

**A Case Study Analysis of the Racial Disparities within Criminal Enforcement and  
Sentencing**

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## INTRODUCTION:

This study will analyze the judicial, legislative and social policy of illicit substances prohibition known as the ‘War on Drugs’ and related criminal enforcement and sentencing policies, such as mandatory minimum sentencing. Many researchers and academics have identified the War on Drugs and recent criminal justice system policies as having significant long term damaging effects to communities of color. One effect is that policy and lawmakers are now forced to look at the cost of maintaining prisons, and the policies that result in increases to the prisoner population. Regarding costs, a 2007 PEW research publication reported that states collectively spent roughly 44 billion dollars per year on prisons. That number is up from 10.6 billion in 1987.<sup>1</sup> To further complicate matters, while crime has been decreasing for the last 40 years, incarceration rates have steadily increased.<sup>2</sup> The disconnection between reduced crime rates but increasing incarceration rates is forcing policymakers to review the ethics of sentencing policy as well. For example, the Supreme Court recently ruled that California’s current prisoner crowding and prison conditions meet the standard for cruel and unusual punishment, and are thereby unconstitutional.<sup>3</sup> The recession is now forcing policy makers to look into all avenues of saving revenue. While crime control measures may have previously been a politically unpopular area for cost saving measures to be implemented, the direness of the economy and governments need of revenues has eased their reluctance to modification. Among the most frequently recommended changes are mandatory minimum sentencing policies for drug offenders.

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1 Pew Center on the States (2008) One in 100: America Behind Bars. The Pew Charitable Trusts, Washington D.C. P. 12 Retrieved from <[http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing\\_and\\_corrections/one\\_in\\_100.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/one_in_100.pdf)>.

2 Opper, R. (2011, March 23). Steady Decline in Major Crime Baffles Experts. New York Times [New York], p. a17.

3 Brown, Gov. of California, et al. v. Plata et al. ( No. 09-1233 )

Overall, this case study will analyze whether the criminal enforcement and sentencing policies of the War on Drugs era had an impact on racial disparities in sentencing and enforcement in Washington, Oregon and at the federal level. The reasons for looking at Washington State and Oregon are twofold. Aside from their proximity to one another, the first reason to look at these two states their relative historical homogeneity. Both states have long been predominantly White American since statehood, with comparably few non-white residents. While disparities in enforcement and sentencing in more diverse states can grant a good understanding of the relationship between the justice system and various demographics within the state, disparities in less diverse states require a different look. This is particularly true when the disparities are noticeably more severe. Also, the increase in diversity among the two states populations mandates a close look at the issues in order to potentially avoid any problems larger and more diverse states have with issues of race, enforcement and sentencing disparities.

The reason why we should analyze federal policies and disparities is a bit counter intuitive, but also somewhat obscure. Much of the War on Drugs punitive policies exist at the federal level. As will be mentioned later in the study, the sentencing and criminal enforcement policies of the War on Drugs began at the federal level. In addition, states look to the policies at the federal level in drug enforcement and sentencing as a starting point for crafting their own measures. Federal policies tend to be reflected in state policies once implemented. Because of this, a comparative analysis of federal sentencing and enforcement disparities must be looked into.

## CHAPTER 1: PURPOSE OF STUDY

### I. Statement of Problem

The war on drugs and mandatory minimum sentencing requirements for drug related crimes have been suspected of having a causal, if not direct relationship with recent increases in prisoner populations.<sup>4</sup> Primarily, these policies and their tertiary functions have been suggested to be one of the primary causes of the disparate incarceration rates and differential treatment within the justice system of people of color.<sup>5</sup>

This case study will look at the criminal enforcement and sentencing policies of the War on Drug-era, and some of their more drastic impacts on racial disparities in sentencing and enforcement in Washington, Oregon and at the federal level. Researchers have found that mandatory minimum sentencing is having a much harsher impact on vulnerable communities compared to others has also been raised.<sup>6</sup> The constitutional legitimacy of mandatory minimum sentencing requirements, as well as the legislative and policy changes brought about by the War on Drugs, are also issues that will be analyzed and referenced in the study. Finally, a clarification of the intent at inception of the War on Drugs and mandatory minimum requirements will be made.

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4 Marvell, T. B. (March 07, 1996). Sentencing Guidelines and Prison Population Growth. *Journal of Criminal Law and Criminology*. p. 85, 3, 696-709.

5 Families Against Mandatory Minimums, & National Conference of Laraza (2006). Disparate Impact of Federal Mandatory Minimums on Minority Communities in the United States. P. 2-7. Retrieved from Inter-American Commission on Human Rights website:

[http://www.nclr.org/images/uploads/publications/38367\\_file\\_IAHRC\\_statement\\_FNLNWQC\\_\\_2\\_\\_fnl.pdf](http://www.nclr.org/images/uploads/publications/38367_file_IAHRC_statement_FNLNWQC__2__fnl.pdf)

6 Alexander, Michelle. (2010) *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: New, 2010. P.233-237 Print, Blakemore, J.D., E. (1998). The Effect of Mandatory Minimum Sentencing on Black Males and Black Communities (1). p.1. Retrieved from <http://academic.udayton.edu/race/03justice/s98blake.htm>

## II. Fact Versus Presumption

A common theme among the American public is the association of African American and Latino communities with drug crime. The general idea that ‘crime is predominantly a black issue’ comes up often in lay discussions of crime in America.<sup>7</sup> The perception is that most crime, particularly violent and drug crime, is committed by African Americans. This assumption often becomes the impetus in defending the equally well-discussed disparities within the criminal justice system. Disparities such as the significantly higher rate of African Americans in prisons, or the higher rates of arrests for African Americans. The stereotypical portrayal of African American men as ‘racial criminals’ has been tied to the persistence of discrimination and racial profiling. Historians and academics have analyzed the media perception of African American men and its subtle or direct ties to hostility, aggression, violence and hypersexuality.<sup>8</sup> An individual unaware of the complexities of the problem may argue “they are overrepresented because they over offend”. This is not the case. I will break down the actual data on African American and Latino offending, crime rates, sentencing, policing and relevant revelations involving the disparities. I will also analyze current events involving research revelations, case law, and legislation pertaining to crime predominantly relating to minority Americans.

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<sup>7</sup> McWhirtter, C., & Fields, G. (2012, August 18). Grim Cycle: Black Men Killing Black Men - WSJ.com. Retrieved January 7, 2013, from <http://online.wsj.com/article/SB10001424052702304830704577496501048197464.html>

<sup>8</sup> Tucker, L. G. (2007). *Lockstep and dance: Images of black men in popular culture*. Jackson: University Press of Mississippi. P. 70-72, 87-9, 1, Russell-Brown, K. (1998). *The color of crime: Racial hoaxes, white fear, black protectionism, police harassment, and other macroaggressions*. New York: New York University Press. P. 1591-1593

## CHAPTER 2: REVIEW OF LITERATURE

### I. Different Perspectives

From a policy perspective, the general trends of literature regarding sentencing disparities, mandatory minimum drug sentencing and the prosecution of the drug war is profusely negative. Sentencing disparities, mandatory minimum sentencing requirements, case law modifications on civil liberties and modern illegal substance legislation are all generally viewed as results of America's War on Drugs. The secondary effects of the drug war, including detrimental effects on people of color and the poor, are the general areas of disagreement among policy makers and scholars. Advocates of mandatory minimum sentencing and the war on drugs tend to believe that drug policies overall effects on society has been beneficial.<sup>9</sup> Supporters for mandatory minimum sentencing tend to be supporters of the War on Drugs in general.<sup>10</sup> They primarily include police agencies and their representatives, substance prohibition groups, and hardline anti-drug jurists.

Opponents of the drug war, mandatory minimum sentencing and drug crime disparities argue that the costs have had catastrophic effects on the nation as a whole. This cost has mostly affected people of color and the poor.<sup>11</sup> The opponents of the drug war and mandatory minimum sentencing tend to be divided politically based on their rationale for opposition.<sup>12</sup>

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<sup>9</sup> Alexander, Michelle. (2010) *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: New, 2010. P.256,636. Print.

<sup>10</sup> (Ibid)

<sup>11</sup> Alexander, Michelle. (2010) *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: New, 2010. P.250-256 Print.

<sup>12</sup> (Ibid)

The Rand Drug Policy Research Center is a libertarian-oriented group that focuses primarily on the cost measures of the drug war. The study made an economic analysis of the War on Drugs by analyzing the cost effectiveness of its various attributes compared to its results. The research analysis attempted to find where the War on Drugs were producing results at a rate comparable to its expenditures. It also sought to find if those results were cumulative in a rate that over time, the aim of reducing and reasonably eliminating cocaine, crack, and marijuana usage could be attained by a consistent measurable expenditure amount. The results were nearly a unanimous ‘no’.<sup>13</sup> The drug war, as it is being prosecuted, spends more money on penalization and enforcement than reduction and prevention. Even when considering the amount spent on those aspects, the methodology by which they are carried out is ineffective and inefficient. The study concluded that even if expenditures were increased, there would be no reasonable gain in reducing illegal drug usage. The general perception is implied that the drug war’s perpetuation must be solely for its social punitive value, and that even deterrence defenses to the policies do not measure up.<sup>14</sup>

Dr. Doris Provine, Professor Emerita of the Arizona State University School of Social Justice, makes the argument that drug war perpetuation by judges and prosecutors have not, for the most part, been intentionally driven by racial bias. The professor asserts that the drug war’s racial animus is institutional instead, though functionally this has the same results. Judges are

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13 Caulkins, J.P., & RAND Drug Policy Research Center. (1997). Mandatory minimum drug sentences: Throwing away the key or the taxpayers’ money? Santa Monica, CA: Rand. P. 25

14 Caulkins, J.P., & RAND Drug Policy Research Center. (1997). Mandatory minimum drug sentences: Throwing away the key or the taxpayers’ money? Santa Monica, CA: Rand. P. 65

aware that they are promulgating discriminatory policies in utilizing mandatory minimum sentencing standards in the federal sentencing guidelines for drug use, but rather refused to challenge laws they knew were biased.<sup>15</sup> This libertarian view also asserts that the drug war has been a purposefully enacted racial anatomization policy, used to damper the political and social stances of persons of color, particularly African Americans and Latinos. For example, when Civil Rights groups in the 1990's urged Congress to address the obvious racial biases within the federal sentencing guidelines, conservative supporters in congress railed against the idea asserting that because there was no direct 'intent', or at least specific proof of intent provable, that there was nothing racist about the policies, regardless the resulting discriminatory effect.<sup>16</sup> Other opponents have the same disregard of mandatory minimum requirements and drug laws, but their basis is from a different perspective. Some contend that the social harm to families of color and the impoverished, the political disenfranchisement, and the historic targeting of poor, young and people of color by drug legislation efforts, forms a social harm that damages the fabric of society.<sup>17</sup> While the libertarian leaning sect base their constitutional arguments around the concept of limited government and civil liberties, the progressive wing bases its constitutional arguments within concepts of equal protection and civil liberties.

Dan Baum, journalist, drug war expert and historian, makes the argument that the Drug War is not only problematic regarding to its secondary results of erosion of civil liberties caused

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<sup>15</sup> Provine, D. M. (2007). *Unequal under law: Race in the war on drugs*. Chicago: University Chicago Press. P.24-27

<sup>16</sup> Provine, D. M. (2007). *Unequal under law: Race in the war on drugs*. Chicago: University Chicago Press. P.153

<sup>17</sup> Alexander, Michelle. (2010) *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: New, 2010. P.230, 333. Print.

by the drug war.<sup>18</sup> Baum brings to light the problems to which, in the name of prosecuting the drug war, that Congress and the Courts have ignored, deflated or rejected Constitutional protections against state intrusion and personal liberties. Baum looks at the history of the Drug War, how its institution was primarily political and secondarily based on animus by the Nixon Administration towards African Americans and left leaning voters.<sup>19</sup>

Civil rights academic and legal scholar Michelle Alexander argues that the mandatory minimum sentencing standards in the war on drugs is just a single piece of a myriad of institutional racism and functional classism perpetuated by the American justice system.<sup>20</sup> This system begins with the criminal justice system changing over time in response to the civil rights period, effectively becoming a placeholder for the social disenfranchisements which were formerly codified in law. The justice system began to be crafted in a manner which was not only aimed at criminalizing newly 'equal' African Americans, but creating a system to legally ensure the social position of African Americans remains secondary to their white counterparts.<sup>21</sup> This was done partially through the creation of the 'War on Drugs' by the Nixon Presidency as part of his 'Southern Strategy' plan to gain support among white democratic voters in the south by taking policy stances in opposition to civil rights and racial equality related initiatives.<sup>22</sup> The system was also changed through conservative justices on the Supreme Court who would enact

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18 D. Baum, The Drug War on Civil Liberties, *The Nation*, 29 June 1992, p. 886.

19 Baum, D. (1996). *Smoke and mirrors: The war on drugs and the politics of failure*. Boston: Little, Brown. P.10

20 Alexander, Michelle. (2010) *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: New, 2010. P.148, 169-163 Print.

21 (Ibid)

22 Alexander, Michelle. (2010) *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: New, 2010. P.123-125. Print.

dramatic reductions to 4<sup>th</sup> Amendment protections against excessive and unlawful searches, seizures of property and detainment.<sup>23</sup> Alexander writes that the lack of constraints on police discretion is one of the hallmarks of legal design of the drug war, which allows for a nationwide mass round up of nonviolent offenders with little pushback.<sup>24</sup> The Supreme Court has, through various case rulings, facilitated the drug war through eviscerating Fourth Amendment protections against unreasonable search and seizure by law enforcement.<sup>25</sup>

While their positions and stances differ, each wing of the opposition agrees on the problematic nature of the war on drugs and mandatory minimum sentencing. Each sect tends to agree that there are civil liberty issues with mandatory minimum sentencing and the drug war. Though their other reasoning's may differ, each side seems willing to concede the others points in exchange for mutual support for drug legislation and policy reform.

## **II. Judicial Policy Makers**

There is little consensus in the courts as to the support of mandatory minimum sentencing and drug war legislation. The Supreme Court of the United States has taken numerous cases stemming from drug war legislation over the last 40 years. While most stem from civil liberties challenges that were the result of methods used to apprehend suspects or obtain evidence in drug related arrests, some stem directly from challenges to the legality of policies and penalties on drug usage. Provine makes the comparison of the judicial enforcement of discriminatory drug

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<sup>23</sup> Alexander, Michelle. (2010) *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: New, 2010. P.169-171 Print.

<sup>24</sup> Alexander, Michelle. (2010) *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: New, 2010. P.153 Print.

<sup>25</sup> Ibid

laws and policies such as the mandatory minimum sentencing as akin to northern judges reluctantly enforcing fugitive slave laws. Judges were aware of the immorality of the laws they were enforcing, but for the most part enforced them on the pretense that it was someone else's responsibility to change the bad rule of law.<sup>26</sup> Modern lower court judges tend to be aware of the unfairness of drug war requirements, however refuse to acknowledge their place as jurist of justice rather than gatekeepers for congress.<sup>27</sup>

### **III. Judicial Discretion and Mandatory Minimum Sentencing**

One of the first cases involving the question of whether mandatory minimum sentences were constitutionally valid was *Blakely*.<sup>28</sup> The case involved a Washington state man, sentenced to an amount of time higher than traditionally given, for kidnapping. State law allowed for, in limited cases, a judge to increase the penalty of a sentence at will if the case met with certain conditions such as excessive or deliberate cruelty. *Blakely* appealed on grounds that that his increased sentence, which was instated by the judge after jury deliberation, violated his federal Sixth Amendment right to have a jury determine beyond a reasonable doubt all facts essential to his sentence.<sup>29</sup> The Supreme Court concluded that an exceptional sentence increase based solely on the judge's determination that *Blakely* had acted with "deliberate cruelty" violated *Blakely's*

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26 Provine, D. M. (2007). *Unequal under law: Race in the war on drugs*. Chicago: University Chicago Press. P. 152

27 (ibid)

28 *Blakely v. Washington*, 542 U. S. 296 (2004)

29 United States Const. Amend. VI

Sixth Amendment right to trial by jury.<sup>30</sup> Some scholars have argued that the structure element of mandatory minimum sentencing should govern what analysis of the holding in *Blakely* should apply.<sup>31</sup> A Drake University law review entry makes the argument that because mandatory minimum sentencing was not the traditional interpretation of the ruling that followed the case, it should have been far more restrictively applied than it was, particularly in the form of restrictions on parole.

Another example of the court's modifications was a related case that followed *Blakely*, *United States v. Booker*.<sup>32</sup> In this case, the Supreme Court held that regardless of whether a defendant has plead guilty or was proven guilty, the Sixth Amendment right to a jury trial requires that only facts admitted by a defendant or proved, beyond a reasonable doubt, to the jury can be used by a judge to formulate a sentence. The ruling was a response to lower courts confusion in the application of *Blakely*. The court ruled that its holding in *Blakely* applies to the federal mandatory minimum guidelines set out by congress, thereby removing the mandatory element to the statutory guidelines.<sup>33</sup> This ruling effectively ended the general policy of mandatory element of mandatory minimum sentencing guidelines, but did not end mandatory minimum sentencing requirements by statute, or modifications of the requirement such as three strikes laws.

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30 *Blakely v. Washington*, 542 U. S. 296 (2004)

31 Hall, B. R. (2009) Mandatory Sentencing Guidelines by Any Other Name: When 'Indeterminate Structured Sentencing' Violates *Blakely V. Washington*. Drake Law Review, Vol. 57, No. 3, p. 643, 2009

32 *United States v. Booker*, 543 U. S. 220 (2005)

33 (*Ibid*)

Another important case dealing with mandatory minimum sentencing was *Cunningham v. California*.<sup>34</sup> In that case, the Supreme Court overturned *The People v. Black*, which held a ruling crafted to address the changes mandated in *Blakely v. WA*. These changes required judges to select a predetermined high, medium and low penalty for certain crimes. The Supreme Court held that interpretation in *Blakely v. WA* that demands a jury review any fact pertaining to an increased sentence by upheld, and that California's low, medium and high system does not meet this standard.<sup>35</sup>

#### **IV. Racial Disparities in Sentencing and Prosecution**

With a reduction in protections against state intrusion by the 4<sup>th</sup> Amendment, under the guise of eliminating drug crime, law enforcement, prosecutors and judges were open to engage in targeted criminalization aimed at African Americans. Professor Michelle Alexander argues that the common defense arguments for increased penalizations such as mandatory minimum sentencing, the drug war, targeted policing, and racial profiling, is that it has yielded a reduction in crime rates.<sup>36</sup> The circular assumption may be that because African American men are in prison, they must represent a larger criminal population, thus imprisoning more African American males has the positive effect on reducing crime.<sup>37</sup> The 24-hour news-media outlets overzealous coverage of violent crime in particular often places a skewed urgency into the minds of the public; the argument to defend these policies becomes further spun into a notion that

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34 *Cunningham v. California*, 549 U. S. 270 (2007)

35 (Ibid)

36 Alexander, Michelle. (2010) *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: New, 2010. Print. P.148-149

37 Alexander, Michelle. (2010) *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: New, 2010. P.352 Print.

‘Crime is obviously up considering how often we hear about it, so the increase in incarceration is understandable to deal with that, even if it is over-affecting African Americans’.<sup>38</sup> In the event of any following downward crime spikes this notion further spins to ‘Crime is down, so targeted policing and mass incarceration must be working’. Thus arguments defending the overall discriminatory policies of the drug war can become the same whether crime is up or down, and thus the system is allowed to perpetuate itself without an inquisitive look into its disastrous results on part of the community, nor an objective analysis as to the impetus of the policies.

Alexander also draws, as an example, a comparison to the crack-cocaine disparity to the war on drunk driving. Drunk driving has received a very popular crackdown in states across the nation. The rate of fatalities every year cause by drunk driving exceeds that of crack related deaths many times over, with nearly 22,000 deaths per year as of 2010.<sup>39</sup> However, at its stiffest punishment, drunk driving is often penalized by a brief jail sentence, a fine and a temporary retraction of one’s ability to operate a vehicle.<sup>40</sup> Compare this to crack cocaine possession, wherein prior to the passage of the Fair Sentencing Act, possession of even a tiny amount carries a 5 year mandatory minimum federal prison sentence, with many state criminal codes having the same or higher penalties.<sup>41</sup> When one considers the offenders of drunk driving tend to be white

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38 Dowler, Kenneth (2003) MEDIA CONSUMPTION AND PUBLIC ATTITUDES TOWARD CRIME AND JUSTICE: THE RELATIONSHIP BETWEEN FEAR OF CRIME, PUNITIVE ATTITUDES, AND PERCEIVED POLICE EFFECTIVENESS. *Journal of Criminal Justice and Popular Culture*, Volume 10, Issue 2. P. 109-126

39 Alexander, Michelle. (2010) *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: New, 2010. P.531-535. Print.

40 (Ibid)

41 Fair Sentencing Act of 2010 (Public Law 111-220)

males, and the offenders of crack cocaine possession are African American, the bias of mandatory minimum sentencing for crack related drug offenses becomes more apparent.<sup>42</sup>

## **V. Drug War Legislation**

The utilization of anti-drug legislation was a useful tool to marginalize the administrations poor and African American political opponents, but also to do so in a manner that did not appear overtly racial or antagonistic. The war on drugs was hailed as a public health response, when in action it was used as more a criminal justice reform and redirection. Later scholars would argue that the drug war, from inception, was enacted as a method to imbue upon white voters the image of the need of a strong handed government to protect the public from perceived “dangerous minorities”, particularly African Americans, victimizing White American citizens.<sup>43</sup>

Modern scholars that have researched the rate of offending and drug usage among the general population have provided startling conclusions. A study by the non-profit group Human Rights Watch researched racial disparities in drug enforcement in 34 states.<sup>44</sup> Their results found that African American males were 11.8 times more likely to be arrested on drug charges than White males. African American females were 48 times more likely to be arrested than White

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42 (Ibid),(Ibid)

43 Provine, D. M. (2007). *Unequal under law: Race in the war on drugs*. Chicago: University Chicago Press. P. 13, 32-33

44 Human Rights Watch Report (2008) *Targeting Blacks*. Washington D.C.. Digital Report. P. 45-47. Retrieved from

<[http://www.hrw.org/sites/default/files/reports/us0508\\_1.pdf](http://www.hrw.org/sites/default/files/reports/us0508_1.pdf)>

females.<sup>45</sup> Their report also found that in 16 states, African Americans are sent to prison on drug charges at more than 10 times the rate of Whites. The greatest racial disparities were found in the states of Wisconsin, Michigan, Illinois, New Jersey, Maryland, New York, Virginia, West Virginia, Colorado, and Pennsylvania. African Americans, being 14% of the population, represented 33% of all drug arrests and more than 53% of drug related offenders incarcerated in the year 2003. Another study done by the nonprofit group known as the Sentencing Project, found that as of 1980, the rate of arrests of African Americans for drug related offenses had increased 225% in the country's 43 largest cities.<sup>46</sup> In 11 of the cities researched, black arrest rates for drug related offenses in 2008 are roughly 5 times what they were in 1980. In the majority of the cities researched, African Americans are equally likely to use or possess drugs as White Americans, but more than twice as likely to be arrested for drug usage.<sup>47</sup>

These disparities within the results of such studies on racial disparities are a not a rarity. A Duke University Department of Psychology and Behavioral Sciences study recently revealed that African American teenagers are less likely to use drugs than White teenagers.<sup>48</sup> Yet another study, by the nonprofit Illinois Disproportionate Justice Impact Study Commission reveals that young African American males are significantly more likely to be arrested for drug possession or

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45 (Ibid)

46 King (2008) Disparity By Geography, Sentencing Project. Washington D.C.. Digital Report. Retrieved from [http://www.sentencingproject.org/doc/publications/dp\\_drugarrestreport.pdf](http://www.sentencingproject.org/doc/publications/dp_drugarrestreport.pdf)

47 Department of Justice Office of Justice Programs, Statistical Briefing Book, (2008) Washington D.C.. Digital Report. Retrieved from [http://www.ojjdp.gov/ojstatbb/crime/JAR\\_Display.asp?ID=qa05274](http://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05274)

48 Wu, Woody, Yang, Pan, Blazer (November 7th, 2011) Racial/Ethnic Variations in Substance-Related Disorders Among Adolescents in the United States, Archives of General Psychiatry. Vol. 68, N. 11, P. 1176-1185

usage than White American males.<sup>49</sup> The vast racial disparities in enforcement and incarceration have lead some scholars to consider the drug war as synonymous to a race war, or a new form of Black Codes.<sup>50</sup> Black Codes were post reconstruction legislation aimed at returning African American's to a second class citizen position within society. They allowed for disparate treatment in all aspects of life from employment, to law enforcement, to curfews and wages. Law scholar Michelle Alexander, in her research, has argued that the disparate incarceration rates that arose with the drug war, and were formulated earlier during the Nixon Administration, has lead to catastrophic damage to African American's throughout the nation.<sup>51</sup> Mass incarceration of African American males has lead to an increase of single parent homes and perpetual poverty. Men who are brought into the criminal justice system become isolated from all functional levels of society as they are unable to vote, unable to receive state aid for lower income households, and their job procurement abilities shrink considerably. They are also unable to gain acceptance into college or get aid for college in many cases. Individuals are left with the choice to either slowly degenerate to indigence or become further involved in crime to survive.

Alexander brings to light what many other scholars and researchers have noticed, that mandatory minimum sentencing, as part of the drug war, has functioned more as something between a multifaceted restraint and an outright attack against African Americans. Alexander argues that the drug war has functionally created an unspoken racial caste system within society

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49 Illinois Disproportionate Justice Impact Study Commission. Final Report to the Illinois General Assembly (2010). Report. Springfield, Illinois. P. 3-5, 14-15

50 Alexander, M. (2010). *The New Jim Crow: Mass incarceration in the age of colorblindness*. New York: New Press. P. 28-30, 37

51 Alexander, M. (2010). *The New Jim Crow: Mass incarceration in the age of colorblindness*. New York: New Press. P. 41-46

analogous to the old codified racial hierarchy of the Jim Crow era. The examples given are illustrative and frightening. In June 2001, there were roughly 20,000 more African American men in the Illinois state than enrolled in the state's public universities. The rate of black men in prison in Illinois on drug charges alone was higher than the number of African American undergraduates in the state.<sup>52</sup>

Alexander further illustrates the politics of the 1970s and 1980s, wherein northern and western conservative politicians sought to utilize racial biases against African Americans and economic biases against the poor in order to retain support among the white southern vote.<sup>53</sup> This was done as southern conservative politicians sought to voice their disfavor for the legislation of the Civil Rights era, which they believed to be unfairly forced upon them. The result is a persistent press toward the idea of criminalizing African Americans, through rigorous drug legislation targeting drugs predominantly used by African Americans, as well as civil liberties restrictions and extreme police enforcement targeting the black population of metropolises around the nation.<sup>54</sup>

The history of mandatory minimum sentencing is tied to the history of the war on drugs. In 1971, President Richard Nixon announced the beginning of the 'War on Drugs', as an aggressive prohibition policy on drug usage in America. The declaration came after a report was released to congress on the rate of illegal drug dependency and usage among returning Vietnam

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52 Alexander, M. (2010). *The New Jim Crow: Mass incarceration in the age of colorblindness*. New York: New Press. P. 180

53 Alexander, M. (2010). *The New Jim Crow: Mass incarceration in the age of colorblindness*. New York: New Press. P. 112-116

54 Alexander, M. (2010). *The New Jim Crow: Mass incarceration in the age of colorblindness*. New York: New Press. P. 61

War veterans.<sup>55</sup> Public health officials were also noticing a spike in drug usage for inbound jail inmates around the nation.<sup>56</sup> Dr. Robert Dupont, who worked with the Nixon Administrations Department of Domestic Affairs, recalled that around 1969, health officials found that up to forty four percent of inmates around the country were testing positive for heroin and other drugs.<sup>57</sup> What followed were several changes to law and policy pressed by the Nixon Whitehouse.

Publically Nixon Whitehouse wanted to be seen as addressing the needs of soldiers coming home with considerable addiction problems, but behind the scenes, the politics of the decision to enact the war on drugs was very different than was publically known. Decades later, in an interview with then Wall Street Journal Reporter Dan Baum, White House Counsel and Assistant to the President for Domestic Affairs John Erlichman spoke of the Nixon Administrations rationale for the drug war: “Look, we understood we couldn’t make it illegal to be young or poor or black in the United States, but we could criminalize their common pleasure. We understood that drugs were not the health problem we were making them out to be, but it was such a perfect issue for the Nixon White House we couldn’t resist it. ”<sup>58</sup>

The policies drawbacks were known from the beginning, though its political benefits to the Nixon Administration and the Republican Party were considerable. President Nixon was not unfamiliar with the concept of utilizing race for political goals. The President was the founder of

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55 Timeline: America's War on Drugs. (April 2, 2007). National Public Radio. Digital Report. Retrieved from <<http://www.npr.org/templates/story/story.php?storyId=9252490>>

56 (Ibid)

57 Bergman, Dupont, Hamilton, Levis Runnette, Smith, Zill (2000) Frontline: The Drug Wars. Video Documentary. Retrieved from <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/interviews/dupont.html>

58 Lee, M. A. (2012). Smoke signals: A social history of marijuana : medical, recreational, and scientific. New York: Scribner. P. 118

the political policy known as the “Southern Strategy”, which aimed to gain support for the Republican President from southern white Democratic voters by appealing to coded racial stereotypes against African Americans. He did this by opposing minority empowerment programs such as Civil Rights, Affirmative Action, and anti-discrimination initiatives.<sup>59</sup> Nixon Administration officials were very much aware of the delicate racial atmosphere that was prevalent throughout America in the late 1960’s/early 1970’s. America was still recovering from the assassination of political figures such as President John Kennedy, Martin Luther King Jr., and Presidential Candidate Robert Kennedy. Race Riots, school busing, and racial bombings and murders throughout the south and northeast were recent occurrences. Administration officials felt that the party had to make a choice between siding with liberal wings of the Republican and Democratic parties or unite the Republican Party under a solid conservative wing. Nixon’s administration officials saw the political gains to be made from taking a racial stance against African Americans. Southern white voters formed a strong political union in the south, and after the decline of the Dixiecrat wing of the Democratic Party with the success of civil rights, they were seeking a solid political party to support. The easiest way to get them on board would be to advocate policy seen as antagonistic to African American interests. Nixon White House Chief of Staff H. R. Haldeman later emphasized the administrations political impetus towards legislating overtly discriminatory policies in his published diary: “[President Nixon] emphasized that you have to face the fact that the whole problem is really the blacks. The key is to devise a system that

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59 Alexander, M. (2010). *The new Jim Crow: Mass incarceration in the age of colorblindness*. New York: New Press. P. 42-48

recognizes this while not appearing to. [He] Feels we have to get rid of the veil of hypocrisy and guilt and face reality. ”<sup>60</sup>

## **VI. Mandatory Minimum Sentencing**

Mandatory Minimum sentencing for drug related offenses came by way of two separate legislative actions. The Sentencing Reform Act of 1984, which was part of the Comprehensive Crime Control Act of that same year, was created to force a consistency in sentencing for criminal offenses at the federal level.<sup>61</sup> It was one of the first attempts to mandate punitive guidelines for judges and juries. The act created the Federal Sentencing Commission, an independent agency within the judicial branch of the federal government aimed at formulating a consistency in criminal sentencing. The act also ended federal paroling of prisoners.<sup>62</sup> At the time, the political mantra of getting tough on criminals was a popular notion. Much attention was brought to rising levels of urban crime, and the governments perceived soft handedness in dealing with the problem. Moving from a rehabilitative stance to an active punitive stance was a method of retaining public support for conservative and liberal politicians.

A Rand Corporation study on the effects of the Drug War and Mandatory minimum sentencing stated that taking a rehabilitative approach would not only be more effective at reducing recidivism and drug crime as a whole, but would also be significantly more cost effective on tax

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60 Cockburn, A., & St, C. J. (1998). *Whiteout: The CIA, drugs, and the press*. London: Verso. P. 73

61 Sentencing Reform Act of 1984, Pub. L. 98-473, S. 1762, 98 Stat. 1976-1984

62 (Ibid)

payers than focusing on institutionalization.<sup>63</sup> The Rand study also found that conventional enforcement and policing is far more cost efficient than mandatory minimum when analyzing the costs of imprisonment, appeals, and processing. While the study found that mandatory minimums do have a measurably more positive effect than conventional enforcement on high level dealers and users, the treatment and rehabilitation measures other than longer punitive sentences were shown to be equally effective at reducing recidivism while being considerably cheaper to fund, thereby reducing the burden on taxpayers.<sup>64</sup>

The Anti-Drug Abuse Act modified the drug treatment and rehabilitation aims of drug users paroled from prison to a punitive system with less focus on treatment and more on monitoring for recidivism in order to return the convicted to prison.<sup>65</sup> The act also enforced mandatory minimum sentencing requirements in drug related cases. The facilitation of these mandatory minimum laws was not the primary determiner in sentencing, however. Legal researchers such as David Bjerk have pointed out that prosecutorial discretion as to what to charge a defendant with, what degree of a crime, and whether or not to offer or accept a plea bargain, nullified some of the strong arm effect that mandatory minimum sentencing requirements had on the courts.<sup>66</sup> Prosecutor's discretion allowed for wider latitude of sentencing. In this perspective, the power of sentencing

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63 Caulkins, J.P., & RAND Drug Policy Research Center. (1997). Mandatory minimum drug sentences: Throwing away the key or the taxpayers' money? Santa Monica, CA: Rand. P. 25

64 Caulkins, J.P., & RAND Drug Policy Research Center. (1997). Mandatory minimum drug sentences: Throwing away the key or the taxpayers' money? Santa Monica, CA: Rand. P. 75-78

65 Anti-Drug Abuse Act of 1986, Pub. L 99-570, 100 stat. 3207

66 Bjerk, David (2005). Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing. *Journal of Law and Economics*, Vol. 48, No.2, P. 591

discretion was shifted largely away from judges and toward prosecutors. The question of whether or not this change is a positive shift in policy remains to be seen. There may be concern that granting the party on the side of prosecution, which may be away from a presumable impartial judicator, a larger amount of discretion may imbalance the playing field between the defendant and the prosecution.

## **VII. The Racialization of Drug Enforcement**

The prohibition policy against controlled substances known as the “War on Drugs” has produced many critics and few supporters. While the policy was asserted to have been incepted to curb illicit drug usage in America, the politics behind the policy have revealed less altruistic intents. Though the stated goal of the policy, to curb drug usage, has been widely recognized as a failure, the underlying political goals of perpetuating a systemic destabilization and disenfranchisement among the African American community has been an astounding success. The war on drugs has had an extreme impact on African Americans via the criminal justice system. African Americans only consist of a fraction of illegal drug users in America, but represent a much larger portion of individuals targeted and incarcerated for drug use. African Americans are less than 12% of drug users, yet 34% of individuals arrested for drug offenses, and 45% of individuals imprisoned for drug offenses.<sup>67</sup> In fact, among young people, African Americans are less likely to use illicit drugs than White or Hispanic Americans.<sup>68</sup> The disparities between offending and enforcement leads to serious questions as to the nature of the drug war,

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<sup>67</sup> The changing racial dynamics of the war on drugs. (2009). Washington, DC: Sentencing Project. P. 4

<sup>68</sup> Wu, L., Woody, G., Yang, C., Pan, J., & Blazer, D. (2011). Racial/Ethnic Variations in Substance-Related Disorders Among Adolescents in the United States. *JAMA Psychiatry*, 68(11), 1176-1185.. Retrieved from <http://archpsyc.jamanetwork.com/article.aspx?articleid=1107330>

law enforcement, and the judicial system in regards to minorities in America, particularly African Americans.

A rational postulation in light of these facts would question of whether African Americans consist of a majority of drug pushers, and whether a great percentage of non-African Americans purchase their drugs from African Americans. This would be in light of the fact that a larger share of African Americans targeted by law enforcement and entered into the justice system for drug offenses than there are actual users of drugs among the African American community. This understanding could be a reasonable explanation, however studies show that the overwhelming majority of drug users from every race purchase drugs intra-racially.<sup>69</sup> In Seattle alone, a majority of sellers of illegal drugs were shown to be White, while a majority of individuals arrested and prosecuted for drug use were African American.<sup>70</sup> In Seattle, a majority of non-marijuana drug offenses involving African Americans involve crack cocaine, while a majority of those of White Americans involve methamphetamines' and ecstasy.

While crack cocaine constituted a minority among drug offenses in the city of Seattle, they were made the greater priority among Seattle police. Indeed, researchers were unable to find a racially neutral basis or reasoning for police targeting of crack related crimes over the more abundant methamphetamine crimes.<sup>71</sup> It suffices to say this may have been a contributing factor in a recent investigation of the Seattle Police Department by the Department of Justice for civil rights violations. The investigation revealed persistent racially biased policing, racial

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69 Fellner, J. (2009). Race, Drugs, and Law Enforcement in the United States. *Stanford law and Policy Review*, 20(2), P. 257.

70 Ibid

71 Ibid.

profiling, as well as over use of unnecessary excessive and potentially lethal force on citizens, primarily those of color.<sup>72</sup> The Department's findings prompted a settlement with city management in which a police monitor would work with federal judges to oversee police actions and ensure routine violations do not persist. The specifics of the negotiated settlement are, as of March 2013, still being contested by Seattle Police Chief John Diaz and his supporter, Mayor Mike McGinn, against the judgment of City Attorney Pete Holmes.<sup>73</sup>

To give a historical context, the implementation and utilization of racial identity politics in the form of attaching negative or criminal attributes to racial minorities is by no means a new concept. The political mechanism known as the 'Southern Strategy', a Nixon era Republican Party ideal aimed at garnering support from conservative white voters primarily in the south that either disapprove of the social changes brought about by civil rights or hold negative conceptions of African Americans, has been highly successful in both holding that demographic as supporters as well as providing consistent support for the drug war, which primarily effects African Americans. Conservative Justices Antonin Scalia, Anthony Kennedy, Samuel Alito, Clarence Thomas and Chief Justice John Roberts have each clarified their support for the drug war in related cases, following a precedent started by former Supreme Court Chief Justice William Rehnquist. Rehnquist, a President Nixon appointee, was a vocal opponent of the civil rights movement. During his time a clerk for Justice Jackson, he stated that despite the unpopularity

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72 Investigation of the Seattle Police Department. (2011). Retrieved from United States Department of Justice Civil Rights Division. Report. P. 4-6, 25. Retrieved online at [http://www.justice.gov/crt/about/spl/documents/spd\\_findletter\\_12-16-11.pdf](http://www.justice.gov/crt/about/spl/documents/spd_findletter_12-16-11.pdf)

73 Miletich, S. (2013, February 28). An old clash ignites McGinn, Holmes split over police reforms. Seattle Times [Seattle]. Retrieved from [http://seattletimes.com/html/localnews/2020458987\\_spdisissuesxml.html](http://seattletimes.com/html/localnews/2020458987_spdisissuesxml.html)

among those he perceived as ‘liberal’, he agreed with *Plessy v. Ferguson*<sup>74</sup> and thought that it should be reaffirmed. *Plessy v. Ferguson* was a seminal case that reaffirmed racial segregation and the infamous ‘separate but equal’ doctrine. The doctrine was disavowed in the famous *Brown v. Board case of 1954*.<sup>75</sup>

### **VIII. Recent Developments**

A recent development in the field of mandatory minimum sentencing and the war on drugs is the Fair Sentencing Act of 2010.<sup>76</sup> The Fair Sentencing Act, passed in 2010, reduced the sentencing disparity between criminal offenses involving crack and criminal offenses involving cocaine. Crack and cocaine are each illegal drug substances, made from the same active ingredients. Crack, however, is made more cheaply and crudely from lesser amounts of cocaine than pure cocaine. Over the years, as prescribed by the Anti-Drug Abuse Act of 1986, the racial disparities in the war on drugs had guided the mandatory penalties for possession or distribution of crack, which is more commonly used by African Americans, to be more severe to a degree of 100 to 1.<sup>77</sup> This meant the penalty for possession of crack to an amount of  $1^n$  (n being a specific whole number value), would be 100 times that of the penalty for possession of  $1^n$  of pure cocaine, which is a drug more often used by affluent White Americans.

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74 *Plessy v. Ferguson*. 163 U.S. 537 (1896)

75 *Brown v. Board*. 347 U.S. 483 (1954)

76 Fair Sentencing Act of 2010, Public Law 111-220, 2010

77 Anti-Drug Abuse Act of 1986, (Pub. L. 99-570, 100 Stat. 3207)

The passage of the Fair Sentencing Act ended the mandatory minimum 5 year sentence for possession of more than 5 grams of crack cocaine, as well as reduced the disparity between crack and cocaine penalties from 100:1 to 18:1.<sup>78</sup> While the passage of the bill was a definitive step away from the disparate sentencing rate for drug usage tied to race, a disparity persists, if only to a lesser degree.

In November of 2012, voters in Washington State and Colorado voted to decriminalize small amounts of marijuana.<sup>79</sup> Though the law does not circumvent federal legislation making marijuana possession or use illegal, it does send a clear message that states no longer wish to waste the time and resources enforcing a dysfunctional, problematic drug war.

The question of enforcement by federal law enforcement still looms as problematic for the two states populations. Traditionally, federal law enforcement officials work in tandem with local law enforcement in issues pertaining to drug usage. Without the assistance of local officers, the federal government will either have to increase its own expenditures to make up for the newly lack of state resources put towards enforcement, or withdraw away from enforcement entirely. While federal officials assert that they will not make marijuana enforcement a priority in states that have legalized it, there are still questions as to conflicts between the federal illegality and state legality of marijuana.<sup>80</sup>

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78 (Fair Sentencing Act of 2010, Public Law 111-220)

79 WA Initiative 502, 2012

80 Weiner, Rachel. "Obama: I've Got 'Bigger Fish to Fry' Than Pot Smokers." The Washington Post [Washington D.C.] 14 Dec. 2012: 1. The Washington Post Online. Web. 20 Jan. 2013.



### **CHAPTER 3: METHODOLOGY**

In order to provide a comprehensive break down of sentencing and enforcement policy disparities, this investigation will take a regional case study methodology of analysis. Primary data will be taken through pre-existing aggregate economic, social and medical data relating to anti-illegal substances policies in the United States. The data is focused on the national policy, with special emphasis on Washington State and Oregon.

The reasons why I have chosen to focus on the issue at a national level, with secondary emphasis on Washington and Oregon is twofold. First, the data is far more accessible by regional states, such as Washington, as far as requests for information from stakeholders and policymakers. The proximity advantage also helps directly measure effects. The second reason is that the study can be much more comprehensive and relevant if viewed from the national perspective. Washington policy follows the national trend in many areas, however its demographics are less diverse and thus less reflective of the effects of the problem. This is as much as boon as it is a bane. Washington State has always had a tolerance and accepting culture concerning drug usage among its homogenous, mostly white population. And yet the extreme rate of racial disparities in drug enforcement and sentencing on African Americans and Latinos can be seen as a sort of magnification effect highlighting the seriousness of the racial element of the problem. Secondary data will also be taken from prior research, as well as various related case opinions and legal dicta. A portion of the analysis will come from legal research on Supreme Court cases that are either directly related to the War on Drugs, or that had some effect or result that tied into criminal enforcement and sentencing. I believe my experience and

knowledge of the legal community in Washington as a Juris Doctorate may assist me greatly in this. A legal analysis of cases regarding the War on Drugs will be included to grant an understanding of the events that brought about the case, what the legal issue at hand was, the conclusion of the court and resulting policy changes that occurred afterward.

The analysis will look at the relative positions of various policy makers and stakeholders on the issue, their potential and calculated policy influence, as well as their comparative availability of resources at each actor's disposal. The final results will be presented in the case study as a broad analysis of mandatory minimum sentencing.

## CHAPTER 4: RESULTS AND DISCUSSION

### I. Drug Legislation Related Cases

Aside from state and federal legislation, a great deal of policy stemming from the War on Drugs has been the result of several court cases that either directly, or indirectly, promulgated sentencing and enforcing practices in America. Among the more prominent related cases involving the prosecution of the drug war and its effects on constitutional liberties is *Gant*. *Arizona v. Gant* is a case that modified a ruling in an earlier case, *New York v. Belton*.<sup>81</sup> The prior ‘Belton Rule’ stated that a search of a vehicles passenger compartments after the lawful arrest of a passenger does not constitute a violation of 4<sup>th</sup> Amendment protections against unlawful search and seizure by the state.<sup>82</sup> The *Gant* case modified the Belton rule by stating a search of the passenger compartments of a vehicle after the arrest of a passenger is not constitutional once the arrested party has been secured and no longer has access to the vehicle, although the court did allow for circumstances where it could reasonably be believed that evidence may be found in the vehicle.<sup>83</sup>

The nature of this case may seem specific, but the verdict is far reaching. Many instances of arrests for illegal substances or drug paraphernalia occur after traffic stops. The Belton rule allowed for searches of vehicles without specifying warrants for any cause upon any arrest of a

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81 *Arizona v. Gant*, 556 U. S. 332 (2009)

82 *New York v. Belton*, 453 U.S. 454 (1981)

83 *Arizona v. Gant*, 556 U.S. 332 (2009), United States Const. Amend. IV

passenger.<sup>84</sup> While a search of a vehicle for illegal contraband may seem counter intuitive, the arrest need not be for a drug offense, nor any serious offense at all, and the states have wide and varying justifications given to allow for an arrest; ranging from general ‘suspicion of illegal activities’ to ‘obstruction of a public official’. The wide latitude *Belton* provided allowed for considerable usage of stops for alternative reasons to justify searches, arrests and convictions for minor drug offenses.

Another area of concern in the field of War on Drugs-related case law is decriminalization in the form of legalized medical marijuana. The legality of federal criminalizing of medical marijuana in the face of state legalization was decided in *Ashcroft v. Raich*.<sup>85</sup> This case regarded a legal challenge after the state of California passed an initiative legalizing medical marijuana which allows for the growth of a specified amount of medical marijuana plants in one’s home. After the Plaintiff’s plants were seized and destroyed, and the plaintiff arrested, a challenge was made to the federal Controlled Substances Act as a violation of the Due Process Clause of the 14<sup>th</sup> Amendment and the federalism doctrine of the 10<sup>th</sup> Amendment. The Supreme Court ruled that Congress had not over reached its powers in the banning of marijuana, even for medical usage.<sup>86</sup> This case had the distinction of being a mixed decision wherein two of the more conservative, formerly pro-drug war justices, Justice Thomas and Justice Rehnquist, dissented and where the more liberal leaning justices, Justice O’Connor and Justice Stevens, formed a majority with other conservative justices to rule the holding.

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84 *New York v. Belton*, 453 U.S. 454 (1981)

85 *Ashcroft v. Raich*, 545 U.S. 1 (2005)

86 (*Ibid*)

In addition to being highly restrictive in its willingness to balance civil liberties with the ability of the state to conduct its War on Drugs, the Supreme Court has had an equal sporadic response to the issue of racial discrimination within the criminal justice system. In 1976, the Supreme Court heard a case involving an African American man in Georgia who had been discovered in the process of burglarizing a home. The man, Furman, was carrying a firearm.<sup>87</sup> Upon being discovered and fleeing, Furman tripped and his firearm went off, killing a resident of the home. Furman was sentenced to death under the Georgia felony murder law. On appeal, Furman questioned whether the issuance of the death penalty under the felony murder standard violates the cruel and unusual punishment clause of the 8<sup>th</sup> Amendment.<sup>88</sup> The defendant cited numerous examples of racial biases in the issuance of death sentences for black defendants, particularly in the south, in contrast to white defendants convicted of the same or similar crimes. In a 5-4 per curium divided vote, the court held that the issuance of death sentences for felony murder cases was unconstitutional. The case effectively ended the death penalty in the United States, until another court case revisited the issue, albeit in 1976.<sup>89</sup> Though the case was later overruled by the Supreme Court which consisted of several newer Justices, *Furman* was one of the first times that the Supreme Court took racial biases against minority defendants into consideration.

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<sup>87</sup> *Furman v. Georgia*, 408 U.S. 238 (1972)

<sup>88</sup> US Const. amend. VIII

<sup>89</sup> *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)

*McClesky* was a landmark Supreme Court case that involved an African American man convicted in Georgia of armed robbery and murder that was sentenced to death.<sup>90</sup> The aspect of the case that makes it so important issue is the fact that the question brought to the court was not an element of the offense, but rather the penalty. The defendant's argument was that Georgia was issuing the death penalty in a discriminatory fashion dependent upon the race of the defendant and victim, which would be a violation of the Equal Protection Clause of the 14<sup>th</sup> Amendment.<sup>91</sup>

Evidence was introduced to the court from a study conducted by the University of Iowa Law School showing that, within the state of Georgia, the application of the death penalty was substantially tied to the race of the victim and the defendant.<sup>92</sup> Evidence was also introduced showing African American defendants were considerably more likely to receive the death penalty than white defendants; African American defendants who were convicted of murdering white victims were also significantly more likely to get the death penalty than white defendants convicted of murdering white or black victims.<sup>93</sup> Though the court accepted the evidence as valid and legitimate, the court held that aggregate scientific evidence showing racial discrimination in the application of the death sentence is not enough to reverse the sentence. Justice Powell, writing the opinion, asserted that discrimination is an inevitable part of our justice system. Many scholars have charged that the *McClesky* case legitimized racial

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90 *McCleskey v. Kemp*, 481 U. S. 279 (1987)

91 (*Ibid*), United States Const. amend. XIV

92 *McCleskey v. Kemp*, 481 U. S. 279 (1987)

93 (*Ibid*)

discrimination within the court justice system as an acceptable practice.<sup>94</sup> The case implied the concept that the court was willing to accept verified racial bias and prejudice in the treatment of minority defendants by the justice system. Further, the court could accept bias and prejudice that had no bearing on the actual facts of the cases other than the race and/or ethnicity of the defendant. Justice Powell would later admit that he would not have ruled in the manner he did if he could do the case over again.<sup>95</sup>

The racial disparity in the issuance of the death penalty remains true even today. In “A Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience”, Scholars David Baldus, Charles Pulaski and George Woodworth analyzed the proportional differences in the issuance of the death penalty in America by race, taking among other things, criminal history and crime into account.<sup>96</sup> The scholars used the state of Georgia as their model, due to the McClesky case coming from Georgia, and most other states using the death penalty modeled their criminal sentencing standards after Georgia.<sup>97</sup>

An additional example of the courts loosening restrictions on constitutionally acceptable racial discrimination is *Washington v. Davis*.<sup>98</sup> In *Davis*, two African American applicants the

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94 Liptak, A. (April 29, 2008) New Look at Death Sentences and Race. New York Times. p. A10

95 Jeffries, J. C. (1994). Justice Lewis F. Powell, Jr. New York: C. Scribner's Sons. P. 451, Liptak, A. (April 29, 2008) New Look at Death Sentences and Race. New York Times. p. A10

96 Baldus, D.C., Pulaski, C., & Woodworth, G. (2009). Comparative review of death sentences: An empirical study of the Georgia experience. The journal of criminal law and criminology, Vol 74, No. 3 1983,. Ann Arbor, Mich: ProQuest LLC. pp. 661-753Bottom of Form

97 (Ibid)

98 *Washington v. Davis*, 426 U.S. 229 (1976)

District of Columbia Police Department were denied employment after they failed a verbal skills test. The defendants argued that the test was unrelated to job performance was unconstitutionally discriminatory, partially evident in the fact that most applicants to whom the test excluded were African American. The court held that the test was not unconstitutionally discriminatory, and created a standard by which rules and legislation that have effects which are discriminatory, but were not overtly enacted to advance racially discriminatory purposes are not inconstitutionally invalid.<sup>99</sup> The question could be asked as to whether any intent can be fully proven if enactors of discrimination do not openly admit to a discriminatory intent. Indeed, it seems unlikely that many who would embark upon a discriminatory institution would openly admit it, but the court left that question open.

In a case that ties drug war legislation to the related topics of racial profiling in pretextual stops, the case of *Whren v. United States* was one of the few cases wherein the court specifically involved the use of profiling.<sup>100</sup> The case involved the vehicular stop and search of two men driving in a high drug usage area. Plain clothed officers noticed the men were stopped longer than usual at a stop light and allegedly turned without signaling. The men were later stopped by other officers, who were informed by the plain clothed officers of the suspicious behavior. Upon noticing crack cocaine in the vehicle, the officers arrested the suspect. At trial, defendant argued that the evidence should be thrown out because the search that resulted in finding the illegal substance was enacted by an unlawful pretextual stop. In other words, the stop would not have

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<sup>99</sup> (Ibid)

<sup>100</sup> *Whren v. United States*, 517 U.S. 806 (1996)

occurred but for to give the officers conducting the stop a chance to search the vehicle.<sup>101</sup> Under the fruit from a poisonous tree doctrine of the 4<sup>th</sup> Amendment, evidence seized from an illegal search is not admissible in court.<sup>102</sup> The court considered whether a search is constitutional if it was conducted for a stop in which officers used the stop in place of reasonable suspicion or probable cause to conduct a search. Reasonable suspicion and probable cause are the traditional standards for conducting warrantless searches. The court held that as long as officers believe some traffic violation has occurred, they may stop and incidentally search the accessible areas of a vehicle.

Though the question of race did not come up, the court effectively opened the door to pretextual stops, so long as they can be tied by an officer's claim of a traffic violation. The court ruled that the true motivations of the officer would be irrelevant. The realm of traffic violations is both too vague and too vast to the average driver. Suspicion of even a minor or non-visually detectable traffic violation may be used as an excuse for a pretextual stop and search wherein by which the actual motivation for the stop is racially or ethnically motivated.<sup>103</sup>

A current case regarding racial profiling and drug legislation is *Floyd v. City of New York*.<sup>104</sup> The case involves a policy enacted by the New York Police Department collectively known as 'Stop and Frisk'. This policy grants law enforcement the ability to stop individuals on the street and conduct searches of their persons. The case involves a class action lawsuit against

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101 (Ibid)

102 US Const. amend. IV

103 Whren v. United States, 517 U.S. 806 (1996)

104 Floyd v. City of New York, 813 F. Supp. 2d 417 – 2011

the City of New York for violating the 14<sup>th</sup> Amendment Equal Protection rights of those stopped, the overwhelming majority of which are African American or Latino. The suit also asserts that the city policy routinely violates the 4<sup>th</sup> Amendment protections against unlawful search and seizure by way of statistical evidence showing whites are found to hold illegal contraband at a higher percentage than African Americans and Latinos, though Whites are searched considerably less often and to a far lesser frequency.<sup>105</sup> The case is still progressing though court, but has become a beacon of attention for civil liberties experts and citizens of color against racial profiling and stop and frisk policies.<sup>106</sup>

**Table 1**

<b>Table 43A</b>										
<b>Arrests</b>										
by Race, 2011										
[12,023 agencies; 2011 estimated population 238,952,977]										
Offense charged	Total arrests					Percent distribution <sup>1</sup>				
	Total	White	Black	American Indian or Alaskan Native	Asian or Pacific Islander	Total	White	Black	American Indian or Alaskan Native	Asian or Pacific Islander
<b>TOTAL</b>	<b>9,499,725</b>	<b>6,578,133</b>	<b>2,697,539</b>	<b>142,422</b>	<b>81,631</b>	<b>100.0</b>	<b>69.2</b>	<b>28.4</b>	<b>1.5</b>	<b>0.9</b>

<sup>105</sup> New York Civil Liberties Union Report (2012) Analysis Reveals NYPD Street Stops Soar 600% Over Course of Bloomberg Administration. Digital Report. P. 1

Retrieved from <http://www.nyclu.org/news/nyclu-analysis-reveals-nypd-street-stops-soar-600-over-course-of-bloomberg-administration>

<sup>106</sup> Floyd v. City of New York, 813 F. Supp. 2d 417 – 2011

Murder and nonnegligent manslaughter	8,341	4,000	4,149	105	87	100 .0	48.0	49.7	1.3	1.0
Forcible rape	14,611	9,504	4,811	170	126	100 .0	65.0	32.9	1.2	0.9
Robbery	82,436	35,443	45,827	619	547	100 .0	43.0	55.6	0.8	0.7
Aggravated assault	305,220	194,981	102,597	4,540	3,102	100 .0	63.9	33.6	1.5	1.0
Burglary	227,899	151,934	72,244	2,095	1,626	100 .0	66.7	31.7	0.9	0.7
Larceny-theft	977,743	670,768	281,197	15,122	10,656	100 .0	68.6	28.8	1.5	1.1
Motor vehicle theft	50,902	32,575	17,250	658	419	100 .0	64.0	33.9	1.3	0.8
Arson	8,965	6,479	2,302	107	77	100 .0	72.3	25.7	1.2	0.9
Violent crime <sup>2</sup>	410,608	243,928	157,384	5,434	3,862	100 .0	59.4	38.3	1.3	0.9
Property crime <sup>2</sup>	1,265,509	861,756	372,993	17,982	12,778	100 .0	68.1	29.5	1.4	1.0
Other assaults	952,421	625,330	304,083	14,875	8,133	100 .0	65.7	31.9	1.6	0.9
Forgery and counterfeiting	53,791	35,239	17,695	295	562	100 .0	65.5	32.9	0.5	1.0
Fraud	127,664	84,919	40,621	1,140	984	100 .0	66.5	31.8	0.9	0.8
Embezzlement	12,454	8,155	4,032	65	202	100 .0	65.5	32.4	0.5	1.6
Stolen property; buying, receiving, possessing	71,727	47,434	23,191	542	560	100 .0	66.1	32.3	0.8	0.8
Vandalism	182,482	132,850	45,055	3,029	1,548	100 .0	72.8	24.7	1.7	0.8
Weapons; carrying, possessing, etc.	117,820	68,453	47,515	859	993	100 .0	58.1	40.3	0.7	0.8
Prostitution and commercialized vice	44,090	23,555	19,227	255	1,053	100 .0	53.4	43.6	0.6	2.4

Sex offenses (except forcible rape and prostitution)	52,891	38,422	13,189	729	551	100.0	72.6	24.9	1.4	1.0
Drug abuse violations	1,171,866	783,564	371,248	8,275	8,779	100.0	66.9	31.7	0.7	0.7
Gambling	6,507	1,937	4,351	40	179	100.0	29.8	66.9	0.6	2.8
Offenses against the family and children	87,586	56,973	28,183	1,848	582	100.0	65.0	32.2	2.1	0.7
Driving under the influence	924,210	788,175	111,480	13,618	10,937	100.0	85.3	12.1	1.5	1.2
Liquor laws	380,663	312,106	51,446	12,896	4,215	100.0	82.0	13.5	3.4	1.1
Drunkenness	413,723	339,019	64,268	7,619	2,817	100.0	81.9	15.5	1.8	0.7
Disorderly conduct	447,201	281,531	153,840	8,771	3,059	100.0	63.0	34.4	2.0	0.7
Vagrancy	22,375	12,989	8,794	447	145	100.0	58.1	39.3	2.0	0.6
All other offenses (except traffic)	2,693,823	1,794,893	837,095	42,869	18,966	100.0	66.6	31.1	1.6	0.7
Suspicion	1,150	634	506	5	5	100.0	55.1	44.0	0.4	0.4
Curfew and loitering law violations	59,164	36,271	21,343	829	721	100.0	61.3	36.1	1.4	1.2
Because of rounding, the percentages may not add to 100.0.										
Violent crimes are offenses of murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault. Property crimes are offenses of burglary, larceny-theft, motor vehicle theft, and arson.										

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## II. Offense Data

107 United States Department of Justice (2012). FBI — Table 43. Retrieved from Federal Bureau of Investigation website: <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-43>

Now we look at the primary data involving crime. The Federal Bureau of Investigation Uniform Crime Data Report is the most comprehensive, nationwide, crime data source available [see above]. At first glance, while the percentage of African American arrests in most categories of offenses is unusually high, they do not consist of a clear majority in any category other than illegal gambling. The trend of African American individual's not consisting of a majority of arrests in practically all categories extends backwards at least 3 years, which the noticeable exception of robbery arrests in 2010, on suspicion of any crime in 2009.<sup>108</sup> As the data reveals, the majority of violent and nonviolent arrests are of individuals who are not African American. Though African Americans consist of a sizeable portion of murder and manslaughter arrests, they still do not consist of a pure majority of the offenses. The natural follow up question to anyone viewing this data but remaining skeptical would be to question actual offense rates by race. Looking at offense data for violent crime, we see again that while African Americans, at 37%, represent a large portion of offenders of known offenders, they do not represent a majority of offenders.<sup>109</sup> While it may be argued that there is an overrepresentation issue among African American offenders, the stereotype that African Americans represent a majority of criminals, or even that African Americans commit the majority of homicides in America is completely false. Ohio State University law professor Michelle Alexander explains that while the media and general lay consensus explains that the reason so many black and brown

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108 United States Department of Justice (2011). FBI — Table 43a. Retrieved from Federal Bureau of Investigation website: <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/table-43/10tbl43a.xls>

109 United States Department of Justice (2012). FBI — Table 43a. Retrieved from Federal Bureau of Investigation website: <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/expanded-homicide-data-table-3>

men are in jail is because they simply are bad individuals, the truth is far from this.<sup>110</sup> Crime rates have not been reflective of the explosive rate of mass incarceration of African Americans in the last three decades. Crime has slowly inched downward over the last 30 years, while incarceration, and criminal laws have been increasing. Two thirds of the increase of federal prisoners has been due to the drug war alone; as well as more than half of the prisoners incarcerated between 1985 and 2000.<sup>111</sup> While some may make the argument that the decrease in crime is reflective increase in incarceration that logic ignores the notion that incarceration only happens after a crime is committed. If more people were committing crimes, then the logic would follow that more are being incarcerated for it. In the current instance, fewer people are committing crimes, and committing them at lesser rates, yet more individuals are being incarcerated.

The falsity of these perceived stereotypes reveals a significant flaw in the defenses of the disparities within the criminal justice system, particularly disparities stemming from, fully or partially, the drug war. While refuting the simple direct truth of the matter is important, the general concept of the stereotype as a trend must be confronted before we look to the direct problems of the drug war as a social war on the African American community.

### **III. The Obama Effect on Crime**

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110 Alexander, M. (2012, March 27). Drug War Nightmare: How We Created a Massive Racial Caste System in America | Alternet. Retrieved November 11, 2012, from [http://www.alternet.org/story/154698/drug\\_war\\_nightmare%3A\\_how\\_we\\_created\\_a\\_massive\\_racial\\_caste\\_system\\_in\\_america](http://www.alternet.org/story/154698/drug_war_nightmare%3A_how_we_created_a_massive_racial_caste_system_in_america)

111(Ibid)

Around 2009, Criminologists and Criminal Justice academics began noticing a trend. Normally, crime in America normally follows the trend of “down in good economy, up in bad economy”, there was a noticeable disruption in that trend. Among these trends, the African American community serves as a bellwether for crime measurement. Crime, particularly violent crime, involving African American offenders or victims experiences the most noticeable change during economic changes of current. After the economic collapse of 2006, it would thus be presumed that African American crime with increase with the depression of the economy. This did not occur. Crime had, in fact, continued to drop among the African American community in most cities. In some places the drop was gradual and on par with the previous rate of decrease; in other places the drop was considerably steeper. Criminologists were baffled. At that point researchers began to expand their viewpoint to find out what was different about this recession. Dr. Richard Rosenfield of Criminology at the University of Missouri-St. Louis, found that despite the economic depression, African Americans were noticeably more positive about their economic prospects than other groups.<sup>112</sup> The study concluded that almost 40% of African Americans surveyed felt they were better off in 2009 than they had been in 2004. This was up from a study in 2007 where just 20% of African Americans said they were better off than they had been in five years earlier.<sup>113</sup> The general consensus seemed to be that the election of the first black president has had such a positive effect on the psych of many African Americans that the results of the economic depression have been nullified somewhat, insofar as lack of faith and

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112 Verini, J. (2011, October 5). The Obama Effect: A surprising new theory for the continuing crime decline among black Americans - Slate Magazine Online.

Retrieved November 11, 2012, from

[http://www.slate.com/articles/news\\_and\\_politics/crime/2011/10/the\\_obama\\_effect\\_a\\_surprising\\_new\\_theory\\_for\\_the\\_continuing\\_crim.html](http://www.slate.com/articles/news_and_politics/crime/2011/10/the_obama_effect_a_surprising_new_theory_for_the_continuing_crim.html)

113( Ibid)

crime. Dr. Randolph Roth, Professor of Sociology and History at The Ohio State University, wrote in an essay on the topic of homicide trends among the African American community as of 2009. In it he notes that positive feelings about the new president may have lead to lower rates of criminality among the African American community in many urban areas.

The general trend seems to imply that not only is crime among African Americans less than what the general stereotype is, but as a trend African American crime rates are on the decline.

#### **IV. Racial Profiling from Racial Presumption**

A common identifier in academia for many of the disparities in the criminal justice system's treatment of people of color is racial profiling. The American Civil Liberties Union defines racial profiling as a practice of law enforcement officials targeting individuals for suspicion of criminal activity based on the individual's race, ethnicity, religion or national origin.<sup>114</sup> Racial profiling is frequently identified as one of the primary mechanisms to which racial disparities in the criminal justice system arise, however the problem of profiling extends deeper than to choice of whether to stop or arrest a person based purely on their race or ethnicity.<sup>115</sup> A recent study revealed that race and ethnicity even play a factor in what kind of force is used against a suspect.<sup>116</sup> Law enforcement officers were shown to decide to fire upon African American

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114 Racial Profiling: Definition (November 23rd, 2005). American Civil Liberties Union Online. Retrieved from < [http://www.aclu.org/racial-justice/racial-profiling-definition#\\_ednref1](http://www.aclu.org/racial-justice/racial-profiling-definition#_ednref1) >

115 Alexander, M. (2010). *The New Jim Crow: Mass incarceration in the age of colorblindness*. New York: New Press. P. 325-330

116 Correll, J., Park, B., Judd, C. M., & Wittenbrink, B. (January 01, 2002). The police officer's dilemma: using ethnicity to disambiguate potentially threatening individuals. *Journal of Personality and Social Psychology*, 83, 6, 1314-29.

suspects faster than deciding to fire upon White suspects when the risk of threat was the same.<sup>117</sup> Another study by the University of California and University of Colorado that analyzed law enforcement reactions to dangerous situations found that law enforcement officers were far quicker to fire at African American armed suspects than White armed suspects. The study also revealed that enforcement were less likely to fire upon armed White suspects, and were more likely to fire on unarmed African American suspects than unarmed White suspects.<sup>118</sup> Studies such as this seem to indicate that there is a significant racial perception bias, either subtle or overt, for law enforcement that associates criminality with race, rather than criminality with action. The disparities reflect a chilling trend at the behalf of American law enforcement. One report on use of deadly force in America revealed that in 2012, an African American was killed by an agent or law enforcement every 28 hours, per average.<sup>119</sup> This can lead to treatment disparities in how the law is enforced towards African American civilians, suspects, and convicts by law enforcement. The results of such studies show a stereotype criminality and dangerousness associated with African Americans, particularly males. These chilling results of the stigmatization of African Americans and other racial minorities reveals a deep seated problem within the criminal justice system. While the problem of racial biases and racial prejudice in the justice system is often shown in academic research, the excuses and justifications given for them by law enforcement or advocates of such policies are not often discussed.

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117 (Ibid)

118 (Ibid)

119 Akuno, K., Eisen, A. (April 2013). Operation Ghetto Storm. Malcolm X Grassroots Movement Report. Atlanta. P.11

Among the counter-argument defenses of racial disparities within the justice system, the assumption that African Americans are the primary targets of the criminal justice system because African Americans comprise of the majority of drug offenders is a frequently utilized as a defense of the drug war. The actuality of this concept is far from the case. As Professor Michelle Alexander notes that while President Reagan declared the war on drugs to be official in 1982, drug usage was actually declining.<sup>120</sup> From its very beginnings, the drug war had very little to do with drug usage, and a great deal to do with racial politics by tying the threat of drugs and welfare crime to the sense of criminality to minorities in the eyes of white voters. This use of identity politics was aimed at gaining further support from working class white voters, and white voters who opposed the relatively recent passages of affirmative action, busing and desegregation.<sup>121</sup>

Alexander goes on to reference the fact that the drug war was never actually about stopping large scale drug dealers and violent offenders, as federal funding to enforcement is only given to agencies and municipalities where drug arrests are increasing, not decreasing.<sup>122</sup> The rate of arrests is seen as meriting award, not prevention; while drug forfeiture laws permit law enforcement agencies to keep up to 80% of monies seized from those suspected of involvement

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120 Alexander, M. (2010). *The new Jim Crow: Mass incarceration in the age of colorblindness*. New York: New Press. p.6, 71

121 Ibid

122 Ibid

in drug dealing.<sup>123</sup> Indeed, the drug war has shown to be highly profitable to law enforcement along with the actual drug kingpins.

The casualties of the racialized drug war extend beyond mere punitive disparities. The war has been used as a tertiary excuse for various limitations on civil liberties, particularly in the form of racial profiling. In New York City for example, the aforementioned “Stop and Frisk” policy has spawned a massive public outcry; along with a massive ongoing federal court case. In addition to civil liberties violations, disenfranchisement from voting has been another harmful results of the policy. According to research by the Sentencing Project, due to laws that limit felons (including drug related felons) from voting, nearly 1 in 13 African Americans of voting age is no longer able to vote.<sup>124</sup> In states such as Florida, Kentucky and Virginia, this number is no less than 20%.<sup>125</sup>

## **V. Washington State Enforcement and Sentencing Disparities**

In 2010, a Washington State Supreme Court Justice candidate caused a considerable uproar after making, and then dismissing, a significantly controversial claim. During a court meeting between cases at Gonzaga University Law School, then State Supreme Court Justice Richard Sanders stated that African Americans are overrepresented in the prison system because they have a “crime problem”. The Seattle Times reported that Sanders confirmed his remarks on imprisonment of African Americans by stating "certain minority groups" are "disproportionately

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123 Ibid

124 (Ibid)

125 (Ibid)

represented in prison because they have a crime problem." He further confirmed: "I think that's obvious."<sup>126</sup>

The statements were also supported by State Supreme Court Justice James Johnson, who also referred to attorneys primarily represent the poor in the legal system as “poverty pimps”.<sup>127</sup> Several members requested then-Justice Sanders to review academic and legal research brought to the speech on biases towards African Americans and biases to fair treatment within the Washington criminal justice system, to which Sanders dismissed the claims claiming that African Americans simply commit more crime. Sanders allegedly referred to African Americans within the audience in stating “you people” commit crimes in your own communities.<sup>128</sup> While Sanders lost his bid for re-election due to the controversy, a study was done by Seattle University School of Law on race, crime and enforcement in Washington State. The study revealed several stark and alarming conclusions that, for the most part, verified the critics of Sanders sweeping rational of criminal disparities in the state.<sup>129</sup> The study also revealed what may be evidence if persistent racial profiling of racial minorities by law enforcement around the state, as evident is disparate arrest rates:

In their report to the Washington State Senate Judiciary Committee that:

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<sup>126</sup> Miletich, S. (2010, October 20). Two state Supreme Court justices stun some listeners with race comments. Seattle Times [Seattle], p. 1. Retrieved online at [http://seattletimes.com/html/localnews/2013226310\\_justices22m.html](http://seattletimes.com/html/localnews/2013226310_justices22m.html)

<sup>127</sup> Ibid

<sup>128</sup> Ibid

<sup>129</sup> Stang, J. (2011, December 11). Want to do the crime but not the time in Washington? Be white | Crosscut.com. Retrieved November 11, 2012, from <http://crosscut.com/2011/12/21/washington-legislature/21690/Want-do-crime-but-not-time-in-Washington-Be-white/>

- African Americans who are arrested in Washington are no less than 6 times more likely to receive a prison sentence than a white individual charged with the same crime with comparable criminal history.<sup>130</sup>
- Persons of Hispanic descent arrested in Washington are 1.5 times more likely to receive a prison sentence than a non Hispanic white arrestee charged with the same offense. In King county, a Hispanic person is 3 times more likely, in Peirce 1.3 times more likely, in Thurston 1.1 times, and in Asotin County 19.1 times more likely.<sup>131</sup>
- In King County, an African American is almost 11 times more likely to receive a prison sentence than a similar white offender. In Thurston county the individual is more than 8 times more likely; in Kitsap County the individual is 6 times more likely; In Snohomish County 4.7 times more likely; in Pierce the individual is 6 times more likely, and in Clark County an African American individual is 62 times more likely to receive prison.<sup>132</sup>
- American Indians arrested states wide are 4.1 times more likely to receiving a prison sentence than similar white offenders. In King County the ratio is 7.2 times higher; 4.7 times higher in Pierce County; 3.5 times higher in Pierce County; 3.6 times in Thurston County, 2.7 times in Snohomish County and 27.3 times more likely in Chelan County.<sup>133</sup>
- African Americans in Washington are more than 3 times more likely to be convicted of a drug crime or property crime than a white individual charged with the same offense with

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130 Preliminary report on race and Washington's criminal justice system. (2011). Seattle, Wash: Working Research Group. Retrieved from [http://www.law.washington.edu/About/RaceTaskForce/preliminary\\_report\\_race\\_criminal\\_justice\\_030111.pdf](http://www.law.washington.edu/About/RaceTaskForce/preliminary_report_race_criminal_justice_030111.pdf)

131 Ibid

132 Ibid

133 Ibid

a similar background, and more than 5 times more likely to be convicted of a violent crime than a white individual with the same charge and a similar background. Native Americans are 1.4 times more likely to be convicted for a drug crime, 1.3 times more likely to be convicted of a property crime and more than twice as likely to be convicted of a violent crime as a white individual charged with the same offense.<sup>134</sup>

- The research could find no definitive link between race and the likelihood of committing a crime in Washington State.<sup>135</sup>
- The study did find that race plays a significant factor in the determination of whether an individual will be sent to jail after arrest upon arrest.<sup>136</sup>
- The study revealed that biases on the basis of race are definitively present in the Washington justice system, but are not concentrated or overtly directed at any one part of the system.<sup>137</sup>

Among the more curious findings the report found, research indicated that in cases of subtle discrimination, if plausible deniability is available to certain individuals, then the individual is more likely to act out on their biases. Essentially, if one can discriminate and not get caught, or at least do so in a manner to which it can be argued that they were not discriminating, even if not true, they will discriminate. A follow up study commissioned by the Washington State Supreme Court found that African American young people are 250 times more likely to be referred to

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134 Ibid

135 Ibid

136 Ibid

137 Ibid

juvenile court for prosecution for any offense than White youth who are suspected of committing the same offense. Minority youth in Washington are 20% more likely to be submitted for prosecution than white counterparts overall. <sup>138</sup>

The data for disparities within the Washington State system are mostly reflective of the national trend. Academic studies have shown that African Americans receive up to 60% more prison time in federal court than White offenders who commit similar offenses with similar or longer criminal histories; studies also show that African Americans receive up roughly 20% longer sentences than Whites who commit the exact same offenses. The trend is partially attributed to prosecutorial discretionary trends in which Black defendants are given harsher charges than White defendants. <sup>139</sup>

Over 30 universities and legal groups, which included Seattle University, the University of Washington, and the Washington Bar Association examined the issue and report, which was submitted the Senate Judicial Committee. The report concluded "We found that the assertion attributed to then-Justice Sanders that African-Americans are overrepresented in the prison population because they commit a disproportionate number of crime is a gross oversimplification." <sup>140</sup> The report further concludes by stating "Nobody wants to be called a racist. Most people do not want to be racist. Yet many of us harbor explicit and implicit racial biases,

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138 Valdez, M. (2013, January 20). Minority youth more often in state courts than whites | Local & Regional | Seattle News, Weather, Sports, Breaking News | KOMO News. Retrieved January 21, 2013, from <http://www.komonews.com/news/local/Minority-youth-more-often-in-state-courts-than-whites-187666291.html>

139 Starr, S., & Rahavi, M. (2012). Racial Disparity in Federal Criminal Charging and its Sentencing Consequences. Retrieved from University of Michigan website: [http://www.fjc.gov/public/pdf.nsf/lookup/NSPI201213.pdf/\\$file/NSPI201213.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/NSPI201213.pdf/$file/NSPI201213.pdf)

140 Ibid

regardless of our professed commitments to racial equality."<sup>141</sup> Sanders later lost a re-election bid for the Supreme Court, but the issue remains unsolved.

## **VI. Oregon and Crime Disparities: A Comparative Look**

The trend of significant racial disparities within enforcement of the drug war, sentencing, and enforcement in the Pacific Northwest is by no means limited to Washington. A 2011 legislative report card on racial equity found that though Oregon has one of the smallest Black populations in the nation, it has the 13<sup>th</sup> highest rate of incarceration for African Americans in the nation.<sup>142</sup> Though nationally there is no difference between the races among likelihood to commit a crime overall<sup>143</sup>, a lack of policies that prevent racial profiling and discrimination within the justice system has allowed much of this problem to persist. Mandatory prosecution laws such as Oregon's Measure 11 mandatory minimum mandate that juveniles that are between 15 and 18 must be automatically prosecuted as adults for a specific set of 21 statutory offenses.<sup>144</sup> Upon conviction, the juvenile is required to serve the mandatory minimum sentence that is applied to adult defenders requires youth ages 15 years or older to be prosecuted automatically in the adult criminal justice system as soon as they are charged with one of 21 specific offenses. Though only 25% of Oregon minors are minorities, they represent 36% of

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141 Ibid

142 Facing Race: 2011 Legislative Report on Racial Equity. (2011). Oregon state legislature. Retrieved from <http://www.basicrights.org/wp-content/uploads/2012/01/OR-Racial-Equity-Report.pdf>

143 Ibid.

144 Oregon Ballot Measure 11 (1994)

individuals indicted under Measure 11. Among that rate, Black minors, being only 4% of the states minor population, represent 34% of all female juveniles indicted under the measure.<sup>145</sup>

The racial disparities do not stop there. While Oregon’s African American population is roughly 4%, African Americans represent 10% of the state prison population. A 2007 report by the Nonprofit Partnership for Safety and Justice issued an article revealing serious problems with a crime-prevention policy in the state’s largest city, Portland. This policy prescribes certain areas of the city, called “Exclusion Zones”, and allows for the arrest and exclusion of any person without due process for up to 90 days based solely on law enforcement suspicions that the individual may be involved in drugs or prostitution.<sup>146</sup> A report commissioned by the city found widespread racial discrimination within the policy, wherein African Americans were excluded at a rate of 68% of the time, contrasted to Whites who were only excluded 54% of the time.<sup>147</sup> The Partnership for Safety and Justice reported that after arrest exclusions were issued 60% of the time for White suspects, and 100% of the time for Black suspects.<sup>148</sup> By September of 2007, Former Portland Mayor Tom Potter ended the policy, however in 2011, the city reinstated a ‘Gun Crime’ exclusionary zone largely focused in Portland’s historically Black northern end.<sup>149</sup>

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145 Facing Race: 2011 Legislative Report on Racial Equity. (2011). Oregon State Legislature. Digital Report. P.7-8 Retrieved from <http://www.basicrights.org/wp-content/uploads/2012/01/OR-Racial-Equity-Report.pdf>

146 Ibid

147 An Analysis of Data Relating to The City of Portland’s Drug Free Zone Ordinance. (2007). Cambell Delong Resources. Digital Report. P. 4 Retrieved from [http://blogtown.portlandmercury.com/files/2007/09/CDRI\\_DFZ%20Report%20Sept%202007.pdf](http://blogtown.portlandmercury.com/files/2007/09/CDRI_DFZ%20Report%20Sept%202007.pdf)

148 Partnership for Safety and Justice (2007). Yes, Racial Disparity exists in Oregon. Justice Matters, P. 10, 14. Retrieved from [http://www.safetyandjustice.org/files/Justice\\_Matters\\_Summer\\_2007.pdf](http://www.safetyandjustice.org/files/Justice_Matters_Summer_2007.pdf)

149 Theriault, D. (March 24th, 2011). Unloaded Barrel: Tough Questions Tangle Mayor's Gun Laws. Portland Mercury Online [Portland]. Retrieved online at <http://www.portlandmercury.com/portland/the-unloaded-barrel/Content?oid=3686486>, Portland Exclusion Zones. (2013) American Civil Liberties Union- Oregon. Retrieved at <http://www.aclu-or.org/content/portland-exclusion-zones-0>

## VII. Effectiveness and Efficiency

The other side of the war on drugs, its stated purpose to limit drug usage and access in the United States, has also failed miserably. According to the United States Department of Health and Human Services, illicit drug usage has remained relatively static since the announcement of the drug war, yet the costs for fighting the drug war have increased at an exponential rate.<sup>150</sup> Estimates range as high as a trillion dollars total having been spent on fighting the drug war, with approximately 51,000,000 spent every year on maintaining drug war policies.<sup>151</sup>

With such catastrophic damage done to poor and minority communities, and no discernable gains as far as successfully limiting drug use, there are no rational reasons to maintain this flawed policy. Many states have stepped ahead of the game and have taken the first steps to buck the federal trend and decriminalize certain controlled substances, such as marijuana. Washington and Colorado became the first states to decriminalize enforcement of recreational marijuana use in 2012. With their successful campaigns, other states are already looking at similar measures. At the federal level, limited efforts have been taken to deal with the serious disparities in punishment for drug use. The Fair Sentencing act of 2010 reduced the disparity between federally mandated minimum sentences for crack cocaine related crimes, which are predominantly committed by African Americans, and powder cocaine crimes, which are predominantly committed by Whites. The Act reduced the sentencing disparity comparison

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150 Results from the 2010 National Survey on Drug Use and Health: Summary of national findings. (2011). Rockville, MD: U.S. Dept. of Health and Human Services, Substance Abuse and Mental Health Services Administration, Center for Behavioral Health Statistics and Quality, Dai, S. (2012, October 12). A Chart That Says the War on Drugs Isn't Working. The Atlantic Wire. Retrieved from <http://www.theatlanticwire.com/national/2012/10/chart-says-war-drugs-isnt-working/57913/>

151 Policy Drug Alliance (2011). Wasted tax dollars. retrieved from <http://www.drugpolicy.org/wasted-tax-dollars>, Drug Policy Alliance (2011). Guiding Drug Law Reform & Advocacy. Drug War Statistics | Drug Policy Alliance. Retrieved from <http://www.drugpolicy.org/drug-war-statistics>

from 100:1 to 18:1.<sup>152</sup> While this is certainly a positive step forward, the persistence of the policy that continues to disparately weigh harsher penalties on a drug more often consumed by African Americans in contrast to a similar and more potent version predominantly consumed by White Americans signals that the problem and its racially charged dynamics remain.

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<sup>152</sup> Fair Sentencing Act of 2010 (Public Law 111-220)

## CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

The pernicious nature of the drug war, mandatory minimum sentencing programs and racial disparities within justice system ensures that any solution to the issue to be multifaceted. The evidence of the failure of the drug war, the disparities within the legal system and the social destruction makes it clear that the drug war is a failure. Drug war policies such as mandatory minimum sentencing cause significant problems, and actually do little to nothing to solve the problems they were proposed to address. The most logical solution is fourfold; mandatory reform and enforced equity in sentencing practices, strengthening bans on racial profiling, and an increase of monitoring of law enforcement and court actors for racial biases, and drug decriminalization.

Another issue that must be reformed is the prison industrial culture, whereas an entire political, economic and societal industry has been created around increasing incarceration regardless of actual increases in offending. Civil Rights advocate and former University of California-Santa Cruz Professor Angela Davis wrote that prison construction, management and investment have created highly lucrative markets for corporate and private investment.<sup>153</sup> These markets create a profit incentive for building and filling prisons that results in those that invest may also support politicians who advocate increases in incarceration and sentencing to keep the prison population rising. Policies such as the War on Drugs greatly contribute to this system. To

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<sup>153</sup> Davis, Andela (September 10 1998). Masked Racism: Reflections on the Prison Industrial Complex

. Colorlines Online Magazine. Retrieved from <[http://colorlines.com/archives/1998/09/masked\\_racism\\_reflections\\_on\\_the\\_prison\\_industrial\\_complex.html](http://colorlines.com/archives/1998/09/masked_racism_reflections_on_the_prison_industrial_complex.html)>

reform this, the first step would be to end the contracting of prison construction and maintenance by private businesses. Current private-run or privately owned prisons could be purchased by the state to which they operate in. By forcing the states to deal with the ramifications and costs of increased incarceration amidst possibly decreases in offending, there could be less incentive to maintain the ‘industry’ of prisons.

Reformation of sentencing policy would include completely eradicating the federal crack-cocaine disparity, rather than simply decreasing it as the Fair Sentencing Act does. It would also include additional measures at the state level to ensure that similar laws at the state level are eradicated across the nation. To enforce equity regarding sentencing practices, the governments would have to enact monitoring policies of sentencing practices rather than rely upon randomly commissioned reports and academic reviews. In instances of clear disparities, such as a trend of charging or sentencing one race or ethnicity much more harshly than another who commits the same offense, a review would set in of the particular prosecutor or judge. The review should involve informing the party of the disparity, a more comprehensive review of previous work/cases of the party, an interview, and either warnings or a sanction of the individual. The review should be done by an independent 3<sup>rd</sup> party coalition consisting of a state mandated board, preferably composed of academics, constituent community groups, and members of the state bar. A similar approach should be taken to strengthen preexisting bans on racial profiling by law enforcement.

A similar review board can be used to prevent profiling or bias by police, however additional statutory measures should be taken by states to enforce accountability for officers who profile but are protected from termination by police union guild agreements. While racial

profiling is already banned by states such as Washington, there is little monitoring and less enforcement to prevent it when it is shown to be happening, as it was in Seattle by the Department of Justice.<sup>154</sup> A review board that can monitor police detainment, arrest data, along with citizen complaint data would be able to effectively check racial profiling. The board must have the power to discipline or remove violating officers, however. A board that can only monitor rule breaking but not punish it would have no value or worth whatsoever, considering the individuals being monitored at the actual enforcers of the law themselves.

Finally, having the federal government and states take measures similar to the ones recently taken in Washington and Colorado by decriminalizing the usage and limited possession of popular drugs. The decriminalization of small quantities of marijuana can have a strong effect on reducing incarceration rates and freeing funds and time that would normally go towards enforcement for other more serious offenses. While a great start, marijuana decriminalization is only one step in ending the drug war. As socially odd as it may seem, decriminalizing limited amounts of other recreational drugs can cut the secondary problems of the drug war. Decriminalizing small amounts of drugs like heroine, methamphetamine and crack cocaine would cut the problems of the drug war at their stems, rather than the traditional method which functions more leaf by leaf. A counter argument to this approach may be that these drugs have considerably more harmful effects than marijuana. This is an understandable position, however, as stated earlier in the manuscript, the problem can be address far more efficiently and effectively through the non-criminal means of counseling, treatment, rehabilitation and pan-

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<sup>154</sup> RCW 43.101.410 Racial profiling

structural education opposed to scare tactic prohibition education such as the proven-ineffectual DARE program and criminalization.<sup>155</sup>

While each of these recommendations would yield more positive effects than the current systems in place, the first step to achieving them is education. This means educating the public to the history behind the drug war, its results, and the truth about offense rates, racial-criminal stereotypes and racial disparities in enforcement, sentencing and incarceration. In order to garner enough adamant support among the general public, common misconceptions, stereotypes and myths and crime, drugs, and people of color must be eliminated.

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<sup>155</sup> Youth Illicit Drug Use Prevention (January 15th, 2003) United States General Accountability Office. Report. P. 5 Retrieved at <http://www.gao.gov/new.items/d03172r.pdf>

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