

**Apartheid Resurrected: How American Incarceration
Policies Wage War On Poor African American Communities**

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I. Status of Incarceration Today

As of December 31, 2003, according to the Bureau of Justice Statistics, America's incarcerated population stands at over 2 million people housed in federal and state prisons.¹ From 1925 to 1972, the prison population fluctuated between 100,000 and 200,000 inmates.² Beginning in the late 1970's, there was a dramatic increase in incarceration. Today's incarcerated population represents a ten-fold increase since 1972. As of year end 2003, there are an estimated 482 prison inmates per 100,000 U.S. residents.³

In order to put in perspective how astonishing such incarceration rates truly are, we may look to other nations for a comparison. The United States is second in the world in its rate of incarceration per 100,000 population.⁴ Of all 59 nations in Europe, Asia and North America from which data may be compiled, only Russia incarcerates people at a higher rate.⁵ In comparison to other similar industrialized nations, the United States incarceration rate is approximately six to ten times higher.⁶

While these numbers are shocking in and of themselves, when the incarceration rates are distilled on the basis of race, the numbers can only be described as catastrophic. Despite the fact that African Americans constitute 12% of the United States population, 44% of all prisoners, state and federal, are African American.⁷ A close examination of incarcerated populations by state supplies a striking revelation – the proportion of African Americans in the prison population exceeds their proportion among state residents in every single state.⁸

¹ Department of Justice, Bureau of Justice Statistics, *Prison Statistics*, March 22, 2005, available at <http://www.ojp.usdoj.gov/bjs/prisons.htm>.

² Phillip J. Wood, *The Rise of the Prison Industrial Complex in the United States*, in *Capitalist Punishment: Prison Privatization & Human Rights* 16, 17 (Andrew Coyle, Allison Campbell, & Rodney Neufeld eds., Clarity Press 2003).

³ Department of Justice, Bureau of Justice Statistics, "Prison Statistics," March 22, 2005, available at: <http://www.ojp.usdoj.gov/bjs/prisons.htm>.

⁴ Marc Mauer, *Race to Incarcerate* 19 (The New Press 1999).

⁵ *Id.*

⁶ *Id.*

⁷ Human Rights Watch, *Incarcerated America*, April 2003, available at <http://www.hrw.org/background/usa/incarceration/>.

⁸ *Id.*

While only .6 percent of all white men are incarcerated, 5 percent of African American men are.⁹ In 1999, one out of three African American men between the ages of twenty and twenty-nine was under the control of the criminal justice system either as prisoners, parolees or on probation.¹⁰ In 2003, 9.3% of African American males between the ages of twenty-three and twenty-nine were imprisoned, compared to 2.6% of Hispanic males and 1.1% of white males.¹¹ For every one African American man in college, 100 are arrested.¹² If the current incarceration rates persist, at least one in four African American men born today will serve more than one year in prison at some time during his lifetime.¹³

II. Introduction

The creation of determinate sentencing policies in response to the War on Drugs has contributed significantly to the disproportionate incarceration of poor African American men which, in turn, continues to have a devastating effect on their communities. In order to demonstrate this thesis, I analyzed the development of sentencing policy, specifically citing those policies which have had the most significant impact on the incarceration of African American men; explored the failures of the War on Drugs; analyzed the wide-ranging effects on poor African American communities; and concluded with my recommendations for addressing these problems.

III. History of U.S. Sentencing Policy

In the 18th to early 19th centuries, the American criminal system modeled itself after the English model, having specific punishments for each crime. It was not until the late nineteenth century that penological views favoring judicial discretion gained popularity, allowing judges the flexibility of sentencing offenders to punishments based upon the severity of the crime and the character of the

⁹ Department of Justice, Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2002*, March 22, 2005, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim02.pdf>.

¹⁰ David Cole, *No Equal Justice: Race and Class in the American Justice System* 4 (The New Press 1999).

¹¹ Department of Justice, Bureau of Justice Statistics, *Prisoners in 2003*, April 12, 2005, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p03.pdf>.

¹² *Id.*

¹³ *Id.* at 5.

offender.¹⁴ Under this scheme, the branches of governments shared control over the criminal justice system. Legislatures defined crimes and set a range of years which could be served, judges enjoyed wide-ranging discretion in assigning sentences or even probation, and the executive branch, via the parole board, could release a prisoner if he or she had demonstrated a desire to be rehabilitated through his or her actions.¹⁵ In the 1960's and 1970's, Congress became increasingly alarmed by the disparities in federal sentencing. This alarm gave rise to the push for sentencing guidelines as a measure with which to alleviate disparities by reducing judicial discretion.

IV. Let's Get Tough on Crime: War on Drugs

The "Tough on Crime" movement emerged in the 1960's. At the time, not only was our country at a crossroads due to the civil rights movement, but it was also facing the first drug epidemic over heroin. Crime rates also rose, although there is some disagreement as to how much. Much of the disagreement flows from the fact that much of what was reported as crime also included protests related to both the civil rights movement and the war.¹⁶ The rapid urbanization of the nation as well as the burgeoning feminist movement have also been cited as factors that contributed to the emerging tough on crime movement.¹⁷ The influence of the feminist movement arises from the demands for increased punitive measures as punishment for those who might prey on women.¹⁸

In an effort to capitalize on the changes the country was facing, those who opposed developments in civil rights encouraged the blurring of the distinction between political unrest and crime. People like George Wallace criticized the Supreme Court for ordering integration, citing it as an attempt to "assist criminals."¹⁹ Nixon's campaign in the late 60's calling for a return to "law and order" was an attempt to play on the prejudiced fears of mainstream white Americans who were unsettled by the

¹⁴ Civil Rights Organization, *Race, Sentencing and Tough on Crime Movement*, March 22, 2005, available at www.civilrights.org/publications/reports/cj/sentencing.html.

¹⁵ David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. Rev. 211, 216 (2004).

¹⁶ Mauer, *supra* note 4, at 52.

¹⁷ *Id.* at 53.

¹⁸ *Id.* at 54.

¹⁹ *Id.* at 53.

images of African Americans protesting.²⁰ Racial undertones were infiltrating the discussion of crime in a very pronounced fashion. In a poll conducted in the late 1960's, the public was asked to cite reasons for the breakdown of law and order in the nation. Eighty-one percent of the public cited "Negroes who start riots" and "communists" as the perpetrators.²¹ With the convergence of the heroin epidemic and the unrest, political and otherwise, there was the increased fear of both drugs and violent crime.

Beginning with the unsuccessful presidential campaign of Barry Goldwater in 1964, crime control became politicized. Of course, prior to 1964, crime control was important to the nation; however, in 1964 crime control became a wedge issue, a pawn in partisan politics. Republicans were very successful at demonizing judges based on what they saw as the use of judicial discretion to produce disparate sentences, viewed as being soft on criminals. The rationale was that tougher laws would produce tougher sentences leading to deterrence and a lower crime rate overall.

Although President Richard Nixon was the first to formally declare a "War on Drugs," most people look to President Ronald Reagan as having put the war into full swing in the early 1980s. President Reagan pursued this "war" throughout his presidency (indeed the war has never ended). As evidenced by a speech given by Reagan regarding crime policy, this was a purposeful rejection by the administration of what Reagan termed the "utopian presumptions about human nature that see man primarily as a creature of his material environment."²² This evidenced a philosophical belief that directly impacted the criminal policy decisions of the time. President Reagan's sentiments invoked concepts such as personal responsibility and vindication of the victim's interests as well as

²⁰ *Id.*

²¹ *Id.*

²² Mauer, *supra* note 4, at 60, citing Ronald Reagan, "Remarks Announcing Federal Initiatives Against Drug Trafficking and Organized Crime," October 14, 1982, cited in Dan Baum, *Smoke and Mirrors: The War on Drugs and the Politics of Failure* 170 (Little, Brown 1996).

zero tolerance for the immorality and irresponsibility of criminals.²³ This demonstrated a shift towards morality but also towards punishment as opposed to rehabilitation.

Analysis of the success of crime as a wedge issue points to two factors: 1) the expansion of the federal government and 2) the trend towards single-issue politics.²⁴ There was a time when an issue like street crime was outside of the realm of federal law. With growing discontent over the inability of the national government to solve the country's issues, politicians recognized that crime control was an issue with a great deal of political capital. In the political arena, by defining crime in terms of morality, the effectiveness of policies to reduce crime was no longer relevant. Politicians recognized that the public would respond favorably to the debate on criminal policy in moral terms due to the widely shared anxiety over safety. Politicians wanted to ensure that they were on the "right" side of the issue, because no politician wants to be viewed as sympathizing with the plight of criminals. Therefore, the politician who could most successfully portray himself as being tough on crime while simultaneously discounting his or her opponent's views on the subject would emerge the winner.

To be successful, politicians utilized frightening stereotypes to play on people's prejudices and fears. Often cited is the perception that race indicates a propensity for criminal behavior. This concept was capitalized upon with the use of Willie Horton during the 1988 presidential campaign of George Bush, Sr.²⁵ Just as President Reagan successfully used the stereotypical image of an African American welfare queen to engender support for his views on welfare policy, President Bush Sr. utilized the image of an African American man, Willie Horton, to send a message about crime policy.²⁶ Willie Horton had been convicted of murdering a minor in 1975.²⁷ While he was out on a prison furlough, Horton raped a woman and stabbed another individual.²⁸ The use of Horton during

²³ Michael Tonry, *Why are U.S. Incarceration Rates So High?*, Crime and Delinq. October 1999 Vol 45 No. 4, at 428.

²⁴ *Id.* at 429.

²⁵ Michael Tonry, *Malign Neglect: Race, Crime and Punishment in America* 10 (Oxford University Press 1995).

²⁶ *Id.*

²⁷ *Id.* at 11.

²⁸ *Id.*

the campaign was a powerful reminder of the potential failures of the criminal justice system, making the case for stronger punishments.

The aim of the War on Drugs was to impose harsh punishments on all those involved in the underground drug community of the United States, no matter what the level of their involvement. Thus, the goal was to punish not only drug lords and dealers, but also users and those who may simply have had the misfortune of being in a close relationship with a dealer. In order to sustain the War on Drugs, Reagan dramatically increased law enforcement budgets, including the FBI and Drug Enforcement Administration (DEA).²⁹ This new emphasis on no nonsense laws aimed at removing drug dealers and users from our streets gave birth to several sentencing policy developments which are discussed in the following sections.

V. Discretion Flew Out the Window Making Room for Increased Incarceration of African American Men

a. Determinate Sentencing

Due to the push for sentencing reform, Congress passed the Sentencing Reform Act of 1984 (SRA).³⁰ This Act created the United States Sentencing Commission with the express purpose of drafting a set of federal sentencing guidelines. As created, the Federal Sentencing Guidelines detailed a range of years that may be imposed for a specific crime in addition to specifying sentencing factors that must be considered by a judge. These factors, known as “departures,” could either have the effect of enhancing a sentence or mitigating a sentence. Special circumstance factors, such as age, race, gender, and socio-economic background were deemed inappropriate for consideration. Additionally, the SRA had the effect of abolishing parole, thereby doing away with good time credits

²⁹ Jeff Sinden, *The Problem of Prison Privatization: The US Experience*, in *Capitalist Punishment: Prison Privatization & Human Rights* 39, 42 (Andrew Coyle, Allison Campbell, & Rodney Neufeld eds., Clarity Press 2003).

³⁰ Zlotnick, *supra*, at 216.

and other discretionary measures in place that may allow a prisoner to be released prior to the end of his or her sentence.³¹

The implementation of Federal Truth-in-Sentencing laws went hand in hand with the abolition of parole. Truth-in-Sentencing laws regulate the amount of time an offender must spend in prison. Presently, in the federal system, offenders are required to serve 85% of their sentence.³² The amount of prison time or supervision imposed pursuant to state truth-in-sentencing laws varies state by state. The Violent Crime Control & Law Enforcement Act established grants that may be awarded to states in order to expand their prisons if the states agree to pursue the increased incarceration of violent offenders.³³ Clearly by offering such grants the federal government encourages the increased use of incarceration as a means of crime control. In order to take advantage of the Violent Offender Incarceration and Truth-in-Sentencing (VOI/TIS) grant programs, states must meet three requirements: 1) states must assure the federal government that the punishment imposed upon violent offenders will be sufficiently severe, 2) states must assure that violent offenders will be required to serve a substantial portion of their sentences, and 3) states must assure that the time served is sufficient to meet the goals of deterrence and protection of the public.³⁴

b. Mandatory Minimums

In direct response to the War on Drugs, Congress passed the Anti-Drug Abuse Act of 1986 and later its sister, the Anti-Drug Abuse Act of 1988.³⁵ The first of these Acts established the majority of the harsh mandatory minimums for illegal narcotics, minimums that exceeded the existing applicable federal law.³⁶ These penalties applied to crimes of simple possession of drugs, the doubling of penalties for any individual who knowingly involved a minor in drug activity, as well as mandatory

³¹ *Id.*

³² *Id.*

³³ The Urban Institute, *The Influences of Truth-in-Sentencing Reforms on Changes in States' Sentencing Practices and Prison Populations*, March 22, 2005, available at http://www.urban.org/uploadedPDF/410470_FINALTISrpt.pdf.

³⁴ *Id.*

³⁵ Zlotnick, *supra*, at 218.

³⁶ *Id.* at 219.

life sentences for drug lords convicted of maintaining a criminal enterprise.³⁷ The second Act imposed harsher penalties for drug conspiracy convictions.³⁸ Essentially these laws set minimum sentences that must be applied for convictions of drug crimes, regardless of the appropriateness of the sentence under the circumstances, leaving no room for judicial discretion.

Both of the Anti-Drug Abuse Acts were passed without any hearings, a fact which likely precipitated the problems associated with their application.³⁹ To begin with, the minimum sentence which attaches to a crime corresponds to the amount of the drug involved.⁴⁰ This is problematic because the amounts that trigger a sentence are typically absurdly low.⁴¹ For example, under this new legal scheme, five grams of crack-cocaine (which is equivalent in weight to two packets of sugar) garnered a sentence of five years in prison.⁴² In practice, this had led to the prosecution of many minor participants as if they possessed the same level of culpability as drug lords.⁴³ Congress relied on what was limited knowledge of the drug trade absent expert testimony, leading to the selection of arbitrary triggering amounts.⁴⁴ The prosecution of minor players was further exacerbated by the addition of conspiracy provisions which came with the second Act.⁴⁵

Of additional importance in the context of mandatory minimums is their effect on the Sentencing Guidelines. Prior to the passage of the Anti-Drug Abuse Acts, the Sentencing Commission devised penalties for drug crimes based upon past sentencing data.⁴⁶ This practice changed when the Sentencing Commission adopted the mandatory minimums as the base level guideline penalties for

³⁷ James P. Gray, *Why Our Drug Laws Have Failed Us and What We Can Do About It: A Judicial Indictment of the War on Drugs* 27 (Temple University Press 2001).

³⁸ Neil Bernstein, *Swept Away*, in *Prison Nation: Warehousing of America's Poor* 66,68 (Tara Herivel & Paul Wright eds., Routledge 2003).

³⁹ Zlotnick, *supra*, at 218.

⁴⁰ *Id.*

⁴¹ Bernstein, *supra*, at 68.

⁴² Zlotnick, *supra*, at 219.

⁴³ Bernstein, *supra*, at 68.

⁴⁴ *Id.*

⁴⁵ *Id.* at 69.

⁴⁶ Zlotnick, *supra*, at 219.

drug offenses.⁴⁷ Additionally, where the sentencing guidelines and mandatory minimums deviated, the mandatory minimum was adopted as the prevailing sentence to be applied.⁴⁸ This is problematic because even in those cases where an individual could benefit from a downward departure in his or her sentence under the guidelines, if the amount of drugs involved in the crime is enough to trigger a mandatory minimum, it is the mandatory minimum which must be applied by law.⁴⁹

There are only two ways to avoid a mandatory minimum sentence. The first is by providing “substantial assistance” to the prosecution by implicating others who may or may not have been involved in the crime.⁵⁰ The conspiracy provisions have worked hand in hand with this exception to victimize women who have played minor roles in the crimes of their husbands and boyfriends.⁵¹ Husbands or boyfriends may easily implicate their wives and girlfriends in an effort to save themselves. Furthermore, this victimization is perpetuated by the fact that these women, as minor participants, have very little to offer as assistance to the prosecution, so are oftentimes subject to the mandatory minimum with no recourse.

One may also avoid a mandatory minimum if he/she qualifies for the “safety valve” provision.⁵² This provision was enacted by Congress to account for the excessive sentencing which often befalls non-violent drug offenders.⁵³ This provision allows judges to apply the sentencing guideline punishment if a drug offender is found to be a non-violent, minor participant in the drug crime.⁵⁴ Although this appears to be a viable option, the circumstances that must be met to qualify

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Families Against Mandatory Minimums, *Understanding Mandatory Sentencing Laws*, March 29, 2005, available at <http://www.famm.org/pdfs/Primer.pdf>.

⁵⁰ Bernstein, *supra*, at 69.

⁵¹ *Id.*

⁵² *Understanding Mandatory Sentencing Laws*, *supra* note 50, at 2.

⁵³ *Id.*

⁵⁴ *Id.*

an offender for this exception are narrow, resulting in few individuals who may take advantage of it.⁵⁵

c. “Three Strikes and You’re Out” Laws

Perhaps the most memorable of such mandatory sentencing measures is the “3 strikes and you’re out” laws. The federal government and various states have adopted forms of the three strikes law. The federal version was adopted in 1994, when President Clinton signed the Violent Crime Control and Enforcement Act.⁵⁶ This law provided for the imposition of mandatory life sentences for individuals convicted of their third felony offense. The goal of this sentencing policy was to deter recidivism.

California was one of the first states to enact a three strikes law. Under California’s three strikes law, a conviction for a second felony doubles the sentence that would ordinarily be imposed and a conviction of a third felony imposes a mandatory sentence of twenty-five years to life.⁵⁷ It is important to note that in California, the three strikes scheme is triggered regardless of where the previous offenses were committed as long as they were violent or serious offenses.⁵⁸ Additionally, the three strikes rule attaches regardless of the severity of the third offense.⁵⁹ In evaluating such laws, it is important to remember that prosecutors retain the ultimate discretion in determining who should be subject to these harsh laws.

d. Results of Mandatory Sentencing Regimes

The imposition of mandatory sentencing schemes across the nation has resulted in the explosion of the prison system as indicated by the statistics at the opening of this paper. These determinate sentencing policies have been especially “effective” in incarcerating appalling numbers of African Americans, particularly men, creating a startling racial disparity in prisons. This was all done

⁵⁵ *Id.*

⁵⁶ Nancy Rodriguez, *Persistent Offender Law: Racial Disparity, Patterned Offenses and Unintended Effects* 4 (Marilyn McShane & Frank P. Williams III eds., LFB Scholarly Publishing LLC 2003).

⁵⁷ Cole, *supra*, at 146.

⁵⁸ *Id.*

⁵⁹ *Id.*

supposedly in the name of deterrence, but these policies have proved to be ineffective deterrents of both crime and drug use.

There are no positive results of these levels of incarceration. Incarceration is a legitimate sanction to be used sensibly with appropriate consideration given to ensuring that punishment allotted is proportional. Furthermore, it is adverse to international human rights law to fail to respect human dignity in devising criminal punishment. The current status of incarceration in America clearly indicates a failure to be cognizant of such considerations.

Even those who would typically support such punitive measures cannot deny the astronomical costs that have accrued in connection with the maintenance of prisons. From a purely economic perspective, mass incarceration is not a good investment considering its inability to effectively deter crime. Between 1980 and 1994, the costs for maintaining both federal and state prisons grew from \$3.1 billion to \$17.7 billion.⁶⁰ All prison costs, including both operational and capital costs, for the period between 1980 and 1996, totaled approximately \$163 billion.⁶¹ Undeniably such vast amounts of money could be better spent on preventative measures or alternative means of dealing with convicted criminals. Programs such as community supervision, diversion, and drug treatment would be a better solution for those non-violent offenders who possess the capability of being productive in society.

VI. Failure of the War on Drugs and its Consequences

a. Failure as a deterrent of crime

Undeniably the mass incarceration that has resulted from the War on Drugs has failed to have a substantial effect on the reduction of crime in America. In analyzing the effects of tougher penalties, it is insufficient to simply compare crime rates prior to and after such laws were enacted. Arguably it could be that both time periods are part of a larger trend that was in effect, which would indicate that

⁶⁰ United States General Accounting Office, *Federal and State Prisons: Inmate Populations, Costs and Projection Models*, April 13, 2005, available at <http://www.gao.gov/archive/1997/gg97015.pdf>.

⁶¹ *Id.*

the change in policy had nothing to do with the change in crime rates. Overall crime rates as well as violent crime rates began a steady decline in 1992.⁶² To the casual observer this may appear to demonstrate that imprisonment was working as a deterrent. However, taking into consideration the period just before the new sentencing policies took effect, beginning around 1970 and examining the subsequent 25 year period, crime rates appeared to be following a cycle.⁶³ Historians have long noted the cyclical nature of crime rates, finding that rates rise and fall over time regardless of the existence of crime control policies.⁶⁴

Crimes rates rose and fell during four distinct periods from 1970 until 1995.⁶⁵ General crime rates rose in the 1970s, declined from 1980 to 1984, rose from 1984 to 1991 and then declined from 1995 onward.⁶⁶ Throughout the ups and downs, there was a continual increase in the prison population. Thus, increasing imprisonment coincided with growing crime rates twice during these cycles. These facts demonstrate that while imprisonment may have some effect on crime rates, there must be other factors at work as well. Between 1970 and 1995, there was a 328 percent increase in the rate of incarceration.⁶⁷ Although crimes related to property reached a low in 1995, that rate remained higher than the corresponding rate for 1970.⁶⁸ Of particular importance is the fact that the rate of violent crime (except murder) was also higher than the corresponding rate for 1970.⁶⁹ These statistics demonstrate that crime levels did not decrease as many anticipated they would after the onset of mandatory sentencing during the 1980's.

By 1995, the decline in the murder rate was seemingly noteworthy. Over a period of fifteen years, from 1980 to 1995, the murder rate dropped 20 percent to 8.2 murders per 100,000

⁶² Mauer, *supra* note 4, at 82.

⁶³ *Id.*

⁶⁴ Tonry, *supra* note 21, at 431.

⁶⁵ Mauer, *supra* note 4, at 82.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 84.

⁶⁹ *Id.*

population.⁷⁰ But when examined in the context of that 25 year period, it is virtually the same as the rate in 1970 of 8.3 murders per 100,000 population.⁷¹ Thus, although the prison population had grown by one million over that time period, the murder rate remained essentially the same.⁷²

The failure of the War on Drugs to incarcerate the most violent of offenders is also disturbing. In state prisons from 1980 to 1992, eighty-four percent of the increase in the prison population can be attributed to the incarceration of non-violent offenders.⁷³ In 1980, forty-eight percent of new admissions to prison were due to a conviction of violent crime, while seven percent were convicted of drug crimes.⁷⁴ By 1996, new admissions to prison due to convictions of drug crimes increased to 31.7 percent, while those convicted of violent crime dropped to 26.8 percent.⁷⁵ These proportions have remained approximately the same to date.⁷⁶

At best, increased incarceration can be credited with deterring one-quarter of violent crime.⁷⁷ That impact may appear substantial; however, it also tells us that three-quarters of the decline of violent crime must be attributed to other factors. Some argue that perhaps factors such as violence, AIDS, preventable diseases as well as accidents that have befallen low income minorities may have contributed to declines in crime rates.⁷⁸ Additionally, in the 1990s, a strong economy, decline of the crack-cocaine epidemic, increased reliance on citizen policing, and changes in behavior likely contributed greatly to the decline.⁷⁹ Most research supports this contention. For instance, the National Research Council of the National Academy of the Sciences concluded that the tripling of

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Human Rights Watch, *Punishment and Prejudice: Racial Disparities in the War on Drugs*, March 22, 2005, available at <http://www.hrw.org/reports/2000/usa>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Marc Mauer, *Lessons of the 'Get Tough' Movement in the United States*, March 22, 2005, available at <http://www.sentencingproject.org/pdfs/mauer-icpa.pdf>.

⁷⁸ Mauer, *supra* note 4, at 87.

⁷⁹ Mauer, *supra* note 76.

sentences applied for violent crimes from 1975 to 1989 had a marginal impact upon violent crime rates.⁸⁰

An often overlooked consequence of the overwhelming emphasis on drug crimes has been the reduction of resources spent on pursuing other crimes. This is especially disturbing since typically the offenders imprisoned on drug charges are bit players in the drug scene. These individuals are also usually non-violent offenders.⁸¹ Most are small-scale dealers, addicts, couriers and women who have been pressured into occasional drug-related activities at the behest of their husbands or boyfriends.⁸²

b. Failure as a deterrent of drug use

In assessing the success of the War on Drugs in deterring the use of drugs, it is again important to not simply rest one's conclusions on a snapshot of drug use prior to the institution of tougher policies in comparison to information gathered later. Just as crime was experiencing a decline prior to the enforcement of more severe sentencing policies, so too was drug use. Both frequent and casual drug use were declining in certain communities.⁸³ The following data was compiled by the National Institute on Drug Abuse (NIDA). Between the years of 1975 to 1991, survey data of high school seniors showed a demonstrated decrease in the use of marijuana, cocaine and heroin.⁸⁴ Those same students were polled for drug use within the thirty days prior to the survey in order to gauge the results for frequent users.⁸⁵ The results were similar.⁸⁶

There is also data collected from the National Household Survey on Drug Abuse, which collects data on drug use for individuals twelve years old and over.⁸⁷ Surveys were conducted from 1972

⁸⁰ Mauer, *supra* note 4, at 87.

⁸¹ Michael Welch, *Punishment in America* 71 (Sage Publications 1999).

⁸² Welch, *supra*, at 52

⁸³ Tonry, *supra* note 25, at 85-86.

⁸⁴ *Id.* at 84.

⁸⁵ *Id.* at 86.

⁸⁶ *Id.* at 87.

⁸⁷ *Id.*

until 1990.⁸⁸ Individuals between the ages of 12 and 17 years old as well as between 18 and 25 years old, showed similar declines in use of marijuana and cocaine.⁸⁹ The data for those over 25 demonstrated different patterns because those who are users at that point in their lives are typically habitual users.⁹⁰ The data for those 25 and older reflected a stagnant level of use of marijuana and cocaine during the 1980s.⁹¹ On the other hand, the data for the younger group showed a peak in marijuana use in 1979 followed by a decline.⁹² Data for the 18 to 25 year olds showed a peak in cocaine use in 1979 followed by a decline.⁹³

When the first National Drug Control Strategy was announced in late 1989, it was clear to the national government that drug use was already steadily decreasing.⁹⁴ This fact calls into question why the national government found it necessary to continue in this war. Historians point out that during periods of decline in drug use the administration's reaction to drug use is usually disproportionately severe.⁹⁵ David Musto, a leading historian who focuses on American drug policy, has isolated a cyclical pattern to the intolerance of drug use in America.⁹⁶ Musto points out that the United States tends to go through periods of tolerance which are defined by notions of personal autonomy and accepted use of drugs which are then followed by intolerance, defined by ideas of moral disapproval and the perception of drug use as deviant behavior.⁹⁷ Usually the most punitive punishments are enacted after drug use has begun declining because intolerance has reached a peak in society.⁹⁸ Clearly at such a period, politicians will be reluctant to point out the decline, not wanting to appear as tolerant of such destructive behavior.

⁸⁸ *Id.*

⁸⁹ *Id.* at 88.

⁹⁰ *Id.*

⁹¹ *Id.* at 90.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 92.

⁹⁶ *Id.*

⁹⁷ *Id.* at 93.

⁹⁸ *Id.*

Another interesting characteristic of the decline in tolerance is the adoption of racial and ethnic minority figures as representative of predominant drug users.⁹⁹ In the context of the War on Drugs, the minority scapegoat of choice has been poor African Americans. Impoverished African Americans were seen as the principal users and dealers of crack-cocaine, the drug primarily targeted during the 1980s.¹⁰⁰ Knowing this to be true, the federal government had to have been fully aware of the disproportionate impact this war would have on poor minority populations.

The state of drug use portrayed by the NIDA survey is contradicted by surveys conducted by the Drug Abuse Warning Network (DAWN), a NIDA-sponsored research group. DAWN found that while subjects in the previously mentioned NIDA research were showing declines in drug use, other indicators such as admissions to emergency rooms due to drug related ailments indicated the opposite.¹⁰¹ These statistics implied stable or rising levels of drug use during the middle of the 1980s followed by a rapid increase.¹⁰² Cocaine, heroin and marijuana were increasingly cited as the reasons behind emergency room admittance.¹⁰³ The admissions to the emergency room peaked in 1988, followed by a decline in 1989.¹⁰⁴ This is an especially important statistic since individuals admitted to emergency rooms due to drug related conditions are typically habitual drug users who may be more resistant to deterrence efforts.¹⁰⁵ The contrast between the NIDA and DAWN results may not be as contentious as they appear, however, if one considers the process of abuse which leads to emergency room visits. Data suggests that it may take three to five years after initial onset of drug abuse before acute medical symptoms surface.¹⁰⁶ If that is true then the disparity is reduced because the peak in the mid-1980s (approximately 1985) of certain drugs as demonstrated by the NIDA

⁹⁹ *Id.* at 94

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 97.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

research coincides with a peak in emergency room visits three years later in 1988 as evidenced by the DAWN research.¹⁰⁷

Besides the DAWN results, perhaps most appalling is the fact that the War on Drugs failed to specifically deter habitual drug use in poor minority communities that were especially plagued by drugs to begin with. Although there was aggressive policing in the most drug infested areas, areas inhabited by poor minorities, those communities did not reap the expected benefits. We may look to urinalyses of felony arrestees to indicate as much. As part of the Drug Use Forecasting program (DUF) under the Department of Justice, urinalyses were taken of state felony arrestees for the presence of any drug.¹⁰⁸ In 1991, data revealed positive urinalyses for an alarming number of arrestees, ranging from a high of 75% of arrestees in San Diego to a low of 36% in Omaha.¹⁰⁹ Positive results indicating cocaine use ranged from a high of 62% in New York to 14% in Omaha.¹¹⁰ Across the nation, the data indicated the same thing – all states had a stable proportion of positive test results.¹¹¹ When the DUF positive urinalyses data was broken down according to race, we find that the percentage of African American arrestees testing positive for drug use was higher than the corresponding white percentage in every city where data was collected.¹¹² The fact the majority of arrestees testing positive for drugs are African American would seem to indicate that drug use amongst some African American groups was unaffected.

The findings of the NIDA and DUF research appear irreconcilable. There is a possible explanation. Perhaps these discrepancies resulted because each survey was testing different segments of the population.¹¹³ The NIDA survey failed to take into account young people in the

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 99.

¹¹¹ *Id.* at 101.

¹¹² *Id.*

¹¹³ *Id.*

inner city, thereby failing to account for many minorities' experiences.¹¹⁴ Additionally, because the NIDA survey concentrated on surveying high school seniors, it may have missed young people who have dropped out prior to senior year or students who may have been truant, truancy being a particular problem amongst disadvantaged students.¹¹⁵ Further, students absent during surveys are more likely to include disadvantaged minority students.¹¹⁶

Regardless of the deficiencies of the NIDA surveys, habitual drug use specifically in the inner cities was unaffected and unaddressed by the War on Drugs. It is clear that methods employed to address recurrent drug use must be of a more intense nature than those addressing experimental drug use. The same methods that are effective in deterring new users may be less effective when applied to addicts. Addicts need treatment programs, not a change in sentencing policy as a solution to their problem. Furthermore, as previously mentioned, the decline that was experienced by sectors of the population began prior to the implementation of the War on Drugs. Thus we may conclude that while it is clear that efforts to decrease drug use in African American communities are necessary, any way you analyze the statistical findings, the War on Drugs failed to provide the deterrent effect necessary. Incarceration is not the answer.

VII. Racial Disparities in Sentencing

The War on Drugs is cited as the most significant impetus behind the enormous growth of the prison system. The policies borne of the War on Drugs have resulted in the incarceration of a disproportionate number of African Americans. Drug policies have accomplished this by encouraging the incarceration of drug offenders, a disproportionate number of whom are African American.

The chances of receiving a prison term when arrested for a drug offense increased dramatically after the passage of mandatory sentencing laws. Drug arrests rose from 581,000 to 1,476,000 from

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

1980 to 1995.¹¹⁷ An increase in drug arrests combined with more severe sentencing policies has caused the drug offender populations in jails and prisons to skyrocket. For instance, in 1990, drug offenders released from prison terms, many of which were not imposed pursuant to mandatory drug laws, served an average of 30 months in prison.¹¹⁸ In contrast, those offenders who were sentenced for drug offenses in 1990, mostly pursuant to mandatory drug laws, were expected to serve more than twice that term, an average of sixty-six months.¹¹⁹ Additionally, statistics show that the percentage of federal prisoners serving a drug sentence almost tripled from 1980 to 1996, from 25% to 72%.¹²⁰ In the state system, the percentage of prisoners serving sentences for drug offenses did triple from 1980 to 1993, from 6% to 22%.¹²¹ As of 1999, almost one-fourth, approximately 400,000 inmates out of the total incarcerated population of 1.7 million were in jails and prisons on drug charges.¹²²

Subsequent to the adoption of mandatory sentencing laws, African Americans specifically experienced dramatic increases in both arrest and incarceration for drug offenses. The proportion of African American drug arrests grew from 25% in 1980 to 37% in 1995.¹²³ As of the year 2000, African Americans were incarcerated at 8.2 times the rate of whites.¹²⁴ In the District of Columbia, African Americans have been incarcerated at 34 times the rate of whites.¹²⁵ In Connecticut, Illinois, Iowa, New Jersey, Pennsylvania and Wisconsin, African Americans are over 13 times more likely to be incarcerated than whites.¹²⁶ The state with the widest racial disparity in incarceration is Minnesota where African Americans are 23 times more likely to be incarcerated than whites.¹²⁷ As of the year 2000, African American incarceration nationally stood at a rate of 1,547 per 100,000

¹¹⁷ Marc Mauer, *The Crisis of the Young African American Male and the Criminal Justice System*, March 25, 2005, available at <http://www.sentencingproject.org/pdfs/5022.pdf>.

¹¹⁸ Mauer, *supra* note 4, at 151.

¹¹⁹ Mauer, *supra* note 4, at 151-152.

¹²⁰ Welch, *supra*, at 52.

¹²¹ *Id.*

¹²² *Punishment and Prejudice: Racial Disparities in the War on Drugs*, *supra* note 2.

¹²³ Mauer, *supra* note 114.

¹²⁴ *Punishment and Prejudice: Racial Disparities in the War on Drugs*, *supra* note 2.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

African American residents.¹²⁸ When you take similar account of African American incarceration per 100,000 at the state level, even in North Dakota with the lowest rate of incarceration of 570 per 100,000, the rate remains higher than the highest rate for whites of 440 per 100,000 in Arizona.¹²⁹

Statistics gathered based on race and gender find that African American men are incarcerated 9.6 times the rate of white men.¹³⁰ In the District of Columbia, African American men have been incarcerated at 49 times the rate of white men.¹³¹ In Connecticut, Illinois, Iowa, New Jersey, Pennsylvania and Wisconsin, African American men are over 15 times more likely to be incarcerated than white men.¹³² Minnesota again has the widest disparity due to race and gender with African American men being incarcerated at 26.8 times the rate of white men.¹³³ Overall, as a result, 1 in every 20 African American man over the age of eighteen is in a state or federal prison compared to 1 in every 180 white men.¹³⁴

As far as drug offenses are concerned, African Americans account for 62.6% of all drug offenders sentenced to prison, while whites constituted 36.7%.¹³⁵ Some states reflect worse disproportion amongst the races. African Americans account for 90% of the drug admissions to state prisons in Maryland and Illinois.¹³⁶ The state prison admission rate for African American men convicted of drug offenses in comparison to white men shocks the conscience. The admission of African American men ranges from 60 to 1,146 per 100,000 African American men, while the admission of white men ranges from 6 to 139 per 100,000 white men.¹³⁷ More African Americans were sent to prison (38%) for drug offenses than for violent crimes (27%).¹³⁸ If one combined all

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

non-violent crimes including property, drug and public order crimes, 73% of African Americans in prison are there for non-violent crimes.¹³⁹

Many blame this phenomenon on an idea of African American criminality, believing that their overrepresentation in the prison system is directly correlated to the disproportionate amount of offenses committed at the hands of African Americans as indicated by arrests. To many, crime is young, black and male. David Cole, a leading constitutional scholar and civil rights lawyer, astutely observed that “there is a mutually reinforcing relationship between criminal stigmatization of blacks and racial subordination: the criminal stigmatization of blacks perpetuates and justifies their subordination as a group, and the status of blacks as a segregated, subordinated group makes it easier to insist on ever-more-stringent stigmatizing measures in the criminal law.”¹⁴⁰ Statistics, however, show that Whites account for sixty-seven percent of all arrests and have accounted for more than eighty percent of all arrests in certain categories of crime.¹⁴¹

Twenty percent of racial disparities in sentencing remain unexplained even considering those crimes that African Americans appear to commit at higher rates. While it is true that African Americans are arrested in numbers that are disproportionate to their population, the existing disproportion cannot simply be explained by higher rates of offending. Statistical evidence to support the disproportionate drug offending of African Americans is particularly weak due to differential policing strategies.¹⁴² Drug offense statistics are tainted by discretion, the discretion that governs decisions of who gets arrested, where police patrol and their level of aggression, who gets prosecuted and ultimately the sentencing policies that are applied.¹⁴³ This differential treatment is demonstrated by statistics that show that police officers are more likely to stop African Americans

¹³⁹ *Id.*

¹⁴⁰ Cole, *supra* note 20, at 177.

¹⁴¹ Donna Coker, *Foreword: Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. Crim. L. & Criminology 827, 864 (2003).

¹⁴² *Id.* at 865–866.

¹⁴³ *Id.*

for traffic stops and once stopped they are more likely to have their vehicles searched.¹⁴⁴

Anecdotally, we are all familiar with the racial profiling of African Americans, often referred to as “driving while black.” Further, police often have a substantial presence in African American communities, leading to the disproportionate arrests of African Americans, thus more African Americans will inevitably be incarcerated.

Another factor contributing to the disproportionate incarceration of African Americans via the War on Drugs is the crack-cocaine dichotomy. According to the mandatory minimum laws set by Congress, an individual convicted of selling 500 grams of cocaine and a person selling five grams of crack cocaine receive the same sentence of five years.¹⁴⁵ Selling 500 kilos of cocaine and selling 50 grams also garner the same sentence of ten years in prison.¹⁴⁶ The ratio is 100:1. That a person selling fewer grams of crack would face the same sentence as one selling a considerably larger amount of cocaine is clearly problematic. This disparity also extends to the crime of possession. Simple possession of crack cocaine is a felony, punishable by a five year mandatory sentence, while simple possession of any quantity of cocaine by a first time offender is a misdemeanor, carrying no more than one year of prison.¹⁴⁷ The rub lies in the fact that the person who is charged with selling or possessing crack is much more likely to be African American. As a matter of fact, in 1992 through 1993, eighty-eight percent of all persons charged with trafficking crack were African American.¹⁴⁸ While prosecutors rationalize this by asserting that the percentage simply corresponds to the proportion of large scale traffickers, data compiled by the U.S. Sentencing Commission indicates that only 5.5% of crack defendants in 1992 were classified as high level dealers, while 30.8% were mid-level and 63.7% were low level.¹⁴⁹

¹⁴⁴ *Id.* at 835.

¹⁴⁵ Families Against Mandatory Minimums, *Crack vs. Powder Cocaine Sentencing*, April 12, 2005, available at http://www.famm.org/si_crack_powder_sentencing_fact_sheet.htm.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Mauer, *supra* note 4, at 155.

¹⁴⁹ *Id.* at 156.

This is another area where prosecutorial discretion regarding whether to prosecute as a state or federal offense can have devastating consequences for African American drug offenders dealing in crack. A study was completed by the *Los Angeles Times* from 1988 to 1994 analyzing prosecutions for crack cocaine trafficking in Los Angeles. The *Los Angeles Times* found that not one white defendant was brought in federal court, although whites comprise the majority of crack users.¹⁵⁰ Instead, these defendants were shuttled through state courts, receiving sentences that were sometimes 8 years less than federal defendants.¹⁵¹ The analysis also revealed that African Americans charged in federal courts were sometimes low level offenders or accomplices, as is true nationally as well.¹⁵² This policy of punishing drug offenses involving crack more severely thus has the odd consequence of punishing a low level offender dealing in crack with a strict mandatory five year sentence while punishing a major dealer of 499 grams of powder cocaine with a mere one year in prison, a virtual slap on the wrist.

Many factors contribute to this disparity, but the impact of the socio-economic level of the offender on sentencing is especially relevant to this paper. The O.J. Simpson trial is a perfect example of what can happen when race and wealth intersect. Few would argue that if Simpson had been an impoverished African American male, as opposed to a rich African American athlete, the outcome of the criminal trial would have been different. Thus, we must take into consideration class and the appurtenances thereof.

Prison has long been the dumping ground for the poor. According to a survey conducted in 1991 by the Justice Department of state inmates, 65% of inmates did not have high school diplomas, 53% earned less than \$10,000 the year prior to incarceration, and almost one half were unemployed or working part time prior to their arrest.¹⁵³ These results are important to the argument that perhaps

¹⁵⁰ *Id.* at 157.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 163.

real opportunity and job training would deter disadvantaged young men, particularly African American young men, from becoming criminals. African American young people are more likely to suffer from the effects of concentrated poverty, that which you usually find in inner city neighborhoods. Impoverished African American communities have been largely isolated from years of de facto housing segregation. Sixteen percent of poor African Americans live in non-poverty areas, while 70% of poor whites do.¹⁵⁴

VIII. Effects on the Poor African American Community

The mass incarceration of African American men has produced calamitous consequences for the poor African American community (as well as the larger community).

First, the prevalence of HIV amongst prisoners due to intravenous drug use, rape and bartering of sex to obtain drugs continues to have dire effects on the outside community.¹⁵⁵ At the most basic level, the infection of prisoners is essentially giving them a death sentence since it has been well documented that oftentimes prisoners suffer from substandard healthcare in prisons.¹⁵⁶ However in addition to the personal consequences of infection, there is the collateral consequence endured by the wives and girlfriends they have left home. Oftentimes these men have been raped or otherwise have participated in homosexual relationships while in prison which led to their infection, and they conceal their status from their significant others. Regardless of the mode of transmission, this fact is a contributing factor to the growing rate of African American women becoming infected with HIV today.

Another problem which results is a loss of marriageable men in the African American community.¹⁵⁷ This factor has contributed to an imbalance in the male-female ratio among African

¹⁵⁴ *Id.* at 169.

¹⁵⁵ *Id.* at 182.

¹⁵⁶ See Anne-Marie Cusac, *The Judge Gave Me Ten Years. He Didn't Sentence Me to Life*, in Prison Nation (Routledge 2003) (discussing prisoners with HIV who have been deprived of proper care).

¹⁵⁷ Mauer, *supra* note 4, at 183.

Americans. The male-female ratio at birth is approximately 102 males for every 100 females.¹⁵⁸ However, by ages 40 to 44, this ratio declines significantly to 86 males per 100 females.¹⁵⁹ This is in sharp contrast to the corresponding white ratio which is 100 to 100 for the same age group.¹⁶⁰ Interestingly, while some might believe the growth in imprisoned males would result in a lower crime rate since crime is disproportionately committed by males, they fail to realize the negative consequences that result. It has been shown that men take advantage of the fact that they are a scarce commodity, wielding a sort of “sexual bargaining power” which may lead to increased illegitimacy and single-parent families.¹⁶¹ Additionally, close scrutiny of census data obtained from cities across the nation has shown that gender ratios are an important indicator of the likelihood of family disruption which in turn promotes violence.¹⁶² Clearly then, this becomes a vicious cycle which feeds on the men, women and children of poor African American communities.

Another significant casualty in the mass incarceration of African American men is their children. Impoverished African American children have enough to contend with. That they must also endure the shame, humiliation and loss of social status that accompanies having a parent in prison adds insult to injury. To put some perspective on this problem, statistics taken in 1999 show that about 2% of all American children, almost 1.5 million children, had a parent in prison that year.¹⁶³ When that statistic is distilled based on race, seven percent of the nation’s African American children had a parent in prison, making them nine times more likely than a white child to have an incarcerated parent.¹⁶⁴ More than half the men in prison are fathers and about half of them lived with their children before they were incarcerated.¹⁶⁵ There is the obvious loss of financial and physical support which causes both emotional and financial strain on those left behind. More important, however, is

¹⁵⁸ Mauer, *supra* note 114.

¹⁵⁹ Mauer, *supra* note 114.

¹⁶⁰ Mauer, *supra* note 114.

¹⁶¹ Mauer, *supra* note 4, at 184.

¹⁶² *Id.*

¹⁶³ Dorothy E. Roberts, *Criminal Justice and Black Families*, 34 U.C. Davis L. Rev. 1005, 1015 (2001).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1017.

the loss of emotional support and guidance which has serious psychological consequences for the children.¹⁶⁶ Such consequences include depression, anxiety, and problems in school.¹⁶⁷ Children have even been shown to experience separation trauma with symptoms indicative of post-traumatic stress disorder.¹⁶⁸ Due to the remoteness of many prison facilities, it is difficult for many inmates to keep in touch with their families. Any limited ability they have is frustrated by transfers to different facilities. Thus, not only are imprisoned persons deprived of their liberty interest in being free, but they are also in some respects deprived of the liberty interest in the care and custody of their children.¹⁶⁹

Incarceration also damages social networks that traditionally upheld poor African American communities in times of strife and hardship. This injury counters the benefit the community arguably gains from being rid of an offender who harmed the community. Because the offenders at issue are mainly non-violent, low level drug offenders, their removal from the community cannot be rationalized in the same way as the removal of violent offenders. Many of these offenders, for whatever their bad behavior, were likely to have valuable ties in the community, ties that were beneficial. Sociologists point to the loss of social capital, the “capacity of individuals and groups to achieve important goals through their connections to others.”¹⁷⁰ This makes it more difficult for the community left behind to form the expansive social networks necessary to thrive.

Incarceration interferes with the maintenance of informal social controls which play a vital role in ensuring public safety. Mass incarceration of the residents of poor African American communities destabilizes social order.¹⁷¹ Ironically, this breakdown of social order creates an environment that

¹⁶⁶ *Id.* at 1016.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 1018.

¹⁷⁰ Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 *Stan. L. Rev.* 1271, 1283 (2004).

¹⁷¹ *Id.* at 1285.

makes crime easier and more sustainable.¹⁷² There are two prevailing arguments that concern the effects of mass incarceration on social norms. The first holds that mass imprisonment undermines the deterrent effect of long sentences¹⁷³, relying on an idea of “social influence” as being more effective at reducing crime.¹⁷⁴ The argument recognizes that the mass incarceration of African Americans shows an indifference to differentiating between law-abiding and offending African American citizens.¹⁷⁵ It results in a stigmatization of all African Americans, especially men.¹⁷⁶ This stigmatization in turn works to reduce any support the African American community may have had for the policies creating the mass incarceration, believing they are being singled out and that the law is therefore illegitimate.¹⁷⁷ These lower levels of support in turn may allow for higher levels of offending.¹⁷⁸ Basically the stigma undermines the potential for deterrence of these policies.

Social influence is a concept of deterrence which recognizes the impact of social context as well as the price of crime on the decisions of individuals to commit crimes.¹⁷⁹ The theory holds that “criminal behavior is shaped by individuals’ perceptions of others’ values, beliefs, and conduct.”¹⁸⁰ Community disorder frightens law abiding citizens, preventing them from taking measures along with the police to cleanse their streets of crime.¹⁸¹ In so doing, the message is sent to potential law breakers that crime pays and is morally acceptable.¹⁸² Thus if governments assist citizens by enforcing laws that maintain visible order in the community, law abiding citizens will be more likely to impose social order themselves and make crime less attractive.¹⁸³

¹⁷² *Id.*

¹⁷³ Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 Am. Crim. L. Rev. 191, 212-213 (1998).

¹⁷⁴ See Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. Crim. L. & Criminology 775, 791-792 (1999).

¹⁷⁵ Meares, *supra* note 174 at 213.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 213-214.

¹⁷⁸ *Id.* at 214.

¹⁷⁹ Roberts, *supra* note 175.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

The second argument holds that mass incarceration weakens the ability of citizens within that disadvantaged community to keep violence at bay, resulting in the decreased likelihood that they will take joint action against such violence.¹⁸⁴ While the removal of the most disruptive members may have a positive effect on social order, the removal of marginally disruptive members, such as low-level drug dealers or users for long periods of time weakens beneficial social networks to which they have the potential of contributing to. Mass incarceration also undermines the trust people have for their government and policing bodies, causing them to refrain from seeing law enforcement as helpful but rather as a system to be avoided.¹⁸⁵

Incarceration also impairs the economic viability of poor African American communities by imprisoning their workers. Those who are in prison clearly had a hard enough time finding legitimate employment when they were in the community, but by being imprisoned, their ability to pursue legal work when they leave prison is dramatically reduced. Economists have found that imprisonment has a dramatic effect on their future earning ability based on a sample of young people incarcerated in 1979 who experienced a 25% reduction in the number of hours they worked over the next 8 years.¹⁸⁶ Incarceration impedes connections to legal work in communities that could be enjoyed both by previously incarcerated men and young people who presently live in the area. Those young people have few men to serve as their role models or mentors and so experience an attenuated connection to the labor market.¹⁸⁷

Lastly, mass incarceration removes any political voice or means by which to participate in democracy by disenfranchising felons. Felons may lose their right to vote either temporarily or permanently. The District of Columbia and 48 states disenfranchise felons while they are

¹⁸⁴ Meares, *supra* note 174 at 1287.

¹⁸⁵ *Id.*

¹⁸⁶ Mauer, *supra* note 4, at 182.

¹⁸⁷ Roberts, *supra* note 162, at 1294.

incarcerated.¹⁸⁸ Felons are disenfranchised while they are in prison as well as on probation or parole in 32 states.¹⁸⁹ Fourteen states disenfranchise felons for life.¹⁹⁰

The Sentencing Project and Human Rights Watch engaged in a study in 1998 in which they concluded that 1.4 million African American men have been currently or permanently disenfranchised.¹⁹¹ That constitutes 13% of the African American male population.¹⁹² The present generation of children has a higher likelihood of negative interaction with the criminal justice system which makes it likely that between 30 to 40% of African American men will be disenfranchised for some or all of their adult lives.¹⁹³ This clearly implies an enormous loss of political power in the very communities who need it the most. Such mass disenfranchisement undermines a universal right many fought to achieve and enjoy.

Mass imprisonment results in the political subordination of poor African American communities in a way that is reminiscent of measures previously taken to marginalize this population. Mass incarceration may be added to institutions such as slavery and Jim Crow as a means by which to define and control African Americans. Some sociologists regard penal policy as a means of controlling the behavior of ostracized communities.¹⁹⁴ Sociologists have cited the simultaneous narrowing of the welfare state along with the expansion of prisons as a means to stigmatize poor inner city communities.¹⁹⁵ Thus, the future of incarcerated African American males and their communities appear bleak.

IX. Recommendations

There are several steps that can be taken to address the problem of mass incarceration thereby minimizing the effects on the communities to which the incarcerated belong.

¹⁸⁸ *Id.* at 1291.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 1292.

¹⁹¹ Mauer, *supra* note 4, at 186.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Roberts, *supra* at 162, at 1298.

¹⁹⁵ *Id.*

a. Judicial Responses

First, we should expand the use of alternative sentencing. This past January, the Supreme Court handed down a decision in the companion cases of *United States v. Booker* and *United States v. Fanfan*, holding that sentencing guidelines are to be advisory in effect and are no longer mandatory.¹⁹⁶ The issue addressed by each case was whether an application of the federal sentencing guidelines violated the Sixth Amendment.¹⁹⁷ The Supreme Court upheld the lower courts rulings, reasoning that their decision in *Blakely v. Washington* required that the proposed sentences to be applied per the guidelines were improper because those sentences were based on additional facts that the sentencing judge found by a preponderance of the evidence.¹⁹⁸ In so doing, the Supreme Court reasoned that the Sixth Amendment as applied in *Blakely* applied to the sentencing guidelines.¹⁹⁹ The only way to remedy this discrepancy was to strike the provisions of the Sentencing Reform Act of 1984 (the legislation which created the sentencing guidelines) which made the guidelines mandatory, ensuring that the legislation would comport with the congressional intent behind it.²⁰⁰

The holdings of these cases clearly have a substantial effect on the federal sentencing regime. While the decisions had no effect on mandatory sentencing schemes set by Congress, it would allow judges some discretion in veering from the sentences dictated in the guidelines. There is one caveat, however – any sentence outside of the guideline is subject to reversal if it fails to meet the reasonableness test.²⁰¹ While there is speculation that most judges and prosecutors will continue to adhere to the guidelines, optimists believe this would be an opportune time for the judiciary to examine the effects of the guidelines and use this additional discretion, limited as it may be, to a good end. The exercise of such discretion could lead to fairer and more accurate results.

¹⁹⁶ 125 S.Ct. 738 (2005).

¹⁹⁷ *Id.* at 746.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 766.

The development of alternative services has risen recently resulting in programs such as community service, day reporting centers²⁰², victim-offender mediation, and substance abuse programs.²⁰³ These programs can be used to divert those offenders who would benefit from a punishment other than incarceration, while ensuring that the victim's needs are met. As long as proper supervision over such programs is maintained to ensure that all populations are given opportunity to take advantage of them, this could be a viable alternative.

Second, besides incarceration, it is important to ensure that drug treatment is an integral part of the means of addressing the problems of addicted drug offenders. This would serve to decrease drug addiction which is an impetus behind some offenders' behavior. Judges and prosecutors could accomplish this by making more use of diversion programs that "sentence" offenders to treatment programs.

b. Legislative Responses

Prior to the enactment of new sentencing policies, the Legislature should be required to develop racial/ethnic impact statements in which legislators assess any unintended effects such legislation will have on racial and ethnic minorities.²⁰⁴ Michael Tonry, a national criminal law scholar, asserts that the disparate impact on African Americans due to policies borne of the War on Drugs was foreseeable.²⁰⁵ If his hypothesis is correct, which I hold it is, then such analyses of potential impact on racial and ethnic minorities would be invaluable to prevent such disastrous results from recurring.

²⁰² See Virginia Department of Corrections Website, *Day Reporting Programs and Drug Courts*, April 12, 2005, available at <http://www.vadoc.state.va.us/offenders/community/drc.htm> (defining day reporting centers as a nonresident programs staffed by Probation and Parole Staff which offer daily offender contact and monitoring, including random checking on daily itineraries, job interviews, counseling attendance, substance abuse treatment, job training and referrals, parenting classes and community service.).

²⁰³ Mauer, *supra* note 114.

²⁰⁴ *Id.*

²⁰⁵ Tonry, *supra* note 26, at 104.

Additionally, the Legislature should put in place a scheme with the objective of reducing the non-violent offender population, perhaps over a set time period.²⁰⁶ Michael Mauer, assistant director of the Sentencing Project, a national organization which participates in research on criminal policy and developing alternatives to incarceration, points out that this remedy would provide a means to reducing the economically burdensome burgeoning prison system, allowing for funds to be diverted for the support of treatment programs and community based supervision.²⁰⁷

It would also be desirable to equalize the penalties for crack and cocaine. The disparities resulting from the sentences corresponding to crack sales and possession have substantially contributed to the disproportionate incarceration of African Americans. By equalizing the sentencing, we would reduce the racial disparity in incarceration and correct the absurd consequence of longer sentences for lower level offenders.

Due to the fact that low economic status prevents many of the accused from obtaining private representation, in order to equalize an uneven criminal justice playing field, public defender offices should receive increased funding which will enable them to better address the needs of their clients. As a former summer clerk for the Public Defender Service of the District of Columbia, I saw first hand what a difference adequate funding could have on the ability of attorneys to perform their jobs well, affording their clients all the necessary aids (experts, investigators, exhibits, etc.) to ensure a proper defense. Too many public defenders are plagued by overbearing caseloads and inadequate funding. If we are to truly have a fair criminal justice system, it is imperative that all individuals, especially those facing a loss of liberty, be granted the same opportunity to defend themselves with adequate resources at their disposal.

The last of my recommendations, while likely to be politically unfeasible, are necessary to restore any political clout in poor African American communities. First, not only should felons'

²⁰⁶ Mauer, *supra* note 114.

²⁰⁷ Mauer, *supra* note 114.

ability to vote be restored, but disenfranchisement should be disallowed altogether. This measure is crucial to combat the sustained dilution of political power occurring in these communities. Secondly, student loans should be made available for individuals with felony convictions. A criminal record stigmatizes people, preventing them from obtaining and maintaining worthwhile employment, thereby contributing to recidivism. By restoring felons' ability to obtain federal funding for college and other forms of higher education, would greatly improve their ability to obtain sustainable employment.

X. Conclusion

Clearly, determinate sentencing policies which are disproportionate in their application, resulting in increased incarceration of a specific minority group, fail to fulfill the objectives of a fair and just criminal justice system. As I have mentioned before, incarceration is a legitimate governmental sanction, but it must be used sensibly. The situation faced by poor African American communities as a result of such criminal policies is an urgent one. Affirmative steps must be taken to address these disparities if there is to be any hope of reversing their effects.

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