

RACIAL PROFILING AND THE FOURTH AMENDMENT

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I. Introduction

“The erosion of Fourth Amendment liberties comes not in dramatic leaps but in small steps, in decisions that seem “fact-bound,” case specific, and almost routine at first blush. Taken together, though, these steps can have broader implications for the constitutional rights of law-abiding citizens.”¹

It seems as though one can barely turn on the nightly news without learning of yet another heartbreaking tale of a person dying at the hands of law enforcement officers. The face of the deceased is disproportionality black and/or brown. Of course this phenomenon is not new – these days it is simply caught on camera and disseminated via mass and social media for all to consume. While there are differing views on how these matters should be handled and what they mean for society as a whole, there is no question that having these issues surrounding race and the Fourth Amendment discussed openly means it is time for criminal defense attorneys to dig in and fight for change in our system. Specifically, we must address racial profiling and its impact on our clients articulating how the life experience, both individual and collective, our clients endure must be factored in to the court’s Fourth Amendment analysis.

¹ *United States v. Tinnie*, 629 F.3d 749, 754 (7th Cir. 2011)(HAMILTON, dissenting).

This session will delve into the standards set forth by the United States Supreme Court and how we can use those standards to combat seizures that run afoul of the Fourth Amendment.

II. Legal Standard

A. Seizures

A person can be “seized” before he is actually restrained by physical force at the moment when, given all the circumstances, a **reasonable person** would believe he is not free to leave². As the Supreme Court reaffirmed in *Florida v. Bostick*³, the test for determining whether a *Terry* stop has taken place "is whether a **reasonable person** would feel free to decline the officers' requests or otherwise terminate the encounter." That turns on "whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'"⁴

The court stressed in *Chesternut* that there is a need for a seizure test which “calls for consistent application from one police encounter to the next” and permits police “to determine in advance whether the conduct contemplated will implicate the Fourth Amendment.”⁵ While this test is an “objective” one, it is “necessarily imprecise” because “what constitutes a restraint on liberty prompting a person to conclude that he is not free to

² *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988)

³ 501 U.S. 429, 436 (1991)

⁴ *Bostick* at 437

⁵ *Chesternut* at 574

‘leave’ will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs.”⁶

“While it is true that any one stop is a limited intrusion in duration and deprivation of liberty, each stop is also a demeaning and humiliating experience. No one should live in fear of being stopped whenever he leaves his home to go about the activities of daily life. Those who are routinely subjected to stops are overwhelmingly people of color, and they are justifiably troubled to be singled out when many of them have done nothing to attract unwarranted attention.”⁷

"Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions."⁸ So long as a **reasonable person** would feel free to disregard the police and go about his or her business, the encounter is consensual and no reasonable suspicion is required.⁹ “A consensual encounter becomes a seizure implicating the Fourth Amendment when, considering the totality of the circumstances, the questioning is ‘so intimidating, threatening, or coercive that a **reasonable person** would not have believed himself free to leave.’ ”¹⁰

B. Traffic Stops

⁶ *Chestnut* at 573–74

⁷ *Floyd v. City of New York*, 959 F.Supp.2d 540 (S.D.N.Y., Aug. 12, 2013)

⁸ *Florida v. Royer*, 460 U.S. 491, 497; 523, n. 3 (REHNQUIST, J., dissenting)

⁹ *Bostick* at 434 (citing *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968))

¹⁰ *United States v. Flores-Sandoval*, 474 F.3d 1142, 1145 (8th Cir.2007) (quoting *United States v. Hathcock*, 103 F.3d 715, 718 (8th Cir.1997)).

The phenomenon of police seizures for “driving while black” has long been recognized.¹¹ *Terry* authorized investigatory stops without a warrant when a police officer has a reasonable suspicion that a person is engaged or is about to engage in crime¹². The logic of *Terry* has long been understood to authorize traffic stops to address violations of traffic laws.¹³ The Supreme Court’s ruling in *Whren v. United States*¹⁴ solidified law enforcement’s ability to engage in racial profiling by affirming that pretext alone does not render a traffic stop unreasonable. Any traffic violation, no matter how minor, is enough for the police to stop a person.

“This combination of constitutional decisions already enables aggressive and intrusive police tactics. Officers who have probable cause for a trivial traffic violation can stop the car and then order all occupants out of the car¹⁵, often to frisk them¹⁶, to inspect the interior of the car visually¹⁷, and often to search at least portions of the vehicle's interior¹⁸. Add in the fact that a stop can be justified by an officer's *mistake* of either law or fact¹⁹, and the opportunities for pretextual intrusions on civilians multiply”²⁰.

¹¹ See, e.g., 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).

¹² *Terry v. Ohio*, 392 U.S. 1, 20 (1968)

¹³ E.g., *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977); see also *Rodriguez v. United States*, 575 U.S. —, 135 S.Ct. 1609, 1614, 191 L.Ed.2d 492 (2015) (routine traffic stop more analogous to *Terry* stop than to formal arrest).

¹⁴ *Whren v. United States*, 517 U.S. 806 (1996) allows police to engage in traffic stops, even when the true motive is to find other things, as long as they treat it like a traffic stop.

¹⁵ *Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997)

¹⁶ *Arizona v. Johnson*, 555 U.S. 323, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009)

¹⁷ *Colorado v. Bannister*, 449 U.S. 1, 4 n. 3, 101 S.Ct. 42, 66 L.Ed.2d 1 (1980)

¹⁸ *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009); *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

¹⁹ *Heien v. North Carolina*, 574 U.S. —, 135 S.Ct. 530, 536, 190 L.Ed.2d 475 (2014).

²⁰ *United States v. Johnson*, 823 F.3d 408, 412 (7th Cir. 2016), reh'g en banc granted, opinion vacated (Aug. 8, 2016)

We must continue to make challenges to racial profiling stops. As the public is inundated with stories of the black community's decades of harassment at the hands of law enforcement, judges are getting the same information. Part of the problem historically is that case scenarios were dismissed as outliers, thus not worthy of a ruling protecting the constitutional rights of the masses. These things weren't prevalent, at least that is the rationale that was provided. Today we have data, technology, and a rampant news cycle on our side. We need to use it for good. Moreover, the courts can dismiss, if they choose, a single case as an outlier, but to deem a plethora of motions as such would be irrational.

III. Why Race Matters In This Analysis

As attorneys we must ask ourselves whether the standard currently used takes into consideration the way people of color view law enforcement and their interactions with citizens in this country. If that answer is not consistent with the way the courts view reasonableness and other Fourth Amendment violations, there is a problem with the standard, not the way millions of people in this country view their encounters with police. Courts must begin taking this into account in their analysis.

In *United States v. Smith*²¹, I argued that race was a factor that should be considered in the totality of the circumstances analysis. The Seventh Circuit did not rule in Smith's favor because of race, but instead determined that race was not dispositive in his case. Specifically, they said, "[w]e do not deny the relevance of race in everyday police encounters with citizens in

²¹ 794 F.3d 681 (7th Cir. 2015)

Milwaukee and around the country. Nor we do we ignore empirical data demonstrating the existence of racial profiling, police brutality, and other racial disparities in the criminal justice system. But today we echo the sentiments of the Court in *Mendenhall* that while Smith's race is "not irrelevant" to the question of whether a seizure occurred, it is not dispositive either. Even without taking into account Smith's race, we are able to find on the strength of the other factors discussed that this encounter constituted a seizure."²²

The distrust of law enforcement existing as a product of the long-standing us-versus-them reality between police officers and people of color, particularly Black Americans isn't a new phenomenon. It's a long-standing atmospheric that can no longer be ignored by courts across this country, especially in light of the ever-growing visual documentation of the negative treatment by law enforcement Black Americans have complained about for decades. To continue to do so necessarily deprives people of color charged in the system of a standard that incorporates their day-to-day reality. The dire consequence of doing so renders a controlling portion of the persons charged in criminal cases left without a body of jurisprudence that pays what is reasonable to them a scintilla of attention.

Numerous studies and polls show that minority groups have a disturbingly negative perception of police officers.²³ The relationship between these two groups has been fraught with mistrust, and at times, minority communities have erupted in violence over allegations of police

²² *United States v. Smith*, 794 F.3d 681, 688 (7th Cir. 2015)

²³ See William J. Stuntz, *Race, Class, and Drugs*, 98 Colum. L. Rev. 1795, 1797 & n. 6 (1998).

misconduct. In 1999, then United States Attorney General Janet Reno explicitly acknowledged that minority communities' mistrust of police officers stems from the belief that "police have used excessive force, that law enforcement is too aggressive, [and] that law enforcement is biased, disrespectful and unfair."²⁴ This distrust is not simply due to misperceptions or unsubstantiated allegations of police bias. Unfortunately, empirical evidence supports the notion that African Americans' perceptions of mistreatment and differential treatment by the criminal justice system are substantiated.²⁵ Some scholars have found that the underlying cause of this distrust is linked to the excessive force and aggressive policing techniques that police have consistently been employed in minority communities.²⁶ In 1968, the United States Supreme Court's decision in *Terry v. Ohio* noted the link between racism and the aggressive patrolling of minority communities:

"[I]t cannot help but be a severely exacerbating factor in police-community tensions. This is particularly true in situations where the "stop and frisk" of youths or minority group members is "motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets."²⁷

²⁴ Associated Press, Reno Urges Officers to Try to Regain Trust, Balt. Sun, April 16, 1999 at 7A.

²⁵ See Marc Mauer & Tracy Huling, Young Black Americans and the Criminal Justice System: Five Years Later, 7-8 (1995).

²⁶ See I. Bennett Capers, Crime, Legitimacy, and Testifying, 83 Ind. L.J. 835, 844-46 (2008)("[T]he very fact that most victims of police brutality are members of poor and minority communities . . . contributes to the perception that the police are more likely to engage in force when dealing with a minority suspect[,] . . . a perception for which there is evidentiary support.").

²⁷ 392 U.S. 1, 14 n. 11 (1967)(quoting Lawrence P. Tiffany et al., Detection of Crime: Stopping and Questioning, Search and Seizure, Encouragement and Entrapment 47-48 (Frank J. Remington ed., 1967)).

Further, empirical evidence reveals that racial profiling is not a figment of the imagination; rather, it is a widespread practice employed by police officers in many communities.²⁸ This adds to the negative perception of law enforcement's role in the community. In New Jersey, African Americans and Hispanics constituted 78% of "the motorists [that police] stopped and searched."²⁹ Although police stopped and searched white individuals far less frequently, officers uncovered evidence of criminal wrongdoing twenty-five percent of the time that they searched white motorists.³⁰ Similarly, in Maryland, although African Americans constituted "only 17.5% of the drivers violating traffic laws" on a particular stretch of Interstate 95, they comprised "72.9%" of all of the drivers that were stopped and searched along [that] stretch."³¹ "Similar studies in other jurisdictions have produced similar data."³²

More recently data was released from New York City. The New York Police Department conducted over 4.4 million *Terry* stops between January 2004 and June 2012.³³ In 52% of those stops, the person was black, in 31% the person was Hispanic, and 33% white.³⁴ In 2010, New York City's resident population was roughly 23% black, 29% Hispanic, and 33% white.³⁵ In 23% of the stops of blacks, and 24% of the stops of Hispanics, the officer recorded using force, but the number for whites was much lower at 17%.³⁶ Weapons

²⁸ See Capers, Testilying at 849-52.

²⁹ *Id.* at 850.

³⁰ *Id.*

³¹ *Id.*

³² See *id.* at 850 & n. 86 (listing evidence of racial profiling in several American cities).

³³ *Floyd* at 10.

³⁴ *Id.* at 10-11.

³⁵ *Id.* at 11.

³⁶ *Id.*

were seized in 1.0% of the stops of blacks, 1.1% of the stops of Hispanics, and 1.4% of the stops of whites.³⁷

III. CONCLUSION

Addressing issues of race in the context of police stops is necessary, and defense attorneys need to be more aggressive in their pursuit of justice in this area. As materials, I have provided the Seventh Circuit opinion *United States v. Smith* reversing my client's conviction, Judge Weinstein's opinion in *United States v. Bannister*³⁸ providing a nice roadmap on the history of race and mass incarceration in this country and in New York, *Utah v. Strieff*³⁹ for great dicta in Justice Sotomayor's dissent on the issue of race and the Fourth Amendment, and "Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions" by Jonathan Rapping—a must read for any attorney engaged in criminal defense practice. These materials are not an exhaustive list of relevant materials. Indeed there are many articles and cases worthy of inclusion, but there is no simple way to provide everything worthy of mention.

Continue to fight the good fight. The human seated next to you at counsel table needs your energy, dedication, and support.

³⁷ *Id.*

³⁸ 786 F.Supp.2d 617 (E.D.N.Y. 2011)

³⁹ 579 U.S. ____ (2016)

In the
United States Court of Appeals
For the Seventh Circuit

No. 14-2982

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

DONTRAY A. SMITH,

Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 2:13-cr-136 — **Rudolph T. Randa**, *Judge*.

ARGUED APRIL 17, 2015 — DECIDED JULY 20, 2015

Before POSNER and WILLIAMS, *Circuit Judges*, and WOOD,
District Judge.^{*}

WILLIAMS, *Circuit Judge*. Two Milwaukee Police Department officers on bicycle patrol were investigating gunshots around 16th and Center Street. They saw Dontray Smith

^{*} Of the United States District Court for the Northern District of Illinois, sitting by designation.

crossing 16th Street as he prepared to enter an alley. The officers rode ahead of Smith into the alley and when they were five feet from Smith, they stopped and positioned their bicycles at a 45-degree angle to him. One officer dismounted, approached Smith, and asked whether he had a gun or any other weapon in his possession. When Smith indicated that he had a gun, the officers confiscated it and arrested him.

Smith was indicted for being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1). He filed a suppression motion alleging evidence to be used against him—his statement to the officers and the gun they confiscated—was obtained through an unreasonable seizure in violation of his Fourth Amendment rights. The district court found that Smith’s encounter with the officers was consensual, and no seizure had occurred. Smith entered a conditional plea agreement, retaining the right to appeal the denial of his motion to suppress. After being sentenced to 37 months’ imprisonment and three years of supervised release, Smith appeals. He argues that his encounter with the officers cannot be treated as consensual because a reasonable person in his situation would not have felt free to ignore the police and go about his business. We agree that in light of all the circumstances surrounding the encounter, Smith was seized by the officers. Since he was seized without reasonable suspicion, Smith’s Fourth Amendment rights were violated. Therefore, the district court erred by not suppressing the evidence, and we reverse.

I. BACKGROUND

On June 6, 2013, Michael Michalski and Michael Flannery, Milwaukee Police Department officers, were on bicycle patrol in the vicinity of North and Teutonia Avenues. At

around 10 p.m., the officers heard three to four gunshots fired north of their location. They did not call dispatch to report the shots fired. Instead, they rode their bicycles to 2600 North 15th Street where they spoke with a witness who reported that he heard gunshots west of his location. The officers made no further inquiries of this witness and did not ask whether he possessed a weapon.

The officers rode one block west on Clarke Street and turned north on North 16th Street towards Center Street. In this residential area, they saw Dontray Smith crossing North 16th Street. Smith, a resident of the neighborhood, had just left an alley on the east side of the street and was preparing to enter an alley on the west side. He was not running or engaging in any other suspicious behavior, nor was he coming from the direction where the shots were reportedly fired.

The officers rode ahead of Smith into the alley. When the officers were roughly 20 feet in front of Smith (and all were in the alley), they made a U-turn to face Smith and began closing the distance. They stopped approximately five feet in front of Smith, positioning their bicycles at a 45-degree angle to face him. Neither Michalski nor Flannery identified himself as an officer, said hello, or asked Smith for identifying information. Officer Michalski got off his bicycle and approached Smith with his hand on his gun.¹ He asked Smith, "Are you in possession of any guns, knives, weapons, or anything illegal?"

¹ At the suppression hearing, Officer Michalski testified that he was trained to approach someone suspected of having a firearm with a hand on his weapon and that this training would have been part of his behavior on the evening of the officers' encounter with Smith.

According to the officers, Smith then “nodded towards like his right side, his head down, and he said ‘Yes, I have a gun.’” At this point, Officer Flannery got off his bicycle and asked Smith if he had a concealed weapon permit, to which he responded “no.” The officers handcuffed Smith and searched his front pocket to recover a gun. After seizing the gun, the officers obtained Smith’s identifying information. At approximately 10:13 p.m., the officers notified dispatch that they had arrested Smith. Officer Michalski recorded the encounter as a “field interview” in the police report.

Smith was indicted for being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1). He filed a suppression motion alleging his statement to the officers and the gun were obtained through an unreasonable seizure in violation of his Fourth Amendment rights. After an evidentiary hearing, the magistrate judge recommended that his suppression motion be denied because no seizure had occurred and no constitutional interests were implicated. The district court issued an order adopting the magistrate’s recommendation. Smith then entered into a conditional plea agreement that allowed him to retain his right to appeal the denial of his motion to suppress. He was sentenced to 37 months’ imprisonment and three years of supervised release. This appeal followed.

II. ANALYSIS

In reviewing the district court’s denial of a motion to suppress, we review its factual findings for clear error and legal questions *de novo*. *United States v. Schmidt*, 700 F.3d 934, 937 (7th Cir. 2012). In this appeal, the sole issue presented is a legal one: whether a police encounter in an alley of the type described above constitutes a “seizure” within the

meaning of the Fourth Amendment. The government conceded at oral argument, and we accept for purposes of this decision, that the officers lacked the reasonable suspicion required to justify a seizure and that, if a seizure took place, the gun found on Smith's person must be suppressed as tainted fruit.

It is well established that a seizure does not occur merely because a police officer approaches an individual and asks him or her questions. *See, e.g., Florida v. Royer*, 460 U.S. 491, 497 (1983) (“[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.”); *accord United States v. Childs*, 277 F.3d 947, 950 (7th Cir. 2002). So long as a reasonable person would feel free to disregard the police and go about his or her business, the encounter is consensual and no reasonable suspicion is required. *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (citing *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)).

The “crucial” test for determining if there has been a seizure is “whether taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.” *Bostick*, 501 U.S. at 434. While this test is an “objective” one, it is “necessarily imprecise” because “what constitutes a restraint on liberty prompting a person to conclude that he is not free to ‘leave’ will vary, not only with the particular police conduct at issue, but also with the setting in which the

conduct occurs.” *Michigan v. Chesternut*, 486 U.S. 567, 573–74 (1988).

Circumstances that suggest a seizure include “the threatening presence of several officers, display of their weapons, physical touching of the private citizen, use of forceful language or tone of voice (indicating that compliance with the officers’ request might be compelled), and the location in which the encounter takes place.” *United States v. Clements*, 522 F.3d 790, 794 (7th Cir. 2008) (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). Courts also consider whether police made statements to the citizen intimating that he or she was a suspect of a crime, *United States v. Borys*, 766 F.2d 304, 311 (7th Cir. 1985), whether the citizen’s freedom of movement was intruded upon in some way, *Chesternut*, 486 U.S. at 575, whether the encounter occurred in a public or private place, *United States v. Adebayo*, 985 F.2d 1333, 1338 (7th Cir. 1993), and whether the officers informed the suspect that he or she was free to leave. *Id.* These factors, however, are neither exhaustive nor exclusive. See *Mendenhall*, 446 U.S. at 554 (indicating that such factors are merely “[e]xamples”).

With this guidance mind, we turn to the circumstances surrounding the encounter in this case. Smith, while walking alone at night in an alley, was intercepted by two armed, fully uniformed police officers. Leading up to this encounter, the officers waited for Smith to enter the alley, rather than engaging with him on the more open and presumably illuminated street. The officers rode past Smith into the alley and then made a U-turn to face him. When they were five feet from Smith, the officers stopped and positioned their bicycles at a 45-degree angle to him, obstructing his intended

path forward. Officer Michalski dismounted from his bicycle and approached Smith with his hand on his gun. Neither officer introduced himself, engaged in any pleasantries with Smith, or asked Smith for his name. Nor did the officers ask Smith general investigatory questions, such as whether he had heard gunshots. Instead, Officer Michalski posed a single, accusatory question to Smith: “Are you in possession of any guns, knives, weapons, or anything illegal?” Smith was not informed that he was at liberty to ignore the question.

Given these factors—in particular, the location of the encounter in a dark alley, the threatening presence of multiple officers, the aggressive nature of the questioning, and the fact that Smith’s freedom of movement was physically obstructed by the positioning of the officers and their bicycles—we conclude that a reasonable person in Smith’s situation would not have felt at liberty to ignore the police presence and go about his business. Therefore, we find that Smith was seized for purposes of the Fourth Amendment.

In arguing that this encounter should be treated as a consensual one, the government emphasizes that its location was “public.” While it is true that the alley in which Smith was approached is public, the fact remains that alleys are by their nature less travelled and narrower than streets. A citizen approached in an alley will very often be alone, as Smith was, and have limited room in which to maneuver, conditions that may contribute to the reasonable belief that simply walking away from the police is not an option. *See, e.g., United States v. Jerez*, 108 F.3d 684, 692 (7th Cir. 1997) (“When a person is in a confined area, encircling the area in an intimidating fashion contributes to a reasonable belief that ignoring the law enforcement presence is not an option.”); *cf.*

United States v. Drayton, 536 U.S. 194, 204 (2002) (noting that “a reasonable person may feel ... more secure in his or her decision not to cooperate with police on a bus than in other circumstances” because “many fellow passengers are present [on a bus] to witness officers’ conduct”). Alleys are distinguishable from the sorts of open, populated spaces in which police questioning is typically deemed consensual. Compare *Florida v. Rodriguez*, 469 U.S. 1, 4 (1984) (no seizure where questioning occurred in “public area of the airport”), with *Royer*, 460 U.S. at 508–09 (questioning in enclosed, windowless room constituted a seizure).²

The government also stresses that Smith was not physically touched during the encounter. While the touching of a citizen by an officer is indicative of coercion, *Clements*, 522 F.3d at 794, we disagree with the suggestion that physical contact is required to find that a seizure has taken place. A seizure may transpire any time police conduct “communicate[s] to the reasonable person an attempt to capture or otherwise intrude upon [his] freedom of movement.” *Ches-ternut*, 486 U.S. at 575. Such a communication can occur absent physical contact such as when police activate a siren or flashers, or, as in this case, when police act “aggressively to block [a person’s] course or to control his direction or speed.” See *id.* at 575.

² Even questioning in the most circumscribed of spaces may be deemed non-coercive if, for example, police explicitly communicate to the citizen that compliance is not required. See *United States v. Thompson*, 106 F.3d 794, 798 (7th Cir. 1997) (rejecting argument there could be no consensual interrogation of citizen in confines on a police squad car where trooper explicitly informed citizen she was free to leave). Here, however, no such message was conveyed to Smith.

The government also contends that no seizure occurred here because the officers did not entirely block Smith's "path" or his "exit" from the alley with their bicycles. According to the government, all Smith had to do to end the encounter was walk "around" or "through" the officers. Common sense dictates that no reasonable person in an alley would feel free to walk "through" two armed officers on bicycles. And our case law makes clear that officers need not totally restrict a citizen's freedom of movement in order to convey the message that walking away is not an option. In *United States v. Burton*, 441 F.3d 509 (7th Cir. 2006), three police officers approached the defendant's car on their bicycles. *Id.* at 510. One of the officers placed his bicycle in front of the car and the others placed their bikes on either side of it. *Id.* at 510–11. We held that "[i]t [was] a reasonable, in fact a compelling, inference that the police placed their bikes where they did in order to make sure that Burton didn't drive away before they satisfied themselves that there was no criminal activity afoot. By doing this they 'seized' the car, though in a severely attenuated sense." *Id.* at 511. Although it was theoretically possible for Smith, like the defendant in *Burton*, to extricate himself from the situation by reversing course, the officers' positioning nonetheless was sufficient to communicate to a reasonable person that he was not free to leave. See also *United States v. Pavelski*, 789 F.2d 485, 488 (7th Cir. 1986) (noting that a reasonable person "bounded on three sides by police patrol cars, would not have believed that he was free to leave"); *Jerez*, 108 F.3d at 692 (noting that a "confined area ... contribute[s] to a reasonable belief that ignoring the law enforcement presence is not an option").

Lastly, the government argues that the police did not convey any message to Smith that he was a suspect in an

ongoing investigation. The line between a consensual conversation and a seizure is crossed when police convey to an individual that he or she is suspected of a crime. *See Borys*, 766 F.2d at 311. While the government posits that in order to convey such a message, police must say “you are a suspect,” such magic words are not required. Any statement that “intimate[s] that an investigation has focused on a specific individual easily could induce a reasonable person to believe that failure to cooperate would lead only to formal detention.” *See id.* at 311 (citing *United States v. Berry*, 670 F.2d 583, 597 (11th Cir. 1982) (en banc)). In other words, courts must look to the totality of the circumstances when determining whether an officer’s words or conduct have conveyed the reasonable belief to a citizen that he or she is suspected of a crime. In the context of this highly charged encounter—which involved no pleasantries, the cornering of a lone citizen in an alley, and the posing of the sole question, “do you have a weapon?”—we find that a reasonable person in Smith’s position would believe he or she was suspected of some criminal wrongdoing, and as such, not at liberty to walk away.

We note that our assessment is consistent with the officers’ own contemporaneous and subsequent descriptions of the encounter. In his police report, Officer Michalski described the encounter with Smith as a “field interview. A “field interview,” according to the Milwaukee Police Department’s Standard Operating Procedure (SOP), is “the brief detainment of an individual ... based on articulable reasonable suspicion, for the purposes of determining the individual’s identity and resolving the member’s suspicions concerning criminal activity.” SOP § 085. In other words, it is a seizure (a *Terry* stop, to be precise). By contrast, the SOP

defines a “social contact” as a consensual encounter with a citizen for the “purpose of asking questions or ... information gathering.” *Id.* No reasonable suspicion is required for this sort of encounter, but a “proper introduction” by the officer is recommended. *See id.* (“Police members should safeguard their actions and requests so that a reasonable person does not perceive the contact as a restraint on their freedom. Police members will be respectful, attempt to build rapport, and keep the contact as brief as possible.”).³

The officers’ testimony at the suppression hearing also indicates the coercive nature of the encounter. According to Officer Flannery, Smith was not at liberty to simply walk away from the officers:

Q. If Mr. Smith looked up to you and said “go screw yourself” and kept walking, would you have considered him to be cooperative?

A. Honestly, not really, no.

Q. And then what would you have done?

A. Probably would have stopped him.

During his testimony, Officer Michalski stated the encounter with Smith was a “field interview,” rather than a citizen contact, and suggested that Smith was a suspect in the shooting incident that the officers were investigating that night. He explained that since he had heard gunshots in the

³ The version of the Milwaukee Police Department’s SOP governing citizen contacts and field interviews effective at the time of Smith’s arrest is available at http://city.milwaukee.gov/ImageLibrary/Groups/cityFPC/agendas3/130516_PD_C.pdf (last visited July 1, 2015).

area, “for safety reasons, walking in an alley like that, I’m going to ask someone are they in possession of anything like that—guns, knives, a weapon or something like that.” He further clarified that were the encounter a consensual “citizen contact,” he would have posed different questions, such as “[d]id you see somebody run through a yard? We’re looking for somebody.” He reiterated that if he is “going to a shots fired call I’m going to ask that person, ‘Do you have a gun on you?’”

The government would have us believe that a “reasonable person” would view this encounter in a manner at odds with how it would be classified by the Milwaukee Police Department’s Standard Operating Procedures, how the officers viewed the encounter, and obviously how Smith himself perceived it. We simply cannot ignore the coercive nature of this encounter. Of course, the subjective beliefs and intent of the officers are relevant to the assessment of the Fourth Amendment implications of police conduct only to the extent they have been conveyed to the person confronted. *Mendenhall*, 446 U.S. at 554, n. 6. But in this case, we find that Officers Flannery and Michalski intended to and in fact did communicate to Smith precisely what was going on—that he was a suspect in their investigation and was not free to leave before submitting to their questioning.

Finally, we address Smith’s argument that the reasonable person test should take into account Smith’s race. Specifically, he contends that no reasonable person in his “position”—as a young black male confronted in a high-crime, high-poverty, minority-dominated urban area where police-citizen relations are strained—would have felt free to walk

away from the encounter with Officers Flannery and Michalski.

The Supreme Court dealt with a similar argument in *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). There, the respondent suggested that as “a female and a Negro,” she “felt unusually threatened by the officers, who were white males.” *Id.* at 558. While the Court stated that these factors “were not irrelevant,” it also found they were not “decisive,” ruling that the totality of the evidence demonstrated voluntarily consent to police questioning. *Id.*

We do not deny the relevance of race in everyday police encounters with citizens in Milwaukee and around the country. Nor we do we ignore empirical data demonstrating the existence of racial profiling, police brutality, and other racial disparities in the criminal justice system. But today we echo the sentiments of the Court in *Mendenhall* that while Smith's race is “not irrelevant” to the question of whether a seizure occurred, it is not dispositive either. Even without taking into account Smith's race, we are able to find on the strength of the other factors discussed that this encounter constituted a seizure.

III. CONCLUSION

The judgment of the district court is VACATED, and this case is REMANDED for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

– against –

DAMIEN BANNISTER, DARRELL
BANNISTER, CHRISTOPHER HALL,
CYRIL MCCRAY, ERIC MORRIS, ROGER
PATRICK, JAMES ROSS, DERRICK
TATUM, INDIO TATUM, JAWARA
TATUM, and PEDRO TORRES,

Defendants.

10-CR-0053

**Statement of Reasons Pursuant to
18 U.S.C. § 3553(c)(2)**

JACK B. WEINSTEIN, United States District Judge:

Appearances:

Loretta Lynch, United States Attorney, Eastern District of New York, by Daniel S. Silver and Seth David DuCharme.

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

Jeremy L. Gutman, New York, N.Y., for defendant Darrell Bannister.

Robert L. Moore, Quesada & Moore, LLP, West Hempstead, N.Y., for defendant Christopher Hall.

John S. Wallenstein, Garden City, N.Y., for defendant Cyril McCray.

Michael H. Soroka, Mineola, N.Y., for defendant Roger Patrick.

Erika McDaniel Edwards, Donaldson, Chilliast & McDaniel, LLP, New York, N.Y., for defendant Derrick Tatum.

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

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

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I. Introduction

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

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

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

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

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

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

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

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

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

II. Facts

A. Place

1. Bedford-Stuyvesant

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

Most of Bed-Stuy's housing stock consists of brownstone and brick row houses. *Id.* at 95. Present also are numerous large housing projects, including some high-rise developments. *See, e.g.,* New York City Hous. Auth., *NYCHA Housing Developments: Lafayette Gardens*,

<http://www.nyc.gov/html/nycha/html/developments/bklynlafayette.shtml> (last visited Mar. 14, 2011) (describing a complex of buildings up to twenty stories tall).

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

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

In 2000, 63 percent of Bed-Stuy’s families with children under the age of eighteen were headed by a female with no husband present. *See District Report, supra*, at 5 (reporting 13,783

such households led by females, 1,671 by males, and 6,520 by both parents). Thirty-three percent of the residents were dependent on some form of government assistance in 2000; by 2009, the number had risen to 45 percent. *Id.* at 1. Employment opportunities in the neighborhood are scarce, due in part to a lack of access to government work force development programs. New York City Dep't of City Planning, *Community District Needs for the Borough of Brooklyn: Fiscal Year 2011*, 92 (2011) (“*District Needs*”).

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

Residents of the seventy-ninth police precinct, in which Louis Armstrong Houses is located, live with a high rate of violent crime. “[Y]oung people and residents are menaced by the rise in gang culture and the proliferation of guns that are readily available in [Bed-Stuy’s] public housing complexes.” *District Needs, supra*, at 92. In 2010, there were twelve murders, twenty-nine rapes, 433 robberies, 422 felonious assaults, 408 burglaries, and 119 automobile thefts in the precinct. New York City Police Dep’t, *CompStat: Report Covering the Week 2/28/2011 Through 3/6/2011*, available at http://www.nyc.gov/html/nypd/downloads/pdf/crime_statistics/cs079pct.pdf. See also Al Baker & Janet Roberts, *New York City Crime Dips but Violent Crime Is Up*, N.Y. Times, Nov. 25, 2010, <http://www.nytimes.com/2010/11/26/nyregion/26crime.html> (reporting that the seventy-ninth was among the three New York City precincts with the highest increases in robbery from 2009 to 2010); Email from Joseph

Reek, Inspector, Hous. Bureau, New York City Police Dep't, Mar. 3, 2011 (on file with court) ("Reek Email") (reporting three murders, seven rapes, twenty robberies, and seventy-five felonious assaults in Louis Armstrong Houses from 2006 through 2010). Since many crimes in similar areas are unreported because of victims' fear of reprisal, the actual crime rate in the neighborhood is doubtless even higher. Cf. *The Kerner Report: The 1968 Report of the National Advisory Commission on Civil Disorders* 267 (Pantheon 1988) (1968) ("Kerner Report") ("[O]fficial statistics normally greatly understate actual crime rates because the vast majority of crimes are not reported to the police.").

2. Louis Armstrong Houses

a. Physical Environment

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

Model Cities Area Sites 11-14.” Flatley Email 1. Their names were changed to Louis Armstrong I and Louis Armstrong II in 1982. *Id.*

Pictured is a portion of Louis Armstrong Houses along Clifton Place between Nostrand and Marcy Avenues. See Part II.B.1, *infra*.



Source: New York City Housing Authority.

The neighborhood is of medium density and appears not to be overcrowded. The low-rise buildings of Louis Armstrong Houses are scattered among substantial brownstone homes and apartment buildings, skillfully blended into good existing housing. Small trees are planted in front of the buildings. Nearby, the large Herbert Von King Park and a community garden are well kept and provide the neighborhood with breathing room. Situated in the park are a baseball field, a playground, handball courts, an amphitheater, and a recreational center. New York City

Dep't of Parks & Recreation, *Herbert Von King Park*, <http://www.nycgovparks.org/parks/herbertvonking/highlights/152> (last visited Mar. 14, 2011). The park, established in 1857, is one of the oldest in Brooklyn. It was originally named for Daniel Tompkins, a vice president of the United States and governor of New York. In 1985, it was renamed to honor a Bed-Stuy community leader. *Id.*

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

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

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

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

b. Residents

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

Data from the 2000 census indicate a high rate of joblessness and poverty and low rates of education in the Louis Armstrong Houses area. The official unemployment rate for residents aged sixteen and over “in the labor force” was 20 percent. See *District Report* at 17 (reporting 2000 census data for census tracts 243, 251, 263 and 265); *id.* at 6 (map of 2000 census tracts in Bed-Stuy). Forty-nine percent of residents sixteen and over were not in the labor force. See *id.* Their numbers, combined with those of the officially unemployed, amount to a 59 percent jobless rate. See *id.* Thirty-five percent lived below the poverty line. See *id.* at 13, 15 (reporting data for relevant census tracts). This line is an inexact measurement of need, especially in areas with high living expenses, such as New York City. See Carmen Denavas-Walt, et al., United States Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States*:

2009 20 (2010), available at <http://www.census.gov/prod/2010pubs/p60-238.pdf> (“The official poverty thresholds developed more than 40 years ago do not take into account rising standards of living . . . or geographic differences in the cost of living.”). Forty-one percent of residents at least twenty-five years of age in and around Louis Armstrong Houses have not completed high school. See *District Report* at 15 (reporting data for relevant census tracts). Nine percent have graduated from college. *Id.*

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

B. Conspiracy

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

There are no facts in the record concerning the market for illegal drugs in the neighborhood or the identity of those who bought drugs from the crew. There is no indication

that they sold to children. No information has been provided concerning the operations of other drug networks with whom the crew may have competed for market share.

1. Members of Conspiracy

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

Derrick Tatum established the crew in September 2007. He led it until the arrest of most of its members on January 27, 2010. It was he who selected and supervised conspirators, negotiated major transactions, and determined compensation. *Id.* at ¶¶ 3–7, 10.

Indio Tatum, Derrick Tatum’s nephew, joined the conspiracy in late 2007 and was promoted the following summer to serve as Derrick Tatum’s top lieutenant. Presentence Investigation Report of Indio Tatum (“Indio Tatum PSR”) ¶ 7. He obtained heroin and cocaine powder from wholesale suppliers, processed or “cooked” powder cocaine into crack, distributed drugs to dealers in street-ready packages, and collected revenues. *Id.* at ¶ 5. On occasion, Derrick Tatum performed some of these functions himself. Derrick Tatum PSR ¶ 5.

The other nine members of the conspiracy served as street-level dealers, working in shifts. Their dates of involvement in the conspiracy were as follows: Damien Bannister, August 2008–January 2010, Presentence Investigation Report of Damien Bannister (“Damien Bannister PSR”) ¶ 6; Darrell Bannister, July–September 2008, Presentence Investigation Report of Darrell Bannister (“Darrell Bannister PSR”) ¶ 6; Christopher Hall, September 2007–January 2010, Presentence Investigation Report of Christopher Hall (“Hall PSR”) ¶ 6; Cyril McCray,

September 2007–January 2010, Presentence Investigation Report of Cyril McCray (“McCray PSR”) ¶ 8; Eric Morris, late 2007–January 2010, Presentence Investigation Report of Eric Morris (“Morris PSR”) ¶ 6; Roger Patrick, August 2008–January 2010, Presentence Investigation Report of Roger Patrick (“Patrick PSR”) ¶ 6; James Ross, June 2008–January 2010, Presentence Investigation Report of James Ross (“Ross PSR”) ¶ 7; Jawara Tatum, September 2009–January 2010, Presentence Investigation Report of Jawara Tatum (“Jawara Tatum PSR”) ¶ 5; and Pedro Torres, August 2008–June 2009, Presentence Investigation Report of Pedro Torres (“Torres PSR”) ¶ 5. Many of the dealers used drugs themselves. *See generally* Part II, *infra*. At least four of them—Cyril McCray, Roger Patrick, Jawara Tatum, and Pedro Torres—lived on Clifton Place near where the crew sold drugs. *See* McCray PSR 2; Patrick PSR 2; Jawara Tatum PSR ¶ 43; Torres PSR 2. Three street-level sellers—Hall, Morris, and Ross—were entrusted occasionally by Derrick and Indio Tatum with picking up bulk quantities of drugs and delivering them to the other dealers, but none of the three held supervisory roles. Hall PSR ¶ 8; Morris PSR ¶ 6; Ross PSR ¶ 7.

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

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

2. Investigation of Conspiracy

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

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

Following are notable incidents:

- September 2007: Derrick Tatum founded the crew. *Id.*
- October 23, 2007: Police recovered two loaded pistols, 249 glassines of heroin, and \$1,190 in cash in a vehicle driven by Cyril McCray. McCray PSR ¶ 6. A glassine is a small envelope or bag made of transparent or semitransparent paper. *See Webster’s Third New International Dictionary* 963 (1993).
- Summer 2008: Indio Tatum was promoted as Derrick Tatum’s top lieutenant.

- August 31, 2008: Indio Tatum and Derrick Tatum sold a loaded .32 caliber pistol to a confidential informant in a videotaped transaction. Derrick Tatum PSR ¶ 7; Indio Tatum PSR ¶ 8.
- September 2008: Christopher Hall and Pedro Torres were involved in a shootout at a location on Clifton Place where members of the crew regularly sold drugs. Hall fired shots. Torres was shot in the leg, and another individual was shot in the leg and chest. It is not known whether Hall was responsible for any injuries. Hall PSR ¶ 6; Torres PSR ¶ 6.
- December 18, 2008: Eric Morris sold a loaded pistol to a confidential informant. Morris PSR ¶ 7.
- February 16, 2009: Police recovered a pistol and ammunition from Morris's home. *Id.*
- June 30, 2009: Police recovered a loaded gun and thirty-five bags of heroin, about two grams' worth, from an apartment used by Hall. Hall PSR ¶ 6.
- July 9, 2009: Torres was placed in custody after being sentenced for a weapons offense on June 8, 2009. Torres PSR ¶ 22.
- August 9, 2009: Damien Bannister was arrested with 48 bags of crack cocaine and 90 glassines of heroin. Damien Bannister PSR ¶ 39–40.
- October 19, 2009: Police recovered a loaded .380 caliber pistol belonging to Indio Tatum from an abandoned vehicle parked on Clifton Place. Indio Tatum PSR ¶ 8.
- January 21, 2010: Damien Bannister was sentenced for the August 9, 2009 drug offense described above. Damien Bannister PSR ¶ 39–40.

- January 26 and 27, 2010: Investigators arrested nine of the eleven defendants in this case. *See, e.g.*, Derrick Tatum PSR ¶ 1. Torres and Damien Bannister were already in custody. Upon arresting Derrick Tatum, investigators recovered approximately \$10,000 in cash. *Id.* at ¶ 8.

C. History and Sociology

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

1. Roots of African American Segregation and Poverty

a. Segregation and the Civil Rights Movement

The poverty and *de facto* racial segregation in which defendants have lived have their immediate roots in the nineteenth century, as the American South coped with the economic and social transformations wrought by the Civil War, the abolition of slavery, and the gains made by African Americans during Reconstruction. Under the protection of the federal government, the condition of newly freed African Americans improved. Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 29 (2010). Racial oppression returned as the federal government indicated an unwillingness to protect African Americans, troops were withdrawn from southern states, and courts issued decisions validating racial segregation as

lawful. *Id.* at 30–35; Lawrence M. Friedman, *A History of American Law* 382 (3d ed. 2005) (“*History*”); Herbert Hill, *Black Labor and the American Legal System: Race, Work, and the Law* 12–14 (1985 Univ. of Wisc. Press) (1977).

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

The Jim Crow system—*de facto* and *de jure* racial segregation and political and civic disenfranchisement—remained intact for over half a century, due in large part to the complicity

of the federal government. *See, e.g.,* Michael G. Long, *Marshalling Justice: The Early Civil Rights Letters of Thurgood Marshall* 72–73 (2011) (criticism by Thurgood Marshall, in a 1940 letter to President Franklin Roosevelt, of the Federal Housing Administration’s embrace of racially restrictive covenants and its refusal to insure loans to African Americans buying homes in White areas); *id.* at 74–75 (criticism by Thurgood Marshall, in a 1940 letter to Secretary of the Navy, Frank Knox, complaining of segregation in the United States military).

Jim Crow was dismantled from the 1940s through the 1960s, as courts and federal lawmakers began to recognize the necessity of meeting widespread demands of African American citizens for equality. *E.g., Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that state court enforcement of racially restrictive covenants violated the Equal Protection Clause). Resisted by citizens of all backgrounds were attempts by segregationists, through both legal and extralegal channels, to enforce demeaning control. By the mid-1960s, with some school desegregation following *Brown v. Board of Education*, 347 U.S. 483 (1954), and with the Voting Rights Act and the Civil Rights Act having been passed, the movement for equal legal rights and equal opportunities began to achieve substantial success. Alexander, *supra*, at 35–38.

b. Urbanization and Unemployment

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

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

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

Subsequently, unemployment worsened. In the 1950s, the unemployment rate for African Americans in New York City was twice that of Whites. *Id.* In 1965, it was observed that African American unemployment, particularly in northern urban areas, had been at “disaster levels” for thirty-five years, with the exception of the World War II and Korean War years. United States Dep’t of Labor Ofc. of Pol’y Planning & Res., *The Negro Family: The Case for*

National Action 20 (photo. reprint 2011) (1965) (emphasis removed). *See also id.* at 26 (“The most conspicuous failure of the American social system in the past 10 years has been its inadequacy in providing jobs for Negro youth. Thus, in January 1965 the unemployment rate for Negro teenagers stood at 29 percent. This problem will now become steadily more serious.”); *Kerner Report, supra*, at 13 (“Between 2 and 2.5 million Negroes—16 to 20 percent of the total Negro population of all central cities—live in squalor and deprivation in ghetto neighborhoods.”); *id.* (“[D]espite continuing economic growth and declining national unemployment rates, the unemployment rate for Negroes in 1967 was more than double that for whites.”).

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

Conditions worsened after the 1960s. Just as the promise of work in the industrial north brought African Americans in large numbers to northern cities in the Great Migration, the closing of factories contributed to the partial unraveling of African American communities. *See Lemann, supra*, at 201 (“From 1960 to 1994, manufacturing employment increased nationally by 3 per cent but fell in New York, Chicago, Los Angeles, Philadelphia, and Detroit, and later the drop in urban unskilled manufacturing jobs became more precipitous.”); William Julius Wilson,

supra, at 31 (“The number of employed black males ages 20 to 29 working in manufacturing industries fell dramatically between 1973 and 1987 (from three of every eight to one in five).”).

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

2. Government Efforts to Alleviate Poverty and Poor Living Conditions

a. Public Housing

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

Building of high-rise housing projects began in 1939. *Id.* Under a slogan of “slum clearance,” blocks of low-income housing in old, poorly maintained tenements were razed and replaced with “superblocks” of high-density buildings with small, cheaply constructed apartments. Nicholas Dagen Bloom, *Public Housing that Worked: New York in the Twentieth Century* 129–132, 142–43 (2008); Caro, *supra*, at 611; Jackson, *supra*, at 954–55. Tenants,

particularly African Americans and Puerto Ricans, were evicted with little notice and little hope of finding decent housing elsewhere. Caro, *supra*, at 968–976, Jackson, *supra*, at 955. The methods of slum clearance were criticized for uprooting communities and disrupting the fabric of city neighborhoods. *E.g.*, Jane Jacobs, *The Death and Life of Great American Cities* 4, 270–72 (1961).

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

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

b. Welfare Policy

Noteworthy attempts at improving the lives of those in defendants’ position have been made. Foremost among initiatives to aid poor families was Aid for Families with Dependent Children (AFDC), a federally-funded and state-run program in which low-income families were

given money equivalent to 12 percent to 55 percent of poverty-level income for a family of three. Hilfiker, *supra*, at 88. From AFDC's inception in the 1930s until the 1960s, only about one in three eligible families received welfare; most were widows with children. An increased number of applications for aid, and the higher rate at which applications were accepted, resulted in a dramatic expansion of AFDC in the 1960s; nine out of every ten eligible families received this aid. *Id.* at 78.

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

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

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

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

A significant portion of the federal welfare system was overhauled in 1996. AFDC had for years utilized a number of controversial provisions discouraging work or marriage. “Essentially all work income was deducted from [AFDC] benefits, and mothers going to work

also lost Medicaid and childcare benefits, making it almost impossible to transition from welfare to work. Since a marriage partner's income was deducted from benefits, it was better to keep the relationship informal and not get married.” Hilfiker, *supra*, at 88. Under the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), enacted in 1996, AFDC was replaced with a new program—Temporary Assistance for Needy Families (TANF). Eligibility for TANF benefits was made contingent on meeting work and work preparation requirements. Recipients were allowed to receive cash assistance for no more than two to five years over their lifetimes; childless individuals were allowed only three months of food stamps every three years. *Id.* at 88–90. PRWORA appears not to have substantially reduced poverty. Forty percent of families who left the welfare rolls had neither work nor other cash assistance. In a three-city study, 93 percent who were dropped from the welfare rolls due to sanctions remained in poverty. *Id.* at 95–96.

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

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

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

a. Racial Segregation

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

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

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

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

b. Poverty and Unemployment

The economic situation of low-income, poorly educated African Americans in defendants’ position has deteriorated in relation to both poor Whites and middle- and upper-class Blacks. Patterson, *supra*, at 392. While the African American middle class has grown substantially over the past decades, a third of African Americans remain in the lowest economic quintile, compared to about 18 percent of Whites. *Id.* at 390–91 (citing 2006 United States Census figures). Income inequality by race is underscored by disparity within the lowest income

quintile; the average Black household in this category earns \$7,869, compared to \$16,440 for White households. *Id.* at 391.

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

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

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

Patterson, *supra*, at 398.

The blighted hopes of low-income African American families have been exacerbated by the recent economic crisis and its effect on employment. ““The impact is potentially devastating on black families in the city. This has kicked more black families into poverty, families who were clinging to working-class lives.”” Ryan Strong & Lore Croghan, *‘Labeled, Judged’ & Can’t Find a Job: Black New Yorkers Hit Hard by Unemployment*, N.Y. Daily News, Dec. 14, 2010, at 4 (quoting Michelle Holder, Cmty. Serv. Soc. of New York). *See also* Eckholm, *supra*, *Recession Raises Poverty Rate to a 15-Year High*, N.Y. Times, Sept. 16, 2010, <http://www.nytimes.com/2010/09/17/us/17poverty.html> (“The share of [United States] residents in poverty climbed to 14.3 percent in 2009, the highest level recorded since 1994. The rise was steepest for children, with one in five affected.”) (citing data from the United States Census Bureau). *Cf.* Hon. Carolyn Maloney, Chair, U.S. Cong. Joint Econ. Comm., 111th Cong., *Income Equality and the Great Recession 2* (2010) (“Between 1980 and 2008, [the share of total national income accrued by the wealthiest 1 percent of households] rose from 10.0 percent to 21.0 percent, making the United States . . . one of the most unequal countries in the world.”).

For African American men living in New York City, the unemployment rate doubled between 2006 and 2009. The 2009 rate was 17.9 percent, compared to 6.3 percent for White men. Strong & Croghan, *supra*, at 4. For African American men aged 16 to 24, the unemployment rate from January 2009 through June 2010 was 33.5 percent, and the labor force participation rate was 38 percent. Steven Greenhouse, *Study Shows Depth of Unemployment for Blacks in New York*, N.Y. Times, Dec. 13, 2010, <http://economix.blogs.nytimes.com/2010/12/13/study-shows-depth-of-unemployment-for-blacks-in-new-york/>. *See also* Motoko Rich, *Few New Jobs as Jobless Rate Rises to 9.8%*, N.Y. Times, Dec. 3, 2010, <http://>

www.nytimes.com/2010/12/04/business/economy/04jobs.html?ref=motokorich (“More than 15 million people are out of work, among them 6.3 million who have been jobless for six months or longer.”).

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

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

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

c. Health Problems

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

the instant case among defendants suffering from asthma, depression, trauma, and deep psychological problems.

Racial disparities in health persist. “Infants born to black women are 1.5 to 3 times more likely to die than infants born to women of other races/ethnicities.” Thomas R. Frieden, Director, Ctrs. for Disease Control & Prevention, *Foreword, Morbidity and Mortality Weekly Report: CDC Health Disparities and Inequalities Report*, Jan. 14, 2011, at 1, available at <http://www.cdc.gov/mmwr/pdf/other/su6001.pdf>. African Americans account for about 45 percent of people diagnosed with HIV in the United States. Ctrs. for Disease Control and Prevention, *HIV among African Americans* 1 (2010), available at <http://www.cdc.gov/hiv/topics/aa/pdf/aa.pdf> (reporting 2006 data). Blacks also suffer higher rates of heart disease, stroke, high blood pressure, and preventable hospitalizations. Frieden, *supra*, at 1. The asthma rate among African American children is 60 percent higher than the rate for White children. Angela Zimm, *Children Sicker Now than in Past, Harvard Report Says*, Bloomberg, June 26, 2007, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a8jD2znv51pU>.

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

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

Caterina G. Roman & Carly Knight, Urban Inst., *An Examination of the Social and Physical Environment of Public Housing in Two Chicago Developments in Transition* 1 (2010), available at <http://www.urban.org/uploadedpdf/412134-chicago-public-housing.pdf>. See also *id.* at 22

(“[E]conomic stressors, which include threats of eviction, not being able to pay bills, or buy food for oneself, [are] associated with depression.”). African Americans are more than four times more likely than Whites to be diagnosed as schizophrenic, apparently due in part to misdiagnosis of depression. Shankar Vedantam, *Racial Disparities Found in Pinpointing Mental Illness*, Wash. Post, June 28, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/27/AR2005062701496.html>.

d. Family Structure

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

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

fathers are often viewed with mistrust and resentment by women. William Julius Wilson, *supra*, at 98–99.

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

The absence of fathers and the prevalence of single-female-headed families gravely impairs the ability of children, particularly boys, to internalize positive values as they mature. “Young men who lack . . . [an] effective father figure, both as a role model and as a viable presence in their lives, are often hard-pressed to organize their lives in accordance with his standards, standards handed down from generation to generation[.]” Anderson, *supra*, at 237. See also Kenneth W. Griffin, et al., *Parenting Practices as Predictors of Substance Use, Delinquency, and Aggression Among Urban Minority Youth: Moderating Effects of Family Structure and Gender*, 14 Psych. of Addictive Beh. 174, 174 (2000) (“[R]esearch has shown that youth from single-parent families often have higher rates of problem behaviors including substance use, aggression, school dropout, and teenage pregnancy.”) (citations omitted).

e. Undereducation

African American children remaining in the ghetto have demonstrated a marked lack of academic preparation relative to students of other racial groups. Boys lag behind Hispanic

students and far behind White students in ways that cannot be explained satisfactorily by poverty alone. Trip Gabriel, *Proficiency of Black Students Is Found to Be Far Lower than Expected*, N.Y. Times, Nov. 9, 2010, at A22 (reporting results from a 2010 study by the Council of the Great City Schools). “Only 12 percent of black fourth-grade boys are proficient in reading, compared with 38 percent of white boys, and only 12 percent of black eighth-grade boys are proficient in math, compared with 44 percent of white boys.” *Id.* It has been suggested that the undereducation of many African American males may result in part from parenting practices. *Id.*

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

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

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

A significant campaign to reform urban public schools continues. Numerous initiatives have been pursued: reliance on high-stakes testing to develop data with which to evaluate student progress, school performance, and teacher effectiveness; recruitment of young, highly educated people to become teachers and administrators; de-emphasis of tenure in favor of retention of teachers based on merit; reliance on mathematics and reading, often to the exclusion of science, social studies, physical education, art, and extracurricular activities; longer school days;

promotion of parents' ability to choose schools for their children; creation of quasi-autonomous charter schools, managed and funded to varying degrees by corporations and non-profit organizations; contracting of public school teaching and administration to private companies; the closing of "failing" schools and dismissal of their administrators and faculty; and dividing large neighborhood high schools into small schools, often organized around a theme. *See generally, e.g.,* Diane Ravitch, *The Death and Life of the Great American School System: How Testing and Choice are Undermining Education* (2010).

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

Some school reforms may be jeopardized by reductions in school spending to respond to increasing fiscal pressures. *See* Thomas Kaplan, *As Schools Face Cutbacks, a Debate Over What's Fair*, N.Y. Times, Feb. 14, 2011, <http://www.nytimes.com/2011/02/15/nyregion/15schools.html> (quoting Billy Easton, Alliance for Quality Educ.) ("The governor's budget

hurts school kids across the board, because the cuts are enormous, and they are much larger in poor districts than rich districts[.]’”).

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

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

f. Social Values

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

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

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

g. Crime

For many boys, the cumulative result of poverty, racial segregation, antisocial ethics, and fatherlessness is often crime. “Their career ‘choices’ and their major life changes largely result from, and are coextensive with, their background and the disturbed family systems in which they were raised and/or currently reside. Persons who grew up in severely distressed households learned strategies that leave them ill-equipped for conventional society.” Bruce D. Johnson, et al., *Crack Distribution and Abuse in New York*, 11 Crime Prevention Stud. 19, 26 (2000). Accord Glenn C. Loury, *Crime, Inequality & Social Justice*, Daedalus, Summer 2010, at 136–37 (“The factors that lead young people to crime—the ‘root causes’—have long been known: disorganized childhoods, inadequate educations, child abuse, limited employability, delinquent peers. These are factors that also have long been more prevalent among the poor than the middle classes[.]”).

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

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

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

Kerner Report, *supra*, at 262.

The lure of reliable, easy income through the sale of drugs is particularly appealing to many young men living in poverty. Bruce D. Johnson, et al., *supra*, at 41; Anderson, *supra*, at 114 (“For many impoverished young black men of the inner city, the opportunity for dealing drugs is literally just outside the door.”). They may also align themselves with gangs in order to avoid ostracism and violence.

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

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

The costs of the crimes engaged in by young people in impoverished communities are borne primarily by their neighbors. “[B]lack[s] are disproportionately *victims* of crime. . . . Most crime is neighborhood crime; blacks trapped in ghettos are the most vulnerable people in society. Two blacks are likely to fall victim to robbery, vehicle theft, or aggravated assault for every white; the black homicide rate is more than six times as great as the white rate, and has been so for over fifty years.” Friedman, *Crime*, *supra*, at 379. *See also Kerner Report*, *supra*, at 267 (“Because most middle-class Americans live in neighborhoods [with low crime rates], they have little comprehension of the sense of insecurity that characterizes the ghetto resident.”); *id.* at 268 (stating that law-abiding residents of ghetto neighborhoods “face much higher probabilities of being victimized than residents of most higher-income areas, including almost all suburbs[.]”).

A 2010 study revealed close racial parity between murder victims and murder suspects in New York City. Victims were 67 percent African American, 25 percent Hispanic, 4 percent White, and 3 percent Asian; suspects were 62 percent African American, 31 percent Hispanic, 4

percent White, and 4 percent Asian. Edgar Sandoval, et al., *Drugs & Guns Are Killing New York*, N.Y. Daily News, Dec. 2, 2010, at 12. See also Clyde Haberman, *In the Bronx, Looking in the Mirror for Blame, and Solutions, on Gun Violence*, N.Y. Times, Sept. 28, 2010, at A25 (“[I]n [a Bronx neighborhood,] as elsewhere in the city, no one is a greater threat to life and limb for young black and Hispanic men than other young black and Hispanic men.”).

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

Guns and drug violence contribute to a climate of terror.

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

William Julius Wilson, *supra*, at 59–60. See also, e.g., *Kerner Report*, *supra*, at 14 (“Crime rates, consistently higher than in other areas, create a pronounced sense of insecurity.”);

Fernanda Santos, *At Sharpton's King Day Forum, a Focus on Gun Violence*, N.Y. Times, Jan. 18, 2011 (quoting Rev. Al Sharpton) (““Our grandmothers are afraid to go to the corner store. . . . [T]hat’s real life.””). The fear of crime and the culture of violence surrounding it drive some residents, even those who are not involved in crime, to rely on firearms to protect themselves, to settle disputes, or to gain respect from peers. William Julius Wilson, *supra*, at 61.

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

D. Anti-Drug Abuse Act of 1986

The Anti-Drug Abuse Act of 1986 (“1986 Act”), by which the penalties bearing on this case were enacted, was passed during an election-year push to respond to what was perceived as a dangerous spread of drugs, particularly crack cocaine. Sentencing provisions concerning crack cocaine have been repeatedly challenged in court on racial disparity grounds and upheld.

Amelioration in 2010 by congressional amendment was limited. This punitive scheme is one manifestation of an ongoing pattern of racial disparity in the enactment and enforcement of drug laws continuing to the present.

1. Historical Drug Sentencing Laws

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

If cocaine was a spur to violence against whites in the South, as was generally believed by whites, then reaction against its users made sense. The fear of the cocainized black coincided with the peak of lynchings, legal segregation, and voting laws all designed to remove political and social power from him. . . . [E]vidence does not suggest that cocaine caused a crime wave [in the early 1900s] but rather that anticipation of black rebellion inspired white alarm. Anecdotes often told of superhuman strength, cunning, and efficiency resulting from cocaine. One of the most terrifying beliefs about cocaine was that it improved pistol marksmanship. . . . These fantasies characterized white fear, not the reality of cocaine’s effects, and gave one more reason for the repression of blacks.

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

The extent of cocaine use by African Americans was over-reported in the early twentieth century. Musto, *supra*, at 7. Forgotten today is its popularity in the late nineteenth century as an

over-the-counter tonic, addiction cure, hay fever remedy, and soft drink ingredient for the middle and upper classes. *Id.* at 7; Iniciardi, *supra*, at 6–7. *See also id.* (describing the use and promotion of cocaine by Sigmund Freud and Pope Leo XIII,); Musto, *supra* at 7 (discussing the drug’s endorsement by William Hammond, former surgeon general of the United States Army).

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

2. Congressional Awareness of Racial Disparity

It should have been anticipated that most of those sentenced under the crack laws would be low-income African Americans. Materials inserted in the congressional record stated that “[m]ost of the dealers [of crack] . . . are black or Hispanic.” 132 Cong. Rec. S00000-22 (daily ed. June 17, 1986) (statement of Sen. Lawton Chiles) (quoting Paul Blythe, *Buying Rocks Easy*, Palm Beach Post & Evening Times). *See also id.* (“Haitians also comprise a large number of those selling cocaine rocks, authorities said. . . . Whites rarely sell the cocaine rocks.”); *id.* (“Less than a block from where unsuspecting white retirees play tennis, bands of young black men push their rocks on passing motorists, interested or not.”); 132 Cong. Rec. S00000-22 (daily ed. June 17, 1986) (statement of Sen. Lawton Chiles) (quoting Paul Blythe, *It’s Cheap, It’s Available and It’s Ravaging Society*, Palm Beach Post & Evening Times) (“Even though sellers usually set up shop in primarily black neighborhoods, their customers tend to be white.”); 132

Cong. Rec. S00000-22 (daily ed. June 17, 1986) (statement of Sen. Lawton Chiles) (quoting Paul Blythe, *It Takes All Types*, Palm Beach Post & Evening Times) (“Although police said most dealers are black, cocaine rocks are sold in all types of neighborhoods by all types of people.”); 132 Cong. Rec. S7123-01 (daily ed. June 9, 1986) (statement of Sen. Paula Hawkins) (quoting Tom Morganthau, et al., *Crack and Crime*, Newsweek, June 16, 1986, at 16) (discussing crack house dealers “recruited from poor Haitian and American black kids in New York”); *id.* (quoting Peter McKillop, *An Inferno of Craving, Dealing and Despair*, Newsweek, June 16, 1986, at 18) (describing a “big-shouldered Trinidadian” selling crack).

3. Procedural Irregularities in Legislative History

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

The 1986 Act was expedited through Congress. As a result, its passage left behind a limited legislative record. While many individual members delivered floor statements about the Act, no committee produced a report analyzing the Act’s key provisions. . . . Apparently because of the heightened concern [arising from media coverage of crack], Congress dispensed with much of the typical deliberative legislative process, including committee hearings.

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

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

4. Departures from Established Penal Policy

The newly adopted mandatory minimum sentences for crack cocaine represented a significant departure from explicitly established policy. Statements by lawmakers indicated that Congress intended that five-year mandatory minimums be targeted at “middle-level dealers,” while ten-year sentences be given to “kingpins” and “masterminds.” *E.g.*, 132 Cong. Rec. S. 13741-01 (Sept. 30, 1986) (statement of Sen. Biden).

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

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

5. Racially Disparate Impact

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

Table A: Race of Those Sentenced for Federal Crack Offenses

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

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

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

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

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

* *Id.*

The racial disparity in sentencing bears no apparent relationship to the race of the consumers whose demand for drugs drives their distribution.

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

United States v. Armstrong, 517 U.S. 456, 479–80 (1996) (Stevens, J., dissenting) (citations omitted). See also 1997 U.S.S.C. Report, *supra*, at 8. (“[N]early 90 percent of the offenders convicted in federal court for crack cocaine distribution are African-American while the majority of crack cocaine users is white.”).

Invidious racial disparity in crack cocaine sentences has made a substantial contribution to the racial disparity in incarceration generally. “This one sentencing rule contributes more to the differences in average sentencing between African-Americans and White offenders than any possible effect of discrimination.” U.S. Sentencing Comm’n, *Fifteen Years of Guideline Sentencing* 132 (2004). See also Douglas C. McDonald & Kenneth E. Carlson, *Why Did Racial/Ethnic Sentencing Differences in Federal District Courts Grow Larger under the Guidelines?*, 6 Fed. Sentencing Rep. 223, 225 (1994) (stating that the crack sentencing ratio is the primary reason that African American offenders’ average prison sentences are longer than those of White offenders).

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

There appears to be a disparate racial impact on those sentenced for heroin offenses as well, although it is less dramatic than that for crack cocaine. In 2009, 28% of those convicted for

federal heroin offenses were African American; 17% were White. 2009 Fiscal Year Report at 6 (2009). In per capita terms, considering the universe of total national population, African Americans are about ten times more likely to be convicted of a federal heroin offense than Whites. See U.S. Census Bureau, *State and County Quick Facts*, <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Mar. 20, 2011) (reporting that in 2009, Whites were 79.6% of the United States population and African Americans 12.9%).

E. Incarceration Policy

1. Mass Incarceration

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

Much of the swiftest growth has occurred in the federal system. “Between 2001 and 2008, the federal prison population swelled by 56,000, accounting for more than a quarter of new inmates nationwide. In 2002, for the first time in American history, the federal government was locking up more people than any single state[.]” Robert Perkinson, *Texas Tough: The Rise of America’s Prison Empire* 349 (Picador 2010) (2009). See also Hon. William K. Sessions III, At

the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reforms in the Midst of Inter-Branch Power Struggles 3 (forthcoming 2011 from J. L. Policy), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1773045 (stating that the federal prison population increased 76 percent between 1999 and 2010 resulting in a 37 percent overcapacity). In state prisons, the number of annual prison admissions increased 18 percent between 2000 and 2008. Linh Vuong, et al., *The Extravagance of Imprisonment Revisited*, *Judicature*, Sept.–Oct. 2010, at 71.

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

The high United States incarceration rate is unparalleled internationally. Our national prison population of 1.6 million people is the world's largest—larger even than that of China, an authoritarian nation with three times our population. *See* James Austin, *supra*, at 3. The national rate of incarceration, 737 per 100,000 persons, exceeds that of Russia, which imprisons 581 per

100,000. *Id.* This rate is far higher than those of peer nations with democratic, market-based economies. Such countries incarcerate between 63 and 196 people per 100,000, Nicola Lacey, *American Imprisonment in Comparative Perspective*, Daedalus, Summer 2010, at 103, a rate comparable to that of the United States for much of the twentieth century. Among our peer nations, the second-highest rate is found in New Zealand, which incarcerates 196 per 100,000 people. *Id.*

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

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

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

The length of sentences is often a product of mandatory minimum sentencing statutes.

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

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

Mandatory minimum sentencing deviated from the common law tradition of granting courts discretion to sentence criminals based on the varying circumstances of their backgrounds and offenses. *See United States v. Polouizzi*, 687 F. Supp. 2d at 167–86 (discussing wide

sentencing discretion afforded to judges and juries at the founding of the Republic). Mandatory minimum sentences have been sharply criticized since at least the 1960s. Am. L. Inst., Model Penal Code: Sentencing § 6.06 rep. note d, at 31–32 (Tentative Draft No. 2, 2011) (not yet adopted) (collecting sources critical of mandatory minimum sentencing); *id.* § 6.06 cmt. a, at 19 (“[T]here is no current mechanism in American law more misconceived than mandatory minimum penalty laws.”).

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

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

Convictions for drug offenses are the single most important cause of the explosion in incarceration rates in the United States. Drug offenses alone

account for two-thirds of the rise in the federal inmate population and more than half of the rise in state prisoners between 1985 and 2000. Approximately a half-million people are in prison or jail for a drug offense today, compared to an estimated 41,400 in 1980—an increase of 1,100 percent.

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

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

2. Racial Disparity

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

[T]hroughout the twentieth century, both before and after developments in civil rights, blacks have been arrested, convicted, and jailed entirely out of proportion to their share of the population. Southern chain gangs . . . were, to all intents and purposes, gangs of black semislaves. [B]lacks still constitute far more than their share of the prison population; they have done so for decades. Since 1933, the federal government's *Uniform Crime Reports* have kept track each year of the race of men and women arrested for serious crime. Blacks were arrested at a higher rate than whites even at the start; in 1940, 17 blacks per 1,000 were arrested, and only 6 whites.

Arrest rates for both races have skyrocketed since 1933, but the gap remains, and it gets if anything wider. The figures for blacks are, indeed, staggering. . . . In 1978, 35 whites out of every 1,000 were arrested, and almost 100 out of every 1,000 blacks—nearly one out of ten.

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

Race-based differences in incarceration continue today.

Other than sheer scale, [the] most salient feature [of prisons in the United States] is the heavy racial and ethnic imbalances among those incarcerated. Roughly 60 percent of the nations’ prisoners are either African American or Hispanic. The current black-male imprisonment rate stands at nearly 7 times the rate for whites, while the Latino rate is 2.5 times the white rate. Today, 1 of every 100 adults is held in prison on any given day, including 1 of every 15 black males between the ages of 20 and 50. The U.S. Justice Department estimated that the lifetime likelihood of serving a state or federal prison term for a white male born in 2001 was 6.6 percent, while for a black male child it was a staggering 32.2 percent.

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

American men—namely, military service and a college degree—are significantly less common than a prison record.” *Id.* at 11.

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

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

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

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

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

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

3. Consequences

a. Inmates, Families, and Communities

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

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

b. Collateral

Beyond separating convicts from their families and the work force, incarceration imposes numerous collateral consequences. “In every state and under federal law, there are hundreds of collateral consequences that apply automatically or on a discretionary basis, to people convicted of crimes. Most of these apply for life . . . and can never be removed, or can be relieved only through virtually unavailable methods like a pardon from the President[.]” Gabriel Chin, *The Constitution in 2020 and the Secret Sentence: Rethinking Collateral Consequences*, Balkinization (Sept. 30, 2010), <http://balkin.blogspot.com/2010/09/constitution-in-2020-and-secret.html> (hyperlink omitted).

Consequences imposed by law include “ineligibility for federal welfare benefits, public housing, student loans, and employment opportunities, as well as various forms of civic exclusion, such as ineligibility for jury service and felon disenfranchisement.” Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85

N.Y.U. L. Rev. 457, 459 (2010). Felon disenfranchisement laws, which have their roots in attempts by Whites to suppress African American votes in the late nineteenth century, bar 13 percent of African American men from casting ballots. Erika Wood, Brennan Center, *Restoring the Right to Vote* 6–7 (2d ed. 2009), available at http://brennan.3cdn.net/5c8532e8134b233182_z5m6ibv1n.pdf. Ex-convicts’ difficulties in finding work are discussed in detail below.

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

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

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

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

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

c. Fiscal

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

Much of the cost of incarceration is due to the imprisonment of nonviolent offenders. If the number of such inmates were cut in half, taxpayers would be saved an estimated \$16.9 billion

annually. Valerie Wright, Sentencing Project, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment* 8 (2010), available at <http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf>.

4. Alternatives

a. Generally

Concerns about strained state budgets and prison overcrowding have prompted lawmakers to reconsider lengthy incarceration as the preferred response to crime. Carrie Johnson, *supra*. Some reforms are designed to eliminate or shorten sentences, often by increasing judicial discretion. Between 2000 and 2002, more than two dozen states implemented sentencing reforms, “eliminating mandatory minimums, accelerating parole, or expanding [prison] alternatives like drug treatment.” Perkinson, *supra*, at 344. *But see* Heather Gillers, *Daniels-Backed Prison Reform is Dealt a Blow by Prosecutors*, Indianapolis Star, Feb. 15, 2011, <http://www.indystar.com/fdcp/?1299882692541> (reporting that legislation in Indiana designed to reduce incarceration due to budgetary pressures was amended at the pressure of state prosecutors to include a provision that would result in longer sentences). A provision that would eliminate all mandatory minimum sentences is included in a draft of the Model Penal Code. Model Penal Code: Sentencing § 6.06(3) (Tentative Draft No. 2, 2011) (“The court is not required to impose a minimum term of imprisonment for any offense under this Code.”).

In New York, a recent rescission of the vicious Rockefeller drug laws eliminated mandatory minimum prison sentences for first-time and many second-time nonviolent drug offenders and some drug-related property offenses, such as third-degree burglary. Noeleen G. Walder, *One-Year-Old Reform Saves 1,000 Drug Offenders from Prison, According to*

Preliminary Estimates, N.Y. L.J. (Oct. 14, 2010), at 1. Courts may order drug treatment instead of imprisonment for many drug and property crime offenders, even over the objection of prosecutors. *Id.* Mandatory minimum sentences for certain felonies have been reduced from three years to two. Adrienne Austin, *supra*, at 12 (citing S. 56, 231st Legis. Sess. (N.Y. 2009)).

Numerous states have shortened or eliminated mandatory minimum sentences and allowed greater judicial discretion. Adrienne Austin, *supra*, at 12–13, 15–16 (citing H.B. 210, 142d Gen. Assemb. (Del. 2003) (decreasing mandatory minimum sentences for drug trafficking crimes and increasing the quantity threshold for crack-related offenses from five to ten grams); S.B. 1722, 110th Reg. Sess. (Fla. 2009) (requiring non-prison sentences for certain third-degree felons unless a risk of public endangerment is found); H.B. 1892, S.B. 358 112th Gen. Assemb., 1st Reg. Sess. (Ind. 2001) (eliminating mandatory minimums for certain nonviolent drug offenses, allowing judges to sentence offenders to home detention or work release, providing for drug treatment as an alternative to prison for some offenders, and exempting certain drug offenders from the state’s “three strikes” scheme); H.B. 372, 2009 Reg. Sess. (Ken. 2009) (authorizing time served on parole to be credited toward a total sentence, except for violent offenders, registered sex offenders, or parole violators convicted of new felonies); H.B. 225, 35th Reg. Sess. (La. 2009) (expanding from two to four years the period that a felon may be sentenced to house arrest instead of incarceration); Mich. Pub. Acts 665, 666, 670 of 2002 (eliminating most mandatory minimum sentences for drug offenses and eliminating a separate sentencing scheme for drug offenders); S.F. 802, 1st Reg. Sess. of 86th Legis. Sess. (Minn. 2009) (authorizing courts to disregard mandatory minimum sentences for individuals convicted of fifth-degree drug felonies); A.B. 239, 75th Reg. Sess. (Nev. 2009) (limiting “habitual offender” status,

which requires a five-year mandatory minimum sentence, to offenders with prior felony convictions); S.B. 1866, 86th Legis. Sess. (N.J. 2009) (authorizing courts to waive or reduce mandatory minimum sentences for drug offenses within 1,000 feet of a school); S.B. 39, Gen. Assemb. (R.I. 2009) (removing mandatory minimum sentences for two categories of drug offenses and reducing maximum sentences from fifty years to twenty years and from life to thirty years); S1154, 118th Sess. Gen. Assemb. (S. Car. 2010) (eliminating mandatory minimum sentences for simple drug possession and eliminating a powder/crack sentencing disparity); H.B. 2073, 85th Legis. Assemb. (S. Dak. 2010) (allowing courts to suspend any portion of a sentence); H.B. 2338, 57th Legis., Reg. Sess. (Wash. 2002) (expanding opportunities for drug offenders to receive treatment instead of imprisonment)).

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

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

b. Non-Incarceratory Sentencing

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

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

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

Hon. Jonathan Lippman, *Chief Judge Judith S. Kaye: A Visionary Third Branch Leader*, 84 N.Y.U. L. Rev. 655, 658 (2009).

Technological advances promise useful innovations in non-incarceratory sentencing, either after or in lieu of a custodial sentence. Electronic monitoring of ex-convicts’ movements

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

5. Effectiveness in Reducing Crime

a. Rehabilitation

The effectiveness of prisons as places for maximum rehabilitation is called into question by high rates of recidivism. “More than 40 percent of murders and robberies are committed by people on probation, parole, or pretrial release.” Kleiman, *supra*, at A5. A 2002 study of 272,111 former state prisoners in fifteen states indicated high rates of recidivism within three years of release from prison: 68 percent were rearrested for new offenses, almost exclusively felonies and serious misdemeanors; 52 percent were returned to prison for new offenses or technical violations; 47 percent were convicted of new offenses; and 25 percent were resentenced to prison for new offenses. Patrick A. Langan & David J. Levin, Bureau of Justice Statistics, United States Dep’t of Justice, *Recidivism of Prisoners Released in 1994* 1 (2002), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf> (reporting results for prisoners

released since 1994). Thirty percent of ex-convicts were arrested for a serious offense in the first six months after release. *Id.* at 3.

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

The ability to relate such factors to recidivism risks has led some to suggest strong reliance on them in determining the length of prison sentences. *See* Am. L. Inst., Model Penal Code: Sentencing § 6B.09 cmt. A at 56 (Preliminary Draft No. 5, 2007) (not yet adopted) (citing Stephen D. Gottfredson & Laura J. Moriarty, *Statistical Risk Assessment: Old Problems and New Applications*, 52 *Crime & Delinq.* 178, 192 (2006)) (“Risk assessment may be defined as predicting who will or will not behave criminally in the future.”). It has been argued that these instruments can reduce prison populations by allowing the release of inmates who pose little risk to the public. Bernard E. Harcourt, *Risk as a Proxy for Race* 1 (U. Chi. L. Sch., John M. Olin Law & Economics Working Paper No. 535, Public Law and Legal Theory Working Paper No. 323), *available at* [http:// papers.ssrn.com/sol3/papers.cfm?abstract_id=1677654&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677654&download=yes) (“Risk”). The reliability of risk assessment tools may be undermined by faulty assumptions. *See generally, e.g., United States v. C.R.*, No. 09-CR-155, draft op., at 243–297 (E.D.N.Y. Mar. 10,

2011) (discussing the limitations of risk assessment tools in detecting the danger to the public posed by some classes of child pornography offenders). From the 1920s to the 1970s, race and nationality were explicitly relied upon in making such determinations. Harcourt, *Risk*, *supra*, at 4–5. Racial disparity continues today through the use of prior criminal history as a tool for determining sentence length. *Id.* at 8. Criminal history may be a reflection less of a defendant’s risk of recidivism than of disparities in investigation, arrest, prosecution, and sentencing.

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

Among low-risk offenders, those who spent less time in prison were 4% less likely to recidivate than low-risk offenders who served longer sentences. Thus, when prison sentences are relatively short, offenders are more likely to maintain their ties to family, employers, and their community, all of which promote successful reentry into society. Conversely, when prisoners serve longer sentences they are more likely to become institutionalized, lose pro-social contacts in the community, and become removed from legitimate opportunities, all of which promote recidivism.

Wright, *supra*, at 7; *but see* Langan & Levin, *supra*, at 11 (“No evidence was found that spending more time in prison raises the recidivism rate.”).

Because prisons are often located in rural areas, and because convicts' families and friends have limited ability to travel, convicts' relationships with people on the outside—the people most likely to motivate convicts to lead straight lives—may be eroded seriously during long terms of imprisonment. See Jeremy Travis, et al., Urban Inst. Justice Pol'y Ctr., *Families Left Behind: The Hidden Costs of Incarceration and Reentry* 1 (rev. ed. 2005) available at http://www.urban.org/uploadedpdf/310882_families_left_behind.pdf (reporting that incarcerated fathers and mothers are housed an average of 100 and 160 miles, respectively, from their children); *id.* (stating that over half of incarcerated parents report never receiving a personal visit from their children).

Programs such as those for drug and alcohol treatment, adult basic education, vocational training, and prison industries reduce recidivism by 8 to 15 percent. Petersilia, *supra*, at 17. See also *id.* at 34 (reporting a study of inmates in three states that found that those who underwent prison education programs were 23 percent less likely than other inmates to be re-incarcerated). Treatment for mental disabilities may have an even greater positive impact. Nearly a third of state prisoners and a quarter of federal prisoners suffer from a mental condition or physical impairment. *Id.* at 35. Ten percent of state prisoners and 5 percent of federal prisoners have a learning disability. *Id.* Among state prisoners, 19 percent are completely illiterate and 40 percent functionally illiterate, compared to 4 percent and 21 percent, respectively, of the non-incarcerated population. *Id.* at 32. In 1999, 51 percent of released prisoners lacked a high school education, and 11 percent had an eighth-grade education or less. *Id.*

Coinciding with the nationwide push for stiffer prison sentences since the 1970s has been a de-emphasis on the rehabilitation of criminals and a preference for lengthy incapacitation. *Id.*

at 13. When rehabilitative measures were retained, it was often with the purpose of keeping inmates manageable, not in reducing recidivism. *Id.* The continued existence of programs effective at combating recidivism both for current and released prisoners may be threatened by budgetary pressures. See Kevin Johnson, *Budget Cuts Slice Programs for Ex-Inmates*, USA Today, Feb. 9, 2011, at 7A (reporting concerns that state government spending for parole and probation departments may be reduced, depleting resources for drug treatment, supervision of offenders, and housing and job assistance).

Recidivism may be promoted by the behavior traits prisoners develop while incarcerated. To survive, they “tend to develop characteristics institutionally selected for survival: circumspection, canniness, coldness, and cruelty.” Perkinson, *supra*, at 368. After release, the negative traits cultivated in prison may be received as virtues on the street. “[P]rison usually enhances one’s prestige on the street, particularly in terms of . . . values like toughness, nerve, and willingness to retaliate for transgressions.” Anderson, *supra*, at 292.

b. Incapacitation

Some penologists have estimated that by incapacitating criminals, incarceration has caused between 10 and 25 percent of the decrease in violent crime rates of the 1990s. Marc Mauer, *The Impact of Mandatory Minimum Penalties in Federal Sentencing*, Judicature, July–Aug. 2010, at 7; Perkinson, *supra*, at 370. It is not known, however, whether this reduction through incapacitation is greater than what could have been accomplished through less restrictive measures, nor is there any indication that mandatory minimum sentences have appreciably affected the reduction. Mauer, *supra*, at 7.

To some extent, the greater effectiveness of prisons in preventing crime through incapacitation may be decreasing as a result of technology. Cellular telephones and Internet-capable “smartphones” smuggled into prisons enable inmates to freely maintain contact with people on the outside. Kim Severson & Robbie Brown, *Outlawed, Cellphones are Thriving in Prisons*, N.Y. Times, Jan. 2, 2011, <http://www.nytimes.com/2011/01/03/us/03prisoners.html>. Such devices are ubiquitous in some prisons, and they may be used by gang-affiliated prisoners to maintain contact with outside criminal networks and orchestrate violence and drug trafficking. *Id.*

c. General and Specific Deterrence

A purpose of imprisonment is to deter people generally from engaging in crime. Another form of deterrence directed to this particular criminal who has violated the law—specific deterrence—is designed to prevent recidivism.

Compelling arguments have been made that the deterrent value of a sentence is highest when the chances of its being administered are high and the offender is able to rationally consider the consequences of his or her actions. It appears to be primarily in the certainty of punishment, not its severity, that deterrent power lies. See Steven N. Durlauf & Daniel S. Negin, *Imprisonment and Crime: Can Both be Reduced?*, 10 *Criminology & Pub. Pol’y* 13, 37 (2011); Wright, *supra*, 1–2, 4–5.

General deterrence depends on potential offenders’ rational assessment of the likely costs and benefits of crime. Shawn D. Bushway & Peter Reuter, *Deterrence, Economics, and the Context of Drug Markets*, 10 *Criminology & Pub. Pol’y* 183, 184 (2011). That the defendants in

this case were rationally capable of making accurate cost-benefit assessments when they were young, before embarking on crime, seems doubtful.

Deterrent power of either type is reduced when potential offenders' reasoning ability is impaired due to alcohol or drug use. See Wright, *supra*, at 2. It may be similarly affected among young people due to the natural rate of brain development. See B.J. Casey et al., *The Adolescent Brain*, 28 Developmental Rev. 62, 64 (2008) ("A cornerstone of cognitive development is the ability to suppress inappropriate thoughts and actions in favor of goal-directed ones, especially in the presence of compelling incentives."); *United States v. C.R.*, No. 09-CR-155, draft op., at 375 (E.D.N.Y. Mar. 10, 2011) (collecting sources).

General deterrence particularly may be impaired when the perceived injustice of punishment damages the credibility of the justice system.

[Studies suggest] that knowledge of systematic injustice produced by the criminal justice system . . . can have a range of deleterious effects on people's attitudes and behavior. People are less likely to comply with laws they perceive to be unjust. They may also be less likely to comply with the law in general when they perceive the criminal justice system to cause injustice. . . . [In contrast,] if the criminal justice system reflects ordinary perceptions of justice, it can take advantage of a range of psychological mechanisms that increase assistance, compliance, and deference.

Paul H. Robinson, et al., *The Disutility of Injustice*, 85 N.Y.U. L. Rev. 1940, 2016 (2010).

6. Employment and Social Integration of Ex-Prisoners

Employment is a crucial antidote for recidivism. See Jack McDonough & William D. Burrell, *Offender Workforce Development: A New (and Better?) Approach to an Old Challenge*, Fed. Probation, June 2008, at 71 (2008). "Employment helps ex-prisoners be productive, take care of their families, develop valuable life skills, and strengthen their self-esteem and social

connectedness.” Petersilia, *supra*, at 112. There are few reliable analyses of post-release employment, *id.* at 119, but the unemployment rate for former prisoners has been found to be as high as 50 percent within the first nine months of release, compared to an overall national unemployment rate of 9.4 percent. See Steven Greenhouse, *Job Placement, with a Record: States Help Find Work (and Hope) for Ex-Convicts*, N.Y. Times, Jan. 25, 2011, at B4 (“Job Placement”).

Ex-prisoners face numerous obstacles to employment. Statutes and licensing regulations bar felons from holding certain jobs. Petersilia, *supra*, at 113–15. “The most common types of jobs with legal prohibitions . . . are in the fields of child care, education, security, nursing, and home health care[.]” *Id.* at 113. Many prohibitions are in areas with little connection to public safety. *Id.* at 114–15. In New York, as in numerous other states, drug offenders’ drivers’ licenses are revoked. *Id.* at 115. Ex-offenders have difficulty meeting requirements of bonding against theft, required in many service businesses. *Id.* at 114.

Employers are often reluctant to employ released prisoners. A survey conducted in four major United States cities indicated that 60 percent of employers who had recently hired low-skilled workers were unwilling to hire applicants with criminal records. *Id.* at 116. A record is often seen by employers as a negative reflection on employee trustworthiness; employers also fear that by hiring a convict they may expose themselves to liability for suits for negligent hiring. *Id.* at 116–117. Employers in the construction and manufacturing sectors are more likely to hire ex-convicts than those in businesses involving customer contact, child care, or elder care, but jobs in the former categories are diminishing. *Id.* at 118. Many of the areas in which released prisoners face significant obstacles to employment are those projected to show the greatest

growth in coming years. *See* Hacker, *supra* (reporting that among the occupations projected to grow most significantly by the year 2018 are long-haul truck driver, security guard, receptionist, home health aide, nursing aide, orderly, and customer service representative).

Ex-convicts are often eligible for only temporary or seasonal work. Petersilia, *supra*, at 116. The jobs they are able to secure yield wages 10 to 30 percent lower than the wages earned for similar work by those who have not been incarcerated. *Id.* at 119. Ex-offenders face additional competition for jobs as a result of welfare reform. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 instituted incentives for welfare recipients to join the work force; such recipients compete for the same low-skilled jobs as released prisoners. *Id.* at 120.

Obstacles beyond job availability exist. “Many offenders do not have the necessary skills or experience to find, compete for, and secure legitimate, full-time employment, even if they are sufficiently motivated.” McDonough & Burrell, *supra*, at 72. Often, released prisoners are hindered by limited education and work experience, substance abuse, psychological and mental problems, residence in inner-city neighborhoods far from available jobs, social connections to criminals, and embedded patterns of behavior learned from the criminal world. *See* Petersilia, *supra*, at 40, 113.

Limited programs have been implemented to prepare released convicts for entry into the job market. *See* Greenhouse, *Job Placement*, *supra*, at B1. In the federal court for the Eastern District of New York, the Probation Department offers a number of useful services to ex-convicts through an “Offender Workforce Development” program: counseling in seeking and retaining jobs; furnishing of clothing for work; and instruction and assistance in obtaining state

identification cards and driver's licenses, searching for job openings, networking, filling out job applications, writing résumés, and interviewing. See Michelle A. Powell, *Report on Workforce Development Initiatives in the Eastern District of New York* 2–6 (2011). Probationers are eligible for subsidized training in such areas as food preparation, plumbing, pest control, and dental assistance through the New York City College of Technology in Brooklyn through the Second Chance Act of 2007, Pub. L. 110–199, 122 Stat. 657. *Id.* at 5.

III. Law

A. Sentencing Rules

A sentencing court shall “state in open court the reasons for its imposition of the particular sentence.” 18 U.S.C. § 3553(c). If the sentence is not of the kind prescribed by, or is outside the range of, the sentencing guidelines referred to in section 3553(a)(4), the court shall indicate the specific reasons for imposing a sentence different from the guidelines. 18 U.S.C. § 3553(c)(2). These “reasons must also be stated with specificity in the written order of judgment and commitment.” *Id.* The mandatory nature of the guidelines has been excised, and they are now “advisory.” *United States v. Booker*, 543 U.S. 220, 245–46 (2005). See also *Gall v. United States*, 552 U.S. 38, 50 (2007) (district judges “may not presume that the Guidelines range is reasonable but must make an individualized assessment based on the facts presented”). However, the sentencing court must still adhere to the requirements of 18 U.S.C. § 3553(c)(2). *United States v. Jones*, 460 F.3d 191, 197 (2d Cir. 2006).

As to each defendant in this case, the “nature and circumstances of the offense and the history and characteristics of the defendant” were considered. See 18 U.S.C. § 3553(a)(1). Respectful consideration was given to the sentencing guidelines, the Sentencing Commission’s

policy statements, and all other factors listed under 18 U.S.C. § 3553(a) to ensure that the sentence was “sufficient, but not greater than necessary, to comply with the purposes” of sentencing. *See* 18 U.S.C. § 3553(a). Under section 3553, there are two major considerations: specific and general deterrence. *Id.* Under our common law tradition, sentencing courts also consider the need to incapacitate criminals and the possibility of rehabilitating them. Wayne R. LaFare, 1 Substantive Criminal Law 38–39 (2d Ed. 2003).

Deviation from guideline sentences on policy grounds is permitted. “[D]istrict courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those guidelines.” *Spears v. United States*, 129 S.Ct. 840, 843–44 (2009). Such discretion may be exercised not only based on characteristics that distinguish a case from the “heartland” of cases contemplated by the guidelines, but also based on general policy considerations that apply “even in a mine-run case.” *Kimbrough v. United States*, 552 U.S. 85, 109 (2007). A court may substitute the congressional powder/crack ratio with a ratio of its own on the basis of such policy considerations. *Spears*, 129 S.Ct. at 844-45. *See also, e.g., United States v. Whigham*, No. 6-CR-10328-NG, 2011 WL 4959882 at 12 (D. Mass. Nov. 30, 2010) (“I will apply a 1:1 ratio for all crack cocaine sentencings”). This authority is consistent with the frequently employed power of federal courts to impose non-guideline sentences. *See United States Sentencing Commission, U.S. Sentencing Commission Preliminary Quarterly Data Report, 4th Quarter Release 1* (2010) (reporting that of sentences issued between October 1, 2009, and September 30, 2010, 43.6 percent deviated below the guidelines’ recommended length, and 1.8 percent exceeded their recommended length).

B. Equal Protection

1. Mandatory Minimum Sentences

The defendants in this case face steep sentences according to the Sentencing Guidelines. Most face mandatory minimum sentences of five or ten years for offenses involving heroin, crack cocaine, or both. The sentencing provisions in effect for these crimes are those enacted in the Anti-Drug Abuse Act of 1986. *Supra* Part II(E). Before the enactment of the 1986 Act, federal drug offenders were subject to maximum sentences and no statutory mandatory minimum sentences. *See, e.g.*, 21 U.S.C. § 841(b)(1)(A) (1982) (providing for a maximum sentence of fifteen years for offenses involving Schedule I or II narcotic drugs). As a result of the 1986 Act, mandatory minimum sentences were based primarily on the quantity of the drugs involved. *See* Table C below.

Table C: Amounts Necessary to Trigger Mandatory Minimum Sentences under the 1986 Act

Drug	Five-Year Minimum	Ten-Year Minimum
Cocaine base (crack)	5 grams	50 grams
Powder cocaine	500 grams	5 kilograms
Heroin	100 grams	1 kilogram
LSD	1 gram	10 grams
PCP (not in mix)	10 grams	100 grams
Marijuana	100 kilograms	1,000 kilograms

Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat 3207 (1986).

The mandatory minimum sentence for crack cocaine offenses was amended by Congress in the Fair Sentencing Act of 2010 (FSA). Under the FSA, a five-year mandatory minimum sentence is imposed for offenses involving twenty-eight grams of crack, and a ten-year sentence for offenses involving 280 grams of crack. Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372. In effect, the powder/crack sentencing ratio has been reduced from 100:1 to 18:1. These revised sentencing provisions are not implicated in the present case because they were enacted after the commission of the defendants' crimes and are not retroactive. *See United States v. Acoff*, No. 10-285-CR, 2011 WL 447043, at *1 (2d Cir. Feb. 10, 2011, Am'd Feb. 11, 2011) (citing Pub. L. No. 111-220, § 2, 124 Stat. 2372) (holding that the Fair Sentencing Act does not apply retroactively). *But see id.* at *2 (Calabresi, J., concurring) (“[T]here is something troubling about [non-retroactivity] with regard to a statute whose grossly different treatment of chemically identical drugs—the rock and powder forms of cocaine—has been criticized and questioned, particularly on grounds of racial injustice.”). Even if the FSA applied retroactively, its amended thresholds would not affect defendants' sentences. Each is subject to a mandatory minimum sentence on the basis of a heroin offense or an offense involving a quantity of crack cocaine in excess of 280 grams.

2. Framework

The Supreme Court has established two elements for determining whether a superficially neutral law violates the Equal Protection Clause: “discriminatory effect” and “purposeful discrimination.” *McClesky v. Kemp*, 481 U.S. 279, 292 (1987) (citing *Whitus v. Georgia*, 385 U.S. 545, 550 (1967); *Wayte v. United States*, 470 U.S. 598, 608 (1985)).

In cases involving alleged racial discrimination, once a discriminatory purpose and a discriminatory effect are shown, the law is subject to strict scrutiny. Strict scrutiny requires a law to be “‘narrowly tailored’ to achieve a ‘compelling government interest.’” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 9*, 551 U.S. 701, 720 (2007) (quoting *Adarand Contractors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)). Under strict scrutiny, the state bears the burden of rebutting a presumption of unconstitutionality. *Washington v. Davis*, 426 U.S. 229, 242 (1976) (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

If both a disparate impact and a discriminatory motive are not shown, in most cases a law is subjected to rational basis review, under which it can be overturned only if “it is [not] rationally related to a legitimate government purpose.” *United States v. Stevens*, 19 F.3d 93, 96 (1994) (citing *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981)). This rational basis for legislative action may be wholly notional; it need only be conceivable by a court, not actually contemplated by lawmakers. See *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (quoting *Flemming v. Nestor*, 363 U.S. 603, 612 (1960)) (“Where . . . there are plausible reasons . . . our inquiry is at an end. It is, of course, ‘constitutionally irrelevant whether this reasoning in fact underlay the legislative decision.’”).

3. Discriminatory Effect

The Supreme Court described a discriminatory effect in *Palmer v. Thompson* as “state action affecting [African Americans] differently from whites.” 403 U.S. 217, 225 (1971). Laws which criminalize voluntary conduct may violate the Equal Protection Clause when they target conduct associated with members of a protected class. See *Loving v. Commonwealth of Virginia*, 388 U.S. 1 (1967) (overturning a Virginia law criminalizing interracial marriage); *Craig v.*

Boren, 429 U.S. 190 (1976) (overturning an Oklahoma law establishing differing ages for legal alcohol purchase and consumption based on gender).

4. Discriminatory Purpose

Intent was not a clear requirement of Equal Protection violations before the Supreme Court's 1976 decision of *Washington v. Davis*. Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. Pa. L. Rev. 540, 544 (1977) (discussing 426 U.S. 229). Pre-*Davis*, some cases indicated that impact alone was sufficient basis for finding a violation. See, e.g., *Hunter v. Erickson* 393 U.S. 385, 390-91 (1969) (holding that a law violated the Equal Protection Clause without explicitly addressing its intent, purpose, or legislative history). The *Davis* Court rejected that approach, stating, "[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional [s]olely because it has a racially disproportionate impact." 426 U.S. at 238–39. The origin of the rule of *Davis* is not clear. See Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 Stan. L. Rev. 1105, 1109 (1989) (stating that the *Davis* Court followed the unsupported assumption by Professor Paul Brest that "the Constitution prohibits government not from reaching unequal results but from pursuing suspect objectives") (citing Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95, 110, 116 (1970)).

Intent requires more than mere predictability of consequences. "‘Discriminatory purpose’ . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in

part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”

Personnel Admin. of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979).

Equal Protection Clause violations do not depend on but-for causation. “*Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. . . . When there is a proof that a discriminatory purpose has been a [—not *the*—] motivating factor in the decision, . . . judicial deference is no longer justified.” *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977) (emphasis added).

A discriminatory purpose need not be clear from the text of the statute; even a facially neutral provision can result in *de jure* segregation. *Davis*, 426 U.S. at 241. The task of recognizing intent is made particularly difficult by “the growing unacceptability of overtly bigoted behavior, and a growing awareness of the possible legal consequences of such behavior.” *U.S. v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1369 (S.D.N.Y. 1985), *aff’d*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988). Consequently, “[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Arlington Heights*, 429 U.S. at 266 (emphasis added).

An initial indicator of discriminatory intent is a law’s discriminatory impact itself, although such an impact, without more, is seldom dispositive.

Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence.

Id. at 266 (citations omitted). *Accord Feeney*, 442 U.S. at 275.

A second factor is the foreseeability of such a discriminatory impact, especially “[a]dherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence upon racial imbalance.” *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464–65 (1979) (citation and quotation marks omitted); *Davis v. Bandemer*, 478 U.S. 109, 127-129 (1986). Foreseeability is to be determined through an objective reasonable person standard. *Arthur v. Nyquist*, 573 F.2d 134, 143 (2d Cir. 1978); *Hart v. Cmty. Sch. Bd. of Educ., New York Sch. Dist. #21*, 512 F.2d 37, 50 (2d Cir. 1975).

Third, a court should consider “[t]he historical background of the decision . . . , particularly if it reveals a series of official actions taken for invidious purposes.” *Arlington Heights*, 429 U.S. at 267. A court should consider the “[t]he specific sequence of events leading up to the challenged decision”; “[d]epartures from the normal procedural sequence”; and “[s]ubstantive departures . . . , particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.” *Id.* Courts may also consider historical context dating from before the enactment of the law at issue. *See Rogers v. Lodge*, 458 U.S. 613, 623–25 (1982).

Even where a sentencing law is constitutionally valid, its history and any disparate effect it works on those similarly situated to an individual defendant may be relevant to a court in determining an individual sentence.

5. Conclusion as to Constitutionality

As already indicated, there is substantial evidence of racial impact and awareness of probable racially invidious effect when the applicable drug statutes were adopted to warrant a

finding that the mandatory minimum sentences for crack cocaine were motivated in part by racial animus, in contravention of the Equal Protection Clause of the United States Constitution.

Such a finding would be justified by numerous factors: (1) the stark racial disparity itself; (2) the reasonable foreseeability of that disparity, as indicated by the repeated racial references in the legislative history of the 1986 Act; (3) the inconsistency between the sentencing scheme and Congress's established law enforcement priorities; (4) Congress's deviations from legislative procedures in its haste to enact the legislation; and (5) the historical pattern of enacting antidrug laws out of racial motivations.

Only a single published decision by a federal court has reached this conclusion. See *United States v. Clary*, 846 F. Supp. 768, 791 (E.D. Mo. 1994), *rev'd*, 34 F.3d 709, 713 (8th Cir. 1994), *cert. denied*, 513 U.S. 1182 (1995) (“[R]acial discriminatory influences, at least unconsciously, played an appreciable role in promulgating the enhanced statutory scheme for possession and distribution of crack.”). Cf. *State v. Russell*, 477 N.W.2d 886, 889–891 (Minn. 1991) (holding that a law with a powder/crack disparity had no rational basis under Minnesota’s Equal Protection Clause because of the irrelevance of the crack/powder disparity to its statutory purpose and the lack of legitimate distinction between crack cocaine and powder cocaine or their respective users).

A holding in the instant case of unconstitutionality under the Equal Protection Clause is precluded by rulings of the Court of Appeals for the Second Circuit. That court held “that Congress and the Sentencing Commission did not enact the 100 to 1 ratio with a discriminatory intent.” *United States v. Moore* 54 F.3d 92, 99 (2d Cir. 1995). See also *United States v. Teague*, 93 F.3d 81, 85 (2d Cir. 1996) (quoting *Feeney*, 442 U.S. at 279) (“There is no evidence that

Congress reaffirmed the sentencing disparity ‘at least in part “because of,” not merely “in spite of,” its adverse effects’ upon blacks.”). While the holding must be followed, this analysis, it is respectfully suggested, needs revisiting in view of the strong contradicting evidence.

The holding of the *Moore* Court dramatizes the limitations of the intent requirement that was introduced in *Davis*. See *Perry, supra*, at 544. The ease with which lawmakers can conceal improper motives behind permissible, racially neutral legislation makes proving discriminatory intent on the part of a legislature almost impossible. Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan. L. Rev.* 317, 319 (1987). Nor is it clear why a discriminatory impact that would be prohibited when inflicted intentionally by lawmakers is permissible when accomplished through negligence or reckless disregard. L. Tribe, *American Constitutional Law* 1518–19 (2d ed. 1988) (quoted in *Russell*, 477 N.W.2d at 888 n.2 (Minn. 1991)) (“[The intent requirement] overlooks the fact that minorities can also be injured when the government is ‘only’ indifferent to their suffering or ‘merely’ blind to how prior official discrimination contributed to it and how current acts will perpetuate it.”). *Cf.* Olatunde C.A. Johnson, *Disparity Rules*, 107 *Colum. L. Rev.* 374, 386 (2007) (stating that Equal Protection doctrine “provides little incentive for public institutions to address how their policies and practices perpetuate racial inequality.”). The cumulative effect of *Davis* and its progeny has been, some would charge, to suppress constitutional litigation and allow the perpetuation of inequality in such areas as sentencing.

[T]he Supreme Court has closed the courthouse doors to claims of racial bias at every stage of the criminal justice process, from stops and searches, to plea bargaining and sentencing. The Court has ruled that in the absence of conscious, intentional bias— tantamount to an admission or a racial slur—you can’t even get in

the courthouse doors with allegations of race discrimination in the criminal justice system.

Michelle Alexander, *How the Drug War Has Subjugated Poor People of Color and Nullified the Fourth Amendment*, Nieman Watchdog (Sept. 20, 2010), <http://www.niemanwatchdog.org/index.cfm?fuseaction=background.view&backgroundid=00486>. A number of alternatives to the current Equal Protection framework have been proposed. *E.g.* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting) (quoting *Dandridge v. Williams*, 397 U.S. 471, 520–21 (Marshall, J., dissenting) (suggesting that a balancing approach be adopted in place of the strict scrutiny/rational basis review structure); Perry, *supra*, at 560 (proposing a balancing test).

Although *Moore* precludes holding that the crack cocaine sentencing provisions of the Anti-Drug Abuse Act of 1986 were motivated by a discriminatory purpose, the facts concerning the history and impact of the law are relevant to a determination of the appropriate sentences in the instant case. They suggest that the mandatory minimum sentences and sentencing guidelines at issue in this case should be enforced with restraint.

To date, other constitutional attacks on mandatory minima have been rejected, but they also suggest discretion in enforcement. *See, e.g., United States v. Polizzi*, 549 F. Supp. 2d 308, 400 (E.D.N.Y. 2008), *rev'd*, 564 F.3d 142 (2d Cir. 2009) (“[M]andatory minimum penalties may be unsoundly aggrandizing the power of the executive and legislative branches. . . . Since the initial institution of the practice of widespread imprisonment in the United States, the legislature has assumed major responsibility for prescribing periods of incarceration for offenses. The Supreme Court has recognized the power of Congress to do so.”).

In sum, there is no significant basis for a finding of unconstitutionality that has not already been reviewed and rejected by the Court of Appeals for the Second Circuit.

C. Rationale

1. General Deterrence

There is little evidence that our regime of mandatory minimum sentences works any significant deterrent effect on potential offenders from backgrounds similar to those of the defendants in this case. General deterrence is especially unlikely in the case of younger people with few educational or professional prospects; limited impulse control due to adolescent development; serious drug and alcohol abuse problems; limited guidance from responsible adults, particularly male ones; and pressure from peer groups in which criminal behavior is accepted and in which the penalty for deviance from the group's norms is embarrassment, ostracism, or physical punishment. In light of these circumstances and given that effective deterrence arises from certainty, not harshness, of punishment, our society might better consider whether our scarce resources would be better spent, not on extended incarceration, but on eliminating social conditions encouraging crime and on non-incarceratory techniques.

2. Specific Deterrence and Rehabilitation

Nothing suggests that the defendants will be rehabilitated or specifically deterred by lengthy incarceration. Resources for providing them necessary education or job training are limited. The experience of incarceration will remove them from their families and communities and whatever ties they may retain to the non-criminal world. Their peers inside prison are unlikely to serve as positive role models. Incarceration will give them opportunities to expand their networks of criminal acquaintances, develop antisocial behavior patterns and attitudes, and

sharpen whatever criminal skills they have acquired on the streets. Upon release, they are likely to return to their broken families and impoverished communities with underdeveloped skills, dismal job prospects, and a host of the lifelong punishments that are heaped upon ex-convicts in our society, all factors inclining them away from straight life and toward recidivism.

3. Incapacitation

The most compelling justification for incarceration in this case is that it will prevent defendants from committing further crimes while they are in prison. Excepting the possibility of organizing crimes outside the prison walls via cellular phone, incarcerated criminals can do little direct harm to the public. The hope—and experience—is that as they grow older they become less violent.

There is little evidence, however, that incapacitating the members of this modest-sized drug organization will cause a net decrease in crime. The sentences in this case will not suppress the demand for crack and heroin, nor are they likely to work any meaningful effect on the price or supply of drugs sold by other organizations near Louis Armstrong Houses. See Bushway & Reuter, *supra*, at 190 (reporting that the inflation-adjusted prices of cocaine and heroin in the United States have declined or remained relatively constant since the 1980s, while incarceration of drug offenders has increased dramatically). There is no shortage of would-be players, veteran criminals, and directionless young people to replace the incarcerated defendants as managers, enforcers, and dealers in the drug trade.

4. Retribution

A meaningful regime of retribution requires a sober-minded assessment of proportionality and moral responsibility. The imposition of lengthy prison sentences for drug

offenses, particularly for nonviolent offenses committed by street vendors, often defies a fair sense of retribution. Violent offenders must be punished appropriately for their crimes. Such crimes as murder, rape, or armed robbery warrant harsh sentences. The same treatment may not be warranted for the consensual sale of a product, even a highly destructive one, to knowing, willing, adult purchasers in retail quantities. See *United States v. Brewer*, 624 F.3d 900, 910 (8th Cir. 2010) (Bright, J., dissenting) (quoting Perkinson, *supra*, at 336) (discussing the frequency with which penalties for crack cocaine offenses exceed those for murder). This is particularly true since the higher-up dealers in this country and abroad continue to supply the enormous demand for drugs in this country. Demand is not reduced by sentencing low-level purveyors such as these defendants to prison.

Illegal drugs are dangerous products. Reportedly, they impair users' health, diminish their usefulness to their families and employers, and increase their likelihood of committing further crime. But the moral burden for drug use is borne primarily by the users themselves. Putting aside cases where users become helplessly addicted as children, drug habits are generally the product of voluntary choices. The notion of the drug pusher preying upon defenseless, sober individuals, coercing them to sample addictive drugs so that they may become lifelong customers, has little congruence with reality as observed in court.

In moral terms, those working in the drug trade are primarily responsible not for drug abuse but for the trade itself and the violence and extortion attendant to it. Those who engage in violence and extortion should be punished in accordance with the danger their actions represent to the community. Street-level dealers are at least indirectly complicit in such acts; this commerce cannot continue without people serving their function. But it cannot be assumed that

such low-level players are morally in the same category as murderers, assailants, and major purveyors of monetary frauds. They may be little more than cogs, easily replaced. To fix their punishment under mandatory minimum sentences, not on the basis of their limited roles and acts but on the quantities of drugs they sell by chance or in cooperation with others of their ilk, ill accords with a fair sense of retribution.

IV. Application of Law to Defendants

A. Excessiveness

A number of the sentences described in Part B, below, are excessive because of the requirement of statutory mandatory minimum terms of incarceration under present case law. They cannot as yet be said to violate the Constitution. *See* Part III.B.5, *supra*. *Cf. United States v. C.R.*, No. 09-CR-155, draft op., at 394–402 (E.D.N.Y. Mar. 10, 2011) (discussing unconstitutionality of five-year mandatory minimum as applied).

Were four defendants—Darrell Bannister, Roger Patrick, Jawara Tatum, and Pedro Torres sentenced to shorter, more appropriate terms, defendants and society would be better served.

For three defendants, sentences both met the applicable mandatory minimum sentence and were required by the defendants’ offenses and criminal history. They are Christopher Hall, Cyril McCray, and Derrick Tatum.

Damien Bannister was not subject to a mandatory minimum sentence. He received a long sentence but less than five years because of his vicious behavior.

The remaining defendants are not discussed in this memorandum.

B. Individual Defendants

1. Damien Bannister

a. Background

Damien Bannister is African American. He was born in Brooklyn in 1984. His parents were married and had three children. Damien Bannister PSR ¶ 45. He is the younger brother of defendant Darrell Bannister, growing up together in the same household in Louis Armstrong Houses. *Id.* at ¶¶ 45, 48; Tr. of Sent’g of Damien Bannister 13 Jan. 19, 2011 (“Damien Bannister Tr.”). Their father was a heroin addict who used drugs at home, often with friends. Damien Bannister PSR ¶ 45. While the Bannisters were children, their father was “in and out” of drug treatment programs and often in jail on drug and gun-related charges. *Id.*; *see also* Darrell Bannister PSR ¶ 44. Their grandmother, who abused cocaine, lived with the family sporadically. Darrell Bannister PSR ¶ 45.

Defendant was raised by both parents until the age of nine or ten, when his father was “kicked out of the home” because of his drug abuse. Darrell Bannister PSR ¶ 45. The family struggled financially during defendant’s childhood. Damien Bannister PSR ¶ 46. His mother, who worked for the New York City Department of Social Services, was the family’s sole breadwinner; she received no financial support from the father, other family members, or public assistance. *Id.* at ¶ 46; Darrell Bannister PSR ¶ 45. Defendant was not physically abused as a child. Damien Bannister PSR ¶ 45.

In 1996, Bannister volunteered for the Bedford-Stuyvesant Volunteer Ambulance Corps as a janitorial worker. *Id.* at ¶ 79. His mother sent him to Hawaii in 1998 to live for a year with

an uncle, a police officer, so that he could escape his home and neighborhood environment. He returned the next year because he was homesick. *Id.* at ¶ 51.

Defendant attended Grover Cleveland High School in Ridgewood, Queens; the John V. Lindsay Wildcat Academy High School, a charter school in Lower Manhattan; and a high school in Hawaii before dropping out of school in the tenth grade. *Id.* at ¶¶ 68–70. (A number of defendants also attended Grover Cleveland High School.) Grover Cleveland has been identified by the New York City Department of Education as poorly performing. New York City Dep’t of Educ., 2008–09 *Progress Report Measures for High Schools*, <http://schools.nyc.gov/Accountability/tools/report/default.htm#FindPR>, select “PR Results 2009–10” and “High Schools” (last visited Mar. 20, 2011) (reporting a student performance grade of “D” for Grover Cleveland High School for the 2009–2010 school year).

In the summers of 1999 and 2000, Bannister performed maintenance work for NYCHA through the New York City Summer Youth Program. Damien Bannister PSR ¶ 79. His subsequent employment history consisted of intermittent work assembling office cubicles for a company in Long Island City, New York, and a four-month stint in 2003 and 2004 as a vertical blind installer in Brooklyn. *Id.* at ¶¶ 75–76. He has never filed a tax return. *Id.* at ¶ 82. He has expressed an interest in learning a trade, such as plumbing or electricity. Damien Bannister Tr. 13.

When sixteen, defendant began smoking marijuana habitually; while he has been enrolled in drug treatment programs, he has continued to smoke marijuana and drink cognac heavily. Damien Bannister PSR ¶ 62. He has twice been treated for substance abuse. *Id.* at ¶¶ 63–65. Before his arrest, he gambled on dice, cards, or sports events every other day. *Id.* at ¶ 58.

Damien Bannister suffers from asthma. He is otherwise in good health. *Id.* at ¶ 60.

He has two children, ages five and seven, with his fiancée, whom he has dated for nine years. *Id.* at ¶ 49. She describes him as a devoted father. *Id.* at ¶ 53. She worked as an administrative assistant but is currently unemployed. Damien Bannister Tr. 18. She relies on public assistance to support the family. Damien Bannister PSR ¶ 49.

Defendant's father died in 2008, at the age of fifty-seven, from a heart attack. His mother suffers from diabetes and lives in Chattanooga, Tennessee, where she receives disability payments. *Id.* at ¶ 47. She moved out of Louis Armstrong Houses about 2004. Defendant's sister continues to live in the development. Damien Bannister Tr. 20.

Bannister has a substantial criminal history. At the age of fourteen, he was found by police in a car with defendant Derrick Tatum and a loaded gun, but his record does not indicate that this incident resulted in a conviction. Derrick Tatum PSR ¶ 28–29; *see generally* Damien Bannister PSR. When sixteen, he stole a car from a woman at knifepoint, fled in the car, and used the knife to menace two people who pursued him. *Id.* at ¶ 21–22. When he was twenty-one, he, together with his brother Darrell Bannister and three others, stole merchandise from a store after intimidating an employee with a pair of scissors. *Id.* at ¶ 28.

b. Offense

Defendant was a street-level dealer in the crew, with no managerial role. He is personally charged with selling 150 grams of crack cocaine between August 2008 and January 2010. While he had no personal involvement with firearms, he maintained access to firearms shared with other members of the crew. *Id.* at ¶¶ 5–6.

Bannister was arrested on August 9, 2009, with forty-eight bags of crack and ninety glassines of heroin. On January 21, 2010, he was sentenced by the State of New York to a year of incarceration. He was transferred from state to federal custody on February 9, 2010. *Id.* at ¶¶ 39–40.

On July 27, 2010, he pled guilty to a lesser included offense within Count One of a twenty-four-count superseding indictment. Count One charged that between September 2007 and January 2010, defendant and others conspired to distribute and possess with intent to distribute cocaine base in violation of 21 U.S.C. §§ 846 and 841(b)(1)(C). *Id.* at ¶ 1.

The total offense level was seventeen, and the criminal history category was V, yielding a guidelines range between 46 and 47 months. Bannister’s offense, unlike those pled to by other members of the crew, carried no mandatory minimum sentence. The guidelines range of fine was from \$5,000 to \$50,000.

c. Sentence

Bannister was sentenced on January 19, 2011. At his sentencing, he apologized to his mother and his family members.

He was sentenced to three years’ incarceration and five years’ supervised release. The three-year sentence was set to begin at the date of sentencing, rather than the date of arrest, because of a state sentence then being served. Damien Bannister Tr. 21–22. A \$100 special assessment was imposed. No fines were imposed because the defendant does not have any assets, and it is unlikely that he will have any in the future to pay a fine. The remaining counts of the indictment were dismissed.

A non-guideline sentence was imposed under 18 U.S.C. § 3553(a) and *Booker*, 543 U.S. 220. This sentence balances the threat posed by Bannister’s past crimes of violence with his involvement as a street-level dealer, his lack of personal involvement with firearms, his impoverished background in a fatherless home, his remorse for his crime, and his desire to reform his life and be a good husband to his fiancée and father to his children. The sentence provides ample specific and general deterrence. Given defendant’s background, an excessively harsh sentence would lead only to a greater risk of recidivism.

2. Darrell Bannister

a. Background

Darrell Bannister is African American. He was born in Brooklyn in 1979. He is the older brother of defendant Damien Bannister; the two grew up together in the same household in Louis Armstrong Houses. Darrell Bannister PSR ¶ 44; *see* Part IV.B.1.a, *supra*. The troubled relationship between defendant’s parents cast him into depression as a child. He attempted suicide around 1989 by hanging himself and cutting his wrists. *Id.* at ¶ 57. His mother beat him with a belt to discipline him, and he once reported her to Child Protective Services; the case was eventually dismissed. *Id.* at ¶ 46. He was treated by a psychiatrist in 1989 and 1990. *Id.* at ¶ 57.

As a teenager defendant volunteered with the Bedford-Stuyvesant Volunteer Ambulance Corps, assisting with ambulance dispatching and CPR classes. *Id.* at ¶ 78. He attended Grover Cleveland High School in Queens, but he failed all of his classes and had excessive absences. He was expelled in the tenth grade for fighting with a school security officer after he tried to bring a prohibited mobile phone to school. *Id.* at ¶ 72. He once left home to live with an aunt because his mother was pressuring him to attend school. *Id.* at ¶ 46.

Bannister suffered from schizophrenia as a child, experiencing his most recent episode around 2007. Tr. of Sent'g of Darrell Bannister 7–8 Nov. 16, 2010 (“Darrell Bannister Tr.”) (testimony of defendant’s mother). He has experienced difficulties controlling his temper. *Id.* at 9, 16 (testimony of defendant and his mother). Like his brother Damien, he suffers from asthma. Darrell Bannister PSR ¶ 61; Damien Bannister PSR ¶ 60.

When fourteen, defendant began smoking marijuana. From the age of sixteen until his arrest for the current offense, he smoked marijuana daily and marijuana mixed with cocaine about once a week. Darrell Bannister PSR ¶ 67. He has used crack cocaine as well. Darrell Bannister Tr. 8. He was treated for substance abuse in 1996 and 1997 while on probation for a prior offense. Darrell Bannister PSR ¶ 70. He gambled several times a week before his arrest, usually playing poker or dice on the street and wagering about \$200 each time. *Id.* at ¶ 59.

From 2003 to 2008, Bannister and his then-girlfriend, with whom he fathered two children, lived in upstate New York and Tennessee. He returned to New York periodically. He and his girlfriend broke up after he was arrested for the instant offense. *Id.* at ¶ 52.

Darrell Bannister has held only two paying, legal jobs. *Id.* at ¶ 74. He reports that in 2003, he worked as an industrial laborer in Binghamton, New York, but this information could not be verified. *Id.* at ¶ 77. He spent part of 2005 working in construction at Brooklyn College. *Id.* at ¶ 76. At his sentencing, he expressed an interest in receiving training in construction and electrical work. Darrell Bannister Tr. 16.

Before his arrest, he was primarily supported by his mother and former girlfriend. Darrell Bannister PSR ¶ 74. In his free time he watched his children and used drugs. *Id.*

Bannister has a number of prior convictions, most from his adult years. In 2005, while he was twenty-five, he, together with his brother Damien and three others, stole merchandise from a store after intimidating an employee with scissors. *Id.* at ¶ 31. At the age of nineteen, he was arrested for possession of a loaded, defaced gun, but he was not convicted. *Id.* at ¶¶ 35–36.

b. Offense

Bannister's tenure with the crew, from July 2008 through September 2008, *id.* at ¶ 6, was the shortest among the defendants. He worked as a street-level dealer with no managerial role. He is charged with the sale of more than 100 grams of heroin. It has not been shown that he possessed or maintained access to firearms during the course of the conspiracy or that possession of firearms by his coconspirators was part of his jointly undertaken criminal activity. *Id.* at ¶ 7.

Bannister was arrested on a state charge in October 2009, a year after his involvement with the conspiracy ceased, for possession of marijuana, 500 grams of cocaine, and paraphernalia for weighing and packaging drugs. A gun was recovered from the location where he was arrested, but he was not charged with a firearms offense. *Id.* at ¶ 33.

Defendant was arrested for the instant offense on January 27, 2010. *Id.* at 1. On July 13, 2010, he pled guilty to a lesser included offense within Count One of a 24-count superseding indictment. The lesser included offense charged that between September 2007 and January 2010, he and others conspired to distribute and possess with intent to distribute 100 grams or more of heroin in violation of 21 U.S.C. §§ 846 and 841(b)(1)(B)(i). *Id.* at ¶ 1.

The total offense level was twenty-three, and the criminal history category was II, yielding a guidelines range between fifty-one and sixty-three months. The offense carried a

mandatory minimum sentence of five years. *See* 18 U.S.C. § 841(b)(1)(B). The guidelines fine range was from \$10,000 to \$100,000.

c. Sentence

Bannister was sentenced on November 16, 2010. At his sentencing, he stated, “I would like to say sorry to the court and to my mother, my family, and friends, and most important, my little brother[, Damien Bannister,] for looking at me as a role model[,] and I wasn’t really a role model.” Darrell Bannister 13.

Defendant was sentenced to five years’ incarceration and five years’ supervised release. A \$100 special assessment was imposed. No fines were imposed because defendant does not have any assets, and it is unlikely that he will have any in the future to pay a fine. A non-guideline sentence was imposed under 18 U.S.C. § 3553(a) and *Booker*, 543 U.S. 220. The remaining counts of the indictment were dismissed.

This sentence, mandated by the Anti-Drug Abuse Act of 1986, is excessive under 18 U.S.C. § 3553(a) in view of Bannister’s troubled upbringing, his childhood history of mental illness, his brief and low-level involvement in the conspiracy, his remorse for his crime, his lack of personal involvement during the conspiracy with firearms, and the fact that his criminal history includes but a single offense involving violence or the threat of violence. General and specific deterrence would be amply served by a sentence of two to three years; a five-year sentence serves only to diminish his potential for rehabilitation.

3. Christopher Hall

a. Background

Christopher Hall is African American. Hall PSR 2. He was born in an unknown location in North Carolina in 1986. He is the sole child of a nonmarital union. *Id.* at ¶ 37. His father's surname is unknown; the father died when defendant was an infant. Tr. of Sent'g of Christopher Hall 21 Nov. 16, 2010 ("Hall Tr."). Hall reports an uneventful childhood. His mother smoked marijuana while he was a child, but not in his presence. She worked for the Metropolitan Transit Authority (MTA) as a bus traffic checker but was fired in 2007 or 2008 for failing a drug test. She received public assistance during defendant's childhood. Hall PSR ¶ 37. She also worked for the New York City Department of Parks and Recreation, but her position was terminated. Hall Tr. 21. In 2010, the family was living in a building with no heat or hot water. They subsequently moved in with defendant's grandmother. Presentence Hr'g Tr. 9–10 Aug. 16, 2010

Despite being a poor student, Hall graduated from Grover Cleveland High School in 2004. Hall PSR at ¶ 53. In 2005, he worked as a maintenance worker through the New York City Summer Youth Program, and in 2005 and 2006 he performed janitorial work for the MTA. From mid-2009 to his arrest for the instant offense, he performed construction work for the Bedford Stuyvesant Restoration Corporation as part of a job training program. *Id.* at ¶ 58–60. At his sentencing, he expressed an interest in receiving training in construction. Hall Tr. 18.

Defendant enjoys generally good health, although it was reported that he has had occasional chest pains from an unspecified congenital lung condition. Hall PSR ¶ 49. He drinks occasionally and has no history of drug use. *Id.* at ¶ 52. He impregnated a girlfriend. After his

arrest, she left New York to live with her mother in an unspecified location “down South.” *Id.* at ¶ 40.

Hall has three prior convictions. In 2008, while twenty-two, he was arrested for selling drugs and was found in possession of twenty glassines of heroin and \$515. He was twice convicted of disorderly conduct. *Id.* at ¶¶ 29-30, 32-34.

b. Offense

Hall worked in the crew from September 2007 to January 2010 as a street-level dealer of heroin and crack. He sold drugs once or twice a week, earning \$150 for every \$500 worth he sold. He is charged with the sale of more than 4.5 kilograms of crack and three kilograms of heroin over the course of the conspiracy. He held no managerial role but was occasionally ordered by Derrick Tatum, the leader, to pick up packages of drugs from suppliers and distribute them to members of the crew. *Id.* at ¶¶ 6, 8.

Hall personally possessed a firearm in furtherance of the conspiracy. He purchased a .380 caliber handgun for \$200 and a bulletproof vest for \$100. *Id.* at ¶ 8. In September 2008, he and defendant Pedro Torres were at a location on Clifton Place where the crew regularly sold drugs. Several armed individuals approached, and an altercation ensued. Hall was armed. An unnamed individual was shot in the leg and chest, and Torres was shot in the leg. It is not known whether Hall fired any of the shots that wounded Torres or the unknown victim, and he has not been charged in connection with this shooting. *Id.* at ¶ 6; Torres PSR ¶ 6. On June 30, 2009, police recovered a loaded gun and thirty-five bags of heroin—about two grams’ worth—from an apartment that was used by Hall. Hall PSR ¶ 6.

Defendant was arrested on January 27, 2010. *Id.* at 1. On May 13, 2010, he pled guilty to both counts of a two-count indictment. Count One charged that between September 2007 and January 2010, he conspired with others to distribute and to possess with intent to distribute one kilogram or more of heroin and fifty grams or more of cocaine base in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A). Count Two charged that between September 2007 and January 2010, he, together with others, possessed a firearm in furtherance of the drug trafficking crime charged in Count One, in violation of 18 U.S.C. § 924(c)(1)(A)(i). *Id.* at ¶ 1.

The total offense level was thirty-three, and the criminal history category was I, yielding a guidelines range between 135 and 168 months. A two-point enhancement for the use of a firearm ordinarily would have been added, but none applied in order to avoid double counting, because defendant is being convicted of an 18 U.S.C. § 924(c) gun offense. The guidelines range of fine is from \$17,500 to \$175,000. The offense carried a mandatory minimum sentence of ten years. *See* 18 U.S.C. § 824(b)(1)(A).

c. Sentence

Hall was sentenced on November 16, 2010 to ten years' incarceration and five years' supervised release. A \$200 special assessment was imposed. No fines were imposed because defendant does not have any assets, and it is unlikely that he will have any in the future to pay a fine.

A non-guideline sentence was imposed under 18 U.S.C. § 3553(a) and *Booker*, 543 U.S. 220. This sentence is appropriate. Defendant was raised in a fatherless home under impoverished conditions. Nevertheless, the relative stability of his background, his completion of high school, and his work history indicate that he had substantial options beyond criminal

activity. The sentence is justified by his brazen use of guns. Shootouts conducted in residential areas to protect drug operations are among the worst consequences of the illegal drug trade. They contribute to the climate of terror in which residents of drug-ridden neighborhoods are forced to live. Defendant's acquisition of a bulletproof vest indicates a calculated decision to engage in such street combat. The sentence imposed provides ample general and specific deterrence. Given defendant's background, an excessively harsh sentence would lead only to a greater risk of recidivism.

4. Cyril McCray

a. Background

Cyril McCray is African American. McCray PSR 2. He was born in Brooklyn in 1964. His parents were married, but they separated when he was two years old. *Id.* at ¶ 64. He never knew his father. Tr. of Sent'g of Cyril McCray 13 Nov. 16, 2010 ("McCray Tr."). An uncle occasionally cared for defendant and provided financial support. McCray's mother worked as a schoolteacher and relied on public assistance to support the family. She beat him with extension cords and hangers when he was a child for being rebellious, but he does not feel he was abused. McCray PSR ¶¶ 64–66.

Defendant attended Boys and Girls High School in Bed-Stuy but dropped out after the tenth grade. *Id.* at ¶ 91. Boys and Girls High School has been identified by the New York City Department of Education as a poorly performing school. New York City Dep't of Educ., *2009-2010 Progress Report Measures for High Schools*, <http://schools.nyc.gov/Accountability/tools/report/default.htm#FindPR>, select "PR Results 2009–10" and "High Schools" (last visited Mar. 20, 2011) (reporting a student performance grade of "F" for Boys and Girls High School for

the 2009–2010 school year). *See also* Patrick Wall, *Boys and Girls High School Struggles to Survive*, Brooklyn Movement Ctr., <http://brooklynmovementcenter.org/node/39> (last visited Mar. 14, 2011) (reporting the attempts of the school’s principal to change its rating as one of the city’s “‘persistently lowest-achieving’ schools”).

After dropping out of high school, McCray temporarily lived with friends in Brooklyn. His mother then sent him to North Carolina, where he resided with grandparents for four years before returning to Brooklyn. McCray PSR ¶¶ 73, 91.

He has worked as a security guard, day laborer, stock person, janitor, maintenance worker, and helper to a truck driver. *Id.* at ¶¶ 98–109. It was reported that he worked for a paving company for fourteen years, but this could not be verified. *Id.* at ¶ 103. He has held a number of unskilled positions while in state custody for prior offenses. *Id.* at ¶ 101. In 2006, he received a security guard license after attending classes at a vocational college. *Id.* at ¶ 92. He was unemployed from 2006 to 2007 and from mid-2008 until his arrest in January 2010. *Id.* at ¶¶ 97, 99. He has expressed an interest in receiving training in electrical work and obtaining his graduate equivalency diploma (G.E.D.) while incarcerated. McCray Tr. 8.

McCray has an extensive history of serious, violent criminal offenses. In 1981, at the age of seventeen, he robbed a victim at gunpoint and attempted to rape her. McCray PSR ¶¶ 23–24. In 1986, he and two others attempted to break into an apartment and menaced a witness. *Id.* at ¶¶ 27–28. He was arrested in 1991 for assaulting a victim with a baseball bat, along with nine other individuals, but the charge was dismissed. *Id.* at ¶¶ 61–62. In 1998, he pushed a long-time girlfriend into a bathtub, injuring her. *Id.* at ¶¶ 34–35. He has been convicted of numerous offenses relating to car theft; driving with stolen license plates, falsified insurance information,

and altered vehicle identification numbers; and fleeing from police who were attempting to effect traffic stops. *Id.* at ¶¶ 29–30, 36–41, 46–51, 54–57. In 1998, he and another individual intentionally blocked police officers’ cars from pursuing a vehicle that a coconspirator had stolen. *Id.* at ¶¶ 36–37. In 2000, McCray was pursued by police as he fled with a stolen car; he sped through stoplights and stop signs, causing the collision of two police cars and injuries to two officers. *Id.* at ¶¶ 40–41. His driver’s license has been suspended at least thirty times. *Id.* at ¶ 57.

Two orders of protection have been issued against McCray by a prior girlfriend. Details concerning these orders have not been provided. *Id.* at ¶ 72. McCray acknowledged physically abusing another girlfriend on one occasion. *Id.* at ¶ 69.

In 2005, Defendant was diagnosed with diabetes; he also suffers from high blood pressure and depression. *Id.* at ¶¶ 82, 85. Between 2005 and 2007, he drank three to four glasses of rum a day. *Id.* at ¶ 88. In 2007, he gambled at casinos in Atlantic City two weekends each month and lost \$4,000 to \$5,000 on each occasion. *Id.* at ¶ 80. It was reported in 2000 that he smoked marijuana daily. *Id.* at ¶ 87. He has also smoked crack cocaine. McCray Tr. 7. In 2002 he underwent drug and alcohol treatment while incarcerated for a prior offense. McCray PSR ¶ 89.

McCray has never been married, but he is engaged to his girlfriend of three years. She lives in Brooklyn and has three children from a prior relationship. She also has two adopted children. Defendant has a sixteen-year-old daughter with a prior girlfriend; the daughter lives with her mother in Brooklyn. McCray stated that before his arrest, he saw his daughter weekly and provided her with \$100 to \$150 of voluntary financial support every week or two. He has

stayed in contact with his daughter since his arrest by writing her letters from jail. McCray PSR ¶¶ 68, 70. He has a son, now twenty-nine years of age, from another relationship; the two have not maintained contact. *Id.* at ¶ 71. Attempts by the Probation Department to contact McCray's mother and the mother of his daughter were unsuccessful. *Id.* at ¶ 63. His address of record is in Louis Armstrong Houses, near where the crew sold drugs. *See id.* at 2.

b. Offense

Defendant participated in the conspiracy throughout its duration, from September 2007 until January 2010, as a street-level dealer with no managerial role. He is charged with responsibility for the sale of more than 4.5 kilograms of crack and three kilograms of heroin. *Id.* at ¶¶ 5, 8.

He personally possessed firearms during the conspiracy. On October 23, 2007, he was stopped by police near the intersection of Clifton Place and Nostrand Avenue, at a location where members of the crew regularly sold drugs, when police observed that the license plate on his car was assigned to a different vehicle. In a hidden compartment, officers found a loaded .38 caliber revolver, a loaded .22 caliber revolver, 249 glassine bags of heroin, and \$1,190 in cash. *Id.* at ¶ 6.

Defendant was arrested on January 26, 2010. *Id.* at 1. On July 22, 2010, he pled guilty to a lesser included offense in Count One of a twenty-four-count superseding indictment. *Id.* at ¶ 1. Count One charged that between September 2007 and January 2010, McCray and others conspired to distribute and possess with intent to distribute one kilogram or more of heroin and fifty grams or more of cocaine base in violation of 21 U.S.C. §§ 846, 841(b)(1)(A)(i), and 841(b)(1)(A)(iii). *Id.*

The total offense level was thirty-six, and the criminal history category was VI, yielding a guidelines range between 292 and 365 months. The total offense level included a two-point enhancement for possession of a firearm during a drug offense. The guidelines range of fine was from \$20,000 to \$200,000. The offense carried a mandatory minimum sentence of ten years. See 18 U.S.C. § 824(b)(1)(A).

c. Sentence

McCray was sentenced on November 16, 2010 to ten years' incarceration and five years' supervised release. A \$100 special assessment was imposed. No fines were imposed because defendant does not have any assets, and it is unlikely that he will have any in the future to pay a fine. The remaining counts of the indictment were dismissed.

A non-guideline sentence was imposed under 18 U.S.C. § 3553(a) and *Booker*, 543 U.S. 220. This sentence is high in light of defendant's impoverished background in a fatherless home, his remorse for his crimes, his age and medical condition, and his desire to be a good father and husband. Nevertheless, his role in the conspiracy, his carrying of guns, and the threat to the community indicated by his extensive history of violent crimes warrant the mandatory minimum sentence. The sentence provides ample specific and general deterrence. To follow the guidelines in this case would mean sending defendant to prison for over twenty years, at which point he would emerge a sixty-six-year-old, diabetic ex-convict with little to no hope of a productive life.

5. Roger Patrick

a. Background

Roger Patrick is African American. Patrick PSR 2. He was born in 1989 in Puerto Rico. His parents were married and had six children. *Id.* at ¶ 39. His father frequently came home drunk and abused Patrick, his siblings, and his mother by beating them with his hands and with extension cords, sticks, an iron, and a frying pan. He once threw an electric fan into Patrick's mother's face. Patrick received the worst of the abuse because he intervened to protect his mother from his father's attacks. *Id.* at ¶ 40. This history of abuse was corroborated in letters sent to the court by defendant's family members. In 1995, to escape defendant's father's abuse, his mother moved with her children from Puerto Rico to Antigua to live with her mother. Patrick PSR ¶ 40. She then moved alone to New York City and had the children sent afterward to join her. In New York, the family lived in homeless shelters before finding an apartment. They would often go a day or two without food so that his mother could afford to keep their apartment, when they had one. *Id.* at ¶¶ 39, 41. She supported the family by working as a home health aide. *Id.* at ¶ 44.

Defendant smoked marijuana daily from the age of twelve until his arrest for the current offense. From the age of fifteen, he drank cognac or vodka each weekend to the point of losing his memory of what happened the night before. *Id.* at ¶ 57. He has expressed an interest in substance abuse treatment. *Id.* at ¶ 60.

About 2002, codefendant Jawara Tatum, who had abused drugs and alcohol heavily starting as a teenager, lived with Patrick's family. Tatum again lived with the family for part of

2009, around the time that Tatum and Patrick were involved in the instant conspiracy. Jawara Tatum PSR ¶ 43.

Patrick attended Lafayette High School, in the Bath Beach section of Brooklyn, but he withdrew in February 2005, while in the ninth grade, when he was arrested for a prior offense. Patrick PSR ¶ 62.

He has two prior convictions, both for robberies committed while he was a teenager. In April 2004, while fifteen and under the influence of alcohol, he and about eight other teenagers were on their way to a party when they decided to rob a man they saw on the street. Defendant was armed with a knife during the incident and struck the victim in the head with a long-handled dustpan. *Id.* at ¶¶ 24–26. While serving probation for this offense, in February 2005, he committed the second robbery. In it, Patrick and two others, wearing masks, attacked a victim by choking, punching, and kicking him. They also pistol-whipped him with a bb gun. Patrick was incarcerated for the second robbery and for a parole violation from September 2005 to April 2008. *Id.* at ¶¶ 29–30. While in custody, he committed several disciplinary infractions, including fighting. *Id.* at ¶ 32.

Unskilled jobs defendant held while in custody constitute his entire employment history. *Id.* at ¶ 68. He was released from prison in April 2008 at the age of nineteen. *Id.* at ¶ 29. He was enrolled in a G.E.D. program from 2008 until his arrest for the instant offense. *Id.* at ¶ 61. He has expressed an interest in doing carpentry and electrical work. Tr. of Sent’g of Roger Patrick 16 Nov. 16, 2010.

Patrick has never been married and has no children. Since 2008, he has been in a relationship with a college student, Shakeyia Tatum, who plans to become a parole or probation

officer. *Id.* at ¶ 46. Shakeyia Tatum is the sister of Jawara Tatum and the niece of Derrick Tatum. Jawara Tatum PSR ¶ 37; Tr. of Sent’g of Derrick Tatum 5 Nov. 16, 2010 (“Derrick Tatum Tr.”).

Defendant experiences pain from an untreated knee injury he suffered as a result of a car accident in 2002 or 2003. Otherwise he enjoys good health. *Id.* at ¶¶ 54–55.

His family lives in an apartment in Louis Armstrong Houses on the same block where Cyril McCray and Pedro Torres lived and near where the crew sold drugs. *See id.* at 2. Patrick has described the neighborhood as a “negative” environment where there is substantial pressure from peers to engage in crime. *Id.* at ¶ 42.

b. Offense

Defendant began working with the crew in August 2008 as a street-level dealer, with no supervisory role. He continued in that capacity until January 2010. He is responsible for selling more than a kilogram of heroin. He maintained access to guns shared by members of the crew, but he did not personally possess firearms. *Id.* at ¶ 6.

Defendant was arrested on January 27, 2010. *Id.* at ¶ 7. On July 27, 2010, he pled guilty to a lesser included offense in Count One of a twenty-four-count indictment. Count One charged that between September 2007 and January 2010, he conspired to distribute and possess with intent to distribute more than 100 grams of heroin, in violation of 21 U.S.C. §§ 841(b)(1)(B)(i) and 846. *Id.* at ¶ 1.

The total offense level was thirty-one, and the criminal history category was VI, yielding a guidelines range between 188 and 235 months. The offense level included a two-point enhancement because defendant maintained access to firearms used by the conspiracy. The

guidelines range of fine was from \$15,000 to \$150,000. The offense for which he has pled guilty under Count One carries a mandatory minimum sentence of five years. See 18 U.S.C. § 824(b)(1)(B).

c. Sentence

It was stated orally at Patrick's sentencing on November 16, 2010 that he would be incarcerated for six years. In general, sentence is imposed when orally announced. Fed. R. Crim. P. 35(c). It may then be corrected within fourteen days for arithmetical, technical, or other clear error. Fed. R. Crim. P. 35(a). It is the practice of this court for judgment to be entered promptly after sentence is orally announced. In the case of this defendant, given the mandatory minimum sentence required by 21 U.S.C. section 841(b)(1)(B)(i), five years was the reasonable sentence under section 3553(a). The sentence of six years, announced orally, violated 18 U.S.C. section 3553(a)(6), requiring consistency with like cases. See Part IV.B.1.c, *supra* (three-year sentence for Damien Bannister); Part IV.B.2.c, *supra* (five-year sentence for Darrell Bannister); Part IV.B.7.c, *infra* (five-year sentence for Jawara Tatum). A hearing was held Mar. 24, 2011, and defendant was resentenced to five years' imprisonment and five years' supervised release.

A non-guideline sentence was imposed under 18 U.S.C. § 3553(a) and *Booker*, 543 U.S. 220. A \$100 special assessment was imposed. No fines were imposed because defendant does not have any assets, and it is unlikely that he will have any in the future to pay a fine. The remaining counts of the indictment were dismissed.

Even a five-year sentence, mandated by the Anti-Drug Abuse Act of 1986, is excessive in view of Patrick's remorse for his crime, his childhood history of grave abuse and deprivation, the young age at which he became involved in this conspiracy, his lack of personal involvement with

guns, and the fact that all of his prior offenses were committed while he was a minor. It provides more than enough general and specific deterrence. Given defendant's background, its excessive length can lead only to a greater risk of recidivism.

6. Derrick Tatum

a. Background

Derrick Tatum is African American. Derrick Tatum PSR 2. He was born in 1980 in Brooklyn. *Id.* at 2, ¶ 44. His parents were unmarried and had six children. *Id.* at ¶ 44. His father supported the family through plumbing and boiler work; his mother was a homemaker. *Id.*

Derrick Tatum has described a bleak upbringing that is only partially corroborated. He stated that he lived in poor conditions without heat or hot water, that the family “had nothing” and “barely had food,” and that his father was an alcoholic who was intoxicated daily and beat Tatum's mother once or twice a week. He stated that his older brother, Michael Tatum, used drugs in the house. *Id.* at ¶¶ 44, 45. His mother confirmed that the family lived at times without heat or hot water, but she denied that the family went without food or had financial difficulties. She stated that Tatum's father drank alcohol only occasionally. *Id.* at ¶ 51. Tatum's fiancée expressed familiarity with his upbringing, but she said she was unaware of any drug or alcohol abuse or physical abuse in the household. *Id.* at ¶ 52.

Derrick Tatum's older brother, Michael Tatum, has an extensive criminal history, including robbery and attempted robbery. Defendant reported that Michael Tatum has been shot nine times. A second brother, Jermaine Tatum, was killed in a car accident in 2002. Defendant's remaining five siblings are ages thirty-five to forty-three, live in Brooklyn, are

single, and enjoy good health. One sister is the mother of codefendant Indio Tatum; another is the mother of codefendant Jawara Tatum. *Id.* at ¶ 47.

Defendant attended Grover Cleveland High School to the ninth grade. He was expelled because he did not attend classes. *Id.* at ¶ 71. He then went to Street Academy in Bed-Stuy for the tenth grade, but he withdrew when he started selling drugs. *Id.* at ¶ 70.

Tatum began smoking marijuana daily at the age of 18. He was enrolled in multiple drug treatment programs between 1999 and 2005 but continued to smoke marijuana heavily—about three “blunts” of it per day—until his arrest for the present offense in January 2010. *Id.* at ¶¶ 63, 65–67. He declined to state how he financed his drug habit. *Id.* at ¶ 64. He has no history of other drug or alcohol use. *Id.* at ¶ 63, 69. He claims that he would be interested in receiving drug treatment. *Id.* at ¶ 68.

Tatum has a lengthy history of serious criminal offenses. In May 1998, while he was seventeen years old, he drove a vehicle into the wall of a building after almost striking several children. *Id.* at ¶ 26; Addendum to the Presentence Report of Derrick Tatum 2. In October of that year, he was observed by police in a car with codefendant Damien Bannister, who was then fourteen years old, and two others in a car speeding and weaving from lane to lane. Derrick Tatum PSR ¶¶ 28–29. Police recovered a loaded, defaced .25 caliber handgun from the car. *Id.* at ¶ 29. In 2000, he was convicted for possession of drugs and sentenced to a year of confinement after police executing a search warrant recovered twenty-eight bags of crack cocaine and a loaded .357 Magnum pistol from a residence to which he was connected. *Id.* at ¶¶ 33–34. In February 2001 he fired six shots at an individual with a stolen .9 millimeter handgun; he explained to a probation officer that he did so because he “had a problem [that he] had to take

care of.” *Id.* at ¶¶ 35–36. In July 2001 he was arrested for selling heroin. *Id.* at ¶¶ 37–38. He was convicted of the shooting and the sale of drugs and sentenced to six years in prison. *Id.* at ¶¶ 35, 37. While incarcerated he was cited for numerous violations, including fighting, interference, and drug use. *Id.* at ¶ 39. He was discharged in July 2007. *Id.* at ¶ 35.

Defendant has had little legal employment. In 2000 and 2001, his late brother, Jermaine Tatum, found him sporadic employment with a moving and storage company. *Id.* at ¶ 78. He worked as a porter and group leader while incarcerated from 2001 to 2005, and he worked briefly in 2007 as a laborer with a scrap metal company. *Id.* at ¶¶ 74, 76–77. He declined to state how he supported himself between 2007 and 2010. *Id.* at ¶ 74. He has expressed an interest in receiving culinary training and opening a restaurant. Derrick Tatum Tr. 13.

Tatum has a ten-year-old daughter with a woman he has been seeing since 1995 and who works as a 911 operator. The two are engaged to be married. He has no other children and has never been married. Derrick Tatum PSR ¶ 48.

Defendant gambled frequently. He wagered \$4,000 to \$5,000 per month at various gambling spots in Brooklyn and took regular trips to Atlantic City and Las Vegas. *Id.* at ¶ 56. He reported that his greatest gambling payout was \$30,000 and that he used his gambling proceeds to finance his involvement in the current offense. *Id.* His fiancée is paying his legal bills. *Id.* at ¶ 82.

b. Offense

The present conspiracy was initiated by Derrick Tatum in September 2007. He led the crew until January 2010. He recruited members, determined how much they should be compensated, negotiated major transactions, obtained bulk quantities of heroin and cocaine from

suppliers, and received a portion of the proceeds of all sales. *Id.* at ¶¶ 5–6. Occasionally he packaged bulk quantities of drugs to distribute to street-level dealers and collected their proceeds from drug sales, but he typically delegated this role to others in the organization, particularly his nephew, Indio Tatum. *Id.*; Indio Tatum PSR ¶ 10.

Defendant personally possessed and maintained access to multiple firearms. Derrick Tatum PSR ¶ 7. In August 2008, he negotiated the sale of a loaded .32 caliber pistol to a confidential informant, and he directed Indio Tatum to deliver it to the customer. *Id.* Derrick Tatum is charged with responsibility for the distribution of more than 4.5 kilograms of cocaine base and three kilograms of heroin over the course of the conspiracy. *Id.* at ¶ 10.

He was arrested on January 27, 2010. *Id.* at ¶ 10. Officers executing a search warrant at his apartment on the day of his arrest recovered approximately \$10,000 in cash, which was retained by the government. *Id.* at ¶ 8.

On July 22, 2010, defendant pled guilty to Count One of a twenty-four-count indictment, charging that between September 2007 and January 2010, he conspired with others to distribute and possess with intent to distribute one kilogram or more of heroin and fifty grams or more of cocaine base in violation of 21 U.S.C. §§ 846, 841(b)(1)(A)(I), and 841(b)(1)(A)(iii). *Id.* at ¶ 1.

The total offense level was thirty-nine, and the criminal history category was IV, yielding a guidelines range of 360 months to life in prison. The offense level included a two-point enhancement for defendant's involvement with firearms and a four-point enhancement for his leadership role in the conspiracy. The guidelines range of fine was from \$25,000 to \$250,000. The offense carried a mandatory minimum sentence of ten years. *See* 18 U.S.C. § 824(b)(1)(A).

c. Sentence

Tatum was sentenced on November 16, 2010 to fifteen years' incarceration and five years' supervised release. A \$10,000 fine and a \$100 special assessment were imposed. The remaining counts of the indictment were dismissed.

A non-guideline sentence was imposed under 18 U.S.C. § 3553(a) and *Booker*, 543 U.S. 220. This sentence is appropriate in light of defendant's criminal history, his impoverished background, his professed desire to lead a lawful life, and his desire to provide a stable home for his family. Defendant was sentenced to a significantly longer term of imprisonment than any of his coconspirators, consistent with the court's practice of giving heavier sentences to those who have played senior roles in criminal conspiracies or who for their own gain have induced or encouraged others to enter into criminal enterprises. This sentence provides substantial incapacitation and ample specific and general deterrence. Given defendant's background, an excessively harsh sentence would lead only to a greater risk of recidivism.

7. Jawara Tatum

a. Background

Jawara Tatum is African American. Jawara Tatum PSR 2. He was born in 1988 in Brooklyn. *Id.* at ¶ 35. His parents were unmarried. *Id.* at ¶ 7. He is the nephew of Derrick Tatum and the cousin of Indio Tatum, both leaders of the conspiracy; his mother is Derrick Tatum's sister. *Id.* at ¶ 34; see Derrick Tatum PSR ¶ 47, Indio Tatum PSR ¶ 7.

Defendant's father was only intermittently present during his childhood. Jawara Tatum PSR ¶ 35. He and his siblings were raised primarily by his mother, who works as a home health aide, with assistance from his maternal grandmother. His mother received financial assistance

from his father and from welfare. *Id.* ¶¶ 35, 38. Deprived of a male role model, Tatum relied for guidance on his maternal grandparents; on a maternal uncle, Jermaine Tatum; and on a maternal aunt, Barbara Judkins. *Id.* at ¶ 38.

Jawara Tatum appears to have a serious learning disability. As a child, he was “cursed out” by his mother for being “not smart.” *Id.* at ¶ 35. He struggled in school and was held back twice in the fifth grade. *Id.* He was enrolled in special education classes and was identified by teachers as being emotionally disturbed and having skills far below his grade level. New York City Board of Education Individualized Education Program for Jawara Tatum, Nov. 14, 2001, at 1, 3. When he was in the sixth grade, at age thirteen, a teacher wrote, “Student has severe problems in self-control and, at the same time, is beginning to perceive external events as overwhelming. He relies upon physical aggression to avoid emotional pain. This dynamic when combined with his physical strength creates a dangerous situation.” *Id.* at 4. He is functionally illiterate and is able to read “only a little bit.” Addendum to the Presentence Report of Jawara Tatum 2; Tr. of Sent’g of Jawara Tatum 19 Nov. 16, 2010 (“Jawara Tatum Tr.”).

Defendant suffered grave physical abuse at the hands of his father as punishment for his continued difficulties in school. On one occasion, his father burned him in the face with an iron. On another, defendant was beaten fiercely and found by police in a nearby park, covered with blood. Between the ages of fourteen and fifteen, he ran away from home three times to escape his father’s abuse, sometimes after his mother informed his father that he was doing poorly in school. Once, after running away, he slept in a park and begged publicly for food. His mother stated that she never abused him and never witnessed his father treat him badly. Jawara Tatum PSR ¶ 35.

While fourteen, defendant was hit in the head with a rock while playing with friends; his mother declined to take him to the hospital for treatment because he was being “dumb.” He suffers sporadic headaches that he associates with this injury and with previous head trauma suffered at the age of thirteen. *Id.* at ¶ 53.

While thirteen, Tatum began suffering from depression caused by the physical abuse his father inflicted. *Id.* at ¶ 47. He began living in the apartment of Jean Patrick, a family friend and the mother of codefendant Roger Patrick, in Louis Armstrong Houses. *Id.* at ¶ 43.

Tatum began drinking alcohol and using drugs as a means of coping with his depression. He regularly drank cognac and used marijuana, ecstasy, and PCP. *Id.* at ¶¶ 47, 56.

Between 2003 and 2004, while he was a middle-school student, he worked periodically for a moving and storage company. The job was arranged by his uncle, Jermaine Tatum. After this job he worked briefly at a pet store and at a different moving company. *Id.* at ¶¶ 68, 70.

Defendant was promoted to the ninth grade at sixteen, in 2004, and attended William E. Grady Career and Technical Education High School, in the Brighton Beach section of Brooklyn. *Id.* at ¶ 59. His grades were poor, and he was occasionally suspended for fighting and skipping class. *Id.* at ¶ 60. He was ridiculed by other students for his poor academic performance. Jawara Tatum Tr. 25. He acknowledges that he has had difficulty controlling his anger. *Id.* at 24.

In 2004 and 2005, a series of violent events occurred that culminated in defendant’s conviction for robbery and armed robbery. In 2004, his uncle Jermaine, the only positive male role model he had known for most of his life, was struck and killed by a car. Jawara Tatum PSR ¶ 38. In the same year, defendant was stabbed at a house party after he punched someone who

had insulted his mother. A stab wound punctured his lung; he still bears scars from the stab and from a chest tube that was inserted so that he could breathe while in the hospital. *Id.* at ¶ 52.

When sixteen, in December 2004 and January 2005, Tatum participated in a series of robberies. On December 19, 2004, he and four other individuals surrounded a victim and demanded his wallet, then knocked him to the ground and repeatedly kicked him in the face. *Id.* at ¶¶ 25–26. On January 9, 2005, Tatum and four others surrounded a victim and punched him, knocking out his teeth, and struck him on the head with a weapon. *Id.* at ¶¶ 21–22. They robbed him of money and a mobile phone. On January 14, 2005, Tatum was arrested for another assault and robbery. After this incident, he was seen running into a nearby apartment and throwing a bb gun out of a window. *Id.* at ¶ 22.

In March 2005, his brother, Ras-Sahara Tatum, filed for a protection order against him after the two got into a fight at their mother's home. The police were called, and defendant was detained overnight, but no charges were filed. *Id.* at ¶ 42.

In November 2005, Jawara Tatum was convicted of robbery and attempted robbery and sentenced to forty-two months confinement. *Id.* at ¶ 21. While in custody he committed numerous violations, including drug possession, fighting, assault, and gang activity. *Id.* at ¶ 23. He is a member of the Bloods gang. *Id.* at ¶ 45. He took a number of classes while incarcerated, including special education and maintenance. *Id.* at ¶ 61.

He was released on parole on March 9, 2009 at the age of twenty. *Id.* at ¶ 21. He lived at his mother's home and that of Jean Patrick and Roger Patrick. *Id.* at ¶ 43. Roger Patrick had been working with the crew as a drug dealer since August 2008. Roger Patrick PSR ¶ 6. After

his release, Jawara Tatum worked full-time in a job training program. He also helped out at a corner store on an unpaid basis in exchange for food and other items. Jawara Tatum PSR ¶ 66.

Tatum resumed heavy drug use after his release, usually taking drugs alone, at home. He smoked marijuana about ten times daily and took ecstasy and drank cognac every second or third day. For part of this period he used cocaine. *Id.* at ¶ 56. He underwent drug counseling after his release, from March 2009 to May 2009, but he was discharged from the program because he failed to file for Medicaid. From May 2009 until his arrest in January 2010, he was enrolled in an outpatient drug treatment program, but his drug use went undetected because the program failed to require on-site drug testing. *Id.* at ¶ 57.

Tatum has few family ties. He lost contact with the majority of his family after his prior imprisonment began in 2005, and his brother, Ras-Sahara Tatum, was incarcerated on a drug conviction from 2008 to 2010. Only his mother and his sister Shakeyia Tatum, the girlfriend of Roger Patrick, remain in contact with and supportive of him. *Id.* at ¶¶ 35, 37. He has stated that he feels “alone and lonely.” *Id.* at ¶ 47.

He has never married and has no children. *Id.* at ¶¶ 39–41. Since April 2009, he has been involved in a relationship with a woman living in Staten Island. *Id.* at ¶ 43. She became pregnant but had a miscarriage after his arrest for the present offense. *Id.* at ¶ 39; Addendum to the Presentence Report of Jawara Tatum 1. He believes that he may have had a young child with another woman and is willing to support the child financially if it is his. Jawara Tatum PSR ¶ 40.

b. Offense

Jawara Tatum began working for the crew in September 2009. *Id.* at ¶ 5. Defendant was the last of the eleven defendants in this case to join the crew. He sold drugs at the street level on a daily basis and is charged with responsibility for selling 315 grams of crack and eighty grams of heroin. He had no managerial role. *Id.* at ¶ 5. He had access to firearms possessed by his coconspirators, but he did not personally carry a gun. *Id.* at ¶ 6.

Defendant was arrested on January 27, 2010. *Id.* at ¶ 35. On June 22, 2010, he pled guilty to a lesser included offense in Count One of a two-count indictment. Count One charged that between September 2007 and January 2010, he conspired to distribute and possess with intent to distribute 100 grams or more of heroin and five grams or more of cocaine base in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(B). *Id.* at ¶ 1.

The total offense level was twenty-three, and the criminal history category was III, yielding a guidelines range between fifty-seven and seventy-one months. The offense level included a two-point enhancement because Tatum maintained access to firearms used in the conspiracy. The guidelines range of fine was from \$10,000 to \$100,000. The offense for which he pled guilty under Count One carried a mandatory minimum sentence of five years. *See* 18 U.S.C. § 824(b)(1)(B).

c. Sentence

Defendant was sentenced on November 16, 2010. At his sentencing, he stated, “I learned from my mistakes, I just want to get a second chance in society, to live with my family and . . . help out others that wasn’t helped and to have kids of my own and raise them and just do better in life and know how to read and write and go home.” Jawara Tatum Tr. 16.

Tatum was sentenced to five years' incarceration and five years' supervised release. A \$100 special assessment was imposed. No fines were imposed because defendant does not have any assets, and it is unlikely that he will have any in the future to pay a fine. The remaining counts of the indictment were dismissed.

This sentence, mandated by the Anti-Drug Abuse Act of 1986, is excessive under 18 U.S.C. § 3553(a) in view of defendant's upbringing in an atmosphere of horrific physical abuse; his functional illiteracy and apparent learning disability; the absence of a positive male role model in his childhood; the involvement of his uncle, Derrick Tatum, in bringing him into the conspiracy; his sincere remorse for his crimes; his crippling addiction to drugs and alcohol; his continuing efforts to occupy himself with lawful work; his stated desire to lead an honest, healthy, and productive life; his lack of personal involvement with firearms; his lack of involvement as an adult in any crimes of violence; and the fact that all of his criminal history points stem from offenses committed during a short period of time while he was a minor. A shorter period of incarceration would provide ample general and specific deterrence. Given defendant's background, the excessive length of the sentence imposed will probably increase the risk of recidivism.

8. Pedro Torres

a. Background

Pedro Torres is White and Hispanic. Torres PSR 2. He was born in 1987 in Brooklyn. His parents never married. They had nine children. His father was a crack cocaine addict and spent much of Torres's childhood in and out of various drug treatment programs. Defendant has not seen his father since 2006. *Id.* at ¶¶ 28–29. Over a five-year period during Torres's

childhood, he and his family lived in four different shelters, including two for victims of domestic violence. *Id.* at ¶¶ 28, 33. The family lives in an apartment in Louis Armstrong Houses, a few doors from Roger Patrick's and Cyril McCray's apartments and near where the crew sold drugs. *See id.* at 2; McCray PSR 2; Patrick PSR 2.

Torres's mother was unemployed and depended on public assistance to support the family. The mother received no financial support from defendant's father or from their extended family, which lives in Puerto Rico. *Id.* at ¶ 28. She receives a \$170 public assistance check every three weeks and \$600 a month in disability benefits and pays \$450 a month in rent. *Id.* at ¶¶ 30, 35. The family receives clothing and food from their church. They rarely had enough money for school supplies. *Id.* at ¶ 28.

Torres received little parental guidance while growing up because of his father's absence and his mother's need to attend to his eight siblings. Seven of them, ages twelve through twenty-five, continue to reside with his mother in Brooklyn. The eighth, age nine, was adopted by a Queens family at birth so that he could receive medical attention for a severe birth defect. *Id.* at ¶ 31.

Torres began smoking marijuana at the age of sixteen. He was drinking alcohol to excess at the age of seventeen. Before his incarceration in July 2009, he smoked marijuana twice a day and daily drank cognac to the point of inebriation. He admits to having a substance abuse problem, but he says he is interested in treatment. *Id.* at ¶ 45. His mother reports that he has been depressed since 2007. She attempted to obtain psychological treatment for him but was unable to afford it. *Id.* at ¶ 40.

Defendant attended Abraham Lincoln High School, in the Coney Island section of Brooklyn, from 2003 to 2005, at which point he transferred to a school with a vocational training program. *Id.* at ¶ 48. He was enrolled in special education classes and was able to graduate despite never having learned to read or write. Tr. of Sent’g. of Pedro Torres 10 Nov. 16, 2010. He worked intermittently at pet stores from 2003 to 2009 and from 2007 to 2009. Torres PSR ¶ 53.

For the past six years, Torres has been in a relationship with a woman, now twenty years old, who plans to attend St. Francis College. The two expect to be married. He has no children. *Id.* at ¶ 32.

He was injured in a shooting in July 2006. He had returned home from a funeral when three individuals walked down his street firing randomly into houses. He was shot in his chest, back, right leg, and right forearm. Doctors were unable to remove a bullet from his chest because it was lodged near his heart. As a result of his injuries, Torres continues to suffer pain in his chest and nerve damage that limits the use of his right hand. *Id.* at ¶ 42.

Torres has two prior convictions. In July 2007, he was arrested for possession of two loaded firearms. *Id.* at ¶¶ 22–23. In April 2008, he was arrested for possession of narcotics after he was seen exchanging an envelope containing heroin. *Id.* at ¶ 24–25.

b. Offense

Torres became involved in the conspiracy as a street-level dealer in September 2007 and distributed a total of more than 300 grams of crack. Torres PSR ¶ 5; Addendum to the Presentence Report of Pedro Torres 1. He had no managerial responsibility. He carried guns and had access to firearms shared by the crew’s members. Torres PSR ¶ 5. In September 2008,

he and defendant Hall were approached by six armed men at a location where the two regularly sold drugs. A gunfight ensued. Torres was shot four times in the legs, and another individual was hit in the leg and chest. *Id.* at ¶¶ 6, 42.

Defendant's involvement in the conspiracy ended in July 2009, when he began serving a forty-two month sentence for a July 2007 firearms possession charge. *Id.* at ¶¶ 7, 22. On July 22, 2010, he pled guilty to an amended Count One of a 24-count superseding indictment. Count One charged that between September 2007 and January 2010, he conspired to distribute and possess with intent to distribute fifty grams or more of cocaine base in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A). *Id.* at ¶ 1.

The total offense level was thirty-one, and the criminal history category was III, yielding a guidelines range of 121 to 151 months. The offense level included a two-point enhancement because defendant maintained access to firearms used by the conspiracy. The guidelines range of fine was from \$15,000 to \$150,000. The offense carried a mandatory minimum sentence of ten years. *See* 18 U.S.C. § 824(b)(1)(A).

c. Sentence

Defendant was sentenced on November 16, 2010 to 104 months' incarceration and five years' supervised release. This sentence, combined with the sixteen months he had already served for his July 2007 firearms offense, satisfies the ten-year mandatory minimum sentence. *See United States v. Rivers*, 329 F.3d 119 (2d Cir. 2003). A \$100 special assessment was imposed. No fines were imposed because defendant does not have any assets, and it is unlikely that he will have any in the future to pay a fine. The remaining counts of the indictment were dismissed.

The sentence, mandated by the Anti-Drug Abuse Act of 1986, is excessive under 18 U.S.C. § 3553(a) in view of Torres's background of deprivation, physical abuse, and fatherlessness; his learning disability and illiteracy; his limited criminal history; his sincere remorse for his crime; his efforts to hold lawful employment; his commitment to his girlfriend of six years; his continuing medical difficulties; and the lack of evidence that he has engaged in violence against anyone. Because of his possession of guns, he poses a greater threat to the community than defendants who received sentences of four or five years in prison. But this threat is not so great that he must be incapacitated for ten years. A shorter sentence would provide ample specific and general deterrence. Given defendant's background, the excessive length of this sentence will probably lead to a greater risk of recidivism.

C. Summary of Sentences Covered in this Memorandum

Defendants were sentenced as follows:

Table D: Summary of Sentences

Name	Supervised Release	Special Assessment	Incarceration	Fine	Forfeiture	Evaluation of Appropriateness
Damien Bannister	5 years	\$100	36 months (plus 12 months state time)	None	None	Appropriate
Darrell Bannister	5 years	\$100	60 months	None	None	Too High
Christopher Hall	5 years	\$200	120 months	None	None	Appropriate
Cyril McCray	5 years	\$200	120 months	None	None	Appropriate
Roger Patrick	5 years	\$100	60 months	None	None	Too High
Derrick Tatum	5 years	\$100	180 months	\$10,000	None	Appropriate
Jawara Tatum	5 years	\$100	60 months	None	None	Too High
Pedro Torres	5 years	\$100	104 months (plus 16 months state time)	None	None	Too High

V. Conclusion

Several of the sentences in this case, imposed only because of statutory minima, are disproportionate to the crimes committed and the backgrounds of the defendants. Their excess causes particular concern when applied to youthful defendants. *See United States v. C.R.*, No. 09-CR-155, draft op., at 394–402 (E.D.N.Y. Mar. 10, 2011) (discussing unconstitutionality of

five-year mandatory minimum as applied to a defendant who possessed and distributed child pornography between the ages of fifteen and nineteen). *Cf. Roper v. Simmons*, 543 U.S. 551, 575 (2005) (holding that the death penalty is disproportionate for offenders under the age of eighteen); *Graham v. Florida*, 130 S.Ct. 2011, 2034 (2010) (holding that sentences of life without parole are unconstitutional for juvenile offenders who have not committed homicides). That concern is multiplied by their imposition upon young defendants subject to abuse, poverty, drug and alcohol addiction, unemployment, illiteracy, and learning disability, largely attributable to their backgrounds.

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

As part of defendants' sentences, it has been ordered that every reasonable effort be made to provide counseling, drug and alcohol treatment, gambling rehabilitation, anger management therapy, education, and job training while defendants are incarcerated and during supervised release.

Considering the limited resources devoted to such rehabilitative measures, however, it is by no means clear that these aids will be effectively provided. *See Petersilia, supra*, at 5–6.

When the defendants are released from prison, they will probably have to return to all of the problems that led them to engage in crime. Whatever tenuous connection they retain to the lawful, supportive world will likely be diminished after years of forced separation in prison. Incarceration will make entry into the job market more difficult. Remaining will be the root problems that have largely brought them to this pass: poverty; dysfunctional families; mental and physical problems; legal and *de facto* housing segregation; segregated and inferior schools; and an economy that appears to have little need or concern for low- and semi-skilled workers. Such individuals constitute a permanent underclass with almost no opportunity to achieve economic stability, let alone the American dream of upward mobility.

These problems are concentrated among low-income African Americans, but they affect the country as a whole. Our rates of imprisonment, income inequality, and unemployment are either the highest or among the highest of the world's advanced economies, while our rates of food security and life expectancy are among the lowest. Charles M. Blow, *Empire at the End of Decadence*, N.Y. Times, Feb. 19, 2011, at A23 (reporting statistics on thirty-two countries). The hardships of poverty fall most severely on the youngest Americans. See Charles M. Blow, *Suffer the Little Children*, N.Y. Times, Dec. 25, 2010, at A29 (“[A]ccording to a 2007 Unicef report on child poverty, the U.S. ranked last among 24 wealthy countries.”).

Significant reforms are needed in our sentencing regime. The Fairness in Sentencing Act of 2010 reduced the dubious 100:1 powder/crack ratio to a 17.8:1 ratio. It did nothing to remove the sentencing regime's dependence on arbitrary drug quantities—not just with regard to crack cocaine but other drugs as well—that bear little relationship to the harm a defendant has done to society or to the danger of his inflicting further harm. Harsh, disproportionate mandatory

sentences impose grave costs not only on the punished but on the moral credibility upon which our system of criminal justice depends. *See* Robinson, *supra*, at 2025.

Judges approach the grave responsibility of sentencing criminals with all the thoughtfulness and limited insight that their knowledge and wisdom can muster. “Sentencing . . . is in its essence subjective. . . . It is not possible to determine a condign sentence without looking closely at all relevant facts and circumstances, and making a nuanced decision.” Hon. John L. Kane, *Sentencing: Beyond the Calculus*, Litig., Fall 2010, at 5. *See also* Hon. David L. Bazelon, *Questioning Authority: Justice and Criminal Law* 27 (“We have to conduct this searching inquiry into the criminal’s life history, not to excuse, but to appreciate the conditions that inevitably attend and may lead to criminal behavior. Focusing on the individual offender is not part of the problem of crime; it is part of the solution.”).

Mandatory minimum sentencing provisions, leaving no alternative but lengthy incarceration, prevent the exercise of this fundamental judicial duty. Such laws are “overly blunt instruments, bringing undue focus upon factors (such as drug quantities) to the exclusion of other important considerations, including role in the offense, use of guns and violence, criminal history, risk of recidivism, and many personal characteristics of an individual defendant.” Sessions, *supra*, at 42. It is difficult to conceive of a system of mandatory minimum sentences that could effectively anticipate and provide for such factors.

For nonviolent, low-level drug crimes, the goals of incarceration—general and specific deterrence, incapacitation, retribution, and rehabilitation—could in most cases be achieved with limited incarceration, through a system of intense supervised release utilizing home visits; meetings with parole officers; a combination of counseling, drug and alcohol treatment,

education, job training, and job placement; and electronic monitoring to prevent flight, promote positive choices, and deter and detect incipient crime. Such a regime would likely be more effective in reducing crime and much less costly than imprisonment. Given discouraging economic, social, and psychological conditions, it seems doubtful that the long sentences of incarceration imposed will appreciably reduce crime.

Pragmatism and a sense of fairness suggest reconsideration of our overreliance on incarceration. Though defendants are hemmed in by circumstances, the law must believe that free will offers an escape. Otherwise, its vaunted belief in redemption and deterrence—both specific and general—is a euphemism for cruelty. These defendants are not merely criminals, but human beings and fellow American citizens, deserving of an opportunity for rehabilitation. Even now, they are capable of useful lives, lived lawfully.

/s/

Jack B. Weinstein
Senior United States District Judge

Dated: March 24, 2011
Brooklyn, New York

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UTAH *v.* STRIEFF

CERTIORARI TO THE SUPREME COURT OF UTAH

No. 14–1373. Argued February 22, 2016—Decided June 20, 2016

Narcotics detective Douglas Fackrell conducted surveillance on a South Salt Lake City residence based on an anonymous tip about drug activity. The number of people he observed making brief visits to the house over the course of a week made him suspicious that the occupants were dealing drugs. After observing respondent Edward Strieff leave the residence, Officer Fackrell detained Strieff at a nearby parking lot, identifying himself and asking Strieff what he was doing at the house. He then requested Strieff’s identification and relayed the information to a police dispatcher, who informed him that Strieff had an outstanding arrest warrant for a traffic violation. Officer Fackrell arrested Strieff, searched him, and found methamphetamine and drug paraphernalia. Strieff moved to suppress the evidence, arguing that it was derived from an unlawful investigatory stop. The trial court denied the motion, and the Utah Court of Appeals affirmed. The Utah Supreme Court reversed, however, and ordered the evidence suppressed.

Held: The evidence Officer Fackrell seized incident to Strieff’s arrest is admissible based on an application of the attenuation factors from *Brown v. Illinois*, 422 U. S. 590. In this case, there was no flagrant police misconduct. Therefore, Officer Fackrell’s discovery of a valid, pre-existing, and untainted arrest warrant attenuated the connection between the unconstitutional investigatory stop and the evidence seized incident to a lawful arrest. Pp. 4–10.

(a) As the primary judicial remedy for deterring Fourth Amendment violations, the exclusionary rule encompasses both the “primary evidence obtained as a direct result of an illegal search or seizure” and, relevant here, “evidence later discovered and found to be derivative of an illegality.” *Segura v. United States*, 468 U. S. 796, 804. But to ensure that those deterrence benefits are not outweighed by

Syllabus

the rule’s substantial social costs, there are several exceptions to the rule. One exception is the attenuation doctrine, which provides for admissibility when the connection between unconstitutional police conduct and the evidence is sufficiently remote or has been interrupted by some intervening circumstance. See *Hudson v. Michigan*, 547 U. S. 586, 593. Pp. 4–5.

(b) As a threshold matter, the attenuation doctrine is not limited to the defendant’s independent acts. The doctrine therefore applies here, where the intervening circumstance is the discovery of a valid, pre-existing, and untainted arrest warrant. Assuming, without deciding, that Officer Fackrell lacked reasonable suspicion to stop Strieff initially, the discovery of that arrest warrant attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to his arrest. Pp. 5–10.

(1) Three factors articulated in *Brown v. Illinois*, 422 U. S. 590, lead to this conclusion. The first, “temporal proximity” between the initially unlawful stop and the search, *id.*, at 603, favors suppressing the evidence. Officer Fackrell discovered drug contraband on Strieff only minutes after the illegal stop. In contrast, the second factor, “the presence of intervening circumstances, *id.*, at 603–604, strongly favors the State. The existence of a valid warrant, predating the investigation and entirely unconnected with the stop, favors finding sufficient attenuation between the unlawful conduct and the discovery of evidence. That warrant authorized Officer Fackrell to arrest Strieff, and once the arrest was authorized, his search of Strieff incident to that arrest was undisputedly lawful. The third factor, “the purpose and flagrancy of the official misconduct,” *id.*, at 604, also strongly favors the State. Officer Fackrell was at most negligent, but his errors in judgment hardly rise to a purposeful or flagrant violation of Strieff’s Fourth Amendment rights. After the unlawful stop, his conduct was lawful, and there is no indication that the stop was part of any systemic or recurrent police misconduct. Pp. 6–9.

(2) Strieff’s counterarguments are unpersuasive. First, neither Officer Fackrell’s purpose nor the flagrancy of the violation rises to a level of misconduct warranting suppression. Officer Fackrell’s purpose was not to conduct a suspicionless fishing expedition but was to gather information about activity inside a house whose occupants were legitimately suspected of dealing drugs. Strieff conflates the standard for an illegal stop with the standard for flagrancy, which requires more than the mere absence of proper cause. Second, it is unlikely that the prevalence of outstanding warrants will lead to dragnet searches by police. Such misconduct would expose police to civil liability and, in any event, is already accounted for by *Brown*’s “purpose and flagrancy” factor. Pp. 9–10.

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2015 UT 2, 357 P. 3d 532, reversed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, and ALITO, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, J., joined as to Parts I, II, and III. KAGAN, J., filed a dissenting opinion, in which GINSBURG, J., joined.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 14–1373

UTAH, PETITIONER *v.* EDWARD
JOSEPH STRIEFF, JR.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

[June 20, 2016]

JUSTICE THOMAS delivered the opinion of the Court.

To enforce the Fourth Amendment’s prohibition against “unreasonable searches and seizures,” this Court has at times required courts to exclude evidence obtained by unconstitutional police conduct. But the Court has also held that, even when there is a Fourth Amendment violation, this exclusionary rule does not apply when the costs of exclusion outweigh its deterrent benefits. In some cases, for example, the link between the unconstitutional conduct and the discovery of the evidence is too attenuated to justify suppression. The question in this case is whether this attenuation doctrine applies when an officer makes an unconstitutional investigatory stop; learns during that stop that the suspect is subject to a valid arrest warrant; and proceeds to arrest the suspect and seize incriminating evidence during a search incident to that arrest. We hold that the evidence the officer seized as part of the search incident to arrest is admissible because the officer’s discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest.

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I

This case began with an anonymous tip. In December 2006, someone called the South Salt Lake City police's drug-tip line to report "narcotics activity" at a particular residence. App. 15. Narcotics detective Douglas Fackrell investigated the tip. Over the course of about a week, Officer Fackrell conducted intermittent surveillance of the home. He observed visitors who left a few minutes after arriving at the house. These visits were sufficiently frequent to raise his suspicion that the occupants were dealing drugs.

One of those visitors was respondent Edward Strieff. Officer Fackrell observed Strieff exit the house and walk toward a nearby convenience store. In the store's parking lot, Officer Fackrell detained Strieff, identified himself, and asked Strieff what he was doing at the residence.

As part of the stop, Officer Fackrell requested Strieff's identification, and Strieff produced his Utah identification card. Officer Fackrell relayed Strieff's information to a police dispatcher, who reported that Strieff had an outstanding arrest warrant for a traffic violation. Officer Fackrell then arrested Strieff pursuant to that warrant. When Officer Fackrell searched Strieff incident to the arrest, he discovered a baggie of methamphetamine and drug paraphernalia.

The State charged Strieff with unlawful possession of methamphetamine and drug paraphernalia. Strieff moved to suppress the evidence, arguing that the evidence was inadmissible because it was derived from an unlawful investigatory stop. At the suppression hearing, the prosecutor conceded that Officer Fackrell lacked reasonable suspicion for the stop but argued that the evidence should not be suppressed because the existence of a valid arrest warrant attenuated the connection between the unlawful stop and the discovery of the contraband.

The trial court agreed with the State and admitted the

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evidence. The court found that the short time between the illegal stop and the search weighed in favor of suppressing the evidence, but that two countervailing considerations made it admissible. First, the court considered the presence of a valid arrest warrant to be an “‘extraordinary intervening circumstance.’” App. to Pet. for Cert. 102 (quoting *United States v. Simpson*, 439 F. 3d 490, 496 (CA8 2006)). Second, the court stressed the absence of flagrant misconduct by Officer Fackrell, who was conducting a legitimate investigation of a suspected drug house.

Strieff conditionally pleaded guilty to reduced charges of attempted possession of a controlled substance and possession of drug paraphernalia, but reserved his right to appeal the trial court’s denial of the suppression motion. The Utah Court of Appeals affirmed. 2012 UT App 245, 286 P. 3d 317.

The Utah Supreme Court reversed. 2015 UT 2, 357 P. 3d 532. It held that the evidence was inadmissible because only “a voluntary act of a defendant’s free will (as in a confession or consent to search)” sufficiently breaks the connection between an illegal search and the discovery of evidence. *Id.*, at 536. Because Officer Fackrell’s discovery of a valid arrest warrant did not fit this description, the court ordered the evidence suppressed. *Ibid.*

We granted certiorari to resolve disagreement about how the attenuation doctrine applies where an unconstitutional detention leads to the discovery of a valid arrest warrant. 576 U. S. ____ (2015). Compare, *e.g.*, *United States v. Green*, 111 F. 3d 515, 522–523 (CA7 1997) (holding that discovery of the warrant is a dispositive intervening circumstance where police misconduct was not flagrant), with, *e.g.*, *State v. Morales*, 297 Kan. 397, 415, 300 P. 3d 1090, 1102 (2013) (assigning little significance to the discovery of the warrant). We now reverse.

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II

A

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” Because officers who violated the Fourth Amendment were traditionally considered trespassers, individuals subject to unconstitutional searches or seizures historically enforced their rights through tort suits or self-help. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 625 (1999). In the 20th century, however, the exclusionary rule—the rule that often requires trial courts to exclude unlawfully seized evidence in a criminal trial—became the principal judicial remedy to deter Fourth Amendment violations. See, e.g., *Mapp v. Ohio*, 367 U. S. 643, 655 (1961).

Under the Court’s precedents, the exclusionary rule encompasses both the “primary evidence obtained as a direct result of an illegal search or seizure” and, relevant here, “evidence later discovered and found to be derivative of an illegality,” the so-called “fruit of the poisonous tree.” *Segura v. United States*, 468 U. S. 796, 804 (1984). But the significant costs of this rule have led us to deem it “applicable only . . . where its deterrence benefits outweigh its substantial social costs.” *Hudson v. Michigan*, 547 U. S. 586, 591 (2006) (internal quotation marks omitted). “Suppression of evidence . . . has always been our last resort, not our first impulse.” *Ibid*.

We have accordingly recognized several exceptions to the rule. Three of these exceptions involve the causal relationship between the unconstitutional act and the discovery of evidence. First, the independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source. See *Murray v. United States*, 487 U. S. 533, 537 (1988). Second, the inevitable

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discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source. See *Nix v. Williams*, 467 U. S. 431, 443–444 (1984). Third, and at issue here, is the attenuation doctrine: Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that “the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.” *Hudson*, *supra*, at 593.

B

Turning to the application of the attenuation doctrine to this case, we first address a threshold question: whether this doctrine applies at all to a case like this, where the intervening circumstance that the State relies on is the discovery of a valid, pre-existing, and untainted arrest warrant. The Utah Supreme Court declined to apply the attenuation doctrine because it read our precedents as applying the doctrine only “to circumstances involving an independent act of a defendant’s ‘free will’ in confessing to a crime or consenting to a search.” 357 P. 3d, at 544. In this Court, Strieff has not defended this argument, and we disagree with it, as well. The attenuation doctrine evaluates the causal link between the government’s unlawful act and the discovery of evidence, which often has nothing to do with a defendant’s actions. And the logic of our prior attenuation cases is not limited to independent acts by the defendant.

It remains for us to address whether the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of drug-related evidence on Strieff’s person. The three factors articulated in *Brown v. Illinois*, 422 U. S. 590 (1975), guide our analysis. First, we look to the “temporal

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proximity” between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search. *Id.*, at 603. Second, we consider “the presence of intervening circumstances.” *Id.*, at 603–604. Third, and “particularly” significant, we examine “the purpose and flagrancy of the official misconduct.” *Id.*, at 604. In evaluating these factors, we assume without deciding (because the State conceded the point) that Officer Fackrell lacked reasonable suspicion to initially stop Strieff. And, because we ultimately conclude that the warrant breaks the causal chain, we also have no need to decide whether the warrant’s existence alone would make the initial stop constitutional even if Officer Fackrell was unaware of its existence.

1

The first factor, temporal proximity between the initially unlawful stop and the search, favors suppressing the evidence. Our precedents have declined to find that this factor favors attenuation unless “substantial time” elapses between an unlawful act and when the evidence is obtained. *Kaupp v. Texas*, 538 U. S. 626, 633 (2003) (*per curiam*). Here, however, Officer Fackrell discovered drug contraband on Strieff’s person only minutes after the illegal stop. See App. 18–19. As the Court explained in *Brown*, such a short time interval counsels in favor of suppression; there, we found that the confession should be suppressed, relying in part on the “less than two hours” that separated the unconstitutional arrest and the confession. 422 U. S., at 604.

In contrast, the second factor, the presence of intervening circumstances, strongly favors the State. In *Segura*, 468 U. S. 796, the Court addressed similar facts to those here and found sufficient intervening circumstances to allow the admission of evidence. There, agents had probable cause to believe that apartment occupants were deal-

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ing cocaine. *Id.*, at 799–800. They sought a warrant. In the meantime, they entered the apartment, arrested an occupant, and discovered evidence of drug activity during a limited search for security reasons. *Id.*, at 800–801. The next evening, the Magistrate Judge issued the search warrant. *Ibid.* This Court deemed the evidence admissible notwithstanding the illegal search because the information supporting the warrant was “wholly unconnected with the [arguably illegal] entry and was known to the agents well before the initial entry.” *Id.*, at 814.

Segura, of course, applied the independent source doctrine because the unlawful entry “did not contribute in any way to discovery of the evidence seized under the warrant.” *Id.*, at 815. But the *Segura* Court suggested that the existence of a valid warrant favors finding that the connection between unlawful conduct and the discovery of evidence is “sufficiently attenuated to dissipate the taint.” *Ibid.* That principle applies here.

In this case, the warrant was valid, it predated Officer Fackrell’s investigation, and it was entirely unconnected with the stop. And once Officer Fackrell discovered the warrant, he had an obligation to arrest Strieff. “A warrant is a judicial mandate to an officer to conduct a search or make an arrest, and the officer has a sworn duty to carry out its provisions.” *United States v. Leon*, 468 U. S. 897, 920, n. 21 (1984) (internal quotation marks omitted). Officer Fackrell’s arrest of Strieff thus was a ministerial act that was independently compelled by the pre-existing warrant. And once Officer Fackrell was authorized to arrest Strieff, it was undisputedly lawful to search Strieff as an incident of his arrest to protect Officer Fackrell’s safety. See *Arizona v. Gant*, 556 U. S. 332, 339 (2009) (explaining the permissible scope of searches incident to arrest).

Finally, the third factor, “the purpose and flagrancy of the official misconduct,” *Brown, supra*, at 604, also strongly

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favours the State. The exclusionary rule exists to deter police misconduct. *Davis v. United States*, 564 U. S. 229, 236–237 (2011). The third factor of the attenuation doctrine reflects that rationale by favoring exclusion only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant.

Officer Fackrell was at most negligent. In stopping Strieff, Officer Fackrell made two good-faith mistakes. First, he had not observed what time Strieff entered the suspected drug house, so he did not know how long Strieff had been there. Officer Fackrell thus lacked a sufficient basis to conclude that Strieff was a short-term visitor who may have been consummating a drug transaction. Second, because he lacked confirmation that Strieff was a short-term visitor, Officer Fackrell should have asked Strieff whether he would speak with him, instead of demanding that Strieff do so. Officer Fackrell’s stated purpose was to “find out what was going on [in] the house.” App. 17. Nothing prevented him from approaching Strieff simply to ask. See *Florida v. Bostick*, 501 U. S. 429, 434 (1991) (“[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions”). But these errors in judgment hardly rise to a purposeful or flagrant violation of Strieff’s Fourth Amendment rights.

While Officer Fackrell’s decision to initiate the stop was mistaken, his conduct thereafter was lawful. The officer’s decision to run the warrant check was a “negligibly burdensome precautio[n]” for officer safety. *Rodriguez v. United States*, 575 U. S. ___, ___ (2015) (slip op., at 7). And Officer Fackrell’s actual search of Strieff was a lawful search incident to arrest. See *Gant*, *supra*, at 339.

Moreover, there is no indication that this unlawful stop was part of any systemic or recurrent police misconduct. To the contrary, all the evidence suggests that the stop was an isolated instance of negligence that occurred in connection with a bona fide investigation of a suspected

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drug house. Officer Fackrell saw Strieff leave a suspected drug house. And his suspicion about the house was based on an anonymous tip and his personal observations.

Applying these factors, we hold that the evidence discovered on Strieff's person was admissible because the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant. Although the illegal stop was close in time to Strieff's arrest, that consideration is outweighed by two factors supporting the State. The outstanding arrest warrant for Strieff's arrest is a critical intervening circumstance that is wholly independent of the illegal stop. The discovery of that warrant broke the causal chain between the unconstitutional stop and the discovery of evidence by compelling Officer Fackrell to arrest Strieff. And, it is especially significant that there is no evidence that Officer Fackrell's illegal stop reflected flagrantly unlawful police misconduct.

2

We find Strieff's counterarguments unpersuasive.

First, he argues that the attenuation doctrine should not apply because the officer's stop was purposeful and flagrant. He asserts that Officer Fackrell stopped him solely to fish for evidence of suspected wrongdoing. But Officer Fackrell sought information from Strieff to find out what was happening inside a house whose occupants were legitimately suspected of dealing drugs. This was not a suspicionless fishing expedition "in the hope that something would turn up." *Taylor v. Alabama*, 457 U. S. 687, 691 (1982).

Strieff argues, moreover, that Officer Fackrell's conduct was flagrant because he detained Strieff without the necessary level of cause (here, reasonable suspicion). But that conflates the standard for an illegal stop with the standard for flagrancy. For the violation to be flagrant, more severe police misconduct is required than the mere

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absence of proper cause for the seizure. See, *e.g.*, *Kaupp*, 538 U. S., at 628, 633 (finding flagrant violation where a warrantless arrest was made in the arrestee's home after police were denied a warrant and at least some officers knew they lacked probable cause). Neither the officer's alleged purpose nor the flagrancy of the violation rise to a level of misconduct to warrant suppression.

Second, Strieff argues that, because of the prevalence of outstanding arrest warrants in many jurisdictions, police will engage in dragnet searches if the exclusionary rule is not applied. We think that this outcome is unlikely. Such wanton conduct would expose police to civil liability. See 42 U. S. C. §1983; *Monell v. New York City Dept. of Social Servs.*, 436 U. S. 658, 690 (1978); see also *Segura*, 468 U. S., at 812. And in any event, the *Brown* factors take account of the purpose and flagrancy of police misconduct. Were evidence of a dragnet search presented here, the application of the *Brown* factors could be different. But there is no evidence that the concerns that Strieff raises with the criminal justice system are present in South Salt Lake City, Utah.

* * *

We hold that the evidence Officer Fackrell seized as part of his search incident to arrest is admissible because his discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to arrest. The judgment of the Utah Supreme Court, accordingly, is reversed.

It is so ordered.

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SUPREME COURT OF THE UNITED STATES

No. 14–1373

UTAH, PETITIONER *v.* EDWARD
JOSEPH STRIEFF, JR.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

[June 20, 2016]

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins as to Parts I, II, and III, dissenting.

The Court today holds that the discovery of a warrant for an unpaid parking ticket will forgive a police officer’s violation of your Fourth Amendment rights. Do not be soothed by the opinion’s technical language: This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong. If the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the warrant. Because the Fourth Amendment should prohibit, not permit, such misconduct, I dissent.

I

Minutes after Edward Strieff walked out of a South Salt Lake City home, an officer stopped him, questioned him, and took his identification to run it through a police database. The officer did not suspect that Strieff had done anything wrong. Strieff just happened to be the first person to leave a house that the officer thought might contain “drug activity.” App. 16–19.

As the State of Utah concedes, this stop was illegal. App. 24. The Fourth Amendment protects people from “unreasonable searches and seizures.” An officer breaches

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that protection when he detains a pedestrian to check his license without any evidence that the person is engaged in a crime. *Delaware v. Prouse*, 440 U. S. 648, 663 (1979); *Terry v. Ohio*, 392 U. S. 1, 21 (1968). The officer deepens the breach when he prolongs the detention just to fish further for evidence of wrongdoing. *Rodriguez v. United States*, 575 U. S. ___, ___–___ (2015) (slip op., at 6–7). In his search for lawbreaking, the officer in this case himself broke the law.

The officer learned that Strieff had a “small traffic warrant.” App. 19. Pursuant to that warrant, he arrested Strieff and, conducting a search incident to the arrest, discovered methamphetamine in Strieff’s pockets.

Utah charged Strieff with illegal drug possession. Before trial, Strieff argued that admitting the drugs into evidence would condone the officer’s misbehavior. The methamphetamine, he reasoned, was the product of the officer’s illegal stop. Admitting it would tell officers that unlawfully discovering even a “small traffic warrant” would give them license to search for evidence of unrelated offenses. The Utah Supreme Court unanimously agreed with Strieff. A majority of this Court now reverses.

II

It is tempting in a case like this, where illegal conduct by an officer uncovers illegal conduct by a civilian, to forgive the officer. After all, his instincts, although unconstitutional, were correct. But a basic principle lies at the heart of the Fourth Amendment: Two wrongs don’t make a right. See *Weeks v. United States*, 232 U. S. 383, 392 (1914). When “lawless police conduct” uncovers evidence of lawless civilian conduct, this Court has long required later criminal trials to exclude the illegally obtained evidence. *Terry*, 392 U. S., at 12; *Mapp v. Ohio*, 367 U. S. 643, 655 (1961). For example, if an officer breaks into a home and finds a forged check lying around, that check

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may not be used to prosecute the homeowner for bank fraud. We would describe the check as “fruit of the poisonous tree.” *Wong Sun v. United States*, 371 U. S. 471, 488 (1963). Fruit that must be cast aside includes not only evidence directly found by an illegal search but also evidence “come at by exploitation of that illegality.” *Ibid.*

This “exclusionary rule” removes an incentive for officers to search us without proper justification. *Terry*, 392 U. S., at 12. It also keeps courts from being “made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.” *Id.*, at 13. When courts admit only lawfully obtained evidence, they encourage “those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.” *Stone v. Powell*, 428 U. S. 465, 492 (1976). But when courts admit illegally obtained evidence as well, they reward “manifest neglect if not an open defiance of the prohibitions of the Constitution.” *Weeks*, 232 U. S., at 394.

Applying the exclusionary rule, the Utah Supreme Court correctly decided that Strieff’s drugs must be excluded because the officer exploited his illegal stop to discover them. The officer found the drugs only after learning of Strieff’s traffic violation; and he learned of Strieff’s traffic violation only because he unlawfully stopped Strieff to check his driver’s license.

The court also correctly rejected the State’s argument that the officer’s discovery of a traffic warrant unspoiled the poisonous fruit. The State analogizes finding the warrant to one of our earlier decisions, *Wong Sun v. United States*. There, an officer illegally arrested a person who, days later, voluntarily returned to the station to confess to committing a crime. 371 U. S., at 491. Even though the person would not have confessed “but for the illegal actions of the police,” *id.*, at 488, we noted that the

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police did not exploit their illegal arrest to obtain the confession, *id.*, at 491. Because the confession was obtained by “means sufficiently distinguishable” from the constitutional violation, we held that it could be admitted into evidence. *Id.*, at 488, 491. The State contends that the search incident to the warrant-arrest here is similarly distinguishable from the illegal stop.

But *Wong Sun* explains why Strieff’s drugs must be excluded. We reasoned that a Fourth Amendment violation may not color every investigation that follows but it certainly stains the actions of officers who exploit the infraction. We distinguished evidence obtained by innocuous means from evidence obtained by exploiting misconduct after considering a variety of factors: whether a long time passed, whether there were “intervening circumstances,” and whether the purpose or flagrancy of the misconduct was “calculated” to procure the evidence. *Brown v. Illinois*, 422 U. S. 590, 603–604 (1975).

These factors confirm that the officer in this case discovered Strieff’s drugs by exploiting his own illegal conduct. The officer did not ask Strieff to volunteer his name only to find out, days later, that Strieff had a warrant against him. The officer illegally stopped Strieff and immediately ran a warrant check. The officer’s discovery of a warrant was not some intervening surprise that he could not have anticipated. Utah lists over 180,000 misdemeanor warrants in its database, and at the time of the arrest, Salt Lake County had a “backlog of outstanding warrants” so large that it faced the “potential for civil liability.” See Dept. of Justice, Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2014 (2015) (Systems Survey) (Table 5a), online at <https://www.ncjrs.gov/pdffiles1/bjs/grants/249799.pdf> (all Internet materials as last visited June 16, 2016); Inst. for Law and Policy Planning, Salt Lake County Criminal Justice System Assessment 6.7 (2004), online at

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<http://www.slco.org/cjac/resources/SaltLakeCJSAfinal.pdf>. The officer's violation was also calculated to procure evidence. His sole reason for stopping Strieff, he acknowledged, was investigative—he wanted to discover whether drug activity was going on in the house Strieff had just exited. App. 17.

The warrant check, in other words, was not an “intervening circumstance” separating the stop from the search for drugs. It was part and parcel of the officer's illegal “expedition for evidence in the hope that something might turn up.” *Brown*, 422 U. S., at 605. Under our precedents, because the officer found Strieff's drugs by exploiting his own constitutional violation, the drugs should be excluded.

III

A

The Court sees things differently. To the Court, the fact that a warrant gives an officer cause to arrest a person severs the connection between illegal policing and the resulting discovery of evidence. *Ante*, at 7. This is a remarkable proposition: The mere existence of a warrant not only gives an officer legal cause to arrest and search a person, it also forgives an officer who, with no knowledge of the warrant at all, unlawfully stops that person on a whim or hunch.

To explain its reasoning, the Court relies on *Segura v. United States*, 468 U. S. 796 (1984). There, federal agents applied for a warrant to search an apartment but illegally entered the apartment to secure it before the judge issued the warrant. *Id.*, at 800–801. After receiving the warrant, the agents then searched the apartment for drugs. *Id.*, at 801. The question before us was what to do with the evidence the agents then discovered. We declined to suppress it because “[t]he illegal entry into petitioners' apartment did not contribute in any way to discovery of the evidence seized under the warrant.” *Id.*, at 815.

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According to the majority, *Segura* involves facts “similar” to this case and “suggest[s]” that a valid warrant will clean up whatever illegal conduct uncovered it. *Ante*, at 6–7. It is difficult to understand this interpretation. In *Segura*, the agents’ illegal conduct in entering the apartment had nothing to do with their procurement of a search warrant. Here, the officer’s illegal conduct in stopping Strieff was essential to his discovery of an arrest warrant. *Segura* would be similar only if the agents used information they illegally obtained from the apartment to procure a search warrant or discover an arrest warrant. Precisely because that was not the case, the Court admitted the untainted evidence. 468 U. S., at 814.

The majority likewise misses the point when it calls the warrant check here a “‘negligibly burdensome precaution[n]” taken for the officer’s “safety.” *Ante*, at 8 (quoting *Rodriguez*, 575 U. S., at ___ (slip op., at 7)). Remember, the officer stopped Strieff without suspecting him of committing any crime. By his own account, the officer did not fear Strieff. Moreover, the safety rationale we discussed in *Rodriguez*, an opinion about highway patrols, is conspicuously absent here. A warrant check on a highway “ensur[es] that vehicles on the road are operated safely and responsibly.” *Id.*, at ___ (slip op., at 6). We allow such checks during legal traffic stops because the legitimacy of a person’s driver’s license has a “close connection to roadway safety.” *Id.*, at ___ (slip op., at 7). A warrant check of a pedestrian on a sidewalk, “by contrast, is a measure aimed at ‘detect[ing] evidence of ordinary criminal wrongdoing.’” *Ibid.* (quoting *Indianapolis v. Edmond*, 531 U. S. 32, 40–41 (2000)). Surely we would not allow officers to warrant-check random joggers, dog walkers, and lemonade vendors just to ensure they pose no threat to anyone else.

The majority also posits that the officer could not have exploited his illegal conduct because he did not violate the Fourth Amendment on purpose. Rather, he made “good-

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faith mistakes.” *Ante*, at 8. Never mind that the officer’s sole purpose was to fish for evidence. The majority casts his unconstitutional actions as “negligent” and therefore incapable of being deterred by the exclusionary rule. *Ibid*.

But the Fourth Amendment does not tolerate an officer’s unreasonable searches and seizures just because he did not know any better. Even officers prone to negligence can learn from courts that exclude illegally obtained evidence. *Stone*, 428 U. S., at 492. Indeed, they are perhaps the most in need of the education, whether by the judge’s opinion, the prosecutor’s future guidance, or an updated manual on criminal procedure. If the officers are in doubt about what the law requires, exclusion gives them an “incentive to err on the side of constitutional behavior.” *United States v. Johnson*, 457 U. S. 537, 561 (1982).

B

Most striking about the Court’s opinion is its insistence that the event here was “isolated,” with “no indication that this unlawful stop was part of any systemic or recurrent police misconduct.” *Ante*, at 8–9. Respectfully, nothing about this case is isolated.

Outstanding warrants are surprisingly common. When a person with a traffic ticket misses a fine payment or court appearance, a court will issue a warrant. See, e.g., Brennan Center for Justice, Criminal Justice Debt 23 (2010), online at <https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>. When a person on probation drinks alcohol or breaks curfew, a court will issue a warrant. See, e.g., Human Rights Watch, Profiting from Probation 1, 51 (2014), online at <https://www.hrw.org/report/2014/02/05/profitting-probation/americas-offender-funded-probation-industry>. The States and Federal Government maintain databases with over 7.8 million outstanding warrants, the vast majority of which appear to be for minor offenses. See Systems Sur-

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vey (Table 5a). Even these sources may not track the “staggering” numbers of warrants, ““drawers and drawers”” full, that many cities issue for traffic violations and ordinance infractions. Dept. of Justice, Civil Rights Div., Investigation of the Ferguson Police Department 47, 55 (2015) (Ferguson Report), online at https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf. The county in this case has had a “backlog” of such warrants. See *supra*, at 4. The Department of Justice recently reported that in the town of Ferguson, Missouri, with a population of 21,000, 16,000 people had outstanding warrants against them. Ferguson Report, at 6, 55.

Justice Department investigations across the country have illustrated how these astounding numbers of warrants can be used by police to stop people without cause. In a single year in New Orleans, officers “made nearly 60,000 arrests, of which about 20,000 were of people with outstanding traffic or misdemeanor warrants from neighboring parishes for such infractions as unpaid tickets.” Dept. of Justice, Civil Rights Div., Investigation of the New Orleans Police Department 29 (2011), online at https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf. In the St. Louis metropolitan area, officers “routinely” stop people—on the street, at bus stops, or even in court—for no reason other than “an officer’s desire to check whether the subject had a municipal arrest warrant pending.” Ferguson Report, at 49, 57. In Newark, New Jersey, officers stopped 52,235 pedestrians within a 4-year period and ran warrant checks on 39,308 of them. Dept. of Justice, Civil Rights Div., Investigation of the Newark Police Department 8, 19, n. 15 (2014), online at https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf. The Justice Department analyzed these warrant-checked stops and reported that “approximately 93% of the stops would

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have been considered unsupported by articulated reasonable suspicion.” *Id.*, at 9, n. 7.

I do not doubt that most officers act in “good faith” and do not set out to break the law. That does not mean these stops are “isolated instance[s] of negligence,” however. *Ante*, at 8. Many are the product of institutionalized training procedures. The New York City Police Department long trained officers to, in the words of a District Judge, “stop and question first, develop reasonable suspicion later.” *Ligon v. New York*, 925 F. Supp. 2d 478, 537–538 (SDNY), stay granted on other grounds, 736 F. 3d 118 (CA2 2013). The Utah Supreme Court described as “‘routine procedure’ or ‘common practice’” the decision of Salt Lake City police officers to run warrant checks on pedestrians they detained without reasonable suspicion. *State v. Topanotes*, 2003 UT 30, ¶2, 76 P. 3d 1159, 1160. In the related context of traffic stops, one widely followed police manual instructs officers looking for drugs to “run at least a warrants check on all drivers you stop. Statistically, narcotics offenders are . . . more likely to fail to appear on simple citations, such as traffic or trespass violations, leading to the issuance of bench warrants. Discovery of an outstanding warrant gives you cause for an immediate custodial arrest and search of the suspect.” C. Remsberg, *Tactics for Criminal Patrol* 205–206 (1995); C. Epp et al., *Pulled Over* 23, 33–36 (2014).

The majority does not suggest what makes this case “isolated” from these and countless other examples. Nor does it offer guidance for how a defendant can prove that his arrest was the result of “widespread” misconduct. Surely it should not take a federal investigation of Salt Lake County before the Court would protect someone in Strieff’s position.

IV

Writing only for myself, and drawing on my professional

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experiences, I would add that unlawful “stops” have severe consequences much greater than the inconvenience suggested by the name. This Court has given officers an array of instruments to probe and examine you. When we condone officers’ use of these devices without adequate cause, we give them reason to target pedestrians in an arbitrary manner. We also risk treating members of our communities as second-class citizens.

Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more. This Court has allowed an officer to stop you for whatever reason he wants—so long as he can point to a pretextual justification after the fact. *Whren v. United States*, 517 U. S. 806, 813 (1996). That justification must provide specific reasons why the officer suspected you were breaking the law, *Terry*, 392 U. S., at 21, but it may factor in your ethnicity, *United States v. Brignoni-Ponce*, 422 U. S. 873, 886–887 (1975), where you live, *Adams v. Williams*, 407 U. S. 143, 147 (1972), what you were wearing, *United States v. Sokolow*, 490 U. S. 1, 4–5 (1989), and how you behaved, *Illinois v. Wardlow*, 528 U. S. 119, 124–125 (2000). The officer does not even need to know which law you might have broken so long as he can later point to any possible infraction—even one that is minor, unrelated, or ambiguous. *Devenpeck v. Alford*, 543 U. S. 146, 154–155 (2004); *Heien v. North Carolina*, 574 U. S. ____ (2014).

The indignity of the stop is not limited to an officer telling you that you look like a criminal. See *Epp*, *Pulled Over*, at 5. The officer may next ask for your “consent” to inspect your bag or purse without telling you that you can decline. See *Florida v. Bostick*, 501 U. S. 429, 438 (1991). Regardless of your answer, he may order you to stand “helpless, perhaps facing a wall with [your] hands raised.” *Terry*, 392 U. S., at 17. If the officer thinks you might be dangerous, he may then “frisk” you for weapons. This

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involves more than just a pat down. As onlookers pass by, the officer may “feel with sensitive fingers every portion of [your] body. A thorough search [may] be made of [your] arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.” *Id.*, at 17, n. 13.

The officer’s control over you does not end with the stop. If the officer chooses, he may handcuff you and take you to jail for doing nothing more than speeding, jaywalking, or “driving [your] pickup truck . . . with [your] 3-year-old son and 5-year-old daughter . . . without [your] seatbelt fastened.” *Atwater v. Lago Vista*, 532 U. S. 318, 323–324 (2001). At the jail, he can fingerprint you, swab DNA from the inside of your mouth, and force you to “shower with a delousing agent” while you “lift [your] tongue, hold out [your] arms, turn around, and lift [your] genitals.” *Florence v. Board of Chosen Freeholders of County of Burlington*, 566 U. S. ___, ___–___ (2012) (slip op., at 2–3); *Maryland v. King*, 569 U. S. ___, ___ (2013) (slip op., at 28). Even if you are innocent, you will now join the 65 million Americans with an arrest record and experience the “civil death” of discrimination by employers, landlords, and whoever else conducts a background check. Chin, *The New Civil Death*, 160 U. Pa. L. Rev. 1789, 1805 (2012); see J. Jacobs, *The Eternal Criminal Record* 33–51 (2015); Young & Petersilia, *Keeping Track*, 129 Harv. L. Rev. 1318, 1341–1357 (2016). And, of course, if you fail to pay bail or appear for court, a judge will issue a warrant to render you “arrestable on sight” in the future. A. Goffman, *On the Run* 196 (2014).

This case involves a *suspicionless* stop, one in which the officer initiated this chain of events without justification. As the Justice Department notes, *supra*, at 8, many innocent people are subjected to the humiliations of these unconstitutional searches. The white defendant in this case shows that anyone’s dignity can be violated in this

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manner. See M. Gottschalk, *Caught* 119–138 (2015). But it is no secret that people of color are disproportionate victims of this type of scrutiny. See M. Alexander, *The New Jim Crow* 95–136 (2010). For generations, black and brown parents have given their children “the talk”—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them. See, *e.g.*, W. E. B. Du Bois, *The Souls of Black Folk* (1903); J. Baldwin, *The Fire Next Time* (1963); T. Coates, *Between the World and Me* (2015).

By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.

We must not pretend that the countless people who are routinely targeted by police are “isolated.” They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. See L. Guinier & G. Torres, *The Miner’s Canary* 274–283 (2002). They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.

* * *

I dissent.

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SUPREME COURT OF THE UNITED STATES

No. 14–1373

UTAH, PETITIONER *v.* EDWARD
JOSEPH STRIEFF, JR.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

[June 20, 2016]

JUSTICE KAGAN, with whom JUSTICE GINSBURG joins, dissenting.

If a police officer stops a person on the street without reasonable suspicion, that seizure violates the Fourth Amendment. And if the officer pats down the unlawfully detained individual and finds drugs in his pocket, the State may not use the contraband as evidence in a criminal prosecution. That much is beyond dispute. The question here is whether the prohibition on admitting evidence dissolves if the officer discovers, after making the stop but before finding the drugs, that the person has an outstanding arrest warrant. Because that added wrinkle makes no difference under the Constitution, I respectfully dissent.

This Court has established a simple framework for determining whether to exclude evidence obtained through a Fourth Amendment violation: Suppression is necessary when, but only when, its societal benefits outweigh its costs. See *ante*, at 4; *Davis v. United States*, 564 U. S. 229, 237 (2011). The exclusionary rule serves a crucial function—to deter unconstitutional police conduct. By barring the use of illegally obtained evidence, courts reduce the temptation for police officers to skirt the Fourth Amendment’s requirements. See *James v. Illinois*, 493 U. S. 307, 319 (1990). But suppression of evidence also “exact[s] a heavy toll”: Its consequence in many cases is to release a criminal without just punishment. *Davis*, 564

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U. S., at 237. Our decisions have thus endeavored to strike a sound balance between those two competing considerations—rejecting the “reflexive” impulse to exclude evidence every time an officer runs afoul of the Fourth Amendment, *id.*, at 238, but insisting on suppression when it will lead to “appreciable deterrence” of police misconduct, *Herring v. United States*, 555 U. S. 135, 141 (2009).

This case thus requires the Court to determine whether excluding the fruits of Officer Douglas Fackrell’s unjustified stop of Edward Strieff would significantly deter police from committing similar constitutional violations in the future. And as the Court states, that inquiry turns on application of the “attenuation doctrine,” *ante*, at 5—our effort to “mark the point” at which the discovery of evidence “become[s] so attenuated” from the police misconduct that the deterrent benefit of exclusion drops below its cost. *United States v. Leon*, 468 U. S. 897, 911 (1984). Since *Brown v. Illinois*, 422 U. S. 590, 604–605 (1975), three factors have guided that analysis. First, the closer the “temporal proximity” between the unlawful act and the discovery of evidence, the greater the deterrent value of suppression. *Id.*, at 603. Second, the more “purpose[ful]” or “flagran[t]” the police illegality, the clearer the necessity, and better the chance, of preventing similar misbehavior. *Id.*, at 604. And third, the presence (or absence) of “intervening circumstances” makes a difference: The stronger the causal chain between the misconduct and the evidence, the more exclusion will curb future constitutional violations. *Id.*, at 603–604. Here, as shown below, each of those considerations points toward suppression: Nothing in Fackrell’s discovery of an outstanding warrant so attenuated the connection between his wrongful behavior and his detection of drugs as to diminish the exclusionary rule’s deterrent benefits.

Start where the majority does: The temporal proximity

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factor, it forthrightly admits, “favors suppressing the evidence.” *Ante*, at 6. After all, Fackrell’s discovery of drugs came just minutes after the unconstitutional stop. And in prior decisions, this Court has made clear that only the lapse of “substantial time” between the two could favor admission. *Kaupp v. Texas*, 538 U. S. 626, 633 (2003) (*per curiam*); see, e.g., *Brown*, 422 U. S., at 604 (suppressing a confession when “less than two hours” separated it from an unlawful arrest). So the State, by all accounts, takes strike one.

Move on to the purposefulness of Fackrell’s conduct, where the majority is less willing to see a problem for what it is. The majority chalks up Fackrell’s Fourth Amendment violation to a couple of innocent “mistakes.” *Ante*, at 8. But far from a Barney Fife-type mishap, Fackrell’s seizure of Strieff was a calculated decision, taken with so little justification that the State has never tried to defend its legality. At the suppression hearing, Fackrell acknowledged that the stop was designed for investigatory purposes—*i.e.*, to “find out what was going on [in] the house” he had been watching, and to figure out “what [Strieff] was doing there.” App. 17–18. And Fackrell frankly admitted that he had no basis for his action except that Strieff “was coming out of the house.” *Id.*, at 17. Plug in Fackrell’s and Strieff’s names, substitute “stop” for “arrest” and “reasonable suspicion” for “probable cause,” and this Court’s decision in *Brown* perfectly describes this case:

“[I]t is not disputed that [Fackrell stopped Strieff] without [reasonable suspicion]. [He] later testified that [he] made the [stop] for the purpose of questioning [Strieff] as part of [his] investigation The illegality here . . . had a quality of purposefulness. The impropriety of the [stop] was obvious. [A]wareness of that fact was virtually conceded by [Fackrell] when

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[he] repeatedly acknowledged, in [his] testimony, that the purpose of [his] action was ‘for investigation’: [Fackrell] embarked upon this expedition for evidence in the hope that something might turn up.” 422 U. S., at 592, 605 (some internal punctuation altered; footnote, citation, and paragraph break omitted).

In *Brown*, the Court held those facts to support suppression—and they do here as well. Swing and a miss for strike two.

Finally, consider whether any intervening circumstance “br[o]ke the causal chain” between the stop and the evidence. *Ante*, at 6. The notion of such a disrupting event comes from the tort law doctrine of proximate causation. See *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U. S. 639, 658–659 (2008) (explaining that a party cannot “establish[] proximate cause” when “an intervening cause break[s] the chain of causation between” the act and the injury); Kerr, Good Faith, New Law, and the Scope of the Exclusionary Rule, 99 Geo. L. J. 1077, 1099 (2011) (Fourth Amendment attenuation analysis “looks to whether the constitutional violation was the proximate cause of the discovery of the evidence”). And as in the tort context, a circumstance counts as intervening only when it is unforeseeable—not when it can be seen coming from miles away. See W. Keeton, D. Dobbs, B. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 312 (5th ed. 1984). For rather than breaking the causal chain, predictable effects (*e.g.*, X leads naturally to Y leads naturally to Z) are its very links.

And Fackrell’s discovery of an arrest warrant—the only event the majority thinks intervened—was an eminently foreseeable consequence of stopping Strieff. As Fackrell testified, checking for outstanding warrants during a stop is the “normal” practice of South Salt Lake City police. App. 18; see also *State v. Topanotes*, 2003 UT 30, ¶2, 76 P. 3d 1159, 1160 (describing a warrant check as “routine

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procedure” and “common practice” in Salt Lake City). In other words, the department’s standard detention procedures—stop, ask for identification, run a check—are partly designed to find outstanding warrants. And find them they will, given the staggering number of such warrants on the books. See generally *ante*, at 7–8 (SOTOMAYOR, J., dissenting). To take just a few examples: The State of California has 2.5 million outstanding arrest warrants (a number corresponding to about 9% of its adult population); Pennsylvania (with a population of about 12.8 million) contributes 1.4 million more; and New York City (population 8.4 million) adds another 1.2 million. See Reply Brief 8; Associated Press, Pa. Database, NBC News (Apr. 8, 2007), online at <http://goo.gl/3Yq3Nd> (as last visited June 17, 2016); N. Y. Times, Oct. 8, 2015, p. A24.¹ So outstanding warrants do not appear as bolts from the blue. They are the run-of-the-mill results of police stops—what officers look for when they run a routine check of a person’s identification and what they know will turn up with fair regularity. In short, they are nothing like what intervening circumstances are supposed to be.² Strike

¹What is more, outstanding arrest warrants are not distributed evenly across the population. To the contrary, they are concentrated in cities, towns, and neighborhoods where stops are most likely to occur—and so the odds of any given stop revealing a warrant are even higher than the above numbers indicate. One study found, for example, that Cincinnati, Ohio had over 100,000 outstanding warrants with only 300,000 residents. See Helland & Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J. Law & Econ. 93, 98 (2004). And as JUSTICE SOTOMAYOR notes, 16,000 of the 21,000 people residing in the town of Ferguson, Missouri have outstanding warrants. See *ante*, at 8.

²The majority relies on *Segura v. United States*, 468 U. S. 796 (1984), to reach the opposite conclusion, see *ante*, at 6–7, but that decision lacks any relevance to this case. The Court there held that the Fourth Amendment violation at issue “did not contribute in any way” to the police’s subsequent procurement of a warrant and discovery of contraband. 468 U. S., at 815. So the Court had no occasion to consider the

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three.

The majority's misapplication of *Brown's* three-part inquiry creates unfortunate incentives for the police—indeed, practically invites them to do what Fackrell did here. Consider an officer who, like Fackrell, wishes to stop someone for investigative reasons, but does not have what a court would view as reasonable suspicion. If the officer believes that any evidence he discovers will be inadmissible, he is likely to think the unlawful stop not worth making—precisely the deterrence the exclusionary rule is meant to achieve. But when he is told of today's decision? Now the officer knows that the stop may well yield admissible evidence: So long as the target is one of the many millions of people in this country with an outstanding arrest warrant, anything the officer finds in a search is fair game for use in a criminal prosecution. The officer's incentive to violate the Constitution thus increases: From here on, he sees potential advantage in stopping individuals without reasonable suspicion—exactly the temptation the exclusionary rule is supposed to remove. Because the majority thus places Fourth Amendment protections at risk, I respectfully dissent.

question here: What happens when an unconstitutional act in fact leads to a warrant which then leads to evidence?

IMPLICITLY UNJUST: HOW DEFENDERS
CAN AFFECT SYSTEMIC RACIST
ASSUMPTIONS

Jonathan A. Rapping*

This article examines the power of implicit racial bias on all major players in the criminal justice system, focusing specifically on the criminal defense attorney—whose role in defending his or her client makes racial bias particularly devastating to the criminal justice system we would like to believe we have. If a criminal defense attorney is to be maximally effective in the defense of his or her client, this Article argues, it is critical for said attorney to fight to affect systemic racial assumptions built into the American court system. The article suggests a three-prong strategy for the criminal defense lawyer working against our racialized criminal justice system that includes: 1) working to overcome his or her own racial biases, 2) developing strategies to educate others about their biases, and 3) continuing to focus on racial justice even when everyone else in the system seems to disregard it.

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INTRODUCTION

Arguably, no feature of America’s criminal justice system is more obvious than its disparate impact on people of color. That so many well-intentioned people working within this system help to reinforce this status quo is at first blush mystifying. But understanding the influence of implicit racial bias (IRB), that subconscious association between race and crime that affects us all, helps one appreciate how people who deeply believe in justice can help perpetuate a racially unjust system. Defense attorneys must be conscious of this subversive force and develop strategies to counteract it if they are to achieve just outcomes for so many of their clients. Reflecting upon my own evolution as a public defender helps me understand the subtle ways the criminal justice system can shape our assumptions about race and crime.

It was the summer of 1993 when I first walked into Courtroom C-10. This was the basement courtroom of the Superior Court of the District of Columbia where arrestees were brought for “first appearance hearings.” It was where the accused would first see a judge, discover the charges made against him, and learn whether he would be released pending his next court date. There was no better place to learn first-hand who was likely to be arrested in Washington, DC.

I had just completed my first year of law school and was working as an intern investigator at the Public Defender Service (PDS). I had lived in Washington, DC for three years and knew the city was racially diverse. While there were certainly a larger percentage of African-Americans residing there than in the nation generally, there was

still a significant white population. Although I had previous experience working in economically disadvantaged communities, and I understood the correlations between race and poverty, and poverty and crime, I expected to see a cross section of arrestees that more closely resembled the racial make-up of the city at large. I was surprised to see that every arrestee I saw that day was black.

But as I continued to work in DC's criminal justice system—for two more years as an intern and then as a public defender—my surprise morphed into acceptance. In fact, over time I found myself more surprised to see the occasional white defendant. When I did, I assumed there must be some extraordinary story behind the arrest. The image did not fit the narrative I was being socialized to accept: one in which criminality and skin color were inextricably intertwined.

I spent the next eleven years living in the corridors and courtrooms of that courthouse, and nine years since involved in indigent defense reform across the country. For the last six years, I have studied and taught criminal justice issues as a law school professor. I now understand that what I witnessed that day during the summer of 1993 was not anomalous; it was a snapshot of the harsh racial realities in our nation's criminal justice system. I also understand that my waning sensitivity to this reality is not unusual. Our justice system obviously punishes people of color disproportionately. Many well-intentioned people lose sight of that phenomenon and end up perpetuating it.

All across the country, African-Americans are disproportionately processed through a maze of courts and prisons. Individually, many are unable to overcome the many obstacles they experience every day. Collectively, they come from communities torn apart by these traumas. The national implications of a criminal justice system that so disproportionately impacts minorities, in a world divided along racial and socioeconomic lines, are alarming. Our criminal justice system has emerged as the greatest barrier to our most cherished American ideals: equal justice and equal opportunity for all.

And yet, I observed that so many of the professionals whose jobs ensured that the system functioned effectively were African-American. It was not uncommon to walk into a courtroom in which the judge, prosecutor, and defense counsel were all black. African-American police and probation officers frequently provided the evidence necessary to lock away the accused. And in Washington, DC, white professionals in the system were frequently progressive on issues of race outside the criminal justice context.

Puzzled by this situation, I frequently found myself wondering how so many people who presumably cared about racial justice could

preside over such a system. I then began my own soul searching. Despite my commitment to my clients, did I harbor subconscious biases about them? Was I enabling the system by participating in it? Did I have an obligation to racial justice beyond the individual interests of my client? If so, what was my appropriate role? These are the questions I address in this article. It intends to initiate thoughtful discussions among defense attorneys about the impact of race in the criminal justice system and strategies that can be utilized to neutralize or mitigate such impact.

The remaining sections of this article will articulate the widespread problem that inspired it, specifically focusing on implicit racial biases that affect everyone, including those who are progressive on issues of race, as well as members of the same race that are experiencing the bias. The last two sections tackle the roles that criminal defense lawyers have within the justice system and suggest more ways in which defense attorneys can move beyond racially slanted judicial outcomes.

Section I provides critical foundation for the rest of the article. In it, I will explore the ways racial disparity is driven by virtually every aspect of the criminal justice system to show how prevalent this phenomenon is, and the driving need to combat it. In the second section I then look at the ways implicit racial bias works to explain how even well-intended people can actually facilitate the functioning of such an unjust system. Scholars have examined how this unconscious racial bias can cause decision-makers in the criminal justice system to unknowingly contribute to racist outcomes by skewing their perceptions of events that occur within the system. However, an area left relatively unexplored in these studies is the role of the criminal defense lawyer.¹ In what ways might the defender inadvertently facilitate a racist system and is it possible for him or her to help mitigate such unjust outcomes? In the third section I will argue that a focus on systemic

1. At the time I began writing this article I found two articles that touched on the impact of implicit racial bias on criminal defense lawyers. The first looked at racial attitudes of capital defense lawyers. Theodore Eisenberg & Sherri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539 (2004). The second looked at how implicit racial biases can impact both the ways that defense lawyers interact with clients and how they select juries. Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755 (2012). As I was finishing this article another was published that looks at how implicit racial bias can impact how overworked public defenders elect to allocate scarce resources. L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L. J. 2626 (2013). While I will also examine how implicit racial bias affects defense lawyers, in this article I also explore what role defenders can play in trying to mitigate its impact of racial justice.

reform is consistent with the defender's singular obligation to the client,² and that the conscientious, client-centered criminal defense lawyer can play a critical role in raising consciousness of the racism that plagues the criminal justice system and work to engender resistance to it. I further argue that by shining a light on the racism in the system, the defense attorney helps all of his or her clients, not just those who are of color. I argue that a racialized system is also a less humane system that enforces punitive policies that unfairly affect everyone accused of a crime. Finally, I suggest a three-prong strategy for the criminal defense lawyer working against our racialized criminal justice system that includes: 1) working to overcome his or her own racial biases, 2) developing strategies to educate others about their biases, and 3) continuing to focus on racial justice even when everyone else in the system seems to disregard it.³

I.

CRIMINALIZING RACE

A. *Racially Disparate System and its Devastating Consequences*

2.2 million people are currently incarcerated in America.⁴ With a population of approximately 315.5 million,⁵ roughly 1 out of every 143 people in the country is locked up at any point in time, or 0.7% of the total population. While 75% of Americans are white,⁶ over 60% of those incarcerated are racial and ethnic minorities.⁷ While 0.4% of white Americans are among those incarcerated, the figure for black Americans is 2.2%.⁸ In short, African-Americans are nearly six times

2. Although there will be times when this agenda will have to give way to the interests of an individual client.

3. Certainly I do not mean to suggest that even the most committed and race-conscious defense lawyers can eradicate systemic racism. See Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L. J. 2236 (2013). But, conscientious defense counsel can develop strategies to fight against racist influences that negatively impact their clients.

4. *Incarceration*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=107> (last visited May 15, 2013).

5. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <http://www.census.gov/population/www/popclockus.html> (last visited May 15, 2013).

6. *White U.S. Population Grows but Drops in Overall Percentage*, CNN (Sept. 29, 2011, 6:07 PM), http://articles.cnn.com/2011-09-29/us_census_1_census-figures-racial-statistics-branch-hispanics?_s=PM:US.

7. *Racial Disparity*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=122> (last visited May 15, 2013).

8. Peter Wagner, *Incarceration is Not an Equal Opportunity Punishment*, PRISON POLICY INITIATIVE, <http://www.prisonpolicy.org/articles/notequal.html> (last updated Aug. 28, 2012).

as likely to be incarcerated as their white counterparts.⁹ For African-American men in their thirties, one in every ten is in prison or jail at any given time.¹⁰ In fact, soon after I began my career as a public defender in Washington, DC, a study revealed that, in that city, nearly 50% of all black men between the ages of eighteen and thirty-five were under the supervision of the criminal justice system.¹¹

In her much acclaimed book, *The New Jim Crow*, Michelle Alexander makes the argument that these racial disparities are exacerbated by the War on Drugs. Alexander argues that although whites and blacks use and sell drugs at similar rates,¹² blacks are far more likely to be incarcerated for drug crimes. To support this argument, she points to a 2000 study that found that “in seven states, African-Americans constitute 80 to 90 percent of all drug offenders sent to prison” and that “[i]n at least fifteen states, blacks are admitted to prison on drug charges at a rate from twenty to fifty-seven times greater than that of white men.”¹³ These trends are national in scope.¹⁴

That the American criminal justice system disproportionately impacts communities of color, and African-Americans in particular, is beyond question. And the impact is devastating as its ripples have impact well beyond the rate and duration of incarceration.¹⁵ The impact of non-criminal penalties is described by the American Bar Association Task Force on Collateral Sanctions:

[Once convicted, a person] may be ineligible for many federally-funded health and welfare benefits, food stamps, public housing, and federal educational assistance. His driver’s license may be automatically suspended, and he may no longer qualify for certain employment and professional licenses. If he is convicted of another crime he may be subject to imprisonment as a repeat offender. He will not be permitted to enlist in the military, or possess a firearm,

9. *Interactive Map*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/map/map.cfm> (last visited May 15, 2013).

10. *Racial Disparity*, *supra* note 7.

11. *Half of Young Black Men in Nation’s Capital in or Being Pursued by Criminal Justice System*, *NewsBriefs*, NAT’L DRUG STRATEGY NETWORK, <http://www.ndsn.org/sepect97/blackmen.html> (last visited May 15, 2013) (accounting also for those in prison or jail, on probation or parole, out on bond or being sought on an arrest warrant).

12. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 97 (2010) (arguing that, if anything, whites are more likely to sell and use drugs than blacks).

13. *Id.* at 96, (citing HUMAN RIGHTS WATCH, *PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS* 12 (2000)).

14. *Id.*

15. See ALEXANDER, *supra* note 12, at ch. 4.

or obtain a federal security clearance. If a citizen he may lose the right to vote; if not, he becomes immediately deportable.¹⁶

Erma Faye Stewart's story provides a chilling example of how the non-criminal consequences that accompany conviction can wreak more havoc than the criminal sanction itself.¹⁷ Stewart was one of twenty-seven people arrested as part of a drug sweep in Hearne, Texas.¹⁸ The prosecutions were based on the word of a lone informant, later proven to be unreliable. The lack of evidence forced the district attorney to drop the prosecutions.¹⁹ However, before the problems with the state's case came to light, seven of the arrestees had already pled guilty in order to secure their release from jail.²⁰ One of them was Erma Faye Stewart.²¹ Unable to pay her bond, and desperate to return home to her two small children, Stewart accepted a plea offer that resulted in a ten year prison sentence, as well as a \$1,800.00 fine.²² She did not realize that by pleading guilty she lost her eligibility for food stamps, which she needed, and for federal educational assistance.²³ She lost her right to vote.²⁴ She was evicted from public housing and separated from her children who had to sleep in various homes.²⁵ She had to use the money she made at her minimum wage job as a cook to pay her fines, leaving her unable to afford her young son's asthma medicine.²⁶

Despite her probable innocence, Stewart was rendered unable to be the mother she needed to be, ruining not only her life, but the lives of her two children. When we consider these consequences, coupled with the fact that they so disproportionately impact communities of color, we begin to see how disparities in our criminal justice system

16. Marc Mauer & Meda Chesney-Lind, *Introduction to INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 5* (Marc Mauer & Meda Chesney-Lind eds., 2002) (quoting Am. Bar Ass'n, *Introduction to Proposed Standards on Collateral Sanctions and Administrative Disqualification of Convicted Persons* (Jan. 18, 2002) (unpublished draft, on file with author)).

17. See *The Plea, Erma Faye Stewart and Regina Kelly*, FRONTLINE (June 17, 2004), <http://www.pbs.org/wgbh/pages/frontline/shows/plea/four/stewart.html>.

18. *Id.*

19. *Id.*

20. *Id.* Those who refused to plead guilty but could not post bond had to sit in jail for five months before the charges were dismissed. The seven who pled guilty remain convicted felons.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

can render entire communities unable to fully participate in our society.²⁷

B. The Role of the Criminal Justice Professional

It is certainly disquieting to learn that these racial disparities have such devastating consequences. But even more alarming is the role that skin color plays in driving this outcome. In a powerful essay entitled *Racism: The Crime in Criminal Justice*, Professor William Quigley makes the case that the criminal justice system in America “is a race-based institution where African-Americans are directly targeted and punished in a much more aggressive way than white people.”²⁸ He shows how, at every step of the process, those tasked with ensuring systemic fairness contribute to these racial disparities. Like Alexander, he starts out by explaining that mass incarceration in America is largely driven by the war on drugs,²⁹ and that African-Americans are arrested for drug offenses at an alarmingly higher rate than their white counterparts, despite similar rates of involvement.³⁰ This is partly explained because police investigative practices often target people of color and their communities for surveillance and investigation.³¹ Despite similar rates of involvement in drug selling and using, police monitor communities of color more heavily.³² Evidence shows that police are significantly more likely to stop people of color, whether they are walking or driving, and search their clothing or cars.³³

Once in the system, the disparate treatment continues. Prosecutors have ultimate discretion to determine whether to charge an arrestee and, if so, with what charge. Studies suggest both factors are influenced by the race of the accused.³⁴ African-Americans, who are 13% of the population and 14% of drug users, are not only 37% of the people arrested for drugs, but 56% of the people in state prisons for

27. Hence, Michelle Alexander's position that our system of mass incarceration represents a new era of “Jim Crow.” See ALEXANDER, *supra* note 12.

28. William Quigley, *Racism: The Crime in Criminal Justice*, 13 LOY. J. PUB. INT. L. 417, 417 (2012).

29. *Id.*

30. *Id.* at 418 (“[W]hile African-Americans comprise 13% of the U.S. population and 14% of monthly drug users, they account for 37% of the people arrested for drug offenses . . .”).

31. See Reginald T. Shuford, *Any Way You Slice It: Why Racial Profiling is Wrong*, 18 ST. LOUIS U. PUB. L. REV. 371, 378–79 (1999).

32. See *id.*

33. Quigley, *supra* note 28, at 418–19.

34. Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 806–13 (2012).

drug offenses. People of color are also significantly more likely to be detained pending trial than white arrestees,³⁵ and disproportionately must rely on the services of an overworked and under resourced public defender.³⁶

Roughly 95% of convictions are the product of guilty pleas,³⁷ and perhaps no factor is more greatly correlated with whether one gives up their right to a trial than the fact that they were detained pretrial.³⁸ Having a lawyer without the time and resources to adequately prepare only exacerbates this disparity.³⁹ However, even where people of color exercise their right to go to trial, there is a greater chance that the fact-finder—whether a jury or a judge—will interpret the facts in a manner consistent with guilt because of the defendant’s skin color.⁴⁰ Therefore, defendants of color are more likely to plead guilty and to be found guilty at trial due to forces independent of their own culpability or the merits of the case.

Either way, once in the system, the process for non-white defendants is more likely to result in conviction and sentencing. At this stage, judicial sentencing practices further drive systemic racism, as judges are both more likely to sentence African-American defendants to prison terms, and for longer periods of time, than similarly situated white defendants.⁴¹

35. Quigley, *supra* note 28, at 419–20.

36. Rebecca Marcus, *Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact on Racial Minorities*, 22 HASTINGS CONST. L.Q. 219, 220 (1994).

37. *Felony Defendants, Summary Findings*, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/index.cfm?ty=tp&tid=231#pubs> (last visited May 17, 2013).

38. See Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment’s Right to Bail*, 32 N. KY. L. REV. 1, 36–37 n.311 (2005) (suggesting the “strain of being incarcerated” encourages the defendant to accept a plea).

39. See Marcus, *supra* note 36.

40. See Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 347–50 (2007) (discussing the likelihood that judges and jurors “‘misremember’ facts in racially biased ways” at all steps of a legal proceeding).

41. See U.S. SENTENCING COMM’N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES 23 (2010), available at http://www.ussc.gov/Research_and_Statistics/Research_Publications/2010/20100311_Multivariate_Regression_Analysis_Report.pdf (finding that in the federal system male African-American defendants receive sentences that are 5% to 23% longer than their white counterparts for the same crimes); See also David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence for the U.S. Federal Courts*, 44 J.L. & ECON. 285, 300 (2001) (finding that African-American defendants in federal court received sentences that were, on average, 12 percent longer than similarly situated whites); *Unfairness in the Federal Cocaine Sentencing: Is it Time to Crack the 100 to 1 Disparity?: Hearing on H.R. 1459, H.R. 1466, H.R. 265, H.R. 2178 and H.R. 18 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th

Indisputably, race plays a significant role in whether a person is thrust into the criminal justice system at all and how (s)he is treated once in it. What is less clear is why, at every stage of the process, those who are meant to ensure judicial fairness contribute to racially disparate outcomes. It would be easy to chalk this up to a community of professionals who harbor outwardly racist attitudes, as such stories occur quite frequently and are always newsworthy.

For example, accounts of rampant racism in the Los Angeles Police Department in the wake of the Rodney King beating, served as a reminder that there are some who take the oath “to protect and to serve”⁴² who are overtly biased in their attitudes toward African-Americans. In the wake of this teachable moment, we sadly learned how often LAPD officers used racial epithets to describe African-Americans including “monkey hunt, tar buddy, [and] gorillas in the mist.”⁴³

That prosecutors will at times take advantage of racist stereotypes was evidenced in a recent trial during which a federal prosecutor cross examining an African-American defendant explicitly sought to use race as evidence of propensity to sell drugs. To rebut the defendant’s claim that he did not intend to associate himself with the drug activity of others around him, the prosecutor asked, “You’ve got African-Americans, you’ve got Hispanics, you’ve got a bag full of money. Does that tell you—a light bulb doesn’t go off in your head and say, this is a drug deal?”⁴⁴

We were recently reminded that some judges also harbor disturbing stereotypes about African-Americans which they will even ex-

Cong. 92, 97–98 (2009) (statement of Marc Mauer, Executive Director, The Sentencing Project), *available at* http://judiciary.house.gov/hearings/printers/111th/111-27_49783.pdf (revealing that African Americans are 21% more likely to receive mandatory minimum sentences than white defendants and 20% more likely to be sentenced to prison than white drug defendants, and that African Americans who are 13% of the population and 14% of drug users, are not only 37% of the people arrested for drugs but 56% of the people in state prisons for drug offenses).

42. This is the motto of the Los Angeles Police Department. *The Origin of the LAPD Motto*, THE LOS ANGELES POLICE DEPARTMENT, http://www.lapdonline.org/history_of_the_lapd/content_basic_view/1128 (last visited May 17, 2003).

43. Seth Mydans, *Los Angeles Force Accused From Within*, N.Y. TIMES, Mar. 29, 1991, at A10.

44. *Calhoun v. United States*, 133 S.Ct. 1136, 1136 (2013). (While Calhoun’s petition was denied for other reasons, Justice Sotomayor expressed her disgust at the prosecutor for “suggesting that race should play a role in establishing a defendant’s criminal intent.” She went on to say, “It is deeply disappointing to see a representative of the United States resort to this base tactic more than a decade into the 21st century . . . We expect the government to seek justice, not fan the flames of fear and prejudice . . . I hope to never see a case like this again.”).

press publicly, as when Richard Cebull, then Chief Judge of the federal District Court in Montana, admittedly made a racist joke about President Obama.⁴⁵

From time to time citizens who harbor racist attitudes make it onto juries where they are asked to judge those they hold in disdain. For example, following Gary Sterling's death sentence in Corsicana, Texas, "one of the 12 jurors who voted to send him to death row freely used the word 'nigger' during a post-trial interview."⁴⁶

And, sadly, even some defense attorneys charged with representing the most marginalized among us harbor racial animosity towards their own clients of color. Curtis Osborne, who was executed by the State of Georgia on June 5, 2008, was represented by a lawyer who did not inform him of a plea offer that would have spared his life⁴⁷ because, in the lawyer's words to another client, "'that little [racial epithet] deserves the death penalty.'"⁴⁸

But while disturbing, stories of explicitly racist attitudes and behaviors by those responsible for operating our justice system are too infrequent to account for the magnitude of the system's racially disparate outcomes. Something else must be at work here. Something less obvious and far more pernicious must cause well-intentioned people to participate in a clearly discriminatory system of justice.

So how does a community of people who believe in the color-blind administration of justice collectively enforce a system that is anything but that? The answer lies in the concept of implicit racial bias (IRB).

II.

IMPLICIT RACIAL BIAS

We all unconsciously harbor attitudes or stereotypes about race that shape the way we understand the world around us. We make decisions based upon that understanding, and act on those decisions, often unaware we have these attitudes. This reflexive way of responding to

45. See Editorial, *Judge Cebull's Racist 'Joke'*, N.Y. TIMES, Mar. 5, 2012, at A26.

46. Timothy K. Lewis, Commentary, *A Black Defendant, a Racist Juror*, L.A. TIMES, May 19, 2005, at B13.

47. William S. Sessions, Op-Ed., *Death Penalty: Osborne Sentence a Stain on Justice*, ATLANTA J.-CONST., June 3, 2008, at A11.

48. Bill Rankin, *Racism 'Infected' Killer's Defense? Inmate's Trial to Be Scrutinized As Lawyers Ask Board to Commute Osborne's Death Sentence*, ATLANTA J.-CONST., May 30, 2008 at D1.

racial stimuli is called IRB.⁴⁹ Social scientists have demonstrated how certain stimuli cause us to subconsciously draw stereotypic associations and how they can affect our decision-making.⁵⁰ In the criminal justice context, it manifests itself as a subconscious association of race—particularly blackness—with criminality, and influences how actors in the criminal justice system behave when confronted with the application of race to decision-making.⁵¹ No matter how weak the association between race and criminality, the decisions that result from that association can have very serious implications.

That we, as a society, are inclined to see African-Americans as subhuman, and therefore more readily endorse cruel and violent treatment towards them, was the subject of a series of studies by a group of respected social psychologists, aimed at gauging the extent to which we view blacks as less human than non-blacks and the consequences for our criminal justice system.⁵² These researchers found “evidence of a bidirectional association between Blacks and apes that can operate beneath conscious awareness yet significantly influence perception and judgments.”⁵³ The studies further established that these associations do not depend on one harboring explicitly racist attitudes, and facilitate a general acceptance of harsher treatment and punishment of Blacks in the criminal justice context.⁵⁴

49. CHERYL STAATS, KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2013 6 (2013), available at http://kirwaninstitute.osu.edu/docs/SOTS-Implicit_Bias.pdf.

50. For an excellent summary of the social science behind IRB, see Justin D. Levinson, Danielle M. Young & Laurie A. Rudman, *Implicit Racial Bias: A Social Science Overview*, in IMPLICIT RACIAL BIAS ACROSS THE LAW 9 (Justin D. Levinson & Robert J. Smith eds., 2012); see also STAATS, *supra* note 49.

51. See Levinson, Young & Rudman, *supra* note 50, at 22; see also ALEXANDER, *supra* note 12, at 103, (citing Betty Watson Burston, Dionne Jones & Pat Robertson-Saunders, *Drug Use and African Americans: Myth Versus Reality*, 40 J. ALCOHOL & DRUG EDUC. 19, 20 (1995)) (describing a 1989 survey in which 95% of participants were asked, “Would you close your eyes for a second, envision a drug user, and describe that person to me?” pictured a black drug user); STAATS, *supra* note 49, at 36–45 (discussing studies that measure the association between race and criminality in the criminal justice context).

52. Jennifer L. Eberhardt, Phillip Atiba Goff, Matthew Christian Jackson & Melissa J. Williams, *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292 (2008).

53. *Id.* at 304.

54. *Id.*; see also Nick Haslam, *Dehumanization: An Integrative Review*, 10 PERSONALITY & SOC. PSYCHOL. REV. 252, 252 (2006) (arguing that “the denial of full humanness to others, and the cruelty and suffering that accompany it, is an all-too-familiar phenomenon,” and that it is most frequently considered in the context of race and ethnicity).

IRB affects us all regardless of whether we believe ourselves to be free of racial biases,⁵⁵ have positive associations with members of other races,⁵⁶ or are members of a minority group, including African American.⁵⁷ Scholars have more recently turned their attention to the effects of IRB on criminal justice professionals, giving us additional insight into how its influence drives the racial disparities discussed above. They have studied its impact on police, prosecutors, jurors, and judges, concluding that implicit biases drive each of these players to behave in ways that work to create racial disparities in the justice system.⁵⁸ Each step of the criminal justice system will be further elaborated to illustrate IRB in practice.

A. Police

Beginning with police, whose decisions determine who will come in contact with the criminal justice system in the first place, IRB works in three ways: who they choose to monitor, how they interpret the behavior of those they scrutinize, and how they react to their conclusions about that behavior.⁵⁹ Initially, IRB drives the increased scrutiny of young African-American males because of a subconscious and automatic association between this group and danger.⁶⁰ These involuntary and “rapid threat reactions towards black men” occurs independent of our conscious attitudes about race.⁶¹ In fact, it affects even the most race conscious among us as demonstrated when the Reverend Jesse Jackson told an audience, “There is nothing more painful to me at this stage in my life than to walk down the street and hear footsteps and start thinking about robbery . . . Then look around and see some-

55. STAATS, *supra* note 49, at 11 (describing the automatic process in which we categorize an individual as “‘either one of us,’ that is a member of our in-group, or different from ourselves, meaning a member of our out-group.” Members of our in-group are favored over those in our out-group, resulting in “in-group bias”).

56. See ALEXANDER *supra* note 12, at 104.

57. See STAATS, *supra* note 49, at 27 (discussing why minorities may favor out-groups); see also ALEXANDER *supra* note 12, at 104.

58. There is a rich field of research that explains how IRB works and how it applies to actors in the criminal justice context. This article is not meant to provide an exhaustive survey of those studies but rather to provide sufficient explanation for how IRB operates in the criminal justice context to allow a meaningful discussion of how defense counsel can play a role in addressing the resulting racial disparities. For a fuller treatment of IRB and its application to the criminal justice system, see IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 50; see also STAATS *supra* note 49.

59. See L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2043–52 (2011).

60. *Id.* at 2044–45.

61. *Id.* at 2044.

one white and feel relieved.”⁶² This unconscious association between blackness and crime can drive policing patterns that target black communities,⁶³ as well as increased and prolonged scrutiny of individuals based on skin-color.

Once an officer focuses on a subject or a group, IRB influences how (s)he interprets observed behavior. Studies show that in a variety of situations, individuals are more likely to interpret ambiguous behavior conducted by blacks as more aggressive or consistent with violent intentions while the same behavior engaged in by whites is more likely seen as harmless.⁶⁴ Furthermore, when faced with a situation in which there is more than one appropriate response, studies suggest IRB can cause subjects to react more forcefully when interacting with blacks than whites.⁶⁵

These studies suggest three points at which IRB can cause police to behave in ways that perpetuate racial injustice. First, the very decision to monitor African-Americans more closely is due to subconscious belief that they pose a greater threat. Second, there is an increased subliminal tendency to associate ambiguous behavior by blacks as criminal. And third, there is a greater propensity to treat black suspects more harshly than their white counterparts, and to more readily exercise their discretion to arrest.⁶⁶

B. Prosecutors

Once arrested, a person's odyssey through the criminal justice system is largely controlled by the discretion exercised by prosecutors. In a thoughtful study of how IRB drives these decisions, Professors Robert Smith and Justin Levinson conclude that “implicit racial attitudes and stereotypes skew prosecutorial decisions in a range of racially biased ways.”⁶⁷ They examine the impact of IRB on

62. Mary A. Johnson, *Crime: New Frontier: Jesse Jackson Calls it Top Civil Rights Issue*, CHI. SUN-TIMES, Nov. 29, 1993, at 4.

63. See ALEXANDER, *supra* note 12, at 120–24.

64. See Richardson, *supra* note 59, at 2046–48.

65. *Id.* at 2049–50.

66. The conclusion that police are more likely to arrest black suspects when there is an option is supported by studies that show that “black boys are disproportionately suspended, expelled, and arrested for behaviors committed in school” even though they do not seem to “commit infractions at greater rates than their white counterparts”. Charles Ogletree, Robert J. Smith & Johanna Wald, *Coloring Punishment: Implicit Social Cognition and Criminal Justice*, in IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 50, at 53 (citing Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 4 (2002)).

67. Smith & Levinson, *supra* note 34, at 797.

prosecutorial discretion at various stages of the process, including charging decisions, pretrial strategy, trial strategy, and post-trial.⁶⁸

With respect to charging decisions, Smith and Levinson conclude that there is little reason to believe prosecutors do not harbor the same racial stereotypes as the rest of us,⁶⁹ and that prosecutors are both more likely to proceed with a prosecution, and to institute more serious charges that carry graver consequences, against an African-American than a similarly situated white defendant.⁷⁰

In the pre-trial stage, IRB probably impacts the bond request the prosecutor deems appropriate for the accused, how the prosecutor evaluates evidence in determining whether it is exculpatory and therefore subject to disclosure to the defense, and what plea offer the prosecutor considers fair under the circumstances. In each of these arenas, the subconscious association between race and criminality almost certainly influences the prosecutor to act less favorably towards black defendants.⁷¹

Once at trial, IRB is likely to explain why “egalitarian-minded prosecutors nonetheless disproportionately strike black jurors.”⁷² It also can cause the prosecutor to use animal imagery in closing argument, oblivious to the way these arguments play on the jury’s unconscious association with blacks as less human and, therefore, less deserving of compassion.⁷³

Finally, Smith and Levinson argue that IRB infects prosecutorial decision-making beyond trial, such as how they might respond to re-

68. While the instant article identifies the stages of the process where IRB can influence prosecutors to exercise discretion in ways that exacerbate systemic racial disparities, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion* provides illustrations of how this occurs at each point. *Id.*

69. *Id.* at 810.

70. *Id.* at 806–13.

71. *Id.* at 813–18.

72. *Id.* at 819 (citing Antony Page, Batson’s *Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005)).

73. *Id.* at 819–20. I am reminded of two trials I had towards the end of my career as a public defender in Washington, DC, both with African-American clients. In one in which my client was accused of sexually assaulting a student at the high school where he worked, the prosecutor argued that my client turned the high school into a jungle in which he acted as the predator. In another, the prosecutor used an analogy in which her large black dog, left alone in a room with dinner on the table, took some food off the table when she was not looking to suggest that in the same way the jury should know my client was guilty despite the fact that no witness saw him commit the crime. I assume neither of these prosecutors intended to suggest the jury should use race as a factor in evaluating the evidence in the case.

quests for post-trial relief or how they develop office-wide policies that impact communities of color.⁷⁴

C. Jurors

As we continue to consider how IRB can cause racial disparities in the criminal justice system, we turn to the role of jurors in driving this phenomenon. Several scholars have contributed to our understanding of the ways that jurors can unconsciously draw conclusions that increase the likelihood that blacks will be convicted relative to similarly situated white defendants. This occurs at three points: when evaluating evidence as it is presented, later remembering facts, and applying this data during the decision-making process.

With respect to the former, research has shown that “even the simplest of racial cues introduced into a trial might automatically and unintentionally evoke racial stereotypes, thus affecting the way jurors evaluate evidence.”⁷⁵ Studies suggest that when confronted with ambiguous facts, jurors process that evidence through a racially biased lens.⁷⁶ As a result, they are more likely to associate ambiguous behavior with evidence of criminality when the defendant is black rather than when he is white.⁷⁷

74. *Id.* at 821–22.

75. Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 309–10 (2010).

76. One scholar suggested several ways implicit racial bias operates to the detriment of black defendants, including:

- It can affect how jurors react to assertions that someone acted in self-defense.
- It can affect assertions that there was excessive force by the police.
- It can affect whether there really is a presumption of innocence.
- It can affect whether the jury believes that remaining silent, which is a defendant’s constitutional right, is an admission of guilt.
- It can even affect how the jury perceives an expert witness who is a person of color.

Ronald J. Tabak, *The Continuing Role of Race in Capital Cases, Notwithstanding President Obama’s Election*, 37 N. KY. L. REV. 243, 256–57 (2010) (internal citations omitted).

77. See Levinson & Young, *supra* note 75 (discussing the tendency of mock jurors to find ambiguous facts about a black suspect as more likely to indicate evidence of guilt than when viewing a lighter skinned suspect); see also Levinson, Young & Rudman, *supra* note 50, at 15 (describing “shooter bias” studies in which participants play a videogame where they are asked to shoot perpetrators (who are holding a gun) but not innocent bystanders (who are unarmed). When confronted with white and black suspects, participants more quickly decided to shoot black perpetrators than white perpetrators and more quickly decided not to shoot white bystanders than black bystanders.).

Research has also shown that, when asked to recall facts, jurors are inclined to misremember information in racially biased ways. One study revealed that when asked to recall facts from a fictional story, mock jurors were significantly more likely to recall the fictional defendant as being aggressive when he was African-American than when he was Caucasian or Hawaiian.⁷⁸

Not only are facts understood by jurors in racially biased ways—either because of how the evidence is evaluated or remembered—but once asked to use these facts to make decisions, jurors again rely on racially tainted filters to do so. In one compelling study, researchers demonstrated that jurors are more likely to associate black defendants with guilt, thereby undermining the power of the presumption of innocence—a bedrock principle of our justice system—for an entire class of defendants.⁷⁹ This suggests that while jurors are expected to consider evidence in light of the presumption of innocence, they are less likely to do so when the defendant is black.

D. Judges

Last, but certainly not least, we consider the influence of IRB over trial judges. Judges play a particularly important role in the criminal justice system as their decisions define the fairness of the process used to adjudicate guilt. While the hallmark of a good judge is impartiality, studies suggest jurists, like other professionals in the system, are susceptible to the implicit biases that promote racial disparity.⁸⁰

Judges, like jurors, are prone to “stereotype-consistent memory errors,” causing them to remember facts through a racially biased filter.⁸¹ This can have an impact on how judges set bail,⁸² rule on fact-determinative pretrial motions and trial objections, assess guilt when they are the trier of fact, decide how to instruct during jury trials,⁸³ and determine the appropriate sentence in a given case.

78. Levinson, *supra* note 40, at 345–50.

79. Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 189–90 (2010).

80. Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009).

81. Levinson, *supra* note 40, at 381.

82. See Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987 (1994).

83. The instructions a judge decides to give can also have the effect of triggering racial stereotypes in jurors. See Levinson & Young, *supra* note 75, at 343.

III.

A STRATEGY FOR THE DEFENDER IN A RACIALLY
UNJUST SYSTEMA. *The Defender's Role as Reformer: Cause-Lawyering Meets
Client-Centered Representation*

Before we go on to consider strategies for the defense attorney to combat the disparate racial impact fostered by the effects of IRB discussed above, it is worth addressing whether this is the appropriate role of defense counsel. While many defense attorneys choose their career based, in part, on a deep commitment to justice—including racial justice—they are duty bound to pursue this end through the representation of individual clients. Yet, they must be careful to not allow the client to merely become a vessel for achieving an independent goal. Criminal defense lawyers owe a duty of fidelity to one individual; the client.⁸⁴ To use the client as a vehicle to promote the lawyer's own agenda diminishes the lawyer's role in giving respect and voice to the client, who frequently does not otherwise have access to the system.

There is a body of scholarship that considers the potential tension between what is coined "cause-lawyering" and a more traditional model of unwavering fidelity to the goals of the individual client.⁸⁵ There is no universally accepted definition of a "cause lawyer," nor is it clear whether the criminal defense lawyer can responsibly serve that role. Arguably, the answer depends on whether the criminal defense lawyer in question is free to choose his or her clients or whether (s)he is a public defender; a lawyer whose clients do not enjoy the luxury of shopping for an advocate. In the former situation, the lawyer can inform the client of his or her intentions and allow the client to choose whether to retain him or her nonetheless. In the latter case, the client will probably not have the option to select another lawyer should (s)he not wish to be part of the lawyer's "cause".

While this discussion could be the topic of a wholly separate article, for purposes of this paper, I rely upon several assumptions without engaging in exhaustive analysis. These assumptions stem from my fi-

84. *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *see also* Jonathan Rapping, *You Can't Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training, and Mentoring*, 3 HARV. L. & POL'Y. REV. 161, 164–65 (2009).

85. *See* M. Chris Fabricant, *Rethinking Criminal Defense Clinics in "Zero-Tolerance Policy" Regimes*, 36 N.Y.U. REV. L. & SOC. CHANGE 351, 379–80 (2012) (discussing the ethical implications between cause-lawyering and client-centered representation).

delity to the concept of client-centered representation and the duty of the lawyer to serve as the representative of the client who does not have the education and experience to advocate for himself in a complex legal system. While once informed, a client may elect to defer to the lawyer, and his or her “cause,” this author takes the position that without permission to do otherwise, the lawyer must respect the client’s decisions.⁸⁶

The first assumption is that the criminal defense lawyer should never pursue a cause through his or her representation of a client that is inconsistent with the goals of the client. This arguably places different obligations on the public defender than it does on the private lawyer whose clients have some choice over who represents them. For example, in an article about the ethics of “cause lawyering,” Professor Margareth Etienne introduces the reader to a prominent criminal defense lawyer who refuses to represent any client who desires to cooperate with the prosecution.⁸⁷ Finding such representation “personally, morally, and ethically offensive, [this lawyer] would no sooner represent a snitch than he would represent ‘Nazis or an Argentine general said to be responsible for 10,000 disappearances.’”⁸⁸ Assuming the lawyer fully informs the client of this, or any other conditions of his service, before the client retains him, the client has the opportunity to decide whether he wishes to hire the lawyer with these limitations. This may be an appropriate exercise of a private lawyer’s prerogative to provide individual representation while simultaneously pursuing a “cause,” since the client gets to decide if he accepts a lawyer with that

86. In a previous article, I noted:

Many scholars, lawyers, and legal clinicians charged with training future lawyers embrace a philosophy that gives the client significant autonomy over the decisions that impact her case. The popularity of this approach stems from a recognition that “most [clients] are in a better position to make case decisions because so many decisions ultimately turn on the values and priorities that the client alone best appreciates.” While deference to a client’s decisions must be preceded by sufficient counsel to ensure that the decisions are informed and that the risks have been appropriately conveyed and considered, “[u]nder this view, the client has the right to make his own choices because it is he who stands to gain or lose the most from decisions made in his case.” This way of thinking comports with the *Strickland* Court’s construction of the defense attorney as assistant to the client.

Rapping, *supra* note 83, at 167–68 (footnotes omitted).

87. Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195 (2005).

88. *Id.* at 1196 (citing Gail D. Cox, *Fighting and Flaunting It: The Criminal Defense Bar’s Best Defense is Barry Tarlow – Just Ask Him*, NAT’L L.J., Apr. 19, 1993, at 28).

particular “cause.” But for the indigent client who does not get to choose his lawyer, but who may wish to consider cooperating with the government, it would be inappropriate for his appointed counsel to deprive him of this option because of the lawyer’s personal beliefs.

Because eighty percent of people accused of crimes rely on the services of a court-appointed lawyer,⁸⁹ if defense counsel is going to have a meaningful impact on the way the system treats people of color, public defenders will be a big part of that effort. There may be times when the public defender has an individual client who will not benefit from systemic awareness of IRB. When representing that client, the lawyer’s desire to promote racial justice by raising awareness of IRB must give way to the goals of the client.⁹⁰ However, because indigent defendants, disproportionately clients of color, so frequently bear the brunt of our system’s racial biases, it will be the rare case where the lawyer’s desire to promote racial justice will conflict with the client’s interests.

In many cases in which the defendant is non-white, a direct strategy of promoting systemic consciousness of IRB will be helpful to the client. However, in addition, there is a less direct benefit to every person accused of a crime from raising the public awareness about our subconscious assumptions about race. To the extent that our collective dehumanization of African-Americans facilitates our promotion and acceptance of a draconian criminal justice system that confronts every person accused of crime, all defendants benefit from a more racially sensitive public. By racializing crime and exploiting a public willingness to accept harsh treatment of a criminal population perceived to be black, politicians have been able to expand the categories of behavior defined as criminal and enact increasingly punitive sentencing schemes.⁹¹ While these forces have certainly been fueled by the association between race and crime, they have harshly impacted everyone accused of crime regardless of race.

89. See BUREAU OF JUSTICE STATISTICS, *Indigent Defendants Systems: Summary Findings*, <http://www.bjs.gov/index.cfm?ty=tp&tid=28> (last updated Oct. 14, 2011).

90. There may be times when the accused derives an advantage from the biases of a judge, juror, or prosecutor, particularly where biases about a victim or witness inure to the defendant’s benefit. As distasteful as those biases may be, it would undermine the primary responsibility of the defender—to zealously and faithfully advocate for the client—to educate the relevant actors about their misguided assumptions. In this situation, the duty of loyalty to the individual client trumps the lawyer’s interest in promoting systemic racial justice. The cause may not interfere with the duty to the client.

91. See Jonathan A. Rapping, *Who’s Guarding the Henhouse? How the American Prosecutor Came to Devour Those He is Sworn to Protect*, 51 WASHBURN L.J. 513, 532–35 (2013).

Tough-on-crime politicians have understood the power of invoking race to drive public fear about crime. In the 1960s, conservative politicians like Barry Goldwater and George Wallace began to exploit the public association between race and crime to oppose politicians with pro civil-rights campaigns.⁹² By the 1980s and 1990s, politicians on both ends of the spectrum sought to benefit from tough on crime stances with more subtle racial messages.⁹³ The result has been a harsher criminal justice system that impacts every client the defender represents, regardless of race.

In short, while defense lawyers owe a duty of allegiance to pursue the client's goals, it will frequently be the case that using strategies to minimize the impact of IRB will be in the client's interest. Even where such a strategy does not clearly benefit a particular client, chipping away at the impact of racial stereotypes serves to benefit all clients, as the result is a fairer and more humane system of justice. While it may be the extraordinary case where undermining the influence of IRB is inconsistent with the client's goals – and, this author would argue that the individual client's goals must prevail – this will be the rare exception. Therefore, to be an effective advocate for our clients, the criminal defense lawyer must be equipped with strategies for addressing IRB.

In the following sections, we examine a three-prong approach for criminal defense lawyers to address the disparate impact of IRB in the criminal justice system: 1) raising our own self-awareness, 2) devising strategies to educate others, and 3) staying inspired to continue pushing forward despite systemic pressures to do otherwise.

B. Self-Awareness

As we consider how we can combat IRB driven racial disparity in the criminal justice system as defense lawyers, we must first ask whether we are affected by it and if so, how we can overcome it within ourselves. As I have discussed above, the literature demonstrates that we all harbor implicit biases, including those of us who hold egalitarian views.⁹⁴ There is no reason to believe that those of us

92. *See id.* at 529.

93. *See id.* at 530.

94. In his compelling essay on the subject, U.S. District Court Judge Mark W. Bennett, a former civil rights lawyer and seasoned federal judge with a “lifelong commitment to egalitarian and anti-discrimination values,” describes how he eagerly took the Implicit Association Test, certain he would “pass.” He did not, motivating him to intensely study IRB, concluding “we unconsciously act on implicit biases even though we abhor them when they come to our attention.” Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias In Jury Selection: The Problems of Judge-Dominated*

who choose criminal defense as a profession are immune to the influences of IRB. In fact, if our biases are shaped by the world around us,⁹⁵ there is every reason to believe that those of us who spend our days immersed in such a racist criminal justice system develop even deeper IRB. This effect is only heightened by the fact that public defenders operate in a world in which they are forced to make quick decisions, with imperfect information, under intense pressure.⁹⁶

In their work examining how IRB influences public defender decision-making about how to allocate their very limited time amongst clients, Professors L. Song Richardson and Phillip Atiba Goff identify three areas in which IRB influences defenders: 1) in their evaluation of evidence, 2) in their interactions with their clients, and 3) in their acceptance of punishments.⁹⁷ At each of these stages of the process, through their subconscious assumptions about their clients, what the evidence against them means, and what consequences are appropriate, defenders can be pushed to accept a lower standard of justice, and to fight a little less aggressively, for their clients of color.

To further clarify this point, artist Frank Wu depicts several pairs of mechanical legs walking past a homeless veteran huddled on the sidewalk in a fetal position in his chillingly insightful piece of artwork entitled “Indifference.” The robots walking past represent us; bombarded on a daily basis with tragedy, we become desensitized to the injustice. Although the symbolism is clear, the message is punctuated with the statement, “When we walk by a homeless person, ignoring him, we lose a little bit of our own humanity.”⁹⁸

Walk into a courtroom anywhere in the country and you can see defense lawyers who have been exposed to repeated injustices for so long that they have become immune to its effect.⁹⁹ Exposure to racial injustice is no different and, as my opening anecdote demonstrates,

Voir Dire, the Failed Promise of Batson, and Proposed Solutions, 4 HARV. L. & POL’Y REV. 149, 149–50 (2010).

95. See Jerry Kang, *Communications Law: Bits of Bias*, in IMPLICIT BIAS ACROSS THE LAW 132–45, 134 (Justin D. Levinson & Robert J. Smith eds., 2012) (“even if nature provides the broad cognitive canvas, nurture paints the detailed pictures – regarding who is inside and outside, what attributes they have, and who counts as friend or foe”).

96. Richardson & Goff, *supra* note 1, at 105–07.

97. *Id.* at 108–115.

98. Frank Wu & Christina Song, *Indifference*, FRANK WU <http://www.frankwu.com/indifference.html> (last visited May 31, 2013).

99. See Jonathan Rapping, *National Crisis, National Neglect: Realizing Justice Through Transformative Change*, 13 U. PA. J. L. & SOC. CHANGE 331, 333–36 (2009–2010) (discussing the “culture of injustice” that occurs when defense attorneys are overworked and under resourced).

working in the vortex of a system that so clearly associates race and criminality can serve to break down our egalitarian beliefs and cause us to more deeply accept the race/crime association narrative.

In her insightful commentary on this issue Professor Andrea Lyon, a long time public defender, discusses her experience with IRB among her defender colleagues in Chicago.¹⁰⁰ She shares the story of a career public defender whom she overheard counseling a young, black client during a first meeting. The lawyer wanted the client to accept a plea that he had worked out. Clearly frustrated with the client's lack of enthusiasm for the deal, the lawyer called him "stupid. . . [a] 'mope' and [an] 'ignorant gangbanger.'"¹⁰¹ He went on to tell his client that "he—the client—could 'do six [years] standing on his head.'"¹⁰² When Professor Lyon, convinced the lawyer would not have talked to a white client in the same way, raised these issues with her colleague, he responded with anger.¹⁰³ When she raised the matter in a supervisors meeting in an effort to get the staff to confront racial attitudes, she was accused of being "overly sensitive."¹⁰⁴

That none of the supervisors in the office were willing to consider such clearly racist behavior, or even see it as racist, speaks volumes about the existence of IRB among defenders. Professor Lyon's anecdotal conclusion is further supported by research suggesting that death penalty lawyers, arguably among the most race-conscious of defenders, share the same racially biased attitudes as the rest of the population.¹⁰⁵ With these lessons in mind, before we can begin to take on IRB across the system, we must address it among our own ranks.

For those of us who strive to be color-blind in our decision-making, perhaps the greatest obstacle to overcoming the powerful influence of IRB is our own lack of awareness of it.¹⁰⁶ For we who spend our careers committed to people who have been victims of systemic injustice, there is a greater risk that we can have a "bias blindspot—the belief that others are biased but that we are not."¹⁰⁷ The fact that

100. Lyon, *supra* note 1.

101. *Id.* at 756–57.

102. *Id.* at 757 (alteration in original).

103. *Id.*

104. *Id.*

105. Eisenberg & Johnson, *supra* note 1, at 1553.

106. See Laurie A. Rudman, *Social Justice in Our Minds, Homes, and Society: The Nature, Causes, and Consequences of Implicit Bias*, 17 SOC. JUSTICE RESEARCH 129, 138 (2004) (arguing that awareness of implicit bias is the first step to eliminating it).

107. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1173–74 (2012).

education is foundational to addressing this issue is supported by psychologists who have made careers out of studying the influences of unconscious biases:

An important first step is making people aware of discrepancies between their conscious ideals and automatic negative responses. By making these non-conscious negative responses conscious, it may be possible to take advantage of the genuinely good intentions of aversive racists to motivate them to gain the experiences they need to unlearn one set of responses and learn the new set that they desire.¹⁰⁸

Therefore, the first steps towards developing a corps of defenders poised to take on the issue of IRB in our criminal justice system is a campaign designed to raise self-awareness. This should include recruiting defenders who are motivated to address racial inequities, training these lawyers to understand the role their own IRB can play in driving disparate outcomes, and building an office culture in which resistance to the pressures that drive IRB is an explicit value.¹⁰⁹ Defenders must understand that they harbor these subconscious biases so that they can combat their influence and overcome the subtle pressures to associate race and criminality. Only then can the defender appreciate the power of IRB, a prerequisite to continuing with a strategy to illuminate the problem for others in the system.

C. *Educating Others*

Once (s)he understands that IRB determines how well-intentioned criminal justice professionals unknowingly behave in ways that drive racially disparate outcomes, and that raising awareness of subconscious bias is the first step in addressing it, the defense lawyer must look for opportunities to educate others in the system about their own unconscious biases. At least for those committed to a color-blind system of justice, understanding the role that IRB plays in their own decision-making will encourage them to work to combat it.¹¹⁰ There-

108. John F. Dovidio, Kerry Kawakami, Craig Johnson, Brenda Johnson & Adaiah Howard, *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510, 535 (1997).

109. Transforming office culture through values-based recruitment, training, and mentoring is at the heart of the indigent defense reform movement being built through Gideon's Promise (formerly The Southern Public Defender Training Center). This model is introduced in Rapping, *supra* note 83. As recognized in the work of Professors Richardson and Goff, what Gideon's Promise is doing through recruitment, training, and transforming office culture is a critical piece of the effort to address IRB among defenders. See Richardson & Goff, *supra* note 1, at 116–117.

110. See Kang et al., *supra* note 107, at 1172–85 (arguing that education is a critical component of a strategy to reduce implicit racial bias in judges and jurors).

fore, defense lawyers should be vigilant about identifying opportunities during the course of litigation to educate others about IRB. Several vehicles exist through which creative defense lawyers can raise the issue of IRB. They are: motions practice, voir dire, use of experts, narrative, jury instructions, and sentencing advocacy. And even if trial courts are reluctant in the short term to allow defense counsel to pursue all of these strategies, through the process of demanding and litigating these requests, counsel can begin to educate the court and raise awareness of this concept.

1. *Motions Practice*

Defense counsel should think about how IRB is relevant to the resolution of motions and seek to introduce evidence of it whenever possible. While the Supreme Court has made it difficult to raise the issue of race in the litigation of criminal procedure,¹¹¹ IRB studies may provide a new avenue through which to do so. This is because how criminal justice professionals evaluate and remember facts necessary to determining the outcome of such motions—two factors influenced by IRB—will always be relevant. One illustration is defense challenges to the legality of searches and seizures.

Despite the intention of the drafters of the Constitution to ensure that a neutral magistrate determines when governmental interference with personal liberty is reasonable,¹¹² Supreme Court jurisprudence has given the police powerful tools that expand their ability to conduct searches and seizures under the Fourth Amendment. Most arrests today are justified by a police officer's determination of probable cause

111. See Robin W. Sterling, *Raising Race*, THE CHAMPION, Apr. 2011, at 24, 25 (arguing that “[t]he legal standard for proving impermissible invidious racial discrimination is hopelessly tied to overt intent at a time when the social opprobrium attached to overt expressions of racial bias is significant.”); See also ALEXANDER, *supra* note 12, at 108 (arguing that in addressing police/citizen contact in the context of the war on drugs, “the [Supreme] Court adopted rules that would maximize – not minimize – the amount of racial discrimination that would likely occur.”). Both Professors Sterling and Alexander provide examples of Supreme Court rulings that had this effect. ALEXANDER, *supra* note 12, at ch. 3 (referencing *Whren v. United States*, 517 U.S. 806, 813 (1996) and *McCleskey v. Kemp*, 481 U.S. 279 (1987) in particular).

112. *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932)

“[T]he informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime.”

Id.

without prior approval by a judicial officer.¹¹³ Through the Search Incident to Arrest doctrine, whenever police arrest an individual, they may search the person, their clothing, and any containers within their reach without any additional justification.¹¹⁴ If the arrestee recently occupied a vehicle, the police may also search the entire passenger compartment including containers within.¹¹⁵ Through the Automobile Exception, if an officer concludes that there is probable cause to believe contraband, or evidence of a crime, may be found in a vehicle, (s)he may search it without a warrant, regardless of whether it is related to an arrest.¹¹⁶ Through the Exigent Circumstance doctrine, police are authorized to conduct a warrantless search when they conclude that, in addition to probable cause to search, there exists an emergency that justifies dispensing with the warrant requirement.¹¹⁷ And, in perhaps the greatest shift of power to police in the attempt to appropriately balance the needs of law enforcement with the liberty interest of the individual. In *Terry v. Ohio* the Court sanctioned searches and seizures—coined “stops” and “frisks”—based on reasonable suspicion, a bar significantly lower than the already permissive probable cause standard.¹¹⁸

The result of this jurisprudence is that there is an incredibly broad universe of behavior in which police may engage without antecedent scrutiny by a neutral arbitrator.¹¹⁹ An officer may monitor a car, waiting for the driver to inevitably violate one of the thousands of minor traffic violations, justifying the arrest of the driver and subsequent search of the vehicle. An officer who has cause to search a home may

113. See *Gerstein v. Pugh*, 420 U.S. 103, 112–13 (1975).

114. *Chimel v. California*, 395 U.S. 752, 762–63 (1969).

115. A broad application of the search incident to arrest doctrine as it applies to automobile searches following the arrest of an occupant was authorized in *New York v. Belton*, 453 U.S. 454, 459–60 (1981). The Court later held in *Thornton v. United States*, 541 U.S. 615 (2004), that the *Belton* rule applied whenever an arrestee was a “recent occupant” of a vehicle. While the Court narrowed the scope of the *Belton* rule in *Arizona v. Gant*, 556 U.S. 332 (2009), to apply only when the arrestee has access to the vehicle at the time of the search or when the officer has reason to believe that evidence of the offense for which the occupant was arrested is in the car, the law still leaves officers wide latitude to search cars incident to the arrest of an occupant.

116. *United States v. Ross*, 456 U.S. 798, 823–24 (1982).

117. *Chambers v. Maroney*, 399 U.S. 42, 51 (1970).

118. *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968).

119. The Supreme Court has repeatedly cautioned against deferring to “the hurried judgment of a law enforcement officer ‘engaged in the often competitive enterprise of ferreting out crime.’” *Illinois v. Krull*, 480 U.S. 340, 351 (1987) (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)). Despite this concern, the exceptions to the warrant requirement have come to swallow the rule. See Phyllis T. Bookspan, *Re-working the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 500–03 (1991).

get around the warrant requirement by knocking and announcing his presence, then listening for sounds consistent with the destruction of evidence, or some other emergency, justifying a warrantless entry. An officer may aggressively enter a “high crime” neighborhood and look for anyone trying to avoid contact with him to justify detaining, and potentially patting down, that individual.

In these situations, the officer evaluates the facts before him or her and determines whether the requisite justification exists to detain and search individuals and their property. The officer’s judgment about how to interpret the facts before him or her necessarily determines whether she or he believes there is cause to act. While an officer’s belief that blacks are more likely to commit crimes is not an appropriate basis to justify a search or seizure of a person, the Court has given the police officer who is motivated by the race of a target broad latitude to act on such race-based motivations. In *Whren v. United States*, the Court held that as long as the facts give rise to an objectively reasonable basis for an officer to conduct a search or seizure, the fact that the officer was in fact motivated by the race of the target may not be considered by a court assessing the legality of the officer’s actions.¹²⁰

Therefore, in the wake of *Whren*, if an officer uses the search and seizure authority granted by the Court to solely target blacks, the defense cannot challenge the police conduct based on the racist motives. According to the Court, the only relevant issue is whether there existed an objective justification for the behavior.¹²¹ Whether that was the actual basis, or the interaction was motivated by the race of the target, is irrelevant. As long as the consciously racist police officer waits to develop an objective basis—of which there are many—to search a citizen of color, (s)he is shielded from having the defense challenge his or her true motivations. In this way, the Supreme Court has precluded defense counsel from attempting to ferret out conscious racism in policing when asking the trial court to evaluate legality under the Fourth Amendment.

But the social science discussed above suggests two ways that IRB may be relevant to a judge’s determination whether a search or seizure was justified, providing an opening to use Fourth Amendment litigation to educate the court about this phenomenon. First, because IRB affects how police evaluate the facts before them, causing them to more likely interpret ambiguous behavior as consistent with criminal

120. *Whren v. United States*, 517 U.S. 806, 813 (1996).

121. *Id.*

involvement where the target is black, a trial court should consider this influence when evaluating whether justification for the conduct in question actually exists. Second, because IRB affects how we later remember facts, causing us to more likely misremember them in ways consistent with criminality when relating to blacks, trial courts should consider this influence when determining how much credit to give an officer's testimony regarding his memory of facts used to justify the conduct in question.

Raising these issues allows the defense lawyer to avoid the hurdle raised in *Whren*. Unlike in that case, the defense is not suggesting that despite objective facts justifying the conduct, the court should find the officer's conduct unreasonable because it was motivated by an improper motive. Rather, the defense is arguing that the influence of IRB undermines the objective basis claimed by the officer, both by improperly skewing how (s)he evaluated the facts on the scene and how (s)he recollects them at the hearing on the motion to suppress.

For example, when determining whether there is a reasonable basis to stop and frisk a suspect, the officer is entitled to make reasonable inferences from the facts in light of his experience.¹²² But, he may not base his conclusions on biases about the association of race and crime. Therefore, a court should ensure that an officer's conclusions were reasonable (i.e. unbiased) inferences based on experience rather than based on unconscious assumptions of criminality based on the skin color of the target. Likewise, the court's findings will be based on the officer's recollection of the facts that gave rise to the conduct in question. The court should similarly guard against those recollections being tainted by impermissible bias. In order to do this, the judge must understand how implicit racial bias works. Therefore, it is relevant to introduce evidence of implicit racial bias among police officers in the context of this hearing.

Defense counsel should consider asking the court to hear expert testimony about the impact that IRB has on a police officer's evaluation of facts at the moment of decision-making and on his or her recollection of facts at a subsequent hearing. If the court is reluctant to consider expert testimony without knowing whether the particular officer is influenced by IRB, defense counsel might consider requesting that the officer either be evaluated by the expert or submit to testing

122. *Terry v. Ohio*, 392 U.S. at 27. Police may also rely on experience when interpreting facts to determine whether probable cause exists. See *Ornelas v. United States*, 517 U.S. 690, 700 (1996) ("In a similar vein, our cases have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists.").

designed to answer this question.¹²³ And while many courts will be reluctant to devote much time or resources to considering the effect of IRB on an investigating officer, through the filing, and arguing of these pleadings the judge and prosecutor will begin to become educated on this issue.

Finally, while I use Fourth Amendment litigation as an example of an area where defense counsel may begin to press this issue, because it influences decisions in a variety of contexts, defenders should look for openings to raise IRB broadly in their motions practice.

2. *Voir Dire*

While defense counsel can begin to educate judges and prosecutors about IRB through a thoughtful pretrial motions practice, there will be other opportunities throughout the trial as well. The next will be during voir dire. The value to addressing IRB through voir dire is that it not only continues to educate judges and prosecutors, but it is the first time counsel can begin to blunt the impact IRB will have on the jury; the group of citizens ultimately responsible for rendering the most important decision in the case. Through voir dire we can both begin to educate potential jurors about the impact of IRB, and so influence how they respond to triggers, and to identify future jurors who will more likely consider the role IRB may play in their own decision-making.

Before we go on to discuss these two strategies, it is important to note that I am not suggesting that through voir dire we can change people's deeply held beliefs. People are influenced by a strong value system that is the product of a lifetime of experience. It is folly to believe that we can tell jurors to set those beliefs aside and they will be capable of abandoning them throughout the trial. It is also important to recognize that if asked by the judge if they can set aside a deeply held belief, especially where they believe the socially acceptable answer is "yes," many will claim the ability to do so.¹²⁴ This may be because they are averse to giving what they see as a socially unacceptable response to such an authority figure,¹²⁵ or it may be that be-

123. Evaluative tests might include the Implicit Association Test (IAT), the most common measure of social cognition, or "shooter bias" evaluative video games. Both are discussed in Levinson, Young & Rudman, *supra* note 50, at 15–19.

124. See Bennett, *supra* note 93, at 160 (citing Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 LAW & HUM. BEHAV. 131 (1987)).

125. See Jones, *supra* note 124, at 132.

cause they are unaware of the power of their subconscious biases, they honestly believe in their ability to do so.

I embrace the view that the most effective approach to voir dire is to use it to identify jurors' immutable belief systems and then to select (or de-select) jurors based on whether their belief systems are consistent with your theory of the case.¹²⁶ However, what the IRB social science tells us is that there are times when we act inconsistently with our own belief systems because of unconscious biases that cut against the values we embrace. There is an important distinction between the "explicit racist" (i.e. the person who consciously believes, for example, in the association between black skin and criminality), and the "implicit racist" (i.e. the person who believes themselves to be egalitarian but subconsciously is influenced by societal pressures associating race and crime). The former may respond "yes," to the question, "can you disregard the race of a person when making important decisions about them." (S)he knows (s)he will not disregard race, but understands that this is a value that we aspire to in our system of justice and is unwilling to publicly denounce it. That this juror provided a socially acceptable response, even when coupled with an instruction by the judge to be "fair" or to "disregard race," should not necessarily mean that (s)he can set aside his or her deep beliefs about race. We must identify these jurors and keep them from judging our case. On the other hand, the implicit racist, unaware of the role race plays in their decision-making, wants to make decisions free of racial considerations. If educated, this person might be able to understand that there are pressures that may cause him or her to act inconsistently with his or her values about race, and if warned that such pressures may crop up during trial, is more likely to be motivated to guard against those pressures and resist the pull of IRB. In the context of how each may contribute to racial disparity in the criminal justice system, what distinguishes these two groups is that the former holds racist beliefs that consciously drives their decisions while the latter is influenced by subconscious biases that may undermine their desire to promote racial justice.¹²⁷

126. See Ira Mickenberg, *Voir Dire and Jury Selection*, NORTH CAROLINA DEFENDER TRIAL SCHOOL 5–7 available at <http://www.ncids.org/Defender%20Training/2011DefenderTrialSchool/VoirDire.pdf> (last visited Sept. 12, 2013).

127. For purposes of this section I use the word "beliefs" to mean a set of assumptions and views about the world that the juror is conscious of, and that help shape his or her value system that guides how (s)he thinks and acts, regardless of whether (s)he is comfortable admitting it publicly. This is distinguished from implicit biases that the juror is unaware of, and which may be contrary to the values the juror espouses and believes shape his or her decision-making.

As we consider how to use voir dire to combat IRB we must have two goals in mind. First we want to identify potential jurors who harbor racist beliefs, as opposed to those with egalitarian views subconsciously tainted by societal pressures, and get rid of those jurors. Next we want to educate the latter group about IRB and the racial pressures that may exist in our case in order to raise their awareness and combat the likelihood that they will succumb to those pressures. While ideally, there would be a third group—those who are unaffected by subconscious racial attitudes—the social science discussed in this article suggests this group probably does not exist.

Therefore, identifying the latter group and developing strategies to mitigate the impact of IRB must be a goal in jury selection. I recommend that we start by educating the venire about IRB, a concept that will be foreign to most, if not all. Follow up questioning can then focus on two areas: 1) gauging jurors' reactions and receptiveness to the concept of IRB and 2) exploring jurors' relevant belief systems.

i. Educating the Venire

Counsel should begin by considering ways to educate the entire jury panel about the concept of IRB. This may be done by having jurors examine their own IRB, by requesting judicial instruction, and through attorney conducted voir dire. None of these three approaches is mutually exclusive.

Counsel might begin by considering whether to request that the entire venire submit to the Implicit Association Test (IAT),¹²⁸ the most common evaluative instrument designed to indicate the presence of implicit bias in an individual, as “research has indicated that the process of taking the IAT and seeing the results can help address implicit bias.”¹²⁹ By requesting that the court use the IAT as an educational tool,¹³⁰ he or she can begin the process of raising juror

128. For a discussion of the IAT, see Levinson, Young & Rudman, *supra* note 50, at 16–21.

129. Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 873 n.346 (2012) (quoting Reshma M. Saujani, “The Implicit Association Test”: A Measure of Unconscious Racism in Legislative Decision-Making, 8 MICH. J. RACE & L. 395, 409–10 (2003) (“Studies show that the IAT test-taker’s prejudices can actually be reduced once an individual is confronted with his unconscious prejudices . . . Once individuals take the IAT and get their results, they can then stop and ask whether thoughtless adherence to racial stereotypes is affecting their decisions. If so, decision-makers can take remedial measures to prevent or diminish unconscious use of race-specific criteria.”)).

130. Some scholarship has cautioned against using the IAT as a “screening” device to weed out jurors, as it is not a proven predictor of juror behavior. See Kang et al., *supra* note 107, at 1179–80; Roberts, *supra* note 129, at 854–57. But see Levinson,

awareness. This request might well be denied because of its perceived impact on efficiency, the logistical challenges associated with it, and judicial resistance to any significant change to the traditional way of doing things. However, the process of making this request would serve to further educate the court, as it would probably come in the form of a pre-trial motion supported by information about IRB and the potentially destructive role it plays in the fair administration of justice.

A second consideration which should be met with much less resistance is to request that the court explain IRB to the jury and instruct the venire on the influence it has over all of us and the risk it poses to the jury's ability to reach a verdict based solely on appropriate considerations. Federal Judge Mark W. Bennett includes a discussion of IRB in a PowerPoint presentation to the venire before he allows the attorneys to begin questioning.¹³¹ A request for such an explanation from the court would likewise serve to educate the judge because it would be supported by an explanation of the social science.

A third option is for the lawyer to inform the venire about IRB during voir dire.¹³² While this may be less effective than an instruction from the court, which may carry a greater air of neutrality, it is certainly preferable to abandoning attempts to inform the jury. In the following sub-section we will see how, through further voir dire, the lawyer can follow up on these attempts to educate the jury to get a better sense of how receptive individual jurors are to the concept of IRB.

Young & Rudman, *supra* note 50, at 20–21 (noting “the predictive validity of the IAT generally, particularly when it is employed in socially sensitive domains such as race.”). However, even if not a proven predictor of future behavior, there is value in having jurors take the IAT as it can reveal that a person harbors implicit biases. By educating jurors about their own biases, this strategy can help them guard against succumbing to IRB in the future. In this way, merely taking the IRB into account can serve a debiasing function. It can also help lawyers exercise peremptory challenges by providing relevant—if not predictive—information. Questioning designed to learn relevant information about jurors during voir dire need not be proven to be predictive, and in fact almost never will be. Relevant questioning that is not proven predictive is the coin of the realm in jury selection. The IAT is at least as useful in making informed decisions during jury selection. The alternative is to exercise peremptory strikes based on stereotypes, a troubling aspect of jury selection, which lawyers engage in regularly.

131. Bennett, *supra* note 93, at 169.

132. If the lawyer is concerned that the court will preclude such voir dire, this again provides an opportunity to file a motion requesting permission to do so that lays out the applicable social science.

ii. Identifying Educable Jurors

Once defense counsel has educated the venire about IRB, voir dire provides an opportunity to identify racially conscious jurors who appreciate its influence and the role it may play on their own decision-making. By exploring jurors' own attitudes about race, their receptiveness to the idea that subconscious biases may influence them, and their willingness to be introspective and self-critical, the lawyer can begin to identify jurors who are better equipped to overcome IRB during trial.

In order to do this it is critical that the lawyer be allowed to engage in attorney-conducted voir dire.¹³³ This is important for two reasons. First, lawyers are more likely to elicit candid responses, as jurors are apt to provide "socially desirable" responses to judges regardless of their truth.¹³⁴ Second, defense counsel, who knows the case better than the judge, is in a superior position to consider how IRB may affect the outcome, to craft questions to reveal juror biases, and to evaluate responses to those questions.¹³⁵

Voir dire designed to identify jurors who have the capacity to overcome the influence of IRB should fall into two categories: 1) questioning that builds off attempts to raise awareness of IRB, designed to learn the extent to which jurors appreciate its influence, and 2) a more general examination of jurors' life experiences that help reveal relevant attitudes and belief systems.

a. Questioning about IRB

Once the jury panel has been successfully informed about IRB using one or more of the approaches above, the lawyer must try to learn whether they are receptive to, or critical of, the concept. Keeping in mind that jurors are reluctant to provide answers that they believe are socially unacceptable,¹³⁶ in order to increase the chances that ju-

133. See Jones, *supra* note 125, at 144 (suggesting jurors are more comfortable with lawyers than judges and are therefore more likely to candidly disclose personal information to the former); Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 222 (2001) (suggesting that attorney-conducted voir dire facilitates the introduction of racial issues and promotes the expression of jurors' racial bias). See generally, Bennett, *supra* note 93, at 159–61 (arguing that "judge-dominated voir dire allows jurors with undetected and undeterred implicit biases to decide cases").

134. See Bennett, *supra* note 93, at 160.

135. *Id.*

136. While the pressure to provide a socially acceptable response is greatest when the answer is invited by the judge, the desire to appear to hold conventional opinions will exist even when the question comes from a lawyer.

rors will provide forthcoming answers, counsel should give them “permission” to provide an answer that might otherwise be considered unpopular. By “normalizing” a contrary response,¹³⁷ the lawyer can make jurors feel more comfortable providing it. Attorney questioning is critical in this regard as many judges instinctually attempt to rehabilitate jurors.¹³⁸ Afraid of eliciting responses that will disqualify a juror or, even worse, taint the panel, judges tend to ask questions that minimize potential problems and stifle honest discussion. Judges’ questions are frequently leading and suggest the way the question should be answered. An example of how a judge might follow up an antecedent attempt to educate the venire is:

You have all just heard how we are all impacted by implicit, or subconscious, biases. In this case, where the accused is African-American, we are particularly concerned about subconscious biases that may cause you to unfairly evaluate the evidence due to the accused’s race. Will each of you be able to guard against such biases and do your best to treat Mr. Client fairly?

This question invites the jurors to give the obviously socially acceptable response, “yes.” Providing any other response is made even more difficult by the fact that the judge is the questioner, clearly wanting an affirmative answer.¹³⁹

A more effective approach would be for the lawyer to ask something like:

You have just learned about the concept of IRB. Not everyone agrees on the power of its influence or that they are personally susceptible to it. I’d like to get a sense of your reaction to the concept of subconscious racial bias and whether you are open to believing it may influence you in your day-to-day decision-making. Let me start by asking for your reaction to learning about the idea of implicit, or subconscious, racial bias.

137. See Mickenberg, *supra* note 126, at 14. Ira Mickenberg informed me that he got the idea of “normalizing” from Ann Roan, the Training Director for the Colorado Public Defender system. The concept is a component of the highly touted “Colorado Method” of jury selection.

138. See Caroline B. Crocker & Margaret B. Kovera, *The Effects of Rehabilitative Voir Dire on Juror Bias and Decision Making*, 34 J.L. & HUM. BEHAV. 212 (2010) (finding that many judges attempt to rehabilitate jurors to address juror bias).

139. Lawyers should never ask questions like “Can you be fair?” This question is worse than meaningless in that it causes the juror to perceive what (s)he is “expected” to say and creates an additional hurdle to learning his or her true opinions and assumptions. Judges frequently ask these questions to either rehabilitate a juror who has exposed a bias or to insulate a juror from being subject to a strike for cause. Counsel might consider requesting the judge not ask this or similar questions through a motion in limine.

The lawyer may then ask jurors to share their thoughts, using the responses to draw in other jurors, or may call on individual jurors. But the point is that by giving the jury permission to question this concept, and by asking the question in an open-ended manner, the lawyer is more likely to generate a thoughtful and candid discussion of this topic. Once a juror expresses skepticism, the lawyer can further invite skeptical responses by validating the response in a non-judgmental way. For example, the lawyer might say, “I appreciate your candor and thank you for sharing this view . . . it is certainly not an uncommon reaction to first learning about IRB . . . do others share Juror Number X’s skepticism?”

While questioning aimed at exploring which jurors are most receptive to the concept of IRB both generally, and as it may affect them personally, could take many forms, it is critical to learn which jurors will be educable throughout the trial.¹⁴⁰ It is equally important to ferret out those resistant to the concept of IRB who may be less motivated to consider how it impacts them. The lawyer who runs from the bad response cannot make informed decisions on how to exercise challenges, and is destined to have the “wrong” jurors deciding the case.¹⁴¹ The same is true when looking for IRB skeptics. The lawyer should work to identify those skeptics, and not hide from their responses.

b. Exploring Juror’s Relevant Experiences

While a line of questioning that builds on antecedent efforts to educate the jury about IRB—and explores jurors’ receptiveness to the concept—will be an important component of our strategy, the lawyer also wants to mine for attitudes and belief systems that are relevant to the jurors’ ability to overcome the influence of subconscious racial bias.

Obviously, the lawyer will want to explore jurors’ beliefs about race in general. But (s)he should also look for attitudes that make it more likely that a juror will consciously guard against the influence of IRB. Research that focuses on “de-biasing,” or strategies to combat implicit biases, point to a couple factors defense counsel might con-

140. Because being motivated to achieve egalitarian outcomes impacts the extent to which a person will seek to control expressions of prejudice, it is important to consider motivation in determining who will most likely overcome IRB. *See* STAATS, *supra* note 49, at 17. Therefore ferretting out potential jurors who lack such motivation can frustrate efforts to address IRB.

141. Ira Mickenberg, borrowing from the incredibly successful Colorado Method of jury selection, refers to this as “Running to the Bummer.” *See* Mickenberg, *supra* note 126, at 14.

sider in formulating voir dire questions. One is the fact that people with egalitarian motivations are more likely to be conscious of bias pressures and, therefore, better able to counteract them.¹⁴² Another is that people with positive associations with members of an “out-group,” or group that engenders implicit biases, will be better prepared to guard against those subconscious biases.¹⁴³ This is especially true where exposure includes out-group members who contradict common stereotypes,¹⁴⁴ and where exposure involves working with members of the out-group to achieve common goals.¹⁴⁵

As we develop lines of questioning to help us identify jurors that will be best equipped to overcome IRB, we should consider that people often aspire to act in ways that do not perfectly match how they have behaved in the past. “The best predictor of what a person will do in the future is not what they say they will do, but what they have done in the past in analogous situations.”¹⁴⁶ Therefore, we want to develop questions that explore how potential jurors have behaved in past analogous situations.

To learn about racial assumptions, rather than asking:

- “How do you feel about racism?” or
- “Do you believe it is ever appropriate to judge someone based on their skin color?”

the lawyer might ask:

- Describe your most significant interaction(s) with a member of another race.

This forces the jurors to discuss how they actually responded in a relevant situation as opposed to allowing them to describe how they hope they would act.¹⁴⁷ A technique that can prove useful in eliciting experiential responses is to broaden the question to include friends, family, or others. For example, perhaps the lawyer would ask:

- Describe a particularly impactful interaction that you or someone close to you had with a member of another race.

142. See STAATS, *supra* note 49, at 60–61 (suggesting research shows “fostering egalitarian motivations can counteract the activation of automatic stereotypes.”).

143. *Id.* at 56–58.

144. *Id.* at 56.

145. *Id.* at 58.

146. Mickenberg, *supra* note 126, at 6.

147. In addition to allowing the lawyer to learn about racial beliefs, questions about race can also have a de-biasing effect. Studies show that jurors will more readily guard against IRB when they are made aware of the fact that race plays a salient role in the case. Introducing race in voir dire by asking about racial beliefs can play this role. See Sommers & Ellsworth, *supra* note 133, at 222.

This formulation of the question may be preferred in order to: “a) [g]ive the juror the chance to relate an experience that had an effect on their perceptions but may not have directly happened to them [, or] b) [t]o give the juror the chance to relate an experience that happened to them but to avoid embarrassment by attributing it to someone else.”¹⁴⁸

Additional questions that explore associations with members of out-groups to determine if they are motivated by egalitarian values might inquire into the best or worst experience the juror has had with a member of another race or may ask about who the juror most admires and why.

In order to gauge jurors’ willingness to be introspective and self-evaluative, the lawyer might ask the juror to describe a prejudice that they have about others, a time that they relied on a stereotype, or a time that they made an assumption about another person that turned out to be wrong. Obviously, with follow up questioning, and techniques to pull other jurors into the discussion, these and other lines of questioning can begin to help the lawyer understand past experiences that are relevant to the issues raised in this section. Although of course jurors may not always be willing to be forthcoming in such situations, it is still worth exploring this approach since many may well provide useful information.

Voir dire is a particularly difficult phase of the trial, but it can serve as a critical piece of a larger strategy to address the effect of IRB at trial. To summarize, the lawyer can use carefully crafted voir dire questions to identify those jurors who harbor attitudes and beliefs that will make it hard for them to overcome the influence of IRB, either because they are explicit racists; they are unreceptive to the concept of IRB; they are reluctant to admit that they may rely on stereotypes personally; or they struggle to be introspective and self-evaluative. One goal is to select egalitarian-minded jurors who are open to the concept of IRB and willing to believe it may influence their decision-making. A second goal is to begin the process of educating the jurors who will ultimately decide the case about IRB and promoting those motivators to act in accordance with their egalitarian ideals. While this process begins during voir dire, defense counsel should consider other opportunities throughout trial to continue this process, including the use of experts, storytelling/narrative, and jury instructions.

148. Mickenberg, *supra* note 126, at 10.

iii. Educating Jurors During Trial

Although we have begun to educate jurors about IRB during voir dire, efforts must be made to continue to remind jurors of the tendency for subtle pressures to influence how they view the association between race and crime. Expert testimony, use of narrative, and jury instructions provide three vehicles through which to do so.

a. Use of Expert Testimony

Perhaps the most obvious way to educate jurors about scientific principles that are not commonly known to the layperson is through the use of expert witnesses. Social scientists have increasingly been used in courtrooms to explain what studies tell us about human behavior when that behavior is both relevant to an issue in the case and not commonly understood by the layperson.¹⁴⁹ The expert can convey important information about how people behave under certain circumstances that jurors might otherwise not appreciate. This is particularly true in the case of IRB, to which many jurors may be resistant. Expert testimony can help jurors understand the relationship between explicit and implicit bias and reinforce an understanding that implicit biases “do not necessarily align with individuals’ openly-held beliefs or even reflect stances one would explicitly endorse.”¹⁵⁰

An expert can also better educate the jury about the power that motivation can play in controlling our subconscious biases.¹⁵¹ Thereby jurors can better understand that by consciously working to make decisions consistent with their egalitarian ideals, they can help overcome the influence of IRB.

Another important principle for jurors is the effect that “time pressures” and “cognitive busyness” can play in driving our subconscious biases.¹⁵² During deliberations jurors may become anxious, feeling pressure to come to an agreement as the deliberative process becomes lengthy. Attention spans can become short and jurors may get distracted. Loss of focus and pressure to speed up the process may facilitate stereotypic thinking. Expert testimony can help remind jurors to be patient and focused when evaluating the evidence in the case, particularly the type of ambiguous evidence that is subject to being evaluated through a biased lens.

149. See John Monahan & Laurens Walker, *Twenty-Five Years of Social Science in Law*, 35 LAW & HUM. BEHAV. 72 (2011).

150. STAATS, *supra* note 49, at 14.

151. *Id.* at 17.

152. *Id.* at 18–19.

Because this is a relatively new area of psychology that involves behavior of which, by definition, people are unaware, expert testimony can help jurors understand the role of IRB in decision-making and guard against its distorting effects. While judges maintain considerable discretion over the admission of expert testimony given the gatekeeping function they serve under *Daubert*,¹⁵³ “[e]xpert opinion regarding how implicit bias can operate as a motivating factor that could result in a discriminatory decision appears to readily pass muster.”¹⁵⁴ Certainly some judges will initially refuse to allow such testimony, as judges can be resistant to new practices. However, an important side benefit is that through the process of litigating the issue, defense counsel will help to educate the judge about IRB.

b. Storytelling/Crafting Narratives

Another mechanism through which the lawyer can blunt the impact of IRB is through the narratives we tell during opening and closing statements. In an article that examines how capital defense lawyers can make use of narrative during the sentencing phase of trial to mitigate the impact of IRB, Professor Pamela A. Wilkins discusses several ways that jurors’ application of racial stereotypes may be inhibited through narrative.¹⁵⁵ Three, in particular, are relevant to our discussion.

Wilkins discusses how we tend to harbor subconscious schemas, or stereotypes, that shape how we view others,¹⁵⁶ and considers strategies for blunting the impact of the racial schema jurors hold about black men and crime.¹⁵⁷

One of the strategies she discusses involves understanding that “more than one schema applies to most persons.”¹⁵⁸ As an example, she uses a female, Asian, mechanic and points out that there are different schemas for females, Asians, and mechanics.¹⁵⁹ Research suggests that by getting jurors to focus on one schema (say, the mechanic), we can “inhibit the activation of stereotypes associated with another cate-

153. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589, 597 (2003).

154. David L. Faigman et al., *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389, 1431 (2008).

155. Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors’ Implicit Racial Biases*, 115 W. VA. L. REV. 305 (2012).

156. *Id.* at 320.

157. *Id.* at 330–33.

158. *Id.* at 331.

159. *Id.*

gory.”¹⁶⁰ This suggests that by developing a narrative that promotes the client as a devoted husband, a loving father, a committed son, or a dedicated employee, we can potentially help to suppress the more pernicious racial stereotype.

A second strategy is to “prime”¹⁶¹ jurors with, or provoke their subconscious thinking about, “ideals of fairness and equality” in order to “suppress . . . racial and other stereotypes.”¹⁶² This strategy is based on research that suggests “‘that it is possible to counter stereotypes at the same preconscious level at which they are activated.’”¹⁶³ Therefore, by reminding jurors during closing argument of our nation’s highest ideals, the role of the jury in promoting justice, and the important principles of law that protect each of us as individuals against a far more powerful government, we may be able to counteract some of the influence of IRB.¹⁶⁴

A third strategy is to expose the jury to members of the group (in this case African-Americans) who clearly do not conform to the stereotype of the group.¹⁶⁵ Research suggests that this may inhibit activation or reduce implicit biases.¹⁶⁶ Therefore, opportunities to weave characters into the defense narrative who defy the stereotypes the de-

160. *Id.* (quoting Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1253 (2002)).

161. *Id.* at 332. “[P]riming is . . . the act of being exposed to a stimulus that influences how an individual later responds to a different stimulus. Often used in experimental settings, priming methods typically feature a subliminal initial prime that influences or increases the sensitivity of the respondent’s later judgments or behaviors.” STAATS, *supra* note 49, at 24.

162. Wilkins, *supra* note 154, at 332.

163. *Id.* (quoting Blasi, *supra* note 159, at 1254).

164. Based on my experience as a trial lawyer and public defender trainer, I recommend waiting for closing argument to begin discussing legal principles like presumption of innocence, burden of proof, and standard of proof (beyond a reasonable doubt) designed to ensure fairness and protect the individual against the state. While these are important principles to ensure the jury understands, as they give a significant advantage to the accused, discussing them during opening statements carries a grave risk. During opening statements the jury is presented with two competing narratives and will likely select one through which it will process the evidence in the case. The defense wants the jury to embrace its narrative. A discussion of the law can be heard by jurors as the defense saying, “my client may be guilty but they can’t prove it.” This is far less risky during closing when the jury has already heard the evidence and processed it through the framework constructed during opening. While the social science suggests that there can be a benefit to “priming” the jury with ideals of fairness and equality, if the lawyer decides to do so during opening statements, (s)he should make sure it is not unintentionally undermining his or her confidence in the defense theory. There are strategies at closing for weaving these important principals into the narrative the defense builds throughout trial without undermining counsel’s confidence in his or her position, but that is beyond the scope of this article.

165. Wilkins, *supra* note 154, at 332.

166. *Id.*

fense seeks to suppress, and playing those individuals up in the narrative may have a positive impact.

These strategies should help guide the creation of the narrative and stories we develop in crafting our opening and closing statements, as these can be powerful tools in the effort to de-bias the jury.

c. Jury Instructions

A final vehicle to educate the jury about, and raise awareness of, implicit racial bias is through the use of jury instructions. Defense counsel should consider proposing a set of instructions to the judge to address this phenomenon. Above, we discussed requesting that the judge begin jury selection with a discussion of IRB. Regardless of success in this endeavor, lawyers should also consider requesting an instruction at the beginning of trial and again when final instructions are read.

After discussing IRB during voir dire, federal Judge Mark W. Bennett, a leading scholar on implicit bias in the courtroom, asks jurors to take a pledge upon the completion of jury selection.¹⁶⁷ As part of the pledge, jurors must “pledge . . . not to decide this case based on biases. This includes gut feelings, prejudices, stereotypes, personal likes or dislikes, sympathies or generalizations.”¹⁶⁸

Judge Bennett also gives the following instruction to the jury before opening statements:

Do not decide this case based on “implicit biases.” As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is “implicit biases,” that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making every important decision in this case, I strongly encourage you to evaluate the evidence carefully and resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of the evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.¹⁶⁹

167. Kang et al., *supra* note 107, at 1182.

168. *Id.*

169. *Id.* at 1182–83.

Considering some of the social science discussed in this article, Judge Bennett's instruction is potentially effective for a number of reasons. It continues the process of awareness-raising that he started during the voir dire process. It appeals to the jurors' sense of fairness, which could serve to inhibit IRB. It motivates jurors to live up to their egalitarian ideals. And it urges thoughtful, unhurried deliberation, which can help jurors avoid the "cognitive busyness" that fosters stereotyping. A similar instruction should be requested at the end of the case.

iv. Sentencing Advocacy

Thus far we have considered how to educate judges and jurors about IRB through motions practice, jury selection, and trial. However, the vast majority of people who end up convicted and sentenced in our criminal justice system will never have a trial.¹⁷⁰ In these cases, counsel will not have the opportunity to educate the judge about the influence IRB may have on him or her, an important consideration in light of evidence of racially disparate sentencing practices. And even in those cases where there is a trial, and defense counsel is able to employ one or more of the above strategies, it will be helpful to engage in awareness-raising in the judge specifically. For the judge may embrace the general concept of IRB, and agree that it influences police officers and jurors, but believe that (s)he is immune from its effects. Studies show that judges, who believe themselves to be objective, are in fact more susceptible to biases.¹⁷¹ And, although counsel must be delicate in how (s)he does it, judges must be reminded that they are "human and fallible, notwithstanding their status, their education, and the robe."¹⁷²

Sentencing advocacy provides an ideal opportunity for the lawyer to educate the judge about the impact IRB can have on him or her, as the lawyer will often have freer rein to discuss relevant social science, sentencing statistics, and the appropriate goals of sentencing, which include promoting important societal values including racial justice. Unlike the previous strategies discussed, where the lawyer hoped to educate the judge by introducing IRB in the context of how it applies to others in the system, at sentencing, defense counsel can point out how subconscious bias can affect how judges sentence.

170. Today, more than ninety-five percent of all cases are resolved through guilty pleas. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 7 (2011).

171. Kang et al., *supra* note 107, at 1173.

172. *Id.*

It should come as no surprise that judges are highly susceptible to succumbing to subtle pressures to stereotype. They spend their days in a criminal justice system that is overburdened and under-resourced, and they see it as their responsibility to ensure that a high volume of cases are processed efficiently through broken systems. The time pressures and “cognitive busyness,” discussed above, that drive subconscious stereotyping are a regular feature of a trial judge’s routine. If our criminal justice system is defined by a culture that dehumanizes those accused of crimes,¹⁷³ judges live in this culture. This culture is part of what journalist Amy Bach describes as the “Ordinary Injustice” that has come to define our criminal justice system. It is a system in which professionals, including judges, “become[] so accustomed to a pattern of lapses that they can no longer see their role in them.”¹⁷⁴

Given their immersion in a criminal justice system so influenced by race, it is understandable that even judges who view themselves as egalitarian are influenced by IRB.¹⁷⁵ But, just as judges are susceptible to IRB, so too can they suppress its influence when they are made aware of it and become motivated to do so.¹⁷⁶ Sentencing advocacy provides an excellent opportunity to do this.

As a first step, through both written and oral advocacy, lawyers should consider how to effectively educate judges about IRB and its demonstrated impact on even egalitarian-minded judges. This can be done through sentencing memoranda that discuss the social science and its impact on trial judges.¹⁷⁷

A second step might be to lay out the statistics that demonstrate the extent to which race accounts for sentencing disparity in our criminal justice system.¹⁷⁸ Ideally, counsel would be able to compile statistics about sentencing patterns of the particular judge, or the relevant jurisdiction.

173. See Rapping, *supra* note 90, at 561 (2012) (discussing how the criminal justice system drives prosecutors to dehumanize those accused of crimes).

174. AMY BACH, *ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT* 2 (2009); see also Rapping, *supra* note 99, at 339 (discussing a criminal justice culture in which injustice is accepted by everyone, including judges).

175. See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1221 (2009) (summarizing a study that used IAT scores of participating judges to conclude that judges do in fact harbor implicit bias about race).

176. *Id.*

177. See *id.* at 1225–26 (suggesting control of implicit bias in the courtroom requires taking action and raising awareness of IRB for judges who lack time to address it on their own).

178. See Kang, et al., *supra* note 107, at 1148–52.

Finally, using some of the narrative strategies addressed above, defense counsel might discuss the client in the context of a schema distinct from race (father, son, dedicated employee, coach, deacon, volunteer, good neighbor, etc.) and appeal to the judge's role in promoting fairness in our criminal justice system. In particular, as racial justice is an important American ideal, one goal of sentencing should be to send a message to the community that our court system is color-blind. Therefore, countering systemic sentencing disparity on a case-by-case basis is an appropriate sentencing goal.¹⁷⁹

D. A Lone Light in the Darkness

After laying out a host of strategies that defense counsel might use to blunt the force of IRB, thereby addressing a leading contributor to racial disparity in the criminal justice system, I hope it is not defeating to say that the likelihood of short-term improvement is slim. Unfortunately, many judges will not embrace IRB as a widespread phenomenon that warrants their intervention. Others may appreciate the power of IRB, but are nevertheless resistant to altering the way they have always done things. Even for the lawyer who has success with these strategies, racism in the criminal justice system is so entrenched that any progress will be incremental. Educating people in the system about their implicit biases and hoping they will be motivated to address them is a long term strategy, and only one part of a badly needed, comprehensive solution. Once one becomes conscious of the racial injustice in the system, continuing to toil in a patently unfair system can cause the most committed lawyer to question whether he or she is making a difference. Some may even come to believe that by participating in such a corrupt system they are effectively enabling racism.

Michelle Alexander convincingly argues that “mass incarceration in the United States . . . [is] a stunningly comprehensive and well-designed system of racialized social control that functions in a manner

179. In fact, counsel should always be sensitive to the potential for a judge to be defensive about the perceived accusation that they may be less than fair, even if subconsciously. Counsel should know the judge and craft the argument accordingly. For some judges, an argument about systemic shortcomings, that take the focus off the individual judge, will be much better received. In this instance the lawyer might consider packaging the message as follows: “While we are not suggesting that this court would allow prejudice or stereotyping to affect its sentence in this case, promoting the color blind administration of justice and correcting for systemic racial disparity is an appropriate sentencing consideration. For that reason we ask the court to consider the social science and statistics provided.”

strikingly similar to Jim Crow.”¹⁸⁰ If so, should conscientious defense counsel play any role other than trying to dismantle it? Politically conscious lawyers have always debated whether there is a role for them to play within a patently unjust system.¹⁸¹

In her article examining the role of conscientious lawyers in unjust systems, Professor Alexandra Lahav suggests five possible responses: 1) organized boycott, 2) individual refusal, 3) working to transform the system from within, 4) making a record for a higher tribunal, and 5) appealing to public opinion.¹⁸² She then provides thoughtful critiques of each strategy. The degree to which an individual lawyer embraces each will probably depend on the extent to which they see themselves as a “cause lawyer,” committed to pursuing a larger political agenda, or a “client-centered lawyer,” committed to helping individual clients achieve their goals on a case-by-case basis. Defense lawyers can fall on a wide range of points along the “cause lawyer” to “client-centered lawyer” spectrum. As argued above, I believe the public defender is duty-bound to reside at one end of the spectrum, suppressing the desire to pursue all personal causes that are inconsistent with the lawful goals of the individual client.

For the client-centered lawyer, the organized boycott approach is obviously problematic as it requires the lawyer to abandon the individual clients to whom (s)he is responsible, leaving them to fend for themselves and almost certainly experiencing worse outcomes individually.¹⁸³ As Professor Lahav points out, it is also impractical in that it requires widespread participation by members of the Bar, a group with heterogeneous political views.¹⁸⁴

Individual refusal is a practical solution for the lawyer who is unwilling to participate in a racially unjust system, but it will not lead to systemic reform as there will be other lawyers to handle the cases.

180. ALEXANDER, *supra* note 12, at 4.

181. See e.g., Mary Cheh, *Should Lawyers Participate in Rigged Systems? The Case of the Military Commissions*, 1 J. NAT’L SECURITY L. & POL’Y 375 (2005) (considering whether lawyers should participate in unjust military tribunals); Alexandra D. Lahav, *Portraits of Resistance: Lawyer Responses to Unjust Proceedings*, 57 UCLA L. REV. 725 (2012) (considering the appropriate reaction of lawyers to unjust tribunals).

182. Lahav, *supra* note 180, at 755–70.

183. In theory, the client-centered lawyer could engage in a boycott if, after being fully informed of the larger strategy including all of the costs and benefits to them personally, each client agreed to have his or her lawyer participate in the boycott. While theoretically possible, such an idea is impractical as many clients will be far more concerned with their fate in the case at hand than in sacrificing their own interests to attempt to combat systemic racial injustice.

184. Lahav, *supra* note 180, at 756.

While it is certainly understandable that some lawyers will decide not to participate in a racially unjust system, there will remain a large population of accused individuals whose fate will depend on the quality of their counsel. Given that there will always be lawyers available who have come to acquiesce to the existing system, and who will not push for racially just outcomes, the reform movement cannot afford to have all socially conscious lawyers refuse to participate. This result would be tantamount to an acceptance of the status quo.¹⁸⁵

This leaves the final three responses, which are not mutually exclusive. Working within the system requires pushing for change on a case-by-case basis. At times, the lawyer will be able to obtain a successful result for an individual client at trial. At other times, through his or her trial advocacy, (s)he will build a record that might lead to an appellate victory that changes the legal landscape for future clients. And finally, through his or her participation in the system, the lawyer will find opportunities to educate the public about the gap between our ideals and the reality of our broken system of justice.

But, undoubtedly, progress for the lawyer who chooses to work within the system is incremental. It involves “taking advantage of the possibilities for justice wherever they can be found [and looking for] [s]mall victories in the courtroom [that] may open the door for more substantial changes.”¹⁸⁶

Some argue that “unjust legal regimes can only be resisted extralegally.”¹⁸⁷ There is certainly an important role for lawyers to play from outside the system, such as pushing reform efforts to address racially disparate police practices, the over-criminalization phenomenon,¹⁸⁸ and mandatory minimum sentencing, which, drive racially disparate mass incarceration.

But while these worthwhile campaigns are underway, there will still be human beings processed through the system whose lives may well be destroyed. A conscientious lawyer who represents individuals in this system will not dismantle the system single-handedly. (S)he will not be able to wrestle justice from an unjust system for every client. And while the lawyer committed to representing individuals in an unjust system will enjoy success, the victories can be overshadowed by the sheer volume of injustice (s)he will witness daily. Most clients will fall victim to the unjust system. (S)he will often feel re-

185. *See id.* at 762.

186. *Id.* at 764.

187. *Id.* at 765.

188. For an excellent discussion of the over-criminalization phenomenon, see Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005).

sponsible. Unfortunately, it is the lawyers who are most conscious of injustice who will internalize the defeats the most. Thus, ironically, the unjust system will most threaten to drive away the warriors who are most valuable to the struggle.

Perhaps the greatest obstacle to the lawyer's ability to remain in the system and push for change is the depressing view that any progress short of the elimination of all racial disparity is failure. To fight this defeatist attitude and survive in the system, the lawyer will need to redefine success and calibrate it to the reality of the existing criminal justice system, rather than focusing on an unattainable ideal.¹⁸⁹ In his seminal essay introducing the concept of "Racial Realism," Professor Derrick Bell cautions warriors for racial justice to abandon the notion that there will ever be true racial equality and instead to steel themselves to fight against an inherently unjust system.

While implementing Racial Realism we must simultaneously acknowledge that our actions are not likely to lead to transcendent change and, despite our best efforts, may be of more help to the system we despise than to the victims of that system we are trying to help. Nevertheless, our realization, and the dedication based on that realization, can lead to policy positions and campaigns that are less likely to worsen conditions for those we are trying to help, and will be more likely to remind those in power that there are imaginative, unabashed risk-takers who refuse to be trammelled upon. Yet confrontation with our oppressors is not our sole reason for engaging in Racial Realism. Continued struggle can bring about unexpected benefits and gains that in themselves justify continued endeavor. The fight in itself has meaning and should give us hope for the future.¹⁹⁰

At Gideon's Promise, an organization I founded in 2007, we train and support public defenders to work in some the most dysfunctional criminal justice systems in the country. It is through our training that these lawyers learn what their clients deserve in an advocate and just how far they will come from being able to fulfill those obligations in light of resource and caseload pressures. Once aware of this gap between aspiration and reality, we teach these young warriors strategies for narrowing that gap; for incrementally moving towards the ideal. But at this point the work has just begun. We next provide these lawyers the support they will need as they confront the fact daily that they cannot live up to this ideal for most clients and that many are falling

189. See Jonathan Rapping, *Redefining Success As a Public Defender: A Rallying Cry for Those Most Committed to Gideon's Promise*, THE CHAMPION, June 2012, at 30.

190. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 378 (1992).

through the cracks on their watch. We encourage them to understand that there is value in moving the ball forward, even if only slightly. We remind them that there is victory in refusing to give into the status quo, where every pressure pushes the lawyer to abandon his and her passion and ideals. We inspire these lawyers to see victory in the fact that they may be the lone person reminding the system of its most important values. If victory is complete justice, they will never win. But if victory is always promoting justice where it is otherwise forgotten, they can begin to advance the cause.

Bell ends his article with a story that makes this point.

The year was 1964. It was a quiet, heat-hushed evening in Harmony, a small, black community near the Mississippi Delta. Some Harmony residents, in the face of increasing white hostility, were organizing to ensure implementation of a court order mandating desegregation of their schools the next September. Walking with Mrs. Biona MacDonald, one of the organizers, up a dusty, unpaved road toward her modest home, I asked where she found the courage to continue working for civil rights in the face of intimidation that included her son losing his job in town, the local bank trying to foreclose on her mortgage, and shots fired through her living room window. "Derrick," she said slowly, seriously, "I am an old woman. I lives to harass white folks."¹⁹¹

He then explains how this anecdote explains racial realism and the role it can play in combatting injustice:

Mrs. MacDonald did not say she risked everything because she hoped or expected to win out over the whites who, as she well knew, held all the economic and political power, and the guns as well. Rather, she recognized that—powerless as she was—she had and intended to use courage and determination as weapons "to harass white folks." Her fight, in itself, gave her strength and empowerment in a society that relentlessly attempted to wear her down. Mrs. MacDonald did not even hint that her harassment would topple whites' well-entrenched power. Rather, her goal was defiance and its harassing effect was more potent precisely because she placed herself in confrontation with her oppressors with full knowledge of their power and willingness to use it.

Mrs. MacDonald avoided discouragement and defeat because at the point that she determined to resist her oppression, she was trium-

191. *Id.*

phant. Nothing the all-powerful whites could do to her would diminish her triumph.¹⁹²

CONCLUSION

America is a country that has struggled mightily to overcome a troubling history of racism. Arguably, there is no institution in this country that provides a greater measure of our racial progress than our criminal justice system; for it is there that we decide matters of life and liberty. If we cannot make these critical decisions without regard to skin color, it is difficult to claim that we have conquered our racist legacy. Yet sadly, perhaps no feature of our criminal justice system defines it more than its racially disparate outcomes. That this can be true even as Americans come to accept more explicitly egalitarian views only speaks to the complexity of the problem and the power of the implicit racial biases we have been studying. For aspiring to promote color-blind outcomes is only the beginning. If we are to minimize racially disparate criminal justice outcomes, we must work to overcome the subconscious biases that drive them. While the defense lawyer owes allegiance to the individual client, and must not lose sight of this critical role, in the battle to eradicate racism in the system, defense lawyers can also play a pivotal role.

The first thing defense lawyers must do is become aware of their own implicit biases so that they may guard against them. As the personal anecdote at the beginning of the article reveals, systemic pres-

192. *Id.* at 379. This story reminds me of one of my favorite parables that I use as part of a presentation I do for public defenders on their capacity to transform broken systems:

One of the Just Men came to Sodom, determined to save its inhabitants from sin and punishment. Night and day he walked the streets and markets protesting against greed and theft, falsehood and indifference. In the beginning, people listened and smiled ironically. Then they stopped listening; he no longer even amused them. The killers went on killing, the wise kept silent, as if there were no Just Man in their midst.

One day a child, moved by compassion for the unfortunate teacher, approached him with these words: "Poor stranger, you shout, you scream, don't you see that it is hopeless?"

"Yes, I see," answered the Just Man.

"Then why do you go on?"

"I'll tell you why. In the beginning, I thought I could change man. Today, I know I cannot. If I still shout today, if I still scream, it is to prevent man from ultimately changing me."

ELIE WIESEL, *ONE GENERATION AFTER*, 72 (Lily Edelman & Elie Wiesel trans., 1st prtg. 1970).

sures can drive any of us to accept negative assumptions about race if we are not consciously guarding against them. The conscientious defense lawyer can then use many tools in his or her advocacy toolkit to begin to educate judges, jurors, and prosecutors about this phenomenon, as self-awareness is a first step towards combatting implicit biases. But, perhaps most importantly, the defender must recognize the intractable nature of the problem and avoid becoming discouraged and accepting the status quo. Progress will be incremental and there is value in resistance, even when the results are not obvious. For arguably nothing ensures that racist outcomes will persist more than when those charged with representing the accused stop pushing back against the forces of injustice.