

GOING UP IN SMOKE: THE IMPACTS OF THE DRUG WAR ON YOUNG BLACK MEN

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INTRODUCTION

For the last thirty years or so, America has been embroiled in a great domestic war. This war has had devastating impacts on the lives of countless individuals, families, and in some cases whole communities. This war has left numerous casualties in its wake; some of its youngest victims are small children whose parents have been captured in this war and incarcerated.¹ This war has cost our nation trillions of dollars and the ongoing loss of human and intellectual capital. Many of the unintended consequences of this war are irreversible. This war is a war on drugs.²

The war on drugs began in the mid-1980s when Congress passed harsh, draconian federal drug laws in response to concerns of an “exploding” drug problem in the United States.³ The newly minted drug laws required mandatory minimum sentences and lengthy prison terms under the sentencing guidelines for those convicted of violating drug trafficking laws.⁴

The drug trafficking laws have garnered a great deal of attention and controversy in recent years, due to the vast increase of low-level, non-violent drug offenders being swept into the criminal justice system through the laws’ reach. In addition

¹ See Deseriee A. Kennedy, *Children, Parents & the State: The Construction of a New Family Ideology*, 26 BERKELEY J. GENDER, L. & JUST. 78, 87–88 (2011); see also Nekima Levy-Pounds, *Can These Bones Live? A Look at the Impacts of the War on Drugs on Poor African-American Children and Families*, 7 HASTINGS RACE & POVERTY L.J. 353, 377 (2010) [hereinafter Levy-Pounds, *Bones*] (discussing common ingredients that have led to increased incarceration rates among poor African-Americans).

² See Eric E. Sterling, *Drug Laws and Snitching: A Primer*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/snitch/primer/> (last visited Mar. 6, 2013) (discussing the mandatory sentencing requirements in drug cases); see also *Rising Prison Costs: Restricting Budgets and Crime Prevention Options: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2012) (testimony of Marc Maurer, Executive Director, The Sentencing Project) (noting “[t]he United States is the world’s leader in incarceration with 2.2 million people currently in the nation’s prisons or jails—a 600% increase over 40 years . . .” and also noting that the incarceration rate has steadily continued to increase for over the last 30 years, despite the changes in the political landscape).

³ Nekima Levy-Pounds, *From the Frying Pan into the Fire: How Poor Women of Color and Children Are Affected by Sentencing Guidelines and Mandatory Minimums*, 47 SANTA CLARA L. REV. 285, 292 (2007) [hereinafter Levy-Pounds, *Frying Pan*]; see also JONATHAN P. CAULKINS ET AL., HOW GOES THE “WAR ON DRUGS”? AN ASSESSMENT OF U.S. DRUG PROBLEMS AND POLICY 1 (2005) (“In response to [public] concerns, federal and state legislators and executive-branch officials have enacted and implemented policies that, while diverse in approach, are oriented toward enforcement.”); Sterling, *supra* note 2.

⁴ Levy-Pounds, *Frying Pan*, *supra* note 3, at 307–08.

to ensuring that those convicted of drug offenses would serve excessively long sentences, the war on drugs is also largely responsible for the creation of one of the most pressing social justice issues of our time—the unprecedented rate of incarceration in the United States.⁵ Although the United States holds about 5% of the world’s population, it holds roughly 25% of its prisoners.⁶

According to the Pew Center, the United States currently has the highest rate of incarceration in the world, with over 2.3 million, or about 1 in 100 American adults currently incarcerated.⁷ To make matters worse, more than 7 million adults are under some form of correctional supervision or control.⁸ This exploding prison population has come at no small price, as

⁵ JOHN SCHMITT, KRIS WARNER & SARIKA GUPTA, *THE HIGH BUDGETARY COST OF INCARCERATION 2* (2010) [hereinafter SCHMITT ET AL.] (stating the U.S. has the highest incarceration rate in the world); *see also* Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329, 329 (2009) (“Our nation has been described as a ‘carceral state’ with a policy of ‘mass imprisonment,’ and our vast prison system has been termed a ‘prison industrial complex.’”).

⁶ *U.S. & World Population Clocks*, U.S. CENSUS BUREAU, <http://www.census.gov/main/www/popclock.html> (last visited Jan. 29, 2013); Jim Webb, *Why We Must Fix Our Prisons*, PARADE (Mar. 29, 2009), <http://www.parade.com/news/2009/03/why-we-must-fix-our-prisons.html>. In 1980, there were slightly over 500,000 individuals incarcerated in prisons or jails in the U.S.; by 1990, there were over 1 million individuals incarcerated in the U.S.; by 2000, there were over 2 million individuals incarcerated. *Correctional Populations*, BUREAU JUST. STAT., <http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm> (last visited Jan. 29, 2013). Now, there are currently over 2.3 million people incarcerated in the U.S. (about 1 in 100 adults). THE PEW CTR. ON THE STATES, *ONE IN 100: BEHIND BARS IN AMERICA 2008*, at 5 (2008). In 2008, over 7.2 million people were under some form of correctional supervision or control (about 1 in 31 Adults). *Correctional Populations*, *supra*.

⁷ Press Release, The Pew Center on the States, *Pew Quantifies the Collateral Costs of Incarceration on the Economic Mobility of Former Inmates, Their Families, and Their Children* (Sept. 28, 2010), <http://www.pewstates.org/newsroom/press-releases/pew-quantifies-the-collateral-costs-of-incarceration-on-the-economic-mobility-of-former-inmates-their-families-and-their-children-85899371878>.

⁸ NICOLE D. PORTER, THE SENTENCING PROJECT, *THE STATE OF SENTENCING 2011: DEVELOPMENTS IN POLICY AND PRACTICE 1* (2012); Levy-Pounds, *Bones*, *supra* note 1, at 353 n.1.

[I]n addition to having the highest incarceration *rate* in the world, the United States also boasts the largest prison *population* in the world. With 2.3 million adult Americans behind bars, there are 800,000 more Americans behind bars than Chinese . . . [Please note, these] figures do not take into account the number of juveniles currently in detention centers, which means that the total number of incarcerated Americans is higher still.

Id. (emphasis added) (citations omitted).

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states and the federal government spend about \$55 billion dollars annually on criminal justice expenditures;⁹ in some cases, it outpaces spending on education.¹⁰

Communities across the country have been negatively affected by our nation's over-reliance on incarceration and punishment to address low-level, drug-related crime. One segment of the population that has been detrimentally impacted is African American men in general, and young African American men in particular. Recent estimates indicate that one in fifteen black men age eighteen and over, and one in nine black men from ages twenty to thirty-four, are currently incarcerated.¹¹ When a disproportionate number of African American men are incarcerated or otherwise involved with the criminal justice system, African American children and families suffer debilitating impacts that often last generationally, and work to dismantle the fabric of the African American community.¹² This complex and multifaceted issue has reached crisis-level proportions in the United States, and the full scope of the consequences has yet to be uncovered.¹³

⁹ TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, JUSTICE EXPENDITURES AND EMPLOYMENT, FY 1982–2007 – STATISTICAL TABLES, at 1, 6 (2011); see also NOW on PBS: *Prisons for Profit* (PBS television broadcast May 9, 2008) (“[S]tate and federal officials . . . want a share of the 55 billion dollars the government spends on corrections each year.”).

¹⁰ According to the Pew Center on the States, “[f]ive states spent as much or more on [prisons] than they did on education”: Vermont, Michigan, Oregon, Connecticut, and Delaware. THE PEW CTR. ON THE STATES, *supra* note 6, at 16.

¹¹ THE PEW CTR. ON THE STATES, *supra* note 6, at 34; see also WILLIAM J. SABOL & HEATHER COUTURE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2007, at 7 (2008) (showing that African Americans represent nearly 40% of the prison population).

¹² See Bruce Western & Christopher Wildeman, *The Moynihan Report Revisited: Lessons and Reflections After Four Decades: The Black Family and Mass Incarceration*, 621 ANNALS 221, 222 (2009) (“Although family breakdown was not the immediate cause of the American prison boom, mass incarceration has had potentially profound effects on the family life of those caught in the web of the criminal justice system.” (emphasis omitted)); see generally Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1304 (2004).

¹³ See Ryan Grim, *Ron Paul: Drug War in U.S. Has Racist Origins*, HUFFINGTON POST (Dec. 27, 2011, 10:56 AM), http://www.huffingtonpost.com/2011/12/27/ron-paul-drugs-drug-war_n_1170878.html. Grim notes:

The reaction of the American government, and its people, to drug use was—and still is—a complex mix of factors, involving lobbying by the medical community, pharmaceutical companies, the alcohol industry, temperance advocates, and religious movements. Historically, the argument has played out—and continues to play out—amid a backdrop of racism and class antagonism. Racism and bigotry were

Thus, this paper seeks to shed light on the impacts of drug war policies and marijuana suppression efforts on African American men, and to explore recent changes within the law that may affect this segment of the population. Although discourse regarding the war on drugs is becoming more prevalent, it is important for policy makers, law enforcement, and scholars to recognize the unique circumstances that African American men face in light of the historical discrimination and oppression they have experienced, and to craft narrowly tailored solutions to address the myriad issues they encounter. Unless deliberate action is taken to address these concerns, these men will continue to be systematically excluded from mainstream society, and are at grave risk of cycling in-and-out of the revolving doors of the criminal justice system.

I. AN OVERVIEW OF THE WAR ON DRUGS

The war on drugs began in the mid to late 1980s as a result of Congress' perception that drug trafficking and usage had reached epidemic proportions in the United States.¹⁴ In addition, during that time period there was increased media coverage creating alarm and panic across the country about the "dramatic effects of crack cocaine in inner-city communities."¹⁵ Following the untimely death of basketball star Len Bias from a cocaine overdose,¹⁶ Congress declared the "war on drugs" through the establishment of laws aimed at "getting tough on crime" and reducing the flow of drug trafficking in the United States.¹⁷

In furtherance of its mission, Congress enacted three sets of federal laws that comprised the war on drugs. These laws consisted of the Anti-Drug Abuse Acts of 1986 and 1988, and the

generally not the drivers of prohibition movements, but instead were the weapons used by temperance advocates to achieve their ends. The movement to ban alcohol, for instance, gained its strongest adherents without resorting to bigotry, but when World War I broke out, the movement was quick to tie beer and booze to instantly despised German immigrants, pushing the effort over the Constitutional hump.

Id.

¹⁴ Levy-Pounds, *Frying Pan*, *supra* note 3, at 292.

¹⁵ Nekima Levy-Pounds, *Justice for All?*, COVENANT COMPANION, July 2012, at 13, 13 [hereinafter Levy-Pounds, *Justice for All?*].

¹⁶ *Id.* ("At the time his death was thought to be caused by crack cocaine. (Later reports confirmed that it was actually caused by powder cocaine use.)").

¹⁷ Levy-Pounds, *Frying Pan*, *supra* note 3, at 286, 303; *see also* Levy-Pounds, *Justice for All?*, *supra* note 15, at 13.

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Sentencing Reform Act of 1984.¹⁸ Through the use of these laws, Congress authorized lengthy mandatory minimum sentences and harsh sentencing guidelines at the federal level that would result in extended sentences for drug kingpins and higher-level dealers.¹⁹ Reports in subsequent years revealed that the majority of those sentenced to the mandatory minimum terms were not drug kingpins, but rather those who committed lower-level, nonviolent offenses.²⁰

The rationale for increasing sentence lengths for drug traffickers included the notion that deterrence would play a major role in reducing the number of people who would become or remain engaged in illegal drug trafficking.²¹ Sadly, the deterrent effect of these laws was practically non-existent, as soon after the laws were implemented, hundreds of thousands of men and a growing number of women²² were caught and incarcerated for their involvement in drug trafficking.²³ Many states crafted laws that mirrored the federal drug laws. This resulted in a

¹⁸ Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984) (codified as amended at 18 U.S.C. § 3551 (2006)); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (established mandatory minimum penalties for crimes involving drugs and firearms); see also AM. BAR ASS'N: JUSTICE KENNEDY COMM'N, REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES 28 (2004) (revealing that the Anti-Drug Abuse Act made crack cocaine the only drug for which one may face a mandatory minimum sentence for possession (citing 21 U.S.C. § 844)); U.S. GEN. ACCOUNTING OFFICE, MANDATORY MINIMUM SENTENCES: ARE THEY BEING IMPOSED AND WHO IS RECEIVING THEM? 2-3 (1993); Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 104-05 (1988) (discussing the purpose of the legislation as analyzed in Sentencing Guidelines for United States Courts, 52 Fed. Reg. 18,045, 18,095 (1987)).

¹⁹ Sterling, *supra* note 2.

²⁰ Levy-Pounds, *Justice For All?*, *supra* note 15, at 13.

²¹ *But see* Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 615 (2011).

[A] task force found no evidence that long prison sentences for drug offenders decreased either drug use or violence; indeed, some evidence suggested that these policies may increase violence. Notwithstanding these findings, some members of the task force resisted the implications of this research, finding that to concede that the punitive approach to drug use was 'misguided' would be 'simply too politically risky' In other words, the drugs-violence connection is a political truth in the United States, even if not an empirical one.

Id. (internal citations omitted).

²² See Levy-Pounds, *Justice For All?*, *supra* note 15, at 14 (discussing Kemba Smith as an example of one such woman who was charged and incarcerated for participation in a drug conspiracy).

²³ Levy-Pounds, *Frying Pan*, *supra* note 3, at 295.

tremendous increase in the rate of incarceration;²⁴ suddenly prisons were filled to capacity and in many cases, exceeding the maximum capacity of occupants.²⁵ As a result, plans to build more prisons in each state were on the horizon, as well as extravagant spending policies in an effort to keep pace with prison growth and expansion.²⁶

A. *The Shift Away from Judicial Discretion*

In circumstances in which a federal judge sensed that a given punishment was too harsh for a particular criminal drug defendant, the judge was rarely able to deviate from the mandatory punishment²⁷ that was prescribed under law.²⁸ The loss of judicial discretion caused many federal judges to protest the fairness of the laws.²⁹ As a result of the reduction in judicial

²⁴ THE SENTENCING PROJECT, THE EXPANDING FEDERAL PRISON POPULATION 1 (2012), http://sentencingproject.org/doc/publications/inc_FederalPrisonFactsheet_March2012.pdf [hereinafter EXPANDING POPULATION] (“The total federal prison population increased 761% from 1980 to 2010 . . .”).

²⁵ *Id.* at 2.

²⁶ See SCHMITT ET AL., *supra* note 5, at 10 (“In 2008, federal, state, and local governments spent nearly \$75 billion on corrections, with the large majority on incarceration.”).

²⁷ THE SENTENCING PROJECT, THE EXPANDING FEDERAL PRISON POPULATION (2006), http://www.sentencingproject.org/doc/publications/inc_expanding_fedpopulation.pdf. The Sentencing Project states that:

Federal sentencing policy has shifted dramatically as a result of policy decisions of the mid-1980s. Mandatory minimum sentencing policies adopted by Congress beginning in 1984 have contributed substantially to the number of drug offenders in federal prison, both by removing discretion from sentencing judges and increasing the length of sentence for many offenders. In 2005, 64% of federal offenders convicted of a drug offense received a mandatory minimum prison term. Thirty-seven percent of all drug offenders received a 10-year mandatory minimum.

Id.; see also Levy-Pounds, *Frying Pan*, *supra* note 3, at 307.

²⁸ See Alexander B. Smith & Harriet Pollack, *Curtailing the Sentencing Power of Trial Judges: The Unintended Consequences*, 36 CT. REV. 4, 5 (1999); John Caher, ‘Small-Time’ Dealer Gets Mandatory Life Sentence; ‘Something Terribly Wrong’ With System, *Judge Says*, N.Y. L.J. ONLINE, Jan. 19, 2006, <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=900005445342&slreturn=20130119110036> (Judge Hurd cites congressionally imposed mandatory minimums as the cause of sentencing defendants whose

“increment of harm . . . bears no rational relationship to the increment of punishment [imposed] . . .”); *Justice Calls Mandatory Sentences ‘Bad Policy’*, NOVEMBER COALITION (Sept. 22, 2003), <http://november.org/dissentingopinions/Breyer.html> (Supreme Court Justice Breyer concludes that mandatory minimums “set back the cause of fairness in sentencing.”).

²⁹ See Caher, *supra* note 28.

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discretion, the actors within the criminal justice system who wielded the most power were federal prosecutors, as they were able to make charging decisions outside of courtroom proceedings with limited oversight. Thus, federal prosecutors were able to charge drug traffickers as part of a conspiracy,³⁰ thereby increasing the likelihood of conviction for those connected to a drug trafficking ring.³¹

As a result, even peripheral and minor players in a drug trafficking ring could be charged with trafficking drugs at the same level as a drug kingpin or higher level dealer.³² Additionally, federal prosecutors had the power to determine which criminal drug defendants offered enough “substantial assistance” to qualify for a reduced sentence or a lower charge.³³ Often, those who qualified under the substantial assistance provision were the higher level dealers and kingpins that the drug laws were originally intended to capture, as higher level dealers could offer more substantial information to prosecutors than lower level dealers and peripheral players.³⁴

B. Is it Crack? Is it Powder? Is it Different?

One of the most controversial aspects of federal drug laws stemmed from the distinction in punishment that was made between those who trafficked crack cocaine, versus those who trafficked powder cocaine.³⁵ Although powder cocaine is used as

³⁰ See Levy-Pounds, *Frying Pan*, *supra* note 3, at 310–11.

³¹ See Levy-Pounds, *Justice For All?*, *supra* note 15, at 14.

³² Jonathan P. Caulkins & Philip Heymann, *How Should Low-Level Drug Dealers Be Punished?* 8–9 (Heinz College, Working Paper, 1998), available at <http://www.heinz.cmu.edu/research/17full.pdf>.

³³ See U.S. SENTENCING COMM’N, REPORT ON COCAINE AND FEDERAL SENTENCING POLICY 148 (1995), http://www.uscc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/199502_RtC_Cocaine_Sentencing_Policy/CHAP7.HTM; Levy-Pounds, *Frying Pan*, *supra* note 3, at 307.

³⁴ See Levy-Pounds, *Frying Pan*, *supra* note 3, at 312–314; see also U.S. SENTENCING COMM’N, *supra* note 33, at 171 (reporting that in 1995, 9.2% of powder cocaine and 5.5% of crack cocaine defendants were high-level offenders); Nekima Levy-Pounds, *Beaten by the System and Down for the Count: Why Poor Women of Color and Children Don’t Stand a Chance Against U.S. Drug-Sentencing Policy*, 3 ST. THOMAS L.J. 462, 470–474 (2006); David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J.L. & ECON. 591, 596 (2005).

³⁵ PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS, HUM. RTS. WATCH n.93 (2000), http://www.hrw.org/reports/2000/usa/Rcedrg00-05.htm#P323_67487; see generally Troy Duster, *Pattern, Purpose, and Race in*

the base for developing crack cocaine, and in its purest form has a significantly higher street value than crack cocaine, under the law, crack cocaine dealers were treated substantially more harshly than those who trafficked powder cocaine.³⁶ Under the law, possession of five grams of crack cocaine, or roughly a teaspoon, would result in a five year mandatory minimum term of imprisonment.³⁷ Meanwhile, those who sold powder cocaine would face the same punishment for possession of 500 grams, or roughly the size of a loaf of bread, of powder cocaine.³⁸

It was thought by critics of the crack versus powder cocaine disparity that race played a major role in the differing treatment between crack and powder cocaine under law.³⁹ On average, whites were more likely to be charged and convicted of trafficking powder cocaine, while blacks were more likely to traffic crack cocaine, even though rates of drug use amongst the two groups are split pretty evenly.⁴⁰

The widely disparate treatment between crack and powder cocaine persisted for over two decades, despite recommendations by the United States Sentencing Commission to reduce the disparity, and in spite of the fact that tens of thousands of poor African American men were being sentenced to serve lengthy terms of imprisonment for possession of the drug.⁴¹ Sadly, it was

the Drug War: The Crisis of Credibility in Criminal Justice, in *CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE* 260, 280–282 (Craig Reinerman & Harry G. Levine eds., 1997).

³⁶ See Levy-Pounds, *Justice For All?*, *supra* note 15, at 13 (The result of this was what was called the “100-to-1 sentencing ratio between crack and powder cocaine.”).

³⁷ Levy-Pounds, *Bones*, *supra* note 1, at 358.

³⁸ *Id.*

³⁹ Carissa Byrne Hessick, *Race and Gender as Explicit Sentencing Factors*, 14 *J. GENDER RACE & JUST.* 127, 138 (2010) (“[M]embers of Congress, presumably unintentionally, engaged negative racial stereotypes in considering the threat posed by crack cocaine and in determining what steps would be necessary to respond to it.”).

⁴⁰ H.R. REP. NO. 104-272, at 16 (1995); *see also* AM. BAR ASS’N: JUSTICE KENNEDY COMM’N, *supra* note 18, at 2 (citing the approximate percentage of young, African American men in the prison population).

⁴¹ H.R. REP. NO. 104-272; *see also* MICHAEL D. LYMAN, *DRUGS IN SOCIETY: CAUSES, CONCEPTS AND CONTROL* 367 (2011):

More than 80 percent of the increase in the federal prison population from 1985 to 1995 is due to drug convictions. . . . In 1986, the year Congress enacted federal mandatory drug sentences, the average federal drug sentence for African Americans was 11 percent higher than for whites. Four years later, the average federal drug sentence for African Americans was 49 percent higher.

Id.; Carrie Johnson, *Bill Targets Sentencing Rules for Crack and Powder*

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not until the summer of 2010 that the crack versus powder cocaine disparity was reduced by Congress from a 100 to 1 ratio down to an 18 to 1 ratio.⁴² Although this change in the law is significant, it does not go far enough in closing the disparity that exists between the treatment of crack and powder cocaine.⁴³

The reality of the situation is the notion that tens of thousands of African American men have been irreparably harmed through disparate treatment and uneven enforcement of drug war policies. The African American men who were forced to spend excess time behind bars, largely due to drug war policies and laws that were inherently biased, can never regain those years of their lives. One of the most challenging aspects of this situation is the idea that for many of these men, their lower socioeconomic status—in some cases due to historic discrimination, generational poverty, and marginalization—may have been the catalyst for their involvement in drug-related crime to begin with.⁴⁴ Our government's punitive approach to this circumstance merely

Cocaine, WASH. POST, Oct. 16, 2009, at A06:

The sentencing disparity between crack and powder cocaine has contributed to the imprisonment of African Americans at six times the rate of whites and to the United States' position as the world's leader in incarcerations," Majority Whip Richard J. Durbin (D-Ill.) said in a statement. "It's time for us to act" . . . Today's sentencing ratio has been in place since 1986, a time when crack cocaine was ravaging inner-city neighborhoods. Academic research has since cast doubt on the assertion that rock cocaine is more addictive and dangerous than the powder.

Id.

⁴² Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (codified as amended at 21 U.S.C. §§ 841, 960 (2010)); see also Levy-Pounds, *Bones*, *supra* note 1, at 378.

⁴³ See Levy-Pounds, *Bones*, *supra* note 1, at 360–61 (describing how judges are now granted greater discretion in considering the disparity between crack and powder cocaine offenses). The decision by Congress to reduce the disparity between the treatment of crack and powder cocaine was made on the heels of two Supreme Court decisions that were handed down in 2005 and 2007 which gradually began to restore some semblance of justice within the system, although there is still a long way to go in achieving complete equity. The 2005 Supreme Court decision in *United States v. Booker*, 543 U.S. 220 (2005), made the sentencing guidelines, presumptive for federal judges, rather than mandatory; which in theory increased judicial discretion in sentencing. The second blow to the drug war occurred in the 2007 Supreme Court decision in *Kimbrough v. United States*, 552 U.S. 85 (2007). In that case, the Supreme Court gave federal judges the discretion to sentence defendants below the sentencing guideline range in cases involving crack versus powder cocaine disparities. *Id.*

⁴⁴ See Levy-Pounds, *Bones*, *supra* note 1, at 363–64.

served to reinforce racial disparities and lend credence to allegations of bias within the justice system. Irrespective of the intent or lack thereof of lawmakers to create racial disparities, the outcome to these black men is real and the matter deserves further consideration and redress.⁴⁵

The disparities that young African American men experience cannot be explained away by simply hypothesizing that this phenomenon is occurring as a result of greater participation in criminal activity than the general population. It is evident that the problem is much deeper and appears to demonstrate how the structures and systems that exist in society often work to the detriment of young black men, and make their involvement in what are sometimes survival crimes an easy decision.⁴⁶

II. NEW DEVELOPMENTS IN MARIJUANA LEGALIZATION INITIATIVES

As illustrated above, the war on drugs has had devastating impacts on communities of color in general, and African American men in particular. Although the initial stated intent of cracking down on drug traffickers was ostensibly to reduce the flow of illicit drugs throughout the United States, in the decades since the war on drugs began, the goals, strategies, and intended outcomes have become more opaque, with tremendous disparities to boot. One aspect of the drug war at the federal and state levels consists of strategies to reduce the possession and trafficking of marijuana. In light of recent changes to state law in two jurisdictions—with the decriminalization of marijuana for personal use in a growing number of states, and sustained allegations of racially biased enforcement of marijuana laws against African American and Latino males—⁴⁷ a conflict has arisen regarding the current and future legality of marijuana sales and possession, and it is unclear how things will unfold.

During the November 2012 elections, an unprecedented event occurred that may forever change the landscape of at least one aspect of the drug war—the legalization of marijuana for personal

⁴⁵ *See id.* at 365.

⁴⁶ *Id.* at 364–65.

⁴⁷ *See* HARRY G. LEVINE & DEBORAH PETERSON SMALL, N.Y. CIVIL LIBERTIES UNION, MARIJUANA ARREST CRUSADE: RACIAL BIAS AND POLICE POLICY IN NEW YORK CITY 1997–2007, at 4 (2008); Natasha Lennard, *Marijuana and Racial Inequality*, SALON.COM (Apr. 20, 2011, 8:09 PM), http://www.salon.com/2011/04/20/racially_biased_marijuana_policing/.

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use in two states.⁴⁸ Voters in Washington State⁴⁹ and Colorado⁵⁰ voted to legalize the sale and use of marijuana,⁵¹ even with federal laws in place to the contrary. Although there were initial concerns and questions regarding the role of the Department of Justice in enforcing federal drug statutes prohibiting the sale of marijuana, for better or for worse, the federal government has largely remained silent on the issue.⁵² This could constitute an indication that the door might be open for other states to follow

⁴⁸ See SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN., U.S. DEP'T HEALTH & HUMAN SERVICES, SESSION 10: MARIJUANA 7 (last visited Mar. 8, 2013) [hereinafter SAMHSA] ("Marijuana (except for medical use) has been illegal in the United States since 1937.").

⁴⁹ See Laura L. Myers, *Marijuana Goes Legal in Washington State Amid Mixed Messages*, REUTERS, Dec. 6, 2012, <http://www.reuters.com/article/2012/12/06/us-usa-marijuana-washington-idUSBRE8B506L20121206>. Myers notes:

The Washington law legalizes possession of up to 16 ounces (0.45 kg) of solid cannabis-infused goods—like brownies or cookies—and up to 72 ounces (2.4 kg) of weed in liquid form. However, driving under the influence of cannabis, or imbibing in public places where the consumption of alcohol is already banned, remain illegal. . . . The new law ultimately will permit cannabis to be legally sold and taxed at state-licensed stores in a system to be modeled after those in many states for alcohol sales. The state Liquor Control Board, along with agriculture and public health officials, have until next December to set up such a system. But for now, it remains a crime to sell, cultivate or even share one's own stash, even though the law allows individuals to purchase a limited amount for personal possession.

Id.

⁵⁰ See Dan Whitcomb, *Marijuana Smokers Get Nod to Light Up in Colorado as Pot Legalized*, REUTERS, Dec. 10, 2012, <http://www.reuters.com/article/2012/12/11/us-usa-colorado-marijuana-idUSBRE8BA02B20121211> (showing Colorado's Constitution was amended to allow the personal use and possession of 28 grams or an ounce of marijuana, for persons 21 and older and that 55% of voters approved the measure, known as Amendment 64, while 45% voted in opposition).

⁵¹ See generally Walter Hickey, *These Are the Next 13 States That Could Legalize Marijuana . . .*, BUS. INSIDER, Dec. 12, 2012, <http://www.businessinsider.com/marijuana-legalization-laws-washington-colorado-weed-pot-2012-12>; see also Whitcomb, *supra* note 50. Whitcomb cites that:

Pot smokers formally gained the right to light up in Colorado on Monday as Governor John Hickenlooper signed into effect a controversial ballot measure legalizing marijuana for adult recreational use in what proponents hailed as a "historic day." Hickenlooper's signature, largely a formality, made Colorado the second U.S. state after Washington to legalize recreational pot use, and put it on a possible collision course with the federal government—which calls marijuana an illegal drug.

Whitcomb, *supra* note 50.

⁵² Hickey, *supra* note 51; see also Jordy Yager, *New Marijuana Laws Cause Confusion*, THE HILL, Dec. 11, 2012, <http://thehill.com/homenews/news/272403-new-marijuana-laws-cause-confusion>.

the precedent set by Washington and Colorado without fear of federal intervention and enforcement.⁵³

In the years and months leading up to the unprecedented decisions of the voters in Washington State and Colorado to legalize marijuana, at least two schools of thought emerged as reasons strongly opposing and strongly supporting this decision. Opponents of marijuana legalization counter that there are potential public health effects of legalization of marijuana.⁵⁴ For example, legalization of marijuana could lead to greater levels of public intoxication and driving under the influence, which could become a threat to public safety as well. Opponents of legalization of marijuana also raise concerns about the harms to children, who could interpret legalization of marijuana as an indication that the drug is safe and socially acceptable and this could lead to children experimenting at younger and younger ages. Studies show that youths who began using marijuana prior to age eighteen and continued using the drug for twenty years experienced effects to the brain that were largely irreversible.⁵⁵ Additionally, according to SAMHSA, “[m]arijuana is the most widely used illegal drug.”⁵⁶ As the public’s acceptance of marijuana legalization has risen to an all-time high, so too has the rate of emergency room referrals for marijuana-related ailments and admissions into drug treatment programs by children under age eighteen. Disturbingly, “[m]ore young people go into treatment for marijuana use than for all other illegal drug use combined.”⁵⁷

⁵³ According to a policy brief released by the Pew Research Center for the People & the Press, “support for legalizing marijuana has never been higher.” THE PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, FEWER ARE ANGRY AT GOVERNMENT, BUT DISCONTENT REMAINS HIGH 17 (2011), <http://www.people-press.org/files/legacy-pdf/3-3-11%20Political%20Release.pdf>. In a poll conducted by the Pew Center in 2011, 45% of those polled favored legalization of marijuana, while 50% were in opposition. *Nearly Half Support Legalization of Marijuana*, PEW RESEARCH CTR. (Nov. 12, 2012), <http://www.pewresearch.org/daily-number/nearly-half-support-legalization-of-marijuana/>.

⁵⁴ See SAMHSA, *supra* note 48, at 9 (“Today’s marijuana has 3 times as much THC (the active ingredient) as marijuana of 20 years ago, making it more potent.”).

⁵⁵ Maggie Clark, *A Marijuana Revolt?*, PEW CTR. ON THE STATES (Sept. 7, 2012), <http://www.pewstates.org/projects/stateline/headlines/a-marijuana-revolt-85899415933>.

⁵⁶ SAMHSA, *supra* note 48, at 3.

⁵⁷ *Id.* “Marijuana use affects nearly every organ system in the body. It can have a profound impact on people’s education, employment, and personal life.” *Id.*

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One of the most compelling arguments raised in support of legalizing marijuana has been advanced by various state chapters of the National Association for the Advancement of Colored People (NAACP).⁵⁸ Prior to the historic vote in Colorado, the president of the Colorado chapter of the NAACP, Alice Huffman, strongly supported the legalization of marijuana due to civil rights issues connected to enforcement laws.⁵⁹ Indeed, although African Americans comprise 4% of the population in Colorado, they represent 22% of those who are arrested for violating marijuana laws.⁶⁰

Sadly, this issue does not only affect African American men in Colorado. Uneven enforcement of marijuana laws is a problem across the nation. Recent studies indicate that African American men on a national level are routinely pulled over by law enforcement, harassed, arrested, and charged with low-level drug offenses, with marijuana being one of the primary factors.⁶¹

⁵⁸ See *NAACP Backs Marijuana Legalization in Colorado*, HUFFINGTON POST (DENVER) (Aug. 23, 2012, 11:57 AM), http://www.huffingtonpost.com/2012/08/23/naacp-backs-marijuana-leg_n_1824351.html.

⁵⁹ *Id.*; see also *Colorado's Marijuana Arrests Disproportionately Impact Latinos, Blacks: MARP Report*, HUFFINGTON POST (DENVER) (Oct. 27, 2012, 12:23 PM), http://www.huffingtonpost.com/2012/10/25/colorado-marijuana-arres_n_2018694.html (“Although young African Americans and Latinos use marijuana at lower rates than young whites, in the last ten years police in Colorado arrested Latinos at 1.5 times the rate of whites and arrested blacks at 3.1 times the rate of whites.”).

⁶⁰ *NAACP Backs Marijuana Legalization in Colorado*, *supra* note 58.

The NAACP provided this data in a press statement about marijuana arrests in Colorado: African-Americans made up roughly 4% of the population in Colorado in 2010, but they accounted for about 9% of marijuana possession arrests and 22% of arrests for marijuana sales and cultivation. The numbers in Denver are particularly staggering. According to a report prepared by the Denver Police Department for the city's Marijuana Policy Review Panel, African-Americans accounted for more than 31.5% percent [sic] of arrests for private adult marijuana possession, despite making up less than 11% of the city's population.

Id.

⁶¹ See HARRY G. LEVINE, JON B. GETTMAN & LOREN SIEGEL, *TARGETING BLACKS FOR MARIJUANA: POSSESSION ARRESTS OF AFRICAN AMERICANS IN CALIFORNIA, 2004–08*, at 6 (2010) [hereinafter LEVINE ET AL.]. Key findings of this report show: African Americans are “arrested for marijuana possession at higher rates than whites, typically at double, triple or even quadruple the rate of whites[,]” and further that “blacks [are] arrested for simple marijuana possession far out of proportion to their percentage in the total population of the counties.” *Id.* at 6; see also Lennard, *supra* note 47.

In all major cities and counties across the country, [Professor Harry] Levine said, police are overwhelmingly deployed to low-income

Concerns about the racially biased application⁶² of marijuana enforcement laws against African Americans played a major role in NAACP chapters in other parts of the country making a decision to advocate for the legalization of marijuana.⁶³

neighborhoods, which are overwhelmingly black and Latino. They are sent out to fill quotas (the potentially dangerous effect of which was well documented by a Village Voice investigation last year into a Brooklyn police precinct) and quota demands mean that, as Levine put it, “the bulk of police activity is generated over very petty offences, like marijuana possession.” A California-focused report Levine helped produce for The Drug Policy Alliance (DPA) in 2010 called “Targeting Blacks for Marijuana” argued that racially-biased arrest numbers are not largely a result of personal racism on the part of individual police officers, but rather that there is “a system-wide phenomenon,” occurring in every county and nearly every police department in California, New York and elsewhere.

Lennard, *supra* note 47.

⁶² See Amanda Reiman, *75 Years of Racial Control: Happy Birthday Marijuana Prohibition*, HUFFINGTON POST: BLACK VOICES (Sept. 28, 2012, 12:13 PM), http://www.huffingtonpost.com/amanda-reiman/marijuana-prohibition-anniversary_b_1923370.html (“There are 100,000 total marijuana smokers in the US, and most are Negroes, Hispanics, Filipinos and entertainers. Their Satanic music, jazz and swing, result from marijuana usage. This marijuana causes white women to seek sexual relations with Negroes, entertainers and any others.” - Harry Anslinger, first Drug Czar.”).

⁶³ NAACP *Backs Marijuana Legalization in Colorado*, *supra* note 58.

The Denver Post reports that at a Thursday morning conference, the NAACP’s Colorado-Wyoming-Montana local branch is expected to announce its support of Amendment 64, not because the group necessarily favors marijuana use, but because members say current marijuana laws lead to a disproportionately high number of people of color being incarcerated or otherwise negatively affected.

“Marijuana prohibition policy does more harm to our communities than good,” said Rosemary Harris Lytle in a statement, president of the NAACP-Colorado-Montana-Wyoming State Conference. “That is why we have endorsed Amendment 64 which presents a more effective and socially responsible approach to how Colorado addresses the adult use of marijuana.”

Id.; see also Reiman, *supra* note 62.

Marijuana is still an illicit substance and the laws are still being used to justify the search, detainment and questioning of populations deemed “untrustworthy” and “suspicious” by modern society, namely the poor and young men of color. A prime example is New York’s Stop and Frisk program, which stopped nearly 700,000 people in 2011. Hailed as a strategy for removing guns and violent crime from the streets, this method of stopping and questioning “suspicious” individuals, highlights the racial inequities associated with drug laws. From 2002 to 2011, African American and Hispanic residents made up close to 90% of people stopped. This is not limited to New York. In California, African-Americans are 4 times more likely to be arrested for marijuana, 12 times more likely to go to prison with a felony marijuana charge, and 3 times more likely to go to prison with a

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In the face of discriminatory patterns and practices of harassment and humiliating searches, it is understandable why the simplest approach may appear to be the legalization of marijuana, in hopes of reducing the unnecessary arrests or harassment of young black men. However, it is important to recognize that the initial steps that were taken by Colorado voters to legalize marijuana may not be enough to effectively address the root-level issues that lead to the possession and sales of marijuana amongst young men of color. To be clear, studies show that whites are in the majority as far as marijuana usage and arrests go.⁶⁴ However, African American and Latino males are more likely than whites to be arrested for possessing small amounts of marijuana.⁶⁵ What may not be apparent is the fact that even with the dramatic change to the law in Colorado, men of color may still be at risk of experiencing racial profiling and harassment, especially in circumstances where law enforcement suspects that they are in possession of more than an ounce of marijuana. Beyond that, persons caught selling marijuana in any

marijuana possession charge.

Reiman, *supra* note 62; Stephen Gutwillig, *The Racism of Marijuana Prohibition*, L.A. TIMES, Sept. 7, 2009, <http://www.latimes.com/news/opinion/opinionla/la-oe-gutwillig7-2009-sep07,0,1308672.story>.

Not surprisingly, given the way drug laws are traditionally enforced in this country, the burden has fallen disproportionately on people of color, and on young black men in particular. According to the CJCJ, half of California's marijuana possession arrestees were nonwhite in 1990 and 28% were under age 20. Last year, 62% were nonwhite and 42% were under age 20. Marijuana possession arrests of youth of color rose from about 3,100 in 1990 to about 16,300 in 2008—an arrest surge 300% greater than the rate of population growth in that group.

Even more disturbing, African Americans account for an even higher portion of all marijuana felony arrests. Blacks make up less than 7% of the state population but 22% of people arrested for all marijuana offenses and 33% of all marijuana felony arrests. More African Americans are arrested in California for marijuana felonies than are whites, even though whites are six times more represented in the state population.

The overrepresentation of African Americans is not explained by use rates. According to the federal Substance Abuse and Mental Health Services Administration, the percentage of African Americans and whites who use marijuana over any 30-day period are similar. However, for the 18–25 age group — which constitutes a substantial proportion of marijuana arrests — African Americans regularly use marijuana at rates lower than whites (16.5% and 18.4%, respectively), indicating that their overrepresentation may be even more profound.

Gutwillig *supra*.

⁶⁴ See, e.g., LEVINE ET AL., *supra* note 61, at 3, 5.

⁶⁵ See, e.g., *id.* at 3, 7; see also Gutwillig, *supra* note 63.

amount without a license could be subject to a felony and a fine, if convicted.⁶⁶

There are at least two factors, and likely many more, that make African American men more vulnerable to experiencing criminal justice impacts relating to marijuana possession. The first factor that contributes to disparate arrest and conviction rates of African American men for low-level drug offenses, such as marijuana, is the poor socioeconomic conditions that entice these men to enter the drug trade. Indeed, black men between the ages of sixteen to twenty-four have one of the highest rates of unemployment amongst any other group on a national level.⁶⁷ Young black men have tremendous difficulty obtaining jobs that pay a living wage, which in turn make it difficult to support their families through legitimate means.⁶⁸

The effects of generational poverty, racial discrimination, and marginalization of African American men have led to perpetuating cycles of poverty, intolerable rates of incarceration, high rates of unemployment, lower levels of educational attainment, and ongoing disengagement with mainstream

⁶⁶ For a comprehensive look at Colorado's laws and penalties pertaining to marijuana violations, see *Colorado Penalties*, NAT'L ORG. FOR REFORM OF MARIJUANA LAWS, <http://norml.org/laws/penalties/item/colorado-penalties> (last visited Mar. 8, 2013) (showing the illegal sale or distribution of marijuana in any quantity is a felony, punishable by fines and incarceration); COLO. REV. STAT. § 18-18-406 (2012); see also generally Scot Kersgaard, *Marijuana in Colorado: From the Black Market to the Corner Store*, COLO. INDEP. (Sept. 25, 2012), <http://coloradoindependent.com/125033/marijuana-in-colorado-from-the-black-market-to-the-corner-store>.

Possession of up to two ounces of marijuana in Colorado is now a Class Two petty offense, punishable by a fine of up to \$100 and up to 15 days in jail. If 64 passes, the first ounce would be legal, but possession of one to two ounces would remain a petty offense. If 64 passes, growing up to six plants for personal use would become legal. Currently growing even one plant is a class one misdemeanor, which comes with a fine of up to \$5000 and a jail sentence of up to 18 months.

Kersgaard *supra*.

⁶⁷ See JOINT ECON. COMM., ECONOMIC FACT SHEET: THE CRISIS OF BLACK MALE JOBLESSNESS (2007), http://www.jec.senate.gov/public/?a=Files.Serve&File_id=8da123a9-300f-4be0-bb36-1f871f58cf90; see also Peter Coy, *The Plight of Young, Black Men is Worse Than You Think*, BUS. WK., September 28, 2012, <http://www.businessweek.com/articles/2012-09-28/the-plight-of-young-black-men-is-worse-than-you-think>.

⁶⁸ The late rapper Tupac Shakur defined the essence of this paradigmatic experience of poor African Americans when he sang: "I'm tryin' to make a dollar out of fifteen cents[;] It's hard to be legit and still pay the rent." 2PAC, KEEP YA HEAD UP LYRICS (Interscope Records 1993).

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society.⁶⁹ Lacking access to social networks and opportunities to gain upward mobility, poor African American men may suffer an unreasonable amount of temptation to enter the underground drug trade as a means of providing for their families and gaining a greater level of social standing and street credibility within their neighborhoods and social circles.⁷⁰ When that happens, as illustrated above, harsh drug laws, policies, and uneven enforcement of the laws by law enforcement are awaiting African American men.⁷¹ And the cycle merely continues with newer generations of young black men subjected to the same fate as their older, incarcerated, or deceased predecessors. One of many disturbing aspects of this cycle is the fact that with all of the resources that are routinely poured into drug enforcement, the notion that the underlying socioeconomic conditions that contribute to a young man's decision to enter the drug trade are rarely ever addressed. The system as it stands, merely reinforces racial and socioeconomic inequities.⁷²

⁶⁹ See generally Levy-Pounds, *Bones*, *supra* note 1.

⁷⁰ See generally *id.*; see also Levy-Pounds, *Justice For All?*, *supra* note 15.

⁷¹ See generally Levy-Pounds, *Bones*, *supra* note 1; see also Levy-Pounds, *Justice For All?*, *supra* note 15.

⁷² This has arguably never been more apparent than in the sudden push to legalize marijuana and by those who stand to gain financially from this change in the law by reshaping and "mainstreaming" a market that was once underground. Drug arrest statistics support the notion that at least a subset of young men of color, as similar to their white counterparts, were involved in the sale of marijuana. By regulating the market and transforming it into a professional industry, young men of color will be effectively locked out of a market that might have provided a source of income. Assuming that low level marijuana dealers decide that they are interested in participating in the new marijuana market, the high financial thresholds and additional regulations will have the consequence, whether intentionally or not, of locking them out of the opportunity to engage in entrepreneurship. Obviously, there are moral implications involved in one's decision to sell drugs, legally or illegally. The difference here is that young men of color have been demonized, harassed, and have suffered criminal justice contacts for years for engaging in the very same underground market that will now be seen as a cash cow for wealthy white investors. This seems to be hypocritical and merely reinforces the socioeconomic inequities that are permeating our society. A recent article in Newsweek provides compelling support for my hypothesis regarding how wealthy white men stand to profit handsomely from bringing the market above ground, in full violation of current federal law. Ironically, these men are doctors, lawyers, members of law enforcement, etc., but will likely not suffer criminal justice impacts for their activities. This is not a judgment against them, but merely an observation. See Tony Dokoupil, *The New Pot Barons*, NEWSWEEK, Oct. 29, 2012 (Newsweek's cover stated: "The New Pot Barons[:] They're young, well educated, politically savvy—and about to get rich making marijuana legit.").

The second factor that contributes to African American men's higher propensity to come into contact with the criminal justice system relates to systemic practices by law enforcement, such as biased policing, also known as racial profiling, and an oversaturation of law enforcement in inner city communities. Excess policing in inner city communities lends itself to more frequent contact between law enforcement and young African American men:

Young blacks and Latinos use marijuana at *lower* rates than young whites. So why are police in California arresting young blacks and Latinos at higher rates than young whites, and at greater numbers than their percentages of the population? Based on our studies of policing in New York and other cities, we do not think the arrests are mostly a result of personal bias or racism on the part of individual patrol officers and their immediate supervisors. Rather, this is a system-wide phenomenon, occurring in every county and nearly every police department in California and elsewhere.

Police departments deploy most patrol and narcotics police to certain neighborhoods, usually designated "high crime." These are disproportionately low-income, and disproportionately African American and Latino neighborhoods. It is in these neighborhoods where the police make most patrols, and where they stop and search the most vehicles and individuals, looking for "contraband" of any type in order to make an arrest. The item that young people in *any* neighborhood are most likely to possess, which can get them arrested, is a small amount of marijuana. In short, the arrests are racially-biased mainly because the police are systematically "fishing" for arrests in only some neighborhoods, and methodically searching only some "fish." This produces what has been termed "racism without racists."⁷³

There are numerous anecdotal accounts of young Black men being stopped and searched for no apparent reason.⁷⁴ The "stop and frisk"⁷⁵ so-called crime reduction strategy in New York is a

⁷³ LEVINE ET AL., *supra* note 61, at 9.

⁷⁴ The New York Times featured the story of an 18 year-old African American man named Tyquan Brehon who alleges to have been stopped by the police at least 60 times. Julie Dressner & Edwin Martinez, 'The Scars of Stop-and-Frisk', N.Y. TIMES (June 12, 2012), http://www.nytimes.com/2012/06/12/opinion/the-scaars-of-stop-and-frisk.html?_r=0. Tyquan's story is a part of a short documentary film regarding the issue. *Id.* Tyquan is one of countless African American and Latino men who are alleging that they are being unfairly targeted by police due to their race and/or ethnicity.

⁷⁵ See generally *Stop and Frisk Policy – New York City Police Department*, N.Y. TIMES (Jan. 8, 2013), <http://topics.nytimes.com/top/reference/timestopics/>

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prime example of how policing practices and policies can have a disparate impact on poor communities of color and men of color in particular. In New York, officers allegedly engaged in a disturbing practice of “stopping and frisking” random men of color if they were thought to look suspicious or to have made “furtive movements.”⁷⁶ Allegedly, officers would invariably stop, question, and search black and Latino men, who comprised 85% of those who were stopped by police.⁷⁷ In circumstances where the men were found to be in possession of low-level drugs, such as small amounts of marijuana, they would face arrest or fines. Low-level drug arrests cost New York millions of dollars a year, although such arrests do not necessarily result in a positive effect on public safety.

Given the frequency with which “stop and frisk” type initiatives occur, and the disproportionate impacts on African American men, it is not altogether surprising that the NAACP would see these challenges as a pressing civil rights issue. The question remains, however, of whether a push for legalization of marijuana is the most judicious way to address systemic issues of racial profiling and low-level drug arrests.

III. UNINTENDED CONSEQUENCES OF MARIJUANA LEGALIZATION

Unless law enforcement agencies throughout the states of Washington and Colorado intend to reduce their law enforcement ranks, due to the potential reduction in low-level marijuana arrests and ensuing cost-savings, officers may still face pressure to over-police low-income communities of color, in part to justify their expenditures. The ongoing over-saturation of law

subjects/s/stop_and_frisk/index.html.

The term “stop and frisk” is shorthand for a strategy that police officers use to reduce crime in an area by stopping and searching people they consider suspicious. In New York City, the approach led to close to 700,000 stops in 2011 alone.

In 2012, the number of street stops in New York from January through March 2012 rose to 203,500 from 183,326 during the same quarter of 2011.

The tactic has come under fire from civil rights groups, as well as some city council members and minority community leaders, who point out that the overwhelming majority of the stops do not result in the discovery of any wrongdoing on the part of the person stopped.

Id.

⁷⁶ *Id.*

⁷⁷ *Id.*

enforcement in certain communities may continue to produce a disproportionate rate of contact between African Americans and the criminal justice system.⁷⁸ With so many low-level offenses, such as loitering and disorderly conduct⁷⁹ on the books in many jurisdictions, it may not be difficult to find other pretexts to justify searches and arrests of men of color.

One additional consequence of legalizing marijuana is the possible shift in the underground drug market to account for a loss of revenue, due to the market being brought aboveground and regulated. Since the underlying economic conditions that may lead to underground drug trades will remain in place, the question must be posed of whether this will cause an uptick in the trafficking of higher level drugs to replace lost income for illegal marijuana sales. Is it possible that more potent marijuana will appear in the unregulated, underground market in order to compete more effectively with the government-sanctioned market? If this happens, it is important to think about what impacts could occur to the families and communities in which underground markets currently exist.

IV. COLLATERAL EFFECTS OF CRIMINAL JUSTICE INVOLVEMENT

Comprehensive reentry initiatives that assist formerly incarcerated persons in successfully reentering society are extremely limited. Thus, African American men exiting prisons

⁷⁸ See Graham Rayman, *The NYPD Tapes: Inside Bed-Stuy's 81st Precinct*, VILLAGE VOICE (May 4, 2010), <http://www.villagevoice.com/2010-05-04/news/the-nypd-tapes-inside-bed-stuy-s-81st-precinct/>. The article discusses the secret tapes created by a Bed-Stuy police officer from June 2008 to October 2009 to expose the inner tensions and disturbing practices within the precinct. *Id.* It also provides an illustration of the pressures of law enforcement to patrol high crime communities, saying:

[The secret tapes] reveal that precinct bosses threaten street cops if they don't make their quotas of arrests and stop-and-frisks, but also tell them not to take certain robbery reports in order to manipulate crime statistics. The tapes also refer to command officers calling crime victims directly to intimidate them about their complaints.

As a result, the tapes show, the rank-and-file NYPD street cop experiences enormous pressure in a strange catch-22: He or she is expected to maintain high 'activity'—including stop-and-frisks—but, paradoxically, to record fewer actual crimes.

Id.

⁷⁹ Wayne A. Logan, *Policing Identity*, 92 B.U. L. REV. 1561, 1585 (2012); Linda M. Ricci, Note, *Hawking Neighborhood Justice: Unlicensed Vending in the Midtown Community Court*, 12 YALE L. & POL'Y REV. 231, 246 (1994).

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find it difficult, if not impossible to obtain gainful employment,⁸⁰ housing, and the resources necessary to have a stable life.⁸¹ Employers are often unwilling to hire persons with criminal histories, which increases the likelihood that recently released prisoners will recidivate,⁸² or remain unemployed and unable to provide for their families.⁸³ This debilitating cycle of poverty, unemployment and incarceration persists and continues to effect subsequent generations of poor African Americans.⁸⁴

Disturbingly, many of the individuals—even those who commit low-level crimes—who enter the prison system become entrapped in the revolving door of criminal justice, and find it extremely difficult, if not impossible to disengage from this system.⁸⁵ For one, prisons no longer serve as places where inmates can be rehabilitated, as spending on education within prisons has

⁸⁰ PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 4 (2010) [hereinafter PEW, COLLATERAL COSTS] (“By age 48, the typical former inmate will have earned \$179,000 less than if he had never been incarcerated. Incarceration depresses the total earnings of white males by 2 percent, of Hispanic males by 6 percent, and of black males by 9 percent.”).

⁸¹ See Shawn D. Bushway, *Labor Market Effects of Permitting Employer Access to Criminal History Records*, 20 J. CONTEMP. CRIM. JUST. 276, 276 (2004); see also Vince Beiser, *Punishment Delayed*, AM. PROSPECT (Nov. 22, 2005), <http://www.unz.org/Pub/AmProspectWeb-2005nov-00067>; Paul Stinson, *Restoring Justice: How Congress Can Amend the One-Strike Laws in Federally-Subsidized Public Housing to Ensure Due Process, Avoid Inequity, and Combat Crime*, 11 GEO. J. ON POVERTY L. & POL'Y 435, 437 (2004); Memorandum from the Drug Policy Alliance prepared by Robin Levi & Judith Appel, *Collateral Consequences: Denial of Basic Social Services Based on Drug Use 4–5* (June 13, 2003), available at http://www.drugpolicy.org/docUploads/Postincarceration_abuses_memo.pdf; Letter from NAACP Legal Defense Fund to Congress, *Suspend Federal Bans on Public Assistance* (Oct. 26, 2005), available at http://www.drugpolicy.org/docUploads/Katrina_Sign On_102605.pdf.

⁸² The stigma of being an ex-offender often creates a barrier to employment. However, there are states, such as Oregon, Michigan, and Missouri that are succeeding in reducing such barriers that lead to a greater likelihood of recidivism. The PEW CTR. ON THE STATES, *STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS 19–23*, 32 (2011) [hereinafter PEW, STATE OF RECIDIVISM].

⁸³ See generally LEGAL ACTION CTR., *AFTER PRISON: ROADBLOCKS TO REENTRY* (2008–2009), <http://www.lac.org/roadblocks-to-reentry/main.php?view=state>.

⁸⁴ PEW, STATE OF RECIDIVISM, *supra* note 82, at 19–23, 32; PEW, COLLATERAL COSTS, *supra* note 80, at 5 (“Previous research has shown that having a parent incarcerated hurts children, both educationally and financially.” In addition, “[c]hildren with fathers who have been incarcerated are significantly more likely than other children to be expelled or suspended from school (23 percent compared with 4 percent).”).

⁸⁵ See Levy-Pounds, *Justice For All?*, *supra* note 15, at 15 (“According to recent estimates, two-thirds of persons released from prison return to prison within three years of being released.”).

decreased dramatically within recent years.⁸⁶ This poses a tremendous problem for the broader society, as 95% of prisoners eventually return home from prison, with nearly 700,000 being released annually;⁸⁷ and often with scarce resources, inadequate housing options, and few prospects for gainful employment.

Additionally, prisoners often suffer extra-judicial punishment, known as collateral consequences,⁸⁸ which prevent persons with criminal histories from working in certain industries and obtaining various professional licenses⁸⁹ in accordance with specific state statutes and federal regulations. Further, given the advent of criminal and other court records being easily accessible through the internet and the use of data harvesters, persons with criminal histories find it difficult to identify employers who are willing to give them a second chance. In fact, recent reports show that over 90% of employers conduct background checks on prospective employees, which are then used as screening tools to eliminate candidates with criminal records.⁹⁰ In many cases, arrest records, even those without a conviction, may bar an otherwise qualified applicant from being hired. Such employment

⁸⁶ See ECLA Task Force on Criminal Justice, Evangelical Lutheran Church in America, Draft Social Statement on Criminal Justice 15 (Mar. 2012), <http://www.elca.org/What-We-Believe/Social-Issues/Social-Statements-in-Process/Criminal-Justice/Draft-Statement.aspx>.

Related to exploding populations of prisoners is the troubling emergence of much more punitive attitudes toward the incarcerated; services such as educational and recreational opportunities, as well as access to counseling, education and the care of chaplains have been eliminated not simply for budgetary reasons. As people of reason, we accept differences in correctional philosophies, but as people of faith we reject dehumanization of the incarcerated.

Id. at 15:393–398.

⁸⁷ JEREMY TRAVIS, AMY L. SOLOMON & MICHELLE WAUL, FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 9 (2001), http://www.urban.org/pdfs/from_prison_to_home.pdf; Shay, *supra* note 5, at 331.

⁸⁸ Jordan Segall, *Mass Incarceration, Ex-Felon Discrimination & Black Labor Market Disadvantage*, 14 U. PA. J.L. & SOC. CHANGE 159, 174–175 (2011) (“Collateral consequences for ex-felons are preconditions for a system of punitive segregation with no remedy in equal protection or antidiscrimination jurisprudence Statutory limitations on ex-felon employment therefore exert a disparate impact on black Americans . . .”).

⁸⁹ *Id.* at 160 (“Discrimination against ex-felons may be state-mandated—as in laws that restrict ex-felons from public employment or licensed professions—or simply permitted by the state.”).

⁹⁰ MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSELLEM, THE NAT’L EMP’T LAW PROJECT, 65 MILLION “NEED NOT APPLY”: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 1 (2011), http://www.nelp.org/page//SCLP/011/65_Million_Need_Not_Apply.pdf?nocdn=1.

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discrimination is viewed as permissible because of employers' interests in hiring law-abiding employees.⁹¹

Twenty years ago, misdemeanor arrest and conviction records were papers kept in court storerooms and warehouses, often impossible to locate. Ten years ago they were computerized. Now they are instantly searchable on the Internet for \$20 to \$40 through commercial criminal-record database services. Employers, landlords, credit agencies, licensing boards for nurses and beauticians, schools, and banks now routinely search these databases for background checks on applicants. The stigma of criminal records can create barriers to employment and education for anyone, including whites and middle class people. Criminal drug arrest and conviction records can severely limit the life chances of the poor, the young, and especially young African Americans and Latinos.⁹²

As a result, a prisoner with few employment options⁹³ and no hope for the future is a prime candidate to become re-engaged in criminal activity and ultimately to re-enter the revolving doors of the prison system,⁹⁴ costing taxpayers over \$22,000 annually per prisoner, with little to no positive return on the investment for the rest of society.⁹⁵ This cycle of incarceration and recidivism arguably results in a waste of monetary resources, as well as a loss of human capital and productivity. Additional effects include the debilitating effects on the human psyche and spirit that flow from mass incarceration.⁹⁶ Incarcerated persons are more likely to experience extreme poverty prior to incarceration, have significantly lower rates of literacy than the general population,⁹⁷ and have higher rates of mental health issues⁹⁸ than the general

⁹¹ *Id.*

⁹² LEVINE ET AL., *supra* note 61, at 10.

⁹³ Ronald S. Everett & Deborah Periman, "The Governor's Court of Last Resort: An Introduction to Executive Clemency in Alaska, 28 ALASKA L. REV. 57, 95 (2011) ("The most important predictive factor as to whether an offender will become a recidivist appears to be employment Those who cannot find legitimate work are more likely to engage in criminal acts.").

⁹⁴ See Levy-Pounds, *Justice For All?*, *supra* note 15, at 15.

⁹⁵ JAMES J. STEPHAN, BUREAU OF JUSTICE STATISTICS, STATE PRISON EXPENDITURES, 2001, at 1 (2004), <http://bjs.ojp.usdoj.gov/content/pub/pdf/spe01.pdf> (In 2001 the average cost to house an adult prisoner is \$22,650 per year, or \$62.05 per day); see also SCHMITT ET AL., *supra* note 5, at 11 (Today the average cost is between \$25,500 and \$26,000 per year).

⁹⁶ See Levy-Pounds, *Bones*, *supra* note 1, at 380.

⁹⁷ See U.S. DEP'T OF EDUC., START EARLY, FINISH STRONG: HOW TO HELP EVERY CHILD BECOME A READER (1999), <http://www2.ed.gov/pubs/startearly/intro.html>; see also Levy-Pounds, *Bones*, *supra* note 1, at 379.

⁹⁸ KAMALA MALLIK-KANE & CHRISTY A. VISHER, URBAN INST.: JUSTICE POLICY

public. Although incarcerated persons as a group garner little compassion and empathy from the general public, they are a group that is suffering and in need of attention and access to resources, even more so upon their release from prison.⁹⁹

As one might imagine, the high rate of incarceration, coupled with the exorbitant cost of maintaining the criminal justice system, has taken a tremendous toll on families,¹⁰⁰ communities, and children of incarcerated parents.¹⁰¹ Although mass incarceration in America is a critically important human rights and civil rights issue, society as a whole has largely been silent on criminal justice issues, and has failed to become more heavily engaged in combating laws and policies that create injustice for “the least of these.”¹⁰²

CTR., HEALTH AND PRISONER REENTRY: HOW PHYSICAL, MENTAL, AND SUBSTANCE ABUSE CONDITIONS SHAPE THE PROCESS OF REINTEGRATION 9, 42 (2008).

⁹⁹ Adam Gopnik, *The Caging of America: Why Do We Lock Up So Many People?*, NEW YORKER, Jan. 30, 2012.

The inhumanity of American prisons was as much a theme for Dickens, visiting America in 1842, as the cynicism of American lawyers. His shock when he saw the Eastern State Penitentiary, in Philadelphia—a “model” prison, at the time the most expensive public building ever constructed in the country, where every prisoner was kept in silent, separate confinement—still resonates: “[I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers. . . . I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body: and because its ghastly signs and tokens are not so palpable to the eye and sense of touch as scars upon the flesh; because its wounds are not upon the surface, and it extorts few cries that human ears can hear; therefore I the more denounce it, as a secret punishment which slumbering humanity is not roused up to stay.]”

Id.

¹⁰⁰ See Press Release, The Pew Ctr. on the States, *supra* note 7.

Before being incarcerated, two-thirds of male inmates were employed and more than half were the primary source of financial support for their children. After release, former male inmates work nine fewer weeks annually and take home 40 percent less in annual earnings, making \$23,500 instead of \$39,100. That amounts to an expected earnings loss of nearly \$179,000 through age 48 for men who have been incarcerated.

Id.

¹⁰¹ See Levy-Pounds, *Justice For All?*, *supra* note 15, at 14.

¹⁰² See *Religion & Ethics NewsWeekly: Mass Incarceration* (PBS television broadcast Jan. 13, 2012), available at <http://www.pbs.org/wnet/religionandethics/episodes/january-13-2012/mass-incarceration/10091/> (Judge Wendell Griffen, who serves not only as a judge, but as a Baptist minister, stated during the interview that “[w]e don’t recognize the God in our brothers and sisters who are in prison, and the biblical imperative is for us to see that our sisters and

CONCLUSION

Irrespective of one's political beliefs, it is clear that poor communities of color in general, and African American males in particular, continue to experience alarming rates of racial disparities in the criminal justice system.¹⁰³ The laws and policies that comprise the war on drugs provide a disturbing example of how the political process sometimes manipulates the public into supporting criminal justice laws and policies that are costly, ineffective, and fail to address the underlying societal problems that lead to incarceration.¹⁰⁴ The persistent disparities that currently exist will not disappear simply with the passage of time or as a result of a changing political landscape.¹⁰⁵

brothers in prison are our sisters and brothers. We owe it to God to get them out.”).

¹⁰³ *Incarceration Rates By Race & Ethnicity, 2010*, PRISON POL'Y INITIATIVE (2012), <http://www.prisonpolicy.org/graphs/raceinc.html> (showing that in 2010, blacks were incarcerated at a rate of 2,207 per 100,000 people in that group, Latinos were incarcerated at a rate of 966 per 100,000 people, and whites were incarcerated at a rate of 380 per 100,000 people).

¹⁰⁴ Justin Brooks & Kimberly Bahna, “*It’s a Family Affair*”—*The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. REV. 271, 280–81 (1994) (“[I]ncarceration most commonly occurs in the lowest socioeconomic strata of our society[.]”).

¹⁰⁵ See EXPANDING POPULATION, *supra* note 24 (“The total federal prison population increased 761% from 1980 to 2010[.]”).