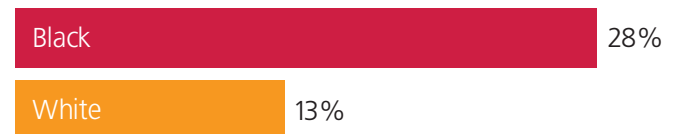
A closer look at the causes of traffic stops reveals that police are more likely to stop black and Hispanic drivers for discretionary reasons. A study of police stops between 2003 and 2004 in Kansas City distinguished between

“traffic-safety stops” (reactive stops used to enforce traffic laws or vehicle codes) and “investigatory stops” (proactive stops used to investigate drivers deemed suspicious).³⁸ The authors found that rates of traffic-safety stops did not differ by the driver’s race, but rates of investigatory stops did, and did so significantly. While these differences persisted for all ages, they were sharpest among drivers under age 25: among these drivers, 28% of black men had experienced an investigatory traffic stop, as had 17% of black women, 13% of white men, and 7% of white women.

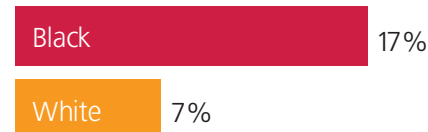
Class differences did not fully explain this racial disparity: black drivers under age 40 were over twice as likely as their

Figure 5. Rates of investigatory traffic stops among Kansas City drivers under age 25, 2003-2004

Men



Women



Source: Epp, C. R., Maynard-Moody, S., & Haider-Markel, D. P. (2014). *Pulled Over: How Police Stops Define Race and Citizenship*. Chicago, IL: The University of Chicago Press (p. 67).

white counterparts to experience investigatory stops for both the highest- and lowest-valued cars. Traffic-safety stops, the researchers concluded, are based on “how people drive,” whereas investigatory stops are based on “how they look.”

Nationwide surveys also reveal disparities in the outcomes of police stops. Once pulled over, black and Hispanic drivers were three times as likely as whites to be searched (6% and 7% versus 2%) and blacks were twice as likely as whites to be arrested during a traffic stop.³⁹ These patterns hold even though police officers generally have a lower “contraband hit rate” when they search black versus white drivers.⁴⁰

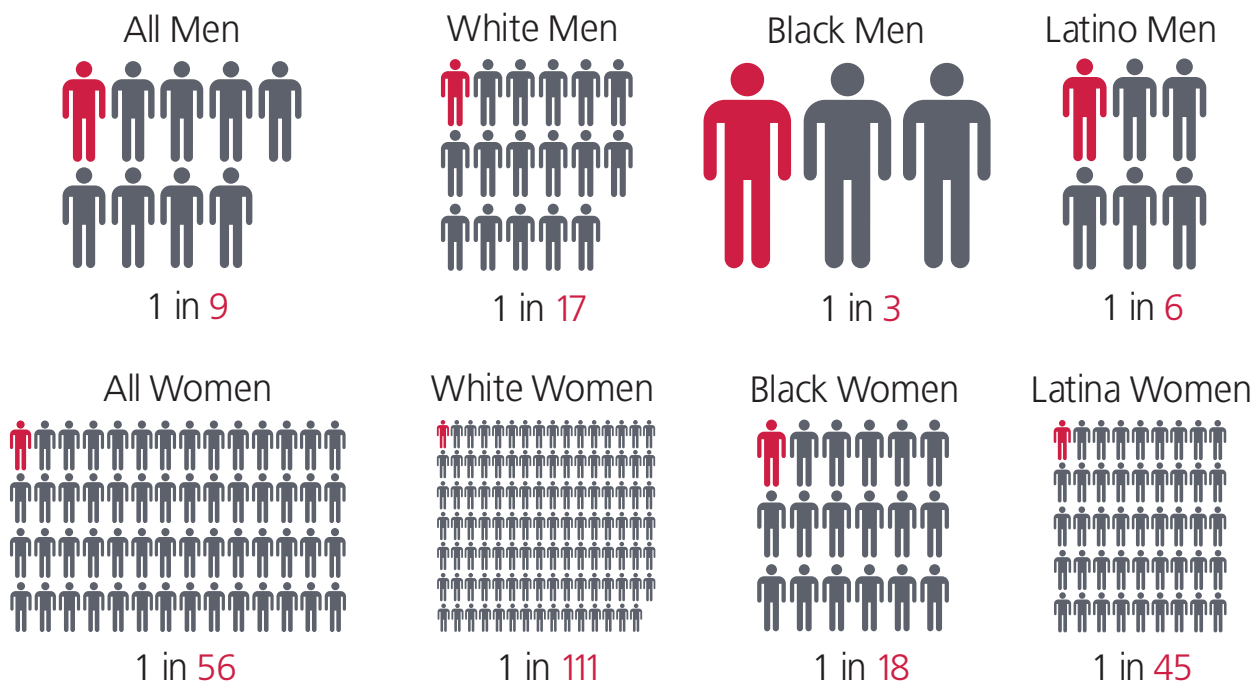
A recent investigation of all arrests – not just those resulting from traffic stops – in over 3,500 police departments across the country found that 95% of departments arrested black people at a higher rate than other racial groups.⁴¹ The cumulative effect of these

policies is that 49% of African American men reported having been arrested by age 23, in contrast to 38% of their non-Hispanic white counterparts.⁴² The next section of this briefing paper will examine how much of this disparity stems from differential crime rates.

The nature of police encounters also differs substantially for people of color compared to whites. Several surveys conducted between 2002 and 2008 have shown that Hispanics were up to twice as likely and blacks were up to three times as likely as whites to experience physical force or its threat during their most recent contact with the police.⁴³ More broadly, when a 1999 Gallup survey asked Americans about perceptions of police brutality in their neighborhoods, 58% of people of color said police brutality took place in their area, in contrast to only 35% of whites.⁴⁴ Police officers’ greater use of discretion when stopping people of color suggests that differences in drivers’ behavior alone are unlikely to account for disparities in use of force.

Once arrested, people of color are also likely to be charged more harshly than whites; once charged, they are more likely to be convicted; and once convicted, they are more likely to face stiff sentences – all after accounting for relevant legal differences such as crime severity and criminal history.

Figure 6. Lifetime likelihood of imprisonment for those born in 2001



Source: Bonczar, T. (2003). Prevalence of Imprisonment in the U.S. Population, 1974-2001. Bureau of Justice Statistics. Available at: <http://www.bjs.gov/content/pub/pdf/piusp01.pdf> (p. 1).

People of color are therefore more likely than whites to be arrested – in part due to differences in crime rates but also due to differences in police policies and use of discretion. Once arrested, people of color are also likely to be charged more harshly than whites; once charged, they are more likely to be convicted; and once convicted, they are more likely to face stiff sentences – all after accounting for relevant legal differences such as crime severity and criminal history.⁴⁵ A recent comprehensive scholarly review conducted by the National Research Council concluded that:

Blacks are more likely than whites to be confined awaiting trial (which increases the probability that an incarcerative sentence will be imposed), to receive incarcerative rather than community sentences, and to receive longer sentences. Racial differences found at each stage are typically modest, but their cumulative effect is significant.⁴⁶

If recent trends continue, one of every three black teenage boys can expect to go to prison in his lifetime, as can one of every six Latino boys – compared to one of every seventeen white boys.⁴⁷ Smaller but still substantial racial and ethnic disparities also persist among women.

New York's and Ferguson's racial disparities in policing are therefore representative of many aspects of police-citizen encounters around the country. Moreover, policing is not the only stage of the justice system that produces unwarranted racial disparity. Disadvantage accumulates throughout the criminal justice process and contributes to the disproportionate presence of blacks and Latinos in prisons, jails, and under community supervision. The next section presents a closer examination of the causes of these racial disparities.

III. CAUSES OF DISPARITIES

Like an avalanche, racial disparity grows cumulatively as people traverse the criminal justice system.

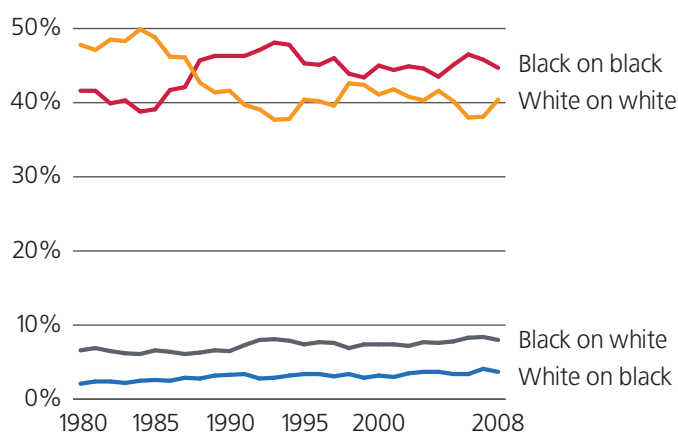
The roots of this disparity precede criminal justice contact: conditions of socioeconomic inequality contribute to higher rates of certain violent and property crimes among people of color. But four features of the justice system exacerbate this underlying disparity: First, a variety of **ostensibly race-neutral criminal justice policies** in fact have a disparate racial impact. Second, **implicit racial bias** leads criminal justice practitioners to punish people of color more severely than whites. Third, **resource allocation decisions** disadvantage low-income defendants, who are disproportionately people of color. Finally, **criminal justice policies exacerbate socioeconomic inequalities** by imposing collateral consequences on those with criminal records and by diverting public spending away from preventative measures. This section first examines the role of differential crime rates before discussing inequities created by the criminal justice system.

DIFFERENTIAL CRIME RATES

People of color are more likely than whites to experience **economic disadvantage** that is compounded by **racial inequality**. These forces erode economic and social buffers against crime and contribute to higher rates of certain violent and property crimes – but not drug offenses – among people of color.

- Blacks and Latinos constituted half of the jail population in 2013.⁴⁸ In 2002, 44% of people in jail **lacked a high school degree**. In the month prior to their arrest, 29% were **unemployed**, and 59% reported **earning less than \$1000/month**.⁴⁹

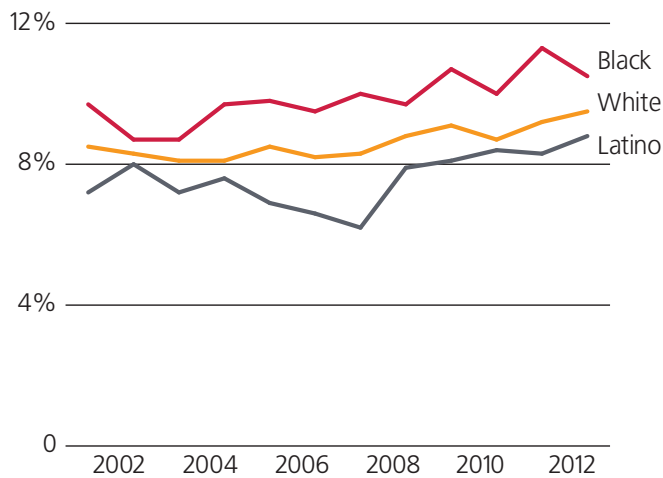
Figure 7. Homicides by race of offender and victim, 1980-2008



Source: Cooper, A. & Smith, E. L. Homicide Trends in the United States, 1980-2008. Bureau of Justice Statistics. Available at: <http://www.bjs.gov/content/pub/pdf/htus8008.pdf> (p. 13, Figure 19).

- Higher rates of geographically concentrated socioeconomic disadvantage contribute to higher rates of certain violent and property crimes among African Americans.⁵⁰ In 2012, African Americans represented 13% of the U.S. population. But African Americans comprised 39% of arrests for **violent crimes** (49% for murder and nonnegligent manslaughter) and 29% of arrests for **property crimes**. Information gathered from victimization surveys and self-reports of criminal offending suggest that, especially for certain violent crimes and to a lesser extent for property crimes, the race of those arrested resembles those of the people who have committed these crimes.⁵¹ Blacks and Hispanics are also more likely than whites to be **victims** of property and violent crimes.⁵² The overall homicide rate for blacks was 6.2 times higher than for whites in 2011.⁵³

Figure 8. Illicit drug use in past month among persons aged 12 or older, by race/ethnicity, 2002-2013



Source: U.S. Department of Health and Human Services (2013). Results from the 2013 Survey on Drug Use and Health: Summary of National Findings. Available at: <http://www.samhsa.gov/data/sites/default/files/NSDUHresultsPDFWHTML2013/Web/NSDUHresults2013.pdf> (Figure 2.12).

- **Drug offending** does not differ substantially by race. Surveys by federal agencies show that both recently and historically, whites, blacks, and Hispanics have used illicit drugs at roughly **similar rates**.⁵⁴ Many studies also suggest that drug users generally purchase drugs from people of the same race or ethnicity as them.⁵⁵ Socioeconomic inequality does lead people of color to disproportionately use and sell drugs outdoors, where they are more readily apprehended by police. But disparities in drug arrests are largely driven by the factors described later in this section.

How much of the racial disparity in the prison population stems from crime rates, and how much is produced by the criminal justice system? In recent decades, a number of leading scholars, including Alfred Blumstein and Michael Tonry, have sought to quantify these effects. Over various time periods, these studies concluded that between 61% and 80% of black overrepresentation in prison is explained by higher rates of arrest (as a proxy for involvement in crime).⁵⁶ The remainder might be caused by racial bias, as well as other factors like differing criminal histories.⁵⁷ Several important nuances, described next, help to interpret these results.

Estimates of the extent to which differential crime rates account for disparities in imprisonment rates vary significantly by offense type and geography. In comparing the demographics of the prison population with arrestees, these studies have shown that the least racial disparity exists for the most serious offenses and that the most exists for the least serious offenses (for which arrest rates are also poor proxies for criminal involvement). This is because criminal justice practitioners can exercise greater discretion with less serious crimes. Scholars have also noted that there is wide variation among states in the degree to which arrest disparities explain incarceration disparities.⁵⁸

The overall conclusion of these studies is that racial differences in criminal offending explain a substantial, but incomplete, portion of the racial differences in the prison population for non-drug crimes. If racial differences in crime rates do not fully account for the high proportion of African Americans in prisons, what else is driving this disparity?

FOUR KEY SOURCES OF UNWARRANTED RACIAL DISPARITIES IN CRIMINAL JUSTICE OUTCOMES

1) Disparate racial impact of ostensibly race-neutral policies and laws

Myriad criminal justice policies that appear to be race-neutral collide with broader socioeconomic patterns to create a **disparate racial impact**. **Policing policies** and **sentencing laws** are two key sources of racial inequality.

Police policies that cast a wide net in neighborhoods and on populations associated with high crime rates disproportionately affect people of color, as described in Sections I and II. Consequently, people of color are more likely to be arrested even for behavior that they do not engage in at higher rates than whites. This greater level of scrutiny also contributes to higher rates of recidivism among people of color.

- Almost 1 in 3 people arrested for **drug law violations** is black, although drug use rates do not differ by race and ethnicity.⁵⁹ An ACLU report found that blacks were 3.7 times more likely to be arrested for marijuana possession than whites in 2010.⁶⁰ This disparity expands at later stages of the criminal justice system so that 57% of people in state prisons for drug offenses are people of color, even though whites comprise over two-thirds of drug users, and are likely a similar proportion of sellers.⁶¹

Myriad criminal justice policies that appear to be race-neutral collide with broader socioeconomic patterns to create a disparate racial impact.

Sentencing laws that are designed to more harshly punish certain classes of offenses, or to carve out certain groups from harsh penalties, also often have a disparate impact on people of color. This occurs because of how sentencing laws interact with broader racial differences in our society and within the criminal justice system.

- **Drug-free school zone laws** mandate sentencing enhancements for people caught selling drugs near school zones. The expansive geographic range of

Figure 9. Racial disparities in marijuana use in past month and marijuana possession arrests, 2010

Usage rates



Blacks used marijuana at 1.3 times the rate of whites.

Arrest rates



Blacks were arrested for marijuana possession at 3.7 times the rate of whites.

Source: Edwards, E. Bunting, W. Garcia, L. (2013). *The War on Marijuana in Black and White*. New York, NY: American Civil Liberties Union. Available at: https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rel1.pdf (p. 47); U.S. Department of Health and Human Services (2011). *Results from the 2010 Survey on Drug Use and Health: Detailed Tables*. Available at: <http://www.samhsa.gov/data/nsduh/2k10NSDUH/tabs/Sect1peTabs1to46.htm> (Tbl. 1.28B).

these zones coupled with high urban density has disproportionately affected residents of urban areas, and particularly those in high-poverty areas – who are largely people of color.⁶² A study in New Jersey found that 96% of persons subject to these enhancements in that state were African American or Latino. All 50 states and the District of Columbia have some form of drug-free school zone law.

- **Diversion programs** and **alternative courts** disproportionately bar people of color from alternatives to incarceration because they frequently disqualify people with past convictions.⁶³
- “**Three strikes and you’re out**” and other **habitual offender** laws disproportionately affect people of color who are more likely to have criminal records.

2) Racial bias among criminal justice professionals

While most white Americans no longer endorse overt and traditional forms of **prejudice** associated with the era of Jim Crow racism – such as beliefs about the biological inferiority of blacks and support for segregation and discrimination – a nontrivial proportion continue to express negative cultural stereotypes of blacks.⁶⁴ Even more common among most white Americans, and many people of color, is **implicit racial bias**: unintentional and unconscious racial biases that affect decisions and behaviors. Psychological experiments have shown that these biases are pervasive in our society, and are held even by people who disavow overt prejudice.⁶⁵ Implicit racial biases also permeate the work of criminal justice professionals and influence the deliberation of jurors.⁶⁶

In **experimental research** such as video simulated shooter studies, subjects are asked to quickly identify and shoot armed suspects, or to press another button to not shoot unarmed suspects. Participants more quickly and accurately decided to shoot an armed target when that person was African American, but more quickly and accurately chose not to shoot if the unarmed target was white.⁶⁷ When researchers conducted this study with a predominantly white group of Denver-based **police officers**, they found that the officers were less likely than the general public to mistakenly shoot at black unarmed suspects.⁶⁸ However, officers more quickly shot at armed black suspects than at armed white suspects. The researchers concluded that while these officers exhibited bias in their speed to shoot, their experience and training reduced bias in their decision to shoot.⁶⁹

Studies of **criminal justice outcomes** also reveal that implicit biases influence the decisions of criminal justice professionals. Researchers have analyzed the extent to which implicit bias affects the work of **police officers, prosecutors, judges, and other members** of the courtroom work group.

- **Police:** As described in Sections I and II, many jurisdictions continue to experience significant racial disparities in police stops. Police have been

more likely to pull over people of color for what researchers call **investigatory stops**. Once pulled over, blacks and Hispanics were three times as likely as whites to be **searched**, and blacks were twice as likely as whites to be **arrested** during a traffic stop.

- **Prosecutors:** Prosecutors are more likely to charge people of color with crimes that carry heavier sentences than whites.⁷⁰ Federal prosecutors, for example, are twice as likely to charge African Americans with offenses that carry **mandatory minimum sentences** than otherwise-similar whites. State prosecutors are also more likely to charge black rather than similar white defendants under habitual offender laws.
- **Judges:** Judges are more likely to **sentence** people of color than whites to prison and jail and to give them **longer sentences**, even after accounting for differences in crime severity and criminal history.⁷¹ In federal cases, the sentencing disparities between **noncitizens** and **citizens** are even larger than those between people of color and whites.⁷² The race penalty, research from the 1990s revealed, is harshest for certain categories of people and offenses: it particularly affects men and the young, and is more pronounced for **less serious offenses**. In effect, young black men are perceived as being more dangerous because of their race and socioeconomic characteristics.
- **Other members of the courtroom work group:** Unconscious racial bias has been found in many other corners of the criminal justice system. A study in Washington state found that in narrative reports used for sentencing, **juvenile probation officers** attributed the problems of white youth to their social environments but those of black youth to their attitudes and personalities.⁷³ **Defense attorneys** may exhibit racial bias in how they triage their heavy caseloads.⁷⁴ Racially diverse **juries** deliberate longer and more thoroughly than all-white juries, and studies of capital trials have found that all-white juries are more likely than racially diverse juries to sentence individuals to death.⁷⁵ Studies of **mock jurors** have even shown that people exhibited skin-color bias in how they evaluated evidence: they were more likely to view

Studies of criminal justice outcomes also reveal that implicit biases influence the decisions of criminal justice professionals.

ambiguous evidence as indication of guilt for darker skinned suspects than for those who were lighter skinned.⁷⁶ Finally, an investigation of disparities in **school discipline** – including rates of out-of-school suspensions and police referrals – led the Departments of Education and Justice to declare that the substantial racial disparities in school discipline “are not explained by more frequent or more serious misbehavior by students of color,” but suggest racial discrimination.⁷⁷

3) Resource allocation decisions that disadvantage low-income people

Key segments of the criminal justice system are **underfunded**, leading to worse outcomes for low-income defendants, who are disproportionately people of color. Moreover, many criminal justice policies and practices **disadvantage** people with **limited resources**.

- Over 60% of people in jail are being detained prior to trial.⁷⁸ **Pretrial detention** has been shown to increase the odds of conviction, and people who are detained awaiting trial are also more likely to accept less favorable plea deals, to be sentenced to prison, and to receive longer sentences. Seventy percent of pretrial releases require **money bond**, an especially high hurdle for low-income defendants, who are disproportionately people of color.⁷⁹ Blacks and Latinos are more likely than whites to be denied bail, to be set a higher money bond, and to be detained because they cannot pay their bond. They are often assessed to be higher safety and flight risks because they are more likely to experience socioeconomic disadvantage and to have criminal records. Implicit bias also contributes to people of color also faring worse than comparable whites in bail determinations.

Key segments of the criminal justice system are underfunded... Moreover, many criminal justice policies and practices disadvantage defendants with limited resources.

- Most states inadequately fund their indigent defense programs. While there are many high-quality **public defender** offices, in far too many cases indigent individuals are represented by public defenders with excessively **high caseloads**, or by **assigned counsel** with **limited experience** in criminal defense.
- Certain policies disadvantage **lower income individuals**, who are disproportionately people of color. Examples include **risk assessments** that give preference to employed people, or **probation or parole requirements** to report at locations where there is little public transportation.
 - Due to limitations in **publicly funded treatment options**, there are fewer sentencing alternatives available to low-income defendants, who cannot afford to pay for treatment programs as an alternative to confinement.
- **Community supervision** and **reentry** programs are underfunded, with too many parole and probation systems offering supervision with little support.

4) Criminal justice policies that exacerbate socioeconomic inequalities

Because the criminal justice system is an institution that primarily reacts to – rather than prevents – crime, it is ill-equipped to address many of the underlying causes of crime. But mass incarceration's hold on vast **public resources and the obstacles** erected for people with criminal records further erode the economic and social buffers that prevent crime.

- Reentry is obstructed by the **collateral consequences** of a criminal conviction. A criminal record creates overwhelming odds against securing steady employment.⁸⁰ Moreover, those with felony drug convictions are disqualified from receiving federal cash assistance, food stamps, and publicly subsidized housing in many areas.⁸¹ Combined with

heightened surveillance, these obstacles contribute to three of four people released from prison arrested within 5 years, and half being re-imprisoned.⁸²

Mass incarceration's hold on vast public resources and the obstacles erected for people with criminal records further erode the economic and social buffers that prevent crime.

- Excessive spending on criminal justice programs limits public funds that can be allocated to **crime prevention** and **drug treatment**. Because of their higher rates of incarceration, victimization, and poverty, people of color are disproportionately affected by these shortcomings in policy.

These four features have created an unequal justice system. They contribute to blacks' and Latinos' high rates of contact with the police and disadvantage them throughout the criminal justice process. Excessive levels of control and punishment, particularly for people of color, are not advancing public safety goals and are damaging families and communities.⁸³ Consequently, although people of color experience more crime than whites, they are less supportive than whites of punitive crime control policies.⁸⁴

The best practices described in the following section are drawn from the following sources, unless otherwise stated: The Sentencing Project (2008). Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers. Washington, D.C. Available at: http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf (pp. 11–57); Hoytt, E. H., Schiraldi, V., Smith, B. V., & Ziedenberg, J. (2001). Reducing Racial Disparities in Juvenile Detention (2001). Baltimore, MD: Annie E. Casey Foundation. Available at: <http://www.aecf.org/m/resourcedoc/aecf-Pathways8reducingracialdisparities-2001.pdf>; Shoenberg, D. (2012). Innovation Brief: Reducing Racial and Ethnic Disparities in Pennsylvania. Chicago, IL: MacArthur Foundation. Available at: <http://www.modelsforchange.net/publications/351>; National Association of Counties (2011). Juvenile Detention Reform: A Guide for County Officials, Second Edition. Available at: <http://www.aecf.org/m/resourcedoc/aecf-JuvDetentionReformForCountyOfficials-2011.pdf>; New York University Journal of Legislation and Public Policy (2013). 16(4). Available at: <http://www.nyujlpp.org/issues/volume-16-number-4/>.]

IV. BEST PRACTICES FOR REDUCING RACIAL DISPARITIES

Jurisdictions around the country have implemented reforms to address these sources of inequality. This section showcases best practices from the adult and juvenile justice systems. In many cases, these reforms have produced demonstrable results.

1) REVISE POLICIES AND LAWS WITH DISPARATE RACIAL IMPACT

Through careful data collection and analysis of racial disparities at various points throughout the criminal justice system, police departments, prosecutor's offices, courts, and lawmakers have been able to identify and address sources of racial bias.

Revise policies with disparate racial impact:

Seattle; New York City; Florida's Miami-Dade and Broward County Public Schools; Los Angeles Unified School District

- After criticism and lawsuits about racial disparities in its drug law enforcement, some precincts in and around Seattle have implemented a **pre-booking diversion strategy**: the **Law Enforcement Assisted Diversion program**.⁸⁵ The program gives police officers the option of transferring individuals arrested on drug and prostitution charges to social services rather than sending them deeper into the criminal justice system.
- Successful litigation and the election of a mayor with a reform agenda effectively curbed “**stop and frisk**” policing in New York City.⁸⁶ Mayor Bill de Blasio vowed that his administration would “not break the law to enforce the law” and significantly curbed a policy that was described by a federal judge as one of “indirect racial profiling.”⁸⁷ Thus far, the reform has not had an adverse impact on crime rates.⁸⁸ In a related effort to address disparities in enforcement, the New York City Police Department stated it would **no longer make arrests for possession of small amounts of marijuana** but would instead

treat these cases as non-criminal offenses subject to a fine rather than jail time.⁸⁹ Yet experts worry that this policy does not go far enough to remedy unfair policing practices and may still impose problematic consequences on those who are ticketed.⁹⁰

- Several school districts have enacted **new school disciplinary policies** to reduce racial disparities in out-of-school-suspensions and police referrals. Reforms at Florida's Miami-Dade and Broward County Public Schools have cut school-based arrests by more than half in five years and significantly reduced suspensions.⁹¹ In Los Angeles, the school district has nearly eliminated police-issued truancy tickets in the past four years and has enacted new disciplinary policies to reduce reliance on its school police department.⁹² School officials will now deal directly with students who deface property, fight, or get caught with tobacco on school grounds. Several other school districts around the country have begun to implement similar reforms.

Revise laws with disparate racial impact:

Federal; Indiana; Illinois; Washington, D.C.

- The Fair Sentencing Act (FSA) of 2010 reduced from 100:1 to 18:1 the weight disparity in the amount of **powder cocaine versus crack cocaine** that triggers federal mandatory minimum sentences. If passed, the Smarter Sentencing Act would apply these reforms retroactively to people sentenced under the old law. California recently eliminated the crack-cocaine sentencing disparity for certain offenses, and Missouri reduced its disparity. Thirteen states still impose different sentences for crack and cocaine offenses.⁹³

- Indiana amended its **drug-free school zone sentencing laws** after the state's Supreme Court began reducing harsh sentences imposed under the law and a university study revealed its negative impact and limited effectiveness. The reform's components included reducing drug-free zones from 1,000 feet to 500 feet, eliminating them around public housing complexes and youth program centers, and adding a requirement that minors must be reasonably expected to be present when the underlying drug offense occurs. Connecticut, Delaware, Kentucky, Massachusetts, New Jersey, and South Carolina have also amended their laws.⁹⁴
- Through persistent efforts, advocates in Illinois secured the repeal of a 20-year-old law that required the **automatic transfer** to adult court of 15- and 16-year-olds accused of certain drug offenses **within 1,000 feet of a school or public housing**. A broad coalition behind the reform emphasized that the law was unnecessary and racially biased, causing youth of color to comprise 99% of those automatically transferred.
- Following a campaign that emphasized disparate racial enforcement of the law, a ballot initiative in Washington, D.C. may **legalize possession of small amounts of marijuana** in the district.⁹⁵
- Officials in Clayton County, Georgia reduced **school-based juvenile court referrals** by creating a system of graduated sanctions to **standardize** consequences for youth who committed low-level misdemeanor offenses, who comprised the majority of school referrals. The reforms resulted in a 46% reduction in school-based referrals of African American youth.

Anticipate disparate impact of new policies: Iowa; Connecticut; Oregon; Minnesota

- Iowa, Connecticut, and Oregon have passed legislation requiring a **racial impact analysis** before codifying a new crime or modifying the criminal penalty for an existing crime. Minnesota's sentencing commission electively conducts this analysis. This proactive approach of **anticipating disparate racial impact** could be extended to local laws and incorporated into police policies.

Revise risk assessment instruments:

Multnomah County, OR; Minnesota's Fourth Judicial District

- Jurisdictions have been able to reduce racial disparities in confinement by documenting racial bias inherent in certain **risk assessment instruments (RAI)** used for criminal justice decision making. The development of a new RAI in Multnomah County, Oregon led to a greater than 50% reduction in the number of youth detained and a near complete elimination of racial disparity in the proportion of delinquency referrals resulting in detention. Officials examined each element of the RAI through the lens of race and **eliminated known sources of bias**, such as references to "gang affiliation" since youth of color were disproportionately characterized as gang affiliates often simply due to where they lived.
- Similarly, a review of the **RAI** used in consideration of pretrial release in Minnesota's Fourth Judicial District helped reduce sources of racial bias. Three of the nine indicators in the instrument were found to be **correlated with race**, but were **not significant predictors** of pretrial offending or failure to appear in court. As a result, these factors were removed from the instrument.

Address upstream disparities:

New York City; Clayton County, GA

- The District Attorney of Brooklyn, New York informed the New York Police Department that he would **stop prosecuting minor marijuana arrests** so that "individuals, and especially young people of color, do not become unfairly burdened and stigmatized by involvement in the criminal justice system for engaging in non-violent conduct that poses no threat of harm to persons or property."⁹⁶
- Following a two-year study conducted in partnership with the Vera Institute of Justice, Manhattan's District Attorney's office learned that its **plea guidelines** emphasizing **prior arrests** created racial disparities in plea offers. The office will conduct implicit bias training for its assistant prosecutors, and is being urged to revise its policy of tying plea offers to arrest histories.⁹⁷

2) ADDRESS IMPLICIT RACIAL BIAS AMONG CRIMINAL JUSTICE PROFESSIONALS

In its comprehensive review of implicit racial bias research, the Kirwan Institute for the Study of Race and Ethnicity concludes that “education efforts aimed at raising awareness about implicit bias can help debias individuals.”⁹⁸ Their review describes a number of debiasing strategies shown to reduce implicit racial bias in both experimental and non-experimental settings. These include providing exposure to counter-stereotypic imagery, increasing inter-racial contact and diversity, and monitoring outcomes to increase accountability. This section examines recent proposals to reduce bias in policing, as well as how jurisdictions have mitigated the negative impact of implicit bias in later stages of the justice system by establishing objective guidelines to standardize decision making, ensuring that decision-makers have access to the most complete information possible, and providing training on racial bias.

Address bias and excessive use of force among police officers:

Connecticut; Maryland; Wisconsin; Austin, TX

In addition to **reducing excessive police contact**, police departments must also improve the nature of this contact to **curb excessive use of force**. Because of their training and experience, police officers are less likely than the general public to mistakenly shoot at black unarmed suspects in experimental settings, and exhibit less bias in their response times.⁹⁹ But it is unclear how these lab-based outcomes translate to real-world scenarios. Simulation studies have underscored the challenges in using officer training – especially exposure to counter-stereotypic imagery – to reduce racial bias in police officers’ response times.¹⁰⁰ Research on many recently proposed reforms to reduce racial bias in policing has been limited and mixed:

- Many police departments have struggled to **recruit and retain persons of color** in their ranks. Underrepresentation of people of color presents a barrier to building relationships with the communities they are sworn to serve.¹⁰¹ Survey data suggest that black officers may be more mindful than white officers of biased policing. A majority of black officers believe (and a majority of white
- officers disagree) that police treat whites better than people of color, and agree that police are more likely to use force against people of color than against whites.¹⁰² Yet a diverse police force alone is unlikely to remedy community-police relations. Studies have reached **conflicting conclusions** about the relationship between the race of officers and their likelihood of having used force.¹⁰³
- Some jurisdictions in the United States and abroad offer improved models for preventing excessive use of force, investigating claims, and ensuring police accountability. Connecticut, Maryland, and Wisconsin have passed laws requiring **special prosecutors** to handle cases of police misconduct in order to address the potential conflict of interest when local district attorneys prosecute the law enforcement officials with whom they work daily.¹⁰⁴ France and Spain have similar laws, requiring independent investigating magistrates for cases involving police use of deadly force.¹⁰⁵ Given the considerable leeway given to police on when to use force within the “objectively reasonable” standard set forth by the Supreme Court,¹⁰⁶ it is important to create clear guidelines that **curb excessive use of force**. Germany, for example, provides strict limitations on the use of force for petty offenses.¹⁰⁷ A case study of the Austin Police Department recommends a use of force policy that contains clear deadly force and less-lethal force guidelines, extensive police training in all force options, and an early warning system for identifying problem officers.¹⁰⁸ Once officers are deemed unqualified by their commanders, a process should be established to **remove problem officers and prevent those with a history of misconduct from transferring to other departments**.¹⁰⁹ In addition, an independent **civilian review board** with the power to discipline officers should be established to oversee complaints filed by the public.
- There is currently growing interest in the potential for **body cameras** worn by officers to reduce their excessive use of force and increase accountability. Following the fatal police shooting in Ferguson, Missouri, President Obama has pledged to allocate \$75 million to the purchase of 50,000 body cameras.¹¹⁰ **Research** on the effectiveness of these cameras, however, is both **limited and mixed**.

There is some evidence that body cameras can reduce use of force by police, assaults on officers, and citizen complaints, by changing either police or citizen behavior.¹¹¹ Yet as the non-indictment of NYPD officer Daniel Pantaleo for Eric Garner's death suggests, video footage of excessive police force does not ensure accountability. Meanwhile, this technology has raised concerns that body cameras may intrude on citizen privacy and exacerbate trauma among victims of crimes and accidents. Yet a number of civil rights organizations, including the American Civil Liberties Union, have generally expressed support for the use of body cameras, provided that they are governed by strict privacy policies.¹¹² This year, Los Angeles will become the first major U.S. city to implement body camera technology widely.¹¹³

Eliminate racial disparities in charging decisions:

Milwaukee County, WI; Mecklenburg County, NC; San Diego County, CA

- The Vera Institute of Justice's Prosecution and Racial Justice program has worked with various jurisdictions to reduce unwarranted racial and ethnic disparities caused by **prosecutorial decision making**. In Milwaukee, prosecutors previously filed drug paraphernalia charges against 73% of black suspects but only 59% of white suspects.¹¹⁴ The prosecutor's office was able to eliminate these disparities by **reviewing data** on outcomes, **stressing diversion** to treatment or **dismissal**, and requiring attorneys to consult with supervisors prior to filing such charges.

Establish objective criteria and guidelines for decision making:

Dorchester, MA; Multnomah County, OR; Saint Louis County, MN

- In Dorchester, 52% of people of color arrested in a school zone for a drug crime received an enhanced charge, while only 15% of whites received such a charge. Based on these findings, judicial leadership worked with police and prosecutors to develop **guidelines** to more fairly handle **school zone cases**.
- Similarly, Multnomah County instituted a "**sanctions grid**" for probation violations

that minimized **staff inconsistencies**, while encouraging youth sanctions other than secure detention. The changes resulted in an immediate reduction in the detention population and were part of a broader effort that largely eliminated the racial disparity in the proportion of referrals resulting in detention.

- When making bail determinations in Saint Louis County, Minnesota, judges did not **have access to a defendant's bail report**, which contained important personal background information, and relied exclusively on the name of the person arrested, the current charge, and the person's prior criminal history in the state. Local officials perceived the system to be biased against people of color, releasing whites on their own recognizance twice as often as other racial groups, and imposing money bond on African Americans more often and in a greater amount than on whites. Racial disparities remained even when controlling for offense severity level, number of felony charges, and the defendant's criminal history. Changes were made so that in all felony cases, judges only made bail determinations once a bail report had been provided. The judges also received training on best practices in making bail determinations.

Address potential bias among jurors:

Northern District of Iowa; North Carolina

- U.S. District Court Judge Mark W. Bennett spends 25 minutes **discussing implicit bias** with the potential jurors in his court.¹¹⁵ He shows video clips that demonstrate bias in hidden camera situations, gives specific instructions on avoiding bias, and asks jurors to sign a pledge. Although the impact of this approach has not been measured, mock jury studies have shown that *increasing* the salience of race and making jurors more conscious of their biases *reduces* biased decision making.¹¹⁶
- North Carolina's **Racial Justice Act** enabled commutation of death sentences based on statistical evidence that race had played a role in sentencing. Four death sentences were commuted to life without parole. But as a result of divisive state politics on the issue, the legislature subsequently repealed the law.

3) REALLOCATE RESOURCES TO CREATE A FAIR PLAYING FIELD

Investing in alternatives to incarceration and limiting the financial outlays required from defendants have helped to reduce the disadvantage of low-income people of color in the criminal justice system.

Increase pretrial release:

New Jersey; Cook County, IL

- In 2014, New Jersey reformed its bail system to **emphasize risk assessment over monetary bail** in pretrial release decisions. Previously, all defendants were detained based on their ability to post bail, regardless of their risk level. The new set of laws, which includes a constitutional amendment approved by voters, expands judicial discretion to set the terms of pretrial release and provides judges with **broader nonmonetary pretrial release options**. Judges may now release lower-risk indigent individuals who cannot afford bail and may deny pretrial release for high-risk individuals.¹¹⁷ All defendants will undergo a risk assessment before their bail hearing and monetary bail may only be set if it is determined that no other conditions of release will assure their appearance in court. In addition, the legislation established time limits to ensure more speedy trials and guarantees defendants the right to counsel at their pretrial detention hearings.¹¹⁸

In 2014, New Jersey reformed its bail system to emphasize risk assessment over monetary bail in pretrial release decisions.

- Appointed counsel is under-resourced and often struggles to **gather information supporting pretrial release** to present at custody or bail hearings. The Cook County Public Defender's Office established the Detention Response Unit in 1996

to improve case outcomes for youth of color. The unit consisted of two paralegals who interviewed detained youth prior to their custody hearings. The paralegals helped add a larger social narrative to the court process by checking on community ties and stressing to families the importance of attending the custody hearing.

Establish alternatives to incarceration for low-income individuals:

Berks County, PA; Illinois; Rock County, WI; Union County, NC

- In Berks County, PA, officials were able to reduce the number of youth in secure detention – most of whom were youth of color – by 67% between 2007 and 2012 in part by **increasing reliance on alternatives**. These included non-secure shelters for youth who cannot safely return home but did not require locked detention, evening reporting centers, electronic monitoring, and expanded use of evidence-based treatment programs. Because many of these youth had committed technical violations of their probation terms, this broader range of alternatives made it possible to keep them out of detention without harming public safety.
- In 2004, Illinois **expanded alternative community programs** and decreased reliance on detention. By 2007, detentions had been reduced by 44% across the state's four pilot sites. The sites created a wide variety of programs, including Aggression Replacement Training, Functional Family Therapy, a community restorative board, teen court, and substance abuse treatment. For every \$1 spent on the programs, \$3.55 in incarceration costs were avoided.
- Other jurisdictions have reduced the proportion of youth of color in detention by **adopting graduated sanctions** for probation violations. In Rock County, WI, graduated sanctions and incentives for probation violators, such as Aggression Replacement Training and evening reporting, helped drop the percentage of youth of color in the total detention population from 71%

to 30%. Similarly, in Union County, NC, the use of graduated sanctions for youth who violated probation helped to decrease the representation of youth of color in the total detention population by 32%.

Offer Spanish language resources:

Maricopa County, AZ; Santa Cruz County, CA

- Maricopa County significantly improved outcomes in the Driving Under the Influence (DUI) Court, by creating a separate **Spanish-speaking court**. The court achieved an 88% graduation rate, higher than the 66% rate for participants in English-speaking

In 2004, Illinois expanded alternative community programs and decreased reliance on detention.

DUI court. Graduates of the DUI court have to complete at least 20 weeks of treatment, education, and counseling, reach 6 months of sobriety, and be attending school or employed.

- Santa Cruz County's probation department addressed difficulties of communicating with Latino families by increasing the number of Spanish-speaking staff to match the proportion of such youth at the detention center. The department also doubled the number of youth diversions by **creating programs** to meet the needs of Latino youth, designing programs to meet regional needs across the county, and **expanding bilingual staff** at a local community provider. Overall, these efforts helped lead to a 25% reduction in the average daily detention population, and a simultaneous 22% reduction in the Latino representation in the juvenile hall population.

4) REVISE POLICIES THAT EXACERBATE SOCIOECONOMIC INEQUALITIES AND REDIRECT PUBLIC SPENDING TOWARD CRIME PREVENTION AND DRUG TREATMENT

While the criminal justice system is not well-positioned to address the socioeconomic inequality that contributes to differential crime rates, it should not aggravate these conditions.¹¹⁹ Advocates have had success in downsizing and redirecting criminal justice spending, increasing utilization of existing resources, and limiting the collateral consequences of criminal convictions.

Expand and maximize utilization of available community resources:

California; Pima County, AZ

- California voters in November 2014 approved Proposition 47, which reclassifies a number of low-level offenses from felonies to misdemeanors.¹²⁰ This allows 10,000 incarcerated individuals to petition to have their sentences reduced. Moreover, a significant portion of projected state prison savings each year will be allocated to preventing crime from happening in the first place. This includes **investments in mental health and substance abuse treatment**, programs to reduce **school truancy** and **prevent dropouts**, and support for **victim services**.
- Officials and community groups in Pima County, AZ, helped to increase the utilization of community resources by creating geocoded maps to identify communities with high proportions of youth referred to detention and then developing **community asset maps** to find available program services for at-risk youth in those areas.

Limit the collateral consequences of criminal convictions:

Numerous states and localities

- A criminal record is a strong **barrier to employment**, and therefore to successful reentry. In 2012, the **Equal Employment Opportunity Commission** warned employers that they may be liable under Title VII of the Civil Rights Act

of 1964 if they uniformly administer “a criminal background check that disproportionately excludes people of a particular race, national origin, or other protected characteristic” when it is not related to the job or necessary for the business.¹²¹ To reduce barriers to employment for those with criminal records, many jurisdictions have passed laws or issued administrative orders to “**Ban the Box**” – or remove the question about conviction history from initial job applications and delay a background check until later in the hiring process.¹²² Twelve states – including Maryland, Illinois, and California – and 60 cities – including Atlanta and New York City – have passed these reforms. More broadly, 41 states and the District of Columbia have enacted some form of legislation to reduce collateral consequences.¹²³

- Advocates have been urging states to end denial of **federal cash assistance and food stamp benefits** for people convicted in state or federal courts of felony drug offenses. These bans primarily affect low-income women of color.¹²⁴ The 1996 Personal Responsibility and Work Opportunity Reconciliation Act that created the ban also permitted states to **opt out or modify** its terms. To date, 13 states have fully opted out of the cash assistance ban and nine from the food stamp ban. Others have opted out in part through smaller changes, such as making access dependent on type of drug offense or enrollment in treatment.
- In recent years, advocates have worked to address **housing insecurity** for persons with convictions. In 2011, the federal **Department of Housing and Urban Development** began urging public housing agencies to relax admission policies in an effort to help people released from prison reunite with their families.¹²⁵ Litigation underway in Kansas City and New York City strives to address exclusionary housing policies in the **private rental market**.¹²⁶
- Since 1997, 23 states, including New Mexico, Rhode Island, and Virginia, have enacted reforms to expand **voter eligibility** for people with felony convictions.¹²⁷ Felony disenfranchisement policies have had a disproportionate impact on communities of color, with black adults four times more likely to lose their voting rights than the rest of the adult population.¹²⁸

V. IMPLEMENTATION STRATEGIES AND METRICS FOR SUCCESS

Policymakers and practitioners can draw on lessons from these reforms to develop successful implementation strategies and sound evaluation metrics.¹²⁹

All key decision-makers and interested parties – policymakers, practitioners, community groups, and formerly incarcerated individuals – should be included in the development and implementation of reforms. This collective approach can identify sources of disparity, develop solutions and weigh their costs, carry out implementation, and establish monitoring and accountability practices. Institutionalizing reforms in this way can also ensure that they are sustainably funded and implemented. In addition, public education can expand demand and support for reforms.

Analyzing the impact of reforms to address racial disparity within the justice system requires not only access to comprehensive data, but also a framework for measuring success. A key question is whether an initiative should be designed to reduce the *total number* of people of color in the justice system (in absolute count or as a rate) or the *relative ratio of racial disparity* (a comparison of rates of contact with the justice system). These are

both laudable goals, but with potentially very different outcomes. Just as it is possible to reduce the absolute level of imprisonment without reducing racial disparity (for example, if both white and black incarceration rates were equally reduced), so is it possible to reduce racial disparities without affecting incarceration levels (for example, if the white incarceration rate rose while the black incarceration rate remained constant).

A recent study of the juvenile justice system illustrates these dynamics. The National Council on Crime and

A key question is whether an initiative should be designed to reduce the total number of people of color in the justice system (in absolute count or as a rate) or the relative ratio of racial disparity (a comparison of rates of contact with the justice system).

Delinquency analyzed data from five geographically diverse counties engaged in juvenile justice reform in the period 2002–2012, a period when the number of juveniles in residential placement nationally declined by about 40%. The study found that of the juveniles placed in

secure confinement during this period, the proportion who were youth of color increased from 12.4% in 2002 to 22.3% in 2012. While it is troubling that the racial disparity has increased, there are nonetheless far fewer African Americans (and whites) behind bars. From the perspective of reducing the consequences of criminal justice control over people of color, such a development has been constructive overall.

VI. CONCLUSION

Despite substantial progress in achieving racial justice in American society over the past half century, racial disparities in the criminal justice system have persisted and worsened in many respects. Among African American men born just after World War II, 15% of those without a high school degree were imprisoned by their mid-30s.¹³⁰ For those born in the 1970s, 68% were imprisoned by their mid-30s.

The country has made progress on these issues in recent years. New York and other large states have significantly reduced their prison populations¹³¹ and the juvenile justice system has reduced youth confinement and detention by over 40% since 2001.¹³² The racial gap in incarceration rates has begun to narrow¹³³ and police departments in many cities are increasingly diverse.¹³⁴ The Garner case has sensitized many white Americans to problems in the justice system, with 47% of whites nationwide and half in New York City stating that the officer should have been indicted.¹³⁵ Finally, proper enforcement of the recently reauthorized Death in Custody Reporting Act can ensure accurate data on future police use of lethal force.¹³⁶

But demonstrators have echoed Garner's final words – “I can't breathe” – and the message attributed to Brown – “hands up, don't shoot” – in public protests because there is much left to do.

As proven by the jurisdictions highlighted in this report, reforms can improve criminal justice outcomes by targeting the four key causes of racial disparity: disparate racial impact of laws and policies, racial bias in the discretion of criminal justice professionals, resource allocation decisions that disadvantage low-income people, and policies that exacerbate socioeconomic inequalities. We must now expand the scale and increase the speed of these efforts.

ENDNOTES

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Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System

Nazgol Ghandnoosh, Ph.D.

February 2015



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The New York Times

What's Going On in Our Prisons?

By MICHELE DEITCH and MICHAEL B. MUSHLIN JAN. 4, 2016

Leonard Strickland's barbaric and unnecessary death at the hands of prison guards at the Clinton Correctional Facility in upstate New York highlights the need for independent oversight of the state's prisons. His beating in 2010, the details of which have only recently come to light, is the latest in a long list of instances of brutality toward inmates in New York's prison system.

The state's inhumane practices involving solitary confinement have also generated outrage. Thousands of prisoners have been held in extreme isolation, in some cases for years, and often for minor rule violations, at great cost to their mental health and potential for rehabilitation. A settlement announced last month of a lawsuit brought by the New York Civil Liberties Union will reduce both the number of inmates held in isolation and the maximum stay, and will abolish some of the harshest conditions.

While this is a welcome move, it provides for only two years of monitoring once it has been implemented and does not address the many issues that affect inmate health and safety for the overwhelming number not in solitary confinement.

This is why additional governmental oversight is urgently needed to truly change the culture of a system that holds 53,000 inmates across 54 prisons. What goes on inside these prisons is largely hidden from view, and there is little accountability for wrongdoing.

The New York State Commission of Correction has longstanding authority to regulate and visit prisons. The state comptroller pointed out in a 2006 audit that the commission had essentially defaulted on that responsibility. Nine years later, little has changed. The commission investigates some inmate deaths, but it cannot be fairly described as a monitoring body.

The result is that New York's prison system operates almost entirely below the radar. This invisibility should end by setting up a system of effective independent governmental oversight to ensure the health and safety of prisoners. If harm is to be prevented in these dark places, we must know what is happening inside.

Nationally, the situation is not better. For example, abuse of prison inmates appears to be endemic in Florida, prison rape is widespread across the country, and the hanging death in a Texas jail cell of Sandra Bland, who was arrested after a routine traffic stop, highlighted the national problem of suicide in custody. (Her family has disputed the finding by authorities that she killed herself.)

While we are witnessing a movement for increased police accountability, the need for transparency and accountability is even more urgent in the nation's jails and prisons, given their closed environments and lack of cellphones and body cameras to capture abusive encounters. These institutions primarily confine the most powerless and vulnerable, including poor people who are disproportionately African-American and Latino, as well as people with mental illness.

The New York State Assembly Standing Committee on Correction recently held a hearing about the need for such oversight. We were among the experts invited to testify about what an effective system of oversight might look like.

The American Bar Association has provided clear guidance on this issue, which we helped to develop. It calls for every state to create an independent government monitoring body for its prisons and jails that reports to the public about conditions in those facilities.

The State Legislature should follow the A.B.A.'s guidance and establish a monitoring body with unfettered access to prison facilities, staff, inmates and records in announced or unannounced visits.

The monitor should be empowered to examine and report on all aspects of a facility's operations that affect inmates, including, for example: medical and mental health care; use of force; inmate violence; conditions of confinement; staffing practices; inmate discipline and use of solitary confinement; substance abuse treatment; educational and rehabilitative programming; and re-entry planning.

There also should be an independent investigatory body that reviews complaints and allegations of wrongdoing, including inmate grievances, abuse claims, denial of access to health care and inmate deaths.

At the same time, the prison system should enhance its own internal accountability measures, such as its decision to electronically log complaints to monitor accusations of staff misconduct.

But in light of recent events, the public is unlikely to be satisfied with a prison agency's pronouncements that everything is fine or trust the vindications of staff members accused of abusive behavior. Only independent monitoring and investigations can provide that level of public accountability.

The costs of this oversight would pale in comparison to the hundreds of millions of dollars paid out in lawsuits stemming from unconstitutional practices and the untold costs associated with ineffective programs and unnecessary use of solitary confinement.

Designed correctly, an oversight body can provide an early warning system about patterns of complaints against certain prison employees, assess the

appropriateness of discipline meted out to staff members, address concerns about inadequate health care or protocols for dealing with mentally ill inmates, highlight programs that are ineffective, point to areas for improved staff training, and identify policies that need to be adjusted. A monitor could also identify practices worth replicating at other prisons.

Michele Deitch is a senior lecturer in the Lyndon B. Johnson School of Public Affairs and in the law school at the University of Texas, Austin. Michael B. Mushlin is a professor at Pace Law School. They are the co-chairs of the A.B.A.'s Subcommittee on Independent Correctional Oversight.

Reform prison isolation

By Martin F. Horn and Michael B. Mushlin, Commentary
Updated 7:08 am, Tuesday, October 29, 2013

We are the odd couple of prison reform. One has dedicated a career to running prisons, the other to affirming prisoners' rights. But when it comes to extreme isolation, often called solitary confinement, we agree: this inhumane practice must end.

An estimated 80,000 prisoners in this country are living close to 23 hours a day alone in their cells, many deprived of meaningful stimulation. These extreme conditions cause such suffering they have been called "torture." For the young, the mentally ill, and other vulnerable prisoners, extreme isolation is especially dangerous, often leaving permanent psychological damage.

What is the rationale for such cruelty? California and New York are leaders in the use of extreme isolation but for different reasons. In California, officials resort to isolation to keep large groups of prisoners, such as gangs, from assembling, and from harming one another and staff. Historically, California placed prisoners affiliated with gangs in isolation until they disavowed their gang allegiance. Twice in the last year, California prisoners have engaged in a hunger strike to protest the worst abuses; more than 10,000 prisoners are believed to be in isolation.

New York uses extreme isolation to punish people for violating rules — some minor. According to the New York Civil Liberties Union, hundreds of prisoners were sent to isolation for having an "untidy cell or person," "littering," and hundreds more for "unreported illness." Approximately 4,300 New York prisoners are being punished this way.

California and New York are being sued in major class action cases. We are convinced there is another way, an approach that doesn't involve court orders. We propose a drastic cutback by prison officials in their dependence on isolation—no more applying it to minor, nonviolent offenses, no more using it for crowd control—with an acknowledgement by prisoners' rights advocates that some of the officials' safety concerns are legitimate, that certain violent prisoners must be isolated when they pose a serious danger.

Prison administrators would set new conditions for isolation without excessive deprivations. While isolated, prisoners should be allowed to read, receive visits, make phone calls, and have other forms of human contact and stimulation. Time spent in isolation need not stretch into months or years. Periodic reviews to determine whether danger persists would lead to far shorter periods of isolation for most prisoners.

Where does that leave California and New York? Both must make greater efforts to keep the mentally ill out of isolation. To address gangs in California's prisons, we recommend continuation of efforts to reduce overcrowding and reconsider the isolation of gang members, as well as providing sufficient staff, properly trained and equipped to keep prisoners safe. In New York, prison administrators should use other punishments for breaking the rules in nonviolent ways, including greater use of alternative sanctions for nonviolent offenses like monetary penalties, restricted privileges, and the use of "conditional discharges" for first-time nonviolent offenders, offering them an opportunity to "cleanse" their record through continued good behavior.

These are solutions to problems that extreme isolation is supposed to solve — steps prisons can take immediately. Some states — including Maine, Mississippi, and Colorado — have begun to reform the use of extreme isolation. New York and California can lead this movement by ending a practice that is harmful and counterproductive. This would also show the nation and the world that America can have a prison system worthy of its values.

Martin F. Horn is a distinguished lecturer at John Jay College of Criminal Justice, and served as Commissioner of Correction for New York City and Corrections Secretary in Pennsylvania. Michael B. Mushlin is a law professor at Pace Law School, past project director of the New York City Legal Aid Society Prisoners' Rights Project and author of "Rights of Prisoners".

Breeding Psychotics

By MICHAEL B. MUSHLIN

WHITE PLAINS

AS the State Legislature considers reinstating the death penalty, lost in the debate is any mention of the appalling conditions that are often inflicted on prisoners sentenced to death.

Since the death penalty was re-enacted during Gov. George E. Pataki's first term, seven people have been condemned to die, but none

On death row, 'dog runs' and solitary confinement.

have been executed. Prisoners on death row have been kept in virtual solitary confinement while they await the outcome of their appeals, exoneration or execution. A recent study by the Association of the Bar of the City of New York, of which I am a co-author, has found that the conditions on New York's death row are among the harshest in the nation.

According to the study, each condemned man in New York is locked in his isolated 78 square-foot space for 23 hours each day. Each cell contains only a toilet, a sink, a bed, a mattress and a pillow. The cells are not air-conditioned and fans are not permitted. All meals are given to inmates in their cells during the daytime shift, which means that inmates go more than 16 hours without food. The inmates cannot see other prisoners from their cells and are not permitted to hold prison jobs, attend programs or engage in organized activities. When a prisoner is allowed out of his cell for his one hour a day, he is confined to a solitary cage of about 2,000 square feet, aptly called a dog run.

Compounding the isolation, visits are greatly restricted and take place in booths separated by a plexiglass barrier that prevents physical contact. Inmates are limited to two 10-minute phone calls per week.

Judge James L. Dennis of the Unit-

ed States Court of Appeals for the Fifth Circuit, in New Orleans, has said that restrictive death row conditions are "enough to weaken even the strongest individual." Psychologists who have studied such conditions have concluded that they can lead to severe psychological consequences, including withdrawal, hopelessness, hallucinations, aggression, rage, paranoia and psychosis.

Death row inmates who may be rendered insane by these conditions may no longer be deemed competent when the time comes to execute them. There is also the possibility that inmates will be driven by these conditions to abandon their appeals and volunteer for execution, a phenomenon that occurs with more than 10 percent of all inmates on death row nationally.

And, of course, some prisoners subjected to these conditions might actually be innocent — last month, an Ohio inmate who was convicted in 1985 became the 119th innocent person to be freed from death row since 1973.

Not only are conditions harsh, but the state is also highly secretive about how it runs death row. The Department of Correctional Services has refused to open death row to inspection even to representatives of the New York City bar association asserting undefined security concerns. When the death penalty law was passed, the Legislature and Governor Pataki gave the department the authority to close death row to inspection by judges, members of the Legislature, district attorneys, ministers in towns where prisons are located and even by the governor himself.

Inmates on death row are not the only ones who must endure these horrible conditions. New York confines approximately 5,000 other inmates by locking them into their cells for 23 hours a day. Approximately 2,800 of these inmates are housed in disciplinary lockdown units, some of which approach the severity and degree of isolation of the notorious "supermax" prisons in other states.

The conditions in these units are analogous to those on death row. The toll exacted by these conditions has not been fully calculated, but some things are known. A recent review of public data by lawyers from the Prisoners' Rights Project of the New York Legal Aid Society found that from 1998 to 2001, 30 percent to 50

percent of prison suicides occurred within these harsh confinement units, which house less than 8 percent of the total prison population.

There is never justification for prison conditions that cause mental torture. And it is a mistake to think that the conditions do not directly affect us. Many inmates will some day return to be our neighbors, some even from death row. New York State should not be in the business of creating dreadful conditions that breed psychotics who then return to society.

Given the extreme conditions of death row, one might expect that the inmates held there are exceptionally dangerous. But they are not.

The bar association study found that prisoners on death row are among New York's most cooperative inmates. From 1996, when New York's death row was established, to 2001, there was not a single reported incident of violence, an attempted escape or even a serious security violation, like the possession of a banned item that could be made into weapons.

The time has come to correct these problems. No longer should any areas of the New York prison system

Prisons shouldn't be off limits to outside inspection.

be off limits to observers. Governor Pataki should ensure that state prisons, including death row, are open to inspection by responsible persons outside the system. And legislation should be enacted that ensures that the harsh isolation and brutal conditions that are inflicted on death row inmates are stopped.

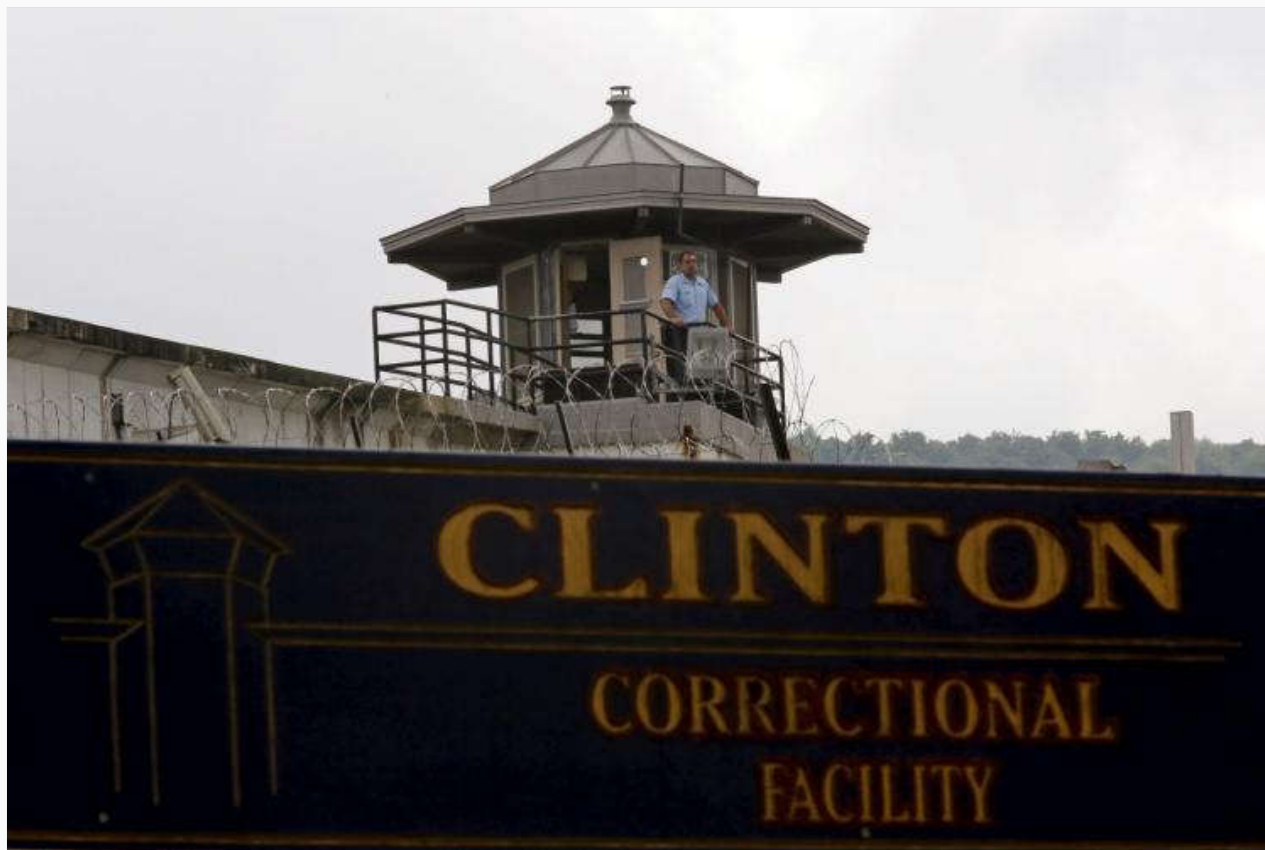
Whether or not the death penalty is reinstated in New York, death row conditions and the ill treatment of thousands of other inmates in supermax units need to be part of the debate. We cannot close our eyes to their suffering. The Legislature and the governor should immediately undertake reforms to ensure that New York State prisoners are no longer subjected to what is essentially state-sponsored torture. □

Michael B. Mushlin is a professor at Pace Law School.

The prisoners we should put on Rikers: Bring back inmates from upstate

BY MICHAEL MUSHLIN

NEW YORK DAILY NEWS Wednesday, April 5, 2017, 5:00 AM



Far-flung (CHRIS WATTIE/REUTERS)

The decision announced Friday by Mayor de Blasio to endorse the central recommendation of an independent commission and [close the sprawling jail complex on Rikers Island](#) — by downsizing the city's pretrial population and housing the remaining detainees and inmates in local jails close to courts — could be a major advance.

But the plan is missing one critical piece that would mark a real step forward for thousands of families throughout the five boroughs. Namely, we should keep Rikers open to incarcerate people convicted of crimes who would otherwise be sent upstate.

Locating pretrial detention facilities in the boroughs rather than on Rikers Island, which is nearly impossible for attorneys and court officials to access, will make the city's criminal justice system more efficient and responsive to the values of our people and to the commands of the Constitution.

People who care about fairness and decency in criminal justice should commend former state Chief Judge Jonathan Lippman, and also de Blasio and City Council Speaker Mark Viverito, for embracing the plan's main goal.

If the city follows its recommendations and replaces Rikers-based detention with borough-based jails, no longer will New Yorkers charged with crimes but not convicted be banished to a small island far from courts and communities. No longer will New York City taxpayers be forced to pay millions for fleets of buses to transport inmates on and off the island for court appearances.

Moreover, no longer will detainees be housed in ill-maintained and inadequate facilities. The horrors and brutality that detainees have suffered on Rikers Island has made that place reminiscent of Devil's Island.

Missing from the proposal to close Rikers for pretrial detainees, however, is any provision to use this singular opportunity to relocate New York State prisoners — inmates who have been convicted of crimes and are serving their sentences — from far upstate prisons like Attica and Clinton to a prison closer to their home communities.

The sprawling New York prison system is broken. Recidivism rates are high, brutality is common and programs are limited. The hallmark of this broken system is that most inmates are housed hundreds of miles away from their homes.

For example, 58% of incarcerated individuals from the city's metropolitan region are in prisons more than 200 miles from their homes. And remarkably, 27% of the entire state prison population is more than 300 miles from the county of commitment.

The location of New York prisons so far away makes maintaining meaningful family ties almost impossible. These ties are strongly associated with successful reintegration, lower recidivism rates and improved behavior while incarcerated.

This distance is particularly brutal for the approximately 105,000 children in the state who have a parent in jail or prison. To visit parents, these children must endure grueling overnight bus trips to and from the far-flung prisons.

Indeed, Gov. Cuomo [has proposed cutting back visitation rights](#) for maximum-security prisoners from seven to three days a week — all to save \$2.6 million.

In the remote New York prisons, programs are difficult to deliver and prisoners are under the control of staffers drawn from areas culturally and racially different from the prison population, increasing a sense of isolation and alienation among the incarcerated that is antithetical to rehabilitation.

National standards provide that, whenever possible, prisons should be located "near the population centers from which the bulk of their prisoners are drawn, and in communities where there are resources to supplement treatment programs for prisoners and to provide staff for security, programming and treatment."

With the land made available by the closing of Rikers Island for pretrial detainees and those serving short sentences, it is not unimaginable to contemplate what before was unthinkable: using the space made available to bring New York City prisoners home.

Building a modern prison on the land left vacant by the evacuation of Rikers' present populations would be a truly transformative step, benefiting immeasurably the incarcerated and their families, and ultimately all of us. We should not let this moment pass.

Mushlin is a professor at the Elisabeth Haub School of Law at Pace University.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Docket No.

- against -

15 Cr. 334 (RA)

GERALD TISDALE, et al.,

Defendants.

- - - - - x

SENTENCING MEMORANDUM FOR GERALD TISDALE

(Along with Accompanying Letters of Support & Exhibits)

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Steven Z. Legon, Esq.
Of Counsel and on the Memorandum

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Defendants.

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This Memorandum is submitted pursuant to Rule 32 (f) of the Federal Rules of Criminal Procedure, and it sets forth Gerald Tisdale’s objections to the Presentence Investigation Report and his sentencing recommendation. Gerald Tisdale requests that the court impose a sentence at variance with the Sentencing Guidelines, pursuant to the court’s authority under *United States v. Booker*, 534 U.S. 220 (2005) and 18 U.S.C. § 3553(a).

The request for a sentence at variance is based upon four primary grounds: (1) a sentence under the guidelines fails to account for the dysfunctional background and extraordinary lack of guidance Gerald Tisdale’s endured during his youth, which served to derail his life and influence his relapse into criminal conduct; (2) Gerald Tisdale’s exceptional post arrest and overall institutional rehabilitation, along with his diminishing likelihood of recidivism; (3) the mitigating circumstances present in the commission of the offense, related to the weight

of drugs involved, which served to drive up the drug quantity calculation to a level 34 (reverse sting operation); and (4) the destructive impact that the guideline sentence in this case would have on innocent third parties (Gerald Tisdale's wife and sons), *inter alia*.

I. Preliminary Statement

This case involves the appropriate length of the sentence to be imposed upon Gerald Tisdale, a complicated man presently 44 years of age, who relapsed into criminal conduct after having served a substantial prison sentence imposed by Judge Miriam B. Cedarbaum nearly 25 years ago. At the center of the issues in controversy at sentencing is the compelling dysfunctional circumstances into which Gerald Tisdale was born and the parental abandonment and trauma that he endured during his youth, that this court shall deem material to the determination of the length of the sentence to be imposed.

Gerald Tisdale, has had a challenging life journey which began in a chaotic dysfunctional family setting amidst the poverty, drugs and crime in the sprawling George Washington Carver housing projects in East Harlem. Gerald Tisdale was born into a family ravaged by alcoholism, chronic drug addiction and death. As will be explained in detail below, the court will discover that as a child, Gerald Tisdale was abandoned by his

parents, and that by the time Gerald Tisdale reached his pre-teen years, he was assisting local drug dealers distribute drugs in and around the Carver housing projects, in order to survive and obtain daily sustenance. By the early 1990's, Gerald Tisdale began selling drugs on his own crew, in and around the Carver housing projects, with other teens from the projects, which included his present co-defendant Rudy Forman.

By age 21, Gerald Tisdale was arrested and prosecuted by federal law enforcement authorities on narcotics conspiracy and weapons possession charges in the Southern District of New York. In 1992, Gerald Tisdale was convicted after a jury before Judge Cedarbaum. As a result of a prior state court conviction, Judge Cedarbaum sentenced Gerald Tisdale to the statutory mandatory minimum of 20 years imprisonment.¹

As a result of the harsh mandatory statutory minimum sentence, Gerald Tisdale, at age 22, received a sentence of 20 years in federal prison for a narcotics conspiracy that charged the distribution of 50 grams or more of crack cocaine. The lengthy sentences imposed upon young offenders like Gerald Tisdale, which resulted in the warehousing of a generation of offenders, brought about the proliferation of scholarly articles on the impact of mass incarceration, and eventually resulted in

¹ Gerald Tisdale's conviction on a violation of 18 U.S.C. 924© was subsequently set aside by Judge Cedarbaum on a post-conviction Rule 33 motion.

sweeping changes and sentencing reforms relating to crack cocaine laws.²

At the time of his arrest in 1991 on charges on crimes committed during his teen years, Gerald Tisdale, was an illiterate 9th grade drop out from Chelsea Vocational High School and the product of an unimaginably horrible childhood, which served to derail his life and was directly related to his involvement in the distribution of narcotics. However, at the time of sentencing, Judge Cedarbaum was unable take any of those individual factors into consideration when imposing sentence. As a result of the prohibitions set forth in the then-mandatory sentencing guidelines, (Guideline §5H1.12), which forbade the consideration of factors related to Gerald Tisdale's dysfunctional childhood, coupled with the application of the mandatory 20 year statutory minimum sentence, the powerful forces which served to derail Gerald Tisdale's life were never factored into the determination of the length of the sentence to be imposed.

Gerald Tisdale's lengthy 20 year sentence of imprisonment, imposed upon a young man with little or no education or skills, further served to alienate him from society; and, in the absence of counseling or therapy to address the root causes of the issues

² Lynn Adelman, *What the Sentencing Commission Ought to be Doing: Reducing Mass Incarceration*, 18 Mich. J. Race & L. 295, 296 (2013).

which served to derail his life in the first instance, Gerald Tisdale was ill equipped to make a sustained transition back into society, notwithstanding the extraordinary length of the prison sentence that he served. Once confronted with adversity and pressures of providing for his new family, Gerald Tisdale, relapsed into criminal conduct, again selling drugs in and around the Carver housing projects in East Harlem. See, *Exhibit A*, Tisdale Letter at page A-1.

A review of the Bureau of Prison institutional records, reveals that Gerald Tisdale adjusted positively to his long term of imprisonment, by developing his academic skills and participating in programs to prepare him for his eventual re-entry into society. See, *Exhibit B*, Inmate Education Data Transcript, A-1. However, the painful reality is that the harsh long term period of incarceration, without necessary therapy and counseling, did not serve to prevent Gerald Tisdale from overcoming the influences of his past which served to influence his relapse into criminal conduct.

A review of Gerald Tisdale's post arrest conduct while awaiting trial on the new charges at the Metropolitan Correctional Center, demonstrates that Gerald Tisdale is committed to devoting himself to exposing the root causes of his past influences. Since his arrest, Gerald Tisdale has immersed

himself in reflection and introspection. See, *Exhibit C*. In addition, Gerald Tisdale has initiated and served as facilitator of programs at the Metropolitan Correctional Center entitled "Reverse The Trend and Lead by Example," "Getting Out By Going Out" and also teaches a G.E.D. preparation course at the Metropolitan Correctional Center. See, *Exhibit C*.

Gerald Tisdale's efforts in prison demonstrate that he is a person willing and capable of obtaining his redemption. With proper guidance and counseling, Gerald Tisdale has demonstrated that he has the ability to contribute to society and overcome the debilitating obstacles of his childhood, and the social alienation resulting from the unfair long term period of incarceration he has previously served.

In addition to the foregoing, were the court to impose the recommended Guidelines sentence in this case, such an unfairly harsh sentence would result in a devastating hardship to Gerald Tisdale's wife and eight year old son, contributing to yet another generational cycle marred by the influences of the imbedded drugs culture in the East Harlem community.

Finally, the defense requests that the court closely examine the circumstances of the offense. In this case, Gerald Tisdale pled guilty pursuant to an agreement that contained a guideline calculation based upon at least 10, but fewer than 30 kilograms

of heroin, which results in the applicable base offense level is 34. In Criminal History Category II, a level 34 results in a guideline range of 168 to 210 months. For reasons set forth more fully below, the defense asserts that a level 34 overstates the range that the court should fairly consider for the punishment of Gerald Tisdale in this case. All other co-conspirators in the very same conspiracy were permitted to plead to a guidelines range based upon a level 32, at least 3 kilograms but less than 10 kilograms of heroin. Under the guideline concept of relevant conduct, there is no reasonable basis for this unfair and unwarranted disparity. The court can rectify this disparity by imposing a sentence at variance with the guidelines.

In the post-*Booker* era, the Supreme Court has repeatedly made clear, that at the time of sentencing the district court must consider the individualized circumstances of a defendant's background and character, along with the circumstances of the offense, avoid unwarranted disparities and impose a sentence that is sufficient but not greater than necessary to reach the overall sentencing goals of Congress as set forth in 18 U.S.C. §3553(a). However, notwithstanding this clear mandate, sentencing courts continue to rely upon the sentencing guidelines as a talismanic measure by which to impose a sentence. Courts continue to utilize the guideline range, even where, as here, the sentencing

guidelines fail to accord any numerical value to the extraordinary hardship and lack of guidance a defendant has endured and/or the impact those circumstances has had on the offender's adult life.

At the time the Guidelines were adopted, our nation was at the height of the so-called "War on Drugs."³ The Guidelines were formulated to augment social police policies such "Safe Streets," to dispense harsh prison sentences designed to "get tough" on offenders. The Guidelines' policy (Guideline 5H1.12) stated that a sentencing court was absolutely prohibited from considering the "lack of youthful guidance or similar circumstance" as a basis to deviate from the imposition of harsh prison sentences, regardless of how much it was demonstrated that the individual circumstances endured by the offender had a direct relationship to the crimes committed. This stern, thinly veiled admonishment, was a policy aimed squarely at the young offenders from our nation's inner city ghettos, and as all scholars of this policy now agree, had a staggering disproportionate impact on young African American and Latino offenders.⁴ See, *United States v. Bannister*, 786 F. Supp.

³ Ryan S. King and Marc Mauer, *A 25-Year Quagmire: The "War on Drugs" and Its Impact on American Society*, The Sentencing Project, 2007.

⁴ See, Osler and Bennett, "A Holocaust In Slow Motion?" *America's Mass Incarceration and the Role of Discretion*, 7 DePaul Journal for Social Justice 117 (2010).

2d 617, 648-649 (EDNY 2011).

The result of the implementation of this policy has been the unprecedented mass incarceration of offenders to draconian prison terms, unparalleled in our nation's history. Gerald Tisdale suffered dearly from the implementation of an unfair sentencing policy.

Through the implementation of this policy, sentencing courts turned away from the magnificent sentencing philosophy mandated by Congress, as articulated in 18 U.S.C. §3553(a), and in many instances - to this day - continue to unfairly permit the Sentencing Guidelines (and its policy statements) to remain the predominate focus of each sentencing proceedings. Scholars of the evolving history of the Sentencing Guidelines have described this phenomena as the "anchoring effect."⁵

In this case, there are powerful forces which served to derail and ultimately destroy the life of Gerald Tisdale. These forces were not based upon the defendant's autonomous choices, but were the devastating socioeconomic circumstances into which he was born and raised in the East Harlem, and the disturbing

⁵ After decades of applying the guidelines, litigants and courts remain beholden to a policy which, upon close examination, is contrary to the mandate of individualized sentencing. See, Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" And "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming A Fundamental Flaw*, 104 J. Crim. L. & Criminology 101, 132 (2014) (citing *United States v. Newhouse*, 919 F.Supp.2d 955, 958 n.1 (N.D. Iowa 2013) (Bennett, J).

conditions and exploitation he endured when abandoned by his parents.

In consideration of sentencing, the court will undoubtedly address, and give considerable weight to the fact that the defendant has served a substantial prison sentence, which seems not to have been a sufficient deterrent to his return to criminal behavior. This is an undoubtedly powerful but over simplistic point of view. There is growing view among many federal jurists and legal scholars, that massive periods of incarceration simply do not serve to address the problematic reasons why many young offenders engage in criminal conduct in the first instance, and that such sentences only serve to suspend conduct which inexorably emerges from the chronic conditions of poverty, crime and an imbedded drug culture from which many of today's offenders were born and raised. See, e.g., *United States v. Bannister*, 786 F. Supp. 2d 617, 658 (EDNY 2011)⁶.

Moreover, were the court to impose a sentence of 10 years, Gerald Tisdale would be well into his 50s upon release and when coupled with his exceptional post arrest rehabilitation, he would statistically be a low probably for recidivism.

⁶ See, *United States v. Dossie*, 851 F. Supp. 2d 478 (EDNY 2012)(criticizing the routine use of drug offense mandatory minimums); *United States v. Vasquez*, No. 09-CR-259, 2010 WL 1257359 (EDNY Mar. 30, 2010)(same); New York Times, "Federal Judge Urges U.S. to 'Jettison the Madness of Mass Incarceration,'" June 23, 2016, Judge Raymond J. Dearie, observes that mandatory sentencing guidelines, disregard the socioeconomic roots of crime and resulted in unwarranted mass incarceration over the past decades.

Most importantly, Gerald Tisdale requests that the court accord meaningful consideration to the tremendous harm that was done to a once bright little boy whose life was driven by the fear and reality of parental abandonment and the unthinkable anguish from childhood sexual exploitation. In the absence of knowledge about the devastating life path of Gerald Tisdale endured, Congress' mandate that the sentencing court impose a sentence sufficient but not greater than necessary, based upon his individual circumstances, is rendered an empty promise.

II. Background Investigation/Guilty Plea

Gerald Tisdale has pled guilty and accepted responsibility for his criminal conduct in relation to this case. As a result, there are no facts related to the commission of the crimes to which Gerald Tisdale has pled guilty, which are in controversy.

The Investigation and Arrest

As the result of a state court narcotics investigation prosecuted before the Hon. Edward McLaughlin of the New York County Supreme Court, and other information, Gerald Tisdale became a subject that led to an investigation commenced by federal law enforcement officers in November 2014. From late 2014 into early 2015, federal law enforcement officers employed a series of traditional law enforcement techniques and tactics to build a case against Gerald Tisdale and his co-conspirators.

Those tactics included the use of controlled purchases of narcotics from Gerald Tisdale, Rudy Forman and other co-conspirators, physical surveillance and the use of Title III wiretap interceptions, *inter alia*.

Through the use of informants, cooperating witnesses, surveillance and wiretap intercepts, the federal investigation revealed that Gerald Tisdale was distributing heroin in and around the Carver Public Housing Project and 1590 Madison Avenue in East Harlem. During the course of the investigation, federal agents became aware that Neil Lizardi was a major drug supplier, who provided quantities of heroin to Gerald Tisdale on consignment. From on or about February 2015 to June of 2015, Gerald Tisdale was supplied heroin by Neil Lizardi. Upon information and belief, the defense believes that at some juncture during the federal investigation, Neil Lizardi was debriefed and began cooperating with federal law enforcement. Again, upon information and belief, during his cooperation, Neil Lizardi agreed to make at least one controlled delivery of heroin to Gerald Tisdale.

In fact, on June 17, 2015, Neil Lizardi provided Gerald Tisdale with five kilograms of heroin, which was seized from the automobile that Gerald Tisdale was operating moments after he received the heroin from Neil Lizardi. Gerald Tisdale was

arrested on June 17, 2015, and taken into federal custody. A later search of an apartment at 1590 Madison Avenue resulted in the seizure of an additional kilogram of heroin, which Gerald Tisdale had previously received from Neil Lizardi on consignment, as well as a loaded hand gun.

The Indictment

On July 7, 2015, a two count superseding indictment was filed in the Southern District charging Gerald Tisdale and others with a conspiracy to possess with intent distribute one kilogram or more of heroin in violation of 21 U.S.C. §§841(B)(1)a) and 846 (count one). Under count two, Gerald Tisdale was charged with the possession of a firearm in furtherance of the drug conspiracy charged in count one of the indictment in violation of 18 U.S.C. § 924(c)(1)(A)(I).

The Plea Agreement & Guilty Plea

Gerald Tisdale was one of the very first of the defendants in this case to accept responsibility for his conduct, and he sought to enter into a plea agreement with government. On February 25, 2016, Gerald Tisdale entered a guilty plea, pursuant to a plea agreement, to the conspiracy to possess with intent to distribute heroin, as set forth in count one of the indictment.

It is significant that the government permitted Gerald Tisdale to plead guilty without pleading to a violation of 18

U.S.C. § 924(c)(1)(A)(I), which would have resulted in a combined minimum statutory sentence of 10 years on the narcotics charged in count one, to be followed by 5 years consecutive on count two. This would have resulted in the mandatory imposition of a 15 year (180 month) sentence under both counts. Gerald Tisdale greatly appreciates that the government has exercised its prosecutorial discretion so that he does not have to face an 180 month mandatory sentence at this juncture of his life.

The Plea Agreement & Sentencing

As stated above, Gerald Tisdale pled guilty pursuant to a plea agreement. For the purpose of sentencing, the plea agreement merely sets forth the government's non-binding estimates of the likely advisory guidelines applicable to this case.

The plea agreement set the base offense level at 34, as directed by Guideline §2D1.1[c](3), since the offense involved at least 10 but less than 30 kilograms of heroin. The plea agreement provided for a two level enhancement since the defendant possessed a firearm during the course of the conspiracy pursuant to Guideline §2D1.1(b)(1). The plea agreement provided for an additional two level enhancement for an aggravated role enhancement, pursuant Guideline §3B1.1(b). Since Gerald Tisdale accepted responsibility for the offense and gave timely notice of

his intention to plead guilty, the plea agreement included a three (3) level reduction for acceptance of responsibility pursuant to 3E1.1(a) and (b). Therefore, the adjusted offense level is 35. The plea agreement also correctly states that Criminal History Category II would apply to Gerald Tisdale, yielding a Guidelines sentencing range of 188 to 235 months imprisonment. Finally, the plea agreement included an opportunity to argue, at the time of sentencing, for a sentence at variance with the Guidelines based upon the factors set forth in 18 U.S.C. § 3553(a). See, P.S.R., ¶ 6, pages 3-4.

The Presentence Investigation Report

The Guidelines conclusions of the Presentence Investigation Report (P.S.R.) are consistent with the Guidelines ranges set forth in the plea agreement. Therefore, there are no material objections guideline offense level calculations set forth in the P.S.R. See, P.S.R., ¶35, page 7 to ¶44, page 8.

Statutory Sentences on the Count of Conviction

The statutory minimum term of imprisonment on the count of conviction is 10 years and the maximum is life, along with at least 5 years on supervised release. See, 21 U.S.C. §841(b)(1)(A).

A conviction under the count of conviction also carries a fine of up to \$10,000,000. 21 U.S.C. §841(b)(1)(A). A mandatory

special assessment of \$100.00 on each count of conviction is also required. See, 18 U.S.C. § 3013(a)(2)(A).

III. Defendant's Sentencing Recommendation

As stated above, Gerald Tisdale requests that the court impose a sentence at variance with the guidelines, pursuant to the court's authority under 18 U.S.C. §3553(a). In the pre-*Booker* era, the fate of an offender like Gerald Tisdale was determined entirely upon the application of the numerical assessments and policy statements set forth in the Guidelines. In this case, utilizing the numerical range of imprisonment suggested by the Guidelines violates Gerald Tisdale's right to due process of law and the sentencing goals of 18 U.S.C. §3553(a), which mandates that the sentence imposed include an assessment of a defendant's individual background and history.

The numerical range deemed applicable to Gerald Tisdale under the Sentencing Guidelines fails to include (within its calculation) any numerical value or consideration of the most profound and devastating, mitigation factors relevant to Gerald Tisdale's life narrative - *the complete lack of guidance in his youth*.

The Defendant's Background/Formative Years

On April 29, 1971, Gerald Tisdale was the second child born to Steve Gerald and Katrina Tisdale. It is without question that

both parents were addicted to heroin and abused alcohol. Gerald Tisdale's older sister, Lashawn, is a homemaker who presently resides in Bronx County with her children. Gerald Tisdale's younger brother, Steven, became a heroin addict, who spent his entire life in and out of prison, until he died from AIDS in 2003, while serving a state prison sentence for a narcotics related offense.

Gerald Tisdale was by all accounts, a bright and promising young child, whose fate was doomed even prior to his birth. Gerald Tisdale was born and raised in the sprawling George Washington Carver public housing project located in East Harlem. Notwithstanding its geographical proximity to the economic and social affluence of the New York's Upper East Side, the Carver housing project was notorious for its poverty, crime and prolific drug culture, which over a period of three decades, served to derail the lives of thousands of its residents. The devastating impact of these conditions on the lives of the children who have the misfortune of being born into grips of this phenomena, are often misunderstood, marginalized and/or discredited.

However, both of Gerald Tisdale's parents fell victim to the crushing cycle of poverty, crime and drugs. Although Steven Tisdale was employed as a drug counselor, he was himself a chronic alcoholic and addicted to heroin. Gerald's mother,

Katrina Tisdale, along with her siblings Carol, Gloria and Denise, were all heroin addicts, who themselves grew up in and around the Carver housing projects in East Harlem.

As a result of the powerful ravages of heroin addiction, Gerald Tisdale and his siblings grew up with little direction or guidance in an extremely hostile and dangerous environment, which had already served to destroy the lives of his parents. The imposing obstacles faced by a young Gerald Tisdale were compounded when, at the age of 8, Katrina Tisdale was convicted of Manslaughter and sent to New York state prison to serve a 5 to 15 year prison sentence. Katrina Tisdale served 6 ½ before being released on parole. The imposition of this prison sentence, however, served to seal Gerald Tisdale's fate and to completely destroy his childhood.

During his mother's absence, Gerald Tisdale and his two siblings were left in the hands of his father. However, Steven Tisdale, himself an addict, abandoned the children, spending most of his time with a girlfriend and tending to the demands of a crippling addiction. Gerald Tisdale and his siblings were left alone to fend for themselves in the midst of crime and poverty in the notorious Carver housing projects. At age 9 or 10, Gerald Tisdale's sister Lashawn became the primary care-giver for her younger siblings. Each day, the unattended children would

forage around the poverty of their East Harlem neighborhood for food and sustenance. Occasionally, the children's maternal Aunt Carol would look in on them, however she was also addicted to, and later died from an overdose of heroin, and was unable to properly care for the children. Although the circumstances of the children escaped the attention of any of the various child services agencies, there were adults present in the Carver projects who were aware of the plight of Gerald Tisdale and his siblings. However, no adult intervened to assist or guide them. To the contrary, a sinister fate awaited young Gerald. An older adult male living in the Carver projects, who was aware of the circumstances of the children, sexually victimized Gerald Tisdale for food and/or money. This sexual exploitation of an innocent and vulnerable child took place over a period of three to four years. Gerald Tisdale was traumatized by the recurring frequency of the abuse, and the shame of his experience indelibly impacted his immediate circumstance and future.

Unattended by adult supervision, Gerald Tisdale and his siblings, without clothing or parental encouragement, rarely attended school. Young Gerald was assigned to P.S. 83, a local public school, but rarely attended. Gerald was socially promoted, a practice prevalent during that time period, to Immediate School 117, where he was assigned to a Special Educational program.

Other adults, in the Carver projects took note of the circumstance of Gerald and began using him to help shuttle drugs to their customers. By age 12 or 13, while other children were in school preparing for the promise of a future, Gerald Tisdale was trapped in the grips of an overwhelming malaise of poverty, crime and drug culture. Gerald and his siblings were abandoned and ultimately exploited by the adults who, in a normal community, would have served to lift them up and inspire them from the trappings of poverty. Instead, Gerald Tisdale was exploited and deprived of the precious blessing of a loving, nurturing childhood.

By the age of 12 or 13, Gerald was no longer allowing himself to be sexually exploited for money. Instead, he began hustling with older drug dealers. It is during this time period, that Gerald Tisdale began bonding with Rudy Forman. Both young boys were completely unaware that their young, teenage involvement in drugs would influence the future decades of their lives. It was also during this time period that Katrina Tisdale was released to parole from state prison.

Although there was a brief attempt to resume their relationship, upon her release from prison, Katrina became romantically involved with another man and moved to the Bronx, leaving Gerald and his siblings behind in the Carver projects.

In 1984, Gerald Tisdale's youngest sister Tameka, presently age 33, was born out of Katrina's new relationship.

During the preparation of the Presentence Investigation Report in this case, the Probation Officer had the opportunity and benefit to review the Report prepared by Probation nearly a quarter of a century ago in connection Gerald Tisdale's prior federal case. In that report, Probation discusses an interview with Katrina Tisdale, (who later died of natural causes in 2008 at age 63). See, P.S.R., ¶57, at pages 11 and 12. Katrina was emotional and tearfully acknowledged during an interview in 1992, that she had abandoned her parental responsibility to her children and that her prison sentence served to destroy their lives.

In fact the enormous emotional reach of the tragedies imposed upon the lives of Gerald Tisdale and his siblings was present during his Presentence Interview, which took place on March 22, 2015 at the Metropolitan Detention Center. During that interview, Probation Officer Ramos, an experienced interviewer with over 20 years of service at Probation, was able to help Gerald Tisdale recall and discuss the painful experiences of his childhood and young teen years. It was a powerfully moving experience, as Gerald Tisdale quietly and humbly recounted the abandonment, shame and humiliation he endured as a child. In

soft trembling words, Gerald Tisdale recounted the devastating circumstances of his youth, with tears streaming down his face. It was one of the most significant moments of my career, as I sat quiet and motionless, while listening to a proud man reluctantly recount the heartfelt pain he endured so many years ago.

Although I represented Gerald Tisdale in his prior case before Judge Cedarbaum more the 25 years ago, it wasn't until the March 2015 interview that I became acutely aware of how his life was destroyed and how these untreated and previously undisclosed traumatic events have continued to haunt him decades later. In a moment of profound sadness and insight, it became clear that the decades of incarceration in federal prison failed to help Gerald Tisdale address or overcome the root causes of the problems that triggered his involvement in the drug culture, which served to derail his life and the lives of so many of his family members.⁷

In fact, all of Gerald Tisdale's maternal relatives died from overdoses of heroin; Aunts Carol, Gloria, and Denise, as well as Uncle Michael. As noted above, Gerald Tisdale's brother Steven fell to the ravages of a lifetime of heroin addiction, and died of AIDS contracted from his intravenous drug usage, while

⁷ In a subsequent interview, Gerald Tisdale said that insight he gained from the programs at the Metropolitan Correctional Center, and the sincere interest expressed by Ms. Ramos during the Presentence Investigation Report interview helped him confront and disclosure his deep shame and humiliation related to events in his childhood and pre-teen years. Gerald Tisdale expressed gratitude, happiness and relief.

serving a state prison sentence.

Although he was never a drug abuser, Gerald Tisdale's eventual involvement in the drug culture at a young age was inescapable. By age 16, Gerald Tisdale had completely stopped attending school and was involved with other teens selling drugs in and around the Carver housing projects in East Harlem. Also at age of 16, Gerald Tisdale was convicted in New York County Supreme Court, for possession of cocaine with the intent to sell, in violation of New York State Penal Law §220.16. Gerald Tisdale was adjudicated a Youthful Offender and placed on 5 years probation, and he resumed his life in the Carver housing projects.

As the court is aware, Gerald Tisdale was prosecuted in the Southern District of New York for dealing drugs in and around the Carver housing projects during his late teen and young adult years. Gerald Tisdale, who had never previously served any prison time, was sentenced to serve a 20 year term of federal imprisonment. At the time Judge Cedarbaum imposed a statutory mandatory period of 20 years, none of the factors which served to derail his life were considered. Gerald Tisdale, who had never previously served any jail time, recognized that a long hard road was ahead of him.

Gerald Tisdale's Prison Adjustment

Although Gerald Tisdale entered federal prison as a relatively young inmate serving a substantial term of imprisonment, he made a positive adjustment to prison life. In fact, during his imprisonment over the next decade and a half, Gerald Tisdale served his time without any BOP series 100, 200 or 300 violations. Instead of joining a prison gang and engaging in acts of violence like so many young inmates looking to establish a reputation in a dangerous and hostile environment, the illiterate and uneducated Gerald Tisdale began taking classes. Gerald Tisdale studied for and obtained his GED and enrolled in business management and psychology courses offered by Adams University. See, *Exhibit B*. Gerald Tisdale also worked several jobs while incarcerated, which included serving as a warehouse clerk in the Unicore program; and he learned vocational skills (master in sewing).

In fact, Gerald Tisdale is very proud of his academic and work accomplishments in prison, and the fact that he was able to serve such a long prison term without becoming involved in any institutional violence or any other illicit conduct. In fact, it was near the end of his long prison term that Gerald Tisdale was reunited his teenage friend, Yvonne Quiles.

The Probation Investigation Report accurately describes that

Gerald Tisdale and Yvonne Quiles, who also grew up in East Harlem, were reunited through a mutual friend. See, P.S.R., ¶62, page 13. The two began to regularly correspond and fell in love with each other. With a view towards the future, the fatherless Gerald Tisdale also took courses on parenting and family responsibility. See, *Exhibit B*, Inmate Education Data Transcript, page A-1.

After his release from prison in 2007, Gerald Tisdale moved in with Yvonne Quiles and her 12 year old son Jayvon. At first, Jayvon did not approve of his mother's relationship with Gerald Tisdale. Jayvon's father was and remains incarcerated serving a thirty year sentence for narcotics trafficking. As a result, he did not want his mother to endure the anguish that she experienced raising him without the benefit of his father. However, Gerald Tisdale demonstrated that he truly loved Yvonne and became an excellent role model and father figure to Jayvon.

Despite a devastating childhood and a lengthy period of incarceration, Gerald Tisdale was very optimistic when he emerged from federal prison in 2007. With the assistance of Probation, Gerald Tisdale gained employment with Abatement Unlimited, an asbestos removal company here in New York. For a two year period immediately following his release from prison, Gerald Tisdale made a positive transition into the work force and began

establishing himself as a responsible role model to young Jayvon. Additionally, in 2008, Yvonne Quiles and Gerald Tisdale became parents to a baby boy, Darnell. At age 38, Gerald Tisdale became a parent for the first time in his life, and was excited about being a father to his newborn son.

During his employment with Abatement Unlimited, Gerald Tisdale was earning a substantial salary and felt that he was an important contributor to his household. Gerald Tisdale described this time period as the happiest and most meaningful of his life. However, after two years of gainful employment, Gerald Tisdale was laid off, because he lacked the skill set to pass the test to secure his abatement removal license.

After getting laid off in late 2009, Gerald Tisdale began working odd jobs to maintain his financial responsibilities at home. While working at a job in a restaurant and selling used cars on commission, Gerald Tisdale also worked hard at developing the skills to pass the abatement removal license. With a dwindling income, few financial resources, and increased contact with former friends from the Carver housing projects, Gerald Tisdale slowly became involved in the street culture, and ultimately his involvement drugs.

In fact, in June of 2012, Gerald Tisdale did, in fact, pass the test for his abatement asbestos license and was rehired by

Abatement Unlimited, but was later laid off again in late 2013. After being laid off again, Gerald Tisdale resumed contact with drug dealers as an answer to his financial responsibilities, and he engaged in the conduct that led to his arrest in this case.

During these few years of freedom - and for the first time in his life - Gerald Tisdale demonstrated that he possesses the skills for achievement and to obtain his redemption. By his failure, Gerald Tisdale demonstrated that he was unable to rehabilitate himself from the influences and mind set which served to derail his young life, and has now put into jeopardy the promise of the beautiful family life he began with Yvonne Quiles.

Disappointment, Anger and Bitterness

It is very difficult to find words to accurately describe the profound level of disappointment, anguish and bitterness that Gerald Tisdale's criminal conduct has had upon his family and himself. First and foremost, is the impact that his conduct has had on his new family.

The depth of Yvonne Quiles anger and frustration is also difficult to describe. In her relationship with Gerald Tisdale, Yvonne Quiles took a chance to love again - and more important - to bring him into contact with her young son, Jayvon.

Yvonne Quiles also grew up in East Harlem and witnessed the

destructive influences that the drug culture has upon families of both those who sell and use drugs. During her youth, she fell in love with John Spry, also a teen from East Harlem, whose life was consumed by the drug culture. Over the years, Yvonne Quiles paid dearly for her love for John Spry; the birth of two sons, trips to prison and loneliness resulting from raising children alone, with an incarcerated spouse. In fact, Yvonne Quiles blames John Spry's criminal conduct and long term incarceration for the eventual incarceration of her eldest son, for engaging in drug trafficking.

From the experience of losing her first son to the streets, Yvonne Quiles was determined to help Jayvon live a better life. For several years of her life, Yvonne stopped dating, began concentrating on her work and focused upon raising Jayvon. Yvonne was very apprehensive about getting involved with Gerald Tisdale and the possible negative influences that he could have upon young Jayvon. However, upon his release from federal prison, Gerald Tisdale filled their lives with so much joy and promise. Gerald Tisdale was an excellent partner, a hard worker, and above all, an excellent role model to Jayvon, spending hours with him warning of the trappings of the street and the false promise of a life in the drug world. Gerald Tisdale not only renewed her faith and love, but permitted her to let her guard down.

With the arrest of Gerald Tisdale, Yvonne Quiles life has spiraled downward. Deep disappointment has evolved into anger and bitterness. As a result of her depression, isolation and anger, Yvonne Quiles has become uncharacteristically temperamental. As Gerald Tisdale's counsel, I have found it extremely difficult to communicate with his spouse. Yvonne Quiles is very hurt and bitter. The prospect of enduring another lengthy prison sentence while raising children alone is simply unbearable.

Yvonne Quiles often expresses her disappointment in rage. As a result of her fragile temperament, Yvonne Quiles got into a meaningless argument at work and was fired from a job that she proudly held for more than 13 years. As a result of a verbal incident with a Correction Officer at the front desk of the Metropolitan Detention Center, regarding her attire, Yvonne Quiles was barred from visiting Gerald Tisdale at the Metropolitan Detention Center.⁸

Notwithstanding her personal setback and feelings of deep betrayal, Yvonne Quiles has balanced the positive influences of Gerald Tisdale, and remains committed to being part of his future and keeping their family intact.

Post Arrest Rehabilitation and Likelihood of Recidivism

Since his arrest in this case, Gerald Tisdale has

⁸ Yvonne Quiles' visiting privileges at the Metropolitan Corrections Center have since been reinstated.

distinguished himself while serving time at the Metropolitan Detention Center. Gerald Tisdale has received certificates of completion for his participation in several long term adult continuing education programs, including business ethics, drug abuse education and prevention, environment studies, positive leadership and influence, tutoring and training. However, most significant is Gerald Tisdale's leadership in establishing programs to assist detainees with re-entry into society.

While at the Metropolitan correctional Center, Gerald Tisdale has helped establish a program at the facility called "Lead by Example, Reverse The Trend," which is an innovative violence prevention program designed to address the needs of "at risk" inner city youth and young adults. The program has been established in several New York City Public Schools, selected Public Housing Projects throughout the city, the New York City Department of Corrections, and now the Metropolitan Detention Center. Another program in which he has served as a facilitator is "Getting Out By Going Out," a program which helps improve upon making better decisions and exercising improved judgment, by understanding the root causes of problems and conflicts. See, Exhibit C.

It should not escape notice that at a time when the Bureau of Prisons is faced with the influence of gangs - from the traditional Bloods and Crypts to the lesser known, but equally

dangerous Trinitarios, Bronx Young Guns, etc. - Gerald Tisdale is a leader who has always been a positive influence on other inmates in whichever prison setting he has served time.

Notwithstanding the presence of firearms in both of his federal convictions, Gerald Tisdale has absolutely no history of engaging in acts of violence on the street or in prison. Gerald Tisdale served 17 ½ years in federal prison without accruing any series 100 or 200 violations and has never been arrested for participating in any acts of violence typically and routinely associated with drug trafficking. This is a noteworthy fact. Not only is Gerald Tisdale engaged in activity to demonstrate his own redemption, but he is helping other interested young detainees prepare for their eventual reentry into society.

When Gerald Tisdale entered the Bureau of Prisons 25 years ago, he was an illiterate 9th grade drop out, who could barely read or write. Gerald Tisdale's May 13, 2016, unedited letter to the court, along with the transcripts of courses he has taken over the years of imprisonment in the Bureau of Prisons, (including obtaining his GED), reflect the thoughtfulness and skill set of a man who has come a very long way. Sadly, Gerald Tisdale's relapse into criminal activity has demonstrated that there remains a long journey ahead. However, counsel is of the profound belief that the goal can be accomplished by imposing a lengthy prison sentence of approximately 10 years of additional

imprisonment, along with a requirement of therapy and counseling.

Ten years of imprisonment remains a substantial period of incarceration. The positive conduct engaged in by Gerald Tisdale both inside and outside of prison, coupled with the reality that by his mid 50s, he will be "aging out" with a decreased likelihood of recidivism,⁹ indicates that a sentence near 10 years would be of sufficient length to reasonably ensure sufficient punishment and the likelihood rehabilitation.

Circumstances of the Offense

Counsel raises a modest point about the circumstances of the offense. Gerald Tisdale is the only defendant who was required to plead to an agreement with the quantity of drugs of at least 10 but less than 30 kilograms of heroin. Although part of the same conspiracy, all other non-cooperating co-conspirators pled to a quantity which placed them in a lower guidelines range.

On this score, the defense raises two minor but significant points: (1) Gerald Tisdale was given 5 kilograms of cocaine on consignment by Neil Lizardi on the date of his arrest. Counsel is of the view that the delivery of this large amount of heroin, on consignment, was a planned event to arrest Gerald Tisdale, but

⁹ Male criminal behavior in general is known to decline in frequency with age. *Life Course Desisters? Trajectories of Crime Among Delinquent Boys Followed To Age 70*, Sampson & Lamb, *Criminology*, Vol. 41, Issue 3, pages 555-592 (August 2003) This relationship between prisoners' age and recidivism reflects what is known as the "aging-out" phenomenon (Farrington 1986; Maruna 2001). The data reveals that as individuals become older, they begin to age out of their criminal behavior. See, *Aging Behind Bars, Trends and Implications of Graying Prisoners in the Federal Prison System*, KiDeuk Kim, Bryce Peterson Urban Institute August 2014, (Applying the US Bureau of Justice Statistics (BJS) National Corrections Reporting Program) at page 6.

also apparently, in part, to elevate his sentencing exposure.¹⁰

The intercepted telephone calls, drugs seized and information provided by informants and cooperating witnesses all indicate that Gerald Tisdale had not completed paying for the heroin that was provided to him by Neil Lizardi on consignment in May of 2016, when Neil Lizardi provided him with an additional 5 kilograms. In fact, the June 17th delivery was by far largest delivery of heroin, on a single occasion, that Neil Lizardi had ever provided to Gerald Tisdale.

The delivery of the 5 kilograms surely served to raise the quantity over and above the threshold of the 10 kilogram guidelines level; (2) Level 34 increases the punishment for a drug dealer whether it is based upon an attempt to obtain at least 10 or less than 30 kilograms or if the dealer actually obtains and successfully distributes and profits from the large volume of heroin. The sentencing guideline punishes an offender for 11 kilograms of heroin with the sentencing range it punishes an offender for 29 kilograms of heroin. This wide disparity in

¹⁰ By June 17, 2015, there was strong evidence gathered against Gerald Tisdale to arrest and prosecute him on a conspiracy to distribute more than one kilogram of heroin. A review of the Title III wiretap affidavits reveal that Gerald Tisdale had participated in several incriminating telephone calls and had participated in the direct delivery of heroin from Neil Lizardi and had made other direct sales of heroin. Gerald Tisdale, who had not yet paid for the last delivery of heroin from Neil Lizardi, was to be arrested and taken into custody on June 17, 2015. Gerald Tisdale was going to be arrested whether Neil Lizardi delivered to him 5 kilograms of heroin or any lesser amount. There was no correlation between the past deliveries of heroin and the 5 kilograms delivered on June 17, 2015. The decision to deliver 5 kilograms, instead of a lower quantity, was a decision driven to assure his culpability and, in part, to elevate the corresponding sentencing exposure.

the quantity (18 kilograms of heroin), which nevertheless results in the same punishment level, when coupled with the disparity of the lower drug quantities that his co-conspirators in the same charged conspiracy, provides a reasonable basis for a sentence at variance with the guidelines.

Rehabilitation and Letters of Support

Throughout his adult life, notwithstanding his long period of incarceration and troubled childhood, Gerald Tisdale has managed to be an inspiration to others both within and outside of the prison environment. Several individuals have submitted heartfelt letters of support. Those letters are from family and friends, many of whom themselves have endured and survived life growing up in and around the poverty, violence and drug culture in East Harlem. See, *Exhibit A*. The letters attest to the character and promise of a man, which is not reflected or accounted for in the federal sentencing guideline calculation.

From a painful past, Gerald Tisdale has somehow been able to provide meaningful advice to others, and to caution them to avoid the very same circumstances that destroyed his own life. See, *Exhibit C*, page A-2, (Letter to Detainee inviting participation in the "Reverse The Trend and Lead by Example" program). On the other hand, however, Gerald Tisdale has been unable to resolve his own internal conflicts which led him to relapse back into criminal conduct. However, to his credit, Gerald Tisdale took

responsibility for his actions from the very beginnings of this case, and sought a prompt resolution from the government.

At age 44, Gerald Tisdale remains a work in progress; a complex individual who possesses extraordinary promise, who has demonstrated his ability overcome many of the obstacles of his past but who remains flawed. The letters of support, along with his modest achievements in prison and when released to supervised release demonstrate that Gerald Tisdale has the capability, coupled with the love and support of committed family and friends to meaningfully seek his redemption, and that a sentence at variance with Guidelines, that includes special conditions of supervised release, (therapy and counseling), is appropriate to punish him and to protect the public from the diminishing likelihood of his future criminal conduct.

Many years ago, as a young lawyer at the very beginning of my career, I appeared before the Hon. Leroy Kellum, a long retired and now deceased state court judge, who observed in his consideration of an appropriate sentence for a first time offender, that the "first step towards rehabilitation is recognizing that you have made a mistake and taking steps to correct that mistake." In this case, Gerald Tisdale has taken that important first step, by recognizing that he made an awful mistake in judgment which has jeopardized the stability of his family and accepting early responsibility for his relapse into

criminal conduct.

Gerald Tisdale has begun the journey towards his redemption. On behalf of his deserving sons and their committed mother, who must carry the burden yet again to keep her family together alone during the period of incarceration of her partner, Gerald Tisdale prays for a sentence at variance with the Guidelines.

III. Application of Law at Sentencing

The Sentencing Commission's policy, which is contrary to the enactments of Congress, results in a sentencing range, in this case, that is *per se* unreasonable. This court is not required to impose a sentence based upon a policy of the Sentencing Commission which circumvents the specific intent of Congress. *Pepper v. United States*, 131 S.Ct. 1229, 1247 (2011).

In this case, a sentence at variance with the Guidelines under count one is appropriate, because a Guidelines sentence fails to include an account of critical factors about Gerald Tisdale's background (lack of youthful guidance), which Congress mandated must be included in arriving at the sentence to be imposed. Congress has mandated that at the time of sentencing, district courts must consider the "background and history" of the offender in arriving at a sentence that is sufficient but not greater than necessary to reach the goals set forth in 18 U.S.C. §3553(a)(2). Congress makes no exception for an offender who is from a dysfunctional background where there was a failure to

provide guidance and direction. The Guidelines, on the other hand, create such an exception. See, Guideline 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances).

In the *post-Booker* era, however, the Supreme Court has held that sentencing courts are no longer mandated to follow the policy decisions of the Sentencing Commission. See, *Pepper v. United States*, 131 S.Ct. 1229, 1247 (2011). This is particularly important where a Sentencing Commission's policy decision is contrary to public policy decisions enacted into law by Congress.

A sentencing calculation that focuses only on the offense and does not include, in its calculation, the individual characteristics of the defendant is unreasonable. See, *United States v. Olhovsky*, 562 F.3d 530, 549 (3rd Cir. 2009). Sentencing courts have a duty to consider the full range and specific characteristics of the defendants, along with a consideration of the circumstances of the offense, in determining the appropriate sentence. Therefore, the presentment of the fullest information possible concerning the defendant's life and characteristics is highly relevant, if not essential, to the selection of an appropriate sentence. *Pepper v. United States*, 131 S.Ct. at 1240; *Williams v. New York*, 337 U.S. 241, 247 (1949).

Inclusion of the widest breadth of information concerning the offender's background and history ensures that the punishment will suit not merely the offense (as is the focus of the government) but also the individual characteristics and

background of the defendant (which is the mandate of Congress). *Pepper v. United States*, 131 S.Ct. at 1240; *Wasman v. United States*, 468 U.S. 559, 564 (1984). To fulfill this mandate, Congress makes no exception for those offenders who are from dysfunctional families and who lacked youthful guidance in their formative years.

In a recent case in the United States District Court for the Eastern District of New York, the Hon. Jack B. Weinstein authored a brilliant opinion, which analyzed the impact that overwhelming negative risk factors present in and around a Brooklyn public housing project had on the lives of the young men before the court for sentencing for conspiring to sell narcotics. *United States v. Bannister*, 786 F. Supp. 2d at 688-89.

The court's 57 page opinion, complete with statistics on the deprivation of education, employment opportunity, poverty, drugs and violence over the past 40 years and futility and adverse consequences of imposing harsh mandatory minimum sentences, examined how those conditions served to derail the lives of each of the young men before the court for sentencing. From the outset, Judge Weinstein observed:

"As a group, defendants grew up in dysfunctional homes characterized by a combination of poverty, unemployment, under education, crime, addiction to drugs and alcohol, physical and emotional abuse, and the absence of an adult male role model. They attended low-functioning public schools with limited resources to help students with

their in- and out-of-school difficulties. Most dropped out of school, habitually abused drugs and alcohol from an early age, and found little lawful employment. They became involved in a gang of illegal narcotics distributors, which turned to guns and violence, contributing to the degradation of their community."

United States v. Bannister, supra, 786 F. Supp. 2d at 621.

After a lengthy and scholarly review of the confluence of the conditions of poverty, race, crime, drugs and violence prevalent in the communities in which the young offenders were born and raised, Judge Weinstein observed in conclusion:

Had the defendants been raised by cohesive, adequate families, most of the difficulties they encountered would probably never have come to pass. Well-resourced, attentive parents would have had the knowledge, ability, and insight to protect their children from many of the difficulties that befell these defendants in their youth, to obtain assistance to deal with their psychological and physical problems, and to obtain crucial opportunities for education, work, and personal growth. Even those with learning disabilities would likely have been provided available resources to overcome their impairments at public expense. That the defendants were born into circumstances without such support is at the center of this tragedy.

United States v. Bannister, supra, 786 F. Supp. 2d at 688-89.

Gerald Tisdale was born into the very same circumstances without the necessary support and guidance which is, as Judge Weinstein astutely observed, is at the center of the tragedy before the court. Gerald Tisdale's failure on supervised

release demonstrates, as observed by Judge Weinstein, that there is no correlation between general deterrence, recidivism and the imposition of the harsh mandatory minimum sentences and sentencing guidelines. *United States v. Bannister*, supra, 786 F. Supp. 2d at 658. This conclusion is particularly true for offenders from backgrounds similar to that endured by Gerald Tisdale. *United States v. Bannister*, supra, 786 F. Supp.2d at 668. Notwithstanding the proliferation of scholarly work and the corroborating statistical data in support, there is nevertheless a continued reluctance to embrace the painful reality that the conditions faced by many of the offenders before our courts have deep rooted long term consequences which there is no correlating relationship to the harsh mandatory sentences and calculated sentences recommended by following the guidelines.

Therefore, the information regarding the circumstances endured by Gerald Tisdale during his childhood and young adult years has been provided to give the court additional insight into the confluence of circumstances which combined to explain Gerald Tisdale's relapse into criminal conduct after such a long period of incarceration and after initially doing so well on supervised release. The information is not offered as an excuse for criminal conduct, but rather, as demonstrated in *United States v. Bannister*, to assist the court in its determination of

the appropriate sentence to be imposed in his case.

IV. Conclusion

Gerald Tisdale's request for a sentence at variance with the Guidelines is based upon several mitigating factors which include, *inter alia*, that he was born to drug abusing parents and that he was raised in the pervasive culture of drugs and violence in East Harlem, without youthful guidance and direction. The horrible abandonment and resulting trauma that he endured as young boy and pre-teen remains very present part of Gerald Tisdale's life journey, as demonstrated during an extraordinary interview with Probation on March 22, 2016. The influence these powerful factors continue as part of Gerald Tisdale's life narrative and help to explain his relapse into criminal conduct.

At the time Gerald Tisdale was born, both parents were addicted to drugs. The failure of Gerald Tisdale's parents to overcome the pervasive and crushing conditions of poverty and drugs in East Harlem predetermined the destiny of their children. The abandonment and abuse that Gerald Tisdale endured for several years remains embedded in his soul. Gerald Tisdale endured a lengthy prison sentence; a sentence that today is deemed excessive and would not have been imposed, as a result of sentencing reform. The many years that Gerald Tisdale unfairly served in prison can never be restored. But this time, armed

with more information about incarceration and more insightful information about Gerald Tisdale's promise and remaining demons, it is our hope that the court will not be bound by the harsh mechanics of the guidelines - which fails to account for the circumstances of his individual background and character.

Finally, the information about Gerald Tisdale's life narrative is not provided as an excuse, nor as an attempt to shift blame. The conditions present in his life are historical facts that influenced the lives of Gerald Tisdale and his siblings. Gerald Tisdale's life was doomed from the start, as a lack of guidance coupled with physical and emotional abuse during his formative years served to overwhelm and corrupt his natural growth as a child and young adult. Gerald Tisdale's lengthy prison sentence, which did not include any counseling, failed to provide a realistic opportunity for his full redemption. While incapacitation serves to protect the public by removing the offender from society, therapy and counseling serves to empower the offender by equipping the offender with the skill set to escape the grips of the powerful influence of negative risk factors.

The above factors derailed Gerald Tisdale's life and directly led to, and influenced, his relapse and involvement in criminal conduct. In arriving at the ultimate Guidelines range, the Sentencing Commission prohibits the court from considering

any mitigating factors resulting from a lack of youthful guidance during his formative years. Gerald Tisdale requests that the court consider those factors, when imposing a sentence that is sufficient but not greater than necessary to reach the sentencing goals of Congress in this case.

Dated: New York, New York
July 10, 2016

Respectfully submitted,

Anthony L. Ricco

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Counsel for *Gerald Tisdale*

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▲ United States v. Bannister, 786 F. Supp. 2d 617

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United States District Court for the Eastern District of New York

April 8, 2011, Decided; April 8, 2011, Filed

10-CR-0053

Reporter

786 F. Supp. 2d 617 * | [2011 U.S. Dist. LEXIS 57402](#) **

UNITED STATES OF AMERICA - against - DAMIEN BANNISTER, DARRELL BANNISTER, CHRISTOPHER HALL, CYRIL MCCRAY, ERIC MORRIS, ROGER PATRICK, JAMES ROSS, DERRICK TATUM, INDIO TATUM, JAWARA TATUM, and PEDRO TORRES, Defendants.

Subsequent History: As Amended November 14, 2011.

Prior History: [United States v. Bannister, 2011 U.S. Dist. LEXIS 30569 \(E.D.N.Y., Mar. 24, 2011\)](#)

Core Terms

sentence, incarceration, prison, http, mandatory minimum sentence, neighborhoods, arrested, poverty, families, offenders, crack, convicted, disparity, heroin, drugs, Houses, conspiracy, guns, www, grams, crew, imprisonment, lived, deterrence, residents, reporting, schools, crack cocaine, dealers, high school

Case Summary

Overview

The court, providing a statement of reasons under [18 U.S.C.S. § 3553\(c\)\(2\)](#) for sentences given to defendants charged with conspiracy to sell, and the selling of, crack cocaine and heroin, stated that certain of the sentences were excessive because of the requirement of statutory mandatory minimum terms of incarceration stemming from the Anti-Drug Abuse Act of 1986. Several of the sentences, imposed only because of statutory minima, were disproportionate to the crimes committed and the backgrounds of the defendants. Their excess caused particular concern when applied to youthful defendants.

Outcome

The court imposed and explained defendants' sentences.

▼ LexisNexis® Headnotes

HN1 The Anti-Drug Abuse Act of 1986 was passed during an election-year push to respond to what was perceived as a dangerous spread of drugs, particularly crack cocaine. Sentencing provisions concerning crack cocaine have been repeatedly challenged in court on racial disparity grounds and upheld. Amelioration in 2010 by congressional amendment was limited. This punitive scheme is one manifestation of an ongoing pattern of racial disparity in the enactment and enforcement of drug laws continuing to the present. [Shepardize - Narrow by this Headnote](#)

Criminal Law & Procedure > [Postconviction Proceedings](#) > [General Overview](#)
Criminal Law & Procedure > [Postconviction Proceedings](#) > [Clemency](#)
Governments > [Legislation](#) > [Statutory Remedies & Rights](#)

HN2 In every state and under federal law, there are hundreds of collateral consequences that apply automatically or on a discretionary basis, to people convicted of crimes. Most of these apply for life and can never be removed, or can be relieved only through virtually unavailable methods like a pardon from the President. Consequences imposed by law include ineligibility for federal welfare benefits, public housing, student loans, and employment opportunities, as well as various forms of civic exclusion, such as ineligibility for jury service and felon disenfranchisement. [Shepardize - Narrow by this Headnote](#)

Criminal Law & Procedure > [Sentencing](#) > [Imposition of Sentence](#) > [Factors](#)

HN3 A purpose of imprisonment is to deter people generally from engaging in crime. Another form of deterrence directed to this particular criminal who has violated the law—specific deterrence—is designed to prevent recidivism. [Shepardize - Narrow by this Headnote](#)

Criminal Law & Procedure > [Sentencing](#) > [Sentencing Guidelines](#) > [General Overview](#)
Criminal Law & Procedure > [Sentencing](#) > [Imposition of Sentence](#) > [Factors](#)
Criminal Law & Procedure > [Sentencing](#) > [Imposition of Sentence](#) > [Findings](#)
Criminal Law & Procedure > [Sentencing](#) > [Ranges](#)

HN4 A sentencing court shall state in open court the reasons for its imposition of the particular sentence. [18 U.S.C.S. § 3553\(c\)](#). If the sentence is not of the kind prescribed by, or is outside the range of, the U.S. Sentencing Guidelines referred to in [18 U.S.C.S. § 3553\(a\)\(4\)](#), the court shall indicate the specific reasons for imposing a sentence different from the Guidelines. [18 U.S.C.S. § 3553\(c\)\(2\)](#). These reasons must also be stated with specificity in the written order of judgment and commitment. The mandatory nature of the Guidelines has been excised, and they are now advisory. However, the sentencing court must still adhere to the requirements of [18 U.S.C.S. § 3553\(c\)\(2\)](#). [Shepardize - Narrow by this Headnote](#)

Criminal Law & Procedure > [Sentencing](#) > [Imposition of Sentence](#) > [Factors](#)
Governments > [Courts](#) > [Common Law](#)

HN5 Under [18 U.S.C.S. § 3553](#), there are two major considerations: specific and general deterrence. Under our common law tradition, sentencing courts also consider the need to incapacitate criminals and the possibility of rehabilitating them. [Shepardize - Narrow by this Headnote](#)

Criminal Law & Procedure > ... > [Sentencing Guidelines](#) > [Departures From Guidelines](#) > [General Overview](#)
Criminal Law & Procedure > [Sentencing](#) > [Imposition of Sentence](#) > [Factors](#)
Governments > [Courts](#) > [Authority to Adjudicate](#)

HN6 Deviation from U.S. Sentencing Guidelines sentences on policy grounds is permitted. District courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those guidelines. Such discretion may be exercised not only based on characteristics that distinguish a case from the "heartland" of cases contemplated by the Guidelines, but also based on general policy considerations that apply even in a mine-run case. A court may substitute the congressional powder/crack ratio with a ratio of its own on the basis of such policy considerations. This authority is consistent with the frequently employed power of federal courts to impose non-guideline sentences. [Shepardize - Narrow by this Headnote](#)

Document: Constitutional Law > [Equal Protection](#) > [Judicial Review](#) > [Standards of Review](#) > [United States v. Barnister, 780 F. Supp. 2d 617](#) > [Actions](#)

Constitutional Law > [Equal Protection](#) > [National Origin & Race](#)

Constitutional Law > [Equal Protection](#) > [Nature & Scope of Protection](#)

Evidence > [Inferences & Presumptions](#) > [Presumptions](#) > [Rebuttal of Presumptions](#)

Evidence > [Burdens of Proof](#) > [Allocation](#)

HN7 The U.S. Supreme Court has established two elements for determining whether a superficially neutral law violates the [Equal Protection Clause](#): discriminatory effect and purposeful discrimination. In cases involving alleged racial discrimination, once a discriminatory purpose and a discriminatory effect are shown, the law is subject to strict scrutiny. Strict scrutiny requires a law to be narrowly tailored to achieve a compelling government interest. Under strict scrutiny, the state bears the burden of rebutting a presumption of unconstitutionality. If both a disparate impact and a discriminatory motive are not shown, in most cases a law is subjected to rational basis review, under which it can be overturned only if it is not rationally related to a legitimate government purpose. This rational basis for legislative action may be wholly notional; it need only be conceivable by a court, not actually contemplated by lawmakers. [Shepardize - Narrow by this Headnote](#)

Constitutional Law > [Equal Protection](#) > [National Origin & Race](#)

Constitutional Law > [Equal Protection](#) > [Nature & Scope of Protection](#)

HN8 A discriminatory effect is state action affecting African Americans differently from whites. Laws which criminalize voluntary conduct may violate the [Equal Protection Clause](#) when they target conduct associated with members of a protected class. [Shepardize - Narrow by this Headnote](#)

Constitutional Law > [Equal Protection](#) > [National Origin & Race](#)

Constitutional Law > [Equal Protection](#) > [Nature & Scope of Protection](#)

HN9 Intent requires more than mere predictability of consequences. "Discriminatory purpose" implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group. [Equal Protection Clause](#) violations do not depend on but-for causation. Washington v. Davis does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. When there is a proof that a discriminatory purpose has been a—not the?motivating factor in the decision, judicial deference is no longer justified. A discriminatory purpose need not be clear from the text of a statute; even a facially neutral provision can result in de jure segregation. The task of recognizing intent is made particularly difficult by the growing unacceptability of overtly bigoted behavior, and a growing awareness of the possible legal consequences of such behavior. Consequently, determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. [Shepardize - Narrow by this Headnote](#)

Constitutional Law > [Equal Protection](#) > [National Origin & Race](#)

Constitutional Law > [Equal Protection](#) > [Nature & Scope of Protection](#)

Governments > [Legislation](#) > [Interpretation](#)

HN10 An initial indicator of discriminatory intent is a law's discriminatory impact itself, although such an impact, without more, is seldom dispositive. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in Gomillion or Yick Wo, impact alone is not determinative, and the court must look to other evidence. A second factor is the foreseeability of such a discriminatory impact, especially adherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence upon racial imbalance. Foreseeability is to be determined through an objective reasonable person standard. Third, a court should consider the historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes. A court should consider the specific sequence of events leading up to the challenged decision; departures from the normal procedural sequence; and substantive departures, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached. [Shepardize - Narrow by this Headnote](#)

Constitutional Law > [Equal Protection](#) > [General Overview](#)

Criminal Law & Procedure > [Sentencing](#) > [Imposition of Sentence](#) > [Factors](#)

Governments > [Legislation](#) > [Interpretation](#)

HN11 In determining whether a statute has a discriminatory purpose, courts may consider historical context dating from before the enactment of the law at issue. Even where a sentencing law is constitutionally valid, its history and any disparate effect it works on those

Document: [United States v. Bannister](#), 788 F. Supp. 2d 617 [Actions](#)
similarly situated to an individual defendant may be relevant to a court in determining an individual sentence. [Shepardize - Narrow by this Headnote](#)

Constitutional Law > [Equal Protection](#) > [National Origin & Race](#)
Criminal Law & Procedure > [Criminal Offenses](#) > [Controlled Substances](#) > [General Overview](#)

HN12 There is substantial evidence of racial impact and awareness of probable racially invidious effect when the drug statutes were adopted to warrant a finding that the mandatory minimum sentences for crack cocaine were motivated in part by racial animus, in contravention of the [Equal Protection Clause of the United States Constitution](#). Such a finding would be justified by numerous factors: (1) the stark racial disparity itself; (2) the reasonable foreseeability of that disparity, as indicated by the repeated racial references in the legislative history of the Anti-Drug Abuse Act of 1986; (3) the inconsistency between the sentencing scheme and Congress's established law enforcement priorities; (4) Congress's deviations from legislative procedures in its haste to enact the legislation; and (5) the historical pattern of enacting antidrug laws out of racial motivations. [Shepardize - Narrow by this Headnote](#)

Constitutional Law > [Equal Protection](#) > [General Overview](#)
Criminal Law & Procedure > [Criminal Offenses](#) > [Controlled Substances](#) > [General Overview](#)

HN13 As to the United States District Court for the Eastern District of New York, a holding of unconstitutionality of the Anti-Drug Abuse Act of 1986 under the [Equal Protection Clause](#) is precluded by rulings of the Court of Appeals for the Second Circuit. That court held that Congress and the Sentencing Commission did not enact the 100 to 1 crack/powder cocaine ratio with a discriminatory intent. [Shepardize - Narrow by this Headnote](#)

Criminal Law & Procedure > ... > [Delivery, Distribution & Sale](#) > [Conspiracy](#) > [Penalties](#)
Criminal Law & Procedure > ... > [Possession](#) > [Intent to Distribute](#) > [Penalties](#)
Criminal Law & Procedure > [Sentencing](#) > [Imposition of Sentence](#) > [Factors](#)

HN14 Conspiracy to distribute and possess with intent to distribute 100 grams or more of heroin in violation of [21 U.S.C.S. §§ 846](#) and [841\(b\)\(1\)\(B\)\(i\)](#) carries a mandatory minimum sentence of five years. [Shepardize - Narrow by this Headnote](#)

Criminal Law & Procedure > ... > [Delivery, Distribution & Sale](#) > [Conspiracy](#) > [Penalties](#)
Criminal Law & Procedure > ... > [Possession](#) > [Intent to Distribute](#) > [Penalties](#)
Criminal Law & Procedure > [Sentencing](#) > [Imposition of Sentence](#) > [Factors](#)

HN15 Conspiracy to distribute and possess with intent to distribute one kilogram or more of heroin and fifty grams or more of cocaine base in violation of [21 U.S.C.S. §§ 846](#), [841\(b\)\(1\)\(A\)\(i\)](#), and [841\(b\)\(1\)\(A\)\(iii\)](#) carries a mandatory minimum sentence of ten years. [21 U.S.C.S. § 841\(b\)\(1\)\(A\)](#). [Shepardize - Narrow by this Headnote](#)

Criminal Law & Procedure > [Sentencing](#) > [Imposition of Sentence](#) > [Pronouncement](#)
Criminal Law & Procedure > [Postconviction Proceedings](#) > [General Overview](#)

HN16 In general, sentence is imposed when orally announced. [Fed. R. Crim. P. 35\(c\)](#). It may then be corrected within fourteen days for arithmetical, technical, or other clear error. [Fed. R. Crim. P. 35\(a\)](#). [Shepardize - Narrow by this Headnote](#)

Criminal Law & Procedure > [Sentencing](#) > [Imposition of Sentence](#) > [Factors](#)

HN17 Sentencing is in its essence subjective. It is not possible to determine a condign sentence without looking closely at all relevant facts and circumstances, and making a nuanced decision. Mandatory minimum sentencing provisions, leaving no alternative but lengthy incarceration, prevent the exercise of this fundamental judicial duty. Such laws are overly blunt instruments, bringing undue focus upon factors (such as drug quantities) to the exclusion of other important considerations, including role in the offense, use of guns and violence, criminal history, risk of recidivism, and many personal characteristics of an individual defendant. [Shepardize - Narrow by this Headnote](#)

Joel Cohen, New York, N.Y., for defendant Damien Bannister.

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Robert L. Moore, [Quesada & Moore, LLP](#) ▼, West Hempstead, N.Y., for defendant Christopher Hall.

[John S. Wallenstein](#) ▼, Garden City, N.Y., for defendant Cyril McCray.

[Michael H. Soroka](#) ▼, Mineola, N.Y., for defendant Roger Patrick.

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Heidi C. Cesare, Federal Defenders of New York, Inc., Brooklyn, N.Y., for defendant Jawara Tatum.

Margaret M. Shalley, Fasulo, Shalley & DiMaggio, LLP, New York, N.Y., for defendant Pedro Torres.

Judges: [Jack B. Weinstein](#) ▼, Senior United States District Judge.

Opinion by: [JACK B. WEINSTEIN](#) ▼

Opinion

[*621] Amended Statement of Reasons Pursuant to [18 U.S.C. § 3553\(c\)\(2\)](#)

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[*623] Introduction

Almost [\[**2\]](#) filling the jury box were the defendants—Damien Bannister, Darrell Bannister, Christopher Hall, Cyril McCray, Eric Morris, Roger Patrick, James Ross, Derrick Tatum, Indio Tatum, Jawara Tatum, and Pedro Torres—eleven males, ranging in age from twenty-one to forty-nine, ten African American and one Hispanic. Fully occupying the well of the court were counsel for the defendants, assistant United States attorneys, agents of the Federal Bureau of Investigation, and a phalanx of United States Marshals. Jammed into the gallery were defendants' anxious mothers, girlfriends, other family members, and friends.

The indictment embraced twenty-three counts connected by a conspiracy to sell, and the selling of, crack cocaine and heroin in the hallways of, and the streets surrounding, a public housing project in Brooklyn between September 2007 and January 2010. Guns were carried. The lives of the residents were made miserable by the attendant depravity and violence. These were serious crimes.

The unspoken questions permeating the courtroom were: How did these eleven come to this pass, and what should be done with them if they were convicted, as all of them eventually were, by guilty pleas? Some of [\[**3\]](#) the unsatisfactory answers in such all-too-frequent urban tragedies are discussed in the memorandum that follows.

The issue of what should be done about these defendants, and others like them, is central to the law's rationale for the heavy mandatory minimum incarceratory sentences being imposed in this case. For a number of the defendants, they are much heavier than are appropriate. One of our most thoughtful jurists reminds us, "[o]ur resources are misspent, our punishments too severe, our sentences too long." Justice

Document: [Anthony M. Kennedy](#) Address at the American Bar Association Annual Meeting, San Francisco, Ca. (Aug. 9, 2003), available at http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/Justice_Kennedy_ABA_Speech_Final.pdf. See also *id.* ("I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust.").

[*624] As a group, defendants grew up in dysfunctional homes characterized by a combination of poverty, unemployment, undereducation, crime, addiction to drugs and alcohol, physical and emotional abuse, and the absence of an adult male role model. They attended low-functioning [\[**4\]](#) public schools with limited resources to help students with their in- and out-of-school difficulties. Most dropped out of school, habitually abused drugs and alcohol from an early age, and found little lawful employment. They became involved in a gang of illegal narcotics distributors, which turned to guns and violence, contributing to the degradation of their community.

While the defendants are before this court because of choices they themselves have made, the limited options available to them are partly the fixed artifacts of history. Their story begins hundreds of years ago with the enslavement of African Americans. It runs through Reconstruction, Jim Crow, northward migration, *de jure* and *de facto* segregation, decades of neglect, and intermittent improvement efforts by government and others.

Protection of the public requires serious terms of incarceration. But enforcement of the harsh mandatory minimum sentences required by Congress imposes longer terms of imprisonment than are necessary. Such long years of incarceration and separation from relatives generally increase the likelihood of further crime by these defendants and their children.

Nevertheless, strong efforts will be made [\[**5\]](#) by the Bureau of Prisons to help educate the defendants and provide occupational training. Drug and alcohol treatment will be made available. Upon their release from prison, the court's probation service will provide strict, day-to-day supervision and assist in attempts to obtain essential jobs.

I. Facts

A. Place

1. Bedford-Stuyvesant

The conspirators operated in and around Louis Armstrong Houses, a public housing development in the Bedford-Stuyvesant ("Bed-Stuy") section of Brooklyn. Bed-Stuy is a large neighborhood in northern Brooklyn bound by Flushing Avenue to the North, Broadway and Saratoga Avenue to the East, Atlantic Avenue to the South, and Classon Avenue to the West. Kenneth T. Jackson, *Encyclopedia of New York* 94 (1995). It is named for two nineteenth-century communities, Bedford and Stuyvesant Heights. The first Europeans to occupy the area were Dutch settlers who bought the land from Native Americans in the seventeenth century and farmed it with the labor of African slaves. It was home to communities of free Blacks as early as the 1830s. From the nineteenth century through the mid-twentieth century, Bedford and Stuyvesant were populated by a fluctuating mix of Dutch, Germans, [\[**6\]](#) Scots, Irish, Jews, Italians, and African Americans. *Id.* In the 1940s the area became known as Bedford-Stuyvesant, and subsequently it became home to a majority African American and Afro-Caribbean population. See *id.* at 94-95.

Most of Bed-Stuy's housing stock consists of brownstone and brick row houses. *Id.* at 95. Present also are numerous large housing projects, including some high-rise developments. See, e.g., New York City Hous. Auth., *NYCHA Housing Developments: Lafayette Gardens*, <http://www.nyc.gov/html/nycha/html/developments/bklynlafayette.shtml> (last visited Mar. 14, 2011) (describing a complex of buildings up to twenty stories tall).

Bed-Stuy is the largest African American neighborhood in New York City. Jackson, *supra*, at 95. It is the northernmost **[*625]** of several predominantly black neighborhoods in Brooklyn lying east of Flatbush Avenue, which roughly bisects the borough. See *Mapping America: Every City, Every Block*, N.Y. Times, <http://projects.nytimes.com/census/2010/explorer> (last visited Mar. 11, 2011) ("*Mapping America*") (interactive map indicating racial distribution from 2005 to 2009). Other neighborhoods in this group are Crown Heights, East New York, Brownsville, East [\[**7\]](#) Flatbush, Flatlands, and Canarsie. See *id.*; New York City Dep't of City Planning, *New York: A City of Neighborhoods*, <http://www.nyc.gov/html/dcp/html/neighbor/neighbor.shtml> (last visited Mar. 20, 2011) (map of New York neighborhoods). Neighborhoods lying west of Flatbush Avenue are primarily White; Hispanics and Asians are distributed throughout the borough. See *Mapping America, supra*.

As of the 2000 census, the population of Bed-Stuy was 77 percent African American, non-Hispanic; 18 percent Hispanic; and less than 2 percent White, non-Hispanic. New York City Dep't of City Planning, *Brooklyn Community District 3 4* (2010), available at <http://www.nyc.gov/html/dcp/pdf/lucds/bk3profile.pdf> ("*District Report*"). In recent years, increasing numbers of middle-class residents of various races have moved to Bed-Stuy as pockets have become gentrified. Jeff Coplon, *The Tipping of Jefferson Avenue*, N.Y. Mag., May 21, 2005, <http://nymag.com/print/?nymetro/realestate/neighborhoods/features/11775/>.

In 2000, 63 percent of Bed-Stuy's families with children under the age of eighteen were headed by a female with no husband present. See *District Report, supra*, at 5 (reporting 13,783 such households led by [\[**8\]](#) females, 1,671 by males, and 6,520 by both parents). Thirty-three percent of the residents were dependent on some form of government assistance in 2000; by 2009, the number had risen to 45 percent. *Id.* at 1. Employment opportunities in the neighborhood are scarce, due in part to a lack of access to government work force

Health problems such as HIV/AIDS, obesity, and asthma plague the neighborhood. *Id.* The infant mortality rate in 2007 was 9.7 deaths per 1,000 births, compared to a national average of 6.75. *District Report, supra*, at 1; Jiaquan Xu, et al., Ctrs. for Disease Control & Prevention, *Deaths: Final Data for 2007*, Nat'l Vital Stat. Rep., May 20, 2010, at 1, available at http://www.cdc.gov/NCHS/data/nvsr/nvsr58/nvsr58_19.pdf.

Residents of the seventy-ninth police precinct, in which Louis Armstrong Houses is located, live with a high rate of violent crime. "[Y]oung people [redacted] and residents are menaced by the rise in gang culture and the proliferation of guns that are readily available in [Bed-Stuy's] public housing complexes." *District Needs, supra*, at 92. In 2010, there were twelve murders, twenty-nine rapes, 433 robberies, 422 felonious assaults, 408 burglaries, and 119 automobile thefts in the precinct. New York City Police Dep't, *CompStat: Report Covering the Week 2/28/2011 Through 3/6/2011*, available at http://www.nyc.gov/html/nypd/downloads/pdf/crime_statistics/cs079pct.pdf. See also Al Baker & Janet Roberts, *New York City Crime Dips but Violent Crime Is Up*, N.Y. Times, Nov. 25, 2010, <http://www.nytimes.com/2010/11/25/nyregion/26crime.html> (reporting that the seventy-ninth was among the three New York City precincts with the highest increases in robbery from 2009 to 2010); Email from Joseph Reek, Inspector, Hous. Bureau, New York City Police Dep't, Mar. [redacted] 3, 2011 (on file with court) ("Reek Email") (reporting three murders, seven rapes, twenty robberies, and seventy-five felonious assaults in Louis Armstrong Houses from 2006 through 2010). Since many crimes in similar areas are unreported because of victims' fear of reprisal, the actual crime rate in [redacted] the neighborhood is doubtless even higher. Cf. *The Kerner Report: The 1968 Report of the National Advisory Commission on Civil Disorders* 267 (Pantheon 1988) (1968) ("*Kerner Report*") ("[O]fficial statistics normally greatly understate actual crime rates because the vast majority of crimes are not reported to the police.").

2. Louis Armstrong Houses

a. Physical Environment

Louis Armstrong Houses is a public development of two complexes of sixteen buildings, each three, four, or six stories high, administered by the New York City Housing Authority (NYCHA). New York City Hous. Auth., *NYCHA Housing Developments: Armstrong, Louis Houses*, <http://www.nyc.gov/html/nycha/html/developments/bklynarmstrong.shtml> (last visited Mar. 14, 2012) ("*Armstrong Home Page*"); Email from Anne-Marie Flatley, Dir., Research & Mgmt. Analysis, NYCHA (Feb. 22, 2011) (on file with court) ("Flatley Email 1"). The development is spread over an eleven-block area in central Bed-Stuy bounded by Clifton Place and Herbert Von King Park to the North, Tompkins Avenue to the East, Gates Avenue to the south, and Bedford Avenue to the West. See *Armstrong Home Page*. The two complexes were built between 1970 and 1974 with funding [redacted] from the federal government's Model Cities program under the names "Bedford Stuyvesant Model Cities Area Sites 3-69A" and "Bedford Stuyvesant Model Cities Area Sites 11-14." See Flatley Email 1. Their names were changed to Louis Armstrong I and Louis Armstrong II in 1982. *Id.*

Pictured is a portion of Louis Armstrong Houses along Clifton Place between Nostrand and Marcy Avenues.



[redacted] Source: New York City Housing Authority.

The neighborhood is of medium density and appears not to be overcrowded. The low-rise buildings of Louis Armstrong Houses are scattered among substantial brownstone homes and apartment buildings, blended into good existing housing. Small trees are planted in front of the buildings. Nearby, the large Herbert Von King Park and a community garden are well kept and provide the neighborhood with breathing room. Situated in the park are a baseball field, a playground, handball courts, an amphitheater, and a recreational center. New York City Dep't of Parks & Recreation, *Herbert Von King Park*, <http://www.nycgovparks.org/parks/herbertvonking/highlights/152> (last visited Mar. 14, 2011).

The park, established in 1857, is one of the oldest in Brooklyn. It was originally named for [**12] Daniel Tompkins, a vice president of the United States and governor of New York. In 1985, it was renamed to honor a Bed-Stuy community leader. *Id.*

Public transportation and local shopping seem acceptable. Streets are clean. Schools, houses of worship, a hospital, and a large outdoor swimming pool are within walking distance. See Google Maps, www.maps.google.com, enter "11216" (last visited Mar. 21, 2011) (interactive map displaying the area surrounding Louis Armstrong Houses). Some of Manhattan's towers are visible.

The project is generally wellmaintained, although there is a broken cement stanchion eliminating one basket in the backyard basketball court. The large concrete play area behind the houses on Clifton Place lacks benches or vegetation.

The aesthetics of the buildings bespeak poverty. Corridors and stairwells are narrow, lined with painted cement blocks and cheap metal railings. Entrances to the apartments and the buildings appear much like those for prison cells.

All in all, children in an integrated, well-motivated, and disciplined family could experience a good childhood here, not much different from those of millions of New Yorkers who lead stable, productive lives. These [**13] defendants did not, however, grow up in such families. It was the dangers and impoverishment of their families and peers, combined with the bleak economic prospects facing their community, to which their difficulties can be traced.

b. Residents

Housed in Louis Armstrong Houses are 2,150 residents in 617 apartments. Armstrong Home Page, *supra*. Seventy-six percent are African American, 17 percent are Hispanic, and 5 percent are White. See NYCHA, *Armstrong I Data Sheet* (Jan. 1, 2010) ("*Armstrong I Data*"); NYCHA, *Armstrong II Data Sheet* (Jan. 1, 2010) ("*Armstrong II Data*"). The average household earns a gross income of \$23,251 and pays \$419 per month in rent. See *id.* Half of all families receive income from employment. Email from Anne-Marie Flatley, Director, Research & Mgmt. Analysis, NYCHA (Mar. 1, 2011) (on file with the court) ("Flatley Email 2"). Seventeen percent receive income from welfare, and 8 percent are listed as receiving "full welfare" benefits. See *Armstrong I Data, supra*; *Armstrong II Data, supra*. The rest are supported from Social Security benefits, Supplemental Security Income (disability payments), pensions, or other sources. Flatley Email 2.

Data from the 2000 census [**14] indicate a high rate of joblessness and poverty and low rates of education in the Louis Armstrong Houses area. The official unemployment rate for residents aged sixteen and over "in the labor force" was 20 percent. [**628] See *District Report* at 17 (reporting 2000 census data for census tracts 243, 251, 263 and 265); *id.* at 6 (map of 2000 census tracts in Bed-Stuy). Forty-nine percent of residents sixteen and over were not in the labor force. See *id.* Their numbers, combined with those of the officially unemployed, amount to a 59 percent jobless rate. See *id.* Thirty-five percent lived below the poverty line. See *id.* at 13, 15 (reporting data for relevant census tracts). This line is an inexact measurement of need, especially in areas with high living expenses, such as New York City. See Carmen Denavas-Walt, et al., United States Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2009* 20 (2010), available at <http://www.census.gov/prod/2010pubs/p60-238.pdf> ("The official poverty thresholds developed more than 40 years ago do not take into account rising standards of living . . . or geographic differences in the cost of living."). Forty-one percent of residents [**15] at least twenty-five years of age in and around Louis Armstrong Houses have not completed high school. See *District Report* at 15 (reporting data for relevant census tracts). Nine percent have graduated from college. *Id.*

Rates of poverty and joblessness are substantially higher, and rates of education lower, in the housing project itself; its residents account for a fraction of the population of the relevant census tracts. See *id.* at 13 (reporting data for relevant census tracts); *Armstrong Home Page, supra*. Rates of poverty and joblessness in the area are likely higher than the 2000 census indicated as a result of the current economic crisis. See, e.g., Eckholm, *supra* (reporting that one in seven United States residents lived in poverty in 2009, the highest rate recorded since 1994).

B. Conspiracy

Defendants were members of a drug distribution organization called the Clifton Place Crew ("the crew"). The crew controlled the heroin and crack cocaine trade in part of Louis Armstrong Houses along Clifton Avenue, near the building pictured above. Daily it sold drugs from residences and public spaces in and around the complex. Presentence Investigation Report of Derrick Tatum ("Derrick Tatum [**16] PSR") ¶ 2. The crew membership fluctuated, generally consisting of five to ten men. *Id.* at ¶ 4.

There are no facts in the record concerning the market for illegal drugs in the neighborhood or the identity of those who bought drugs from the crew. There is no indication that they sold to children. No information has been provided concerning the operations of other drug networks with whom the crew may have competed for market share.

1. Members of Conspiracy

Members of the crew came from similar deprived backgrounds. They lacked appropriate male models in their homes, they had an inadequate education, and they grew up in an environment of personal abuse, illegal drugs, and general poverty. See Part IV.B, *infra* (detailed histories of defendants in connection with the sentence imposed).

~~Document: United States v. Bannister, 786 F. Supp. 2d 617. Actions~~
Derrick Tatum established the crew in September 2007. He led it until the arrest of most of its members on January 27, 2010. It was he who selected and supervised conspirators, negotiated major transactions, and determined compensation. *Id.* at ¶¶ 3-7, 10.

Indio Tatum, Derrick Tatum's nephew, joined the conspiracy in late 2007 and was promoted the following summer to serve as Derrick Tatum's top lieutenant. Presentence Investigation Report of Indio Tatum ("Indio Tatum PSR") ¶ 7. He obtained [***629**] heroin and cocaine powder from wholesale suppliers, processed or "cooked" powder cocaine into crack, distributed drugs to dealers in street-ready packages, and collected revenues. *Id.* at ¶ 5. On occasion, Derrick Tatum performed some of these functions himself. Derrick Tatum PSR ¶ 5. The other nine members of the conspiracy served as street-level dealers, working in shifts. Their dates of involvement in the conspiracy were as follows: Damien Bannister, August 2008- January 2010, Presentence Investigation Report of Damien Bannister ("Damien Bannister PSR") ¶ 6; Darrell Bannister, July-September 2008, Presentence Investigation Report of Darrell Bannister ("Darrell Bannister PSR") ¶ 6; Christopher Hall, September 2007-January 2010, Presentence Investigation Report of Christopher Hall ("Hall PSR") ¶ 6; Cyril McCray, September 2007-January 2010, Presentence Investigation Report of Cyril McCray ("McCray PSR") ¶ 8; Eric Morris, late 2007-January 2010, Presentence Investigation Report of Eric Morris ("Morris PSR") ¶ 6; Roger Patrick, August 2008-January 2010, Presentence Investigation Report of Roger Patrick ("Patrick PSR") ¶ 6; James Ross, June 2008-January 2010, Presentence Investigation Report of James Ross ("Ross PSR") ¶ 7; Jawara Tatum, September 2009-January 2010, Presentence Investigation Report of Jawara Tatum ("Jawara Tatum PSR") ¶ 5; and Pedro Torres, August 2008-June 2009, Presentence Investigation Report of Pedro Torres ("Torres PSR") ¶ 5. Many of the dealers used drugs themselves. See generally Part II, *infra*. At least four of them—Cyril McCray, Roger Patrick, Jawara Tatum, and Pedro Torres—lived on Clifton Place near where the crew sold drugs. See McCray PSR 2; Patrick PSR 2; Jawara Tatum PSR ¶ 43; Torres PSR 2. Three street-level sellers—Hall, Morris, and Ross—were entrusted occasionally by Derrick and Indio Tatum with picking up bulk quantities of drugs and delivering them to the other dealers, but none of the three held supervisory roles. Hall PSR ¶ 8; Morris PSR ¶ 6; Ross PSR ¶ 7.

Most members of the crew carried or maintained access to guns to defend against robbers and protect their territory from rival drug dealers. Derrick Tatum, Indio Tatum, Hall, McCray, Morris, Ross, and Torres personally possessed guns. Derrick Tatum PSR ¶ 7; Indio Tatum PSR ¶ 10; Hall PSR ¶ 6; McCray PSR [***19**] ¶ 6; Morris PSR ¶ 7; Ross PSR ¶ 7; Pedro Torres PSR ¶ 5. Damien Bannister, Roger Patrick, and Jawara Tatum did not carry guns but had access to those controlled by the conspiracy. Damien Bannister PSR ¶ 5; Patrick PSR ¶ 6; Jawara Tatum PSR ¶ 6. Darrell Bannister neither carried guns nor had access to them. Darrell Bannister PSR ¶ 6. On one occasion, Hall and Torres were involved in a shootout. Hall PSR ¶ 6; Torres PSR ¶ 6.

Members of the crew stored drugs and guns in nearby residences. They moved them frequently to avoid detection and seizure by police or robbers. Derrick Tatum PSR ¶ 5.

2. Investigation of Conspiracy

The New York City Police Department and the Federal Bureau of Investigation jointly investigated the crew from late 2007 to January 2010 using a combination of surveillance, search warrants, and videotaped purchases of drugs and guns. Over seventy-five videotaped purchases were executed, resulting in the seizure of over 100 grams of heroin and 100 grams of crack. Seized from residences linked with the organization were fourteen guns, ammunition, a machete, a police radio scanner, about \$15,000 in cash, and about fifteen "G-packs" of heroin (approximately 75 grams). *Id.* at ¶ 3. A G-pack [***20**] is a bulk quantity of processed drugs worth about [***630**] \$1,000 and packaged into retail quantities. *G Pack*, Urban Dictionary, <http://www.urbandictionary.com/define.php?term=g%20pack> (last visited February 23, 2011).

It is estimated that more than 4.5 kilograms of crack and three kilograms of heroin were distributed by the crew over the course of the conspiracy. Derrick Tatum PSR ¶ 9.

Following are notable incidents:

- September 2007: Derrick Tatum founded the crew. *Id.*
- October 23, 2007: Police recovered two loaded pistols, 249 glassines of heroin, and \$1,190 in cash in a vehicle driven by Cyril McCray. McCray PSR ¶ 6. A glassine is a small envelope or bag made of transparent or semitransparent paper. See Webster's Third New International Dictionary 963 (1993).
- Summer 2008: Indio Tatum was promoted as Derrick Tatum's top lieutenant.
- August 31, 2008: Indio Tatum and Derrick Tatum sold a loaded .32 caliber pistol to a confidential informant in a videotaped transaction. Derrick Tatum PSR ¶ 7; Indio Tatum PSR ¶ 8.
- September 2008: Christopher Hall and Pedro Torres were involved in a shootout at a location on Clifton Place where members of the crew regularly sold drugs. Hall fired shots. Torres [***21**] was shot in the leg, and another individual was shot in the leg and chest. It is not known whether Hall was responsible for any injuries. Hall PSR ¶ 6; Torres PSR ¶ 6.
- December 18, 2008: Eric Morris sold a loaded pistol to a confidential informant. Morris PSR ¶ 7.
- February 16, 2009: Police recovered a pistol and ammunition from Morris's home. *Id.*
- June 30, 2009: Police recovered a loaded gun and thirty-five bags of heroin, about two grams' worth, from an apartment used by Hall. Hall PSR ¶ 6.

Document: [July 9, 2009: Torres was placed in custody after being sentenced for a weapons offense on June 8, 2009. Torres PSR ¶ 22.](#) [United States v. Bannister, 786 F. Supp. 2d 617](#) [Actions](#) ▼

- August 9, 2009: Damien Bannister was arrested with forty-eight bags of crack cocaine and ninety glassines of heroin. Damien Bannister PSR ¶ 39-40.
- October 19, 2009: Police recovered a loaded .380 caliber pistol belonging to Indio Tatum from an abandoned vehicle parked on Clifton Place. Indio Tatum PSR ¶ 8.
- January 21, 2010: Damien Bannister was sentenced for the August 9, 2009 drug offense described above. Damien Bannister PSR ¶ 39-40.
- January 26 and 27, 2010: Investigators arrested nine of the eleven defendants in this case. See, e.g., Derrick Tatum PSR ¶ 1. Torres and [\[**22\]](#) Damien Bannister were already in custody. Upon arresting Derrick Tatum, investigators recovered approximately \$10,000 in cash. *Id.* at ¶ 8.

C. History and Sociology

Because the saga of deprivation, isolation, and crime that characterize life in neighborhoods such as Louis Armstrong Houses is relevant to sentences, the history and sociology of such areas are discussed below. See Philip J. Cook & Jens Ludwig, *The Economist's Guide to Crime Busting*, Wilson Q., Winter 2011, at 62 ("Most of us choose to abstain from crime in part because we have a lot to lose if we [\[*631\]](#) get caught. . . . The calculus for an unemployed dropout with readily available criminal options and few licit prospects is likely to be quite different.").

1. Roots of African American Segregation and Poverty

a. Segregation and the Civil Rights Movement

The poverty and *de facto* racial segregation in which defendants have lived have their immediate roots in the nineteenth century, as the American South coped with the economic and social transformations wrought by the Civil War, the abolition of slavery, and the gains made by African Americans during Reconstruction. Under the protection of the federal government, the condition of newly [\[**23\]](#) freed African Americans improved. Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 29 (2010). Racial oppression returned as the federal government indicated an unwillingness to protect African Americans, troops were withdrawn from southern states, and courts issued decisions validating racial segregation as lawful. *Id.* at 30-35; Lawrence M. Friedman, *A History of American Law* 382 (3d ed. 2005) ("*History*"); Herbert Hill, *Black Labor and the American Legal System: Race, Work, and the Law* 12-14 (1985 Univ. of Wisc. Press) (1977).

The Jim Crow system compelled segregation and oppression of African Americans. In the South they were put to work in quasi-servitude under the sharecropping system. Nicholas Lemann, *The Promised Land: The Great Migration and How It Changed America* 6, 18-20 (1991); Friedman, *History, supra*, at 321. They were prohibited from holding many jobs, particularly in the skilled trades, or from joining labor unions. Hill, *supra*, at 12-25. They were forced to live, work, and conduct their daily business under rules of rigid racial separation. Friedman, *History, supra*, at 383-84. Criminal vagrancy laws were enforced, ensuring that African [\[**24\]](#) Americans continued to work for the benefit of white employers. Those who were convicted of crimes were forced to work for little or no pay as prisoners--often leased out to white employers. Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* 7-8 (2008); Alexander, *supra*, at 31. African Americans were further suppressed through a terrorist campaign of lynchings, bombings, and mob violence. Alexander, *supra*, at 30; Lawrence M. Friedman, *Crime and Punishment in American History* 187-91 (1993) ("*Crime*"). See also Orlando Patterson, *Black Americans, in Understanding America: The Anatomy of an Exceptional Nation* 385 (Peter H. Schuck & James Q. Wilson, eds., 2008) (describing the Jim Crow period as a "seventy-five year disaster: a vicious system of terror during which some five thousand African Americans were slaughtered, many of them ritually burnt alive").

The Jim Crow system—*de facto* and *de jure* racial segregation and political and civic disenfranchisement—remained intact for over half a century, due in large part to the complicity of the federal government. See, e.g., Michael G. Long, *Marshalling Justice: The Early Civil Rights Letters of Thurgood Marshall* [\[**25\]](#) 72-73 (2011) (criticism by Thurgood Marshall, in a 1940 letter to President Franklin Roosevelt, of the Federal Housing Administration's embrace of racially restrictive covenants and its refusal to insure loans to African Americans buying homes in White areas); *id.* at 74-75 (criticism by Thurgood Marshall, in a 1940 letter to Secretary of the Navy, Frank Knox, complaining of segregation in the United States military).

Jim Crow was dismantled from the 1940s through the 1960s, as courts and [\[*632\]](#) federal lawmakers began to recognize the necessity of meeting widespread demands of African American citizens for equality. E.g., [Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 \(1948\)](#) (holding that state court enforcement of racially restrictive covenants violated the [Equal Protection Clause](#)). Resisted by citizens of all backgrounds were attempts by segregationists, through both legal and extralegal channels, to enforce demeaning control. By the mid-1960s, with some school desegregation following [Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 \(1954\)](#), and with the Voting Rights Act and the Civil Rights Act having been passed, the movement for equal legal rights and equal opportunities began to achieve

substantial success. [\[**26\]](#) Alexander, *supra*, at 35-38; see generally Jack Greenberg, *Crusaders in the Courts: Legal Battles of the Civil Rights Movement* 2004) (recounting the role of the NAACP Legal Defense Fund in civil rights litigation); Jack Greenberg, *Brown v. Board of Education: Witness to a Landmark Decision* (2004) (chronicling the litigation of *Brown*).

b. Urbanization and Unemployment

Concurrent with the dismantling of the Jim Crow system was the migration of African Americans from the rural South to urban centers across the United States. Lemann, *supra*, at 6. See also Patterson, *supra*, at 381 ("As late as 1940, over a half of the black population was still rural (52.4 percent); within a decade, 62 percent was urban, and by 1960 nearly three in every four.").

African Americans migrated to northern cities in part to escape racial persecution and in part for jobs. Jackson, *supra*, at 113. The decline of the sharecropping system and the advent of chemical herbicides and the mechanical cotton picker had reduced the demand for farm labor in the South. Lemann, *supra*, at 70. Northern cities offered the lure of well-paying industrial jobs. *Id.*; Patterson, *supra*, at 381. During the 1940s and 1950s, the result of [\[**27\]](#) this migration was a far higher standard of living in urban areas than African Americans had experienced in the rural South. William Julius Wilson, *When Work Disappears: The World of the New Urban Poor* 53- 54 (1996). See also *id.* at 26-27 ("The traditional American economy featured rapid growth in productivity and living standards. . . . In this system plenty of blue-collar jobs were available to workers with little formal education.").

Economic gains for African Americans in the industrialized North were, however, limited. "[I]n 1939 half of all Negro wage earners in New York were receiving less than \$850 per year." Robert A. Caro, *The Power Broker: Robert Moses and the Fall of New York* 491 (Vintage ed. 1975) (1974). "40 percent of New York City's African American population in 1940 remained on relief or dependent on federal funds for temporary work relief." Jackson, *supra*, at 114. Despite the need for labor to support the war effort, some factories excluded Black workers entirely. See *id.*

Subsequently, unemployment worsened. In the 1950s, the unemployment rate for African Americans in New York City was twice that of Whites. *Id.* In 1965, it was observed that African American unemployment, [\[**28\]](#) particularly in northern urban areas, had been at "disaster levels" for thirty-five years, with the exception of the World War II and Korean War years. United States Dep't of Labor Ofc. of Pol'y Planning & Res., *The Negro Family: The Case for National Action* 20 (photo. reprint 2011) (1965) (emphasis removed). See also *id.* at 26 ("The most conspicuous failure of the American social system in the past 10 years has been its inadequacy in providing jobs for Negro youth. Thus, in January [\[**633\]](#) 1965 the unemployment rate for Negro teenagers stood at 29 percent. This problem will now become steadily more serious."); Kerner Report, *supra*, at 13 ("Between 2 and 2.5 million Negroes—16 to 20 percent of the total Negro population of all central cities—live in squalor and deprivation in ghetto neighborhoods."); *id.* ("[D]espite continuing economic growth and declining national unemployment rates, the unemployment rate for Negroes in 1967 was more than double that for whites.").

Unemployment in large cities was cited by the presidentially appointed Kerner Commission as a primary cause of the wave of rioting in African American neighborhoods in the late 1960s. Kerner Report, *supra*, at 1, 24. Other identified [\[**29\]](#) causes of disorder included pervasive discrimination and segregation; the exodus of White residents from inner-city areas and in-migration of African Americans; and the frustration of hopes of advancement that had been raised by the Civil Rights Movement. *Id.* at 10.

Conditions worsened after the 1960s. Just as the promise of work in the industrial north brought African Americans in large numbers to northern cities in the Great Migration, the closing of factories contributed to the partial unraveling of African American communities. See Lemann, *supra*, at 201 ("From 1960 to 1994, manufacturing employment increased nationally by 3 per cent but fell in New York, Chicago, Los Angeles, Philadelphia, and Detroit, and later the drop in urban unskilled manufacturing jobs became more precipitous."); William Julius Wilson, *supra*, at 31 ("The number of employed black males ages 20 to 29 working in manufacturing industries fell dramatically between 1973 and 1987 (from three of every eight to one in five).").

Much of the new job growth in recent decades has occurred in high-technology fields that are inaccessible to workers with limited education and training. *Id.* at 29. Most jobs for workers with [\[**30\]](#) limited skills are not in manufacturing but in the service sector, which hires more women than men. *Id.* at 27. Typically, these jobs are located in suburban or exurban areas far from inner-city neighborhoods, and are sometimes inaccessible by public transportation. *Id.* at 37-41; David Hilfiker, *Urban Injustice: How Ghettos Happen* 9 (2002). See also Alfonso Castillo, *MTA Plans to Cut Most of LI Bus Routes*, *Newsday*, Mar. 2, 2011, at 2 (reporting service cuts that would leave certain [low income] neighborhoods with no access to public transportation).

2. Government Efforts to Alleviate Poverty and Poor Living Conditions

a. Public Housing

NYCHA was organized in the 1930s with the hope of "eliminat[ing] the crime, illness, poverty, and moral decay bred by slums[.]" Jackson, *supra*, at 954. The earliest NYCHA housing developments were low-rise buildings provided for families with moderate incomes; the destitute were ineligible. Like the neighborhoods in which they were located, these developments were racially segregated. *Id.*

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Building of high-rise housing projects began in 1939. *Id.* Under a slogan of "slum clearance," blocks of low-income housing in old, poorly maintained tenements were razed and replaced with [\[**31\]](#) "superblocks" of high-density buildings with small, cheaply constructed apartments. Nicholas Dagen Bloom, *Public Housing that Worked: New York in the Twentieth Century* 129-132, 142-43 (2008); Caro, *supra*, at 611; Jackson, *supra*, at 954-55. Tenants, particularly African Americans and Puerto Ricans, were evicted with little notice and little hope of finding decent [\[**634\]](#) housing elsewhere. Caro, *supra*, at 968-976, Jackson, *supra*, at 955. The methods of slum clearance were criticized for uprooting communities and disrupting the fabric of city neighborhoods. *E.g.*, Jane Jacobs, *The Death and Life of Great American Cities* 4, 270-72 (1961).

By the 1960s, after many White, middle-class New Yorkers migrated to suburban areas, housing projects were inhabited mostly by poor African Americans and Hispanics. Jackson, *supra*, at 915; *see also* Bloom, *supra*, at 211 (discussing the increased population of welfare recipients in NYCHA projects during the 1960s); William Julius Wilson, *supra*, at 48 ("Since smaller suburban communities refused to permit the construction of public housing, the units were overwhelmingly concentrated in the overcrowded and deteriorating inner-city ghettos?the poorest and least socially [\[**32\]](#) organized sections of the city and the metropolitan area.").

A significant portion of New York City's population now lives in housing under the management of NYCHA, the largest public housing system in North America. It serves more than 650,000 people—over 8 percent of city residents. New York City Hous. Auth., *About NYCHA: Fact Sheet*, <http://www.nyc.gov/html/nycha/html/about/factsheet.shtml> (revised May 20, 2010).

b. Welfare Policy

Noteworthy attempts at improving the lives of those in defendants' position have been made. Foremost among initiatives to aid poor families was Aid for Families with Dependent Children (AFDC), a federally-funded and state-run program in which low-income families were given money equivalent to 12 percent to 55 percent of poverty-level income for a family of three. Hilfiker, *supra*, at 88. From AFDC's inception in the 1930s until the 1960s, only about one in three eligible families received welfare; most were widows with children. An increased number of applications for aid, and the higher rate at which applications were accepted, resulted in a dramatic expansion of AFDC in the 1960s; nine out of every ten eligible families received this aid. *Id.* at 78.

In the [\[**33\]](#) 1960s, as part of a set of initiatives labeled the War on Poverty, a "community action" program was implemented. Social services were to be delivered to inner-city residents through a decentralized network of federally funded offices. Lemann, *supra*, at 133; Hilfiker, *supra*, at 77. This system failed to significantly ameliorate poverty conditions. "There is no clear example of a community action agency in a poor neighborhood accomplishing either the original goal of reducing juvenile delinquency or the subsequent goal of reducing poverty." Lemann, *supra*, at 192. Federal funding was terminated in 1974. Hilfiker, *supra*, at 78.

The federal government launched Model Cities, a program managed by the Department of Housing and Urban Development, in the late 1960s. It "was supposed to spend billions to rehabilitate the ghettos physically and otherwise . . . fixing slums up rather than tearing them down." Lemann, *supra*, at 187. Developed after a pilot community development program launched in Bed-Stuy, it was conceived as an improvement over the community action program. *Id.* at 198. Its primary benefit was not to improve living conditions for residents of impoverished neighborhoods but to provide [\[**34\]](#) jobs to those employed in Model Cities programs, many of whom used their newfound economic stability to relocate outside ghetto neighborhoods. *Id.* at 251.

Federal social welfare expenditures were not focused on the poor. Medicare and social security, which delivered benefits to elderly Americans regardless of income, accounted for most federal social [\[**635\]](#) support expenditures. As a result, 75 percent of welfare funding from the mid-1960s through the early 1970s was devoted to the non-poor. Hilfiker, *supra*, at 80. Nor were many steps taken during the War on Poverty to remedy the causes of poverty. There was no attempt to replace welfare with a program designed to move poor people into the mainstream of society by boosting employment. Lemann, *supra*, at 219.

There were a number of enduring legislative achievements, including Medicare, Medicaid, and Head Start, an early intervention program for low-income children. Friedman, *History, supra*, at 508; Lemann, *supra*, at 350. Nevertheless, the perceived failure of some programs prompted many to conclude that any broad attempts by government, particularly the federal government, to remedy poverty were doomed to fail. Lemann, *supra*, at 219. *See also* [\[**35\]](#) *id.* at 344 ("Rhetorically, the war on poverty was made to sound more sweeping than it really was, and so set itself up to seem as if it had ended in defeat when it didn't vanquish all poverty."). Government intervention did succeed in making a lasting difference benefiting upwardly mobile, middle-class African Americans. Hilfiker, *supra*, at 76 ("[M]any war on poverty programs were successful by almost any measure."); Lemann, *supra*, at 201; *id.* at 219 ("The black middle class grew faster during the Great Society period than at any other time in American history.").

A significant portion of the federal welfare system was overhauled in 1996. AFDC had for years utilized a number of controversial provisions discouraging work or marriage. "Essentially all work income was deducted from [AFDC] benefits, and mothers going to work also lost Medicaid and childcare benefits, making it almost impossible to transition from welfare to work. Since a marriage partner's income was deducted from benefits, it was better to keep the relationship informal and not get married." Hilfiker, *supra*, at 88. Under the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), enacted in 1996, AFDC [\[**36\]](#) was replaced with a new program—Temporary Assistance for Needy Families (TANF). Eligibility for TANF benefits was made contingent on meeting work and work preparation requirements. Recipients were allowed to receive cash assistance for no more than two to five years over their lifetimes; childless individuals were allowed only three months of food stamps every three years. *Id.* at 88-90. PRWORA appears not to have substantially reduced poverty. Forty percent of families

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who left the welfare rolls had neither work nor other cash assistance. In a three-city study, 93 percent who were dropped from the welfare rolls due to sanctions remained in poverty. *Id.* at 95-96.

Few anti-poverty programs today are targeted at unemployed men. "Many of today's antipoverty programs focus . . . on single mothers and their children. Although men obviously play important roles in these families and their communities, they are often excluded or overlooked by efforts to encourage poor mothers to transition from welfare to work or to improve the life-chances of poor children." Margery Austin Turner & Lynette A. Rawlings, Urban Inst., *Overcoming Concentrated Poverty and Isolation: Lessons from Three HUD Demonstration [**37] Initiatives* 33 (2005).

3. Economic and Social Conditions of Those in Defendants' Position

The problems associated with poverty, segregation, and lack of jobs for low-income African Americans, particularly males, continue.

[*636] a. Racial Segregation

Persistent *de facto* racial segregation remains a fundamental aspect of life for low-income African Americans. "[A]lthough legalized segregation has long been abolished and antiexclusionary laws strictly enforced, the great majority of blacks still live in highly segregated communities." Patterson, *supra*, at 376.

[A]lmost 60 percent of blacks would have to move to realize a distribution across neighborhoods that reflected their actual proportion of the population Both the level of segregation and the extent to which it is changing vary considerably by region. The highest segregation rates in metropolitan areas are surprisingly in the "liberal" regions of the Northeast and Midwest . . . [including] New York[.]

Id. at 395. Cf. *Kerner Report, supra*, at 13 (stating that in 1960, 86 percent of African Americans would have had to move in order to create an unsegregated population distribution).

To a significant degree, this lack of integration results [**38] from the segregated conditions in public housing. William Julius Wilson, *supra*, at 48 ("[P]ublic housing . . . has isolated families by race and class for decades, and has therefore contributed to the growing concentration of jobless families in the inner-city ghettos in recent years.").

b. Poverty and Unemployment

The economic situation of low-income, poorly educated African Americans in defendants' position has deteriorated in relation to both poor Whites and middle- and upper-class Blacks. Patterson, *supra*, at 392. While the African American middle class has grown substantially over the past decades, a third of African Americans remain in the lowest economic quintile, compared to about 18 percent of Whites. *Id.* at 390-91 (citing 2006 United States Census figures). Income inequality by race is underscored by disparity within the lowest income quintile; the average Black household in this category earns \$7,869, compared to \$16,440 for White households. *Id.* at 391.

African Americans from inner-city communities who enjoy economic success are likely to leave their neighborhoods for more affluent communities. Elijah Anderson, *Code of the Street: Decency, Violence, and the Moral Life of the [**39] Inner City* 145 (2000) ("Because of all the vice and crime in the neighborhood, those who can leave tend to do so, isolating the very poor and the working poor even more."). Accord William Julius Wilson, *supra*, at 46. See also Lemann, *supra*, at 347 ("The impressive record of black success in America's cities since the 1960s has been almost entirely bound up with leaving the ghettos rather than improving them[.]").

Many experts agree that a key cause of poverty among African Americans is unemployment and underemployment. Statistics underestimate unemployment partly because the criminal system and large-scale incarceration result in taking sentenced men like defendants out of the labor market.

The overall rate [of black unemployment and underemployment] has remained twice that of whites from the early 1970s, even while falling to historic lows of under 10 percent in the late 1990s and again in 2006 when it stood at 8.8 percent, compared with the white rate of 3.8 percent. But an increasing proportion of the impoverished are working people who, because of inadequate skills and education, cannot earn enough to rise above the poverty line. And general unemployment rates conceal the exceedingly [**40] high youth unemployment rate of 37 percent among young black men. [*637] The true rate . . . is even higher because it neglects the substantially lower labor force participation rate among young black men and the astonishingly high proportion of young black men in prison or jail, who are not included in the employment figures.

Patterson, *supra*, at 398.

The blighted hopes of low-income African American families have been exacerbated by the recent economic crisis and its effect on employment. "The impact is potentially devastating on black families in the city. This has kicked more black families into poverty, families who were clinging to working-class lives." Ryan Strong & Lore Croghan, *Labeled, Judged' & Can't Find a Job: Black New Yorkers Hit Hard by*

Unemployment, N.Y. Daily News, Dec. 14, 2010, at 4 (quoting Michelle Holder, Cmty. Serv. Soc. of New York). See also Erik Eckholm, *Document: United States v. Bannister*, 786 F. Supp. 2d 617 (2011), [Actions](#) *Recession Raises Poverty Rate to a 15-Year High*, N.Y. Times, Sept. 16, 2010, <http://www.nytimes.com/2010/09/17/us/17poverty.html> ("The **[**41]** share of [United States] residents in poverty climbed to 14.3 percent in 2009, the highest level recorded since 1994. The rise was steepest for children, with one in five affected.") (citing data from the United States Census Bureau). Cf. Hon. Carolyn Maloney, Chair, U.S. Cong. Joint Econ. Comm., 111th Cong., *Income Equality and the Great Recession 2* (2010), available at http://jec.senate.gov/public/?a=Files.Serve&File__id=91975589-257c-403b-8093-8f3b584a088c ("Between 1980 and 2008, [the share of total national income accrued by the wealthiest 1 percent of households] rose from 10.0 percent to 21.0 percent, making the United States . . . one of the most unequal countries in the world.").

For African American men living in New York City, the unemployment rate doubled between 2006 and 2009. The 2009 rate was 17.9 percent, compared to 6.3 percent for White men. Strong & Croghan, *supra*, at 4. For African American men aged 16 to 24, the unemployment rate from January 2009 through June 2010 was 33.5 percent, and the labor force participation rate was 38 percent. Steven Greenhouse, *Study Shows Depth of Unemployment for Blacks in New York*, N.Y. Times, Dec. 13, 2010, <http://economix.blogs.nytimes.com/2010/12/13/study-shows-depth-of-unemployment-for-blacks-in-new-york/>. See also Motoko Rich, *Few New Jobs as Jobless Rate Rises to 9.8%*, N.Y. Times, Dec. 3, 2010, <http://www.nytimes.com/2010/12/04/business/economy/04jobs.html?ref=motokorich> ("More than 15 million people are out of work, among them 6.3 million who have been jobless for six months or longer.").

The cost of joblessness is not merely economic. Its psychological and sociological effects are devastating.

[W]ork is not simply a way to make a living and support one's family. It also constitutes a framework for daily behavior and patterns of interaction because it imposes disciplines and regularities. Thus, in the absence of regular employment, a person lacks not only a place in which to work and the receipt of regular income but also . . . a system of concrete expectations and goals. Regular employment provides the anchor for . . . daily life. It determines where you are going to be and when you are going to be there. In the absence of regular employment, life, including family life, becomes less coherent. Persistent unemployment and irregular employment hinder rational planning in daily life, the necessary condition of adaptation **[**43]** to an industrial economy.

William Julius Wilson, *supra*, at 73. See also *Id.* at 75 ("The problems associated with the absence of work are most severe **[*638]** for a jobless family in a low-employment neighborhood because they are more likely to be shared and therefore reinforced by other families in the neighborhood[.]").

c. Health Problems

Adverse health effects of life in inner-city neighborhoods were memorialized by the Kerner Commission. "The residents of the racial ghetto are significantly less healthy than most other Americans. They suffer from higher mortality rates, higher incidence of major diseases, and lower availability and utilization of medical services. They also experience higher admission rates to mental hospitals." *Kerner Report*, *supra*, at 269. This situation is reflected in the instant case among defendants suffering from asthma, depression, trauma, and deep psychological problems.

Racial disparities in health persist. "Infants born to black women are 1.5 to 3 times more likely to die than infants born to women of other races/ethnicities." Thomas R. Frieden, Director, Ctrs. for Disease Control & Prevention, *Foreword, Morbidity and Mortality Weekly Report: CDC Health Disparities **[**44]** and Inequalities Report*, Jan. 14, 2011, at 1, available at <http://www.cdc.gov/mmwr/pdf/other/su6001.pdf>. African Americans account for about 45 percent of people diagnosed with HIV in the United States. Ctrs. for Disease Control and Prevention, *HIV among African Americans 1* (2010), available at <http://www.cdc.gov/hiv/topics/aa/pdf/aa.pdf> (reporting 2006 data). Blacks also suffer higher rates of heart disease, stroke, high blood pressure, and preventable hospitalizations. Frieden, *supra*, at 1. The asthma rate among African American children is 60 percent higher than the rate for White children. Angela Zimm, *Children Sicker Now than in Past, Harvard Report Says*, Bloomberg, June 26, 2007, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a8jD2zv51pU>.

Difficulties of life in public housing are closely linked to psychological problems, including depression.

Public housing households are some of the poorest households in the United States, and the concentration of problems that many residents experience in addition to high levels of crime—poor nutrition, obesity, low social capital, illiteracy, racial segregation—have been linked to poor mental health, including high levels of depression **[**45]** and other mental illnesses[.]

Caterina G. Roman & Carly Knight, Urban Inst., *An Examination of the Social and Physical Environment of Public Housing in Two Chicago Developments in Transition 1* (2010), available at <http://www.urban.org/uploadedpdf/412134-chicago-public-housing.pdf>. See also *id.* at 22 ("[E]conomic stressors, which include threats of eviction, not being able to pay bills, or buy food for oneself, [are] associated with depression."). African Americans are more than four times more likely than Whites to be diagnosed as schizophrenic, apparently due in part to misdiagnosis of depression. Shankar Vedantam, *Racial Disparities Found in Pinpointing Mental Illness*, Wash. Post, June 28, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/27/AR2005062701496.html>.

d. Family Structure

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A high percentage of African Americans are raised in families headed by single females. "An almost [**46] equal number of black families are headed by a single female (44.7 percent) as a married couple (46.5 percent) compared with white families, 82 percent of which are headed by a married couple and only 13 percent by a single woman, or Hispanics, among whom the rates are 71 and 20 percent, respectively." Patterson, *supra*, at 402.

[*639] Much of the decline in family structure can be attributed to unemployment and under-employment. Studies have demonstrated a close correlation between the income of young African American men and their likelihood of being married. William Julius Wilson, *supra*, at 95. "As jobs become scarce for young black men, their success as breadwinners and traditional husbands declines. The notion is that with money comes control of the domestic situation." Anderson, *supra*, at 175. See also Kerner Report, *supra*, at 260 ("If men stay at home without working, their inadequacies constantly confront them and tensions arise between them and their wives and children. [M]any of these men flee from their responsibilities as husbands and fathers[.]"). Men whose joblessness and undereducation make them ill-suited as husbands and fathers are often viewed with mistrust and resentment [**47] by women. William Julius Wilson, *supra*, at 98-99.

In the absence of suitable, reliable men, women bear the onus of rearing children and supporting families financially. See Anderson, *supra*, at 58 (quoting a fatherless woman from a low-income neighborhood in Philadelphia) ("I see all of the weight shifted on the mother. And the mother really has to be strong if she wants her kids to do something in society. It really takes a lot to do it by yourself."). Cf. William Julius Wilson, *supra*, at 123-24 (discussing the tendency of some employers to view African American women as more dependable than their male counterparts).

The absence of fathers and the prevalence of single-female-headed families gravely impairs the ability of children, particularly boys, to internalize positive values as they mature. "Young men who lack . . . [an] effective father figure, both as a role model and as a viable presence in their lives, are often hard-pressed to organize their lives in accordance with his standards, standards handed down from generation to generation[.]" Anderson, *supra*, at 237. See also Michael C. Lu, et al., *Where is the F in MCH? Father Involvement in African American Families*, 20 *Ethnicity & Disease* S2-49, S2-49 (2010) ("[C]hildren growing up in father-absent families are at greater risk for various educational or behavioral problems and poorer developmental outcomes, even after controlling for parental education, income and other factors."); Kenneth W. Griffin, et al., *Parenting Practices as Predictors of Substance Use, Delinquency, and Aggression Among Urban Minority Youth: Moderating Effects of Family Structure and Gender*, 14 *Psych. of Addictive Beh.* 174, 174 (2000) ("[R]esearch has shown that youth from single-parent families often have higher rates of problem behaviors including substance use, aggression, school dropout, and teenage pregnancy.") (citations omitted).

e. Undereducation

African American children remaining in ghetto neighborhoods have demonstrated a marked lack of academic preparation relative to students of other racial groups. Boys lag behind Hispanic students and far behind White students in ways that cannot be explained satisfactorily by poverty alone. Trip Gabriel, *Proficiency of Black Students Is Found to Be Far Lower than Expected*, N.Y. Times, Nov. 9, 2010, at A22 (reporting results from a 2010 study by the Council of the Great City Schools). "Only [**49] 12 percent of black fourth-grade boys are proficient in reading, compared with 38 percent of white boys, and only 12 percent of black eighth-grade boys are proficient in math, compared with 44 percent of white boys." *Id.* It has been suggested that the undereducation of many African American [*640] males may result in part from parenting practices. *Id.*

Many African American students attend racially segregated schools. "A half-century after the Court's decision in Brown, approximately 40% of black and Latino students attended schools with 90-100% minority enrollment, and more than one-in-six black children attended schools made up of 99-100% minority students." Matthew Scutari, Note, *"The Great Equalizer": Making Sense of the Supreme Court's Equal Protection Jurisprudence in American Public Education and Beyond*, 97 *Geo. L.J.* 917, 920-21 (2009). Racial integration in schools rose through the 1970s but has fallen steadily since 1988. *Id.* at 921. In New York City, African American students are more likely than White students to attend poorer performing schools. See New York City Indep. Budget Ofc., *Demographics, Performance, Resources: Schools Proposed for Closing Compared with Other Schools* 5 [**50] (2011), available at <http://www.ibo.nyc.ny.us/iboreports/schoolclosingjan2011.pdf> (reporting that twenty-five underperforming New York City schools proposed for closing by the New York City Department of Education were 52 percent African American and 3 percent White, while the average city school was 31 percent African American and 14 percent White).

The failures of our school system are demonstrated by our high schools' unacceptably high dropout rates. In many areas with concentrated populations of low-income families from racial minorities, "up to half of all high school students drop out and up to half of these dropouts are simply idle, neither joining the work force nor seeking further education. Entire communities are thus being shut off from full participation in American society." Robert Balfanz, *Can the American High School Become an Avenue of Advancement for All?*, 19 *Future of Children* 17, 31 (2009).

Over the past three decades, high schools have shifted toward a universal college preparation curriculum intended to bolster the nation's sagging performance relative to other countries. Valerie E. Lee & Douglas D. Ready, *U.S. High School Curriculum: Three Phases of Contemporary [**51] Research and Reform*, 19 *Future of Children* 135, 142, 144-45 (2009); Balfanz, *supra*, at 25. The move to a college preparatory curriculum has coincided with a decrease in the prevalence of vocational and technical training programs to prepare high school students to enter the skilled trades. Balfanz, *supra*, at 26. Today, fewer than 3 percent of high school students attend vocational or technical schools, and the average student earns only 3.5 credits in vocational coursework. *Id.*

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A significant campaign to reform urban public schools continues. Numerous initiatives have been pursued: reliance on high-stakes testing to develop data with which to evaluate student progress, school performance, and teacher effectiveness; recruitment of young, highly educated people to become teachers and administrators; de-emphasis of tenure in favor of retention of teachers based on merit; reliance on mathematics and reading, often to the exclusion of science, social studies, physical education, art, and extracurricular activities; longer school days; promotion of parents' ability to choose schools for their children; creation of quasi-autonomous charter schools, managed and funded to varying degrees by corporations [**52] and non-profit organizations; contracting of public school teaching and administration to private companies; the closing of "failing" schools and dismissal of their administrators and faculty; and dividing large neighborhood high schools into small schools, [**641] often organized around a theme. See generally, e.g., Diane Ravitch, *The Death and Life of the Great American School System: How Testing and Choice are Undermining Education* (2010).

There is little evidence to date that these initiatives have worked significant salutary effects for children with histories like those of the instant defendants. See *id.* at 225-229; Robert J. Samuelson, *School Reform's Meager Results*, Wash. Post, Sept. 6, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/09/05/R2010090502817_pf.html ("[N]o one has yet discovered transformative changes in curriculum or pedagogy, especially for inner-city schools, that are . . . easily transferable to other schools, where they would predictably produce achievement gains."); Gabriel, *supra* (quoting Michael Casserly, Council of the Great City Schools) ("[T]here's not a lot of research to indicate that [strategies such as opening charter schools, closing [**53] underperforming schools, and attempting to boost teacher quality] produce better results.").

Some school reforms may be jeopardized by reductions in school spending to respond to increasing fiscal pressures. See Thomas Kaplan, *As Schools Face Cutbacks, a Debate Over What's Fair*, N.Y. Times, Feb. 14, 2011, <http://www.nytimes.com/2011/02/15/nyregion/15schools.html> (quoting Billy Easton, Alliance for Quality Educ.) ("The governor's budget hurts school kids across the board, because the cuts are enormous, and they are much larger in poor districts than rich districts[.]").

Much school reform is focused on developing advanced skills and increasing college matriculation and graduation rates. Andrew Hacker, *Where Will We Find the Jobs?*, N.Y. Rev. Books, Feb. 24, 2011, <http://www.nybooks.com/articles/archives/2011/feb/24/where-will-we-find-jobs/>; Lawrence Mishel, *The Overselling of Education*, Am. Prospect, Feb. 23, 2011, http://www.prospect.org/cs/articles?article=the_overselling_of_education. There is, however, little evidence that a broad increase in college education will foster economic growth or reduce unemployment or income inequality. Mishel, *supra* ("[T]he wages of all college [**54] graduates have been flat over the last 10 years, with those for men having markedly declined. . . . A major increase in the supply of college graduates would . . . drive down the wages of all college graduates[.]"); *id.* ("Wage gaps are primarily driven by increased inequalities among workers with similar educations . . . rather than by differences across education groups.").

Many social problems appear to be beyond the reach of educational reforms alone. Cf. Joie Tyrell, *Dividing by Three to Multiply Grads*, Newsday, Sept. 27, 2010, at A10 (quoting Prof. Alan Singer, Hofstra Univ.) ("[School administrators] keep looking for solutions within the schools because no one wants to address the underlying problem of racial isolation and segregation. . . . There are no miracle solutions. . . . Kids will do better in schools when their lives are better."). It appears that instead of pursuing reforms focused on preparing children for college, "[t]he key challenge is to provide good jobs[.]" Mishel, *supra*.

f. Social Values

In place of steady jobs and the values and satisfactions that those jobs inculcate, low-income African Americans in urban neighborhoods are left with an economic desperation [**55] that can lead to antisocial behavior. Anderson, *supra*, at 145. "[W]hen jobs disappear and people are left poor, highly concentrated, and hopeless, the way is paved for the underground economy to become . . . an unforgiving way of life organized around a code of [**642] violence and predatory activity." *Id.* at 325.

A high premium is placed upon self-defense and "respect." Children are conditioned by their families and friends, perhaps more so than in middle-class and wealthy settings, to assert themselves physically to prevent or avenge perceived insults or abuse. *Id.* at 70-71. Generated among many young people is a constant competition for status and physical dominance acted out on street corners and other gathering places. *Id.* at 76-79. Some young males, particularly those who are engaged in crime, present themselves as ready to confront and fight anyone. This may reflect a sort of fatalism, as those without hopes for a long-term, positive future adopt the view that they must accept whatever misfortune may befall them, even death; the outcome is out of their hands. *Id.* at 136. To such young people, momentary gratification is more reliable than future benefits.

Adverse factors in low-income, [**56] urban neighborhoods appear to affect boys and girls differently. "[A] boy is under constant pressure to demonstrate his masculinity in destructive ways (chief among them, joining a gang) and doesn't have a parent of the same sex around, as girls do." Lemann, *supra*, at 299.

g. Prevalence of Crime

For many boys, the cumulative result of poverty, racial segregation, antisocial ethics, and fatherlessness is often crime. "Their career 'choices' and their major life changes largely result from, and are coextensive with, their background and the disturbed family systems in which they were raised and/or currently reside. Persons who grew up in severely distressed households learned strategies that leave them ill-equipped for

conventional society." Bruce D. Johnson, et al., *Crack Distribution and Abuse in New York*, 11 Crime Prevention Stud. 19, 26 (2000). Accord Document: United States v. Bannister, 786 F. Supp. 2d 617 (2011) Actions Glenn C. Loury, *Crime, Inequality & Social Justice*, Daedalus, Summer 2010, at 136-37 ("The factors that lead young people to crime—the 'root causes'—have long been known: disorganized childhoods, inadequate educations, child abuse, limited employability, delinquent peers. These are factors that also have long been more prevalent among [**57] the poor than the middle classes[.]").

Lack of male parental guidance is a known, significant contributor to crime.

With the father absent and the mother working, many ghetto children spend the bulk of their times on the streets . . . of a crime-ridden, violence-prone and poverty-stricken world. The image of success in this world is not that of the "solid citizen," the responsible husband and father, but rather that of the "hustler" who promotes his own interests by exploiting others. The dope sellers . . . are the "successful" men because their earnings far outstrip those [of] men who try to climb the economic ladder in honest ways.

Young people in the ghetto are acutely conscious of a system which appears to offer rewards to those who illegally exploit others, and failure to those who struggle under traditional responsibilities. Under these circumstances, many adopt exploitation and the "hustle" as a way of life. . . .

Kerner Report, *supra*, at 262. Cf. Michelle Little & Laurence Steinberg, *Psychosocial Correlates of Adolescent Drug Dealing in the Inner City: Potential Roles of Opportunity, Conventional Commitments, and Maturity*, 43 J. Res. in Crime & Delinq. 357, 378 (2006) ("[A]dolescents [**58] who sold the most drugs were more likely to live in contexts characterized by high physical and social disorder, low parental monitoring, high rates of parental [**643] substance use and abuse, and high levels of peer deviance. These results highlight the converging influence of broader socioeconomic factors[.]").

The lure of reliable, easy income through the sale of drugs is particularly appealing to many young people living in poverty. Bruce D. Johnson, et al., *supra*, at 41. "For many impoverished young black men of the inner city, the opportunity for dealing drugs is literally just outside the door." Anderson, *supra*, at 114. See also Rozanne Marel, et al., *Drug use Trends in New York City*, in Nat'l Inst. on Drug Abuse, 2 *Epidemiological Trends in Drug Abuse: Proceedings of the Community Epidemiology Work Group* 180-82 (2006), available at http://drugabuse.gov/PDF/CEWG/Vol2_106.pdf (stating that the street sale of powder cocaine and crack occurs primarily in low-income African American and Hispanic communities, while in other areas drugs are distributed by delivery or from dealers' homes); Xiaoming Li, et al., *Exposure to Drug Trafficking Among Urban, Low-Income African American Children [**59] and Adolescents*, 153 Arch. Pediatrics & Adol. Med. 161, 161 (1999) (reporting estimate that 6 to 9 percent of nine- to fifteen-year-olds in low-income, urban settings are involved in the drug trade). Drug organizations often recruit from networks of trusted family and friends. Bruce D. Johnson, et al., *supra*, at 32. Young people may also align themselves with gangs in order to avoid ostracism and violence.

At the age of eight or nine, boys . . . will begin to receive the attentions of gang recruiters. They are asked to prove their fitness for gang membership by stealing, selling drugs, and . . . denouncing the authority of[] their mothers . . . all of which are signs of their having attained manhood; if they don't join, they are taunted, provoked, and sometimes beaten.

Lemann, *supra*, at 296 (describing gangs in a Chicago public housing development).

Young people are also lured to drug gangs by the dubious promise of economic gain. "[M]any young adults who would prefer to avoid drug sales find that such illicit distribution is the only economic activity available to them. Their participation . . . is typically a sporadic and intermittent way to earn some limited income." Bruce D. Johnson, et al., *supra*, at 41. [**60] The primary economic motivation appears to be the hope of attaining the financial rewards enjoyed by upper-level personnel in a drug hierarchy. Steven D. Levitt & Sudhir Alladi Venkatesh, *An Economic Analysis of a Drug-Selling Gang's Finances*, 115 Q.J. Econ. 755, 757 (2000). Many work as street-level sellers of drugs in retail quantities, serving a role roughly equivalent to that of a store clerk. Bruce D. Johnson, et al., *supra*, at 29. They work part-time for little compensation and often supplement their income by working in low-skilled jobs for legitimate businesses. Levitt & Venkatesh, *supra*, at 771 (stating that rank-and-file members in a Chicago drug gang earned below the minimum wage). In part, this is due to the "minimal skill requirements of the job [of drug dealer] and the presence of a 'reserve army' of potential replacements[.]" *Id.* at 771. Unable to afford separate residences, rank-and-file members often live with family members. *Id.*

The career of a drug dealer is often short. Dealers often cycle in and out of the drug trade and the legitimate job market. John M. Hagedorn, *Homeboys, Dope Fiends, Legits, and New Jacks*, 32 Criminology 197, 205 (1994). For those who do not [**61] ascend in a gang's hierarchy, there may be little motivation to remain. See Levitt & Venkatesh, *supra*, at 757. Drug [**644] dealers face a high risk of injury or murder, particularly when rival gangs battle for control of the drug market. *Id.* at 784 (observing that the members of a studied gang who were active in the gang continuously over a four-year period had about a 25 percent chance of death). Because of the lack of legally enforceable contracts or property rights in the trade, violence is often a drug organization's only recourse to settling disputes. *Id.* at 780.

4. Victims of Crime

The costs of the crimes engaged in by young people in impoverished communities are borne primarily by their neighbors. "[B]lacks are disproportionately victims of crime. . . . Most crime is neighborhood crime; blacks trapped in ghettos are the most vulnerable people in society. Two blacks are likely to fall victim to robbery, vehicle theft, or aggravated assault for every white; the black homicide rate is more than six times as great as the white rate, and has been so for over fifty years." Friedman, *Crime, supra*, at 379. See also Kerner Report, *supra*, at 267

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("Because most middle-class Americans live in neighborhoods [**62] [with low crime rates], they have little comprehension of the sense of insecurity that characterizes the ghetto resident."); *id.* at 268 (stating that law-abiding residents of ghetto neighborhoods "face much higher probabilities of being victimized than residents of most higher-income areas, including almost all suburbs[.]").

A 2010 study revealed close racial parity between murder victims and murder suspects in New York City. Victims were 67 percent African American, 25 percent Hispanic, 4 percent White, and 3 percent Asian; suspects were 62 percent African American, 31 percent Hispanic, 4 percent White, and 4 percent Asian. Edgar Sandoval, et al., *Drugs & Guns Are Killing New York*, N.Y. Daily News, Dec. 2, 2010, at 12. See also Clyde Haberman, *In the Bronx, Looking in the Mirror for Blame, and Solutions, on Gun Violence*, N.Y. Times, Sept. 28, 2010, at A25 ("[I]n [a Bronx neighborhood,] as elsewhere in the city, no one is a greater threat to life and limb for young black and Hispanic men than other young black and Hispanic men.").

Guns are carried for protection as well as aggression, leading to fatalities when a transient conflict flares suddenly into gunfire. The combination of young [**63] men and readily available guns is deadly. "Teenagers with guns, especially rapid-fire assault weapons, increase the danger in these neighborhoods. Adolescents are generally less likely to exercise restraint than mature adults are. Armed with deadly weapons, youngsters are tempted to solve temporary problems in a very permanent fashion." William Julius Wilson, *supra*, at 60-61. See also *id.* at 61 ("The sharp growth in the number of teenage male homicide victims is directly related to the sudden rise in the number of young male killers.").

Guns and drug violence contribute to a climate of terror.

[R]espondents [to a survey of ghetto residents in Chicago] revealed that the increase in drug trafficking heightened feelings that their neighborhoods had become more dangerous. As a consequence, many residents retreated to the safety of their homes. "More people are dying and being killed," reported one respondent. "There are many drugs sold here every day. It's unsafe and you can't even go out of your house because of being afraid of being shot." Another stated, "I stay home a lot. Streets are dangerous. Killings are terrible. Drugs make people crazy." Similar sentiments were voiced by other [**64] residents who felt trapped. One put it this way: [**645] "It's scary to see these people. I'm afraid to go outside."

William Julius Wilson, *supra*, at 59-60. See also, e.g., *Kerner Report*, *supra*, at 14 ("Crime rates, consistently higher than in other areas, create a pronounced sense of insecurity."); Fernanda Santos, *At Sharpton's King Day Forum, a Focus on Gun Violence*, N.Y. Times, Jan. 18, 2011 (quoting Rev. Al Sharpton) ("Our grandmothers are afraid to go to the corner store. . . . [T]hat's real life."). The fear of crime and the culture of violence surrounding it drive some residents, even those who are not involved in crime, to rely on firearms to protect themselves, to settle disputes, or to gain respect from peers. William Julius Wilson, *supra*, at 61.

As a result of the prevalence of crime, residents in impoverished African American neighborhoods often view police with skepticism, criticizing them for failing to provide sufficient protection. Friedman, *Crime*, *supra*, at 379. African Americans and Hispanics are disproportionately stopped and frisked by police, frequently with no apparent legal basis. Al Baker & Ray Rivera, *Study Finds Street Stops Unjustified*, N.Y. Times, Oct. 26, 2010, [**65] <http://www.nytimes.com/2010/10/27/nyregion/27frisk.html> (reporting that 6.7 percent of discretionary stops made by New York City police in 2009 had no constitutional basis, while 24 percent lacked any record from which constitutionality could be determined). See also Al Baker, *Street Stops by the Police Hit a New High*, N.Y. Times, Feb. 22, 2011, <http://www.nytimes.com/2011/02/23/nyregion/23stop.html> (reporting that 600,601 stops were made by New York City police in 2010, more than in any year since such stops were first counted in 2002). In 2009, guns were discovered in 0.15 percent of all such stops, and 13 percent of stops resulted in arrests. Baker & Rivera, *supra*.

D. Anti-Drug Abuse Act of 1986

HN1 The Anti-Drug Abuse Act of 1986 ("1986 Act"), by which the penalties bearing on this case were enacted, was passed during an election-year push to respond to what was perceived as a dangerous spread of drugs, particularly crack cocaine. Sentencing provisions concerning crack cocaine have been repeatedly challenged in court on racial disparity grounds and upheld. Amelioration in 2010 by congressional amendment was limited. This punitive scheme is one manifestation of an ongoing pattern of racial [**66] disparity in the enactment and enforcement of drug laws continuing to the present.

1. Historical Drug Sentencing Laws

The 1986 Act follows a long tradition of antidrug laws enacted, at least in part, with discriminatory design. Throughout the twentieth century, drugs have been linked to the racial fears of White Americans. "[Whites in the American] South feared that Negro cocaine users might become oblivious of their prescribed bounds and attack White society." David Musto, *The American Disease: Origins of Narcotic Control* 7 (1973). Accord James A. Inciardi, *The War on Drugs II: The Continuing Epic of Heroin, Cocaine, Crack, Crime, AIDS, and Public Policy* 82, 148 (1992).

If cocaine was a spur to violence against whites in the South, as was generally believed by whites, then reaction against its users made sense. The fear of the cocainized black coincided with the peak of lynchings, legal segregation, and voting laws all designed to remove political and social power from him. . . . [E]vidence does not suggest that cocaine caused a crime wave [in the early 1900s] but rather that anticipation of black rebellion inspired white alarm. Anecdotes often told of superhuman strength, cunning,

Document: [\[**67\]](#), [\[**646\]](#) and efficiency resulting from cocaine. One of the most terrifying beliefs about cocaine was that it improved pistol marksmanship. . . . These fantasies characterized white fear, not the reality of cocaine's effects, and gave one more reason for the repression of blacks.

Musto, *supra*, at 7. Cf. Tom Feiling, *Cocaine: How the White Trade Took over the World* 29 (2009) (quoting Harry J. Anslinger, first head of the United States Bureau of Narcotics) ("[R]eefers makes darkies think they're as good as white men.").

The extent of cocaine use by African Americans was over-reported in the early twentieth century. Musto, *supra*, at 7. Forgotten today is its popularity in the late nineteenth century as an over-the-counter tonic, addiction cure, hay fever remedy, and soft drink ingredient for the middle and upper classes. *Id.* at 7; Iniciardi, *supra*, at 6-7. See also *id.* (describing the use and promotion of cocaine by Sigmund Freud and Pope Leo XIII.); Musto, *supra* at 7 (discussing the drug's endorsement by William Hammond, former surgeon general of the United States Army).

Racially motivated prohibition of cocaine a century ago was but one of a series of drug prohibitions in American history prompted [\[**68\]](#) in part by fears of and distaste for distinct ethnic or racial minority groups. "Fear that smoking opium facilitated sexual contact between Chinese and white Americans was also a factor in its total prohibition. Chicanos in the Southwest were believed to be incited to violence by smoking marihuana. . . . Alcohol was associated with immigrants crowding into large and corrupt cities." Musto, *supra*, at 244-45.

2. Congressional Awareness of Racial Disparity

It should have been anticipated that most of those sentenced under the crack laws would be low-income African Americans. Materials inserted in the congressional record stated that "[m]ost of the dealers [of crack] . . . are black or Hispanic." 132 Cong. Rec. S00000-22 (daily ed. June 17, 1986) (statement of Sen. Lawton Chiles) (quoting Paul Blythe, *Buying Rocks' Easy*, Palm Beach Post & Evening Times). See also *id.* ("Haitians also comprise a large number of those selling cocaine rocks, authorities said Whites rarely sell the cocaine rocks."); *Id.* ("Less than a block from where unsuspecting white retirees play tennis, bands of young black men push their rocks on passing motorists, interested or not."); 132 Cong. Rec. S00000-22 (daily ed. June [\[**69\]](#) 17, 1986) (statement of Sen. Lawton Chiles) (quoting Paul Blythe, *It's Cheap, It's Available and It's Ravaging Society*, Palm Beach Post & Evening Times) ("Even though sellers usually set up shop in primarily black neighborhoods, their customers tend to be white."); 132 Cong. Rec. S00000-22 (daily ed. June 17, 1986) (statement of Sen. Lawton Chiles) (quoting Paul Blythe, *It Takes All Types*, Palm Beach Post & Evening Times) ("Although police said most dealers are black, cocaine rocks are sold in all types of neighborhoods by all types of people."); 132 Cong. Rec. S7123-01 (daily ed. June 9, 1986) (statement of Sen. Paula Hawkins) (quoting Tom Morganthau, et al., *Crack and Crime*, Newsweek, June 16, 1986, at 16) (discussing crack house dealers "recruited from poor Haitian and American black kids in New York"); *id.* (quoting Peter McKillop, *An Inferno of Craving, Dealing and Despair*, Newsweek, June 16, 1986, at 18) (describing a "big-shouldered Trinidadian" selling crack).

3. Procedural Irregularities in Legislative History

The Anti-Drug Abuse Act of 1986 was enacted with unusual haste. It was passed without many of the formalities that normally [\[**647\]](#) accompany important legislation, such as subcommittee [\[**70\]](#) hearings, markups of bills, and amendments passed at the committee level. Testimony of Eric E. Sterling, President, Crim. Justice Pol'y Found., Before U.S. Sent'g Comm'n on Proposed Guideline Amendments for Public Comment 2 (Mar. 22, 1993) ("Sterling Testimony").

The 1986 Act was expedited through Congress. As a result, its passage left behind a limited legislative record. While many individual members delivered floor statements about the Act, no committee produced a report analyzing the Act's key provisions. . . .

Apparently because of the heightened concern [arising from media coverage of crack], Congress dispensed with much of the typical deliberative legislative process, including committee hearings.

Of particular relevance to this report, the legislative history does not include any discussion of the 100-to-1 powder cocaine/crack cocaine quantity ratio *per se*.

U.S. Sent'g Comm'n, *Special Report to Congress—Cocaine and Federal Sentencing Policy* 117 (1995), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/199502_RtC_Cocaine_Sentencing_Policy/ ("1995 U.S.S.C. Report"). Drug quantities triggering mandatory minimum sentences [\[**71\]](#) were determined based on anecdotal evidence, not statistical data. Sterling Testimony at 2-3. There was little input into the process from administrative agencies with relative expertise or from the public. *Id.*

4. Departures from Established Penal Policy

The newly adopted mandatory minimum sentences for crack cocaine represented a significant departure from explicitly established policy. [Document: United States v. Bannister, 786 F. Supp. 2d 617](#) [Actions](#) Statements by lawmakers indicated that Congress intended that five-year mandatory minimums be targeted at "middle-level dealers," while ten-year sentences be given to "kingpins" and "masterminds." *E.g.*, 132 Cong. Rec. S. 13741-01 (Sept. 30, 1986) (statement of Sen. Biden).

By setting the quantity thresholds for crack at five and ten grams, however, the legislation imposed unusually harsh punishment on low-level street dealers. "Five grams of crack cocaine is indicative of a retail or street-level dealer rather than a mid-level dealer." U.S. Sent'g Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 8 (1997) ("1997 U.S.S.C. Report") at 5. Because the quantity thresholds were set so low, "[f]ully two-thirds of the Federal crack offenders are street-level dealers compared to 29% of the [\[**72\]](#) powder cocaine offenders." Testimony of Alfred Blumstein, Nat'l Consortium on Violence Res., Before the United States Sentencing Comm'n 5 (Nov. 14, 2006) at 5.

A resulting incongruity was that the mandatory minimum sentences for low-level crack dealers, who manufactured or sold the drug at "the lowest levels of the drug distribution system," were often harsher than sentences for the higher-level dealers of powder cocaine, the drug from which crack is made. United States Sentencing Comm'n, *Fifteen Years of Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 132 (2004) ("2004 U.S.S.C. Report"). *See also id.* ("High penalties for relatively small amounts of crack cocaine appear to be misdirecting federal law enforcement resources away from serious traffickers and kingpins toward street-level retail dealers[.]"). The anomaly has distorted drug sentencing. "This disparity means that a [\[**648\]](#) major supplier of powder cocaine may receive a shorter sentence than a low-level dealer who buys powder from the supplier but then converts it to crack." [Kimbrough v. United States, 552 U.S. 85, 95, 128 S. Ct. 558, 169 L. Ed. 2d 481 \(2007\)](#) (citing 1995 U.S.S.C. Report 193-94).

5. [\[**73\]](#) Racially Disparate Impact

Overwhelming data, analyses, and judicial findings support the conclusion of a disparate racial impact in the mandatory minimum sentences for crack cocaine. Although the disparity has somewhat narrowed in the past two decades, it remains stark. In 2009, federal crack offenders were 79 percent African American, 10 percent White, and 10 percent Hispanic. *See* Table A below.

Table A: Race of Those Sentenced for Federal Crack Offenses

	1992	2000	2006	2009
White	3.2%	5.6%	8.8%	9.8%
African American	91.4%	84.7%	81.8%	79.0%
Hispanic	5.3%	9.0%	8.4%	10.3%

* U.S. Sent'g Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy*, 16 (2007); U.S. Sent'g Comm'n, *Overview of Federal Criminal Cases: Fiscal Year 2009* 6 (2010) ("2009 Fiscal Year Report").

Racial disparities exist for powder cocaine offenses as well, but they are less striking. Federal powder offenders were 28 percent African American, 17 percent White, and 53 percent Hispanic. *See* Table B below.

Table B: Race of Those Sentenced for Federal Powder Cocaine Offenses

	1992	2000	2006	2009
White	32.3%	17.8%	14.3%	17.1%
African American	27.2%	30.5%	27.0%	28.0%
Hispanic	39.8%	50.8%	57.5%	53.2%

* *Id.*

The racial disparity in sentencing bears no apparent relationship [\[**74\]](#) to the race of the consumers whose demand for drugs drives their distribution.

While 65% of the persons who have used crack are white, in 1993 they represented only 4% of the federal offenders convicted of trafficking in crack. Eighty-eight percent of such defendants were black. During the first 18 months of [Federal Sentencing Guidelines] implementation, the sentencing disparity between black and white defendants grew from pre-guideline levels: Blacks on average received sentences over 40% longer than whites. . . . The Sentencing Commission acknowledges that the heightened crack penalties are a "primary cause of the growing disparity between sentences for Black and White federal defendants."

[United States v. Armstrong, 517 U.S. 456, 479-80, 116 S. Ct. 1480, 134 L. Ed. 2d 687 \(1996\)](#) (Stevens, J., dissenting) (citations omitted). *See also* 1997 U.S.S.C. Report, *supra*, at 8. ("[N]early 90 percent of the offenders convicted in federal court for crack cocaine distribution are African-American while the majority of crack cocaine users is white.")

Invidious racial disparity in crack cocaine sentences has made a substantial contribution to the racial disparity in incarceration generally. "This Document: [United States v. Bannister](#), 786 F. Supp. 2d 617. [Actions](#) This one sentencing rule contributes more [\[**75\]](#) to the differences in average sentencing between African-Americans and White offenders than any possible effect of discrimination." 2005 U.S.S.C. Report 132. See also Douglas C. McDonald & Kenneth E. Carlson, *Why Did Racial/Ethnic Sentencing Differences in Federal District Courts Grow Larger under the Guidelines?*, 6 Fed. Sent'g Rep. 223, 225 (1994) (stating that the crack sentencing ratio is the primary reason that African [\[**649\]](#) American offenders' average prison sentences are longer than those of White offenders).

Based upon their experience and the statistics, courts have observed "[t]he overwhelmingly disparate impact that crack cocaine sentences have had on young black men in America." [United States v. Wideman](#), No. 05-10357, 187 Fed. Appx. 758, 760 (9th Cir. 2006). See also [United States v. Moore](#), 54 F.3d 92, 97 (2d. Cir. 1995) ("The statistical evidence regarding discriminatory impact is, indeed, irresistible: approximately 88% of defendants charged with crack cocaine-related crimes are Black (the percentage is even higher in some urban areas).").

There appears to be a disparate racial impact on those sentenced for heroin offenses as well, although it is less dramatic than that for crack [\[**76\]](#) cocaine. In 2009, 28 percent of those convicted for federal heroin offenses were African American; 17 percent were White. 2009 Fiscal Year Report at 6 (2009). In per capita terms, considering the universe of total national population, African Americans are about ten times more likely to be convicted of a federal heroin offense than Whites. See U.S. Census Bureau, *State and County Quick Facts*, <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Mar. 20, 2011) (reporting that in 2009, Whites were 79.6 percent of the United States population and African Americans 12.9 percent).

E. Incarceration Policy

1. Mass Incarceration

By any meaningful measurement, the prison population of the United States is extraordinarily high, an "incarceration explosion . . . unmatched by any other society in any historical era." Am. L. Inst., Model Penal Code: Sentencing xx (Tentative Draft No. 2, 2011) (not yet adopted). The American prison population has more than quadrupled in the past three decades, growing from 500,000 in 1980 to 2.3 million in 2010. Steven Hawkins, *Education vs. Incarceration*, Am. Prospect, Jan.-Feb. 2011, at A18. "In 2008, the United States reached a new milestone: it incarcerated [\[**77\]](#) more than 1 percent of its adult population[.]" Bernard E. Harcourt, *The Illusion of Free Markets: Punishment and the Myth of Natural Order* 198 (2011) ("*Illusion*").

Much of the swiftest growth has occurred in the federal system. "Between 2001 and 2008, the federal prison population swelled by 56,000, accounting for more than a quarter of new inmates nationwide. In 2002, for the first time in American history, the federal government was locking up more people than any single state[.]" Robert Perkinson, *Texas Tough: The Rise of America's Prison Empire* 349 (Picador 2010) (2009). See also Hon. William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reforms in the Midst of Inter-Branch Power Struggles* 3 (forthcoming 2011 from J.L. & Pol'y), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1773045 (stating that the federal prison population increased 76 percent between 1999 and 2010 resulting in a 37 percent overcapacity). In state prisons, the number of annual prison admissions increased 18 percent between 2000 and 2008. Linh Vuong, et al., *The Extravagance of Imprisonment Revisited*, *Judicature*, Sept.-Oct. [\[**78\]](#) 2010, at 71.

From 1925 to 1973, about 110 people were incarcerated in the United States for every 100,000 members of the population. Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* 21 (2003). The rate increased dramatically beginning in the 1970s, as lawmakers and courts responded to high crime rates and [\[**650\]](#) the seeming failure of rehabilitative measures by relying on lengthy sentencing as the primary tool to deter crime and incapacitate criminals. *Id.*; Perkinson, *supra*, at 331-39; James Austin, et al., JFA Inst., *Unlocking America: Why and How to Reduce America's Prison Population* 4 (2007). "From 1980 to 2008, the U.S. incarceration rate climbed from 221 to 762 per 100,000. In the previous five decades . . . [it] had been stable at around 100 per 100,000." Bruce Western & Becky Pettit, *Incarceration and Social Inequality*, Daedalus, Sommer 2010, at 9. See also Perkinson, *supra*, at 6 ("Between 1965 and 2000, the U.S. prison population swelled by 600 percent[.]").

The high United States incarceration rate is unparalleled internationally. Our national prison population of 1.6 million people is the world's largest—larger even than that of China, an authoritarian nation with [\[**79\]](#) three times our population. See James Austin, *supra*, at 3. The national rate of incarceration, 737 per 100,000 persons, exceeds that of Russia, which imprisons 581 per 100,000. *Id.* This rate is far higher than those of peer nations with democratic, market-based economies. Such countries incarcerate between 63 and 196 people per 100,000, Nicola Lacey, *American Imprisonment in Comparative Perspective*, Daedalus, Summer 2010, at 103, a rate comparable to that of the United States for much of the twentieth century. Among our peer nations, the second-highest rate is found in New Zealand, which incarcerates 196 per 100,000 people. *Id.*

The increased prison population is due in large part to longer sentences.

For the same crimes, American prisoners receive sentences twice as long as English prisoners, three times as long as Canadian prisoners, four times as long as Dutch prisoners, five to 10 times as long as French prisoners, and five times as long as Swedish prisoners. Yet these countries' rates of violent crime are lower than ours, and their rates of property crime are comparable.

James Austin, *supra*, at 4. See also *id.* at 3 (stating that between 1990 and 1997, the prison population increased [\[**80\]](#) 60 percent even though admissions increased by only 17 percent).

Since 1991, the number of criminal statutes which have mandatory minimum sentences has increased by more than 78%. There are now over 170 provisions which bear mandatory minimum sentences. Twenty-eight percent of the federal criminal cases subject to the sentencing guidelines in 2009 involved statutes that carried mandatory minimums. That figure increases to 40% of the docket if immigration cases are excluded.

Sessions, *supra*, at 39. Cf. Harcourt, *Illusion, supra*, at 198 ("In 2009, one of every eleven state and federal prisoners was serving a sentence of life imprisonment[.]").

Mandatory minimum sentencing deviated from the common law tradition of granting courts discretion to sentence criminals based on the varying circumstances of their backgrounds and offenses. See [United States v. Polouizzi, 687 F. Supp. 2d 133, 167-86 \(ENDY 2010\)](#) (discussing wide sentencing discretion afforded to judges and juries at the founding of the Republic). Mandatory minimum sentences have been sharply criticized since at least the 1960s. Am. L. Inst., Model Penal Code: Sentencing [\[**81\]](#) § 6.06 rep. note d, at 31-32 (Tentative Draft No. 2, 2011) (not yet adopted) (collecting sources critical of mandatory minimum sentencing); **[*651]** *id.* § 6.06 cmt. a, at 19 ("[T] here is no current mechanism in American law more misconceived than mandatory minimum penalty laws.").

Our emphasis on lengthy sentences began, in part, as a response to the high crime rates of the 1960s and 1970s, when the rehabilitation of criminals and attempt to address the root causes of crime were increasingly seen as futile endeavors. See, e.g., James Q. Wilson, *Lock 'Em Up: And Other Thoughts on Crime*, N.Y. Times Mag., Mar. 9, 1975, at 11 ("Considering that our society is in the grip of a decade-old crime wave . . . , it is strange that we should persist in the view that we can find and alleviate the 'causes' of crime, that serious criminals can be rehabilitated, . . . and that prosecutors and judges have the wisdom to tailor sentences to fit the 'needs' of the individual offender."); *id.* at 46 ("Wicked people exist. Nothing avails but to set them apart from innocent people.").

While the movement to mass incarceration was prompted largely by concerns with violent crime, much of its focus is on nonviolent activities, [\[**82\]](#) particularly drug offenses. In 2008 and 2009, only about 8 percent of federal prisoners were serving time for violent crimes. See Heather C. West, et al., Bureau of Justice Stat., U.S. Dep't of Justice, *Prisoners in 2009* 33 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf>. Over half were incarcerated for drug offenses. *Id.*

Convictions for drug offenses are the single most important cause of the explosion in incarceration rates in the United States. Drug offenses alone account for two-thirds of the rise in the federal inmate population and more than half of the rise in state prisoners between 1985 and 2000. Approximately a half-million people are in prison or jail for a drug offense today, compared to an estimated 41,400 in 1980—an increase of 1,100 percent.

Alexander, *supra*, at 59. See also Perkinson, *supra*, at 335 (stating that between 1982 and 1988, the number of federal drug prosecutions increased 99 percent, while nondrug prosecutions increased only 4 percent).

Today's high incarceration rate bears little relationship to the prevalence of crime. "[T]he crime decline of the 1990s did coincide with a large increase in the prison population. But the large crime increase [\[**83\]](#) during the preceding period coincided with an even bigger jump in imprisonment, and incarceration rates continued to climb after 2000 even though crime rates were relatively static[.]" Cook & Ludwig, *supra*, at 64 (emphasis in original).

2. Racial Disparity

Excessive incarceration has disproportionately affected African Americans. "Today, a generation after the triumphs of the civil rights movement, African Americans are incarcerated at seven times the rate of whites, nearly double the disparity measured before desegregation." Perkinson, *supra*, at 3. Racial disparities in investigation, prosecution, and sentencing have long existed in the United States.

[T]hroughout the twentieth century, both before and after developments in civil rights, blacks have been arrested, convicted, and jailed entirely out of proportion to their share of the population. Southern chain gangs . . . were, to all intents and purposes, gangs of black semislaves. [B]lacks still constitute far more than their share of the prison population; they have done so for decades. Since 1933, the federal government's *Uniform Crime Reports* have kept track each year of the race of men and women arrested for serious crime. Blacks [\[**84\]](#) were arrested at a higher rate than whites even at the start; in 1940, 17 blacks per 1,000 were arrested, and only 6 whites. **[*652]** Arrest rates for both races have skyrocketed since 1933, but the gap remains, and it gets if anything wider. The figures for blacks are, indeed, staggering. . . . In 1978, 35 whites out of every 1,000 were arrested, and almost 100 out of every 1,000 blacks—nearly one out of ten.

Friedman, *Crime, supra*, at 377-78. See also Thorsten Sellin, *The Negro Criminal: A Statistical Note*, 140 Ann. Am. Acad. Pol. & Soc. Sci. 52, 59 (1928) ("The Negro is not only convicted more frequently than whites, but he seems to receive the heavier sentences").

Race-based differences in incarceration continue today.

Other than sheer scale, [the] most salient feature [of prisons in the United States] is the heavy racial and ethnic imbalances among those incarcerated. Roughly 60 percent of the nations' prisoners are either African American or Hispanic. The current black-male imprisonment rate stands at nearly 7 times the rate for whites, while the Latino rate is 2.5 times the white rate.

Document: Today, 1 of every 100 adults is held in prison on any given day, including 1 of every 15 black males between [\[**85\]](#) the ages of 20 and 50. The U.S. Justice Department estimated that the lifetime likelihood of serving a state or federal prison term for a white male born in 2001 was 6.6 percent, while for a black male child it was a staggering 32.2 percent.

Am. L. Inst., Model Penal Code: Sentencing xx-xxi (Tentative Draft No. 2, 2011) (not yet adopted). See also Patterson, *supra*, at 398-99 (stating that in 2005, 25 percent of the United States prison population was African American men between the ages of twenty and thirty-nine); Western & Pettit, *supra*, at 11 (reporting a 68 percent risk of imprisonment for African American male high school dropouts born from 1975 to 1979, versus 28 percent for Whites of the same demographic). If African Americans and Latinos were sentenced at the same frequency at which Whites are sentenced, the American prison population would be cut in half. See James Austin, *supra*, at 8. African American men with little schooling are more likely to be incarcerated than employed. Western & Pettit, *supra*, at 12. "The main sources of upward mobility for African American men—namely, military service and a college degree—are significantly less common than a prison record." *Id.* at 11.

Racial [\[**86\]](#) disparity in incarceration is particularly stark with regard to drug crimes. Between 1983 and 1987, African Americans and Whites were incarcerated for such offenses in roughly equal numbers. Petersilia, *supra*, at 29. Between 1983 and 1998, the population of African Americans imprisoned for drug offenses increased twenty-six times, compared to an eighteenfold increase for Hispanics and a sevenfold increase for Whites. *Id.* at 28 (citing Michael Tonry, *Malign Neglect: Race, Crime, and Punishment in America* (1995)). African Americans comprised only 11 to 12 percent of the United States population during this period. *Id.* at 28.

Among those convicted of drug offenses, racial disparities exist in both the likelihood of imprisonment and the length of imprisonment. 2004 U.S.S.C. Report 122 ("The odds of a typical Black drug offender being sentenced to imprisonment are about 20 percent higher than the odds of a typical White offender, while the odds of a Hispanic drug offender are about 40 percent higher."); *id.* at 123 ("The typical Black drug trafficker receives a sentence about ten percent longer than a similar White drug trafficker. This translates into a sentence about seven months longer."). [\[**87\]](#) *Cf. id.* at 129 (African Americans [\[*653\]](#) are less likely than defendants of other races to receive downward departures under the sentencing guidelines).

The disproportionate imprisonment of African Americans far exceeds other statistics related to poverty. "[A]t roughly seven to one, the black-white ratio of male incarceration rates dwarfs the two to one ratio of unemployment rates, the three to one nonmarital child-bearing ratio, the two to one black-white ratio of infant mortality rates, and the one to five ratio of net worth." Loury, *supra*, at 137.

It has been persuasively argued that the enactment of harsh sentencing schemes has been motivated in part by racial animus.

Empirical research has established that support for highly punitive policies correlates with the tendency to think that Blacks have inherently criminal tendencies. The pattern is consistent at the state level: The size of a state's Black population is a stronger prediction of the prison population and its propensity to adopt the death penalty than its rate of violent crime.

Doris Marie Provine, *Unequal under the Law: Race in the War on Drugs* 102 (2007) (citations omitted).

3. Consequences

a. Inmates, Families, and Communities

Incarceration [\[**88\]](#) affects the lives not only of prisoners but of those around them. Families of prisoners face higher rates of divorce, separation, domestic violence, and developmental and behavioral problems among children than the families of non-prisoners. Western & Pettit, *supra*, at 15. Prisoners' children may experience numerous consequences of incarceration, including loss of contact with the incarcerated parent, strained relationships with caregivers, a diminished sense of stability and safety, economic insecurity, social stigma, shame, increased risk of drug involvement, and susceptibility to adverse peer pressure and risky behavior. See generally Patricia Allard & Judith Greene, Justice Strategies, *Children on the Outside: Voicing the Pain and Human Costs of Parental Incarceration* (2011), available at <http://www.justicestrategies.org/sites/default/files/publications/JS-COIP-1-13-11.pdf>. These children are at "greater risk of diminished life chances and criminal involvement, and at a greater risk of incarceration as a result." Western & Pettit, *supra*, at 16.

As with incarceration itself, these adverse effects are multiplied when racial disparity is taken into account. In 2008, 11 percent of [\[**89\]](#) African American children had lived with a parent being locked up, compared to 1.75 percent of White children. *Id.* at 16. High incarceration affects communities as well. Disadvantaged communities are more likely to send more persons to prison, increasing their likelihood of becoming even more troubled in the future. See Robert J. Sampson & Charles Loeffler, *Punishment's Place: The Local Concentration of Mass Incarceration*, Daedalus, Summer 2010, at 20. "[T]he combination of poverty, unemployment, family disruption, and racial isolation is bound up with high levels of incarceration even when adjusting for the rate of crime that a community experiences." *Id.* at 21.

b. Collateral

Beyond separating convicts from their families and the work force, incarceration imposes numerous collateral consequences. [HN2](#) "In every state and under federal law, there are hundreds of collateral consequences that apply automatically or on a discretionary basis, to people

convicted of crimes. Most of these apply for life, and can never be removed, or can be relieved only through virtually unavailable methods like a pardon from the President[.]” Gabriel Chin, *The Constitution in 2020 and the Secret Sentence: Rethinking Collateral Consequences*, Balkinization (Sept. 30, 2010), <http://balkin.blogspot.com/2010/09/constitution-in-2020-and-secret.html> (hyperlink omitted).

Consequences imposed by law include "ineligibility for federal welfare benefits, public housing, student loans, and employment opportunities, as well as various forms of civic exclusion, such as ineligibility for jury service and felon disenfranchisement." Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U.L. Rev. 457, 459 (2010). Felon disenfranchisement laws, which have their roots in attempts by Whites to suppress African American votes in the late nineteenth century, bar 13 percent of African American men from casting ballots. Erika Wood, Brennan Center, *Restoring the Right to Vote* 6-7 (2d ed. 2009), available at http://brennan.3cdn.net/5c8532e8134b233182_z5m6ibv1n.pdf. Ex-convicts' difficulties in finding work are discussed in detail below.

Other handicaps limit felons' ability to rehabilitate themselves in more tangible ways. Ineligibility for federal student loans may bar those convicted of drug offenses, even misdemeanors, from attending college or pursuing vocational training after release. See Pinard, *supra*, at 514. Drug offenders are ineligible in many states for receipt of federal welfare benefits. *Id.* at 494. Felons are ineligible for receipt of public housing assistance for five years after their release from prison, and private landlords routinely, and lawfully, discriminate against applicants based on criminal history. Alexander, *supra*, at 141-42.

The cumulative effect of such adverse consequences is to render an ex-convict a social pariah.

[I]t is legal to discriminate against ex-offenders in ways it was once legal to discriminate against African Americans. Once you're labeled a felon depending on the state you're in, the old forms of discrimination . . . are suddenly legal. As a criminal, you have scarcely more rights and arguably less respect than a black man living in Alabama at the height of Jim Crow."

Michelle Alexander, *The New Jim Crow: How Mass Incarceration Turns People of Color into Permanent Second-Class Citizens*, Am. Prospect (Jan.-Feb. 2011), at A19-20. Prior incarceration is a greater predictor of low upward mobility among low-income men than failure to complete high school or very low levels of cognitive ability. Western & Pettit, *supra*, at 14-15.

Beyond the direct and indirect consequences of imprisonment, the convict upon reentry must still face those problems that complicated his life before imprisonment but that remain unresolved: poverty; dysfunctional family relationships; addiction to drugs, alcohol, or gambling; and limited education and vocational skills.

c. Fiscal

Mass incarceration imposes serious costs upon the wider society. "As of 2006, the U.S. imprisoned over 1.6 million of its people at a cost of \$69 billion, an increase in cost of over six times during the prior quarter century." Vuong, *supra*, at 70. See also Western & Pettit, *supra*, at 18 (reporting the annual cost of imprisonment as \$70 billion); Perkinson, *supra*, at 343 ("[B]y 2000, states were spending nearly \$40 billion on corrections, one of every fourteen general revenue dollars."). The average cost of incarcerating an inmate for a year was \$22,650 in 2001, the latest year for which national data is available. [655] Vanessa Gregory, *Indefensible*, Am. Prospect (Jan.-Feb. 2011), at A11; Harcourt, *Illusion supra*, at 202. Cf. Carrie Johnson, *Budget Crunch Forces a New Approach to Prisons*, Nat'l Pub. Radio, Feb. 15, 2011, <http://www.npr.org/2011/02/15/133760412/budget-crunch-forces-a-new-approach-to-prisons> [93] (quoting Adam Gelb, Pew Ctr. on the States) ("It costs 23 times as much to have somebody behind the walls as it does in the community[.]"). Expenditures for corrections account for as much as 10 percent of state budgets. Harcourt, *Illusion, supra*, at 199. In Connecticut, Delaware, Michigan, Oregon, and Vermont, more state money is spent on corrections than on higher education. *Id.* (citing 2007 data).

Much of the cost of incarceration is due to the imprisonment of nonviolent offenders. If the number of such inmates were cut in half, taxpayers would be saved an estimated \$16.9 billion annually. Valerie Wright, Sentencing Project, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment* 8 (2010), available at <http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf>.

4. Alternatives

a. Generally

Concerns about strained state budgets and prison overcrowding have prompted lawmakers to reconsider lengthy incarceration as the preferred response to crime. Carrie Johnson, *supra*. Some reforms are designed to eliminate or shorten sentences, often by increasing judicial discretion. Between 2000 and 2002, more than two dozen states implemented sentencing reforms, "eliminating mandatory minimums, accelerating parole, or expanding [prison] alternatives like drug treatment." Perkinson, *supra*, at 344. But see Heather Gillers, *Daniels-Backed Prison Reform is Dealt a Blow by Prosecutors*, Indianapolis Star, Feb. 15, 2011, <http://www.indystar.com/fdcp/71299882692541> (reporting that legislation in Indiana designed to reduce incarceration due to budgetary pressures was amended at the pressure of state prosecutors to include a provision that would result in longer sentences). A provision that would eliminate all mandatory minimum sentences is included in a draft of the Model Penal Code. Am. L. Inst., Model Penal Code: Sentencing § 6.06(3) (Tentative Draft No. 2, 2011) (not yet adopted) ("The court is not required to impose a minimum term of imprisonment for any offense under this Code.").

In New York, a recent rescission of the vicious Rockefeller drug laws eliminated mandatory minimum prison sentences for first-time and many second-time nonviolent drug offenders and some drug-related property offenses, such as third-degree burglary. Noeleen G. Walder, *One-Year-Old Reform Saves 1,000 Drug Offenders from Prison, According to Preliminary Estimates*, N.Y.L.J. (Oct. 14, [**95] 2010), at 1. Courts may order drug treatment instead of imprisonment for many drug and property crime offenders, even over the objection of prosecutors. *Id.* Mandatory minimum sentences for certain felonies have been reduced from three years to two. Adrienne Austin, *supra*, at 12 (citing S. 56, 231st Legis. Sess. (N.Y. 2009)).

Numerous states have shortened or eliminated mandatory minimum sentences and allowed greater judicial discretion. Adrienne Austin, *supra*, at 12-13, 15-16 (citing H.B. 210, 142d Gen. Assemb. (Del. 2003) (decreasing mandatory minimum sentences for drug trafficking crimes and increasing the quantity threshold for crack-related offenses from five to ten grams); S.B. 1722, 110th Reg. Sess. (Fla. 2009) (requiring non-prison sentences for certain third-degree felons unless a risk of public endangerment is found); H.B. 1892, S.B. 358 112th Gen. Assemb., 1st Reg. [**656] Sess. (Ind. 2001) (eliminating mandatory minimums for certain nonviolent drug offenses, allowing judges to sentence offenders to home detention or work release, providing for drug treatment as an alternative to prison for some offenders, and exempting certain drug offenders from the state's "three strikes" scheme); [**96] H.B. 372, 2009 Reg. Sess. (Ky. 2009) (authorizing time served on parole to be credited toward a total sentence, except for violent offenders, registered sex offenders, or parole violators convicted of new felonies); H.B. 225, 35th Reg. Sess. (La. 2009) (expanding from two to four years the period that a felon may be sentenced to house arrest instead of incarceration); Mich. Pub. Acts 665, 666, 670 of 2002 (eliminating most mandatory minimum sentences for drug offenses and eliminating a separate sentencing scheme for drug offenders); S.F. 802, 1st Reg. Sess. of 86th Legis. Sess. (Minn. 2009) (authorizing courts to disregard mandatory minimum sentences for individuals convicted of fifth-degree drug felonies); A.B. 239, 75th Reg. Sess. (Nev. 2009) (limiting "habitual offender" status, which requires a five-year mandatory minimum sentence, to offenders with prior felony convictions); S.B. 1866, 86th Legis. Sess. (N.J. 2009) (authorizing courts to waive or reduce mandatory minimum sentences for drug offenses within 1,000 feet of a school); S.B. 39, Gen. Assemb. (R.I. 2009) (removing mandatory minimum sentences for two categories of drug offenses and reducing maximum sentences from fifty [**97] years to twenty years and from life to thirty years); S1154, 118th Sess. Gen. Assemb. (S. Car. 2010) (eliminating mandatory minimum sentences for simple drug possession and eliminating a powder/crack sentencing disparity); H.B. 2073, 85th Legis. Assemb. (S. Dak. 2010) (allowing courts to suspend any portion of a sentence); H.B. 2338, 57th Legis., Reg. Sess. (Wash. 2002) (expanding opportunities for drug offenders to receive treatment instead of imprisonment)).

Some states have enacted laws expanding opportunities for inmates, particularly nonviolent ones, to qualify for early release, often based on their successful completion of programs such as training or counseling. Adrienne Austin, *supra*, at 13-15 (citing S.B. 1476, 48th Legis., 2d Reg. Sess. (Ariz. 2008); H.B. 1351, 1st Reg. Sess., 67th Gen. Assemb. (Colo. 2009); S.B. 193, 150th Gen. Assemb., Reg. Sess. (Ga. 2009); S.B. 14, 2007 Sess. (Kan. 2007); S.B. 2136, 2008 Reg. Sess. (Miss. 2008); A.B. 510, Seventy-Fifth Reg. Sess. (Nev. 2007); H.B. 4, 2007 Sess. (Penn. 2008); S.B. 292, 2009-10 Reg. Sess. (Vt. 2009); A.B. 500, 99th Legis. (Wis. 2009); S.F. 32, 59th Legis. (Wyo. 2008)). *Cf.* Second Chance Act of 2007, [Pub. L. 110-199, § 231\(g\), 122 Stat. 657](#) [**98] (providing for a pilot program of home detention of certain elderly offenders who have completed ten years or 75 percent of their prison terms).

In general, reforms reducing the length of prison sentences are not expected to affect deterrence. Wright, *supra*, at 9.

b. Non-Incarceratory Sentencing

As prison sentences are reduced or eliminated, non-incarceratory methods of rehabilitation can be used and improved to minimize the risk of recidivism. Systems of probation, parole, and supervised release have proven to be effective when violations are met with swift, consistent, and predictable negative consequences. See Mark A.R. Kleiman, *Smarter Punishment, Less Crime*, Am. Prospect, Jan.-Feb. 2011, at A5 (discussing a probation enforcement program for drug offenders in Hawaii).

"Problem-solving" or "behavioral" courts may order nonviolent offenders to undergo drug and alcohol treatment, counseling, or [**657] other programs as an alternative to incarceration. In some circumstances, charges are dismissed when a convict has successfully complied with such a regimen. Sasha Abramsky, *May It Please the Court*, Am. Prospect (Jan.-Feb. 2011), at A14. Crucial to post-release programs is job training to equip [**99] ex-convicts for lawful work. See Adam Serwer, *Permanent Lockdown*, Am. Prospect (Jan.-Feb. 2011), at A16. Non-incarceratory methods have proven effective when used in a coordinated fashion.

By combining punishment and rigorous court monitoring with essential services like drug treatment, counseling, and job training, problem-solving courts have successfully reengineered how courts respond to societal dysfunction, especially low-level, nonviolent crime. These courts have a demonstrated record of reducing recidivism and forging better outcomes for offenders, victims, and communities.

Hon. Jonathan Lippman, Chief Judge Judith S. Kaye, *A Visionary Third Branch Leader*, 84 N.Y.U.L. Rev. 655, 658 (2009). *But see* Hon. Kevin S. Burke, *Just What Made Drug Courts Successful?*, 36 New Eng. J. on Crim. & Civ. Confinement 39, 51 (2010) (arguing that drug courts may coerce defendants, including victims of racial profiling, to accept guilty pleas); Nat'l Assn' of Crim. Defense Lawyers, *America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform* 22-24 (2009), available at <http://www1.spa.american.edu/justice/documents/2710.pdf> (criticizing problem-solving courts' tendency [**100] to direct resources to nonviolent, first-time offenders instead of higher-risk offenders).

Document: United States v. Bannister, 786 F. Supp. 2d 617, Actions

Technological advances promise useful innovations in non-incarceratory sentencing, either after or in lieu of a custodial sentence. Electronic monitoring of ex-convicts' movements helps keep convicts confined to their homes and other permissible locations and enables probation officers and police to locate them quickly when they stray—and to swiftly detect any crimes they may commit. See Graeme Wood, *Prison Without Walls*, Atlantic, Sept. 2010, at 88. Biological monitoring systems detect alcohol use and could be used to identify the abuse of other drugs or the presence of elevated tension. *Id.* at 96. Such tools promise the effective control of criminals at much lower cost and without subjecting them to the anti-rehabilitative aspects of prison life. *Id.* at 88, 96. Because would-be coconspirators may realize that associating with an electronically monitored convicted felon increases the likelihood of their own detection and capture, such tools may dissuade criminal conspiracies involving monitored ex-prisoners.

5. Effectiveness in Reducing Crime

a. Rehabilitation

The effectiveness of prisons as places [\[**101\]](#) for maximum rehabilitation is called into question by high rates of recidivism. "More than 40 percent of murders and robberies are committed by people on probation, parole, or pretrial release." Kleiman, *supra*, at A5. A 2002 study of 272,111 former state prisoners in fifteen states indicated high rates of recidivism within three years of release from prison: 68 percent were rearrested for new offenses, almost exclusively felonies and serious misdemeanors; 52 percent were returned to prison for new offenses or technical violations; 47 percent were convicted of new offenses; and 25 percent were resentenced to prison for new offenses. Patrick A. Langan & David J. Levin, Bureau of Justice Stat., Dep't of Justice, *Recidivism of Prisoners Released in 1994* 1 (2002), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf> (reporting results for prisoners released since 1994). Thirty percent of ex-convicts were **[*658]** arrested for a serious offense in the first six months after release. *Id.* at 3.

Demographic data correlate with higher risks of recidivism. In the 2002 study, men were more likely to be rearrested than women (68 percent versus 58 percent) and African Americans more than Whites [\[**102\]](#) (73 percent versus 63 percent). *Id.* at 7. The risk of recidivism is inversely correlated with age; prisoners released as teenagers were those most likely to be rearrested or reconvicted within three years, and those released at the age of forty-five or older were the least. *Id.* at 7. The highest rearrest rates were seen for those initially convicted of property offenses: 74 percent. *Id.* at 8. Prisoners convicted of violent crimes and drug crimes had lower rearrest rates: 62 percent and 67 percent, respectively. *Id.*

The ability to relate such factors to recidivism risks has led some to suggest strong reliance on them in determining the length of prison sentences. See Am. L. Inst., Model Penal Code: Sentencing § 6B.09 cmt. A at 56 (Preliminary Draft No. 5, 2007) (not yet adopted) (citing Stephen D. Gottfredson & Laura J. Moriarty, *Statistical Risk Assessment: Old Problems and New Applications*, 52 Crime & Delinq. 178, 192 (2006)) ("Risk assessment may be defined as predicting who will or will not behave criminally in the future."). It has been argued that these instruments can reduce prison populations by allowing the release of inmates who pose little risk to the public. Bernard E. Harcourt, [\[**103\]](#) *Risk as a Proxy for Race* 1 (U. Chi. L. Sch., John M. Olin Law and Economics Working Paper No. 535, Public Law and Legal Theory Working Paper No. 323), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677654&download=yes ("Risk"). The reliability of risk assessment tools may be undermined by faulty assumptions. See generally, e.g., *United States v. C.R.*, No. 09-CR-155, draft op., at 243-297 (E.D.N.Y. Mar. 10, 2011) (discussing the limitations of risk assessment tools in detecting the danger to the public posed by some classes of child pornography offenders). From the 1920s to the 1970s, race and nationality were explicitly relied upon in making such determinations. Harcourt, *Risk, supra*, at 4-5. Racial disparity continues today through the use of prior criminal history as a tool for determining sentence length. *Id.* at 8. Criminal history may be a reflection less of a defendant's risk of recidivism than of disparities in investigation, arrest, prosecution, and sentencing.

Except for the incapacitation effect of incarceration, there is little apparent correlation between recidivism and the length of imprisonment. Those who serve five years or less in prison have rearrest [\[**104\]](#) rates of 63 to 68 percent, with no discernible pattern relating to sentence length. Langan & Levin, *supra*, at 11. A 2002 study did note a lower rearrest rate—54 percent—among those who served more than five years. *Id.* No conclusions regarding these longer sentences can be drawn because the report did not differentiate among them by length. See *id.* It appears that among low-risk offenders, recidivism may to a limited extent be fostered, not prevented, by lengthy imprisonment.

Among low-risk offenders, those who spent less time in prison were 4% less likely to recidivate than low-risk offenders who served longer sentences. Thus, when prison sentences are relatively short, offenders are more likely to maintain their ties to family, employers, and their community, all of which promote successful reentry into society. Conversely, when prisoners serve longer sentences they are more likely to become institutionalized, lose pro-social contacts in the community, and become **[*659]** removed from legitimate opportunities, all of which promote recidivism.

Wright, *supra*, at 7; but see Langan & Levin, *supra*, at 11 ("No evidence was found that spending more time in prison raises the recidivism rate.").

Because [\[**105\]](#) prisons are often located in rural areas, and because convicts' families and friends have limited ability to travel, convicts' relationships with people on the outside—the people most likely to motivate convicts to lead straight lives—may be eroded seriously during long terms of imprisonment. See Jeremy Travis, et al., Urban Inst. Justice Pol'y Ctr., *Families Left Behind: The Hidden Costs of Incarceration and Reentry* 1 (rev. ed. 2005) available at http://www.urban.org/uploadedpdf/310882_families_left_behind.pdf (reporting that incarcerated

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fathers and mothers are housed an average of 100 and 160 miles, respectively, from their children); *id.* (stating that over half of incarcerated parents report never receiving a personal visit from their children).

Programs such as those for drug and alcohol treatment, adult basic education, vocational training, and prison industries reduce recidivism by 8 to 15 percent. Petersilia, *supra*, at 17. See also *id.* at 34 (reporting a study of inmates in three states that found that those who underwent prison education programs were 23 percent less likely than other inmates to be re-incarcerated). Treatment for mental disabilities may have an even greater [**106] positive impact. Nearly a third of state prisoners and a quarter of federal prisoners suffer from a mental condition or physical impairment. *Id.* at 35. Ten percent of state prisoners and 5 percent of federal prisoners have a learning disability. *Id.* Among state prisoners, 19 percent are completely illiterate and 40 percent functionally illiterate, compared to 4 percent and 21 percent, respectively, of the non-incarcerated population. *Id.* at 32. In 1999, 51 percent of released prisoners lacked a high school education, and 11 percent had an eighth-grade education or less. *Id.*

Coinciding with the nationwide push for stiffer prison sentences since the 1970s has been a de-emphasis on the rehabilitation of criminals and a preference for lengthy incapacitation. *Id.* at 13. When rehabilitative measures were retained, it was often with the purpose of keeping inmates manageable, not in reducing recidivism. *Id.* The continued existence of programs effective at combating recidivism both for current and released prisoners may be threatened by budgetary pressures. See Kevin Johnson, *Budget Cuts Slice Programs for Ex-Inmates*, USA Today, Feb. 9, 2011, at 7A (reporting concerns that state government spending [**107] for parole and probation departments may be reduced, depleting resources for drug treatment, supervision of offenders, and housing and job assistance).

Recidivism may be promoted by the behavior traits prisoners develop while incarcerated. To survive, they "tend to develop characteristics institutionally selected for survival: circumspection, canniness, coldness, and cruelty." Perkinson, *supra*, at 368. After release, the negative traits cultivated in prison may be received as virtues on the street. "[P]rison usually enhances one's prestige on the street, particularly in terms of . . . values like toughness, nerve, and willingness to retaliate for transgressions." Anderson, *supra*, at 292.

b. Incapacitation

Some penologists have estimated that by incapacitating criminals, incarceration has caused between 10 and 25 percent of the decrease in violent crime rates of the 1990s. Marc Mauer, *The Impact of Mandatory Minimum Penalties in Federal [**660] Sentencing*, Judicature, July-Aug. 2010, at 7; Perkinson, *supra*, at 370. It is not known, however, whether this reduction through incapacitation is greater than what could have been accomplished through less restrictive measures, nor is there any indication [**108] that mandatory minimum sentences have appreciably affected the reduction. Mauer, *supra*, at 7.

To some extent, the greater effectiveness of prisons in preventing crime through incapacitation may be decreasing as a result of technology. Cellular telephones and Internet-capable "smartphones" smuggled into prisons enable inmates to freely maintain contact with people on the outside. Kim Severson & Robbie Brown, *Outlawed, Cellphones are Thriving in Prisons*, N.Y. Times, Jan. 2, 2011, <http://www.nytimes.com/2011/01/03/us/03prisoners.html>. Such devices are ubiquitous in some prisons, and they may be used by gang-affiliated prisoners to maintain contact with outside criminal networks and orchestrate violence and drug trafficking. *Id.*

c. General and Specific Deterrence

HN3 A purpose of imprisonment is to deter people generally from engaging in crime. Another form of deterrence directed to this particular criminal who has violated the law—specific deterrence—is designed to prevent recidivism.

Compelling arguments have been made that the deterrent value of a sentence is highest when the chances of its being administered are high and the offender is able to rationally consider the consequences of his or [**109] her actions. It appears to be primarily in the certainty of punishment, not its severity, that deterrent power lies. See Steven N. Durlauf & Daniel S. Negin, *Imprisonment and Crime: Can Both be Reduced?*, 10 Criminology & Pub. Pol'y 13, 37 (2011); Wright, *supra*, 1-2, 4-5.

General deterrence depends on potential offenders' rational assessment of the likely costs and benefits of crime. Shawn D. Bushway & Peter Reuter, *Deterrence, Economics, and the Context of Drug Markets*, 10 Criminology & Pub. Pol'y 183, 184 (2011). That the defendants in this case were rationally capable of making accurate cost-benefit assessments when they were young, before embarking on crime, seems doubtful.

Deterrent power of either type is reduced when potential offenders' reasoning ability is impaired due to alcohol or drug use. See Wright, *supra*, at 2. It may be similarly affected among young people due to the natural rate of brain development. See B.J. Casey et al., *The Adolescent Brain*, 28 Developmental Rev. 62, 64 (2008) ("A cornerstone of cognitive development is the ability to suppress inappropriate thoughts and actions in favor of goal-directed ones, especially in the presence of compelling incentives."); [**110] *United States v. C.R.*, No. 09-CR-155, draft op., at 375 (E.D.N.Y. Mar. 10, 2011) (collecting sources).

General deterrence particularly may be impaired when the perceived injustice of punishment damages the credibility of the justice system.

[Studies suggest] that knowledge of systematic injustice produced by the criminal justice system . . . can have a range of deleterious effects on people's attitudes and behavior. People are less likely to comply with laws they perceive to be unjust. They may also be less likely to comply with the law in general when they perceive the criminal justice system to cause injustice. . . .

Paul H. Robinson, et al., *The Disutility of Injustice*, [85 N.Y.U. L. Rev. 1940, 2016 \(2010\)](#).

6. Employment and Social Integration of Ex-Prisoners

Employment is a crucial antidote for recidivism. See Jack McDonough & William D. Burrell, *Offender Workforce Development: A New (and Better?) Approach to an Old Challenge*, Fed. Probation, June 2008, at 71 (2008); Mark Sherman, *Reducing [\[**111\]](#) Risk Through Employment and Education*, Special Needs Offenders Bulletin, Jan. 2000, at 1-2. "Employment helps ex-prisoners be productive, take care of their families, develop valuable life skills, and strengthen their self-esteem and social connectedness." Petersilia, *supra*, at 112. There are few reliable analyses of post-release employment, *id.* at 119, but the unemployment rate for former prisoners has been found to be as high as 50 percent within the first nine months of release, compared to an overall national unemployment rate of 9.4 percent. See Steven Greenhouse, *Job Placement, with a Record: States Help Find Work (and Hope) for Ex-Convicts*, N.Y. Times, Jan. 25, 2011, at B4 ("Job Placement").

Ex-prisoners face numerous obstacles to employment. Statutes and licensing regulations bar felons from holding certain jobs. Petersilia, *supra*, at 113-15. "The most common types of jobs with legal prohibitions . . . are in the fields of child care, education, security, nursing, and home health care[.]" *Id.* at 113. Many prohibitions are in areas with little connection to public safety. *Id.* at 114-15. In New York, as in numerous other states, drug offenders' drivers' licenses are revoked. *Id.* at 115. [\[**112\]](#) Ex-offenders have difficulty meeting requirements of bonding against theft, required in many service businesses. *Id.* at 114.

Employers are often reluctant to employ released prisoners. A survey conducted in four major United States cities indicated that 60 percent of employers who had recently hired low-skilled workers were unwilling to hire applicants with criminal records. *Id.* at 116. A record is often seen by employers as a negative reflection on employee trustworthiness; employers also fear that by hiring a convict they may expose themselves to liability for suits for negligent hiring. *Id.* at 116-117. Employers in the construction and manufacturing sectors are more likely to hire ex-convicts than those in businesses involving customer contact, child care, or elder care, but jobs in the former categories are diminishing. *Id.* at 118. Many of the areas in which released prisoners face significant obstacles to employment are those projected to show the greatest growth in coming years. See Hacker, *supra* (reporting that among the occupations projected to grow most significantly by the year 2018 are long-haul truck driver, security guard, receptionist, home health aide, nursing aide, orderly, [\[**113\]](#) and customer service representative).

Ex-convicts are often eligible for only temporary or seasonal work. Petersilia, *supra*, at 116. The jobs they are able to secure yield wages 10 to 30 percent lower than similar jobs held by those who have not been incarcerated. *Id.* at 119. Ex-offenders face additional competition for jobs as a result of welfare reform. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 instituted incentives for welfare recipients to join the work force; such recipients compete for the same low-skilled jobs as released prisoners. *Id.* at 120.

Obstacles beyond job availability exist. "Many offenders do not have the necessary **[*662]** skills or experience to find, compete for, and secure legitimate, full-time employment, even if they are sufficiently motivated." McDonough & Burrell, *supra*, at 72. Often, released prisoners are hindered by limited education and work experience, substance abuse, psychological and mental problems, residence in inner-city neighborhoods far from available jobs, social connections to criminals, and embedded patterns of behavior learned from the criminal world. See Petersilia, *supra*, at 40, 113.

Limited programs have been implemented [\[**114\]](#) to prepare released convicts for entry into the job market. See Greenhouse, *Job Placement, supra*, at B1. In the federal court for the Eastern District of New York, the Probation Department offers a number of useful services to ex-convicts through an "Offender Workforce Development" program: counseling in seeking and retaining jobs; furnishing of clothing for work; and instruction and assistance in obtaining state identification cards and driver's licenses, searching for job openings, networking, filling out job applications, writing résumés, and interviewing. See Michelle A. Powell, *Report on Workforce Development Initiatives in the Eastern District of New York 2-6* (2011). Probationers are eligible for subsidized training in such areas as food preparation, plumbing, pest control, and dental assistance through the New York City College of Technology in Brooklyn under the Second Chance Act of 2007, [Pub. L. 110-199, 122 Stat. 657](#). *Id.* at 5.

II. Law

A. Sentencing Rules

HN4 A sentencing court shall "state in open court the reasons for its imposition of the particular sentence." [18 U.S.C. § 3553\(c\)](#). If the sentence is not of the kind prescribed by, or is outside the range of, the sentencing guidelines [\[**115\]](#) referred to in [section 3553\(a\)\(4\)](#), the court shall indicate the specific reasons for imposing a sentence different from the guidelines. [18 U.S.C. § 3553\(c\)\(2\)](#). These "reasons must also be stated with specificity in the written order of judgment and commitment." *Id.* The mandatory nature of the guidelines has been excised, and they are now "advisory." *United States v. Booker*, [543 U.S. 220, 245-46, 125 S. Ct. 738, 160 L. Ed. 2d 621 \(2005\)](#). See also *Gall v. United States*, [552 U.S. 38, 50, 128 S. Ct. 586, 169 L. Ed. 2d 445 \(2007\)](#) (district judges "may not presume that the Guidelines range is reasonable but must make an individualized assessment based on the facts presented"). The sentencing court must still adhere to the requirements of [18 U.S.C. § 3553\(c\)\(2\)](#). *United States v. Jones*, [460 F.3d 191, 197 \(2d Cir. 2006\)](#).

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As to each defendant in this case, the "nature and circumstances of the offense and the history and characteristics of the defendant" were considered. See [18 U.S.C. § 3553\(a\)\(1\)](#). Respectful consideration was given to the sentencing guidelines, the Sentencing Commission's policy statements, and all other factors listed under [18 U.S.C. § 3553\(a\)](#) to ensure that the sentence was "sufficient, but not greater than necessary, to comply with [\[**116\]](#) the purposes" of sentencing. See [18 U.S.C. § 3553\(a\)](#). [HNS](#) Under [section 3553](#), there are two major considerations: specific and general deterrence. *Id.* Under our common law tradition, sentencing courts also consider the need to incapacitate criminals and the possibility of rehabilitating them. Wayne R. LaFave, 1 Substantive Criminal Law 38-39 (2d Ed. 2003).

[HNG](#) Deviation from guideline sentences on policy grounds is permitted. "[D]istrict courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those guidelines." [Spears v. United](#) [\[**663\]](#) *States*, 555 U.S. 261, 129 S.Ct. 840, 843-44, 172 L. Ed. 2d 596 (2009). Such discretion may be exercised not only based on characteristics that distinguish a case from the "heartland" of cases contemplated by the guidelines, but also based on general policy considerations that apply "even in a mine-run case." [Kimbrough v. United States](#), 552 U.S. 85, 109, 128 S. Ct. 558, 169 L. Ed. 2d 481 (2007). A court may substitute the congressional powder/crack ratio with a ratio of its own on the basis of such policy considerations. [Spears](#), 129 S.Ct. at 844-45. See also, e.g., [United States v. Whigham](#), 754 F. Supp. 2d 239, 2011 WL 4959882 at 12 (D. Mass. 2010) ("I will apply [\[**117\]](#) a 1:1 ratio for all crack cocaine sentencings"). This authority is consistent with the frequently employed power of federal courts to impose non-guideline sentences. See United States Sent'g Comm'n, *U.S. Sentencing Commission Preliminary Quarterly Data Report, 4th Quarter Release 1* (2010) (reporting that of sentences issued between October 1, 2009, and September 30, 2010, 43.6 percent deviated below the guidelines' recommended length, and 1.8 percent exceeded their recommended length).

B. Equal Protection

1. Mandatory Minimum Sentences

The defendants in this case face steep sentences according to the Sentencing Guidelines. Most face mandatory minimum sentences of five or ten years for offenses involving heroin, crack cocaine, or both. The sentencing provisions in effect for these crimes are those enacted in the Anti-Drug Abuse Act of 1986. See Part II.E, *supra*. Before the enactment of the 1986 Act, federal drug offenders were subject to maximum sentences and no statutory mandatory minimum sentences. See, e.g., [21 U.S.C. § 841\(b\)\(1\)\(A\) \(1982\)](#) (providing for a maximum sentence of fifteen years for offenses involving Schedule I or II narcotic drugs). As a result of the 1986 Act, mandatory [\[**118\]](#) minimum sentences were based primarily on the quantity of the drugs involved. See Table C below.

Table C: Amounts Necessary to Trigger Mandatory Minimum Sentences under the 1986 Act

Drug	Five-Year Minimum	Ten-Year Minimum
Cocaine base (crack)	5 grams	50 grams
Powder cocaine	500 grams	5 kilograms
Heroin	100 grams	1 kilogram
LSD	1 gram	10 grams
PCP (not in mix)	10 grams	100 grams
Marijuana	100 kilograms	1,000 kilograms

[Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat 3207 \(1986\)](#).

The mandatory minimum sentence for crack cocaine offenses was amended by Congress in the Fair Sentencing Act of 2010 (FSA). Under the FSA, a five-year mandatory minimum sentence is imposed for offenses involving twenty-eight grams of crack, and a ten-year sentence for offenses involving 280 grams of crack. [Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372](#). In effect, the powder/crack sentencing ratio has been reduced from 100:1 to 18:1. These revised sentencing provisions are not implicated in the present case because they were enacted after the commission of the defendants' crimes and are not at this time retroactive. See [United States v. Acoff](#), 634 F.3d 200, 2011 WL 447043, at *1 (2d Cir. 2011, Am'd Feb. 11, 2011) [\[**119\]](#) (citing Pub. L. No. 111-220, § 2, 124 Stat. 2372) (holding that the Fair Sentencing Act does not apply retroactively). *But see* [634 F.3d 200, id. at *2](#) (Calabresi, J., concurring) ("[T]here is something troubling about [non-retroactivity] with regard to a statute whose grossly different treatment of chemically identical drugs—the rock and powder forms of cocaine—has been criticized and questioned, particularly on grounds of racial injustice."). [\[**664\]](#) Even if the FSA applied retroactively, its amended thresholds would not affect defendants' sentences. Each is subject to a mandatory minimum sentence on the basis of a heroin offense or an offense involving a quantity of crack cocaine in excess of 280 grams.

2. Framework

HNZ The Supreme Court has established two elements for determining whether a superficially neutral law violates the [Equal Protection Clause](#): "discriminatory effect" and "purposeful discrimination." [McCleskey v. Kemp](#), 481 U.S. 279, 292, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987) (citing [Whitus v. Georgia](#), 385 U.S. 545, 550, 87 S. Ct. 643, 17 L. Ed. 2d 599 (1967); [Wayte v. United States](#), 470 U.S. 598, 608, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985)).

In cases involving alleged racial discrimination, once a discriminatory purpose and a discriminatory effect are shown, the law is subject to [\[**120\]](#) strict scrutiny. Strict scrutiny requires a law to be "narrowly tailored" to achieve a 'compelling government interest.' [Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 9](#), 551 U.S. 701, 720, 127 S. Ct. 2738, 168 L. Ed. 2d 508 (2007) (quoting [Adarand Constructors v. Peña](#), 515 U.S. 200, 227, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995)). Under strict scrutiny, the state bears the burden of rebutting a presumption of unconstitutionality. [Washington v. Davis](#), 426 U.S. 229, 242, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976) (quoting [Alexander v. Louisiana](#), 405 U.S. 625, 632, 92 S. Ct. 1221, 31 L. Ed. 2d 536 (1972)).

If both a disparate impact and a discriminatory motive are not shown, in most cases a law is subjected to rational basis review, under which it can be overturned only if "it is [not] rationally related to a legitimate government purpose." [United States v. Stevens](#), 19 F.3d 93, 96 (1994) (citing [Schweiker v. Wilson](#), 450 U.S. 221, 230, 101 S. Ct. 1074, 67 L. Ed. 2d 186 (1981)). This rational basis for legislative action may be wholly notional; it need only be conceivable by a court, not actually contemplated by lawmakers. See [United States R.R. Retirement Bd. v. Fritz](#), 449 U.S. 166, 179, 101 S. Ct. 453, 66 L. Ed. 2d 368 (1980) (quoting [Fleming v. Nestor](#), 363 U.S. 603, 612, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960)) ("Where . . . there are plausible reasons . . . our inquiry is at an end. It is, of course, 'constitutionally [\[**121\]](#) irrelevant whether this reasoning in fact underlay the legislative decision.'").

3. Discriminatory Effect

The Supreme Court described **HN8** a discriminatory effect in [Palmer v. Thompson](#) as "state action affecting [African Americans] differently from whites." [403 U.S. 217, 225, 91 S. Ct. 1940, 29 L. Ed. 2d 438 \(1971\)](#). Laws which criminalize voluntary conduct may violate the [Equal Protection Clause](#) when they target conduct associated with members of a protected class. See [Loving v. Commonwealth of Virginia](#), 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (overturning a Virginia law criminalizing interracial marriage); [Craig v. Boren](#), 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) (overturning an Oklahoma law establishing differing ages for legal alcohol purchase and consumption based on gender).

4. Discriminatory Purpose

Intent was not a clear requirement of Equal Protection violations before the Supreme Court's 1976 decision of [Washington v. Davis](#). Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. Pa. L. Rev. 540, 544 (1977) (discussing [426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597](#)). Pre-*Davis*, some cases indicated that impact alone was sufficient basis for finding a violation. **[*665]** See, e.g., [Hunter v. Erickson](#) 393 U.S. 385, 390-91, 89 S. Ct. 557, 21 L. Ed. 2d 616 (1969) (holding that a law violated the [Equal Protection Clause](#) [\[**122\]](#) without explicitly addressing its intent, purpose, or legislative history). The *Davis* Court rejected that approach, stating, "[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional [s]olely because it has a racially disproportionate impact." [426 U.S. at 238-39](#). The origin of the rule of *Davis* is not clear. See Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 *Stan. L. Rev.* 1105, 1109 (1989) (stating that the *Davis* Court followed the unsupported assumption by Professor Paul Brest that "the Constitution prohibits government not from reaching unequal results but from pursuing suspect objectives") (citing Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 *Sup. Ct. Rev.* 95, 110, 116 (1970)).

HN9 Intent requires more than mere predictability of consequences. "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its [\[**123\]](#) adverse effects upon an identifiable group." [Personnel Admin. of Massachusetts v. Feeney](#), 442 U.S. 256, 279, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979).

[Equal Protection Clause](#) violations do not depend on but-for causation. "*Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. . . . When there is a proof that a discriminatory purpose has been a [—not *the*—] motivating factor in the decision, . . . judicial deference is no longer justified." [Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.](#), 429 U.S. 252, 265-66, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) (emphasis added).

A discriminatory purpose need not be clear from the text of the statute; even a facially neutral provision can result in *de jure* segregation. [Davis](#), 426 U.S. at 241. The task of recognizing intent is made particularly difficult by "the growing unacceptability of overtly bigoted behavior, and a growing awareness of the possible legal consequences of such behavior." [U.S. v. Yonkers Bd. of Educ.](#), 624 F. Supp. 1276, 1369 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055, 108 S. Ct. 2821, 100 L. Ed. 2d 922 (1988). Consequently,

"[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive [\[**124\]](#) inquiry into such circumstantial and direct evidence of intent as may be available." [Arlington Heights, 429 U.S. at 266](#) (emphasis added).

HN10 An initial indicator of discriminatory intent is a law's discriminatory impact itself, although such an impact, without more, is seldom dispositive.

Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence.

[*666] [Id. at 266](#) (citations omitted). Accord [Feeney, 442 U.S. at 275](#).

A second factor is the foreseeability of such a discriminatory impact, especially "[a]dherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence upon racial imbalance." [Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464-65, 99 S. Ct. 2941, 61 L. Ed. 2d 666 \(1979\)](#) (citation and quotation marks omitted); [Davis v. Bandemer, 478 U.S. 109, 127-129, 106 S. Ct. 2797, 92 L. Ed. 2d 85 \(1986\)](#). Foreseeability is to be determined through an objective reasonable person standard. [Arthur v. Nyquist, 573 F.2d 134, 143 \(2d Cir. 1978\)](#); [\[**125\] Hart v. Cmty. Sch. Bd. of Educ., New York Sch. Dist. #21, 512 F.2d 37, 50 \(2d Cir. 1975\)](#).

Third, a court should consider "[t]he historical background of the decision . . . , particularly if it reveals a series of official actions taken for invidious purposes." [Arlington Heights, 429 U.S. at 267](#). A court should consider the "[t]he specific sequence of events leading up to the challenged decision"; "[d]epartures from the normal procedural sequence"; and "[s]ubstantive departures . . . , particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." *Id.* **HN11** Courts may also consider historical context dating from before the enactment of the law at issue. See [Rogers v. Lodge, 458 U.S. 613, 623-25, 102 S. Ct. 3272, 73 L. Ed. 2d 1012 \(1982\)](#).

Even where a sentencing law is constitutionally valid, its history and any disparate effect it works on those similarly situated to an individual defendant may be relevant to a court in determining an individual sentence.

5. Conclusion as to Constitutionality

As already indicated, **HN12** there is substantial evidence of racial impact and awareness of probable racially invidious effect when the applicable drug statutes were adopted to [\[**126\]](#) warrant a finding that the mandatory minimum sentences for crack cocaine were motivated in part by racial animus, in contravention of the [Equal Protection Clause of the United States Constitution](#).

Such a finding would be justified by numerous factors: (1) the stark racial disparity itself; (2) the reasonable foreseeability of that disparity, as indicated by the repeated racial references in the legislative history of the 1986 Act; (3) the inconsistency between the sentencing scheme and Congress's established law enforcement priorities; (4) Congress's deviations from legislative procedures in its haste to enact the legislation; and (5) the historical pattern of enacting antidrug laws out of racial motivations.

Only a single published decision by a federal court has reached this conclusion. See [United States v. Clary, 846 F. Supp. 768, 791 \(E.D. Mo. 1994\)](#), *rev'd*, [34 F.3d 709, 713 \(8th Cir. 1994\)](#), *cert. denied*, [513 U.S. 1182, 115 S. Ct. 1172, 130 L. Ed. 2d 1126 \(1995\)](#) ("[R]acial discriminatory influences, at least unconsciously, played an appreciable role in promulgating the enhanced statutory scheme for possession and distribution of crack."). *Cf.* [State v. Russell, 477 N.W.2d 886, 889-891 \(Minn. 1991\)](#) (holding that a law [\[**127\]](#) with a powder/crack disparity had no rational basis under Minnesota's [Equal Protection Clause](#) because of the irrelevance of the crack/powder disparity to its statutory purpose and the lack of legitimate distinction between crack cocaine and powder cocaine or their respective users).

HN13 A holding in the instant case of unconstitutionality under the [Equal Protection Clause](#) is precluded by rulings of **[*667]** the Court of Appeals for the Second Circuit. That court held "that Congress and the Sentencing Commission did not enact the 100 to 1 ratio with a discriminatory intent." [United States v. Moore 54 F.3d 92, 99 \(2d Cir. 1995\)](#). See also [United States v. Teague, 93 F.3d 81, 85 \(2d Cir. 1996\)](#) (quoting [Feeney, 442 U.S. at 279](#)) ("There is no evidence that Congress reaffirmed the sentencing disparity 'at least in part "because of," not merely "in spite of," its adverse effects' upon blacks."). While the holding must be followed, this analysis, it is respectfully suggested, needs revisiting in view of the strong contradictory evidence.

The holding of the *Moore* Court dramatizes the limitations of the intent requirement that was introduced in *Davis*. See Perry, *supra*, at 544. The ease with which lawmakers [\[**128\]](#) can conceal improper motives behind permissible, racially neutral legislation makes proving discriminatory intent on the part of a legislature almost impossible. Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, [39 Stan. L. Rev. 317, 319 \(1987\)](#). Nor is it clear why a discriminatory impact that would be prohibited when inflicted intentionally by lawmakers is permissible when accomplished through negligence or reckless disregard. Laurence H. Tribe, *American Constitutional Law* 1518-19 (2d ed. 1988) (quoted in [Russell, 477 N.W.2d at 888 n.2 \(Minn. 1991\)](#)) ("[The intent requirement] overlooks the fact that minorities can also be injured when the government is 'only' indifferent to their suffering or 'merely' blind to how prior official discrimination contributed to it and how current acts will perpetuate it."). *Cf.* Olatunde C.A. Johnson, *Disparity Rules*, [107 Colum. L. Rev. 374, 386 \(2007\)](#) (stating that Equal Protection doctrine "provides little incentive for public institutions to address how their policies and practices perpetuate racial inequality."). The cumulative effect of *Davis* and its progeny has been, some would charge, to suppress constitutional [\[**129\]](#) litigation and allow the perpetuation of inequality in such areas as sentencing.

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The Supreme Court has closed the courthouse doors to claims of racial bias at every stage of the criminal justice process, from stops and searches, to plea bargaining and sentencing. The Court has ruled that in the absence of conscious, intentional bias—tantamount to an admission or a racial slur—you can't even get in the courthouse doors with allegations of race discrimination in the criminal justice system.

Michelle Alexander, *How the Drug War Has Subjugated Poor People of Color and Nullified the Fourth Amendment*, Nieman Watchdog (Sept. 20, 2010), <http://www.niemanwatchdog.org/index.cfm?fuseaction=background.view&backgroundid=00486>. A number of alternatives to the current Equal Protection framework have been proposed. *E.g.* [San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98-99, 93 S. Ct. 1278, 36 L. Ed. 2d 16 \(1973\)](#) (Marshall, J., dissenting) (quoting [Dandridge v. Williams, 397 U.S. 471, 520-21, 90 S. Ct. 1153, 25 L. Ed. 2d 491](#) (Marshall, J., dissenting) (suggesting that a balancing approach be adopted in place of the strict scrutiny/rational basis review structure); Perry, *supra*, at 560 (proposing a balancing test).

Although *Moore* precludes holding that the [§ 853.01](#) crack cocaine sentencing provisions of the Anti-Drug Abuse Act of 1986 were motivated by a discriminatory purpose, the facts concerning the history and impact of the law are relevant to a determination of the appropriate sentences in the instant case. They suggest that the mandatory minimum sentences and sentencing guidelines at issue in this case should be enforced with restraint.

[*668] To date, other constitutional attacks on mandatory minima have been rejected, but they also suggest discretion in enforcement. *See, e.g., United States v. Polizzi, 549 F. Supp. 2d 308, 400 (E.D.N.Y. 2008), rev'd, 564 F.3d 142 (2d Cir. 2009)* ("[M]andatory minimum penalties may be unsoundly aggrandizing the power of the executive and legislative branches. . . . Since the initial institution of the practice of widespread imprisonment in the United States, the legislature has assumed major responsibility for prescribing periods of incarceration for offenses. The Supreme Court has recognized the power of Congress to do so.").

In sum, there is no significant basis for a finding of unconstitutionality that has not already been reviewed and rejected by the Court of Appeals for the Second Circuit.

C. Rationale

1. General [§ 853.01](#) Deterrence

There is little evidence that our regime of mandatory minimum sentences works any significant deterrent effect on potential offenders from backgrounds similar to those of the defendants in this case. General deterrence is especially unlikely in the case of younger people with few educational or professional prospects; limited impulse control due to adolescent development; serious drug and alcohol abuse problems; limited guidance from responsible adults, particularly male ones; and pressure from peer groups in which criminal behavior is accepted and in which the penalty for deviance from the group's norms is embarrassment, ostracism, or physical punishment. In light of these circumstances and given that effective deterrence arises from certainty, not harshness, of punishment, our society might better consider whether our scarce resources would be better spent, not on extended incarceration, but on eliminating social conditions encouraging crime and on non-incarceratory techniques.

2. Specific Deterrence and Rehabilitation

Nothing suggests that the defendants will be rehabilitated or specifically deterred by lengthy incarceration. Resources for providing them necessary education [§ 853.02](#) or job training are limited. The experience of incarceration will remove them from their families and communities and whatever ties they may retain to the non-criminal world. Their peers inside prison are unlikely to serve as positive role models. Incarceration will give them opportunities to expand their networks of criminal acquaintances, develop antisocial behavior patterns and attitudes, and sharpen whatever criminal skills they have acquired on the streets. Upon release, they are likely to return to their broken families and impoverished communities with underdeveloped skills, dismal job prospects, and a host of the lifelong punishments that are heaped upon ex-convicts in our society, all factors inclining them away from straight life and toward recidivism.

3. Incapacitation

The most compelling justification for incarceration in this case is that it will prevent defendants from committing further crimes while they are in prison. Excepting the possibility of organizing crimes outside the prison walls via cellular phone, incarcerated criminals can do little direct harm to the public. The hope—and experience—is that as they grow older they become less violent.

There is little evidence, [§ 853.03](#) however, that incapacitating the members of the modest-sized drug organization described is the instant case will cause a net decrease in crime. The sentences in this case will not suppress the demand for crack and heroin, nor **[*669]** are they likely to work any meaningful effect on the price or supply of drugs sold by other organizations near Louis Armstrong Houses. *See* Bushway & Reuter, *supra*, at 190 (reporting that the inflation-adjusted prices of cocaine and heroin in the United States have declined or remained relatively constant since the 1980s, while incarceration of drug offenders has increased dramatically). In this respect, the mandatory minimum

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sentences at issue here have failed in their apparent intention of depleting the pool of cheap, unskilled criminal labor on which the drug trade relies. Mark Osler, *What Would It Look Like if we Cared about Narcotics Trafficking?: An Argument to Attack Narcotics Capital Rather than Labor 3* (unpublished manuscript) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1800370 (last visited Apr. 4, 2011). There is no shortage of would-be players, veteran criminals, and directionless young people to replace the incarcerated defendants as managers, enforcers, [**134] and dealers in the drug trade. See *id.* at 5 (stating that incarceration attempts "to shut [drug networks] down by taking away something they can easily replace.").

4. Retribution

A meaningful regime of retribution requires a sober-minded assessment of proportionality and moral responsibility. The imposition of lengthy prison sentences for drug offenses, particularly for nonviolent offenses committed by street vendors, often defies a fair sense of retribution. Violent offenders must be punished appropriately for their crimes. Such crimes as murder, rape, or armed robbery warrant harsh sentences. The same treatment may not be warranted for the consensual sale of a product, even a highly destructive one, to knowing, willing, adult purchasers in retail quantities. See *United States v. Brewer*, 624 F.3d 900, 910 (8th Cir. 2010) (Bright, J., dissenting) (quoting Perkinson, *supra*, at 336) (discussing the frequency with which penalties for crack cocaine offenses exceed those for murder). This is particularly true since the higher-up dealers in this country and abroad continue to supply the enormous demand for drugs in this country. Demand is not reduced by sentencing low-level purveyors such as [**135] as these defendants to prison.

Illegal drugs are dangerous products. They impair users' health, diminish their usefulness to their families and employers, and increase their likelihood of committing further crime. But the moral burden for drug use is borne primarily by the users themselves. Putting aside cases where users become helplessly addicted as children, drug habits are generally the product of voluntary choices. The notion of the drug pusher preying upon defenseless, sober individuals, coercing them to sample addictive drugs so that they may become lifelong customers, has little congruence with reality as observed in court.

In moral terms, those working in the drug trade are primarily responsible not for drug abuse but for the trade itself and the violence and extortion attendant to it. Those who engage in violence and extortion should be punished in accordance with the danger their actions represent to the community. Street-level dealers are at least indirectly complicit in such acts; this commerce cannot continue without people serving their function. But it cannot be assumed that such low-level players are morally in the same category as murderers, assailants, and major purveyors [**136] of monetary frauds. They may be little more than cogs, easily replaced. To fix their punishment under mandatory minimum sentences, not on the basis of their limited roles and acts but on the quantities of drugs they sell by chance or in cooperation [**670] with others of their ilk, ill accords with a fair sense of retribution.

III. Application of Law to Defendants

A. Excessiveness

A number of the sentences described in Part B, below, are excessive because of the requirement of statutory mandatory minimum terms of incarceration under present case law. They cannot as yet be said to violate the Constitution. See Part III.B.5, *supra*. Cf. *United States v. C.R.*, No. 09-CR-155, draft op., at 394-402 (E.D.N.Y. Mar. 10, 2011) (discussing unconstitutionality of five-year mandatory minimum as applied to nineteen-year-old charged with possession of child pornography).

Were four defendants—Darrell Bannister, Roger Patrick, Jawara Tatum, and Pedro Torres—sentenced to shorter, more appropriate terms, defendants and society would be better served.

For three defendants, sentences both met the applicable mandatory minimum sentence and were required by the defendants' offenses and criminal history. They are Christopher [**137] Hall, Cyril McCray, and Derrick Tatum.

Damien Bannister was not subject to a mandatory minimum sentence. He received a long sentence but less than five years because of his vicious behavior.

The remaining defendants are not discussed in this memorandum.

B. Individual Defendants

1. Damien Bannister

a. Background

Damien Bannister is African American. He was born in Brooklyn in 1984. His parents were married and had three children. Damien Bannister PSR ¶ 45. He is the younger brother of defendant Darrell Bannister; both grew up together in the same household in Louis Armstrong Houses. *Id.* at ¶¶ 45, 48; Tr. of Sent'g of Damien Bannister 13 (Jan. 19, 2011) ("Damien Bannister Tr."). Their father was a heroin addict who used

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drugs at home, often with friends. Damien Bannister PSR ¶ 45. While the Bannisters were children, their father was "in and out" of drug treatment programs and often in jail on drug and gun-related charges. *Id.*; see also Darrell Bannister PSR ¶ 44. Their grandmother, who abused cocaine, lived with the family sporadically. Darrell Bannister PSR ¶ 45.

Defendant was raised by both parents until the age of nine or ten, when his father was "kicked out of the home" because of his drug [**138] abuse. Darrell Bannister PSR ¶ 45. The family struggled financially during defendant's childhood. Damien Bannister PSR ¶ 46. His mother, who worked for the New York City Department of Social Services, was the family's sole breadwinner; she received no financial support from the father, other family members, or public assistance. *Id.* at ¶ 46; Darrell Bannister PSR ¶ 45. Defendant was not physically abused as a child. Damien Bannister PSR ¶ 45.

In 1996, Bannister volunteered for the Bedford-Stuyvesant Volunteer Ambulance Corps as a janitorial worker. *Id.* at ¶ 79. His mother sent him to Hawaii in 1998 to live for a year with an uncle, a police officer, so that he could escape his home and neighborhood environment. He returned the next year because he was homesick. *Id.* at ¶ 51.

Defendant attended Grover Cleveland High School in Ridgewood, Queens; the John V. Lindsay Wildcat Academy High School, a charter school in Lower Manhattan; and a high school in Hawaii before dropping out of school in the tenth grade. *Id.* at ¶¶ 68-70. (A number of other defendants [**671] also attended Grover Cleveland High School.) Grover Cleveland has been identified by the New York City Department of Education as poorly [**139] performing. New York City Dep't of Educ., 2008-09 *Progress Report Measures for High Schools*, <http://schools.nyc.gov/Accountability/tools/report/default.htm#FindPR>, select "PR Results 2009-10" and "High Schools" (last visited Mar. 20, 2011) (reporting a student performance grade of "D" for Grover Cleveland High School for the 2009-2010 school year).

In the summers of 1999 and 2000, Bannister performed maintenance work for NYCHA through the New York City Summer Youth Program. Damien Bannister PSR ¶ 79. His subsequent employment history consisted of intermittent work assembling office cubicles for a company in Long Island City, New York, and a four-month stint in 2003 and 2004 as a vertical blind installer in Brooklyn. *Id.* at ¶¶ 75-76. He has never filed a tax return. *Id.* at ¶ 82. He has expressed an interest in learning a trade, such as plumbing or electricity. Damien Bannister Tr. 13.

When sixteen, defendant began smoking marijuana; while he has been enrolled in drug treatment programs, he has continued to smoke marijuana and drink cognac heavily. Damien Bannister PSR ¶ 62. He has twice been treated for substance abuse. *Id.* at ¶¶ 63-65. Before his arrest, he gambled on dice, cards, or [**140] sports events every other day. *Id.* at ¶ 58.

Damien Bannister suffers from asthma. He is otherwise in good health. *Id.* at ¶ 60.

He has two children, ages five and seven, with his fiancée, whom he has dated for nine years. *Id.* at ¶ 49. She describes him as a devoted father. *Id.* at ¶ 53. She worked as an administrative assistant but is currently unemployed. Damien Bannister Tr. 18. She relies on public assistance to support the family. Damien Bannister PSR ¶ 49.

Defendant's father died in 2008, at the age of fifty-seven, from a heart attack. His mother suffers from diabetes and lives in Chattanooga, Tennessee, where she receives disability payments. *Id.* at ¶ 47. She moved out of Louis Armstrong Houses in about 2004. Defendant's sister continues to live in the development. Damien Bannister Tr. 20.

Bannister has a substantial criminal history. At the age of fourteen, he was found by police in a car with defendant Derrick Tatum and a loaded gun, but his record does not indicate that this incident resulted in a conviction. Derrick Tatum PSR ¶ 28-29; see generally Damien Bannister PSR. When sixteen, he stole a car from a woman at knifepoint, fled in the car, and used the knife to menace two people [**141] who pursued him. *Id.* at ¶ 21-22. When he was twenty-one, he, together with his brother Darrell Bannister and three others, stole merchandise from a store after intimidating an employee with a pair of scissors. *Id.* at ¶ 28.

b. Offense

Defendant was a street-level dealer in the crew, with no managerial role. He is personally charged with selling 150 grams of crack cocaine between August 2008 and January 2010. While he had no personal involvement with firearms, he maintained access to firearms shared with other members of the crew. *Id.* at ¶¶ 5-6.

Bannister was arrested on August 9, 2009, with forty-eight bags of crack and ninety glassines of heroin. On January 21, 2010, he was sentenced by the State of New York to a year of incarceration. He was transferred from state to federal custody on February 9, 2010. *Id.* at ¶¶ 39-40.

[**672] On July 27, 2010, he pled guilty to a lesser included offense within Count One of a twenty-four-count superseding indictment. Count One charged that between September 2007 and January 2010, defendant and others conspired to distribute and possess with intent to distribute cocaine base in violation of [21 U.S.C. §§ 846](#) and [841\(b\)\(1\)\(C\)](#). *Id.* at ¶ 1.

The total offense level [**142] was seventeen, and the criminal history category was V, yielding a guidelines range between forty-six and fifty-seven months. Bannister's offense, unlike those pled to by other members of the crew, carried no mandatory minimum sentence. The guidelines range of fine was from \$5,000 to \$1,000,000.

c. Sentence

Bannister was sentenced on January 19, 2011. At his sentencing, he apologized to his mother and his family members. Damien Bannister Tr. 17.

He was sentenced to three years' incarceration and five years' supervised release. The three-year sentence was set to begin at the date of sentencing, rather than the date of arrest, because of a state sentence then being served. Damien Bannister Tr. 21-22. A \$100 special assessment was imposed. No fines were imposed because the defendant does not have any assets, and it is unlikely that he will have any in the future to pay a fine. The remaining counts of the indictment were dismissed.

A non-guideline sentence was imposed under [18 U.S.C. § 3553\(a\)](#) and [Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621](#). This sentence balances the threat posed by Bannister's past crimes of violence with his involvement as a street-level dealer, his lack of personal involvement with firearms, [\[**143\]](#) his impoverished background in a fatherless home, his remorse for his crime, and his desire to reform his life and be a good husband to his fiancée and father to his children. The sentence provides ample specific and general deterrence. Given defendant's background, an excessively harsh sentence would lead only to a greater risk of recidivism.

2. Darrell Bannister

a. Background

Darrell Bannister is African American. He was born in Brooklyn in 1979. He is the older brother of defendant Damien Bannister; the two grew up together in the same household in Louis Armstrong Houses. Darrell Bannister PSR ¶ 44; see Part IV.B.1.a, *supra*. The troubled relationship between defendant's parents cast him into depression as a child. He attempted suicide around 1989 by hanging himself and cutting his wrists. *Id.* at ¶ 57. His mother beat him with a belt to discipline him, and he once reported her to Child Protective Services; the case was eventually dismissed. *Id.* at ¶ 46. He was treated by a psychiatrist in 1989 and 1990. *Id.* at ¶ 57.

As a teenager, defendant volunteered with the Bedford-Stuyvesant Volunteer Ambulance Corps, assisting with ambulance dispatching and CPR classes. *Id.* at ¶ 78. He attended [\[**144\]](#) Grover Cleveland High School in Queens, but he failed all of his classes and had excessive absences. He was expelled in the tenth grade for fighting with a school security officer after he tried to bring a prohibited mobile phone to school. *Id.* at ¶ 72. He once left home to live with an aunt because his mother was pressuring him to attend school. *Id.* at ¶ 46.

Bannister suffered from schizophrenia as a child, experiencing his most recent episode around 2007. Tr. of Sent'g of Darrell Bannister 7-8 (Nov. 16, 2010) ("Darrell Bannister Tr.") (testimony of defendant's mother). He has experienced [\[*673\]](#) difficulties controlling his temper. *Id.* at 9, 16 (testimony of defendant and his mother). Like his brother Damien, he suffers from asthma. Darrell Bannister PSR ¶ 61; Damien Bannister PSR ¶ 60.

When fourteen, defendant began smoking marijuana. From the age of sixteen until his arrest for the current offense, he smoked marijuana daily and marijuana mixed with cocaine about once a week. Darrell Bannister PSR ¶ 67. He has used crack cocaine as well. Darrell Bannister Tr. 8. He was treated for substance abuse in 1996 and 1997 while on probation for a prior offense. Darrell Bannister PSR ¶ 70. He gambled [\[**145\]](#) several times a week before his arrest, usually playing poker or dice on the street and wagering about \$200 each time. *Id.* at ¶ 59.

From 2003 to 2008, Bannister and his then-girlfriend, with whom he fathered two children, lived in upstate New York and Tennessee. He returned to New York City periodically. He and his girlfriend broke up after he was arrested for the instant offense. *Id.* at ¶ 52.

Darrell Bannister has held only two paying, legal jobs. *Id.* at ¶ 74. He reports that in 2003, he worked as an industrial laborer in Binghamton, New York, but this information could not be verified. *Id.* at ¶ 77. He spent part of 2005 working in construction at Brooklyn College. *Id.* at ¶ 76. At his sentencing, he expressed an interest in receiving training in construction and electrical work. Darrell Bannister Tr. 16.

Before his arrest, he was primarily supported by his mother and former girlfriend. Darrell Bannister PSR ¶ 74. In his free time, he watched his children and used drugs. *Id.*

Bannister has a number of prior convictions, most from his adult years. In 2005, while he was twenty-five, he, together with his brother Damien and three others, stole merchandise from a store after intimidating an employee [\[**146\]](#) with scissors. *Id.* at ¶ 31. At the age of nineteen, he was arrested for possession of a loaded, defaced gun, but he was not convicted. *Id.* at ¶¶ 35-36.

b. Offense

Bannister's tenure with the crew, from July 2008 through September 2008, *id.* at ¶ 6, was the shortest among the defendants. He worked as a street-level dealer with no managerial role. He is charged with the sale of more than 100 grams of heroin. It has not been shown that he possessed or maintained access to firearms during the course of the conspiracy or that possession of firearms by his coconspirators was part of his jointly undertaken criminal activity. *Id.* at ¶ 7.

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Bannister was arrested on a state charge in October 2009, a year after his involvement with the conspiracy ceased, for possession of marijuana, 500 grams of cocaine, and paraphernalia for weighing and packaging drugs. A gun was recovered from the location where he was arrested, but he was not charged with a firearms offense. *Id.* at ¶ 33.

Defendant was arrested for the instant offense on January 27, 2010. *Id.* at 1. On July 13, 2010, he pled guilty to a lesser included offense within Count One of a 24-count superseding indictment. The lesser included offense charged [**147] that between September 2007 and January 2010, he and others conspired to distribute and possess with intent to distribute 100 grams or more of heroin in violation of [21 U.S.C. §§ 846](#) and [841\(b\)\(1\)\(B\)\(i\)](#). *Id.* at ¶ 1.

The total offense level was twenty-three, and the criminal history category was II, yielding a guidelines range between fifty-one and sixty-three months. [HN14](#) The offense carried a mandatory minimum sentence of five years. See [21 U.S.C. § 841\(b\)\(1\)\(B\)](#). [**674] The guidelines fine range was from \$10,000 to \$2,000,000.

c. Sentence

Bannister was sentenced on November 16, 2010. At his sentencing, he stated, "I would like to say sorry to the court and to my mother, my family, and friends, and most important, my little brother[, Damien Bannister,] for looking at me as a role model[,] and I wasn't really a role model." Darrell Bannister 13.

Defendant was sentenced to five years' incarceration and five years' supervised release. A \$100 special assessment was imposed. No fines were imposed because defendant does not have any assets, and it is unlikely that he will have any in the future to pay a fine. A non-guideline sentence was imposed under [18 U.S.C. § 3553\(a\)](#) and [Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621](#). The remaining [**148] counts of the indictment were dismissed.

This sentence, mandated by the Anti-Drug Abuse Act of 1986, is excessive under [18 U.S.C. § 3553\(a\)](#) in view of Bannister's troubled upbringing, his childhood history of mental illness, his brief and low-level involvement in the conspiracy, his remorse for his crime, his lack of personal involvement during the conspiracy with firearms, and the fact that his criminal history includes but a single offense involving violence or the threat of violence. General and specific deterrence would be amply served by a sentence of two to three years; a five-year sentence serves only to diminish his potential for rehabilitation.

3. Christopher Hall

a. Background

Christopher Hall is African American. Hall PSR 2. He was born in an unknown location in North Carolina in 1986. He is the sole child of a nonmarital union. *Id.* at ¶ 37. His father's surname is unknown; the father died when defendant was an infant. Tr. of Sent'g of Christopher Hall 21 (Nov. 16, 2010) ("Hall Tr."). Hall reports an uneventful childhood. His mother smoked marijuana while he was a child, but not in his presence. She worked for the Metropolitan Transit Authority (MTA) as a bus traffic checker [**149] but was fired in 2007 or 2008 for failing a drug test. She received public assistance during defendant's childhood. Hall PSR ¶ 37. She also worked for the New York City Department of Parks and Recreation, but her position was terminated. Hall Tr. 21. In 2010, the family was living in a building with no heat or hot water. They subsequently moved in with defendant's grandmother. Presentence Hr'g Tr. 9-10 Aug. 16, 2010.

Despite being a poor student, Hall graduated from Grover Cleveland High School in 2004. Hall PSR at ¶ 53. In 2005, he worked as a maintenance worker through the New York City Summer Youth Program, and in 2005 and 2006 he performed janitorial work for the MTA. From mid-2009 to his arrest for the instant offense, he performed construction work for the Bedford Stuyvesant Restoration Corporation as part of a job training program. *Id.* at ¶ 58-60. At his sentencing, he expressed an interest in receiving training in construction. Hall Tr. 18.

Defendant enjoys generally good health, although it was reported that he has had occasional chest pains from an unspecified congenital lung condition. Hall PSR ¶ 49. He drinks occasionally and has no history of drug use. *Id.* at ¶ 52. He impregnated [**150] a girlfriend. After his arrest, she left New York to live with her mother in an unspecified location "down South." *Id.* at ¶ 40.

Hall has three prior convictions. In 2008, while twenty-two, he was arrested for selling drugs and was found in possession of twenty glassines of heroin and [**675] \$515. He was twice convicted of disorderly conduct. *Id.* at ¶¶ 29-30, 32-34.

b. Offense

Hall worked in the crew from September 2007 to January 2010 as a street-level dealer of heroin and crack. He sold drugs once or twice a week, earning \$150 for every \$500 worth he sold. He is charged with the sale of more than 4.5 kilograms of crack and three kilograms of heroin over the course of the conspiracy. He held no managerial role but was occasionally ordered by Derrick Tatum, the leader, to pick up packages of drugs from suppliers and distribute them to members of the crew. *Id.* at ¶¶ 6, 8.

Hall personally possessed a firearm in furtherance of the conspiracy. He purchased a .380 caliber handgun for \$200 and a bulletproof vest for \$100. *Id.* at ¶ 8. In September 2008, he and defendant Pedro Torres were at a location on Clifton Place where the crew regularly sold drugs.

Several armed individuals approached, and an altercation [**151] ensued. Hall was armed. An unnamed individual was shot in the leg and chest, and Torres was shot in the leg. It is not known whether Hall fired any of the shots that wounded Torres or the unknown victim, and he has not been charged in connection with this shooting. *Id.* at ¶ 6; Torres PSR ¶ 6. On June 30, 2009, police recovered a loaded gun and thirty-five bags of heroin—about two grams' worth—from an apartment that was used by Hall. Hall PSR ¶ 6.

Defendant was arrested on January 27, 2010. *Id.* at 1. On May 13, 2010, he pled guilty to both counts of a two-count indictment. Count One charged that between September 2007 and January 2010, he conspired with others to distribute and to possess with intent to distribute one kilogram or more of heroin and fifty grams or more of cocaine base in violation of [21 U.S.C. §§ 846](#) and [841\(b\)\(1\)\(A\)](#). Count Two charged that between September 2007 and January 2010, he, together with others, possessed a firearm in furtherance of the drug trafficking crime charged in Count One, in violation of [18 U.S.C. § 924\(c\)\(1\)\(A\)\(i\)](#). *Id.* at ¶ 1.

The total offense level was thirty-three, and the criminal history category was I, yielding a guidelines range between 135 [**152] and 168 months. A two-point enhancement for the use of a firearm ordinarily would have been added, but none applied in order to avoid double counting, because defendant was convicted of an [18 U.S.C. § 924\(c\)](#) gun offense. The guidelines range of fine was from \$17,500 to \$4,000,000. The offense carried a mandatory minimum sentence of ten years. See [21 U.S.C. § 841\(b\)\(1\)\(A\)](#).

c. Sentence

Hall was sentenced on November 16, 2010 to ten years' incarceration and five years' supervised release. A \$200 special assessment was imposed. No fines were imposed because defendant does not have any assets, and it is unlikely that he will have any in the future to pay a fine.

A non-guideline sentence was imposed under [18 U.S.C. § 3553\(a\)](#) and [Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621](#). This sentence is appropriate. Defendant was raised in a fatherless home under impoverished conditions. Nevertheless, the relative stability of his background, his completion of high school, and his work history indicate that he had substantial options beyond criminal activity. The sentence is justified by his brazen use of guns. Shootouts conducted in residential areas to protect drug operations are among the worst consequences of the illegal drug [**153] trade. They contribute to the climate of terror in which residents of drug-ridden neighborhoods are forced to live. Defendant's acquisition of a bulletproof vest indicates a calculated decision to [**676] engage in such street combat. The sentence imposed provides ample general and specific deterrence. Given defendant's background, an excessively harsh sentence would lead only to a greater risk of recidivism.

4. Cyril McCray

a. Background

Cyril McCray is African American. McCray PSR 2. He was born in Brooklyn in 1964. His parents were married, but they separated when he was two years old. *Id.* at ¶ 64. He never knew his father. Tr. of Sent'g of Cyril McCray 13 (Nov. 16, 2010) ("McCray Tr."). An uncle occasionally cared for defendant and provided financial support. McCray's mother worked as a schoolteacher and relied on public assistance to support the family. She beat him with extension cords and hangers when he was a child for being rebellious, but he does not feel he was abused. McCray PSR ¶¶ 64-66.

Defendant attended Boys and Girls High School in Bed-Stuy but dropped out after the tenth grade. *Id.* at ¶ 91. Boys and Girls High School has been identified by the New York City Department of Education [**154] as a poorly performing school. New York City Dep't of Educ., *2009-2010 Progress Report Measures for High Schools*, <http://schools.nyc.gov/Accountability/tools/report/default.htm#FindPR>, select "PR Results 2009-10" and "High Schools" (last visited Mar. 20, 2011) (reporting a student performance grade of "F" for Boys and Girls High School for the 2009-2010 school year). See also Patrick Wall, *Boys and Girls High School Struggles to Survive*, Brooklyn Movement Ctr., <http://brooklynmovementcenter.org/node/39> (last visited Mar. 14, 2011) (reporting the attempts of the school's principal to change its rating as one of the city's "'persistently lowest-achieving' schools").

After dropping out of high school, McCray temporarily lived with friends in Brooklyn. His mother then sent him to North Carolina, where he resided with grandparents for four years before returning to Brooklyn. McCray PSR ¶¶ 73, 91.

He has worked as a security guard, day laborer, stock person, janitor, maintenance worker, and helper to a truck driver. *Id.* at ¶¶ 98-109. It was reported that he worked for a paving company for fourteen years, but this could not be verified. *Id.* at ¶ 103. He has held a number of unskilled positions [**155] while in state custody for prior offenses. *Id.* at ¶ 101. In 2006, he received a security guard license after attending classes at a vocational college. *Id.* at ¶ 92. He was unemployed from 2006 to 2007 and from mid-2008 until his arrest in January 2010. *Id.* at ¶¶ 97, 99. He has expressed an interest in receiving training in electrical work and obtaining his graduate equivalency diploma (G.E.D.) while incarcerated. McCray Tr. 8.

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McCray has an extensive history of serious, violent criminal offenses. In 1981, at the age of seventeen, he robbed a victim at gunpoint and attempted to rape her. McCray PSR ¶¶ 23-24. In 1986, he and two others attempted to break into an apartment and menaced a witness. *Id.* at ¶¶ 27-28. He was arrested in 1991 for assaulting a victim with a baseball bat, along with nine other individuals, but the charge was dismissed. *Id.* at ¶¶ 61-62. In 1998, he pushed a long-time girlfriend into a bathtub, injuring her. *Id.* at ¶¶ 34-35. He has been convicted of numerous offenses relating to car theft; driving with stolen license plates, falsified insurance information, and altered vehicle identification numbers; and fleeing from police who were attempting to effect traffic stops. [\[**156\]](#) *Id.* at ¶¶ 29-30, 36-41, 46-51, 54-57. In 1998, [\[*677\]](#) he and another individual intentionally blocked police officers' cars from pursuing a vehicle that a coconspirator had stolen. *Id.* at ¶¶ 36-37. In 2000, McCray was pursued by police as he fled with a stolen car; he sped through stoplights and stop signs, causing the collision of two police cars and injuries to two officers. *Id.* at ¶¶ 40-41. His driver's license has been suspended at least thirty times. *Id.* at ¶ 57.

Two orders of protection have been issued against McCray by a prior girlfriend. Details concerning these orders have not been provided. *Id.* at ¶ 72. McCray acknowledged physically abusing another girlfriend on one occasion. *Id.* at ¶ 69.

In 2005, Defendant was diagnosed with diabetes; he also suffers from high blood pressure and depression. *Id.* at ¶¶ 82, 85. Between 2005 and 2007, he drank three to four glasses of rum a day. *Id.* at ¶ 88. In 2007, he gambled at casinos in Atlantic City two weekends each month and lost \$4,000 to \$5,000 on each occasion. *Id.* at ¶ 80. It was reported in 2000 that he smoked marijuana daily. *Id.* at ¶ 87. He has also smoked crack cocaine. McCray Tr. 7. In 2002, he underwent drug and alcohol treatment while [\[**157\]](#) incarcerated for a prior offense. McCray PSR ¶ 89.

McCray has never been married, but he is engaged to his girlfriend of three years. She lives in Brooklyn and has three children from a prior relationship. She also has two adopted children. Defendant has a sixteen-year-old daughter with a prior girlfriend; the daughter lives with her mother in Brooklyn. McCray stated that before his arrest, he saw his daughter weekly and provided her with \$100 to \$150 of voluntary financial support every week or two. He has stayed in contact with his daughter since his arrest by writing her letters from jail. McCray PSR ¶¶ 68, 70. He has a son, now twenty-nine years of age, from another relationship; the two have not maintained contact. *Id.* at ¶ 71. Attempts by the Probation Department to contact McCray's mother and the mother of his daughter were unsuccessful. *Id.* at ¶ 63. His address of record is in Louis Armstrong Houses, near where the crew sold drugs. See *id.* at 2.

b. Offense

Defendant participated in the conspiracy throughout its duration, from September 2007 until January 2010, as a street-level dealer with no managerial role. He is charged with responsibility for the sale of more than 4.5 kilograms [\[**158\]](#) of crack and three kilograms of heroin. *Id.* at ¶¶ 5, 8.

He personally possessed firearms during the conspiracy. On October 23, 2007, he was stopped by police near the intersection of Clifton Place and Nostrand Avenue, at a location where members of the crew regularly sold drugs, when police observed that the license plate on his car was assigned to a different vehicle. In a hidden compartment, officers found a loaded .38 caliber revolver, a loaded .22 caliber revolver, 249 glassine bags of heroin, and \$1,190 in cash. *Id.* at ¶ 6.

Defendant was arrested on January 26, 2010. *Id.* at 1. On July 22, 2010, he pled guilty to a lesser included offense in Count One of a twenty-four-count superseding indictment. *Id.* at ¶ 1. Count One charged that between September 2007 and January 2010, McCray and others conspired to distribute and possess with intent to distribute one kilogram or more of heroin and fifty grams or more of cocaine base in violation of [21 U.S.C. §§ 846, 841\(b\)\(1\)\(A\)\(i\)](#), and [841\(b\)\(1\)\(A\)\(iii\)](#). *Id.*

The total offense level was thirty-five, and the criminal history category was VI, yielding a guidelines range between 292 and 365 months. The total offense level included a two-point enhancement [\[**159\]](#) for possession [\[*678\]](#) of a firearm during a drug offense. The guidelines range of fine was from \$20,000 to \$4,000,000. [HN15](#) The offense carried a mandatory minimum sentence of ten years. See [21 U.S.C. § 841\(b\)\(1\)\(A\)](#).

c. Sentence

McCray was sentenced on November 16, 2010 to ten years' incarceration and five years' supervised release. A \$100 special assessment was imposed. No fines were imposed because defendant does not have any assets, and it is unlikely that he will have any in the future to pay a fine. The remaining counts of the indictment were dismissed.

A non-guideline sentence was imposed under [18 U.S.C. § 3553\(a\)](#) and [Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621](#). This sentence is high in light of defendant's impoverished background in a fatherless home, his remorse for his crimes, his age and medical condition, and his desire to be a good father and husband. Nevertheless, his role in the conspiracy, his carrying of guns, and the threat to the community indicated by his extensive history of violent crimes warrant the mandatory minimum sentence. The sentence provides ample specific and general deterrence. To follow the guidelines in this case would mean sending defendant to prison for over twenty years, at which point [\[**160\]](#) he would emerge a sixty-six-year-old, diabetic ex-convict with little to no hope of a productive life.

a. Background

Roger Patrick is African American. Patrick PSR 2. He was born in 1989 in Puerto Rico. His parents were married and had six children. *Id.* at ¶ 39. His father frequently came home drunk and abused Patrick, his siblings, and his mother by beating them with his hands and with extension cords, sticks, an iron, and a frying pan. He once threw an electric fan into Patrick's mother's face. Patrick received the worst of the abuse because he intervened to protect his mother from his father's attacks. *Id.* at ¶ 40. This history of abuse was corroborated in letters sent to the court by defendant's family members. In 1995, to escape defendant's father's abuse, his mother moved with her children from Puerto Rico to Antigua to live with her mother. Patrick PSR ¶ 40. She then moved alone to New York City and had the children sent afterward to join her. In New York, the family lived in homeless shelters before finding an apartment. They would often go a day or two without food so that his mother could afford to keep their apartment, when they had one. *Id.* at ¶¶ 39, 41. She [\[**161\]](#) supported the family by working as a home health aide. *Id.* at ¶ 44.

Defendant smoked marijuana daily from the age of twelve until his arrest for the current offense. From the age of fifteen, he drank cognac or vodka each weekend to the point of losing his memory of what happened the night before. *Id.* at ¶ 57. He has expressed an interest in substance abuse treatment. *Id.* at ¶ 60.

About 2002, codefendant Jawara Tatum, who had abused drugs and alcohol heavily starting as a teenager, lived with Patrick's family. Tatum again lived with the family for part of 2009, around the time that Tatum and Patrick were involved in the instant conspiracy. Jawara Tatum PSR ¶ 43.

Patrick attended Lafayette High School, in the Bath Beach section of Brooklyn, but he withdrew in February 2005, while in the ninth grade, when he was arrested for a prior offense. Patrick PSR ¶ 62.

He has two prior convictions, both for robberies committed while he was a teenager. In April 2004, while fifteen and under the influence of alcohol, he and several [\[*679\]](#) other teenagers were on their way to a party when they robbed a man they saw on the street. Defendant was armed with a knife during the incident and struck the victim in the [\[**162\]](#) head with a long-handled dustpan. *Id.* at ¶¶ 24-26. While serving probation for this offense, in February 2005, he committed the second robbery. In it, Patrick and two others, wearing masks, attacked a victim by choking, punching, and kicking him. They also pistol-whipped him with a bb gun. Patrick was incarcerated for the second robbery and for a parole violation from September 2005 to April 2008. *Id.* at ¶¶ 29-30. While in custody, he committed several disciplinary infractions, including fighting. *Id.* at ¶ 32.

Unskilled jobs defendant held while in custody constitute his entire employment history. *Id.* at ¶ 68. He was released from prison in April 2008 at the age of nineteen. *Id.* at ¶ 29. He was enrolled in a G.E.D. program from 2008 until his arrest for the instant offense. *Id.* at ¶ 61. He has expressed an interest in doing carpentry and electrical work. Tr. of Sent'g of Roger Patrick 16 (Nov. 16, 2010).

Patrick has never been married and has no children. Since 2008, he has been in a relationship with a college student, Shakeyia Tatum, who plans to become a parole or probation officer. *Id.* at ¶ 46. Shakeyia Tatum is the sister of Jawara Tatum and the niece of Derrick Tatum. Jawara Tatum [\[**163\]](#) PSR ¶ 37; Tr. of Sent'g of Derrick Tatum 5 (Nov. 16, 2010) ("Derrick Tatum Tr.").

Defendant experiences pain from an untreated knee injury he suffered as a result of a car accident in 2002 or 2003. Otherwise he enjoys good health. *Id.* at ¶¶ 54-55.

His family lives in an apartment in Louis Armstrong Houses on the same block where Cyril McCray and Pedro Torres lived and near where the crew sold drugs. *See id.* at 2. Patrick has described the neighborhood as a "negative" environment where there is substantial pressure from peers to engage in crime. *Id.* at ¶ 42.

b. Offense

Defendant began working with the crew in August 2008 as a street-level dealer, with no supervisory role. He continued in that capacity until January 2010. He is responsible for selling more than a kilogram of heroin. He maintained access to guns shared by members of the crew, but he did not personally possess firearms. *Id.* at ¶ 6.

Defendant was arrested on January 27, 2010. *Id.* at ¶ 7. On July 27, 2010, he pled guilty to a lesser included offense in Count One of a twenty-four-count indictment. Count One charged that between September 2007 and January 2010, he conspired to distribute and possess with intent to distribute more [\[**164\]](#) than 100 grams of heroin, in violation of [21 U.S.C. §§ 841\(b\)\(1\)\(B\)\(i\)](#) and [846](#). *Id.* at ¶ 1.

The total offense level was thirty-one, and the criminal history category was VI, yielding a guidelines range between 188 and 235 months. The offense level included a two-point enhancement because defendant maintained access to firearms used by the conspiracy. The guidelines range of fine was from \$15,000 to \$2,000,000. The offense for which he pled guilty under Count One carried a mandatory minimum sentence of five years. *See* [21 U.S.C. § 841\(b\)\(1\)\(B\)](#).

c. Sentence

It was stated orally at Patrick's sentencing on November 16, 2010 that he would be incarcerated for six years. [HN16](#) In general, sentence is imposed when orally announced. [Fed. R. Crim. P. 35\(c\)](#). It may then be corrected within fourteen days for arithmetical, technical, or other clear **[*680]** error. [Fed. R. Crim. P. 35\(a\)](#). It is the practice of this court for judgment to be entered promptly after sentence is orally announced. In the case of this defendant, given the mandatory minimum sentence required by [21 U.S.C. section 841\(b\)\(1\)\(B\)\(i\)](#), five years was the reasonable sentence under [section 3553\(a\)](#). The sentence of six years, announced orally, violated [\[**165\] 18 U.S.C. section 3553\(a\) \(6\)](#), requiring consistency with like cases. See Part IV.B.1.c, *supra* (three-year sentence for Damien Bannister); Part IV.B.2.c, *supra* (five-year sentence for Darrell Bannister); Part IV.B.7.c, *infra* (five-year sentence for Jawara Tatum). A hearing was held Mar. 24, 2011, and defendant was resentenced to five years' imprisonment and five years' supervised release.

A non-guideline sentence was imposed under [18 U.S.C. § 3553\(a\)](#) and [Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621](#). A \$100 special assessment was imposed. No fines were imposed because defendant does not have any assets, and it is unlikely that he will have any in the future to pay a fine. The remaining counts of the indictment were dismissed.

Even a five-year sentence, mandated by the Anti-Drug Abuse Act of 1986, is excessive in view of Patrick's remorse for his crime, his childhood history of grave abuse and deprivation, the young age at which he became involved in this conspiracy, his lack of personal involvement with guns, and the fact that all of his prior offenses were committed while he was a minor. It provides more than enough general and specific deterrence. Given defendant's background, its excessive length can lead [\[**166\]](#) only to a greater risk of recidivism.

6. Derrick Tatum

a. Background

Derrick Tatum is African American. Derrick Tatum PSR 2. He was born in 1980 in Brooklyn. *Id.* at 2, ¶ 44. His parents were unmarried and had six children. *Id.* at ¶ 44. His father supported the family through plumbing and boiler work; his mother was a homemaker. *Id.*

Derrick Tatum has described a bleak upbringing that is only partially corroborated. He stated that he lived in poor conditions without heat or hot water, that the family "had nothing" and "barely had food," and that his father was an alcoholic who was intoxicated daily and beat Tatum's mother once or twice a week. He stated that his older brother, Michael Tatum, used drugs in the house. *Id.* at ¶¶ 44, 45. His mother confirmed that the family lived at times without heat or hot water, but she denied that the family went without food or had financial difficulties. She stated that Tatum's father drank alcohol only occasionally. *Id.* at ¶ 51. Tatum's fiancée expressed familiarity with his upbringing, but she said she was unaware of any drug or alcohol abuse or physical abuse in the household. *Id.* at ¶ 52.

Derrick Tatum's older brother, Michael Tatum, has an extensive [\[**167\]](#) criminal history, including robbery and attempted robbery. Defendant reported that Michael Tatum has been shot nine times. A second brother, Jermaine Tatum, was killed in a car accident in 2002. Defendant's remaining five siblings are ages thirty-five to forty-three, live in Brooklyn, are single, and enjoy good health. One sister is the mother of codefendant Indio Tatum; another is the mother of codefendant Jawara Tatum. *Id.* at ¶ 47.

Defendant attended Grover Cleveland High School to the ninth grade. He was expelled because he did not attend classes. *Id.* at ¶ 71. He then went to Street Academy in Bed-Stuy for the tenth grade, but he withdrew when he started selling drugs. *Id.* at ¶ 70.

[*681] Tatum began smoking marijuana daily at the age of eighteen. He was enrolled in multiple drug treatment programs between 1999 and 2005 but continued to smoke marijuana heavily—about three "blunts" of it per day—until his arrest for the present offense in January 2010. *Id.* at ¶¶ 63, 65-67. He declined to state how he financed his drug habit. *Id.* at ¶ 64. He has no history of other drug or alcohol use. *Id.* at ¶ 63, 69. He claims that he would be interested in receiving drug treatment. *Id.* at ¶ 68.

Tatum has [\[**168\]](#) a lengthy history of serious criminal offenses. In May 1998, while he was seventeen years old, he drove a vehicle into the wall of a building after almost striking several children. *Id.* at ¶ 26; Addendum to the Presentence Report of Derrick Tatum 2. In October of that year, he was observed by police in a car with codefendant Damien Bannister, who was then fourteen years old, and two others in a car speeding and weaving from lane to lane. Derrick Tatum PSR ¶¶ 28-29. Police recovered a loaded, defaced .25 caliber handgun from the car. *Id.* at ¶ 29. In 2000, he was convicted for possession of drugs and sentenced to a year of confinement after police executing a search warrant recovered twenty-eight bags of crack cocaine and a loaded .357 Magnum pistol from a residence to which he was connected. *Id.* at ¶¶ 33-34. In February, 2001 he fired six shots at an individual with a stolen .9 millimeter handgun; he explained to a probation officer that he did so because he "had a problem [that he] had to take care of." *Id.* at ¶¶ 35-36. In July 2001, he was arrested for selling heroin. *Id.* at ¶¶ 37-38. He was convicted of the shooting and the sale of drugs and sentenced to six years in prison. *Id.* at [\[**169\]](#) ¶¶ 35, 37. While incarcerated he was cited for numerous violations, including fighting, interference, and drug use. *Id.* at ¶ 39. He was discharged in July 2007. *Id.* at ¶ 35.

Defendant has had little legal employment. In 2000 and 2001, his late brother, Jermaine Tatum, found him sporadic employment with a moving and storage company. *Id.* at ¶ 78. He worked as a porter and group leader while incarcerated from 2001 to 2005, and he worked briefly in 2007 as a laborer with a scrap metal company. *Id.* at ¶¶ 74, 76-77. He declined to state how he supported himself between 2007 and 2010. *Id.* at ¶ 74. He has expressed an interest in receiving culinary training and opening a restaurant. Derrick Tatum Tr. 13.

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Tatum has a ten-year-old daughter with a woman he has been seeing since 1995 and who works as a 911 operator. The two are engaged to be married. He has no other children and has never been married. Derrick Tatum PSR ¶ 48.

Defendant gambled frequently. He wagered \$4,000 to \$5,000 per month at various gambling spots in Brooklyn and took regular trips to Atlantic City and Las Vegas. *Id.* at ¶ 56. He reported that his greatest gambling payout was \$30,000 and that he used his gambling proceeds to finance [**170] his involvement in the current offense. *Id.* His fiancée is paying his legal bills. *Id.* at ¶ 82.

b. Offense

The present conspiracy was initiated by Derrick Tatum in September 2007. He led the crew until January 2010. He recruited members, determined how much they should be compensated, negotiated major transactions, obtained bulk quantities of heroin and cocaine from suppliers, and received a portion of the proceeds of all sales. *Id.* at ¶¶ 5-6. Occasionally he packaged bulk quantities of drugs to distribute to street-level dealers and collected their proceeds from drug sales, but he typically delegated this role to others in [**682] the organization, particularly his nephew, Indio Tatum. *Id.*; Indio Tatum PSR ¶ 10.

Defendant personally possessed and maintained access to multiple firearms. Derrick Tatum PSR ¶ 7. In August 2008, he negotiated the sale of a loaded .32 caliber pistol to a confidential informant, and he directed Indio Tatum to deliver it to the customer. *Id.* Derrick Tatum is charged with responsibility for the distribution of more than 4.5 kilograms of cocaine base and three kilograms of heroin over the course of the conspiracy. *Id.* at ¶ 10.

He was arrested on January 27, 2010. *Id.* at [**171] ¶ 10. Officers executing a search warrant at his apartment on the day of his arrest recovered approximately \$10,000 in cash, which was retained by the government. *Id.* at ¶ 8.

On July 22, 2010, defendant pled guilty to Count One of a twenty-four-count indictment, charging that between September 2007 and January 2010, he conspired with others to distribute and possess with intent to distribute one kilogram or more of heroin and fifty grams or more of cocaine base in violation of [21 U.S.C. §§ 846](#), [841\(b\)\(1\)\(A\)\(i\)](#), and [841\(b\)\(1\)\(A\)\(iii\)](#). *Id.* at ¶ 1.

The total offense level was thirty-nine, and the criminal history category was IV, yielding a guidelines range of 360 months to life in prison. The offense level included a two-point enhancement for defendant's involvement with firearms and a four-point enhancement for his leadership role in the conspiracy. The guidelines range of fine was from \$25,000 to \$4,000,000. The offense carried a mandatory minimum sentence of ten years. See [21 U.S.C. § 841\(b\)\(1\)\(A\)](#).

c. Sentence

Tatum was sentenced on November 16, 2010 to fifteen years' incarceration and five years' supervised release. A \$10,000 fine and a \$100 special assessment were imposed. The remaining [**172] counts of the indictment were dismissed.

A non-guideline sentence was imposed under [18 U.S.C. § 3553\(a\)](#) and [Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621](#). This sentence is appropriate in light of defendant's criminal history, his impoverished background, his professed desire to lead a lawful life, and his desire to provide a stable home for his family. Defendant was sentenced to a significantly longer term of imprisonment than any of his coconspirators, consistent with the court's practice of giving heavier sentences to those who have played senior roles in criminal conspiracies or who for their own gain have induced or encouraged others to enter into criminal enterprises. This sentence provides substantial incapacitation and ample specific and general deterrence. Given defendant's background, an excessively harsh sentence would lead only to a greater risk of recidivism.

7. Jawara Tatum

a. Background

Jawara Tatum is African American. Jawara Tatum PSR 2. He was born in 1988 in Brooklyn. *Id.* at ¶ 35. His parents were unmarried. *Id.* at ¶ 7. He is the nephew of Derrick Tatum and the cousin of Indio Tatum, both leaders of the conspiracy; his mother is Derrick Tatum's sister. *Id.* at ¶ 34; see Derrick Tatum PSR ¶ 47, [**173] Indio Tatum PSR ¶ 7.

Defendant's father was only intermittently present during his childhood. Jawara Tatum PSR ¶ 35. He and his siblings were raised primarily by his mother, who works as a home health aide, with assistance from his maternal grandmother. His mother received financial assistance from his father and from welfare. *Id.* ¶¶ 35, 38. Deprived of a male role model, Tatum relied for guidance on his maternal [**683] grandparents; on a maternal uncle, Jermaine Tatum; and on a maternal aunt, Barbara Judkins. *Id.* at ¶ 38.

Jawara Tatum appears to have a serious learning disability. As a child, he was "cursed out" by his mother for being "not smart." *Id.* at ¶ 35. He struggled in school and was held back twice in the fifth grade. *Id.* He was enrolled in special education classes and was identified by teachers as being emotionally disturbed and having skills far below his grade level. New York City Bd. of Educ., Individualized Education Program for Jawara Tatum, Nov. 14, 2001, at 1, 3. When he was in the sixth grade, at age thirteen, a teacher wrote, "Student has severe

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problems in self-control and, at the same time, is beginning to perceive external events as over-whelming. He relies upon physical aggression to avoid emotional pain. This dynamic when combined with his physical strength creates a dangerous situation." *Id.* at 4. He is functionally illiterate and is able to read "only a little bit." Addendum to the Presentence Report of Jawara Tatum 2 ("Jawara Tatum Addendum"); Tr. of Sent'g of Jawara Tatum 19 (Nov. 16, 2010) ("Jawara Tatum Tr.").

Defendant suffered grave physical abuse at the hands of his father as punishment for his continued difficulties in school. On one occasion, his father burned him in the face with an iron. On another, defendant was beaten fiercely and found by police in a nearby park, covered with blood. Between the ages of fourteen and fifteen, he ran away from home three times to escape his father's abuse, sometimes after his mother informed his father that he was doing poorly in school. Once, after running away, he slept in a park and begged publicly for food. His mother stated that she never abused him and never witnessed his father treat him badly. Jawara Tatum PSR ¶ 35.

While fourteen, defendant was hit in the head with a rock while playing with friends; his mother declined to take him to the hospital for treatment because he was being "dumb." He suffers ¶ 175] sporadic headaches that he associates with this injury and with previous head trauma suffered at the age of thirteen. *Id.* at ¶ 53.

While thirteen, Tatum began suffering from depression caused by the physical abuse his father inflicted. *Id.* at ¶ 47. He began living in the apartment of Jean Patrick, a family friend and the mother of codefendant Roger Patrick, in Louis Armstrong Houses. *Id.* at ¶ 43.

Tatum began drinking alcohol and using drugs as a means of coping with his depression. He regularly drank cognac and used marijuana, ecstasy, and PCP. *Id.* at ¶¶ 47, 56.

Between 2003 and 2004, while he was a middle-school student, he worked periodically for a moving and storage company. The job was arranged by his uncle, Jermaine Tatum. After this job he worked briefly at a pet store and at a different moving company. *Id.* at ¶¶ 68, 70.

Defendant was promoted to the ninth grade at sixteen, in 2004, and attended William E. Grady Career and Technical Education High School, in the Brighton Beach section of Brooklyn. *Id.* at ¶ 59. His grades were poor, and he was occasionally suspended for fighting and skipping class. *Id.* at ¶ 60. He was ridiculed by his peers for his poor academic performance. Jawara ¶ 176] Tatum Tr. 25. He acknowledges that he has had difficulty controlling his anger. *Id.* at 24.

In 2004 and 2005, a series of violent events occurred that culminated in defendant's conviction for robbery and attempted robbery. In 2004, his uncle Jermaine, the only positive male role model he had known for most of his life, was struck and ¶ 684] killed by a car. Jawara Tatum PSR ¶ 38. In the same year, defendant was stabbed at a house party after he punched someone who had insulted his mother. A stab wound punctured his lung; he still bears scars from the stab and from a chest tube that was inserted so that he could breathe while in the hospital. *Id.* at ¶ 52.

When sixteen, in December 2004 and January 2005, Tatum participated in a series of robberies. On December 19, 2004, he and four other individuals surrounded a victim and demanded his wallet, then knocked him to the ground and repeatedly kicked him in the face. *Id.* at ¶¶ 25-26. On January 9, 2005, Tatum and four others surrounded a victim and punched him, knocking out his teeth, and struck him on the head with a weapon. *Id.* at ¶¶ 21-22. They robbed him of money and a mobile phone. On January 14, 2005, Tatum was arrested for another assault and ¶ 177] robbery. After this incident, he was seen running into a nearby apartment and throwing a bb gun out of a window. *Id.* at ¶ 22.

In March 2005, his brother, Ras-Sahara Tatum, filed for a protection order against him after the two got into a fight at their mother's home. The police were called, and defendant was detained overnight, but no charges were filed. *Id.* at ¶ 42.

In November 2005, Jawara Tatum was convicted of robbery and attempted robbery and sentenced to forty-two months confinement. *Id.* at ¶ 21. While in custody he committed numerous violations, including drug possession, fighting, assault, and gang activity. *Id.* at ¶ 23. He is a member of the Bloods gang. *Id.* at ¶ 45. He took a number of classes while incarcerated, including special education and maintenance. *Id.* at ¶ 61.

He was released on parole on March 9, 2009 at the age of twenty. *Id.* at ¶ 21. He lived at his mother's home and that of Jean Patrick and Roger Patrick. *Id.* at ¶ 43. Roger Patrick had been working with the crew as a drug dealer since August 2008. Roger Patrick PSR ¶ 6. After his release, Jawara Tatum worked full-time in a job training program. He also helped out at a corner store on an unpaid basis in exchange ¶ 178] for food and other items. Jawara Tatum PSR ¶ 66.

Tatum resumed heavy drug use after his release, usually taking drugs alone, at home. He smoked marijuana about ten times daily and took ecstasy and drank cognac every second or third day. For part of this period he used cocaine. *Id.* at ¶ 56. He underwent drug counseling after his release, from March 2009 to May 2009, but he was discharged from the program because he failed to file for Medicaid. From May 2009 until his arrest in January 2010, he was enrolled in an outpatient drug treatment program, but his drug use went undetected because the program failed to require on-site drug testing. *Id.* at ¶ 57.

Tatum has few family ties. He lost contact with the majority of his family after his prior imprisonment began in 2005, and his brother, Ras-Sahara Tatum, was incarcerated on a drug conviction from 2008 to 2010. Only his mother and his sister Shakeyia Tatum, the girlfriend of Roger Patrick, remain in contact with and supportive of him. *Id.* at ¶¶ 35, 37. He has stated that he feels "alone and lonely." *Id.* at ¶ 47.

He has never married and has no children. *Id.* at ¶¶ 39-41. Since April 2009, he has been involved in a relationship with a woman ¶ 179] living in Staten Island. *Id.* at ¶ 43. She became pregnant but had a miscarriage after his arrest for the present offense. *Id.* at ¶ 39;

[*685] b. Offense

Jawara Tatum began working for the crew in September 2009. *Id.* at ¶ 5. He was the last of the eleven defendants in this case to join the crew. He sold drugs at the street level on a daily basis and is charged with responsibility for selling 315 grams of crack and eighty grams of heroin. He had no managerial role. *Id.* at ¶ 5. He had access to firearms possessed by his coconspirators, but he did not personally carry a gun. *Id.* at ¶ 6.

Defendant was arrested on January 27, 2010. *Id.* at ¶ 35. On June 22, 2010, he pled guilty to a lesser included offense in Count One of a two-count indictment. Count One charged that between September 2007 and January 2010, he conspired to distribute and possess with intent to distribute 100 grams or more of heroin and five grams or more of cocaine base in violation of [21 U.S.C. §§ 846, 841\(a\)\(1\)](#), and [841\(b\)\(1\)\(B\)](#). *Id.* at ¶ 1.

The total offense level [\[**180\]](#) was twenty-three, and the criminal history category was III, yielding a guidelines range between fifty-seven and seventy-one months. The offense level included a two-point enhancement because Tatum maintained access to firearms used in the conspiracy. The guidelines range of fine was from \$10,000 to \$2,000,000. The offense for which he pled guilty under Count One carried a mandatory minimum sentence of five years. See [21 U.S.C. § 841\(b\)\(1\)\(B\)](#).

c. Sentence

Defendant was sentenced on November 16, 2010. At his sentencing, he stated, "I learned from my mistakes, I just want to get a second chance in society, to live with my family and . . . help out others that wasn't helped and to have kids of my own and raise them and just do better in life and know how to read and write and go home." Jawara Tatum Tr. 16.

Tatum was sentenced to five years' incarceration and five years' supervised release. A \$100 special assessment was imposed. No fines were imposed because defendant does not have any assets, and it is unlikely that he will have any in the future to pay a fine. The remaining counts of the indictment were dismissed.

This sentence, mandated by the Anti-Drug Abuse Act of 1986, is excessive under [\[**181\] 18 U.S.C. § 3553\(a\)](#) in view of defendant's upbringing in an atmosphere of horrific physical abuse; his functional illiteracy and apparent learning disability; the absence of a positive male role model in his childhood; his crippling addiction to drugs and alcohol; his continuing efforts to occupy himself with lawful work; the involvement of his uncle, Derrick Tatum, in bringing him into the conspiracy; his relatively brief involvement as a low-level member of the conspiracy; his lack of personal involvement with firearms; his lack of involvement as an adult in any crimes of violence; his sincere remorse for his crimes; his stated desire to lead an honest, healthy, and productive life; and the fact that all of his criminal history points stem from offenses committed during a short period of time while he was a minor. A shorter period of incarceration would provide ample general and specific deterrence. Given defendant's background, the excessive length of the sentence imposed will probably increase the risk of recidivism.

8. Pedro Torres

a. Background

Pedro Torres is White and Hispanic. Torres PSR 2. He was born in 1987 in Brooklyn. His parents never married. They had nine children. His [\[**182\]](#) father was a crack cocaine addict and spent much of Torres's childhood in and out of various drug treatment programs. Defendant has not seen his father since 2006. *Id.* at [\[*686\]](#) ¶¶ 28-29. Over a five-year period during Torres's childhood, he and his family lived in four different shelters, including two for victims of domestic violence. *Id.* at ¶¶ 28, 33. The family lives in an apartment in Louis Armstrong Houses, a few doors from Roger Patrick's and Cyril McCray's apartments and near where the crew sold drugs. See *id.* at 2; McCray PSR 2; Patrick PSR 2.

Torres's mother was unemployed and depended on public assistance to support the family. The mother received no financial support from defendant's father or from their extended family, which lives in Puerto Rico. *Id.* at ¶ 28. She receives a \$170 public assistance check every three weeks and \$600 a month in disability benefits; she pays \$450 a month in rent. *Id.* at ¶¶ 30, 35. The family receives clothing and food from their church. They rarely had enough money for school supplies. *Id.* at ¶ 28.

Torres received little parental guidance while growing up because of his father's absence and his mother's need to attend to his siblings. Seven of them, [\[**183\]](#) ages twelve through twenty-five, continue to reside with his mother in Brooklyn. The eighth, age nine, was adopted by a Queens family at birth so that he could receive medical attention for a severe birth defect. *Id.* at ¶ 31.

Torres began smoking marijuana at the age of sixteen. He was drinking alcohol to excess at the age of seventeen. Before his incarceration in July 2009, he smoked marijuana twice a day and daily drank cognac to the point of inebriation. He admits to having a substance abuse

Document: United States v. Bannister, 786 F. Supp. 2d 617
problem, but he says he is interested in treatment. *Id.* at ¶ 45. His mother reports that he has been depressed since 2007. She attempted to obtain psychological treatment for him but was unable to afford it. *Id.* at ¶ 40. Actions

Defendant attended Abraham Lincoln High School, in the Coney Island section of Brooklyn, from 2003 to 2005, at which point he transferred to a school with a vocational training program. *Id.* at ¶ 48. He was enrolled in special education classes and was able to graduate despite never having learned to read or write. Tr. of Sent'g. of Pedro Torres 10 (Nov. 16, 2010). He worked intermittently at pet stores from 2003 to 2009 and from 2007 to 2009. Torres PSR ¶ 53.

For the past six years, [**184] Torres has been in a relationship with a woman, now twenty years old, who plans to attend St. Francis College. The two expect to be married. He has no children. *Id.* at ¶ 32.

He was injured in a shooting in July 2006. He had returned home from a funeral when three individuals walked down his street firing randomly into houses. He was shot in his chest, back, right leg, and right forearm. Doctors were unable to remove a bullet from his chest because it was lodged near his heart. As a result of his injuries, Torres continues to suffer pain in his chest and nerve damage that limits the use of his right hand. *Id.* at ¶ 42.

Torres has two prior convictions. In July 2007, he was arrested for possession of two loaded firearms. *Id.* at ¶¶ 22-23. In April 2008, he was arrested for possession of narcotics after he was seen exchanging an envelope containing heroin. *Id.* at ¶ 24-25.

b. Offense

Torres became involved in the conspiracy as a street-level dealer in September 2007 and distributed a total of more than 300 grams of crack. Torres PSR ¶ 5; Addendum to the Presentence Report of Pedro Torres 1. He had no managerial responsibility. He carried guns and had access to firearms shared by the crew's members. [**185] Torres PSR ¶ 5. In September 2008, he and defendant Hall were approached [**687] by six armed men at a location where the two regularly sold drugs. A gunfight ensued. Torres was shot four times in the legs, and another individual was hit in the leg and chest. *Id.* at ¶¶ 6, 42.

Defendant's involvement in the conspiracy ended in July 2009, when he began serving a forty-two month sentence for a July 2007 firearms possession charge. *Id.* at ¶¶ 7, 22. On July 22, 2010, he pled guilty to an amended Count One of a 24-count superseding indictment. Count One charged that between September 2007 and January 2010, he conspired to distribute and possess with intent to distribute fifty grams or more of cocaine base in violation of [21 U.S.C. §§ 846, 841\(a\)\(1\)](#), and [841\(b\)\(1\)\(A\)](#). *Id.* at ¶ 1.

The total offense level was thirty-one, and the criminal history category was II, yielding a guidelines range of 121 to 151 months. The offense level included a two-point enhancement because defendant maintained access to firearms used by the conspiracy. The guidelines range of fine was from \$15,000 to \$4,000,000. The offense carried a mandatory minimum sentence of ten years. See [21 U.S.C. § 841\(b\)\(1\)\(A\)](#).

c. Sentence

Defendant [**186] was sentenced on November 16, 2010 to 104 months' incarceration and five years' supervised release. This sentence, combined with the sixteen months he had already served for his July 2007 firearms offense, satisfies the ten-year mandatory minimum sentence. See [United States v. Rivers, 329 F.3d 119 \(2d Cir. 2003\)](#). A \$100 special assessment was imposed. No fines were imposed because defendant does not have any assets, and it is unlikely that he will have any in the future to pay a fine. The remaining counts of the indictment were dismissed.

The sentence, mandated by the Anti-Drug Abuse Act of 1986, is excessive under [18 U.S.C. § 3553\(a\)](#) in view of Torres's background of deprivation, physical abuse, and fatherlessness; his learning disability and illiteracy; his addiction to drugs and alcohol; his limited criminal history; his sincere remorse for his crime; his efforts to hold lawful employment; his commitment to his girlfriend of six years; his continuing medical difficulties; and the lack of evidence that he has engaged in violence against anyone. Because of his possession of guns, he poses a greater threat to the community than defendants who received sentences of four or five years [**187] in prison. But this threat is not so great that he must be incapacitated for ten years. A shorter sentence would provide ample specific and general deterrence. Given defendant's background, the excessive length of this sentence will probably lead to a greater risk of recidivism.

C. Summary of Sentences Covered in this Memorandum

Defendants were sentenced as follows:

[**688] [Table D: Summary of Sentences](#)

Name	Supervised Release	Special Assessment
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Damien Bannister	5 years	\$100
Darrell Bannister	5 years	\$100
Christopher Hall	5 years	\$200
Cyril McCray	5 years	\$200
Roger Patrick	5 years	\$100
Derrick Tatum	5 years	\$100
Jawara Tatum	5 years	\$100
Pedro Torres	5 years	\$100

Incarceration	Fine	Forfeiture	Evaluation of Appropriateness
36 months (plus 12 months state time)	None	None	Appropriate
60 months	None	None	Too High
120 months	None	None	Appropriate
120 months	None	None	Appropriate
60 months	None	None	Too High
180 months	\$10,000	None	Appropriate
60 months	None	None	Too High
104 months (plus 16 months state time)	None	None	Too High

IV. Conclusion

Several of the sentences in this case, imposed only because of statutory minima, are disproportionate to the crimes committed and [\[**188\]](#) the backgrounds of the defendants. Their excess causes particular concern when applied to youthful defendants. See *United States v. C.R.*, No. 09-CR-155, draft op., at 394-402 (E.D.N.Y. Mar. 10, 2011) (discussing unconstitutionality of five-year mandatory minimum as applied to a defendant who possessed and distributed child pornography between the ages of fifteen and nineteen). Cf. *Roper v. Simmons*, 543 U.S. 551, 575, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (holding that the death penalty is disproportionate for offenders under the age of eighteen); *Graham v. Florida*, 130 S.Ct. 2011, 2034, 176 L. Ed. 2d 825 (2010) (holding that sentences of life without parole are unconstitutional for juvenile offenders who have not committed homicides). That concern is multiplied by the imposition of these sentences upon young defendants subject to abuse, poverty, drug and alcohol addiction, unemployment, illiteracy, and learning disability, largely attributable to their backgrounds.

Had the defendants been raised by cohesive, adequate families, most of the difficulties they encountered would probably never have come to pass. Well-resourced, attentive parents would have had the knowledge, ability, and insight to protect their children from many of the [\[**189\]](#) difficulties that befell these defendants in their youth, to obtain assistance to deal with their psychological and physical problems, to obtain crucial opportunities for education, work, and personal growth, and to act as useful role models. Those with learning disabilities would likely have been [\[**689\]](#) provided available resources to overcome their impairments at public expense. That the defendants were born into circumstances without such support is at the center of this tragedy.

As part of defendants' sentences, it has been ordered that every reasonable effort be made to provide counseling, drug and alcohol treatment, gambling rehabilitation, anger management therapy, education, and job training while defendants are incarcerated and during supervised release.

Considering the limited resources devoted to such rehabilitative measures, however, it is by no means clear that these aids will be effectively provided. See *Petersilia*, *supra*, at 5-6. When the defendants are released from prison, they will probably have to return to all of the problems that led them to engage in crime. Whatever tenuous connection they retain to the lawful, supportive world will likely be diminished after years of forced separation in prison. [\[**190\]](#) Incarceration will make entry into the job market more difficult. Remaining will be the root problems that have largely brought them to this pass: poverty; dysfunctional families; mental and physical problems; legal and *de facto* housing segregation; segregated and inferior schools; and an economy that appears to have little need or concern for low- and semi-skilled workers.

Such individuals constitute a permanent underclass, with almost no opportunity to achieve economic stability, let alone the American dream of upward mobility.

These problems are concentrated among low-income African Americans, but they affect the country as a whole. Our rates of imprisonment, income inequality, and unemployment are either the highest or among the highest of the world's advanced economies, while our rates of life expectancy are among the lowest. Charles M. Blow, *Empire at the End of Decadence*, N.Y. Times, Feb. 19, 2011, at A23 (reporting statistics on thirty-two countries). The hardships of poverty fall most severely on the youngest Americans. See Charles M. Blow, *Suffer the Little Children*, N.Y. Times, Dec. 25, 2010, at A29 ("[A]ccording to a 2007 Unicef report on child poverty, [\[**191\]](#) the U.S. ranked last among 24 wealthy countries.").

Significant reforms are needed in our sentencing regime. The Fairness in Sentencing Act of 2010 reduced the dubious 100:1 powder/crack ratio to a 17.8:1 ratio. It did nothing to remove the sentencing regime's dependence on arbitrary drug quantities—not just with regard to crack cocaine but other drugs as well—that bear little relationship to the harm a defendant has done to society or to the danger of his inflicting further harm. Harsh, disproportionate mandatory sentences impose grave costs not only on the punished but on the moral credibility upon which our system of criminal justice depends. See Robinson, *supra*, at 2025. Such sentences, aimed at the drug trade's lowest levels of labor, appear to have no effect on illegal drugs' price or availability. Osler, *supra*, at 3.

Judges approach the grave responsibility of sentencing criminals with all the thoughtfulness and limited insight that their knowledge and wisdom can muster. [HN17](#) "Sentencing . . . is in its essence subjective. . . . It is not possible to determine a condign sentence without looking closely at all relevant facts and circumstances, and making a nuanced decision." Hon. John [\[**192\]](#) L. Kane, *Sentencing: Beyond the Calculus*, Litig., Fall 2010, at 5. See also Hon. David L. Bazelon [▼](#), *Questioning Authority: Justice and Criminal Law* 27 ("We have to conduct this searching inquiry into the criminal's life history, not to excuse, but to appreciate the conditions that inevitably attend and may lead to criminal behavior. Focusing on the individual offender is not [\[*690\]](#) part of the problem of crime; it is part of the solution.").

Mandatory minimum sentencing provisions, leaving no alternative but lengthy incarceration, prevent the exercise of this fundamental judicial duty. Such laws are "overly blunt instruments, bringing undue focus upon factors (such as drug quantities) to the exclusion of other important considerations, including role in the offense, use of guns and violence, criminal history, risk of recidivism, and many personal characteristics of an individual defendant." Sessions, *supra*, at 42. It is difficult to conceive of a system of mandatory minimum sentences that could effectively anticipate and provide for such factors.

For nonviolent, low-level drug crimes, the goals of sentencing—general and specific deterrence, incapacitation, retribution, and rehabilitation—could [\[**193\]](#) in most cases be achieved with limited incarceration, through a system of intense supervised release utilizing home visits; meetings with parole officers; a combination of counseling, drug and alcohol treatment, education, job training, and job placement; and electronic monitoring to prevent flight, promote positive choices, and deter and detect incipient crime. Such a regime would likely be more effective in reducing crime and much less costly than imprisonment. Given discouraging economic, social, and psychological conditions, it seems doubtful that the long sentences of incarceration imposed will appreciably reduce crime.

Pragmatism and a sense of fairness suggest reconsideration of our overreliance on incarceration. Though defendants are hemmed in by circumstances, the law must believe that free will offers an escape. Otherwise, its vaunted belief in redemption and deterrence—both specific and general—is a euphemism for cruelty. These defendants are not merely criminals, but human beings and fellow American citizens, deserving of an opportunity for rehabilitation. Even now, they are capable of useful lives, lived lawfully.

Dated: April 8, 2011

Brooklyn, New York

/s/ [Jack B. Weinstein](#) [▼](#)

[Jack B. Weinstein](#) [▼](#) [\[**194\]](#)

Senior United States District Judge



<http://paidpost.nytimes.com/netflix/women-inmates-separate-but-not-equal.html>

The New York Times

Unlocking the Truth About the Clinton Crime Bill

By DAVID YASSKY

APRIL 9, 2016

AT a campaign event in Philadelphia last week, former President Bill Clinton was interrupted by protesters incensed about his 1994 crime bill. Mr. Clinton did not hold back: “Because of that bill we had a 25-year low in crime, a 33-year low in the murder rate, and because of that and the background-check law, we had a 46-year low in deaths of people by gun violence,” he said.

It is undeniable that two decades of mass incarceration have inflicted grievous harm on African-American men and their families. And yet Mr. Clinton was right to defend his policies (and, by extension, Hillary Clinton’s support for those policies at the time).

As counsel to the House Subcommittee on Crime led by Charles E. Schumer, then a representative, I spent 18 months helping to draft and negotiate the 1994 crime bill. Anyone who thinks the bill was just about locking people up is simply wrong.

If the battle over the 1994 bill was just campaign noise, we could shrug it off, but what’s really at stake is the future of crime policy. If we are going to move forward thoughtfully — keeping our neighborhoods safe without consigning huge segments of the population to life behind bars — we must understand how we got here.

In 1993, the year President Clinton took office, violent crime struck nearly 11 million Americans, and an additional 32 million suffered thefts or burglaries. These staggering numbers put millions more in fear. They also choked the economic vitality out of entire neighborhoods.

Politically, crime had become one of the most divisive issues in the country. Republicans called for an ever more punitive “war on drugs,” while many Democrats offered little beyond nebulous calls to eliminate the “root causes” of crime.

President Clinton took a different approach, working with like-minded Democrats, including Mr. Schumer and Joseph Biden, who was the chairman of the Senate Judiciary Committee. The bill they devised actually reduced sentences for federal drug crimes by exempting first-time, nonviolent drug offenders from the onerous “mandatory minimum” penalties created under earlier administrations. It funded specialized drug courts, drug treatment programs, “boot camps” and other efforts to rehabilitate offenders without incarceration. It allocated more than \$3 billion to keep at-risk young people away from gangs and the drug trade.

The bill also banned semiautomatic assault weapons, building on the Brady Law background checks that had passed a year earlier. Recognizing that much violent crime involves intimate partners, not strangers, the bill incorporated Senator Biden's Violence Against Women Act, which has transformed enforcement against domestic violence and sexual assault.

We didn't get everything we wanted. There are two parties in Congress; the Republicans won some concessions. The crime bill left many of the Reagan-era sentences in place. Regrettably, it expanded the federal death penalty, with the support of President Clinton and solid majorities in both parties. But on the whole, it was indisputably a de-escalation of the so-called war on drugs, a first step toward the more wholesale decriminalization underway today.

The centerpiece of the bill — the part Bill Clinton ran on as a candidate — was a provision known as the "100,000 cops on the beat" program. In hearings on the legislation, local police chiefs told Congress that soaring crime rates had overwhelmed their departments — officers were spending far too much of their time responding to 911 calls. In response, the bill provided funds for police departments to add personnel and to adopt "community policing" strategies.

Each locality has used the program differently, but in general cities were able to hire more police officers for old-fashioned "walk the beat" assignments. These policies set in motion a reversal of crime trends. Since 1994, violent crime rates have essentially been cut in half. As Bill Clinton pointed out in Philadelphia, the people who benefit most from decreased crime are residents of poor urban neighborhoods. And — crucially for progressives — the reduction in crime has helped restore citizens' confidence that government can accomplish important goals.

But those benefits have come with two enormous costs. First, far too many young African-American and Latino men have been subjected to unconstitutional or inappropriate stops by police officers. The Black Lives Matter movement is right to demand change in this practice. There is every reason to think that police departments can scale back the use of "stop-and-frisk" techniques substantially and still do their jobs well. The federal government can help protect against the overuse of stop-and-frisk with greater monitoring of local police departments — in retrospect, the 1994 bill should have specifically authorized such oversight.

The second cost is that an unacceptable number of Americans are in prison. This mass incarceration will be much harder to fix because it has resulted from the same "broken windows" policing that has helped to push down crime rates. Beefed-up police departments, pushing officers to be more active, have produced many more convictions and therefore many more inmates.

These people may not be hardened criminals, but taking them off the street nonetheless helps to reduce crime. That is what makes the mass incarceration problem so morally vexing. Bill Clinton diagnosed this issue precisely in a more reflective speech last year: "The good news is we had the biggest drop in crime in history. The bad news is we had a lot of people who were locked up, who were minor actors, for way too long."

Critics of the 1994 bill gloss over the hard truth that the good news and the bad news are linked, perhaps because a myth has grown up that the inmates swelling our prison population are drug offenders who pose no real threat to public safety. That is not the case. Only about one-fifth of the people entering prison since the 1990s are drug offenders, according to research by John F. Pfaff, a law professor at Fordham University. As FiveThirtyEight.com recently pointed out, if prisons in the United States released every drug offender tomorrow, we would still have the highest incarceration rates in the world (next up: the United States Virgin Islands, Turkmenistan and Cuba). When we talk about “mass incarceration,” we are mostly talking about people convicted of relatively low-level crimes of violence or theft — a stolen iPhone, a street-corner fight, a few-hundred-dollar burglary from a clothing store.

Surely these crimes need an enforcement response. We mustn't abandon active policing, as some progressive advocates urge. That path leads back to pre-Clinton days, when Democrats left the crime-policy field entirely to lock-'em-up conservatives. To be fair, many progressives understand this. In New York City, for example, a mayor and City Council speaker who have been prominent supporters of the Black Lives Matter movement recently agreed to add 1,300 new officers to that city's police force, and their police commissioner staunchly defends the broken windows approach.

Nor can we continue our extraordinary reliance on incarceration. The next evolution in criminal justice policy must be to reform our correctional system, and we must start by restoring rehabilitation as a core goal. Maybe prisons can someday accomplish that goal, but the ones that we have today do not. Instead, we should make much greater use of parole, halfway houses and other forms of supervised release. We also need to devote far greater resources to mental health services. By some estimates, more than 20 percent of inmates have a recent history of mental illness.

President Bill Clinton was right to reinvigorate policing. And President Obama was right to be the first sitting president to visit one of our prisons. The challenge for the next president is to reimagine those prisons — and as much as possible, to replace them.

David Yassky, the dean of Pace University School of Law, was counsel to the House Subcommittee on Crime from 1991 to 1994.

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How New York City Reduced Mass Incarceration: A Model for Change?

JANUARY 2013

James Austin, President, JFA Institute

Michael Jacobson, President & Director, Vera Institute of Justice

Foreword By Inimai Chettiar, Brennan Center for Justice at *New York University School of Law*

ABOUT THE AUTHORS

Dr. James Austin is the President of the JFA Institute. He is the former director of the Institute on Crime, Justice and Corrections at George Washington University in Washington, DC. He serves, or has recently served, as director for several large U.S. Department of Justice-funded research and evaluation programs and has served as the project director of the Bureau of Justice Assistance projects. He provides technical assistance to state and local jails, probation, parole, and prison systems. He was an expert witness in the landmark Supreme Court decision, *Brown v. Plata*, which mandated the state of California to reduce its prison population. Dr. Austin has authored numerous publications, including co-authoring (with John Irwin) *It's About Time: America's Imprisonment Binge*. (4th Edition), Wadsworth, 2011.

He was named by the American Correctional Association as its 1991 recipient of the Peter P. Lejin's Research Award, and received the Western Society of Criminology Paul Tappin Award for outstanding contributions in the field of criminology. Dr. Austin holds a Ph.D. in sociology.

Michael P. Jacobson is the President and Director of the Vera Institute of Justice. He joined Vera as its fourth director in January 2005. He was a professor at the City University of New York Graduate Center and the John Jay College of Criminal Justice. He was the New York City Correction Commissioner from 1995 to 1998 and the City's Probation Commissioner from 1992 to 1996. Prior to that, he worked in the New York City Office of Management and Budget from 1984 to 1992 where he was the Deputy Budget Director. He is the author of *Downsizing Prisons: How to Reduce Crime and End Mass Incarceration* (NYU Press 2005). He serves as chair of the New York City Criminal Justice Agency. Dr. Jacobson holds a Ph.D. in sociology.

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Foreword

Inimai Chettiar

Several remarkable things have happened in New York's crime and crime policy over the past 20 years. Some of these changes have been very visible, and others less so.

As in the rest of the country, crime and violence in the state plummeted dramatically. New York City reported the largest decline in crime. Meanwhile, the New York Police Department shifted its policing practices beginning in the 1990s, starting with the implementation of "broken windows" policing and morphing into the now infamous "stop-and-frisk" practices. These practices focus law enforcement resources on petty crimes or violations.

During this same time period, the entire incarcerated and correctional population of the City – the number of people in jails and prisons, and on probation and parole – dropped markedly. New York City sending fewer people into the justice system reduced mass incarceration in the entire state. This change was much less publicly noticed but just as noteworthy as the other two shifts. Though other states have decreased their prison populations, New York is the first state documented to have decreased its entire correctional population.

Are there connections between these three shifts – a decrease in crime, a decrease in the correctional population, and a sharp increase in controversial police practices? What factors contributed to these shifts? What about the costs of these shifts? Have they been evaluated and weighed against the benefits?

In this report, leading criminologists James Austin and Michael Jacobson take an empirical look at these powerful social changes and any interconnections. Examining data from 1985 to 2009, they conclude that New York City's "broken windows" policy did something unexpected: it reduced the entire correctional population of the state. As the NYPD focused on low-level arrests, it devoted fewer resources to felony arrests. At the same time, a lowered crime rate – as an additional factor – meant that fewer people were committing felonies.

This combination led to fewer felony arrests and therefore fewer people entering the correctional system. Other policies – like programs that stopped punishing people with prison if not necessary – also contributed to this population drop.

New York's drop in the correctional population was almost derailed in 1994 when the federal government paid states to create laws increasing prison sentences. Congress used the power of the purse to pull states in this direction in spite of evidence showing that increased prison time does not decrease crime or recidivism. The drop in New York's corrections population would have occurred more quickly had the state not enacted such laws and increased prison stays.

This report poses a host of difficult questions for those who defend "broken windows" policing as well as those who find fault with it. Though the New York strategy identified by Austin and Jacobson has benefits, it also has costs. Focusing police resources on petty crimes, predominantly in neighborhoods of color, creates a host of economic and social costs for those arrested and their families. At the same time, this move actually contributed to a decrease in mass incarceration.

The data in this report tells us a lot, but there are still questions. The *increase* in low-level arrests did not bring down the correctional population; rather, the *decrease* in felony arrests did. Had the number of misdemeanor arrests decreased, the

correctional population would have declined more steeply. To what extent New York City’s policing strategy contributed to the drop in the crime rate is a complex question unanswered by the data in this report.

This report also does not evaluate the NYPD’s “stop-and-frisk” policy. It analyzes data in years before this practice became systemic. It also does not analyze the effects of the reforms to the notorious Rockefeller drug laws, since those reforms were enacted after the documented drop in correctional population.

Austin and Jacobson’s study comes at a critical juncture, when the United States is starting to reconsider its crime policy. With 2.3 million people behind bars and more than 25 percent of the country with criminal records, mass incarceration has become a national epidemic.¹ Half of the people in state prisons are there for nonviolent offenses; half the people in federal prisons are there for drug offenses.² At least 30 percent of new prison admissions are for violations of parole; and more than 20 percent of those incarcerated have not been convicted and are simply awaiting trial.³

In a policy area historically marked by rancor and recrimination, Austin and Jacobson offer something vital to lawmakers and advocates: facts. As state and federal governments begin to discuss how to reduce their incarcerated populations, this report offers empirical data to evaluate one model for change. The New York experience provides some vital lessons:

- > Theories abound about why the national crime rate dropped, but the New York experience shows that mass incarceration is not necessary to decrease crime.
- > Police practices have a monumental impact on mass incarceration. The police are almost always the first point of contact between an individual and the criminal justice system.
- > Ending mass incarceration entails more than simply reducing prison populations. It requires reducing the entire correctional population – meaning the number of people arrested, in jails awaiting trial, in prisons serving sentences, and on probation and parole.
- > Federal, state, and local policies can work together – or against each other – to create a drop in corrections populations. Federal funding streams can be a key mechanism affecting the size of state correctional systems.
- > All criminal justice policies have costs and benefits that should be fully identified and weighed before implementation. This practice would be a marked shift from typical policymaking.

We hope this report will help lawmakers and advocates develop rational and effective criminal justice policies that keep Americans safe while shrinking the widening net of mass incarceration.

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Executive Summary

New York is one of the first states to significantly reduce its *entire* correctional population. It reduced the number of people in prison and jail, and on probation and parole. This drop was driven exclusively by declines in New York City's correctional population. Other jurisdictions in the state did not experience similar declines. This reduction occurred as the crime rate sharply declined in New York, showing that increasing imprisonment or other forms of correction are not needed to enjoy a lower crime rate.

This report concludes that a change in New York City's policing strategy created this drop. Beginning in the 1990s, the New York Police Department shifted toward making more arrests for misdemeanors and fewer arrests for felonies. At the same time, the crime rate – and therefore actual commission of felonies – dropped. This drop in felony arrests is what contributed to the drop in the correctional population. The increase in misdemeanor arrests contributed to a small increase in the correctional population. However, taken together, these two shifts created a huge drop in the correctional population. This result demonstrates why local policies are just as vital to reducing mass incarceration as state legislation, and how every state could benefit from a strategy that incorporates both levels of reform.

Analyzing primary data from 1985 to 2009, this report finds the following key facts:

REDUCTION IN PRISON POPULATION

1. The New York State prison population declined by 17 percent from approximately 71,000 people in 2000 to 59,000 in 2009. Declines in the New York City prison population drove the decline for the entire state.
2. Much of the decline in the prison population occurred as the number of people sentenced to state prison for felonies (prison admissions) from New York City began to decline in 1992. Conversely, prison admissions *increased* for felony convictions outside of New York City.
3. Prison disposition rates (cases in which defendants were sent to prison) in New York City declined from about 22 percent in 1994 to 15 percent by 2008. The main causes of this drop were the use of “conditional discharge,” and the expansion of programs to divert drug offenders to alternatives to prison. Prison disposition rates in non-New York City counties actually increased from 14 percent to 18 percent over the same period.
4. Sentence lengths and time served in prison in New York City and the state as a whole increased from 1990 to 2010. The federal government's Violent Crime Control and Law Enforcement Act of 1994 was one driver of this increase. That law provided over \$9 billion in prison construction funds to states if they increased their length of sentence through “truth-in-sentencing” laws. Congress passed this law despite evidence showing that such laws do not decrease crime or recidivism. New York alone received over \$216 million by passing such laws. The state prison population would have declined more dramatically had these “truth-in-sentencing” laws not been enacted.

REDUCTION IN PAROLE, PROBATION, AND JAIL POPULATIONS

5. The state probation population declined 19 percent from 150,000 in 1998 to 122,000 by 2008. Fewer probation sentences in New York City, where the probation population declined 43 percent, from 77,000 in 1998 to 44,000 in 2008, drove this decline. During the same time period, the probation population remained stable outside of New York City.

6. Similarly, the state parole population declined 22 percent, from 54,000 in 1997 to 42,000 in 2008, with all of the reduction occurring in New York City.
7. The New York City jail system declined 40 percent, from nearly 22,000 in 1991 to 13,200 in 2009.
8. Declines in the New York City non-prison correctional population drove the decline for the entire state.

DELAYED EFFECT ON BUDGET

9. Despite the decline in the state prison population, the annual operating budget of the New York Department of Correctional Services *increased* from \$1.6 billion in Fiscal Year 1998-99 to \$2.5 billion in Fiscal Year 2006-07. This occurred because the state did not close any facilities, although it had housed 8,000 fewer people than in 2000.
10. Only in 2008 did the corrections budget stabilize. Beginning in 2011, the state closed 10 prisons as well as many other camps, dorms, and housing units.
11. There is evidence that the reduced prison population created a safer prison system with less violence to inmates and staff.

REDUCTION IN CRIME AND SHIFT IN ARREST POLICY

12. From 1988 to 2008, the number of felonies reported by New York City to the FBI dropped from 719,887 to 198,419 – a remarkable 72 percent reduction. Outside of New York City, the number of crimes declined by half as much, only 38 percent.
13. The primary driver of the drop in correctional population in New York was the significant decrease in felony arrests in New York City. Jurisdictions outside of New York City did not experience a similar shift in arrests.
14. NYPD's shifting resources toward misdemeanor arrests as part of the "broken windows" policing model contributed to the decrease in the felony arrests. A drop in the number of felonies committed generally also contributed to the correctional population decrease. Fewer felony arrests led fewer people to enter prison, probation, or parole rolls.
15. A policy simply increasing misdemeanor arrests while keeping felony arrest and indictments constant would not reduce correctional populations.
16. Other factors, such as New York's various diversion programs, also contributed to the correctional population decline.

From a policy view, the New York experience shows what legal scholars such as Franklin E. Zimring have noted, that police practices "matter."⁴ A shift in these local practices can have a dramatic impact on reducing state correctional populations *while enhancing* public safety and encouraging a drop in the crime rate. Such shifts can have complex results. When evaluating the big picture, reducing mass incarceration in New York may be worth more misdemeanor arrests. There also may be ways to implement police practices that do not increase misdemeanor rates. States that seek to reduce mass incarceration should embrace a balanced, data-driven policy selection process that involves both state and local action.

I. Decline in New York Prison Population

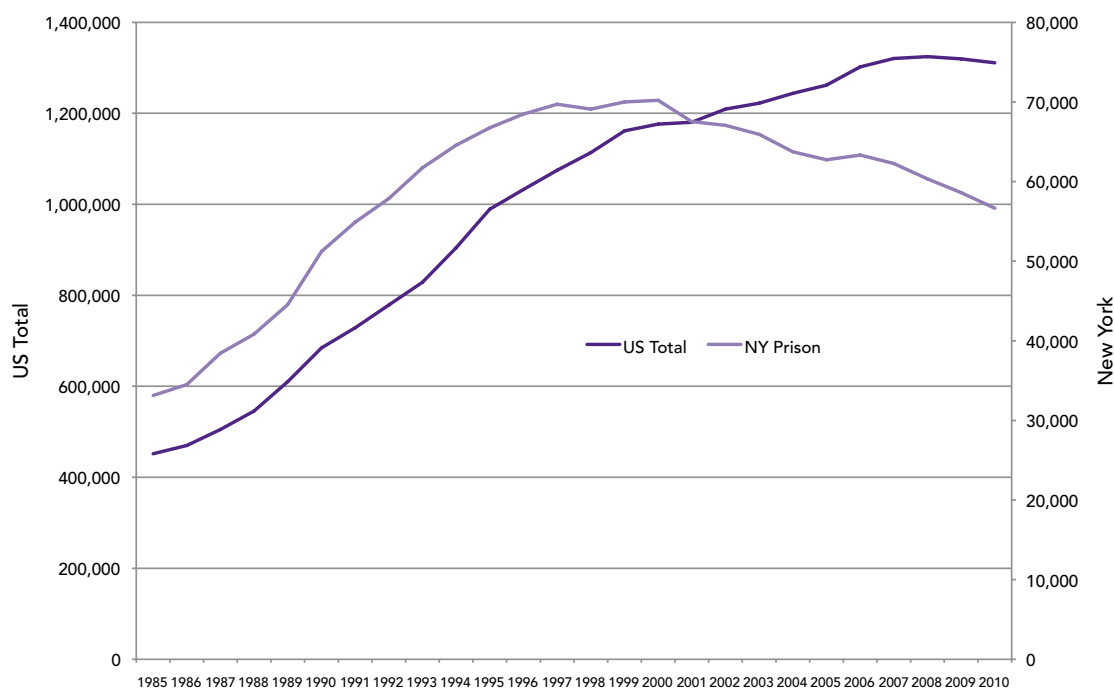
All correctional populations are the result of two key factors – admissions and length of stay (LOS). A jurisdiction’s correctional population is the function of the following formula:

$$\text{(ADMISSIONS X LENGTH OF STAY)} = \text{CORRECTIONAL POPULATION.}$$

As either or both of these two population drivers change, so too will the resulting correctional population. While this is a straight-forward formula, it masks the various factors and decisions that produce an admission or a LOS. In order to propose reforms that would lower correctional populations, it is important to understand these various factors and dynamics that have fueled the historic increases in population.

Like most states, New York’s prison population began to increase steadily beginning in the 1970s. However, New York reached its peak in 2000 with about 71,500 people and has since declined by 17 percent to 59,000 people in 2009. Conversely, the national state prisoner population has continued to increase at a steady but gradually declining rate (**Figure 1**). So one must ask: Did prison admissions or length of stay (or a combination of the two) reduce New York’s prison population?

Figure 1. Prisoners Under Jurisdictions of the States, 1985 – 2010

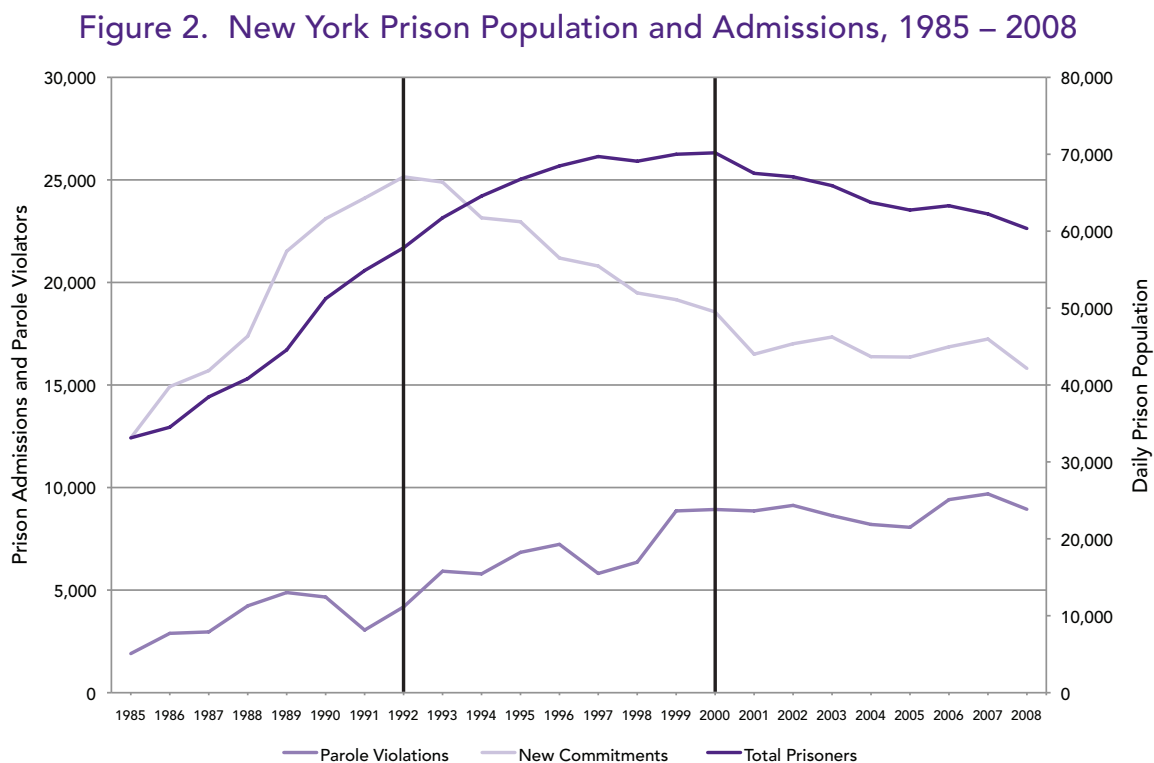


Source: *Sourcebook of Criminal Justice Statistics, On Line* and BJS NPS Prisoner Reports 2000 – 2010.

A. DROP IN NEW YORK CITY ADMISSIONS

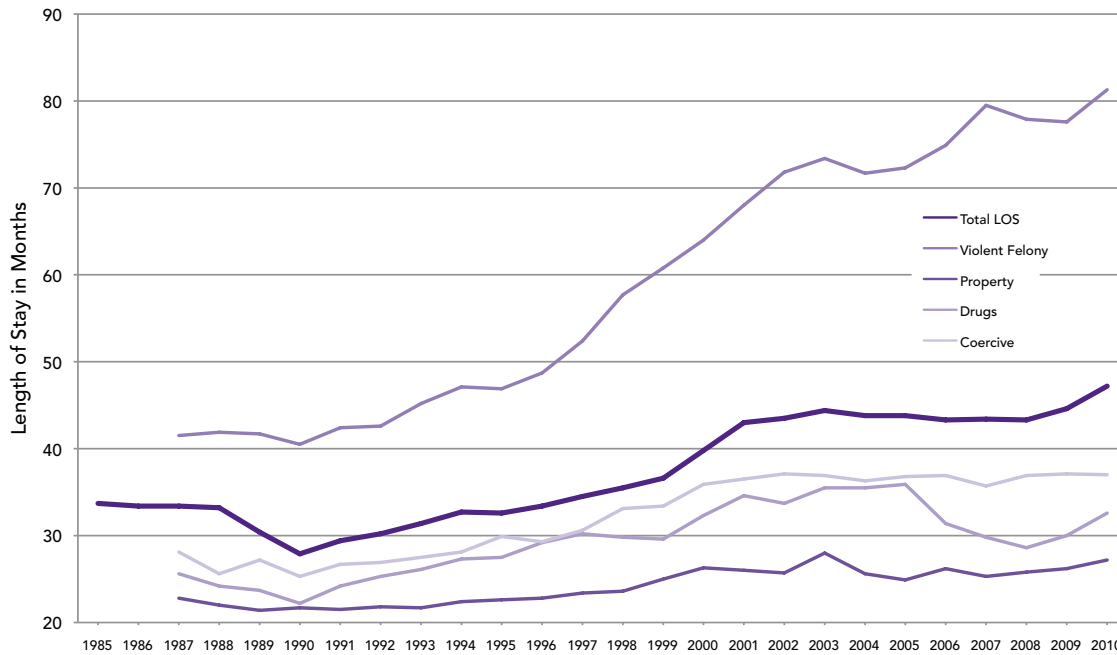
Nationally, parole violations and new commitments are two of the most common categories for people admitted to the prison system. A new commitment is an individual who was not under parole supervision at the time he or she was convicted of a new crime. A sizeable portion of new commitments, however, include people who were under probation supervision at the time they either were convicted of a new felony or violated the terms of supervision. People who violate probation or parole supervision can account for more than half of total prison admissions.

As shown in **Figure 2**, the number of new commitments began to decline in 1992, *eight years before the prison population began to decline*. Since 1992, the number of new court commitments declined by 36 percent from 25,000 to 16,000 per year.



Source: Primary data from New York Department of Corrections and Community Supervision, 2009 – 2010.

Figure 3. Length of Stay for First Release by Major Crime Category, 1985 – 2010



Source: Primary data from New York Department of Corrections and Community Supervision, 2009 – 2010.

B. INCREASE IN STATEWIDE LENGTH OF STAY

Why did the prison population continue to increase for eight years before it began to decline? In New York, it was due to a steady increase in the LOS. As shown in **Figure 3**, the LOS steadily increased beginning after 1990, when it averaged 28 months.⁵ By 2004 the LOS had increased to nearly 44 months, a 57 percent increase. More recently, in 2010, it increased yet again.

A partial explanation for this increase is a greater proportion of people entering prison convicted of violent crimes while the number of people convicted of non-violent crimes (especially drug crimes) has declined (see **Figure 4**). But even for those convicted of violent crimes, the LOS has steadily increased (see **Table 1**).

Table 1. New York State Prison Length of Stay (In Months) by Major Crime Category, 1990 – 2010

YEAR	VIOLENT FELONY	OTHER COERCIVE	DRUG OFFENSES	PROPERTY OTHER	TOTAL RELEASES
1990	40.5	25.3	22.2	21.7	27.9
1991	42.4	26.7	24.2	21.5	29.4
1992	42.6	26.9	25.3	21.8	30.2
1993	45.2	27.5	26.1	21.7	31.4
1994	47.1	28.1	27.3	22.4	32.7
1995	46.9	29.9	27.5	22.6	32.6
1996	48.7	29.3	29.2	22.8	33.4
1997	52.4	30.6	30.2	23.4	34.5
1998	57.7	33.1	29.8	23.6	35.5
1999	60.8	33.4	29.6	25.0	36.6
2000	64.0	35.9	32.3	26.3	39.8
2001	69.9	36.7	34.6	26.1	43.0
2002	71.8	37.1	33.7	25.7	43.5
2003	73.4	36.9	35.5	26.0	44.4
2004	71.7	36.3	35.5	25.6	43.8
2005	72.3	36.8	35.9	24.9	43.8
2006	74.9	36.9	31.4	26.2	43.3
2007	79.5	35.7	29.8	25.3	43.4
2008	77.9	36.9	28.6	25.8	43.2
2009	77.6	37.1	30.0	26.2	44.6
2010	81.3	37.0	32.6	27.2	47.2

Source: Primary data from New York Department of Corrections and Community Supervision, 2009 – 2010.

This increase in the LOS is largely due to New York state enacting a number of “truth-in-sentencing” laws since 1995 that require people convicted of certain violent crimes to serve six-sevenths (approximately 85 percent) of their imposed sentences. Prior to 1995, all prisoners were sentenced under an indeterminate sentencing structure.⁶ The state also added burglary in the 1st and 2nd degree – which typically involve burglary in an occupied building – to the violent crime category, increasing the LOS for those crimes too.

This move to increase the LOS was driven in part by a 1994 federal law titled the Violent Crime Control and Law Enforcement Act. This law, signed by President Clinton, provided more than \$9 billion in prison construction funds to states that would increase the LOS to 85 percent of the imposed sentence for people convicted of violent crimes.⁷ This was done despite little if any scientific evidence that longer prison terms would reduce either crime or recidivism rates. New York alone received over \$216 million for passing “truth-in-sentencing” laws. These funds were also used to open the New York Department of Corrections and Community Supervision’s (DOCCS) innovative Willard Drug Treatment Center prison.

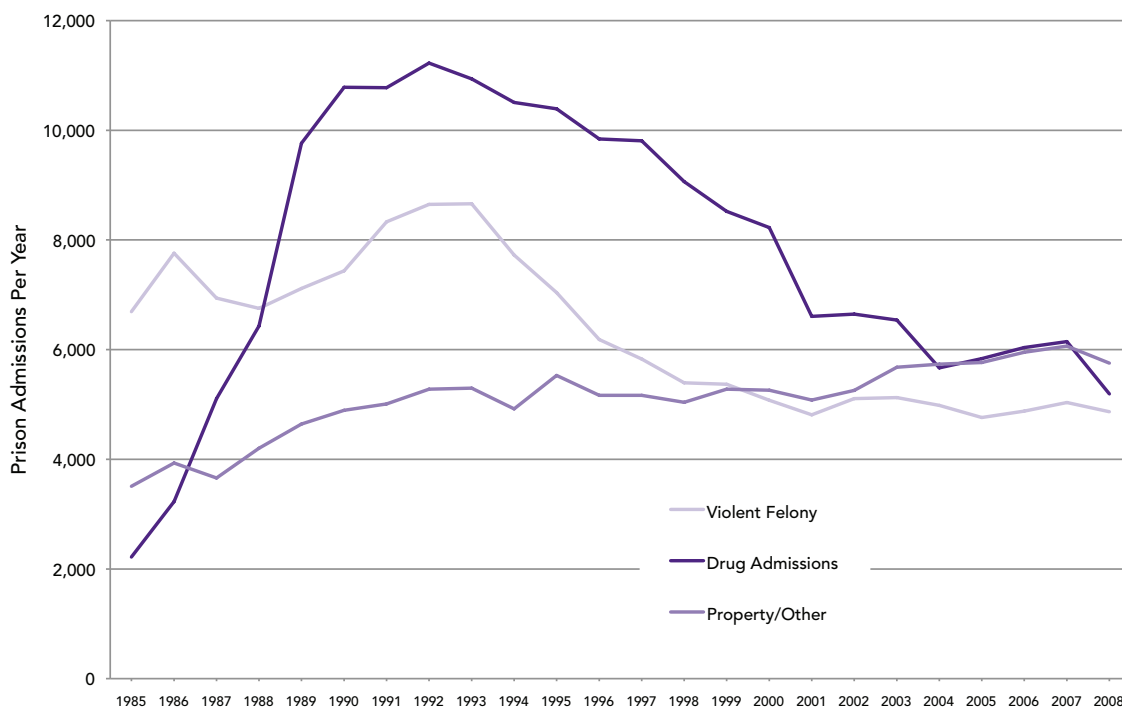
The DOCCS mitigated the effects of the growing LOS through its Merit Time Program (MTP). Enacted in 1997, the MTP allows people convicted of certain non-violent offenses to receive a one-sixth reduction in their minimum sentence for indeterminate sentences or one-sixth off their determinate sentence.⁸ To receive merit time, one must participate in a program – such as obtaining a GED, a substance abuse treatment certificate, or a vocational training certificate – or perform 400 hours on a community work crew.

Between 1997 through the end of 2006, approximately 24,000 inmates were released on average six months earlier through the MTP. In 2003, the state expanded eligibility for the MTP to include people convicted of high level drug crimes. With about 2,700 people released six months early each year, the MTP is reducing the total prison population by approximately 1,350 people annually.

The types of crimes for which people were sentenced to prison also helps explain the overall increase in the LOS. **Figure 4** shows that prison admissions for drug crimes dropped the most since 1992 compared to other crimes. Although admissions declined for violent crimes (from 8,600 in 1992 to about 5,000 in 2008), drug crime admissions dropped as well, from 11,250 to about 5,000 over that same period, a 55 percent decrease. Conversely property crime admissions steadily increased.

From 1999 to 2008, the LOS for violent felony offenses increased by 17 months, whereas the LOS for other crime categories remained relatively stable (see **Table 1**). Therefore, substantial increases in the LOS for violent offenses outweighed the decline in admissions for these crimes. The increase in overall LOS was largely due to increases in the LOS for violent crimes.

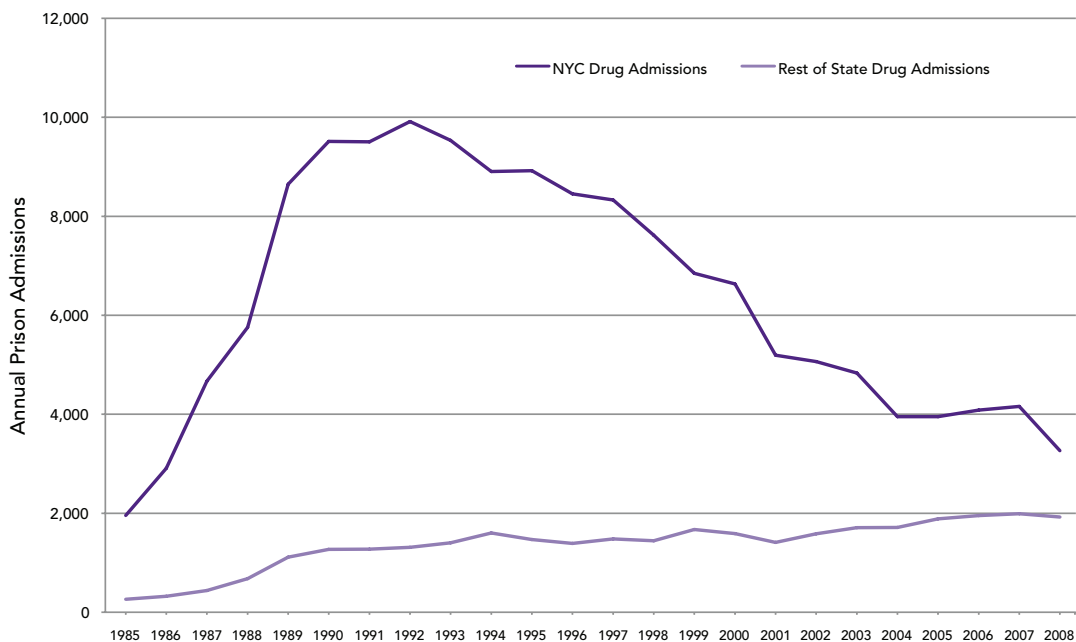
Figure 4. Prison Admissions by Violent, Drug and Property Offenses, 1985 – 2008



Source: Primary data from New York Department of Corrections and Community Supervision, 2009 – 2010.

In sum, despite the trend toward longer sentences for violent crimes, the prison population began to fall because fewer people entered prison for drug offenses. The vast majority of reductions in admissions for drug offenses occurred in New York City (Figure 5). Most of the decline in the state prison population was due to declines in drug admissions and, in particular, declines in admissions from New York City.

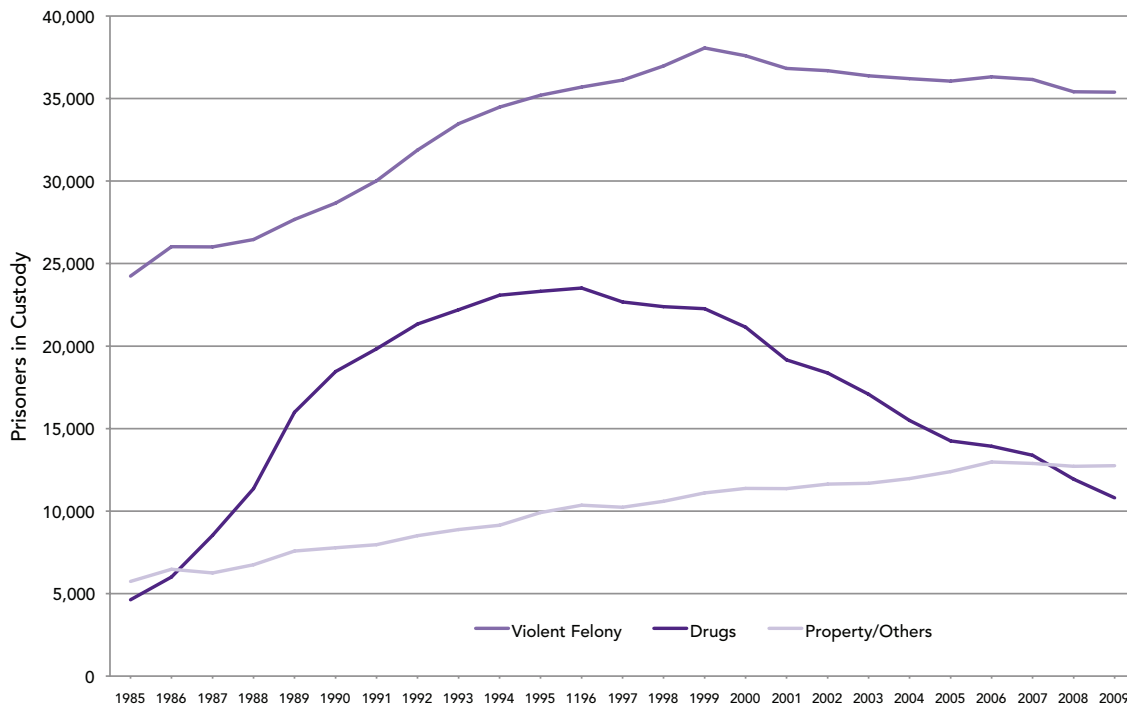
Figure 5. Prison Admissions for Drug Crimes, 1985 – 2008: New York City vs. Rest of the State



Source: Primary data from New York Department of Corrections and Community Supervision, 2009 – 2010.

The city's Drug Treatment Alternatives Program (DTAP) may also have contributed to this decline. In DTAP, an individual is convicted but the sentence is delayed. If the individual completes a court ordered drug treatment, his or her felony conviction is often reduced to a misdemeanor or the charges are dismissed with no prison time. As a result of these major trends, the state prison population increasingly consisted of persons convicted of non-drug crimes and from jurisdictions outside of New York City (**Figure 6**).

Figure 6. Prison Population by Crime Category, 1985 – 2009



Source: Primary data from New York Department of Corrections and Community Supervision, 2009 – 2010.

II. Decline in New York Parole, Probation, and Jail Populations

The same differential growth and decline between New York City and the rest of the state also occurred for probation, jail, and parole populations. **Figure 7** shows the historic growth patterns for the probation system for New York City and the rest of the state. The state probation population declined significantly beginning in 1998, from 150,000 to 122,000 people by 2008, a 19 percent decrease. Like the decline in the state prison population, this reduction was limited to people sentenced to probation in New York City, which saw its probation population decline from 77,000 to 44,000 over this period. During the same time period, the probation population outside of New York City remained stable.

Figure 7. Probation Populations, 1985 – 2008



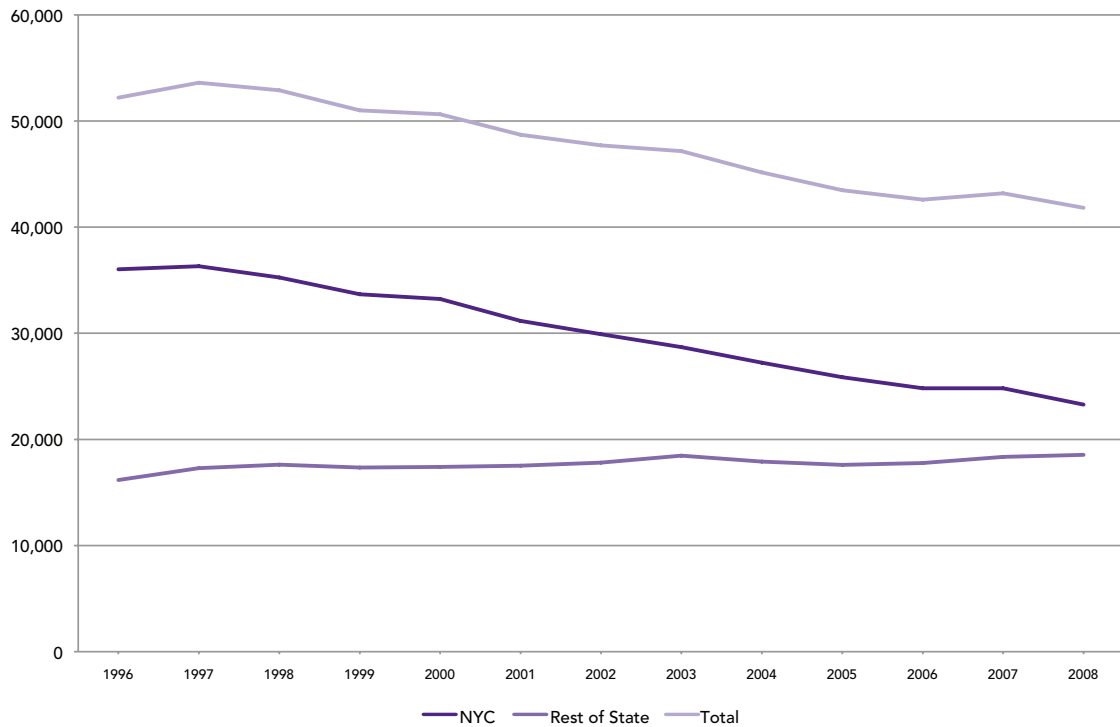
Source: Primary data from New York Division of Criminal Justice Services, 2009 – 2010.

Similarly, the state parole population declined since 1997, from 54,000 to 42,000 in 2008, due to fewer parolees from New York City. The number of people on parole supervision who had served prison terms from New York City declined from 36,000 to 23,000 (**Figure 8**).

Finally, the New York City jail system population declined significantly, from nearly 22,000 in 1991 to 13,200 as of 2009, a 40 percent decrease. While non-New York City jail data is only available from 1999, that information shows a slight increase in jail populations (**Figure 9**).

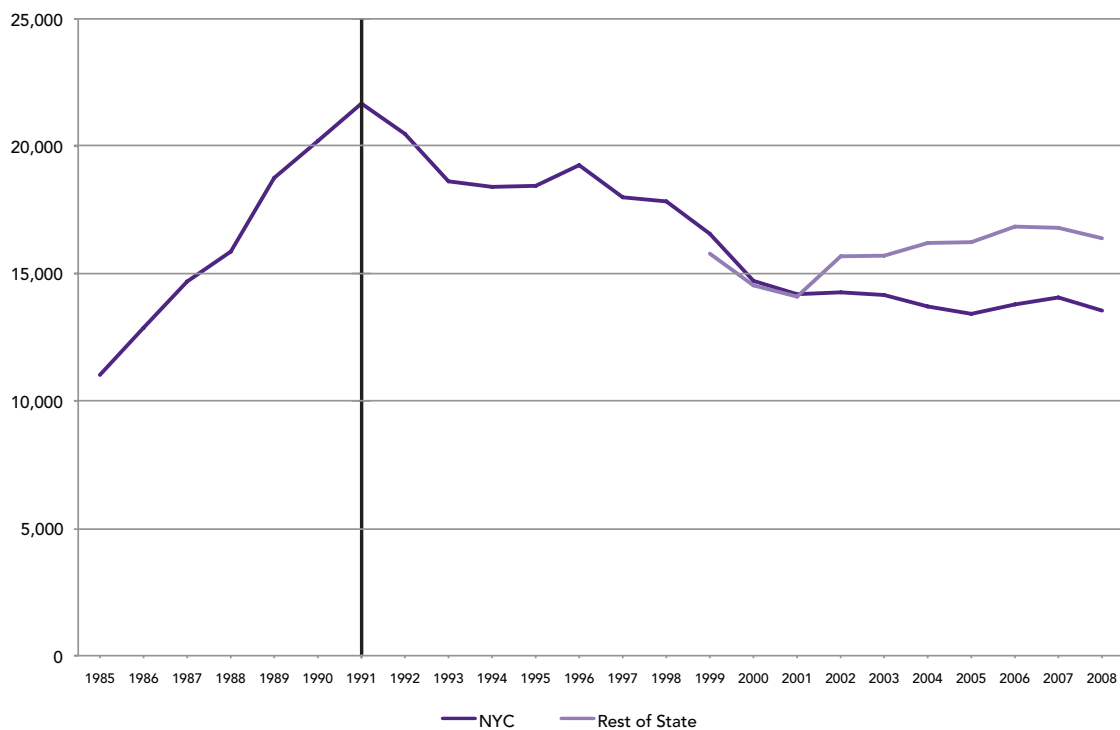
In summary, while every correctional population in New York State declined, these reductions occurred only because these populations declined in New York City.

Figure 8. Parole Populations, 1996 – 2008: New York City vs. Rest of the State



Source: Primary data from New York Department of Corrections and Community Supervision, 2009 – 2010.

Figure 9. Jail Populations, 1985 – 2008: New York City vs. Rest of the State



Source: Primary data from New York Division of Criminal Justice Services, 2009 – 2010.

III. Delayed Effect on State Corrections Budget

Despite the falling prison population, the annual operating budget of the New York DOCCS increased from \$1.6 billion in FY98-99 to \$2.5 billion by FY06-07 (**Table 2**). The overall corrections budget, which includes other related costs, increased from about \$2.2 billion to \$3 billion. The largest increases were in support, security, and health services (from \$1.3 billion to \$2.2 billion per year).

Table 2. DOCCS Budget, FY1998-99 to FY2009-10

FY	OPERATIONAL	OTHER COSTS	TOTAL
1998-99	\$1,534,594,000	\$713,073,000	\$2,247,667,000
1999-00	\$1,617,960,000	\$533,612,800	\$2,151,572,800
2000-01	\$1,674,043,100	\$494,053,000	\$2,168,096,100
2001-02	\$1,782,754,000	\$449,225,700	\$2,231,979,700
2002-03	\$1,808,035,000	\$456,523,000	\$2,264,558,000
2003-04	\$1,820,594,000	\$391,401,000	\$2,211,995,000
2004-05	\$1,991,292,000	\$405,967,000	\$2,397,259,000
2005-06	\$2,089,745,000	\$386,568,000	\$2,476,313,000
2006-07	\$2,552,891,000	\$424,141,000	\$2,977,032,000
2007-08	\$2,478,734,000	\$470,717,000	\$2,949,451,000
2008-09	\$2,516,751,000	\$505,107,000	\$3,021,858,000
2009-10	\$2,474,990,000	\$516,569,000	\$2,991,559,000

Source: Primary data from New York Department of Corrections and Community Supervision, 2009 –2010.

As recently as 2008, the DOCCS operated the same number of correctional facilities despite housing 8,000 fewer people than in 2000. During this time, the lowered prison population may have resulted in cost avoidance for the state, especially in overtime or non-personnel items, even if it did not result in immediate budget reductions.

In 2008, the budget stabilized as the DOCCS began to reduce its capacity. In 2011, Governor Andrew Cuomo announced the closure of seven medium and minimum security prisons, which constituted approximately a 3,800 bed reduction. To date, 10 prisons have closed, as have several camps, dorms, and housing units. Furthermore, the state saved about \$58 million per year in funds paid to local jails to house DOCCS inmates.

There was much resistance to these closures. The legislature created several required steps before a state prison can be closed. Specifically, the DOCCS Commissioner must confer with the Departments of Civil Service, Economic Development, and the Governor’s Office of Employee Relations to minimize the adverse effects of a prison closure (e.g. job losses, local economic growth, etc.). The Commissioner must also give a 12 month notice of such a closure.⁹

Despite the declining prison population, correctional staffing levels remained relatively steady. By 2005 New York had one of the lowest staff to inmate ratios in the nation (**Table 3**). The number and rate of inmate assaults on staff and other inmates has dropped significantly since 1985.¹⁰ While this decline in assaults predates the decline in the prison population, it does appear that the reduced prison population has contributed to a much safer prison system for prisoners and staff.

Table 3. Employee and Inmate Numbers and Ratios, 2005

	EMPLOYEES	INMATES	STAFF TO INMATE RATIO
US	445,055	1,430,208	1:3.2
California	47,881	169,988	1:3.5
Florida	23,038	86,705	1:3.8
New York	31,573	63,855	1:2.0
Texas	38,097	163,556	1:4.3

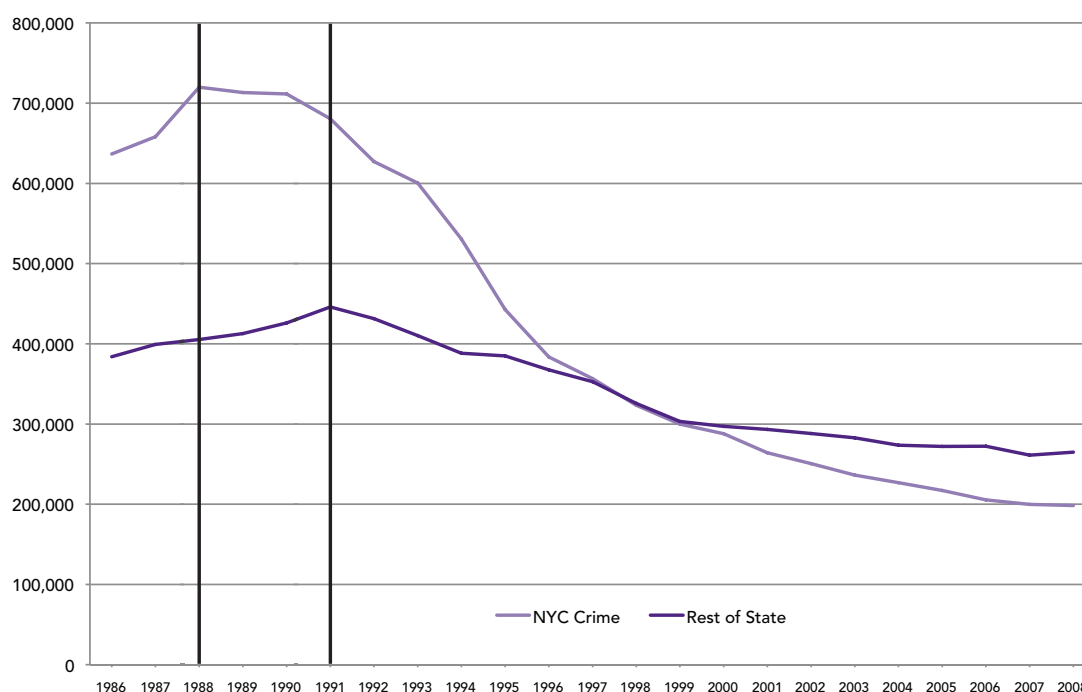
Source: James J. Stephan, Bureau of Justice Statistics, U.s. Dep't Of Justice, Bulletin No. Ncj 222182, Census of State and Federal Correctional Facilities (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/csfcf05.pdf>.

IV. Accompanying Drop in New York City's Crime Rate and Shift in Arrest Policy

During the same period that New York City's correctional populations dramatically declined, the crime rate also declined. Beginning in 1990, the number of serious crimes reported to police in New York City began to fall dramatically, as it also did in other major U.S. cities. In 1988, there were approximately 720,000 FBI Unified Crime Report Index (UCR) crimes.¹¹ By 2008, there were only 198,419 crimes – a remarkable 72 percent reduction (**Figure 10**).

Several factors contributed to this significant decline, including changes in demographics, declining birth rates, economic conditions (including high employment), and reduction in illicit drug markets, as well as a shift to more effective policing practices.¹²

Figure 10. UCR Index Crimes, 1986 – 2008: New York City vs. Rest of the State



Source: Primary data from: New York Division of Criminal Justice Services, 2009 – 2010.

As shown in **Table 4**, New York City, compared to the United States as a whole, had significantly lower rates of crime and correctional supervision by 2008. The rates of jail and probation supervision in New York City are extremely low compared to national rates. The state prison rate for New York City would be even lower had the state not increased the LOS, which is now one of the nation's highest.

Table 4: New York City and United States Crime and Use of Corrections Per 100,000 Population, 2008

ATTRIBUTE	NYC	US
Crime Rates Per 100,000		
Total	2,378	3,667
Violent	580	455
Corrections Rates Per 100,000		
Prison	369	445
Jail	162	258
Probation	538	1,397
Parole	285	240
Total Corrections Rate	1,354	2,340

Source: FBI Uniform Crime Reports and Bureau of Justice Statistics, 2008.

But one should not conclude that reductions in the crime rate *produced* the drop in the correctional population. New York state jurisdictions outside New York City experienced a 38 percent drop in crime, without reducing the number of people sentenced to state and local correctional systems. Furthermore, the other 49 states and the District of Columbia have also reported significant reductions in their crime rates, some as much as New York City, but have not reduced their correctional populations.¹³

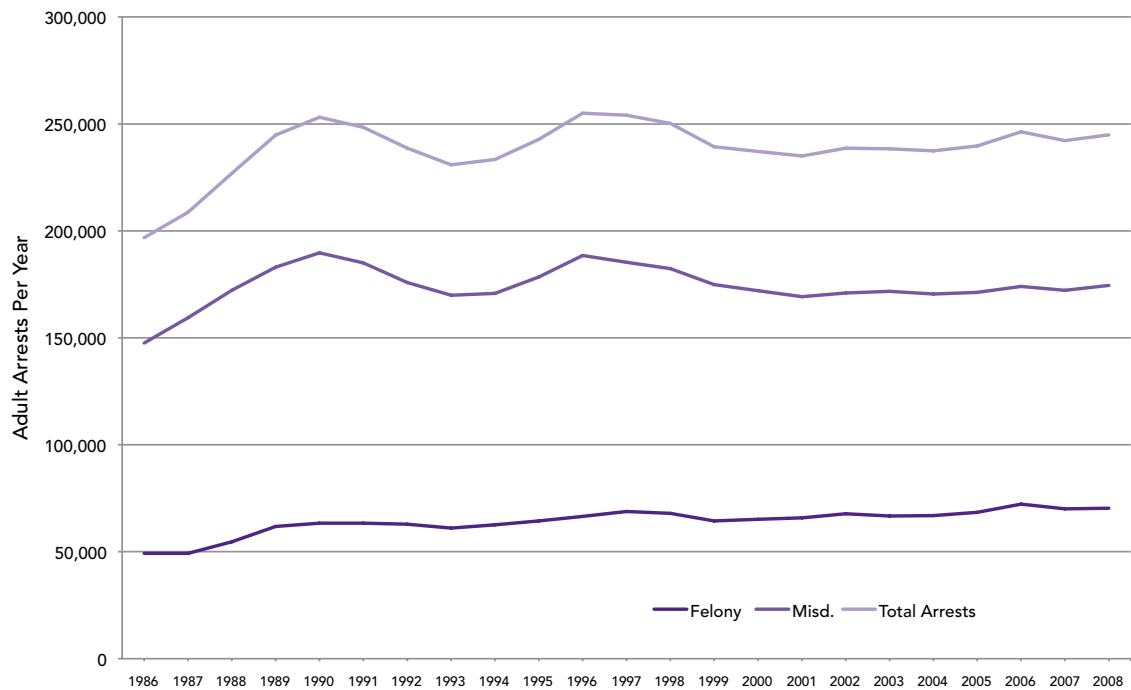
One key difference between New York City and other jurisdictions is evident in arrest data. As shown in **Figure 11**, while overall arrests increased slightly since 1985, there was a major shift from felony to misdemeanor arrests. In the early 1990s, the NYPD began to slowly but steadily decrease the number of felony arrests and simultaneously increase the number of misdemeanor arrests. By 2008, felony arrests had significantly declined while misdemeanor arrests had significantly increased. The reduction in felony arrests coincides with the drop in prison admissions noted earlier (see **Figure 2**), which predated the drop in correctional populations by several years. Because this shift only occurred in New York City, the rest of the state did not experience similar reductions in correction populations (**Figure 12**).

Figure 11. New York City Arrests for Misdemeanors and Felonies, 1985 – 2008



Source: Primary data from New York Division of Criminal Justice Services, 2009 – 2010.

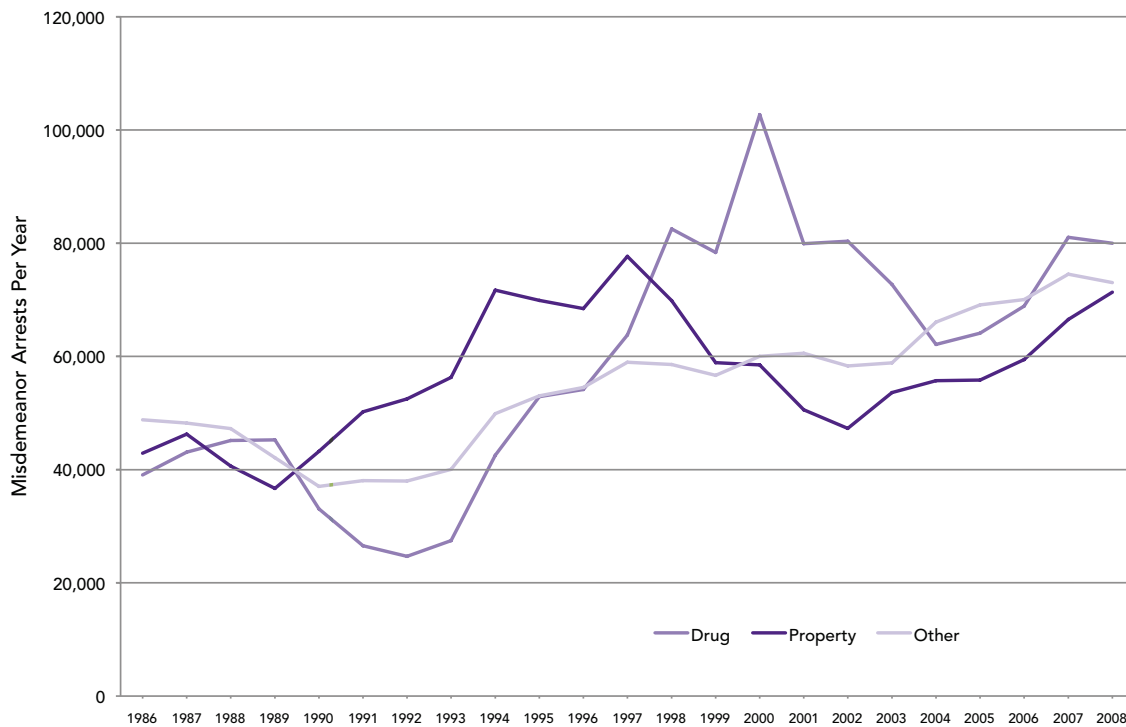
Figure 12. Non-New York City Arrests for Misdemeanors and Felonies, 1985 – 2008



Source: Primary data from New York Division of Criminal Justice Services, 2009– 2010.

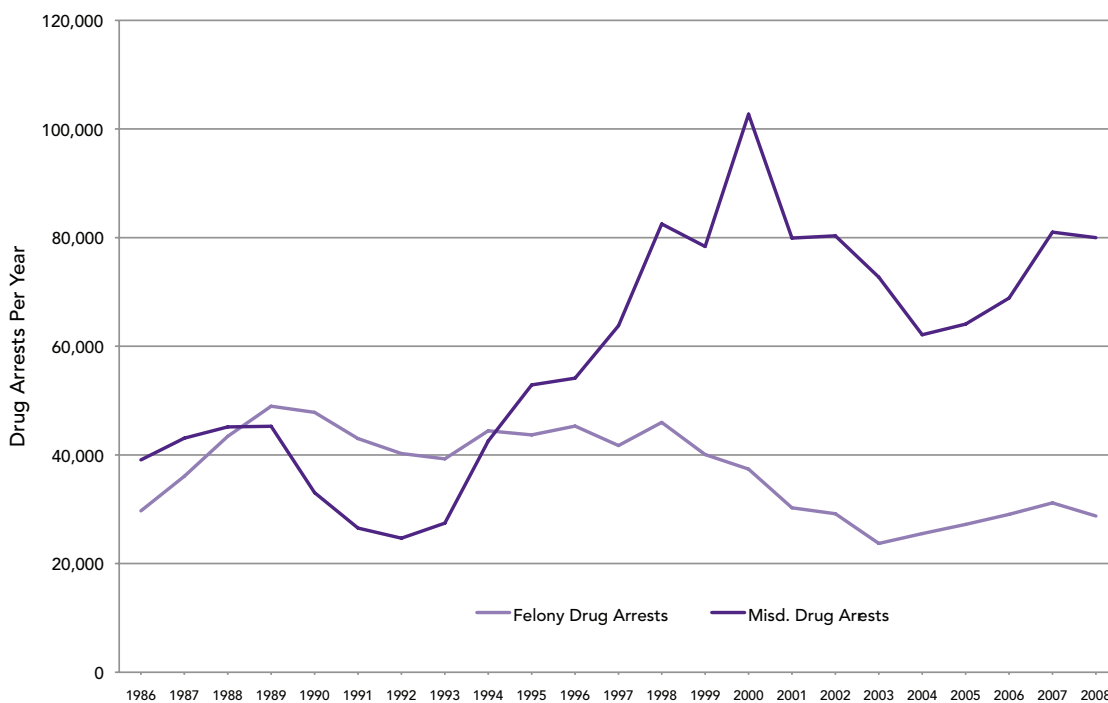
Arrests for misdemeanor drug crimes in New York City increased more than arrests for other misdemeanor crimes (Figure 13). Further, felony drug arrests dropped significantly since 1986 while misdemeanor drugs arrests in New York City more than doubled (Figure 14).

Figure 13. New York City Misdemeanor Arrests, 1986 – 2008



Source: Primary data from New York Division of Criminal Justice Services, 2009 – 2010.

Figure 14. New York City Drug Arrests, 1986 – 2008

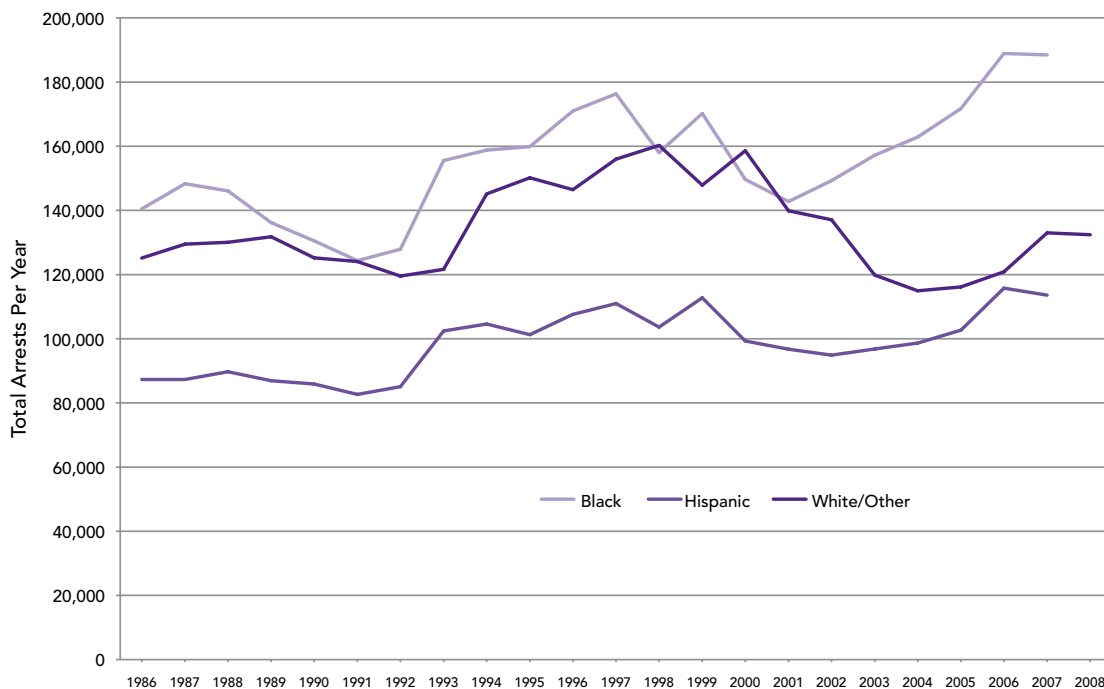


Source: Primary data from New York Division of Criminal Justice Services, 2009 – 2010.

The reduction in felony arrests should not be viewed as a decision by the NYPD to ignore serious crime. Rather, it reflects a shift in police strategies to focus on so-called “quality of life”, “zero tolerance”, or “broken windows” police strategies.¹⁴ These policies focus law enforcement resources on misdemeanor crimes such as loitering, trespassing, and vagrancy. Notably, these changes in NYPD practices post-date the beginning of the crime rate decline.

More recently, NYPD’s police practices have been the subject of considerable controversy due to reports of a steady increase in the number of people arrested for misdemeanor drug possession (especially marijuana) who are black or Hispanic.¹⁵ To illustrate this most current trend, the number of Hispanic and black arrestees in New York City has increased significantly since 2002, most sharply for black arrestees. Arrests of white individuals and other ethnic groups have also increased, but not as sharply (**Figure 15**). Notably, the surge in stop-and-frisk as a policy practice occurred from the mid to late 2000s – after the drop in correctional population noted in this report.

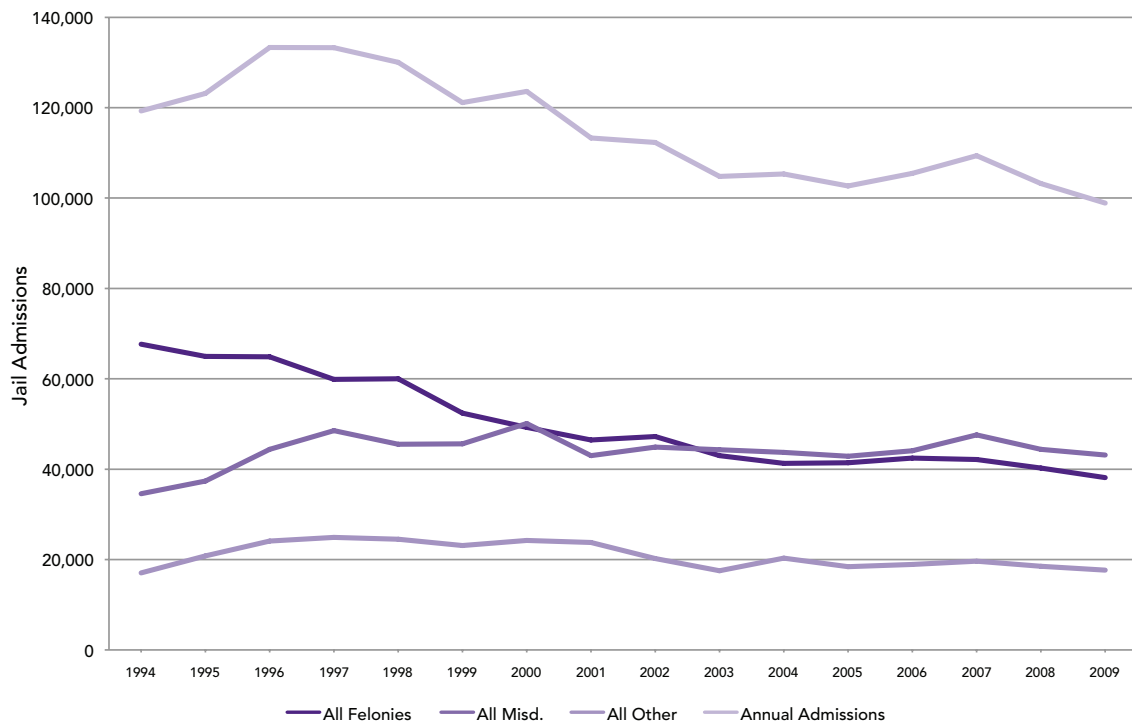
Figure 15. New York City Arrests by Race, 1986 – 2008



Source: Primary data from New York Division of Criminal Justice Services, 2009 – 2010.

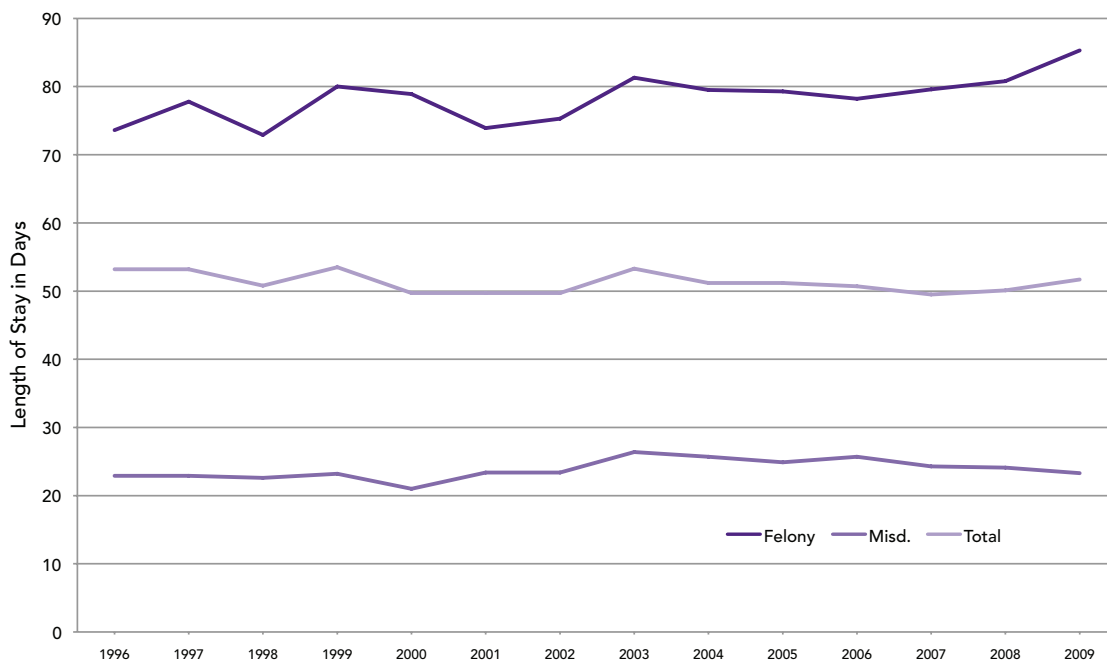
The dramatic drop in the New York City jail population reinforces the perspective that changes in the NYPD’s arrest practices were central to the drop in the New York City correctional populations. As noted earlier (**Figure 9**), the New York City jail population peaked at 21,448 in 1991. By 2009, the jail population had declined a staggering 38 percent to 13,362. Remarkably, this occurred while the total number of arrests increased. Total jail admissions also declined, especially for felony level charges (**Figure 16**). The number of misdemeanor and “other” related jail admissions increased, but these increases did not outweigh the large decline in felony jail admissions. Ironically, there were no changes in the LOS for people admitted and released from New York City jails (**Figure 17**).

Figure 16. New York City Jail Admissions by Most Serious Charge, 1994 – 2009



Source: Primary data from New York City Department of Corrections, 2009 – 2010.

Figure 17. New York City Jail Length of Stay (in days) by Felony and Misdemeanors, 1996 – 2009



Source: Primary data from New York City Department of Corrections, 2009 – 2010.

In summary, the reduction in felony arrests by the NYPD explains why all forms of correctional supervision dropped. Fewer people arrested for felonies led to fewer people in prison, and on probation or parole. Even though the volume of arrests actually increased, courts are less able to sentence people to prison, keep them in jail on pretrial detention status, or sentence them to probation. This lowering of the prison, jail, probation, and parole populations of the city brought down the correctional population of the entire state.

Also, there was a sharp decline in the prison disposition rate within New York City. As shown in **Table 5**, between 1993 and 2008 there was a 50 percent decline in the prison disposition rate for felony convictions in New York City. Outside of New York City, there was no such decline.

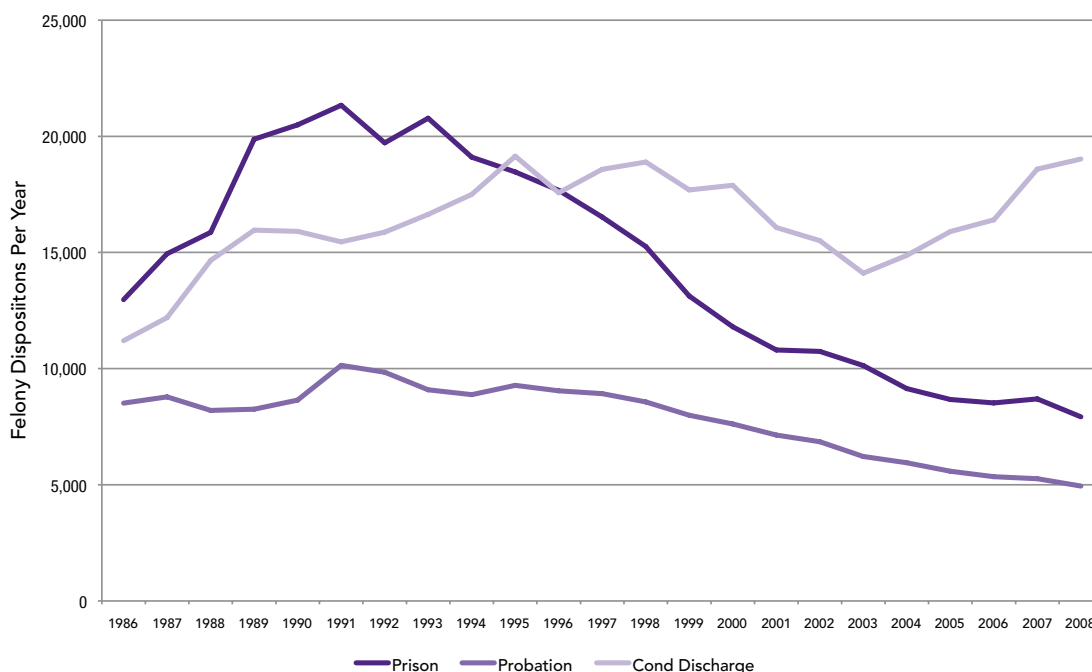
Table 5. Prison Disposition Rates for Felony Convictions, 1993 & 2008

REGION	1993	2008
New York City	27%	13%
Rest of the State	17%	18%
Total	22%	15%

Source: Primary data from: New York State Division of Criminal Justice Services, 2009 – 2010.

The drop in the prison disposition rate in New York City coincided with an increase in the use of “conditional discharge,” which is a form of diversion (**Figure 18**). The prosecutor reaches an agreement with the defendant early on in the pretrial process that if the defendant agrees to enter into treatment (usually drug treatment) and complete that program without incurring subsequent arrests, the original charges are dropped. However, according to Manhattan District Attorney staff, conditional discharges are not offered to any defendant who may serve a prison term if convicted. Thus, the greater use of conditional discharge may not be related to the overall decline in prison dispositions (**Figure 18**).¹⁶

Figure 18. Felony Dispositions by Type, 1986 – 2008



Source: Primary data from New York Division of Criminal Justice Services, 2009 – 2010.

New York City has a wide array of alternatives to incarceration programs funded by New York State, New York City, and local foundations aimed at reducing the prison disposition rate. These programs are operated by the following entities:

- > Center for Alternative Sentencing and Employment Services (CASES);
- > Center for Community Alternatives (CCA);
- > Center for Employment Opportunities (CEO);
- > Fortune Society;
- > Project Greenhope;
- > Palladia;
- > Osborne Association; and
- > Women's Prison Association (WPA).

Such a vibrant and mature array of alternative programs does not exist outside of New York City, which may explain why the prison disposition rate for non-New York City counties did not decline, but actually increased slightly from 17 percent to 18 percent over the same period. The percentage of felony arrests resulting in a “conditional discharge” has not increased in these other jurisdictions.

Much of the decline in the correctional population is linked directly to a decline in the number of people arrested for felony level crimes. This decline in felony arrests was due, in large part, to changes in police practices carried out by the New York Police Department beginning in the early 1990s.

Conclusion

The declines in New York State's prison population as well as the New York City jail population are due largely to a reduction in the number of people being arrested for felony level crimes. Greater use of non-prison sanctions by New York City courts also contributed to the decline. The New York City and overall New York prison population decline would have occurred much sooner had the state legislature not been incentivized by the federal government to adopt “truth-in-sentencing” laws that increased the length of imprisonment.

These results show that policy changes at the local level can have a dramatic and lasting impact on state prison as well as jail, probation, and parole populations. Further, the decline in the state prison population was not initially associated with a decline in prison costs. In fact, the state prison budget increased significantly while the prison population declined. Only in recent years has the DOCCS budget stabilized, and prisons begun to close.

The New York experience has two important lessons for efforts to reduce the national epidemic use of mass incarceration. First, changes in policy at the local level (especially police policy) can have a dramatic impact on all forms of correctional supervision and imprisonment. Thus, efforts that only focus on reform at the state level of government are incomplete and may not be as effective as those coupled with locally initiated reforms. Second, both incarceration and crime rates can be reduced. Thus, the argument that lowering prison and jail populations will necessarily trigger increases in crime rates are patently false.

ENDNOTES

- 1 The 2.3 million figure is the sum of the total prisoners under the jurisdiction of state and federal correctional facilities at the end of 2011 (1,598,780) and the total number of people confined in county and city jails in June 2011 (735,601). E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN NO. NCJ 239808, PRISONERS IN 2011, at 1 (2012), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p11.pdf>; TODD D. MINTON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN NO. NCJ 237961, JAIL INMATES AT MIDYEAR 2011, at 1 (2012), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim11st.pdf>. According to The National Employment Law Project (NELP) there were about 65 million Americans with some sort of criminal record in 2008. MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMMSELLEM, THE NAT'L EMP'T LAW PROJECT, 65 MILLION PEOPLE 'NEED NOT APPLY': THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT, at 3 n.2 (2011), available at http://www.nelp.org/page/-/65_Million_Need_Not_Apply.pdf?nocdn=1. NELP estimated that this number accounted for approximately 27.8% of the adult population. *Id.*
- 2 In 2011, approximately 47% of state prisoners were incarcerated for non-violent offenses. CARSON & SABOL, *supra* note 1, at 9. Approximately 48% of sentenced federal prisoners were held for drug crimes as of 2011. *Id.* at 10.
- 3 As of 2011, approximately 22% of individuals incarcerated in state and federal prisons as well as city and county jails were held without conviction. See CARSON & SABOL, *supra* note 1, at 6 (stating that 96% of all federal and state prisoners were post-conviction in 2011); MINTON, *supra* note 1, at 7 (stating that 60.6% of all those in city and county jail were unconvicted as of June 2011). In 2011, approximately 30% of all federal and state prison admissions were for parole violations. See CARSON & SABOL, *supra* note 1, at 11. Parole violations include all conditional release violators returned to prison for either violations of the conditions of release or for new crimes. *Id.*
- 4 See generally FRANKLIN E. ZIMRING, THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL (2012).
- 5 The amount of time served presented in Figure 3 includes the amount of time a person spends in the local jails as part of the pretrial process and awaiting transfer to the state prison. In 2010, the average amount of time served in the local jails prior to be transferred to the state prison system averaged about 7 months.
- 6 See N.Y. DEP'T OF CORR. AND CMTY. SUPERVISION, 2007 RELEASES: THREE YEAR POST RELEASE FOLLOW-UP, at 1 n.2 (2010), available at http://www.doccs.ny.gov/Research/Reports/2012/2007_releases_3yr_out.pdf (stating that prisoners sentenced prior to the Sentencing Reform Act of 1995 received indeterminate sentences while violent offenders sentenced after 1995 received determinate sentences); see also N.Y. PENAL LAW § 70.02 (McKinney 2012) (codifying part of the Sentencing Reform Act of 1995 and defining categories of felony offenses that require determinate sentences).
- 7 The Violent Crime Control and Law Enforcement Act became law in 1994. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1786 (codified as amended in scattered sections of 42 U.S.C.). It also provided for 100,000 new police officers, and \$6.1 billion in funding for prevention programs. The bill was originally written by then Senator Joe Biden of Delaware and signed into law by President Bill Clinton.
- 8 N.Y. DEP'T OF CORR. SERVS., MERIT TIME PROGRAM SUMMARY OCTOBER 1997 – DECEMBER 2006, at 2 (2007), available at http://www.doccs.ny.gov/Research/Reports/2007/Merit_Time_Through_2006.pdf. Those with serious discipline infractions and those convicted of a violent felony, a homicide or a sex offense are excluded from this program. *Id.*
- 9 E-mail from Anthony J. Annucci, Exec. Deputy Comm'r, N.Y. Dep't of Corrs. and Cmty. Supervision, to James Austin, President, JFA Inst. (Nov. 27, 2012) (on file with authors).
- 10 See Bert Useem, *Right-Sizing Corrections in New York*, 12 JUST. RES. & POL'Y 89 (2010).
- 11 The FBI Uniform Crime Reporting Program collects offense information for: murder, nonnegligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, and arson. FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTING HANDBOOK 8 (2004), available at http://www.fbi.gov/about-us/cjis/ucr/additional-ucr-publications/ucr_handbook.pdf.
- 12 Several studies examined why the crime rate declined in New York City and elsewhere. The general consensus is that a variety of factors or trends contributed to the decline, including more effective police practices that occurred in New York City and other locations. See John E. Eck & Edward R. Maguire, *Have Changes in Policing Reduced Violent Crime? An Assessment of the Evidence*, in THE CRIME DROP IN AMERICA 207, 207-65 (Alfred Blumstein & Joel Wallman eds., 2d ed. 2006) (summarizing these studies); see also ANDREW KARMEN, NEW YORK MURDER MYSTERY: THE TRUE STORY BEHIND THE CRIME CRASH OF THE 1990S (2000) (providing a succinct summary for various factors and trends contributing to movements in the New York City crime rate).
- 13 Eck & Maguire, *supra* note 12, at 207-65.
- 14 The "broken windows" theory was originally presented in 1982 as an article published by *The Atlantic*. George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, THE ATLANTIC, Mar. 1982, <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>.
- 15 In 2010, black New Yorkers were seven times more likely than white individuals to be arrested for marijuana possession. Harry G. Levine, *The Epidemic of Pot Arrests in New York City*, ALTERNET, Aug. 9, 2009, http://www.alternet.org/story/141866/the_epidemic_of_pot_arrests_in_new_york_city. Latino individuals were four times more likely to be arrested than white individuals. *Id.* In 2008, New York City police arrested 40,300 for small marijuana possession, constituting about 12% of arrests for all crimes. *Id.* Of these arrests, 87% were black or Latino. *Id.*
- 16 Interview with Cyrus R. Vance, Jr., New York Cnty. Dist. Attorney, in N.Y.C., N.Y. (2010).

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