



THE NEW JIM CROW by Michelle Alexander

CHAPTER 3

The Color of Justice

Imagine you are Erma Faye Stewart, a thirty-year-old, single African American mother of two who was arrested as part of a drug sweep in Hearne, Texas.¹ All but one of the people arrested were African American. You are innocent. After a week in jail, you have no one to care for your two small children and are eager to get home. Your court-appointed attorney urges you to plead guilty to a drug distribution charge, saying the prosecutor has offered probation. You refuse, steadfastly proclaiming your innocence.

BOOK
EXCERPT

Finally, after almost a month in jail, you decide to plead guilty so you can return home to your children. Unwilling to risk a trial and years of imprisonment, you are sentenced to ten years probation and ordered to pay \$1,000 in fines, as well as court and probation costs. You are also now branded a drug felon. You are no longer eligible for food stamps; you may be discriminated against in employment; you cannot vote for at least twelve years; and you are about to be evicted from public housing. Once homeless, your children will be taken from you and put in foster care.

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

Now place yourself in the shoes of Clifford Runoalds, another African American victim of the Hearne drug bust.² You returned home to Bryan, Texas, to attend the funeral of your eighteen-month-old daughter. Before the funeral services begin, the police show up and handcuff you. You beg the officers to let you take one last look at your daughter before she is buried. The police refuse. You are told by prosecutors that you are needed to testify against one of the defendants in a recent drug bust. You deny witnessing any drug transaction; you don't know what they are talking about. Because of your refusal to cooperate, you are indicted on felony charges. After a month of being held in jail, the charges against you are dropped. You are technically free, but as a result of your arrest and period of incarceration, you lose your job, your apartment, your furniture, and your car. Not to mention the chance to say good-bye to your baby girl.

This is the War on Drugs. The brutal stories described above are not isolated incidents, nor are the racial identities of Erma Faye Stewart and Clifford Runoalds random or accidental. In every state across our nation, African Americans—particularly in the poorest neighborhoods—are subjected to tactics and practices that would result in public outrage and

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scandal if committed in middle-class white neighborhoods. In the drug war, the enemy is racially defined.

Although the majority of illegal drug users and dealers nationwide are white, three-fourths of all people imprisoned for drug offenses have been black or Latino.³

The notion that whites comprise the vast majority of drug users and dealers—and may well be more likely than other racial groups to commit drug crimes—may seem implausible to some, given the media imagery we are fed on a daily basis and the racial composition of our prisons and jails. Upon reflection, however, the prevalence of white drug crime—including drug dealing—should not be surprising. After all, where do whites get their illegal drugs? Do they all drive to the ghetto to purchase them from somebody standing on a street corner? No. Studies consistently indicate that drug markets like American society generally, reflect our nation's racial and socioeconomic boundaries. Whites tend to sell to whites; blacks to blacks.⁴ University students tend to sell to each other.⁵ Nevertheless, black men have been admitted to state prison on drug charges at a rate that is more than thirteen times higher than white men.⁶ The racial bias inherent in the drug war is a major reason that 1 in every 14 black men was behind bars in 2006, compared with 1 in 106 white men.⁷ For young black men, the statistics are even worse. One in 9 black men between the ages of twenty and thirty-five was behind bars in 2006, and far more were under some form of penal control—such as probation or parole.⁸ These gross racial disparities simply cannot be explained by rates of illegal drug activity among African Americans.

[D]efenders of mass incarceration ... point to violent crime rates in the African American community as a justification for the staggering number of black men who find themselves behind bars.

The uncomfortable reality is that arrests and convictions for drug offenses—not violent crime—have propelled mass incarceration.

The idea that the criminal justice system discriminates in such a terrific fashion when few people openly express or endorse racial discrimination may seem far-fetched, if not absurd. How could the War on Drugs operate in a discriminatory manner, on such a large scale, when hardly anyone advocates or engages in explicit race discrimination?

Rather easily, it turns out. The process occurs in two stages. The first step is to grant law enforcement officials extraordinary discretion regarding whom to stop, search, arrest, and charge for drug offenses, thus ensuring that conscious and unconscious racial beliefs and stereotypes will be given free rein. Then, the damning step: Demand that anyone who wants to challenge racial bias in the system offer, in advance, clear proof that the racial disparities are the product of intentional racial discrimination—i.e., the work of a bigot. This evidence will almost never be available in the era of colorblindness, because everyone knows—but does not say—that the enemy in the War on Drugs can be identified by race.

Picking and Choosing—The Role of Discretion

... Drug-law enforcement is *unlike* most other types of law enforcement. When a violent

crime or a robbery or a trespass occurs, someone usually calls the police. There is a clear victim and perpetrator. But with drug crime, neither the purchaser of the drugs nor the seller has any incentive to contact law enforcement. It is consensual activity. Equally important, it is popular. In fact, in any given year, more than one in ten Americans violate drug laws. But due to resource constraints (and the politics of the drug war), only a small fraction are arrested, convicted, and incarcerated.

It is impossible for law enforcement to identify and arrest every drug criminal. Strategic choices must be made about whom to target and what tactics to employ. Police and prosecutors did not declare the War on Drugs—and some initially opposed it—but once the financial incentives for waging the war became too attractive to ignore, law enforcement agencies had to ask themselves, if we're going to wage this war, where should it be fought and who should be taken prisoner?

That question was not difficult to answer, given the political and social context. [T]he Reagan administration launched a media campaign a few years after the drug war was announced in an effort to publicize horror stories involving black crack users and crack dealers in ghetto communities. Although crack cocaine had not yet hit the streets when the War on Drugs was declared in 1982, its appearance a few years later created the perfect opportunity for the Reagan administration to build support for its new war.

Jimmie Reeves and Richard Campbell show in their research how the media imagery surrounding cocaine changed as the practice of smoking cocaine came to be associated with poor blacks.⁹ Early in the 1980s, the typical cocaine-related story focused on white recreational users who snorted the drug in its powder form. These stories generally relied on news sources associated with the drug treatment industry, such as rehabilitation clinics, and emphasized the possibility of recovery. By 1985, however, as the War on Drugs moved into high gear, this frame was supplanted by a new “siege paradigm,” in which transgressors were poor, nonwhite users and dealers of crack cocaine. Law enforcement officials assumed the role of drug “experts,” emphasizing the need for law and order responses—a crackdown on those associated with the drug.

A survey was conducted in 1995 asking the following question: “Would you close your eyes for a second, envision a drug user, and describe that person to me?” Ninety-five percent of respondents pictured a black drug user, while only 5 percent imagined other racial groups.¹⁰ These results contrast sharply with the reality of drug crime in America. African Americans constituted only 15 percent of current drug users in 1995, and they constitute roughly the same percentage today. Whites constituted the vast majority of drug users then (and now), but almost no one pictured a white person when asked to imagine what a drug user looks like. The same group of respondents also perceived the typical drug trafficker as black.

There is no reason to believe that the survey results would have been any different if police officers or prosecutors—rather than the general public—had been the respondents. Law enforcement officials, no less than the rest of us, have been exposed to the racially charged political rhetoric and media imagery associated with the drug war. In fact, for nearly three decades, news stories regarding virtually *all* street crime have disproportionately featured African American

offenders. One study suggests that the standard crime news “script” is so prevalent and so thoroughly racialized that viewers imagine a black perpetrator even when none exists. In that study, 60 percent of viewers who saw a story with no image falsely recalled seeing one, and 70 percent of those viewers believed the perpetrator to be African American.¹¹

Decades of cognitive bias research demonstrates that both unconscious and conscious biases lead to discriminatory actions, even when an individual does not want to discriminate.¹²

[T]he fact that you may honestly believe that you are not biased against African Americans, and that you may even have black friends or relatives, does not mean that you are free from unconscious bias. Implicit bias tests may still show that you hold negative attitudes and stereotypes about blacks, even though you do not believe you do and do not want to.¹³ [S]tudies indicate that people become increasingly harsh when an alleged criminal is darker and more “stereotypically black”; they are more lenient when the accused is lighter and appears more stereotypically white. This is true of jurors as well as law enforcement officers.¹⁴

The risk that African Americans would be unfairly targeted should have been of special concern to the U.S. Supreme Court—the one branch of government charged with the responsibility of protecting “discrete and insular minorities” from the excesses of majoritarian democracy, and guaranteeing constitutional rights for groups deemed unpopular or subject to prejudice.¹⁵ Yet when the time came for the Supreme Court to devise the legal rules that would govern the War on Drugs, the Court adopted rules that would *maximize*—not minimize—the amount of racial discrimination that would likely occur.

As we shall see below, the Supreme Court has made it virtually impossible to challenge racial bias in the criminal justice system under the Fourteenth Amendment, and it has barred litigation of such claims under federal civil rights laws as well.

Closing the Courthouse Doors—*McCleskey v. Kemp*

First, consider sentencing. In 1987, when media hysteria regarding black drug crime was at fever pitch and the evening news was saturated with images of black criminals shackled in courtrooms, the Supreme Court ruled in *McCleskey v. Kemp* that racial bias in sentencing, even if shown through credible statistical evidence, could not be challenged under the Fourteenth Amendment in the absence of clear evidence of conscious, discriminatory intent.

Warren McCleskey was a black man facing the death penalty for killing a white police officer during an armed robbery in Georgia. Represented by the NAACP Legal Defense and Education Fund, McCleskey challenged his death sentence on the grounds that Georgia’s death penalty scheme was infected with racial bias and thus violated the Fourteenth and Eighth Amendments. In support of his claim, he offered an exhaustive study of more than two thousand murder cases in Georgia.¹⁶

[E]ven after accounting for thirty-five nonracial variables, the researchers found that defendants charged with killing white victims were 4.3 times more likely to receive a death sentence than defendants charged with killing blacks. Black defendants, like McCleskey, who killed white victims had the highest chance of being sentenced to death in Georgia.¹⁷

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

By a one-vote margin, the Court rejected McCleskey's claims under the Fourteenth Amendment, insisting that unless McCleskey could prove that the prosecutor in his particular case had sought the death penalty because of race or that the jury had imposed it for racial reasons, the statistical evidence of race discrimination in Georgia's death penalty system did not prove unequal treatment under the law.

There is good reason to believe that, despite appearances, the *McCleskey* decision was not really about the death penalty at all; rather, the Court's opinion was driven by a desire to immunize the entire criminal justice system from claims of racial bias.

Cracked Up—Discriminatory Sentencing in the War on Drugs

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

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

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

Judge Clyde Cahill of the Federal District of Missouri, an African American judge assigned Clary's case, boldly challenged the prevailing view that courts are powerless to address forms of race discrimination that are not overtly hostile. “The 100-to-1 ratio, coupled with mandatory minimum sentencing provided by federal statute, has created a situation that

reeks with inhumanity and injustice. ... If young white males were being incarcerated at the same rate as young black males, the statute would have been amended long ago.” Judge Cahill sentenced Clary as if the drug he had carried home had been powder cocaine. The sentence imposed was four years in prison. Clary served his term and was released.

The prosecution appealed Clary’s case to the Eighth Circuit Court of Appeals, which reversed Judge Cahill in a unanimous opinion, finding that the case was not even close. In the court’s view, there was no credible evidence that the crack penalties were motivated by any conscious racial bigotry, as required by *McCleskey v. Kemp*. The court remanded the case back to the district court for resentencing. Clary—now married and a father—was ordered back to prison to complete his ten-year term.¹⁸

Charging Ahead

[[N]o one has more power in the criminal justice system than prosecutors. The prosecutor is free to dismiss a case for any reason or no reason at all, regardless of the strength of the evidence. The prosecutor is also free to file more charges against a defendant than can realistically be proven in court, so long as probable cause arguably exists. Whether a good plea deal is offered to a defendant is entirely up to the prosecutor. And if the mood strikes, the prosecutor can transfer drug defendants to the federal system, where the penalties are far more severe. Juveniles, for their part, can be transferred to adult court, where they can be sent to adult prison.

The most comprehensive studies of racial bias in the exercise of prosecutorial and judicial discretion involve the treatment of juveniles. These studies have shown that youth of color are more likely to be arrested, detained, formally charged, transferred to adult court, and confined to secure residential facilities than their white counterparts.¹⁹ African American youth account for 16 percent of all youth, 28 percent of all juvenile arrests, 35 percent of the youth waived to adult criminal court, and 58 percent of youth admitted to state adult prison.²⁰ A major reason for these disparities is unconscious and conscious racial biases infecting decision making.

Prosecutors are well aware that the exercise of their discretion is unchecked, provided no explicitly racist remarks are made, as it is next to impossible for defendants to prove racial bias. It is difficult to imagine a system better designed to ensure that racial biases and stereotypes are given free rein—while at the same time appearing on the surface to be color-blind—than the one devised by the U.S. Supreme Court.

In Defense of the All-White Jury

The rules governing jury selection provide yet another illustration of the Court’s complete abdication of its responsibility to guarantee racial minorities equal treatment under the law. In 1985, in *Batson v. Kentucky*, the Court held that the Fourteenth Amendment prohibits prosecutors from discriminating on the basis of race when selecting juries, a ruling hailed as an important safeguard against all-white juries locking up African Americans based on racial biases and stereotypes.

Notwithstanding *Batson's* formal prohibition on race discrimination in jury selection, the Supreme Court and lower federal courts have tolerated all but the most egregious examples of racial bias in jury selection.

Both prosecutors and defense attorneys are permitted to strike “peremptorily” jurors they don’t like—that is, people they believe will not respond favorably to the evidence or witnesses they intend to present at trial. Lawyers typically have little information about potential jurors, so their decisions to strike individual jurors tend to be based on nothing more than stereotypes, prejudices, and hunches. Achieving an all-white jury, or nearly all-white jury, is easy in most jurisdictions, because relatively few racial minorities are included in the jury pool. Potential jurors are typically called for service based on the list of registered voters or Department of Motor Vehicle lists—sources that contain disproportionately fewer people of color, because people of color are significantly less likely to own cars or register to vote. Making matters worse, thirty-one states and the federal government subscribe to the practice of lifetime felon exclusion from juries. *As a result, about 30 percent of black men are automatically banned from jury service for life.*²¹ The practice of systematically excluding black jurors has not been halted by *Batson*; the only thing that has changed is that prosecutors must come up with a race-neutral excuse for the strikes—an exceedingly easy task.

Courts accept explanations that jurors are too young, too old, too conservative, too liberal, too comfortable, or too uncomfortable. Clothing is also a favorite reason; jurors have been stricken for wearing hats or sunglasses. Even explanations that might correlate with race, such as lack of education, unemployment, poverty, being single, living in the same neighborhood as the defendant, or prior involvement with the criminal justice system—have all been accepted as perfectly good, non-pretextual excuses for striking African Americans from juries.

Hollow Hope

The purpose of our Constitution—especially the Fourteenth Amendment’s equal-protection guarantee—is to protect minority rights even when, or especially when, they are unpopular. So shouldn’t African American defendants be able to file a successful lawsuit demanding an end to these discriminatory practices or challenge their drug arrests on the grounds that these law enforcement practices are unlawfully tainted by race? The answer is yes, they should, but no, they probably can’t.

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

dirt, had urinated and defecated, and had suffered permanent damage to his larynx.”²² The officers issued a traffic ticket for the burned-out taillight and released him.

Lyons sued the City of Los Angeles for violation of his constitutional rights and sought, as a remedy, a ban against future use of the chokeholds. By the time his case reached the Supreme Court, sixteen people had been killed by police use of the chokehold, twelve of them black men. The Supreme Court dismissed the case, however, ruling that Lyons lacked “standing” to seek an injunction against the deadly practice.

In order to have standing Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either (1) that all police officers in Los Angeles always choke any citizen with whom they have an encounter, whether for the purpose of arrest, issuing a citation or for questioning, or (2) that the City ordered or authorized the police to act in such a manner.²³

The Court’s ruling in *Lyons* makes it extremely difficult to challenge systemic race discrimination in law enforcement and obtain meaningful policy reform

Race as a Factor

Police departments and highway patrol agencies frequently declare, “We do not engage in racial profiling,” even though their officers routinely use race as a factor when making decisions regarding whom to stop and search. The justification for the implicit doublespeak—“we do not racial-profile; we just stop people based on race”—can be explained in part by the Supreme Court’s jurisprudence. [T]he Supreme Court has authorized the police to use race as a factor when making decisions regarding whom to stop and search, [and] police departments believe that racial profiling exists only when race is the *sole* factor. Thus, if race is one factor but not the only factor, then it doesn’t really count as a factor at all.

The problem is that although race is rarely the sole reason for a stop or search, it is frequently a *determinative* reason. Similarly situated people inevitably are treated differently when police are granted permission to rely on racial stereotypes when making discretionary decisions.

[T]he sole-factor test ignores the ways in which seemingly race-neutral factors—such as location—operate in a highly discriminatory fashion. Subjecting people to stops and searches because they live in “high crime” ghettos cannot be said to be truly race-neutral, given that the ghetto itself was constructed to contain and control groups of people defined by race.²⁴ Even seemingly race-neutral factors such as “prior criminal history” are not truly race-neutral. A black kid arrested twice for possession of marijuana may be no more of a repeat offender than a white frat boy who regularly smokes pot in his dorm room. But because of his race and his confinement to a racially segregated ghetto, the black kid has a criminal record, while the white frat boy, because of his race and relative privilege, does not. Thus, when prosecutors throw the book at black repeat offenders or when police stalk ex-offenders and subject them to regular frisks and searches on the grounds that it makes sense to “watch criminals closely,” they are often exacerbating racial disparities created by the discretionary decision to wage the War on Drugs almost exclusively in poor communities of color.

Studies of racial profiling have shown that police do, in fact, exercise their discretion regarding whom to stop and search in the drug war in a highly discriminatory manner.²⁵

In New Jersey, the data showed that only 15 percent of all drivers on the New Jersey Turnpike were racial minorities, yet 42 percent of all stops and 73 percent of all arrests were of black motorists—despite the fact that blacks and whites violated traffic laws at almost exactly the same rate. A subsequent study conducted by the attorney general of New Jersey found that searches on the turnpike were even more discriminatory than the initial stops—77 percent of all consent searches were of minorities.²⁶

What most surprised many analysts was that ... whites were actually *more likely* than people of color to be carrying illegal drugs or contraband in their vehicles. In fact, in New Jersey, whites were almost twice as likely to be found with illegal drugs or contraband as African Americans, and five times as likely to be found with contraband as Latinos.²⁷ Although whites were more likely to be guilty of carrying drugs, they were far less likely to be viewed as suspicious, resulting in relatively few stops, searches, and arrests of whites.

Pedestrian stops, too, have been the subject of study and controversy. The New York Police Department released statistics in February 2007 showing that during the prior year its officers stopped an astounding 508,540 people— an average of 1,393 per day—who were walking down the street, perhaps on their way to the subway, grocery store, or bus stop. Often the stops included searches for illegal drugs or guns—searches that frequently required people to lie face down on the pavement or stand spread-eagled against a wall while police officers aggressively groped all over their bodies while bystanders watched or walked by. The vast majority of those stopped and searched were racial minorities, and more than half were African American.²⁸

The End of an Era

[I]n a little noticed case called *Alexander v. Sandoval*, decided in 2001, the Supreme Court eliminated the last remaining avenue available for challenging racial bias in the criminal justice system.²⁹

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

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

After *Sandoval* ... [o]nly the federal government can sue to enforce Title VI's antidiscrimination provisions—something it has neither the inclination nor the capacity to do in most racial profiling cases due to its limited resources and institutional reluctance to antagonize local law enforcement.

The Supreme Court has now closed the courthouse doors to claims of racial bias at every stage of the criminal justice process, from stops and searches to plea bargaining and sentencing. The system of mass incarceration is now, for all practical purposes, thoroughly immunized from claims of racial bias.

Endnotes

1 Frontline, *The Plea*, www.pbs.org/wgbh/pages/frontline/shows/plea/four/stewart.html; and Angela Davis, *Arbitrary Justice: The Power of the American Prosecutor* (New York: Oxford University Press, 2007), 50–52.

2 American Civil Liberties Union, *Stories of ACLU Clients Swept Up in the Hearne Drug Bust of November 2000* (Washington, DC: American Civil Liberties Union, 2002), www.aclu.org/DrugPolicy/DrugPolicy.cfm?ID=11160&c=80.

3 Marc Mauer and Ryan S. King, *Schools and Prisons: Fifty Years After Brown v. Board of Education* (Washington, DC: Sentencing Project, 2004), 3.

4 Researchers have found that drug users are most likely to report using as a main source for drugs someone who is of their own racial or ethnic background. See, e.g., K. Jack Riley, *Crack, Powder Cocaine and Heroin: Drug Purchase and Use Patterns in Six U.S. Cities* (Washington, DC: National Institute of Justice, 1997), 1; see also George Rengert and James LeBeau, “The Impact of Ethnic Boundaries on the Spatial Choice of Illegal Drug Dealers,” paper presented at the annual meeting of the American Society of Criminology, Atlanta, Georgia, Nov. 13, 2007 (unpublished manuscript), finding that most illegal drug dealers sell in their own neighborhood and that a variety of factors influence whether dealers are willing to travel outside their home community.

5 See Rafik Mohamed and Erik Fritsvold, “Damn, It Feels Good to Be a Gangsta: The Social Organization of the Illicit Drug Trade Servicing a Private College Campus,” *Deviant Behavior* 27 (2006): 97–125.

6 Human Rights Watch, *Punishment and Prejudice: Racial Disparities in the War on Drugs*, HRW Reports, vol. 12, no. 2 (May 2000).

7 PEW Center on the States, *One in 100: Behind Bars in America 2008* (Washington, DC: Pew Charitable Trusts, 2008)—data analysis is based on statistics for midyear 2006 published by the U.S. Department of Justice in June 2007.

8 *Ibid.*; Pew Center on the States, *One in 31: The Long Reach of American Corrections* (Washington, DC: Pew Charitable Trusts, 2009).

9 Jimmie Reeves and Richard Campbell, *Cracked Coverage: Television News, the Anti-Cocaine Crusade and the Reagan Legacy* (Durham, NC: Duke University Press, 1994).

10 Betty Watson Burston, Dionne Jones, and Pat Robertson-Saunders, “Drug Use and African Americans: Myth Versus Reality,” *Journal of Alcohol and Drug Abuse* 40 (Winter 1995): 19.

11 Franklin D. Gilliam and Shanto Iyengar, “Prime Suspects: The Influence of Local Television News on the Viewing Public,” *American Journal of Political Science* 44 (2000): 560–73.

12 See, e.g., Nilanjana Dasgupta, “Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations,” *Social Justice Research* 17 (2004): 143. For a review of the social science literature on this point and its relevance to critical race theory and antidiscrimination law, see Jerry Kang, “Trojan Horses of Race,” *Harvard Law Review* 118 (2005): 1489.

- 13 See John F. Dovidio et al., “On the Nature of Prejudice: Automatic and Controlled Processes,” *Journal of Experimental Social Psychology* 33 (1997): 510, 516–17, 534; and Dasgupta, “Implicit Intergroup Favoritism.” See also Brian Nosek, Mahzarin Banaji, and Anthony Greenwald, “Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site,” *Group Dynamics* 6 (2002): 101.
- 14 John A. Bargh et al., “Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action,” *Journal of Personality and Social Psychology* 71 (1996): 230; Gilliam and Iyengar, “Prime Suspects”; Jennifer L. Eberhardt et al., “Looking Deathworthy,” *Psychological Science* 17, no. 5 (2006): 383–86 (“[J]urors are influenced not simply by the knowledge that the defendant is Black, but also by the extent to which the defendant appears to be stereotypically Black. In fact for the Blacks with [the most stereotypical faces], the chance of receiving a death sentence more than doubled”); Jennifer L. Eberhardt et al., “Seeing Black: Race, Crime, and Visual Processing,” *Journal of Personality and Social Psychology* 87, no. 6 (2004): 876–93 (not only were black faces considered more criminal by law enforcement, but the more stereotypical black faces were considered to be the most criminal of all); and Irene V. Blair, “The Influence of Afrocentric Facial Features in Criminal Sentencing,” *Psychological Science* 15, no. 10 (2004): 674–79 (finding that inmates with more Afrocentric features received harsher sentences than individuals with less Afrocentric features).
- 15 The notion that the Supreme Court must apply a higher standard of review and show special concern for the treatment of “discrete and insular minorities”—who may not fare well through the majoritarian political process—was first recognized by the Court in the famous footnote 4 of *United States v. Caroline Products Co.*, 301 U.S. 144, n. 4 (1938).
- 16 *McCleskey v. Kemp*, 481 U.S. 279, 327 (1989), Brennan, J., dissenting.
- 17 *Ibid.*, 321.
- 18 Doris Marie Provine, *Unequal Under Law: Race in the War on Drugs* (Chicago: University of Chicago Press, 2007), 26.
- 19 See, e.g., Carl E. Pope and William Feyerherm, “Minority Status and Juvenile Justice Processing: An Assessment of the Research Literature,” *Criminal Justice Abstracts* 22 (1990): 527–42; Carl E. Pope, Rick Lovell, and Heidi M. Hsia, U.S. Department of Justice, *Disproportionate Minority Confinement: A Review of the Research Literature from 1989 Through 2001* (Washington, DC: U.S. Department of Justice, 2002); Eleanor Hinton Hoytt, Vincent Schiraldi, Brenda V. Smith, and Jason Ziedenberg, *Reducing Racial Disparities in Juvenile Detention* (Baltimore: Annie E. Casey Foundation, 2002), 20–21.
- 20 Christopher Hartney and Fabiana Silva, *And Justice for Some: Differential Treatment of Youth of Color in the Justice System* (Washington, DC: National Council on Crime and Delinquency, 2007).
- 21 Brian Kalt, “The Exclusion of Felons from Jury Service,” *American University Law Review* 53 (2003): 65, 67.
- 22 David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (New York: The New Press, 1999), 162.
- 23 *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983).
- 24 See Douglas Massey and Nancy Denton, *American Apartheid: Segregation and the Making of the Underclass* (Cambridge, MA: Harvard University Press, 1993).
- 25 For a thoughtful overview of these studies, see David Harris, *Profiles in Injustice: Why Racial Profiling Cannot Work* (New York: The New Press, 2002).
- 26 *Ibid.*, 80.
- 27 *Ibid.*
- 28 Al Baker and Emily Vasquez, “Number of People Stopped by Police Soars in New York,” *New York Times*, Feb. 3, 2007.
- 29 *Alexander v. Sandoval*, 532 U.S. 275 (2001).