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Recommended Citation

Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" Was a "War on Blacks,"* 6 J. Gender Race & Just. 381 (2002), *available at* http://scholarship.law.ufl.edu/facultypub/107

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Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" was a "War on Blacks"

Kenneth B. Nunn[*]

INTRODUCTION

The War on Drugs[1] has had a devastating effect on African American communities nationwide. Throughout the drug war, African Americans have been disproportionately investigated, detained, searched, arrested and charged with the use, possession and sale of illegal drugs.[2] Vast numbers of African Americans have been jailed and imprisoned pursuant to the nation's tough drug trafficking laws, implemented as part of the War on Drugs.[3] Indeed, in some

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1. By "War on Drugs" I mean the anti-drug policies and law enforcement practices commenced by the Reagan administration in the fall of 1982 and continued by the Bush and Clinton administrations until at least the end of the year 2000. This period is only the most recent manifestation of America's ongoing war against drugs. Clarence Lusane states that "[n]early every President since World War II has declared a 'war on drugs.'" CLARENCE LUSANE, PIPE DREAM BLUES: RACISM AND THE WAR ON DRUGS 77 (1991). Steven Witsotsky has identified three wars against drugs in American history. *See* STEVEN WITSOTSKY, BEYOND THE WAR ON DRUGS: OVERCOMING A FAILED PUBLIC POLICY xvii-xviii (1990). The first began with the passage of the Harrison Act in 1914 and includes the period of its enforcement by the Department of the Treasury. *Id.* at xvii. President Nixon commenced the second in the late 1960's. *Id.* at xviii. Nixon's "total offensive" against drugs set the pattern for the drug war waged by Reagan, Bush and Clinton. *See id.* For more on America's earlier drug wars, see EDWARD J. EPSTEIN, AGENCY OF FEAR (1977) (examining anti-drug campaigns from the turn of the century through the Nixon presidency). It remains to be seen whether the younger Bush will continue the federal government's drug war policies, since law enforcement resources and priorities have shifted to "the war against terrorism."

2. I discuss the ways the War on Drugs has impacted African American communities in Section I (A)(2). *See infra* notes 74-215. For sources that address racial disparities in drug enforcement practices generally, see Floyd Weatherspoon, *The Devastating Impact of the Justice System on the Status of African American Males,* 23 CAP. L. REV. 23, 27-43 (1994) (detailing the disproportionate investigation, arrest, charging and sentencing of Black men within the criminal justice system); Ira Glasser, *American Drug Laws: The New Jim Crow*, 63 ALB. L. REV. 703 (2000) (detailing racial disparities in the prosecution of drug laws); D.J. Silton, *U.S. Prisons and Racial Profiling: A Covertly Racist Nation Rides a Vicious Cycle*, 20 LAW & INEQ. 53, 61 (2002) (reporting that between 1976 and 1989 "the total number of drug arrests of Caucasians grew by 70%, compared to a 450% increase among African Americans" and that the number of Caucasians incarcerated for drug offenses increased by 50% from 1986 to 1991, while the number of African Americans incarcerated increased by 350%).

3. *See* Silton, *supra* note 2, at 61(While African Americans are 13% of the U.S. population and 13% of drug users they are 35% of drug arrests, 55% of drug convictions, and 74% of drug

jurisdictions, the majority of African American men age thirty-five and under are within the grip of the criminal justice system.[4] Nationally, more African American men go to prison than go to college,[5] and African American males are incarcerated at a rate that is almost eight times higher than that for white males.[6]

Indeed, it appears that African Americans-and African American males in particular-are the real targets of the country's drug enforcement efforts.[7] In the minds of the criminal justice system's managers, planners and workers, drugs are frequently associated with African American citizens and their communities.[8]

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imprisonments.).

4. See JEROME G. MILLER, NATIONAL CENTER ON INSTITUTIONS AND ALTERNATIVES, HOBBLING A GENERATION: YOUNG AFRICAN-AMERICAN MALES IN WASHINGTON D.C.'S CRIMINAL JUSTICE SYSTEM (April 1992) (In Washington D.C., 42% of African American males ages 18-35 are in penal institutions, on probation, or on parole.) [hereinafter MILLER, WASHINGTON, D.C.]; JEROME G. MILLER, NATIONAL CENTER ON INSTITUTIONS AND ALTERNATIVES, HOBBLING A GENERATION: YOUNG AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM OF AMERICA'S CITIES: BALTIMORE, MARYLAND (Sept. 1992) (In Baltimore, 56% of African American males ages 18-35 are in penal institutions, on probation, or on parole.) [hereinafter MILLER, BALTIMORE].

5. Almost a decade ago, the Sentencing Project reported that Black males in prison outnumbered Black males in higher educational institutions in the United States. *See* MARC MAUER, THE SENTENCING PROJECT, AMERICANS BEHIND BARS: THE INTERNATIONAL USE OF INCARCERATION, 1992-93, at 18 (1994) (reporting 583,000 African American males in prisons or jails in 1992 while number enrolled in institutions of higher education was 537,000). Since the time of the Sentencing Project's 1994 report, the gap between African American education and incarceration has widened considerably. In 1997, there were 579,800 African American males in higher education institutions (undergraduate, graduate and professional). STATISTICAL ABSTRACT OF THE UNITED STATES, 2000, at 184 tbl.268 (2001). However, over a third more African American males (791,270) were incarcerated in prisons or jails in 1997. Of this total, 237, 900 Black males were held in jail facilities. *Id.* at 220 tbl.367. An additional 553,370 African American males were housed in prisons under the jurisdiction of state and federal correctional authorities. BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1997, at 78 tbl.5.7 (2000). See also, DAN MACALLAIR, KHALED TAQI-EDDIN, & VINCENT SHIRALDI, JUSTICE POLICY INSTITUTE, CLASS DISMISSED: HIGHER EDUCATION VS. CORRECTIONS DURING THE WILSON YEARS (1998), *available at* http://www.cjcj.org/jpi/classdis.html (reporting that for every Black male enrolled in California public universities, there are five African American males in state correctional institutions).

6. *See infra* note 76 and accompanying text.

7. According to researcher Christina Johns, "There is no question that the enforcement tactics of the War on Drugs are focused on minority populations." CHRISTINA JACQUELINE JOHNS, POWER, IDEOLOGY, AND THE WAR ON DRUGS 73 (1992). *See also* Weatherspoon, *supra* note 2, at 30-31 (describing the War on Drugs as virtually "synonymous" to policing African American communities and Black males); Silton, *supra* note 2, at 61 (Gross racial disparities in drug cases "indicate that through the enforcement and prosecution of the drug laws, the United States is, in effect, waging a war on Blacks."); john a. powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557, 559 (1991) ("[T]he war on drugs could more aptly be called a war on the minority populations").

8. See Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 813 (1999) (asserting "myths of Black criminality are so embedded in the white psyche that it seems perfectly natural to many Americans that Blacks are disproportionately [stopped, arrested and imprisoned]"); powell & Hershenov, *supra* note 7, at 559 (claiming widespread public association of drugs with minority group members); Jeffrey Goldberg, *The Color of Suspicion*, N.Y. TIMES, June 20, 1999, § 6 at 50, 53 (reporting the belief among police officers that Blacks and Hispanics are "the blue collar backbone of the country's heroin – and cocaine – distributions networks").

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The criminal justice system shapes its policies and practices according to this perception.[9] Consequently, police expend greater resources and time looking for drug infractions in Black neighborhoods[10] than in white neighborhoods and focus the bulk of their energies on Black suspects rather than white ones.

The targeting of the Black[11] community by law enforcement agencies has produced enormously harmful, but entirely predictable, results.[12] As a consequence of the War on Drugs, large numbers of African American males have been virtually erased from African American communities and incarcerated in prisons and jails. This mass incarceration of African American males has created many endemic problems for African American communities, including:

> [T]he loss of male role models and fathers for African American youths; the loss of husbands and male companions for African American women; the loss of earnings and wealth for the African American community; the loss of membership of important African American organizations and institutions; the preclusion of the

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9. See David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches without Cause*, 3 U. PA. J. CONST. L. 296, 308 (2001) (reporting the "widely held view[ ]—within and without law enforcement circles—that African Americans and other minorities commit a disproportionate number of crimes and, therefore, they are justifiably targeted" for disproportionate law enforcement practices); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 575 (2001) ("[C]lass based, and hence to some degree race-based, [drug] enforcement remains common.").

10. According to one scholar:

> Because of differential enforcement patterns, blacks are imprisoned at a rate greater than they deserve given the offenses they commit. Police commonly look at African American neighborhoods—and at African Americans—with greater scrutiny than they do in white neighborhoods or at whites. The cumulative effect of differential enforcement patterns is that blacks receive greater sentences because they have more contacts with the police, and consequently have a greater likelihood of conviction and a longer criminal history.

Alfred L. Brophy, *Losing the (Understanding of the Importance of) Race: Evaluating the Significance of Race and the Utility of Reparations*, 80 TEX. L. REV. 911, 916-17 (2002).

11. I use "Black" and "African" interchangeably throughout this article to refer to persons who are of African descent. "Black" denotes racial and cultural identity rather than mere physical appearance and is, therefore, capitalized. See Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology, and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63, 64 n. 7 (1993). In order to emphasize the connectedness of all members of the African diaspora, I will use the term "African American" only when it is necessary to distinguish African people resident in the United States from African people elsewhere.

12. I discuss Michael Tonry's claim that the drug war's effects on the African American community were predictable and avoidable. *See infra* notes 228-43 and accompanying text. For other scholars who make similar claims, see powell & Hershenov, *supra* note 7, at 599 (arguing that law enforcement efforts to curb drug use are misguided and threaten the lives and health of African American citizens); RONALD K. SIEGEL, INTOXICATION: LIFE IN PURSUIT OF ARTIFICIAL PARADISE 279-95 (1989) (detailing ineffectiveness of several methods of drug prohibition and concluding that all wars on drugs are doomed to fail); JOHNS, *supra* note 7, at 1-31 (discussing social costs of the War on Drugs and concluding that "if the government were sincerely concerned with reducing, if not stopping, the use of dangerous drugs, it would have learned from past mistakes and pursued a different strategy.").

educational and social development of the incarcerated; and the encouragement of the spread of AIDS.[13]

In addition, the police strategy of concentrating aggressive street-based law enforcement measures on the low income communities where the vast majority of African Americans live has only made drug dealing a more lucrative, if not dangerous, choice for young Black men seeking economic gain.[14] Consequently, there is increased conflict, violence, and death as new street dealers seek to replace those arrested by the police.[15] In waging the War on Drugs, police have detained African American pedestrians and drivers without probable cause or reasonable suspicion, gained consent for searches through coercion, and conducted indiscriminate seizures of property and cash as proceeds of drug trafficking.[16] These types of tactics have led to harassment and the curtailment of African American privacy rights.[17] Moreover, aggressive law enforcement practices such as these can only contribute to the feelings of distrust that African Americans have toward police, courts, and the government generally.[18]

What made the War on Drugs become, for all practical purposes, a war on Blacks? In this article, I argue that the drug war's focus on the African American community was neither an accident nor a conspiracy. Rather, the drug war is simply a prominent example of the central role both race and the definition of crime play in the maintenance and legitimization of white supremacy. Race and crime, as two significant social phenomena, are linked in an endless cycle of oppression.[19] What is defined as crime determines who is oppressed in American society and simultaneously legitimates that oppression.

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13. Kenneth B. Nunn, *The "Darden Dilemma": Should African Americans Prosecute Crimes?*, 68 FORDHAM L. REV. 1473, 1481-82 (2000) [hereinafter Nunn, *Darden Dilemma*].

14. See JOHNS, *supra* note 7, at 63-64 (arguing that the criminalization of drugs drives up the profits that are to be gained from selling them and makes drug dealing an attractive alternative for the underemployed).

15. See Doug Bandow, *Drug Prohibition: Destroying America to Save It*, 27 CONN. L. REV. 613, 616 (1995) ("[D]rug prohibition, by creating a highly profitable criminal market, has funded individuals, gangs, and organizations that are far more dangerous and commit far more real crimes than they otherwise would.").

16. I discuss several of these police tactics in section I (A)(2)(c). *See infra* notes 141-76 and accompanying text. *See also*, powell & Hershenov, *supra* note 7, at 581-99 (describing drug profiling and other police tactics that disproportionately affect the African American community); Weatherspoon, *supra* note 2; STEVEN B. DUKE & ALBERT C. GROSS, AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS 160-71 (1993) (describing negative impact of drug war practices on African Americans).

17. See, powell & Hershenov, *supra* note 7, at 581 (arguing that a "war on drugs threatens property, due process, and privacy rights").

18. See Dorothy E. Roberts, *The Moral Exclusivity of the New Civil Society*, 75 CHI.-KENT L. REV. 555, 572 (2000) (reporting that research "consistently shows that Blacks quite understandably have higher levels of mistrust toward government institutions than most Americans").

19. *See infra* notes 366-470 for a discussion of race and crime as social phenomena.

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In this way, crime can mask racial oppression by allowing it to be represented as a legitimate response to wrongdoing. At the same time, labeling conduct that is associated with a particular racial group as criminal can create racial animosity toward that group.[20]

In addition to the role that the definition of crime plays in determining who is oppressed, crime also defines the limits and form of mainstream law-abiding society. The definition of crime, then, is eminently political. Consequently, its manipulation by politicians and citizens' groups alike is a well-known feature of American political life. For its part, race helps establish the boundaries of criminality and imbues it with a sense of political urgency. Race provides the contours of a discourse of threat that supplies the social phenomenon of crime with power and political significance.[21]

The symbiotic relationship between race and crime can be explained further by reference to a concept I call "the pool of surplus criminality."[22] This concept recognizes the cyclical connection of crime—to race—to culture. The concept of surplus criminality holds that African people constitute a pool of surplus, or inchoate criminals in the collective psyche of white America. In times of crisis, when there is a need to reinforce the solidarity of the white community, these inchoate African American criminals can be turned into fully perceived wrongdoers. The pool of surplus criminality concept asserts that African American criminals are needed as scapegoats for problems and threats perceived by the white community, and are thus essential to the constitution of American culture.[23]

In this article, I use the concept of the pool of surplus criminality to explain the drug war's focus on African Americans. I argue that faced with a perceived drug problem, white Americans naturally identified African people as the source of that threat and targeted them for police harassment and penal control. First, I point out the ways the drug war may be construed as a race war.[24] I review the drug war's disproportionate impact on the African American community,[25] evidence that policy makers anticipated the drug war would disproportionately harm the African American community,[26] and the historic connection between drugs and racial stereotyping.[27] Next, I explore the connection between race and crime at the theoretical level. I show how race and crime define and reinforce each other and the role they play in construction of American

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20. *See infra* notes 458-70 and accompanying text.

21. *See generally,* Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears-On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994).

22. *See infra* notes 471-502 and accompanying text.

23. *See infra* notes 471-502 and accompanying text.

24. *See infra* notes 31-73 and accompanying text.

25. *See infra* notes 74-215 and accompanying text.

26. *See infra* notes 216-43 and accompanying text.

27. *See infra* notes 244-88 and accompanying text.

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culture.[28] Finally, I describe the pool of surplus criminality.[29] I show how the pool of surplus criminality explains why the drug war targeted African American communities and why, consequently, African Americans will always be treated unfairly by the nation's criminal laws.[30]

I. DRUG WAR AS RACE WAR

The War on Drugs that has been a centerpiece of American foreign and domestic policy over the past two decades should not be viewed as a war against a particular collection of inanimate objects. The War on Drugs in this sense is but a convenient, yet inaccurate, metaphor. Instead the War on Drugs should be understood as a special case of what war has always been–the employment of force and violence against certain communities, and/or their institutions, in order to attain certain political objectives.[31] Race has played an important role over the years in identifying the communities that became the targets of the drug war, consequently exposing their cultural practices and institutions to military-style attack and police control.[32] Although the drug war has certainly sought to eradicate controlled substances and destroy the networks established for their distribution, this is only part of the story. As I shall explain, state efforts to control drugs are also a way for dominant groups to express racial power.[33] Before addressing the historical and culturally entrenched connection of drug control and race, I first want to explore the origins of the most recent round of American anti-drug policies–the so-called War on Drugs–and examine the impact of these policies on African American communities.

A. The War on Drugs

1. Origins of the Drug War

In October of 1982, President Ronald Reagan declared war on drugs.[34]

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28. *See infra* notes 365-470 and accompanying text.

29. *See infra* notes 471-502 and accompanying text.

30. *See infra* notes 503-19 and accompanying text.

31. Black's Law Dictionary defines war as "hostile contention by means of armed forces, carried on between nations, states or rulers, or between citizens in the same nation or state." BLACK'S LAW DICTIONARY, 1577 (7th ed. 1999). According to Clausewitz, war is simply "an act of force to compel our enemy to do our will." CARL VON CLAUSEWITZ, ON WAR 75 (M. Howard & P. Paret eds., 1976).

32. I discuss the racial aspect of the War on Drugs vis-à-vis African Americans in section I(A)(2); *See infra* notes 74-243 and accompanying text.

33. *See infra* notes 292-364 and accompanying text.

34. *See Reagan, In Radio Talk, Vows Drive Against Drugs,* N.Y. TIMES, Oct. 3, 1982, at 1:38.

Speaking to the nation in his weekly radio address, Reagan promised a "planned, concerted campaign" against all drugs–"hard, soft or otherwise."[35] Reagan described his campaign in military terms, using words like "battle," "war," and "surrender."[36] "[W]e're going to win the war on drugs," he vowed.[37] President Reagan increased anti-drug spending and increased the number of federal drug task forces.[38] Most importantly, the Reagan administration launched a public relations campaign designed to change the public perception of drug use and the threat posed by illegal drugs.[39] The centerpiece of this public relations campaign was a new rhetorical strategy that sought to demonize drugs and ostracize drug users.[40] Presidents Bush and Clinton continued the Reagan administration's anti-drug policies. President Bush established a national office of drug policy, appointed a drug "czar," increased anti-drug spending and intensified drug law enforcement efforts.[41] President Clinton, for his part, increased the anti-drug budget by twenty-five percent, proposed expanded drug testing rules and intensified efforts toward drug interdiction and prosecution.[42]

No matter who has occupied the executive branch, the United States has pursued the same overall policies throughout the drug war.[43] Anti-drug policies can be separated into two general camps, "supply-reduction" and "demand-reduction." Supply-reduction strategies seek to reduce the availability of drugs by limiting access to drug sources and increasing the risks of drug possession and distribution.[44] Demand-reduction strategies, on the other hand, seek to reduce demand for illegal drugs through drug use prevention and treatment.[45] The rhetoric of war helped shape the strategies that were used to combat the

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35. *Id.*

36. *Id.*

37. *Id.*

38. Leslie Maitland, *President Gives Plan to Combat Drug Networks*, N.Y. TIMES, Oct. 15, 1982, at A1.

39. *See* EVA BERTRAM ET AL., DRUG WAR POLITICS: THE PRICE OF DENIAL 112 (Univ. of Cal. Press 1996) (describing the president's anti-drug agenda as an "aggressive public-relations and legislative campaign").

40. Reagan described the drug threat as the consequence of a "dark, evil enemy within." *Id.* This type of language has been described as part of a "rhetorical, multifaceted public relations campaign designed to enhance the images of specific political figures and to absolve the federal government of responsibility for resolving problems involved with drug addictions and trade . . . ." WILLIAM N. ELWOOD, RHETORIC IN THE WAR ON DRUGS: THE TRIUMPHS AND TRAGEDIES OF PUBLIC RELATIONS 3 (1994). Nancy Reagan's "Just Say No" campaign was perhaps the best-known part of the Reagan Administration's anti-drug rhetoric. *See infra* note 360 and accompanying text.

41. Eric Blumenson and Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 36 n.4 (1998).

42. *Id.*

43. *See id.*

44. MICHAEL TONRY, MALIGN NEGLECT–RACE, CRIME, AND PUNISHMENT IN AMERICA 117 (1995).

45. *Id.*

perceived drug threat.[46] The Reagan administration embraced a supply-reduction strategy focusing on interdiction, seizure and criminal prosecution, rather than a demand-reduction strategy that focused on public education and drug treatment designed to reduce demand for illegal drugs.[47] The supply-reduction strategy adopted by the Reagan administration fits a war model of the drug problem. Viewing the drug problem through a war model implies that the perceived drug problem can be attacked through aggressive law enforcement measures designed to seek out and destroy contraband and interrupt distribution networks. These kinds of measures are more analogous to the military tactics one would expect to see in warfare than are demand-reduction measures, which are primarily social service based.

According to Michael Tonry, the drug war was "fought largely from partisan political motives to show that the Bush and Reagan administrations were concerned about public safety, crime prevention, and the needs of victims."[48] While the drug war may have been initiated out of political motives, this assessment does not tell the entire tale. To understand the origins of the War on Drugs in its entirety, we must know what was going on in the cultural landscape that made it politically advantageous to fight a war on drugs.

When Reagan declared war on drugs, a broad cultural change was underway in the United States.[49] The country was moving from a period of relative liberalism that included skepticism toward government and authority and an emphasis on personal freedoms, to a period of relative conservatism that included respect for government and authority and an emphasis on personal responsibility.[50] Reagan's very election to the presidency was in large part a manifestation of this shift in attitudes.[51] Reagan was the embodiment of a mainstream reaction to the counterculture of the 60s and 70s.[52] Part of this sea

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46. "War" is a powerful and evocative symbol. Elwood describes the term as a "condensation symbol," that is, a term that condenses complex and expansive categories of connected meaning into an emotionally charged emblem. See ELWOOD, *supra* note 40, at 4. *See also* Barbara Ann Stolz, *Congress and Capital Punishment: An Exercise in Symbolic Politics*, 5 LAW & POL'Y REV. 157, 161 (1983) (describing condensation symbols as "highly condensed forms of substitutive behavior, requiring no check with reality"). War, as a condensation symbol, "connotes heroes and enemies, battles and battlefields, and war-sized allocations of resources to guarantee ultimate victory over the enemy." ELWOOD, *supra* note 40, at 5.

47. *See* TONRY, *supra* note 44, at 83, 121.

48. TONRY, *supra* note 44, at 82.

49. *See* BERTRAM ET AL., *supra* note 39, at 110-12 (describing how the social and political climate and patterns of drug use were changing as Reagan took office).

50. *See id.* at 110-11 ("[Reagan's] drug policy agenda was shaped by a sizable and vocal national constituency that had grown impatient with the permissive attitude toward drug abuse and other counter cultural activities of the previous decade.").

51. *See* JOEL KRIEGER, REAGAN, THATCHER AND THE POLITICS OF DECLINE 134-35 (1986) (crediting Reagan's electoral success to a movement of socially conservative middle-class Americans).

52. *See* BERTRAM ET AL., *supra* note 39, at 111 ("At the center of . . . [Reagan's] domestic agenda was a set of social policies, articulated most powerfully by the so-called moral majority,

change in cultural attitudes was a different perspective toward drugs.[53]

In 1982, when the drug war began, the recreational use of illegal drugs was in decline.[54] Tonry points out that in 1982, surveys conducted by the National Institute on Drug Abuse showed significant drops in drug usage over long periods for a wide range of age groups.[55] This decline impacted the use of both legal and illegal substances. For example, the percentages of respondents 18 to 25 years of age reporting marijuana use during the preceding year dropped by approximately 15% between 1979 and 1982, and continued to decline sharply throughout the decade of the 80s.[56] Reported use of cocaine by the same age group also dropped by approximately 15% between 1979 and 1982, and continued to decline throughout the decade.[57] Finally, 18 to 25 year olds who reported using alcohol during the preceding year rose only slightly from 1979 to 1982, but also declined sharply following a peak in 1985.[58] According to Tonry, these statistics "signal a broadly based and widely shared change in American attitudes toward the ingestion of dangerous or unhealthy substances that can have little to do with the deterrent effects of law enforcement strategies or criminal sanctions."[59] Consequently, Reagan's declaration of war tapped into a growing public sentiment against illegal drug use.[60] Many citizens viewed drugs as a menace and many of these same citizens were readily supportive of Reagan's proposals to address the drug problem.[61]

This widespread public support explains the political value of the War on Drugs. The cultural environment created virtually unanimous bi-partisan support for an extensive and costly intervention into the world of drugs.[62] Both Republicans and Democrats sought to exploit the public sentiment against

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which embodied a defense of traditional family values, conservative Christian morality, and patriotism.").

53. TONRY, *supra* note 44, at 91.

54. *Id.* at 83.

55. *See id.* at 84-90 (reporting various surveys showing decline in usage of alcohol, marijuana, cigarettes, cocaine, and heroin).

56. *Id.* at 89.

57. *Id.*

58. *Id.* at 90.

59. TONRY, *supra* note 44, at 91.

60. *See* WITSOTSKY, *supra* note 1, at 4 (asserting there was a "growing social consensus that illegal drug use had gotten out of hand").

61. ELWOOD, *supra* note 40, at 21. According to Elwood: "The War on Drugs is one initiative that citizens accepted. It looked good in headlines, and it positively influenced public opinion ratings of Ronald and Nancy Reagan and of George Bush." *Id.*

62. Morgan Cloud writes that: "Historical and political constraints have predisposed Congress to emphasize programs consistent with the traditional law enforcement model of drug control. These forces have led Congress to support the well-publicized, well-entrenched, and politically popular law enforcement apparatus that has flourished in the 'war on drugs.'" A. Morgan Cloud, III, *Cocaine, Demand, and Addiction: A Study of the Possible Convergence of Rational Theory and National Policy*, 42 VAND. L. REV. 725, 801 (1989).

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drugs.[63] The drug war also fostered a remarkable level of cooperation between the executive and legislative branches.[64] In response to Reagan administration proposals, Congress quickly moved to pass and fund tough drug enforcement initiatives.[65] Fueled by political considerations, the drug war took on a life of its own. For each anti-drug measure that passed, it became necessary to further escalate the war so that no one, Democrat or Republican, executive or legislative branch, could be called soft on this critical issue.[66]

In addition to shaping the methods used to address the drug problem, the rhetoric of war also shaped the impact of those methods, for a war requires not only military strategies, but an enemy as well. For the constituency the Reagan Administration was trying to reach, it was easy to construct African Americans, Hispanics, and other people of color as the enemy in the War on Drugs.[67] These are the groups that the majority of white Americans have always viewed as the sources of vice and crime.[68] Reagan's anti-drug rhetoric was skillfully designed

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63. *See* Nkechi Taifa, *Cracked Justice: A Critical Examination of Cocaine Sentencing*, 27 UWLA L. REV. 109, 120-21 (describing how both Republicans and Democrats sought to rush through legislation enacting stiff cocaine penalties for political advantage).

64. *See, e.g.*, WITSOTSKY, *supra* note 1, at 4 (claiming Reagan's anti-drug initiatives "drew energy from a broad base of political support").

65. According to Witsotsky:

> Congress itself soon became a beehive of activity in support of the War on Drugs. First, the Administration persuaded Congress to enact all of its "legislative offensive" toughening the laws governing bail, sentencing, criminal forfeiture, and the exclusionary rule. Second, Congress was called upon to finance the war, and it responded in the first year of the war with a special appropriation that gave the Administration 100 percent of what it had requested in addition to the regular fiscal 1983 drug enforcement budget.

Id.

66. *See* Ross C. "Rocky" Anderson, *We are all Casualties of Friendly Fire in the War on Drugs*, 13 UTAH B. J. 10-11 (Nov. 2000) (arguing that "our nation's leaders have spent billions of taxpayer dollars on a strategy focused on the supply side, rather than on the demand side, simply because Republicans and Democrats alike are terrified of appearing to be soft on crime."); Peter Reuter, *Truce in Needle Park; Time to End the Drug War*, WASH. POST, Feb. 28, 1993, at C01.

67. Both Reagan and Bush sought to exploit latent racist fears of the white majority. As Elwood states:

> Voters in the Reagan-Bush coalition typically are concerned about crime, specifically urban crime; and as Edsall and Edsall discuss, both officeholders were skilled in using rhetoric that blamed social ills on minorities without communicating a sense of racism to white constituents. Hence, presidential drug war declarations make oblique references to housing projects and to urban areas and the people who live there.

ELWOOD, *supra* note 40, at 11.

68. Gunnar Myrdal wrote in his classic study of American race relations, *An American Dilemma* (first published in 1944), that "whites believe the Negro to be innately addicted to crime." GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 655 (20th anniv. ed. 1962). More recent public opinion data discloses that the connection of African Americans to criminal behavior endures in white culture. *See* Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the*

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to tap into deeply held cultural attitudes about people of color and their links to drug use and other illicit behavior.[69] According to mass communications scholar William Elwood, Reagan's rhetorical declaration of a war on drugs had a deliberate political effect. In Elwood's view, "Such rhetoric allows presidents to appear as strong leaders who are tough on crime and concerned about domestic issues and is strategically ambiguous to portray urban minorities as responsible for problems related to the drug war and for resolving such problems."[70] Thus, the origins of the drug war can be traced to shifting public attitudes toward drugs in the early 1980s. President Reagan sought to exploit this change in attitude through a public relations campaign that promised to wage "war on drugs."[71] As the metaphor of war might suggest, the War on Drugs required both weapons and enemies. A punitive law enforcement policy of prohibition and interdiction provided the weapons and, while the professed enemies of the War on Drugs were drug cartels in drug source countries,[72] those most affected were people of color in inner city neighborhoods, chiefly African Americans and Hispanics.[73]

2. How the Drug War Targeted Black Communities

By almost any measure, the drug war's impact on African American communities has been devastating. Millions of African Americans have been imprisoned, many have been unfairly treated by the criminal justice system, the rights of both legitimate suspects and average citizens have been violated and the quality of life of many millions more has been adversely affected. These effects are the consequences of deliberate decisions; first, to fight a "war" on drugs, and second, to fight that war against low-level street dealers in communities populated by people of color. In this section, I consider the impact of the War on Drugs specifically on the African American community.

a. Mass Incarceration and Disproportionate Arrests

As a result of the War on Drugs, African American communities suffer

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Public Defender and a Proposal for Reform, 32 AM. CRIM. L. REV. 743, 770 n.142 (1995) (citing survey) [hereinafter Nunn, *Trial as Text*].

69. See ELWOOD, *supra* note 40, at 11 (noting that "presidential drug war declarations make oblique references to housing projects and to urban areas and the people who live there" while not mentioning drug problems among white affluent people).

70. *Id.*

71. *See supra* note 34 and accompanying text.

72. See CarrieLyn Donigan Guymon, *International Legal Mechanisms for Combating Transnational Organized Crime: The Need For a Multinational Convention*, 18 BERKELEY J. INT'L L. 53, 59 (2000) (describing Columbian cartels as "the main enemy in the United States' war on drugs").

73. *See infra* notes 74-215.

from a phenomenon I call "mass incarceration."[74] Not only are large numbers of African Americans incarcerated, African Americans are incarcerated at percentages that exceed any legitimate law enforcement interest and which negatively impact the African American community.[75] While African Americans only comprise twelve percent of the U.S. population,[76] they are forty-six percent of those incarcerated in state and federal prisons.[77] At the end of 1999, over half a million African American men and women were held in state and federal prisons.[78] A disparity this great appears inexcusable on its face. However, the inequity is even worse when one considers the *rate* of incarceration and the *proportion* of the African American population that is incarcerated.

The rate of incarceration measures the likelihood that any African American male will be sentenced to prison. In 2000, the rate of incarceration for African American males nationwide was 3457 per 100,000. In comparison, the rate of incarceration for white males was 449 per 100,000.[79] This means, on average, African American males were 7.7 times more likely to be incarcerated than white males.[80] For some age groups, the racial disparities are even worse. For young men between the ages of 25 and 29, African Americans are 8.7 times more likely to be incarcerated than whites.[81] For 18 and 19 year olds, African American men are 8.8 times more likely to be incarcerated than whites.[82]

Another way to measure the extent of mass incarceration is to examine the proportion of the African American population that is serving time in prison. In some jurisdictions, as many as one third of the adult African American male population may be incarcerated at any given time.[83] Nationwide, 1.6 % of the

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74. I define mass incarceration as the imprisonment of a percentage of the population greater than that necessary to accomplish valid penal goals. Mass incarceration may be used for purposes of genocide, group oppression or repressive social control. See Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005, 1007-8 (2001) (arguing that "the government can use mass incarceration as a tool of state repression").

75. See Paul Butler, *Starr is to Clinton as Regular Prosecutors are to Blacks*, 40 B.C. L. REV. 705, 707 (1999) (arguing that the criminal justice system is unjust because disproportionate numbers of African Americans are incarcerated for crimes they do not disproportionately commit).

76. African Americans comprise 34,658,190 out of 281,421,906 U.S. residents. U.S. CENSUS BUREAU, RACE-UNIVERSE: TOTAL POPULATION, CENSUS 2000, tbl.P3, *available at* http://factfinder.census.gov.

77. ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2000, at 11 (2001) [HEREINAFTER PRISONERS IN 2000].

78. *Id.* at tbl.16.

79. In 2000, the Black rate of incarceration was 3457 per 100,000, or 7.69 times the white male rate of 449 per 100,000. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. If we broaden the category to include persons under any kind of criminal justice

African American population is in prison.[84] However, nearly 10% of African American males ages 25-29 are in prison.[85] Nearly 8% of African American males between the ages of 18 and 39 are in prison.[86]

The mass incarceration of African Americans is a direct consequence of the War on Drugs. As one commentator states, "Drug arrests are a principal reason that the proportions of [B]lacks in prison and more generally under criminal justice system control have risen rapidly in recent years."[87] Since the declaration of the War on Drugs in 1982, prison populations have more than tripled.[88] The rapid growth in prison populations is particularly clear in federal institutions. Although the overall federal prison population was only 24,000 in 1980, by 1996, it had reached 106,000.[89] The federal prison population continued to grow in the 1990s. In 2000, the federal prison population exceeded 145,000.[90] Fifty-seven percent of the federal prisoners in 2000 were incarcerated for drug offenses.[91] In 1982 there were approximately 400,000 incarcerated persons.[92] By 1992, that number had more than doubled to 850,000.[93] In 2000, there were over 1.3 million persons in prison.[94] From 1979 to 1989, the percentage of African Americans arrested for drug offenses almost

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supervision (probation, jail, prison or parole), an even starker picture appears. One study has found that almost one quarter of African American males between the ages of 20 and 29 nationwide are incarcerated, on probation, or on parole. MARC MAUER & TRACY HULING, THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 1 (Oct. 1995). In some urban areas, almost 60% of young Black males are under criminal justice supervision. MILLER, WASHINGTON, D.C., *supra* note 4 (reporting 42% of African American males in ages 18-35 in D.C. are involved in the criminal justice system); MILLER, BALTIMORE, *supra* note 4 (finding 56% of African American males ages 18-35 in Baltimore are incarcerated, on probation, or on parole).

84. US CENSUS BUREAU, *supra* note 76; PRISONERS IN 2000, *supra* note 77, at 11 tbl.16.

85. The actual figure is 9.7%. PRISONERS IN 2000, *supra* note 77, at 11.

86. U.S. CENSUS BUREAU, Table P12B, Sex by Age (Black or African American Alone), Census 2000 Summary File 1 (SF1), *available at* http://factfinder.census.gov/servlet/DTTable?_ts=298; PRISONERS IN 2000, *supra* note 77, at 11 tbl.15.

87. TONRY, *supra* note 44, at 110. Indeed, statistics from the Department of Justice disclose that the probability of receiving a prison sentence after being arrested for a drug offense increased by 447% between 1980 and 1992. ALLEN J. BECK & DARRELL K. GILLIARD, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 1994, at 13 (Aug. 1995).

88. BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS 1980-2000, *available at* http://www.ojp.usdoj.gov/bjs/[glance/tables/corr2tab.htm [hereinafter CORRECTIONAL POPULATIONS].

89. Doris Marie Provine, *Too Many Black Men: The Sentencing Judge's Dilemma*, 23 LAW SOC. INQUIRY 823, 835 (1998).

90. PRISONERS IN 2000, *supra* note 77, at 1.

91. *Id.* at 13.

92. *See* CORRECTIONAL POPULATIONS, *supra*, note 88.

93. *Id.*

94. *Id.*

doubled from 22% to 42% of the total.[95] During that same period, the total number of African American arrests for drug abuse violations skyrocketed from 112,748 to 452,574, an increase of over 300 %.[96]

Jerome Miller analyzed arrest statistics from several American cities to determine the impact of the War on Drugs on policing. [97] He found striking racial disparities in how drug arrests were made. In many jurisdictions, African American men account for over eighty percent of total drug arrests.[98] In Baltimore, for example, African American men were eighty-six percent of those arrested for drug offenses in 1991.[99] The fact that African Americans are incarcerated in such large percentages and are arrested and incarcerated at such disproportionate rates is shocking. It is obscene in the absence of a strong showing that African Americans are responsible for a comparable percentage of crime in the United States.[100]

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95. TONRY, *supra* note 44, at 109 tbl.3-3.

96. *Id.*

97. JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM 82 (1996) [hereinafter MILLER, SEARCH AND DESTROY].

98. *Id.*

99. *Id.* Miller's analysis revealed gross disparities in many other cities:

> In Columbus, Ohio, where African-American males made up less than 11 percent of the population, they comprised over 90 percent of the drug arrests and were being arrested at 18 times the rate of whites. In Jacksonville, Florida, 87 percent of those arrested on drug charges were African-American males, even though they comprised only 12 percent of that county's population. In Minneapolis. . . though [B]lack men only made up only about 7 percent of the population, they were being arrested at a ratio of approximately 20:1 to white males. These patterns were repeated across the nation.

Id.

100. Some commentators have indeed suggested the racial disparities that exist in the criminal justice system are due to racial differences in rates of offending, or in other words, that African Americans commit more crimes. *See, e.g.*, WILLIAM WILBANKS, THE MYTH OF A RACIST CRIMINAL JUSTICE SYSTEM vii (1987) (claiming that evidence of racism in the criminal justice system is weak and contradictory). But these claims have been vigorously contested by criminologists who point out problems with the assumptions, methodology, and data being offered to prove differential offending. *See, e.g.*, CORAMAE RICHEY MANN, UNEQUAL JUSTICE: A QUESTION OF COLOR 32-35 (1993) (attacking statistics purporting to show African Americans commit more crimes as inflated due to: (1) over-reporting of crimes committed by African Americans; (2) the over-policing of Black communities; (3) counting multiple charges against a single individual as multiple arrests; and (4) undercounting the Black population so the per capita rate of crime appears to be higher); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 149-51 (1999) (tracing disagreement over whether the criminal justice system is racially discriminatory to three problems: (1) a lack of consensus over whether Black and non-Black offenders are similarly situated or not; (2) disagreement over relevant control factors (3) the possibility that studies of disparities at one stage of the process may miss discrimination that occurred at earlier stages). *See also* SAMUEL WALKER ET AL., THE COLOR OF JUSTICE: RACE, ETHNICITY AND CRIME IN AMERICA 99-100 (2000) (acknowledging controversy over the cause of racial disparities and discussing studies contesting the conclusion that more African Americans are arrested due to their greater involvement in crime); Paul Knepper, *The Alchemy of Race and Crime Research*, *in* THE SYSTEM IN BLACK AND WHITE 15-27 (Michael W. Markowitz & Delores D. Jones-Brown eds., 2000) (claiming the question of Black extracriminality is unanswerable because "there

The claim that African Americans violate the drug laws at a greater rate, and that this justifies the great disparities in rates of arrest and incarceration, seems unlikely. Most drug arrests are made for the crime of possession.[101] Possession is a crime that every drug user must commit and, in the United States, most drug users are white.[102] The U.S. Public Health Service Substance Abuse and Mental Health Services Administration reported in 1992 that 76% of drug users in the United States were white, 14% were African American, and 8% were Hispanic.[103] Cocaine users were estimated to be 66% white, 17.6% Black, and 15.9% Hispanic.[104] Rather than demonstrating patterns of use that approach arrest disparities, African Americans "are *less* likely to . . . [use] drugs than whites are, for all major drugs of abuse except heroin."[105]

There also seems to be insufficient evidence to conclude that African Americans are more likely to deal drugs, and thus more likely to be arrested. Most drug users purchase drugs from persons of the same race and socio-economic background.[106] So, the large numbers of white users would suggest an equally large number of white dealers, as well. On the other hand, there are logical reasons to conclude that the number of African American dealers may be disproportionately large.[107] Still, it is unlikely that drug use and offense are so out of balance that Blacks constitute the vast majority of drug offenders given that they are such a small minority of drug users.

Disproportionate enforcement is a more likely cause of racial disparities in the criminal justice system than is disproportionate offending. Differences in the way that Black dealers and white dealers market drugs may encourage law enforcement officers to concentrate efforts against African Americans. Michael Tonry argues that it is easier for police to make arrests in "socially disorganized

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is no statistical alchemy in which the government's crime statistics can be made to yield meaningful, social scientific information about the criminality of races or race discrimination"); Nunn, *Darden Dilemma, supra* note 13, at 1487 (citing sources demonstrating that the claim of disproportionate offending by Blacks is overstated).

101. See FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS 2000, at 216 tbl.4.1 (2000) (showing possession crimes constitute 81% of all drug arrests).

102. The United States Sentencing Commission reported in 1995 that of the persons reporting cocaine use within the year, 75% were white, 15% were Black and 10% Hispanic. UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 34 (1995).

103. *Id.*

104. MILLER, SEARCH AND DESTROY, *supra* note 97, at 81.

105. TONRY, *supra* note 44, at 108 (emphasis added).

106. K. JACK RILEY, NATIONAL INSTITUTE OF JUSTICE, CRACK POWDER COCAINE AND HEROIN: DRUG PURCHASE AND USE PATTERNS IN SIX U.S. CITIES 1 (Dec. 1997).

107. As one commentator has remarked: "Drug dealing may or may not be a disproportionately minority enterprise. Poverty, lack of education, and racial discrimination do tend to channel racial minorities into the drug trade for lack of other opportunities. And among users, minorities may be more likely to turn to dealing to finance their habits because they lack other means of earning a living." Provine, *supra* note 89, at 836.

neighborhoods" because drug dealing is more likely to occur on the streets[108] and transient drug buyers are less likely to draw attention to themselves.[109]

In addition, disproportionate arrests may simply be a function of discriminatory exercise of discretion by police officers.[110] Police officers may decide to arrest African Americans under circumstances when they would not arrest white suspects, and they may be in a position to do so more frequently than with whites because they are more likely to stop and detain African Americans.[111]

b. Crack Cocaine and Sentencing Disparities

Perhaps no aspect of the drug war has contributed to the rapid increase of African American prisoners in federal prisons more than the federal cocaine sentencing scheme. Federal sentencing rules for the possession and sale of cocaine distinguish between cocaine in powder form and cocaine prepared as crack.[112] A person sentenced for possession with intent to distribute a given amount of crack cocaine receives the same sentence as someone who possessed one hundred times as much powder cocaine.[113] This difference in sentencing exists notwithstanding the fact that cocaine is cocaine, and there are no physiological differences in effect between the powder and the crack form of the drug.[114]

The difference in crack/powder cocaine sentencing is significant because

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108. TONRY, *supra* note 44, at 105-06. Alfred Blumstein also makes this point. As Blumstein describes it: "Markets operated by blacks tend much more often to be outdoors and vulnerable to police action, while markets operated by whites tend much more often to be clandestine and indoors, and thereby less visible and more protected from police surveillance and arrest." Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 753 (1993).

109. TONRY, *supra* note 44, at 106. Tonry explains:

> [I]t is easier for undercover narcotic agents to penetrate networks of friends and acquaintances in poor urban minority neighborhoods than in more stable and closely knit working-class and middle-class neighborhoods. The stranger buying drugs on the urban street corner or in an alley or overcoming local suspicions by hanging around for a few days and then buying drugs, is commonplace.

Id. See also William J. Stunz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795 (1998) (suggesting police focus on street sales in lower income areas because it is cheaper to do so).

110. *See infra* notes 140-76 and accompanying text.

111. *See* WALKER ET AL., *supra* note 100, at 100 (discussing studies showing African Americans more likely to be arrested on less stringent evidentiary criteria than whites); Angela J. Davis, *Benign Neglect of Racism in the Criminal Justice System*, 94 MICH. L. REV. 1660, 1660-61 (1996) (describing how three white adults found smoking crack cocaine in a car with a baby were released by police without arrest) [hereinafter Davis, *Benign Neglect*].

112. *See* 21 U.S.C. § 841(b)(1)(A) (1994) (describing penalties for possessing cocaine with intent to distribute).

113. *Id.*

114. *See* Taifa, *supra* note 63, at 129-37.

African Americans are more likely to use crack, while white drug users are more likely to use powder cocaine.[115] Since the passage of the Anti-Drug Abuse Act of 1986,[116] which first enacted the crack/powder sentencing disparity, virtually all federal cocaine prosecutions have been against African Americans charged with the possession or sale of crack cocaine.[117] Although, the disproportionate racial impact of the Anti-Drug Abuse Act of 1986 has been noted by the U.S. Sentencing Commission,[118] neither Congress nor the executive branch has moved to rectify the disparities in the law.[119]

The disparity in cocaine sentencing is obvious and may be traced to the language of the underlying statute.[120] Even in the absence of such a manifest cause of discrimination, African Americans have traditionally received more severe sentences than similarly situated whites.[121] Although it is by no means conclusive,[122] there is substantial evidence that racial discrimination within the criminal justice system is the cause of the sentencing disparities that exist between Blacks and whites.[123] Numerous surveys have found racial disparities

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115. *Id.* at 121-28.

116. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended at 21 U.S.C. § 841).

117. Justice Stevens noted in his dissenting opinion in *U.S. v. Armstrong*, that while whites represented 65% of crack cocaine users, they made up only 4% of the federal defendants charged with trafficking in crack. U.S. v. Armstrong, 517 U.S. 456, 479-80 (1996) (Stevens, J., dissenting). Eighty-eight percent of crack distribution prosecutions were directed against African Americans. *Id.* Between 1996 and 2000, the percentage of white crack distribution defendants averaged 5.6% while the percentage of Black crack distribution defendants averaged 84.8%. *See* U.S. SENTENCING COMMISSION, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 47 (1997) and Sourcebooks for the years 1997-2000.

118. *See* U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 8 (1997) (noting "sentences appear to be harsher and more severe for racial minorities as a result of this law").

119. *See* Taifa, *supra* note 63, at 111-17 (describing how Congress failed to act on the Sentencing Commission's recommendation that sentencing for crack and powder cocaine be equalized and how President Clinton failed to veto congressional legislation re-enacting the 100 to 1 crack/powder differential).

120. *See id.*, at 122, quoting DOUGLAS C. MCDONALD & KENNETH E. CARLSON, U.S. DEP'T OF JUSTICE, SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? 2 (1993) ("[I]f legislation and guidelines were changed so that crack and powdered cocaine traffickers were sentenced identically for the same weight of cocaine, this study's analysis suggests that the Black/White difference in sentences for cocaine trafficking would not only evaporate, but it would slightly reverse.").

121. Researchers have found racial disparities in criminal sentencing since the first studies were conducted in the 1930's. *See* WALKER ET AL., *supra* note 100, at 186 ("Studies conducted from the 1930s through the 1960s often concluded that racial disparities in sentencing were due to racial discrimination").

122. See COLE, *supra* note 100, at 149-50 (claiming results are mixed).

123. *See generally, Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1525-29 (1988) (describing studies showing race discrimination in criminal sentencing); RICHEY MANN, *supra* note 100, at 191-200 (describing sentencing studies and summarizing findings).

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in the sentencing process and attributed those disparities to racial discrimination. For example, a study by Miethe and Moore in 1984 found that African Americans received longer sentences than whites and that African Americans were less likely to benefit from lower sentences as a result of plea-bargaining.[124] Likewise, Welch, Spohn, and Gruhl reviewed convictions and sentences in six cities nationwide in 1985.[125] They found that African Americans were substantially more likely to be sentenced to prison than whites and that the disparity in incarceration rates is due to "discrimination in the sentencing process itself."[126] In 1983, Baldus, Pulaski, and Woodworth subjected death sentences in Georgia to painstaking review.[127] Using multiple regression analysis to control for over 230 nonracial factors, the researchers found that the race of the victim was the determining factor in whether a defendant received the death penalty.[128] They found defendants who killed white victims were over four times more likely to receive a death sentence than defendants whose victims were not white.[129] In addition, African American defendants who killed whites were eleven times more likely to receive a death sentence than white defendants who killed Blacks.[130]

Racial discrimination in sentencing can only be worsened by efforts to make sentences tougher and harsher.[131] The War on Drugs has spawned a panoply of "get tough on crime" measures such as "three strikes and you're

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124. See Terence D. Miethe & Charles A. Moore, *Racial Difference in Criminal Court Sentencing Decisions: The Consequences of Model Selection on Conclusions about Differential Treatment*, 27 SOC. Q. 217 (1986).

125. Susan Welch et al., *Convicting and Sentencing: Differences among Black, Hispanic and White Males in Six Localities*, 2 JUSTICE QTR. 67 (1985).

126. *Id.* at 75.

127. *See* David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983).

128. *See* Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1397 (1988). The Baldus team marshaled one of the most compelling collections of sentencing data ever compiled by social scientists. *See id.* at 1396 (calling the Baldus study "the most comprehensive analysis to date of racial influences in capital sentencing in a single state"). Although, the Supreme Court accepted the validity of the Baldus study's data, the Court nevertheless concluded that statistical evidence alone was not sufficient to establish that racial discrimination had occurred in the Georgia capital sentencing process. McCleskey v. Kemp, 481 U.S. 279, 297 (1987). For a vigorous critique of the McCleskey holding, see Kennedy, *supra* at 1408-21 (arguing McCleskey decision is ill-reasoned and doctrinally unsound).

129. Kennedy, *supra* note 128, at 1398.

130. *McCleskey*, 481 U.S. at 286.

131. MARC MAUER, RACE TO INCARCERATE 136 (1999). Mauer pointed out that terrible consequences were likely to come from harsher drug laws given pre-existing racial disparities: "With African Americans already representing 40 percent of the prison population in 1970, a doubling of the prison population was likely to have a substantial impact on the absolute number of imprisoned minorities, absent some dramatic changes in crime rates or criminal justice processing decisions." *Id.*

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out"[132] and habitual offender provisions,[133] as well as enhancements for possession of weapons[134] and for selling drugs near schools or public housing.[135] The cumulative effect of these sentencing policies has been to increase the proportion of convicted drug dealers sentenced to prison and increase the length of their sentences.[136] A substantial increase in length of sentence for drug offenders is precisely what Marc Mauer found when he analyzed the impact of mandatory sentences in the federal court system.[137] Mauer observed:

> Drug offenders released from prison in 1990, many of whom had not been sentenced under mandatory provisions, had served an average of 30 months in prison. But offenders sentenced to prison in 1990–most of whom were subject to mandatory penalties–were expected to serve more than twice that term, or an average of 66 months.[138]

Guideline sentencing has also contributed to the increase in African Americans incarcerated as a result of the drug war. The Federal Sentencing Guidelines, by depriving judges of discretion, have resulted in many more defendants serving substantially longer sentences.[139] This combined with the fact that African Americans in general usually get longer sentences than

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132. *See e.g.*, CAL. PENAL CODE §§ 667, 11170.12 (1996) (California Career Criminal Punishment Act); *See generally* Andrade v. California, 270 F.3d 743, 762-66 (2001), *cert. granted sub nom.* Lockyer v. Andrade, 122 S.Ct. 1434 (2002) (declaring California's three strike law unconstitutional as applied and discussing three strikes laws of other states); FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2000); Thomas B. Marvell & Carlisle E. Moody, *The Lethal Effects of Three-Strikes Laws*, 30 J. LEGAL STUD. 89 (2001).

133. See *Andrade*, 270 F.3d at 762 (noting many states have laws that punish recidivists more severely than first time offenders).

134. *See, e.g.*, 18 U.S.C. § 924 (c) (requiring at least 5 years consecutive sentence if defendant "uses or carries" a fireman "during and in relation to" any crime of violence). *See generally* Paul J. Hofer, *Federal Sentencing for Violent and Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects for Improvement*, 37 AM. CRIM. L. REV. 41 (2000).

135. *See, e.g.*, 705 ILL. COMP. STAT. ANN. 405/5-4(6)(a), (7)(a) (West 1992 & Supp. 1998) (providing enhanced sentences for selling drugs within 1000 feet of school). *See generally* Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 70-71 (1993). Other common sentencing enhancement provisions include enhancements for repeat felony offenders, offenses committed against vulnerable victims, possession of specified amounts of prohibited drugs, and offenses committed while released from custody. *See id.* at 70-71, notes 38, 40, and 41.

136. MAUER, *supra* note 131, at 151.

137. *Id.*

138. *Id.* at 151-52.

139. UNITED STATES DEPARTMENT OF JUSTICE, DOUGLAS C. MCDONALD & KENNETH E. CARLSON, SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? 1 (1993); Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161 (1991).

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comparably situated whites,[140] means that drug war sentencing has been particularly unkind to African Americans.

c. Driving While Black, Drug Sweeps and the Overpolicing of the African American Community

The gross disparities that exist in the criminal justice system may be traced to the differential treatment that African Americans and other people of color receive from the police.[141] A growing body of evidence suggests that Blacks are investigated and detained by the police more frequently than are other persons in the community.[142] This unwarranted attention from the police is a result of the longstanding racism that pervades American culture. Like all who are socialized in American culture, police officers are more suspicious of African Americans and believe they are more likely to engage in crime.[143] Consequently, police concentrate their efforts in areas frequented by African Americans and detain African Americans at a greater rate.[144]

In part, this concentration of effort may be designed to uncover specific illegal activity. Certain police activity, such as undercover drug buys, may be more frequent in African American communities than in other areas of a city.[145] As a consequence, a disproportionate number of African American drug dealers may be arrested, leading to racial disparities in drug prosecutions and sentencing.[146] To the extent that the concentration of investigation and arrests in African American communities exceeds that in white communities, without reason to believe that African Americans offend at a greater rate than whites, then such practices amount to unjustified "over-policing."[147] Over-policing may also occur when the police concentrate their efforts not on illegal activity, but on *legitimate* citizen behavior with the hope that in the process of investigation some evidence of crime may be uncovered.[148] This kind of over-policing is what occurs when police conduct drug sweeps in Black neighborhoods and detain African American motorists for "driving while

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140. *See supra* notes 125-28 and accompanying text.

141. *See* Nunn, *Darden Dilemma, supra* note 13, at 1489-91.

142. *Id.* at 1489-90.

143. *See supra* notes 8-9, see also WALKER ET AL., *supra* note 100, at 104 (describing how police officers use race as a "cue" to determine whom to stop).

144. WALKER ET AL., *supra* note 100, at 101 (reporting that racial and ethnic minorities are disproportionately stopped and questioned by the police).

145. *See supra*, notes 109-11 and accompanying text.

146. *See id.*

147. *Cf.* Jeremiah E. Goulka, *A New Stategy for Human Rights Protection: Learning from Narcotics Trafficking in Mexico*, 9 CARDOZO J. INT'L. & COMP. L. 231, 235 (2001)(describing "overpolicing" as an "overzealous response" to crime which ignores the rights of suspects and the accused).

148. *Cf. id.*

Black."[149]

"Driving while Black" refers to the police practice of using the traffic laws to routinely stop and detain Black motorists for the investigation of crime in the absence of probable cause or reasonable suspicion for the stop.[150] There is reason to believe that this is a widespread practice performed by police officers throughout the nation.[151] Many prominent African Americans have reported being victimized by these stops.[152] Although they have unfortunately become routine, "[s]uch stops and detentions are by their very nature invasive and intrusive."[153]

The intrusive and invasive practice of detaining African American motorists without cause has occurred in other contexts as well.[154] "Driving while Black" is essentially a type of racial profiling.[155] People have claimed to be the victims of racial profiling while walking on the street,[156] shopping or strolling through department stores and malls,[157] seeking entry into buildings,[158] traveling through airports,[159] or passing through immigration checkpoints.[160] In all of these situations, African Americans are subjected to police harassment and denied the freedom of movement to which other citizens are entitled.

Perhaps the most egregious intrusion into the rights of African Americans

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149. For general treatments of the phenomenon of "Driving while Black," see Angela J. Davis, *Race, Cops, and Traffic Cops*, 51 U. MIAMI L. REV. 425 (1997) [hereinafter Davis, *Race, Cops, and Traffic Cops*]; David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997) [hereinafter Harris, *Driving While Black*]; David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999) [hereinafter Harris, *The Stories, the Statistics, and the Law*]; Katheryn K. Russell, *"Driving While Black": Corollary Phenomena and Collateral Consequences*, 40 B.C. L. REV. 717 (1999); KENNETH MEEKS, DRIVING WHILE BLACK: HIGHWAYS SHOPPING MALLS, TAXICABS, SIDEWALKS: HOW TO FIGHT BACK IF YOU ARE A VICTIM OF RACIAL PROFILING (2000).

150. Harris, *The Stories, the Statistics, and the Law*, *supra* note 149, at 265.

151. *Id.*

152. *Id.*

153. Davis, *Benign Neglect*, *supra*, note 111, at 1676.

154. See MEEKS, *supra* note 149, at 3-20, 63-157 (discussing racial profiling in a variety of settings and describing the reactions of its victims).

155. Racial profiling occurs when an individual is targeted for criminal investigation based primarily or solely on racial or ethnic characteristics. *See* Silton, *supra* note 2, at 58-60 (offering both broad and narrow definitions of racial profiling).

156. *See* MEEKS, *supra* note 149, at 3-20.

157. *Id.*

158. *Id.*

159. *Id.*

160. See Kevin R. Johnson, *The Case Against Racial Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 688-706 (2000) (describing racial profiling at immigration checkpoints and in other immigration related contexts).

occurs during so-called "drug sweeps." "Drug sweeps" or "street sweeps" occur when the police simply close off a neighborhood and indiscriminately detain or arrest large numbers of people without lawful justification.[161] Police conduct street sweeps in order to subject those caught in the dragnet to questioning and searches in the absence of probable cause or reasonable suspicion.[162] One such drug sweep, which occurred in New York City, was described in the following account:

> In a publicized sweep on July 19, 1989, the Chief of the Organized Crime Control Bureau (OCCB), led 150 officers to a block in upper Manhattan's Washington Heights. Police sealed off the block and detained virtually all of the 100 people who were present there for up to two hours, during which time the police taped numbers on the chests of those arrested, took their pictures and had them viewed by undercover officers. By the end of the operation, police made only 24 felony and two misdemeanor arrests . . . which strongly suggests there was no probable cause to seize those who were arrested.[163]

African Americans have long had to suffer police harassment and disregard for their rights.[164] However, the drug war made the types of police harassment described above more likely to occur.[165] One of the key consequences of the War on Drugs is that courts have relaxed their oversight of the police.[166] In a series of decisions written since the declaration of war on drugs, the Supreme Court has made it easier for the police to establish grounds to stop and detain

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161. Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1952 (1993).

162. See powell & Hershenov, *supra* note 7, at 613 ("During street sweeps, law enforcement authorities routinely engage in mass indiscriminate arrests without probable cause").

163. Michael Z. Letwin, *Report from the Front Line: The Bennett Plan, Street Level Drug Enforcement in New York City and the Legalization Debate*, 18 HOFSTRA L. REV. 795, 817 n.137 (1990).

164. See Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 839 (1994) (noting that during the 19th and most of the 20th centuries, police forces "treated blacks and black communities with extraordinary harshness, while often ignoring, and sometimes actively encouraging illegal white-on-black violence"); Tracey Maclin, *"Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?* 26 VAL. U. L. REV. 243, 264 n.83 (1991) (describing the brutality suffered by Black men at the hands of the police as "legendary"); Don Jackson, *Police Embody Racism to My People*, N.Y. TIMES, January 23, 1989, at A25 (arguing that "[o]perating free of constitutional limitations, the police have long been the greatest nemesis of blacks").

165. See Steven A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1, 4, 23 (1986) (arguing that the War on Drugs is eroding Fourth Amendment jurisprudence).

166. See powell & Hershenov, *supra* note 7, at 578-85 (claiming that "the retreat from the Fourth Amendment. . .[has] made all of us, but particularly African-Americans, fair game for police harassment");Paul Finkleman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389 (1993) (describing how the War on Drugs has reduced judicial oversight of the police).

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motorists and pedestrians on the street.[167] In particular, two recent decisions have made it virtually impossible for African Americans to move freely on the streets without police intervention and harassment.[168]

In *Whren v. United States*,[169] the Supreme Court held that an officer's subjective motivations for a stop were irrelevant to Fourth Amendment analysis, and that the legitimacy of the stop should solely be determined by an objective analysis of the totality of the circumstances.[170] Under *Whren*, so long as an officer can offer an "objective" reason for a detention or arrest, it does not matter whether the officer's "real" reason for the stop was racist.[171] In *Illinois v. Wardlow*,[172] the Supreme Court ruled that the flight of a middle-aged Black man from a caravan of Chicago police officers provided reasonable suspicion for his detention and search.[173] In the majority's view, African Americans have no legitimate reason to flee the police.[174] Thus, the Court, in essence, established a per se rule that flight equals reasonable suspicion.[175] As Professor

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167. *See* David A. Moran, *The New Fourth Amendment Vehicle Doctrine: Stop and Search Any Car at Any Time*, 47 VILL. L. REV. 815, 817 (2002) (arguing "the Supreme Court, largely in support of the [W]ar on [D]rugs . . . [has] significantly limited" Fourth Amendment protections and allowed "the police to stop and search any vehicle at any time"); Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851, 893-94 (2002) (arguing courts have reduced Fourth Amendment protections against searches and seizures in order to support the War on Drugs); Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on Terry "Stop and Frisk,"* 50 OKLA. L. REV. 451, 455 (2001) (arguing that the Supreme Court's limited interpretation of the Fourth Amendment "has gained momentum from a societal fear of crime and illegal drugs"); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1337 (1990) ("The Court's current methodology and crabbed view of the fourth amendment's protection for those on the street is the inevitable result of replacing traditional fourth amendment principles without ad hoc balancing" as a consequence of the War on Drugs.); Harris, *Driving While Black*, *supra* note 149, at 582 (arguing the Supreme Court has increased police power and discretion as a result of the War on Drugs).

168. *See* Johnson, *supra* note 160, at 686, n.52 (asserting that *Whren* and *Wardlow* have contributed significantly to the Supreme Court's erosion of the Fourth Amendment).

169. Whren v. U.S., 517 U.S. 806 (1996).

170. *Id.* at 813.

171. *See* Tracy Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 354-62 (1998); *See also*, Kenneth B. Nunn, *Law, Culture, and the Morality of Judicial Choice*, 28 CUMB. L. REV. 581, 587 n.22 (1998) ("The Supreme Court's decision in *Whren* permits police departments to stop pedestrians and motorists at will, and allows well-documented and widespread discriminatory detentions of people of color to continue unchecked.").

172. Illinois v. Wardlow, 528 U.S. 119 (2000).

173. *Id.* at 123.

174. Although the Court had ruled earlier in *Florida v. Royer*, 460 U.S. 491, 498 (1983), that citizens had the right to ignore the police and "go about [their] business," the Court in *Wardlow* rejected any interpretation of flight that would allow a citizen to legitimately flee to avoid the police. "[U]nprovoked flight," stated the Court, "is simply not a mere refusal to cooperate. Flight, by its very nature, is not 'going about one's business,' in fact, it is just the opposite." *Wardlow*, 528 U.S. at 125.

175. According to the Supreme Court, "Headlong flight—whenever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly

Ronner has remarked, this perspective takes "an apartheid approach to the Fourth Amendment and actively condones police harassment of minorities."[176]

d. No-Knock Warrants, SWAT Teams and Military-Style Police Tactics

The War on Drugs has led to the militarization of police departments across the nation.[177] More specifically, it has led to the increased deployment of military-style tactics for crime control in African American communities, with a correspondently greater potential for death and destruction of property.[178] As these new tactics have become commonplace, the role of police has changed, altering the character of many police departments from law enforcement agencies to military occupation forces.[179]

The militarization of local police forces can be traced to the proliferation of paramilitary police units, often referred to as Special Weapons and Tactics (SWAT) teams. Los Angeles established the first SWAT team in the 1960s.[180] Originally, paramilitary police units were intended for use in special circumstances, such as hostage situations and terrorist attacks.[181] In the 1960s and 70s, there were few SWAT units; those that existed were typically found in large metropolitan areas. However, the policies and practices of the drug war[182]

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suggestive of such." *Wardlow,* 528 U.S. at 124. The Court's holding in *Wardlow* was presaged by *California v. Hodari D.*, 499 U.S. 621 (1991) (holding that a suspect fleeing from a police officer was not "seized" for Fourth Amendment purposes). While the Court in *Hodari* did not decide the question whether flight would give rise to reasonable suspicion for a stop, Scalia's opinion for the Court strongly suggested that it would answer such a question in the affirmative. Justice Scalia cited Proverbs 21:8 ("The wicked flee when no man pursueth") to emphasize his point. *Hodari D.*, 499 U.S. at 624, n.1.

176. Amy D. Ronner, *Fleeing While Black: The Fourth Amendment Apartheid*, 32 COLUM. HUM. RTS. L. REV. 383, 409 (2001).

177. *See generally* Peter B. Kraska & Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 SOC. PROBLEMS 1 (1997); William Booth, *Exploding Number of S.W.A.T. Teams Set Off Alarms*, WASH. POST, June 17, 1997, at A1.

178. See Kraska & Kappeler, *supra* note 177, at 8, 12 (claiming "numerous incidents and common sense raise questions about the dangerousness of these units to officers and citizens").

179. *See id.* at 12 (noting "the normalization of paramilitary units into mainstream police work, and a close ideological and material connection between [SWAT teams] and the U.S. armed forces") and at 2 (observing that a "close ideological and operational alliance between [the military and the police] in handling domestic social problems usually is associated with repressive governments").

180. *See* DIANE CECILIA WEBER, CATO INSTITUTE, WARRIOR COPS: THE OMINOUS GROWTH OF PARAMILITARISM IN AMERICAN POLICE DEPARTMENTS 6, Briefing Paper No. 50 (1999) (stating that Los Angeles formed the first SWAT team shortly after a mass killing by a sniper in a University of Texas tower in 1966). The official web site of the Los Angeles Police Department states that its SWAT team was founded in 1967. See the Official Website of the Los Angeles Police Department, *at* http://www.lapdonline.org/index.htm.

181. WEBER, *supra* note 180, at 7. According to Weber, "[T]he modern SWAT team was born of public fear and the perception by police that crime had reached such proportions . . . that more armament and more training were needed." *Id.* at 6.

182. These policies and practices include an inherent "militarism," defined by Kraska and

encouraged the use of SWAT teams to expand rapidly into small and medium sized cities throughout the country. As a consequence, "most SWAT teams have been created in the 1980s and 1990s."[183] A study by Peter Kraska and Victor Kappeler showed that by 1997, in cities with populations over 50,000, SWAT teams were operated by nearly ninety percent of police departments surveyed.[184] Surprisingly, the survey also disclosed that seventy percent of the police departments in cities under 50,000 had paramilitary units, as well.[185]

SWAT units have provided a conduit for the transfer of military techniques and materials into the hands of ordinary police departments. As a result of a 1994 Memorandum of Understanding between the Justice Department and the Department of Defense,[186] civilian police departments have access to "an array of high-tech military items previously reserved for use during wartime."[187] Between 1995 and 1997, the U.S. military donated 1.2 million pieces of military hardware to domestic police departments, including 73 grenade launchers and 112 armored personnel carriers.[188] Other sophisticated equipment provided to police departments includes the following: "automatic weapons with laser sights and sound suppressors, surveillance equipment such as Laser Bugs that can detect sounds within a building by bouncing a laser beam off a window, pinhole cameras, flash and noise grenades, rubber bullets, bullet-proof apparel, battering rams, and more."[189]

Although originally intended for extreme and dangerous situations that were beyond the response capability of regular police patrols, the ubiquity of SWAT teams means that police departments often use their paramilitary units for routine law enforcement activities.[190] The main use of a SWAT team in departments throughout the country appears to be to support the drug war.[191] According to Kraska and Kappeler, the respondents to their survey "reported that the majority of call-outs were to conduct what the police call 'high risk

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Kappeler as "a set of beliefs and values that stress the use of force and domination as appropriate means to solve problems and gain political power." Kraska & Kappeler, *supra* note 177, at 1.

183. WEBER, *supra* note 180, at 8.

184. Kraska and Kappeler, *supra* note 177, at 5-6.

185. *Id.* Weber notes that small towns "like Jasper, Lakeland and Palm Beach, Florida; Lakewood, New Jersey; Chapel Hill, North Carolina; Charlottesville, Virginia; and Harwich, Massachusetts, have SWAT teams." WEBER, *supra* note 180, at 8. In addition, the campus police at the University of Central Florida even operate a SWAT unit. *Id.*

186. See U.S. DEPARTMENT OF JUSTICE & U.S. DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE AND DEPARTMENT OF DEFENSE JOINT TECHNOLOGY PROGRAM: SECOND ANNIVERSARY REPORT, 8-18 (Feb. 1997) (discussing Memorandum of Understanding Between Department of Defense and Department of Justice on Operations Other than War and Law Enforcement).

187. WEBER, *supra* note 180, at 5.

188. *Id.* at 1.

189. *Id.* at 7. *See also* Kraska & Kappeler, *supra* note 177, at 3 (describing machine guns, grenades, and other lethal and non-lethal equipment SWAT teams are likely to possess).

190. WEBER, *supra* note 180, at 8.

191. Kraska &Kappeler, *supra* note 177, at 7.

warrant work,' mostly 'drug raids.'"[192] Less than twenty percent of paramilitary police unit calls were for situations understood as typically amenable to SWAT team intervention.[193] Particularly in so-called "high crime areas," police departments are likely to use SWAT teams as proactive units to seek out criminal activity, as opposed to using them solely to respond to a crisis situation. Kraska and Kappeler found 107 departments that used paramilitary police units as a proactive patrol in high crime areas.[194] According to some of the SWAT team commanders that Kraska and Kappeler interviewed, "[T]his type of proactive policing–instigated not by an existing high risk situation but one generated by the police themselves–is highly dangerous for both PPU [police paramilitary unit] members and citizens."[195]

Warrant work conducted by SWAT teams "consists almost exclusively of what police call 'no-knock entries.'"[196] The potential danger of allowing police officers to enter homes and businesses without announcing their identity and purpose has been well-known since colonial times.[197] Officers may startle residents who may seek to defend their homes.[198] Officers may inadvertently harm residents or innocent bystanders by the use of force necessary to effect the sudden entry of targeted buildings.[199] Breaking into buildings through surprise and stealth seems like a tactic better suited to an occupying army, then to civilian peace officers. However, the drug war has worn down the traditional resistance to the no-knock warrant.[200] Since the onset of the drug war, courts

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192. *Id.*

193. Of the total number of call-outs, civil disturbances accounted for 1.3%, terrorist incidents .09%, hostage situations 6.6%, barricaded persons 13.4%, and warrant work 75.9 %. *Id.*

194. Kraska & Kappeler, *supra* note 177, at 9. The response of 107 departments was 20% of total departments responding. *Id.*

195. *Id.* at 8.

196. *Id.* at 7.

197. *See* Mark Josephson, *Fourth Amendment—Must Police Knock and Announce Themselves Before Kicking in the Door of a House?* 86 J. CRIM. L. & CRIMINOLOGY 1229, 1235-37 (1996) (discussing how the common law requirement that police knock and announce prior to a search of a home was transplanted to the colonies following the 1603 English holding in Semayne's Case). Under current law, police officers are not required to knock and announce in every case. Rather, following *Wilson v. Arkansas*, 514 U.S. 929 (1995), whether officers do knock and announce is a factor in determining whether a search is reasonable under the Fourth Amendment. *See* Josephson, *supra* at 1229, 1250.

198. Josephson, *supra* note 197, at 1234.

199. *Id.*

200. Prior to the Supreme Court's 1997 decision in *Richards v. Wisconsin*, 520 U.S. 385, many jurisdictions permitted courts to issue no-knock warrants based merely on broad generalizations about the dangerousness of drug dealers and the presumed ease with which drugs could be destroyed. *See* Adina Schwartz, *Homes as Folding Umbrellas: Two Recent Supreme Court Decisions on "Knock and Announce,"* 25 AM. J. CRIM. L. 545, 555-56 (1998) (discussing the "blanket approach" that prevailed in many jurisdictions prior to *Richards*). *Richards* held that the Fourth Amendment does not permit courts to create a *per se* exemption from the knock and announce rule for drug cases and that the reasonableness of a departure from the knock and

have been willing to legalize no-knock warrants and issue them to the police.[201] Thus, African American communities are now subject to this potentially dangerous and intimidating police technique.[202]

The extension of paramilitary police units into everyday policing not only escalates the degree of force and violence that may be interposed between citizens and the state, it also escalates the likelihood that more forceful methods will actually be used.[203] In the context of a war on drugs, the identification of drug users and dealers as an enemy upon whom force may be used, is not surprising. The very use of the metaphor of "war," as a conceptual matter, implies the use of force. As Kraska and Kappeler state:

> [I]t takes little acumen to recognize how the metaphor of "war"—with its emphasis on occupation, suppression through force, and restoration of territory—-coincides naturally with the "new science" of the police targeting and taking control, indeed ownership, of politically defined social spaces, aggregate populations, and social problems with military-style teams and tactics. [204]

Thus, the growing collaboration between the police and the military can be expected to have ideological consequences, as well as technological ones. As police paramilitary units train with military organizations, they may be encouraged to develop what amounts to a "warrior mentality."[205] While training "may seem to be a purely technical exercise, it actually plays a central role in paramilitary subculture," as several scholars of police behavior have

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announce rule must be determined on a case-by-case basis. *Richards*, 520 U.S. at 388. Yet, as Professor Schwartz points out, *Richards* does not sound a retreat from the use of no-knock warrants in drug cases. *See* Schwartz, *supra*, at 561-62. *Richards'* constitutionally imposed standards for the issuance of no-knock warrants are minimal. Police may enter a residence without knocking and announcing if they entertain a "reasonable suspicion that knocking and announcing their presence . . . would be dangerous or futile," or that it would allow the destruction of evidence or otherwise "inhibit the effective investigation of the crime." *Richards*, 520 U.S. at 394. The *Richards* court stated explicitly that "[t]his showing is not high" and that "felony drug investigations may frequently present circumstances warranting a no-knock entry." *Id.*

201. *See* Richard E. Burket, *The State Law Enforcement Apparatus as America: Authority, Arbitrariness, and the "Force of Law" in Vineland*, 24 OKLA. CITY U. L. REV. 727, 749 (1999) (describing numerous incidents where innocent people were brutalized by police executing no-knock warrants as a consequence of the War on Drugs); Michael Cooper, *Raids, and Complaints, Rise as City Draws on Drug Tips*, NY TIMES, May 26, 1998, at A1 (reporting that warrants for drug searches in NYC more than doubled from 1994 to 1997, and that the that the majority of these were no-knock warrants).

202. Cooper, *supra* note 201 (reporting complaints of civil libertarians that "the questionable raids have all been in the homes of black and Hispanic families").

203. According to Kraska & Kappeler, the militarization of local police departments through the proliferation of SWAT teams has encouraged "the cynical view that the most expedient route to solving social problems is through military-style force, weaponry, and technology." Kraska & Kappeler, *supra* note 177, at 12.

204. *Id.* at 1.

205. WEBER, *supra* note 180, at 10 (describing "mindset of the warrior" as a state of mind which requires a soldier to "use lethal force on the enemy, . . . follow orders unthinkingly, act[ ] in concert with his comrades, and initiate[ ] violence on command").

observed.[206] The inoculation of a "warrior mentality" in police officers, however, is inappropriate because police and military have different social functions:

> The job of a police officer is to keep the peace, but not by just any means. Police officers are expected to apprehend suspected law-breakers while adhering to constitutional procedures. They are expected to use *minimum* force and to deliver suspects to a court of law. The soldier on the other hand, is an instrument of war. In boot camp, recruits are trained to inflict *maximum* damage on enemy personnel. Confusing the police function with the military function can have dangerous consequences. As Albuquerque police chief Jerry Glavin has noted, "If [cops] have a mind-set that the goal is to take out a citizen, it will happen."[207]

The danger that SWAT teams pose to inner-city communities has been exposed by several incidents in which citizens have been unnecessarily harmed as a result of paramilitary police activity.[208] In Dinuba, California, a man was wrongly killed when a SWAT team stormed his house looking for one of the man's sons.[209] The man was shot fifteen times before he or his wife could determine who was breaking into their house and why.[210] Albuquerque, New Mexico has experienced several controversial SWAT team killings.[211] Professor Samuel Walker of the University of Nebraska was hired by the City of Albuquerque to evaluate police department policies and procedures. "According to Walker, 'The rate of killings by the police was just off the charts. . . . They had an organizational culture that led them to escalate situations upward rather than de-escalating.'. . . [T]he mindset of the warrior is simply not appropriate for the civilian officer charged with enforcing the law."[212]

As a consequence of the War on Drugs, the use of military-style weapons and tactics by police departments throughout the nation has become routine.[213] Police departments are locked in a race to see who can arm themselves with the most powerful weaponry available for civilian use.[214] Yet, the easy manner in

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206. Kraska &Kappeler, *supra* note 177, at 11.

207. WEBER, *supra* note 180, at 2-3.

208. Kraska and Kappeler found it anomalous that seven of the departments they studied registered "sharp drops" in SWAT team activity. According to the researchers, "[w]e called these departments out of curiosity and they explained that there had been a controversy over the PPU killing or wounding innocent people, sometimes while at the wrong residence, or instances where team members were shot by 'friendly fire.'" Kraska & Kappeler, *supra* note 177, at 12 n.11.

209. WEBER, *supra* note 180, at 10-11.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 7-8.

214. *Id.*

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which military technology can be obtained, and the militaristic attitudes that police officers using this technology also acquire, pose potential dangers to citizens who are unfortunate enough to encounter paramilitary police units, especially those African Americans who live in the areas where these units regularly patrol.[215]

3. Tonry's Thesis: Did Drug Policy Makers Intentionally Target the Black Community?

In 1995, Michael Tonry, a criminologist and law professor at the University of Minnesota, wrote a book published by the Oxford University Press entitled "Malign Neglect: Race, Crime and Punishment in America."[216] In his book, Tonry proffered a thesis, which generated a significant amount of controversy.[217] Tonry charged that the racial disparities in the criminal justice system were not merely happenstance, but the result of a "calculated effort foreordained to increase [the] percentages [of Blacks in prison]."[218] According to Tonry, the planners of the drug war knew that the War on Drugs was unnecessary, and that the policies they selected to fight the War on Drugs would not work.[219] More critically, Tonry charged that the drug war's planners were aware that the ineffective policies they proposed to implement would adversely affect African American males.[220]

The War on Drugs was unnecessary, according to Tonry, because drug use was already declining in the United States, and had been doing so for several years.[221] If less and less Americans were using drugs, then a costly war to

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215. Kraska and Kappeler claim that "most PPUs proactively seek out and even manufacture highly dangerous situations." Kraska & Kappeler, *supra* note 177, at 12.

216. TONRY, *supra* note 44.

217. *See, e.g.*, Davis, *Benign Neglect, supra* note 111, at 1670-71 (critiquing Tonry's claim that the overrepresentation of Black men in the criminal justice system is not primarily caused by racial bias and questioning Tonry's conclusion that the architects of the drug war were aware it would disproportionately affect Blacks and should be held morally culpable for the damage the drug war inflicted on Black communities).

218. TONRY, *supra* note 44, at 82.

219. *See id.* at 83 (arguing that the goal of reducing drug abuse "had been achieved before the drug war began" and that no convincing case could be made for "more emphasis on law enforcement directed at users, user-dealers, and street level trafficking").

220. According to Tonry:

> Given what we know about past periods of intolerance of drug use and their tendencies to scapegoat minority groups, and that disadvantaged urban blacks are the archetypal users of crack cocaine—and therefore are the principal possessors, sellers, and low-level distributors—anyone who knew the history of American drug policy could have foreseen that this war on drugs would target and mostly engage young disadvantage members of minority groups as the enemy.

Id. at 94. For an argument that there is scant evidence to support the widespread belief that African Americans are the "principal possessors, sellers, and low-level distributors" of crack cocaine, *see supra* notes 101-111 and accompanying text.

221. TONRY, *supra* note 44, at 83 (claiming that at the time of Reagan's declaration of the

reduce drug usage would not seem to make sense.[222] More importantly, Tonry charged, even if the drug war was necessary to address a burgeoning problem with illegal drugs in the United States, the policies the drug warriors selected to deal with that problem were not likely to work.[223] Tonry argues that changes in drug usage are best effected through a combination of supply reduction and demand reduction strategies.[224] The anti-drug policies of the Reagan and Bush administrations were skewed too far in favor of supply reduction approaches to be effective.[225] The drug policy strategists who planned the drug war, Tonry asserts, knew this.[226]

Tonry's most explosive charges addressed the racial imbalance in drug war motivated arrests, prosecutions, and convictions.[227] According to Tonry, "The War on Drugs foreseeably and unnecessarily blighted the lives of hundreds of thousands of young disadvantaged [B]lack Americans."[228] Tonry believes the planners of the drug war knew their decision to increase penalties for drug possession and sale would adversely and disproportionately affect African Americans because while white middle-class drug use was declining, other data showed that drug use among poor, urban African Americans and Hispanics remained steady.[229] In Tonry's words:

> The white-shirted-and-suspendered officials of the Office of National Drug Control Policy understood the arcane intricacies of NIDA[230] surveys, DUF,[231] and DAWN[232] better than anyone else in the United

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War on Drugs in 1987, "it was clear that drug use was in decline and had been since the early 1980s").

222. *Id.*

223. *Id.* at 116 (asserting that "by adapting a prohibitionistic crime control approach, rather than a harm-reduction approach, policymakers chose strategies that had little prospect of succeeding but a high likelihood of worsening racial disproportions in the criminal justice system").

224. *Id.* at 122 (arguing that both supply-side and demand-side strategies have a role to play in drug use reduction efforts).

225. *Id.* at 119 (claiming that "American policy has tilted heavily toward prohibition" and that the ratio of federal funding which allots 70% of resources to law enforcement programs and only 30% to treatment and education, has resulted in "[t]oo many people in prison and too few people in treatment").

226. *Id.* at 116 (arguing that "policymakers chose strategies that had little prospect of succeeding" and that "[t]here was no basis on which policymakers could have believed in good faith that the key strategies of the War on Drugs would be so successful as to justify the burdens that they would impose on minority citizens").

227. TONRY, *supra* note 44, at 104-5 (discussing the disparate impact of drug arrests and prosecutions). According to Tonry, "Drug arrests are a principle reason that the proportions of blacks in prison and more generally under criminal justice system control have risen rapidly in recent years to . . . extraordinary levels . . . ." *Id.* at 110.

228. *Id.* at 82.

229. *Id.* at 100-3.

230. NIDA stands for The National Institute on Drug Abuse. *See id.* at 87.

231. DUF stands for Drug Use Forecasting program of the Department of Justice. *See id.* at

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> States. They knew that drug abuse was falling among the vast majority of the population. They knew that drug use was not declining among disadvantaged members of the urban underclass. They knew that the War on Drugs would be fought mainly in the minority areas of American cities and that those arrested and imprisoned would disproportionately be young blacks and Hispanics.[233]

Thus, the adverse impact of the drug war could not be accidental. The architects of the drug war had to know who would be most affected by their policies. They had to understand what Daniel Patrick Moynihan pointed out in 1993 when he said "[B]y choosing prohibition [of drugs] we are choosing to have an intense crime problem concentrated among minorities."[234] At best, according to Tonry, the explosion in the Black prison population was "a foreseen but not an intended consequence" of the War on Drugs.[235] At worst, Tonry says, it was "the product of malign neglect"–a consequence that was malicious and evil.[236]

If the architects of the drug war knew their plans would have devastating impact on the African American community, then they apparently did not care. What could provide the motive for such an assault on African Americans? According to Tonry, the motive was two-fold.[237] First, Tonry claims that to the extent the Reagan and Bush administrations attempted to craft an actual drug policy, they intended to use the criminalization of behaviors disproportionately found in the African American and Hispanic community to shape and encourage anti-drug values and beliefs in the white community.[238] Thus, the drug war was "an exercise in moral education"[239] that inflicted great damage on young African Americans and Hispanics "primarily for the benefit of the great mass of, mostly white, non-disadvantaged Americans."[240] But Tonry suggests there is another, more sinister, reason for the sacrifice of the young African American victims of the drug war.[241] According to Tonry, the drug war was "launched to

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232. DAWN stands for Drug Abuse Warning Network. *See id.*

233. TONRY, *supra* note 44, at 104.

234. *Id.*

235. *Id.* at 115.

236. *Id.* Tonry makes the point that using standard criminal law doctrine, the architects of the drug war ought to be held culpably for the consequences of their actions. That is, to undertake an act with the knowledge that a given result will occur, is substantially the same as to undertake the act with the purpose that the result occur. *See id.* at 32-33.

237. *See id.* at 95-123.

238. TONRY, *supra* note 44, at 96-97.

239. *Id.* at 97.

240. *Id.* at 95.

241. *Id.* at 123.

achieve political, not policy objectives."[242] Reagan's advisors wanted to reap the political benefits of appearing tough on drugs at a time when drug use had fallen into disfavor with the American public. The drug war, then, was a cynical way to "use . . . disadvantaged [B]lack Americans as a means to the achievement of politician's electoral ends."[243]

B. The Historic Connection of Drugs and Race

The exploitation of drugs and race for political ends is nothing new.[244] It is as old as American-style politics.[245] Consequently, there has always been a racial dimension to American drug policy.[246] Drugs have always been associated with foreign or alien cultural groups and constructed as part of the threat posed by those groups.[247] The drug war fits well into old patterns and is merely the latest version of a time-honored tradition.[248] Over the years, drug hysteria has come and gone.[249] Interestingly, each period develops its own

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242. *Id.*

243. *Id.*

244. *See* JOHNS, *supra* note 7, at 74 (claiming that "[t]he focus of drug panics on minority populations is. . . nothing new."); Arthur L. Burney, *Cocaine Prohibition: Drug-Induced Madness in the Western Hemisphere*, 15 B.C. THIRD WORLD L.J. 19, 49-50 (1995) (stating "political interest in maintaining the connection between drugs and race has been a central theme of drug prohibition from the outset"). For an excellent treatment of the history of drug prohibition in the United States and the complex political and social issues that were involved in that history, see generally DAVID F. MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTICS CONTROL (3d ed. 1999).

245. *See* JOHNS, *supra* note 7, at 74 (tracing a negative connotation of opium to the Chinese to as early as the late 1800's); *see id.* at 294 (describing the American concern with narcotics as a political problem "in the fullest sense").

246. *See* David H. Angeli, *A "Second Look" at Crack Cocaine Sentencing Policies: One More Try for Federal Equal Protection*, 34 AM. CRIM. L. REV. 1211, 1222 (1997) ("Historically, drugs have been regulated when they were perceived to threaten essential social restrictions that kept minority groups under the control of the white majority.").

247. *See* MUSTO, *supra* note 244, at 294 –95. According to Musto:

> Certain drugs were dreaded because they seemed to undermine essential social restrictions which kept [disempowered] groups under control: cocaine was supposed to enable blacks to withstand bullets which would kill normal persons and to stimulate sexual assault. Fear that smoking opium facilitated sexual contact between Chinese and white Americans was also a factoring its total prohibition. Chicanos in the Southwest were believed to be incited to violence by smoking marijuana . . . Alcohol was associated with immigrants crowding into large and corrupt cities. In each instance, use of a particular drug was attributed to an identifiable and threatening minority group.

Id.

248. *See id.* at 299 (asserting that "[a]s new generations confront the narcotics question, the same fundamental issues reappear").

249. John Helmer argues that "[p]ublic concern about narcotics use and drug addiction is a repeating thing." JOHN HELMER, DRUGS AND MINORITY OPPRESSION 8 (1975). Helmer argues these periods of concern recur every twenty to thirty years and consist of three identifiable stages. *Id.* at 8-9. Stage one begins with the discovery of a new "drug problem." *Id.* at 8. Stage two

racist myths.[250] These myths deserve close examination because they disclose the nature of the fears of the dominant culture and illuminate the need to construct reality to eliminate those fears. Below, I briefly review some of the more prominent myths. Next, I discuss some of the social purposes these myths served.

1. Drugs, Myths, and Race

a. Chinese and Opium

The first national campaign against narcotics was designed to suppress opium, a drug that was identified with Chinese immigrants.[251] Opium use in the United States was virtually unnoticed until efforts were made to curb Chinese immigration in the mid-1870s.[252] Then, opium became a dangerous drug and its suppression a reason to exclude the Chinese.[253] The Chinese were disliked as economic competitors of the white laboring classes and small-scale merchants and farmers.[254] Chinese immigrants were blamed for the low wages and depressed economic conditions of the time.[255] Although the Chinese were ostracized because of the belief that they were "opium eaters," Chinese immigrants were also victims of a racist society that was not prepared to assimilate people who were different.[256] According to John Helmer, "The ideological role of the anti-opium campaign was to get rid of the Chinese. It had a practical consequence–providing a legal basis for the unrestrained and arbitrary police raids and searches of Chinese premises in San Francisco."[257] At the turn of the century, it was estimated that approximately thirty-five percent of the Chinese American population used opium.[258] Most users were immigrants

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involves determining causes of the problem and selecting potential cures. *Id.* Finally, stage three is reached as the application of the identified solutions to the problem become routine. *Id.* at 9.

250. *See id.* at 18-79 (discussing negative stereotypes involving drug use associated with the Chinese, Blacks, and Mexicans); MUSTO, *supra* note 244; RICHEY MANN, *supra* note 100, at 58-67 (discussing drug myths associated with Chinese Americans, Mexican Americans, African Americans and Native Americans).

251. HELMER, *supra* note 249, at 58 n. 241.

252. *Id.*

253. *See* MUSTO, *supra* note 244, at 3 (asserting that opium prohibition resulted from the drug's association with the Chinese).

254. RICHEY MANN, *supra* note 100, at 59.

255. *Id.*

256. *Id.*

257. HELMER, *supra* note 249, at 32.

258. RICHEY MANN, *supra* note 100, at 58.

from the Chinese mainland[259] where opium use was widespread, chiefly due to the efforts of the British and other western powers that imposed the drug on China as a result of the Opium Wars.[260] While in European eyes the use of opium among the Chinese could be exploited for economic gain, opium use in the United States was not permitted.[261] Other than the fact that it provided a convenient excuse to harass the Chinese, opium use was disliked because of the perceived threat it posed to the safety and purity of white women.[262] It was widely believe that Chinese opium dens would entrap virtuous white women who would then be available to have sex with Asian men.[263]

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259. *See id.* at 60.

260. *See* Alfred W. McCoy, *From Free Trade to Prohibition: A Critical History of the Modern Asian Opium Trade*, 28 FORDHAM URB. L. J. 307, 317-18, 320 (2000) (discussing how Britain defied Chinese drug laws and fought two wars to eventually force China to legalize opium and import sufficient opium for the drug to become "a major global commodity, produced and traded on the scale of stimulants such as coffee and tea"); R.I.R. Abeyratne, *International Initiatives at Controlling the Illicit Transportation of Narcotic Drugs by Air*, 63 J. AIR L. & COM. 289, 291-93 (1997) (depicting Chinese attempts to ban opium as cause of Opium Wars with Britain). The Chinese made attempts to prohibit the importation of opium as early as 1729, but this attempt "was to little avail, as opium was being smuggled at that time into China through India by the Portuguese and later by the English." *Id.* at 291. Following Chinese seizure of foreign stocks of opium in 1840, the British initiated the First Opium War against China. *Id.* at 292. As a result of the British victory in the First Opium War, China ceded Hong Kong to England, which the British then used to extend the opium trade even further. *Id.* The British and French fought the Second Opium War from 1856 to 1858 to force the Chinese to legalize the opium trade and stymie Chinese attempts at prohibition. *Id.* Queen Victoria was apparently unmoved by a letter from Chinese officials, which, appealing to her sense of reason stated: "Suppose there were people from another country who carried opium for sale to England and seduced your people into buying and smoking it; certainly your honorable rule would deeply hate it and be bitterly aroused." WILLIAM ALFORD, COMPARATIVE LAWS: CHINA 278-80 (1990), *quoted in* Di Jiang-Schuerger, *The Most Favored Nation Trade Status and China: The Debate Should Stop Here*, 31 J. MARSHALL L. REV. 1321, 1349 (1998).

261. MUSTO, *supra* note 244, at 3-4 (noting that efforts to prohibit opium began as early as 1909).

262. See Constance Backhouse, *The White Women's Labor Laws: Anti-Chinese Racism in Early Twentieth-Century Canada*, 14 LAW & HIST. REV. 315, 338 n.80 (1996) ("Opium . . . was thought to be capable of fueling 'flagging sexual energies,' transforming the asexual Chinese man into a sexually dangerous adversary.").

263. Respectable whites believed the drug encouraged white women to lose sexual inhibition and to engage in acts of immorality. *See* Kathleen Auerhahn, *The Split Labor Market and the Origins of Antidrug Legislation in the United States*, 24 LAW & SOC. INQUIRY 411, 420 n. 4 (1999) (noting white fears that "the seductiveness and aphrodisiac qualities of the drug itself would lure white women into relations with Chinese"). Indeed, Hamilton Wright, the campaigner most responsible for the passage of the Harrison Act, stated that "one of the most unfortunate phases of the habit of smoking opium in this country [is] the large number of women who have become involved and were living as common-law wives or cohabiting with Chinese in the Chinatowns of our cities." MUSTO, *supra* note 244, at 43. Another 19th century writer opined that "[m]any females are so much excited sexually by the smoking of opium during the first few weeks that old smokers with the sole object of ruining them have taught them to smoke. Many innocent and over-curious girls have thus been seduced." H.H. KANE, OPIUM SMOKING IN AMERICA AND CHINA 8 (1882), *quoted in* HELMER, *supra* note 249, at 10. The hysterical character of these fears for white female purity becomes evident when one considers that, "in fact, the use of opiates *reduces* erotic interest and drive." HELMER, *supra* at 11.

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b. Blacks and Cocaine

The identification of African Americans with cocaine predates the recent panic over crack cocaine and the current War on Drugs.[264] African Americans were associated with cocaine use as early as the 1890s.[265] At that time, cocaine was widely available in the United States, particularly in the South, in the form of patent medicines and soft drinks.[266] While cocaine use was then acceptable for whites, it was considered dangerous to allow African Americans access to the drug.[267] Around the turn of the century, as racism against African Americans solidified, whites viewed African Americans as threatening in new ways.[268] White society viewed Africans as docile and childlike during slavery, but following the Reconstruction, whites came to view Blacks as a threat to white property, interests, and lives.[269] African Americans were thought to be untrustworthy scoundrels, who if left uncontrolled, would rob and steal.[270] From the Reconstruction on, propaganda in the North and South portraying the vulnerability of white families, particularly white women, to Black scoundrels was common.[271]

It was thought Blacks used cocaine to fortify themselves for criminal activities.[272] Whites believed cocaine would make Blacks bolder, more aggressive, and oblivious to pain.[273] Rumors stated that Blacks under the influence of cocaine were more inclined toward crime and harder to catch. Most importantly, "[s]outhern whites believed that cocaine use by [B]lacks would cause them to 'forget their place' and lead to violence against whites, particularly

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264. See JOHNS, *supra* note 7, at 74 (noting similarities between rhetoric regarding cocaine use by Blacks during previous anti-drug campaigns and the current War on Drugs).

265. See MUSTO, *supra* note 244, at 304 n.15 (reporting cocaine's association with the southern Negro had become a cliché "a decade or more before the Harrison Act").

266. RICHEY MANN, *supra* note 100, at 60.

267. *See* HELMER, *supra* note 249, at 47 (reporting 1908 comments by Washington, D.C. police chief that cocaine "transforms otherwise safe and tractable citizens into dangerous characters"). Musto writes: "Cocaine was especially feared in the South by 1900 because of its euphoric and stimulating properties. The South feared that Negro cocaine users might become oblivious of their prescribed bounds and attack white society." MUSTO, *supra* note 244, at 6.

268. *See generally* GEORGE M. FREDERICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817 -1914 (1971) (describing white attitudes toward African people in the formative years of American culture).

269. *Id.* at 111. *See also*, Delgado, *supra* note 21, at 1264 (describing a new, post-reconstruction stereotype of African American men as "brutish and bestial").

270. *See* FREDERICKSON, *supra* note 268, at 111.

271. *Id.*

272. *See* MUSTO, *supra* note 244, at 65 (reporting that "[c]ocaine raised the specter of the wild Negro" who was predisposed through use of the drug "toward insanity and crime").

273. *See id.* at 7 (relating that "[a]necdotes often told of superhuman strength, cunning, and efficiency resulting from cocaine").

the dreaded rape of white women."[274] The belief that cocaine made African Americans impervious to pain led police departments all across the South to switch from .32 caliber revolvers to the more lethal .38 caliber revolvers.[275]

Consequently, state and local governments, and later the federal government, sought to suppress the availability of cocaine.[276] Federal regulation of food and drugs removed cocaine from foodstuffs and over-the-counter medications.[277] Later, the Harrison Act, the nation's first drug criminalization statute, made cocaine illegal.[278]

c. Chicanos and Marijuana

Chicanos, or Mexican Americans, resided in the Southwest before it became part of the United States and before Anglo-Americans arrived in that part of the country.[279] When the southwestern region became part of the United States through conquest and colonization, the Chicanos were reduced to a second class status.[280] Viewed as a race apart, whites stereotyped Chicanos as lazy, crime-ridden, and violent.[281] In the 1920s, efforts were first made to suppress the use of marijuana, which was used as a drug within the Chicano community.[282] Several western states passed laws banning marijuana at that

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274. RICHEY MANN, *supra* note 100, at 60. Musto quotes from several early 20th century sources who expressed fear that Black cocaine use would lead to the sexual assault of white women. In a report to Congress, Dr. Hamilton Wright asserted "[I]t has been authoritatively stated that cocaine is often the direct incentive to the crime of rape by the Negroes of the South and other sections of the country." MUSTO, *supra* note 244, at 43-44. Dr. Christopher Koch, a member of the Pennsylvania State Pharmacy Board, claimed that "[m]ost of the attacks upon white women of the South are the direct result of a cocaine-crazed Negro brain." *Id.*

275. MUSTO, *supra* note 244, at 7.

276. *See* WITSOTSKY, *supra* note 1, at 10 (reporting Oregon was first of several states to ban the sale of cocaine without a prescription).

277. *See id.*; MUSTO, *supra* note 244, at 10 (describing federal efforts to control cocaine through the 1906 Pure Food and Drug Act and revenue powers).

278. WITSOTSKY, *supra* note 1, at 10-11. The Harrison Act passed in 1914. *See* Pub. L. No. 63-233, 38 Stat. 785 (1914).

279. Chicanos did not immigrate to the United States. Instead, "Chicanos came under United States authority through territorial conquest. Mexico's defeat at the hands of U.S. invaders in the war of 1846-1848 left an estimated 60,000 Mexican citizens north of the new border in New Mexico alone." Luis Angel Toro, *"A People Distinct from Others": Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15*, 26 TEX. TECH L. REV. 1219, 1245 (1995).

280. *See* Kevin R. Johnson, *Puerto Rico, Puerto Ricans, and Lat Crit Theory: Commonalities and Differences Between Latina/o Experiences*, 6 MICH. J. RACE & L. 107, 114 (2000) (claiming that for Chicanos and Chicanas "second class citizenship can be traced to the conquest of the Southwest, once a part of the Republic of Mexico").

281. *See* CHICANOS AND FILM: ESSAYS ON CHICANO REPRESENTATION AND RESISTANCE 3 (Chon A. Noriega ed., 1992) ("Like similar unflattering stereotypes of other subordinate groups, those of the Chicano depict him as dirty, violent, hypersexual, treacherous, and thieving").

282. *See* MUSTO, *supra* note 244, at 219 (reviewing how concern over marijuana arose with

time.[283] Like cocaine with African Americans, it was thought that marijuana encouraged Chicanos to commit crimes and become more violent and dangerous.[284] During that same period, a labor surplus in the West positioned Chicanos as competitors to white laborers.[285] The marijuana laws were used to reduce the economic threat of a Mexican labor surplus.[286] According to one observer of the period, "Public concern about marijuana grew because Americans wanted to drive the Mexicans back over the border, for reasons that had nothing to do with the nature of the drug or its physiological effects."[287] In 1937, the federal government restricted access to marijuana through the Marijuana Tax Act.[288]

2. Drugs as a Threat to White Power

What explains the centrality of drugs to American law enforcement efforts? Why is law enforcement the social institution of choice in dealing with the threat or perceived threat of drugs? Why do racial groups other than Europeans figure so prominently in the history of drug use and prohibition in this country? These patterns are replicated as they are because drug use by non-white populations is perceived as a threat to white power.[289] As I explain below, drug use threatens white control over non-white populations[290] and drug use creates economic activity that is outside of the control of white elites.[291]

a. Drugs as a Threat to White Social Control

The use of drugs threatens white control of non-European communities and individuals. It threatens the present social and political order in three ways. First, social control is ultimately maintained by coercion.[292] African

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Mexican immigration in 1920s).

283. *See* HELMER, *supra* note 249, at 54, 165 n.3 (discussing early anti-marijuana legislation in Washington, California, Texas, Mississippi, Louisiana, and Kansas).

284. *See* MUSTO, *supra* note 244, at 219 (reporting that "[b]y the mid-twenties horrible crimes were attributed to marihuana and its Mexican purveyors").

285. *See* HELMER, *supra* note 249, at 73 (discussing excess labor as result of Great Depression).

286. *See id.* at 74 ("Jail on drug or other charges, or repatriation by force or choice—these were the methods adopted for reducing the Mexican labor surplus in the city where surplus . . . was the fundamental economic threat.").

287. *Id.* at 56.

288. Pub. L. No. 238, 50 Stat. 551 (1937). *See* HELMER, *supra* note 249, at 54.

289. *See* MUSTO, *supra* note 244.

290. *See infra* notes 292-364 and accompanying text.

291. *See infra* notes 333-39 and accompanying text.

292. See RAYMOND J. MICHALOWSKI, ORDER, LAW, AND CRIME: AN INTRODUCTION TO CRIMINOLOGY 29 (1985) (arguing that "political power rests ultimately on force" and that "it is the

Americans, and other people of color who know they are oppressed, submit to the oppression predominantly because of their fear of the consequences should they not.[293] Drug intoxication may prevent people of color from recognizing the extent of the threat posed by white institutions of social control, thereby undermining the coercive power of the white power structure.[294] Secondly, people of color who use drugs are by this very act rebelling against the authority of the white power structure.[295] Their disobedience may cause them to lose respect for white authority or may cause others to lose respect for white authority.[296] Finally, and perhaps most significantly, drug use may tie users to cultural institutions and cultural practices that are not dominated by whites and are competitive to white institutions.[297] Different cultures have different ways of relating to mind altering substances.[298] One culture may use a substance for recreational purposes, while another culture may use the drug for religious

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existence and reliance upon centralized force in the form of political power that distinguishes state law from other forms of social control").

293. *See* Kimberle' Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law,* 101 HARV. L. REV. 1331, 1357 (1988) (arguing coercion rather than consent explains Black obedience to authority).

294. Indeed, this is one of the reasons why Southern whites sought to regulate cocaine. They were concerned that the drugs "euphoric and stimulating" qualities would cause African American cocaine users to "become oblivious of their prescribed bounds and attack white society." MUSTO, *supra* note 244, at 6.

295. Jock Young, a prominent scholar of critical criminology in Britain, remarked on the relationship between drug use and the conscious rejection of societal norms. According to Young, "drug-taking in itself [may be] of greater value [to a marginalized group] as a symbol of their difference and of their defiance of perceived social injustices." JOCK YOUNG, THE DRUGTAKERS: THE SOCIAL MEANING OF DRUG USE 46 (1971). John Schuler and Arthur McBride similarly state: "If we are committed to thinking about drug prohibition through the metaphor of the 'war on drugs,' we should bear in mind that it is a civil war. It is one group of citizens, probably a numerical minority, defying the dominant group's command not to purchase or use certain substances." John T. Schuler & Arthur McBride, *Notes From the Front: A Dissident Law-Enforcement Perspective on Drug Prohibition*, 18 HOFSTRA L. REV. 893, 940-41 (1990).

296. See Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1774 (1992) (discussing how identification with lawbreakers in the Black community may be an act of defiance).

297. *See* DUKE & GROSS, *supra* note 16, at 79 (noting that every culture sanctions some form of recreational drug use along with appropriate social controls).

298. *Id.* A publication by the British Medical Association explains that:

> [A]lmost every psychoactive drug known to humanity, from alcohol to opium, has been regarded by some government and society as a dire threat to public order and moral standards, and by another government and another society as a source of harmless pleasure. Further, nations and governments sometimes change their views completely. Almost every society has at least one drug whose use is tolerated, while drugs used in other cultures are generally viewed quite differently and with deep suspicion. Mexican Indians may have disapproved of alcohol, but they used mescaline. Most Muslim cultures forbid alcohol, but they tolerate cannabis and opium.

BRITISH MEDICAL ASSOCIATION, LIVING WITH RISK: THE BRITISH MEDICAL ASSOCIATION GUIDE 58 (1987), *quoted in* Norbert Gilmore, *Drug Use and Human Rights: Privacy, Vulnerability, Disability, and Human Rights Infringements*, 12 J. CONTEMP. HEALTH L. & POL'Y 355, 357-58 (1996).

purposes. In either case, the social practice of "drug use" requires the establishment of a network of social institutions that "support" the use (or abuse) of the substance in question.[299] For example, in the United States, the cultural interpretation of cocaine use has required the establishment of social institutions of ostracization, punishment and purification (e.g. jails, prisons, drug abuse treatment programs, etc).[300] But this constellation of social institutions is culturally specific.[301] That is, cocaine use does not necessarily have to result in the same set of social institutions.[302] This is most readily seen in cases such as the use of peyote by Native Americans,[303] or ganja by Rastafarians,[304] but in any case, the principle is the same. The suppression of the drug is also the suppression of a particular cultural point of view.[305]

Every society uses natural and artificial substances to alter moods and change psychology.[306] The substances used for such purposes in a given culture are familiar.[307] Their effects are well known and understood.[308] Substances used for such purposes by other cultures, on the other hand, are unknown, and their use is viewed as strange and unnatural.[309] According to historian John F. Richards:

Generally each society and culture has drugs of choice that have been

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299. *See* Gilmore, *supra* note 298, at 382 (noting that "which users and which drugs are to be controlled, as well as which means are to be employed to accomplish this control, vary from jurisdiction to jurisdiction depending upon how drug usage has been perceived and conceptualized").

300. *See id.* at 398 (explaining that "viewing drug use and drug users as immoral has strongly influenced the evolution of prohibitionary approaches to drug use, particularly in the United States").

301. *See id.* at 382.

302. *Id.*

303. *See* Michael J. Simpson, *Accommodating Indian Religions: The Proposed 1993 Amendment to the American Indian Religious Freedom Act*, 54 MONT. L. REV. 19, 37-41 (1993) (describing the sacramental use of peyote by the Native American Church).

304. *See* Jim Stipanuk, *The High Priesthood: Room Under the E Pluribus Umbrella?* 22 ARIZ. ST. L. J. 703, 714-15 (1990) (describing Rastafarianism and the religious use of ganja, or marijuana).

305. *See* MUSTO, *supra* note 244, at 295 (arguing that drug prohibition has historically been used to suppress ethnic groups and preserve the established order); *id.* at 298 (noting that drugs were viewed as threats imposed on America by foreign nations, which were made accessible by "un-American" ethnic minorities). *See also* Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 26 (1986) (asserting that efforts to suppress the drug trade can be viewed as efforts to suppress a particular political point of view).

306. DUKE & GROSS, *supra* note 16, at 79 (1993).

307. *Id.* (asserting that prior to the time of Columbus, access to psychotropic drugs was limited to a few familiar substances).

308. *Id.*

309. *Id.* at 80 (arguing indigenous cultural controls "not easily adaptable to the unfamiliar imported intoxicants"). *See also* Stipanuk, *supra* note 304, at 706 ("Societies encounter the fewest problems with psychoactive substances when they are able to incorporate those drugs into the social fabric and define appropriate circumstances for their safe and intelligent use").

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> assimilated to its cultural practices. The pleasures of these familiar drugs are known; their dangers minimized by taboos and social rituals of consumption, and their damage contained [or] ignored. Similar adaptations in other cultures are invisible, or, if seen, grotesque.[310]

The use of unknown drugs produces fear precisely because they are unknown, and because what is perceived of as "other" is not controlled.[311]

b. Drugs and the Alternative Economic Threat

Illegal drugs constitute an enormous economic engine. The White House Office of National Drug Control Policy estimates that Americans spent over $64 billion on illegal drugs in 2000.[312] This would rank the drug trade as one of the largest industries in the country.[313] Some estimate that illegal earnings from the drug trade are as large as $100 billion a year.[314] Most of the people who benefit from the drug trade–who collect the bulk of the profits, who earn interest on secret bank deposits, who supply the guns, transportation services, and trappings of the drug lifestyle–are not Black.[315] Yet, African Americans can earn significant amounts of income from the drug trade, employing large numbers of employees, and providing needed economic benefits to otherwise forgotten communities.[316]

Drug trafficking in the African American community is the result of "a complex web of economic need meeting economic opportunity."[317] Predominantly African American communities in inner cities throughout the nation are entrapped in severe economic depression.[318] They lack jobs,

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310. John F. Richards, Opium and the British Indian Empire, Kingsley Martin Lecture (May 23, 2001) *available at* http://www-history.aas.duke.edu/pdfs/Kingsley%20Martin%20Lecture%206.pdf.

311. *See id.;* DUKE & GROSS, *supra* note 16, at 79-80.

312. OFFICE OF NATIONAL DRUG CONTROL POLICY, WHAT AMERICA'S USERS SPEND ON ILLEGAL DRUGS: 1988-2000, at 2 (2001) (reporting that Americans spent $64.8 billion on illegal drugs, including $36 billion on cocaine, $10 billion on heroin, $5.4 billion on methamphetamine, $11 billion on marijuana and $2.4 billion on other illegal substances).

313. See Erik Grant Luna, *Our Vietnam: The Prohibition Apocalypse*, 46 DEPAUL L. REV. 483, 514 (1997) (quoting Labor Secretary Robert Reich as stating that the narcotics trade "is one of America's major industries, right up there with consumer electronics, automobiles and steel").

314. *See* Jeff Gerth, *Vast Flow of Cash Threatens Currency, Banks, and Economies*, N.Y, TIMES, Apr. 11, 1988, at A12.

315. *See* LUSANE, *supra* note 1, at 88 (listing professions and businesses that benefit from drug trafficking).

316. *Id.* at 49.

317. *Id.* at 47.

318. *See* Dash T. Douglas, *A House Divided: The Social and Economic Underdevelopment of America's Inner Cities*, 10 U. FLA. J. L. & PUB. POL'Y 369, 380 (1999) (arguing that "[t]he inner cities have become 'America's poorhouses, and millions of African Americans. . . are today locked

opportunities, and resources and there is little government assistance available.[319] Chronic unemployment is a serious problem in these neighborhoods.[320] In most urban areas, Black youth unemployment hovers at fifty percent or higher.[321] These neighborhoods suffer from high crime rates as well.[322] Large percentages of the young men in these communities are involved in the criminal justice system.[323] When crack cocaine became readily available, the social and economic despair in these communities made them a breeding ground for drug dealing: "Poor Black communities became the ideal market for crack. They provided a ready-made distribution network of existing or easily created street gangs of unemployed youth who could retail crack and other drugs. These communities also had consumers who would purchase the . . . product."[324]

In many African American communities, drug dealers are the largest employer.[325] Large numbers of young unskilled African Americans can only find employment as workers in the drug trade.[326] At a time when African Americans communities were literally abandoned by their government, the limited and equivocal benefits of the drug trade provided the only glimmer of economic hope. "In the era of Reagan budget cuts, large cash flow into these communities was quite welcome. Due to income derived from drug trafficking, people can buy food, pay rent, and live materially better lives. Black youth can easily make $100 a day or more simply by watching for the police and steering customers in the right direction."[327]

Clarence Lusane describes the illegal drug industry as "the most equal

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in them, with little hope of escape'") (citations omitted).

319. *See id.* (discussing the lack of economic and social resources including employment and educational opportunities).

320. *See id.* at 382 ("Shifts in the American economy have resulted in an extraordinary rate of African American inner-city joblessness, which has exacerbated other social problems in [urban] areas").

321. *See* DUKE & GROSS, *supra* note 16, at 169 (claiming "[s]ixty to [seventy] percent of the youngsters in many inner-city communities are unemployed"). Writing in the mid-1980s, sociologist William Julius Wilson found that 66% of all Black males ages 18 to 19 were unemployed in 1955. By the mid-1980s, only 34% of all 18-19 year old Black males were unemployed. *See* WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 43 (1987).

322. *See* Douglas, *supra* note 318, at 380 (stating inner city "communities are predisposed to public disorder, whereby crime and other aberrant behavior flourish").

323. *See supra* note 5 (discussing percentage of African American males in prison, on probation, or on parole).

324. LUSANE, *supra* note 1, at 49.

325. *See id.* at 49 (claiming "the illegal narcotics industry has become a major (perhaps the major) employer of Black youth").

326. *Id.*

327. *Id.*

opportunity employer in the world."[328] Anyone can participate in the drug business.[329] All it takes is a willingness to expose oneself to the substantial risks.[330] According to Rutgers University sociologist Jeffrey Fagan, "[c]rack really is a deregulated market. It is totally open . . . people have access to raw materials . . . and to selling locations."[331] No other area of the legitimate economy offers this kind of barrier free opportunity to would be African American entrepreneurs.[332]

The equal opportunity character of the drug trade makes it a threat to white supremacy. The ability of African Americans to access money and power in the drug trade creates an alternative economy in predominantly Black inner city areas.[333] Through the drug trade, African Americans and other people of color can earn money and develop channels of wealth and power that are not controlled by whites.[334] In the same fashion, certain white individuals and groups were able to gain a foothold in the American economy through illegal activities.[335] The Kennedy's, for example, earned their family fortune running alcohol during prohibition.[336] Other wealthy Americans became rich pursing

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328. *Id.* at 87.

329. *Id.* at 93 (reporting statement of Steve Rickman, of the Washington, D.C., Office of Criminal Justice, that "anyone can set up shop" as a drug dealer). *See also* Nora V. Demleitner, *Organized Crime and Prohibition: What Difference Does Legalization Make?* 15 WHITTIER L. REV. 613, 637 (1994) (claiming barriers to market entry low for some drugs like marijuana).

330. *See* Jeffrey Fagan & Deanna L. Wilkerson, *Guns, Youth Violence and Social Identity in Inner Cities*, 24 CRIME & JUS. 105, 165-66 (1998) (describing robbery and violence as common risks of street-level dealing).

331. LUSANE, *supra* note 1, at 93.

332. *See* DUKE & GROSS, *supra* note 16, at 169 (decrying the dearth of "meaningful opportunities for inner-city youngsters" other than drug dealing). Prominent sociologist Joe Feagin has argued that African American business people "are situated in a business world mostly not of their own making, one with recurring racist hurdles they must overcome if they are to stay in business." JOE R. FEAGIN, RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS 168 (2000) [hereinafter FEAGIN, RACIST AMERICA]. Some of the racial barriers that Feagin found African American business owners must face include fewer resources, higher costs, lack of entrée into business networks, lack of access to government contracts, and difficulties obtaining business loans. FEAGIN, *supra* at 166-68.

333. *See* LUSANE, *supra* note 1, at 49 (arguing that "[d]ue to income derived from drug trafficking, people can buy food, pay rent, and live materially better lives.").

334. *See id.*

335. *See* Sara Jankiewicz, *Glasnost and the Growth of Global Organized Crime*, 18 HOUS. J. INT'L L. 215, 220-21 (1995) (arguing new Italian "immigrants made millions of dollars bootlegging liquor during Prohibition, and supplemented these fortunes with other more traditional sources of racketeering income: gambling, loan-sharking, blackmail, and pizzu, or payment for protection").

336. *See* LAURENCE LEAMER, THE KENNEDY MEN: 1901-1963: THE LAWS OF THE FATHER 38-42 (2001) (detailing Joe Kennedy's acquisition of a fortune through liquor smuggling and describing his view of the Volstead Act instituting prohibition as "a regressive piece of legislation, targeted at the poor and foreign"); RONALD KESSLER, THE SINS OF THE FATHER: JOSEPH P. KENNEDY AND THE DYNASTY HE FOUNDED 36 (1996) (describing Joe Kennedy's dealings with Mafia boss Frank Costello to illegally import liquor during prohibition).

illegal activities, as well.[337] The rise of Jews, Italians, Irish and other ethnic groups from poverty into the mainstream through organized and petty crime is well known.[338] The repression of the Black community requires that this avenue of potential economic advancement be closed off.[339]

c. The Geopolitics of Drug Trafficking

To fully understand the significance of the drug trade and the oppression of African people and other people of color, one must recognize the central role drug trafficking has played in the European conquest of other cultures and the maintenance of white supremacy worldwide.[340] Addictive and deleterious substances have historically been used to undermine non-European societies and further white interests.[341] In this connection, drugs can be used to weaken a country or culture internally and limit its ability to resist white economic or

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337. Indeed, most of the so-called "robber barons" of late 19th century American were so named because of the improper wheeling and dealing that accompanied the acquisition of their great fortunes. *See generally* MATHEW JOSEPHSON, THE ROBBER BARONS (1934) (describing fraudulent and corrupt practices that led to the establishment of 19th century fortunes); GUSTAVUS MEYERS, HISTORY OF THE GREAT AMERICAN FORTUNES (1936) (depicting Vanderbilt, Gould, Astor, Rockerfeller, Duke and others as immoral men who acquired their fortunes through deceit and thievery). Meyers reports that J.P. Morgan, for example, enlarged his inherited fortune through a fraudulent sale of the government's own useless and discarded rifles back to the army during the Civil War. MEYERS, *supra* at 553. Then, "[b]y means of financial laws corruptly passed, [Morgan and other financiers] compelled the people of the United States . . . to present them with the funds with which to buy up railroads and other forms of property" for their own personal enrichment. MEYERS, *supra* at 554.

338. One author describes the wide-spread criminal activity by immigrant ethnic groups in the United States as a tried and true means of social advancement:

> In the major urban centers there had been a distinct ethnic sequence in organized crime membership. While it may be true that membership in criminal activity during the 1930s and 1940s was often of Italian origin; twenty years before, Eastern European Jews were the most prominent; and before the Jews, the Irish were dominant. As each group acquired the wealth and social position accompanying the profits of illicit activity, they invested in legitimate businesses and assumed a greater political role in the dominant, legitimate society. Criminal activity became a method of social climbing.

David R. Wade, *The Conclusion that a Sinister Conspiracy of Foreign Origin Controls Organized Crime: The Influence of Nativism in the Kefauver Committee Investigation*, 16 N. ILL. U. L. REV. 371, 384 (1996).

339. The economic threat to white power is not limited to illegal drugs, but to any commodity that the African community produces or distributes. Thus, once drug use is associated with a given culture, then that drug use must be suppressed lest it develop into a potential economic engine that can be used for economic advancement.

340. *See* WARD CHURCHILL, A LITTLE MATTER OF GENOCIDE: HOLOCAUST AND DENIAL IN THE AMERICAS 247 (1997) (stating alcohol has been "consciously used since colonial times as a sort of 'chemical weapon' to dissipate indigenous societies").

341. *See id.* at 405 (describing the "deliberate use of alcohol to effect the dissolution of many of North America's indigenous peoples"). See also LYNN PAN, ALCOHOL IN COLONIAL AFRICA 7-9 (1975) (describing the use of alcohol first as a currency to acquire slaves and later as a means of providing economic support for colonial regimes).

cultural intrusion.[342] This classic use of drugs for political purposes is what happened to China during the Opium Wars.[343] The supply of alcohol to Native Americans in North America is also a primary example of the use of drugs for oppression.[344]

In more recent times, drugs have been used to advance the political interests of European and European-derived countries in two additional ways. First, as a means to generate finances for covert or "off the book" activities,[345] and secondly, as a way to reward collaborators and favored parties in countries under attack with a lucrative franchise.[346] In 1946, the French began a secret war against the Viet Minh in Indochina, which they financed by taking over the opium trade in that region.[347] The covert action branch of the French intelligence service, *Service d'action*, transported large amounts of opium into Saigon and used the profits from the drug trade for covert operations.[348] The United States used the same tactics when it inherited the Indochinese war from the French.[349] To support its mercenary armies, the CIA ferried the opium its clients produced out of the hills of Laos to urban markets.[350] The CIA later relied on heroin smuggling to finance covert operations in Afghanistan and cocaine trafficking to fund military support for the Nicaraguan Contras.[351]

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342. *See* Wilbur R. Jacobs, *The Fatal Confrontation: Early Native-White Relations on the Frontiers of Australia, New Guinea and America—A Comparative Study*, *in* THE FATAL CONFRONTATION: HISTORICAL STUDIES OF AMERICAN INDIANS, THE ENVIRONMENT, AND HISTORIANS 52 (Wilbur R. Jacobs, ed. 1996) (describing depopulation and despondency from disease and alcoholism as a key stage in the subjugation of native people by whites).

343. *See* DUKE & GROSS, *supra* note 16, at 80.

344. *See* Churchill, *supra* note 340. An extensive treatment of the practice of using alcohol for cultural domination may be found in WILLIAM E. UNRAU, WHITE MAN'S WICKED WATER: THE ALCOHOL TRADE AND PROHIBITION IN INDIAN COUNTRY, 1802-92 (1996). Unrau states: "Alcohol figured prominently in the European invasion of North America. It was endemic wherever the French, British, or Dutch established New World beach heads and deployed policies for cultural alteration and economic gain." *Id.*

345. *See* PETER DALE SCOTT & JONATHAN MARSHALL, COCAINE POLITICS: DRUGS, ARMIES, AND THE CIA IN CENTRAL AMERICA 171 (updated paperback ed. 1998) (charging intelligence agencies use narcotics as "common coin for the purposes of espionage, paramilitary operations, covert trade and counterintelligence").

346. *See id.* at 186 (alleging that "[s]ince the 1940s. . . government intelligence connections have opened up unsupervised shipping and plane communications between the United States and drug-growing areas and conferred protection on drug traffickers willing to ally themselves [to U.S. interests]"); Alfred W. McCoy, *From Free Trade to Prohibition: A Critical History of the Modern Asian Opium Trade*, 28 FORDHAM URB. L. J. 307, 329 (2000) (stating "covert agencies found urban criminals and upland warlords useful allies in the prosecution of the Cold War, providing de facto political protection for drug dealers in key source regions").

347. ALFRED MCCOY, THE POLITICS OF HEROIN IN SOUTHEAST ASIA 92-97 (1972).

348. *Id.* Some of this opium was even transported to criminal syndicates in France. *Id.* at 96.

349. *Id.* at 151-52.

350. *Id.* at 153, 263, 285-87.

351. LUSANE, *supra* note 1, at 119-23. Thus, while the U.S. claimed to be waging a war *on*

Many in the African American community have long believed that the United States government has been implicated in the drug epidemics that have swept through the Black community over the years.[352] Many African Americans have reached this conclusion after observing the correlation between periods of high Black political activism swiftly followed by periods of easy drug availability in the Black community.[353] In August of 1996, news reports surfaced that stoked African American fears that the government was behind the influx of drugs into the Black community.[354] Gary Webb wrote a series of stories in the San Jose Mercury News, alleging that the government was allowing Nicaraguan Contra supporters to smuggle crack into south-central Los Angeles in order to support their war against the Nicaraguan government.[355] "For the better part of a decade," wrote Webb, "a San Francisco Bay Area drug ring sold tons of cocaine to the Crips and Bloods street gangs of Los Angeles and funneled millions in drug profits to a Latin American guerilla army run by

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drugs, it was simultaneously waging a war *with* drugs. As Peter Scott and Jonathan Marshall note in their informative study of U.S. involvement in Central American cocaine trafficking, the reliance on the drug trade was not incidental–it was fundamental to the American intelligence structure. They point out that:

> [T]he long and sordid history of CIA involvement with the Sicilian Mafia, the French Corsican underworld, the heroin producers of Southeast Asia's Golden Triangle, the marijuana–and cocaine–trafficking Cuban exiles of Miami, and the opium smuggling *mujaheddin* of Afghanistan simply reinforces the lesson of the Contra period: far from considering drug networks their enemy, U.S. intelligence organizations have made them an essential ally in the covert expansion of American influence abroad.

SCOTT & MARSHALL, *supra* note 345, at 4. Alfred McCoy also argues that CIA involvement in the drug trade is longstanding. According to McCoy: "[O]ver the past forty years American and allied intelligence agencies have played a significant role in protecting and expanding the global drug traffic. CIA cover operations in key drug producing areas have repeatedly restrained or blocked DEA efforts to deal with the problem." ALFRED W. MCCOY, THE POLITICS OF HEROIN: CIA COMPLICITY IN THE GLOBAL DRUG TRADE 491 (1991).

352. LUSANE, *supra* note 1, at 13.

353. *Id.* According to Lusane, there is "ample historical evidence" of such a correlation. He notes that "as the Civil Rights and Black Power movements of the Sixties gained momentum and after the urban rebellions in the major cities, more illegal drugs entered the Black community than at any other time in history." *Id.*

354. *See* ALEXANDER COCKBURN & JEFFREY ST. CLAIR, WHITE OUT: THE CIA, DRUGS, AND THE PRESS 63 (1998) (describing the Black community's reaction to "Dark Alliance" story).

355. Gary Webb, *'Crack' Plague's Roots are in Nicaraguan War*, SAN JOSE MERCURY NEWS, Aug. 18, 1996 at, A1 [hereinafter Webb, *Crack Plague*]; Gary Webb, *Testimony Links U.S. to Drugs-Guns Trade*, SAN JOSE MERCURY NEWS, Aug. 18, 1996; Gary Webb, *Shadowy Origins of "Crack" Epidemic*, SAN JOSE MERCURY NEWS, Aug. 19, 1996; Gary Webb, *Drug Agent Thought She Was on to Something Big*, SAN JOSE MERCURY NEWS, Aug. 19, 1996; Gary Webb, *Drug Expert: "Crack" Born in SF Bay Area in '74*, SAN JOSE MERCURY NEWS, Aug. 19, 1996; Gary Webb, *War on Drugs' Unequal Impact on Black Contra Case*, SAN JOSE MERCURY NEWS, Aug. 20, 1996; Gary Webb, *SF Bay Area Man Tangled in Drug Web*, SAN JOSE MERCURY NEWS, Aug. 20, 1996. The *Mercury News* retracted the "Dark Alliance" stories in 1997. *See* Mark Jurowitz, *Repudiated Stores No Longer Fade Away*, BOSTON GLOBE, July 23, 1998, at D1. As a result, these articles are no longer available on the Mercury News website or from proprietary databases, such as Westlaw or Lexis. However, Gary Webb has posted a reproduction of the original "Dark Alliance" website, including all articles initially published in the Mercury News, *at* http://home.attbi.com/~gary.webb/drugs/start.htm.

the CIA."[356] The stories caused a sensation at the time and led to the extraordinary appearance of CIA Director John Deutch at a town hall meeting in south-central Los Angeles in an attempt to defuse the anger of the Black community.[357] Although Webb's story was viciously attacked in some quarters, it was just the tip of the iceberg.[358] Both preceding and subsequent investigations have bolstered Webb's disclosures and expanded the range of government culpability.[359]

While the government was trumpeting its War on Drugs and an anti-drug culture ideology,[360] it was in fact deeply involved in the drug trade.[361] The government had organized and financed organizations that were importing

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356. Webb, *Crack Plague*, *supra* note 355, at A1.

357. COCKBURN & ST. CLAIR, *supra* note 354, at 2, 84-89.

358. Webb's stories received "extraordinary" criticism in the mainstream press, including attacks published in the *New York Times, Los Angeles Times* and *Washington Post*. SCOTT & MARSHALL, *supra* note 345, at viii. The attacks, described as "one of the most venomous and factually inane assaults on a professional journalist's competence in living memory," are reviewed at length by investigative reporters Alexander Cockburn and Jeffrey St. Clair in their 1998 book *White Out*. *See* COCKBURN & ST. CLAIR, *supra* note 354, at 29-62. In a nutshell, the criticism of Webb's account was a smokescreen, which focused on details and failed to blunt the thrust of his argument. As two reporters later remarked:

> But even Webb's harshest critics had to concede–as the *San Francisco Examiner* had first documented ten years earlier–that Meneses and his colleagues did bring large drug shipments into the country, that they did meet with top CIA Contra proteges, that they gave at least tens of thousands of dollars to the Contra cause, and that they were given extraordinary special treatment by U.S. federal prosecutors. SCOTT & MARSHALL, *supra* note 345, at viii.

359. *See generally* SCOTT & MARSHALL, *supra* note 345; COCKBURN & ST. CLAIR, *supra* note 354. The CIA's own report to Congress on the Contra-drug connection admits that the CIA had information that the Contra leadership was involved in drug trafficking, but failed to investigate these reports or inform the proper agencies of this knowledge. James Risen, *C.I.A. Reportedly Ignored Charges of Contra Drug Dealing in '80's*, N.Y. TIMES, Oct. 10, 1998, at A7. According to Alfred McCoy:

> The question is not whether the Contra war against the Sandinista government became involved in drug trafficking, but in what way and in what degree. The State Department adopted the minimalist position that a few people somehow affiliated with the Contras may have been involved with cocaine. Better-informed agencies, the DEA and the CIA, reported that leading Contra commanders were major traffickers.

McCoy, *supra* note 351, at 480.

360. The War on Drugs has been described as a "one-way, mass-mediated, multifaceted public relations campaign designed to influence public opinions regarding the issue of 'the drug problem.'" ELWOOD, *supra* note 40, at 10. The core rhetorical feature of this public relations campaign was the "just say no to drugs" crusade initiated by Nancy Reagan. *See id.* at 1, 84-87 (describing "just say no" campaign). Although the "just say no" slogan was ubiquitous, *see id.* at 1 (claiming "just say no" at one time was one of the two most popular sayings in the country), there is no evidence of its effectiveness. *See id.* at 11 (claiming that "the children following the "just say *no*" generation increasingly are getting high any way they can"). Patti Davis, Nancy Reagan's daughter, speculates that the "just say no" campaign was a subconscious "cry for help" from Nancy Reagan, who was battling a long time addiction to prescription tranquilizers, and White House aid Michael Deaver, who was engaged in his own struggle with alcohol. *Id* at 75-76.

361. *See supra* notes 354-59 and accompanying text.

massive amounts of drugs into the African American community and the government looked the other way while they did it.[362] At the same time, the government was vigorously enforcing harsh drug laws that led to police harassment and intimidation of African American communities and the mass arrest and incarceration of low-level drug dealers.[363] These law enforcement efforts had enormously deleterious effects on the entire African American community and did little to stem the tide of illegal drugs.[364] Consequently, the Black community was targeted by a vicious three-pronged assault; a drug epidemic with all of the attendant social, health and economic costs; a draconian prosecution-centered drug policy that did not stop the flow of illegal drugs and exacerbated the Black community's social and economic problems; and the callous exploitation of the African American community's misery to advance the government's larger geo-political ends.

II. TOWARD A THEORY OF RACE AND CRIME

The preceding analysis has disclosed two observable features of the War on Drugs. First, that given a choice between demand-reduction and supply-reduction strategies, United States policy makers chose harsh supply-reduction measures and implemented those supply-reduction policies in ways that heavily affected young urban African and Hispanic males. Second, that the drug war's supply-reduction policies were implemented in a cultural environment which has historically associated non-white peoples with drugs, and used this association to justify their subjugation and control. The remaining parts of this article examine whether these dual features of the War on Drugs can be explained theoretically. A workable theory of race and crime would predict these outcomes and show why the criminal justice system operates, as it does, in a racialized way.[365]

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362. *See supra* notes 354-59 and accompanying text.

363. *See supra* notes 74-111 and accompanying text. *See also* Nunn, *supra* note 13, at 1491 (arguing War on Drugs has led to police harassment and intimidation of African American communities); Tovah Renee Calderon, *Race-Based Policing from Terry to Wardlow: Steps Down the Totalitarian Path*, 44 HOW. L. J. 73 (2000) (arguing African Americans and Hispanics are intimidated and victimized by police targeting and disparate sentencing).

364. Lisa R. Nakdai, *Are New York's Rockefeller Drug Laws Killing the Messenger for the Sake of the Message?* 30 HOFSTRA L. REV. 557, 564-65 (2001) (arguing harsh drug laws do not deter drug crimes and mainly incarcerate low-level, non-violent offenders); powell & Hershenov, *supra* note 7, at 565-67 (arguing "the war on drugs has done little to slow, much less stem, the tide of the drug trade" and instead has inflicted great suffering on the African American community); Nunn, *supra* note 13, at 1485-86 (arguing War on Drugs "had little effect on the amount of drug use or the amount of drugs brought into the country" and instead caused "many more African American males [to go to] jail, greater violence as the transaction costs of the drug trade skyrocketed, and greater police repression"); TONRY, *supra* note 44, at 81-82 (claiming although "there is no evidence that crime control efforts lowered the levels of drug use. . . [t]he War on Drugs foreseeably and unnecessarily blighted the lives of hundreds of thousands of young disadvantaged black Americans and undermined decades of efforts to improve the life chances of the urban black underclass").

365. *See* Nunn, *Darden Dilemma, supra* note 13, at 1479-80 (claiming that "[n]ot only is [the criminal justice system] racist, but arguably it is one of the most racist institutions in the United

A. Crime and the Definition of Society

What is often overlooked, particularly in legal analyses of the criminal justice system, is that crime is not simply a product of a given society, but that crime plays an important socially constitutive role.[366] That is, crime, both in its occurrence and in its imagining, helps make society what it is.[367] Crime plays a central role in constructing the society we live in and ordering the power relationships within that society.[368] Crime does this by allowing authority to govern in coercive ways without making it appear to do so.[369] This is best understood through the deployment of the concept of the "consensus," as it is understood within the discipline of cultural studies.[370]

1. Crime and the Consensus

The "consensus" is a term that describes the prevailing ideology or worldview of the society at large.[371] The term is attributed to Stuart Hall, and grew out of the approach to Gramscian hegemony developed within the Birmingham School of cultural studies.[372] The "consensus" is "the accepted parameters of social conduct and the established view of the purposes and functions of the institutions of society."[373] However, consensus is not simply a description of what might be called popular opinion.[374] The consensus describes a relationship of power.[375] That is to say, the prevailing ideology only *prevails* because it is compatible with the preexisting institutions of power and

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States").

366. *See* Nunn, *Trial as Text, supra* note 68, at 764-65 (arguing that traditional views of crime focus on individuals who threaten violence to persons or property).

367. *See id.* at 763 (asserting that crime helps determine the borders of the law-abiding community).

368. *See id.*

369. *See id.* at 763-64 (explaining how crime helps the state to govern with the appearance of legitimacy).

370. I have examined this concept extensively in Nunn, *Trial as Text, supra* note 68, at 761-64.

371. *Id.* at 761 .

372. *See* Stuart Hall, *The Rediscovery of "Ideology": The Return of the Repressed in Media Studies*, *in* CULTURE, SOCIETY AND THE MEDIA 56, 61-65 (Michael Gurevitch, et al., eds. 1982) (explaining origins of term "consensus"). For an explanation of the role of the Birmingham School in cultural studies, see Kenneth B. Nunn, *Illegal Aliens: Extraterrestrials and White Fear*, 48 FLA. L. R. 397, 399 (1996) [hereinafter Nunn, *Illegal Aliens*].

373. Nunn, *Trial as Text*, *supra* note 68, at 761.

374. *See* STUART HALL ET AL., POLICING THE CRISIS: MUGGING, THE STATE AND LAW AND ORDER 215 (1978).

375. *Id.*

authority that exist in any given society.[376] But the relationship is not one-sided.[377] Consensus can only emerge through authority and power,[378] *and* power can only operate through the consensus.[379] Thus, the following is true:

> Coercion, then, is the flip side of consent and consent is the flip side of coercion. Power relies on the consensus to govern because without consent it cannot govern efficiently. But for power to govern in its own interest, the consensus must allow it to do so. Thus, power seeks to shape and direct the consensus.[380]

Crime contributes to the formation of the consensus. First, crime "allows a community to determine its norms and 'label' other conduct as deviant."[381] This labeling process allows the dominant group to clothe its values and priorities with the guise of morality.[382] Those that violate these norms may then be stigmatized and punished, not simply because they do not conform to the norms, but because they are immoral.[383] Secondly, having labeled some conduct as deviant, crime then sets the boundaries of the consensus, or law-abiding society.[384] The corollary of defining certain conduct as criminal is to define other conduct as acceptable, thus creating the substance of civil society.[385] In addition, "crime plays a crucial defining role in the construction of the ideological representations of society."[386] That is crime provides a way to signify or make a statement, about the righteousness of given social behavior with a definite political content.[387] Thus, crime has enormous power. It has the power to draw lines and it has the power to mobilize people against it.[388] The

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376. *See* Nunn, *Trial as Text*, *supra* note 68, at 762 (describing process through which elite views become accepted by the masses).

377. *See id.*

378. *See id.* at 763 (explaining that the construction of consensus is "controlled predominantly by the state through its control of educational and cultural institutions").

379. HALL ET AL., *supra*, note 374, at 203 (asserting that the state cannot govern through the raw exercise of power alone).

380. *See* Nunn, *Trial as Text*, *supra* note 68, at 762 (citations omitted).

381. *Id.* at 759-60.

382. *Id.* at 760 (arguing that "labeling process serves to mobilize moral censure" and to help create a "moral community").

383. This labeling process is, of course, contested. *See id.* at 760 n.84.

384. *See id.* at 764 (stating that "crime as a category helps determine the borders of the consensus").

385. *See id.* at 760 ("As crime creates and excludes 'them' it also creates and strengthens 'us'.").

386. Nunn, *Trial as Text*, *supra* note 68, at 763.

387. *Id.*

388. *Id.*

support of the community can always be rallied to address crime.[389] This power allows crime to mask differences within the community and present a consensus with a false sense of homogeneity.[390]

2. Power and the Definition of Crime

The power of crime to mobilize the community makes it desirable for the state to seek out its services.[391] Thus, the state holds a virtual monopoly on the formal mechanisms for defining crime.[392] Consequently, it can be said that crime "provides hegemonic services for the state."[393] Yet, these hegemonic services are limited.[394] This limitation arises because the definition of crime is socially constructed through a process that is politically contested.[395] Different groups compete to have their definitions of crime predominate.[396] They compete to control the state apparatus, (the formal lawmaking process) and they compete to establish the dominant cultural definition of crime to which the state must respond.[397]

While the state definition of crime is contested, the process of labeling, defining crime and consensus formation is nonetheless heavily weighted in favor of the state and dominant groups.[398] The definition of crime and the formation of the consensus results from a semiotic process of articulation.[399] Each potential definition of crime is dependent upon definitions that have been expressed before.[400] As expressed here, new meanings must draw on the "social reservoir of ideas:"

> Any new meaning is of necessity constrained by the meanings that have been articulated before. In other words, meaning is constructed

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389. *Id.*

390. *Id.*

391. *Id.* at 764.

392. Nunn, *Trial as Text, supra* note 68, at 765.

393. Drew Humphries, *Report on the Conference of the European Group for the Study of Deviance and Social Control*, 1 CRIME & SOC. JUST. 11, 12 (1974).

394. *See* Nunn, *Trial as Text, supra* note 68, at 764 (explaining state has advantages but no monopoly over the production of consensus).

395. *Id.*

396. *See id.* at 764-65 (describing how definition of crime is arrived at through the consensus).

397. *See id.* at 765 (stating that the definition of crime "derives from the political give and take generated as various interests compete for control of the state apparatus").

398. *See id.* at 766 (arguing that alternative views of crime "generally lack credibility").

399. *See id.* at 767 (describing how the definition of crime is produced through a "semiotic process of articulation").

400. *See* Nunn, *Trial as Text, supra* note 68, at 767-68 (stating views of crime based on foundational notions cloaked with commonsense).

> from concepts that already exist within the social reservoir of ideas. In order to be understood, even to be conceived of in the first instance, all new ideas must be built on the ideas of the past.[401]

Individuals contribute ideas about crime to the social reservoir of ideas on a differential basis.[402] Some individuals have greater access to the public consciousness than others.[403] Stuart Hall refers to those who contribute to our conceptualization of crime as the "definers of crime."[404] These definers of crime may be placed in different classes. "Primary definers" are high status figures of authority within a given culture.[405] Primary definers are usually government officials or mainstream academics associated with elite educational institutions, foundations or think tanks.[406] Primary definers are "considered to have greater expertise and to have access to more accurate or more specialized information to particular topics than the majority of the population."[407] "Secondary definers" are those, like the media, who "reproduce as secondary sources the definitions established by primary definers."[408] Finally, a class of "counter-definers" can be identified, made up of dissidents, radical academics, minority group spokespersons and the like.[409] The counter-definers produce alternative views of crime, but their ability to do so is restricted, first because they cannot easily access the media, but more importantly because they "must respond *in terms* pre-established by the primary definers and the privileged definitions."[410]

Consequently, while the definition of crime is worked and reworked through a semiotic process of articulation controlled by no one, the state has a clear advantage.[411] The state and the dominant groups that control the state are able to articulate their definition of crime more frequently and with greater authority.[412] Yet, this advantage held by the state is not the same thing as instrumental control.[413] The definition of crime remains a politically contested

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401. Nunn, *Illegal Aliens, supra* note 372, at 401.

402. *See* Nunn, *Trial as Text, supra* note 68, at 766-67 (describing distinction between primary, secondary and counter-definers).

403. *Id.*

404. *Id.* at 766.

405. *Id.*

406. *Id.*

407. *Id.*

408. Nunn, *Trial as Text, supra* note 68, at 766.

409. *Id.* at 766-67.

410. HALL ET AL., *supra* note 374, at 64.

411. *See* Nunn, *Trial as Text, supra* note 68, at 766 (claiming that opinions and view points of primary definers more likely to be treated as authoritative).

412. *Id.*

413. *Id.*

reality.[414] Crime, then, is not what the state wants it to be, but what it is socially constructed as.[415]

3. Crime, Authority, and Legitimation

While the definition of crime is not itself an instrumental process, it would be a mistake to conclude that the state does not use crime instrumentally.[416] As mentioned earlier, crime is frequently used to rally the support of the population.[417] The threat of crime is used to gain legitimacy for the government or its policies and practices.[418] Behavior that the government finds threatening in one way or another can be made criminal, not simply to detain and arrest those who engage in the behavior, but to change the attitude of the public toward the behavior.[419] Certain groups or individuals, particularly those viewed as subversive or threatening to the dominant order in some way, can be further ostracized by their designation as criminals.[420] This process only works, of course, so long as the state acts congruently with the consensus.[421] If the state were to go against the consensus and seek to demonize a favored group in society it would simply undermine its own legitimacy in the eyes of those who are governed.[422]

B. The Symbiotic Relationship of Race and Crime

Even with an understanding of the multiple ways in which crime can be used and with the recognition that the definition of crime is politically contested, our theory of race and crime is not yet complete. For within this interactive network of meaning, race plays a particularly important role. Race forms a special relationship with crime, which enhances the ideological function of both of these socially constructed categories. In this relationship, race helps to define crime, and crime helps to define race.

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414. *See id.* at 765 (describing definition of crime as "politically contingent").

415. *Id.* at 764 (asserting that the definition of crime is arrived at through a semiotic process, "in which the state has distinct advantages, although no monopoly").

416. *Id.* at 763 (describing how crime can be used to rally the support of the community).

417. *See supra* notes 387-90 and accompanying text.

418. *See* Nunn, *Trial as Text*, *supra* note 68, at 764 (describing how the consensus can gain legitimacy for the state's definition of crime).

419. *See id.* at 760 (describing how crime reinforces the "internal solidarity of the moral community").

420. *See id.* (discussing ostracization of drug abuse and drug users).

421. This is so because "for [the state] to govern in its own interest, the consensus must allow it to do so." *Id.* at 762.

422. The state would undermine its legitimacy since the consensus is the means through which legitimacy is granted. *See id.*

1. Crime as a Definer of Race

In addition to establishing the boundaries of the consensus, crime functions as a means of defining race. Once conduct is defined as criminal, it is then excluded from the consensus.[423] It is behavior in which law-abiding citizens, who are within the cultural mainstream do not engage.[424] But, this conceptual distinction does not apply to persons who are part of the racialized "other."[425] The "other" is impressed with the negative characteristics that those who occupy the center, or who are within the consensus, wish to exclude.[426] That is, race and crime share the same conceptual space within the discourse of social formation.[427] They are both outside of the center, and the demarcation of one lends itself to the social construction of the other.[428]

Crime, then, is intimately associated with race.[429] Crime sets the borders of race and crime is language that constitutes the definition of race.[430] African Americans, in particular, have been defined by their proclivity to commit certain criminal acts.[431] Theft, rape, and drug use have all been associated with African Americans.[432] Floyd Weatherspoon describes the white culture's view of African American males succinctly: "Generally, stereotypical attitudes and feelings from white Americans and foreigners are that black males are overly aggressive, violent, involved in drugs, dishonest, shiftless and lazy, desirous of white women, lacking in work ethics, and are often rapists and criminals."[433]

Without crime it would be difficult to describe African Americans other than in physical terms. Crime gives content to the image of African Americans produced in western cultures.[434] In fact, the very notion of race is determined

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423. *See* Nunn, *Trial as Text, supra* note 68 and accompanying text (discussing crime and the consensus).

424. *See id.*

425. *See* Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679 (2002) [hereinafter Nunn, *The Child as Other*].

426. *Id.* at 692 (noting Foucaultian argument that Western societies construct undesirables out of negative qualities in order to normalize the center).

427. *See* Crenshaw, *supra* note 293, at 1373 (discussing criminality as part of a Black counter-image to whites).

428. *See id.*

429. *See generally* KATHERYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT AND OTHER MICROAGGRESSIONS xiii (1998) (exploring link between Blackness and criminality).

430. *See* MILLER, *supra* note 97, at 149 ("Replete with images of dark-skinned predators, crime has become a metaphor for race").

431. Roberts, *supra* note 8, at 810 (stating "Blacks are presumed to be lawless and are entitled to fewer liberties").

432. Weatherspoon, *supra* note 2, at 28.

433. *Id.*

434. *See* Crenshaw, *supra* note 293; FEAGIN, RACIST AMERICA, *supra* note 332, at 75

by socially constructed notions of crime.[435]

2. Race as a Definer of Crime

While crime is a definer of race, at the same time, race is a definer of crime. That is, those acts that are conceived of as criminal, as being outside of the consensus, are often the very acts that are associated with African people and other people of color.[436] According to Dorothy Roberts, a leading criminal law theorist, the very meaning of crime is racially determined:

> Not only is race used in identifying criminals, it is also used in defining crime. In other words, race does more than predict a person's propensity for committing neutrally defined offenses. Race is built into the normative foundation of the criminal law. Race becomes part of society's determination of what conduct to define as criminal. Crime is actually constructed according to race.[437]

Consequently, conduct can become criminalized simply because African people engage in that conduct–either because negative connotations are supplied to the conduct through it's association with African people, or because controlling the conduct is desirable as a means to control Africans.[438] Nowhere is this more apparent than in connection with drugs.[439] The previously described association of the Chinese with opium, Chicanos with marijuana, and Africans with cocaine led to the criminalization of these substances.[440] Furthermore, when the same substances (at least in the case of marijuana and cocaine) began being used by white youths in the 1960s and 70s, then there was a movement to decriminalize them and provide drug treatment programs.[441]

(asserting Blacks have been constructed as criminal since the first century of slavery).

435. FEAGIN, RACIST AMERICA, *supra* note 332, at 74-75, 105-16 (discussing criminal behavior as a constitutive part of white racist imagery of African people).

436. *See* RICHEY MANN, *supra* note 100, at 132-33 (describing legislation that disproportionately impacted people of color and concluding that "minority people commit crimes that are created for them.").

437. Roberts, *supra* note 161, at 1954.

438. *See* Nunn, *Trial as Text*, *supra* note 68, at 1483 (claiming that "activities that African Americans are more likely to engage in are those that are more likely to be criminalized").

439. *See supra* notes 292-364 and accompanying text.

440. *See supra* notes 251-88 and accompanying text.

441. *See* Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 61-62 (describing drop in white marijuana arrest rates in early 1970s and arguing that a major factor contributing to the decriminalization of marijuana was "undoubtedly a realization that the arrestees were too often the children of individuals, usually white, in positions of power and influence").

3. Consequences from the Combination of Race and Crime

The fact that race defines crime, and crime defines race, produces three consequences that are worth examining. The first is the production of racism from the intersection of race and crime. The second is the criminogenic effect of racism, and the third is the obscuration and legitimation of racist oppression.

a. Crime and the Production of Racism

Crime as a social phenomenon creates racism.[442] When crime occurs, whites generally associate Blacks and certain other people of color with criminal activity.[443] This association creates animus in the white community towards people of color.[444] This is observable in every public opinion survey about racism.[445] Substantial portions of the white majority have repeatedly admitted that they dislike or are suspicious of Blacks and Hispanics because they believe these groups cause crime.[446]

Crime causes fear and fear is the chief ingredient in racism.[447] This is true whether the criminal behavior feared by the white majority is behavior that is indigenous to the African American community or something that was imposed on that community by the policies and practices of the white majority.[448] It is the prevalence of crime in communities of color and, more specifically, the representation of crime as the unique province of communities of color that has fostered and encouraged racism in American society.[449]

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442. Professor Joe Feagin argues that specific anti-Black images, particularly the images of Black criminals, "are part of a broader racial ideological structure" that "buttress the ideology, undergird white privilege, and generate discriminatory practices." FEAGIN, RACIST AMERICA, *supra* note 332, at 105.

443. *See* DORIS A. GRABER, CRIME NEWS AND THE PUBLIC 55 (1980) (reporting findings of 1977 study that most respondents viewed crime as work of young Black males or young males of other communities of color); Jody P. Armour, *Race Ipsa Loquitor: Of Reasonable Racists, Intelligent Baysians and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 787 (1994) (citing 1990 University of Chicago study which found over 56% of Americans believe Blacks to be more violence prone); RUSSELL, *supra* note 429, at 125 ("Studies show the closer Whites live to Blacks, the more fearful they are of crime.").

444. FEAGIN, RACIST AMERICA, *supra* note 332 at 113 (White stereotypes of Blacks as criminals "has rationalized much discrimination."). *Cf.* RUSSELL, *supra* note 429 at 124-27 (claiming white fear of Black crime is irrational and should not excuse white racist views).

445. FEAGIN, RACIST AMERICA, *supra* note 332, at 107-10, 113-16 (describing historic and current attitudes toward perceived Black criminality).

446. *Id.*

447. *See* JOE R. FEAGIN ET AL., WHITE RACISM: THE BASICS 50 (2d ed. 1995) (discussing fear as motivating factor for white racist violence); MILTON KLEG, HATE, PREJUDICE AND RACISM 181-83 (1993) (discussing fear of others as one of the causes of racist thought and behavior).

448. *See* Nunn, *Trial as Text, supra* note 68, at 1486 (suggesting Black crime is result of white social policies).

449. *See* FEAGIN, RACIST AMERICA, *supra* note 332, at 113 (representation of Black men as criminals "has rationalized much discrimination over the centuries").

b. Racism and the Creation of Crime

Racism produces crime in ways that go beyond that definitional sense we have already discussed. White racism-that is animus toward African Americans and other people of color-leads to racist oppression.[450] Racist oppression is made up of those social practices that are designed to subjugate and punish a disfavored group,[451] to enable those who hold racist sentiments to experience the pleasure of superiority.[452] The history of the United States is replete with examples of the use of the criminal justice system as an instrument of racist oppression.[453] These include the imposition of the death penalty, police brutality, the denial of the right to counsel, and the long and protracted struggle to get African Americans on juries.[454] Indeed, in a social landscape where the occurrence of racism is, at least openly, discouraged, the criminal justice system may be one of the few venues where racist practices can continue.[455]

Consequently, racism leads to the creation of crime in order to produce opportunities for racist oppression.[456] The corollary in interpersonal relations would be for a tormentor to invent transgressions so that he or she could inflict more pain on his or her target. In the criminal justice system, racism calls for more and more criminal offences, particularly offences of the character that persons of color are likely to commit, and harsher and harsher criminal punishments.[457]

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450. *See id.* at 70 (describing how racist ideology structures "specific racial attitudes, prejudices, and stereotypes").

451. *See id.* at 2 (describing "white racism" as "commonplace discriminatory practices of individual whites, white images of dangerous blacks. . . and the white-dominated institutions that allow or encourage such practices").

452. *See* Anthony Paul Farley, *The Black Body as Fetish Object*, 76 OR. L. REV. 457, 487 (1997) (describing racism as sadomasochistic pleasure). bell hooks similarly argues that whites hold a contradictory view of Black male bodies—seeing them both as a threat and as "a location for transgressive pleasure." bell hooks, *Feminism Inside: Toward a Black Body Politic*, in BLACK MALE: REPRESENTATIONS OF MASCULINITY IN CONTEMPORARY AMERICAN ART 127, 131 (Thelma Golden ed., 1994).

453. *See* RICHEY MANN, *supra* note 100, at 115-65 (detailing discrimination in laws, law enforcement and the judicial system).

454. *See id.*

455. *See* Nunn, *Trial as Text, supra* note 68, at 1480 (arguing that racism in the criminal justice system can provide legitimacy and cover to racism elsewhere).

456. This is clear from the central role that crime plays in racist oppression. *See* FEAGIN, RACIST AMERICA, *supra* note 332, at 107-13.

457. *See* Nunn, *Trial as Text*, *supra* note 68, at 1488-89 (describing tough on crime attitudes toward punishment).

c. Crime and the Legitimation of Racist Oppression

Crime produces racism and racism produces crime.[458] But crime does more than simply produce racial animus toward disfavored groups.[459] Crime plays a unique role in the whole structure of racist oppression.[460] This is because crime actually legitimates and masks the very racism it creates.[461] Crime provides an easy and convenient excuse for racist attitudes and behaviors.[462] As a result of the working and reworking of the consensus as political ideas compete for acceptance, racism is currently a disfavored political ideology.[463] Racism still holds tremendous sway as a persuasive force and even more as a subterranean cause of conduct, either unrecognized or not admitted.[464] But this residual power of racist ideology must remain hidden and crime provides the perfect hiding place.[465] Crime generates race hatred and focuses it on its target, while claiming all along that it is not so.[466]

Open racial animus toward a member of a non-white group is not acceptable in most mainstream social circles, but animus toward a criminal is not only acceptable, it is encouraged.[467] Even the most elite gentleman is free to hate criminals and even slavery is all right, under the Constitution, if it is imposed as a punishment for crime.[468] It matters not, in this analysis, whether the ranks of criminals are disproportionately Black, or whether racial discrimination contributed to the numbers of Africans entrapped in the system.[469] The fact that they can be called criminals justifies the hatred directed

458. *See supra* notes 442-56 and accompanying text. *See also* Roberts, *supra* note 161, at 1947 (arguing that society "constructs crime in terms of race and race in terms of crime").

459. *See supra* notes 442-49.

460. FEAGIN, RACIST AMERICA, *supra* note 332, at 105 (claiming that "specific anti-black images," including the image of Black men as criminals, help constitute "a broader ideological structure of racialized thinking").

461. *See* Nunn, *Darden Dilemma, supra* note 13, at 1480 (arguing that the criminal justice system is "one of the principle causes of racism elsewhere in society, since it provides legitimacy and cover to racist ideas and behaviors").

462. *See supra* note 449.

463. *See* FEAGIN, RACIST AMERICA, *supra* note 332, at 110 (stating since "it is less socially acceptable to publicly avow strong racist attitude . . . many whites may reserve most of their blatantly racist comments for the private sphere[ ]").

464. *See id.* (claiming racist views and behaviors still of consequence).

465. *See supra* note 461 and accompanying text.

466. *See* FEAGIN, RACIST AMERICA, *supra* note 332, at 110.

467. *See* 2 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81 (1883) ("The criminal law thus proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it.").

468. The Thirteenth Amendment states: "Neither slavery nor involuntary servitude, *except as a punishment for crime* whereof the party shall have been duly convicted, shall exist in the United States. . . ." U.S. CONST. amend. XIII, § 1 (emphasis added).

469. *See* Nunn, *Darden Dilemma, supra* note 13, at 1482 (arguing that the disproportionate

toward them.[470]

Thus, cycling through a semiotic system of articulation, crime produces racism, racism produces crime, and crime produces again more racism. At the same time, crime also legitimizes the very racism it produces. Consequently, the criminal justice system can easily be called the most significant source of racism today, and its greatest protector. The criminal justice system is therefore the weak link in any serious effort to rid American society of racism. Social equality cannot be had unless the criminal justice system as refuge for racist ideology is eliminated.

III. THE POOL OF SURPLUS CRIMINALITY AS EXPLANATORY TOOL

What I have argued thus far is that crime and race play a central role in relations of power. I have claimed that the drug war is a race war[471] and pointed out that there is a long historical connection between drugs and the demonization of African people as criminals.[472] I have also suggested that this connection between drugs and race is not surprising, given the symbiotic interconnectedness of race and crime.[473] In the way that race and crime have been socially constructed through a process of articulation in American culture, race and crime define and inform each other.[474] In addition, the ideological aspect of race, *racism*, actually produces crime.[475] Crime, for its part, produces racism, then legitimates that racism so that it disappears from view.[476]

The theory of race and crime that I have presented can be further explained by an idea I call the concept of surplus criminality. The concept of surplus criminality holds that inchoate or surplus criminals are needed to play social roles in American society necessitated by the intersection of race and crime. The concept of surplus criminality is borrowed from a similar concept in Marxist economic theory–the reserve army of labor. First, I describe the reserve army of labor as it is expressed in Marxist thought. Then, I describe my concept of surplus criminality and discuss its ability to predict criminal justice policy.

A. Marxism and the Theory of Surplus Labor

Marxists believe that capitalist economies go through an endless cycle of

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numbers of African Americans under criminal justice control are due to racism).

470. *Id.*

471. *See supra* notes 31-243 and accompanying text.

472. *See supra* notes 264-78 and accompanying text.

473. *See supra* notes 423-41 and accompanying text.

474. *Id.*

475. That is, racism causes certain behavior to be interpreted as criminal, creating the need for criminal laws and other apparatuses of the criminal justice system to address a perceived crime problem. *See supra* notes 450-57 and accompanying text.

476. *See supra* notes 458-70 and accompanying text.

contraction and expansion.[477] This is because capital investment, which drives capitalist economies, will fluctuate in response to changes in the rate of return.[478] When the economy is growing, the rate of return will be high and new investment will flood into the economy.[479] But the ready availability of capital and the resulting rise in the capitalization of production reduce the rate of profit and the return on investment.[480] Ultimately, the economy stagnates;[481] workers are laid off, the consumer market shrinks, recession occurs and the system resets itself.[482]

During economic growth cycles, the system needs labor power to meet the demand for new production.[483] This labor power is provided by the reserve pool of labor, the number of unemployed persons in the economy who are available to work.[484] The demand for labor drives up wages and as economic growth stabilizes, manufacturers seek to replace their higher labor cost through mechanization and other capital investments.[485] This process accelerates as the reserve pool of labor shrinks, driving the cost of labor even higher.[486] Consequently, the situation changes from one where new jobs are being created and there is a labor demand, to one where jobs are being terminated and there is a labor surplus.[487] The labor surplus is returned to the reserve pool of labor where it resides in the guise of unemployed and underemployed workers until economic conditions change sufficiently to create a new labor demand.[488] Capitalist economies need to maintain a reserve pool of labor to allow quick economic expansion when conditions should warrant.[489] Thus, in a nutshell,

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477. *See* BADE ONIMODE, AN INTRODUCTION TO MARXIST POLITICAL ECONOMY 167 (1985) (explaining that under the assumptions of Marxist theory, economic crises are endemic to capitalism and cannot be eliminated through better monetary management policies). For more in depth treatments of the Marxist view of capitalist economic crises see ARGHIRI EMMANUEL, PROFITS AND CRISES (1984) and MICHAEL PERELMAN, MARX'S CRISES THEORY: SCARCITY, LABOR, AND FINANCE (1987).

478. ONIMODE, *supra* note 477, at 167.

479. *Id.* at 169.

480. *Id.*

481. *Id.*

482. *Id.*

483. ONIMODE, *supra* note 477, at 162 (stating "in this competitive drive for accumulation . . . the capitalist must exploit labour, constantly revolutionise his method of production and create an industrial reserve army of unemployed workers for facilitating further exploitation of labour").

484. *See id. See also* TOM BOTTOMORE ET AL., A DICTIONARY OF MARXIST THOUGHT 422-23 (1983) (describing the reserve army of labor).

485. ONIMODE, *supra* note 477, at 164.

486. *Id.*

487. *Id.*

488. *Id.*

489. *Id.*

Marxists argue that capitalist economies demand a permanent pool of unemployed workers, to keep wages low and to provide needed labor power during times of expansion.

B. The Pool of Surplus Criminality

Given the importance of crime to the maintenance of hegemony and the construction of the consensus, an argument similar to that regarding the reserve pool of labor in the economic field can be made regarding the need to identify criminals in the cultural and political fields. In order for the entire cultural process of consensus creation through labeling and articulation to occur, a group of individuals who can be reasonably labeled, vilified and ostracized must be found.[490] This group cannot be selected arbitrarily. It must be a group that can be legitimately constructed as outsiders and deviants within the bounds of the culture.[491]

For the maintenance of order to be successful, the general public cannot view the criminal justice apparatus as necessary to control the general population.[492] If the general public believes this, then the criminal justice apparatus is likely to be perceived as oppressive.[493] Thus, the success of the policing enterprise is dependent on it being perceived as necessary to control *others*–that is, *them* and not *us*.[494] The entire criminal justice apparatus must be perceived as being necessary to protect society from a criminal class that is fundamentally unlike law-abiding citizens.[495]

This group of outsiders and deviants who are "fundamentally unlike law-abiding citizens" constitutes what I call "the pool of surplus criminality." They are "surplus" to the extent that they stand ever ready to be denoted as criminals, even when such labeling does not occur. When a crisis arises, however, they can easily be identified as criminals, and when it recedes, they can swiftly melt back into the background where they await the next crisis.

In a time of national crisis, a criminal class must already be present and ready to be blamed. Society cannot wait for this class to be developed and it

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490. *See* HALL ET AL., *supra* note 374, at 86.

491. *See id.* at 162 ("The defence of the traditional world view with its appropriate scapegoats does not take place by magic. The necessary connections have to be made, publicly forged and articulated."). See also STANLEY COHEN, FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND THE ROCKERS 75 (1972) (arguing that the deviant's conduct "threatens social reality" and is outside of the norm) and TOM DOUGLAS, SCAPEGOATS: TRANSFERRING BLAME 145-51 (1995) (discussing difference as cause of scapegoating within groups).

492. HALL ET AL., *supra* note 374, at 220 ("The capitalist state cannot remain securely founded on the legitimacy of popular representation, *and* take severe and unusual measures to contain a threat to its foundation which the vast majority of the population does not believe exists.").

493. *See id.*

494. *See id.* at 161 (describing need for and creation of "Folk Devils" to bear social anxieties and legitimize repression).

495. *See id.*

cannot wait for the group to be identified through a long and drawn out juridical process.[496] In a crisis, power[497] has an agenda. Power will wish to exploit the crisis to secure its authority and expand its reach.[498] Power may even generate a crisis, or generate and regenerate a series of crises, in order to manipulate the consensus to its advantage.[499] Consequently, power must constantly keep potential criminals around to serve its interests when necessary.[500]

The recurring War on Drugs is an example of this process of the conscious creation and manipulation of crises by the state.[501] The threat of drugs can always be used to mobilize and strengthen society. Yet the threat created by drugs is only workable, is only "real," to the extent that it is perceived as an external threat posed by an external "enemy" outside of the mainstream.[502] In order for the drug threat to be invoked, a plausible and available scapegoat has to be found. In other words, before the possession, sale, and use of drugs can be criminalized, a group of potential criminals must be identified. In the case of the War on Drugs, African Americans and other people of color provide that group of potential criminals.

C. The Predictive Value of the Theory of Surplus Criminality

The concept of surplus criminality allows us to determine who will be identified as a threat by the cultural processes at work in the social construction of crime. Given the way that race and crime intersect in American culture, African Americans comprise the most significant part of the pool of surplus criminality in the United States. African Americans are labeled as deviant and outside the consensus as a general proposition, but should any specific threat arise, African Americans can also be associated with that threat.[503] While

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496. *See* COHEN, *supra* note 491, at 74 ("The labellers... have a ready-made stock of images to draw upon.").

497. By "power" I mean the state and those dominant groups that control the state.

498. *See* HALL ET AL., *supra* note 374, at 221 (describing how moral panics arise from social or moral controversies that authorities sought to exploit in order to exert or re-exert control).

499. *See id.* (stating "the 'moral panic' appears to us to be one of the principal forms of ideological consciousness by means of which a 'silent majority' is won over to the support of increasingly coercive measures on the part of the state . . .").

500. The process may not work as instrumentally as I describe here. That is, dominant groups, by their sheer dominance, may create an alter ego, or "other," on whom to project their worst fears. *See generally* Nunn, *The Child as Other, supra* note 425, at 690-99 (discussing the concept of otherness). This "othering" will occur because it is part of a cultural dynamic and not because it is planned by any particular person or group. *Id.* at 699.

501. *See* HALL ET AL., *supra* note 374, at 222 (discussing drug use as a cause of panics).

502. *See supra* note 431 and accompanying text.

503. *See* Nunn, *The Child as Other, supra* note 425, at 699 (noting "Blacks sometimes serve as convenient political scapegoats"); Leonard S. Rubinowitz & Imani Perry, *Crimes without Punishment: White Neighbors, Resistance to Black Entry*, 92 J. CRIM. L. & CRIMINOLOGY 335, 350 (2002) (discussing use of Blacks as scapegoats for white economic woes during the Great Depression); Anthony E. Cook, *King and the Beloved Community: A Communitarian Defense of*

African Americans are part of American society, they are viewed suspiciously and treated as merely provisional members of the polity.[504] When the necessity presents itself, this provisional membership can be withdrawn. African American are thus always under suspicion and need to be policed closely.[505]

The pool of surplus criminality not only applies to African Americans as a group; it applies to them individually, as well. Individual African Americans may find that as they go about their daily lives, they may come under suspicion for a variety of real and imagined criminal and antisocial acts.[506] For example, it will be assumed that the African American employee is pilfering goods,[507] violating departmental rules and breaking social taboos like those governing sexual relations in the workplace.[508] African Americans are considered members of the pool of surplus criminality, regardless of class or social position.[509] Black males, for example, are viewed as potentially involved in the drug trade, whether they are part of the middle class or the urban poor.[510]

Black Reparations, 68 GEO. WASH. L. REV. 959, 970-71 (2000) (discussing the role and function of identifying threats with particular groups, especially "[B]lacks, whom society often makes the social scapegoats for its ills").

504. *See* FEAGIN, RACIST AMERICA, *supra* note 332, at 126 ("Whites maintain a positive sense of self and their claims to greater privileges and resources while fending off what whites see as illegitimate black demands for a fair share of those resources.").

505. *See* Maclin, *supra* note 171, at 386 ("Blacks correctly see pretextual stops as another sign that police officers view blacks, particularly black males, as criminals who deserve singular scrutiny and treatment as second class citizens."); Roberts, *supra* note 8, at 811 (arguing that order maintenance policing "helps to reinforce the second class citizenship of Blacks and other people of color").

506. *See* Armour, *supra* note 443, at 787 (discussing "widespread exclusion of blacks from shops and taxicabs by anxious shopkeepers and cabdrivers" as exemplars of white suspicions derived from cultural stereotypes). Such acts of racial profiling may be specific examples of what psychologists refer to as "microaggressions," or those "subtle, minor, stunning automatic assaults . . . by which whites stress blacks unremittingly and keep them on the defensive, as well as in a psychologically reduced condition." Address by C. Pierce, *Unity in Diversity: Thirty-Three Years of Stress*, Solomon Carter Fuller Lectures, American Psychiatry Association Meeting, Washington, D.C. (May 12, 1986), *quoted in* Richard Delgado, *Critical Legal Studies and the Realities of Race—Does the Fundamental Contradiction Have a Corollary?* 23 HARV. C.R.-C.L. L. REV. 407, 408 n.3 (1988). For a treatment of common microaggressions and their treatment in the law, see Peggy C. Davis, *Law as Microaggression*, 98 YALE L. J. 1559, 1561-71 (1989) (describing common stereotypes and how they lead to biased behavior).

507. *See* Deseriee Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection*, 66 MO. L. REV. 275, 276 (2001) (describing "consumer discrimination" as the practice of assuming African customers are potential thieves and treating them accordingly).

508. *See* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 121 (expanded and rev. ed. 1995) (asserting that reasons why white employers refuse to hire African men include the failure of black men generally to fit into white norms of appearance and behavior, and "that having black men and white women work together might lead to familiar relationships . . . .").

509. Consequently, "[b]lack men know they are liable to be stopped at anytime . . ." by the police, and that hostile treatment by the police "applies to black men of all economic strata, regardless of their level of education, and whatever their job status or place in the community." Maclin, *supra* note 164, at 253.

510. *See* Nkechi Taifa, *Codification or Castration? The Applicability of the International*

The theory of the surplus criminality allows us to see that all African Americans are viewed as potential criminals. Whether the issue is the drug war, street crime, welfare fraud, or sexual violence, African Americans will be targeted as the likely cause of the problem.[511] This is not to suggest that African Americans will be the only people targeted and treated as a source of surplus criminality. Other groups may be socially constructed in ways that make them readily available for blame and censure as well.[512] In the current panic, which has been articulated by primary and secondary definers as a "war on terrorism," it is clear that Arabs, Middle-Eastern people, and Muslims have all been constructed as the source of a likely threat.[513] It is instructive to observe how readily this identification occurred. Within minutes of the attack on the World Trade Center, the likely suspects were identified as "Arab terrorists."[514]

The same thing occurred in the aftermath of the Oklahoma City bombing.[515] The first bulletins that issued sought Middle-Easterners for the crime[516] and at least one Arab-American was actually detained.[517] This

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Convention to Eliminate All Forms of Racial Discrimination to the U.S. Criminal Justice System, 40 HOW. L.J. 641, 672 (1997) (discussing how middle-class or well-to-do African Americans may be perceived as drug dealers when seen driving expensive cars).

511. *See supra* note 501 and accompanying text (suggesting that African people will be identified as the source of virtually any threatening behavior).

512. *See* Devon Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1288 (2002) (asserting that "in America there is more than one race on the bottom").

513. *See* Leti Volpe, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1586-87 (2002) (explaining that the attacks on the World Trade Center on September 11, 2001 gave currency to old racist tropes concerning the barbaric and despotic Middle East).

514. Almost immediately after the World Trade Center was attacked, intelligence officials blamed Osama bin Laden's militant Islamic organization, al Qaeda, for the terrorist act. *See* James Risen & David Johnston, *A Day of Terror: Intelligence Agencies; Officials Say They Saw No Signs of Increased Terrorist Activity*, N.Y. TIMES, Sept. 12, 2001, at A21 (quoting unnamed counterterrorism officials for reports that eavesdropping intercepts indicated that bin Laden was responsible for World Trade Center attacks). More importantly, the American public almost instantly perceived the wrong-doers in the World Trade Center attacks as Arab terrorists, and did so before any evidence about the identity of the suspected perpetrators was released. *See* Laurie Goodstein, *A Day of Terror: The Ties; In U.S., Echoes of Rift of Muslims and Jews*, N.Y. TIMES, Sept. 12, 2001, at A12 (describing accusations leveled against Muslims and Arab-Americans, "[e]ven though there was no definitive information yet about who was behind the terrorist attacks"); Amy Harmon, *A Day of Terror: The Talk Online; Web Offers Both News and Comfort*, N.Y. TIMES, Sept. 12, 2001, at A25 ("On many of the Internet discussion groups, participants blamed Arab terrorists for the acts, and anti-Arab sentiment and slurs abounded.").

515. *See* Gustav Niebuhr, *After the Attacks: The Muslims*, N.Y. TIMES, Aug. 22, 1998, at A8 (stating that after the bombing of the Federal Building in Oklahoma City in 1995 "some media reports, particularly on television, allowed free reign to the suspicion that Middle Eastern radicals might be responsible") and Gustav Niebuhr, *Religion Journal; In Shift, Islam is Unaffected by 2 Deadly Incidents,* N.Y. TIMES, Aug. 3, 1996, §1, at 25 (stating that "in the immediate aftermath of the Oklahoma City bombing in April 1995 . . . television reports hummed with speculation that the attack was the work of Middle Eastern terrorists" and that these reports led to the harassment of Arab-Americans and American Muslim organizations).

516. *See* Joseph P. Fried, *Terror in Oklahoma: New York Trial; Defense Denied Mistrial Request Over Oklahoma Blast Publicity,* N.Y. TIMES, April 21, 1995, at A26 (stating that "[i]nitial news reports have suggested that investigators in the Oklahoma City explosion were looking for

response could only occur so swiftly if Middle-Easterners were already socially constructed as a potential threat. At the time of crisis, then, the natural and reflexive response would be to blame Middle-Easterners, that is, to draw them from the pool of surplus criminality.

It is important to remember that the theory of surplus criminality predicts that those who are placed within the pool stand ready to be swiftly converted to what ever the present need of the society is in regards to threats. Thus, the theory of surplus criminality would predict that when Arabs, Middle-Eastern people, and Muslims cannot be found, African Americans will be marshaled to fill the role as threat.[518] My expectation is that somehow, America will find a way to search, detain and identify African Americans as terrorists.[519] If there is

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Arab suspects").

517. An American citizen of Jordanian background was detained in London after he fit a profile being used to stop "young men traveling alone to destinations like the Middle East." David Johnston, *Terror in Oklahoma: The Investigation; A Piece of Rented Truck Offers a Clue to 2 Suspects*, N.Y. TIMES, April 21, 1995, at A24. A white man, Timothy McVeigh, was ultimately tried and convicted of bombing the federal courthouse in Oklahoma City. Raymond Bonner & Marc Lacey, *U.S. Plans Delay in First Execution in Four Decades*, N.Y. TIMES, July 7, 2000, at A1.

518. The War on Terrorism's current focus on Arabs and Middle-Easterners seems to have reduced the degree to which other people of color are perceived as threats and required to prove their allegiance to American institutions and goals. *See* Volpe, *supra* note 513, at 1584. But as Professor Volpe cogently acknowledges, the current acceptance of people of color as "true Americans" is at best a "momentary phenomenon." *Id.* at 1584, n.30. Cultural forces can be expected to push non-Arab people of color, particularly African people, back into their usual status as objects of suspicion and fear. There is some evidence that the re-identification of African Americans with the threat of terrorism is already occurring. Some government agencies, fearing potential recruits to terrorist causes, view the large number of African-American Muslims with alarm. *See* Patrick J. McDonnell, *FBI Focuses on Black Muslims in Seattle; Terrorism: Agents are Checking Possible Links Between Local Mosques and Al Qaeda Network*, L.A. TIMES, July 20, 2002, at A1 (reporting that "court papers suggest that FBI anxiety about radical African American Muslims has reemerged in the last decade as the bureau has concentrated on Islamic terrorism."); Edward Hegstrom, *A Twisting Trek: From Beautician to Terror Suspect*, HOUSTON CHRONICLE, Oct. 16, 2002, at A29 (reporting concern that "the mixing of a long-simmering resentment among some blacks and obvious hatred by some Middle Easterners could create a dangerously explosive anti-American cocktail.").

519. Ihsan Bagby, a professor at Shaw University in North Carolina, has noted increased surveillance of African American Muslims since the 1993 World Trade Center bombing and argues that "this is a combination of a focus on terrorism and an agenda about black 'radicals' and Muslims—all lumped together." McDonnell, *supra* note 518, at A1. *See also* Karen Auge, *In 1991, Suspect Lionized as a Hero*, DENVER POST, July 24, 2002, at A01 (discussing case of James Ujamaa, an African American held as a terrorism suspect). One activist familiar with the James Ujamaa case claimed Ujamaa was singled out because he was African American and a Muslim. "If he was a white youth doing the same thing," Seattle activist Charlie James stated, "I don't think [anyone] would say [he's a] terrorist." Auge, *supra*, at A01. As this article goes to press, a number of African Americans have been arrested by the government as terrorism suspects allegedly connected to Islamic or Middle Eastern groups, including two suspects charged with the shooting of thirteen people in the Washington, D.C. metropolitan area. *See* Patrick J. McDonnell & Peter Y. Hong, *Response to Terror; Terrorism Case Shows U.S. Moving Proactively; Oregon: Some Groups Question Tactic, Wonder Whether Muslims are Being Targeted for Beliefs*, L.A. TIMES, Oct. 6, 2002, at p. 1 (reporting that several terrorism suspects connected with Portland, Oregon mosque are African American converts to Islam); Steven A. Holmes, *The Hunt for the Sniper: An Assumption Undone; Many Voice Surprise Arrested Men are Black*, N.Y. TIMES, Oct. 25, 2002, at A26 (reporting that two suspects arrested in Washington sniper case, John Allen Muhammad and John Malvo, are African Americans).

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a social need to demonstrate that the government is responding to this newly identified threat, the government will do so in ways that, like the drug war, intrude less on the general population and intrude more on the African American community.

CONCLUSION

Because of their historic connection to drugs in the American public consciousness, African Americans provide a ready and available target for the nation's war on drugs. Socially constructed as an "other" which is both lascivious and violent, African Americans provide the perfect source when white policy makers seek out both drug users and drug dealers for punishment and ostracization. The close connection of race and crime in American culture helped lead to the identification of drugs as the preeminent threat facing the nation as Ronald Reagan assumed the presidency. Once drugs were identified as a threat, African Americans were sure to be identified as the source of that threat.

But the culpability of African people in the Euro-American mind is not limited to drugs. Since race actually defines crime and crime produces racism, African Americans will constitute "the usual suspects" no matter what the social concern. The drug war is just a specific instance of this general problem. To address the general problem, and thereby drain the pool of surplus criminality, American culture has to be reshaped. The deep and sometimes hidden attraction to racism in American culture must be confronted head on. In particular, the way racism is both invoked and sheltered within the criminal justice system must be addressed and eliminated. The criminal justice system, I have argued, provides the foundation for racist attitudes and behaviors throughout society. When the criminal justice foundation of racial prejudice is shattered, the entire racist edifice will fall.

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