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The Color of Justice

Imagine you are Emma Faye Stewart, a thirty-year-old, single African American mother of two who was arrested as part of a drug sweep in Hearne, Texas.[1] All but one of the people arrested were African American. You are innocent. After a week in jail, you have no one to care for your two small children and are eager to get home. Your court-appointed attorney urges you to plead guilty to a drug distribution charge, saying the prosecutor has offered probation. You refuse, steadfastly proclaiming your innocence. Finally, after almost a month in jail, you decide to plead guilty so you can return home to your children. Unwilling to risk a trial and years of imprisonment, you are sentenced to ten years probation and ordered to pay $1,000 in fines, as well as court and probation costs. You are also now branded a drug felon. You are no longer eligible for food stamps; you may be discriminated against in employment; you cannot vote for at least twelve years; and you are about to be evicted from public housing. Once homeless, your children will be taken from you and put in foster care.

A judge eventually dismisses all cases against the defendants who did not plead guilty. At trial, the judge finds that the entire sweep was based on the testimony of a single informant who lied to the prosecution. You, however, are still a drug felon, homeless, and desperate to regain custody of your children.

Now place yourself in the shoes of Clifford Runoalds, another African American victim of the Hearne drug bust.[2] You returned home to Bryan, Texas, to attend the funeral of your eighteen-month-old daughter. Before the funeral services begin, the police show up and handcuff you. You beg the

officers to let you take one last look at your daughter before she is buried. The police refuse. You are told by prosecutors that you are needed to testify against one of the defendants in a recent drug bust. You deny witnessing any drug transaction; you don't know what they are talking about. Because of your refusal to cooperate, you are indicted on felony charges. After a month of being held in jail, the charges against you are dropped. You are technically free, but as a result of your arrest and period of incarceration, you lose your job, your apartment, your furniture, and your car. Not to mention the chance to say good-bye to your baby girl.

This is the War on Drugs. The brutal stories described above are not isolated incidents, nor are the racial identities of Emma Faye Stewart and Clifford Runoalds random or accidental. In every state across our nation, African Americans—particularly in the poorest neighborhoods—are subjected to tactics and practices that would result in public outrage and scandal if committed in middle-class white neighborhoods. In the drug war, the enemy is racially defined. The law enforcement methods described in chapter 2 have been employed almost exclusively in poor communities of color, resulting in jaw-dropping numbers of African Americans and Latinos filling our nation's prisons and jails every year. We are told by drug warriors that the enemy in this war is a thing—drugs—not a group of people, but the facts prove otherwise.

Human Rights Watch reported in 2000 that, in seven states, African Americans constitute 80 to 90 percent of all drug offenders sent to prison.[3] In at least fifteen states, blacks are admitted to prison on drug charges at a rate from twenty to fifty-seven times greater than that of white men.[4] In fact, nationwide, the rate of incarceration for African American drug offenders dwarfs the rate of whites. When the War on Drugs gained full steam in the mid-1980s, prison admissions for African Americans skyrocketed, nearly quadrupling in three years, and then increasing steadily until it reached in 2000 a level *more than twenty-six times* the level in 1983.[5] The number of 2000 drug admissions for Latinos was twenty-two times the number of 1983 admissions.[6] Whites have been admitted to prison for drug offenses at increased rates as well—the number of whites admitted for drug offenses in 2000 was eight times the number admitted in 1983—but their relative numbers are small compared to blacks' and Latinos'.[7] Although the majority of illegal drug users and dealers nationwide are white, three-fourths of all people imprisoned for drug offenses have been black or Latino.[8] In recent

years, rates of black imprisonment for drug offenses have dipped somewhat—declining approximately 25 percent from their zenith in the mid-1990s—but it remains the case that African Americans are incarcerated at grossly disproportionate rates throughout the United States.[9]

There is, of course, an official explanation for all of this: crime rates. This explanation has tremendous appeal—before you know the facts—for it is consistent with, and reinforces, dominant racial narratives about crime and criminality dating back to slavery. The truth, however, is that rates and patterns of drug crime do not explain the glaring racial disparities in our criminal justice system. People of all races use and sell illegal drugs at remarkably similar rates.[10] If there are significant differences in the surveys to be found, they frequently suggest that whites, particularly white youth, are more likely to engage in illegal drug dealing than people of color.[11] One study, for example, published in 2000 by the National Institute on Drug Abuse reported that white students use cocaine at seven times the rate of black students, use crack cocaine at eight times the rate of black students, and use heroin at seven times the rate of black students.[12] That same survey revealed that nearly identical percentages of white and black high school seniors use marijuana. The National Household Survey on Drug Abuse reported in 2000 that white youth aged 12–17 are more than a third more likely to have sold illegal drugs than African American youth.[13] Thus the very same year Human Rights Watch was reporting that African Americans were being arrested and imprisoned at unprecedented rates, government data revealed that blacks were no more likely to be guilty of drug crimes than whites and that white youth were actually the *most likely* of any racial or ethnic group to be guilty of illegal drug possession and sales. Any notion that drug use among blacks is more severe or dangerous is belied by the data; white youth have about three times the number of drug-related emergency room visits as their African American counterparts.[14]

The notion that whites comprise the vast majority of drug users and dealers—and may well be more likely than other racial groups to commit drug crimes—may seem implausible to some, given the media imagery we are fed on a daily basis and the racial composition of our prisons and jails. Upon reflection, however, the prevalence of white drug crime—including drug dealing—should not be surprising. After all, where do whites get their illegal drugs? Do they all drive to the ghetto to purchase them from somebody standing on a street corner? No. Studies consistently indicate that drug markets,

like American society generally, reflect our nation's racial and socioeconomic boundaries. Whites tend to sell to whites; blacks to blacks.[15] University students tend to sell to each other.[16] Rural whites, for their part, don't make a special trip to the 'hood to purchase marijuana. They buy it from somebody down the road.[17] White high school students typically buy drugs from white classmates, friends, or older relatives. Even Barry McCaffrey, former director of the White House Office of National Drug Control Policy, once remarked, if your child bought drugs, "it was from a student of their own race generally."[18] The notion that most illegal drug use and sales happens in the ghetto is pure fiction. Drug trafficking occurs there, but it occurs everywhere else in America as well. Nevertheless, black men have been admitted to state prison on drug charges at a rate that is more than thirteen times higher than white men.[19] The racial bias inherent in the drug war is a major reason that 1 in every 14 black men was behind bars in 2006, compared with 1 in 106 white men.[20] For young black men, the statistics are even worse. One in 9 black men between the ages of twenty and thirty-five was behind bars in 2006, and far more were under some form of penal control—such as probation or parole.[21] These gross racial disparities simply cannot be explained by rates of illegal drug activity among African Americans.

What, then, does explain the extraordinary racial disparities in our criminal justice system? Old-fashioned racism seems out of the question. Politicians and law enforcement officials today rarely endorse racially biased practices, and most of them fiercely condemn racial discrimination of any kind. When accused of racial bias, police and prosecutors—like most Americans—express horror and outrage. Forms of race discrimination that were open and notorious for centuries were transformed in the 1960s and 1970s into something un-American—an affront to our newly conceived ethic of colorblindness. By the early 1980s, survey data indicated that 90 percent of whites thought black and white children should attend the same schools, 71 percent disagreed with the idea that whites have a right to keep blacks out of their neighborhoods, 80 percent indicated they would support a black candidate for president, and 66 percent opposed laws prohibiting intermarriage.[22] Although far fewer supported specific policies designed to achieve racial equality or integration (such as busing), the mere fact that large majorities of whites were, by the early 1980s, supporting the antidiscrimination principle reflected a profound shift in racial attitudes. The margin of support for colorblind norms has only increased since then.

This dramatically changed racial climate has led defenders of mass incarceration to insist that our criminal justice system, whatever its past sins, is now largely fair and nondiscriminatory. They point to violent crime rates in the African American community as a justification for the staggering number of black men who find themselves behind bars. Black men, they say, have much higher rates of violent crime; that's why so many of them are locked up.

Typically, this is where the discussion ends.

The problem with this abbreviated analysis is that violent crime is *not* responsible for mass incarceration. As numerous researchers have shown, violent crime rates have fluctuated over the years and bear little relationship to incarceration rates—which have soared during the past three decades regardless of whether violent crime was going up or down.[23] Today violent crime rates are at historically low levels, yet incarceration rates continue to climb.

Murder convictions tend to receive a tremendous amount of media attention, which feeds the public's sense that violent crime is rampant and forever on the rise. But like violent crime in general, the murder rate cannot explain the growth of the penal apparatus. Homicide convictions account for a tiny fraction of the growth in the prison population. In the federal system, for example, homicide offenders account for 0.4 percent of the past decade's growth in the federal prison population, while drug offenders account for nearly 61 percent of that expansion.[24] In the state system, less than 3 percent of new court commitments to state prison typically involve people convicted of homicide.[25] As much as half of state prisoners are violent offenders, but that statistic can easily be misinterpreted. Violent offenders tend to get longer prison sentences than nonviolent offenders, and therefore comprise a much larger share of the prison population than they would if they had earlier release dates. In addition, state prison data excludes federal prisoners, who are overwhelmingly incarcerated for nonviolent offenses. As of September 2009, only 7.9 percent of federal prisoners were convicted of violent crimes.[26]

The most important fact to keep in mind, however, is this: debates about prison statistics ignore the fact that most people who are under correctional control today are not in prison. As noted earlier, of the nearly 7.3 million people currently under correctional control, only 1.6 million are in prison.[27] This caste system extends far beyond prison walls and governs millions of

people who are on probation and parole, primarily for nonviolent offenses. They have been swept into the system, branded criminals or felons, and ushered into a permanent second-class status—acquiring records that will follow them for life. Probationers are the clear majority of those who are under community supervision (84 percent), and only 19 percent of them were convicted of a violent offense.[28] The most common offense for which probationers are under supervision is a drug offense.[29] Even if the analysis is limited to people convicted of felonies—thus excluding extremely minor crimes and misdemeanors—nonviolent offenders still predominate. Only about a quarter of felony defendants in large urban counties were charged with a violent offense in 2006.[30] In cities such as Chicago, criminal courts are clogged with low-level drug cases. In one study, 72 percent of criminal cases in Cook County (Chicago) had a drug charge, and 70 percent of them were charged as class 4 felony possession (the lowest-level felony charge).[31]

None of this is to suggest that we ought not be concerned about violent crime in impoverished urban communities. We should care deeply, and as discussed in the final chapter, we must come to understand the ways in which mass imprisonment increases—not decreases—the likelihood of violence in urban communities. But at the same time, we ought not be misled by those who insist that violent crime has driven the rise of this unprecedented system of racial and social control. The uncomfortable reality is that arrests and convictions for drug offenses—not violent crime—have propelled mass incarceration. In many states, including Colorado and Maryland, drug offenders now constitute the single largest category of people admitted to prison.[32] People of color are convicted of drug offenses at rates out of all proportion to their drug crimes, a fact that has greatly contributed to the emergence of a vast new racial undercaste.

These facts may still leave some readers unsatisfied. The idea that the criminal justice system discriminates in such a terrific fashion when few people openly express or endorse racial discrimination may seem far-fetched, if not absurd. How could the War on Drugs operate in a discriminatory manner, on such a large scale, when hardly anyone advocates or engages in explicit race discrimination? That question is the subject of this chapter. As we shall see, despite the colorblind rhetoric and fanfare of recent years, the design of the drug war effectively guarantees that those who are swept into the nation's new undercaste are largely black and brown.

This sort of claim invites skepticism. Nonracial explanations and excuses for the systematic mass incarceration of people of color are plentiful. It is the genius of the new system of control that it can always be defended on nonracial grounds, given the rarity of a noose or a racial slur in connection with any particular criminal case. Moreover, because blacks and whites are almost never similarly situated (given extreme racial segregation in housing and disparate life experiences), trying to "control for race" in an effort to evaluate whether the mass incarceration of people of color is really about race or something else—anything else—is difficult. But it is not impossible.

A bit of common sense is overdue in public discussions about racial bias in the criminal justice system. The great debate over whether black men have been targeted by the criminal justice system or unfairly treated in the War on Drugs often overlooks the obvious. What is painfully obvious when one steps back from individual cases and specific policies is that the system of mass incarceration operates with stunning efficiency to sweep people of color off the streets, lock them in cages, and then release them into an inferior second-class status. Nowhere is this more true than in the War on Drugs.

The central question, then, is *how* exactly does a formally colorblind criminal justice system achieve such racially discriminatory results? Rather easily, it turns out. The process occurs in two stages. The first step is to grant law enforcement officials extraordinary discretion regarding whom to stop, search, arrest, and charge for drug offenses, thus ensuring that conscious and unconscious racial beliefs and stereotypes will be given free rein. Unbridled discretion inevitably creates huge racial disparities. Then, the damning step: Close the courthouse doors to all claims by defendants and private litigants that the criminal justice system operates in racially discriminatory fashion. Demand that anyone who wants to challenge racial bias in the system offer, in advance, clear proof that the racial disparities are the product of intentional racial discrimination—i.e., the work of a bigot. This evidence will almost never be available in the era of colorblindness, because everyone knows—but does not say—that the enemy in the War on Drugs can be identified by race. This simple design has helped to produce one of the most extraordinary systems of racialized social control the world has ever seen.

Picking and Choosing—The Role of Discretion

Chapter 2 described the first step in some detail, including the legal rules that grant police the discretion and authority to stop, interrogate, and search anyone, anywhere, provided they get "consent" from the targeted individual. It also examined the legal framework that affords prosecutors extraordinary discretion to charge or not charge, plea bargain or not, and load up defendants with charges carrying the threat of harsh mandatory sentences, in order to force guilty pleas, even in cases in which the defendants may well be innocent. These rules have made it possible for law enforcement agencies to boost dramatically their rates of drug arrests and convictions, even in communities where drug crime is stable or declining.[33] But that is not all. These rules have also guaranteed racially discriminatory results.

The reason is this: Drug-law enforcement is *unlike* most other types of law enforcement. When a violent crime or a robbery or a trespass occurs, someone usually calls the police. There is a clear victim and perpetrator. Someone is hurt or harmed in some way and wants the offender punished. But with drug crime, neither the purchaser of the drugs nor the seller has any incentive to contact law enforcement. It is consensual activity. Equally important, it is popular. The clear majority of Americans of all races have violated drug laws in their lifetime. In fact, in any given year, more than one in ten Americans violate drug laws. But due to resource constraints (and the politics of the drug war), only a small fraction are arrested, convicted, and incarcerated. In 2002, for example, there were 19.5 million illicit drug users, compared to 1.5 million drug arrests and 175,000 people admitted to prison for a drug offense.[34]

The ubiquity of illegal drug activity, combined with its consensual nature, requires a far more proactive approach by law enforcement than what is required to address ordinary street crime. It is impossible for law enforcement to identify and arrest every drug criminal. Strategic choices must be made about whom to target and what tactics to employ. Police and prosecutors did not declare the War on Drugs—and some initially opposed it—but once the financial incentives for waging the war became too attractive to ignore, law enforcement agencies had to ask themselves, if we're going to wage this war, where should it be fought and who should be taken prisoner?

That question was not difficult to answer, given the political and social context. As discussed in chapter 1, the Reagan administration launched a

media campaign a few years after the drug war was announced in an effort to publicize horror stories involving black crack users and crack dealers in ghetto communities. Although crack cocaine had not yet hit the streets when the War on Drugs was declared in 1982, its appearance a few years later created the perfect opportunity for the Reagan administration to build support for its new war. Drug use, once considered a private, public-health matter, was reframed through political rhetoric and media imagery as a grave threat to the national order.

Jimmie Reeves and Richard Campbell show in their research how the media imagery surrounding cocaine changed as the practice of smoking cocaine came to be associated with poor blacks.[35] Early in the 1980s, the typical cocaine-related story focused on white recreational users who snorted the drug in its powder form. These stories generally relied on news sources associated with the drug treatment industry, such as rehabilitation clinics, and emphasized the possibility of recovery. By 1985, however, as the War on Drugs moved into high gear, this frame was supplanted by a new "siege paradigm," in which transgressors were poor, nonwhite users and dealers of crack cocaine. Law enforcement officials assumed the role of drug "experts," emphasizing the need for law and order responses—a crackdown on those associated with the drug. These findings are consistent with numerous other studies, including a study of network television news from 1990 and 1991, which found that a predictable "us against them" frame was used in the news stories, with "us" being white, suburban America, and "them" being black Americans and a few corrupted whites.[36]

The media bonanza inspired by the administration's campaign solidified in the public imagination the image of the black drug criminal. Although explicitly racial political appeals remained rare, the calls for "war" at a time when the media was saturated with images of black drug crime left little doubt about who the enemy was in the War on Drugs and exactly what he looked like. Jerome Miller, the former executive director of the National Center for Institutions and Alternatives, described the dynamic this way: "There are certain code words that allow you never to have to say 'race,' but everybody knows that's what you mean and 'crime' is one of those. . . . So when we talk about locking up more and more people, what we're really talking about is locking up more and more black men."[37] Another commentator noted, "It is unnecessary to speak directly of race [today] because speaking about crime is talking about race."[38] Indeed, not long after the drug war was

ramped up in the media and political discourse, almost no one imagined that drug criminals could be anything other than black.

A survey was conducted in 1995 asking the following question: "Would you close your eyes for a second, envision a drug user, and describe that person to me?" The startling results were published in the *Journal of Alcohol and Drug Education*. Ninety-five percent of respondents pictured a black drug user, while only 5 percent imagined other racial groups.[39] These results contrast sharply with the reality of drug crime in America. African Americans constituted only 15 percent of current drug users in 1995, and they constitute roughly the same percentage today. Whites constituted the vast majority of drug users then (and now), but almost no one pictured a white person when asked to imagine what a drug user looks like. The same group of respondents also perceived the typical drug trafficker as black.

There is no reason to believe that the survey results would have been any different if police officers or prosecutors—rather than the general public—had been the respondents. Law enforcement officials, no less than the rest of us, have been exposed to the racially charged political rhetoric and media imagery associated with the drug war. In fact, for nearly three decades, news stories regarding virtually *all* street crime have disproportionately featured African American offenders. One study suggests that the standard crime news "script" is so prevalent and so thoroughly racialized that viewers imagine a black perpetrator even when none exists. In that study, 60 percent of viewers who saw a story with no image falsely recalled seeing one, and 70 percent of those viewers believed the perpetrator to be African American.[40]

Decades of cognitive bias research demonstrates that both unconscious and conscious biases lead to discriminatory actions, even when an individual does not want to discriminate.[41] The quotation commonly attributed to Nietzsche, that "there is no immaculate perception," perfectly captures how cognitive schemas—thought structures—influence what we notice and how the things we notice get interpreted.[42] Studies have shown that racial schemas operate not only as part of conscious, rational deliberations, but also automatically—without conscious awareness or intent.[43] One study, for example, involved a video game that placed photographs of white and black individuals holding either a gun or other object (such as a wallet, soda can, or cell phone) into various photographic backgrounds. Participants were told to decide as quickly as possible whether to shoot the target. Consistent with earlier studies, participants were more likely to mistake a black target as

armed when he was not, and mistake a white target as unarmed, when in fact he was armed.[44] This pattern of discrimination reflected automatic, unconscious thought processes, not careful deliberations.

Most striking, perhaps, is the overwhelming evidence that implicit bias measures are disassociated from explicit bias measures.[45] In other words, the fact that you may honestly believe that you are not biased against African Americans, and that you may even have black friends or relatives, does not mean that you are free from unconscious bias. Implicit bias tests may still show that you hold negative attitudes and stereotypes about blacks, even though you do not believe you do and do not want to.[46] In the study described above, for example, black participants showed an amount of "shooter bias" similar to that shown by whites.[47] Not surprisingly, people who have the greatest explicit bias (as measured by self-reported answers to survey questions) against a racial group tend also to have the greatest implicit bias against them, and vice versa.[48] Yet there is often a weak correlation between degrees of explicit and implicit bias; many people who think they are not biased prove when tested to have relatively high levels of bias.[49] Unfortunately, a fairly consistent finding is that punitiveness and hostility almost always increase when people are primed—even subliminally—with images or verbal cues associated with African Americans. In fact, studies indicate that people become increasingly harsh when an alleged criminal is darker and more "stereotypically black"; they are more lenient when the accused is lighter and appears more stereotypically white. This is true of jurors as well as law enforcement officers.[50]

Viewed as a whole, the relevant research by cognitive and social psychologists to date suggests that racial bias in the drug war was *inevitable*, once a public consensus was constructed by political and media elites that drug crime is black and brown. Once blackness and crime, especially drug crime, became conflated in the public consciousness, the "criminalblackman," as termed by legal scholar Kathryn Russell, would inevitably become the primary target of law enforcement.[51] Some discrimination would be conscious and deliberate, as many honestly and consciously would believe that black men deserve extra scrutiny and harsher treatment. Much racial bias, though, would operate unconsciously and automatically—even among law enforcement officials genuinely committed to equal treatment under the law.

Whether or not one believes racial discrimination in the drug war was inevitable, it should have been glaringly obvious in the 1980s and 1990s that

an extraordinarily high *risk* of racial bias in the administration of criminal justice was present, given the way in which all crime had been framed in the media and in political discourse. Awareness of this risk did not require intimate familiarity with cognitive bias research. Anyone possessing a television set during this period would likely have had some awareness of the extent to which black men had been demonized in the War on Drugs.

The risk that African Americans would be unfairly targeted should have been of special concern to the U.S. Supreme Court—the one branch of government charged with the responsibility of protecting "discrete and insular minorities" from the excesses of majoritarian democracy, and guaranteeing constitutional rights for groups deemed unpopular or subject to prejudice.[52] Yet when the time came for the Supreme Court to devise the legal rules that would govern the War on Drugs, the Court adopted rules that would *maximize*—not minimize—the amount of racial discrimination that would likely occur. It then closed the courthouse doors to claims of racial bias.

Whren v. United States is a case in point. As noted in chapter 2, the Court held in *Whren* that police officers are free to use minor traffic violations as an excuse to stop motorists for drug investigations—even when there is no evidence whatsoever that the motorist has engaged in drug crime. So long as a minor traffic violation—such as failing to use a turn signal, exceeding the speed limit by a mile or two, tracking improperly between the lines, or stopping on a pedestrian walkway—can be identified, police are free to stop motorists for the purpose of engaging in a fishing expedition for drugs. Such police conduct, the Court concluded, does not violate the Fourth Amendment's ban on "unreasonable searches and seizures."[53]

For good reason, the petitioners in *Whren* argued that granting police officers such broad discretion to investigate virtually anyone for drug crimes created a high risk that police would exercise their discretion in a racially discriminatory manner. With no requirement that any evidence of drug activity actually be present before launching a drug investigation, police officers' snap judgments regarding who seems like a drug criminal would likely be influenced by prevailing racial stereotypes and bias. They urged the Court to prohibit the police from stopping motorists for the purpose of drug investigations unless the officers actually had reason to believe a motorist was committing, or had committed, a drug crime. Failing to do so, they argued, was unreasonable under the Fourth Amendment and would expose African Americans to a high risk of discriminatory stops and searches.

Not only did the Court reject the petitioners' central claim—that using traffic stops as a pretext for drug investigations is unconstitutional—it ruled that claims of racial bias could not be brought under the Fourth Amendment. In other words, the Court barred any victim of race discrimination by the police *from even alleging a claim of racial bias* under the Fourth Amendment. According to the Court, whether or not police discriminate on the basis of race when making traffic stops is irrelevant to a consideration of whether their conduct is "reasonable" under the Fourth Amendment.

The Court did offer one caveat, however. It indicated that victims of race discrimination could still state a claim under the equal protection clause of the Fourteenth Amendment, which guarantees "equal treatment under the laws." This suggestion may have been reassuring to those unfamiliar with the Court's equal protection jurisprudence. But for those who have actually tried to prove race discrimination under the Fourteenth Amendment, the Court's remark amounted to cruel irony. As we shall see below, the Supreme Court has made it virtually impossible to challenge racial bias in the criminal justice system under the Fourteenth Amendment, and it has barred litigation of such claims under federal civil rights laws as well.

Closing the Courthouse Doors—*McCleskey v. Kemp*

First, consider sentencing. In 1987, when media hysteria regarding black drug crime was at fever pitch and the evening news was saturated with images of black criminals shackled in courtrooms, the Supreme Court ruled in *McCleskey v. Kemp* that racial bias in sentencing, even if shown through credible statistical evidence, could not be challenged under the Fourteenth Amendment in the absence of clear evidence of conscious, discriminatory intent. On its face, the case appeared to be a straightforward challenge to Georgia's death penalty scheme. Once the Court's opinion was released, however, it became clear the case was about much more than the death penalty. The real issue at hand was whether—and to what extent—the Supreme Court would tolerate racial bias in the criminal justice system as a whole. The Court's answer was that racial bias would be tolerated—virtually to any degree—so long as no one admitted it.

Warren McCleskey was a black man facing the death penalty for killing a white police officer during an armed robbery in Georgia. Represented by the

NAACP Legal Defense and Education Fund, McCleskey challenged his death sentence on the grounds that Georgia's death penalty scheme was infected with racial bias and thus violated the Fourteenth and Eighth Amendments. In support of his claim, he offered an exhaustive study of more than two thousand murder cases in Georgia. The study was known as the Baldus study—named after Professor David Baldus, who was its lead author. The study found that defendants charged with killing white victims received the death penalty eleven times more often than defendants charged with killing black victims. Georgia prosecutors seemed largely to blame for the disparity; they sought the death penalty in 70 percent of cases involving black defendants and white victims, but only 19 percent of cases involving white defendants and black victims.[54]

Sensitive to the fact that numerous factors besides race can influence the decision making of prosecutors, judges, and juries, Baldus and his colleagues subjected the raw data to highly sophisticated statistical analysis to see if nonracial factors might explain the disparities. Yet even after accounting for thirty-five nonracial variables, the researchers found that defendants charged with killing white victims were 4.3 times more likely to receive a death sentence than defendants charged with killing blacks. Black defendants, like McCleskey, who killed white victims had the highest chance of being sentenced to death in Georgia.[55]

The case was closely watched by criminal lawyers and civil rights lawyers nationwide. The statistical evidence of discrimination that Baldus had developed was the strongest ever presented to a court regarding race and criminal sentencing. If McCleskey's evidence was not enough to prove discrimination in the absence of some kind of racist utterance, what would be?

By a one-vote margin, the Court rejected McCleskey's claims under the Fourteenth Amendment, insisting that unless McCleskey could prove that the prosecutor in his particular case had sought the death penalty because of race or that the jury had imposed it for racial reasons, the statistical evidence of race discrimination in Georgia's death penalty system did not prove unequal treatment under the law. The Court accepted the statistical evidence as valid but insisted that evidence of conscious, racial bias in McCleskey's individual case was necessary to prove unlawful discrimination. In the absence of such evidence, patterns of discrimination—even patterns as shocking as demonstrated by the Baldus study—did not violate the Fourteenth Amendment.

In erecting this high standard, the Court knew full well that the standard could not be met absent an admission that a prosecutor or judge acted because of racial bias. The majority opinion openly acknowledged that longstanding rules generally bar litigants from obtaining discovery from the prosecution regarding charging patterns and motives, and that similar rules forbid introduction of evidence of jury deliberations even when a juror has chosen to make deliberations public.[56] The very evidence that the Court demanded in *McCleskey*—evidence of deliberate bias in his individual case—would almost always be unavailable and/or inadmissible due to procedural rules that shield jurors and prosecutors from scrutiny. This dilemma was of little concern to the Court. It closed the courthouse doors to claims of racial bias in sentencing.

There is good reason to believe that, despite appearances, the *McCleskey* decision was not really about the death penalty at all; rather, the Court's opinion was driven by a desire to immunize the entire criminal justice system from claims of racial bias. The best evidence in support of this view can be found at the end of the majority opinion where the Court states that discretion plays a necessary role in the implementation of the criminal justice system, and that discrimination is an inevitable by-product of discretion. Racial discrimination, the Court seemed to suggest, was something that simply must be tolerated in the criminal justice system, provided no one admits to racial bias.

The majority observed that significant racial disparities had been found in other criminal settings beyond the death penalty, and that McCleskey's case implicitly calls into question the integrity of the entire system. In the Court's words: "Taken to its logical conclusion, [Warren McCleskey's claim] throws into serious question the principles that underlie our criminal justice system. . . . [I]f we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty."[57] The Court openly worried that other actors in the criminal justice system might also face scrunity for allegedly biased decision-making if similar claims of racial bias in the system were allowed to proceed. Driven by these concerns, the Court rejected McCleskey's claim that Georgia's death penalty system violates the Eighth Amendment's ban on arbitrary punishment, framing the critical question as whether the Baldus study demonstrated a "constitutionally unacceptable risk" of discrimination. Its answer was no. The Court deemed the risk of

racial bias in Georgia's capital sentencing scheme "constitutionally acceptable." Justice Brennan pointedly noted in his dissent that the Court's opinion "seems to suggest a fear of too much justice."[58]

Cracked Up—Discriminatory Sentencing in the War on Drugs

Anyone who doubts the devastating impact of *McCleskey v. Kemp* on African American defendants throughout the criminal justice system, including those ensnared by the War on Drugs, need only ask Edward Clary. Two months after his eighteenth birthday, Clary was stopped and searched in the St. Louis airport because he "looked like" a drug courier. At the time, he was returning home from visiting some friends in California. One of them persuaded him to take some drugs back home to St. Louis. Clary had never attempted to deal drugs before, and he had no criminal record.

During the search, the police found crack cocaine and promptly arrested him. He was convicted in federal court and sentenced under federal laws that punish crack offenses one hundred times more severely than offenses involving powder cocaine. A conviction for the sale of five hundred grams of powder cocaine triggers a five-year mandatory sentence, while only five grams of crack triggers the same sentence. Because Clary had been caught with more than fifty grams of crack (less than two ounces), the sentencing judge believed he had no choice but to sentence him—an eighteen-year-old, first-time offender—to a minimum of ten years in federal prison.

Clary, like defendants in other crack cases, challenged the constitutionality of the hundred-to-one ratio. His lawyers argued that the law is arbitrary and irrational, because it imposes such vastly different penalties on two forms of the same substance. They also argued that the law discriminates against African Americans, because the majority of those charged with crimes involving crack at that time were black (approximately 93 percent of convicted crack offenders were black, 5 percent were white), whereas powder cocaine offenders were predominantly white.

Every federal appellate court to have considered these claims had rejected them on the ground that Congress—rightly or wrongly—believed that crack was more dangerous to society, a view supported by the testimony of some drug-abuse "experts" and police officers. The fact that most of the evidence in support of *any* disparity had since been discredited was deemed irrele-

vant; what mattered was whether the law had seemed rational at the time it was adopted. Congress, the courts concluded, is free to amend the law if circumstances have changed.

Courts also had rejected claims that crack sentencing laws were racially discriminatory, largely on the grounds that the Supreme Court's decision in *McCleskey v. Kemp* precluded such a result. In the years following *McCleskey*, lower courts consistently rejected claims of race discrimination in the criminal justice system, finding that gross racial disparities do not merit strict scrutiny in the absence of evidence of explicit race discrimination—the very evidence unavailable in the era of colorblindness.

Judge Clyde Cahill of the Federal District of Missouri, an African American judge assigned Clary's case, boldly challenged the prevailing view that courts are powerless to address forms of race discrimination that are not overtly hostile. Cahill declared the hundred-to-one ratio racially discriminatory in violation of the Fourteenth Amendment, notwithstanding *McCleskey*.[59] Although no admissions of racial bias or racist intent could be found in the record, Judge Cahill believed race was undeniably a factor in the crack sentencing laws and policies. He traced the history of the get-tough movement and concluded that fear coupled with unconscious racism had led to a lynch-mob mentality and a desire to control crime—and those deemed responsible for it—at any cost. Cahill acknowledged that many people may not believe they are motivated by discriminatory attitudes but argued that we all have internalized fear of young black men, a fear reinforced by media imagery that has helped to create a national image of the young black male as a criminal. "The presumption of innocence is now a legal myth," he declared. "The 100-to-1 ratio, coupled with mandatory minimum sentencing provided by federal statute, has created a situation that reeks with inhumanity and injustice. . . . If young white males were being incarcerated at the same rate as young black males, the statute would have been amended long ago." Judge Cahill sentenced Clary as if the drug he had carried home had been powder cocaine. The sentence imposed was four years in prison. Clary served his term and was released.

The prosecution appealed Clary's case to the Eighth Circuit Court of Appeals, which reversed Judge Cahill in a unanimous opinion, finding that the case was not even close. In the court's view, there was no credible evidence that the crack penalties were motivated by any conscious racial bigotry, as required by *McCleskey v. Kemp*. The court remanded the case back to the

district court for resentencing. Clary—now married and a father—was ordered back to prison to complete his ten-year term.[60]

Few challenges to sentencing schemes, patterns, or results have been brought since *McCleskey*, for the exercise is plainly futile. Yet in 1995, a few brave souls challenged the implementation of Georgia's "two strikes and you're out" sentencing scheme, which imposes life imprisonment for a second drug offense. Georgia's district attorneys, who have unbridled discretion to decide whether to seek this harsh penalty, had invoked it against only 1 percent of white defendants facing a second drug conviction but against 16 percent of black defendants. The result was that 98.4 percent of those serving life sentences under the provision were black. The Georgia Supreme Court ruled, by a 4–3 vote, that the stark racial disparity presented a threshold case of discrimination and required the prosecutors to offer a race-neutral explanation for the results. Rather than offer a justification, however, the Georgia attorney general filed a petition for rehearing signed by every one of the state's forty-six district attorneys, all of whom were white. The petition argued that the Court's decision was a dire mistake; if the decision were allowed to stand and prosecutors were compelled to explain gross racial disparities such as the ones at issue, it would be a "substantial step toward invalidating" the death penalty and would "paralyze the criminal justice system"—apparently because severe and inexplicable racial disparities pervaded the system as a whole. Thirteen days later, the Georgia Supreme Court reversed itself, holding that the fact that 98.4 percent of the defendants selected to receive life sentences for repeat drug offenses were black required no justification. The court's new decision relied almost exclusively on *McCleskey v. Kemp*. To date, not a single successful challenge has ever been made to racial bias in sentencing under *McCleskey v. Kemp* anywhere in the United States.

Charging Ahead—*Armstrong v. United States*

If sentencing were the only stage of the criminal justice process in which racial biases were allowed to flourish, it would be a tragedy of gargantuan proportions. Thousands of people have had years of their lives wasted in prison—years they would have been free if they had been white. Some, like McCleskey, have been killed because of the influence of race in the death

penalty. Sentencing, however, is not the end, but just the beginning. As we shall see, the legal rules governing prosecutions, like those that govern sentencing decisions, maximize rather than minimize racial bias in the drug war. The Supreme Court has gone to great lengths to ensure that prosecutors are free to exercise their discretion in any manner they choose, and it has closed the courthouse doors to claims of racial bias.

As discussed in chapter 2, no one has more power in the criminal justice system than prosecutors. Few rules constrain the exercise of prosecutorial discretion. The prosecutor is free to dismiss a case for any reason or no reason at all, regardless of the strength of the evidence. The prosecutor is also free to file more charges against a defendant than can realistically be proven in court, so long as probable cause arguably exists. Whether a good plea deal is offered to a defendant is entirely up to the prosecutor. And if the mood strikes, the prosecutor can transfer drug defendants to the federal system, where the penalties are far more severe. Juveniles, for their part, can be transferred to adult court, where they can be sent to adult prison. Angela J. Davis, in her authoritative study *Arbitrary Justice: The Power of the American Prosecutor*, observes that "the most remarkable feature of these important, sometimes life-and-death decisions is that they are totally discretionary and virtually unreviewable."[61] Most prosecutors' offices lack any manual or guidebook advising prosecutors how to make discretionary decisions. Even the American Bar Association's standards of practice for prosecutors are purely aspirational; no prosecutor is required to follow the standards or even consider them.

Christopher Lee Armstrong learned the hard way that the Supreme Court has little interest in ensuring that prosecutors exercise their extraordinary discretion in a manner that is fair and nondiscriminatory. He, along with four of his companions, was staying at a Los Angeles motel in April 1992 when federal and state agents on a joint drug crime task force raided their room and arrested them on federal drug charges—conspiracy to distribute more than fifty grams of crack cocaine. The federal public defenders assigned to Armstrong's case were disturbed by the fact that Armstrong and his friends had something in common with every other crack defendant their office had represented during the past year: they were all black. In fact, of the fifty-three crack cases their office had handled over the prior three years, forty-eight defendants were black, five were Hispanic, and not a single one was white. Armstrong's lawyers found it puzzling that no white crack offenders

had been charged, given that most crack offenders are white. They suspected that whites were being diverted by federal prosecutors to the state system, where the penalties for crack offenses were far less severe. The only way to prove this, though, would be to gain access to the prosecutors' records and find out just how many white defendants were transferred to the state system and why. Armstrong's lawyers thus filed a motion asking the district court for discovery of the prosecutors' files to support their claim of selective prosecution under the Fourteenth Amendment.

Nearly one hundred years earlier, in a case called *Yick Wo v. Hopkins*, the Supreme Court had recognized that racially selective enforcement violates equal protection of the laws. In that case, decided in 1886, the Court unanimously overturned convictions of two Chinese men who were operating laundries without a license. San Francisco had denied licenses to all Chinese applicants, but granted licenses to all but one of the non-Chinese laundry operators who applied. Law enforcement arrested more than a hundred people for operating laundries without licenses, and every one of the arrestees was Chinese. Overturning Yick Wo's conviction, the Supreme Court declared in a widely quoted passage, "Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations, between persons in similar circumstances . . . the denial of equal justice is still within the prohibition of the Constitution."[62] Armstrong's lawyers sought to prove that, like the law at issue in *Yick Wo*, federal crack laws were fair on their face and impartial in their appearance, but were selectively enforced in a racially discriminatory manner.

In support of their claim that Armstrong should, at the very least, be entitled to discovery, Armstrong's lawyers offered two sworn affidavits. One was from a halfway house intake coordinator who testified that, in his experience treating crack addicts, whites and blacks dealt and used the drugs in similar proportions. The other affidavit was from a defense attorney who had extensive experience in state prosecutions. He testified that nonblack defendants were routinely prosecuted in state, rather than federal, court. Arguably the best evidence in support of Armstrong's claims came from the government, which submitted a list of more than two thousand people charged with federal crack cocaine violations over a three-year period, all but eleven of whom were black. None were white.

The district court ruled that the evidence presented was sufficient to justify discovery for the purposes of determining whether the allegations of selective enforcement were valid. The prosecutors, however, refused to release any records and appealed the issue all the way to the U.S. Supreme Court. In May 1996, the Supreme Court reversed. As in *McCleskey*, the Court did not question the accuracy of the evidence submitted, but ruled that because Armstrong failed to identify any similarly situated white defendants who should have been charged in federal court but were not, he was not entitled even to discovery on his selective-prosecution claim. With no trace of irony, the Court demanded that Armstrong produce in advance the very thing he sought in discovery: information regarding white defendants who should have been charged in federal court. That information, of course, was in the prosecution's possession and control, which is why Armstrong filed a discovery motion in the first place.

As a result of the *Armstrong* decision, defendants who suspect racial bias on the part of prosecutors are trapped in a classic catch-22. In order to state a claim of selective prosecution, they are required to offer *in advance* the very evidence that generally can be obtained only through discovery of the prosecutor's files. The Court justified this insurmountable hurdle on the grounds that considerable deference is owed the exercise of prosecutorial discretion. Unless evidence of conscious, intentional bias on the part of the prosecutor could be produced, the Court would not allow any inquiry into the reasons for or causes of apparent racial disparities in prosecutorial decision making. Again the courthouse doors were closed, for all practical purposes, to claims of racial bias in the administration of the criminal justice system.

Immunizing prosecutors from claims of racial bias and failing to impose any meaningful check on the exercise of their discretion in charging, plea bargaining, transferring cases, and sentencing has created an environment in which conscious and unconscious biases are allowed to flourish. Numerous studies have shown that prosecutors interpret and respond to identical criminal activity differently based on the race of the offender.[63] One widely cited study was conducted by the *San Jose Mercury News*. The study reviewed 700,000 criminal cases that were matched by crime and criminal history of the defendant. The analysis revealed that similarly situated whites were far more successful than African Americans and Latinos in the plea bargaining process; in fact, "at virtually every stage of pretrial negotiation, whites are more successful than nonwhites."[64]

The most comprehensive studies of racial bias in the exercise of prosecutorial and judicial discretion involve the treatment of juveniles. These studies have shown that youth of color are more likely to be arrested, detained, formally charged, transferred to adult court, and confined to secure residential facilities than their white counterparts.[65] A report in 2000 observed that among youth who have never been sent to a juvenile prison before, African Americans were more than six times as likely as whites to be sentenced to prison for *identical* crimes.[66] A study sponsored by the U.S. Justice Department and several of the nation's leading foundations, published in 2007, found that the impact of the biased treatment is magnified with each additional step into the criminal justice system. African American youth account for 16 percent of all youth, 28 percent of all juvenile arrests, 35 percent of the youth waived to adult criminal court, and 58 percent of youth admitted to state adult prison.[67] A major reason for these disparities is unconscious and conscious racial biases infecting decision making. In the state of Washington, for example, a review of juvenile sentencing reports found that prosecutors routinely described black and white offenders differently.[68] Blacks committed crimes because of internal personality flaws such as disrespect. Whites did so because of external conditions such as family conflict.

The risk that prosecutorial discretion will be racially biased is especially acute in the drug enforcement context, where virtually identical behavior is susceptible to a wide variety of interpretations and responses and the media imagery and political discourse has been so thoroughly racialized. Whether a kid is perceived as a dangerous drug-dealing thug or instead is viewed as a good kid who was merely experimenting with drugs and selling to a few of his friends has to do with the ways in which information about illegal drug activity is processed and interpreted, in a social climate in which drug dealing is racially defined. As a former U.S. Attorney explained:

> I had an [assistant U.S. attorney who] wanted to drop the gun charge against the defendant [in a case in which] there were no extenuating circumstances. I asked, "Why do you want to drop the gun offense?" And he said, "'He's a rural guy and grew up on a farm. The gun he had with him was a rifle. He's a good ol' boy, and all good ol' boys have rifles, and it's not like he was a gun-toting drug dealer." But he was a gun-toting drug dealer, exactly.

The decision in *Armstrong* effectively shields this type of biased decision making from judicial scrutiny for racial bias. Prosecutors are well aware that the exercise of their discretion is unchecked, provided no explicitly racist remarks are made, as it is next to impossible for defendants to prove racial bias. It is difficult to imagine a system better designed to ensure that racial biases and stereotypes are given free rein—while at the same time appearing on the surface to be colorblind—than the one devised by the U.S. Supreme Court.

In Defense of the All-White Jury—*Purkett v. Elm*

The rules governing jury selection provide yet another illustration of the Court's complete abdication of its responsibility to guarantee racial minorities equal treatment under the law. In 1985, in *Batson v. Kentucky*, the Court held that the Fourteenth Amendment prohibits prosecutors from discriminating on the basis of race when selecting juries, a ruling hailed as an important safeguard against all-white juries locking up African Americans based on racial biases and stereotypes. Prior to *Batson*, prosecutors had been allowed to strike blacks from juries, provided they did not *always* strike black jurors. The Supreme Court had ruled in 1965, in *Swain v. Alabama*, that an equal-protection claim would arise only if a defendant could prove that a prosecutor struck African American jurors in every case, regardless of the crime involved or regardless of the races of the defendant or the victim.[69] Two decades later, in *Batson*, the Supreme Court reversed course, a nod to the newly minted public consensus that explicit race discrimination is an affront to American values. Almost immediately after *Batson* was decided, however, it became readily apparent that prosecutors had no difficulty circumventing the formal requirement of colorblindness in jury selection by means of a form of subterfuge the Court would come to accept, if not endorse.

The history of race discrimination in jury selection dates back to slavery. Until 1860, no black person had ever sat on a jury in the United States. During the Reconstruction era, African Americans began to serve on juries in the South for the first time. The all-white jury promptly returned, however, when Democratic conservatives sought to "redeem" the South by stripping blacks of their right to vote and their right to serve on juries. In 1880, the

Supreme Court intervened, striking down a West Virginia statute that expressly reserved jury service to white men. Citing the recently enacted Fourteenth Amendment, the Court declared that the exclusion of blacks from jury service was "practically a brand upon them, affixed by law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to . . . equal justice."[70] The Court asked, "How can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of his color alone, however well qualified in other respects, is not a denial to him of equal protection?"[71]

For all its bluster, the Court offered no meaningful protection against jury discrimination in the years that followed. As legal scholar Benno Schmidt has observed, from the end of Reconstruction through the New Deal, "the systematic exclusion of black men from Southern juries was about as plain as any legal discrimination could be short of proclamation in state statutes or confession by state officials."[72] The Supreme Court repeatedly upheld convictions of black defendants by all-white juries in situations where exclusion of black jurors was obvious.[73] The only case in which the Court overturned a conviction on the grounds of discrimination in jury selection was *Neal v. Delaware*, a case decided in 1935. State law in Delaware once had explicitly restricted jury service to white men, and "no colored citizen had ever been summoned as a juror."[74] The Delaware Supreme Court had rejected Neal's equal protection claim on the grounds that "the great body of black men residing in this State are utterly unqualified [for jury service] by want of intelligence, experience, or moral integrity."[75] The Supreme Court reversed. Clearly, what offended the U.S. Supreme Court was not the exclusion of blacks from jury service per se, but rather doing so openly and explicitly. That orientation continues to hold today.

Notwithstanding *Batson*'s formal prohibition on race discrimination in jury selection, the Supreme Court and lower federal courts have tolerated all but the most egregious examples of racial bias in jury selection. *Miller El v. Cockrell* was such a case.[76] That case involved a jury-selection manual that sanctioned race-based selection. The Court noted that it was unclear whether the official policy of race-based exclusion was still in effect, but the prosecution did in fact exclude ten of eleven black jurors, in part by employing an unusual practice of "jury shuffling" that reduced the number of black jurors.[77] The prosecution also engaged in disparate questioning of jurors

based on race—practices that seemed linked to the jury-selection manual. This was a highly unusual case. In typical cases, there are no official policies authorizing race discrimination in jury selection still lurking around, arguably in effect. Normally, the discrimination is obvious yet unstated, and the systematic exclusion of black jurors continues largely unabated through use of the peremptory strike.

Peremptory strikes have long been controversial. Both prosecutors and defense attorneys are permitted to strike "peremptorily" jurors they don't like—that is, people they believe will not respond favorably to the evidence or witnesses they intend to present at trial. In theory, peremptory strikes may increase the fairness of the proceeding by eliminating jurors who may be biased but whose biases cannot be demonstrated convincingly to a judge. In practice, however, peremptory challenges are notoriously discriminatory. Lawyers typically have little information about potential jurors, so their decisions to strike individual jurors tend to be based on nothing more than stereotypes, prejudices, and hunches. Achieving an all-white jury, or nearly all-white jury, is easy in most jurisdictions, because relatively few racial minorities are included in the jury pool. Potential jurors are typically called for service based on the list of registered voters or Department of Motor Vehicle lists—sources that contain disproportionately fewer people of color, because people of color are significantly less likely to own cars or register to vote. Making matters worse, thirty-one states and the federal government subscribe to the practice of lifetime felon exclusion from juries. *As a result, about 30 percent of black men are automatically banned from jury service for life.*[78] Accordingly, no more than a handful of strikes are necessary in many cases to eliminate all or nearly all black jurors. The practice of systematically excluding black jurors has not been halted by *Batson*; the only thing that has changed is that prosecutors must come up with a race-neutral excuse for the strikes—an exceedingly easy task.

In fact, one comprehensive study reviewed all published decisions involving *Batson* challenges from 1986 to 1992 and concluded that prosecutors almost never fail to successfully craft acceptable race-neutral explanations to justify striking black jurors.[79] Courts accept explanations that jurors are too young, too old, too conservative, too liberal, too comfortable, or too uncomfortable. Clothing is also a favorite reason; jurors have been stricken for wearing hats or sunglasses. Even explanations that might correlate with race, such as lack of education, unemployment, poverty, being single, living in the

same neighborhood as the defendant, or prior involvement with the criminal justice system—have all been accepted as perfectly good, non-pretextual excuses for striking African Americans from juries. As professor Sheri Lynn Johnson once remarked, "If prosecutors exist who . . . cannot create a 'racially neutral' reason for discriminating on the basis of race, bar exams are too easy."[80]

Given how flagrantly prosecutors were violating *Batson*'s ban on race discrimination in jury selection, it was reasonable to hope that, if presented with a particularly repugnant case, the Supreme Court might be willing to draw the line at practices that make a mockery of the antidiscrimination principle. Granted, the Court had been unwilling to accept statistical proof of race discrimination in sentencing in *McCleskey*, and it had brushed off concerns of racial bias in discretionary police stops in *Whren*, and it had granted virtual immunity to prosecutors in their charging decisions in *Armstrong*, but would it go so far as to allow prosecutors to offer blatantly absurd, downright laughable excuses for striking blacks from juries? It turns out the answer was yes.

In *Purkett v. Elm*, in 1995, the Supreme Court ruled that any race-neutral reason, no matter how silly, ridiculous, or superstitious, is enough to satisfy the prosecutor's burden of showing that a pattern of striking a particular racial group is not, in fact, based on race. In that case, the prosecutor offered the following explanation to justify his strikes of black jurors:

> I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared not to be a good juror for that fact. . . . Also, he had a mustache and a goatee type beard. And juror number twenty-four also had a mustache and goatee type beard. . . . And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me.[81]

The Court of Appeals for the Eighth Circuit ruled that the foregoing explanation for the prosecutor's strikes of black jurors was insufficient and should have been rejected by the trial court because long hair and facial hair are not plausibly related to a person's ability to perform as a juror. The appellate court explained: "Where the prosecution strikes a prospective juror who is a member of the defendant's racial group, solely on the basis of factors

which are facially irrelevant to the question of whether that person is qualified to serve as a juror in the particular case, the prosecution must at least articulate some plausible race neutral reason for believing that those factors will somehow affect the person's ability to perform his or her duties as a juror."[82]

The U.S. Supreme Court reversed, holding that when a pattern of race-based strikes has been identified by the defense, the prosecutor need not provide "an explanation that is persuasive, or even plausible."[83] Once the reason is offered, a trial judge may choose to believe (or disbelieve) any "silly or superstitious" reason offered by prosecutors to explain a pattern of strikes that appear to be based on race.[84] The Court sent a clear message that appellate courts are largely free to accept the reasons offered by a prosecutor for excluding prospective black jurors—no matter how irrational or absurd the reasons may seem.

The Occupation—Policing the Enemy

The Court's blind eye to race discrimination in the criminal justice system has been especially problematic in policing. Racial bias is most acute at the point of entry into the system for two reasons: discretion and authorization. Although prosecutors, as a group, have the greatest power in the criminal justice system, police have the greatest discretion—discretion that is amplified in drug-law enforcement. And unbeknownst to the general public, the Supreme Court has actually authorized race discrimination in policing, rather than adopting legal rules banning it.

Racially biased police discretion is key to understanding how the overwhelming majority of people who get swept into the criminal justice system in the War on Drugs turn out to be black or brown, even though the police adamantly deny that they engage in racial profiling. In the drug war, police have discretion regarding whom to target (which individuals), as well as where to target (which neighborhoods or communities). As noted earlier, at least 10 percent of Americans violate drug laws every year, and people of all races engage in illegal drug activity at similar rates. With such an extraordinarily large population of offenders to choose from, decisions must be made regarding who should be targeted and where the drug war should be waged.

From the outset, the drug war could have been waged primarily in overwhelmingly white suburbs or on college campuses. SWAT teams could have rappelled from helicopters in gated suburban communities and raided the homes of high school lacrosse players known for hosting coke and ecstasy parties after their games. The police could have seized televisions, furniture, and cash from fraternity houses based on an anonymous tip that a few joints or a stash of cocaine could be found hidden in someone's dresser drawer. Suburban homemakers could have been placed under surveillance and subjected to undercover operations designed to catch them violating laws regulating the use and sale of prescription "uppers." All of this could have happened as a matter of routine in white communities, but it did not.

Instead, when police go looking for drugs, they look in the 'hood. Tactics that would be political suicide in an upscale white suburb are not even newsworthy in poor black and brown communities. So long as mass drug arrests are concentrated in impoverished urban areas, police chiefs have little reason to fear a political backlash, no matter how aggressive and warlike the efforts may be. And so long as the number of drug arrests increases or at least remains high, federal dollars continue to flow in and fill the department's coffers. As one former prosecutor put it, "It's a lot easier to go out to the 'hood, so to speak, and pick somebody than to put your resources in an undercover [operation in a] community where there are potentially politically powerful people."[85]

The hypersegregation of the black poor in ghetto communities has made the roundup easy. Confined to ghetto areas and lacking political power, the black poor are convenient targets. Douglas Massey and Nancy Denton's book, *American Apartheid*, documents how racially segregated ghettos were deliberately created by federal policy, not impersonal market forces or private housing choices.[86] The enduring racial isolation of the ghetto poor has made them uniquely vulnerable in the War on Drugs. What happens to them does not directly affect—and is scarcely noticed by—the privileged beyond the ghetto's invisible walls. Thus it is here, in the poverty-stricken, racially segregated ghettos, where the War on Poverty has been abandoned and factories have disappeared, that the drug war has been waged with the greatest ferocity. SWAT teams are deployed here; buy-and-bust operations are concentrated here; drug raids of apartment buildings occur here; stop-and-frisk operations occur on the streets here. Black and brown youth are the primary targets. It is not uncommon for a young black teenager living in a ghetto community to be stopped, interrogated, and frisked numerous times

in the course of a month, or even a single week, often by paramilitary units. Studies of racial profiling typically report the total number of people stopped and searched, disaggregated by race. These studies have led some policing experts to conclude that racial profiling is actually "worse" in white communities, because the racial disparities in stop and search rates are much greater there. What these studies do not reveal, however, is the frequency with which any given individual is likely to be stopped in specific, racially defined neighborhoods.

The militarized nature of law enforcement in ghetto communities has inspired rap artists and black youth to refer to the police presence in black communities as "The Occupation." In these occupied territories, many black youth automatically "assume the position" when a patrol car pulls up, knowing full well that they will be detained and frisked no matter what. This dynamic often comes as a surprise to those who have spent little time in ghettos. Craig Futterman, a law professor at the University of Chicago, reports that his students frequently express shock and dismay when they venture into those communities for the first time and witness the distance between abstract legal principles and actual practice. One student reported, following her ride-along with Chicago police: "Each time we drove into a public housing project and stopped the car, every young black man in the area would almost reflexively place his hands up against the car and spread his legs to be searched. And the officers would search them. The officers would then get back in the car and stop in another project, and this would happen again. This repeated itself throughout the entire day. I couldn't believe it. This was nothing like we learned in law school. But it just seemed so normal—for the police and the young men."

Numerous scholars (and many law enforcement officials) attempt to justify the concentration of drug law enforcement resources in ghetto communities on the grounds that it is easier for the police to combat illegal drug activity there. The theory is that black and Latino drug users are more likely than white users to obtain illegal drugs in public spaces that are visible to the police, and therefore it is more efficient and convenient for the police to concentrate their efforts on open-air drug markets in ghetto communities. Sociologists have been major proponents of this line of reasoning, pointing out that differential access to private space influences the likelihood that criminal behavior will be detected. Because poor people lack access to private space (often sharing small apartments with numerous family members

or relatives), their criminal activity is more likely to be conducted outdoors. Concentrating law enforcement efforts in locations where drug activity will be more easily detected is viewed as a race-neutral organizational necessity. This argument is often buttressed by claims that most citizen complaints about illegal drug activity come from ghetto areas, and that the violence associated with the drug trade occurs in inner cities. These facts, drug war defenders claim, make the decision to wage the drug war almost exclusively in poor communities of color an easy and logical choice.

This line of reasoning is weaker than it initially appears. Many law enforcement officials acknowledge that the demand for illegal drugs is so great—and the lack of alternative sources of income so few in ghetto communities—that "if you take one dealer off the street, he'll be replaced within an hour." Many also admit that a predictable consequence of breaking up one drug ring is a slew of violence as others fight for control of the previously stabilized market.[87] These realities suggest—if the past two decades of endless war somehow did not—that the drug war is doomed to fail. They also call into question the legitimacy of "convenience" as an excuse for the mass imprisonment of black and brown men in ghetto communities.

Even putting aside such concerns, though, recent research indicates that the basic assumptions upon which drug war defenses typically rest are simply wrong. The conventional wisdom—that "get tough" tactics are a regrettable necessity in poor communities of color and that efficiency requires the drug war to be waged in the most vulnerable neighborhoods—turns out to be, as many have long suspected, nothing more than wartime propaganda, not sound policy.

Unconventional Wisdom

In 2002, a team of researchers at the University of Washington decided to take the defenses of the drug war seriously, by subjecting the arguments to empirical testing in a major study of drug-law enforcement in a racially mixed city—Seattle.[88] The study found that, contrary to the prevailing "common sense," the high arrest rates of African Americans in drug-law enforcement could not be explained by rates of offending; nor could they be explained by other standard excuses, such as the ease and efficiency of policing open-air drug markets, citizen complaints, crime rates, or drug-related

violence. The study also debunked the assumption that white drug dealers deal indoors, making their criminal activity more difficult to detect.

The authors found that it was untrue stereotypes about crack markets, crack dealers, and crack babies—not facts—that were driving discretionary decision making by the Seattle Police Department. The facts were as follows: Seattle residents were far more likely to report suspected narcotics activities in residences—not outdoors—but police devoted their resources to open-air drug markets and to the one precinct that was *least* likely to be identified as the site of suspected drug activity in citizen complaints. In fact, although hundreds of outdoor drug transactions were recorded in predominantly white areas of Seattle, police concentrated their drug enforcement efforts in one downtown drug market where the frequency of drug transactions was much lower. In racially mixed open-air drug markets, black dealers were far more likely to be arrested than whites, even though white dealers were present and visible. And the department focused overwhelmingly on crack—the one drug in Seattle more likely to be sold by African Americans—despite the fact that local hospital records indicated that overdose deaths involving heroin were more numerous than all overdose deaths for crack and powder cocaine combined. Local police acknowledged that no significant level of violence was associated with crack in Seattle and that other drugs were causing more hospitalizations, but steadfastly maintained that their deployment decisions were nondiscriminatory.

The study's authors concluded, based on their review and analysis of the empirical evidence, that the Seattle Police Department's decisions to focus so heavily on crack, to the near exclusion of other drugs, and to concentrate its efforts on outdoor drug markets in downtown areas rather than drug markets located indoors or in predominantly white communities, reflect "a racialized conception of the drug problem."[89] As the authors put it: "[The Seattle Police Department's] focus on black and Latino individuals and on the drug most strongly associated with 'blackness' suggest that law enforcement policies and practices are predicated on the assumption that the drug problem is, in fact, a black and Latino one, and that crack, the drug most strongly associated with urban blacks, is 'the worst.'"[90] This racialized cultural script about who and what constitutes the drug problem renders illegal drug activity by whites invisible. "White people," the study's authors observed, "are simply not perceived as drug offenders by Seattle police officers."[91]

Hollow Hope

One might imagine that the facts described above would provide grounds for a lawsuit challenging the Seattle Police Department's drug war tactics as a violation of the equal protection clause of the Fourteenth Amendment and demanding reform. After all, obtaining reform through the city council or state legislature may seem unlikely, for black "criminals" are perhaps the most despised minority in the U.S. population. Few politicians will leap at the opportunity to support black people labeled criminals. Accordingly, a lawsuit may seem like the best option. The purpose of our Constitution—especially the Fourteenth Amendment's equal-protection guarantee—is to protect minority rights even when, or especially when, they are unpopular. So shouldn't African American defendants be able to file a successful lawsuit demanding an end to these discriminatory practices or challenge their drug arrests on the grounds that these law enforcement practices are unlawfully tainted by race? The answer is yes, they should, but no, they probably can't.

As legal scholar David Cole has observed, "The Court has imposed nearly insurmountable barriers to persons challenging race discrimination at all stages of the criminal justice system."[92] The barriers are so high that few lawsuits are even filed, notwithstanding shocking and indefensible racial disparities. Procedural hurdles, such as the "standing requirement," have made it virtually impossible to seek reform of law enforcement agencies through the judicial process, even when the policies or practices at issue are illegal or plainly discriminatory.

Adolph Lyons's attempt to ban the use of lethal chokeholds by the Los Angeles Police Department (LAPD) is a good example. Lyons, a twenty-four-year-old black man, was driving his car in Los Angeles one morning when he was pulled over by four police officers for a burned-out taillight. With guns drawn, police ordered Lyons out of his car. He obeyed. The officers told him to face the car, spread his legs, and put his hands on his head. Again, Lyons did as he was told. After the officers completed a pat-down, Lyons dropped his hands, prompting an officer to slam Lyons's hands back on his head. When Lyons complained that the car keys he was holding were causing him pain, the officer forced Lyons into a chokehold. He lost consciousness and collapsed. When he awoke, "he was spitting up blood and dirt, had urinated

and defecated, and had suffered permanent damage to his larynx."[93] The officers issued a traffic ticket for the burned-out taillight and released him.

Lyons sued the City of Los Angeles for violation of his constitutional rights and sought, as a remedy, a ban against future use of the chokeholds. By the time his case reached the Supreme Court, sixteen people had been killed by police use of the chokehold, twelve of them black men. The Supreme Court dismissed the case, however, ruling that Lyons lacked "standing" to seek an injunction against the deadly practice. In order to have standing, the Court reasoned, Lyons would have to show that he was highly likely to be subject to a chokehold again.

Lyons argued that, as a black man, he had good reason to fear he would be stopped by the police for a minor traffic violation and subjected to a chokehold again. He had done nothing to provoke the chokehold; to the contrary, he had obeyed instructions and cooperated fully. Why wouldn't he believe he was at risk of being stopped and choked again? The Court, however, ruled that in order to have standing

> Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either (1) that all police officers in Los Angeles always choke any citizen with whom they have an encounter, whether for the purpose of arrest, issuing a citation or for questioning, or (2) that the City ordered or authorized the police to act in such a manner.[94]

Lyons did not allege race discrimination, but if he had, that claim would almost certainly have been a loser too. The Court's ruling in *Lyons* makes it extremely difficult to challenge systemic race discrimination in law enforcement and obtain meaningful policy reform. For example, African Americans in Seattle who hope to end the Seattle police department's discriminatory tactics through litigation would be required to prove that they plan to violate drug laws and that they will almost certainly face race discrimination by Seattle police officers engaged in drug-law enforcement, in order to have standing to seek reform—i.e., just to get in the courthouse door.

It is worthy of note that the *Lyons* standard does not apply to suits for damages. But any suggestion that litigants need not worry about policy reform because they can always sue for damages would be disingenuous—particularly as applied to race discrimination cases. Why? Neither the state

nor the state police can be sued for damages. In a series of cases, the Supreme Court has ruled that the state and its offices are immune from federal suits for damages under the Eleventh Amendment to the Constitution (unless they consent), and the state can't be sued for damages for constitutional violations in state court either.[95] City police departments, like the LAPD, are also typically off limits. The Court has ruled that a city police department cannot be sued for damages unless a specific city policy or custom can be identified authorizing the illegal practice.[96] Most cities, of course, do not have policies specifically authorizing illegal conduct (particularly race discrimination), and "custom" is notoriously difficult to prove. Accordingly, suing a city police department for damages is generally not an option. Yet even if all of those hurdles can somehow be overcome, there is still the matter of proving a claim of race discrimination. As we have seen, to establish an equal-protection violation, one must prove *intentional* discrimination—conscious racial bias. Law enforcement officials rarely admit to having acted for racial reasons, leaving most victims of discriminatory law enforcement without anyone to sue and without a claim that can be proven in a court of law. But even if a plaintiff managed to overcome all of the procedural hurdles and prove that a police officer deliberately exercised his or her discretion on the basis of race, that still might not be enough.

Race as a Factor

The dirty little secret of policing is that the Supreme Court has actually granted the police license to discriminate. This fact is not advertised by police departments, because law enforcement officials know that the public would not respond well to this fact in the era of colorblindness. It is the sort of thing that is better left unsaid. Civil rights lawyers—including those litigating racial profiling cases—have been complicit in this silence, fearing that any acknowledgment that race-based policing is authorized by law would legitimate in the public mind the very practice they are hoping to eradicate.

The truth, however, is this: At other stages of the criminal justice process, the Court has indicated that overt racial bias necessarily triggers strict scrutiny—a concession that has not been costly, as very few law enforcement officials today are foolish enough to admit bias openly. But the Supreme Court has indicated that in policing, race *can* be used as a factor in

discretionary decision making. In *United States v. Brignoni-Ponce*, the Court concluded it was permissible under the equal protection clause of the Fourteenth Amendment for the police to use race as a factor in making decisions about which motorists to stop and search. In that case, the Court concluded that the police could take a person's Mexican appearance into account when developing reasonable suspicion that a vehicle may contain undocumented immigrants. The Court said that "the likelihood that any person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor."[97] Some commentators have argued that *Brignoni-Ponce* may be limited to the immigration context; the Court might not apply the same principle to drug-law enforcement. It is not obvious what the rational basis would be for limiting overt race discrimination by police to immigration. The likelihood that a person of Mexican ancestry is an "alien" could not be significantly higher than the likelihood that any random black person is a drug criminal.

The Court's quiet blessing of race-based traffic stops has led to something of an Orwellian public discourse regarding racial profiling. Police departments and highway patrol agencies frequently declare, "We do not engage in racial profiling," even though their officers routinely use race as a factor when making decisions regarding whom to stop and search. The justification for the implicit doublespeak—"we do not racial-profile; we just stop people based on race"—can be explained in part by the Supreme Court's jurisprudence. Because the Supreme Court has authorized the police to use race as a factor when making decisions regarding whom to stop and search, police departments believe that racial profiling exists only when race is the *sole* factor. Thus, if race is one factor but not the only factor, then it doesn't really count as a factor at all.

The absurdity of this logic is evidenced by the fact that police almost never stop anyone solely because of race. A young black male wearing baggy pants, standing in front of his high school surrounded by a group of similarly dressed black friends, may be stopped and searched because police believe he "looks like" a drug dealer. Clearly, race is not the only reason for that conclusion. Gender, age, attire, and location play a role. The police would likely ignore an eighty-five-year-old black man standing in the same spot surrounded by a group of elderly black women.

The problem is that although race is rarely the sole reason for a stop or search, it is frequently a *determinative* reason. A young white male wearing

baggy pants, standing in front of his high school and surrounded by his friends, might well be ignored by police officers. It might never occur to them that a group of young white kids might be dealing dope in front of their high school. Similarly situated people inevitably are treated differently when police are granted permission to rely on racial stereotypes when making discretionary decisions.

Equally important, though, the sole-factor test ignores the ways in which seemingly race-neutral factors—such as location—operate in a highly discriminatory fashion. Some law enforcement officials claim that they would stop and search white kids wearing baggy jeans in the ghetto (that would be suspicious)—it just so happens they're rarely there. Subjecting people to stops and searches because they live in "high crime" ghettos cannot be said to be truly race-neutral, given that the ghetto itself was constructed to contain and control groups of people defined by race.[98] Even seemingly race-neutral factors such as "prior criminal history" are not truly race-neutral. A black kid arrested twice for possession of marijuana may be no more of a repeat offender than a white frat boy who regularly smokes pot in his dorm room. But because of his race and his confinement to a racially segregated ghetto, the black kid has a criminal record, while the white frat boy, because of his race and relative privilege, does not. Thus, when prosecutors throw the book at black repeat offenders or when police stalk ex-offenders and subject them to regular frisks and searches on the grounds that it makes sense to "watch criminals closely," they are often exacerbating racial disparities created by the discretionary decision to wage the War on Drugs almost exclusively in poor communities of color.

Defending against claims of racial bias in policing is easy. Because race is never the only reason for a stop or search, any police officer with a fifth-grade education will be able to cite multiple nonracial reasons for initiating an encounter, including any number of the so-called "indicators" of drug trafficking discussed in chapter 2, such as appearing too nervous or too calm. Police officers (like prosecutors) are highly adept at offering race-neutral reasons for actions that consistently disadvantage African Americans. Whereas prosecutors claim they strike black jurors not because of their race but because of their hairstyle, police officers have their own stock excuses—e.g., "Your honor, we didn't stop him because he's black; we stopped him because he failed to use his turn signal at the right time," or "It wasn't just because he was black; it was also because he seemed nervous when he saw

the police car." Judges are just as reluctant to second-guess an officer's motives as they are to second-guess prosecutors'. So long as officers refrain from uttering racial epithets and so long as they show the good sense not to say "the only reason I stopped him was 'cause he's black," courts generally turn a blind eye to patterns of discrimination by the police.

Studies of racial profiling have shown that police do, in fact, exercise their discretion regarding whom to stop and search in the drug war in a highly discriminatory manner.[99] Not only do police discriminate in their determinations regarding where to wage the war, but they also discriminate in their judgments regarding whom to target outside of the ghetto's invisible walls.

The most famous of these studies were conducted in New Jersey and Maryland in the 1990s. Allegations of racial profiling in federally funded drug interdiction operations resulted in numerous investigations and comprehensive data demonstrating a dramatic pattern of racial bias in highway patrol stops and searches. These drug interdiction programs were the brainchild of the DEA, part of the federally funded program known as Operation Pipeline.

In New Jersey, the data showed that only 15 percent of all drivers on the New Jersey Turnpike were racial minorities, yet 42 percent of all stops and 73 percent of all arrests were of black motorists—despite the fact that blacks and whites violated traffic laws at almost exactly the same rate. While radar stops were relatively consistent with the percentage of minority violators, discretionary stops made by officers involved in drug interdiction resulted in double the number of stops of minorities.[100] A subsequent study conducted by the attorney general of New Jersey found that searches on the turnpike were even more discriminatory than the initial stops—77 percent of all consent searches were of minorities. The Maryland studies produced similar results: African Americans comprised only 17 percent of drivers along a stretch of I-95 outside of Baltimore, yet they were 70 percent of those who were stopped and searched. Only 21 percent of all drivers along that stretch of highway were racial minorities (Latinos, Asians, and African Americans), yet those groups comprised nearly 80 percent of those pulled over and searched.[101]

What most surprised many analysts was that, in both studies, whites were actually *more likely* than people of color to be carrying illegal drugs or contraband in their vehicles. In fact, in New Jersey, whites were almost twice as likely to be found with illegal drugs or contraband as African Americans, and five times as likely to be found with contraband as Latinos.[102] Although

whites were more likely to be guilty of carrying drugs, they were far less likely to be viewed as suspicious, resulting in relatively few stops, searches, and arrests of whites. The former New Jersey attorney general dubbed this phenomenon the "circular illogic of racial profiling." Law enforcement officials, he explained, often point to the racial composition of our prisons and jails as a justification for targeting racial minorities, but the empirical evidence actually suggested the opposite conclusion was warranted. The disproportionate imprisonment of people of color was, in part, a product of racial profiling—not a justification for it.

In the years following the release of the New Jersey and Maryland data, dozens of other studies of racial profiling have been conducted. A brief sampling:

- In Volusia County, Florida, a reporter obtained 148 hours of video footage documenting more than 1,000 highway stops conducted by state troopers. Only 5 percent of the drivers on the road were African American or Latino, but more than 80 percent of the people stopped and searched were minorities.[103]
- In Illinois, the state police initiated a drug interdiction program known as Operation Valkyrie that targeted Latino motorists. While Latinos comprised less than 8 percent of the Illinois population and took fewer than 3 percent of the personal vehicle trips in Illinois, they comprised approximately 30 percent of the motorists stopped by drug interdiction officers for discretionary offenses, such as failure to signal a lane change.[104] Latinos, however, were significantly less likely than whites to have illegal contraband in their vehicles.
- A racial profiling study in Oakland, California, in 2001 showed that African Americans were approximately twice as likely as whites to be stopped, and three times as likely to be searched.[105]

Pedestrian stops, too, have been the subject of study and controversy. The New York Police Department released statistics in February 2007 showing that during the prior year its officers stopped an astounding 508,540 people—an average of 1,393 per day—who were walking down the street, perhaps on their way to the subway, grocery store, or bus stop. Often the stops included searches for illegal drugs or guns—searches that frequently required people to lie face down on the pavement or stand spread-eagled against a wall while

police officers aggressively groped all over their bodies while bystanders watched or walked by. The vast majority of those stopped and searched were racial minorities, and more than half were African American.[106]

The NYPD began collecting data on pedestrian stops following the shooting of Amadou Diallo, an African immigrant who died in a hail of police bullets on the front steps of his own home in February 1999. Diallo was followed to his apartment building by four white police officers—members of the elite Street Crime Unit—who viewed him as suspicious and wanted to interrogate him. They ordered him to stop, but, according to the officers, Diallo did not respond immediately. He walked a bit farther to his apartment building, opened the door, and retrieved his wallet—probably to produce identification. The officers said they thought the wallet was a gun, and fired forty-one times. Amadou Diallo died at the age of twenty-two. He was unarmed and had no criminal record.

Diallo's murder sparked huge protests, resulting in a series of studies commissioned by the attorney general of New York. The first study found that African Americans were stopped six times more frequently than whites, and that stops of African Americans were less likely to result in arrests than stops of whites—presumably because blacks were less likely to be found with drugs or other contraband.[107] Although the NYPD attempted to justify the stops on the grounds that they were designed to get guns off the street, stops by the Street Crime Unit—the group of officers who supposedly are specially trained to identify gun-toting thugs—yielded a weapon in only 2.5 percent of all stops.[108]

Rather than reducing reliance on stop-and-frisk tactics following the Diallo shooting and the release of this disturbing data, the NYPD dramatically *increased* its number of pedestrian stops and continued to stop and frisk African Americans at grossly disproportionate rates. The NYPD stopped five times more people in 2005 than in 2002—the overwhelming majority of whom were African American or Latino.[109] By 2008, the NYPD was stopping 545,000 in a single year, and 80 percent of the people stopped were African Americans and Latinos. Whites comprised a mere 8 percent of people frisked by the NYPD, while African Americans accounted for 85 percent of all frisks.[110] A report by the *New York Times* found that the highest concentration of stops in the city was a roughly eight-block area of Brownsville, Brooklyn, that was predominately black. Residents there were stopped at a rate thirteen times the city average.[111]

Although the NYPD frequently attempts to justify stop-and-frisk operations in poor communities of color on the grounds that such tactics are necessary to get guns off the streets, less than 1 percent of stops (0.15 percent) resulted in guns being found, and guns and other contraband were seized less often in stops of African Americans and Latinos than of whites.[112] As Darius Charney, a lawyer for the Center for Constitutional Rights, observed, these studies "confirm what we have been saying for the last 10 or 11 years, which is that with stop-and-frisk patterns—it is really race, not crime, that is driving this."[113]

Ultimately, these stop-and-frisk operations amount to much more than humiliating, demeaning rituals for young men of color, who must raise their arms and spread their legs, always careful not to make a sudden move or gesture that could provide an excuse for brutal—even lethal—force. Like the days when black men were expected to step off the sidewalk and cast their eyes downward when a white woman passed, young black men know the drill when they see the police crossing the street toward them; it is a ritual of dominance and submission played out hundreds of thousands of times each year. But it is more than that. These routine encounters often serve as the gateway into the criminal justice system. The NYPD made 50,300 marijuana arrests in 2010 alone, mostly of young men of color. As one report noted, these marijuana arrests offer "training opportunities" for rookie police who can practice on ghetto kids while earning overtime.[114] These arrests serve another purpose as well: they "are the most effective way for the NYPD to collect fingerprints, photographs and other information on young people not yet entered into the criminal databases."[115] A simple arrest for marijuana possession can show up on criminal databases as "a drug arrest" without specifying the substance or the charge, and without clarifying even whether the person was convicted. These databases are then used by police and prosecutors, as well as by employers and housing officials—an electronic record that will haunt many for life. More than 353,000 people were arrested and jailed by the NYPD between 1997 and 2006 for simple possession of small amounts of marijuana, with blacks five times more likely to be arrested than whites.[116]

In Los Angeles, mass stops of young African American men and boys resulted in the creation of a database containing the names, addresses, and other biographical information of the overwhelming majority of young black men in the entire city. The LAPD justified its database as a tool for tracking gang or

"gang-related" activity. However, the criterion for inclusion in the database is notoriously vague and discriminatory. Having a relative or friend in a gang and wearing baggy jeans is enough to put youth on what the ACLU calls a Black List. In Denver, displaying any two of a list of attributes—including slang, "clothing of a particular color," pagers, hairstyles, or jewelry—earns youth a spot in the Denver Police's gang database. In 1992, citizen activism led to an investigation, which revealed that eight out of every ten people of color in the entire city were on the list of suspected criminals.[117]

The End of an Era

The litigation that swept the nation in the 1990s challenging racial profiling practices has nearly vanished. The news stories about people being stopped and searched on their way to church or work or school have faded from the evening news. This is not because the problem has been solved or because the experience of being stopped, interrogated, and searched on the basis of race has become less humiliating, alienating, or demoralizing as time has gone by. The lawsuits have disappeared because, in a little noticed case called *Alexander v. Sandoval*, decided in 2001, the Supreme Court eliminated the last remaining avenue available for challenging racial bias in the criminal justice system.[118]

Sandoval was not, on its face, even about criminal justice. It was a case challenging the Alabama Department of Public Safety's decision to administer state driver's license examinations only in English. The plaintiffs argued that the department's policy violated Title VI of the Civil Rights Act of 1964 and its implementing regulations, because the policy had the effect of subjecting non-English speakers to discrimination based on their national origin. The Supreme Court did not reach the merits of the case, ruling instead that the plaintiffs lacked the legal right even to file the lawsuit. It concluded that Title VI does not provide a "private right of action" to ordinary citizens and civil rights groups; meaning that victims of discrimination can no longer sue under the law.

The *Sandoval* decision virtually wiped out racial profiling litigation nationwide. Nearly all of the cases alleging racial profiling in drug-law enforcement were brought pursuant to Title VI of the Civil Rights Act of 1964 and its implementing regulations. Title VI prohibits federally funded programs

or activities from discriminating on the basis of race, and the regulations employ a "disparate impact test" for discrimination—meaning that plaintiffs could prevail in claims of race discrimination without proving discriminatory intent. Under the regulations, a federally funded law enforcement program or activity is unlawful if it has a racially discriminatory impact and if that impact cannot be justified by law enforcement necessity. Because nearly all law enforcement agencies receive federal funding in the drug war, and because drug war tactics—such as pretext stops and consent searches—have a grossly discriminatory impact and are largely ineffective, plaintiffs were able to argue persuasively that the tactics could not be justified by law enforcement necessity.

In 1999, for example, the ACLU of Northern California filed a class action lawsuit against the California Highway Patrol (CHP), alleging that its highway drug interdiction program violated Title VI of the Civil Rights Act because it relied heavily on discretionary pretext stops and consent searches that are employed overwhelmingly against African American and Latino motorists. During the course of the litigation, the CHP produced data that showed African Americans were twice as likely, and Latinos three times as likely, to be stopped and searched by its officers as were whites. The data further showed that consent searches were ineffective; only a tiny percentage of the discriminatory searches resulted in the discovery of drugs or other contraband, yet thousands of black and brown motorists were subjected to baseless interrogations, searches, and seizures as a result of having committed a minor traffic violation. The CHP entered into a consent decree that provided for a three-year moratorium on consent searches and pretext stops statewide and the collection of comprehensive data on the race and ethnicity of motorists stopped and searched by the police, so that it would be possible to determine whether discriminatory practices were continuing. Similar results were obtained in New Jersey, as a result of landmark litigation filed against the New Jersey State Police. After *Sandoval*, these cases can no longer be brought under Title VI by private litigants. Only the federal government can sue to enforce Title VI's antidiscrimination provisions—something it has neither the inclination nor the capacity to do in most racial profiling cases due to its limited resources and institutional reluctance to antagonize local law enforcement. Since the War on Drugs, private litigants represented by organizations such as the ACLU have been at the forefront of racial profiling litigation. Those days, however, have come to an end. The racial profil-

ing cases that swept the nation in the 1990s may well be the last wave of litigation challenging racial bias in the criminal justice system that we see for a very long time.

The Supreme Court has now closed the courthouse doors to claims of racial bias at every stage of the criminal justice process, from stops and searches to plea bargaining and sentencing. The system of mass incarceration is now, for all practical purposes, thoroughly immunized from claims of racial bias. Staggering racial disparities in the drug war continue but rarely make the news. One recent development that did make news was President Obama's decision to sign legislation reducing the hundred-to-one disparity in sentencing for crack versus powder cocaine to eighteen to one, a small step in the right direction.[119] Under the new law, it takes 28 grams of crack cocaine to net a five-year mandatory minimum sentence, while it still takes selling 500 grams of powdered cocaine to net the same sentence. There should be no disparity—the ratio should be one-to-one. But that disparity is just the tip of the iceberg. As noted in chapter 2, this system depends primarily on the prison label, not prison time. What matters most is who gets swept into this system of control and then ushered into an undercaste. The legal rules adopted by the Supreme Court guarantee that those who find themselves locked up and permanently locked out due to the drug war are overwhelmingly black and brown.