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## Fourth Annual W. Haywood Burns Memorial Lecture: Discrimination in the New York Criminal Justice System Address

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**FOURTH ANNUAL W. HAYWOOD BURNS  
MEMORIAL LECTURE  
THE COMMITTEE ON MINORITIES AND THE  
LAW OF THE NEW YORK COUNTY  
LAWYERS ASSOCIATION  
14 VESEY STREET  
NEW YORK, NEW YORK  
MARCH 16, 2000**

**DISCRIMINATION IN THE NEW YORK  
CRIMINAL JUSTICE SYSTEM**

*The Honorable Robert L. Carter\**

Occupying the Haywood Burns Chair not only provides the intellectual stimulus and energy obtained in great measure from interaction with the students at CUNY Law School, but there is the bonus of being given a forum and a captive audience to whom you can present a topic you consider worthy of public interest.

For most of my professional life I have been concerned with eliminating racial barriers to educational opportunity, because of a conviction that equal educational opportunity is a *sine qua non* for black Americans to secure full citizenship rights. Until recently, I had not invested much time or energy with familiarizing myself about fairness in the operation of the criminal justice system. In part this neglect was a result of acceptance of conventional wisdom in this country that blacks commit more crimes than other groups. Despite this acceptance, I always had the nagging certainty that the criminal justice system was not free of racism. Recently, the system

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\* Judge Carter, who assumed the bench of the Southern District of New York in 1972, was a chief architect and litigator of the NAACP team – headed by the late Supreme Court Justice Thurgood Marshall – that developed the legal challenge to end racial discrimination in America’s public schools. The high point of his twenty-four-year NAACP career, during which he argued and won twenty-one of twenty-two cases in the Supreme Court, was the historic *Brown v. Board of Education* decision outlawing segregation in public education. A current member of the Council of Advisors of the Northside Center for Child Development, Judge Carter was a co-founder of the National Conference of Black Lawyers (NCBL). He is the former member of innumerable committees of the bar and the court, and was associated with a very wide array of educational institutions, organizations and foundations. He has written extensively about discrimination in the United States, particularly school segregation, and of his longtime friend and colleague, Thurgood Marshall.

has been opened up to public view, with statistics and studies which reveal that systemic racial discrimination is operative throughout the state and federal criminal justice systems in the United States; that disparate treatment of blacks is operative in the rate of arrests, in the severity of criminal charges, in the rate of convictions and in the severity of the punishment – in short, at every level and in every phase of the various systems, racism is at play.

The information on which I base those conclusions and which I will summarize for you tonight has convinced me that ending racial discrimination in the criminal justice system is just as critical to achieving social justice in this country as is finding the means to provide equal educational opportunity for inner-city children in the United States.

Blacks in the United States have always been imprisoned at disproportionate rates. United States census figures indicate that blacks were ten percent of the nation's population in 1926 and 1954. However, in his book *Race to Incarcerate*, Marc Mauer shows that in 1926 blacks were twenty-one percent of the incarcerated<sup>1</sup>; and in 1954, the time of *Brown v. Board of Education*,<sup>2</sup> blacks were thirty percent of that group. The report of the Department of Justice (hereinafter, "DOJ"), *Prisoners in 1998*, shows that today things are worse. Blacks are now twelve to thirteen percent of the American public, yet DOJ statistics from year-end 1998 show that there were 1.8 million people in federal, state and local jails – of which fifty percent were black.<sup>3</sup> This means that at the beginning of 1999, there were approximately 900,000 blacks behind bars.

One wonders how the number of black prisoners could have jumped so precipitously in the last forty years, America's supposedly strongest period of racial progress. The reasons are clear. Despite our improved attitudes about racial equality, we are still unwilling to confront a criminal justice system that holds blacks hostage and treats them as second-class citizens. The criminal justice system sends blacks this message of second-class status in three

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<sup>1</sup> MARC MAUER & THE SENTENCING PROJECT, *RACE TO INCARCERATE* 120-21 (1999).

<sup>2</sup> *BROWN v. Board of Education of Topeka*, 347 U.S. 483 (1954) (holding that segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprives children of the minority group of equal educational opportunities, in contravention of the Equal Protection Clause of the Fourteenth Amendment).

<sup>3</sup> ALLEN J. BECK & CHRISTOPHER J. MUMOLA, *PRISONERS IN 1998* (Bureau of Justice Statistics, United States Department of Justice, NCJ 175687, 1999) [hereinafter *PRISONERS IN 1998*]. See also THOMAS P. BONCZAR, *PROBATION AND PAROLE IN THE UNITED STATES, 1998* (Bureau of Justice Statistics, United States Department of Justice, NCJ 178234, 1999) [hereinafter *PROBATION AND PAROLE IN 1998*].

ways. For one, blacks are subject to more surveillance. Two, blacks are subject to harsher punishment when they engage in lawbreaking. And three, criminal justice officials refuse to alter so-called neutral criminal justice policies that disproportionately affect black communities.

To highlight how bad America's imprisonment rates are, criminal justice scholars compare the nation's imprisonment rates with those of other countries. The Sentencing Project, in its 1995 report *Intended and Unintended Consequences*, warned that the nation's imprisonment rates were making America the shame of the Western world. The Sentencing Project concluded, based on comparative imprisonment data from 1993, that the U.S. had five to ten times the number of people in jail as our Western neighbors.<sup>4</sup> Thus far, no one has gathered the data to do a more current comparison of prison rates. However, we can safely assume things are worse. Our prison population had only just reached the one million mark at the beginning of 1994,<sup>5</sup> right after these data were collected, and, as indicated, the most recent DOJ statistics in *Prisoners in 1998* show that the figure is now close to two million people in jail.<sup>6</sup>

What is particularly disquieting about this study is that once the rates of black imprisonment are factored out, America's imprisonment rates for whites are only one to two times the rate of other Western countries.<sup>7</sup> Harvard statistician Bruce Western analyzed the same data set, and concluded that America in 1993 imprisoned blacks at twenty times the rate that the Europeans imprisoned their citizens.<sup>8</sup>

These national statistics can only tell part of the story, for ninety percent of the nation's prisoners are held in state jails, and here disparities are worse. The Sentencing Project, analyzing 1994 DOJ data collected from state jails, determined that twelve states and the District of Columbia jail blacks at ten times the rate they

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<sup>4</sup> MARC MAUER, *INTENDED AND UNINTENDED CONSEQUENCES: STATE RACIAL DISPARITIES IN IMPRISONMENT 2* (1997). Western, *infra* note 8, reveals this is 1993 data.

<sup>5</sup> See BUREAU OF JUSTICE STATISTICS, UNITED STATES DEPARTMENT OF JUSTICE, *STATE AND FEDERAL PRISON POPULATION TOPS ONE MILLION* (press release summarizing PRISONERS AT MIDYEAR 1994 [BUREAU OF JUSTICE STATISTICS, UNITED STATES DEPARTMENT OF JUSTICE, NCJ 151168, 1994], 1994).

<sup>6</sup> See PRISONERS IN 1998, *supra* note 3. See also PROBATION AND PAROLE IN 1998, *supra* note 3.

<sup>7</sup> See MAUER, *supra* note 4, at 2.

<sup>8</sup> Bruce Western, *How Unregulated is the U.S. Labor Market? The Penal System as a Labor Market Institution*, 104 AM. J. SOC. 1030, 1036 (1999).

do whites.<sup>9</sup> Additionally, David F. Greenberg and Valerie West's 1999 study, *Growth in State Prison Populations*, collecting data from 1971 through 1992, indicates that during that period the size of a state's black population was a stronger indicator of the size of the state's prison population than the state's rate of violent crime.<sup>10</sup>

The problem is even more sobering when we recognize that every part of the black community is being swept up in the imprisonment wave. The Sentencing Project's report *Young Black Americans and the Criminal Justice System* indicates that America's criminal justice policies resulted in one in fourteen black men being in jail on any given day in 1995, in contrast to one in one hundred white men.<sup>11</sup> The DOJ reports in *Prisoners in 1997* that in 1996 one in three black men between age 20 and 29 were in jail, on probation or on parole.<sup>12</sup> Earlier figures showed one in four.<sup>13</sup> The DOJ's 1997 report *Lifetime Likelihood of Going to State or Federal Prison* gives us an idea of the dismal future black men face. The DOJ concluded that if America's 1995 incarceration rates continued, one in four black male babies born would spend a year or more of his life in prison, in contrast to one in twenty-three white male babies.<sup>14</sup>

Black women are also being swept up in the nation's imprisonment wave. In *Race to Incarcerate*, Marc Mauer reports that between 1985 and 1995, the number of black women in federal and state prisons grew by 204 percent: faster than the rate for black men.<sup>15</sup> The DOJ's report *Prisoners in 1998* confirms that black women are being sent to jail at disproportionate rates; at year-end 1997 they were being jailed at eight times the rate of white women.<sup>16</sup> Black youth are similarly being affected. The DOJ report *Juvenile Arrests 1998* shows that black youth, while only fifteen percent of the nation's juvenile population, were thirty-two percent of juveniles ar-

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<sup>9</sup> MAUER, *supra* note 4, at 3.

<sup>10</sup> David F. Greenberg and Valerie West, *Growth in State Prison Populations*, paper presented to the Law and Society Association, Aspen, Colorado (June 1998) (unpublished manuscript).

<sup>11</sup> MARC MAUER ET AL., *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* 3 (1995).

<sup>12</sup> Jan M. Chaiken, *Crunching Numbers: Crime and Incarceration at the End of the Millennium*, NAT'L INST. JUST. J., Jan. 2000, at 14.

<sup>13</sup> See Nathaniel R. Jones, *For Black Males and American Society—The Unbalanced Scales of Justice: A Costly Disconnect*, 23 CAP. U. L. REV. 1, 20 (1994).

<sup>14</sup> THOMAS P. BONCZAR & ALLEN J. BECK, *LIFETIME LIKELIHOOD OF GOING TO STATE OR FEDERAL PRISON* (Bureau of Justice Statistics, United States Department of Justice, NCJ 160092, 1997).

<sup>15</sup> MAUER, *supra* note 1, at 125. (The rate for black men was 143 percent.)

<sup>16</sup> PRISONERS IN 1998, *supra* note 3, at 10.

rested on drug offenses.<sup>17</sup> DOJ data collected between 1990 and 1994 reveals that during that period black juveniles were twenty-five to fifty percent of the arrests for various juvenile crimes, thirty-six percent of the juvenile delinquents referred for court proceedings, and sixty-three percent of the juvenile defendants transferred as adults to criminal court.<sup>18</sup>

Now some of you may think that blacks are being arrested and incarcerated more because they commit more crime. Marc Mauer dismantles this perception in *Race to Incarcerate*. Mauer examined several studies showing that there are higher crime rates among blacks, and found that these studies attribute higher crime rates to blacks because blacks are *arrested* at higher rates than whites. When examined critically, the only thing these studies prove is that part of the reason blacks are being disproportionately incarcerated is because they are more closely *surveyed*. Mauer specifically shows that, even when you control for the fact that some black neighborhoods, because of poverty and lack of opportunity, do have higher violent crime rates, these factors are insufficient to explain the vastly higher rates of imprisonment blacks suffer as compared to other groups.<sup>19</sup>

Once one recognizes that America's high rates of black imprisonment cannot simply be attributed to greater criminality, the presence of discrimination seems clear; but specific examples more compellingly illustrate the problem. For example, the nation's "War on Drugs" policies more closely scrutinize and more harshly punish blacks. The Department of Health and Human Services reports that in 1998 blacks were fifteen percent of the country's illegal drug users;<sup>20</sup> yet, the DOJ's 1998 *Criminal Justice Sourcebook* shows that during 1997 blacks were thirty-seven percent of those arrested locally for drug crimes, and fifty-three percent of those convicted in state courts for drug crimes.<sup>21</sup> The Sentencing Project's *Unintended Consequences* report indicates that between 1986 and 1991, the peak years of the "War on Drugs," 66,000 blacks were

<sup>17</sup> HOWARD N. SYNDER, JUVENILE ARRESTS 1998 (Office of Juvenile Justice and Delinquency Programs, United States Department of Justice, NCJ 179064, 1999).

<sup>18</sup> See KEVIN J. STROM ET AL., JUVENILE FELONY DEFENDANTS IN CRIMINAL COURTS: STATE COURT PROCESSING STATISTICS, 1990-94 (Bureau of Justice Statistics, United States Department of Justice, NCJ 165815, 1998).

<sup>19</sup> MAUER, *supra* note 1, at 128; MAUER, *supra* note 11, at 3.

<sup>20</sup> OFFICE OF APPLIED STUDIES, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, SUMMARY OF FINDINGS FROM THE 1998 NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE (1999).

<sup>21</sup> BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE CRIMINAL JUSTICE SOURCEBOOK 1998 342 (Table 4.10), 345, & 432 (Table 5.4).

arrested nationwide on drug offenses as opposed to 15,000 whites.<sup>22</sup> Black youth were particularly hard-hit: in *Juvenile Arrests 1998*, the DOJ reports that between 1990 and 1994, black juveniles were seventy-five percent of the nation's juvenile drug convictions, in contrast to only twenty-five percent for whites.<sup>23</sup>

Drug arrests are disproportionately black because of police department surveillance patterns. Michael Tonry, in his book *Malign Neglect*, explains that police drug surveillance is concentrated on inner-city drug markets because these drug arrests are easier: drugs are sold on street corners, through neighborhood networks, and a stranger appearing to buy drugs is a commonplace occurrence.<sup>24</sup> Police departments devote less effort in infiltrating the much larger suburban drug market because it is conducted by word of mouth, through stable workplace and social contacts, and therefore requires more intense investigatory effort.<sup>25</sup> In 1998 John Hagerdon, in a field study for the Wisconsin Policy Research Institute, confirmed Tonry's findings.<sup>26</sup> These studies prove that our drug enforcement efforts result in black city-dwellers being disproportionately arrested for activity both races engage in, simply because they are more easily subject to surveillance.

Crack, a form of cocaine, has long been associated with poor black communities. The association persists despite the Sentencing Commission's widely publicized 1995 Special Report to Congress on cocaine and federal sentencing, which established that fifty-two percent of crack users are white, and only thirty-eight percent are black.<sup>27</sup> This association between blacks and crack has proved a self-fulfilling prophecy. The Sentencing Commission's 1997 update report on cocaine and federal sentencing policy shows that, despite being a minority of crack users, ninety percent of persons convicted of crack offenses are black.<sup>28</sup>

Blacks have been dealt a staggering blow by being linked to crack. Congress, in response to its fears about urban crack users, has created uniquely high crack possession sentences. Persons

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<sup>22</sup> MAUER, *supra* note 4, at 10.

<sup>23</sup> SNYDER, *supra* note 17, at 4.

<sup>24</sup> MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* 105-06 (1995).

<sup>25</sup> See JOHN M. HAGERDON & WISCONSIN POLICY RESEARCH INSTITUTE, *THE BUSINESS OF DRUG DEALING IN MILWAUKEE* (1998).

<sup>26</sup> *Id.*

<sup>27</sup> UNITED STATES SENTENCING COMMISSION, *SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY* 145 (1995).

<sup>28</sup> UNITED STATES SENTENCING COMMISSION, *SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY* 8 (1997).

convicted of possessing five grams of crack receive a mandatory minimum sentence of five years. In contrast, conviction for possession of any other drug carries a misdemeanor or one-year jail sentence. The sentence for powdered cocaine possession, a form of cocaine associated with white middle-class users, is similarly mild: one must be convicted of possessing 500 grams of cocaine and of having the intent to distribute the drug in order to receive a five-year mandatory minimum sentence.<sup>29</sup>

The Federal Judicial Center in its 1994 report *Consequences of Mandatory Minimum Prison Terms* found racial disparity in federal sentencing, and much of this disparity is due to crack sentencing laws.<sup>30</sup> For example, the DOJ's 1998 *Criminal Justice Sourcebook* indicates that, on average, under the federal guidelines blacks are sentenced to ninety-one months in prison, while whites are sentenced to forty-eight months.<sup>31</sup> Aside from the sentencing disparity between black crack offenders and white powdered cocaine offenders, the Federal Judicial Center has indicated that defendants involved in marijuana and methamphetamine offenses (drugs more associated with whites) are more likely to receive sentence reductions during a plea agreement or post-conviction.<sup>32</sup>

Despite the blatantly discriminatory impact of our criminal justice policies, surprisingly, challenges to them have been rare. The Sentencing Commission recognized in its 1995 and 1997 review of crack sentences that the black poor were predominantly affected; that Congress passed these laws in part in the belief that crack addicts pose the greatest risk of committing violent crime in the inner city, and therefore must be harshly punished.<sup>33</sup> Certainly, poor crack addicts can devastate inner-city neighborhoods: there are few social services available to them, and their families are often too poor to help them. However, it seems to me that racism led Congress to decide on long terms of incarceration rather than the more humane and less costly option of treatment. Indeed, the Rand Corporation, in a study issued in 1997, concluded that for every one million dollars spent on treatment, serious crime would be reduced at a rate fifteen times greater than would result in in-

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<sup>29</sup> See FEDERAL JUDICIAL CENTER, *THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS* 23-24 (1994); see also UNITED STATES SENTENCING COMMISSION, *supra* note 28, at 4.

<sup>30</sup> FEDERAL JUDICIAL CENTER, *supra* note 29, at 23-24.

<sup>31</sup> BUREAU OF JUSTICE STATISTICS, *supra* note 21, at 406.

<sup>32</sup> FEDERAL JUDICIAL CENTER, *supra* note 29, at 23-24.

<sup>33</sup> UNITED STATES SENTENCING COMMISSION, *supra* note 28, at 4.

vesting the same money in prisons.<sup>34</sup> Treatment sounds soft; warehousing the black poor in jail is being "tough on crime."

This is a strong indictment, but let us take a look at drunk drivers' arrest statistics. In 1990, seventy-eight percent of those arrested for drunk driving were white men.<sup>35</sup> In *Race to Incarcerate*, Marc Mauer reports that during 1990 drunk drivers alone killed 22,000 people; while the deaths attributable to *all* illicit drugs (including overdoses, persons who contracted AIDS from dirty needles, and persons who died as a result of violence associated with the drug trade) numbered 21,000.<sup>36</sup> Yet, drunk drivers are given misdemeanor sentences, and are merely required to perform community service or pay a fine. Crack offenders, as we have seen, are charged with a felony, and are subject to long-term incarceration.<sup>37</sup>

My purpose tonight is not to attack our drug policies, as such, although they should be reexamined. My purpose is to protest the discriminatory implementation of those policies. We villainize minority drug users, when the known data tells us that the vast majority of drug users are white. The system fosters the erroneous belief that crack users are largely black inner-city drug users or sellers who are prone to violence, because they are easier arrest targets than their white counterparts. There are no reliable data to support the view that crack use leads to more violence than use of powdered cocaine, which robs the huge disparity between the two offenses of whatever justifiable rationale it was thought to possess, and the vast majority of the black crack offenders now in prison are not associated with violence. Where the offenders are largely white (as are drunken drivers, as well as powdered cocaine, marijuana and methamphetamine users) the punishment is mild. We cannot expect young black men and women to respect the law in the face of such unequal treatment.

Thus far I have concentrated on implementation of our drug laws, but racial bias shows its ugly face in many other areas in the criminal justice system. Old-style racism is leading to racial disparities in New York's sentencing rates. A 1994 report from the Governor's office entitled *Disparities in Processing Felony Arrests* shows that New York state court judges, in cases where they had discretion to sentence a defendant to jail time, were more likely to sentence mi-

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<sup>34</sup> JONATHAN P. CAULKINS, ET AL., *MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS' MONEY?* xxiv (1997).

<sup>35</sup> MAUER, *supra* note 1, at 135.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

norities to jail than they were to sentence whites. According to the report, during the years between 1990 and 1992, this bias resulted in an additional 4,000 jail sentences for minorities a year nationwide for property crimes and petty offenses, and an additional 300 minority persons being imprisoned for serious crimes.<sup>38</sup>

The most tragic example of the criminal justice system's punitive attitude towards blacks is the nation's racially distorted death penalty rates. The NAACP Legal Defense Fund, in its report *Death Penalty Watch U.S.A.*, shows that although blacks are no more than twelve to thirteen percent of the population, as of September 1999 they were forty-three percent of the persons on Death Row.<sup>39</sup> The report further shows that in many southern states the blacks outnumber the whites on Death Row.<sup>40</sup> The number of blacks *actually executed* also far exceeds what one would expect of such a small minority group: between 1976 and 1999, thirty-five percent of persons executed were black.<sup>41</sup> This high toll is particularly suspect given that prosecutors in capital punishment states are overwhelmingly white. Jeffrey Pokorak's report, *Probing the Capital Prosecutor's Perspective*, based on a survey of prosecutors' offices between 1993 and 1998, indicates that prosecutors in death penalty states are ninety-eight percent white, one percent black, and one percent Hispanic.<sup>42</sup>

Moreover, the death penalty is imposed predominately on persons convicted of killing white victims. The NAACP-LDF's report *Death Penalty Watch U.S.A.* shows that in the twenty-four years since the death penalty was reinstated by the United States Supreme Court, 619 persons were executed for killing white victims, whereas only 93 persons were executed for killing black victims. The report further indicates that each year, eighty-four percent of persons sentenced to death have killed white victims, even though whites typically are only fifty percent of the homicide victims in the nation each year.<sup>43</sup>

So much attention has recently been focused on how blacks

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<sup>38</sup> JAMES F. NELSON, DISPARITIES IN PROCESSING FELONY ARRESTS IN NEW YORK STATE, 1990-1992 1 (1995).

<sup>39</sup> NAACP LEGAL DEFENSE FUND, DEATH PENALTY WATCH U.S.A. 1999 1 (1999).

<sup>40</sup> *Id.* at 21-22. (Consider, for example, Louisiana: sixty blacks, and twenty-two whites, on Death Row. The proportion in Maryland is thirteen blacks, four whites; and in North Carolina, 122 blacks, eighty-five whites.)

<sup>41</sup> *Id.* at 7.

<sup>42</sup> Jeffrey Pokorak, *Probing the Capital Prosecutor's Perspective: The Race and Gender of Discretionary Actors*, 83 CORNELL L. REV. 1811, 1815-16 (1998).

<sup>43</sup> NAACP LEGAL DEFENSE FUND, *supra* note 39, at 1.

and Hispanics have been victimized by *Terry*<sup>44</sup> stops, traffic stops and racial profiling policies that these troubling issues need not be addressed in this presentation. It is interesting to note, however, that there is a racial divide on these issues. In a national poll on racial profiling released in December 1999, the Gallup organization found that seventy-seven percent of blacks surveyed thought that racial profiling is widespread, whereas only fifty-six percent of whites believed it to be widespread. The Gallup poll further indicated that seventy-two percent of black men surveyed between the ages of 18 and 34 reported being stopped by police because of their race, and sixty percent of black men surveyed between the ages of 35 and 49 reported being stopped because of their race.<sup>45</sup> An informal *Daily News* poll conducted during March 1999 revealed similar results: eighty-one out of 100 randomly questioned young black and Hispanic men living in New York said they had been stopped and frisked by police at least once, and none reported that the stop resulted in arrest.<sup>46</sup>

Blacks also report being subject to violence during police interactions at higher rates than whites. A *New York Times* poll conducted in March 1999 showed that ninety percent of blacks thought that police brutality against blacks was common, and sixty-six percent thought it widespread; in contrast, only twenty-four percent of whites thought police brutality was widespread.<sup>47</sup>

Many of the statistics I've shared with you tonight may be surprising. The news that blacks are bearing the brunt of the nation's criminal justice policies has been the nation's secret, until the data just discussed began to surface.

Researchers are beginning to recognize how our criminal justice policies are eviscerating the Fifteenth Amendment. The Sentencing Project's report *Intended and Unintended Consequences* shows that in fourteen states a person with a felony conviction can perma-

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<sup>44</sup> *Terry v. Ohio*, 392 U.S. 1 (1968) (holding that police officer who observed conduct by defendant and another consistent with hypothesis that they were contemplating daylight robbery, and who approached, identified himself as an officer, and asked their names, acted reasonably, when nothing appeared to dispel his reasonable belief of their intent, in seizing defendant in order to search him for weapons, and did not exceed reasonable scope of search in patting down outer clothing of defendants without placing his hands in their pockets or under outer surface of garments until he had felt weapons, and then merely reached for and removed guns).

<sup>45</sup> GALLUP ORGANIZATION, SPECIAL REPORTS: BLACK/WHITE RELATIONS IN THE UNITED STATES 15 (1997).

<sup>46</sup> Leslie Casimir, *Minority Men: We Are Frisk Targets*, N.Y. DAILY NEWS, March 26, 1999.

<sup>47</sup> Dan Barry & Marjorie Connelly, *Poll in New York Finds Many Think the Police are Biased*, N.Y. TIMES, March 16, 1999 at A1, 6.

nently lose his right to vote – and, as of 1996, in seven of these states, one in four black men have permanently lost that right. As a result of these policies, in 1996 1.4 million black males (that is one in seven of the adult black male population) were temporarily or permanently disenfranchised.<sup>48</sup> Projections based on these estimates indicate that the proportion of black men of all ages who lack the right to vote could rise to one in three by the year 2020; and in some southern cities, the proportion of black men without the right to vote could rise to fifty percent. In this version of the future, an overwhelmingly black town might end up with a majority white electorate.<sup>49</sup> One thing is clear: black ex-cons who find work during the period in which they are disenfranchised will live a *de facto* Jim Crow existence: they will be paying taxes into a system that does not have to represent them.<sup>50</sup>

The high rates of black imprisonment will also economically devastate black communities. Newly released black inmates will inevitably be poor. The DOJ's 1998 report *Profile of Jail Inmates*, which is based on 1995 and 1996 surveys, reports that fifty percent of the incarcerated in local jails earned less than six hundred dollars a month prior to their incarceration, and thirty-six of these prisoners were unemployed prior to arrest.<sup>51</sup> The report also indicates that over eighty-six percent of the nation's prison population has a high school education or less. This means that in future years we can expect as many as 774,000 low-skilled blacks to flood the labor market.<sup>52</sup>

When these paroled blacks enter the labor market, we can expect wages for low-skilled black workers to decrease generally. Harvard statistician Bruce Western's study, *How Unregulated is the U.S. Labor Market?*, explains that the high rates of black imprisonment are keeping us from realizing how bad the employment market is for black men, keeping black unemployment figures almost five points below what they would otherwise be.<sup>53</sup> When black inmates are included in the nation's unemployment estimates, Western reveals, low-skilled blacks have an unemployment rate of close

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<sup>48</sup> MAUER, *supra* note 4, at 2.

<sup>49</sup> See Eric Schlosser, *The Prison Industrial Complex*, THE ATLANTIC MONTHLY, Dec. 1998, at 7.

<sup>50</sup> See JANIE FELNER AND MARC MAUER, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (1998).

<sup>51</sup> CAROLINE WOLF, PROFILE OF JAIL INMATES, 1996 (Bureau of Justice Statistics, United States Department of Justice, NCJ 164620, 1998).

<sup>52</sup> *Id.*

<sup>53</sup> Western, *supra* note 8, at 1034.

to forty percent – the same rate as it was during the economic recession of 1983.<sup>54</sup> Western also shows that prisons now ensure that black inmates will be dumped into the low-skilled labor market, for state and federal legislation passed in the mid-1990s now prevents prison inmates from getting grants for higher education.<sup>55</sup>

Apart from their effect on the labor market, ex-offenders will also exact a harsh toll on black communities' social resources. Prison, at worst, will have taught inmates to commit more crimes; at best, it will have taught them to live in a culture where the strong dominate the weak. Ex-offenders are unlikely to be weaned from aberrant behavior by community institutions: their prison records will make them unattractive marriage partners and, if unmarried, research shows that they are less likely to be involved in family, work, church, and other stabilizing community influences. These ex-offenders will rely heavily on whatever community contacts they form, as Congressional legislation has decreased their access to Medicare, welfare, and other social programs.<sup>56</sup> We can expect a future where former inmates flood black working-class and middle-class communities that are ill equipped to absorb them. Scholar William Sabol has predicted that the wave of black ex-offenders entering these communities will cause middle-class blacks to flee to the suburbs, and we will enter a new era of urban blight.<sup>57</sup>

The black community has long focused on police misconduct, and that problem has begun to receive nationwide attention. But the issues raised tonight have received little attention from the black community, and none at all from the white. I believe our priorities must be reassessed. Eliminating unjustified use of excessive force by the police will not cure the problems just discussed; and these problems, in the long term, inflict the more crippling damage. There is no justification in a so-called free and democratic society for one in four male babies of one segment of the population to face a certain future of one year or more of his life in prison, or one in three being ensnared in some aspect of the criminal justice system. There is no justification for laws or policies that produce such devastating disparate results. Because of the data studied, I have concentrated on how adversely the black community is affected, but I recognize that Hispanic men are also at risk. The problem is not as dire, but the signs point to trouble ahead.

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<sup>54</sup> *Id.* at 1043.

<sup>55</sup> *Id.*

<sup>56</sup> See Schlosser, *supra* note 49, at 7.

<sup>57</sup> *Id.*

The crack plague has somewhat abated, but the black community must intensify the effort to educate the young about the perils of drug use. Since the greatest harm is presently being inflicted on blacks, I urge black leaders and organizations to give high priority to amassing the facts, disseminating the data, and mounting a concerted effort to reform the criminal justice system so that blacks will receive fair and equal treatment. These pernicious policies, approaches and practices now operative at state and federal levels must be addressed. The longer they are left in place, the more they entrench black Americans in a degraded status. With initiative provided by the black community, we can address this problem. The Hispanic community, and, I am sure, many in the white community will join the effort.

